

IN THE
MISSOURI SUPREME COURT

TERRANCE ANDERSON,)	
)	
Appellant,)	
)	
vs.)	No. SC 87060
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI
THIRTY-SECOND JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE WILLIAM SYLER, 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

Terrance was convicted of the first degree murder of Stephen and Debbie Rainwater, the parents of his girlfriend, Abbey Rainwater(T.L.F.1005-06).¹ Terrance was charged with shooting them on July 25, 1997(T.L.F.45-48). The jury voted for life without parole for Mr. Rainwater and for death for Mrs. Rainwater(T.L.F.1036-37).

A. Pretrial Evaluations And Jury Selection

In June, 1998, psychiatrist Dr. Lewis found Terrance was suffering from major depression with psychotic features(Ex.4 at 1169). Terrance presented symptoms that were consistent with a dissociative disorder and which required further evaluation(Ex.4 at 1170).

In September, 1998, neurologist Dr. Pincus found Terrance displayed paranoia that was of delusional proportions(Ex.4 at 1184,1186).

Lewis' March, 1999, Addendum report questioned generally Terrance's ability to assist counsel(Ex.4 at 1175). One item that particularly called into question Terrance's competence to assist counsel was that he was convinced he had not shot Mrs. Rainwater(Ex.4 at 1173-74). Terrance displayed a high degree

¹ The record on appeal is designated as follows: (1) Trial Transcript (T.Tr.); (2) Trial Legal File (T.L.F.); (3) 29.15 Hearing Transcript (H.Tr.); and (4) 29.15 Legal File (L.F.). On January 5, 2006, this Court took judicial notice of the entire contents of Terrance's direct appeal file in SC83680.

of paranoia(Ex.4 at 1174-75). He also displayed symptoms that were consistent with a dissociative state(Ex.4 at 1174).

Five days before the scheduled March, 1999, trial, counsel filed a motion that Terrance be found incompetent to proceed or alternatively for a §552.020 mental examination(T.L.F.815-18). That motion relied on Lewis' and Pincus' findings(T.L.F.815-18;Ex.4 at 1156-75).

The trial court ordered an evaluation under §552.020(T.L.F.823-26). The evaluator was to determine whether Terrance was competent to proceed, but not whether at the time of the offense Terrance suffered from a mental disease or defect that made him incapable of conforming his conduct to the requirements of law(T.L.F.823-26).

In September, 1999, court appointed psychologist Dr. English submitted a report that found Terrance was competent to proceed(Ex.4 at 1187-98). The court granted a motion for a second examination under §552.020(T.L.F.827-29).

The defense hired psychologist Dr. Nichols to evaluate Terrance's competence to proceed(Moreland Depo.#1 at 21-22;Ex. 4 at 1287-89).² Nichols prepared a November, 1999, two and one-half page report(Ex.4 at 1287-89). Nichols found no symptoms of mental illness(Ex.4 at 1289). Counsel Moreland, was disappointed in the quality of Nichols' work because her competency to

² Counsel Moreland's testimony was obtained in two depositions. That testimony is referenced as Depo.#1 (September 18, 2003) or Depo.#2 (March 9, 2005).

proceed evaluation and report were superficial and not thorough(Moreland Depo.#1 at 44-45,51-52,55).

Moreland had met with Dr. Cross about Terrance's case before hiring Nichols(Moreland Depo.#1 at 45). Moreland had a favorable impression of Cross and that he would be helpful to the case, but Moreland did not hire him(Moreland Depo.#1 at 31-33). Moreland got sidetracked on the case and never got back to Cross(Moreland Depo.#1 at 33). He got sidetracked because he was so disappointed in Nichols' work(Moreland Depo.#1 at 44-45).

Dr. Cross evaluated Terrance for the 29.15 case and concluded that on the day of the offense, Terrance not only suffered from depression, paranoid thinking, and paranoid personality disorder, but also Post-Traumatic Stress Disorder (PTSD)(H.Tr.149-50). The abuse Terrance's stepfather Robert inflicted was significant in producing the PTSD(H.Tr.131-32). The reality of Robert's abuse sharply contrasted with Robert's penalty phase testimony in which Robert portrayed himself as a model caring father involved in Terrance's life as part of a normal family(T.Tr.1670-80). Moreland believes that Cross would have made stronger the case for a diminished capacity and he had no strategic reason for not using Cross(Moreland Depo.#1 at 37-38).

On January 19, 2001, counsel wrote to the court and urged it to find Terrance was incompetent to proceed based on Lewis' and Pincus' findings(T.L.F.943-44). Immediately before trial began, three days later, counsel again relied on Lewis' and Pincus' findings to urge the court to find Terrance was

incompetent to proceed(T.Tr.351-58). The court found Terrance was competent to proceed(T.Tr.356-58).

Juror Dormeyer served on the jury that convicted and sentenced Terrance to death(T.L.F.949). During voir dire, Dormeyer testified that the death penalty was automatically appropriate, unless defense counsel persuaded Dormeyer not to impose death(T.Tr.577). Counsel had no strategic reason for leaving Dormeyer on the jury and Dormeyer was left on because of an error by the notetaker(Moreland Depo.#1 at 13,56-57;H.Tr.251).

B. Circumstances Of The Shooting

Abbey Rainwater and Terrance began dating in February, 1996(T.Tr.1240). When they met, Terrance was a lot of fun, had a good sense of humor, and they spent a lot of time together(T.Tr.1240-41). Terrance had graduated from high school and was working at a furniture store(T.Tr.1242).

Abbey became pregnant in July, 1996(T.Tr.1264). When Terrance first learned Abbey was pregnant, he was very happy(T.Tr.1348).

In September, 1996, Abbey's parents invited Terrance to live with them(T.Tr.1264). Things started out well at the Rainwater's house, but things changed(T.Tr.1265). In December 1996, Terrance was asked to leave(T.Tr.1265).

Prior to December 1996, Terrance had not tried to physically hurt Abbey(T.Tr.1267-68). Around that time though, Terrance and Abbey fought (T.Tr.1268,1271). Terrance became different from the person Abbey had first met(T.Tr.1272).

When Abbey was first pregnant, she wanted Terrance to be present when the baby was born(T.Tr.1273). Later, while Abbey was pregnant, she threatened Terrance that she would move away to California(T.Tr.1351,1358). By the time Abbey was ready to deliver their child, she did not want Terrance present(T.Tr.1273). Terrance and Abbey's daughter, Kyra was born on April 18, 1997, when Abbey was sixteen(T.Tr.1215-16,1299). When Kyra was born, her name was Anderson-Rainwater(T.Tr.1276). Abbey changed Kyra's name, six days after her birth, removing Anderson(T.Tr.1276-79).

After Kyra was born, Terrance and Abbey had an off and on relationship(T.Tr.1274). While Kyra was a newborn, Terrance and Mrs. Rainwater had an argument and Mrs. Rainwater got a restraining order(T.Tr.1274). During June and July, 1997, Terrance struck Abbey twice(T.Tr.1275). When Abbey was working at Sonic, however, Terrance or Terrance's mother cared for Kyra(T.Tr.1275-76, 1281-82). Also, Terrance accompanied the Rainwaters to a barbecue and day of swimming at a park(T.Tr.1282-83).

Abbey, Kyra, Amy Dorris, and Stacy Turner were at the Rainwaters' house on the evening of July 25, 1997(T.Tr.1297-98). Mr. and Mrs. Rainwater and their ten year old daughter, Whitney, were home(T.Tr.1224,1298-99). When there was knocking on the back door, Mr. Rainwater took a gun and went outside, but found no one(T.Tr.1299-1300). Mr. Rainwater left and drove around the neighborhood looking for who was responsible(T.Tr.1300,1337).

After Mr. Rainwater left the house, Terrance, carrying a gun, forced his way inside(T.Tr.1301-02). Mrs. Rainwater told Abbey to run and she and Whitney ran out the back door(T.Tr.1230,1364). Abbey ran to a neighbor's house and told them to call the police(T.Tr.1233). While Mrs. Rainwater was in the dining room holding Kyra, she and Terrance argued and he shot her(T.Tr.1079-80,1303-06). Whitney heard Kyra crying and went back in the house(T.Tr.1364-65). Whitney took Kyra to a bedroom(T.Tr.1309-10).

Terrance took Kyra from Whitney and went outside with Amy, Whitney, and Kyra(T.Tr.1311-14). Terrance had Amy and Whitney yell for Abbey and Stacy(T.Tr.1312). Stacy hid in a closet and a shower and called 911(T.Tr.1340,1342). Terrance shot Mr. Rainwater when he pulled up(T.Tr.1314,1368-72).

Terrance, Whitney, Amy, and Kyra went back inside the house(T.Tr.1372). The police arrived and Terrance, while holding Kyra, yelled from a window at them(T.Tr.1041-43). The police ordered Terrance to put down his gun and he did(T.Tr.1044,1057-58). Terrance handed Kyra to Whitney(T.Tr.1047,1111-12).

During the days before the shooting, Terrance and Abbey's relationship was marked with conflict(T.Tr.1216). Terrance and Abbey fought(T.Tr.1216-17). Terrance threatened to kill himself, Abbey, and Kyra(T.Tr.1218). The night before the shooting, Abbey told her parents about the fight(T.Tr.1218-19). On the morning of the shooting, Abbey and her parents had obtained a restraining order against Terrance(T.Tr.1219).

Terrance was supposed to take care of Kyra on the day of the shooting, while Abbey was at work(T.Tr.1286-87). Abbey did not tell Terrance she would not be leaving Kyra with him(T.Tr.1286-87). Terrance spoke to Abbey at about 3 p.m. and she told him that it would be up to the court to determine visitation rights(T.Tr.1222-24).

C. Guilt Defense

Terrance attended Missouri Valley for one year on a basketball scholarship(T.Tr.1381-83). Linda Smith, Terrance's mother, disapproved of Terrance having moved in with the Rainwaters because Terrance and Abbey were not married and the Rainwaters were white(T.Tr.1384). Terrance was proud that Abbey had wanted Kyra to have his last name(T.Tr.1387). Terrance moved back with his mother after he was made to leave the Rainwaters' house(T.Tr.1385). After Terrance was fired from his job, he isolated himself in his room and did not talk(T.Tr.1385).

Linda was married to Robert Smith, but Timothy Smith was Terrance's father(T.Tr.1389-90). After Linda became pregnant with Terrance, her relationship with Timothy ended(T.Tr.1390). Terrance had a special relationship with Linda's father, until he died when Terrance was fourteen(T.Tr.1388-89). Terrance grew up believing his father was Robert, until around the time Linda's father died when she told him who his father was(T.Tr.1390-91). Terrance became sad when he learned Robert was not his father and he never met his biological father(T.Tr.1391,1393).

Donald Brandon's son, Jason, and Terrance were good friends and Terrance was like a family member(T.Tr.1396-97). Donald was a furniture shipping supervisor and hired Terrance in May, 1995(T.Tr.1397). Initially, Terrance was a very good employee, but his job performance suffered because of absences and calls he received from Abbey(T.Tr.1398-1401). Terrance left work before his shifts were over to be with Abbey because of problems she was having with her pregnancy(T.Tr.1399-1401). In December, 1996, Donald had to fire Terrance because of excessive absences and leaving early(T.Tr.1401-02).

Terrance told a friend that he was not being allowed to see his daughter, even though he loved her very much(T.Tr.1414). Terrance's family and friends knew him to be an upstanding, hard-working, law-abiding, non-violent person(T.Tr.1393-94,1403-04,1413-15,1478-81,1506-07, 1510).

Dr. Pincus' neurological evaluation determined Terrance could not read above a sixth grade level and what he did read he did not fully comprehend(T.Tr. 1419-20,1423-27,1429-30,1438). Pincus found defects in Terrance's frontal lobe and likely deficits in his left parietal lobe(T.Tr.1435). The frontal lobe is important to insight, judgment, and the capacity to predict outcomes(T.Tr.1435-36).

Terrance's neurological problems made it impossible for him to have coolly reflected given the emotionally stressful circumstances he was experiencing(T.Tr.1454,1462-63). Terrance dropped out of college because he was becoming depressed(T.Tr.1439-40). At the time of the killings, Terrance had

the frontal lobe and parietal lobe deficits and he was depressed(T.Tr.1440-41). Terrance's reading problems were likely the result of brain damage caused at birth(T.Tr.1444-45).

Dr. Lewis' testimony was presented by videotape(Exs.D,E).³ Terrance's records showed he was born prematurely and there was evidence of fetal distress(Ex.E at 15-18). Also, when Terrance was sixteen months old, he swallowed rubbing alcohol, which is toxic to the brain(Ex.E at 19-20). Terrance's school records reflected a learning disability(Ex.E at 23-25).

Terrance was depressed and withdrawn because of having lost his job, Abbey being pregnant, and being thrown-out of the Rainwaters' house(Ex.E at 31). Terrance was encountering many stressful circumstances which caused him to be increasingly depressed, suspicious, and paranoid(Ex.E at 35-41). Terrance was depressed about the possibility of losing his daughter and her not knowing him, like he did not know his father(Ex.E at 38-43). Terrance insisted that someone else shot Mrs. Rainwater and that he only shot Mr. Rainwater in self-defense(Ex.E at 43-44). At the time of the offense, Terrance was paranoid, delusional, severely depressed, and in an altered state such that he was suffering from a mental disease or defect that prevented cool reflection(Ex.E at 43-47,58). The altered state Terrance was in caused him to be unable to remember the

³ Dr. Lewis' testimony will be referenced using the exhibit letter designations assigned at the time of the criminal case.

charged acts(Ex.E at 46-47). When a person performs an act that is an anathema to the person's character and has no memory or a distorted memory of the act, the possibilities are either a dissociative state or an organic impairment(Ex.E at 58-59). Lewis was unable, however, to opine with psychiatric certainty whether Terrance's altered state was the result of a dissociative disorder or an organic impairment(Ex.E at 58-59).

D. Guilt Rebuttal

English testified Terrance had not suffered from a mental disease or defect(T.Tr.1526-27,1542). Counsel objected to respondent calling English in rebuttal on the grounds that English said in his deposition that he was unable to render an opinion as to Terrance's mental state at the time of the offense(T.Tr.1485-88,1524-25). In guilt and penalty argument, prosecutor Ahsens relied on English's findings to support the existence of deliberation, the only contested issue(T.Tr.1605,1629,1634-35,1723).

Section 552.020.14 prohibits the admission in guilt of any statement or information received and placing the jury on notice of a finding of competence to proceed through an examiner appointed under §552.020. Counsel had no strategic reason for failing to object to English testifying on the grounds that his testimony violated §552.020.14(Moreland Depo.#1 at 36).

E. Defense Penalty Phase

The penalty phase was devoted to calling family, friends, and the jail administrator where Terrance was confined(T.Tr.1670-1703). That evidence was

limited to focusing on Terrance's athletic accomplishments, his good work ethic, his polite and respectful behavior, and people's inability to comprehend what caused Terrance to do the shooting(T.Tr.1670-1703).

F. 29.15 Case

The 29.15 court held a hearing on Terrance's 29.15 claims. All of Terrance's 29.15 claims were denied(L.F. 482-503).

From the denial of the 29.15 case, this appeal followed.

POINTS RELIED ON

I.

COUNSEL FAILED TO OBJECT - ENGLISH'S TESTIMONY

VIOLATED §552.020.14

The motion court clearly erred denying the 29.15 postconviction claim that counsel was ineffective for failing to object to respondent's calling English in guilt rebuttal because Terrance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that §552.020.14 prohibited English from testifying in guilt and reasonably competent counsel under similar circumstances would have objected on that ground. There is a reasonable probability that without English's testimony and Ahsens' related argument Terrance would not have been convicted of first degree murder.

State v. Copeland, 928 S.W.2d 828 (Mo. banc 1996);

State v. Bowman, 681 A.2d 469 (Me. 1996);

Tarantino v. Superior Court, 122 Cal. Rptr. 61 (Ca. Ct. App. 1975);

People v. Arcega, 186 Cal. Rptr. 94 (Ca 1982);

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

Section 552.020.14; and

Rule 29.15.

II.

JUROR DORMEYER COULD NOT FAIRLY SERVE

The motion court clearly erred in denying the 29.15 postconviction claim that trial counsel was ineffective for failing to move to strike for cause Juror Dormeyer on the grounds that he would require the defense prove that life without parole was appropriate and/or because Dormeyer was a juror who was an automatic death penalty juror, because Terrance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that Dormeyer testified that he required counsel prove life was appropriate and he would automatically vote for death if Terrance was convicted of first degree murder and trial counsel testified they failed to move to strike Dormeyer because of a note-taking error. Reasonably competent counsel would have moved to strike Dormeyer and prejudice is presumed, but even so Terrance was prejudiced because there is a reasonable probability he would have been sentenced to life.

Presley v. State, 750 S.W.2d 602 (Mo.App., S.D. 1988);

State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001);

State v. Ivy, 869 S.W.2d 297, 300-02 (Mo.App., E.D. 1994);

Knese v. State, 85 S.W.3d 628 (Mo. banc 2002);

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

Rule 29.15.

III.

FAILURE TO CALL CLINICAL SOCIAL WORKER ALFONSO

The motion court clearly erred in denying the 29.15 postconviction claim counsel was ineffective for failing to call clinical social worker Alfonso in penalty to testify about specific background experiences from Terrance's life because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that Alfonso's testifying would have caused the jury to empathize with and lessen Terrance's moral culpability and explain why Terrance snapped and which would have complemented, without being inconsistent with, Lewis' and Pincus' testimony that was simply technical clinical diagnoses. Reasonably competent counsel would have called Alfonso as she was not called merely because the defense team ran out of time. Terrance was prejudiced because there is a reasonable probability the jury would have imposed life.

Wiggins v. Smith, 539 U.S. 510 (2003);

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004);

Simmons v. Luebbers, 299 F.3d 929 (8th Cir. 2002);

Butler v. State, 108 S.W.3d 18 (Mo. App., W.D. 2003);

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

Rule 29.15.

IV.

BRADY VIOLATION - PREVENTING DISCLOSURE RAINWATERS' **PSYCHIATRIC RECORDS**

The motion court clearly erred in denying the 29.15 postconviction claim that respondent failed to satisfy its *Brady* obligations when prosecutor Ahsens advised Abbey Rainwater not to sign a release to obtain her psychiatric treatment records, because Terrance was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that trial counsel was unable to obtain those records and since the State cannot evade its *Brady* obligations by never obtaining such records, it also cannot affirmatively impede counsel's effort to obtain those records and Abbey's records showed a family history of manic-depressive illness which would have then warranted disclosure of Mr. Rainwater's records. Terrance was prejudiced because Abbey's and Mr. Rainwater's records would have supported the guilt defense that Terrance had snapped because of the pressures he was under and mitigated punishment.

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

State v. Whitfield, 837 S.W.2d 503 (Mo. banc 1992);

State v. Robinson, 835 S.W.2d 303 (Mo. banc 1992);

Berger v. United States, 295 U.S. 78 (1935);

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

Rule 29.15.

V.

FAILURE TO CALL DR. CROSS

The motion court clearly erred in denying the 29.15 postconviction claim that counsel was ineffective for failing to retain and call Dr. Cross because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel who had obtained from psychologist Nichols a competency to proceed evaluation that counsel thought was superficial and who had previously met with Dr. Cross and been impressed with Dr. Cross would have retained Dr. Cross to evaluate Terrance. Terrance was prejudiced because Cross' thorough examination diagnosed Terrance as suffering from PTSD arising from the abuse Terrance had suffered. There is a reasonable probability that if the jury had heard this evidence that it would have accepted Terrance's guilt phase defense of diminished capacity or at a minimum would have voted for life sentences on both counts.

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

Wiggins v. Smith, 123 S.Ct. 2527 (2003);

Tennard v. Dretke, 124 S.Ct. 2562 (2004);

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004);

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

Rule 29.15.

VI.

CLOSING ARGUMENTS - FAILURE TO OBJECT

The motion court clearly erred in denying the 29.15 postconviction claims that trial counsel was ineffective for failing to properly object to prosecutor Ahsens' arguments and preserve the following:

A. In guilt:

(1) that the body count would have been higher but for a quick police response brought about by fortuitous circumstances already putting police in the neighborhood; and

(2) to find Terrance not guilty of first degree murder the jury had "to believe the hired mercenaries" that Lewis and Pincus were;

B. In penalty:

(1) death was appropriate in order to minimize the risk Terrance might pose someday of violently harming prison staff and other inmates;

(2) telling the jury that it was their duty to impose death because they "dare not" and;

(3) contrasting Terrance to those members of Ahsens' generation who had led men into combat;

because Terrance 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 properly objected to these arguments to preserve them. Whether considered individually or cumulatively, Terrance was prejudiced because there is a reasonable probability that had counsel properly objected and preserved these claims, Terrance would not have been convicted of first degree murder or at a minimum sentenced to life on both counts and on direct appeal, Terrance's convictions or at a minimum his death sentence would have been reversed.

