

**IN THE
MISSOURI SUPREME COURT**

KENNETH BAUMRUK,)
)
 Appellant,)
)
 vs.) **No. SC 91564**
)
 STATE OF MISSOURI,)
)
 Respondent.)

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE LUCY D. RAUCH, JUDGE**

APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

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

RECORD CITATION DESIGNATIONS

The lengthy case record, *infra*, is referenced as follows: (a) 1/24/94Tr. - competency hearing before Judge Belt; (b) 1/27/94Tr. - competency hearing before Judge Belt; (c) 11/13/96Tr. - hearing transcript subject of Judge Belt writ case; (d) 1stTrialTr. - first trial transcript; (e) 1stTrialTr.Vol.#4.5 - first trial transcript volume numbered as "4.5"; (f) 6/28-29/05Tr. - retrial competency hearing transcript; (g) 1/17/07Tr. - retrial motion hearing transcript of 1/17/07; (h) 2ndTrialTr. - retrial transcript; (i) 2ndTrialL.F. - retrial Legal File; (j) 2ndTrial2ndSupp.L.F. - retrial Second Supplemental Legal File; (k) KoubaDepo. - Kouba deposition transcript; (l) RetrialEx. # - retrial exhibits; (m) 9/21/09Tr. - 29.15 motion hearing transcript; (n) 6/17/10Tr. - 29.15 motion hearing transcript; (o) 29.15Tr. - 29.15 evidentiary hearing transcript; (p) 29.15L.F. - 29.15 Legal File; and (q) 29.15Ex.# - 29.15 exhibits.

STATEMENT OF FACTS

I. Procedural History

In *State v. Baumruk*, 85S.W.3d 644 (Mo. banc 2002), this Court reversed Baumruk's conviction and death sentence for denying his change of venue motion. Baumruk was convicted of shooting and killing his wife, Mary Baumruk, on May 5, 1992 in a St. Louis County courtroom during their dissolution proceedings. *Baumruk*, 85S.W.3d at 646-48. The change of venue was required because the trial was conducted in the St. Louis County Courthouse, where the shooting happened. *Baumruk*, 85S.W.3d at 649-50.

Before Baumruk's case was ultimately tried in St. Louis County, it had originally proceeded on a change of venue in Macon County Circuit Court. *Baumruk*, 85S.W.3d at 647-48. While Baumruk was being apprehended, law enforcement shot him in the head and he sustained brain injuries that rendered him incompetent to proceed. The Macon County Circuit Court, Judge Belt, ordered Baumruk committed to the Department of Mental Health. *Baumruk*, 85S.W.3d at 647.

The Department of Mental Health brought guardianship proceedings, but a jury found Baumruk did not need a guardian. *Baumruk*, 85 S.W.3d at 647. Judge Belt refused to dismiss the charges. *Baumruk*, 85S.W.3d at 647. Baumruk's then counsel, Patrick Berrigan, obtained a writ of mandamus from this Court ordering the charges dismissed. *State ex rel. Baumruk v. Belt*, 964S.W.2d 443, 443-47 (Mo. banc 1998). After the charges were dismissed, the St. Louis County prosecutor recharged Baumruk and

he was tried in St. Louis County, which produced the conviction this Court reversed for failing to grant a venue change. *See Baumruk*, 85S.W.3d at 647.

After this Court ordered a new trial, Baumruk was reconvicted and sentenced to death in St. Charles County in a trial before Judge Rauch. *State v. Baumruk*, 280S.W.3d 600 (Mo. banc 2009). At the retrial, Baumruk was represented by Public Defenders David Kenyon and Robert Steele. Baumruk's competency to proceed was challenged before retrial and this Court rejected that challenge. *Baumruk*, 280S.W.3d at 608-09.

II. Retrial Competency Proceedings

At the retrial competency proceedings, respondent reoffered the evidence from the first trial's competency proceedings (6/28-29/05 Tr. 6-8).

A. Competency Proceedings - First Trial

1. Rabun

Psychiatrist Rabun first evaluated Baumruk in 1994 as respondent's retained expert and opined Baumruk did not have a mental disease or defect and was competent to proceed then (1st Trial Tr. 400-02, 441).

In 1999, Rabun evaluated Baumruk as a court appointed expert (1st Trial Tr. 408). Baumruk told Rabun he did not remember the facts of the acts alleged and the next thing he remembered was being treated at Regional Hospital (1st Trial Tr. 260, 262).

In May, 1999, Rabun diagnosed Baumruk as having amnestic disorder for a circumscribed period due to head trauma(1stTrialTr.278,290,434-35,444-45,532-33,561). Rabun found Baumruk competent to proceed(1stTrialTr.279-81,288).

In approximately March, 2000, respondent provided Rabun witnesses' names and documents it wanted Rabun to consider(1stTrialTr.291,415-17,564-65). Because of the subsequent information furnished, Rabun no longer believed Baumruk had an amnestic disorder(1stTrialTr.390-91,444-45).

St. Louis County Jail social worker Buck told Rabun that Baumruk had recounted to Buck details surrounding the shooting(1stTrialTr.315-17). Buck's overall description of Baumruk was someone who did not have memory deficits(1stTrialTr.322). In 1992, Buck, however, opined Baumruk did not appreciate the seriousness of his circumstance because Baumruk expected that he was going to be released to return to living in Seattle(1stTrialTr.559-60).

Rabun opined that in 2000 Baumruk did not suffer from any mental disease or defect and was competent to proceed(1stTrialTr.399-400,434-35). Rabun also opined that he never had any evidence to support a dementia diagnosis and disagreed with 1994 reports from Fulton State Hospital that found dementia due to head trauma(1stTrialTr.441-44,543).

Rabun believed Baumruk was malingering as to amnesia and chooses to have a selective memory(1stTrialTr.337,394,397-98,448-50,568,601).

2. Scott

Rabun's supervisor, Psychologist Scott, asked Rabun to evaluate Baumruk(1stTrialTr.675). Baumruk told Scott that he remembered taking the cross county bus to the courthouse, but did not remember anything else until he was treated at Regional Hospital(1stTrialTr.694). Baumruk told Scott he did not remember what took place at the courthouse, but he remembered traveling from Seattle to St. Louis and the events of the weekend he spent in St. Louis that preceded the shooting(1stTrialTr.694-96). Scott opined that Baumruk was not forthcoming about remembering what happened(1stTrialTr.696).

Baumruk did not attempt to make himself appear more impaired than he actually is(1stTrialTr.724-26,740). Scott found Baumruk has significant impairment as to visual memory abilities, but competent to proceed(1stTrialTr.717-18,722). Scott found no signs of progressive deterioration of memory functions(1stTrialTr.721).

3. Sullivan

Fulton psychologist Sullivan did not observe any memory deficits when Baumruk was there(1stTrialTr.633).

4. Buck

Buck testified that Baumruk told him that he did the shootings because he believed Judge Hais was going to give his wife the house and that was unfair(1stTrialTr.763). Buck testified Baumruk told him that he remembered doing the shootings(1stTrialTr.763-64). Buck told Berrigan that Baumruk was unrealistic about the consequences to him for the courthouse shooting(1stTrialTr.789).

5. Harry

Psychiatrist Harry evaluated Baumruk's competency to proceed in 1994, while Baumruk was at Fulton(1stTrialTr.873-74). Harry reviewed the CT scans of Baumruk's head injuries, which helped Harry arrive at his diagnoses(1stTrialTr.877-85). Part of Baumruk's occipital temporal lobe was removed because of bullet damage(1stTrialTr.886-87,890). The portion of Baumruk's brain that was damaged is responsible for the storage and retrieval of memory and will not regenerate(1stTrialTr.890-91). Baumruk's brain injury caused retrograde amnesia(1stTrialTr.893-94,899). Baumruk had no memory of the courthouse shooting(1stTrialTr.904). However, Baumruk's brain injury did not compromise his remote memory(1stTrialTr.924).

Harry found in 1994 that Baumruk had the mental disease or defect of dementia due to head trauma(1stTrialTr.907,956-57). Baumruk had the capacity to understand the proceedings, but did not as a result of dementia have the capacity to assist counsel(1stTrialTr.907-08,961). Harry found Baumruk's short term memory deficits caused him to be so impaired that he could not meaningfully participate in the proceedings(1stTrialTr.908-09). Baumruk was not competent to proceed because of the amnesia(1stTrialTr.953,959).

While Baumruk's short term memory impairment was not as drastic in 2000 as it was in 1994, Baumruk continued to have amnesia(1stTrialTr.909-10). Harry still believed Baumruk was incompetent to proceed because the physical injuries to Baumruk's brain were permanent and, therefore, he still had dementia(1stTrialTr.911,913,936). Harry believed Baumruk was truthful and honest

and that was why he believed Baumruk has amnesia(1stTrialTr.921,928). Harry noted that Scott did testing for malingering and did not find Baumruk was malingering as to lack of memory(1stTrialTr.902,905).

6. Parwatikar

Dr. Parwatikar diagnosed Baumruk in 1993 as having organic dementia, organic personality disorder, and borderline personality disorder which were caused by his head gunshot wounds(1stTrialTr.Vol.#4.5 at 7,10,30-31).¹ Parwatikar was confident in his opinion because of Baumruk's significant loss of brain tissue and because it does not regenerate(1stTrialTr.Vol.#4.5 at 48-49). Parwatikar's opinion was unchanged(1stTrialTr.Vol.#4.5 at 21-22). Parwatikar feels Baumruk has dementia, but not amnesia(1stTrialTr.Vol.#4.5 at 29). Parwatikar does not believe Baumruk has a selective memory and Baumruk is not malingering(1stTrialTr.Vol.#4.5 at 32,58). Baumruk lacked the capacity to assist counsel(1stTrialTr.Vol.#4.5 at 41).

7. Cuneo

Psychologist Cuneo found Baumruk has dementia and amnesia due to head trauma(1stTrialTr.Vol.#4.5 at 80,86,195-96). Cuneo found Baumruk was not impaired as to his ability to understand the proceedings, but was incapable of assisting counsel(1stTrialTr.Vol.#4.5 at 86-88). Baumruk had impaired judgment as demonstrated by lawsuits Baumruk filed against counsels' advice(1stTrialTr.Vol.#4.5

¹ Transcript Volume #4.5 begins with page 1.

at 90). Baumruk has amnesia caused by brain damage which causes him to be incompetent to proceed(1stTrialTr.Vol.#4.5 at 104-05,171-72,174). Because Baumruk could not remember having done the shootings, he was incompetent to proceed(1stTrialTr.Vol.#4.5 at 124-26).

Baumruk has visual memory problems(1stTrialTr.Vol.#4.5 at159). Baumruk's recall of the shooting comes from what people have told him(1stTrialTr.Vol.#4.5 at 203). Discrepancies between what Baumruk has reported to different examiners as to what he remembers is confabulation based on what people have told Baumruk about the shooting(1stTrialTr.Vol.#4.5 at 182).

B. Retrial Competency Proceedings Original Evidence

1. Reynolds

Psychiatrist Reynolds indicated Baumruk reported having no memory of the shooting and no memory of making statements to co-workers in Seattle about any intentions to hurt his wife and those connected with the divorce proceedings(6/28-29/05Tr.59-64,70-72).

Baumruk had dementia NOS (not otherwise specified) because of brain damage he sustained during the shooting(6/28-29/05Tr.97-98). Reynolds found Baumruk was competent to proceed, despite his amnesia(6/28-29/05Tr.104-05,109-11). Reynolds was unable to express an opinion on whether Baumruk was malingering as to memory loss as to the shooting's details(6/28-29/05Tr.133-34).

2. Bagsby

Larry Bagsby and Berrigan represented Baumruk through the time this Court ordered Baumruk's charges dismissed(6/28-29/05Tr.236-37). Bagsby and Berrigan represented Baumruk at the Macon competency proceedings where Judge Belt found Baumruk was incompetent to proceed and committed Baumruk to the Department of Mental Health(6/28-29/05Tr.240-41,243). Before Judge Belt, it was established Baumruk had no appreciation of his circumstances and no ability to assist in his defense(6/28-29/05Tr.241). Baumruk's lack of appreciation for his circumstances was highlighted by him wanting to be released on bond to return to work(6/28-29/05Tr.242).

The competency issue was relitigated before Judge Seigel in St. Louis County with Bagsby and Attorney Joseph Green representing Baumruk(6/28-29/05Tr.236-37,244-45). Seigel found Baumruk competent to proceed and the case was tried(6/28-29/05Tr.245). From the time Seigel found Baumruk competent, Baumruk never related any recall of the shooting(6/28-29/05Tr.245-46). Bagsby and Green had urged Baumruk that if he could recall what happened to do so(6/28-29/05Tr.246-47). Baumruk was only able to talk about the shooting after he was provided the police reports and even then could not relate whether their contents accurately reported what happened(6/28-29/05Tr.248-49).

Baumruk displayed more interest in getting the Post Dispatch than he did his criminal charges(6/28-29/05Tr.261-62).

3. Parwatikar

Berrigan asked Parwatikar to evaluate Baumruk in 1992(6/28-29/05Tr.264,277-78). Baumruk was consistent as to his inability to recall the courthouse events(6/28-29/05Tr.268-69). Parwatikar diagnosed Baumruk with organic dementia and organic personality disorder in 1992(6/28-29/05Tr.269). Baumruk has problems focusing on the issues at hand in light of their seriousness as evidenced by his preoccupation with not getting his Post Dispatch(6/28-29/05Tr.335-36).

Parwatikar evaluated Baumruk again in 2003 and diagnosed him with dementia NOS due to head trauma and amnesia disorder(6/28-29/05Tr.270-71). Parwatikar does not believe Baumruk is malingering as to his amnesia and memory deficits(6/28-29/05Tr.274). Baumruk is incompetent and lacks the capacity to assist counsel because of amnesia(6/28-29/05Tr.331,348).

4. Cuneo

In 1993, Cuneo found Baumruk had dementia due to a gunshot wound(6/28-29/05Tr.367). Baumruk's amnesia was consistent with brain injuries(6/28-29/05Tr.368). Cuneo opined that Baumruk could understand the proceedings, but could not assist counsel, and therefore, was incompetent(6/28-29/05Tr.371-72). Baumruk has no memory of the shooting and what he knows is based on what others have told him(6/28-29/05Tr.372). Cuneo noted that Dr. Scott did neuropsychological testing and found Baumruk was not malingering(6/28-29/05Tr.380-82,384-85).

In 1999, Cuneo found Baumruk had dementia due to head trauma(6/28-29/05Tr.387-90). Baumruk had the ability to understand the proceedings, but could not assist counsel because of dementia(6/28-29/05Tr.393).

In 2003, Cuneo evaluated Baumruk again(6/28-29/05Tr.403). Cuneo found then that Baumruk suffered from dementia due to head trauma(6/28-29/05Tr.408-09,425). Baumruk was incompetent to proceed in 2003 because of the dementia due to head trauma which prevented him from assisting counsel as his amnesia prevents him from remembering what happened(6/28-29/05Tr.411,425,479,485-86). Baumruk was not malingering and testing done confirmed he was not malingering(6/28-29/05Tr.412-13). Baumruk has no real memory of the shooting and the information he does relate was furnished to him such that he is confabulating(6/28-29/05Tr.413-15). Baumruk regularly reads the newspaper and it has been a source of information to Baumruk about what happened(6/28-29/05Tr.419-21).

5. Harry

Harry did a court ordered competency evaluation of Baumruk in 1994 and found dementia due to head trauma such that Baumruk lacked the capacity to assist counsel(6/28-29/05Tr.511-12).

In 2003, Harry found Baumruk had amnesia due to a head gunshot wound with surgical debridement (removal) of dead brain tissue(6/28-29/05Tr.520-21,532). Baumruk's CT scans showed the head gunshot destroyed brain tissue(6/28-29/05Tr.531-32). Harry believes Baumruk's does not remember the shooting because of the consistency in Baumruk's records and the type of injuries Baumruk

sustained(6/28-29/05Tr.534-35). Harry found that because of Baumruk's deficits he could not assist counsel(6/28-29/05Tr.539-41). There are inconsistencies as to what Baumruk does and does not remember which is the product of Baumruk either guessing about what happened or having learned from others what happened(6/28-29/05Tr.578-79).

C. Macon County Competency Proceedings

The two volumes of transcript of the competency hearing conducted in front of Judge Belt held on January 24, 1994 and January 27, 1994 were admitted into evidence at the retrial's competency proceedings(6/28-29/05Tr.588).

D. Retrial Competency Rulings

Judge Rauch found Baumruk competent to proceed(2ndTrial2ndSupp.L.F.2-20;1/17/07Tr.22-34; 2ndTrialL.F.561-62,573).

III. Respondent's Guilt Evidence

Sandra Woolbright was Judge Hais' Division 38, second floor, courtroom clerk(2ndTrialTr.1011-12,1016-17). Baumruk shot his wife(2ndTrialTr.1035). Woolbright and Baumruk's attorney Gary Seltzer hid under Woolbright's desk after Baumruk shot Seltzer(2ndTrialTr.1035,1040).

Judge Hais left through the courtroom's back door and Baumruk pursued Hais(2ndTrialTr.1036-37,1533-34). Attorney Hilton was nearby and helped Hais get safely to his office(2ndTrialTr.1466). Baumruk appeared and aimed two guns at Hilton and then left(2ndTrialTr.1467-68).

Baumruk had had no contact with Judge Hais until the trial date and Hais had not made any rulings against Baumruk as there had not been any contested motions(2ndTrialTr.1378-79). Baumruk began shooting while there was a record discussion about a conflict of interest and waiver of conflict involving Baumruk's wife's attorney, Scott Pollard, having represented Baumruk in Baumruk's first marriage divorce(2ndTrialTr.1050-53,1154-55,1383-84,1354-55). Pollard had represented Baumruk on a motion to modify matters regarding the children in Baumruk's first divorce(2ndTrialTr.1168-69). The shooting began before the proceedings reached the merits of the divorce and property disposition (2ndTrialTr.1050-53,1175-79,1208-09,1384,1390-91).

Baumruk's Seattle co-workers, Pittson and Wagner, testified that Baumruk made statements that if he did not get to keep the property he thought he was entitled to, then he would shoot his wife and the lawyers because he felt he was being treated extremely unfairly(2ndTrialTr.1141-44,1147-48,1219-27,1231-32,1234). Pittson thought Baumruk's threats to harm others were out of character(2ndTrialTr.1150). Baumruk told Pittson that he did not trust his lawyer(2ndTrialTr.1148).

Officer Salamon was on the second floor, dressed in plain clothes, to testify at a preliminary hearing(2ndTrialTr.1393-96). Salamon was surprised when Baumruk shot at him because Baumruk was dressed in a suit coat and tie, which was how court bailiffs dressed(2ndTrialTr.1401-02).

Baumruk was holding two guns and shot at Officer Neske(2ndTrialTr.1507,1513). Neske and Officer Bozarth both shot Baumruk and

Baumruk fell to the ground(2ndTrialTr.1513-14). Salamon saw Baumruk down on the ground and Baumruk was already handcuffed(2ndTrialTr.1407).

Salamon searched Baumruk for weapons and seized ammunition from his pockets(2ndTrialTr.1407-09). Before Baumruk was given *Miranda* warnings, Baumruk asked Salamon whether he had killed Mary(2ndTrialTr.1409,1430-31). Salamon told Baumruk that he did not know if Mary died because he did not want to give Baumruk the satisfaction of knowing he had killed her(2ndTrialTr.1409). Salamon represented that Baumruk's inquiry about Mary was volunteered and unsolicited(2ndTrialTr.1430-31).

Fred Nicolay was the Division 36 bailiff(2ndTrialTr.1479-80). Nicolay tried to persuade Baumruk to stop and Baumruk shot him(2ndTrialTr.1483-84).

Rufus Whittier transported jail inmates(2ndTrialTr.1526-27). Baumruk placed a gun in Whittier's mid-section and to his head while asking him where the elevator went(2ndTrialTr.1535-36).

Jim Hartwick was a St. Louis County Prosecutor's office investigator(2ndTrialTr.1562-63). Baumruk shot at Hartwick and Hartwick fled inside an office and Baumruk fired into its door(2ndTrialTr.1570-73).

Officer Mudd was in Division 37 for a case(2ndTrialTr.1575-76). Baumruk had a gun in each hand and shot at Mudd and Mudd returned fire(2ndTrialTr.1586-87).

Wade Dillon was a court security officer who received a call to go to the second floor(2ndTrialTr.1592-94). Baumruk shot Dillon(2ndTrialTr.1598).

Dr. Alex Kane treated Baumruk at Barnes Hospital's Emergency room(2ndTrialTr.1652-56). When Kane asked Baumruk how he was doing, Baumruk responded that he wanted to shoot the bitch because of the divorce(2ndTrialTr.1657-58). Kane testified that even without his treatment records, he could recall Baumruk's statement because "this man was expressing great vehemence and coldness about having reached a conclusion to something."(2ndTrialTr.1664-65).

Mary died from two neck gunshot wounds(2ndTrialTr.1740).

IV. Guilt Defense

Psychologist Dr. Nettles and psychiatrist Dr. Shopper found Baumruk suffers from a persecutory delusional disorder, which is a mental disease or defect(2ndTrialTr.1788,1949,1988). Baumruk's persecutory delusions were of the nature that the system is against him, he is being singled out, and the system is corrupt(2ndTrialTr.1813). Baumruk has a hyper-vigilance and mistrust for everyone believing that they are going to wrong him(2ndTrialTr.1816,1835,1864). Anger and violent behavior are the products of a persecutory delusional disorder(2ndTrialTr.1839,1988-91).

Baumruk viewed the entire system as corrupt(2ndTrialTr.1965). Baumruk's delusions were characterized by his belief in advance of any court decision that the divorce proceedings would be decided adversely to him and the house awarded to his wife(2ndTrialTr.1813-14,1966-67,1972-73). Baumruk had that view of Judge Hais, even though Hais was new to the case and had not made any adverse rulings(2ndTrialTr.1814,1966-67,1972-73). Moreover, Baumruk began shooting

before Hais had the opportunity to decide any house related issues(2ndTrialTr.1972-73,2097-98). Baumruk's mental disorder was highlighted by his belief that his wife was having an affair with her attorney, Pollard(2ndTrialTr.1817,1964).

Baumruk had had little contact with his attorney, Seltzer, and Seltzer had done nothing to warrant Baumruk's animosity for him(2ndTrialTr.1815-16). Baumruk had either assaulted or threatened the first attorney he retained for his divorce from Mary, Attorney Smiley(2ndTrialTr.1816-17).

Baumruk's litigiousness against Buck and the Department of Health demonstrated his persecutory delusional nature(2ndTrialTr.1989-94,2096). Baumruk sued Buck for attempted extortion when Buck suggested that Baumruk ask Baumruk's son to provide him money to repair his glasses or purchase a new pair(2ndTrialTr.1989-94).

Baumruk put Mary's daughter Lisa's clothes in the backyard because of a controversy surrounding her boyfriend(2ndTrialTr.1821-22). Mary intervened and there was a dispute about whether Baumruk struck Mary during those events(2ndTrialTr.1821-22). Mary obtained an ex parte adult abuse order against Baumruk for him allegedly pushing her against a wall in response to her efforts to try to stop him from putting her daughter's clothes outside(2ndTrialTr.2032-34). The wrong that Baumruk perceived is that the police believed Mary rather than him on whether he assaulted her(2ndTrialTr.1880). Baumruk spent a day in jail as a result of that conflict(2ndTrialTr.1821-22).

Baumruk did not appreciate the wrongfulness of his conduct and was incapable of conforming his conduct to the requirements of law(2ndTrialTr.1864,2000,2002). Baumruk's insight into his situation was especially poor because he expected to be released from jail and allowed to return to his Seattle life(2ndTrialTr.2094).

