Sup. Ct. # 86358

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

DAVID STANLEY ZINK,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of St. Clair County, Missouri,
27th Judicial Circuit
The Honorable William J. Roberts, Judge

APPELLANT'S BRIEF AND APPENDIX

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JURISDICTIONAL STATEMENT

David Zink was convicted of first-degree murder, §565.020, and was sentenced to death. Notice of appeal was timely filed. This Court has exclusive jurisdiction of the appeal. Mo.Const.,Art.V,§3.

STATEMENT OF FACTS

David Zink was born in 1959 to the embittered union of June and Stanley Zink (Tr.3244,4208). When Zink was four, his father was involuntarily committed to a mental hospital for several months (Tr.2997,3625,4156,4178). Stanley often talked of suicide, or engaged in suicidal behaviors, even in front of Zink and his two sisters (Tr.2997,3626). Zink saw his father take a gun and threaten to shoot himself (Tr.3626). In January 1964, June and Stanley divorced (Tr.4209).

In kindergarten, Zink started crying and told his teacher he wanted to go home and kill himself (Tr.4227). He was referred for psychiatric treatment and received counseling for about a year (Tr.2996). Zink was terrified to see the doctor, however, because his father had told him that he would be locked up (Tr.4206).

Meanwhile, Zink was afraid of his mother, who suffered from depression and was impatient, nervous and irritable (Tr.4208,4388). She was very harsh with him and often yelled at him, grabbed him, and talked down to him (Tr.2710-11,3006,4208,4357). She worked strange shifts and provided little guidance or

discipline (Tr.4194,4357). She was drunk a lot and would get angry (Tr.2712). Zink hid from her (Tr.2712).

In 1966, when Zink was about six or seven, June moved the children to Pennsylvania to live with her new husband and his children (Tr.3008,3198-99). Zink shared a bedroom with his two step-brothers (Tr.3213). They strongly resented him and vented their anger on him (Tr.3200-03). They often humiliated him and made fun of his speech impediment (Tr.3203-07). After less than a year, the marriage failed, and June brought her children back to Kansas (Tr.3210,4210).

Next, Zink was shipped off to his father in Butler, Missouri, and his new wife and children (Tr.3008,3495-97,4193). Zink was a loner with no friends (Tr.4228). At seven or eight, he was "sad, bitter and needy of love and attention" (Tr.4228). He would wake up at night screaming (Tr.4228). At age eight, Zink was sent back to live with his mother because he got on his stepmother's nerves (Tr.3501,4229).

Zink was extremely active (Tr.3003,3005). His energy level was about as high as it could go; he always had to be doing something (Tr.3498-99). In elementary and middle school, he was constantly in trouble for distracting behavior and clowning around (Tr.3008). He was paddled a lot, but simply was not able to stop (Tr.3010,4190).

In fourth grade, Zink came to school crying and wouldn't say why (Tr.4348). His teacher found that he had been hit at home and reported it to the

principal (Tr.4348-49). At age nine, Zink ran away to escape the physical abuse inflicted by his mother (Tr.3442-43).

By the time he was ten, Zink was placed in foster care with the Morfitt family (Tr.4408). Within a few weeks, Zink ran away (Tr.4409). Around that time, his foster-mother found him making a noose out of a rope (Tr.4229,4409). Although the Morfitts wanted to adopt him, he always fantasized about going back home (Tr.4229-30,4410). At age 14, Zink asked to move home, but his mother refused, devastating him (Tr.4194-95). Although she lived only twelve miles away, his mother never came to visit him from the time he was 10 to 18 (Tr.4194,4411).

Although the Morfitts were very strict, church-going people, their household was rife with sexual misconduct (Tr.3483,4222-23,4413). One of Zink's step-sisters, Rhonda, was sexually abused by both her father (Zink's foster-father) and grandfather (Tr.4222-23,4413). Zink too was sexually intimate with Rhonda (Tr.4221,4413). Two of Zink's foster brothers interacted sexually with each other (Tr.4221).

Zink started drinking alcohol regularly on weekends when he was fifteen (Tr.3487-89). He had trouble moderating his alcohol intake and would occasionally black out or act as if he did not know what he was doing (Tr.3488). He had a lengthy family predisposition toward alcohol abuse (Tr.4171).

When Zink was eighteen, he committed an alcohol-related burglary (Tr.4235). At twenty-one, he pled guilty to a federal kidnapping charge and two

state rape charges (Tr.4325). As part of those proceedings, Zink underwent a competency evaluation (Tr.3123,3433-34). The psychiatrist determined that he had no severe mental disease or defect, although he experienced some paranoia (Tr.2855,3124,3140-43). There were some competency concerns since Zink had hostility to the criminal justice system and stated that he could not trust his attorney just like he could not trust anyone (Tr.3072,3469-70).

Zink received a thirty year sentence, and the judge recommended that he receive psychiatric counseling in prison (Tr.2934). Three years later, in 1983, Zink was diagnosed with paranoid personality disorder, after he disclosed his belief that there was a plot by the prison administration to have him killed (Tr.2857-58,3077-79,3446). In his twenty-year prison term, Zink never received the psychiatric counseling recommended by the court in 1980 (Tr.3108).

Events of July 2001

On the evening of July 11, 2001, nineteen-year-old Amanda Morton was with one of her boyfriends, Devon Lee, at his house about 20 miles from her home in Strafford, Missouri (Ex.85-p.7-8,28,88-89;Tr.1996). Lee and Morton had dated three times, and each time they had sex (Ex.85-p.43-44). On this night, they had sex, but Lee did not ejaculate (Ex.85-p.47). Morton fell asleep on the couch until Lee woke her around midnight (Ex.85-p.37-39). Lee dressed Morton, including her shoes (Ex.85-p.48).

Morton had a 1:00 curfew, so she left Lee's house between 12:15-12:30 (Ex.85-p.8,53;Tr.1997). Her cell phone rang at 12:21, as Lee walked her to her car, and she and Lee spoke with another male friend (Ex.85-p.49-50;Tr.3562).

On her way home, Morton called Lee (Ex.85-p.9-10). She commented that she was going to make it home on time for once (Ex.85-p.54). As they were talking, Lee heard a slam (Ex.85-p.10). He assumed that she had run into someone else, but she told him that someone had hit the back of her car (Ex.85-p.11,56). She was scared and asked Lee to come (Ex.85-p.11,13). Lee heard a knock on the window and a male voice ask for her driver's license (Ex.85-p.12). Lee told her he was on his way (Ex.85-p.12).

At least three people saw a woman and a man talking by the vehicles. One observer had to drive around the vehicles in the middle of the road at 12:35 or 12:40 (Tr.1902-03,1911-12). He saw a woman on her cell phone examining the rear of the car, and a man walking between the car and a pickup truck (Tr.1906,1912-13). When the observer drove by a few minutes later, both vehicles were on the shoulder and no people were visible (Tr.1907-09). Another observer was walking to the convenience store and saw a man go from the truck and talk to someone in the car for five to ten minutes (Tr.1882,1884,1892,1898-99). A third observer saw the vehicles around 1:00, as he headed to the convenience store (Tr.2862,2864-65). He saw a girl talking on her cell phone outside her car, and a guy looking for something in his truck (Tr.2865). This observer bought a pack of

cigarettes at 1:11; on his way home, he saw the two vehicles but no people (Tr.2866-67).

Morton called her sister at 1:02 (Tr.3310,cf.2121). She stated that she had been in an accident and would be late getting home (Tr.1993).

At 1:03, Morton called 911 and reported that she had been in an accident (Tr.1867-69,2169,3310). A highway patrolman arrived at 1:29 but could not find her, because she had given the wrong location (Tr.1921-22,1950).

Meanwhile, at 1:12, a Strafford police officer found a car abandoned on the I-44 exit ramp with its engine running, its flashers and headlights on, and the driver's window down (Ex.86-p.10-11,13,55,68; Tr.1934). He radioed for help, and the highway patrolman and a Greene County deputy responded (Ex.86-p.14, Tr.1930-32). The officers found a wallet and driver's license in the car (Ex.86-p.14). There was ice on the back floorboard, and the car smelled of alcohol (Ex.86-p.16-17,76;Tr.1948). The officers concluded that Morton had been drinking and walked off from the vehicle (Ex.86-p.20-22,80-82,112;Tr.1949,1960-61).

Lee rode his motorcycle to the accident scene (Ex.85-p.13-17). He identified himself as Morton's boyfriend and asked where she was (Ex.86-p.17-18). The highway patrolman suggested that she had been drinking and left with a boyfriend (Ex.85-p.17,70,85-86). Lee told them that she would not have done that and had not been drinking (Ex.85-p.17-18,22-23). Several people confirmed that

Morton had been talking to someone in a truck and left in the truck, with no indication of foul play (Ex.85-p.20-21,85;Ex.86-p.93-95;Tr.2740-41).

At about 5:30 a.m., Zink registered at a motel, using his true name, address and license plate number (Tr.2006,2009). He joked about the price of the room and requested an 11:00 wake-up call (Tr.2037,2040). Morton, looking frightened, walked in and joined Zink as he registered (Tr.2011). Zink commented that she was cold and needed some rest (Tr.2013, 2040).

When the motel-keeper awoke between 8:00 and 9:00, the pair had left (Tr. 2017). The bed was slept in, the shower had been used, and two bars of soap had been used in the tub (Tr.2046,2050-51). There was no blood and no signs of a struggle (Tr.2156,2158).

At 8:48 a.m., Zink cashed a check at the drive-through window at a bank (Tr.2188-89,2194). The bank teller only saw Zink in the truck (Tr.2190).

On the 6:00 evening news, the motel-keeper learned that Morton was missing and gave the police Zink's registration card (Tr.2018-19). The police went to Zink's house and noted that his truck seemed to have chips of blue paint–the color of Morton's car–on the front (Tr.2223-24,2515,2555,2632).

Initially Zink denied knowing anything about Morton, but after several hours, he asked for a tape recorder so that he could confess (Tr.2344). He explained that he had been drinking and accidentally rear-ended Morton's car (Ex.22). She admitted that she was drunk, and Zink suggested they leave before

the police arrived and go drink some more (Ex.22). The bars were closed, so they drank in his truck (Ex.22).

They went to a motel, where they "messed around" but both were very tired (Ex.22). After they left the motel, she wanted to go home, but Zink needed to get back to see his parole officer (Ex.22). He drove to the bank and cashed his check as she slept (Ex.22). When she awoke, she insisted on going home, or she would call the police (Ex.22). Zink worried that she would falsely accuse him and send him back to prison (Ex.22). He took her to the cemetery near his house, tied her up, broke her neck, choked her, and cut her spinal cord in the back of her neck (Ex.22). He buried her in back of the cemetery in the woods (Ex.22). He denied raping or kidnapping her and asked for a death sentence (Ex.22). Zink added, "I wish I could pull life back into her, but I can't" (Ex.22). Zink led officers to the body (Tr.2130,2230).

An autopsy determined the cause of death was a broken neck, which injured the spinal cord and stopped the ability to breathe (Tr.2469). There was manual and ligature strangulation (Tr.2468). There were two stab wounds to the back of the neck deep enough to hit the spine (Tr.2429,2468). There were more than fifty total blunt force injuries to the head, neck and torso and eight broken ribs (Tr.2465,2468-69). Mud and leaves were in the mouth (Tr.2425). There was no bruising, cuts, or semen in the vaginal area (Tr.2484,2605). Semen found in the anal vault was linked through DNA testing to Zink and perhaps one other contributor (Tr.2572-75,2612-13).

Two reporters wrote to Zink (Tr.3156-57). He wrote back, upset that reporters were saying that the crime was sexually motivated, when it really wasn't (Tr.3169,3172,3417). Zink stated that life without parole was not an option for him (Tr.3415).

On August 6, 2001, Zink spoke with Deputy Stewart about the crime in exchange for cigarettes (Tr.2636). Stewart had heard Zink say that he wanted the death penalty and likely told Zink that to get a death sentence, there would need to be aggravators (Tr.2670). Zink gave a statement to Stewart, adding details he had not given in his earlier statement (Ex.67).

Pre-trial Proceedings

On July 13, 2001, the court appointed the Office of the State Public Defender to represent Zink (L.F.49). On September 27, 2001, two attorneys–Short and Budesheim–entered (L.F.56). In June 2002, attorney Thomas Jacquinot joined the defense team as lead counsel (L.F.341). He replaced Short, whose attorney-client relationship with Zink was so poor that, according to Jacquinot, it was a conflict of interest for her to represent Zink further (L.F.341-42).

On June 7, 2002, defense counsel requested a continuance because attorney and investigative staff had been drastically cut and efforts in Zink's case had been diverted by duties to other cases (L.F.102-103). Although the case had been pending for almost a year, the investigation had only just begun (L.F.102-103). The court continued the trial to March 26, 2003 (L.F.111).

On October 17, 2002, Zink asked the court for help in dealing with counsel (L.F.122-25). He advised the court that he and counsel had a conflict: counsel would not investigate guilt phase issues, but was only concerned with penalty phase, whereas Zink was only concerned with guilt phase (L.F.124). Zink advised the court that counsel was not providing him discovery and was being so sensitive toward the victim's family that they would not pursue the "truth." (L.F.123). He asked the court to bar counsel from contacting certain of his family members and to order counsel to provide him discovery materials (L.F.122). He requested a hearing (L.F.124-25).

On January 15, 2003, counsel requested another continuance because Budesheim left the office, so just Jacquinot and Short remained to handle the office's large caseload (L.F.135). They had been busy resolving other cases, so their energies were diverted away from Zink's case during 2001 and 2002 (L.F.136-40). Jacquinot admitted that he did not start actively working on the case until January 2003 (a year and a half after Zink's arrest) (L.F.500). The court granted a continuance to October 14, 2003 (L.F.149).

On June 12, 2003, the court heard Zink's October 17, 2002 motion asking the court's help in dealing with counsel (Tr.138). The court indicated that upon receiving the motion, he notified Jacquinot's boss and requested that he look into the situation (Tr.138). Zink advised the court that Jacquinot was the only person doing any work on his case, and the two of them had a conflict (Tr.152). He urged the court to either get counsel in line, or tell Zink he was out of line (Tr.153).

Jacquinot agreed that more work was needed and that Zink's case had been adversely affected by budget cuts (Tr.161-62). The court advised Zink that if he had further problems with his attorneys, he should address the issue to them, and then to Jacquinot's boss (Tr.148).

On June 25 and July 22, 2003, defense counsel moved for yet another continuance (L.F.338-49,426-31). Jacquinot stated that Zink's defense team was more short-staffed than ever–now, he was the only attorney on the team, and he lacked a necessary mitigation specialist (L.F.339). Jacquinot admitted that, of all his cases, Zink's "has far and away been the most directly affected by staffing issues" (L.F.429).

On August 28, 2003, Zink moved for new counsel (L.F.457-87). He stated that he and counsel had a conflict, because counsel refused to investigate guilt phase issues and instead, only did penalty phase investigation (L.F.460-61). He asserted that counsel's failure to investigate the case early had irreparably harmed his defense (L.F.475-76). Zink stressed Jacquinot's errors, including his suggestion that the venirepanel be told that Zink "confessed to murdering" the victim, and his failure to elicit necessary evidence at the suppression hearing due to lack of preparation (L.F.465,469-72). Additionally, counsel wanted him to concede that he committed crimes (possession of a knife in jail and kidnapping) that he had not committed (L.F.476-77). Zink vouched that, for all these reasons, he could not trust his lawyers (L.F.478-80). He requested that the court order his attorneys to give him a copy of everything in their file (L.F.486-87).

The next day, August 29, 2003, Jacquinot filed a brief in support of the prior motions to continue (L.F.488-511). He stated that the defense still was not ready for trial (L.F.488). Zink's case had been handled by just one attorney since early 2003; the remaining part of the team–another lawyer and a mitigation specialist–had only been on the case for one month (L.F.489). Jacquinot complained that "this case has proceeded as if it can prepare itself and have new people jump on board without severely sacrificing the level of representation that Mr. Zink will receive" (L.F.499).

Jacquinot argued that Zink, though competent to stand trial, was mentally impaired (L.F.504). He complained that Zink "is not necessarily a reasonable, rational, or cooperative client, although this is a point he would dispute" (L.F.504-505). Jacquinot alleged that because of mental illness, Zink occasionally made choices that impeded counsel's ability to represent him (L.F.505). He acknowledged that, "[t]his court is well aware that Mr. Zink's relationship with counsel over the past two years has often been strained at times" (L.F.504). Jacquinot admitted, however, that Zink's beliefs had some basis in reality (L.F.505). He conceded that for a year and a half, the primary focus had been on mitigation investigation (L.F.505). He further conceded that the first two attorneys on the case were gone, as were the first two mitigation specialists (L.F.505). Jacquinot admitted that the investigation of both phases was substantially inadequate (L.F.505).

Four days later, Zink asked the court to clarify whether he, or Jacquinot, controlled the defense presented (L.F.515-23). He advised the court that he and Jacquinot had a major conflict regarding the strategy to be pursued at trial (L.F.518). He expressed strong dissatisfaction that efforts had primarily been spent on the penalty phase, with very little done on the guilt phase (L.F.517). The court took the motion to dismiss counsel under advisement (Tr.547).

Five months later, on February 6, 2004, the court summarily denied the motion (L.F.546). It ordered counsel to provide Zink copies of all documents within its file within ten days (L.F.546). The court refused to resolve the conflict as to who controlled the defense (L.F.546).

On March 1, 2004, Zink moved to represent himself (L.F.604-607). He stressed that he merely wanted new counsel, but, if pushed, would represent himself rather than go to trial represented by the Public Defender's Office (L.F.607).[1] The court accepted Zink's request to proceed *pro se* and ordered counsel to remain on the case, to aid and assist Zink and prepare the case as if they were trying it (Tr.576,597-98).

On June 28, 2004, Jacquinot stated that they would be pursuing a diminished capacity defense (Tr.775). Zink expressed that he did not know what

[1] David Kenyon entered his appearance on 7/15/03 (L.F.418) and withdrew on 6/28/04 (Tr.818). Curtis Winegarner entered his appearance on 12/5/03 (L.F.533), but did not meet Zink until shortly before 3/1/04 (Tr.554).

the diminished capacity defense was, but that he did not believe that what happened when he was five years old had any bearing on the charged crime (Tr.775-76).[2] He stated that talking to counsel was "like talking to a brick wall" (Tr.776). Jacquinot advised the court that the dispute over witnesses was "a significant issue in a capital case" (Tr.791). Asked again if he wanted to represent himself, Zink responded that representing himself was "the only way I'm going to get a defense put up here" (Tr.794).

On July 8, 2004, Jacquinot told the court that he could not "proffer that manslaughter is a rational, reasonable or viable option" (L.F.974-76). He claimed that presenting the manslaughter defense was "a self destructive act" (L.F.975).

On July 12th, the morning voir dire started, Zink requested that the court appoint new counsel to assist him (L.F.1050-60). He advised that the diminished capacity defense that Jacquinot wanted to present was inconsistent with Zink's preferred defense of voluntary manslaughter and would defeat his defense (L.F.1053-55). Zink stated that he absolutely would not advance the defense of diminished capacity and that counsel "completely refuse" to present his defense (Tr.898). Zink stated that if counsel would present the voluntary manslaughter defense, he would allow counsel to represent him (Tr.898-99). Jacquinot stated

[2] Evidence in support of diminished capacity included that at age five, Zink was referred for psychiatric treatment after threatening to kill himself (Tr.2996).

that the two defenses could be presented together, but complained that Zink's defense would hurt the diminished capacity defense (Tr.902-903).

