

IN THE MISSOURI SUPREME COURT

CECIL L. CLAYTON,)	
)	
Appellant,)	
)	
vs.)	No. 83355
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

Appeal to the Missouri Supreme Court
From the Circuit Court of Jasper County, Missouri
Twenty-Ninth Judicial Circuit
The Honorable C. David Darnold, Special Judge

APPELLANT’S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Clayton was convicted after a jury trial in the Jasper County Circuit Court of first-degree-murder, Section 565.020.1, RSMo, and sentenced to death. On direct appeal, this Court affirmed the judgment and sentence and issued its mandate on August 3, 1999. Clayton timely filed a *pro se* post-conviction motion on October 29, 1999. Counsel timely filed an amended motion on January 31, 2000. The motion court denied relief, after a hearing, on December 19, 2000. Notice of appeal was timely filed on January 26, 2001.

The punishment imposed in this case was death, therefore this Court has exclusive appellate jurisdiction. Article V, Section 3, Mo. Const. (amended 1982).

STATEMENT OF FACTS

Cecil Clayton is one of ten children born to Lloyd and Rosie Clayton (PCRTTr.19,26). Clayton grew up in a two and a half bedroom house on a farm in Purdy, Missouri (PCRTTr.19,26). The Claytons were poor, and their home did not have electricity until the mid-1950s or running water until 1963 (PCRTTr.20-21).

Clayton's parents had difficulty expressing affection for their children (PCRTTr.30). Lloyd was not mean, but he was very strict and a "screamer" (PCRTTr.27). Clayton was not his father's favorite child (PCRTTr.33-35). His older brother, Wayne, was "daddy's pick" (PCRTTr.34-35). Clayton and his siblings were "high-strung" (PCRTTr.37-38). Clayton was insecure, moody and not as out-going as others (PCRTTr.36-37). Clayton was self-conscious, because he had bad acne (Ex.4,p.15,25,50-51). He felt like the "black sheep" of the family, because he believed he was the least favorite child (Ex.4,p.19).

Clayton made average to above-average grades through eighth grade (Ex.12). His IQ measured 99 in the eighth grade and 88 in the tenth grade (Ex.12).

As a young man, Clayton suffered head injuries. In 1958, he was in a car accident and was knocked unconscious (Ex.4,p.3,15,18,25). In 1965, he was beaten over the head with a nightstick (PCRTTr.206,476). Clayton is blind in one eye (Ex.4,p.2,12,19,21,41).

In 1960, Clayton married (PCRTTr.39). Clayton and his wife, Connie, had five children (PCRTTr.1521-1522). Clayton was self-employed as a sawmill operator (Tr.1521).

In 1968, Clayton got into trouble and was put in jail (PCRTTr.40-42). After this experience, Clayton had a religious conversion (PCRTTr.40). Clayton quit drinking and remained sober for nine years (PCRTTr.42,73). He attended the Assembly of God Church (PCRTTr.43). Clayton had a ministry for four or five years at various area churches (PCRTTr.103-104). Clayton preached, and he and his family sang gospel music (PCRTTr.44,98-102,608-609). For several years, every Thursday Clayton and his family visited a nursing home (Ex.3,p.10). Clayton conducted church services, sang, and played guitar (Ex.3,p.10).

In 1972, Clayton was injured in a sawmill accident when a piece of wood pierced his skull and entered his brain (Tr.1522-1525; PCRTTr.44; Ex.4,p.75,77). He underwent surgery and was hospitalized for nine days (Ex.4,p.3,24,75,76). Clayton tried to resume his job as a sawmill operator but was unable to work (Tr.1528-1529; Ex.4,p.2,18,20-21,24-25,47,50).

After the accident, friends and family noticed changes in Clayton's behavior. His sister, Carolyn Dorsey, noticed that Clayton would be very quiet at times and had memory problems (PCRTTr.45). Clayton was less sociable, and it was hard for him to maintain his normal every-day life (PCRTTr.47-48). He dwelled on and was tormented by small things that most people would just ignore (PCRTTr.46). Clayton had difficulty controlling his anger (PCRTTr.45-58). Clayton's friend, Arnold Evans, noticed that Clayton was more nervous, depressed, and upset more easily (PCRTTr.612). Leslie Paul, another friend, noticed these same things and that Clayton was more easily frustrated, confused, and angered (PCRTTr.106-119).

In 1974, Clayton voluntarily admitted himself to Nevada State Hospital, because he wanted help coping with his brain injury (Ex.7). The admission records state, “[p]atient stated that he has become irritable and is fearful that he might lose his temper beyond control” (Ex.7). Clayton was “cooperative, asking for help so he can function better as husband and father” (Ex.7). The records state, “He loves his wife and children and he wants to provide for them. He finds that his mental functioning is interfering with his ability to make a living” (Ex.7). According to the records, Clayton was experiencing memory problems, confusion, anxiety, undue sensitivity, and depression (Ex.7).

Clayton was administered the Minnesota Multiphasic Personality Inventory (MMPI), which showed elevations on the psychasthenia (bodily pain), schizophrenia, psychopathic, and depression scales (PCRT.264). The doctors diagnosed him with organic brain syndrome, brain trauma, and anxiety, and suspected he had schizophrenia (Ex.7).

Clayton sought Social Security disability and saw many doctors to determine whether he was eligible for benefits (Ex.4). On January 30, 1978, Clayton saw Dr. George Klinkerfuss (Ex.4,p.24-25). Clayton had problems with his left arm, excessive worrying, difficulty concentrating, tangential conversation, confusion around people, anger, mild headaches and nausea (Ex.4,p.24). Klinkerfuss noted that Clayton had attempted to work at a sawmill, but was unable to do the work (Ex.4,p.24-25). He also worked for nine months as a policeman, but “was so unsure of himself and worried about his judgment to the point that he felt he should not be in a position of responsibility. . . .He did drink modestly when he was working at the police job to see if it would quiet his

nerves but thought it was a bad idea and stopped” (Ex.4,p.24). Klinkerfuss concluded that Clayton was disabled (Ex.4,p.25).

On May 6, 1978, Dr. Jack Eardley evaluated Clayton (Ex.4,p.50-53). Clayton had a slight gait disturbance due to some clumsiness on his left side (Ex.4,p.50). Clayton reported that he was agitated, frightened in situations of pressure, anxious, worried, depressed, had suicidal thoughts, and felt hopeless (Ex.4,p.51). Eardley found that Clayton was tangential, obsessed on thoughts, and maintained circular thinking for long time periods (Ex.4,p.51).

Clayton reported that he was shy and avoided people all of his life, but the problem was much worse after the accident (Ex.4,p.50). Clayton told Eardley that he typically puttered about the house and drank coffee (Ex.4,p.50). Clayton reported that “his early life was marred by his acne and general feelings of inferiority. . . .He frequently felt that he needed to be the meanest person in town and got himself in lots of difficulty with fighting and creating trouble. . .” (Ex.4,p.51). Eardley diagnosed Clayton with chronic, severe anxiety reaction and mild organic brain disease and concluded that Clayton was permanently disabled (Ex.4,p.52-53).

On January 24, 1979, Clayton saw Dr. William Clary (Ex.4,p.15-16). Clary quoted Clayton as saying, “I can’t get ahold of myself, I’m all tore up” (Ex.4,p.15-16). Clayton again reported extreme anxiety, depression, and paranoia (Ex.4,p.15). Clayton had “blunting of affect” and at other times “over powering playing of emotion” (Ex.4,p.15). Clary concluded that Clayton was “incapacitated and totally disabled. . . barely making it outside of an institution” (Ex.4,p.16).

In March of 1980, Clayton saw Klinkerfuss again (Ex.4,p.41-42). Clayton was still experiencing nausea, vertigo, nervousness, and hallucinations (Ex.4,p.41).

Klinkerfuss prescribed Haldol and Dilantin (Ex.4,p.41). Clayton had episodes where he would sit and stare, and his wife could not rouse him (Ex.4,p.41). Clayton told Klinkerfuss that he had attacked a married man who was sleeping with his eighteen year old daughter (Ex.4, p.41).

In March of 1980, Dr. Clifford Whipple tested Clayton (Ex.4,p.12-14). Clayton told Whipple that he was extremely sensitive to loud noises (Ex.4,p.12). Whipple measured Clayton's IQ at 75 (Ex.4,p.12). Clayton scored an eight on the vocabulary subtest and a four on the digit symbol subtest (Ex.4,p.13). Clayton was reading on a fifth grade level and spelling on a fourth grade level (Ex.4,p.13).

Clayton saw Dr. Douglas Stevens on October 31, 1983 (Ex.4,p.2-5). According to the report, Clayton was unable to work as a logger following his injury (Ex.4,p.2). Clayton was experiencing nervousness, impulsiveness, no tolerance for stress, violent impulses, and hallucinations (Ex.4,p.2-3). Clayton's left arm was numb sometimes and would not function properly (Ex.4,p.3; PCRTr.220).

Clayton told Stevens that he was depressed and frequently thought about shooting himself (Ex.4,p.3). Clayton cried and said it bothered him that no one would come around his family because of him (Ex.4,p.3). Clayton reported feeling very uncomfortable around people and avoided social interaction (Ex.4,p.3). He was paranoid and believed that people talked about him (Ex.4 p.3).

Stevens gave Clayton an MMPI (Ex.4,p.3-4). The schizophrenia, paranoia, depression, and F scales were elevated (Ex.4,p.3-4). On the Halstead-Reitan battery, Clayton had an impairment index of .7 (Ex.4,p.4). Stevens found damage to both hemispheres of Clayton's brain (Ex.4,p.4). Stevens also gave Clayton a Wide Range Achievement Test, which measured Clayton's reading and arithmetic at a fourth grade level and his spelling at a third grade level (Ex.4,p.4).

Stevens found that Clayton had chronic brain syndrome with deterioration in intellectual functioning, memory defects, and impoverished, slowed thinking with confusion (Ex.4,p.5). Stevens found that Clayton had a psychotic disorder characterized by thought disorganization, depression, agitation, hallucinations, delusions, regressive behavior, and some inappropriateness of affect (Ex.4,p.5). Stevens observed that Clayton had a seriously impaired ability to relate to people (Ex.4,p.5). Stevens concluded that Clayton was disabled (Ex.4,p.5). Stevens eerily predicted that Clayton would become a danger to himself and others:

There is presently no way that this man could be expected to function in the world of work. Were he pushed to do so he would become a danger both to himself and to others. He has had both suicidal and homicidal impulses, so far controlled, though under pressure they would be expected to exacerbate. He is best left alone and allowed to exist at his present marginal level of functioning (Ex.4,p.5).

In February of 1984, Dr. James Bright evaluated Clayton (Ex.4,p.21-22). Clayton reported hallucinations and his inability to work (Ex.4,p.21). Bright diagnosed him with organic personality disorder and prescribed Chlorpromazine (Ex.4,p.22).

Clayton and his wife divorced. Years later he began a relationship with Martha Ball. In November of 1996, Clayton and Martha had known each other for about two and a half years and had been living together for five months (Tr.1156,1167). The relationship was ending, and on November 26, 1996, they agreed to meet at the Country Corner store so Clayton could return some papers Martha had left at his house (Tr.1157). At the store, they argued (Tr.1160,1163-1164). The clerk called the police, and Officer Jim McCracken went to the store (Tr.1148-1149). Clayton and Martha left and went their separate ways (Tr.1164).

Clayton went to Martin Cole's home and asked Cole to go out with him (Tr.1426). Cole refused, because he had to take a friend, Rosemary Youngblood, to work (Tr.1425-1426). Clayton got angry and left (Tr.1426). Cole drove Youngblood to work, where she clocked in at 9:53 p.m., then he returned home (Tr.1420,1427-1428).

At 9:57 p.m. Carolyn Leonard, Martha's sister, noticed a truck, which she believed belonged to Clayton, at the end of her mother's driveway, so she called the police (Tr.1002,1133-1136). Officer Christopher Castetter arrived at the scene at 10:03 p.m. (Tr.1000,1003). When Castetter did not respond to calls from the dispatcher, other officers went to the scene and found Castetter seriously injured (Tr.1004,1022). Castetter later died from a single gunshot to the head (Tr.1122).

Around 10:15 p.m., Clayton returned to Cole's home (Tr.1428). They left together in Clayton's truck and drove to Clayton's home (Tr.1429-1430,1435). Clayton told Cole that he had shot a police officer and, if questioned by the police, Cole should tell them that he and Clayton were together all afternoon watching television (Tr.1432-1435).

Clayton and the police arrived at his home at about the same time (Tr.1194-1195). McCracken saw Clayton get out of his truck, walk to a pile of concrete blocks, remove something from his pocket, and bend over (Tr.1205-1210). The police arrested Clayton and impounded his truck (Tr.1216,1312). McCracken examined the block pile and found a .38 caliber gun, which contained four live rounds and one expended cartridge (Tr.1219,1344,1353). Later testing could not confirm that the bullet recovered from Castetter's body was fired from the gun (Tr.1358-1359).

Sergeant Michael Rogers interrogated Clayton, who initially stated that he had been with Cole all evening (Tr.1281). When told he had been seen at the Country Corner, Clayton admitted that he had been there but maintained that he spent the remainder of the evening with Cole (Tr.1283-1286). Rogers told Clayton he knew Clayton had been at the shooting scene and asked if Castetter had done something that provoked him (Tr.1290). Clayton replied, "He probably should have just stayed home ... He shouldn't have smarted off to me ... But I don't know because I wasn't out there" (Tr.1291).

The police seized paint samples from Castetter's patrol car and Clayton's truck (Tr.1302-1307,1322-1323). The samples from Clayton's truck were of similar color and

chemical composition to the paint transfers from the patrol car (Tr.1379-1382). The police found a piece of black molded plastic at the crime scene (Tr.1309-1312). It fit perfectly into a damaged area of the tail-light of Clayton's truck (Tr.1313-1314).

Clayton and Cole submitted to gunshot residue tests (Tr.1286,1323). Clayton's test was negative, but Cole's test was consistent with having fired a weapon (Tr.1371,1373).

Clayton was incarcerated in the Lawrence County jail and shared a cell with William Rogers and Robert Compton (Tr.1457-1458). Clayton told Rogers and Compton that he had shot a police officer (Tr.1459-1461,1482-1484).

While confined in jail, Clayton demonstrated erratic behavior. Jeff Tichenor, a physician's assistant, treated Clayton from January 15 to March 13, 1997 (PCRTTr.512-513; Ex.8). Clayton was very nervous and not eating or sleeping well (PCRTTr.515; Ex.8). Clayton reported that he felt a need to be violent because of the noise and horseplay of other inmates (PCRTTr.515; Ex.8). Clayton displayed aggressive and anxious behaviors and had an altercation with his cellmate (PCRTTr.516-517; Ex.8). Other inmates complained about Clayton's hygiene, and Clayton had smeared feces all over the bathroom (PCRTTr.519-520; Ex.8). Clayton reported hearing persecuting voices (PCRTTr.519; Ex.8). Tichenor believed that Clayton might be schizophrenic (PCRTTr.510; Ex.8).

Clayton retained attorney Ross Rhoades, who was assisted by his daughter Christine (PCRTTr.743-744). During their first meeting, Clayton told Rhoades that he shot Castetter (PCRTTr.858). Rhoades discouraged Clayton from discussing any details of

the shooting at that point (PCRTTr.940). During a subsequent meeting, Clayton told Rhoades that he went to the crime scene to talk to his girlfriend and try to win her back (PCRTTr.941-942). A car turned in the driveway and sideswiped his truck (PCRTTr.942). Clayton said that he did not know the driver was a law officer (PCRTTr.942). Clayton expressed remorse to Rhoades about the shooting (PCRTTr.943).

As part of his investigation, Rhoades obtained Clayton's Social Security file and hired two experts, Dr. Bettye Back, a neuropsychologist, and Dr. Michael Morse, a neurologist, to evaluate Clayton (Tr.1538,1546,1605;PCRTTr.855,861). Rhoades provided Back part of Clayton's Social Security file (Ex.31). Rhoades instructed Back not to discuss the facts of the case with Clayton (PCRTTr. 857-858). On March 11, 1997, Tichenor called Rhoades, told him about Clayton's problems at the jail, and recommended a psychiatric consultation (PCRTTr.527-28,892; Ex.8). Rhoades did not ask Back to evaluate Clayton's competency to stand trial (Ex.1,p.10,77).

Rhoades interviewed Carolyn Dorsey who told Rhoades about Clayton's upbringing, his sawmill accident and behavior afterwards, including two violent incidents when Clayton lost his temper and hit her and threatened her husband (PCRTTr.65,78). Rhoades endorsed Carolyn as a penalty phase witness and asked her to be present for the trial (Ex.35;PCRTTr.903). Rhoades interviewed Les Paul by telephone (PCRTTr.121-122,908). Paul is deaf, and the two had great difficulty communicating over the phone (PCRTTr.122,908). Rhoades obtained phone numbers for Arnold Evans (Ex.34). Although Rhoades did not interview Evans, he endorsed him as a penalty phase witness (PCRTTr.620;Ex.37).

Before the trial, Rhoades hired Patrick Berrigan to consult on the case and help Rhoades with voir dire (PCRTTr.639). Since 1990, Berrigan worked exclusively on capital cases and represented over fifty capital defendants (PCRTTr.635). To help prepare Rhoades for voir dire, Berrigan reviewed all of the police reports concerning the case (PCRTTr.639-640).

After Berrigan reviewed the police reports, he discussed the case with Rhoades and Christine (PCRTTr.646,750,752,852-853). In the guilt phase, Rhoades wanted to assert that Clayton was not guilty, because there was no gunshot residue on Clayton's hands, but there was gunshot residue on Cole's hands (PCRTTr.648-649). In the penalty phase, Rhoades intended to base his mitigation theory on Clayton's brain damage (PCRTTr.651,849). Berrigan vehemently advised Rhoades to abandon the not guilty theory and present a guilt phase defense of diminished capacity (PCRTTr.650-651,853). In Berrigan's opinion, diminished capacity was the only viable defense (PCRTTr.742). Berrigan advised Rhoades to abandon the not guilty theory, because the evidence was "fairly overwhelming" that Clayton was the shooter, and because it is "a disaster" to present inconsistent guilt phase defenses or a guilt phase defense that is inconsistent with the mitigation theory, because the defense will have no credibility with the jury (PCRTTr.646-648,661-662). Berrigan recalled that during their last meeting, four days before trial, Rhoades was not "very sure of his diminished capacity defense" (PCRTTr.660-661).

Christine and Rhoades discussed the case many times (PCRTTr.747-748). Christine thought it was a bad idea to present a not guilty defense portraying Cole as the shooter

and then, if Clayton was convicted, present the mental defect evidence in the penalty phase (PCRTTr.748-750).

The trial began October 14, 1997. In his opening statement, Rhoades explained how Clayton was involved in a sawmill accident that resulted in permanent brain injury (Tr.987-988). Rhoades told the jury that he would present the testimony of two doctors who would explain the specific nature of Clayton's brain injury (Tr.988-990). Rhoades told the jury that as a result of the brain injury, Clayton was impulsive and could not control himself, particularly when he is under stress (Tr.990-992).

The state presented Leonard's testimony about seeing Clayton's truck at her mother's home around the time Castetter was shot, McCracken's testimony about arresting Clayton and finding the gun, expert testimony regarding ballistics and the paint comparisons, and testimony regarding Clayton's statements to Cole, Sergeant Rogers, Compton, and William Rogers (Tr.1133-1136,1205-1210,1216,1219,1281-1291,1358-1359,1379-1382,1457-1461,1482-1484).

Rhoades cross-examined Officer David Bowman, one of the first officers to arrive at the scene, about information he received from Leonard (Tr.1057). Rhoades elicited testimony that Leonard did not tell Bowman that she saw Clayton; Leonard could not tell Bowman how many people were in the vehicle; Leonard could not identify the driver; and it was too dark to see from the house to the end of the driveway (Tr.1057-1058). Rhoades questioned Leonard on the fact that she did not see Clayton the night of the shooting; she did not know whether he was in the vehicle; she did not know how many

people were in the vehicle; and she did not like Clayton and did not want him to have a relationship with her sister (Tr.1139-1141).

On cross-examination of McCracken, Rhoades attempted to elicit testimony that McCracken could not clearly see Clayton (Tr.1225). Rhoades elicited testimony that McCracken did not see Clayton holding a gun and did not see what, if anything, Clayton removed from his pocket while standing beside the cement blocks (Tr.1226).

On cross-examination of the state's ballistics expert, Rhoades emphasized that it was impossible to make a positive identification of the bullet (Tr.1365,1367-1368). Rhoades elicited testimony that the land width measurements of the recovered bullet did not correspond to the measurements of bullets test fired from Clayton's gun (Tr.1367-1368). On cross-examination of the state's trace evidence expert, Rhoades emphasized that a paint match is not conclusive and only meant that Clayton's vehicle could have been the source of the paint (Tr.1387-1388).

Rhoades elicited testimony that Clayton did not have gunshot residue on his hands or clothing, but that Cole had gunshot residue on his left hand, and Cole is left-handed (Tr.1389-1391,1395,1452).

