

IN THE
MISSOURI SUPREME COURT

BRANDON HUTCHISON,)
)
 Appellant,)
)
vs.) No. 85548
)
STATE OF MISSOURI,)
)
 Appellant.)

 APPEAL TO THE MISSOURI SUPREME COURT
 FROM THE CIRCUIT COURT OF LAWRENCE COUNTY, MISSOURI
 39th JUDICIAL CIRCUIT, DIVISION I
 ORIGINAL POSTCONVICTION ACTION – HON. J. EDWARD SWEENEY, JUDGE
 REMAND HEARING – HON. DAVID DARNOLD, SENIOR JUDGE

 APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Brandon Hutchison, was jury-tried for two counts of first degree murder and sentenced to death in Lawrence County Circuit Court. This Court affirmed. *See State v. Hutchison*, 957 S.W.2d 757(Mo.banc1997).

Brandon filed a Rule 29.15 motion, and Judge J. Edward Sweeney denied the amended motion after an evidentiary hearing on some claims. Brandon appealed, and this Court reversed and remanded for further evidence. *Hutchison v. State*, 59 S.W.3d 494(Mo.banc2001). On remand, Judge Sweeney recused himself and, after a hearing, Judge David Darnold denied relief, adopting the State's Proposed Findings and Conclusions.

Because a death sentence was imposed, this Court has jurisdiction. Art. V., Sect. 3 and 10.

STATEMENT OF FACTS

Procedural Overview

In January, 1996, the State charged Brandon Hutchison, Michael Salazar, and Freddy Lopez with the murders of Ronald and Brian Yates(S.L.F.1,Exs.64,66,67,68).¹ Lopez testified against Hutchison who was tried in October, 1996(T.Tr.1068-1252). Brandon was convicted of two counts of first degree murder and sentenced to death (T.Tr.1956,1985). He appealed to this Court, but it denied relief. *State v. Hutchison*, 957 S.W.2d 747(Mo.banc1997).

In June, 1997, a jury found Salazar guilty of first degree murder, but imposed life without parole(Ex.62J at 1747). Lopez did not testify at Salazar's trial(Ex.79 at 27).

On November 21, 1997, Lopez pled guilty to two counts of second degree murder and the prosecutor agreed, at the recommendation of the victims' family, that he be sentenced to ten years on each count, to be served concurrently(Ex.79, at 9,48). On December 10, 1997, Lopez received ten years. *Id.* at 48.

In March, 1998, Brandon filed his *pro se* Rule 29.15 motion(L.F. 9-14). Appointed counsel filed an amended motion(L.F.20-156). Judge Sweeney granted an evidentiary hearing on all claims, except two: first, that the prosecutor failed to disclose its deal with

¹ Record citations are as follows: original evidentiary hearing transcript(Tr.); legal file of original 29.15 appeal in *Hutchison v. State*, S.Ct. No. 83106(L.F.); trial transcript(T.Tr.); supplemental legal file(S.L.F.); remand legal file(R.L.F.); remand supplemental legal file (R.S.L.F.); remand evidentiary hearing transcript(R.Tr.); and 29.15 exhibits(Ex.).

Lopez, misled the jury in not correcting Lopez's testimony that the prosecutor was giving him no deal, and argued that Lopez convicted himself of first degree murder and was not getting out of anything; and second, that justice was for sale as Lopez paid the victims' family \$200,000.00 to obtain a ten-year sentence(L.F.810-11,814).

On appeal, Brandon raised ten issues, including the error in failing to grant a hearing on these two claims. *Hutchison v. State*, S.Ct. No. 83106. This Court reversed and remanded for an evidentiary hearing. *Hutchison v. State*, 59 S.W.3d 494(Mo.banc 2001). This Court instructed that "on remand, the parties should be allowed to present witnesses and evidence relating to any plea negotiations or agreements occurring before, during or after Hutchison's trial." *Id.* at 496.

On remand, counsel moved to disqualify Judge Sweeney for cause(R.L.F.34-42). Judge Sweeney sustained the motion and this Court reassigned the case to Judge David Darnold, Senior Judge(R.L.F.49). He heard evidence regarding the State's plea negotiations and agreements with Lopez(R.Tr.). The parties drafted proposed findings and conclusions(R.L.F.72-85,86-107). Judge Darnold adopted the State's findings *verbatim* and denied relief(R.L.F.108-126).²

² Since this Court ruled on none of the claims from his original postconviction appeal or the remand appeal, Brandon asks that this Court consider both the record filed in S.Ct. No. 83106 and the record filed in this appeal, S.Ct. No. 85548. Additionally, Brandon requests that this Court take judicial notice of its files in *State v. Hutchison*, S.Ct. No. 79453.

Facts

When the State charged Brandon with the murders of Ronald and Brian Yates (S.L.F.1), Brandon was 21 (Tr.251;T.Tr.1914). He lived at home with his parents, Lorraine and Bill(T.Tr.1915). Since Brandon was broke, his parents contacted Dee Wampler, a criminal defense attorney in Springfield, Missouri(Tr.279). Wampler interviewed Brandon and obtained a \$15,000.00 retainer from the Hutchisons(Tr.1043). However, he decided that he could not handle the case for that amount and Brandon's parents could not afford his additional fees(Tr.279). Wampler referred Brandon to Shane Cantin and William Crosby(Tr.280,1086).

Cantin had been admitted to practice law three years and this was his only first degree murder degree case(Tr.932-34). Crosby had been admitted five years, but had never handled murder cases as a licensed attorney(Tr.1057,1059). They spent nearly their entire time preparing for guilt phase(Tr.981,990). They were concerned that co-defendants, Lopez and Salazar, might testify against Brandon. They asked for disclosure of any deals made with them(Tr.990). They also sought to admit evidence that Lopez and Salazar were members of a violent, Hispanic gang, arguing this would impact their credibility and give them a motive to protect each other and try to pin the offense on Brandon(T.Tr.239-46,252-90). The defense theory was that Lopez and Salazar were gang members "running herd" over

Judges Sweeney and Darnold considered the trial transcript and legal file in ruling on Brandon's claims(Tr.43,R.Tr.14-15).

their client(Tr.1016,1094). Counsel believed that Brandon was a follower, who did not make the decisions(Tr.1024,1068,1090).

The prosecutor told counsel they had no formal deal with either codefendant (T.Tr.141-42). He had recommended life without parole for Salazar(T.Tr.140). He had discussions with Lopez's attorney and said that if Lopez was a good witness at Brandon's trial, he would reduce the charges to second-degree murder(T.Tr.142). They had not reached a formal agreement on the sentence, but he was thinking 30 years(T.Tr.142). The trial court ordered the state to disclose any agreement, formal or informal, reached with either co-defendant(T.Tr.143).

At the remand hearing, the prosecutor, Robert George, and Lopez's attorney, Dean Price,³ confirmed these discussions(Ex.88, at 17-30,R.Tr.207, 209,217). Price indicated that Lopez was willing to testify(Ex.88, at 17).

George told Price that if Lopez did a good job as a witness at his deposition and George decided to use him at trial, he probably would recommend second-degree murder and 30 years(Ex.88, at 19,20,22). George and Price emphasized that they had not struck a "final" or "firm" deal(Ex.88, at 19,21,25,R.Tr.217,225-26,227-28). Assistant Prosecutor Matt Selby also emphasized they had not reached a formal deal(R.Tr.233,234). However, George acknowledged that prior to Brandon's trial, "we were extending offers" to

³ Price testified that Lopez waived his preliminary hearing in exchange for a promise not to pursue the death penalty(R.Tr. 204). However, Lopez had a preliminary hearing (R.S.L.F.59-173).

Lopez(Ex.88 at 30). Price conveyed these plea discussions to Lopez before he testified in Brandon's case(R.Tr.220,229). Lopez knew that obtaining leniency depended on the prosecutor's satisfaction with his testimony(R.Tr.220).

Brandon's trial was set in October. A couple of months before trial, Brandon's counsel realized they were not ready. They were up to their eyeballs in work and felt swamped and unprepared(Tr.1003,1030). They knew that Brandon had grown-up and spent nearly all his life in the State of California, but they had been unable to investigate his background(Tr.1064). Counsel wanted to go to California to investigate(Tr. 1064). They had requested no background records, only getting some grade cards from Brandon's mother(Tr.974-78,1030,1042). They requested a continuance to prepare for penalty phase(Tr.989,1003,1064;S.L.F.27-28). Judge Sweeney denied the request(S.L.F.3-4).

For the next few weeks, counsel focused on the guilt phase; they had no time to prepare for the penalty phase(Tr.1064,1083). They had hired Dr. Lester Bland to evaluate Brandon to decide whether he was competent and whether he suffered from a mental disease or defect(Tr.986-89,1030,1069). Bland identified some deficits and problems in his report, including Borderline Intellectual Functioning, Personality Disorder, but concluded that Brandon was competent and had no mental disease or defect(Ex.12, at 6,8-10). A psychiatrist had treated Brandon during his teens and Brandon had been hospitalized for drug overdoses. *Id.* at 4.

Counsel followed-up on none of the information in Bland's report, obtained no background records or additional testing(Tr.1074). They had no money to hire additional

experts(Tr.983,1048). The Hutchisons had paid \$5-6,000 in additional fees, which counsel used for Bland and depositions(Tr.1047).

Jury selection began October 4, 1996, less than eight months after counsel had entered(T.Tr.295). Lopez testified that he sold Terry Ferris methamphetamine the evening of December 31, 1995(T.Tr.1080). Timmy Yates was with Ferris when he bought the drugs(Tr.87-88). Later that evening, Ronnie and Brian Yates came to Lopez's garage looking for their brother, and stayed for a New Year's Eve party(T.Tr.1096). Lopez talked to the Yates and used methamphetamine with them(T.Tr.1097). At 4:00 a.m., Lopez and his wife argued and went to their bedroom(T.Tr.1098). While Lopez was gone, Salazar shot the Yates, claiming one had tried to stab him with a screwdriver (T.Tr.1105, 1109). Brandon ran into the house asking Lopez to come to the garage, because something bad had happened(T.Tr.1101). When Lopez went to the garage, he saw the Yates on the floor(T.Tr.1106).

Lopez's testimony minimized his involvement and portrayed Brandon as the most culpable(T.Tr.1110,1112-13,1121,1127,1129,1131,1133-34). They took the bodies to a farm road and shot them again(T.Tr.1127,1133-34).⁴ Lopez claimed he stayed in the car while Salazar and Brandon got out(T.Tr.1133). Later Lopez burned his shoes, because he was afraid they would incriminate him(T.Tr.1234).

⁴ Lopez's testimony at Brandon's trial differed from what he had told his lawyers, i.e., that both victims were dead when they put them into the trunk(R.Tr.163).

Counsel did not believe that Brandon actually made the decisions that night (Tr.1024,1094). Counsel believed Salazar was the shooter at both locations(Tr.1090).⁵ Counsel tried to impeach Lopez with prior inconsistent statements(T.Tr.1162-68) and by questioning him about what he was getting for his testimony(T.Tr.1161-62,1242-43).

Lopez said his lawyer told him that the prosecutor was giving no deals(T.Tr.1242-43). He was testifying to clear his conscience and prayed for leniency. *Id.* The prosecutor did not correct Lopez's testimony, that he would not give Lopez a deal. The prosecutor later argued that Lopez was still charged with first-degree murder and was not getting out of anything(T.Tr.1820). He argued that Lopez convicted himself on the stand and would be held responsible(T.Tr.1820-21). The jury convicted Brandon(T.Tr.1836).

In penalty phase, John Galvan, whom the state endorsed only after jury selection, claimed that Brandon stabbed him months before the charged offense(Tr.938,951,1063). Counsel objected to Galvan's late endorsement, but did not request a continuance (T.Tr.1466-79). Counsel wanted time to investigate this allegation and thought they requested a continuance(Tr.951-53,1064).

Brandy Kulow had seen Brandon with a gun(T.Tr.1859). He pulled it out and pointed it at her, scaring her. *Id.*

⁵ Judge Sweeney refused to consider Salazar's admission that he was the actual shooter on the farm road(Ex.65), although he was an unavailable witness at the evidentiary hearing, invoking his right against self-incrimination(L.F.618).

Joyce Kellum, the victims' mother, testified about the impact the deaths had on her and her family, especially her grandchildren(T.Tr.1872-76). Several people, including the court reporter, cried(Tr.972,1079).

The defense called four witnesses in penalty phase, Dr. Bland, Brandon's parents, and a friend who had met Brandon seven months before the killings(T.Tr.1876-1935).⁶ Counsel wanted to present a full and complete story of Brandon's life(Tr.990,1082-83). But they had no time and the penalty phase suffered(Tr.990,1064,1083).

The jury recommended death(T.Tr.1956). The court sentenced Brandon (T.Tr.1985). He appealed to this Court; counsel raised seven issues, three of which were unpreserved. *State v. Hutchison*, 957 S.W.2d 747(Mo.banc1997). This Court denied relief. *Id.*

The prosecutors were satisfied with Lopez's testimony(R.Tr.236-37) so, after Brandon's trial, they extended Lopez a formal offer, consistent with George's earlier discussions, agreeing to reduce the charges from first-degree to second-degree murder on each count and ten years for armed criminal action, to be served concurrently, for a total of thirty years(R.Tr.234-35,237,248,Ex.DD).⁷

Lopez rejected the offer, wanting less time(R.Tr.240). If the state agreed to 20 years, Lopez would serve 17(R.Tr.240). The prosecutors did not believe a 17-year sentence

⁶ The testimony is further detailed in the argument portion of the brief.

⁷ State's Exhibit DD and GG show the State extended a formal plea offer to Lopez while Price represented him, contrary to Price's testimony that he never received a plea offer during his representation(R.Tr.227-28,230).

was appropriate given the nature of the crime(R.Tr.240). They wrote Price, telling him they believed their original 30-year offer was reasonable and they were sticking to it(R.Tr.241,Ex.GG). If Lopez did not accept the offer, it would be withdrawn, since Salazar's trial was scheduled for June, 1997(R.Tr.242).

Lopez's family obtained a large sum of money(R.Tr.130). Lopez's mother or sister called Dee Wampler and asked him to represent Lopez on the double murder case(R.Tr.130). Wampler said he was not interested(R.Tr.130). However, when she told him that Freddy's sister had just won \$23 million in the California lottery, Wampler responded, "I'll be over there in 45 minutes"(R.Tr.130). Wampler and Sean Askinosie entered on April 7, 1997(R.Tr.130) and Price withdrew(Ex.69,at3). Wampler's firm consulted with Price(R.Tr.132,151-52,Ex.86). Price told them that George agreed to a 30-year sentence, but Lopez had rejected it(R.Tr.152,Ex.86). Price argued for 20 years, but George refused(R.Tr.152). Price was concerned because Lopez had changed his story so many times, as new facts arose, he incorporated them into his story(R.Tr.162).

Salazar's attorneys scheduled a deposition of Lopez for use in Salazar's case (R.Tr.243). Wampler and Askinosie appeared, saying Lopez would not testify (R.Tr.243, Ex.88, at 31-33). The prosecutors withdrew their offer and noticed their intent to seek death against Lopez(R.Tr.243,Ex.88 at 31-34,37-38,40-41).

The State tried Salazar and Lopez did not testify(Ex.62A-I). Both George and Judge Sweeney recognized that Lopez's testimony was not critical in Salazar's case, like Hutchison's, because Salazar had confessed(Ex.88, at 35,Ex.ZZ, at 38). Judge Sweeney

suspected that Lopez might minimize Salazar's actions since they were friends and both were Hispanic(Ex.ZZ, at 38).

At Salazar's trial, the evidence showed Lopez's active involvement and culpability (Ex.62E,at841-42,Ex.62H,at1452-53). After Salazar shot the victims in the garage, Lopez instructed him to get the .22 which belonged to Lopez's brother, Daniel, and ammunition from Salazar's bedroom(Exs.62E and 62H at 841,843,997,1452-53). Lopez had the murder weapon on the dirt road where the victims were killed(Ex. Exs.62E and 62H at 841,842,1452-53). Lopez yelled at Salazar and directed activities (Exs.62E and 62H at 841,1452-53). Lopez was at least ten years older than Salazar, who was 18 (Ex.62H at 1455). The jury found Salazar guilty of first degree murder, but imposed life without parole(Ex.62J at 1747).

Wampler and Askinosie called Steven Hays,⁸ an attorney who represented the victims' children(R.Tr.73,75,78). Hayes returned their calls and spoke with Askinosie (R.Tr.79). Askinosie said he was representing Lopez and wanted to propose a friendly wrongful death lawsuit(R.Tr.79-80). Askinosie thought Lopez's family could come up with \$200,000.00 to divide among the four children(R.Tr.83). Hays knew that Lopez's defense attorneys were hoping that by paying the family money, they would get a lesser charge(R.Tr.82).

⁸ Two children had been subpoenaed as witnesses in the criminal cases(R.Tr.75-77). They retained Hays to determine if they would have to testify(R.Tr.75-77).

Hays contacted the family(R.Tr.82-83). Hays called Askinosie and told him the family was interested but Hays' \$30,000.00 fee would have to be added to the \$200,000.00(R.Tr.84). Askinosie agreed and said that Dan Sivils, another attorney, would handle the matter(R.Tr.84).

On September 10, 1997, Judge Sweeney wrote to the prosecutor and Wampler(A-2-3,Ex.OO,R.S.L.F.45-46). The judge stated:

Further, I am aware there had been talk that *because some type of monetary award might be forthcoming to the children of the Yates', it might affect any ultimate disposition.*⁹ If that is a possibility, it should be done now and not later. Having set aside 10 days for motions, voir dire and trial, I need the days for other litigants if a resolution can be had. If Mr. Wampler has a proposal, it should be submitted to Mr. George by September 29. That should be conveyed to the victims by October 10. A response thereto should be made by November 1. If acceptable to the daughters of Ronnie Yates, there

⁹ Judge Sweeney testified that he was unaware that payment of money was part of the plea agreement(Ex.ZZ,at 12-13,20-21). He thought that any correspondence in Lopez's case would be in the official court file. *Id.* at 39-40. However, Judge Sweeney's 9/10/97 letter was not in the court file(R.Tr.297,298-99). It first surfaced, attached to the State's Response and Suggestions in Opposition to Movant's Motion For Court Order to Produce All Documents Regarding Offers and Deals with Freddy Lopez, after the remand hearing (R.S.L.F.45-46).

needs to be a victim impact statement to that effect. For the children of Brian Yates, I assume the grandmother would have to agree and *a formal guardianship set up*. This could all take place before our scheduled motions on November 21, and Mr. Lopez could plead that date. If no resolution is reached by November 21, then the case will go to trial. I will expect Mr. George to make this clear to the victims. Mr. Wampler should make this clear to Mr. Lopez.

Id. (emphasis added).

Askinosie contacted Sivils to handle the settlement(R.Tr.47). Its terms were that Lopez would pay \$230,000 to the victims' family through a conservatorship(R.Tr.48). In exchange, the family would recommend that Lopez not receive more than a ten-year sentence(R.Tr.48-49). A contingency of the settlement was that Lopez actually receive a sentence of ten years or less(R.Tr.49). Hayes and Sivils discussed the agreement and the next day Sivils put the terms in writing(R.Tr.50-52,Ex.85, at 2,A-4). Sivils agreed to provide proof that he had the \$230,000 in his trust and the money would be paid to Hays' client if:

- a) your clients recommend to the prosecuting attorney in Lawrence County that Freddie Lopez receive no more than ten (10) years in prison for the wrongful deaths at issue in this case,
- b) that the recommendation is made to the prosecuting attorney prior to November 21, 1997, and

c) the sentencing judge actually sentences Freddie Lopez to a prison term not to exceed ten (10) years.

(A-4, Ex.85, at 2, R.Tr.51).

Joyce Kellum went to George's office and told him she was considering a settlement(Ex.88, at 47). She had always wanted death for all three defendants. *Id.* Kellum was emotional. She felt like she was selling out her boys, but she also wanted her grandchildren to receive something for their fathers' deaths. *Id.* at 47-48. Lopez would pay the family, but only if they recommended a ten-year sentence to the prosecutor. *Id.* at 49. Kellum said her family wanted Lopez to receive ten years so they could receive the money. *Id.*

George wanted at least 20-30 years for this double homicide. *Id.*, at 49, 58. When Wampler told him about the negotiations, George told him he would not be part of it. *Id.* at 49-50. Nevertheless, at the family's request, George agreed to a 10 year sentence. *Id.*, at 50, 57-58, Ex. B, attached to Lopez Plea Agreement(A-8). George recommended 10 years solely because the family asked him to so they could receive the money(Ex.88, at 57-58).

Sivils informed Hays that the plea and sentencing would take place on November 21, 1997(A-5,Ex.85 at 3). Sivils said:

I spoke with Shawn Askinosie this morning and he indicated that the judge has agreed to sentence Freddie Lopez on the same day as the plea, which is scheduled on November 21, 1997. I expect that I will have the \$230,000 in my trust account by tomorrow morning and not later than Thursday morning of this week. As soon as I have confirmation that the money is in my account,

I will let you know. In the meantime, I would appreciate it if you could share to me the recommendation that is going to be made by the family. I fully understand that you need to have confirmation that the money is in my account before the recommendation will become final and made to the judge.

(A-5,Ex.85 at 3).

On November 21, 1997, Lopez pled guilty to the reduced charge of second-degree murder with the understanding that he would receive ten years on each count, concurrent. *Id.* at 9,48. The state believed he was guilty of first-degree murder, but recommended ten years at the request of the victims' family. *Id.* at 9,27,28,38. Wampler requested a continuance for sentencing(Ex.79, at 33,R.Tr.159-60). Wampler could not recall why he requested a continuance, but upon seeing documents, said it seemed obvious the check had not arrived from a bank in California(R.Tr.160). On December 4, 1997, a cashier's check for \$230,000.00 was paid to Sivils' trust account(A-7,Ex.85, at 5). The next day, Sivils faxed a copy of the check to Hays(A-6-7,Ex.85, at 4-5). On December 10, 1997, the court sentenced Lopez to ten years on each count, to be served concurrently(Ex.79, at 48).

