IN THE
MISSOURI SUPREME COURT

DAVID M. BARNETT,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC84806**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY FIRST JUDICIAL CIRCUIT, DIVISION 17
THE HONORABLE LARRY L. KENDRICK, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

The St. Louis County jury deliberated over 19 hours before finding the appellant, David M. Barnett, guilty of two counts of first degree murder, § 565.020 RSMo; two counts of first degree robbery, § 569.020 RSMo, and two counts of armed criminal action, § 571.015 RSMo. It then took more than 16 hours for the jury to recommend death sentences on both murder counts. The court sentenced appellant accordingly. This Court affirmed in *State v. Barnett*, 980 S.W.2d 297 (Mo. banc 1998). Appellant filed a motion for post-conviction relief under Rule 29.15, which the court denied without a hearing. He appeals. Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo. Const. (as amended 1982); Standing Order, June 16, 1988.

STATEMENT OF FACTS

David Barnett was one of three boys adopted by John Barnett. David was charged with the first degree murders of John's parents, Clifford and Leona Barnett. (LF2, 17-19, 27-30).[1]

The jury began its guilt phase deliberations at 10:50 a.m. on March 15, 1997. (Tr969). It retired for the night at 8:25 p.m. and resumed its deliberations at 9 a.m. the next day. (Tr979-80). At 7 p.m. that day, after more than 19 hours of deliberations, the jury returned guilty verdicts. (Tr981). The jury began penalty phase deliberations at 10:50 a.m. on March 20, 1997 and continued until 6:45 p.m., when it retired for the evening. (Tr1292-99). It resumed deliberations at 9:12 a.m. the next day and deliberated until 5:35 p.m., when, after more than 16 hours of deliberations, it returned verdicts of death on both counts. (Tr1300-01).

After this Court affirmed David's conviction and sentences, David filed a Rule 29.15 motion on March 22, 1999, (PCRLF4-9), to which appointed counsel filed an amended motion on June 30, 1999. (PCRLF23-220). The state moved to dismiss without an evidentiary hearing. (PCRLF221-239). On July 23, 2001, the motion court denied

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[1] Record references are as follows: Motion hearing Transcript (MTTr); Trial transcript: (Tr); Legal file: (LF); Post-conviction legal file: (PCRLF). David requests that this Court take judicial notice of its own files, specifically the record on direct appeal in *State v. Barnett*, S.Ct.79985. The essential facts of the case are set forth in this Court's opinion in *State v. Barnett*, 980 S.W.2d 297 (Mo.banc 1998).

David's request for an evidentiary hearing. (PCRLF399). On September 10, 2001, David filed a Motion to Reconsider and 19 volumes of materials that his proposed expert witnesses had reviewed, including affidavits from witnesses and trial counsel. (PCRLF403-4265). The court took the matter under submission and thereafter, on July 29, 2002, adopted the state's findings and conclusions and denied relief. (PCRLF4313-4333).

Pre-trial, counsel requested discovery under Rule 25.03. (LF32-34). The state, however, did not honor this request. Rather, it surprised David with Officer Smith, who David expected to testify and opine that a shoeprint on the air conditioning unit beside the house suggested that David had stood on it to enter his grandparents' house through the bathroom window. (Tr697). Officer Granat later testified that the tread design of that shoeprint was similar to that of a pair of gym shoes taken from David. (Tr768,774). Granat surprised David when he added that David's shoes were manufactured beginning October 12, 1995 and were first available for distribution as of February 1, 1996, three days before the Barnetts were killed. (Tr769,771). Granat had not disclosed this information at a pre-trial deposition. In fact, he had specifically stated that he did not know how common the tread design was in the St. Louis area in February, 1996. (Supp.LF27A-28).

Despite this surprise, trial counsel did not object when Granat testified. Instead, she waited until after Officer Derickson testified. She then finally requested a mistrial, a curative instruction and the right to recall Granat. (Tr801-13). Counsel also asked that the prosecutor be prohibited from arguing those facts because of Granat's late disclosure.

(Tr813). The court denied the requested relief, finding that counsel had waited too long to object. (Tr807-09). This Court noted that the state had withheld material evidence, but

> Barnett waived any objection to the state's lack of disclosure because defense counsel failed to raise an objection to the expert's testimony at the time it was given…the objection was not timely because it could have, and should have, been made when the expert testified. The trial court would have been able to take remedial action at that time. Instead, defense counsel delayed an objection until long after the witness had been excused.

