**SC 90554**

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**IN THE**
**MISSOURI SUPREME COURT**

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**MIGUEL VACA,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

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Appeal from the Circuit Court of Platte County, Missouri
6th Judicial Circuit
The Honorable Owens Lee Hull, Jr., Judge
Division 2

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# APPELLANT'S SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

Miguel Vaca appeals the denial, after an evidentiary hearing, of his Rule 29.15 motion for postconviction relief by the Honorable Owens Lee Hull, Jr., Judge of Division 2, Circuit Court of Platte County. The judgment sought to be vacated was for two counts of first degree robbery, Section 569.020, RSMo 2000 (Counts I and III); two related counts of armed criminal action, Section 571.015, RSMo 2000 (Counts II and IV); one count of attempted first degree robbery, Sections 564.011 and 569.020, RSMo 2000 (Count V); a related count of armed criminal action (Count VI); and assault in the second degree, Section 565.060, RSMo 2000 (Count VII). Judge Hull sentenced Mr. Vaca in accordance with the jury's recommendation to 30 years in prison for Count I; 10 years in prison for Count II; life in prison for Count III; 10 years in prison for Count IV; 15 years in prison for Count V; 30 years in prison for Count VI; and 7 years in prison for Count VII. The court ordered the sentences to run consecutively, for a total of life plus 102 years in prison.

On October 13, 2009, the Court of Appeals, Western District, affirmed the denial of postconviction relief. Mr. Vaca filed a motion for rehearing, which the Court of Appeals denied on November 24, 2009. On January 26, 2010, this Court sustained Mr. Vaca's application for transfer to the Missouri Supreme Court. Therefore, the Missouri Supreme Court has jurisdiction to hear this case. Missouri Supreme Court Rule 83.04.

## STATEMENT OF FACTS

The state charged Mr. Vaca with three counts of first-degree robbery, Section 569.020, RSMo 2000, three counts of armed criminal action, Section 571.015, RSMo 2000, and one count of second-degree assault, Section 565.060, RSMo 2000 (L.F. 17-19). The state alleged that on October 21, 2002, Mr. Vaca forcibly stole money from Victoria Lynn while Mr. Vaca was armed with a deadly weapon (L.F. 17). The state charged that on October 30, 2002, Mr. Vaca forcibly stole money from Quality Cleaners while armed with a deadly weapon (L.F. 18). The state also charged that on November 15, 2002, Mr. Vaca pointed a gun at Lorie Seper and demanded money from her, then hit her on the head with a gun (L.F. 18-19). Mr. Vaca pleaded not guilty and the case was tried before a jury (L.F. 7).[1] The trial consisted of two phases: A guilt/innocence phase, followed by a sentencing phase (L.F. 7-9). Evidence adduced at trial was as follows.

During Fall 2002, Sergeant Joseph Wellington, Jr. of the Kansas City Police Department was investigating a series of robberies (Tr. 511, 516). In each one, the robber was reported to have fled toward one of two apartment complexes (Tr. 516-517). Police reports also stated that the robber was in his forties and rode a bicycle (Tr. 516-517). Sgt. Wellington used the reports to create a general description of the robber, which he compiled into a flyer (Tr. 517, 520).

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[1] The record on appeal consists of the trial transcript (Tr.), the direct appeal legal file (L.F.), a supplemental direct appeal legal file (Supp. L.F.); the transcript of the Rule 29.15 evidentiary hearing (PCR Tr.), and the postconviction relief legal file (PCR L.F.).

At 6:30 a.m. on November 20, 2002, Sgt. Wellington and other officers met at the Quail Run apartment complex (Tr. 530-531, 533). The officers stood at the entrances and exits of the complex and handed out copies of the flyers to people in cars (Tr. 532).

While the officers were handing out flyers, a woman told Detective Chad Rives that a man matching the description in the flyer lived in the nearby Coves North apartments (Tr. 533, 535). She pointed out the area where she thought he lived (Tr. 533-535). Soon thereafter, a cab entered the Coves North complex and drove to the building the woman had pointed out (Tr. 536).

Detective Rives saw a garage door go up and a man matching the description on the flyer came out and got into the back seat of the cab (Tr. 600). The cab started to come around to leave the complex (Tr. 537-538, 601). When the cab stopped, Detective Rives handed the passenger a flyer and asked if he knew anyone that matched the description (Tr. 538, 601). The man said that he did not (Tr. 601). Detective Rives noticed that the man spoke with a lisp or speech impediment, which was part of the description of the robber (Tr. 540, 601).

The officers asked for identification (Tr. 540). The man's name was Miguel Vaca and the police dispatcher reported that Mr. Vaca had a municipal warrant for his arrest (Tr. 541). The officers arrested Mr. Vaca, and Mr. Vaca consented to a search of his apartment (Tr. 542-545).

In the basement, officers found a bicycle (Tr. 548, 551). In an upstairs bedroom, they found a .38 caliber Taurus revolver inside a bank bag, along with a receipt for the gun, containers of .38 caliber ammunition, and two money bags containing $444.00 in

cash (Tr. 551, 554-555, 557, 562, 583). Among the cash was a one-dollar bill with writing on it (Tr. 585). The writing on the dollar bill included the date October 21, 2002, and a description that matched the details of a robbery that occurred on that day (Tr. 586).

Victoria Lynn was working at Salon North on October 21, 2002, when a man wearing a ski mask and a dark jacket came in and demanded money (Tr. 340-345). The man was five feet, six inches tall, 140 pounds, slender, over forty years of age, and had dark eyes, a Hispanic skin tone, and "garbled" speech (Tr. 354-355, 362-363).

The man pointed a dark steel gray gun at Ms. Lynn (Tr. 347, 356). Ms. Lynn told the man that there was no money because her customers paid by check (Tr. 346). The man demanded a purse from Ms. Lynn's customer, who showed him that her wallet was empty (Tr. 342, 347). Ms. Lynn retrieved a dollar from her purse and put it down within the man's reach (Tr. 351). The man picked it up and then grabbed Ms. Lynn's "posterior" (Tr. 351-352). He ordered Ms. Lynn and her customer to get on the floor and then he left (Tr. 356-357).

In October 2002, John Copeland worked for Quality Cleaners, next door to Salon North (Tr. 394, 396). On the night the salon was robbed, Mr. Copeland saw a man on a mountain bike (Tr. 396-397, 400). The man had on a dark ski mask with two holes for eyes and one hole for the mouth, and was wearing jeans, a gray coat, and dark tennis shoes (Tr. 398). Mr. Copeland went to his car and then went back inside the cleaners (Tr. 397).

When Mr. Copeland left the store a second time, he saw the man again, but this time the man had removed his ski mask (Tr. 398). He had dark hair and a goatee,

weighed about 150 pounds, was about five feet, four inches tall, and was in his early forties (Tr. 398-99). Mr. Copeland could not guess the man's race, but said that he was not Asian or black (Tr. 399).

On October 30, 2002, Mr. Copeland was working when a man wearing a dark ski mask came in the door, pointed a gun at him, and demanded money (Tr. 403, 405-406, 408). The man was about five feet, four inches tall, 150 pounds, in his forties, and had a lisp (Tr. 408, 411). Mr. Copeland did not think the man was serious (Tr. 411). After the man shot his gun off toward the ceiling, Mr. Copeland handed the man all of the store's money (Tr. 411-412, 415). The man told Mr. Copeland to lie on the floor and then he left (Tr. 412).

On November 15, 2002, Brittnie Mathi had a birthday party in the second-floor clubhouse of Coves North Apartments (Tr. 439-440, 444). A man came in wearing a dark ski mask and holding a dark black or silver gun (Tr. 446-447). The man told Brittnie and her friends to get on the ground, then he grabbed Brittnie's mother, Lorie Seper, and told Ms. Seper to give him money (Tr. 447-448).

Ms. Seper told the man she did not have any cash, but he could have her checks and credit cards from her purse (Tr. 460, 465). Ms. Seper told the man that she had money in her apartment, to try to get him away from the children (Tr. 465-466). The man dragged Ms. Seper down the steps of the clubhouse and started pulling her toward the women's restroom (Tr. 466, 468). He hit her in the head with the gun and she pulled away from him (Tr. 469). Ms. Seper ran out the door and screamed for help (Tr. 471).

Robert Clardy lived in the apartment complex and heard Ms. Seper scream (Tr. 480, 486). Mr. Clardy saw Ms. Seper running from the clubhouse and then saw a man run from the clubhouse toward him (Tr. 487-488). The man was thirty-five to forty years old, had black hair and a goatee, weighed about 160 to 170 pounds, and was five feet, nine inches to five feet, eleven inches tall (Tr. 491). The man pulled off his ski mask and pointed a gun at Mr. Clardy (Tr. 488-489). The man said, with a lisp, "Get your ass up the steps" (Tr. 488-489).

