IN THE
SUPREME COURT OF MISSOURI

KEVIN JOHNSON JR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC 92448**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 19
THE HONORABLE GLORIA CLARK RENO, JUDGE

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Kevin Johnson appeals the denial of his motion under Rule 29.15 by the Honorable Gloria Clark Reno, Judge of the Circuit Court of St. Louis County, Missouri. Kevin had sought to vacate his conviction of first degree murder, § 565.020,[1] and the resultant sentence of death imposed by the Honorable Melvin W. Wiesman. On January 12, 2012, the court denied relief on Kevin's motion (Supp.L.F.42),[2] and notice of appeal was timely filed February 17, 2012(PCR.L.F.6, 486). Because a death sentence was imposed, this appeal involves an issue reserved for this Court's exclusive appellate jurisdiction. Art.V,§3,Mo.Const.

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

[2] Counsel has tendered a supplemental legal file(Supp.L.F.), containing a complete copy of the motion court's findings, conclusions, and judgment.

STATEMENT OF FACTS

The jury at Kevin Johnson's first trial for the death of Kirkwood Police Sergeant William McEntee hung 10-2 in favor of convicting him of second degree murder(Hr.Tr.491-92).[3] There was no issue whether Kevin killed Sgt.McEntee; the sole defense was that he did not coolly reflect(Tr.1092,1096-98,1101).

Post-conviction mitigation/diminished capacity evidence.

The allegations in Kevin's Rule 29.15 motion included that trial counsel failed to present available evidence concerning childhood neglect and abuse, that Kevin suffered from acute stress disorder, and had the jury heard that evidence it would not have found him guilty of first degree murder, or alternatively would not have sentenced him to death(PCR.L.F.169-196,240-294).

Psychologist Daniel Levin testified in the post-conviction case to Kevin's history and mental functioning, based on his meeting with Kevin and his review of more than 3,500 pages of Kevin's records from DFS; St. Louis County Family Court and Department of Mental Health; St. John's Hospital; several residential placements;

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[3] The Record on Appeal consists of a post-conviction legal file(PCR.L.F.), and an evidentiary hearing transcript(Hr.Tr.). Kevin also asks this Court to take judicial notice of its complete file in the direct appeal, *State v. Johnson*, No. SC89168. The trial transcript and legal file will be referred to as (Tr.) and (L.F.) respectively. Exhibits will be referred to as St.Ex.(State's), D.Ex.(Defendant's), and M.Ex.(Movant's).

and DOC; plus police reports, the trial transcript; Kevin's testimony, relevant statutes, and Levin's own report(Hr.Tr.169-71,281).

DFS first became involved with Kevin in October 1987, when he was two(Hr.Tr.171-72;M.Ex.17).[4] As shown by a long history of psychological research showing connections between early losses and traumas – which includes child abuse or neglect – and future criminal behavior and mental illness, the first five years of a child's life are his most vulnerable, when his brain is most developing and most subject to influences from his environment(Hr.Tr.172-73). DFS became involved when Kevin's mother, Jada Tatum, was hotlined; the family had severe financial stress – Kevin's father went to prison for murder, and Jada, one of nine children, was very young when she started having children herself(Hr.Tr.173-75). The initial report was about Jada, then twenty, going out and leaving her children with her grandmother, Henrietta Kimble, without asking or even telling her she had left them(Hr.Tr.173-74;M.Ex.17.1). Dr.Levin hypothesized Kevin's problems began before age two, before the first hotline(Hr.Tr.175).

Kevin's home conditions included a very cold home – it had broken windows and no heat – no cooking, refrigeration, or bathroom facilities, and electricity through an extension cord from Henrietta's house(Hr.Tr.176;M.Ex.17.2). Jada's felony

[4] M.Ex.17 is an excerpt from M.Ex.13, which consists of some 3,400 pages of DFS records. "M.Ex.17.1" refers to page 1 of M.Ex.17.

probation for assault with a knife was significant because it showed she was already having problems when DFS entered her life(Hr.Tr.176-77;M.Ex.17.3).

Jada's mother, Patricia Ward, reported concerns to DFS; Jada was often not home, and her whereabouts were often unknown(Hr.Tr.180-81;M.Ex.17.3-4). A visit by DFS showed that Jada was not paying attention to the worker or taking DFS involvement seriously(Hr.Tr.180-81;M.Ex.17.3-4). That pattern was repeated many times over the years of DFS involvement: workers found Kevin, age two, outside in December with a thin jacket and no socks, supervised only by an eight-to-nine-year-old child; Jada appeared unconcerned about her children, and did not take any action to dress them, instead sending them to find their own clothes and dress themselves for the cold(Hr.Tr.180-81;M.Ex.17.4). Patricia, concerned that Jada's children would be taken away, volunteered to take them; Patricia had nine children of her own and had had a baby three weeks prior to her offer(M.Ex.17.3). During a home visit, Kevin was acting out – he was standing on a coffee table; Jada threatened to whoop him and laughed at his misbehaviors – which was all highly telling and concerning behavior for a mother while a DFS worker was present(Hr.Tr.182;M.Ex.17.5).

In February 1988, a Meacham Park health clinic social worker called DFS, also concerned about Jada's ability to parent Kevin and his siblings based on her observation that Jada was limited intellectually, which many people observed over the years(Hr.Tr.182;M.Ex.17.7). Her family noted that she had a learning disability, and had long been in the special school district with an IQ of around 70 to

74(Hr.Tr.191;M.Ex.17.12-13). Levin explained that put her in the second or third percentile of intellectual ability(Hr.Tr.191).

In March 1988 Jada's aunt called DFS, because Jada was reportedly taking her AFDC check and leaving for long periods, then returning without any money; the children were not being properly clothed and fed, and the family suspected drug abuse(Hr.Tr.183;M.Ex.17.8). When a worker went to the home, she found it dirty, with roaches, and Jada did not seem concerned(Hr.Tr.185-86;M.Ex.17.10). Later that month, Patricia told DFS Jada was staying out all night and coming in high, showing no interest in her children, just going to bed(M.Ex.17.9). Also in March, the home was dirty and had roaches; Jada would not listen to the worker, denied drug use, and assumed her mother – who was also on AFDC and food stamps – would provide for her and her children (M.Ex.17.10).

Two fires in the home about a year apart strongly evidenced neglect(Hr.Tr.186-88). The fires resulted in the family moving in with Henrietta, and they were all stressed for lack of money and space(Hr.Tr.188). Jada reluctantly accepted the help of a homemaker and parent aide – a Life Skills worker(Hr.Tr.189).

In May 1988, after she tested positive, Jada admitted using drugs and went into a rehabilitation program because her probation officer required it(M.Ex.17.11-12). She left the program after a few days, telling them that her probation officer, Yount, approved; Yount told DFS Jada was told to enter the program or face revocation; she did not want the family to help Jada leave the program(M.Ex.17.12-13). The counselors noted Jada's poor attitude on entry, and assessed her as chronically

chemically dependent(Hr.Tr.190-92). It is significant to a child when a parent is addicted to crack, as was Jada – it affects all aspects of one's ability to function as a parent; getting the drug is the sole preoccupation(Hr.Tr.193). Two days after leaving the program, Jada hit Kevin's brother Marcus with a shoe near his eye(Hr.Tr.194-95).

A May 1988 hotline call regarding Jada hitting Marcus revealed lack of supervision of Kevin – he and another child were playing with a fan while it was running, and Jada left a hot iron where the children could reach it(M.Ex.17.13-14). Kevin was also playing in the street, unsupervised(M.Ex.21.1783).[5] Dr.Levin explained that the lack of supervision by an adult of a child in his preschool years affects the child negatively in every possible way; a two-year-old relies on the care of adults to protect him and help him to learn about the world and to feel connected to other people(Hr.Tr.196-97). A child left alone, or whose mother is addicted to cocaine, is affected negatively in every way, and will come to not trust the world to care for him(Hr.Tr.197). There is nothing more destructive or terrifying to a child(Hr.Tr.197).

Observations of lack of supervision included: the children fighting, Kevin and his sister wearing dirty pajamas, Jada leaving the hot iron around several small children, and Kevin and another boy playing with and tipping over the running fan, to

[5] M.Ex.21, along with 22,23,24,27,29,31,33,34,35,38,51,52,53,55, and 56, referred to *infra*, are also excerpts from M.Ex.13; the page numbers from M.Ex.13 were transferred to M.Ex.21.

which Jada paid no attention(Hr.Tr.197-98). This was another example of how Jada was not taking action to protect her children – something the vast majority of parents do when they see a child in danger(Hr.Tr.198). In a letter to the chemical dependency unit at Deaconess Hospital in May 1988, a DFS worker noted that the children "appear to suffer from environmental delays"(Hr.Tr.199; M.Ex.22).

DFS continued to get calls from family in June 1998 about Jada staying out all night or otherwise failing to supervise or care for her children(Hr.Tr.201-02;M.Ex.17.16-7). Life Skills reported that she left Kevin unsupervised in a park on June 7, leaving him to the Life Skills worker(Hr.Tr.207;M.Ex.23). On June 23, she was shouting at, threatening, hitting, and slapping the children(Hr.Tr.209). A Life Skills report in July indicated that Jada slapped her children on the head, arms and buttocks an average of three times per hour(Hr.Tr.205-06;M.Ex.23). A hotline call five days later reported that Jada left the day before and had not returned, and there was inadequate food for the children(M.Ex.17.17). Jada's situation seemed to have worsened; the family also felt she was prostituting herself for drugs(M.Ex.17.18).

Dr.Levin explained that it is never appropriate to hit a two-year-old in the head; A two-year-old child is completely dependent upon his parents for care and safety, and cannot defend himself against an adult physically(Hr.Tr.207). Such hitting, combined with the neglect Jada showed, only adds to the child's sense that the world is unsafe, and he cannot trust his parents to care for him(Hr.Tr.207-08). A long line of psychological study shows a connection between early physical abuse and development of later criminal behavior and later mental disorders(Hr.Tr.208).

July continued the pattern, with another call to DFS about Jada going out and leaving her children(Hr.Tr.209). In August, Jada was back to using drugs and left her kids again and got high(Hr.Tr.212). Still in August, a social worker at the health clinic reported inappropriate behavior by Jada towards her children(Hr.Tr.213). A Life Skills report for August indicated that Kevin and Marcus hit other children without provocation, threw things, and picked up cigarettes and pretended to burn each other(Hr.Tr.217;M.Ex.24.4). Jada would discipline them by slapping them and shouting at them(Hr.Tr.218-19;M.Ex.24.4).

On August 3, 1988, Marcus and Kevin were out of control; Kevin showed more behavioral problems and aggressive acts(M.Ex.17.22). The worker saw a long thin burn on the top of both of Kevin's thighs; Jada said it happened when she was in the hospital, and a hot dog fresh from boiling water fell on Kevin's lap(M.Ex.17.22). On August 6, Jada was again reported to be high(M.Ex.17.22). On August 24, DFS was told she continued to stay out all night on a regular basis(M.Ex.17.26). She expected her family to care for her children, and they were sure she was using drugs(M.Ex.17.26).

September brought another report that Jada was gone all night, and a fire – apparently one of the children was playing with matches(M.Ex.17.27). Also in September, Kevin was reportedly very aggressive with his sister and exhibited acting-out behaviors, which progressively increased(Hr.Tr.215; M.Ex.17.29). Showing such acting-out, aggressive behaviors before age three is significant, because when children who are limited verbally have been abused and neglected and are suffering, "they

can't just say, I'm suffering or I'm in pain or I'm so hurt or I'm so scared or I'm so angry, they do what children do; they express it through their behavior."(Hr.Tr.215-16). They act out what they're feeling inside, which communicates what they've experienced themselves. So if a child acts aggressively or in ways that put themselves or others in danger, it is usually because they've been treated aggressively, or been put in danger(Hr.Tr.216).

During an unscheduled visit on October 20, 1988, Jada was angry at the worker's presence and the worker suspected Jada was high(M.Ex.17.31). Jada was still living in the "back house," with several broken windows covered with cardboard, and only a stove for heat(M.Ex.17.31). There were reports on October 25 and 26, and November 1 of Jada's drug use, hostility, and lack of supervision of her children(M.Ex.17.31-32). She was gone for hours on November 2, taking Kevin with her(M.Ex.17.32). The health clinic on November 7 reported its concerns for the children and Jada's apparently worsening situation and capabilities(M.Ex.17.32). The Life Skills worker on November 9 reported frequently intervening when Jada hit the children in her presence(M.Ex.17.32). Kevin hit the other children without being provoked, and was often out of control(M.Ex.17.32).

The October and November 1988 Life Skills summaries noted that Jada was again observed disciplining her children by hitting them(Hr.Tr.219-20;M.Ex.24.5). The November report also indicated that the instructor intervened twice to protect the children from Jada(Hr.Tr.219;M.Ex.24.5). An October hotline to DFS reported that Jada was continuing to leave her children with her mother or grandmother without

asking them to watch them, then going off without telling anyone where she was(Hr.Tr.222-23;M.Ex.21.1800-01). The call in October also reported that Jada had taken Marcus's asthma medication with her(Hr.Tr.223;M.Ex.21.1800-01). Another call to DFS on November 1 reported that Jada was not just leaving but was taking Kevin with her for hours at a time; the family felt she was using cocaine, was prostituting herself for money, and was taking Kevin, who had just turned three, along(Hr.Tr.224-25;M.Ex.17.32). No one knew where Jada and Kevin were during an unscheduled visit to the home the next day(Hr.Tr.225;M.Ex.17.32).

The Meacham Park Clinic social worker reported concerns on November 7 about Jada's not following up on the children's medications(Hr.Tr.226;M.Ex.17.32). They saw general deterioration in Jada's overall functioning capacities with the children(Hr.Tr.226;M.Ex.17.32). On November 18, the DFS worker observed that Kevin was very aggressive, knocking other children down and hitting them; the worker intervened several times, and Kevin hit the worker(M.Ex.17.34).

On December 1st, 1988, a doctor at the clinic called the hotline because when Jada brought the children: they were filthy and smelled of urine, and Jada seemed disoriented and could not keep the medication straight(Hr.Tr.227-28;M.Ex.18.2787-88).[6] The children were poorly behaved and seemed to have no limits, and they observed that Jada struck one of the children on the buttocks to the point where the doctor had to discuss discipline with her(Hr.Tr.227-28;M.Ex.18.2788). The doctor also reported that Jada was spanking Kevin a lot in the office; it was one of the worst

[6] M.Ex.18 is a copy of the clinic's records.

situations the doctor had seen(Hr.Tr.227-28;M.Ex.17.35;M.Ex.18.2788). A risk assessment by DFS in December put Jada's children mostly in the high risk category, due to Jada's drug abuse and limited mental abilities, and her inability and unwillingness to provide minimal care(Hr.Tr.229-30;M.Ex.21.1815-17).

On December 7, a family member called DFS and said Jada had received her $600 AFDC check, took Kevin with her while he was still in his pajamas, and did not return until 5:00 the next morning, with only $100 remaining; they assumed she spent the money on drugs(Hr.Tr.230;M.Ex.17.36). Taking Kevin on drug runs at age three, even if he didn't remember what he witnessed or experienced, would still have a psychological impact on him(Hr.Tr.231).

The Life Skills worker reported on December 13, that the children were inappropriately dressed and dirty, Jada's efforts were not improving, and although she was hitting a bit less, Kevin's behavior was worsening, and he was being very aggressive towards other children(Hr.Tr.231-32;M.Ex.17.36-37). Jada was arrested and incarcerated in December 1988(Hr.Tr.232;M.Ex.17.37). After her release, there was another call to DFS, on January 5, 1989, about the lack of supervision of her children(Hr.Tr.232;M.Ex.17.38). They were concerned that nothing had changed: Kevin, left alone, had turned on two burners on the stove while Jada was in the front of the house, and his sister did not seem to be getting enough food(Hr.Tr.232-33;M.Ex.17.38). Jada tested positive for cocaine in January 1989; probation was revoked and she was sentenced to 60 days imprisonment(Hr.Tr.233;M.Ex.17.39,44).

The family court placed custody of Marcus with Patricia Ward in April 1989, but Kevin and his sister remained with Jada(Hr.Tr.233).

On May 1st, 1989, after her release, Jada resumed staying out all night and using cocaine, and she reportedly hit the children and was very short-tempered(Hr.Tr.233-35;M.Ex.17.44-46). Also in May, Jada took the children to a friend's house and walked off without informing her friend, leaving the children outside; Jada was away for over twelve hours without making arrangements for them(Hr.Tr.234-35;M.Ex.17.46). The caller thought Jada might have stabbed a man who failed to deliver drugs(Hr.Tr.235; M.Ex.17.46).

In June 1989, Jada's probation officer called DFS, concerned about Kevin because she had observed his eye to be irritated and appearing to need medical attention, and Jada told her Kevin found a can of spray paint and sprayed it in his eye(Hr.Tr.235-3;M.Ex.17.48). Jada called the clinic because she had lost Kevin's medication, and they were concerned about her ability to care for him(Hr.Tr.237;M.Ex.17.48-49). The clinic called DFS and a worker went to the home, but neither Jada nor Kevin was there; Patricia said she did not know when they would return(Hr.Tr.237;M.Ex.27). The next day, Kevin was not wearing his prescribed eye patch; Jada said he had run out and she had lost his eye drops(Hr.Tr.237-38;M.Ex.27). The worker noted Jada's hostility toward her children – she was cursing at them(Hr.Tr.238;M.Ex.27).

Patricia made another hotline call in July 1989; she was very concerned that the children were being exposed to drug use and drug users, and to sexual

behavior(Hr.Tr.238-39;M.Ex.17.50). On July 21, Kevin, still not yet four, was left alone from 4:30 p.m. to 11:00 p.m.; he had scratches by his eye, and said that his mother did it(M.Ex.17.52). Jada overheard and screamed at Kevin and told him not to lie; he then said he did it himself(M.Ex.17.52; Ex.29.1706-08). During a home visit, workers and an officer saw a rat and roaches, and there was a curling iron left on within reach of the small children; the only food in the home was spoiled, and one small child was filling a baby bottle that was crusted with dried milk; Jada refused to wash it(M.Ex.29.1707). When asked where she had been until 3:30 a.m., Jada said she was in a motel with her boyfriend, "flat-backing"(Hr.Tr.241-42;M.Ex.29.1707-08). On July 26, Patricia reported that she saw Jada and Kevin on the street late the night before; Kevin had an abrasion on his forehead, and he said his mom "kicked him and knocked him down."(M.Ex.17.52).

On August 4, 1989, there was another hotline call for lack of supervision; when questioned later Jada admitted sometimes leaving her children alone, but "what of it"(Hr.Tr.243-44;M.Ex.31). Later in August Patricia accused Jada of stealing her food stamps(Hr.Tr.244;M.Ex.17.55). Several hotline calls in August and September concerned insufficient food for the children; a worker responding to one found no food in the home and Kevin eating the few chips that remained in a bag – he said he had been eating them for a couple of days and he liked them(Hr.Tr.244-45, 248;M.Ex.34.1745-46). A neighbor said another time that Jada was using her food stamp money for cocaine(Hr.Tr.246;M.Ex.34.1745-46). Jada's probation officer called DFS in August to report that Jada was mistreating Kevin in her office – she

said Jada was yelling at him and hitting him(Hr.Tr.246;M.Ex.18.56). She was also seen slapping Kevin on the head and back at the health clinic in August(Hr.Tr.246-47;M.Ex.35.1757-58). Also in August DFS wrote to the Juvenile Court for the second time to try to get the court to assume jurisdiction over Kevin and his sister(Hr.Tr.247-48;M.Ex.33).