The following month, the paperwork was completed and Lopez paid the victims' family \$230,000 for his ten year sentence; \$200,000.00 for the victims and \$30,000.00 for their attorney, Hays(Ex.84).

Brandon challenged his conviction and sentence, filing a Rule 29.15 motion(L.F.9-14). The amended motion alleged constitutional violations(L.F.20-156).

The original evidentiary hearing focused on trial counsel's ineffectiveness, primarily their failure to investigate and prepare for penalty phase. Brandon's mother smoked

marijuana with her sons when they were small boys(Tr.413). An uncle sexually abused Brandon when he was only ten(Tr.169-71,183,190-93,201-02,250,262,370,422). Brandon had difficulties in school, reading and writing poorly, and being placed in Special Education(Tr.187,197-98,257-59,Ex.53 at 52). Other kids made fun of him, which he hated(Tr.137,168-69,198-99,258). Brandon turned to alcohol and drugs (Tr.184-85,193,208-09,261,268-69,Ex.53 at 11,13,16-17,18,20-21,27,38-40,50). This was not unique to Brandon; his family was replete with alcoholics and substance abusers (Tr.180,209-10,253,389,413,414,415,426-27,461).

By 16, Brandon was being treated by a psychiatrist(Tr.382,Ex.53). Dr. Jarrold Parrish concluded that he suffered from Bipolar Disorder(Tr.383,Ex.53 at 11-13). He tried to treat him with Lithium(Tr.390). Brandon tried to quit drinking and using drugs, attending three treatment centers(Exs.Tr.184-85,193,261,268-69,393,395,399,403, 406,412). Parrish thought Brandon was a good kid, with many problems(Ex.53 at 19,50,Tr.383,418).

For the postconviction case, several experts analyzed and explained Brandon's problems(Tr.294-657,659-742,743-87,790-853,854-905).¹⁰ They relied on background material, including school, medical, psychiatric, law enforcement and jail records(Exs.3-15,Tr.325). Brandon has mild brain damage(Tr.440,696,969). He suffers from a Learning Disorder, Attention Deficit Hyperactivity Disorder, Bipolar Disorder, Polysubstance Dependence and was sexually abused as a child(Tr.341-42,450-465). His functioning

¹⁰ The expert testimony is further detailed in Point V, *infra*.

places him at the bottom 9% of the population(Tr.442-43,868-86).¹¹ His mental age is 8 to 12 years(Tr.444). These deficits impacted on Brandon's ability to deliberate and to appreciate the criminality of his conduct(Tr.481-83,499). They made him susceptible to the domination of others, like Lopez and Salazar(Tr.350,359,362,381,394,473,476,477,827). He wanted desperately to fit in and was easily manipulated and used(Tr.369,476-77,827).

The experts' opinions were consistent with Brandon's family and friends' views. They knew Brandon was a follower, not a leader(Tr.53,66,81,136-37,161,185,213,266, 914). They knew Lopez was a controlling, bad influence(Tr.51-53,66,73,81,141,188, 213,277-78,915-16). They cared for Brandon and thought he was a good person(Tr.48-49,97,138,908-09). Trial counsel agreed, saying, "he's a good kid"(Tr.1050).

Judge Sweeney denied the 29.15 motion(L.F.755-809,814). On remand, Judge Darnold denied the claims regarding Lopez's deal and that justice was for sale(R.L.F.108-126). He adopted the State's findings *verbatim*(R.L.F.86-107). Brandon's counsel moved to reopen the evidence, since the State had found the prosecutor's file and made arrangements for counsel to view it(R.L.F.127-36). It included a handwritten notation on a memo dated April 12, 1996, several months before Brandon's trial, "Plead on Brian -- second-degree murder/ACA 30 years concurrent"(R.L.F.135). Mr. Selby acknowledged the note was in his handwriting and the parties filed a stipulation regarding the note (S.R.L.F.1-

¹¹ Brandon's low intelligence contrasted with Salazar's, who had above average intelligence(Ex.62H, at 1593).

4). Judge Darnold denied the motion to reopen the evidence(R.L.F.15). This appeal follows.

POINTS RELIED ON

I. Justice for Sale

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied his rights that justice not be sold, Mo. Const., Art.I, Section 14, and to due process, equal protection and freedom from arbitrary and capricious sentencing, U.S.Const.,Amends.VIII,XIV, in that the prosecutor reduced Lopez's charges from first-degree to second-degree murder and offered him ten years and the judge sentenced Lopez to ten years, because Lopez agreed to pay the victims' family \$200,000.00, whereas Brandon, indigent, could not. A defendant's wealth is an arbitrary classification. Brandon was prejudiced because he received death, not because he is the most culpable, but because he could not pay the victims' family lots of money.

Kilmer v. Mun, 17 S.W.3d 545(Mo.banc2000);

Griffin v. Illinois, 351 U.S. 12(1956);

State v. Esdale, 45 So.2d 865(Ala.1950);

Bearden v. Georgia, 461 U.S. 660(1983);and

Mo. Const. Art. I, Sec. 14.

II.

Jury Misled About Whether Lopez Would Receive Leniency for his Testimony

The motion court clearly erred in denying Brandon's Rule 29.15 motion because Prosecutor George let the jury consider Lopez's false testimony that George was giving no deals and argued that Lopez convicted himself of first-degree murder and would be held responsible, denying Brandon due process, U.S. Const., Amend. XIV, in that George had agreed that if Lopez was a good state witness and testified truthfully, he would reduce charges from first-degree to second-degree murder and probably recommend 30 years. Brandon was prejudiced since Lopez was the only testifying witness present during the actual killing and he attributed statements and acts to Brandon, which if believed, made Brandon guilty of first-degree murder.

Banks v. Dretke, 540 U.S. ____ (2004);

Napue v. Illinois, 360 U.S. 264 (1959);

Giglio v. United States, 405 U.S. 150 (1972); and

Hayes v. State, 711 S.W.2d 876 (Mo. banc 1986).

III.

Counsel Did Not Investigate Brandon's Background

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied Brandon effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S.Const.,Amends.VI,VIII,XIV, in that trial counsel failed to investigate and present evidence of Brandon's background, including:

- A. Dr. Parrish, a psychiatrist, who treated Brandon when he was a teen for Bi-Polar Disorder, alcoholism, family history of drug and alcohol use, childhood sexual abuse, Attention Deficit Hyperactivity Disorder; and**
- B. School, medical, mental health, and jail records further documenting Brandon's troubled childhood, mental health problems, drug and alcohol addiction, sex abuse, ADHD, learning difficulties, memory problems, and other social and emotional problems that made Brandon easily influenced by others and a follower.**

Counsel's failure to investigate and present this evidence was unreasonable. They wanted to investigate, but spent their time on guilt-phase issues. Brandon was prejudiced because, had the jury heard this mitigating evidence, a reasonable probability exists that they would have imposed a life sentence.

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

Williams v. Taylor, 120 S.Ct.1495(2000);

Carter v. Bell, 218 F.3d 581(6thCir.2000);and

Eddings v. Oklahoma, 455 U.S. 104(1982).

IV. Continuance Needed to Prepare Mitigation Case

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied Brandon effective assistance of counsel, due process, equal protection, and freedom from cruel and unusual punishments, U.S.Const.,Amends. V,VI,VIII,XIV, in that the trial court abused its discretion and appellate counsel was ineffective for not raising the trial court's error in overruling the continuance motion:

- 1) the claim had significant merit since trial counsel lacked time to investigate
and prepare for the penalty phase;**
- 2) the law supported the claim;**
- 3) the claim was preserved; and**
- 4) appellate counsel pursued weaker issues, including three plain error claims, and claims requiring an abuse of discretion to warrant relief.**

Brandon was prejudiced because, had the claim been raised, a reasonable probability exists that this Court would have granted a new trial, and with a continuance, counsel could have presented a substantial amount of mitigation, creating a reasonable probability of a life sentence.

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

State v. Whitfield, 837 S.W.2d 503(Mo.banc1992);

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

Williams v. Taylor, 120 S.Ct.1495(2000).

V.

Counsel Failed to Effectively Consult and Present Expert Testimony

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied him effective assistance of counsel, due process and non-arbitrary and capricious sentencing, U.S.Const.,Amends.V,VI,VIII,XIV, in that Dr. Bland failed to conduct an adequate evaluation and trial counsel failed to:

- 1. provide Dr. Bland any background information, refer any mitigation questions, or follow-up on any information in Bland's report;**
- 2. investigate and present evidence about:**
 - a) Brandon's learning disability, ADHD, Bi-Polar Disorder, Polysubstance Dependence, and Sexual Abuse that substantially impaired Brandon, rendering him incapable of deliberating and mitigating his conduct;**
 - b) neuropsychological evidence of Brandon's brain damage and inadequate functioning;**
 - c) pharmacological testimony of Brandon's drug and alcohol addiction and its effects on him;**
 - d) Brandon's learning disabilities and the extent of his deficits;**
 - e) childhood development expert to explain Brandon's childhood, the effects of sexual abuse, and how and why Brandon turned to alcohol and drugs.**

This mitigation would have reduced Brandon's culpability, reasonably likely resulting in a life sentence.

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

Wallace v. Stewart, 184 F.3d 1112(9thCir.1999);

Williams v. Taylor, 120 S.Ct.1495(2000);and

Glenn v. Tate, 71 F.3d 1204(6thCir.1995).

VI. Brandon's Family

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied Brandon effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S.Const.,Amends.VI,VIII,XIV, in that trial counsel failed to investigate and present evidence of Brandon's background, including: his mother-Lorraine, his father-Bill, his brother-Matt, and other relatives, Marilyn Williamson, Shawna Alvery, and Jeff Beall, who would have testified about the family history of alcoholism, mental illness, Brandon's childhood, including his difficulties in school, sexual abuse, move from Fillmore to Palmdale, alcohol and drug use, the family's financial problems, and Lopez's domination and influence on Brandon. Counsel's failure to investigate and present this evidence was unreasonable. They wanted to investigate, but spent their time on guilt-phase issues. Brandon was prejudiced because, had the jury heard this mitigating evidence, a reasonable probability exists that they would have imposed a life sentence.

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

Williams v. Taylor, 120 S.Ct.1495(2000);

Eddings v. Oklahoma, 455 U.S. 104(1982);and

Collier v. Turpin, 177 F.3d 1184(11thCir.1999).

VII. Lopez's Domination and Control over Brandon

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied Brandon effective assistance of counsel, due process and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV, in that counsel failed to investigate and present testimony of Frankie Young (Smith), Terry Ferris, Brandy Kulow (Morrison), Marcella Hillhouse, and Phillip Reidle that Lopez was a drug dealer who bragged about his gang, showed-off his stab wounds, considered Salazar his close gang brother, hit-man and enforcer, dominated and controlled Brandon; Lopez instigated John Galvan's stabbing and Brandon was sorry it happened; Lopez tried to force Brandon to shoot Marcella Hillhouse, but he refused; and the victims were known as heavy drug users of marijuana, crank and pills. Brandon was prejudiced because this evidence would have refuted the State's theory that Brandon was in charge, deciding to kill the Yates, and would have provided mitigation supporting a life sentence.

State v. Herrera, 850 P.2d 100(Az.1993);

Glenn v. Tate, 71 F.3d 1204(6thCir.1995);

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

Williams v. Taylor, 120 S.Ct. 1495(2000).

VIII. Counsel's Failure to Object to Prejudicial Error

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied Brandon effective assistance of counsel, due process and freedom from cruel and unusual punishment, U.S. Const., Amends., VI, VIII, XIV, in that trial counsel failed properly to object to:

1. prosecutor's opening statement that Yates was "sprawled out there like Christ crucified on the cross;"
2. closing argument that Troy Evans, the one man linking all three defendants to the crime, was destroyed, suggesting he was killed to eliminate him as a witness;
3. closing argument that Lopez would receive no deal although, if he testified favorably for the State, his charges would be reduced from first to second-degree murder and he would receive a term of years;
4. the State's late endorsement of penalty phase witness, John Galvan; and
5. expert opinion that Brandon was competent and not suffering from a mental disease or defect, which was irrelevant and inadmissible in penalty phase.

These errors prejudiced Brandon, denying him a fair trial and a reliable sentencing, and a reasonable probability exists that, had counsel properly objected, reversal and a new trial would have resulted.

Kenner v. State, 709 S.W.2d 536(Mo.App.E.D.1986);

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

State v. Storey, 901 S.W.2d 886(Mo.banc1995);and

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

IX. Brandon's Death Sentence is Disproportionate

The motion court clearly erred in rejecting Brandon's claim that this Court's proportionality review denies due process and freedom from cruel and unusual punishment, U.S.Const.,Amends.VIII,XIV, because: this Court fails to consider codefendants' sentences, Salazar, life without parole, and Lopez, ten years, even when they are more or equally culpable; *de novo* review should apply on appellate review of death sentences; this Court's database does not comply with §565.035.6 and omits numerous cases; and this Court fails to consider all similar cases required by §565.035.3(3).

Parker v. Dugger, 498 U.S. 308(1991);

Richmond v. Lewis, 506 U.S. 40(1992);

Cooper Industries v. Leatherman Tool Group, Inc., 532 U.S. 424(2001);

Palmer v. Clarke, 293 F.Supp. 1011,1041-42(D.Neb.2003);and

Section 565.035.

X. Penalty Phase Instructions

The motion court clearly erred in denying Brandon's claim that jurors do not understand penalty phase instructions and counsel failed to object to them denying Brandon due process, effective assistance of counsel and individualized, non-arbitrary or capricious sentencing, U.S.Const.,Amends.V,VI,VIII,XIV, in that counsel believed the instructions were objectionable, but unreasonably failed to offer evidence to challenge them, and Brandon was prejudiced because the less jurors understand the instructions, the more likely they are to impose death.

Boyde v. California, 494 U.S.370(1990);

Free v. Peters,12 F.3d 700(7th.Cir.1993);

Gray v. Lynn, 6 F.3d 265(5th.Cir.1993);and

State v. Wheat, 775 S.W.2d 155(Mo.banc1989).

XI. Reasonable and Necessary Litigation Expenses

The motion court clearly erred in denying Brandon's 29.15 motion and thus denied due process, U.S.Const.,Amend. XIV, and Rule 29.16(d), in that the State Public Defender failed to provide counsel reasonable and necessary litigation expenses, money to investigate witnesses and records located in California where Brandon and his codefendants grew up and spent most of their lives, evidence relevant to claims from both guilt and penalty phases.

Ford v. Wainwright, 477 U.S. 399(1986);

Wolff v. McDonnell, 418 U.S. 539(1974);

State v. Hunter, 840 S.W.2d 850(Mo.banc1992);

State v. Ervin, 835 S.W.2d 905(Mo.banc1992); and

Rule 29.16(d).

ARGUMENTS

I. Justice for Sale

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied his rights that justice not be sold, Mo. Const., Art.I, Section 14, and to due process, equal protection and freedom from arbitrary and capricious sentencing, U.S.Const.,Amends.VIII,XIV, in that the prosecutor reduced Lopez's charges from first-degree to second-degree murder and offered him ten years and the judge sentenced Lopez to ten years, because Lopez agreed to pay the victims' family \$200,000.00, whereas Brandon, indigent, could not. A defendant's wealth is an arbitrary classification. Brandon was prejudiced because he received death, not because he is the most culpable, but because he could not pay the victims' family lots of money.

“Justice shall be administered without sale, denial or delay,” Article I, Section 14, Missouri Constitution. This is one of the most basic principles upon which our criminal justice system is founded. But justice was for sale here. Brandon received death, while his co-defendant, Lopez, bought a 10-year sentence, paying the victims' family \$200,000.00. Whether someone lives or dies should not depend on their ability to pay.

Brandon alleged that justice was for sale, violating Mo.Const.,Art. I, Section 14, and Brandon's federal constitutional rights to due process, equal protection and the Eighth Amendment(L.F.97-98). Evidence presented at the remand hearing proved this claim.

Lopez's attorneys contacted Hays to determine whether they could pay the victims' family \$200,000.00 in exchange for their recommendation to the prosecutor that he receive a 10-year sentence(R.Tr.73,75,78,79-80,82,83). They agreed. The terms were that Lopez would pay the victims' family through a conservatorship(R.Tr.48). In exchange, they would recommend that Lopez not receive more than 10-years(R.Tr.48-49). Lopez would pay only if he actually were sentenced to ten years or less(R.Tr.49). Lopez's attorney wrote the terms. He agreed to provide proof that he had the \$230,000 in his trust account, which would be paid to Hays' clients if:

- a) your clients recommend to the prosecuting attorney in Lawrence County that Freddie Lopez receive no more than ten (10) years in prison for the wrongful deaths at issue in this case,
- b) that the recommendation is made to the prosecuting attorney prior to November 21, 1997, and
- c) the sentencing judge actually sentences Freddie Lopez to a prison term not to exceed ten (10) years.

(A-4,Ex.85,at 2,R.Tr.51).

The terms were met. Joyce Kellum asked the prosecutor to recommend 10 years so her family could get paid(Ex.88, at 47). She had always wanted death for all three defendants and felt like she was selling out her sons, but she also wanted her grandchildren to receive something for their fathers' deaths. *Id.* at 47-48. Lopez's family would pay them, but only if they recommended 10 years to the prosecutor. *Id.* at 49.

George, the prosecutor responsible for charging decisions, agreed to reduce the charges from first to second-degree murder and to concurrent 10 year sentences(Ex.81, Ex.79, at 9, Plea Exs.A and B, A-8-11). The prosecutor did not like this agreement, 10 years was less than he thought Lopez deserved, and he made the recommendation at the victims' request so they could get paid(Ex.88, at 49,57-58). The whole thing left a "bad taste in [his] mouth." *Id.* at 50.

Judge Sweeney accepted the agreement and sentenced Lopez to ten years(Ex.79, at 33,48). Judge Sweeney knew, at least two months before the plea, that the prosecutor's recommendation was "*because some type of monetary award might be forthcoming to the children of the Yates'*" (A-2-3,Ex.OO,R.S.L.F.45). Lopez pled on November 21, 1997, but his sentencing was continued until after he paid up(Ex.79,at 33,R.Tr.159-60). On December 4, 1997, a cashier's check for \$230,000.00 was paid into Sivils' trust account (A-7,Ex.85, at 5). The next day, Sivils faxed a copy of the check to Hays(A-6,Ex.85,at 4). On December 10, 1997, the court sentenced Lopez to concurrent ten-year sentences (Ex.79,at 48).

The following month, the paperwork was completed and, as agreed, Lopez paid \$230,000.00 for his ten year sentence; \$200,000.00 for the victims and \$30,000.00 for their attorney(Ex.84).

Despite this evidence, Judge Darnold denied the claim, adopting the State’s proposed findings verbatim(R.L.F.86-107,108-26).¹² He concluded that Lopez reached a civil settlement with the victims’ families in which the family agreed to recommend a ten year sentence to the prosecution(R.L.F.122). He found that Brandon failed to prove the prosecutor or court’s involvement in the civil case(R.L.F.122-24). He acknowledged that George did make “the ten year recommendation on Lopez against his better judgment and only because the victims’ family made the request” and Judge Sweeney “went along with the recommendation only because the prosecutor indicated that was what the victims’ family wanted”(R.L.F.123). He also found that wealth is not a suspect class for equal protection analysis, Brandon failed to prove he is indigent, and he is not similarly situated to Lopez (R.L.F.124-25).

Standard of Review

The motion court’s findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo.banc2000); Rule 29.15. Findings and conclusions are “clearly erroneous” if, after reviewing the entire record, the court has the definite and firm

¹² This Court should give little deference to the findings drafted by the State. *See, United States v. El Paso Natural Gas Co.*, 376 U.S. 651,656, n.4(1964), criticizing the practice of judges merely adopting a party’s proposed findings. *See also, State v. Griffin*, 848 S.W.2d 464, 471(Mo.banc1993)(the judiciary “should not be a rubber-stamp for anyone”); and *State v. Kenley*, 952 S.W.2d 250, 281(Mo.banc1997)(Stith, J.,dissenting) (criticizing the court’s adoption of state’s findings and failure to exercise independent judgment).

impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo.banc1996). The record shows clear error.

Missouri Constitution: Justice for Sale

Article I, Section 14 of the Missouri Constitution provides: “that the courts of justice shall be open to every person and certain remedy afforded for every injury to person, property or character, and that right and *justice shall be administered without sale*, denial or delay.”(A-1)(emphasis added). This constitutional provision stems from the *Magna Carta* provision that “[t]o none will we sell, to none will we deny, delay, right or justice.” *Kilmer v. Mun*, 17 S.W.3d 545, 547(Mo.banc2000). Article I, Section 14’s language has been strengthened since its original adoption in 1820. *Id.* at 548. The original language, “. . . justice *ought* to be administered without sale . . .” was amended twice, first to “should be” and later to “shall.” *Id.* This Court has found the provision is not simply aspirational, but is mandatory in tone and substance. *Id.*

Few cases have challenged the sale of justice claim since it rarely occurs. More than 100 years ago, this Court found that a homicide defendant’s poverty and inability to pay or secure the costs afforded the clerk no excuse to refuse to prepare the transcript for the defendant’s appeal. *State v. McCarver*, 20 S.W. 1058 (Mo.1893). See also, *Griffin v. Illinois*, 351 U.S. 12, 19(1956)(plurality opinion), invoking *Magna Carta*’s language to emphasize that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

In *State v. Esdale*, 45 So.2d 865,867-68(Ala.1950), the Court found that the benefits of probation and suspension of sentence are not the subject of bargain and sale to

be conditioned on payment of costs and fees assessed as an incident to prosecution. The Court interpreted Alabama's 1901 Constitution, which provided that "justice shall be administered without sale, denial or delay." *Id.* at 868(citations omitted). Like the *Kilmer* Court, *Esdale* traced the constitutional language to the *Magna Carta* and the abhorrence of payment for justice. *Esdale*, at 868.