The man fired one shot and the bullet hit the wall behind Mr. Clardy (Tr. 489, 493). Ballistics testing determined that the bullet was fired from the Taurus .38 Special found in Mr. Vaca's residence (Tr. 562, 644, 666, 668). Bullet fragments and a bullet jacket recovered from Quality Cleaners also were fired from Mr. Vaca's gun (Tr. 648-649, 662, 665).

Detective Todd Butler questioned Mr. Vaca on November 20, 2002, and asked what happened at Salon North (Tr. 765-767, 770-772, 774). Mr. Vaca said that he thought he rode his bike there from his townhouse across the street (Tr. 775) There were two white women in the salon, and he had a black Taurus .38 revolver (Tr. 776). The women said they did not have any money, so he left (Tr. 776-777).

When asked what happened at Quality Cleaners, Mr. Vaca said he rode there on his bike, walked in, pointed his .38 revolver at a tall white man behind the counter, and demanded money (Tr. 777-778, 781). He said that the man just stood there and looked at him, so Mr. Vaca fired a shot into the ceiling to scare him (Tr. 777). The man was startled and gave him the money (Tr. 777).

When asked about the apartment clubhouse, Mr. Vaca said that he was walking his dog and followed the sound of voices up to a party in the clubhouse (Tr. 779). When he got there, a woman started yelling at him and told him to get out, and they started pushing and shoving each other (Tr. 779). He said that as he ran away, someone yelled at him, so he turned around and fired a shot at the person (Tr. 779).

Mr. Vaca testified as part of the defense case-in-chief and denied any involvement in the charged offenses (Tr. 1089-1090). The trial court overruled Mr. Vaca's motions for judgment of acquittal at the close of the state's case and at the close of all the evidence (L.F. 8-9, 53-54, 55-56; Tr. 829, 1296-1297).

During the deliberations on the issue of guilt or innocence, the jury asked the following questions:

1) Where has Miguel been since arrested 11-2002
2) Was Miguel given psychological testing
3) Had he been compliant with medications before arrest
4) Is he currently on meds

(L.F. 80; Tr. 1367). The court informed the jury that it could not answer those questions (L.F. 80; Tr. 1368).

The jury convicted Mr. Vaca of two counts first degree robbery (Counts I and III), two related counts of armed criminal action (Counts II and IV), one count of attempted first degree robbery (Count V), a related count of armed criminal action (Count VI), and one count of assault in the second degree (Count VII) (L.F. 82-88; Tr. 1371-1372).

During the sentencing phase, the state called five of the complaining witnesses to testify about how the offenses had affected their lives (Tr. 1395-1406). Mr. Vaca's father testified as the only defense witness at sentencing; he testified that Mr. Vaca had no prior felony or misdemeanor convictions and that he and his wife had only visited Mr. Vaca two times during the 45 months he was incarcerated awaiting trial (Tr. 1406-1407).

The jury declared punishment at: Count I, 30 years in prison; Count II, 10 years in prison; Count III, life in prison; Count IV, 10 years in prison; Count V, 15 years in prison; Count VI, 30 years in prison; and Count VII, seven years in prison (L.F. 9, 95-101; Tr. 1418-1420).

On February 17, 2005, the trial court sentenced Mr. Vaca according to the jury's recommendations and ordered that the sentences run consecutively for a total of life plus 102 years in prison (Tr. 1425, 1429-30; L.F. 120-23). On direct appeal, the Court of Appeals, Western District, affirmed Mr. Vaca's convictions and sentences, and issued its mandate on November 29, 2006 (PCR L.F. 25); *State v. Vaca*, 204 S.W.3d 754 (Mo. App. W.D. 2006).

Mr. Vaca prematurely filed a *pro se* Rule 29.15 motion on August 2, 2005 (PCR L.F. 1, 2, 5-14). Appointed postconviction counsel filed a timely amended motion on February 27, 2007 (PCR L.F. 2, 3, 15, 16, 18-20, 22-23, 24-54). The amended motion alleged, *inter alia*, that Mr. Vaca received ineffective assistance of trial counsel when his attorney 1) failed to call Dr. Bill Geis, Ph.D., to testify as a mitigation witness during the sentencing phase of trial; and 2) introduced evidence during the defense case-in-chief of

an additional uncharged incident of robbery, in which the two complaining witnesses were hit in their heads with a gun (PCR L.F. 26-45).

An evidentiary hearing was held on July 12, 2007 (PCR L.F. 3; PCR Tr. 1). Mr. Vaca presented the testimony of Dr. Geis about the results of a mental evaluation and record review he performed on Mr. Vaca (PCR Tr. 3-67). Dr. Geis diagnosed Mr. Vaca as having paranoid schizophrenia, dysthymia, post-traumatic stress disorder, and borderline intellectual functioning (PCR Tr. 38). Dr. Geis gave his opinion, to a reasonable degree of professional certainty, that Mr. Vaca suffered from these mental diseases and defects at the time of the offenses, from October through November 2002 (PCR Tr. 40).

Trial counsel Anthony Cardarella testified at Mr. Vaca's Rule 29.15 hearing that he had concerns about Mr. Vaca's mental health before the case went to trial (PCR Tr. 68-69). Mr. Cardarella retained Dr. Geis to evaluate Mr. Vaca's competency to proceed to trial and to determine whether Mr. Vaca had a mental disease or defect that could have impacted the commission of the alleged crimes (PCR Tr. 4-6, 9-10, 71). After he evaluated Mr. Vaca, Dr. Geis provided Mr. Cardarella with a report detailing the results of his evaluation (PCR Tr. 71-73).

Mr. Vaca's trial was one of the first times that Mr. Cardarella represented a client in a bifurcated trial under Section 557.036, RSMo Supp. 2008 (PCR Tr. 78-79). Mr. Cardarella did not consider calling Dr. Geis to testify at the sentencing phase (PCR Tr. 81, 109). Mr. Cardarella testified that he had no strategic reason for not calling Dr. Geis as a witness in the punishment phase (PCR Tr. 81, 109). Mr. Cardarella stated, "I

honestly didn't give that a thought. . . . . I didn't analyze it from that perspective at all." (PCR Tr. 109).

Additional detailed evidence adduced at the hearing will be set forth where relevant in the Argument sections of this brief.

On September 11, 2007, the hearing court issued findings of fact and conclusions of law denying Mr. Vaca's motion for postconviction relief (PCR L.F. 3, 55-67). This appeal follows (PCR L.F. 4, 69). This Court granted transfer, after opinion, on January 26, 2010.

## POINT RELIED ON I

**The hearing court clearly erred in denying Appellant's Rule 29.15 motion for postconviction relief, because Appellant has established that trial counsel failed to act as a reasonably competent attorney, in violation of Appellant's rights to due process of law and to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution, when trial counsel failed to call Dr. Bill Geis, Ph.D., to testify on Appellant's behalf in the sentencing phase of the trial regarding Appellant's history of mental illness and about the mental evaluation of Appellant that Dr. Geis conducted, in that counsel's failure to call Dr. Geis to testify prejudiced Appellant, because the jury was not provided relevant information about Appellant's history of mental illness and borderline intellectual functioning, and a reasonable probability exists that such evidence would have had a mitigating effect on the punishment assessed by the jury.**

*Taylor v. State*, 262 S.W.3d 231 (Mo. banc 2008);

*Glass v. State*, 227 S.W.3d 463 (Mo. banc 2007);

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

*Eichelberger v. State*, 134 S.W.3d 790 (Mo. App. W.D. 2004);

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

Mo. Const., Art. I, Sections 10 and 18(a);

Sections 557.036 and 565.030, RSMo Supp. 2008; and

Missouri Supreme Court Rule 29.15.

## POINT II

**The hearing court clearly erred in denying Appellant's Rule 29.15 motion for postconviction relief, because Appellant has established that trial counsel failed to act as a reasonably competent attorney, in violation of Appellant's rights to due process of law and to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution, when counsel elicited evidence of uncharged offenses, including a robbery of KC Collectibles on October 28, 2002, and assaults on Connie Miller and Margaret Francis, during the defense case-in-chief. Appellant was prejudiced, because there is a reasonable probability that the outcome of the guilt phase and punishment phase of trial would have been different but for trial counsel's deficient performance.**

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

*Butler v. State*, 108 S.W.3d 18 (Mo. App. W.D. 2003);

*State v. Galicia*, 973 S.W.2d 926 (Mo. App. S.D. 1998);

*Hamilton v. State*, 871 S.W.2d 31 (Mo. App. W.D. 1993);

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

Mo. Const., Art. I, Sections 10 and 18(a); and

Missouri Supreme Court Rule 29.15.

