

**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**

APPELLANT’S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Kevin Johnson, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

STATEMENT OF FACTS

Kevin incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

ARGUMENT

I. FAILURE TO PRESENT EVIDENCE OF ACUTE STRESS DISORDER

Where ten of twelve jurors at Kevin’s first trial found that the State failed to prove deliberation, the State’s claim of “overwhelming” evidence of that element is totally without support. Trial counsel did not adequately investigate the issue of diminished capacity, hence they could not have made a reasonable strategy decision to forgo that defense. The State made no response to Kevin’s claim that, alternatively, counsel should 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. The 3500 pages of records that Kevin presented in the post-conviction case were not cumulative to the bare summary of Kevin’s childhood presented at trial.

The State’s position is that counsel made reasonable strategic choices in presenting evidence of Kevin’s background in guilt and sentencing phases (Resp.Br.23). It says the decision not to present a diminished capacity defense was reasonable, and that the failure to do so was not prejudicial, due to what it calls “overwhelming” evidence of deliberation. (Resp.Br.36-37).

As to the assertion of “overwhelming” evidence of deliberation – which the State repeats in its responses to Points III, V, and VI(Resp.Br.60-61,77,82) – the State argues, “[t]his Court noted on direct appeal the evidence showing deliberation, evidence that could reasonably be characterized as overwhelming”(Resp.Br.37). To

clarify – because the wording of the State’s assertion seems to suggest that this Court in the direct appeal found the evidence overwhelming, and it certainly was not the State’s intent to misstate the holding – this Court made no such statement. *State v. Johnson*, 284 S.W.3d 561, 572 (Mo. banc 2009).

In *State v. Dexter*, 954 S.W.2d 332, 342 (Mo. banc 1997), this Court said:

. . . a test to determine whether there is overwhelming evidence of guilt in a particular case is not easily articulated. Perhaps the most vivid articulation in Missouri’s jurisprudence is that expressed in *State v. Martin*, 797 S.W.2d [758] at 765 (Mo. App. [E.D.] 1990), “if [defendant] were tried one hundred times on this evidence, with or without [the detective’s] testimony, she would be convicted one hundred times.”

(Further attribution omitted). Kevin points out as the most significant fact for this Court to consider in reviewing the evidence and considering the prejudicial effect of trial counsel’s failure to investigate and present evidence of diminished capacity, is that the first jury to hear the State’s case against Kevin voted ten to two for second-degree, not first-degree murder (Hr. Tr. 453, 491-92). Therefore, not only can the State not say that Kevin would be convicted 100 of 100 times, he was barely convicted one out of two times.

The issue of prejudice as to all of Kevin’s claims raising the issue of deliberation (Points I-VI) must be considered in that light. On essentially the same evidence, at least ten of twelve jurors at the first trial felt that the State had not proved deliberation (counsel did not know how the other two voted). The tiniest difference in the defense

case might have been the difference between a death penalty and a second degree murder conviction. Therefore, the State's claim of "overwhelming" evidence is completely without support in law, fact, or logic.

The State cites *Lyons v. State*, 39 S.W.3d 32 (Mo. banc 2001) in support of its argument about overwhelming evidence. (Resp. Br. 36-37). In *Lyons*, what the Court found to be overwhelming included that Lyons told at least four people prior to the murders that he was planning to commit them, that he went to the victim's home with a shotgun and a duffel bag containing clothing and ammunition, and that nothing indicated that he was out of touch with reality or did not know what he was doing. *Id.* at 37. In contrast, there is no evidence that Kevin sought out the initial encounter with Sgt. McEntee; he did not go into that encounter armed with multiple weapons or having announced his intention to kill anyone.

Most important is that it is undersigned counsel's understanding that Lyons ultimately got relief on his claim that he lacked the capacity to deliberate – it did not occur in the cited opinion, but he was granted relief in a later proceeding, and Kevin asks this Court to take judicial notice of its records in that case.

But the fundamental flaw in the State's argument is that it is circular: it claims that there can be no prejudice from counsels' failure to present evidence that would have cast doubt on Kevin's capacity to deliberate because, it asserts, there was overwhelming evidence of deliberation. (Resp. Br. 36-37). That makes absolutely no sense. Had the evidence of diminished capacity been presented that Kevin presented in this post-conviction proceeding and alleged should have been done at trial, the

State’s evidence of deliberation would have been seriously undermined by the evidence of how his acute stress disorder (ASD), and his childhood traumas, affected him, which is the very definition of prejudice. *Moore v. State*, 827 S.W.2d 213,215(Mo.banc1992); *Strickland v. Washington*, 466 U.S.668,694(1984).