Here, Lopez received 10 years only because he paid \$200,000.00 to the victims' family and \$30,000.00 to their attorney. Although, the payment of money was not Prosecutor George's idea, he recommended 10 years, at the victims' family's request, so they could get paid. George was not bound by the family's wishes, since they could not dictate his charging decisions. *State v. Barnett*, 980 S.W.2d 297, 308(Mo.banc1998). "The basic tenet of the criminal justice system [is] that prosecutions are undertaken and punishments are sought by the state on behalf of the citizens of the state, and not on behalf of particular victims or complaining witnesses." *Id.* See also, *State v. Jones*, 979 S.W.2d 171, 179(Mo.banc1998)(trial court need not follow the victims' family's wishes). Without George's action reducing charges from first to second-degree murder (Ex.81) and his 10-year recommendation, the pay-off would not have happened. He was the prosecutor; he alone controlled the charging decision.

The agreement also was made with the judge's knowledge and approval, as he informed the parties in writing two months before the plea(A-2-3,Ex.OO,R.S.L.F.45-46). He even suggested a guardianship for the younger children. *Id.*

The record refutes Judge Darnold's finding that the prosecutor and the judge lacked involvement in selling justice. Lopez could not have bought a ten-year sentence unless

George recommended it and Judge Sweeney actually accepted the plea agreement and gave him ten years. While the judge and prosecutor did not make the sale, they brokered the deal.

Unfortunately, since Brandon was not wealthy, he could not pay the victims' family for a lesser sentence. Brandon was poor(Tr.279). His parents originally hired Dee Wampler(Tr.1043), who later represented Lopez and arranged the money deal. Brandon's parents paid Wampler \$15,000.00, but could not afford Wampler's additional fees, so Wampler referred the case to Cantin and Crosby(Tr.279-80,1086). The Hutchisons paid \$5-6,000.00 in additional fees, but had no more for experts or other expenses (Tr.983, 1047-48). Public defenders represented Brandon throughout the postconviction and appellate proceedings.

“There can be no equal justice where the kind of trial [or sentence] a man gets depends on the amount of money he has.” *Griffin, supra*. Lopez bought his 10-year sentence. Since Brandon could not afford to pay, he got death.

Federal Constitutional Rights

The motion court concluded that wealth is not a suspect class for equal protection analysis; Brandon failed to prove his indigent status; and that he was not similarly situated to Lopez(R.L.F.124-25). The court rejected his claims that he was denied equal protection, due process and to be free from the arbitrary imposition of death, under the 5th, 8th, and 14th Amendments to the Constitution. *Id.* These findings are clearly erroneous and do not square with Supreme Court jurisprudence.

The Court has “long been sensitive to the treatment of indigents in our criminal justice system.” *Bearden v. Georgia*, 461 U.S. 660, 664(1983). Thus, it applied the principle of “equal justice” to strike down a state practice of granting appellate review only to persons able to afford a trial transcript. *Griffin v. Illinois*, 351 U.S. 12, 19(1956) (plurality opinion). See also, *Douglas v. California*, 372 U.S. 353(1963)(indigent entitled to counsel on first direct appeal); *Roberts v. LaVallee*, 389 U.S. 40(1967)(indigent entitled to free transcript of preliminary hearing for use at trial); *Mayer v. Chicago*, 404 U.S. 189(1971)(indigent cannot be denied an adequate record to appeal a conviction under a fine-only statute); *Williams v. Illinois*, 399 U.S. 235(1970)(state cannot subject a certain class of convicted defendants to imprisonment beyond the statutory maximum because they are too poor to pay the fine).

Most of these decisions used an equal protection framework, in which the issue is whether the State has “invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.” *Bearden*, 461

U.S. at 665. The issue also can be decided under the Due Process Clause, analyzing the fairness of relations between the criminal defendant and the State. *Id.*

Even if the motion court correctly found that wealth is not a suspect class, strict scrutiny review nonetheless applies if the unequal treatment impinges on a fundamental right of liberty, like freedom from physical restraint. *In re Care and Treatment of Norton*, 123 S.W.3d 170, 173, n.10 (Mo.banc2003). Thus, strict scrutiny should apply where defendants receive different sentences according to their ability to pay. To pass strict scrutiny review, the action must be justified by a “compelling state interest” and be narrowly drawn to meet that interest. *Id.* If strict scrutiny does not apply, the unequal treatment nonetheless must be rationally related to a legitimate state interest. *Id.* Under either standard, the disparate treatment afforded Brandon and Lopez cannot stand.

In *Bearden*, the question was whether a sentencing court could revoke a defendant’s probation for failure to pay a fine and restitution, absent evidence and findings that he was responsible for the failure or that alternative forms of punishment were inadequate. *Id.* The Court held that the State could not deprive the probationer of his conditional freedom simply because he could not pay the fine. *Id.* at 672-73. That would contravene the 14th Amendment’s requirement of fundamental fairness. *Id.* States cannot punish a person more harshly just because he is poor. *Id.* at 672.

Thus, reducing charges and sentencing Lopez to 10 years because he could pay the victims’ family \$200,000.00, while Brandon received death because he could not pay, was fundamentally unfair. Under either strict scrutiny or rational basis, the State cannot justify this disparate treatment. George said “the only reason I’m making this recommendation,

Judge Sweeney, is the family has asked me to recommend ten years on second degree murder because there has been money.”(Ex.88, at 57-58). George did not think it was fair:

I don't believe someone who is involved in the murder of two people – I mean, my general recommendation on murder in the second degree is a 15 year sentence, at the very minimum when somebody is killed, and *I thought this was deserving of 20 to 30 years if he pled guilty to a second degree murder and this was against my recommendation as a prosecuting attorney that's trying to set a standard in Lawrence County for what is going to be done. And I think that goes to the fundamental fairness to everybody that comes in front of this court. We try to treat our defendants equally within that perimeter [sic] based on their involvement in the case.*

Id. at 58 (emphasis added). George's view was consistent with his earlier refusal to lower their offer from 30 to 20 years; the state did not believe 17 years in prison was enough for Lopez(R.Tr.240-41,Ex.GG). The only factor that changed was that Lopez was now paying the family \$200,000.00.

Contrary to the motion court's finding, George believed Lopez was very culpable and should receive more than ten years. The evidence supported his view. When Lopez was charged with first-degree murder, he was 28, the oldest of the three defendants (T.Tr.1074). He was a founding member of the violent Party Boys gang, a self-admitted drug dealer, with numerous prior convictions(T.Tr.1074).

Lopez actively participated in the crime. Salazar shot the victims at Lopez's garage(T.Tr.1106) with guns kept at Lopez's house(T.Tr.1090-93,1200). Lopez gave the

victims drugs, having sold drugs earlier that evening(T.Tr.1080,1097). He provided the car that transported the victims to the farm road where they were shot again(T.Tr.1113, 1116,1203). He accompanied his co-defendants to the farm road(T.Tr.1123). He told his co-defendants what to do with the guns, drug paraphernalia, and other incriminating evidence(T.Tr.1118,1121,1122,1201,1218-19). He ordered Hutchison and Salazar to clean up his shop(T.Tr.1122). He told them to make sure no bullets were left there (T.Tr.1139,1201). He admitted burning his shoes, something unnecessary if he were not involved(T.Tr.1234). Lopez ensured the others kept quiet(T.Tr.1144,1146). After the shooting, he called California, making arrangements to get the others out of town (T.Tr.1147). He gave Salazar \$300 to leave(T.Tr.1152).

George admitted no rational basis existed for treating Lopez disparately by giving him such a light sentence, while similar defendants received greater punishment. The motion court clearly erred in not finding this unequal treatment violated Brandon's constitutional rights to due process and equal protection.

The Eighth and Fourteenth Amendments require heightened reliability in determining a death sentence. *Woodson v. North Carolina*, 428 U.S. 280,305(1976). Who lives or dies should not depend on arbitrary factors like wealth. *McCleskey v. Kemp*, 481 U.S. 279,309, n 30(1987); *Wayte v. United States*, 470 U.S. 598,608(1985)(race is improper factor in sentencing). Yet, here, George admitted that money was the only reason he treated Lopez so differently. Had Brandon been able to pay the victims' family, he could have avoided death too. This Court cannot allow his death sentence to stand, since it was based on the arbitrary factor of wealth.

The court clearly erred in denying relief. This Court should reverse for a new trial, in which the state cannot seek death.

**II. Jury Misled About Whether Lopez Would Receive
Leniency for his Testimony**

The motion court clearly erred in denying Brandon's Rule 29.15 motion because Prosecutor George let the jury consider Lopez's false testimony that George was giving no deals and argued that Lopez convicted himself of first-degree murder and would be held responsible, denying Brandon due process, U.S. Const., Amend. XIV, in that George had agreed that if Lopez was a good state witness and testified truthfully, he would reduce charges from first-degree to second-degree murder and probably recommend 30 years. Brandon was prejudiced since Lopez was the only testifying witness present during the actual killing and he attributed statements and acts to Brandon, which if believed, made Brandon guilty of first-degree murder.

Lopez lied to the jury, saying that the prosecutor was giving no deals (T.Tr.1162, 1242,1243). George stood silently and did not correct this lie. Then in argument, George further misled the jury, arguing Lopez was still charged with first-degree murder and not escaping liability(T.Tr.1820-21). The jury was entitled to know about Lopez's on-going interest in pleasing George with his testimony. George's use of false testimony and improper argument to gain a conviction denied Brandon due process.

Lopez's Continuing Interest In Helping the State

Before trial, counsel requested disclosure of any deals with testifying witnesses, including Lopez(T.Tr.139-43,235). The court ordered disclosure of formal or informal

agreements(T.Tr.143). George had plea discussions with Lopez's attorney, Price, and had told him that, if Lopez was a good witness at Brandon's trial, he would likely reduce the charges of first-degree to second-degree murder(T.Tr.142,Ex.88,at 17-30,R.Tr.207,209, 217). They had not reached an agreement on a term of years, but George contemplated 30 years. *Id.* Both prosecutors and Price emphasized they had not struck a "final" or "firm" deal(Ex.88, at 19,21,25,R.Tr.217,225-26,227-28,233,234). George admitted that prior to Brandon's trial they "were extending offers"(Ex.88 at30). Price conveyed these plea discussions to Lopez before he testified in Brandon's case(R.Tr.220, 229). Lopez knew that obtaining a deal depended on George's satisfaction with his testimony(R.Tr.220).

Lopez testified at Brandon's trial(T.Tr.1068-1252). He did everything possible to make Brandon the most culpable and to reduce his own involvement. Lopez said that after Salazar shot the victims in the garage, he wanted to call an ambulance, but Brandon said no(T.Tr.1110,1112-13). However, he had told his own attorneys that the Yates were dead at his garage when they put them in the trunk(R.Tr.163). Therefore, he would have no reason to call an ambulance.

At trial, Lopez told jurors that Brandon thought they should use Lopez's car to move the bodies, Brandon kicked Brian on the upper part of his body and Lopez tried to stop him, and Brandon had the gun and said, "we got to kill them, we got to kill them" (T.Tr.1113,1121,1129,1131,1133). This account differed from the evidence from Salazar's trial that Lopez had the murder weapon when they went to the farm road (Exs. 62E and 62H, at 841,842,1452-53).

Lopez claimed that he stayed in the car while Salazar and Brandon got out(T.Tr.1133). He claimed that after the Yates were shot on the road, Brandon tried to run them over, while Lopez took the steering wheel and swerved around them (T.Tr.1134).

Lopez was the lynchpin of the state's case. Salazar admitted shooting the victims at the garage. Brandon gave no statement and admitted no involvement. At most, the state had a circumstantial case based on Brandon's presence at the scene near the time of the crime, physical evidence linking him to the crime, and his flight to California. While this evidence was significant, it was not compelling.

Lopez's credibility was key. Counsel tried to impeach him with prior inconsistent statements(T.Tr.1162-68) and asked about any deals he got for his testimony. Lopez testified that he was still charged with two counts of first-degree murder, two charges of armed criminal action, and sale of methamphetamine(T.Tr.1161-62). He knew of no deals(T.Tr.1162,1242,1242-43). When pressed, Lopez said "the prosecutor is not giving no deals" [sic]. Lopez testified to clear his conscience and he prayed he got a deal(A-14-15,T.Tr.1242-43).

George did not correct Lopez's false testimony that he was giving no deals. Instead, he embellished it during his closing argument:

But we have an eyewitness that says he went along and he could have continued to lie about it if he'd wanted to. But remember this, ladies and gentlemen, *Freddy Lopez is charged with murder in the first degree too. He didn't get out of anything. If anything he convicted himself on the stand because he is responsible also.* He went along also.

(A-16,T.Tr.1820) (emphasis added). The jury convicted Brandon and assessed punishment at death(T.Tr.1836,1956).

The prosecutors were satisfied with Lopez’s testimony(R.Tr.236-37) so, after Brandon’s trial, consistent with earlier discussions, they agreed to reduce the charges from first-degree to second-degree murder on each count and to give ten years for armed criminal action, to be served concurrently, for a total of thirty years(R.Tr.234-35,237,248, Ex.DD). Lopez later pled to two counts of second degree murder and got ten years(Ex.79 at 9,48) See Point I, *supra*.

Brandon alleged that the state denied him due process, first, by not revealing the deal they actually had with Lopez; and second, by using false evidence to obtain a conviction(L.F.46-47). On remand, Judge Darnold heard evidence on this claim and adopted the state’s proposed findings(R.L.F.86-107,108-126). He found that Brandon failed to establish that Lopez had a “deal” before he testified, at most he hoped to receive favorable treatment if he testified truthfully(R.L.F.111-13). He concluded that, since there was no deal, *Napue*, *Giglio*, and *Hayes* did not apply(R.L.F.114).

This Court reviews the motion court’s findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822(Mo. banc 2000);Rule 29.15. The court clearly erred, because the jury was entitled to know the truth – that Lopez had every reason to believe he would receive leniency if his testimony satisfied George, and, therefore, he had every incentive to please the prosecutor with his testimony.

Due Process requires disclosure of exculpatory information, *Brady v. Maryland*, 373 U.S. 83,87(1963), including impeaching evidence, *United States v. Bagley*, 473 U.S.

667(1985). Under *Brady*, this Court must determine whether a reasonable probability exists that had jurors heard the impeaching evidence, the outcome would have been different. *Kyles v. Whitley*, 514 U.S.419(1995). The central issue is whether the confidence in the outcome is undermined. *Id.*

“It has long been established that the prosecution’s ‘deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.’” *Banks v. Dretke*, 540 U.S. ____, slip op. at 21(2004), quoting *Giglio v. United States*, 405 U.S. 150, 153(1972). The state may not stand silently and do nothing to correct its witness’ false testimony. *Napue v. Illinois*, 360 U.S. 264,269-70(1959). *Banks* reaffirms that a prosecutor’s duty to tell the truth is not limited to situations where a witness has a formal deal. The jury is entitled to know of a witness’s continuing interest in helping the State. *Banks, supra* at 29. Under *Napue*, a conviction “must be set aside if there is *any* reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97,103-104(1976).

In *Banks*, one of the state’s witnesses, Farr, was a paid informant and was afraid, that if he did not help the deputy and testify against Banks, he might be arrested on drug charges. *Id.* at 29. When he testified, Bank’s counsel asked whether, because of his previous drug related activity, Farr would “testify to anything anybody wanted to hear.” *Id.* Farr denied this. *Id.* After trial, the truth of his paid informant status was revealed. *Id.* The Court held the jury was entitled to know about Farr’s continuing interest in helping the prosecution. *Id.*

Like Farr, Lopez had a continuing interest in pleasing the state with his testimony against Brandon. Lopez knew the prosecutor would likely reduce the charges to second-

degree murder and give him a term of years, but only if he satisfied George with his testimony(R.Tr.220). Yet, Lopez lied, telling the jury that his attorney told him the prosecutor was giving no deals. The prosecutor did nothing to correct this lie, but further misled the jury, saying Lopez was not getting out of anything – he was still charged with first degree murder(T.Tr.1820). He led the jury to believe he would not reduce the charges or make Lopez any deal.

Banks shows that the motion court wrongly concluded that *Napue*, *Giglio* and *Hayes* were inapplicable. A prosecutor’s duty not to rely on false testimony extends beyond cases where a formal deal exists. It applies where a state witness has a continuing interest in pleasing the state. *Banks, supra* at 29.

In *Napue*, an important government witness in a murder prosecution testified that he had received no promise of consideration for his testimony. 360 U.S. at 265. In fact, the government had promised consideration. *Id.* Its failure to correct the witness’s false testimony denied *Napue* due process. *Id.* at 269-70. The government has an affirmative duty to correct false evidence when it appears, even if it did not solicit it. *Id.* at 269. This duty remains even when the false testimony goes only to the witness’s credibility. *Id.* The jury’s estimate of the witness’s truthfulness and reliability may well determine guilt or innocence. *Id.*

Similarly, in *Giglio, supra*, at 154, an important government witness testified that no one told him he would not be prosecuted on pending charges if he testified against *Giglio*. *Id.* In fact, a prosecutor had told him that if he testified, he would not be prosecuted. *Id.* at 152. The government’s conduct denied *Giglio* due process. “[T]his Court [has] made clear

that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’” *Id.* at 153. Citing *Napue*, the Court reiterated that “(t)he same result obtains when the State, although not soliciting the false evidence, allows it to go uncorrected when it appears.” *Id.*

In *Hayes v. State*, 711 S.W.2d 876, 876-77(Mo.banc1986), the defendant was charged with second-degree murder. Arnold, the victim’s companion, testified for the prosecution. *Id.* at 877. His assault charges, pending at the time of trial, were later dismissed. *Id.* The prosecution and Arnold had entered into an understanding that, for his testimony, the charges would be dismissed. *Id.* However, no one told Hayes’ counsel about this understanding. *Id.* The failure to disclose the agreement denied due process under *Brady v. Maryland*, 373 U.S. 83(1963) and *Napue, supra. Hayes, supra.*

Like *Hayes*, George watched Lopez testify to decide whether to reduce the charges and what sentence to recommend. If Lopez performed well, George would likely reduce the charges to second-degree murder and give him 30 years. George had a duty to correct Lopez when he testified George was giving no deals. Lopez’s testimony misled the jury.

Commonwealth v. Strong, 761 A.2d 1167(Pa.2000) is also instructive. Strong was convicted of first-degree murder and sentenced to death. *Id.* Strong and Alexander hitchhiked, the victim picked them up, and they killed him. *Id.* at 1169. Alexander agreed to cooperate and assist authorities in finding the body. *Id.* at 1170. Before trial, Strong requested the prosecution disclose any agreements. *Id.* The prosecutor maintained no deals existed. *Id.* At trial, Alexander denied that his testimony against Strong was in exchange for favorable treatment, although he also faced trial for the same murder and

kidnapping. *Id.* After trial, Alexander pled guilty to murder and kidnapping charges and received 40 months. *Id.* Strong was sentenced to death. *Id.*

At Strong's postconviction hearing, letters showed that Alexander's public defender and the District Attorney had been discussing an agreement before Strong's trial. *Id.* The motion court ruled that no actual deal was struck, so no material evidence was withheld under *Brady*. *Strong*, at 1170.

The Pennsylvania Supreme Court reversed. Under *Brady*, *Napue* and *Giglio*, "any implication, promise or understanding that the government would extend leniency in exchange for a witness's testimony is relevant to the witness's credibility." *Strong*, at 1171. *Brady* does not require a signed contract. *Id.* The prosecution discussed consideration, but followed its practice of avoiding entering into a plea agreement until after the testifying witness cooperated. *Id.* at 1172-73. The understanding that Alexander would be treated with considerable leniency for his testimony, although not articulated in an iron-clad agreement, implicated *Brady's* due process protections. *Strong*, at 1174.

Impeaching evidence that goes to a primary witness's credibility is critical evidence and is material, whether it is merely a promise or an understanding between the prosecution and the witness. *Id.* "Indeed, an unconsummated agreement can create a greater incentive for a witness to testify in a manner that he perceives to be favorable to the government." *Id.* at 1178 (Castille, J., concurring)(citing *State v. Lindsey*, 621 So.2d 618(La.Ct.App.1993)(promise of favorable consideration for testimony deemed credible gave witness "a direct personal stake" in defendant's conviction). "[T]hat a specific reward was not guaranteed through a promise or a consummated plea agreement, but was expressly

contingent on the state's good faith and satisfaction with [the witness's] testimony served only to strengthen any incentive to testify falsely in order to secure [the defendant's] conviction." *Strong, supra* at 1178, quoting *Bagley*, 473 U.S. at 683 (plurality opinion)(Blackmun, J.).

As in *Strong*, we know that the State and Lopez negotiated for his testimony against Brandon(T.Tr.142,Ex.88,at 17-30,R.Tr.207,209,217). If Lopez testified well, George would reduce charges to second-degree murder and he was thinking of recommending 30 years. *Id.* They understood that, for his testimony, Lopez would likely be treated with considerable leniency. Like Alexander, Lopez had every incentive to testify favorably for the prosecution. He had a direct personal stake in Brandon's conviction, to land a good outcome for himself(Ex.79,at 9,48).

Circumstantial evidence gave Lopez and Brandon coequal culpability. Both were at the scene of the shootings: first, at Lopez's garage, and second, on the farm road (T.Tr.1106,1123,1127,1133-34). Both had access to the guns kept at Lopez's house (T.Tr.1090-93,1200).

Much of the physical evidence, however, pointed to Lopez. They used his car to transport the victims(T.Tr.1113,1116,1203). Their blood was in his garage and his car (T.Tr.1011,1016,1019-20,1022,1024,1347-48,1637-38,1640-44,1660-61,1670-75,1677-78). Lopez burned his own shoes, afraid they would link him to the crime(T.Tr.1234). He had Brandon and Salazar clean his garage and instructed them to get rid of the gun and bullets(T.Tr.1118,1121-22,1201,1218-19). Lopez arranged for Salazar to travel to California and he gave him money to leave town(T.Tr.1147,1152).

Without Lopez's testimony, the only evidence against Brandon was his presence at the garage, some physical evidence, and his trip to California with Salazar. Guns were found wrapped in his shirt and blood was on him shortly after the offense(T.Tr.1032-36,1510,1540). While this evidence suggested his involvement in the homicide and the effort to cover up, it proved neither deliberation nor his active involvement in the killing. The crucial fact altering the balance between Lopez and Brandon was Lopez's testimony. Lopez put the gun in Brandon's hands at the moment of the murder; Lopez's credibility was decisive to the jury's finding Brandon guilty.