In October Jada made threatening remarks to her children: "I'm going to bust your lip," "I'm going to kill you," "I'm going to beat on you."(M.Ex.38). A Life Skills instructor intervened when Jada was going to get a switch to hit the children, and when she was slapping the children in the Vocational Rehabilitation Office(M.Ex.38).

DFS placed Kevin at about age four and a half with his great Aunt Edythe Richey, Patricia Ward's sister(Hr.Tr.256-57;Tr.2088). When Kevin was in kindergarten, the DFS worker and his kindergarten teacher met; there was a concern about his having emotional problems(Hr.Tr.264;M.Ex.51.605). They agreed there was a lack of a loving and nurturing environment; although Edythe was providing for his basic needs, she was very detached emotionally and Kevin felt very insecure in her care(Hr.Tr.264;M.Ex.51.605).

DFS records also indicate that Edythe disciplined Kevin by hitting him for wetting the bed and for bringing home poor behavior marks in school(M.Ex.13). Kevin said if he got a bad "mark" in school – meaning a behavior problem – he would get spanked when he got home(Hr.Tr.260; M.Ex.51). In April 1994, a report noted

Kevin was having problems acting out aggressively and sexually at school(Hr.Tr.263-65;M.Ex.52.3).

In 1995, when Kevin was nine, he was diagnosed with adjustment reaction conduct(Hr.Tr.273-74;M.Ex.53). "An adjustment reaction is when a person is having problems adjusting and coping and managing after experiencing a number of complex stressors. And what the conduct part means is that in Kevin's case he was manifesting his problems coping and adjusting through disturbances of conduct. He was doing things that were hurtful to himself or others."(Hr.Tr.274).

At age ten Kevin first received therapy, eight years after the first hotline(Hr.Tr.267). There were no detailed notes about his therapy(Hr.Tr.267). Levin also noted Jada was continuing to use drugs, and she had another child, and there were records of Kevin's acting out in school and fighting; his bedwetting continued until age thirteen(Hr.Tr.267).

At that age, Edythe refused to continue with custody of Kevin(Hr.Tr.267-68). Kevin went first to YES – Youth Emergency Service – and then to St. Joseph's Boys' Home(Hr.Tr.268). Shortly before that, Kevin's father was paroled, "triggering in Kevin and in Kevin's therapist, [Dr.Levin believed], hopes that the father would be able to care for Kevin."(Hr.Tr.268). But Kevin told Dr.Levin that his father beat him up when he came home, which began a "very contentious relationship between the two of them that lasted for many years."(Hr.Tr.268). DFS had been considering placing Kevin with his father, but Kevin told Dr.Levin once his father found out Kevin wet the bed he didn't want him; "So he was rejected by his father at age

thirteen."(Hr.Tr.269). That was when Kevin went to YES, then to St. Joseph's Boys Home, where he received his first psychological evaluation, at age thirteen (Hr.Tr.269). While at St. Joseph's, Kevin attempted suicide(Hr.Tr.269). At fourteen, he briefly went to SouthPointe, a psychiatric hospital(Hr.Tr.270). Dr.Levin saw no evidence that Kevin received any helpful psychotherapy at St. Joseph's(Hr.Tr.270).

When he entered SouthPointe, Kevin's flow of thought was tangential – he was not speaking logically – and he had an inappropriate affect and showed poor insight and judgment(Hr.Tr.274-76;M.Ex.55.2). He was taking Ritalin, prescribed for children with attention deficit disorder with hyperactivity, and Imipramine, prescribed for depression(Hr.Tr.276;M.Ex.55). Therapist Kenneth Woods thought Kevin appeared depressed, and might have ADHD(Hr.Tr.276-77;M.Ex.56).

While in detention in 2001 at age fifteen, Kevin was evaluated by Dr. Richard Taylor(M.Ex.11.1).[7] Kevin reported to Taylor that his aunt whipped him when he got in trouble, and he got into trouble a lot before he was twelve(M.Ex.11.6). Dr. Taylor diagnosed Kevin with depression and dysthymia – a "depressed mood over a long period of time that does not reach the level of a current crises where a person is unable to eat or unable to sleep, but it's a lower level, ongoing chronic malaise that lasts over a longer period of time than a major depressive episode which is more acute."(Hr.Tr.278-79;M.Ex.11). Taylor also diagnosed adjustment disorder with mixed disturbance of emotions and conduct(M.Ex.11.6).

[7] M.Ex.11 is Dr.Taylor's evaluation, from the Family Court records.

At seventeen, in 2003, Kevin was evaluated by Dr.Levin, who also diagnosed Kevin with dysthymia, adjustment disorder with mixed disturbance of emotions and conduct, and child neglect(Hr.Tr.280;M.Ex.12).[8] From ages fifteen through seventeen, after "residential treatments where he essentially got no help," Kevin was discharged back to Edythe's home; Dr.Levin saw no discharge plan, nor any plan to help him and his aunt live together(Hr.Tr.271). These were "terrible times for Kevin. His grades were bad. He ran from her twice."(Hr.Tr.271). Although DFS assigned a therapist, they only had one session in two months(Hr.Tr.271). Notes indicated Edythe was "denying Kevin's need for help or therapy. She said that she didn't need any help with Kevin, and she didn't think Kevin needed help. And that her threatening and punishing of him would continue."(Hr.Tr.271).

Dr.Levin met with Kevin in 2009 in Kevin's post-conviction case(Hr.Tr.281). After this meeting and his review of case materials, Dr.Levin concluded that at the time of the offense, Kevin suffered from acute stress disorder – an "anxiety disorder that a person develops in response to extreme acute stress."(Hr.Tr.282-83).

Trial evidence: July 5, 2005.

On July 5th, about 5:20 p.m., Kirkwood Officer Nelson saw Kevin's Ford Explorer across the street from 413 Saratoga in the Meacham Park neighborhood, and

[8] M.Ex.12 is Dr.Levin's report.

called Officer Brand for assistance(Tr.1224-25,1228-29,1232;St.Ex.80-T.19).[9] Kevin lived at 411 Saratoga with his great-grandmother Henrietta, his 12-year-old brother, Joseph (Bam-Bam) Long, and his grandfather(Tr.1299-1300;St.Ex.80-T.2-3). Kevin's grandmother Patricia and other family members lived next door at No.413(Tr.1229,1232;St.Ex.77,78,79;St.Ex.80-T.21). The Kirkwood police had been seeking Kevin for several weeks for violating his misdemeanor probation(Tr.1219-21,1272).

Kevin was then inside No.411 with his daughter Cori,[10] his grandparents, and Bam-Bam(St.Ex.80-T.18). He saw a Kirkwood police car on Saratoga in front of No.413 and a second patrol car approaching(St.Ex.80-T.18-19). The officers parked near Kevin's Explorer and began looking in it(St.Ex.80-T.20-21). Kevin worried that they might tow his vehicle because there was a warrant for his arrest(St.Ex.80-T.21). He gave his keys to Bam-Bam saying, "give these keys to Grandma Pat" and tell her to "act like she's driving it so they don't take my car"(St.Ex.80-T.21). Bam-Bam immediately "ran over to 413"(St.Ex.80-T.21).

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[9] Exhibit 80 is a video recording of Kevin's testimony from his first trial that ended in a hung jury; it was recorded by the news media and played at the second trial; "St.Ex.80-T." refers to a transcript of the testimony that, although not admitted as an exhibit, is included in the Appendix for the Court's convenience(App. A-43 – A-156).

[10] There are different spellings of Cori's name in the record; Kevin has used "Cori" because her full name is Coriansa(St.Ex.80-T.3).

The officers looked through Kevin's vehicle and "ran" the VIN to determine the owner(Tr.1232;St.Ex.80-T.23). Kevin watched through a window facing No.413(St.Ex.80-T.22-23). Patricia came out of No.413 and dangled Kevin's keys in the air to show she was "driving" his car, then began yelling for help, saying Bam-Bam had collapsed(Tr.1232,1235;St.Ex.80-T.23).

Kevin saw the officers looking at each other as though confused about whether Patricia was talking to them(Tr.1232-33;St.Ex.80-T.24). He saw them walk slowly toward the house and go inside(St.Ex.80-T.24). Brand made an emergency call(Tr.1235).

Kevin could not see Bam-Bam on the floor, but thought he must be where people inside were standing in a half-circle(St.Ex.80-T.24). The officers "immediately made everybody" – Patricia, Kevin's Aunt Ivory, and his Uncle Cameron – "get out of the house"(St.Ex.80-T.25). Nelson walked around "going through the rooms"(St.Ex.80-T.25-26).

An ambulance arrived approximately four minutes later(Tr.1180-82). Kirkwood police Sgt.McEntee arrived at the house just after the medics; they all went inside and Kevin saw the paramedics bend down(St.Ex.80-T.28). Officers Nelson, Brand, and McEntee were talking(St.Ex.80-T.28). Patricia ran to No.411 and said that something was wrong with Bam-Bam(St.Ex.80-T.28-29). When Kevin started to go over, Patricia told him not to go, he would be arrested(St.Ex.80-T.29).

Jada arrived; she was very upset and wanted to get inside to Bam-Bam(Tr.1192;St.Ex.80-T.29-30). Fire Captain Dahm said the paramedics asked

Sgt.McEntee to take her outside(Tr.1192-93). Dahm said Jada was very upset, crying, and McEntee "asked her to come with him" then took her out to the front porch(Tr.1193). Kevin testified Sgt.McEntee blocked Jada's way and would not let her inside and she kept pushing him to get inside(St.Ex.80-T.30). Jada "went to look through the window" to see Bam-Bam, and Sgt.McEntee pushed her away, almost pushing her off the porch in the process(St.Ex.80-T.30-31). Eventually, Jada just went into the yard and cried(St.Ex.80-T.31).

Attempts to restart Bam-Bam's heart using CPR were unsuccessful(Tr.1187-89). An ambulance took him to a hospital where he was pronounced dead(Tr.1197-98). Sgt.McEntee and Nelson walked to No.411 and told Henrietta where the ambulance was taking Bam-Bam(St.Ex.80-T.32). Kevin had moved to the front window of No.411 and heard McEntee ask if he was in the house and Patricia say "no"(St.Ex.80-T.33). Sgt.McEntee saw Kevin "standing in the window" and tapped Nelson's shoulder(St.Ex.80-T.33). "[T]hey both looked and they just started smiling" then got in their cars and left(St.Ex.80-T.33).

About 30 minutes later, Patricia told Kevin that they had "lost" Bam-Bam; she returned Kevin's keys(St.Ex.80-T.33-34). Kevin was shocked, becoming angry and upset(St.Ex.80-T.34). He left Cori in the house with his grandpa, got in his truck, and drove around Meacham Park to clear his mind and think(St.Ex.80-T.34-35). He called Cori's grandmother to come get her(St.Ex.80-T.35).

Kevin drove home and waited but no one came to get Cori, so he decided to take her home(St.Ex.80-T.35). He started walking and met his cousin Jermaine, and

they walked toward Cori's home at 319 Alsobrook(St.Ex.80-T.35-36). Kevin told Jermaine the police "act[ed] like they didn't want to save" Bam-Bam(Tr.1426-27). He said, "They wasn't trying to help him, they was too busy looking for me"(St.Ex.80-T.36). Kevin repeated this to other people he saw while walking with Jermaine(St.Ex.80-T.36-37).

Jermaine said Bam-Bam's death "was a shocker" and he "couldn't believe it"(Tr.1466). Kevin was more shocked than Jermaine; Kevin was "devastated" and confused(Tr.1467,1469). When they walked together, they talked about Bam-Bam's death; Kevin never mentioned taking revenge or harming an officer or Sgt.McEntee or anything like that(Tr.1468-69).

At some point, Cori's mother, Dana, came and took her from Kevin(St.Ex.80-T.37). People began coming up to Kevin and asking "are you all right," or "what happened"(St.Ex.80-T.38). He wanted to put it out of his mind and kept trying to smile(St.Ex.80-T.38).

Jermaine and Kevin had walked to the 300 block of Alsobrook where they saw Kevin's girlfriend, Brittany, in her SUV rolling a marijuana cigarette(Tr.1427-29;St.Ex.80-T.40-41). Jermaine got in the car and smoked with Brittany(Tr.1428-29;St.Ex.80-T.41). About this time, Kirkwood issued a dispatch about someone shooting fireworks in Meacham Park and Sgt.McEntee said he would respond(Tr.1167-68).

Kevin decided to go to his father's house in Berkeley and began walking down Alsobrook toward home(Tr.1433;St.Ex.80-T.42). Jermaine remained in the SUV with

Brittany smoking marijuana(Tr.1433-35). Jermaine saw a Kirkwood police car turn onto Alsobrook(Tr.1433-35). He gave the blunt back to Brittany and ran down the hill toward Kevin(Tr.1435-36). Many people were outside at the time(Tr.1339,1345). Although there is no dispute that at this point Kevin shot Sgt.McEntee, witnesses differed on what occurred before, during, and after the shooting.

Lamont Chester, Eric Long, and Manu Jones were at Alsobrook and Orleans at about 7:30 p.m. when Sgt.McEntee pulled up and talked to them about "popping fireworks" – it was the day after the Fourth of July(Tr.1110,1147,1294-96,1316-18;St.Ex.68,69). While the boys talked to McEntee on the driver's side of the car, Lamont saw Kevin walking towards the car on the other side(Tr.1298;St.Ex.68,69). Kevin ran up to the front passenger door and started shooting, saying, "you killed my brother"(Tr.1299-1301,St.Ex.68). He fired five to seven shots in rapid succession(St.Ex.68). Lamont was shot in the leg and ran home(Tr.1301;St.Ex.68). Eric didn't see anyone approach the police car; he heard gunshots and heard "Kevin Tatum" say "killed my brother"(Tr.1320,1325;St.Ex.69). Eric ran; he looked back and saw Kevin running away from the police car(Tr.1322,1324).

Manu, talking to Sgt.McEntee, heard what sounded like fireworks(Tr.1384). He heard someone say "you killed my brother," then he heard gunshots "coming from the passenger side" of the police car(Tr.1384-86). He did not see who shot and he did not recognize the voice(Tr.1385). He testified no one got into the car – Manu saw "an arm in the car" firing shots "and then afterwards reaching for the gun"(Tr.1386). Kevin put his arm into the car, struggled with the officer, and took the officer's

gun(Tr.1386-91). He also said Kevin got in the car in the struggle for the gun(Tr.1387). Manu acknowledged that when deposed, he said he saw Kevin in the car struggling for the gun; he testified that statement was not accurate(Tr.1395-96).

Norvell Harris was outside and noticed the police car(Tr.1338-40,1345). Kevin, on the passenger side of the police car, said something like "you killed my brother," stuck a gun in the car window, shot the officer, and ran(Tr.1347-49;St.Ex.75).

As Jermaine ran down the street from Brittany's SUV, he saw Kevin in the street by the stopped police car's passenger window(Tr.1437-42). Jermaine didn't see anyone on the driver's side but the driver was looking that direction(Tr.1440). Jermaine walked past Kevin to the rear of the car; from there he saw Kevin pull his gun, put it through the car window, and shoot(Tr.1442-45). He said Kevin's hand was all the way in the car when he began shooting(Tr.1445). Before running away, Jermaine saw Kevin open the police car door(Tr.1442,1448). Kevin had his gun and a second gun when he ran past Jermaine after the shooting(Tr.1450-51).

At some point after Jada and her boyfriend, Norman Madison, returned from the hospital after Bam-Bam's death, Madison heard a lot of people "running past the house going down toward Orleans"(Tr.1649-50). He went outside to look for his daughter(Tr.1650-52). People "were coming back up Orleans toward Saratoga" and a few minutes later, Madison saw Kevin coming down Saratoga toward Orleans (Tr.1653). Madison testified when Kevin reached them, Jada asked Kevin what he had done "and he said, that mother fucker let my brother die, he needs to see what it

feel[*sic*] like to die"(Tr.1654). Jada told him, "that's not true," and Kevin turned and walked away up Saratoga(Tr.1654-55). Kevin was "highly upset"(Tr.1656).

Sgt.McEntee's car drove several houses up Alsobrook and hit a tree at No.329(Tr.1250-51,1349). Norvell ran partway up the street and saw Kevin shoot the officer and run off(Tr.1354-55;1373-76). Vivian Harris saw Kevin come through a yard and go to the crashed police car(Tr.1709-10). Cecil Jones, at home across from 329 Alsobrook, saw Kevin bending over Sgt.McEntee, who was on the ground; Kevin was going through his pockets(Tr.1678-79). He heard Kevin say, "You killed my brother. You killed my little brother and that's what you get"(St.Ex.74).

Officer Nelson, the first officer to arrive, found Sgt.McEntee on the sidewalk next to the car, unresponsive(Tr.1174,1251-55). He died before an ambulance arrived(Tr.1200,1211,1256-57).

The State played Kevin's video-recorded testimony from the first trial(Tr.1283-87;St.Ex.80). In the video, Kevin testified he retrieved his loaded gun from his truck after Bam-Bam went to the hospital, because he was worried about the police finding it if they towed his truck(St.Ex.80-T.65-67,106). He first noticed the police car on Alsobrook when it was about fifteen feet from him(St.Ex.80-T.44). Not wanting to draw the officer's attention, he did not run; instead, hoping not to be seen, he and Jermaine began walking past the car(St.Ex.80-T.44). Reaching the passenger window, Kevin saw Sgt.McEntee and stopped(St.Ex.80-T.44-45). McEntee saw Kevin; "he just started smiling"(St.Ex.80-T.45). Kevin "flipped out," said "you killed my brother" and shot McEntee seven times(Tr.1299,1384-86;St.Ex.68;St.Ex.80-T.45).

Walking away, Kevin heard McEntee's car take off and turned to see it hit a car up the street(St.Ex.80-T.45-46). Kevin kept walking away(St.Ex.80-T.46). At Saratoga and Orleans, his mother saw him and asked what was wrong(St.Ex.80-T.47). Kevin said, "he killed Bam-Bam" meaning "[t]he police, McEntee" killed Bam-Bam(St.Ex.80-T.47). Jada said, "Bam-Bam died, nobody killed him"(St.Ex.80-T.47). Kevin insisted the police killed Bam-Bam; that was how he felt(St.Ex.80-T.47). When Jada asked about Cori, Kevin immediately ran up Saratoga, then cut through several back yards to get to Cori's house at 319 Alsobrook(St.Ex.80-T.48-50).

At Alsobrook, Kevin went around the white car and the police car to get to Cori's house; he saw Sgt.McEntee moving alongside the police car(St.Ex.80-T.50-51). Kevin "flipped out again" and fired at Sgt.McEntee(St.Ex.80-T.51). Kevin walked toward Sgt.McEntee, stumbled, and the gun went off again, the bullet hitting the ground(St.Ex.80-T.51). Kevin heard someone calling his name, then heard sirens and began walking towards Orleans(St.Ex.80-T.51-52).

Kevin realized what had happened and ran to his truck(St.Ex.80-T.52-53). As he drove out of Meacham Park, he began wondering, "why did I do that" and smacked himself in the head(St.Ex.80-T.54-55). Kevin reached his dad's house in Berkeley and thought about Bam-Bam dying and what he had done(St.Ex.80-T.55). His family eventually arranged for him to surrender to the police(St.Ex.80-T.59-60).

Kevin agreed he knew he was shooting Sgt.McEntee, but he was not thinking about whether the bullets would hit him or about killing him(St.Ex.80-T.109-11). He did not know why he shot Sgt.McEntee the last time(St.Ex.80-T.112).