V. Respondent's Guilt Rebuttal

Psychiatrist Peters evaluated Baumruk in 1993 and found no mental disease or defect(2ndTrialTr.2142-43,2157-58,2170). In 1993, Peters diagnosed Baumruk as having post-traumatic amnesia(2ndTrialTr.2220). Baumruk's inability to recall the facts of the shooting was consistent with post-traumatic amnesia(2ndTrialTr.2223).

Peters again evaluated Baumruk in 2006-2007(2ndTrialTr.2175). Peters found no delusional thinking or behaviors(2ndTrialTr.2181,2192). Peters found Baumruk's memory loss was not credible(2ndTrialTr.2185-86).

Peters found Baumruk's behaviors were methodical and planned(2ndTrialTr.2190). Baumruk waited until all his intended targets were assembled together in the courtroom to shoot them(2ndTrialTr.2193-94). Baumruk had the ability to decide between right and wrong(2ndTrialTr.2195). Baumruk's statements to Salamon and Kane showed Baumruk's behavior was goal directed, he was not delusional, and knew his conduct's wrongfulness(2ndTrialTr.2196-98). Baumruk's actions moving through the courthouse demonstrated self-preservation consistent with recognizing the wrongfulness of his conduct(2ndTrialTr.2199).

Peters does not believe Baumruk has a delusional disorder(2ndTrialTr.2202-03). On Axis II, he found personality disorder NOS with paranoid, schizoid, and

narcissistic traits(2ndTrialTr.2200). Baumruk fully appreciated the nature and quality and wrongfulness of his conduct and was able to conform his conduct to the requirements of law(2ndTrialTr.2201-02).

Psychiatrist Rabun testified that he first evaluated Baumruk in 1994 and had no psychiatric diagnosis(2ndTrialTr.2379-80,2384).

In 1999, Rabun collaborated with Dr. Scott on a court ordered evaluation to diagnose Baumruk as having amnestic disorder due to head trauma(2ndTrialTr.2386-88). Baumruk's amnesia was for a circumscribed period between the time he entered the courthouse and until he was taken to the St. Louis County Jail(2ndTrialTr.2389-92).

In 2000, Rabun did a court ordered evaluation on the issue of responsibility and he interviewed multiple individuals to evaluate the legitimacy of Baumruk's amnesia(2ndTrialTr.2392-95). Those interviews led Rabun to revert to his original no diagnosis and to question whether Baumruk is malingering memory loss(2ndTrialTr.2396-97,2405-06).

Rabun recounted nurse Lisa Williams provided care for Baumruk at Regional Hospital(2ndTrialTr.2398-99). Rabun reported Baumruk allegedly made statements to Williams that his wife and the lawyers deserved what happened(2ndTrialTr.2398-99). Baumruk reportedly said that he wished he would have died(2ndTrialTr.2398-99). Baumruk allegedly grabbed Williams' arm when he felt she was not doing her job properly and told her that she deserved to have the same thing happen to her as happened to his wife(2ndTrialTr.2398-99). That Baumruk referred to people as

deserving certain things demonstrated to Rabun that Baumruk had a memory for the events because he was recalling the reason they deserved what happened to them(2ndTrialTr.2399).

Rabun reported that according to snitch witness Sickinger, Baumruk told him that at one point Baumruk believed he could escape from the courthouse(2ndTrialTr.2399). Sickinger also claimed that Baumruk stated that the police officers' account that he was running towards them was inconsistent with him having been shot in the back of the head(2ndTrialTr.2400). To Rabun such matters demonstrated Baumruk remembered what happened(2ndTrialTr.2400).

Rabun reported that during Baumruk's complaining to a police officer (Officer Glenn) about not getting his newspaper at the jail, Baumruk made statements indicating that he recalled the moment he shot his wife(2ndTrialTr.2402). Rabun opined that Baumruk was malingering as to his memory loss(2ndTrialTr.2402-03). Baumruk had a selective memory for being able to remember neutral matters leading up to the shooting, but an inability to remember matters related to the shooting itself(2ndTrialTr.2403-05).

According to Rabun, Baumruk's asking Salamon if he had killed his wife and his statements to Kane showed Baumruk understood the nature and quality of his acts(2ndTrialTr.2425-26).

Rabun found no evidence of delusion(2ndTrialTr.2409). Baumruk did not suffer from any mental disease or defect(2ndTrialTr.2415). Baumruk knew and

appreciated the wrongfulness of his conduct and had the ability to conform his conduct to the requirements of law(2ndTrialTr.2415-16,2432).

Rabun opined Baumruk's shooting his wife in the courtroom demonstrated planning for the most opportune time to carry out his acts against her and others involved in the divorce(2ndTrialTr.2422-23). Rabun testified that Baumruk's acts were not delusional, but instead were driven by hatred and anger for his wife and the courts(2ndTrialTr.2583).

VI. Respondent's Guilt Closing Argument Rebuttal

The prosecutor argued that Baumruk knew what he was doing was wrong based on Baumruk's question to Salamon whether he killed his wife(2ndTrialTr.2720).

VII. Respondent's Penalty Phase

St. Louis County Jail medical assistant Bland testified that she helped Baumruk in March, 2006 care for his stomach surgical incision(2ndTrialTr.2806). Bland was scheduled to change Baumruk's dressing one day, but was unable to do it because other patients' needs were more pressing and she planned to take care of it the following day(2ndTrialTr.2807). That next day Baumruk hit Bland because she had not changed his dressing as scheduled(2ndTrialTr.2808-10).

Jail Officer Venable came to Bland's assistance(2ndTrialTr.2823-28). Baumruk said to Venable that he had killed before and he would do it again(2ndTrialTr.2830). On cross-examination, Baumruk's counsel elicited from Venable that Baumruk had stabbed a social worker with a pencil(2ndTrialTr.2832-

33). Counsel also had Venable repeat his statement about having killed in the past(2ndTrialTr.2835).

Mary's family, including her sister, Barbara Bockstruck, her father, Harry Fozzard, her daughters, Shelley Whelan and Lisa Barker Schmitt, testified about their loss(2ndTrialTr.2836-44,2849-52,2853-56,2858-65). Their testimony included highlighting photos of significant family events and other family members(2ndTrialTr.2840-41,2844,2853-56,2861-65).

VIII. Defense Penalty Phase

Baumruk's brother Wilbur, Wilbur's son, Ray, nursing home employee Carter, and Baumruk's friends Kouba and Damarly testified in penalty. Their testimony focused on highlighting how what happened was so out of character for the person they all knew(2ndTrialTr.2892-93,2923,2939-40;KoubaDepo.Tr.25). Their testimony included highlighting Baumruk's blue collar middle class upbringing, amiable magnanimous personality, upstanding community connections having been a Boy Scout who later served his country in the Coast Guard, devotion to caring for his mother when she developed dementia, and special attachment to his house because his father helped put an addition on it(2ndTrialTr.2867-82,2887-93, 2907-16,2919-26,2930-40;KoubaDepo.Tr.5-16,25).

IX. State's Initial Penalty Argument.

The prosecutor argued Baumruk's statement to Salamon showed Baumruk wanted to go back to Division 38 to kill everyone whom he had targeted(2ndTrialTr.3039).

The prosecutor also argued for death based on Kane having testified he could not forget how cold, calm, and cruel Baumruk was(2ndTrialTr.3041).

X. 29.15 Case

Baumruk filed a 29.15 action. The amended motion included claims that counsel was ineffective for failing to object to Dr. Kane's testimony about Baumruk's statements made during treatment as falling within the physician-patient privilege, to move to suppress statements Baumruk made to law enforcement personnel, and to present testimony utilizing brain scans obtained to treat Baumruk's brain injuries in order to rebut respondent having employed Baumruk's post-shooting behavior to cast him as merely a "jerk"(29.15L.F.183-533).

The court granted a hearing on some claims and denied a hearing on others(29.15L.F.611-25,710-56). Following a hearing, the court entered findings denying the 29.15(29.15L.F.611-25,710-56).

This appeal followed.

POINTS RELIED ON

I.

DR. KANE TESTIMONY

The motion court clearly erred overruling Baumruk’s 29.15 because counsel was ineffective and Baumruk’s rights to due process, effective counsel, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV were violated in that effective counsel would have objected to Dr. Kane’s testimony recounting Baumruk’s statements, admitting Kane’s treatment notes recording Baumruk’s statements, and the prosecutor’s opening statement referencing Baumruk’s statements, as they were within the physician-patient privilege and prejudicial and would have objected to Kane’s commentary about his reason for recalling the statements, independent of Baumruk’s medical records, as the reasons for remembering were irrelevant, inflammatory prejudicial opinion.

State ex rel. Dean v. Cunningham,182S.W.3d561(Mo.banc2006);

State v. Johnson,968S.W.2d123(Mo.banc1998);

Ervin v. State,80S.W.3d817(Mo.banc2002);

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

§491.060;

§552.030.

II.

HEARING REQUIRED EMT WORCHESTER –

BAUMRUK’S APOLOGY

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for failing to call Emergency Medical Technician Austin Worchester who responded to the shooting because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warrant relief which were Worchester would have testified that while he provided medical care to Baumruk he apologized for what he had done stating he was sorry which would have rebutted respondent’s evidence and argument casting Baumruk as an unremorseful calculating “jerk.”

Ervin v. State, 80S.W.3d817(Mo.banc2002);

State v. Smith, 32S.W.3d532,547(Mo.banc2000);

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

III.

HEARING REQUIRED - COUNSEL FAILED TO OBTAIN CURRENT SCANS AND CALL EXPERT

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for failing to obtain current CT and PET scans and to have an expert, like Dr. Merikangas, testify about those scans because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warrant relief which were that such an expert would use the scan's image's findings to establish Baumruk was incompetent to proceed and to neutralize as aggravators Baumruk's post-shooting acts and statements because the brain areas impacted are responsible for executive decision making and controlling impulsivity.

Wainwright v.State,143S.W.3d681(Mo.App.,W.D.2004);

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

IV.

PROHIBITING BAUMRUK FROM OBTAINING SCANS

The motion court clearly erred in granting respondent's objections to obtaining CT and PET scans because that ruling, which prohibited obtaining them, denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that Baumruk pled the claim that required a hearing that counsel was ineffective for failing to obtain current scans and present expert testimony utilizing those scans that would have supported Baumruk was incompetent to proceed and neutralized respondent's aggravation and without the scans Baumruk cannot prove his claim.

Ake v. Oklahoma, 470 U.S. 68 (1985);

Taylor v. State, 728 S.W.2d 305 (Mo.App., W.D. 1987);

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

V.

**FAILURE TO PRESENT EXPERT TESTIMONY UTILIZING
AVAILABLE CT SCANS**

The motion court clearly erred overruling Baumruk’s 29.15 because counsel was ineffective and Baumruk’s rights to due process, effective assistance, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV, were violated in that effective counsel would have called Dr. Harry, or a similar expert, to testify to explain the precise areas of Baumruk’s brain damaged are responsible for executive decision making and controlling impulsivity while utilizing Baumruk’s pre and post surgery 1992 CT scans and Baumruk was prejudiced because that evidence would have rebutted respondent’s aggravating evidence Baumruk was just a “jerk” as shown by Baumruk’s post-shooting behaviors towards those responsible for his custody and care.

Hutchison v. State, 150S.W.3d292(Mo.banc2004);

State v. McCarter, 883S.W.2d75(Mo.App.,S.D.1994);

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

VI.**FAILING TO CALL PENALTY EXPERT LOGAN -
HEARING REQUIRED**

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for failing to present an expert, like Dr. Logan, to testify in penalty about the impact on Baumruk of numerous life stressors which included the divorce action itself, the death of his mother, and relocating to start a new job because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warrant relief which were Logan would have testified that an ordinary person would, and Baumruk did, feel an overwhelming sense of rejection and betrayal from Mary's actions and his actions were not the actions of someone who was merely a "narcissistic jerk," as respondent and its experts cast Baumruk.

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

Wainwright v. State, 143 S.W.3d 681 (Mo. App., W.D. 2004);

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

VII.**BERRIGAN DISREGARDED BAUMRUK'S WISHES TO REMAIN UNDER
MENTAL HEALTH DEPARTMENT'S CUSTODY**

The motion court clearly erred denying without an evidentiary hearing the claim counsel Berrigan was ineffective in ignoring Baumruk's wishes to remain under the Mental Health Department's custody and instead pursued a writ before this Court which caused Baumruk's charges to be dismissed and refiled with a resulting death sentence because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warrant relief which were Baumruk's stated wishes were memorialized in a Berrigan casefile memo, Judge Belt told Berrigan dismissal would cause immediate refiling, charges were refiled, and Baumruk was death sentenced when he would otherwise have been under the Mental Health Department's custody.

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

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

VIII.**HEARING REQUIRED - FAILING TO DISQUALIFY ST. LOUIS COUNTY****PROSECUTOR'S OFFICE**

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for failing to move to disqualify the St. Louis County Prosecutor's Office because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warranted relief which were there was an appearance of impropriety requiring the St. Louis County Prosecutor's Office have been disqualified because Baumruk shot at St. Louis County Prosecutor's Office Investigator Hartwick making Hartwick a victim, the St. Louis County prosecutors who prosecuted Baumruk were Hartwick's friends, Hartwick's wife was a St. Louis County Prosecutor, and shooting at Hartwick was an aggravator submitted and found such that counsel was ineffective for failing to move to disqualify.

State v. Ross, 829 S.W.2d 948 (Mo. banc 1992);

State v. Jones, 268 S.W.83 (Mo. 1924);

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

IX.

OFFICER GLENN STATEMENTS

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, to counsel and effective counsel, not to incriminate himself, and to be free from cruel and unusual punishment, U.S. Const. Amends V, VI, VIII, and XIV, were violated in that effective counsel would have moved to suppress Baumruk's statements to Officer Glenn so as to preclude their use by respondent's experts because Glenn questioned Baumruk without first giving *Miranda* warnings and without counsel present and questioned Baumruk about the courtroom shooting under the guise of investigating Baumruk's reporting his newspapers were stolen. Baumruk was prejudiced because respondent's expert pointed to Baumruk's statements to Glenn as evidence Baumruk was fabricating memory loss.

Massiah v. United States, 377 U.S. 201 (1964);

Mathis v. U.S., 391 U.S. 1 (1968);

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

X.**OFFICER SALAMON STATEMENTS**

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, counsel and effective assistance, to not incriminate himself, and to be free from cruel and unusual punishment, U.S. Const. Amends V, VI, VIII, and XIV, were violated in that effective counsel would have moved to suppress Baumruk's statements to Officer Salamon because Salamon questioned Baumruk without first giving *Miranda* warnings and Salamon's questioning was prompted by a desire to obtain a dying declaration. Baumruk was prejudiced because these statements were used to show Baumruk remembered the shooting and knew its wrongfulness and to show the case's aggravated nature.

Missouri v. Seibert, 542 U.S. 600 (2004);

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

XI.**VENABLE STATEMENTS**

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, to counsel and effective counsel, to not incriminate himself, and to be free from cruel and unusual punishment, U.S. Const. Amends V, VI, VIII, and XIV, were violated in that effective counsel would have moved to suppress Baumruk's statements to Officer Venable when Venable questioned Baumruk why Baumruk struck jail medical assistant Bland and Baumruk stated he had killed once before and he would again because Venable questioned Baumruk without first giving *Miranda* warnings and without counsel present. Baumruk was prejudiced because the statements made the jury more likely to impose death.

Mathis v. U.S., 391 U.S. 1 (1968);

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

§552.030.

XII.

SOCIAL WORKER BUCK STATEMENTS

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, counsel and effective counsel, to not incriminate himself, and to be free from cruel and unusual punishment, U.S. Const. Amends V, VI, VIII, and XIV, were violated in that effective counsel would have moved to suppress and objected to Baumruk's alleged statements to social worker Buck explaining why Baumruk did the shooting and that Baumruk said he remembered doing it because Buck obtained prejudicial statements from Baumruk *without Miranda* warnings and without counsel present. Those statements were prejudicial because they were used in finding Baumruk competent to proceed and to discredit his delusional disorder defense.

State v. Dixon, 916 S.W.2d 834 (Mo.App., W.D. 1996);

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

§552.030.

XIII.**SOCIAL WORKER BUCK INCIDENT**

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for asking Officer Venable in penalty the open ended question whether Baumruk's jail file showed past violent behavior, causing Venable to testify that while Baumruk's casefile did not contain such, Baumruk had stabbed a social worker with a pencil because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warrant relief which were counsel knew pretrial about an incident involving Baumruk and a social worker and counsel's questioning caused that incident's details to be heard which was prejudicial inflammatory aggravating evidence.

Gant v. State, 211 S.W.3d 655 (Mo.App., W.D. 2007);

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

XIV.**RESPONDENT'S REPEATING SLIDE SHOW – TRIAL****COUNSEL INEFFECTIVE**

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, effective assistance, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV, were violated in that effective counsel would have made a complete record so as to have allowed direct appeal counsel to challenge respondent's use of a repeating highly emotionally charged slide show during penalty rebuttal argument and Baumruk was prejudiced because that repetition produced a punishment decision based on caprice and emotion. Had counsel made a sufficient record as to the show's content reversal on direct appeal would have been required.

Payne v. Tennessee, 501 U.S. 808 (1991);

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

XV.**RESPONDENT'S REPEATING SLIDE SHOW – APPELLATE****COUNSEL INEFFECTIVE**

The motion court clearly erred overruling Baumruk's 29.15 because appellate counsel was ineffective and Baumruk's rights to due process, effective assistance, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV, were violated in that effective appellate counsel would have raised trial counsel's objections to a repeating highly emotionally charged slide show during penalty rebuttal argument and Baumruk was prejudiced because that repetition produced a punishment decision based on caprice and emotion and had appellate counsel raised this issue a new penalty phase would have been ordered.

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

Payne v. Tennessee, 501 U.S. 808 (1991);

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

XVI.**FAILURE TO ENTER FINDINGS - APPELLATE****COUNSEL INEFFECTIVE**

The motion court clearly erred overruling Baumruk's 29.15 motion because it failed to enter findings of fact and conclusions of law on whether direct appeal counsel was ineffective in failing to raise trial counsel's objection to a repeating highly emotionally charged slide show respondent played during penalty rebuttal argument because Baumruk was denied his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends VIII, and XIV in that Rule 29.15 requires findings of facts and conclusions of law on all issues presented.

Brown v.State, 810S.W.2d716(Mo.App.,W.D.1991);

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

XVII.

RABUN'S DIVORCE

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective, violating his rights to due process, to be free from cruel and unusual punishment, and effective assistance, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have cross-examined and impeached state witness Dr. Rabun that he rendered his first opinions about Baumruk's mental state while Rabun's divorce was pending in front of Judge Hais, an alleged target of Baumruk's courtroom shooting, and that Hais retained continuing authority over any later potentially contested matters to show Rabun's bias for holding opinions unfavorable to Baumruk and Baumruk was prejudiced because respondent urged the jury to reject Baumruk's defenses based on Rabun's opinions.

State v. Anderson, 79S.W.3d420(Mo.banc2002);

Wainwright v. State, 143S.W.3d681(Mo.App., W.D.2004);

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

XVIII.**DRS. FISHER'S AND PERKOWSKI'S OPINIONS DEMONSTRATED
INCOMPETENCY TO PROCEED**

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, effective assistance, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV, were violated in that effective counsel would have presented treating physicians Fisher's and Perkowski's opinions that Baumruk's memory deficits were genuine because as Baumruk's treating physicians, and not retained experts, their opinions Baumruk's memory loss was genuine were especially credible and there is a reasonable probability Baumruk would have been found incompetent to proceed.

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

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

XIX.**FAILURE TO CALL TREATING NURSES****GAST AND JOHNS**

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, effective assistance, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV, were violated in that effective counsel would have called Baumruk's Barnes Hospital treating nurses Gast and Johns in penalty to testify patients with Baumruk's kinds of head injuries can become belligerent, as a result of their head injuries, to neutralize respondent's aggravating evidence about Baumruk's belligerent behavior Regional Hospital nurse Williams reported which was elicited through Rabun and was used to cast Baumruk as just a "jerk."

Hutchison v. State, 150S.W.3d292(Mo.banc2004);

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

APPLICABLE STANDARDS - ALL CLAIMS

Throughout there are repeating standards governing review here. To avoid unnecessary repetition, those are not repeated throughout.

Appellate Review Scope

This Court reviews for whether the 29.15 court clearly erred. *Barry v. State*, 850S.W.2d348,350(Mo.banc1993).

Right To An Evidentiary Hearing

To be entitled to an evidentiary hearing a movant must: (1) allege facts, not conclusions that warrant relief; (2) the facts alleged must not be refuted by the record; and (3) the matters complained of must have resulted in prejudice to the movant. *State v. Driver*, 912S.W.2d52,55(Mo.banc1995).

Ineffectiveness

To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*, 466U.S.668,687(1984). A movant is prejudiced if there is reasonable probability but for counsel's errors the result 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. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883S.W.2d75,78(Mo.App.,S.D.1994).

Eighth and Fourteenth Amendment Death

Penalty Requirements

The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lankford v. Idaho*, 500 U.S. 110, 125 (1991).

ARGUMENT

I.

DR. KANE TESTIMONY

The motion court clearly erred overruling Baumruk’s 29.15 because counsel was ineffective and Baumruk’s rights to due process, effective counsel, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV were violated in that effective counsel would have objected to Dr. Kane’s testimony recounting Baumruk’s statements, admitting Kane’s treatment notes recording Baumruk’s statements, and the prosecutor’s opening statement referencing Baumruk’s statements, as they were within the physician-patient privilege and prejudicial and would have objected to Kane’s commentary about his reason for recalling the statements, independent of Baumruk’s medical records, as the reasons for remembering were irrelevant, inflammatory prejudicial opinion.

Counsel was ineffective for failing to object to respondent’s use of Baumruk’s statements to ER treating physician Kane.

Reviewing Standards

This Court reviews for whether the 29.15 court clearly erred. *Barry v.State*,850S.W.2d348,350(Mo.banc1993).

To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). A movant

is prejudiced if there is reasonable probability but for counsel's errors the result 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. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo. App., S.D. 1994).

The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lankford v. Idaho*, 500 U.S. 110, 125 (1991).

Kane's Retrial Testimony

In guilt opening statement, the prosecutor told the jury it would hear statements Baumruk made to Dr. Kane (2nd Trial Tr. 1002-03).

Respondent called Kane who assessed and treated Baumruk at Barnes' Emergency Room (2nd Trial Tr. 1652-56). Kane recounted that when he first encountered Baumruk he did an initial survey to determine whether Baumruk had an adequate airway and was assessing Baumruk's awareness level (2nd Trial Tr. 1656-57). As part of Kane's initial survey, he asked an open ended question like how Baumruk was doing to determine whether Baumruk could talk (2nd Trial Tr. 1657). Kane said he put in quotation marks Baumruk's reply which was "wanted to shoot that bitch" due to "divorce" (2nd Trial Tr. 1658). Kane's notes containing this statement (Retrial Ex. 95 and 29.15 Ex. 19) were admitted without objection (2nd Trial Tr. 1658-64). Kane recounted after Baumruk made that statement he elicited from Baumruk his medical history (2nd Trial Tr. 1660).

Baumruk described a history of colon problems, but denied other medical problems(2ndTrialTr.1660). Kane then recounted the nature of Baumruk's injuries(2ndTrialTr.1661-63). Baumruk was able to tell Kane the day, time, and place(2ndTrialTr.1663).

The prosecutor elicited from Kane that he "vividly" remembered the words Kane placed in quotes and could remember them without Baumruk's medical records because "despite being under the obvious stresses of multiple wounds this man was expressing great vehemence and coldness about having reached a conclusion to something."(2ndTrialTr.1664-65).