1. *The failure to present a diminished capacity defense was not reasonable.*

The State cites *Worthington v. State*, 166 S.W.3d 566,574-75 (Mo.banc 2005), *Middleton v. State*, 103 S.W.3d 726,737(Mo.banc 2003), and *Henderson v. State*, 111 S.W.3d 537, 539-40 (Mo.App.W.D. 2003), in support of the proposition that, “[s]trategic decisions not to present a diminished capacity defense because counsel did not believe a jury would be persuaded by such a defense have been upheld as reasonable.”(Resp.Br.36).

The State’s argument is based on a false premise: that presenting evidence of Kevin’s childhood traumas without expert testimony as to his mental status and the impact of those traumas on his functioning was as readily understandable to a jury as would have been an expert diagnosis and explanation. The two are not equivalent. Evidence without explanation is not useful, and there was a great deal of evidence trial counsel never obtained, as detailed in Kevin’s opening brief.

Worthington – who it is important to note pleaded guilty, so the issue he raised was solely as to the voluntariness of that plea – argued that plea counsel “acted unreasonably in not further investigating his social and medical history”; he alleged that with an adequate investigation he would have gone to trial using a diminished

capacity defense.166 S.W.3d at 573-74. This Court held that the motion court was not required to believe his “doctors’ diagnoses, which were not otherwise supported by prior medical opinions and which were based on very limited experience with Mr. Worthington.” *Id.* at 574. Their contacts all came at least four years after the murder and two had only a single meeting.*Id.* “Furthermore, the fact that Mr. Worthington found experts who were willing to testify at the post-conviction stage that he had a variety of medical disorders does not mean that counsel were ineffective in failing to find similar experts before deciding that a diminished capacity defense would not be effective and recommending that Mr. Worthington plead guilty.”*Id.*

Significantly, plea counsel considered and investigated presenting a diminished capacity defense: he hired a psychiatrist who met with Worthington but found, as did the State’s expert, that “Worthington did not suffer from mental disease or defect at the time of the offense and that he could appreciate the nature, quality, and wrongfulness of his conduct.”*Id.* Counsel also made a strategic decision not to pursue the diminished capacity defense because he feared that his own expert would corroborate the State’s expert’s diagnoses of anti-social personality and malingering.*Id.*

In stark contrast, Kevin first saw Dr.Levin in 2003(Tr.2265) – some two years before he shot Sgt.McEntee. And Kevin was diagnosed with adjustment reaction conduct in 1995 at age nine, and he first received therapy at age ten(Hr.Tr.273-74, 267;M.Ex.53). Counsel knew of Dr.Levin and presented him in penalty phase. But counsel *did not* give Dr.Levin the necessary background records about Kevin which

would have enabled him to testify, as he did in the post-conviction case, how his childhood, documented in the voluminous DFS records of Kevin and his siblings, impacted him and helped in diagnosing acute stress disorder. Dr. Levin reviewed more than 3,500 pages of records, including DFS records – more than twice as much material as what Kevin’s trial counsel had provided him(Hr.Tr.169-71).

Middleton’s defense at trial was that he did not commit the murders; then in his post-conviction case, he alleged that trial counsel unreasonably failed to assert he lacked the requisite mental state.*Middleton*,103S.W.3d at 737. But this Court rejected that claim where counsel testified that Middleton was adamant about his innocence and did not want them to present either a diminished capacity or an “NGRI” defense, that he threatened to act up if they attempted to raise either on their own, and that counsel believed that a lack-of-mental-state defense “would distract from and might be inherently inconsistent with . . . an innocence defense.”*Id.* Again, that is nothing like Kevin’s case.

Finally, in *Henderson*, the defense expert, had he been called to testify to diminished capacity, would have also testified that some of his testing was invalid because of Henderson’s exaggerated responses, and that he agreed with the State’s expert that Henderson was exaggerating symptoms.111 S.W.3d at539. Thus, it was reasonable for counsel not to risk seriously undermining the defense he preferred – arguing for second-degree murder without relying on diminished capacity – if both defenses were presented to the jury, which would mean they would hear about Henderson’s malingering.*Id.*at 540.