## ARGUMENT I

**The hearing court clearly erred in denying Appellant's Rule 29.15 motion for postconviction relief, because Appellant has established that trial counsel failed to act as a reasonably competent attorney, in violation of Appellant's rights to due process of law and to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution, when trial counsel failed to call Dr. Bill Geis, Ph.D., to testify on Appellant's behalf in the sentencing phase of the trial regarding Appellant's history of mental illness and about the mental evaluation of Appellant that Dr. Geis conducted, in that counsel's failure to call Dr. Geis to testify prejudiced Appellant, because the jury was not provided relevant information about Appellant's history of mental illness and borderline intellectual functioning, and a reasonable probability exists that such evidence would have had a mitigating effect on the punishment assessed by the jury.**

The hearing court clearly erred in denying Miguel Vaca's Rule 29.15 motion for postconviction relief. Mr. Vaca has established that trial counsel Anthony Cardarella provided ineffective assistance of counsel when he failed to call Dr. Bill Geis, Ph.D., to testify in the sentencing phase of the trial. Dr. Geis could have testified that he conducted a mental status evaluation of Mr. Vaca and that Mr. Vaca has a longstanding history of mental illness and borderline intellectual functioning. A reasonable probability exists that evidence of Mr. Vaca's mental illness and intellectual deficits would have had a

mitigating effect on the sentences assessed by the jury. As a result of counsel's ineffectiveness, Miguel Vaca has been denied his rights to the effective assistance of trial counsel, to a fair trial, and to due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

Appellate review of a hearing court's decision in a Rule 29.15 proceeding is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 29.15(j). A hearing court's rulings are deemed clearly erroneous only if a review of the entire record leaves the appellate court with a definite and firm impression that a mistake has been made. *Zink v. State*, 278 S.W.3d 170, 175 (Mo. banc 2009).

The right to the effective assistance of counsel is mandated by the Sixth Amendment to the United States Constitution and is a fundamental right guaranteed to state defendants through the Fourteenth Amendment. *Gideon v. Wainwright*, 83 S.Ct. 752 (1963); *Powell v. Alabama*, 53 S.Ct 55 (1932); *Argersinger v. Hamlin*, 92 S.Ct 2006 (1972). To be entitled to relief, Mr. Vaca must show that trial counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display rendering similar services under the existing circumstances, and that he was prejudiced thereby. *Strickland v. Washington*, 104 S.Ct 2052, 2064-2065 (1984).

To show prejudice, Mr. Vaca must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Id*. Because the alleged error occurred during sentencing, the prejudice prong

requires a showing that there is a reasonable probability that Mr. Vaca would have received a lesser sentence if his attorney had called Dr. Geis to testify at the sentencing phase of the trial. *See, e.g., Eichelberger v. State,* 134 S.W.3d 790, 792 (Mo. App. W.D. 2004). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland,* 104 S.Ct. at 2068. Mr. Vaca is not required to prove that the attorney's deficient performance more likely than not altered the outcome. *Nix v. Whiteside,* 106 S.Ct. 998 (1986).

In pursuing evidence, "trial counsel has a duty to make a reasonable professional investigation, or make a reasonable decision that the particular investigation is unnecessary." *Alhamoud v. State,* 91 S.W.3d 119, 121 (Mo. App. E.D. 2002). "When a movant claims ineffective assistance of counsel for failure to locate and present expert witnesses, he must show that such experts existed at the time of trial, that they could have been located through reasonable investigation, and that the testimony of these witnesses would have benefited movant's defense." *State v. Davis,* 814 S.W.2d 593, 603-604 (Mo. banc 1991); *State v. Baldridge*, 857 S.W.2d 243, 257 (Mo.App., W.D. 1993). *See also, Hutchison v. State,* 150 S.W.3d 292, 304 (Mo. banc 2004).

Section 557.036, RSMo Supp. 2008, establishes a bifurcated proceeding for jury trials in non-capital criminal cases. The relevant parts of Section 557.036 read as follows:

> 2. Where an offense is submitted to the jury, the trial shall proceed in two stages. At the first stage, the jury shall decide only whether the defendant is

guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the jury at the first stage.

3. If the jury at the first stage of a trial finds the defendant guilty of the submitted offense, the second stage of the trial shall proceed. The issue at the second stage of the trial shall be the punishment to be assessed and declared. Evidence supporting or mitigating punishment may be presented. Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. The court shall instruct the jury as to the range of punishment authorized by statute for each submitted offense. The attorneys may argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The jury shall assess and declare the punishment as authorized by statute.

Section 557.036.4 clarifies that the foregoing procedure is not followed in cases in which the defendant is a prior, persistent, or dangerous offender, persistent misdemeanor offender, or persistent or predatory sexual offender. Section 557.036 sets out a bifurcated trial structure remarkably similar to the trial procedure of a first degree murder case in which the state is seeking the death penalty.

Under Section 565.030, RSMo Supp. 2008:

> 2. Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage.
>
> * * * *
>
> 4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances . . . . may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. . . .

Section 565.030 goes on to explain the jury's duties before the jury can reach its decision whether to assess punishment of death or life in prison without probation or parole.

As noted in *State v. Prosser*, 186 S.W.3d 330, 333 (Mo. App. E.D. 2005), "the purpose of having a separate penalty phase in non-capital trials, as in capital trials, is to permit a broader range of evidence relevant to the appropriate punishment to be imposed." Consequently, in both types of cases, both the state and defense are permitted to present evidence relevant to the issue of sentencing.

This Court has recognized that in death penalty cases defense counsel's failure to present evidence of a defendant's significant mental illness and intellectual deficits can present a reasonable probability of a different sentencing outcome. In *Taylor v. State*, 262 S.W.3d 231 (Mo. banc 2008), defense counsel failed to put on additional evidence, including testimony and records showing the defendant's abusive childhood and history of mental illness, in the penalty phase of a death penalty case. The evidence omitted from the sentencing hearing in *Taylor* included the defendant's prior diagnoses of paranoid schizophrenia, antisocial personality disorder, post-traumatic stress disorder, and depression. 263 S.W.3d at 237-238.

At the hearing on Taylor's Rule 29.15 motion, trial defense counsel testified that they did not want to introduce the mental health records because they felt the records contained some harmful information. *Id.* at 251. This Court noted that such records are seldom completely favorable to the defendant. *Id.* The Court held that where the only basis of defense is a long record of mental illness that reduces the defendant's responsibility, the failure to introduce records that present support for that history and "a treasure trove of mitigation" is not a reasonable trial strategy. *Id.* Mitigating evidence may alter the jury's selection of penalty, even if it does not undermine or rebut the

prosecution's death-eligibility case; this Court also found that counsel's performance did not satisfy the standards of the Sixth Amendment and that the defendant was prejudiced by the deficient performance. *Id.* at 252-253. This Court concluded that if trial counsel had presented the evidence in question, "there is a reasonable likelihood that the outcome of the penalty phase proceeding may have been different." *Id.* at 237.

Similarly, this Court ordered a new sentencing hearing in *Hutchison v. State,* 150 S.W.3d 292 (Mo. banc 2004), after trial counsel failed to investigate possible mitigating evidence, including evidence of the defendant's mental health problems. This Court found that there were readily available documents, which counsel admitted they did not attempt to obtain, that would have documented the defendant's "troubled childhood, mental health problems, drug and alcohol addiction, history of sex abuse, attention deficit hyperactivity disorder, learning disabilities, memory problems and social and emotional problems." 150 S.W.3d at 304. Because this evidence was not presented, "the jury did not have the opportunity to consider and give effect to all of the mitigating evidence in the penalty phase," and a new sentencing hearing was warranted. *Id.* at 307-308.

More recently, this Court held that the failure to call a doctor to testify about the defendant's impaired intellectual functioning can be prejudicial, "as such evidence can be inherently mitigating." *Glass v. State,* 227 S.W.3d 463, 469 (Mo. banc 2007). The Court found, "It is well-established that evidence of impaired intellectual functioning is valid mitigating evidence in the penalty phase of [a] capital case, regardless of whether defendant has established a nexus between his mental capacity and crime." *Id.* at 471; *citing, Hutchison,* 150 S.W.3d at 305.

This case is remarkably similar to *Taylor*, *Hutchison*, and *Glass*, with the sole exception that Mr. Vaca was not charged with crimes for which he could face the death penalty. Mr. Vaca recognizes that because of the unique nature of capital sentencing, including both the stakes and the character of evidence to be presented, the courts have imposed a heightened duty on capital trial counsel to present mitigation evidence to the jury. *Taylor*, 262 S.W.3d at 249; *citing*, *Eddings v. Oklahoma*, 102 S.Ct. 869 (1982), and *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989).