State v. Barnett, 980 S.W.2d at 304-05.

In the post-conviction action, David asserted that counsel was ineffective for not objecting timely to the state's failure to disclose Granat's testimony. (PCRLF155-161). Counsel Blau affied that the failure to object timely was not a strategic decision by either her or her co-counsel. (PCRLF461).

During guilt phase, Officer Henry Morris, who was dispatched to the Barnett home on February 4, 1996, testified that he met with John Barnett at his parents' home and asked John who he thought could have killed them. (Tr616,618). Morris testified that John responded, "'I think my son David did it, he's always been in trouble with the law. He was just arrested by Ladue the other day.'" (Tr618-19). Counsel did not object. Later in guilt phase, Rhonda James, one of David's friends, testified that they and other friends had been drinking in the days before the murders and "we would get high, drink, and that's it." (Tr658). She also testified that they smoked marijuana. (Tr659). Again, counsel did not object. Finally, Detective Steve Nelke, a member of the Major Case

Squad who was assigned to check out leads on David, testified that he went to Texas Avenue where the Barnetts' car was found and began an area canvass. (Tr843-44). Nelke described his actions, stating, "And I had a mug shot of David Barnett, and I said, 'That's David Barnett.' As a matter of fact, he was wearing the same clothes that he was wearing in the mug shot." (Tr844-45). Yet again, counsel did not object.

In the post-conviction action, David asserted that counsel's failures to object to evidence of prior bad acts constituted ineffective assistance of counsel. (PCRLF163-175). Counsel Blau affied that neither she nor co-counsel had made a strategic decision not to object to this testimony and evidence. (PCRLF461-62).

During voir dire, Judge Kendrick explained to each panel that they would be asked about three areas—sequestration, pre-trial publicity and punishment—during small group voir dire. Prefacing his questions about publicity, Judge Kendrick told each group that "The victims in this case were an older couple, Clifford R. and Leona Barnett, husband and wife, who lived in the City of Glendale here in St. Louis County. They were killed in their home by stabbing a little over one year ago on February 4th, 1996." (Tr140-41,117-18,227,280-81,326-27,375-76,419,STr8-9,56,101-02,166). Based on this statement, the veniremembers were simply asked if they had heard of the incident in question. Defense counsel never mentioned the Barnetts' age or status as David's grandparents in their voir dire examination.

In the post-conviction action, David asserted that counsel was ineffective for not conducting a complete voir dire of all critical issues in David's case. (PCRLF152-54).

Counsel Blau affied that the failure to voir dire on these issues was not the result of a strategic decision. (PCRLF461).

Approximately three months before trial, Clifford and Leona's children, John, Lana and Polly, wrote the court requesting that David be sentenced to life without parole (LF78; PCRLF3397). They further wrote that, "As Christians, we believe in forgiveness, repentance, and atonement for sins. We feel that the death penalty would not allow for these necessary steps. David has some good in him. Possibly that good can grow as the years go by. We hope and pray so!" (LF78;PCRLF3397).

After David's trial and about two weeks before sentencing, John wrote the court asking that, despite the jury's verdict, David be sentenced to life without parole. (LF15-16,795;PCRLF3162). John felt that his family had "suffered enough;" the prosecutor had ignored the family's wishes; if the jury had heard from John, they would have voted for life; executing David will only bring more pain to David's son, Sethan, and David has good qualities that could flourish in prison. (LF795;PCRLF3162). Adding their voices to John's were Bishop Ann Sherer; David's first foster parents, the Reames; and an adoption specialist with the Division of Family Services. (PCRLF3163-67). At sentencing, trial counsel urged that the court impose a life sentence, based on the pleas from Clifford and Leona Barnett's children. (Tr1306-07).

In the guilt phase opening argument, the prosecutor told jurors that "Clifford and Leona Barnett had a right to peacefully and sweetly live out their lives on God's terms." (Tr944). Counsel did not object to the argument, and this Court later found no resulting manifest injustice. *State v. Barnett*, 980 S.W.2d at 306.