Deck v. State, 68 S.W.3d 418 (Mo. banc 2002);

State v. Johnson, 539 S.W.2d 493 (Mo. App., St. L. D. 1976);

State v. Harris, 662 S.W.2d 276 (Mo. App., E. D. 1983);

State v. Edwards, 116 S.W.3d 511 (Mo. banc 2003);

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

Rule 29.15.

VII.

INEFFECTIVE APPELLATE COUNSEL - ENGLISH'S TESTIMONY

The motion court clearly erred in denying the 29.15 postconviction claim that direct appeal counsel was ineffective because Terrance 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 that the trial court erred in overruling the objections trial counsel made to Dr. English testifying and that the trial court plainly erred in allowing English's testimony in violation of §552.020.14. Terrance was prejudiced because there is a reasonable probability that Terrance's convictions for first degree murder would have been reversed.

Williams v. State, 168S.W.3d433(Mo.banc2005);

State v. Copeland, 928S.W.2d828(Mo.banc1996);

State v. Bowman, 681A.2d 469(Me.1996);

Roe v. Delo, 160F.3d416(8thCir.1998);

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

Section 552.020.14; and

Rule 29.15.

VIII.

INEFFECTIVE APPELLATE COUNSEL - JUROR DORMEYER

The motion court clearly erred in denying the 29.15 postconviction claim that appellate counsel was ineffective because Terrance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent appellate counsel would have raised as plain error that an unqualified juror, Juror Dormeyer, served. Terrance was prejudiced because there is a reasonable probability on direct appeal a manifest injustice would have been found that required a new penalty phase.

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

Evitts v. Lucey, 469 U.S. 387 (1985);

Williams v. State, 168 S.W.3d 433 (Mo. banc 2005);

State v. Middleton, 995 S.W.2d 443 (Mo. banc 1999);

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

Rule 29.15.

IX.

RING VIOLATION

The motion court clearly erred in denying the 29.15 postconviction claims that the information was defective so that respondent could not seek death against Terrance and counsel was ineffective for failing to properly object because Terrance was denied his rights to due process, a jury trial, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. V, VI, VIII, and XIV, in that the information only charged Terrance with unaggravated and not aggravated first degree murder since it did not plead any aggravating circumstances and trial counsel was ineffective for failing to move to prohibit respondent from seeking death based on that defect. Reasonably competent trial counsel would have raised this matter and Terrance was prejudiced because life was the only authorized punishment.

Jones v. United States, 526 U.S. 227 (1999);

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

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

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003);

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

Sections 565.020 and 565.030.4; and

Rule 29.15.

X.

INABILITY TO PERFORM CONSTITUTIONAL EXECUTIONS

The motion court clearly erred in denying the 29.15 postconviction claim challenging the constitutionality of the lethal injection method to execute because that ruling denied Terrance his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that the State conducted the execution of Emmitt Foster in a manner that required repeated efforts to kill him and caused lingering death, mutilation, and the unnecessary and wanton infliction of pain and similar mishaps in carrying out executions in other states have occurred such that Missouri cannot carry out constitutional executions.

Louisiana v. Resweber, 329 U.S. 459 (1947);

Glass v. Louisiana, 471 U.S. 1080 (1985);

In re Kemmler, 136 U.S. 43 (1890);

Nelson v. Campbell, 124 S.Ct. 2117 (2004);

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

42 U.S.C. § 1983; and

Rule 29.15.

ARGUMENT

I.

COUNSEL FAILED TO OBJECT - ENGLISH'S TESTIMONY

VIOLATED §552.020.14

The motion court clearly erred denying the 29.15 postconviction claim that counsel was ineffective for failing to object to respondent's calling English in guilt rebuttal because Terrance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that §552.020.14 prohibited English from testifying in guilt and reasonably competent counsel under similar circumstances would have objected on that ground. There is a reasonable probability that without English's testimony and Ahsens' related argument Terrance would not have been convicted of first degree murder.

Counsel did not object to respondent calling Dr. English as a guilt phase rebuttal witness in violation of §552.020.14. Terrance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

This Court reviews for clear error. *Barry v. State*, 850S.W.2d 348,350(Mo.banc1993). The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence

reasonably competent counsel would have exercised and he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A movant is prejudiced if there is a reasonable probability that but for counsel's errors the result of the proceeding would have been different. *Deck v. State*, 68 S.W.3d 418, 426 (Mo. banc 2002) (discussing *Strickland*). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* 426.

A. How English Was Designated To Evaluate Terrance

Five days before the March 22, 1999, trial date, counsel filed a motion that Terrance be found incompetent to proceed or alternatively for a \$552.020 evaluation (T.L.F. 815-18). That motion relied on Lewis' and Pincus' findings (T.L.F. 815-18; Ex. 4 at 1156-75). The trial court ordered a \$552.020 evaluation (T.L.F. 823-26). The evaluator was to determine whether Terrance was competent to proceed, but not whether at the time of the offense Terrance suffered from a mental disease or defect that made him incapable of conforming his conduct to the requirements of law (T.L.F. 823-26).

B. Defense Guilt Mental Health Evidence

Pincus found defects in Terrance's frontal lobe and likely deficits in his left parietal lobe (T.Tr. 1435). The frontal lobe is important to insight, judgment, and predicting outcomes (T.Tr. 1435-36). Terrance's neurological problems made it impossible for him to have coolly reflected given the emotionally stressful circumstances he was experiencing (T.Tr. 1454, 1462-63).

Lewis testified that Terrance was encountering many stressful circumstances which caused him to be increasingly depressed, suspicious, and paranoid(Ex.E at 35-41). At the time of the offense, Terrance was paranoid, delusional, severely depressed, and in an altered state such that he was suffering from a mental disease or defect that prevented him from coolly reflecting(Ex.E at 43-47,58). Terrance's altered state caused him to be unable to remember the acts he was accused of committing(Ex.E 46-47). Terrance suffered from either a dissociative state or an organic impairment(Ex.E at 58-59).

C. English's Rebuttal Testimony

English testified that he had special Department of Mental Health training to become a certified forensic examiner to examine peoples' mental status(T.Tr.1527-28). He had been doing evaluations since 1974(T.Tr.1528). English testified he did not go into matters relating to Terrance's mental status that pertained to when the crime took place(T.Tr.1582).

When defense counsel asked English whether he could rule out that Terrance's paranoia rose to a delusional level at the time of the offense, prosecutor Ahsens objected in the jury's presence stating that English was "not asked by the Court to make that kind of an analysis...."(T.Tr.1582). Further, when counsel asked English whether he could rule out that Terrance's level of paranoia rose to the level of a mental disease or defect on the day of the offense, Ahsens objected and the court stated in the jury's presence: "He's not been asked to do that so far. Do you want to ask him now?" (T.Tr.1590).

English testified that Terrance was able to speak with him in a meaningful manner(T.Tr.1529). Based on Terrance's answers, English had no difficulty making himself understood by Terrance(T.Tr.1529).

English did testing designed to measure Terrance's psychological functioning(T.Tr.1529-30). Terrance's 84 I.Q. placed him in the low average category(T.Tr.1534-35). English gave Terrance the Bender Gestalt Test, which screens for brain damage and no evidence of brain damage was found(T.Tr.1531,1535-36).

Terrance was able to complete all English's testing(T.Tr.1533). Terrance understood the intelligence testing that was done and he responded meaningfully (T.Tr.1534). Terrance's mood and demeanor were appropriate and English made that assessment based on speaking back and forth with Terrance(T.Tr.1541-42). English did not note any behavior or test results that were indicative of any kind of mental disease or defect(T.Tr.1542).

In response to English's questioning, Terrance denied having any symptoms of depression, brain damage, or any other mental disease or defect(T.Tr.1588-89;Ex.4 at 1194).⁴ According to English, Terrance's distrust and paranoia did not rise to the level of a mental disease or defect(T.Tr.1590).

⁴ English testified at his deposition: "I mean, in my report here, he **told me** he wasn't under any, you know, particular severe emotional stress or wasn't having

D. Counsels' Objections

Moreland objected to English testifying because English said in his deposition that he was unable to render an opinion as to Terrance's mental state at the time of the offense(T.Tr.1485-88,1524-25). At English's deposition, he testified that his evaluation was limited to determining Terrance's competence to proceed and it did not include his mental state at the time of the offense(Ex.4 at 1255). English's deposition testimony reflected that he was not able to render an opinion as to Terrance's mental state at the time of the offense(Ex.4 at 1255).

E. Guilt Arguments

Whether Terrance acted with deliberation was the issue the jury had to decide and that issue was the focal point of both sides' arguments.

Ahsens' initial guilt argument began by highlighting that to convict Terrance of first degree murder under verdict directing Instructions 6 and 10 he had to show Terrance acted with deliberation, which means cool reflection(T.Tr.1596-97). Next, Ahsens highlighted Instruction 7(T.Tr.1597-98). Instruction 7 told the jury that it could consider whether Terrance had a mental disease or defect for determining whether Terrance had acted with deliberation(T.L.F.987). Ahsens' argument included the following:

any particular problems at the time [of the offense].”(Ex.4 at 1255)(emphasis added).

Did he know what he was doing? Absolutely. Absolutely. Is there mental disease or defect? No. **He told Dr. English he didn't have any of the symptoms of any of those psychiatric disorders that the experts from the East Coast says he has.**

I've proved this case. None of us like to believe that this sort of thing really happens. All of us would like to believe that there is some sort of explanation. Well there is an explanation, and that is that this man decided to do this. The reasons we will never know for certain, and I submit to you as long as he knew what he was doing and as long as he did not suffer from a mental disease or defect which prevented him from deliberating, that is coolly reflecting on the matter for any length of time, no matter how brief, that if he had a mental disease, unless it prevented him from doing that, it doesn't matter.

(T.Tr.1605)(emphasis added).

Defense counsel began closing argument by telling the jury that the evidence supported second degree murder and not first(T.Tr.1607). Counsel's argument continued:

[Terrance] did not deliberate because of what had been happening in his life and the particular vulnerabilities that you have heard about of his brain and the way he was thinking and the way he was emotionally reacting. He was unable to coolly reflect.

(T.Tr.1608).

Defense counsel also told the jury: “Deliberation is without emotion, and what had been happening to Terrance Anderson was all about emotion.”(T.Tr.1609). Drawing from Lewis’ and Pincus’ findings counsel urged the following:

But what you can’t see and what the physicians have told you is that someone with brain damage looks normal. Like this bridge, it looks normal. You can’t see the weakness. You can’t see the stress fractures. Normal functioning. Get up, go to work, get dressed, drive a car, go shopping. You can’t see the brain damage, but the pressure’s building. (T.Tr.1617).

Defense counsel expressly referenced Lewis by name and her findings about Terrance’s delusional and paranoid beliefs as showing a lack of deliberation(T.Tr.1620). Counsel referred to many events as causing a slow boiling followed by the heat being turned up on the day in question and Terrance becoming like a whistling, screaming kettle(T.Tr.1621). Those events made Terrance “no longer able to think, reflect or deliberate....”(T.Tr.1621).

Defense counsel referred to what happened as “acts of madness” in which Terrance had “no real control”(T.Tr.1625). Counsel again referenced Dr. Lewis by name as having testified about Terrance not remembering great parts of what happened(T.Tr.1626).

Ahsens began his guilt rebuttal argument with: “You have to believe the hired mercenaries from the East Coast.”(T.Tr.1628). That line of argument

continued with Ahsens telling the jury that Lewis and Pincus, because of how much they were paid, had “a vested interest in coming to the right conclusions” and the two were “mercenaries” that were “not worthy of belief.”(T.Tr.1628-29). According to Ahsens, Terrance’s actions were explainable in one word: “Anger.”(T.Tr.1629).

Ahsens returned to his attacks on Lewis and Pincus describing them as “these people who hold themselves out as being such great experts” who “speculate all over the place.”(T.Tr.1629). Ahsens continued: “[Lewis and Pincus] grab one fact, and from it comes a multitude of conclusions, and that is not good science and certainly not believable.”(T.Tr.1630).

Ahsens told the jury that the idea that Terrance has a mental disease is “nonsense.”(T.Tr.1634). Ahsens continued: “Look at him. He’s just fine. There’s nothing wrong with him.”(T.Tr.1634). Ahsens concluded his rebuttal, arguing that Terrance deliberated because he planned to kill the Rainwaters(T.Tr.1635).

F. Respondent’s Penalty Argument

Ahsens’ initial penalty argument included:

You already know he was in possession of his faculties, don’t we? He deliberated and planned these murders and carried them out.

(T.Tr.1723).

G. Counsels’ 29.15 Testimony

Moreland had no strategic reason for failing to object to English's testimony on the grounds that it violated §552.020.14, was misleading, was confusing, lacked foundation, and was irrelevant, all of which were proper objections(Moreland Depo.#1 at 36).

Co-counsel McBride acknowledged Terrance's competence to proceed was irrelevant to his defense of diminished capacity(H.Tr.266-67).

H. 29.15 Findings

English testified that Terrance did not suffer from any mental disease or defect(L.F.499 relying on T.Tr.1542). As a licensed psychologist, English was a competent expert witness(L.F.499). The testimony was admissible to show Terrance did not have a mental disease or defect, and thereby, assist the jury(L.F.499). The evidence was competent, admissible, and relevant to challenge the claim Terrance had a mental disease or defect(L.F.499).

English's testimony did not contain any statements Terrance made to English, and therefore, Terrance's right to be free from self-incrimination was not violated(L.F.500). Because none of Terrance's statements were admitted, no limiting instruction was required(L.F.500). Because English's testimony was proper, counsel cannot be ineffective for failing to make a meritless objection(L.F.500).

I. §552.020.14 Was Violated And Counsel Was Ineffective

Section 552.020.14 (emphasis added) provides:

14. **No statement** made by the accused in the course of any examination or treatment pursuant to this section and **no information received** by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, **shall be admitted in evidence against the accused on the issue of guilt** in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused **is mentally fit** to proceed **shall in no way prejudice** the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue **nor otherwise be brought to the notice of the jury.**

This provision was formerly §552.020.12. *See State v. Copeland*, 928 S.W.2d 828, 838-39 (Mo. banc 1996). In *Copeland*, this Court rejected a claim that it was error to allow the state to call in penalty phase rebuttal the psychiatrist who conducted the competency to proceed evaluation because that portion of §552.020 “only prohibits admission of the examiner's testimony on the issue of guilt.” *Id.* 839. For that reason, the statute was not violated. *Id.* 839. Since *Copeland*, §552.020 was amended such that §552.20.12 is now §552.020.14.

English's testimony violated §552.020.14 because he testified in guilt about statements Terrance made and information English received from Terrance.

English testified that when he asked, Terrance denied having any symptoms of depression, brain damage, or any other mental disease or defect(T.Tr.1588-89;Ex.4 at 1194,1255). English described in great detail the testing he did and the results he obtained(T.Tr.1529-36,1538,1541). Most notably, English testified that he did not observe any behavior or test results that in any suggested any kind of mental disease or defect and Terrance was able to speak with him in a meaningful manner(T.Tr.1529,1542).

In violation of §552.020.14, the jury was given “notice” that English evaluated Terrance to determine his competence to proceed and Terrance was found competent to proceed. English testified that his examination did not get into matters that related to Terrance’s mental status at the time of the offense(T.Tr.1582). When defense counsel asked English whether he could rule out that Terrance’s paranoia rose to a delusional level at the time of the offense, Ahsens objected and informed the jury that English was “not asked by the Court to make that kind of an analysis....”(T.Tr.1582). Further, when counsel asked English whether he could rule out that Terrance’s level of paranoia rose to the level of a mental disease or defect on the day of the offense, Ahsens objected and the court brought to the notice of the jury that English did a competency to proceed evaluation, stating: “He’s not been asked to do that so far. Do you want to ask him now?” (T.Tr.1590).

The 29.15 findings were clearly erroneous. While English may have possessed a license that made him a witness with sufficient professional

qualifications to testify(L.F.499), §552.020.14 prohibited him from testifying in guilt as he did. Section 552.020.14 prohibited admitting English's testimony to show Terrance did not have a mental disease or defect because it was admitted on the issue of whether Terrance was guilty of first degree murder. English's testimony in fact contained statements Terrance made(L.F.500) that he had denied having symptoms that were consistent with mental disease or defect(T.Tr.1588-89;Ex.4 at 1194,1255).

Moreland had no strategic reason for failing to object that English's testimony violated §552.020.14(Moreland Depo.#1 at 36). Reasonably competent counsel under similar circumstances, who had sought a competency to proceed evaluation under §552.020, would have known that statute's limitations and objected to respondent presenting testimony through English that was prohibited under it. Furthermore, reasonably competent counsel would have been aware of this Court's decision in *Copeland* which held that the limitations imposed under §552.020.14 applied to guilt phase. *See Copeland, supra*.

Decisions from other jurisdictions show why Terrance was prejudiced. In *State v. Bowman*,681A.2d469,470(Me.1996), the defendant relied on a defense of not guilty by reason of insanity and presented supporting mental health experts. Those experts testified that Bowman had a longstanding history of schizophrenia. *Id.*470. On cross-examination, the state elicited evidence that Bowman was competent to stand trial. *Id.*470-71. The state also called in rebuttal its own expert to testify that Bowman was competent for trial. *Id.*471.

The *Bowman* Court reversed Bowman's conviction because evidence of his competence for trial should not have been admitted. *Id.*471. That evidence was not proper because evidence of Bowman's competence to stand trial "could only have led the jury to believe erroneously that Bowman's present competence to stand trial had some bearing on his mental state on the date of the commission of the charged offense." *Id.*471. The same considerations apply here. The jury learned that English had determined that Terrance was competent to proceed and that could only have led the jury to believe that Terrance's competence to stand trial meant that he was not suffering from a diminished capacity at the time of the offense.

In *Tarantino v. Superior Court*, 122 Cal. Rptr. 61, 62-63 (Ca. Ct. App. 1975), that court ruled that a mental examination done to determine competency to proceed on an arson charge could not be properly used in determining guilt. That result was required because the purpose of an inquiry into competency to proceed is not to determine guilt or innocence. *Id.*63. Furthermore, to hold otherwise would be inconsistent with furthering the "humanitarian" desire of ensuring someone is not tried while mentally unable to defend himself. *Id.*63. Section 552.020.14 codifies those policy considerations.

Tarantino's rationale was applied to order a new trial for the death sentenced defendant in *People v. Arcega*, 186 Cal. Rptr. 94, 100-02 (Ca. 1982). Arcega's defense was that he had not deliberated because he had acted with a diminished capacity. *Id.*95-96. During guilt, the state introduced through the

psychiatrist, who conducted the competency to proceed evaluation, that he had found Arcega competent to proceed. *Id.*102-03. Relying on *Tarantino*, the *Arcega* Court noted: “neither the statements of [a defendant] to the psychiatrists appointed under section 1369 nor the fruits of such statements may be used in trial of the issue of [an individual’s] guilt” *Id.*102(quoting *Tarantino*, 122Cal.Rptr. at 63)(alterations made by *Arcega*). Admitting that evidence was prejudicial because the psychiatrist’s overall conclusions were contrary to finding a lack of deliberation. *Arcega*,186Cal.Rptr. at 105.

Admitting English’s testimony was similarly prejudicial because his testimony was contrary to finding the absence of deliberation. While Lewis and Pincus found brain damage(T.Tr.1435-36;Ex.E at 19-20,23-25), English said there was none(T.Tr.1531,1535-36).

English’s testimony was prohibited under §552.020.14 because that statute provides that a finding of fitness to proceed “shall in no way prejudice” the defense to the crime charged. English’s testimony was especially prejudicial when it is considered in conjunction with Ahsens’ closing arguments. Ahsens expressly invoked English’s testimony that Terrance “told” English that he did not have any symptoms consistent with a mental disease or defect(T.Tr.1605). English’s opinions were argued as the ones the jury should believe, and not Lewis’ and Pincus’ opinions, to find Terrance deliberated(T.Tr.1605,1628-30). Ahsens was able to argue that it was “nonsense” that Terrance had a mental disease, he was “just fine,” and there was “nothing wrong” with Terrance because that was how

English portrayed Terrance(T.Tr.1634). Likewise, Ahsens was able to tell the jurors in penalty that they “already know he was in possession of his faculties” (T.Tr.1723) because English had told them in guilt that was the situation. Ahsens could not have made any of these arguments without English’s testimony which was prohibited under §552.020.14.

