

IN THE
MISSOURI SUPREME COURT

JOHN MIDDLETON,)	
)	
Appellant,)	
)	
vs.)	No. 83909
)	
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CALLAWAY COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT
THE HONORABLE FRANK CONLEY, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Because death was imposed, this Court has exclusive jurisdiction of this Rule 29.15 appeal. Art. V, Sec. 3, Mo. Const.

STATEMENT OF FACTS

Mr. Middleton was convicted of two counts of first degree murder and sentenced to death on each count following trial in Callaway County. State v. Middleton, 998 S.W.2d 520, 523 (Mo. banc 1999). Following affirmance, Mr. Middleton filed a Rule 29.15 motion (R.L.F. 8-23, 29-203). After an evidentiary hearing, the motion court entered findings denying all claims.

Mr. Middleton's Callaway County case, involving victims Hamilton and Hodge, arose in Mercer County from an offense alleged to have occurred on June 11, 1995 (See, e.g., T.L.F. 382-83). Mr. Middleton was also convicted of first degree murder and sentenced to death in an Adair County trial for killing a Mr. Pinegar in Harrison County. State v. Middleton, 995 S.W.2d 443, 451-52 (Mo. banc 1999).¹ The Adair case went to trial on February 24, 1997. Id. 452. The Callaway case went to trial on March 30, 1998 (T.Tr. Vol. I at iii). In the trial of both cases, the Attorney General's Office represented respondent (See Vol. I transcript each case).² The local prosecutors for Mercer and Harrison Counties each also represented the State on the charges from their respective counties (See Vol. I transcript each case).

¹ Throughout the two cases will be referenced according to the counties where they were tried, rather than where the charges arose.

² On December 13, 2001, this Court took judicial notice of the entire contents of this Court's files in both of Mr. Middleton's appeals.

Respondent presented evidence Mr. Middleton and his girlfriend, Margaret Hodges, shot and killed Randy Hamilton and Hamilton's girlfriend, Stacey Hodge. Middleton, 998S.W.2d at 523. On June 10, 1995, several drug dealers were arrested in Cainsville, Missouri. Id.523. Evidence was presented that Mr. Middleton was involved in selling drugs. Id.523. He allegedly made statements he was concerned about informants, including Mr. Hamilton, implicating him in drug dealing. Id.523.

Respondent presented evidence that Mr. Middleton and Margaret Hodges allegedly met Mr. Hamilton and Stacey Hodge on a gravel road. Id.523. According to respondent, Mr. Middleton and Margaret Hodges, using separate SKS rifles, shot and killed Mr. Hamilton and Stacey Hodge. Id.523. Their bodies were found in the trunk of Mr. Hamilton's car on July 10, 1995. Id.523-24.

Dan Spurling testified Mr. Middleton had admitted to him killing Mr. Hamilton and Stacey Hodge (T.Tr.553-54). According to Spurling, Mr. Middleton asked him how to dispose of the bodies (T.Tr.534). Spurling reported that when Mr. Middleton made those alleged admissions, Spurling saw blood on Mr. Middleton's shirt (T.Tr.534). Spurling represented that Mr. Middleton had suggested burning the bodies in Mr. Hamilton's old house (T.Tr.534,549). Spurling reported having seen Mr. Middleton the next day and that Mr. Middleton had Mr. Hamilton's car stereo (T.Tr.538).

John Thomas was among those arrested on June 10, 1995 for drug offenses (T.Tr.560). Thomas reported he had gone to Mr. Middleton's house on June 25, 1995 to warn Mr. Middleton that Billy Worley had snitched on him (T.Tr.557). Thomas reported having seen Mr. Hamilton's "stash box" at Mr. Middleton's house and that Mr.

Middleton allegedly said the guy who owned the box would not need it anymore (T.Tr.558). Thomas testified Mr. Middleton said he believed Mr. Hamilton had snitched on him and something had to be done (T.Tr.558-59). According to Thomas, Mr. Middleton made statements Mr. Hamilton and Alfred Pinegar needed to be taken care of (T.Tr.580).

On cross-examination of Thomas, counsel established that when he saw Mr. Hamilton's "stash box" at Mr. Middleton's house, Thomas did not immediately report what he had seen to the police (T.Tr.576). Respondent was allowed on redirect to present evidence Thomas went to the police when Mr. Pinegar's body was discovered because Mr. Middleton had indicated Mr. Pinegar was a snitch who Mr. Middleton had said needed to be taken care of (T.Tr.578-81). This redirect was allowed on the grounds defense counsel had opened the door to this evidence through her questioning of when Thomas reported Mr. Middleton to the police (T.Tr.577-78). In guilt rebuttal argument, respondent argued Thomas' "stash box" testimony and its relationship to the Pinegar killing (T.Tr.828). That argument was objected to and a mistrial was requested (T.Tr.828,833-34). All of these matters were included in the motion for new trial (T.L.F.670,674-75), but appellate counsel did not raise them on appeal.

Thomas was charged by complaint, on June 8, 1995, by the Harrison County prosecutor with the Class B felony sale of a controlled substance, methamphetamine, alleged to have occurred on August 23, 1994 (Exs.17 and 42). On January 27, 1998, the State advised the court assigned to preside over this charge against Thomas that the delay in prosecuting the case was due to Thomas' "participation as witness in companion

proceedings.” (Ex.42). On March 31, 1998, Thomas testified for respondent at Mr. Middleton’s Callaway trial (T.Tr.Vol.I at iv). On April 27, 1998, Thomas pled guilty to an amended information charging the Class C felony of an attempt to sell methamphetamine (Exs.17 and 42). On September 10, 1998, the court considered the PSI and recommendations made and suspended imposition of sentence and placed Thomas on five years probation (Exs.17 and 42).

The Harrison County prosecutor dismissed six cases brought against Spurling after Mr. Middleton was first charged on July 21, 1995 on the Hamilton and Hodge matters (T.L.F.1) and before his Callaway trial began on March 30, 1998. (Exs. 4,5,7,8,9,10,11,14,15,16).

When Thomas testified against Mr. Middleton, the sale charge was still pending and he represented that he had not made any deals (T.Tr.559). Spurling testified on direct and redirect that he had neither received nor sought any deals for testimony (T.Tr.528,552-53). During guilt arguments, respondent repeatedly emphasized none of its witnesses had been given deals in exchange for testimony (T.Tr.802,829,830-31).

Respondent had continually represented to Mr. Middleton’s counsel that none of its witnesses had received deals for testimony (R.Tr.285-86,341,344). Counsel would have wanted to cross-examine and impeach Thomas about his case ultimately being amended from a Class B felony to a Class C felony with probation recommended (R.Tr.343). Counsel was unaware Spurling’s multiple casefiles were dismissed and would have wanted to impeach him with those facts (R.Tr.344-45).

Jailhouse informant Douglas Stallsworth alleged that Mr. Middleton made admissions while in the Harrison County Jail to killing Mr. Hamilton and Stacey Hodge. Middleton, 998 S.W.2d at 524. When Stallsworth was confined in the Harrison County Jail with Mr. Middleton, he was on parole for ten counts of forgery (T.Tr.677). Stallsworth was being held in the Harrison County Jail because he had picked-up a new forgery charge (T.Tr.678). On that latest forgery charge, Stallsworth was found not guilty by reason of insanity and was sent to a hospital (T.Tr.636,679). Around the time Stallsworth testified against Mr. Middleton, one of his treating psychiatrists had recommended a conditional release, but that recommendation was retracted when Stallsworth stole a purse from a socialworker's desk (T.Tr.642-43).

Counsel did not present any guilt phase evidence (T.Tr.787,799-800). During guilt closing argument, counsel focused on arguing Mr. Middleton was not guilty because respondent had failed to satisfy its burden of proof (T.Tr.811-27). More particularly, respondent had failed to prove its case because its primary witnesses were all drug-abusers with criminal records, some of whom were receiving favorable treatment in their cases for their testimony (T.Tr.811-27).

After arguing Mr. Middleton did not commit the charged acts, counsel called in penalty neuropharmacologist Dr. Lipman (T.Tr.936). Dr. Lipman testified that at the time of the alleged acts Mr. Middleton was suffering from delusions, hallucinations, and paranoia caused by his chronic methamphetamine use (T.Tr.961-64,974). Dr. Lipman further testified that at the time of the offense Mr. Middleton was suffering from the influence of extreme mental or emotional disturbance (T.Tr.977).

Dr. Lipman could have testified in guilt that Mr. Middleton could not have coolly reflected or deliberated because of his chronic state of methamphetamine psychosis, paranoia, and delusions (R.Tr.63-65). Dr. Lipman also believed Mr. Middleton's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired because of these mental infirmities (R.Tr.66-68). Counsel never sought from Dr. Lipman his opinions as to Mr. Middleton's ability to have deliberated or coolly reflected (R.Tr.68-69). Dr. Lipman would have told counsel that Mr. Middleton's behavior was influenced by his mental condition and his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was impaired (R.Tr.69-70).

Counsel's penalty opening statement (T.Tr.854) and closing argument (T.Tr. 1062-74) urged the jury not to sentence Mr. Middleton to death because he already had a death sentence from Adair County for the Pinegar killing. In penalty rebuttal, the prosecutor argued the jury should impose death to ensure Mr. Middleton would be executed because of how frequently Federal Courts of Appeals reverse death penalty cases (T.Tr.1074). This Court rejected a direct appeal challenge the prosecutor's arguments had diminished the jury's sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Middleton, 998 S.W.2d at 529-30. The prosecutor's argument was ruled proper retaliation to defense counsel's argument Mr. Middleton would be executed no matter what the jury did in this case and addressed the finality of the Pinegar death sentence. Id. 529-30.

Even though Mr. Middleton already had a death sentence for the Pinegar killing, the prosecutor urged the jury to impose death for the Hamilton and Hodge killings to punish Mr. Middleton for the Pinegar killing (T.Tr.1061,1075-76).

The Rule 29.15 amended motion pleadings included multiple claims. The pleadings included allegations counsel was ineffective in penalty opening statement and closing argument because the “rationale” argued for not imposing death was Mr. Middleton already had one death sentence for the Pinegar killing (R.L.F.88-97). Appellate counsel was also alleged to be ineffective for failing to challenge on appeal the admission of the Pinegar evidence (R.L.F.139-40) and arguments made about the frequency of federal appeals court reversals as being outside the record and based on factually false representations (R.L.F.137-38). The pleadings also alleged counsel failed to investigate and call Dr. Lipman in guilt to support a diminished capacity defense (R.L.F.38-40,161-63). Additionally, the pleadings alleged respondent failed to disclose deals with Thomas and Spurling (R.L.F.59-62,174-76,178-80).

From the denial of these claims and other claims Mr. Middleton raised, he brings this appeal.

POINTS RELIED ON

I. PINEGAR MATTERS SHOULD HAVE BEEN EXCLUDED

THE MOTION COURT CLEARLY ERRED IN DENYING CLAIMS COUNSEL WAS INEFFECTIVE IN MAKING PENALTY OPENING STATEMENTS AND ARGUMENTS OFFERING AS A “RATIONALE” TO NOT IMPOSE DEATH THAT MR. MIDDLETON ALREADY HAD A DEATH SENTENCE FOR THE PINEGAR KILLING AND COULD NOT BE KILLED MORE THAN ONCE, FAILING TO OBJECT TO RESPONDENT’S ARGUMENTS THAT THE JURORS SHOULD IMPOSE DEATH HERE BECAUSE FEDERAL COURTS OF APPEALS REVERSE DEATH PENALTY CASES WITH GREAT FREQUENCY SUCH THAT ADDITIONAL DEATH SENTENCES WERE NECESSARY TO ENSURE MR. MIDDLETON WOULD BE EXECUTED, FAILING TO OBJECT TO ANY USE OF THE PINEGAR KILLING BECAUSE UNDER § 565.032.2(1) THE PINEGAR KILLING WAS NOT RELEVANT BECAUSE IT OCCURRED AFTER THE HAMILTON AND HODGE KILLINGS, FAILING TO OBJECT TO RESPONDENT PRESENTING ANYTHING MORE THAN THE FACT OF THE CONVICTION FOR THE PINEGAR KILLING SUCH THAT THE DEATH SENTENCE AND CASE DETAILS WERE INADMISSIBLE, AND FAILING TO OBJECT TO ARGUMENT DEATH SHOULD BE IMPOSED FOR THE PINEGAR KILLING BECAUSE MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL

AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD NOT HAVE ACTED OR FAILED TO ACT AS NOTED AND MR. MIDDLETON WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY THAT LIFE WOULD HAVE BEEN IMPOSED.

Hall v. Washington, 106F.3d742(7thCir.1997);

State v. Storey, 901S.W.2d885(Mo.banc1995);

Randall v. State, 2001W.L.1137623(Ms. Sept. 27, 2001);

Commonwealth v. LaCava, 666A.2d221(Pa.1995);

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

§565.032; and

Liebman, Fagan, West, and Lloyd, Capital Attrition: Error Rates In Capital Cases, 1973-1995, 78Tex.L.Rev.1839(2000).

II. APPELLATE COUNSEL WAS INEFFECTIVE

THE MOTION COURT CLEARLY ERRED DENYING THE CLAIMS DIRECT APPEAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE TRIAL COURT HAVING ALLOWED THE PRESENTATION OF EVIDENCE AND ARGUMENT ABOUT THE PINEGAR KILLING AND ARGUMENT ABOUT THE DEATH PENALTY APPEALS PROCESS BECAUSE MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT APPELLATE COUNSEL WOULD HAVE RAISED THESE CLAIMS AND THERE IS A REASONABLE PROBABILITY MR. MIDDLETON'S CONVICTIONS AND/OR SENTENCES WOULD HAVE BEEN REVERSED.

State v. Collins, 669 S.W.2d 933 (Mo. banc 1984);

State v. Holbert, 416 S.W.2d 129 (Mo. 1967);

Caldwell v. Mississippi, 472 U.S. 320 (1985);

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995);

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

Liebman, Fagan, West, and Lloyd, Capital Attrition: Error Rates In Capital

Cases, 1973-1995, 78 TexL.Rev. 1839 (2000).

III. UNDISCLOSED DEALS

THE MOTION COURT CLEARLY ERRED IN DENYING THE CLAIMS RESPONDENT FAILED TO DISCLOSE DEALS MADE WITH JOHN THOMAS AND DAN SPURLING IN EXCHANGE FOR THEIR TESTIMONY BECAUSE THOSE RULINGS DENIED MR. MIDDLETON HIS RIGHTS TO DUE PROCESS, TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AND TO CONFRONT THE WITNESSES AGAINST HIM, U.S. CONST. AMENDS VI, VIII, AND XIV, IN THAT BOTH RECEIVED FAVORABLE DISPOSITION OF CHARGES BROUGHT AGAINST THEM IN EXCHANGE FOR THEIR TESTIMONY, THEY BOTH AFFIRMATIVELY REPRESENTED OTHERWISE, AND RESPONDENT ARGUED THERE WERE NO DEALS.

Hayes v. State, 711 S.W.2d 876 (Mo. banc 1986);

Giglio v. U.S., 405 U.S. 150 (1972);

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

Commonwealth v. Strong, 761 A.2d 1167 (Pa. 2000); and

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

**IV. MR. MIDDLETON LACKED THE REQUIRED MENTAL STATE FOR
FIRST DEGREE MURDER**

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL IN GUILT DRS. MURPHY, LIPMAN, AND DANIEL TO SUPPORT THE DEFENSE HE WAS NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT OR SUFFERED FROM A DIMINISHED CAPACITY AS EACH OF THESE WITNESSES WOULD HAVE TESTIFIED AT TRIAL IN GUILT THAT HE WAS PSYCHOTIC AT THE TIME OF THE OFFENSES SO AS TO HAVE SUPPORTED THESE DEFENSES BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE CALLED THESE WITNESSES IN GUILT TO TESTIFY ABOUT HIS PSYCHOSIS TO SUPPORT THESE GUILT DEFENSES AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY THAT HE WOULD NOT HAVE BEEN CONVICTED OF FIRST DEGREE MURDER OR AT MINIMUM NOT SENTENCED TO DEATH.

FURTHER, THE MOTION COURT CLEARLY ERRED IN REFUSING TO CONSIDER DR. LIPMAN'S OPINIONS AS THEY WERE THE PROPER SUBJECT OF TESTIMONY AFTER A SUFFICIENT FOUNDATION WAS PRESENTED BECAUSE THAT ACTION DENIED MR. MIDDLETON HIS

RIGHTS TO DUE PROCESS, A FULL AND FAIR HEARING, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VIII AND XIV, IN THAT THE MOTION COURT COULD NOT FULLY AND FAIRLY RULE ON THIS CLAIM WHEN IT REFUSED TO CONSIDER DR. LIPMAN'S OPINIONS.

State v. Harris, 870 S.W.2d 798 (Mo. banc 1994);

State v. Preston, 673 S.W.2d 1 (Mo. banc 1984);

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);

Henderson v. Fields, 2001 W.L. 1529262 (Mo. App., W.D. Dec. 4, 2001);

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

§552.010; and

§552.030.

V. FAMILY AND EMPLOYER MITIGATION

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL EMPLOYER AND FAMILY MITIGATION WITNESSES CHARLES WEBB, VERN WEBB, VIRGINIA WEBB, RUBY SMITH, SYLVIA PURDIN, AND GLENN WILLIAMS TO TESTIFY ABOUT HIS IMPAIRED COGNITIVE ABILITIES WHICH PRECEDED HIS HEAVY DRUG USE, AND THEREBY, OFFERED AN EXPLANATION FOR WHY HE MAY HAVE BECOME INVOLVED IN DRUGS; HIS WORK-ETHIC DILIGENCE TO DEMONSTRATE WHY HE WOULD BE A HARD-WORKING GOOD INMATE; AND HIS MOTHER'S INHALANT ABUSE WHICH MIGHT HAVE EXPLAINED WHY AS A CHILD HE WAS COGNITIVELY IMPAIRED BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND CALLED THESE WITNESSES AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THEIR TESTIMONY LIFE WOULD HAVE BEEN IMPOSED.

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

Jermyn v. Horn,1998W.L.754567(M.D.Pa. Oct.27, 1998), aff'd, Jermyn v. Horn,266F.3d257(3rdCir.2001);
Kenley v. Armontrout,937F.2d1298(8thCir.1991);
Strickland v. Washington,466U.S.668(1984); and
U.S. Const., Amends. VI, VIII and XIV.

VI. FAILURE TO PRESENT ALL MITIGATING EVIDENCE

- JANICE MIDDLETON

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ELICIT SUBSTANTIAL MITIGATING EVIDENCE FROM MR. MIDDLETON'S MOTHER, JANICE MIDDLETON, BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE PRESENTED THROUGH JANICE MIDDLETON ADDITIONAL EVIDENCE INCLUDING EVIDENCE OF MR. MIDDLETON'S MEDICAL PROBLEMS AT BIRTH, HEAD INJURY AS A CHILD, THE ABUSIVE ENVIRONMENT IN WHICH HE WAS RAISED BY A MENTALLY IMPAIRED MOTHER, THAT ENVIRONMENT'S ROLE IN HIS EARLY EXPOSURE TO CONTROLLED SUBSTANCES, AND THE LEARNING IMPAIRMENTS HE DISPLAYED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THIS TESTIMONY THEY WOULD HAVE IMPOSED LIFE.

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

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);

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

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

VII. PRIOR CONFINEMENT MITIGATION

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIMS MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL HIS IOWA CORRECTIONS COUNSELOR, JAKE NOONAN, AND TO INTRODUCE HIS IOWA CORRECTIONS FILE IN PENALTY TO SUPPORT A LIFE SENTENCE TO ESTABLISH HE HAD BEEN A WELL-BEHAVED AND WELL-ADJUSTED PRISONER IN IOWA, AND THEREFORE, COULD BE EXPECTED TO BE EQUALLY SUCCESSFUL IF SENTENCED TO LIFE BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND PRESENTED THIS EVIDENCE AND MR. MIDDLETON WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THIS EVIDENCE THEY WOULD HAVE IMPOSED LIFE.

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

Skipper v. South Carolina, 476 U.S. 1 (1986);

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);

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

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

VIII. FAILURE TO PRESERVE AND EVIDENTIARY INEFFECTIVENESS

THE MOTION COURT CLEARLY ERRED OVERRULING CLAIMS MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE WHEN COUNSEL:

- A. FAILED TO PRESERVE RESPONDENT EXAMINING DR. LIPMAN WHETHER HE BELIEVED MR. MIDDLETON HAD LIED TO HIM;**
- B. ELICITED FROM WILLIAM WORLEY THAT WORLEY SAW WHAT APPEARED TO BE A FRESHLY DUG GRAVE AT MR. MIDDLETON'S HOUSE;**
- C. FAILED TO OBJECT TO ARGUMENT DEATH WAS WARRANTED BECAUSE OF SOCIETY'S DRUG PROBLEM;**
- D. FAILED TO OBJECT TO QUESTIONING OF CECIL PETTIS THAT MR. MIDDLETON ATTEMPTED TWICE TO ESCAPE FROM JAIL;**
- E. FAILED TO ELICIT FROM DR. LIPMAN EVIDENCE MR. MIDDLETON'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED AND HAVE THE JURY SO INSTRUCTED;**
- F. FAILED TO OBJECT TO ARGUMENT THAT IF THE JURY COULD NOT IMPOSE DEATH FOR THIS CRIME THEN THERE COULD BE NO CRIME FOR WHICH IT COULD; BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST.**

AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD NOT HAVE SO ACTED AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY THAT HE WOULD HAVE BEEN SENTENCED TO LIFE.

FURTHER, THE MOTION COURT CLEARLY ERRED IN REFUSING TO ALLOW EVIDENCE ON THE ISSUE OF COUNSEL'S INEFFECTIVENESS FOR FAILING TO ELICIT FROM DR. LIPMAN EVIDENCE ABOUT MR. MIDDLETON'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR IMPAIRMENT OF HIS ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW BECAUSE THAT ACTION DENIED MR. MIDDLETON HIS RIGHTS TO DUE PROCESS, A FULL AND FAIR HEARING, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VIII AND XIV, IN THAT A SUFFICIENT FOUNDATION WAS PRESENTED AND THE MOTION COURT COULD NOT FULLY AND FAIRLY RULE ON THIS CLAIM (E SUPRA), WHEN IT REFUSED TO CONSIDER DR. LIPMAN'S OPINIONS.

