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IN THE SUPREME COURT OF MISSOURI

SC 96016

STATE OF MISSOURI,
PLAINTIFF and RESPONDENT

v.

LARRY CLAY,
DEFENDANT and APPELLANT

On Appeal
From The Circuit Court of Jackson County, Missouri
16th Judicial Circuit
Honorable Kathleen A. Forsyth
Case No. 1316-CR00641-01

APPELLANT'S SUBSTITUTE OPENING BRIEF

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II. The trial court erred in overruling Clay's Motion for New Trial regarding the trial court's rejection of Clay's Instruction 16 (explaining his lack of duty to retreat), because Clay's Instruction 16 complies with Rule 28.02(d)'s requirement that non-MAI instructions be "simple, brief, impartial, and free from argument" and correctly advised the jury of the law regarding one's duty to retreat in Missouri after there was a relevant change in law and no corresponding change to the MAI and, if the trial court would not submit Instruction 16 as a stand-alone instruction, the trial court was required to modify Missouri Approved Instruction 306.06A to accurately reflect the change in Section 563.031.3, rather than reject the instruction and improperly instruct the jury regarding Clay's lack of a duty to retreat, in that Instruction 16 (or the information therein) was required to properly instruct the jury regarding the law of a duty to retreat in Missouri; the jury was thereby improperly instructed regarding Clay's theory of self-defense; and the jury's verdict would have been different if the jury had been instructed properly that Clay did not have a duty to retreat, resulting in prejudice to Clay as well as fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions. 37

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Fourteenth Amendments to the United States Constitution and Art. I, §§ 10 and 18(a) of the Missouri Constitution, in that evidence of uncharged drug offenses served only to portray Clay as a "drug user" and inflame the jury; evidence of uncharged drug offenses is irrelevant and unduly prejudicial to factually determining whether a homicide or assault took place; and the jury's verdict would have been different if the jury had not been exposed to this overly prejudicial, irrelevant, and inflammatory evidence both under these circumstances and as a matter of law, resulting in fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions. 49

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VI. The trial court erred, plainly erred, and abused its discretion in submitting Missouri Approved Instruction 314.04 for murder in the second degree without including the required instruction regarding the nested lesser included offense of

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voluntary manslaughter, because MAI 314.04 includes a nested lesser included offense of voluntary manslaughter and nested lesser included offenses must be given in every case, especially when a directly on point MAI exists, in that the portion of MAI 314.04 including the nested lesser included offense of voluntary manslaughter was removed before submission to the jury; no record made as to why this nested lesser included offense was removed; and the jury's verdict would have been different if the jury had been instructed properly regarding this nested lesser included offense, and as a matter of law, failing to give a nested lesser included offense when an MAI is on point results in fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions. 64

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JURISDICTIONAL STATEMENT

On this direct appeal, Larry Clay ("Clay") appeals his conviction for murder in the second degree (Count 1) and armed criminal action ("ACA") (Count 2) as they related to Joel White ("White"). Clay was convicted after jury trial. Clay was found not guilty of assault in the second degree (Count 3) and ACA (Count 4) as they related to Steven McGhee ("McGhee"). On February 25, 2015, The Honorable Kathleen A. Forsyth, Circuit Court Judge in Jackson County, Missouri sentenced Clay to 25 years for murder in the second degree and 10 years for years for ACA, to run concurrent. On March 5, 2015, a timely Notice of Appeal regarding the two convictions was filed.

After an Unpublished Memorandum Decision from the Missouri Court of Appeals, Western District affirming his convictions Clay timely filed a Request for Rehearing and a Request for Transfer (as well as a Motion to Modify the Decision). All such motions were denied. Clay filed an Application for Transfer in this Court under Rule 83.04, which this Court granted. This Court has jurisdiction under Article V, Section 10 of the Missouri Constitution and Rule 83.04. Mo. Const., Art. V, §10.

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STATEMENT OF FACTS

I. Preliminary statement.

This case stems from the actions of four men (Clay, McGhee, White, and Jeff Becklean ("Becklean")) on the night of March 3, 2013, stretching into the early morning hours of March 4, 2013. As explained below, Counts 3 and 4 relate to an alleged assault against McGhee which occurred in Clay's basement. Clay was acquitted of those charges. As such, this Statement of Facts focuses on the death of White, which occurred outside and was recorded by a surveillance camera. Clay's allegations of error focus on those events, as well as inappropriate and prejudicial jury instructions, evidence, and argument by the State.

II. A night of revelry in Clay's basement.

White was McGhee's mother's fiancé and lived with McGhee's mother. Tr., p. 311. Becklean was McGhee's mother's neighbor. *Id.* at 312, 641-42. Each of the four men (Clay, McGhee, Becklean, and White) was at least somewhat acquainted with each other in varying degrees of friendship. *Id.* at 312-14. These four men would regularly "hang out" in Clay's basement, where they would "[s]hoot pool, sing, [and] drink." *Id.* at 313-14, 316-17. Sometime after 10:00 p.m. on March 3, 2013, McGhee returned to his mother's home where White and Becklean asked if McGhee wanted to go to Clay's. *Id.* at 317, 643-44. On the way to Clay's, McGhee, Becklean, and White purchased more alcohol for the evening. *Id.* at 318, 645.

Becklean testified that he and White consumed "whiskey and beer" before going to Clay's. *Id.* at 642-43. The parties did not recall exactly why they decided to go to

Clay's, but eventually McGhee, Becklean, and White arrived at Clay's and went to the basement to play pool, listen to music, and use the karaoke machine. *Id.* 319-20. Testimony indicated that Clay was reluctant to begin a party at that time of day, but ultimately the mood in the basement began as fun and cordial. *Id.* at 320-22, 710-15. As discussed more completely, below, the State (at trial) was very concerned with apprising the jury of numerous alleged uncharged crimes which may have occurred on March 3-4, 2013. *Id.* at 819. To this end, the State started the case by discussing possible marijuana use in Clay's basement that evening. *E.g.*, *id.* at 320-21. There was a large amount of conflicting, irrelevant, and prejudicial testimony about the presence and use of marijuana that evening. *E.g.*, *id.* at 320-21, 409-15, 472, 494, 678-81, 754-55, 774. Regardless, a night of revelry turned dark as White became "belligerent." *Id.* at 503-04; 652.

III. The revelry becomes an altercation.

The State's toxicology expert, Diane Peterson, M.D., testified that White's blood alcohol level was .274 (more than three times Missouri's driving limit of .08). Tr., pp. 503-04. Likely due to excessive alcohol consumption, the testimony of Clay, Becklean, and McGhee regarding the course of events as the night turned ugly vary significantly. All agreed that one or more altercations broke out between Clay and White in Clay's basement. *Id.* at 323-48, 657-59, 723-24. Some testimony indicated that McGhee attempted to break up the fight, *id.* at 659, while other testimony suggested McGhee and White both attacked Clay, *id.* at 723-24. The initial cause of the fight appeared to be that a "belligerent" White escalated trash talk with Clay that was "getting personal and not

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friendly anymore" while playing pool. *Id*. at 652-54. White also refused to stop drinking and damaged a set of drums that Clay spent the day tuning. *Id*. at 654, 715-22.

White outweighed Clay and was outnumbered by McGhee and White. *Id*. at 759-60. Therefore, at some point during the fight (or fights) Clay armed himself with a knife to escape. *Id*. 725-29. Clay used the knife to escape from White and stabbed McGhee when McGhee continued to grab at Clay during the fight. *Id*. Clay used that opportunity to drop the knife and fetch a gun from upstairs. *Id*. at 729. After retrieving the gun, Clay demanded that White, McGhee, and Becklean leave his house. *Id*.

While the testimony of McGhee, Becklean, and Clay is not entirely consistent, two relevant similarities run between each man's testimony:

- White either initiated the fight in the basement after Clay asked him to leave, *id*. at 654-58, 721-23, or at least re-initiated a much more serious fight after an initial "verbal altercation" between White and Clay, *id*. at 323, 336, 661; and
- Everyone – except White – agreed that White needed to leave and Clay demanded that White, McGhee, and Becklean leave his property. *Id*. at 338-43, 654, 729.

Clay was charged with assault second degree against McGhee for the stabbing which occurred in the basement (and an ACA count). L.F., p. 37.[1] The jury ultimately acquitted Clay of these two charges. *Id*. at 123. Counts 1 and 2 dealt with the shooting death of White, captured on surveillance video outside Clay's home.

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[1] One Legal File, cited as "L.F., p. #" was filed in this case. Two Uncertified Legal Files, cited as "1st Supp. L.F., p. #" and "2d Supp. L.F., p. #" were also filed.

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IV. A belligerent guest refuses to leave.

The testimony surrounding the exit from Clay's basement and house was unclear. Clay, McGhee, and Becklean each generally testified that a tense situation was ultimately resolved when Clay retrieved the gun and demanded that everyone leave his home. Tr., pp. 338-43, 654, 729. In his belligerence, White further antagonized Clay and threatened to destroy property as he left Clay's home. *Id.* at 729-33. Fortunately, the home across the street from Clay's home (9221 Eastern) had a security camera which faced the front of Clay's home. *Id.* at 280. This video sheds light on the relevant events outside of Clay's home, was admitted into evidence through McGhee and Ann Mallot (of the KCPD Crime Lab) as State's Exhibit 17, *id.* at 280, 351-56, and was submitted to this Court on DVD[2] on December 22, 2016 (this DVD was submitted to the Western District as an Exhibit on November 23, 2015). The State "walked through" the video with a number of witnesses. *E.g.*, 352-56. The events recorded on the video are as follows:

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[2] **Playing Instructions**: Video is formatted to Auto-Play on any Windows Operating System in Windows Media Player, upon insertion of the DVD into a PC. If the video does not Auto-Play, the viewer should open the folder labelled "VIDEO_TS" and double-click the file "VTS_01_1" which will open the video and begin playing the video in the viewer's default video player. There may be an on-screen button to press which says "Play" and "Scenes." "Play" should be selected if the video is not playing.

1. Clay hears a loud noise and exits his home to investigate.

The entire video is 13 minutes and 28 seconds long, with most of the relevant actions occurring in the first five minutes. State's Exhibit 17. The video starts at 3:40:32 a.m. on March 4, 2013. Three vehicles are visible in Clay's driveway; Becklean's car is the one closest to the camera on the right side of the driveway. State's Exh. 17, at 3:40:32. Becklean walked out of Clay's house at 3:41:08 and almost immediately walked back inside. State's Exh. 17; Tr., p.352. Shortly thereafter Becklean and White exited Clay's home together, State's Exh. 17, at 3:41:56; Tr., p. 353, they lingered on the porch until McGhee exited Clay's home, State's Exh. 17, at 3:42:08; Tr., p. 353. The three individuals walked toward the car and a motion light flashed on. State's Exh. 17, at 3:42:08.

Clay testified that he heard a loud noise after retreating to his kitchen to watch White, McGhee, and Becklean leave on a monitor.[3] Tr., pp. 731-35. Clay testified that after hearing the noise, he believed that someone was breaking his truck, so he went to investigate. *Id*. The video shows Clay exit his home at about the 3:42:23 mark. State's Exh. 17. While this occurred, Becklean can be seen placing a pool cue (gifted to Becklean by Clay) in his trunk. *Id*. at 3:42:55; Tr., p. 354. While Becklean put the pool cue in his trunk, the other individuals are shielded from view by shadows from the motion light, until the 3:43:33 mark. *See* State's Exh. 17.

[3] Clay had a video-only stream of his driveway in his kitchen which was not recorded.

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2. *Clay urges everyone to leave, walks White off of his property, and withdraws from the encounter.*

As Clay, McGhee, and White become visible, Clay urged them to leave his property. State's Exh. 17, at 3:41:08; Tr., p. 735. McGhee (holding his coat) walked off the property, State's Exh. 17, at 3:43:33, but returned to Clay's driveway, *id*. at 3:43:47. Clay seemed upset that McGhee returned to the property and McGhee walked back off the driveway. *Id*. at 3:43:50. McGhee disappeared out of frame. *Id*. At this point, Clay pointed his gun at White and used that advantage to walk White off of his property. *Id*. at 3:43:55. During this encounter, White faced towards Clay (and the gun) as he walked backwards off of the driveway. *Id*.

Once White was off Clay's driveway, Clay testified that he told White to wait there for Becklean to pick him up. Tr., p. 735. Clay then indicated to White that Clay intended to withdraw from the encounter by lowering his gun, turning his back on White, and walking back up his driveway toward his front door. State's Exh. 17, at 3:43:58.

3. *After being walked off Clay's property, White invades Clay's driveway, attacks Clay again, and is shot by Clay.*

After Clay withdrew from the confrontation, and told White to wait for Becklean to pick White up, McGhee reappeared in frame and attempted to enter Becklean's car. State's Exh. 17, at 3:44:19. White quickly reentered Clay's driveway, spun Clay around, and began fighting with Clay. *Id*. at 3:44:27. The State's own witness, McGhee, acknowledged that after Clay withdrew from the encounter, White reinitiated the encounter because he needed to "make his point." Tr., p. 395.

In the ensuing struggle, White, Clay, and McGhee all made their way to the passenger side of Becklean's car. State's Exh. 17, at 3:44:45. Becklean was in his car. *Id.* At approximately 3:44:48, White can be seen attacking Clay before Clay shoots White. *Id.*; Tr., p. 739. McGhee (the State's witness) testified that "[they were] on the side, trying to get into the car. And Joel swung and hit [Clay]." Tr. p. 355. After the shooting, McGhee and Clay talked briefly as Becklean slowly backed out of the driveway. State's Exh. 17, at 3:45:08. Clay went inside and called the police. Tr., p. 740. Becklean's car paused briefly in the street at 3:45:36, before Becklean drove off. State's Exh. 17. McGhee paused in the driveway for a while, then walked out of scene before walking back into scene, and then walking off scene at about the 3:46:30 mark. *Id.* Later, the video shows police arriving and arresting Clay. State's Exh. 17.