In summary, the cases are very fact-specific, and not one is like Kevin's case. In fact, the reasons why counsels' decisions in Worthington, Middleton, and Henderson were not unreasonable under the facts of those cases demonstrates why counsels' failure here was unreasonable: there were no issues with the validity of Dr. Levin's or Dr. Cross's potential testimony, there was no insistence by Kevin on a complete innocence defense, and there was a wealth of available mental health evidence had counsel only sought it and presented it to the jury. Although Kevin's counsel tried to *achieve* what a successful diminished capacity defense would – a second degree murder verdict – they did not undertake a reasonable investigation of Kevin's background and mental health, so they did not provide the jury the available and truly compelling mental health evidence to support that defense.

So this is not a case in which counsel rejected diminished capacity evidence in favor of a different defense; the defense was that Kevin did not deliberate, that he was guilty only of second degree murder. But the psychological evidence counsel failed to present would have given the jury a credible reason why they should find that Kevin did not deliberate. As it was, their theory – that Kevin's story was compelling because of the circumstances of his brother's death – fell far short of the reasonableness standard of performance.

Kraft thought Kevin's compelling story could get lost in testimony from competing experts had they relied on diminished capacity (Hr.Tr.482-84). And Steele felt that 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). He believed taking something “very simple” and presenting expert testimony would have made Kevin’s experience something that was “complex”(Hr.Tr.527-28).

So trial counsel instead went with the “compelling story” approach, relying solely on lay testimony about the death of Kevin’s brother and its impact on Kevin. But counsels’ explanation for not relying on the defense of diminished capacity was self-contradictory. They both said they wanted to present evidence of Kevin’s background – counsel 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; she had no strategy reason for not having gone into greater detail(Hr.Tr.466). And while counsel 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, he acknowledged that the task of whether to present expert testimony and evidence about Kevin’s childhood was Kraft’s responsibility(Hr.Tr.503,509-10). And he would have wanted physical abuse evidence to be presented at least in some summary form, and 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.505 -08).

But Kraft also 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). Steele said they did not consider presenting expert testimony of diminished capacity at the retrial because at the original trial ten jurors voted for second degree murder(Hr.Tr.510-11). He 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).

So both counsel said they did not want to muddy the waters with expert testimony, but both would have considered it *if they had had it*. Yet they did have, or should have had it. It was readily available from their own penalty phase expert, Dr.Levin. But they ignored it, focusing on what on its face is unreasonable: trying to convince twelve laypersons that shooting a police officer is somehow a normal, or at least understandable response to the death of someone close. As Steele put it:

This case specifically you are talking about an individual's response to a death. That's something that a jury can understand. I mean, most jurors have lost someone; I mean, mother, brother, father, whatever, they've lost somebody. So they have an understanding emotionally what someone would be going through at that point.

(Hr.Tr.526).

On the contrary, the jury understood that people do *not* go around committing murder when a family member dies, and they particularly do not kill police officers. *That* was why counsel needed to give the jury a framework for really understanding the defense – that due to Kevin's history and his suffering from ASD, *his* response to Bam-Bam's death was *not* that of the normal people with whom the jurors would be familiar. It was the reasons for Kevin's *abnormal* response to Bam-Bam's death that provided a defense. His story was not compelling without those reasons.

In *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003), the Court said that in light of *Strickland* and *Williams v. Taylor*, 529 U.S. 362 (2000), the principal concern in deciding whether Wiggins’s counsel exercised reasonable professional judgment was not whether they should have presented a mitigation case; “[r]ather, we focus on whether the investigation supporting counsel’s decision not to introduce mitigating evidence of Wiggins’[s] background *was itself reasonable*.” (emphasis in original). “In assessing the reasonableness of an attorney’s investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” *Id.* at 527.

The State refers to counsel Kraft’s belief that Kevin’s story was “compelling” and she was afraid turning the case into a battle of experts would undermine that quality. (Resp.Br.32-33). But rather than supporting the State’s argument, that demonstrates clearly why counsels’ beliefs and strategy was unreasonable: it was not based on a reasonable investigation. “Counsel cannot make a strategic decision against pursuing a line of investigation when he or she has not yet obtained the facts upon which such a decision could be made.” *Cravens v. State*, 50 S.W.3d 290, 295 (Mo.App.S.D.2001) citing, *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir.1991). Kevin’s story, based on the psychological evaluations and testimony of Drs. Levin and Cross is more compelling, not less. This is not a case involving a claim that counsel should have done more of the same. They did not investigate a diminished capacity defense. They both specifically admitted that, thus their strategy to let

Kevin's story speak for itself through lay testimony was not based on reasonable investigation; hence that decision cannot be called reasonable. *Wiggins*.

