

**IN THE
SUPREME COURT OF MISSOURI**

RICHARD D. DAVIS,)
)
 Appellant,)
)
 vs.) **No. SC94622**
)
 STATE OF MISSOURI,)
)
 Respondent.)

**APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 16
THE HONORABLE MARCO A. ROLDAN, JUDGE**

BRIEF OF APPELLANT

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CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF FACTS	2
POINTS RELIED ON	31
STANDARD OF REVIEW – ALL POINTS	39
ARGUMENT	
I. Failure to present sexual trauma evidence	40
II. Rick was incompetent to be tried	66
III. Failure to present evidence of bipolar disorder – diminished capacity	77
IV. Failure to of bipolar disorder – mitigation	87
V. Failure to present evidence of bipolar disorder – NGRI	94
VI. Failure to present evidence of involuntary intoxication	100
VII. Failure to prepare and call Rick to testify – guilt phase	112
VIII. Failure to prepare for Rick’s testimony – penalty phase	121
CONCLUSION	126
CERTIFICATE OF COMPLIANCE AND SERVICE	127

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Antwine v. Delo</i> ,54 F.3d 1357(8thCir. 1995)	65,85,93,98
<i>Com. v. McDermott</i> ,864 N.E.2d 471(Mass.2007)	108
<i>Cuyler v. Sullivan</i> ,446 U.S.335(1980)	39
<i>Deck v. State</i> ,68S.W.3d418(Mo.banc2002)	39,65,86,93,99
<i>Drope v. Missouri</i> ,420 U.S.162(1975)	73
<i>Dusky v. United States</i> ,362 U.S.402(1960)	73,76
<i>Feuget v. State</i> ,454 S.W.3d 734(Ark.2015)	107
<i>Glass v.State</i> ,227 S.W.3d 463(Mo.banc2007)	63,90,110
<i>Howard v. State</i> ,59 S.W.3d 586(Mo.App.E.D.2001)	118
<i>Hutchison v. State</i> ,150 S.W.3d292(Mo.banc2004)	61,63,84,90,97,110
<i>Jacobson v.State</i> ,2015 WL 2214569(Fla.App.May 13,2015)	107
<i>Johnson v. State</i> ,479 S.W.2d 416(Mo.1972)	109
<i>Kenley v. Armontrout</i> ,937 F.2d1298(8thCir.1991)	61,82,84,89,92,96,97,110,120,125
<i>Kyles v. Whitley</i> ,514 U.S.419(1995)	65,85,93,98
<i>Lankford v. Idaho</i> ,500 U.S.110(1991)	39
<i>Marsh v. State</i> ,942 S.W.2d 385(Mo.App.W.D.1997)	74
<i>Mendenhall v. State</i> ,15 S.W.3d 560(Tex.App.2000), <i>affirmed</i> ,77 S.W.3d 815(Tex.Crim.App.2002)	108

<u>CASES</u> (Continued):	<u>Page</u>
<i>Morrow v. State</i> , 21S.W.3d 819(Mo.banc2000)	39
<i>Murphy v. Carron</i> ,536 S.W.2d 30(Mo. banc 1976)	74
<i>Pate v. Robinson</i> ,383 U.S.375,378(1966)	73,74
<i>Patton v. State</i> ,973 P.2d 270(Okla.Ct.Crim.App.1998)	107
<i>Penry v. Lynaugh</i> ,492 U.S.302(1989)	64,90
<i>People v. Hari</i> ,843 N.E.2d 349(2006)	106
<i>People v. Mathson</i> ,210 Cal.App.4th 1297(2012)	107
<i>Pulliam v. State</i> ,480 S.W.2d 896(Mo.1972)	73
<i>Rock v. Arkansas</i> ,483 U.S.44(1987)	118,123
<i>Rompilla v. Beard</i> ,545 U.S.374(2005)	60,64,65,83,89,98
<i>State ex rel. Sisco v. Buford</i> ,559 S.W.2d 747(Mo.banc 1978)	73
<i>State v. Anderson</i> ,515 S.W.2d 534(Mo. banc1974)	83
<i>State v. Anderson</i> ,851 N.W.2d 760(Wisc.2014)	107
<i>State v. Brown</i> ,902 S.W.2d 278(Mo.banc 1995)	59,62
<i>State v. Davis</i> ,318 S.W.3d 618(Mo. banc 2010)	118,123
<i>State v. Elam</i> ,779 S.W.2d 7167(Mo.App.E.D.1989)	108,109
<i>State v. Erwin</i> ,848 S.W.2d 476(Mo.banc 1993)	83
<i>State v. Johns</i> ,34 S.W.3d 93(Mo.banc 2000)	73,76
<i>State v. McCarter</i> ,883S.W.2d 75(Mo.App.S.D.1994)	61,84,92,97,110,120,125
<i>State v. Samuels</i> ,905 S.W.2d 536(Mo.App.S.D. 1995)	108
<i>State v. Shields</i> ,862 S.W.2d 503(Mo.App.E.D.1993)	108,109

<u>CASES</u> (Continued):	<u>Page</u>
<i>State v. Simmons</i> ,955 S.W.2d 752(Mo.banc 1997)	74
<i>State v. Walkup</i> ,220S.W.3d748(Mo.banc2007)	82,83
<i>State v. Wise</i> ,879 S.W.2d 494(Mo.banc1994)	73
<i>State v. White</i> ,913 S.W.2d 435(Mo.App.E.D.1996)	59,62
<i>Strickland v. Washington</i> ,466 U.S.66(1984)	39,64,65,86,93,99
<i>Tennard v. Dretke</i> ,542U.S.274(2004)	63,90,110
<i>Wiggins v. Smith</i> ,539U.S.510(2003)	60,63,64,65,83,89,91,98
<i>Williams v. Taylor</i> ,529U.S.362(2000)	60,64,65,83,89,98
<i>Woodson v. North Carolina</i> ,428U.S.280(1976)	39

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. V	118,123
U.S. Const., Amend. VI	39,40,66,77,87,94,100,112,118,121
U.S.Const., Amend. VIII	39,40,66,77,87,94,100,112,121
U.S. Const., Amend. XIV	39,40,66,77,87,94,100,112,118,121,123
Mo. Const., Art. I, Sec. 10	40,66,77,87,94,100,112,121
Mo. Const., Art. I, Sec. 18(a)	40,66,77,87,94,100,112,121
Mo. Const., Art. I, Sec. 19	118
Mo. Const., Art. I, Sec. 21	40,66,77,87,94,100,112,121

STATUTES – Missouri:

§546.260 118

§552.015 82

§552.020 73

§552.030 96

§562.076 106

§565.032 92,93

STATUTES – Other States:

§720 ILCS 5/6–3(West 2002)(Illinois) 106

Wis. Stat. §939.42 108

MISSOURI SUPREME COURT RULES:

Rule 29.15 39

OTHER:

MAI-CR 310.52 106,109

American Psychiatric Association; Practice Guideline for the Treatment
of Patients with Bipolar Disorder 104

Merriam-Webster Online Dictionary 81

JURISDICTIONAL STATEMENT

Richard Davis appeals the denial of his motion under Rule 29.15 by the Honorable Marco A. Roldan, Judge of the Circuit Court of Jackson County, Missouri. Mr. Davis had sought to vacate his conviction of first degree murder, §565.020,¹ and the resultant sentence of death imposed by the Honorable Judge Roldan. The motion court denied relief on October 1, 2014(PCR.L.F.1530), and notice of appeal was timely filed November 10, 2014(PCR.L.F.1533). Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art.V,§3,Mo.Const.

¹ All statutory citations are to RSMo 2000, unless otherwise noted.

STATEMENT OF FACTS

Richard (Rick) Davis was convicted of first-degree murder and sentenced to death for his part in the murder of Marsha Spicer on May 14, 2006(L.F.5359).² Rick's acts were not in dispute at trial; instead, counsel's argument was that neither Rick nor Dena Riley deliberated on the killing(Tr.4209,4215). Rick's mental status at the time was not otherwise placed in issue. The State's theory as submitted and found by the jury was that Riley was actually the one who killed Ms. Spicer, and that Rick aided her after deliberation(L.F.5130).

Rick's background—trial evidence

Rick's mother, Billie Carol Davis, was eighteen at the time of Rick's birth; she did not list Rick's father on his birth certificate and there were indications that she did not know who the father was(Tr.4582;M.Ex.1,p.1). Billie married Stan Cothern³ when Rick was six years old(M.Ex.1,pp.1,50). Rick was twelve when he was first admitted to Western Missouri Mental Health Center, having been ordered there by the juvenile court(M.Ex.1,p.49). One issue that led Rick to the court system was his running away

² The record is denominated as follows: The direct appeal legal file will be shown as(L.F.), the supplemental legal file from the direct as(Supp.L.F.), the trial transcript as(Tr.), the post-conviction legal file as(PCR.L.F.), the evidentiary hearing transcript as(Hr.Tr.), Movant's exhibits as(M.Ex.), and Respondent's exhibits as(Resp.Ex.).

³ Mr. Cothern's name was misspelled "Cotheren" in the trial transcript, and was misspelled "Cauthern" in the evidentiary hearing transcript.

from home(M.Ex.1,p.49). In the course of the juvenile proceedings, Stan admitted beating Rick(Tr.4576).

Trial counsel retained psychologist Steven Mandracchia to evaluate Rick and assess his mental condition, at trial and at the time of the offenses, and “assess general background and developmental issues that may have contributed to” the charged offenses(Tr.4571-72). Dr.Mandracchia is a forensic psychologist employed by the State of Missouri Department of Mental Health at the Western Missouri Mental Health Center(WMMHC)(Tr.4569-70). His evaluation included an assessment of Rick’s sexual development(Tr.4572). Dr.Mandracchia found the lack of interpersonal connection and physical abuse that existed in Rick’s family when he was growing up, and the nature and range of sexual experiences beginning at a very early age in his life to be striking(Tr.4574).

Normal human development depends on children, from an early age, having “positive relationships with those around them”(Tr.4575). Dr.Mandracchia found Rick’s family experiences “laden with pretty harsh physical abuse, inconstant adult figures, and sexual abuse”(Tr.4576). The records consistently showed a harsh, antagonistic home environment(Tr.4576). Records from WMMHC showed that Rick was being severely “scapegoated” as a child and the family needed help to see that(Tr.4577,4579). Rick got the brunt of whatever negative, abusive, and rejection behaviors were going on in his home(Tr.4580).

The assessment at WMMHC showed Rick was depressed and anxious, had very low self-esteem, and had become very angry(Tr.4581). His anger and his sexuality

became associated(Tr.4582). Rick's parents resisted treatment, rejected him, and lacked concern for him(Tr.4582).

Rick's earliest sexual experiences began at age 6 and involved family members setting up sexual acts or at least simulated sexual acts with his sister(Tr.4590). Rick reported that between age 10 and 12 he was engaging in sexual activity with a range of people including adults(Tr.4591). By age 15, he was already tired of "routine sexuality" and moved to anal sex, threesomes, rough sex(Tr.4591). Adult family members had provided inadequate supervision; at least one aunt had made Rick and his sister engage in sexual acts and the aunt had talked with Rick about her sexual experiences(Tr.4592).

Rick reported being molested at least twice when he was a child, and at least once by his stepfather(Tr.4593). Sexual abuse happened across generations in Rick's family(Tr.4593). The constant exposure Rick had to sex contributed to how he developed psychologically(Tr.4594).

Dr.Mandracchia found Rick probably had several severe personality disorders(Tr.4597). He identified these disorders as antisocial personality, narcissism, and paranoid personality(Tr.4598). The rejection, lack of acceptance, and lack of warmth in his home contributed to his distrust and insecurity in social and interpersonal relationships(Tr.4599). Rick was given "woefully little" that could have helped him develop in a more positive direction(Tr.4599). In essence, Rick was abandoned by his parents(Tr.4599).

The psychological term for Rick’s significant sexual abnormalities is paraphilia—attraction “outside of normal” to something(Tr.4601). Rick’s paraphilias, which involved children and aggressive types of sexual activity, had begun by his adolescence(Tr.4602-04). The childhood sexual abuse Rick experienced was a factor in the development of his paraphilias(Tr.4604).

Dr.Mandracchia asked Rick several times if his stepfather had sexually abused him(Tr.4610-11). He finally asked Rick whether it had happened, had not happened, he did not remember, or he was not going to tell Dr.Mandracchia; Rick said, “I’m not going to tell you”(Tr.4611). Other people, including Vickie Gunn, Rick’s former girlfriend, had reported to Dr.Mandracchia that Rick had said he had been sexually abused by his stepfather(Tr.4611).

Dr.Mandracchia said that many things in Rick’s childhood, including who his parents were, and whether he was molested or beaten by adults, were out of his control—as is true for everyone—and those things had contributed to his development(Tr.4614). Dr.Mandracchia explained he was not saying that Rick could not control his behavior(Tr.4614). He meant that Rick could not control the factors that influenced him, e.g., the violence in his home when he was a 96-pound 12 year-old, the extensive, multi-generational sexual abuse in his family, the deviant sexuality that Rick experienced at a very young age and lack of supervision by adults, the complete abandonment by his father and significant abandonment by his mother(Tr.4614-16).

Dr. William Logan

Dr. Logan is a board-certified psychiatrist(Hr.Tr.508). He was originally retained by trial counsel in 2006, at first because counsel were interested in whether Rick would benefit from medication—there was a great deal of strain between Rick and counsel at that time(Hr.Tr.523-24). Dr. Logan did not testify at trial, but he testified at the post-conviction evidentiary hearing about his work with Rick and the defense team during the pretrial phase of the case.

Rick clearly did not trust the defense team; there were disagreements over how to proceed in several areas(Hr.Tr.524). Dr. Logan was asked to determine whether Rick had a treatable condition and whether treatment might make his relationship with counsel more workable(Hr.Tr.524). Dr. Logan also sought to determine whether Rick's working relationship with Dr. Mandracchia, which had also deteriorated, could be restored(Hr.Tr.525).

Between January and March, 2007, Dr. Logan talked with Rick six or seven times(Hr.Tr.527). After the initial meeting, in which he was fairly conversant and forthcoming, Rick later became extremely tense, quite paranoid, and very suspicious(Hr.Tr.527). There was a change after Rick's disagreement with trial counsel—he particularly had cross words with lead counsel Tom Jacquinet(Hr.Tr.527). Rick went from being fairly revealing to wanting to say very little about how he was doing or what he was dealing with emotionally(Hr.Tr.527-28). Dr. Logan had to ask specific questions and Rick provided one- or two-word answers(Hr.Tr.528).

Rick became very suspicious of the defense team; he thought they were spying on him and cooperating with the prosecutor(Hr.Tr.528). He also thought they were withholding things from him and wanted to see him convicted(Hr.Tr.528). He did not see them as being his allies(Hr.Tr.528). He indicated that he thought his current defense team was the same as the original team, from before the case became a capital case(Hr.Tr.528). He said he did not believe Dr.Logan when told that they were different(Hr.Tr.528).

Although there was nothing to indicate psychosis, Rick was angry and paranoid(Hr.Tr.529). His degree of paranoia was certainly near delusional proportions, in that there was no objective reason to think the defense team was out to undermine him(Hr.Tr.529). Rick wasn't amenable to any reasons Mr.Jacquinot would give to support his position about Rick's defense(Hr.Tr.529). Dr.Logan evaluated Rick for competence, though without going into a great deal of detail(Hr.Tr.529). He suggested that an antipsychotic medication with a mood stabilizer be prescribed(Hr.Tr.529).⁴ Dr.Logan did not prepare a competency report or give a definitive opinion(Hr.Tr.530).

Because Rick did not talk about his emotional state, mitigation specialist Carol Muller tried other sources of information about Rick's functioning—correctional officers and other jail contacts(Hr.Tr.530,857,861). She reported to Dr.Logan that

⁴ Dr.Logan was not Rick's treating psychiatrist—prescriptions were handled by the jail's contract physician while Rick was incarcerated pretrial(Hr.Tr.526).

Rick had become so agitated he had beaten down a wall, that he was extremely paranoid of other inmates, and that he was talking to himself and beating his head against a wall(Hr.Tr.530). Rick would not talk about this behavior(Hr.Tr.530).

At one point Rick became angry, believing that Muller and the defense team were spying on him(Hr.Tr.531). At that point, communications completely broke down and Rick didn't want to talk further; he just seemed to get more agitated the more Dr.Logan tried to explore issues with him(Hr.Tr.531). Dr.Logan decided that further meetings at that point—early April, 2007—would not be helpful(Hr.Tr.531). He did not see Rick again until August, then once between then and trial in July, 2008(Hr.Tr.531-32,540;Tr.ii).

Although Dr.Logan did not testify at trial, he was deposed by the State before trial, and Dr.Logan met with counsel and Muller beforehand, his only meeting with them other than when he met with Rick(Hr.Tr.540). Among the issues discussed was whether Dr.Logan thought there might be any type of insanity or mental state defense(Hr.Tr.541-42). Dr.Logan thought he would be better used in mitigation(Hr.Tr.542). The subject of Rick's medication was also discussed; the team explored his use of a class of antidepressant called an SSRI, which he began in March 2006, some two months before the murder of Marsha Spicer(Hr.Tr.542-43;Resp.Ex.261,p.5;L.F.45).

In a small percentage of patients SSRIs can cause mania(Hr.Tr.543-44). This group includes people with bipolar disorder(Hr.Tr.544). Dr.Logan testified that the defense team had interest in evaluating Rick for an "SSRI" defense—so named

because there are warnings on many drugs in this class regarding an “unrelated but similar type of phenomenon in which some individuals have a worsening of symptoms, including suicide and violence [while] on the medications.”(Hr.Tr.544).

Dr.Logan explained that he told the team he thought the drug aggravated Rick’s condition and likely made him exhibit symptoms of mania, but he did not think Rick had a viable SSRI defense(Hr.Tr.545-46). Instead, Dr.Logan told counsel about a phenomenon called “switching,” in which an antidepressant drug, not necessarily an SSRI, causes one taking it to switch from a depression state to mania when taken without a mood stabilizer(Hr.Tr.547,577). In March 2006, Dr. Wade Hachinsky prescribed Rick the antidepressant Lexapro without a mood stabilizer, and this likely triggered manic symptoms(Hr.Tr.577;St.Ex.261).

Based in part on information he did not have before trial, Dr.Logan diagnosed Rick with Bipolar I Disorder, most recent episode mixed, severe with psychotic features(Hr.Tr.575-76;M.Ex.20,p.6370). One item Dr.Logan did not have was a letter Rick wrote to trial counsel in August 2007(the “8/24/07 letter”), in which he discussed his mental issues, including taking Lexapro(Hr.Tr.575; M.Ex.29;Supp.L.F. 28-44).⁵ Trial counsel did not share the letter with Dr.Logan or advise him of its existence(Hr.Tr.575).

⁵ The letter was admitted as Movant’s Exhibit 29 but the court reporter did not list it in the exhibit index(Hr.Tr.4-9,126-128); a copy was included in the supplemental legal file filed in the direct appeal, No. SC89699(Supp.L.F.28-44).

Rick's bipolar disorder manifested in symptoms including periods of persistently elevated or irritable mood that is often rapidly cycling—meaning symptoms of depression may coexist with it, which manifest themselves during the course of a day(Hr.Tr.576). Other symptoms include some of those associated with manic episodes, such as decreased need for sleep, feeling grandiose, being hypertalkative, being very distracted, making foolish investments and spending lots of money, and engaging in risky sexual activity, including sexual activity of long duration(Hr.Tr.576). Rick's risky sexual behavior included having sex with people who have hepatitis, resulting in Rick's contracting hepatitis himself(Hr.Tr.576).

Rick has all of the associated symptoms of a manic episode, with some psychotic features(Hr.Tr.576). He is also paranoid, believing people are trying to harm or trick him(Hr.Tr.576-77). And he has fairly significant suicidal thoughts at times(Hr.Tr.577). Dr.Logan had insufficient information to diagnose Rick with bipolar disorder in the period before trial(Hr.Tr.577). Had he had available at that time what he learned during the post-conviction case, he thought he would have diagnosed bipolar disorder before trial(Hr.Tr.577).

Dr.Logan further opined that the SSRI antidepressants Dr.Hachinsky prescribed, without a concurrent mood stabilizer, “produced a predominance of manic symptoms, which Mr. Davis, due to a lack of insight characteristic of the disorder, failed to recognize.”(M.Ex.20,p.6370). He said Bipolar I Disorder is a severe mental disease that rendered Rick “unable to appreciate the nature, and wrongfulness of his conduct at the time of the offense and rendered him incapable at the time of the offense in the

homicide of Marcia Spicer, of conforming his conduct to the requirement of law.”(M.Ex.20,p.6370). And Dr.Logan opined that the Bipolar I Disorder substantially impaired Rick’s capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law, as well as causing him to lack the capacity to assist legal counsel in his defense(M.Ex.20,p.6370-71).

