IN THE
MISSOURI SUPREME COURT

JOHN E. WINFIELD,	)	
	)	
Appellant,	)	
	)	
	)	
vs.	)	**No. SC84244**
	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Appeal to the MISSOURI SUPREME COURT
From the Circuit Court of ST. LOUIS COUNTY
Twenty-First Judicial Circuit, The Honorable Maura B. McShane, JUDGE

APPELLANT'S OPENING BRIEF

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[1] For convenience, this Index contains hyperlinks to various sections of this brief.

AUTHORITIES[2]

***CASES*:**

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[2] For this Court's convenience, undersigned counsel has prepared this brief with hyperlinks to each case, statute, rule and instruction cited herein. By clicking on the brief's hyperlinks, the reader will open an MS Word 2002 document containing that authority. If the reader is also connected to Westlaw, the reader can access authorities cited within the MS Word document. Click here to sign on to Westlaw. Undersigned counsel has filed 8 such CDs with this Court (1 for the file and 1 for each member of the Court). He has provided the State with a CD as well.

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

RULES:

MAI's:

MISCELLANEOUS:

Jurisdiction

Appellant, John E. Winfield, was convicted in St. Louis County Circuit Court of two counts of first-degree murder, two counts of first-degree assault and four counts of armed criminal action. Upon the jury's recommendation, the Honorable Maura B. McShane, Judge of Division 2, sentenced John to death for each count of first-degree murder, as well as terms of imprisonment totaling life plus ninety years. This Court affirmed his convictions and sentences in *State v. Winfield*, 5 S.W.3d 505 (Mo.banc 1999). John timely filed a motion for post-conviction relief under Rule 29.15, which Judge McShane denied after a partial evidentiary hearing. Since John seeks relief from a death sentence, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo.Const. (as amended 1982); Standing Order, June 16, 1988.

Facts

While in jail on charges of two counts of first-degree murder, two counts of first-degree assault and four counts of armed criminal action, John heard that Scott Rosenblum was one of the best defense attorneys in St. Louis (TrialL.F.8-11,30-34; JohnEdmond Depo30).[3] John decided he wanted Rosenblum instead of his public defender, and he convinced his father, John Edmond, to try to retain Rosenblum. *Id.;* (TrialL.F.2,48). Edmond contacted Rosenblum and asked him why John needed a private attorney rather than his public defender (JohnEdmond Depo31). Rosenblum told Edmond about his background, including a favorable result in a death penalty trial. *Id*. Rosenblum convinced Edmond that his skill made him the "number one or two defense attorneys for capital murder trials…in the city." (JohnEdmond Depo32).

Edmond could not afford Rosenblum's fee of up to $50,000 plus expenses (JohnEdmond Depo33-34; H.Tr.257). Rosenblum countered, asking what Edmond could afford (JohnEdmond Depo33-34). Edmond said he could write a check for $20,000, but anything above that would have to come from John's mother, Evelyn Winfield (John Edmond Depo33; H.Tr.259). They continued fee discussions throughout November, December and January (H.Tr.258). Then, Brad Kessler joined the firm and suggested that they could take John's case for a $30,000 fee plus expenses because he has a

[3] The record on appeal contains: the post-conviction legal file (PcrL.F.); the evidentiary hearing transcript (H.Tr.); various depositions (WitnessName Depo); the direct appeal legal file (TrialL.F.); the trial transcript (TrialTr.); and various exhibits (PcrEx.).

different approach (H.Tr.258).[4] Rosenblum went to John's family with this offer, and they agreed to it (H.Tr.258). Edmond paid Rosenblum and Kessler $20,000, but Evelyn only paid another $4,000 (H.Tr.258). The firm entered its appearance in April 1997 (TrialL.F.63). Initially, Rosenblum and Kessler both entered their appearance, but Rosenblum withdrew a few days later (TrialL.F.2-3,63,84-85).

Rosenblum and Kessler "have always had an interesting relationship," filled with "ups and downs." (H.Tr.273). Rosenblum described it as "utilitarian" or "functional," but the pair soon learned that they could not function as partners (H.Tr.101,273). Less than a year after merging, their relationship fell apart (H.Tr.101). In March 1998, with John's trial just a few months away, Kessler left the firm (H.Tr.101-102). Later, John learned that Rosenblum apparently "locked [Kessler] out of the office." (PcrL.F.242; JohnWinfield Depo95-96).[5]

On February 23, 1998, Kessler sent Rosenblum a memorandum, stating,

> This will confirm our conversation of Sunday, February 22, 1998, in which you agreed to undertake the second stage responsibilities of [John Winfield's

[4] Rosenblum's testimony about these fee discussions was part of an offer of proof affecting Rosenblum's credibility, but the court rejected the proffer (H.Tr.257-260). Edmond testified about the negotiations without objection (JohnEdmond Depo32-35).

[5] John filed a *pro se* motion and attached a "Memo to Case File" in which Kessler described having been locked out of the firm's offices by Rosenblum, but the motion court ordered that memo be removed from the court's file (PcrL.F.242,268).

case], should they become necessary. I will give you any updated family information for purposes of the second stage as soon as I receive it from John.

I will assume that your entry of appearance will somehow find its way back into the court file, and that Sheri or another of your staff will have responsibility for coordinating the contacting, interviewing and subpoena serving of the various second stage witnesses.

(H.Tr.103; PcrEx.28). Rosenblum re-entered his appearance about ten days after getting this memo (TrialL.F.4,84-85).

When Kessler left the firm, he took John's entire file with him, advising, "if [the firm] needed anything from the file, I would make them copies…." (H.Tr.127). Kessler never heard from Rosenblum, but there was nothing in the file because nothing had yet been done to investigate the second stage anyway (H.Tr.127).

Kessler admitted that his arrogance and petty aggravation with Rosenblum prevented him from acting in John's best interest at trial (H.Tr.122,169). Indeed, the rift that ended their partnership infected the relationship between Kessler and Rosenblum throughout John's entire trial (H.Tr.169).

The Guilt Phase of John's Trial

In his opening statement, Kessler told the jurors that John committed the murders but that he had not done so after cool reflection (TrialTr.583-586). He also prepared them for John's memory gaps (TrialTr.583). Kessler then called John to testify in the guilt phase of trial and conducted a direct examination that "often seemed more like a

cross-examination," and John alleged that Kessler thereby rendered ineffective assistance (PcrL.F.35-36,100-109). The motion court overruled this claim (PcrL.F.285).

John testified that he did not intend to shoot anyone and that he certainly never planned to do so (TrialTr.894-895). He added, "I'm not saying that I didn't do it. I'm not saying that." (TrialTr.896). Although this served to prove Kessler's defense that John did it but did not deliberate, Kessler began to attack John's testimony (PcrL.F. 101,106): "John, you shot her in the face, okay. That's what happened" (TrialTr.895); "But you shot her. You shot her point-blank range in the face" (TrialTr.895); "Well, you're the only person who did it. You're the only person that had a gun" (TrialTr.896); "But you shot them. You didn't accidentally shoot them. Your finger moved, it pulled the trigger six times (pause)." (TrialTr.898).

The damage from Kessler's interrogation of John could be seen in the jurors' negative body language (PcrL.F.101; H.Tr.271). "[T]hey were not embracing [John] at all." (H.Tr.271). Kessler exacerbated the problem, arguing that John's testimony was awful (TrialTr.1014) and suggesting that John may remember more than he told the jurors (TrialTr.999-1001,1007).

Before trial, Kessler moved to suppress John's statements to police as involuntary, but he stood mute on the subject at trial (TrialL.F.20-22). The shootings occurred around midnight, and police arrested John around 2:00 a.m. (TrialTr. 709,765,773). John made one statement while he was being booked, another about three hours later, and a third two hours after that (TrialTr.767,941,944). He had had no sleep and was in shock that night (TrialTr.899). John alleged that Kessler rendered ineffective assistance in failing to

request MAI CR3d 310.06 to tell the jury it had to decide how much, if any, weight to give these statements (PcrL.F.37,122-126).

Despite Kessler's interrogation of John and his failure to request MAI CR3d 310.06, the jury still deliberated 2½ hours before finding John guilty (TrialTr.1022-1025). Nonetheless, the motion court refused even to hold a hearing on this claim (PcrL.F.288).

The Penalty Phase of John's Trial

After John's testimony in guilt phase, Rosenblum, Kessler and members of John's family met with John and talked about how poor he testified on direct examination (H.Tr.208). Rosenblum noted,

> The theory of the defense was that he snapped…that evening because of a series of stimuli…To snap [though], you would have to be able to explain to the jury in rather emotional terms…what you were going through, what you were thinking…and Brad couldn't get it out of [John]. And he resorted to basically having to cross-examine him, which was another point that was raised [in this meeting].

(H.Tr.207-208). Describing John's guilt phase testimony as devoid of emotion and devastating, Rosenblum told John he should not testify in penalty phase unless he could search someplace within himself to find some emotion (H.Tr.209). Rosenblum did not tell John, however, that emotional testimony from him in penalty phase "would have exacerbated his already bad testimony by taking on a different persona." (H.Tr.329).

This meeting ended with Rosenblum telling John to think about whether he was going to testify in penalty phase (H.Tr.232). Rosenblum never revisited this issue with John (H.Tr.209). After this meeting, Rosenblum simply told John what witnesses he planned to call in penalty phase, omitting John's name from his list (H.Tr.210-211). John did not later approach Rosenblum to say that he wanted to testify, and Rosenblum never asked (H.Tr.209-211). Before Rosenblum rested, John asked, "Am I going to testify?" or "Could I testify?" and Rosenblum, considering it sound strategy not to call John, replied, "I'm going to rest." (H.Tr.329,333,382). Rosenblum did not call John to testify in penalty phase (TrialTr. Index,1055-1082).

John wanted to testify (JohnWinfield Depo8). He wanted to tell the jurors about his love and devotion for his family, especially for his children (JohnWinfield Depo20-21). He wanted to tell the jurors about his hope to remain a big part of his children's lives (JohnWinfield Depo20). And, he would have asked the jurors to spare his life, "not for myself, for my children, for my family." (JohnWinfield Depo20). Rosenblum did not let the jurors hear this; nor did he submit the instruction[6] that would have protected John from the jurors drawing an adverse inference from his failure to testify (TrialL.F.156-189; TrialTr.1082-1086). Instead, Rosenblum told the jurors, "I can't get John to express himself and I don't know why." (TrialTr.1103).

Kessler knew that John wanted to testify in penalty phase (H.Tr.45,116,122). He also knew how to bring that fact to the court's attention, but he did not do so until the

[6] Motion counsel did not allege that this was ineffective (PcrL.F.29-181).

motion for new trial (H.Tr.123,184). In the motion for new trial, Kessler alleged that Rosenblum prevented John from testifying, thereby rendering ineffective assistance (TrialL.F.251-252). Kessler did not raise the issue at trial because he let his petty aggravation with Rosenblum prevent him from protecting John (H.Tr.122,169,188). As Kessler put it, "Some guy got screwed because Scott and I had problems. That's not fair." (H.Tr.187).

The motion court overruled John's claim that trial counsel were ineffective in preventing him from testifying in penalty phase (PcrL.F.34,85-92,279-283).

In penalty phase, Rosenblum wanted to build on Kessler's theory that John is a normal person that seemed to have snapped (H.Tr.194,291). He also wanted to utilize John's family history to show that John is a loving, caring, dependable person whose life is worth sparing (H.Tr.242-243). Rosenblum hoped to use John's mother, Evelyn Winfield, and his grandmother, Delores Dent, to tell his story (H.Tr.206,237). At nearly the eleventh hour, Rosenblum decided he could call neither Evelyn nor Delores, and without them, he could not tell the story he wanted the jury to hear (H.Tr.244).

John alleged that Rosenblum could not tell the complete story because he had not talked to all of the witnesses (PcrL.F.32,40-62). Indeed, Rosenblum admitted he did not interview "all of John Winfield's family members and friends." (H.Tr.315). For example, he did not interview Katherine Patton-Bennett (an aunt), or Maurice Patton (a cousin), or Frank Elliott (a cousin's husband), or Darrell Jefferson (a friend) (H.Tr.315-317; Katherine Patton-Bennett Depo64,66,69; MauricePatton Depo26; FrankElliott Depo34-35; DarrellJefferson Depo40-41).

Rosenblum did not talk to John's children, Mykale Donald and Symone Winfield, before trial either (TrialTr.13-14). He waited until a recess during penalty phase to have his first and only conversation with them (TrialTr.13-14; H.Tr.52-53,213,321-322). And then, he only spent about five to ten minutes with them (SymoneWinfield Depo19). Rosenblum called neither Mykale nor Symone to testify (TrialTr.Index,1055-1082), and John alleged that that failure constituted ineffective assistance (PcrL.F.34-35,92-96; *see also* TrialL.F. 251-252). The motion court overruled this claim (L.F.283-284).

Mykale and Symone would have testified that their dad took them to fun places like carnivals, amusement parks, city parks, car shows and just driving around town (MykaleDepo6-8,10,13; SymoneWinfield Depo6-7,13). He took them shopping and bought them toys and clothes (MykaleDepo6,9; SymoneWinfield Depo8). He played games with them and taught them how to build things (MykaleDepo6,9; SymoneWinfield Depo8).

Rosenblum gave the jury a sketch of John with four witnesses in penalty phase: John Edmond (father), Marsha Edmond (step-mother), David Winfield (brother) and Rasalie Bell (family friend) (TrialTr. Index,1055-1082). John alleged that a reasonably competent attorney could have and would have done much more (PcrL.F.32,34-35,40-62,92-96). The motion court disagreed, overruling this claim (PcrL.F.275-277).

The jury did not hear that John provided Mykale and Symone with emotional support, bathed them, he tucked them into bed, dressed them, fed them, took them to school, read to them, played with them and taught them the ABC's (*Cf.* TrialTr.

1061,1063,1066, 1068,1074 *with* DarrellJefferson Depo25; MauricePatton Depo23; JohnSutherland Depo18).

Nor did the jury hear that, as a boy, John collected boxes and boxes of comic books that he preserved in plastic (MauricePatton Depo16). He also played sports, with football being his favorite (MauricePatton Depo13; DavidWinfield16,18). He often did not have a ride to practice, so he made the 15-20 mile trip on his bike dressed in full pads (DavidWinfield Depo18). His hard work and practice helped him win trophies (David Winfield Depo17).

But John soon had to turn his effort toward helping support his family. He became man of the house very early (FrankElliott Depo11; KatherinePatton-Bennett Depo20; DarrellJefferson Depo19; DavidWinfield Depo19). His mother, Evelyn Winfield, fell on hard times, and she leaned heavily on John (FrankElliott Depo12; DavidWinfield Depo 6,8). John's older brother, David, never stepped up to help Evelyn, so John accepted the responsibility of making sure the bills got paid and of making the family's important decisions about housing and transportation (FrankElliott Depo12,29,37; KatherinePatton-Bennett Depo21; MauricePatton Depo18; DavidWinfield Depo20-21,29). When Evelyn got sick, the family ran up "some pretty serious bills." (FrankElliott Depo29).

When John met Carmelita (Carmel) Donald, he fell in love with her (Darrell Jefferson Depo10,21). Upon learning that Carmel was pregnant, he accepted more responsibility, offering her his home since she was not on good terms with the father of the child and her family was not helping her (KatherinePatton-Bennett Depo24-25). Carmel had no job, so John provided her with food, clothes and shelter, and he took her

to her prenatal appointments (KatherinePatton-Bennett Depo25). Having accepted responsibility for Carmel, John also felt responsible for her family; at various times, Carmel, her mother, father, sister and grandmother each lived with John's family (KatherinePatton-Bennett Depo30-31,41-42; JohnSutherland Depo19; DavidWinfield Depo24-25).

John had the weight of the world on his shoulders (FrankElliott Depo28). As a child, he had often responded to stress by acting out, though the stress twice became so severe that he contemplated suicide (DrStacy Depo38). As an adult, John did not feel comfortable showing his feelings, so he simply kept things bottled up, and immersed himself in a relaxing activity like spending time with friends or working on cars (DrStacy Depo38-39). During July and August 1996, however, those outlets were being pushed aside by familial demands. (DrStacy Depo40). "John was assuming more without dealing with any … and [the stressors] came very rapidly…one on top of the other, and each one involved more obligation from John, more commitment, more responsibility. There wasn't much time." (Depo37-38).

For example, during those two months, Evelyn nearly died after a brown recluse spider bit her (KatherinePatton-Bennett Depo50-52; FrankElliott Depo30; John Sutherland Depo11-13; DavidWinfield Depo30-31); John's grandmother, Delores, who had previously attempted suicide, fell into another episode of depression (DavidWinfield Depo33); and John's brother David suffered a neck injury that left him partially paralyzed for a short time (DavidWinfield Depo33-34;FrankElliott Depo34; Katherine Patton-Bennett Depo57-58; JohnSutherland Depo16). All the while, John made plans to

marry Carmel, buy a home, move to Gary, Indiana, and start a business (DavidWinfield Depo35; JohnSutherland Depo22-23,25-26; KatherinePatton-Bennett Depo62; Darrell Jefferson Depo28-30,32).

Rosenblum presented evidence that simply described John as "the man of the house," who meant "everything" to his mother and grandmother (TrialTr. 1058,1061, 1066-1067,1069,1071,1075) and a devoted and loving father (TrialTr.1061, 1066, 1074). With only this evidence, trial counsel could only offer two statutory mitigating circumstances: no significant criminal history and John's age (TrialL.F.166, 178). As a result, John also alleged that Rosenblum and Kessler rendered ineffective assistance by failing to consult an expert regarding the extreme emotional disturbance mitigating circumstance (PcrL.F.32-33,63-79; *see also* TrialL.F.252). The motion court overruled that claim (L.F.277-278).

Kessler limited his preparation to the guilt phase of trial, letting petty differences with Rosenblum prevent him from investigating mental health issues for mitigation (H.Tr.156). Kessler admitted, "[T]hese are things that I should have, even though I was the first stage counsel, these are things I should have been doing anyway…" (H.Tr.144). Meanwhile, Rosenblum limited his inquiry to asking Drs. Rabun and Cuneo whether they found anything in their competency and sanity evaluations that could be of any assistance in the penalty phase (H.Tr.201-202,217). Rabun, on whom Rosenblum relied most heavily, did not address whether John suffered from an emotional disturbance and did not mention stressors John faced in the weeks before the offense (H.Tr.201-202,306-308,310).