2. *The failure to present a diminished capacity defense was not reasonable.*

Kevin notes that the State did not respond to his claim that, in the alternative to a diminished capacity defense, counsel should have at least presented in penalty phase as mitigating evidence Levin's and Cross's findings as to ASD, including all foundations for their opinions, including DFS records. Its response was limited to the argument that further evidence of Kevin's "upbringing" would have been cumulative.(Resp.Br.38-39). Kevin notes that the entire defense case in penalty phase comprised barely over 200 transcript pages(Tr.Index).¹ In the post-conviction hearing transcript, Dr.Levin's testimony alone – in which he explained in detail the DFS records and their significance – is over 160 pages, and Dr.Cross's is an additional 70 pages of discussion of ASD and how it affected Kevin(Hr.Tr.Index). In addition, trial counsel did not share with the jury the 3500 pages of records that Dr.Levin reviewed and which the jury should have seen. This was not "cumulative" evidence but an entirely different type of evidence – Kevin's suffering from ASD – and extensive documentation of what trial counsel presented, if at all, only in summary fashion.

Being told that a capital defendant had a tough childhood is simply a cliché, something a jury would expect to hear. But showing the jury that childhood, in records prepared as events happened, documenting that this was not something

¹ Neither the trial nor the evidentiary hearing transcript's index pages are numbered.

defense counsel “came up with” to save their client’s life, is a vastly different presentation, one that is reasonably likely to have led to a different result.

For these reasons, as well as those in his opening brief, Kevin asks this Court to remand for a new trial, or at a minimum a new penalty phase.

II. Failure to Disclose Exculpatory Evidence Regarding Jermaine Johnson

Kevin’s allegation concerning the State’s breach of its obligation to produce evidence of Jermaine Johnson’s expectation of a benefit from his testimony against Kevin, coupled with the State’s failure to disclose the role of the prosecutor in Kevin’s case also representing the State in Jermaine’s case and escorting Jermaine through the system until he had fulfilled his obligation to testify against Kevin, was not refuted by the record, and the motion court’s “factfinding” was done on the basis of “evidence” never tested in a true evidentiary hearing.

The State confuses its obligation to disclose exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963), with the issue of whether Jermaine had a specific agreement with the State for his testimony. Kevin’s claim was that the State failed to disclose a *benefit* – that Mr. Monahan, the assistant prosecutor directly involved in prosecuting Kevin, personally shepherded Jermaine’s probation violation case through the system, until Jermaine was no longer needed, i.e., after he had testified against Kevin (PCR.L.F. 80-84).

The State argues that trial counsel were “aware during trial that the prosecutor’s office had intervened to obtain a continuance in [Jermaine’s] probation violation case.” (Resp.Br.41). Those are not the facts. Further, the State takes out of context the nature of a hearing on August² 27, 2010, in the post-conviction case, in which an

² The State mistakenly says the hearing was October 27 (Resp.Br.45).

employee of the circuit clerk's office made representations about the status of Jermaine's court file during the pendency of the prosecution of Kevin (Resp.Br.45; Hr.Tr.21-26).

First, the August 27 hearing was held on postconviction counsel's motion to produce various records; Jermaine's court file was discussed only because postconviction counsel wanted to make sure that she had not on a previous occasion failed to make a copy of an item that was listed on the docket sheets but was not in the file (Hr.Tr.22-23). This was not an evidentiary hearing on the claim concerning Jermaine's treatment by the prosecutor; indeed the motion court specifically denied such a hearing, and that is the relief Kevin requested herein.

It is illogical in the extreme to argue that the record refutes Kevin's claim, relying on a "hearing" that was not concerned with this issue – and a hearing at which Kevin never had the opportunity to examine the clerk's representative, or assistant prosecutor Monahan, who was involved in both Kevin's and Jermaine's cases. If the State claims that the August 27, 2010 discussion sufficed to provide Kevin due process on his claim, it has provided no support for such a proposition – that a representative from the clerk's office, and the same assistant prosecutor who held Jermaine's hand throughout his probation "revocation" proceedings can make unsworn declarations to the court, and those declarations can then be used to justify not holding a hearing.