V. The State transforms a murder in the second degree trial into a trial over the possession of marijuana and brass knuckles.

Clay was charged with murder in the second degree (Count 1) and ACA (Count 2) for the shooting. L.F., p. 36. Clay was also charged with assault in the second degree (Count 3) and ACA (Count 4) as they related to the encounter with McGhee in Clay's basement. *Id.* at 37. A review of the Transcript in this case (by an individual that had not seen the Indictment) would likely cause one to believe that this was a multi-day trial regarding the possession of a small tin of marijuana and marijuana paraphernalia. *E.g.*, Tr., pp. 57, 320-21, 409-13, 414-15, 433-34, 678-81, 754-55, 906-07. Clay was not charged with possession of marijuana, or any crimes related to marijuana, related to the events of March 3-4, 2013. L.F., pp. 36-37; Tr., p. 819. One of the first issues the State

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discussed during *voir dire* was the veniremembers' thoughts about marijuana use. *E.g.*, Tr., p. 57.

Nearly every witness was questioned about marijuana usage at Clay's home; or where the tin of marijuana and/or marijuana paraphernalia originated. *E.g.*, *id*. at 320-21, 409-13, 414-15, 433-34, 472, 494-95, 678-81, 754-55, 906-07. One of the few times the State stopped asking a witness about marijuana, the State inquired regarding the presence of illegal "brass knuckles" at Clay's house. *Id*. at 437-38, 444-46. Clay was not charged with possession of "brass knuckles." L.F., pp. 36-37; Tr., p. 819. No allegations were made that "brass knuckles" were used as part of either the assault or murder charge. *See* L.F., pp. 36-37; Tr., pp. 437-38. CST Robert Fields appears to have been called by the State solely to introduce evidence of uncharged crimes of marijuana possession, Tr., pp. 414-15, 433-34, and possession of "brass knuckles," *id*. at 437-38, 444-46.

VI. The trial court uses the State's facially incorrect self-defense jury instruction, rejects Clay's self-defense jury instruction, and rejects Clay's separate jury instruction regarding his lack of a duty to retreat.

A. Instruction 14 and Self-Defense.

Supreme Court Rule 70.02(e) requires the trial court retain copies of all instructions refused and all instructions given as part of the record. Neither parties'

refused jury instructions were retained in this case,[4] so the Western District granted leave to file the relevant refused jury instructions as Uncertified Legal Files. 1st & 2d Supp. L.F., pp. 160-68. To date, the State has not objected to the veracity of the Uncertified Legal Files. Further, the instructions contained therein comport with the conversations on the Record relating to proposed jury instructions. *E.g.*, 798-821, 823-28.

Instruction 14 in this case was based on Missouri Approved Instruction 306.06A,[5] "Justification: Use of Force in Self-Defense." L.F., pp. 83-85 (with cites), 114-16 (clean) (Appx., pp. A38-A40, A42-A44). During the instruction conference, the State submitted Instruction 14, asserting that it was "accurate" and "the only thing that it does not have substantively is this paragraph regarding threats against the defendant made by the victim." Tr., p. 806; 2d Supp. L.F., pp. 164-66 (Appx., pp. A30-A32). Clay's submitted Instruction 14 included, *inter alia*, language regarding threats made by White against Clay. 2d Supp. L.F., pp. 167-68 (Appx., pp. A33-A34). The trial court rejected Clay's Instruction 14 and accepted the State's Instruction 14 with the caveat that the State would add the "threat" language, as requested by Clay. Tr. p. 805-10, 825-27.

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[4] Jackson County Criminal Records also originally asserted that *no* jury instructions were retained in this case at all, but ultimately the submitted jury instructions were discovered and included in the Legal File, pages 68-120.

[5] Throughout his Brief, Clay refers to the Missouri Approved Jury Instructions – Criminal as simply the "Missouri Approved Jury Instructions" as only criminal jury instructions are at issue herein.

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Instruction 14 omitted material portions of 306.06A from the "General Statement of Law" and "Case-Specific Statement of Law." Specifically, Instruction 14 utilized the "initial aggressor" language in part [1] of 306.06A without including the required "withdrawal" language from that same part of 306.06A. L.F., pp. 83-85, 114-16.

B. Defendant's Submitted Instruction 16 and No Duty to Retreat.

In 2010, Missouri Revised Statute Section 563.031.3 was amended to include language that "[a] person does not have a duty to retreat from private property that is owned or leased by such individual." (Appx., pp. A45-A50) Thus, one of Clay's defenses was that he was justified in exiting his home after ousting the attackers from his basement, because it was all his property and he had no duty to retreat. *E.g.*, L.F., pp. 133-34, 136-40. Clay also asserted the related theory of defense that, because Clay believed the attackers were destroying his truck or other property, he was justified in exiting the home in defense of property under Section 563.041 and, once outside, he had no duty to retreat back inside when White escalated the encounter, under Section 563.031.3. *E.g.*, L.F., pp. 133-34, 136-40; Tr., pp. 731-35.

To support his defense, and because Missouri Approved Instruction 306.06A has not been revised since the 2010 amendment of Section 563.031.3, Clay submitted Defendant's Instruction 16 to inform the jury that Clay did not have a duty to retreat:

> A person does not have a duty to retreat from private property that is owned or leased by such individual in order to avoid the need to use force in self-defense.

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1st Supp. L.F., pp. 160-61.[6] The trial court rejected Defendant's Instruction 16. Tr. 827. Clay filed Motions for Acquittal at the Close of State's Evidence and at the Close of All Evidence *and* a Motion for New Trial on this instructional error. L.F., pp. 125-141.

VII. The trial court prevents Clay from arguing that he did not have a duty to retreat and permits the State to argue that Clay did have a duty to retreat.

While listening to argument regarding Defendant's Instruction 16, the trial court took up (for at least the second time) a number of motions regarding Clay's purported duty to retreat. After numerous Motions in Limine and argument, the trial court denied Clay's motion to prohibit the State from arguing that Clay had a duty to retreat and, conversely, granted the State's motion to prohibit Clay from arguing that he did not have a duty to retreat. *Id*. at 824-25.

Prior to the trial, Clay filed a Motion in Limine specifically to prevent the State form arguing that he had a duty to retreat in contravention of Section 563.031.3. *E.g.*, L.F., pp. 39-44. Both parties argued extensively on this point before the trial court finally denied Defendant's Eighth Motion in Limine and granted the State's request to prohibit Clay from arguing he did not have a duty to retreat. *E.g.*, Tr. 814-15, 824-25. Clay also filed Motions for Acquittal at the Close of State's Evidence and at the Close of All Evidence *and* a Motion for New Trial on the duty to retreat. L.F., pp. 125-141.

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[6] Section 563.031 was further amended during the pendency of Clay's appeal at the Western District to provide additional protections to individuals in Clay's situation regarding their lack of a duty to retreat. This amendment is discussed at length below.

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VIII. Clay is found guilty of counts 1 and 2 and not guilty of counts 3 and 4.

After trial, the jury found Clay guilty of counts 1 and 2, but not guilty of counts 3 and 4. L.F., pp. 123-24. On February 25, 2015, the trial court sentenced Clay to 25 years on the murder in the second degree charge and 10 years on the ACA charge, to run concurrent. Tr., p. 1014; L.F., pp. 156-57 (Appx., pp. A51-A52).

Clay appeals his convictions on counts 1 and 2. L.F., pp. 158-59.

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POINTS RELIED ON

I. The trial court erred, plainly erred, and abused its discretion in submitting the "initial aggressor" language of Missouri Approved Instruction 306.06A as submitted by the State without including the "withdrawal" language from that same part of the instruction, because the "withdrawal" language is required as a matter of law any time the issue of "withdrawal" is injected into the case, regardless of source, in that any dispute in the evidence and the facts was for the jury to decide and failing to instruct the jury on "withdrawal" when the matter has been injected (by the State's witnesses and third parties) into the trial mischaracterized the law of self-defense; this instruction prohibited Clay from acting in self-defense even after he withdrew from the encounter, which forced the jury to convict Clay in violation of Missouri law; and the jury's verdict would have been different if the jury had been instructed properly that an "initial aggressor" can "withdraw" and then defend himself, resulting in fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

State v. Westfall, 75 S.W.3d 278 (Mo. banc 2002)

State v. White, 222 S.W.3d 297 (Mo. App. W.D. 2007)

State v. January, 176 S.W.3d 187 (Mo. App. W.D. 2005)

Missouri Approved Jury Instruction 306.06A

II. The trial court erred in overruling Clay's Motion for New Trial regarding the trial court's rejection of Clay's Instruction 16 (explaining his lack of duty to retreat), because Clay's Instruction 16 complies with Rule 28.02(d)'s requirement

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that non-MAI instructions be "simple, brief, impartial, and free from argument" and correctly advised the jury of the law regarding one's duty to retreat in Missouri after there was a relevant change in law and no corresponding change to the MAI and, if the trial court would not submit Instruction 16 as a stand-alone instruction, the trial court was required to modify Missouri Approved Instruction 306.06A to accurately reflect the change in Section 563.031.3, rather than reject the instruction and improperly instruct the jury regarding Clay's lack of a duty to retreat, in that Instruction 16 (or the information therein) was required to properly instruct the jury regarding the law of a duty to retreat in Missouri; the jury was thereby improperly instructed regarding Clay's theory of self-defense; and the jury's verdict would have been different if the jury had been instructed properly that Clay did not have a duty to retreat, resulting in prejudice to Clay as well as fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

State v. White, 222 S.W.3d 297 (Mo. App. W.D. 2007)

State v. Edwards, 60 S.W.3d 602 (Mo. App. W.D. 2001)

Missouri Revised Statute Section 563.031

III. The trial court erred, plainly erred, and abused its discretion in failing to exclude evidence of uncharged marijuana-related crimes throughout Clay's trial, because the admission of evidence regarding marijuana consumption and possession of marijuana and marijuana paraphernalia violated Clay's due process right to be tried only for the charged offenses, denying a fair trial as required by the Fifth and

Fourteenth Amendments to the United States Constitution and Art. I, §§ 10 and 18(a) of the Missouri Constitution, in that evidence of uncharged drug offenses served only to portray Clay as a "drug user" and inflame the jury; evidence of uncharged drug offenses is irrelevant and unduly prejudicial to factually determining whether a homicide or assault took place; and the jury's verdict would have been different if the jury had not been exposed to this overly prejudicial, irrelevant, and inflammatory evidence both under these circumstances and as a matter of law, resulting in fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982)

State v. Krebs, 106 S.W.2d 428 (Mo. 1937)

State v. Burnfin, 771 S.W.2d 908 (Mo. App. W.D. 1989)

State v. Jones, 583 S.W.2d 212 (Mo. App. W.D. 1979)

IV. The trial court erred, plainly erred, and abused its discretion in overruling Clay's objections to evidence of brass knuckles and the uncharged crime of possession of brass knuckles throughout Clay's trial, because the admission of the brass knuckles and evidence of the uncharged crime of possession of brass knuckles violated Clay's due process right to be tried only for the charged offenses, denying a fair trial as required by the Fifth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 10 and 18(a) of the Missouri Constitution, in that admission of unrelated weapons or evidence of uncharged weapon offenses served only to portray Clay as a "lawbreaker" and inflame the jury; such evidence is

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irrelevant and unduly prejudicial to factually determining whether a homicide or assault took place; and the jury's verdict would have been different if the jury had not been exposed to this overly prejudicial, irrelevant, and inflammatory evidence both under these circumstances and as a matter of law, resulting in fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982)

State v. Krebs, 106 S.W.2d 428 (Mo. 1937)

State v. Jones, 583 S.W.2d 212 (Mo. App. W.D. 1979)

State v. Grant, 810 S.W.2d 591 (Mo. App. S.D. 1991)

V. The trial court erred in overruling Clay's Motion for New Trial regarding its ruling sustaining the State's Motion to prohibit Clay from arguing that Clay had no duty to retreat and to permit the State to argue that Clay had a duty to retreat during closing, because Section 563.031.3 was amended after the most recent Missouri Approved Instruction edition to specifically grant persons lawfully on property the right to exercise self-defense without first considering retreat, in that Clay's intended argument was in accord with Section 563.031.3; the State's argument was a misstatement of Section 563.031.3; and the State's misstatement of the law told the jury that it was *per se* illegal for Clay to be outside of his home which automatically made Clay the "initial aggressor" and required the jury to convict Clay as a matter of law, especially in light of the inaccurate jury instruction which did not include the required "withdrawal" language and required a

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conviction for anyone ever acting as the initial aggressor, thus the jury's verdict would have been different if the jury had been correctly informed regarding the duty to retreat in Missouri, resulting in prejudice to Clay as well as fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

State v. Blackburn, 859 S.W.2d 170 (Mo. App. W.D. 1993)

State v. Perry, 447 S.W.3d 749 (Mo. App. E.D. 2014)

Missouri Revised Statute Section 563.031

VI. The trial court erred, plainly erred, and abused its discretion in submitting Missouri Approved Instruction 314.04 for murder in the second degree without including the required instruction regarding the nested lesser included offense of voluntary manslaughter, because MAI 314.04 includes a nested lesser included offense of voluntary manslaughter and nested lesser included offenses must be given in every case, especially when a directly on point MAI exists, in that the portion of MAI 314.04 including the nested lesser included offense of voluntary manslaughter was removed before submission to the jury; no record made as to why this nested lesser included offense was removed; and the jury's verdict would have been different if the jury had been instructed properly regarding this nested lesser included offense, and as a matter of law, failing to give a nested lesser included offense when an MAI is on point results in fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