During guilt phase, the prosecutor set up this argument, requesting to have Exhibit 29N admitted. (Tr728-29). This was a photograph of the Barnetts' bedroom, showing the word "**JESUS,**" in large capital letters, appended to a picture mounted on the wall. (Exh.29N; MTTr2). Another photograph of the same part of the bedroom, yet lacking the "**JESUS**" reference, Exhibit 29O, was also admitted. (Tr728-29). The prosecutor wanted Exhibit 29N, claiming, "The fact that these people were God-fearing is most definitely a relevant issue especially when you get to the penalty phase." (MTTr41-43). The trial court overruled defense counsel's pre-trial and trial objections to the photograph. (MTTr43;Tr685). This Court affirmed on direct appeal. *State v. Barnett*, 980 S.W.2d 297, 304 (Mo. banc 1998).

In the post-conviction action, David alleged that counsel was ineffective for failing to call John Barnett, Lana Barnett-Campbell and Polly Barnett-Hargett in penalty phase about their desires, as Christians, that David not be sentenced to death but that instead he be sentenced to life without probation or parole. (PCRLF176-79).

In penalty phase, defense counsel called Mary Lacey, the sister of Robert Biggerstaff, the man whom David believed to be his natural father (Tr1049); Barbara Eshenroder, a DFS social worker who first became involved in David's case in 1981 and facilitated placing him in foster care (Tr1058-59); Rita Reames, David's first foster mother, with whose family he lived for six months (Tr1067-70); Jacqueline Thirlkel, the DFS social worker who monitored David's case from April, 1983 until February, 1984 (Tr1074-75); Marian Schuchardt, David's sixth grade teacher, who recalled that, on the last day of school, David had brought a baggie of marijuana with him to school, asserting

it was John Barnett's (Tr1084-86); Florence Meier, David's high school counselor, who became involved in David's case when David told her that he and his brothers were running away from home and immediately thereafter, when David attempted self-immolation (Tr1096-98); Patricia Voss, David's assistant high school principal, who only knew that David had had some attendance problems at school (Tr1100); Dr. Ahmad Ardekaani, a psychiatrist who reviewed David's records from a 1992 hospitalization at St. Anthony's Medical Center in St. Louis, during which he was diagnosed with Major Depression, Oppositional Defiant Disorder, Conduct Disorder and Bipolar Disorder (Tr1109-13); Dr. Don Kleinschmidt, a psychiatrist who treated David for Depression after his October, 1992 attempted self-immolation (Tr1121-23); Secil Blount, David's girlfriend and mother of his child, Sethan, who recalled David's good behavior toward herself and Sethan and her mistreatment of David (Tr1134-42); Dr. Rosalyn Schultz, a psychologist who explained the effects on David of his childhood history of abandonment and abuse (Tr1147-1231); Officer Robert Catlett, who had interviewed one of David's adopted brothers, Kris, about John Barnett's physical and sexual abuse of the children and his implicit suicide threats (Tr1234-37), and Eric Barnett, another of David's adopted brothers, whom David taught games and told to stay away from drugs. (Tr1238-40).

David's post-conviction motion asserted that counsel's performance was deficient because, despite knowing that David suffers from Major Depression and that he self-medicates with illicit substances, factors which have genetic bases, she never even investigated David's biological mother and her family. And, since she never did this basic investigation, she could not supply this critical information to her expert witnesses

or the jury. The motion asserted that counsel was ineffective for failing to present readily available evidence that would have demonstrated that David did not deliberate and that would have mitigated punishment by showing *inter alia* the facts underlying and problems caused by David's adoption that in turn affected who David came to be and were a reason he should not be executed. (PCRLF26-28, 33-147). In support of those claims, David filed affidavits from Charles Pullen, David's biological maternal uncle, who would have testified about the family history of alcohol abuse and mental illness (PCRLF453-56); Mary Jane Cook, Mary Melton and Sue McBride, the best friends of David's biological mother, Shirley Pullen Acree, who would have testified about Shirley's drinking throughout her pregnancy with David and her lack of prenatal care; who was really David's biological father; her rejection and neglect of David and her inability to care for any of her children. (PCRLF411-17,476), and Eric Barnett, one of David's younger adopted brothers, who would have testified that David protected him from physical and mental abuse; that John Barnett physically, emotionally and sexually abused all three boys, and that David loved and was loved by his grandparents, Clifford and Leona. (PCRLF418-21). David also filed an affidavit from Dr. Robert Smith, who would have testified about the rejection and depression that David experienced and David's genetic predisposition toward substance abuse and mental illness, specifically Major Depression, which, combined with the cumulative stressors he experienced at the time of his grandparents' murders, caused him to be incapable of dealing with those stressors and thus inexplicably lashing out against those he loved. (PCRLF463-67).