Reasonably competent counsel under similar circumstances would have objected to English’s testimony on the grounds that it violated §552.020.14. *Strickland* and *Deck, supra*. There is a reasonable probability that Terrance would not have been convicted of first degree murder if English’s testimony had been excluded. *Strickland* and *Deck, supra*.

This Court should order a new trial on both murder counts.

II.

JUROR DORMEYER COULD NOT FAIRLY SERVE

The motion court clearly erred in denying the 29.15 postconviction claim that trial counsel was ineffective for failing to move to strike for cause Juror Dormeyer on the grounds that he would require the defense prove that life without parole was appropriate and/or because Dormeyer was a juror who was an automatic death penalty juror, because Terrance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that Dormeyer testified that he required counsel prove life was appropriate and he would automatically vote for death if Terrance was convicted of first degree murder and trial counsel testified they failed to move to strike Dormeyer because of a note-taking error. Reasonably competent counsel would have moved to strike Dormeyer and prejudice is presumed, but even so Terrance was prejudiced because there is a reasonable probability he would have been sentenced to life.

Juror Dormeyer unequivocally testified that he would shift the burden to the defense to prove that life without parole was the appropriate punishment and would automatically vote for death if Terrance was convicted of first degree murder. Trial counsel failed to move to disqualify for cause Dormeyer because of an oversight in their note taking. Terrance was denied his rights to due process, a

fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

This Court reviews for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo. banc 1993). The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). To establish ineffectiveness, a movant must demonstrate that counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised and he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A movant is prejudiced if there is a reasonable probability that but for counsel's errors the result of the proceeding would have been different. *Deck v. State*, 68 S.W.3d 418, 426 (Mo. banc 2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* 426

A. Mandatory Qualifications To Be Eligible Juror

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Counsel's failure to strike a juror who cannot fairly serve constitutes ineffective assistance. *Presley v. State*, 750 S.W.2d 602, 606-09 (Mo. App., S.D. 1988). When counsel fails to strike such a juror, a movant is not required to show as prejudice that there was a reasonable probability the outcome would have been different. *Id.* 603-07. Instead, the circumstance presented is one under *Strickland*, where prejudice is presumed. *Id.* 607. *See, also, Johnson v. Armontrout*, 961 F.2d 748, 754-

56(8th Cir.1992)(prejudice can be presumed when counsel fails to move to strike a biased venireperson).

The state has the burden of proof to prove every element of its case and a defendant cannot be required to prove a critical fact in dispute. *Mullaney v. Wilbur*,421U.S.684,699-701(1975). “[I]t is a cardinal principle of criminal law that the state bears the burden of proof, and a venireperson who cannot unequivocally follow that principle must be excused for cause.” *State v. Lang*,795 S.W.2d598,602(Mo.App.,E.D.1990). A venireperson who imposes on a defendant a duty to prove his innocence is not qualified to serve. *State v. Clark-Ramsey*,88S.W.3d 484,489-91(Mo.App.,W.D.2002).

Venirepersons are excludable “when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the court’s instructions and their oaths.” *State v. Smith*,32S.W.3d532,544 (Mo.banc2000)(relying on *Wainwright v. Witt*,469U.S.412,424(1985)). A for cause challenge should be sustained if “it appears that [a] venireperson cannot ‘consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court’s instructions in a first degree murder case.’” *State v. Smith*,32S.W.3d at 544(quoting *State v. Rousan*,961S.W.2d 831,839(Mo.banc 1998)). A prospective juror’s qualifications “are not determined conclusively by a single response, ‘but are made on the basis of the entire examination.’” *State v. Clayton*,995S.W.2d468,475(Mo.banc1999)(quoting *State v. Kreutzer*,928S.W.2d

854,866(Mo.banc1996)). A ruling on a venireperson's ability to follow the law is reviewable for an abuse of discretion. *Rousan*,961S.W.2d at 839.

To be qualified to serve as a juror in a death penalty case, a juror must be able to consider imposing a punishment other than death. *Morgan v. Illinois*,504 U.S.719,728-29(1992). A juror who would automatically vote for death is not qualified to serve because that juror cannot consider the mitigating circumstances as required by the instructions. *Id.*729.

B. Questioning of Dormeyer

Dormeyer served on Terrance's jury(T.L.F.949)

The relevant questioning was as follows:

MR. AHSENS: Is it Mr. Dormeyer?

PANELIST DAVID F. DORMEYER: Yes.

MR. AHSENS: Same question, sir. Final point of decision, could you vote for the death penalty?

PANELIST DORMEYER: Yes.

MR. AHSENS: Could you vote for the other sentencing alternative of life without parole?

PANELIST DORMEYER: Yes.

MR. AHSENS: And would you be willing, sir, to listen and give full and fair consideration to all of the evidence before you made a final decision?

PANELIST DORMEYER: Yes.

(T.Tr.546-47).

MR. MORELAND: Well, I guess - - Okay. Mr. Dormeyer?

PANELIST DAVID F. DORMEYER: I'd like a restatement of the question. I'm kind of - -

MR. MORELAND: Would you be able to give serious consideration to a sentence of life in prison without parole?

PANELIST DORMEYER: Well, can I ask a question? Without the - -

MR. MORELAND: I don't know if I'll be able to answer or not.

PANELIST DORMEYER: Well, if there's no evidence otherwise, I probably - - I mean, I believe in capital punishment, but that's not, I have to be really convinced. That's what I'm saying.

MR. MORELAND: Are you saying you really have to be convinced by the State, or you really have to be convinced by me?

PANELIST DORMEYER: I would have to be convinced that the person was not deserving of capital punishment.

MR. MORELAND: Okay. So your position in entering - - If you're on the jury and entering the penalty phases, the death penalty is automatically an appropriate punishment in your mind, right?

PANELIST DORMEYER: Uh-huh.

MR. MORELAND: And a life imprisonment could be an appropriate punishment if I can persuade you so?

PANELIST DORMEYER: Right.

MR. MORELAND: All right. Would you require me to put on evidence to persuade you that life imprisonment would be appropriate in this case before you would give serious consideration to a life sentence?

PANELIST DORMEYER: I believe so.

MR. MORELAND: Okay. And you understand the burden of proof is on the State?

PANELIST DORMEYER: Yes.

MR. MORELAND: But you would nonetheless require us to put on, to convince you otherwise?

PANELIST DORMEYER: Right.

MR. MORELAND: Against the death sentence.

PANELIST DORMEYER: Right.

(T.Tr.576-78).

C. Dormeyer Was Not Qualified To Serve

When the entire examination of Dormeyer is considered, it establishes that he required the defense to prove life, rather than death, was the appropriate punishment and that if Terrance was convicted of first degree murder, then he would automatically vote for death. *See Clayton and Kreutzer, supra.* During the prosecutor's questioning that covered a total of 10 lines, Dormeyer did say that he could consider life and that he could consider all evidence before deciding punishment(T.Tr.546-47). The prosecutor, however, **never asked** Dormeyer to

answer whether he would always keep the burden of proof on the State to prove death was the appropriate punishment(T.Tr.546-47). The only evidence in the record as to Dormeyer's view about the burden of proof came when Moreland questioned Dormeyer.

Dormeyer told Moreland that entering penalty phase he thought that the death penalty was "automatically" appropriate(T.Tr.577). Dormeyer would require Moreland to put on evidence to persuade Dormeyer that life was the appropriate punishment(T.Tr.577). Dormeyer said that even though he understood that the burden of proof was on the State he would require Moreland "to convince" him that life was appropriate(Tr.578).

While reversing the defendant's conviction because venireperson Smith should have been struck for cause, *Lang* noted:

At times, he did respond to questions to say he would follow the court's instructions and would not require defendant to present evidence. Just as often, if not more often, Mr. Smith said he would require defendant to present evidence. This *equivocation* required him to be stricken when challenged for cause.

Lang, 795S.W.2d at 602(emphasis added). In *Lang* there was conflicting testimony indicating equivocation, but that still required the juror have been disqualified for cause. Here, there was no conflicting testimony from Dormeyer, instead he was clear and unequivocal that the defense had to prove that life was appropriate. Ahsens did not ask Dormeyer whether he understood that the burden

was always on the State to prove death was appropriate. When Moreland questioned Dormeyer, he stated that he would only vote for life if Moreland persuaded him it was appropriate(T.Tr.577).

Dormeyer was substantially impaired as to his ability to perform the duties of a juror in accordance with the court's instructions and his oath. *See Smith and Wainwright v. Witt*. Dormeyer placed the burden on Moreland to persuade him that life was appropriate, rather than on the State to persuade him that death was appropriate. Dormeyer was required to be disqualified for cause because he could not follow the "cardinal principle" that the State bears the burden of proof. *See Mullaney and Lang, supra*.

Dormeyer also was not qualified to serve because he "automatically" believed death was appropriate going into penalty, unless Moreland persuaded him otherwise. Dormeyer was a juror who would automatically vote for death, and therefore, was not qualified. *See Morgan, supra*.

D. Counsels' Testimony

1. Moreland

Moreland was the lead attorney and ultimately responsible for strategic decisions(Moreland Depo.#1 at 7-8) Moreland did death qualification(Moreland Depo.#1 at 56). Moreland believed that they should have moved to strike Dormeyer for cause because he testified that he would automatically vote for death and require they prove that Terrance should not be sentenced to death(Moreland Depo.#1 at 11-12). Dormeyer's responses to Ahsens did not establish Dormeyer

was qualified to serve because Ahsens' questioning "was merely scratching the surface."(Moreland Depo.#1 at 12). Moreland was "shocked" that they had not moved to strike Dormeyer for cause or used a peremptory(Moreland Depo.#1 at 12-13). There was no strategic reason for leaving Dormeyer on(Moreland Depo.#1 at 13,57).

Moreland relied on co-counsel to take notes to identify which jurors he would want to move to strike for cause(Moreland Depo.#1 at 56-57). Moreland failed to move to strike Dormeyer for cause because co-counsel failed to take notes that identified the grounds for striking Dormeyer(Moreland Depo.#1 at 57). Moreland has to rely on co-counsel to take thorough notes because when he is talking to so many people he cannot remember whom they should later move to strike for cause(Moreland Depo.#1 at 57). The only voir dire notes Moreland took were of Ahsens' voir dire because Moreland does not take notes while he is questioning(Moreland Depo.#1 at 57). When Moreland reviewed co-counsel's voir dire notes, Dormeyer was not identified as someone to move to strike for cause(Moreland Depo.#1 at 57). That failure caused Dormeyer to be left on(Moreland Depo.#1 at 57).

Moreland would never want a juror with Dormeyer's responses on a capital case(Moreland Depo.#1 at 57). There were venirepersons with less extreme views than Dormeyer who were struck for cause(Moreland Depo.#1 at 57).

2. McBride

McBride believed that the defense should have moved to strike Dormeyer for cause because he testified that he would automatically vote for death and require the defense to prove that Terrance should not be sentenced to death(H.Tr.249-51). There was no strategic reason for failing to move to strike Dormeyer(H.Tr.251).

E. The Attorney General's Findings The Motion Court

Signed As To Dormeyer

If trial counsel had challenged Dormeyer for cause, then that challenge would have been denied(L.F.487). Dormeyer's responses were given in response to hypothetical confusing questions that asked him to assume the situation where the defense presented no evidence and the trial court had earlier warned Moreland not to ask that(L.F.486-87). Dormeyer's responses to the prosecutor were that he could consider both punishments(L.F.487). Dormeyer's answers to the prosecutor were credible and his answers to Moreland's confusing hypothetical questions were not credible(L.F.487-88).

Moreland's and McBride's testimony that leaving Dormeyer on the jury was not strategic was not credible(L.F.488). Their testimony was not credible because McBride sought to strike for cause JoAnn Williams, who was on the same panel as Dormeyer, on the same grounds that the 29.15 motion alleged should have been relied on to strike Dormeyer(L.F.488). Counsel made a strategic decision to leave Dormeyer on(L.F.488).

Dormeyer said that he would require counsel to put on evidence to support life and counsel presented a substantial mitigation case calling six witnesses(L.F.489). Moreland’s question to Dormeyer involved a hypothetical that did not occur such that Terrance was not prejudiced under *Strickland* as there is no reasonable probability that the result of the trial would have been different(L.F.489).

F. Terrance Did Not Have A Full Qualified Panel of Jurors

It is irrelevant that had trial counsel moved to disqualify Dormeyer for cause that request would have been denied (L.F. 487) because if that had occurred, then this Court would have been required on direct appeal to reverse. *See Rousan and Lang, supra. See, also, State v. Clark, 981S.W.2d143,146-48(Mo.banc 1998)(improperly limiting voir dire in capital case required reversal).* While Dormeyer’s responses to the prosecutor were that he could consider both punishments (L.F.487), that ignores the requirement that a juror’s qualifications are not determined conclusively by a single response, but are made on the basis of the entire examination. *See Kreutzer and Clayton, supra.* As Moreland noted, Ahsens’ questioning “was merely scratching the surface”(Moreland Depo. #1 at 12). The entire examination shows that Dormeyer was not qualified. *See* discussion, *supra*.

Dormeyer’s responses were not given in response to confusing hypothetical questions the trial court had warned Moreland not to ask. The record shows that in response to the prosecutor’s objection during questioning of JoAnn Williams,

Moreland was directed not to ask jurors to assume a hypothetical that if he presented no mitigation evidence at all would jurors still be able to consider a life sentence(T.Tr.566-70).⁵ Moreland’s questioning of Dormeyer never asked Dormeyer to assume the hypothetical where the defense presented no evidence(T.Tr.576-78). Moreland’s questioning only asked Dormeyer whether he would have to “persuade” or “convince” Dormeyer that life was appropriate(T.Tr.576-78). Moreover, had Moreland asked the prohibited line of questioning Ahsens would have objected, as he did with JoAnn Williams, but he made no objections during the questioning of Dormeyer(T.Tr.576-78).

Even if counsel can be deemed to have presented a substantial mitigation case (L.F.489), Dormeyer stated that he would require the defense to persuade and convince him that life was appropriate. Dormeyer was not qualified to serve because he could not apply the proper burden of proof and otherwise follow the court’s instructions. *See Smith and Rousan*. Dormeyer’s statements were not made in response to the hypothetical situation of how would he vote if the defense presented no mitigating evidence, and therefore, counsel having presented a substantial mitigation case of six witnesses does not cure Dormeyer having served.

⁵ While the prosecutor had complained about this hypothetical, he had told the venire during his explanation of the two phases: “In fact, **you may hear no evidence at all**, but I would suspect in this case you will hear evidence, and that evidence will go to what the punishment should be.”(Tr.532-33)(emphasis added).

Venirepersons “have a duty to answer all questions fully, fairly, and truthfully during voir dire.” *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001). That duty to be truthful during voir dire is founded on the jurors having sworn to tell the truth. *State v. Everage*, 124 S.W.3d 11, 14 (Mo. App., W.D. 2004) (reproducing and relying favorably on trial judge’s rationale for believing venirepersons’ responses based on oath they have taken and for denying motion to quash panel).

This Court has noted that “credibility means capacity for being believed or credited at all” *State v. Madole*, 148 S.W.2d 793, 794 (Mo. 1941). *See, also, Nieberg Real Estate Co. v. Taylor-Morley-Simon, Inc.*, 867 S.W.2d 618, 626 (Mo. App., E.D. 1993) (citing *Madole* for this definition). Someone is a “truthful” witness if “the sense that the information put forth is ‘believed or appropriately accepted by the affiant as true.’” *Moody v. St. Charles County*, 23 F.3d 1410, 1412 (8th Cir. 1994) (quoting *Franks v. Delaware*, 438 U.S. 154, 165 (1978)).

Truthfulness and credibility of a witness refer to the same quality - whether a witness should be believed. *See, e.g., In the Interest of Q.D.D. v. J.I.D.*, 144 S.W.3d 856, 861 (Mo. App., S.D. 2004) (deferring to court’s findings on mother’s “truthfulness” because it had a better opportunity to determine her “credibility.”); *State v. Cole*, 71 S.W.3d 163, 170 (Mo. banc 2002) (prior convictions may be used to “to attack the defendant’s truthfulness and credibility”).

The finding that Dormeyer was credible as to his responses to the prosecutor, but not credible in his responses to Moreland's hypothetical questions (L.F.487-88) flies in the face of the fundamental premise that jurors answer all questions fully, fairly, and truthfully. *See Mayes, supra*. That finding in effect says that Dormeyer was truthful in his answers to the prosecutor, but lied to Moreland. Moreover, as already noted, the questions that Moreland asked Dormeyer did not involve the hypothetical Moreland was directed not to ask.

The 29.15 findings that Moreland's testimony on this issue was not credible were clearly erroneous because the motion court could not properly make such a credibility determination when it did not see and observe Moreland's testimony as his testimony was obtained by deposition (Moreland Depo.#1 at 5; L.F.488). In *Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980), it was recognized that

One of the most important principles in our judicial system is the deference given to the finder of fact who hears the live testimony of witnesses because of his opportunity to judge the credibility of those witnesses. [Citations omitted]. The Supreme Court has emphasized, in cases that involve the constitutional rights of criminal defendants, that factual findings may not be made by someone who decides on the basis of a cold record without the opportunity to hear and observe the witnesses in order to determine their credibility. [Citations omitted].

The *Louis* Court ruled it was improper in a habeas case for the district court judge to credit one witness' testimony over another to deny relief. *Id.* 1107-08. The

competing testimony was heard by a magistrate judge who had recommended granting the writ, but it was not heard by the district court judge. *Id.* 1107-08. The *Louis* Court reasoned that in order to determine witness credibility the fact finder “must observe the witness.” *Id.* 1110. If the district court was not going to follow the magistrate’s recommendation, then it was required to have come to an independent decision after hearing the testimony and viewing the witnesses. *Id.* 1110. *See, also, Jordan v. Hargett*, 34 F.3d 310, 312-14 (5th Cir. 1994) (improper for district court to reject magistrate’s recommendation to grant habeas writ where district court relied on and credited transcript testimony of witness given in a separate civil action); and *Hill v. Beyer*, 62 F.3d 474, 478-82 (3rd Cir. 1995) (improper for district court to make credibility determinations as to witnesses it did not hear as basis for denying habeas relief magistrate recommended). The 29.15 findings that Moreland was not credible were not made after the motion court saw Moreland testify in court, and therefore, were clearly erroneous. *See Louis v. Blackburn, Jordan v. Hargett, and Hill v. Beyer, supra.*

In *State v. Ivy*, 869 S.W.2d 297, 300-02 (Mo. App., E.D. 1994), the 29.15 court denied an evidentiary while finding that if a witness was called to testify that he and not his appellant, defendant brother committed the charged offense, then that witness was not credible because of the witness’ contrary grand jury testimony. It was error for the motion court to make that credibility finding without having had the opportunity to hear the witness’ testimony and observe his demeanor and an evidentiary hearing was required. *Id.* 300-02. The motion court did not see

Moreland testify, and therefore, it was improper to find his testimony was not credible. *See Ivy*.

The rationale and principles recognized in *Louis v. Blackburn*, *Jordan v. Hargett*, *Hill v. Beyer*, and *Ivy* have been applied in Missouri driving revocation actions and should apply here. In *Krakov* v. *Director of Revenue*, 128 S.W.3d589,595(Mo.App.,E.D.2004), the Eastern District noted that because the circuit court had not actually heard testimony, it was not able to make credibility determinations. *See also, Isom v. Director of Revenue*, 705S.W.2d116,117 (Mo.App.,W.D.1986)(trial court could not assess witness credibility because witnesses did not appear and trial court had no opportunity to observe witness demeanor). The finding as to Moreland's credibility was improper when the motion court did not see and observe Moreland testify. *See Krakover* and *Isom*.

Rule 4-3.3 "Candor Toward the Tribunal" mandates that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. This Court should, in the absence of compelling evidence to the contrary presume, that when an attorney testifies that the testimony satisfies this ethical command. The findings that counsels' testimony that conceded the mistake they made in overlooking moving to strike Dormeyer was not credible (L.F. 488) effectively accuses counsel of lying.

The credibility finding as to the claim involving Dormeyer should be contrasted to the strategy findings made as to counsels' failure to call Alfonso, failure to call Dr. Cross, and decision to call Lewis(L.F.494-98). All of these

claims were rejected as reasonable strategy and premised on Moreland's and McBride's testimony that there were strategy considerations for what they had done(L.F.494-98). This Court should not allow findings to stand that the Attorney General wrote (L.F.478) and the motion court signed⁶ which conclude that counsel is infinitely truthful and credible when they provide strategy testimony that is harmful to postconviction claims, but liars when they concede and acknowledge a mistake was made, and thus, support a 29.15 claim alleged.