After the jury was selected, Zink again advised the court that he did not want the diminished capacity defense, but he would gladly accept representation if his attorneys would present his voluntary manslaughter defense (Tr.1730-31). He stated that the two defenses were inconsistent, and that presenting the diminished capacity defense would disqualify his voluntary manslaughter defense (Tr.1731-33). Jacquinot stated that he would talk to Zink to see if they could present both defenses (Tr.1730).

The court conducted general voir dire, and the attorneys conducted death qualification (Tr.770-71). Defense counsel objected to the court's removal of Venireperson Byron Kronshage for cause off the record, but the objection was overruled (Tr.1719). Both Zink and Jacquinot gave opening statements for the defense (Tr.1797-1865). Zink handled the questioning of some witnesses, and his attorneys the others.

Evidence Presented at Trial:

Evidence was presented as set forth above. In addition, the defense presented evidence and psychiatric testimony in support of a diminished capacity defense, and evidence in support of a voluntary manslaughter defense. The State then rebutted with its own psychiatric evidence.

The Two Defenses:

Diminished Capacity

Defense counsel presented a diminished capacity defense. In support, he presented evidence as set forth above regarding Zink's background. He also presented the testimony of Dr. Kenneth Benedict, a psychologist who evaluated Zink in 2003 (Tr. 2956). Benedict explained that as a child, Zink suffered from attention deficit hyperactivity disorder, which went untreated and developed into an adult impulse control disorder called intermittent explosive disorder (Tr.2989,3011,3013,3026-30). Zink would become angry very easily and then shortly thereafter not be angry at all (Tr.3028-29), or have a buildup of frustration and then a temporary explosiveness (Tr.3012). His degree of response did not match the cause; he had intense reactions to seemingly small causes (Tr.3029-32). Zink had great difficulty dealing with ambiguous situations and dealt much better with concrete, clear situations (Tr. 3054-55).

Benedict concluded that at the time of the events, Zink was suffering from mental illness–intermittent explosive disorder and mixed personality disorder with paranoid and narcissistic features (Tr.3111-12). His mental illness was substantial enough that it may have impaired or eliminated his capacity to coolly deliberate at the time of the crime (Tr.3112). Zink believed that any interaction with the police would result in parole revocation (Tr.3102). He had a major dilemma, and the stress caused his thought processes to deteriorate to a level approaching psychosis (Tr.3103,3110). Zink's mental illness distorted the information, thereby lessening

his ability to assess how to react to the perceived threat (Tr.3103-05). Panicked, his thinking became increasingly rigid, and he was certain he had only one course of action available (Tr.3100-11,3103-04).

Voluntary Manslaughter:

Zink presented character evidence to show he was not an aggressive person and rarely got angry or fought (Tr.2720,2729-30,3242,3486). If angry, Zink was quiet and would walk away, and he did not stay angry long (Tr.2719,2830-31,3486). He was quiet, reserved, polite and very kind (Tr.2825). In his last seven years in prison, Zink had no infractions (Tr.4433-34). When he got out of prison, he was happy-go-lucky (Tr.3504).

Zink testified that after work on July 11, 2001, he went out drinking (Tr.3684-85). He jokingly showed a few women his fake million-dollar bill and asked if they wanted to party with him (Tr.3362,3367). On his way home, Zink was drunk and got lost (Tr.3693-94). At about 12:50, he accidentally hit the back of a car on an exit ramp (Tr.3693-94,3851). Morton was drunk and got in his truck voluntarily (Tr.3855-56). He showed her his fake million-dollar bill and asked her if she wanted to go party (Tr.3855-56). They left after 15-20 minutes (Tr.3857).

The next morning, they were figuring out how to get Morton home without trouble (Tr.3745-46). Zink told her he'd take her to his house, but he turned down the cemetery road on impulse (Tr.3749,3789). He told Morton he would tie her up and then call the police (Tr.3791). That way she could say she had been

kidnapped and would not be in trouble with her parents or boyfriend (Tr.3746,3790).

Zink tied Morton up at the cemetery (Tr.3791). He was scared, because she was willing to call the police for something that he had not done (Tr.3792). He took a few steps away and then snapped (Tr.3792). He turned back to her, grabbed her and slung her to the ground (Tr.3793). He was angrier than he had ever been, because he thought she would file a false police report against him (Tr.3793,3858-59). Zink had never lost control like that before (Tr.3801).

Initially, Zink wanted the death penalty. He talked to Deputy Stewart so that he would receive the death penalty and slanted his statement to show deliberation and the existence of an aggravator (Tr.3781-82,3786). But as he heard news reports about the crime, he was angered that the press alleged that he raped and kidnapped Morton, and he decided to fight it (Tr.3546,3549,3768-69).

Zink believed that the police had distorted or destroyed evidence to make the case appear like a kidnapping. He argued that the State distorted the timing of the phone calls Morton made after the accident to make it seem that they were together just a few minutes before they left (Tr.3809-13). He argued that other evidence was missing or never disclosed (Tr.3014-16,3265,3573). He wanted to present evidence that Morton stayed out late, to rebut the State's testimony that she habitually obeyed her curfew, but the court would not let him (Tr.2121,3376-79). The court also barred him from eliciting evidence that the police joked about

destroying evidence, and refused to let him expose the motivation for the manipulation or destruction of evidence (Tr.3335-37,3354,3381-84,3389-90).

In rebuttal, the State presented the testimony of Dr. Cynthia Brooks, a psychologist at Fulton State Hospital (Tr.3582). She concluded that Zink was competent to stand trial, had no mental disease or defect as defined under Missouri statute, and had the capacity to deliberate (Tr.3603-05). She denied that Zink had paranoid personality disorder but found that he had narcissistic personality disorder (not rising to the level of a mental disease or defect) and anti-social personality disorder (Tr.3627-28,3653).

The court instructed the jury on first-degree murder, second-degree murder and voluntary manslaughter (L.F.1084,1086-87). The jury convicted Zink of first-degree murder (L.F.1093).

Penalty Phase

Zink asserted his right to counsel for penalty phase (Tr.3984). The State presented testimony from Morton's mother, father and sister about how her death had affected them and other family members (Tr.4059-82). The State also presented testimony regarding Zink's prior rape and kidnapping convictions (Tr.4006-24,4038-49). Two women testified that Zink had put a knife to their throats and forced them to come with him to his apartment, where he raped them (Tr.4011-15,4038-49).

The defense presented evidence that Zink now held deeply religious views and had helped several female inmates who were seriously depressed, by talking

to them about the Bible through an adjoining cell wall (Tr.4084-84,4089-92,4103-04,4108,4370-76). Zink donated money to buy materials for the jail ministry (Tr.4110). He cried often about his actions, expressed remorse for how his acts had affected others, and wished he could take it all back (Tr.4106-07).

Dr. Mark Cunningham, a clinical psychologist, conducted two evaluations of Zink: a moral culpability analysis and a future risk assessment (Tr. 4139-41). He described the developmentally poisoning factors Zink had experienced in childhood and adolescence and how they had shaped Zink and led to his criminal behavior (Tr.4152-53,4170-81,4191-4239). He concluded that Zink was likely to make good adjustment to prison life because of his age, his past behavior in prison, and the nature of his convictions (Tr.4254-71). In line with Cunningham's testimony, a female federal prison employee testified that she supervised Zink at his prison job, and he was always respectful and never threatened or committed any act of violence (Tr.4450-53). A former federal prison inmate testified as to Zink's accomplishment of being infraction-free for his last seven years of his prison term, and also described the difficulty for Zink in adjusting to life on the streets after such a long term (Tr.4433-34,4436-39).

Finally, Dr. Robert Smith, a psychologist, explained how Zink's neglectful and abusive upbringing caused him to develop narcissistic personality disorder (Tr.4461-68). Zink was also alcohol dependent, and Smith explained how it exacerbated Zink's other problems (Tr.4469-72).

The court instructed the jury to consider four statutory aggravating circumstances: (1) whether Zink had a prior serious and assaultive criminal conviction, (2) whether he committed the crime to avoid arrest; (3) whether it occurred during the course of a forcible sodomy; and (4) whether it involved depravity of mind (L.F.1111). The jury asked for a definition of depravity, but the court did not provide one (Tr.4561-62). The jury recommended a death sentence (L.F.1118). It stated that it found (1),(2),and (4), but did not set forth the required language for the depravity aggravator (L.F.1118). Notice of Appeal was timely filed (L.F.1393-94).

POINT I

The trial court abused its discretion in sustaining the State's objection and refusing admission of Defense Exhibit 1092, failing to sanction the State for late disclosure, and allowing the State to engage in prosecutorial misconduct. As such, the court denied Zink his right to present a defense, to confront and cross-examine, to a fair trial and due process, and to freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. By presenting false testimony that Amanda Morton habitually obeyed her curfew, the State opened the door to the exhibit, a police report showing that just twelve days before the events at issue, Morton witnessed a fight as she was driving around with a male friend well after her curfew. To make matters worse, the State prevented the defense from eliciting the truthful testimony, by its late disclosure and its objection to the report of her curfew violation when it was offered. Exclusion of the report prejudiced Zink, because a key issue in both the guilt and penalty phases was whether Zink kidnapped Morton, and the jury was left with the false impression that Morton never would have stayed out late, let alone driven off with Zink.

Brady v. Maryland, 373 U.S. 83 (1963);

Napue v. Illinois, 360 U.S. 264 (1959);

State v. Kilgore, 771 S.W.2d 57 (Mo.banc1989);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21;

Rules 25.02,25.03,25.18.

POINT II

The trial court abused its discretion in overruling Zink's motions asking the court to replace defense counsel Thomas Jacquinot and the Public Defender's Office with new counsel, because Zink had justifiable dissatisfaction with counsel and that dissatisfaction resulted in an irreconcilable conflict between Zink and counsel. The court's failure to adequately resolve the conflict or appoint substitute counsel violated Zink's rights to counsel, due process, a fair trial, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I, Secs.10,18(a),21. Zink had repeatedly and timely advised the court that counsel had failed to investigate the guilt phase, resulting in the loss of favorable defense evidence; failed to provide discovery and documents from the files; refused to pursue Zink's desired defense; acted incompetently; and that as a result, Zink had lost all trust in counsel. Zink was forced to choose between representing himself and proceeding to trial represented by counsel with whom he had an irreconcilable conflict. Either choice essentially rendered him without counsel, warranting automatic reversal.

*State v. Gilmore***,** 697 S.W.2d 172 (Mo.banc1985);

State v. Moody, 968 P.2d 578 (Ariz.1998);

United States v. Mullen, 32 F.3d 891 (4th Cir.1994);

United States v. Walker, 915 F.2d 480 (9th Cir.1990);

U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I, Secs.10,18(a),21.

POINT III

The trial court erred, after it allowed Zink to proceed *pro se* and appointed the Public Defenders to assist him, in failing to resolve in Zink's favor the conflict between him and counsel over the defense to be presented, and thereby failing to protect Zink's right, as a *pro se* defendant, to control the defense presented, because this had the effect of compromising Zink's rights such that he neither received the right to counsel nor was he truly allowed to represent himself, in violation of his right to either have counsel or to represent himself, to due process and a fair trial, and to be free from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const., Art.I,Secs.10,18(a),21. Zink was prejudiced because the court's refusal to protect his *pro se* rights resulted in the presentation of two defenses that conflicted and canceled each other out, leaving Zink without a defense.

Faretta v. California, 422 U.S. 806 (1975);

McKaskle v. Wiggins, 465 U.S. 168 (1984);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,Secs.10,18(a),21;

§§552.015; 565.002; 565.020; 565.021; 565.023.

POINT IV

The trial court erred in ignoring Zink's pleas that the court resolve the conflict over whether he or counsel should decide the defense to be presented and in thereby forcing Zink to choose between the right to have his defense presented to the jury and the right to be represented by counsel. Zink surrendered his right to counsel only after the trial court failed to act when advised that appointed counsel refused to investigate Zink's voluntary manslaughter defense and present it to the jury and instead insisted on presenting a diminished capacity defense. Forcing Zink to choose between his right to present *his* defense and his right to counsel violated his rights to a fair trial, due process, assistance of counsel, equal protection, presentation of his defense, and freedom from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV;Mo.Const., Art.I,Secs.2,10,18(a),21. The court's refusal to act when it knew that Zink was waiving the right to counsel solely so that he could present his defense was a structural error that warrants reversal.

Faretta v. California, 422 U.S. 806 (1975);

McKaskle v. Wiggins, 465 U.S. 168 (1984);

Simmons v. United States, 390 U.S. 392 (1968);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const., Art.I,Secs.2,10,18(a),21.

POINT V

The trial court erred and abused its discretion in accepting Zink's request to represent himself at the guilt phase, because the court did not ensure that the request was knowing, voluntary and intelligent. As a result of the trial court's error, Zink was denied his rights to due process, a fair trial, and the assistance of counsel. U.S.Const.,Amends.V,VI,XIV;Mo.Const., Art.I,Secs.10,18(a). Zink was prejudiced, because if the court had questioned him more fully regarding his mental health and/or had advised Zink that counsel would significantly interfere with Zink's strategic decisions (and thus Zink would gain nothing by waiving counsel), Zink would not have waived his right to counsel.

Faretta v. California, 422 U.S. 806 (1975);

Franklin v. Roper, No. 4:00-CV-1465 (CEJ)(U.S.Dist.Ct.,E.D.Mo.,6/15/04);

State v. Quinn, 565 S.W.2d 665 (Mo.App.1978);

Wilkins v. Bowersox, 145 F.3d 1006 (8th Cir.1998);

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

Mo.Const.,Art.I,Secs.10,18(a).

POINT VI

The trial court (1) plainly erred in the guilt phase in failing to act *sua sponte* to prevent the State from improperly suggesting that because defense expert Kenneth Benedict was from out-of-state that he should not be believed, or to imply, without foundation, that Zink could not find a Missouri expert and (2) abused its discretion in penalty phase in overruling defense counsel's objection to the State's improper cross-examination of defense expert Mark Cunningham when it asked him whether he ever testified that a defendant should receive a death sentence, knowing that no expert could testify as such. The State's misconduct violated Zink's rights to due process of law, a fair trial by an impartial jury, freedom from cruel and unusual punishment, and fair and reliable sentencing. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const., Art.I,§§10,18(a),21. Zink suffered manifest injustice in guilt phase, because the diminished capacity defense hinged on the jury believing Benedict's testimony that Zink did not have the capacity to deliberate; the cross-examination of Cunningham prejudiced Zink in penalty phase, because Cunningham provided the primary testimony supporting Zink's argument that he would not re-offend in prison, which was a major consideration for the jury in deciding whether Zink would live or die.

Napue v. Illinois, 360 U.S. 264 (1959);

State v. Dunn, 577 S.W.2d 649 (Mo.banc 1979);

State v. McClain, 498 S.W.2d 798 (Mo.banc1973);

State v. Selle, 367 S.W.2d 522 (Mo.1963);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const., Art.I,§§10,18(a),21;

Rule 30.20.

POINT VII

The trial court abused its discretion in overruling defense motions *in limine* and objections when the two prosecutors, while questioning witnesses, and several State witnesses, while testifying, invaded the province of the jury in describing the events at issue as "murder" and "kidnapping" or "abduction," and the scene of the car accident as a "crime scene," in violation of Zink's rights to due process, a fair trial, a fair and impartial jury, a fair and reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Secs.10,18(a),21, in that the "determination" by these prosecutors or witnesses that Zink committed murder and kidnapping was improper opinion testimony, usurped the role of the jury on these key issues, and improperly vouched for the strength of the State's case.

State v. Link, 25 S.W.3d 136 (Mo.banc2000);

State v. Linzia, 412 S.W.2d 116 (Mo.1967);

State v. Presberry, 128 S.W.3d 80 (Mo.App.2003);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,Secs.10,18(a),21;

ABA Standards for Criminal Justice 3-5.8 (3d ed. 1993).

POINT VIII

The trial court erred and abused its discretion in *sua sponte* discharging Venireman Byron Kronshage for hardship, because that action denied Zink due process, his right to a fair trial by a fair and impartial jury, a reliable sentencing, and his right to be free from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Secs.10, 18(a),21, and violated §§494.430(4) and 494.480.2(1) in that the trial court had overruled the State's motion to strike Kronshage for cause, neither party challenged Kronshage for hardship, and the court made no record of its hardship ruling until 36 hours after the fact. The court's unwarranted removal of Kronshage for hardship, off the record, effectively granted the State an additional peremptory strike and tipped the scales toward death.

State v. Tisius, 92 S.W.3d 751 (Mo.banc2002);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,Secs.10,18(a),21;

§§494.430, 494.480.

POINT IX

The trial court abused its discretion when it sustained the State's objections and refused to admit (1) excerpts from Officer Clark's discovery and trial depositions and (2) Defendant's Exhibit 1094, an audio tape of a radio conversation between the Green County Sheriff's dispatcher and Sergeant Gibson on July 12, 2001, because the exclusion of this relevant evidence violated Zink's right to confront and cross-examine the witnesses against him and present a defense, a fair trial, due process, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII, XIV;Mo. Const.,Art.I,§§10,14,18(a),21. The evidence was relevant to Zink's theory that the police agencies had engaged in a cover-up to protect their public image and destroyed evidence that would have supported his defense. Zink was prejudiced, because he had no other means to elicit these facts and as a result, he was not able to present his full defense to the jury.

Crane v. Kentucky, 476 U.S. 683 (1986);

State v. O'Neil, 718 S.W.2d 498 (Mo.banc 1986);

State v. Rousan, 961 S.W.2d 831 (Mo.banc 1998);

United States v. Mora, 81 F.3d 781 (8th Cir. 1996);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo. Const.,Art.I,§§10,14,18(a),21.

POINT X

The trial court erred in overruling Zink's objections to Instructions 19 and 21 and refusing Instructions 19A, 21A, and 21B; it plainly erred in instructing his jury to consider "all" evidence presented at both stages of trial instead of, per §565.030.4(3), only aggravating evidence "found." This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const.,Amends.V,VI,VIII,XIV; §565.030.4(3). Instructions 19 and 21 prejudiced Zink by violating the requirement that Step 3 be found "against" a defendant thus eliminating the State's burden at step 3; diminishing its overall burden of establishing death-eligibility; improperly shifting the burden to Zink to prove his non death-eligibility; and imposing prerequisites for a life sentence, non-existent in §565.030.4(3), that "*each* juror," and the jurors "*unanimously*" find that mitigators outweigh aggravators. These errors must have affected the verdict, warranting a new penalty phase.

Apprendi v. New Jersey, 530 U.S. 466 (2000);

Ring v. Arizona, 536 U.S. 584 (2002);

State v. Carson, 941S.W.2d 518 (Mo.banc1997);

State v. Whitfield, 107 S.W.3d 253 (Mo.banc2003);

U.S.Const.,Amends.V,VI,VIII,XIV

§565.030;

Rule 30.20;

MAI-CR3d 313.44.

POINT XI

The trial court plainly erred in accepting the jury's recommendation of death and sentencing Zink to death, or in the alternative, in failing to conduct an inquiry to determine whether the jury had made the requisite finding that limits the jury's discretion and is constitutionally mandated. The court's actions denied Zink the right to a fair and reliable sentencing trial, due process, jury determination of the elements beyond a reasonable doubt, and freedom from cruel and unusual punishment, U.S.Const. Amends.V,VI,VIII, XIV,Mo.Const.,Art. I,§§10,18(a),19,21, and §565.030. Although the jurors purported to find the "depravity of mind" aggravator, they failed to make the proper factual finding to allow it to do so. Zink was prejudiced, because the jurors had questioned the meaning of depravity and without properly finding the limiting language of the aggravating circumstance, should not have considered this aggravator in determining whether Zink should live or die.