State v. Link, 25 S.W.3d 136 (Mo. banc 2000);

State v. McCarter, 883 S.W.2d 75 (Mo. App., S.D. 1994);

Commonwealth v. LaCava, 666 A.2d 221 (Pa. 1995);

U.S. v. Villalpando, 259 F.3d 934 (8th Cir. 2001);

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

§ 565.032.

IX. FAILURE TO CALL BRIAN FIFER

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL BRIAN FIFER IN PENALTY TO TESTIFY HE WAS CONFINED IN IOWA WITH MR. MIDDLETON AND THAT AN INMATE INFORMING SOMEONE OUTSIDE A PENAL FACILITY HE INTENDED TO “SELL THEIR ADDRESS” MEANT THE INMATE NO LONGER INTENDED TO WRITE THE PERSON BECAUSE THAT PERSON HAD NOT WRITTEN BACK AND DOES NOT CONSTITUTE A THREAT TO HARM BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND CALLED THIS WITNESS TO REFUTE RESPONDENT’S PORTRAYAL OF MR. MIDDLETON HAVING USED THIS PHRASE AS A THREAT TO HARM AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THIS EVIDENCE THEY WOULD HAVE IMPOSED LIFE.

Kenley v. Armontrout, 937F.2d1298(8thCir.1991);

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

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

X. EVIDENCE SPURLING DID KILLINGS

THE MOTION COURT CLEARLY ERRED IN REJECTING CLAIMS COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE TO SHOW DAN SPURLING, AND NOT MR. MIDDLETON, KILLED MR. HAMILTON AND STACEY HODGE BECAUSE MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED UNDER U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE PRESENTED EVIDENCE THROUGH A FIREARMS EXPERT, DON SMITH, THAT THE BULLET FRAGMENTS RECOVERED FROM STACEY HODGE COULD HAVE COME FROM A BULLET FIRED FROM A GUN BELONGING TO SPURLING AND WOULD HAVE CALLED JEREMY WYATT TO TESTIFY SPURLING MADE ADMISSIONS HE COMMITTED THE KILLINGS AND THERE IS A REASONABLE PROBABILITY MR. MIDDLETON WOULD NOT HAVE BEEN CONVICTED OF FIRST DEGREE MURDER OR AT WORST HE WOULD HAVE BEEN SENTENCED TO LIFE.

Kenley v. Armontrout, 937F.2d1298(8thCir.1991);

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

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

XI. CLEMENCY ARBITRARINESS

THE MOTION COURT CLEARLY ERRED DENYING MR. MIDDLETON'S CLAIM MISSOURI'S CLEMENCY PROCESS VIOLATES HIS RIGHTS TO DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND EQUAL PROTECTION, U.S. CONST. AMENDS. VIII AND XIV, IN THAT THE PROCESS IS WHOLLY ARBITRARY AND CAPRICIOUS AS THE CLEMENCY OF TRIPLE MURDERER MEASE EVIDENCES. MEASE WAS GRANTED CLEMENCY NOT ON THE MERITS OF HIS CASE, BUT BECAUSE OF THE POPE'S APPEAL ON RELIGIOUS GROUNDS.

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998);

Duvall v. Keating, 162 F.3d 1058 (10th Cir.), cert. denied, 525 U.S. 1061 (1998);

State v. Mease, 842 S.W.2d 98 (Mo. banc 1992);

Gregg v. Georgia, 428 U.S. 153 (1976);

U.S. Const. Amends. VIII and XIV; and

§ 565.035.

ARGUMENT

I. PINEGAR MATTERS SHOULD HAVE BEEN EXCLUDED

THE MOTION COURT CLEARLY ERRED IN DENYING CLAIMS COUNSEL WAS INEFFECTIVE IN MAKING PENALTY OPENING STATEMENTS AND ARGUMENTS OFFERING AS A “RATIONALE” TO NOT IMPOSE DEATH THAT MR. MIDDLETON ALREADY HAD A DEATH SENTENCE FOR THE PINEGAR KILLING AND COULD NOT BE KILLED MORE THAN ONCE, FAILING TO OBJECT TO RESPONDENT’S ARGUMENTS THAT THE JURORS SHOULD IMPOSE DEATH HERE BECAUSE FEDERAL COURTS OF APPEALS REVERSE DEATH PENALTY CASES WITH GREAT FREQUENCY SUCH THAT ADDITIONAL DEATH SENTENCES WERE NECESSARY TO ENSURE MR. MIDDLETON WOULD BE EXECUTED, FAILING TO OBJECT TO ANY USE OF THE PINEGAR KILLING BECAUSE UNDER § 565.032.2(1) THE PINEGAR KILLING WAS NOT RELEVANT BECAUSE IT OCCURRED AFTER THE HAMILTON AND HODGE KILLINGS, FAILING TO OBJECT TO RESPONDENT PRESENTING ANYTHING MORE THAN THE FACT OF THE CONVICTION FOR THE PINEGAR KILLING SUCH THAT THE DEATH SENTENCE AND CASE DETAILS WERE INADMISSIBLE, AND FAILING TO OBJECT TO ARGUMENT DEATH SHOULD BE IMPOSED FOR THE PINEGAR KILLING BECAUSE MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL

AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD NOT HAVE ACTED OR FAILED TO ACT AS NOTED AND MR. MIDDLETON WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY THAT LIFE WOULD HAVE BEEN IMPOSED.

The motion court rejected several claims related to opening statements, argument, and use generally of Mr. Middleton's conviction and death sentence for the Pinegar killing. Counsel failed to act as reasonably competent counsel and there is a reasonable probability Mr. Middleton would have been sentenced to life. Mr. Middleton was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const., Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State, 850 S.W.2d 348, 350 (Mo. banc 1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). Sentencing someone to death is cruel and unusual punishment if the punishment is meted out arbitrarily and capriciously. Furman v. Georgia, 408 U.S. 238 (1972). The trial and sentencing phases of a capital case must satisfy the requirements of the Due Process Clause. Gardner v. Florida, 430 U.S. 349, 358 (1977).

While substantial latitude is given to counsel as to matters of trial strategy, counsel is not given "unconstrained discretion" State v. McCarter, 883 S.W.2d 75, 78 (Mo. App.,

S.D.1994). Counsel’s strategy “must be reasonable under prevailing professional norms.” McCarter,883S.W.2d at 78(relying on Strickland, emphasis in McCarter). Counsel is required “to exercise ‘sound trial strategy.’” McCarter,883S.W.2d at 78 (quoting Porter v. State,682S.W.2d16,19(Mo.App.,W.D.1984)). Some trial strategy decisions can be so unsound as to constitute ineffectiveness. McCarter,883S.W.2d at 78.

A. OPENING STATEMENT AND CLOSING ARGUMENTS

In counsel’s penalty opening statement, the jury was told “as ironic as you may think it seems, I’m going to come back and I’m going to ask you to spare the life of this man who’s already on death row.” (T.Tr.854).

In respondent’s initial penalty argument, the jury was told “the very first” aggravator it should find was Mr. Middleton’s Pinegar killing conviction (T.Tr.1056-57).³ The prosecutor then proceeded to recount Stallsworth’s testimony of what Mr. Middleton allegedly had said about how the Pinegar killing was carried-out (T.Tr.1056-57).

The defense argument included:

MS. DAVIS: Never have had to ask a jury to spare the life of a man who’s already on death row. That’s exactly what I’m asking you to do. And it might be said why? Why does it matter? And it might be said why weren’t we told about this when we all came together on Monday? When it

³ The text of all the penalty arguments is included in this brief’s Appendix.

might be said that, you know, any decision you make here is going to be kind of scratched off the list by what's already gone before you as jurors.

**** (T.Tr.1062)

The fact of the matter is John Middleton can only be killed once. And he's already under a sentence of death. John Middleton can only be strapped down to a gurney one time and only once can a needle be inserted into his arm and only once can a lethal dose of poison be injected into his body and only once can John Middleton give up a life, have his life taken in return for these cases. And these families can only see that happen one time. And when that one time is over, ladies and gentlemen, as he's already under a sentence of death, they're going to have to go home and they're going to have to do what they've been doing this whole time. They've been carrying on with their lives. They've been living. They've been raising their children. They've been loving each other. They've been supporting each other. They've been surviving. And they've been surviving good and in style. And they will continue to do that no matter how many sentences of death this man is under.

And it might be said that you should impose two more sentences of death to make a total of three sentences of death because maybe he won't be executed the first time around. Missouri is a killing state. We're right up there behind Texas and Florida. We kill our killers. We do that in Missouri.

***** (T.Tr.1064-65).

MS. DAVIS: In those rare occasions when you might have heard somebody under a sentence of death has had their life spared, chalk it up to a higher intervention.

Three sentences of death is excessive. Three sentences of death is wrong. And it might be said to you that three murders is wrong too. We're not condoning that. We agree. Three murders is wrong. Any murder is wrong. We're not asking you to set John free. We're asking you to look at the evidence in this case. And we're asking you to consider the reasons that people came in and testified to what they did. And we're asking you to hold the State to its burden of proof. The fact of the matter is, there's no question that John was convicted for the murder of Alfred Pinegar. So the statutory aggravating circumstances there, I think it's their first one that he's been convicted for a prior murder has been proven. We cannot disprove that. But he's under a sentence of death, ladies and gentlemen. He's already a condemned man and you're being asked to condemn him again and again. And that's excessive. And it's wrong.

We're not asking you for anything other than a sentence of life in prison without parole for whatever the remainder of his life will be. We're asking you to impose no additional death sentences. Additional sentences of death, it's such a waste. And to sentence a man to death three times, I

will make this argument to you, it shows the same disregard for the sanctity of all human life that they claim.

***** (T.Tr.1065-66)

MS. DAVIS: Asking for a man to be condemned again and again and again shows disregard for the sanctity of all human life that they are claiming John showed for Al, for Randy and for Stacey.

**** (T.Tr.1066)

You understand this man is not getting out. You state with a verdict of life in prison without parole or probation on those two murder charges that you know this man is condemned but you're not going to take any further steps to condemn him any further.

**** (T.Tr.1067)

Common sense should prevail here because it remains that he can only be killed one time.

(T.Tr.1067).

Respondent's rebuttal argument included:

MS. KOCH: Ms. Davis may be real sure that this defendant isn't going to get out, but I'm not.

MS. DAVIS: Objection, personalization. Calls for speculation, Judge.

THE COURT: The objection will be overruled. Proceed.

MS. KOCH: Ms. Davis mentioned to you about those few occasions where a person's life is spared. She didn't talk to you about the many appeals that people go through.

MS. DAVIS: Judge, I'm going to object to the levels of appeal. That's not relevant and not been evidence in this trial.

THE COURT: The objection will be overruled. Proceed.

MS. KOCH: She didn't talk to you about the many different levels of appeals that these cases go through. She didn't talk to you about the Federal Court of Appeals and how often those cases get overturned on appeal because they're death penalty cases. She didn't talk to you about any of that, did she?

**** (T.Tr.1074)

And show him as much mercy as he showed for Al Pinegar who he shot twice in the back.

**** (T.Tr.1076)

The prosecutor then argued that because of society's drug problems death should be imposed and that two additional death sentences would constitute "an insurance policy" (T.Tr.1078-79). See, also, Point VIII.

B. FINDINGS

The claims found in 8(Y), relating to penalty opening and closing arguments were rejected on the grounds that counsel exercised reasonable strategy making "a conscious

decision” not to object to all objectional matters and it was not shown the outcome would have changed (R.L.F.532).

On the 8(Z) claim, the motion court ruled that counsel’s opening statement and closing argument were part of a reasonable strategy that additional death sentences were unnecessary and excessive (R.L.F.533).

On the 8(AA) claims, the motion court ruled counsel was not ineffective for failing to object to evidence of circumstances surrounding the three homicides because those matters were admissible and appropriate for the sentencing determination and there was no showing of any probability the result would have changed (R.L.F.533-35).

C. RESPONDENT CAN ONLY KILL MR. MIDDLETON ONCE

The pleadings (8(Z) (3) and 8(Z) 4(a),(e),(f),(g),(h), and (m)) alleged multiple related claims counsel was ineffective in penalty opening statement and closing argument because the “rationale” given for not imposing death was Mr. Middleton already had one death sentence (R.L.F.88-97).

The overriding theme of counsel’s opening statement and argument supra was the jury should impose life not because under the facts of this case that is what the law required, but rather the jury should not follow the law because Mr. Middleton already had a death sentence. This argument was not reasonable and it invited respondent to counter with retaliatory false outside the record representations about the frequency of Federal Courts of Appeals reversals of death penalty cases which made it necessary to impose additional death sentences to ensure Mr. Middleton was executed.

Sentencing relief was granted the petitioner, even under AEDPA, in Hall v. Washington, 106F.3d742(7thCir.1997) for actions similar to those of Mr. Middleton’s counsel. Hall’s counsel, like counsel here, see Points V, VI, VII, failed to investigate readily available mitigating evidence. Id.746,752. In arguing against death, counsel urged the sentencing judge to disregard the law of Illinois and decide punishment on wholly extralegal grounds. Id.750. Rather than rely on legally sufficient grounds such as particular mitigating evidence, counsel relied on “sweeping and largely irrelevant appeals to the judge’s personal beliefs and religious principles.” Id.750. Counsel’s argument included death was inappropriate because ““vengeance is not ours to assert””. Id.750. Counsel’s argument amounted to the functional equivalent of jury nullification and asked the sentencing judge to ignore Illinois’ valid law and decide punishment on an entirely extralegal basis. Id.750. The lack of focus on Halls’ individual character and irrelevant considerations caused counsel’s argument to not be reasonable strategy under Strickland. Id.750. The combination of the failure to present available mitigating evidence and counsel’s argument for the judge to not follow the law required reversal. Id.752.

Counsel’s argument the jury should impose life not because that was what Missouri law called for, but because Mr. Middleton already had one death sentence and the State could not kill him more than once was ineffective for the reasons Hall recognized. Counsel argued for jury nullification and urged the jury to decide punishment on an entirely extralegal basis. See Hall. Counsel’s argument did not constitute reasonable strategy under Strickland. See Hall. Like Hall, the absence of relevant mitigating evidence and proper argument requires reversal. Counsel’s argument

that imposing death for these killings reflects the same disregard for the sanctity of human life (T.Tr.1066) is the equivalent of telling the jury ““vengeance is not ours to assert””. See Hall,106F.3d at 750.

Counsel Turlington indicated Counsel Davis was responsible for objecting to matters involving Mr. Middleton’s prior convictions (R.Tr.308). Counsel Davis testified her opening statement and arguments the jury should sentence Mr. Middleton to life because he could only be killed once were her strategy to persuade the jury to vote for life because it would be excessive to vote for additional death sentences (R.Tr.357-58,360-61,401-07). Counsel’s strategy was not a reasonable strategy. See Hall and McCarter.

On direct appeal, this Court rejected the challenge made to the prosecutor’s rebuttal argument dealing with the appeals process and the alleged high frequency of Federal Courts of Appeals death penalty reversals. State v. Middleton,998S.W.2d520, 529-30(Mo.banc1999). Specifically, this Court rejected the claim brought under Caldwell v. Mississippi,472U.S.320(1985) that the prosecutor’s argument diminished the jury’s sense of responsibility. This Court reasoned the prosecutor’s argument was proper retaliation to defense counsel’s argument Mr. Middleton would be executed no matter what the jury did in this case and addressed the finality of the Pinegar death sentence. Middleton,998S.W.2d at 529-30.

What defense counsel’s argument did was open the door to factually false outside the record retaliatory argument as portraying federal courts as granting relief with great frequency in capital appeals such that additional death sentences were needed to ensure

Mr. Middleton was executed. A comprehensive study and analysis of all the capital cases that were reviewed by state appellate courts and those in federal habeas corpus courts between 1973 and 1995 found only 10% of all reversals occurred in federal court.

Liebman, Fagan, West, and Lloyd, Capital Attrition: Error Rates In Capital Cases, 1973-1995, 78Tex.L.Rev.1839,1844,1849,1855(2000). What these statistics indicate is that the prosecutor's portrayal here of the need to fear federal judges as predisposed to overturn capital sentences, and therefore impose death again, is factually false. The prosecutor's argument injected arbitrariness in the punishment decision because it urged death for reasons unrelated to the acts Mr. Middleton was charged with committing. Moreover, in light of the narrowed scope of federal court review mandated under the AEDPA, the federal court reversal rate can expected to be lowered. See Terry Williams v. Taylor, 529U.S.362,375-90(2000)(interpreting and explaining AEDPA standard of contrary to or involving an unreasonable application of clearly established Federal law). Without defense counsel's argument, the prosecutor would not have been able to make factually false outside the record and contrary to Caldwell arguments.

Counsel's argument was also unreasonable because it lessened the jury's sense of responsibility as to the punishment decision and was contrary to the principles embodied in Caldwell. That argument effectively told the jury that what it did really did not matter because Mr. Middleton was already subject to a death sentence, and therefore, proceeding to impose additional death sentences was not to be undertaken with the same sense of ominousness for someone who did not already have a death sentence.

Reasonably competent counsel under similar circumstances would not have made these appeals in opening statement and during argument because they urged the jury to not impose death for reasons that are contrary to Missouri law, failed to urge the jury that life was warranted because of legally proper grounds and particular mitigating evidence, invited factually false retaliatory argument, and lessened the jury's sense of responsibility under Caldwell. Mr. Middleton was prejudiced because there is a reasonable probability that he would have been sentenced to life absent counsel's actions. See Hall.

D. FAILURE TO ADEQUATELY OBJECT TO APPEALS PROCESS

ARGUMENT

The pleadings (8(Y) 4(y) and (z)) alleged counsel was ineffective for failing to completely and properly object to the prosecutor's rebuttal argument about the appeals process that this Court concluded was proper retaliation (R.L.F.85-87). Counsel should have: (1) objected again to the argument about "how often those cases get overturned", (T.Tr.1074); (2) objected as arguing outside the evidence; (3) objected that the argument was factually false; and (4) objected it was improper to suggest if death was not imposed, then Mr. Middleton could be released (R.L.F.85-87).

In State v. Storey, 901S.W.2d886,900-01(Mo.banc1995), the prosecutor argued that case was among the most brutal in St. Charles County's history. That argument was improper because it relied on facts outside the record. Id.900-01. Also, the argument was improper because "[a]ssertions of fact not proven amount to unsworn testimony by the prosecutor." Id.901. Because there was no evidence about the brutality of other St. Charles County murders, the argument was improper. Id.901. This Court noted that a

prosecutor arguing facts outside the record is highly prejudicial “because the jury is aware of the prosecutor’s duty to serve justice, not just win the case.” Id.901(relying on Berger v. United States,295U.S.78,88(1935)). This Court concluded counsel was ineffective for failing to object to this argument and other prosecutorial arguments. Storey,901S.W.2d at 900-03.

Counsel Davis did not know why she failed to object to respondent’s rebuttal penalty arguments that death was required because of the frequency of reversals by the Federal Courts of Appeals on the grounds respondent was making false representations that were outside the record (R.Tr.407-08). Counsel Davis did not have any reason for failing to object to argument suggesting Mr. Middleton could be released someday if death was not imposed (R.Tr.408-09). Counsel Davis had not wanted to open the door to argument by respondent about the federal appeals court reversal rate and Mr. Middleton someday being released (R.Tr.409-10).

Under Storey, reasonably competent counsel under similar circumstances would have renewed her objections, objected on the grounds respondent was arguing outside the evidence factually false matters, and objected to argument about release considerations found to be error in cases such as State v. Jordan,420So.2d420,426-27(La.1982) (argument that defendant should be sentenced to death to avoid possibility of a Parole Board pardon required reversal of death sentence). Mr. Middleton was prejudiced because there is a reasonable probability life would have been imposed.

E. PINEGAR KILLING NOT STATUTORILY AUTHORIZED

The pleadings (8(Y) 4(b) and 8(AA) 3(aa)) alleged counsel was ineffective for failing to object to penalty opening statement references, evidence, and argument about the Pinegar killing as an aggravator (R.L.F.68-69,117-18). On both counts, one of the aggravators the jury found was the Pinegar killing (T.L.F.643-44). That occurrence was offered as a statutory aggravator under §565.032.2(1).

In penalty opening statement, respondent told the jury it would hear evidence about Mr. Middleton's conviction for killing Mr. Pinegar and that was an aggravator (T.Tr.848). Counsel did not object to the admission of evidence of the Pinegar conviction being introduced and limited her objections to respondent passing to the jury the documents evidencing that conviction (T.Tr.925-26). Respondent argued the Pinegar killing as an aggravator (T.Tr.1056-57,1076).

Respondent alleged the Hamilton and the Hodge killings took place on June 11, 1995 (See, e.g., T.L.F.382-83). Respondent alleged the Pinegar killing took place after the other two, on June 23, 1995 (See, e.g., Adair T.L.F. 23-24).

Section 565.032.2(1) authorizes submission as an aggravator: “[t]he offense was committed by a person with a prior record of conviction for murder in the first degree” In State v. Harris, 870S.W.2d798,813(Mo.banc1994)(emphasis added), this Court stated: “Section 565.032.2(1) allows the jury to consider only those convictions for first degree murder committed prior to the charged offense; no such limitation is imposed for serious assaultive offenses.” Because the Pinegar killing was “committed” after the Hamilton and Hodge killings it was not properly an aggravator under Harris. Counsel

Davis did not know why she failed to object to respondent introducing evidence of Mr. Middleton's conviction for the Pinegar killing on the grounds the Pinegar killing occurred after the Hamilton and Hodge killings (R.Tr.353-54,373-74). In light of Harris, reasonably competent counsel under similar circumstances would have opposed all instances of respondent utilizing the Pinegar killing as an aggravator. Mr. Middleton was prejudiced because there is a reasonable probability that the jury would have voted for life.

Even though the jury found other aggravating circumstances, there still is a reasonable probability that had the jury not heard about the Pinegar murder it would have voted for life. Knowing that a defendant has killed before could cause an otherwise fair-minded juror to disregard mitigating evidence. State v. Biegenwald,594A.2d172,187 (N.J.1991). The probability a death sentence will be imposed is increased 520% for each prior murder conviction of a capital defendant. Id.187(relying on Baldus, Woodworth, and Pulaski, Equal Justice and the Death Penalty,318-20(1990)). Because of the substantial prejudice a prior murder conviction injects, Mr. Middleton was prejudiced.