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State v. Randle, 465 S.W.3d 477 (Mo. banc 2015)

State v. Roberts, 465 S.W.3d 899 (Mo. banc 2015)

State v. Jackson, 433 S.W.3d 390 (Mo. banc 2014)

Missouri Approved Jury Instruction 314.04

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ARGUMENT

I. The trial court erred, plainly erred, and abused its discretion in submitting the "initial aggressor" part of Missouri Approved Instruction 306.06A as submitted by the State without including the "withdrawal" language from that same part of the instruction, because the "withdrawal" language is required as a matter of law any time the issue of "withdrawal" is injected into the case, regardless of source, in that any dispute in the evidence and the facts was for the jury to decide and failing to instruct the jury on "withdrawal" when the matter has been injected (by the State's witnesses and third parties) into the trial mischaracterized the law of self-defense; this instruction prohibited Clay from acting in self-defense even after he withdrew from the encounter, which forced the jury to convict Clay in violation of Missouri law; and the jury's verdict would have been different if the jury had been instructed properly that an "initial aggressor" can "withdraw" and then defend himself, resulting in fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

A. MAI 306.06A – Initial Aggressor and Withdrawal Instructions.

Missouri Approved Instruction 306.06A provides a number of parts to be used when self-defense is an issue in a criminal case. MAI-3d 306.06A, Justification: Use of Force in Self-Defense (Appx., pp. A01-A22). Part [1] of 306.06A provides "initial aggressor" language which "will be used unless there is no evidence that the defendant was the initial aggressor." MAI-3d 306.06A, Notes on Use, ¶4(a) (Appx., pp. A01; A12). The initial aggressor language provides that "one who first (attacks) (or) (threatens to

attack) another, is not justified in using force to protect himself from the counter-attack that he provoked." MAI-3d 306.06A; L.F., pp. 83-85, 114-16; 2d Supp. L.F., pp. 164-66, 167-68(Appx., p. A01).

Missouri Approved Instruction 306.06A provides a means by which an initial aggressor can regain the right to protect himself, under Missouri Revised Statute Section 563.031, via "withdrawal" language, which "will be used if there is further evidence that the defendant withdrew from the encounter." MAI-3d 306.06A, Notes on Use, ¶4(a) (Appx., pp. A01; A12). The "General Statement of Law" portion of part [1] of 306.06A provides:

> (A person who is the initial aggressor in an encounter can regain the privilege of using force in lawful self-defense if he withdraws from the original encounter and clearly indicates to the other person his desire to end the encounter. Then, if the other person persists in continuing the incident by threatening to use or by using force, the first person is no longer the initial aggressor, and he can then lawfully use force to protect himself.)

MAI-3d 306.06A, Part A, §[1] (Appx., p. A01). The "Case-Specific Statement of Law" portion of 306.06A provides:

> First, if the defendant was not the initial aggressor in the encounter with [*name of victim*], (or if he was the initial aggressor and clearly indicated to [*name of victim*] his withdrawal from the encounter, [*See Notes on Use 4(a).*]), and … [additional requirements for the use of force] … then his use of deadly force is justifiable and he acted in lawful self-defense.

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MAI-3d 306.06A, Part B, §[1]-[3B] (Appx., pp. A04-A06). The relevant additional requirements for the use of force included:

- Defendant's reasonable belief that the use of force was necessary to protect himself from what he reasonably believed to be the imminent use of unlawful force, MAI-3d 306.06A, Part B, §[3]; L.F., pp. 83-85, 114-16(Appx., p. A06); and
- Defendant's reasonable belief that the use of deadly force was necessary to protect himself from death or serious physical injury, MAI-3d 306.06A, Part B, §[3B]; L.F., pp. 83-85, 114-16(Appx., p. A06).

In other words, MAI 306.06A provides that when a defendant is not an "initial aggressor," he can use deadly force to protect himself from death or serious physical injury, if defendant reasonably believed that such use of deadly force was necessary. *See* MAI-3d 306.06A. Additionally, via a number of parentheticals, MAI 306.06A provides a means by which a defendant can lose his status as an "initial aggressor" by withdrawing from the encounter – and clearly manifesting his intent to "withdraw" from the encounter. *Id*. The parentheticals "will be used" if there is evidence that the defendant withdrew from the encounter. MAI-3d 306.06A, Notes on Use, ¶4(a) (Appx., p. A12).

B. Clay Clearly Withdrew and Manifested an Intent to Withdraw from the Encounter before White Re-Initiated the Encounter and was Shot.

Clay obviously agrees with the jury that he was not the initial aggressor during, or otherwise responsible for, the violence in his basement. L.F., pp. 123-24. Clay also argued at trial – and continues to argue – that under Missouri Revised Statute Sections 563.031 and 563.041, he was not the "initial aggressor" when he exited his home. L.F.,

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pp. 133-34, 136-40; Tr., pp. 731-35; *see also* below, Argument §§II, V. However, even if Clay was the initial aggressor in the basement and even if Clay was unjustified in leaving his home, Clay's use of self-defense was justified under Missouri law, because he "withdrew from the encounter" with White and clearly manifested that intent. *E.g.*, State's Exh. 17, at 3:43:58.

"[W]ithdrawal is the abandonment of the struggle by one of the parties." *State v. Williams*, 815 S.W.2d 43, 48 (Mo. App. W.D. 1991). For actions to constitute a withdrawal, "there must be substantial evidence showing an abandonment of the struggle by the defendant operating as a clear announcement of his desire for peace; and these facts must be perceived by or made known to this adversary." *Id*. Clay clearly and unequivocally indicated his abandonment of the struggle to White, McGhee, and Becklean around 3:43:58 of State's Exhibit 17.

All witnesses in the underlying case agreed that Clay wanted McGhee, Becklean, and especially White to leave his property. Tr., pp. 338-43, 654, 729. State's Exhibit 17 supports this testimony, showing Clay remove McGhee and White from his property, while Becklean prepared his car. *E.g.*, State's Exh. 17, at 3:43:50. Eventually McGhee walked off the driveway and disappeared out of frame. *Id*. Clay then pointed his gun at White and walked White off of his property. *Id*. at 3:43:55. In accord with all of the testimony, once White was off Clay's driveway, Clay told White to wait for Becklean to pick him up. Tr., p. 735.

It is at this point that Clay clearly and unequivocally evidenced his intent to end the encounter: ***he lowered his gun, turned his back on White, and walked up his***

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driveway toward his front door. State's Exh. 17, at 3:43:58. At this point in the video, McGhee has disappeared off of camera (to the left) and Becklean has moved to the passenger side of his vehicle (to the right). *Id*. at 3:43:50. The video evidence is unequivocal: Clay is not walking towards any of the three men (nor is he "fleeing") at that point. *Id*. In accord with the testimony in this case, Clay had achieved his goal of removing White from his property and was clearly demonstrating that the encounter was over.

At 3:43:58 of State's Exhibit 17, Clay has abandoned the encounter and clearly manifested that intent to White, McGhee, and Becklean by, among other things, lowering his weapon and turning his back on them. At this point White, McGhee, and Becklean "had an opportunity to abandon" the encounter completely. *See e.g.*, *State v. Hajek*, 716 S.W.2d 481, 483 (Mo. App. E.D. 1986). However, White reentered Clay's driveway, spun Clay around, and began fighting with Clay. State's Exhibit 17, at 3:44:27. McGhee (the State's witness) testified that White reinitiated the encounter because he needed to "make his point." Tr., p. 395. McGhee testified that White struck Clay. Tr. p. 355. During the struggle – initiated by White – Clay shot White in lawful self-defense.

C. The Jury Was Not Instructed Regarding Withdrawal.

Instruction 14, the self-defense instruction, was based upon MAI 306.06A. *See e.g.*, L.F., pp. 83-85, 114-16. During the instruction conference, the State asserted that its Instruction 14 was "accurate" and "the only thing that it does not have substantively is this paragraph regarding threats against the defendant made by the victim." Tr., p. 806; 2d Supp. L.F., pp. 164-66 (Appx., pp. A30-A32). The trial court rejected Clay's

Instruction 14 and accepted the State's Instruction 14.[7] Tr. p. 805-10, 825-27. However, the State's Instruction 14 was not "accurate" as it omitted all parentheticals regarding the required "withdrawal" language from 306.06A. 2d Supp. L.F., pp. 164-66 (State's original submitted Instruction 14) (Appx., pp. A30-A32); L.F., pp. 83-85, 114-16; MAI-3d 306.06A, Part A, §[1], Part B, §[1]-[3B] (Appx., pp. A01-A07).

Instruction 14, as submitted by the State and used to instruct the jury, substantially and materially misrepresented the law of self-defense, by asserting that an initial aggressor can ***never*** defend himself. L.F., pp. 83-85, 114-16. Or, as the State misstated during its closing, once "Larry Clay is the initial aggressor… [s]elf-defense is out the window, and he doesn't get to claim that as justification." Tr., p. 876. The withdrawal language is key to properly instructing the jury on self-defense when there is unequivocal video evidence – ***admitted by the State and analyzed by the State's witnesses*** – that Clay withdrew (and clearly manifested an intent to withdraw) from the encounter. Mo. Rev. Stat. §563.031.1(1)(a); MAI-3d 306.06A; MAI-3d 306.06A, Notes on Use, ¶4(a) (Withdrawal parentheticals "will be used if there is further evidence that the defendant withdrew from the encounter.") (Appx., p. A12).

D. Standard of Review.

The Standard of Review for this error follows a somewhat complex path: First, Clay did not object to the lack of the withdrawal language, thus review is for plain error.

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[7] The State literally typed "Submitted by Plaintiff" on the "dirty" copy of Instruction 14 submitted and accepted by the trial court. L.F., pp. 83-85.

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Presumably, the State will continue to argue that Clay "jointly" drafted Instruction 14, despite the clear evidence to the contrary (such as the fact that the State literally wrote "Drafted by Plaintiff" on Instruction 14, L.F., pp. 83-85). Therefore, this Standard of Review section further examines the case law regarding jury instructions and allegations that a defendant has "waived" errors in jury instructions.

1. Review of the self-defense instruction is for plain error.

Clay filed Motions for Acquittal at the close of the State's evidence, at the close of all evidence, and with his Motion for New Trial. L.F., pp. 125-141. These Motions asserted that the State did not negate Clay's self-defense arguments. *E.g.*, *id*. at 132-33. Clay's Motion for New Trial specifically asked for a new trial due to the trial court's error in submitting 306.06A without including the "no duty to retreat" language in Section 563.031.3. *Id*. at 135 (This is the subject of Argument §II). Clay's Motion for New Trial also asked for a new trial due to the trial court's error in forbidding Clay from discussing the lack of a duty to retreat and permitting the State to argue that Clay *did* have a duty to retreat. *Id*. at 139 (This is the subject of Argument §V).

Clay never specifically objected that the State's Instruction 14 was inappropriate because of the lack of the "withdrawal" language. *See* Tr., pp. 798-827. As such, review is for plain error. *State v. White*, 222 S.W.3d 297, 299-300 (Mo. App. W.D. 2007); *State v. January*, 176 S.W.3d 187, 196-97 (Mo. App. W.D. 2005) (Holding that even failure to object to an instruction does not waive plain error review.). Plain error for instructions requires reversal when it is "readily apparent" that the error may have altered the jury's verdict. *January*, 176 S.W.3d at 193-94. Fortunately, numerous decisions hold that faulty

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instructions regarding self-defense nearly always results in manifest injustice or a miscarriage of justice, especially if there is an MAI on point. *E.g.*, *White*, 222 S.W.3d at 300; *January*, 176 S.W.3d at 198.

2. Defendants do not waive plain error review of Instructions, unless a defendant's erroneous Instruction is submitted to the jury.

Presumably, the State will continue to improperly rely on *State v. Bolden*, 371 S.W.3d 802, 806 (Mo. banc 2012), for the proposition that "the proffering of an incorrect instruction to the trial court is an invited error by the party who proffered the instruction." This is a correct statement of the law; however, *Bolden* applies ***only*** when the incorrect instruction was actually given to the jury. *Id.* at 805. *Bolden* does ***not*** apply when the incorrect instruction is ***not*** given to the jury. *State v. Celis-Garcia*, 344 S.W.3d 150, 154 n.3 (Mo. banc 2011) (citing *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002); *State v. Wurtzberger*, 40 S.W.3d 893, 897-98 (Mo. banc 2001)). Clay did ***not*** submit Instruction 14, the State did. *E.g.*, L.F., p. 85 ("Submitted by Plaintiff").

The State previously asserted (and presumably will continue to assert) three reasons why plain error review of Instruction 14 was "waived" by Clay; ***all three reasons have been specifically rejected in recent Missouri Supreme Court case law***. The State previously asserted that plain error review was waived because (1) Clay did not object to the State's instruction and, in fact, stated that it "looks good"; (2) Clay submitted instructions with the same errors of which he now complains; and (3) similarly to the second argument, Clay did not submit a correct instruction. Resp. Br., pp. 16-20 (at the

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Western District). Each argument has been considered by this Court and rejected, as summarized in *Celis-Garcia*:

> The state argues that [the defendant] waived her right to plain error review by failing to object to the state's verdict directors and by submitting her own verdict directors that suffered from the same defect she now challenges on appeal. Contrary to the state's argument, ***this Court previously has determined that a defendant does not waive plain error review by failing to object to a faulty jury instruction or by failing to submit a correct instruction***. *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002) (submission of an incorrect instruction did not waive plain error review); *State v. Wurtzberger*, 40 S.W.3d 893, 897-98 (Mo. banc 2001) (counsel's affirmative statement that he had no objection to the instruction and his failure to submit an alternative instruction did not waive plain error review).