Maynard v. Cartwright, 486 U.S. 356 (1988);

State v. Griffin, 756 S.W.2d 475 (Mo.banc1988);

State v. Preston, 673 S.W.2d 1 (Mo.banc1984);

U.S.Const.Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I, §§10,18(a),19,21;

§565.030;

Rule 30.20;

MAI-CR3d 313.40.

POINT XII

The trial court lacked jurisdiction and authority to sentence Zink to death because the State never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder. The State failed to plead in the indictment those facts, required by §565.030.4(1), (2), and (3), that the jury must find beyond a reasonable doubt before a defendant may be sentenced to death. Furthermore, Zink was charged with the lesser offense of *unaggravated* first degree murder, not punishable by death and, as a result, his death sentence violates his rights to jury trial, due process, freedom from cruel and unusual punishment, and reliable sentencing. U.S.Const.,Amends. V,VI,VIII,XIV;Mo.Const.,Art.I,§§ 10,17, 18(a),21.

Apprendi v. New Jersey, 530 U.S. 466 (2000);

Ring v. Arizona, 536 U.S. 584 (2002);

State v. Whitfield, 107 S.W.3d 253 (Mo.banc2003);

U.S.Const.,Amends. V,VI,VIII,XIV;

Mo.Const.,Art.I,§§ 10,17,18(a),21;

§§565.020, 565.030.

ARGUMENT I

The trial court abused its discretion in sustaining the State's objection and refusing admission of Defense Exhibit 1092, failing to sanction the State for late disclosure, and allowing the State to engage in prosecutorial misconduct. As such, the court denied Zink his right to present a defense, to confront and cross-examine, to a fair trial and due process, and to freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. By presenting false testimony that Amanda Morton habitually obeyed her curfew, the State opened the door to the exhibit, a police report showing that just twelve days before the events at issue, Morton witnessed a fight as she was driving around with a male friend well after her curfew. To make matters worse, the State prevented the defense from eliciting the truthful testimony, by its late disclosure and its objection to the report of her curfew violation when it was offered. Exclusion of the report prejudiced Zink, because a key issue in both the guilt and penalty phases was whether Zink kidnapped Morton, and the jury was left with the false impression that Morton never would have stayed out late, let alone driven off with Zink.

The search for truth is the central aim of the American justice system. *Arizona v. Fulminante*, 499 U.S. 279,295 (1991); *State v. Carter*, 641 S.W.2d 54,58 (Mo.banc1982). To arrive at the truth, our system imposes on prosecutors

the "duty to serve justice, not just win the case." *Berger v. United States*, 295 U.S. 78,88 (1935). A conviction obtained on the basis of false evidence, known by the prosecutor to be false, cannot stand. *Napue v. Illinois*, 360 U.S. 264,269 (1959).

Here, the State presented false evidence that Amanda Morton always obeyed her curfew (Tr.2121), when it knew in fact she did not. To make matters worse, the State then prevented the defense from eliciting the truthful testimony, by its late disclosure and its objection to the report of her curfew violation when it was offered (Tr.3376-79). The State's misconduct, and its acceptance by the court, violated Zink's rights to present a defense, confront and cross-examine, a fair trial and due process, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21.

I. The Prosecutors Failed to Disclose the Police Report Before Clark Testified, Despite Numerous Requests

The court granted the State's motion to preserve Officer Clark's testimony via videotaped deposition (Tr.649). He was first deposed on August 26, 2003 (Ex.612), as a discovery deposition preliminary to his May 6, 2004, "trial" deposition (Ex.611). In the August deposition, Clark disclosed that he had taken a statement from Morton regarding an assault she had witnessed (Ex.612-p.8-12). He had interviewed Morton and written a report but did not recall when it happened (Ex.612-p.10-11). However, he remembered looking up the case when Morton disappeared (Ex.612-p.11-12).

On March 1, 2004, Zink himself filed a discovery request for any records detailing Morton's interaction with law enforcement (L.F.599-603). The motion specifically requested the report dealing with the case Clark discussed in his deposition (L.F.601,603). The court ordered the material disclosed (Tr.606). On March 16, 2004, Zink moved for sanctions when the State had not yet provided the report (L.F.666-67). On April 5, 2004, Zink again advised the court that he had not received Clark's report, which was crucial for the upcoming deposition (Tr.650-55).

On May 6, 2004, the parties took Clark's videotaped deposition, anticipating that the videotape would be played to the jury in lieu of Clark's in-court testimony (Ex.611). Clark testified that he had met Morton previously, when he interviewed her in front of her house regarding the assault she witnessed (Ex.611-p.20-21).

On June 12, 2004, the State finally disclosed Clark's report (L.F.789;Tr. 3376). The report indicated that on June 30, 2001, at 2:30 a.m., Morton and her sister were witnesses to an assault as they drove around with a male friend (Ex.1092). This was the first indication the defense received that the assault Morton witnessed took place well after her curfew and that it took place just twelve days prior to the events at issue.

At trial, the State elicited that an investigator went to Morton's house on the morning after her disappearance (Tr.2117-18). He spoke with Morton's family about her habits and responsibilities regarding her curfew (Tr.2121). He testified

that he "learned that [Morton] was very prompt and respectful of curfew" (Tr.2121).

After the State played Clark's videotaped deposition for the jury (Tr.1981,1990), Zink moved for admission of Clark's report on the assault (Tr.3376-77;Ex.1092). He argued that the defense should be allowed to rebut the State's evidence that Morton habitually obeyed her curfew by the fact that twelve days before the charged crime, she was out with friends and witnessed a fight between 2:00 and 2:30 a.m., way past her curfew (Tr.3377,3379). He argued that by withholding the report, the State denied him the ability to fully cross-examine Clark, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution (Tr.3376).

The prosecutor, Assistant Attorney General Robert Ahsens[3], responded that initially, the search for the report was unsuccessful; but that later it was found

[3] Recently, two capital cases have been reversed due to prosecutorial misconduct by Mr. Ahsens, namely, failure to disclose and the presentation of false evidence. The State has elected not to appeal those reversals, apparently because the misconduct was clear and inexcusable. See *Michael Tisius v. State*, Boone County Case No. 03CV165704 (11/4/04)(death sentence vacated because Ahsens failed to make pertinent discovery disclosures and presented false and misleading evidence), and *Walter Barton v. State*, Benton County Case No. CV199-453CC (1/30/04)(conviction overturned because Ahsens failed to disclose numerous

inadvertently and disclosed right away (Tr.3378). He argued that whether Morton routinely made her curfew was irrelevant, and the report was hearsay (Tr.3379). The court sustained the objection as to relevance (Tr.3380).

The State had a duty to disclose the report under Rule 25.03. The purpose of the discovery rules is to allow the defendant a decent opportunity to prepare his case in advance of trial and avoid surprise. *State v. Grant*, 784 S.W.2d 831,835 (Mo.App.1990). Zink had filed a proper request for Clark's police report, and the State should have provided it within ten days. Rules 25.02,25.03(9). Because the State failed to disclose the report timely, Zink could not use it to prepare for Clark's trial testimony or for Clark's cross-examination.

The State also had a duty to disclose the report under *Brady v. Maryland*, 373 U.S. 83 (1963). There, the Supreme Court held that the State's suppression "of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*,87. The Court recognized that nondisclosure

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criminal convictions of a key snitch witness, as well as her use of numerous aliasas, birth dates, and social security numbers, and a deal that was made with the State in exchange for her testimony). Counsel will file a motion providing certified copies of the findings of fact and conclusions of law in these cases and requesting that the Court take judicial notice.

of exculpatory or mitigating evidence cannot be tolerated even when the nondisclosure was unwitting:

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though ... his action is not 'the result of guile.'

Id.,87-88. The duty to disclose includes impeaching information. *United States v. Bagley*, 473 U.S. 667,676 (1985); *Giglio v. United States*, 405 U.S. 150,154 (1972). A duty to disclose also exists where the prosecutor knows that false testimony has been elicited; unless the prosecutor corrects the false evidence and elicits the truth, he has violated his duty and the trial cannot "in any real sense be termed fair." *Napue*, 360 U.S.,269.

Prosecuting Attorney Marcus Reed elicited that Morton habitually obeyed her curfew (Tr.2121), although he and Ahsens knew that just twelve days prior to the events at issue, she was caught out far past her curfew (Ex.1092). The prosecutors themselves should have corrected the false impression that their witness created when he testified that Morton habitually obeyed her curfew; certainly, Ahsens should not have objected when the defense wished to correct that false impression. Indeed, the prosecutors caused the problem in the first place by failing to timely disclose Clark's report despite being asked for it repeatedly.

By failing to disclose the report timely, the State prevented full and fair cross-examination and confrontation of Clark by the defense. The Confrontation Clauses of the United States and Missouri Constitutions guarantee to every criminal defendant the right to confront his accusers. *Pointer v. Texas*, 380 U.S. 400,404 (1965); *State v. Parker*, 886 S.W.2d 908,916 (Mo.banc1994). The right of cross-examination is "implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process'." *Chambers v. Mississippi*, 410 U. S. 284,295 (1973). The rights to confrontation, cross-examination and presentation of evidence are essential to due process and the ability to present a defense. *Id*.,294.

The jury's determination of guilt and its death recommendation are undermined by the withholding of information and the use of deceptive evidence. "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Taylor v. Illinois*, 484 U.S. 400,409 (1988), citing *United States v. Nixon*, 418 U.S. 683,709 (1974). This is especially true of a capital case, where the stakes are so high, and hence the need for reliability is heightened. *Woodson v. North Carolina*, 428 U.S. 280,305 (1976); *Lockett v. Ohio*, 438 U.S. 586,604 (1978). Due process mandates that a death sentence cannot be imposed based on information that the defendant had no opportunity to deny or explain. *Gardner v. Florida*, 430 U.S. 349,362 (1977).

II. Standard of Review

A trial court enjoys broad discretion in determining the relevance of evidence, in admitting or excluding evidence at trial, and in determining whether there's been a denial of meaningful discovery. *State v. Taylor*, 134 S.W.3d 21,26 (Mo.banc2004). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Brown*, 939 S.W.2d 882,883-84 (Mo.banc1997). Reversal is warranted when the trial court clearly abuses its discretion and there is a reasonable probability that the trial court's error affected the outcome of the trial. *State v. Mayes*, 63 S.W.3d 615,629 (Mo.banc2001).

III. The Trial Court Abused its Discretion in Excluding the Report

The court has discretion to impose sanctions for failure to make timely disclosure. *State v. Kilgore*, 771 S.W.2d 57,66 (Mo.banc1989). It may order disclosure of the information, grant a continuance, exclude such evidence, or enter such other order it deems just under the circumstances. Rule 25.18. The trial court would have been well within its discretion to allow admission of the report as a sanction for the State's late disclosure. Denial of the sanction was an abuse of discretion, because it resulted in fundamental unfairness. *Kilgore*, 771 S.W.2d,66.

The State opened the door to the exhibit. At trial, an investigator with the Greene County Sheriff's Department testified that he went to Morton's house on the morning after her disappearance (Tr.2117-18). He spoke with Morton's family

about her habits and responsibilities regarding her curfew (Tr.2121). He testified that he "learned that [Morton] was very prompt and respectful of curfew" (Tr.2121).

This Court has repeatedly held that if one party elicits facts that create a certain inference, that party has opened the door so that the other side can elicit facts that refute that inference. Thus, in *State v. Weaver*, 912 S.W.2d 499,510 (Mo.banc1995), the defendant elicited that the victim carried a gun, creating the inference that the victim was a violent person. This Court held that it was permissible for the State, in response, to elicit that the deceased victim had told others that he feared the defendant and carried a gun out of fear of him. *Id.*

In *State v. Lingar*, 726 S.W.2d 728,734 (Mo.banc1987), the State was allowed to elicit testimony explaining the terms of a State witness' plea agreement after defense counsel showed that the plea agreement gave the witness a motive to fabricate his testimony. This Court held that:

> [W]here the defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects.

Id.,734-35.

In *State v. Odom*, 353 S.W.2d 708,710-11 (Mo.1962), defense counsel elicited that the State pumped the defendant's stomach and tested its contents. This Court held that "having opened the door to that transaction it is but common fairness that the State be permitted to show the results obtained when it 'checked'

the stomach contents." *Id.*,711. It held that, "[i]t is a well settled rule ... that, where either party introduces part of an act, occurrence, or transaction, … the opposing party is entitled to introduce or to inquire into other parts of the whole thereof, in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary, or prove his version with reference thereto." *Id*.

The State opened the door to testimony that Morton was out way past her curfew by eliciting testimony that she habitually obeyed her curfew (Tr.2121). It urged the jury to believe that Morton was prompt and respectful of curfew, so she surely would not have decided to run off with Zink shortly before 1:00 a.m. The State opened the door to the exhibit and cannot now complain about evidence given in rebuttal.

If Zink had been given the report before Clark's deposition, *i.e.*, before Clark's testimony, he would have cross-examined him about the fact that Morton was out well past her curfew just twelve days earlier. Before receiving the report, Zink had no indication of the time the assault took place or that Morton was out past her curfew. He would not have known to cross-examine on that topic. By the time that the state provided the report, Clark was no longer available, so Zink had no opportunity to question him about the report. It was fundamentally unfair not to admit the report as a sanction for the State's late disclosure, and that fundamental unfairness warrants a new trial. *Kilgore*, 771 S.W.2d,66; *State v. Simms*, 131 S.W.3d 811,815 (Mo.App.2004).

IV. Reversal is Warranted

When a trial court excludes admissible evidence, prejudice is presumed, rebuttable by facts and circumstances of the particular case. *State v. Barriner*, 111 S.W.3d 396,401 (Mo.banc2003). The State cannot meet this burden.

A very large segment of Zink's defense was that he did not kidnap Morton–she left voluntarily with him. The fact that just twelve days earlier, Morton was out at 2:30 a.m. solidly refuted the State's theory that she habitually obeyed her curfew and the implication that she would have done everything in her power to obey it the night of her disappearance.

The State repeatedly used the alleged kidnapping to sway the jury to find Zink guilty of first-degree murder. In closing argument, the State used evidence of a kidnapping to argue that Zink was guilty of first-degree murder (Tr.3891-92,3896). It reminded the jury that Zink had been convicted twice of kidnapping and rape (Tr.3898). The State urged the jury to believe that Zink had hours to deliberate, starting from the time Morton disappeared from the accident scene (Tr.3899;3967).

This issue was also critical in the penalty phase. One of the statutory aggravating circumstances submitted to the jury was "whether the murder … was committed while the defendant was engaged in the perpetration of forcible sodomy" (L.F.1110). The jury was instructed that forcible sodomy occurs by the use of forcible compulsion, which "means either (a) physical force that overcomes reasonable resistance; or (b) a threat, express or implied, that places a person in

reasonable fear of death, serious physical injury or kidnapping of himself or herself or of another person" (L.F.1110).

In penalty closing, the State returned to the issue of kidnapping, to support the sodomy aggravator (Tr. 4522-23). The State clearly wanted the jury to believe that Zink's current crime mirrored his prior kidnapping and rape charges (Tr.3987-88). It attempted to argue that the jury should consider Zink's past rape and kidnapping convictions to see how he was able to keep his hold over Morton (Tr.4556-57).

Although the jury found that the State did not prove the sodomy aggravator beyond a reasonable doubt, the jurors likely considered the alleged kidnapping as a non-statutory aggravating circumstance. The jury was instructed that it could consider any of the evidence presented in either the guilt or penalty phases, in determining whether the evidence in aggravation warranted death and in determining whether the evidence in mitigation outweighed the evidence in aggravation (L.F.1112). The issue of whether Morton was kidnapped clearly was highly significant to both the guilt and penalty phases.

Under *Napue, supra,* a conviction "must be set aside if there is *any* reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs,* 427 U.S. 97,103-104 (1976). The issue of whether Zink kidnapped Morton was crucial to both the guilt and penalty phases. Although the State was allowed to elicit that Morton routinely obeyed her curfew, Zink was barred from revealing that just twelve days before her disappearance, she

was out with friends well after her curfew (Ex.1092). That evidence would have rebutted the impression that Morton likely was doing everything in her power to meet her curfew the night she disappeared and must have been kidnapped. The State used the kidnapping as evidence of Zink's guilt of first-degree murder and to seal his fate with a death verdict.

The prejudicial effect of the court's error extended to the penalty phase and undermined confidence in the death verdict. Because relevant rebutting evidence was precluded, the jury could not perform its vital task of determining the truth in assessing whether Zink kidnapped Morton, a fact that obviously would sway a juror to impose death. The search for truth–the ultimate goal of our justice system–was frustrated by the court's exclusion of Exhibit 1092. David Zink cannot be denied of his liberty, and his life, by the trial court's arbitrary exclusion of evidence rebutting the State's evidence on a key issue. This Court must reverse Zink's conviction and sentence in full and grant him a new trial.

ARGUMENT II

The trial court abused its discretion in overruling Zink's motions asking the court to replace defense counsel Thomas Jacquinot and the Public Defender's Office with new counsel, because Zink had justifiable dissatisfaction with counsel and that dissatisfaction resulted in an irreconcilable conflict between Zink and counsel. The court's failure to adequately resolve the conflict or appoint substitute counsel violated Zink's rights to counsel, due process, a fair trial, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I, Secs.10,18(a),21. Zink had repeatedly and timely advised the court that counsel had failed to investigate the guilt phase, resulting in the loss of favorable defense evidence; failed to provide discovery and documents from the files; refused to pursue Zink's desired defense; acted incompetently; and that as a result, Zink had lost all trust in counsel. Zink was forced to choose between representing himself and proceeding to trial represented by counsel with whom he had an irreconcilable conflict. Either choice essentially rendered him without counsel, warranting automatic reversal.

The Sixth Amendment guarantees that, in all criminal prosecutions, the accused shall enjoy the right to the assistance of counsel for his defense. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may

have." *United State v. Cronic,* 466 U.S. 648,654 (1984). The assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson v. Zerbst*, 304 U.S. 458,462 (1938); *Gideon v. Wainwright*, 372 U.S. 335,340-41 (1963). The right to conflict-free counsel is an essential component of the Sixth Amendment right to effective assistance of counsel. *Glasser v. United States*, 315 U.S. 60,70 (1942).

To warrant substitution of counsel, the defendant must show good cause or "justifiable dissatisfaction" with his appointed counsel. *State v. Gilmore***,** 697 S.W.2d 172,174 (Mo.banc1985); see also *State v. Hornbuckle***,** 769 S.W.2d 89,96 (Mo.banc1989). Justifiable dissatisfaction includes "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *United States v. Long Crow*, 37 F.3d 1319,1324 (8th Cir.1994). Loss of trust is a factor to be considered in determining if there is good cause to appoint substitute counsel, although the defendant must show legitimate reasons for that distrust. *McKee v. Harris*, 649 F.2d 927,932 (2ndCir.1981).

When an indigent defendant requests substitute counsel, the trial court has a duty "to inquire thoroughly into the factual basis of defendant's dissatisfaction." *Smith v. Lockhart*, 923 F.2d 1314,1320 (8thCir.1991); see also *State v. Owsley*, 959 S.W.2d 789,793 (Mo.banc1997). After all, "[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel." *Holloway v. Arkansas*, 435 U.S. 475,484 (1978), quoting

Glasser, 315 U.S.,71. The trial court must make the kind of inquiry that might ease the defendant's dissatisfaction, distrust or concern. *Smith*, 923 F.2d,1320; *Brown v. Craven*, 424 F.2d 1166,1170 (9th Cir.1970). The court must undertake the inquiry and resolve the matter before the case proceeds. *Schell v. Witek*, 218 F.3d 1017,1025 (9th Cir.2000).