In respondent's initial penalty argument, the prosecutor argued for death based on Kane having testified he could not forget how cold, calm, and cruel Baumruk was(2ndTrialTr.3041).

29.15 Evidence

Counsel had no strategy reason for failing to object that Baumruk's statements to Kane were privileged under §491.060.5(29.15Tr.343-44). Counsel assumed Kane's testimony was admissible because Baumruk's statements were unnecessary for treatment and any privilege was waived by relying on a mental disease defense(29.15Tr.360-61,425-27,506,510-14,551). The Kane statements were consistent with the delusional disorder defense(29.15Tr.427,551). Baumruk's anger as reflective of his delusional disorder was also presented through his threatening actions towards his prior divorce counsel Smiley, the assault on Trina Bland, and Baumruk's lawsuit against social worker Buck(29.15Tr.428). Counsel did not believe

Kane's commentary on why he remembered Baumruk's statements was objectionable(29.15Tr.363-64,513-14).

Appellate Counsel Rosemary Percival did not brief the Kane matters because counsel failed to object(29.15Tr.482-84). Percival viewed Kane's questioning and Baumruk's response as done in furtherance of Baumruk's treatment(29.15Tr.484,493-94). She considered Baumruk's statement to Kane more prejudicial than Baumruk's statement to Officer Salamon while on the courthouse's floor(29.15Tr.492).

29.15 Findings

The motion court rejected all claims counsel was ineffective in their handling of the Kane statements. The court found that counsel testified they had believed Kane's testimony would be admitted through the mental health experts(29.15L.F.727-29,733). The findings noted Kane was the first physician to "assess" Baumruk at Barnes(29.15L.F.727-29). Kane's testimony was consistent with the defense expert testimony Baumruk suffered from a delusional disorder, and therefore, part of counsels' strategy(29.15L.F.727-29). Counsel believed Baumruk waived the physician-patient privilege because he put in issue his mental state(29.15L.F.727-29). Baumruk's statement was unnecessary for Baumruk to get treatment, and therefore, not privileged under §491.060(29.15L.F.727-29). From his ER treatment, Baumruk had swelling which required surgical treatment and Kane's treatment preceded the surgery so that Kane's testimony was relevant to Baumruk's mental state(29.15L.F.727-29).

Counsel Was Ineffective

Section 491.060.5 provides that a physician is incompetent to testify: concerning any information which he or she may have acquired from any patient while attending the patient in a professional character, and which information was necessary to enable him or her to prescribe and provide treatment for such patient as a physician. . . .

“The purpose of the physician-patient privilege is to enable the patient to secure complete and appropriate medical treatment by encouraging candid communication between patient and physician, free from fear of the possible embarrassment and invasion of privacy engendered by an unauthorized disclosure of information.”’ *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 567 (Mo. banc 2006) (quoting *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 392 (Mo. banc 1989)).

Kane testified that the inquiries he made were necessary to assess Baumruk’s airway and awareness (2nd Trial Tr. 1656-57), and therefore, the information was necessary to enable Kane to prescribe and provide treatment to Baumruk and were subject to the §491.060.5 physician-patient privilege. The fact that Baumruk’s chosen words did not delineate his medical needs is not the standard for judging under §491.060.5 whether Baumruk’s statements were privileged. Rather the fact that Baumruk was responsive at all to Kane’s questioning provided Kane guidance as to the treatment options that should be pursued, and therefore, was “necessary” “to prescribe and provide” treatment. *See* §491.060.5. That view of Kane’s actions is reinforced by his deposition testimony where he testified the fact Baumruk could converse at all during the initial surveys established Baumruk had an airway and

guided Kane in determining which medical specialists were appropriate and necessary for treating Baumruk(29.15Ex.18 at 11-14,21,24-26). In fact, the 29.15 court found that Baumruk’s statements to Kane were made as part of Kane “assess[ing]” Baumruk at Barnes(29.15L.F.727).

In *State v. Lewis*,735S.W.2d183(Mo.App.,S.D.1987), the defendant, who was traveling with a companion, was convicted of vehicular manslaughter based on his intoxicated state. The *Lewis* Court found that it was not within the physician-patient privilege for the defendant’s treating ER physician to testify Lewis had identified himself to that physician as the driver, rather than his companion. *Id.*187-88. That particular statement was not within the privilege because Lewis’ treatment did not depend on whether he was the passenger or driver. *Id.*187-88.

In contrast to *Lewis*, here Kane testified that he made his inquiry, which elicited the statements at issue, for the purpose of assessing the adequacy of Baumruk’s airway and awareness level(2ndTrialTr.1656-57). No matter what Baumruk said in response to Kane’s inquiry, that information was used by Kane in determining the course of treatment Kane pursued, and therefore, privileged.

Section 552.030 establishes procedures to be followed for the ordering of mental evaluations when a defense of not guilty by reason of mental disease or defect is presented. Under §552.030.5, statements made during “the course of any such examination” are not privileged. The statements made to Dr. Kane were not made during the course of an examination ordered under §552.030, and therefore, the privilege waiver provided for in §552.030.5 is inapplicable.

In *State v. Johnson*, 968 S.W.2d 123 (Mo. banc 1998), the defendant presented a mental disease or defect defense. This Court found Johnson waived any privilege as to statements he made to a psychologist because ““when a party once places the question of his mental condition in issue he thereby waives the physician-patient privilege to exclude testimony of any doctors who have **examined him for that purpose.**”” *Id.* 131 (quoting *State v. Carter*, 641 S.W.2d 54, 57 (Mo. banc 1982)) (emphasis added). Kane was examining Baumruk for the purpose of providing emergency treatment for his gunshot wounds and not for the purpose of relying on a mental disease or defect defense, and therefore, the physician-patient privilege was not waived. *See Johnson*.

To support it was counsels’ strategy to have Baumruk’s statements to Kane admitted, the findings assert that Kane’s testimony was relied on in guilt phase by Shopper (relying on 2nd Trial Tr. 2020), Peters (relying on 2nd Trial Tr. 2197-99), and Rabun (relying on 2nd Trial Tr. 2426) (29.15 L.F. 727-29). Shopper’s testimony about Baumruk’s statement to Kane was **presented by the state on cross-examination** to assert Baumruk’s inability to remember what he did was fabricated (2nd Trial Tr. 2020-21).

Peters and Rabun were **respondent’s witnesses**. Peters testified that Baumruk’s statements to Kane supported that Baumruk did not suffer from psychoses or delusions and they reflected a knowledge of the wrongfulness of his conduct (2nd Trial Tr. 2197-99). In response **to the state having injected** the Kane statements on Peters’ direct, counsel unsuccessfully attempted to get Peters to opine

that while Baumruk had memories of the shooting in the ER, Baumruk's subsequent amnesia was caused by the surgical procedures intended to alleviate Baumruk's hydrocephalus(2ndTrialTr.2226-28).

Rabun testified on direct that Baumruk's statements to Kane reflected a "rational motive" that was "immoral," "illegal," "irresponsible," and "repugnant"(2ndTrialTr.2426).

Reasonable counsel would have objected to all references to Kane's exchanges with Baumruk because they were confidential and subject to the physician-patient privilege. *See* §491.060.5 and *Strickland*. That privilege was not waived because Kane examined Baumruk for the purpose of assessing and formulating medical care intended to address Baumruk's gunshot wounds and not for the purpose of providing Baumruk a mental disease or defect defense. *See* §491.060.5 and *Johnson*. In fact, appellate counsel Percival noted that Kane's questioning was done in furtherance of Baumruk's medical treatment for his gunshot wounds(29.15Tr.484,493-94). While Baumruk's statements to Kane may have been consistent with the delusional disorder defense, counsel never used the statements for that purpose at trial with their experts. Instead, respondent used the Kane statements with both party's experts to assert Baumruk's lack of memory was fabricated and Baumruk had not acted subject to a mental disease or defect defense, but had acted with deliberation(2ndTrialTr.2020-21,2197-99,2426). Moreover, any strategy to rely on Baumruk's Kane statements as evidence of his anger demonstrating his delusional state was unreasonable because the jury heard about that correlation as to the actions Baumruk took towards his former

divorce counsel Smiley, his assault on Trina Bland, and his lawsuit against social worker Buck(29.15Tr.428;2ndTrialTr.1816-17,1839,1988-94,2096). *See McCarter*.

Counsel has a duty to neutralize the state's aggravating circumstances. *Ervin v. State*,80S.W.3d817,827(Mo.banc2002). Since counsel has a duty to neutralize aggravating circumstances, they also must have a duty to get excluded aggravating matters for which there are legal grounds to exclude. Baumruk's statements and Kane's commentary about them made the offense appear more aggravated and reasonable counsel would have acted to exclude these matters.

Baumruk was prejudiced because respondent used the Kane matters to establish Baumruk acted with deliberation and not subject to a mental disease or defect and his actions were so offensive he deserved death. *Strickland*. Kane's testimony he remembered Baumruk's statements because of how egregious he perceived them to be, independent of his treatment notes, was irrelevant. Kane's opinion commentary was inflammatory and prejudicial predisposing the jury to impose death and the prosecutor used the statements in that way in penalty closing to argue for death(2ndTrialTr.3041). *Strickland*.

A new trial, or at minimum, a new penalty phase is required.

II.

HEARING REQUIRED EMT WORCHESTER –

BAUMRUK’S APOLOGY

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for failing to call Emergency Medical Technician Austin Worchester who responded to the shooting because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warrant relief which were Worchester would have testified that while he provided medical care to Baumruk he apologized for what he had done stating he was sorry which would have rebutted respondent’s evidence and argument casting Baumruk as an unremorseful calculating “jerk.”

Baumruk was entitled to an evidentiary hearing on the claim counsel was ineffective for failing to present evidence Baumruk said that he was sorry to Emergency Medical Technician Worchester while he provided medical attention to Baumruk. This evidence would have rebutted respondent’s evidence and argument casting Baumruk as an unremorseful calculating “jerk.”

29.15 Pleadings

The pleadings alleged counsel was ineffective for failing to call Clayton responding EMT Austin Worchester to testify in penalty phase(29.15L.F.405-07). When Worchester responded, he provided medical care to Baumruk(29.15L.F.405-

07). Counsel should have known about Worcester and how he could testify because of a February 8, 1994 letter in counsel's file that Assistant Prosecutor Weber wrote to prior counsel Berrigan(29.15L.F.405-07). Weber's letter stated that while Worcester was providing Baumruk medical attention, Baumruk said a couple of times that he was sorry while also asking if Mary had died(29.15L.F.405-07). Weber's letter also recounted that Worcester had noted that Baumruk was in and out of consciousness(29.15L.F.405-07). If Worcester had been called to testify, then he would have testified as set forth in Weber's letter(29.15L.F.405-07).

Worcester's testimony was critical because throughout the trial respondent relied on statements attributed to Baumruk contending they demonstrated no remorse, including the statements to Kane(29.15L.F.405-07). Worcester could have provided mitigating evidence that rebutted respondent's aggravation(29.15L.F.405-07). Counsel's failure to present this evidence was not reasonable strategy(29.15L.F.405-07). If the jury had heard Worcester's testimony, there was a reasonable probability Baumruk would have been sentenced to life(29.15L.F.405-07).

What The Jury Heard From Respondent

And Its Witnesses

The jury heard Kane recount that Baumruk said to Kane that he wanted to shoot Mary because of the divorce(2ndTrialTr.1658). Kane testified that he "vividly" remembered Baumruk's words without Baumruk's medical records because "despite being under the obvious stresses of multiple wounds this man was expressing great vehemence and coldness about having reached a conclusion to

something.”(2ndTrialTr.1664-65). In respondent’s initial penalty argument, the prosecutor argued for death based on Kane having testified he could not forget how cold, calm, and cruel Baumruk was(2ndTrialTr.3041).

Rabun recounted that Baumruk’s statement to Glenn that when Mary “crunched her lips” he then shot her(RetrialEx.21 at 7)² reflected that Baumruk was malingering and manipulating as to his memory loss(2ndTrialTr.2402-03). Rabun also testified that Baumruk’s shooting his wife in the courtroom demonstrated planning for the most opportune time to carry out his acts against her and the others involved in the divorce case(2ndTrialTr.2422-23).

The jury heard Salamon testify that while Baumruk was handcuffed and lying on the ground he asked Salamon whether he had killed Mary(2ndTrialTr.1407,1409,1430-31).

Jail Officer Venable recounted in penalty he came to nurse assistant Bland’s assistance(2ndTrialTr.2823-28). Respondent elicited on direct from Venable that Baumruk said to Venable that he had killed before and he would do it again(2ndTrialTr.2830).

In penalty phase opening statement, the prosecutor told the jury that Baumruk’s statements that he had killed before and he could do it again could be

² Respondent furnished undersigned counsel copies of two exhibits with exhibit labels numbered 21 - the Glenn interrogation transcript and a courtroom shooting photo of Mary Baumruk made part of its cycling slide show (Points XIV,XV, XVI).

considered in aggravation in deciding on punishment(2ndTrialTr.2792-93). The prosecutors and their witnesses portrayed Baumruk simply as a “jerk”(2ndTrialTr.2658,2724).

29.15 Findings

The findings stated that Worchester’s testimony would have been inadmissible hearsay and counsel cannot be ineffective for failing to present inadmissible evidence(29.15L.F.623).

Reviewing Standards

To be entitled to an evidentiary hearing a movant must: (1) allege facts, not conclusions that warrant relief; (2) the facts alleged must not be refuted by the record; and (3) the matters complained of must have resulted in prejudice to the movant. *State v. Driver*,912S.W.2d52,55(Mo.banc1995). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

A Hearing Was Required

Counsel has a duty to neutralize the state’s aggravating circumstances. *Ervin v. State*,80S.W.3d817,827(Mo.banc2002). Throughout respondent emphasized that statements Baumruk made about having shot and killed Mary and actions he took in furtherance of doing the shooting made the offense more aggravated and highlighted why Baumruk was an unremorseful “jerk.” *See, supra*. That Baumruk told Worchester he was sorry would have rebutted respondent’s portrayal of Baumruk.

See Ervin. The failure to neutralize this casting of Baumruk in such a damning light is not refuted by the record and Baumruk was prejudiced by it.

In *State v. Smith*, 32 S.W.3d 532, 547 (Mo. banc 2000), this Court recognized that to qualify as a dying declaration the declarant must have perceived death as imminent and was without hope for recovery. In *Smith*, the declarant's expression of love for her child was relevant to whether she perceived death was imminent. Here, Prosecutor Weber's letter indicated that Worcester had noted that Baumruk was in and out of consciousness and that was evidence Baumruk would have perceived his death as imminent (29.15L.F.405-07). Moreover, as discussed more fully in Point X, Officer Salamon attempted to obtain a dying declaration from Baumruk. Thus, Baumruk's statement to Worcester fell within the dying declaration exception to the hearsay rule and was admissible. *See Smith.*

A hearing was required.

III.

HEARING REQUIRED - COUNSEL FAILED TO OBTAIN CURRENT SCANS AND CALL EXPERT

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for failing to obtain current CT and PET scans and to have an expert, like Dr. Merikangas, testify about those scans because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warrant relief which were that such an expert would use the scan's image's findings to establish Baumruk was incompetent to proceed and to neutralize as aggravators Baumruk's post-shooting acts and statements because the brain areas impacted are responsible for executive decision making and controlling impulsivity.

A hearing was required on counsels' failure to obtain current CT and PET scans and call an expert, like Dr. Merikangas, to testify how the scan visual images establish Baumruk was incompetent to proceed and to neutralize as aggravators Baumruk's post-shooting acts and statements because the brain areas impacted are responsible for executive decision making and controlling impulsivity.

To be entitled to an evidentiary hearing a movant must: (1) allege facts, not conclusions that warrant relief; (2) the facts alleged must not be refuted by the record; and (3) the matters complained of must have resulted in prejudice to the movant.

State v. Driver, 912 S.W.2d 52, 55 (Mo. banc 1995).

29.15 Pleadings

Dr. Merikangas, who has expertise in both CT and PET scans was available to interpret the results of such scans(29.15L.F.265-66). Counsel was aware that the only scans available were those in 1992 at the time Baumruk was shot(29.15L.F.266).

Trial counsel consulted with psychologist Kaufman who advised counsel to confer with medical doctors about the need for CT, MRI, and PET scans(29.15L.F.267). Dr. Parwatikar on June 14, 2005, wrote counsel urging they obtain current MRI and CT scans because of concerns he had about the likelihood of Baumruk having deteriorating cognitive functions(29.15L.F.267).

Counsel was aware that abnormalities shown in CT or PET scans would be probative at the competency hearing and the penalty phase as corroborative evidence to support the defense experts' findings(29.15L.F.268). The scans' results would have made compelling the findings of other defense experts on the issue of competency through linking those findings with specific anatomical injuries(29.15L.F.278).

If counsel had conferred with someone like Merikangas a CT and PET scan would have been recommended and they would have learned that the 1992 CT scans done were not comprehensive enough because the jury would benefit from seeing images of Baumruk's brain not visible in the 1992 CT scans(29.15L.F.269). Merikangas would have found from the combination of current CT and PET scans Baumruk sustained injury to his frontal lobes and the frontal lobes are responsible for impulse control, reasoning, problem solving, and decision making(29.15L.F.270-71).

The jury did not hear any evidence about how the particular anatomical injuries Baumruk sustained impacted his impulse, judgment, and ability to understand and comprehend the proceedings(29.15L.F.272).

After the shooting, Baumruk had incidents evidencing lack of judgment and impulse control including, but not limited to, the Bland and nurse Williams incidents and making statements harmful to his circumstances(29.15L.F.266,274-75). The scans would have rebutted respondent's post-shooting incidents, like the Bland and nurse Williams incidents, respondent used to cast Baumruk as a "jerk" as providing explanations for Baumruk's lack of impulse control(29.15L.F.276).

29.15 Findings

The findings state CT scans were done when Baumruk was admitted for treatment of his gunshot wounds and during the immediate days following his 1992 admission(29.15L.F.720). Harry testified at the first 2001 trial's penalty phase that from a CT scan alone you cannot tell the impact on a person(29.15L.F.720). Harry indicated that it is necessary for the person to be observed and followed over time to make such a determination(29.15L.F.720).

The findings stated that Harry testified at the 2005 competency proceedings that medical science cannot be "absolutely 100 percent" certain which areas of the brain control certain abilities(29.15L.F.720). Harry acknowledged that Baumruk had displayed improvements in many areas even though when Harry saw Baumruk in 1994 Harry believed certain brain injury effects would be permanent(29.15L.F.720-21). Harry testified at the 2005 competency proceedings that healthy portions of

Baumruk's brain have taken over the functions of damaged portions(29.15L.F.720-21). Parwatikar's and Cuneo's 2005 competency proceedings testimony noted Baumruk had displayed improvement in many areas over the years(29.15L.F.721).

Scans would not be probative, would be speculative, and cumulative to evidence presented(29.15L.F.721).

A Hearing Was Required

In *Wainwright v.State*,143S.W.3d681,685(Mo.App.,W.D.2004), the defendant was convicted of first degree murder when counsel called four experts to support his defense of not guilty by reason of mental disease or defect. The 29.15 pleadings alleged counsel was ineffective for failing to call a fifth expert who would have rebutted the state's psychological expert. *Id.*685-87. A hearing was denied because four experts were called and one of them made a cursory reference to matters the additional expert would have testified about. *Id.*687-88. It was error to deny a hearing because the alleged testimony was not cumulative to the trial experts' testimony and it would have rebutted the state's expert's testimony. *Id.*688-89.

As in *Wainwright*, the pleadings alleged matters requiring a hearing. Kaufman advised counsel to seek advice from medical doctors about the need for CT, MRI, and PET scans(29.15L.F.267). Medical doctor Parwatikar advised counsel to obtain current MRI and CT scans because of concerns he had about the likelihood of Baumruk having deteriorating cognitive functions(29.15L.F.267). Parwatikar evaluated Baumruk in 2003 and diagnosed him with dementia NOS due to head trauma and amnesia disorder(6/28-29/05Tr.270-71). Parwatikar found Baumruk is

incompetent and lacks the capacity to assist counsel(6/28-29/05Tr.331,348).

Parwatikar's findings were rejected and Baumruk was found competent to proceed.

Failing to have scans that supported Parwatikar's findings was prejudicial because that would have been objective evidence confirming Parwatikar's subjective opinions that Baumruk has a dementia that makes him incompetent to proceed. Moreover, the pleadings alleged that the scans' results would have made compelling the findings of other experts on the issue of competency through linking their findings with specific anatomical injuries(29.15L.F.278). *Cf. Wainwright*.

The pleadings also alleged that Merikangas could have provided mitigation testimony that current CT and PET scans would show Baumruk sustained injury to his frontal lobes and that such injury explains Baumruk's post-shooting impulse control, reasoning, problem solving, and decision making deficits(29.15L.F.270-71). The pleadings noted this evidence would have neutralized evidence like the Bland and nurse Williams incidents and respondent casting Baumruk as a "jerk"(29.15L.F.266,274-76). *Cf. Wainwright*. Additionally, the jury did not hear any evidence on this subject(29.15L.F.272).

Dr. Harry's testimony at the 29.15 expressly contradicts what the findings assert as to the need for scans. Harry testified that the locations of the brain damage Baumruk sustained adversely impacts his executive decision making and impulsivity(29.15Tr.244-47). This testimony indicated that Harry held the medical opinion that the location of injury corresponds with specific adverse consequences manifested. Moreover, the underlying record reflects Baumruk had been observed

since 1992 by examiners and treatment providers so that opinions can be expressed correlating physical anatomical brain injuries with specific adverse consequences to Baumruk(*See* 29.15L.F.720).

The pleadings alleged facts that required a hearing and this Court should order one.

IV.

PROHIBITING BAUMRUK FROM OBTAINING SCANS

The motion court clearly erred in granting respondent's objections to obtaining CT and PET scans because that ruling, which prohibited obtaining them, denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that Baumruk pled the claim that required a hearing that counsel was ineffective for failing to obtain current scans and present expert testimony utilizing those scans that would have supported Baumruk was incompetent to proceed and neutralized respondent's aggravation and without the scans Baumruk cannot prove his claim.

The 29.15 court improperly granted respondent's objections to obtaining CT and PET scans which would have supported Baumruk was incompetent to proceed and neutralized respondent's aggravation.

Pre-Amended Motion Proceedings

Before an amended motion was filed, on September 8, 2009, and September 14, 2009, 29.15 counsel filed motions for the Court to order the Department of Corrections to transport Baumruk to Barnes Hospital to obtain both PET and CT scans(29.15L.F.25-48). Counsel noted Barnes had agreed to accept Baumruk for the testing, Dr. Merikangas would interpret the scans, and the Public Defender would pay the scans' costs(29.15L.F.26-27,33,38-39,43,45). The filings noted that the only

scans available were those done on Baumruk in May, 1992 at the time he was shot and treated(29.15L.F.27,39).

The motions alleged that the jury did not see or hear evidence connecting the portions of Baumruk's brain that were damaged to their impact on impulse control, judgment, and ability to understand and comprehend(29.15L.F.27-28,39-40,43-44). The pleadings noted that respondent's aggravation included evidence from Bland and Venable regarding Baumruk's attack on Bland(29.15L.F.30,42-43). The scans would provide mitigating evidence(29.15L.F.44). The filings included that the scans would provide probative evidence correlating the nature of Baumruk's brain damage with deficits in impulse control and judgment for behaviors post-shooting(29.15L.F.31-32,45). The scans also would produce evidence that would have been persuasive at the competency proceedings(29.15L.F.32). Also, the scans would produce evidence that would corroborate the defense Baumruk did not remember the shooting(29.15L.F.32,44-45).