The jury was entitled to know the truth, that Lopez would likely receive leniency for his testimony. The state had a duty to correct his false testimony and not further mislead the jury with its argument. Under these facts, the false testimony and misleading argument could have affected the judgment of the jury. This Court should reverse and grant a new trial.

III. Counsel Did Not Investigate Brandon's Psychiatrist and Background Records

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied Brandon effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S.Const.,Amend.VI,VIII,XIV, in that trial counsel failed to investigate and present evidence of Brandon's background, including:

A. Dr. Parrish, a psychiatrist, who treated Brandon when he was a teen for Bi-Polar Disorder, alcoholism, family history of drug and alcohol use,

childhood sexual abuse, Attention Deficit Hyperactivity Disorder; and

B. School, medical, mental health, and jail records further documenting

Brandon's troubled childhood, mental health problems, drug and alcohol addiction, sex abuse, ADHD, learning difficulties, memory problems, and

other social and emotional problems that made Brandon easily influenced by others and a follower.

Counsel's failure to investigate and present this evidence was unreasonable. They wanted to investigate, but spent their time on guilt-phase issues. Brandon was prejudiced because, had the jury heard this mitigating evidence, a reasonable probability exists that they would have imposed a life sentence.

Brandon had three strikes against him when Cantin and Crosby agreed to represent him. They were inexperienced, had insufficient time, and little money to spend on his case. As a result, they did not follow-up leads and discover the most basic background

information. They obtained none of Brandon's school, medical, mental health, or jail records, documenting his troubled childhood and mental problems. Counsel was ineffective. A new penalty phase should result.

Dr. Bland reported to counsel that Brandon had seen a psychiatrist during his teen years in California from 1989 to 1993(Tr.979,Ex.12 at 3). Counsel did no follow-up and failed to contact the treating doctor, Parrish, before Brandon's trial(Ex.53 at 21-22(Tr.979-80,1042,1073). They did not request Parrish's treatment records. *Id.* Trial counsel admitted that they were not even aware of Parrish, despite Bland's report(Tr.979,1073).

Counsel candidly admitted that they would have liked more time to follow-up on the information in Bland's report(Tr.1029) and that they would have liked to present a full and complete life story for mitigation(Tr.1082-83). Yet, they obtained none of Brandon's background records(Tr.974-77,1030,1067-68). They only got some grade reports from Brandon's mother(Tr.976). Counsel acknowledged that they wanted the records and would have considered using them(Tr.1068,1030).

Motion Court's Findings

As to Parrish, the court ruled:

- 1) since he treated Brandon almost three years before the charged offense, the mitigating value of his testimony was undermined by its remoteness;
- 2) since he was unfamiliar with the facts of the case his opinion had little relevance;
- 3) he provided no opinion regarding Brandon's state of mind at the time of the crime, giving his testimony little relevance;

- 4) Brandon's family did not want the details of Brandon's sex abuse disclosed, thus, his testimony would have violated the patient–physician privilege; and
- 5) Dr. Parrish's treatment records were virtually illegible, and had harmful information, including Brandon's threatening a teacher, skipping school, fighting, and vandalizing a car (L.F.799-800).

The court ruled that counsel's failure to obtain and admit background records was not prejudicial, because:

- 1) they contained both helpful and detrimental information;
- 2) were remote, some 14 years before the offense;
- 3) contained inadmissible hearsay; and
- 4) Exhibits 3 and 11 had been refused at the evidentiary hearing(L.F.800-01).

These findings do not withstand scrutiny. They are clearly erroneous.

Standard of Review

This Court reviews the findings for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo.banc2000); Rule 29.15. To establish ineffective assistance, Brandon must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668(1984); *Williams v. Taylor*, 120 S.Ct.1495,1511-12(2000). The Sixth Amendment requires counsel to “discover *all reasonably available* mitigating evidence . . .” *Wiggins v. Smith*, 123 S.Ct. 2527, 2537(2003)(emphasis in original).

To prove prejudice, Brandon must show a “reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, at 2542. When deciding if Brandon established prejudice, this Court must “evaluate the totality of the evidence - - ‘both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*’” *Wiggins, supra* at 2543, quoting *Williams v. Taylor*, 120 S.Ct. at 1515(emphasis in opinion).

Contrary to the motion court’s findings, background information is mitigating evidence. *Wiggins, supra*. It is not remote. *Id.* Wiggins’ counsel was constitutionally ineffective for failing to investigate Wiggins’ life history, that included severe physical and sexual abuse. *Id.*, at 2538. Wiggins’ counsel hired a psychologist who tested Wiggins and concluded he had an IQ of 79, had difficulty coping with demanding situations, and exhibited personality disorder features. *Id.*, at 2536. Counsel reviewed a PSI that referenced Wiggins’ “misery as youth” and documented his placement in foster care. *Id.* Counsel also obtained social service records regarding foster care. *Id.*

This investigation was insufficient. *Id.*, at 2536-38. Counsel had a duty to pursue leads in order to make informed choices about how to proceed and what evidence to present. *Id.* When assessing the reasonableness of an attorney’s investigation, a court must not only consider the quantum of evidence known to counsel, but whether the known evidence would lead a reasonable attorney to investigate further. *Id.* at 2538. Wiggins’ counsel failed to follow leads and discover readily available evidence of severe physical and sexual abuse. *Id.*

In *Williams*, counsel was ineffective for not investigating and presenting substantial mitigation of Williams’ nightmarish childhood. *Williams, supra* at 1514. Williams’

borderline mental retardation and that he did not advance beyond the sixth grade was mitigating. *Id.* So were prison records showing good behavior, prison officials' testimony that Williams was unlikely to be violent in the future, and testimony that Williams seemed to thrive in a regimented, structured environment. *Id.*

Brandon's counsel did less than Wiggins' counsel. They were on notice that Brandon had severe psychiatric problems, as their own expert told them a psychiatrist treated Brandon for three years. Yet they failed to investigate further. They knew Brandon had been hospitalized, but did not request the records. Counsel knew that Brandon had an IQ of 76 and problems in school, but did not get his records. They did not follow leads and discover readily available evidence of mental illness, sexual abuse, his borderline intelligence, and other mitigation. Counsel had no excuse for their failures. They wanted to pursue leads, but had no time or money.

The motion court's suggestion that Brandon's life history is not mitigating, because Dr. Parrish had no knowledge of the crime facts is refuted by *Wiggins* and *Williams, supra*. Both cases involved the defendants' life history, information which did not refute the crime. As records documenting Williams' nightmarish childhood were mitigating, so was evidence of Brandon's troubled childhood.

The court justified not investigating Parrish because Brandon's family, especially his mother, did not want the family's history of sex abuse revealed(L.F.799,803,806). Having treated Brandon for three years, Dr. Parrish had much more information to provide than his sexual abuse. He could have testified without discussing this topic. Further, counsel's duty of loyalty was to their client, not his family, even though his family paid their fees. Rule 4-

1.7. If a lawyer is paid from a source other than the client, that arrangement should not compromise the lawyer's duty of loyalty to the client. Rule 4-1.8(f). Counsel unreasonably failed to proffer this mitigation.

Foregoing mitigation, because it contains something harmful is not reasonable. *Williams, supra* at 1514. Williams had a juvenile record for larceny, pulling a false fire alarm, and breaking and entering. *Id.* But failing to introduce the comparatively voluminous mitigating evidence was not justified by counsel's strategy. *Id.*

Parrish's testimony included harmful information, but it paled in comparison its helpful mitigation. Nearly every unfavorable fact the court mentioned had already been elicited. Appellant's drug and alcohol use were discussed during both the guilt and penalty phase. The jury knew Brandon hung out with Lopez and Salazar. They heard he had a gun more than once. That he skipped school, vandalized a car and fought in school was not that harmful, especially given how Lopez falsely portrayed Brandon at trial, as the leader and major actor in the homicide. This negative evidence was much less damaging than that in *Williams*.

The motion court's finding that his background records were too old is nonsensical. All records from a defendant's childhood will be dated. That does not make them remote and irrelevant. *Wiggins, supra* (counsel ineffective for failing to adequately investigate client's childhood); and *Williams, supra* at 1514 (records graphically describing childhood held relevant and mitigating); *Eddings v. Oklahoma*, 455 U.S. 104 (1982)(evidence of defendant's turbulent family history is mitigating). Such records provide an objective look

at the defendant's childhood, from many perspectives: teachers, counselors, nurses, and doctors.

Additionally, the motion court admitted the vast majority of Brandon's records. When Brandon's post-conviction counsel provided proper record custodians' affidavits, the court reconsidered its earlier ruling and admitted Exhibits 3A,6A,9A,14A,17, 26,27,31,33(Tr.1055-56). Exhibit 11, his drug and alcohol treatment records, was refused, but the motion court heard testimony about these records(Tr.340,404-05).

Counsel's conduct was similar to the attorneys in *Carter v. Bell*, 218 F.3d 581(6thCir.2000). There, Carter killed a 72-year-old man whom he abducted at a rest stop. *Id.* at 587. Carter's co-defendant, Price, testified against him and received 35 years for second-degree murder. *Id.* Carter's attorneys had been licensed seven and three years respectively. *Id.* at 588. Neither had prepared a penalty phase before. *Id.* They spent 90-95% of their time on guilt phase evidence. *Id.* They met with family members, but could not recall discussing mitigation. *Id.* They did not obtain releases from Carter for his or his family's records. *Id.* at 588-89. Their strategy was to impeach the codefendant, to create a reasonable doubt and show his testimony was insufficient to prove aggravation. *Id.* at 589.

Counsel was ineffective. Mental health evidence, childhood poverty, neglect and instability, poor education and Carter's positive relationship with his stepchildren, adult family and friends was helpful mitigation. *Id.* at 592-93. Carter had borderline intelligence, his IQ was 79 or 87. *Id.* at 593. Although this evidence might have opened the door to Carter's extensive criminal record, including his assaults on his former wives, stepdaughter, and fellow inmate, the court found prejudice. *Id.* at 592. The mitigation

would have humanized Carter and at least one juror may have found him undeserving of death. *Id.*

Here too, Brandon's counsel had a duty to investigate. Like Carter's attorney, they were inexperienced and spent almost their entire time on guilt phase. They obtained no releases for background records. Their focus was to challenge Lopez's testimony (Tr.1092). The jury, therefore, never heard much compelling mitigation. Brandon was prejudiced.

A review of the trial evidence, together with that adduced at the 29.15 hearing, shows that had the jury heard all this mitigation, they likely would have sentenced Brandon to life. At trial, Brandon's father said his son did not deserve to die, they visited every Sunday at the jail, he took care of Brandon's children who would visit Brandon and he did not want Brandon executed(T.Tr.1932-35). Similarly, Lorraine did not think her son deserved to die(T.Tr.1922-23). He was a loving boy with a big heart, close to his family(T.Tr.1918). He had two brothers and two children of his own (T.Tr.1913-14,1916). She mentioned his difficulties in school, he was in Special Education, had a learning disability, and was diagnosed with Attention Deficit Disorder (T.Tr.1919-21). As a result, he took Ritalin(T.Tr.1919).

Dr. Bland did not evaluate Brandon for mitigation, so he did not address Brandon's deficits or the effect they had on him. Rather, he said that Brandon was competent and that he found nothing that relieved Brandon of responsibility(T.Tr.1903). He did not address the history of substance abuse on direct examination, this was raised by the prosecutor on cross-examination(T.Tr.1893-1900).

Dr. Bland's report(Ex.12) was also short and only documented the history that Brandon provided, a defect not lost on the prosecutor or the jury(T.Tr.1891-93,1903, 1906). Dr. Bland only spent two or three hours with Brandon, again a fact seized upon for cross-examination(T.Tr.1891). Dr. Bland admitted that no secondary sources were available(Ex.12,at 2), which the prosecutor emphasized to the jury(T.Tr.1891-93,1903, 1906). Dr. Bland concluded that Brandon was competent, not suffering from a mental disease or defect and was responsible for his actions(Ex.12,at 8-10).

The jury never heard that on August 24, 1989, when he was only 16, Brandon saw Dr. Jerrold Parrish, a psychiatrist, specializing in adolescent psychiatry(Ex. 53, at 5-7). Dr. Parrish had fine credentials, a 1973 graduate of Georgetown Medical School and a Diplomate of American Board of Psychiatry and Neurology and Adolescent Psychiatry. *Id.*, at 5-6. He treated Brandon for three and one-half years and had a wealth of information about him.

Brandon suffered from Bi-Polar Disorder, a major mental illness that caused a disorder of his moods. *Id.* at 13. Brandon also suffered from alcoholism, that dependence illustrated by his heavy drinking of 6-12, and sometimes 24, cans of beer daily. *Id.* Brandon's family suffered alcoholism; his father was alcoholic and his grandfather died of alcoholism. *Id.* at 14. Brandon also had Attention Deficit Hyperactivity Disorder, making it difficult for Brandon to deal with large groups, wait his turn and follow directions. *Id.* at 11-12. All of these illnesses had a genetic basis; the same chromosome accounts for alcoholism and Bi-Polar Disorder and the two illnesses are often transmitted together. *Id.* at 14.

Dr. Parrish treated Brandon with medication and counseling. *Id.* at 14-16. When Brandon stopped drinking in June, 1990, he suffered from withdrawal symptoms. He had tremors for four days, ran fevers and had horrible nightmares, from which he awakened screaming. *Id.* at 16, 20-21.

These illnesses were not Brandon's only problems. He was sexually abused as a child, and, like most sexual abuse victims, this devastated his self-image. *Id.* at 17. Brandon followed a common pattern for abuse victims, getting involved in alcohol and drugs to escape the pain. *Id.* at 17-18. Using alcohol and drugs was also his family's pattern of dealing with stress. *Id.* at 18. Based on his years of treating Brandon, Parrish concluded that Brandon was a good kid, well-motivated, with good intentions. *Id.* at 19. He tried to do the right thing, but lacked parental guidance on how to handle situations. *Id.* He was a follower, not a leader. *Id.* at 19-20.

Parrish's information was consistent with all of Brandon's records. His school records documented many of his troubles(Exs.4,5,6,8,9). He struggled in Special Education, having learning disabilities(Exs.4-5). In the first and second grade, he performed below average. *Id.* Teachers recognized his social and emotional problems; that he lacked confidence, was overly dependent, and easily influenced by disruptive peers, especially older boys. *Id.*

Brandon suffered from an Attention Deficit Hyperactivity Disorder. *Id.* Ritalin helped, but did not solve his problems(Exs.3,5). Because of attention and memory deficits, he could not keep up in spelling and math(Ex.4, at 19, 25). *Id.* He was embarrassed, and

vulnerable to those who manipulated him. *Id.* School officials recognized that, because of his illness, he exercised bad judgment and put himself in bad situations. *Id.*

After four years of Special Education, Brandon's functioning worsened(Ex.4, at 32). He was sad, cried, gave up easily, and became depressed. *Id.* When in the seventh grade, he made one C, his remaining grades were Ds and Fs. *Id.* Officials recommended education for the severely emotionally disturbed. *Id.*

His medical records also illustrated his difficulties(Exs.3,7). Brandon's pediatrician recognized his trouble playing at age seven(Ex.3). He could not complete tasks and sit still. *Id.* His mother disciplined him inconsistently. *Id.* Brandon's problems worsened as he aged. He self-mutilated and began having behavioral problems(Ex.7). He tried to get treatment, and went to three different alcohol and drug treatment centers (Exs.7,10). Brandon went to the third treatment center on April 26, 1995 for drug-induced psychosis(Tr.404). Jail records also documented Brandon's depression and history of mental illness(Ex.14). Since Brandon had no prior criminal history, the Lawrence County Jail records were the only correctional records he had.

Brandon's counsel were ineffective in failing to investigate and present mitigation. They had no strategic reasons for not pursuing leads about Brandon's troubled childhood. The evidence was consistent with defense counsel's theory that Brandon was a follower, not a leader, that he was duped by Lopez and Salazar. The evidence showed that Brandon was not deserving of the death penalty. Had the jury heard all this mitigation, there is a reasonable probability that they would have sentenced Brandon to life. A new penalty phase should result.

IV. Continuance Needed to Prepare Mitigation Case

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied Brandon effective assistance of counsel, due process, equal protection, and freedom from cruel and unusual punishments, U.S. Const., Amend. V, VI, VIII, XIV, in that the trial court abused its discretion and appellate counsel was ineffective for not raising the trial court's error in overruling the continuance motion:

- 1) the claim had significant merit since trial counsel lacked time to investigate
and prepare for the penalty phase;**
- 2) the law supported the claim;**
- 3) the claim was preserved; and**
- 4) appellate counsel pursued weaker issues, including three plain error claims, and claims requiring an abuse of discretion to warrant relief.**

Brandon was prejudiced because, had the claim been raised, a reasonable probability exists that this Court would have granted a new trial, and with a continuance, counsel could have presented a substantial amount of mitigation, creating a reasonable probability of a life sentence.

Trial counsel entered their appearance on Brandon's behalf in February, 1996 (L.F.626). Less than eight months later, they tried their first capital case(Tr.934,1059).

Cantin had been admitted to practice for three years, Crosby for five, and neither had handled a first degree murder case(Tr.932-34,1057,1059).

Counsel requested a continuance to investigate and prepare for penalty phase (L.F.627). The court denied this request. *Id.* Counsel thus focused on guilt phase (Tr.1003,1083). They lacked time to prepare for penalty phase(Tr.1003,1029,1082-83,1103). Counsel obtained no school, medical or psychiatric records, except for a few grade cards from Brandon's mother(Tr.974-77,1068). Although they wanted the records, they had no time(Tr.1030).

Counsel were so rushed that they had no idea that, as a teen, Brandon saw a psychiatrist and was diagnosed with Bipolar Disorder, although Bland reported this(Tr.978-80,1073). Counsel wanted to interview witnesses, like Dr. Parrish and others in California(Tr.979-80,1064). They wanted to prepare a full and complete life story for mitigation(Tr.1082-83), but their guilt phase preparation consumed their time(Tr.989-90,1082-83). Cantin remembered being "swamped in work"(Tr.1003). Crosby felt very pressed and knew the penalty phase suffered(Tr.1064).

In penalty phase, counsel called four witnesses - Brandon's parents, a friend and Dr. Bland(T.Tr.1876-1935). Brandon received death(T.Tr.1957-58). Counsel included the trial court's denial of their continuance motion in their new trial motion(D.L.F.118, L.F.627). Appellate counsel failed to raise this issue on direct appeal(L.F.627-29).

Appellate counsel could not recall why he did not raise the continuance issue(L.F.628,646). He knew Brandon had spent most of his life in California and background material was there(L.F.625-26). He acknowledged that investigating mitigating

circumstances and preparing for the penalty phase was time consuming and hard work(L.F.626). He recognized that trial counsel had less than eight months to prepare for their first death penalty trial and had requested a continuance because they needed more time to prepare for the penalty phase(L.F.626-27).

Although this issue was preserved, counsel did not raise it on appeal. Counsel generally limits issues to those most likely to succeed(L.F.628). The standard of review for a ruling on a continuance is “abuse of discretion” and counsel knew no Missouri or federal cases that had reversed on this basis(L.F.629-30).

The motion court denied that appellate counsel was ineffective(L.F.770-71). "Counsel's decision to 'winnow' out claims that have little chance of success in favor of stronger points is reasonable appellate strategy” (L.F.771). The court also denied that the trial court violated Brandon’s constitutional rights by failing to grant a continuance(L.F.768-69).

This Court reviews these findings for clear error. *Sanders v. State*, 738 S.W.2d 856,857(Mo.banc1987). Brandon is entitled to effective assistance on his first appeal of right. *Evitts v. Lucey*, 469 U.S. 387(1985); *State v. Sumlin*, 820 S.W.2d 487,490 (Mo.banc1991). The standard for effectiveness of appellate counsel is the same as that for evaluating trial counsel's performance: Brandon must show that counsel's performance was deficient and the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Sanders, supra*. Counsel need not raise every possible claim on appeal, but the "failure to raise a claim that has significant merit raises an inference that counsel performed beneath professional standards." *Sumlin, supra* at 490.

The presumption of reasonableness afforded an appellate attorney can be overcome if he neglected to raise a significant and obvious issue while pursuing substantially weaker ones. *Bloomer v. United States*, 162 F.3d.187,193(2nd.Cir.1998). Other factors to consider include whether the error was objected to at trial and whether the omission was a reasonable strategic decision. *Mapes v. Coyle*, 171 F.3d. 408,427-28 (6thCir.1999).

Appellate counsel was ineffective. The continuance claim had significant merit. This was counsel's first death penalty case. They had less than eight months to prepare. They spent nearly all their time preparing for guilt phase, leaving no time to investigate, let alone present mitigation. They failed to conduct even the most basic investigation. They requested no background records, spoke to few witnesses, and could not follow-up on leads they needed to pursue. *See* Points III, *supra* and Points V and VI, *infra*.

Case law supported granting a continuance under these facts. Only a few years before, this Court reversed a death penalty case, finding the trial court's failure to grant a continuance for a discovery violation an abuse of discretion. *State v. Whitfield*, 837 S.W.2d 503,507(Mo.banc1992). Thus, while the standard is burdensome, this Court grants relief if the facts support the claim. *State v. McIntosh*, 673 S.W.2d 53,54-55(Mo.App.W.D.1984) similarly held that a trial court abuses its discretion when it fails to grant a continuance necessary for the defense to prepare for trial. *See also, State v. Perkins*, 710 S.W.2d 889,893(Mo.App.E.D.1986)(court's failing to grant a continuance was an abuse of discretion). Although all these cases were decided long before Brandon's appeal, appellate counsel acknowledged his unfamiliarity with them(L.F.629-30).

Since the continuance claim was preserved, counsel's failure to raise it on direct appeal was unreasonable, especially since counsel pursued much weaker, unpreserved claims. A review of counsel's brief shows he raised seven issues(App.Br.). Three were unpreserved. *State v. Hutchison*, 957 S.W.2d 757,760(Mo.banc1997). Respondent highlighted the preservation problem, prefacing the arguments with an introduction highlighting the preservation problems and urging this Court *not* to review for plain error. (Resp.Br. at 20). This Court found the briefed issues had no merit, and did not create manifest injustice. *Hutchison, supra* at 764-65.