Dr.Hachinsky also thought bipolar disorder was a possible diagnosis in March, 2006; he found a generalized anxiety disorder and depressive disorder not otherwise specified(Hr.Tr.555;St.Ex.261). Dr.Hachinsky recalled when deposed that when he saw Rick in March, 2006, Rick was concerned about getting “wound up” over the course of the upcoming weeks, and avoiding that, along with helping him improve his temper, were goals of his treatment(M.Ex.21,p.6681).

Dr. Victoria Reynolds

Dr.Reynolds, a clinical psychologist who specializes in trauma, had worked in a Military Sexual Trauma program with the VA; she started and supervised a program for male veterans who had been sexually abused and raped in the military(Hr.Tr.218). She also has substantial experience with combat trauma(Hr.Tr.219-20). Because often if there is sexual abuse, there are other kinds of abuse or maltreatment, such as neglect, emotional, verbal abuse, or domestic violence, it is not possible to focus just on sexual trauma(Hr.Tr.219).

Dr.Reynolds reviewed Rick’s records and interviewed Rick three times for a total of thirteen hours, with the third occurring a year after the first two(Hr.Tr.219-20,230-

31). She reviewed a large volume of Rick's records, including his birth, school, medical, psychological and psychiatric records; Rick's writings about physical and sexual abuse; transcripts of discovery and Dr.Mandracchia's trial testimony; interviews with Rick's family members; and her own four conversations with Chris Alvarez, a resident of the Haley House youth facility when Rick was there(Hr.Tr.225-29,274,906).

Rick reported, and Dr.Reynolds concluded, that Rick's stepfather Cothorn began sexually abusing Rick between ages eight and eleven(Hr.Tr.237). As Dr.Reynolds explained it, men disclose sexual abuse far less than women, and they do so far less depending on how the subject is raised(Hr.Tr.231). Yvonne, Rick's sister, said Stan abused her from ages seven to fifteen(Hr.Tr.237). Rick also had another sister, Stephanie, and a stepbrother, Tim(Hr.Tr.238). Dr.Reynolds concluded that the children in the family were targets in late elementary school(Hr.Tr.237).

Importantly, Rick's mother, Billie, was eighteen when Rick was born, because that is quite young to be parenting(Hr.Tr.238p;M.Ex.1,p.1). The girls in Rick's mother's generation were sexually abused by their father and/or their grandfather, so Rick was born to a young and unmarried mother who had been sexually abused, which made her less able to protect her own children from abuse(Hr.Tr.238-39).

The identity of Rick's biological father is unclear(Hr.Tr.239). Rick spent the first three to four years of his life with Billie's first husband, Junior(Hr.Tr.239). She had to leave him because he was violent, so Rick as a very young child was in a situation

in which there was violence and a sense of danger for the mother, and though Rick has no memory of that, those early experiences have a biologic impact(Hr.Tr.239).

A child will more likely be vulnerable to maltreatment if he has a parent with a history of unresolved maltreatment, or if the parent has problems coping with it(Hr.Tr.240). Rick's mother was in a violent relationship, coping with her own history in a problematic way(Hr.Tr.240). At least by the time she left that relationship, she was using substances(Hr.Tr.240). Those experiences made Rick more vulnerable(Hr.Tr.241).

At some point they moved to Rick's grandmother's house; there was a lot of housing instability(Hr.Tr.241-42). Rick's memories of abuse go back to that time; he had some fragmentary memories of being in the bathtub with his grandmother, and Rick was aware of his mother's prostitution(Hr.Tr.241-42). At a young age he saw a lot of his mother's sexual activity with different men(Hr.Tr.242).

During that period they lived with various family members(Hr.Tr.242). Rick told of two aunts—though Rick was not clear whether they were actually aunts—named Sarah and Sharon; Aunt Sarah was having sex with Billie's husband, Cothorn(Hr.Tr.242). Aunt Sarah touched Rick while in the bathtub, and he remembered seeing her touch her vagina(Hr.Tr.242). She used drugs in front of Rick(Hr.Tr.242) Rick also has a memory of being put on top of his sister, Yvonne(Hr.Tr.242). He was so young that he could not have an erection, but he recalled urinating on her and that there was a big hubbub about it in the family(Hr.Tr.242-43).

Rick also had a memory of being in the basement with his uncle Andy, a known sexual perpetrator who sexually abused Rick's sisters(Hr.Tr.243). They warned that Rick should not go near him(Hr.Tr.243). Thus, even before Cothorn there were a lot of experiences where Rick was exposed to adult sexuality—he saw adults having sex, he was present with adults who were dressing and undressing, he was touched by other adults, and his aunt Peggy taught him how to “go down on her” when he was a little boy(Hr.Tr.243). Rick was exposed to adult sexuality, and being shown pornography, more than a child can process(Hr.Tr.243). Dr.Reynolds found no parental guidance about appropriate sexuality(Hr.Tr.243-44).

Rick came from an unregulated environment without sexual boundaries, and with adults who, due to substance abuse and their own history, were probably not attending to what Rick as a child was seeing or experiencing(Hr.Tr.244). Dr.Reynolds explained that one loses a sense of empathy and understanding what it's like for a child; she was familiar with the patterns of sexual abuse, and she could see them in Rick(Hr.Tr. 244-45). Billie and her sisters had no experience in being protected from such an environment themselves, making Rick's home environment simply normal for them and disinhibiting them in front of the children(Hr.Tr.245).

Rick had a very strong wish to have an attachment with his mother that still persists(Hr.Tr.246). When he had accomplished things in prison to improve himself, he sought to share those accomplishments with his mother to gain her approval(Hr.Tr.246). Rick told Dr.Reynolds about trying to intervene when Cothorn beat Billie(Hr.Tr.246). Or if she intervened when Cothorn was beating Rick, and she

was beaten for it, Rick would feel very guilty; that was some of why he tried to stay away from the house(Hr.Tr.246). So even though Rick was sometimes cruelly beaten or treated neglectfully by his mother—e.g. hitting him with a frying pan or toys—he wanted to think well of her(Hr.Tr.247). Very often Rick didn't know what he had done wrong, but he would register shock and a sense of betrayal that she would mistreat him(Hr.Tr.247).

Rick's first psychological assessment noted that he was "scapegoated" for family problems. Dr.Reynolds said one psychologist observed the children misbehaving, but Rick was the only one who suffered any consequences(Hr.Tr.247-48;M.Ex.1,p.49). A counselor noted that it was "surprising" that Rick had been able to cope at all; Dr.Reynolds said that was strong language for such a record(Hr.Tr.248).

In Dr.Reynolds's assessment, Rick felt the coldness and distance from his mother(Hr.Tr.249). His running away was often an attempt to see whether she cared—and he at times hid to see whether she would notice that he was gone(Hr.Tr.249). Rick did not experience physical contact except what was sexualized or violent(Hr.Tr.251). That registers at a physical level—sexual arousal will create soothing, which is a very strong setup for substance abuse(Hr.Tr.251). So Billie's difficulties in parenting and attaching to Rick made him vulnerable(Hr.Tr.251).

Another effect of the lack of attachment is that if a parent, particularly the mother, consistently denies her child's experience, such as physical or sexual abuse, the child doesn't understand that the parent isn't aware of it(Hr.Tr.251-52). Rick's mother at

least knew about the physical abuse he suffered(Hr.Tr.251-52). So if the parent doesn't intervene to end or prevent the abuse, the child believes either: 1) that he is not loved enough because of something so deeply wrong with him that the caretaker would choose not to intervene; or 2) that what is happening is normal and right(Hr.Tr.252). That Rick felt there was something wrong with him is documented in his earliest psychological report(Hr.Tr.252).

The lack of sexual boundaries in the family in Rick's childhood fueled a sexual response in Rick later on(Hr.Tr.292). Stimulating a child's body sexually at such an early age meant that that sexual response was primed(Hr.Tr.292-93). Children in more normal situations might have a momentary sexual response to stimuli and then typically socialization will tell the child what behavior is acceptable, and when, how, where, and with whom it is acceptable(Hr.Tr.293). None of that occurred with Rick; he was continuously exposed to adult material such as pornography, and adults doing sexual things and stimulating him(Hr.Tr.293).

Stan Cothorn was a major perpetrator in Rick's life(Hr.Tr.253-54). Dr.Reynolds believed that the sexual abuse did not begin immediately, though there was physical abuse earlier(Hr.Tr.254). Rick was at first shocked, wondering what he had done wrong to deserve such treatment(Hr.Tr.254-55). But he did not already have an attachment to Cothorn, and he became angry—with Cothorn for the abuse, and with himself for fearing Cothorn and failing to get away from him(Hr.Tr.256).

Survival behaviors include fight, flight, and freeze(Hr.Tr.256-57). Rick demonstrated flight by running away, but when he was being beaten, he could not get

away, so while mentally in flight or fight mode, thinking things like, “I hate you,” he was trapped, left in freeze mode(Hr.Tr.257). Rick attributed his fear of Cothorn and his inability to get away or fight back to his own weakness(Hr.Tr.257). With no way to stop Cothorn’s abuse, Rick would run away(Hr.Tr.258).

Rick reported that the sexual abuse by Cothorn began when Rick was eight(Hr.Tr.259;M.Ex.19,p.6224). Dr.Reynolds determined Rick’s reporting was reliable because of his detailed descriptions, family factors, his reluctance to disclose, and the evidence that Cothorn had sexually abused Rick’s two sisters(Hr.Tr.260-61). The detail demonstrated reliability because perpetrators have a pattern, and Rick’s description was consistent with that pattern(Hr.Tr.261). Rick described things that Cothorn said to him to “get off,” and his questioning of Rick about little girls—his way of fantasizing—so that he would get sexually aroused(Hr.Tr.261). He also described Cothorn putting his penis so far down Rick’s throat that he choked, and he described having to swallow the ejaculate, though he didn’t use that word—Rick described the acts using the language of a child consistent with his age at the time it occurred(Hr.Tr.261-62). The level of detail is important because in an intolerable situation, including sexual abuse, one’s mind will focus on small details as a way to distance oneself from emotional or physical pain(Hr.Tr.263-64).

Rick also described patterns of hypervigilance that children display before an incident of abuse—seeing the signals that it was coming, such as Cothorn’s sitting in his chair, watching a particular television program, and beginning to masturbate, or Rick would watch Cothorn’s crotch to see if he had an erection, which he might get

before seeking out Rick for sexual gratification(Hr.Tr.262). Rick's reluctance to disclose also indicated that his was a valid report(Hr.Tr.262).

One of the things Rick is most ashamed of is that he has had what he called sex with men, meaning Cothorn, Uncle Andy, any of the men thereafter who raped him or had sex with him(Hr.Tr.262-63). Rick is ashamed of that because he believes it means he is a homosexual; this is typical of men who have been sexually abused, which in this culture is stigmatized, and Rick did not want to be seen as a "fag"(Hr.Tr.263). Rick has no tolerance for the sexual acts he was engaged in, and judges himself and the other men for it(Hr.Tr.278). Rick misconstrued, also typical, that these were acts of homosexual sex rather than abuse, and that because he did not fight or flee, he was complicit and willing(Hr.Tr.263). It is not unusual for boys who have been sexually abused to, once they reach adolescence, have other sexual experiences with boys or men, in part because they are confused about their sexuality; they may not know whether they are heterosexual or homosexual, because often they could be stimulated into arousal during the abuse(Hr.Tr.278).

A counselor's note from a psychological referral while Rick was incarcerated in DOC in 1993 summarized that Rick described being sexually molested by a school coach and by a Big Brother volunteer(Hr.Tr.267-68;M.Ex.2,p.372). He described to Dr.Reynolds how the coach asked the boys to undress in the shower; his initial story was that he resisted because he didn't want the coach to see his bruises from home(Hr.Tr.268). In Dr.Reynolds's second assessment, Rick provided much more detail, saying that the coach cornered him in shower and forced him to have oral

sex(Hr.Tr.268). He also anally raped Rick(Hr.Tr.268). Rick described these in detail; it was extremely painful(Hr.Tr.268). The detail again led Dr.Reynolds to conclude that Rick's report was reliable(Hr.Tr.268-69).

Rick told Dr.Reynolds that there was a period in adolescence, not much later than the period of sexual abuse by Cothorn and the coach, that Rick was solicited for sex by men(Hr.Tr.272). He described not being able to say no when approached, which made him very disgusted and distressed with himself(Hr.Tr.272). He said a number of those men were very sexually sadistic and abusive—tying him up, raping him to the point where he was bloody, holding him imprisoned, tying his genitals, and biting him(Hr.Tr.272).

The abuse Rick suffered continued when he was placed in the Haley House residential facility; he described sexual abuse by two older boys there. Rick was 12 and the other boys were around 17 or 18(Hr.Tr.273). Rick said the two would get him when he was alone; they would do what he called "slick-legging" him—rubbing soda between his legs, then sticking their penises between his legs until they ejaculated(Hr.Tr.273).

Chris Alvarez was a Haley House resident when Rick was there(Hr.Tr.274,906). He described to Dr.Reynolds the atmosphere in the home and told her who was in charge, who was aware of what, and how the boys treated each other(Hr.Tr.274). He said the other boys would tease Rick, and they saw him as typically one of the weaker and younger ones in the home(Hr.Tr.274). There was also sexual intimidation, such as saying, "We're going to make you suck our dick[s]"(Hr.Tr.274).

Alvarez's survival strategy was befriending the biggest, most powerful boy, who then taught him to box(Hr.Tr.275). Alvarez said Rick was vulnerable because he was small; he would see Rick coming up from the basement crying, because Rick did not have a strategy for protecting himself(Hr.Tr.275-76).

Rick hid the abuse from those in charge; he tried not to let anyone know what was happening(Hr.Tr.276). And he also tried to avoid thinking about it; he described how, when Cothorn was committing sexual acts against him, Rick would imagine himself going fishing in his mind, or he would masturbate—he would do something either to induce a positive mood state, or would try to hide it, though he was seen as weak by potential perpetrators(Hr.Tr.276-77).

Before Rick's release from prison on his rape conviction, he was given an assignment to take stock of what he had done and prepare a history of his sexual activity(Hr.Tr.282;M.Ex.6, pp.1795-1874). He did not refer in this document to being sexually abused himself; he refers to a lot of sexual activity with other girls and when he was very young, but he did not refer to a coach or to Cothorn(Hr.Tr.282;M.Ex.6, pp.1795-1874). Dr.Reynolds said it would have been typical for Rick not to reveal that part of his sexual experiences(Hr.Tr.283). In Dr.Reynolds's clinical experience with men under conditions similar to Rick's regarding shame and stigma, the psychological cost of disclosure is often too high, so that even when given the direct opportunity, they will still fail to disclose, and will even lie about it(Hr.Tr.284).

Dr.Reynolds found Rick's mental processes disorganized—he would repetitively say things about wanting to be able to describe an event and then not being able to put

it into words(Hr.Tr.286). His fragmentation is a reflection of the early childhood trauma that occurred as Rick’s language was developing(Hr.Tr.286-87).

There are many ways in which trauma victims try to cope; Rick used drugs and engaged in a lot of sex to self-soothe(Hr.Tr.290-91). Rick has a lot of problems with empathy for and understanding of other people(Hr.Tr.291). He is dysregulated[*sic*], as Dr.Reynolds put it—for example, alternating between extremes of feeling responsible for his mother’s safety, and then being completely cut off from others to the point that he does not understand that another person is in pain(Hr.Tr.291-92). This attachment “dysregulation” in adulthood often indicates attachment “dysregulation” very early(Hr.Tr.292).

Dr.Reynolds concluded that Rick’s memories of his experiences of abuse and his adaptations are consistent with and typical of individuals who have experienced very early, prolonged and multiple forms of abuse and neglect(M.Ex.19,p.6226-27). Her conclusions were based on the totality of the data available in the records she was given, her assessment of Rick, her discussions with Alvarez, and the available family history(Hr.Tr.285).

Trial Defense Team

Curt Winegarner and Tim Burdick

Non-capital public defenders Winegarner and Burdick initially represented Rick before the State filed its notice of intent to seek the death penalty(Hr.Tr.616,830). They knew they would need a mental health expert, and retained Dr.Mandracchia to

talk to and evaluate Rick(Hr.Tr.618). They both had experience with him and high regard for him(Hr.Tr.618-19). His expertise in working with sexual offenders seemed like a good fit for Rick's situation(Hr.Tr.619).

The most important reason for selecting Dr.Mandracchia in the beginning was to assess the needs they would have going forward(Hr.Tr.619). They also learned that Rick had recently gone through a period of crisis in his life, and they were concerned whether that would continue into their representation(Hr.Tr.619). They wanted Dr.Mandracchia to meet with Rick and see whether he would be able to work with counsel, whether he needed treatment, and whether there might be competency issues(Hr.Tr.620). Even though they did not rule out Dr.Mandracchia testifying at trial, they envisioned him as a consultant rather than a potential witness(Hr.Tr.620-21). In fact, Burdick explained that he determined as early as Dr.Mandracchia's second visit with Rick that he would need to be a consultant rather than a witness because, among other reasons, in the opinions of Burdick and Dr.Mandracchia, what he would have to tell the jury was not very helpful(Hr.Tr.844).

Tom Jacquinot

Lead trial counsel Jacquinot acknowledged that his view of Rick's case was that the focus even before trial would be on penalty phase—Rick had confessed, the defense motions to suppress evidence had been denied, Rick had video-recorded most of the crimes, so there was audio and video documentation of acts that were so disturbing they were hard to describe(Hr.Tr.1131).

An early concern was issues surrounding communicating with Rick(Hr.Tr.1123). Jacquinot said there was not a lot of give and take—Rick had his own ideas and wanted counsel to stay focused on those, and go forward with them in the way Rick saw fit(Hr.Tr.1123). Jacquinot said that was really the only issue with Rick—when Jacquinot would visit, Rick initially may not want to see him, but once he got talking, Jacquinot could easily stay for several hours(Hr.Tr.1123).

Jacquinot decided to keep Dr.Mandracchia on the case when his team took it over because Dr.Mandracchia had been working with Rick for a while and Jacquinot had previously worked with him(Hr.Tr.1128). He did not recall Winegarner or Burdick telling him about any negative feelings toward using Dr.Mandracchia as an expert witness in Rick’s case or advising him against doing so(Hr.Tr.1122).

At some point early in the case, Jacquinot hired Dr. William Logan(Hr.Tr.1128-29). Jacquinot said his purpose was to perform a similar function to Dr.Mandracchia, as well as to complement him and provide another perspective – Dr.Mandracchia is a psychologist, while Dr.Logan is a psychiatrist, an M.D. who would be able to evaluate whether Rick’s state of mind might be improved through medication, and make suggestions to the jail’s mental health provider(Hr.Tr.1129).

Jacquinot recalled that Rick’s unwillingness to discuss with Dr.Mandracchia the sexual abuse Rick suffered in childhood was an ongoing issue(Hr.Tr.1132). That was common in Jacquinot’s experience, in that it is a very emasculating, life-scarring experience, and people are generally very reluctant to discuss sexual abuse(Hr.Tr.1132-33).

Dr.Mandracchia did not make a diagnosis under Chapter 552 that would mitigate the offense level or constitute a full defense(Hr.Tr.1133-34). Jacquinot thought Dr.Mandracchia acknowledged that Rick had several mental health issues, that he potentially had a fairly severe mood disorder, a variety of sexual disorders, and a severe personality disorder that manifested itself in a variety of ways(Hr.Tr.1134). But he did not feel those disorders rose to a level where they would significantly have impaired Rick's ability to coolly reflect upon the death of Ms.Spicer, or provided even a partial defense(Hr.Tr.1134).

Jacquinot did not recognize Movant's Exhibit 29, a letter Rick wrote, dated August 24, 2007, as something he saw before trial(Hr.Tr.1146). He also did not know whether he had given it to Dr.Logan(Hr.Tr.1146;Supp.L.F.28-44).

If Jacquinot had had an expert who diagnosed Bipolar I Disorder, he could not say whether he would have been more or less likely to use that expert(Hr.Tr.1146-47). He agreed that that diagnosis, which Dr.Logan made after reviewing, among other materials, Ex.29, would meet the definition of a mental disease or defect under Chapter 552(Hr.Tr.1147). But he said a multitude of factors go into the decision whether to use an expert(Hr.Tr.1147). In fact, given an opinion that Rick was unable to appreciate the nature or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of the law, Jacquinot said he might actually be less likely to use that doctor, because he thought that was far enough "off the mark," given the totality of the evidence, that the defense would lose credibility with the jury in going for a "full-blown" insanity defense(Hr.Tr.1148). He might

possibly use that evidence to support a diminished capacity defense(Hr.Tr.1148). He would be more likely to call that expert if his testimony supported statutory mitigating circumstances(Hr.Tr.1149).

Counsel considered and discussed hiring an expert in sexual and physical trauma but did not do so(Hr.Tr.1149). To some extent it was a time problem, but he said it was primarily due to the level of cooperation they were getting from Rick with the experts they had(Hr.Tr.1149). His opinion at the time was that he really did not see Rick engaging in that process and cooperating with that type of expert(Hr.Tr.1149).