Mr. Vaca does not ask this Court to impose a heightened standard of performance, such as would be expected of capital trial counsel, on counsel in a non-capital bifurcated trial. Mr. Vaca urges that this Court's death penalty cases – dealing with evidence of mental disease or defect and limits on intellectual capacity as mitigation evidence – provide guidance to counsel and the courts in non-capital cases as to the mitigating impact of such evidence on the jury. As noted above, trial counsel has a duty to make a reasonable professional investigation, *Alhamoud*, 91 S.W.3d at 121, and to call witnesses who could have benefitted the defendant's case. *Hutchison*, 150 S.W.3d at 304, 307-308

Mr. Vaca was tried before a jury in a bifurcated proceeding (L.F. 7-9). As detailed below, Mr. Vaca had a long history of mental illness, which resulted in his being dependent upon and living with family members for much of his adult life, and for which he had been medicated (PCR Tr. 18-19, 21, 41, 70; Movant's Exhibits 1, 2). As will be developed below, Mr. Vaca's attorney realized early in the representation that Mr. Vaca had mental health issues, and trial counsel requested a mental evaluation (PCR Tr. 4-6, 9-10, 68-71). Dr. Bill Geis, Ph.D., conducted the testing and records review, and testified

to a reasonable degree of psychological certainty that at the time of the offenses Mr. Vaca had a serious mental disease, schizophrenia, paranoid type, which impacted his ability to form rational thought and conform his behavior to the requirements of the law (PCR Tr. 6-7, 38, 40; M. Ex. 1). Mr. Vaca also has borderline intellectual functioning, which affected his ability to understand the impact of his actions (PCR Tr. 38, 40). Dr. Geis was willing and available to testify at Mr. Vaca's trial, but trial counsel did not call him to testify (Tr. 1406-1407; PCR Tr. 4-6, 9-10). Trial counsel failed to present any evidence specifically detailing Mr. Vaca's mental health problems for the jury during the sentencing phase of trial (Tr. 1406-1407), even though Dr. Geis was readily available and could have provided such testimony. Mr. Vaca has established that trial counsel rendered ineffective assistance by failing to call Dr. Bill Geis to testify in the sentencing phase of the trial.

At trial, the jury heard very little information regarding Mr. Vaca's mental health. Detective Chad Rives testified during the state's case-in-chief that Mr. Vaca was detained in a police wagon while the police searched his home, that Mr. Vaca requested some medication for a headache, and that the police provided him some prescription medication (Tr. 609). Detective Todd Butler testified that at the beginning of the interrogation Mr. Vaca said, "I have psychological problems and sometimes I do things wrong" (Tr. 775).

Mr. Vaca's brother, Albert, testified as a defense witness in the first phase of trial that in 1988 Mr. Vaca suffered an injury which required brain surgery (Tr. 1037, 1041). After that, Mr. Vaca sometimes seemed to be nervous (Tr. 1044). Mr. Vaca testified on

his own behalf during the first phase of trial that he received a Social Security disability pension because he was paralyzed in the left neck and arm and he had a weak right knee (Tr. 1073, 1080). Mr. Vaca added that he had headaches and was nervous and took some medications for a "mental disorder" (Tr. 1067-1068, 1080, 1106). Mr. Vaca testified that he had received a head injury in a bicycle accident when he was 28 or 29 (Tr. 1080-1081). Mr. Vaca's sister, Rita Vaca, testified in the first phase that Mr. Vaca was "on disability" (Tr. 1195).

During the guilt phase deliberations, the jury asked the following questions:

1) Where has Miguel been since arrested 11-2002
2) Was Miguel given psychological testing
3) Had he been compliant with medications before arrest
4) Is he currently on meds

(L.F. 80; Tr. 1367). The court informed the jury that it could not answer those questions (L.F. 80; Tr. 1368). The jury's questions indicate that the jury found Mr. Vaca's mental health to be important to the case.

During the sentencing phase, the state called five of the complaining witnesses to testify about the effects of the offenses on their lives (Tr. 1395-1406). Mr. Vaca's father testified as the sole defense witness at sentencing; he stated that Mr. Vaca had no prior misdemeanor or felony convictions, and that he and his wife had visited Mr. Vaca only twice during the approximately 45 months that Mr. Vaca had been held in jail awaiting trial (Tr. 1406-1407).

Trial counsel Anthony Cardarella testified at Mr. Vaca's Rule 29.15 evidentiary hearing that he had concerns about Mr. Vaca's mental health before the case went to trial (PCR Tr. 68-69). Mr. Cardarella met with Mr. Vaca at the jail on January 7, 2003 (PCR Tr. 70). Mr. Vaca told Mr. Cardarella that he was being treated by Dr. Anya at the Platte County jail and that he was currently taking Trazadone, Paxil, Clonazepam, and Zyprexa (PCR Tr. 70). Mr. Vaca told Mr. Cardarella that he was on Social Security due to a mental disorder (PCR Tr. 69). Mr. Vaca informed Mr. Cardarella that when he lived in Arizona, he was treated by Dr. Rajiv Parikh (PCR Tr. 71). Mr. Vaca provided Mr. Cardarella with Dr. Parikh's address and telephone number (PCR Tr. 71).

Mr. Cardarella retained a licensed clinical and forensic psychologist, Dr. Bill Geis, Ph.D, to evaluate Mr. Vaca's competency to proceed to trial and to determine whether Mr. Vaca had a mental disease or defect that could have impacted the commission of the alleged crimes (PCR Tr. 4-6, 9-10, 71). After he evaluated Mr. Vaca, Dr. Geis provided Mr. Cardarella with a report detailing his findings (PCR Tr. 71-73). Mr. Cardarella read the report and was aware of the information it contained (PCR Tr. 72-73).

Mr. Cardarella obtained records from Mr. Vaca's treating physician, Dr. Martin Rhodes, and provided those records to Dr. Geis (PCR Tr. 73-74). Mr. Cardarella did not obtain Mr. Vaca's records from the Platte County jail, the Clay County jail, Dr. Rajiv Parikh, the schools Mr. Vaca attended, or the Social Security Administration (PCR Tr. 76-77).

Mr. Vaca's trial was one of the first times that Mr. Cardarella represented a client in a bifurcated trial under Section 557.036 (PCR Tr. 78-79). To prepare for the

sentencing phase, Mr. Cardarella thought about family members who could testify and draw sympathy for Mr. Vaca (PCR Tr. 80). Mr. Cardarella did not consider calling Dr. Geis to testify at the sentencing phase, and specifically testified that he had no strategic reason for not calling Dr. Geis as a witness in the punishment phase (PCR Tr. 81, 109). Mr. Cardarella stated, "I honestly didn't give that a thought. . . . . I didn't analyze it from that perspective at all." (PCR Tr. 109).

Dr. Geis testified at the evidentiary hearing that Mr. Cardarella asked him to evaluate whether Mr. Vaca had a mental disease or defect, whether Mr. Vaca was competent to stand trial and aid in his defense, and whether Mr. Vaca was capable of knowing and appreciating the nature, quality, and wrongfulness of his actions (PCR Tr. 10, 71). Dr. Geis evaluated Mr. Vaca on June 5, 2003 (PCR Tr. 6). This evaluation included a mental status examination and testing (PCR Tr. 22; Movant's Exhibit 1). Dr. Geis prepared a report and provided that report to Mr. Cardarella (PCR Tr. 7). That report was admitted into evidence at the evidentiary hearing as Movant's Exhibit 1 (M. Ex. 1).

In answer to the question whether Mr. Vaca has a mental disease or defect that could have impacted the commission of the alleged crimes, Dr. Geis reported:

> The defendant has a serious mental disease – schizophrenia – that clearly could have had an impact on his ability to form rational thought and conform his behavior to the expectations of society at the time of the offense. The condition of schizophrenia is corroborated by other medical personnel and appears to have been in existence for most of his life. He also has a condition of low intelligence

(borderline intellectual functioning) that could have impacted his ability to understand the impact of his actions.

(M. Ex. 1).

Dr. Geis could not recall Mr. Cardarella asking him to testify during the sentencing phase of Mr. Vaca's trial, but said that he was available and willing to testify, if he had been asked to do so (PCR Tr. 4-6, 9-10). Dr. Geis had reviewed his calendar and saw nothing on the date of the sentencing phase proceedings that could have prevented him from testifying on that date (PCR Tr. 10).

Dr. Geis diagnosed Mr. Vaca as having paranoid schizophrenia, dysthymia, post-traumatic stress disorder, and borderline intellectual functioning (PCR Tr. 38; M. Ex. 1). On the Global Assessment of Functioning Scale, Mr. Vaca received a score of 40 on a 100 point scale, with 100 being best functioning and 40 being limited functioning (PCR Tr. 38; M. Ex. 1).