Rhoades impeached Compton and William Rogers with evidence of their prior convictions (Tr.1462-1463,1490). He elicited testimony that they had obtained information about Clayton's case from the media and from Clayton's discovery (Tr.1465, 1468-1470,1472-1473,1487-1488). From Rogers, Rhoades elicited testimony that Clayton had "unusual spells" and would black out (Tr.1471). According to Rogers, Clayton would do things he didn't remember and would cry (Tr.1471). From Compton,

Rhoades elicited testimony that Clayton angered easily and would cry (Tr.1494). At times Clayton could not remember events (Tr.1494). Clayton believed his lawyers and the police were “in cahoots” and that the police were trying to poison him (Tr.1495).

In the defense’s case-in-chief, Rhoades called Clayton’s brother, Marvin, to describe the sawmill accident that caused Clayton’s brain injury (Tr.1523-1525). Back testified that Clayton’s brain damage made him incapable of deliberating before he shot Castetter (Tr.1552-1574). Morse showed the jury MRI scans of Clayton’s brain and explained that Clayton was missing approximately 8% of his brain (Tr.1604-1623).

In closing argument, the prosecutor said Back’s testimony was “preposterous,” “voodoo,” and an “excuse” (Tr.1648-1649). He argued, “you notice she didn’t want to deal with the facts surrounding this incident, did she? She wanted to deal with her nice little computer tests. She wanted to deal with her nice clean little numbers ... if you don’t look at the facts, you don’t know what happened” (Tr.1648).

In the defense’s closing argument, Rhoades initially argued that the expert testimony showed that Clayton was brain damaged and was incapable of deliberation (Tr.1654-1658). Rhoades then argued that what happened was a “mystery” or “puzzle,” and there was reasonable doubt as to Clayton’s guilt (Tr.1663). Rhoades suggested that Clayton may have been at the crime scene, he may have been with someone else, or he may not have been there at all (Tr.1659-1660).

Rhoades argued that the police did not do a thorough investigation, because they did not attempt to recover fingerprints from Clayton’s truck (Tr.1666-1667). Rhoades

implied that the police were not interested in finding out what really happened, because they already had Clayton in custody (Tr.1667).

Rhoades argued that William Rogers and Compton were not credible witnesses because of their extensive criminal histories (Tr.1667-1669). Rhoades suggested that Rogers and Compton fabricated their testimony, because they had access to Clayton's discovery and could have gleaned knowledge of the crime by reading Clayton's legal papers or from the media (Tr.1669-1670). Rhoades also recalled that Compton and Rogers testified that Clayton would get angry or cry for no reason and had memory lapses (Tr.1670). Rhoades argued that these behaviors were indicative of Clayton's brain damage (Tr.1670).

Rhoades concluded by arguing that Cole was not a credible witness (Tr.1671). For his last point, Rhoades reminded the jury that Cole had gunshot residue on his hands, but Clayton did not (Tr.1672).

In rebuttal, the prosecutor criticized the defense for suggesting that Cole was the shooter and for being inconsistent (Tr.1675-1677). The prosecutor pointed out that Cole could not have been the shooter, because he had an alibi (Tr.1676). He noted the defense wanted the jury to believe Rogers' and Compton's descriptions of Clayton's erratic behavior yet discredit their testimony concerning his confessions (Tr.1676). The prosecutor argued that the defense theories were contradictory, therefore neither should be believed: "This idea that either Martin Cole did it, or, if you don't believe that, I must -- the defendant must be crazy. . . if you don't believe that, then maybe you'll believe the other. Well, folks, neither one are true (Tr.1676-1677).

The jury found Clayton guilty of first-degree murder (Tr.1685). After the penalty phase, the jury assessed punishment at death (Tr.1864). After sentencing, Rhoades wrote Berrigan a letter: “It was not until the trial had been completed and some days had passed before I fully realized how inadequate and inept I was in attempting to spare Cecil from the death penalty. As you pointed out to me, but I was unwilling to listen, our chances of succeeding in the first phase were minimal” (Ex.30).

On direct appeal, this Court affirmed Clayton’s conviction and sentence. Clayton timely sought post-conviction relief (PCRL.F.19). Clayton asserted that Rhoades was ineffective for presenting inconsistent defenses, failing to thoroughly investigate and present the diminished capacity defense and all mitigating evidence regarding his brain injury, failing to challenge his competency to proceed to trial, and failing to call several penalty phase witnesses (PCRL.F.36-76,84-93).

At the post-conviction hearing, Clayton presented the testimony of Dr. Daniel Foster and a complete set of Clayton’s records (PCRTTr.156,164-169,175-503). Foster is a forensic psychologist and is trained in neuropsychology (PCRTTr.177). Foster was employed with the United States Bureau of Prisons for approximately fifteen years (Ex.19; PCRTTr.178). He has performed hundreds of forensic evaluations and has supervised thousands (PCRTTr.178-179).

Foster reviewed numerous records including records of Clayton’s incarceration at the Lawrence County jail (Ex.8) and the Jasper County jail, Clayton’s treatment at Nevada State Hospital (Ex.7), Clayton’s school records (Ex.12), Back’s raw data (Ex.21), Morse’s report, and all of the psychiatric and psychological evaluations in Clayton’s

Social Security file (Ex.4) (PCRTTr.182-189). Foster interviewed several friends and family members of Clayton (PCRTTr.189). Foster interviewed Clayton for four hours and discussed the events surrounding the shooting with Clayton (PCRTTr.323,338-341).

Foster explained that in 1972, rehabilitation for brain injuries did not exist (PCRTTr.232-233). From 1985 to 1986, Foster worked at the hospital where Clayton had his surgery (PCRTTr.233-234). The hospital did not begin developing a neuro-rehabilitation facility until the mid-1980s (PCRTTr.234). At the time Clayton was injured, a brain-damaged person was considered recovered if he could walk, talk, and use the bathroom (PCRTTr.234-235).

Foster explained that cognitive rehabilitation therapy is important, because a damaged brain has to be retrained to find neural pathways around damaged or missing brain tissue (PCRTTr.235-238). It is critical, however, to begin rehabilitation therapy within twelve months of sustaining the injury (PCRTTr.239). Once twenty-four months have passed, rehabilitation therapy does not provide significant improvement (PCRTTr.239).

Foster explained that the frontal lobe is in charge of executive function; in other words, it is the boss of every conscious decision (PCRTTr.251). The frontal lobes are responsible for all of the behavior unique to human beings (PCRTTr.193). Information travels from the limbic system to the frontal lobe so the frontal lobe can give meaning to the information (PCRTTr.253-255). If information, or a signal, cannot reach the frontal lobe due to damaged or missing brain tissue, the signal bounces back to the limbic system and causes a flight or fight response (PCRTTr.253-256). The person will become

aggressive or will retire and hide (PCRTTr.256). This is why frontal lobe damaged people have high anxiety levels (PCRTTr.253-254). Their frontal lobe cannot interpret all of the information coming into their brain, therefore the person has no explanation for the incoming stimuli (PCRTTr.253-254; 257-259).

Foster testified that Clayton had a history of head injuries (PCRTTr.206). In 1958, Clayton was in a car accident and was knocked unconscious (PCRTTr.206; Ex.4,p.3,15,18,25). In 1965, Clayton was beaten over the head with a nightstick (PCRTTr.206,476). Foster explained that closed head injuries can be even more damaging than a penetrating wound, because the brain bumps against the skull and can be bruised in different areas (PCRTTr.222). Furthermore, head injuries have a cumulative effect, meaning that each injury does progressively more damage (PCRTTr.226). Back's testing yielded an impairment scattergram showing that Clayton has damage to every lobe of his brain except the right occipital lobe (PCRTTr.202-208;Ex.21).

Foster found Clayton's records from Nevada State Hospital to be significant as they are the earliest available records in which Clayton attempted to get help following his head injury (PCRTTr.261). The records were significant, in that they reflect Clayton experienced memory problems, confusion, anxiety, undue sensitivity, and depression, which are symptoms consistent with brain injury (PCRTTr.261,264-265;Ex.7). The records do not indicate that Clayton was provided any treatment other than a prescription for Valium (Ex.7). Clayton did not get the help he was seeking (PCRTTr.264).

Foster found Stevens' 1983 report significant, because it documented that Clayton was unable to work as a logger following his injury (Ex.4,p.2; PCRTTr.217). He was

unable to do jobs that were routine for him before the injury (Ex.4,p.2; PCRTTr.217). From 1968 to 1977, Clayton was sober (PCRTTr.40,42,73). Clayton's sobriety during this time demonstrates that the brain damage, not alcohol abuse, was responsible for his inability to work and handle the stress associated with jobs that were routine for him before the injury (PCRTTr.217). Clayton had classic characteristics of frontal lobe damage, including nervousness, impulsiveness, no tolerance for stress, and violent impulses (Ex.4,p.2-3; PCRTTr.218-219). He also suffered visual and auditory hallucinations (Ex.4,p.5; PCRTTr.222-223). If another person was present, he could distract himself from the hallucinations (PCRTTr.223).

According to the report, Clayton's left arm was numb sometimes and would not function properly (Ex.4,p.3;PCRTTr.220). Foster explained that this indicates that the piece of wood that entered Clayton's brain caused damage to the motor area of his brain, which is a larger degree of penetration than revealed by the MRI done by Morse (PCRTTr.221;A-47;Ex.22).

Foster found the results of the MMPI given by Stevens to be significant, because they were consistent with Back's MMPI results; the schizophrenia, paranoia, depression, and F scales were elevated, confirming Clayton's reports of depression, emotional inappropriateness, anxiety, suspicion, and inability to function (Ex.4,p.3-4; PCRTTr.214,231-232). The consistency between Stevens' MMPI and Back's MMPI was important, because it indicated that Clayton was not malingering (PCRTTr.230-231).

Foster found the results of the MMPI administered by Back to be significant, because the results showed a "cry for help" profile indicating that Clayton was "hanging

on by his fingernails and toe nails to get through an average day” (PCRTTr.210, 214). The schizophrenia, psychasthenia, and paranoia scales were elevated (PCRTTr.211-212). Elevation of the psychasthenia scale means that Clayton was reporting many signs and symptoms of aches and pains throughout his body (PCRTTr.212). Foster explained that the brain is responsible for every sensation (PCRTTr.213). Brain injured persons have random firing of signals which cause the person to hurt in all areas of the body (PCRTTr.213).

Foster found the results of the Halstead-Reitan battery given by Stevens to be significant, because the results were consistent with Back’s testing (PCRTTr.241). At the time of Stevens’ testing, Clayton had an impairment index of .7, and on Back’s testing his impairment index was .8 (PCRTTr.241). The slight variation shows that Clayton’s brain damage worsened with aging (PCRTTr.241). Stevens found damage to both hemispheres of Clayton’s brain just as Back did on the impairment scattergram (PCRTTr.241).

Foster noted that on the Wide Range Achievement Test given by Stevens, Clayton’s reading and arithmetic were at a fourth grade level and his spelling was at a third grade level (Ex.4,p.4;PCRTTr.240). Clayton’s school records, however, showed that he functioned at an average to above average level through the eighth grade (Ex.12; PCRTTr.228, 240). Foster found this significant, because it shows not only impairment of Clayton’s skills, but his frustration of knowing he has the ability to perform those skills but not being able to access the information (PCRTTr.228-229). Foster found it significant that Stevens predicted that Clayton would become suicidal or homicidal (PCRTTr.242-244;Ex.4,p.5).

Foster found Whipple's March, 1980 report significant, although he did not agree with Whipple's ultimate conclusion that Clayton did not have an organic disturbance (PCRTTr.244-250;Ex.4,p.12-14). Whipple administered the Wechsler Adult Intelligence Scale (WAIS) but did not give the full Halstead-Reitan battery, thus his testing yielded less meaningful information in terms of long term prognosis and in identifying the areas of the brain that were damaged (PCRTTr.244-246). Training on the Halstead-Reitan was not widespread in 1980 (PCRTTr.245).

The WAIS has "hold" and "don't hold" tests (PCRTTr.246). "Hold" tests are least sensitive to brain injury and therefore are the best indicator of a person's pre-injury level of functioning (PCRTTr.246). "Don't hold" tests are the most sensitive to brain injury and therefore are expected to show the most change following a brain injury (PCRTTr.246-247). Analysis of these scores provides a good test for malingering, because the patient does not know which are the "hold" tests that he should score higher on and which are the "don't hold" tests which he should score lower on (PCRTTr.246).

The strongest "hold" test is the vocabulary test (PCRTTr.246). Clayton scored an eight, which is roughly equivalent to an IQ of 80 (PCRTTr.246;Ex.4,p.13). According to school records, Clayton's IQ score was 99 in eighth grade and 88 in tenth grade (Ex.12; PCRTTr.246). As expected, the vocabulary score was fairly close to his pre-injury IQ (PCRTTr.246). The test most sensitive to brain injury is the digit symbol test (PCRTTr.246-247). Clayton scored a four, equivalent to an IQ of 40, which is in the severe, mentally retarded range, and showing a forty point difference (PCRTTr.247;Ex.4,p.13). When Back evaluated Clayton, he again performed poorly on the digit symbol test, showing a

difference of fifty points (PCRTTr.247). Foster found the results significant, because they show the consistency in the severity of Clayton's brain damage from 1980 to 1997 and that he is not malingering (PCRTTr.247-248).

Foster found Klinkerfuss' report dated January 30, 1978 to be significant, because it documented the same symptoms seen in other reports: problems with Clayton's left arm, worry, difficulty concentrating, tangential conversation, confusion around people, and anger (PCRTTr.267-268;Ex.4,p.24-25). Clayton complained of mild headaches and nausea, which Foster explained are typical of closed head injury (PCRTTr.268-269). Foster found it significant that when Clayton attempted to work as a policeman, he began drinking to quiet his nerves, even though he had been sober for many years (PCRTTr.270,272-273). In Foster's opinion, Clayton was self-medicating in an effort to cope (PCRTTr.273).

Eardley's 1978 report noted a slight gait disturbance due to some clumsiness on Clayton's left side, which indicated to Foster that the brain damage extended all the way back to the motor and body sense area of Clayton's brain (Ex.4,p.50-53; Ex.22; PCRTTr.274; A-47). Foster found it significant that Clayton reported to Eardley the same symptoms seen in other reports: agitation, frightened in situations of pressure, anxiety, worry, depression, suicidal thoughts, and hopelessness (Ex.4,p.51; PCRTTr.275-276). The report documented how Clayton was tangential, obsessed on thoughts, and maintained circular thinking for long periods of time (Ex.4,p.51; PCRTTr.277,283-284). Foster noted that Clayton reported that his shyness and avoidance of people was a lifelong situation,

but was much more severe after the accident (Ex.4,p.50; PCRTTr.275). Foster explained that a person's personality traits are amplified after a brain injury (PCRTTr.275-276).

Foster found Clayton's statement to Eardley that he typically puttered about the house and drank coffee to be another common characteristic of brain injury (Ex.4,p.50; PCRTTr.276). Foster explained that there are very few things a brain injured person can do at a level that they know they ought to be able to perform, so they avoid activities that cause a sense of failure and avoid people because others will criticize their misbehavior (PCRTTr.276-277).

Clayton told Eardley that he felt "his early life was marred by his acne and general feelings of inferiority . . . he frequently felt that he needed to be the meanest person in town and got himself in lots of difficulty with fighting and creating trouble . . . " (Ex.4,p.51). Foster explained that Clayton is not antisocial (PCRTTr. 280-281). Clayton cares very much about what others think of him (PCRTTr. 281). Clayton created emotional safety by running people off (PCRTTr. 279). Clayton did not grow up in a home with a lot of warmth or expressed love (PCRTTr. 279). He competed, unsuccessfully, with his brother Wayne (PCRTTr. 279). Clayton established dominance with other men by fighting; it was one area in which he could excel (PCRTTr. 281). He fears being alone and he fears other people, so he pretends that he is not scared of anybody (PCRTTr. 280).

Foster found Clary's 1979 report to be consistent with the others, in that Clayton again reported extreme anxiety, depression, and paranoia (Ex.4,p.15; PCRTTr.285-286). The report described that Clayton had "blunting of affect" and at other times "over

powering playing of emotion” (Ex.4,p.15; PCRTTr.287). Foster explained that Clayton has two responses, extra emotional or unemotional, because his frontal lobe is not working to mediate his responses (PCRTTr.287).

From Klinkerfuss’ March, 1980 report, Foster noted that Clayton was still experiencing nausea, vertigo, nervousness, and hallucinations, and Klinkerfuss prescribed Haldol and Dilantin (Ex.4,p.41; PCRTTr.288,290). Foster explained that Clayton’s episodes in which he would sit and stare were a fight or flight response in which he was withdrawing and shutting out outside stimuli (PCRTTr. 288).

Clayton told Klinkerfuss that he had attacked a married man who was sleeping with his eighteen year old daughter (Ex.4,p.41;PCRTTr.289). Foster interviewed Les Paul, who was present during this event (PCRTTr.289). Foster explained that sometimes Clayton can exercise control and other times he cannot (PCRTTr.290-291). It is completely random (PCRTTr.290). If a signal in Clayton’s brain can find a neurochemical pathway to a solution, he can make a good judgment response, but if the signal hits scar tissue, then it bounces back to his limbic system and the flight or fight response is triggered (PCRTTr.253,290-291). Clayton has the same values as most people, including civility, honesty, integrity, and hard work, but his brain cannot always function in accord with his value system (PCRTTr.291-292).

Foster found Bright’s 1984 report to be significant, because Clayton again reported the same symptoms documented in other reports: hallucinations, nervousness, and paranoia (Ex.4,p.21-22;PCRTTr.294). In the report, Clayton referred to an assault on his sister (Ex.4,p.21;PCRTTr.294-295). Foster explained that the incident was another

example of Clayton being unable to inhibit a violent impulse which was contradictory to his belief that it is wrong for a man to hit a woman (PCRTTr.296-297).

In addition to reviewing Clayton's records, Foster gathered more information by interviewing Clayton's friends and family (PCRTTr.189-190). Foster explained that it was important to know what Clayton was like before the sawmill accident (PCRTTr.304-305). A person's coping skills are lessened by a brain injury, and a person's character defects are exacerbated by a brain injury (PCRTTr.304-305). Knowledge of a patient's formative experience and formative presentation of himself gives the examiner a better idea of the patient's prognosis and what to expect in the future (PCRTTr.305).

Foster interviewed Clayton's sister, Carolyn Dorsey (PCRTTr. 304). Carolyn described her father as extremely hard working, very old fashioned, well mannered, a perfectionist, honest, not violent, and cold (PCRTTr.306-307). When Clayton got into trouble as a teenager, his father thought he should have to learn his lesson, but Clayton's mother always bailed him out (PCRTTr.307). In Carolyn's opinion, Clayton was a "momma's boy" (PCRTTr.306-307). Clayton's brother, Wayne, was his father's favorite, and Clayton always "played second fiddle" to Wayne (PCRTTr.308). Throughout his life, Clayton alienated people (PCRTTr.309).

Based on this information, Foster concluded that Clayton holds himself to a standard that is not always realistic for him (PCRTTr.308). Clayton felt the only way he could be successful and hold his own with his brothers was in his work ethic and his fighting ability (PCRTTr.308).

Clayton's friend, Les Paul, told Foster that Clayton was more willing to ask for help after his brain injury and that Clayton sought help for things he did not need help with before (PCRTTr.316-317). Clayton could not stay focused on a task and would get irritable and forgetful (PCRTTr.317). Clayton would get frustrated more quickly and more intensely (PCRTTr.318).

As part of his evaluation, Foster interviewed Clayton for a little over four hours (PCRTTr.323). Clayton was easily distracted and could not sustain attention (PCRTTr.323). He had difficulty understanding Foster's questions (PCRTTr.324). Foster questioned Clayton about the circumstances surrounding the shooting, so that he could form an opinion as to Clayton's ability to deliberate (PCRTTr.337). Clayton described how he and his girlfriend, Martha, were fighting (PCRTTr.338). They had lived together for about four months, but she had moved out and was staying with her mother (PCRTTr.338). They met at a store to try and reach some agreement about some items she had left at his home (PCRTTr.338). At the store, they argued, and a police officer came (PCRTTr.338).

Clayton told Foster that he went to Cole's house hoping that they could drink some beer together, but Cole had something else he had to do (PCRTTr.339). Later, Clayton went to Martha's mother's home to make one last effort to get her back (PCRTTr.338). Clayton told Foster that he backed into the driveway and turned the lights off (PCRTTr.339-340). He had a gun and was considering suicide (PCRTTr.339). Clayton did not tell Foster that he had any thoughts of hurting someone else (PCRTTr.339).

The next thing he knew, there were headlights in his face and a car was rapidly accelerating (PCRTTr.340). Clayton could not see who it was (PCRTTr.340). Clayton's

vehicle was struck (PCRTTr.340). Clayton said he assumed he shot the officer, but he could not recall the specific event (PCRTTr.340). Clayton remembered going to Cole's house (PCRTTr.340). Clayton said he did not know the victim was a police officer until he was driving away (PCRTTr.342-4343). Initially, Clayton thought the driver was Martha's brother with whom he had had words (PCRTTr.342).

Clayton cried as he related these events to Foster (PCRTTr.340). He said that he was feeling abandoned just like he had when he and his wife divorced (PCRTTr.341). He felt rejected and that he wasn't good enough and he would never be good enough (PCRTTr.341).

Foster concluded that at the time of the shooting Clayton had a mental defect - dementia, secondary to a traumatic head injury (PCRTTr.191). Foster also diagnosed Clayton as having social anxiety disorder and alcohol dependence (PCRTTr.191). Foster concluded Clayton was not capable of deliberation (PCRTTr.363-364). Clayton was devastated and depressed about the end of his relationship with Martha (PCRTTr.366). The headlights and rapid acceleration of the approaching car frightened Clayton, triggering the limbic system of his brain into a flight or fight, shut down or attack, response (PCRTTr.367).