This case does not present the circumstance in which a postconviction court is "entitled to believe all, part, or none of the evidence presented at the post-conviction hearing." *State v. Hunter*,840S.W.2d850,863(Mo.banc1992). In *Hunter*, that rule was invoked to uphold finding the defendant was competent to plead guilty when there was competing conflicting testimony from multiple witnesses about the defendant's competence. In *Hunter*, the postconviction court was free to choose which view to adopt as to Hunter's competence. In contrast, Terrance's counsel cannot be infinitely "credible" witnesses when their testimony helps the state, but "incredible" witnesses when their testimony supports finding they were ineffective.

Post-conviction proceedings must comport with due process notions of fundamental fairness. *Thomas v. State*,808S.W.2d364,367 (Mo.banc1991)(a

⁶ The motion court's only changes were to use a pen to correct obvious typographical spelling errors in the Attorney General's Findings(L.F.488,502).

movant is entitled as a matter of due process to disqualify for cause a biased judge). The U.S. Supreme Court has viewed with contempt the practice of judges merely adopting a party's proposed findings. See *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 n.4 (1964). This Court has expressed similar concerns noting:

Here the trial judge followed the often troublesome practice of adopting, without modification, significant portions of a proposed order prepared by respondent's counsel. Advocates are prone to excesses of rhetoric and lengthy recitals of evidence favorable to their side but which ignore proper evidence or inferences from evidence favorable to the other party. Trial judges are well advised to approach a party's proposed order with the sharp eye of a skeptic and the sharp pencil of an editor.

Massman Construction Co. v. Missouri Highway and Transportation Comm'n, 914 S.W.2d 801, 804 (Mo. banc 1996). This Court, while addressing this issue, has stated that "[t]he judiciary is not and should not be a rubber-stamp for anyone." *State v. Griffin*, 848 S.W.2d 464, 471 (Mo. banc 1993).

In *State v. Kenley*, 952 S.W.2d 250, 281 (Mo. banc 1997), Judge Stith dissented noting that when a motion court signs the state's proposed findings there should be evidence that the motion court exercised independent judgment. There was reason to question whether the motion court had in fact exercised independent judgment and the case should have been remanded for a new 29.15 hearing and independent findings. *Id.* 284. The factors that showed a lack of independent judgment were:

(1) adoption of the respondent's 29 pages of complex findings; and (2) the State's findings uniformly found every State's witness credible and every defense expert not credible. *Id.*284. It was "exceedingly indicative of a lack of independent judgment that the motion court made all of them [the findings] in exactly the terms suggested by the attorney general." *Id.*284. The same thing happened here. The Attorney General submitted 22 pages of complex findings here in which defense counsel was infinitely credible when they had testimony that was harmful to proving the 29.15 claims, but incredible on a claim in which they acknowledged their mistake. For this reason, the customary deference accorded findings that were in fact actually made by the motion court is not appropriate.

In *State v. McKee*, 826 S.W.2d 26, 27-29 (Mo.App., W.D. 1992) counsel was ineffective for failing to move to strike two venirepersons who could not fairly serve. Both attorneys representing McKee testified that they could not remember any reason for failing to move to strike the two. *Id.*28. The Western District found that the motion court finding that the failure to move to strike the two for cause was trial strategy was not supported by evidence. *Id.*28. The same is true here. Moreland and McBride both testified that they should have moved to disqualify Dormeyer and there was no strategic reason for leaving Dormeyer on the jury (Moreland Depo. #1 at 11-13, 57; H.Tr. 249-51). Like *McKee*, the trial strategy finding here is not supported by any evidence.

The findings assert that counsel was not credible because McBride sought to disqualify JoAnn Williams on the same grounds as the 29.15 motion claims

counsel should have sought to disqualify Dormeyer(L.F.488).⁷ The record shows that McBride sought to remove JoAnn Williams based on her responses given to Moreland's hypothetical question as to whether she would be able to consider life, if the defense presented no evidence at all(T.Tr.583-84). McBride's record to strike JoAnn Williams was as follows:

MR. MCBRIDE: For the defense in row five, Your Honor, we begin with Ms. JoAnn Williams. Initially said that she could consider the death penalty and life without parole as punishment. Mr. Moreland clears up her apparent misunderstanding concerning the process and the fact that there may be times when the Court has directed the death penalty must be given. Upon that, we get into a discussion regarding mitigating circumstances and beliefs that if we do not present evidence, she would not be able to consider life without probation or parole as an appropriate punishment this case. We believe that should be a cause to strike Ms. Williams, Ms. JoAnn Williams.

(T.Tr.583-84).

Specifically, McBride argued that JoAnn Williams should be struck for cause because she answered the hypothetical question stating that if the defense presented no evidence, then she would be unable to consider life (T.Tr.583-84).

⁷ There were two venirepersons named Williams - Donna and Josephine ("JoAnn")(T.Tr.530,537).

Ahsens objected to that questioning of JoAnn Williams, the court sustained that objection, Moreland was directed not to ask that question, and Moreland did not pose that hypothetical to Dormeyer(T.Tr.564-70,576-78). Since Moreland never asked Dormeyer the hypothetical question and McBride argued JoAnn Williams should be struck because of her answers to Moreland's hypothetical, the grounds advanced in the 29.15 motion as to Dormeyer in fact are not the same McBride argued as to JoAnn Williams(L.F.23-25,48-55). Moreover, the fact that counsel remembered to strike JoAnn Williams does not mean they did not overlook striking Dormeyer because of a note-taking error.

G. *Knese Should Be Followed*

In *Knese v. State*,85S.W.3d628(Mo.banc2002), this Court found that counsel was ineffective for failing to move to strike for cause two jurors. *Knese's* counsel failed to read jurors Gray's and Maloney's questionnaires. *Id.*632. Counsel testified in the postconviction case that had he read the two jurors' questionnaires then he would have moved to strike them for cause. *Id.*632. This Court noted that the two jurors' questionnaire responses "suggest--although not conclusively establishing--that they would automatically vote to impose death after a murder conviction." *Id.*633.

Knese's counsel's failure to read the two jurors' questionnaires and to question them on their views on the death penalty established that counsel had not performed as reasonably competent counsel under *Strickland*. *Knese*,85S.W.3d at 633. Counsel's deficient performance resulted in "a structural error," in jury

selection. *Id.*633. This Court went on to find that there was a reasonable probability sufficient to undermine confidence in the outcome that Knese was prejudiced. *Id.*633. Because the error went to penalty only, this Court reversed for a new penalty phase. *Id.*633.

Like Knese's counsel, Terrance's counsel did not perform as reasonable counsel when they failed to move to strike Dormeyer because of a note-taking oversight. Failing to move to strike Dormeyer was a structural error. *See Knese*. There is a reasonable probability sufficient to undermine confidence in the outcome and a new penalty phase is required. *See Knese*. Moreover, as recognized in *Johnson v. Armontrout* and *Presley, supra*, when an unqualified juror serves prejudice is presumed.

In some of respondent's questioning, it sought to suggest that Terrance was not prejudiced by Dormeyer serving because he voted for life on the count involving Mr. Rainwater(Moreland Depo. #1 at 40). How Dormeyer voted on one count versus the other is not relevant. Terrance was entitled to a panel of twelve jurors who could both consider life and not require he persuade them life was the appropriate punishment on both murder counts. *See Wainwright v. Witt, Smith, and Rousan, supra*.

For all the reasons discussed, this Court should order a new penalty phase.

III.

FAILURE TO CALL CLINICAL SOCIAL WORKER ALFONSO

The motion court clearly erred in denying the 29.15 postconviction claim counsel was ineffective for failing to call clinical social worker Alfonso in penalty to testify about specific background experiences from Terrance's life because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that Alfonso's testifying would have caused the jury to empathize with and lessen Terrance's moral culpability and explain why Terrance snapped and which would have complemented, without being inconsistent with, Lewis' and Pincus' testimony that was simply technical clinical diagnoses. Reasonably competent counsel would have called Alfonso as she was not called merely because the defense team ran out of time. Terrance was prejudiced because there is a reasonable probability the jury would have imposed life.

Counsel retained Cessie Alfonso to assist them with developing mitigation evidence. Even though Alfonso provided them helpful mitigating explanations for why Terrance shot the Rainwaters, that transcended the technical clinical medical diagnoses that Drs. Lewis and Pincus provided to support the guilt phase diminished capacity defense, counsel did not call her. Counsel did not call Alfonso because they ran out of preparation time. Reasonably competent counsel would have called Alfonso and there is a reasonable probability the jury would

have imposed life. Terrance 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). The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). 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); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000).

A. Linda Peters - Public Defender Investigator

Linda Peters was a Public Defender investigator assigned to investigate mitigation evidence in Terrance's case (H.Tr. 181, 183-84, 186-87). Terrance and his family were especially distrustful (H.Tr. 186-87, 227). One factor that contributed to their distrust was that Peters is white and Terrance's family is African-American and Terrance's family had experienced a lot of racism in Poplar Bluff (H.Tr. 187). Peters urged the team to hire an African-American mental health expert because of these race based considerations (H.Tr. 221).

Peters became familiar with Alfonso and recommended her to Moreland because of Alfonso's cultural mitigation expertise and because Alfonso is African-American (H.Tr. 222-23, 237). On December 19, 1998, Peters wrote to Alfonso about Terrance's case (H.Tr. 223-27). Peters' letter informed Alfonso that she

believed there likely was racial and economic cultural mitigation that needed to be presented in penalty, but Peters lacked direction and knowledge of how to proceed(L.F.77;H.Tr.223-27). Peters solicited ideas from Alfonso on how to address the cultural issues(L.F.77;H.Tr.223-27).

B. Cessie Alfonso - Clinical Social Worker

Cessie Alfonso is a licensed clinical social worker(H.Tr.23-24). Much of Alfonso's work has involved providing psychosocial assessments in death penalty cases(H.Tr.25-26). A psychosocial history focuses on identifying the interrelationship between a person's biology and environmental experience and how those factors contribute to shaping the person's perceptions and reality(H.Tr.34). Her expertise includes death penalty mitigation generally, which includes assessing culturally based issues(H.Tr.25-27,29).

Alfonso's work has included consulting with prosecutors in domestic abuse cases, training social workers how to present their findings in-court on domestic abuse cases, training other death penalty social workers, and training for judges(H.Tr.28,30). Alfonso has been accepted as an expert witness in capital cases(H.Tr.30). Alfonso routinely collaborates with other mental health professionals on capital cases(H.Tr.32-33).

Peters sought to involve Alfonso in Terrance's case because of Alfonso's expertise in cultural and racial aspects of obtaining mitigation evidence(H.Tr.34). Alfonso was hired to develop a psychosocial history, consult on racial dynamics,

consult with other experts, and present her findings, if appropriate at trial(H.Tr.79).

Alfonso met with Terrance's family(H.Tr.40-43). She learned that because of the racism and discrimination Robert had experienced in Poplar Bluff, he had taught Terrance to be extremely cautious with white people(H.Tr.44). Robert also taught Terrance that he should keep his feelings to himself(H.Tr.44-45).

Terrance's mother, Linda became involved with Timothy Smith, who was Terrance's biological father(H.Tr.46). Linda was unable to locate Timothy Smith after she became pregnant with Terrance(H.Tr.46-47). For Linda, her pregnancy was embarrassing and shameful and she was not ready to have a child(H.Tr.47,49).

Terrance's family was seriously dysfunctional in its communication skills(H.Tr.50). When Terrance asked his mother whether Robert was his father, she told Terrance that Robert was his father(H.Tr.50). Terrance was ten before he learned from his grandfather that Robert was not his biological father(H.Tr.50-51). That revelation was traumatic for Terrance(H.Tr.51-52).

Terrance lost his identity when he was told the truth about who his father was(Ex.6 at 10). Before learning this fact, Terrance was always left to wonder why his name was Anderson and not Smith(H.Tr.52-53). When Terrance finally asked his mother about his biological father, after waiting two years to make that inquiry, she told him that she did not want to talk about it(H.Tr.53,55). Linda never thought about how concealing that information from Terrance would impact

him, which highlighted family pathology(H.Tr.55). Robert did not know that Linda had acknowledged to Terrance that Robert was not Terrance's father(H.Tr.55). When Terrance's half-sister, Shaneka, was born, he became marginalized because she became the focus of the parenting(H.Tr.65-66).

Terrance grew up in a household with a step-father who had a history of blowing up, hitting people, and practicing infidelity(H.Tr.59). One incident that was described to Alfonso involved Robert turning over a table, throwing objects around, and breaking a light fixture because Terrance had eaten some chicken(H.Tr.61). During that same incident, Robert told Terrance and Shaneka that they had to leave(H.Tr.61).

Robert had a history of abusive behavior and used coercive control, intimidation, and violence to control the household(H.Tr.56). In response, Terrance either tried to intervene or isolated himself by withdrawing and locking himself in his room(H.Tr.56,60-61,63). Terrance still had a bed wetting problem when he was twelve, which was indicative of the intensity, duration, and frequency of family conflict(H.Tr.56-57).

Alfonso reviewed documents that showed Robert's violent behavior towards a former wife included dislocating her shoulder, giving her black eyes, twisting her breasts following surgery, and raping her while she was pregnant(H.Tr.58). While Robert was married to Linda, he had relationships with other women(H.Tr.58-59). Robert was assaultive in a relationship he had with another woman while he was married to Linda(H.Tr.59-60).

Robert had a long documented violent history(H.Tr.58). During December of one school year, Robert was expelled from school because he had “been nothing but trouble all year”(Ex.3 at 933). The final incident that prompted Robert’s expulsion was fighting with a teacher(Ex.3 at 933). Besides having fought with a teacher, Robert had thrown books out a window, cursed at a teacher, and fought with another student(Ex.3 at 934).

Robert was discharged after a short military service because of his violent behavior(H.Tr.58; Ex.3 at 965). The military identified Robert as having a “character and behavior disorder”(Ex.3 at 965). The military discharged Robert because he had an “Explosive Personality, as manifested by gross outbursts of rage or physical aggressiveness”(Ex.3 at 965). Rehabilitation was not recommended(Ex.3 at 966). Robert was involved in several fights(Ex.3 at 990). Robert had to be restrained when he punched another serviceman and hit him with a board that contained nails(Ex.3 at 976,989,993,1006,1018). Robert also pulled a telephone from the wall, broke other equipment, and hit a pipe(Ex.3 at 988).

August, 1986, police reports showed that Robert shot a gun at Samuel Norris, threatened to kill Norris, and was arrested for first degree assault(Ex.3 at 1125-33).

August, 1989, police reports showed that Robert, following an argument with his girlfriend Shirley Pratt, intentionally struck her with a car(Ex.3 at 1122-24).

February, 1990, police reports showed that Robert assaulted Shirley Pratt(Ex.3 at 1118-21). Robert struck Shirley in the head with a gun(Ex.3 at 1118-21). He also slammed Shirley against a wall and on the ground while she was naked(Ex.3 at 1121). When Shirley's brother intervened, Robert threatened him with the gun(Ex.3 at 1121).

Robert served prison time for two counts of forgery and one count of passing a bad check(Ex.3 at 1145).

Terrance returned from college because he was not doing well academically(H.Tr.66). When he returned home, Terrance became involved with Abbey(H.Tr.66). Their dating created problems because of the dynamics of interracial relationships, which were even more pronounced because they lived in Poplar Bluff(H.Tr.66-67). Terrance came from an African-American, primarily segregated, monoracial community(H.Tr.67). Abbey's family communicated both verbally and non-verbally that they were not thrilled with their interracial relationship(H.Tr.67-68). Her family's unhappiness was highlighted by Mrs. Rainwater having called Terrance "a nigger," which was devastating to him(H.Tr.67-68).

When Abbey became pregnant, Terrance viewed that as an opportunity to undo what had been done to him as to all the issues relating to his biological father(H.Tr.67). Terrance was going to become the kind of father he had not had(H.Tr.68). Terrance was not going to abandon his child the way his biological

father had abandoned him(Ex.6 at 10). By not abandoning his daughter, Terrance would gain a sense of identity and worth(Ex.6 at 10).

Some specific actions triggered Terrance shooting the Rainwaters(H.Tr.69). Unlike in the past, Terrance could not just withdraw from the situation because he had become a father and he had envisioned wanting to undo what had been done to him through being a good father to Kyra(H.Tr.68-70). When Abbey was ready to deliver Kyra, he was not allowed to be present(H.Tr.69). Most significant was the removal of Terrance's name from Kyra's birth certificate as her father because Mrs. Rainwater told Abbey to do that to ensure Terrance did not have any power(H.Tr.69).

Removing Terrance's name from Kyra's birth certificate brought to the surface all of the identity issues and feelings Terrance had about not having his father's last name of Smith(H.Tr.70-71). Terrance viewed Mr. and Mrs. Rainwater as behaving like his mother and Robert, who had lied to him and cheated him out of his right to know who he was and his right to live with dignity(Ex.6 at 10). Terrance felt he had lost the opportunity to develop an identity of being a responsible parent(H.Tr.71). Terrance became frightened that his daughter was going to be taken away from him and she would find herself in the same position he was(H.Tr.70;Ex.6 at 10). The Rainwaters' actions tapped into a submerged rage that left Terrance feeling he was denied the opportunity to undo what was done to him and culminated in Terrance's violent acts(Ex.6 at 10-11).

Outside the home, at school, and in sports, Terrance was a loner who dealt with conflict by withdrawing(H.Tr.65). The two restraining orders that had been obtained against Terrance suggested that his defense mechanisms were disintegrating because he was not able to just withdraw(H.Tr.71).

After Alfonso submitted her preliminary report in May, 1999, she did not have any further contact with the defense team(H.Tr.35,77;Ex.6). Alfonso's preliminary report highlighted that Terrance's case presented a situation in which he was trying to undo what had been done to him by trying to be a father who did not abandon his child, and thereby, gain a sense of identity and worth(Ex.6 at 10-11). When Terrance perceived that opportunity being taken from him, the explosive violent behavior involving the Rainwaters happened(Ex.6 at 10-11). Alfonso felt that she had begun to establish rapport with Terrance and his family(H.Tr.72). Alfonso had a phone conversation with Lewis and Pincus in which they discussed some of the case dynamics(H.Tr.73). No one testified in penalty about the racial dynamics that were present in Terrance's case(H.Tr.77). Alfonso was ready and willing to testify at trial in January, 2001(H.Tr.78).

C. Robert Smith's Penalty Phase Testimony

Robert presented himself as a model caring father involved in Terrance's life as part of a normal family(T.Tr.1670-80). In particular, Robert identified himself as Terrance's stepfather who had raised him since he was ten months old(T.Tr.1670). Robert had only learned a couple of years before testifying that Terrance had found out that he was not Terrance's biological father(T.Tr.1670).

Robert had never really wanted Terrance to know that he was not Terrance's biological father(T.Tr.1670).

Robert testified about having coached Terrance in Little League and having attended all of Terrance's basketball games(T.Tr.1673). Through Robert, assorted family pictures were presented, along with various awards Terrance had received(T.Tr.1671-77).

Robert testified that the tragedy involving the Rainwaters has caused all of the family to become closer to one another(T.Tr.1678-79). Robert has applied this experience to his everyday life to try to help other young people(T.Tr.1679).

D. Counsel Moreland

Moreland was the lead attorney which meant he was ultimately responsible for strategy decisions(Moreland Depo.#1 at 7-8). Moreland had "primary responsibility" for mental health aspects of the case(Moreland Depo.#1 at 7). McBride's emphasis was penalty phase(Moreland Depo.#1 at 7). The defense theory was that Terrance snapped, more properly referred to as diminished capacity(Moreland Depo.#1 at 8).

Moreland felt that Terrance and his family did not trust the defense team(Moreland Depo.#1 at 13-14). Racial differences, that encompassed distrust for white people, were a factor in the distrust that was present(Moreland Depo.#1 at 14-15).

One reason for hiring Alfonso was that she is African-American(Moreland Depo.#1 at 16). Alfonso was retained because the mitigation case was just not

coming together well and the team was not able to adequately address the significant racial issues the case presented(Moreland Depo.#1 at 41-42).

Moreland sent Alfonso a retention letter on February 26, 1999(Moreland Depo.#1 at 16-17; Moreland Depo.#1 Ex. 12)⁸. Terrance’s case was scheduled to go to trial only one month later on March 22, 1999(Moreland Depo.#1 at 17-18; Moreland Depo.#1 Ex. 12).

In Moreland’s retention letter, he stated that Alfonso was expected to consult with the team about her impressions and a decision would be made as to whether Alfonso could provide expert testimony(Moreland Depo.#1 Ex. 12). That letter also stated that Alfonso was being retained to “help us with racial and cultural aspects of jury selection (a subject with which we very much need help)”(Moreland Depo.#1 Ex. 12).