The police talked to Jermaine after the shooting, and he said he "didn't know anything"(Tr.1456). Jermaine was then on probation for robbery and had warrants from Kirkwood and Maplewood for other "[d]rugs and traffic" offenses(Tr.1456-58). When he was arrested on the warrants, he knew would receive a probation violation and asked to talk to the Kirkwood police(Tr.1460-61). He said his police statement was the same as his testimony; his robbery probation was never revoked(Tr.1461-62).

The post-conviction case.

Kevin filed a *pro se* Rule 29.15 motion on September 22, 2012(PCR.L.F.1,7-12). The motion court conducted an evidentiary hearing on, *inter alia*, claims H,K, and L, alleging ineffective assistance of counsel for failure to present mitigating and diminished capacity evidence (PCR.L.F.169-196,240-290;Hr.Tr.46,51-52,56,84,110-11,114,122 -23,142-541).

Kevin's claim of a ***Brady***[11] violation – failure to disclose the State's role in, and Jermaine's expectation of, a benefit for testifying against Kevin(PCR.L.F.80-84) – was denied without a hearing(Supp.L.F.7-9), as were his claims that counsel were ineffective for failing to properly argue their ***Batson***[12] challenge(PCR.L.F.74-79;Supp.L.F.5-7); and failing to object to: the reenactment video exhibited by the State(PCR.L.F.86-92;Supp.L.F.12-13); the presence of numerous uniformed police officers in the courtroom and hallways(PCR.L.F.123-24;Supp.L.F.22); Madison's

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[11] ***Brady v. Maryland***, 373U.S.83(1963).

[12] ***Batson v. Kentucky***, 476U.S.79(1986).

assertion about what Kevin said(PCR.L.F.126;Supp.L.F.22-23); the prosecutor's improper and erroneous definition of "deliberation" in argument(PCR.L.F.128-129;Supp.L.F.23); Kevin's appearance before the jury in restraints(PCR.L.F.137; Supp.L.F.23); the fact that jurors were sleeping during defense counsel's argument(PCR.L.F.136;Supp.L.F.23). The court also denied his claim that Missouri's death penalty scheme does not sufficiently narrow the class eligible for the death penalty (PCR.L.F.304;Supp.L.F.24-25).

After hearing evidence, the motion court issued its Findings of Fact, Conclusions of Law, and Judgment denying relief on all claims on January 12,2012 (Supp.L.F.1-42;App.A-1 – A-42). Notice of appeal was filed February 17,2012 (PCR.L.F.486).

To avoid repetition, additional facts will be presented as necessary in the argument.

POINTS RELIED ON

I. FAILURE TO PRESENT EVIDENCE OF ACUTE STRESS DISORDER

The motion court clearly erred in denying Kevin's claim that counsel were ineffective for failing to call Drs. Levin and Cross in guilt phase to support a diminished mental capacity defense, that included relying on Kevin's DFS records, and that Kevin suffered from Acute Stress Disorder (ASD) triggered by his young brother Bam-Bam's tragic sudden death, denying Kevin 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 Kevin would not have been convicted of first degree murder.

Alternatively, reasonably competent counsel would have at least presented in penalty phase as mitigating evidence Levin's and Cross's findings as to ASD, and all foundations for their opinions, including DFS records, and Kevin would not have been sentenced to death.

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

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

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

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

II. Failure to Disclose Exculpatory Evidence Regarding Jermaine Johnson

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that the State failed to disclose that its witness Jermaine Johnson received a direct benefit in exchange for his testimony against Kevin, denying Kevin 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 Kevin pleaded facts not refuted by the record and if proved would entitle him to relief: he pleaded that the State continued Jermaine's probation violation hearings until he had testified favorably for the State at Kevin's trial. The record is contrary to the motion court's finding that there was no agreement, because co-counsel for the State in Kevin's case represented the State in Jermaine's case until Jermaine had testified against Kevin, and Jermaine's affidavit shows while he did not have a formal deal he expected a benefit for his testimony. Had the State disclosed its role in continuing Jermaine on probation, there is a reasonable probability the jury would have looked less favorably on his testimony about Kevin's actions, thus it would not have found that Kevin deliberated.

United States v. Bagley, 473U.S.667(1985);

Taylor v. State,262S.W.3d231(Mo.banc2008);

Strickler v. Greene,527U.S.263(1999).

III. Failure to Object to Inaccurate Reenactment Video

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to object to the admission of the reenactment video, Exhibit 88, as well as to its use in closing argument, denying Kevin 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 Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: he alleged that the video was inadmissible as improper demonstrative evidence because it was an inaccurate representation of Kevin's statement and testimony as to his actions and what he could see; those actions were disputed issues, yet the video portrayed the State's theory as established fact, thus giving it an authority that was unfairly prejudicial, because without it there is a reasonable probability that the jury would not have found deliberation.

State v. Caudill,789S.W.2d 213(Mo.App.W.D.1990);

Lopez v. State,651S.W.2d413(Tex.App.2Dist.1983);

Deck v. State,68 S.W.3d418(Mo.banc2002);

Strickland v. Washington,466 U.S.66(1984);.

IV. Numerous Uniformed Police Officers in Courtroom and Hallways

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to object to the numerous uniformed police officers in the courtroom and hallways, denying Kevin 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 Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: he alleged that reasonably competent counsel would have objected to the obvious call for conviction and harsh punishment deprived Kevin of his right to a fair trial and a fair and impartial jury to decide his guilt and punishment.

Norris v. Risley,918F.2d828(9thCir.1990);

Cox v. Louisiana,379U.S.559(1965);

State v. Franklin,327S.E.2d449(W.Va.1985).

V. Failure to Correct Norman Madison's Assertion That His Testimony and What He Told Police Kevin Said After the Shooting Were the Same

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to object – as improper rehabilitation and bolstering, and untrue – to Norman Madison's assertion that his testimony that Kevin said Sgt.McEntee needed to "see what it felt like to die" was the same as what he told the police, and for failing to call detectives Guyer and Raymond to testify that Madison told them only that he heard Kevin say Sgt.McEntee "killed my brother," denying Kevin 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 Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: that Madison did not say to police that Kevin said Sgt.McEntee needed to see what it felt like to die, and failure to object and adduce evidence to refute the negative inference from Madison's testimony on the crucial issue of deliberation was highly prejudicial and deprived Kevin of effective counsel and a fair trial.

State v. Ramsey,864 S.W.2d 320(Mo.banc1993);

Black v. State,151S.W.3d49(Mo.banc2004);

Hadley v. Groose,97F.3d1131(8th Cir. 1996);

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

VI. Improper and Erroneous Definition of "Deliberation"

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to object to the prosecutor's improperly and erroneously defining "deliberation" in closing argument, denying Kevin 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 Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: he alleged the prosecutor's argument that several times told the jury making a "conscious decision" to kill was the same as deliberation misstated the law; whether Kevin deliberated was the central issue in the case, and the prosecutor's improper and erroneous definition of that concept was highly prejudicial, leading the jury to ignore the question whether Kevin was able to coolly reflect; had counsel objected, there is a reasonable probability that the jury would not have found deliberation.

State v. Jordan,646 S.W.2d747(Mo.banc1983);

Copeland v. Washington,232 F.3d 969(8thCir.2000);

Strickland v. Washington,466 U.S.66(1984);

State v. Anderson,306S.W.3d529(Mo.banc2010).

VII. Kevin's Appearance Before the Jury in Restraints

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to object to Kevin's appearance before the jury in restraints, denying Kevin 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 Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: that the jury's awareness that he was required to wear a shackling device concealed under his clothing, that was made "visible" to the jury because it caused Kevin to limp and made a noise when he sat, was inherently prejudicial structural error that deprived him of his right to a fair trial before a fair and impartial jury, and reasonable counsel would have objected to the device's use.

Deck v. Missouri,544U.S.622(2005);

Brecht v. Abrahamson,507U.S.619(1993);

Lankford v. Idaho,500U.S.110(1991);

Anderson v. State,196S.W.3d28(Mo.banc2006).

VIII. Arbitrary and Capricious Sentence

The motion court clearly erred in denying an evidentiary hearing on the claim that Missouri's death penalty statute is unconstitutional because it does not genuinely narrow the class of people eligible for the death penalty, denying Kevin due process, freedom from cruel and unusual punishment, and a full and fair determination of his claims, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that his motion pled facts, not conclusions, that entitled him to relief: specifically, a review of intentional homicide cases in Missouri shows that, while 76% of cases were death-eligible under the statute, only 2.5% resulted in death; the mental state in the murder first and second statutes do not narrow those eligible for death; the statutory aggravators, especially the broad "wantonly vile" aggravator used in this case does not narrow those eligible for death; and whether one receives the death penalty is based on arbitrary factors such as the location of the prosecution, like St. Louis County, rather than the seriousness of the crime and culpability of the offender.

State v. Worthington,8S.W.3d83(Mo.banc1999);

Tuilaepa v. California,512U.S.967(1994);

Zant v. Stephens,462U.S.862(1983);

Roper v. Simmons,543U.S.551(2005).

IX. Sleeping Jurors

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to seek to replace sleeping jurors, denying Kevin his rights to effective assistance, due process, freedom from cruel and unusual punishment, and a full complement of jurors, U.S.Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, 22(a), in that Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: because members of the panel were falling asleep and not able to hear counsel's argument, Kevin was essentially tried by a jury of fewer than the twelve members to which he was entitled; a hearing is necessary to determine whether Kevin can demonstrate prejudice, which, because the right to be tried by a full jury is structural, Kevin would prove by proving that jurors were sleeping.

State v. Ralls,8S.W.3d64(Mo.banc1999);

Brecht v. Abrahamson,507U.S.619(1993);

Anderson v. State,196S.W.3d28(Mo.banc2006);

Strickland v. Washington,466 U.S.66(1984).

X. ***Batson***

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to properly object as *Batson* **violations to the prosecutor's strike of venirepersons Clark, Jackson, Cottman and Stephenson, denying Kevin his rights to effective assistance, due process, a fair trial, and freedom from cruel and unusual punishment, U.S.Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, 22(a), in that Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: counsel failed to object to the strikes or point out to the trial court the similarly situated white venirepersons on the panel.**

Knese v. State,85S.W.3d628(Mo.banc2002);

Strong v. State,263 S.W.3d636(Mo banc2008);

State v. Johnson, 284S.W.3d561(Mo.banc2009);

Strickland v. Washington,466 U.S.66(1984).

XI. Failure to Present Mitigation Evidence From Lavonda Bailey About Kevin's Relationship With His Daughter, Cori

The motion court clearly erred in denying Kevin's claim regarding failure to call Lavonda Bailey as a witness in penalty phase, denying Kevin his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, Mo. Const., Art. I, §§10, 18(a), 21, in that Lavonda would have testified that Kevin was a good and loving father to Lavonda's granddaughter, Cori, and countered the evidence presented as an aggravator that Kevin had assaulted Dana, Cori's mother and Lavonda's daughter; had counsel investigated and called Lavonda to testify in penalty phase, there is a reasonable probability Kevin would have received a life sentence.

State v. Wells,804S.W.2d746(Mo.banc1991);

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

Chambers v. Armontrout,907F.2d825(8th Cir.1990);

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

ARGUMENT

I. FAILURE TO PRESENT EVIDENCE OF ACUTE STRESS DISORDER

The motion court clearly erred in denying Kevin's claim that counsel were ineffective for failing to call Drs. Levin and Cross in guilt phase to support a diminished mental capacity defense, that included relying on Kevin's DFS records, and that Kevin suffered from Acute Stress Disorder (ASD) triggered by his young brother Bam-Bam's tragic sudden death, denying Kevin 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 Kevin would not have been convicted of first degree murder.

Alternatively, reasonably competent counsel would have at least presented in penalty phase as mitigating evidence Levin's and Cross's findings as to ASD, and all foundations for their opinions, including DFS records, and Kevin would not have been sentenced to death.

Counsel failed to present evidence from Drs. Levin and Cross in guilt phase that Kevin suffered from diminished capacity such that he was not guilty of first degree murder. These experts would have testified that Kevin suffered from Acute Stress Disorder (ASD) which was triggered by his young brother Bam-Bam's tragic sudden death and Kevin was predisposed to ASD because of Kevin's and his siblings'

shared abuse history. At a minimum Levin's and Cross's findings should have been presented as mitigating evidence in penalty phase to support a life sentence.

STANDARD OF REVIEW

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***,428U.S.280,305(1976); ***Lankford v. Idaho***,500U.S.110, 125(1991). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised and prejudice. ***Strickland v. Washington***,466U.S.668,687(1984). A movant is prejudiced if there is a reasonable probability that but for counsel's errors the result would have been different. ***Deck v. State***,68S.W.3d418,426(Mo.banc2002)(discussing ***Strickland***). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.426.

DR. LEVIN

A. *Penalty Phase Testimony*.

Levin testified in penalty phase that he evaluated Kevin at DFS's request when Kevin was seventeen years old(Tr.2232). Levin reported that Kevin's mother, Jada, had a serious drug habit and was neglectful and abusive while the family lived in filth(Tr.2240,2246). Levin recommended that Kevin be provided intensive therapy and medication for depression(Tr.2269-70). Levin's recommendations were ignored(Tr.2270).

Levin expressed the opinion that Bam-Bam's death was a catastrophic painful occurrence and led to the shooting of Sgt.McEntee(Tr.2271).

B. *Post-conviction testimony*.

Psychologist Levin does psychological evaluations for the State in abuse and neglect cases(Hr.Tr.164-66). Levin reviewed more than 3,500 pages of records, which included DFS records(Hr.Tr.169-71). Levin drew from and relied extensively on the contents of DFS records during his 29.15 testimony. He was provided 1690 pages – less than half of those records – before Kevin's trial(Hr.Tr.170).

Levin recounted that DFS became involved when Jada was hotlined when Kevin was two years old(Hr.Tr.171-72). The family had severe financial stress – Kevin's father was in prison for murder, and Jada, one of nine children, was very young when she started having children(Hr.Tr.171-75). The initial report was about Jada going out and leaving her children unsupervised(Hr.Tr.173-74;M.Ex.17.1).

Kevin's home conditions included a very cold home – it had broken windows and no heat – no cooking, refrigeration, or bathroom facilities, and electricity through an extension cord from Henrietta's house(Hr.Tr.176;M.Ex.17.2). Jada's felony probation for assault with a knife was significant because it showed she was already having problems when DFS entered her life(Hr.Tr.176-77;M.Ex.17.3).

Jada's mother Patricia Ward reported concerns to DFS; Jada was often not home, and her whereabouts were often unknown(Hr.Tr.180-81). That pattern was repeated many times over the years of DFS involvement: workers found Kevin, age two, outside in December with a thin jacket and no socks, supervised only by an

eight-to-nine-year-old child; Jada appeared unconcerned about her children, and did not take any action to dress them, instead sending them to find their own clothes and dress themselves for the cold(Hr.Tr.181;M.Ex.17).

Levin noted that in February, 1988 a Meacham Park Clinic social worker called DFS, also concerned about Jada's ability to parent Kevin and his siblings based on her observation that Jada was limited intellectually with an I.Q. of 70(Hr.Tr.182,191;M.Ex.17.7).

Jada took her AFDC check and left for long periods, then returned without any money, having spent it on drugs; the children were not being properly clothed and fed(Hr.Tr.183). When a DFS worker went to the home, she found it dirty and roach infested(Hr.Tr.185-86). Two fires in the home about a year apart strongly evidenced neglect(Hr.Tr.186-88).

Jada went into a drug program because her probation officer required it, but she did not complete it; the counselors noted her poor attitude on entry, and assessed her as chronically chemically dependent(Hr.Tr.190-92). It is significant to a child when a parent is addicted to crack, as was Jada – it affects all aspects of one's ability to function as a parent; getting the drug is the sole preoccupation(Hr.Tr.193). Two days after leaving the program, Jada hit Kevin's brother Marcus near the eye with a shoe(Hr.Tr.194-95).

Observations of lack of supervision included: the children fighting, Kevin and his sister wearing dirty clothes, Jada leaving a hot iron in a room with several small children, and Kevin and another boy playing with a large running fan(Hr.Tr.197-98).

A DFS worker noted that the children "appear to suffer from environmental delays"(Hr.Tr.199; M.Ex.22).

Levin recounted that DFS continuously got calls from family about Jada staying out all night or otherwise failing to supervise or otherwise care for the children(Hr.Tr.201-02;M.Ex.17.16-7). Life Skills reported that she left Kevin unsupervised in a park(Hr.Tr.207;M.Ex.23). Jada shouted at, threatened, and struck her children(Hr.Tr.209).

A Life Skills report in July indicated that Jada slapped her children on the head, arms and buttocks an average of three times per hour(Hr.Tr.205-06;M.Ex.23). Levin explained that it is never appropriate to hit a two-year-old in the head; a two-year-old child is completely dependent upon his parent for care and safety, and cannot defend himself against an adult physically(Hr.Tr.207). Such hitting, combined with the neglect Jada showed, only adds to the child's sense that the world is unsafe, and he cannot trust his parents to care for him(Hr.Tr.207-08).

One month after a drug rehabilitation stay, Jada was back to using drugs and left her children to get high(Hr.Tr.209-12).

October and November 1988 Life Skills summaries noted that Jada was again observed disciplining her children by hitting them(Hr.Tr.219-20;M.Ex.24.5). The November report also indicated that the instructor intervened twice to protect the children from Jada, only to have Kevin attempt to bite the instructor(Hr.Tr.219; M.Ex.24.5). An October hotline to DFS reported that Jada was continuing to abandon her children with her mother or grandmother(Hr.Tr.222-23;M.Ex.21.1800-01). Jada

was not just vanishing, but was taking Kevin with her for hours at a time; she was using cocaine, prostituting herself, and was taking Kevin, who had just turned three, along with her(Hr.Tr.224-25;M.Ex.17.32).

Levin recounted that in December, 1988, a Meacham Park Clinic physician called the hotline because when Jada brought the children, they were filthy and smelled of urine, and Jada seemed disoriented(Hr.Tr.227-28;M.Ex.18.2787-88). A risk assessment by DFS put Jada's children mostly in the high risk category, due to Jada's drug abuse and limited mental abilities(Hr.Tr.229-30;M.Ex.21.1815-17).

A family member called DFS in December, 1988, and said Jada had received her AFDC $600 check, took Kevin with her while he was still in his pajamas, and did not return until 5:00 the next morning with only $100 left, having spent her money on drugs(Hr.Tr.230;M.Ex.17.36). Taking Kevin on drug runs at age three had negative psychological consequences on him(Hr.Tr.231).

In December, 1988, the children were found inappropriately dressed and dirty; Jada's behavior had not changed(Hr.Tr.231-32;M.Ex.17.36-37). Jada was arrested and incarcerated in December 1988(Hr.Tr.232;M.Ex.17.37). After her release in January 1989, there was another call to DFS about the lack of supervision of the children(Hr.Tr.232;M.Ex.17.38). Jada tested positive for cocaine in January(Hr.Tr.233;M.Ex.17.39,44).

The Court placed custody of Kevin's brother Marcus with Patricia Ward in April 1989, but Kevin and his sister remained with Jada(Hr.Tr.233).

In May 1989, Jada was staying out all night and using cocaine; she hit the children and was very short-tempered(Hr.Tr.233-35;M.Ex.17.44,17.46). Also in May, Jada took the children to a friend's house and abandoned them there without asking the friend(Hr.Tr.234-35;M.Ex.17.46). Jada was suspected of having stabbed a man who failed to deliver her drugs(Hr.Tr.235; M.Ex.17.46).