F. PINEGAR KILLING – SENTENCE AND DETAILS INADMISSIBLE

The pleadings (8(Z) 4(a),(e),(f); 8(AA) 3(aa); 8(AA) 4(h)) alleged counsel was ineffective for injecting the Pinegar death sentence through penalty opening statement, presenting evidence and making argument, and for failing to object to respondent relying on the Pinegar death sentence (R.L.F.89-93,117-18,129-30). Specifically counsel was ineffective because if it is assumed §565.032.2(1) authorized use of the Pinegar killing as

an aggravator, it still only authorized the admission of the fact of the murder conviction and not the death sentence (R.L.F.89-93,117-18,129-30).

Besides, counsel's opening statement and argument, supra, counsel also elicited evidence through two penalty phase witnesses, Mr. Middleton's mother and Potosi psychologist, Ms. Weber, that Mr. Middleton was already under a death sentence for the Pinegar killing (T.Tr.1003,1020,1049). Counsel Davis testified she elicited this evidence from Weber because her primary purpose was to present evidence Mr. Middleton was a good inmate (R.Tr.378-79). Ms. Davis testified she elicited evidence about Mr. Middleton's Pinegar death sentence from his mother because she wanted the jury to know Mr. Middleton's death sentence adversely impacted his family (R.Tr.379). These were not reasonable strategy reasons for injecting the Pinegar matters. See Hall, McCarter supra.

The pleadings (8(Y) 4(a); 8(AA) 3(u)) also alleged counsel was ineffective for failing to object to respondent's opening statement, evidence, and argument on the Pinegar killing (R.L.F.67-68,112-13). Specifically, even assuming §565.032.2(1) authorized use of the Pinegar killing, it only allowed the use of the conviction and not the underlying factual details of that case (R.L.F.67-68,112-13).

Respondent called Richard Pardun who testified Mr. Middleton had a "hit list" containing Mr. Pinegar's name and that Mr. Middleton had asked Pardun to get him some shells for a 9mm and an SKS (T.Tr.899). Counsel Davis did not see anything objectionable about the Pinegar evidence respondent presented through Pardun (R.Tr.370-71).

Respondent called Douglas Stallsworth to testify Mr. Middleton had said he was afraid Pinegar would “roll over on him” for dealing methamphetamine; Mr. Middleton said he did not want to go back to prison; Mr. Middleton shot Pinegar with a .12 gauge gun and dumped him over a fence; Mr. Middleton said the shotgun was in the truck with other guns; and Mr. Middleton had a “hit list” (T.Tr.927-29,932). Counsel Davis did not see anything objectionable as to the Stallsworth matters (R.Tr.387).

Section 565.032.2(1) authorizes as an aggravator: “[t]he offense was committed by a person with a prior record of conviction for murder in the first degree....” That provision does not authorize the admission of the sentence imposed for a prior murder or its factual details. This Court has long adhered to the principle criminal statutes are to be strictly construed against the State and liberally construed in favor of a defendant. See, e.g., State v. Getty, 273 S.W.2d 170, 172 (Mo. 1954). Because §565.032.2(1) neither authorized the admission of the sentence for a conviction for first degree murder nor the details of that offense, the Pinegar death sentence and details of that offense were not a proper subject at Mr. Middleton’s trial.

Counsel Davis did not know why she failed to object to respondent’s argument about details of the Pinegar killing other than the jury had heard evidence about it (R.Tr.387). Reasonably competent counsel under similar circumstances would not have injected these Pinegar matters and would have objected to all occurrences of respondent injecting these Pinegar matters. Mr. Middleton was prejudiced because there is a reasonable probability he would have been sentenced to life (See supra 520% increase in

likelihood of death sentence when jury hears evidence of other murder conviction of defendant).

G. IMPOSE DEATH FOR PINEGAR KILLING

The pleadings (8(Y) 4(h)) alleged counsel was ineffective for failing to object to arguments that told the jury to impose death for having killed Mr. Pinegar (R.L.F.75-76). Those arguments included respondent's initial penalty argument's conclusion:

MS. KOCH: You as jurors have to make up your own minds.

There's no question the aggravators are here. No question whatsoever.

And there really should not be any question now that justice demands that this man be held accountable not for just one murder but for all three murders. And that's what we ask you to do.

THE COURT: Argument by the defense.

**** (T.Tr.1061) (emphasis added).

The prosecutor's rebuttal penalty argument included:

MS. KOCH: She got up here and tried to guilt-trip you folks in trying to make you think that you're the same as this man if you give him the death penalty. You didn't go out and commit a crime. This man went out and committed not one, not two, but three murders and threatened the lives of at least three other people. You didn't do that. He did. It's for his acts he's on trial. And it's for his acts he needs to be punished. That's the whole point.

**** (T.Tr.1075) (emphasis added).

Ms. Davis talked to you about mercy. Mercy is something that the strong give the weak and helpless. And there is nothing helpless about a man who goes out and systematically eliminates the people that might put him in jail for life. Show him as much mercy as he showed Stacey who he shot four times in the back. Show him as much mercy as he showed Randy who he shot twice in the back. And show him as much mercy as he showed for Al Pinegar who he shot twice in the back.

(T.Tr.1075-76)(emphasis added).

The prosecutor's arguments were improper because they urged the jury to impose death for the deaths of Mr. Hamilton and Ms. Hodge because Mr. Middleton had killed Mr. Pinegar. This argument injected arbitrariness into the sentencing decision through advocating for death for a crime which Mr. Middleton was not then on trial and for which he had already been punished with death.

The defendant's conviction and death sentence were reversed in Randall v. State, 2001W.L.1137623(Ms. Sept. 27, 2001). One ground that required reversal was the prosecutor's penalty argument death should be imposed because of the defendant's previous capital murder conviction in an unrelated case. Id.*35-*36. The argument was improper because it served only to inflame and prejudice the jury. Id.*36. The same occurred in Mr. Middleton's penalty phase and served only to unfairly inflame and prejudice the jury.

The prosecutor's argument is also similar to the improper one made in Commonwealth v. LaCava,666A.2d221(Pa.1995). There, the prosecutor focused on

arguing for death because the defendant was a drug dealer and the ills drug dealing impose on society, rather than for the proper reason that he had brutally killed a police officer. Id.235-37. Trial counsel was found ineffective for failing to object to this improper argument. Id.237. That argument was improper because it shifted the jury's focus from the legally proper aggravating circumstance, the killing of a police officer, to a larger general victimization of society by drug dealers. Id.237.

In Mr. Middleton's case, the prosecutor shifted the jury's proper focus from sentencing Mr. Middleton to death for the Hamilton and Hodge killings to the illegitimate purpose of punishing him for the Pinegar killing when he already had been sentenced to death for killing Mr. Pinegar. Counsel Davis testified that she should have objected to respondent's argument to impose death because of the Pinegar killing (R.Tr.390). Reasonably competent counsel under similar circumstances would have objected to this argument. Mr. Middleton was prejudiced because there is a reasonable probability he would have been sentenced to life. See LaCava.

For all the reasons noted, a new penalty phase is required because Mr. Middleton was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment.

II. APPELLATE COUNSEL WAS INEFFECTIVE

THE MOTION COURT CLEARLY ERRED DENYING THE CLAIMS DIRECT APPEAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE TRIAL COURT HAVING ALLOWED THE PRESENTATION OF EVIDENCE AND ARGUMENT ABOUT THE PINEGAR KILLING AND ARGUMENT ABOUT THE DEATH PENALTY APPEALS PROCESS BECAUSE MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT APPELLATE COUNSEL WOULD HAVE RAISED THESE CLAIMS AND THERE IS A REASONABLE PROBABILITY MR. MIDDLETON'S CONVICTIONS AND/OR SENTENCES WOULD HAVE BEEN REVERSED.

The motion court denied Mr. Middleton's claims direct appeal counsel was ineffective for failing to raise as error the trial court having allowed: (1) the presentation of evidence and argument about the Pinegar killing; and (2) argument about the death penalty appeals process. Mr. Middleton was denied his rights to effective assistance of appellate counsel, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State, 850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise

customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984).

A defendant is entitled to effective assistance of appellate counsel. Evitts v. Lucey,469U.S.387,396-97(1985). See, also, Roe v. Delo,160F.3d416(8thCir.1998) (failure to raise viable issues on appeal constitutes appellate counsel ineffectiveness). To be entitled to relief on a claim of appellate ineffectiveness the error not raised must have been so substantial as to rise to the level of a manifest injustice or a miscarriage of justice. Moss v. State,10S.W.3d508,514-15(Mo.banc2000). A death sentence constitutes cruel and unusual punishment if that punishment is meted out arbitrarily and capriciously. Furman v. Georgia,408U.S.238(1972). Both the guilt and penalty phases of a capital trial must satisfy the requirements of the Due Process Clause. Gardner v. Florida,430U.S.349,358(1977).

The motion court found appellate counsel raised the issues she believed had merit and did not appeal those she believed lacked merit (R.L.F.525). Also, the motion court ruled that this Court's Moss ineffectiveness standards were not met (R.L.F.535).

A. PINEGAR EVIDENCE

Respondent called John Thomas to testify Mr. Middleton had made statements that he thought that Mr. Hamilton was a snitch and something had to be done about Mr. Hamilton (T.Tr.558-59). Thomas testified that when he was at Mr. Middleton's house he had seen Mr. Hamilton's "stash box" and Mr. Middleton had said "the guy who owned that box wouldn't be needing it no more" (T.Tr.558).

Cross-examination of Thomas included:

Q. So when you're over there that morning, 7 a.m. and you see "Happy's" stash box there at John's house, you don't run to the police right away and tell them that John's got "Happy's" stash box, do you?

A. No.

(T.Tr.576).

After cross-examination, the following occurred:

THE COURT: Redirect.

MS. KOCH: Can we approach the bench?

(Counsel approached the bench and the following proceedings were had):

MS. KOCH: Defense counsel I believe has now opened up the door on Alfred Pinegar. She asked this witness whether or not he didn't go, he made the comment he didn't go running to the police when he found out about "Happy's" stash box. My question I would like to propound to the witness is "Why didn't you go to the police at that time" and then "When did you go to the police and why?"

THE COURT: Leave granted.

MS. DAVIS: Judge, excuse me. I'd like a clarification. I object to State's statement that I've opened the door to Al Pinegar. I don't think asking him when he went to the police is opening the door to the evidence about the Al Pinegar murder can come in at this time.

I think that was obviously asking for dates and time.

THE COURT: No, the question that was asked on cross-examination was “You didn’t go to the police after you saw the stash box.” That was the question you asked. The objection is overruled.

MS. DAVIS: Wait a minute, Judge. I don’t understand the ruling here. Are you saying she’s now able to get into the evidence of the Al Pinegar murder?

THE COURT: I don’t know what he’s going to say. If you raise the question he didn’t go to the police, then she’s entitled to --

MS. DAVIS: Then I withdraw the question and ask the jury be instructed to disregard.

THE COURT: No. The objection will be overruled. Let’s proceed.

(T.Tr.577-78).

Respondent then elicited from Thomas that he went to the police when Mr. Pinegar’s body was found because Mr. Middleton had indicated Alfred (Pinegar) was a snitch Mr. Middleton had said needed to be taken care of (T.Tr.578-81). On subsequent occasions, when defense counsel was concerned respondent might attempt to elicit additional evidence about the Pinegar killing, counsel objected and respondent indicated it did not plan to do so (T.Tr.754-55,764-65).

In guilt rebuttal argument, respondent argued Thomas’ “stash box” testimony and its relationship to the Pinegar killing (T.Tr.828). Defense counsel’s objection was overruled (T.Tr.828). After respondent had concluded its guilt rebuttal argument,

defense counsel also requested a mistrial based on this Pinegar argument (T.Tr.833-34). That requested was denied (T.Tr.833-34).

The argument record was as follows:

Have you ever wondered why the defendant went to each one of these people and he told them he killed “Happy”? He went to his friends and associates, told them he’d killed “Happy”. Why would that be? Well, it was because he wanted to scare them. And it worked. For a while. It worked because, and John Thomas told you this, when the defense attorney asked him about that stash box, he didn’t think anything about that stash box. Not until Al Pinegar’s body turned up dead. Because when he went through the list of snitches, he said Al and “Happy.” And “Happy” had been missing. Al Pinegar’s body turned up dead on the 29th.

MS. TURLINGTON: Objection to this line of argument.

THE COURT: The objection will be overruled.

MS. KOCH: Al Pinegar’s body turned up on June 26th.

“Happy” had been missing since June 10th. What do you think these people thought? After he said he did “Happy”? They thought they were next. Dan Spurling was so scared, he was moving around all over the place. They finally caught up to him in Iowa and he talked to them in Iowa which is where he picked up the weapons charge.

(T.Tr.828).

The motion for new trial included the admission of the Pinegar evidence, the overruling of the objection to argument about the Pinegar evidence, and the denial of the request for a mistrial based on that argument (T.L.F.670,674-75).

The pleadings alleged appellate counsel was ineffective for failing to raise on appeal the trial court's ruling allowing evidence of the Pinegar killing (R.L.F.139-40). Direct appeal counsel testified she did not raise a claim as to the admission of the Pinegar evidence because she did not consider this evidence particularly significant and defense counsel may have opened-up this subject (R.Tr.185-86). Direct appeal counsel testified she did not raise a claim as to closing argument about this evidence because she felt that counsel's objection was not sufficiently specific to have preserved the claim (R.Tr.187-88).

In State v. Collins, 669 S.W.2d 933, 935-36 (Mo. banc 1984), the defendant was charged with selling marijuana and respondent introduced evidence of a marijuana delivery by the defendant one month before the charged offense. The defendant had testified that he had seen the undercover informant who had made the purchase from him on one prior occasion, but that the informant had remained in a car while the informant's companion, Woods, had gotten out at the defendant's house. Id. 935. Respondent called Woods, in rebuttal, to testify that the informant had gotten out of the car, the three had sat down together at a table, and the defendant made a marijuana delivery. Id. 935-36. This Court reversed because while the State was entitled to impeach the defendant about his acquaintanceship with the informant by showing they had a face to face meeting on a prior occasion, it was unnecessary to mention the criminal conduct. Id. 936. This Court

noted that evidence of other crimes should only be received when there is “strict necessity.” Id.936. The prejudicial effect of the evidence admitted outweighed its probative value. Id.936.

In State v. Holbert,416S.W.2d129,130(Mo.1967), the defendant was convicted of carrying a concealed weapon, a .32 caliber revolver, and respondent introduced evidence that at the time of his arrest the defendant was also in possession of two .22 caliber guns. This Court reversed because the other two guns “had no legitimate probative value in establishing defendant’s guilt of the offense on trial.” Id.133.

This Court’s decisions in Collins and Holbert indicate that it was error to have admitted evidence of the Pinegar killing. Strict necessity did not exist for the Pinegar evidence to be admitted. Respondent could have established when Thomas reported that Mr. Middleton possessed Mr. Hamilton’s “stash box” to the police without also linking it to the discovery of Mr. Pinegar’s body. See Collins supra (State could have impeached defendant without admission of other crimes evidence). Counsel did not open the door to the Pinegar killing evidence by establishing Thomas did not promptly report having seen the “stash box” at Mr. Middleton’s house.

The prejudice of this evidence was only accentuated by respondent’s argument. Counsel adequately preserved their objection to the closing argument when they objected to “this line of argument.” (See T.Tr.828 supra). Throughout the evidentiary phase of the trial, counsel had objected to the line of matters relating to the Pinegar killing (T.Tr.577-78,754-55,764-65) so that the trial court was sufficiently on notice that counsel

was reasserting and renewing their objections to the irrelevancy of injecting the Pinegar killing during argument.

Reasonably competent appellate counsel under similar circumstances would have raised all the matters relating to evidence of the Pinegar killing because of decisions such as Collins and Holbert. Mr. Middleton was prejudiced because there is a reasonable probability that had these matters been argued that his convictions would have been reversed.

A new trial is required.

B. DEATH PENALTY APPEALS PROCESS

The pleadings alleged appellate counsel was ineffective for failing to properly challenge improper arguments respondent made during penalty rebuttal argument (R.L.F.137-38). Appellate counsel did raise a claim as to respondent's arguments, but the claim was narrowly limited to the prosecutor having diminished the jury's sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) (R.L.F.137-38) (Ex.24 at 27-28). See State v. Middleton, 998 S.W.2d 520, 529 (Mo. banc 1999). Counsel should have challenged the arguments because they: (1) referenced matters outside the record - "how often" capital cases are reversed; (2) falsely represented the frequency of Federal Courts of Appeals reversing death penalty cases; and (3) improperly suggested if death was not imposed Mr. Middleton might someday be released (R.L.F.137-38).

Appellate counsel agreed the arguments that were alleged that could and should have been raised on appeal were preserved (R.Tr.177). Appellate counsel testified that she did not think that the prosecutor's argument was outside the record and might have

been invited (R.Tr.178-79). Appellate counsel did not consider making any arguments that the prosecutor's closing argument was false or misleading through its reference to the purported frequency of federal court reversals (R.Tr.179). Appellate counsel was not aware of State v. Jordan,420So.2d420(La.1982) and its holding that it is improper to urge death because a defendant may someday be released (R.Tr.179).

In rejecting the direct appeal challenge made, this Court ruled the prosecutor had responded to the defense argument Mr. Middleton would be executed even if the jury on this case did not return a death sentence. Middleton,998S.W.2d at 530. The prosecutor had not minimized the jury's sense of responsibility, but addressed the finality of Mr. Middleton's sentence in the Adair County case so that Caldwell was inapposite. Id.530.

The relevant argument was:

MS. KOCH: Ms. Davis may be real sure that this defendant isn't going to get out, but I'm not.

MS. DAVIS: Objection, personalization. Calls for speculation, Judge.

THE COURT: The objection will be overruled. Proceed.

MS. KOCH: Ms. Davis mentioned to you about those few occasions where a person's life is spared. She didn't talk to you about the many appeals that people go through.

MS. DAVIS: Judge, I'm going to object to the levels of appeal. That's not relevant and not been evidence in this trial.

THE COURT: The objection will be overruled.

Proceed.

MS. KOCH: She didn't talk to you about the many different levels of appeals that these cases go through. She didn't talk to you about the Federal Court of Appeals and how often those cases get overturned on appeal because they're death penalty cases. She didn't talk to you about any of that, did she?

(T.Tr.1074).

In State v. Storey, 901 S.W.2d 886, 900-01 (Mo. banc 1995), the prosecutor argued that case was among the most brutal in St. Charles County's history. That argument was improper because it relied on facts outside the record. Id. 900-01. Also, the argument was improper because "[a]ssertions of fact not proven amount to unsworn testimony by the prosecutor." Id. 901. Because there was no evidence about the brutality of other murders in St. Charles County, the argument was improper. Id. 901. This Court noted that a prosecutor arguing facts outside the record is highly prejudicial "because the jury is aware of the prosecutor's duty to serve justice, not just win the case." Id. 901 (relying on Berger v. United States, 295 U.S. 78, 88 (1935)).

The prosecutor's argument here falsely referenced matters outside the record in support of death by portraying federal courts as granting relief with great frequency in death penalty appeals such that additional death sentences were needed to ensure Mr. Middleton was executed. A comprehensive study and analysis of all the death penalty cases that were reviewed by state appellate courts and in federal habeas corpus between

1973 and 1995 showed only 10% of all reversals occurred in federal court. Liebman, Fagan, West, and Lloyd, Capital Attrition: Error Rates In Capital Cases, 1973-1995, 78TexL.Rev.1839,1844,1849,1855(2000). What these statistics indicate is that the prosecutor's representations that additional death sentences were needed to ensure Mr. Middleton was executed because of the frequency of federal court reversals of death penalty cases was factually false. The prosecutor's argument injected arbitrariness because it urged death for grounds entirely unrelated to the acts Mr. Middleton was charged with committing. Moreover, in light of the narrowed scope of federal court review mandated under the AEDPA, the federal court reversal rate can be expected to be lowered. See Terry Williams v. Taylor, 529U.S.362,375-90(2000) (interpreting and explaining AEDPA standard of contrary to or involved an unreasonable application of clearly established Federal law). The prosecutor argued "facts" outside the record about federal courts of appeals and what was portrayed as "facts" was untrue. What the facts indicate is that federal courts are not especially predisposed to granting relief to death sentenced individuals. Under Storey, the prosecutor's argument was improper because it injected factually false outside the record matters as grounds for imposing death.

Argument that advocates a death sentence because of a defendant's potential for being released by some authority at a future date requires reversal. State v. Jordan, 420So.2d420,426-27(1982). That brand of argument injects passion, prejudice, and arbitrariness. Id.426-27. The prosecutor here argued that the appeals process could someday result in Mr. Middleton being released, and therefore, it was necessary to avoid

that possibility by imposing death. That argument injected passion, prejudice, and arbitrariness. See Jordan.

Reasonably competent appellate counsel would have raised as error that the prosecutor argued matters outside the record that were factually false and improperly suggested if death was not imposed, then Mr. Middleton might someday be released. Mr. Middleton was prejudiced because there is a reasonable probability that had these matters been fully and properly briefed his sentences would have been reversed and a new penalty phase ordered.

A new penalty phase is required.

III. UNDISCLOSED DEALS

THE MOTION COURT CLEARLY ERRED IN DENYING THE CLAIMS RESPONDENT FAILED TO DISCLOSE DEALS MADE WITH JOHN THOMAS AND DAN SPURLING IN EXCHANGE FOR THEIR TESTIMONY BECAUSE THOSE RULINGS DENIED MR. MIDDLETON HIS RIGHTS TO DUE PROCESS, TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AND TO CONFRONT THE WITNESSES AGAINST HIM, U.S. CONST. AMENDS VI, VIII, AND XIV, IN THAT BOTH RECEIVED FAVORABLE DISPOSITION OF CHARGES BROUGHT AGAINST THEM IN EXCHANGE FOR THEIR TESTIMONY, THEY BOTH AFFIRMATIVELY REPRESENTED OTHERWISE, AND RESPONDENT ARGUED THERE WERE NO DEALS.

The motion court denied the claims respondent failed to reveal deals it made with John Thomas and Dan Spurling for their testimony. Those rulings denied Mr. Middleton his rights to due process, freedom from cruel and unusual punishment, and to confront the witnesses against him. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State, 850S.W.2d348,350(Mo.banc1993). The pleadings alleged respondent failed to disclose deals it had made with John Thomas, 8(S) (R.L.F.59-60,174-76), and Dan Spurling, 8(U) (R.L.F.61-62,178-80) in exchange for their testimony. This Court has recognized the State's failure to disclose deals to its witnesses is the proper subject of a 29.15 challenge. Hayes v. State, 711S.W.2d876,879 (Mo.banc1986); Hutchison v. State, 59S.W.3d494,496(Mo.banc2001).