344 S.W.3d at 154 n.3 (emphasis added). As such, this Court is bound by its own precedent to find that plain error review was not waived by Clay, because the record clearly and unequivocally shows that the State drafted Instruction 14.

3. The State submitted Instruction 14 (the self-defense Instruction).

The Instruction 14 given to the jury was offered by the State. Tr. p. 805-10, 825-27. No more proof should be required that the State submitted Instruction 14 besides the fact that the State literally typed "Submitted by Plaintiff" on the "dirty" copy of Instruction 14 submitted and accepted by the trial court. L.F., pp. 83-85. Instruction 14

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was "Submitted by Plaintiff" after minor additions suggested by Clay.[8] The majority of the discussion regarding Instruction 14 takes place on pages 801 through 810 and 825 through 827 of the Transcript, should this Court desire to review the verbatim discussion. The facts surrounding the submission of Instruction 14 can be summarized as follows:

- ***Initially***, the Court suggested that Instruction 14 was "going to be amended by [Clay]." Tr. 801; Resp. Br., p. 19.
- The Transcript shows Clay proposed *adding* the "initial aggressor language, plus adding threats" *to the State's proposed jury instructions*. Tr. 801; Resp. Br., p. 17.
- Some discussion regarding the propriety of "threats" language and "from harm" language occurred on the record, during which time all statements indicate that the parties are working *only* from the State's proposed instructions, for example:
    - "MR. MOEDER [CO-COUNSEL FOR THE STATE]: Well, it was the State's, the verdict director, that I'm handing you." Tr. 803;
    - "MR. MOEDER: I'm going to hand you what's – I guess this is 306.06(a) [sic], Instruction No. 14, proposed by the State." *Id*. at 804-05.
    - "MS. LUNDAK [CO-COUNSEL FOR THE STATE]: We can take that out." *Id*. at 806 (After discussing a proposed deletion.).

[8] Clay objected to the lack of language regarding threats made by White against Clay and the State agreed to include threat language in ***its*** Instruction 14. Tr. 807-08.

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- The State asserted that its Instruction 14 was "accurate" and "the only thing that it does not have substantively is this paragraph regarding threats against the defendant made by the victim." *Id*. at 806.
- The parties then conducted some matters off the record, before going back on the record to discuss the additions the State would make to the State's submitted Instruction 14 and, in fact, the trial court stated that it lost Clay's submitted instructions. *Id*. at 806-10.
- Later, the trial court acknowledged that it was "waiting for the State's revised instructions to come back." *Id*. at 824.
- Ultimately, Ms. Lundak returned with the State's Instruction 14, which literally stated it was "Submitted by Plaintiff." *Id*. at 825-26; L.F., p. 85.
- The trial court asked the State to share its submitted instruction with Clay's trial attorney. Tr., pp. 825-26.
- Clay's trial attorney stated that the State's Instruction 14 "[l]ooks good," and that instruction was accepted and used by the trial court. *Id*. at 826; L.F., pp. 83-85; Resp. Br., p. 17.

Under these circumstances, Clay did not "jointly" draft Instruction 14 with the State. The State drafted Instruction 14 and made *some* additions to comport the Instruction with the MAI, but simply did not draft Instruction 14 to fully comport with the MAI. Clay may have submitted an instruction that contained similar errors; ***such is irrelevant according to Missouri Supreme Court case law discussed above***.

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E. It was Error to Fail to Include the Withdrawal Language in Instruction 14; prejudicing Clay and resulting in a manifest injustice.

1. Withdrawal was "injected" into the case, so the withdrawal instruction was required.

To show even plain error in failing to give a self-defense instruction, the defendant must only show that the issue was "injected" into the underlying case:

> For example, in determining whether a defendant has carried his burden of injecting the issue of self-defense, in accordance with § 563.031.4, it is well settled that the evidence must be viewed in a light most favorable to the defendant … Logically, the same standard would apply in any case involving the 'burden of injecting the issue'; otherwise, despite the definition of that concept applying equally throughout the criminal code, pursuant to § 556.051, its actual application would be different from case to case.

January, 176 S.W.3d at 195. The State will assert that the trial court was not required to view the evidence in a light most favorable to the appellant; however, such tactics invade the province of the jury. *Id*. The appellant need not "prove" self-defense to have a correct jury instruction submitted on self-defense, just as Clay does not need to "prove" he withdrew to obtain a withdrawal instruction. Once Clay's withdrawal was injected into the case, the trial court ***must*** instruct the jury on withdrawal. *State v. Westfall*, 75 S.W.3d 278, 281 (Mo. banc 2002); MAI-3d 306.06A, Notes on Use, ¶4(a).

This Court views all evidence in "the light most favorable to the defendant" to decide if "withdrawal" was injected into the case. *White*, 222 S.W.3d at 300. This is true regardless of the source of the evidence and "***regardless of whether the evidence supporting [the withdrawal] defense is inconsistent with the defendant's testimony or theory of the case***." *Id*. (emphasis added). The withdrawal instruction *must* be given, regardless of whether it was requested, because failure to submit that aspect of the self-defense instruction "constitutes reversible error if the defense was supported by the evidence." *Id*. (citing *State v. Avery*, 120 S.W.3d 196 (Mo. banc 2003)). Any evidence which tends to put a matter in issue, viewed in the light most favorable to offering the withdrawal instruction, is "substantial evidence" which requires the instruction. *Avery*, 120 S.W. at 200.

In *State v. Morrow*, 41 S.W.3d 56 (Mo. App. W.D. 2001), there was no error for the trial court to fail to give the withdrawal instruction where no evidence or testimony offered at trial supported withdrawal. In *Morrow*, the defendant's testimony supported *only* the theory that he was not the initial aggressor. *Id*. at 57-60. Similarly, Clay's theory of his case here was that he was never the initial aggressor, due to his right to defend his property (and the lack of a duty to retreat). However, unlike *Morrow*, in this case the State's evidence and testimony from third parties, injected the issue of withdrawal, even if it was contrary to Clay's theory of the case. *White*, 222 S.W.3d at 300.

> [I]f the evidence introduced by the State was sufficient to insert the issue of [withdrawal] into the case, then defendant was entitled to an instruction on that defense...

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Avery, 120 S.W.3d at 202.

Viewed in the light most favorable to Clay, the State's witnesses and exhibits (and third parties) injected the issue of withdrawal. McGhee and Becklean both testified that Clay wanted White to leave his property. Tr., pp. 338-43, 654, 729; *see also* State's Exhibit 17, at 3:43:50. McGhee testified, and State's Exhibit 17 shows, Clay pointed his gun at White and walked White off of his property. *Id*. at 3:43:55. In accord with all the testimony, once White was off Clay's driveway, Clay told White to wait for Becklean to pick him up. Tr., p. 735. In the light most favorable to offering the withdrawal instruction, it is at this point that Clay clearly and unequivocally evidenced his intent to end the encounter: ***he lowered his gun, turned his back on White, and walked toward his front door***. State's Exh. 17, at 3:43:58.

In the light most favorable to Clay, State's Exhibit 17 shows that White became the aggressor after Clay abandoned the encounter: The video evidence is unequivocal; Clay is clearly not walking towards any of the three men at that point. *Id*. at 3:43:50. White "had an opportunity to abandon" the encounter completely, but instead he reentered Clay's driveway, spun Clay around, and began fighting with Clay. State's Exhibit 17, at 3:44:27; *see Hajek*, 716 S.W.2d at 483. Further, McGhee testified that White reinitiated the encounter because he needed to "make his point" and that he struck Clay. Tr., p. 395. Becklean's testimony is in accord with McGhee's in these respects.

Thus, in the light most favorable to Clay and to offering the withdrawal instruction, the issue of withdrawal was injected, even if it does not comport with Clay's theory of defense. "Failure to submit a self-defense instruction when required by the

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evidence constitutes reversible error." *Avery*, 120 S.W.3d at 200. The withdrawal instruction is a part of the self-defense instruction and failure to submit it is similarly reversible error. *E.g.*, *January*, 176 S.W.3d at 195.

2. Failure to give the withdrawal instruction is a manifest injustice and miscarriage of justice.

Clay was prejudiced by the failure to give the withdrawal instruction because the jury was instructed that once an individual is the "initial aggressor," he can ***never*** use self-defense to defend himself and that is a clear and unequivocal misstatement of the law, when withdrawal has been injected by the State. Any conflict in the evidence must be resolved by a properly-instructed jury. *State v. Zumwalt*, 973 S.W.2d 504, 507 (Mo. App. W.D. 1998).

A trial court's "[f]ailure to provide the required instruction, or give it in accordance with an accompanying Note on Use" is "presumed to prejudice the defendant unless it is clearly established by the State that the error did not result in prejudice." *Westfall*, 75 S.W.3d at 284. This is true ***even if the error is not preserved***. *White*, 222 S.W.3d at 301. Thus, "Missouri courts have repeatedly found manifest injustice or miscarriage of justice in the failure to instruct, ***or properly instruct***, on self-defense." *Id.* (emphasis added). The issue of withdrawal was injected, the withdrawal instruction was required under the Notes on Use to 306.06A, and the instruction was not given. This Court should presume this prejudiced the jury, because it was not properly instructed.

Further, the manifest injustice and miscarriage of justice here was plain and therefore goes above and beyond the requirements of case law. The State repeatedly

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acknowledged that whether Clay was the "initial aggressor" was the "key issue" in this case. *E.g.*, Tr., p. 816; *see also* Tr., p. 873 ("Let's talk about the outside, the initial aggressor outside … the most important aspect of this case, is who was the initial aggressor outside."). By failing to properly instruct the jury regarding initial aggressor (by failing to instruct the jury regarding withdrawal), the jury decided the "key issue" in this case with a faulty instruction. This instruction – as mentioned above – prohibited Clay from ***ever*** using self-defense if the jury found that he was ***ever*** the "initial aggressor." Once the withdrawal issue was injected, the State had the burden of proving beyond a reasonable doubt, that Clay did not withdraw:

> By omitting the jury instruction on [withdrawal], the trial court completely relieved the State of its burden to prove beyond a reasonable doubt that [Clay] did not act in self-defense [because he withdrew from the encounter]. Substantial evidence of [withdrawal and] self-defense was presented at trial but the jury was given no means by which to consider it in reaching a verdict.

See White, 222 S.W.3d at 301.

The Notes on Use are clear. The trial court provided a jury instruction in direct contravention of the MAI on the "key issue" in this case. The jury falsely believed that Clay could never defend himself from White, if Clay was ever determined to be the "initial aggressor." The State cannot possibly "clearly establish[] … that the error did not result in prejudice." *Westfall*, 75 S.W.3d at 284. As such, reversal is required on Clay's convictions for murder in the second degree and the associated ACA.

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3. The jury likely followed the incorrect instruction and found Clay to be the "initial aggressor."

In order for Clay to be justified in using self-defense against White, the following must be met: (1) He was not the initial aggressor, or he withdrew from the encounter; and (2) Clay had a reasonable belief that the use of force was necessary to protect himself from what he reasonably believed to be the imminent use of unlawful force; and (3) Clay had a reasonable belief that the use of deadly for was necessary to protect himself from death or serious physical injury. *E.g*. MAI-3d 306.06A; L.F., pp. 83-85, 114-16. A non-withdrawn initial aggressor cannot use deadly force to repel an attack, even if he believes that it is necessary to protect himself from death or serious injury. *E.g*. MAI-3d 306.06A. Similarly, even a person that is not an initial aggressor cannot use an unreasonable amount of force to deter a non-deadly attack. *Id*.

Because Clay was being attacked on his own property (as stated by the State's witness), it seems unlikely that the jury found his use of force unreasonable. However, it seems likely that the jury simply found Clay to be the "initial aggressor" under the mistaken instruction and found that Clay would never be permitted to use deadly force to protect himself. This is especially true in light of the impermissible misstatements of law during the State's closing and the fact that the State relied almost exclusively upon the fact that it believed Clay was the "initial aggressor" in all of its arguments to the jury. *E.g*., Tr., p. 816; 873. Reversal on Counts 1 and 2 is required.

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F. This Court Can Change the Law, If Necessary.

As set forth above, Clay asserts that the law in Missouri requires this Court to rule in his favor. However, to the extent that this Court believes that precedent does not require reversal, this Court is authorized to change the law to correct this clear and manifest injustice.

II. The trial court erred in overruling Clay's Motion for New Trial regarding the trial court's rejection of Clay's Instruction 16 (explaining his lack of duty to retreat), because Clay's Instruction 16 complies with Rule 28.02(d)'s requirement that non-MAI instructions be "simple, brief, impartial, and free from argument" and correctly advised the jury of the law regarding one's duty to retreat in Missouri after there was a relevant change in law and no corresponding change to the MAI and, if the trial court would not submit Instruction 16 as a stand-alone instruction, the trial court was required to modify Missouri Approved Instruction 306.06A to accurately reflect the change in Section 563.031.3, rather than reject the instruction and improperly instruct the jury regarding Clay's lack of a duty to retreat, in that Instruction 16 (or the information therein) was required to properly instruct the jury regarding the law of a duty to retreat in Missouri; the jury was thereby improperly instructed regarding Clay's theory of self-defense; and the jury's verdict would have been different if the jury had been instructed properly that Clay did not have a duty to retreat, resulting in prejudice to Clay as well as fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

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A. Standard of Review.