On September 18, 2009 respondent filed objections to the scans being performed(29.15L.F.137-42). Respondent argued: (1) a PET scan would be cumulative to the testimony presented at trial that Baumruk has brain damage; (2) none of the prior examiners in 15 years had wanted a PET scan done in addition to the scans already done when Baumruk was shot and treated; (3) a current PET scan was irrelevant to Baumruk's competency to proceed at trial and could not isolate which of Baumruk's memories were truly lost; and (4) a PET scan was unnecessary because

counsel was not obligated to search for a more favorable expert who would have ordered a PET scan(29.15L.F.138-42).

The prosecutor's office also argued that if the procedure was allowed the Public Defender should have to pay Department of Corrections' transportation costs(29.15L.F.141).

On September 21, 2009, the court heard argument on Baumruk's transportation request(29.15L.F.181). Baumruk's 29.15 counsel urged that scan imaging has improved since 1992(9/21/09Tr.77-79).

Respondent argued the decision to get a scan "would not be within the purview of the trial counsel, but rather the experts that they retained" (9/21/09Tr.80).

Respondent argued any information scans would show would be cumulative to what the jury heard(9/21/09Tr.80). Respondent argued the Department of Corrections should not have to incur the transportation costs(9/21/09Tr.80). Baumruk's counsel argued that the prosecutor's office lacked standing to object on behalf of Corrections and if Corrections objected to a court order, then Corrections could move to set aside that order(9/21/09Tr.81-82). Baumruk's counsel further noted the purpose of getting the scans was to establish a link between the areas of Baumruk's brain that was damaged and the impact on Baumruk's impulse control and judgment(9/21/09Tr.84-85). The scans would go to rebutting respondent's evidence regarding Baumruk's assault on Bland(9/21/09Tr.84-85).

Pre-Amended Motion Order

On September 23, 2009, the court ruled scans would be irrelevant to Baumruk's status on the shooting date and any 2007 trial strategy decisions(29.15L.F.182). Extensive evidence was presented at trial regarding Baumruk's mental state(29.15L.F.182). Neither scan would provide probative evidence as to Baumruk's condition leading up to and at the time of trial(29.15L.F.182)(citing *Zink v. State*,278S.W.3d170(Mo.banc2009) and *Forrest v. State*,290S.W.3d704(Mo.banc2009)).

Post-Amended Motion Proceedings

On October 23, 2009, the amended motion was filed(29.15L.F.183). The amended motion contained the factual allegations as set forth in Point III.

On November 24, 2009, respondent filed a motion to dismiss without a hearing(29.15L.F.540).

On March 19, 2010, the court entered an order listing claims denied without a hearing and directed respondent to prepare findings dismissing those claims(29.15L.F.606). That order stated respondent's motion was denied as to all other claims(29.15L.F.606). The claim involving the need for the scans was claim 8(G) and that was not included in the list of claims the court denied without a hearing(29.15L.F.606).

On May 24, 2010, Baumruk's counsel filed a motion to reconsider the denial of the request to transport Baumruk for the PET and CT scans(29.15L.F.627-33). That motion set forth that the court had granted an evidentiary hearing on claim 8(G) alleging that trial counsel should have obtained the scans(29.15L.F.628). The motion

to reconsider urged Baumruk could not prove Claim 8(G) without a court order for Baumruk to have the necessary scans done(29.15L.F.630-32;6/17/10Tr.2-6).

On June 17, 2010, the court took up the motion to reconsider the denial of the motion to transport Baumruk to Barnes and denied the motion while directing respondent prepare findings on Claim 8(G)(29.15L.F.636; 6/17/10Tr.2-8).

Baumruk Was Entitled To Get Scans

A defendant has a due process right to obtain evidence that goes to his mental state or rebuts the state's aggravation as to his mental state. *Ake v. Oklahoma*,470U.S.68,83-84(1985). A defendant must be allowed the opportunity to conduct appropriate examinations that go to the presentation of his case. *Id.*83-84. It violates due process to deny a postconviction claim because the movant failed to present evidence to support his claim when the postconviction court prohibited the movant from presenting the evidence necessary to prove that claim. *Taylor v. State*,728S.W.2d305,307(Mo.App.,W.D.1987)(due process was violated when postconviction court refused to writ in for hearing inmates critical to proving movant's claim).

Baumruk was entitled to a hearing on his claim counsel was ineffective for failing to obtain current scans and call experts to testify about the relationship between Baumruk's particularized brain injuries as those injuries impacted his competency to proceed and to neutralize respondent's aggravation. *See* Point III. Prohibiting Baumruk from obtaining the information necessary to prove that claim in the form of the scans violated due process. *See Ake* and *Taylor*.

While the motion court cited *Zink* and *Forrest*, they are inapplicable. Initially, it should be noted *Zink* and *Forrest* only involved PET scans and did not include CT scans.

In *Zink*, counsel made a strategic decision not to obtain a PET and even if counsel had had a PET, it would not have assisted Zink's defense because there has not been established a causal relationship between **personality disorders** and PET scan results. *Zink*,278S.W.3d at 177-83. In *Forrest*, counsel made a strategic decision not to obtain a PET and the evidence would have been cumulative. *Forrest*,290S.W.3d at 709. In Baumruk's case, it was pled that the two types of scans sought would provide a causal connection between the specific sites of Baumruk's **brain damage** (not personality disorder) and his lack of competency to proceed and his behaviors reflecting poor impulse control and decision making so as to neutralize respondent's aggravation. *See* Point III. Unlike *Zink* and *Forrest*, there is no record basis for concluding a strategic reason existed for failing to obtain the scans or the scan evidence would be cumulative.

In opposing the scans being done, respondent argued the decision to get a scan "would not be within the purview of the trial counsel, but rather the experts that they retained" (9/21/09Tr.80). In fact, the pleadings alleged retained defense expert Parwatikar wrote counsel urging they obtain current MRI and CT scans because of concerns Parwatikar had about the likelihood of Baumruk having deteriorating cognitive functions(29.15L.F.267).

The motion court improperly precluded Baumruk from obtaining the scans which were necessary to prove his claim for which he was entitled to a hearing that counsel was ineffective for failing to obtain current scans and present expert testimony using those scans.

This Court should remand with directions the scans be allowed to prove the associated claim (Point III) counsel was ineffective for failing to rely on those scans.

V.**FAILURE TO PRESENT EXPERT TESTIMONY UTILIZING
AVAILABLE CT SCANS**

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, effective assistance, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV, were violated in that effective counsel would have called Dr. Harry, or a similar expert, to testify to explain the precise areas of Baumruk's brain damaged are responsible for executive decision making and controlling impulsivity while utilizing Baumruk's pre and post surgery 1992 CT scans and Baumruk was prejudiced because that evidence would have rebutted respondent's aggravating evidence Baumruk was just a "jerk" as shown by Baumruk's post-shooting behaviors towards those responsible for his custody and care.

Baumruk's counsel was ineffective for failing to present evidence through an expert, such as Dr. Harry. An expert, like Harry, would have utilized Baumruk's 1992 CT scans to explain that Baumruk's post-shooting negative behaviors were explainable as the product of damage to those portions of his brain responsible for executive decision making and impulsivity.

Counsels' Testimony

Kenyon did not have any expert testify about the frontal lobe damage visible in Baumruk's scans and the correlation of that damage with Baumruk's post trauma

treatment behavior(29.15Tr.396-97). Kenyon testified that Harry testified during the first penalty phase and Baumruk got death there(29.15Tr.461). Kenyon and Steele discussed using the CT scans, but decided it was not worth the trouble(29.15Tr. 461). Kenyon thought the CT scans had minimal mitigation value and possibly were aggravating(29.15Tr.461-62).

Steele testified it was decided it was unnecessary to have an expert testify using Baumruk's CT scans about the influence of Baumruk's brain damage on his subsequent behavior(29.15Tr.537-38). Steele testified the evidence might have some mitigating value and some aggravating impact because Baumruk sustained the brain damage in a gun battle with police(29.15Tr.556-57).

Findings

Multiple experts testified at trial about Baumruk's brain injury(29.15L.F.747). CT scan evidence was presented at the first trial and Baumruk got death there(29.15L.F.747). Counsel testified they considered presenting the CT scans, but decided against doing that because Baumruk sustained his injuries because he shot at police, and therefore, this evidence was more aggravating than mitigating(29.15L.F.747-48).

Respondent's Aggravation Evidence

Respondent's aggravation included calling Bland to testify that Baumruk assaulted her because he felt she had failed to change his medical dressings as his doctor had ordered(2ndTrialTr.2806-10). The jury was told in Penalty Instruction 18 that in addition to the statutory aggravators submitted in Instruction 17, it could also

consider whether Baumruk assaulted Bland(2ndTrialL.F.771-78). To make that act appear even more aggravated, respondent called Officer Venable to testify that he responded to help Bland and that Baumruk had said he had killed before and he would do it again(2ndTrialTr.2830). As discussed in Point XIII, Steele elicited on cross-examination of Venable that Baumruk had stabbed a social worker with a pencil(2ndTrialTr.2832-33).

In guilt rebuttal, through Rabun, the jury heard that while at Regional Hospital Baumruk allegedly made statements to nurse Williams that his wife and the lawyers deserved what happened(2ndTrialTr.2398-99). The jury also heard, through Rabun, Baumruk allegedly grabbed Williams' arm when he felt she was not doing her job properly and told her that she deserved to have the same thing happen to her as happened to his wife(2ndTrialTr.2398-99).

Dr. Harry's 29.15 Testimony

Dr. Harry noted that Baumruk's CT scans pre-surgery showed brain damage to his right parietal, temporal, and occipital lobes, as well as his cerebellum(29.15Tr.223-34).

The CT scans post surgery showed where portions of Baumruk's brain were removed(29.15Tr.234-36). The scans also showed a hydrocephalus which required inserting a shunt(29.15Tr.238-42). A shunt can cause its own brain damage(29.15Tr.243).

The location of the brain damage Baumruk sustained adversely impacts executive decision making and impulsivity(29.15Tr.244-47). The physical damage

shown in Baumruk's CT scans is helpful for explaining his subsequent behaviors(29.15Tr.259).

Counsel Was Ineffective

Counsel has a duty to neutralize the state's aggravating circumstances. *Ervin v. State*, 80S.W.3d817,827(Mo.banc2002). Harry would have provided testimony that neutralized the aggravated nature of respondent's evidence. Harry would have explained the particular areas of Baumruk's brain that are damaged, as reflected in Baumruk's CT scans, are responsible for executive decision making and controlling impulsivity(29.15Tr.244-47). "[E]vidence of impaired intellectual functioning is inherently mitigating...." *Hutchison v. State*, 150S.W.3d292,308(Mo.banc2004)(relying on *Tennard v. Dretke*, 542U.S.274,288(2004)). Harry's testimony coupled with the CT scans was inherently mitigating evidence because it was evidence of Baumruk's impaired intellectual functioning. *See Hutchison*. Harry's testimony would have minimized the aggravating qualities of Baumruk's behavior and statements involving the Bland events (2ndTrialTr.2806-10,2830), Venable's reporting that Baumruk stabbed a social worker with a pencil (2ndTrialTr.2832-33), and the alleged actions and statements involving nurse Williams(2ndTrialTr.2398-99). Moreover, scan evidence would have neutralized the prosecutor having told the jury in guilt argument Baumruk was merely a "jerk" and the aggravating quality of being cast as a "jerk" for the jury's ultimate punishment decision(2ndTrialTr.2658,2724).

Counsels' strategy was not reasonable. *See McCarter*. "Foregoing mitigation because it contains something harmful is not reasonable when its prejudicial effect may be outweighed by the mitigating value." *Hutchison*, 150S.W.3d at 305. *See Williams v. Taylor*, 529U.S.362,395-96(2000)(counsel ineffective in failing to present evidence of severe abuse and defendant's limited mental capabilities). While Baumruk sustained his injuries because he was involved in a police shootout, those injuries standing alone were not what served to neutralize respondent's aggravation. What made Harry's testimony compelling, coupled with using the CT scans, was Harry's explanation that the damaged areas were responsible for executive decision making and impulsivity and the matters involving Bland, social worker Buck, and nurse Williams all reflected disturbances in executive decision making and impulsivity. *See McCarter, Hutchison, and Williams v. Taylor*. Harry's testimony, coupled with him using the CT scans, would have neutralized respondent's aggravation. *See Ervin*.

While Harry testified in the first trial penalty phase, that fact does not mean that if Harry testified here the result would have been death. This Court reversed the first trial because it was tried at the murder scene which was "inherently prejudicial." *State v. Baumruk*, 85S.W.3d644,649-51(Mo.banc2002). That prejudice was only heightened by the jurors' awareness that the courtroom in which they sat was the crime scene, the building they entered daily was the scene of the terrifying events, and the prosecutor emphasized those connections arguing for "the citizens of this county" to punish Baumruk "for what he did in this courthouse."

Baumruk, 85S.W.3d at 649-50. Harry's first trial's compelling testimony was rendered meaningless because of the prejudice of trying Baumruk in the St. Louis County courthouse and the prosecutor hammering the connection of the crime to that courthouse. There is a reasonable probability the retrial jury, which was not subjected to the prejudice of the case being tried at the crime scene, would have voted for life.

Reasonable counsel would have called Harry to testify while utilizing Baumruk's CT scans to explain that Baumruk sustained damage to those areas of his brain responsible for executive decision making and impulsivity. *See Ervin, Hutchison, and Strickland*. Baumruk was prejudiced because this evidence would have neutralized the aggravating quality of post shooting acts respondent relied on and its argument Baumruk was just a "jerk." *Id.*

A new penalty phase is required.

VI.**FAILING TO CALL PENALTY EXPERT LOGAN -
HEARING REQUIRED**

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for failing to present an expert, like Dr. Logan, to testify in penalty about the impact on Baumruk of numerous life stressors which included the divorce action itself, the death of his mother, and relocating to start a new job because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warrant relief which were Logan would have testified that an ordinary person would, and Baumruk did, feel an overwhelming sense of rejection and betrayal from Mary's actions and his actions were not the actions of someone who was merely a "narcissistic jerk," as respondent and its experts cast Baumruk.

A hearing on the claim counsel was ineffective for failing to call a witness, like Dr. Logan, in penalty to testify about the impact on Baumruk of numerous stressors in Baumruk's life as mitigating evidence was required.

To be entitled to an evidentiary hearing a movant must: (1) allege facts, not conclusions that warrant relief; (2) the facts alleged must not be refuted by the record; and (3) the matters complained of must have resulted in prejudice to the movant.

State v. Driver, 912 S.W.2d 52, 55 (Mo. banc 1995).

Nettles' And Shopper's Testimony

Nettles and Shopper found Baumruk suffers from a paranoid persecutory delusional disorder, which is a mental disease or defect(2ndTrialTr.1788,1949,1988). Baumruk's persecutory delusions were the system is against him, he is being singled out, and the system is corrupt(2ndTrialTr.1813,1965). Baumruk has a hyper-vigilance and mistrust for everyone believing they are going to wrong him(2ndTrialTr.1816,1835,1864,1883). Anger, violent behavior, and litigiousness are characteristic of a persecutory delusional disorder(2ndTrialTr.1839-47,1988-91). Part of Baumruk's delusional disorder is a concomitant irritable and dysphoric mood(2ndTrialTr.1838-39).

Baumruk viewed the entire system as corrupt(2ndTrialTr.1965). Baumruk was certain Judge Hais would award his house to his wife, even though Hais was new to the case and had not taken any prior adverse action(2ndTrialTr.1966-67,1972-73). Evidence of Baumruk's delusional disorder included Baumruk maintaining a social worker had stolen money from him and his filing of many jail grievances(2ndTrialTr.1970-72).

29.15 Pleadings Logan's Mitigating Testimony

The pleadings alleged counsel was ineffective for failing to call Dr. Logan or a similar expert in penalty to testify about the impact on Baumruk of numerous stressors in Baumruk's life which included the divorce action itself, the death of his mother, and relocating to start a new job as mitigating evidence.

Baumruk married Theresa Hebberger in 1965 and they were divorced in 1974(29.15L.F.360-61). As part of that divorce, it was agreed Baumruk would keep the house and it was the house that he and Mary were living in(29.15L.F.360-61).

While Baumruk was married to Mary he worked at McDonnell Douglas receiving pay increases for positive work evaluations(29.15L.F.361-62). While Baumruk and Mary were married they had a very good relationship with one another and with the children that each brought from their prior marriages(29.15L.F.362-64).

The marital relationship began deteriorating around the time McDonnell Douglas began laying off large numbers of employees(29.15L.F.364-66). Mary refused to consider moving to Washington state with Baumruk so he could work for Boeing(29.15L.F.365-66). In August, 1990, Baumruk took Mary on a vacation to the Pacific Northwest hoping to persuade her to move to Washington(29.15L.F.366-67). When they returned in late August, 1990, Mary filed for divorce(29.15L.F.367).

Also at the same time as the job layoffs, Baumruk's mother developed severe dementia and he was caring for her(29.15L.F.366). Baumruk's mother died on August 31, 1990(29.15L.F.367-68).

In September, 1990, Mary obtained an order of prohibiting Baumruk from going to the home they shared and as part of that action Baumruk spent a brief time in jail(29.15L.F.368-70). Baumruk believed Mary had lied when she had these actions taken against him(29.15L.F.369-70).

In June, 1991, Baumruk took a Seattle Boeing job because of the on-going McDonnell Douglas layoffs(29.15L.F.372-73). Baumruk moved there in August, 1991(29.15L.F.374-75).

Dr. Logan would have testified that the combination of psychological traumas which included loss of his wife, home, money, job, friends, and connections with the St. Louis area were more than Baumruk could handle(29.15L.F.376). Logan specifically would have testified that when Mary filed for divorce Baumruk was especially vulnerable because his job was in jeopardy fearing he would be laid off, knew he would have to start a new job, and knew he would have to relocate to a different state(29.15L.F.377). Logan would have testified that in addition to Mary having filed for divorce, she had obtained an ex parte order prohibiting Baumruk from returning to the house he had lived in for twenty-five years and she caused Baumruk to be jailed for a day when he had never been incarcerated(29.15L.F.377). About the time Baumruk was jailed, Mary took exclusive control of significant monies that belonged to both of them(29.15L.F.377). Mary also had the order of protection extended from August, 1990 through March, 1991(29.15L.F.377). Mary also knew the emotional value Baumruk attached to retaining the house, but she was insistent on obtaining it(29.15L.F.377). Logan would have testified that an ordinary person would have felt an overwhelming sense of rejection and betrayal from Mary's actions and Baumruk experienced those emotions(29.15L.F.377).

Logan also would have provided testimony that rebutted inflammatory matters the jury heard from Peters and Rabun(29.15L.F.377-78). Peters testified Baumruk's

attachment to his home reflected narcissism, conceitedness, self-importance, entitlement, and arrogance(2ndTrialTr.2243-44;29.15L.F.380-81). Rabun testified that Baumruk's acts were solely about Baumruk's wanting the house and other assets(2ndTrialTr.2419;29.15L.F.377-78). Logan would have testified about the special and symbolic significance Baumruk's home had for him(29.15L.F.377-78). In particular, Logan would have testified that the significance Baumruk attached to the home did not reflect narcissism(29.15L.F.379). Logan would have explained the symbolic significance of the home which for Baumruk reflected his hard work and having made payments on it for twenty-five years and which he hoped to pass on to his son(29.15L.F.379). Logan also would have explained the special significance Baumruk attached to the home because Baumruk's father had helped him do work on it(29.15L.F.379). The prosecutor told the jury in argument Baumruk was merely a "jerk"(2ndTrialTr.2658,2724;29.15L.F.380).

29.15 Findings

Counsel called Nettles and Shopper in guilt who testified Baumruk was not guilty by reason of mental disease or defect(29.15L.F.620-21). Nettles' and Shopper's testimony included opinions about the divorce and other stressors in Baumruk's life and how that impacted his mental state at the time of the offense(29.15L.F.620-21). Counsel also cross-examined Peters and Rabun about Baumruk's anger and emotion surrounding the divorce(29.15L.F.620-21).

Counsels' penalty strategy was to highlight until the time of the shooting Baumruk had led a peaceful and productive life(29.15L.F.621). Counsel used the

guilt phase expert testimony to create a contrast between the offense and the rest of Baumruk's life(29.15L.F.621). Calling an additional expert was unnecessary because the evidence was earlier rejected by the jury and would have been cumulative(29.15L.F.621-22).

A Hearing Was Required

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*,539U.S.510,524-25(2003); *Williams v. Taylor*,529U.S.362,395-96(2000). That evidence includes the defendant's family and social history. *Hutchison v. State*,150S.W.3d292,302(Mo.banc2004). "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Hutchison v. State*,150S.W.3d at 304(quoting *Tennard v. Dretke*,542U.S.274,285(2004)).

This Court has recognized that "in deciding prejudice from counsel's failure to investigate a client's life history, courts should evaluate the totality of the evidence." *Hutchison v. State*,150S.W.3d at 306(relying on *Wiggins*,539U.S. at 536). Furthermore, "The question is whether, when all the mitigation evidence is added together, is there a reasonable probability that the outcome would have been different?" *Hutchison v. State*,150S.W.3d at 306.

The pleadings alleged Logan would have testified to matters the jury did not hear and for which there is a reasonable probability there would have been a different penalty result. *See Strickland* and *Hutchison*. The jury never learned that when Mary filed for divorce Baumruk was especially vulnerable because Baumruk's job was in

jeopardy, Baumruk knew he would have to start a new job, and Baumruk knew he would have to relocate to a different state(29.15L.F.377). Logan would have provided details about Mary obtaining an ex parte order and causing Baumruk to be jailed and her taking exclusive control of significant monies belonging to both of them(29.15L.F.377). Logan would have testified about Baumruk's feelings of rejection and betrayal(29.15L.F.377). Logan would have addressed the special and symbolic significance of the home to Baumruk(29.15L.F.377-78). Logan's testimony also would have rebutted the prosecutors' and its witnesses contentions Baumruk was simply a "jerk"(2ndTrialTr.2658,2724). Logan's testimony would not have been cumulative.

In *Wainwright v.State*,143S.W.3d681,685(Mo.App.,W.D.2004), the defendant was convicted of first degree murder when counsel called four experts to support his defense of not guilty by reason of mental disease or defect. The 29.15 pleadings alleged counsel was ineffective for failing to call a fifth expert who would have rebutted respondent's psychological expert. *Id.*685-87. A hearing was denied because four experts were called and one of them made a cursory reference to matters the additional expert would have testified about. *Id.*687-88. It was error to deny a hearing because the alleged testimony was not cumulative to the trial experts' testimony and it would have rebutted respondent's expert's testimony. *Id.*688-89. In like fashion, Logan's testimony would not have been cumulative, Nettles and Shopper did not address the matters Logan would have been called to testify about to mitigate punishment. *See Wainwright*. The pleadings sufficiently alleged there was a

reasonable probability Baumruk would not have been death sentenced had the jury heard Logan testify for mitigation purposes about the various stressors Baumruk was experiencing. *See Wainwright*.

In *Glass v. State*, 227 S.W.3d 463, 469-70 (Mo. banc 2007), respondent introduced a prior stealing conviction as an aggravator. Counsel was found ineffective for failing to call Glass' probation officers who would have testified to how Glass had been a good probationer. *Id.* 469-70. Counsel was ineffective because that evidence would have "reduced the prejudicial impact of Glass' prior stealing conviction." *Id.* 469-70.

Glass' counsel also was ineffective in penalty for failing to call a psychologist. *Glass v. State*, 227 S.W.3d at 470. That failure was especially prejudicial because no expert was presented in penalty. *Id.* 470.

The evidence the jury did not hear and Logan would have presented concerned the particularized circumstances of this case that mitigated Baumruk's conduct. *See Hutchison*. The evidence Logan would have provided would have reduced the prejudicial impact of respondent and its witnesses having cast Baumruk as a "narcissistic jerk" (2nd Trial Tr. 2243-44, 2658, 2724). *Cf. Glass*. Moreover, like in *Glass*, there was no expert psychological expert called to testify in penalty.