I. Standard of Review and Preservation

Motions to substitute counsel fall within the trial court's discretion. *State v. Turner*, 623 S.W.2d 4,11 (Mo.banc1981). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Christeson*, 50 S.W.3d 251,261 (Mo.banc2001). Appellate courts will not interfere with a trial court's exercise of discretion unless it clearly appears that it has been abused, and the appellate court will indulge every intendment in favor of the trial court. *Hornbuckle*, 769 S.W.2d,96.

Zink repeatedly and timely raised this issue prior to trial (Tr.150-54, 502-509,572-73,592,767,776;L.F.122-25,457-87,515-23,604-607,1050-60) and included it in the motion for new trial, thereby preserving it for review (L.F.1132).

II. The Court Failed to Act in Response to the Enormous and Mounting Difficulties Between Zink and Jacquinot

Zink repeatedly advised the court of the significant problems with counsel. The problems were not Zink's fault, but rather arose from huge delays in investigation and development of the case due to vast staff turnover and budget

cutbacks at the Public Defender's Office. Both Zink and counsel repeatedly acknowledged the conflict. Both urged the court to help resolve it. Yet, other than ordering counsel to provide discovery to Zink, the court adopted a "hands-off, wait-and-see" approach that essentially left Zink with no choice but to waive counsel rather than proceed with counsel with whom he had an irreconcilable conflict.

A. Zink's problems with counsel were legitimate and significant.

Zink repeatedly, promptly and consistently challenged certain basic aspects of counsel's representation: counsel's failure to investigate, counsel's focus on the penalty phase to the detriment of the guilt phase, counsel's competence, and counsel's refusal to pursue Zink's desired defense. Zink alerted the court that, because counsel had waited so long to investigate, evidence now was lost to the defense, either because witnesses' memories had long faded, or because the witnesses could not be located after the lapse of so much time (L.F.460,475-76). Jacquinot conceded that Zink's assertions about how his case had been handled were well-founded (L.F.505).

As Jacquinot himself acknowledged, the Standards of the American Bar Association (A.B.A.) serve as a guide for determining what is reasonable conduct for attorneys in capital cases (L.F.427-28;also L.F.103,142,338). Zink advised the court that the A.B.A. Standards mandate that "[i]nvestigation and planning for both phases must begin *immediately* upon counsel's entry into the case." Commentary to A.B.A. Guideline 1.1, p.5 (L.F. 475) (emph.added).

Despite counsel's duty of prompt investigation, the investigation in Zink's case, especially regarding guilt phase, was extremely late and, as to some issues, non-existent. Counsel admitted that, almost a year after the events at issue, the investigation had only just begun (L.F.102-103). During the first year-and-a-half of the case, counsel's energies admittedly were diverted away from Zink's case (L.F.136-40,500). Two years after the case started, Jacquinot admitted that, of all his cases, Zink's "has far and away been the most directly affected by staffing issues" (L.F.429). He conceded that his office had been "clobbered" with turnover, conflicts of interest, and elimination of lawyer and support staff positions (L.F.498). He complained that "this case has proceeded as if it can prepare itself and have new people jump on board without severely sacrificing the level of representation that Mr. Zink will receive" (L.F.499). Jacquinot admitted that, even a full two years after the events, the investigation of both phases still was substantially inadequate (L.F.505).

Zink also expressed grave concerns to the court over counsel's competence. He believed that counsel had made grave errors in failing to elicit needed evidence at the motion to suppress, largely because he was ill-prepared (L.F.469-72). He believed that counsel was all too willing for him to admit guilt to crimes he did not commit, such as possession of a knife in the jail (L.F.467-68). He stressed that counsel, in his proposed jury questionnaire, had stated that Zink had confessed to murder (L.F.466-67).

After the conflict had solidified on these grounds, another arose–the actual defense to be presented. Jacquinot insisted on presenting the defense of diminished capacity, which Zink believed was based on lies (Tr.898-99). Instead, Zink wanted to present a voluntary manslaughter defense, which Jacquinot lambasted as not "a rational, reasonable or viable option" but instead "a self destructive act" (L.F.975). Zink alerted the court that, despite counsel's assertions, the two defenses could not be presented together. To present the diminished capacity defense, his attorneys would need to present evidence directly at odds with his voluntary manslaughter defense and thereby defeat that defense (Tr.1731-33). As Zink noted, "[i]t's one thing to help a person…. But it's an entirely different thing when you've got your own defense attorney opposing your defense" (Tr.1735).

Jacquinot too acknowledged the conflict. "This court is well aware that Mr. Zink's relationship with counsel over the past two years has often been strained at times" (L.F.504). He blamed the turnover in his office as the primary cause of the difficulties and acknowledged that his focus had been on the penalty phase (L.F.498-99,505). Jacquinot acknowledged that the conflict over the defense to be presented "[is] not a little conflict. It's not about minor witnesses. It's a significant issue in a capital case" (Tr.791).

B. Zink alerted the court of the problems timely and repeatedly, yet the court took little, if any, action to resolve them.

On October 17, 2002–well over a year and a half before trial–Zink first brought the matter to the court's attention by motion (L.F.122-25).[4] He advised the court that he and counsel had a conflict based on counsel's failure to investigate guilt phase issues, counsel's focus on the penalty phase alone, counsel's failure to provide Zink with discovery, and counsel's sensitivity towards the victim's family (L.F.123-24). Eight months later (June 2003), the court finally heard Zink's motion, but deflected the issue by referring the matter to Jacquinot's supervisor (Tr.138).

Zink raised the issue again several months later (eleven months before trial), by moving for substitute counsel (L.F.457-87). The court took the matter under advisement and, after waiting five months, denied the motion without explanation (Tr.547;L.F.546). It merely ordered counsel to provide Zink all documents in the case (L.F.546).

Zink raised the issue again four-and-a-half months before trial, by moving to represent himself rather than being represented by counsel with whom he had a conflict (L.F.604-607). He reminded the court that he had warned the court many times about the conflict of interest and counsel's failure to investigate (L.F.604-

[4] A more detailed recitation of the procedural facts is set forth in the Statement of Facts, *supra*, 20-26.

607). He stressed that he merely wanted new counsel, but, if pushed, would represent himself rather than go to trial represented by these counsel (L.F.607).

Finally, on July 12th, the morning voir dire started, Zink again requested new counsel (L.F.1050). He advised the court that Jacquinot–as stand-by counsel–was insisting on a defense that was inconsistent with the defense Zink wanted (L.F.1054-58). Zink stated that he absolutely would not advance the defense of diminished capacity and that counsel "completely refuse" to present his defense (Tr.898). He expressed that he felt betrayed by counsel and thus had no need to talk with counsel about it further (Tr.898). Zink reiterated these concerns after voir dire was completed two days later (Tr.1729-30). He alerted the court that the two defenses were inconsistent, and that, by presenting diminished capacity, his attorneys would present evidence directly at odds with his voluntary manslaughter defense (Tr.1732-33).

C. The problems escalated such that Zink and counsel could not effectively communicate.

Zink had initially liked appointed counsel and thought he was "a nice guy," although they had difficulties (Tr.154). But, as the difficulties mounted, he believed counsel was incompetent to the point of mental retardation and was aligned more with the State's interests than his (L.F.472,474,592,606). In turn, Jacquinot accused Zink of being unable to make rational and reasonable decisions because of mental illness (L.F.505). The ability of counsel and client to

communicate effectively deteriorated quickly as the conflict became increasingly quagmired.

The court proceedings just two weeks before the start of trial demonstrate the break-down of effective communication between Zink and Jacquinot. Zink advised the court that the conflict had not been resolved (Tr.767). He expressed that talking to Jacquinot about the guilt phase issues was "like talking to a brick wall" (Tr.776). When Jacquinot stated that he would pursue a diminished capacity defense, Zink revealed that he did not know what that was (Tr.775-76). Had Jacquinot and Zink had been communicating effectively, Zink would have been fully apprised of the defense. After all, counsel has a duty under the A.B.A. Guidelines to "engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as … (2) current or potential legal issues; (3) the development of a defense theory; (4) presentation of the defense case." Guideline 10.5.

Furthermore, on the morning voir dire started, Zink expressed that he felt betrayed by counsel's July 8th letter to the court, in which Jacquinot called Zink mentally ill and lambasted Zink's chosen defense (Tr.898;L.F.974-75). Zink believed that counsel had stabbed him in the back and thus, talking to Jacquinot further about the conflict would serve no purpose (Tr.898).

III. The Case is Distinguishable from *State v. Owsley*

In *State v. Owsley*, 959 S.W.2d 789 (Mo.banc1998), the defendant asserted, among other things, that counsel failed to investigate. *Id.* at 793. The trial court

fully addressed the issue–it told Owsley that the information he sought was irrelevant and warned him not to distract counsel from legitimate trial preparation by leading him on "wild goose chases." *Id.* Owsley also maintained that he and counsel had a breakdown in communication. *Id.* Although Owsley was still communicating with his lawyer, he merely did not like the lawyer's comments and criticisms. *Id.* Owsley's displeasure was the result of his own uncooperativeness with his lawyer, and thus he was the cause of the problems. *Id.* To solve the problem, the trial court appointed co-counsel with whom Owsley could communicate. *Id.* This Court held that the trial court did not abuse its discretion in failing to appoint substitute counsel. *Id.*

As discussed above, the problems here did not arise from lack of cooperation from Zink, but rather from the huge delay in investigation engendered by cutbacks and staffing problems at the Public Defender's Office (L.F.102-103,136-40,429,498-500,505). Counsel himself acknowledged the conflict and admitted that Zink's concerns were well-founded (L.F.505).

In *Owsley*, the court addressed the defendant's concerns and resolved them. *Id.* at 793. Here, both Zink and Jacquinot begged the court to help resolve their conflict. Zink urged the court to either get counsel in line or tell Zink he was out of line (Tr.153). Jacquinot urged the court to tell Zink that he needed to comply with the defense urged by Jacquinot (L.F.974-75). The court did neither. Instead, it adopted a hands-off, wait-and-see approach that only exacerbated the problem and forced Zink to relinquish his right to counsel.

IV. Cases from Other Jurisdictions Demonstrate that Zink is Entitled to Relief

Numerous other jurisdictions have granted relief based on very similar facts. In *State v. Moody*, 968 P.2d 578 (Ariz.1998), the Supreme Court of Arizona reversed the defendant's conviction for first-degree murder because the trial court should have appointed substitute counsel. *Id.*,580,582. Like Zink, Moody was frustrated with his attorney's failure to interview witnesses. *Id.* His attorney, like Jacquinot, acknowledged that his caseload prevented him from preparing adequately for trial. *Id.*,581. Moody, like Zink, neither trusted his lawyer nor believed his lawyer would act in his best interest. *Id.*,579-80. The attorney called Moody crazy, while Moody called counsel incompetent and crazy. *Id.*,580-81.

Like Zink's case, part of the conflict arose from a difference in defense strategies–Moody insisted on pursuing a defense that space aliens made him commit the crimes, a theory that counsel rejected. *Id.*,581-82. The Arizona Court rejected the State's argument that the conflict was really just a disagreement over trial strategy insufficient to justify new counsel. *Id.*,580. It also recognized that, although Moody might have had the same problems with other counsel, new counsel might have had more success convincing him to pursue another defense. *Id.*,581. The court held that the trial court deprived Moody of his right to counsel,

which infected the entire trial process, and mandated reversal. *Id.*,582. That result is mandated here too.[5]

Zink's case is also similar to *United States v. Mullen*, 32 F.3d 891 (4th Cir.1994). There, the defendant requested new counsel because she and her attorney did not "see eye to eye" on the issues, her attorney was not forthcoming with discovery, used a forceful and threatening tone of voice, and refused to answer her questions. *Id.*,893-94. From a month before trial when the issue was raised, the defendant and counsel had no contact. When counsel attempted to see the defendant the day before trial, she refused. *Id.*,896. Counsel admitted that the lack of communication hampered his defense efforts. *Id.*,897. The court told the defendant she could either proceed with her attorney or represent herself. *Id.*,894. The defendant went *pro se*, and the court assigned the attorney to serve as standby counsel. *Id.* The Fourth Circuit held that the trial court abused its discretion in failing to appoint substitute counsel. *Id.*,895.

In *United States v. Walker*, 915 F.2d 480,481-82 (9th Cir.1990), the defendant requested substitute counsel one week before trial. He claimed that, although he had told his attorney about several witnesses, she had not contacted them, and he believed that she was doing as little as possible and would not present the real defense that was available. *Id.*,482. When the defendant brought

[5] Although counsel lambasted Zink's defense, the court found there was sufficient evidence presented to warrant an instruction to the jury (L.F.1087).

the matter to the court's attention on the day before trial, defense counsel concurred in the motion and agreed that they had irreconcilable differences that kept her from representing the defendant. *Id.*

The Ninth Circuit held that the defendant made a *prima facie* showing of an irreconcilable conflict. *Id.*,484. His lack of trust was not created by his own unreasonableness or manufactured discontent, but arose from disagreements over trial preparation and witnesses. *Id.* By denying the motion for substitute counsel, the court forced the defendant, "into a trial with the assistance of a particular lawyer with whom he was dissatisfied, with whom he would not cooperate, and with whom he would not ... communicate. Thus, the attorney was understandably deprived of the power to present any adequate defense in [the defendant's] behalf" and the defendant was denied the right to counsel. *Id.*, quoting *Brown*, 424 F.2d,1169. See also *United States v. Williams*, 594 F.2d 1258,1260-61 (9th Cir.1979).

V. The Court's Refusal to Appoint Substitute Counsel Resulted in an Involuntary Waiver of Counsel

Zink was given a Hobson's choice–he could accept representation from counsel, with whom he had an irreconcilable conflict, or he could represent himself. This forced choice was no choice at all.

In *Moody*, supra, the Arizona Court held that the court's refusal to appoint new counsel rendered Moody's subsequent waiver of counsel involuntary. 968 P.2d,580,582. "Waiver is voluntary if the choice presented to the defendant is not

constitutionally offensive. In other words, the options must be consistent with the protections of the Sixth Amendment." *Id.*,582. The Court concluded that by forcing Moody to choose between self-representation and representation by counsel with whom he had an irreconcilable conflict, the trial court left him no alternative. *Id.* "Forcing Moody to choose in this situation was constitutionally impermissible because both alternatives resulted in a violation of his right to representation." *Id.* Automatic reversal was mandated. *Id.*; see also *Mullen*, 32 F.3d,895.

Like Moody, Zink opted for self-representation after exhausting every effort to have counsel removed from the case, or to have the court ameliorate the conflicts. Because the court should have removed Jacquinot but failed to do so, Zink's "choice" of self-representation was not voluntary.

VI. Zink Must Receive a New Trial with Conflict-Free Counsel

The irreconcilable conflict between counsel and Zink resulted in an attorney-client relationship that fell far short of Sixth Amendment standards. Compelling Zink–on trial for his life–"to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict [was] to deprive him of the effective assistance of any counsel whatsoever." *Brown*, 424 F.2d,1170. Zink's subsequent waiver of his right to counsel was involuntary, forced as it was by the court's refusal to appoint substitute counsel. The subsequent presentation of inconsistent theories prejudiced Zink's defense and

resulted in an unfair trial. See, e.g., *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1479 (9th Cir. 1994).

As Judge Stith has recognized, the improper deprivation of the right to counsel cannot be treated as harmless error. *State v. Schnelle*, 924 S.W.2d 292,296, fn.3 (Mo.App.1996); *Pension v. Ohio*, 488 U.S. 75,88 (1988). The trial court's failure to adequately resolve the conflict or appoint substitute counsel violated Zink's rights to counsel, due process, and a fair trial. U.S.Const.,Amends. V,VI,VIII,XIV;Mo.Const.,Art.I, Secs.10,18(a),21. This Court must reverse the conviction and sentence in full and remand for a new trial.

ARGUMENT III

The trial court erred, after it allowed Zink to proceed *pro se* and appointed the Public Defenders to assist him, in failing to resolve in Zink's favor the conflict between him and counsel over the defense to be presented, and thereby failing to protect Zink's right, as a *pro se* defendant, to control the defense presented, because this had the effect of compromising Zink's rights such that he neither received the right to counsel nor was he truly allowed to represent himself, in violation of his right to either have counsel or to represent himself, to due process and a fair trial, and to be free from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const., Art.I,Secs.10,18(a),21. Zink was prejudiced because the court's refusal to protect his *pro se* rights resulted in the presentation of two defenses that conflicted and canceled each other out, leaving Zink without a defense.

Zink waived his right to counsel specifically to secure the ability to present voluntary manslaughter as his defense (Tr.898-99,1730). He advised the court repeatedly that, although he wanted help, he did not want to present a diminished capacity defense (Tr.775-76,898,1730-35). Even after Zink became a *pro se* defendant, however, stand-by counsel refused to follow his lead. Stand-by counsel then presented a diminished capacity defense (Tr.901-902,1730), which was inconsistent with Zink's chosen voluntary manslaughter defense.

Since the court had determined that Zink was competent to waive counsel, it was charged with protecting his rights as a *pro se* defendant. Counsel was adamantly opposed to helping Zink present the voluntary manslaughter defense (L.F.975). This opposition had been the catalyst for Zink's desire to go *pro se*.

The court had several remedies available. It could replace Jacquinot as stand-by counsel, as Zink urged, or it could order Jacquinot to follow Zink's lead and abandon the diminished capacity defense. Instead, the court chose a third "remedy"–he urged Zink to give in, and Zink and counsel to compromise by presenting both defenses, despite being advised that they were conflicting. The result was devastating–instead of one unified defense, the jury heard two conflicting defenses that canceled each other out. By failing to resolve the conflict in Zink's favor, protecting the rights of a *pro se* defendant, the court created a high-stakes, life or death game of tug-of-war at defense table.[6]

In *Faretta v. California*, 422 U.S. 806,834 fn.46 (1975), the Court noted that stand-by counsel may be appointed to help the defendant if he requests it and to be available to take over the case if the defendant's self-representation is

[6] This issue is preserved for review (Tr.898-904,1730-35;L.F.1050-60,1132-33). The denial of the right to self-representation, like the denial of the right to counsel, cannot be considered harmless. *McKaskle v. Wiggins*, 465 U.S. 168,177 fn.8 (1984). The trial court's rulings reconciling the defendant's right to self-representation with the role of stand-by counsel are entitled to deference. *Id.*

terminated. The Court elaborated on the role of stand-by counsel in *McKaskle v. Wiggins*, 465 U.S. 168 (1984). There, the defendant argued that his right to self-representation was violated by the unsolicited participation of stand-by counsel throughout the trial. *Id.*,176. The Court held that stand-by counsel may help the defendant–even over the defendant's objection–with rules of procedure or to overcome basic obstacles hindering the presentation of his defense. *Id.*,184.

But the Court recognized that the rights anticipated under *Faretta* can be compromised by stand-by counsel's unsolicited and excessive participation. *Id.*,177. It stressed that the "primary focus must be on whether the defendant had a fair chance to present his case in his own way." *Id***.** The right of self-representation necessarily entails the right of the defendant to have his voice heard. *Id.*,174. The Court recognized that "the right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others" and that "multiple voices 'for the defense' will confuse the message the defendant wishes to convey." *Id.*,177.

The Court recognized two main concepts. First, the core of the *Faretta* right is that the *pro se* defendant must be allowed to preserve actual control over the case he chooses to present to the jury. *Id.*,178. The *Faretta* right is compromised when stand-by counsel's participation allows counsel substantially to interfere with any significant tactical decisions or to speak instead of the defendant. *Id.* Disagreements between counsel and the defendant must be resolved in the defendant's favor whenever the decision would normally be made

by counsel. *Id.*,179. Second, participation by stand-by counsel must not destroy the jury's perception that the defendant is representing himself. *Id.*,178.