Patricia made a hotline call in July 1989; she was very concerned that the children were being exposed to drug use, and also to sexual behavior(Hr.Tr.238-39;M.Ex.17.50). The home was unacceptable – there were rats and no unspoiled food(Hr.Tr.241;M.Ex.29.1706-08). When asked where she had been until 3:30 a.m., Jada said she was in a motel with her boyfriend, "flat-backing"(Hr.Tr.241-42;M.Ex.29.1707-08).

Also in July, Jada abandoned the children with Patricia(Hr.Tr.242; M.Ex.30.1722). A few days later, Patricia called DFS concerning a physical injury – she saw Kevin and Jada walking on the street late at night; Kevin had a large mark on his forehead, and when she asked him how he got hurt, he said his mother kicked him and knocked him down(Hr.Tr.243;M.Ex.17.2439).

A response to a hotline call revealed no food in the home(Hr.Tr.244-45;M.Ex.34.1745-46). Jada was using her food stamp money for cocaine(Hr.Tr.246; M.Ex.34.1745-46). Jada's probation officer called DFS in August 1989 to report that Jada was mistreating Kevin in her office – she reported Jada was yelling at him and hitting him(Hr.Tr.246;M.Ex.18.56). She was also seen slapping Kevin on the head and back at the health clinic in August(Hr.Tr.246-47;M.Ex.35.1757-58).

DFS placed Kevin at age four and a half with his great Aunt Edythe Richey(Hr.Tr.256-57). Edythe would hit Kevin for bedwetting(Hr.Tr.259-60). Levin noted at times Kevin acted out, but that was a manifestation of the neglect and abuse he endured(Hr.Tr.263).

Levin recounted that Kevin's father was paroled from prison when Kevin was thirteen or fourteen and he beat Kevin(Hr.Tr.268-69). Kevin then spent time at St. Joseph's Boys' Home where he attempted suicide(Hr.Tr.268-69). From St. Joseph's, Kevin went to SouthPointe Psychiatric Hospital(Hr.Tr.269). At these facilities, Kevin did not get appropriate treatment(Hr.Tr.269-70).

At SouthPointe Kevin displayed illogical, tangential disorganized thinking(Hr.Tr.275). Kevin was prescribed Ritalin for attention deficit disorder and the anti-depressant Imipramine(Hr.Tr.276-77). Kevin's DFS records reflected a diagnosis of Major Depression(Hr.Tr.277). Kevin's sister Kanesha's records reflected she was a diagnosed with bipolar disorder, and with crank, cannabis, and alcohol abuse, and ADHD(Hr.Tr.277-78).

At ages fifteen through seventeen, Kevin returned to living with Edythe(Hr.Tr.270). A social worker at Catholic Charities found that Kevin lacked a sense of security and stability in his relationships with adults(Hr.Tr.273).

When Levin saw Kevin prior to this offense, when Kevin was seventeen, he diagnosed Kevin as having an on-going type of depression referred to as dysthymia, and also adjustment disorder with mixed disturbance of emotions and child neglect(Hr.Tr.278-80).

Levin's post-conviction evaluation found that at the time of the offense Kevin suffered from the mental disease or defect, Acute Stress Disorder(Hr.Tr.282). ASD develops in response to an extreme acute stress(Hr.Tr.283). To be diagnosed with this disorder, a person must have witnessed or have been confronted with an event that involved actual or threatened death or serious injury or a threat to the physical integrity of oneself or others and the person's response involved intense fear, helplessness, or horror(Hr.Tr.284). That happened to Kevin when he witnessed his twelve year old brother, Bam-Bam, die(Hr.Tr.284). Kevin felt both a sense of responsibility and horror for his brother's death(Hr.Tr.284).

ASD is characterized by disturbed, irrational thinking(Hr.Tr.286-88). That was present as demonstrated by Kevin's trial testimony, when he described his feeling at the time of being in a "trance"(Hr.Tr.287). Disturbance was demonstrated through Kevin's statements accusing the police of having killed Bam-Bam(Hr.Tr.286-88)

Also characteristic of ASD is a re-experiencing of the traumatic event through flashbacks or a reliving of the experience, which happened to Kevin(Hr.Tr.288-89). Another characteristic of ASD is the avoidance of stimuli that generate recall of the trauma; Kevin was overwhelmed by images of the events surrounding Bam-Bam's death(Hr.Tr.289). In ASD, social functioning is impaired and Kevin was impaired as shown by his belief that the police were responsible for Bam-Bam's death(Hr.Tr.290-91). Kevin suffered from a lack of impulse control which is characteristic of ASD(Hr.Tr.291).

Kevin had returned from living with his father to living in Meacham Park when he was seventeen to take care of his family and his little brother Bam-Bam(Hr.Tr.285). Kevin's great grandmother Henrietta Kimble was Bam-Bam's legal guardian and Kevin was living with them for about one year prior to Bam-Bam's death(Hr.Tr.285-86). Immediately before Bam-Bam died, Kevin had sent Bam-Bam over to the house next door, which was Kevin's grandmother Patricia Ward's house(Hr.Tr.286). Bam-Bam had a heart condition and that was what caused his death(Hr.Tr.286).

Levin noted that it was significant that Kevin and his siblings were very close to one another because of their shared tumultuous childhood documented in the DFS records(Hr.Tr.258). When Kevin's brother died, he felt he had failed in caring for his brother and his family(Hr.Tr.285). Kevin committed the act that he did because of an extraordinary stressor and reacted out of character for him(Hr.Tr.312-13).

Kevin's ASD overwhelmed his ability to think rationally such that he was unable to deliberate or coolly reflect(Hr.Tr.291-92). Levin found that Kevin's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired because of his ASD(Hr.Tr.292). Levin also found that Kevin acted under extreme emotional distress at the time of the shooting(Hr.Tr.292-93).

Knowing Kevin had been sentenced to death and had a motivation to lie, Levin gave serious consideration to whether Kevin was lying and malingering and concluded he was not(Hr.Tr.300,302-03).

DR. CROSS

Dr. Cross, a psychologist, evaluated Kevin in the post-conviction case to determine whether he suffered from a mental disease at the time of the crime, and if so, whether it impacted his ability to deliberate(Hr.Tr.320-30,333). Cross reviewed numerous records, and in particular the DFS records(Hr.Tr.334-35).

The records revealed that Kevin had been subjected to considerable neglect and physical abuse: Kevin and his siblings were often left alone, sometimes for days at a time(Hr.Tr.335-36;M.Ex17.1,17.3-4,17.13,17.14,17.26,17.32,17.38,17.46). There were at least two fires in the home, there was not enough food for the children, and they were not well kept(Hr.Tr.336;M.Ex.17.27). There were a number of hotline calls, not only by local agencies and medical clinics, but also by family members(Hr.Tr.336).

There were also numerous reports of Kevin's mother's, Jada's drug use, prostituting herself, and spending her AFDC money to support her drug habit(Hr.Tr.336-37;M.Ex.17.8,17.10,17.11-12,17.18,17.22,17.26;17.31-32,17.46). Jada failed to provide basic necessities – food, clothing, and a heated house in the winter(M.Ex.17.2,17.4,17.17,17.31). The home was dirty and rat and roach infested(M.Ex.17.10;M.Ex.29.1707). DFS workers noted that Jada would be gone with Kevin for substantial periods of time, which exposed Kevin to situations that were dangerous to his well-being, and to observing inappropriate interactions between Jada and drug dealers or others(Hr.Tr.337). Jada beat and threatened Kevin and her

other children(M.Ex.17.17,17.22,17.32,17.52,17.56;M.Ex.38). Jada spent time incarcerated(M.Ex.17.38,17.39).

The records further indicated that beyond a lack of supervision, workers reported that Jada repeatedly hit, cursed at, and threatened Kevin(Hr.Tr.338). This causes a child to be very confused about whether or not his parent actually cares about him, and negatively impacts his self-esteem and feelings of importance and relevance(Hr.Tr.338-39).

When Kevin was taken from Jada in March 1990 at four and a half and placed with his great aunt Edythe, his very severe bedwetting problem was evidence of regression – going back to an earlier developmental stage because of emotional trauma(Hr.Tr.341). When the bedwetting continued into his early teen years without a physical cause, it was psychologically significant; the records showed that Edythe dealt with the bedwetting by spanking Kevin, which would remind him of his experiences with Jada, and he would react in the same way he had with her – emotional numbing and negative feelings toward the person who was hitting him(Hr.Tr.341-42). Kevin's acting out sexually, and acting out aggressively at school after he was placed with Edythe, and his diagnosis as having attention deficit disorder (ADHD), are all symptoms of emotional adjustment difficulty(Hr.Tr.342-43). The ADHD diagnosis suggests he would have difficulty concentrating and focusing, and with impulse control(Hr.Tr.356).

In 1999 at age nine, Kevin was diagnosed with adjustment reaction – a reaction to stress(Hr.Tr.345; M.Ex.53). When Kevin was in the eighth grade, he was admitted

to a psychiatric hospital(Hr.Tr.345-46). His records indicated tangential thoughts, which is significant because it reflects inability to accurately interpret reality(Hr.Tr.346). He was also diagnosed with major depression(Hr.Tr.347). Dr.Cross noted that it is common for children whose mothers have a drug history to suffer from neurological disorders including ADHD(Hr.Tr.349).

Some of the stressors in Kevin's life in July 2005 included that he was basically emancipated, no longer dependent upon or being cared for by relatives, so he lost much of his social and emotional support system(Hr.Tr.350-51). He was no longer in counseling and his relationship with Edythe was estranged(Hr.Tr.351). And he was estranged from the teenage mother of his daughter, he had a pending warrant for his arrest, and he had a fear that his daughter was not being properly cared for by her mother and he might not be able to continue to be a daily part of her life(Hr.Tr.351).

Kevin was living back and forth between his great-grandmother's and his father's homes, he did not have a place to call home, his relationship with his father was always estranged, he had recently lost a part-time job, and he had difficulty regulating his emotions as his stress increased(Hr.Tr.351-52). The anxiety increases stimulated his need to take action to reduce his anxious feelings; Dr.Cross thought Bam-Bam's death "was sort of the straw that broke the camel's back."(Hr.Tr.352). When Kevin was playing football in high school, he did well because it provided a buffer – a way to deal effectively with the stress in his life – but in July 2005 he no

longer played on a football team(Hr.Tr.352-53). By the time he was seventeen, all his buffers were gone(Hr.Tr.353).

Dr.Cross administered multiple tests – the Wechsler Adult Intelligence Scale(WAIS), the Wide Range Achievement Test(WRAT), the Minnesota Multiphasic Personality Inventory(MMPI), the Traumatic Stress Inventory(TSI), the Detailed Assessment of Post-Traumatic Stress(DAPS) (last 3), the Thematic Apperception Test(TAT), and the Rotter Incomplete Sentence Blank(RISB) (Hr.Tr.354-60). The MMPI, TSI, and DAPS all have validity scales to determine whether or not the subject's responses are valid (Hr.Tr.358). There was no indication of malingering; Kevin's responses were valid and Dr.Cross thought he answered honestly(Hr.Tr.357-58,360).

The 13-point difference between Kevin's verbal IQ and performance IQ on the WAIS was statistically significant; people with such discrepancies between the verbal and the performance components tend to have some executive function difficulties(Hr.Tr.355). Dr.Cross explained that the brain's frontal lobe is responsible for our executive functions: decision making, problem solving, insight, and judgment; the test results suggested Kevin would have difficulty with those executive functions, especially during times of high stress(Hr.Tr.355).

The DAPS indicated an acute stress disorder(Hr.Tr.359). Kevin's pattern of responses to the TSI suggested that he had high levels of traumatic stress throughout his developmental years(Hr.Tr.360).

Based upon his review of all the materials he received, his meetings with Kevin and his relatives, and the results of his tests, Dr.Cross determined, to a reasonable degree of psychological certainty, that Kevin was experiencing Acute Stress Disorder at the time he shot Sgt.McEntee(Hr.Tr.360-61). The ASD, combined with Kevin's frontal lobe executive function difficulty, as shown by the intelligence testing, and the increase in his stress level due to his brother's death, meant that Kevin's ability to coolly reflect – his ability to make rational and reasonable decisions, about anything – was "seriously impaired."(Hr.Tr.369). The anxiety and grief he was experiencing at the time substantially impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law(Hr.Tr.370). And he shot Sgt.McEntee while under the influence of extreme mental or emotional disturbance(Hr.Tr.370).

COUNSELS' TESTIMONY

Counsel Kraft questioned Dr.Levin at trial(Tr.2227). Kraft testified that she thought it would have been helpful to have explored in more detail with Dr.Levin the abuse and neglect that Kevin experienced(Hr.Tr.466). Kraft had no strategy reason for not having gone into greater detail with Dr.Levin(Hr.Tr.466).

Kraft testified that whether she would have considered presenting evidence from an expert that Kevin suffered from a mental disease would have depended on what the expert found(Hr.Tr.469). She testified they made a strategic decision not to pursue a diminished capacity defense because they felt Kevin's story that the shooting occurred because of the circumstances of his brother's death was compelling(Hr.Tr.

482-84). Kraft thought Kevin's compelling story could get lost in testimony from competing experts had they relied on diminished capacity(Hr.Tr.482-84).

Counsel Steele testified that the task of whether to present expert testimony and evidence about Kevin's childhood was Kraft's responsibility(Hr.Tr.503,509-10). Steele testified he did not see a need to present in any detail the abuse Kevin endured because he was concerned about losing the jury's attention(Hr.Tr.505-08). Steele would have wanted physical abuse evidence to be presented at least in some summary form(Hr.Tr.505-08). Steele acknowledged that he would have wanted the jury to hear about such details of Jada's drug abuse as her taking Kevin on her drug runs(Hr.Tr.507). Steele acknowledged that the prosecutor argued in penalty closing that the evidence of abuse Kevin endured which the jury did hear was overstated as to severity(Hr.Tr.507-08).

Steele testified that they did not consider presenting at the retrial expert testimony of diminished capacity because at the original trial ten jurors voted for second degree murder(Hr.Tr.510-11). Steele agreed that if a mental health expert had been retained following the original trial and had found that Kevin had suffered from a mental disease or defect he would have considered calling that witness(Hr.Tr.511).

Steele testified that he did not believe that by presenting evidence of the details of the abuse Kevin endured that the jury would conclude that counsel was trying to "excuse" what Kevin did(Hr.Tr.521-22).

Steele testified that there was a decision not to pursue a diminished capacity defense because everyone has experienced the death of a loved one and the jury

would know what Kevin was feeling and how those feelings impacted whether he deliberated(Hr.Tr.525-28). Steele believed that taking something "very simple" and presenting expert testimony would have made Kevin's experience something that was "complex"(Hr.Tr.527-28). Steele did not want to lose "the simple emotional impact of a death upon a person"(Hr.Tr.528). According to Steele "someone's emotional state is common after a death. It's not something that jurors don't already understand"(Hr.Tr.528). According to Steele, relying on a diminished capacity defense would have "sidetracked [the jury] from the major issue."(Hr.Tr.529).

FINDINGS

A. *Claim 8(H): failure to raise diminished capacity*.

The motion court rejected Claim 8(H), the failure to raise diminished capacity; it found that Dr.Levin's testimony was unpersuasive and incredible(Supp.L.F.29). Trial counsel presented evidence that Kevin was under significant stress at the time of the shooting(Supp.L.F.29). Dr.Levin's findings depended on Kevin's truthfulness in what he reported he experienced(Supp.L.F.29-30). There was substantial evidence of deliberation as shown by the facts of the shooting itself(Supp.L.F.30-31). Dr.Levin was not credible because he did not provide an ASD diagnosis at the time of trial(Supp.L.F.31). Counsels' strategy was not to use an expert because it would detract from Kevin's compelling story about the loss of his brother, and therefore, presented other evidence of Kevin's emotional state at the time of the shooting(Supp.L.F.31-32).

B. *Claim 8(K): failure to present DFS information*.

The court found the DFS evidence that was not presented would have been cumulative(Supp.L.F.36). Counsels' strategy was to present Kevin's story about the grief he suffered from his brother's death and his belief the police were responsible and expert testimony would have detracted(Supp.L.F.36-37). Deliberation evidence was strong(Supp.L.F.37). Presenting evidence of abuse and neglect would be disastrous as an excuse for Kevin's actions(Supp.L.F.37). Presenting this evidence would have opened the door to respondent presenting Kevin's past assaultive acts(Supp.L.F.37). The evidence of abuse was presented through other witnesses that counsel called(Supp.L.F.37-38).

C. *Claim 8(L): failure to call Dr. Cross*.

Dr.Cross was unpersuasive and incredible(Supp.L.F.39-40). Kevin's violent past would have been opened up by Cross's testimony(Supp.L.F.39-40). Counsels' strategy was to present Kevin's compelling story about the death of his brother and presenting expert testimony would detract from that(Supp.L.F.39-41). Dr.Cross failed to test for malingering(Supp.L.F.39-40). It was unnecessary to call Dr.Cross because counsel called Dr.Levin(Supp.L.F.40-41).

COUNSEL WERE INEFFECTIVE

A. *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***,220S.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***,515S.W.2d534,540(Mo. banc1974).

Failing to interview witnesses relates to preparation and not strategy. ***Kenley v. Armontrout***,937F.2d1298,1304(8thCir.1991). Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*.1304. Counsel did not interview Dr.Levin about a mental disease defense, but instead relied on him strictly as a penalty phase witness for his diagnoses made for DFS that preceded the offense(Hr.Tr.482-84,510-11). Counsel, likewise, did not interview someone such as Dr.Cross about such a defense(Hr.Tr.482-84,510-11). This failure was not diligent investigation and cannot be legitimated as strategy. *See* ***Kenley***.

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. Kevin's counsels' strategy was to present standing alone the facts of what

they considered a compelling story about Kevin's reaction to his brother's death because everyone has experienced the death of a loved one(Hr.Tr.482,525-28).

This was not a reasonable strategy because everyone who has experienced the death of a loved one does *not* in response shoot a police officer while attributing the death of their loved one to the police, when that person died from a heart ailment. *See* ***McCarter***. The jury needed to hear from Drs. Levin and Cross that Kevin had ASD, which they linked up to the framework of the long-term abuse Kevin and his siblings endured, as documented in the DFS records. That abuse created a shared experience for Kevin and his siblings, and Bam-Bam's death caused Kevin to feel he had failed in caring for his brother and family(Hr.Tr.285). Moreover, the jury needed to hear that Kevin's ASD overwhelmed him such that he was unable to deliberate(Hr.Tr.291-92,369).

Counsel who fail to present evidence of diminished mental abilities are ineffective. *See* ***Williams v. Taylor***,529U.S.362,396(2000)(counsel failed to present evidence defendant was borderline mentally retarded and did not go beyond sixth grade); ***Wiggins v. Smith***,539U.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). Kevin had diagnosable diminished mental abilities in the form of ASD, but the jury never heard that evidence.

The findings that Drs. Levin and Cross were not persuasive and not credible (Supp.L.F.29,31,39-40) are 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***,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(8th Cir. 1995).

The evidence the doctors provided was not cumulative(Supp.L.F.36-38), because they did more than recount the abuse and neglect evidence documented in DFS records when they linked that history to their ASD diagnosis.

None of the ASD evidence, coupled with its link to the DFS records, would have opened up evidence of Kevin's past assaultive behavior from respondent (Supp.L.F.37,39-40), because evidence of Kevin's sole prior conviction for a misdemeanor assault conviction of his girlfriend, Dana Ramey, was in fact presented by both respondent and defense counsel even though the ASD evidence was not(Tr.1911,1915,2154,2174,2337). Respondent also presented evidence that Kevin was involved in fighting with residents and counselors when he was placed outside his home(Tr.2179,2185). Thus, this brand of evidence made its way into the record without any expert evidence of ASD linked to Kevin's DFS abuse and neglect history.