Moreland recalled conversations with Linda Peters that Alfonso thought that the defense theory approach needed to be expanded to include greater attention to issues of race and Terrance’s sense of loss of identity(Moreland Depo.#1 at 18). Terrance’s case did not go to trial as scheduled in March, 1999

⁸ Moreland’s retention letter for Alfonso was labeled as Exhibit 12 to Moreland’s first deposition. There is a second 29.15 hearing Exhibit 12, which is Judge Syler’s *in camera* review findings on the Rainwaters’ medical records and copies of those records he released.

because of concerns about Terrance's competency to proceed(Moreland Depo.#1 at 21).

When Moreland initially retained Alfonso, he felt that it was too late to incorporate the expanded defense theory Alfonso recommended(Moreland Depo.#1 at19). Terrance's case ultimately did not go to trial until twenty-three months later, in January 2001(Moreland Depo.#1 at 19). Even though the competency questions created the opportunity to expand the defense theory, as Alfonso recommended, that did not happen(Moreland Depo.#1 at 42). Alfonso also did not believe that Drs. Lewis and Pincus were a good fit for the cultural issues presented(Moreland Depo.#1 at 19-20). Drs. Lewis and Pincus are white(Moreland Depo.#1 at 22-23).

Alfonso's report addressed Terrance's experience as an African-American in Poplar Bluff(Moreland Depo.#1 at 20). Moreland felt Terrance's basketball coach in penalty phase "touched on" the cultural factors Alfonso identified in "a very superficial way," but that evidence did not approach what Alfonso had identified in her report(Moreland Depo.#1 at 20-21).

Moreland agreed with Lewis' conclusion that Terrance's entire family was secretive and did not trust white people(Moreland Depo.#1 at 28-29; Ex.4 at 1162). Lewis put in her report that she did not have a clear picture of the family relationships, especially as they involved Robert, and Moreland, likewise, did not have a clear view of those matters(Moreland Depo.#1 at 29;Ex. 4 at 1161).

Moreland remembered having a conversation with McBride about calling Alfonso, but could not remember the exact reasons why they decided not to call her(Moreland Depo.#1 at 43). Moreland does not typically call witnesses with Alfonso's expertise(Moreland Depo.#1 at 43). Moreland's preference, however, is to present both lay witnesses and social workers or psychologists(Moreland Depo.#1 at 43). In Terrance's penalty phase, no mental health experts were called(Moreland Depo.#1 at 43-44).

Moreland's "primary reason" for not calling Alfonso was that they just ran out of time(Moreland Depo.#1 at 58). The jury did not hear any evidence relating to Alfonso's findings dealing with Terrance's identity loss(Moreland Depo.#1 at 58). Likewise, the jury did not hear anything that related to the racial nature of Terrance's experience that formed his emotional state(Moreland Depo.#1 at 59). Moreland was not happy with the evidence presented through Lewis(Moreland Depo.#1 at 59).

E. Counsel McBride

The person responsible for expert mental health issues, was Moreland(H.Tr.275-76). McBride was responsible for both guilt and penalty witnesses, but with a greater emphasis on penalty witnesses(H.Tr.275).

Alfonso was hired because it was felt that as an African-American mental health professional, she might be able to gain Terrance's family's trust(H.Tr.253). Alfonso was successful in getting Terrance's mother to be more forthcoming(H.Tr.255). McBride thought that Alfonso was not called because

there were concerns that what she had to offer did not fit with what Lewis had to present(H.Tr.256).

McBride agreed that the identity crisis and the racial factors Alfonso identified were not presented to the jury(H.Tr.256). As to penalty, McBride could only say that he decided to present lay witnesses to personalize Terrance, but did not know whether calling Alfonso would have been helpful or whether a specific decision was made not to call her(H.Tr.282-83). Alfonso would not have contradicted the guilt phase defense(H.Tr.282-83).

F. 29.15 Findings

McBride made a strategic decision not to call Alfonso(L.F.495). In particular, the findings relied on McBride's testimony that he had concerns that Alfonso's testimony would not fit with what Lewis had to present and conflict with what Lewis would say(L.F.495-96).

G. Dr. Lewis' Guilt Testimony

Terrance's records showed he was born prematurely and there was evidence of fetal distress(Ex.E at 15-18). When Terrance was sixteen months old, he swallowed rubbing alcohol, which is toxic to the brain(Ex.E at 19-20). Terrance's school records reflected a learning disability(Ex.E at 23-25).

Terrance was depressed and withdrawn because he lost his job, Abbey was pregnant, and he was thrown-out of the Rainwaters' house(Ex.E at 31). Terrance was encountering many stressful circumstances which caused him to be increasingly depressed, suspicious, and paranoid(Ex.E at 35-41).

At the time of the offense, Terrance was paranoid, delusional, severely depressed, and in an altered state such that he was suffering from a mental disease or defect that prevented him from coolly reflecting(Ex.E at 43-47,58). The altered state Terrance was in caused him to be unable to remember the acts he was accused of committing(Ex.E 46-47). When a person performs an act that is an anathema to the person's character and has no memory or a distorted memory of the act, the possibilities are either a dissociative state or an organic impairment(Ex.E at 58-59). Lewis was unable to opine with psychiatric certainty whether Terrance's altered state was the result of a dissociative disorder or the result of an organic impairment(Ex.E at 58-59).

H. Dr. Pincus' Guilt Testimony

Pincus found defects in Terrance's frontal lobe and likely deficits in his left parietal lobe(T.Tr.1435). The frontal lobe is important to insight, judgment, and the capacity to predict the outcomes of actions(T.Tr.1435-36). Terrance's neurological problems made it impossible to have coolly reflected given the emotionally stressful circumstances he was experiencing(T.Tr.1454,1462-63).

I. Counsel Was Ineffective

In *Wiggins v. Smith*,539U.S.510,516-17,526(2003), counsel was ineffective for putting on a "halfhearted mitigation case" that included failing to present the type of social history that a postconviction forensic social worker uncovered from such sources as medical and school records about the abuse the defendant had

experienced. Counsels' social history investigation was limited to a psychologist's testing and PSI and social service records. *Id.*523-24.

As in *Wiggins*, counsel failed to present significant social history background that was not covered by other witnesses. The jury did not hear about the traumatic impact on Terrance of how he learned that Robert was not his biological father and his mother having concealed the truth from him(H.Tr.50-53). The jury also never learned that when Abbey became pregnant, Terrance saw that as an opportunity to undo all that had been done to him by being a good father to his daughter(H.Tr.67-68;Ex.6 at 10). That Terrance saw his opportunity to be the father he had never had being taken away, because he was not allowed to be present when Kyra was born (H.Tr.69) was the kind of mitigating evidence that would have made the jury want to vote for life. Moreover, Terrance's name being removed from Kyra's birth certificate at Mrs. Rainwater's direction so that he would have no rights (H.Tr.69) was mitigating evidence that would have caused the jury to want to vote for life. It was significant that Terrance viewed Mr. and Mrs. Rainwater as behaving like his mother and Robert to deny him the right to live his life with dignity(Ex.6 at 10). The jury needed to hear that unlike in the past, where Terrance was able to withdraw from conflict, he could not withdraw because he had become a father(H.Tr.68-70). *See Wiggins*.

From Robert's testimony, the jury was left with the erroneous impression that Terrance came from a stable, loving family(T.Tr.1670-80). The jury was also left with an erroneous impression of Terrance's family through Pincus testifying

that Terrance was living in “a good home” and everyone was “working together”(T.Tr.1442).⁹ The jury should have learned the truth that Terrance came from a family that was seriously dysfunctional(H.Tr.50). The jury did not know about Robert’s violent criminal past (Ex.3 at 1145), violent abusive acts within the family (H.Tr.56), infidelity (H.Tr.58-59), and control of the household through intimidation(H.Tr.56). *See Wiggins*.

The jury also needed to hear about the emotional turmoil Terrance was feeling because of the prejudice surrounding his and Abbey’s interracial relationship(H.Tr.67-68). That emotional pain was only accentuated by Mrs. Rainwater having called him “a nigger”(H.Tr.67-68). Moreover, Moreland erroneously testified that Terrance’s high school basketball coach, Larry Morgan, “touched on” the cultural issues in “a very superficial way”(MorelandDepo.#1 at 20-21). Morgan’s testimony never addressed the cultural issues(T.Tr.1695-1703). Instead, Morgan’s testimony highlighted that Terrance was a soft-spoken young man with a smile that boosted others’ spirits and who displayed the kind of personal qualities a coach would want all his players to possess(T.Tr.1695-1703).

“Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Tennard v.*

⁹ Counsel Moreland erroneously testified that Pincus testified about cigarette burns Pincus observed on Terrance(Moreland Depo. #1 at 58). The jury did not hear any evidence of abuse from Lewis or Pincus(T.Tr.1419-65;Exs.D,E).

Dretke, 124 S.Ct. 2562, 2570 (2004). In *Hutchison v. State*, 150 S.W.3d 292, 307 (Mo. banc 2004), this Court concluded that counsel was ineffective for failing to present a thorough comprehensive expert presentation. That is what happened to Terrance. Counsel did call Lewis and Pincus in guilt to support a diminished capacity defense. Their testimony as physicians, however, addressed Terrance's actions from a purely technical, medical, clinical perspective of providing diagnoses that it was hoped would establish a guilt legal defense. Their testimony did not explain for the jury in any personal way that engendered empathy or explained why Terrance's background made his actions less morally culpable so as to warrant a life sentence. Counsel did not have "to shop for" Alfonso because they had retained her to assist them with the unique family issues.

Insufficient time to prepare does not excuse counsel failing to discover reasonably available mitigating evidence. *Hutchison*, 150 S.W.3d at 302. Alfonso was retained nearly two years before Terrance's case actually was tried to overcome the distrust that existed, to acquire information about Terrance's family, and to address the cultural, racial issues (Moreland Depo.#1 at 13-17, 19, 41-42; Moreland Depo.#1 Ex.12). Moreland's "primary reason" for not calling Alfonso was that they ran out of time to incorporate her findings (Moreland Depo.#1 at 58). Here, counsel did not have to discover the mitigation evidence because they already had it in their possession in Alfonso's report. Furthermore, counsel had almost two years to incorporate Alfonso's findings into the penalty defense.

In *Simmons v. Luebbers*, 299 F.3d 929, 936-41 (8th Cir. 2002) counsel was ineffective for failing to present penalty mitigating evidence about Simmons' childhood background. This Court had ruled counsel's failure to present the available evidence constituted sound strategy. *Id.* 937. In ruling counsel was ineffective, the Eighth Circuit reasoned, "Simmons's attorneys' actions cannot be considered a product of a reasonable trial strategy because there was no justifiable reason to prevent the jury from learning about Simmons's childhood experiences." *Id.* 938. Likewise, it cannot be reasonable strategy to fail to call Alfonso to testify about all of Terrance's childhood experiences.

The *Simmons* Court went on to note "a vivid description of Simmons's poverty stricken childhood, particularly the physical abuse, and the assault in Chicago, may have influenced the jury's assessment of his *moral culpability*." *Simmons*, 299 F.3d at 939 (emphasis added). Testimony by Alfonso about the role of Terrance's father's abandonment of him, the withholding and manner of revealing to Terrance who his father was, the abusive environment Terrance grew up in, and the racial conflict surrounding his relationship with Abbey, likely would have influenced the jury's assessment of Terrance's moral culpability. *See Simmons*.

For trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*, 108 S.W.3d 18, 25 (Mo.App., W.D. 2003). *See, also, State v. McCarter*, 883 S.W.2d 75, 77-79 (Mo.App., S.D. 1994) (counsel ineffective because not reasonable strategy in sexual abuse trial to admit

document containing allegations defendant had sexually abused other children which had not resulted in charges to show false reporting); and *Blankenship v. State*, 23 S.W.3d 848, 850-52 (Mo.App., E.D. 2000) (not reasonable strategy to tell jury in opening it would hear expert testimony, but agree not to call expert in exchange for state not presenting rebuttal witness when counsel learned expert would provide harmful testimony).

Moreland was the lead attorney who had ultimate responsibility for strategic decisions (Moreland Depo.#1 at 7-8). Moreland had “primary responsibility” for the mental health components of the case (Moreland Depo.#1 at 7). Despite Moreland’s testimony that Alfonso may not have been called because of how she thought the defense theory should be expanded (Moreland Depo.#1 at 20) and he typically does not call as an expert someone with Alfonso’s expertise (Moreland Depo.#1 at 43), any decision based on those considerations was not reasonable. Alfonso had childhood experience evidence that the jury could have relied on to lessen Terrance’s moral culpability. *See Simmons, supra*. It was not a reasonable strategy to fail to call Alfonso when this evidence was not presented through any other witness. *See Butler, McCarter, and Blankenship, supra*. Moreover, Alfonso would have accurately presented the family household as one where the family lived in fear of Robert’s violence, rather than a normal loving family. It was critical for the jury to understand that the picture Robert painted of a normal loving family was not true. After hearing that Terrance came from a normal loving family, the jury was left believing that death was more

appropriate than life. In contrast, had the jury heard that Terrance came from a violent abusive family, they would have viewed him as less morally culpable for his actions. *See Simmons, supra.*

McBride testified that Alfonso was not called because there were concerns that what she had to offer would have conflicted with Lewis(H.Tr.256). None of Alfonso's testimony in fact conflicted with Lewis' testimony. Instead, Alfonso's testimony provided childhood background experience that would have supported Lewis' and Pincus' clinical diagnoses. Moreover, Alfonso could have provided testimony that would have complemented both Lewis' and Pincus' testimony by explaining in a non-technical and non-clinical manner why Terrance did what he did. The failure to call Alfonso was not a reasonable strategy and the 29.15 findings were clearly erroneous. *See Butler, McCarter, and Blankenship, supra.*

It also was not reasonable strategy to fail to call Alfonso because Lewis had put in her report that she did not have a clear sense for the family relationships, especially as to Robert, and Moreland also did not have a clear view of those matters(Moreland Depo.#1 at 29;Ex. 4 at 1161). In contrast, Alfonso did have a clear sense for the family relationships, which included Robert's abusive behavior and controlling the family through intimidation. Moreover, the unreasonableness in failing to call Alfonso is apparent because Moreland was not happy with the evidence presented through Lewis(Moreland Depo.#1 at 59).

The 29.15 strategy finding, based on McBride's testimony, is also clearly erroneous because McBride provided inconsistent testimony as to whether there

was any strategy decision not to call Alfonso. During the State's questioning of McBride, he testified that he did not know whether there was a specific decision made not to call Alfonso and she would not have contradicted the guilt defense(H.Tr.282-83). Further, Moreland was the team member who was responsible for the preparation and presentation of mental health experts and not McBride(Moreland Depo. #1 at 7;H.Tr.275-76).

Reasonably competent counsel under similar circumstances would have called Alfonso to testify about these matters. *See Strickland and Williams v. Taylor, supra.* There is a reasonable probability that had the jury heard Alfonso testify that they would have determined that Terrance should be sentenced to life.

A new penalty phase is required.

IV.

BRADY VIOLATION - PREVENTING DISCLOSURE RAINWATERS' **PSYCHIATRIC RECORDS**

The motion court clearly erred in denying the 29.15 postconviction claim that respondent failed to satisfy its *Brady* obligations when prosecutor Ahsens advised Abbey Rainwater not to sign a release to obtain her psychiatric treatment records, because Terrance was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that trial counsel was unable to obtain those records and since the State cannot evade its *Brady* obligations by never obtaining such records, it also cannot affirmatively impede counsel's effort to obtain those records and Abbey's records showed a family history of manic-depressive illness which would have then warranted disclosure of Mr. Rainwater's records. Terrance was prejudiced because Abbey's and Mr. Rainwater's records would have supported the guilt defense that Terrance had snapped because of the pressures he was under and mitigated punishment.

When defense counsel sought Abbey's consent to obtain her psychiatric treatment records, Ahsens advised her not to sign a release. That action prevented trial counsel from obtaining Abbey's records. Had they been disclosed, they would have provided grounds for disclosure of Mr. Rainwater's records. This violated respondent's *Brady* obligations. Terrance was denied his rights to due

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

This Court reviews for whether the motion court clearly erred. *Barry v. State*, 850 S.W.2d 348, 350 (Mo. banc 1993). The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

A. Brady Obligations

The prosecution must disclose favorable evidence material either to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). For purposes of due process, no distinction between exculpatory and impeachment evidence exists. *U.S. v. Bagley*, 473 U.S. 667, 676-78 (1985). Nondisclosure of *Brady* evidence violates due process “irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. *See, also, U.S. v. Agurs*, 427 U.S. 97, 110 (1976). Under *Brady*, the focus is whether Terrance was prejudiced. *State v. Whitfield*, 837 S.W.2d 503, 508 (Mo. banc 1992).

Prosecutors are required to disclose, even without a request, exculpatory evidence. *State v. Robinson*, 835 S.W.2d 303, 306 (Mo. banc 1992) (citing *Bagley* and *Brady*). The state’s interest in a criminal case is seeing justice is done. *Robinson*, 835 S.W.2d at 306. *See also, Berger v. United States*, 295 U.S. 78, 88 (1935). In *Robinson*, the victim’s competence to be a witness was questioned because of her significant psychiatric history. *Robinson*, 835 S.W.2d at 305. The State’s duty under *Brady* required the disclosure of the victim’s psychiatric record. *Id.* 306.

Because of the disclosure the State made, the defense was able to present vast amounts of psychiatric records questioning the victim's mental competence and the views of one of her treating physicians. *Id.*305-06. This Court rejected the notion that would allow the prosecution to evade its duties under *Brady* by never gaining possession of the victim's psychiatric records. *Id.*306-07. *See also, State v. Newton*, 925 S.W.2d 468, 472 (Mo.App., E.D. 1996) (relying on *Robinson*).

B. Ahsens' *Brady* Violation Behavior

At her March 5, 1999, pre-trial deposition, Abbey revealed that she had attempted suicide during the early stages of her relationship with Terrance (Moreland Depo.#2 at 10-11). In an earlier July 13, 1998, deposition of Abbey, counsel learned that Mr. Rainwater had used methamphetamine and that use had caused marital problems (Moreland Depo.#2 at 8-9; T.L.F. 741-43; Cross Depo. at 7). The information about Mr. Rainwater's methamphetamine use was relied on as grounds by trial counsel when they filed a motion for disclosure of any criminal records of Mr. and Mrs. Rainwater (T.L.F. 741-43). During one of her depositions, Abbey recounted that her father had been treated for manic-depressive illness (Moreland Depo.#2 at 18-19).

Moreland asked Abbey to sign a release to obtain her suicide treatment records and Prosecutor Ahsens advised her not to sign a release (Moreland

Depo.#2 at 13-14).¹⁰ Moreland indicated that his request may have been directed through Ahsens, rather than made directly to Abbey(Moreland Depo.#2 at 13-14).

C. How The Records Came To Light

Postconviction counsel subpoenaed treatment records of all the Rainwaters(H.Tr.4-8). When the records custodian produced copies, the motion court indicated that it would not release the documents to anyone and would destroy them(H.Tr.4-8,176-77). Rule counsel's argument about the records to the motion court included that the State could have gotten releases signed because Abbey and her sister Whitney were state witnesses(H.Tr.175).

In response to the motion court's stated intent to destroy the treatment records, 29.15 counsel filed a writ application with this Court(L.F.304-90). This Court entered an order on September 28, 2004, directing the motion court to

¹⁰ Moreland's deposition refers to him having dealt with respondent's counsel "Mr. Austin"(Moreland Depo.#2 at 13-14). Respondent's trial counsel was "Robert Ahsens"(T.Tr.1).

In two death penalty postconviction cases, Ahsens was found to have withheld *Brady* material that required reversals. See *Barton v. State*, Benton Co. CV199-453CC (Findings of January 30, 2004) and *Tisius v. State*, Boone Co. 03CV165704 (Findings of November 4, 2004) (see *Tisius v. State*, SC86534 (L.F.458-556)). The State did not appeal either decision.

conduct an *in camera* review to determine if the records contained any relevant information and to enter written findings by October 28, 2004(L.F.402).

After conducting its *in camera* review, the motion court, on October 12, 2004, released mental health records for Abbey and Mr. Rainwater(L.F.403-06). On December 15, 2004, the motion court released additional treatment records for Abbey(L.F.464-65).