John alleged that reasonably competent attorneys would have hired an expert for mitigation; after all, on the night of the offense, John underwent a very drastic change in a matter of minutes. (PcrL.F.32-33,63-79; DrStacy95). The next night, he went to Carmel's apartment to talk to her, but she was not there. *State v. Winfield*, 5 S.W.3d 505,508 (Mo.banc 1999). Carmel was living with her sister, Melody, and a friend, Arthea Sanders. *Id.* Knowing that Carmel was out with another man, Melody and Arthea gave John differing explanations about Carmel's whereabouts. *Id.* By the time Carmel returned to the apartment around midnight, John was pacing the apartment. *Id*. Carmel explained,

> [H]e couldn't—He was asking me these questions. He couldn't stand still. He had to rub his hands, his head, his face, his stomach. He was just looking—He just couldn't stay still. While he was talking to me he was walking—you know, walking back and forth like he just didn't know what to do….

(TrialTr.665). As John paced, two sounds interrupted his conversation with Carmel: bumps on John's car and a hissing noise (TrialTr.661,670,893). John went to his car and found that a tire had been slashed (TrialTr.894). After getting a gun from his car, he went into the apartment, where he shot and killed Arthea Sanders and Shawnee Murphy (Trial.Tr.603-604,693-695,894); shot and wounded Carmel (TrialTr.661-662); pointed the gun at Melody, who ran out the back door (TrialTr.604-605,648) and tried to shoot James Johnson, but the gun was empty (TrialTr.695-697). Police arrested John a couple of hours later at his house (TrialTr.765-766).

Witnesses to the shooting described John's unusual level of agitation and anxiety immediately before the offense – he paced, rubbing his hands, stomach, head and face (DrStacy Depo14; TrialTr.665). Motion counsel investigated the cause of this drastic change and learned that, in the preceding two months, John had experienced "a number of stressors including his mother's illness, his grandmother's depression, his brother's injury, the plans to relocate, the venture into purchasing a home…, the commitment to enter a business venture, the pending relocation from St. Louis." (DrStacy Depo14). John's agitation and anxiety on the night of the offense paralleled his reaction to his mother's near-fatal spider bite (DrStacy Depo41).

Had Rosenblum and Kessler consulted an expert, like Stacy, they would have learned that stress is an additive phenomenon (DrStacy Depo35). The body has a general adaptation syndrome (GAS), which it uses to cope with stress (DrStacy Depo36). But the body has a fixed amount of resources to cope with stress. *Id*.

> [W]e have a tank of GAS. So we have a tank of GAS. But it's a…finite tank, and each stress takes a little GAS from that tank. And sooner or later, the tank's going to run dry, and there's not going to be any more coping. And that's when you start developing either serious physical or emotional problems.

Id. In the weeks before the shootings, John endured multiple stressors in rapid succession, and he was running out of GAS (DrStacy Depo37-38). Stacy concluded that John suffered from an extreme emotional disturbance at the time of the offense (DrStacy Depo113-114). John's reaction the night of the shootings went beyond anger (DrStacy Depo146). "What makes it extreme emotional distress is the level of physical agitation

that he was displaying, the background of many, many emotional stressors contributing to it." (DrStacy Depo148).

Hearing evidence from only Rosenblum's four witnesses, the St. Louis County jury still deliberated for over 5½ hours before recommending that John be executed (TrialTr.1108-1109). Nonetheless, the motion court found that none of the evidence John presented at the 29.15 hearing created a reasonable probability that better informed jurors would have spared his life (PcrL.F.297-298).

On December 17, 2001, the Honorable Maura B. McShane entered Findings of Fact, Conclusions of Law and Judgment, overruling John's motion for post-conviction relief from his convictions and sentences (PcrL.F.5,269). John timely appealed to this Court on January 28, 2002 (PcrL.F.6,308); Rule 44.01(a).

Points

I.

The motion court clearly erred in overruling John's 29.15 claim that trial counsel did not let him testify during penalty phase because that ruling violated John's rights to effective assistance of counsel, testify in his defense, due process, his privilege against compelled self-incrimination, and subjected him to cruel/unusual punishment. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21. John had a fundamental right to testify in the penalty phase of his trial, and that right could only be denied upon proof that *John* knowingly, intelligently and voluntarily waived it. No such proof exists. Indeed, Counsel Kessler knew that John wanted to testify, but, because of "petty differences" with Counsel Rosenblum, Kessler didn't make John's desire known to the trial court. John didn't know that whether he would testify was *his* decision, so, after Rosenblum called the last defense witness, John asked "Could I testify?" or "Am I going to testify?" Rosenblum replied, "I'm going to rest," and he did – without letting John testify. There is a reasonable probability that the result would have been different had John been able to tell the jury about his background, his deep love for his children and his desire to remain a "big part" of their lives.

Rock v. Arkansas, 483 U.S.44 (1987);

Johnson v. Zerbst, 304 U.S. 458 (1938);

Carter v. Kentucky, 450 U.S. 288 (1981);

Nichols v. Butler, 953 F.2d 1550 (11th Cir 1992);

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

Mo.Const., Art.I, §§10,18(a),21;

Rule 29.15.

II.

The motion court plainly erred in failing to vacate John's death sentences because such ruling violated John's rights to due process, a fair trial, effective counsel, freedom from cruel/unusual punishment and his privilege against self-incrimination. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§ 10,18(a), 19,21. John testified in guilt phase but not in penalty phase; this fact was "inescapably impressed on the jury's consciousness." Although John had a fundamental right not to have the jury transform his silence into an aggravating circumstance, the jury did not know that because (a) the trial court ignored its "serious and weighty" responsibility to insure that *John* had knowingly, intelligently and voluntarily waived his fundamental right; and (b) trial counsel did not request the "no-adverse-inference" instruction. Had trial counsel offered that instruction, the trial court would have been obliged to give it. But for trial counsel's error left John's failure to testify would not have been "inescapably impressed upon the jury's consciousness," and there is a reasonable probability that the jury would have spared his life. This error was blatantly obvious from the record and caselaw, but post-conviction counsel failed to raise it in the amended motion. Because post-conviction counsel abandoned John in his first appeal of right as to his right to effective counsel, this Court should excuse the default.

State v. Storey, 986 S.W.2d 462 (Mo.banc 1999);

United States v. Teague, 953 F.2d 1525 (11th Cir.1992);

Carter v. Kentucky, 450 U.S. 288 (1981);

Coleman v. Thompson, 501 U.S. 722 (1991);

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

Mo.Const., Art.I, §§10,18(a),21;

Rule 29.15;

MAI CR3d313.30A.

III.

The motion court clearly erred in denying post-conviction relief because trial counsel constructively absented himself from trial during John's testimony and thus deprived John of due process, effective counsel and a fair trial. U.S. Const., Amends. V,VI,XIV; Mo.Const., Art.I, §§10,18(a). Kessler interrogated John, attacking his testimony whenever it did not comport with what Kessler believed actually happened. Asserting that the jurors had "*an absolute right* to hear everything," Kessler performed as their advocate, not John's. He told the jury "it doesn't make me happy to stand up here and have to even be in this position…I don't know why he doesn't remember. I don't know if maybe he does remember." John was cross-examined twice – once by Kessler and once by the State, and, this breakdown in the adversarial process produced a trial without reliability. But for Kessler being constructively absent during John's testimony, there is a reasonable probability that the result would have been different.

United States v. Cronic, 466 U.S. 648 (1984);

Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988);

United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991);

Strickland v. Washington, 466 U.S. 668 (1984);

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

Mo.Const., Art.I, §§10,18(a);

Rule 29.15.

IV.

The motion court clearly erred in failing to reappoint counsel before reaching the merits of John's 29.15 motion because such failure violated John's rights to due process, effective counsel, a full and fair hearing, and freedom from cruel/unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21; Rules 29.15(e), 29.16. Missouri courts refuse to review claims of ineffective counsel on direct appeal; rather, those claims must wait for post-conviction review, during which movants have the right to counsel. Indeed, since Rule 29.15 provides Missouri defendants with their first appeal of right as to their constitutional right to counsel, 29.15 counsel must provide effective assistance to insure that the amended motion includes (A) all claims known and (B) sufficient facts. Here, 29.15 counsel did neither: (A) they omitted any claim regarding John's right to have the "no-adverse-inference" instruction submitted during penalty phase – an error for which this Court had reversed *State v. Storey* for a new penalty phase just 15 months earlier; they omitted any claim regarding the total breakdown in communication between Kessler, Rosenblum and John; and (B) they alleged several questions that trial counsel should have asked regarding unadjudicated assaults against Carmel, but they omitted any hint of what answers trial counsel might have gotten.

Evitts v. Lucey, 469 U.S. 3874 (1985);

Pennsylvania v. Finley, 481 U.S.551 (1987);

Coleman v. Thompson, 501 U.S. 722 (1991);

Jackson v. Weber, 637 N.W.2d 19 (S.D. 2002),

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

Mo.Const., Art.I, §§10,18(a),21;

§§ 547.070 and 600.042;

Rules 29.15 and 29.16.

V.

The motion court clearly erred in denying post-conviction relief because trial counsel rendered ineffective assistance in failing to investigate and call John's children, Mykale Donald and Symone Winfield, as mitigation witnesses. Such ineffectiveness also deprived John of his rights to due process, a fair trial and freedom from cruel/unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21. Counsel knew about Mykale and Symone; indeed, John's mother took Mykale and Symone to Rosenblum's office "early on in the case." Rosenblum met with them, but not about their being mitigation witnesses because he saw no reason to do so "at that time." Counsel finally endorsed the children three days before trial, but he did not talk to them until a recess during penalty phase. A reasonably competent attorney would not have waited to investigate during trial. Counsel's inaction prejudiced John in that Mykale and Symone would have testified that John did many fun activities with them, taught them how to do things and loved them deeply.

Williams v. Taylor, 529 U.S. 362 (2000);

People v. Towns 696 N.E.2d 1128 (Ill. 1998);

Strickland v. Washington, 466 U.S. 668 (1984);

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

Mo.Const., Art.I, §§10,18(a),21;

Rule 29.15.

VI.

The motion court clearly erred in overruling John's 29.15 claim that trial counsel failed to investigate and present John's complete life history because that ruling violated John's rights to due process, effective assistance of counsel and freedom from cruel/unusual punishment. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const.,Art.I, §§10,18(a),21. Trial counsel theorized that John was "a normal person that seemed to have snapped," and, to develop this theory, counsel wanted "to show [John's] family history." Trial counsel, however, did not conduct the investigation necessary to let him do that. A reasonably competent attorney would have learned that John's mother and grandmother were not the only sources through whom counsel could tell John's life history. Katherine Patton-Bennett, Maurice Patton, Darrell Jefferson, Frank Elliott, John Sutherland, Jr., and David Winfield could have and would have testified:

1. **John collected boxes and boxes of comic books as a child, preserving them in plastic;**
2. **John played football with a youth organization, and he often had to ride his bike to practice – some 20 miles from his house;**
3. **John watched over his cousin, Maurice, and "helped him develop the thought of wanting to be the artist that [he is, now];"**
4. **John was not merely "the man of the house," he had "the weight of the world on his shoulders" just trying to keep his family afloat, but he always opened**

his home to help those who could not make it on their own – e.g., Carmel, Jackie Donald, Michael Donald, Melody Donald, and Carmel Donald;

5. **John suffered when he lost his infant son, John Jr., to SIDS;**
6. **John did not simply love his children, he loved being with them, playing dolls, reading books;**
7. **In the weeks before the murders,**
    a. **John's mother nearly died after being bitten by a brown recluse spider;**
    b. **John's brother suffered two neck injuries that left him partially paralyzed and in a halo for a few weeks;**
    c. **John's grandmother, who had attempted suicide after John Jr.'s death, fell "in deep depression" because "everything that was going on at – at one time;"**
    d. **John was trying to buy Carmel's childhood home in Gary, Indiana so he could "pull his family together," marry Carmel and "start over" away from this turmoil.**

Despite hearing no detail about John's life, the jury nevertheless deliberated for over five and a half hours before recommending death; had they heard this copious evidence, there is a reasonable probability that they would have spared John's life.

People v. Towns, 696 N.E.2d 1128 (Ill. 1998);

Williams v. Taylor, 529 U.S. 362 (2000);

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Harris, 64 S.W.2d 256 (Mo.1933);

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

Mo.Const., Art.I, §§10,18(a),21;

Rule 29.15.

VII.

The motion court clearly erred in overruling John's post-conviction motion because trial counsel failed to investigate and present expert evidence that John suffered from an extreme emotional disturbance at the time of the murders thereby depriving John of due process, effective counsel, a fair trial and subjecting him to cruel/unusual punishment. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const.,Art.I, §§10,18(a),21. Trial counsel theorized that John "was an otherwise normal law-abiding young man," who "snapped," but counsel conducted no investigation aimed at discovering support for his theory. Counsel simply asked the 552 examiners, who had found that John did not suffer from a mental disease or defect at the time of the murders, whether they "could provide useful testimony in the second phase." Knowing that a pretrial 552 evaluation does not replace a mitigation investigation, a reasonably competent attorney would have investigated further, particularly given that, in the two months before the murders, John "suffered from cumulative results of a number of stressors including his mother's illness, his grandmother's depression, his brother's injury, the plans to relocate, the venture into purchasing a home…, the commitment to enter into a business venture, the pending relocation from St. Louis." Had counsel consulted an expert, like Dr. Stacy, for purposes of mitigation, he would have learned that John had no means of coping with the series of stressors he suffered, and, consequently, at the time of the murders, he suffered from an extreme emotional disturbance. With evidence of this statutory mitigator, there is a reasonable probability that the jury would have spared John's life.

People v. Towns, 696 N.E.2d 1128 (Ill.1998);

Jacobs v. Horn, 129 F.Supp.2d 390 (M.D.Penn. 2001);

Antwine v Delo, 54 F.3d 1357 (8th Cir. 1995);

Williams v. Taylor, 529 U.S. 362 (2000);

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

Mo.Const., Art.I, §§10,18(a),21;

Rule 29.15

VIII.

The motion court clearly erred in denying an evidentiary hearing on Claim 8(J) regarding trial counsel's failure to offer MAI-CR3d 310.06 because that claim states facts, which are not refuted by the record that, if proved, would warrant relief. John alleged: (a) the State offered evidence that he confessed; (b) MAI-CR3d 310.06 must be given upon request; (c) but trial counsel did not request it; and (d) a properly instructed jury could have inferred that John's rage on the night of the murders entitled them to give his confession little or no evidentiary weight. If proved, these facts would show that trial counsel denied John due process, effective counsel and a fair trial. U.S.Const., Amends. V,VI,XIV; Mo.Const., Art.I, §§ 10,18(a). In a virtually undisputed case without guidance from MAI-CR3d 310.06, the jurors still spent two and a half hours deliberating John's guilt. Then, after being instructed that they could consider all evidence they had heard in both phases, they spent five and a half hours deliberating John's punishment. During that time, they asked to see John's confession, which had no relevance to any statutory aggravator or mitigator but could have tended to resolve some residual doubt as to John's mental state.

State v. Driver, 912 S.W.2d 52 (Mo.banc 1995);

Clemmons v. State, 785 S.W.2d 524 (Mo.banc 1990);

State v. Tokar, 918 S.W.2d 753 (Mo.banc 1996);

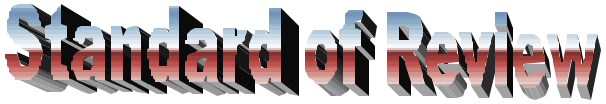
U.S. Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art.I, §§10,18(a),21;

Rule 29.15;

MAI CR3d 310.06.

Argument



A. Ineffective Assistance of Counsel:

Our Constitutions guarantee John the right to be assisted by effective counsel. U.S.Const.,Amends.VI,XIV; Mo.Const.,Art.I,§18(a); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Cuyler v. Sullivan*, 446 U.S. 335 (1980). This guarantee is not a matter of etiquette, but one of necessity to ensure a fair trial. *United States v. Cronic*, 466 U.S. 648,658 (1984). While counsel is presumed to be effective, John need only show the contrary by a preponderance of the evidence. Rule 29.15(i). To meet this burden, John must prove two things: (1) counsel didn't exercise the skill and diligence of reasonably competent attorneys working under similar circumstances and (2) he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668,689 (1984). Prejudice exists whenever counsels' error undermines confidence in the outcome. *Moore v. State*, 827 S.W.2d 213,215 (Mo.banc 1992). Confidence is lacking whenever a reasonable probability exists that, but for counsels' deficiencies, the result would have been different. *Id*.

B. Clearly erroneous:

This Court must determine whether the motion court's ruling is clearly erroneous. Rule 29.15(k); *Day v. State*, 770 S.W.2d 692,695 (Mo.banc 1989). It is, if this Court has the definite and firm impression that a mistake was made. *State v. White*, 798 S.W.2d 694, 697 (Mo.banc 1990).

I.

The motion court clearly erred in overruling John's 29.15 claim that trial counsel did not let him testify during penalty phase because that ruling violated John's rights to effective assistance of counsel, testify in his defense, due process, his privilege against compelled self-incrimination, and subjected him to cruel/unusual punishment. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21. John had a fundamental right to testify in the penalty phase of his trial, and that right could only be denied upon proof that *John* knowingly, intelligently and voluntarily waived it. No such proof exists. Indeed, Counsel Kessler knew that John wanted to testify, but, because of "petty differences" with Counsel Rosenblum, Kessler didn't make John's desire known to the trial court. John didn't know that whether he would testify was *his* decision, so, after Rosenblum called the last defense witness, John asked "Could I testify?" or "Am I going to testify?" Rosenblum replied, "I'm going to rest," and he did – without letting John testify. There is a reasonable probability that the result would have been different had John been able to tell the jury about his background, his deep love for his children and his desire to remain a "big part" of their lives.