The DFS evidence would not have been disastrous as an excuse for Kevin's actions(Supp.L.F.37), because counsel testified it would not have been presented for that purpose(Hr.Tr.521-22).

Reasonable counsel would have presented evidence through both Dr.Levin and Dr.Cross that Kevin had ASD, which they linked up with his longstanding history of abuse and neglect documented in his DFS records. *See* ***Strickland*** and ***Deck***. Kevin was prejudiced because there is a reasonable probability that had the jury heard from Drs. Levin and Cross about their ASD findings that the jury would not have convicted Kevin of first degree murder. *See* ***Strickland*** and ***Deck***. For these reasons, a new guilt and penalty phase are required.

B. *Mitigation evidence*.

"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.

In ***Wiggins v. Smith***, 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. 539U.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.

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. 529U.S. at 369,395. Similarly, Williams was denied effective assistance under ***Strickland***. *Id*.396-98. Likewise, in ***Rompilla v. Beard***, counsel was ineffective in failing to uncover and present abuse evidence. 545U.S. at 390-93

Wiggins, ***Williams***, and ***Rompilla*** all recognized the inherent mitigating value of abuse evidence. Dr.Levin and Dr.Cross both were able to provide a diagnosis of ASD which they were able to link to the extreme abuse and neglect Kevin experienced and lessened his culpability in shooting a police officer in response to his brother's death from a heart ailment. Kraft conceded that it would have been helpful to have explored Kevin's abuse history in greater detail with Dr.Levin and she had no

strategic reason for failing to do so(Hr.Tr.466). Steele likewise conceded that there should have been a more detailed presentation of some abuse evidence(Hr.Tr.507). Reasonable counsel would have called Dr.Levin and Dr.Cross to testify about their ASD diagnosis and its connection to Kevin's abuse experience as documented in the DFS records. *See* ***Strickland*** and ***Deck***. Kevin 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***

The prejudice to Kevin in failing to call Dr.Levin and Dr.Cross is underscored by the statutory mitigating circumstances that their testimony would have supported. §565.032.3 provides that statutory mitigating circumstances shall include:

> (2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> ..……..
>
> (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired[.]

Both Dr.Levin and Dr.Cross testified that because of Kevin's ASD, he acted under the influence of extreme mental or emotional disturbance and he lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law(Hr.Tr.292-93,369-70).

In ***Hutchison v. State***, this Court concluded counsel was ineffective for failing to present a thorough comprehensive expert presentation. 150S.W.3d at 307.

Similarly, in ***Glass v. State***, counsel was ineffective for failing to call multiple expert witnesses who could have provided mitigating evidence. 227S.W.3d at 470-71. Counsel was ineffective for failing to call a neuropsychologist, who had evaluated Glass before trial, and found Glass had brain impairment that caused him to have difficulty with learning, memory, and impulse control. *Id*.470. The failure was prejudicial because the psychological evidence had powerful inherently mitigating value and was especially prejudicial because the jury heard no penalty phase experts. *Id*. Counsel was also ineffective for failing to call a toxicology pharmacologist, who would have provided a powerful basis to support the statutory mitigating circumstances of substantial impairment and extreme emotional distress under §565.032.3(2) and (6). *Id*.471. Additionally, counsel was ineffective for failing to call a learning disability expert, who identified Glass' learning deficits. *Id*.471. The failure was prejudicial because evidence of impaired intellectual functioning is mitigating evidence regardless of whether a defendant has established a nexus between his mental capacity and the crime. *Id*.470-71. *See also*, ***Hutchison***,150S.W.3d at 305(same)(relying on ***Tennard***,524U.S. at 289).

When counsel failed to call Dr.Levin and Dr.Cross to testify that Kevin suffered from ASD, counsel failed to make a thorough and comprehensive expert presentation. *See* ***Hutchison*** and ***Glass***. In deciding prejudice from failing to present mitigating evidence, courts are required to evaluate the totality of the evidence. ***Hutchison***,150S.W.3d at 306(relying on ***Wiggins***,539U.S. at 536). "The question is whether, when all the mitigation evidence is added together, is there[*sic*] a reasonable

probability that the outcome would have been different?"***Hutchison***,150S.W.3d at 306. Kevin was prejudiced because the jury was not provided significant evidence to support the two statutory mitigators – that he acted under the influence of extreme mental or emotional disturbance and he lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. There is a reasonable probability that at a minimum had Dr.Levin and Dr.Cross presented evidence about Kevin's ASD and the missing details from his DFS records, he would have been sentenced to life.

The first jury to hear Kevin's case could not even find him guilty of first degree murder – indeed, it hung at 10-2 for *second* degree (Hr.Tr.491-92), thus there is a reasonable probability that a jury that heard all of this evidence would have found him guilty of the lesser offense or sentenced him to life. For all the reasons discussed, counsels' failure to call Dr.Levin and Dr.Cross to testify about Kevin's ASD coupled with the evidence of his abuse history in the DFS records denied him effective assistance of counsel and a new trial is required or at a minimum a new penalty phase.

II. Failure to Disclose Exculpatory Evidence Regarding Jermaine Johnson

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that the State failed to disclose that its witness Jermaine Johnson received a direct benefit in exchange for his testimony against Kevin, denying Kevin 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 Kevin pleaded facts not refuted by the record and if proved would entitle him to relief: he pleaded that the State continued Jermaine's probation violation hearings until he had testified favorably for the State at Kevin's trial. The record is contrary to the motion court's finding that there was no agreement, because co-counsel for the State in Kevin's case represented the State in Jermaine's case until Jermaine had testified against Kevin, and Jermaine's affidavit shows while he did not have a formal deal he expected a benefit for his testimony. Had the State disclosed its role in continuing Jermaine on probation, there is a reasonable probability the jury would have looked less favorably on his testimony about Kevin's actions, thus it would not have found that Kevin deliberated.

Kevin alleged that the State failed to disclose benefits that Jermaine Johnson, Kevin's cousin, received in exchange for his testimony against Kevin(PCR.L.F.80-84). Specifically, he claimed that Jermaine, who was on probation and who initially refused to speak to the police after the homicide, approached officers in January 2007,

saying he wanted to help himself in his situation(PCR.L.F.82). He then gave a statement and ultimately testified that he was present when Kevin first shot Sgt.McEntee(Tr.1442).

The motion court found the claim was refuted by the record (Supp.L.F.7). It noted that Jermaine had testified at Kevin's trial and was questioned extensively by both sides about his probation violation, and he said he had no deals with the State for favorable treatment in exchange for his testimony (Supp.L.F.7). It further noted that Jermaine testified that his probation violation had not "gone away" and his case had not been dismissed (Supp.L.F.8). It concluded that the record showed that there was no agreement, that Jermaine's testimony was corroborated by Norvell Harris, Manu Jones, and Lamont Chester, who all saw Kevin shoot Sgt.McEntee numerous times, and that trial counsel's strategy included eliciting some favorable testimony from Jermaine about Kevin's appearance as devastated, shocked, and confused (Supp.L.F.9).

These findings are clearly erroneous and should be reversed.

***Standard of review*.**

This Court reviews the motion court's findings and conclusions for clear error. ***Morrow v. State***, 21S.W.3d819,822(Mo.banc2000); Rule 29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. ***State v. Taylor***, 929 S.W.2d 209(Mo.banc1996). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death.

Woodson v. North Carolina,428U.S. 280,305(1976); ***Lankford v. Idaho***,500U.S.110, 125(1991).

Kevin was entitled to an evidentiary hearing if (1) he cites facts, not conclusions that, if true, would entitle him to relief; (2) the allegations are not refuted by the record, and (3) the matters complained of prejudiced him. ***Wilkes v. State***,82 S.W.3d 925,929(Mo.banc2002). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id*. at 928 (emphasis in original);Rule29.15(h).

***"Brady" claims*.**

The prosecution must produce exculpatory information, including impeaching material, under the Due Process Clause of the United States Constitution. ***United States v. Bagley***, 473 U.S. 667, 674-77(1985); ***Brady v. Maryland***, 373 U.S. 83, 86-89(1963). For purposes of due process, no distinction between exculpatory and impeachment evidence exists. ***Bagley***,473 U.S.667,676-78(1985). Nondisclosure violates due process "irrespective of the good faith or bad faith of the prosecution." ***Kyles v. Whitley***, 514 U.S. 419, 437(1995). While some courts would allow the prosecution to evade this duty by never gaining "possession" of the mental health records, this Court rejected such an approach, saying it "fails to recognize the nature of the prosecutor's role in the system." ***State v. Robinson***,835 S.W.2d 303,306-07(Mo.banc1992).

In ***Taylor v. State***,262S.W.3d231,237-48(Mo.banc2008), the State failed to disclose evidence that would have impeached its critical jailhouse snitch witness and

required reversing the penalty phase. A ***Brady*** violation has three components: '"The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."' *Id.*240(quoting ***Strickler v. Greene***,527U.S.263,281-82(1999)). A defendant is prejudiced and his due process rights are violated if the suppressed evidence '"is material to either guilt or to punishment."***Taylor v. State***,262S.W.3d at 243(quoting ***Brady***,373U.S. at 87). Evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed.***Taylor***,262S.W.3d at 243.

Kevin's claim is not conclusively refuted by the record.

Jermaine Johnson is Kevin's cousin(Tr.1423). Jermaine testified that he was present when Kevin shot Sgt.McEntee in July 2005(Tr.1442). Officers attempted to interview Jermaine after the shooting but he told them that he did not know anything, and even if did, he would not tell them(Tr.1455-56). He also told them that if they came for him, he hoped to get some of them before they got him(Tr.1456). Jermaine was on probation at the time, but it was not until he was arrested on outstanding warrants on January 2, 2007, that, seeking to benefit himself, he gave a statement about the shooting(Tr.1456-62;M.Ex.62).[13]

[13] M.Ex.62 is an affidavit signed by Jermaine that was submitted at the evidentiary hearing, in which he stated he expected to receive a benefit for his testimony (Hr.Tr.532-35).

Kevin alleged that Jermaine told the police that he had come forward because he was "trying to help [him]self out in [his] situation" – a second degree robbery case(Tr.1456-57;PCR.L.F.82). Kevin further alleged that it was clear from Jermaine's statement that he expected to receive a benefit, and it was clear from his robbery court file that he did receive a benefit – his probation violation issue was continued several times from his arrest in January 2007 through his testimony at Kevin's November 2007 trial(PCR.L.F.82-84). "A reasonable jury could have concluded that [Jermaine's] subjective hope was a source of bias." *See*,***State v. Clark***,364 S.W.3d 540,544(Mo.banc2012).

The court file in Jermaine's robbery case reflects assistant prosecutor Patrick Monahan, co-counsel in the capital prosecution of Kevin, was not involved in Jermaine's case before January 2, 2007. Monahan appeared six times on Jermaine's case between the January 29, 2007 hearing request, and the February 21, 2008 final continuation of probation:

January 2, 2007:	Jermaine's arrest; statement to Det. Neske and Wigge
February 28:	Probation violation hearing set for 4/19/07; memo signed by Monahan.
March 8:	Order: with consent of APA, court requests probation office withdraw hold/warrant for defendant's arrest. Probation suspended. Memo signed by Monahan; not signed by Defendant or counsel.
March 28:	Jermaine testifies in Kevin's first trial

April 19:	Continued by State to 6/14/07. Memo signed by Monahan; not signed by Defendant or counsel.
November 6:	Jermaine testifies in Kevin's second trial.
November 21:	Continued to 1/17/08. Memo signed by Monahan; not signed by Defendant or counsel.
January, 17, 2008:	Continued to 2/21/08. Memo signed by Monahan; not signed by Defendant or counsel.
January 18:	Kevin's hearing on motion for new trial
February 1:	Kevin sentenced to death
February 21:	Jermaine continued on probation. Memo signed by Monahan and Defendant, no defense counsel.

(PCR.L.F.82-83).

Kevin alleged that after February 21, 2008, Monahan was not the prosecutor of record on Jermaine's case, and that although Jermaine had several allegations of probation violations which were pending for over a year, his probation was not revoked; he testified when deposed that he had not even seen his probation officer since December 31, 2006, before his arrest on allegations of probation violations(PCR.L.F.84).

Contrary to the motion court's finding, Kevin's allegations are not refuted by the record, let alone *conclusively* refuted. ***Wilkes***. Not only did Jermaine expect to receive a benefit for his testimony against Kevin, and not only did he actually receive one, in the form of a year's continuance of his probation violation allegations while

Kevin's case was pending, and finally being continued on probation after Kevin's sentencing, but it was all done under the direct supervision of Monahan. Jermaine may have claimed that he did not know who appeared on his probation case(Tr.1491-92). These benefits, especially the extent of the State's involvement in personally walking Jermaine through the probation violation proceeding, were not disclosed to trial counsel and violated ***Brady***.

The record also does not refute the claim that Jermaine received the benefit of not being prosecuted for an unrelated murder, which Kevin's amended motion also alleged(PCR.L.F.85). The motion court's finding that this does not "establish viable defense" (Supp.L.F.10) is irrelevant, because impeachment evidence is also ***Brady*** material.***Taylor v. State***,262S.W.3d at 240.

Finally, the motion court's finding that Norvell Harris, Manu Jones, and Lamont Chester all "corroborated" Jermaine's testimony (Supp.L.F.9), is not relevant, because their testimony does not refute Kevin's claim. Jermaine's testimony concerned, *inter alia*, two important, contested facts relevant to deliberation: 1) whether Kevin reached into Sgt.McEntee's car to shoot the officer; and 2) whether he took the officer's gun(PCR.L.F.81). Jermaine testified that he saw Kevin put a gun through the window and fire it inside the police car(Tr.1445). He said Kevin then opened the car door, and reached in and took Sgt.McEntee's gun(Tr.1445). He also testified that he saw Kevin with two guns after the second shooting(Tr.1450). Jermaine also testified that Kevin called Jermaine a "pussy" as he ran by him after the second shooting because he was throwing up after what he had seen(Tr.1450).

While Harris, Jones, and Chester said they saw Kevin shoot Sgt.McEntee, Chester did not mention where Kevin's hands were, nor whether he took Sgt.McEntee's gun, and he said nothing about either subject when he spoke to the police(Tr.1300-02; Ex.68). In fact, Lamont testified that he did *not* see Kevin reach into the car, and he did *not* see him open the car door, and he did *not* see him take the officer's gun; and he did not tell the police that he saw any of those things happen(Tr.1314-15).

And while Harris testified that he saw Kevin put his hand in the car window(Tr.1348), when he spoke to the police, he first responded to a non-leading question that Kevin's hands were outside the car; it was only when the interviewer immediately repeated Harris's answer in a questioning tone that Harris said his hands were in the car(St.Ex.75). The inconsistencies made his testimony insignificant. He also testified that he did not see Kevin take Sgt.McEntee's gun out of the car(Tr.1348). There were such differences among the various witnesses and their out-of-court statements that the ability to impeach Kevin's own cousin, the person who was with him, was extremely important.

The fact that Monahan, who was prosecuting Kevin, became Jermaine's shepherd through the probation violation process only after Jermaine gave his statement, which process ended with Kevin's sentence, is strongly suggestive that the State knowingly conferred a benefit on Jermaine, especially where Jermaine went through that process largely unrepresented. And he not only *hoped* for a benefit, he *expected* one from his testimony(M.Ex.62). *See*,***Clark***. In that sense all indications

are that there truly was an agreement to hold off on prosecuting Jermaine pending his testimony in Kevin's trial.

For these reasons, Kevin's claim was not conclusively refuted by the record, and he is entitled to an evidentiary hearing to prove his allegations The motion court's denial of the claim without a hearing was clearly erroneous.

III. Failure to Object to Inaccurate Reenactment Video

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to object to the admission of the reenactment video, Exhibit 88, as well as to its use in closing argument, denying Kevin 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 Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: he alleged that the video was inadmissible as improper demonstrative evidence because it was an inaccurate representation of Kevin's statement and testimony as to his actions and what he could see; those actions were disputed issues, yet the video portrayed the State's theory as established fact, thus giving it an authority that was unfairly prejudicial, because without it there is a reasonable probability that the jury would not have found deliberation.

***The claim*.**

Kevin's amended motion alleged that counsel was ineffective for not objecting to State's Exhibit 88, the video of what the State asserted was a "re-creation" of what Kevin had said he had done in the initial shooting of Sgt.McEntee and the course he followed from that point until he again shot the officer(PCR.L.F.86-92;Tr.1747). Kevin alleged that the video was not an accurate portrayal of what he said had happened(PCR.L.F.88-90).

Detective Neske testified that the prosecuting attorney tasked him with "[a] re-creation of what the Defendant had said that he did."(Tr.1747). Kevin alleged the reenactment, St.Ex.88, was inaccurate because Neske, who began the video by saying they were "doing a reenactment of Sgt.[]McEntee's homicide"(St.Ex.88) was a third party portraying Kevin, and approached the passenger side of the car, leaned into it, and put his arm through the window as though shooting the driver(PCR.L.F.88). He alleged this does not accurately reflect his testimony, in which he said that he and his cousin Jermaine started to walk past the car hoping Sgt.McEntee would not see him.(St.Ex.80;T.44-45), that he was passing the car when he saw Sgt. McEntee smile at him, and he started shooting(St.Ex.80;T.71). Kevin said he never reached through the window(St.Ex.80;T.74).

Kevin also alleged the re-enactment is also not accurate because Kevin is 5'7" tall while Neske, playing him, is 6'(PCR.L.F. 88), giving the detective a different view of the driver upon approaching the car, but Neske's depiction was portrayed to the jury as fact(PCR.L.F.88-89). Kevin further alleged counsel were ineffective for failing to object to the State's use of the reenactment in closing to argue deliberation(PCR.L.F.90-91).

***The findings*.**

The motion court found that the video was not objectionable, because it was simply demonstrative evidence depicting the route Kevin took after shooting Sgt.McEntee, which was corroborated by other witnesses(Supp.L.F.12). The court also said:

> Movant fails to demonstrate any prejudice. Numerous witnesses testified to Movant's actions during the murder of Sgt. McEntee. The video merely depicted the route *and the actions of Movant during the two shootings of the officer*. . . . The only words spoken by Detective Neske [are] regarding the amount of time it took him.

(Supp.L.F.12-13)(emphasis added). The court found, regarding argument, that "Movant argues as if this is the only evidence of deliberation in this case. Evidence of Movant[']s deliberation was abundant."(Supp.L.F.13).

These findings are clearly erroneous and should be reversed.

***Standard of review*.**

This Court reviews for clear error. ***Morrow v. State***,21 S.W.3d 819,822(Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made. ***State v. Taylor***,929S.W.2d 209(Mo.banc1996). Ineffectiveness claims are reviewed under ***Strickland v. Washington***,466U.S.668,687 (1984); ***Williams v. Taylor***,529 U.S. 362,390-91(2000). ***Strickland's*** prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. *Id*.;***State v. Butler***,951S.W.2d 600,608(Mo.banc1997). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. ***Woodson v. North Carolina***,428U.S. 280,305(1976); ***Lankford v. Idaho***,500U.S.110,125(1991).

Kevin was entitled to an evidentiary hearing if (1) he cites facts, not conclusions that, if true, would entitle him to relief; (2) the allegations are not refuted by the record, and (3) the matters complained of prejudiced him. ***Wilkes v. State***,82 S.W.3d 925,929(Mo.banc2002). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id*.928 (emphasis in original);Rule29.15(h).