It is the first of these concepts that was primarily at issue in Zink's case. While the court gave lip service to Zink's right under *Faretta* to control the defense presented to the jury, it defeated that right by appointing stand-by counsel who was unwilling–and whom the court knew was unwilling–to abide by Zink's wishes regarding the defense to be presented. Conflicts between Zink and counsel were not resolved in Zink's favor; instead, the court forced both Zink and counsel to compromise. But two compromised defenses do not equal one unified defense. They remain compromised.

As discussed in Argument II, *supra*, the court was well aware of the conflict that had arisen between Zink and his appointed counsel. On March 1, 2004, Zink requested to represent himself due to conflicts over the focus of the case, the witnesses to be called, and the investigation to be done (L.F.604-607). The court accepted Zink's request to proceed *pro se* and ordered counsel to remain on the case, to aid and assist Zink and prepare the case as if they were trying it (L.F.576;Tr.597-98).

The problem is that counsel proceeded just as the court ordered–counsel proceeded as if *they* would be leading the defense and making the strategic decisions. On June 28, 2004, Jacquinot reiterated that he would be pursuing the diminished capacity defense (Tr.775). Zink expressed that he did not know what the diminished capacity defense was, but that he did not believe that what

happened when he was five years old had any bearing on the charged crime (Tr.775-76). He stated that talking to counsel was "like talking to a brick wall" (Tr.776).

On July 8, 2004, Jacquinot wrote to the court (L.F. 974-76). He told the court that he could not "proffer that manslaughter is a rational, reasonable or viable option" (L.F.975). He claimed that presenting the manslaughter defense was "a self destructive act" (L.F.975).

On July 12th, the morning voir dire started, Zink requested that the court appoint new counsel to assist him (L.F.1050). He advised the court that counsel was insisting on a defense that was inconsistent with the defense Zink wanted (L.F.1054-58). Zink stated that he absolutely would not advance the defense of diminished capacity and that counsel "completely refuse" to present his defense (Tr.898). He stated that counsel did not want his defense, because it defeated their defense which was based on lies (Tr.898-99). He expressed that he felt betrayed by counsel's July 8th letter to the court and thus there was no need to talk with counsel about it any further (Tr.898). Zink stated that the diminished capacity defense would not be presented as long as he was controlling the case, but that if counsel would present his voluntary manslaughter defense, he would allow counsel to represent him (Tr.898-99).

Counsel's lack of understanding that his role was to help present the defense that Zink chose is evidenced by Jacquinot's response: "I can't get up here and announce that I'm going do [sic] proceed on a defense when I think it's–it's

overwhelmingly the case where the Court isn't even going to allow that instruction to go to the jury…. I can't sit here and say I'm going to offer this defense and then get shut out in the instructions conference" (Tr.901-902). Jacquinot did not understand that it was no longer his call as to what defense would be presented. He furthermore refused to follow Zink's instruction that the diminished capacity defense would absolutely not be presented. Even after Zink had just stated that he absolutely would not allow the diminished capacity defense, Jacquinot stated that the two defenses could be presented together, yet complained that Zink's defense would hurt the diminished capacity defense (Tr.902-903). Instead of resolving the conflict in favor of Zink, to protect Zink's rights as a *pro se* defendant, the court stated it would wait to see what happened at trial, and jumped immediately into voir dire (Tr.903-904).

After the jury was selected, the court asked Zink to reconsider self-representation (Tr.1729-30). Zink again advised the court that he believed the diminished capacity defense had no merit, but he would gladly accept representation if his attorneys would present his voluntary manslaughter defense (Tr.1730). Jacquinot stated that he would talk to Zink to see if they could present both defenses (Tr.1730). Instead of instructing stand-by counsel to abide by Zink's wishes as a *pro se* defendant, the court urged Zink to consider not waiving the diminished capacity defense (Tr.1731).

Zink reiterated that he did not want the diminished capacity defense (Tr.1731). He stated that the two defenses were inconsistent, and that presenting

the diminished capacity defense would disqualify his voluntary manslaughter defense (Tr.1731-32). By presenting diminished capacity, his attorneys would present evidence directly at odds with his voluntary manslaughter defense (Tr.1732-33). Although he previously thought they would present both defenses, now it appeared that counsel would not help with the voluntary manslaughter defense and actually would oppose it (Tr.1735). "It's one thing to help a person…. But it's an entirely different thing when you've got your own defense attorney opposing your defense" (Tr.1735). Jacquinot advised the court that he thought they may just have a misunderstanding and that they could present the two defenses together (Tr.1735). Instead of resolving the conflict, the court told Zink to talk some more with counsel (Tr.1735-36).

The next day, Zink stated that he would be conducting the defense with the help of Jacquinot and Winegarner (Tr.1751-52). The court denied Zink's July 12th motion asking again for new counsel (Tr.1752). Jacquinot advised the court that Zink "might consider" allowing Jacquinot to do part of opening statement dealing with diminished capacity, while Zink made an opening statement on the facts of the case (Tr.1757). The court asked Zink if he would be doing part of the opening statement on the facts of the case, and Jacquinot would do part on the diminished capacity defense (Tr.1758). Realizing the futility of continuing to object, Zink responded, "very well" (Tr.1758).

At the end of his opening statement, Zink advised the jury that counsel would "put on their own defense" that was his defense, technically (Tr.1819). He

told the jurors, "I have my own defense that I'm going to basically put on myself. It's not necessarily the same; it's, obviously, not the same as his. He's going to tell you about his defense" (Tr.1819). Refused the proper protection of his *pro se* rights, and feeling "like a fish out of water" (Tr.789), Zink was forced to abide by counsel's insistence upon the diminished capacity defense.

During the trial, the jury heard evidence on both voluntary manslaughter and diminished capacity. For the jury to find diminished capacity as counsel urged, it would need to conclude that Zink had a mental disease or defect that prevented him from acting with deliberation, and hence he was guilty of second-degree murder. *See* §§552.015.2(8); 565.020.1; 565.021.1. For the jury to find voluntary manslaughter, it would need to find that Zink caused the victim's death "under circumstances that would constitute murder in the second degree … except that he caused the death under the influence of sudden passion arising from adequate cause." §565.023.1(1). Adequate cause is "cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control." §565.002(1).

The defense presented by counsel necessarily negated Zink's defense. Counsel urged the jury to find that Zink committed second degree murder. But the jury could not reach voluntary manslaughter unless it rejected, or was deadlocked on, second-degree murder. *State v. Berry*, 2005 WL 946787, *4 (Mo.App.W.D., 4/26/05); *State v. Wise*, 879 S.W.2d 494,517 (Mo.banc1994). Furthermore, the foundation of the diminished capacity defense was that Zink was mentally ill and

did not think like an ordinary person. In contrast, the foundation of the voluntary manslaughter defense was that Zink acted as any person would have under the circumstances.

Counsel's closing argument illustrates how devastating the diminished capacity defense was to Zink's defense that he acted as an ordinary person would. Counsel urged the jury to believe that Zink had a severe personality disorder and possibly was even delusional or psychotic (Tr.3936-38). As a result of his impaired thinking, the way Zink solved problems was bizarre, and how he perceived threats made "no sense at all" (Tr.3936,3939). Something that a normal person would see as a simple problem with a simple solution, Zink saw as a completely overwhelming problem (Tr.3936-37). Counsel told the jury that if it believed that Zink's thinking was caused by mental illness, as he urged, then it could not reach voluntary manslaughter (Tr.3941-42). Counsel urged the jury, given the overwhelming evidence of mental illness, to convict of second-degree murder (Tr.3950,3960). Although he half-heartedly suggested that the jury could find that Zink committed merely voluntary manslaughter (Tr.3959-61), the overwhelming theme of his closing argument was that Zink was mentally ill and hence committed second-degree murder.

So, too, evidence needed for the manslaughter defense hurt the defense of diminished capacity, and vice versa. Zink presented evidence that he had a very easy-going, happy-go-lucky character and was not known for getting in fights (Tr.2720,2729-30,2825,2830-31,3204-05,3242,3253,3485-86,3504). But to

support diminished capacity, counsel presented testimony that Zink suffered from intermittent explosive disorder, such that every so often, he would engage in "extremely explosive acts or behaviors" in response to something seemingly small, way out of proportion to the cause (Tr. 3031-33). Presenting both of these defenses, neither was believable.

The State exploited the fact that Zink had two defenses to argue that he was not mentally ill and hence was guilty of first degree murder, arguing that the use of both defenses showed a "considerable ability [by Zink] to reason and come up with a very subtle combination of defense" (Tr.3967). It highlighted the conflict between the defenses to argue for first degree murder:

> Now the Defendant himself, when he talked to you, would have you believe that somehow there was some sudden passion arising from adequate cause, thus it must be manslaughter. That seemed to be his position. And his counsel's position on the other hand seems to be, well, okay, it's probably murder in the second degree. Although he talked about sudden passion, there was a notable lack of enthusiasm there, wasn't there?

(Tr.3964-65).

Zink recognizes that *McKaskle* states that a defendant's apparent acquiescence in counsel's participation substantially undermines any later claim that counsel unacceptably interfered. 465 U.S.,182-83. However, while Zink wanted help from counsel to present his defense, his mere request for help did not require him to forego altogether his rights to self-representation and force him to

accept a second, conflicting defense against his wishes. Zink objected to Jacquinot specifically and to the diminished capacity defense and asked the court to appoint new counsel to assist him in "his" defense (Tr.775,898,1730-35;L.F. 1050-60). He repeatedly alerted the court that counsel was impermissibly pushing the diminished capacity defense on him (Tr.775-76,898-99,1730-35;L.F.1054-58), but the court merely swept the problem under the rug, urging Zink instead to compromise his rights (Tr. 1735-36). This "remedy" of compromising Zink's rights was simply impermissible. See *State v. Hampton*, 2005 WL 1089834 (Mo.banc, 5/10/05) (court's impermissible remedy of *Batson* violation warranted new trial).

Because of counsel's overbearing "assistance," Zink did not have a fair chance to present his case in his own way. *McKaskle*, 465 U.S.,177. The court's refusal to deal head-on with the problem made Zink believe that he had no choice but to compromise and present both defenses against his will. Rather than protecting Zink's rights as a *pro se* defendant, the court created a high stakes tug-of-war at defense table. As a result, the jury was presented with "multiple voices 'for the defense,'" which confused the message Zink wished to convey. *Id*. Zink thus was denied the right to counsel and the alternative right to represent himself, in violation of his right to either have counsel or to represent himself, to due process and a fair trial, and to be free from cruel and unusual punishment. U.S. Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,Secs.10,18(a),21. This Court must reverse the conviction and sentence in full and remand for a new trial.

ARGUMENT IV

The trial court erred in ignoring Zink's pleas that the court resolve the conflict over whether he or counsel should decide the defense to be presented and in thereby forcing Zink to choose between the right to have his defense presented to the jury and the right to be represented by counsel. Zink surrendered his right to counsel only after the trial court failed to act when advised that appointed counsel refused to investigate Zink's voluntary manslaughter defense and present it to the jury and instead insisted on presenting a diminished capacity defense. Forcing Zink to choose between his right to present *his* defense and his right to counsel violated his rights to a fair trial, due process, assistance of counsel, equal protection, presentation of his defense, and freedom from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV;Mo.Const., Art.I,Secs.2,10,18(a),21. The court's refusal to act when it knew that Zink was waiving the right to counsel solely so that he could present his defense was a structural error that warrants reversal.

Zink believed that defense counsel's proffered diminished capacity defense was "hogwash" and he made his belief clear to the court (Tr.887,1731). Zink was so adamant that he wanted a voluntary manslaughter defense presented that he waived his right to counsel (Tr.605-07,794,898-99,1730-31). He repeatedly advised the court that, if counsel would present his defense, he gladly would

accept counsel. By forcing Zink to relinquish his fundamental right to counsel in order to utilize his fundamental right to present his defense, the court violated Zink's rights to a fair trial, due process, assistance of counsel, equal protection, presentation of his defense and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const., Art.I,Secs.2,10, 18(a),21.

I. The Defendant Must Not be Forced to Choose Between Two Constitutionally Protected Rights

The right to present a defense is a fundamental right. *Washington v. Texas*, 388 U.S. 14,19 (1967); *California v. Trombetta*, 467 U.S. 479,485 (1986). To further that right, the Sixth Amendment guarantees every criminal defendant the right to "the assistance of counsel for his defense." *Gideon v. Wainwright*, 372 U.S. 335,340-41 (1963). The right to counsel is part of the "due process" to which the defendant is entitled under the Fourteenth Amendment. *Specht v. Patterson*, 386 U.S. 605,610 (1967).

A defendant may not be forced to choose between constitutional rights. *Simmons v. United States*, 390 U.S. 392-94 (1968); *State v. Samuels*, 965 S.W.2d 913,920 (Mo.App.1998).[7]

[7] In addressing trial court errors on appeal, this Court reviews for prejudice, not mere error, and will reverse only if error was so prejudicial that it deprived defendant of a fair trial. *State v. Tokar*, 918 S.W.2d 753,761 (Mo.banc1996).

II. The Defendant Has the Right to Choose the Defense Presented

In *Faretta v. California*, 422 U.S. 806,819-20 (1975), the Court held that a criminal defendant should be allowed to conduct his own defense. Part and parcel of that right is the right to direct his own defense. The Court acknowledged:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." … The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

Id.,819-20. The Court stressed that the Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Id.*,820. The Court reiterated:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his

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Error committed in a criminal case is presumed to be unfairly prejudicial. *State v. Dale*, 874 S.W.2d 446,452 (Mo.App.1994).

own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

Id.,834, quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring). The Court stressed that, unless the defendant agreed to representation by counsel, "the defense presented is not the defense guaranteed [the defendant] by the Constitution, for, in a very real sense, it is not his defense." *Faretta*, 422 U.S.,821. See also *McKaskle v. Wiggins*, 465 U.S. 168,174 (1984)(Sixth Amendment implies defendant's right to "conduct his own defense, with *assistance* at what, after all, is his, not counsel's trial").

The Court acknowledged that, if a defendant chooses to proceed with counsel, he has allocated power to counsel to make certain binding strategy decisions. *Id.*,822. The Court made clear, however, that, although counsel makes certain binding decisions, *e.g.*, whether to object at trial, *Henry v. Mississippi*, 379 U.S. 443,451 (1965), the defendant must make other decisions, *e.g.*, whether to plead guilty, *Brookhart v. Janis*, 384 U.S. 1,7-8 (1966); or whether to appeal the conviction, *Fay v. Noia*, 372 U.S. 391,439 (1963).

Faretta recognizes that counsel's role is to protect the dignity and autonomy of a person on trial by assisting him in making choices that are his to make, rather than making those choices for him. See *McKaskle*, 465 U.S.,173-74; *Jones v. Barnes*, 463 U.S. 745 (1983) (Brennan, J., dissenting). Even when appointed counsel believes an appeal has no merit, for instance, he must provide to his client a copy of the brief that he filed with the court describing all colorable

grounds of relief, so that the client may raise any points *he chooses*. *Anders v. California*, 386 U.S. 738,744 (1967). The right to counsel "is not an all-or-nothing right, under which a defendant must choose between forgoing the assistance of counsel altogether or relinquishing control over every aspect of his case beyond its most basic structure (*i.e.*, how to plead, whether to present a defense, whether to appeal)." *Jones*, 463 U.S.,759 (Brennan, J., dissenting). "The role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process." *Id.*,763.

Allowing the defendant to have veto power over counsel's choice of defense minimizes the distinction between indigent defendants and those who can afford to hire counsel. A lawyer who is retained surely abides by the wishes of his paying client, although he may try to sway that client to follow the lawyer's preferred strategy. So, too, an indigent defendant should be allowed to decide, after consultation with counsel, whether to proceed with one defense or another. Such a practice would enforce "the central aim of our entire judicial system"–that all people charged with crime stand on equal footing before the court. *Griffin v. Illinois*, 351 U.S. 12,17 (1956). After all, the "constitutional requirement of substantial equality and fair process" means that the rich and poor alike deserve "the same rights and opportunities...." *Anders*, 386 U.S.,744.

The Court has traditionally striven to protect individual dignity and autonomy, especially for persons making unusually important decisions that will

affect their destiny. See, e.g., *McKaskle*, 465 U.S.,176-77 (right of self-representation "exists to affirm the dignity and autonomy of the accused"); *Roe v. Wade*, 410 U.S. 113 (1973) (woman's decision whether or not to terminate pregnancy); *Planned Parenthood of Southwestern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (constitution protects choices central to personal dignity and autonomy). Surely the defendant's decision of what defense to present to the jury that will decide whether he lives or dies is as personal and important, if not more so, than any other decision.

III. The Supreme Court has Never Considered this Issue.

Although the Court has enumerated those decisions that the defendant must make–whether to plead guilty, testify, waive a jury or counsel, or take an appeal–it has never held that this list is exhaustive. *Jones*, 463 U.S.,751. In *Jones*, the Court considered a similar issue, but at the appellate level. *Id.* There, appointed counsel did not raise on appeal all the issues the defendant urged. *Id.*,748. The Court held that the defendant has the ultimate authority to make certain fundamental decisions in his case–those mentioned above–but does not have the right to force his attorney to present issues on appeal that counsel decides, as a matter of professional judgment, not to raise. *Id.*,751.

Jones is distinguishable, because defendants' rights at trial are greater than those on appeal. For example, a defendant has the right to self-representation at trial, but not on appeal. After all, "the autonomy interests that survive a felony conviction are less compelling" than those present at trial. *Martinez v. Court of*

Appeal of California, Fourth Appellate Dist., 528 U.S. 152,163 (2000). Similarly, the defendant on appeal has no right to be present, *Schwab v. Berggren*, 143 U.S. 442,447-48 (1892), or to present oral argument, *Price v. Johnston*, 334 U.S. 266,285-86 (1948). Merely because the defendant does not have a right to force an issue to be raised on appeal, does not mean that he may not choose the defense presented at trial.

Florida v. Nixon, 125 S.Ct. 551,557 (2004), does not consider the situation where the defendant attempts to veto the defense suggested by counsel. There, the defendant remained silent when apprised by counsel that the trial strategy was to concede guilt to murder and kidnapping in an attempt to avoid the death penalty. *Id.* The Court held that counsel's failure to obtain the defendant's express consent to the strategy did not automatically constitute deficient performance. *Id.*,560. The Court held that an "attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy," but does not need to get the client's approval for "every tactical decision." *Id.*,560. The defendant must make certain decisions, such as whether to plead guilty, waive a jury, testify or take an appeal. *Id.* The Court concluded that when "counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." *Id.*,563.

Nixon held that, when a defendant remains silent regarding the strategy his attorney proposes, he cannot later claim that counsel was ineffective. *Nixon* does not address when the defendant adamantly objects to the defense appointed counsel proposes.

IV. State Courts are in Accord

In *Morrison v. State*, 373 S.E.2d 506,509 (Ga.1998), the Georgia Supreme Court held that an attorney has a duty to investigate the case, evaluate possible avenues of defense, and advise the client of those avenues. But, once the client is fully informed, "the defendant, and not his attorney, makes the ultimate decision about, for example, what line of defense to pursue." *Id.* The court stressed that, even when the defendant has counsel, "the attorney 'is still only an assistant to the defendant and not the master of the defense." *Id.*, quoting *Mulligan v. Kemp*, 771 F.2d 1436,1441 (11th Cir.1985) (extrapolating from *Faretta* that courts must recognize that defendant has broad power to dictate how he is tried). See also *Zagorski v. State*, 983 S.W.2d 654,658 (Tenn.1998) ("Generally, the client has exclusive authority to make decisions about his or her case, which are binding upon the lawyer if made within the framework of the law…. Counsel must remember that decisions, including whether to forego a legally available objective because of non-legal factors, are for the client and not the lawyer); *Boyd v. State*, 2005 WL 318568, *16 (Fla.,2/10/05) (at trial level, defendant is "captain of the ship" and is entitled to control overall objectives of counsel's argument).