Counsel also raised claims requiring an abuse of discretion -- the standard he deplored. Point VI alleged an "abuse of discretion" in allowing a late endorsement of John Galvan as a penalty phase witness(App.Br.at15).

Point IV raised the trial court's failure *sua sponte* to disallow the State's improper opening statement(App.Br.at13-14). Even were the error preserved, the trial court's discretion in controlling counsel's argument will not be reversed absent an abuse. *State v. Rousan*, 961 S.W.2d 831(Mo.banc1998). So, counsel raised plain error and abuse of discretion claims, while ignoring the preserved and factually supported continuance claim.

Counsel's failure prejudiced Brandon. Like *Sumlin*, this Court should doubt the validity of the decision on Brandon's appeal to affirm his sentence. Counsel admitted they lacked time to prepare and as a result, the jury never heard mitigating evidence. *See* Points III, *supra* and Points V and VI, *infra*.

The trial court's error also denied Brandon's constitutional rights to due process, equal protection and effective assistance of trial counsel and to be free from cruel and

unusual punishment. The motion court clearly erred in ruling otherwise. The court held that a continuance claim is not cognizable in a 29.15 action(L.F.768).

The motion court's reliance on *State v. Clark*, 859 S.W.2d 782,789 (Mo.App. E.D.1993) is misplaced. *Clark* was a consolidated appeal and the appellant tried to raise the same issue on both direct and post-conviction appeal. *Id.* While postconviction motions are not substitutes for direct appeals, when exceptional circumstances show that a movant was justified in not raising the claim on direct appeal, the claim can be raised on post-conviction. *Id.*

The court's denial of a continuance denied Brandon a fair trial. Counsel did not obtain the most basic background information. As counsel explained, they had to forego preparing for penalty phase in favor of guilt phase. Counsel is ineffective for not investigating and presenting substantial mitigating evidence during the sentencing phase. *Wiggins v. Smith*, 123 S.Ct. 2527, 2537(2003); *Williams v. Taylor*, 120 S.Ct.1495(2000). Despite Brandon's constitutional right to present evidence of his troubled childhood in mitigation, *Eddings v. Oklahoma*, 455 U.S.104,113-16(1982), it was meaningless, because counsel lacked time to obtain the available information.

Brandon was also denied equal protection. Had Brandon had money, counsel could have hired investigators or experts to assist(Tr. 983). Whether someone lives or dies should not depend on their socio-economic status and access to resources. *Ake v. Oklahoma*, 470 U.S. 68(1985); *see also, McCleskey v. Kemp*, 481 U.S.279,309,n.30 (1987)(death cannot be based on an arbitrary classification like race). Basing a death sentence on arbitrary factors also violates the Eighth and Fourteenth Amendments, which

require heightened reliability in death cases. *Woodson v. North Carolina*, 428 U.S. 280,305(1976).

The unfairness of denying Brandon a continuance is illustrated by Salazar's case. Unlike Brandon, Salazar's attorneys requested and received a continuance to prepare adequately for trial(Ex.64, at 11-12). They went to California and investigated Salazar's background and upbringing. *Id.* They called at least eight out-of-state witnesses, at the state's expense. *Id.* at 17. Their investigation yielded good results, Salazar received a sentence of life without parole. *Id.* at 29-30.

The court's disparate treatment of Brandon and Salazar denied Brandon due process and equal protection of law, *Bearden v. Georgia*, 461 U.S. 660, 664(1983); *McCleskey v. Kemp, supra*, and subjected him to cruel and unusual punishment, *Woodson, supra*.

The motion court tried to explain the differences, ruling counsel had similar amounts of time to prepare(L.F.769). The court ignores that Salazar's counsel had 18 months to prepare, Brandon's counsel had eight(S.L.F.1-22). This was Crosby and Cantin's first death penalty case(Tr.934,1059). In contrast, Salazar's counsel were experienced attorneys specializing in death penalty litigation.

The court suggests that Brandon's size and appearance may account for why he got death(L.F.769). He was much taller and bigger than Salazar. *Id.* If size is an appropriate factor for assessing death, we have reached the height of arbitrariness. *Woodson, supra*.

The court also rationalizes the disparate treatment, saying evidence showed Brandon was the final shooter(L.F.769). The court ignores other evidence suggesting just the opposite, that Salazar was the final shooter(Ex.65,L.F.618). Unquestionably, Salazar was

the initial shooter, placing in motion the events leading to the Yates' deaths. At the very least, Salazar and Brandon were equally culpable, yet Salazar got life. The difference was the continuance to adequately prepare for penalty phase.

The court clearly erred. A new penalty phase should result.

V. Expert Testimony

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied him effective assistance of counsel, due process and non-arbitrary and capricious sentencing, U.S.Const.,Amends.V,VI,VIII,XIV, in that Dr. Bland failed to conduct an adequate evaluation and trial counsel failed to:

- 1. provide Dr. Bland any background information, refer any mitigation questions, or follow-up on any information in Bland's report;**
- 2. investigate and present evidence about:**
 - a) Brandon's learning disability, ADHD, Bi-Polar Disorder, Polysubstance Dependence, and Sexual Abuse that substantially impaired Brandon, rendering him incapable of deliberating and mitigating his conduct;**
 - b) neuropsychological evidence of Brandon's brain damage and inadequate functioning;**
 - c) pharmacological testimony of Brandon's drug and alcohol addiction and its effects on him;**
 - d) Brandon's learning disabilities and the extent of his deficits;**
 - e) childhood development expert to explain Brandon's childhood, the effects of sexual abuse, and how and why Brandon turned to alcohol and drugs.**

This mitigation would have reduced Brandon's culpability, reasonably likely resulting in a life sentence.

Shortly before trial, Brandon's counsel hired a psychologist, Dr. Bland, to determine whether Brandon was competent to stand trial and whether he was suffering from a mental disease or defect. Bland's evaluation was inadequate: counsel did not have him investigate mitigation and provided Bland no background information. Counsel should have investigated Brandon's medical history, educational history, family and social history, and other influences. Proper investigation was essential and counsel's failure denied Brandon effective assistance of counsel and mitigating evidence that would have supported a life sentence.

Dr. Bland's Pretrial Evaluation

Counsel hired a psychologist, Dr. Bland, to evaluate Brandon for competence and mental disease or defect(Tr.986-89,1030,1069,Ex.59). They did not ask Bland to look for mental problems that were mitigating. *Id.* Counsel provided Bland no material, like school, medical, psychiatric, jail or drug and alcohol records(Ex.12,at 2). Counsel never even requested these records(Tr.974-79,985,1030-31). Counsel admitted that they wanted the records, but simply failed to obtain them(Tr.1030-31).

Bland spent 2-3 hours with Brandon(T.Tr.1891) and administered a Quick Test, an I.Q. test, and a reading recognition subtest(T.Tr.1882-83). Bland found deficits: Brandon's IQ was 76 or 78, showing his borderline intelligence, and his reading was at a fourth grade level. *Id.* at 7. Brandon had been in Special Education, diagnosed with ADHD in the third grade, and was prescribed Ritalin for six years. *Id.* at 2. As a teen, he saw a psychiatrist,

who prescribed Lithium and diagnosed Brandon, as “manic depressant” Bipolar Disorder. *Id.*, at 2,4,7.

Counsel did not know what the term Bi-Polar Disorder meant to explain it with any intelligence(Tr.1042). He never discussed it with Bland. *Id.* Counsel had no reason for not retaining a psychiatrist-a medical doctor-to investigate Brandon’s mental problems and wished he had(Tr.981-82).

Counsel also failed to obtain any additional testing based on Brandon’s low I.Q., history in Special Education and ADHD(Tr.981,985). Counsel discussed Brandon’s Special Education with Brandon and his family, but did not hire an expert, because of the lack of money(Tr.981). He failed to get any school records or interview any teachers. Since counsel saw no indication of brain damage, they saw no need for a neuropsychological evaluation(Tr.981,985).

Brandon revealed to both counsel and Bland that a family member sexually molested him when he was a boy(Tr.986,1094,Ex.12 at 3). Yet counsel did not present this evidence or obtain additional evaluations(Tr.986). Since the family did not want to talk about it and down-played the incident as a “one-time thing,” counsel felt a sex-abuse evaluation was not a necessary expense(Tr.986).

Brandon also provided Bland his alcohol and substance abuse history(Ex.12 at 3-4). Counsel knew about Brandon’s addiction, but did not consider additional testing (Tr.982,985). Counsel said that Bland’s evaluation gave him answers(Tr.982), but actually, it raised more questions than it answered. For example, counsel did not know the extent of Brandon’s drug use(Tr.1034,1104). They did not obtain his drug and alcohol treatment

records(Tr.974-77,1030,1067-68). Counsel would have investigated the drug use more thoroughly had they had more time(Tr.1104).

Bland concluded that Brandon was competent, had no mental disease or defect, but had a personality disorder(Ex.12at6,8-10,Tr.1106). Since he was not asked, he provided no opinions on mitigation.

Post-trial Evaluations

Dr. Peterson, a psychiatrist, analyzed and explained Brandon's problems, relying on an in-person evaluation of Brandon, background material, including school, medical, psychiatric, law enforcement and jail records(Exs.3-15,Tr.294-657,325). Brandon has mild brain damage(Tr.440). He suffers from a Learning Disorder, ADHD, Bipolar Disorder, Poly-substance Dependence and was sexually abused(Tr.341-42,450-465). His functioning places him at the bottom 9% of the population(Tr.442-43). His mental age is between eight and twelve years(Tr.444). Brandon's deficits impacted his ability to deliberate and appreciate the criminality of his conduct(Tr.481-83,499). They made him susceptible to the domination of others, like Lopez and Salazar(Tr.350,359,362,381, 394,473,476,477). He wanted desperately to fit in; others easily manipulated and used him(Tr.369,476-77).

Dr. Cowan, a neuropsychologist, reviewed many records and evaluated Brandon(Tr.664-65,Ex.51at 1). Brandon sustained two head injuries, one from a hammer and another from falling from a motorcycle(Ex.51 at 2). Brandon took Klonopin and Elavil for anxiety and Depression. *Id.* Because of Brandon's history, Cowan administered a battery of neuropsychological tests to determine Brandon's brain functioning(Tr.680-88). The tests included the WAIS-R, Halstead-Reitan, Memory Assessment Scale, Wisconsin

Card Sorting and Test of Memory Malingered(Ex.51 at 3). He found Brandon suffers brain damage, in the mild impairment range(Tr.696). His full scale IQ is 76(Tr.697). His memory function is mildly to moderately impaired(Ex. 51,at 6).

Cowan reviewed Bland's report and determined it was inadequate to assess brain function(Tr.706). The scientific community does not recognize the Quick Test as a reliable means of testing(Tr.707). Several studies show it is inaccurate, does not have good correlational coefficients, and its norms and manual are out-dated. *Id.* The Wide Range Achievement Test only measures reading and an IQ test alone is unhelpful. *Id.* Bland should have reviewed background materials. Brandon's substance abuse history raised a red flag for potential brain dysfunction, and his borderline intelligence highlighted the need to look at neurological deficits(Tr.708-710).

Dr. O'Donnell, a pharmacologist, evaluated Brandon regarding his drug use, reviewing numerous background records, Exhibits 3-15, and interviewing Brandon (Tr.743-45,747). Brandon's family had a history of alcoholism and alcohol abuse: his great grandfather, grandfather and father all were alcoholics(Tr.750). Brandon first used alcohol at eleven. *Id.* He used marijuana daily and experimented with cocaine, LSD and occasionally morphine. *Id.* By age 15, Brandon was chronically intoxicated. *Id.*

Brandon's addiction was diagnosed and he had been treated(Tr.751). The severity of his addiction rendered his intoxication involuntary(Tr.752-53). He lacked the ability to abstain(Tr.752-53). Genetics and his environment predisposed him to drug and alcohol addiction(Tr.754-55).

Brandon's addiction affected his behavior(Tr.752). Alcohol can cause seizures, brain damage, and depression(Tr.754-55). It depresses inhibitions, eventually causing loss of control and judgment(Tr.756). It first affects reasoning functions(Tr.756-57). Methamphetamine stimulates the nervous system(Tr.757). Its continued use can cause delusions, paranoia, psychosis, depression, psychiatric changes, and organic brain syndrome(Tr.758). Brandon's addictions left him with brain damage(Tr.758).

On the night of the offense, Brandon was severely intoxicated. His ability to think, perceive, make judgments, and deliberate was impaired(Tr.758-61). He lost judgment and control(Tr.761). He had a diminished capacity, could not deliberate and suffered from an extreme mental or emotional disturbance(Tr.761-64).

Teri Burns, a speech and language pathologist, did a psycho-educational evaluation of Brandon to determine if he had learning disorders, that interfered with his socialization skills and ability to function(Tr.854-59). Brandon's school records showed that, in early childhood, his special needs resulted in placement in Special Education (Tr.862). School was always difficult for him(Tr.863).

Burns administered several tests(Tr.864,Ex.56). They demonstrated his limited proficiency in reading, math and written language aptitude; very low oral language achievement in the bottom 1% of the population; and his reading, math written language, and writing skills were all low, ranging from the bottom half of 1- 9% of the population(Tr.868,870,874,877-78,878-80,880-85). Brandon's deficits created problems with attention, concentration, memory, problem solving, reasoning, judgment, organization

and planning(Tr.892). These test results were consistent with his school records(Tr.893). Brandon's deficits were not acquired, they were innate(Tr.893).

Dr. Vlietstra, a child development psychologist, evaluated Brandon(Tr.790-803). Because the family provides the context and nurturing for a child, she interviewed his family, his mother, father and brother, Matt(Tr.796-97). Vlietstra found significant the family's history of alcohol abuse; Lorraine's history of sexual abuse, fear of childbirth, and anxiety attacks; the family's move from Fillmore to Palmdale; and family members' sexually inappropriate behavior(Tr.798-99,822-23).

Vlietstra explained that children need genuine love and discipline to grow well(Tr.800). Brandon received neither, his parents were distant, never expressing feelings, minimizing problems, and being permissive(Tr.800-02,809-10). Brandon could connect emotionally to neither parent(Tr.800-02).

Vlietstra examined Brandon in terms of three developmental states: birth to six years; seven-12 years; and 13-18 years(Tr.803-27). She identified numerous problems, from school struggles to nightmares(Tr.807-11). Brandon was insecure, anxious, lacked self-confidence, overly dependent, impulsive and easily influenced(Tr.811). His low performance at school embarrassed him, creating self-blame(Tr.812-13). He was inappropriate and disruptive in groups(Tr.813). He benefited from encouragement and reinforcement, but never received enough(Tr.813).

Compounding these problems was the sexual abuse he suffered(Tr.813-14). This abuse confused Brandon and caused him shame(Tr.813-14). He blamed himself and turned to alcohol and drugs to mask the pain. *Id.* Brandon became even more distant and

rebellious(Tr.817). He self-mutilated(Tr.819-20). He could not trust authority figures(Tr.817).

On the Developmental Asset Scale, Brandon had only four to six assets, from a potential 40, needed for a healthy life(Tr.826-27). He lacked the building blocks to make good decisions and was susceptible to risky behavior(Tr.826). He could not resist group influences(Tr.827).

Standard of Review

This Court reviews the findings for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo.banc2000); Rule 29.15. To establish ineffective assistance, Brandon must show that his counsel's performance was deficient and that their performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 120 S.Ct.1495,1511-12(2000). The Sixth Amendment guarantee of effective assistance requires counsel to “discover *all reasonably available* mitigating evidence.” *Wiggins v. Smith*, 123 S.Ct. 2527, 2537(2003)(emphasis in original).

Counsel must investigate their client’s medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. *Id.*, citing 1 ABA Standards for Criminal Justice, 4-4.1, commentary, pg. 4-55. Investigation is essential. *Wiggins, supra*. Critical to this investigation is consulting expert and lay witnesses along with supporting documentation. *See*, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003), Guideline 10.11,F.2. These

witnesses and records provide “insights into the client’s mental and/or emotional state and life history that may explain or lessen the client’s culpability. . .” *Id.*

Dr. Bland: Due Process Violation

The court found that Brandon failed to prove that Bland’s evaluation was inadequate(L.F.799-80). The court said *Ake v. Oklahoma*, 470 U.S. 68,83(1985) does not require a psychologist to do certain things and no Missouri law provides an evaluation checklist(Tr.780). It found much of the evidence non-persuasive and the absence of expert testimony non-prejudicial(Tr.780).

While neither *Ake*, nor any Missouri case, sets forth a particular checklist for a competent psychiatric evaluation, *Ake* provides some guidance. The Fourteenth Amendment’s due process guarantee stems from the belief that “justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding where his liberty is at stake.” *Id.* at 76. It also underpins the compelling interest that criminal proceedings that places an individual’s life at risk be accurate. *Id.* at 78. Accordingly, “when the State has made the defendant’s mental condition relevant to his criminal culpability and to *the punishment he might suffer*, the assistance of a psychiatrist may well be crucial to the defendant’s ability to marshal his defense.” *Id.*, at 80 (emphasis added).

“Psychiatrists gather facts, through professional examination, interviews, *and elsewhere.*” *Id.* (emphasis added). They analyze the information and draw plausible conclusions about the defendant’s mental condition and the disorder’s effects on behavior. *Id.* Through investigation, interpretation, and testimony, psychiatrists assist lay jurors to

make a sensible and educated determination about the defendant's mental condition. *Id.* at 80-81.

If a defendant demonstrates his mental condition is significant, he is entitled, at a minimum, to access to a “*competent* psychiatrist who will conduct an *appropriate* examination and assist in evaluation, preparation, and presentation of the defense.” *Id.* at 83. (emphasis added). Contrary to the motion court's conclusion, Dr. Bland failed *Ake's* requirement that expert assistance be “competent” and his evaluation be “appropriate.” He did not properly investigate from sources other than Brandon and did not address Brandon's mental condition with respect to mitigating circumstances.

Bland's failure to get any background records hurt Brandon, allowing his impeachment(Tr.1891-93,1903,1906). The prosecutor criticized Bland for relying solely on Brandon to render his diagnosis. *Id.* Since Bland failed to gather facts from other sources, his examination was inadequate under *Ake*. The background records were available and would have shown Brandon's mental and emotional problems. *See, Point III, supra.*

Bland evaluated whether 1) Brandon was competent to stand trial and 2) whether he suffered from a mental disease or defect(Tr.1880,1885,Ex.12 at1,8-10). Yet, he testified in penalty phase(Tr.1876-1907). He addressed no statutory mitigators relating to Brandon's mental health, like whether 1) he was under the influence of extreme mental or emotional disturbance; 2) he acted under extreme duress or under the substantial domination of another person; or 3) his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. Sections 565.032.3(2),(5),(6), RSMo, 2000.

Bland reported Brandon's IQ was 76 or 78 and that Brandon read at the beginning 4th grade level(Tr.1882-83). He told his diagnostic conclusions that Brandon had Borderline Intellectual Functioning and a Personality Disorder, Non-specified(Tr.1888). But he drew no plausible conclusions about Brandon's mental condition and the effects of his disorder on his behavior, something *Ake* requires. Bland did no investigation, gave no interpretations, and provided no testimony to assist lay jurors to make a sensible, educated determination about Brandon's mental condition and whether it mitigated the offense.

Forensic mental health professionals know that the scope of a mitigation evaluation at a capital sentencing proceeding is far broader than one for competence or criminal responsibility. *Jacobs v. Horn*, 129 F.Supp2d 390, 403(M.D.Pa.2001). "Mental, cognitive and emotional impairments and disturbances that do not render a person incompetent or insane are nevertheless highly relevant for purposes of mitigation." *Id.* One's background, including medical and other records, childhood abuse, drug or alcohol abuse history are particularly important. *Id.* Bland's narrow and limited evaluation was only for competence and criminal responsibility. His evaluation and testimony violated due process under *Ake*.

Dr. Bland: Ineffective Assistance of Counsel

The court also found counsel not ineffective for not providing Bland with independent sources of information so that he could reach a competent and accurate diagnosis, and, since Bland did not testify at the hearing, Brandon failed to meet his burden(L.F.781). This finding is clearly erroneous. Counsel admitted having no legitimate reason for not obtaining background records; they simply did not have them. Therefore, Brandon proved that counsel acted unreasonably.

The issue is whether counsel's failure prejudiced Brandon. Brandon proved prejudice by presenting testimony showing what an adequate evaluation would have shown (Tr.294-657,659-742,743-87,790-853,854-905).

In *Wallace v. Stewart*, 184 F.3d 1112(9th Cir.1999), counsel was ineffective for not giving an expert relevant background materials for the evaluation. In reviewing counsel's actions, the court first found that remarkably little time had been devoted to exploring Wallace's mental state or other mitigators. *Id.* Had they looked, they would have discovered a great deal about Wallace's family history, including his psychotic, alcoholic and anorexic mother. *Id.* at 1116. This family history was important, because psychosis and alcoholism are genetically passed from parents to children. *Id.* Wallace home life was chaotic. *Id.* Wallace started sniffing glue and gasoline between the ages of ten and twelve and experienced head traumas. *Id.* This was important, because children raised in profoundly dysfunctional environments are prone to develop severe psychiatric disturbances. *Id.*

The appellate court reached the heart of the issue: "Does an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes." *Id.* at 1117. *See also, Wiggins, supra*, citing ABA guidelines, *supra*.

Just like *Wallace*, counsel ineffectively failed to investigate Brandon's background and give Bland that information, so he could completely and accurately evaluate Brandon. Adequate information, like school, medical, mental health, and jail records and family

interviews would have revealed Brandon's family's history of mental illness and alcoholism, traits genetically passed to children. His chaotic childhood included sexual abuse. Records revealed the extent of his mental problems. Without this information, Bland could not accurately diagnose Brandon. That is exactly what the State established in its cross-examination at trial, discrediting the validity of Bland's evaluation.

Brandon was prejudiced. He was denied a full and complete mental health evaluation. More importantly, the jury never heard about Brandon's background, his mental deficiencies and how they impacted his behavior at the time of the crime. Contrary to the court's findings, this evidence established that, with competent and adequate mental health evaluations, the jury could have heard significant mitigating evidence.