John testified during guilt phase (Tr.843-969), and he wanted to testify during penalty phase (JohnWinfield Depo8). Kessler knew this, and he recalled that John "did vocalize himself, but we ignored him." (H.Tr.189). Rosenblum "left it open" but advised John it would be a bad idea for him to testify, and John never "came out and said, 'I want to testify.'" (H.Tr.340). Rosenblum rested penalty phase without John testifying (Tr.

1055-1082). In his amended motion, John alleged that "trial counsel failed to [let him] testify during penalty phase [and] [b]ut for trial counsel's ineffectiveness…, the outcome of John's proceedings would have been different and John would not have received the death penalty (L.F.34,85-92;*accord*TrialL.F.251-252).

John's Right to Testify

Once John exercised his right to be assisted by counsel, few decisions rested with him. But, there remained a few decisions that ***only*** he could make. "[W]hether to plead guilty, waive a jury, or ***testify*** in one's own behalf are [decisions] ultimately for the accused to make." *Wainwright v. Sykes*, 433 U.S. 72, 93,n.1 (1977) (Burger,C.J., concurring)(emphasis added), *cited with approval Jones v. Barnes*, 463 U.S. 745, 751 (1983). Several constitutional provisions grant defendants the right to testify. *Rock v. Arkansas*, 483 U.S.44, 51(1987).

The right to testify is an essential component of due process within a fair adversarial process. *Id*. It is secured by the Fourteenth Amendment. *Id*. (citation omitted).

> A person's right to reasonable notice of a charge against him, and *an opportunity to be heard in his defense*—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

In re Oliver, 333 U.S. 257,273 (1948). The Sixth Amendment also secures it. *Rock*, *supra* at52. The right to call witnesses necessarily includes the right to call himself; after all, "the most important witness for the defense in many criminal cases is the defendant

himself." *Id*. Finally, the right to testify is "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id*., *citing* *Harris v. New York*, 401 U.S.222, 230 (1971).

Counsel **Must Safeguard their Client's Right to Testify**

The right to testify is "[e]ven more fundamental to a personal defense than the right of self-representation." *Rock*, 483 U.S. at 52. Courts must indulge every reasonable presumption against waiver of this fundamental right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "[Courts] do not presume acquiescence in the loss of fundamental rights." *Id*. (citation omitted). Such waivers must be knowing, intelligent and voluntary. *Id.* at 465. Whether a proper waiver exists "should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Id.* Trial courts certainly bear this "serious and weighty responsibility." *Id.* But Missouri courts have never required trial courts *sua sponte* to examine every defendant about his right to testify. *See e.g.*, *State v. Kretzer*, 898 S.W.2d 639, 644 (Mo.App.W.D. 1995) (no duty to examine defendant *sua sponte* regarding multiple representation).

The primary duty to inform defendants of their right to testify rests with defense counsel. *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992). Competent counsel must advise his client "of his right to testify or not to testify, the strategic implications of each choice, *and that it is ultimately for the defendant himself to decide*." *Id.* (emphasis added). Without this advice, the client cannot make an "intentional relinquishment of a *known* right…." *Id.* Thus, it is the "generally accepted practice

within the bar" that counsel must provide this minimal advice to protect his client's fundamental right to testify. *Id*. at1533-1534(citation omitted).

John **Wanted to Testify in Penalty Phase**

A. *Kessler Rendered Ineffective Assistance*

Kessler knew that John wanted to testify in penalty phase (H.Tr.45,116,122). And, Kessler knew how to stop court proceedings to let the judge know that John wanted to testify (H.Tr.184). Kessler, however, still clung to the "petty aggravation[s]" that had caused him to abruptly end his role in Rosenblum's law firm a couple months earlier (H.Tr.94,101,105,169,180). This "infected the relationship" between Kessler and Rosenblum throughout John's trial (H.Tr.169). Indeed, Kessler conceded that his "arrogance" and "petty aggravation" with Rosenblum prevented him acting in John's best interest at trial (H.Tr.122,169). The motion court found it "inconceivable that an experienced trial lawyer…would sit by and out of 'arrogance' not inform this Court of Movant's desire to testify." (L.F.282-283). Indeed, a reasonably competent attorney would not have let his "arrogance" and "petty aggravation" impede his representation. Unfortunately, Kessler did. He waited until writing the motion for new trial to address John's right to testify (H.Tr.123;DirAppL.F.251-252). Kessler testified,

> I wasn't trying to protect anybody. [The problem with Rosenblum] interfered with my ability to protect my client. You know, that's the problem. I should have been protecting my client…There's no excuse to let the personal stuff interfere.

(H.Tr.188).

The motion court did not specifically address whether Kessler rendered ineffective assistance by failing to protect John's right to testify during penalty phase (L.F.279-283). It mistakenly believed that "[the allegations in the amended motion] deal with Mr. Kessler's actions during guilt phase and Mr. Rosenblum in the penalty phase." (H.Tr.267). This is clearly erroneous. As former Judge Holstein observed during the oral argument of John's direct appeal, "cases are not so neatly divided. Were both of them present during the entire trial at the counsel table?" *State v. Winfield*, No.SC81165 (9/8/1999;OralArgument-Rebuttal).[7]

The motion court "conclude[d] that the only reason [the trial judge] was not informed of Movant's desire to testify is because Movant did not want to testify during the penalty phase of trial." (L.F.283). A review of the entire record leaves the definite and firm impression that the motion court made a mistake. *State v. White*, 798 S.W.2d 694, 697 (Mo.banc 1990). There is *no evidence* to support this conclusion. No one testified that John *did not* want to testify. In fact, everyone testified that John wanted to testify (H.Tr.45,52,72,116,122,189,333). The motion court's conclusion is propelled by its clearly erroneous belief that this claim of ineffectiveness addressed only Rosenblum's representation.

Kessler and Rosenblum represented John during penalty phase (H.Tr.144). Kessler knew that John wanted to testify (H.Tr.45,110,116,122). He also knew how to

[7] Kessler understood this: "I had primary responsibility for the first stage, Scott had it for the second stage. That doesn't mean I'm – not that I withdrew at that point." (H.Tr.144).

bring that critical fact to the court's attention (H.Tr.123,184). Inconceivably, however, he did not do so; he let his "arrogance" prevent him from protecting John's desire (H.Tr.121-123). Kessler, who makes a living based on his reputation, did not act as a reasonably competent attorney, and he accepted that reality: "I've been doing this a long time, and I'm not falling on my sword. Some guy got screwed because Scott and I had problems. That's not fair" (H.Tr.187). "[N]o one did their job." (H.Tr.120).

A reasonably competent attorney performing under similar circumstances would have taken steps to insure that John was allowed to exercise his right to testify, as he wished. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Kessler rendered ineffective assistance.

B. *Rosenblum Rendered Ineffective Assistance*

Rosenblum didn't think it would be in John's interest to testify because John had been "devoid of any emotion" during his guilt phase testimony (H.Tr.208-209). Rosenblum cautioned John, "Think about whether you can search someplace within yourself that we haven't seen." (H.Tr.209). They made no decision; John "was going to think about it." (H.Tr.232). The motion court pointed to this advice as reasonable, ignoring that Rosenblum set up a *Catch-22* for John (L.F.281). Rosenblum told John he would need to express more emotion if he wanted to testify in penalty phase, but, silently, Rosenblum believed that showing emotion in penalty phase would be equally devastating: "If at that point [John] came off as somebody different [i.e., if he showed emotion while testifying in penalty phase]…, in my mind…he would have just

exacerbated his already bad testimony by taking on a different persona." (H.Tr.329). The motion court clearly erred.

Even if it was reasonable for Rosenblum to advise John not to not testify, the inquiry must continue because the ultimate decision whether to testify can only be made by John. After telling John to think about whether he could show emotion, Rosenblum never sat down with John and asked if he was going to testify (H.Tr.209). Instead, Rosenblum shifted the burden to John to insist on testifying because Rosenblum considered it sound trial strategy not to have John testify (H.Tr.329). The motion court gave its imprimatur to this, emphasizing that John "never told Mr. Rosenblum that he wanted to testify…." (L.F.279, *accord* L.F.281-282). The motion court clearly erred by presuming that John *knew* that *only he* could decide whether he would testify. *Teague*, 953 F.2d at 1533.

The motion court correctly noted that Kessler had made a record with John regarding his right to testify during guilt phase (L.F.279). That colloquy, however, did not address, nor was it intended to address, John's right to testify during penalty phase (DirAppTr.834-839; H.Tr.173). Neither Rosenblum, nor Kessler revisited the issue for penalty phase when the issue arose, anew. A review of the entire record leaves the definite and firm impression that the court made a mistake. The motion court ignored the requirement that waivers of fundamental rights be knowing, intelligent and voluntary, and, instead, presumed acquiescence from a silent trial record. It clearly erred. *Johnson*, 304 U.S. at 464.

Worse yet, the motion court excused Rosenblum's blatant disregard for John's fundamental right to testify. Before resting, Rosenblum walked over and put his hand on John (H.Tr.231). John asked, "Am I going to testify?" or "Could I testify?" (H.Tr. 333,382). That John asked this question illustrates that he *did not* understand the scope of his right to testify, i.e., that he could testify and that *only he* could decide whether he would do so. Incredibly, Rosenblum simply replied, "I'm going to rest." (H.Tr.333). And, he did—without calling John to testify.

A reasonably competent attorney performing under similar circumstances would have taken steps to insure that John got to exercise his right to testify. *Strickland*, *supra*. Rosenblum rendered ineffective assistance.

C. John Suffered Prejudice

To show prejudice, John must show that counsels' error undermines confidence in the outcome. *Moore v. State*, 827 S.W.2d 213, 215 (Mo.banc 1992). This error certainly does. This was not an easy decision for the jurors, nor was death a sure thing for the State. The jurors deliberated 5 hours and 38 minutes before recommending death (TrialTr.1108-1109).

In deciding whether to recommend life or death, the jurors had to consider "all of the evidence presented" in both stages (TrialL.F.164-165,176-177). John's failure to testify lay among that evidence. "Jurors are not lawyers; they do not know the technical meaning of 'evidence.' They can be expected to notice a defendant's failure to testify, and, without [a] limiting instruction, to speculate about incriminating inferences from [his] silence." *Carter v. Kentucky*, 450 U.S. 288, 303-304 (1981).

In penalty phase, the trial court did not instruct the jurors that they *could not consider* John's failure to testify. *See* Point II, *infra*. The fact that he didn't testify remained "inescapably impressed on the jury's consciousness." *State v. Storey*, 986 S.W.2d 462, 464-465 (Mo.banc 1999) (quote omitted). The jurors could have reasonably found John's failure to testify during penalty phase an aggravating factor warranting death, and the motion court clearly erred in failing to consider this in its prejudice analysis.

The risk that jurors found John's failure to testify to aggravate his punishment is particularly troubling since *John wanted* to testify. He wanted to express the deep love and devotion he feels for his family in general and his children in particular (JohnWinfield Depo8,20-21). He wanted to explain his desire to remain a "big part" of his children's lives (JohnWinfield Depo20). He would have asked jurors to spare his life, "if not for myself, for my children, for my family." (JohnWinfield Depo20).

The motion court summarily rejected the value of this, concluding, "[T]here can be no prejudice from Movant failing to convey to the jury that he wished to have his life spared because that wish would be obvious to the jury whether spoken or not." (L.F.283). The motion court clearly erred. "The testimony of a criminal defendant at his own trial is unique and inherently significant." *Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir 1992); *accord State v. Hampton*, 2002 WL 449778 (La. 3/22/2002) (refusing defendant's unequivocal request to testify is not amenable to harmless-error review). Furthermore, it is not always obvious that a capital defendant wants his life to be spared.

Indeed, this Court has seen plenty of defendants willing to "volunteer" for execution—e.g., Joe Franklin and James Hampton.

John is not a volunteer. He wanted to ask for mercy and to explain his family background (JohnWinfield Depo21). Nothing more. *Id.* And whether he would testify was a decision for him, not counsel, to make. Nevertheless, the motion court concluded that "[trial counsel] would have been limited to asking him his name and then turning him over to cross-examination…because Movant would be lying about the commission of the murders." (L.F.283, *citing* H.Tr.175-176,337). But John made clear that all he wanted to testify about in penalty phase was his love for his children, his desire to remain in their lives, and his family background (JohnWinfield Depo.21). He did not want to discuss the murders during his penalty phase testimony. He testified in his deposition that he had wanted to deny being present for the murders during his ***guilt*** phase testimony – not his penalty phase testimony (JohnWinfield Depo.94). The motion court clearly erred in ignoring this distinction.

The motion court also wholly ignored that John would have testified about his background. It gave no consideration to the value of John telling his jurors about his life:

John lived with his mother, grandmother and older brother (JohnWinfield Depo. 23,27-28,31). He saw his father about six times a year and grew confused when his father got married and adopted a child (JohnWinfield Depo.22-23). From age 10 to 13, John played football with Northside Youth Association (JohnWinfield Depo33). Since his mother worked odd hours trying to make a living driving a bus, John often had to ride his bike to practice—15-20 miles from his home (JohnWinfield Depo33-34).

By age 16 or 17, John accepted the responsibility of being the "man of the house" (JohnWinfield Depo. 29,44). "[He] provided the food…paid utilities." (JohnWinfield Depo.44).

John met Carmel when he was 20 (JohnWinfield Depo.21,45-46). Not long after that, she became pregnant with Mykale, and, although Mykale was not John's biological child, he let Carmel move into his family's home (JohnWinfield Depo48). John raised Mykale as his son (JohnWinfield Depo52). Over the years, John invited several members of Carmel's family to live in his family's home to help them get back on their feet (JohnWinfield Depo49-50,52,60,62).

Kessler and Rosenblum prevented John from providing his jurors with these reasons to spare his life. His opportunity to ask that they spare his life is uniquely significant and cannot be dismissed as "obvious." A review of the entire record leaves the definite and firm impression that John's testimony may have been what the jury wanted to hear before it would spare his life. The motion court clearly erred, and this Court must remand for a new penalty phase trial.

II.

The motion court plainly erred in failing to vacate John's death sentences because such ruling violated John's rights to due process, a fair trial, effective counsel, freedom from cruel/unusual punishment and his privilege against self-incrimination. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§ 10,18(a), 19,21. John testified in guilt phase but not in penalty phase; this fact was "inescapably impressed on the jury's consciousness." Although John had a fundamental right not to have the jury transform his silence into an aggravating circumstance, the jury did not know that because (a) the trial court ignored its "serious and weighty" responsibility to insure that *John* had knowingly, intelligently and voluntarily waived his fundamental right; and (b) trial counsel did not request the "no-adverse-inference" instruction. Had trial counsel offered that instruction, the trial court would have been obliged to give it. But for trial counsel's error left John's failure to testify would not have been "inescapably impressed upon the jury's consciousness," and there is a reasonable probability that the jury would have spared his life. This error was blatantly obvious from the record and caselaw, but post-conviction counsel failed to raise it in the amended motion. Because post-conviction counsel abandoned John in his first appeal of right as to his right to effective counsel, this Court should excuse the default.

John testified in guilt phase (DirAppTr.843-969). He wanted to testify in penalty phase, but his attorneys prevented him from doing so. *See* Point I, *supra*. They did not, however, prevent the jury from using John's failure to testify in penalty phase as an

aggravating circumstance. Indeed, they highlighted John's silence and let the State do the same. The motion court plainly erred in failing to vacate John's death sentences.

> It has been almost universally thought that juries notice a defendant's failure to testify. "[T]he jury will, of course, realize this quite evident fact, even though the choice goes unmentioned…. [It is] a fact inescapably impressed on the jury's consciousness."… "[t]he layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime."

Carter v. Kentucky, 450 U.S. 288, 301 (1981), *citing* *Griffin v. California*, 380 U.S. 609, 621 (1965) and 8 J. Wigmore, Evidence §2272, p.426 (J.McNaughton rev.1961).

The Fifth Amendment privilege against compelled self-incrimination guarantees defendants not only the right to stand silent, but also the right not to have the jury draw an adverse inference from that silence. *State v. Storey*, 986 S.W.2d 462 (Mo.banc 1999); *State v. Mayes*, 63 S.W.3d 615 (Mo.banc 2001); *Carter*, *supra* at305. This privilege does not differentiate between the guilt and penalty phases of a capital trial. *Storey*, *supra* at 463; *Estelle v. Smith*, 451 U.S. 454, 462-463 (1981). Thus, to ensure that jurors do not transform the failure to testify into an aggravating circumstance, an instruction is necessary. *Carter*, *supra* at 302; *Storey*, *supra*.

If a defendant doesn't testify during penalty phase, the court *must* give the "no-adverse-inference" upon the defendant's request. *Storey*, *supra* at 464 (emphasis added). Indeed, whenever trial courts have refused such a request, this Court has reversed the death sentences. *Storey*, *supra*; *Mayes*, *supra*.

Whether a defendant will testify is a decision that only *he* can make. *Wainwright v. Sykes*, 433 U.S.72, 93,n.1 (1977) (Burger,C.J., concurring), *cited with approval Jones v. Barnes*, 463 U.S. 745, 751 (1983). This is a fundamental right; indeed, it is "more fundamental to a personal defense than the right of self-representation." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). "[Courts] do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citation omitted). Courts must indulge every reasonable presumption against waiver of fundamental rights. *Id.* Such waivers must be knowing, intelligent and voluntary. *Id.* at 465. Whether a proper waiver exists "should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Id.* As fully discussed in Point I, *supra*, however, trial courts have never been required to examine defendants *sua sponte* about fundamental rights. To require otherwise would force trial courts to enter treacherous waters and risk intruding on the attorney-client relationship.

A. *Trial Counsel Deprived John of Effective Counsel*

The duty to advise John about the nature and scope of his fundamental right to testify must lie with trial counsel. *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir.1992). Trial counsel is the first line of defense, and, as fully discussed in Point I, *supra*, only John could waive his fundamental right to testify. It logically follows that only John could decide whether to have his failure to testify commented on—even by the "no-adverse-inference" instruction. Indeed, this Court has held, "when a defendant does not testify in the penalty phase of a capital murder trial, the court must give a "no-

adverse-inference" instruction if the ***defendant*** so requests." *Storey*, 986 S.W.2d at 464 (emphasis added).