Foster explained that the events that followed the shooting were typical of Clayton's poor judgment, his inability to plan, organize, or be rational (PCRTTr.369). For example, Clayton told Cole to provide him with an alibi for the afternoon and evening, even though Clayton knew that a police officer who had known him all his life saw him at the store just a couple hours earlier (PCRTTr.369). Also, Clayton made a comment to

the police that it was smart of him to get rid of the gun, even though the officers saw him drop the gun (PCRTTr.370).

Foster testified that Clayton was not competent at the time of trial (PCRTTr.323,359). Clayton had a basic understanding of the charges against him and his legal rights (PCRTTr.327). He understood the role of the judge, prosecuting attorney, defense attorney, and jury, although he could not articulate his role in the proceedings (PCRTTr.327-328). Clayton could not verbalize an understanding of courtroom process or an understanding of strategy issues (PCRTTr.327-329,362). Throughout the interview, Clayton referred to grandiose, illogical claims of plots against him (PCRTTr.325).

Clayton could not articulate the meaning of aggravating and mitigating circumstances (PCRTTr.336,358-360). Clayton did not and still does not understand the inevitability of the death penalty absent a successful appeal (PCRTTr.336-337). Clayton understood he had been sentenced to death, but engaged in “magical thinking” in that he believes he will not be executed because the Lord will see him through and help him out (PCRTTr.336).

Clayton was not able to assist in his own defense (PCRTTr.359). His distractibility, emotional lability, and poor concentration prevent him from participating meaningfully in procedures that last for hours or days (PCRTTr.323,359). Clayton could not sustain a rational understanding for any significant length of time (PCRTTr.342-343,359). When Foster interviewed Clayton, he could not respond appropriately to questions after approximately two hours (PCRTTr.323). Clayton became increasingly tangential during the interview, and his thoughts became rambling and disorganized (PCRTTr.323,342-343).

His concentration was impaired, and he was easily distracted (PCRTTr.327-328). Clayton cannot process new information, nor can he recall facts on demand (PCRTTr.360-361).

Foster testified that Clayton did not have the ability to comprehend counsel's advice and instruction and make meaningful decisions based on that information (PCRTTr.362). If called to testify, Clayton could not have testified relevantly or responded appropriately to cross-examination (PCRTTr.359-360). Clayton could not sustain coherent thought processes long enough to testify meaningfully (PCRTTr.359-360). Clayton did not have the capacity to follow the testimony of witnesses for a sustained period of time, thus he could not advise counsel of discrepancies or errors in testimony and provide meaningful assistance with cross-examination (PCRTTr.359-360). His memory deficits and inability to recall facts on demand significantly impaired his ability to provide counsel with information that would help his case, such as names of helpful witnesses (PCRTTr.359).

At the time of trial, Clayton's ability to think was already severely impaired because of his brain damage. The extreme sedation he was under even further suppressed his ability to think (PCRTTr.357).

In addition to Foster's testimony, Clayton presented the testimony of Carolyn Dorsey, Leslie Paul, Delores Williams, Arnold Evans, Patrick Berrigan, Jeff Tichenor, Christine and Ross Rhoades, and Norma Mitchell and Dr. Bettye Back through deposition (PCRTTr.18,90,508,546,634,743,832;Ex.1,3).

Rhoades testified that he thought the state had a strong case, but he thought he had "pretty good" evidence of diminished capacity (PCRTTr.844,849). Rhoades agreed that

his defense theories were inconsistent, but he “didn’t think it would be smart to just give up on reasonable doubt, and not require the State to put their proof on” (PCRTTr.833,849). Rhoades stated that “juries can hang up on the silliest damn things,” and so he tried to “throw it on the wall and see where it sticks” (PCRTTr.971). Rhoades also stated, “if you can put some doubt in somebody’s mind or give them an opportunity to try and compromise, what the hell” (PCRTTr.973). Rhoades claimed that he tried to “soft-pedal” the not guilty theory (PCRTTr.973).

Rhoades thought he knew that Clayton had been treated at Nevada State Hospital, but he could not recall whether he obtained the records (PCRTTr.879-880). Rhoades thought the records would have humanized Clayton (PCRTTr.880-881). Rhoades testified that he probably did not get Clayton’s school records, because he did not think they were important (PCRTTr.889).

Although Rhoades obtained Clayton’s Social Security file and disclosed it to the state, he did not use the records, because he thought there were “some inconsistent reports in there . . . And I didn’t want to get into a contest, in front of a jury, swapping these reports back and forth” (PCRTTr.861-864). Rhoades could not recall any specific examples of inconsistent reports other than one report might have said Clayton was not suicidal and no longer had a bad temper (PCRTTr.872). He did not question Back about the reports, because he was afraid the prosecutor would cross-examine her about any inconsistent reports (PCRTTr.875).

Rhoades could not recall why he did not question Back about the MMPI test she administered to Clayton (PCRTTr.878-879). Rhoades could not recall whether he asked

Clayton or his family whether he received rehabilitation after the sawmill accident, and Rhoades did not recall discussing the issue with Back (PCRTTr.883-886). Rhoades did not question Back about Clayton's history of head injuries, because he wanted to "keep it simple," although he admitted that testimony about the cumulative effect of head injuries would have been good (PCRTTr.891). Rhoades believed Clayton was competent to stand trial (PCRTTr.929).

Rhoades had a vague recollection of interviewing Carolyn Dorsey (PCRTTr.902-906). His file contained some sparse notes from the interview referencing the incidents when Clayton slapped Carolyn and threatened her husband (Ex.34; PCRTTr.898-899). Although Rhoades endorsed Carolyn as a penalty phase witness, and he remembered asking her to be present at the trial, he could not recall why he did not have her testify (PCRTTr.900-901,903,907). He asked her to attend the trial, because he possibly wanted her to testify about the violent incidents with Clayton to demonstrate how his behavior was aberrant and volatile after the sawmill injury (PCRTTr.903-905). Rhoades thought that Carolyn's testimony about Clayton's upbringing and his personality would have been helpful, because it would have humanized him and explained some of his behavior (PCRTTr.907).

Rhoades could not remember whether he interviewed Evans and could not remember any strategic reason for not calling Evans to testify (PCRTTr.911,914). Upon hearing a summary of Evans' testimony, Rhoades said it sounded like testimony he would have wanted to present to the jury (PCRTTr.911-912).

Rhoades vaguely recalled interviewing Paul over the telephone, but he could not recall why he did not call him as a witness (PCRTR. 908). Rhoades interviewed one of Clayton's neighbors by telephone, but he could not recall who it was (PCRTr.912). He did not know whether he interviewed Williams or Mitchell (PCRTr.912). Williams would have testified that Clayton helped her around the house and was a good friend to her husband and son (PCRTr.550-565).

The motion court denied relief on all claims (A-2-A-46). Notice of Appeal was timely filed (PCRL.F.174).

POINT I

The motion court clearly erred in denying Clayton's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel presented inconsistent defense theories: 1) Clayton did not kill Castetter, but Cole was the shooter; and 2) Clayton killed Castetter, but due to a mental defect, Clayton could not deliberate. Clayton was prejudiced, because the weaker not guilty defense compromised the credibility of the diminished capacity defense in the guilt phase and the credibility of the mental defense in the penalty phase. There is a reasonable probability that Clayton would have been convicted of second-degree murder or at least sentenced to life without parole if counsel had not pursued the inconsistent not guilty defense.

Ross v. Kemp, 393 S.E.2d 244 (Ga.1990);

Rode v. Lockhart, 675 F.Supp. 491 (E.D.Ark.1987);

People v. Harris, 491 N.Y.S.2d 678 (N.Y.App.Div.1985);

State v. Shabazz, 719 A.2d 440 (Conn.1998);

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

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

Rule 29.15.

POINT II

The motion court clearly erred in denying Clayton's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel did not thoroughly investigate and present the diminished capacity defense and the mitigation case based on Clayton's brain injury. Counsel failed to: 1) present evidence that Clayton had a history of head injuries and never had rehabilitation therapy; 2) use records from Nevada State hospital, Clayton's Social Security file, and Clayton's school and present anecdotal evidence from Carolyn Dorsey and Les Paul that would have shown Clayton sought help for his brain damage, the brain damage consistently affected Clayton's behavior since 1972, the brain damage was documented consistently since 1972, and all testing of Clayton was consistent since 1972; and 3) present a coherent theory as to why Clayton's brain damage prevented him from deliberating at the time of the shooting, which counsel could not do, because he prohibited his expert from discussing the shooting with Clayton. There is a reasonable probability that Clayton would have been convicted of second-degree

murder or at least sentenced to life without parole if counsel had presented this evidence.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

Hill v. Lockhart, 28 F.3d 832 (8thCir.1994);

Eldridge v. Atkins, 665 F.2d 228 (8thCir.1981);

Smith v. Stewart, 241 F.3d 1191 (9thCir.2001);

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

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

Rule 29.15.

POINT III

The motion court clearly erred in denying Clayton's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution were violated, because: 1) counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in that counsel failed to have Clayton's competency to stand trial adjudicated when counsel was aware of his debilitating brain injury in 1972, his history of mental illness, including other brain injuries, his heavily medicated condition before and during trial, and a medical professional's recommendation that Clayton undergo a psychiatric examination based on Clayton's extreme agitation, aggression, hallucinations, and schizophrenic behaviors; and 2) Clayton was tried, convicted, and sentenced even though he lacked the capacity to understand the proceedings against him and assist in his own defense, due to a mental defect. Clayton was prejudiced, because his conviction and sentence are fatally flawed and thus unreliable, in that his lack of concentration, memory, and rational and organized thought process deprived Clayton of 1) the ability to consult with counsel with a reasonable degree of rational understanding and 2) a rational and factual understanding of the proceedings against him.

State v. Tilden, 988 S.W.2d 568 (Mo.App.1999);

Hubbard v. State, 31 S.W.3d 25 (Mo.App.2000);

Cooper v. Oklahoma, 116 S.Ct. 1373 (1996);

Bouchillon v. Collins, 907 F.2d 589 (5thCir.1990);

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

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

Section 552, RSMo (1994);

Rule 29.15.

POINT IV

The motion court clearly erred in denying Clayton's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel failed to present mitigating evidence through readily available witnesses who were willing to testify, including: 1) Carolyn Dorsey's testimony about Clayton's formative years, religious conversion, and changed behavior after the sawmill accident, including examples of his inability to control violent impulses, 2) Arnold Evans' testimony about Clayton's religious beliefs, church attendance, and changed behavior after the sawmill accident, 3) Leslie Paul's testimony about Clayton's religious beliefs, church attendance, and changed behavior after the sawmill accident, 4) Norma Mitchell's testimony that Clayton was a good neighbor and he regularly ministered to her nursing home residents, and 5) Delores Williams' testimony that Clayton was a good neighbor. There is a reasonable probability that Clayton would have been sentenced to life without parole had these witnesses testified.

Eldridge v. Atkins, 665 F.2d 228 (8thCir.1981);

Chambers v. Armontrout, 907 F.2d 825 (8thCir.1990);

State v. McCauley, 831 S.W.2d 741 (Mo.App.1992);

State v. Hayes, 785 S.W.2d 661 (Mo.App.1990);

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

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

Rule 29.15.

ARGUMENT I

The motion court clearly erred in denying Clayton's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel presented inconsistent defense theories: 1) Clayton did not kill Castetter, but Cole was the shooter; and 2) Clayton killed Castetter, but due to a mental defect, Clayton could not deliberate. Clayton was prejudiced, because the weaker not guilty defense compromised the credibility of the diminished capacity defense in the guilt phase and the credibility of the mental defense in the penalty phase. There is a reasonable probability that Clayton would have been convicted of second-degree murder or at least sentenced to life without parole if counsel had not pursued the inconsistent not guilty defense.

Decisions regarding strategy must be reasonable under prevailing professional norms. It is not reasonable to pursue inconsistent defenses. In capital cases the prevailing professional norm demands that counsel present a guilt phase theory that is consistent with the mitigation theory, because it is critical to maintain credibility with the jury. Counsel argued that Clayton did not shoot Castetter, but if Clayton did shoot

Castetter, then he was not guilty of first-degree murder, because he could not deliberate due to a mental defect. Counsel's presentation of mutually exclusive guilt phase theories was ineffective, because it destroyed any chance of conviction of a lesser offense or recommendation of a life sentence by the jury.

Rhoades chose to present a not guilty/reasonable doubt theory, even though there was very strong evidence that Clayton shot Castetter. Clayton had a motive for being at the crime scene (Tr.1160,1163-1164). Eyewitness testimony and physical evidence established that Clayton's truck was at the crime scene (Tr.1134-1136,1376-1386). Clayton was found hiding a gun, which contained one spent casing, shortly after the shooting (Tr.1208-1211,1344). Clayton made incriminating statements to four people (Tr.1291,1432-1435,1459-1461,1482-1484). Despite this strong evidence of guilt, counsel chose to argue that Cole was the shooter, even though Cole had an alibi (Tr.1002-1003,1419-1420,1427-1428).

In conjunction with the highly suspect reasonable doubt theory, Rhoades presented a diminished capacity defense. The diminished capacity defense was much stronger. Rhoades had Clayton's Social Security file, which contained numerous psychological and psychiatric evaluations documenting the devastating effect Clayton's brain injury had on his life (PCRTr.861;Ex.4). Rhoades consulted with two experts, Back and Morse, who agreed that Clayton had severe brain damage (Tr.1552-1574,1604-1623). Back concluded that Clayton could not deliberate (Tr.1574).

Rhoades was ineffective for presenting both defenses. He should have presented one consistent theory based on Clayton's brain damage. Other attorneys working with

Rhoades tried to convince him of the need for a consistent theory, but Rhoades would not listen.

Rhoades hired Patrick Berrigan, a criminal defense attorney who briefly represented Clayton before Rhoades was retained, to consult on the case and help Rhoades with voir dire (PCRTTr.639). Berrigan worked with the Missouri Public Defender System for almost fourteen years (PCRTTr.635). Since 1990, Berrigan worked exclusively on capital cases and provided representation in over fifty cases (PCRTTr.635). Berrigan reviewed all of the police reports concerning the case (PCRTTr.639-640).

After Berrigan reviewed the police reports, he discussed the case with Rhoades and Christine (PCRTTr.646,750,752,852-853). In the guilt phase, Rhoades wanted to assert that Clayton was not guilty, because there was no gunshot residue on Clayton's hands, but there was gunshot residue on Cole's hands (PCRTTr.648-649). In the penalty phase, Rhoades intended to base his mitigation theory on Clayton's brain damage (PCRTTr.651, 849). Berrigan vehemently advised Rhoades to abandon the not guilty theory and present a diminished capacity defense (PCRTTr.650-651, 853). In Berrigan's opinion, diminished capacity was the only viable guilt phase defense (PCRTTr.742). Berrigan advised Rhoades to abandon the not guilty theory, because the evidence was "fairly overwhelming" that Clayton was the shooter, and because it is "a disaster" to present inconsistent guilt phase defenses or a guilt phase defense that is inconsistent with the mitigation theory, because the defense will have no credibility with the jury (PCRTTr.646-648,661-662).

Christine and Ross Rhoades discussed the case many times (PCRTTr.747-748). Christine told Rhoades she thought it was a bad idea to present a not guilty defense portraying Cole as the shooter and then, if Clayton was convicted, present the mental defect evidence in the penalty phase (PCRTTr.748-750). During her employment with the Missouri Public Defender System, Christine was taught not to present inconsistent defenses (PCRTTr.749).

Rhoades ignored Christine's and Berrigan's advice. He presented a not guilty defense and a diminished capacity defense. In his opening statement, Rhoades laid the groundwork for a diminished capacity defense (Tr.985-993). Rhoades explained how Clayton was involved in a sawmill accident that resulted in permanent brain damage (Tr.987-988). Rhoades told the jury that two doctors would testify about Clayton's brain injury (Tr. 988-990). Rhoades told the jury that as a result of the brain injury, Clayton was impulsive and could not control himself, particularly when under stress (Tr.990-992).

Even though Rhoades' opening statement exclusively focused on the diminished capacity theory, he cross-examined state's witnesses with the purpose of creating reasonable doubt as to Clayton's participation in the shooting.

Carolyn Leonard testified that she noticed a truck, which she believed belonged to Clayton, at the end of her mother's driveway, so she called the police for assistance (Tr.1133-1136). Rhoades attacked Leonard's testimony, which put Clayton at the crime scene. Rhoades cross-examined Officer David Bowman, one of the first officers to arrive at the scene, about the information he received from Leonard (Tr.1057). Rhoades elicited testimony that Leonard did not tell Bowman that she saw Clayton; Leonard could not tell

Bowman how many people were in the vehicle; Leonard could not identify the driver; and it was too dark to see from the house to the end of the driveway (Tr.1057-1058). On cross-examination of Leonard, Rhoades emphasized the same information. Rhoades questioned Leonard on the fact that she did not see Clayton the night of the shooting; she did not know whether he was in the vehicle; she did not know how many people were in the vehicle; and she did not like Clayton and did not want him to have a relationship with her sister (Tr.1139-1141).

The state presented evidence that when Clayton was arrested, he was seen hiding a .38 caliber gun in a pile of cement blocks (Tr.1208-1211). On cross-examination of McCracken, Rhoades attempted to elicit testimony that McCracken could not clearly see Clayton (Tr.1225). Rhoades elicited testimony that McCracken did not see Clayton holding a gun and did not see what, if anything, Clayton removed from his pocket while standing beside the cement blocks (Tr.1226).

Rhoades also attacked state testimony regarding physical evidence linking Clayton to the crime scene. The state presented evidence that a bullet with characteristics of a .38 caliber bullet was recovered during Castetter's autopsy (Tr.1117,1120,1366). The bullet was too deformed to positively identify whether it was fired from the gun found on Clayton's property (Tr.1359). On cross-examination of the state's ballistics expert, Rhoades emphasized that it was impossible to make a positive identification of the bullet (Tr.1365, 1367-1368). Rhoades elicited testimony that the land width measurements of the recovered bullet did not correspond to the measurements of bullets test fired from Clayton's gun (Tr.1367-1368).

The state also presented evidence that Clayton's vehicle struck Castetter's vehicle. Paint transfers recovered from the two vehicles matched one another (Tr.1376-1386). On cross-examination of the state's expert, Rhoades emphasized that a paint match is not conclusive and only meant that Clayton's vehicle could have been the source of the paint (Tr.1387-1388).

Rhoades also presented evidence suggesting that Cole shot Castetter. Rhoades elicited testimony that Clayton did not have gunshot residue on his hands or clothing, but Cole had gunshot residue on his left hand, and Cole is left-handed (Tr.1389-1391,1395,1452).

In the defense's case-in-chief, Rhoades reverted to the diminished capacity defense. He presented evidence regarding the sawmill accident that caused Clayton's brain injury (Tr.1523-1530). He presented expert testimony regarding the nature of the injury. Back testified that Clayton's brain damage made him incapable of deliberating before he shot Castetter (Tr.1552-1574). Morse showed the jury MRI brain scans and explained that Clayton was missing approximately 8% of his brain (Tr.1604-1623).

In closing argument, Rhoades argued the diminished capacity defense *and* the not guilty defense. He initially argued that the expert testimony showed that Clayton was brain damaged and incapable of deliberation (Tr.1654-1658). Rhoades abruptly shifted the focus of the argument to reasonable doubt (Tr.1658). He argued that what happened was a "mystery" or "puzzle" and there was reasonable doubt as to Clayton's guilt (Tr.1663). Rhoades suggested that Clayton may have been at the crime scene, he may have been with someone else, or he may not have been there at all (Tr.1659-1660).

Rhoades argued that the police did not thoroughly investigate, because they did not attempt to recover fingerprints from Clayton's truck (Tr.1666-1667). Rhoades implied that the police were not interested in learning what really happened, because they already had Clayton in custody (Tr.1667).

Rhoades argued that William Rogers and Robert Compton, the inmates who testified that Clayton confessed, were not credible witnesses because of their criminal histories (Tr.1667-1669). Rhoades suggested that Rogers and Compton fabricated their testimony, because they had access to Clayton's discovery and could have gleaned knowledge of the crime by reading Clayton's legal papers or from the media (Tr.1669-1670). After attacking Rogers' and Compton's credibility, Rhoades attempted to use their testimony to support the diminished capacity defense (Tr.1670). He noted that Compton and Rogers testified that Clayton would get angry or cry for no reason and had memory lapses (Tr.1670). Rhoades argued that these behaviors were indicative of Clayton's brain damage (Tr.1670).

Rhoades finished his argument by returning to the reasonable doubt theory and arguing that Cole was not a credible witness (Tr.1671). For his last point, Rhoades reminded the jury that Cole had gunshot residue on his hands, but Clayton did not (Tr.1672).

Of course the inconsistency of Rhoades' argument did not escape criticism from the state. In rebuttal, the prosecutor argued that: 1) Cole could not have been the shooter, because he had an alibi for the precise time of the shooting; 2) the defense wanted the jury to believe Rogers' and Compton's descriptions of Clayton's erratic behavior yet

discredit their testimony concerning his confessions; and 3) the two defense theories were contradictory, therefore neither should be believed (Tr.1675-1677).