In *Hutchison v. State*, 150 S.W.3d 292, 304-05 (Mo. banc 2004), even though counsel called a psychologist and called Hutchison's mother to testify about his learning disability and special education, counsel was ineffective for failing to investigate and present records and additional expert testimony. Nettles and Shopper were called in guilt to testify Baumruk was not guilty by reason of mental disease or

defect and did not offer any evidence to mitigate the offense, and like *Hutchison*, there is a reasonable probability additional expert testimony would have produced a different result. Nettles and Shopper did not provide evidence that would have made respondent's evidence less aggravated, whereas, Logan would have provided that evidence. *Cf. Ervin v. State*, 80S.W.3d817,827(Mo.banc2002)(counsel has duty to neutralize state's aggravating circumstances). Nettles and Shopper did not provide testimony about the matters Logan would have testified about, and therefore, calling Logan was not a matter of presenting evidence the jury previously rejected.

Moreover, counsels' cross-examinations of Peters and Rabun simply did not address the matters that Logan would have testified about regarding the numerous stressors in Baumruk's life and how they impacted Baumruk(2ndTrialTr.2203-2357,2369-76,2461-2593,2599-2602). While counsels' strategy was to highlight Baumruk's positive attributes, counsel also had a duty to rebut respondent's aggravation. *See Ervin*.

Facts the record did not refute resulting in prejudice to Baumruk were alleged. *See Driver*. A hearing was required.

VII.**BERRIGAN DISREGARDED BAUMRUK'S WISHES TO REMAIN UNDER
MENTAL HEALTH DEPARTMENT'S CUSTODY**

The motion court clearly erred denying without an evidentiary hearing the claim counsel Berrigan was ineffective in ignoring Baumruk's wishes to remain under the Mental Health Department's custody and instead pursued a writ before this Court which caused Baumruk's charges to be dismissed and refiled with a resulting death sentence because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warrant relief which were Baumruk's stated wishes were memorialized in a Berrigan casefile memo, Judge Belt told Berrigan dismissal would cause immediate refiling, charges were refiled, and Baumruk was death sentenced when he would otherwise have been under the Mental Health Department's custody.

A hearing was required on the claim counsel Berrigan was ineffective when he ignored Baumruk's wishes, memorialized in a Berrigan memorandum, that Baumruk wished to remain under the Mental Health Department's custody and Berrigan instead pursued dismissal of the charges.

To be entitled to an evidentiary hearing a movant must: (1) allege facts, not conclusions that warrant relief; (2) the facts alleged must not be refuted by the record;

and (3) the matters complained of must have resulted in prejudice to the movant.

State v. Driver, 912 S.W.2d 52, 55 (Mo. banc 1995).

29.15 Pleadings

The pleadings alleged that counsel Berrigan was ineffective for continuing to pursue and succeeding in obtaining having the criminal charges dismissed because that was not in Baumruk's best interests (29.15L.F.185-86).

The pleadings set forth that on January 24 and 27, 1994 Judge Belt conducted a competency hearing (29.15L.F.186). Judge Belt heard experts who had conflicting opinions on Baumruk's competence to proceed (29.15L.F.186-87). On February 15, 1994, Judge Belt had found Baumruk incompetent to proceed (29.15L.F.187).

On February 16, 1994 Baumruk was placed in the custody and care of Fulton State Hospital (29.15L.F.187).

On June 21, 1995, Baumruk's competency was reexamined at a second hearing before Judge Belt (29.15L.F.187-88). Once again Judge Belt heard conflicting expert opinions (29.15L.F.187-88). On September 6, 1995, Judge Belt ruled Baumruk was incompetent to proceed and there was no substantial probability Baumruk would become competent to proceed in the reasonably foreseeable future (29.15L.F.188).

After the second incompetency determination, Fulton State Hospital filed a petition to appoint a guardian for Baumruk (29.15L.F.189). Berrigan represented Baumruk at the hearing to appoint a guardian (29.15L.F.189). On October 29, 1996, a jury found Baumruk did not need a guardian (29.15L.F.189).

At a November 13, 1996 hearing, before Judge Belt, Berrigan moved to dismiss the criminal charges against Baumruk(29.15L.F.189). At the same hearing, the state moved the court reconsider its finding that Baumruk was incompetent to proceed based on the findings in the guardianship proceedings(29.15L.F.189). Judge Belt cautioned Berrigan at the argument on the motions if he dismissed the charges, then within five minutes of the charges being dismissed the state would refile them(29.15L.F.189). Judge Belt denied both parties' motions(29.15L.F.190).

If Berrigan had taken no further action, then Baumruk would have remained at Fulton State Hospital as someone who was incompetent to proceed(29.15L.F.190). Instead, Berrigan continued seeking dismissal of the charges first filing a petition for mandamus with the Western District Court of Appeals and then with this Court(29.15L.F.190-91). On February 24, 1998, Berrigan succeeded in obtaining an opinion and order from this Court directing the Circuit Court to dismiss the charges against Baumruk(29.15L.F.191).

Berrigan's actions of pursuing dismissal were unreasonable because Berrigan's files contained a memo which indicated that Baumruk had informed Berrigan that he was willing to accept a guardianship and indefinite confinement in the Mental Health Department(29.15L.F.193).

Moreover, Berrigan's actions were not reasonable because as Judge Belt had cautioned, as soon as he ordered the Macon County criminal case dismissed, respondent refiled the charges in St. Louis County(29.15L.F.192,196-97).

The prejudice alleged was that had Berrigan not pursued dismissal of the charges Baumruk would still be subject to the care and custody of the Department of Mental Health and not death sentenced(29.15L.F.192,197-98). It was not a reasonable strategy for Berrigan to pursue dismissal of the charges(29.15L.F.192-93).

Contents Of This Court's Writ Casefile³ And Its Opinion

At the November 13, 1996 hearing, Judge Belt heard Berrigan's motion to dismiss and respondent's motion to reopen the competency issue based on the finding Baumruk did not need a guardian. At that hearing, respondent argued that Baumruk's competency was an issue that could be "taken up at any time" and "there is no deadline for determination" on Baumruk's competency because the incompetency ruling was "an interlocutory order"(11/13/96Tr.6-7). Respondent argued that Judge Belt had "discretion" to reopen the competency issue(11/13/96Tr.15-16).

In support of dismissing the case, Berrigan argued that Baumruk gets to be released from all custody(11/13/96Tr.30). It was at that point that Judge Belt stated if he sustained Berrigan's motion, then within five minutes the state would refile the charges(11/13/96Tr.30).

At the hearing's conclusion, Judge Belt commented that he could not believe that the Legislature ever intended that a defendant found incompetent to proceed

³ On August 30, 2011, this Court took judicial notice of the *State ex rel. Baumruk v. Belt*,964S.W.2d443(Mo.banc1998)(SC79861) casefile.

should “go free” (11/13/96Tr.40). Judge Belt restated that if he dismissed the charges, then respondent was entitled to refile them(11/13/96Tr.40).

On November 18, 1996, Judge Belt issued an order denying Berrigan’s motion to dismiss. That order noted that because of the probate court decision that Baumruk did not require a guardian, the Circuit Court retained jurisdiction of the criminal case and had done so by committing Baumruk to the Mental Health Department. Respondent’s motion to reconsider was denied because the issues tried in a guardianship were different from those of competency to proceed.

This Court’s writ casefile docket sheets reflect that on May 27, 1997, it issued a preliminary writ in mandamus. This Court’s show cause order directed that Judge Belt file a response by June 26, 1997.

This Court’s file contains a motion from Berrigan filed on June 30, 1997, urging that Judge Belt had not complied with filing a response under the terms of the show cause order. Berrigan moved this Court to dismiss the charges and to order Baumruk immediately released from the Mental Health Department. A cover letter to that motion, dated June 26, 1997, asked that this Court fax its ruling to Berrigan because “Mr. Baumruk has been in custody for over five (5) years now on this matter and would like to know as soon as possible if he is being released.”

In the brief the St. Louis County Prosecutor’s filed in this Court on behalf of Judge Belt, that office argued that dismissal was not required, but Judge Belt was required to revisit the competency issue at least every six months. *See* Respondent’s

Brief at 5-8. Berrigan's brief argued that Baumruk was entitled to "be set free."

Relator's Brief at 9.

This Court found that §552.020.10(6), as Berrigan urged, required the criminal charges against Baumruk be dismissed. *State ex rel. Baumruk v. Belt*, 964S.W.2d443,446-47(Mo.banc1998).

Findings

This Court ruled that §552.020.10(6) required the charges against Baumruk be dismissed based on Judge Belt having found Baumruk incompetent to proceed and a jury finding that Baumruk did not need a court appointed guardian(29.15L.F.615). Baumruk was subsequently found competent to proceed in the first trial by Judge Seigel in St. Louis County and in the second trial by Judge Rauch in St. Charles County(29.15L.F.615). Because Baumruk has twice since been found competent to proceed he cannot collaterally attack a prior dismissal based on his incompetence to proceed(29.15L.F.615-16). Respondent was free to prosecute Baumruk based on his improved mental competence to proceed(29.15L.F.615-16).

A Hearing Was Required

The findings simply did not address Baumruk's claim. The pleadings alleged facts which if true would entitle Baumruk to relief. The pleadings alleged Berrigan authored a memo in which Baumruk told Berrigan that he was willing to accept a guardianship and indefinite confinement in the Mental Health Department(29.15L.F.193). The pleadings further alleged that Berrigan, despite Baumruk's stated wishes, pursued dismissal of the charges in this Court and in the

face of Judge Belt having warned Berrigan if he succeeded, respondent would simply refile the charges(29.15L.F.189). The pleadings continued that had Berrigan taken no further action, then Baumruk would have remained at Fulton State Hospital as someone who was incompetent to proceed(29.15L.F.190).

What the pleadings and record reflect is Berrigan lost sight of what was in Baumruk's best interests - long term custody in the Mental Health Department and not seeking release back into the community. Instead, the charges were dismissed, refiled, and Baumruk sentenced to death. Thus, there is a reasonable probability Baumruk would be entitled to relief and a hearing was required. *Driver, Strickland*.

In *Thomas v. State*, 249S.W.3d234,237-38(Mo.App.,E.D.2008), the pleadings alleged counsel was ineffective because the movant had advised counsel that he was previously diagnosed as mentally retarded, but counsel failed to investigate his mental status before he pled guilty. A hearing was required because the record did not refute that factual allegation and it related directly to the claim of ineffectiveness for failing to seek a competency evaluation. *Id.*238-39. Here, Baumruk's pleadings alleged that there is a Berrigan memo which stated Baumruk had informed Berrigan that Baumruk was willing to accept a guardianship and indefinite confinement in the Mental Health Department. *Cf. Thomas*. The record does not refute this factual allegation and it goes to the essence of the claim that Berrigan forged ahead seeking dismissal of the charges when it was in Baumruk's best interests not to have the charges dismissed. *See Thomas*.

This Court should order a hearing.

VIII.

HEARING REQUIRED - FAILING TO DISQUALIFY ST. LOUIS COUNTY

PROSECUTOR'S OFFICE

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for failing to move to disqualify the St. Louis County Prosecutor's Office because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warranted relief which were there was an appearance of impropriety requiring the St. Louis County Prosecutor's Office have been disqualified because Baumruk shot at St. Louis County Prosecutor's Office Investigator Hartwick making Hartwick a victim, the St. Louis County prosecutors who prosecuted Baumruk were Hartwick's friends, Hartwick's wife was a St. Louis County Prosecutor, and shooting at Hartwick was an aggravator submitted and found such that counsel was ineffective for failing to move to disqualify.

A hearing was required on the claim counsel should have moved to disqualify the St. Louis County Prosecutor's Office because one of the victims of Baumruk's acts was St. Louis County Prosecutor's Office Investigator Hartwick.

To be entitled to an evidentiary hearing a movant must: (1) allege facts, not conclusions that warrant relief; (2) the facts alleged must not be refuted by the record;

and (3) the matters complained of must have resulted in prejudice to the movant.

State v. Driver, 912 S.W.2d 52, 55 (Mo. banc 1995).

29.15 Amended Motion Pleadings

The pleadings alleged counsel was ineffective for failing to move to disqualify the St. Louis County Prosecutor's office because one of its employees was also an alleged victim and the act of shooting at Hartwick was itself an aggravator respondent relied on (29.15L.F.199-21). The pleadings expressly alleged counsel was ineffective for failing to research the legal issue presented (29.15L.F.201,205). The motion set forth the details of Hartwick's second trial's testimony at which Hartwick recounted Baumruk having shot at him (29.15L.F.201-02). The motion pled that one of the statutory aggravators the jury found was that Baumruk attempted to engage in the unlawful homicide of Hartwick (29.15L.F.202-03; *see* 2nd Trial L.F.774-75,788).

The pleadings set forth that Hartwick was a personal friend of the elected prosecutor and other prosecutors who worked on prosecuting the case against Baumruk (29.15L.F.205). Hartwick's wife was a St. Louis County Prosecutor's Office attorney (29.15L.F.204). It was alleged Hartwick discussed with other members of the St. Louis County Prosecutor's Office, including his wife, the details of the shooting (29.15L.F.204). Hartwick and his wife were not screened from accessing or discussing the case (29.15L.F.204). Hartwick participated in collecting 911 call evidence and making a copy of the tape which recorded the courtroom shooting (29.15L.F.204).

The motion alleged that Hartwick's employment prevented the St. Louis County Prosecutor's Office from acting objectively and without personal bias in pursuing death against Baumruk(29.15L.F.205-06). The facts presented here created an appearance of impropriety in the St. Louis County Prosecutor's Office prosecuting Baumruk(29.15L.F.208).

Proceedings On Motion to Disqualify St. Louis

County At 29.15

For purposes of the 29.15 case, 29.15 counsel moved to disqualify the St. Louis County Prosecutor's Office on the same rationale for which trial counsel was ineffective for having failed to do so(29.15L.F.49-131). The motion to disqualify was filed on September 15, 2009(29.15L.F.49). On September 21, 2009, a hearing was held on the motion to disqualify(9/21/09Tr.1). On September 23, 2009, the motion to disqualify was denied because it was untimely, no conflict was shown, and no prejudice was shown(29.15L.F.182). The amended motion was timely filed on October 23, 2009 - after the motion to disqualify was heard(29.15L.F.183).

At the disqualification hearing, Hartwick testified(9/21/09Tr.10). Hartwick and his wife, prosecutor Kim Duncan, had access to all office computer casefiles(9/21/09Tr.36-37). Hartwick was personal friends with elected prosecutor McCulloch and other prosecutors responsible for prosecuting and convicting Baumruk(9/21/09Tr.37-40). Hartwick attended social functions with those prosecutors including having been to their homes and they had been to Hartwick's home(9/21/09Tr.37-40). Hartwick discussed with his work colleagues Baumruk

having shot at him(9/21/09Tr.41-43). Hartwick was involved in handling a 911 call tape and a tape from the courtroom which recorded the shooting there(9/21/09Tr.45-46,49-51). Hartwick also gave statements that the Post Dispatch reported(9/21/09Tr.52-54). Hartwick did not do any actual case related investigation and did not participate in office discussions with prosecutors about whether death should be sought against Baumruk(9/21/09Tr.63-65,67-68,70-71).

29.15 Findings

The findings state that the factual basis for disqualifying the St. Louis County Prosecutor's Office, that Hartwick was both a St. Louis County Prosecutor's Office employee and victim, were known to Baumruk's counsel for more than seventeen years(29.15L.F.616). The findings cite *State v.*

Wilson,195S.W.3d23,26(Mo.App.,S.D.2006) and *State v.*

Mann,35S.W.3d913(Mo.App.,S.D.2001) for the proposition that the claims pled were waived because they were not raised sooner(29.15L.F.616-18).

The findings also assert Hartwick did not have meaningful participation in the investigation or prosecution of the case against Baumruk(29.15L.F.617). Also, the findings assert that Hartwick was never consulted about which aggravators should be filed or whether death should be sought (29.15L.F.617-18).

Hearing Required

This Court has recognized that a prosecutor in bringing charges against a defendant has a duty to avoid the appearance of impropriety. *State v.*

Ross,829S.W.2d948,951(Mo.banc1992). *See also, Wilkins v.*

Bowersox, 933F.Supp.1496,1522-24(W.D.Mo.1996)(prosecutor has duty to seek justice and in doing so has a duty avoid the appearance of impropriety). Under §56.110, if a prosecutor is “interested” in a case or his employment is “inconsistent with the duties of his office,” then the court with criminal jurisdiction has the authority to appoint “some other attorney.”

In *State v. Jones*, 268S.W.83,83-86(Mo.1924), this Court reversed a conviction for driving while intoxicated because the prosecutor, whose automobile was struck by the defendant’s car, failed to act as a disinterested prosecuting attorney in filing an information against the defendant. *Cf. State v.*

Kroenung, 188S.W.3d89,91(Mo.App.,S.D.2006)(prosecutor filed motion requesting appointment of a special prosecutor in property damage case because some vandalized property belonged to prosecutor). The result in *Jones* was required even though a special prosecutor tried the case because the filing of an information by an interested prosecutor was “an object lesson of maladministration of the criminal code” and the information should have been quashed by the **court on its own motion.**

Jones, 268 S.W.84-86. Whenever it appears that a prosecutor might be influenced by the prosecutor’s interests and not be altogether fair to the defendant, the prosecutor should be disqualified and a special prosecutor appointed. *State v.*

Nicholson, 7S.W.2d375,378(Mo.App.Spfld.Dist.1928)(relying on *Jones*). *See also, State v. Tyler*, 587S.W.2d918,929-30(Mo.App.,W.D.1979)(prosecutor’s personal animus against defendant disqualifies him from prosecuting case).

The pleadings alleged that there was an appearance of impropriety for Hartwick to have been a victim at whom Baumruk shot, the St. Louis County prosecutors who prosecuted Baumruk were Hartwick's friends, Hartwick's wife was a St. Louis County Prosecutor, and shooting at Hartwick was an aggravator submitted and found. These circumstances here, like those in *Jones*, reflect an appearance of impropriety. Under §56.110, the St. Louis County Prosecutor's Office was "interested" in the case because one of its employees was an alleged victim of Baumruk's acts. The degree of Hartwick's actual participation in preparing the case against Baumruk simply is not the measure under *Jones* as to whether St. Louis County should have been disqualified, rather it is the appearance of impropriety. Hartwick's testimony at the 29.15 disqualification hearing confirmed what was pled, that Hartwick's personal and professional affiliations with St. Louis County created an appearance of impropriety for the St. Louis County Prosecutor's Office to prosecute Baumruk. *Cf. Jones*. In *Jones*, this Court recognized that the trial court on its own motion should have taken corrective action. In like manner here the trial court should have acted on its own motion, but since it did not counsel was ineffective.

The amount of time that has passed and counsels' knowledge of the facts does not make Baumruk's claim untimely. What is critical and what was pled is Baumruk's counsel was unaware of the **legal grounds** and basis for disqualifying St. Louis County because **counsel failed to conduct the necessary legal research**(29.15L.F.201,205). A hearing should have been held at which counsel

could be questioned about their failure to move to disqualify St. Louis County and lack of knowledge of the legal basis for so moving.

The cases cited in the findings are inapplicable. In *Wilson*, the defendant tried to raise a conflict of interest claim against the prosecutor for the first time at the hearing on the motion for new trial. *Wilson*, 195S.W.3d at 24-25. In *Wilson*, what caused the claim to be waived was that the defendant told her lawyer before trial that the prosecutor had represented the defendant in the past. *Id.* 25. Simply because Baumruk's claim was not raised until this postconviction case does not mean it was waived based on the passage of time. What the passage of time reflects is that all of Baumruk's counsel, until the time of this postconviction action, failed to recognize the legal basis for the conflict that existed in the St. Louis County Prosecutor's Office prosecuting his case. Here, the record supports that all of Baumruk's previous counsel never recognized the legal problem, as opposed to being aware of the factual basis for why the St. Louis County Prosecutor's Office ought to be disqualified.

In *Mann*, the defendant tried to raise a constitutional challenge to a statute for the first time on direct appeal and the claim was, therefore, deemed waived. *Mann*, 35S.W.3d at 916. The claim here does not involve a challenge to a statute raised for the first time on appeal.

A hearing was required.

IX.

OFFICER GLENN STATEMENTS

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, to counsel and effective counsel, not to incriminate himself, and to be free from cruel and unusual punishment, U.S. Const. Amends V, VI, VIII, and XIV, were violated in that effective counsel would have moved to suppress Baumruk's statements to Officer Glenn so as to preclude their use by respondent's experts because Glenn questioned Baumruk without first giving *Miranda* warnings and without counsel present and questioned Baumruk about the courtroom shooting under the guise of investigating Baumruk's reporting his newspapers were stolen. Baumruk was prejudiced because respondent's expert pointed to Baumruk's statements to Glenn as evidence Baumruk was fabricating memory loss.

Officer Glenn exploited Baumruk's reporting that his newspapers were stolen as an opportunity to question him about the courtroom shooting without *Miranda* warnings and counsel present. Statements Baumruk made to Glenn were relied on as evidence Baumruk was fabricating his memory loss.

Glenn's Testimony At First Trial Competency Proceedings

Officer Glenn testified at the first trial's competency proceedings. In October 1998, Baumruk was in custody awaiting trial and had a newspaper subscription(1stTrialTr.825,828). Baumruk made a police complaint about someone stealing his newspapers(1stTrialTr.828). Glenn came to the St. Louis County jail to

take Baumruk's complaint about his missing newspapers(1stTrialTr.825,828,839,844). Glenn knew Baumruk was accused of the courthouse shooting(1stTrialTr.827,840,851).

Glenn's practice was to carry a tape recorder(1stTrialTr.826-27,839). Glenn did not record every conversation, but recorded his Baumruk conversation, even though he was only investigating a complaint of stolen newspapers, because Baumruk was "a high profile person"(1stTrialTr.827,841,844). Baumruk did not know he was being recorded(1stTrialTr.828).

Initially, Glenn elicited background information about Baumruk not getting his newspapers(RetrialEx.21 at 1-6). That was then followed by Glenn eliciting from Baumruk that others had told Baumruk he shot his wife in court and she died(RetrialEx.21 at 6-7). Baumruk made the statement that when Mary "crunched her lips" he shot her(RetrialEx.21 at 7).

Glenn knew Baumruk was talking about matters that had nothing to do with missing newspapers and that Baumruk's statements could be used against him, but never *Mirandized* Baumruk(1stTrialTr.844,852-53). Glenn never told Baumruk to limit his discussions to his complaint about missing newspapers(1stTrialTr.845).

Rabun's Retrial Reliance On Glenn Statements

Respondent elicited from Rabun that Baumruk's statements to Glenn about his remembering the moment when he shot Mary reflected that Baumruk was malingering and manipulating as to his memory loss(2ndTrialTr.2402-03). Rabun

opined Baumruk was engaging in a selective memory remembering neutral matters, but unable to remember inculpatory matters(2ndTrialTr.2402-03).

29.15 Findings

The motion court found counsel reasonably decided not to move to suppress the Officer Glenn statements because Baumruk initiated contact with Glenn about Baumruk's missing newspapers and thereby forfeited any grounds to suppress his statements(29.15L.F.740). Glenn did not testify at trial such that Baumruk was not harmed(29.15L.F.740). The motion court also relied on Baumruk's direct appeal opinion as authority that it was proper for expert witnesses to rely on inadmissible hearsay in formulating their opinions(29.15L.F.740-41).

Counsels' Testimony

Kenyon acknowledged that prior to the retrial the state had indicated on the record it would neither call Glenn nor play the recorded interrogation, but did intend to rely on Baumruk's Glenn statements through respondent's experts(29.15Tr.372-74;1/17/07Tr.54-57). Kenyon had no strategy reason for failing to move to suppress Baumruk's statements to the extent respondent's experts would rely on them(29.15Tr.376).