If this Court concludes that John's attorneys could decide whether to offer this instruction, then it must determine whether they acted reasonably under the circumstances. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Appellant can think of only two explanations for trial counsel's failure to offer this instruction: (1) they didn't know it applied to penalty phase; or (2) they didn't want to highlight John's silence. Neither is reasonable. *Id*. And, it bears noting that "the mere incantation of the word 'strategy' does not insulate attorney behavior from review. The attorney's choice of tactics must be *reasonable* under the circumstances." *Cage v. Singletary*, 971 F.2d 1513,1518 (11th Cir. 1992) (emphasis in original).

Any reasonably competent attorney whose practice involves capital murder would know that the "no-adverse-inference" instruction applied to penalty phase silence as well as guilt. While *Storey*, *supra* and *Mayes*, *supra* were decided after John's trial, this Court adopted MAI CR3d313.30A and its Notes on Use some five years before John's trial. Note on Use 4 makes clear that the "no-adverse-inference" instruction is one that must be given in penalty phase—upon request.

The alternative explanation that giving the instruction would only highlight John's silence is no more compelling. Indeed, when Kentucky argued this as a basis for never giving a "no-adverse-inference" instruction, the Supreme Court resoundingly rejected it as nonsensical.

> This purported justification was specifically rejected in the *Lakeside [v. Oregon*, 435 U.S. 333, 339 (1978)] case, where the Court noted that "[i]t would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect."

Carter, 450 U.S. at 303. A cautionary instruction is "perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination." *Id.* at 302. To suggest that the instruction would have had no effect is tantamount to saying that jurors will not heed the court's instructions. *Id.*; *Bruno v. United States*, 308 U.S. 287, 294 (1939).

B. Withholding the "No-Adverse-Inference" Instruction Prejudiced John

To prove prejudice, John only need demonstrate that counsel's error undermines confidence in the outcome. *Moore v. State*, 827 S.W.2d 213, 215 (Mo.banc 1992). It certainly did. Counsel's failure to submit this instruction left John's silence "inescapably impressed on the jury's consciousness." *Carter*, 450 U.S. at 301. Had counsel acted reasonably, this impression would have been removed from the jury's consciousness. Left to find John's silence to be aggravating evidence, jurors still spent over 5½ hours deliberating whether death was the proper punishment. Had jurors known that John's silence could not be so considered, a reasonable probability exists that they would have opted for life imprisonment without probation or parole.

C. This Court Should Excuse the Procedural Default

Ordinarily, a finding of prejudice stemming from trial counsel's deficient performance would end the inquiry. This, however, is not an ordinary case because post-

conviction counsel did not include this substantial claim in their amended motion (L.F.29-181). Before letting John be executed without review of this substantial claim, this Court should determine whether sufficient cause and prejudice exists to excuse John for the default caused by motion counsel. As this Court has recently held, death is different. *Deck v. State*, 68 S.W.3d 418, 430 (Mo.banc 2002); *accord Woodson v. North Carolina*, 428 U.S. 280, 305 (1977). Indeed, the qualitative difference between death and any other sentence is illustrated by this Court's promulgation of Rule 29.16, which sets very strict qualifications for capital post-conviction counsel—something not seen in the non-capital arena.

As fully discussed in Point IV, *infra*, post-conviction counsel abandoned John in his first appeal of right regarding his constitutional right to effective counsel. They did not include all claims known to them, as mandated by Rule 29.15(e). Clearly, they knew about this substantial claim. They filed John's motion **15 months after** this Court decided *Storey*, *supra*. Yet, inexplicably, they did not allege that trial counsel rendered in effective assistance by failing to offer the "no-adverse-inference" instruction. John's 29.15 motion was the first place he could gain review of his right to effective assistance of trial counsel. *State v. Wheat*, 775 S.W.2d 155, 157-158 (Mo.banc 1989). Since Rule 29.15 provided John with his first opportunity to obtain review of that constitutional right, he was entitled to effective assistance in his Rule 29.15 action as to that claim. *See* Point IV, *infra*; *Cf. Coleman v. Thompson*, 501 U.S. 722, 755 (1991). He was denied it. Reasonably competent post-conviction counsel, trained and acting in accordance with

Rule 29.16, would have raised this substantial claim of trial counsel ineffectiveness. The Sixth Amendment requires the default be imputed to the State. *Coleman*, *supra* at754.

The ultimate question then is whether John suffered prejudice, and he did. John wanted to testify in penalty phase. *See* Point I, *supra*. Certainly, he did not want jurors to interpret the silence forced upon him by counsel as an aggravating fact that justified the death penalty. As this Court observed in *Storey*, *supra*, capital sentencing juries never *have* to give death. Even if they find that the aggravators outweigh the mitigators, they have discretion to assess life. *Id.* "In light of this discretion, the prejudice against a defendant who invokes the privilege—prejudice which is 'inescapably impressed on the jury's consciousness'—is not purely speculative." *Id.* at 464-465 (citation omitted).

Here, prejudice is even less speculative. In a tragic twist, however, trial counsel not only prevented John from testifying but also encouraged jurors to consider John's failure to testify, arguing: "And is John proud that he had two prior altercations with Carmel? Probably not." (Tr.1099); and "I can't get John to express himself and I don't know why." (Tr.1103). This opened the door for the State to refer directly to John's failure to testify in penalty phase, arguing, "And would we like him to explain to us why he did this? Sure." (Tr.1106). These arguments served to insure prejudice. *See Mayes*, *supra*,at 639,n.13.

This Court should vacate John's death sentences and remand for a new penalty phase.

III.

The motion court clearly erred in denying post-conviction relief because trial counsel constructively absented himself from trial during John's testimony and thus deprived John of due process, effective counsel and a fair trial. U.S. Const., Amends. V,VI,XIV; Mo.Const., Art.I, §§10,18(a). In direct-examination, Kessler interrogated John, attacking his testimony whenever it did not comport with what Kessler believed actually happened. Kessler performed as the State's advocate, telling the jury, "[I]t doesn't make me happy to stand up here and have to even be in this position…I don't know why he doesn't remember. I don't know if maybe he does remember." John was cross-examined twice – once by Kessler and once by the State, and, this breakdown in the adversarial process produced a trial that lacked reliability. But for Kessler's constructive absence during John's testimony, there is a reasonable probability that the result would have been different.

A. …I was in the upstairs apartment and just trying to figure out what – you know, what the hell is – what the hell is going on and, you know, I believe I knocked [the entertainment center] over.

Q All right. Well, did you knock it over out of anger or out of – ***How did it just get knocked over? Things don't just fall.***

A. No, it was –You know, I was upset. I was upset.

(TrialTr.882) (emphasis added).

A. I was just basically trying to figure out what was – you know, why was everybody lying, you know, that's all.

Q. All right. ***Well, you had some idea of the reason they were lying is because she had been out with Anthony Reynolds, correct***?

A. Correct.

(TrialTr.884-885) (emphasis added).

A. …I went to my car to see, you know, what was what and I just learned to see that my tire was cut on my car.

Q. All right. And what did you do?

A. Got my gun

Q. All right. Why did you get the gun?

A. I don't know.

Q. ***Well, we don't know. Why did you get it***?

A. At that point, I had just snapped. I don't really know what I was actually thinking.

Q. What were you going to do with the gun?

A. I didn't have any intention of doing anything.

Q. ***Well, you did something with it. What were you thinking about when you got the gun***?

A. (Pause). I just – I went into the apartment building and I just asked – I just asked Arthea what the hell was going on, that's all. And from that point all hell broke loose.

Q. ***John, you shot her in the face, okay. That's what happened. Why did you shoot her in the face***?

A. I don't know. I don't know. I didn't intend – I didn't plan on hurting nobody.

Q. ***But you shot her. You shot her point-blank range in the face***.

A. I just – I said I didn't plan on – I didn't intend on hurting nobody and nothing was planned. And I know that's no justification for anything.

Q. ***Well, John, these people [the jurors] are entitled to know what you were thinking when you shot her in the face***.

A. I don't know what I was thinking about.

(TrialTr.894-895) (emphasis added).

A. …A lot of those things are still cloudy. I'm not saying – I'm not saying that I didn't do it. I'm not saying that.

Q. ***Well, you're the only person who did it. You're the only person that had a gun***. Do you remember doing it?

A. Some of it. Some of it I do.

(TrialTr.896) (emphasis added)

A. …I never had any intention to shoot anybody.

Q. ***But you shot them. You didn't accidentally shoot them. Your finger moved, it pulled the trigger six times***. (Pause).

(TrialTr.898) (emphasis added).

Now, for the $1,000,000 question: Who is conducting this interrogation? Readers of these excerpts cannot help but think they are reading an aggressive cross-examination by a seasoned prosecutor (*See, e.g.*, H.Tr.176). They are not. Incredibly, this hostile

inquisition came, not from the prosecutor, but from Kessler – John's own attorney. John alleged that Kessler rendered ineffective assistance by conducting "[a direct] examination that often seemed more like a cross-examination" (L.F. 35-36,100-109). For all practical purposes, "[the prosecutor] could have taken a break or even a long lunch because Kessler [did] an extremely effective job of ensuring John would be convicted of capital first degree murder…." (L.F. 106). By the time Kessler finished his attack, the damage could be seen in the jurors' negative body language (L.F.101; H.Tr.271). Kessler's examination devastated John's case (L.F.101,108).

The motion court summarily denied this allegation, finding only that (a) John made a knowing decision to testify and (b) "counsel cannot be found ineffective because Movant did not have a compelling story to tell." (L.F. 285, *citing* *State v. Cuno*, 869 S.W.2d 285,287 (Mo.App.[E.D.]1994). This Court must review the entire record and decide whether the motion court clearly erred. Rule 29.15(k); *State v. White*, 798 S.W.2d 694, 697 (Mo.banc1990). It did.

"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 States v. Cronic*, 466 U.S. 648, 654 (1984). Merely being represented by counsel, however, does not suffice. *Id.* The Sixth Amendment requires "assistance of counsel for his defense." U.S.Const., Amend.VI. At its core, the Sixth Amendment serves to assure "assistance" to the accused when he is confronted by both the intricacies of the law and the advocacy of a public prosecutor. *United States v. Ash*, 413 U.S. 300,309 (1973). An accused "requires the guiding hand of counsel at every step of the

proceedings against him." *Id.* Indeed, the Sixth Amendment's guarantee that counsel will provide assistance underscores the "very premise of our adversary system." *Cronic*, 466 U.S. at655. We have an adversarial system of justice because of our strong belief that partisan advocacy on each side best promotes the ultimate objective of discovering the truth. *Id.* For this objective to be realized, defense counsel must act as his client's advocate. *Anders v. California*, 386 U.S. 738,743 (1967).

> The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing…[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Cronic, 466 U.S. at656.

The process of John's trial lost any resemblance to "a confrontation between adversaries" the minute Kessler called John to testify. Kessler's examination of John sought not to put the State's case "to the crucible of meaningful adversarial testing," but rather to put John to the crucible. Kessler voiced a theory that John did it, but did not deliberate – "all of a sudden he just lost it" (H.Tr.162; TrialTr.583,586,1003-1018). But he did nothing to move this theory forward. Indeed, he did everything to pull the rug out from under this theory by arguing with nearly everything John said.

In opening statement, Kessler told the jurors that John had snapped when he went in the apartment with the gun he was not deliberating and that John cannot remember the sequence of events (TrialTr.583). But, when John testified accordingly, Kessler attacked him. Then, in closing argument, Kessler complained, "I don't condone what he did, it's

not justified, it doesn't make me happy to stand up here and have to even be in this position…" (TrialTr.1005).

This is partisan advocacy? On whose behalf? It certainly advocated *none* of John's interests. The adversarial process suffered a fundamental breakdown. The record reveals that there was not a confrontation between adversaries, but a confrontation that pitted Kessler and the prosecutor against John.

> A defense attorney who abandons his duty of loyalty to his client and effectively joins the [S]tate in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "'represents' the defendant only through a tenuous and unacceptable legal fiction." *Faretta v. California*, 422 U.S. 806,821 (1975). In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the [S]tate and the defendant are necessarily in opposition.

Osborn v. Shillinger, 861 F.2d 612,629 (10th Cir. 1988). Osborn's attorney adopted and acted upon a belief that his client should be convicted. *Id.* at625-630. The Tenth Circuit concluded that Osborn's plea and sentence resulted from "a process [that] was not adversarial, and therefore was unreliable." *Id.* at629; *accord* *United States v. Swanson*, 943 F.2d 1070,1074-1076 (9th Cir. 1991) ("We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client [committed the charged offense].").

Kessler's conduct undermined the adversarial process, and the motion court clearly erred in finding otherwise. No reasonable trial attorney would have subjected his client to the sort of tag-team cross-examination that John had to endure by Kessler and the prosecutor. Exacerbating the matter, Kessler later complained to the jurors, "I don't know why [John] doesn't remember. I don't know if maybe he does remember." (Trial Tr.1007). Telling the jurors that ***Kessler, John's attorney***, believed it possible that John had lied under oath did not advocate for John's defense. It severely undermined his defense. Indeed, it "*so undermined the proper functioning of the adversarial process* that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668,686 (1984) (emphasis added).

Kessler did not act as a reasonably competent attorney. The question is whether John must show that prejudice resulted from Kessler's actions. "Actual or *constructive* denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Id.* at692 (emphasis added). Circumstances analogous to the situation here result in the constructive absence of counsel altogether. *Swanson*, *supra* at1075. When Swanson's attorney told the jury that there was no reasonable doubt but that Swanson committed the offense, "he ceased to function as defense counsel." *Id.* Similarly, when Kessler cross-examined John, he stopped functioning as John's advocate and became his adversary. Kessler constructively absented himself from John's defense. Prejudice, therefore, should be presumed. *Strickland*, *supra*.

The presumption of prejudice from the denial of counsel at a critical stage of the trial is echoed by *Cronic*, *supra*. This term the United States Supreme Court reaffirmed

that this is the "[m]ost obvious" of the three circumstances that require a presumption of prejudice. *Bell v. Cone*, __ U.S. __, 122 S.Ct. 1843,1851 (2002). After all, "[a] trial would be presumptively unfair,…where the accused is denied the presence of counsel at a 'critical stage…." *Id*. (citations omitted). John was constructively denied the presence of counsel during his testimony – a highly critical stage of the proceedings. Prejudice should be presumed.

Even if prejudice is not presumed, however, prejudice clearly resulted. Prejudice exists whenever counsels' error undermines confidence in the outcome. *Moore v. State*, 827 S.W.2d 213,215 (Mo.banc1992). It does here. Kessler undermined John's sole defense at trial – i.e., that he did not deliberate. John testified that he did not intend to shoot anyone and that he certainly never planned to do so (TrialTr.894-895). He testified, "I'm not saying that I didn't do it. I'm not saying that." (TrialTr.896). Rather than build on this testimony to show the jury that John did not deliberate, Kessler attacked this testimony and provided the jurors a picture of a cold, vicious killer: "John, you shot her in the face, okay. That's what happened" (TrialTr.895); "But you shot her. You shot her point-blank range in the face" (TrialTr.895); "Well, you're the only person who did it. You're the only person that had a gun" (TrialTr.896); "But you shot them. You didn't accidentally shoot them. Your finger moved, it pulled the trigger six times (pause)." (TrialTr.898). Then, he closed, telling the jurors that John's testimony "was awful" (TrialTr.1014) and suggesting that John may remember more than he was willing to admit (TrialTr.1007). Kessler gave the jurors no reason to find that John did not deliberate.

Kessler took every opportunity to discredit his client and his defense. He may as well have been sitting with the prosecutor for all the "assistance" he provided John. John's trial lost its character as a contest between two adversaries and became a contest of Kessler and the prosecutor against John. This Court can have no confidence that the resulting trial produced a reliable result. Thus, it should reverse the motion court's order, vacate John's convictions and remand for a new trial.

IV.

The motion court clearly erred in failing to reappoint counsel before reaching the merits of John's 29.15 motion because such failure violated John's rights to due process, effective counsel, a full and fair hearing, and freedom from cruel/unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21; Rules 29.15(e), 29.16. Missouri courts refuse to review claims of ineffective counsel on direct appeal; rather, those claims must wait for post-conviction review, during which movants have the right to counsel. Indeed, since Rule 29.15 provides Missouri defendants with their first appeal of right as to their constitutional right to counsel, 29.15 counsel must provide effective assistance to insure that the amended motion includes (A) all claims known and (B) sufficient facts. Here, 29.15 counsel did neither: (A) they omitted any claim regarding John's right to have the "no-adverse-inference" instruction submitted during penalty phase – an error for which this Court had reversed *State v. Storey* for a new penalty phase just 15 months earlier; they omitted any claim regarding the total breakdown in communication between Kessler, Rosenblum and John; and (B) they alleged several questions that trial counsel should have asked regarding unadjudicated assaults against Carmel, but they omitted any hint of what answers trial counsel might have gotten.

Scott Rosenblum and Brad Kessler "have always had an interesting relationship." (H.Tr.273). It got more interesting, however, when Kessler joined Rosenblum's firm – less than seven months before John's trial (H.Tr.101;TrialTr.index). Within a few months, the merger fell apart (H.Tr.101). With John's trial just three or four months

away, Kessler left the firm and took John's file with him (H.Tr.102). "There was a breakdown of trust." (H.Tr.183). Indeed, John later learned that Rosenblum apparently "locked [Kessler] out of the office." (L.F.242; JohnWinfield Depo95-96). Kessler admitted that his "arrogance" and "petty aggravation" with Rosenblum prevented him from acting in John's interest at trial (H.Tr.122,169). While 29.15 counsel knew about the rift between Rosenblum and Kessler, their amended motion makes only passing reference to it and no reference to the error resulting from it (L.F.72,86-88).

Appointed Counsel's Duty

When John filed his *pro se* motion for post-conviction relief, he completed the indigency affidavit (L.F.18). This required the motion court to appoint counsel. Rule 29.15(e). It did, and John Tucci and Tony Manansala entered their appearance (L.F. 26-28). The Rule instructed them to review John's *pro se* motion, and "[I]f the motion does not assert sufficient facts or allege all claims known to the movants, counsel *shall* file an amended motion that sufficiently alleges the additional facts and claims." Rule 29.15(e) (emphasis added). Presumably, this is because, to promote finality, movants are deemed to have waived all claims that could have been raised in the amended motion. *Day v. State*, 770 S.W.2d 692, 696 (Mo.banc1989). Post-conviction counsel did not fulfill their mandated role.