Counsel can be ineffective for failing to object to prejudicial evidence, ***Kenner v. State***, 709 S.W.2d 536,539(Mo.App.E.D.1986); and argument, ***Copeland v. Washington***, 232 F.3d 969,974-75(8thCir.2000); ***State v. Storey***, 901 S.W.2d 886,901(Mo.banc1995).

In ***State v. Caudill***,789S.W.2d 213,216(Mo.App.W.D.1990), the Court held that a video in which a crime victim reenacts the crime with a third party playing the role of the defendant, is generally inadmissible. The Court quoted ***Lopez v. State***, 651 S.W.2d 413,414-15(Tex.App.2Dist.1983): "the concept of recreating human events with the use of actors is a course of conduct that is fraught with danger. The general appearance of an actor, his facial expression or slightest gesture, whether intended or not, may sway a juror who has listened to lengthy testimony. The danger of jurors branded with television images of actors, not testimony is too great to ascertain." In Kevin's case, Neske's actions depict his, or the prosecutor's conclusions or interpretations of Kevin's actions. This is not the same as if Kevin himself had cooperated in recreating the event; that would be admissible as an admission. Instead, Ex.88 was simply a State-produced alleged "documentary" of Kevin's conduct. But

the impact of the visual representation cannot be ignored or understated. As the ***Caudill*** court noted, the ***Lopez*** court recognized the danger: "a defendant with ample funds and a flair for the dramatic would inevitably be competing with the State in making their own films for trial if videotape reenactments were admissible. In this same vein the best video production would arguably have more persuasive value when presented to a jury." ***Caudill***,789S.W.2d at216.

The danger of the inaccuracies is illustrated by the State's use of the video in its guilt phase rebuttal, to which no objection was made, to argue deliberation. After discussing Kevin's statement that Sgt.McEntee smiled at him, the prosecutor said:

> . . . Now, as I said before, even a little guy like him has got to squat down to see inside the car. He can't possibly see him smile at him unless he is squatting down and looking inside that car. And McEntee smiles at him, and in exchange for that, he gets a bullet in his face and another bullet in his face and several more bullets in his face and across his chest. That's what he got.
>
> That is cool reflection. He walked up to that car. This is Neske doing it here. You know he's not walking down the sidewalk going by trying not to draw attention to himself. He comes right down the street, in the street. Not where Neske is but down the street in the Street walking right to the passenger window of the car. You're telling me that's not drawing attention to yourself. What he's doing is making sure that that's the guy he wants to kill inside that car. That is cool reflection

> before he shoots the guy. Before he kills him.
>
> Go ahead and run just that part if you could. (a clip of State's Exhibit No. 88 was played for the jury.)
>
> You can't see him there. You can't see him there. Now, you can see him. Once he's inside, once he's down. I know Neske is taller, but take that he starts five inches lower, especially if you're walking down, just as everybody says, he's only a few feet from the side of the car as he's walking down in the street. He's not trying to avoid drawing attention to himself. He's trying to make sure that the guy or one of the guys he wants to kill is inside that car.

(Tr.1991-93). The upshot is that the State created its own interpretation of the event, then argued that what it created disproved Kevin's testimony, and proved deliberation. It could not have made that argument if the reenactment had not been admitted and played.

That is why the motion court's finding that there was ample other evidence of deliberation is irrelevant – the point here is not that there would have been insufficient evidence of deliberation without the re-creation; that would be applying a but-for test as to prejudice. That is the same as requiring Kevin to prove that the result *would* have been different, and imposes an improper "outcome-determinative" test. *See*, ***Deck v. State***,68S.W.3d418,426(Mo.banc2002)("the Supreme Court [in ***Strickland***] specifically rejected the argument that a movant must meet an 'outcome-determinative' test by showing that it is more likely than not that counsel's deficient

conduct altered the outcome of the case, because '[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.'" *Quoting* ***Strickland***,466U.S.at693. Instead, Kevin need only show a *reasonable probability* of a different outcome. ***Deck***,68S.W.3dat426;***Strickland***,466 U.S.at694.

The proper standard, applied to the motion court's own recognition that the video depicted *Kevin's* actions(Supp.L.F.12-13), shows that because it *inaccurately* depicted his actions, allowing the State to use the video was highly improper, and reasonably competent trial counsel would have objected to its admission and use in argument. Kevin is entitled to an evidentiary hearing to establish that counsel had no reasonable trial strategy reason for their failure to do so.

IV. Numerous Uniformed Officers in Courtroom and Hallways

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to object to the numerous uniformed police officers in the courtroom and hallways, denying Kevin 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 Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: he alleged that reasonably competent counsel would have objected to the obvious call for conviction and harsh punishment deprived Kevin of his right to a fair trial and a fair and impartial jury to decide his guilt and punishment.

***The claim and the ruling*.**

Kevin alleged that counsel was ineffective for not objecting to the numerous uniformed police officers who he claimed were present in the hallway and courtroom during voir dire and both phases of trial, and that this was an obvious call for a harsh punishment for the death of a colleague, depriving Kevin of his right to a fair trial and to a fair and impartial jury, and that counsel should have moved to exclude the officers, at least while in uniform, from observing the trial(PCR.L.F.123-24).

The motion court found, "[h]ere the jury was sequestered throughout the proceedings and had no contact with any spectators at any point during the trial. This is a mere allegation and [Kevin] has failed to demonstrate any prejudice."

(Supp.L.F.22). But the issue was not improper contact, but the intimidating display by large numbers of uniformed officers. It was clearly erroneous in denying a hearing on this issue.

***Standard of review*.**

This Court reviews the motion court's findings and conclusions for clear error. ***Morrow v. State***,21 S.W.3d 819,822(Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made. ***State v. Taylor***,929S.W.2d 209(Mo.banc1996).

Kevin was entitled to an evidentiary hearing if (1) he cites facts, not conclusions that, if true, would entitle him to relief; (2) the allegations are not refuted by the record, and (3) the matters complained of prejudiced him. ***Wilkes v. State***,82 S.W.3d 925,929(Mo.banc2002). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id*. at 928 (emphasis in original);Rule29.15(h).

To establish ineffective assistance, Kevin must show counsel's performance was deficient and prejudice resulted. ***Strickland v. Washington***, 466U.S.668(1984); ***Williams v. Taylor***,529 U.S.362,390-91(2000). The prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. *Id*.; ***State v. Butler***, 951 S.W.2d 600,608(Mo.banc1997).

In ***Norris v. Risley***,918F.2d828,829-30(9thCir.1990), the habeas petitioner was convicted in state court of kidnapping and rape; during his trial, women in the courtroom were wearing "Women Against Rape" buttons that were 2 1/2 inches in diameter with the word "Rape" underlined with a wide red stroke. The state trial judge allowed the women to wear the buttons despite objection, reasoning that the women had a First Amendment right to wear their buttons so long as their display was peaceful. *Id*.829.

In reversing, the Court reasoned that the buttons conveyed an implied message to encourage a guilt finding and were not subject to the constitutional safeguards of confrontation and cross-examination. *Id*.830. The Court noted: "'[t]he constitutional safeguards relating to the integrity of the criminal process . . . embrace the fundamental conception of a fair trial, and . . . exclude influence or domination by either a hostile or friendly mob.'" *Id*.831 (quoting ***Cox v. Louisiana***,379 U.S. 559, 562(1965)(alterations in ***Norris*** opinion)). The ***Norris*** Court noted that "[t]he women who wore buttons obviously intended to convey a message." 918F.2dat832. It added: "[w]here fair trial rights are at significant risk, however, the first amendment rights of trial attendees can and must be curtailed at the courthouse door." *Id*.832(relying on ***Richmond Newspaper, Inc. v. Virginia***,448U.S.555,564(1980)). The state trial court erred in failing to recognize that the importance of a fair trial outweighed the spectators' First Amendment rights. ***Norris***,918F.2dat832.

The ***Norris*** Court indicated that the state court's First Amendment rationale for allowing the buttons was seriously flawed. *Id*.833. The ***Norris*** Court noted that the

rights the First Amendment protects are those to receive information about court proceedings. *Id*.833,n.5. The First Amendment does not afford spectators the right to advocate trial outcomes in a courthouse. *Id*. Instead, courtroom spectators' First Amendment rights are subject to reasonable time, place, and manner restrictions. *Id*.

The ***Norris*** buttons were impermissible, in part, because their message was not subject to cross-examination. *Id*.833. Additionally, the sort of participation by the spectators was contrary to notions of due process. *Id*. Similarly, here, the officers' First Amendment rights could not ride roughshod on Kevin's right to a fair trial and an impartial jury.

In ***State v. Franklin***,327S.E.2d449,451(W.Va.1985), the defendant was convicted of driving under the influence of alcohol resulting in death. During Franklin's trial, spectators wore buttons with capital letters "MADD"(Mothers Against Drunk Drivers).*Id*.454. The conviction was reversed because the defendant's right to a fair trial was violated by the display of buttons. *Id*.455.

The message from the officers in Kevin's case is "remember William McEntee and convict and harshly punish Kevin Johnson." This message is improper because it advocates an outcome in the courthouse. ***Norris***. The message here is, likewise, not subject to cross-examination. *Id*. Furthermore, the spectators' prominent participation here is contrary to notions of due process. *Id*. The officers' actions goes far beyond what occurred in ***Norris*** and ***Franklin***, because it involved state action – these were not mere spectators with buttons supporting a cause; they were police officers, agents of the state, seeking to influence the proceedings by their prominent presence in

uniform. The heavy police presence was especially problematic because Kevin's first jury hung 10-2 in favor of second degree murder(Hr.Tr.491-92), and it appeared the officers came out en masse to make sure that didn't happen again.

The motion court clearly erred in denying an evidentiary hearing because the issues were *not* whether the jury was sequestered or had "contact" with spectators(Supp.L.F.22) at any point during the trial. There was "contact" if, as alleged, the officers were in the audience in the courtroom. The jurors in such a situation had to be aware of them. There was no need to allege that any jurors spoke with the officers. The prejudice is in the presence, not any spoken message.

And the whole point of a Rule 29.15 motion is to make allegations. Calling this a "mere allegation" does not address whether it is refuted by the record – it is not – nor does it whether Kevin would be entitled to relief if he proves his claim. Under ***Norris*** and ***Franklin***, he would be entitled to relief. Finally, the only way Kevin *can* "demonstrate any prejudice" is at an evidentiary hearing – which the motion court denied. That ruling must be reversed, and Kevin must be granted a hearing, at which he can demonstrate prejudice, and that counsel had no reasonable trial strategy reason for their failure to object to this unfair influence on the jury.

V. Failure to Correct Norman Madison's Assertion That His Testimony and What He Told Police Kevin Said After the Shooting Were the Same

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to object – as improper rehabilitation and bolstering, and untrue – to Norman Madison's assertion that his testimony that Kevin said Sgt.McEntee needed to "see what it felt like to die" was the same as what he told the police, and for failing to call detectives Guyer and Raymond to testify that Madison told them only that he heard Kevin say Sgt.McEntee "killed my brother," denying Kevin 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 Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: that Madison did not say to police that Kevin said Sgt.McEntee needed to see what it felt like to die, and failure to object and adduce evidence to refute the negative inference from Madison's testimony on the crucial issue of deliberation was highly prejudicial and deprived Kevin of effective counsel and a fair trial.

***The claim and the ruling*.**

Kevin alleged that counsel was ineffective for not objecting to the State's question of Norman Madison whether what he told the jury was the same as he told officers about what Kevin said to him and Kevin's mother, Jada Tatum, when Kevin

encountered them after he shot Sgt.McEntee the first time(PCR.L.F.126). Kevin alleged that the question was improper rehabilitation and bolstering, and the answer it evoked was untrue, and that after objecting, counsel should have asked Madison to review the police report to refresh his memory, and if that were objected to, should have called detectives Guyer and Raymond, to whom Madison spoke, to impeach him and establish what he told them was different than his testimony(PCR.L.F.126).

Jada was Madison's girlfriend; they had a daughter together, who was six in July 2005(Tr.1635-36). After he and Jada went from the hospital to Kevin's great-grandmother's house following Bam-Bam's death, Madison heard a commotion outside and went out to look for his daughter(Tr.1649-50). He saw her on the corner, and when he and Jada went to get her they saw Kevin(Tr.1651-53). Madison testified that when Kevin approached, Jada asked him, "son, what have you done, and he said, that mother fucker let my brother die, he needs to see what it feel[*sic*] like to die."(Tr.1654). Jada told Kevin that was not true, and Kevin walked away(Tr.1654-55). Madison testified that Kevin said nothing else, and that his testimony was the same as what he told the police "several" days after the shooting(Tr.1654, 1657).

Kevin alleged in his amended motion that Madison told detectives two days after the shooting that Kevin said only that, "The motherfucker killed my brother," and Jada replied, "That's not true."(PCR.L.F.126). Counsel's cross-examination of Madison about the discrepancy consisted of asking, "You didn't tell the police officers that [needing to see what it felt like to die] the first time they interviewed you, did you?" to which Madison replied, "Yes, I did."(Tr.1660). Counsel asked whether

seeing his statement would refresh his recollection, and the prosecutor objected, saying that there was no "statement" authored by Madison; the court sustained the objection(Tr.1660-61). Counsel elicited that Madison thought he told the police the same as he had testified, but he did not remember; counsel then asked, "So if the police don't have it in the report, they've got it down wrong?(Tr.1661). Madison said that was possible, but counsel never established what Madison told the police(Tr.1661).

The motion court found that "counsel was not ineffective. The prior inconsistent statements made by Norman Madison were brought out during his examination and [Kevin] has demonstrated no prejudice."(Supp.L.F.22-23). The court clearly erred denying a hearing.

***Standard of review*.**

This Court reviews for clear error. ***Morrow v. State***,21 S.W.3d 819,822(Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made. ***State v. Taylor***,929S.W.2d 209(Mo.banc1996). Ineffectiveness claims are reviewed under ***Strickland v. Washington***,466U.S.668,687 (1984); ***Williams v. Taylor***,529 U.S. 362,390-91(2000). ***Strickland's*** prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. *Id*.;***State v. Butler***,951S.W.2d 600,608(Mo.banc1997). The Eighth Amendment and the Fourteenth Amendment's

due process clause require heightened reliability in assessing death. ***Woodson v. North Carolina***,428U.S. 280,305(1976); ***Lankford v. Idaho***,500U.S.110,125(1991).

Kevin was entitled to an evidentiary hearing if (1) he cites facts, not conclusions that, if true, would entitle him to relief; (2) the allegations are not refuted by the record, and (3) the matters complained of prejudiced him. ***Wilkes v. State***,82 S.W.3d 925,929(Mo.banc2002). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id*. at 928 (emphasis in original);Rule29.15(h).

Discussion.

"*[W]hen a witness has been impeached* by proof of his statements inconsistent with his trial testimony, prior consistent statements are admissible into evidence for the purpose of rehabilitation." ***Stafford v. Lyon***, 413S.W.2d495,498(Mo.1967) (emphasis added). "Improper bolstering occurs when the out of court statement of a witness is offered solely to be duplicative or corroborative of trial testimony." ***State v. Ramsey***,864 S.W.2d 320,329(Mo.banc1993) citing, ***State v. Seever***,733S.W.2d438, 441(Mo.banc1987)(superseded on unrelated grounds by amendment to §492.304).

Madison had not been impeached, he was testifying on direct, yet the prosecutor improperly sought to rehabilitate him and bolster his testimony by showing a prior consistent statement. Further, as alleged, Madison's testimony was untrue – which the prosecutor presumably knew, since his prior statement was contained in a

police report to which he would at least have had access, even if he was not the source of it. Counsel should have objected.

Kevin admitted shooting Sgt.McEntee; his defense was that he did not deliberate(Tr.1101). Thus the distinction between "killed my brother" and "needs to see what it feel[*sic*] like to die" was crucial, where the prosecutor argued that Kevin was seeking revenge for Bam-Bam's death, while the defense argued Kevin was confused and distraught, and lost control, but did not coolly reflect. Allowing Madison's assertion that differed from his statement to the police to go unchallenged did not meet the ***Strickland*** standard of performance and was highly prejudicial.

First, counsel should have objected that the claim was inaccurate: what Madison told the detectives was not the same as his testimony. *After* that, counsel should have attempted to refresh Madison's memory by having him review the police report. If the court – as happened here where counsel did not object first – sustained a State's objection to that attempt, then counsel should have taken the appropriate step of adducing that statement through detectives Guyer and Raymond (which could have been done anyway)(PCR.L.F.126).

Counsel are ineffective when they fail to impeach critical witnesses. ***Black v. State***,151S.W.3d49,51(Mo.banc2004); ***Hadley v. Groose***,97F.3d1131,1136(8th Cir. 1996). To establish ineffective assistance of counsel for failure to call a witness, Kevin was required to show: "1) trial counsel knew or should have known of the existence of the witness, 2) the witness could be located through reasonable investigation, 3) the witness would testify, and 4) the witness's testimony would have

produced a viable defense." ***Hutchison v. State***,150S.W.3d292,304(Mo.banc2004). Here, the witnesses are detectives Guyer and Raymond, to whom Madison spoke, and who recorded only that he told them Kevin said he "killed my brother."

Unquestionably, counsel knew of the witnesses – she tried to use their report to refresh Madison's recollection(Tr.1660). Under §491.074, his prior statement to the police was admissible as substantive evidence. And the prosecutor and court pointed out to counsel that the proper approach was not to try to "refresh" Madison's recollection with something that he had not written himself(Tr.1660-61). Instead, counsel should have used §491.074 to independently establish what Madison told the police – and show that it was *not* the same as his testimony.

The motion court was absolutely incorrect that Madison's inconsistent statement was "brought out"(Supp.L.F.23) during his testimony. Counsel *attempted* to bring it out, but the State successfully objected to her improper attempt(Tr.1660-61). The inconsistent statement *could* have been brought out by calling Guyer and Raymond, but counsel did not do so; she abandoned the matter after the State's objection was sustained, leaving the jury with the only evidence on the topic being Madison's testimony – testimony that the prosecutor reminded the jury of in closing: "But remember what Norman Madison said. Madison has him coming over screaming that, hey, he killed my brother, he deserved to know what it's like to die."(Tr.1924). Madison's testimony could permit an inference that Kevin was essentially announcing his intent to go shoot Sgt.McEntee again. It was crucial that counsel dispel that inference, but she failed to do so.

Finally, as Kevin has argued previously, the motion court's conclusion that he "demonstrated no prejudice"(Supp.L.F.23), is meaningless where the only way he *can* demonstrate prejudice is at an evidentiary hearing – which was denied. That ruling must be reversed, and Kevin must be granted a hearing, at which he can demonstrate prejudice, and that counsel had no reasonable trial strategy reason for the failure to present crucial evidence on Kevin's sole defense.

VI. Improper and Erroneous Definition of "Deliberation"

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to object to the prosecutor's improperly and erroneously defining "deliberation" in closing argument, denying Kevin 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 Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: he alleged the prosecutor's argument that several times told the jury making a "conscious decision" to kill was the same as deliberation misstated the law; whether Kevin deliberated was the central issue in the case, and the prosecutor's improper and erroneous definition of that concept was highly prejudicial, leading the jury to ignore the question whether Kevin was able to coolly reflect; had counsel objected, there is a reasonable probability that the jury would not have found deliberation.

***The claim*.**

Kevin's amended motion alleged that counsel was ineffective for not objecting to the prosecutor's improper argument, in which he several times in closing argument misstated the definition of "deliberation" and lessened the State's burden of proof on that issue(PCR.L.F.128). Kevin alleged that the prosecutor equated deliberation with a conscious decision to kill or acting knowingly by arguing:

If you can make a conscious decision to follow through on something

> even if you're mad about something, even if you are mad about it... and you make a conscious decision to go after somebody and kill them, that is cool reflection.... He made a conscious decision that he was going to kill Sergeant McEntee, or was he going to kill the first cop who came through... whomever he wanted to take his anger out on.