The Sixth Amendment guarantees a defendant the right to confront the witnesses against him. Pointer v. Texas,380U.S.400,406(1965). A primary interest the Confrontation Clause secures is the right of cross-examination. Davis v. Alaska,415U.S.308,315(1974).

Sentencing someone to death is cruel and unusual punishment if the punishment is meted out arbitrarily and capriciously. Furman v. Georgia,408U.S.238(1972). Both phases in a capital trial must comport with the requirements of the Due Process Clause. Gardner v. Florida,430U.S.349,358(1977).

A. MR. MIDDLETON'S TRIAL

The acts in question were alleged to have occurred on June 11, 1995 (T.L.F.382-84). A complaint initiating the case against Mr. Middleton was filed July 21, 1995 (T.L.F.1). Trial commenced March 30, 1998 (T.Tr.Vol.I at iii).

On direct, John Thomas testified he was arrested on June 10, 1995 for delivering methamphetamine (T.Tr.556). When Thomas testified, that sale charge was still pending and he represented he had not made any kind of deal (T.Tr.559).

On cross-examination, Thomas admitted he was one of those who were arrested on June 10, 1995 for drug violations (T.Tr.560). Thomas testified he was arrested for selling methamphetamine (T.Tr.560). Thomas testified this drug charge had been pending from 1995 and was still pending when he testified in 1998 (T.Tr.563-64). During that time, Thomas was out on bond, except for having spent four days in jail (T.Tr.561-64,574). Thomas attributed the fact he was out free for three years with a pending drug charge to the prosecutor having postponed his case (T.Tr.573).

Thomas reported he went to Mr. Middleton's house on June 25, 1995 to warn Mr. Middleton that Billy Worley had snitched him out (T.Tr.557). Thomas reported that he saw Mr. Hamilton's "stash box" at Mr. Middleton's house (T.Tr.558). Thomas claimed that when he asked Mr. Middleton about the box, he stated that the guy who owned the box would not need it anymore (T.Tr.558). According to Thomas, Mr. Middleton stated that he thought that Mr. Hamilton had snitched on him and something had to be done (T.Tr.558-59). Again according to Thomas, Mr. Middleton made statements that Mr. Hamilton and Mr. Pinegar, the victim in the Adair case, needed to be taken care of (T.Tr.580).

Respondent called Dan Spurling in guilt (T.Tr.528). Spurling testified on direct and redirect that he had neither sought nor received any deals (T.Tr.528,552-53).

Spurling testified on cross-examination that in approximately August, 1995 he picked-up Missouri charges for the sale of marijuana and pled guilty a year later (T.Tr.540-44). At that same time, Spurling also pled guilty to child endangerment (T.Tr.544). Spurling testified he was originally charged with assault and armed criminal action (T.Tr.544-45). On these cases, Spurling entered an open plea where the State did not make a recommendation (T.Tr.545). Instead of going to prison for 15 years, Spurling went to a treatment program for 120 days (T.Tr.546). Spurling stated that when he completed the program that he was released on probation (T.Tr.546).

Spurling testified that Mr. Middleton had admitted to him killing Mr. Hamilton and Stacey Hodge (T.Tr.553-54). According to Spurling, Mr. Middleton asked him what he should do with their bodies (T.Tr.534). Spurling reported that when Mr. Middleton

made those admissions, he had observed blood on his shirt (T.Tr.534). According to Spurling, Mr. Middleton suggested burning the bodies in Mr. Hamilton’s old house (T.Tr.534,549). Spurling reported that he saw Mr. Middleton the next day and Mr. Middleton had a car stereo that belonged to Mr. Hamilton (T.Tr.538). Spurling represented that Mr. Middleton also stated that next day that “they were really going to freak out when they found those two” (T.Tr.538).

In respondent’s initial guilt argument, the jury was told that there were “no deals with any of these witnesses.” (T.Tr.802).

In respondent’s guilt rebuttal argument, the jury was told that the defense had not exposed any benefit anyone had gotten for their testimony (T.Tr.829). The prosecutor told the jury that the only deals that existed were “in the defense attorney’s imagination” (T.Tr.830). The jury was also told Spurling had not gotten any deal (T.Tr.830-31).

B. THOMAS’ CHARGES - 29.15 EVIDENCE

Evidence was presented at the 29.15 of John Thomas’ Harrison County deal. That evidence is summarized as follows:

DATE	OCCURRENCE	EX. #/RECORD
June 8, 1995	Harrison County Complaint filed - charging Thomas with Class B felony sale of a controlled substance, methamphetamine, alleged to have occurred August 23, 1994 and made to a confidential informant.	17, 42

DATE	OCCURRENCE	EX. #/RECORD
February 27, 1998	Docket entry: “ρ appears with counsel, Mr. Garry Allen, and waives preliminary hearing in open court. State appears by Ms. Chris Stallings, and state advises delay in prosecution due to ρ’s participation as witness in companion proceedings. ρ band over [sic] to Div. I and to appear at 9 a.m., March 17, 1998 and file to be certified to said division.”	42
March 16, 1998	Information filed against Thomas - same charge as complaint.	17, 42
March 31, 1998	Thomas testifies for respondent at Mr. Middleton’s Callaway trial.	Vol. I T.Tr. at iv.
April 27, 1998	Amended Information decreasing charge of Thomas to Class C felony of an attempt to sell methamphetamine is filed and Thomas pleads	17, 42

	guilty.	
DATE	OCCURRENCE	EX. #/RECORD
September 10, 1998	Docket entry: "State appears by Pros. Atty. Defendant appears in person by atty. PSI is considered and recommendations are made. Court suspends imposition of sentence and places defendant on probation for a period of five (5) years under supervision rules and regulations. The court[']s regular special conditions [illegible] #1-6 [illegible]"	17, 42

C. SPURLING'S CHARGES

The Harrison County prosecutor dismissed six cases against Spurling after Mr. Middleton was first charged on July 21, 1995 on the Hamilton and Hodge matters (T.L.F.1) and before his trial commenced on March 30, 1998. Those were as follows:

Cause No. Offense Date Charge Date Dismissal Date Charges Exhibit No.

CR495-243FX	11/4/95	11/6/95	3/31/97	unlawful use	4, 11
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		(complaint) 2/6/96 (information)		of a weapon, Class D Felony	
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Cause No. Offense Date Charge Date Dismissal Date Charges Exhibit No.

CR495-244FX	11/4/95	11/6/95 (complaint) 2/6/96 (information)	3/31/97	2nd degree assault, Class C Felony	5, 10
CR496-144FX	3/19/96	4/[illegible]/96 (complaint) 6/10/96 (information)	3/31/97	Delivery of a controlled substance, Class A Felony (morphine)	9, 15
CR496-194FX	5/17/96	5/17/96 (complaint) 6/27/96	9/5/96	2nd degree Assault pointing gun	7, 16

		(information)		at Penny Whitt and her unborn child	
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Cause No. Offense Date Charge Date Dismissal Date Charges Exhibit No.

CR496-344FX	5/17/96	[illegible] (complaint) 11/26/96 (information)	3/31/97	Armed Criminal Action	14
CR496-195FX	5/17/96	5/17/96 (complaint) 6/27/96 (information)	9/5/96	Armed Criminal Action	8

The 29.15 record reflects Spurling also had some Harrison County charges disposed of, but not dismissed, before Mr. Middleton's case was tried. On April [illegible], 1996 a complaint was filed in CR496-143FX charging that on March 16, 1996 Spurling sold more than 5 grams of marijuana, a Class A felony (Exs.6,12). On June 10, 1996 a one count information was filed charging that same offense (Exs.6,12). On

January 27, 1997, Spurling pled open to one count of the Class B felony of sale of a controlled substance and the Class D felony of first degree endangering the welfare of a child (Exs.6,12). Spurling was originally charged with two counts of Class A felony of sale of a controlled substance and first degree assault (Exs.6,12). Based on “ a plea recommendation” the drug charge was reduced to the Class B felony of sale of a controlled substance (Exs.6,12). The assault charge was dismissed (Exs.6,12). On July 21, 1997, Spurling was placed on probation (Exs.6,12). The record suggests that these were the same charges about which Spurling testified at trial. See supra.

D. MOTION COURT’S FINDINGS

The motion court found that the documentary exhibits offered on Thomas’ and Spurling’s cases failed to establish there were any undisclosed deals (R.L.F.523,531-32).

E. COUNSELS’ TESTIMONY

Counsel Turlington recalled that it was the State’s position and its witnesses’ position that they had been given no deals (R.Tr.285-86). Ms. Turlington did not recall obtaining any information about cases involving Spurling other than those two he testified about in court (R.Tr.286). Ms. Turlington did not go to Harrison County to look for charges pending against Spurling (R.Tr.286).

Counsel Davis testified that the respondent continually represented that none of respondent’s witnesses were getting deals in exchange for testimony (R.Tr.341,344). Counsel Davis would have wanted to cross-examine and impeach Thomas about his case ultimately being amended from a Class B felony to a Class C felony with a probation recommendation (R.Tr.343). Counsel Davis was aware that during the pendency of Mr.

Middleton's case, Spurling had pending files in Harrison County, but she was unaware that several of those files were dismissed (R.Tr.344-45). If she had known several of Spurling's cases had been dismissed, then she would have wanted to impeach him with those facts (R.Tr.345).

F. THOMAS AND SPURLING HAD UNDISCLOSED DEALS

Respondent failed to disclose the deals Thomas and Spurling received in exchange for their testimony. This failure denied counsel the opportunity to challenge these witnesses' credibility on cross-examination.

The prosecution must disclose favorable evidence that is material either to guilt or punishment. Brady v. Maryland,373U.S.83,87(1963). For purposes of the Due Process Clause, no distinction between exculpatory and impeachment evidence exists. U.S. v. Bagley,473U.S.667,676-78(1985). See, also, State v. Robinson,835S.W.2d303,306 (Mo.banc1992). Nondisclosure of Brady evidence violates due process "irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland,373U.S. at 87. See, also, U.S. v. Agurs,427U.S.97,110(1976). Under Brady, the focus is whether Mr. Middleton was prejudiced. State v. Whitfield,837S.W.2d503,508(Mo.banc1992).

A government attorney, in Giglio v. U.S.,405U.S.150,150-53(1972), promised the defendant's co-conspirator that he would not be charged. The co-conspirator testified against Giglio while representing there were no deals, and a different government attorney argued the government had made no promises to the co-conspirator. Id.151-52. The failure to disclose that promise violated due process. Id.154-55. It did not matter different prosecutors were involved in the promise of leniency and the trial because "[t]he

prosecutor's office is an entity and as such it is the spokesman for the Government.”

Id.154.

In Napue v. Illinois,360U.S.264,265-67(1959), a co-participant in the charged homicide testified no promises had been made in exchange for his testimony. In fact, the State's Attorney had promised the co-participant that he would recommend a sentence reduction. Id.265-67. The State's Attorney allowed that testimony to go uncorrected. Id.265-67. Napue's right to due process was violated by the State allowing this false evidence to go uncorrected. Id.269-70. While so ruling the Court reasoned that “[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.”

Id.269.

This Court, in Hayes v. State,711S.W.2d876,877(Mo.banc1986), granted the movant relief because the State failed to disclose to his counsel that it had agreed to dismiss charges against a co-participant in exchange for his testimony. While so ruling, this Court reasoned the deal “related directly to the quality and substance of [the co-participant's] trial testimony.” Id.879.

In Commonwealth v. Strong,761A.2d1167(Pa.2000), the death sentenced postconviction movant's conviction was reversed. The State's attorneys had represented no deal had been made with the co-defendant and the co-defendant testified there were no deals. Id.1170. After testifying for the State at Strong's trial, the co-defendant pled guilty and was sentenced to 40 months in prison. Id.1170. The evidence at the

postconviction proceedings indicated there were discussions about a deal for the co-defendant before Strong's trial. Id.1170. The postconviction court rejected the failure to disclose a deal claim finding "there was no actual deal struck. . . ." Id.1170.

The Pennsylvania Supreme Court agreed with the finding that there was no deal struck, but still reversed. Strong,761A.2d at 1174. Relief was required because the record established the existence of "an understanding" that the codefendant would be treated with leniency in exchange for his testimony. Id.1174. That Court went on to indicate it is unnecessary for there to be "an ironclad agreement" in order to impose a due process duty to disclose under Brady and Giglio. Id.1174-75. That Court reasoned that in circumstances where there is no binding agreement, disclosure is even more critical because when a deal is only contingent and dependent on the government's satisfaction with the final result, the witness has a greater motive to testify favorably for the government. Id.1175(relying on U.S. v. Bagley,473U.S.667,683(1985)(Blackmun and O'Connor, J.J) "The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction").

The evidence as to Thomas is like that presented in Strong. Thomas was first charged on June 8, 1995. The docket entry from February 27, 1998 indicates that the "state advises delay in prosecution due to 's participation as witness in companion proceedings." See supra. This docket entry reflects that there was "an understanding" that Thomas would be treated with leniency. While there is not evidence of "an ironclad

agreement” there still was a duty under Brady to disclose the understanding. After Thomas testified, the charge against him was amended from the Class B felony of sale of a controlled substance to the Class C felony of an attempted sale. Thomas was then placed on five years probation. See supra.

Thomas received a very good deal. The Missouri Highway Patrol Confidential Narcotics Report, contained in the prosecutor’s file, recounted that Confidential Informant 1352 had “purchased the methamphetamine from John Thomas in Thomas’s shop near Thomas’s residence for three hundred dollars (\$300.00)” (Ex.17 and page 1 of report). The prosecutor’s file also contained a handwritten statement signed by Billy Worley dated August 23, 1994 stating that he had purchased the methamphetamine from Thomas (Ex.17). Worley testified as a penalty phase witness for respondent (T.Tr.905-22). The Highway Patrol’s Forensic Laboratory Report, again contained in the prosecutor’s file, identified what Thomas had sold as methamphetamine (Ex.17). Thomas admitted during his PSI interview that he sold methamphetamine to an undercover agent (Ex.17,PSI at 1). Even though Thomas actually sold methamphetamine he was allowed to plead guilty to an attempted sale and placed on probation. Counsel would have wanted to impeach Thomas with this especially good disposition. Attacking Thomas’ credibility was critical and Mr. Middleton was entitled to the undisclosed information to use for that purpose. See Giglio and Napue, supra.

Spurling was the beneficiary of six cases against him being dismissed. Counsel would have wanted to impeach Spurling with these dismissals that were not disclosed and this information was required to be disclosed for that purpose. See Giglio and Napue.

Respondent's failure to disclose these matters was especially harmful because both Thomas (T.Tr.559) and Spurling (T.Tr.528,552-53) testified they had no deals. See Giglio and Napue. Counsel was precluded from cross-examining Thomas and Spurling about the deals they received in violation of Mr. Middleton's right to confront the witnesses against him. See Pointer and Davis, supra. Moreover, the prejudice of the nondisclosures was exacerbated because the prosecutor repeatedly argued there were no deals (T.Tr.802,829,830-31). See Napue, supra (failure of State to correct misinformation on a deal).

This Court should order a new trial.

**IV. MR. MIDDLETON LACKED THE REQUIRED MENTAL STATE FOR
FIRST DEGREE MURDER**

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL IN GUILT DRS. MURPHY, LIPMAN, AND DANIEL TO SUPPORT THE DEFENSE HE WAS NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT OR SUFFERED FROM A DIMINISHED CAPACITY AS EACH OF THESE WITNESSES WOULD HAVE TESTIFIED AT TRIAL IN GUILT THAT HE WAS PSYCHOTIC AT THE TIME OF THE OFFENSES SO AS TO HAVE SUPPORTED THESE DEFENSES BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE CALLED THESE WITNESSES IN GUILT TO TESTIFY ABOUT HIS PSYCHOSIS TO SUPPORT THESE GUILT DEFENSES AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY THAT HE WOULD NOT HAVE BEEN CONVICTED OF FIRST DEGREE MURDER OR AT MINIMUM NOT SENTENCED TO DEATH.

FURTHER, THE MOTION COURT CLEARLY ERRED IN REFUSING TO CONSIDER DR. LIPMAN'S OPINIONS AS THEY WERE THE PROPER SUBJECT OF TESTIMONY AFTER A SUFFICIENT FOUNDATION WAS PRESENTED BECAUSE THAT ACTION DENIED MR. MIDDLETON HIS

RIGHTS TO DUE PROCESS, A FULL AND FAIR HEARING, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VIII AND XIV, IN THAT THE MOTION COURT COULD NOT FULLY AND FAIRLY RULE ON THIS CLAIM WHEN IT REFUSED TO CONSIDER DR. LIPMAN'S OPINIONS.

The motion court denied claims counsel was ineffective for failing to call in guilt Drs. Murphy, Lipman, and Daniel. These witnesses should have been called to testify in guilt that at the time in question Mr. Middleton was psychotic. That evidence would have supported the jury finding he was not guilty by reason of mental disease or defect or suffered from a diminished capacity so as to not be guilty of first degree murder and would have served to mitigate his punishment to a life sentence. Mr. Middleton was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV. The motion court also improperly excluded Dr. Lipman's opinions, denying Mr. Middleton his rights to a full and fair hearing, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VIII and XIV. Without Dr. Lipman's testimony, the motion court could not fairly rule on Mr. Middleton's claim.

Review is for clear error. Barry v. State, 850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington, 466U.S.668,687(1984). A postconviction movant is

entitled to a full and fair opportunity to develop the factual basis of his claims for relief in state court. Miller v. Champion,161F.3d1249,1252-54(10thCir.1998). See, also, Michael Williams v. Taylor,529U.S.420,440-45(2000).

It is recognized that “[t]he wide latitude trial counsel has in matters of trial strategy does not amount to unconstrained discretion.” State v. McCarter,883S.W.2d75, 78(Mo.App.,S.D.1994). Counsel’s trial strategy “must be reasonable under prevailing professional norms.” McCarter,883S.W.2d at 78(relying on Strickland)(emphasis in McCarter). In particular, counsel is required “to exercise ‘sound trial strategy.’” McCarter,883S.W.2d at 78(quoting Porter v. State,682S.W.2d16,19(Mo.App., W.D.1984)). Some trial strategy decisions may be so unsound as to constitute ineffectiveness. McCarter,883S.W.2d at 78.

Counsel is required to utilize reasonable diligence to produce exculpatory evidence and a “strategy” that resulted from lack of diligent preparation and investigation is not clothed with the presumption counsel was effective. Kenley v. Armontrout, 937F.2d1298,1304(8thCir.1991). Moreover, it is recognized counsel can hardly be viewed as having made a strategic choice against pursuing a certain line of investigation when counsel has not yet obtained the facts on which such a decision could be made. Id.1308. When counsel decides not to conduct further investigation that decision is only reasonable to the extent professional judgment makes the limitations placed on further investigation reasonable in those circumstances. Id.1308. Counsel is ineffective when it was not a reasonable strategy that caused counsel not to investigate, but lack of thoroughness and preparation. Id.1308.

Counsels' actions here are like those in Dumas v. State, 903P.2d 816 (Nev. 1995) and Antwine v. Delo, 54F.3d 1357 (8th Cir. 1995) and similarly require finding counsel were ineffective. The defendant in Dumas was convicted of first degree murder in a case, like Mr. Middleton's case, where the only issue was mental state at the time of the killing. Dumas, 903P.2d at 816. Counsel failed to present evidence through a state employed psychiatrist that Dumas "suffered 'organic damage to [his] intellectual capabilities and was incapable of premeditating an act such as the killing'" Id. 817. Counsel was ineffective because proper investigation, preparation, and presentation of this evidence could have provided a complete defense or one that Dumas' mental state was inconsistent with a deliberated first degree murder. Id. 817.

In Antwine, a court ordered mental examination concluded Antwine did not suffer from any mental disease or defect. Antwine, 54F.3d at 1365. Counsel failed to request a second independent examination even though Antwine was entitled to one under state law. Id. 1365. Post-conviction testing found Antwine suffered from a lifetime condition, bipolar disorder. Id. 1365. Antwine's death sentence was reversed because counsel was ineffective for failing to present this evidence during penalty. Id. 1367-68. The Antwine Court reasoned the failure to request a second mental examination constituted inadequate trial preparation and not appropriate strategy. Id. 1367.

A. THE CLAIMS PLED

The amended motion, 8(A), alleged counsel was ineffective for failing to investigate and to call Dr. Murphy to testify in guilt that Mr. Middleton was not guilty by reason of mental disease or defect (R.L.F. 31-32, 147-150). Dr. Murphy would have

provided evidence that would have allowed the jury to find that Mr. Middleton was not responsible because he did not know and appreciate the nature, quality, or wrongfulness of his conduct as provided for in § 552.030 (R.L.F.31-32,147-50). The pleadings also alleged, 8(F), that counsel failed to investigate and Dr. Murphy should have been called in guilt phase to support a diminished capacity defense (R.L.F.37-38,158-161).

The pleadings also alleged counsel failed to investigate and Dr. Lipman should have been called in guilt phase, 8(G), to support a diminished capacity defense (R.L.F.38-40,161-63).

Additionally, the pleadings alleged that counsel failed to investigate a psychiatrist, such as Dr. Daniel, 8(H), who should have been called to testify in guilt (R.L.F.40-42,163-67). Dr. Daniel, or a similarly qualified psychiatrist, could have testified in guilt that Mr. Middleton's mental diseases precluded him from knowing and appreciating the nature, quality, or wrongfulness of his actions under Chapter 552 (R.L.F.40-42,163-67).

B. TRIAL MENTAL HEALTH EVIDENCE

Counsel did not present any guilt defense evidence (T.Tr.787,799-800). During guilt closing argument, counsel focused on arguing that Mr. Middleton was not guilty because respondent failed to satisfy its burden of proof (T.Tr.811-27). In particular, the State had not proved its case because its primary witnesses were all drug abusers with criminal records, some of whom were receiving favorable treatment in their cases for their testimony (T.Tr.811-27).