Dr. Geis also reviewed Mr. Vaca's social history and found the following information about that social history to be significant. Individuals on both sides of Mr. Vaca's family have been diagnosed with paranoid schizophrenia (PCR Tr. 16; M. Ex. 1). As an adult, Mr. Vaca was only able to care for himself in the most minimal way (PCR Tr. 18). Mr. Vaca lived at home with his parents until he was 36 years old (PCR Tr. 18). He had an episodic work history, including as a restaurant busboy, car detailing at a car wash, carpet installation, livestock work, and work in a department store (PCR Tr. 18; M. Ex. 1). In 1996, Mr. Vaca moved to Arizona where he lived with his brother until 2001 (from age 37 to age 42) (PCR Tr. 19; M. Ex. 1). In 2001, Mr. Vaca returned to the

Kansas City area and lived with his sister, Rita, with whom he was living at the time of the charged offenses (PCR Tr. 18; M. Ex. 1). Mr. Vaca never had a girlfriend or dated (M. Ex. 1).

During an early grade at one school, Mr. Vaca poked another student with a pencil seriously enough that the school "really freaked out"; Mr. Vaca was immediately removed from the school and sent to another school (PCR Tr. 16-17; M. Ex. 1). Mr. Vaca saw his first psychiatrist after that incident (PCR Tr. 17). Mr. Vaca described himself as a nervous child (M. Ex. 1). He never felt very comfortable around other children and he never felt like he fit in (M. Ex. 1).

In 1989, at age 27, Mr. Vaca fell off his bicycle and suffered a head injury (PCR Tr. 19). A hematoma (blood clot) formed in his brain (PCR Tr. 19-20). This information was verified through the records of Dr. Martin Rhodes, which Mr. Cardarella had provided to Dr. Geis (PCR Tr. 19-20; Movant's Exhibit 2). Reports from a CT-Scan of Mr. Vaca's head documented a right hemisphere epidural hemorrhage affecting Mr. Vaca's parietal region, an area of the brain which controls sensory and movement functions (M. Ex. 1, 2). Dr. Beatty at Bethany Hospital performed surgical draining to relieve pressure on the brain (PCR Tr. 20; M. Ex. 2). This was accomplished by creating a hole in Mr. Vaca's skull to drain off blood and reduce pressure (PCR Tr. 20).

Dr. Rhodes's records date from April 27, 1989, to June 21, 2002 (Movant's Exhibit 2). On December 19, 2001, Dr. Rhodes noted that this was the first time that he had seen Mr. Vaca in several years, after Mr. Vaca returned to the Kansas City area from Arizona (M. Ex. 2). Mr. Vaca indicated that while in Arizona he had been diagnosed

with schizophrenia and was taking Trazodone, an anti-depressant sleep medication, and Klonopin, an anti-anxiety medication (PCR Tr. 21; M. Ex. 2). Dr. Rhodes noted that at that time Mr. Vaca was on disability for his psychiatric problems, that Mr. Vaca did not leave his house very often, and that Mr. Vaca had "problems with routine mental function" (M. Ex. 2). Dr. Rhodes continued Mr. Vaca on the Trazodone and Klonopin (M. Ex. 2).

On March 20, 2002, Dr. Rhodes noted that Mr. Vaca appeared "depressed with what may be some delusions concerning the effects of lab drawing" (PCR Tr. 47; M. Ex. 2). Dr. Rhodes advised Mr. Vaca that he had to have his blood drawn every three to six months to monitor his Klonopin levels (M. Ex. 2). On June 21, 2002, Dr. Rhodes noted that Mr. Vaca's paranoid schizophrenia appeared "worse than last visit" (M. Ex. 2). Dr. Rhodes noted that Mr. Vaca appeared agitated, anxious, and had "looseness of association" (PCR Tr. 47; M. Ex. 2). Dr. Rhodes informed Mr. Vaca that he could restart the Klonopin, if Mr. Vaca agreed to a blood test, and he encouraged Mr. Vaca to see a psychiatrist (M. Ex. 2)

From his mental status examination of Mr. Vaca, Dr. Geis observed that Mr. Vaca appeared depressed and subdued (M. Ex. 1). He appeared to have some trouble thinking (PCR Tr. 22; M. Ex. 1). Mr. Vaca reported that when he first arrived at the detention center, he thought he was having a "mental breakdown" (M. Ex. 1). Mr. Vaca said that he spoke with a psychiatrist at the jail, Dr. Anya, and Mr. Vaca told him that he was "seeing things and seeing people burning and trying to pull me into" the burning (PCR Tr. 23; M. Ex. 1). Mr. Vaca reported that he was having experiences from the past of

being “slapped and beaten and whipped” (PCR Tr. 23; M. Ex. 1). Mr. Vaca reported having frequent nightmares and that he found it difficult to be touched, indicating a strong startle response (PCR Tr. 23; M. Ex. 1). Mr. Vaca also reported daytime flashbacks of bad events from the past (M. Ex. 1).

Mr. Vaca reported symptoms of dysthymia (chronic, low-level depression) including poor sleep, crying jags, dejection, demoralization, interpersonal withdrawal, fatigue, low motivation, and anhedonia (reduced pleasure) (PCR Tr. 23; M. Ex. 1). Mr. Vaca also reported hearing voices (PCR Tr. 23-24; M. Ex. 1). He initially indicated that he had heard voices since his head injury in 1989 (PCR Tr. 23-24; M. Ex. 1). He later indicated that he had heard voices before, but that the voices had gotten worse since the head injury (PCR Tr. 23-24; M. Ex. 1). Mr. Vaca reported that sometimes the voices would holler and scream, causing him to feel agitated and terrorized (PCR Tr. 23; M. Ex. 1). Sometimes, Mr. Vaca heard the name “Linda” (PCR Tr. 24; M. Ex. 1).

Mr. Vaca reported that at the time of the offenses, he “did not know exactly what was going on” in his mind (PCR Tr. 24; M. Ex. 1). He was not taking his medication, because he was having trouble with his insurance (M. Ex. 1). Mr. Vaca was having “visions of people burning in fire, yelling and screaming, trying to pull me in” (PCR Tr. 24; M. Ex. 1) Mr. Vaca also reported flashbacks of a previous experience of “one guy choking me real bad- he thought I messed up his car” (PCR Tr. 24; M. Ex. 1). He recalled hearing voices that said, “go out, go out, go out,” but he was not sure what the voices meant (PCR Tr. 24; M. Ex. 1).

Mr. Vaca told Dr. Geis that he had no motivation for robbery, because he had enough money and support from the people around him (PCR Tr. 25). He did not think he was angry at people and did not want to hurt anyone (PCR Tr. 25; M. Ex. 1).

Dr. Geis performed psychological testing of Mr. Vaca. Dr. Geis administered the Wechsler Adult Intelligence Scale – Revised (WAIS-R) (PCR Tr. 25-26; M. Ex. 1). This is a general intelligence test that provides a functional picture of how someone is able to think and function (PCR Tr. 25). Mr. Vaca's Verbal IQ is 76, his Performance IQ is 72, and his Full Scale IQ is 73 (PCR Tr. 26, 29; M. Ex. 1). The subtests for the verbal and performance scales did not show a lot of scatter (variability) (PCR Tr. 27-29). This indicates that Mr. Vaca did not suffer significant cognitive impairment as a result of his head injury; instead, he has always operated at a lower range of intellectual functioning, consistent with other low-functioning, non-mentally retarded individuals (PCR Tr. 27-29; M. Ex. 1).

Dr. Geis also administered the Psychiatric Diagnostic Interview for Schizophrenia (PCR Tr. 31-32; M. Ex. 1). Mr. Vaca acknowledged that other people have felt that he has acted and talked in a strange way since he was young (M. Ex. 1). He also acknowledged hearing voices and seeing things (burning people) that no one else could see (PCR Tr. 34-35; M. Ex. 1). He reported thinking that: someone was trying to force thoughts in his head (during a trip to Mexico, someone put something in his food); someone was secretly out to get him (a man who choked him and tried to break his neck was tormenting him); someone was taking his thoughts away from him against his will; he might be possessed (he talked to a pastor and a priest about this at the jail); others

thought he was homosexual; others laughed at him behind his back; and others could read his mind (M. Ex. 1).

When asked whether he ever felt he had stopped being real, Mr. Vaca reported that at times he wonders if he is a demon, because he feels like something else is controlling his mind (PCR Tr. 35; M. Ex. 1). Mr. Vaca also stated that he sometimes hears voices like an echo, voices like he is overhearing a conversation in his head, and voices that tell him what to do (command hallucinations) (PCR Tr. 35; M. Ex. 1). Mr. Vaca said that his family and other people have told him that he is crazy (M. Ex. 1).

Postconviction counsel provided additional records to Dr. Geis in anticipation of his testimony at the Rule 29.15 hearing (PCR Tr. 11-15). Evidence regarding Dr. Geis's review of these records is set forth below to illustrate the breadth of additional evidence supporting his finding that Mr. Vaca suffers from mental disease or defect.

The additional records included Mr. Vaca's school records from the Kansas City, Kansas public schools (PCR Tr. 12, 14; Movant's Exhibit 4). Mr. Vaca had poor performance in school, which Dr. Geis found to be consistent with intellectual functioning assessments that had been conducted on him in the past (PCR Tr. 16, 18, 28; M. Ex. 4). Mr. Vaca attended special education classes and dropped out of school in ninth grade (PCR Tr. 17-18; M. Ex. 4).