Kenyon testified Shopper relied on Baumruk's preoccupation with his stolen newspapers as evidence of Baumruk's delusional disorder(29.15Tr.448).

Steele testified that he did not move to suppress Baumruk's statements because Baumruk initiated contact with the police through his stolen newspapers complaint(29.15Tr.525-26,554-56).

Counsel Was Ineffective

The Sixth Amendment right to counsel attaches “at or after the initiation of adversary judicial proceedings against the defendant.” *U.S. v. Gouveia*, 467 U.S. 180, 187 (1984). The right to counsel applies to “indirect and surreptitious interrogations.” *Massiah v. United States*, 377 U.S. 201, 206-07 (1964).

The prosecution may not use statements “stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). “Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” *Id.* 444. The defendant can waive his right to silence, but that waiver must be knowing, voluntary and intelligent. *Id.* 444. “Custodial interrogation” is “questioning initiated by law enforcement officers” that occurs either when a person is formally arrested or under any other circumstances where the suspect is significantly deprived of his freedom of action. *Id.* 444. “[F]ailure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained.” *Missouri v. Seibert*, 542 U.S. 600, 608 (2004).

Even if police statements are voluntary, the interrogation techniques employed can violate due process. *Miller v. Fenton*, 474 U.S. 104, 109 (1985). The deliberate use of deception and manipulation by the police is incompatible with a system that

presumes innocence and assures a conviction will not be secured by inquisitorial means. *Illinois v. Perkins*, 496 U.S. 292, 303 (1990) relying on *Miller v. Fenton*, 474 U.S. at 116 (Brennan, J. concurring).

To the extent that Baumruk could be viewed as having initiated contact with the police, he did so for the limited purpose of making a **complaint** that his newspapers were being stolen. Baumruk did not open himself up to questioning without *Miranda* warnings about the details of the courthouse shooting by complaining something belonging to him was stolen. In *Mathis v. U.S.*, 391 U.S. 1, 2-3 (1968), the defendant was incarcerated on a state sentence and questioned without *Miranda* warnings by an I.R.S. agent about possible criminal tax violations. The government argued *Miranda* warnings were unnecessary because when the interrogation was conducted the defendant was incarcerated for a crime unrelated to the subject of the interrogation. *Id.* 2, 4. The Court held that the defendant was entitled to *Miranda* warnings and the necessity for those warnings was not removed because the defendant was incarcerated on an unrelated matter. *Id.* 4-5. If *Mathis* was entitled to *Miranda* warnings when he was questioned about an unrelated offense, then Baumruk surely was entitled to *Miranda* warnings for questioning about the offense for which he was charged when he merely initiated contact about his stolen newspapers.

Reasonable counsel would have moved to suppress the statements made to Glenn in order to prohibit their use in expert questioning. *See Mathis* and *Strickland*. The statements were obtained in violation of Baumruk's *Miranda* rights and his right

to counsel. *See Miranda* and *Gouveia*. The questioning about the facts of the offense here was an indirect and surreptitious interrogation done in violation of Baumruk's right to counsel under the guise of responding to Baumruk's stolen newspapers complaint. *See Messiah*.

Moreover, Glenn obtained the statements in violation of due process. *Miller v. Fenton*. Glenn recorded their conversation without telling Baumruk it was being recorded because Baumruk was a "a high profile person" accused of the courthouse shooting(1stTrialTr.827-28,840-41,844,851). Glenn knew Baumruk was talking about matters that had nothing to do with missing newspapers and that Baumruk's statements could be used against him, but never *Mirandized* Baumruk(1stTrialTr.844,852-53).

Baumruk was prejudiced because respondent used with the experts Baumruk's statements to discredit Baumruk's mental disease defense. In *Miller v. Dugger*,838F.2d1530,1540(11thCir.1988), a statement was improperly obtained in violation of *Miranda*. In questioning expert witnesses, the government used statements the defendant made in order to discredit his mental disease or defect defense. *Id.*1541-43. The questioning of the experts about the defendant's statements was intended to show that the defendant was a deceptive malingerer and he was not suffering from a mental disease or defect. *Id.*1541-43. That use was prejudicial to the mental disease or defect defense, even though there was no doubt the defendant committed the acts charged. *Id.*1540-43. In the same way, Rabun's testimony that

Baumruk's statements to Glenn showed he was malingering as to his memory loss was prejudicial(2ndTrialTr.2402-03).

It was not reasonable strategy for counsel to fail to move to exclude that portion of Baumruk's statements relating to this offense because they wanted to rely on his missing newspaper preoccupation as evidence of his delusional disorder(29.15Tr.448). Counsel could have moved to suppress only the illegally obtained parts of the Glenn statements pertaining to the circumstances of the offense and not the facts of Baumruk's stolen newspapers complaints. *See McCarter*.

A new trial is required.

X.**OFFICER SALAMON STATEMENTS**

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, counsel and effective assistance, to not incriminate himself, and to be free from cruel and unusual punishment, U.S. Const. Amends V, VI, VIII, and XIV, were violated in that effective counsel would have moved to suppress Baumruk's statements to Officer Salamon because Salamon questioned Baumruk without first giving *Miranda* warnings and Salamon's questioning was prompted by a desire to obtain a dying declaration. Baumruk was prejudiced because these statements were used to show Baumruk remembered the shooting and knew its wrongfulness and to show the case's aggravated nature.

Effective counsel would have moved to suppress Baumruk's statements to Officer Salamon because they were made without *Miranda* warnings and prompted by Salamon's desire to obtain a dying declaration.

Salamon's Trial Testimony

In response to reports about shooting in the courthouse, Officer Salamon went into the courtroom and saw Mary's body and believed she was dead(2ndTrialTr.1397-98). After other officers had shot Baumruk, Salamon saw Baumruk down on the ground and Baumruk was already handcuffed(2ndTrialTr.1407). Salamon searched Baumruk for weapons and seized ammunition from his pockets(2ndTrialTr.1407-09). Before Baumruk was given *Miranda* warnings, Baumruk asked Salamon whether he

had killed Mary(2ndTrialTr.1409,1430-31). Salamon represented that Baumruk's inquiry about Mary was volunteered and unsolicited(2ndTrialTr.1430-31). Salamon told Baumruk that he did not know if Mary died because he did not want to give Baumruk the satisfaction of knowing he had killed her(2ndTrialTr.1409).

29.15 Evidence

Clayton Officer Perry interviewed Salamon the afternoon of the shooting and prepared a report(29.15Tr.170;29.15Ex.21). Perry's report reflected that Salamon told Perry that Salamon saw Baumruk on the floor seriously wounded and leaned over to see if he could obtain a dying declaration from Baumruk(29.15Tr.170;29.15Ex.21). Salamon then asked Baumruk: "Did you do all this?"(29.15Tr.170-71;29.15Ex.21). It was in response to this question of Salamon that Baumruk then asked Salamon if he had killed Mary?"(29.15Tr.170-71;29.15Ex.21). Salamon told Perry that Salamon initiated the conversation with Baumruk(29.15Tr.170-71;29.15Ex.21).

Salamon denied he told Perry that he leaned over Baumruk hoping to obtain a dying declaration and asked Baumruk whether he did all of this(29.15Tr.149-50). Salamon represented that Baumruk volunteered the statement asking whether Mary had died(29.15Tr.150-51). Salamon testified that after Baumruk's inquiry about whether Mary was dead he then heard over a radio there was a second shooter and that was when he asked Baumruk if there was a second shooter(29.15Tr.147-48).

Kenyon did not have a strategy reason for failing to move to suppress the Salamon statements(29.15Tr.383). Kenyon did not object to Salamon's reporting of Baumruk's alleged statements because Salamon asserted that Baumruk initiated their

conversation(29.15Tr.452). Kenyon also did not object because he viewed the statement as consistent with the delusional disorder defense(29.15Tr.452-53).

Steele did not think there was any basis for moving to suppress the Salamon statements, and in particular, Steele did not read Perry's report as supporting Salamon initiated a conversation with Baumruk(29.15Tr.526-30). Steele agreed that if Perry were to testify, as Perry did at the 29.15 hearing, then there would have been a basis for moving to suppress the Salamon statements(29.15Tr.530).

29.15 Findings

The motion court ruled a motion to suppress Baumruk's Salamon statements lacked merit because Baumruk's statements were unsolicited and not the product of custodial interrogation making *Miranda* warnings unnecessary(29.15L.F.741). Questioning without *Miranda* warnings is allowed if it is prompted by a concern for public safety and Salamon's questioning was directed at such matters, and therefore, a motion to suppress would have been denied (citing *Anglin v. State*,157S.W.3d400,404(Mo.App.,W.D.2005))(29.15L.F.741-42).

Counsel Was Ineffective

The prosecution may not use statements "stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*,384U.S.436,444(1966). "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney,

either retained or appointed.” *Id.*444. The defendant can waive his right to silence, but that waiver must be knowing, voluntary and intelligent. *Id.*444. “[F]ailure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained.” *Missouri v. Seibert*, 542 U.S. 600, 608 (2004).

“Custodial interrogation” is “questioning initiated by law enforcement officers” that occurs either when a person is formally arrested or under any other circumstances where the suspect is significantly deprived of his freedom of action. *Miranda*, 384 U.S. at 444.

Reasonable counsel would have moved to suppress Baumruk’s statements because he was in handcuffs on the ground and under arrest when Salamon initiated questioning him without giving *Miranda* warnings and hoped to obtain a dying declaration (29.15 Tr. 170; 29.15 Ex. 21). *See Miranda* and *Strickland*.

Counsel has a duty to neutralize the state’s aggravating circumstances. *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002). Since counsel has a duty to neutralize aggravating circumstances, they also must have a duty to get excluded aggravating matters for which there are legal grounds to exclude. Baumruk’s alleged statements to Salamon made the offense appear more aggravated and reasonable counsel would have acted to exclude these matters.

Baumruk was prejudiced because his statements to Salamon were relied on to demonstrate Baumruk remembered the offense, knew its wrongfulness, and made the offense appear more aggravated. *See Strickland*. On respondent’s cross-examination

of Shopper, Baumruk's inquiry to Salamon was used as evidence Baumruk had a memory for the charged offense(2ndTrialTr.2020;29.15Tr.379). On respondent's direct examination of Rabun, respondent used Baumruk's statement to Salamon as evidence that Baumruk understood the nature and quality of the wrongfulness of his conduct(2ndTrialTr.2424-25). In respondent's guilt rebuttal closing argument, it argued that Baumruk's statements to Salamon showed Baumruk appreciated the wrongfulness of his conduct(2ndTrialTr.2720;29.15Tr.380). In respondent's initial penalty argument, Baumruk's Salamon statement was highlighted to show Baumruk had wanted to go back to Division 38 to kill all his intended targets(2ndTrialTr.3039).

In *Anglin v. State*, 157S.W.3d400,404(Mo.App.,W.D.2005), it was noted that *Miranda* warnings are not required to precede questions "as long as they are reasonably prompted by a concern for the public safety." Salamon's failure to give *Miranda* warnings, unlike *Anglin*, was not prompted by public safety, but instead a desire to obtain a dying declaration(29.15Tr.170;29.15Ex.21). Salamon only inquired about a second shooter, in response to what Salamon heard on a radio, after Baumruk's statements to Salamon about whether Mary was dead(29.15Tr.147-48).

It was not reasonable strategy for counsel to fail to investigate the information Perry was able to provide that established Salamon initiated a conversation with Baumruk intended to obtain a dying declaration(29.15Tr.170;29.15Ex.21). Failing to interview witnesses relates to preparation and not strategy. *Kenley v. Armontrout*, 937F.2d1298,1304(8thCir.1991). Lack of diligence in investigation is not

protected by a presumption in favor of counsel and cannot be justified as strategy.

*Id.*1304.

It was not a reasonable strategy for counsel to fail to move to suppress Baumruk's Salamon statements. The Salamon statements were used to show Baumruk remembered shooting and knew its wrongfulness and to show the case's aggravated nature and were inconsistent with the delusional disorder defense. *See McCarter.*

A new trial, or at minimum, a new penalty phase is required.

XI.

VENABLE STATEMENTS

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, to counsel and effective counsel, to not incriminate himself, and to be free from cruel and unusual punishment, U.S. Const. Amends V, VI, VIII, and XIV, were violated in that effective counsel would have moved to suppress Baumruk's statements to Officer Venable when Venable questioned Baumruk why Baumruk struck jail medical assistant Bland and Baumruk stated he had killed once before and he would again because Venable questioned Baumruk without first giving *Miranda* warnings and without counsel present. Baumruk was prejudiced because the statements made the jury more likely to impose death.

Counsel was ineffective for failing to move to suppress Baumruk's statements to Officer Venable after Baumruk struck jail medical assistant Bland.

Trial Use Of The Venable Statements

In respondent's penalty phase, St. Louis County Jail medical assistant Bland testified that she helped Baumruk in March, 2006 care for his stomach surgical incision(2ndTrialTr.2806). Bland was scheduled to change Baumruk's dressing one day, but was unable to do it because other patients' needs were more pressing and she planned to take care of it the following day(2ndTrialTr.2807). That next day Baumruk hit Bland because she had not changed his dressing as scheduled(2ndTrialTr.2808-10). Respondent displayed and had admitted a picture of

Bland's face for the jury showing the injuries she sustained as a result of Baumruk having "assaulted" her(2ndTrialTr.2812,2815).

Jail Officer Venable recounted in penalty he came to Bland's assistance(2ndTrialTr.2823-28). Respondent elicited on direct from Venable that Baumruk said to Venable that he had killed before and he would do it again(2ndTrialTr.2830). On cross-examination, in an effort to minimize the damaging nature of Baumruk's statements to Venable, counsel Steele asked Venable whether he knew Baumruk had committed the charged acts in 1992 and that 14 years had passed between those acts and the time of Baumruk's Venable statements(2ndTrialTr.2835). That was followed by Steele asking whether Venable knew of any records documenting Baumruk had tried to strike any other nursing staff and Venable did not(2ndTrialTr.2835).

Earlier, during the guilt phase direct examination of Shopper, Baumruk's counsel Kenyon asked Shopper to provide examples of Baumruk's delusional thinking(2ndTrialTr.1973-74). One example was Baumruk's attempt to discharge his attorneys(2ndTrialTr.1973-74). Kenyon's questioning on that included asking Shopper to explain that the reason Baumruk attempted to discharge counsel was they had declined to call the doctor responsible for overseeing Baumruk's care to testify that Bland had not followed that doctor's directions as to the necessary frequency for changing Baumruk's dressing(2ndTrialTr.1974-75). In the middle of responding to that question, Shopper **blurted out in a rambling non-responsive manner** that Baumruk had made the statements now at issue(2ndTrialTr.1974-75). Shopper

concluded this line of questioning stating that Baumruk's desire to represent himself was delusional because he had no concept about how to present a coherent defense(2ndTrialTr.1975-76).

On cross-examination of Shopper, respondent repeated Baumruk's Venable statements and followed that asking Shopper whether Baumruk's statements evidenced Baumruk had no remorse for striking Bland(2ndTrialTr.2077). Shopper responded that Baumruk had "No remorse whatsoever"(2ndTrialTr.2077).

In penalty phase opening statement, the prosecutor told the jury that Baumruk's statements that he had killed before and he could do it again could be considered in aggravation in deciding on punishment(2ndTrialTr.2792-93).

Venable's 29.15 Testimony

Venable testified that when he questioned Baumruk he had not *Mirandized* Baumruk(29.15Tr.322-23). Venable asked Baumruk "what happened" with Bland(29.15Tr.330). Venable knew the charges that Baumruk was in custody for, that Baumruk was represented by counsel at the time of the Bland incident, and Baumruk was in custody when Venable questioned him(29.15Tr.323).

Counsels' Testimony

Kenyon had no strategy reason for failing to move to suppress the statements made to Venable(29.15Tr.395). Kenyon thought the information would come in through the experts(29.15Tr.395). Shopper testified on direct examination about Baumruk's Venable statements and the statements were consistent with the defense theory(29.15Tr.457-59).

Steele considered a motion to suppress, but thought any privilege was waived through pursuing a mental disease and defect defense(29.15Tr.533-34). Steele thought the Venable statements were consistent with the defense theory(29.15Tr.533-34).

29.15 Findings

Venable's questioning did not constitute interrogation, and therefore, *Miranda* warnings were not required(29.15L.F.745-47). Counsel testified they did not object to Venable testifying about these statements because it was evidence included as part of Shopper's opinion that Baumruk suffered from a delusional disorder, and therefore, part of their strategy(29.15L.F.746-47).

Counsel Was Ineffective

The prosecution may not use statements "stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*,384U.S.436,444(1966). "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*444. A person is in custody for purpose of being entitled to *Miranda* warnings, even if he is in prison on another charge. *Mathis v. U.S.*,391U.S.1,2-5(1968).

The Sixth Amendment right to counsel attaches "at or after the initiation of adversary judicial proceedings against the defendant." *U.S. v.*

Gouveia,467U.S.180,187(1984). The right to counsel applies to “indirect and surreptitious interrogations.” *Massiah v. United States*,377U.S.201,206-07(1964).

Under §552.030.5, statements made during “the course of any such examination” are not privileged. The statements made to Venable were not made during the course of an examination ordered under §552.030, and therefore, the privilege waiver provided for in §552.030.5 is inapplicable.

Venable asked Baumruk “what happened” (29.15Tr.330) as to an event respondent characterized to the jury as an “assault” while respondent displayed Bland’s facial injuries to the jury(2ndTrialTr.2812,2815). Venable’s questioning was clearly a custodial interrogation for which *Miranda* warnings were required. *See Miranda* and *Mathis*. Moreover, Venable testified that Baumruk was in custody when he interrogated him(29.15Tr.323). Venable testified he knew that Baumruk was represented by counsel(29.15Tr.323), yet Venable questioned Baumruk without counsel and violated his right to counsel. *See Gouveia* and *Massiah*.

Counsel has a duty to neutralize the state’s aggravating circumstances. *Ervin v. State*,80S.W.3d817,827(Mo.banc2002). Since counsel has a duty to neutralize aggravating circumstances, they also must have a duty to get excluded aggravating matters for which there are legal grounds to exclude. Baumruk’s alleged statements made the offense appear more aggravated and reasonable counsel would have acted to exclude these matters by moving to suppress Baumruk’s Venable statements.

Baumruk was prejudiced because the prosecutor urged the jury in penalty opening statement not just to consider the “assault” on Bland as an aggravating

circumstance, but to consider Baumruk's statements to Venable(2ndTrialTr.2792-93). Those statements were that much more prejudicial because during guilt cross-examination respondent asked Shopper whether the statements evidenced lack of remorse and Shopper replied "No remorse whatsoever"(2ndTrialTr.2077). Further, the Venable statements were prejudicial because they were evidence Baumruk had no remorse for killing Mary and none for striking Bland and left the jury to believe he would kill again if sentenced to life without parole.

Counsels' own actions reflect while they may have considered Baumruk's **actions** of striking Bland consistent with their delusional defense theory and part of their strategy, their strategy did not include wanting Baumruk's **statements** to Venable in front of the jury. Shopper on direct examination blurted out in a rambling non-responsive answer the Venable statements when counsel had asked Shopper to explain how Baumruk's attempts to discharge counsel evidenced his delusional disorder(2ndTrialTr.1973-76). The Venable statements had nothing to do with discharging counsel and counsel Kenyon did not intentionally put them in front of the jury and that action contradicts Kenyon's 29.15 testimony(29.15Tr.457-59). On cross-examination of Venable, counsel Steele tried to minimize the devastating nature of the Venable statements highlighting that fourteen years had passed since the courthouse shooting and Baumruk's Venable statements and there was no records of Baumruk having tried to strike other nursing staff(2ndTrialTr.2835). Thus, Steele's trial actions contradict his 29.15 testimony that admitting the Venable statements was part of presenting their defense(29.15Tr.533-34).

Reasonable counsel would have moved to exclude the Venable statements and those statements would have been suppressed. *See Strickland, Miranda, Mathis, Gouveia, and Massiah.* Baumruk was prejudiced because respondent used the highly inflammatory Venable statements in penalty opening statement and guilt cross-examination of Shopper to show Baumruk deserved death. *See Strickland and Ervin.*

A new penalty phase is required.

XII.

SOCIAL WORKER BUCK STATEMENTS

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, counsel and effective counsel, to not incriminate himself, and to be free from cruel and unusual punishment, U.S. Const. Amends V, VI, VIII, and XIV, were violated in that effective counsel would have moved to suppress and objected to Baumruk's alleged statements to social worker Buck explaining why Baumruk did the shooting and that Baumruk said he remembered doing it because Buck obtained prejudicial statements from Baumruk *without Miranda* warnings and without counsel present. Those statements were prejudicial because they were used in finding Baumruk competent to proceed and to discredit his delusional disorder defense.

Counsel was ineffective for failing to move to suppress and object to statements Baumruk made to jail social worker Buck without *Miranda* warnings and counsel present. The statements were used prejudicially to find Baumruk competent to proceed and to discredit his delusional disorder defense.

Buck's First Trial Competency Testimony

Buck testified at the competency hearing conducted for the first trial(1stTrialTr.750). Buck's job at the St. Louis County Jail as a social worker was to assess and meet weekly with inmates(1stTrialTr.750,754-55).

Buck testified that Baumruk told him that he did the shootings because he believed Judge Hais was going to give his wife the house and that was unfair(1stTrialTr.763). Buck testified Baumruk told him that he remembered doing the shootings(1stTrialTr.763-64).

Rabun's First Trial Competency Testimony

Rabun recounted Buck told Rabun that Baumruk had told Buck details surrounding the shooting(1stTrialTr.315-17). Buck opined to Rabun that Baumruk was not simply repeating what Baumruk had read about what happened and Baumruk did not have memory deficits(1stTrialTr.318,322).

Retrial Competency Hearing

At the retrial competency proceedings, respondent offered into evidence the transcript of the competency proceedings done for the first trial(6/28-29/05Tr.6-8).

Respondent called psychiatrist Reynolds. Reynolds found on Axis I, Baumruk had dementia NOS (not otherwise specified) because of the brain damage he sustained during the shooting(6/28-29/05Tr.97-98). Reynolds was unable to express an opinion on whether Baumruk was malingering as to memory loss as to the shooting's details(6/28-29/05Tr.133-34). Reynolds found Baumruk was competent to proceed, despite his amnesia(6/28-29/05Tr.104-05,109-11).

Counsel Bagsby recounted from the time Seigel found Baumruk competent, Baumruk never related any recall of the shooting(6/28-29/05Tr.245-46). Bagsby and Green had urged Baumruk that if he could recall what happened to do so(6/28-29/05Tr.246-47). Baumruk was only able to talk about the shooting after he was

provided the police reports and even then could not relate whether their contents accurately reported what happened(6/28-29/05Tr.248-49). Bagsby recounted that Baumruk was unable to participate in preparing a defense, and in particular, a diminished capacity defense because he was unable to recall the shooting(6/28-29/05Tr.238-40,251). Baumruk displayed more interest in getting the Post Dispatch than he did his criminal charges(6/28-29/05Tr.261-62).

Dr. Parwatikar testified that Baumruk was consistent as to his inability to recall the courthouse events(6/28-29/05Tr.268-69). Parwatikar diagnosed Baumruk in 1992 with organic dementia and organic personality disorder(6/28-29/05Tr.269). Parwatikar opined that Baumruk had problems focusing on the issues at hand in light of their seriousness as evidenced by his preoccupation with not getting his Post Dispatch(6/28-29/05Tr.335-36).