In penalty, counsel called neuropharmacologist Dr. Lipman (T.Tr.936). Dr. Lipman explained that chronic methamphetamine use produces paranoia, unreasonable

fears, delusions, and hallucinations (T.Tr.946-47). A chronic methamphetamine abuser will present symptoms that appear functionally indistinguishable from someone who is a paranoid schizophrenic (T.Tr.946-47). Chronic abusers also experience brain damage (T.Tr.947-48). Dr. Lipman relied on the work of neuropsychologist Dr. Murphy as a source of data for his findings on Mr. Middleton (T.Tr.948). Dr. Lipman actually became involved in the case based on Dr. Murphy recommending him (T.Tr.948). Dr. Lipman learned there was a family history of depression for Mr. Middleton's family which would have predisposed him to having that infirmity (T.Tr.951). At the time of the offense, Mr. Middleton was experiencing delusions, hallucinations, and paranoia (T.Tr.961-64). Those symptoms were consistent with his chronic methamphetamine use (T.Tr.974). Dr. Lipman found that at the time of this offense Mr. Middleton was suffering from the influence of extreme mental or emotional disturbance (T.Tr.977).

C. MOTION COURT'S FINDINGS

The motion court rejected these claims as follows.

Dr. Lipman testified in penalty and his testimony would not have been more persuasive in guilt (R.L.F.524). Dr. Lipman's testimony contradicted Dr. Daniel's diagnosis because he testified methamphetamine psychosis is indistinguishable from schizophrenia while Dr. Daniel's diagnosis was schizophrenia (R.L.F.524). To have called Dr. Lipman in guilt would have required admitting Mr. Middleton committed the charged acts and would not have been persuasive (R.L.F.524).

Defense counsel consulted Dr. Murphy before trial and his report did not include any conclusions that Mr. Middleton was not guilty by reason of mental disease or

suffered from diminished capacity (R.L.F.524-25). It was reasonable for counsel to assume Dr. Murphy held only those opinions found in his report (R.L.F.524-25). Dr. Murphy's testimony was duplicative of Dr. Lipman's trial testimony and counsel is not obligated to "shop" for a particular expert (R.L.F.525). Testimony from Dr. Murphy would not have changed the outcome (R.L.F.525). Evidence from Dr. Murphy would have been contrary to the reasonable strategy Mr. Middleton did not commit the crime (R.L.F.525). Mr. Middleton's mental abnormality was caused by methamphetamine use and involuntary intoxication cannot negate a mental state (R.L.F.525). Dr. Murphy's testimony was not credible and not persuasive (R.L.F.529).

Both Dr. Lipman and Dr. Murphy testified in the Adair trial with the same result there, and therefore, the result would not have been different in Callaway (R.L.F.529).

Dr. Daniel's diagnosis of schizophrenia contradicted Drs. Lipman and Murphy (R.L.F.526). Dr. Daniel was not persuasive and not credible, Dr. Lipman was more credible, and counsel is not obligated to select a particular expert (R.L.F.526). Dr. Daniel contradicted Drs. Lipman and Murphy because he believed it was not possible to express a conclusion about whether Mr. Middleton knew the wrongfulness of his conduct (R.L.F.526). Dr. Daniel admitted his opinion on diminished capacity would have changed had he known Mr. Middleton had arranged to meet Mr. Hamilton and Stacey Hodge to kill them (R.L.F.526).

If Dr. Daniel had been called in addition to Drs. Lipman and Murphy, then the contradictions he would have presented would have undermined the credibility of those other experts (R.L.F.526). If Dr. Daniel alone had testified he would have been cross-

examined on the opinion of these other experts whose opinions were inconsistent with his opinions (R.L.F.526). If Dr. Daniel had been called in guilt or penalty his testimony would not have helped and he was not credible (R.L.F.527). Counsel was not ineffective for failing to hire a psychiatrist rather than a psychologist (R.L.F.530).

Counsel exercised reasonable strategy in presenting Mr. Middleton's desired defense that he did not commit the charged acts and in not presenting an insanity defense (R.L.F.528-29).

D. RULE 29.15 EVIDENCE

1. Dr. Murphy

Dr. Murphy is a clinical psychologist whose expertise includes evaluating for organic brain damage (R.Tr.97). He was contacted to evaluate Mr. Middleton by his counsel on the Adair County case, Ms. Zembles (R.Tr.101). He evaluated Mr. Middleton in November, 1996, utilizing psychological and neuropsychological testing (R.Tr.101). Dr. Murphy limits his work on a case to the referral question counsel supplied (R.Tr.102-03). The referral question Ms. Zembles furnished asked Dr. Murphy to identify any organic brain damage or other psychological difficulties related to methamphetamine use (R.Tr.102-03).

Dr. Murphy's testing found Mr. Middleton suffers from an organic paranoid thought disorder (R.Tr.148-49). Mr. Middleton has organic brain damage that is the product of chronic methamphetamine use (R.Tr.145). Mr. Middleton is in a chronic methamphetamine paranoid state such that he is continuously and chronically psychotic (R.Tr.146). Dr. Murphy concluded Mr. Middleton suffers from a mental disease or

defect - organic paranoid thought disorder, methamphetamine induced, in a chronic fashion (R.Tr.149). At the time of this offense, Mr. Middleton was suffering from this mental disease or defect (R.Tr.149). Also, at the time of this offense, Mr. Middleton could not form the requisite mental state for first degree murder and was unable to coolly reflect (R.Tr.151-52). Mr. Middleton acted based on his delusions (R.Tr.151-52). Mr. Middleton's acts were fueled by his psychotic thought disorder (R.Tr.158). Dr. Murphy concluded Mr. Middleton is not schizophrenic (R.Tr.159). Individuals with test results similar to Mr. Middleton's test results often are successful with a not guilty by reason of insanity defense (R.Tr.136-37).

Dr. Murphy also identified Mr. Middleton as suffering from chronic depression since he was a child (R.Tr.149-50). Also, Dr. Murphy found Mr. Middleton suffers from a chronic anxiety disorder (R.Tr.149-50).

Dr. Murphy had not furnished his opinions to Mr. Middleton's counsel, as to him suffering from a mental disease or defect that precluded deliberation, because his attorneys did not request an opinion on that issue (R.Tr.161). If Mr. Middleton's attorneys had asked Dr. Murphy to furnish an opinion on this issue he would have done so (R.Tr.161). Dr. Murphy was present for trial, but did not testify (R.Tr.152).

2. Dr. Lipman

Dr. Lipman explained that neuropharmacology deals with the effects of drugs on the brain and resulting behavior (R.Tr.36). Methamphetamine's effects on an individual varies according to whether usage was acute or chronic (R.Tr.38-41). He also recounted

Mr. Middleton's detailed drug use history information that he had acquired (R.Tr.41-45,48-59).

Individuals who suffer from depression and who have used methamphetamine have an increased vulnerability for becoming a chronic user (R.Tr.47).

Methamphetamine provides a temporary relief for depression and at one time was prescribed for depression (R.Tr.47). Dr. Lipman noted that Mr. Middleton has experienced a life-long mood disorder, and thus, would have been predisposed to chronic methamphetamine abuse (R.Tr.48).

Dr. Lipman indicated the symptoms that characterize paranoid schizophrenia are the same as those presented by someone suffering the effects of chronic methamphetamine use (R.Tr.39-40). Because the symptoms are the same for both, making a differential diagnosis can be difficult (R.Tr.39-40,70). At the time of this offense, Mr. Middleton was suffering from hallucinations and delusions (R.Tr.54-58).

The motion court sustained respondent's foundation objections to Dr. Lipman expressing an opinion on Mr. Middleton's ability to have coolly reflected (R.Tr.59-60,65,77-78) and whether Mr. Middleton was able to appreciate the criminality of his conduct or whether his ability to conform his conduct to the requirements of law was substantially impaired (R.Tr.66,77-78). The evidence that followed on these issues was then presented as an offer of proof.

Dr. Lipman believed Mr. Middleton could not have coolly reflected or deliberated because of his chronic state of methamphetamine psychosis, paranoia, and delusions (R.Tr.63-65). Dr. Lipman also believed Mr. Middleton's ability to appreciate the

criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired because of his noted mental infirmities (R.Tr.66-68).

Counsel never sought from Dr. Lipman his opinions as to Mr. Middleton's ability to have deliberated or coolly reflected (R.Tr.68-69). Dr. Lipman would have told counsel Mr. Middleton's behavior was influenced by his mental condition and his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was impaired (R.Tr.69-70). Dr. Lipman would have provided the same testimony at trial, if counsel had made the appropriate inquiries (R.Tr.70). Dr. Lipman stated that methamphetamine psychosis and schizophrenia are "behaviorally indistinguishable" but differ in their causes (R.Tr.70).

Before respondent's foundation objection, substantial evidence was presented establishing the propriety of Dr. Lipman testifying about his findings. Dr. Lipman explained that he is a neuropharmacologist and his work focuses on the effects of drugs on the brain and behavior (R.Tr.36). His C.V. (Ex.18), was admitted (R.Tr.37-38). That C.V. includes: (1) board certification as to forensic examination, the psychopharmacology specialty board, and substance abuse board (Ex.18 at 2); (2) extensive history of publications and presentations in his field (Ex.18 at 5-11); and (3) educational background through Ph.D. in neuropharmacology (Ex.18 at 1). Dr. Lipman explained the effects of methamphetamine on a person's brain (R.Tr.38-40). A detailed recounting of Mr. Middleton's drug history focusing on his methamphetamine use and resulting hallucinations and delusions was presented (R.Tr.40-59).

To establish an adequate foundation for expert testimony a party is required to show a witness has sufficient experience and an acquaintance with a phenomena to testify about it. State v. Bradley,57S.W.3d335,340(Mo.App.,S.D.2001). The determination of the adequacy of a foundation is committed to the trial court's discretion. Id.340.

The plaintiffs in Henderson v. Fields,2001W.L.1529262 *1-2,19-20(Mo.App.,W.D.Dec.4,2001), called a Kansas City police criminologist in their wrongful death action to testify about the number of drinks the defendant would have consumed at the time he collided with their family members' vehicle killing them. In ruling the officer's testimony had sufficient foundation and was properly admitted, the court indicated the officer had established that "he had significant experience in the blood alcohol testing field, that he had studied the subject, and that he was basing his opinion on a well-established formula." Id.*20. The Court then indicated that any attack on the formula and any foundation weakness went to weight and could be brought out on cross-examination. Id.*20.

Dr. Lipman testified about his substantial education and professional experience in neuropharmacology and his C.V. was admitted. He also testified about the historical information he had acquired about Mr. Middleton's drug use and, in particular, his methamphetamine use. Dr. Lipman's testimony was of the same quality as that presented in Henderson, and therefore, the motion court clearly erred in refusing to consider his opinions. The motion court's actions denied Mr. Middleton his right to due process because he was deprived of a full and fair opportunity to present his claims. See Michael

Williams v. Taylor and Miller v. Champion, *supra*. Without considering this evidence, the motion court could not properly rule on Mr. Middleton's claims.

3. Dr. Daniel

Dr. Daniel is a psychiatrist who examined Mr. Middleton during the 29.15 proceedings (R.Tr.200,215). He found Mr. Middleton suffers from a substance induced chronic psychosis or psychotic disorder with delusions and hallucinations caused by his methamphetamine use (R.Tr.220,230-31). At the time of this offense, Mr. Middleton was suffering from that psychotic disorder and was experiencing delusions and hallucinations (R.Tr.229,233,238,240-41). Dr. Daniel would treat Mr. Middleton with the same class of drugs prescribed to schizophrenics - anti-psychotic drugs (R.Tr.232). Mr. Middleton's drug use has caused brain damage (R.Tr.241).

Mr. Middleton has a family history that predisposed him to psychotic conditions (R.Tr.239-40). That family history included treatment his mother received for recurrent depression with possible psychotic features (R.Tr.240). He also concluded Mr. Middleton suffers from a schizoid personality disorder (R.Tr.238-39). This disorder makes individuals more susceptible to psychotic disorder, depression, and substance abuse (R.Tr.238-39).

At the time of the offense, Mr. Middleton was suffering from a paranoid psychosis such that he was unable to coolly reflect, and therefore, acted with a diminished capacity (R.Tr.241-42). Dr. Daniel was unable to form an opinion whether Mr. Middleton was unable to know the nature, quality, and wrongfulness of his actions because he did not discuss the crime with Dr. Daniel (R.Tr.243-44,247-48). Dr. Daniel disagreed with Dr.

Murphy on the issue of Mr. Middleton's ability to know the nature, quality, and wrongfulness of his actions because Dr. Daniel did not have sufficient information to address that issue (R.Tr.244-45).

Dr. Daniel was not aware respondent had relied on evidence Mr. Middleton had arranged a meeting with the victims in order to create an opportunity to kill them (R.Tr.249-50). In response to whether that would change his opinion as to Mr. Middleton's inability to deliberate he responded: "The answer would be yes and no. It depends" (R.Tr.250)(emphasis added). Dr. Daniel's testimony that followed, reasserted his confidence in his finding Mr. Middleton was unable to deliberate (R.Tr.250). Thus, contrary to the motion court's findings, Dr. Daniel never admitted his opinion on diminished capacity would have changed had he known that Mr. Middleton had arranged to meet Mr. Hamilton and Stacey Hodge (R.L.F.526).

E. TRIAL COUNSELS' 29.15 TESTIMONY

1. Sharon Turlington

Ms. Turlington discussed with Dr. Murphy whether he believed Mr. Middleton was able to form the mental state required for first degree murder (R.Tr.272). This evidence was not presented in guilt because Mr. Middleton did not want to pursue a mental disease or defect defense because he asserted his innocence (R.Tr.272-73). She did not choose to present a defense Mr. Middleton did not commit the acts alleged, but that if he did, then he was acting with a diminished capacity because presenting two inherently inconsistent defenses was not wise (R.Tr.272-73). Instead, counsel chose to go with a not guilty defense (R.Tr.273-74).

Ms. Turlington indicated Dr. Lipman was called in penalty, but not guilt, because his testimony would have been inconsistent with a defense that Mr. Middleton was not guilty (R.Tr.275-76).

Ms. Turlington indicated a psychiatrist was not employed in Mr. Middleton's case because counsel believed Drs. Lipman and Murphy sufficiently addressed the mental health issues (R.Tr.276).

2. Beth Davis (Kerry)

Ms. Davis did not call Dr. Murphy because she believed Dr. Lipman adequately explained to the jury the impact of methamphetamine on a person's brain (R.Tr.359).

Ms. Davis believed the jury "hated" Dr. Lipman's testimony, and therefore, decided "not to compound" what she "thought was a really bad feeling" she was getting from the jury by also calling Dr. Murphy (R.Tr.359). She also stated that she did not call Dr. Murphy because he testified in Mr. Middleton's Adair County case and the result was not favorable (R.Tr.412).

F. ADAIR COUNTY TRIAL

Because the motion court relied on the result in the Adair case, this Court must consider the defense presented there. Trial in Adair County on a single homicide charge against Mr. Middleton commenced on February 24, 1997 (AdairTr.Vol.6 at ii). Trial in Callaway County on the two homicide charges at issue here commenced more than one year later on March 30, 1998 (T.Tr.125). Ms. Zembles and Mr. Slusher represented Mr. Middleton on the Adair case (R.Tr.264,328). The Adair counsel casefiles were

transferred to counsel on the Callaway case, Ms. Davis and Ms. Turlington (R.Tr.328-29).

The defense guilt phase theory in Adair County was Mr. Middleton was not guilty and respondent's evidence was not credible so as to satisfy its burden of proof (AdairTr.2919-60). In the Adair penalty phase, Drs. Murphy and Lipman testified as to their findings on Mr. Middleton's mental impairments (AdairTr.3409-3605,3607-3745). Thus, Adair counsel pursued the same defense strategy as Callaway counsel - for guilt Mr. Middleton did not commit the crimes and for penalty he was mentally impaired.

G. COUNSEL PRESENTED INCONSISTENT GUILT AND PENALTY THEORIES

This Court has recognized the importance of presenting defense theories that are consistent from guilt to penalty phases. In State v. Harris,870S.W.2d798,816 (Mo.banc1994), counsel presented a guilt phase defense of self-defense. Harris' postconviction motion alleged counsel was ineffective for failing to present mental health penalty evidence that he had suffered from post-traumatic stress. Id.815. In rejecting this claim, this Court noted the guilt phase defense theory presented can determine the evidence that can be "credibly" presented in penalty. Id.816. This Court went on to reason:

The injection of evidence of a mental disease or defect during the penalty phase risks alienating a jury that has consistently heard a different theory of the case during the guilt phase. It is a reasonable strategic decision by trial counsel to avoid presenting a defense *du jour* to the jury.

Id.816.

Other courts have similarly emphasized the importance of counsel presenting consistent defense theories. See, e.g., Bland v. California, 20F.3d1469,1479 (9thCir.1994), overruled on other grounds, Schell v. Witek, 218F.3d1017,1024-25(9thCir.2000)(petitioner was denied his right to counsel in non-capital case when state court failed to furnish substitute counsel and prejudice occurred because counsel presented inconsistent theories on guilt issue); Ross v. Kemp, 393S.E.2d244,245-46(Ga.1990)(counsel was ineffective in capital case where in guilt defendant was represented by two attorneys who each presented inconsistent defense theories - not guilty because the state failed to satisfy its burden and a mental illness defense).

Counsel failed to act as reasonably competent counsel under similar circumstances when they failed to present in guilt the mental health evidence that could have been presented through Drs. Murphy, Lipman, and Daniel. Presenting this evidence in guilt was crucial to ensure there was consistency across the guilt and penalty phases. Instead of consistency, the jury was presented with inherently contradictory theories in guilt and penalty. The jury first heard Mr. Middleton did not commit the charged homicides and then heard that his acts should be excused because of his mental impairments. The jury never heard in guilt evidence why Mr. Middleton lacked the requisite mental state for first degree murder. See Dumas, supra. The failure to present this evidence was the result of lack of preparation. Antwine v. Delo, supra.

Mr. Middleton was prejudiced because there is a reasonable probability that the jury would not have found him guilty of first degree murder if these witnesses had been

called in guilt. Even if the jury had convicted Mr. Middleton of first degree murder, there is a reasonable probability that had the jury heard this evidence in guilt that the jury would have sentenced Mr. Middleton to life because it would have heard a consistent “credible” explanation for his behavior. See Harris, supra. By presenting inconsistent theories, counsel “alienated” the jury so that they were unwilling to impose a life sentence. See Harris, supra.

The reason Dr. Lipman’s testimony was not persuasive in penalty was counsel presented inconsistent guilt and penalty theories that alienated the jury (R.L.F.524 Findings). Dr. Lipman did not testify that methamphetamine psychosis is indistinguishable from schizophrenia (R.L.F.524 Findings). Dr. Lipman testified the symptoms presented in both are the same, and therefore, making a differential diagnosis is that much more difficult (R.Tr.39-40,70). Dr. Daniel’s findings in fact were the same as Dr. Lipman - Mr. Middleton suffers from substance induced chronic psychosis caused by methamphetamine use (T.Tr.961-64,974;R.Tr.220,230-31). Dr. Daniel did find that in addition to this mental impairment, Mr. Middleton also suffers from a schizoid personality disorder (R.Tr.238-39). Dr. Daniel did not find Mr. Middleton suffers from schizophrenia. Furthermore, schizophrenia and schizoid personality disorder are not the same mental impairments. See DSM IV at 273-96,638-41.

To the extent the motion court found Dr. Murphy’s testimony “was a duplication” and “cumulative” of Dr. Lipman’s testimony (R.L.F.524-25), and therefore not helpful, that finding ignores that the reason Dr. Lipman’s testimony was not persuasive was counsel presented inconsistent guilt and penalty theories. Moreover, Drs. Murphy and

Lipman would not constitute “duplicative” or “cumulative” testimony because each used completely different methods and arrived at the same results which thereby increased the validity of their findings (AdairTr.3729-30). Relying on Dr. Murphy was not a question of “shopping” (R.L.F.524-25) for a particular expert, since he was utilized in the Adair trial (AdairTr.3409-2605) and Callaway counsel had relied on what Adair counsel did (R.Tr.328-29).

Counsels’ strategy of denying Mr. Middleton committed the offenses (R.L.F.528-29) was not a reasonable strategy. See McCarter, supra. Drs. Lipman and Murphy both found Mr. Middleton is subject to a chronic psychotic state (R.Tr.63-65,146). Because Mr. Middleton is in a chronic psychotic state, it was counsels’ responsibility to pursue a viable guilt phase defense after adequate investigation and preparation and not to acquiesce to Mr. Middleton’s insistence on a not guilty theory.

The motion court was clearly erroneous in relying on State v. Nicklasson, 967S.W.2d596(Mo.banc1998) for the general proposition voluntary intoxication cannot excuse or negate a mental state. Drs. Murphy and Lipman agreed that at the time of the offense Mr. Middleton was in a psychotic state (R.Tr.54-58,63-65,149,151-52, 158). What the motion court ignored was that intoxication accompanied by psychosis can serve to excuse or negate a mental state. See, §552.010,RSMO 2000; Joyce v. State,684S.W.2d553,554-55(Mo.App.,E.D.1985); State v. Preston,673S.W.2d1,8 (Mo.banc1984); State v. Williams,812S.W.2d518,520(Mo.App.,E.D.1991). Because Dr. Murphy could have testified Mr. Middleton was suffering from psychosis at the time of the offense (R.Tr.149,151-52,158) this evidence would have been admissible.

Dr. Murphy did not express opinions about Mr. Middleton's mental state at the time of the offense because counsel never requested an opinion on that issue (R.Tr.102-03,161). It was not reasonable for counsel to assume Dr. Murphy did not have opinions on this issue (R.L.F.524-25 Findings) since he was not asked to express such an opinion.

Dr. Daniel did not diagnose Mr. Middleton as suffering from schizophrenia (R.L.F.526-27). He did testify that he would treat Mr. Middleton with the same class of drugs used to treat schizophrenics - anti-psychotics (R.Tr.232). Thus, Dr. Daniel did not contradict Drs. Lipman and Murphy (R.L.F.526-27). It is irrelevant whether the motion court considered Dr. Daniel credible (R.L.F.526-27), because the issue is whether the jury might have found him convincing. See Kyles v. Whitley, 514 U.S. 419, 449 n.19 (1995). Because Dr. Daniel's testimony was consistent with Drs. Murphy's and Lipman's testimony, the credibility of their testimony would have only been enhanced and the lack of mental state defense made that much more credible.

Dr. Daniel did not contradict Drs. Lipman and Murphy on the issue of whether Mr. Middleton knew of the wrongfulness of his conduct (R.L.F.526-27). Dr. Daniel was only unable to form an opinion on that issue because Mr. Middleton did not discuss the crime with Dr. Daniel (R.Tr.243-45,247-48). Dr. Daniel did not testify that had he known Mr. Middleton had arranged to meet the victims to kill them that his opinion on diminished capacity would have changed (R.L.F.526-27). What he stated was "The answer would be yes and no. It depends" (R.Tr.250 emphasis added). That testimony was followed by Dr. Daniel reasserting his confidence in his findings (R.Tr.250).