Jacquinet did not recall having any discussions with Rick about using an expert who would be more focused on sexual disorder and trauma(Hr.Tr.1150). He had no doubt that Rick would have gone through that process; he did not think Rick would have refused to see anyone(Hr.Tr.1150). But it would have been a “negotiation” process(Hr.Tr.1150). The quality of any evaluation would depend on the effort and candor Rick was willing to put into it(Hr.Tr.1150).

Counsel endorsed both Dr.Mandracchia and Dr.Logan as witnesses, and the decision to call Dr.Mandracchia was based on counsel’s feeling that he was the stronger witness, in that he had a better relationship with Rick—it was primarily positive and understanding, which had significance to Jacquinet in light of Rick’s issues(Hr.Tr.1157). The relationship between Rick and Dr.Logan was deteriorating; at the time Dr.Logan had a negative attitude toward Rick(Hr.Tr.1157-58). Counsel decided to use Dr.Mandracchia over Dr.Logan despite the “wealth of negative information” in Dr.Mandracchia’s possession about Rick(Hr.Tr.1158). But he

thought that consequence was unavoidable for any possible expert(Hr.Tr.1158). After the State's cross-examination of Dr.Mandracchia resulted in his testimony being what Jacquinet saw as either "break even" or a "net loss," he certainly was not going to call Dr.Logan, whom he perceived to be a weaker witness(Hr.Tr.1159).

The discussions with Rick about whether he would testify in guilt phase began weeks before trial and continued throughout trial(Hr.Tr.1159-60). Jacquinet remembered Rick continuously "telling [them] that no matter what happened, he just wanted to be heard, that he'd be heard."(Hr.Tr.1160). He constantly pushed wanting to testify(Hr.Tr.1160-61). When asked what he advised Rick, Jacquinet said that it never got to that point, that Rick acknowledged that Jacquinet did not want him to testify but said, "I've just got to be heard."(Hr.Tr.1161). Jacquinet recalled that the court recessed to allow Rick and counsel to discuss the issue, "to see if [they] could get it in question-and-answer format based on specific relevant topics."(Hr.Tr.1161). Jacquinet did not write out questions in preparation for Rick's possible testimony in either guilt or penalty phase(Hr.Tr.1162). They did not get to the point of discussing specific topics on which Rick wanted to be heard(Hr.Tr.1162).

Susan Elliott

Co-counsel Elliott did not find the personality disorders with which Dr.Mandracchia diagnosed Rick to be mitigating(Hr.Tr.116-17). She recalled that Dr.Mandracchia testified that although Rick would not confirm that Cothorn sexually abused him, she thought he had disclosed that to the defense team(Hr.Tr.117).

Elliott researched the issue of SSRI medications; she found one or two cases where the issue arose, either as a defense in a criminal case or a plaintiff's claim in a civil case, and she contacted Dr.Logan to discuss the subject(Hr.Tr.124-25). When she asked whether the SSRIs might have affected Rick's ability to control his behavior, Dr.Logan just kind of cut her off and told her that the facts that Rick planned the crime and acted with another would preclude that defense(Hr.Tr.125-26). As a result, Elliott did not discuss the rest of the information she had, including Dr.Hachinsky's records and Rick's statements about changes in his behavior after he began taking SSRIs(Hr.Tr.126).

Elliott did not specifically recall receiving Ex.29, Rick's 8/24/07 letter to Jacquinet, but she recalled some of the matters Rick set out therein(Hr.Tr.126-27). She also did not recall whether she provided it to Dr.Logan(Hr.Tr.127). She did not think she brought up the contents of the letter to Dr.Logan, including that after Rick left Dr.Hachinsky's office, his life, behavior, thoughts, and feelings changed; he: began smoking and chewing tobacco; stopped working out; stopped visiting his sister; quit drinking sugar-free and caffeine-free drinks; greatly decreased how often he went to the motorcycle shop he had taken over; discovered that he had, without remembering, closed his post office box through which he ran that business; started wasting money; started buying drugs for Dena Riley, thinking they would help her; stole items worth little; heard sirens and other things that were not real; had increased sexual activity, which was already high; questioned what he was doing; threatened others with harm; had suicidal thoughts, such as talking with Riley as they drove

about crashing into another car; stopped seeing friends; smashed things at home; had poor hygiene; thought the movie “Natural Born Killers” was about Riley and him; had to write things down to remember them; felt that he was living in a dream; heard that he had fought with his sisters without remembering it; did not keep his word; cried often; saw everything around him as it appeared in the 1970s; thought Riley was putting methamphetamine in his drink; felt like he had electricity in his brain and body; blacked out while at work; felt numb, physically and emotionally; and believed Riley was a demon(Hr.Tr.127;M.Ex.29,pp.5-14).

Carol Muller

It took a long time for Rick to tell Muller, the defense mitigation specialist, that Cothorn had sexually abused him(Hr.Tr.857,861,870). Rick’s sisters Yvonne and Stephanie told Muller they believed that was true, though neither had seen it happen(Hr.Tr.870). Rick clearly was physically abused—they heard a lot about that from Rick’s mother, his aunts, and both sisters(Hr.Tr.870-71). But although they strongly suspected sexual abuse, Rick had not told them about it, and no one saw it(Hr.Tr.871). Rick finally disclosed the abuse after Muller told him Stephanie had disclosed that Cothorn had abused her, which she had previously denied, but was by then willing to testify to it(Hr.Tr.877-78).

Yvonne and Jane, one of Rick’s aunts, told Muller that Rick’s mother, two aunts—Darlene and Jane herself—and Stephanie had worked as prostitutes, and there was really no boundary concerning inappropriate touching among the children or the

adults and children(Hr.Tr.871-72). Jane told Muller about her ex-husband putting Rick on top of his sister Yvonne(Hr.Tr.872).

Muller's understanding was that Jacquinet brought Dr.Logan into the case to assess Rick's competency, because of difficulties Rick had been having at the jail, including problems with the staff and aggressive acting-out behavior(Hr.Tr.873-75).

Muller was familiar with Rick's letter, M.Ex.29(Hr.Tr.880). She said when it was received, a copy was delivered to her(Hr.Tr.880). They followed up on some of the items in the letter—such as trying to locate a security tape from Wal-Mart showing Rick exercising in the parking lot, and asking Rick's former girlfriend, Vickie Gunn, about a videotape Rick had made that he said showed that he was "crazy"(Hr.Tr.880-82). They were not able to obtain any videos from Wal-Mart, and Gunn told them that Rick had gotten angry at her and destroyed the tape he had made(Hr.Tr.881-82).

Dr.Mandracchia's trial testimony

During cross-examination of Dr.Mandracchia at trial, the prosecutor elicited details of the offenses against Ms.Spicer that Rick had told Dr.Mandracchia, as well as details of Rick's rape conviction and his sexual fantasies(Tr.4653,4661-62,4664-6,4669-71,4681-82).

Rick's testimony

Before the close of all the evidence in guilt phase, the court examined Rick as to whether he wished to testify(Tr.4144). When the court asked whether Rick understood that he had "a right to testify or not to testify," Rick answered, "I know

I've read it, I understand kind of what you're saying but I want to know if I have the right to testify. Do I have the right to testify to what I want to testify to, or do I have to rely on my attorneys to question me?"(Tr.4145). After an extensive colloquy during which Rick said he wanted to testify, and the court informed Rick that he could not tell counsel what questions he wanted to be asked, the court recessed for Rick to confer with counsel(Tr.4145-52,4157-59). After the break, Rick said that because counsel would not ask the questions he wanted to be asked, and he could not examine himself, he would not testify—"Because I would be testifying to basically just what the prosecution wants."(Tr.4161-62).

Order and Judgment

The motion court entered findings on October 1, 2014, denying all claims(PCR.L.F.1397-1530). Notice of appeal was filed November 10, 2014 (PCR.L.F.1533). To avoid repetition, additional facts will be presented as necessary in the argument.

POINTS RELIED ON

I. Failure to call Dr. Victoria Reynolds to present evidence concerning Rick's trauma resulting from multigenerational sexual, physical, and emotional abuse.

The motion court clearly erred in denying Rick's claim that counsel were ineffective for failing to call Dr. Victoria Reynolds in penalty phase to present mitigating evidence, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, in that reasonably competent counsel would have retained an appropriate expert to present Rick's complete psychosocial, psychosexual, and trauma history, including that Rick suffers from multiple forms of sexual, physical and emotional trauma, and that he was born into a family in which multigenerational incest, sexual and physical abuse, drug use, and prostitution were the norm; the expert presented, Dr. Mandracchia, did not have expertise in assessing or evaluating males with trauma from sexual abuse. Had the jury heard Dr. Reynolds's testimony, there is a reasonable probability it would have sentenced Rick to life.

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

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

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

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

II. Rick's competence to be tried and counsels' failure to challenge competency.

The motion court clearly erred in denying Rick's claim that counsel were ineffective for failing, through the testimony of Dr. William Logan, M.D., to challenge Rick's competence to be tried, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, in that Rick was not competent to be tried, and reasonably competent counsel would have provided to their expert retained for that purpose sufficient information to support a finding of a mental illness within a reasonable degree of medical certainty, namely a letter they received from Rick, which documented changes in Rick's behavior after ingesting psychotropic medication provided to him by a licensed psychiatrist, and which identified potential witnesses who observed these personality changes, and which upon reviewing, Dr. Logan was able to use to support a diagnosis of Bipolar I Disorder, which resulted in his opinion that Rick was incapable of assisting counsel in his defense, and thus was incompetent to be tried.

Pate v. Robinson, 383 U.S. 375, 378 (1966);

Dusky v. United States, 362 U.S. 402 (1960);

Drope v. Missouri, 420 U.S. 162 (1975);

State v. Simmons, 955 S.W.2d 752 (Mo. banc 1997).

III. Failure to present evidence of Rick's Bipolar I Disorder to support a diminished capacity defense.

The motion court clearly erred in denying Rick's claim that counsel were ineffective for failing to investigate and call William Logan, M.D., in guilt phase to support a diminished mental capacity defense based on Rick's proper diagnosis of Bipolar I Disorder, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21 in that reasonably competent counsel would have provided all available information, including Rick's letter, to Dr. Logan, and thereafter presented this evidence to the jury, and had counsel done so, there is a reasonable probability Rick would not have been convicted of first-degree murder.

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

State v. Walkup, 220 S.W.3d 748(Mo. banc 2007);

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

Kyles v. Whitley, 514 U.S. 419(1995).

IV. Failure to present evidence of Rick's Bipolar I Disorder in mitigation.⁶

The motion court clearly erred in denying Rick's claim that counsel were ineffective for failing to investigate and call William Logan, M.D., in penalty phase to present evidence of Rick's diagnosis of Bipolar I Disorder, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21 in that reasonably competent counsel would have presented Rick's letter supporting that defense to Dr. Logan, and thereafter presented Logan's findings as to Bipolar I Disorder, and all foundations for his opinions, to the jury in penalty phase as mitigating evidence; had counsel done so there is a reasonable probability that Rick would not have been sentenced to death.

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

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

Kyles v. Whitley, 514 U.S.419(1995);

Antwine v. Delo, 54 F.3d 1357(8thCir.1995).

⁶ This Point is presented separately from the preceding because the claim goes to penalty phase rather than guilt phase relief, though the evidence and most of the legal principles are identical.

V. Failure to present evidence of Rick’s Bipolar I Disorder to support NGRI defense.

The motion court clearly erred in denying Rick’s claim that counsel were ineffective for failing to call William Logan, M.D., in guilt phase to support an “NGRI” defense that included relying on Rick’s proper diagnosis of Bipolar I Disorder, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21 in that reasonably competent counsel would have presented this evidence and there is a reasonable probability Rick would have been found not guilty by reason of mental disease or defect.

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

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

Kyles v. Whitley, 514 U.S.419(1995);

Antwine v. Delo, 54 F.3d 1357(8thCir. 1995).

VI. Failure to present evidence of involuntary intoxication(SSRI).

The motion court clearly erred in denying Rick’s claim that counsel were ineffective for failing to call William Logan, M.D., in guilt phase to support either an involuntary intoxication or a diminished mental capacity defense based on the fact that Rick was prescribed a psychotropic medication known as an “SSRI,” without what should have been an accompanying mood stabilizer, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21 in that reasonably competent counsel would have discovered and presented this evidence, which meant Rick did not know or appreciate the nature, quality, or wrongfulness of his conduct, and there is a reasonable probability Rick would not have been convicted of first degree murder.

Alternatively, reasonably competent counsel would have at least presented this evidence in penalty phase as mitigation, and Rick would not have been sentenced to death.

People v. Hari,843 N.E.2d 349(2006);

Patton v. State,973 P.2d 270(Okla.Ct.Crim.App.1998);

Johnson v. State,479 S.W.2d 416(Mo.1972);

Kenley v. Armontrout,937 F.2d 1298(8thCir.1991).

VII. Failure to call Rick and prepare for his testimony in guilt phase

The motion court clearly erred in denying Rick's claim that counsel were ineffective in failing to call Rick to testify and prepare either themselves or Rick for his testimony in guilt phase, denying Rick his rights to effective assistance, due process, testify, and freedom from cruel and unusual punishment, U.S.Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, in that reasonably competent counsel would have followed Rick's repeated assertions that he wanted to be heard, and understood that it was important that questions be ready ahead of trial and that Rick be advised as to the proper topics of testimony. Had counsel prepared, Rick would have been able to testify in guilt phase, rather than have been forced to tell the court he did not wish to testify, since he could not know whether counsel would elicit the testimony Rick wanted to present, and there is a reasonable probability that he would not have been convicted of first-degree murder.

State v. Davis, 318 S.W.3d 618 (Mo. banc 2010);

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

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

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

VIII. Failure to prepare for Rick's testimony in penalty phase

The motion court clearly erred in denying Rick's claim that counsel were ineffective in failing to prepare either themselves or Rick for his testimony in either guilt or penalty phase, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, in that reasonably competent counsel would have followed Rick's repeated assertions that he wanted to be heard, and understood that it was important that questions be ready ahead of trial and that Rick be advised as to the proper topics of testimony. Had counsel prepared, Rick would have been able to testify in guilt phase, and he would have presented coherent testimony in penalty phase, and there is a reasonable probability that he would not have been convicted of first-degree murder, or in the alternative would not have been sentenced to death.

State v. Davis, 318 S.W.3d 618 (Mo. banc 2010);

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

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

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

STANDARD OF REVIEW – ALL POINTS

This Court reviews Rule 29.15 findings for clear error. *Morrow v. State*, 21S.W.3d819,822(Mo.banc2000). 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). Applicable to all points is the concept that the Sixth Amendment guarantee of the assistance of counsel includes the requirement that the assistance of counsel be effective.*Cuyler v. Sullivan*,446 U.S.335(1980). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466 U.S.668,687(1984). A movant is prejudiced if there is a reasonable probability that but for counsel's errors the result would have been different. *Deck v. State*,68 S.W.3d418,426(Mo.banc2002)(discussing *Strickland*). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*426.

ARGUMENT

I. Failure to call Dr. Victoria Reynolds to present evidence concerning Rick's trauma resulting from multigenerational sexual, physical, and emotional abuse.

The motion court clearly erred in denying Rick's claim that counsel were ineffective for failing to call Dr. Victoria Reynolds in penalty phase to present mitigating evidence, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, in that reasonably competent counsel would have retained an appropriate expert to present Rick's complete psychosocial, psychosexual, and trauma history, including that Rick suffers from multiple forms of sexual, physical and emotional trauma, and that he was born into a family in which multigenerational incest, sexual and physical abuse, drug use, and prostitution were the norm; the expert presented, Dr.Mandracchia, did not have expertise in assessing or evaluating males with trauma from sexual abuse. Had the jury heard Dr.Reynolds's testimony, there is a reasonable probability it would have sentenced Rick to life.

The Claim

Rick alleged that trial counsel failed to investigate, discover, and present evidence that he suffers from multiple forms of sexual, physical and emotional trauma; failed to present witnesses to testify to Rick's complete social history and additional experiences of trauma, including multigenerational incest, sexual abuse, physical

abuse, drug use and prostitution; failed to present Dr.Reynolds, or a similar expert in male sexual abuse and trauma, which trial counsels' expert, Dr.Mandracchia, did not have, to testify to how those experiences and the resulting trauma—particularly as a male suffering from sexual abuse trauma—affected his psychosocial development and his life(PCR.L.F.185-86). He alleged that had the jury heard this evidence, there is a reasonable probability that he would not have been sentenced to death(PCR.L.F.185).

The Evidence

Dr.Mandracchia's penalty phase testimony

Trial counsel retained and presented testimony from forensic psychologist Dr. Steven Mandracchia(Tr.4569-70). His testimony touched on the subjects Rick alleged in Paragraph 8(a) of his amended motion that counsel failed to fully investigate and present, but it did not begin to present a complete picture of the multiple forms of sexual, physical and emotional trauma Rick suffered due to multigenerational incest, sexual and physical abuse, drug use, and prostitution to which he was subjected in childhood. Significantly, the word “trauma” does not appear in his testimony(Tr.4569-4690). Instead, the defense approach through Dr.Mandracchia was to categorize Rick's sexual behavior as abnormal, without an adequate presentation either of the reasons for that abnormality, or of the underlying multifaceted childhood trauma that led to that behavior.

Dr.Mandracchia assessed Rick's sexual development; he found physical abuse and a lack of interpersonal connection in the family when Rick was growing up, and that

Rick underwent a range of sexual experiences beginning at a very early age(Tr.4572,4574). The records Dr.Mandracchia reviewed and his interviews showed that Rick's family experiences included physical and sexual abuse, and inconstant adult figures(Tr.4576). Rick's stepfather, Stan Cothorn, admitted beating Rick(Tr.4576).

Rick was admitted to the Western Missouri Mental Health Center(WMMHC) three times from ages 12 to 14(Tr.4576). He was severely "scapegoated" by the family and took the brunt of "negative, abusive, and rejection behaviors" in his home(Tr.4579-80). The WMMHC assessment showed that Rick was depressed and anxious, had very low self-esteem, and had become very angry(Tr.4581). His anger and sexuality became associated(Tr.4582). Rick's parents resisted treatment, rejected him, and lacked concern for him(Tr.4582).

Rick's earliest sexual experiences began at age 6, involving family members setting up sexual acts or at least simulated sexual acts with his sister(Tr.4590). Rick reported that between ages 10 and 12 he was "engaging in sexual activity with a range of people," including adults(Tr.4591). By age 15, he was tired of routine sexual behavior and moved to anal sex, threesomes, and rough sex(Tr.4591). Adult family members provided inadequate supervision; at least one aunt had made Rick and his sister engage in sexual acts, and she had talked with him about her sexual experiences(Tr.4592). Rick reported being molested at least twice when he was a child, and at least once by Stan(Tr.4593). Sexual abuse happened across generations in Rick's family(Tr.4593).

Dr.Mandracchia found Rick probably had several severe personality disorders—antisocial personality, narcissism, and paranoid personality(Tr.4597-98). The rejection, lack of acceptance, and lack of warmth in his home contributed to Rick’s distrust and insecurity in social and interpersonal relationships(Tr.4599). Rick was given little to help him develop in a more positive direction(Tr.4599). Rick was essentially abandoned by his parents(Tr.4599).

The psychological term for Rick’s significant sexual abnormalities was paraphilia—an “outside of normal” sexual attraction(Tr.4601). Rick’s paraphilias, involving children and aggressive types of sexual activity, had begun by his adolescence(Tr.4602-04). The childhood sexual abuse Rick experienced was a factor in the development of his paraphilias(Tr.4604).

Dr.Mandracchia asked Rick several times whether Stan had sexually abused him, and Rick finally said he would not answer(Tr,4610-11). Other people, including Vickie Gunn, Rick’s former girlfriend, reported to Dr.Mandracchia that Rick had said, or they suspected, that Rick had been sexually abused by his stepfather(Tr.4611).

Dr.Mandracchia said situations that were out of Rick’s control had contributed to his development—Rick could not control the factors that influenced him, e.g., the violence in his home as a 96-pound 12 year-old, the extensive, multi-generational sexual abuse in his family, the deviant sexuality Rick experienced at a very young age, the lack of supervision by adults, the complete abandonment by his father, and the significant abandonment by his mother(Tr.4614-16).

Dr.Reynolds's post-conviction testimony

Dr.Reynolds, a clinical psychologist who specializes in trauma, started and supervised a program for the VA for male veterans who had been sexually abused in the military(Hr.Tr.218). She also has substantial experience with combat trauma(Hr.Tr.219-20). Because often if there is sexual abuse, there are other kinds of abuse or maltreatment, such as neglect, emotional, verbal abuse, or domestic violence, it is not possible to focus just on sexual trauma(Hr.Tr.219).

Dr.Reynolds reviewed Rick's records and interviewed Rick three times for a total of thirteen hours(Hr.Tr.219-20,230-31). The third interview took place a year after the first two(Hr.Tr.231). She reviewed a large volume of Rick's records, including his birth, school, medical, psychological and psychiatric records; Rick's writings about physical and sexual abuse; transcripts of discovery and Dr.Mandracchia's trial testimony; interviews with Rick's family members; and her own four conversations with Chris Alvarez, a resident of the Haley House youth facility when Rick was there(Hr.Tr.225-29,274,906).