The Omitted Claims

About six weeks before his July 1997 trial, John tendered a pleading to the St. Louis Circuit Clerk that accused Rosenblum and Kessler of malpractice (L.F.218). When John lodged his complaints to Rosenblum and Kessler, each directed him to the other,

putting John on a perpetual loop. *Id.* John asked post-conviction counsel to include this claim in his amended motion (L.F.241). They did not (L.F. 29-181). Not only would the explication of the breakdown in communication between Rosenblum and Kessler and between them and John have put their abysmal performance in context, it would have entitled John to relief, or at least a hearing. *See e.g.*, *State v. Robertson*, 44 P.3d 1283, 1287-1291 (Kan.App. 2002) (disciplinary complaint put counsel in the untenable position of being both advocate and adversary of defendant created a conflict and thus required further inquiry).

Also, as fully discussed in Point II, *supra*, 29.15 counsel failed to allege that trial counsel rendered ineffective assistance by not requesting the "no-adverse-inference" instruction in the penalty phase of John's trial. Had trial counsel requested that instruction, the trial court would have been obliged to give it. *State v.* Storey, 986 S.W.2d 462 (Mo.banc 1999). Had the trial court refused to give it, John would have been entitled to a new penalty-phase trial. *Id.*; *State v. Mayes*, 63 S.W.3d 615 (Mo.banc 2001). Motion counsel filed John's motion **15 months after** this Court decided *Storey*, yet, they inexplicably omitted this obvious error from John's amended motion.

The Omitted Facts

In claim 8(f), 29.15 counsel alleged that "trial counsel failed to effectively address the State's presentation during the penalty phase of two alleged prior unadjudicated bad acts." (L.F.35). As factual support, they began by reciting Carmel's trial testimony regarding the two unadjudicated bad acts and then simply alleged that:

> A reasonably competent trial attorney would have put this proof to the test. But John's trial counsel failed to challenge it during Carmel's cross examination. Trial counsel **failed to question** Carmel about whether there are other witnesses in either alleged event to corroborate Carmel's story. Trial counsel **failed to question** Carmel about whether she called the police concerning either alleged event. Trial counsel **failed to question** Carmel about whether she sought medical and/or psychological attention concerning either alleged event. Trial counsel **failed to question** Carmel about whether, to the best of her knowledge, there was any physical evidence to prove that either event really occurred.

(L.F.97-100) (emphasis added). They did not provide the slightest hint as to what answers these questions might have produced. *Id.* The motion court denied this claim without an evidentiary hearing (L.F.248,285). After all, 29.15 counsel needed to show that the "**testimony** would have provided a viable defense." *State v. Vinson*, 800 S.W.2d 444,448-449 (Mo.banc 1990). Positing questions does not suffice.

Rule 29.15(e) Contemplates Meaningful Action

Missouri has not always provided counsel to post-conviction litigants. Realizing that the lack of counsel too often led to unfortunate and unintended summary denials of *pro se* post-conviction claims, this Court granted the absolute right to counsel. *Fields v. State*, 572 S.W.2d 477, 482-483 (Mo.banc 1978).

> Appointed counsel has the duties and responsibilities enjoined upon [them] under the rule and petitioner has the correlative opportunity thereby

> provided to make a full disclosure of every fact he knows concerning his case to one who by [their] legal training [are] able to appreciate the legal significance. Additionally, an attorney is able *by training and experience* to ask probing questions and thereby elicit important information which the petitioner might otherwise fail to disclose through ignorance. These are important factors in enabling a strong measure of finality…where counsel has been appointed.

Id. at 482,n.3 (emphasis added).

Thirteen years after *Fields* created the right to counsel, this Court recognized that more than mere appointment was necessary. It held that the motion court must not let counsel "abandon" their clients' efforts to obtain post-conviction relief. *Luleff v. State*, 807 S.W.2d 495, 498 (Mo.banc 1991). To date, this Court has identified two forms of abandonment: complete inaction and late action. *Moore v. State*, 934 S.W.2d 289, 291 (Mo.banc 1996). In both instances, the motion court must reappoint counsel since failing to do so would deprive the defendant/movant "meaningful review of post-conviction claims." *Id.*

Today, this Court must recognize a third form of abandonment: materially incomplete action. Why? Because post-conviction counsel are not the movants or their agents. When this Court decided *Luleff*, post-conviction movants remained the masters of their case. The former rule required movants to verify that the amended motion contained all facts and all claims known to them. *Vinson*, 800 S.W.2d at 448. In 1996,

however, this Court removed that requirement and essentially made counsel the master of the post-conviction case. Rule 29.15. Although John knew of and insisted upon the conflict of interest claim, he had no power to avoid its being waived by post-conviction counsel. *Cf. Coleman v. Thompson*, 501 U.S. 722,753-754 (1991) (movants bear risk of attorney inaction when their attorney acts as their agent) Under the present state-of-the-law, Rule 29.15(d) punishes John by deeming waived any claim that he knew about but that counsel omitted. To avoid this unfair result, abandonment must be extended to encompass materially incomplete action by post-conviction counsel.

Meaningful review of John's post-conviction claims requires meaningful action by John's post-conviction counsel. He did not get it. They provided materially incomplete action, and John put the motion court on notice of that inaction. The motion court clearly erred in failing to reappoint counsel.

If this Court disagrees that incomplete action constitutes abandonment, it must, then, decide whether Rule 29.15 serves as the first appeal of right as to one's right to effective counsel such that 29.15 counsel must, themselves, be effective in litigating that constitutional right. The answer must be that it does.

The First Appeal of Right

There is no constitutional right to appeal a criminal conviction and sentence. *McKane v. Durston*, 153 U.S. 684, 687 (1894). Whether to allow an appeal is "wholly within the discretion of the state." *Id.* Every state, however, has exercised its discretion and made the right to appeal an integral part of our system for finally adjudicating the

guilt or innocence of a defendant. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Having done so, the states must insure that "the procedures used in deciding appeals…comport with…Due Process." *Evitts v. Lucey*, 469 U.S. 387, 393-394 (1985) (citation omitted).

Missouri's Procedure for Deciding Appeals

Missouri has created an appeal of right that can only be described as bifurcated. *See* §547.070 and Rule 29.15(a). On direct appeal, Missouri courts will review every constitutional error ***except*** the right to effective assistance of counsel. *State v. Wheat*, 775 S.W.2d 155, 157-158 (Mo.banc 1989). Review of that constitutional error must await the 29.15 action. *Id*.; Rule 29.15(a). Indeed, Rule 29.15 is "the exclusive procedure" for gaining review of this constitutional right to effective assistance of trial and appellate counsel. *Id.* Rule 29.15 provides defendants their first appeal of right as to those claims. *Id.* In theory, this bifurcated appeal can afford due process. Indeed, it may well be the best method of doing so. In practice, however, because of situations like this, it falls far short.

The Right to Counsel

Missouri must provide counsel for the first appeal of right. *Douglas v. California*, 372 U.S. 353, 358 (1963); *Ross v. Moffitt*, 417 U.S. 600, 607 (1974). It does. §600.042.4(1); Rule 29.15(e). But, is mere appointment of an attorney enough, or does the right to counsel necessarily entail the right to effective counsel? The fact that the rule provides for counsel does not end the inquiry. *Pennsylvania v. Finley*, 481 U.S.551, 556 (1987). "Rather, it is the source of that right to a lawyer's assistance, combined with the

nature of the proceedings, that controls the constitutional question." *Id.* The nature of the proceeding at issue is John's first appeal of right. Due process demanded that he have counsel. Due process also demanded that counsel be effective. *Evitts*, 469 U.S. at 395. Permitting anything less would reduce the promise of counsel on appeal to "a futile gesture." *Id.* at 397.

This Court requires direct appeal counsel to render effective assistance. *State v. Sumlin*, 820 S.W.2d 487,490-491 (Mo.banc 1991) and Rule 29.15(a); it does not require the same from 29.15 counsel. *See e.g.*, *Pollard v. State*, 807 S.W.2d 498,502 (Mo.banc 1991); *State v. Ervin*, 835 S.W.2d 905, 928-929 (Mo.banc 1992). As fully discussed, Rule 29.15 provides Missouri defendants with their first appeal of right as to claims of trial and appellate counsel ineffectiveness. *Pollard*, *Ervin* and their progeny must be overruled. "A first appeal of right…is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts*, 469 U.S. at 397. So far as undersigned counsel can discern from his research, this Court has never addressed this precise issue.

The Court of Appeals has addressed this issue and summarily rejected it. *McCabe v. State*, 792 S.W.2d 694,694-695 (Mo.App.E.D. 1990); *Crandall v. State*, 785 S.W.2d 780,781-782,n.5 (Mo.App.S.D. 1990); *State v. Anderson*, 800 S.W.2d 465,468 (Mo.App.E.D. 1990). *McCabe*, *supra*, and *Crandall*, *supra*, rely on *Finley*, *supra*, for the blanket proposition that, since states need not provide defendants with any post-conviction remedy, they need not provide counsel, let alone effective assistance of

counsel.[8] This black-letter statement paints the issue with too broad a brush, and this Court should overrule *McCabe*, *supra*, *Crandall*, *supra* and *Anderson*, *supra*.

Missouri had no obligation to provide a first appeal of right, but it did. *McCabe*, *Crandall* and *Anderson* beg the question: In structuring its appeal of right, can Missouri simply isolate one constitutional right and declare that, as to it, there is no appeal of right? The answer must be "no." Once Missouri vested defendants with a right to appeal, due process protected the defendants from having their state-created appeal of right arbitrarily denied or abrogated. *Morrissey v. Brewer*, 408 U.S. 471, 481-483 (1972).

In Missouri, then, *Finley*, *supra*, best stands for the proposition that Missouri was not obliged to provide a post-conviction remedy as to any issue that could have been raised in the direct appeal, but it was obliged to provide a post-conviction remedy as to effective assistance of trial and appellate counsel. The bifurcation of Missouri's appeal of right has the capacity to afford due process, but only if it is recognized that Missouri must provide effective counsel in Rule 29.15 so that movants can challenge the effectiveness of trial and appellate counsel, an issue on its first appeal of right.

Effective Post-conviction Counsel

The United States Supreme Court has not addressed this precise question. In *Coleman*, 501 U.S. at755, the habeas petitioner tried to cast his question in terms of the right to effective counsel in habeas actions that serve as the first appeal of right as to trial

[8] *Anderson*, *supra*, simply relied on *McCabe* and *Crandall*.

and appellate counsel's effectiveness. The Court concluded that it need not answer the question Coleman posed because Coleman's real complaint was with the representation he received in his second appeal. *Id.*

> [O]ne state court has addressed Coleman's claims: the state habeas trial court. The effectiveness of Coleman's counsel ***before that court*** is not at issue here. Coleman contends that it was the ineffectiveness of his counsel during the appeal from that determination that constitutes cause for his default. We thus need to decide only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment. We conclude that he did not.

Id. (emphasis added). *Coleman* did not hold that post-conviction counsel in the ***first appeal of right*** need not be effective. Rather, it simply held that post-conviction counsel in the ***second appeal*** need not be effective. That flows logically from *Douglas*, *supra*, and *Ross*, *supra*.

Unlike Coleman, John's complaint lies with the representation by 29.15 counsel who represented him in the motion court on his first appeal of right as to the issue of trial counsel's ineffectiveness. Further, as noted above, post-conviction counsel is no longer a mere agent of the post-conviction movant since, once appointed, counsel is the master of the post-conviction action. The post-conviction movant has been stripped of any power he once had to insure that the amended motion alleges all claims known to him. Thus, the logical target of any sanction for violating the procedural rules is post-conviction counsel, not movant.

> Such a course may well be more effective than the alternative of refusing to decide the merits of an appeal and will reduce the possibility that a defendant who was ***powerless*** to obey the rules will serve a term of years on an unlawful conviction.

Evitts, 469 U.S. at399 (emphasis added).

This Court cannot have intended to provide counsel as a hollow gesture. *Fields*, *supra* recognized the need to appoint counsel in order to insure finality. "[I]t would be absurd to have the right to appointed counsel who is not required to be competent." *Jackson v. Weber*, 637 N.W.2d 19, 22-23 (S.D. 2002), *citing* *Lozada v. Warden*, 613 A.2d 818, 821 (Conn. 1992); *accord* *Crump v. Warden*, 934 P.2d 247, 253 (Nev. 1997); *also* *In the Matter of Carmody*, 653 N.E.2d 977, 983 (Ill.App.4th Dist. 1995). Appointing counsel for indigent post-conviction movants but letting counsel be prejudicially ineffective would render the appointment of counsel "a hollow gesture serving only superficially to satisfy due process requirements." *Carmody*, 6543 N.E.2d at 984 (quotation omitted); *accord* *Jackson*, *supra*. Indeed, since this Court established specific "qualifications" for post-conviction counsel, it implicitly recognized that post-conviction counsel must be effective. *See* Rule 29.16(b); *Compare* *Lozada*, *supra* at 821 (the court rejected the State's argument that counsel need not be effective since "there was no statutory reference to the qualifications of counsel.").

Recognizing that due process requires post-conviction counsel to be effective will not open a *Pandora's Box* for this Court. It will not be enough for a post-conviction movant to argue that the proceedings in the motion court were unfair because post-conviction counsel rendered ineffective assistance. Any claim of ineffective assistance

by post-conviction counsel "must eventually be directed to error in the original trial or plea of guilty." *Jackson*, 637 N.W.2d at 23. Thus, "[t]o succeed in his bid for [post-conviction relief], the [movant] must prove both (1) that his appointed [post-conviction] counsel was ineffective, and (2) that his trial counsel was ineffective." *Lozada*, 613 A.2d at 823. This will be a "herculean task." *Id.*

The Remedy

Occasionally, there will errors so egregious that the ineffectiveness of both post-conviction and trial counsel will be apparent on the face of the record. Such is the case, here, regarding the failure to submit the "no-adverse-inference" instruction. *See* Point II, *supra*. The record itself establishes that that error entitles John to a new penalty phase. Most often, however, the errors will need factual development. Such is the case here, regarding the conflict of interest. The appropriate forum for that factual development is the motion court. *See Luleff*, *supra* at 497. Therefore, this Court should remand for further proceedings in the motion court so that John may prove that post-conviction counsel rendered ineffective assistance to John's substantial prejudice.

V.

The motion court clearly erred in denying post-conviction relief because trial counsel rendered ineffective assistance in failing to investigate and call John's children, Mykale Donald and Symone Winfield, as mitigation witnesses. Such ineffectiveness also deprived John of his rights to due process, a fair trial and freedom from cruel/unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21. Counsel knew about Mykale and Symone; indeed, John's mother took Mykale and Symone to Rosenblum's office "early on in the case." Rosenblum met with them, but not about their being mitigation witnesses because he saw no reason to do so "at that time." Counsel finally endorsed the children three days before trial, but he did not talk to them until a recess during penalty phase. A reasonably competent attorney would not have waited to investigate during trial. Counsel's inaction prejudiced John in that Mykale and Symone would have testified that John did many fun activities with them, taught them how to do things and loved them deeply.

Evelyn took John's children, Mykale Donald and Symone Winfield, with her to a meeting with Rosenblum "early in the case." (H.Tr.211). Rosenblum met with the children, but not about their being potential mitigation witnesses (H.Tr.211,321-322). According to Rosenblum, "I don't think I would have had any reason to talk to them about their role in the case as possible witnesses at that time." (H.Tr.211-212).

By Friday, July 10, 1998, neither Rosenblum nor Kessler had ever talked to Mykale and Symone (TrialTr.14). Indeed, so far as they knew, no one had even

mentioned the trial to the children. *Id.* With John's trial just a weekend away, Rosenblum and Kessler blindly endorsed the children as witnesses (TrialTr.13; TrialL.F.106). The prosecutor immediately notified Carmel (TrialTr.13). Although Carmel had previously agreed that the children would live with Evelyn, their being endorsed as witnesses changed that (TrialTr.13-14,1038). Carmel, along with four others, went directly to Evelyn's home and removed the children (TrialTr.13-14). When the parties met for pre-trial matters that Monday, Rosenblum and Kessler complained that the children were "unavailable to us. We don't know where they are." (TrialTr.13). Of course, having done none of the necessary investigation before trial, Rosenblum admitted that they entered trial not knowing "what the [children's] reaction [to testifying] would be [or] what they would have to say." (TrialTr.14).

John alleged that counsel rendered ineffective assistance in failing to investigate and call Mykale and Symone as mitigation witnesses (L.F.34-35,92-96).[9] The motion court overruled this claim, finding that Rosenblum made a strategic choice not to call the children and that he had no duty to present mitigating character evidence (L.F.283-284). The motion court clearly erred. Rule 29.15(k).

Certainly, at the evidentiary hearing, Rosenblum claimed to have made a strategy decision not to call Mykale and Symone (H.Tr.214). But this simply begs the question

[9] Kessler made this same allegation in the Motion for New Trial (TrialL.F.251-252).

whether Rosenblum's strategy was reasonable and ignores the predicate question about his lack of investigation.

> [S]trategic choices made ***after less than complete investigation*** are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland v. Washington, 466 U.S. 668, 690-691 (1984) (emphasis added). It cannot be disputed that Rosenblum did not make a complete investigation before deciding not to call Mykale and Symone to testify. He never even talked to them about that prospect until a recess during the penalty phase of trial, and then, he only met with them for a few minutes (H.Tr.52-53,213321-322;SymoneWinfield Depo19). At the evidentiary hearing, he tried to excuse this dereliction of duty, claiming, "this was my first opportunity [to meet with the children because] we didn't have access to them for at least a week or two before [trial]." (H.Tr.325). This is patently untrue. The record unequivocally demonstrates that Rosenblum could have found the children at Evelyn's home until three days before trial.