"The submission or refusal to submit a tendered instruction is within the trial court's discretion." *State v. Edwards*, 60 S.W.3d 602, 610 (Mo. App. W.D. 2001). Review is for an abuse of discretion. *Id*. One objection Clay made throughout the trial was that it was error for the trial court to fail to instruct the jury regarding the change of law in Section 563.031.3 and Clay's lack of a duty to retreat. *See* Tr., pp. 798-827. Clay also filed Motions for Acquittal and a Motion for New Trial which specifically addressed this error. L.F., pp. 125-141. The failure to submit Clay's Instruction 16 regarding the "duty to retreat" is preserved for review by this Court.

As the trial court is required to assure that the jury is properly instructed, the error by the trial court here was in outright rejecting Clay's Instruction 16. *Edwards*, 60 S.W.3d at 610. The trial court should have either submitted Clay's Instruction 16 ***or*** incorporated Clay's Instruction 16 as a modification to MAI 306.06A. Simply rejecting Instruction 16 outright, after Clay drew the trial court's attention to the change in law, was an abused of discretion.

B. The 2010 Amendment of Section 563.031.03 after Publication of the Most Recent MAI.

In 2010, Section 563.031.3 was amended to include the language that "A person does not have a duty to retreat from private property that is owned or leased by such individual." Mo. Rev. Stat. §563.031.3 (Appx., pp. A45-A47); *see also* 2010 Statutory Amendment Document, p.3 (Appx., pp. A48-A50). Section 563.031.3 was previously

amended in 2007, with changes to the MAI effective January 1, 2009. The MAI were not revised after Section 563.031.3 was amended in 2010 (Appx., pp. A301-A22).

C. The 2010 Amendment of Section 563.031 Logically Supports Clay's Arguments Herein.

During the pendency of Clay's appeal at the Western District, the Missouri Legislature passed SB656 which (among many other things) expanded the lack of a duty to retreat in Missouri. SB656 repealed Section 563.031 and enacted language which would specifically remove the duty to retreat before using force as long as the "person is in any other location such person has the right to be," providing:

> 3. A person does not have a duty to retreat:
>
> (1) From a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining[. A person does not have a duty to retreat];
>
> (2) From private property that is owned or leased by such individual; or
>
> (3) If the person is in any other location such person has the right to be.

See also Mo. Rev. Stat. § 563.031.3 (2016 Version) (Appx., p. A53). SB656 was signed by the Senate President Pro Tem on May 25, 2016, and the House Speaker on May 25, 2016. After delivery to the Governor; however, SB656 was vetoed.

On June 27, 2016, the same date as the veto, Governor Nixon delivered to the Secretary of State of the State of Missouri a letter setting forth the reasons for the veto.

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June 27, 2016 Veto Letter (Appx., pp. A54-A57).[9] Governor Nixon's letter specifies that SB656 was vetoed exclusively due to his concerns for safety related to portions of SB656 which would "eliminate the current requirements that individuals obtain training, education, a background check and a permit in order to carry a concealed firearm in Missouri." *Id.* (Appx., pp. A54-57). As such, Governor Nixon expressed no reservations regarding the proposed Section 563.031 language. *Id.* (Appx., pp. A54-A57). Therefore the legislative intent behind SB656 is relevant to this case. Further, SB656 passed with sufficient majority to override Governor Nixon's veto and the Missouri Legislature did override Governor Nixon's veto on September 14, 2016. The changes to Section 563.031 are now law and, as such, SB656's legislative intent is relevant to this case. Mo. Rev. Stat. § 563.031.3 (2016 Version) (Appx., p. A53).

SB656 indicates a clear legislative intent to protect individuals that are being attacked (as Clay was herein). The jury ultimately found that the assailants attacked Clay in his basement and the remainder of the case (and this appeal) focuses on the various trial court errors related to the assault by the individuals in Clay's house once they exited his house. SB656 provides clear direction that, in Missouri, ***individuals that are being attacked should not be required to exactly and specifically calculate the use of force***

[9] On July 14, 2016, Clay moved to submit this information as part of the Record at the Western District. The State did not object and the Western District granted Clay's Motion on July 27, 2016. Clay submitted this information to the Western District on July 28, 2016.

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necessary to defend themselves, nor should they be required to exactly and specifically calculate whether they can safely escape. Particularly relevant to Clay's case is the fact that victims of an attack (such as Mr. Clay) should not be required to retreat as long as they are not trespassing.

Further, SB656 appears to be a direct response to the overly narrow view of the lack of a duty to retreat in Missouri put forward by the State, as embodied in case law such as *State v. Henderson*, 311 S.W.3d 411 (Mo. App. W.D. 2010). In *Henderson*, the defendant's conviction was upheld because of a theoretical possibility that she could have escaped being killed by a truck by "getting behind [an] ice machine outside the store, running into the store, or simply running away…" *Id.* at 414-15. SB656 rejects this narrow interpretation of the lack of duty to retreat, removing the burden from victims of an assault to precisely calculate their ability to retreat while their lives are being threatened (or face the prospect of a lifetime in prison). Mo. Rev. Stat. § 563.031.3 (2016 Version) (Appx., p. A53).

The lack of a duty to retreat has been a central issue to Clay's case throughout and, as briefed, the trial court erred in failing to properly instruct the jury regarding this duty (and permitting the State to argue the opposite). SB656 reveals that the State's overly narrow interpretation of the lack of a duty to retreat runs contrary to legislative intent. For these reasons, while not directly on point, because it did not alter the language regarding one's duty to retreat from their own property, SB656 supports the arguments made by Clay regarding his lack of a duty to retreat (as more completely set forth below).

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D. It Was Error to Outright Deny Clay's "No Duty to Retreat" Instruction.

In accord with the 2010 amendment of Section 563.031.3, Clay submitted Defendant's Instruction 16 to inform the jury that Clay did not have a duty to retreat:

> A person does not have a duty to retreat from private property that is owned or leased by such individual in order to avoid the need to use force in self-defense.

1st Supp. L.F., pp. 160-61 (Appx., pp. A35-A36). It was an abuse of discretion for the trial court to refuse this instruction or modify the self-defense instruction (Instruction 14, cited and quoted above) to include this language. *Edwards*, 60 S.W.3d at 615-16. Further, as discussed above, the 2016 Amendment to this Statute shows that the trial court has exacted a far too narrow view regarding the fact that Clay did not have a duty to retreat herein.

1. A non-MAI instruction was required.

Clay's theory regarding the exit from his home was admittedly complicated but covered two prongs, related to the 2010 Amendment to Section 563.031.3:[10]

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[10] Again, as noted above, the 2016 Amendments to Section 563.031.3 do not alter the language regarding the "duty to retreat" as they relate to property owned or leased by Clay, so either version supports Clay's argument. The 2016 Amendments further expand the lack of a duty to retreat, providing even greater support to Clay's argument.

- First, Clay was justified in exiting his home after ousting the attackers from his basement, because it was all his property and he had no duty to retreat. *E.g.*, L.F., pp. 133-34, 136-40; and/or
- Second, Clay was justified in exiting the home in defense of property under Section 563.041 and, once outside, he had no duty to retreat back inside when the encounter was escalated by White, under Section 563.031.3. *E.g.*, L.F., pp. 133-34, 136-40; Tr., pp. 731-35.

"In determining whether a refusal to submit an instruction was error, the evidence is viewed in the light most favorable to the defendant." *Avery*, 120 S.W.3d at 200. "If the evidence tends to establish the defendant's theory, or supports differing conclusions, the defendant is entitled to an instruction on it." *Id*.

In the light most favorable to the Clay, Clay was justified in exiting his home under either of these theories and the jury should have been instructed regarding the lack of a duty to retreat, once he was outside. *Id*. "Ordinarily, where an MAI instruction addresses a given issue, 'it must be given to the exclusion of any other instruction.'" *Edwards*, 60 S.W.3d at 612. "However, MAI-CR and its Notes on Use are not binding to the extent they conflict with the substantive law." *Edwards*, 60 S.W.3d at 612. (quoting *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997)).

> Where the law has been materially altered by statute following the promulgation of the MAI-CR instruction, the trial court may no longer rely upon the MAI instruction as an accurate statement of the law, and the trial

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> court must modify the MAI instruction to comply with the change in the law.

Edwards, 60 S.W.3d at 612. In *Edwards*, this Court required a non-MAI instruction in order to give meaning to newly-enacted Section 563.033's changed mental state for certain defendants. 60 S.W.3d at 615-16 (see expanded discussion below). Here, Section 563.031.3 was modified in 2010 to state that "A person does not have a duty to retreat from private property that is owned or leased by such individual." No change has been made to Missouri Approved Instruction 306.06A since that time. 2010 Statutory Amendment Document, p.3 (Appx., pp. A48-A50). The instruction now fails to follow the substantive law under the facts of this case.

Clay had no duty to retreat into (or leave) his private property pursuant to Section 563.031.3 to avoid the use of force in self-dense. Clay had the unmitigated right to be where he was when White was shot and killed under either the general "no duty to retreat" theory or the "defense of property plus no duty to retreat" theory listed above. The jury was not instructed on the new substantive law.

> By omitting the jury instruction on [retreat], the trial court completely relieved the State of its burden to prove beyond a reasonable doubt that [Clay] did not act in self-defense [because he had no duty to retreat, rather than defend himself].

See White, 222 S.W.3d at 301. Therefore, a non-MAI instruction to apprise the jury of the correct law regarding Clay's duty to retreat was required.

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2. The trial court erred in failing to give Clay's Instruction 16 without modifying 306.06A.

In *Edwards*, the Defendant shot her husband following years of physical and sexual abuse of the Defendant and her children by the husband. 60 S.W.3d at 602. At trial, the Defendant relied on self-defense pursuant to the newly enacted Section 563.033 which allowed evidence of battered spouse syndrome to be admitted on the issue of self-defense. *Id*. at 612. The trial court gave the standard self-defense instruction at the time, which was MAI (3d) 306.06A. *Id*. No changes to 306.06A were made regarding battered spouse syndrome after the enactment of Section 563.033. *See id*. This Court noted that if Section 563.033 were to have any meaning, it must change the mental state required of a battered woman to use self-defense. *Id*. at 615. The instruction, as given, did not modify the required mental state from that of the normal reasonable person, and therefore failed to follow the existing substantive law as expressed in Section 563.033. *Id*. As a result, "[t]he instruction was contradictory, confusing and misleading" and submission of the instruction was prejudicial and required reversal. *Id*. at 615-616.

The defendant in *Edwards* submitted a stand-alone jury instruction which directed the jury "to consider the testimony of [her battered spouse syndrome expert] and the purpose or effect of her testimony." *Id*. at 610. The Western District found that such instruction was not required, in part due to the error in pointing the jury to specific testimony. *Id*. Similarly, the Western District in *State v. Plunkett*, 473 S.W.3d 166, 173 (Mo. App. W.D. 2015), rejected a verbatim quote of all of Section 563.031.3 as a stand-alone jury instruction. This stand-alone instruction was rejected because it:

> presented an abstract statement of law and placed emphasis on the "no duty to retreat" principle without context or cross-reference to the self-defense instruction, creating potential confusion.

Id.

Clay's submitted Instruction 16 differs from the instructions offered in *Edwards* and *Plunkett* in important ways. First, Clay's Instruction 16 does not specifically draw attention to any testimony. 1st Supp. L.F., pp. 160-61; *see also Edwards*, 60 S.W.3d at 610. Further, as discussed in *Plunkett*, Clay's Instruction 16 is similar to the "no duty to retreat" instruction from Missouri Approved Instruction 306.11. *Plunkett*, 437 S.W.3d at 173 (compare "A person does not have a duty to retreat from private property that is owned or leased by such individual in order to avoid the need to use force in self-defense," 1st Supp. L.F., pp. 160-61, with "[a] person lawfully occupying a (dwelling) (residence) (vehicle) is not required to retreat before resorting to the use of force to defend himself," MAI–CR3d 306.11.). As such, the trial court abused its discretion in outright refusing to give Clay's Instruction 16 without modifying MAI 306.06A.

Even if Clay's Instruction 16 should not have been submitted as a separate instruction, it is still the trial court's duty to assure that the jury is properly instructed. *White*, 222 S.W.3d at 301. The "trial court should have modified the pattern jury instruction [306.06A] on self-defense, to refer to" the lack of duty to retreat. *See Edwards*, 60 S.W.3d at 602. As discussed in *Plunkett*, the preferable way to insert this manner of non-MAI instruction would be to include it as a part of 306.06A, using language similar to 306.11. *Plunkett*, 437 S.W.3d at 173. Clay alerted the trial court to the

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change in law, which requires that the MAI be altered. *Edwards*, 60 S.W.3d at 612. At that point, even if the trial court disagreed with the manner in which Clay submitted Clay's Instruction 16, the solution was not to shove ahead with the case, failing to properly instruct the jury. The solution was to modify 306.06A to include the "no duty to retreat" language. *Id*. at 602.

For the change in Section 563.031.3 to have any meaning, it must alter the responsibilities of a defendant when there is a chance to retreat before using self-defense in the eyes of the jury. *Id*. at 615. It was an abuse of the trial court's discretion to reject Clay's Instruction 16 and simply fail to inform the jury regarding this change in law. It was also an abuse of discretion for the trial court to fail to grant Clay a new trial on this point of error, as requested by Clay.