Rick reported, and Dr.Reynolds concluded, that Rick's stepfather Cothern began sexually abusing Rick between ages eight and eleven(Hr.Tr.237). As Dr.Reynolds explained it, men disclose sexual abuse far less than women, and they do so far less depending on how the subject is raised(Hr.Tr.231). Yvonne, Rick's sister, said Stan abused her from ages seven to fifteen(Hr.Tr.237). Rick also had another sister, Stephanie, and a stepbrother, Tim(Hr.Tr.238). Dr.Reynolds concluded that the children in the family were targets in late elementary school(Hr.Tr.237).

Importantly, Rick's mother, Billie, was eighteen when Rick was born, because that is quite young to be parenting(Hr.Tr.238p;M.Ex.1,p.1). The girls in Rick's mother's generation were sexually abused by their father and/or their grandfather, so Rick was born to a young and unmarried mother who had been sexually abused, which made her less able to protect her own children from abuse (Hr.Tr.238-39).

The identity of Rick's biological father is unclear(Hr.Tr.239). Rick spent the first three to four years of his life with Billie's first husband, Junior(Hr.Tr.239). She had to leave him because he was violent, so Rick as a very young child was in a situation in which there was violence and a sense of danger for the mother, and though Rick has no memory of that, those early experiences have a biologic impact(Hr.Tr.239).

A child will more likely be vulnerable to maltreatment if he has a parent with a history of unresolved maltreatment, or if the parent has problems coping with it(Hr.Tr.240). Rick's mother was in a violent relationship, coping with her own history in a problematic way(Hr.Tr.240). At least by the time she left that relationship, she was using substances(Hr.Tr.240). Those experiences made Rick more vulnerable(Hr.Tr.241).

At some point the family moved to Rick's grandmother's house; there was a lot of housing instability(Hr.Tr.241-42). Rick's memories of abuse go back to that time; he had some fragmentary memories of being in the bathtub with his grandmother, and Rick was aware of his mother's prostitution(Hr.Tr.241-42). At a young age he saw a lot of his mother's sexual activity with different men(Hr.Tr.242).

During that period they lived with various family members (Hr.Tr.242). Rick told of two aunts—though Rick was not clear whether they were actually aunts—named Sarah and Sharon; Aunt Sarah was having sex with Billie’s husband, Cothorn(Hr.Tr.242). Aunt Sarah touched Rick while in the bathtub, and he remembered seeing her touch her vagina(Hr.Tr.242). She used drugs in front of Rick(Hr.Tr.242) Rick also has a memory of being put on top of his sister, Yvonne(Hr.Tr.242). He was so young that he could not have an erection, but he recalled urinating on her and that there was a big hubbub about it in the family(Hr.Tr.242-43).

Rick also had a memory of being in the basement with his uncle Andy, a known sexual perpetrator who sexually abused Rick’s sisters(Hr.Tr.243). They warned that Rick should not go near him(Hr.Tr.243). Thus, even before Cothorn there were a lot of experiences where Rick was exposed to adult sexuality—he saw adults having sex, he was present with adults who were dressing and undressing, he was touched by other adults, and his aunt Peggy taught him how to “go down on her” when he was a little boy(Hr.Tr.243). Rick was exposed to adult sexuality, and being shown pornography, more than a child can process(Hr.Tr.243). Dr.Reynolds found no parental guidance about appropriate sexuality(Hr.Tr.243-44).

Rick came from an unregulated environment without sexual boundaries, and with adults who, due to substance abuse and their own history, were probably not attending to what Rick as a child was seeing or experiencing(Hr.Tr.244). Dr.Reynolds explained that one loses a sense of empathy and understanding what it’s like for a

child; she was familiar with the patterns of sexual abuse, and she could see them in Rick(Hr.Tr. 244-45). Billie and her sisters had no experience in being protected from such an environment themselves, making Rick’s home environment simply normal for them and disinhibiting them in front of the children(Hr.Tr.245).

Rick had a very strong wish to have an attachment with his mother that still persists(Hr.Tr.246). When he had accomplished things in prison to improve himself, he sought to share those accomplishments with his mother to gain her approval(Hr.Tr.246). Rick told Dr.Reynolds about trying to intervene when Cothorn beat Billie(Hr.Tr.246). Or if she intervened when Cothorn was beating Rick, and she was beaten for it, Rick would feel very guilty; that was some of why he tried to stay away from the house(Hr.Tr.246). So even though Rick was sometimes cruelly beaten or treated neglectfully by his mother—e.g. hitting him with a frying pan or toys—he wanted to think well of her(Hr.Tr.247). Very often Rick didn’t know what he had done wrong, but he would register shock and a sense of betrayal that she would mistreat him(Hr.Tr.247).

Rick’s first psychological assessment noted that he was “scapegoated” for family problems. Dr.Reynolds said one psychologist observed the children misbehaving, but Rick was the only one who suffered any consequences(Hr.Tr.247-48;M.Ex.1,p.49). A counselor noted that it was “surprising” that Rick had been able to cope at all; Dr.Reynolds said that was strong language for such a record(Hr.Tr.248).

In Dr.Reynolds’s assessment, Rick felt the coldness and distance from his mother(Hr.Tr.249). His running away was often an attempt to see whether she

cared—and he at times hid to see whether she would notice that he was gone(Hr.Tr.249). Rick did not experience physical contact except what was sexualized or violent(Hr.Tr.251). That registers at a physical level—sexual arousal will create soothing, which is a very strong setup for substance abuse(Hr.Tr.251). So Billie’s difficulties in parenting and attaching to Rick made him vulnerable(Hr.Tr.251).

Another effect of the lack of attachment is that if a parent, particularly the mother, consistently denies her child’s experience, such as physical or sexual abuse, the child doesn’t understand that the parent isn’t aware of it(Hr.Tr.251-52). Rick’s mother at least knew about the physical abuse he suffered(Hr.Tr.251-52). So if the parent doesn’t intervene to end or prevent the abuse, the child believes either: 1) that he is not loved enough because of something so deeply wrong with him that the caretaker would choose not to intervene; or 2) that what is happening is normal and right(Hr.Tr.252). That Rick felt there was something wrong with him is documented in his earliest psychological report(Hr.Tr.252).

The lack of sexual boundaries in the family in Rick’s childhood fueled a sexual response in Rick later on(Hr.Tr.292). Stimulating a child’s body sexually at such an early age meant that that sexual response was primed(Hr.Tr.292-93). Children in more normal situations might have a momentary sexual response to stimuli and then typically socialization will tell the child what behavior is acceptable, and when, how, where, and with whom it is acceptable(Hr.Tr.293). None of that occurred with Rick;

he was continuously exposed to adult material such as pornography, and adults doing sexual things and stimulating him(Hr.Tr.293).

Stan Cothorn was a major perpetrator in Rick’s life(Hr.Tr.253-54). Dr.Reynolds believed that the sexual abuse did not begin immediately, though there was physical abuse earlier(Hr.Tr.254). Rick was at first shocked, wondering what he had done wrong to deserve such treatment(Hr.Tr.254-55). But he did not already have an attachment to Cothorn, and he became angry—with Cothorn for the abuse, and with himself for fearing Cothorn and failing to get away from him(Hr.Tr.256).

Survival behaviors include fight, flight, and freeze(Hr.Tr.256-57). Rick demonstrated flight by running away, but when he was being beaten, he could not get away, so while mentally in flight or fight mode, thinking things like, “I hate you,” he was trapped, left in freeze mode(Hr.Tr.257). Rick attributed his fear of Cothorn and his inability to get away or fight back to his own weakness(Hr.Tr.257). With no way to stop Cothorn’s abuse, Rick would run away(Hr.Tr.258).

Rick reported that the sexual abuse by Cothorn began when Rick was eight(Hr.Tr.259;M.Ex.19,p.6224). Dr.Reynolds determined Rick’s reporting was reliable because of his detailed descriptions, family factors, his reluctance to disclose, and the evidence that Cothorn had sexually abused Rick’s two sisters(Hr.Tr.260-61). The detail demonstrated reliability because perpetrators have a pattern, and Rick’s description was consistent with that pattern (Hr.Tr.261). Rick described things that Cothorn said to him to “get off,” and his questioning of Rick about little girls—his way of fantasizing—so that he would get sexually aroused(Hr.Tr.261). He also

described Cothorn putting his penis so far down Rick's throat that he choked, and he described having to swallow the ejaculate, though he didn't use that word—Rick described the acts using the language of a child consistent with his age at the time it occurred(Hr.Tr.261-62). The level of detail is important because in an intolerable situation, including sexual abuse, one's mind will focus on small details as a way to distance oneself from emotional or physical pain(Hr.Tr.263-64).

Rick also described patterns of hypervigilance that children display before an incident of abuse—seeing the signals that it was coming, such as Cothorn's sitting in his chair, watching a particular television program, and beginning to masturbate, or Rick would watch Cothorn's crotch to see if he had an erection, which he might get before seeking out Rick for sexual gratification(Hr.Tr.262). Rick's reluctance to disclose also indicated that his was a valid report(Hr.Tr.262).

One of the things Rick is most ashamed of is that he has had what he called sex with men, meaning Cothorn, Uncle Andy, any of the men thereafter who raped him or had sex with him(Hr.Tr.262-63). Rick is ashamed of that because he believes it means he is a homosexual; this is typical of men who have been sexually abused, which in this culture is stigmatized, and Rick did not want to be seen as a "fag"(Hr.Tr.263). Rick has no tolerance for the sexual acts he was engaged in, and judges himself and the other men for it(Hr.Tr.278). Rick misconstrued, also typical, that these were acts of homosexual sex rather than abuse, and that because he did not fight or flee, he was complicit and willing(Hr.Tr.263). It is not unusual for boys who have been sexually abused to, once they reach adolescence, have other sexual

experiences with boys or men, in part because they are confused about their sexuality; they may not know whether they are heterosexual or homosexual, because often they could be stimulated into arousal during the abuse(Hr.Tr.278).

A counselor's note from a psychological referral while Rick was incarcerated in DOC in 1993 summarized that Rick described being sexually molested by a school coach and by a Big Brother volunteer(Hr.Tr.267-68;M.Ex.2,p.372). He described to Dr.Reynolds how the coach asked the boys to undress in the shower; his initial story was that he resisted because he did not want the coach to see his bruises from home(Hr.Tr.268). In Dr.Reynolds's second assessment, Rick provided much more detail, saying that the coach cornered him in shower and forced him to have oral sex(Hr.Tr.268). He also anally raped Rick(Hr.Tr.268). Rick described these in detail; it was extremely painful(Hr.Tr.268). The detail again led Dr.Reynolds to conclude that Rick's report was reliable(Hr.Tr.268-69).

Rick told Dr.Reynolds that there was a period in adolescence, not much later than the period of sexual abuse by Cothorn and the coach, that Rick was solicited for sex by men(Hr.Tr.272). He described not being able to say no when approached, which made him very disgusted and distressed with himself(Hr.Tr.272). He said a number of those men were very sexually sadistic and abusive—tying him up, raping him to the point where he was bloody, holding him imprisoned, tying his genitals, and biting him(Hr.Tr.272).

The abuse Rick suffered continued when he was placed in the Haley House residential facility; he described sexual abuse by two older boys there. Rick was 12

and the other boys were around 17 or 18(Hr.Tr.273). Rick said the two would get him when he was alone; they would do what he called “slick-legging” him—rubbing soda between his legs, then sticking their penises between his legs until they ejaculated(Hr.Tr.273).

Chris Alvarez was a Haley House resident when Rick was there(Hr.Tr.274,906). He described to Dr.Reynolds the atmosphere in the home and told her who was in charge, who was aware of what, and how the boys treated each other(Hr.Tr.274). He said the other boys would tease Rick, and they saw him as typically one of the weaker and younger ones in the home(Hr.Tr.274). There was also sexual intimidation, such as saying, “We’re going to make you suck our dick[s]”(Hr.Tr.274).

Alvarez’s survival strategy was befriending the biggest, most powerful boy, who then taught him to box(Hr.Tr.275). Alvarez said Rick was vulnerable because he was small; he would see Rick coming up from the basement crying, because Rick did not have a strategy for protecting himself(Hr.Tr.275-76).

Rick hid the abuse from those in charge; he tried not to let anyone know what was happening(Hr.Tr.276). And he also tried to avoid thinking about it; he described how, when Cothorn was committing sexual acts against him, Rick would imagine himself going fishing in his mind, or he would masturbate—he would do something either to induce a positive mood state, or would try to hide it, though he was seen as weak by potential perpetrators(Hr.Tr.276-77).

Before Rick’s release from prison on his rape conviction, he was given an assignment to take stock of what he had done and prepare a history of his sexual

activity(Hr.Tr.282;M.Ex.6, pp.1795-1874). He did not refer in this document to being sexually abused himself; he refers to a lot of sexual activity with other girls and when he was very young, but he did not refer to a coach or to Cothorn(Hr.Tr.282;M.Ex.6, pp.1795-1874). Dr.Reynolds said it would have been typical for Rick not to reveal that part of his sexual experiences(Hr.Tr.283). In Dr.Reynolds's clinical experience with men under conditions similar to Rick's regarding shame and stigma, the psychological cost of disclosure is often too high, so that even when given the direct opportunity, they will still fail to disclose, and will even lie about it(Hr.Tr.284).

Dr.Reynolds found Rick's mental processes disorganized—he would repetitively say things about wanting to be able to describe an event and then not being able to put it into words(Hr.Tr.286). His fragmentation is a reflection of the early childhood trauma that occurred as Rick's language was developing(Hr.Tr.286-87).

There are many ways in which trauma victims try to cope; Rick used drugs and engaged in a lot of sex to self-soothe(Hr.Tr.290-91). Rick has a lot of problems with empathy for and understanding of other people(Hr.Tr.291). He is “dysregulated”—for example, alternating between extremes of feeling responsible for his mother's safety, and then being completely cut off from others to the point that he does not understand that another person is in pain(Hr.Tr.291-92). This attachment dysregulation in adulthood often indicates attachment dysregulation very early(Hr.Tr.292).

Dr.Reynolds concluded that Rick's memories of his experiences of abuse and his adaptations are consistent with and typical of individuals who have experienced very

early, prolonged and multiple forms of abuse and neglect(M.Ex.19,p.6226-27). Her conclusions were based on the totality of the data available in the records she was given, her assessment of Rick, her discussions with Alvarez, and the available family history(Hr.Tr.285).

Dr.Mandracchia's trial testimony

During cross-examination of Dr.Mandracchia at trial, the prosecutor elicited that Rick told Dr.Mandracchia about his excitement over the acts he and Riley committed against Ms.Spicer(Tr.4681-82). He graphically told the details of the rape for which he had been imprisoned, which the prosecutor repeated(Tr.4664-65). He also told Dr.Mandracchia that he first acted out on someone who was resisting his sexual advances when he was around twenty-one or twenty-two years old(Tr.4661-62). And he told Dr.Mandracchia how he had women who visited him while he was in prison for rape who would tell him their often perverted sexual fantasies, and that Rick would then go back to his cell and masturbate(Tr.4653,4669-71). It was the stories from these visitors that gave Rick ideas for sexual acts after his release(Tr.4672-75). Dr.Mandracchia also described that Rick told him that he had a copy in his cell in jail of a transcript of the video he and Dena made of the assault on and death of Marsha Spicer(Tr.4637-38).

Counsels' testimony

Curt Winegarner and Tim Burdick

Non-capital public defenders Winegarner and Burdick initially represented Rick

before the State filed its notice of intent to seek the death penalty(Hr.Tr.616,830). They knew they would need a mental health expert, and retained Dr.Mandracchia to talk to and evaluate Rick(Hr.Tr.618). They both had experience with him and high regard for him(Hr.Tr.618-19). His expertise in working with sexual offenders seemed like a good fit for Rick's situation(Hr.Tr.619).

The most important reason for selecting Dr.Mandracchia in the beginning was to assess the needs they would have going forward(Hr.Tr.619). They also learned that Rick had recently gone through a period of crisis in his life, and they were concerned whether that would continue into their representation(Hr.Tr.619). They wanted Dr.Mandracchia to meet with Rick and see whether he would be able to work with counsel, whether he needed treatment, and whether there might be competency issues(Hr.Tr.620). Even though they did not rule out Dr.Mandracchia testifying at trial, they envisioned him as a consultant rather than a potential witness(Hr.Tr.620-21). In fact, Burdick explained that he determined as early as Dr.Mandracchia's second visit with Rick that he would need to be a consultant rather than a witness because, among other reasons, in the opinions of Burdick and Dr.Mandracchia, what he would have to tell the jury was not very helpful(Hr.Tr.844).

Tom Jacquinot

Lead trial counsel Jacquinot acknowledged that his view of Rick's case was that even before trial, the focus would be on penalty phase—Rick had confessed, the defense motions to suppress evidence had been denied, and Rick had video-recorded

most of the crimes, so there was audio and video documentation of acts that were so disturbing they were hard to describe(Hr.Tr.1131).

Jacquinet decided to keep Dr.Mandracchia on the case when the capital team took over because Dr.Mandracchia had been working with Rick for a while and Jacquinet had previously worked with him(Hr.Tr.1128). He did not recall Winegarner or Burdick telling him about any negative feelings toward using Dr.Mandracchia as an expert witness in Rick's case or advising him against doing so(Hr.Tr.1122).

Jacquinet recalled that Rick's unwillingness to discuss with Dr.Mandracchia the sexual abuse Rick suffered in childhood was an ongoing issue(Hr.Tr.1132). That was common in Jacquinet's experience, in that it is a very emasculating, life-scarring experience, and people are generally very reluctant to discuss sexual abuse(Hr.Tr.1132-33).

In an offer of proof concerning the State's cross-examination of Dr.Mandracchia at trial about things Rick told him, Jacquinet agreed that several items were damaging to Rick, including details of the offenses against Michelle Ricci⁷ and Ms.Spicer, that women told Rick their sexual fantasies while he was in prison, and that Rick acted out some of those fantasies after his release(Hr.Tr.1138-44).

Counsel considered hiring an expert in sexual and physical trauma but did not do so(Hr.Tr.1149). To some extent it was a time problem, but he said it was primarily

⁷ Rick was convicted of assaultive and sexual offenses against Ms.Ricci; he was charged with her death in Clay County(L.F.5154-5189,5359)

due to the level of cooperation they were getting from Rick with the experts they had(Hr.Tr.1149). Although Jacquinot said it was his opinion at the time that he really did not see Rick engaging in that process and cooperating with that type of expert, he did not recall having any discussions with Rick about using such an expert(Hr.Tr.1149-50). And he had no doubt that Rick would have gone through that process; he did not think Rick would have refused to see anyone(Hr.Tr.1150).

Counsel endorsed both Dr.Mandracchia and Dr.Logan as witnesses, and the decision to call Dr.Mandracchia was based on counsel's feeling that he was the stronger witness, in that his relationship with Rick was primarily positive, which had significance to Jacquinot in light of Rick's issues(Hr.Tr.1157). Counsel decided to use Dr.Mandracchia despite the "wealth of negative information" Dr.Mandracchia knew about Rick—a consequence he thought unavoidable for any expert(Hr.Tr.1158). After the State's cross-examination of Dr.Mandracchia resulted in his testimony being what Jacquinot saw as either "break even" or a "net loss," he certainly was not going to call Dr.Logan, whom he perceived to be a weaker witness(Hr.Tr.1159).

Susan Elliott

Co-counsel Elliott did not find the personality disorders with which Dr.Mandracchia diagnosed Rick to be mitigating(Hr.Tr.116-17). She recalled that Dr.Mandracchia testified that although Rick would not confirm that Cothorn sexually abused him, she thought he had disclosed that to the defense team(Hr.Tr.117).

Carol Muller

It took a long time for Rick to tell Muller, the defense mitigation specialist, that Cothorn had sexually abused him(Hr.Tr.857,861,870). Rick’s sisters Yvonne and Stephanie told Muller they believed that was true, though neither had seen it happen(Hr.Tr.870). Rick clearly was physically abused—they heard a lot about that from Rick’s mother, his aunts, and both sisters(Hr.Tr.870-71). But although they strongly suspected sexual abuse, Rick had not told them about it, and no one saw it(Hr.Tr.871). Rick finally disclosed the abuse after Muller told him Stephanie had disclosed that Cothorn had abused her, which she had previously denied, but was by then willing to testify to it(Hr.Tr.877-78).

Yvonne and Jane, one of Rick’s aunts, told Muller that Rick’s mother, two aunts—Darlene and Jane herself—and Stephanie had worked as prostitutes, and there were really no boundaries concerning inappropriate touching among the children or the adults and children(Hr.Tr.871-72). Jane told Muller about her ex-husband putting Rick on top of his sister Yvonne(Hr.Tr.872).