Parwatikar evaluated Baumruk again in 2003 and diagnosed him with dementia NOS due to head trauma and amnesia disorder(6/28-29/05Tr.270-71). Parwatikar does not believe Baumruk is malingering as to his amnesia and memory deficits(6/28-29/05Tr.274). Baumruk is incompetent and lacks the capacity to assist counsel because of his amnesia(6/28-29/05Tr.276,331,348).

In 1993, 1999, and 2000, Dr. Cuneo found Baumruk had dementia due to his head gunshot wound trauma(6/28-29/05Tr.367,387-90,408-09,425). Cuneo found Baumruk had the ability to understand the proceedings(6/28-29/05Tr.371-72,393). Baumruk, however, was incompetent to proceed as he could not assist counsel because he could not participate in formulating a mental disease defense since his

amnesia causes him to not remember the shooting(6/28-29/05Tr.371-72,395-96,398-99,411,425,479,485-86).

Cuneo found Baumruk was not malingering(6/28-29/05Tr.412-13). Baumruk has no real memory of the shooting and the information he relates was furnished to him by others such that he is confabulating(6/28-29/05Tr.372,413-15). Baumruk regularly reads the newspaper and it has been his source of information about what happened(6/28-29/05Tr.419-21).

Harry did a court ordered competency evaluation of Baumruk in 1994 and found dementia due to head trauma such that Baumruk lacked the capacity to assist counsel(6/28-29/05Tr.511-12).

In 2003, Harry found Baumruk had amnesia due to a head gunshot wound with surgical debridement (removal) of dead brain tissue(6/28-29/05Tr.520-21,532). Harry believes Baumruk's reporting that he does not remember the shooting because of the consistency in the records Harry reviewed and the type of injuries Baumruk sustained(6/28-29/05Tr.534-35). Harry found that because of Baumruk's deficits he could not assist counsel with his defense(6/28-29/05Tr.539-41). There are inconsistencies as to what Baumruk does and does not remember which is the product of Baumruk either guessing about what happened or having learned from others what happened(6/28-29/05Tr.578-79).

For the proceedings before Judge Belt in Macon County, Dr. Gowdy found Baumruk has some specific post-trauma amnesia consistent with a head wound(1/27/94Tr.45,54). Gowdy indicated there is no way to know whether

Baumruk truly has amnesia for the shooting(1/27/94Tr.57). Baumruk's lack of memory for the shooting and subsequent associated events are consistent with a brain injury(1/27/94Tr.112). Gowdy found Baumruk is competent to proceed(1/27/94Tr.58).

Also for the Macon County proceedings, Psychiatrist Peters testified Baumruk's inability to recall the events of the shooting were consistent with post-traumatic amnesia(1/27/94Tr.155). Peters did not believe that Baumruk was malingering as to his lack of memory(1/27/94Tr.193-95). Baumruk does not remember the shooting and cannot relate to his counsel his state of mind at the time of the shooting(1/27/94Tr.198-200). Peters found Baumruk was capable of assisting counsel and competent to proceed(1/27/94Tr.162-63,207).

Judge Rauch found Baumruk was competent to proceed(2ndTrial2ndSupp.L.F.2-20; 2ndTrialL.F.561-62,573).

Trial Defense

Defense experts Nettles and Shopper testified Baumruk suffers from a paranoid persecutory delusional disorder which constitutes a mental disease or defect(2ndTrialTr.1788,1949,1988). Baumruk's litigiousness against Buck demonstrated his persecutory delusional nature(2ndTrialTr.1989-1994,2096). Baumruk sued Buck for attempted extortion when Buck suggested that Baumruk ask Baumruk's son to provide him money to repair his glasses or purchase a new pair(2ndTrialTr.1989-1994).

Respondent's Trial Use Of Baumruk's Buck Statements

During trial cross-examination of Shopper, he was asked whether Buck had previously testified that Baumruk told Buck that Baumruk remembered doing the shooting because of the divorce(2ndTrialTr.2025-26). That was followed by Shopper conceding that such statement reflected Baumruk remembered having done the shooting(2ndTrialTr.2025-26).

Rabun testified at trial that based on Rabun's conversations with Buck about the conversations that Buck had with Baumruk, Rabun believed that Baumruk remembered the shooting(2ndTrialTr.2401-02).

Counsels' Testimony

Kenyon thought any objection was waived when Baumruk placed in question his mental state(29.15Tr.446). Kenyon thought the Buck contacts were not interrogations(29.15Tr.446).

Steele testified that the only overruled objection counsel from the prior trial made was that the statements to Buck fell within a social worker privilege(29.15Tr.522). Steele testified no consideration was given to moving to suppress the Buck statements on Fifth or Sixth Amendment grounds(29.15Tr.522-23).

29.15 Findings

Buck was not called as a trial witness(29.15L.F.737). Baumruk's statements were not made during custodial interrogation and Buck was not acting as a member of law enforcement(29.15L.F.738). Any motion to suppress would have been denied(29.15L.F.738).

Buck's statements were referenced only after Baumruk presented a not guilty by reason of mental disease or defect defense and not during the state's case-in-chief(29.15L.F.738). Those statements were introduced during cross-examination of Shopper and the respondent's experts' direct(29.15L.F.738-39). It was proper to cross-examine Shopper even about inadmissible evidence(29.15L.F.739). Counsel testified they believed Buck's statements were admissible(29.15L.F.739). Counsel also believed Buck's statements supported the delusional disorder defense(29.15L.F.739).

Counsel Was Ineffective

Under §552.030.5, statements made during “the course of any such examination” are not privileged. The statements made to Buck were not made during the course of an examination ordered under §552.030, and therefore, the privilege waiver provided for in §552.030.5 is inapplicable.

In *State v. Dixon*, 916S.W.2d834,835(Mo.App.,W.D.1996), a social worker obtained inculpatory admissions from the defendant during a jail interview while he was awaiting trial. Those statements were obtained in violation of Dixon's *Miranda* rights which were never administered and his Sixth Amendment right to counsel. *Id.*835-37. The social worker “was obligated to heed the same procedural safeguards as those imposed on the prosecutor and the police.” *Id.*837.

Reasonable counsel would have moved to suppress and objected to Baumruk's statements made to jail social worker Buck. *See Dixon* and *Strickland*.

Baumruk was prejudiced as to the second trial competency determination. *See Strickland*. Rabun's first trial's competency testimony included recounting that Buck reported Baumruk remembered details of the offense and Buck observed Baumruk had no memory deficits and that testimony of Rabun was made part of the second trial's competency determination(1stTrialTr.315-18,320,322;6/28-29/05Tr.6-8). That evidence, during the retrial competency hearing, was the only evidence that Baumruk remembered the shooting and Baumruk's lack of memory was a critical piece of why the defense experts urged he was incompetent to proceed.

Baumruk was prejudiced as to the retrial defense. *See Strickland*. The cross-examination of Shopper and Rabun's testimony that Buck's contact with Baumruk supported Baumruk remembers the shooting contradicted the defense that Baumruk acted while under a paranoid delusion and did not support that defense. *See McCarter*.

A new trial is required because Baumruk was incompetent to proceed and his delusional disorder defense was prejudiced by the matters premised on Buck's contact with Baumruk.

XIII.

SOCIAL WORKER BUCK INCIDENT

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for asking Officer Venable in penalty the open ended question whether Baumruk's jail file showed past violent behavior, causing Venable to testify that while Baumruk's casefile did not contain such, Baumruk had stabbed a social worker with a pencil because that ruling denied Baumruk due process, freedom from cruel and unusual punishment, and opportunity to prove ineffectiveness, U.S. Const. Amends VI, VIII, and XIV, in that the pleadings alleged facts which, if true, warrant relief which were counsel knew pretrial about an incident involving Baumruk and a social worker and counsel's questioning caused that incident's details to be heard which was prejudicial inflammatory aggravating evidence.

A hearing was required on the claim counsel was ineffective for asking Venable whether there was anything in Baumruk's jail file showing he had been violent in the past and which resulted in Venable testifying Baumruk had stabbed a social worker with a pencil.

Trial Evidence

On Steele's cross-examination of Venable he asked whether there was anything in Baumruk's jail file reflecting past violent behavior other than what Venable had reported about nursing assistant Bland(2ndTrialTr.2832-33). Venable responded that there was an incident where Baumruk had stabbed a social worker

with a pencil, but that occurrence was not contained in Baumruk's jail file(2ndTrialTr.2832-33).

On Kenyon's direct and redirect of Shopper, he elicited that Baumruk had attacked social worker Buck, but that questioning was done without eliciting any details of the manner in which Baumruk attacked Buck(2ndTrialTr.1989-90,2098-99).

Standard of Review

To be entitled to an evidentiary hearing a movant must: (1) allege facts, not conclusions that warrant relief; (2) the facts alleged must not be refuted by the record; and (3) the matters complained of must have resulted in prejudice. *State v. Driver*,912S.W.2d52,55(Mo.banc1995).

29.15 Pleadings

The pleadings alleged counsel was ineffective when counsel asked Venable whether there was anything in Baumruk's jail file reflecting past violent behavior(29.15L.F.391-95). Venable's response that there was an incident where Baumruk stabbed a social worker was prejudicial aggravating evidence(29.15L.F.391-95). Before trial, counsel had knowledge of this incident, and therefore, should not have made any inquiry about other incidents of violent jail behavior whether or not those incidents appeared in Baumruk's jail file(29.15L.F.393,395).

29.15 Findings

The findings stated the transcript refuted the claim(29.15L.F.622). Venable did not respond directly to the question asked, but instead offered his own recall of a

prior incident, and therefore, counsel did not elicit this matter with the question asked(29.15L.F.622).

A Hearing Was Required

“Trial counsel's admission of evidence tending to support the State's position can be a significant factor in finding ineffective assistance of counsel.” *Gant v. State*,211S.W.3d655,659-60(Mo.App.,W.D.2007). Counsel has a duty to neutralize the state’s aggravating circumstances. *Ervin v. State*,80S.W.3d817,827(Mo.banc2002). Since counsel has a duty to neutralize aggravating circumstances, they also must have a duty to not affirmatively inject aggravating evidence.

The pleadings alleged facts the record did not refute and resulted in prejudice. The pleadings alleged that before trial counsel had knowledge of the attempt to stab Buck, and therefore, counsel should not have made any inquiry about other incidents of violent jail behavior whether or not those incidents appeared in Baumruk’s jail file(29.15L.F.393,395). Moreover, Steele had to have known by penalty phase that there had been a prior social worker incident because Kenyon had elicited in guilt from Shopper about a social worker Buck incident(2ndTrialTr.1989-90,2098-99). Thus, it was not reasonable to ask Venable whether Venable knew of any prior jail incidents whether or not they appeared in Baumruk’s jail records.

Steele elicited evidence supporting the state’s position Baumruk deserved death and rather than neutralizing aggravating circumstances Steele injected additional aggravating matters. *See Gant* and *Ervin*. Thus, the pleadings alleged facts

not refuted by the record and prejudicial to Baumruk that warranted a hearing. *See Driver.*

This Court should order a hearing.

XIV.**RESPONDENT'S REPEATING SLIDE SHOW – TRIAL****COUNSEL INEFFECTIVE**

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, effective assistance, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV, were violated in that effective counsel would have made a complete record so as to have allowed direct appeal counsel to challenge respondent's use of a repeating highly emotionally charged slide show during penalty rebuttal argument and Baumruk was prejudiced because that repetition produced a punishment decision based on caprice and emotion. Had counsel made a sufficient record as to the show's content reversal on direct appeal would have been required.

Counsel was ineffective for failing to make a sufficient record so as to have allowed direct appeal counsel to challenge the prosecutor's use of a repeating highly emotionally charged slide show during penalty rebuttal argument which removed reason from the sentencing decision and injected caprice and emotion.

Slide Show's Content

During the slide show, there were eleven photos which cycled over and over again(29.15Ex.17).⁴

The jury saw a smiling head and shoulders picture of Mary(RetrialEx.9). There was a separate head and shoulders photo of Baumruk(RetrialEx.10).

There was a photo of Mary with her daughter Shelley with Shelley dressed in her wedding gown holding a wedding bouquet at the church where Shelley was married in 1988(2ndTrialTr.2852-55; RetrialEx.102). The slide show included a photo taken during the year before retrial of Shelley's two elementary school age children who knew about Mary, but were born after Mary's death(2ndTrialTr.2856-57;RetrialEx.105).

Mary's daughter, Lisa, identified a photo of Mary with her birthday cake on Mary's forty-fifth and last birthday(2ndTrialTr.2861-62;RetrialEx.106). Lisa identified a photo of Lisa and Mary sitting in front of a fireplace at Lisa's cousin's house from Christmas 1988 or 1989(2ndTrialTr.2863;RetrialEx.108). Lisa identified a newborn nine day old baby photo of Lisa's daughter, Jillian, who was born on February 5, 2004(2ndTrialTr.2863-64;RetrialEx.109). The photo shows an infant with an infant hospital hat that says "Cardinal Glennon Loves Kids"(2ndTrialTr.2863-

⁴ The slide show was 29.15 Exhibit 17. To view the show it is necessary to go to the Power Point's slide #36. Slide #36 will appear to have multiple pictures superimposed on one another. Under the #36 is a star icon, clicking on the star will cause the slide show to cycle through all pictures.

64;RetrialEx.109). Lisa explained that the picture was from when Jillian was able to come home from Cardinal Glennon Hospital after having surgery for a congenital aortic stenosis heart defect(2ndTrialTr.2863-64;RetrialEx.109). Jillian was their Valentine's baby because she got to come home from the hospital on Valentine's Day(2ndTrialTr.2863-64;RetrialEx.109). Lisa also identified an eighteen month old studio picture of Jillian dressed in an orange palm trees outfit and sandals with an ocean waves background, seashells, and a bucket and hand rake for beach sand play(2ndTrialTr.2864;RetrialEx.110).

Before respondent elicited any evidence about Jillian's pictures, counsel objected to Exhibits 109 and 110 as improper victim impact evidence because the offense happened in 1992, the case was being tried in 2007, and Jillian was not even born until a couple of years before retrial(2ndTrialTr.2844-49). Counsel urged that such use was intended to appeal to the jurors' passions and prejudices(2ndTrialTr.2847).

Juxtaposed with these photos were three photos of Mary slumped over in a courtroom chair with blood on her face and neck(29.15Ex.17;RetrialExs.16,20,21).

Respondent's Penalty Closing Argument

The prosecutor's rebuttal argument began with telling the jurors they needed to follow the instructions(2ndTrialTr.3069). Defense counsel had argued a life sentence was worse than death and the jury should not check its common sense at the door(2ndTrialTr.3069). Death was appropriate because of all the lives Baumruk

attempted to take(2ndTrialTr.3069). Dr. Case testified Mary did not die immediately from her gunshot wounds(2ndTrialTr.3070).

Officer Mudd had described how he helped frightened people get out of the courthouse and saved their lives(2ndTrialTr.3070). Baumruk's mental disease or defect defense was disparaged as whenever someone commits a horrible crime it is blamed on mental illness which is "nonsense"(2ndTrialTr.3070-71).

Respondent argued defense counsel went after Dr. Peters hard and had relied on Kouba's testimony to challenge Peters' findings(2ndTrialTr.3071). The jury was again told not to check its common sense at the door because Baumruk was someone who had decided committing this offense was worth dying for and he was not mentally ill(2ndTrialTr.3071). Rabun had testified that Baumruk's commitment to his goals did not make Baumruk suicidal(2ndTrialTr.3071-72). The delusional disorder defense was "nonsense"(2ndTrialTr.3071-72). Baumruk made the "choices" to commit this offense and Baumruk was in control(2ndTrialTr.3072).

Mary's family testified how the offense has impacted them and the instructions provide the jury can consider that as aggravation(2ndTrialTr.3074-75). Baumruk committed this act in the presence of Mary's daughter Lisa who was ten feet away when Baumruk shot Mary(2ndTrialTr.3075). Baumruk's acts reflected "cruelty" and Baumruk following through with what he said he intended to do(2ndTrialTr.3075).

The verdict mechanics instruction established the aggravators outweighed mitigators(2ndTrialTr.3075-76). Baumruk could have controlled himself, but chose not to(2ndTrialTr.3076).

Instruction 17 submitted ten aggravators which were all of the other people Baumruk intended to kill(2ndTrialTr.3076). The jury was told that it should also find as an aggravator Baumruk's Bland acts(2ndTrialTr.3076). The jury was advised the foreperson was required to sign the verdict form(2ndTrialTr.3076-77).

The jury should ignore defense counsel's arguments that life without will be harder than death(2ndTrialTr.3077). The jury's verdict should send a message to those "heroes" in the shooting who were able to stop Baumruk's actions would appreciate(2ndTrialTr.3077).

At this point, Kenyon objected:

MR. KENYON: I'm sorry, Mr. Waldemer. At this point, your Honor, I'm going to object. I want the record to reflect that while Mr. Waldemer is going through his closing argument there is a nice little slide show that's going on behind him that's showing various pictures of the victim's family members, showing Mary Baumruk, various State's exhibits that have been admitted into evidence, pictures of the courtroom. And I anticipate that they will keep on flashing up as he goes through closing argument. I would object to that, and I would at the very least want the record to reflect that this was going on.

THE COURT: The record will reflect that the photographs were being displayed. Do you have a response, Mr. Waldemer?

MR. WALDEMER: I didn't know if there was a legal objection, Your Honor. All I can say is these, every one of these exhibits is in evidence and has been available for the jury and they've all viewed them.

THE COURT: And the objection is overruled. You may proceed.
(2ndTrialTr.3077-78).

Respondent's argument continued that the jury should send the right message of appreciation to those law enforcement officers that Baumruk tried to kill(2ndTrialTr.3078). The jury should send Mary's family members the right message with their decision(2ndTrialTr.3078-79). Whether Baumruk dies of natural causes or is executed he should know the jury believed death was appropriate(2ndTrialTr.3079). During voir dire, the jurors assured the prosecutor they could vote for death and they were admonished to do what they promised they could do(2ndTrialTr.3079-80).

Paragraph 42 of the Motion for New Trial did allege respondent's slide show constituted prejudicial error(2ndTrialL.F.838-39). It urged that the slide show had nothing to do with the prosecutor's argument and the argument did not reflect what was presented in the slide show(2ndTrialL.F.838-39).

29.15 Evidence

Kenyon testified that during respondent's rebuttal penalty phase argument the prosecutor's investigator played a slide show containing pictures admitted at trial(29.15Tr.405-06). Kenyon did object, but had problems formulating the basis for his objections(29.15Tr.405-06). Kenyon felt the slide show did not have anything that tracked and correlated with the prosecutor's argument(29.15Tr.406-07). Kenyon included this matter in the motion for new trial, but failed to have a copy of

respondent's DVD made part of the record(29.15Tr.407-08). Kenyon wanted this matter raised on appeal(29.15Tr.407-08).

Steele did not find the prosecutor's argument corresponded with the slide show(29.15Tr.545). Steele wanted this raised on appeal because the slide show use was improper and highly prejudicial(29.15Tr.545-46).

Appellate counsel Percival testified that she did not raise this matter, even though there was a trial objection and the matter was in the motion for new trial, because there was an insufficient record made as to the exact content of the slide show and what photos were included(29.15Tr.486,498). These considerations were critical because Percival would have needed to discuss the show's details in her brief(29.15Tr.486). What Percival needed to raise the matter was to have a copy of the slide show made part of the record(29.15Tr.486-87).

A copy of the slide show was offered at the 29.15 hearing as Exhibit 17, but the 29.15 judge declined to receive it because her memory of the show was "adequately refreshed" without it(29.15Tr.559-60).

29.15 Findings

The findings state a record objection was made and the motion for new trial, paragraph 42, raised this matter, and therefore, preserved the claim for appeal(29.15L.F.751). All slide show photos were admitted into evidence(29.15L.F.751). Respondent's closing argument and its slide show corresponded with the victim impact evidence presented(29.15L.F.751). The

presentation was relevant and probative of the case's issues and not prejudicial(29.15L.F.751).

Counsel Was Ineffective

The decision to impose death must appear to be based on reason rather than caprice or emotion. *Gardner v. Florida*,430U.S.349,358(1977). A prosecutor's argument utilizing victim impact matters can so infect the sentencing decision to render it fundamentally unfair and deny a defendant due process. *Payne v. Tennessee*,501U.S.808,831(1991).

The slide show improperly prejudicially infected the sentencing decision because the repeated cycling of the combination of photos here appealed to caprice and emotion and rendered the punishment decision fundamentally unfair. *Gardner* and *Payne*. The photos were not even remotely connected up with the content of the prosecutor's closing argument. Instead, the jury's senses were repeatedly inundated with pictures of Mary's grandchildren who were not even born until long after this shooting, including one who had a highly emotionally sentimentally charged history of heart surgery when she was born. The prejudice was only compounded through the pictures of Mary with her daughters, including a picture of Mary with her daughter Shelley dressed in her wedding gown at church. Mary's picture with her last birthday cake contributed further to the caprice and emotion this show engendered. What these photos did, without any connection to the substance of the prosecutor's argument, was create a stark arbitrary emotional contrast with Mary's courtroom pictures. *Gardner* and *Payne*.

Reasonable counsel who objected to respondent's use of the slide show and who wanted this matter challenged on appeal would have had the slide show made part of the record. *Strickland*. Making the slide show part of the record was necessary so that appellate counsel could have presented the issue to this Court because without the slide show in front of this Court counsel's objections were unreviewable. *Strickland*. Baumruk was prejudiced because had counsel made the slide show part of the trial record for this Court's review appellate counsel would have challenged respondent's use of the slide show and a new penalty phase would have been ordered. *Strickland*.

A new penalty phase is required.

XV.**RESPONDENT'S REPEATING SLIDE SHOW – APPELLATE****COUNSEL INEFFECTIVE**

The motion court clearly erred overruling Baumruk's 29.15 because appellate counsel was ineffective and Baumruk's rights to due process, effective assistance, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV, were violated in that effective appellate counsel would have raised trial counsel's objections to a repeating highly emotionally charged slide show during penalty rebuttal argument and Baumruk was prejudiced because that repetition produced a punishment decision based on caprice and emotion and had appellate counsel raised this issue a new penalty phase would have been ordered.

Appellate counsel was ineffective for failing to raise the claim that the prosecutor's use of a repeating highly emotionally charged slide show during penalty rebuttal argument removed reason from the sentencing decision and injected caprice and emotion.

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, the outcome of the appeal would have been different. *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005).

The decision to impose death must appear to be based on reason rather than caprice or emotion. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). A prosecutor's argument utilizing victim impact matters can so infect the sentencing decision to render it fundamentally unfair and deny a defendant due process. *Payne v. Tennessee*, 501 U.S. 808, 831 (1991).

As discussed in Point XIV, counsel objected to the slide show and included it in the motion for new trial, but failed to make the show part of the record for review (2nd Trial Tr. 3077-78; 2nd Trial L.F. 838-39; 29.15 Tr. 407-08, 486-87).

The 29.15 court ruled trial counsel's actions sufficiently preserved the claims relating to respondent's slide show (29.15 L.F. 751). The amended motion alleged that if trial counsel adequately preserved the claim as to the improper use of the cycling slide show, then appellate counsel was ineffective for failing to raise this matter on appeal (29.15 L.F. 411-14). The 29.15 findings did not address the claim appellate counsel was ineffective (29.15 L.F. 750-51).

To avoid unnecessary duplication of the factual contents of respondent's slide show and respondent's closing argument, those matters, as they appear in Point XIV, are incorporated here.

Assuming trial counsel made an adequate record without including the show in the trial record, then appellate counsel was ineffective for raising this matter. For the reasons discussed in XIV the slide show improperly prejudicially infected the sentencing decision because the repeated cycling of the combination of photos here appealed to caprice and emotion and rendered the punishment decision fundamentally

unfair. *Gardner and Payne*. Reasonable appellate counsel would have challenged respondent's use of the show. *Williams, Strickland*. Baumruk was prejudiced because had this claim been raised on direct appeal he would have obtained a new penalty phase. *Williams, Strickland*.