Dr. Geis also reviewed Mr. Vaca's Social Security records for the Rule 29.15 hearing (PCR Tr. 29-31). While he was living in Arizona, Mr. Vaca applied for and was approved to receive Social Security disability benefits (Movant's Exhibit 6). At that time, Mr. Vaca was evaluated and found to have a verbal IQ of 69, a performance IQ of

65, and a full scale IQ of 65, results which place Mr. Vaca in the range of mental retardation (PCR Tr. 29-30; M. Ex. 6). These results are consistent with Dr. Geis's results (PCR Tr. 31; M. Ex. 6).

Dr. Geis testified that Dr. Rajiv Parikh's records also support the diagnosis of schizophrenia (PCR Tr. 48). Dr. Parikh treated Mr. Vaca from December 2000 to early 2001 (PCR Tr. 48; Movant's Exhibit 5). Dr. Parikh's notes indicate that Mr. Vaca was extremely paranoid and suffered severe anxiety and depression (M. Ex. 5). Dr. Parikh named Mr. Vaca's condition as a schizoaffective disorder, *i.e.*, schizophrenia with a depressive condition (PCR Tr. 48). Dr. Geis testified that Dr. Parikh's diagnosis was functionally identical to Dr. Geis's diagnosis (PCR Tr. 48). A letter written by Dr. Parikh regarding Mr. Vaca's disability states:

> This patient was initially seen in our clinic on 11/8/00 and since then has been followed on monthly basis for severe depression with anxiety and probable schizoaffective disorder. Patient is unable to seek consultation through psychiatrist secondary to insurance restrictions. Patient is currently on multiple medications, and still continues to feel very depressed and paranoid. Patient has been unable to leave the home for any extended period of time since April 99. Patient does continue to be disabled at this point and at least for a few months in the future.

(PCR Tr. 64-65; M. Ex. 5).

Dr. Susan Laningham's records were admitted into evidence at the postconviction hearing (PCR Tr. 13-14; Movant's Exhibit 7). Mr. Vaca saw Dr. Laningham on October

18, 2002, three days before the first charged offense (PCR Tr. 42-43; M. Ex. 7). Dr. Laningham noted that Mr. Vaca reported "feeling out of control" and that he felt that he needed to start taking Klonopin (clonazepam) again (PCR Tr. 43, 47; M. Ex. 7). Mr. Vaca also stated that he had an appointment scheduled with a psychiatrist, but that it was still a few weeks away (PCR Tr. 44; M. Ex. 7). Dr. Laningham was uncertain whether Mr. Vaca's diagnosis was schizophrenia or bipolar disorder, but she wanted him to see a psychiatrist as soon as possible (PCR Tr. 44; M. Ex. 7). She prescribed Klonopin (PCR Tr. 44; M. Ex. 7).

Mr. Vaca's Platte County jail records were admitted into evidence at the evidentiary hearing as Movant's Exhibit 8 (PCR Tr. 14). Dr. Geis found it significant that Dr. Innocent Anya at the jail saw Mr. Vaca immediately after Mr. Vaca entered the jail (PCR Tr. 41; M. Ex. 8). Dr. Anya put Mr. Vaca on antipsychotic medications right away, which indicated that Mr. Vaca was in a psychotic state when he entered the jail (PCR Tr. 41; M. Ex. 8). While Mr. Vaca was incarcerated in Platte County, the staff mistakenly reduced his medications by 50% (PCR Tr. 49-50; M. Ex. 8). Mr. Vaca experienced difficulty sleeping and had increased auditory hallucinations (PCR Tr. 50; M. Ex. 8). Once the mistake was discovered and the medications were increased, his symptoms became more manageable (PCR Tr. 50; M. Ex. 8).

Dr. Geis believed that Mr. Vaca was not malingering (PCR Tr. 37), but had been showing "incipient signs" of schizophrenia before the commission of the charged offenses (PCR Tr. 41). Dr. Geis believed that the records show Mr. Vaca had been in a psychotic state and had a mental disease or defect before he committed the crimes (PCR

Tr. 41). For example, Mr. Vaca had sought help from Dr. Laningham just three days before the first offense (PCR Tr. 42-43; M. Ex. 7). Dr. Laningham recognized that Mr. Vaca had a problem, and even though she did not know whether Mr. Vaca was bipolar or schizophrenic, she wanted him to see a psychiatrist as soon as possible (PCR Tr. 43-44; M. Ex. 7).

Dr. Geis testified to a reasonable degree of psychological certainty that at the time of the offenses Mr. Vaca had a serious mental disease, schizophrenia, paranoid type, which impacted his ability to form rational thought and conform his behavior to the requirements of the law (PCR Tr. 38, 40; M. Ex. 1). Mr. Vaca's borderline intellectual functioning also affected his ability to understand the impact of his actions (PCR Tr. 38, 40). The additional documents provided by postconviction counsel did not change Dr. Geis's opinion that Mr. Vaca suffered from a mental disease or defect (PCR Tr. 11-14; M. Ex. 4, 5, 6, 7, 8). The additional documents only corroborated and strengthened Dr. Geis's opinion about Mr. Vaca's mental disease or defect (PCR Tr. 15, 64).

Mr. Vaca has established that trial counsel was ineffective for failing to call Dr. Geis to testify on behalf of Mr. Vaca at the sentencing phase of the trial. Mr. Vaca has established 1) that Mr. Cardarella knew of an appropriate expert who could have provided mitigation evidence at sentencing, 2) was able to locate and retain that expert, 3) had obtained helpful information from that expert, and 4) knew or should have known that the expert's testimony could benefit Mr. Vaca at trial. The hearing court clearly erred in denying relief on this claim (PCR L.F. 58-59, 60-62).

The hearing court found that Mr. Cardarella "pursued reasonable trial strategy regarding his concerns about the movant's mental competence" and that counsel did not call Dr. Geis to testify because he "did not analyze the case that way" (PCR L.F. 58). This finding is clearly erroneous, because it ascribes a trial strategy to trial counsel that trial counsel did not have. Mr. Cardarella did not consider calling Dr. Geis to testify at the sentencing phase (PCR Tr. 81, 109). Mr. Cardarella specifically testified that he had no strategic reason for not calling Dr. Geis as a witness in the punishment phase (PCR Tr. 81, 109). Mr. Cardarella stated, "I honestly didn't give that a thought. . . . . I didn't analyze it from that perspective at all." (PCR Tr. 109).

The hearing court concluded that Dr. Geis's report did not provide a "viable defense", because Mr. Vaca was neither incompetent to proceed nor not guilty by reason of mental disease or defect (PCR L.F. 61). This conclusion either ignores or misconstrues Mr. Vaca's claim of ineffective assistance of counsel. The claim is not that counsel was ineffective for failing to present a guilt phase defense of mental disease or defect excluding responsibility; rather, the claim is that evidence of mental disease or defect should have been presented at the sentencing phase to attempt to mitigate the punishment imposed (PCR L.F. 26, 27-39). This conclusion is clearly erroneous because it does not address the issue that was presented to the hearing court.

The hearing court also concluded, "Trial counsel, during the guilt phase of trial, established movant's mental problems from members of his family. Movant's brother and sister testified about movant's mental problems and disabilities, as did movant's father. Movant himself testified about his own mental disability and that he was on

Social Security disability" (PCR L.F. 61). This conclusion is clearly erroneous, because the evidence of mental health problems presented through the lay witnesses was remarkably limited and did not set forth any specific diagnosis.

Mr. Vaca's sister, Rita Vaca, testified only that Mr. Vaca was on disability when he lived with her (Tr. 1195). Mr. Vaca's brother Albert testified only that Mr. Vaca had been hospitalized with a head injury and was sometimes nervous after that incident (Tr. 1037, 1041, 1044). Mr. Vaca himself listed the medications he took, but did not explain the mental conditions that they were intended to treat (Tr. 1067-1068, 1080). Mr. Vaca testified that he was on disability for paralysis on his left side and a weak right knee, and added that he had a "mental disorder" and headaches and nervousness (Tr. 1080). Mr. Vaca's father testified in the sentencing phase for less than a page of transcript, and said only that Mr. Vaca had never been convicted before and that his parents had only visited him in jail twice in the 45 months he had been incarcerated (Tr. 1406-1407). None of this testimony informed the jury of the specific nature of Mr. Vaca's mental illness, nor did it explain his limited intellectual functioning or provide the jury with any insight into Mr. Vaca's actions during commission of the charged offenses.