The Findings

The motion court found that Dr.Mandracchia, a certified forensic examiner for the State, was well qualified to diagnose Rick and offer expert opinions at trial(PCR.L.F.1402). The court rejected Rick’s assertion that Dr.Mandracchia’s focus “missed the mark” by not discussing trauma, finding that to be the same as Dr.Mandracchia’s testimony simply relabeled(PCR.L.F.1407,1409). It found that

counsel were “not ineffective for failing to call an expert who might have put a different ‘spin’ or ‘gloss’ on the evidence presented at trial. Trial counsel was not obligated to shop for an expert who would have testified in a particular manner, such as characterizing the net effects of [Rick’s] alleged abuse as ‘trauma’ or who would have, in hindsight, provided more favorable testimony.”(PCR.L.F.1409).

The motion court also found, as clearly drafted by the State, that a primary basis for Dr.Reynolds’s findings:

comes from information *not available* to trial counsel, but generously supplied by [Rick] in preparation for this motion.”(PCR.L.F.1410). In stark contrast to [Rick’s] garrulous post-conviction persona, his pretrial reticence to cooperate with trial counsel and their retained mental health experts is well documented. In fact, a primary reasons[*sic*] for trial counsel’s retention of...[Dr.Logan] was to evaluate “[Rick’s] difficulty in interpersonal interaction with the goal being able to devise a plan for meaningful attorney-client interaction in a capital murder case.”

(PCR.L.F.1410)(citing Ex.18 to Dr.Logan’s pretrial deposition(Resp.Ex.222,p.303), a letter from counsel to Dr.Logan at the outset of counsel’s representation). The motion court cited *State v. White*,913 S.W.2d 435,438(Mo.App.E.D.1996), for the proposition, “[d]efense counsel is not responsible for his client’s failure to cooperate in the case.” Citing *State v. Brown*,902 S.W.2d 278,298(Mo.banc 1995).

Standard of Review

The standard is as stated immediately before the Argument section of this brief.

Counsel Were Ineffective

Counsel who fail to present evidence of diminished mental abilities are ineffective.

See **Williams v. Taylor**, 529 U.S. 362, 396 (2000) (counsel failed to present evidence defendant was borderline mentally retarded and did not go beyond sixth grade); **Wiggins v. Smith**, 539 U.S. 510, 535 (2003) (counsel failed to present evidence of defendant's homelessness and diminished mental capacities); **Rompilla v. Beard**, 545 U.S. 374, 391 (2005) (even though counsel retained three mental health professionals they failed to present mental health evidence that included test scores showing a third grade achievement level after nine years of schooling).

Rick's counsels' strategy was to present *something* to the jury about Rick's difficult childhood. But they fell far short of the goal of presenting a *reason* for Rick's behavior. Dr. Reynolds supplied the reason, that trial counsel failed to investigate: the childhood trauma that went on for years, and went untreated. That was why the failure to focus on the trauma Rick suffered as a child and adolescent cannot fairly be described as simply putting a different "spin" on the case, or on what testimony should have been sought from an expert.

This case was not about "spin," but about trial counsels' failure to recognize the mental health issues, because they failed to conduct a reasonable investigation into the exact nature of Rick's problems, leading them to fail to contact an appropriate expert.

Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Kenley v. Armontrout*, 937F.2d1298,1304(8th Cir.1991). Counsel’s strategy must be objectively reasonable and sound. *State v. McCarter*, 883S.W.2d75,78(Mo.App.S.D.1994). In *Hutchison v. State*, 150S.W.3d 292,304-05(Mo.banc2004), although counsel called a psychologist and 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. Here, counsel called Dr.Mandracchia to testify to abuse, including sexual acts—though not the detailed information concerning sexual abuse by Stan Cothorn that Dr.Reynolds presented—but counsel was nonetheless ineffective for failing to present true mitigating evidence of the years of trauma Rick suffered and its effect on him.

The motion court’s findings about Rick’s lack of cooperation miss the whole point. Any lack of cooperation by Rick was directly related to his mental illness, as amply supported by Dr.Logan. Dr.Logan specifically found that Rick’s bipolar disorder included symptoms of depression, mania, and paranoia(Hr.Tr.576-77). Dr.Logan further opined that Rick’s Bipolar I Disorder caused him to lack the capacity to assist his legal counsel in his own defense, in that his “persecutory ideas about his defense team and his emotional lability prevented him from being able to collaborate and adequately provide information that would have facilitated a more comprehensive mental defense....”(M.Ex.20,p.6370-71).

So the fact that Rick was *unable* to cooperate with counsel—a topic counsel failed to adequately address, instead throwing up their hands in frustration at their difficulties in dealing with him—is wholly unlike the lack of cooperation at issue in *White* or *Brown*. In *White*, the defendant *chose* not “to discuss the facts of his case because he was quite sure he would hire a private attorney, get a bond reduction, and ultimately be placed on probation. White continually told his counsel that he was planning to get a private attorney, but failed to do so.” *White*, 913 S.W.2d at 438. Similarly, Brown’s lack of cooperation prevented counsel from learning of potentially mitigating witnesses; further, counsel’s investigation revealed Brown’s history of drug use and violent behavior, which counsel felt would come out on cross-examination of mitigating witnesses. *Brown*, 902 S.W.2d at 298. Both cases are very unlike Rick’s situation.

Further, the motion court completely ignored Jacquinot’s testimony that he had no doubt that Rick would have gone through the process of working with an expert who would have focused on sexual disorder and trauma; he did not think Rick would have refused to see anyone (Hr.Tr.1150). It was *counsel* who balked at the thought, because it would have been a “negotiation” process (Hr.Tr.1150). In other words, it was counsel who did not want to deal with Rick, so he did not even have any discussions with Rick about such an expert (Hr.Tr.1150). The motion court’s finding of lack of cooperation is again unsupported by the record.

The motion court’s observation that Rick did not explain how the trauma affected his psychosocial development (PCR.L.F.1407), is completely at odds with

Dr.Reynolds’s testimony and her report(M.Ex.20,pp.6218-27). As set out above, she went into great detail on this very question, which Rick will not repeat in full, but she informed the court how Rick grew up without sexual boundaries, how he had an unfulfilled wish for attachment to his mother, and how he grew up in a highly sexualized environment, which led to sexual arousal creating soothing for Rick, and how he came to see his situation as meaning there was something wrong with him(Hr.Tr.244,246,251-52).

In addition, there was no requirement that Rick show to the last detail how the trauma impacted his development. “Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Tennard v. Dretke*,542U.S.274,285(2004)(quoted in *Hutchison*, 150S.W.3d at 304, and *Glass v. State*,227S.W.3d463,468(Mo.banc2007)). Relevant mitigating evidence “is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” *Tennard*,542U.S.at 284. The evidence that Rick suffered trauma was not otherwise presented to the jury; thus the motion court’s conclusion that he was faulting counsel for, in essence, not engaging in “expert-shopping”(PCR.L.F.1409), is contrary to *Tennard*.

In *Wiggins*, the Court found counsel’s failure to conduct a thorough investigation that would have uncovered evidence of physical and sexual abuse reflected only a partial mitigation case. 539 U.S.at 510,524-26,534-35. That partial case was the result of inattention, not reasoned strategic judgment and constituted ineffective

assistance. *Id.* In finding Wiggins’s counsel was ineffective the Court observed:

Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability. *Penry v. Lynaugh*, 492 U.S. 302, 319...(1989)(“[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background...may be less culpable than defendants who have no such excuse”).

Id. 535.

Wiggins reasoned that if the jury had been able to place Wiggins’s “excruciating life history” on the mitigating side of the scale there was a reasonable probability a different balance would have been struck. *Id.* 537. The mitigating evidence that could have been presented might have influenced the jury’s appraisal of Wiggins’ moral culpability. *Id.* 538.

In *Williams v. Taylor*, trial counsel presented mitigating evidence through the defendant’s mother, his friends, and a psychiatrist, but failed to conduct an investigation that would have uncovered extensive evidence of his abusive and deprived childhood. 529 U.S. at 369, 395. Similarly, Williams was denied effective assistance under *Strickland*.⁸ *Williams*, 529 U.S. at 396-98. Likewise, in *Rompilla*, counsel was ineffective in failing to uncover and present abuse evidence. 545 U.S. at 390-93.

⁸ *Strickland v. Washington*, 466 U.S. 668 (1984).

Wiggins, *Williams*, and *Rompilla* all recognized the inherent mitigating value of abuse evidence. Reasonable counsel would have called Dr.Reynolds to testify to the trauma Rick suffered due to physical and sexual abuse. See *Strickland* and *Deck v.State*,68 S.W.3d418,426(Mo.banc2002). Rick was prejudiced because there is a reasonable probability he would have been sentenced to life had the jury heard this evidence. See *Strickland* and *Deck*.

Finally, although the motion court found Dr.Reynolds not credible—because she was paid for her services, opposes the death penalty, has found childhood trauma in each of the other cases she has worked on in post-conviction proceedings, and because she used Rick’s records as sources of information—(PCR.L.F.1423), a state post-conviction judge’s findings that a witness in the proceeding is not convincing does not defeat a claim of prejudice. *Kyles v.Whitley*,514 U.S.419,449, n.19(1995). Such an observation could not substitute for the jury’s appraisal at the time of trial. *Id.* Credibility of a witness is for the jury, not the post-conviction court. *Antwine v. Delo*,54 F.3d1357,1365(8thCir.1995). It was not up to the motion court to decide what a jury may have believed.

Had trial counsel retained Dr.Reynolds and presented to the jury the evidence of trauma Rick suffered due to physical and sexual abuse, there is a reasonable probability that the jury that heard all of this evidence would have sentenced him to life. For all the reasons discussed, counsels’ failure to call Dr.Reynolds to testify about that trauma denied Rick effective assistance of counsel and a new penalty phase is required.

II. Rick's competence to be tried and counsels' failure to challenge competency.

The motion court clearly erred in denying Rick's claim that counsel were ineffective for failing, through the testimony of Dr. William Logan, M.D., to challenge Rick's competence to be tried, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, in that Rick was not competent to be tried, and reasonably competent counsel would have provided to their expert retained for that purpose sufficient information to support a finding of a mental illness within a reasonable degree of medical certainty, namely a letter they received from Rick, which documented changes in Rick's behavior after ingesting psychotropic medication provided to him by a licensed psychiatrist, and which identified potential witnesses who observed these personality changes, and which upon reviewing, Dr. Logan was able to use to support a diagnosis of Bipolar I Disorder, which resulted in his opinion that Rick was incapable of assisting counsel in his defense, and thus was incompetent to be tried.

The Claim

Rick alleged that trial counsel failed to provide the psychiatrist he retained, Dr. Logan, with sufficient information and documentation to support a finding of a mental illness within a reasonable degree of medical certainty. Most notably the 8/24/07 letter given by Rick to trial counsel, Susan Elliot at her request, which

documented changes in his behavior after ingesting psychotropic medication provided to him by a licensed psychiatrist. The letter, which identified potential witnesses who observed these personality changes, was never provided to Dr.Logan, and Rick was prejudiced, because if it had, Dr.Logan would have been able to testify at a competency hearing that Rick was not competent to stand trial because he was suffering from Bipolar I Disorder, a serious mental illness, which caused him to lack capacity to assist counsel in his defense.

The Evidence

Had Dr.Logan, a psychiatrist hired by defense counsel before Rick's trial, been given a letter Rick wrote to counsel in August 2007, he would have diagnosed Rick with Bipolar I Disorder, and he would have testified that:

. . . Bipolar I Disorder qualifies as a severe mental disease and
. . . Bipolar I Disorder, a mental disease, caused [Rick] to lack the capacity to assist his legal counsel in his own defense. Although he retained the capacity to understand the proceedings against him, [Rick's] persecutory ideas about his defense team and his emotional lability prevented him from being able to collaborate and adequately provide information that would have facilitated a more comprehensive mental defense in the guilt phase and mitigation evidence in the penalty phase of his Jackson County Capital Murder trial.

(M.Ex.20,p.6370-71).

Rick wrote the letter, dated August 24, 2007, to counsel to document for them the behavioral changes he had noted in himself since being prescribed the antidepressant medication Lexapro, a type called an SSRI, which was prescribed in March, 2006, some two months before the murder of Marsha Spicer(Hr.Tr.542-43,575,577;L.F.45; M.Ex.29;Supp.L.F. 28-44;Resp.Ex.216,261).

William Logan

Dr.Logan is a board-certified psychiatrist(Hr.Tr. 508). He was originally retained by trial counsel because counsel were interested in whether Rick would benefit from medication—there was a great deal of strain between Rick and counsel at that time(Hr.Tr.523-24). Rick clearly did not trust the defense team; there were disagreements over how to proceed in several areas(Hr.Tr.524). Dr.Logan was asked to determine whether Rick had a treatable condition and whether treatment might make his relationship with counsel more workable(Hr.Tr. 524). Dr.Logan also sought to determine whether Rick’s working relationship with forensic psychologist Steven Mandracchia, which had also deteriorated, could be restored(Hr.Tr. 525).

Between January and March, 2007, Dr.Logan talked with Rick six or seven times(Hr.Tr.527). After the initial meeting, in which he was fairly conversant and forthcoming, Rick later became extremely tense, quite paranoid, and very suspicious(Hr.Tr.527). There was a change after Rick’s disagreement with trial counsel—he particularly had cross words with lead counsel Jacquinot(Hr.Tr.527). Rick went from being fairly revealing to wanting to say very little about how he was

doing or what he was dealing with emotionally(Hr.Tr.527-28). Dr.Logan had to ask specific questions and Rick provided one- or two-word answers(Hr.Tr.528).

Rick became very suspicious of the defense team; he thought they were spying on him and cooperating with the prosecutor(Hr.Tr. 528). He also thought they were withholding things from him and wanted to see him convicted(Hr.Tr. 528). He did not see them as allies(Hr.Tr. 528). He indicated that he thought his current defense team was the same as the original team, from before the case became a capital case(Hr.Tr. 528). He said he did not believe Dr.Logan when he was told that they were different(Hr.Tr. 528).

Although there was nothing to indicate psychosis, Rick was angry and paranoid(Hr.Tr.529). His degree of paranoia was certainly near delusional proportions, in that there was no objective reason to think the defense team was out to undermine him(Hr.Tr.529). Rick wasn't amenable to any reasons Mr.Jacquinot would give to support his position about Rick's defense(Hr.Tr.529). Dr.Logan evaluated Rick for competence, though without going into a great deal of detail(Hr.Tr.529). He suggested that an antipsychotic medication with a mood stabilizer be prescribed(Hr.Tr.529). Dr.Logan did not prepare a competency report or give a definitive opinion(Hr.Tr.530).

Mitigation specialist Muller reported to Dr.Logan that Rick had become so agitated he'd beaten down a wall, that he was extremely paranoid of other inmates, and was talking to himself and beating his head against a wall(Hr.Tr. 530). Rick would not talk about this behavior(Hr.Tr. 530).

At one point Rick became angry, believing that Muller and the defense team were spying on him(Hr.Tr.531). At that point, communications completely broke down and Rick didn't want to talk further; he just seemed to get more agitated the more Dr.Logan tried to explore issues with him(Hr.Tr.531). Dr.Logan decided that further meetings at that point—early April, 2007—would not be helpful(Hr.Tr.531). He did not see Rick again until August, then once between then and trial in July, 2008(Hr.Tr.531-32,540;Tr.ii).

Based in part on Rick's 8/24/07 letter that he did not get from the trial team, Dr.Logan diagnosed Rick with Bipolar I Disorder, most recent episode mixed, severe with psychotic features(Hr.Tr.575-76;M.Ex.20,p.6370). Rick's bipolar disorder manifested in symptoms including having periods where he shows persistently elevated or irritable mood that is often rapidly cycling—meaning that there are symptoms of depression that may coexist with it, and that manifest themselves during the course of a day(Hr.Tr.576).

Rick has all of the associated symptoms of a manic episode, with some psychotic features(Hr.Tr.576). He is also paranoid, believing people are trying to harm or trick him(Hr.Tr.576-77). And he has fairly significant suicidal thoughts at times(Hr.Tr.577). Dr.Logan had insufficient information to diagnose Rick with bipolar disorder in the period before trial(Hr.Tr.577). Had he had available at that time what he learned during the post-conviction case, he thought he would have diagnosed bipolar disorder before trial(Hr.Tr.577).

Dr. Logan further said Bipolar I Disorder is a severe mental disease and, and it caused Rick to lack the capacity to assist his legal counsel in his own defense, in that he could not collaborate and adequately provide information to facilitate a more comprehensive mental defense and mitigation evidence in guilt and penalty phases(M.Ex.20,p.6370-71).

Tom Jacquinot

An early concern for lead trial counsel Jacquinot was issues surrounding communicating with Rick(Hr.Tr.1123). Jacquinot said there was not a lot of give and take—Rick had his own ideas and wanted counsel to stay focused on those, and go forward with them in the way Rick saw fit(Hr.Tr.1123). Jacquinot said that was really the only issue with Rick—when Jacquinot would visit, Rick initially may not want to see him, but once he got talking, Jacquinot could easily stay for several hours(Hr.Tr.1123).

At some point pretty early in the case, Jacquinot hired Dr. William Logan(Hr.Tr.1128-29). Jacquinot said his purpose was to perform a similar function to Dr.Mandracchia, as well as to complement him and provide another perspective—Dr.Mandracchia is a psychologist, while Dr.Logan is a psychiatrist, an M.D. who would be able to evaluate whether Rick’s state of mind might be improved through medication, and make suggestions to the jail’s mental health provider(Hr.Tr.1129). Jacquinot did not recognize the 8/24/07 letter as something he saw before

trial(Hr.Tr.1146;M.Ex.29). He also did not know whether he had given it to Dr.Logan(Hr.Tr.1146).

The discussions with Rick about whether he would testify in guilt phase began weeks before trial and continued throughout trial(Hr.Tr.1159-60). Jacquinot remembered Rick continuously “telling [them] that no matter what happened, he just wanted to be heard, that he’d be heard.”(Hr.Tr.1160). He constantly pushed the issue of testifying(Hr.Tr.1160-61). When asked what he advised Rick, Jacquinot said that it never got to that point, that Rick acknowledged that Jacquinot did not want him to testify but said, “I’ve just got to be heard.”(Hr.Tr.1161).

The Findings

The motion court found that Rick’s letter, “contains nothing of substance not previously noted in Dr. Logan’s interview notes.”(PCR.L.F.1436). The court further found that “Dr.Logan’s opinion...is apparently based upon the substantive credibility of information contained in the August 24, 2007 letter, authored by [Rick] during a period of time in which...he was [allegedly] *mentally incompetent and suffering from Bipolar I Disorder, mixed, severe with psychotic features.*”(PCR.L.F.1434)(emphasis in original). The court put great stock in Dr.Logan’s pretrial opinion that Rick was competent to go to trial:

Q: Do you believe that Richard Davis is currently competent to stand trial?

A: It’s a close one, but I’d say yes.

(PCR.L.F.1436; citing Logan Pretrial Depo.,p.151; Resp.Ex.222).

These findings are clearly erroneous and should be reversed.

Standard of Review

The standard of review is as stated before the Argument section of Rick’s brief.

Competency to be Tried

“No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.”§552.020.1. Convicting a defendant who is incompetent violates due process.*Pate v. Robinson*,383 U.S.375,378(1966). The test for assessing a defendant’s competence to stand trial is “whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has rational as well as factual understanding of the proceedings against him.”*Pulliam v. State*,480 S.W.2d 896,903(Mo.1972)(quoting *Dusky v. United States*,362 U.S.402(1960)); *State v. Wise*,879 S.W.2d 494,507(Mo.banc1994); accord,*Drope v. Missouri*,420 U.S.162,171(1975)(defendant must have the “capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense”). Also see *State v. Johns*,34 S.W.3d 93,104(Mo.banc 2000).

When this Court reviews a challenge directed at a trial court’s ruling that a defendant is competent to proceed, it is “not bound by and need not defer to [the trial court’s] conclusion as to the legal effect of his finding of fact.”*State ex rel. Sisco v. Buford*,559 S.W.2d 747,748(Mo.banc 1978). In general, a trial court’s decision will

be reversed if there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.*Murphy v. Carron*, 536 S.W.2d 30,32(Mo.banc 1976). Appellate courts must exercise caution in setting aside a judgment as being “against the weight of the evidence,” and should do so “with a firm belief that the decree or judgment is wrong.”*Id.*

However, when the record engenders a firm belief that the judgment is wrong, the reviewing court may weigh the evidence including, of necessity, evidence and all reasonable inferences drawn therefrom, which is contrary to the judgment.*Marsh v. State*, 942 S.W.2d 385,388(Mo.App.W.D.1997). This record engenders a firm belief that the judgment is wrong, and this Court must examine the evidence carefully. Although under §552.020.8, Rick was presumed fit to proceed and bore the burden of proving otherwise, the record as a whole demonstrates conclusively that he was not competent to go to trial.

The motion court erroneously cast the issue as one of credibility regarding Rick’s disclosures to Dr.Logan; that is not the test, and that is not the sole issue. The issue of Rick’s competence itself is at issue herein, not simply counsels’ performance. If Rick was not competent to proceed, as Dr.Logan testified, that is the end of the debate. In *State v. Simmons*, 955 S.W.2d 752,773(Mo.banc 1997), this Court not only found that counsel’s performance in failing to present the issue of competency to the trial court was not deficient, it further “agree[d] with the motion court’s conclusion that Simmons was not prejudiced because he was competent to proceed to trial.” That is the only remedy consistent with *Pate’s* prohibition of trying an incompetent

defendant. The information counsel failed to share with Dr.Logan is only part of the calculation.