D. What The Records Showed

Abbey was admitted to the hospital for a suicide attempt on June 28, 1996 and discharged the next day(Ex.12 at 13). Abbey had a history of depression(Ex.13 at 8,11). Abbey “had a little altercation with her mother and ended up taking an overdose of Serax”(Ex.12 at 13). She took the overdose because of “some family discord”(Ex.12 at 12). Abbey “had an argument with her mother about dating another individual and as a result she took the medication overdose.”(Ex.12 at 13). Abbey’s records noted “**a family history of some manic depressive situation . . .**”(Ex.12 at 13) (emphasis added). The treating doctor recommended “family counseling” to Abbey’s parents and an appointment with a psychiatrist had been set up(Ex.12 at 14). There was some dispute between Abbey’s parents about what Abbey should be allowed to do(Ex.12 at 14).

Mr. Rainwater’s medical records reflected a history of having been prescribed Prozac, Klonopin, Desyrel, Pamelor, Paxil, and Xanax(Ex.12 at 5-6,10,11). He was also treated with Ativan for panic attacks(Ex.12 at 6). In June, 1995, Mr. Rainwater’s medical records noted: “Married is up and down over the

kid and money.”(Ex.12 at 6). There were diagnoses of chronic depression and chronic bipolar(Ex.12 at 10). A June 17, 1997, record stated the last time Mr. Rainwater used amphetamines was two weeks ago and included a diagnosis of amphetamine abuse(Ex.12 at 11).

E. Counsels’ Testimony

Trial counsel filed a request for discovery that included any material or information that negated guilt or mitigated punishment(T.L.F.72-76).

The defense theory was that Terrance could not deliberate because of mental illness and he snapped(Moreland Depo.#2 at 5). That defense focused on Terrance’s beliefs that his daughter was being taken away from him and that he was becoming a nobody to his and the Rainwater families(Moreland Depo.#2 at 5-6). There were a number of events combined with Terrance’s mental illness that caused him to snap(Moreland Depo.#2 at 5-6). Those events included losing his job, being thrown-out of his and the Rainwaters’ homes, Abbey removing his last name from his daughter’s name, and a court order issuing that prevented him from seeing his daughter, except with court involvement(Moreland Depo.#2 at 5-6).

Moreland did not have any indication that Abbey’s attempted suicide was connected to family discord surrounding Abbey dating Terrance, until he saw her suicide attempt medical records(Moreland Depo.#2 at 10-12). If Moreland had had the information contained in Abbey’s records, it would have been helpful for painting a more compelling picture of Terrance’s paranoia about what was going

to happen to his child because Abbey was mentally ill, while she still controlled his opportunity for seeing his daughter(Moreland Depo.#2 at 12-13).

The psychiatric documents obtained in the 29.15 case, as to both Abbey and Mr. Rainwater, would have been something Moreland would have wanted to supply to their experts(Moreland Depo.#2 at 16). Mr. Rainwater's records would have made more realistic Terrance's fears about what was going to happen to his daughter(Moreland Depo.#2 at 19). Mr. Rainwater's records would have helped provide objective documentation of his mental health problems as to both manic depression and amphetamine abuse(Moreland Depo.#2 at 19-20).

Moreland did not have equal access with the State to the Rainwaters' mental health records because Abbey viewed the State's attorneys as looking out for her interests(Moreland Depo.#2 at 27). If the State's attorney had advised Abbey to provide a release for her records, then she would have given one(Moreland Depo.#2 at 27). The State's attorney refused to agree to get a release from Abbey(Moreland Depo.#2 at 27).

Like Moreland, McBride never received the mental health records obtained during the 29.15 case(McBride Depo. at 8-9).¹¹ McBride would have furnished those records to their experts(McBride Depo. at 8-9). The defense theory was that

¹¹ McBride's and Dr. Cross' testimony on the *Brady* issue were obtained by deposition, and therefore, references to their testimony are to Depo., rather than H.Tr.

Terrance snapped because the Rainwaters were trying to take his child from him(McBride Depo. at 9). Mr. Rainwater's records would have supported the defense guilt theory of a very stressful situation that led Terrance to snap and been mitigating as to penalty(McBride Depo. at 9-12). Abbey's records would have been helpful because they documented that Terrance was a source of conflict between Abbey and her parents and how Abbey's overall mental health contributed to what ultimately happened(McBride Depo. at 12-14). Having all the family psychiatric history would have been helpful for both the guilt and mitigation cases(McBride Depo. at 17). All the Rainwater family's mental health history that preceded the shootings was important to the defense(McBride Depo. at 22).

F. Dr. Cross - Significance of Records' Content

Dr. Cross indicated that Klonopin, Desyrel, and Paxil would have been prescribed to treat Mr. Rainwater's manic state symptoms(Cross Depo. at 14). The Prozac, as well as the Desyrel, would have been prescribed to treat Mr. Rainwater's depressive symptoms(Cross Depo. at 14-15)¹². The combinations of

¹² Two other drugs that appear in Mr. Rainwater's records are Pamelor and Xanax(Ex.12 at 6). Pamelor is a tricyclic anti-depressant. *See* www.pdrhealth.com/drug_info/rxdrugprofiles/drugs/pam1315.shtml. Xanax is a tranquilizer used to treat anxiety disorders. *See* www.pdrhealth.com/drug_info/rxdrugprofiles/drugs/xan1491.shtml.

medicines were given to control Mr. Rainwater's mood swings(Cross Depo. at 14-15). The toxicology reports on Mr. Rainwater reflected he was not taking his prescribed medications(Cross Depo. at 18-19). Someone like Mr. Rainwater, who was not medication compliant, would have experienced extreme mood swings(Cross Depo. at 19). Because of each of their mental illnesses, Terrance and Mr. Rainwater would not have interacted well and there would have been lots of emotional out-of-control experiences(Cross Depo. at 21). The Rainwater family was dysfunctional and adding another dysfunctional person, Terrance, could only produce serious problems because there were no effective problem solving strategies in place(Cross Depo. at 72-74).

G. 29.15 Findings

No evidence was presented that anyone associated with the State had possession of the mental health records, and therefore, they could not have been withheld(L.F.491). Trial counsel was aware of Abbey's suicide attempt because she testified about it during her pretrial deposition and counsel could have subpoenaed Abbey's records(L.F.492). Evidence that counsel could have subpoenaed Abbey's records came from Moreland when he testified that he tried to get a release for Abbey's records(L.F.492). Counsel was aware of Mr. Rainwater's amphetamine use because they filed a motion for the state to disclose any police reports relating to him(L.F.492). Counsel also learned from a pretrial deposition of Abbey that Mr. Rainwater had bipolar disorder(L.F.492). The State cannot be responsible for non-disclosure of equally available evidence(L.F.492-

93). The defense could have obtained these materials or requested an *in camera* review because the defense had knowledge of this information(L.F.493).

H. *Brady* Was Violated And Terrance Was Prejudiced

This Court's decision in *Robinson* recognized that the State cannot evade its duties under *Brady* by never obtaining possession of a victim's psychiatric records. *See Robinson, supra*. Ahsens' behavior here was even worse than if he never obtained psychiatric records. Abbey's deposition testimony revealed that she had attempted suicide during the early period in her relationship with Terrance(Moreland Depo.#2 at 10-11). Moreland tried to get Abbey to consent to releasing her records, but Ahsens advised her not to sign a release(Moreland Depo. at 13-14). When Abbey's records were obtained, after this Court ordered an *in camera* review in response to the motion court threatening to destroy the Rainwaters' records,¹³ those records revealed a family history of manic-depressive illness(Ex.12 at 13). Certainly, if the State cannot evade its duties under *Brady* by never obtaining victim psychiatric records, then it also should not be able to affirmatively evade *Brady* by advising a victim not to consent to releasing those records.

Abbey's records showed that her suicide attempt was precipitated by conflict between Abbey and her parents over Abbey's involvement with Terrance(Ex.12 at 12-14; Moreland Depo.#2 at 10-12). Because Abbey's records documented a family history of manic depressive illness (Ex.12 at 13), trial

¹³ Judge Syler was the judge at trial and at the 29.15(T.Tr.1;H.Tr.1).

counsel would have been able to require disclosure of Mr. Rainwater's mental health treatment records. Without Abbey's records, counsel lacked a solid basis for pursuing Mr. Rainwater's records.

Preventing counsel from obtaining records they were entitled to get under *Robinson* was prejudicial. If counsel had had Abbey's and Mr. Rainwater's records, then counsel could have presented a more compelling picture of Terrance's concern about what was going to happen to his daughter because of the dysfunctional setting in which Kyra was being raised (Moreland Depo. #2 at 12-13, 19-20). Further, Abbey's and Mr. Rainwater's records would have supported and explained, for purposes of guilt and mitigation, the stressful circumstances in which Terrance found himself and which caused him to snap (McBride Depo. at 9-14). Expert testimony could have been presented that Mr. Rainwater's non-compliance with his medication regimen would have caused him to have extreme mood swings and that the combination of his mental illness and Terrance's mental illness would have made for a volatile environment (Cross Depo. at 19, 21, 72-74).

This is not a case where defense counsel had equal access to records. Abbey viewed Ahsens as looking out for her interests and Ahsens advised her not to give a release (Moreland Depo. #2 at 13-14, 27). If Ahsens had advised Abbey to give a release, then she would have given one (Moreland Depo. #2 at 27). Because Ahsens affirmatively advised Abbey not to provide a release for her records, the records were not equally accessible (Moreland Depo. #2 at 13-14). Moreover, even if trial counsel had attempted to subpoena the Rainwaters' mental

health records they would not have gotten them. When the records custodian produced the Rainwaters' records, in response to 29.15 counsels' subpoenas, Judge Syler indicated he planned to destroy the records without ever disclosing any of them to 29.15 counsel(H.Tr.4-8,176-77). Postconviction counsel only was able to obtain select treatment records because they filed with this Court an extraordinary writ and succeeded in persuading this Court to order Judge Syler to conduct an *in camera* review(L.F.304-90,402).

Ahsens' counseling Abbey not to release her psychiatric records violated *Brady* and was prejudicial because both her and her father's records supported the guilt defense theory that Terrance snapped due to the pressures he was experiencing and would have mitigated punishment. A new trial or at a minimum a new penalty phase is required.

V.

FAILURE TO CALL DR. CROSS

The motion court clearly erred in denying the 29.15 postconviction claim that counsel was ineffective for failing to retain and call Dr. Cross because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel who had obtained from psychologist Nichols a competency to proceed evaluation that counsel thought was superficial and who had previously met with Dr. Cross and been impressed with Dr. Cross would have retained Dr. Cross to evaluate Terrance. Terrance was prejudiced because Cross' thorough examination diagnosed Terrance as suffering from PTSD arising from the abuse Terrance had suffered. There is a reasonable probability that if the jury had heard this evidence that it would have accepted Terrance's guilt phase defense of diminished capacity or at a minimum would have voted for life sentences on both counts.

Counsel failed to act as reasonably competent counsel when they obtained a superficial competency to proceed evaluation from Dr. Nichols and then failed to retain Dr. Cross to evaluate Terrance. Counsel had met Dr. Cross before hiring Dr. Nichols and were impressed with his abilities as a mental health professional. Terrance was prejudiced because Dr. Cross formulated a PTSD diagnosis arising from the abuse Terrance had suffered. Cross' findings created a reasonable

probability that the jury would have accepted Terrance's guilt phase defense of diminished capacity or at a minimum would have caused the jury to vote for a life sentence on both counts. Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

This Court reviews for clear error. *Barry v. State*, 850 S.W.2d348, 350(Mo.banc1993). The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*, 428U.S.280,305(1976). To establish ineffectiveness, a movant must demonstrate that counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised and he was prejudiced. *Strickland v. Washington*,466 U.S.668,687(1984). A movant is prejudiced if there is a reasonable probability that but for counsel's errors the result of the proceeding would have been different. *Deck v. State*,68S.W.3d418,426(Mo.banc2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*426.

A. Trial Mental Health Investigation And Presentation

Lewis' June, 1998, preliminary report found that Terrance was suffering from major depression with psychotic features(Ex.4 at 1169). Terrance presented symptoms that were consistent with a dissociative disorder and which required further evaluation(Ex.4 at 1170). Lewis recommended several types of testing and a neurological evaluation(Ex. 4 at 1170-71). Psychologist Lester Bland gave

Terrance some psychological tests Lewis recommended and forwarded the data to Lewis(Ex.4 at 1331).

Pincus' September, 1998, preliminary report noted that a dominant theme that Terrance presented was his paranoia, which could be of delusional proportions(Ex.4 at 1184,1186). Pincus recommended additional testing(Ex.4 at 1186).

Lewis' March, 1999, Addendum report questioned generally Terrance's ability to assist counsel(Ex.4 at 1175). One item that particularly called into question Terrance's competence to assist counsel was that he was convinced he had not shot Mrs. Rainwater(Ex.4 at 1173-74). Terrance displayed a high degree of paranoia(Ex.4 at 1174-75). He also displayed symptoms that were consistent with a dissociative state(Ex.4 at 1174).

Five days before the March 22, 1999 trial, Moreland and McBride filed a motion, relying on Lewis' and Pincus' findings that Terrance be found incompetent to proceed or alternatively for a mental examination under §552.020(T.L.F.815-18;Ex.4 at 1156-75). The trial court ordered a §552.020 evaluation(T.L.F.823-26). In September, 1999, court appointed examiner English submitted a report that found Terrance was competent to proceed(Ex.4 at 1187-98). The court granted a motion for a second examination, as provided for under §552.020(T.L.F.827-29).

The team hired psychologist Dr. Nichols to evaluate Terrance's competence to proceed(Moreland Depo.#1 at 21-22;Ex. 4 at 1287-89). Nichols prepared a

November, 1999 report that was only two and one-half pages(Ex.4 at 1287-89).
Terrance did not disclose any history of physical or sexual abuse(Ex.4 at 1287).
Nichols found no symptoms of mental illness(Ex.4 at 1289).

Moreland had intended to have Nichols go back and do a more general examination(Moreland Depo.#1 at 21-22). Moreland, however, was disappointed in the quality of Nichols' work because her competency to proceed evaluation and report were superficial and not thorough(Moreland Depo.#1 at 44-45,51-52,55).

On January 19, 2001, Moreland wrote to the court(T.L.F.943-44).
Moreland argued that the court should find Terrance was incompetent to proceed based on Lewis' and Pincus' findings(T.L.F.943-44).

Lewis found that Terrance was paranoid and delusional(Ex. E-1 at 8).
Terrance also displayed signs of dissociation(Ex. E-1 at 8). Terrance failed to appreciate the significance of evidence against him and he was unable to assist counsel(Ex. E-1 at 9,16-17).

On January 22, 2001, immediately before trial began, counsel renewed their challenge to Terrance's competency to proceed(T.Tr.351-58). The court found Terrance was competent to proceed(T.Tr.356-58).

The defense guilt phase theory was diminished capacity(Moreland Depo.#1 at 8). Pincus, at trial, recounted that Terrance could not read above a sixth grade level and what he did read he did not fully comprehend(T.Tr.1429-30,1438).
Terrance's reading problems were likely the result of brain damage caused at birth(T.Tr.1444-45). Pincus found defects in Terrance's frontal lobe and likely

deficits in his left parietal lobe(T.Tr.1435). The frontal lobe is important to insight, judgment, and the capacity to predict outcomes(T.Tr.1435-36).

Terrance's neurological problems made it impossible for him to have coolly reflected given the emotionally stressful circumstances he was experiencing(T.Tr.1454,1462-63). At the time of the killings, Terrance had the frontal lobe and parietal lobe deficits and he was depressed(T.Tr.1440-41).

Lewis recounted that Terrance's records showed he was born prematurely and there was evidence of fetal distress(Ex.E at 15-18). Also, when Terrance was sixteen months old he swallowed rubbing alcohol, which is toxic to the brain(Ex.E at 19-20). Terrance's school records reflected a learning disability(Ex.E at 23-25).

Terrance was encountering many stressful circumstances which caused him to be increasingly depressed, suspicious, and paranoid(Ex.E at 35-41). Terrance was depressed about the possibility of losing his daughter and her not knowing him as her father(Ex.E at 38-43). Terrance insisted that someone else shot Mrs. Rainwater and that he only shot Mr. Rainwater in self-defense(Ex.E at 43-44). At the time of the offense, Terrance was paranoid, delusional, severely depressed, and in an altered state such that he was suffering from a mental disease or defect that prevented him from coolly reflecting(Ex.E at 43-47,58). The altered state Terrance was in caused him to be unable to remember the acts he was accused of committing(Ex.E 46-47). When a person performs an act that is so contrary to the person's character and has no memory or a distorted memory of the act, the possibilities are either a dissociative state or an organic impairment(Ex.E

at 58-59). Lewis, however, was unable to opine with psychiatric certainty which of these caused Terrance's altered state(Ex.E at 58-59).

At the motion for new trial hearing, counsel relied on findings of Drs. Holcomb and Harry to urge that Terrance was not then competent to proceed(T.Tr.1786-1816;Ex.4 at 1327-30).

B. Counsels' Testimony

1. Moreland

Lewis put in her preliminary report that she did not have a clear picture of the family relationships, especially as they involved stepfather Robert, and Moreland, likewise, did not have a clear view of those matters(Moreland Depo.#1 at 29; Ex. 4 at 1161). Lewis' report contained some indication Terrance might have been abused(Moreland Depo.#1 at 29;Ex.4 at 1158,1160-61). Lewis' report also indicated that she was unclear about the type of discipline used in the family(Moreland Depo.#1 at 29;Ex.4 at 1161). Moreland said they had found information to suggest Terrance was abused, but the defense team could not confirm it(Moreland Depo.#1 at 29).

Moreland and investigator Linda Peters met with Dr. Cross in May, 1999 and discussed Terrance's case(Moreland Depo.#1 at 31-32). Moreland had a favorable impression of Cross and that he would be helpful to the case, but Moreland did not hire him(Moreland Depo.#1 at 31-33).

Instead, Moreland hired Nichols whose work was disappointing(Moreland Depo.#1 at 33). Moreland got sidetracked on the case and never got back to Cross

because he was so disappointed in Nichols' work(Moreland Depo.#1 at 33,44-45).

Moreland had met Cross before he met Nichols(Moreland Depo.#1 at 45).

Moreland just did not get around to hiring Cross(Moreland Depo.#1 at 33).

Moreland felt that Cross' opinions that Terrance suffered from physical abuse, suffers from PTSD, major depression, a personality disorder not otherwise specified with paranoid features, dissociative amnesia, and delusional thinking at the time of the offense would have made stronger the case for a diminished capacity(Moreland Depo.#1 at 37). Moreland had no strategic reason for failing to use Cross(Moreland Depo.#1 at 38). After Terrance's case was tried, Moreland hired Cross to work on another case(Moreland Depo.#1 at 33).

2. McBride

McBride thought that Lewis was sufficient for purposes of the diminished capacity defense(H.Tr.284).

C. Dr. Cross' Testimony

Moreland and Linda Peters contacted Dr. Cross in May, 1999(H.Tr.96). They met with Cross and discussed the possibility of his consulting on Terrance's case(H.Tr.96-97). When they met, possible mitigating circumstances, including PTSD and physical, emotional, or sexual abuse were discussed(H.Tr.97).

Cross told them that he would need to see Terrance four to six times over the course of ninety days to establish rapport and gain Terrance's confidence(H.Tr.97-98). After Cross met with Moreland and Peters, he never

heard from them again(H.Tr.104). Cross was willing to meet with Terrance, four to six times over ninety days, write a report, and testify(H.Tr.104).

Lewis had noted that when Terrance was four years old, he had a spiral tibia fracture, reportedly caused when he was hit by a car(H.Tr.119). Spiral fractures are caused by a twisting motion(H.Tr.136-37; Ex.4 at 1158). Spiral fractures are not impact type fractures, but rather are caused by child abuse(H.Tr.119-120).

Cross saw cigarette burns on Terrance's back, which Pincus' report discussed, and evidenced Terrance was abused(H.Tr.134-36). A puncture to Terrance's thigh was also evidence of child abuse(H.Tr.135-36;Ex.4 at 1158). The secrecy Robert imposed on the family was symptomatic of abuse(H.Tr.135-36).

The documentation of Robert's violent history¹⁴ was significant for explaining the very violent act Terrance committed(H.Tr.121-27). Those records were significant because our parents are models and people incorporate into their personalities many of the strategies and methods their parents display in their efforts to resolve problems(H.Tr.121-27). Robert, as Terrance's step-father, was Terrance's model and Terrance was likely to solve problems the same way that Robert did(H.Tr.121-27).

¹⁴ Robert's violent history is discussed in detail in Point III and will not be repeated here.