After sentencing, Rhoades wrote Berrigan a letter expressing his regret about pursuing the not guilty defense. Rhoades wrote, “It was not until the trial had been completed and some days had passed before I fully realized how inadequate and inept I was in attempting to spare Cecil from the death penalty. As you pointed out to me, but I was unwilling to listen, our chances of succeeding in the first phase were minimal” (Ex.30).

At the post-conviction hearing, Rhoades testified that he thought the state had a strong case, but he thought he had “pretty good” evidence of diminished capacity (PCRTTr.844,849). Rhoades agreed that his defense theories were inconsistent, but he “didn’t think it would be smart to just give up on reasonable doubt, and not require the State to put their proof on” (PCRTTr.833,849). Rhoades stated that “juries can hang up on the silliest damn things,” and so he tried to “throw it on the wall and see where it sticks” (PCRTTr.971). Rhoades also stated, “if you can put some doubt in somebody’s mind or give them an opportunity to try and compromise, what the hell” (PCRTTr.973).

Rhoades claimed that he tried to “soft-pedal” the not guilty theory (PCRTTr.973). His claim is belied by the extent of his cross-examinations of the state’s witnesses as recounted above. Rhoades aggressively attacked the entire state’s case. Furthermore, Rhoades actually argued to the jury that Clayton was not at the crime scene and Cole may have been the shooter (Tr.1660,1672).

Rhoades admitted there was never going to be any doubt that Clayton's gun was the weapon used to kill Castetter (PCRTTr.841). Rhoades also testified that under his theory he conceded that Clayton's truck was at the crime scene (PCRTTr.834). Rhoades' cross-examination concerning the inconclusiveness of the ballistics and paint transfer evidence served no legitimate purpose.

To establish that counsel was ineffective, Clayton must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687 (1984). To show prejudice, Clayton must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. Id. at 688. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

The formulation of a defense theory, selection of witnesses, and introduction of evidence are issues generally left to the expertise of an attorney, and are thus considered trial strategy. Sanders v. State, 738 S.W.2d 856, 858 (Mo.banc1987). But "[t]he wide latitude trial counsel has in matters of trial strategy does not amount to unconstrained discretion. The constraints imposed on trial counsel regarding trial strategy is that his or her actions must be *reasonable under prevailing professional norms*." State v. McCarter, 883 S.W.2d 75, 78 (Mo.App.1994)(emphasis added). Trial counsel's decisions regarding strategy are not beyond a challenge of ineffectiveness. Id.

Rhoades' decision to present mutually exclusive defense theories was unreasonable. In general, it is never good strategy to present inconsistent defenses. Even

if it is technically possible to present inconsistent theories, such arguments are “clearly susceptible to significant credibility questions by the jury.” Vogel v. State, 31 S.W.3d 130, 142 (Mo.App.2000); also see, People v. Harris, 491 N.Y.S.2d 678 (N.Y.App.Div.1985)(“a practical problem occurs every time a defendant raises inconsistent defenses: the law permits them but invariably juries find them suspect”); State v. Shabazz, 719 A.2d 440 (Conn.1998)(“although a defendant is legally permitted to raise inconsistent defenses, when he does so a jury, applying its common sense, is entitled to view with skepticism the persuasiveness of all of the defenses”).

Ross v. Kemp is instructive on the issue of inconsistent defenses. 393 S.E.2d 244 (Ga.1990). In Ross, the defendant was represented by two attorneys, one retained and the other court-appointed, who presented inconsistent theories of defense. Id. at 245. On cross-examination of state witnesses, the appointed attorney developed a theme based on the defendant’s mental illness. Id. The retained attorney, however, insisted that the defendant testify denying all involvement in the charged offenses. Id. Each attorney pursued his respective theme in closing argument. Id. at 245.

The Georgia Supreme Court determined that the presentation of mutually exclusive defenses deprived the defendant of his right to effective assistance of counsel. Id. at 246. The court presumed prejudice, finding, “the presentation of a fractured defense. . .is evidence of ineffectiveness so pervasive that a particularized inquiry into prejudice would be unguided speculation.” Id.

Rode v. Lockhart is another example of how an attorney’s unreasonable choice of defense rises to the level of ineffective assistance. 675 F. Supp. 491 (E.D.Ark.1987).

The defendant confessed to his attorney that he beat his wife to death after an argument about the paternity of their child. Id. at 494. The homicide occurred as the defendant, his wife, and child were traveling in a car. Id. at 493. After committing the homicide, the defendant made several statements to various people, including police officers, claiming that his wife was the victim of a hit and run accident. Id. Despite having knowledge of the defendant's confession, counsel insisted on presenting the hit and run theory which, given the physical evidence, was "totally incredible" Id. at 495. The court found counsel ineffective: "[counsel] knew that petitioner had killed his wife and that all of the facts to be presented to the jury would compel this conclusion. The theory offered by counsel cannot be dismissed as a simple strategical error. Rather it was tantamount to no defense." Id. (citation omitted). The defendant was prejudiced, because had the defendant testified and explained his marital problems, a reasonably competent attorney could have presented an effective argument in favor of conviction of a lesser included offense. Id. at 496.

Rhoades' decision to present inconsistent defenses was unreasonable, because: 1) the diminished capacity defense was much stronger than the reasonable doubt theory, which was untenable under the evidence; 2) the reasonable doubt defense compromised the diminished capacity defense; and 3) the reasonable doubt defense compromised the mitigation case.

First, it was unreasonable, because the diminished capacity defense was much stronger than the reasonable doubt theory. All of the evidence, except for that pertaining to the gunshot residue testing, implicated Clayton. Clayton made incriminating

statements to four people (Compton, William Rogers, Cole, and Sergeant Rogers), and the physical evidence linked Clayton to the crime scene.

The theory that Cole was the shooter was not believable. It would have been impossible for Cole to drop off Rosemary Youngblood at work at 9:53 p.m. in her car, return home, then drive to the crime scene in Clayton's truck by 9:57 p.m. Cole dropped Youngblood at work at 9:53 p.m. in his car (Tr.1419-1420). According to the police dispatcher, Leonard called the police at 9:57 p.m. to report that a person she believed to be Clayton was in a truck at the end of her mother's driveway (Tr.1002-1003). Sergeant Rogers testified that it took him 9.5 minutes to drive the 6.6 miles between Cole's house and the crime scene (Tr.1327). Therefore, Cole could not have made the trip in four minutes. Rhoades' not guilty theory had no explanation for this evidence. Rhoades' own investigation confirmed that Youngblood clocked in at work at 9:53 p.m. (PCRTTr.845-846;Ex.36).

Furthermore, Cole had no reason for being at Seal's residence. Clayton, however, knew that Martha was staying at the Seal residence, and he and Martha had argued earlier that day (Tr.1160,1163-1164). Rhoades' not guilty theory had no explanation as to why Cole would be at Seal's residence. Clayton, on the other hand, had an obvious motive for being at the scene.

Clayton's gun, which he attempted to hide from the police, was obviously the weapon used to kill Deputy Castetter. Rhoades' not guilty theory did not present any explanation for when or how Cole could have obtained Clayton's gun. The physical evidence proved Clayton's truck was at the crime scene.

Rhoades' belief that he should present the not guilty defense, because juries "hang up on the silliest damn things" was not a strategy; it was a gamble that was not based on a realistic evaluation of the state's evidence.

Although the evidence that Clayton was the shooter was strong, the evidence that Clayton deliberated was much weaker. Clayton was waiting for his girlfriend to return home; he was not lying in wait for Castetter. A single gunshot was fired. Clayton was agitated at the time, having argued with his girlfriend earlier in the evening. Clayton is brain damaged and cannot control violent impulses under stress.

Second, by presenting the not guilty/reasonable doubt defense, Rhoades compromised the diminished capacity defense. During their first meeting, Clayton admitted to Rhoades that he shot Castetter (PCRTTr.858). Rhoades discouraged Clayton from discussing any details of the shooting at that point (PCRTTr.940). During a subsequent meeting, Clayton told Rhoades that he went to the crime scene to talk to his girlfriend and try to win her back (PCRTTr.941-942). A car turned in the driveway and sideswiped his truck (PCRTTr.942). Clayton said that he did not know the driver was a law officer (PCRTTr.942). Clayton expressed remorse to Rhoades about the shooting (PCRTTr.943). Rhoades could not recall other details of Clayton's confession to him, but he recalled that Clayton answered all of his questions concerning the shooting and was not evasive (PCRTTr.941-943).

Rhoades instructed Back not to discuss the circumstances of the shooting with Clayton, because he did not want Clayton to confess to her (PCRTTr.857-858). This significantly weakened the diminished capacity defense. Back's credibility was

destroyed, because she had not questioned Clayton about what happened the night of the shooting (Tr.1576-77,1589-90,1648).

Presentation of the inconsistent defenses destroyed the believability of both defenses and Rhoades' credibility. Because the defenses were mutually exclusive, the jury obviously knew that at least one of the defenses was a complete fabrication. There was no reason for the jury to believe Rhoades after he told the jury that Clayton was not the shooter, but if he was the shooter, then he could not have deliberated because of his mental problems.

Third, it was unreasonable to present inconsistent defenses, because the strongest mitigation evidence pertained to Clayton's brain injury. The reasonable doubt defense destroyed the credibility of the mitigation case. Given the evidence against Clayton, it was unreasonable to pursue an outright acquittal thus sacrificing the mitigation case.

A consistent defense theory is especially important in a capital case where not only must the theory presented in the guilt phase be consistent, but the guilt phase theory must be consistent with the theory of mitigation in the penalty phase. Mary Ann Tally, Director of the Trial Assistance Unit, Center for Death Penalty Litigation in Durham, North Carolina has written: "The capital defense team must present and argue a theory of defense at the guilt/innocence phase of the case which will be consistent with the theory of mitigation in the penalty phase in case of a capital conviction. Such consistency is absolutely critical to the defense lawyer's credibility with the jury." Tally, "Integrating Theories for Capital Trials: Developing the Theory of Life," The Champion, November 1998, p. 34 (A-48-A-50). Tally observes that the theory, once chosen, must be strictly

adhered to. Id. at 36. All questions on cross-examination of state's witnesses and all evidence presented by the defense must advance the theory. Id.

With respect to the guilt phase, Clayton was prejudiced by Rhoades' failure to present a unified theory of defense. Well before the trial started, Rhoades knew, or should have known, that there was not a strong case to be made that Clayton did not commit the homicide. Rhoades admitted as much in his letter to Berrigan (Ex.30). It was unreasonable for Rhoades to present mutually exclusive defenses. This is especially true, because the reasonable doubt theory was weak, whereas the diminished capacity defense was much stronger. By presenting both theories, however, neither theory was persuasive or credible. Had Rhoades solely advanced a diminished capacity defense in an effective manner, there is a reasonable probability that the jury would have convicted Clayton of second-degree murder.

With respect to the penalty phase, Clayton was prejudiced by Rhoades' failure to present a unified theory of defense. By the time the penalty phase was reached, Rhoades had no credibility with the jury. Once Rhoades asserted that there was reasonable doubt that Clayton committed the homicide and tried to cast suspicion on Cole, the mitigation theory of mental illness lacked credibility. There is a reasonable probability that the jury would have recommended a sentence of life without parole if Rhoades had pursued a unified theme based on Clayton's mental illness in both phases.

The motion court clearly erred in denying relief on this claim. Appellate review is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Rule 29.15(k). A motion court's actions are deemed clearly erroneous

if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo.banc1991).

The motion court's judgment is clearly erroneous, because it completely ignores the central issue – the inconsistency between the defenses. The motion court noted that Rhoades is an experienced attorney and that he took over twenty depositions, hired experts and consultants, and contacted witnesses (A-7). True, but that finding has no relevance to the issue of whether it was reasonable to assert that Clayton did not shoot Castetter, but if he was the shooter, then he could not deliberate. Much of the motion court's judgment is devoted to summarizing the evidence Rhoades presented in support of the diminished capacity defense (A-9-A-10). Clayton agrees that Rhoades presented evidence of diminished capacity. Clayton's claim is not that Rhoades failed to put on the diminished capacity defense. Clayton's claim is that Rhoades sabotaged the defense by *also* arguing that Clayton was not the shooter. The motion court did not explain why it was reasonable for Rhoades to present inconsistent defenses.

Counsel's presentation of mutually exclusive, inconsistent defenses violated Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. This Court should reverse the judgment and remand this case for a new trial as to both phases. In the alternative, this Court should vacate Clayton's death sentence, and remand this case for a new penalty phase or impose a sentence of life without parole.

ARGUMENT II

The motion court clearly erred in denying Clayton's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel did not thoroughly investigate and present the diminished capacity defense and the mitigation case based on Clayton's brain injury. Counsel failed to: 1) present evidence that Clayton had a history of head injuries and never had rehabilitation therapy; 2) use records from Nevada State hospital, Clayton's Social Security file, and Clayton's school and present anecdotal evidence from Carolyn Dorsey and Les Paul that would have shown Clayton sought help for his brain damage, the brain damage consistently affected Clayton's behavior since 1972, the brain damage was documented consistently since 1972, and all testing of Clayton was consistent since 1972; and 3) present a coherent theory as to why Clayton's brain damage prevented him from deliberating at the time of the shooting, which counsel could not do, because he prohibited his expert from discussing the shooting with Clayton. There is a reasonable probability that Clayton would have been convicted of second-degree

murder or at least sentenced to life without parole if counsel had presented this evidence.

Rhoades was ineffective in the guilt and penalty phases for failing to present all of the available evidence in support of the diminished capacity defense and the mitigation theory based on Clayton's brain injury.

The diminished capacity defense was presented through the testimony of Dr. Bettye Back, a clinical psychologist with a specialty in neuropsychology (Tr.1537-1538). Before evaluating Clayton, she had performed less than ten forensic evaluations in her career (Ex.1,p.5). Her most recent forensic evaluation was approximately ten years before Clayton's (Ex.1,p.5). In post-conviction proceedings, Back admitted that she did not know the meaning of the term mitigation (Ex.1,p.6-9,74-75).

Back did an intake evaluation in which she spoke to Clayton for one hour (Ex.1,p.78-79). She did not question him about the events surrounding the shooting (Tr.1589-90). Rhoades provided Back with only some of the psychological and psychiatric evaluations contained in Clayton's Social Security file (PCRTTr.762-768;Ex.31). These documents are far from a complete record of Clayton's mental health history. Back reviewed one police report that summarized the investigation (Ex.31). She did not interview any friends or family members of Clayton.

Back's trial testimony was not persuasive. Her testimony was confined to a recitation of the test results from the Halstead-Reitan Battery (Tr.1548-1568). The test results were certainly pertinent, but they were less than half the story. Back only testified

to the characteristics of brain-damaged people *in general* (Tr.1570-1571). Back's testimony lacked a cogent explanation of how Clayton's frontal lobe injury affected his behavior since 1972 and, more specifically, how his frontal lobe injury affected his behavior the night of the shooting.

At the post-conviction hearing, Clayton presented the testimony of Dr. Daniel Foster and a complete set of Clayton's records (PCRTTr.156,164-169,175-503). Foster is a forensic psychologist trained in neuropsychology (PCRTTr.177). Foster was employed with the United States Bureau of Prisons for approximately fifteen years (Ex.19; PCRTTr.178). He has performed hundreds of forensic evaluations and has supervised thousands (PCRTTr.178-179).

Foster reviewed numerous records including records of Clayton's incarceration at the Lawrence County jail (Ex.8) and the Jasper County jail, Clayton's treatment at Nevada State Hospital (Ex.7), Clayton's school records (Ex.12), Back's raw data (Ex.21), Morse's report, and all of the psychiatric and psychological evaluations of Clayton contained within his Social Security file (Ex.4)(PCRTTr.182-189). Foster interviewed several friends and family members of Clayton (PCRTTr.189). Foster interviewed Clayton for four hours and discussed the events surrounding the shooting with Clayton (PCRTTr.323,338-341).

Foster's testimony and the records present a far more complete picture of Clayton than did Back's testimony. Critical information was omitted from Back's testimony, and Rhoades made no attempt to use any of Clayton's records at trial. Thus the jury was

deprived of a significant amount of information regarding Clayton's brain damage and his behavior.

The jury was not aware that after Clayton suffered the brain injury in 1972, he never received rehabilitation therapy. Foster explained that in 1972, there was no such thing as rehabilitation for brain injuries (PCRTTr.232-233). From 1985 to 1986, Foster worked at the hospital where Clayton had his surgery (PCRTTr.233-234). The hospital did not begin developing a neuro-rehabilitation facility until the mid-1980s (PCRTTr.234). When Clayton was injured, a brain-damaged person was considered recovered if he could walk, talk, and use the bathroom (PCRTTr 234-235).

Foster explained that cognitive rehabilitation therapy is important, because a damaged brain has to be retrained to find neural pathways around damaged or missing brain tissue (PCRTTr.235-238). It is critical, however, to begin rehabilitation therapy within twelve months of sustaining the injury (PCRTTr.239). Once twenty-four months have passed, rehabilitation therapy does not provide significant improvement (PCRTTr.239). Clayton did not receive any therapy during the critical time period. His brain, therefore, never adequately learned how to find new neural pathways around the missing portion of his brain so that signals could reach the remaining portion of his frontal lobe.

Foster explained that the frontal lobe is in charge of executive function, in other words, it is the boss of every conscious decision (PCRTTr.251). The frontal lobes are responsible for all of the behavior unique to human beings (PCRTTr.193). Information travels from the limbic system to the frontal lobe so the frontal lobe can give meaning to

the information (PCRTTr.253-255). If information, or a signal, cannot reach the frontal lobe due to damaged or missing brain tissue, the signal bounces back to the limbic system and causes a flight or fight response (PCRTTr.253-256). The person will become aggressive or will retire and hide (PCRTTr.256). This is why frontal lobe damaged people, like Clayton, have high anxiety levels (PCRTTr.253-254). Their frontal lobe cannot interpret all of the information coming into their brain, therefore the person has no explanation for the incoming stimuli (PCRTTr.253-254, 257-259).

At trial, the prosecutor asked Back if the brain is capable of finding new pathways and functioning normally by going around a damaged area (Tr.1580). Back responded that this is possible but is dependent on many variables including whether the person received cognitive rehabilitation therapy (Tr.1580). She did not explain that Clayton did not receive rehabilitation therapy, thus his brain was not trained to find new pathways.

Before trial, the state deposed Back. In the deposition she explained that a person's recovery depends on the post-injury care they receive (Ex.N,p.20). Although Rhoades had the benefit of the deposition, he made no effort to investigate the significance of lack of rehabilitation therapy and made no effort at trial to elicit testimony from Back that Clayton did not receive any rehabilitation therapy within the critical time period (PCRTTr.883-886).

The jury was not aware that Clayton sustained other head injuries before he was injured in the sawmill accident. In 1958, Clayton was in a serious car accident and was knocked unconscious (PCRTTr.206; Ex.4,p.3,15,18,25). In 1965, Clayton was beaten over the head with a nightstick (PCRTTr.206,476). Foster explained that closed head injuries

can be even more damaging than a penetrating wound, because the brain bumps against the skull and can be bruised in different areas (PCRTTr.222). Furthermore, head injuries have a cumulative effect, meaning that each injury does progressively more damage (PCRTTr.226).

At trial, Back never mentioned Clayton's history of head injuries, even though the data she obtained from the neuropsychological testing indicated that Clayton has damage to areas of his brain in addition to the right frontal lobe where he suffered the penetrating injury from the sawmill accident (PCRTTr.202-206). In fact, Back's data and the impairment scattergram she generated indicate that he has damage to every area of his brain except for his right occipital lobe (PCRTTr.205; Ex.21).

The jury was not aware that in 1974 Clayton voluntarily admitted himself for psychiatric treatment at Nevada State Hospital, because he wanted help coping with his brain injury (Ex.7). The admission records state, "[p]atient stated that he has become irritable and is fearful that he might lose his temper beyond control" (Ex.7). Clayton was "cooperative, asking for help so he can function better as husband and father" (Ex.7). The records state, "He loves his wife and children and he wants to provide for them. He finds that his mental functioning is interfering with his ability to make a living" (Ex.7).

Foster found the Nevada records significant as they are the earliest available records in which Clayton attempted to get help following his head injury (PCRTTr.261). The records were significant in that they reflect Clayton was experiencing memory problems, confusion, anxiety, undue sensitivity, and depression, which are symptoms consistent with brain injury (PCRTTr.261,264-265). The records do not indicate that

Clayton was provided any therapy or treatment other than a prescription for Valium (Ex.7). Clayton did not get the help he was seeking (PCRTTr.264).

Clayton was administered the Minnesota Multiphasic Personality Inventory (MMPI), which showed elevations on the psychasthenia (bodily pain), schizophrenia, psychopathic, and depression scales (PCRTTr.264). The doctors at Nevada State Hospital diagnosed him with organic brain syndrome, brain trauma, and anxiety, and thought he had schizophrenia (PCRTTr.262,264).

The jury was not aware that Clayton was treated by many mental health professionals during the late 1970s and early 1980s. Clayton's Social Security file contains numerous evaluations (Ex.4). Rhoades did not seek to introduce these records at trial, nor did he question Back about the records.