The reason the result was the same in the Adair case, when Drs. Lipman and Murphy both testified (R.L.F.530), was that counsel there also pursued the same inconsistent guilt and penalty phase theories. In both cases, counsel presented a not guilty defense theory followed by mental impairment evidence offered in penalty. In the Adair case, Drs. Lipman and Murphy were called only in penalty (AdairTr.3409-3605,3607-3745). Moreover, Callaway counsel should have known that presenting inconsistent theories in guilt and punishment was not persuasive to a jury because that was exactly what the Adair counsel had done and death had resulted in Adair County.

The reason the jury “hated” Dr. Lipman and Ms. Davis had “a really bad feeling” about the jury’s reaction to his testimony was counsel presented inconsistent guilt and penalty theories. When the jury heard about Mr. Middleton’s mental impairments for the first time in penalty that evidence was not credible because the jury was left feeling deceived by what they had heard in guilt. It is noteworthy that Ms. Turlington did not want to present in guilt two inherently contradictory defense theories (R.Tr.272-73), but counsel proceeded to present inconsistent theories in guilt and penalty. Furthermore, Counsel Turlington acknowledged that Dr. Lipman’s testimony was inconsistent with the theory Mr. Middleton did not commit the acts charged (R.Tr.275-76).

Counsel presented inherently inconsistent and contradictory guilt and penalty phase defenses, and thereby failed to act as reasonably competent counsel under similar circumstances. Mr. Middleton was prejudiced because there is a reasonable probability that if these three mental health experts had been called in guilt phase Mr. Middleton would not have been convicted of first degree murder or at worst would have been

sentenced to life in penalty after hearing in guilt the mental health evidence that could have been presented. The motion court was unable to give full consideration to Mr. Middleton's claims because it improperly excluded Dr. Lipman's testimony.

This Court should reverse for a new trial or further 29.15 proceedings.

V. FAMILY AND EMPLOYER MITIGATION

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL EMPLOYER AND FAMILY MITIGATION WITNESSES CHARLES WEBB, VERN WEBB, VIRGINIA WEBB, RUBY SMITH, SYLVIA PURDIN, AND GLENN WILLIAMS TO TESTIFY ABOUT HIS IMPAIRED COGNITIVE ABILITIES WHICH PRECEDED HIS HEAVY DRUG USE, AND THEREBY, OFFERED AN EXPLANATION FOR WHY HE MAY HAVE BECOME INVOLVED IN DRUGS; HIS WORK-ETHIC DILIGENCE TO DEMONSTRATE WHY HE WOULD BE A HARD-WORKING GOOD INMATE; AND HIS MOTHER'S INHALANT ABUSE WHICH MIGHT HAVE EXPLAINED WHY AS A CHILD HE WAS COGNITIVELY IMPAIRED BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND CALLED THESE WITNESSES AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THEIR TESTIMONY LIFE WOULD HAVE BEEN IMPOSED.

The motion court rejected the claim counsel was ineffective for failing to call former employers and family to mitigate punishment. Reasonably competent counsel would have investigated and called these witnesses and Mr. Middleton was prejudiced because the jury did not hear evidence warranting life. Mr. Middleton was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State, 850 S.W.2d 348, 350 (Mo. banc 1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). Sentencing someone to death constitutes cruel and unusual punishment if that punishment is imposed arbitrarily and capriciously. Furman v. Georgia, 408 U.S. 238 (1972). The trial and sentencing phases of a capital case must satisfy the requirements of the Due Process Clause. Gardner v. Florida, 430 U.S. 349, 358 (1977).

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991). In Terry Williams v. Taylor, 529 U.S. 362, 369 (2000), trial counsel presented mitigating evidence through the defendant's mother, his friends, and a psychiatrist. Williams' counsel, however, failed to conduct investigation that would have uncovered extensive evidence of his abusive and deprived childhood. Id. 395. The jury also did not hear that Williams was borderline mentally retarded and his mental impairments were likely

organic in origin. Id.370,395-98. The Court concluded Williams was denied effective assistance under Strickland. Id.396-98.

The pleadings, 8(E), alleged counsel was ineffective for failing to call former employers Charles Webb, Vern Webb, Virginia Webb, and Ruby Smith (Mot.L.F.35-37,152-58). Also, the pleadings alleged counsel was ineffective for failing to call Mr. Middleton's aunt, Sylvia Purdin, 8(C), (Mot.L.F.33-34,151) and his uncle Glenn Williams, 8(D), (Mot.L.F.34-35,151-52).

The motion court found as follows:

24. Claims 8(B), (C) and (D) are denied. The testimony of these witnesses was not persuasive nor would it have changed the outcome.

25. Claim 8(E) is denied. The testimony or evidence that Movant was a good worker is neither persuasive nor helpful to Movant. In fact, the Court believes that it would be counterproductive to have presented this evidence since it shows Movant can conform his conduct for extended periods. Trial counsel was not ineffective.

(Mot.L.F.529-30).

The only family member counsel called during penalty was Mr. Middleton's mother, Janice Middleton (T.Tr.1002-24). Counsel did not call any former employers. Janice recounted the details of her own past and present treatment for depression (T.Tr.1007-08), her lack of knowledge about her son's drug problems (T.Tr.1017), and her love for and forgiveness she has extended to him (T.Tr.1020-21). The jury, however, never heard evidence that was crucial to the punishment decision and warranted life.

In Jermyn v. Horn, 1998W.L.754567 at *8 - *17 (M.D.Pa. Oct.27, 1998), aff'd, Jermyn v. Horn, 266F.3d257,303-12(3rdCir.2001), the petitioner was granted relief on counsel's failure to present penalty mitigating evidence. The Commonwealth argued counsel was not ineffective by characterizing the challenge as one of counsel's failure to present all available mitigating evidence. Jermyn, 1998W.L.754567 at *17. Rejecting this argument the District Court reasoned: "[p]resentation of some mitigating evidence does not excuse the failure to provide evidence of different mitigating circumstances." Id.*17. The same is true here - counsel failed to present evidence of different mitigating circumstances.

Vern Webb, his wife Virginia, and their son Charles (Vern), Jr., ran the Leon Sale Barn in Leon, Iowa from 1955-60 and again from 1966-83 (Ex.35 at 2-5,10; Ex.36 at 4-6; Ex.37 at 3-4,6). The Leon Sale Barn was a livestock auction that primarily dealt in cattle, but also, hogs and sheep (Ex.36 at 4-5; Ex.35 at 5). Mr. Middleton worked for the Webbs for a little more than 2 years until the Sale Barn closed in 1983 (Ex.37 at 7; Ex.35 at 10). Mr. Middleton was the only full-time employee and the Webbs paid minimum wage or close to minimum wage with no benefits (Ex.36 at 8; Ex.35 at 5).

Mr. Middleton's work was limited to doing manual labor that included cleaning pens, hauling manure, feeding, working, delivering, and castrating cattle (Ex.35 at 6-7; Ex.36 at 9,11; Ex.37 at 9,11). The Webbs limited Mr. Middleton to doing these types of activities because he was not very bright and was intellectually low functioning (Ex.35 at 6; Ex.36 at 10-11; Ex.37 at 9). Charles had nick-named Mr. Middleton "John Boy" because of the similarity of his character to the television character by that name (Ex.36

at 8). Mr. Middleton simply was not mentally equipped to be able to run the business' computer (Ex.36 at 10-11).

Mr. Middleton was an outstanding worker who did work up to his fullest potential (Ex.35 at 6,9-10; Ex.37 at 7-9). Mr. Middleton was quiet and reserved (Ex.37 at 8). The Webbs never had a worker who pleased them more than Mr. Middleton and they had employed hundreds of workers (Ex.35 at 6; Ex.36 at 7). Mr. Middleton was very dependable and followed orders (Ex.37 at 7; Ex.36 at 13). He would do what he was asked, but lacked the ability to act independently without direction on a job (Ex.36 at 12; Ex.35 at 9). He had an outstanding work ethic so that the Webbs never had to worry about him sitting around doing nothing (Ex.35 at 9). Charles once said that if they had told Mr. Middleton to move the barn he would have done his best to move it (Ex.36 at 10).

Mr. Middleton was definitely someone who was a follower (Ex.36 at 12; Ex.35 at 7; Ex.37 at 8). That manifested itself particularly in his relationship with his girlfriend, Teresa, who displayed the same level of intelligence and for whom he did whatever she told him to do (Ex.35 at 7-9; Ex.37 at 10).

Vern and Virginia Webb had so much confidence in Mr. Middleton that they co-signed a note and advanced money for him to purchase a pick-up truck (Ex.35 at 11; Ex.37 at 12-13). The Webbs never did that for any other employee and never even did that for their own children (Ex.35 at 11; Ex.37 at 13). Mr. and Mrs. Webb helped Mr. Middleton to purchase the pick-up because Mr. Middleton tried to please them and they wanted to help him (Ex.37 at 13).

Ruby Smith owned Smith Feeder Supply Elevator (Ex.34 at 3). Mr. Middleton worked for the Supply Elevator at the same time he worked for the Leon Sale Barn (Ex.34 at 4). He bagged grain, cracked corn, ground feed, and loaded feed on customers' pick-up trucks (Ex.34 at 5). Mr. Middleton's duties were limited to these chores because he had to be supervised in all the details of his work (Ex.34 at 5). In particular, if Ms. Smith asked him to load chicken feed she would have to tell him to take the package with the picture of the baby chickens or if feed was needed for hens she had to tell him it was the bag with the big hen (Ex.34 at 5). Mr. Middleton would wait at the counter until given directions as to what to do (Ex.34 at 7). His intellectual abilities were limited so that he was incapable of handling matters that required he write-out customer sales tickets (Ex.34 at 8). Ms. Smith could rely on Mr. Middleton, however, to come to work on time and do what he was asked to do and never to argue about doing his job (Ex.34 at 5-6,8). Mr. Middleton presented the appearance of someone who was "removed from reality" and who required "a wake-up call" to tell him what you wanted him to do (Ex.34 at 10). Ms. Smith considered Mr. Middleton to be someone who was "a space cadet" who you had to bring back by speaking to him directly (Ex.34 at 10).

While he worked for Ms. Smith, he drove a pick-up that could have been entered in an "ugly pickup contest" (Ex.34 at 8-9). At the Supply Elevator, Mr. Middleton was known by the "demeaning" name of "Sale Barn John" (Ex.34 at 6-7). This nick-name was attached to him because he would work at the Supply Elevator with manure from the Sale Barn on his pant legs and shoes (Ex.34 at 7).

Glenn Williams was Mr. Middleton's uncle and his mother Janice's brother (Ex.38 at 3-4). He remembered that as a child Mr. Middleton was mentally slow (Ex.38 at 5-6). Mr. Middleton was also a follower (Ex.38 at 6). Mr. Middleton's father spent time in the penitentiary for stealing (Ex.38 at 9). Mr. Williams recalled that when Mr. Middleton's mother was growing-up she had a serious habit where she would remove the gas cap from the family tractor and inhale the fumes (Ex.38 at 11-12).

Mr. Middleton's mother was involved in relationships with about three men when he was growing-up (Ex.38 at 12). One of those men was Ken Harding (Ex.38 at 12). Harding could never hold a job, was a drunk, and mean to Janice and her children (Ex.38 at 12-13). Harding took Mr. Middleton to bars (Ex.38 at 13).

The motion court allowed the evidence to be held open to obtain Sylvia Purdin's deposition (R.Tr.418). That deposition was timely filed with the motion court (R.Tr.418;R.L.F.366-73,392-411).

Sylvia Purdin is Mr. Middleton's aunt and his mother's sister (R.L.F.394-95). Ms. Purdin would see Mr. Middleton, as a young child, because his mother, his sister, and he stayed with her when his mother went to visit Harding at the Anamosa Penitentiary (R.L.F.395,399-400). Ms. Purdin recalled that Mr. Middleton's mother had left his father, John Middleton Jr., because he was in the penitentiary for burglary and several other offenses (R.L.F.398-99).

When Ms. Purdin babysat Mr. Middleton, he was quiet and reserved (R.L.F.400-01,404-06). Mr. Middleton had difficulty as a child expressing himself (R.L.F.401). He did not play with the other children, and instead, isolated himself playing with a toy

(R.L.F.401-02). As a child, Mr. Middleton acted like he was “in a daze” and would sit and stare at things (R.L.F.402-03). It was common for her to notice Mr. Middleton displaying “a blank expression” (R.L.F.403). When Mr. Middleton did play with other children, he was a follower and not a leader (R.L.F.403). Ms. Purdin also remembered that as a child Mr. Middleton’s mother had a habit of inhaling gasoline fumes and then passing-out (R.L.F.407-08).

Counsel did not contact any of these witnesses (R.Tr.269-70,332-33). These witnesses could have presented evidence that from the time Mr. Middleton was a young child, and prior to his extensive involvement in drugs at the time of this offense, that he had displayed limited cognitive abilities. Those limited cognitive abilities included that his employers regarded work that he did, including shoveling cow manure, as Mr. Middleton having worked to his fullest intellectual capacity and ability.

In making its punishment decision, it was important for the jury to have heard evidence that while Mr. Middleton was intellectually limited he still was a conscientious and diligent worker at the jobs he was assigned, and therefore, could be expected to perform that way in the penitentiary where he would be drug-free. Also, it was important for the jury to understand that Mr. Middleton’s intellectual capacity was already severely limited before his extensive drug use and not solely the product of that drug use. Mr. Middleton’s preexisting limited intellectual abilities also would have offered an explanation for why he had drifted into the extensive drug use that surrounded this offense. Additionally, evidence of Mr. Middleton’s mother’s inhalant use would have offered the jury an explanation for why he was cognitively impaired as a child and before

he became extensively involved in drugs. Finally, evidence that Mr. Middleton was raised in an abusive family setting, which included his father and one of his mother's boyfriends having spent time in the penitentiary, was important family background that would have underscored the adversity that had confronted Mr. Middleton and limited his opportunity to succeed. This is a case where counsel failed to present evidence of different mitigating circumstances, see Jermyn and Terry Williams, supra, and requires the same relief.

Evidence that Mr. Middleton was a good worker would not have been "counterproductive" as the motion court found (Mot.L.F.529-30). That Mr. Middleton was a good worker when he was not extensively abusing drugs, which would be the case in prison, would have highlighted for the jury that he could be expected to do well in the prison setting, and thus, supported life.

Reasonably competent counsel under similar circumstances would have investigated and called all of these witnesses. Mr. Middleton was prejudiced because there is a reasonable probability that had the jury heard all of this evidence Mr. Middleton would have been sentenced to life.

This Court should order a new penalty phase.

VI. FAILURE TO PRESENT ALL MITIGATING EVIDENCE

- JANICE MIDDLETON

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ELICIT SUBSTANTIAL MITIGATING EVIDENCE FROM MR. MIDDLETON'S MOTHER, JANICE MIDDLETON, BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE PRESENTED THROUGH JANICE MIDDLETON ADDITIONAL EVIDENCE INCLUDING EVIDENCE OF MR. MIDDLETON'S MEDICAL PROBLEMS AT BIRTH, HEAD INJURY AS A CHILD, THE ABUSIVE ENVIRONMENT IN WHICH HE WAS RAISED BY A MENTALLY IMPAIRED MOTHER, THAT ENVIRONMENT'S ROLE IN HIS EARLY EXPOSURE TO CONTROLLED SUBSTANCES, AND THE LEARNING IMPAIRMENTS HE DISPLAYED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THIS TESTIMONY THEY WOULD HAVE IMPOSED LIFE.

The pleadings, Claim 8(AA), alleged counsel was ineffective for failing to present a full and complete picture of Mr. Middleton's life history through his mother, Janice Middleton, even though she testified in penalty (R.L.F.133-35). Corresponding

paragraph 9(AA) alleged the transcript from the Adair County trial would be relied on, which included testimony from Janice Middleton (R.L.F.183-85).

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984). A death sentence constitutes cruel and unusual punishment if it is arbitrarily and capriciously imposed. Furman v. Georgia,408U.S.238(1972). Both phases of a capital trial must satisfy the requirements of the Due Process Clause. Gardner v. Florida,430U.S.349,358(1977).

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. Kenley v. Armontrout,937F.2d1298,1304(8thCir.1991). In Terry Williams v. Taylor,529U.S.362,369(2000), trial counsel presented mitigating evidence through the defendant's mother, his friends, and a psychiatrist. Counsel, however, failed to conduct investigation that would have uncovered extensive evidence of his abusive and deprived childhood. Id.395. The jury also did not hear Williams was borderline mentally retarded and his mental impairments were likely organic in origin. Id.370,395-98. The Court concluded Williams was denied effective assistance of counsel under Strickland. Id.396-98.

To support this claim, Janice Middleton's testimony from the Adair County case was submitted (R.Tr.383-84;Ex.43). Counsel Davis did not review Janice's Adair testimony before she was called in Callaway, even though she knew the transcript from

the Adair case was completed before the Callaway trial and she had obtained copies of portions of the Adair transcript (R.Tr.381-83).

Claim 8(AA) contained many parts (R.L.F.97-135) for which the motion court entered findings (R.L.F.533-35). On the present claim, the motion court's findings were limited to the following: "On two claims pled in the alternative, which related to testimony allegedly available through Brian Fifer and Janice Middleton, Movant failed to present any evidence." (R.L.F.534).

A. JANICE MIDDLETON'S TRIAL TESTIMONY

Trial counsel presented a perfunctory examination of Janice Middleton. She recounted that while Mr. Middleton was held for trial she tried to visit him regularly (T.Tr.1003-04,1019). Because of her health and how far away Potosi is from her, Janice had been unable to continue to visit Mr. Middleton (T.Tr.1004,1006-07). Janice recounted the details of her own past and present treatment for depression (T.Tr.1007-08,1014-15). She recounted Mr. Middleton was a quiet, shy child who had attended Bible school (T.Tr.1009). Also, she recalled when Mr. Middleton was eight years old he obtained a job working in a doughnut shop (T.Tr.1009). She was a single parent who did not receive any financial support from her ex-husband (T.Tr.1009-10). She described having done housekeeping work and becoming a nurses' aide to support the family (T.Tr.1011). She recalled that Mr. Middleton did not cause her any problems and he worked at assorted jobs to earn money (T.Tr.1012). She lacked knowledge of Mr. Middleton's drug use near the time of the acts alleged here (T.Tr.1016-17). Janice still loves her son and she has forgiven him for the acts he committed here (T.Tr.1018-21).

B. EVIDENCE THE JURY NEVER HEARD

Janice Middleton and Mr. Middleton's father, John Middleton Jr., were married in 1957 and remained married for ten years (Ex.43 (AdairTr.) at 3300,3308, 3313, 3332). Their first child was Rose Middleton who was born October 6, 1958 (Ex.43 at 3304,3308). Mr. Middleton was born November 2, 1959 at University Hospital in Iowa City (Ex.43 at 3302). Janice was hospitalized for the six weeks prior to Mr. Middleton's birth because of pregnancy complications (Ex.43 at 3302-03). Mr. Middleton was born with an Rh factor blood problem (Ex.43 at 3303). He was given a series of blood transfusions and was kept for his first eight days in ICU (Ex.43 at 3305-06). After thirteen days, Mr. Middleton was able to leave the hospital (Ex.43 at 3306). Janice had to be especially careful to ensure that during Mr. Middleton's first months home that he did not even scratch himself because there was a substantial risk he could bleed to death (Ex.43 at 3309-10). Mr. Middleton's doctors attributed his failure to learn to walk until later than normal to his birth blood disorder and a related high fever (Ex.43 at 3310-11). His doctors expected his development would be slowed by his birth problems (Ex.43 at 3311).

When Mr. Middleton was five years old, he suffered a head injury that required medical treatment and stitches (Ex.43 at 3312). While the cut he sustained was not large, it still bled profusely, probably because of the blood disorder problems (Ex.43 at 3312-13).

After Janice was married to Mr. Middleton's father only six months, she had a miscarriage caused by him hitting her (Ex.43 at 3317-18). He hit Janice because they had

bills to pay and he had other things to do besides have children (Ex.43 at 3317-18). This was only the first occurrence of many incidents of physical violence directed at Janice (Ex.43 at 3318). Much of the time Mr. Middleton's alcoholic father was unemployed (Ex.43 at 3308,3320). His father had spent time in a military prison for stealing and for going AWOL (Ex.43 at 3321).

Mr. Middleton's father was not happy when he learned Janice was pregnant with him (Ex.43 at 3323). During that time, his father was verbally and emotionally abusive to Janice (Ex.43 at 3323). He was drinking excessively and had an affair with a woman who was making home brew (Ex.43 at 3324).

In 1962, Mr. Middleton's father was arrested for breaking into stores to steal money to buy beer (Ex.43 at 3326-28). He was sentenced to eight years in the Iowa penitentiary and served approximately two years (Ex.43 at 3328,3334,3336). Mr. Middleton was approximately three years old when his father went to prison (Ex.43 at 3328). While John Middleton Jr. was in prison, Janice did house and office cleaning to pay the rent and buy food (Ex.43 at 3331). She stayed married to her husband because she had taken her marriage vows seriously (Ex.43 at 3331).

After John Middleton Jr. was released from prison, he was physically violent and verbally abusive towards Janice in front of the children (Ex.43 at 3338-39). The physical violence averaged twice a week and included occurrences where Mr. Middleton pleaded with his father not to hurt his mother (Ex.43 at 3340). During one incident, when Mr. Middleton was five and Rose was six, they were awakened by Janice's screams (Ex.43 at 3341-42). His father was on top of his mother with his hands around her throat (Ex.43 at

3342). Even though Mr. Middleton and his sister Rose were small children, together they fired a gun at their father to stop him from hurting their mother and which caused a superficial wound to their father (Ex.43 at 3342-43). Following this incident, Mr. Middleton did not trust his father, clung to his mother, and acted as a protector of his mother and sister (Ex.43 at 3345).

During the mid-to-late 1960's, when Mr. Middleton was approximately seven years old, his father continued to be verbally and emotionally abusive to Janice (Ex.43 at 3346-48). Mr. Middleton's father, who was 30 years old, disappeared for about a week and went to California with a 17-year-old girl (Ex.43 at 3348-51). During this same time period, his father also lived with a woman who had two boys (Ex.43 at 3354). Mr. Middleton told his mother he did not want to see his father anymore because he had two new boys and did not need him (Ex.43 at 3354-55). At that time, Mr. Middleton assumed the role of man in the house (Ex.43 at 3355-56).