The threshold question, then, is whether Rosenblum made a reasonable decision that made such an investigation unnecessary. Put another way, is it objectively reasonable for counsel to delay this investigation until after the guilty verdict is returned? Of course not. As Lisa Jones from the Victim's Unit of the Prosecuting Attorney's Office noted, one must spend "a great deal of time" with children to help them feel

comfortable with the idea of testifying (H.Tr.361). Rosenblum had the opportunity to spend a great deal of time with Mykale and Symone – since Evelyn brought them to him "early on in the case." But he did not avail himself of that opportunity. He waited until the most difficult, inopportune moment–the middle of John's trial, when, presumably, he had things besides preliminary investigation to be doing. He ignored that the children were "going through so much right now, they [were] so confused." (Tr.1039). Rosenblum's last-minute investigation could only have compounded their difficult situation.

In *Williams v. Taylor*, 529 U.S. 362,395 (2000), counsel acted deficiently by beginning his investigation ***a week before*** trial. Waiting so long to begin the investigation precluded counsel from uncovering extensive evidence that would have cast Williams in an entirely different light for the jury. *Id.* Williams' attorney clearly did not fulfill his obligation to conduct a thorough investigation. *Id.*at 395-396 (citation omitted).

In *People v. Towns* 696 N.E.2d 1128, 1138 (Ill. 1998), the movant alleged that trial counsel waited until after receiving the guilty verdict to begin investigating possible mitigation evidence. The four witnesses that counsel managed to produce with this last-minute investigation provided testimony "devoid of detail regarding the defendant's life." *Id.* Reversing the motion court, the Illinois Supreme Court held that Towns deserved an evidentiary hearing since "it may be objectively unreasonable to wait until after a guilty verdict to begin to prepare for the imminent capital sentencing hearing." *Id*., *citing, inter alia, Glenn v. Tate*, 71 F.3d 1204, 1207-1208 (6th Cir. 1995).

Like Towns' attorneys, Rosenblum presented four witnesses in mitigation (TrialTr.1055-1077). The evidence lacked any detail about John's life, particularly as it involved Mykale and Symone. Rosenblum elicited only that John was a good father, who loved his children and made sure they were happy and had what they needed (TrialTr.1061,1066,1074).

A reasonably competent attorney acting under similar circumstances could have uncovered much more. The children would have been willing to testify to a much mor complete story of John's life (MykaleDepo13; SymoneWinfield Depo13). [10]

When Mykale was born, John got him a dog (MykaleDepo6). John picked a Boxer and named it Gauge (MykaleDepo6). Later, John got Symone a pit bull (Mykale Depo6).

John, who loved football so much as a youth that he often rode his bicycle 15-20 miles just so he could attend practice (DavidWinfield Depo18), helped Mykale learn how to play the sport (MykaleDepo9). When Mykale showed interest in playing guard in basketball or playing baseball, John lent his support as well (MykaleDepo9). John helped Mykale "get real good" (MykaleDepo9).

[10] While Rosenblum claimed that the children were "adamant" that they didn't want to testify (H.Tr.213), Mykale testified that no one ever asked him to testify (Mykale Depo13) and Symone did not remember being asked to testify (SymoneWinfield Depo12-13).

John longed to give his children the father-figure he had lacked (JohnWinfield Depo30). He took them to local parks and carnivals (MykaleDepo6; SymoneDpo6-7). He also drove them to *Worlds of Fun* in Kansas City, , and once there, rather than watching from a bench, he stood in line and rode rides with them; he played games with them (MykaleDepo6-8). They had fun (MykaleDepo8).

John shared his interest in cars with Mykale, teaching him how to "build stuff on cars," and he let Mykale help him work on a car (MykaleDepo6). He also took Mykale to a car show that "was about these hydraulic cars, and they were doing shifts and stuff." (MykaleDepo6,10).

He took Mykale and Symone to the mall to go shopping (Mykale6). Symone remembered the clothes, Barbie® dolls and baby dolls he bought her (SymoneWinfield Depo8). Mykale remembered that John also bought them a Nintendo® and Sega® (MykaleDepo9; SymoneWinfield Depo8).

The motion court denied relief, declaring that the testimony that Mykale and Symone would have offered at trial was merely cumulative to evidence Rosenblum did present (L.F.283-284). Cumulative to what? Rosenblum elicited no detail about John's life with Mykale and Symone. He asked John's father two general questions about John's feelings for his children (TrialTr.1061,1063); he asked John's stepmother three general questions about John's feelings for his children (TrialTr. 1066,1068); and he asked John's brother two general questions about John's relationship with his children (TrialTr.1074). These questions produced a line pencil sketching of John. As fully detailed above, Mykale and Symone had so much more to say about their relationship

with their father. Their testimony would have provided depth and color to the portrait Rosenblum could have painted of their father.

As to Mykale, the motion court noted that Mykale's deposition describes John getting in a fight with his brother's friend (L.F.284, *citing* MykaleDepo14-15). The court, however, makes no specific finding regarding this incident, but simply notes that it would have been admissible at trial (L.F.284). This does not justify not calling Mykale to testify. The good flowing from Mykale's testimony far outweighed the bad. Indeed, the fight that he described paled in comparison to the unadjudicated assaults against Carmel and would not have contributed to the State's case for death (TrialTr.1033-1036). This is akin to *Williams*, 529 U.S. at 396, where the additional favorable mitigation evidence also included the unfavorable evidence that Williams had "thrice been committed to the juvenile system…" The admissibility of that unfavorable evidence did not excuse the ineffectiveness in *Williams*, nor can it here. Indeed, Rosenblum gave no indication of even knowing about this fight (H.Tr.191-346).

The motion court clearly erred. John proved by a preponderance of the evidence that Rosenblum did not perform like a reasonably competent attorney. *Strickland*, 466 U.S. at 689.

Of course, John must also show that Rosenblum's deficiency caused prejudice. He did. The State did not have an overwhelming case in aggravation of punishment. Its evidence in aggravation focused on the crime, a prior guilty plea to receiving stolen property and two unadjudicated bad acts (TrialTr.1033-1036). This is a much weaker

case in aggravation than existed in *Williams*, *supra,* where the State presented copious evidence of Williams' violent behavior. For example,

- Williams had convictions for armed robbery and grand larceny;
- Williams confessed to assaulting two elderly people after the charged murder;
- Williams set a fire outside a house, then attacked and robbed the victim;
- Williams brutally assaulted an elderly woman, leaving her in a vegetative state;
- Williams stole two cars; and
- Williams set fire to the jail while awaiting trial for the charged murder.

Id. at368. Based on this, two experts opined that Williams posed a continuing threat to society. *Id.* at369. Although the mitigation evidence that Williams' alleged his trial attorneys should have presented would not have rebutted any of these aggravating factors, the United States Supreme Court nevertheless found counsel ineffective because the additional mitigation would have rebutted the State's case for death. *Id.* at398.

Though Mykale and Symone could not rebut the State's aggravating circumstances, they clearly would rebut the State's case for death. Even without hearing from Mykale and Symone, the jury deliberated for more than five and a half hours. There is a reasonable probability that, had the jury heard from Mykale and Symone, it would have spared John's life. Therefore, this Court must reverse the motion court's Order, vacate John's death sentences and remand for a new penalty phase trial.

VI.

The motion court clearly erred in overruling John's 29.15 claim that trial counsel failed to investigate and present John's complete life history because that ruling violated John's rights to due process, effective assistance of counsel and freedom from cruel/unusual punishment. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const.,Art.I, §§10,18(a),21. Trial counsel theorized that John was "a normal person that seemed to have snapped," and, to develop this theory, counsel wanted "to show [John's] family history." Trial counsel, however, did not conduct the investigation necessary to let him do that. A reasonably competent attorney would have learned that John's mother and grandmother were not the only sources through whom counsel could tell John's life history. Katherine Patton-Bennett, Maurice Patton, Darrell Jefferson, Frank Elliott, John Sutherland, Jr., and David Winfield could have and would have testified:

1. **John collected boxes and boxes of comic books as a child, preserving them in plastic;**
2. **John played football with a youth organization, and he often had to ride his bike to practice – some 20 miles from his house;**
3. **John watched over his cousin, Maurice, and "helped him develop the thought of wanting to be the artist that [he is, now];"**
4. **John was not merely "the man of the house," he had "the weight of the world on his shoulders" just trying to keep his family afloat, but he always opened**

his home to help those who could not make it on their own – e.g., Carmel, Jackie Donald, Michael Donald, Melody Donald, and Carmel Donald;

5. **John suffered when he lost his infant son, John Jr., to SIDS;**
6. **John did not simply love his children, he loved being with them, playing dolls, reading books;**
7. **In the weeks before the murders,**
    a. **John's mother nearly died after being bitten by a brown recluse spider;**
    b. **John's brother suffered two neck injuries that left him partially paralyzed and in a halo for a few weeks;**
    c. **John's grandmother, who had attempted suicide after John Jr.'s death, fell "in deep depression" because "everything that was going on at – at one time;"**
    d. **John was trying to buy Carmel's childhood home in Gary, Indiana so he could "pull his family together," marry Carmel and "start over" away from this turmoil.**

Despite hearing no detail about John's life, the jury nevertheless deliberated for over five and a half hours before recommending death; had they heard this copious evidence, there is a reasonable probability that they would have spared John's life.

Scott Rosenblum and Brad Kessler accepted representation of John in April 1997 (TrialL.F.63;H.Tr.261). For a year, they did nothing to investigate mitigating evidence for the penalty phase of John's capital murder trial (H.Tr.102,127). Kessler washed his

hands of the penalty phase and focused entirely on the guilt phase (H.Tr.102-103,105,144,156).

Rosenblum had done the penalty phase investigation in only one other case before this (H.Tr.194,291). He wanted to accomplish two things: continue Kessler's guilt phase theory that John was "a normal person that seemed to have snapped" (H.Tr.194,291) "as well as trying to show [John's] family history." (H.Tr.311-312). Through John's family history, Rosenblum wanted to show John as a loving, caring person whose life was worth sparing (H.Tr.242-243). He did not, however, do the investigation necessary to do that.

Rosenblum pinned all of his hopes on John's mother and grandmother – Evelyn and Delores. Then, about two weeks before trial, they gave depositions regarding an alibi for John (H.Tr.205-206; TrialL.F.102). Rosenblum "begged [Evelyn and Delores] not to go through with the depositions because [he] thought it could seriously compromise their ability to be an effective second phase witness." (H.Tr.206). After Evelyn and Delores gave their depositions, Rosenblum and Kessler withdrew their notice of intent to present an alibi defense (TrialTr.558-560; TrialL.F.110). Rosenblum concluded that he could not even call Evelyn and Delores to describe John's life to the jury (H.Tr.206,237,244).

Without Evelyn and Delores, Rosenblum simply described John's life in the most general terms possible: John was "the man of the house," who meant "everything" to his mother and grandmother (TrialTr.1058, 1061, 1066-1067,1069,1071,1075); John deeply loves his children and did whatever it to "to make sure that they were happy, that they had what they need" (TrialTr.1061,1066, 1074). This testimony "was devoid of detail regarding [John's] life." *People v. Towns*, 696 N.E.2d 1128, 1142 (Ill. 1998).

The State will likely try to excuse Rosenblum's lack of investigation by referring to this Court's recent decision in *Ervin v. State*, 2002 WL 1364037 (Mo.banc June 25,2002). There, trial counsel talked to Ervin and his mother and looked at Ervin's medical and psychological records. *Id*. at5. "None of this investigation by counsel yielded a clue that any additional mitigating evidence would be forthcoming by interviewing Ervin's siblings or additional family." *Id.* Thus, Ervin's attorney made a reasonable decision not to conduct additional interviews. *Id.*

Rosenblum, on the other hand, knew that there was a great deal of mitigating evidence to present about John's life. It may have been reasonable, initially, to rely on Evelyn and Delores to provide that mitigating evidence. After all, they were central figures in his life (FrankElliott Depo8; MauricePatton Depo11; DarrellJefferson Depo11; JohnSutherland Depo9-10; DavidWinfield Depo15). John had never lived apart from them (DarrellJefferson Depo32). But when Evelyn and Delores gave the depositions that convinced Rosenblum he should not call them, he still had two weeks in which to look elsewhere for details about John's life. He simply closed his eyes and claimed that there was no other source (H.Tr. 244). The motion court clearly erred in accepting this excuse (L.F. 276-277).

Had Rosenblum conducted a thorough investigation, the lack of detail in the evidence he presented would be entitled to deference. *Strickland v. Washington*, 466 U.S. 668,690 (1984); *Ervin*, *supra*. "Such deference is not warranted, however, where the lack of mitigating evidence is not attributable to strategy but rather to counsel's failure to properly [sic] investigate mitigation and prepare a defense." *Towns*, 696

N.E.2d at 1139. The lack of detail in Rosenblum's evidence did not result from a strategic choice. Rosenblum simply did not adequately investigate John's case. As fully discussed in Point V, *supra*, Rosenblum was obliged to conduct a thorough investigation. *Williams v. Taylor*, 529 U.S. 362,396 (2000). A reasonably competent attorney would have interviewed additional family members after deciding that Evelyn and Delores should not testify. There were ample other sources through which a reasonably competent attorney could have given the jurors the type of detail that Rosenblum's theory contemplated.

Without either Evelyn's or Delores' testimony, a reasonably competent attorney would have found and presented the following:

Growing up, John collected comic books (MauricePatton Depo16). He meticulously placed each comic book in its own plastic bag to protect the pages (MauricePatton Depo16). He amassed "boxes and boxes of them" (MauricePatton Depo16).

John's other interest as a boy was sports. He played baseball and football, but he most enjoyed football (DavidWinfield Depo17-18). John played organized football with N.Y.A., a youth group (DavidWinfield Depo16; MauricePatton Depo13). He played tight end and backed-up the quarterback (DavidWinfield Depo17). John often found himself without a ride to practice (DavidWinfield Depo18). Rather than skip football practice, however, John would simply get dressed in full-pads and ride his bike nearly 20 miles across town to practice with his team (DavidWinfield Depo18). His hard work helped him win several trophies (DavidWinfield Depo17)

John's cousin, Maurice Patton, played on one of N.Y.A.'s younger teams, but his real interest was art (MauricePatton Depo13,16). John admired Maurice's artistic talent, and, as Maurice recalls, "[John] helped me develop the thought of wanting to be the artist that I am [today]." (MauricePatton Depo15). With John watching over him and helping him follow the right path, Maurice has prospered (MauricePatton Depo17). He now designs shoes for DaDa Footwear (MauricePatton Depo24-25).

As a teenager, John saw his mother fall on hard financial times, and he "stepped up" and accepted the responsibilities of "man of the house." (KatherinePatton-Bennett Depo20; FrankElliott Depo11; MauricePatton Depo18; DarrellLamontJefferson Depo19; DavidWinfield Depo19). To keep his family afloat, John took many different jobs, like mowing yards, working in fast food establishments, driving fork lifts and restoring cars (DavidWinfield Depo20-21). He used his paychecks to help his mother support the household (KatherinePatton-Bennett Depo21; DavidWinfield Depo29). He was not merely the man of the house; John had "the weight of the world…on his shoulders." (FrankElliott Depo28). "He was the one that had to make the decisions as to…the important things in life, housing, transportation,…[b]ills, utilities, food…." (FrankElliott Depo29). And the load only got heavier when his mother got sick and had to miss a lot of work (FrankElliott Depo29).

Despite this weight that he already carried, John never missed an opportunity to help those who could not make it on their own. He opened his house to Carmel when she became pregnant with Mykale (KatherinePatton-Bennett Depo24-25). Carmel had no job, and her family would not help her (KatherinePatton-Bennett Depo25-27). It did not

matter to John that Mykale was not his child, he invited Carmel into his home and gave her food and clothes (KatherinePatton-Bennett Depo25,28-29). He took Carmel to her prenatal appointments, and, once Mykale was born, John regarded him as his son (KatherinePatton-Bennett Depo25; DarrellLamontJefferson Depo16)

Although Carmel's mother, Jackie, inherited "[a] large amount of money," she did nothing to help Carmel or Mykale (KatherinePatton-Bennett Depo42). Instead, Jackie squandered the money on drugs (KatherinePatton-Bennett Depo42). Still, when Jackie needed help, John opened his heart and his home for her (KatherinePatton-Bennett Depo42).

Hoping to get Carmel's sister, Melody, back in school and to "instill some good values…into her," John opened his home to her (KatherinePatton-Bennett Depo31). John became Melody's guardian and got her enrolled in school (KatherinePatton-Bennett Depo31).

John also opened his home to Carmel's father and grandmother (JohnSutherland Depo19). Her father, who sought refuge in John's home from time-to-time, "looked up to John." (DarrellLamontJefferson Depo22; JohnSutherland Depo19).

"[Carmel's] whole family…was living with him at one time." (JohnSutherland Depo18-19; KatherinePatton-Bennett Depo43). The Winfield house then had three bedrooms and a finished basement (KatherinePatton-Bennett Depo43). People were everywhere (KatherinePatton-Bennett Depo43).

In 1991, Carmel gave birth to John's son, John, Jr. (KatherinePatton-Bennett Depo32). A few short months later, John, Jr. died in his sleep – a victim of SIDS

(KatherinePatton-Bennett Depo20,32; DarrellLamontJefferson Depo17; FrankElliott Depo26-27; JohnSutherland Depo20; DavidWinfield Depo26). "John was sad, crying. He didn't want to leave the home. He was real depressed." (DarrellLamontJefferson Depo17). John, Jr.'s death devastated John, he "carr[ied] a great weight," but he still tried to make sure the people around him were alright (KatherinePatton-Bennett Depo33; DarrellLamontJefferson Depo16-17; FrankElliott Depo26-27; JohnSutherland Depo20; DavidWinfield Depo26). Not everyone was alright; John's grandmother tried to kill herself soon after this tragedy (KatherinePatton-Bennett Depo20).

Family was "the most important thing to [John]." (DarrellLamontJefferson Depo26). He did not simply love his children – as Rosenblum told the jurors, he loved being with them. "John was very loving, very loving and playful [with his children]." (MauricePatton Depo22). He provided Mykale and Symone with emotional support, he gave them their baths, he tucked them into bed, he got them dressed, he fed them, he took them to school, he read to them, he taught them the ABC's (DarrellLamontJefferson Depo25; MauricePatton Depo23; JohnSutherland Depo18). He played dolls with Symone (MauricePatton Depo23).