In *Foster v. Strickland*, 707 F.2d 1339,1343 (11th Cir.1983), appointed counsel wished to present a defense that the defendant was guilty only of second-degree murder based upon a "depraved mind" or alternatively, that the defendant was not guilty by reason of insanity. 707 F.2d,1343. The defendant rejected those defenses and insisted that they proceed with the defense that a woman at the scene committed the murder while the defendant was having an epileptic fit. *Id.* The Eleventh Circuit held that, "[i]n light of Foster's adamance, [his attorney] had an ethical obligation to comply with his client's wishes and was thus unable to present an insanity defense." *Id.*,1343. Citing the A.B.A. Code of Professional Responsibility, it stressed:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, are binding on his lawyer.

Ethical Consideration 7-8.

V. Zink was Impermissibly Forced to Choose Between the Right to Counsel and the Right to Present *His* Defense

Zink repeatedly alerted the court of the conflict that had developed with his appointed counsel regarding, in part, the strategy to be pursued at trial. He wanted his voluntary manslaughter defense investigated, developed, and presented at trial (L.F.518). He asked the court to determine whether he or counsel had authority to

choose the defense to be presented (L.F.520-23). Zink stressed that it made more sense for him to choose the defense, because otherwise, he would have to forsake his right to counsel (L.F.523). The court understood Zink's dilemma, yet took no steps to ameliorate it.

Zink should not have been forced to choose between his right to counsel and the right to have his defense presented to the jury. The right to present a defense is personal to the defendant. It is he who suffers the consequences if it fails, so it is he who should decide the defense to be presented. As Justice Scalia recognized in *Martinez*, "[o]ur system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests…" 528 U.S.,165 (concurring). The trial court committed structural error in forcing Zink to choose between two fundamental rights. Reversal is mandated.

ARGUMENT V

The trial court erred and abused its discretion in accepting Zink's request to represent himself at the guilt phase, because the court did not ensure that the request was knowing, voluntary and intelligent. As a result of the trial court's error, Zink was denied his rights to due process, a fair trial, and the assistance of counsel. U.S.Const.,Amends.V,VI,XIV;Mo.Const., Art.I,Secs.10,18(a). Zink was prejudiced, because if the court had questioned him more fully regarding his mental health and/or had advised Zink that counsel would significantly interfere with Zink's strategic decisions (and thus Zink would gain nothing by waiving counsel), Zink would not have waived his right to counsel.

A defendant may waive the right to counsel, but an effective waiver must be voluntary, knowing, and intelligent. *Faretta v. California*, 422 U.S. 806,835-36 (1975). A trial court has "the serious and weighty responsibility" to determine initially whether a knowing and intelligent waiver of counsel has been made. *Von Moltke v. Gillies*, 332 U.S. 708,723 (1947). Because of the strong presumption against waiver, the judge must investigate "as long and as thoroughly as the circumstances of the case before him demand." *Id.*,723-24. The judge can determine whether the waiver was knowing and intelligent "only from a penetrating and comprehensive examination of all the circumstances." *Id.*,724; *State v. Schnelle*, 924 S.W.2d 292,297 (Mo.App.1996). Furthermore, "it is *the*

State's burden to prove that the defendant 'knowingly and intelligently' waived the right to counsel." *Schnelle*, 924 S.W.2d,296 (Stith,J.)(emphasis in original.).

"The test for determining if the waiver is made intelligently and knowingly depends on the 'particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.'" *State v. Hunter*, 840 S.W.2d 850,858 (Mo.banc1992); *Wilkins v. Bowersox*, 145 F.3d 1006,1011 (8thCir.1998). The court must inquire into the defendant's mental capacity if there is any question as to its soundness. *State v. Quinn*, 565 S.W.2d 665,677 (Mo.App.1978). Although no specific litany is required, the record must show that a defendant was apprised of the difficulties of self-representation in terms sufficient to enable him to intelligently decide which course to follow. *Schnelle*, 924 S.W.2d,296. The record must establish that the defendant made his choice "with eyes open." *Faretta*, 422 U.S.,835. It is not enough that the court gave thorough advice; rather, the defendant must have understood all of the relevant considerations. *Godinez v. Moran*, 509 U.S. 389,401 n.12 (1993).

I. Standard of Review

Whether a defendant's waiver of counsel is valid is a mixed question of law and fact that an appellate court reviews *de novo*. *United States v. Erskine***,** 355 F.3d 1161,1166 (9thCir.2004). As Judge Stith, writing for the Court of Appeals in *Schnelle* recognized, "the right to counsel is so basic to a fair trial that [its] infraction can never be treated as harmless error." 924 S.W.2d,296, fn.3; *Pension v. Ohio*, 488 U.S. 75,88 (1988). Improperly granting a request for a defendant to

proceed without counsel constitutes plain and prejudicial error. *Schnelle*, 924 S.W.2d,296, fn.3.

II. Hearing on the Motion for Self-Representation

On March 1, 2004, the court heard Zink's motion to represent himself (Tr.553-98;L.F.604-607). Zink stated that he understood that he was charged with first-degree murder and knew the potential punishments (Tr.561-62). He stated that he understood that both the prosecutor and Jacquinot were experienced in death penalty cases (Tr.585-86,588-89). Zink understood that the court would treat him as if he were a lawyer (Tr.586-87,589).

The court explained that defense counsel was preparing a diminished capacity defense for guilt phase (Tr.580). The court did not want to know what other defenses they were considering (Tr.580). Zink acknowledged that he did not know what the diminished capacity defense entailed (Tr.556,579-80). The court gave a very abbreviated description of the defense (Tr.580-81).

The court read a waiver of counsel form to Zink, and Zink noted his assent and signed it, indicating no one had forced him to sign. (Tr.594-96;L.F.576). The court stated it would allow Zink to proceed "without legal counsel" but then ordered counsel to aid and assist him in his defense and to keep preparing so they would be prepared to try the case when set (Tr.597-98).

III. The Court Failed to Consider Zink's Background and Mental Health History

A defendant is competent to stand trial if he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and

has "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402,402 (1960). The standard of competency to waive counsel is no higher than the standard of competency to stand trial. *Godinez*, 509 U.S.,398-99.

Competency alone does not resolve the issue. A defendant may not waive his right to counsel unless he does so knowingly and voluntarily, as well as competently. *Id*.,396,400-402. While the competency inquiry focuses on whether the defendant has *the ability* to understand the waiver, the "knowing and voluntary" inquiry focuses on whether he *did in fact* understand. *Id.*,401 n.12; *Wilkins*, 145 F.3d,1013.

In *Wilkins*, the Eighth Circuit granted habeas relief based on Wilkins' failure to effectuate a knowing, voluntary and intelligent waiver of counsel before pleading guilty and receiving the death penalty. 145 F.3d,1012-14. The federal court held that this Court failed adequately to consider Wilkins' background and personal characteristics in determining the validity of his waiver. *Id.*,1012. The federal court held that this Court erred in concluding that the waiver was valid merely because Wilkins had been found competent to stand trial. *Id.*,1013.

The Eighth Circuit further found that the trial court accepted the waiver without making findings of fact or explicitly concluding that the waiver was knowing, voluntary and intelligent. *Id.* The trial court erred because the record did not show that Wilkins had sufficient level of understanding. *Id.* His numerous mental and emotional problems interfered with his ability to make a rational

decision. *Id.*,1013-14; see also *Franklin v. Roper*, No. 4:00-CV-1465 (CEJ) (U.S. Dist. Ct.,E.D.Mo.,6/15/04) (granting habeas relief based on invalid waiver of counsel in part because, although court knew of defendant's mental instability, it failed to question him to ensure decision to waive counsel was not founded on irrational beliefs).

Here, the court was on notice that Zink suffered from paranoid personality disorder (L.F.31). Although Zink had been found competent to stand trial, the court was obligated to question him to determine that his diagnosed paranoia did not affect his decision-making process. As detailed in Argument II, *supra*, Zink had plenty of reasons not to trust his attorneys. Indeed, even Jacquinot acknowledged that his feelings of mistrust had a real basis (L.F.505). Given that several doctors had diagnosed Zink with paranoid personality disorder, and that appointed counsel had admittedly aggravated that mistrust, the court had the obligation to question Zink further. The court knew that Zink had spent twenty years in federal prison, where self-preservation and constant vigilance were the way of life (Tr.4436,4439). Counsel brought the mental health issue to the court's attention when he filed a motion to rescind the order of self-representation, yet the court still failed to question Zink on it (Tr.780-87)

Because the court failed to inquire whether Zink's mental condition may have affected his waiver of the fundamental right to counsel and failed to take into consideration his background and personal characteristics, the State has failed to

carry its burden of proving that the waiver was knowing, voluntary, and intelligent.

IV. The Waiver was not Valid Because the Court did not Advise Zink of the Role Stand-by Counsel Would Play

The court should have advised Zink of the role counsel would play so that he could proceed "with eyes open." *Faretta*, 422 U.S.,835. Neither Zink nor counsel understood who had authority to control the "*pro se*" defense. As a result, counsel believed he had more authority over the defense than he really should have had, and Zink could not present his defense as he wished. The outcome—presentation of conflicting defenses that canceled each other out—was devastating to Zink. See Argument III, *supra*.

The court erred in accepting Zink's waiver. As a result, Zink was denied his rights to due process, a fair trial, and the assistance of counsel. U.S.Const., Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a). This Court must reverse for a new trial.

ARGUMENT VI

The trial court (1) plainly erred in the guilt phase in failing to act *sua sponte* to prevent the State from improperly suggesting that because defense expert Kenneth Benedict was from out-of-state that he should not be believed, or to imply, without foundation, that Zink could not find a Missouri expert and (2) abused its discretion in penalty phase in overruling defense counsel's objection to the State's improper cross-examination of defense expert Mark Cunningham when it asked him whether he ever testified that a defendant should receive a death sentence, knowing that no expert could testify as such. The State's misconduct violated Zink's rights to due process of law, a fair trial by an impartial jury, freedom from cruel and unusual punishment, and fair and reliable sentencing. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const., Art.I,§§10,18(a),21. Zink suffered manifest injustice in guilt phase, because the diminished capacity defense hinged on the jury believing Benedict's testimony that Zink did not have the capacity to deliberate; the cross-examination of Cunningham prejudiced Zink in penalty phase, because Cunningham provided the primary testimony supporting Zink's argument that he would not re-offend in prison, which was a major consideration for the jury in deciding whether Zink would live or die.

Prosecutors have wide latitude in cross-examining witnesses to expose their pecuniary interest, bias, or prejudice. *State v. Anderson*, 79 S.W.3d 420,437

(Mo.banc2002). They may test the qualifications, credibility, skill or knowledge, and the value and accuracy of the experts' opinions. *Middleton v. State*, 103 S.W.3d 726,741 (Mo.banc2003); *State v. Brooks*, 960 S.W.2d 479,493 (Mo.banc1997).

But balanced against the need for exploration of possible bias is the danger that cross-examination will inject prejudice or falsehoods into the jurors' considerations. Cross-examination must not covertly convey to the minds of jurors suspicion and prejudice by a recital as facts of matters not in evidence and outside the case. *State v. Selle*, 367 S.W.2d 522,530 (Mo.1963). Prosecutors must not "interject[] into the minds of the jury any matter which is not proper for their consideration, or which would add to the prejudice which the charge itself has produced in their minds." *State v. Tiedt*, 206 S.W.2d 524,527 (Mo.1947). The prosecutor "may not knowingly use false evidence, including false testimony, to obtain a tainted conviction," even if the testimony relates only to the credibility of a witness. *Napue v. Illinois*, 360 U.S. 264,269-70 (1959).

To balance these competing interests, the trial court has discretion in determining the scope of cross-examination of witnesses. *State v. Hemphill*, 669 S.W.2d 633,635-636 (Mo.App.1984). Here, the prosecutor, Robert Ahsens, engaged in cross-examination that led the jury to decide whether Zink was guilty and whether he should live or die, based on prejudices and falsehoods.

I. Guilt Phase: Dr. Benedict

Ahsens cross-examined Dr. Benedict extensively about his fees as a clinical psychologist (Tr.3131). He elicited that Benedict traveled to court from North Carolina and questioned Benedict as to how long his travel took and how much that cost (Tr.3131-32). Ahsens exceeded the proper bounds of cross-examination, however, in the following exchange:

Q How many clinical psychologists are there in North Carolina, if you know?

A I would only be able to give you a rough approximation.

Q That's fine. Your approximation is fine with me.

A Oh, 5,000.

Q And you're flying halfway across the country, almost literally in order to get here; correct?

A That's correct.

Q And would you expect then that there are literally thousands of other clinical psychologists between here and your office?

A I would think.

Q And, probably hundreds of them here in Missouri?

A Yes.

Q Not to mention additional numbers of forensic psychologists and other persons --

A (Witness nodded head.) Correct.

Q -- who are in your field.

Q Well, can you explain, sir -- and we've talked about there being quite a few clinical psychologists and forensic psychologists in the world; particularly, in the eastern half of the United States, why it was necessary to go all the way to North Carolina to find you?

A I would have to refer you to the legal team. I don't know.

(Tr.3133-35).[8]

The inference the jurors would draw from this cross-examination was that the defense could not find an expert closer than North Carolina and, since this questioning followed discussion of Benedict's fees, that Benedict would slant his testimony if he were paid enough. Without any basis in the record, it accused Zink and counsel of negotiating compensation to obtain a particular opinion. *State v. Creason*, 847 S.W.2d 483,488 (Mo.App.1993)(improper to phrase questions on cross-examination so as to assume as fact matters of which there is no evidence). It is unprofessional to make unwarranted personal accusations, and trial courts may take appropriate action, including publicly admonishing counsel, in order to deter such improper conduct. *Perkins v. Runyan Heating & Cooling Services, Inc.*, 933 S.W.2d 837,842 (Mo.App.1996). Finally, by asking about defense strategies, the cross-examination made an accusation that could never be rebutted unless counsel took the stand.

[8] Counsel did not object, so Zink requests review for plain error. Rule 30.20.

Likening an expert to a "hired gun" is both improper and unprofessional. *Regan v. Vizza*, 382 N.E.2d 409,412 (Ill.App.1978). Although lawyers are allowed to stress the lack of objectivity of an expert witness when there is a basis for it in the record, "that does not mean that it is proper to suggest that the fact that plaintiff obtained an out-of-state expert indicated that the expert should not be believed, or to imply, without foundation, that plaintiff could not find a Missouri expert." *Perkins*, 933 S.W.2d, 842. It is improper to imply that the defendant and his attorney negotiated compensation to obtain a particular opinion. *Id.* Prosecutors should not question the motivation of expert witnesses without support in the record and based only on the prosecutor's own opinion. *State v. Smith*, 770 A.2d 255,264-65,267-69 (N.J.2001)(improper for prosecutor to argue that "hefty fees" paid to expert would influence expert to slant testimony and that expert would be willing to shade testimony so he could get hired again in future).

Ahsens' cross-examination was a deliberate attempt to discredit Benedict so that the jury would not believe his testimony that Zink's mental illness may have impaired or eliminated his capacity to coolly deliberate at the time of the crime (Tr.3112). Benedict's testimony was the primary evidence in support of the diminished capacity defense and was hotly contested by the State's expert witness (Tr.3603-05). In closing, the State attacked the diminished capacity defense, chiding that the defense "had to go clear to Carolina to get [Benedict], and [he] charges 'em $300 an hour to come testify here (Tr.3896). Ahsens' improper

attack, encouraging the jury to disbelieve Benedict based on prejudices and allegations outside the record, caused manifest injustice.

II. Penalty Phase: Dr. Cunningham

Dr. Cunningham testified regarding the risk factors that were present in Zink's life that set the stage for his criminal behavior and the factors that made it unlikely that Zink would re-offend in prison (Tr.4152-53,4170-81,4262). On cross, Ahsens questioned Cunningham regarding his compensation in this case and others like it (Tr.4328-31,4335-36). He elicited that Cunningham did not testify for the State in capital cases (Tr.4337). Ahsens then asked, "Have you ever testified for the defense or anyone else, for that matter, as to why a Defendant needed -- should be executed?" (Tr.4337). Defense counsel objected and asked for a mistrial, arguing that the question was improper, since no one would be allowed to testify that a defendant should be executed (Tr.4337-38). The court overruled the objection (Tr.4338). Ahsens then asked a different question, leaving the posed question unanswered (Tr.4338-39).

Ahsens was a very experienced capital prosecutor (Tr.585); he knew that no expert could testify recommending that a defendant be executed. *State v. Taylor*, 944 S.W.2d 925, 938 (Mo.banc1997)(opinion testimony about the appropriate sentence to be imposed is inadmissible). His question intentionally left the jury believing the false premise that Cunningham lacked all objectivity because he had never testified that a defendant needed to be executed. This intentional misleading

of the jury "is incompatible with 'rudimentary demands of justice." *Giglio v. U.S.*, 405 U.S. 150,153 (1972).

Furthermore, because the court overruled the objection, the jury believed it could properly consider the question's implications. After all, the mere asking of a question can be enough to inject poison and prejudice into a trial, warranting relief, even when the objection is sustained and the jury is instructed to disregard. *Selle*, 367 S.W.2d,528-31; *State v. Dunn*, 577 S.W.2d 649,650 (Mo.banc 1979).

Ahsens' improper cross-examination prejudiced Zink, because Cunningham provided the primary testimony supporting Zink's argument that he would not re-offend in prison, which was a major consideration for the jury in deciding whether Zink would live or die. The State repeatedly argued in closing that death was the proper sentence, because otherwise Zink would rape, sodomize and brutalize people in prison (Tr.4554,4556,4558). Ahsens' improper question–posed knowing that it was without basis and that it would give the jury a false ground to discredit Cunningham and disbelieve his conclusion that Zink would not pose a future danger–undercut a major aspect of the penalty phase defense.

The court's failure to force the State to refrain from its improper and prejudicial cross-examination techniques violated Zink's rights to due process of law, a fair trial by an impartial jury, freedom from cruel and unusual punishment, and fair and reliable sentencing. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const., Art.I,§§10,18(a),21. A reasonable likelihood exists that Ahsens' deliberate introduction of falsehoods affected the jury's verdicts. *Napue, supra*,271. "The

jury's estimate of truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of [a] witness in testifying falsely that a defendant's life or liberty may depend." *State v. McClain*, 498 S.W.2d 798,799 (Mo.banc1973), quoting *Napue*, *supra*; *Giglio, supra*. This Court must reverse Zink's conviction and sentence in full and remand for a new trial.

ARGUMENT VII

The trial court abused its discretion in overruling defense motions *in limine* and objections when the two prosecutors, while questioning witnesses, and several State witnesses, while testifying, invaded the province of the jury in describing the events at issue as "murder" and "kidnapping" or "abduction," and the scene of the car accident as a "crime scene," in violation of Zink's rights to due process, a fair trial, a fair and impartial jury, a fair and reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Secs.10,18(a),21, in that the "determination" by these prosecutors or witnesses that Zink committed murder and kidnapping was improper opinion testimony, usurped the role of the jury on these key issues, and improperly vouched for the strength of the State's case.