Investigating Brandon's Medical, Educational, Family and Social History

As to counsel's failure to investigate his background, the court found that Brandon's family could not possibly afford all these experts and counsel had already lost money representing Brandon(L.F.781). The court correctly noted that Brandon's family could not afford experts. Brandon was broke. But indigent defendants nonetheless are entitled to a competent, adequate mental health evaluation to help them against the death penalty. *Ake, supra*. They are entitled to effective assistance of counsel who adequately investigates, with experts if necessary. *Wiggins, supra*. See also, *State v. Jones*, 707 So.2d 975,977(La.1998)(indigent defendant is constitutionally entitled to a state-funded expert, regardless of whether he derives any monetary assistance from an ancillary source); *Moore v. State*, 827 S.W.2d 213,216(Mo.banc1992)(counsel unreasonably failed to investigate by consulting serologist because he thought the money was unavailable).

The court also found that, since counsel was unfamiliar with the specific experts called by post-conviction counsel, they could not be ineffective for not calling them (L.F.788,796). The State established that counsel had not heard of Drs. Peterson, Cowan, O'Donnell, Burns or Vlietstra(Tr.1037-40,1099-1100). Brandon did not allege that counsel should have consulted and called these particular experts, but rather, competent experts in their respective fields. Counsel can be ineffective for failing to present expert testimony, like a serologist. *Moore, supra* at 214. *See also, Wolfe v. State*, 96 S.W.3d 90, 93-95(Mo. banc 2003)(counsel ineffective for not investigating and testing physical evidence, a hair, that would have connected the accomplice Cox, not Wolfe, to the crime scene). The ineffectiveness stems from the failure to call a qualified expert, not the failure to call a specific expert.

The court found Dr. Peterson not credible because he failed to consider facts contrary to his conclusions(L.F.784-85). The court decided that records showed Brandon was antisocial; he was not impaired, but lazy and uncooperative; he was not learning disabled, but simply did not try or was lazy because he did not like Special Education classes; he was a liar; and his actions on the night of the offense showed he was in control and made his own decisions(L.F.784-85). The court said Dr. Peterson looked for biological causes and refused to consider anything else(L.F.786).

These findings are unsupported by the record. Dr. Peterson was thorough and considered in minute detail Brandon's background(Tr.320-430). He looked at everything, not selectively focusing on favorable areas, considering unfavorable, negative facts, the very facts the court references. Simply because Peterson's testimony contained negative facts,

did not justify counsel in not presenting this overwhelmingly mitigating evidence.

Williams, supra at 1514.

All objective evidence demonstrates that Brandon was Learning Disabled and suffered ADHD. His teachers, counselors and objective testing established his problems. For the court to suggest that all this is wrong, and Brandon is “lazy” is unsupported by the record.

The court correctly concluded that the evidence presented at trial, i.e. Lopez’s testimony, suggested that Brandon was in control and made his own decisions(L.F.784-85). This is why counsel should have presented expert testimony regarding Brandon’s mental deficiencies, to explain Brandon was a follower, not a leader, who was “putty” in Lopez’s hands. *Glenn v. Tate*, 71 F.3d 1204,1211(6th Cir.1995).

Glenn, a young, mentally-retarded man, acted at his older brother’s instigation. *Id.* at 1205. He was highly susceptible to suggestion by people he admired. *Id.* His lawyers made no effort to acquaint themselves with his social history, obtaining no school, medical or probation records. *Id.* at 1208. Had they consulted a mental health expert, they could have presented evidence about Glenn’s mental retardation, brain damage, and his inability to conform his conduct to the requirements of law. *Id.* An expert could have explained how Glenn could not think up the planned killing and he followed along. *Id.* at 1208-09. Failing to present evidence of Glenn’s mental history and capacity was ineffective. *Id.*

Brandon’s counsel were ineffective too. A qualified expert like Peterson would have testified about Brandon’s brain damage, Bipolar Disorder, Learning Disorder, ADHD, Polysubstance Dependence and childhood sex-abuse(Tr.341-42,440,450-465). An expert

could have explained Brandon's low functioning, in the bottom 9% of the population(Tr.442-43). An expert could have explained Brandon's mental age -- between eight and 12(Tr.444). These deficits affected Brandon's ability to deliberate and appreciate the criminality of his conduct(Tr.481-83,499). They made him susceptible Lopez and Salazar's domination(Tr.350,359,362,381,394,473,476,477). He wanted desperately to fit in, he was easily manipulated and used(Tr.369,476-77). Like Glenn, he was putty in Lopez's hands. Yet the court inexplicably relied on Lopez's self-serving testimony to deny relief.

The court also found that Peterson's failure to draft a report was not commendable and diminished his credibility(L.F.786). A state postconviction's judge's finding that a witness is not convincing does not defeat a claim of prejudice. *Kyles v. Whitley*, 514 U.S. 419,449,n.19(1995). That observation could not substitute for the jury's appraisal at trial. *Id.* Credibility of a witness is for the jury, not the postconviction court. *Antwine v. Delo*, 54 F.3d 1357,1365(8th Cir.1995).

The court recognized that Peterson's testimony was lengthy and complicated, the records he reviewed contained complex psychological concepts, but then concluded the jury would not have grasped much of testimony(L.F.786). This finding directly conflicts with *Ake*. Such evidence's complexity is why an expert is needed to explain it.

The court also found that Bland reached some of Peterson's same conclusions, about Borderline Intellectual Function, ADHD, and history of substance abuse(L.F.786-87). The experts disagreed regarding Bi-Polar Disorder, but the court thought Bland "absolutely

correct” in finding a personality disorder(L.F.787). Bland was not so off the mark that counsel was ineffective for retaining him(L.F.787-88).

The court’s conclusion is not well-founded. Bland never explained Brandon’s disorders or how they impacted his behavior. He never analyzed how they were mitigating. He never testified about the substance abuse history on direct. Rather, the prosecutor elicited it on cross-examination. Whether Bland was “absolutely correct” in finding a personality disorder is beside the point, since he never explained it to the jury. To lay persons, the label sounds aggravating, not mitigating.

The court additionally found: counsel need not shop for a more favorable expert; Cantin did not feel the need to go further after getting Bland’s report, believing Bland was a good witness; and counsel was never required to investigate Brandon’s mental condition absent some suggestion that he was mentally unstable (L.F.788).

This finding is factually and legally wrong. Cantin acknowledged he should have investigated Brandon’s mental problems more, especially getting his background records (Tr.974-78). He knew Brandon was slow and since they contacted an expert about competency, should have known he had mental problems. Cantin candidly admitted he had no good answer for not obtaining a psychiatric referral, but wished he had(Tr.982).

Brandon’s claim was not that counsel should have shopped for a more favorable expert, but that counsel should have hired a competent expert to conduct an adequate evaluation. *See, In re Brett*, 16 P.3d 601(Wash.banc2001) (where counsel hired a psychologist, but failed to consult and present expert testimony regarding Fetal Alcohol Syndrome and diabetes and its impact on Brett, counsel was ineffective). Like *Brett*,

counsel failed to consult with an expert who could discuss Brandon's impairments and explain why they mitigated his culpability. Simply hiring any expert does not make counsel effective. *Id.*

The court discounted Peterson's testimony because Brandon behaved admirably, being attentive and not disruptive, at the evidentiary hearing and trial(L.F.788-89). The court held this undercut the ADHD diagnosis. *Id.* The court's reliance on demeanor is inappropriate. A mentally ill person's physical demeanor may not illuminate how the mental disorder impacts him. *Lafferty v. Cook*, 949 F.2d. 1546, 1555(10th Cir.1991) (physical demeanor did not reveal the extent defendant suffered from paranoid delusions).

The court rejected Brandon's claim that counsel was ineffective for not obtaining neuropsychological evidence showing his brain damage. It found: counsel is not ineffective for failing to shop for a more favorable expert; Cowan and Bland's conclusions were similar, the I.Q. being nearly identical; Cowan's opinions did not relate to the facts of the murder and therefore, lacked relevance; Brandon scored within the normal range on many tests; and voluntary intoxication is not a defense in Missouri (L.F.791-93).

Brandon did not claim counsel should have shopped for a more favorable expert, but counsel should have hired the appropriate expert initially. *In re Brett, supra.* While Cowan and Bland's conclusions regarding I.Q. were nearly identical, Bland gave no opinion about Brandon's brain functioning. He could not, since he did no neuropsychological testing and his actual testing was inappropriate(Tr.706-07). *See Jacobs v. Horn, supra* at 403 (if possible organic impairment exists, neuropsychological testing is mandated in a capital case, since impairments may not immediately be seen in a standard psychiatric evaluation).

The court's finding that Cowan's opinions did not relate to the facts of the murder and therefore, lacked relevance contravenes *Wiggins* and *Williams, supra*. While mitigation may not undermine or rebut the prosecution's death-eligibility case, it still may alter the jury's selection of penalty. *Williams*, at 1516. Brandon's brain damage and Borderline Intellectual Functioning is like Williams' borderline mental retardation.

The court's suggestion that, since Brandon scored within "normal" on some tests, his deficits were not mitigating, is also erroneous. Brandon suffered brain damage, in the mild range of impairment(Tr.696). Organic brain damage is mitigating evidence. *Glenn v. Tate, supra* at 1211. His full scale IQ was 76(Tr.697). These significant deficits were important mitigating factors the jury should consider.

The court's finding that, since voluntary intoxication is not a defense, counsel could not be ineffective in failing to present it also is erroneous. While correct for guilt phase, it is untrue for penalty phase. Alcohol or drug use, dependence or addiction is relevant mitigating evidence. *Parker v. Dugger*, 498 U.S. 308,314-16(1991); *Mauldin v. Wainwright*, 723 F.2d 799,800(11thCir 1984). A neuropsychologist would have explained how alcohol and drug use damaged Brandon's brain and further impaired functioning.

Regarding Dr. O'Donnell, the court found: his opinion that Brandon's alcohol and drug use was involuntary pharmacologically did not equate with legal involuntariness; intoxication cannot be used to prove diminished capacity; O'Donnell's definition of deliberation as "ability to think in a clear mind" is not Missouri's proper legal definition; the facts at trial refuted that Brandon's ability to make decisions and judgment was deficient; jurors did not need an expert to explain the effects of alcohol and drugs, but could

determine if this was mitigating; no evidence showed Brandon was paranoid on the night of the offense, so O'Donnell's conclusion that Brandon's drug and alcohol use would have made him paranoid is rejected(L.F.790-92).

These findings are clearly erroneous. Alcohol and drug addiction are mitigators, even if not a legal defense to the crime. *Parker v. Dugger*; and *Mauldin v. Wainwright, supra*. That Brandon's could not think clearly was also mitigating.

Lopez claimed that Brandon took a controlling role in the homicides. That is why counsel should have presented evidence to establish that Brandon had mental deficiencies, and was easily influenced, especially when intoxicated. *Glenn v. Tate, supra*.

Jurors could not accurately assess Brandon's punishment, unless they understood his individual characteristics, including his mental problems. Alcohol and methamphetamine are physically and psychologically addicting(Tr.753-54). Alcohol can cause seizures, brain damage and depression(Tr.754-5). Alcohol causes a loss of control and judgment; it interferes with processing impulses and stimuli (Tr.756). Methamphetamine causes delusions, paranoia, psychosis, depression, psychiatric changes, and organic brain syndrome(Tr.758). The average juror would not know about these effects and expert testimony would assist their understanding.

An expert can dispel the myths surrounding "voluntariness," and can explain these addictions' physical and psychological effects. Brandon's alcohol and drug use on the night of the offense was undisputed. The state introduced his history of alcohol and drug use(Tr.1893-97). Trial counsel should have explained this evidence to the jury in a mitigating way.

The court rejected the claim that counsel should have presented Brandon's learning disability. It found: counsel is not ineffective for not shopping for a more favorable expert; Burns' opinion did not relate to the facts of the murder, lacking relevance; and evidence that Brandon functioned at the level of an 8-12 year old was not helpful as most youngsters know right from wrong and that murder is unacceptable(L.F.793-94).

These findings are erroneous. Brandon claimed not that counsel should have shopped for a more favorable expert, but that counsel should have hired the appropriate expert, adequately investigating his educational history, *Wiggins*, and *In re Brett, supra*. That Burns' opinions did not relate to the facts of the murder and therefore lacked relevance contravenes *Williams, supra* at 1516.

Finally, while 8-12 year olds may understand the difference between right and wrong, the law still finds children and those with mental impairments less culpable. *Johnson v. Texas*, 509 U.S. 350(1993)(a defendant's youth is a relevant mitigating circumstance that capital sentencing jury must consider); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397(Mo.banc2003), *cert. granted, Roper v. Simmons*, 124 S.Ct. 1171 (2004) (violates Eighth Amendment to execute juveniles). *See also*, Section 565.032.3(7).

The court rejected that counsel should have presented evidence from a child development expert, finding: counsel need not shop for a more favorable expert; and since much of Vlietstra's testimony explaining Brandon's development had no causal connection to the crime, it was irrelevant and unhelpful(L.F.795-98). These conclusions are directly refuted as discussed above. *In re Brett*; and *Williams, supra*.

Summary

Counsel were ineffective. They provided Bland with no background materials and followed-up on none of the information in his report. They did not investigate Brandon's medical, educational, family and social history, and did not present available evidence of Brandon's emotional and mental problems. Without this evidence, the jury sentenced Brandon to death. Had they heard such testimony, a reasonable probability of a life sentence exists. A new penalty phase should result.

VI. Brandon's Family

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied Brandon effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S.Const.,Amends.VI,VIII,XIV, in that trial counsel failed to investigate and present evidence of Brandon's background, including: his mother-Lorraine, his father-Bill, his brother-Matt, and other relatives, Marilyn Williamson, Shawna Alvery, and Jeff Beall, who would have testified about the family history of alcoholism, mental illness, Brandon's childhood, including his difficulties in school, sexual abuse, move from Fillmore to Palmdale, alcohol and drug use, the family's financial problems, and Lopez's domination and influence on Brandon. Counsel's failure to investigate and present this evidence was unreasonable. They wanted to investigate, but spent their time on guilt-phase issues. Brandon was prejudiced because, had the jury heard this mitigating evidence, a reasonable probability exists that they would have imposed a life sentence.

Counsel did not have to rely solely on experts and background records to find mitigation. Brandon's family members also could have provided mitigating information had counsel investigated. Brandon's parents, Lorraine and Bill, testified briefly at trial, but had much more information. Brandon's brother, Matt, traveled from Kansas City for trial, but did not testify(Tr.236-37). Marilyn Williamson, Brandon's aunt, Jeff Beall, Brandon's uncle, and Shawna Alvery, a cousin, all lived in California, close to Brandon, while he grew up(Tr.135-36,155-56,167-68). Marilyn saw Brandon daily, they were close(Tr.136).

Brandon's father, Bill, recounted that his grandfather and father were alcoholics, and drank daily(Tr.180). Bill's mother was strict and he left home at age 17, joining the Marines(Tr.180-81). He met Lorraine and they married in 1971(Tr.181). They lived in Fillmore, California, a farming community, where they had three sons, Matthew, Brandon and Scotty(Tr.181,182,186,245-46).

Lorraine's mother died during childbirth, making Lorraine's pregnancies stressful (Tr.246-47). When pregnant with Brandon, she fainted and vomited(Tr.246-47). Despite taking medication, her anxiety attacks worsened as the children grew older and eventually she was hospitalized(Tr.247).

Brandon was a sweet, hyperactive little boy(Tr.136). He tried to fit in, but he had few friends(Tr.161). He was shy and followed others(Tr.136-37,161). As Brandon grew up, he appreciated any love and attention his family gave him(Tr.138). He needed reassurance that his family loved him and apologized if he did something wrong. *Id.*

While in Special Education, Brandon felt like he was retarded(Tr.156,197,258). Brandon hated it and was embarrassed(Tr.198,257). He pleaded not to go and wanted to be normal(Tr.258). He was overweight; other children teased and taunted him, and made sarcastic remarks(Tr.137,156,168-69,198,257). Even his coaches made fun of him, calling him "potato thighs" and yelling at him. *Id.* Brandon hung out with Matt and his friends, but they made fun of him too; he did not fit in(Tr.198-99).

When he was ten, Brandon visited Bill's mother in Iowa(Tr.182,259-60). When he returned, he was more distant, closed and quiet, and became angry and rebellious(Tr.182, 201,260). Family later learned that, while in Iowa, an uncle had molested Brandon

(Tr.183,190-93,250,262). He told Matt about the sexual abuse, but did not share details until years later(Tr.202). Brandon also confided in his cousin, Shawna Alvery, who told him to tell his mother(Tr.169-72).

This was especially hard for Lorraine. A cousin molested her when she was five or six, shaming and embarrassing her(Tr.248). Eventually, she went for psychiatric help, but still felt embarrassed and wanted nobody, including family, to know(Tr.249-50,286). It was painful(Tr.293). Lorraine's problem¹³ affected Brandon. She experienced great anxiety about attending school conferences(Tr.251-52). She took Elavil, Valium and Xanax and drank alcohol(Tr.252-53). She and her husband smoked marijuana to decrease their anxiety(Tr.253,287). They used alcohol in front of their sons(Tr.286).

When Brandon was a teenager, they moved to Palmdale, an urban area with gangs and lots of drugs(Tr.138-41,184,203-05,207,263,264). The kids hated it and wanted to move back to Fillmore(Tr.267). They felt like "white trash" and had trouble making friends(Tr.205). They started using drugs and alcohol(Tr.208-09). Brandon became addicted to alcohol and drugs; his parents tried to get him treatment(Tr.184-85,193,261, 268-69).

In 1993 or 1994, the Hutchisons moved to Missouri(Tr.186,194,270). Their Palmdale house had been condemned since it was close to an earthquake fault(Tr.185, 269-70). They lost everything, since all of their money was in their home(Tr.270).

¹³ Lorraine's family's history of mental problems included commitments to mental health facilities and alcoholism(Tr.253-54).

Bill worked as a carpenter with his son, Matthew(Tr.186-87). Brandon could not become part of the Carpenter's Union, since he had not graduated from high school and could not get his GED(Tr.187,271,283). His learning disability caused reading and writing difficulties and he could not get a driver's license(Tr.187,271).

Brandon started hanging out with Lopez and Salazar. The Hutchisons did not like them(Tr.187-88,189-90,212-13). Lopez was cocky and tried to impress others by pulling up his shirt, showing off a gun, and bragging about his gun-shot wounds, battle scars from gang wars(Tr.188,277-78). Salazar always carried a gun and had one on New Year's Eve, 1995(Tr.219-20). Lorraine feared Lopez, who said snitches deserved to die (Tr.278).

Lopez and Salazar acted like brothers and were gang members(Tr.232-34,241). They made fun of Brandon and called him names in Spanish, which Brandon could not understand(Tr.239-40,242). Brandon nonetheless latched onto Lopez, who ordered him around, having him fetch beer and ice, and empty trash(Tr.141,185,213,226,266,277).

Brandon's drug use continued in Missouri and he went to Mount Vernon Rehabilitation Center(Tr.272,274). When he came home, he acted strangely, twitching and jerking(Tr.274). He saw things and screamed(Tr.274-75). He thought Lopez had shot him and tried to run from him(Tr.275). His parents took him to the hospital and he eventually went to Bridgeway Treatment Center(Tr.275).

Bill and Lorraine talked to Brandon's attorneys(Tr.194,280). They paid a retainer of \$15,000, since Brandon had no money(Tr.279-80,282). They told them about Brandon's troubles and gave them names of other relatives, doctors and counselors (Tr.194-95,281,282,284,291). Matt also talked to them, but they did not ask him about their

childhood, instead asking about the night of the offense and Lopez's party(Tr.220-21,230-32,241). Counsel did not contact or interview Marilyn, Jeff, or Shawna to determine if they should testify(Tr.142,163,172-3). Marilyn saw them when they talked to her sister, Lorraine, but she was present only as moral support for Lorraine(Tr.142, 147).

Standard of Review

This Court reviews the findings for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo.banc2000); Rule 29.15. To establish ineffective assistance, Brandon must show that his counsel's performance was deficient and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*,120 S.Ct.1495,1511-12(2000). Counsel must "discover *all reasonably available* mitigating evidence." *Wiggins v. Smith*, 123 S.Ct. 2527,2537(2003)(emphasis in original). Counsel must investigate their client's family and social history. *Id.*

The court rejected that counsel was ineffective for not presenting mitigation through family members. The court found: Bill had some helpful information, but could have been cross-examined about Brandon's drug and alcohol use and having spent time with Lopez and Salazar; he was unaware that Brandon had hid a gun; and his testimony would not have changed the outcome(L.F.804-805).

The court also found Lorraine's testimony would not have changed the outcome, since her family's struggle with sex abuse was irrelevant; her testimony was duplicative of what had been offered in penalty phase; many people live in cities and do not commit murders; the family's financial difficulties did not cause Brandon to kill the victims; the jury would reject this evidence as an attempt to shift blame; she was not forthcoming with

details; and since she wanted the details of her family's sexual abuse kept private, counsel was not ineffective in not presenting it(L.F.806).

The court found Brandon's brother, Matt, was properly not called because: the family did not want to publicize sexual abuse; Brandon's alcohol and drug use was introduced; the balance of his testimony would not have changed the result, and could have been harmful(L.F.803-04). Since counsel spoke to Matt and decided he was unbelievable, their decision not to call him was strategic(L.F.803-04).

The court found that Marilyn Williamson's testimony about boyhood events would not have changed the outcome. She knew little of Brandon's activities since he moved to Missouri; and the prosecutor could have countered with unflattering evidence of Brandon's drug involvement(L.F.801-02).

The court dismissed as cumulative and not outcome determinative, Jeff Beall's account of his nephew's problems, including being in Special Education and a follower (L.F.802-03).

The court found Shawna Alvery's testimony unhelpful, since she only recently moved to Missouri and was unfamiliar with Brandon's recent activities; since counsel was unfamiliar with her name, they could not be ineffective; the family did not want to air its sex-abuse history; and helpful information about the teasing Brandon endured and his good deeds was relatively minor and was cumulative(L.F.802).