Carmel spoke of needing to "find herself" (KatherinePatton-Bennett Depo38). To that end, John helped her enroll in cosmetology school, paying her tuition and taking her to class each day (KatherinePatton-Bennett Depo45-46; DavidWinfield Depo29). Later, Carmel got a job at SAM'S Club and John took her to work each day because she did not have a car (DarrellLamontJefferson Depo27-28). When Carmel felt cramped in the Winfield's small household, John leased an apartment for her (DavidWinfield Depo30;

DarrellLamontJefferson Depo27). He also helped her pay the utilities for the apartment (DavidWinfield Depo30).

In July 1996, John's mother nearly died after being bitten by a brown recluse spider (KatherinePatton-Bennett Depo50; FrankElliott Depo30; JohnSutherland Depo11-12; DavidWinfield Depo30). This complicated Evelyn's existing blood disease; her red blood cell count fell dangerously low (KatherinePatton-Bennett Depo50,52). When doctors told the family that Evelyn was going to die, John turned to his aunt – "He said, Aunt Kat, what are we going to do?" (KatherinePatton-Bennett Depo52). Katherine replied, "baby, all we can do is pray." (KatherinePatton-Bennett Depo52). John paced "up and down the hall" of the hospital, sobbing (KatherinePatton-Bennett Depo51). He went to the hospital to be with his mother every day (FrankElliott Depo30; John Sutherland Depo12). He "took it pretty hard…He was down for a while." (John Sutherland Depo13; DavidWinfield Depo31). Even after being released from the hospital, Evelyn needed frequent blood treatments, and John took her for those treatments (FrankElliott Depo31; DavidWinfield Depo32). Twice, when John was not able to take Evelyn for her blood treatments, his friend, John Sutherland, gave her a ride (JohnSutherland Depo13).

Also in July 1996, John's brother, David, was in two accidents (DavidWinfield Depo33; FrankElliott Depo34). David noted that first he "had a guy run me off the road and my car flipped over" (DavidWinfield Depo33). He injured his neck, but he did not go to the doctor (KatherinePatton-Bennett Depo57; JohnSutherland Depo16). Next, he was at a "late pool party" and hit his chin on the bottom of the swimming pool (David

Winfield Depo34; JohnSutherland Depo16). This nearly broke his neck and left him partially paralyzed (DavidWinfield Depo34; KatherinePatton-Bennett Depo57; FrankElliott Depo34). Doctors put him in a halo and prescribed bed-rest so "he had to be taken care of" (DavidWinfield Depo34; KatherinePatton-Bennett Depo57; John Sutherland Depo16). Again, John stepped up and helped (DavidWinfield Depo34; KatherinePatton-Bennett Depo58; JohnSutherland Depo16).

John's grandmother fell "in deep depression" (DavidWinfield Depo33). David attributed this to "everything that was going on at—at one time" with him and his mother being sick (DavidWinfield Depo33).

John "wanted to start over [and] pull his family together." (DavidWinfield Depo35). Carmel had long suggested that they get married, and in the summer of 1996, John decided it was time (JohnSutherland Depo25-26; KatherinePatton-Bennett Depo62). Carmel wanted to live in her childhood home in Gary, Indiana (JohnSutherland Depo22).

It was a small, brick house in a quiet neighborhood—"supposedly Michael Jackson or someone's house was around the corner" (JohnSutherland Depo22-23). It had two or three bedrooms, a basement and a large, fenced backyard (JohnSutherland Depo23; DavidWinfield Depo35; DarrellLamontJefferson Depo32). Unfortunately, her father had lost the house, so John set out to buy it for Carmel (JohnSutherland Depo22). He and David made several trips to Indiana before John was able to make the down payment on this house (DavidWinfield Depo35; DarrellLamontJefferson Depo30). On September 8, 1996, John told Darrell that he had just bought the house (DarrellLamont Jefferson Depo28). John was very excited "about the home and everything," telling

Darrell that this would be a nice place to raise Mykale and Symone (DarrellLamont Jefferson Depo29-30).

The Motion Court Clearly Erred

The motion court first found that "[m]any of the facts that Movant lists in claim 8(A) were, in fact, elicited at trial…," i.e., the post-conviction evidence would have been cumulative (L.F.275, *referring to* Tr.1038,1055-1058,1061-1063, 1066-1067,1070-1072,1075). The motion court clearly erred.

> Cumulative evidence is additional evidence of the same kind tending to prove the same pint as other evidence already given. Evidence of other and different circumstances tending to establish or disprove the same fact is not cumulative, nor is evidence of facts tending to prove circumstantially the existence of a fact cumulative to evidence which tends to establish the same fact directly.

State v. Harris, 64 S.W.2d 256, 258 (Mo.1933) (quotation omitted). A review of the trial transcript and the post-conviction depositions leaves the definite and firm impression that the proffered evidence is not cumulative. Rule 29.15(k). Rosenblum presented only the barest descriptions of John as a loving man, who served as the "man of the house." He elicited ***no detail*** to show the jury what those descriptions meant. The proffered evidence contains copious detail tending to support Rosenblum's theory that John is a loving, caring, dependable person worthy of having his life spared (*See* H.Tr.242-243).

Next, the motion court found that "Mr. Rosenblum investigated every witness given to him by Movant regarding the penalty phase of trial." (L.F.276, *citing* H.Tr.204). This, too, is clearly erroneous. In one breath, Rosenblum asserted, "Every person that

John provided to me, I investigated." (H.Tr.204). But, in his next breath, Rosenblum admitted that he had not interviewed "all of John Winfield's family members and friends" (H.Tr.315).

Rosenblum knew about Katherine Patton-Bennett, whose husband took their two sons—Maurice and Mario—along with John to do "whatever activities males do" every weekend (H.Tr.315; JohnWinfield Depo15; KatherinePatton-Bennett Depo11-12). John and his "Aunt Kat" were very close, often turning to her for advice (MauricePatton Depo12). Katherine would have testified and would have been an ideal witness to fill the gap created when Rosenblum decided not to call John's mother or grandmother. But, Rosenblum did not interview Katherine (H.Tr.316; KatherinePatton-Bennett Depo64, 66,69). Had he interviewed her, she would have led him to her son, Maurice, who "grew up" with John and would have testified for him (KatherinePatton-Bennett Depo11-12; MauricePatton Depo6,27). He also failed to interview Maurice (H.Tr.317; Maurice Patton Depo26).

Rosenblum talked to John's cousin, Marsha, and "thought it was incredibly important to call [her]." (H.Tr.204). John and Marsha grew up together and had "an incredibly close relationship" (H.Tr.203). Marsha, however, absolutely refused to testify (H.Tr.204). Her husband, Frank Elliott, however, would have testified and would have provided important detail about John's life (FrankElliott Depo35). Rosenblum could not recall if he had talked to Frank (H.Tr.317). Frank testified that Rosenblum never contacted him (FrankElliott Depo34-35).

Rosenblum called David Winfield to testify, but he elicited only the bare minimum from him. Rosenblum's direct examination of David lasted only 3½ pages (TrialTr.1072-1075). The motion court noted,

> Mr. Rosenblum called David Winfield, Movant's brother, to testify about Movant's family history and his relationship with them. [TrialTr] at 1072. He also indicated that the family depended on Movant. *Id.* at1075.

(L.F.276). In reality, it is unlikely that Rosenblum knew enough about David to conduct a longer examination since he had only met with him once for about ten minutes (DavidWinfield Depo38-39). Of course, Rosenblum tried to shift the blame to David, saying, "I don't even think David mentioned it to me." (H.Tr.239). But why would David mention it? David has no reason to know what type of information would be relevant to whether his brother should live or die. What Rosenblum, and presumably the motion court, forget is that it is counsel, Rosenblum, who is charged with the duty to investigate, not David. *Towns*, *supra* at1138.

Rosenblum talked to John Sutherland, Jr., for about 20-30 minutes (H.Tr.318; JohnSutherland Depo31-32). In that brief encounter, Rosenblum opined that Sutherland would not make a good witness because Sutherland had a criminal record and Rosenblum wanted "to put John apart from contacts like that." (H.Tr.318). The motion court concludes that John has no claim because witness selection is "as a matter of trial strategy, virtually unchallengeable." (L.F.277, *citing* *Leisure v State*, 828 S.W.2d 872,875 (Mo.banc 1992)). Again, this paints the issue with too broad a brush.

The motion court overlooked two critical caveats to this general rule. First, **a** strategy is not, alone, sufficient; it must be reasonable. *State v. Hamilton*, 871 S.W.2d 31,34-35 (Mo.App.W.D. 1993). It is patently unreasonable to turn a deaf ear to testimony that could have provided the detail sorely lacking from Rosenblum's paltry mitigation evidence. Rosenblum talked to no one else who could provide detail once he decided not to call John's mother or grandmother. He needed Sutherland. His strategy was to show the jurors that John was a normal guy whose life was worth saving, but he presented no evidence of that. Had he done more than the cursory interview with Sutherland, he would have learned that Sutherland's prior convictions for stealing a stereo and having a knife in his car did not impact his credibility. Second, as already discussed, courts do not defer to such decisions when counsel made them without having first done the hard work of conducting a thorough investigation. *Towns*, 696 N.E.2d at 1139. Rosenblum's lack of investigation made it impossible for him to make an informed decision.

John told Rosenblum about Darrell Jefferson (JohnWinfield Depo15). Darrell would have testified, but Rosenblum did not talk to him either (DarrellJefferson Depo40-41; H.Tr.317). Like, Sutherland, Darrell had a slight criminal record. He picked up a drug offense when he was 18 years old, and he served probation for it (Darrell Jefferson Depo40). This minor skirmish would not provide a reasonable basis for ignoring the copious detail that Darrell could have added.

Rosenblum did not act as a reasonably competent attorney.

Of course, it is not enough that counsel performed deficiently. His inaction must undermine confidence in the outcome before this Court will find him ineffective. *Moore v. State*, 827 S.W.2d 213, 215 (Mo.banc 1992). Confidence is lacking whenever a reasonable probability exists that, but for counsels' deficiencies, the result would have been different. *Id*. Rosenblum presented the jury with only the vaguest description of John as a loving, family-man. Nonetheless, the jury deliberated John's fate for over 5½ hours (TrialTr.1108-1109). Had Rosenblum conducted an thorough investigation and presented the jury with the details of John's life that illustrate that he is worth being spared, there is a reasonable probability that John would have received life imprisonment rather than death. Thus, this Court must reverse John's death sentences and remand for a new penalty phase trial.

VII.

The motion court clearly erred in overruling John's post-conviction motion because trial counsel failed to investigate and present expert evidence that John suffered from an extreme emotional disturbance at the time of the murders thereby depriving John of due process, effective counsel, a fair trial and subjecting him to cruel/unusual punishment. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const.,Art.I, §§10,18(a),21. Trial counsel theorized that John "was an otherwise normal law-abiding young man," who "snapped," but counsel conducted no investigation aimed at discovering support for his theory. Counsel simply asked the 552 examiners, who had found that John did not suffer from a mental disease or defect at the time of the murders, whether they "could provide useful testimony in the second phase." Knowing that a pretrial 552 evaluation does not replace a mitigation investigation, a reasonably competent attorney would have investigated further, particularly given that, in the two months before the murders, John "suffered from cumulative results of a number of stressors including his mother's illness, his grandmother's depression, his brother's injury, the plans to relocate, the venture into purchasing a home…, the commitment to enter into a business venture, the pending relocation from St. Louis." Had counsel consulted an expert, like Dr. Stacy, for purposes of mitigation, he would have learned that John had no means of coping with the series of stressors he suffered, and, consequently, at the time of the murders, he suffered from an extreme emotional disturbance. With evidence of this statutory mitigator, there is a reasonable probability that the jury would have spared John's life.

In December 1996, Officer Webb interviewed Carmel (TrialTr.665). One thing he wanted to know was "how [John] was acting" the night of the shootings (TrialTr.665). Carmel explained,

> [H]e couldn't—He was asking me these questions. He couldn't stand still. He had to rub his hands, his head, his face, his stomach. He was just looking—He just couldn't stay still. While he was talking to me he was walking—you know, walking back and forth like he just didn't know what to do….

(DirAppTr.665). As John paced, two sounds interrupted his conversation with Carmel: bumps on John's car and "a hissing noise" (DirAppTr.661,670,893). John went to his car and found that a tire had been slashed (TrialTr.894). After getting a gun from his car, he went into the apartment, where he shot and killed Arthea Sanders and Shawnee Murphy (TrialTr.603-604,693-695,894); shot and wounded Carmel (TrialTr.661-662); pointed the gun at Melody, who ran out the back door (TrialTr.604-605,648); and tried to shoot James Johnson, but the gun was empty (TrialTr.695-697).

As fully discussed in Point VI, *supra*, John is a dependable, hard-working, devoted, family-man. His only previous exposure to the criminal justice system was for receiving stolen property in 1991, for which he received a suspended imposition of sentence with four years probation (TrialTr.905;L.F.260). So, why did this tragedy happen? This was the question trial counsel needed to answer in order to spare John's life. Counsel's theory was that John "was an otherwise normal law-abiding young man," who "snapped" (H.Tr.311-312). But, counsel did no investigation to provide facts to support this theory. John alleged that counsel rendered ineffective assistance in failing to

investigate and present expert evidence that John suffered from an extreme emotional disturbance at the time of the murders (L.F.32-33,63-79).[11]

The motion court overruled this claim, noting that Drs. Rabun and Cuneo conducted pretrial sanity evaluations; that Rosenblum talked to Dr. Rabun and relied on his finding that John had no ***mental*** disturbance at the time of the offense; and that Rosenblum had no duty "to shop for a more favorable expert…." (L.F.277-278, *citing* H.Tr.217,225-226; *State v Copeland*, 928 S.W.2d 828, 845 (Mo.banc 1996). The motion court clearly erred. Rule 29.15(k). "A pretrial sanity evaluation is not a substitute for conducting a mitigation investigation." *People v. Towns*, 696 N.E.2d 1128,1137 (Ill.1998); *accord Jacobs v. Horn*, 129 F.Supp.2d 390,405-406 (M.D.Penn. 2001). Rosenblum testified that he considered all mitigating circumstances, including whether John suffered from an extreme emotional disturbance (H.Tr.215). He had no evidence to support the extreme emotional disturbance mitigator and neither Rabun nor Cuneo would have helped establish it (H.Tr.215,217,228,312). Thus, he claims to have made a strategic choice not to call an expert regarding this mitigating circumstance (H.Tr.245). Rosenblum's excuse is circular, and it must fail.

Rosenblum and the motion court assert that Rosenblum lacked the evidence because it didn't exist. After all, their reasoning goes, Rosenblum asked Drs. Rabun and Cuneo whether they "could provide useful testimony in the second phase" (H.Tr.201-202,217; L.F.277-278). The question, however, is not whether Rosenblum lacked

[11] Kessler made this same allegation in the motion for new trial (TrialL.F. 252).

evidence to show an extreme emotional disturbance in John's actions, but rather *why* he lacked that evidence. *Jacobs*, *supra* at406.

The answer to that question rests with Rosenblum's inadequate inquiry. Neither Rabun nor Cuneo had evaluated John with a second phase in mind. They had evaluated John only for competency and responsibility (TrialL.F.67-69,74). That evaluation differs markedly from a mitigation evaluation. *Jacobs*, *supra* at405. Rosenblum decided to forego an evaluation of John's emotional state at the time of the murders based on Rabun's and Cuneo's determinations that John had no mental disease or defect and that "a ***mental*** disturbance did not substantially affect [John's] behavior during the instant offense." (H.Tr.225,311; L.F.74) (emphasis added). But the mere fact that John did not suffer from a *mental* disturbance does not address whether he suffered from an *emotional* disturbance. Indeed, Rabun, on whom Rosenblum principally relied, did not even address the latter possibility in his report (H.Tr.145,201-202,310). And Cuneo found the same thing as Rabun (H.Tr.311). Further, whether John suffered from an emotional disturbance was not the focus of Rabun's evaluation as illustrated by the fact that his failure even to mention the many stressors that consumed John's existence during the weeks leading up to this tragedy (H.Tr.306-308).

In the two months before the murders,

- John's mother nearly died after a brown recluse spider bit her (KatherinePatton-Bennett Depo50-52; FrankElliott Depo30; JohnSutherland Depo11-13; DavidWinfield Depo30-31);

- John's grandmother, who previously attempted suicide, experienced another episode of depression (DavidWinfield Depo33);
- John's brother suffered a neck injury that left him partially paralyzed for a time (DavidWinfield Depo33-34;FrankElliott Depo34; KatherinePatton-Bennett Depo57-58; JohnSutherland Depo16);
- John made plans to marry Carmel, buy a home, move to Gary, Indiana, and start a business (DavidWinfield Depo35; JohnSutherland Depo22-23,25-26; Katherine Patton-Bennett Depo62; DarrellLamontJefferson Depo28-30,32).

Rosenblum testified, "I think I was aware" that Evelyn had suffered a spider bite, but he complained, "John didn't indicate to me that it was something that was going on that was affecting him emotionally." (H.Tr.238). And, he asserted that John never indicated that David's accident impacted him, and he did not recall David ever mentioning it (H.Tr.239). But, of course, "[t]he duty to make a reasonable investigation is imposed on counsel and not the defendant." *Towns*, 696 N.E.2d at1137 (citations omitted).

Rosenblum simply took a course of inaction. He did no investigation to provide facts to support his theory that John was a normal guy who snapped. John alleged that this constituted ineffective assistance since a reasonably competent attorney – especially one with Rosenblum's stated defense strategy – would have investigated and presented expert evidence that John suffered from an extreme emotional disturbance at the time of the murders (L.F.32-33,63-79).[12] The motion court overruled this claim, noting that Drs.

[12] Kessler made this same allegation in the motion for new trial (TrialL.F. 252).

Rabun and Cuneo conducted pretrial sanity evaluations; that Rosenblum talked to Dr. Rabun and relied on his finding that John had no ***mental*** disturbance at the time of the offense, and that Rosenblum had no duty "to shop for a more favorable expert…." (L.F.277-278, *citing* H.Tr.217,225-226; *Copeland*, 928 S.W.2d at845). The motion court clearly erred. Rule 29.15(k).