Foster found a great deal of significant information in Clayton's Social Security records. A report by Dr. Douglas Stevens dated October 31, 1983 contained a wealth of information (Ex4,p.2-5). According to the report, Clayton was unable to work as a logger following his injury (Ex.4,p.2; PCRTTr.217). He was unable to do jobs that were routine for him before the injury (Ex.4,p.2; PCRTTr.217). From 1968 to 1977, Clayton was sober (PCRTTr.40,42,73). The fact that Clayton was sober during this time period demonstrates that the brain damage, not alcohol abuse, was responsible for his inability to work and handle the stress associated with jobs that were routine for him before the injury (PCRTTr.217). Clayton had classic characteristics of frontal lobe damage, including nervousness, impulsiveness, no tolerance for stress, and violent impulses (Ex.4,p.2; PCRTTr.218-219). He also suffered visual and auditory hallucinations (Ex.4,p.3;

PCRTTr.222-223). If another person was present, he could distract himself from the hallucinations (PCRTTr.223).

According to the report, Clayton's left arm was numb sometimes and would not function properly (Ex.4,p.3; PCRTTr.220). This indicates that the piece of wood that entered Clayton's brain caused damage to the motor area of his brain, which is a larger degree of penetration than revealed by the MRI done by Morse (PCRTTr.221; A-47).

Clayton was depressed and frequently thought about shooting himself (Ex.4,p.3; PCRTTr.223). According to Stevens' report, Clayton cried and said it bothered him that no one would come around his family because of him (Ex.4,p.3; PCRTTr.223). Clayton reported feeling very uncomfortable around people and avoided social interaction (Ex.4,p.3; PCRTTr.224-225). He was paranoid and believed that people talked about him (Ex.4,p.3; PCRTTr.224-225).

Stevens gave Clayton an MMPI (Ex.4,p.3-4; PCRTTr.230). Foster found the MMPI results to be significant, because they were consistent with the MMPI Back administered thirteen years later; the schizophrenia, paranoia, depression, and F scales were elevated, confirming Clayton's reports of depression, emotional inappropriateness, anxiety, suspicion, and inability to function (PCRTTr.214,231-232). Foster believed the consistency between Stevens' MMPI and Back's MMPI was important, because it indicated that Clayton was not malingering (PCRTTr.230-231).

At trial, Rhoades did not elicit any testimony from Back regarding the MMPI she administered to Clayton. Foster found the results of the MMPI administered by Back to be significant, because the results showed a "cry for help" profile indicating that Clayton

was “hanging on by his fingernails and toe nails to get through an average day” (PCRTTr.210,214). The schizophrenia, psychasthenia, and paranoia scales were elevated (PCRTTr.211-212). Elevation of the psychasthenia scale means that Clayton was reporting many signs and symptoms of aches and pains throughout his body (PCRTTr.212). Foster explained that the brain is responsible for every sensation (PCRTTr.213). Brain injured persons have random firing of signals which cause the person to hurt in all areas of the body (PCRTTr.213).

Stevens also gave Clayton the same neuropsychological test as Back, the Halstead-Reitan battery (PCRTTr.240-241). Again the results were consistent (PCRTTr.241). At the time of Stevens’ testing, Clayton had an impairment index of .7, and on Back’s testing he had an impairment index of .8 (PCRTTr.241;Ex.4,p.4). The slight variation shows that Clayton’s brain damage worsened with aging (PCRTTr.241). Stevens found damage to both hemispheres of Clayton’s brain just as Back did on the impairment scattergram (PCRTTr.241; Ex.21).

Stevens gave Clayton a Wide Range Achievement Test, which measured Clayton’s reading and arithmetic at a fourth grade level and his spelling at a third grade level (Ex.4,p.4; PCRTTr.240). Clayton’s school records, however, showed that he functioned at an average to above average level through the eighth grade (Ex.12; PCRTTr.228,240). Foster found this significant, because it shows not only impairment of Clayton’s skills, but his frustration of knowing he has the ability to perform those skills but not being able to access the information (PCRTTr.228-229).

Rhoades did not provide Back with Clayton's school records (Ex.1,p.60-61; PCRTTr.888-889). Back erroneously assumed that Clayton was always a poor student (Tr.1578). Back was not aware that Clayton's brother, Marvin, testified that Clayton was a good student (Tr.1518). Not only did Back look foolish for making the erroneous assumption, but the lack of information prevented her from explaining to the jury the full extent to which Clayton's skills were impaired by his brain injury.

Stevens' report concluded with a tragically accurate prediction:

His most severe impairment is his chronic brain syndrome with demonstrated deterioration in intellectual functioning, manifested by a marked memory defect for recent events. . .and impoverished, slowed, perseverative thinking with confusion. . .Secondary to this he has a psychotic disorder characterized by thought disorganization, depression, agitation, hallucinations and delusions, regressive behavior, and some inappropriateness of affect. The combination of this results in a marked restriction of daily activities, a constriction of interests, a deterioration in personal habits and a seriously impaired ability to relate to other people. His chronic brain syndrome with psychosis is of such severity as to meet the listings in the determination of disability. *There is presently no way that this man could be expected to function in the world of work. Were he pushed to do so he would become a danger both to himself and to others. He has had both suicidal and homicidal impulses, so far controlled, though under pressure they would be expected to exacerbate. He is best left alone*

and allowed to exist at his present marginal level of functioning. (Ex.4,p.5;
PCRTTr.242-243)(emphasis added).

In March 1980, Dr. Clifford Whipple tested Clayton (Ex.4,p.12-14). Foster found Whipple's report significant, although he did not agree with Whipple's ultimate conclusion that Clayton did not have an organic disturbance (PCRTTr.244-250;Ex.4,p.13). Whipple administered the Wechsler Adult Intelligence Scale (WAIS) but did not give the full Halstead-Reitan battery, thus his testing yielded less meaningful information in terms of long-term prognosis and in identifying the areas of the brain that were damaged (PCRTTr.244-246;Ex.4,p.13). Training on the Halstead-Reitan was not widespread in 1980 (PCRTTr.245).

The WAIS has "hold" and "don't hold" tests (PCRTTr.246). "Hold" tests are least sensitive to brain injury and therefore are the best indicator of a person's pre-injury level of functioning (PCRTTr.246). "Don't hold" tests are the most sensitive to brain injury and therefore are expected to show the most change following a brain injury (PCRTTr.246-247). Analysis of these scores provides a good test for malingering, because the patient does not know which are the "hold" tests that he should score higher on and which are the "don't hold" tests which he should score lower on (PCRTTr.246).

The strongest "hold" test is the vocabulary test (PCRTTr.246). Clayton scored an eight, which is roughly equivalent to an IQ of 80 (PCRTTr.246;Ex.4,p.13). According to school records, Clayton's IQ score was 99 in eighth grade and 88 in tenth grade (PCRTTr.246;Ex.12). Thus, the vocabulary score was fairly close to his pre-injury IQ as expected (PCRTTr.246). The test most sensitive to brain injury is the digit symbol test

(PCRTTr.246-247). Clayton scored a four, equivalent to an IQ of 40, which is in the severe, mentally retarded range and showing a forty point difference (PCRTTr.247; Ex.4,p.13). When Back evaluated Clayton, he again performed poorly on the digit symbol test, showing a difference of fifty points (PCRTTr.247). Foster found the results significant, because they show the consistency in the severity of Clayton's brain damage from 1980 to 1997 and that he is not malingering (PCRTTr.247-248).

A report prepared by Dr. George Klinkerfuss dated January 30, 1978 documented the same symptoms seen in other reports: problems with Clayton's left arm, worry, difficulty concentrating, tangential conversation, confusion around people, and anger (Ex.4,p.24-25; PCRTTr.267-268). Clayton complained of mild headaches and nausea, which are typical of closed head injury (PCRTTr.268-269;Ex.4,p.24). The report noted that Clayton had attempted to work at a sawmill, but was unable to do the work (Ex.4,p.24-25; PCRTTr.270). He also worked for nine months as a policeman, "however, again he was so unsure of himself and worried about his judgment to the point that he felt he should not be in a position of responsibility. . .He did drink modestly when he was working at the police job to see if it would quiet his nerves but thought it was a bad idea and stopped" (Ex.4,p.24-25; PCRTTr.270). Foster found it significant that after many years of sobriety Clayton began drinking again to quiet his nerves (PCRTTr.272-273). In Foster's opinion, Clayton was self-medicating in an effort to cope (PCRTTr.273). Klinkerfuss concluded that Clayton was disabled (Ex.4,p.25; PCRTTr.274).

On May 6, 1978, Dr. Jack Eardley evaluated Clayton (Ex.4,p.50-53; PCRTTr.274). Eardley noted a slight gait disturbance due to some clumsiness on Clayton's left side,

which indicated to Foster that the brain damage extended all the way back to the motor and body sense area of Clayton's brain (Ex.4,p.50; Ex.22; PCRTTr.274; A-47). Clayton reported to Eardley the same symptoms seen in other reports: agitation, frightened in situations of pressure, anxiety, worry, depression, suicidal thoughts, and hopelessness (Ex.4,p.50; PCRTTr.275-276). Eardley documented how Clayton was tangential, obsessed on thoughts, and maintained circular thinking for long periods of time (Ex.4,p.51; PCRTTr.277,283-284). Foster noted that Clayton reported that his shyness and avoidance of people was a lifelong situation but was much more severe after the accident (Ex.4,p.50; PCRTTr.275). Foster explained that a person's personality traits are amplified after a brain injury (PCRTTr.275-276).

Foster found Clayton's statement to Eardley that he typically puttered about the house and drank coffee to be another common characteristic of brain injury (Ex.4,p.50; PCRTTr.276). Foster explained that there are very few things a brain injured person can do at a level that they know they ought to be able to perform, so they avoid activities that cause a sense of failure and avoid people because others will criticize their misbehavior (PCRTTr.276-277).

Clayton told Eardley that he felt "his early life was marred by his acne and general feelings of inferiority. . .he frequently felt that he needed to be the meanest person in town and got himself in lots of difficulty with fighting and creating trouble. . . (Ex.4,p.51). Foster explained that Clayton is not antisocial (PCRTTr.280-281). Clayton cares very much about what others think of him (PCRTTr.281). Clayton created emotional safety by running people off (PCRTTr.279). Clayton did not grow up in a home with a lot

of warmth or expressed love (PCRTTr.279). He competed, unsuccessfully, with his brother Wayne (PCRTTr.279). Clayton established dominance with other men by fighting; it was one area in which he could excel (PCRTTr.281). He fears being alone and he fears other people, so he pretends that he is not scared of anybody (PCRTTr.280).

Eardley diagnosed Clayton with chronic and severe anxiety reaction and mild organic brain disease (Ex.4,p.52; PCRTTr.282-283). Eardley concluded that Clayton was permanently disabled (Ex.4,p.52-53; PCRTTr.284).

On January 24, 1979, Dr. William Clary saw Clayton (Ex.4,p.15-16; PCRTTr.284). Clary quoted Clayton as saying, “I can’t get ahold of myself, I’m all tore up” (Ex.4,p.15; PCRTTr.284-285). Clayton again reported extreme anxiety, depression, and paranoia (Ex.4,p.15; PCRTTr.285-286). The report described that Clayton had “blunting of affect” and at other times “over powering playing of emotion” (Ex.4,p.15; PCRTTr.287). Foster explained that Clayton has two responses, extra emotional or unemotional, because his frontal lobe is not working to mediate his responses (PCRTTr.287). Clary concluded that Clayton was “incapacitated and totally disabled. . .barely making it outside of an institution” (Ex.4,p.16; PCRTTr.287-288).

In March 1980, Clayton saw Klinkerfuss again (Ex.4,p.41-42; PCRTTr.288). Clayton was still experiencing nausea, vertigo, nervousness, and hallucinations (Ex.4,p.41; PCRTTr.288). Klinkerfuss prescribed Haldol, an anti-psychotic medication, and Dilantin, an anti-seizure medication (Ex.4,p.241; PCRTTr.290). Clayton had episodes where he would sit and stare, and his wife could not rouse him from that state (Ex.4,p.41;

PCRTTr.288). Foster explained that these spells were a fight or flight response in which he was withdrawing and shutting out outside stimuli (PCRTTr.288).

Clayton told Klinkerfuss that he had attacked a married man who was sleeping with his eighteen year old daughter (Ex.4,p.41; PCRTTr.289). Les Paul, who was present during this event, testified that Clayton stopped hitting the man when the man yelled, “Oh, God help me” (PCRTTr.119). Foster explained that sometimes Clayton can exercise control and other times he cannot (PCRTTr.290-291). It is completely random (PCRTTr.290). If a signal in Clayton’s brain can find a neurochemical pathway to a solution, he can make a good judgment response, but if the signal hits scar tissue, then it bounces back to his limbic system and the flight or fight response is triggered (PCRTTr.253, 290-291). Clayton has the same values as most people, including civility, honesty, integrity, and hard work, but his brain cannot always function in accord with his value system (PCRTTr.291-292).

In February 1984, Dr. James Bright evaluated Clayton (Ex.4,p.21-22; PCRTTr.292). Bright noted many of the same symptoms documented in other reports: hallucinations, nervousness, and paranoia (Ex.4,p.21-22). In the report, Clayton referred to an assault on his sister (Ex.4,p.22; PCRTTr.294-295). Foster explained that the incident was another example of Clayton being unable to inhibit a violent impulse which was contradictory to his belief that it is wrong for a man to hit a woman (PCRTTr.296-297).

In addition to reviewing Clayton’s records of past treatment, Foster interviewed friends and family members of Clayton to gather more information about him (PCRTTr.189-190). Foster explained that it was important to know what Clayton was like

before the sawmill accident (PCRTTr.304-305). A person's coping skills are lessened by a brain injury, and a person's character defects are exacerbated by a brain injury (PCRTTr.304-305). Knowledge of a patient's formative experience and formative presentation of himself gives the examiner a better idea of the patient's prognosis and what to expect in the future (PCRTTr.305).

Foster interviewed Clayton's sister, Carolyn Dorsey (PCRTTr.304). Carolyn described her father as extremely hard working, very old-fashioned, well mannered, a perfectionist, honest, not violent, and cold (PCRTTr.306-307). When Clayton got into trouble as a teenager, his father thought he should have to learn a lesson, but Clayton's mother always bailed him out (PCRTTr.307). In Carolyn's opinion, Clayton was a "momma's boy" (PCRTTr.306-307). Clayton's brother, Wayne, was his father's favorite, and Clayton always "played second fiddle" to Wayne (PCRTTr.308). Throughout his life, Clayton alienated people (PCRTTr.309).

Based on this information, Foster concluded that Clayton holds himself to a standard that is not always realistic for him (PCRTTr.308). Clayton felt the only way he could be successful and hold his own with his brothers was in his work ethic and his fighting ability (PCRTTr.308).

Clayton's friend, Les Paul, told Foster that Clayton was more willing to ask for help after his brain injury and that Clayton sought help for things he did not need help with before (PCRTTr.316-317). Clayton could not stay focused on a task and would get irritable and forgetful (PCRTTr.317). Clayton would get frustrated more quickly and more intensely (PCRTTr.318).

As part of his evaluation, Foster interviewed Clayton for over four hours (PCRTTr.323). Clayton was easily distracted and could not sustain attention (PCRTTr.323). He had difficulty understanding the content of Foster's questions (PCRTTr.324). Foster questioned Clayton about the circumstances surrounding the shooting, so that he could form an opinion as to Clayton's ability to deliberate (PCRTTr.337). Clayton described how he and his girlfriend were fighting (PCRTTr.338). They had lived together for about four months, but she had moved out and was staying with her mother (PCRTTr.338). They met at a store to try and reach some agreement about some items she had left at his home (PCRTTr.338). At the store, they argued, and a police officer came (PCRTTr.338).

Clayton went to Cole's house hoping that they could drink some beer together, but Cole had something else he had to do (PCRTTr.339). Later, Clayton went to his girlfriend's mother's home to make one last effort to get her back (PCRTTr.338). Clayton told Foster that he backed into the driveway and turned the lights off (PCRTTr.339-340). He had a gun and was thinking of committing suicide (PCRTTr.339). Clayton did not tell Foster that he had any thoughts of hurting someone else (PCRTTr.339).

The next thing he knew, there were headlights in his face and a car was rapidly accelerating (PCRTTr.340). Clayton could not see who it was (PCRTTr.340). Clayton's vehicle was struck (PCRTTr.340). Clayton said he assumed he shot the officer, but he could not recall the specific event (PCRTTr.340). Clayton said he remembered going to Cole's house (PCRTTr.340). Clayton said he did not know the victim was a police officer until he was driving away (PCRTTr.342-343). Initially, Clayton thought the driver was his girlfriend's brother with whom he had had words (PCRTTr.342).

Clayton cried as he related these events to Foster (PCRTTr.340). He said that at the time of the shooting he felt abandoned just as he had when he and his wife divorced (PCRTTr.341). He felt rejected and that he wasn't good enough and he would never be good enough (PCRTTr.341).

Foster concluded that at the time of the shooting, Clayton had a mental defect: dementia, secondary to a traumatic head injury (PCRTTr.191). Foster also diagnosed Clayton as having social anxiety disorder and alcohol dependence (PCRTTr.191). Foster concluded Clayton was not capable of deliberation (PCRTTr.363-364). Clayton was devastated and depressed about the end of his relationship (PCRTTr.366). The headlights and rapid acceleration of the approaching car frightened Clayton, triggering his limbic system into a flight or fight, shut down or attack, response (PCRTTr.367).

Foster explained that the events that followed the shooting were typical of Clayton's poor judgment, his inability to plan, or organize, or be rational (PCRTTr.369). For example, Clayton told Cole to provide him with an alibi for the afternoon and evening, even though Clayton knew that a police officer who had known him all his life saw him at the store a couple hours earlier (PCRTTr.369). Also, Clayton made a comment to the police that it was smart of him to get rid of the gun, even though the officers saw him drop the gun (PCRTTr.370).

Rhoades was ineffective for failing to thoroughly and adequately investigate and present the diminished capacity defense in the guilt phase. Rhoades' investigation was inadequate, because he did not obtain all of the information necessary to a thorough assessment of Clayton's ability to deliberate. Rhoades did not obtain Clayton's school

records or the Nevada State Hospital records. These records were readily available to counsel.

Rhoades knew that Clayton grew up and went to school in Purdy, Missouri (PCRTTr.888-889). He could have simply obtained the records from the Purdy School District. Rhoades testified that he probably did not get the records, because he did not think they were important (PCRTTr.889). Rhoades recalled that a member of Clayton's family told him that Clayton was an above average student (PCRTTr.889). Rhoades did not recall any conversations with Back regarding Clayton's academic performance (PCRTTr.889).

Rhoades knew, or should have known, that Clayton was treated at Nevada State Hospital. Clayton's admission to the Nevada State Hospital is referenced in his Social Security file in reports by Dr. Jim Earls, dated May 16, 1983, and Dr. Jack Eardley, dated May 6, 1978 and February 22, 1980 (Ex.4,p.48,51-54). Rhoades had copies of these reports (PCRTTr.861). Rhoades did not recall whether he saw these references to Nevada State Hospital in the Social Security reports, but he thought that he knew Clayton had been treated there (PCRTTr.879). Rhoades did not have a strategic reason for not obtaining the Nevada State Hospital records (PCRTTr.880).

Rhoades obtained Clayton's Social Security file, but he did not provide all of the mental health evaluations contained in the file to Back, and he did not use the reports in any way at trial. The reports Rhoades sent Back are contained in Exhibit 31. Rhoades did not send her Stevens' report of October 31, 1983, Eardley's report of May 6, 1978, or Bright's report of February 9, 1984. Obviously Back did not have Clayton's school

records or the Nevada State Hospital records, because Rhoades never obtained these records.

Rhoades should have used all of these records at trial. He did not have a reasonable strategy for not using the records. Rhoades disclosed the entire Social Security file to the state before trial (PCRTTr.863-864; Ex.33). It is difficult to fathom why Rhoades would provide the state with more information than he gave his own expert. Since Rhoades disclosed the entire Social Security file to the state, it cannot be argued that Rhoades strategically chose not to provide Back with certain records, because he thought the records would be damaging to Clayton's case.

Rhoades should have integrated the records into the testimony of an expert witness such as Foster or Back. An expert witness is entitled to rely on hearsay evidence to support an opinion so long as that evidence is of the type reasonably relied upon by other experts in that field, and such evidence need not be independently admissible. State v. Woodworth, 941 S.W.2d 679, 698 (Mo.App.1997). In Back's post-conviction deposition, she testified about the information she found significant in the records (Ex.1,p.24-48). Many of her observations were consistent with Foster's review of the records.

From Klinkerfuss' 1978 report, Back noted that Clayton became confused, excited, angered easily, and could not control his behavior and temper (Ex.1,p.28; Ex.4,p.24-25). She found it significant that Clayton had a prior brain injury in 1958 when he lost consciousness in a car accident (Ex.1,p.28;Ex.4,p.25). Back explained that this is important, because brain injuries are cumulative, meaning successive head injuries

cause greater deficits than would have resulted but for the previous injury (Ex.1,p.28).

Back observed that the records document Clayton's sensitivity to stimuli including noise (Ex.1,p.29-30;Ex.4,p.3,12,21,23-24,32,47,51).

From Clary's report and Pamela Denton's social history of January 24, 1979 done at the Ozark Psychiatric Clinic, Back observed that Clayton's prior head injury was again documented (Ex.1,p.30;Ex.4,p.15-20). Back noted that the reports said Clayton was extremely anxious around people, paranoid, and had "overpowering playing of emotion" (Ex.1,p.30-31;Ex.4,p.15,18-19). Back also thought it was significant that Clayton came from an impoverished background, received little affection from his parents, and felt like the least favorite of his siblings (Ex.1,p.32-33;Ex.4,p.19). Back testified that Clayton was in a precarious position psychologically before he had the brain injury from the sawmill accident (Ex.1,p.33).