These findings are clearly erroneous for many of the same reasons discussed in Point III, *supra*. Background information, by definition, occurs years before the crime. It is nonetheless highly relevant and admissible. *Williams, Wiggins, and Eddings v.*

Oklahoma, 455 U.S. 104(1982). Contrary to the court’s ruling, a defendant need not show a causal connection to the charged offense to admit it. *Williams, supra*.

As in *Williams*, the favorable testimony far outweighed the negative. Every fact the court cited as reasons to exclude it, Brandon’s drug use, his association with Lopez and Salazar, and possession of a gun, had already been introduced. The family’s testimony would have added nothing unfavorable, but would have shown the jury Brandon’s good qualities, the hardships he faced, and his mental problems.

The court erroneously concluded, that since counsel had spoken to Matt and found him unbelievable, their decision not to call him was reasonable strategy(L.F.804). Crosby did say Matt was not very believable(Tr.1071), but counsel focused all of their time on the guilt phase(Tr.1064,1083). Nearly their entire interview with Matt discussed the night before the shootings and Matt and his brother’s activities(Tr.220-21,230-32,241). Cantin could recall no details of Brandon’s life history that Matt provided(Tr.966-67). Counsel could not have made a reasoned decision not to call Matt in penalty phase, even if they reasonably chose not to call him in guilt phase.

“[T]he mere incantation of the word ‘strategy’ does not insulate attorney behavior from review. The attorney’s choice of tactics must be reasonable under the circumstances.” *Cave v. Singletary*, 971 F.2d 1513,1518(11thCir.1992). Even tactical decisions can be so unsound that they amount to ineffectiveness. *State v. McCarter*, 883 S.W.2d 75,76-77(Mo.App.S.D.1994); *Poole v. State*, 671 S.W.2d 787,788 (Mo.App.E.D.1983). Whether a tactic was reasonable is a question of law on which motion court’s findings are not entitled

to deference. *Cave, supra*. Counsel's so-called strategy was unreasonable; it was based on an interview in which counsel neither sought nor discovered facts about penalty phase.

The court illogically finds that since counsel was unfamiliar with Alvery's name, counsel could not be ineffective for failing to call her(L.F.802). Under this reasoning, counsel could never be ineffective for failing to investigate those witnesses they should have known about, but did not.

The court improperly looks at each family member's testimony, and finds that it would not have changed the outcome. However, the Supreme Court has ruled that in deciding prejudice from counsel's failure to investigate a client's life history, courts must "evaluate the totality of the evidence - - 'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Wiggins, supra* at 2543, quoting *Williams v. Taylor*, 120 S.Ct. at 1515(emphasis in opinion). The issue is whether, when adding all the mitigation together, is there a reasonable probability that the outcome would have been different. *Id.* Does *all* the mitigating evidence undermine the Court's confidence in the resulting death sentence? One juror might find this mitigation should tip the scales in favor of a life sentence. *Wiggins, supra*.

The jury heard briefly from Brandon's parents. Bill told the jury that he did not believe his son deserved to die, that he visited him every Sunday at the jail, he took care of Brandon's children who would visit Brandon and he did not want Brandon executed(Tr.1932-35). Similarly, Lorraine touched on Brandon's characteristics and his background(T.Tr.1913-23). But the jury never heard about Brandon's problems in school, his mental deficits, his sexual abuse, his family history of mental illness and alcohol and

substance abuse. They never knew the struggles Brandon faced in his childhood or how vulnerable he was. Lopez dominated and controlled Brandon, and jurors needed to hear his family and social history to understand why.

Counsel admitted that they failed to investigate and prepare for penalty phase. They wanted to present Brandon's complete life history. Instead, counsel briefly examined four witnesses and only two family members. Counsel knew their mitigation case suffered(Tr.990,1064,1083) and the motion court should have known it too.

Brandon's case is similar to *Collier v. Turpin*, 177 F.3d 1184(11thCir.1999), where counsel called ten penalty phase witnesses in a session that went late at night and the entire penalty phase lasted only 1 1/2 hours. *Id.* at 1201. Collier's counsel said he wanted to present a strong case in mitigation. *Id.* at 1200. Yet, his desire stood in stark contrast to his presentation. *Id.* His examination of the witnesses was minimal. *Id.* at 1201. He sought to elicit little relevant evidence about Collier's character. *Id.* The court found counsel ineffective. "Counsel presented no more than a hollow shell of the testimony necessary for a 'particularized consideration of relevant aspects of the character and record of [a] convicted defendant before the imposition upon him of a sentence of death.'" *Id.* at 1201-02(quoting *Woodson v. North Carolina*, 428 U.S. 280,303(1976)).

Here, too, counsel presented a hollow shell of the testimony necessary for the jury to understand Brandon' character and upbringing. Had counsel had the time and experience to do the most basic investigation into his background, they would have discovered and presented mitigating evidence. A reasonable probability exists that had counsel been

effective, one juror would have found this mitigation sufficient to tip the scales to a life sentence. A new penalty phase should result.

VII. Lopez's Domination and Control over Brandon

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied Brandon effective assistance of counsel, due process and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV, in that counsel failed to investigate and present testimony of Frankie Young (Smith), Terry Ferris, Brandy Kulow (Morrison), Marcella Hillhouse, and Phillip Reidle that Lopez was a drug dealer who bragged about his gang, showed-off his stab wounds, considered Salazar his close gang brother, hit-man and enforcer, dominated and controlled Brandon; Lopez instigated John Galvan's stabbing and Brandon was sorry it happened; Lopez tried to force Brandon to shoot Marcella Hillhouse, but he refused; and the victims were known as heavy drug users of marijuana, crank and pills. Brandon was prejudiced because this evidence would have refuted the State's theory that Brandon was in charge, deciding to kill the Yates, and would have provided mitigation supporting a life sentence.

Counsel's trial theory was that Lopez and Salazar were gang members, running rough-shod over Brandon, a good kid who followed others(Tr.1016,1024,1050,1094). Unfortunately, the group Brandon followed was not good, they bought and sold drugs and violence was an integral part of their world. Counsel failed to investigate witnesses who would have supported this theory. Frankie Young (Smith),¹⁴ Terry Farris, Brandy

¹⁴ Smith and Morrison had married at the time of the hearing.

Kulow(Morrison), Marcella Hillhouse, and Phillip Reidle could have provided helpful information to support counsel's defense in both phases.

The motion court denied these claims(L.F.756-60). This Court reviews these findings and conclusions for clear error. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo.banc1987). To prove ineffective assistance, Brandon must show counsel's deficient performance and prejudice. *Wiggins v. Smith*, 123 S.Ct. 2527 (2003).

Counsel's defense was that Lopez dominated and controlled Brandon(Tr.1016, 1094). They argued vigorously for admitting evidence of Lopez and Salazar's gang activity in the violent, Hispanic gang, the Party Boys(T.Tr.239-46,252-90). Members beat new members during their initiation to teach them loyalty(T.Tr.271-72). Counsel believed this evidence would show Lopez and Salazar's relationship and Lopez's motives to lie, to protect his gang brother and pin the offense on Brandon(T.Tr.269-70). Further, the victims were not innocent bystanders, but drug users who were connected to Lopez (Tr.91-95). Counsel ineffectively failed to investigate these witnesses, who could have provided helpful information to their defense.

Frankie Young

Lopez dominated, controlled, and made the decisions, while Brandon followed (Tr.51,55). Lopez bragged about being in a gang; he claimed Salazar was his gang brother and California hit man(Tr.55). The court dismissed Young's first-hand account of Lopez's gang activity and her assertions that Salazar was Lopez's gang brother and hit man, ruling gang evidence was presented at trial(L.F.756). This finding ignores that, at trial, Lopez minimized the gang activity and denied Salazar was a good friend of his(T.Tr.1070). Rather,

he claimed Salazar was a good friend of Lopez's brother's and Lopez only let him live with him as a favor to his brother(T.Tr.1156). Lopez claimed his gang, which he left behind in California, was a Mexican group taking pride in their neighborhood(T.Tr.1153,1155,1156). Nothing could be further from the truth. Lopez continued his gang activity in Missouri, bragged about it to intimidate others, and showed off his scars(Tr.55,911). It worked, he scared them(Tr.108). Lopez dominated Brandon, who followed Lopez's directives(Tr.51,53,55,66,81,108,914). This was hardly what the jury heard.

The court also denied the Young claim, because "follower" evidence was refuted by trial evidence(L.F.756). That is exactly the point. Lopez portrayed Brandon as taking charge after Salazar shot the victims(T.Tr.1110-1134). Lopez pretended to be an innocent bystander who wanted to call an ambulance(T.Tr.1110,1112-13). Because Lopez painted this false picture, counsel needed to elicit the truth, that Lopez controlled Brandon, who intimidated and scared, followed.

Evidence of Lopez's control over Brandon also mitigated the offense. Acting under duress is a mitigator. § 565.032.3(6). *See also, State v. Herrera*, 850 P.2d 100,113(Az.1993)(duress statutory mitigating circumstance established where father coerced his son into shooting). Evidence that a defendant is a follower, not a leader, explains how he can be manipulated. *Glenn v. Tate*, 71 F.3d 1204, 1211(6thCir.1995).

Counsel needed to present evidence showing Brandon was a follower, not a leader. *Herrera*, and *Glenn*. Lopez dominated and intimidated him. Lopez directed the show, telling Brandon and Salazar to dispose of the guns, ammunition and drug paraphernalia. He was not the innocent bystander that he claimed.

Finally, the court found that since Crosby deposed Young(Tr.1071-72), Brandon failed to show his failure to elicit this favorable evidence was not reasonable trial strategy (L.F.756). This ignores counsel's testimony that they believed Lopez and Salazar were gang members who controlled Brandon(Tr.1016,1094). They believed Brandon was a good kid, involved with the wrong people, but he did not shoot anyone or make the decisions that night(Tr.1024,1050,1090,1094). Young testified for the state, so counsel had no decision to make about calling her. Counsel unreasonably failed to elicit helpful information from this testifying witness.

Terry Farris

Farris had been at Lopez's house before the New Year's Eve party to buy methamphetamine(T.Tr.1080). The Yates knew Farris, their brother Tim had been with Farris when he went to Lopez's(T.Tr.1080). Despite Farris's association with Lopez and the Yates, counsel did not investigate him. Had counsel looked, they would have found that Farris knew Lopez well, through drug dealing(Tr.79). He had seen Lopez and Brandon together and knew that Lopez called the shots and made the decisions(Tr.81).

The court denied relief, because Lopez lacked "complete" control over Brandon, Crosby concluded Farris would not be helpful, and since Lopez admitted selling drugs, Farris' testimony would have been cumulative(L.F.756-57).

This finding is unsupported. Crosby did not say Farris would not be helpful; he could not even remember the strategy reason for not asking him about this information(Tr.1072). Crosby recognized that Farris was not a pillar of the community and would not be a good character witness for Brandon(Tr.1073). Lopez's friends and drug buyers were not pillars,

but they knew Lopez, they knew him and how he dominated Brandon. The jury heard that Farris' admission of buying drugs from Lopez, but did not hear about Lopez's dominating relationship. This evidence would have supported the defense and provided mitigating evidence. *See Herrera*; § 565.032.3(6), *supra*.

Brandy Kulow

Kulow, a state's trial witness, knew Lopez and Brandon(Tr.906-07). She liked Brandon, not Lopez(Tr.907). Brandon was good to her and her children (Tr.908-09). Lopez bragged about being a gang-member(Tr.911). He hung out with Salazar, who was quiet, but violent(Tr.910-11). Kulow saw Salazar pull a gun on people several times(Tr.910). Once, Salazar pointed a gun to her head(Tr.910-11). She was scared, but did not take Salazar seriously(Tr.911).

At trial, Kulow testified about Brandon having a gun he pulled out of a hay bale(T.Tr.1859). Were she asked, she would have clarified that Brandon did not threaten her or scare her(Tr.912). The sight of the gun scared her(Tr.912).

Counsel failed to elicit favorable information from Kulow. The court acknowledges as much, but finds that any resulting prejudice was overcome by the negative information the state could have elicited: when Salazar threatened Kulow, she did not take him seriously, Brandon could converse with Kulow, she left her children with him, he used drugs, and hid a gun in a haystack(L.F.759-60).

The record refutes these findings. First, Kulow had testified that Brandon hid a gun in a haystack(T.Tr.1859) so the jury already knew it. But the jury did not know that Brandon never threatened her with the gun(Tr.912). Since the jury already knew that Brandon used

drugs(T.Tr.1893-1900), this was not a reason not to question Kulow about Salazar, his violent threats, and her terror of Lopez. Kulow knew Brandon was easily led, something counsel wanted the jury to know. They unreasonably failed to present this evidence.

Marcella Hillhouse

Hillhouse knew Brandon well, seeing him nearly daily a year before the offense (Tr.96-97). She liked Brandon and thought he was a good kid(Tr.97). Lopez, in contrast was domineering, abusive and had sexually assaulted her(Tr.108). He scared her(Tr.108). Hillhouse recounted how Lopez accused her of stealing \$500.00 from him(Tr.99-100). Lopez threatened her with a gun and wanted Brandon to shoot her(Tr.99,101). He refused(Tr.101).

In an offer of proof, Hillhouse also provided details of the Galvan stabbing elicited by the State in penalty phase(Tr.101-06). Lopez started the fight and urged Brandon to stab him(Tr.104-05). Brandon felt badly thereafter and helped Hillhouse bandage Galvan(Tr.106).

Counsel admitted never having talked to Hillhouse before trial. They wanted to investigate the Galvan incident and Lopez's threats(Tr.938-39,952,1016-18,1063-67,1076-77,1095-98). The court found they were not ineffective because Brandon did not disclose her and at the Rule 29.07 hearing, Brandon said "he didn't have no witnesses," citing *State v. Lopez*, 836 S.W.2d 28,35(Mo.App. E.D.1992)(T.Tr.1993) (L.F.757-58).

While *Lopez* supports the court's finding, it was decided before *State v. Driver*, 912 S.W.2d 52(Mo.banc1995). *Driver* discussed Rule 29.07 in detail. Questions like "did the attorney do everything" or "not do anything" were too broad to conclusively refute *Driver's*

ineffectiveness of counsel claim. *Id.* at 55-56. To refute that claim, the record must show the defendant would have known of the claim and that it was a viable defense. *Id.* at 56.

Here, Brandon has Borderline Intellectual Functioning, his IQ was 76 or 78, and he reads at a 4th grade level(T.Tr.1882-83). His attorneys recognized his deficits and believed he tried to answer all their questions truthfully and give them the information they requested(Tr.1107,1109). Nothing suggests Brandon would have known that Hillhouse could be helpful or would provide a viable defense. Rather, the evidence shows that Brandon did not understand the severity of the charges or that he could be convicted(Tr.1093). The underlying theme in every conversation with his attorneys was: “I didn’t kill those boys”(Tr.1093). Brandon could not begin to understand accomplice liability or what witnesses might rebut the State’s aggravation and provide mitigation.

Counsel had a duty to investigate independent of Brandon. *Baxter v. Thomas*, 45 F.3d 1501,1513-14(11thCir.1995); *People v. Perez*, 952 N.E.2d 984,991(Ill.S.Ct.1992). While clients with mental deficiencies may not even talk to their attorneys, *see, e.g., Baxter, supra* at 1514, counsel still must investigate.

The court found that Hillhouse’s testimony about Lopez asking Brandon to shoot her would have been damaging, undercutting counsel’s theory that Lopez dominated Brandon(L.F.758). Hillhouse’s information cut both ways, showing that Brandon refused Lopez’ directive to kill and showing Lopez’s controlling nature and how he enlisted others to do his dirty work. The incident was consistent with counsel’s defense that Lopez dominated and controlled Brandon; Brandon went along, but drew the line at killing for Lopez. Salazar had done that.

The court improperly refused Hillhouse's testimony regarding the Galvan incident and made no findings about it(Tr.101-06;L.F.757-58). The court's stringent pleading requirements are unfair and denied Brandon a full and fair hearing.

Missouri is a fact-pleading state. *State v. Harris*, 870 S.W.2d 798, 815 (Mo.banc1994). Rule 29.15 motions must plead, with factual specificity, the witness's name and the nature of the claim. *Id.* Harris failed to identify a mental health expert he intended to call or the type of mental disease or defect he suffered. *Id.* Nevertheless, this Court reviewed the claim. *Id.*

In contrast, Brandon's motion alleged counsel's ineffectiveness in failing to investigate and call Hillhouse(L.F.24). It detailed that Hillhouse knew Brandon and Lopez, Lopez dominated and threatened Brandon, Lopez once tried to make Brandon kill Hillhouse, and Lopez sexually assaulted her(L.F.24). This adequately covered the Galvan incident, an example of Lopez dominating and threatening Brandon. If 29.15 motions must allege, word by word, every detail expected from a witness, a hearing would be pointless. Yet Rule 29.15(h) provides for them. Here, Brandon's motion specifically identified the witnesses to be called and the claims of ineffectiveness, simply omitting some of the details of the witness' testimony.

Phillip Reidle

Reidle went to high school with Ronald Yates; Brian Yates was Reidle's good friend(Tr.90-91). Reidle and Brian partied for twelve years, from 1980-1992(Tr.91,93). Brian did any and every drug(Tr.91). Like his brother, Ronald was a reputed drug user of

marijuana, crank and pills(Tr.92). The Yates maintained these reputations until their deaths(Tr.95).

Counsel admitted they were unaware of Reidle and never talked to him before trial (Tr.941,1069). The court found that, since counsel was unaware of Reidle, they were not ineffective in failing to call him(L.F.760). Under this analysis, the failure to investigate could never be ineffective, since counsel would never be aware of witnesses they did not investigate.

The court minimized prejudice: Reidle lacked personal knowledge for three years before the killing; Dr. Spindler testified he found drugs in the victims' systems so Reidle would have been cumulative; and the jury would have been inflamed had the defense attacked the victims(L.F.760).

Reidle used drugs with Brian Yates for twelve years and knew about his continuing drug-user reputation until Yates died(Tr.93,95). He knew that the Yates would use anything and everything(Tr.91-92), distinct from Spindler's account that, after one New Year's Eve party, Brian's urine contained only alcohol and marijuana residue, and Ronald's urine contained alcohol, marijuana, amphetamine and methamphetamine residue(T.Tr.1398,1418).

Contrary to the court's suggestion that counsel would never use this evidence, because it had inflammatory tendencies, Cantin acknowledged that, had he known about it, he might have presented it in guilt phase(Tr.941). Reidle's testimony would have been helpful to show their relationship with Lopez, a drug dealer, and their knowledge of the quality of drugs he was selling their brother. The jury should have heard that the Yates were

not two innocent, unknowledgeable bystanders. They were involved in drugs with Lopez and Salazar. They used crack, marijuana, pills, and ended up in a violent altercation with Salazar. At the evidentiary hearing, counsel candidly recognized Reidle's importance. The court should have too.

Counsel was ineffective in failing to investigate and present this evidence. A new trial should result.

VIII. Counsel's Failure to Object to and Preserve Prejudicial Error

The motion court clearly erred in denying Brandon's Rule 29.15 motion because this denied Brandon effective assistance of counsel, due process and freedom from cruel and unusual punishment, U.S. Const.,Amends.,VI,VIII,XIV, in that trial counsel failed properly to object to:

- 1. prosecutor's opening statement that Yates was "sprawled out there like Christ crucified on the cross;"**
- 2. closing argument that Troy Evans, the one man linking all three defendants to the crime, was destroyed, suggesting he was killed to eliminate him as a witness;**
- 3. closing argument that Lopez would receive no deal although, if he testified favorably for the State, his charges would be reduced from first to second-degree murder and he would receive a term of years;**
- 4. the State's late endorsement of penalty phase witness, John Galvan; and**
- 5. expert opinion that Brandon was competent and not suffering from a mental disease or defect, which was irrelevant and inadmissible in penalty phase.**

These errors prejudiced Brandon, denying him a fair trial and a reliable sentencing, and a reasonable probability exists that, had counsel properly objected, reversal and a new trial would have resulted.

Counsel failed to object to prejudicial evidence and arguments and did not know how to preserve constitutional error for appellate review. Brandon was prejudiced because the

errors denied him a fair trial and reliable sentencing and because had they been preserved, a reasonable probability exists of reversal and remand.

Standard of Review

This Court reviews for clear error. *Sanders v. State*, 738 S.W.2d 856,857(Mo.banc1987). To establish ineffective assistance, Brandon must show that his counsel's performance was deficient and prejudice. *Strickland v. Washington*, 466 U.S. 668(1984); *Williams v. Taylor*, 120 S.Ct. 1495,1511-12(2000). Counsel can be ineffective for not objecting 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).

The court's findings and conclusions are clearly erroneous. The court ruled that failure to preserve error and properly object to error was not cognizable and denied Brandon the right to present evidence on some claims(L.F.775,761-62,768,Tr.992). *Kenner, Copeland, and Storey, supra* hold otherwise, finding ineffectiveness for failing to object. To the extent *State v. Loazia*, 829 S.W.2d 558,569-70(Mo.App.E.D.1992),¹⁵ holds otherwise, it should be overruled.

¹⁵ *Loazia* ruled that ineffective assistance claims are limited to errors which prejudice the movant by denying a fair trial and cannot include claims regarding failures to object. *Id.* *Loazia* was a consolidated appeal under former Rule 29.15. Rule 29.15 (a) has been amended to specifically include claims of ineffective assistance of trial and appellate

Brandon’s amended motion alleged counsel failed to preserve claims for review (L.F.53). Crosby intended to preserve federal constitutional claims, but thought citing the applicable constitutional provision would annoy the jury(Tr.1060-61). Crosby believed that if he objected and stated a legal ground, that preserved the claim for state and federal court(Tr.1061). Crosby believed the claim need not be in the new trial motion; an objection and record at trial would sufficiently preserve it. *Id.* Cantin thought an objection, such as hearsay or relevancy, preserved a federal constitutional claim(Tr.935).