John has never claimed that Rosenblum needed to "shop for a more favorable expert." Rather, John has maintained that Rosenblum needed to get ***an*** expert because the pretrial sanity evaluations done by Rabun and Cuneo were not a substitute for an evaluation for mitigating evidence. *See Towns*, *supra; Jacobs*, *supra*. Rosenblum had no expert with whom to consult about mitigation. Since he relied solely on pretrial sanity evaluations, it is not surprising that Rosenblum lacked evidence of an extreme emotional disturbance. But that does not make his decision not to investigate reasonable. "[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984). Counsel must conduct a reasonable investigation unless he can make an informed decision that a particular investigation is unnecessary. *Id*. Further, his investigation must be thorough. *Williams v. Taylor*, 529 U.S. 362,396 (2000).

Rosenblum's theory that John was a normal guy who "snapped" begged the question, "Why did John snap?" A reasonably competent attorney would have "followed through on this question." *Antwine v Delo*, 54 F.3d 1357, 1367 (8th Cir. 1995). Had Rosenblum followed through and consulted an expert like Dr. Stacy, he would have

learned that John had no means of coping with the series of stressors he had suffered in the weeks before the murders and, John thus suffered from an extreme emotional disturbance (DrStacy Depo114-115; PcrEx.26 at19-20—attached to Stacy's deposition).

In *Antwine*, *supra* at1365, trial counsel requested and obtained a pre-trial mental evaluation. That evaluation found no mental disease or defect, attributing Antwine's action during the murders to PCP intoxication. *Id.* Antwine, however, denied using PCP at the time of the murders. *Id.* at1367-1368. The Eighth Circuit held that trial counsel could not ignore this contradiction, even though counsel personally believed that Antwine was "articulate, lucid, and cooperative." *Id.* at1365-1368. Rather, it held that a reasonably competent attorney would have investigated further. *Id.* Post-conviction counsel did investigate further, hiring an expert to re-evaluate Antwine. *Id.* at1365. That evaluation disclosed that Antwine suffers from bipolar disorder, "a lifetime condition that usually arises in early childhood." *Id.* "'Given the severity of the potential sentence and the reality that the life of [the defendant] was at stake,' we believe that it was [counsel's] duty…to collect as much information as possible about [the defendant] for use at the penalty phase of his state court trial." *Id*. at1367, *citing* *Hill v. Lockhart*, 28 F.3d 832, 845 (8thCir. 1994).

Like post-conviction counsel in *Antwine*, post-conviction counsel here retained an expert, Dr. Stacy, to consider John's emotional state at the time of the offense (DrStacy Depo14). In reviewing the transcript and police reports, Stacy noted that others described the level of John's agitation and anxiety immediately before the shooting as being at "a level of physical activation that was very unusual for John." (DrStacy Depo20,41,132).

Stacy also noticed that James Johnson "described a very drastic change in [John] in a matter of a few minutes…." (DrStacy Depo95).

Unlike Rabun and Cuneo, Stacy then evaluated the many stressors that befell John during July and August 1996. As outlined above, John experienced "a number of stressors including his mother's illness, his grandmother's depression, his brother's injury, the plans to relocate, the venture into purchasing a home…, the commitment to enter into a business venture, the pending relocation from St. Louis." (DrStacy Depo114; PcrEx.26 at 19-20; *accord* DrStacy Depo30-34,86,104,106; PcrExs.14,15,16,17,18,19,20, 21,22,23,24).[13] From his review of these stressors, Stacy observed that John's reaction to Evelyn's life-threatening illness paralleled the agitation and anxiety that witnesses described in him immediately before the murders (DrStacy Depo41). Indeed, it was the only other time in John's life where he became so agitated and anxious that he paced (DrStacy Depo41).

Stress is a strain on the body (DrStacy Depo35). The body uses a general adaptation syndrome to cope with such strains (DrStacy Depo36). But stress is an additive phenomenon (DrStacy Depo35). "[W]e only have…a fixed amount of resources to cope with stress, and each stress takes some of those." (DrStacy Depo36). Stacy would have described it like this for the jury:

> [I] talk[] about it as GAS. So we have a tank of GAS. But it's a – it's a finite tank, and each stress takes a little GAS from that tank. And sooner or later, the

[13] Each of these exhibits are attached to Stacy's deposition.

tank's going to run dry, and there's not going to be any more coping. And that's when you start developing either serious physical or emotional problems. (DrStacy Depo36).

As a child, John responded to stress by acting out (DrStacy Depo38). His acting out served as a cry for help when his GAS tank became critically low. His mother got him in therapy for the behavioral symptoms, but the therapy revealed that this child's GAS tank was nearly empty (DrStacy Depo38). John revealed to his therapist that he had contemplated suicide on at least two occasions (DrStacy Depo38).

As an adult, John did not show his feelings; he kept "things bottled up." (DrStacy Depo39). Uncomfortable showing stress or weakness, John usually immersed himself in a relaxing activity like spending time with friends or working on cars (DrStacy Depo38). During July and August 1996, however, "[those] outlets were being pushed aside by the demands." (DrStacy Depo40). "John was assuming more without dealing with any … and [the stressors] came very rapidly…one on top of the other, and each one involved more obligation from John, more commitment, more responsibility. There wasn't much time." (Depo37-38).

All the while, John was trying to make plans to marry Carmel, buy her childhood home and move to Gary, Indiana with her and their two children (DrStacy Depo33). Stress accompanies any event that involves "change and unpredictability," and these plans involved a very significant change in John's life. (DrStacy Depo33). Since accepting the role of man of the house to help his mother maintain their household, John had become "almost…enmeshed with his extended matriarchal family" (DrStacy

Depo28). He felt very attached to them. DrStacy Depo34). But Carmel wanted to live in her childhood home in Gary, Indiana (JohnSutherland Depo22). And thus, to try to satisfy everyone, "[John] was anticipating almost commuting" from Gary, Indiana to help maintain his mother's household in St. Louis (DrStacy Depo34). That commute would be complicated by the poor condition of the house in Indiana because John "was going to take it onto himself to remodel it." (DrStacy Depo34). This could be very stressful (DrStacy Depo34).

What seemed to drive John to take on these changes was his desire "to start over [and] pull his family together." (DavidWinfield Depo35). Key to that was his decision to marry Carmel. Marriage is a positive event, but it is also "a very stressful phenomenon …because of the commitment." (DrStacy Depo33). Carmel had long suggested that they get married, and, even as the stressors piled up in the summer of 1996, John decided it was time (JohnSutherland Depo25-26; KatherinePatton-Bennett Depo62). John loved Carmel and was committed to their relationship (DrStacy Depo46). He viewed them as "a couple," and that had a "profound impact" on his emotional state (DrStacy Depo27).

Dr. Stacy concluded that John suffered from an extreme emotional disturbance at the time of the shootings (DrStacy Depo113-114). John did not have an effective means of coping with the multiple stressors that he experienced during the two months before the shootings (DrStacy Depo114). Then, with his GAS tank almost empty, he experienced "acute stressors that included the events of that evening – finding out that a woman with whom he was planning on purchasing a home, moving, marrying, and as he

put it, making a start that he hoped would straighten things out – finding out she was out with another person." (DrStacy Depo114). Stacy explained,

> Looking at the effects of all those stressors and then looking at the event itself,… all of these appear to be the result of a very acute stress reaction [that] can best be technically labeled as an adjustment disorder with a mixed disturbance of emotions….

(DrStacy Depo115).[14]

Rosenblum and Kessler could not present this compelling evidence in support of their theory that John was a normal guy who snapped because they did not investigate their own theory. They performed deficiently in failing to contact Stacy or someone similar to investigate John's emotional state. Stacy would have testified that John suffered from a series of stressors that accumulated to constitute "severe emotional distress" (DrStacy Depo115-116). John's reaction the night of the shootings went "beyond anger" (DrStacy Depo 146). "What makes it extreme emotional distress is the level of physical agitation that he was displaying, the background of many, many emotional stressors contributing to it." (DrStacy Depo148).

Of course, to get relief from trial counsel's ineffectiveness, John must prove more than their deficient performance. He must also prove that their errant performance undermines confidence in the trial's outcome. *Strickland*, *supra* at690-691. Confidence is lacking whenever a reasonable probability exists that, but for counsels' deficiencies,

[14] This did not rise to the level of a mental disease or defect (DrStacy Depo162-163).

the result would have been different. *Moore v. State*, 827 S.W.2d 213,215 (Mo.banc 1992). In *Antwine*, 54 F.3d at1368, prejudice resulted because counsel's failure to investigate and present evidence of Antwine's bipolar disorder deprived him of having the jury consider a statutory mitigator. The Eighth Circuit noted, "Since the jury found only two aggravating circumstances, the balance of aggravating and mitigating circumstances would have been altered enough to create a reasonable probability that the jury would not sentence Antwine to death." *Id*.

Here, the jury found only one aggravator as to each murder – that it was committed during the commission of the other murder (TrialL.F.240-241). Trial counsel presented the jury with only two mitigators – i.e., John has no significant criminal history and John's age at the time of the murders (TrialL.F.166,178). Still, the jury deliberated John's fate for over 5½ hours (TrialTr.1108-1109). Had counsel conducted a proper investigation and presented the jury with the compelling mitigator that John suffered from an extreme emotional disturbance at the time of the murders, the balance between the aggravating and mitigating circumstances would have been drastically altered. With that new balance there is a reasonable probability that John would have received life imprisonment rather than death. Thus, this Court must reverse John's death sentences and remand for a new penalty phase trial.

VIII.

The motion court clearly erred in denying an evidentiary hearing on Claim 8(J) regarding trial counsel's failure to offer MAI-CR3d 310.06 because that claim states facts, which are not refuted by the record that, if proved, would warrant relief. John alleged: (a) the State offered evidence that he confessed; (b) MAI-CR3d 310.06 must be given upon request; (c) but trial counsel did not request it; and (d) a properly instructed jury could have inferred that John's rage on the night of the murders entitled them to give his confession little or no evidentiary weight. If proved, these facts would show that trial counsel denied John due process, effective counsel and a fair trial. U.S.Const., Amends. V,VI,XIV; Mo.Const., Art.I, §§ 10,18(a). In a virtually undisputed case without guidance from MAI-CR3d 310.06, the jurors still spent two and a half hours deliberating John's guilt. Then, after being instructed that they could consider all evidence they had heard in both phases, they spent five and a half hours deliberating John's punishment. During that time, they asked to see John's confession, which had no relevance to any statutory aggravator or mitigator but could have tended to resolve some residual doubt as to John's mental state.

Carmel, Arthea and Shawnee were shot around midnight on September 10, 1996. *State v. Winfield*, 5 S.W.3d 505,509 (Mo.banc 1999). Arthea and Shawnee died. *Id.* There was no dispute that each woman was shot by John; the dispute concerned John's mental state (TrialTr.1003). To help prove its case, the State elicited that John made three statements in the hours after the shootings (TrialTr.768,941-949). Kessler moved to

suppress each statement, arguing, *inter alia*, that they were involuntary (TrialL.F.20-22). He even renewed that argument in his motion for new trial (TrialL.F.249-250).

Inexplicably, Kessler did not take his argument to the jurors. Once the trial court ruled that the statements were admissible, Kessler's only hope was to convince the jury to give little or no weight to John's confessions. To accomplish that, he needed the jury to receive MAI-CR3d 310.06. He did not request it, and John alleged that Kessler's failure deprived him of due process, effective counsel and a fair trial (L.F. 37,122-126). The motion court denied this claim without a hearing (L.F.248,288).

This Court must determine whether the motion court clearly erred in denying this claim based on the pleadings. Rule 29.15(k). It did. To get an evidentiary hearing, John only had to satisfy three requirements: (1) his motion had to allege facts, not conclusions, warranting relief; (2) the facts alleged could not be *conclusively* refuted by the record; and (3) the alleged ineffectiveness must have resulted in prejudice to him. *State v. Driver*, 912 S.W.2d 52, 55 (Mo.banc 1995).

John alleged the following facts: (a) the State offered evidence that he confessed; (b) MAI-CR3d 310.06 must be given upon request; (c) but trial counsel did not request it; and (d) a properly instructed jury could have inferred that John's rage on the night of the murders entitled his confession to little or no evidentiary weight (L.F.122-125). If proved, these facts would warrant relief, and they are not conclusively refuted by the record. As already discussed, the State introduced John's statements and Kessler argued that John made those statements involuntarily. Had Kessler asked that the jury be instructed that what, if any, weight the statements deserved was for it to decide, the court

would have had to do so. MAI-CR3d 310.06, Notes on Use, 2. A reasonably competent attorney in Kessler's shoes would have submitted an instruction based on MAI-CR3d 310.06. That instruction reads:

Evidence has been introduced that the defendant made certain statements relating to the offense for which he is on trial.

If you find that a statement was made by the defendant (, and that at that time he understood what he was saying and doing), and that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you may give it such weight as you believe it deserves in arriving at your verdict. However, if you do not find and believe that the defendant made the statement (, or if you do not find and believe that he understood what he was saying and doing), or if you do not find and believe that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you must disregard it and give it no weight in your deliberations.

(L.F.122-123, *quoting* MAI-CR3d 310.06).

The motion court's finding first focuses on whether relief would be warranted (L.F.288). The motion court notes that the trial court had found John's statements were admissible and that this Court "held that '[c]learly, the record reflects that constitutional validity of [Movant's] waiver.'" (L.F.288, *citing* *Winfield*, 5 S.W.3d at512). The motion court clearly erred. The admissibility of John's statement is not at issue. Indeed, MAI-CR3d 310.06 presupposes the admissibility of the statement, addressing only what weight the statement should be given. The instruction leaves that question for the jury to answer.

The motion court next turns to whether John satisfied the third requirement, i.e., whether Kessler's ineffectiveness, if proved, resulted in prejudice. The motion court summarily dismisses the possibility that prejudice resulted, finding that John "can show no evidence that [his] statements to police were coerced or uninformed." (L.F.288). This is clearly erroneous.

The shootings occurred around midnight (TrialTr.709). Police arrested John around 2:00 a.m. (TrialTr.765,773). He made one statement while he was being booked, another statement a few hours later at 5:15 a.m., and third statement two hours later at 7:15 a.m. (TrialTr.767,941,944). He had had no sleep. He "was … in shock" that night (TrialTr.899). A properly instructed jury considering these facts could have given John's statements little or no weight.

On direct appeal, the State argued

> [T]he evidence in appellant's case was strong. Both Melody Donald and James Johnson witnessed the shooting. Carmel Donald, the mother of appellant's children, testified about how appellant shot her. Indeed, appellant admitted that he did the shootings. Based on the testimony of Melody Donald, James Johnson, and Carmel Donald, and based upon appellant's admission to the shootings, the jury could find beyond a reasonable doubt that appellant was guilty of the charges. (citation omitted). Appellant's statement to Officer Carney regarding the location of the gun could not have had any appreciable impact given the overwhelming evidence in this case.

(Resp.TrialBr.50). Yet, despite this "overwhelming evidence" and lack of instructional guidance, the jurors deliberated for two and a half hours before deciding John's guilt (TrialTr.1022-1025).

In its guilt phase argument, the State highlighted John's statements at some length (TrialTr.996-997). The State emphasized that John "wasn't crying with the police that night" (TrialTr.996). This was the jury's only guidance regarding the weight to give John's statement. There is a reasonable probability that the ultimate verdict expressed the jury's belief that it had no vehicle for expressing unease that John's lack of sleep and state of shock affected his statements and thus how they should consider them. *Cf.* *Penry v. Johnson*, 532 U.S. 782,798 (2001) ("[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.")(quotation omitted). This probability is illustrated by the jury's request to see John's statements during its penalty deliberations (TrialTr. 1108). John's statement had no relevance to any aggravating or mitigating circumstance. Indeed, it had no relevance to punishment at all unless jurors had residual doubt about John's mental state and believed that Instruction Nos. 25 and 30[15] provided a vehicle through which to consider that doubt.

Finally, the motion court concludes, "The instruction would serve only to direct attention to an obviously voluntary confession." (L.F.288, *citing* *Clemmons v. State*, 785

[15] "…you may consider all of the evidence presented in both the guilt and punishment stages of trial…" (TrialL.F.164,176).

S.W.2d 524,539 (Mo.[banc] 1990)). Again, the motion court clearly erred in stopping this claim at the pleading stage. Clemmons got a chance to present evidence on this claim at an evidentiary hearing. *Clemmons*, *supra* at527.

In *Clemmons*, this Court found that the failure to request an instruction based on MAI-CR3d 310.06 "was sound trial strategy in this case." *Id*. This quote immediately precedes the sentence quoted by the motion court. The motion court cannot attribute Kessler's failure to request this instruction to a strategy, reasonable or otherwise, without Kessler claiming such a strategy at a hearing. *State v. Tokar*, 918 S.W.2d 753,768 (Mo.banc 1996). It bears noting that it is unlikely that Kessler had a strategy for not offering this instruction; after all, his practice is to announce his strategies on the record (TrialTr.553-565; H.Tr.345). He made no such record about MAI-CR3d 310.06.

A review of the entire record leaves the definite and firm impression that the motion court made a mistake. *State v. White*, 798 S.W.2d 694, 697 (Mo.banc1990). The motion court clearly erred in barring evidence on this claim. Therefore, this Court should reverse the motion court's judgment and remand for an evidentiary hearing.

Conclusion

This trial did not produce a fair ascertainment of the truth, thus John E. Winfield respectfully requests the following relief:

New Trial:	Point III
New Penalty-Phase:	Points I,II,V,VI,VII
New PCR:	Point IV
Evidentiary Hearing:	Point VIII

Respectfully Submitted,

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Certificate of Compliance and Service

I, Gary E. Brotherton, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **26,530** words, which does not exceed the 31,000 words allowed for appellant's opening brief.
- ✓ The floppy disc filed with this brief contains a copy of this brief. The CompactDiscs filed with this brief contain a complete copy of this brief as well as complete copies of each authority cited herein. The floppy disc and compact discs have been scanned for viruses using a McAfee VirusScan program, which was updated July 14, 2002. According to that program, the discs are virus-free.
- ✓ True and correct copies of the attached brief, floppy disc and CompactDisc were mailed, this 12th day of July 2002, to John M. Morris, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Gary E. Brotherton

Appendix

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