Mr. Vaca was prejudiced by counsel's failure to present Dr. Geis' testimony during the punishment phase of trial. Mr. Vaca's jury asked questions during the guilt phase deliberations that showed that they realized there were issues surrounding Mr. Vaca's mental health (Tr. 1367). The jury sought information about Mr. Vaca's medications and whether he had been compliant in taking his medication (Tr. 1367). This indicates that the jury was aware that Mr. Vaca's actions may have been motivated

by the "mental disorder" that was vaguely alluded to during the defense case-in-chief (Tr. 1080, 1367). The jury's questions establish that there was a reasonable probability that evidence of Mr. Vaca's mental disease and defect would have influenced the jury's assessment of punishment. *Deck v. State,* 68 S.W.3d 418, 431 (Mo. banc 2002)(referring to questions from the jury to assess the prejudicial effect of counsel's ineffective assistance).

Defense counsel did not put on evidence to try to answer the jury's questions in the sentencing phase. Defense counsel presented no mitigating evidence of any substance during any part of the trial. Because counsel did not call Dr. Geis to testify to readily available information about Mr. Vaca's impaired mental health, the jury did not know that Mr. Vaca suffered from depression, paranoid schizophrenia, and borderline intellectual functioning, that he had been in special education classes, that he could barely support himself and that was the reason he was on Social Security disability, that he had never dated or had a girlfriend, and that he had lived with his immediate family members for most of his adult life (PCR Tr. 18-19, 21-23, 25-29, 31-32, 38-41; M. Ex. 1, 2). The jury did not know that the bicycle accident had resulted in a hematoma on Mr. Vaca's brain and had required surgical draining through a hole cut in his skull (PCR Tr. 19-20; M. Ex. 1, 2). The jury did not know that Mr. Vaca had delusions and that he heard voices that he could not always understand or that he saw things that other people could not see, such as burning people (PCR Tr. 23-24, 34-35, 43, 47; M. Ex. 1, 2). The jury did not learn that Mr. Vaca reported being off his medications at the time of the offenses, due to trouble with his insurance (M. Ex. 1). The jury also did not learn that Mr. Vaca was

placed on anti-psychotic, anti-depressant, and anti-anxiety medications as soon as he was incarcerated in the county jail (PCR Tr. 41; M. Ex. 1, 8).

If Dr. Geis had testified, there is a reasonable probability that the jury, having been informed that Mr. Vaca suffered long-term and debilitating mental illness and intellectual deficits, would have recommended more lenient sentences. Mr. Vaca is not required to show certainty that a different outcome would have resulted. *State v. Johnson,* 968 S.W.2d 686, 702 (Mo. banc 1998).

It is significant that, in the absence of any mitigation evidence pertaining to Mr. Vaca's mental illness, the jury assessed the maximum or close to the maximum sentences on four of the seven counts charged (L.F. 95-101). The jury assessed sentences of 30 years and life in prison on Counts I and III, robbery in the first degree (L.F. 95, 97), and the maximum sentences of fifteen years for Count V, attempted first degree robbery, and seven years in prison for Count VII, assault in the second degree (L.F. 99, 101). Additionally, the jury assessed sentence of 30 years for Count VI, armed criminal action (L.F. 100). In light of these verdicts, defense counsel's failure to present evidence of severe mental health issues and intellectual deficits presents a reasonable probability of a different sentencing phase outcome if Dr. Geis had been called to testify in the second phase of trial.

The hearing court clearly erred in denying relief on this claim (PCR L.F. 60-62). The evidence presented at the evidentiary hearing established that Dr. Geis was willing and able to present sentencing evidence that could have significantly influenced the jury's assessment of punishment. Even though the mitigating evidence was readily available,

Mr. Cardarella did not even consider using that evidence and did not call the mental health expert, Dr. Geis, to testify at the sentencing phase of trial (PCR Tr. 4-6, 9-10, 81, 109). Instead, counsel relied on the vague and limited testimony of Mr. Vaca and his family members. This evidence was a poor substitute for the testimony of Dr. Geis, a trained professional who could have rendered his expert opinion and could have explained Mr. Vaca's mental illness and intellectual limitations for the jurors. The evidence that defense counsel relied on did nothing to establish any reason to impose shorter sentences.

Mr. Vaca has a consistent and long-standing history of mental illness and intellectual deficits. A reasonable probability exists that the result of the sentencing hearing would have been different if defense counsel had called Dr. Geis to testify at sentencing. Mr. Vaca received ineffective assistance of trial counsel and was prejudiced by his trial attorney's failure to make sure that the jury had this important evidence before the jury assessed his punishment. Mr. Vaca therefore respectfully requests that this Court reverse the judgment of the hearing court and remand this cause for either a new sentencing hearing or a new trial in the underlying criminal case.

## ARGUMENT II

**The hearing court clearly erred in denying Appellant's Rule 29.15 motion for postconviction relief, because Appellant has established that trial counsel failed to act as a reasonably competent attorney, in violation of Appellant's rights to due process of law and to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution, when counsel elicited evidence of uncharged offenses, including a robbery of KC Collectibles on October 28, 2002, and assaults on Connie Miller and Margaret Francis, during the defense case-in-chief. Appellant was prejudiced, because there is a reasonable probability that the outcome of the guilt phase and punishment phase of trial would have been different but for trial counsel's deficient performance.**

The hearing court clearly erred in denying Miguel Vaca's Rule 29.15 motion for postconviction relief. Mr. Vaca has established that trial counsel Anthony Cardarella provided ineffective assistance of counsel when he elicited evidence of uncharged offenses, including a robbery of KC Collectibles on October 28, 2002, and assaults on Connie Miller and Margaret Francis, during the defense case-in-chief. As a result of counsel's ineffectiveness, Miguel Vaca has been denied his rights to the effective assistance of trial counsel, to a fair trial, and to due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. Mr. Vaca was prejudiced, because

there is a reasonable probability that the outcome of both the guilt phase and punishment phase of trial would have been different but for counsel's deficient performance.

Appellate review of a hearing court's decision in a Rule 29.15 proceeding is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 29.15(j). A hearing court's rulings are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. *Zink v. State*, 278 S.W.3d 170, 175 (Mo. banc 2009).

The right to the effective assistance of counsel is mandated by the Sixth Amendment to the United States Constitution and is a fundamental right guaranteed to state defendants through the Fourteenth Amendment. *Gideon v. Wainwright*, 83 S.Ct. 752 (1963); *Powell v. Alabama*, 53 S.Ct 55 (1932); *Argersinger v. Hamlin*, 92 S.Ct 2006 (1972). To have his convictions set aside, Mr. Vaca must show that trial counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display rendering similar services under the existing circumstances, and that he was prejudiced thereby. *Strickland v. Washington*, 104 S.Ct 2052, 2064-2065 (1984). To show prejudice, Mr. Vaca must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. at 2068. Mr. Vaca is not required to prove that the attorney's deficient performance more likely than not altered the outcome. *Nix v. Whiteside*, 106 S.Ct. 998 (1986).

Mr. Vaca has established that trial counsel rendered ineffective assistance by eliciting evidence of uncharged offenses, including a robbery of KC Collectibles on

October 28, 2002, and assaults on Connie Miller and Margaret Francis, during the defense case. Mr. Vaca was prejudiced, because there is a reasonable probability that the outcome of the guilt phase and punishment phase of trial would have been different but for counsel's deficient performance.

With respect to the offenses committed at KC Collectibles, Mr. Vaca was originally charged by Information filed on January 9, 2003, with one count of robbery in the first degree, one count of armed criminal action, and two counts of assault in the second degree, in addition to the charges for which he ultimately was tried (L.F. 13-16). The KC Collectibles charges were dropped when the state filed an Amended Information on March 25, 2004 (L.F. 17-20).

The Amended Information charged Mr. Vaca with two counts of robbery in the first degree, one count of attempted robbery in the first degree, three counts of armed criminal action, and one count of assault in the second degree (L.F. 17-20). These remaining charges stemmed from the incidents at Salon North on October 21, 2002, Quality Cleaners on October 30, 2002, and Coves North Apartments clubhouse on November 15, 2002 (L.F. 17-20).

Before trial, the state filed a motion *in limine* to prohibit the defense from introducing evidence regarding the offenses involving KC Collectibles (L.F. 6). Defense counsel opposed the motion, asserting that the jury needed to hear evidence that fingerprints found at KC Collectibles did not match Mr. Vaca's fingerprints and that the victims, Connie Miller and Margaret Francis, had selected someone other than Mr. Vaca from a videotaped lineup (Tr. 181). Because the police pursued the investigation on the

theory that one man committed each of the robberies, defense counsel asserted that this evidence was relevant to Mr. Vaca's defense (Tr. 181-182).

Detective Chad Rives testified at trial under cross-examination by defense counsel that the police investigated a series of four robberies that had occurred in the Northland, including a robbery of KC Collectibles (Tr. 615-616). Detective Rives gave his opinion that all four robberies were committed by the same man (Tr. 618). Detective Todd Butler testified for the state that he interrogated Mr. Vaca about the KC Collectibles robbery, but that Mr. Vaca said that he had no memory of the robbery (Tr. 781). Detective Butler speculated that Mr. Vaca may not have wanted to admit his involvement in the KC Collectibles robbery, because it involved two older women who were both hit on the head with a gun (Tr. 783-785).