(PCR.L.F.128;Tr.1908-09).

> I don't know if he was going to kill the first cop who came around the corner. ... And that's not important. What's important is that he made a conscious decision.

(PCR.L.F.129;Tr.1909).

> And you know from the shots – here we are again with the deliberation. ... He knew what he was going to do. He knew he was going to shoot that cop.

(PCR.L.F.129;Tr.1917).

> Walking down the street to the police car knowing he's going to kill him, knowing he's going to shoot this cop if he's the right guy he wants to kill is cool reflection.

(PCR.L.F.129;Tr.1921).

***The findings*.**

The motion court dealt as a group with several claims concerning failure to object to portions of the State's argument: "[Kevin] claims that counsel was ineffective for failing to object to several portions of the State's closing argument.

All proposed objections were without merit and Movant fails to demonstrate either deficient performance or any prejudice."(Supp.L.F.23). The court clearly erred; Kevin is entitled to an evidentiary hearing, because an objection would have been meritorious, and the motion court could not determine whether counsel had a reasonable strategy reason for not objecting.

***Standard of review*.**

This Court reviews for clear error. ***Morrow v. State***,21 S.W.3d 819,822(Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made. ***State v. Taylor***,929S.W.2d 209(Mo.banc1996). Ineffectiveness claims are reviewed under ***Strickland v. Washington***,466U.S.668,687 (1984); ***Williams v. Taylor***,529 U.S. 362,390-91(2000). ***Strickland's*** prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. *Id*.;***State v. Butler***,951S.W.2d 600,608(Mo.banc1997). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. ***Woodson v. North Carolina***,428U.S. 280,305(1976); ***Lankford v. Idaho***,500U.S.110,125(1991).

Kevin was entitled to an evidentiary hearing if (1) he cites facts, not conclusions that, if true, would entitle him to relief; (2) the allegations are not refuted by the record, and (3) the matters complained of prejudiced him. ***Wilkes v. State***,82 S.W.3d 925,929(Mo.banc2002). "An evidentiary hearing may only be denied when

the record *conclusively* shows that the movant is not entitled to relief." *Id*. at 928 (emphasis in original);Rule29.15(h).

To establish ineffective assistance, Kevin must show counsel's performance was deficient and prejudice resulted. ***Strickland v. Washington***, 466U.S.668(1984); ***Williams v. Taylor***,529 U.S. at 390-91. The prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. *Id*.;***State v. Butler***,951S.W.2d at 608. Counsel can be ineffective for failing to object to prejudicial argument, ***Copeland v. Washington***,232 F.3d 969,974-75(8thCir.2000); ***State v. Storey***,901S.W.2d886,901 (Mo.banc1995).

***Discussion*.**

"In general, under Missouri law, it is not the prerogative of counsel to inform the jury as to the substantive law of the case...."***State v. Jordan***,646 S.W.2d747,751 (Mo.banc1983). Here, the prosecutor not only defined deliberation in a way that was inconsistent with the instructions, *id*., he *mis*-defined it by telling the jury that deliberation and a conscious decision to kill were the same thing(Tr.1908-09,1917, 1921). They are clearly different.

"A person commits the crime of murder in the second degree if he ... (1) Knowingly causes the death of another person...."§565.021.1. "A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter."§565.020.1. "'Deliberation' means cool reflection for any length of time no matter how brief[.]"§565.002(3). "The element of deliberation ... is a mental state that distinguishes first- and second-degree murder."

Zink v. State,278 S.W.3d170,178(Mo.banc2009). Obviously, first degree murder adds an additional element. "Absent evidence of deliberation, an intentional killing is second-degree murder." ***State v. Tisius***,92S.W.3d751,764(Mo.banc2002). Thus, a conscious decision to kill someone, without more, is second degree murder. Although the instructions told the jury that "deliberation ... means cool reflection upon the matter for any length of time no matter how brief,"(L.F.471), nothing expressly defined "cool reflection."

But the prosecutor misstated the law; merging the elements of "knowing" and "deliberation." Even if the prosecutor's term, "conscious decision," goes beyond "knowing," it still is not deliberation, because a "person 'acts purposely', or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result."§562.016.2. So the mental states of "purposely," "knowingly," and "consciously" are equivalent to each other but not to "deliberation."

In ***State v. Rousan***,961S.W.2d831,852(Mo.banc1998), this Court rejected the defendant's argument that the Court had, in ***State v. Gray***,887S.W.2d369,376(Mo. banc1994), eliminated the distinction between first and second degree murder when it quoted the ***Gray*** Court holding, "in order to convict [a defendant of first degree murder], there must be some evidence that defendant made a decision to kill the victims prior to the murder." ***Rousan***,961S.W.2d at852. ***Rousan*** held that the distinction was in the statutory requirement of coolly deliberating – it said the first degree murder conviction in ***Gray*** was affirmed only after finding *both* a "decision" to

kill the victims *and* "sufficient evidence to permit an inference ... that the homicides occurred after [the defendant] coolly deliberated...."*Id*. Significantly, the Court explicitly rejected the notion that "a decision to kill the victims prior to the murder" or a "knowing" killing is deliberation. *Id*. In other words, it explicitly rejected what the prosecutor told the jury here.

The prosecutor misled the jury into believing that if Kevin consciously or knowingly decided to kill a police officer, he had "coolly reflected" and deliberated. These arguments eliminated deliberation, cool reflection, from the elements the jury had to find to convict Kevin of first degree murder. "Misstatements of the law are impermissible during closing arguments, and the trial judge has a duty to restrain such arguments."***State v. Anderson***,306S.W.3d529,543(Mo.banc2010). Therefore, had counsel objected to this improper argument, the objection would have been meritorious, contrary to the motion court's conclusion (Supp.L.F.23), and the trial court would have been required to sustain it.

As noted, whether Kevin deliberated was the primary issue for the jury in guilt phase; it was his sole defense. Allowing the prosecutor to misdefine the legal term at the heart of the case was not the act of reasonably competent counsel. Kevin is entitled to an evidentiary hearing to establish that counsel had no reasonable trial strategy reason for their failure to object to the improper argument.

VII. Kevin's Appearance Before the Jury in Restraints

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to object to Kevin's appearance before the jury in restraints, denying Kevin 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 Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: that the jury's awareness that he was required to wear a shackling device concealed under his clothing, that was made "visible" to the jury because it caused Kevin to limp and made a noise when he sat, was inherently prejudicial structural error that deprived him of his right to a fair trial before a fair and impartial jury, and reasonable counsel would have objected to the device's use.

***The claim and the ruling*.**

Kevin's amended motion alleged that, unlike his first trial, he was brought into the courtroom at various times by the transport officers, after the jury was already seated, that the officers walked him into the courtroom, while he had on a leg brace, thus the jury would have observed a limp when he walked; he further alleged that when he sat down, he had to pull a latch on the leg brace, which made a noise(PCR.L.F.137). He said if given permission by the court to contact the jurors, post-conviction counsel would contact them and they would testify they were aware

Kevin was restrained(PCR.L.F.137). Kevin claimed counsel should have objected and made a record regarding Movant's appearance before the jury in restraints that the jury was aware of(PCR.L.F.137).

The motion court found that Kevin's claim was a "mere allegation[] and [he had] not demonstrated prejudice."(Supp.L.F.23).

***Standard of review*.**

This Court reviews for clear error. ***Morrow v. State***,21 S.W.3d 819,822(Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made. ***State v. Taylor***,929S.W.2d 209(Mo.banc1996). Ineffectiveness claims are reviewed under ***Strickland v. Washington***,466U.S.668,687 (1984); ***Williams v. Taylor***,529 U.S. 362,390-91(2000). ***Strickland's*** prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. *Id*.;***State v. Butler***,951S.W.2d 600,608(Mo.banc1997). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. ***Woodson v. North Carolina***,428U.S. 280,305(1976); ***Lankford v. Idaho***,500U.S.110,125(1991).

Kevin was entitled to an evidentiary hearing if (1) he pled facts, not conclusions that, if true, would entitle him to relief; (2) the allegations were not refuted by the record, and (3) the matters complained of prejudiced him. ***Wilkes v. State***,82 S.W.3d 925,929(Mo.banc2002). "An evidentiary hearing may only be

denied when the record *conclusively* shows that the movant is not entitled to relief." *Id*. at 928 (emphasis in original);Rule29.15(h).

Defendants may be restrained only if the court knows of a reason that they should be. ***Deck v. Missouri***,544U.S.622,624(2005). The court may not order a defendant be shackled without good cause that is specific to the defendant and the case before it. *Id*.632. Normally, the prohibition is against visible shackling. However, that rule comes into play because the reviewing court, upon learning of visible shackling, presumes that the jury saw the defendant shackled if it is done in open court with the jury present. *Id*.634.

Deck was sentenced to death, but his case was remanded for a penalty retrial, at which he was required to wear visible shackles. *Id*.624-25. The Court reversed the penalty retrial use of shackles noting shackling is inherently prejudicial. *Id*.635. That inherent prejudice to Deck did not require he establish actual prejudice. *Id*.635. The Court recognized three considerations which make shackling inherently prejudicial. First, shackling undermines the presumption of innocence and the related fairness of the factfinding process. *Id*.630. Second, shackling interferes with a defendant's ability to participate in his defense. *Id*.631. Third, shackles are an affront to the dignity and decorum of the judicial proceedings the judge is charged to uphold. *Id*.631.

Shackling Kevin detracted from the presumption he was not guilty of first degree murder and treated him as though he were already convicted.

Structural errors in the constitution of the trial mechanism "require[e] automatic reversal of the conviction because they infect the entire trial process." ***Brecht v. Abrahamson***,507U.S.619,629-30(1993). A trial in which structural error has occurred "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." ***Arizona v. Fulminante***,499U.S.279,310(1991). In cases where there is a structural error ***Strickland*** prejudice is not required. *See, e.g.*, ***Anderson v. State***,196S.W.3d28, 39-42(Mo.banc2006)(failure to strike automatic death penalty and burden shifting juror on punishment denied defendant effective assistance of counsel without showing prejudice because error was structural).

The denial of the right to counsel under ***Gideon v. Wainwright***,372U.S.335 (1963), is structural error. ***Fulminante***,499U.S. at 309. ***Deck*** recognized shackling is inherently prejudicial because it interferes with the defendant's ability to participate in his defense. *See* ***Deck***. Shackling Kevin thereby denied him his right to counsel recognized in ***Gideon*** and was structural error requiring a new trial. *See* ***Fulminante***.

It was structural error to use a shackling device revealing to the jury that Kevin was wearing such a device because of how it made him walk with an unnatural gait and made a noise when he sat. For that reason, if the jury was in fact aware of the restraint, structural error occurred and a new trial would be required. *See* ***Deck***. Kevin is entitled to a hearing to adduce evidence in support of his claim that the jury would have been aware and that counsel had no reasonable strategy for failing to object to the use of the device.

VIII. Arbitrary and Capricious Sentence

The motion court clearly erred in denying an evidentiary hearing on the claim that Missouri's death penalty statute is unconstitutional because it does not genuinely narrow the class of people eligible for the death penalty, denying Kevin due process, freedom from cruel and unusual punishment, and a full and fair determination of his claims, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that his motion pled facts, not conclusions, that entitled him to relief: specifically, a review of intentional homicide cases in Missouri shows that, while 76% of cases were death-eligible under the statute, only 2.5% resulted in death; the mental state in the murder first and second statutes do not narrow those eligible for death; the statutory aggravators, especially the broad "wantonly vile" aggravator used in this case does not narrow those eligible for death; and whether one receives the death penalty is based on arbitrary factors such as the location of the prosecution, like St. Louis County, rather than the seriousness of the crime and culpability of the offender.

Kevin alleged in Claim 8(N) that he was subjected to cruel and unusual punishment, a violation of due process, equal protection of laws and a fair trial because the mental state of "deliberation," required for first degree murder, as distinguished from mere "purposeful," required for second degree murder does not narrow the class of defendants eligible for the death penalty, in violation of ***Greg v.***

Georgia,428U.S15(1976), ***Zant v. Stephens***,462U.S.862(1983), and ***Furman v. Georgia***, 408U.S.238(1972)(PCR.L.F.304).

Although Kevin pled that he would present testimony concerning a law review article by Barnes, Sloss, and Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making In Death-Eligible Cases*, 51 Ariz. L.Rev. 305, 355 (2009)(PCR.L.F.349), Judge Reno denied an evidentiary hearing on this challenge to the constitutionality of Missouri's death penalty statute(Hr.Tr.122). She denied the claim, ruling, "[t]his is a well-worn argument by opponents of the death penalty. The constitutionality of the Missouri statutes has been repeatedly upheld as they pertain to the class of individuals eligible for the death penalty. ***State v. Williams***,97S.W.3d462, 473(Mo. banc2003); ***State v. Johnson***,22S.W.3d183,191(Mo.banc2000); ***State v. Worthington***,8S.W.3d83,87-89(Mo.banc1999). This claim has no merit." (Supp.L.F.24-25).

This Court reviews for clear error. ***Morrow v. State***,21 S.W.3d 819,822(Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made. ***State v. Taylor***,929S.W.2d 209(Mo.banc1996). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. ***Woodson v. North Carolina***,428U.S. 280,305(1976); ***Lankford v. Idaho***,500U.S.110,125(1991).

Kevin was entitled to an evidentiary hearing if (1) he pled facts, not conclusions that, if true, would entitle him to relief; (2) the allegations were not

refuted by the record, and (3) the matters complained of prejudiced him. ***Wilkes v. State***,82 S.W.3d 925,929(Mo.banc2002). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id*. at 928 (emphasis in original);Rule29.15(h).

Judge Reno clearly erred in refusing to consider evidence to support this claim. The cases she cited do not prohibit legitimate constitutional challenges to Missouri's statutory scheme. ***State v. Williams***, ***Johnson***, and ***Worthington*** all involved challenges to particular statutory aggravating circumstances and whether they adequately narrowed the class of those eligible for death, not the entire scheme, as Kevin pled. ***State v. Williams***,97S.W.3d at473(depravity of mind aggravator and instruction); ***Johnson***, 22S.W.3d at 191((1 & 2) murder committed while murdering another victim, (3) victim murdered for monetary gain, (4) depravity of mind, (5) murder committed to prevent arrest, and (6) murder committed while engaged in robbery); ***Worthington***,8S.W.3d 83,87-88((1) murder committed for receiving monetary value from victim, and (2) murder committed while engaged in perpetration of forcible rape and burglary). These cases do not purport to address the issues Kevin raised; this Court will consider such challenges where evidence supports them.

"For a statutory aggravating circumstance to narrow the class of persons to whom the death penalty may be applied, that circumstance must satisfy two tests: (1) it may not apply to every defendant convicted of murder, and (2) the circumstance must not be unconstitutionally vague." ***Worthington***,8S.W.3d88-89, citing, ***Tuilaepa v. California***,512U.S.967,972(1994).

The study Kevin cited in the amended motion considered 1046 Missouri homicide cases prosecuted over a five-year period(PCR.L.F.305). 76% were death eligible under Missouri's statutes, but only 2.5% resulted in death(PCR.L.F.305). Missouri distinguishes first and second degree murder through mental state elements, "deliberation" in §565.020, and "knowingly" in §565.021(PCR.L.F.304-05). These elements do not narrow the pool of those eligible for death(PCR.L.F.355-56).

Missouri's statutory aggravators fail to narrow the pool of those eligible for death(PCR.L.F.306). Of particular concern are six broadly-defined aggravators(PCR.L.F.357). The "wantonly vile" aggravator §565.032.2(7), one of three aggravators here (along with the killing of a police officer and creating a risk of death to others; L.F.499) , was charged most often, in over 90% of cases(PCR.L.F. 357). This aggravator has been construed so broadly as to apply to almost any murder. *Id*. at 323-324. Any murder involving multiple injuries is death-eligible under such a broad definition. *Id.* at 324.

Finally, geographical disparities dictate which defendants receive death (PCR.L.F.355). In counties like St. Louis County, defendants are more likely to receive death(PCR.L.F.355).

This study of Missouri's death penalty establishes constitutional violations. Sentencing someone to death is cruel and unusual punishment under the federal and state constitutions if the punishment is meted out arbitrarily and capriciously. ***Furman v. Georgia***, *supra*. Geographical disparity is an arbitrary factor, unrelated to

the offender's moral culpability and the severity of the crime. Who lives and dies should not depend on the county of the killing and prosecution.

Aggravating circumstances "must genuinely narrow the class of people eligible for the death penalty." ***Zant v. Stephens***,462U.S. at 877. Under the Eighth Amendment, "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose culpability makes them 'the most deserving of execution.'"***Roper v. Simmons***,543U.S.551,568(2005), *quoting* ***Atkins v. Virginia***,536U.S.304,319(2002).

Missouri's statutory scheme fails to narrow the pool of those eligible for death. The mental state required for first degree murder, deliberation, requires no advance planning or preconceived design. Courts have applied "deliberation" so broadly that any knowing murder is sufficient to find deliberation. The wantonly vile aggravator is charged in 91.6 % of the cases. It is so broad that it fails to narrow the class of people eligible for death. In Missouri, almost any murder is death-eligible. Death is not limited to those who commit the most serious crimes or who are most deserving of execution. It is unconstitutional.

This Court should reverse and remand for an evidentiary hearing, or alternatively impose life without probation or parole.

IX. Sleeping Jurors

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to seek to replace sleeping jurors, denying Kevin his rights to effective assistance, due process, freedom from cruel and unusual punishment, and a full complement of jurors, U.S.Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, 22(a), in that Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: because members of the panel were falling asleep and not able to hear counsel's argument, Kevin was essentially tried by a jury of fewer than the twelve members to which he was entitled; a hearing is necessary to determine whether Kevin can demonstrate prejudice, which, because the right to be tried by a full jury is structural, Kevin would prove by proving that jurors were sleeping.

***The claim and the ruling*.**

Kevin alleged that during defense counsel's closing argument, at least one juror began to sleep(PCR.L.F.136). When this occurred, the court noticed and asked the jurors to take a break to stretch and regain their focus(Tr.1955-56). Kevin alleged at least one juror missed key points in counsel's argument, including: 1) that Kevin was returning to see his daughter one last time, prior to the second shooting of Sgt.McEntee, and was not going there to shoot him(Tr.1953-54); and 2) counsel's argument that the shots, according to the evidence, could have been fired in as little as

two or three seconds(Tr.1953-55)(PCR.L.F.136). Kevin alleged that trial counsel noticed the problem and would testify at least one juror dozed off during the closing argument, and they should have objected and requested to remove any sleeping jurors(PCR.L.F.136).

The motion court found that Kevin's claim was a "mere allegation[] and [he had] not demonstrated prejudice."(Supp.L.F.23).

***Standard of review*.**

This Court reviews for clear error. ***Morrow v. State***,21 S.W.3d 819,822(Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made. ***State v. Taylor***,929S.W.2d 209(Mo.banc1996). Ineffectiveness claims are reviewed under ***Strickland v. Washington***,466U.S.668,687 (1984); ***Williams v. Taylor***,529 U.S. 362,390-91(2000). ***Strickland's*** prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. *Id*.;***State v. Butler***,951S.W.2d 600,608(Mo.banc1997). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. ***Woodson v. North Carolina***,428U.S. 280,305(1976); ***Lankford v. Idaho***,500U.S.110,125(1991).