The motion court's findings, in which it attempts to discredit Dr.Logan's opinion by showing that he held a different one before trial, actually support Rick's claim. The court noted that in Dr.Logan's pretrial deposition, his diagnoses included "underlying mood disorders," "some degree of paranoia" about his defense team that bordered on delusional," "paranoid personality disorder," that had progressed at times to almost "paranoid psychosis."(PCR.L.F.1435, citing(Resp.Ex.222,pp.132-33)). Those passages speak eloquently to Rick's inability to work with and assist counsel, and when the bipolar disorder diagnosis is added, Dr.Logan's conclusion that Rick was incompetent is practically mandated.

The trial court was aware that Rick had caused trouble, at one point seeking to proceed *pro se*, and being disruptive—on one occasion threatening to hit counsel or the judge(Tr.15-38,200-04). But that is evidence of his incompetence, all of which was clear: Rick was not competent to go to trial. And had counsel shared the 8/24/07 letter with Dr.Logan, he would have given that opinion before the trial occurred.

Finally, the State offered no evidence to counter Dr.Logan's opinion as to competence. It did not seek its own examination. It has merely criticized the timing of the information on which Dr.Logan's opinion is based. But as noted above, that is not of paramount importance. Rick's due process right not to be tried unless competent is of paramount importance, and he was denied that right. For these reasons, Rick requests that this Court reverse the motion court's denial of relief, and

remand for a new trial, to be held at such time as Rick is found to competent to proceed—when ““he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” *Johns, supra*, 34 S.W.3d at 104, quoting *Dusky*.

III. Failure to present evidence of Rick's Bipolar I Disorder to support a diminished capacity defense.

The motion court clearly erred in denying Rick's claim that counsel were ineffective for failing to investigate and call William Logan, M.D., in guilt phase to support a diminished mental capacity defense based on Rick's proper diagnosis of Bipolar I Disorder, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21 in that reasonably competent counsel would have provided all available information, including Rick's letter, to Dr.Logan, and thereafter presented this evidence to the jury, and had counsel done so, there is a reasonable probability Rick would not have been convicted of first-degree murder.

In Claim 8(b), Rick alleged that trial counsel were ineffective in failing to provide Dr.Logan with Rick's letter to counsel, which documented changes in his behavior after ingesting psychotropic medication provided to him by a licensed psychiatrist, and that had counsel given Dr.Logan this information and requested a complete psychiatric evaluation, Dr.Logan would have been able to testify that Rick suffered from Bipolar I Disorder, a serious mental illness, which substantially impaired Rick's ability to appreciate the nature and wrongfulness of his conduct and his capacity to conform his conduct to the requirement of the law(PCR.L.F.187-88). Rick alleged

that had this evidence been presented, he would not have been found guilty of first-degree murder(PCR.L.F.188-89).

Dr.Logan's testimony

As noted above, Dr.Logan, a board-certified psychiatrist, was originally retained to advise trial counsel as to whether Rick would benefit from medication, due to the strain between Rick and counsel(Hr.Tr.508,523-24). Dr.Logan did not evaluate Rick's mental state at the time of the offenses(Resp.Ex.222,p.8-9). After Dr.Logan told counsel that he did not see a viable "SSRI" defense(Hr.Tr.544-46), co-counsel Elliott did not discuss the rest of the information she had, including Dr.Hachinsky's records and Rick's statements about changes in his behavior after he began taking SSRIs(Hr.Tr.126).

Thus, Dr.Logan did not have all available information about Rick, particularly Rick's 8/24/07 letter, which trial counsel did not share with Dr.Logan or advise him of its existence(Hr.Tr.575;M.Ex.29;Supp.L.F. 28-44). Rick sent a copy of the letter to Dr.Logan during Rick's *pro se* consultation with Dr.Logan in the Clay County case involving the homicide of Ms.Ricci, after Rick was convicted in the underlying case herein(M.Ex.25,p.7731). Based on this information he had not previously seen, Dr.Logan diagnosed Rick during the post-conviction case with Bipolar I Disorder, most recent episode mixed, severe with psychotic features(Hr.Tr.575-76;M.Ex.20, p.6370).

Rick's bipolar disorder manifested in symptoms including periods of persistently elevated or irritable mood that is often rapidly cycling—meaning symptoms of depression may coexist with it, which manifest themselves during the course of a day(Hr.Tr.576). Other symptoms include some of those associated with manic episodes, such as decreased need for sleep, feeling grandiose, being hypertalkative, being very distracted, making foolish investments and spending lots of money, and engaging in risky sexual activity(Hr.Tr.576). Rick's risky sexual behavior included having sex with people who have hepatitis, resulting in Rick's contracting hepatitis himself(Hr.Tr.576).

Rick has all of the associated symptoms of a manic episode, with some psychotic features(Hr.Tr.576). He is also paranoid, believing people are trying to harm or trick him, and he has fairly significant suicidal thoughts at times(Hr.Tr.576-77). Dr.Logan had insufficient information to diagnose Rick with bipolar disorder in the period before trial(Hr.Tr.577). Had he had available at that time what he learned during the post-conviction case, he thought he would have diagnosed bipolar disorder before trial(Hr.Tr.577). Dr.Logan further opined that Rick's Bipolar I Disorder is a severe mental disease which substantially impaired Rick's capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of the law(M.Ex.20,p.6370-71).

Dr.Hachinsky, Rick's treating psychiatrist before the murders of Ms.Ricci and Ms.Spicer, also thought bipolar disorder was a possible diagnosis in March 2006; he found a generalized anxiety disorder and depressive disorder not otherwise

specified(Hr.Tr.555;St.Ex.261). Dr.Hachinsky recalled that when he saw Rick in March, 2006 that Rick was concerned about getting “wound up” over the course of the upcoming weeks, and the goals of his treatment were avoiding that and helping him improve his temper(M.Ex.21,p.6681).⁹

Findings

The court’s findings detail Dr.Logan’s opinions formed before trial, based on the information then available to him, although the claim concerns information counsel hadn’t supplied to Dr.Logan at that point(PCR.L.F.1437A-41).¹⁰ The court speculated from Dr.Logan’s pretrial deposition testimony(Resp.Ex.222), that he possibly had access to the 8/24/07 letter(PCR.L.F.1447). The court further found:

Moreover, even if Dr.Logan never physically received the letter in the pretrial phase of the case, he *never testified* at the evidentiary hearing that if he *had* received the letter prior to trial, *its contents* would have changed or altered his pretrial diagnosis. This is borne out by the fact that Dr.Logan failed to specifically testify that the contents of [Rick’s] August 24, 2007 letter was one of the bases for his revised post-conviction opinion.

(PCR.L.F.1448)(emphasis in original).

⁹ Exhibit 21 is part of Dr.Logan’s records and includes materials from Dr.Hachinsky.

¹⁰ There is an inadvertently unnumbered page between 1437 and 1438 in the post-conviction legal file, which is referred to as 1437A.

The court concluded that Dr. Logan was not credible because he did not follow what it called the scientific method—which it defined as attempting to disprove a hypothesis by avoiding seeking out information “that may have disproven, disconfirmed, or altered his diagnosis.”(PCR.L.F.1464). The prosecutor thus adopted his own definition in preparing the findings; when asked whether “part of the scientific method is the generation of a hypothesis and then the attempt to disprove that hypothesis by data that does not conform to that hypothesis?” Dr. Logan responded, “Or some test that would, yes.”(Hr.Tr.680), meaning that a confirming test can be designed to prove a hypothesis as well as disprove it. Further, the scientific method is a topic applicable to scientific research in general; the State offered no evidence that it has been applied to individual psychological or psychiatric diagnoses. Merriam-Webster’s online dictionary defines the term as “principles and procedures for the systematic pursuit of knowledge involving the recognition and formulation of a problem, the collection of data through observation and experiment, and the formulation and testing of hypotheses.” merriam-webster.com/dictionary/scientific%20method.¹¹ This is not a concept with any meaning in the practice of psychiatry on a single patient. The scientific method might apply to the formulation of the definitions in the DSM-5, but the State offered no evidence that it applies to the application of those definitions to Rick or any other patient.

¹¹ Counsel has removed “http://www.” from the address to avoid creating a hyperlink.

The court also rejected as not credible Dr. Logan's opinion that "although [Rick] was responsible for all of the acts leading up to the murder of Marsha Spicer, *he was not responsible for the murder itself* because bipolar disorder precluded his responsibility for *that particular act....*"(PCR.L.F.1464)(emphasis in original). The court noted that the biggest factor in rejecting Dr. Logan's testimony as not credible was that he did not view the videotapes of the crimes, which the court considered the most probative and critical evidence(PCR.L.F.1465). It said Dr. Logan instead "chose to take [Rick's] word for his mental state during those events."(PCR.L.F.1465). The court finally found that Jacquinot's trial strategy—not to call Dr. Logan because he was not as strong a witness as Dr. Mandracchia—was reasonable(PCR.L.F.1465-66).

The court's findings are clearly erroneous, because of their focus on what Dr. Logan knew before trial, and because the motion court substituted its judgment of Dr. Logan's credibility for that of a jury that should have heard his testimony. The court failed to take into account that a strategy based on a less than full investigation is not entitled to deference. *Kenley v. Armontrout*, 937 F.2d1298, 1304(8thCir.1991).

Standard of review

The standard is as stated immediately before the Argument section of this brief.

Diminished capacity

Evidence that the defendant suffered from a mental disease or defect is admissible to prove that he did not have a state of mind which is an element of the offense. *See State v. Walkup*, 220 S.W.3d748,754(Mo.banc2007), relying on §552.015.2(8). This

is the defense of diminished capacity. *Id.* 754. In recognizing the diminished capacity defense, this Court has defined it as “proof of mental derangement short of insanity as evidence of lack of deliberate or premeditated design. In other words, it contemplates full responsibility, not partial, but only for the crime actually committed.” *Id.*, quoting *State v. Anderson*, 515 S.W.2d 534, 540 (Mo. banc 1974). Evidence that a defendant would have difficulty knowing and appreciating the consequences of his conduct goes to diminished capacity. See *State v. Erwin*, 848 S.W.2d 476, 480 (Mo. banc 1993). That was the evidence counsel should have discovered by supplying Dr. Logan with the information in Rick’s 8/24/07 letter.

Counsel who fail to present evidence of diminished mental abilities are ineffective. See *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel failed to present evidence defendant was borderline mentally retarded and did not go beyond sixth grade); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (counsel failed to present evidence of defendant’s homelessness and diminished mental capacities); *Rompilla v. Beard*, 545 U.S. 374, 391 (2005) (even though counsel retained three mental health professionals they failed to present mental health evidence that included test scores showing a third grade achievement level after nine years of schooling).

Rick’s counsel failed to provide Dr. Logan with crucial information that would have led to a diagnosis of a recognized mental illness—Bipolar I Disorder—that “substantially impaired” Rick’s “capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of the law at the time of Marcia Spicer’s homicide” (M.Ex. 20, p. 6370-71). Dr. Logan knew after evaluating

Rick—something Jacquinet never asked him to do—that Rick’s bipolar disorder “substantially affected his reasoning and his judgment and his ability to conform his behavior to the law at time in question, that he was preoccupied with unusual, bizarre ideas, including sexual fantasies, that guided and directed his behavior.”(Hr.Tr.580). Thus, Rick had diagnosable diminished mental abilities in the form of Bipolar I Disorder but the jury never heard that evidence.

Failing to interview witnesses relates to preparation and not strategy. *Kenley*, 937 F.2d at 1304. Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id.* Counsel did not request an opinion from Dr.Logan—essentially did not interview him—about a mental disease defense, but instead relied on him strictly as an advisor as to Rick’s ability to work with counsel and Dr.Mandracchia(Resp.Ex.222,p.8-9). This failure was not diligent investigation and cannot be legitimated as strategy. *Id.*

Counsel’s strategy must be objectively reasonable and sound. *State v. McCarter*, 883S.W.2d75,78(Mo.App.S.D.1994). In *Hutchison v. State*, 150S.W.3d 292,304-05(Mo.banc2004), although counsel called a psychologist and 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. Rick’s counsels’ strategy was to present Dr.Mandracchia, only, despite the wealth of negative information counsel knew would come out at trial during cross-examination(Hr.Tr.1138-44). If that stood alone, it might be considered a matter of trial strategy to choose Dr.Mandracchia over Dr.Logan. But that is not Rick’s claim,

and that is not what happened. What happened was that counsel failed to give Dr.Logan adequate information, information counsel had but did not forward to their retained expert. That was not a reasonable strategy.

The finding that Dr.Logan was not credible(PCR.L.F.1464-65), is also clearly erroneous. First, as to the issue of whether the fact that Rick was capable of deliberating with respect to getting Ms.Spicer to his apartment under false pretenses, and binding her meant that Dr.Logan was not credible(PCR.L.F.1464), the court failed to take into account Dr.Logan's testimony that, as a psychiatrist, he would not assume "that setup was for the aim of murder"(Hr.Tr.810-11). In other words, finding that Rick could have deliberated on a sexual assault does not mean that he necessarily coolly reflected on murder. There was nothing inconsistent in Dr.Logan's testimony.

More important is the concept that a state post-conviction judge's finding that a witness in the proceeding is not convincing does not defeat a claim of prejudice. *Kyles v. Whitley*,514U.S.419, 449,n.19(1995). Such an observation could not substitute for the jury's appraisal at the time of trial. *Id.* Credibility of a witness is for the jury, not the post-conviction court. *Antwine v. Delo*,54F.3d1357,1365(8thCir. 1995). The State would have been free to test Dr.Logan's opinions in the crucible of cross-examination, but the court was not justified in taking that function away from the jury where it rightly was placed. Instead, the motion court substituted its judgment for that of a board-certified psychiatrist. This was not a fact witness, of whom a post-conviction motion court might properly determine credibility. This was an expert

offering an opinion he was plainly qualified to offer. That the court did not like the opinion does not permit the court to withhold a defense from the jury.

Dr.Logan’s pretrial opinion—which the court took special care to find more credible than his post-conviction testimony—was formed without the benefit of the information that Rick claimed should have been provided by counsel. It is therefore of little import that before Rick’s trial Dr.Logan did not see a mental disease defense. Of course he did not, because counsel did not show him the evidence to support such a defense, evidence that counsel had been given by Rick. And counsel did not ask Dr.Logan for an evaluation beyond the “SSRI” defense that Dr.Logan felt then—and still felt at the time of his post-conviction testimony—was not viable(Hr.Tr.545-46). It was therefore clearly erroneous to rely on Dr.Logan’s pretrial opinion to reject his post-conviction testimony.

Rick has shown a reasonable probability of a different outcome had counsel provided Dr.Logan adequate information and requested a proper evaluation of Rick’s mental condition at the time of Ms.Spicer’s murder. *Deck v.State*,68S.W.3d 418,426(Mo.banc2002);*Strickland*,466 U.S.at 694. He asks this Court to reverse the motion court’s decision and remand for a new trial.

IV. Failure to present evidence of Rick's Bipolar I Disorder in mitigation.

The motion court clearly erred in denying Rick's claim that counsel were ineffective for failing to investigate and call William Logan, M.D., in penalty phase to present evidence of Rick's diagnosis of Bipolar I Disorder, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21 in that reasonably competent counsel would have presented Rick's letter supporting that defense to Dr.Logan, and thereafter presented Logan's findings as to Bipolar I Disorder, and all foundations for his opinions, to the jury in penalty phase as mitigating evidence; had counsel done so there is a reasonable probability that Rick would not have been sentenced to death.

As noted above, in Claim 8(b), Rick alleged that trial counsel were ineffective in failing to provide Dr.Logan with Rick's letter to counsel, which documented changes in his behavior after ingesting psychotropic medication provided to him by a licensed psychiatrist, and that had counsel given Dr.Logan this information and requested a complete psychiatric evaluation, Dr.Logan would have been able to testify that Rick suffered from Bipolar I Disorder, a serious mental illness, which substantially impaired Rick's ability to appreciate the nature and wrongfulness of his conduct and his capacity to conform his conduct to the requirement of the law, and that the murder of Marsha Spicer was committed while Rick was under the influence of extreme mental or emotional disturbance(PCR.L.F.187-88). Rick alleged that had this

evidence been presented, he would not have been sentenced to death(PCR.L.F.188-89).

Because the evidence as to this point and the preceding point concerning diminished capacity is identical, Rick incorporates the recitation of that evidence from Point III, and will briefly summarize only a portion of it.

Dr.Logan's testimony

Dr.Logan, a board-certified psychiatrist, diagnosed Rick on the basis of the “new” information that he learned after Rick’s conviction, but that counsel had received long before that, with Bipolar I Disorder, most recent episode mixed, severe with psychotic features(Hr.Tr.575-76;M.Ex.20,p.6370). Rick has periods where he shows persistently elevated or irritable mood that is often rapidly cycling between that mania and depression(Hr.Tr.576). He shows some psychotic symptoms, is paranoid, and he has some fairly significant suicidal thoughts at times(Hr.Tr.576-77). Dr.Logan had insufficient information to diagnose Rick with bipolar disorder before trial(Hr.Tr.577). Had he had available at that time what he learned from Rick’s letter and in the post-conviction case, he probably would have diagnosed bipolar disorder before trial(Hr.Tr.577).

Dr.Logan further opined that Rick’s “capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of the law were substantially impaired at the time of Marcia Spicer’s homicide due to his Bipolar I Disorder and Borderline Personality.”(M.Ex.20,p.6370-71).

Findings

Again, the motion court’s focus was on Dr.Logan’s opinions formed before trial, based on the information then available to him, and on Dr.Logan’s “credibility”(PCR.L.F.1437A-41,1448,1464-65). It also found that Jacquinot’s trial strategy—not to call Dr.Logan because he was not as strong a witness as Dr.Mandracchia—was reasonable(PCR.L.F.1465-66).

As before, the court’s findings are clearly erroneous because of their focus on what Dr.Logan knew before trial, and because the motion court substituted its judgment of Dr.Logan’s credibility for that of a jury that should have heard his testimony (see Points II and III). The court failed to take into account that a strategy based on a less than full investigation is not entitled to deference.*Kenley v. Armontrout*,937 F.2d1298,1304(8thCir.1991).

Standard of review

The standard is as stated immediately before the Argument section of this brief.

Counsel Were Ineffective

Counsel who fail to present evidence of diminished mental abilities are ineffective. See *Williams v. Taylor*,529 U.S.362,396(2000)(counsel failed to present evidence defendant was borderline mentally retarded and did not go beyond sixth grade); *Wiggins v. Smith*,539 U.S.510,535(2003)(counsel failed to present evidence of defendant’s homelessness and diminished mental capacities);*Rompilla v. Beard*,545 U.S.374,391(2005)(even though counsel retained three mental health professionals

they failed to present mental health evidence that included test scores showing a third grade achievement level after nine years of schooling).

Mitigation

“Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (quoted in *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004), and *Glass v. State*, 227 S.W.3d 463, 468 (Mo. banc 2007)). Relevant mitigating evidence “is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” *Tennard*, 542 U.S. at 284. The evidence that Rick suffered from Bipolar I Disorder was not presented to the jury; thus the motion court’s conclusion that he was faulting counsel for choosing Dr. Mandracchia over Dr. Logan (PCR.L.F. 1465-66), is contrary to *Tennard*.

In *Wiggins*, the Court found counsel’s failure to conduct a thorough investigation that would have uncovered evidence of physical and sexual abuse reflected only a partial mitigation case. 539 U.S. at 524-26, 534-35. That partial case was the result of inattention, not reasoned strategic judgment and constituted ineffective assistance. *Id.* In finding *Wiggins*’s counsel was ineffective the Court observed:

Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant’s moral culpability. *Penry v. Lynaugh*, 492 U.S. 302, 319... (1989) (“[E]vidence about the defendant’s background and character is

relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background...may be less culpable than defendants who have no such excuse”).

*Id.*535.

Wiggins reasoned that if the jury had been able to place Wiggin’s “excruciating life history” on the mitigating side of the scale there was a reasonable probability a different balance would have been struck. *Id.*537. The mitigating evidence that could have been presented might have influenced the jury’s appraisal of Wiggins’ moral culpability. *Id.*538.

Rick’s counsel failed to provide Dr.Logan with crucial information that would have led to a diagnosis of a recognized mental illness—Bipolar I Disorder—that “substantially impaired” Rick’s “capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of the law at the time of Marcia Spicer’s homicide”(M.Ex.20,p.6370-71). Dr.Logan knew after evaluating Rick—something Jacquinet never asked him to do—that Rick’s bipolar disorder “substantially affected his reasoning and his judgment and his ability to conform his behavior to the law at time in question, that he was preoccupied with unusual, bizarre ideas, including sexual fantasies, that guided and directed his behavior.”(Hr.Tr.580).