The State next claims that the record shows that trial counsel were aware that Jermaine "had not attended a probation revocation hearing and that someone from the

prosecutor's office had taken care of it for him." (Resp.Br.50). But this is unsupported. The State relies on the cross-examination of Jermaine at trial:

Q. Now, in terms of your probation, there was a hearing on that probation?

A. Yes, sir.

Q. You did not go, is that right?

A. No, sir.

Q. Someone else took care of it for you?

A. Yes, sir.

MR. MCCULLOUGH: Judge, I object. Was the question before, you did not go?

MR. STEELE: That's correct.

MR. MCCULLOUGH: Okay.

Q. (By Mr. Steele) Did someone from the Prosecutor's Office take care of that for you?

MR. MCCULLOUGH: I object to the argumentative form of the question. He doesn't know that because he didn't attend the hearing.

THE COURT: Objection sustained.

Q. (By Mr. Steele) Who went and took care of that for you?

A. I have no idea, sir.

Q. Okay. Did someone tell you you didn't have to go?

A. No, sir.

Q. You just did not go?

A. I just didn't go.

Q. You know you had a violation already, right?

A. Yes, sir.

Q. You did not go at all?

A. No, sir.

Q. Because you knew they were taking care of it, didn't you?

A. No, sir.

(Tr. 1491-93). Jermaine never admitted that the prosecutor was ushering him through the system, which emphasizes why a hearing on this issue is necessary. And while one may assume that trial counsel had some information – to provide a good-faith basis for the questions – this does not answer the *Brady* issue. The State's obligation is to disclose exculpatory information. The assistant prosecutor's intimate involvement in Jermaine's case was such information.

It is no coincidence that a prosecutor involved in a capital case would just happen to be providing coverage for a series of continuances on a probation violation claim in a relatively low-level robbery case. It is extraordinary – that is not how large prosecuting attorney's offices work. Co-counsel in capital cases do not handle probation violation hearings, especially continuing them again and again for a prosecution witness. It is clear that trial counsel did not know of Mr. Monahan's close supervision of Jermaine's case – from the moment Jermaine made a statement inculcating Kevin. Otherwise, counsel would have specifically named him in the

questions to Jermaine about “someone” taking care of his case for him. And Kevin notes that the State did not even allow Jermaine to answer the question about whether a prosecutor provided the assistance(Tr.1491-92).

The assistant prosecutor’s role in Jermaine’s case should have been formally disclosed in the prosecution of Kevin on a capital case. It is no answer that “apparently” trial counsel knew about it. To support the denial of a hearing, the State should be able to point to a disclosure, not a cross-examination question that suggests that trial counsel had some idea that the prosecutor’s office was taking care of Jermaine. The record supports that the State failed to fulfill its duty under *Brady*, and Kevin is entitled to an evidentiary hearing to prove his claim. If the State can show that counsel had access to the court file or otherwise were informed about the prosecutor’s involvement, the place for such proof is at an evidentiary hearing in the motion court, not a housekeeping hearing about access to evidence, or a battle of unsworn declarations that Kevin was not given the opportunity to challenge.

The State’s argument to deny a hearing essentially relies on “evidence” that was never presented as part of an evidentiary hearing, and factual findings based on that non-evidence. (Resp.Br.48). The availability of the court file has never been the subject of an evidentiary hearing, and the motion court was clearly erroneous in holding that it was available to trial counsel (Supp.L.F.10). At any rate, even if the file were available, that would not excuse the State’s failure to disclose the assistant prosecutor’s role.

Finally, the State argues that there could be no prejudice due to the *Brady* violation because Jermaine's testimony was largely cumulative to that of other witnesses.(Resp.Br.50-51). But Jermaine, as Kevin's cousin, is not like the other witnesses. He was with Kevin as they walked through the neighborhood, and he claimed to be practically alongside Kevin as he pulled out his gun and shot Sgt.McEntee. If he was implicating Kevin, the jury would be sure to accept and believe it. His testimony was particularly damaging, but it could have been made less so had the State obliged its duty.

For these reasons and those presented in his opening brief, Kevin's claim was not conclusively refuted by the record, and he is entitled to an evidentiary hearing to prove his allegations.

III. Failure to Object to Inaccurate Reenactment Video

The State's overwhelming-evidence argument is again without merit, especially where the State treated the video at trial as a true depiction, relying on it to refute Kevin's testimony as to his actions and reaction to seeing Sgt.McEntee.