Zink conceded at the start of trial that he killed Morton (Tr.897-98). The key issue at trial was whether Zink committed first-degree murder, second-degree murder, or voluntary manslaughter. A lesser, yet very significant issue to both the guilt and penalty phases, was whether Zink kidnapped Morton from the scene of the car accident. Prior to trial, both Zink and defense counsel filed motions *in limine* asking the court to preclude the State and its witnesses from using the conclusory terms "murder" and "crime scene" during the presentation of evidence

(L.F.843-50,960-64).[9] The court overruled both motions (Tr.829-31,863-64). During the State's case, Zink re-raised the issue, and the court granted his request for a continuing objection (Tr.1923-24).

Deputy Mark Smith referred to Morton's abandoned car as a "crime scene" and testified that he believed that there had been "an abduction" (Tr.2059,2062). He testified that he examined the car "not knowing if she had been in the car when she was abducted or outside the car" (Tr.2062). The court overruled defense counsel's objected to the continuous use of the term abduction (Tr.2062). Smith referred to his work at the scene of the accident as "crime scene" processing (Tr.2073) and continued to referred to the location as the crime scene (Tr.2077,2088,2089,2091,2109). Later, Sergeant Kaiser joined in the use of conclusory terms, testifying that he was contacted "after Amanda Morton was kidnapped" (Tr.2511).

Ironically, while the State's other witnesses appeared to try to avoid these conclusory terms, the prosecutors themselves used them flagrantly. After the court overruled defense counsel's objection, Mr. Ahsens asked the very next

[9] The scene of the car accident would only be a "crime scene" if Zink had kidnapped Morton. The "crime" could not be leaving the scene of the accident, since the State's evidence was that Zink approached Morton and asked for her driver's license (Ex.85-p.12), not that he left the scene without exchanging information with her. §577.060.

witness what steps he took "[w]ith regard to the abduction and what was later discovered to be the murder of Amanda Morton" (Tr.2206). Ahsens asked another witness if he was involved in the "homicide investigation after it was determined she had been murdered" (Tr.2269-70). He asked a detective if he investigated "what was determined to be the murder of Amanda Morton" (Tr.2340). When a police lieutenant testified that Zink wanted to speak with Deputy Stewart about the "whole situation," Prosecutor Marcus Reed suggested it was about "[t]he murder of Amanda Morton" (Tr.2625). Reed asked the next witness, Stewart, if he had "occasion to become involved in the investigation of the murder of Amanda Morton" (Tr.2632). He pushed it further, asking if Stewart videotaped "that interview with David Zink with respect to the events involving Amanda Morton's murder" (Tr.2637). Ahsens further referred to the crime as a murder several times during his cross-examination of defense witness Thomas Bennett (Tr.2781,2783).

Trial courts have wide discretion in admitting the testimony of lay witnesses into evidence. *State v. Presberry*, 128 S.W.3d 80,86 (Mo.App.2003). Even if the trial court finds evidence to be logically relevant, it must still exclude it if its tendency to cause prejudice outweighs its probative value. *State v. Taylor*, 663 S.W.2d 235,239 (Mo.banc1984). When erroneously admitted evidence deprives the defendant of a fair trial, his convictions must be reversed and the cause retried. *State v. Clements*, 849 S.W.2d 640,645 (Mo.App.1993).

I. Impermissible Testimony

It is the *jury's* function to draw conclusions from facts given by the witnesses. *State v. Gray*, 731 S.W.2d 275,284 (Mo.App.1987); *State v. Williams*, 858 S.W.2d 796,801 (Mo.App.1993) (determining whether statutory rape, statutory sodomy, incest, and assault occurred was the *exclusive* province of the jury). A witness may not directly comment that he thinks that the defendant is innocent or guilty. *State v. Cason*, 596 S.W.2d 436,440 (Mo.1980). This Court has recognized that, "[i]t is not proper for a witness to testify to a conclusion when it has the effect of answering the ultimate issue the jury is to determine." *State v. Linzia*, 412 S.W.2d 116,120 (Mo.1967); *State v. Link*, 25 S.W.3d 136,143 (Mo.banc2000)(improper for a police officer to testify as to how certain conduct was classified by police department).

In *Presberry*, 128 S.W.3d,86-90, the Eastern District granted the defendant plain error relief, based on the improper testimony of police officers that they identified the defendant as the robber. It held that the police officers were in no better position than the jurors to correctly identify the defendant–any identification by the officers was based solely on a review of the evidence that was equally available to the jurors. *Id.*,89. When "the trier of fact is as capable as the witness to draw conclusions from the facts provided," opinion testimony is usually inadmissible. *Id.*,86. The officers' opinion testimony warranted reversal.

Here, the officers were in no better position than the jurors to determine whether or not Morton's abandoned car was a "crime scene" or whether she was

kidnapped. Their testimony to such was improper opinion testimony that invaded the province of the jury on a major issue for both guilt and penalty phases.

II. Questioning by Prosecutors

The trial court abused its discretion in allowing the prosecutors to repeatedly refer to the events using the conclusory term "murder," because doing so unfairly predisposed the jury on the very issue it was to decide. As the State's representative, the prosecutor must remain impartial, as his role is not to seek a conviction at any cost but to seek justice. *State v. Storey*, 901 S.W.2d 886,901 (Mo.banc1995). The American Bar Association has warned that "expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." ABA Standards for Criminal Justice 3-5.8 (3d ed. 1993).

III. This Court Must Grant Relief

In *State v. Clements*, 789 S.W.2d 101,107 (Mo.App.1990), an expert testified that the murder "was deliberated." Despite overwhelming evidence of guilt, the Southern District concluded that this opinion caused manifest injustice resulting in plain error. *Id.*,109. The appellate court noted, "[n]ot the least merit of our constitutional system is that its safeguards extend to all–the least deserving as well as the most virtuous." *Id.*,111, quoting *Hill v. Texas*, 316 U.S. 400,406 (1942);); *State v. Churchill*, 98 S.W.3d 536,538 (Mo.banc2003)(granting plain error relief).

Here, the State's repeated comments, coming both from witnesses and the two prosecutors, resulted in real prejudice. Whether Zink committed first-degree murder, second-degree murder, or voluntary manslaughter was the key issue in guilt phase. Whether he committed kidnapping was a crucial issue in both phases. The prosecutors intentionally and repeatedly invaded the province of the jury and thereby injected unfair prejudice into the case through the terms "murder," "abduction," "kidnapping," and "crime scene." The jurors should have been allowed to form their own conclusions without the repeated and completely unnecessary intervention of these State witnesses. This Court must reverse the conviction and sentence in full and remand for a new trial. U.S.Const.,Amends.V, VI,VIII,XIV;Mo.Const.,Art.I,Secs.10,18(a),21.

ARGUMENT VIII

The trial court erred and abused its discretion in *sua sponte* discharging Venireman Byron Kronshage for hardship, because that action denied Zink due process, his right to a fair trial by a fair and impartial jury, a reliable sentencing, and his right to be free from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Secs.10, 18(a),21, and violated §§494.430(4) and 494.480.2(1) in that the trial court had overruled the State's motion to strike Kronshage for cause, neither party challenged Kronshage for hardship, and the court made no record of its hardship ruling until 36 hours after the fact. The court's unwarranted removal of Kronshage for hardship, off the record, effectively granted the State an additional peremptory strike and tipped the scales toward death.

Section 494.480.2(1) provides that in all criminal cases where the offense charged is punishable by death, both the State and the defendant shall have the right to exercise nine peremptory challenges. Here, however, the State was in effect allowed to challenge ten venirepersons, by the court's inexplicable removal, off the record, of Venireperson Byron Kronshage, for hardship after overruling the State's challenge for cause.

Kronshage did not present a case of extreme hardship. He did not respond initially when the court asked if anyone had physical disabilities or problems that would make them uncomfortable (Tr.911-14). He remained quiet when other

venirepersons discussed their allergies and asthma (Tr.911-12), or were questioned regarding whether their ailments would cause a problem with listening to the evidence (Tr.913). He did not respond when the panel was asked if anyone had a hardship that would prevent their service in a sequestered trial (Tr.931-33). About five hours later (Tr.903,1073), Kronshage asked to speak to the court about something "I guess I should have said … this morning" (Tr.1097). He advised the court that his wife has congestive heart failure, and he had had heart problems "this last spring" (Tr.1097). He was scheduled for a blood test the following week to see how thin his blood was, so that his doctor could adjust his medication if necessary (Tr.1097-98). Kronshage stated the blood test could be done anywhere (Tr.1098). The court did not ask Kronshage whether he could reschedule the testing, or whether missing the test would interfere with his ability to serve as a juror.

The State challenged Kronshage for cause based on his belief that imposing death would be hard, but the court overruled the motion (Tr.1131-34,1217-18,1229). No further challenges were made for hardship from this panel, and no further venirepersons were struck for hardship on the record.

When the parties prepared to make their peremptory strikes, they realized that Kronshage was not on the list of remaining panel members (Tr.1712-13). Off the record, the court consulted with the deputies to decipher what had happened (Tr.1713).

Defense counsel argued that the apparent removal of Kronshage from the panel gave the State an advantage. After all, the State secured the removal of Kronshage–a venireperson who could impose a death sentence, but with difficulty–without a strike for cause or for hardship, and without using one of its nine peremptory strikes (Tr.1712-17). At the time, the possibility existed that Kronshage merely had been excused early for the day on Monday (the first day of voir dire), with instructions to come back at 1:00 on Wednesday afternoon (Tr.1712-13). The defense suggested that, since Kronshage might still arrive, the parties treat him as if he were still on the panel when exercising their strikes that morning (Tr.1714-15). If he were not struck and did not show up in the afternoon, the court could replace him with one of the three alternates (Tr.1714-15).

Instead, the court ruled that Kronshage had been removed for hardship on Monday evening, before court adjourned (Tr.1719). The court stated that the hardship was Kronshage's upcoming blood test and his wife's health problem (Tr.1719). It admitted that the ruling was not made on the record (Tr.1718-19). The court believed that it placed an "X" through Kronshage's name and told the bailiff to excuse everyone whose name had been so marked (Tr.1721).

Notably, the court wrote on the jury sheet for that panel, "13 for sure" (L.F.1062). Twelve venirepersons remained on that panel; Kronshage would have been the thirteenth (Tr.1249).

A trial court has wide discretion in determining the qualifications of members of the venire. *State v. Tisius*, 92 S.W.3d 751,763 (Mo.banc2002). It

abuses that discretion when its ruling is "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Hancock v. Shook*, 100 S.W.3d 786,795 (Mo.banc2003).

The trial court abused its discretion in removing Kronshage for hardship. Under Section 494.430(4), a court is authorized to excuse from jury service "[a]ny person upon whom service as a juror would in the judgment of the court impose an extreme hardship." Nothing in the questioning of Kronshage demonstrated an extreme hardship. Kronshage mentioned that his wife has congestive heart failure, but never stated that his absence from home during trial would affect her condition or the care she received. And, although he stated that he had a blood test coming up, it seemed to be a fairly routine matter. When the court asked if the blood test could be done anywhere, Kronshage responded, "Yeah. Well, it's just how thin your blood is" (Tr.1098). The court failed to question Kronshage sufficiently, as he had done with other venirepersons, to determine the true extent of any hardship. As a result, no extreme hardship was shown as is required for removal of a juror under §494.430(4).

Zink suffered a real probability of injury from the court's action, because it essentially handed the State a tenth peremptory challenge. The State fought to remove Kronshage for cause given his belief that imposing a death sentence would be hard (Tr.1229). The court overruled that challenge for cause, leaving Kronshage on the panel (Tr.1229). The court's mistaken removal of Kronshage, a

juror whom the State surely would have moved to strike peremptorily, gave the State an edge by essentially allowing them an additional peremptory strike. The State otherwise used all nine of its peremptory challenges; the court's inexplicable removal of Kronshage gave the State a tenth challenge (L.F.1065).

Although the court stated after the fact that it removed Kronshage for hardship, that account is refuted by the record. First, the court failed to make a record for the removal on the record at the time, as it had with every other venireperson who was removed for hardship (Tr.969,982-90). Second, the court stated that it instructed a deputy to excuse those people whose name was marked in green on the list of panel members (Tr.1721). But the court's instruction to his deputy took place before Kronshage spoke with the court about his situation, so Kronshage could not have been on the deputy's list (Tr.1002,1097). Third, if the court had intended to remove Kronshage for hardship, it would have stated so when the State challenged him for cause; logically, the court at that time would have advised the State that Kronshage would be removed anyway. Finally, the notation the court itself made on the jury sheet for that panel indicates that the court believed Kronshage was still on the panel at the end of the day–it made the notation "13 for sure" on the jury sheet for that day of voir dire (L.F.1062). There is no other explanation for this notation but that Kronshage was the 13th person who was "sure" to be on the panel (L.F.1062;Tr.1249).

Because the court intended that Kronshage remain on the panel, defense counsel's suggested resolution of the problem was both fair and warranted. It is

clear that the State wanted Kronshage removed from the panel based on his answers during death qualification (Tr.1131-34,1217-18,1229). Defense counsel proposed that the parties treat Kronshage as if he were still on the panel; that way, the State would not get an a tenth peremptory strike (Tr.1714-17). The issue is included in the motion for new trial (L.F.1156-57).

Allowing the removal of Kronshage–without a showing of extreme hardship, a valid challenge for cause, or a peremptory strike–denied Zink due process, his right to a fair trial by a fair and impartial jury, a reliable sentencing, and his right to be free from cruel and unusual punishment, U.S.Const.,Amends.V, VI,VIII,XIV;Mo.Const.,Art.I,Secs.10,18(a),21, and violated §§494.430(4) and 494.480.2(1). This Court must remand for a new trial.

ARGUMENT IX

The trial court abused its discretion when it sustained the State's objections and refused to admit (1) excerpts from Officer Clark's discovery and trial depositions and (2) Defendant's Exhibit 1094, an audio tape of a radio conversation between the Green County Sheriff's dispatcher and Sergeant Gibson on July 12, 2001, because the exclusion of this relevant evidence violated Zink's right to confront and cross-examine the witnesses against him and present a defense, a fair trial, due process, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII, XIV;Mo. Const.,Art.I,§§10,14,18(a),21. The evidence was relevant to Zink's theory that the police agencies had engaged in a cover-up to protect their public image and destroyed evidence that would have supported his defense. Zink was prejudiced, because he had no other means to elicit these facts and as a result, he was not able to present his full defense to the jury.

In a criminal prosecution, the defendant must have a fair opportunity to present his defense. "An essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence" that is essential to the defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The right of confrontation and cross-examination is "an essential and fundamental requirement for the kind of

fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

Zink was denied the ability to present his defense and to confront and cross-examine the witnesses against him, and to be free from cruel and unusual punishment by the court's exclusion of Exhibit 1094 and its refusal to allow the defense to read into evidence certain portions of Officer Clark's first deposition. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,14,18(a),21.

I. The Excluded Materials

A significant portion of Zink's opening statement related to actions taken by the police to taint the evidence in order to make the case against him seem stronger (Tr.1815-19). He alleged the police manipulated the evidence to make it appear there was a kidnapping, when there really was not.

A. The Dispatch Tape

To demonstrate the cover-up, Zink offered into evidence Exhibit 1094, a tape recorded conversation between Sergeant Gibson and Dispatcher Cook, of the Greene County Sheriff's Department (Tr.3335-37,3354). They discussed things that the responding officers had failed to do, and Gibson questioned whether their department was involved (Ex.1094-p.3-4). Gibson suggested that Cook's supervisor be advised of the situation, because he wondered "how big a shit storm this is going to stir up. Ah, I think the family is alleging or implying that the police didn't do all that they could or should have done" (Ex.1094-p.5). He and Cook commented that Greene County was probably in the clear, because it was a

Highway Patrol and Strafford "kind of thing" (Ex.1094-p.5-6). They then discussed the dispatch tape from when Morton called 911:

> Sgt. Gibson: You know, we're–I don't know. You might want to kind of flag the tape for that, for that whole spot period of time, because it may yield some answers that somebody in administration may be asking you at–at some point that you don't have the answer to right there in front of you. And I–I don't know. If you're not real certain, I wouldn't go ahead and try to make a recording, because I had somebody try that once and they inadvertently erased it, which we don't want –
>
> Dispatcher Cook: (Laughter.)
>
> Sgt. Gibson: --we don't want to do that here.

(Ex.1094-p.5-6). The court sustained the state's objection, agreeing that the material on the tape was hearsay and did not suggest that Greene County may have altered any tapes (Tr.3337-38,3354-55).

B. Portions of Clark's Deposition

After Clark's "trial" deposition was played for the jury, Zink asked to read into evidence portions of Clark's discovery deposition (Tr.3381). He explained that Clark and another officer had talked about a conflict between the Strafford City P.D. and Greene County (Tr.3382). Zink was trying to show, as with the attempted admission of Exhibit 1094, that Greene County had made errors in the investigation and was destroying evidence to try to maintain a good public image

(Tr.3382-83). The court sustained the State's relevance objection (Tr.3384,3389-90).

II. The Court Abused its Discretion in Hiding these Facts from the Jury[10]

The trial court has discretion in determining the scope of cross-examination of witnesses and the relevance of evidence, but its decision should be overturned when it has abused that discretion. *State v. Brown*, 718 S.W.2d 493, 493-94 (Mo.banc 1986); *State v. Hemphill*, 669 S.W.2d 633,635-636 (Mo.App.1984). The court abused its discretion here, because the State was wrong in arguing that the evidence was irrelevant and inadmissible hearsay.

A. The evidence was relevant to Zink's defense:

Evidence is relevant if it establishes "by any showing, however slight," that it is more or less likely that the defendant committed the crime in question. *United States v. Mora*, 81 F.3d 781, 783 (8th Cir. 1996). The test is whether the offered evidence tends to prove or disprove a fact in issue or corroborates other relevant evidence. *State v. Rousan*, 961 S.W.2d 831, 848 (Mo.banc 1998). Before evidence can be excluded as irrelevant, it must appear so beyond a doubt. *State v. O'Neil*, 718 S.W.2d 498, 503 (Mo.banc 1986); *State v. Girardier*, 801 S.W.2d 793, 796 (Mo. App. 1991).

[10] The issues are included in the motion for new trial and hence are preserved for review (L.F.1164-67).

Both the dispatch tape and the excluded portions of Clark's deposition relate to Zink's defense that the law enforcement agencies had destroyed or manipulated evidence to hide the fact that Morton went with him voluntarily (Tr. 3343-44). The Gibson/Cook tape was relevant to the integrity of the investigation, because it revealed that law enforcement officers were laughing that some of the taped materials from the investigation might get erased (Tr.3341-43,3353). The fact that they joked about evidence being destroyed revealed at best a cavalier attitude toward the preservation of evidence; at worst, an intent to destroy relevant evidence. It also gave more credence to Zink's allegation that a law enforcement officer must have destroyed a voice mail message that had been recorded but now was missing (Tr.3342,3344, 3573).

The fact that there was a conflict between the agencies solidified Zink's theory that the agencies had more of a motivation to shift blame away from themselves and try to maintain a good public image. Because of the conflict, Greene County would be anxious to shift the blame elsewhere (L.F.864-65). The Strafford officer, Clark, had concluded that Morton had been drunk and walked off from the car voluntarily; to distance themselves from Clark and make themselves look better, the Greene County officers were manipulating the evidence to make the case appear to be a kidnapping (L.F. 864).

B. The deposition segments did not constitute hearsay.

Testimony that is not being offered to prove the truth of the matter asserted is not subject to objection as hearsay. *State v. Buckner*, 810 S.W.2d 354, 358 (Mo.App.1991). A "verbal act" includes "any statement of the declarant's existing state of mind that is so closely connected with an act in litigation as to give character to that act." *Id.* Here, the testimony was not being offered to prove the truth of the matter asserted, i.e., how the conflict arose (L.F.865-66). Instead, it was offered to show the officers' state of mind, that they believed the two departments had a conflict (Tr.3383;L.F.864-66). If the officers believed they were in conflict, they would have been more likely to take the actions suggested by Zink. The evidence was not hearsay.