Rick’s substantial impairment due to his Bipolar I Disorder precisely met the language of a statutory mitigator: “Statutory mitigating circumstances shall include...[t]he capacity of the defendant to appreciate the criminality of his conduct or

to conform his conduct to the requirements of law was substantially impaired”§565.032.3(6).

So again, the issue is failing to conduct a complete investigation, by not providing Dr.Logan with adequate information that would have allowed him to make his diagnosis before trial, thus obviating the need to consider the relative merits of Dr.Mandracchia vs. Dr.Logan as mitigation witnesses. This failure to investigate goes to preparation and not strategy, which is not protected by a presumption in favor of counsel and cannot be justified as strategy.*Kenley*,937 F.2d at 1304. Counsel did not provide Dr.Logan with the available information and did not request an opinion from him as to this statutory mitigator(Resp.Ex.222, p.8-9). This failure was not diligent investigation and cannot be legitimated as strategy. *Kenley*.

Counsel’s strategy must be objectively reasonable and sound. *State v. McCarter*,883 S.W.2d75,78(Mo.App.S.D.1994). In *Hutchison*, although counsel called a psychologist and 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.150S.W.3d at 304-05. As noted above, Rick’s claim is not simply that counsel should have chosen Dr.Logan over Dr.Mandracchia. Therefore, the court’s finding that choosing Dr.Mandracchia was a reasonable trial strategy(PCR.L.F.1464-65) is irrelevant.

Rick also incorporates without repeating his argument that the finding that Dr.Logan was not credible(PCR.L.F.1464-65), is clearly erroneous (see Points II and III). Further, here the issue is not whether Rick was capable of deliberating, but only

whether his capacity “to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.”§565.032.3(6).

A state post-conviction judge’s finding that a witness in the proceeding is not convincing does not defeat a claim of prejudice.*Kyles v. Whitley*, 514 U.S. 419, 449, n.19 (1995). Such an observation could not substitute for the jury’s appraisal at the time of trial. *Id.* Credibility of a witness is for the jury, not the post-conviction court. *Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995). Challenging Dr. Logan’s opinions should have been left to cross-examination, with the ultimate decision going to the jury.

Rick has shown a reasonable probability of a different outcome had counsel provided Dr. Logan adequate information and requested a proper evaluation of Rick’s mental condition at the time of Ms. Spicer’s murder. *Deck v. State*, 68 S.W.3d 418, 426 (Mo. banc 2002); *Strickland v. Washington*, 466 U.S. 668, 694 (1984). He asks this Court to reverse the motion court’s judgment and remand for a new penalty phase.

V. Failure to present evidence of Rick's Bipolar I Disorder to support NGRI defense.

The motion court clearly erred in denying Rick's claim that counsel were ineffective for failing to call William Logan, M.D., in guilt phase to support an "NGRI" defense that included relying on Rick's proper diagnosis of Bipolar I Disorder, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21 in that reasonably competent counsel would have presented this evidence and there is a reasonable probability Rick would have been found not guilty by reason of mental disease or defect.

The claim

In Claim 8(b), Rick alleged that trial counsel were ineffective in failing to provide Dr. Logan with Rick's letter to counsel, which documented changes in his behavior after ingesting psychotropic medication provided to him by a licensed psychiatrist, and that had counsel given Dr. Logan this information and requested a complete psychiatric evaluation, Dr. Logan would have been able to testify that Rick suffered from Bipolar I Disorder, a serious mental illness, which substantially impaired Rick's ability to appreciate the nature and wrongfulness of his conduct and his capacity to conform his conduct to the requirement of the law(PCR.L.F.187-88). Rick alleged that had this evidence been presented, he would not have been found guilty of first-degree murder(PCR.L.F.188-89).

Dr. Logan's testimony

As detailed in Point III above, which Rick incorporates herein, Dr. Logan opined that Rick's "Bipolar I Disorder, a mental disease, rendered [him] unable to appreciate the nature, and wrongfulness of his conduct at the time of the offense and rendered him incapable at the time of the offense in the homicide of Marcia Spicer, of conforming his conduct to the requirement of law."(M.Ex.20,p.6370-71).

Findings

Rick pleaded that his ability to appreciate the nature and wrongfulness of his conduct and his capacity to conform his conduct to the requirement of the law were substantially impaired(PCR.L.F.187-88). And if he was unable to appreciate the nature and wrongfulness of his conduct, then his ability to do so was unquestionably impaired. But the motion court did not address this portion of the claim, finding only, as set out in detail in Point III above, that Dr. Logan's opinions formed before trial, based on the information then available to him, was that he would be better used in mitigation rather than to present a mental disease defense(Hr.Tr.541-42). This is clearly erroneous because Dr. Logan did not then have the information that he had after trial(Hr.Tr. 575-76;M.Ex.20,p.6370;M.Ex.29;Supp.L.F. 28-44). As also noted above, the court further found that Dr. Logan did not testify that the 8/24/07 letter would have changed his diagnosis(PCR.L.F.1448).

The court also, as discussed above, faulted Dr. Logan for not following the prosecutor's formulation of the "scientific method" in diagnosing psychiatric

disorders(PCR.L.F.1464). Rick showed in Point III how that finding is clearly erroneous as it takes the subject out of its proper context. The court finally found that Jacquinet’s trial strategy—not to call Dr.Logan because he was not as strong a witness as Dr.Mandracchia—was reasonable(PCR.L.F.1465-66).

Again, the court’s findings are clearly erroneous, because of their focus on what Dr.Logan knew before trial, and because the motion court substituted its judgment of Dr.Logan’s credibility for that of a jury that should have heard his testimony. The court failed to take into account that a strategy based on a less than full investigation is not entitled to deference.*Kenley v. Armontrout*,937 F.2d1298, 1304(8thCir.1991).

Standard of review

The standard is as stated immediately before the Argument section of this brief.

Not guilty by reason of mental disease

“A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person's conduct.”

§552.030.1. That is the standard Rick must meet. That is the evidence he presented at the evidentiary hearing. And that leaves only the issue of counsel’s performance in failing to raise this defense at trial.

Counsel were ineffective

This issue once again comes down to the fact that counsel had in their possession in August 2007—almost a year before the July 2008 trial—information Rick provided

them about his mental state during the spring of 2006, when the murders of Ms. Ricci and Ms. Spicer occurred. And they failed to discuss that collection of symptoms with their retained psychiatrist, Dr. Logan.

As noted above, failing to interview witnesses relates to preparation and not strategy. *Kenley*, 937 F.2d at 1304. Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id.* Rick again points out that counsel did not do a complete investigation, because they did not request an opinion from Dr. Logan, which essentially is failing to interview him about a mental disease defense; instead they simply relied on him strictly as an advisor as to Rick's ability to work with counsel and Dr. Mandracchia (Resp. Ex. 222, p. 8-9). This failure was not diligent investigation and cannot be legitimated as strategy. *Kenley*.

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo. App. S.D. 1994). In *Hutchison v. State*, 150 S.W.3d 292, 304-05 (Mo. banc 2004), although counsel called a psychologist and 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. Rick's counsel could point to no strategy reason for failing to request a responsibility examination from Dr. Logan—this is not about deciding that Dr. Mandracchia's strengths as a witness were superior to Dr. Logan's or whether Dr. Mandracchia's strengths as a witness outweighed his weaknesses. It is purely about retaining a psychiatrist and not asking for his opinion—i.e. failing to investigate mental disease defenses despite having a client that exhibited multiple symptoms of

such diseases, and had a long and well-documented psychiatric history. There could be no valid strategy reason for that failure.

Counsel who fail to present evidence of diminished mental abilities are ineffective. See *Williams v. Taylor*, 529 U.S.362,396(2000)(counsel failed to present evidence defendant was borderline mentally retarded and did not go beyond sixth grade); *Wiggins v. Smith*, 539 U.S.510,535(2003)(counsel failed to present evidence of defendant's homelessness and diminished mental capacities); *Rompilla v. Beard*, 545 U.S.374,391(2005)(even though counsel retained three mental health professionals they failed to present mental health evidence that included test scores showing a third grade achievement level after nine years of schooling). Rick had a diagnosable mental disease and counsel would have learned that if only they had used their expert for the purpose for which he was retained. Therefore the jury never heard that Rick had Bipolar I Disorder that rendered him unable to appreciate the nature and wrongfulness of his conduct at the time of the offense and rendered him incapable at the time of the homicide of Ms.Spicer, of conforming his conduct to the requirements of the law(M.Ex.20,p.6370-71).

For the reasons stated above in Points II, III, and IV, the finding that Dr.Logan was not credible is clearly erroneous. A state post-conviction judge's findings that a witness in the proceeding is not convincing does not defeat a claim of prejudice. *Kyles v. Whitley*, 514 U.S.419,449,n.19(1995). Such an observation could not substitute for the jury's appraisal at the time of trial. *Id.* Credibility of a witness is for the jury, not the post-conviction court. *Antwine v. Delo*, 54 F.3d1357,1365(8thCir. 1995).

Rick has shown a reasonable probability of a different outcome had counsel provided Dr. Logan adequate information and requested a proper evaluation of Rick's mental condition at the time of Ms. Spicer's murder. *Deck v. State*, 68 S.W.3d 418, 426 (Mo. banc 2002); *Strickland v. Washington*, 466 U.S. 668, 694 (1984). He asks this Court to reverse the motion court and remand for a new trial.

VI. Failure to present evidence of involuntary intoxication(SSRI).

The motion court clearly erred in denying Rick’s claim that counsel were ineffective for failing to call William Logan, M.D., in guilt phase to support either an involuntary intoxication or a diminished mental capacity defense based on the fact that Rick was prescribed a psychotropic medication known as an “SSRI,” without what should have been an accompanying mood stabilizer, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, in that reasonably competent counsel would have discovered and presented this evidence, which meant Rick did not know or appreciate the nature, quality, or wrongfulness of his conduct, and there is a reasonable probability Rick would not have been convicted of first degree murder.

Alternatively, reasonably competent counsel would have at least presented this evidence in penalty phase as mitigation, and Rick would not have been sentenced to death.

The claim

In the attachment to the amended motion Rick alleged, “counsel was ineffective for failing to and denying the defendant the right to present his defense of involuntary intoxication due to doctor error and prescribed medication.”(PCR.L.F.300). He further alleged that counsel were ineffective for not investigating the defense and not

providing the 8/24/07 letter and other available evidence to Dr.Logan to provide a basis for expert testimony that Dr.Hachinsky's failure to prescribe a mood stabilizer along with the antidepressant he prescribed for Rick in March 2006 led to Rick's manic behavior and ultimately to Ms.Spicer's death(PCR.L.F.301-03).

Dr.Hachinsky

Rick went to psychiatrist Dr.Hachinsky on March 22, 2006, for treatment for anxiety and depression(Resp.Ex.261,p.4). This was two weeks before the murder of Ms.Ricci and less than two months before the murder of Ms.Spicer(L.F.45,67). Dr.Hachinsky diagnosed generalized anxiety disorder and depressive disorder not otherwise specified, and noted the need to rule out bipolar disorder(Resp.Ex.261,p.5). Dr.Logan explained that this meant that Dr.Hachinsky noted the possibility of bipolar disorder(M.Ex.20,p.6361). Dr.Hachinsky prescribed Lexapro—an antidepressant of a type known as an "SSRI," or a selective serotonin reuptake inhibitor—and Ativan; he did not prescribe a mood stabilizer(Resp.Ex.261,p.5). At a follow-up appointment in April, Dr.Hachinsky switched Rick from Lexapro to Paxil, another SSRI(Resp.Ex.261;M.Ex.20,p.6361).

Dr.Logan

Board-certified psychiatrist Dr.Logan was retained by trial counsel because they were interested in whether Rick would benefit from medication—there was a great deal of strain between Rick and counsel at that time(Hr.Tr.508,523-24). Between January and March, 2007, Dr.Logan talked with Rick six or seven times(Hr.Tr.527).

Rick was angry and paranoid, near delusional proportions(Hr.Tr.529). In early April, 2007, Rick became angry, believing the defense team were spying on him; communications then completely broke down(Hr.Tr.531). Dr.Logan decided that further meetings would not be helpful; he did not see Rick again until that August, and once between then and trial in July 2008(Hr.Tr.531-32,540;Tr.ii).

Among issues Dr.Logan discussed with counsel was the subject of Rick’s SSRI antidepressant(Hr.Tr.542-43). In a small percentage of patients, including people with bipolar disorder, SSRIs can cause mania, and Dr.Logan testified that the defense team had interest in evaluating Rick for this “SSRI defense”—so named because of the warnings on many drugs in this class regarding a “phenomenon in which some individuals have a worsening of symptoms, including suicide and violence [while] on the medications.”(Hr.Tr.543-44). Dr.Logan told counsel that he thought the drug aggravated Rick’s condition and likely made him exhibit symptoms of mania, but he did not think there was a viable SSRI defense in Rick’s case(Hr.Tr.545-46).

Instead, Dr.Logan told the team about another phenomenon called “switching,” in which an antidepressant drug, which need not be an SSRI, causes someone taking it to switch from a state of depression to one of mania(Hr.Tr.547). This can happen when one is prescribed an antidepressant without a mood stabilizer(Hr.Tr.577). Dr.Logan thought Rick’s being prescribed Lexapro without a mood stabilizer likely triggered manic symptoms(Hr.Tr.577;St.Ex.261).

As noted above, during the post-conviction case, Dr.Logan diagnosed Rick with Bipolar I Disorder, most recent episode mixed, severe with psychotic features, based

in part on Rick's 8/24/07 letter that trial counsel did not share with Dr.Logan(Hr.Tr.575-76;M.Ex.20,p.6370;M.Ex.29;Supp.L.F.28-44). Rick's bipolar disorder included symptoms of persistently elevated or irritable mood and rapid cycling between depression and mania(Hr.Tr.576). Rick has all of the associated symptoms that qualify for a manic episode, with some psychotic features(Hr.Tr.576).

Dr.Logan also noted in his report:

The SSRI antidepressants prescribed by Dr. Hachinsky, without the concurrent use of a mood stabilizer, produced a predominance of manic symptoms, which Mr.Davis, due to a lack of insight characteristic of the disorder, failed to recognize. Symptoms included a persistent elevated mood, irritability, grandiosity, decreased need for sleep, hypertalkativeness, racing thoughts, distractibility, increased goal directed activity, especially sexuality and impaired insight and judgment. This included a preoccupation with Dena Riley and driven sexual behavior. There also were intermittent auditory hallucinations and paranoid thinking of delusional intensity. Mr.Davis[sic] Bipolar I Disorder also worsened a borderline personality resulting from a disordered childhood and history of sexual abuse as well as his anxiety with some compulsive rituals.

(M.Ex.20,p.6370).

Drug effects

Documentation Rick obtained from the FDA showed that both Lexapro and Paxil have “adverse event” reports of anger, aggression, hallucinations, mania, and mood swings, in significant percentages of users(M.Ex.23,pp.7003-04,7095-96). Both drugs have also had significant numbers of reports of suicide ideation, attempts, and completion(M.Ex.23,pp.7003,7096).

Included in Exhibit 23 is an excerpt from the American Psychiatric Association “Practice Guideline For The Treatment Of Patients With Bipolar Disorder,” Section II.B.6: Pharmacologic Treatments, Antidepressants, which indicated that, “[v]irtually every available antidepressant agent has been associated with the emergence of mania in bipolar patients[,] although study of the phenomenon, is complicated “by the fact that patients with depression have a baseline risk of switching to mania.”(M.Ex.23,pp.7248). The Guideline also noted that because of reports from investigators of an association between antidepressants and the development of rapid cycling and mixed affective states, it has “been hypothesized that antidepressants may worsen the overall course of bipolar disorder[,]” although this, too, “has not been systematically evaluated”(M.Ex.23,pp.7248-49). The Guideline advised caution “in prescribing antidepressants for patients with bipolar disorder.”(M.Ex.23,pp.7249).

Another article admitted in Exhibit 23 opines that “antidepressants may carry much more risk for people with bipolar disorder than is generally recognized[,]” and that “antidepressants can cause ‘switching’, bringing on a manic or hypomanic phase, is generally accepted,” though there is debate about the

frequency(M.Ex.23,p.7280)(taken from website “psycheducation.org” by James Phelps, M.D., board-certified psychiatrist). Dr.Phelps also noted that “[s]ubstantial evidence suggests that antidepressants can induce ‘rapid cycling’”(M.Ex.23,p.7280).

Findings

The motion court first incorporated its findings as to Rick’s claims in paragraph 8(B) of the amended motion—as detailed in Points III-V above(PCR.L.F.1521). It then found that Dr.Logan’s testimony foreclosed the defense, because he testified that he told trial counsel before trial that he did not think an SSRI defense would be viable, and he maintained that position in the evidentiary hearing(PCR.L.F.1521). The motion court understood neither the claim nor the evidence, thus its findings are clearly erroneous.

Standard of review

The standard is as stated immediately before the Argument section of this brief.

Involuntary intoxication

The simplest way to show the motion court’s clear error is by pointing out that Rick’s claim is not that counsel should have raised an “SSRI” defense. Instead, he raised the claim that Dr.Logan’s testimony and the other evidence noted, support: Rick was involuntarily intoxicated because Dr.Hachinsky prescribed antidepressants, of any kind, without also prescribing a mood stabilizer, thus subjecting Rick to “switching,” or rapid cycling between depression and mania(Hr.Tr.547). This is not an SSRI defense, and Dr.Logan’s testimony was that he tried to tell counsel about the

issue of switching, but all counsel wanted to talk about was the SSRI defense (Hr.Tr.545-47,577).

“A person who is in an intoxicated or drugged condition, whether from alcohol, drugs or other substance, is criminally responsible for conduct unless such condition is involuntarily produced and deprived him of the capacity to know or appreciate the nature, quality or wrongfulness of his conduct.”§562.076.1. MAI-CR 310.52 further states that an “intoxicated or drugged condition of a person is involuntarily produced when it is brought about by the introduction into his body of any substance which he does not know and has no reason to know has a tendency to cause an intoxicated or drugged condition.”

The Illinois Supreme Court, based on a statute virtually identical to Missouri’s held in *People v. Hari*, 843 N.E.2d 349,360(2006), “that an unexpected adverse side effect of a prescription drug that was unwarned by the prescribing doctor, the PDR or the package insert[,] is ‘involuntarily produced’ within the plain meaning of the involuntary intoxication affirmative defense statute.”¹² Here, all Dr.Hachinsky told Rick was that they would “need to be on the lookout for mood destabilization with

¹² The Illinois statute reads: “A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.” §720 ILCS 5/6–3(West 2002).

this medication[,]" and that he should tell the doctor if he noted any such changes(Resp.Ex.261,p.6). That is a far cry from a warning that mania may result from the drug, let alone that Dr.Hachinsky should have prescribed the mood stabilizer to avoid any potential problems in the first place. Those are matters that Rick could not have known.

Courts in other states have followed similar principles, including *Jacobson v. State*,2015 WL 2214569, at *1(Fla.App.May 13, 2015)(though statute abolished voluntary intoxication defense, exception where "consumption, injection, or use of a controlled substance...was pursuant to a lawful prescription issued to the defendant," "is essentially a codification of the involuntary intoxication defense previously acknowledged by this court.");*People v. Mathson*,210 Cal.App.4th 1297, 1313(2012)("Involuntary intoxication can be caused by the voluntary ingestion of prescription medication if the person did not know or have reason to anticipate the drug's intoxicating effects.");*Feuget v. State*,454 S.W.3d 734,738-39(Ark.2015)(noting availability of involuntary intoxication defense arising from prescribed medication though finding evidence offered in post-conviction case to be cumulative);*Patton v. State*,973 P.2d 270,290(Okla.Ct.Crim.App.1998)("Involuntary intoxication results from...ignorance as to effects of prescribed medication.");*State v. Anderson*,851 N.W.2d 760,766(Wisc.2014)("In general, when a defendant argues that prescription medication contributed to criminal conduct, the defense is raised under

the involuntary intoxication statute, Wis.Stat. §939.42.”¹³); *Mendenhall v. State*, 15 S.W.3d 560,565(Tex.App.2000), *affirmed*, 77 S.W.3d 815,818(Tex.Crim.App.2002) (involuntary intoxication by prescription medication occurs where “the individual had no knowledge of possible intoxicating side effects of the drug, since independent judgment is exercised in taking the drug as medicine, not as an intoxicant.”); *Com. v. McDermott*, 864 N.E.2d 471,493(Mass.2007)(involuntary intoxication instruction available where defendant suffered “intoxicating effects from prescription medication used as instructed.”)

The only Missouri case counsel’s research has located that indicates that involuntary intoxication is not available as a defense where medication, as opposed to illegal drugs, is voluntarily ingested is *State v. Samuels*, 905 S.W.2d 536,538-40(Mo.App.S.D.1995), in which the Southern District held that “[i]f taking the medication was a voluntary act, §562.076 affords no defense[,]” citing, *State v. Shields*, 862 S.W.2d 503,504-05(Mo.App.E.D.1993); and *State v. Elam*, 779 S.W.2d 716,717(Mo.App.E.D.1989). But *Samuels* was erroneously decided, for several

¹³ Wisconsin section §939.42 states: “An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:

“(1) Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.