Janice divorced her husband in 1967 (Ex.43 at 3351). She did not get the child support that was owed to her (Ex.43 at 3355).

Mr. Middleton attended Head Start for two years, rather than one, because he was having learning difficulties with such skills as writing his numbers (Ex.43 at 3338). He repeated either the fourth or fifth grade (Ex.43 at 3356). He was placed in special education classes (Ex.43 at 3352-53). Mr. Middleton's sister, Rose, did not have the types of academic problems he experienced (Ex.43 at 3353).

When Mr. Middleton was about ten years old, and in sixth grade, Janice began living with Ken Harding (Ex.43 at 3357-58). She lived with Harding for four years

(Ex.43 at 3358). Harding was alcoholic and mean to her children (Ex.43 at 3358). When Mr. Middleton was about twelve years old, Harding was furnishing him beer (Ex.43 at 3361). Harding hit Mr. Middleton with objects, including a wooden hanger and his fist (Ex.43 at 3361). Harding beat Mr. Middleton so badly that he had welts and bruises (Ex.43 at 3362-63). Harding also beat Rose badly, including with a belt (Ex.43 at 3362). Harding was physically abusive to Janice in front of her children (Ex.43 at 3359). During one incident, when Harding was physically abusing Janice, Mr. Middleton screamed at Harding to stop and went to a neighbor's house to get help (Ex.43 at 3359-60). That incident resulted in Harding being charged, arrested, and sent to a state mental hospital for six months (Ex.43 at 3360).

When Mr. Middleton was about thirteen years old, the family lived with Janice's second cousin Jules Gooden who made homemade wine available (Ex.43 at 3364-65). Rose married Albert Bellon when she was sixteen and he introduced both her and Mr. Middleton to marijuana when Mr. Middleton was fifteen (Ex.43 at 3365-66).

Reasonably competent counsel under similar circumstances would have elicited all these matters from Mr. Middleton's mother. See Kenley and Terry Williams v. Taylor, supra. In particular, reasonable counsel would have elicited this information because it was available in the Adair trial transcript. Further, the motion court clearly erred in finding no evidence was presented to support this claim. Mr. Middleton was prejudiced because there is a reasonable probability had the jury heard this evidence of the adversity he experienced that he would have been sentenced to life.

This Court should order a new penalty phase.

VII. PRIOR CONFINEMENT MITIGATION

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIMS MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL HIS IOWA CORRECTIONS COUNSELOR, JAKE NOONAN, AND TO INTRODUCE HIS IOWA CORRECTIONS FILE IN PENALTY TO SUPPORT A LIFE SENTENCE TO ESTABLISH HE HAD BEEN A WELL-BEHAVED AND WELL-ADJUSTED PRISONER IN IOWA, AND THEREFORE, COULD BE EXPECTED TO BE EQUALLY SUCCESSFUL IF SENTENCED TO LIFE BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND PRESENTED THIS EVIDENCE AND MR. MIDDLETON WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THIS EVIDENCE THEY WOULD HAVE IMPOSED LIFE.

The motion court denied the claims counsel was ineffective for failing to call Mr. Middleton's Iowa Corrections counselor, Jake Noonan, and to introduce his Iowa Corrections file in penalty. Reasonably competent counsel would have investigated and presented this evidence. Mr. Middleton was prejudiced because the jury did not hear evidence warranting life. Mr. Middleton was denied effective assistance, due process,

and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984). A death sentence constitutes cruel and unusual punishment if imposed arbitrarily and capriciously. Furman v. Georgia,408U.S.238(1972). The trial and punishment phases of a capital case must satisfy the requirements of the Due Process Clause. Gardner v. Florida,430U.S.349,358 (1977).

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. Kenley v. Armontrout,937F.2d1298,1304(8thCir.1991). In Terry Williams v. Taylor,529U.S.362,369,395(2000), trial counsel presented mitigating evidence through the defendant's mother, his friends, and a psychiatrist, but failed to conduct investigation that would have uncovered extensive evidence of his abusive and deprived childhood. The jury also did not hear that Williams was borderline mentally retarded and his mental impairments were likely organic in origin. Id.370,395-98. The Court concluded Williams was denied effective assistance under Strickland. Id.396-98.

The pleadings, 8(J) and 8(K), alleged counsel was ineffective for failing to call Mr. Noonan and present Mr. Middleton's Iowa records because this evidence was relevant mitigation under Skipper v. South Carolina,476U.S.1(1986) (R.L.F.43-44,167-68). This evidence should have been presented because it demonstrated Mr. Middleton's

past good adjustment to incarceration, and therefore, he could have been expected to adjust-well to incarceration for life (R.L.F.43-44,167-68).

Mr. Noonan was the treatment services director for the Iowa Department of Corrections at Anamosa State Penitentiary (Ex.39 at 4,8). His duties include chairing the classification committee, overseeing institutional transfers, and making parole board recommendations (Ex.39 at 8). He is also responsible for an in-patient therapeutic community program, an out-patient program at Anamosa, an out-patient program at Luster Heights, and grant writing for the State of Iowa (Ex.39 at 8).

In his counseling duties, Mr. Noonan has supervised 800-900 inmates, including Mr. Middleton (Ex.39 at 9-10). Mr. Middleton was cooperative and took advantage of available opportunities (Ex.39 at 12). He obtained his G.E.D., completed substance abuse programs, and attended substance abuse groups (Ex.39 at 12). During Mr. Middleton's confinement he did not have any disciplinary reports (Ex.39 at 13). Mr. Middleton was initially confined at Anamosa and transferred to Luster Heights (Ex.39 at 14). Luster Heights was a live-out camp without any fence (Ex.39 at 13-14). Mr. Middleton could not have been transferred to Luster Heights any sooner because he had a mandatory minimum sentence for a drug conviction (Ex.39 at 14). Mr. Middleton was sent to Luster Heights because his attitude, behavior, and adjustment were good and he needed substance abuse treatment (Ex.39 at 15-16). Mr. Middleton was eligible for transfer to Luster Heights because he had not had any violent episodes or escapes at Anamosa (Ex.39 at 17). Mr. Middleton was quiet and had a good attitude (Ex.39 at 17). He had an above average adjustment to incarceration and above average work reports

(Ex.39 at 17-18,26). Because Mr. Middleton had a particularly good custody level that made him low-risk, he was allowed to work outside the prison (Ex.39 at 17-18).

Mr. Middleton's Iowa Corrections records contained similar impressions (Ex.40). Those records included a psychological report that concluded Mr. Middleton had a "low" potential for institutional violence (Ex.40).

The motion court ruled:

29. Claims 8(J), (K) and (L) suggest counsel was ineffective in failing to present evidence that Movant was "well adjusted" in prison. This was a matter of trial strategy. Emphasizing Movant's prison records does not seem to be a wise strategy, particularly when it allows the State to emphasize that Movant escaped from confinement, along with the fact that it emphasizes that Movant has been confined on multiple occasions. The "helpfulness" of this evidence was never explained. These claims are denied .

(R.L.F.530).

Counsel Turlington was unsure if she had ever seen Mr. Middleton's Iowa records, and she did not contact Mr. Noonan (R.Tr.279-80). Counsel Turlington thought the Iowa records were not used because they called witnesses from Potosi to discuss Mr. Middleton's behavior there (R.Tr.279-80). Counsel Davis testified that she did not see any point in contacting people connected with the Iowa Department of Corrections because she had contacted people associated with Missouri Corrections who were then housing Mr. Middleton (R.Tr.334).

In penalty, counsel called Mr. Middleton's Potosi unit manager, Cecil Pettis, and Potosi psychologist, Betty Weber, to testify about Mr. Middleton's adjustment to being at Potosi for his Adair death sentence (T.Tr.1024-45,1046-53). On cross-examination of Mr. Pettis, respondent highlighted what it characterized as two escape attempts by Mr. Middleton while he was being held for trial at the Harrison County Jail (T.Tr.1041). In guilt, respondent also had presented evidence of Mr. Middleton allegedly attempting to escape from the Harrison County Jail (T.Tr.756-59). Also on cross-examination of Mr. Pettis, respondent highlighted that there had been a successful escape at Potosi by someone other than Mr. Middleton (T.Tr.1041).

In penalty, respondent introduced Mr. Middleton's Iowa convictions (T.Tr.923-25). In initial penalty, respondent argued the alleged attempted escapes from the Harrison County Jail (T.Tr.1061). In rebuttal penalty argument, respondent returned to Mr. Middleton's alleged attempts to escape from the Harrison County jail and that Potosi had had a successful escape by someone other than Mr. Middleton (T.Tr.1074-75).

In Skipper v. South Carolina,476U.S.1,9,14-15(1986), Justice Powell concurred that the petitioner's jail conduct should have been admitted. That conduct, however, was relevant not as mitigating evidence, but rather to rebut evidence and argument used against him. Skipper,476U.S. at 9,14-15(Powell, J., concurring). Justice Powell took this approach reasoning that a person awaiting trial or sentencing in a capital case could be expected to behave flawlessly in hope that the sentencing authority would not impose death. Skipper,476U.S. at 14-15(Powell, J., concurring).

Reasonably competent counsel under similar circumstances would have investigated and presented evidence of Mr. Middleton's Iowa incarceration through Mr. Noonan and Mr. Middleton's Iowa Correction records (Ex.40). This evidence was crucial because not only would it have apprised the jury of Mr. Middleton's ability to adjust to incarceration well, but also when he was held in Iowa facilities where escape would have been easy, he had not attempted to escape. This evidence would have countered respondent's focus on Mr. Middleton's alleged attempted escapes from Harrison County and the successful escape that had occurred at Potosi by someone other than Mr. Middleton. Also, this evidence was more persuasive than the evidence the jury heard for the reasons Justice Powell identified in Skipper. When Mr. Middleton was confined in Iowa, he did not have any incentive to be well-adjusted in order to hope to persuade a sentencer to not impose death. In contrast, while Mr. Middleton was being housed at Potosi, awaiting trial in Callaway County, that incentive Justice Powell identified existed and made the evidence presented through Mr. Pettis and Ms. Weber not compelling. Moreover, it was critical to present evidence of Mr. Middleton's adjustment in Iowa correctional facilities to counteract the jury learning from respondent about these prior Iowa convictions. Mr. Middleton was prejudiced because there is a reasonable probability had the jury heard this evidence a life sentence would have been imposed.

This Court should reverse for a new penalty phase.

VIII. FAILURE TO PRESERVE AND EVIDENTIARY INEFFECTIVENESS

THE MOTION COURT CLEARLY ERRED OVERRULING CLAIMS MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE WHEN COUNSEL:

- A. FAILED TO PRESERVE RESPONDENT EXAMINING DR. LIPMAN WHETHER HE BELIEVED MR. MIDDLETON HAD LIED TO HIM;**
- B. ELICITED FROM WILLIAM WORLEY THAT WORLEY SAW WHAT APPEARED TO BE A FRESHLY DUG GRAVE AT MR. MIDDLETON'S HOUSE;**
- C. FAILED TO OBJECT TO ARGUMENT DEATH WAS WARRANTED BECAUSE OF SOCIETY'S DRUG PROBLEM;**
- D. FAILED TO OBJECT TO QUESTIONING OF CECIL PETTIS THAT MR. MIDDLETON ATTEMPTED TWICE TO ESCAPE FROM JAIL;**
- E. FAILED TO ELICIT FROM DR. LIPMAN EVIDENCE MR. MIDDLETON'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED AND HAVE THE JURY SO INSTRUCTED;**
- F. FAILED TO OBJECT TO ARGUMENT THAT IF THE JURY COULD NOT IMPOSE DEATH FOR THIS CRIME THEN THERE COULD BE NO CRIME FOR WHICH IT COULD; BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST.**

AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD NOT HAVE SO ACTED AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY THAT HE WOULD HAVE BEEN SENTENCED TO LIFE.

FURTHER, THE MOTION COURT CLEARLY ERRED IN REFUSING TO ALLOW EVIDENCE ON THE ISSUE OF COUNSEL'S INEFFECTIVENESS FOR FAILING TO ELICIT FROM DR. LIPMAN EVIDENCE ABOUT MR. MIDDLETON'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR IMPAIRMENT OF HIS ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW BECAUSE THAT ACTION DENIED MR. MIDDLETON HIS RIGHTS TO DUE PROCESS, A FULL AND FAIR HEARING, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VIII AND XIV, IN THAT A SUFFICIENT FOUNDATION WAS PRESENTED AND THE MOTION COURT COULD NOT FULLY AND FAIRLY RULE ON THIS CLAIM (E SUPRA), WHEN IT REFUSED TO CONSIDER DR. LIPMAN'S OPINIONS.

The motion court denied claims counsel was ineffective for: (a) failing to preserve it was error for respondent to question Dr. Lipman whether he believed Mr. Middleton had lied to him; (b) eliciting from William Worley he saw what appeared to be a freshly dug grave at Mr. Middleton's house; (c) failing to object to argument about society's drug problem; (d) failing to object to questioning about two escape attempts; (e) failing to

properly present the mitigator that Mr. Middleton had lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to law; and (f) failing to object to argument that if death could not be imposed here, then it could not be anywhere. Mr. Middleton was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const., Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State, 850 S.W.2d 348, 350 (Mo. banc 1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). A death sentence constitutes cruel and unusual punishment if that punishment is imposed arbitrarily and capriciously. Furman v. Georgia, 408 U.S. 238 (1972). Both the trial and penalty phases of a capital case must satisfy the requirements of the Due Process Clause. Gardner v. Florida, 430 U.S. 349, 358 (1977).

The motion court's Findings on Claims 8(Y) and 8(AA) were previously set forth in Point I (See also R.L.F.532-35). Additionally, the motion court found:

As to the claims that relate to Dr. Lipman, the state's questioning of Dr. Lipman was proper in that it tested his qualifications, skills, and credibility, and the validity and weight of his opinion. The various objections would have been without merit, and there is no reasonable probability that any of the objections would have changed the outcome of movant's trial.

(R.L.F.534).

A. DR. LIPMAN – OPINION WHETHER MR. MIDDLETON LIED

The pleadings (8(AA) 3(ff) and (kk)) alleged counsel was ineffective for failing to preserve in the motion for new trial and by proper objection respondent cross-examining Dr. Lipman whether he believed Mr. Middleton had lied to him (R.L.F.121,123). They further alleged that had this matter been preserved and raised on appeal, then a new penalty phase would have been ordered (R.L.F.121,123).

The relevant testimony was as follows:

Q. Uh-huh. And when someone has a motive to lie you certainly need external sources to verify the objective reality?

A. That's true.

Q. And of course the defendant very well could have a motivation to lie?

A. Yes, and I think I may have given you examples of how he obviously did deny.

Q. Uh-huh. And in fact he lied to you on a couple different occasions when he was reciting factual scenario of what happened, the days of the offenses?

A. I believe that –

MS. TURLINGTON: I'm going to object. May we approach the bench?

THE COURT: The objection will be overruled. Let's proceed.

A. I formed the impression that he was not being entirely truthful, that's right.

Q. And that's why you needed those external sources?

A. Yes.

**** (T.Tr.984-85).

Q. It's very typical of people who are engaged in criminal behavior to try to mitigate their own responsibility?

A. Yes, it is.

Q. And as you've already stated, the defendant lied to you or you believe he lied to you –

MS. TURLINGTON: Objection, asked and answered.

MS. KOCH: I'm not finished with the question.

THE COURT: Complete the question then I'll hear the objection.

Q. As you already testified, I believe, the defendant has lied to you in relationship to relating several of the events which transpired around the dates of the events?

A. I believe so.

MS. TURLINGTON: Asked and answered.

A. But I don't know that.

THE COURT: That objection will be overruled.

(T.Tr.992-93). The motion for new trial, (Ex.27), did not include these matters.

It is improper for a witness to comment directly on someone else's truthfulness. State v. Link, 25 S.W.3d 136, 143 (Mo. banc 2000). Counsel Turlington did not have any strategic reason for failing to preserve this matter (R.Tr.313). Respondent's questioning of Dr. Lipman should have been objected to on these grounds and included in the motion for new trial so that it could have been raised on direct appeal. This questioning portrayed Mr. Middleton badly and undermined the persuasiveness of Dr. Lipman's testimony. Reasonably competent counsel under similar circumstances would have properly preserved this claim. Mr. Middleton was prejudiced because there is a reasonable probability his case would have been reversed for a new penalty phase had these matters been preserved.

B. WORLEY – GRAVE DUG EVIDENCE

The pleadings (8(AA) 4(c)) alleged counsel was ineffective for eliciting from William Worley that Worley had seen what appeared to be a freshly dug grave at Mr. Middleton's house (R.L.F.127). Counsel Davis was unsure why she elicited such evidence, but thought it was later disproved (R.Tr.377-78). There was no such later evidence.

The applicable questioning was as follows:

Q. Okay. And I think you also said you saw a freshly dug grave at John's house about the size of a person?

A. What looked like one.

Q. What looked like one?

A. Yes.

Q. You said it was covered up with boards?

A. Yep.

Q. Okay. You told that to the police; right?

A. Yep.

(T.Tr.914-15).

In State v. McCarter, 883 S.W.2d 75, 77-79 (Mo.App., S.D. 1994), counsel was found ineffective for introducing evidence that the defendant, who was charged with sexual abuse, had had prior sexual abuse accusations made against him, but had not been charged because they had been investigated and not substantiated. Here, counsel elicited evidence that Mr. Middleton allegedly had a grave dug on his property which was especially prejudicial because respondent's evidence included Mr. Hamilton's and Stacey Hodge's decomposed bodies were not found until one month after they were killed and then in the trunk of a car. State v. Middleton, 998 S.W.2d 520, 523-24 (Mo. banc 1999). Additionally, this evidence was highly prejudicial because respondent's witness Spurling had testified that Mr. Middleton had allegedly made statements about wanting to dispose of the bodies by burning them (T.Tr.534,549).

Mr. Middleton's counsel should be found ineffective for the same reasons counsel in U.S. v. Villalpando, 259 F.3d 934 (8th Cir. 2001) was ineffective. Villalpando was convicted of drug conspiracy in a trial where his counsel elicited on cross-examination of a government witness that he threatened the witness and told the witness he had ordered someone's murder. Id. 937. The Court concluded that it was not reasonable strategy for counsel to elicit evidence establishing the defendant's character as threatening and

murderous. Id.939. There was no reasonable strategy for eliciting from Worley here what he thought appeared to be a freshly dug grave.

Reasonably competent counsel under similar circumstances would not have elicited this evidence. See McCarter. Mr. Middleton was prejudiced because there is a reasonable probability he would have been sentenced to life.

C. SOCIETY'S DRUG PROBLEM

The pleadings (8(Y) 4(t) and (u) alleged counsel was ineffective for failing to timely object to all of respondent's arguments death was warranted because of society's drug problems (R.L.F.83-84). Counsel Davis testified she did object as timely as she felt she could, but was unsure why she did not object sooner (R.Tr.397-99). Counsel Davis did not have any reason for failing to make subsequent objections to the one she made (R.Tr.397-99).

The relevant argument was as follows:

Another reason you need to give him the death penalty for both of these crimes is because you have heard a lot about drugs, not only in this trial about methamphetamine but you've probably heard on the news how bad the methamphetamine problem is. Hear all the time about labs getting shut down and how the problem keeps growing. Well, what kind of message do you send to those drug dealers out there –

MS. DAVIS: Judge, I'm going to object.

MS. KOCH: -- when you don't –

MS. DAVIS: Improper argument and invades the province of the jury.

THE COURT: The objection will be overruled.

MS. KOCH: What kind of message do you send to those drug dealers out there who are keeling methamphetamine who are afraid of going to jail, afraid of getting caught when you give somebody life without parole? Not a very strong message. But you know something? When you give them the highest punishment this state has to offer, which is the death penalty, you send a message. You send a message clear and loud. We're not going to tolerate drugs and we're not going to tolerate anybody who kills because of drugs. And that's why you need to give this man, not one, but finish that circle and give him two more death penalties. Do it as an insurance policy and do it so that everybody in the northeast Missouri will know that the people of Missouri are not going to tolerate people killing to save themselves from going to jail. Because that's exactly what this man did. Exactly what he did.

(T.Tr.1078-79).

The same arguments were made in Commonwealth v. LaCava, 666A.2d221,235-37(Pa.1995). Counsel was found ineffective for failing to object and the death sentence was reversed because such arguments advocating death were not directed at a crime society has deemed worthy of the death penalty and argued outside the record. Id.237. See Point I, discussion. This Court has recognized counsel's failure to object to matters

argued outside the record warrants penalty phase relief. State v. Storey, 901S.W.2d886,900-03(Mo.banc1995). Reasonably competent counsel under similar circumstances would have timely objected to all of respondent's improper argument because respondent was arguing for death on grounds not legally authorized for that punishment. Mr. Middleton was prejudiced and there is a reasonable probability he would have been sentenced to life.

D. QUESTIONING ABOUT TWO ESCAPE ATTEMPTS

The pleadings (8(AA) 4(1)), alleged counsel was ineffective for failing to object to respondent cross-examining Potosi caseworker Mr. Pettis whether he was aware Mr. Middleton had attempted to escape twice from the Harrison County Jail because there was no evidence of two attempts (R.L.F.132-33). The relevant inquiry was as follows:

Q. And are you aware that the defendant had two escape attempts while he was in the Harrison County Jail?

A. No.

Q. That information is not in your file?

A. No. I did, I skimmed the information briefly this morning to see what, because as I said he had not really made an impression on me. And I needed to go back and kind of review.

Q. Is that something that normally you would receive from the jails, that information?

A. It depends on what type of questioning occurred at the time of his initial interview.

Q. So the information would come from the inmate himself, not from the facility?

A. Often self-reporting, yes.

MS. KOCH: I have no other questions.

(T.Tr.1041). Counsel Davis did not object because she thought respondent had presented evidence of two attempted escapes (R.Tr.386).

During guilt, respondent presented evidence through Officer Forck that he had observed Mr. Middleton standing outside the Harrison County Jail's locked area which is located on the courthouse's third floor (T.Tr.756-59). Mr. Middleton was standing in the hallway landing area which separated the men's jail from the women's jail (T.Tr.760). Mr. Middleton's co-defendant, girlfriend, Margaret Hodges, was being held at that time in the women's jail (T.Tr.760). Forck had Mr. Middleton returned to his cell (T.Tr.759).