One of Robert's most notable violent acts was overturning a table and throwing-out Terrance and his half-sister Shaneka because Terrance ate a chicken(H.Tr.130-31). The household was run by Robert creating an atmosphere of fear and intimidation(H.Tr.143-44). Robert's rages were emotionally abusive and created fear because they created the perception of some impending danger to Terrance, his mother, and his sister Shaneka(H.Tr.131). That fear was a factor in the development of Terrance's PTSD(H.Tr.131-32). Terrance also displayed an anxiety type reaction where he entered hypervigilant states characteristic of PTSD(H.Tr.133-34).

Terrance was unable to provide the details of how his injuries happened that would have made them inconsistent with child abuse(H.Tr.137). Terrance's inability to explain his injuries was consistent with a disassociative type amnesia(H.Tr.137). His disassociative experience has been part of his adjustment mechanism, which included shooting the Rainwaters(H.Tr.137-38). The disassociative process did not begin with the shooting, but was part of Terrance's long-term unconscious adjustment(H.Tr.137-38).

Cross found that many of Terrance's symptoms associated with depression, anxiety, and hypervigilance are part of his PTSD(H.Tr.139-40). It was not surprising that Terrance had not disclosed having been abused, because that was part of the family's longstanding secrecy system(H.Tr.142). Likewise, Terrance's non-disclosure of the abuse he had experienced was consistent with him having a dissociative reaction when he is confronted with traumatizing events(H.Tr.142-

43). Cross' testing found that Terrance had longstanding intrusive thoughts, which is a strong indicator of physical and emotional abuse(H.Tr.145-46). Cross' testing also showed Terrance was not malingering on his trauma history(H.Tr.146).

On the day of the offense, Terrance was experiencing PTSD symptoms which were exacerbated by his already existing mood disorder(H.Tr.147-48). Terrance had entered a hypervigilant state where there was intense emotion building(H.Tr.147-48). Terrance could not regulate his emotions by isolating himself because of his fears surrounding not being part of his daughter's life(H.Tr.147-48).

Over the years, Terrance had never developed effective emotional regulating strategies(H.Tr.147-49). Terrance had not developed those abilities because his stepfather had used ineffectual emotional regulating strategies and his mother was withdrawn and passive(H.Tr.147-49). On the day of the offense, Terrance not only suffered from depression, paranoid thinking, a paranoid personality disorder, but also PTSD(H.Tr.149-50). When all these mental diseases are interacting together, a person is likely to engage in abhorrent behavior he cannot control and that is completely out-of-character for him(H.Tr.149-50).

Because Terrance was in a hypervigilant state and unable to control his anxiety, he overreacted to the Rainwaters, who he thought were primarily responsible for what was happening to him(H.Tr.150-51). If Terrance had had just one person who he could have confided in, then the shootings likely would not

have happened(H.Tr.151-52). The lack of anyone to show Terrance concern and support contributed to his PTSD(H.Tr.165-66).

Terrance was experiencing dissociative amnesia when he shot Mrs. Rainwater because she was holding his child and he had no reason to want to hurt his child(H.Tr.152-53). Terrance was under extreme mental and emotional stress at the time of the shooting(H.Tr.153-55). Terrance was unable to deliberate and to conform his behavior to the requirements of law(H.Tr.155-56).

D. 29.15 Findings

Counsel hired Lewis and Pincus whose findings and diagnoses the jury heard(L.F.496-97). Moreland and McBride testified that they believed that Lewis and Pincus provided sufficient testimony to support a diminished capacity defense(L.F.496-97). Counsel cannot be ineffective for failing to shop for a more favorable expert(L.F.496-97). Counsel hired Nichols, but chose not to pursue her services(L.F.497).

Cross' testimony was not credible because he appeared too willing to provide testimony favorable to Terrance(L.F.497). A state postconviction finding a witness is not credible, however, does not defeat a claim of prejudice. *Kyles v. Whitley*,514U.S.419,449 n.19(1995). That observation could not substitute for the jury's trial appraisal. *Id.* Witness credibility is for the jury, not postconviction

court. *Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995).¹⁵ The finding that Dr. Cross was not credible (L.F.497) was clearly erroneous because the proper standard under *Kyles* and *Antwine* was not followed.

E. Counsel Was Ineffective

In *Williams v. Taylor*, 529 U.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. Williams was denied effective assistance under *Strickland*. *Id.* 396-98.

Similarly, in *Wiggins v. Smith*, 123 S.Ct. 2527, 2537, 2542 (2003), the Court found counsel's failure to conduct a thorough investigation that would have uncovered evidence of physical and sexual abuse reflected only a partial mitigation case was presented. That partial case was the result of inattention and not reasoned strategic judgment and constituted ineffective assistance. *Id.* 2537, 2542.

“Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Tennard v. Dretke*,

¹⁵ As discussed in detail in Point II, the 29.15 court abdicated its responsibility to make findings and delegated that responsibility to the Attorney General's Office.

124S.Ct.2562,2570(2004). In *Hutchison v. State*,150S.W.3d292,307(Mo.banc 2004), this Court concluded counsel was ineffective for failing to present a thorough comprehensive expert presentation and not to shop for a more favorable expert.

Nichols' competency to proceed evaluation and report were superficial and poorly done(Moreland Depo.#1 at 44-45,51-52,55). In contrast to Nichols' two and one-half page report(Ex.4 at 1287-89), Dr. Cross prepared a twenty page report(Ex.4 at 1385-1404). Lewis' report reflected that she did not have a clear picture of family relationships, especially as they related to Robert(Ex.4 at 1161). Moreland was aware of information that suggested Terrance was abused, but the team was unable to confirm the abuse(Moreland Depo.#1 at 29).

Moreland had no strategic reason for failing to utilize Cross and he did not simply because he did not get around to hiring Cross(Moreland Depo. #1 at 33,38). Moreland believed that Cross' findings would have made the diminished capacity defense more compelling(Moreland Depo.#1 at 37). It is irrelevant that McBride testified that he thought that what the defense presented to support a diminished capacity defense was sufficient(H.Tr.284) because Moreland's testimony was that Cross' findings would have made the diminished capacity defense even more compelling(Moreland Depo.#1 at 37).

Cross was able to obtain a clear picture of the abuse Terrance endured in order to diagnose that Terrance suffered from PTSD through doing a thorough comprehensive examination. Cross was able to explain that Terrance's exposure

to Robert's violent behavior, as his method for problem solving, served as Terrance's problem solving model(H.Tr.121-27,147-49). Cross was also able to explain that Terrance's coping mechanism of dissociative amnesia was longstanding and not a tactic for refusing to acknowledge responsibility for shooting Mrs. Rainwater(H.Tr.137-38,152-53). In contrast, Dr. Lewis was unable to opine with psychiatric certainty whether Terrance's altered state was the product of a dissociative disorder(Ex.E at 58-59).

Moreland erroneously testified that the jury heard Pincus testify about the cigarette burns inflicted on Terrance (Moreland Depo#1 at 58). In fact, Pincus testified that Terrance was living in "a good home" and everyone was "working together" (T.Tr.1442). Pincus' testimony included nothing about any abuse, and more particularly, nothing about the cigarette burns inflicted on Terrance(See Pincus' testimony T.Tr.1419-65). Likewise, the jury never heard from Lewis any evidence about Terrance having been abused(See Lewis' testimony Exs.D,E).

As discussed in greater detail in Point III, Robert Smith portrayed himself as a model caring father involved in Terrance's life as part of a normal family(T.Tr.1670-80). Thus, the jury never heard an accurate portrayal of Terrance's family life as a youth and the abuse he endured. Instead, the jury received misinformation about the circumstances in which Terrance was raised from both Robert Smith and Pincus.

In both *Williams v. Taylor* and *Wiggins v. Smith*, counsel were ineffective because they failed to uncover substantial evidence of abuse. The same is true of

Terrance's counsel. Reasonably competent counsel, who were disappointed with Nichols' superficial work and findings, would have retained Dr. Cross because counsel had met Dr. Cross and were favorably impressed by his ability to positively influence Terrance's case. *See Williams v. Taylor* and *Wiggins v. Smith*. Moreover, reasonable counsel would have retained Cross because Lewis' report suggested Terrance might have been abused, Lewis was unclear about the family discipline, and the defense team had uncovered information to suggest Terrance was abused (Moreland Depo.#1 at 29; Ex.4 at 1158, 1160-61). Because counsel failed to act reasonably, they failed to discover that Terrance suffered from PTSD caused by the abuse he endured.

Like this Court's decision in *Hutchison*, Terrance's case does not present a claim of failing "to shop" for an expert. Rather, Terrance's case involves the situation in which counsel failed to present a thorough comprehensive expert presentation. *See Hutchison*. Counsel did not have "to shop" for Dr. Cross because counsel had met him and were favorably impressed by him. Counsel, however, failed to retain Dr. Cross because counsel was disappointed with Nichols' work and just never got around to hiring Cross (Moreland Depo.#1 at 33, 44-45).

Terrance was prejudiced because the jury did not hear evidence that Moreland acknowledged would have made Terrance's diminished capacity defense more compelling (Moreland Depo.#1 at 37). At a minimum, the abuse evidence and the resulting PTSD findings would have caused the jury to vote for

life without parole as to the count involving Mrs. Rainwater. *See Williams v. Taylor* and *Wiggins v. Smith*.

This Court should reverse Terrance's convictions for first degree murder and order a new trial. Alternatively, at a minimum, a new penalty phase should be ordered as to the count involving Mrs. Rainwater.

VI.

CLOSING ARGUMENTS - FAILURE TO OBJECT

The motion court clearly erred in denying the 29.15 postconviction claims that trial counsel was ineffective for failing to properly object to prosecutor Ahsens' arguments and preserve the following:

A. In guilt:

(1) that the body count would have been higher but for a quick police response brought about by fortuitous circumstances already putting police in the neighborhood; and

(2) to find Terrance not guilty of first degree murder the jury had "to believe the hired mercenaries" that Lewis and Pincus were;

B. In penalty:

(1) death was appropriate in order to minimize the risk Terrance might pose someday of violently harming prison staff and other inmates;

(2) telling the jury that it was their duty to impose death because they "dare not" and;

(3) contrasting Terrance to those members of Ahsens' generation who had led men into combat;

because Terrance 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 properly objected to these arguments to preserve them. Whether considered individually or cumulatively, Terrance was prejudiced because there is a reasonable probability that had counsel properly objected and preserved these claims, Terrance would not have been convicted of first degree murder or at a minimum sentenced to life on both counts and on direct appeal, Terrance's convictions or at a minimum his death sentence would have been reversed.

On direct appeal, appellate counsel raised and briefed numerous unobjected to plain error claims relating to prosecutor Ahsens' improper guilt and penalty phase closing arguments. *State v. Anderson*, 79S.W.3d420,438-39 (Mo.banc 2002). All briefed claims were rejected. *Id.*438-39. All of the ineffectiveness claims now briefed were argued as plain error on direct appeal.

The 29.15 motion alleged that trial counsel was ineffective for failing to make proper objections(L.F.43-47,237-55). The motion court rejected all the claims. Terrance 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.banc 1993). To establish ineffectiveness, a movant must demonstrate that counsel failed to exercise the customary skill and diligence that reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466 U.S.668,687(1984); *Williams v. Taylor*,529U.S.362,390-91(2000).

A finding on direct appeal of no plain error, manifest injustice, does not mean finding *Strickland* prejudice is foreclosed. *Deck v. State*, 68 S.W.3d 418, 424-29 (Mo. banc 2002). That is because the plain error standard is a higher standard than *Strickland* requires for establishing prejudice. *Id.* 427. The plain error standard imposes a requirement that an error was outcome determinative, whereas *Strickland* prejudice requires establishing only a reasonable probability the result of the proceeding would have been different. *Id.* 426-27. In *Deck*, this Court noted that “[t]he standard for finding prejudice in the context of preserved error is lower than the standard for finding error under *Strickland*, and both are lower than the plain error standard.” *Id.* 427 n.5. Under *Deck*, the fact that this Court rejected the plain error closing argument claims that were raised does not mean Terrance’s claims that counsel was ineffective for failing to properly preserve those claims are now foreclosed.

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). Counsel’s failure to make timely proper objections to improper closing arguments can constitute ineffective assistance.

State v. Storey, 901 S.W.2d 886, 900-03 (Mo. banc 1995) (ineffectiveness failing to object to penalty arguments).

A. Testimony of Counsel And 29.15 Findings

For all the claims presented in this Point, counsel testified there was no strategic reason for failing to object (H.Tr.270-74).

The 29.15 findings were as follows. Because this Court determined on direct appeal no error occurred, counsel could not have been ineffective for failing to make meritless objections (L.F.501-02).

These findings are clearly erroneous. They assume, in violation of *Deck*, that because this Court on direct appeal found no plain error that counsel could not have been ineffective.

B. Ahsens' Guilt Phase Arguments

1. Fortuitous Others Not Killed

Ahsens' initial guilt argument included:

I'll tell you something, folks. The only thing that is surprising in this incident is that the body count isn't any higher than it is. If he had more time, I think we would have had a lot more dead people there. But we got lucky. I think even the Poplar Bluff police would tell you that it was just plain blind dumb luck that they happened to be just down the street on another call. All right.

(T.Tr.1604).

Ahsens' guilt rebuttal concluding comments included:

I can go on. You know the facts. You've heard the case. You've seen the diagrams. You know, and as I've said once before, the only surprise here is that we don't have more bodies on the floor than we did. In that, we are fortunate.

(T.Tr.1635).

Ahsens urged the jury to convict Terrance of first degree murder based on Ahsens' speculation that other people could have been killed during the incident except for the police being able to arrive quickly. In *State v. Johnson*, 539 S.W.2d 493, 513-14 (Mo.App., St.L.D. 1976), the court noted that the trial court had properly sustained objections to the prosecutor's speculative arguments that the defendant would have killed more people if the police had not arrived.

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 St. Charles County murders, the argument was improper. *Id.* 901. 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)). Counsel was ineffective for failing to object to this argument and other prosecutorial arguments. *Storey*, 901 S.W.2d at 900-03.

Reasonably competent counsel under similar circumstances would have objected to Ahsens' argument because he speculated about how many more people might have been killed and argued matters outside the record. *See Johnson and Storey, supra*. Terrance was prejudiced because this guilt phase argument appealed to emotion and prevented a reasoned decision on whether Terrance was in fact guilty of first degree murder, rather than a lesser degree of homicide. *See Gardner, supra*. There is a reasonable probability that had counsel objected, Terrance would not have been convicted of first degree murder. Alternatively, had counsel properly preserved this claim, then on direct appeal a new trial was required.

2. Lewis And Pincus Were "Hired Mercenaries"

Ahsens began his guilt rebuttal argument with the following:

Ladies and gentlemen, in order to find as the defendant just asked you to find, I want you to keep in mind what you must do. You have to believe the defendant. You have to believe the hired mercenaries from the East Coast.

(T.Tr.1628).¹⁶ Ahsens repeated that argument stating: "They are mercenaries, and they are not worthy of belief." (T.Tr.1628-29).

¹⁶ When Ahsens told the jury: "You have to believe the defendant" here he was referring to the defense case's evidence and not Terrance personally because Terrance did not testify.

“Arguing defense counsel suborned perjury or fabricated a defense is patently improper.” *State v. Harris*, 662 S.W.2d 276, 277 (Mo.App., E.D. 1983). In *State v. Burnfin*, 771 S.W.2d 908, 912-13 (Mo.App., W.D. 1989), the prosecutor’s arguments that personally attacked defense counsel for having spent two days trying to hide the truth and coaching their witnesses warranted a new trial. The *Burnfin* Court recognized that reversal was required because “the effect of the multiple errors in the prosecutor’s argument [were] *cumulative* and egregiously prejudicial.” *Id.* 912-13 (emphasis added).

In *State v. Whitfield*, 837 S.W.2d 503, 513 (Mo. banc 1992), the prosecutor referred to the defendant as a “mass murderer” and “serial killer.” This Court agreed that the “common sense” meaning of those terms made the argument improper. *Id.* 513. The terms were “pejorative names.” *Id.* 513. The use of such words constituted “name calling” intended to inflame the jurors’ passions. *Id.* 513.

In *Williams v. North River Insurance Co.*, 579 S.W.2d 410, 411 (Mo.App., S.D. 1979), the plaintiffs brought a successful action to recover on their insurance policy for the loss of a dwelling. The *Williams* Court concluded that the trial court properly sustained the plaintiffs’ objection to argument that their attorneys worked on a contingency fee arrangement because that argument impugned counsel’s motive. *Id.* 413.

Argument that the defense experts had fabricated their testimony and colluded with defense counsel required the death sentence be set aside in *State v. Nelson*, 803 A.2d 1, 28 (N.J. 2002). Likewise, argument that defense counsel had

presented “that high falootin’ expert” whose testimony was an “infomercial” required reversal of the death sentence in *Butler v. Nevada*, 102P.3d.71,83-86(Nv.2004). The same result is required here because Ahsens made the same type of arguments.

Mercenary is defined as “serving merely for pay or sordid advantage.” *See* Merriam Webster Online - <http://www.m-w.com/cgi-bin/dictionary>

Ahsens’ name calling characterizing Lewis and Pincus as mere “hired mercenaries” impugned counsels’ motives in presenting a diminished capacity defense. *Cf. Williams, Nelson, and Butler*. Ahsens’ argument had the effect of portraying defense counsel as having suborned perjury and fabricating a defense. *See Harris*. Ahsens did that by invoking the “common sense” and “pejorative” meaning of a “mercenary” and applying it to Lewis and Pincus. *See Whitfield*. That casting of Lewis and Pincus as people who would say anything for money told the jury that counsel had suborned perjury or fabricated Terrance’s diminished capacity defense. *See Harris and Burnfin*.

Reasonably competent counsel under similar circumstances would have objected because this argument cast counsel as having suborned perjury or fabricated Terrance’s diminished capacity defense. *See Harris and Burnfin*. Terrance was prejudiced because Lewis’ and Pincus’ testimony supplied the only basis for finding Terrance was guilty of a homicide offense that was less than first degree murder. *See Strickland*. Terrance was prejudiced because Ahsens’ name calling was intended to inflame the jurors’ passions. *See Whitfield and Gardner*,

supra. There is a reasonable probability that had counsel objected, Terrance would not have been convicted of first degree murder. Alternatively, had counsel properly preserved this claim, then on direct appeal a new trial was required.

C. Penalty Argument

1. Impose Death To Best Protect Prison Staff And Inmates

In closing argument, counsel told the jury that Ahsens had just urged them that it should impose death to protect society(T.Tr.1725). Counsel continued stating that life without parole did protect society(T.Tr.1725). To emphasize the harshness of life without parole counsel told the jury that Terrance's day-to-day existence would include being confined in a cell that is about the size of a bathroom(T.Tr.1725).

Ahsens began his rebuttal argument with the following:

Let me clarify a few things for you. The defendant is not going to spend the rest of his life in your bathroom. He's going to be in a cell out of which he is allowed to go on many occasions. He is going to have repeated and daily contact with other prisoners and guards. What happens if he gets mad at one of them? The most restrictive environment possible and the safest with one we fear may do this again is death row until he's executed. (T.Tr.1735)(emphasis added).

Ahsens' rebuttal argument was improper. Counsel's argument was directed at emphasizing that *society* outside the prison would be adequately protected if Terrance was sentenced to life without parole. Ahsens countered counsel's

argument by arguing for death because the lives of prison staff and other inmates would be best protected if Terrance were executed, rather than Terrance dying of natural causes in prison.

“A defendant is on trial for the crime he is alleged to have committed in the past, not for what he might do in the future.” *State v. Griggs*, 999 S.W.2d 235, 245 (Mo.App.W.D.1998). The State is prohibited from “refer[ing] to a defendant's criminal proclivities during closing arguments or suggest the jury convict him to prevent him from committing future crimes.” *Id.* 245. Speculation by the state “about a defendant's propensity to commit future criminal acts is error.” *State v. Collins*, 150 S.W.3d 340, 353 (Mo.App., S.D.2004).

Ahsens’ improperly urged the jury to impose death because Terrance was a menace whose criminal proclivities over the course of a life without parole sentence would jeopardize the personal safety of prison staff and inmates. *See Griggs*. Ahsens told the jury that the risk to prison staff and other inmates would be reduced if Terrance was executed. Ahsens improperly argued for death based on a crime Terrance might commit in the future and not for the offenses involving the Rainwaters. *See Griggs* and *Collins*.

In *Henry v. State*, 604 S.E.2d 826, 828-29 (Ga.2004) the defendant’s death sentence for killings done during a robbery was reversed when the prosecutor argued that death was the appropriate punishment because of the defendant’s future danger to other inmates and staff. That argument was improper because

there was no evidence to support it and the same is true in Terrance's case.