E. Failing to Give Clay's "No Duty to Retreat" Instruction Prejudiced Clay.

"Missouri courts have repeatedly found manifest injustice or miscarriage of justice in the failure to instruct, ***or properly instruct***, on self-defense." *White*, 222 S.W.3d at 301. Instruction 14, offered by the State, and unmodified by Clay's Instruction 16, improperly instructed the jury that it was illegal for Clay to be outside on the morning of March 4, 2013. The State used this misstatement of that law to assert that Clay's behavior – in "illegally" leaving his home and/or not retreating back into his home – was the direct cause of White's death:

- "If you didn't go out -- if you didn't leave that residence with that firearm, Joel White would still be alive; is that correct?" Tr., p. 778 (cross exam of Clay);

- "Ladies and gentlemen, in this case Larry Clay was the initial aggressor. He was the initial aggressor as soon as he stepped outside of his residence onto the path." *Id*. at 870 (closing); and
- "You're going to see that [Clay] could have prevented all of this. But he didn't." *Id*. at 874 (closing).

The State successfully submitted a jury instruction which misinformed the jury that Clay was automatically at fault or (at a minimum) automatically the "initial aggressor" because he left his home or did not retreat into his home. By submitting this instruction, "the trial court completely relieved the State of its burden to prove beyond a reasonable doubt that [Clay] did not act in self-defense." *White*, 222 S.W.3d at 301. Rather than prove that Clay was at fault, the State was simply required to prove that Clay was outside.

It was an abuse of discretion for the trial court to deny Clay's Instruction 16. At a minimum, the trial court was required to incorporate Clay's Instruction 16 into the 306.06A self-defense instruction. Reversal is required on Clay's convictions for murder in the second degree and the associated ACA.

F. This Court Can Change the Law, If Necessary.

As set forth above, Clay asserts that the law in Missouri requires this Court to rule in his favor. However, to the extent that this Court believes that precedent does not require reversal, this Court is authorized to change the law to correct this abuse of discretion and clear and manifest injustice.

III. The trial court erred, plainly erred, and abused its discretion in failing to exclude evidence of uncharged marijuana-related crimes throughout Clay's trial,

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because the admission of evidence regarding marijuana consumption and possession of marijuana and marijuana paraphernalia violated Clay's due process right to be tried only for the charged offenses, denying a fair trial as required by the Fifth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 10 and 18(a) of the Missouri Constitution, in that evidence of uncharged drug offenses served only to portray Clay as a "drug user" and inflame the jury; evidence of uncharged drug offenses is irrelevant and unduly prejudicial to factually determining whether a homicide or assault took place; and the jury's verdict would have been different if the jury had not been exposed to this overly prejudicial, irrelevant, and inflammatory evidence both under these circumstances and as a matter of law, resulting in fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

A. Standard of Review.

A trial court's decision to admit evidence is reviewed for an abuse of discretion and will be reversed when "the trial court's error was so prejudicial that it deprived a defendant of a fair trial." *State v. Brown*, 353 S.W.3d 412, 418 (Mo. App. W.D. 2011). Clay did not object to the State's voluminous evidence regarding marijuana, so review is for plain error. *State v. Bescher*, 247 S.W.3d 135 (Mo. App. S.D. 2008). Plain error requires Clay to show that the error was plain or obvious and that it prejudiced his right to a fair trial. *E.g.*, *State v. Cook*, 386 S.W.3d 842, 844 (Mo. App. S.D. 2012). The case law regarding the admission of uncharged marijuana possession is so clear that it is unduly prejudicial that it would require this Court to overturn decades of Court of

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Appeals and Supreme Court case law to hold that Clay was not prejudiced by the State's irrelevant evidence. *E.g.*, *State v. Krebs*, 106 S.W.2d 428, 429 (Mo. 1937); *State v. Burnfin*, 771 S.W.2d 908, 911 (Mo. App. W.D. 1989); *State v. Jones*, 583 S.W.2d 212, 214-16 (Mo. App. W.D. 1979).

B. It Was Plain Error to Admit Evidence of Uncharged Marijuana Crimes.

This case is virtually a clone of the facts in *State v. Burnfin*, 771 S.W.2d 908 (1989). The State's extensive testimony and evidence regarding marijuana at Clay's house appears to be designed to force this Court to overrule the Western District's decision in *Burnfin* and prior Supreme Court precedent. *E.g.*, *State v. Trimble*, 638 S.W.2d 726, 732 (Mo. banc 1982); *Burnfin*, 771 S.W.2d at 910-911. In *Burnfin*, the defendant was convicted by a jury of second degree murder and ACA, the same as Clay's trial. 771 S.W.2d at 910; L.F., pp. 123-24. The defendant in *Burnfin* partied with the deceased in the late hours of one day into the early hours of the next, the same as Clay's trial. 771 S.W.2d at 910; *e.g.*, Tr., pp. 319-22. The State, in *Burnfin*, introduced evidence that the revelry involved marijuana use by the defendant and included a post mortem examination of the deceased which showed no drug use, the same as Clay's trial. 771 S.W.2d at 910-11; Tr. pp. 414-15, 433-34, 494-95.

In *Burnfin*, the night turned violent in the early morning hours of the next day, the same as in Clay's trial. 771 S.W.2d at 910; State's Exh. 17. The deceased in *Burnfin* was much larger than the defendant, just as in Clay's trial. 771 S.W.2d at 910, Tr., pp. 759-60. In *Burnfin*, the deceased died from stab wounds, while White was ultimately killed by shooting. 771 S.W.2d at 910. The defendants in *Burnfin* submitted mental defect and self-

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defense, both of which were rejected by the jury, just as the jury rejected Clay's self-defense argument. *Id.*; L.F., pp. 123-24.

> A criminal defendant has the right to be tried only for the crime with which he is charged. Admission of evidence of unrelated crimes is prejudicial because it may result in a conviction founded upon crimes of which the defendant was not accused.

Burnfin, 771 S.W.2d at 911 (citing *Trimble*, 638 S.W.2d at 732).

The test for the admission of evidence of other crimes is whether the evidence logically tends to prove a material fact in issue. *Burnfin*, 771 S.W.2d at 911. Analyzing facts strikingly similar to the facts herein, the Western District found that whether the defendant (or the deceased) has been smoking marijuana "had no tendency to prove [the defendant] guilty of homicide." *Id.*

> The sole purpose of the prosecutor for injecting this irrelevant fact in the case, as demonstrated by the content of his closing argument, was to portray [the defendant] as a dope user and to thereby prejudice his cause before the jury.

Id. Despite the otherwise overwhelming evidence against the defendant in *Burnfin*, the Western District found that he "did not receive a fair trial as required by the Fifth and Fourteenth Amendments to the United States Constitution and Art. I, §§10 and 18(a) of the Missouri Constitution." *Id.* at 910. The Western District reversed his conviction. *Id.*

Clay's case is strikingly similar to *Burnfin*. One of the first issues the State discussed during *voir dire* was the veniremembers' thoughts about marijuana. *E.g.*, Tr., p.

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57. Nearly every witness was questioned about marijuana and/or marijuana paraphernalia at Clay's home. *E.g.*, *id*. at 320-21, 409-13, 414-15, 433-34, 472, 494-95, 678-81, 754-55, 906-07. CST Robert Fields was called by the State solely to introduce evidence of uncharged crimes of marijuana possession, Tr., pp. 414-15, 433-34, and possession of "brass knuckles," *id*. at 437-38, 444-46 (discussed in Argument §IV, below). The State called a medical expert to testify that White had ***not*** used marijuana, just as in *Burnfin*. *Id*. at 494-95. The State discussed marijuana extensively in closing (and the fact that White did not use marijuana). *Id*. at 906-07, 910.

In short, the State turned this murder trial into a trial regarding the possession of a tin of marijuana and marijuana paraphernalia. It was plain error for the trial court to permit such extensive evidence regarding marijuana, because it had no tendency to prove Clay guilty of homicide. *Burnfin*, 771 S.W.2d at 911. The sole purpose was to portray Clay as a "dope user" and thereby prejudice his case. *Id*. Even without objection by Clay, the error was plain, clear, and obvious. *Bescher*, 247 S.W.3d at 135.

C. Clay Was Prejudiced by Evidence of Uncharged Marijuana Crimes Causing Manifest Injustice or Miscarriage of Justice.

The State admitted that it presented the jury with "a lot" of evidence of uncharged crimes. Tr., p. 819. Even without objection by Clay's trial counsel, this Court should reverse Clay's conviction, because "the trial court's error was so prejudicial that it deprived a defendant of a fair trial." *Brown*, 353 S.W.3d at 418; *Cook*, 386 S.W.3d at 844. Case law holds that even in the face of overwhelming evidence of guilt, it is prejudicial to a defendant's constitutional rights to a fair trial to admit evidence of

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uncharged marijuana crimes. *E.g.*, *Krebs*, 106 S.W.2d at 429; *Burnfin*, 771 S.W.2d at 911; *Jones*, 583 S.W.2d at 214-16. To reverse course now, requires this Court to overturn decades of case law to hold that Clay was not prejudiced by the State's irrelevant evidence. *E.g.*, *Krebs*, 106 S.W.2d at 429; *Burnfin*, 771 S.W.2d at 911; *Jones*, 583 S.W.2d at 214-16. As such, it was plain error, resulting in a manifest injustice or miscarriage of justice to permit the evidence of uncharged marijuana crimes. Clay's convictions on Counts 1 and 2 must be reversed by this Court.

D. This Court Can Change the Law, If Necessary.

As set forth above, Clay asserts that the law in Missouri requires this Court to rule in his favor. However, to the extent that this Court believes that precedent does not require reversal, this Court is authorized to change the law to correct this abuse of discretion and clear and manifest injustice.

IV. The trial court erred, plainly erred, and abused its discretion in overruling Clay's objections to evidence of brass knuckles and the uncharged crime of possession of brass knuckles throughout Clay's trial, because the admission of the brass knuckles and evidence of the uncharged crime of possession of brass knuckles violated Clay's due process right to be tried only for the charged offenses, denying a fair trial as required by the Fifth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 10 and 18(a) of the Missouri Constitution, in that admission of unrelated weapons or evidence of uncharged weapon offenses served only to portray Clay as a "lawbreaker" and inflame the jury; such evidence is irrelevant and unduly prejudicial to factually determining whether a homicide or

assault took place; and the jury's verdict would have been different if the jury had not been exposed to this overly prejudicial, irrelevant, and inflammatory evidence both under these circumstances and as a matter of law, resulting in fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

A. Standard of Review.

Admissibility of evidence is reviewed for an abuse of discretion and will be reversed when it deprived a defendant of a fair trial. *Brown*, 353 S.W.3d at 418. Clay objected to the State's brass knuckles evidence, *e.g.*, Tr., p. 438, 445-46, but did not include such objections in his Motion for New Trial, so review is for plain error. *Bescher*, 247 S.W.3d at 135. Plain error requires Clay to show that the error was plain or obvious and that it prejudiced his right to a fair trial. *E.g.*, *Cook*, 386 S.W.3d at 844 (Failure to include error in motion for new trial necessitates plain error review.). It is clear that admission of weapons unrelated to the charged crime is unduly prejudicial and requires reversal. *E.g.*, *Krebs*, 106 S.W.2d at 429; *Burnfin*, 771 S.W.2d at 911.

B. It Was Plain Error to Admit Evidence of Unrelated Weapons and Uncharged Weapons Crimes.

Again, this case is nearly identical to previous decisions of the Courts of Appeals and the Supreme Court. *E.g.*, *E.g.*, *Krebs*, 106 S.W.2d at 429; *Jones*, 583 S.W.2d at 214-16. The evidence of brass knuckles relates to two aspects of prior case law:

- Because the possession of brass knuckles is illegal, it relates to generalized "evidence of uncharged crimes" case law, as discussed above in Argument §III

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and incorporated herein by reference as if set forth completely. *See also*, Mo. Rev. Stat. §571.020.1(5); *Maserang v. Crawford County Sheriff's Dept.*, 211 S.W.3d 118, 121 (Mo. App. S.D. 2006);

- Additionally, the Courts of Appeals and this Court have held that unrelated weapons portray the defendant as a dark character and are inadmissible, even if possession of those weapons were legal. *E.g.*, *Krebs*, 106 S.W.2d at 429; *Jones*, 583 S.W.2d at 214-16.

Under *Burnfin*, 771 S.W.2d at 911, and *Trimble*, 638 S.W.2d at 732, it was plain error to admit evidence of illegal brass knuckles in Clay's murder trial. Clay was not charged with possession of "brass knuckles." L.F., pp. 36-37; Tr., p. 819. No allegations were made that "brass knuckles" were used as part of either the assault or murder charge. *See* L.F., pp. 36-37; Tr., pp. 437-38. It was simply evidence of an uncharged crime, offered by the State solely to turn the jury against Clay.

Further, this case is on all fours with *Krebs*, 106 S.W.2d at 429, and *Jones*, 583 S.W.2d at 214-16, requiring exclusion of such evidence. In *Jones*, the trial court admitted evidence "that a pistol unrelated to the crimes for which he was on trial was found on him when he was arrested." 583 S.W.2d at 213. The defendant in *Jones* "[did] not question the sufficiency of the evidence." *Id*. However, the gun was admitted into evidence, over his objection, with an instruction that the gun was only relevant to the defendant's "contemplated resistance to arrest." *Id*. The Western District looked to this Court for guidance and found *Krebs*. 106 S.W.2d at 429.

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> The [supreme] court held the evidence that Krebs had in his possession weapons which were not connected with the crime for which he was on trial was of ***no probative value*** in connecting him with the robbery and ***reversed the conviction*** because of the admission of the gun found on Krebs.