There is once again a fundamental flaw in the State's argument: it claims that there was "overwhelming evidence of deliberation apart from the video[,]” and that there can therefore be no prejudice from counsels' failure to object to its admission and use.(Resp.Br.52). Kevin again answers that at his first trial, on the same evidence it calls overwhelming, ten of twelve jurors voted for second degree murder.(Hr.Tr. 453,491-92). The State also tries to limit Kevin's claim – it argues only that he alleged that the disparity in heights between the "actors" and the actual parties made the video inaccurate.(Resp.Br.56).

That was but a part of the allegations. Kevin also alleged that the video was not an accurate portrayal of what he said had happened – he claimed that Detective Neske began the video by saying they were "doing a reenactment of Sgt.[]McEntee's homicide”(St.Ex.88), and as a third party portraying Kevin, he 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). Further, in addition to the height disparity, Kevin 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 “overwhelming evidence of deliberation” that the State claims exists is the following: testimony from multiple witnesses that Kevin reached into the car and shot Sgt.McEntee (and that counsel conceded that fact, due to the stippling around the wounds); that Sgt.McEntee’s gun was missing and a witness saw Kevin walking with two guns shortly after the first set of shots; and “particularly” Kevin’s firing into the back of Sgt.McEntee’s head upon encountering Sgt.McEntee³ outside his car on his knees after it hit a tree. (Resp.Br.60).

While this may be evidence of deliberation, it is far from what could be considered “overwhelming.” Kevin again refers the Court to the ten to two vote for second-degree murder at his first trial(Hr.Tr.510-11).

The State’s argument also does not take into account that the video was overemphasized by the State’s use of it during closing argument – the prosecutor

³ The State’s phrase was “after returning to the area of the initial shooting and finding McEntee outside his car”(Resp.Br.60), but Sgt.McEntee had driven several houses up the street from that location. Kevin did not return to “find” Sgt.McEntee but rather encountered him a second time.

clearly used it as an actual depiction of the events and what Kevin could or could not see as he approached Sgt. McEntee's car. In his opening argument he said: "And you saw the reenactment or the attempted reenactment, and Neske probably did him a favor by bending over as far as he was because what he says is as he's walking down the street, the car is over to the far side of the street, and he's walking down the street, and he tells you, I didn't see him there, I saw him through the passenger window. ... Even a guy who's 5'7 or whatever he is has to squat down to see that." (Tr. 1917). Then in his closing he re-played the "harmless demonstrative evidence" and relied on it as if it were a video of the actual event to make his point:

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.)

MCCULLOCH: 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, Johnson does,

but you still can't do that, and 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.1992-93).

The State argues that *State v. Caudill*, 789 S.W.2d 213 (Mo.App.W.D.1990), does not apply because “neither the victim nor the defendant were participants in the reenactment.” (Resp.Br. 58). The case is not so limited. In *Caudill*, the point was not that the victim reenacted the crime, but that it was the party opposing the defendant. As the Court noted, “[t]he 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.” *Id.* at 216, quoting, *Lopez v. State*, 651 S.W.2d 413, 414-15 (Tex.App.2Dist.1983). That danger came to pass when the State recreated its version of what happened, then passed it off to the jury as absolute fact. The message was clear that if they were seeing it themselves, it had to be exactly how it happened. That is what the *Caudill* Court was talking about, not a limited scenario where the victim made the video.

Similarly, in *Phiropoulos, v. Bi-State Development Agency*, 908 S.W.2d 712 (Mo.App.E.D.1995), the Court reversed where the trial court admitted a reenactment video prepared by the opposing party, where the party offering the exhibit offered it as a re-creation of the actual incident, but without a showing that it was accurate as

such. The same is true here. The State referred to it as a re-creation upon introducing the subject of the video(Tr.1747), then it relied on it as a re-creation in closing(Tr.1917,1992-93).

For these reasons and those in his opening brief, Kevin is entitled to an evidentiary hearing to establish that counsel had no reasonable trial strategy reason for their failure to object to the State's admission and use of the video.

IV. Numerous Uniformed Officers in Courtroom and Hallways

The State’s reliance on *Carey v. Musladin* is misplaced, because that procedural ruling does not apply. The State cites no authority for its argument that Kevin’s pleading is deficient if it does not provide a count of the number of officers who appeared in court in uniform or how they acted.