In penalty, Douglas Stallsworth testified Mr. Middleton had used a pair of fingernail clippers to get outside the men's jail to go visit his co-defendant, girlfriend, Margaret Hodges in the women's jail (T.Tr.930-32). Stallsworth testified that after Mr. Middleton visited his girlfriend in the women's jail he returned on his own to his cell (T.Tr.930-32). In penalty argument, respondent argued for death because Mr. Middleton was an escape risk (T.Tr.1061,1074-75).

Even if the evidence adduced through Forck could be deemed to have constituted one attempted escape there still was no evidence of two attempted escapes. Reasonably competent counsel under similar circumstances would have objected to respondent presenting as fact that Mr. Middleton had attempted to escape twice. Mr. Middleton was

prejudiced because there is a reasonable probability that absent this factual misrepresentation, followed by argument about Mr. Middleton as an escape risk, that he would have been sentenced to life.

E. DR. LIPMAN – MITIGATION NOT PRESENTED

The pleadings (8(AA) 4(f)) alleged counsel was ineffective for failing to elicit from Dr. Lipman the opinion Mr. Middleton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and to have the jury so instructed (R.L.F.128-29).

Section 565.032.3(6) provides that a statutory mitigating circumstance is the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. At Mr. Middleton's Adair trial, that counsel elicited from Dr. Lipman evidence that Mr. Middleton was so impaired (AdairTr.3708). At the Callaway trial, evidence on this issue was not presented through Dr. Lipman and the jury therefore was not instructed on this mitigator (T.Tr.936-1001;T.L.F.632,638).

As discussed in Point IV, because of respondent's foundation objection, Dr. Lipman testified as an offer of proof that Mr. Middleton was so impaired under §565.032.3(6) (R.Tr.66-68). Mr. Middleton incorporates here the same arguments as to why the motion court clearly erred in excluding this evidence. See Point IV.

In Antwine v. Delo,54F.3d1357,1365,1367-68(8thCir.1995), counsel was found ineffective in penalty for failing to present evidence of Antwine's lifelong bipolar disorder condition which could have been identified through an independent examination.

Here, counsel should have known that Dr. Lipman held this opinion as to Mr. Middleton's impairment because he had already testified in the Adair trial that he was so impaired and the Adair transcript was available for counsel's use (R.Tr.381-83). Reasonably competent counsel under similar circumstances would have presented this mitigating evidence and requested the jury be instructed on it. See Antwine. Mr. Middleton was prejudiced because there is a reasonable probability the jury would have voted for life.

F. OUTSIDE THE RECORD SERIOUSNESS ARGUMENT

The pleadings (8(Y) 4(x)) alleged counsel was ineffective for failing to object to argument if the jury could not impose death for this crime there could be no crime for which it would impose death (R.L.F.85).

The relevant argument was as follows:

It's your decision, ladies and gentlemen, but justice here absolutely demands that these two people's deaths are avenged and that they, this defendant get the death penalty for it, the highest punishment you can give for a crime like this. If you can't give the death penalty for this crime, what kind of crimes are you going to give the death penalty for?

THE COURT: Ms. Taylor and Ms. Partington and Ms. Smith, if you will remain in the courtroom. The remainder of the jury will retire, deliberate and reach your verdicts.

(T.Tr.1079). Counsel Davis did not know why she did not object (R.Tr.399).

In State v. Storey, 901 S.W.2d 886, 900-01 (Mo. banc 1995), the prosecutor argued that the case was among the most brutal in St. Charles County's history. That argument was improper because it relied on facts outside the record. Id. 900-01. Because there was no evidence about the brutality of other murders in St. Charles County, the argument was improper. Id. 901. This unobjected to argument in Storey, along with other unobjected to arguments, resulted in finding counsel was ineffective. Id. 900-03.

The prosecutor's argument here was the same as that made in Storey. Here, the jury was told that the facts of Mr. Middleton's case, when compared to those in other cases, made this crime so bad it must deserve death. This argument suggested the prosecutor had special knowledge of why this case was so deserving of death. Further, that perception was only worsened by the prosecutor having talked about in voir dire how she "spend[s] a lot of time traveling around the state trying cases like this." (T.Tr.174). Moreover, this argument was particularly prejudicial because it was the last thing the jury heard before deliberations began.

Reasonably competent counsel under similar circumstances would have objected. See Storey. Mr. Middleton was prejudiced because there is a reasonable probability the jury would have voted for life.

For all the reasons discussed, a new penalty phase is required or further 29.15 proceedings.

IX. FAILURE TO CALL BRIAN FIFER

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL BRIAN FIFER IN PENALTY TO TESTIFY HE WAS CONFINED IN IOWA WITH MR. MIDDLETON AND THAT AN INMATE INFORMING SOMEONE OUTSIDE A PENAL FACILITY HE INTENDED TO “SELL THEIR ADDRESS” MEANT THE INMATE NO LONGER INTENDED TO WRITE THE PERSON BECAUSE THAT PERSON HAD NOT WRITTEN BACK AND DOES NOT CONSTITUTE A THREAT TO HARM BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND CALLED THIS WITNESS TO REFUTE RESPONDENT’S PORTRAYAL OF MR. MIDDLETON HAVING USED THIS PHRASE AS A THREAT TO HARM AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THIS EVIDENCE THEY WOULD HAVE IMPOSED LIFE.

The motion court denied the claim counsel was ineffective for failing to call Brian Fifer in penalty. Reasonably competent counsel would have investigated and called this witness and Mr. Middleton was prejudiced because the jury did not hear evidence

warranting life. Mr. Middleton was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State, 850 S.W.2d 348, 350 (Mo. banc 1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). Sentencing someone to death is cruel and unusual punishment if that punishment is imposed arbitrarily and capriciously. Furman v. Georgia, 408 U.S. 238 (1972). Both phases of a capital trial must comport with the requirements of the Due Process Clause. Gardner v. Florida, 430 U.S. 349, 358 (1977).

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991).

Paul Oglesbee, who is married to Mr. Middleton's sister, Rose, testified for respondent in penalty (T.Tr.871). That testimony included:

Q. And was there a letter that was written to Rose when he was incarcerated?

A. Yes.

Q. And was there a p/s on the end of the letter?

A. Yes. He said if she doesn't write I'll sell this address.

Q. And what did that mean?

A. We --

MS. DAVIS: I'm going to object to what it meant,
Your Honor. He can testify as to what the p/s said. But as to what it meant
he can't testify.

THE COURT: The objection will be overruled.

A. We took it as he was going to put a hit on us.

(T.Tr.875).

Respondent repeatedly argued to the jury death was warranted because Mr.
Middleton had threatened to kill his sister and her husband (T.Tr.1056,1058,1075).

At the Adair trial, and over objection, Oglesbee also had testified that he had
interpreted this phrase to mean that Mr. Middleton intended to have a hit placed on him
and his wife, Rose (AdairTr.3280-92). The transcript of the Adair trial was completed
before the Callaway trial (R.Tr.381-83).

Ms. Turlington did not contact Brian Fifer and could not recall whether she had
discussed with Mr. Middleton matters relating to his Iowa cellmates (R.Tr.280-81). Ms.
Davis did not contact Mr. Fifer because she saw no point in doing that and relied on
people connected to Missouri Corrections (R.Tr.334).

Claim 8(L) alleged counsel was ineffective for failing to investigate and call Brian
Fifer to testify in penalty (R.L.F.44-45,168-70). Mr. Fifer would have testified that he
was Mr. Middleton's cellmate at the Iowa Department of Corrections and that the
expression "sell your address" is not a threat to harm anyone (R.L.F.44-45,168-70). That
expression means that an inmate will stop corresponding with someone outside the prison

if that person is not also corresponding with the inmate (R.L.F.44-45,168-70). These same allegations also were part of Claim 8(AA) (R.L.F.109-10,183).

On this claim the motion court ruled:

29. Claims 8(J), (K) and (L) suggest counsel was ineffective in failing to present evidence that Movant was “well adjusted” in prison. This was a matter of trial strategy. Emphasizing Movant’s prison records does not seem to be a wise strategy, particularly when it allows the State to emphasize that Movant escaped from confinement, along with the fact that it emphasizes that Movant has been confined on multiple occasions. The “helpfulness” of this evidence was never explained. These claims are denied.

* * * * (R.L.F.530).

On two claims pled in the alternative, which related to testimony allegedly available through Brian Fifer and Janice Middleton, Movant failed to present any evidence.

(R.L.F.534).

The motion court allowed the evidence to remain open to obtain Mr. Fifer’s deposition (R.Tr.418). That deposition was filed with the motion court within the time granted (R.Tr.418;R.L.F.366-91). Thus, the motion court’s findings that there was no evidence presented was clearly erroneous.

Brian Fifer and Mr. Middleton were cellmates at Iowa’s Anamosa Penitentiary for approximately two years (R.L.F.374-78). He recalled that inmates looked forward to

receiving mail because it is a link to the outside world (R.L.F.385). Because inmates do not earn much money, they cannot afford to be sending mail to people who do not write back (R.L.F.385-86). The phrase “sell your address” is an expression inmates use to mean they are not going to spend their money to write to people who did not write back (R.L.F.386-87). The phrase is “a prison slang” that does not in any way constitute a threat to physically harm anyone (R.L.F.386-87). People in the penitentiary understand this phrase’s meaning, but people outside do not (R.L.F.386-87).

Reasonably competent counsel under similar circumstances would have investigated and called Mr. Fifer to refute Mr. Oglesbee’s mistaken interpretation “sell your address” meant Mr. Middleton intended to have a hit placed on him and his wife, and thereby, minimized the adverse impact of respondent’s argument as to Mr. Oglesbee’s mistaken interpretation. Reasonable counsel would have taken such action because respondent was allowed to present, over objection, this same testimony at the Adair trial and the Adair trial transcript was completed before the Callaway trial. Mr. Middleton was prejudiced because there is a reasonable probability the jury would have sentenced him to life.

This Court should reverse for a new penalty phase.

X. EVIDENCE SPURLING DID KILLINGS

THE MOTION COURT CLEARLY ERRED IN REJECTING CLAIMS COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE TO SHOW DAN SPURLING, AND NOT MR. MIDDLETON, KILLED MR. HAMILTON AND STACEY HODGE BECAUSE MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED UNDER U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE PRESENTED EVIDENCE THROUGH A FIREARMS EXPERT, DON SMITH, THAT THE BULLET FRAGMENTS RECOVERED FROM STACEY HODGE COULD HAVE COME FROM A BULLET FIRED FROM A GUN BELONGING TO SPURLING AND WOULD HAVE CALLED JEREMY WYATT TO TESTIFY SPURLING MADE ADMISSIONS HE COMMITTED THE KILLINGS AND THERE IS A REASONABLE PROBABILITY MR. MIDDLETON WOULD NOT HAVE BEEN CONVICTED OF FIRST DEGREE MURDER OR AT WORST HE WOULD HAVE BEEN SENTENCED TO LIFE.

The motion court rejected claims 8(O) and 8(T), that counsel was ineffective for failing to present evidence Dan Spurling killed Mr. Hamilton and Stacey Hodge (R.L.F. 49-51,60-61,172-73,176-78). That evidence would have included calling firearms expert, Don Smith, and Jeremy Wyatt. The motion court's rulings were clearly erroneous

because Mr. Middleton was denied his rights to effective assistance of counsel, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State, 850 S.W.2d 348, 350 (Mo. banc 1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). A death sentence constitutes cruel and unusual punishment if it is imposed arbitrarily and capriciously. Furman v. Georgia, 408 U.S. 238 (1972). The guilt and penalty phases of a capital trial must satisfy the Due Process Clause. Gardner v. Florida, 430 U.S. 349, 358 (1977).

The motion court rejected the claims as to Mr. Smith finding that his testimony that the recovered bullets could have been fired from weapons other than those belonging to Mr. Middleton did not contradict the testimony of Highway Patrol crime lab witness, Ms. Green (R.L.F.524,531). The motion court also ruled that Mr. Smith's testimony was confusing and not credible (R.L.F.524,531).

The motion court ruled that Jeremy Wyatt's testimony was not credible and reasonable counsel would not have called him to testify (R.L.F.523-24). Also, the motion court found counsel could not have been ineffective because Mr. Wyatt did not tell anyone about what he would have testified to until after trial (R.L.F.523-24).

As to Claim 8(T), the motion court, relying on Morrow v. State, 21 S.W.3d 819 (Mo. banc 2000), ruled that the pleadings failed to allege with the required specificity what evidence counsel should have presented that Spurling committed the homicides

(R.L.F.531-32). The motion court also ruled the claim was not supported by hearing evidence (R.L.F.531-32).

Claim 8(O) alleged Don Smith should have been called to testify that a 30-30 Winchester, such as that owned by Spurling, could leave markings of the same type as those found on the bullet fragments removed from Stacey Hodge (R.L.F.51,173). Claim 8(T) alleged counsel failed to present evidence Spurling committed these offenses (R.L.F.60-61).

In support of claim 8(T) it was alleged, in corresponding paragraph 9(T), counsel should have called Jeremy Wyatt to testify one of Spurling's associates, Mr. Tramell, had made statements to Wyatt that he and Spurling committed the acts in question (R.L.F.176). Also, Mr. Smith would testify that a Winchester 30-30 could cause the same markings found on the bullet fragments recovered from Stacey Hodge (R.L.F.177). Additionally, to support this claim, Harrison County casefiles dealing with charges against Spurling would be presented (R.L.F.177). These allegations did set forth with sufficient specificity what evidence would be presented to support this claim as required by Morrow v. State, 21S.W.3d819(Mo.banc2000), and therefore, the motion court's contrary finding was clearly erroneous. See supra.

As to both witnesses, the motion court found them not credible. See supra. The issue, however, is not whether the motion court found them credible, but rather what matters is whether the jury might have found them convincing. Kyles v. Whitley, 514U.S.419,449n.19(1995).

Counsel Davis testified the defense theory was someone other than Mr. Middleton did the killings and that someone else was Spurling (R.Tr.351-52). Ms. Davis would have wanted to present evidence Spurling committed the homicides (R.Tr.352). Counsel Turlington similarly testified the defense theory was Mr. Middleton did not commit the homicides and it would have been helpful to have presented evidence someone else did the killings (R.Tr.289). While the defense theory was Mr. Middleton did not commit the acts charged, counsel did not present any guilt phase evidence (T.Tr.787,799-800).

A. DON SMITH

The motion court rejected the claim counsel was ineffective for failing to call firearms expert Don Smith to present evidence that supported Spurling did the killings.

Recently, the Southern District found trial counsel was ineffective for failing to call pathologist Dr. Jay Dix and the same firearms expert alleged that should have been called here, Don Smith, in Cravens v. State, 50S.W.3d290(Mo.App.,S.D.2001). The motion court, like the motion court here, had rejected Cravens' claims. Id.293. Cravens was convicted of second degree murder. Id.292. The trial defense theory was an accidental shooting with the gun fired from a close distance. Id.294-95. Evidence presented through Mr. Smith at the postconviction hearing refuted theories the State's firearm expert had presented. Id.297. In finding that counsel was ineffective, the Southern District reasoned: "[i]f the jury in Movant's case had the expert testimony of Dix and Smith before it, the inferences drawn from the evidence certainly may have changed." Id.296-97. In Cravens, counsel failed to act as reasonably competent counsel

when no investigation was made as to calling expert witnesses as to how the shooting occurred. Id.295. The same is true here and this Court should similarly so find.

Respondent introduced two SKS rifles (Trial Exs.34 and 35), that belonged to Mr. Middleton and the codefendant (T.Tr.694,703). Bullet fragments recovered from Stacey Hodge (T.Tr.658) were examined by Highway Patrol lab employee Kathleen Green (T.Tr.719-25). Ms. Green testified either gun could have fired the bullet that produced those fragments (T.Tr.728-30).

Mr. Smith testified the bullet that produced the fragments recovered from Stacey Hodge could have been fired from a 30-30 Winchester (R.Tr.90). In Harrison County Cause No. CR496-194FX the prosecutor filed an information on June 27, 1996 that alleged Spurling had “attempted to cause physical injury to Penny Whitt and her unborn child by means of a deadly weapon by pointing a loaded Winchester 30-30 at her abdomen and threatening to shoot her” (Ex.7). Also, in Harrison County Cause No. CR496-344FX the prosecutor filed an information on November 26, 1996 that charged Spurling with armed criminal action (Ex.14). The prosecutor’s answer to a request for discovery on the armed criminal action charge, filed on December 9, 1996, indicated the State intended to introduce a “Winchester 30-30” that was obtained from or belonged to Spurling (Ex.14).

Reasonably competent counsel under similar circumstances would have called Mr. Smith to testify the bullet fragments that were removed from Stacey Hodge could have been fired from the type of gun Spurling owned, and thus, would have supported counsels’ theory Spurling did the killings. See Cravens. Mr. Middleton was prejudiced

because there is a reasonable probability he would not have been convicted of first degree murder or at worst been sentenced to life.

B. JEREMY WYATT

The motion court also rejected the claim counsel was ineffective for failing to call Jeremy Wyatt to support the claim Spurling did the killings. Mr. Wyatt testified that during August, 1996 he was held in the Harrison County Jail on a charge of minor in possession of alcohol (R.Tr.28). While Mr. Wyatt was confined there, Spurling made statements that he and Lynn Trammel had killed Mr. Hamilton and Stacey Hodge (R.Tr.29-30).

Reasonably competent counsel under similar circumstances would have called Mr. Wyatt to testify to Spurling's admissions, and thus, would have supported counsels' theory Spurling did the killings. Mr. Middleton was prejudiced because there is a reasonable probability he would not have been convicted of first degree murder or at least would have been sentenced to life.

This Court should reverse for a new trial and/or penalty phase.

XI. CLEMENCY ARBITRARINESS

THE MOTION COURT CLEARLY ERRED DENYING MR. MIDDLETON'S CLAIM MISSOURI'S CLEMENCY PROCESS VIOLATES HIS RIGHTS TO DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND EQUAL PROTECTION, U.S. CONST. AMENDS. VIII AND XIV, IN THAT THE PROCESS IS WHOLLY ARBITRARY AND CAPRICIOUS AS THE CLEMENCY OF TRIPLE MURDERER MEASE EVIDENCES. MEASE WAS GRANTED CLEMENCY NOT ON THE MERITS OF HIS CASE, BUT BECAUSE OF THE POPE'S APPEAL ON RELIGIOUS GROUNDS.

The motion court denied the claim that Missouri's clemency process is arbitrary and capricious. That ruling should be reversed because Missouri's clemency process violates Mr. Middleton's rights to due process, freedom from cruel and unusual punishment, and equal protection. U.S. Const. Amends. VIII and XIV. Review is for clear error. Barry v. State, 850S.W.2d348,350(Mo.banc1993).

The pleadings alleged Mr. Middleton's rights to due process, freedom from cruel and unusual punishment, and equal protection were violated because of the circumstances surrounding Governor Carnahan commuting Darrell Mease's death sentence (R.L.F.45-47). In particular, Governor Carnahan commuted Mease's death sentence because the Pope was in Missouri when Mease was scheduled to be executed and he personally appealed to Governor Carnahan to commute Mease's death sentence (R.L.F.45-47).

The motion court found:

30. Claim 8(M), challenging the clemency process, is denied.

Commutation of another's death sentence does not render Movant's death sentence arbitrary or capricious. On direct appeal, the Missouri Supreme Court has already determined that Movant's sentence was properly imposed.

(R.L.F.530).

The Eighth and Fourteenth Amendments require heightened reliability in assessing death. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). It is of vital importance that a death sentence be, and appear to be, based on reason rather than caprice or emotion. Gardner v. Florida, 430 U.S. 349, 357-58 (1977). Discretion given to sentencers in death penalty cases must be suitably directed, limited and channeled to minimize the risk of wholly arbitrary and capricious action. Gregg v. Georgia, 428 U.S. 153, 189 (1976). While clemency procedures are largely committed to the discretion of the Executive Branch, the Due Process Clause provides some constitutional safeguard to wholly arbitrary and capricious action. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 288-90 (1998) (O'Connor, J., concurring). Due Process requires that the procedures used in rendering a clemency decision "will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin." Duvall v. Keating, 162 F.3d 1058, 1061 (10th Cir.), cert. denied, 525 U.S. 1061 (1998), citing Woodard, 523 U.S. at 289 (O'Connor, J., concurring). The use of criteria such as religion in deciding whether to grant or deny clemency violates the commands of the Equal Protection Clause. Woodard, 523 U.S. at 292 (Stevens, J., concurring and dissenting).

Darrell Mease was convicted and sentenced to death for acts resulting in a triple homicide. State v. Mease, 842 S.W.2d 98, 102 (Mo. banc 1992). Governor Carnahan commuted Mease's death sentence to life. The commutation (Ex.3) states:

COMMUTATION OF SENTENCE

I, MEL CARNAHAN, GOVERNOR OF THE STATE OF MISSOURI, have had presented personally and directly to me by Pope John Paul II, a request for mercy in the case of Darrell Mease who was convicted of First Degree Murder on April 25, 1990 and sentenced to death on June 1, 1990. After careful consideration of the extraordinary circumstance of the Pontiff's direct and personal appeal for mercy and because of the deep and abiding respect I have for him and all that he represents, I hereby grant to Darrell Mease a commutation of the above sentence in the following respect: This commutation eliminates from the sentence the penalty of death and further causes Darrell Mease to remain incarcerated for the remainder of his life without the possibility of parole.

The grant of clemency to Mease establishes the arbitrary and capricious nature of Missouri's clemency process. The Governor commuted Mease's death sentence because of the Pope's personal appeal. That this Court found Mr. Middleton's sentence is not disproportionate under § 565.035 supra simply does not address the arbitrariness of Missouri's clemency process. Because Missouri's clemency proceedings are wholly arbitrary and capricious, this Court should order Mr. Middleton be sentenced to life without parole.

CONCLUSION

Mr. Middleton requests: Points II, III, IV, X, a new trial; Points I, II, V, VI, VII, VIII, IX, X a new penalty hearing; Points IV, VIII further 29.15 proceedings; XI impose life without parole.

Respectfully submitted,

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Certificate of Compliance

I, William J. Swift, hereby certify as follows:

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

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William J. Swift

Certificate of Service

I, William J. Swift, hereby certify that two true and correct copies of the attached brief and floppy disk(s) containing a copy of this brief were hand delivered, on the ____ day of _____ 2002, to the Office of the Attorney General, 4th Floor of the Broadway Building, Jefferson City, Missouri 65101.

William J. Swift