Jones, 583 S.W.2d at 214 (emphasis added). It is clear under Missouri law that displaying a weapon unrelated to the criminal charges at hand is error. *E.g.*, *State v. Merritt*, 460 S.W.2d 591 (Mo. 1970); *State v. Holbert*, 416 S.W.2d 129 (Mo. 1967); *State v. Smith*, 209 S.W.2d 138 (Mo. 1948); *State v. Richards*, 67 S.W.2d 58 (Mo. 1933); *State v. Grant*, 810 S.W.2d 591, 591-92 (Mo. App. S.D. 1991). The State now seeks to test the water and have this Court reverse decades of precedent prohibiting such evidence in a criminal trial.

The error here is even more obvious, because the weapons are not only irrelevant, but possession of brass knuckles is illegal under Missouri law, thereby implicating both theories of exclusion. When Clay objected to the relevance, the State asserted that it was relevant because the knuckles were found in a gun case in Clay's home. Tr., p. 438. The trial court overruled Clay's objection – citing rejected reasoning from previous cases – stating that it would "overrule the objection given the proximity" to where the gun at issue was recovered. *Id*.

These brass knuckle weapons were found inside the house, after the shooting, in a gun case. No allegations were made that brass knuckles were used as part of either the assault or murder charge. *See* L.F., pp. 36-37; Tr., pp. 437-38. CST Robert Fields was called by the State solely to introduce evidence of uncharged crimes of marijuana

possession, Tr., pp. 414-15, 433-34 (discussed above in Argument §III), and possession of "brass knuckles," *id*. at 437-38, 444-46. It was an abuse of discretion – and plain error – for the trial court to admit the brass knuckles into evidence, given the clear rule of exclusion of such evidence.

C. Clay Was Prejudiced by Evidence of Unrelated Weapons and Uncharged Weapons Crimes Causing Manifest Injustice or Miscarriage of Justice.

"The inherent prejudicial nature of demonstrative evidence of weapons not connected with the crime has been frequently recognized." *Jones*, 583 S.W.2d at 215. "[T]he rule barring display of weapons unconnected with either the accused or the offense is firmly embedded in Missouri jurisprudence." *Grant*, 810 S.W.2d at 591-92 (Crow, J., concurring – asserting that the judge disagrees with the rule, but that the precedence in support thereof was far too overwhelming for a Court of Appeals to reverse.).

The State admitted that it presented the jury with "a lot" of evidence of uncharged crimes. Tr., p. 819. Even without including the objection to the brass knuckles in his Motion for New Trial, this Court should reverse Clay's conviction, because "the trial court's error was so prejudicial that it deprived a defendant of a fair trial." *Brown*, 353 S.W.3d at 418. This Court previously held that even in the face of overwhelming evidence of guilt, it is prejudicial to a defendant's constitutional rights to a fair trial to admit evidence of uncharged crimes and/or evidence of unrelated weapons. *E.g.*, *Krebs*, 106 S.W.2d at 429; *Burnfin*, 771 S.W.2d at 911. To reverse course now, requires this Court to overturn decades of Court of Appeals and Supreme Court case law to hold that

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Clay was not prejudiced by the State's irrelevant evidence, which to this point has been held to be *per se* prejudicial. *E.g.*, *Krebs*, 106 S.W.2d at 429; *Burnfin*, 771 S.W.2d at 911. As such, it was plain error, resulting in a manifest injustice to permit the evidence of brass knuckles both as an uncharged crime and as an unrelated weapon. Clay's convictions on Counts 1 and 2 must be reversed by this Court.

D. This Court Can Change the Law, If Necessary.

As set forth above, Clay asserts that the law in Missouri requires this Court to rule in his favor. However, to the extent that this Court believes that precedent does not require reversal, this Court is authorized to change the law to correct this abuse of discretion and clear and manifest injustice.

V. The trial court erred in overruling Clay's Motion for New Trial regarding its ruling sustaining the State's Motion to prohibit Clay from arguing that Clay had no duty to retreat and to permit the State to argue that Clay had a duty to retreat during closing, because Section 563.031.3 was amended after the most recent Missouri Approved Instruction edition to specifically grant persons lawfully on property the right to exercise self-defense without first considering retreat, in that Clay's intended argument was in accord with Section 563.031.3; the State's argument was a misstatement of Section 563.031.3; and the State's misstatement of the law told the jury that it was *per se* illegal for Clay to be outside of his home which automatically made Clay the "initial aggressor" and required the jury to convict Clay as a matter of law, especially in light of the inaccurate jury instruction which did not include the required "withdrawal" language and required a

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conviction for anyone ever acting as the initial aggressor, thus the jury's verdict would have been different if the jury had been correctly informed regarding the duty to retreat in Missouri, resulting in prejudice to Clay as well as fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

A. Standard of Review.

Clay argued that he should be able to inform the jury that he did not have a duty to retreat and, conversely, that the State should not be able to argue that Clay had a duty to retreat during closing. *See* Tr., pp. 798-827; L.F., pp. 45-47. Clay objected to the State's motion to argue that Clay had a duty to retreat in closing. *Id*. Clay also filed Motions for Acquittal and a Motion for New Trial which specifically addressed this error. L.F., pp. 125-141. The "duty to retreat" issue is preserved for review by this Court. Courts of Appeals review questions of law *de novo*. See e.g., *State v. Taylor*, 298 S.W.3d 482, 492, 503-04 (Mo. banc 2009). Therefore, whether the trial court's ruling regarding Clay's "duty to retreat" was erroneous is reviewed *de novo*. When this Court finds that the ruling was incorrect, it then reviews the denial of Clay's Motion for New Trial on those grounds for an abuse of discretion. *State v. Blackburn*, 859 S.W.2d 170, 175 (Mo. App. W.D. 1993); *State v. Perry*, 447 S.W.3d 749, 754-55 (Mo. App. E.D. 2014). However, "[m]isstatements of the law are impermissible during closing argument, and a positive and absolute duty rests upon the trial judge to restrain such arguments." *Blackburn*, 859 S.W.2d at 174.

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B. Clay Did Not Have a Duty to Retreat.

"A person does not have a duty to retreat from a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining. A person does not have a duty to retreat from private property that is owned or leased by such individual." Mo. Rev. Stat. §563.031.3 (2010 Version) (Appx., pp. A45-A47)[11]. At all relevant times, Clay was on his own private property. *E.g.*, Mo. Rev. Stat. §563.011(6). Clay was justified in exiting his home after ousting the attackers from his basement, because it was all his property and he had no duty to retreat. *E.g.*, L.F., pp. 133-34, 136-40. Further, Clay was justified in exiting the home in defense of property under Section 563.041 and, once outside, he had no duty to retreat back inside when White escalated the encounter. *E.g.*, L.F., pp. 133-34, 136-40; Tr., pp. 731-35.

From the plain language of Section 563.031 (and Section 563.041), Clay had no duty to remain inside or to retreat inside: It was all his property and he had an unmitigated right to be on his own property. Argument to the contrary is a misstatement of the law of self-defense and is impermissible. *Blackburn*, 859 S.W.2d at 174.

[11] Further, as discussed above, the 2016 Amendment to this Statute shows that the trial court has exacted a far too narrow view regarding the fact that Clay did not have a duty to retreat herein, even though the section dealing with one's own property was not amended. Mo. Rev. Stat. § 563.031.3 (2016 Version) (Appx., p. A53).

C. Clay is Forbidden from Correctly Arguing the Law While the State is Permitted to Misstate the Law to the Jury.

Clay moved the Court to be able to argue that Clay did not have a duty to retreat inside (or remain in) his home. Tr., pp. 824-25. Clay also filed a Motion in Limine to prohibit the State from arguing that Clay had a duty to retreat, L.F., pp. 45-47, and took that Motion up around that time, Tr., pp. 824-25. After the trial court denied Clay's motion to prohibit the State from mis-advising the jury, the State doubled-down and asked the trial court to prohibit Clay from properly advising the jury and asked for leave to incorrectly argue that Clay had a duty to retreat in closing. *Id*. The trial court granted all motions in favor of the State, holding that Clay could not mention the lack of a duty to retreat and that the State could argue that Clay ***did*** have a duty to retreat. *Id*. The State then successfully argued a *per se* rule that Clay was the "initial aggressor" because he left his home:

- "Ladies and gentlemen, in this case Larry Clay was the initial aggressor. He was the initial aggressor as soon as he stepped outside of his residence onto the path." *Id*. at 870 (closing); and
- "You're going to see that [Clay] could have prevented all of this. But he didn't." *Id*. at 874 (closing).

On cross-examination of Clay, the State asked "If you didn't go out -- if you didn't leave that residence with that firearm, Joel White would still be alive; is that correct?" Tr., p. 778. The State was permitted to argue a misstatement of the law to the jury: That it was illegal for Clay to go outside (or remain outside).

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D. The State's Argument prejudiced Clay.

The State's misstatement of the law is particularly egregious in light of the incorrect self-defense instruction given to the jury. As discussed in Argument §I, and incorporated herein by reference, the State's Instruction 16 incorrectly informed the jury that if the jury believed Clay was the initial aggressor, he could ***never*** defend himself from White. L.F., pp. 83-85, 114-16. By misinforming the jury that Clay had a duty to retreat or remain inside, thereby making it illegal to be outside, the State told the jury that Clay was automatically the "initial aggressor" simply because he went outside. Tr., p. 870 ("He was the initial aggressor as soon as he stepped outside of his residence onto the path."). Thus, "the trial court completely relieved the State of its burden to prove beyond a reasonable doubt that [Clay] did not act in self-defense" by removing ***two*** aspects of the case which the State must prove beyond a reasonable doubt. *White*, 222 S.W.3d at 301.

First, the State was relieved of proving that Clay was the initial aggressor, because the State was permitted to tell the jury that Clay was the initial aggressor ***as a matter of law*** because he was outside. Second, the State was relieved of proving that Clay did not withdraw, because the State was permitted to tell the jury that once Clay was the initial aggressor ***as a matter of law*** he could never defend himself.

It was an abuse of discretion for the trial court to deny Clay's motion for new trial, because the State grossly mischaracterized the law and it prejudicially altered the jury's verdict. Relieving the State of the duty to fully prove its case beyond a reasonable doubt is a manifest injustice. There is "a reasonable probability that, absent the comments, the verdict would have been different." *Perry*, 447 S.W.3d at 755. If the jury had been

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instructed regarding the lack of a duty to retreat – such that it was not "illegal" for Clay to be outside – there is a reasonable probability that the jury would never have found Clay to be the initial aggressor. In fact, the jury found that Clay was ***not*** the initial aggressor in regards to the encounter in the basement when it acquitted Clay of the alleged stabbing of McGhee. Tr., pp. 123-24. As such, it seems quite likely that the jury only found Clay to be the "initial aggressor" because the State was allowed to misstate the law regarding Clay's duty to retreat.

No other remedy beyond a new trial could have remedied this mistake. First, Clay initially asked to be able to explain the correct law (that he did not have a duty to retreat), which the trial court denied. Second, any attempt to orally instruct the jury regarding the correct statement of the law would have been futile given the incorrect 306.06A instruction given to the jury, which did not instruct the jury regarding the lack of a duty to retreat. Thus, because the State's argument removed at least two elements of the State's case, reversal on Counts 1 and 2 is required.

E. This Court Can Change the Law, If Necessary.

As set forth above, Clay asserts that the law in Missouri requires this Court to rule in his favor. However, to the extent that this Court believes that precedent does not require reversal, this Court is authorized to change the law to correct this abuse of discretion and clear and manifest injustice.

VI. The trial court erred, plainly erred, and abused its discretion in submitting Missouri Approved Instruction 314.04 for murder in the second degree without including the required instruction regarding the nested lesser included offense of

voluntary manslaughter, because MAI 314.04 includes a nested lesser included offense of voluntary manslaughter and nested lesser included offenses must be given in every case, especially when a directly on point MAI exists, in that the portion of MAI 314.04 including the nested lesser included offense of voluntary manslaughter was removed before submission to the jury; no record made as to why this nested lesser included offense was removed; and the jury's verdict would have been different if the jury had been instructed properly regarding this nested lesser included offense, and as a matter of law, failing to give a nested lesser included offense when an MAI is on point results in fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial of Clay's convictions.

A. Voluntary Manslaughter is a "Nested" Lesser Included Offense of Murder in the Second Degree.

There is case law which incorrectly holds that voluntary manslaughter is not a "nested" lesser included offense of murder in the second degree. *E.g.*, *State v. Payne*, 488 S.W.3d 161 (Mo. App. E.D. 2016). The cases which reach this erroneous conclusion do so by conflating the "***burden of injection***" of an element and the "***burden of proof***" of an element. *Id*. at 164. "Lesser-included offenses that are separated from the greater offense by one differential element for which the state bears the ***burden of proof*** are referred to as "nested" lesser-included offenses." *State v. Randle*, 465 S.W.3d 477, 479 (Mo. banc 2015). (emphasis added); *see also Payne*, 488 S.W.3d at 164 (Citing, but ignoring,

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Randle, 465 S.W.3d at 479); *State v. Davis*, 474 S.W.3d 179, 186 (Mo. App. E.D. 2015) (Also citing, but ignoring, *Randle*, 465 S.W.3d at 479).

Voluntary manslaughter and murder in the second degree are lesser included offenses which are separated by one differential element, for which the state bears the burden of proof. MAI-3d 314.04; (Appx., p. A23) ("(Third, that defendant did not do so under the influence of sudden passion arising from adequate cause,)"). Further compare MAI 314.04 (Murder in the Second Degree: Conventional) with MAI 314.08 (Manslaughter: Voluntary). (Appx., pp. A23-A24; A58-A60). The Instructions are the same, except that the Instruction for murder in the second degree contains the "Third" element and the Instruction for voluntary manslaughter does not. (Appx., pp. A23-A24; A58-A60). The "Third" element, regarding the lack of sudden passion is "one differential element for which the state bears the burden of proof" and is therefore a "nested" lesser-included offense of murder in the second degree. *Randle*, 465 S.W.3d at 479.