The State first argues that Kevin’s pleading was deficient because it failed to allege prejudice, then it analyzes the case under an inherent-prejudice standard(Resp.Br.63). It then claims that the case on which Kevin relied to argue inherent prejudice, *Norris v. Risley*, 918F.2d828,829-30(9thCir.1990), was either questioned or overruled by *Carey v. Musladin*, 549 U.S. 70(2006)(Resp.Br.64). But *Musladin* did not reach the merits of the issue, and the State has overstated its holding.

Musladin was a federal habeas case in which the state court affirmed the conviction, holding “that buttons displaying the victim’s image worn by the victim’s family during respondent’s trial did not deny respondent his right to a fair trial.”*Id.*at72. Although the State claims that the Supreme Court “found that federal law did not clearly apply the inherent prejudice test articulated in [*Estelle v. Williams*, 425 U.S. 501(1976) and *Holbrook v. Flynn*, 475 U.S. 560(1986)] to claims of spectator conduct at trial[,]” the basis of the decision was entirely procedural – it simply held that the state court decision was not “contrary to or an unreasonable application of clearly established federal law, as determined by this Court.”549U.S.at

72. In other words, the Supreme Court had not previously addressed the merits of the issue, so the state court could not have unreasonably applied its (nonexistent) holding.

Further, as noted, at issue in *Musladin* was expressive conduct by the victim's family, while here it was State action: an overwhelming – to use the State's word – show of support by uniformed law enforcement officers: state agents. That is more like the state action in *Estelle*, whether the accused was compelled to go to trial in prison clothing.^{425U.S.at.512.}

Kevin's pleading was adequate. He raised the inherent prejudice of the "numerous" uniformed officers and their obvious show of emotional support for Sgt.McEntee and his family(PCR.L.F.123-24). The State cites no authority for the proposition that Kevin's pleading needed the exact number of officers, nor that they conducted themselves in a prejudicial manner. (Resp.Br.68). At any rate, that is exactly what the pleading said in alleging that the "obvious display of support for the victim in the case was a cry for justice for the victim and a call for a harsh punishment for" Kevin.(PCR.L.F.123).

For these reasons and those in his opening brief, 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

Kevin was not required to present evidence on his claim in order to be entitled to an evidentiary hearing. The fact that Kevin submitted an affidavit in connection with a different claim on which a hearing was denied does not obligate him to do so on every such claim.

Other than its ubiquitous “overwhelming evidence” argument, dealt with above,⁴ the State also claims that Kevin was required to somehow prove his claim in order to be entitled to an evidentiary hearing on it.(Resp.Br.75). It suggests that Kevin’s act of filing Jermaine Johnson’s affidavit in connection with the claims discussed in Point II somehow obligated him to provide evidence as to this claim to be able to have a hearing and present his evidence.*Id.* Again, this illogical proposition is completely unsupported.

Kevin set out what the police officers would testify to, what was in the report the State claims Kevin was required to file(PCR.L.F.127-28). His pleading thus alleged facts that Norman Madison told the officers something different than what he told the jury – in direct contradiction of his testimony. Just because the State might have argued at trial that the report was not meant to be a verbatim account of Madison’s statement(Resp.Br.75), the fact remains that witnesses are impeached every day by

⁴ As in Point I, the State’s argument is illogical in that it fails to note that the evidence at issue is part of the evidence of deliberation.

what is contained in police reports. As they also testify frequently, they are trained to make accurate reports and not to omit relevant and important details, and it cannot be over-emphasized, the statement, “he needs to see what it feels like to die” is precisely such an important detail. What Madison actually said to the officers would have been a matter for the jury to resolve, not the trial court, the motion court, or this Court.

For these reasons and those in his opening brief, Kevin was entitled to an evidentiary hearing.

VI. Improper and Erroneous Definition of “Deliberation”

The State’s argument is again circular: that counsel’s ineffective performance that made it more likely that the jury would find deliberation is harmless because of the evidence of deliberation. Contrary to the State’s argument, this Court in *Rousan* said precisely what Kevin argued: that a conscious decision to kill is not the same as deliberation, yet that was what the prosecutor claimed, misleading the jury.

No matter how many times the State uses the term “overwhelming,” its argument is illogical where the subject is the question of deliberation itself, and where deliberation was actually a razor-thin question, as demonstrated by the vote in the first trial. Here, the prosecutor gave the jury an incorrect and misleading definition of deliberation, and the State does not bother to make an argument how it would be possible that that would not affect the jury’s decision-making.