Back found Whipple's testing significant for the same reason as Foster (Ex.1,p.37). She noted that according to Whipple's data, Clayton had a vocabulary score near his pre-injury level, but his score on the digit symbol test, which is most sensitive to brain injury, was significantly lower (Ex.1,p.37-38;Ex.4,p.13).

Back observed that Eardley's report of May 6, 1978 and Klinkerfuss' report of January 31, 1980 again documented the same behaviors consistently seen over time in other reports (Ex.1,p.39-40,42-43;Ex.4,p.33,50-53).

Back opined that Officer Castetter's death could have been avoided if anyone had read and listened to Steven's 1983 report in which Stevens predicted that Clayton would become suicidal or homicidal (Ex.1,p.40;Ex.4,p.5). Back observed that Stevens' testing

of Clayton using the MMPI and the Halstead-Reitan battery was consistent with the results she obtained (Ex.1,p.41-42;Ex.4,p.4).

Back found the Nevada State Hospital records significant in that the MMPI results were consistent with later testing and that Clayton voluntarily sought help, because he wanted to function better, but he was not able to (Ex.1,p.44,46-47;Ex.7).

If she had been asked, Back also could have explained the results of the MMPI she administered to Clayton and that he did not receive cognitive rehabilitation training after the sawmill accident (Ex.1,p.52-55).

In addition to using all of the available record evidence, Rhoades should have called lay witnesses who could have testified about what kind of person Clayton was before the sawmill accident and how he changed after the accident. Rhoades should have called Clayton's sister, Carolyn Dorsey, and Clayton's friend, Les Paul.

Carolyn would have testified that her parents, Lloyd and Rosie, were from the "old school," meaning it was hard for them to hug their children and say "I love you" (PCRTTr.30). Lloyd Clayton was not mean, but he was very strict and a "screamer" (PCRTTr.27). Clayton was not his father's favorite child (PCRTTr.33-35). Wayne, Cecil's older brother, was his "daddy's pick" (PCRTTr.34-35). Lloyd was very hard to please (PCRTTr.35). For example, he became upset with Clayton for picking green strawberries, so he sent him home, even though Clayton was color-blind and could not distinguish the ripe from the unripe berries (PCRTTr.35).

Carolyn described her family, including Clayton, as “high-strung” and “high-tempered” (PCRTTr.37-38). Clayton was insecure, moody, and not as out-going as others (PCRTTr.36-37).

Carolyn would have testified that around 1968, Clayton quit drinking and remained sober for nine years (PCRTTr.72-73). After Clayton was injured in a sawmill accident in 1972, Carolyn observed that Clayton would be very quiet at times and had problems with his memory (PCRTTr.44-45). He was less sociable, and it was hard for him to maintain his normal every day life, such as going to church and working as a logger (PCRTTr.47-48). Carolyn noticed that Clayton dwelled on and was tormented by small things that most people would just ignore (PCRTTr.46).

After the accident, Clayton had difficulty controlling his anger, and Carolyn gave two examples (PCRTTr.45-46). The first incident occurred in 1981 (PCRTTr.48). Bright referred to this in his February 1984 report contained in the Social Security file (Ex.4,p.21). Carolyn insulted Clayton’s wife implying that she took advantage of their mother, Rosie, and was cheap (PCRTTr.49). Two or three days later, Clayton confronted Carolyn about her comment (PCRTTr.50). He had been drinking (PCRTTr.74). Clayton struck Carolyn, chipping her teeth and cutting her lip (PCRTTr.50-51). Carolyn called police officer Gary Kennedy, who refused to arrest Clayton (PCRTTr.52-53). Carolyn pursued the matter with the police (PCRTTr.53). Clayton turned himself in and was put on probation (PCRTTr.53).

The second incident occurred in 1990 (PCRTTr.53). Carolyn and several other family members were at Rosie’s house (PCRTTr.54). Clayton took Carolyn’s son, Jarrod,

somewhere in his car, which upset Carolyn, because Clayton had been drinking (PCRTTr.55). Clayton returned with Jarrod, who was fine (PCRTTr. 55-56). Carolyn told Clayton that she did not want Jarrod in Clayton's car when he had been drinking (PCRTTr.56). Clayton got angry, yelled at Carolyn, and threatened her husband, Gene, saying, "I can pull your husband's heart out and hold it in my hand" (PCRTTr.57). Carolyn told Rosie to call the police, but she refused and would not allow anyone else to call (PCRTTr.57-58). Gene got a gun from his car and cocked the gun (PCRTTr.58). Carolyn knocked the gun out of Gene's hand and told Clayton to "take [his] crazy ass home" (PCRTTr.58). Clayton left (PCRTTr.58).

Rhoades interviewed Carolyn, and she told Rhoades about Cecil's upbringing, his head injury, his behavior, and the incidents where he hit her and threatened her husband (PCRTTr.65,78). Rhoades told her that he wanted her to testify, so Carolyn drove from Florida to Missouri for the trial (PCRTTr.61-62,80-81). Rhoades told Carolyn to call him as soon as she arrived (PCRTTr.62). Rhoades endorsed Carolyn as a penalty phase witness (Ex.35). He asked her to attend the trial, because he possibly wanted her to testify about the violent incidents with Clayton to demonstrate how his behavior was aberrant and volatile after the sawmill injury (PCRTTr.903-905).

Carolyn contacted Rhoades when she arrived, but he did not seem interested in speaking with her (PCRTTr.63). Carolyn left the trial to return home while the jury was deliberating during the guilt phase (PCRTTr.81). She informed Rhoades that she was leaving, but he did not ask her to stay (PCRTTr.81-82). If Rhoades had asked her to stay, Carolyn would have (PCRTTr.64).

Leslie Paul would have testified that he and Clayton met around 1967 when Clayton was preaching at the Assembly of God Church in Purdy, Missouri (PCRTTr.91-93). Paul and Clayton became very good friends (PCRTTr.96).

Before Clayton suffered the brain injury, Paul was not aware of Clayton having any marital, family, or alcohol problems (PCRTTr.129). After his brain injury, Paul noticed that Clayton would get confused, especially when he had to make decisions (PCRTTr.106). After his injury, pressure made Clayton nervous, and Clayton would become frustrated when his logging work or his family situation did not go right (PCRTTr.109-110). Clayton tried to continue his logging work but only worked off-and-on (PCRTTr.110). Before his injury, Clayton did not exhibit confusion, frustration, or nervousness (PCRTTr.107,109-110). After his injury, Paul found that Clayton asked him for help with things, such as buying a car (PCRTTr.110-111,138). Before his injury, Clayton did not need help with such tasks (PCRTTr.111).

After his injury, Clayton became depressed, especially about his divorce (PCRTTr.106-107). Clayton did not like being around people, and he made very few friends (PCRTTr.108). Clayton did not trust people, and Paul was one of the few people in whom Clayton would confide (PCRTTr.113).

Before his injury, Paul never saw Clayton lose his temper, but after the injury, Clayton's temper was worse (PCRTTr.114-115). For example, Clayton assaulted his teenage daughter's boyfriend in the early 1980s (PCRTTr.97,115). Klinkerfuss referred to this in his March 1980 report contained in the Social Security records (Ex.4;p.41). The boyfriend was three or four years older than Clayton's daughter, and Clayton suspected

him of using drugs, therefore he did not think this man was good for his daughter (PCRTTr.116). Paul and Clayton went to his daughter's apartment (PCRTTr.118). Clayton had not been drinking and did not have a weapon (PCRTTr.117). Clayton's daughter refused to speak with them and got into a car with her boyfriend (PCRTTr.117-118). Clayton dragged the boyfriend out of the car, pushed him to the ground, and bloodied his nose (PCRTTr.118-119). When the boyfriend said, "Oh, God help me," Clayton let him go (PCRTTr.119).

Rhoades interviewed Paul by telephone for ten to fifteen minutes (PCRTTr.121-122). Paul was born with a severe hearing impairment and communicates by reading lips and sign language (PCRTTr.90-91). Paul cannot communicate well on the telephone (PCRTTr.122). He had difficulty understanding Rhoades (PCRTTr.122). Paul did not like Rhoades and did not trust him, nonetheless Paul would have testified for Clayton (PCRTTr.126,144). Paul would have helped Clayton if Rhoades had asked him to and would have attended the trial if he had been subpoenaed (PCRTTr.144-145). Rhoades vaguely recalled interviewing Paul over the telephone (PCRTTr.908). He recalled that he had to yell and that he could not understand everything Paul said (PCRTTr.908).

The jury was not provided any specific anecdotal evidence regarding changes in Clayton's behavior following the sawmill accident. Although Clayton's brother, Marvin, testified that Clayton's behavior was worse after the accident, Rhoades did not elicit any specific examples of how Clayton's behavior had changed. The prosecutor emphasized this omission on cross-examination (Tr.1535). Rhoades should have called Dorsey and Paul to testify in the guilt phase about Clayton's formative years and his behavior before

and after the sawmill accident. At the very least, Rhoades should have asked Back to interview Carolyn and Paul so that their observations could have been incorporated in her testimony.

As to the guilt phase, Clayton was prejudiced by Rhoades' failure to thoroughly investigate and present the diminished capacity defense. There is a reasonable probability that the jury would have concluded that Clayton did not deliberate before shooting Castetter and convicted him of second-degree murder had Rhoades thoroughly presented the diminished capacity defense. Rhoades never integrated the facts of the case with the diminished capacity defense. This was impossible to do, because Rhoades instructed Back not to question Clayton about the shooting, because Rhoades did not want Clayton to confess to her (PCRTTr.857-858).

The diminished capacity defense was crippled by Rhoades' decision. The prosecution vigorously cross-examined Back about her failure to question Clayton about the shooting and her lack of familiarity with the police reports (Tr.1576-1577,1589-1590). During closing argument, the prosecution again drove the point home: "you notice she didn't want to deal with the facts surrounding this incident, did she? She wanted to deal with her nice little computer tests. She wanted to deal with her nice clean little numbers. . .if you don't look at the facts, you don't know what happened" (Tr.1648).

Clayton's statement to Foster was very similar to what Clayton told Rhoades. Clayton told Rhoades that he went to the crime scene to talk to his girlfriend to try to win her back (PCRTTr.941-942). A car turned in the driveway and sideswiped his truck

(PCRTTr.942). Clayton said that he did not know the driver was a policeman (PCRTTr.942). Clayton expressed remorse to Rhoades about the shooting (PCRTTr.943). Rhoades could not recall any other details of Clayton's confession to him, such as Clayton being blinded by the headlights, but he recalled that Clayton answered all of his questions concerning the shooting and was not evasive (PCRTTr.941-943).

Unlike the reasonable doubt/not guilty theory, which was riddled with inconsistencies, the diminished capacity defense and Foster's opinion are consistent with the evidence. The Social Security records contain observations by various doctors that Clayton was hypersensitive to stimuli, such as loud noises, which caused him to be very agitated and confused (Ex.4,p.3,12,21,23-24,32,47,51). Ever since the sawmill accident Clayton has had an exaggerated response to stimuli. Thus, in Foster's opinion, when Clayton was blinded by Castetter's headlights and his vehicle was sideswiped, Clayton's brain had a typically exaggerated response and perceived a threat (PCRTTr.367). Castetter's headlights were on when his car was found at the crime scene (Tr.1054). This supports Clayton's version that he was blinded by the headlights.

Sergeant Rogers testified that there were acceleration marks from both rear tires of the patrol car on the icy driveway (Tr.1296). The patrol car struck a foreign object and then swerved into a tree (Tr.1296-1298). This is consistent with Clayton's version that the car accelerated towards him and sideswiped his vehicle.

Witnesses from the area of the crime scene could not see well enough to identify Castetter's car as a police vehicle. Carolyn Leonard, Ralph Paul, and Greg Pickert all described seeing two vehicles at the end of Seal's driveway (Tr.1065,1077-78,1134-

35,1137-38). None of these witnesses identified one of the vehicles as a police car.

Leonard and Paul specifically said that they did not know it was a police vehicle (Tr.1077-1079,1137-38). Interestingly, Leonard and Pickert could see the lights on top of Clayton's truck, but neither could see the emergency lights on top of the police car (Tr.1065-66,1134,1138). This is consistent with Clayton's version that he could not tell who was in the approaching vehicle. It should be kept in mind that Clayton is blind in one eye (Ex.4,p.2,12,19,21,41).

Furthermore, Clayton had a heated argument with his girlfriend earlier that evening. Martha testified that their relationship was ending, and her family had been encouraging her to get rid of Clayton (Tr.1157,1174). Within days before the shooting, Martha's brother had asked Clayton to leave the Seal home (Tr.1174). This evidence supported the diminished capacity defense, because it showed that Clayton was in a very emotional state. Clayton was extremely depressed and felt the same rejection he experienced over his divorce. It also explains why he thought the person in the car might be Martha's brother.

The Social Security records would have greatly strengthened the diminished capacity defense. The records demonstrate that Clayton has suffered severe, long-term mental instability due to his brain injury. The reports demonstrate consistency in the symptoms and behaviors reported by Clayton and in the diagnoses reached by the doctors who have evaluated Clayton. The evaluations were not done for the purpose of defending Clayton on criminal charges, but were done at the request of the Social

Security Administration. The records would have enhanced Back's credibility by corroborating her findings.

Jurors are often skeptical of mental health experts and view them as "hired guns." The state played on this skepticism by arguing that Back's testimony was "voodoo" and an "excuse" (Tr.1648-1649). The reports would have provided objective evidence that years before trial Clayton had severe mental problems--so severe that Dr. Stevens predicted that Clayton could become suicidal or homicidal. Counsel could have used the records to counteract the jurors' natural skepticism and the state's argument. The nature and severity of Clayton's mental defect was documented twenty years before trial, thus the defense was not a fabricated excuse.

Although there was a substantial amount of evidence that Clayton was the shooter, the evidence of deliberation was far from overwhelming. Clayton was waiting for his girlfriend to return home; he was not lying in wait for the victim. A single gunshot was fired. Clayton was agitated at the time, having argued with his girlfriend earlier in the evening. There is a reasonable probability the jury would have convicted Clayton of second-degree murder but for Rhoades' deficient performance.

Clayton was also prejudiced with respect to the penalty phase. There is a reasonable probability that the jury would have recommended a sentence of life without parole but for counsel's deficient performance. Not only would the records and anecdotal evidence from Dorsey and Paul have strengthened the mitigation case based on his brain damage, but the records would have shown that Clayton tried very hard to cope with his brain damage but simply did not have the ability to overcome it. Rhoades could have

shown the jury that even though Clayton committed a horrible crime, Clayton was victimized by his brain damage. Rhoades could have impressed upon the jury that Clayton could not help the fact that the accident happened in 1972 when cognitive rehabilitation therapy was not available for brain injured persons. Clayton's doctors saved his life, but his life was never the same following the accident.

With the Nevada State Hospital records, Rhoades could have shown the jury that Clayton sought help, because he knew he was out of control and he wanted to be a better husband and father (Ex.7). With the Social Security records, Rhoades could have shown that Clayton went to doctor after doctor, but he did not receive the help he desperately needed. Clayton was suicidal and distraught that people did not want to be around his family because of him (Ex.4,p.2-3). Clayton was so impaired by his brain damage that in 1983 Stevens predicted that Clayton would become suicidal or homicidal (Ex.4,p.5). The warning signs were present, but no one did anything to avert the inevitable disaster.

Appellate review is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Rule 29.15(k). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo.banc1991).

The motion court's denial of relief was clearly erroneous. The court's primary error was in concluding that the evidence offered at the post-conviction hearing, namely Foster's and Back's testimony, was cumulative to the expert testimony presented at trial (A-12-A-13). The court discounted all of the testimony from Foster and Back regarding

Clayton's extensive history documented in the Nevada State Hospital records, school records, and Social Security records. None of that testimony was presented at trial, therefore it could not possibly be deemed cumulative.

The court accepted Rhoades' excuse for not using the records, because "he wanted to keep the mental issue simple for the jury" and "did not want to get into 'paper shuffling' and lose the jury's attention" (A-22). Brain damage is not simple. It is complicated. It was critical for the defense to show that Clayton's brain damage, and the effects therefrom, was documented. Rhoades needed to use expert testimony to guide the jury through Clayton's history and prove what a profound effect brain damage had on his life. Rhoades did not do this. Rather the diminished capacity defense was presented in a vacuum without context, creating the unbelievable scenario that Clayton was severely injured in 1972, but suffered no consequences until 1996 when he shot Castetter. The records were also critical to show the jury that Clayton was not malingering.

The motion court found that Rhoades purposefully did not provide Back with records that were not helpful to Clayton (A-22). Not true. Rhoades did not provide Back with a copy of Stevens' report (Ex.31). Nothing in Stevens' report was damaging. To the contrary, the report was full of useful information (Ex.4,p.2-5).

The motion court concluded that some of the records were inconsistent and not helpful to Clayton (A-22-A-23). Interestingly, the court did not specifically identify what record was inconsistent or damaging to Clayton's case. The vagueness of the court's conclusion undercuts its validity.

To establish that counsel was ineffective, Clayton must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687 (1984). To show prejudice, Clayton must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

“Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories.” Hill v. Lockhart, 28 F.3d 832, 837 (8thCir.1994), quoting, Foster v. Lockhart, 9 F.3d 722, 726 (8thCir.1993). Counsel has a duty to make prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the punishment to be imposed. Eldridge v. Atkins, 665 F.2d 228, 232 (8thCir.1981). “It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.” Smith v. Stewart, 241 F.3d 1191, 1198 (9thCir.2001). “Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 690-691. Failing to interview witnesses or to discover mitigating evidence relates to trial preparation, not trial strategy. Chambers v. Armontrout, 907 F.2d 825, 828 (8thCir.1990).

Counsel's failure to investigate and present evidence of a capital defendant's mental impairment and social history constitutes deficient performance. Williams v.

Taylor, 120 S.Ct. 1495, 1514-1515 (2000). In Williams, the Supreme Court concluded that the defendant's trial counsel failed to conduct a thorough investigation of the defendant's background. Id. Proper investigation would have uncovered extensive records describing the defendant's "nightmarish childhood," evidence that the defendant was borderline mentally retarded, and prison records showing the defendant's good behavior while incarcerated. Id. at 1514. The Court concluded that the defendant was prejudiced, because the totality of the mitigating evidence – that adduced at trial and that adduced in the habeas proceeding – may have altered the jury's selection of penalty, even if it did not undermine or rebut the prosecution's death-eligibility case. Id. at 1515-1516.

In Hill v. Lockhart, the defendant's attorneys failed to obtain records and present evidence that the defendant, who was schizophrenic, had a history of positive response to anti-psychotic drugs, but he missed an outpatient appointment to receive his medication about three weeks before the charged offenses. 28 F.3d at 842. Although the court did not find that Hill was prejudiced with respect to the guilt phase, with respect to the penalty phase, the court stated, "[g]iven the sympathetic light in which the defendant's past behavior could have been presented, given the significant evidence of medically significant conditions and disorders, and the prospects of successful treatment, we can hardly imagine that Mr. Hill was not prejudiced by his lawyers' default. Id. at 846.

Counsel's inadequate investigation and presentation in both phases violated Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri

Constitution. This Court should reverse the judgment of the motion court and remand this case for a new trial as to both phases. In the alternative, this Court should reverse the denial of post-conviction relief as to the penalty phase, vacate Clayton's death sentence, and remand this case for a new penalty phase or impose a sentence of life without parole.

ARGUMENT III

The motion court clearly erred in denying Clayton's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution were violated, because: 1) counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in that counsel failed to have Clayton's competency to stand trial adjudicated when counsel was aware of his debilitating brain injury in 1972, his history of mental illness, including other brain injuries, his heavily medicated condition before and during trial, and a medical professional's recommendation that Clayton undergo a psychiatric examination based on Clayton's extreme agitation, aggression, hallucinations, and schizophrenic behaviors; and 2) Clayton was tried, convicted, and sentenced even though he lacked the capacity to understand the proceedings against him and assist in his own defense, due to a mental defect. Clayton was prejudiced, because his conviction and sentence are fatally flawed and thus unreliable, in that his lack of concentration, memory, and rational and organized thought process deprived Clayton of 1) the ability to consult with counsel with a reasonable degree of rational understanding and 2) a rational and factual understanding of the proceedings against him.

A conviction of a legally incompetent defendant violates due process. Pate v. Robinson, 86 S.Ct. 836 (1966). “No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.” Section 552.020, RSMo 1994. “Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential for a fair trial, including the right to the effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one’s own behalf or to remain silent without penalty for doing so.” Cooper v. Oklahoma, 116 S.Ct. 1373, 1376 (1996).

An accused is competent to proceed if he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and if he has a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 80 S.Ct. 788, 789 (1960). It is not enough that the accused be oriented to time and place and have some recollection of events. Id. The absence of inappropriate behavior or responses by the accused does not require a finding of competency. Woods v. State, 994 S.W.2d 32, 38 (Mo.App.1999). A defendant’s normal demeanor at trial should be discounted when there is ample uncontradicted testimony as to the defendant’s history of behavior. Pate, at 842.