“(2) Negatives the existence of a state of mind essential to the crime.”

reasons. First, in *Shields*, the defendant “presented no evidence at trial indicating methadone was a substance he did not know or have reason to know caused a drugged condition.” 862 S.W.2d at 505. And in *Elam*, the defendant voluntarily ingested PCP. 779 S.W.2d at 717. These cases do not support the holding that is contrary to MAI-CR3d 310.52, and to *Johnson v. State*, 479 S.W.2d 416,420(Mo.1972), in which this Court impliedly recognized that the defense could apply to the voluntary ingestion of medication, where it held that there was no showing of ineffective assistance of counsel for allegedly failing to investigate the defense of involuntary intoxication by reason of drugs, because Johnson told counsel that he had been taking medication in the form of pills, but did not tell counsel he thought the medication caused any adverse condition or that he had taken the pills improperly, and counsel arranged for an examination by two psychiatrists.

Counsel were ineffective

For these reasons, the defense was available to Rick. But counsel never investigated it. Once more, this issue may be determined on the basis that counsel had in their possession information from Rick in the 8-24-07 letter, and an opinion by their retained expert, Dr.Logan, that the drug Rick was prescribed could itself be responsible for his behavior due to its “switching” effect, such that they failed to perform as reasonably competent counsel when they failed to investigate the antidepressant medication and its effects on Rick. Had counsel done so and presented the evidence detailed above and in the exhibits presented at the evidentiary hearing,

there is a reasonable probability that Rick would not have been found guilty. Counsel did not conduct a full investigation—they ignored Dr. Logan’s explanation that switching was a different issue than the SSRI defense, and they did not investigate the changes in Rick’s behavior caused by his new medication. They did not even share this information with their expert. Without a full investigation, their strategy of defense was not entitled to deference. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991).

Further, counsel’s strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo. App. S.D. 1994). In *Hutchison v. State*, 150 S.W.3d 292, 304-05 (Mo. banc 2004), despite presenting a mental health expert, counsel was ineffective for failing to investigate and present records and additional expert testimony. That is what occurred here.

Alternatively, reasonably competent counsel would have at least presented this evidence in penalty phase as mitigation, and Rick would not have been sentenced to death. Relevant mitigating evidence “is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (quoted in *Hutchison*, 150 S.W.3d at 304, and *Glass v. State*, 227 S.W.3d 463, 468 (Mo. banc 2007)). The evidence that Rick acted due to his involuntary intoxication should have at least been presented to the jury in mitigation; thus the motion court’s rejection of Rick’s claim—even had it recognized the actual claim Rick raised—is clearly erroneous.

For the reasons stated herein, Rick asks this Court to reverse his convictions and sentence and remand for a new trial, or in the alternative for a new sentencing phase.

VII. Failure to call Rick and prepare for his testimony in guilt phase

The motion court clearly erred in denying Rick’s claim that counsel were ineffective in failing to call Rick to testify and prepare either themselves or Rick for his testimony in guilt phase, denying Rick his rights to effective assistance, due process, testify, and freedom from cruel and unusual punishment, U.S.Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, in that reasonably competent counsel would have followed Rick’s repeated assertions that he wanted to be heard, and understood that it was important that questions be ready ahead of trial and that Rick be advised as to the proper topics of testimony. Had counsel prepared, Rick would have been able to testify in guilt phase, rather than have been forced to tell the court he did not wish to testify, since he could not know whether counsel would elicit the testimony Rick wanted to present, and there is a reasonable probability that he would not have been convicted of first-degree murder.

In Claims 19, 27, and 28 of the attachment to the amended motion, Rick alleged that trial counsel were ineffective in failing to allow Rick to testify at trial, despite his wish to do so, that he could have testified in support of his involuntary intoxication/diminished capacity defense, the changes in his mental state and behaviors, and the information in the 8/24/07 letter(PCR.L.F.302,337-38). Rick further alleged that due to a conflict with counsel Jacquinot, Rick became “wound up” and Jacquinot did not “hear” Rick’s demand to testify, that he wanted to testify to the

contents of the 8/24/07 letter and his reasons for going to a psychiatrist, that his testimony would have supported diminished capacity and mitigation, and that counsel said he would not ask any questions or aid Rick in testifying(PCR.L.F.338).

Rick's testimony

Before the close of all the evidence in guilt phase, the court examined Rick as to whether he wished to testify(Tr.4144). When the court asked whether Rick understood that he had “a right to testify or not to testify,” Rick answered, “I know I’ve read it, I understand kind of what you’re saying but I want to know if I have the right to testify. Do I have the right to testify to what I want to testify to, or do I have to rely on my attorneys to question me?”(Tr.4145). The court deferred answering, and Rick said he understood the right to testify or not(Tr.4145-48). The court then asked whether it was correct that Rick was not going to testify, and the following colloquy occurred:

A. No, I’ve been saying from day one I wanted just to be heard, from ever since I filed the first thing in your court and talked to them. That’s what I’ve been trying to do.

Q. I understand that. My question to you is that you might have some strategies that you feel, but after consultation with your attorney, what you’re saying is that after consultations, whether you agree with them or not, you’ve made a decision not to testify in this case. Is that what I’m hearing?

A. I ain't never said that.

Q. I'm asking you that.

A. No, I ain't never said that.

Q. What I'm saying is, I want to ask you that: Have you made a decision not to testify in this case?

A. No.

Q. Are you telling this Court you want to testify in this case?

A. That's what I've been trying to say since day one. I was just trying to get to where I could talk and have other people that knew me, and that's like I wrote to you in the motions, to just try to, you know, explain the last two months that I was out there.

Q. What is your decision at the present time?

A. I want to testify and put on evidence, whatever you call it. You know, I ain't, I have had no say so, and I think I tried to explain that in pretty much everything I've ever written.

(Tr.4149-50).

Rick said he had not discussed with counsel the limits on what he might be able to testify to, then said, "I just told them I want to testify."(Tr.4150-51). Rick again said limits on his testimony had not been discussed, and the court said it would take a recess for him to discuss it with counsel(Tr.4151-52). Before doing so, the court again asked whether Rick understood the right to testify and he answered, "Yes, I know what it means but I don't know what actually to testify means, if they have to

cross-examine me, if I have to count on them to cross-examine me or do I get to just, to talk to my--to say what I want to say within the legal evidence rules and all that.”(Tr.4157). The court explained that the examination would have to follow the rules of evidence, and that counsel would be doing the questioning; Rick said he understood, and asked, “Can I have him ask questions that I want to ask?”(Tr.4158). The court responded, “No[,] because that would . . . fall[] under an attorney-client . . . privilege and then strategy too, what the strategy of the case is.”(Tr.4158).

The court said that whether Rick disagreed with counsel’s advice was not an issue for that time, but would be taken up “down the road” asked whether Rick understood; Rick said, “Yeah, I understand what you’re saying. And like I’ve said all along, I don’t need him, I’ve always just wanted to be heard. I’ve never asked for more than that.”(Tr.4158). The court said Rick would not have that opportunity, “If you’re saying, I don’t need him and I just want to, get up there and say something to the jury, that’s not going to happen.”(Tr.4158-59). Rick said he would waive counsel, and the court responded, “And I’ve already ruled on that issue. You don’t have that opportunity. It’s going to be under the rules of evidence, and that is that Mr. Jacquinot is going to ask you questions or it’s not going to be done at all. Because I will not just let you sit there and talk to the jury on your own.”(Tr.4159). Rick said he understood(Tr.4159).

After the break to confer with counsel, the court ascertained that Rick understood that he would have to testify in accordance with the rules, then asked his decision; Rick said, “Not to be argumentative, but I could not testify to anything I would want

to testify to because the counsel would not ask the questions I wanted to ask. So I cannot [examine] myself, I cannot testify to just whatever I want, so, no.”(Tr.4161). Rick said it was a “longstanding conflict,” but counsel would not be asking the questions Rick wanted asked, so he did not want to testify—“Because I would be testifying to basically just what the prosecution wants.”(Tr.4161-62).

Jacquilot

In the post-conviction evidentiary hearing, Jacquilot testified that discussions with Rick about testifying in guilt phase began “at least weeks” before trial and continued throughout trial(Hr.Tr.1159-60). Specifically as to guilt phase testimony, counsel remembered Rick continuously telling them that “no matter what happened, he just wanted to be heard, that he’d be heard.”(Hr.Tr.1160). Counsel said when they asked what that meant, Rick was not able to provide them with a lot of specific information(Hr.Tr.1160). Counsel was asked what he advised Rick and he answered, “he never even got to the point.”(Hr.Tr. 1161). He added that Rick said he knew they did not want him to testify, but he had to be heard, which counsel took to mean that, “on some level Rick intuitively grasped that [counsel] did not think that him taking the stand and testifying was in his own best interest.”(Hr.Tr.1161).

Jacquilot recalled the court’s taking a recess so they could discuss Rick’s testimony, to see if they “could get it in a question-and-answer format based on specific relevant topics.”(Hr.Tr.1161). He was asked whether that break was the only time he prepared for Rick’s testimony, and he answered, “There was never any

preparation on—Rick didn't testify at guilt phase.”(Hr.Tr. 1162). Counsel added that they “could not get to the point of discussing specific topics with [Rick] regarding what he wanted to be heard about in court.”(Hr.Tr. 1162). When asked why, Jacquinot said, “You would have to ask him.”(Hr.Tr.1162). Counsel never made any preparations ahead of time for Rick testifying in guilt phase, “as far as laying out and writing out questions, no.”(Hr.Tr.1162). Nor did he do so for the penalty phase testimony that Rick gave(Hr.Tr.1162).

Findings

The court found that Rick chose to not testify during guilt phase, that Rick consulted privately with counsel “for almost an hour prior to making the decision,” and that he finally stated, “I do not want to testify...[b]ecause I would testifying to basically just what the prosecution wants.”(PCR.L.F.1529). The court added that Jacquinot testified that he did not prevent Rick from testifying, and it found that testimony credible(PCR.L.F.1529). The court made no specific findings as to claims 27 and 28 of the *pro se* attachment.

The court's findings are clearly erroneous, because of their focus on the fact that Rick chose not to testify, not the underlying reasons for the choice. The court failed to take into account that testimony without adequate preparation would not have allowed Rick to testify to what he wanted to say, specifically, the matters in his 8/24/07 letter, which was admitted into evidence as M.Ex.29(Hr.Tr.127-28).

Standard of review

The standard is as stated immediately before the Argument section of this brief.

Right to testify

As this Court noted in Rick’s direct appeal, a “criminal defendant has a constitutional right to testify in his own behalf at trial.” *State v. Davis*, 318 S.W.3d 618,637(Mo. banc 2010), citing *Rock v. Arkansas*, 483 U.S.44,51(1987). Also see §546.260. *Rock* places the source of the right in the Fifth, Sixth, and Fourteenth Amendments, which necessarily implicates the provisions in Article I, Sections 10, 18(a), and 19 of the Missouri Constitution. 483 U.S.at 51-53. This right is personal to the defendant, *Howard v. State*, 59 S.W.3d 586,588-89(Mo.App. E.D.2001), but he may knowingly and voluntarily waive it. *Davis*, 318 S.W.3d at 637(citation omitted). The Court also noted that “requiring the traditional question-and-answer technique of eliciting testimony—one of the most universal aspects of trial procedure—did not impose an unnecessarily restrictive rule, let alone one that is arbitrary or disproportionate.” *Id.*638.

Counsel was ineffective

With that background, the Court will understand that Rick’s claim is not that he should have been allowed to testify however he chose. And it is not, as the motion court apparently thought, that Rick was coerced by the court into waiving his right to testify. Those issues have been decided. And the claim is not even that counsel refused to allow Rick to testify. Had that been the claim the court’s finding that

Jacquinet was credible might have been problematic for Rick’s claim. But the essence of his claim in this appeal is that a question-and-answer method would have given effect to Rick’s right to testify—*had counsel ever bothered to work with Rick and prepare for what he wanted to say*. But it is clear in reviewing Jacquinet’s testimony that he never had any intention of calling Rick to testify, thus, as he admitted, he never prepared a single question—not even for himself, let alone preparing with Rick ahead of time(Hr.Tr.1161-62).

Counsel admitted that he did not want Rick to testify, he admitted that there was never any preparation, he admitted that the first time he discussed questions and answers with Rick was at a recess the court took to allow them to discuss his testimony, and he admitted that he could not determine what it was Rick wanted to say, though he could not give an answer why that was so, responding only, “You would have to ask [Rick].”(Hr.Tr.1161-62).

Counsel who knows from the beginning that his client wants to testify would make some kind of effort to find out the subjects that client wants to cover, and would prepare questions to elicit that information—or explain to the client why it may not be admissible, or would hurt the client’s cause, or something. But reasonably competent counsel would not embark on a death penalty trial with nothing more than a vague question of what Rick meant by wanting to be heard. Wanting to be heard is obvious in its meaning. Once Rick informed counsel that he wanted to testify, counsel should have gone over his expected testimony sometime before the 16th day of trial, when it became the defense’s turn in guilt phase(Tr.i-xii). And that “sometime” should have

been “at least weeks” before trial, since that was how long Rick had been telling counsel that he wanted to testify(Hr.Tr.1159-60).

This situation is analogous to one where counsel has formed a strategy without adequate investigation. Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy.*Kenley v. Armontrout*,937 F.2d1298,1304(8thCir.1991). Counsel’s strategy must be objectively reasonable and sound. *State v. McCarter*,883 S.W.2d75,78 (Mo.App.S.D.1994). Counsel just assumed that Rick would follow *counsel’s* desire that Rick not testify, but never made sure that that was *Rick’s* desire. If fact, it was not. Counsel simply concluded that Rick’s seeming understanding of counsel’s desire meant that he acquiesced in it. This failure was not diligent investigation or preparation and cannot be legitimated as strategy. *Kenley*.

Rick has shown a reasonable probability of a different outcome had counsel conducted adequate preparation for Rick to testify, including at the least, finding out what Rick wanted to say and either asking those questions or at least informing why he could not or should not. He asks this Court to reverse the motion court and remand for a new trial.

VIII. Failure to prepare for Rick's testimony in penalty phase

The motion court clearly erred in denying Rick's claim that counsel were ineffective in failing to prepare either themselves or Rick for his testimony in either guilt or penalty phase, denying Rick his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, in that reasonably competent counsel would have followed Rick's repeated assertions that he wanted to be heard, and understood that it was important that questions be ready ahead of trial and that Rick be advised as to the proper topics of testimony. Had counsel prepared, Rick would have been able to testify in guilt phase, and he would have presented coherent testimony in penalty phase, and there is a reasonable probability that he would not have been convicted of first-degree murder, or in the alternative would not have been sentenced to death.

As noted in Point VII above, in Claim 28 of his attachment to the amended motion, Rick alleged that trial counsel were ineffective in failing to allow Rick to testify in penalty phase in support of his involuntary intoxication/diminished capacity defense, the changes in his mental state and behaviors, and the information in the 8/24/07 letter(PCR.L.F.338). Rick further alleged that due to a conflict with counsel Jacquinot, Rick became "wound up" and Jacquinot did not "hear" Rick's demand to testify, that he wanted to testify to the contents of the 8/24/07 letter and his reasons for going to a psychiatrist, that his testimony would have supported mitigation, and

that counsel said he would not ask any questions or aid Rick in testifying(PCR.L.F.338).

Rick's testimony

To avoid repetition, Rick incorporates the facts set for in Point VII above concerning the procedure the court went through before the defense rested in guilt phase(Tr.4144-52,4157-62).

Rick did testify in penalty phase(Tr.4718-42). But he did not testify to anything contained in the 8/25/07 letter. And multiple times when he tried to tell the jury something, the prosecutor's "nonresponsive" objection was sustained(Tr.4732,4735,4736,4739,4740,4740-41). So Rick did not get to tell the jury what he considered to be important. He did not tell them about his symptoms of mania after being prescribed Lexapro, or his suicidal thoughts; he did not tell them about the changes in his behavior—in general and his sexual behavior—from that point; he did not tell them how he cut himself off from family and friends; he did not tell them about his weight loss; he did not tell them how he had visions of being in the past; and he did not tell them how the medication changed his thinking(M.Ex.29,pp.1-15).

Jacquinet

Again, Rick will not repeat Jacquinet's testimony entirely, see Point VII, but will just point out that Rick had told him for "at least weeks" before trial that he wanted to

testify(Hr.Tr.1159-60). But he never made any preparations ahead of time for Rick’s penalty phase testimony(Hr.Tr.1162).

Findings

As noted above, the court made no specific findings as to this claim. Its finding that Rick chose to not testify during guilt phase apparently was meant to cover this claim as well.

To the extent that they are sufficient, the court’s findings are clearly erroneous, again because of their focus on the fact that Rick chose not to testify, not the claim that counsel’s lack of preparation meant that Rick did not have the opportunity to support his claims as to his mental health status, again, specifically, the matters in his 8/24/07 letter, which was admitted into evidence as M.Ex.29(Hr.Tr.127-28).

Standard of review

The standard is as stated immediately before the Argument section of this brief.

Right to testify

As set out in Point VII, this Court noted in Rick’s direct appeal, under the Fifth and Fourteenth Amendments, a “criminal defendant has a constitutional right to testify in his own behalf at trial.”*State v. Davis*,318 S.W.3d 618,637(Mo.banc 2010), citing *Rock v. Arkansas*,483 U.S.44,51(1987). And the Court noted that “requiring the traditional question-and-answer technique of eliciting testimony—one of the most universal aspects of trial procedure—did not impose an unnecessarily restrictive rule, let alone one that is arbitrary or disproportionate.”*Davis*,318 S.W.3d at 638.

Counsel was ineffective

But once again, the claim is inadequate investigation and preparation, not simply preventing Rick from testifying. If he had prepared, Rick would have been able to testify to the matters listed above, and would thereby have put before the jury his claims as to what effect the medications, begun scant weeks before Ms. Ricci's murder, had on him. But again, reading the transcripts of trial and the evidentiary hearing shows that Jacquinot was quite surprised that Rick insisted on exercising his right to testify, at least in penalty phase. But since Jacquinot never planned for Rick to testify, as he admitted, he never prepared a single question—not even for himself, let alone preparing with Rick ahead of time(Hr.Tr.1161-62).

Counsel admitted that he did not want Rick to testify, he admitted that there was never any preparation, he admitted that the first time he discussed questions and answers with Rick was at a recess the court took to allow them to discuss his testimony, and he admitted that he could not determine what it was Rick wanted to say, though he could not give an answer why that was so, responding only, “You would have to ask [Rick].”(Hr.Tr.1161-62).

Counsel who knows from the beginning that his client wants to testify would make some kind of effort to find out the subjects that client wants to cover, and would prepare questions to elicit that information—or explain to the client why it may not be admissible, or would hurt the client's cause, or something. But reasonably competent counsel would not embark on a death penalty trial with nothing more than simply trying to “explore” with Rick what he meant when he said he wanted to “be

heard”(Hr.Tr.1160). And it does not matter that Rick could not provide much specific information(Hr.Tr. 1160). Wanting to be heard is obvious in its meaning. Once Rick informed counsel that he wanted to testify, at least in penalty phase, it was counsel’s duty to prepare; he should have gone over Rick’s expected testimony sometime before the 16th day of trial, when it became the defense’s turn in guilt phase(Tr.i-xii). And that “sometime” should have been “at least weeks” before trial, since that was how long Rick had been telling counsel that he wanted to testify(Hr.Tr.1159-60).

As in Point I, this situation is analogous to counsel forming a strategy without adequate investigation. Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy.***Kenley v. Armontrout***,937 F.2d1298,1304(8thCir.1991). Counsel’s strategy must be objectively reasonable and sound. ***State v. McCarter***,883 S.W.2d75,78 (Mo.App.S.D.1994). Counsel just assumed that Rick would follow *counsel’s* desire that Rick not testify, but never made sure that that was *Rick’s* desire. If fact, it was not. Counsel simply concluded that Rick’s seeming understanding of counsel’s desire meant that he agreed, or at least acquiesced in it. This failure was not diligent investigation or preparation and cannot be legitimated as strategy. ***Kenley***.

Rick has shown a reasonable probability of a different outcome had counsel conducted adequate preparation for Rick’s penalty phase testimony, including at the least, finding out what Rick wanted to say and either asking those questions or at least informing why he could not or should not. He asks this Court to reverse the motion court and remand for a new penalty phase.

CONCLUSION

For the reasons stated in Points I, IV, and VIII, Rick asks this Court to reverse his conviction and remand for a new penalty phase. For the reasons stated in Point II, Rick asks the Court to vacate his sentence and remand for a new trial at such time as he is determined to be competent. For the reasons stated in Points III, V, VI, and VII, Rick asks the Court to remand for a new trial.

Respectfully submitted,

/s/ Kent Denzel _____

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 29,122 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On the 10th day of July, 2015, the foregoing brief was filed through the E-file system for delivery to Shaun J Mackelprang, Assistant Attorney General. The electronic file has been scanned for viruses using Symantec Endpoint Protection, updated in July, 2015, and according to that program, the file is virus-free.

/s/ Kent Denzel _____

Kent Denzel