The State misstates the evidence when it argues that the prosecutor argued that “making a conscious decision to kill is part of the deliberative process. The prosecutor argued as much when he said, ‘[Y]ou make a conscious decision to go after somebody and kill them, that is cool reflection[.]’”(Resp.Br.80). That argument does not say a “conscious decision” is *part* of deliberation; he said “that *is* cool reflection.”(Tr. 1908-09). And that is why the prosecutor’s argument was contrary to *State v. Rousan*, 961S.W.2d831,852(Mo.banc1998), in which this Court explicitly rejected the notion that “a decision to kill the victims prior to the murder” or a

“knowing” killing is deliberation. That was a clear statement by the Court, explaining its holding in *State v. Gray*, 887S.W.2d369,376(Mo. banc1994), that the State puzzlingly fails to acknowledge.

Finally, the jury may have been “properly instructed on deliberation”(Resp.Br.81), but the language of the instruction itself did not tell them that the prosecutor was misstating the law – nothing says in so many words that “conscious decision” and “cool reflection” are different. So unless the court or counsel took that step, the jury was free to assume that the prosecutor told them the truth, that all they had to find was that Kevin made a conscious decision.

Again, for the reasons herein and in his opening brief, Kevin asks this Court to remand for an evidentiary hearing.

VII. Kevin's Appearance Before the Jury in Restraints

Kevin is not precluded from raising this claim on the theory that he was required to first raise the issue of shackling in the trial court. *Zink* was *dicta* regarding the use of concealed shackling, because the trial in *Zink* took place before *Deck v. Missouri* was decided.

The State's argument is completely nonsensical. It claims that Kevin is precluded from raising counsels' failure to object to the use of noticeable restraints because that issue was not raised in the trial court.(Resp.Br.84). It seems to rely on *Dickerson v. State*,269 S.W.3d 889(Mo. banc 2008), for the bizarre proposition that “[a]n after-the-fact claim of improper shackling can be considered refuted by the record where the question of shackling was not raised before the trial court.” But that case holds the opposite.

After noting that the “motion court found that because there is no evidence on the record that Dickerson was shackled at trial or that the shackles were visible to the jury, Dickerson’s allegations of ineffective assistance of counsel were refuted by the record[,]” this Court actually said in *Dickerson*:

It is true that the trial record in this case contains no reference to the use of shackles at Dickerson’s trial. For the record to “refute” Dickerson’s claim, however, the record would have to “rebut” the claim or “prove [the claim] to be false.” Black’s Law Dictionary (8th ed.2004). Since the mere absence of any reference to shackling on the

record does not prove Dickerson's allegation that he was shackled at trial to be false, the allegation is not "refuted by the record."

Id. at 892. The Court remanded for an evidentiary hearing. *Id.* at 893.

The Court's reference to Dickerson's raising the issue in the trial court was only to point out that his was not a case in which shackling did not actually occur – it said he had filed a pre-trial motion regarding the issue. *Id.* at 892-93.

The State also cites *Zink v. State*, 278 S.W.3d 170 (Mo. banc 2009), arguing that concealed restraints do not violate due process. (Resp. Br. 84-85). But that part of *Zink* is *dicta*, because, as the Court noted, "[m]ore importantly, *Deck [v. Missouri]*, 544 U.S. 622 (2005)] does not support Mr. Zink's claim that his trial counsel was ineffective for failure to object to the shackling of Mr. Zink because Mr. Zink was tried in July 2004, prior to the *Deck* decision." 278 S.W.3d at 187. Thus *Zink* does not benefit the State here.

For these reasons and those in his opening brief, Kevin is therefore entitled to an evidentiary hearing on his claim.

CONCLUSION

For the reasons stated in Point I herein and in his opening brief, 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, herein and in his opening brief, Kevin asks the Court to remand for an evidentiary hearing. For the reasons stated in Point IX and X in his opening brief, Kevin asks the Court to remand for an evidentiary hearing. For the reasons stated in Point VIII in his opening brief, 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 in his opening brief, 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 reply 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, and this certificate of compliance and service, the brief contains 7,368 words, which does not exceed the 7,750 words allowed for a reply brief.

On the 25th day of January, 2013, the foregoing reply brief was placed for filing and delivery through the E-file system to Daniel N. McPherson, 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 January, 2013, and according to that program, the file is virus-free.

/s/ Kent Denzel _____

Kent Denzel