A new penalty phase is required.

XVI.**FAILURE TO ENTER FINDINGS - APPELLATE****COUNSEL INEFFECTIVE**

The motion court clearly erred overruling Baumruk’s 29.15 motion because it failed to enter findings of fact and conclusions of law on whether direct appeal counsel was ineffective in failing to raise trial counsel’s objection to a repeating highly emotionally charged slide show respondent played during penalty rebuttal argument because Baumruk was denied his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends VIII, and XIV in that Rule 29.15 requires findings of facts and conclusions of law on all issues presented.

The motion court failed to enter findings on the claim direct appeal counsel was ineffective in failing to raise trial counsel’s objection to a repeating highly emotionally charged slide show respondent played during penalty rebuttal argument. A remand for findings is required.

This Court reviews for whether the 29.15 court clearly erred. *Barry v. State*, 850S.W.2d348,350(Mo.banc1993). Rule 29.15(j) provides: “The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held.” Meaningful appellate review is dependent upon sufficiently specific findings of fact and conclusions of law that address the movant’s claims. *Brown v. State*, 810S.W.2d716,717-18(Mo.App.,W.D.1991). Supplying findings and

conclusions by implication constitutes improper de novo review. *Id.*718. The failure to issue findings requires a reversal and remand for findings. *Id.*718.

As discussed in Point XIV, trial counsel objected to the prosecutor's use of the slide show and included it in the motion for new trial, but failed to make the show part of the record for review(2ndTrialTr.3077-78;2ndTrialL.F.838-39;29.15Tr.407-08,486-87).

The 29.15 court ruled trial counsel's actions sufficiently preserved the claims relating to respondent's slide show(29.15L.F.751). The amended motion alleged that if trial counsel adequately preserved the claim as to the improper use of the cycling show, then appellate counsel was ineffective for failing to raise this matter on appeal(29.15L.F.411-14). The 29.15 findings did not address the 29.15 claim that assuming trial counsel adequately preserved this matter so that it was reviewable, then appellate counsel was ineffective for failing to raise it(29.15L.F.750-51).

Because the 29.15 court found that trial counsel adequately objected to the cycling slide show during penalty rebuttal argument, so that the claim could have been presented on direct appeal, the trial court was required to enter findings on whether under those circumstances appellate counsel was ineffective. *See Brown*. For this Court to now supply findings would be improper de novo review. *Brown*.

A remand to enter findings is required.

XVII.

RABUN'S DIVORCE

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective, violating his rights to due process, to be free from cruel and unusual punishment, and effective assistance, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have cross-examined and impeached state witness Dr. Rabun that he rendered his first opinions about Baumruk's mental state while Rabun's divorce was pending in front of Judge Hais, an alleged target of Baumruk's courtroom shooting, and that Hais retained continuing authority over any later potentially contested matters to show Rabun's bias for holding opinions unfavorable to Baumruk and Baumruk was prejudiced because respondent urged the jury to reject Baumruk's defenses based on Rabun's opinions.

Counsel was ineffective for failing to cross-examine and impeach Dr. Rabun, respondent's expert. Rabun rendered his first opinions, which were the basis for his subsequent opinions, on Baumruk's mental state while Rabun's divorce was pending before Judge Hais, an alleged target of Baumruk's shooting. Judge Hais had ongoing authority to adversely impact later contested terms of Rabun's divorce.

Rabun's Evaluator History

In 1994, respondent retained Rabun who opined Baumruk did not have a mental disease or defect and was competent to proceed(1stTrialTr.400-02,441).

In 1999, Rabun evaluated Baumruk as a court appointed competency evaluator(1stTrialTr.408). Rabun believed Baumruk was competent to proceed(1stTrialTr.279-81,288).

In March, 2000, respondent furnished Rabun additional information it wanted Rabun to consider(1stTrialTr.291,415-17,564-65). Rabun opined Baumruk did not suffer from any mental disease or defect and was competent to proceed(1stTrialTr.399-400,434-35). Rabun believed Baumruk was malingering as to amnesia and chooses to have a selective memory(1stTrialTr.337,394,448-50,568,601).

Rabun's Retrial Testimony

Rabun opined Baumruk was malingering as to his memory loss(2ndTrialTr.2402-03). Baumruk had a selective memory for being able to remember neutral matters leading up to the shooting, but an inability to remember matters related to the shooting itself(2ndTrialTr.2403-05).

According to Rabun, Baumruk did not suffer from any mental disease or defect, including delusions(2ndTrialTr.2409,2415). Baumruk knew and appreciated the wrongfulness of his conduct and had the ability to conform his conduct to the requirements of law(2ndTrialTr.2415-16,2432).

Respondent told the jury in its initial guilt closing argument that “[t]he testimony of John Rabun is overwhelming that this man suffers from no mental disease whatsoever”(2ndTrialTr.2676).

Counsels' Testimony

Rabun's 1994 report was used as a basis for his May, 1999 and June, 2000 reports(29.15Tr.349-50). Kenyon did not know Judge Hais presided over Rabun's divorce(29.15Tr.350). Kenyon did not believe Hais presiding over Rabun's divorce was valuable impeachment because the divorce was uncontested(29.15Tr.432-33).

Steele, who cross-examined Rabun at trial (2ndTrialTr.2461,2599), initially stated he would have wanted to cross-examine Rabun about Hais being the judge in Rabun's divorce, but did not know that information(29.15Tr.509). On cross-examination, Steele changed his testimony to say he would not have used that information because thirteen years had passed between the time of Rabun's divorce and Baumruk's retrial(29.15Tr.551-52).

Findings

Counsel testified they were unaware of Rabun's divorce, but would not have considered it worth cross-examining about since Rabun's divorce was uncontested(29.15L.F.730). Attacking Rabun's credibility this way would have diminished counsels' standing with the jury(29.15L.F.730). Rabun's divorce occurred more than ten years before he testified at retrial so cross-examining him about it would not have impacted the result(29.15L.F.730).

Counsel Was Ineffective

Counsels' strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). Lack of diligence in investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991).

Counsel is ineffective when they fail to impeach critical witnesses. *Black v. State*, 151 S.W.3d 49, 51 (Mo. banc 2004); *Hadley v. Goose*, 97 F.3d 1131, 1136 (8th Cir. 1996). “[T]he pecuniary interest, bias or prejudice of a witness may always be shown.” *State v. Anderson*, 79 S.W.3d 420, 437 (Mo. banc 2002). “Because the jury is to assess credibility, it is entitled to any information which might bear significantly on the veracity of a witness....[A]nything that has the legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness is proper for determining the credibility of a witness.” *Wainwright v. State*, 143 S.W.3d 681, 689 (Mo. App., W.D. 2004) (internal quotation marks and citations omitted).

Rabun’s divorce file reflects he was the petitioner who filed for divorce on September 6, 1994 and was represented by Frank Susman (29.15Ex.20 at 1). Judge Hais was the judge (29.15Ex.20 at 2). The disposition date of the divorce was December 9, 1994 (29.15Ex.20 at 1; 29.15Tr.349). The divorce decree was granted on January 3, 1995 (29.15Ex.20 at 2; 29.15Tr.349). Rabun’s first evaluation report, dated December 9, 1994, is the same day there was a disposition of Rabun’s divorce (29.15Ex.20 at 1; 29.15Tr.349; 29.15Ex.27 at 1).

Rabun should have been questioned about Judge Hais having been the judge who presided over Rabun’s divorce to show Rabun had a bias for finding Baumruk competent since Judge Hais was held out as an intended target of Baumruk’s acts (2nd Trial Tr. 1036-37). Rabun’s divorce proceedings were proceeding

concurrently with Rabun's first, 1994 evaluation and the date of Rabun's first report was the same day, December 9, 1994, as there was a disposition of Rabun's divorce(29.15Ex.20 at 1;29.15Tr.349;29.15Ex.27 at 1). Thus, Rabun had a bias for finding Baumruk competent to proceed to avoid any possibility of alienating Judge Hais.

Rabun and his wife had one child born on August 15,1992(29.15Ex.20 at 4,6). Rabun was required to pay \$1025/month child support and \$1000/month maintenance(29.15Ex.20 at 2,4-5,8-9). Rabun's wife was given primary custody of their child(29.15Ex.20 at 8). Rabun was to have reasonable temporary visitation and custody "as the parties shall agree upon"(29.15Ex.20 at 8). Even though Rabun's divorce was uncontested, Judge Hais would have retained authority to rule on later in time contested matters relating to child support, maintenance, child custody, and visitation. That the divorce provided for visitation and custody "as the parties shall agree upon" meant in the absence of agreement Judge Hais would be called to act. Thus, Rabun had a bias for making findings unfavorable to Baumruk to try to remain in Judge Hais' good graces.

Rabun's 1994 report was used as a basis for Rabun's May, 1999 and June, 2000 reports(29.15Tr.349-50). All the evaluations Rabun did were the basis for Rabun's trial testimony opinions. That 13 years had passed from the time of Rabun's divorce and Rabun's trial testimony did not diminish the impeachment value of eliciting Hais presided over Rabun's divorce because Rabun's 1994 initial opinion, rendered during his divorce's pendency before Hais, was the premise for all his

subsequent findings. Moreover, Rabun was not going to express a different opinion over time when Hais had power to modify contested matters relating to child support, maintenance, child custody, and visitation after Rabun locked in his opinion in 1994 when Rabun's divorce was pending in front of Hais.

Reasonable counsel would have cross-examined Rabun about him having formulated his initial unwavering opinion while his divorce was pending in front of Judge Hais and Hais' ability to impact Rabun's circumstances adversely in the future to show Rabun's bias. *See Black, Hadley, Anderson, Wainwright, and Strickland.* Baumruk was prejudiced because respondent urged that Rabun's opinions were overwhelmingly credible and the jury should believe them(2ndTrialTr.2676). *See Strickland.*

Counsel did not know that Hais presided over Rabun's divorce and that was a matter of a lack of diligent investigation(29.15Tr.350,509). *See Kenley.* It was not reasonable strategy to fail to impeach Rabun on these matters. *See Black, Hadley, Anderson, Wainwright, and Strickland.*

A new trial is required.

XVIII.**DRS. FISHER'S AND PERKOWSKI'S OPINIONS DEMONSTRATED
INCOMPETENCY TO PROCEED**

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, effective assistance, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV, were violated in that effective counsel would have presented treating physicians Fisher's and Perkowski's opinions that Baumruk's memory deficits were genuine because as Baumruk's treating physicians, and not retained experts, their opinions Baumruk's memory loss was genuine were especially credible and there is a reasonable probability Baumruk would have been found incompetent to proceed.

Counsel was ineffective for failing to present Drs. Fisher's and Perkowski's findings which would have supported finding Baumruk incompetent to proceed.

Retrial Competency Hearing Evidence

At the competency proceedings, the court heard each side's experts' competing views on whether Baumruk remembered what happened, was malingering as to lack of memory, or was confabulating as to what happened based on what he had learned through other people's reporting(6/28-29/05Tr.100-01,238-40,248-49,251,268-69,274,276,372,411-15,419-21,425,479,485-87,534-35,588; 1/24/94Tr.38,40-41,75-77,97-98,181; 1/27/94Tr.57,193-95).

Bagsby testified at the 2005 competency hearing that he and Green for purposes of the first trial had urged Baumruk that if he recalled what happened at the courthouse to do so(6/28-29/05Tr.246-47). Baumruk was only able to talk to them about the shooting after he was provided the police reports and even then could not relate whether their contents accurately reported what happened(6/28-29/05Tr.248-49).

29.15 Hearing Evidence

Bagsby interviewed Dr. Linda Fisher in preparation for the first trial(29.15Tr.14,18). Bagsby prepared a memorandum of their June, 1993, conversation(29.15Ex.7;29.15Tr.15-16). Dr. Fisher was the Chief of St. Louis County's Department of Health and her specialty was internal medicine(29.15Tr.19). Fisher was one of Baumruk's treating physician's at Regional Hospital and later when Baumruk was at County Jail(29.15Tr.17,351,353).

Bagsby's memo recounted that Fisher was board certified in internal medicine and a Harvard Medical School graduate practicing since 1978(29.15Ex.7;29.15Tr.351). Before Fisher was the Chief of St. Louis County's Department of Health, she was the chief physician for the St. Louis Police Department(29.15Ex.7). Fisher indicated to Bagsby that she had seen many head injuries in her practice and the severity of Baumruk's injuries was rare(29.15Ex.7;29.15Tr.352-53). Fisher believed Baumruk's memory deficits were permanent and the memories he appears to have are based on confabulation from information other people have supplied him and that Baumruk has no real memories

of the shooting(29.15Ex.7;29.15Tr.353). At the time of the 29.15 hearing Fisher was deceased, but she was alive at the time of the 2005 competency proceedings(29.15Ex.6).

Bagsby's memo about Fisher was part of the materials Kenyon and Steele had and Kenyon reviewed that memo(29.15Tr.350-51). Kenyon acknowledged the main issue in the 2005 competency hearing proceedings was whether Baumruk was faking memory loss(29.15Tr.352). Kenyon did not investigate calling Fisher(29.15Tr.353). Kenyon testified the information that could have been presented through Fisher is something he would have wanted to do(29.15Tr.354).

Kenyon testified the value of any testimony by Fisher would have been diminished because the other defense experts were psychologists or psychiatrists, while Fisher was an internal medicine physician, and their opinions were based on more recent information about Baumruk than was reflected in Fisher's findings(29.15Tr.433-36). Kenyon testified the defense retained experts agreed Baumruk's physical condition and memory had improved(29.15Tr.436).

Psychiatrist Dr. Perkowski was a treating physician for Baumruk at Fulton State Hospital in October, 1994(29.15Ex.25;29.15Tr.356). Perkowski found Baumruk had a loss of long term memory and that was unlikely to improve significantly(29.15Ex.25;29.15Tr.356). Perkowski found Baumruk suffered from dementia due to head trauma(29.15Ex.25;29.15Tr.356).

Kenyon testified that other doctors, including Harry, had diagnosed Baumruk with dementia in 1994, but had changed their diagnosis to not include dementia based

on evaluating Baumruk since 1994(29.15Tr.437). Kenyon also testified Perkowski, therefore, would have disagreed with other defense experts on the dementia diagnosis, who included Dr. Kaufman, and for that reason it would not have been wise to call Perkowski(29.15Tr.437-38).

29.15 Findings

At the competency proceedings, experts testified that Baumruk's memory and overall condition were substantially better than they were in 1993 and 1994(29.15L.F.731-32). Fisher's and Perkowski's testimony would have been cumulative to what was presented, impeached by Baumruk's current condition, and of insignificant value to Baumruk's incompetency claim(29.15L.F.731-32).

Counsel Was Ineffective

A disinterested witness may be more credible to the fact finder because that witness has no stake in the case's outcome. *State v. Hayes*, 785 S.W.2d 661, 663 (Mo.App., W.D. 1990). Fisher and Perkowski were disinterested witnesses not retained by either side. Kenyon acknowledged the main issue at the 2005 competency hearing was whether Baumruk was faking memory loss(29.15Tr.352). Both Fisher and Perkowski, as Baumruk's treating physicians, had concluded his memory deficits were genuine and expected to be longstanding(29.15Ex.7;29.15Ex.25;29.15Tr.353,356). Because neither Fisher nor Perkowski were retained experts, they had no stake in the outcome and were especially credible on the genuineness of Baumruk's memory deficits. *See Hayes*.

Thus, reasonable counsel would have called them and there is a reasonable probability Baumruk would have been found incompetent to proceed. *See Strickland*.

Counsel's failure to call Fisher, because her specialty was internal medicine and Baumruk had displayed improvement since she treated him, was not reasonable. *See McCarter*. Fisher was the Chief of St. Louis County's Department of Health who had seen many head injuries in her practice and had found the severity of Baumruk's injuries was rare(29.15Ex.7;29.15Tr.352-53). Fisher's experience with head injuries as an internal medicine specialist made her just as credible as a psychologist or psychiatrist. Fisher never said that Baumruk could not experience any improvement in his memory deficits. Instead, Fisher's findings were his memory deficits were permanent and memories Baumruk appeared to have were based on information others had provided to him(29.15Ex.7;29.15Tr.353). Fisher's findings went to the very issue Kenyon said the competency hearing was about - whether Baumruk's memory loss was genuine(29.15Tr.352).

It likewise was unreasonable to fail to call Perkowski because his diagnosis included dementia(29.15Tr.437-38). *See McCarter*. At the most recent competency proceeding in 2005, the **state's own expert**, Reynolds, diagnosed Baumruk as having dementia NOS caused by the brain damage he sustained in the shooting(6/28-29/05Tr.97-98). Thus, failing to call Perkowski because he had diagnosed Baumruk as having dementia was unreasonable. Notably, Reynolds was unable to express an opinion whether Baumruk was malingering as to memory loss about the shooting's details(6/28-29/05Tr.133-34).

Defense experts Parwatikar and Cuneo, who counsel called at the 2005 competency proceedings, testified that Baumruk had dementia due to head trauma and had an amnesia disorder(6/28-29/05Tr.270-71,408-09,411,425,479,485-86). Thus, counsel in fact called two experts at the 2005 competency hearing to opine Baumruk has dementia. Calling Perkowski as a treating physician, rather than as a hired expert, would have made the retained experts' testimony especially credible on Baumruk's memory deficits. *See Hayes.*

Harry testified at the 2005 competency hearing that Harry did a court ordered competency evaluation of Baumruk in 1994 and found dementia due to head trauma such that Baumruk lacked the capacity to assist counsel(6/28-29/05Tr.511-12). Harry explained at the 2005 competency hearing that between 1994 and 2003 there was a new edition of the DSM which gave greater specificity to the diagnosis of dementia due to head trauma(6/28-29/05Tr.518-22). Harry's changed diagnosis at the 2005 hearing from dementia to amnestic disorder was the result of the DSM's diagnostic criteria changes(6/28-29/05Tr.518-23). Harry testified in 2005 that Baumruk's reporting he does not remember what happened was genuine(6/28-29/05Tr.534-35). To the extent that Perkowski's dementia finding would not have tracked Harry's 2005 conclusion that was attributable and explainable, as Harry did explain, to modifications made in the DSM. The critical fact is that Perkowski and Harry both opined Baumruk has genuine substantial memory deficits and Perkowski, as a disinterested witness, would have made the other experts' memory loss findings especially compelling. *See Hayes.*

Kaufman's 2003 evaluation report includes the diagnosis amnesic disorder due to traumatic brain injury(29.15Ex.9 at 10). Kaufman's 2003 report could not provide any definitive opinions because he was not provided any medical records to review and Kaufman denominated his report a "**Limited** Neuropsychological Evaluation"(29.15Ex.9 at 1,11;29.15Ex.10 at 2)(emphasis added). Kaufman's later 2006 report concluded that Baumruk does not meet the criteria for a dementia diagnosis(29.15Ex.10 at 19). Kaufman, however, was not called by defense counsel to testify at the 2005 competency hearing so presenting Perkowski's findings would not have contradicted Kaufman(29.15Tr.123-24). The prosecutor, not defense counsel, used Baumruk's I.Q. scores in Kaufman's report (29.15Ex.9) to cross-examine Cuneo(6/28-29/05Tr.441-47). Moreover, Kaufman's findings of no dementia is explainable for the reasons Dr. Harry offered – the DSM's criteria for dementia had changed, and thus, Perkowski was not inconsistent with Kaufman.

Reasonable counsel would have presented Fisher and Perkowski's findings because as disinterested witnesses they would have made the retained experts' findings on the genuineness of Baumruk's memory loss especially credible and there is a reasonable probability Baumruk would have been found incompetent to proceed. *See Strickland and Hayes.*

Baumruk's conviction should be reversed for a new trial.

XIX.**FAILURE TO CALL TREATING NURSES****GAST AND JOHNS**

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective and Baumruk's rights to due process, effective assistance, and to be free from cruel and unusual punishment, U.S. Const. Amends VI, VIII, and XIV, were violated in that effective counsel would have called Baumruk's Barnes Hospital treating nurses Gast and Johns in penalty to testify patients with Baumruk's kinds of head injuries can become belligerent, as a result of their head injuries, to neutralize respondent's aggravating evidence about Baumruk's belligerent behavior Regional Hospital nurse Williams reported which was elicited through Rabun and was used to cast Baumruk as just a "jerk."

Counsel was ineffective for failing to call treating nurses Gast and Johns to testify in penalty that patients with Baumruk's kinds of head injuries can become belligerent, as a result of their head injuries, to neutralize respondent's aggravating evidence about Baumruk's belligerent behavior Regional Hospital nurse Williams reported.

Trial Evidence

Rabun recounted Williams had reported Baumruk grabbed her arm when he felt she was not doing her job properly and told her that she deserved to have the same thing happen to her as happened to his wife(2ndTrialTr.2398-99).

29.15 Evidence

Cathy Johns and Catherine Gast were nurses at Barnes' neuro ICU unit who participated in Baumruk's care(29.15Tr.272,280-83,303-05,307). They worked with patients who had head and brain injuries(29.15Tr.273). Johns and Gast recounted patients with brain injuries can become belligerent(29.15Tr.286,309-11).

Kenyon did a memo of his interviews of Johns and Gast(29.15Tr.389-90). Both nurses reported Baumruk was ornery, but they considered that not uncommon for patients who had severe head trauma(29.15Tr.389-90). Kenyon decided not to call Johns and Gast because he learned respondent was not going to call Williams(29.15Tr.392). The purpose Kenyon would have called Johns and Gast for was countering the state painting Baumruk as just a "jerk"(29.15Tr.456).

29.15 Findings

Counsel testified they did not call Gast and Johns because respondent did not call Williams and that was reasonable strategy(29.15L.F.743-44). Gast and Johns only cared for Baumruk once or twice while he was at Barnes, and therefore, could not rebut what Williams had reported(29.15L.F.744).

Counsel Was Ineffective

Counsel has a duty to neutralize the state's aggravating circumstances. *Ervin v. State*, 80S.W.3d817,827(Mo.banc2002). "[E]vidence of impaired intellectual functioning is inherently mitigating...." *Hutchison v. State*, 150S.W.3d292,308(Mo. banc2004)(relying on *Tennard v. Dretke*, 542U.S.274,288(2004)). The jury heard through Rabun about Williams' reporting of Baumruk's belligerent behavior, which was aggravating(2ndTrialTr.2398-99).

Reasonable counsel would have called Gast and Johns because while they had found Baumruk to be ornery, they would have testified that belligerent behavior is not uncommon from persons' who have sustained severe brain trauma as Baumruk had. Gast and Johns would have neutralized the aggravating evidence Rabun reported and it was evidence of impaired intellectual functioning. *See Ervin and Hutchison.* Moreover, Gast and Johns would have countered respondent's closing argument Baumruk was just a "jerk" (2ndTrialTr.2658,2724). Baumruk was prejudiced because the jury did not hear evidence that neutralized the state's portrayal of him as a "jerk." The decision not to call Gast and Johns was unreasonable because while Williams did not testify, the jury heard from Rabun what Williams had reported about Baumruk being belligerent. *See McCarter.*

A new penalty phase is required.

CONCLUSION

For the reasons discussed this Court should order the following: (a) Points IX, XII, XVII, XVIII - a new trial; (b) Points I, X - a new trial or at minimum a new penalty phase; (c) Points V, XI, XIV, XV, XIX - a new penalty phase; (d) Points II, III, VI, VII, VIII, XIII - a 29.15 evidentiary hearing; (e) Point IV - remand to allow medical scans; and (f) Point XVI - remand for findings.

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 2007, 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 30,960 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in September, 2011. According to that program the brief is virus-free.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 28th day of September, 2011, on the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
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