The lower courts have conflated the "burden of injection" and the "burden of proof" to find that voluntary manslaughter is *not* a "nested" lesser included offense of murder in the second degree. *E.g.*, *Davis*, 474 S.W.3d at 187; *State v. Price*, 928 S.W.2d 429, 431 (Mo. App. W.D. 1996). The cases clearly note that the State has the burden to prove that the defendant was ***not*** acting under the influence of sudden passion. *Davis*, 474 S.W.3d at 187 ("Only after the defendant has properly injected the issue does the State have the burden of disproving the issue.").

> [Lack of sudden passion] is an element of the crime and when properly introduced, it requires a finding by the jury that the defendant did not

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> commit the murder under the influence of sudden passion to find the defendant guilty of second degree murder … Once a defendant has properly injected the issue of sudden passion, the state bears the burden of disproving it beyond a reasonable doubt … The defendant is entitled to have the jury consider voluntary manslaughter instead of second degree murder when the defense introduces adequate evidence of the special negative defense…

Price, 928 S.W.2d at 431 (internal citation omitted).

Thus, voluntary manslaughter is a "nested" lesser included offense of murder in the second degree and all case law to the contrary must be overruled.

B. Standard of Review.

This Court will review *de novo* a trial court's failure to offer a lesser-included offense instruction and "failure to give a requested instruction is reversible error." *State v. Jackson*, 433 S.W.3d 390, 395 (Mo. banc 2014). When the lesser-included offense is "nested" this Court is required to reverse, without any further discussion of prejudice, if an offered instruction is rejected. *E.g.*, *State v. Roberts*, 465 S.W.3d 899 (Mo. banc 2015); *State v. Randle*, 465 S.W.3d 477 (Mo. banc 2015). Unfortunately, Clay did not offer an instruction on voluntary manslaughter and, in fact, Clay's attorney may have asked for "voluntary manslaughter" to be removed from the instructions. Tr. p. 800. If this Court believes Clay invited the error, prior case law holds that this Court is not required to review such error, otherwise review is for plain error. *State v. Leisure*, 796 S.W.2d 875, 877 (Mo. banc 1990).

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Based upon a number of recently-transferred cases, the standard of review for this Point will likely hinge upon whether this Court agrees with Clay's analysis, above, showing that voluntary manslaughter is a "nested" lesser-included offense of murder in the second degree.[12] This Court recently transferred at least four cases dealing with the submission of "nested" lesser included offenses. *E.g.*, *State v. Jensen*, 2015 WL 5076702 (SD33186; August 27, 2015) (now SC95280).; *State v. Sanders*, 2015 WL 456404 (WD76452; February 3, 2015) (now SC94865); *State v. Smith*, 2015 WL 7253060 (WD77673; November 17, 2016) (now SC95461); *State v. Brown*, ED102195 (unpublished) (now SC95430).[13] Because this Court has held that submitting "nested" lesser included offenses should be "nearly universal" due to the fact that the jury is always free to disbelieve part or all of the state's evidence, *Jackson*, 433 S.W.3d at 395, Clay asserts that this Court should hold that ***even assuming Clay's attorney asked for removal of the voluntary manslaughter portion of MAI 314.04*** this Court should

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[12] Regardless, Clay refers to voluntary manslaughter in this Point as a "nested" lesser included offense. To the extent that this Court disagrees, voluntary manslaughter is still a lesser included offense and should be analyzed as such.

[13] Clay submitted the information regarding these cases and their Transfer to this Court to the Western District via Supplemental Authority Letter on August 15, 2016, along with a Motion to file an Amended Brief. The Western District received the Supplemental Authority Letter, but denied the Motion to file an Amended Brief.

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conduct a *de novo* review of this error. Clay also asserts that he believes that this will be the standard announced by this Court in the decisions of the above-referenced four cases.

Conversely, because Clay's submitted instructions were not used, at a minimum (regardless of whether voluntary manslaughter is a "nested" lesser included offence) review should be for plain error, because Clay did not "waive" this error by simply not objecting to the State's erroneous instruction. *E.g.*, *Celis-Garcia*, 344 S.W.3d at 154 n.3; *Derenzy*, 89 S.W.3d at 475; *Wurtzberger*, 40 S.W.3d at 897-98. Only if the record clearly reflects that Clay's attorney specifically asked for this provision to be removed can this Court find that the issue was waived. *Leisure*, 796 S.W.2d at 877. The record does not clearly reflect such a request (*i.e.*, Clay's attorney simply stated "thank you" on the record when discussing this point), so review is – at a minimum – for plain error (if this Court does not follow Clay's analysis regarding *de novo* review).

B. Sudden Passion from Adequate Cause was "Injected" Into the Case.

To show error in failing to give the voluntary manslaughter instruction, Clay must only show that the issue was "injected" into the underlying case. *E.g.*, MAI 314.04, Notes on Use ¶4 (Appx., p. A26).

> In determining whether a defendant has carried his burden of injecting the issue of self-defense, in accordance with § 563.031.4, it is well settled that the evidence must be viewed in a light most favorable to the defendant … Logically, the same standard would apply in any case involving the "burden of injecting the issue"; otherwise, despite the definition of that concept

> applying equally throughout the criminal code, pursuant to § 556.051, its actual application would be different from case to case.

January, 176 S.W.3d at 195. Once again, the State will assert that the trial court was not required to view the evidence in a light most favorable to the appellant; however, such tactics invade the province of the jury. *Id*. Clay need not "prove" "sudden passion from adequate cause" to have a correct jury instruction submitted. Once Clay's "sudden passion from adequate cause" was injected into the case, the trial court must instruct the jury on withdrawal. *Westfall*, 75 S.W.3d at 281; MAI 314.04, Notes on Use ¶4 (Appx., p. A26).

This Court views all evidence in "the light most favorable to the defendant" to decide if "sudden passion from adequate cause" was injected into the case. *White*, 222 S.W.3d at 300. This is true regardless of the source of the evidence and "***<u>regardless of whether the evidence supporting [the withdrawal] defense is inconsistent with the defendant's testimony or theory of the case</u>***." *Id*. (emphasis added). The "sudden passion from adequate cause" instruction must be given, regardless of whether it was requested, because failure to submit that aspect of the self-defense instruction "constitutes reversible error if the defense was supported by the evidence." *Id*. (citing *Avery*, 120 S.W.3d at 196). Any evidence which tends to put a matter in issue, viewed in the light most favorable to offering the withdrawal instruction, is "substantial evidence" which requires the instruction. *Avery*, 120 S.W.3d at 200.

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> [I]f the evidence introduced by the State was sufficient to insert the issue of [withdrawal] into the case, then defendant was entitled to an instruction on that defense...

Id. at 202.

Viewed in the light most favorable to Clay, the parties' witnesses and exhibits (and third parties) injected the issue of "sudden passion from adequate cause." The evidence showed at least three events adequate to inject the issue of an attack which arose under "sudden passion from adequate cause":

- The evidence showed – and the jury verdict regarding the fight in the basement shows – that Clay was viciously attacked in the basement. Tr. 323-48, 652-54, 657-59, 723-29, 759-60; L.F., pp. 37, 123;
- The evidence showed that Clay believed his property was being destroyed by White; Clay went to investigate; and Clay was viciously attacked outside. Tr. pp. 731-35; *see generally* State's Exh. 17; and
- The evidence showed that Clay walked White off his property and ended the encounter, before White reinvaded Clay's property and viciously attacked Clay in the driveway. Tr. 735; State's Exh. 17, approximately 3:43:58 through 3:45:08.

Again, Clay is not required to *prove* "sudden passion from adequate cause," he must simply show that substantial facts were in evidence from which a jury *could find* "sudden passion from adequate cause" for the instruction to be required. *Avery*, 120 S.W.3d at 200-02. The vicious attacks described above are clearly sufficient under Missouri law to *inject* the issue of "sudden passion from adequate cause." *State v. Boyd*, 913 S.W.2d 838,

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843 (Mo. App. E.D. 1995) (holding that for adequate cause to exist, a sudden, unexpected encounter or provocation must excite an uncontrolled passion, be it rage, anger, or terror.).

Thus, in the light most favorable to Clay and to offering the voluntary manslaughter portion of the instructions, the issue of "sudden passion from adequate cause" was injected, even if it does not comport with Clay's theory of defense. Failure to submit this portion of the instruction is reversible error. *Avery*, 120 S.W.3d at 200.

C. Failure to Give a Voluntary Manslaughter Instruction Was Plain and Prejudicial Error, Resulting in a Manifest Injustice and a Miscarriage of Justice, Especially if Voluntary Manslaughter is a "Nested" Lesser Included Offense.

The modified version of Missouri Approved Instruction 314.04 offered by the State included the voluntary manslaughter language. 2d Supp. L.F., p. 162 (Appx., p. A28). The instruction offered by the State shows this language crossed out and it was not recreated in the instructions given to the jury. L.F., pp. 75, 106 (Appx., pp. A37, A41). When discussing this instruction, the record is scant:

MR. POWELL: Does it have the last paragraph: However, unless you find?

THE COURT: Yes.

MR. POWELL: Okay.

THE COURT: And it's been modified from the original draft.

MR. POWELL: Okay.

THE COURT: … We discussed it last night.

MR. POWELL: By taking out?

THE COURT: By taking out, but then you must first consider whether he is guilty of voluntary manslaughter, the lesser included.

MR. POWELL: Okay, right. Thank you.

Tr., pp. 799-800. As discussed above, voluntary manslaughter is a "nested" lesser included offense and it is – as a matter of law – a manifest injustice to fail to give nested lesser included offense instructions. *E.g.*, *Jackson*, 433 S.W.3d at 396, 406. Thus, under both plain error and *de novo* review this Court must reverse Clay's conviction for failure to give the voluntary manslaughter instruction.

This Court in *Jackson* suggested that nested lesser included offense instructional error is important enough to override the typical rule that a defendant cannot invite his own error. *See Jackson*, 433 S.W.3d at 396, n.7. The Court Stated:

> Even when the defendant does not request a lesser included offense instruction, this Court recently held that a defendant who was convicted of a greater offense states a valid claim for post-conviction relief under Rule 29.15 by alleging that counsel's failure to request the instruction resulted from "inadvertence" rather than reasonable trial strategy. *McNeal v. State,* 412 S.W.3d 886, 889-90 (Mo. banc 2013). Because there was no record made during trial that defense counsel's decision not to request a lesser included offense instruction was a deliberate (and objectively reasonable) strategic choice, the Court held that the defendant was entitled to an evidentiary hearing and a chance to prove his claim and have the conviction set aside.

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Id. Thus, even if Clay requested this change, there was no record made as to why defense counsel requested this change and, without that record, the matter is simply too important for this Court to fail to review. The message from this Court is clear from the previous cases: Give nested lesser included offense instructions, or have a great explanation on the record for failing to give such instructions, or reversal is required. *See id*. As there is no record as to why voluntary manslaughter was not submitted, reversal is required.

D. Even if Voluntary Manslaughter Is Not a "Nested" Lesser Included Offence, Failure to Give a Voluntary Manslaughter Instruction Was Plain and Prejudicial Error, Resulting in a Manifest Injustice and a Miscarriage of Justice.

As cited above, the record is not explicitly clear that Clay's attorney specifically asked for the removal of the voluntary manslaughter portion of MAI 314.04 and, as such, review is at least for plain error, even if this Court does not believe that voluntary manslaughter is a "nested" lesser included offense because the State's submitted instruction was erroneously used. *E.g.*, *Celis-Garcia*, 344 S.W.3d at 154 n.3; *Derenzy*, 89 S.W.3d at 475; *Wurtzberger*, 40 S.W.3d at 897-98. This Court need not look any further than the ***mandatory*** "Notes on Use" for MAI 314.04:

> The burden of injecting [the] issue [of sudden passion arising from adequate cause] is on the defendant. If there is evidence supporting sudden passion from adequate cause, paragraph (Third) ***must*** be given. Further, an instruction on voluntary manslaughter, MAI-CR 3d 314.08, may be given upon request of a party ***or on the Court's own motion***.

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MAI 314.04, Notes on Use ¶4 (Appx., p. A26) (emphasis added). As discussed above, the issue of sudden passion arising from adequate cause was *injected* into this case and therefore that portion of MAI 314.04 ***must*** be given. It was not; therefore Clay was manifestly and unjustly prejudiced, because the jury would have found him not guilty of murder in the second degree with the "Third" element presented to the jury.

E. This Court Can Change the Law, If Necessary.

As set forth above, other than reversing the lower court cases holding that voluntary manslaughter is *not* a "nested" lesser included offense of murder in the second degree, Clay asserts that the law in Missouri requires this Court to rule in his favor. However, to the extent that this Court believes that precedent does not require reversal, this Court is authorized to change the law to correct the *de novo* errors or the trial court's abuse of discretion and clear and manifest injustice.

CONCLUSION

For the foregoing reasons, Clay has been unfairly prejudiced and a manifestly unjust result has occurred. This Court should reverse his convictions for murder in the second degree and the associated ACA count and remand for dismissal or a new trial.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that the foregoing document (the Substitute Opening Brief of Appellant) has a word count of 21,332 using Microsoft Word's tools calculated in accordance with Missouri and Local Rules and is otherwise in compliance with Missouri and Local Rules and the undersigned hereby additionally certifies that the foregoing document as well as the Appendix thereto was filed via this Court's Electronic Filing System on February 1, 2017, and thereby both were served upon all counsel of record.

/s/ Clayton E Gillette

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