“If counsel for the accused comes to an honest belief that his client lacks present capacity for rational understanding and cooperation, he is under a duty to obtain adjudication of the issue because the ongoing criminal conviction process relies on the

absence of doubt by defense counsel as to the client's competency." Hemme v. State, 680 S.W.2d 734, 736 (Mo.App.1984). There was a substantial amount of information available to Rhoades indicating that Clayton was not competent to proceed. Rhoades did not obtain adjudication of the issue, thus Clayton's conviction and sentence are not reliable and must be vacated.

First, Rhoades knew that Clayton had a long history of mental instability (PCRTTr.860,868,879,892). Not only did Rhoades know that Clayton was severely brain damaged in the 1972 sawmill accident, but he had Clayton's Social Security file, which documented the effects of the brain damage (PCRTTr.860-861,868;Ex.4). The records show that Clayton was not capable of rational understanding and that his ability to assist counsel was impaired (Ex.4,p.2-5,15-16,24-25,41-42,52). From 1978 through 1983, Klinkerfuss reported that Clayton had marked paranoid ideation with hallucinations, considerable memory problems, difficulty concentrating, and tangential conversation (Ex.4,p.21-25,32-34,36,38,41-42). In 1983, Stevens reported that Clayton had auditory and visual hallucinations which he could not separate from reality, impoverished and confused thinking, impaired memory, ideas of reference, paranoid delusions, and unusual and unconventional thought content (Ex.4,p.2-5). Clary also noted that Clayton had ideas of reference, borderline paranoid delusions and was "barely making it outside of an institution" (Ex.4,p.15-16). The records also show that Clayton's condition is permanent (Ex.4,p.5,16-17,32-33,38,41,52-53,70). Rhoades also knew that in 1974, Clayton voluntarily admitted himself to a Nevada State Hospital psychiatric unit (PCRTTr.879; Ex.7).

Second, Rhoades was advised by physician's assistant Jeff Tichenor to have Clayton's competency evaluated, because of his erratic behavior at the Lawrence County jail. Tichenor treated Clayton from January 15 to March 13, 1997 (PCRTTr.512-513; Ex.8). Tichenor noted that Clayton was very nervous and not eating or sleeping well (PCRTTr.514-515;Ex.8). Clayton reported that he felt a need to be violent because of the noise and horseplay of other inmates (PCRTTr.515; Ex.8). Clayton displayed aggressive and anxious behaviors and had an altercation with his cellmate (PCRTTr.516-517;Ex.8). On February 20, Tichenor found that Clayton was still agitated and restless (PCRTTr.515,520;Ex.8). Other inmates complained about Clayton's hygiene, and Clayton had smeared feces all over the bathroom (PCRTTr.519-520; Ex.8). Clayton reported hearing persecuting voices (PCRTTr.519; Ex.8). Tichenor believed that Clayton might be schizophrenic (PCRTTr.510;Ex.8). Tichenor noted that Clayton's speech was pressured and his movements were hyper (Ex.8). On March 11, Tichenor called Rhoades, told him about Clayton's problems, and recommended a psychiatric consultation (PCRTTr.527-528,892;Ex.8).

Third, Rhoades knew that Clayton was prescribed Lorazepam, Chlorpromazine, Prednisone, and Meclizine in the Lawrence County jail (PCRTTr.514-515,521,892-893; Ex.8;Ex.10). Clayton was extremely drugged (PCRTTr.529,892). Prednisone is a very strong steroid, and Lorazepam is a benzodiazepine (PCRTTr.347). At one point, the jail guards mistakenly gave Clayton double doses of Lorazepam (PCRTTr.529,892; Ex.8).

Fourth, Rhoades knew that Clayton was given Temazepam, Actisol, Hydroxyzine, and Amitriptyline while incarcerated at the Jasper County jail and during his trial

(PCRTTr.354-355,892-893). Temazepam is an anxiolytic/hypnotic used to lessen anxiety and sedate a person (PCRTTr.355). It is a powerful and addictive benzodiazapine (PCRTTr.355). Its side effects include a “hangover” effect, drowsiness, and memory impairment (PCRTTr.355). Hydroxyzine is a potent antihistamine often used as a pre-operative sedative (PCRTTr.354). It is very sedating and can cause a “hangover” effect with drowsiness (PCRTTr.354). Amitriptyline is an antidepressant that can be lethal if taken in quantity (PCRTTr.354). Its common side effects include a “hangover” effect, moderate to marked sedation, and impaired cognitive functioning (PCRTTr.354).

Fifth, Rhoades knew or should have known that this extreme sedation impaired Clayton’s ability to understand and assist counsel. Clayton was not focused on the proceedings. At one point during the testimony of a state’s witness, Clayton told Christine Rhoades, “You are a nice girl, and you would make a nice wife for one of my sons” (PCRTTr.769). Even when a defendant is competent before trial, circumstances may arise which suggest a change that would render the defendant unable to meet standards of competency. Drope v. Missouri, 95 S.Ct. 896, 908 (1975). Rhoades had a continuing duty *throughout* representation of Clayton, including during trial, to notify the court if Clayton displayed behavior indicating incompetency. Rhoades failed to alert the trial court to Clayton’s lack of focus and fixation on trivial, unrelated matters. Clayton was not behaving as a competent person facing trial for life or death.

Rhoades never sought to have Clayton’s competency evaluated or adjudicated. Although Rhoades retained Back for a neuropsychological examination, she only evaluated Clayton’s ability to deliberate. In her post-conviction deposition, Back

testified that she was not asked to evaluate Clayton's competency and did not form an opinion as to his competency (Ex.1,p.10,77). She also testified, however, that if she had felt that Clayton was not competent, she would have informed Rhoades (Ex.1,p.77). Back testified, "I felt like he was able to assist Mr. Rhoades and to tell him what had happened to the best of his ability. I didn't -- He was not mentally retarded. He was not actively psychotic at the time. I felt that under calm conditions, that he was not psychotic" (Ex.1,p.77-78).

Back never considered the issue of Clayton's competency before trial. In a pre-trial deposition, Back was asked if she had been asked to determine whether Clayton could assist in his own defense (Ex.N,p.68). Back responded, "I don't believe anyone's asked me that question until today" (Ex.N,p.68). Back was unfamiliar with the legal standards for addressing a competency issue (Ex.N,p.64-65). When asked if Clayton was capable of assisting his lawyers, Back said:

His judgment's not very good and he's not very bright. That's kind of a hard question. I don't think he's going to be a -- That's -- that's a very difficult question and maybe, again, sort of goes into a legal term or a legal question more than a psychological question. You know, in terms -- Legally, I'm not sure how to answer that. From a psychological point of view, I don't think he would be a great deal of help to anyone in making any kinds of decisions about things. He's not real bright and he's not -- his judgment's not very good. I don't know that he would be a lot of help, but

I'm not sure -- Maybe you need to tell me what the legal requirements for that --(Ex.N,p.65).

Back only interviewed Clayton for one hour (Ex.1,p.78-79). Her intake evaluation does not indicate whether she assessed Clayton's ability to understand legal proceedings, his legal rights, or his ability to maintain concentration for a significant period of time to allow him to understand the proceedings (Ex.21).

To establish that counsel was ineffective, Clayton must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove prejudice on an ineffectiveness claim, Clayton need only demonstrate a reasonable probability that he was incompetent, sufficient to undermine confidence in the outcome. Hubbard v. State, 31 S.W.2d 25, 28 (Mo.App.2000); see also, Ford v. Bowersox, 2001 WL 766785 (8thCir.2001)(counsel's failure to request a competency hearing objectively unreasonable if evidence raised a substantial doubt about the defendant's competence to stand trial).

Even if the litigant does not prove a due process claim that he was incompetent in fact, he can still prevail on an ineffective assistance of counsel claim. Bouchillon v. Collins, 907 F.2d 589, 595 (5thCir.1990). The prejudice prong of Strickland "is a lower burden of proof than the preponderance standard. Thus, even if [the litigant] were to fail to prove his incompetency by a preponderance of the evidence, it is still possible that he raised sufficient doubt on that issue to satisfy the prejudice prong of his ineffective assistance of counsel claim." Id.

Clayton was denied effective assistance of counsel, because Rhoades ignored all signs of his incompetency to proceed and never sought an evaluation. A thorough competency evaluation would have demonstrated that Clayton suffered a mental defect rendering him incapable of a rational understanding of the proceedings and incapable of assisting in his own defense. Clayton was incompetent in fact at the time of his trial, and Rhoades was ineffective in failing to seek adjudication of Clayton's competency. Rhoades did not think it was necessary to have Clayton's competency evaluated, because he believed he was able to communicate effectively with Clayton (PCRTTr.897). Clayton's ability to maintain a conversation with Rhoades during brief jail visits is not dispositive of the issue, and Rhoades should have known better. It was unreasonable for Rhoades to ignore this information, and presume that Clayton was competent solely based on his demeanor. "The existence of even a severe psychiatric defect is not always apparent to laymen. One need not be catatonic, raving or frothing, to be legally incompetent." Bouchillon, at 593-594.

Clayton was prejudiced, because, as a result of counsel's deficient performance, Clayton was tried and convicted without a determination of his competency. Thus, the conviction and sentence are unreliable and fatally flawed. Hemme, at 737.

Clayton was denied due process of law, because he was in fact incompetent to proceed (PCRTTr.359). Foster testified that Clayton was not competent at the time of trial (PCRTTr.323,359). Clayton had a basic understanding of the charges against him and his legal rights (PCRTTr.327). He understood the role of the judge, prosecuting attorney, defense attorney, and jury, although he could not articulate his role in the proceedings

(PCRTTr.327-328). Clayton cannot verbalize an understanding of courtroom process or an understanding of strategy issues (PCRTTr.327-329,362). Throughout the interview, Clayton referred to grandiose, illogical claims of plots against him (PCRTTr.325).

Clayton could not articulate the meaning of aggravating and mitigating circumstances (PCRTTr.336,358-360). Clayton did not and still does not understand the inevitability of the death penalty absent a successful appeal (PCRTTr.336-337). Clayton understood he had been sentenced to death, but engaged in “magical thinking” in that he believes he will not be executed because the Lord will see him through and help him out (PCRTTr.336).

Clayton was not able to assist in his own defense (PCRTTr.359). His distractibility, emotional lability, and poor concentration prevent him from participating meaningfully in procedures that last for hours or days (PCRTTr.323,359). Clayton could not sustain a rational understanding for any significant length of time (PCRTTr.342-343,359). When Foster interviewed Clayton, he could not respond appropriately to questions after approximately two hours (PCRTTr.323). Clayton became increasingly tangential during the interview, and his thoughts became rambling and disorganized (PCRTTr.323,342-343). His concentration was impaired, and he was easily distracted (PCRTTr.327-328). Clayton cannot process new information, nor can he recall facts on demand (PCRTTr.360-361).

Foster testified that Clayton did not have the ability to comprehend counsel’s advice and instruction and make meaningful decisions based on that information (PCRTTr.362). If called to testify, Clayton could not have testified relevantly or responded appropriately to cross-examination (PCRTTr.359-360). Clayton could not

sustain coherent thought processes long enough to testify meaningfully (PCRTTr.359-360). Clayton did not have the capacity to follow the testimony of witnesses for a sustained period of time, thus he could not advise counsel of discrepancies or errors in testimony and provide meaningful assistance with cross-examination (PCRTTr.359-360). His memory deficits and inability to recall facts on demand significantly impaired his ability to provide counsel with information that would help his case, such as names of helpful witnesses (PCRTTr.359). At the time of trial, Clayton's ability to think was already severely impaired because of his brain damage. The extreme sedation he was under even further suppressed his ability to think (PCRTTr.357).

Clayton was not competent to proceed to trial, because he lacked the sufficient present ability to consult with counsel with a reasonable degree of rational understanding. Clayton also lacked a rational and factual understanding of the proceedings against him. When Clayton was tried, convicted, and sentenced, he was brain injured, mentally ill, and heavily drugged. Clayton could not meaningfully participate in the criminal justice process, because he lacked the memory, concentration, and rational and organized thought process of a competent defendant.

It is reasonably likely that a pre-trial competency evaluation would have yielded the same results as Foster's evaluation: Clayton is not competent. Once sufficient information comes before a trial court to raise a genuine doubt as to the accused's competency, there is a non-relenting duty to order an exam and failure to do so will be reviewed carefully because of the constitutional implications. State v. Tilden, 988 S.W.2d 568, 576-577 (Mo.App.1999)(a combination of factors including the accused's

partial lobotomy, self-mutilating behavior, alcohol abuse, prior criminal activity, prior mental health treatment, and being disabled for social security purposes formed a sufficient basis to have ordered a competency evaluation).

Appellate review is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Rule 29.15(k). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo.banc1991).

The motion court found that the record was "devoid" of behavior and actions by Clayton requiring a competency examination, and there was nothing bizarre about the shooting that suggested an examination (A-29). The court found that Rhoades fully investigated Clayton's mental status, including having Back examine Clayton, and that Rhoades and Back both believed that Clayton was competent (A-26-A-28). The motion court found that Foster's opinions are not credible and are inconsistent with the record (A-24). The motion court viewed Rhoades' conduct from his perspective at that time (A-28). Clayton had discussions with Rhoades and wrote him letters (A-26; Ex.H-L).

The motion court's findings are clearly erroneous. The record in this case is long and well-documented with the devastating history of Clayton's mental illness and brain injury. The court considered the facts of the crime, but that was only *one* of the factors to be considered. The court and Rhoades erroneously relied on Back, who did not perform a complete and thorough evaluation and who lacked experience in assessing competency to stand trial (Ex.1,p.5). Foster was indeed more credible than Back, since he has fifteen

year's experience in forensic psychological examinations and since he reviewed all of Clayton's records, interviewed Clayton's friends and family, and interviewed Clayton for four hours (Ex.19;PCRTTr.178-179).

Rhoades was ineffective for failing to challenge Clayton's competency to proceed. Rhoades was aware of a significant amount of information that should have caused him to question Clayton's competency to proceed, but Rhoades did not seek a competency determination under Section 552.020, RSMo. Due to a mental defect, Clayton was not able to understand the proceedings against him or to assist in his own defense. Rhoades' ineffectiveness violated Clayton's rights to due process, a fair trial, effective assistance of counsel, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. Furthermore, Clayton was denied due process and freedom from cruel and unusual punishment, because he was convicted and sentenced while incompetent in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 21 of the Missouri Constitution. This Court should reverse the motion court's judgment and remand this case for a new trial.

ARGUMENT IV

The motion court clearly erred in denying Clayton's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel failed to present mitigating evidence through readily available witnesses who were willing to testify, including: 1) Carolyn Dorsey's testimony about Clayton's formative years, religious conversion, and changed behavior after the sawmill accident, including examples of his inability to control violent impulses, 2) Arnold Evans' testimony about Clayton's religious beliefs, church attendance, and changed behavior after the sawmill accident, 3) Leslie Paul's testimony about Clayton's religious beliefs, church attendance, and changed behavior after the sawmill accident, 4) Norma Mitchell's testimony that Clayton was a good neighbor and he regularly ministered to her nursing home residents, and 5) Delores Williams' testimony that Clayton was a good neighbor. There is a reasonable probability that Clayton would have been sentenced to life without parole had these witnesses testified.

To establish that counsel was ineffective, Clayton must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687 (1984). To show prejudice, Clayton must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Counsel has a duty to make prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the punishment to be imposed. Eldridge v. Atkins, 665 F.2d 228, 232 (8thCir.1981). "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-691. Failing to interview witnesses or to discover mitigating evidence relates to trial preparation, not trial strategy. Chambers v. Armontrout, 907 F.2d 825, 828 (8thCir.1990).

Counsel was ineffective for failing to call Carolyn Dorsey, Arnold Evans, Leslie Paul, Norma Mitchell, and Delores Williams to testify in the penalty phase. Each of these people was willing and available to testify. They could have been located through reasonable investigation. They would have provided the following persuasive mitigating testimony.

Carolyn Dorsey

Carolyn Dorsey is Clayton's sister and is the youngest of the ten Clayton children (PCRTTr.19-20). She was born in 1952 and is twelve years younger than Clayton (PCRTTr.20-21). The Claytons lived in a two and a half bedroom house on a farm in Purdy, Missouri (PCRTTr.19,26). The five girls shared one bedroom, and the five boys shared another (PCRTTr.19,26). The house did not have electricity until the mid-1950s or running water until 1963 (PCRTTr.21).

The Claytons were very poor (PCRTTr.20-21). The family sold milk and raised crops on "truck patches" (PCRTTr.22-23). They did not have farming machinery but plowed with horses or mules (PCRTTr.24). If the family needed extra money for something, like coats for the children, the family went to other towns to pick crops (PCRTTr.23).

The family attended the Arnhart Baptist Church, and if they did not attend church on a Sunday, they watched religious television shows (PCRTTr.32). Most of the Clayton family, including Clayton, had musical talent (PCRTTr.33).

Carolyn described her parents, Lloyd and Rosie, as being from the "old school," meaning it was hard for them to hug their children and say "I love you" (PCRTTr.30). Lloyd Clayton was not mean, but he was very strict, and he was a "screamer" (PCRTTr.27).

Clayton was not his father's favorite child (PCRTTr.33-35). Wayne, Clayton's older brother, was his "daddy's pick" (PCRTTr.34-35). Lloyd was very hard to please (PCRTTr.35). For example, he became upset with Clayton for picking green strawberries,

so he sent him home, even though Clayton was color-blind and could not distinguish the ripe from the unripe berries (PCRTTr.35).

Carolyn described her family, including Clayton, as “high-strung” and “high-tempered” (PCRTTr.37-38). Clayton was insecure, moody, and not as out-going as others (PCRTTr.36-37).

Around 1968, Clayton made a significant change in his life and accepted Jesus as his Savior (PCRTTr.40). Although Carolyn had not witnessed any violent behavior by Clayton before that time, she had heard that he drank too much and got into fights (PCRTTr.70-71). In 1968, Clayton got into trouble and was put in jail (PCRTTr.40-42). When he got out of jail, Carolyn observed that Clayton was a “different person” (PCRTTr.42). He quit drinking and using bad language (PCRTTr.42). He began attending the Assembly of God Church (PCRTTr.43). Carolyn described Clayton as being “sweet” and having a “different aura” (PCRTTr.42). Clayton began preaching and singing gospel music at different churches (PCRTTr.44). He did not drink alcohol for nine years (PCRTTr.73).

In 1972, Clayton had another life-changing event when he was injured in a sawmill accident (PCRTTr.44-45). After his brain injury, Clayton would be very quiet at times and had memory problems (PCRTTr.45). Clayton was less sociable, and it was hard for him to maintain his normal every day life, such as going to church and working as a logger (PCRTTr.47-48). He dwelled on and was tormented by small things that most people would just ignore (PCRTTr.46).

After the accident, Clayton had difficulty controlling his anger, and Carolyn gave two examples (PCRTTr.45-46). The first incident occurred in 1981 (PCRTTr.48). Carolyn insulted Clayton's wife implying that she took advantage of Clayton's mother, Rosie, and was cheap (PCRTTr.49). Two or three days later, Clayton confronted Carolyn about her comment (PCRTTr.50). He had been drinking (PCRTTr.74). Clayton struck Carolyn, chipping her teeth and cutting her lip (PCRTTr.50-51). Rosie stepped in between Clayton and Carolyn (PCRTTr.51). He drew back his fist as if to hit his mother but stopped (PCRTTr.51-52). He left the house, and Carolyn called police officer Gary Kennedy, who refused to arrest Clayton (PCRTTr.52-53). Carolyn pursued the matter with the police (PCRTTr.53). Clayton turned himself in and was put on probation (PCRTTr.53).

The second incident occurred in 1990 (PCRTTr.53). Carolyn and several other family members were at Rosie's house (PCRTTr.54). Clayton took Carolyn's son, Jarrod, somewhere in his car, which upset Carolyn, because Clayton had been drinking (PCRTTr.55). Clayton returned with Jarrod, who was fine (PCRTTr.55-56). Carolyn told Clayton that she did not want Jarrod in Clayton's car when Clayton had been drinking (PCRTTr.56). Clayton got angry, yelled at Carolyn, and threatened her husband, Gene, saying, "I can pull your husband's heart out and hold it in my hand" (PCRTTr.57). Carolyn told Rosie to call the police, but she refused and would not allow anyone else to call (PCRTTr.57-58). Gene got a gun from his car and cocked it (PCRTTr.58). Carolyn knocked the gun out of Gene's hand and told Clayton to "take [his] crazy ass home" (PCRTTr.58). Clayton left (PCRTTr.58).

Carolyn did not see Clayton for about a year after he hit her (PCRTTr.59). Eventually, she forgave him (PCRTTr.60). After this, Carolyn thought that she and Clayton had a great relationship (PCRTTr.60). Clayton confided in Carolyn about things he had done, cried, and showed remorse (PCRTTr.61).

At the time of trial, Carolyn lived in Florida (PCRTTr.61). Rhoades telephoned her (PCRTTr.62). She told Rhoades about Clayton's upbringing, his head injury, his behavior, and the incidents where he hit her and threatened her husband (PCRTTr.65,78). Rhoades told her that he wanted her to testify, so Carolyn drove to Missouri for the trial (PCRTTr.62,80-81). Rhoades told Carolyn to call him when she arrived (PCRTTr.62). Rhoades endorsed Carolyn as a witness (Ex.35).