III. Reversal is Warranted

The exclusion of admissible evidence creates a presumption of prejudice, rebuttable by facts and circumstances of the particular case. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo.banc.2003). The State cannot rebut the presumption of prejudice here. The State repeatedly used the alleged kidnapping as evidence that Zink committed first-degree murder. The jurors were entitled to know that the police agencies had a motivation to destroy or exaggerate the evidence to strengthen the State's case that a kidnapping actually did happen. The conviction and resulting death sentence, obtained through half-truths and hidden facts, cannot stand.

ARGUMENT X

The trial court erred in overruling Zink's objections to Instructions 19 and 21 and refusing Instructions 19A, 21A, and 21B; it plainly erred in instructing his jury to consider "all" evidence presented at both stages of trial instead of, per §565.030.4(3), only aggravating evidence "found." This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const., Amends.V,VI,VIII,XIV; §565.030.4(3). Instructions 19 and 21 prejudiced Zink by violating the requirement that Step 3 be found "against" a defendant thus eliminating the State's burden at step 3; diminishing its overall burden of establishing death-eligibility; improperly shifting the burden to Zink to prove his non death-eligibility; and imposing prerequisites for a life sentence, non-existent in §565.030.4(3), that "*each* juror," and the jurors "*unanimously*" find that mitigators outweigh aggravators. These errors must have affected the verdict, warranting a new penalty phase.

I. Preservation

Zink preserved the bulk of this issue for review by filing a pretrial motion, renewing the motion at the instructions conference, offering proposed instructions, and including the issue in the motion for new trial (L.F.1098-1103,1205-08;Tr.4505-07). However, Zink did not object that although §565.030.4(3) expressly limits the jury to weighing *only* that aggravating evidence "found by the trier" against the mitigating evidence, Instructions 19 and 21 incorrectly permitted

the jurors to "consider all of the evidence presented in both the guilt and the punishment stages of trial." Under the facts of this case, this was a manifest injustice; Zink seeks plain error review. Rule 30.20.

II. Standard of Review

An ambiguous instruction that creates "a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence" violates the Eighth Amendment. *Boyde v. California*, 494 U.S. 370,380 (1990). As such, the State must prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Chapman v. California,* 386 U.S.18,24 (1967). Instructional error is not harmless when it "could have affected the jury's decision to impose the death penalty." *State v. Mayes*, 63 S.W.3d 615,636 (Mo.banc2001). It constitutes plain error "when it is clear the trial court so misdirected or failed to instruct the jury so that it is apparent the error affected the verdict." *State v. Beeler*, 11 S.W.3d 294,300 (Mo.banc2000).

III. Discussion

Step 3 provides that the jury must assess a sentence of life without parole (LWOP) if it "concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment *found by the trier*…." §565.030.4(3)(Emphasis added).

In Missouri, a defendant convicted of first degree murder may not be sentenced to death if a jury does not make the factual findings specified by §565.030.4 *against the defendant*, including "unanimously find[ing] that mitigating circumstances weigh less than aggravating circumstances." *State v. Whitfield*, 837 S.W.2d 503,515 (Mo.banc1992) (*Whitfield I*). Steps 1-3 are "prerequisites to the trier of fact's determination that a defendant is death-eligible." *State v. Whitfield*, 107 S.W.3d 253, 261 (Mo.banc2003)(*Whitfield II).*

> *The Supreme Court held that not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed must be found by the jury*. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it must be found by a jury beyond a reasonable doubt.

Id.,257; see also *United States v. Booker*, 125 S.Ct. 738,749 (2005); *Blakely v. Washington*, 124 S.Ct. 2531,2536 (2004); *Ring v. Arizona*, 536 U.S. 584,609 (2002); *Apprendi v. New Jersey*, 530 U.S. 466,469,484 (2000).

Whitfield II emphasized that the four steps set forth by the statute must be determined *against* the defendant to impose a death sentence and the first three steps found *against* the defendant to establish death-eligibility. 107 S.W.3d, 258,264,269,271. Non-unanimity at step 3 would require a life verdict: "Unlike for step 2, however, the jury was *not* told in regard to step 3 that it had to return a verdict of life imprisonment if it could not unanimously agree whether the

mitigating facts outweighed the aggravating facts." *Id.*,264. This comports with the requirement that all death-eligibility steps–steps 1, 2, and 3–be found *against* defendant. *Id.*,271; *see also Whitfield I*, 837 S.W.2d,515.

But Instruction 19, MAI-CR3d 313.44, did not place this burden on the State or require Zink's jury to make the Step 3 findings against him. It instead required Zink to convince "each juror" that mitigators outweighed aggravators to obtain a life sentence and preclude a death sentence:

> *If **each** juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life...* by the Department of Corrections without eligibility for probation or parole.

(L.F.1113;A13; emphasis added).

Instruction 21, MAI-CR3d 313.48, told the jurors to return a life verdict if they "unanimously" found the mitigators outweighed the aggravators:

> *If you unanimously decide that the facts or circumstances in mitigation or punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of [name of victim in this count] by imprisonment for life...,* and your foreperson will sign the verdict form so fixing the punishment.

(L.F.1115-16;A14).

Although Instruction 21 did not *explicitly* tell the jurors what to do if they

did not unanimously find the mitigators outweighed the aggravators, it *implicitly* indicated they should not impose a life sentence but should continue deliberating on punishment:

> If you do unanimously find the matters described in Instructions No. 17 and 18, *and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment*, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment.

(L.F.1115-16;A15).

Instructions 19 and 21 failed to require step 3 to be found against Zink to establish death-eligibility. These instructions eliminated the State's burden of proving step 3 against Zink and substantially diminished the State's burden of establishing death-eligibility. They imposed on Zink the unauthorized burden of establishing eligibility for a life sentence, and precluding a death sentence, by requiring him to prove to "each" juror, "unanimously," that mitigators outweighed aggravators.

Instructions 19 and 21 failed to specify which party had the burden of proof on step 3 or the nature of the burden. The jury was thus free to impose any burden it wished upon Zink or to hold the state to a burden less than beyond a reasonable doubt.

This Court has recognized that "leaving the jury with no guidance" may be harmful because it allows a jury to draw unfair inferences. *State Storey*, 986 S.W.2d 462,465 (Mo.banc1999). Instructions 19 and 21 nowhere told the jury the State had the burden of proving death-eligibility or of proving mitigation insufficient to outweigh aggravation. At best, Instructions 19 and 21 were ambiguous in failing to specify that the State had the burden of proof on step 3. These instructions were contrary to §565.030.4(3) and Chapter 565 and violated Zink's rights to due process of law, jury trial, and reliable sentencing.

Because the instructions required each juror to find mitigation outweighed aggravation, the mitigating evidence had no effect unless the jurors "unanimously" found the mitigation outweighed aggravation. The instructions thus created "a reasonable likelihood that the jury has applied the instruction[s] in a way that prevents the consideration of constitutionally relevant evidence"–*i.e.*, Zink's mitigating evidence–and violated the Eighth Amendment. *Boyde v. California*, *supra*. Assigning to Zink the burden of proving to "each" juror, "unanimously," that mitigation outweighed aggravation was unauthorized and unconstitutionally shifted the burden of proof. §565.030.4(3); U.S.Const.,Amends.V,VI,VIII,XIV.

The trial court could, and should, have modified the instructions as Zink

requested.[11] "MAI-CR and its Notes on Use are 'not binding' to the extent they conflict with the substantive law." *State v. Carson*, 941S.W.2d 518,520 (Mo.banc1997). "If an instruction following MAI-CR3d conflicts with the substantive law, any court should decline to follow MAI-CR3d or its Notes on Use." *Id*.

Section 565.030.4(3) requires a sentence of life imprisonment if "there is evidence in mitigation of punishment ... which is sufficient to outweigh the evidence in aggravation of punishment *found by the trier*." But MAI-CR3d 313.44 contains no limitation on the jury's use of aggravating evidence; Zink's jurors were never instructed that in weighing aggravators and mitigators, the only aggravating evidence they could use was "evidence in aggravation of punishment" *that they had found*. Because Zink's jury did not find the statutory aggravating circumstance most emphasized by the state, failing to limit their use of aggravating evidence to that which was "found" was significant. The jurors likely believed that they could still consider the evidence regarding the alleged sodomy, even though they had not unanimously found that aggravator.

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." *Carter v. Kentucky*,

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[11] The proposed instructions were inadvertently omitted from the Legal File, but will be included in a Supplemental legal File and included in the Appendix to the Reply Brief.

405U.S.288,302 (1981). Zink's jurors were not "accurately instructed in the law" to restrict consideration of aggravating evidence solely to that "found." Absent an instruction directing the jurors, as required by §565.030.4(3) to consider only the evidence in aggravation they had "found," it is unrealistic to think that the jurors would not have considered at step 3 all the aggravating evidence presented– including the aggravating facts and circumstances that they rejected. This is particularly true since Instruction 19 told them to consider "all of the evidence presented in both the guilt and the punishment stages of trial" (L.F.1113).

Instructions 19 and 21, allowing the jury to use evidence it did not "find" to sentence Zink to death, substantially undermined the reliability of his death sentence and violated his rights to due process law, jury trial, and reliable sentencing. U.S.Const.,Amends.V,VI,VIII,XIV. At least one state has held that failing to instruct the jury that it may not consider aggravating evidence it has not found violates the defendant's rights to fair trial, the heightened need for reliability in a capital case, and due process of law. *State v. Fortin*, 843A.2d 974,1021-24 (N.J. 2004).

Instructions 19 and 21 conflicted with substantive law; it was error to submit them to the jury. They failed to assign the burden of proof to the state and did not advise the jury that the state had the burden of proving death-eligibility beyond a reasonable doubt. For that reason, the instructional errors here should be considered structural and no showing of prejudice required. *Sullivan v. Louisiana*, 508 U.S.275,281 (1993). But for the improper and incorrect directions given to

the jury in Instructions 19 and 21, the outcome could have been quite different. For the foregoing reasons, the Court must reverse Zink's death sentence and remand for a new penalty phase trial.

ARGUMENT XI

The trial court plainly erred in accepting the jury's recommendation of death and sentencing Zink to death, or in the alternative, in failing to conduct an inquiry to determine whether the jury had made the requisite finding that limits the jury's discretion and is constitutionally mandated. The court's actions denied Zink the right to a fair and reliable sentencing trial, due process, jury determination of the elements beyond a reasonable doubt, and freedom from cruel and unusual punishment, U.S.Const. Amends.V,VI,VIII, XIV,Mo.Const.,Art. I,§§10,18(a),19,21, and §565.030. Although the jurors purported to find the "depravity of mind" aggravator, they failed to make the proper factual finding to allow it to do so. Zink was prejudiced, because the jurors had questioned the meaning of depravity and without properly finding the limiting language of the aggravating circumstance, should not have considered this aggravator in determining whether Zink should live or die.

The jury must have a principled means to distinguish those cases in which the death penalty is appropriate from those in which it is not. *Maynard v. Cartwright*, 486 U.S. 356,365 (1988); *Godfrey v. Georgia*, 446 U.S. 420,428-29 (1980). If the jury is not adequately informed as to what it must find to impose the death penalty, it has too much discretion. *Furman v. Georgia*, 408 U.S. 238,310 (1972). The discretion of the jury in giving the death penalty must be limited and

channeled to sufficiently lessen the risk of wholly arbitrary and capricious action. *Gregg v. Georgia*, 428 U.S. 153,189 (1976).

In *State v. Preston*, 673 S.W.2d 1,10-11 (Mo.banc1984), this Court set forth a limiting construction of the "depravity of mind" aggravator to save it under *Maynard* from failing constitutional review. In determining whether the defendant acted with "depravity of mind" the following factors should be considered:

> the mental state of the defendant, infliction of physical or psychological torture upon the victim as when the victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantial motive; absence of defendant's remorse and the nature of the crime.

Id.,11.

In *State v. Griffin*, 756 S.W.2d 475,489-90 (Mo.banc1988), this Court decided that further limitation was necessary to save the depravity of mind aggravator. The Court held that, to find the "brutality of defendant's conduct" and the "nature of the crime" factors, the jury must find that the murder involved serious physical abuse, such as when "the murder victim or other victims at the murder scene were beaten or … numerous wounds were inflicted upon a victim." *Id*. The limiting construction of the depravity of mind aggravator is essential to provide a principled means to distinguish cases in which the death penalty is imposed from those in which it is not. *Id*.

The State urged the jury to find four statutory aggravating circumstances, including the "depravity of mind" aggravator (L.F.1110-11). The jury was instructed to consider:

> Whether the murder of Amanda L. Morton involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman. You can make a determination of depravity of mind only if you find: that the defendant committed repeated and excessive acts of physical abuse upon Amanda L. Morton and the killing was therefore unreasonably brutal.

(L.F.1111;MAI-Cr3d 313.40). Instruction 21 told the jurors, that if they assessed a death verdict, they must complete the verdict form and write on it the statutory aggravating circumstances they found beyond a reasonable doubt (L.F.1115). During closing, the State reminded the jury that it must write out the entire aggravating circumstance for each, word-for-word, "so there can be no doubt as to what you found" (Tr.4517-18).

During deliberations, the jury requested a dictionary for the meaning of the word "depravity" (Tr.4561-62). The court refused, telling the jurors they must be guided by the instructions (Tr.4562).

The verdict form submitted by the jury stated merely: "The murder of Amanda L. Morton involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman" (L.F.1118). The verdict form did <u>not</u> include the required limiting language that

"the defendant committed repeated and excessive acts of physical abuse upon Amanda L. Morton and the killing was therefore unreasonably brutal." The court asked each juror if he or she heard the verdict and whether that was his or her verdict; each answered affirmatively; and the court accepted the verdict (Tr.4564).[12]

The trial court has a duty to examine the verdict for any defects, ambiguities, and inconsistencies, and its failure to do so can result in reversible error. *State v. Thompson*, 85 S.W.3d 635,639 (Mo.banc2002). This Court has recognized that "[i]n any case upon the appearance of any uncertainty or contingency in a jury's verdict, it is the duty of the trial judge to resolve that doubt, for '[t]here is no verdict as long as there is any uncertainty or contingency to the finality of the jury's determination.'" *Id.* When a verdict is seemingly inconsistent or ambiguous, the jury should be sent back for further deliberations to resolve the ambiguity. *State v. Peters*, 855 S.W.2d 345,347-49 (Mo.banc1993).

This Court must grant Zink a new penalty trial, because without the limiting language, the "depravity of mind" aggravator is constitutionally invalid. Too great a risk exists that although the jury did not properly find the "depravity of mind" aggravator unanimously beyond a reasonable doubt, the jurors

[12] Zink acknowledges that counsel did not object; hence, the issue was not preserved for review. He requests review under the plain error standard. Rule 30.20.

considered it in determining whether Zink should live or die. Neither the trial court nor this Court can presume that the jury found the requisite limiting clause, because "[a] presumption is simply inadequate to meet this high standard, and no affirmative proof sufficient to meet this standard has been offered by the State, as the record is silent in regard to the jury's findings." *State v. Whitfield*, 107 S.W.3d 253,263 (Mo.banc2003). This is especially true given the jury's uncertainty as to the definition of depravity (Tr.4561-62).

Because a death sentence is qualitatively different from any other sentence, there must be a corresponding difference in the need for reliability in the sentencing determination. *Lockett v. Ohio*, 438 U.S. 586,604 (1978); *Woodson v. North Carolina*, 428 U.S. 280,305 (1976). As this Court has previously penned, the "cloud of doubt and uncertainty is simply too great to permit the court's sentences of death in this case to stand." *Thompson*, 85 S.W.3d,642. The court's actions denied Zink the right to a fair and reliable sentencing trial, due process, jury determination of the elements beyond a reasonable doubt, and freedom from cruel and unusual punishment. U.S.Const.Amends.V,VI,VIII,XIV,Mo.Const., Art.I,§§10,18(a),19,21;§565.030. This Court must reverse for a new penalty trial.

ARGUMENT XII

The trial court lacked jurisdiction and authority to sentence Zink to death because the State never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder. The State failed to plead in the indictment those facts, required by §565.030.4(1), (2), and (3), that the jury must find beyond a reasonable doubt before a defendant may be sentenced to death. Furthermore, Zink was charged with the lesser offense of *unaggravated* first degree murder, not punishable by death and, as a result, his death sentence violates his rights to jury trial, due process, freedom from cruel and unusual punishment, and reliable sentencing. U.S.Const.,Amends. V,VI,VIII,XIV;Mo.Const.,Art.I,§§ 10,17, 18(a),21.

In *Apprendi v. New Jersey*, 530 U.S. 466,469,484 (2000), the Court recognized that due process and other jury protections extend to determinations regarding the length of sentence. The Fifth, Sixth, and Fourteenth Amendments demand that any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Id.*, 476,490; *Ring v. Arizona*, 536 U.S. 584,609 (2002); *United States v. Booker*, 125 S.Ct. 738,775 (2005). The Court deemed unconstitutional any statute that "remove[s] from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S.,476,490. The key inquiry is whether

"the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Id.*,494.

Missouri has expressly provided by statute that life imprisonment without the possibility of probation or parole (LWOP) is the maximum sentence that may be imposed for first-degree murder unless the jury finds that the State has proven certain facts beyond a reasonable doubt. §565.030.4(1),(2),(3); *State v. Whitfield*, 107 S.W.3d 253,258-61 (Mo.banc2003). To make the defendant "death-eligible," the state (1) must plead and prove at least one statutory aggravating circumstance; (2) must prove that evidence in aggravation warrants imposition of a death sentence; and (3) must prove that the evidence in aggravation outweighs the evidence in mitigation. § 565.030.4(1),(2),(3); *Whitfield*, 107 S.W.3d at 258-61.

Thus, while the "form" of Missouri's statutory scheme, and §565.020 appear to create only one crime–first-degree murder punishable by either LWOP or death–the "effect" of the statute is quite different. In reality, there exist in Missouri both the offense of "unaggravated" first-degree murder, for which the only authorized punishment is LWOP; and the offense of "aggravated" first-degree murder, for which the authorized punishments include both LWOP and death. Although §565.020.2 provides that the punishment for first-degree murder shall be either death or life without eligibility for probation or parole (LWOP), "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 124 S.Ct. 2531,2537 (2004).

Under *Ring*, *Whitfield*, and their progeny, these additional facts are, in function and effect, elements of the greater offense of aggravated first-degree murder. For that reason, to pass constitutional muster, these facts must be pled in the charging document. *U.S. v. Allen*, 406 F.3d 940 (8th Cir. 2005); *State v. Fortin*, 843 A.2d 974 (N.J.2004). The State failed to plead in the information (L.F.58-59) those facts that the jury must find beyond a reasonable doubt before Zink could be sentenced to death and thus never charged him with the only offense punishable by death in Missouri–*aggravated* first degree murder. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979); *Presnell v. Georgia*, 439 U.S. 14 (1978). Counsel fully preserved this issue (Tr.4510-11;L.F.738-60,1208-10). This Court must therefore vacate his death sentence and impose a sentence of life without parole.

CONCLUSION

Based on Arguments I-IX, Zink respectfully requests that the Court reverse his conviction and sentence in full and remand for a new trial. Based on Arguments X and XI, Zink requests that the court vacate his death sentence and remand for a new penalty phase. Based on Argument XII, Zink requests that the Court vacate the death sentence and impose a sentence of life without parole.

Respectfully submitted,

_____
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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were mailed, postage prepaid, to: The Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65102; on the 15th day of July, 2005.

_____
Rosemary E. Percival

Certificate of Compliance

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

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 30,788 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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