Defense counsel called Sergeant Joseph Wellington to testify that he relied on the police reports generated during the investigation of the KC Collectibles robbery in order to compile a flyer which was distributed to area residents in an effort to catch the robber (Tr. 864). On cross-examination by the state, Wellington testified that he thought that the same man had committed all four robberies and that there was no doubt in Wellington's mind that Mr. Vaca had committed the robbery of KC Collectibles (Tr. 865). Wellington testified that the two older women who were the victims in the KC Collectibles robbery were "pistol whipped" (Tr. 866). Wellington testified that although Mr. Vaca did not confess to that robbery, it is fairly common for an accused person to distance himself from a crime "that looks really bad for them," such as injuring two older women (Tr. 865-866).

Defense counsel called the two victims of the KC Collectibles robbery, Connie Miller and Margaret Francis, as defense witnesses (Tr. 1166, 1240). Ms. Miller testified in detail as to the circumstances of the robbery (Tr. 1166-1179). Ms. Miller described how the man demanded money from the two women, and after he obtained what money they had, hit both women and forced them to the floor (Tr. 1168-1169). Ms. Miller testified that she thought the man was going to shoot Ms. Francis and that she was afraid that he might kill them (Tr. 1169, 1176).

Ms. Francis testified that she viewed a videotaped lineup and selected a man who she was later told was a police officer (Tr. 1241, 1243). Ms. Francis explained that she picked the man who most closely resembled the robber and that she did not make a definite identification (Tr. 1246).

Mr. Cardarella testified at the Rule 29.15 evidentiary hearing that the theory of defense at trial was both misidentification and that Mr. Vaca confessed because he was manipulated by the police (Tr. 839; PCR Tr. 81-82, 85, 96, 98). Mr. Vaca had confessed to the robbery incidents at three locations: Salon North, Quality Dry Cleaners, and Coves North Apartments, but did not confess to the KC Collectibles robbery (PCR Tr. 82-83). Mr. Cardarella wanted to show that the KC Collectibles robber, and not Mr. Vaca, was the true "Bicycle Bandit" (PCR Tr. 83). Mr. Cardarella thought that this evidence would be consistent with his misidentification defense (PCR Tr. 100-102). Mr. Cardarella characterized Ms. Miller and Ms. Francis as sympathetic victims who were reluctant to help Mr. Vaca (PCR Tr. 86-87). Mr. Cardarella acknowledged the risk that the jury

would decide, based on Ms. Miller's and Ms. Francis's testimony, that Mr. Vaca had committed another robbery and had assaulted two women in the process (PCR Tr. 88).

Since counsel opposed the state's motion *in limine* and introduced evidence in both the state and the defense cases-in-chief regarding the KC Collectibles robbery and assaults, it was obviously counsel's strategy to expose the jury to evidence of uncharged crimes. The fact that it was counsel's strategy to elicit evidence of uncharged offenses does not preclude post-conviction relief. *Butler v. State*, 108 S.W.3d 18, 25 (Mo. App. W.D. 2003); *State v. Galicia,* 973 S.W.2d 926, 934 (Mo. App. S.D. 1998); *Hamilton v. State*, 871 S.W.2d 31, 34-35 (Mo. App. W.D. 1993). "For 'trial strategy' to be the basis for denying post-conviction relief, the strategy must be reasonable." *Butler,* 108 S.W.3d at 25; *Galicia,* 973 S.W.2d at 934; *Hamilton,* 871 S.W.2d at 34-35. A defense attorney's strategic decision to admit evidence of uncharged crimes can be unreasonable under prevailing professional norms and can require reversal of a defendant's conviction. *State v. McCarter,* 883 S.W.2d 75, 78-79 (Mo. App. S.D. 1994)(defense counsel's decision to admit an exhibit showing that the defendant had been accused of sexual abuse seven years before the charged offense in the hope that the jury would see that the charge had been investigated and determined to be false was an unreasonable strategy).

Defense counsel's decision to elicit evidence regarding the robbery of KC Collectibles and the assaults on Ms. Miller and Ms. Francis was unreasonable. The evidence regarding KC Collectibles provided little, if any, benefit to the defense, but had a huge detrimental impact. The fact that Ms. Francis testified that she identified a police officer in the videotaped lineup did not benefit the defense. Sergeant Wellington testified

that the police had never put Mr. Vaca in a photospread or lineup to be viewed by any witnesses (Tr. 590). The jury knew that none of the robbery victims, including Ms. Francis, had had an opportunity to identify Mr. Vaca from a photospread or lineup (Tr. 590). Ms. Francis merely selected a man who most resembled the robber (Tr. 1246). It was not as if she viewed a photospread or lineup containing Mr. Vaca and picked someone else.

Not only was the evidence of the KC Collectibles robbery of little benefit to the defense, it was extremely damaging and prejudicial. Trial counsel's defense strategy was dependent upon convincing the jury that Mr. Vaca had given a false confession (Tr. 805, 1333). In his statement to Detective Butler, Mr. Vaca confessed to the offenses committed at Salon North, Quality Cleaners, and Coves North Apartments clubhouse (Tr. 775-781). But when questioned about KC Collectibles, Mr. Vaca said that he did not remember having committed a robbery there (Tr. 781).

The evidence that Mr. Vaca did *not* confess to the KC Collectibles robbery undermined trial counsel's theory that Butler was able to intimidate Mr. Vaca into confessing to anything that Butler questioned him about. A reasonable juror would have to wonder why, if Butler's behavior was so coercive and intimidating, Butler was unable to obtain a confession to the KC Collectibles robbery. If defense counsel had not presented evidence of the KC Collectibles robbery, the state would not have been permitted to question Butler about the interrogation of Mr. Vaca with respect to KC Collectibles, and the detectives would not have been able to speculate that Mr. Vaca did not want to admit to that robbery because he knew that it was worse than the other

charged offenses (Tr. 781, 783-785, 865-866). Counsel's false confession theory would have been more credible if the KC Collectibles evidence had not been presented.

More importantly, the evidence regarding the KC Collectibles robbery was damaging and prejudicial because it implicated Mr. Vaca in a fourth robbery that involved violent assaults on two older women. Evidence of uncharged criminal acts is prejudicial, because it may encourage the jury to convict the defendant because of his propensity to commit such crimes, without regard to whether he is actually guilty of the crimes charged. *McCarter*, 885 S.W.3d at 78. The admission of the evidence regarding the KC Collectibles incident made it more likely that the jury would convict Mr. Vaca on the charged offenses.

Admission of the evidence regarding KC Collectibles also prejudiced Mr. Vaca with respect to the sentencing phase of trial. None of the victims in the charged robberies were physically harmed, while the victims of the KC Collectibles robbery were pistol-whipped (Tr. 783-785, 866, 1168-1169; PCR Tr. 86). Eliciting details of the KC Collectibles offenses and presenting evidence that the police believed one man was responsible for all four robberies (Tr. 618, 865) was an unreasonable decision given that counsel knew that the jury would be assessing punishment (PCR Tr. 80). The jury was able to take that fourth, uncharged incident into account in determining the length of sentences to assess for each of the counts for which Mr. Vaca was tried and found guilty.

The hearing court clearly erred in denying relief on this claim (PCR L.F. 62-63). Mr. Vaca has amply demonstrated that his trial attorney provided ineffective assistance of counsel and that he was prejudiced when his attorney made the unreasonable strategy

decision to introduce evidence of an additional similar, yet arguably worse, uncharged robbery incident as part of the defense evidence. Mr. Vaca therefore respectfully requests that this Court reverse the judgment of the hearing court and remand this cause for a new trial in the underlying criminal case.

## CONCLUSION

Based on the Argument presented under Point I, Miguel Vaca respectfully requests that this Court reverse the judgment of the hearing court and remand this cause for either a new sentencing hearing or a new trial in the underlying criminal case.

Based on the Argument presented under Point II, Miguel Vaca respectfully requests that this Court reverse the judgment of the hearing court and remand this cause for a new trial in the underlying criminal case.

Respectfully submitted,

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## Certificate of Compliance and Service

I, Susan L. Hogan, hereby certify as follows:

1. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 1997-2003, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification and the certificate of service, the brief contains 13,392 words, which does not exceed the 31,000 words allowed for an appellant's brief.

2. The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which the Public Defender System updated on February 13, 2010. According to that program, this disk is virus-free.

3. Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid, to Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 on February 13, 2010.

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Susan L. Hogan

# APPENDIX

Section 557.036, RSMo Supp. 2008 .....A-1

Findings of Fact, Conclusions of Law, and Order .....A-3