Carolyn contacted Rhoades when she arrived, but he did not seem interested in speaking with her (PCRTTr.63). Carolyn left the trial to return home while the jury was deliberating during the guilt phase (PCRTTr.81). She informed Rhoades that she was leaving, but he did not ask her to stay (PCRTTr.81-82). If Rhoades had asked her to stay, Carolyn would have (PCRTTr.64).

Rhoades had a vague recollection of interviewing Carolyn (PCRTTr.902-906). His file contained some sparse notes from the interview referencing the incidents when Clayton slapped Carolyn and threatened her husband (Ex.34; PCRTTr.898-899). Although Rhoades endorsed Carolyn as a penalty phase witness, and he remembered asking her to be present at the trial, he could not recall why he did not call her to testify (PCRTTr.900-901,903,907). He asked her to attend the trial, because he possibly wanted her to testify about the violent incidents with Clayton to demonstrate how his behavior was aberrant

and volatile after the sawmill injury (PCRTTr.903-905). Rhoades thought that Carolyn's testimony about Clayton's upbringing and his personality would have been helpful, because it would have humanized him and explained some of his behavior (PCRTTr.907).

Clayton was prejudiced by Rhoades' failure to call Carolyn as a witness. If she had testified, there is a reasonable probability that the jury would have recommended a sentence of life without parole. By describing Clayton's formative years, Carolyn's testimony would have helped the jury to understand Clayton as a person. The testimony would have been persuasive mitigation evidence, because it would have shown how Clayton was insecure as a child and did not socialize well with his own family. As Foster explained, if a person has a personality flaw, such as being quick to anger, and then the person suffers frontal lobe damage, after the injury the person has even less ability to mediate and inhibit the negative behavior. Clayton was insecure, moody and high-strung. These personality traits were exacerbated by his frontal lobe brain injury.

Arnold Evans

Arnold Evans is the pastor at Faith Worship Center in Aurora, Missouri (PCRTTr.602). Evans met Clayton in 1970 when Evans was the pastor of the Monett Fundamental Methodist Church (PCRTTr.603). Clayton and his family came to the church to do evangelistic work (PCRTTr.608). The Clayton family sang to the congregation, and Clayton preached (PCRTTr.608). Evans asked him to minister to the church members, because Evans knew that Clayton had changed his life after Clayton had "come to God" and experienced a conversion while in jail (PCRTTr.627).

Evans and Clayton were friends outside of church as well (PCRTTr.609). When Clayton was injured in a sawmill accident, Evans went to the hospital and prayed for Clayton (PCRTTr.611). After the accident, Evans noticed that Clayton was more nervous, depressed, and upset more easily (PCRTTr.612). Clayton did not joke with Evans as much (PCRTTr.612). Evans also noticed that Clayton had begun to drink (PCRTTr.613). Clayton was upset about his divorce, and his main concern was to get his family back (PCRTTr.614). Evans knew that Clayton tried to stop drinking, but it was very difficult for Clayton (PCRTTr.617).

Evans testified that if Clayton were incarcerated for the remainder of his life, Clayton would have things to offer the prison community (PCRTTr.618). Evans believed that Clayton could use his musical talent in prison and help others (PCRTTr.618).

Evans was available and willing to testify during the penalty phase (PCRTTr.621-622). Three days before trial, Rhoades endorsed Evans as a penalty phase witness (Ex.37). A contact sheet from Rhoades' file contains a highlighted notation in Rhoades' handwriting that states: "Arnold Ray Evans 235-5329 Monett/Aurora Faith Church 498-6763" (Ex.34). Rhoades could have easily found Evans at his address in Monett. Although Rhoades endorsed Evans, he never interviewed Evans (PCRTTr.620). Rhoades could not have had a valid strategic reason for not calling Evans as a witness without having interviewed him.

Rhoades could not remember whether he interviewed Evans and could not remember any strategic reason for not calling Evans to testify (PCRTTr.911,914). Upon

hearing a summary of Evans' testimony, Rhoades said it sounded like testimony he would have wanted to present to the jury (PCRTTr.911-912).

Clayton was prejudiced by Rhoades' failure to investigate, interview, and call Evans to testify during the penalty phase. If Evans had testified, there is a reasonable probability that the outcome of the penalty phase would have been different, and the jury would have recommended a sentence of life without parole. Evans' testimony would have shown that Clayton was a religious man who was active in church and used his musical talent to minister to others. Evans' testimony would have refuted the state's assertion that Clayton turned to religion only after being charged with first-degree murder (Tr.1856).

Leslie Paul

Leslie Paul and Clayton met around 1967 when Clayton was preaching at the Assembly of God Church in Purdy, Missouri (PCRTTr.91-93). Paul and Clayton became very good friends (PCRTTr.96). Paul recalled that Clayton had a ministry for four or five years (PCRTTr.103-104). Paul believed that Clayton was sincere in his faith and that Clayton's preaching was well received by others, because Clayton had changed by "turn[ing] his life over to the Lord" and beginning the ministry (PCRTTr.102).

Before Clayton suffered the brain injury, Paul was not aware of Clayton having any marital, family, or alcohol problems (PCRTTr.129). After his brain injury, Clayton would get confused, especially when he had to make decisions (PCRTTr.106). After his injury, pressure made Clayton nervous, and Clayton would become frustrated when work or family problems developed (PCRTTr.109-110). Clayton tried to continue his logging

work but only worked off-and-on (PCRTTr.110). Before his injury, Clayton did not exhibit confusion, frustration, or nervousness (PCRTTr.107,109-110). After his injury, Paul found that Clayton asked him for help with things, such as buying a car (PCRTTr.110-111, 138). Before his injury, Clayton did not need help with such tasks (PCRTTr.111).

After his injury, Clayton became depressed, especially about his divorce (PCRTTr.106-107). Clayton did not like being around people, and he made very few friends (PCRTTr.108). Clayton did not trust people, and Paul was one of the few people in whom Clayton would confide (PCRTTr.113).

Before his injury, Paul never saw Clayton lose his temper, but after the injury, Clayton's temper was worse (PCRTTr.114-115). For example, Clayton assaulted his teenage daughter's boyfriend (PCRTTr.97,115). The boyfriend was three or four years older than Clayton's daughter, and Clayton suspected him of using drugs, therefore he did not think this man was good for his daughter (PCRTTr.116). Paul and Clayton went to his daughter's apartment (PCRTTr.118). Clayton had not been drinking and did not have a weapon (PCRTTr.117). Clayton's daughter refused to speak with them and got into a car with her boyfriend (PCRTTr.117-118). Clayton dragged the boyfriend out of the car, pushed him to the ground, and bloodied his nose (PCRTTr.118-119). When the boyfriend said, "Oh, God help me," Clayton let him go (PCRTTr.119).

Rhoades interviewed Paul by telephone for ten to fifteen minutes (PCRTTr.121-122). Paul was born with a severe hearing impairment and communicates by reading lips and sign language (PCRTTr.90-91). Paul cannot communicate well on the telephone

(PCRTTr.122). He had difficulty understanding Rhoades (PCRTTr.122). Paul did not like Rhoades and did not trust him, nonetheless Paul would have testified for Clayton (PCRTTr.126,144). Paul would have helped Clayton if Rhoades had asked him to and would have attended the trial if he had been subpoenaed (PCRTTr.144-145).

Rhoades vaguely recalled interviewing Paul over the telephone (PCRTTr.908). He recalled that he had to yell and that he could not understand everything Paul said (PCRTTr.908). Rhoades' brief interview of Paul was not sufficient for Rhoades to make a valid strategic decision not to use Paul as a witness. The interview was too short to assess Paul's value as a witness. Rhoades should have personally met with Paul rather than interviewing him by telephone, because Paul's hearing loss prevented him from communicating effectively.

Clayton was prejudiced by Rhoades' failure to adequately interview and call Paul to testify during the penalty phase. If Paul had testified, there is a reasonable probability that the outcome of the penalty phase would have been different, and the jury would have recommended a sentence of life without parole. Paul's testimony would have refuted the state's assertion that Clayton turned to religion only after being charged with first-degree murder (Tr.1856). Paul's testimony would have shown the jury Clayton was sincere about his faith as early as 1967, long before being charged with this homicide (PCRTTr.91-93).

Paul's testimony also would have supported the defense theory that Clayton should be spared the death penalty, because he suffered from a mental defect. Paul's testimony would have provided the jury with evidence of how dramatically Clayton's

brain injury affected his life by increasing Clayton's nervousness, frustration, confusion, and forgetfulness, and by decreasing Clayton's abilities to trust others, to control his temper, and to cope with the tasks involved in every-day life. Paul's testimony would have showed the jury how Clayton's mental condition progressively deteriorated up until the time of the crime.

Norma Mitchell

Norma Mitchell was Clayton's neighbor from 1994 until his arrest (Ex.3,p.3-4). Mitchell thought Clayton was a good neighbor, and she wished that Clayton were still her neighbor (Ex.3,p.4, 6). Clayton visited Mitchell about once a week to see how she was doing (Ex.3,p.6-7). Clayton cut down trees and split wood for Mitchell (Ex.3,p.6). Clayton also moved a stove for her (Ex.3,p.6). Clayton gave Mitchell produce from his garden (Ex.3,p.7).

Some time before 1972, Mitchell owned and operated Mitchell's Guest Home for six years (Ex.3,p.8-10, 27). She provided care to elderly people, foster children, and unwed mothers (Ex.3,p.8). For the last three years that Mitchell ran the home, Clayton and his family visited every Thursday (Ex.3,p.10). Clayton conducted church services and sang and played the guitar (Ex.3,p.10). Mitchell said the residents of the home "adored" Clayton (Ex.3,p.10).

Mitchell was available and willing to testify on Clayton's behalf at trial (Ex.3,p.13). Mitchell would have been able to attend Clayton's trial, although her declining health prevented her from attending the post-conviction proceedings (Ex.3,p.14).

Rhoades could have located Mitchell through reasonable investigation. Mitchell was Clayton's neighbor since 1994 (Ex.3,p.3), and Rhoades knew where Clayton lived. Mitchell had been a friend of Clayton's mother, Rosie Clayton, since 1994 (Ex.3,p.4-5,14). At the time of trial, Mitchell was in regular contact with Rosie (Ex.3,p.12). Rosie knew where Mitchell lived. Thus, Rhoades could have obtained information from Rosie on how to locate Mitchell. Mitchell also had contact with Clayton's ex-wife, Connie, at the auction that Rhoades held at Clayton's home before trial (Ex.3,p.11). Rhoades was in contact with Connie before trial, and thus he could have obtained information from her on how to locate Mitchell (Ex.3,p.11).

It is unclear from the evidence whether Rhoades contacted Mitchell and interviewed her about Clayton. Rhoades could not remember if he interviewed Mitchell (PCRTTr.912). He recalled that he talked to a neighbor over the telephone, but he could not remember to whom he spoke or whether the person was a man or woman (PCRTTr.912). Mitchell thought she had talked to an attorney, but also stated that she did not remember (Ex.3,p.12-13.). Upon hearing a summary of Mitchell's testimony, Rhoades testified that Mitchell sounded like a good witness, and he wished he had called her to testify (PCRTTr.913).

Clayton was prejudiced by Rhoades' failure to interview and call Mitchell to testify during the penalty phase. If Mitchell had testified, there is a reasonable probability that the outcome of the penalty phase would have been different, and the jury would have recommended a sentence of life without parole. Mitchell's testimony would have shown that Clayton was a caring individual who wanted to help others.

Delores Williams

Delores Williams and Clayton became neighbors in 1980 (PCRTTr.558-559).

Williams thought Clayton was a good neighbor, because he helped the older people in the area (PCRTTr.550). Williams' husband, Wilbur, suffered from emphysema and could not leave the house (PCRTTr.553). Clayton visited Wilbur and played his guitar and sang to entertain him (PCRTTr.557). Clayton dug a stump out of the front yard so that Williams could plant a flower garden (PCRTTr.551). He also cut down trees in Williams' back yard so that she could put up a fence (PCRTTr.551). Clayton and Williams' son, Max, built a front porch on Williams' trailer (PCRTTr.553). Max is deaf, retarded, and brain damaged (PCRTTr.564). Clayton was a good friend to Max (PCRTTr.565).

Sometimes when Clayton visited, he, Delores, and Max would have a "church" service (PCRTTr.557-558). Clayton and Delores studied the Bible together and Clayton sang religious songs (PCRTTr.558).

Williams was available and willing to testify on Clayton's behalf at the penalty phase (PCRTTr.563-564). Rhoades did not interview Williams, therefore he could not have had a strategic reason for not having her testify (PCRTTr.562-563). Upon hearing a summary of Williams' testimony, Rhoades said she sounded like a "great" witness (PCRTTr.914-915). Rhoades could not articulate a reason for not calling her, but speculated that he did not know of her existence (PCRTTr.915). Rhoades could have located Williams through reasonable investigation. Williams was Clayton's neighbor for years, and Rhoades certainly knew where Clayton lived (PCRTTr.558-559). Furthermore,

Williams was acquainted with Clayton's mother, and Rhoades could have obtained information from her on how to locate Williams (PCRTTr.561-562).

Clayton was prejudiced by Rhoades' failure to interview and call Williams to testify during the penalty phase. If Williams had testified, there is a reasonable probability that the outcome of the penalty phase would have been different, and the jury would have recommended a sentence of life without parole. Williams' testimony would have shown that Clayton was a caring individual who wanted to help others.

Appellate review is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Rule 29.15(k). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo.banc1991).

With respect to Carolyn Dorsey, the motion court concluded that: 1) her testimony was cumulative to that of Marvin and Jerry Clayton; 2) her testimony regarding violent acts before 1972 would have been prejudicial, and 3) Carolyn left the trial before the penalty phase (A-17-A-18,A-32). These conclusions are clearly erroneous. First, Carolyn's testimony was not cumulative to that of Marvin and Jerry Clayton. Neither Marvin nor Jerry testified about the religious conversion Clayton underwent in 1968 when he quit drinking for nine years. Neither Marvin nor Jerry offered any insight as to Clayton's personality prior to the brain injury. This was critical information, because brain injuries exacerbate pre-existing personality traits, and pre-existing personality sheds light on a person's ability to cope after a brain injury (PCRTTr.304-305).

Neither Marvin nor Jerry testified about any aberrant behavior by Clayton after his brain injury. Carolyn was able to testify to specific incidents of violent, aberrant behavior by Clayton after 1972. Rhoades testified that he wanted to present this type of testimony (PCRTTr.903-905). On cross-examination of Marvin, the prosecutor pointed out that although Marvin claimed Clayton's behavior worsened over time after the brain injury, nonetheless Clayton had not killed anyone to that point (Tr.1535-1536). To be consistent in pursuing the diminished capacity defense, it was important to show specific instances of how Clayton's behavior worsened over time. Otherwise, the jury would get the impression that he was able to control impulsive, violent behavior after the brain injury, thus the jury would conclude he should have been able to control his behavior the night of the homicide.

Second, Carolyn's testimony about Clayton's behavior before 1972 would not have been prejudicial. Carolyn did not witness any violent behavior before 1972 (PCRTTr.70-71). She had only heard that he drank and got into fights (PCRTTr.70-71). Rhoades intentionally elicited testimony from Jerry Clayton that Clayton was "a rounder" and drank before he had the brain injury (Tr.1797). Apparently, Rhoades did not feel that such evidence would be detrimental to his defense strategy. Any such testimony would have been mitigated by the fact that Clayton quit drinking for nine years and started a ministry, which continued until he could no longer cope with his brain damage.

Third, the motion court noted that Carolyn left the trial before the penalty phase, however Carolyn testified that she informed Rhoades that she was leaving and that she would have stayed if he wanted her to testify (PCRTTr.64,81-82). This has nothing to do

with her willingness to testify. If she did not want to testify, she would not have driven all the way from Florida at Rhoades' request (PCRTTr.61-63).

With respect to Arnold Evans, the motion court found that although Rhoades endorsed Evans as a penalty phase witness, Rhoades did not interview him (A-33). The court did not make a finding as to whether Rhoades' performance was deficient (A-32-A-33). Rather the court concluded that Evans' testimony would have been cumulative to that of Jerry Clayton and Thora Shaw, and thus denied relief on the grounds that Clayton was not prejudiced by Rhoades' failure to call Evans (A-33).

The court clearly erred, because Evans' testimony was not cumulative to the testimony of Jerry Clayton and Thora Shaw. Jerry Clayton briefly mentioned that Clayton held revivals and pastored in other churches for three to four years (Tr.1798). Evans, on the other hand, had actually heard Clayton preach and testified about his ministry and attendance at specific churches such as the Fundamental Methodist Church, the Assembly of God Church, the Faith Nondenominational Church, and the Faith Worship Center (PCRTTr.602,608-610,613). Because Evans actually heard Clayton preach, he was able to testify that Clayton had a real talent and ability to help others (PCRTTr.618).

Thora Shaw's testimony was confined to Clayton's participation in religious services at the Jasper County jail (Tr.1807-1812). She did not know Clayton and thus could not testify that he was a religious man for many years before he was charged. In closing argument, the prosecution belittled Shaw's testimony by suggesting that Clayton's faith was less than genuine: "You know, my father said to me one time, 'Bob,

as you go through life, you need to beware of fair weather patriots and foul weather Christians.’ Well, I don’t know whether Mr. Clayton is a fair weather patriot or not, but I suggest what we’re seeing here may well be foul weather Christianity” (Tr.1856). Evans’ testimony would have refuted the state’s assertion that Clayton turned to religion only after being charged with first-degree murder. Evans’ testimony would have shown that Clayton had a long commitment to his faith.

“Evidence is said to be cumulative when it relates to a matter so ‘fully and properly proved by other testimony’ as to take it out of the area of serious dispute.” State v. McCauley, 831 S.W.2d 741, 743 (Mo.App.1992). “Corroboration is critical, and corroborative testimony by a single witness can never be discounted as ‘merely cumulative.’” State v. Hayes, 785 S.W.2d 661, 663 (Mo.App.1990). As seen by his closing argument, the prosecutor was disputing Clayton’s faith. Evans’ testimony was needed to help the jury understand the truth.

With respect to Paul, the motion court stated that Paul’s testimony showed that Clayton “was able to function in life and continue his ministry, interact with people, perform religious ceremonies, and preach at revivals after his sawmill accident” and this “was contrary to the portrait that trial counsel wished to present to the jury” (A-34). Paul testified that Clayton preached at a revival in Oklahoma and he performed a dedication ceremony for Paul’s baby daughter, which consisted of saying a prayer (PCRTTr.99,103). These are not complex activities, and the testimony would not have undermined the diminished capacity theory. Clayton has a brain injury that substantially impairs his ability to control impulsive behavior, especially when under stress; he is not a vegetable.

The motion court's "all or nothing" approach misunderstands the nature of Clayton's brain injury.

The motion court also noted that Paul told Rhoades he did not think he could help him (A-34). It is true that Paul said he did not like or trust Rhoades (PCRTTr.125-126). But Paul never said that he did not want to help Clayton.

With respect to Norma Mitchell, the motion court concluded that Clayton failed to prove that Rhoades did not interview Mitchell and made no showing that he would have received a life sentence had she testified (A-35). These conclusions are erroneous. First, determining whether Rhoades interviewed Mitchell does not resolve the issue. Even if Rhoades did interview Mitchell, a point Clayton does not concede, the evidence showed that Rhoades did not have a reasonable strategy for not presenting her testimony to the jury. Mitchell's testimony did not contain any information that would have damaged Clayton's chance for a life sentence. In fact, just the opposite is true. Her testimony showed that every week for three years Clayton visited her nursing home to minister to foster children, unwed mothers, and the elderly. Second, Clayton is not required to definitively prove that he would have received a life sentence had Mitchell testified. He is required to show a probability sufficient to undermine confidence in the jury's death recommendation. Strickland, at 694.

With respect to Delores Williams, the motion court concluded that her testimony was cumulative to the testimony offered by Jerry Clayton and Thora Shaw at trial (A-36). This conclusion is clearly erroneous, because, as noted above, the state disputed the genuineness of Clayton's Christian faith. Since the issue was in dispute, the evidence

cannot be considered cumulative. McCauley, at 743. Furthermore, Williams' testimony included information which Jerry Clayton and Shaw had no knowledge of. Clayton and Shaw's testimony did not include any information about Clayton's kindness to Williams' bedridden husband and her disabled son or his efforts to help his older neighbors.

Counsel's failure to call these witnesses violated Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. If Dorsey, Evans, Paul, Mitchell, and Williams had testified, there is a reasonable probability that the outcome of the penalty phase would have been different. This Court should reverse the judgment of the motion court and remand this case for a new penalty phase proceeding or impose a sentence of life without parole.

CONCLUSION

Based on Points I and II, this Court should reverse the judgment and remand for a new trial, or in the alternative, vacate Clayton's sentence and remand for a new penalty phase or impose a sentence of life without parole. Based on Point III, this Court should reverse the judgment and remand for a new trial. Based on Point IV, this Court should reverse the judgment, vacate Clayton's sentence and remand for a new penalty phase or impose a sentence of life without parole.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Rebecca L. Kurz, hereby certify that:

The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 30,723 words, which does not exceed the 31,000 words allowed for an appellant's brief.

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

REBECCA L. KURZ

CERTIFICATE OF MAILING

I, Rebecca L. Kurz, certify that on July 25, 2001, two true and correct copies of the Appellant's Brief and a floppy disk containing a copy of this brief were hand delivered to John M. Morris, Assistant Attorney General, Office of the Attorney General, Broadway Building, 221 West High Street, 4th Floor, Jefferson City, Missouri 65102.

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