The court brushes aside that counsel did not know that “[t]o preserve appellate review, constitutional claims must be made at the first opportunity, with citations to specific constitutional sections.” *State v. Parker*, 886 S.W.2d 908,925(Mo.banc1994). A hearsay objection does not preserve a violation of the right to confrontation under the Sixth and Fourteenth Amendments. *Id.* Errors must be included in the motion for new trial. Rule 29.11(d). Counsel did not know how or when to object, and Brandon’s specific claims show how he was prejudiced.

1. Yates was Sprawled Out Like Christ Crucified on the Cross

In the State’s opening, it said that Ronald Yates was sprawled out like Christ crucified on the cross(T.Tr.776). On appeal, this Court recognized the statement was offensive, but found no manifest injustice or miscarriage of justice, so it did not review for plain error. *Hutchison v. State*, 957 S.W.2d. 757,765(Mo.banc1997).

counsel. Claims about the appeal are now to be included in the 29.15 proceedings. *Walker v. State*, 34 S.W.3d 297,301(Mo.App.S.D.2000).

The motion court rejected this claim, finding it not cognizable; not plain error, thus it was not prejudicial; counsel's decision was strategic; and, since the jury was instructed that arguments were not evidence, no harm resulted(L.F.761-62). The claim was cognizable. *See e.g. Storey; Copeland, supra*. Counsel can be ineffective for not objecting to improper argument, even if the arguments are not plain error. *Storey, supra*. Plain error prejudice is not equal to *Strickland* prejudice. *Deck v. State*, 68 S.W.3d 418(Mo.banc2002).

In both *Storey* and *Copeland*, the juries were instructed that the arguments are not evidence; nevertheless, the offensive arguments were prejudicial. *See also, Antwine v. Delo*, 54 F.3d 1357,1364(8thCir.1995) (instruction that arguments are not evidence did not eliminate prejudice).

The finding of strategy does not withstand scrutiny. Counsel recognized the argument was objectionable, but following his general rule, did not object unless it was "too far out of line"(Tr.944,946). If saying a victim is spread out like Jesus Christ on the cross is not out of line, what is? The state improperly compared the victim to Christ, and argued outside the evidence. Courts routinely find religious arguments violate the Eighth and Fourteenth Amendments. *See e.g. Commonwealth v. Chambers*, 599 A.2d 630,644(Pa.1991). This Court also found this statement offensive, but without an objection, would not review for plain error. *Hutchison, supra* at 765. Since counsel had no good reason for not objecting, this Court should reverse.

2. Evans Was Destroyed

Troy Evans died before trial, so his deposition was used instead of live testimony(T.Tr.1532). No evidence was offered to show how he died or that Brandon was at all responsible. Frankie Young simply said Evans died August 6th(Tr.1505). Yet, in his closing, the prosecutor argued, without objection, that “[t]he one man that could link all three defendants to this crime scene was destroyed. Not by the State, but by the three defendants. Had to get rid of those shoes; the thing that linked them there” (T.Tr.1815).

The court denied this claim, because counsel failed to specifically question Crosby about why he did not object(L.F.768), ignoring that counsel asked Cantin about Troy Evans(Tr. 966). Counsel could have no legitimate reason for not objecting to the suggestion that Brandon killed a witness because he could implicate him. Failing to object to other crimes is ineffective and prejudicial. *Kenner, supra*. The court erred in ruling otherwise.

3. Prosecutor Misleads The Jury That Lopez Would Receive No Deal

The State argued that Lopez convicted himself of first-degree murder and was not getting out of anything, suggesting he would receive no deal(T.Tr.1820). Counsel knew, or should have known, that this was untrue. The prosecutor admitted, on the record, to having plea discussions with Lopez’s attorney and telling him that, if Lopez was a “good witness,” the State would reduce the charges, from first-degree to second-degree murder(T.Tr.142). They had not reached an agreement on years, but the State contemplated 30 years. *Id.* In an offer of proof, counsel said that Lopez’s expectation of a deal for second-degree murder and 30 years would have been extremely important (Tr.992).

The court denied this claim, because of the failure to ask counsel why he did not object(L.F.768). This finding is contrary to the record, and ignores the court's refusal to accept the offer of proof when Brandon tried to question counsel about why he did not object(Tr.991,992-93). In an offer of proof, counsel admitted that this was extremely important(Tr.992). The failure to inform the jury of a continuing interest to testify favorably for the state is prejudicial. *See* Point II, discussing *Banks, Giglio, and Napue, supra*.

4. John Galvan

The State called John Galvan in penalty phase, who claimed Brandon had stabbed him months before the charged offense(Tr.938). The State did not endorse Galvan before trial, but provided notice during guilt phase(Tr.951,1063). Counsel did object to the late endorsement, but did not properly request a continuance(T.Tr.1466-79). Counsel wanted to investigate this allegation(Tr.951-3). Given the case's size and complexity, they could not possibly investigate Galvan during trial(Tr.952,1064). Counsel thought they asked for a continuance and wanted one(Tr.953,1064). They would have scrutinized Galvan and his allegations(Tr.1065-66). Letting counsel question Galvan before he testified was insufficient(Tr.1112,1116,T.Tr.1477).

Had counsel requested time to investigate, they could have discovered that Marcella Hillhouse and Lopez were present during Galvan's stabbing(Tr.131). Lopez started the fight and urged Brandon to stab Galvan(Tr.104-05). Brandon felt bad afterwards and helped bandage Galvan(Tr.106).

The court dismissed counsel's ineffectiveness, saying Brandon could have told counsel who else was present and Brandon failed to prove prejudice(L.F.766-67). This finding ignores that Galvan was not endorsed before trial. What Brandon told counsel was irrelevant, since counsel had no time to investigate during trial(Tr.951-53,1064).

The prejudice from counsel's failure to request a continuance is established by this Court's own opinion. It was "noteworthy that Hutchison did not seek a continuance from the trial court asking for more time to complete his investigation." *Hutchison, supra* at 764. Counsel's failure led this Court to infer that the late endorsement did not damage Brandon. *Id.* Nothing could have been more untrue.

Brandon established what investigation could have revealed, but the court rejected Brandon's offer of proof(Tr.101-06). Lopez started the fight(Tr.104-05). Brandon felt bad afterwards and came to Galvan's aid(Tr.106). This would have lessened Brandon's culpability and would have been mitigating.

5. Brandon's Competence And Mental Disease Or Defect

During penalty phase, the prosecutor cross-examined Dr. Bland about whether Brandon was competent and had any mental disease or defect(T.Tr.1902-03). Counsel did not object. *Id.* Counsel did not know why he did not, but believed an objection might have let the prosecutor talk about Brandon's competence and counsel did not want to discredit his own expert(Tr.1082).

The court found counsel was not ineffective, accepting counsel's explanation that he did not want to discredit Bland and wanted Bland to testify so the jury could hear Brandon's version of events(L.F.788-89). Problematic is how objecting to the prosecutor's improper question would have discredited Bland.

Without an objection, the jury was misled about the irrelevance of Bland's finding that Brandon was competent to stand trial. The Missouri Legislature allows juries to consider, in deciding whether someone should receive death, an abnormal mental condition short of legal insanity. Sections 565.032.3(2),(5),(6). These provisions outline the mitigators of extreme mental or emotional disturbance, extreme duress or domination by another, and substantial impairment of capacity to appreciate the criminality of his conduct or to conform it to the requirements of law. *Id.*

Equating competency to stand trial with the standards to prove these mitigators is erroneous. *State v. English*, 367 So.2d 815,819(La.1979); and *State v. Howard*, 751 So.2d 783,810-11(La.1999). In *English, supra*, two psychiatrists testified in the penalty phase that English was competent to stand trial, but had a major psychiatric illness. The prosecutor argued in closing that the doctors said that he knew right from wrong, had no mental disease or defect that relieved him from criminal responsibility. *Id.* The court found that it was wrong to lead the jury to believe that the same test for competency to stand trial applied to mental health mitigators in penalty phase. *Id.*

In *Howard, supra*, the court again recognized this error, but did not find juror confusion. Defense counsel was not focusing on mental illness, but different mitigators

such as youth. *Id.* Accordingly, the mental defect mitigators had no significance for the defense. *Id.*

In contrast, here, the defense called Dr. Bland as a mitigating witness, wanting the jury to consider Brandon's mental problems. But the prosecutor's improper cross-examination suggested that if he was competent and had no mental disease or defect(T.Tr.1902-03), the statutory mitigators did not exist. In closing, the state argued:

Did he have the capacity to appreciate the criminality of his conduct?

Dr. Bland came in here as an expert and told you he did. That he did. Was he under the influence of any extreme emotional disturbance? There's no evidence of that.

(T.Tr.1941-42). Under these circumstances, counsel unreasonably failed to object to the prosecutor's improper cross-examination, equating competency to stand trial with statutory mitigators. Given the state's closing argument, Brandon was prejudiced. The jury was likely confused into believing they could not consider Brandon's mental problems unless they rose to the level of making him incompetent.

Jurors must be allowed to consider, as a mitigating factor, any aspect of the defendant's character that is proffered as a basis for a sentence less than death, under the Eighth Amendment and Fourteenth Amendment Due Process Clause. *Lockett v. Ohio*, 438 U.S. 586(1978). Allowing mitigation is meaningless if jurors are not allowed to give effect to the mitigation. *Hitchcock v. Dugger*, 481 U.S. 393(1987). The state's improper examination and argument led the jury to believe they could not consider Brandon's mental

problems, because Dr. Bland had found him competent to stand trial. Counsel should have objected. A new penalty phase should result.

IX. Brandon's Death Sentence is Disproportionate

The motion court clearly erred in rejecting Brandon's claim that this Court's proportionality review denies due process and freedom from cruel and unusual punishment, U.S.Const.,Amends.VIII,XIV, because: this Court fails to consider codefendants' sentences, Salazar, life without parole, and Lopez, ten years, even when they are more or equally culpable; *de novo* review should apply on appellate review of death sentences; this Court's database does not comply with §565.035.6 and omits numerous cases; and this Court fails to consider all similar cases required by §565.035.3(3).

Brandon alleged that this Court's inadequate proportionality review denied due process and freedom from cruel and unusual punishment, U.S.Const.,Amends.VIII,XIV. (L.F.42-44). The motion court denied relief, ruling this Court had rejected this claim (L.F.768) citing *State v. Clay*, 975 S.W.2d 121,146(Mo.banc1998). On appeal, this Court reviews the motion court for clear error. *Barry v. State*, 850 S.W.2d 348,350 (Mo.banc1993).

Clay ruled this Court's proportionality review adequate and held that a "co-actor's plea agreements and convictions for crimes other than first degree murder are not to be considered in the proportionality review of a death sentence." *Clay, supra* at 146. However, the facts here mandate reconsideration. Salazar received a life sentence (Ex.77), although he shot the victims in the garage, setting events in motion for this

crime(T.Tr.1106,1188). Evidence also suggested that he was the actual shooter on the farm road too(Ex.65,L.F.618).

More shocking, however, is Lopez's ten-year sentence for second-degree murder (Ex.79). George thought Lopez was guilty of first-degree murder(Ex.79at 7-28) and sought his death(Ex.78). Lopez's active involvement in the crime supported George's original decision. Salazar shot the victims at Lopez's garage(T.Tr.1106) with guns kept at Lopez's house(T.Tr.1090-93,1200). Lopez gave the victims drugs and sold drugs on the night of the offense(T.Tr.1080,1097). Lopez's car transported the victims (T.Tr.1113,1116,1203). Lopez accompanied his co-defendants to the farm road where the victims were killed(T.Tr.1123). Lopez directed his codefendants on how to get rid of the guns, drug paraphernalia, and other incriminating evidence(T.Tr.1118,1121,1122,1201, 1218-19). Lopez burned his shoes - fearing they would incriminate him(T.Tr.1234). Lopez made sure the others kept quiet(T.Tr.1144,1146). After the shooting, Lopez made telephone calls(T.Tr.1147) and paid Salazar \$300 to leave town(T.Tr.1152). Despite Lopez's culpability, the State agreed to a ten-year sentence at the insistence of the victim's family who received \$200,000.00 as payment(Ex.79at 9,27,28,38,Ex.84).

Co-defendants' sentences must be considered in deciding whether a death sentence is disproportionate. *Parker v. Dugger*, 498 U.S. 308,314-16(1991) (Parker's accomplices' sentences were relevant mitigating evidence that the sentencer and reviewing court should consider); and *Richmond v. Lewis*, 506 U.S. 40,43-44(1992) (codefendants' conduct and sentencing disposition were relevant mitigators that should be weighed against aggravators). The court erred in not following *Parker* and *Richmond*, *Clay* notwithstanding.

See also, *Ex Parte Burgess*, 811 So.2d 617,628(Ala.2000)(court should have considered mitigating all other participants' complete immunity from prosecution); and *Scott v. Dugger*, 604 So.2d 465,468(Fla.1992)(codefendant's sentence considered in granting defendant collateral relief). To the extent this Court excludes such consideration, its proportionality review is constitutionally flawed.

Appellate comparative *proportionality* review is not constitutionally-required. *Pulley v. Harris*, 465 U.S. 37,44-51(1984); *State v. Ramsey*, 864 S.W.2d 320,238 (Mo.banc1993). However, some form of meaningful *appellate* review is. *Pulley*, 465 U.S. at 54(Stevens, J.concurring). See also, *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424,434,440(2001) (the Eighth and Fourteenth Amendments require appellate courts to apply *de novo* review to the constitutionality of punitive damages, and presumably applies to death penalty cases). *Cooper* cited *Furman v. Georgia*, 408 U.S. 239(1972)(per curiam); *Enmund v. Florida*, 458 U.S. 782,787(1982); *Coker v. Georgia*, 433 U.S. 584,592(1977)(opinion of White, J.).

Once a State mandates state Supreme Court review, that review must comply with the Constitution. *McCleskey v. Kemp*, 481 U.S. 279,313-14,n.37(1987). Section 565.035.3(3) requires a determination as to "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant." By requiring independent proportionality review, the Legislature created a protected liberty interest. *Ford v. Wainwright*, 477 U.S. 399,428(1986)(O'Connor, J.,concurring and dissenting); and *Wolff v. McDonnell*, 418 U.S.539,557-58(1974).

Section 565.035.6 requires this Court to "accumulate the records of all cases in which the sentence of death or *life imprisonment without probation or parole* was imposed after May 26, 1977. . ." (emphasis added). Brandon's evidence showed this Court did not have 189 life cases as required by § 565.035.6 (L.F.264) and was thus deficient, precluding statutory proportionality review.

This Court fails to consider all similar cases § 565.035.3(3) requires. This Court has limited the relevant pool of cases, contrary to the statute(L.F.288-90). It compares only those cases in which the death penalty has been imposed. *Ramsey, supra* at 328. The Court simply finds other cases with the same statutory aggravator, regardless of how dissimilar the cases might be(L.F.294-95). Limiting proportionality review to death-sentenced cases is irrational, contravenes § 565.035, and violates due process. *Palmer v. Clarke*, 293 F.Supp. 1011,1041-42(D.Neb.2003)(Nebraska Supreme Court's limiting proportionality review to death sentence cases is irrational and unconstitutional).

Brandon followed Lopez's directives. He panicked when Salazar shot the victims. Although he was not the most culpable, he is the only defendant condemned to die. Why? He could not afford high-priced, competent counsel and could not pay \$200,000.00 for his life. His sentence is disproportionate; this Court's proportionality review is unconstitutional; and Brandon should receive a life sentence.

X. Penalty Phase Instructions

The motion court clearly erred in denying Brandon's claim that jurors do not understand penalty phase instructions and counsel failed to object to them denying Brandon due process, effective assistance of counsel and individualized, non-arbitrary or capricious sentencing, U.S.Const.,Amends.V,VI,VIII,XIV, in that counsel believed the instructions were objectionable, but unreasonably failed to offer evidence to challenge them, and Brandon was prejudiced because the less jurors understand the instructions, the more likely they are to impose death.

Brandon's motion alleged counsel's ineffectiveness in not challenging the penalty phase instructions and their constitutional infirmities(L.F.26-28). Brandon proved his claim.

Dr. Richard Wiener¹⁶ tested jurors' comprehension(L.F.399). Comprehension of penalty phase instructions was low, the mean accuracy rate not reaching 60%(L.F.613). Jurors did not understand individualized consideration of mitigation, proof beyond a reasonable doubt, burdens of proof, guided discretion, and that the sentencing responsibility rested with them(L.F.474). *See*, "Comprehensibility of Approved Jury Instructions in Capital Murder Cases," *Journal of Applied Psychology*, Vol.No.80, No.4, 455-67. The study contained a control group and model instructions which established a baseline level of comprehension and showed that comprehension could be improved

¹⁶ The motion court considered Dr. Wiener's affidavit and related exhibits(L.F.398-618).

(L.F.400,474,475,606,614), addressing the problems discussed in *Free v. Peters*, 12 F.3d 700, 705-06(7th.Cir.1993). The less jurors understand the instructions, the more likely they are to give death (L.F.399,475,613).

The court denied this claim, ruling: allegations of instructional error are not cognizable in a 29.15 proceeding, but are for direct appeal; counsel acted reasonably; and *State v. Deck*, 994 S.W.2d 527,542-43(Mo.banc1999) requires Wiener's study be discounted(L.F.761). These findings are reviewed for clear error. *Barry v. State*, 850 S.W.2d 348,350(Mo.banc1993).

Brandon's claim is cognizable. He alleged counsel's ineffectiveness in failing to properly object and adduce evidence to support his objections to the penalty phase instructions(L.F.26-28). To establish ineffectiveness, Brandon must demonstrate deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668,687(1984). Counsel can be ineffective for failing to object to an improper instruction or submit proper instructions. *Deck v. State*, 68 S.W.3d 418(Mo.banc2002); *Gray v. Lynn*, 6 F.3d 265,269-71(5thCir.1993). Claims of ineffectiveness must be raised on 29.15 and are prohibited on direct appeal. *State v. Wheat*, 775 S.W.2d 155(Mo.banc1989). 29.15(a)'s plain language supports raising all constitutional claims.

Counsel filed motions challenging the instructions, but factual allegations in motions are not self-proving. They require evidence. *State v. Gray*, 926 S.W.2d 29,33 (Mo.App.W.D.1996). Counsel unreasonably failed to present evidence supporting their motions.

State v. Deck is not dispositive, since this Court reviewed a different issue, whether the trial court abused its discretion in not defining "mitigation" based on the jury's questions. *Deck*, 994 S.W.2d at 542-43. Deck's counsel should have focused on Deck's jurors, and not relied on Wiener's general study. *Id.*

In contrast, here, the issue is whether counsel ineffectively failed to present evidence *before* trial, in support of their motions(T.Tr.1843). Counsel unreasonably failed to provide evidentiary support for their motion challenging the penalty phase instructions.

Brandon was prejudiced. The instructions were constitutionally defective, a reasonable likelihood exists that they misled jurors into sentencing Brandon to death. *Boyde v. California*, 494 U.S.370,380(1990). Jurors do not understand the basic legal principles necessary to decide punishment, that: aggravators must be proven beyond a reasonable doubt, *In re Winship*, 397 U.S. 358(1970); each juror must be free to consider any potential mitigators, *Lockett v. Ohio*, 438 U.S. 586,604(1978); requiring unanimity on a mitigator violates the Eighth Amendment, *Mills v. Maryland*, 486 U.S. 367(1988); and the jury has the ultimate decision for imposing death, *Caldwell v. Mississippi*, 472 U.S. 320(1985)(L.F.613,474). Jurors' confusion creates the risk that death may be imposed arbitrarily and capriciously. *Furman v. Georgia*, 408 U.S. 238(1972); *Gregg v. Georgia*, 428 U.S.153(1976). The risk is significant since, the greater the jurors' confusion, the more likely they are to impose death(L.F.399,473,613).

The court clearly erred in denying this claim. A new penalty phase should result.

XI. Reasonable and Necessary Litigation Expenses

The motion court clearly erred in denying Brandon's 29.15 motion and thus denied due process, U.S.Const.,Amend.XIV, and Rule 29.16(d), in that the State Public Defender failed to provide counsel reasonable and necessary litigation expenses, money to investigate witnesses and records located in California where Brandon and his codefendants grew up and spent most of their lives, evidence relevant to claims from both guilt and penalty phases.

Brandon's counsel informed the court that the State Public Defender denied them reasonable and necessary litigation expenses, violating Rule 29.16(d)(L.F.98-99, Ex.63). Much evidence, including witnesses and records, was in California where Brandon and his codefendants grew up and spent most of their lives(L.F.98-99). Counsel requested \$15,000.00 to investigate Brandon's claim, but the Public Defender provided approximately half(L.F.99,Ex.63, at 3-4).

The court denied this claim, finding postconviction counsel's effectiveness unreviewable(L.F.808). Those findings are erroneous. While postconviction counsel's effectiveness is not cognizable, *State v. Hunter*, 840 S.W.2d 850,871(Mo.banc1992); *State v. Ervin*, 835 S.W.2d 905,928-929(Mo.banc1992), that was not Brandon's complaint. Rather, he asked that Rule 29.16(d) be enforced.

Rule 29.16(d) provides: "As to any counsel appointed as provided in this Rule 29.16, the state public defender . . . *shall* provide reasonable and necessary litigation expenses." (emphasis added). The rule's mandatory language creates an expectation protected by the

Due Process Clause, *Ford v. Wainwright*, 477 U.S. 399,428(1986) (O'Connor, J., concurring and dissenting) that cannot be arbitrarily abrogated. *Wolff v. McDonnell*, 418 U.S. 539,557-58(1974).

Since Brandon's attorneys were denied reasonable and necessary litigation expenses, this Court should remand, with instructions that they be provided and counsel should be given the opportunity to adduce additional evidence to support his claims.

CONCLUSION

Based on the arguments in Points I, Brandon requests a new trial in which the state is precluded from seeking death, or alternatively, life without parole; Points II, VII, and VIII, Brandon requests a new trial; Points III, IV, V, and X, a new penalty phase; Point IX, vacate his death sentence and impose life without parole; and XI, remand for further proceedings consistent with Rule 29.16.

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 30,446 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee Virus Scan program, which was updated in March, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were hand-delivered this 15th day of March, 2004, Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65102.

Melinda K. Pendergraph