Kevin was entitled to an evidentiary hearing if (1) he pled facts, not conclusions that, if true, would entitle him to relief; (2) the allegations were not refuted by the record, and (3) the matters complained of prejudiced him. ***Wilkes v.***

State,82 S.W.3d 925,929(Mo.banc2002). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id*. at 928 (emphasis in original);Rule29.15(h). As in Points II-VIII, Kevin was entitled to a hearing to prove his allegations. The motion court's reliance on "mere allegations" avoided the issue rather than resolving it.

The prejudice Kevin <u>*could*</u> demonstrate, if granted an evidentiary hearing, is that he was in effect denied the full number of jurors to which he was entitled under the Mo.Const.,Art.I,Sec.22(a).

> Trial by jury means something more than a trial by twelve [people]; the term imports a trial by twelve [people] possessing the requisite qualifications for jury duty, impartial between the parties, living within the jurisdictional limits of the court, drawn and selected by impartial and disinterested officers, duly impaneled under the direction of a competent court, and sworn to render an impartial verdict according to the law and evidence . . . .

State v. Ralls,8S.W.3d64,65(Mo.banc1999)(citation omitted). Sleeping jurors could not render an impartial verdict because they missed important points in counsel's argument and would necessarily be dependent on the other jurors for anything they missed, before or after this incident. Their vote in deliberations became more of an amalgam of the others', and Kevin was tried by a jury of less than twelve.

Structural errors in the constitution of the trial mechanism "require[e] automatic reversal of the conviction because they infect the entire trial process."

Brecht v. Abrahamson,507U.S.619,629-30(1993). A trial in which structural error has occurred "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." ***Arizona v. Fulminante***,499U.S.279,310(1991). In cases where there is a structural error ***Strickland*** prejudice is not required. *See, e.g.*, ***Anderson v. State***,196S.W.3d28, 39-42(Mo.banc2006)(failure to strike automatic death penalty and burden shifting juror on punishment denied defendant effective assistance of counsel without showing prejudice because error was structural).

Because one or more members of the jury began to sleep during defense counsel's closing argument, a critical part of the trial, counsel should have objected and made a record regarding the issue. The failure to object subjected Kevin to a verdict by a jury which had not considered all of the argument in the case. As alleged, but for counsel's failure to object, there is a reasonable probability of a different outcome of the case. Kevin is entitled to a hearing to adduce evidence in support of his claim – to go beyond the "mere allegation" of his pleading and establish that he was prejudiced. The court prevented him from taking that step, then penalized him for not doing it. Its ruling was therefore clearly erroneous and this Court should remand for that hearing.

X. ***Batson***

The motion court clearly erred in denying, without an evidentiary hearing, Kevin's claim that counsel were ineffective for failing to properly object as *Batson* **violations to the prosecutor's strike of venirepersons Clark, Jackson, Cottman and Stephenson, denying Kevin his rights to effective assistance, due process, a fair trial, and freedom from cruel and unusual punishment, U.S.Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§10, 18(a), 21, 22(a), in that Kevin pleaded facts that are not refuted by the record and that if proved would entitle him to relief: counsel failed to object to the strikes or point out to the trial court the similarly situated white venirepersons on the panel.**

Kevin's amended motion alleged he received ineffective assistance when counsel failed to make a proper and complete ***Batson***[14] challenge to the State's peremptory strikes of African-Americans from the jury(PCR L.F.74-79). Kevin was denied effective assistance, a fair trial, due process, and was subjected to cruel and unusual punishment in violation of his rights under the U.S.Const. Amends.VI, VIII, XIV, and Mo.Const., Art.I, §§10,18(a),21.

This Court reviews for clear error. ***Morrow v. State***,21 S.W.3d 819,822(Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made. ***State v. Taylor***,929S.W.2d 209(Mo.banc1996).

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[14] ***Batson v. Kentucky***,476U.S.79(1986).

Ineffectiveness claims are reviewed under ***Strickland v. Washington***,466U.S.668,687 (1984); ***Williams v. Taylor***,529 U.S. 362,390-91(2000). ***Strickland's*** prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. *Id*.;***State v. Butler***,951S.W.2d 600,608(Mo.banc1997). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. ***Woodson v. North Carolina***,428U.S. 280,305(1976); ***Lankford v. Idaho***,500U.S.110,125(1991).

Kevin was entitled to an evidentiary hearing if (1) he pled facts, not conclusions that, if true, would entitle him to relief; (2) the allegations were not refuted by the record, and (3) the matters complained of prejudiced him. ***Wilkes v. State***,82 S.W.3d 925,929(Mo.banc2002). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id*. at 928 (emphasis in original);Rule29.15(h).

The motion court denied this claim without an evidentiary hearing, finding that the constitutional claims were waived by the failure to object and defeated by the failure to demonstrate prejudice(Supp.L.F.5-7). As to Cottman, the court found that this Court had ruled the issue on direct appeal against Kevin(Supp.L.F.6).

As to Clark, the motion court found trial counsel had made a ***Batson*** objection and the State's reasons for the strike were race neutral since Clark said he would not sign a death verdict; he was not strong on the death penalty, potentially holding the State to a higher burden; and he exhibited inappropriate behavior by laughing and making comments when other jurors were speaking(Tr.1048-50).

The motion court noted that Jackson stated during voir dire that her son was prosecuted by the St. Louis County Prosecutor for murder and was acquitted after spending about a year in custody(Tr.960-62). The motion court found that a ***Batson*** challenge under these facts would not have been meritorious(Supp.L.F.7).

As to Stephenson, the motion court found that he said during voir dire that he chaired a prison ministry at his church, involving writing letters to prisoners(Tr.960). The motion court found that a ***Batson*** challenge under these facts would not have been meritorious(Supp.L.F.7).

The motion court's findings are clearly erroneous. At the very least, this Court must disregard the motion court's "gratuitous observations" regarding race-neutral reasons that the prosecutor did not even give as to jurors Jackson and Stephenson (Supp.L.F.7). *See*,***State v. Wiley***,337S.W.3d41,46,n.10(Mo.App.S.D.2011).

At Kevin's trial, the State used only four of its peremptory strikes on the regular panel and one on the alternate panel, for a total of five strikes(Tr.1048-1049). The State used three of its four peremptory strikes to strike African-American jurors: #12 John Clark, #41 Cleeta Jackson, and #49 Debra Cottman(Tr.1048). The State used one of its two alternate strikes to strike African-American #62 Harry Stephenson(Tr.1048). Defense counsel objected to the strikes of Clark and Cottman on ***Batson*** grounds, but not for Jackson and Stephenson(Tr.1049).

In response to counsel's ***Batson*** challenge to the strike of Clark, the prosecutor responded that Clark had indicated an unwillingness to sign the verdict form for death

and had stated that he would have to be heavily persuaded to give the death penalty(Tr.1049-50). Counsel did not have a reply(Tr.1050).

In response to counsel's ***Batson*** challenge to the strike of Cottman, the prosecutor indicated that he felt when Cottman was being questioned in a small group, she was not willing to answer the questions he asked regarding the death penalty(Tr.1051). He also said that Cottman was a foster parent for the Annie Malone Children's Home and said that she still "sees a lot" of the children now that they are grown(Tr.1051). Since there would be evidence that Kevin was at Annie Malone's for a period of time, the prosecutor said that he did not want anyone associated with Annie Malone and that she would not be favorable to the State's position regarding Kevin's time away from home(Tr.1051). Counsel pointed out that there was a similarly situated white juror, Robert Bayer, who also was a foster parent, and the State did not strike him(Tr.1052).

Counsel did not point out three other similarly situated white jurors who were connected to DFS but were not struck by the State: Duggan, a teacher who called to report concerns she had about students(Tr.1005); Boedeker, who worked with "new moms and babies" and occasionally would talk with DFS if they were called in due to a positive drug screen after delivery(Tr.1007-08); and Georger, a mentor for the Family Court who had worked with children during the time the Family Court place Kevin in DFS Custody(Tr.1006). Counsel also failed to point out as to Bayer that he had been investigated by DFS on an allegation that he beat his son(Tr.1005,1009).

Counsel can be ineffective during jury selection. ***Knese v. State***,85S.W.3d628, 631-33(Mo.banc2002)(failure to read jury questionnaires suggesting two jurors would automatically vote to impose death was ineffective assistance and structural error requiring penalty phase reversal). Also, failing to strike an automatic death penalty juror upon counsel's note-taking error was ineffective assistance, requiring penalty phase reversal. ***Anderson v. State***,196S.W.3d 28,39-42(Mo.banc2006). And failing to strike for cause two jurors who stated it would bother them if the defendant did not testify constitutes ineffective assistance, ***State v. McKee***,826S.W.2d 26,27-29 (Mo.App.W.D.1992), as is failing to challenge for cause a juror who admitted bias against the defendant. ***Presley v. State***,750S.W.2d 602,604-08(Mo.App.S.D.1988). Claims that trial counsel was ineffective for failing to raise a ***Batson*** challenge are cognizable in post-conviction relief motion. ***Strong v. State***,263 S.W.3d636(Mo banc2008).

Here, trial counsel objected to some of the state's strikes on ***Batson*** grounds, but not others. Those they did object to, they failed to fully preserve. Trial counsel included the denial of the ***Batson*** motions involving Cottman and Clark in the motion for new trial(L.F.557-59).

Direct appeal counsel argued error in overruling the challenge to Cottman. ***State v. Johnson***, 284S.W.3d561(Mo.banc2009). Direct appeal counsel argued that the State's explanation for striking Cottman was pretextual because another member of the venire was also a foster parent but was not struck.*Id*.571. In denying that point,

this Court found that the court did not err in finding the explanation was not pretextual. *Id*.

Judge Teitelman dissented. *Id*.589. He noted that the State had offered two justifications for its strike of Cottman: her association with Annie Malone, and her "alleged unwillingness to answer questions regarding whether she could impose the death penalty."*Id*. Judge Teitelman found neither to be race-neutral: as to Cottman's association with Annie Malone, that justification applied logically to any other juror who was associated with an organization that provided services to Kevin – including four white jurors, who were not stricken. *Id*. Further, the State did not ask any other jurors if they were familiar with Annie Malone or other organizations who had offered services to Kevin during his childhood. *Id*.

> ... If the state's concerns regarding Ms. Cottman's service were truly race-neutral, then it follows that the prosecutor would have asked the remaining jurors if they, like Ms. Cottman, had any past association with any of these organizations. The state's failure to ask this simple question of similarly situated white jurors indicates the state's concern regarding Ms. Cottman's association with Annie Malone Children's Home was not race-neutral and was, instead, an impermissible pretextual "makeweight" justification for striking Ms. Coffman.

Id. Judge Teitelman found the state's justification for striking Coffman regarding her "unwillingness" to answer questions during death-qualification to be unsupported by the record. *Id*.

Had trial counsel objected and fully preserved this claim for review, there is a reasonable probability that the outcome of Kevin's trial would have been different, as indicated by Judge Teitelman's dissent. Kevin recognizes that ***Strong*** holds that prejudice is not presumed in a ***Batson*** issue that is raised through the filter of ineffective assistance of counsel for failure to object or preserve.263 S.W.3d at649. But here the claim was denied without an evidentiary hearing, and it was not conclusively refuted by the record. Kevin must have an opportunity to prove his claims to the motion court and to prove how he was prejudiced. The motion court clearly erred in denying this claim without an evidentiary hearing. This Court should remand for an evidentiary hearing on this claim.

XI. Failure to Present Mitigation Evidence From Lavonda Bailey About Kevin's Relationship With His Daughter, Cori

The motion court clearly erred in denying Kevin's claim regarding failure to call Lavonda Bailey as a witness in penalty phase, denying Kevin his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, Mo. Const., Art. I, §§10, 18(a), 21, in that Lavonda would have testified that Kevin was a good and loving father to Lavonda's granddaughter, Cori, and countered the evidence presented as an aggravator that Kevin had assaulted Dana, Cori's mother and Lavonda's daughter; had counsel investigated and called Lavonda to testify in penalty phase, there is a reasonable probability Kevin would have received a life sentence.

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating circumstance, any aspect of defendant's character or background that the defendant proffers as a basis for a sentence less than death. ***Lockett v. Ohio***,438 U.S.586,604(1978). In Kevin's case, counsel failed to investigate, and then subpoena and present the testimony of Lavonda Bailey, who could have testified in penalty phase that Kevin was a good father to his daughter. Defense counsel in a death penalty case is obligated to discover and present all substantial, available mitigating evidence. ***Wiggins v. Taylor***,539U.S.510,524(2003); ***Kenley v. Armontrout***,937F.2d1298, 1307-09(8th Cir.1991).

Kevin raised this claim in his amended motion (PCRL.F.290-93). The motion court granted an evidentiary hearing on this claim, but denied it (Supp.L.F. 38-39). The motion court found that Lavonda Bailey's testimony was cumulative and would not have supported a viable defense (Supp.L.F.39). The court also found that "after conversations with [Kevin]," trial counsel was left with the impression that Lavonda did not have a positive opinion of Kevin, "entirely logical given [Kevin's] assault of her daughter."(Supp.L.F.39). The motion court concluded that Kevin had failed to demonstrate ineffective assistance of counsel or show prejudice(Supp.L.F.39). These findings are clearly erroneous.

***Standard of review*.**

This Court reviews the motion court's findings and conclusions for clear error. ***Morrow v. State***, 21S.W.3d819,822(Mo.banc2000);Rule 29.15. Findings and conclusions are "clearly erroneous" if after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***State v. Taylor***, 929S.W.2d209 (Mo.banc1996). To establish ineffective assistance, Kevin must show that his counsel's performance was deficient and that such performance prejudiced his case. ***Strickland v. Washington***,466U.S.668(1984); ***Williams v. Taylor***, 529U.S.362,390-91(2000). To prove prejudice, Kevin must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*.;***State v. Butler***, 951S.W.2d600,608(Mo.banc1997). The Eighth Amendment and the Fourteenth Amendment's due process clause require

heightened reliability in assessing death. ***Woodson v. North Carolina***,428U.S. 280,305(1976); ***Lankford v. Idaho***,500U.S.110,125(1991).

To prevail on a claim of ineffective assistance of counsel for failure to investigate and call witnesses, Kevin must show that the witnesses could have been located through reasonable investigation, that they would have testified if called, and that their testimony would have provided a viable defense. ***State v. Griffin,*** 810S.W.2d956,958(Mo.App.E.D.1991). The failure to pursue a single important item of evidence may constitute ineffective assistance of counsel. ***State v. Wells,*** 804S.W.2d746(Mo.banc1991).

Lavonda Bailey testified at the evidentiary hearing that Kevin and her daughter, Dana Ramey, have a child together, Cori, who was seven years old at the time of the hearing(H.Tr.416-17). Dana died before Kevin's trial, and Lavonda has custody of Cori(H.Tr.417). At the time Kevin was arrested, Cori was two years old(H.Tr.417).

Before Kevin's arrest, he spent a lot of time with Cori and had a good relationship with her (H.Tr.417-418). Kevin saw Cori every day, took her to play at the park, and provided things she needed, such as diapers(H.Tr.418-19). At times, Kevin had Cori in his care for several days at a time(H.Tr.418-19).

After Kevin was incarcerated, he maintained contact with Cori by calling her every week(H.Tr.420). A relative or friend took Cori to visit with Kevin at the St. Louis County jail(H.Tr.420). At the time of the post-conviction hearing, Kevin was still calling Cori once every week, and a relative or friend was taking Cori to visit

Kevin in prison(H.Tr.420). Lavonda was in favor of Cori and Kevin continuing to have a relationship(H.Tr.420-21).

At trial, there was evidence concerning a misdemeanor assault to which Kevin pleaded guilty, where Kevin hit Dana(St.Ex.80,T.3-4;H.Tr.421). Despite that incident, Lavonda maintained a good relationship with Kevin(H.Tr.421-22).

Lavonda testified that she was not contacted by trial counsel before trial(H.Tr.422). If she had been, she would have been available and willing to testify as she did at the evidentiary hearing regarding Kevin's relationship with his daughter and that she wanted that relationship to continue(H.Tr.422).

Trial counsel testified that Kevin gave them the impression that he and Lavonda Bailey did not have a good relationship(H.Tr.470). The information they had regarding Lavonda did not indicate to them that she would be helpful(H.Tr.470). Therefore, although they knew how to get in touch with Lavonda, they did not contact her(H.Tr.470).

In ***Williams v. Taylor***,529U.S.at 399, the Supreme Court found Williams's counsel constitutionally ineffective because he failed to conduct a *thorough* investigation of Williams's background. Counsel failed to investigate before trial and did not present extensive records of Williams's nightmarish childhood, his borderline mental retardation, that he only finished sixth grade, and his good behavior in prison. *Id*.395-96. In finding prejudice, the Court looked not only at the omitted evidence, but also the evidence adduced at trial. *Id*.397-98. A court should not look at each piece of evidence in isolation. *Id*. Since counsel had failed to thoroughly investigate,

and the jury might have voted for life with such evidence, the Court found counsel ineffective under the Sixth and Fourteenth Amendments. *Id*.398-99.

Kevin's trial counsel were similarly ineffective. Their decision for ruling out Lavonda without first interviewing her was unreasonable. Even if Kevin represented to counsel that he and Lavonda did not have a good relationship, it was unreasonable for counsel not to talk to Lavonda to find out what she would say about Kevin and his relationship with his daughter. Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy. ***Chambers v. Armontrout***, 907F.2d825, 828(8thCir.1990)(en banc). "Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not yet obtained the facts on which such a decision could be made." ***Kenley v. Armontrout***,937F.2d at 1308.

Lavonda permitted Cori to see Kevin at the St. Louis County jail and to speak with Cori over the phone, so that was an indication that Lavonda believed Cori's relationship with Kevin should be maintained and was good for the child. Under these circumstances, counsel's failure to interview, and then subpoena and call Lavonda as a witness, fell below the standard of care that a reasonably competent attorney would exercise under similar circumstances. ***Strickland***; ***Williams v. Taylor***.

Furthermore, one of the aggravators presented by the State at trial was Kevin's misdemeanor conviction for a domestic assault of Dana(St.Ex.80; Tr.2337). Under those circumstances, the testimony of Dana's mother, Lavonda, that Kevin was a good father to his daughter, would have rebutted that aggravating evidence. *See*,

Ervin v. State,80S.W.3d817(Mo.banc2002)(remand for findings of fact on a claim that trial counsel was ineffective for failing to investigate and call witnesses to rebut aggravating circumstances evidence).

But for counsel's failure to present Lavonda Bailey's testimony regarding Kevin's relationship with his daughter, there is a reasonable probability that the jury would not have sentenced Kevin to death. This Court should reverse the motion court's denial of post-conviction relief and impose life, or remand for a new penalty phase.

CONCLUSION

For the reasons stated in Point I, Kevin asks this Court to reverse his conviction and remand for a new trial, or in the alternative, a new penalty phase. For the reasons stated in Point II-VII, IX, and X, Kevin asks the Court to remand for an evidentiary hearing. For the reasons stated in Point VIII, Kevin asks the Court to remand for an evidentiary hearing, or in the alternative, impose a sentence of life without probation or parole. For the reasons stated in Point XI, Kevin asks this Court to remand for a new penalty phase.

Respectfully submitted,

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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 28,274 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On the 29th day of October, 2012, the foregoing brief was placed for filing and delivery through the E-file system to Shaun J Mackelprang, Assistant Attorney General, 221 W. High Street, Jefferson City, MO 65102. The electronic file has been scanned for viruses using Symantec Endpoint Protection, updated in October, 2012, and according to that program, the file is virus-free.

/s/ *Kent Denzel*
Kent Denzel