*Id.*828-29.

Reasonably competent counsel under similar circumstances would have objected. *See Griggs, Collins and Henry*. Terrance was prejudiced because Ahsens' argument inflamed the jurors' passions and there is a reasonable probability Terrance would have been sentenced to life. *See Gardner*. Further, Terrance was prejudiced because had this claim been preserved, then on direct appeal a new penalty phase was required.

2. The Jury "Dare Not" Impose Death

Ahsens concluded his rebuttal penalty argument with the following:

Ladies and gentlemen, what we punish is the evilness of the crime, and make no mistake, there is evil in the world. As a much smarter man than I once said, the only thing that is necessary for evil to triumph is for good men, and I suggest and good women, to do nothing. I suggest to you that you dare not do nothing. Thank you again for your attention.

(T.Tr.1738)(emphasis added).

In *Evans v. State*,28P.3d498,515-17(Nv.2001), trial counsel and appellate counsel were ineffective for failing to properly challenge the prosecutor's "highly improper" penalty closing argument that asked whether the jury had the resolve, courage, and commitment to do its legal duty and impose death. That argument created an impermissible risk of an arbitrary and capricious decision. *Id.*517. *See also, State v. Cockerham*,365S.E.2d22,23(S.C.1988)(penalty argument that

defense counsel wanted to take advantage of jury's softness and lack of courage was improper penalty argument).

Similarly, in *People v. Castaneda*, 701 N.E.2d 1190, 1192 (Ill. Ct. App. 1998), the defendant's conviction was reversed because the prosecutor argued that the jury had a duty under the oath they had taken and to the people of Illinois to convict. In arriving at that conclusion, the *Castaneda* Court relied on *United States v. Young*, 470 U.S. 1 (1985). The *Young* Court recognized that prosecutorial argument that exhorts the jury to 'do its job' "has no place in the administration of criminal justice...." *Young*, 470 U.S. at 18 (citing to and relying on A.B.A. Standards for Criminal Justice).

In *People v. Johnson*, 803 N.E.2d 405, 421 (Ill. 2003) the prosecutor, like Ahsens did here, quoted Edmund Burke's "All it takes for evil to thrive [is] for good men and women to do nothing." Also, like Ahsens, that argument was followed by telling the jury it had to do something. *Id.* 421. This argument is improper because it diverts the jury's attention from the issues it is to consider and casts the jury's decision as a choice between "good and evil." *Id.* 421.

Ahsens improperly challenged the jurors to have the resolve, courage, and commitment to do their legal duty and to impose death when he told them that they had to impose death because they "dare not." *See Evans*. Ahsens' argument also was improper because he told the jurors that it was their job under their oath to impose death. *See Castaneda* and *Young*. Ahsens cast the choice as one between "good and evil." *See Johnson*.

In *State v. Rousan*, 961 S.W.2d 831, 850-51 (Mo. banc 1998), this Court found Ahsens' argument there that imposing life equated to weakness was improper. Ahsens argument here is the same as his *Rousan* argument because the intent and message are identical.

Reasonably competent counsel under similar circumstances would have objected. *See Evans, Castaneda, Johnson, and Young*. Terrance was prejudiced because this argument improperly appealed to the jurors' passions and emotions to produce a death sentence. *See Gardner*. There is a reasonable probability that had counsel objected, Terrance would have been sentenced to life or on direct appeal a new sentencing hearing ordered. *See Strickland*.

3. Ahsens' Combat Contemporaries

Ahsens' initial penalty argument included the following:

There are ultimate crimes. Murder in the first degree is it in our society. And those ultimate crimes call for the ultimate punishment, and that's harder when the person is young. You notice that is one of the mitigating circumstances. It's cited that you may consider. But I know those in my generation at 21 and 22 were wearing the same color clothes to work every day and leading men into a lot of situations, including combat. (T.Tr.1723).

Ahsens had not presented any evidence that people of his generation at the time they were the same age as Terrance had led people in combat. This argument, like the argument in *Storey, supra*, relied on purported facts outside the

record and constituted unsworn testimony by the prosecutor. Reasonably competent counsel under similar circumstances would have objected. *See Storey*. Terrance was prejudiced because Ahsens argued that his rendition of what people of his generation had done should be relied on as a basis to reject the submitted statutory mitigating circumstance of Terrance's age at the time of the offense(T.L.F.1016). *See Strickland*. There is a reasonable probability that had counsel objected that Terrance would not have been sentenced to death. Further, if counsel had preserved this claim, then a new penalty phase would have been required on direct appeal.

D. Cumulative Effect Was Prejudicial

In *State v. Edwards*,116S.W.3d511,550(Mo.banc2003), Judge Teitelman's concurring opinion reminded trial judges to be cognizant that "[a] new trial can be ordered due to cumulative error, even without deciding if any individual error constitutes grounds for reversal." The *Burnfin* Court recognized that multiple improper prosecutorial arguments can have a cumulative effect that is prejudicial. *Burnfin*,771S.W.2d at 912-13. All of Ahsens' above unobjected to arguments standing alone require a new trial or at a minimum a new penalty phase because counsel was ineffective. Moreover, when all of Ahsens' improper arguments are considered in conjunction with one another there was a cumulative effect that was prejudicial that requires a new trial and at least a new penalty phase because of counsels' ineffectiveness in failing to object. *See Edwards* and *Burnfin*.

For all the reasons discussed, this Court should find counsel was ineffective and order a new trial or alternatively a new penalty phase.

VII.

INEFFECTIVE APPELLATE COUNSEL - ENGLISH'S TESTIMONY

The motion court clearly erred in denying the 29.15 postconviction claim that direct appeal counsel was ineffective because Terrance 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 that the trial court erred in overruling the objections trial counsel made to Dr. English testifying and that the trial court plainly erred in allowing English's testimony in violation of §552.020.14. Terrance was prejudiced because there is a reasonable probability that Terrance's convictions for first degree murder would have been reversed.

The motion court rejected the claims that appellate counsel was ineffective for failing to raise trial counsels' objections to English testifying and that the trial court plainly erred in failing to exclude English's testimony under §552.020.14. Terrance was denied 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). The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence a reasonably competent counsel would have

exercised and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000).

A defendant is entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). To be entitled to relief on a claim appellate counsel was ineffective a movant must establish that competent and effective appellate counsel would have raised the error and that there is a reasonable probability that if the claim had been raised that the outcome of the appeal would have been different. *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005).

As discussed in greater detail in Point I, defense experts Drs. Lewis and Pincus testified in guilt that Terrance had a mental disease or defect that precluded him from having committed first degree murder because he was unable to have deliberated. Respondent called English as a guilt rebuttal witness to testify Terrance did not suffer from any mental disease or defect. *See* Point I.

A. Counsels' Objections

Moreland objected to English testifying on the grounds that English said in his deposition that he was unable to render an opinion as to Terrance's mental state at the time of the offense (T.Tr. 1485-88, 1524-25). The motion for new trial renewed counsels' objections (T.L.F. 1076).

B. Counsel's Testimony And 29.15 Findings

Counsel Thompson represented death sentenced defendant Faye Copeland (H.Tr. 298-99). *See State v. Copeland*, 928 S.W.2d 828 (Mo. banc 1996). In *Copeland*, Thompson challenged the state's use of a competency to proceed

evaluation in penalty phase to counter a penalty mitigation defense psychologist as contrary to §552.020.12(H.Tr.298-99). This Court rejected that argument because §552.020.12 only applied to guilt phase(H.Tr.298-99). *See Copeland*,928S.W.2d at 838-39.

Thompson believed that she should have raised on Terrance’s appeal the objections trial counsel made, along with raising the same kinds of arguments she had made in *Copeland* as then applied to Terrance’s guilt phase(H.Tr.297-300). Thompson’s failure to raise these matters was not strategic(H.Tr.300). Thompson has had success in raising plain error(H.Tr.303-04).

The 29.15 claim was rejected because English’s testimony was proper, appellate counsel was not ineffective for failing to raise a meritless claim(L.F.500).

C. Appellate Counsel Was Ineffective

As discussed in Point I, in *State v. Bowman*,681A.2d469,470-71(Me. 1996), that Court held it was improper for the state to present evidence that the defendant was found competent to proceed in order to rebut the defense of not guilty by reason of insanity. That evidence was not proper because evidence of Bowman’s competence to stand trial “could only have led the jury to believe erroneously that Bowman's present competence to stand trial had some bearing on his mental state on the date of the commission of the charged offense.” *Id.*471.

Terrance’s trial counsel objected to English’s testimony, for the reasons the *Bowman* Court recognized such testimony is improper and prejudicial, that

English's opinion had no bearing on Terrance's mental state at the time of the offense(T.Tr.1485-87,1524-25). Appellate counsel had no strategic reason for failing to brief that claim(H.Tr.297-300). Reasonably competent appellate counsel under similar circumstances would have raised trial counsels' preserved objections. *See Bowman, supra*. Terrance was prejudiced because, as the *Bowman* Court recognized, the jury could have only been left to erroneously believe that Terrance's competence to proceed had some bearing on his mental state at the time of the offense. Thus, if this claim had been briefed on appeal, there is a reasonable probability a new trial would have been ordered. *See Williams v. State*.

In *Copeland*, Terrance's appellate counsel raised the claim that the state's use of a competency to proceed evaluation in penalty phase to counter a penalty mitigation defense psychologist was prohibited under what was then §552.020.12. From this Court's *Copeland* opinion, Terrance's appellate counsel learned that what is now §552.020.14 is limited to the guilt phase. Counsel testified that she should have presented the same kinds of arguments she did in *Copeland*, that English's testimony was prohibited in guilt(H.Tr.297-300).

Reasonably competent appellate counsel who had made a similar challenge in *Copeland* would have recognized the need to raise as plain error that English's testimony in guilt was prohibited under §552.020.14. Terrance was prejudiced by English's testimony such that it constituted a manifest injustice. Section 552.020.14 was intended to avoid the jury having the erroneous impression that

Terrance's competence to proceed had some bearing on his mental state at the time of the offense and that impression is the only impression that the jury could have had. *See Bowman*. Thus, there is a reasonable probability a new trial would have been ordered on direct appeal, if this claim had been briefed.

In *Roe v. Delo*, 160 F.3d 416, 418-20 (8th Cir. 1998), appellate counsel was ineffective for failing to raise, as plain error, that the verdict director misstated the required mental state for first degree murder. The only issue in guilt was whether Terrance had the required mental state of deliberation for first degree murder. Allowing the jury to hear English's testimony misled the jury to believe that Terrance's competence to proceed had some bearing on his mental state at the time of the offense. Reasonably competent appellate counsel would have briefed the objections trial counsel made and challenged as plain error under §552.020.14 the admission of English's testimony as misleading the jury on the critical issue of the required mental state. *See Roe*. The jury in Terrance's case was misled about his mental state in the same way that Roe's jury was misled about the mental state required for first degree murder. Terrance was prejudiced because there is reasonable probability that had these claims been briefed that a new trial was required on direct appeal.

A new trial on both murder counts is required.

VIII.

INEFFECTIVE APPELLATE COUNSEL - JUROR DORMEYER

The motion court clearly erred in denying the 29.15 postconviction claim that appellate counsel was ineffective because Terrance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent appellate counsel would have raised as plain error that an unqualified juror, Juror Dormeyer, served. Terrance was prejudiced because there is a reasonable probability on direct appeal a manifest injustice would have been found that required a new penalty phase.

Appellate counsel failed to raise that it was plain error for Juror Dormeyer to have served. Terrance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV.

This Court reviews for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo. banc 1993). The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised and he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A defendant is entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). To be entitled to relief on a claim appellate counsel was ineffective a movant must establish that competent and effective appellate counsel would have raised the error and that there is a reasonable probability that if the claim had been raised that the outcome of the appeal would have been different. *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005). Under Rules 29.12 and 30.20, a defendant on direct appeal can obtain relief for plain error that resulted in manifest injustice. *See, e.g., State v. Middleton*, 995 S.W.2d 443, 456 (Mo. banc 1999).

As discussed in Point II, Juror Dormeyer was not qualified to serve because he testified that death was “automatically” appropriate and counsel was required to put on evidence to persuade Dormeyer life was appropriate (T.Tr.577). Trial counsel, however, failed to move to strike Dormeyer for cause because of a note-taking error (Moreland Depo.#1 at 57).

A. Counsel Thompson’s Testimony And 29.15 Findings

Dormeyer’s testimony reflected that he was an automatic death penalty juror and would shift the burden to the defense to prove life was appropriate (H.Tr.296). Thompson could have raised as plain error the failure to move to disqualify Dormeyer for cause (H.Tr.297). Thompson did not omit a claim of plain error as a matter of strategy in order to winnow issues and to raise better issues (H.Tr.297).

The claim was rejected because appellate counsel was not ineffective because the underlying claim involving Dormeyer lacked merit and counsel cannot be ineffective for failing to brief a non-meritorious issue(L.F.489-90).

B. Counsel Was Ineffective

Thompson had no strategic reason for failing to raise as plain error that Dormeyer was not qualified(H.Tr.296-97). Reasonably competent appellate counsel under similar circumstances would have raised the failure to strike Dormeyer as plain error because Dormeyer was not qualified to serve. *See* Point II and *Williams v. State*. Terrance was prejudiced because there is a reasonable probability that had this claim been briefed that a new penalty phase would have been ordered. *See Williams v. State*.

A new penalty phase is required.

IX.

RING VIOLATION

The motion court clearly erred in denying the 29.15 postconviction claims that the information was defective so that respondent could not seek death against Terrance and counsel was ineffective for failing to properly object because Terrance was denied his rights to due process, a jury trial, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. V, VI, VIII, and XIV, in that the information only charged Terrance with unaggravated and not aggravated first degree murder since it did not plead any aggravating circumstances and trial counsel was ineffective for failing to move to prohibit respondent from seeking death based on that defect. Reasonably competent trial counsel would have raised this matter and Terrance was prejudiced because life was the only authorized punishment.

The information failed to charge Terrance with aggravated first degree murder when it did not allege any aggravating circumstances. For that reason, Terrance was charged with only unaggravated first degree murder and only subject to a life sentence. Terrance was denied his rights to due process, a jury trial, freedom from cruel and unusual punishment, and effective assistance of counsel because he was sentenced to death based on an information that did not charge aggravated first degree murder and because counsel failed to challenge his death sentence on this ground. U.S. Const. Amends. V, VI, VIII, and XIV.

Review is for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo. banc 1993). The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). 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); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000).

In *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999), the Supreme Court announced a broad constitutional principle governing criminal cases that had only been implicit: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Subsequently, *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), applied this rule to the states through the Fourteenth Amendment. In a third case, *Ring v. Arizona*, 536 U.S. 584, 600, 609 (2002), the Supreme Court held this rule applies to eligibility factors in state capital prosecutions.

The information here did not charge any statutory aggravating facts which respondent must prove to sentence Terrance to death (T.L.F.45-48). Counsel did not have any strategy reason for failing to object to the information's

defect(H.Tr.274-75). The 29.15 findings denied this claim because this Court has previously rejected it(L.F.502).¹⁷

The Court’s opinions suggest aggravating facts that must be found by a jury beyond a reasonable doubt are elements of a greater offense. *See, e.g., Sattazahn v. Pennsylvania*,537U.S.101,111(2003); *Harris v. United States*,536U.S.545,564(2002); *Ring v. Arizona*,536U.S. at 609. The logical corollary of the foregoing cases is this: aggravating circumstances, as elements of the greater offense of capital or *aggravated* murder, must be pled in the document charging capital or aggravated murder. This rule is in line with established federal law. “An indictment must set forth each element of the crime that it charges.” *Almendarez-Torres v. United States*,523U.S.224,228(1998). “[A] conviction upon a charge not made or upon a charge not tried constitutes a denial of due process.” *Jackson v. Virginia*,443U.S.307,314(1979).

Although §565.020 may appear to establish a single offense of first degree murder for which the punishment is either life without probation or parole, or death, under *Ring, Apprendi, and Jones*, the combined effect of §§565.020 and 565.030.4 is to create, *de facto*, two kinds of first degree murder in Missouri: 1) *unaggravated* first degree murder, for which the elements are set out in §565.020.1; and 2) the greater offense of *aggravated* first degree murder.

¹⁷ This claim is presented because it is supported by recent authority from the United States Supreme Court and that Court has not decided this precise issue.

The difference between charging *aggravated* and *unaggravated* first degree murder is constitutionally significant. In Missouri, to prosecute a defendant for *aggravated* first degree murder, the charging document must plead not only the elements of the lesser offense of *unaggravated* first degree murder; the charging document must also plead the statutory aggravating circumstances on which the State will rely to establish death eligibility.

The State did not plead any statutory aggravating circumstances – or any of the facts required by §565.030.4 in the information. The state charged Terrance with the lesser offense of *unaggravated* first degree murder and that is the “greatest” offense of which he could have been properly convicted.

The sentence of death imposed by the trial court violated Terrance’s rights to jury trial, due process, freedom from cruel and unusual punishment, and reliable sentencing. U.S. Const. Amends. V, VI, VIII, and XIV. Alternatively, reasonably competent trial counsel would have objected to the information failing to charge any aggravating circumstances and Terrance was prejudiced because he was required to be sentenced to life. *See Strickland* and U.S. Const. Amend. VI.

This Court should order Terrance sentenced to life.

X.

INABILITY TO PERFORM CONSTITUTIONAL EXECUTIONS

The motion court clearly erred in denying the 29.15 postconviction claim challenging the constitutionality of the lethal injection method to execute because that ruling denied Terrance his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that the State conducted the execution of Emmitt Foster in a manner that required repeated efforts to kill him and caused lingering death, mutilation, and the unnecessary and wanton infliction of pain and similar mishaps in carrying out executions in other states have occurred such that Missouri cannot carry out constitutional executions.

The 29.15 motion challenged the lethal injection method and the State's ability to constitutionally carry out executions. The motion court rejected this claim. That ruling denied Terrance his rights to due process and to be free from cruel and unusual punishment. U.S. Const. Amends. VIII and XIV.

The amended motion alleged lethal injection execution and its related procedures causes death by a process that involves lingering death, mutilation, and the unnecessary and wanton infliction of pain(L.F.262-76). To support that claim, the pleadings relied on how respondent executed Emmitt Foster(L.F.263-66). The State took half an hour to kill Foster(L.F.263). During the execution, the blinds were drawn so witnesses were precluded from observing it(L.F.263). Some witnesses refused to sign the documents that they had witnessed Foster being

executed(L.F.264). The motion also relied on nine lethal injection executions from other states involving similar incidents(L.F.266-71).

The claim was submitted on the pleadings. The 29.15 findings stated that any decision would be advisory because an execution date has not been set and a method of performing the execution had not been “announced.”(L.F.502-03). The findings relied on this Court’s decisions in *Worthington v. State*,166S.W.3d566 (Mo.banc2005) and *Morrow v. State*,21S.W.3d819(Mo.banc2000)(L.F.502-03).

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc 1993). The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976). Under the Eighth Amendment, a punishment “must not involve the unnecessary and wanton infliction of pain.” *Gregg v. Georgia*,428U.S.153,173 (1976)(opinion of Stewart, Powell, and Stevens, J.J.). *See, also, Louisiana v. Resweber*,329U.S.459,463 (1947)(“The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence”). A chosen method of execution must minimize the risk of unnecessary pain, violence, and mutilation. *Glass v. Louisiana*,471U.S.1080,1086(1985)(Brennan, J. dissenting from certiorari denied). A punishment violates the Eighth Amendment if it causes torture or lingering death. *Id.*1086(citing *In re Kemmler*,136U.S.436,447(1890)).

In *Nelson v. Campbell*,124S.Ct.2117,2120(2004), the Court ruled Nelson could bring under 42 U.S.C.§1983 his challenge to the lethal injection procedures planned to kill him. *Id.*2120. The history of execution mishaps, both in Foster’s

case and the other nine cases, establish a significant likelihood that those mishaps could be repeated. That history would allow Terrance to bring a §1983 challenge under *Nelson*.

The motion court clearly erred in rejecting the claim that Missouri's execution procedures violate Terrance's rights to due process and to be free from cruel and unusual punishment because of the significant likelihood the documented execution mishaps could be repeated in executing him. This Court should impose life without parole.

CONCLUSION

For the reasons discussed, Terrance Anderson Requests: Points I, IV, V, VI, VII a new trial; Points II, III, IV, V, VI, VIII a new penalty phase; and Points IX and X impose life without parole.

Respectfully submitted,

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Certificate of Compliance and Service

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains _____ words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in January, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were _____ this ____ day of _____, 2006, to Office of the Missouri Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65102.

William J. Swift

APPENDIX

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