Counsel Blau affied that "I did not contact or interview David's mother, Shirley Acree, prior to trial. I, therefore, was unaware of the portions of David's social history provided by Ms. Acree, and not provided through other sources, as described in portions of claims 8(A) and 9(A) of his post-conviction motion. I would have considered presenting this new evidence, available only through Ms. Acree, to the jury if I had been in possession of this information." (PCRLF460). Counsel Blau continued that "I also would have provided the new information, available only through Ms. Acree, described in portions of claims 8(A) and 9(A) to my experts and/or I would have used the new information in consideration of retaining additional experts to testify in David's case." (PCRLF460). Counsel Blau further affied that her failure to present this evidence was not part of a strategic decision. (PCRLF461).

The motion court denied relief on all claims, after first having denied an evidentiary hearing. (PCRLF4313-4333). This appeal follows.

POINTS RELIED ON

I.

The motion court clearly erred in denying a hearing on David's claim that counsel was ineffective for failing to investigate and provide information about David's background, specifically regarding his mother and her family, because this ruling denied David's rights to due process, a fundamentally fair trial, effective assistance of counsel, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that while counsel investigated parts of David's background and provided information to her expert witnesses, she neglected even to pursue significant aspects of his background related to his mother and her family. Had counsel considered those areas, she would have discovered, and then made available to her expert witnesses: David's birth family's extensive history of alcohol and other substance abuse; David's biological mother's alcohol abuse and lack of pre-natal care during her pregnancy with David; David's birth family's extensive history of Depression and other mental illnesses; and the genetic and environmental effect these factors had upon David's development. Had any expert witnesses had access to this information, they would have explained to the jury who David was and why events unfolded as they did and thus have given the jury reasons not to impose death, but to choose life.

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

Wilkes v. State, 82 S.W.3d 925 (Mo.banc 2002);

Simmons v. Luebbers, 299 F.3d 929 (8th Cir. 2002).

II.

The motion court clearly erred in refusing a hearing on David's claim that counsel was ineffective for not timely objecting to the state's late disclosure of Officer Granat's testimony that David's shoes only became available for sale in the St. Louis area three days before he killed his grandparents because that ruling violated David's rights to due process, effective assistance of counsel, a fundamentally fair trial and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that the state failed to disclose Granat's information, which directly contradicted his deposition testimony, and, had counsel timely objected, a reasonable probability exists that the court would have taken remedial action. Granat's testimony formed the foundation for the state's argument that David deliberated in killing his grandparents since, it asserted, he sneaked into their house through the bathroom window, which evinced his motive in entering the house that morning. Since the defense theory was that David killed his grandparents but had not deliberated and the jury was out over 19 hours in guilt phase, this testimony and argument were highly prejudicial. But for this testimony, a reasonable probability exists that the result would have been different. The motion states facts not refuted by the record, that, if proved, would warrant relief.

Wilkes v. State, 82 S.W.3d 925 (Mo.banc 2002);

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

State v. Whitfield, 837 S.W.2d 503 (Mo.banc 1992).

III.

The motion court clearly erred in denying an evidentiary hearing on David's claim that counsel was constitutionally ineffective in failing to object to repeated references to alleged prior bad acts because that claim states facts not refuted by the record, that, if proved, would warrant relief. David alleged that counsel failed to object to testimony by Officer Morris that John Barnett had told him that David had been "arrested by Ladue the other day;" to testimony by Rhonda James that David had been smoking marijuana in the days leading up to the killings, and to testimony by Detective Nelke that he had shown David's mug shot when doing a neighborhood canvass. David also alleged that counsel did not object to this testimony, which raised the inference of prior bad acts, and that, especially in a case in which the jury deliberated for over 19 hours in guilt phase, David was prejudiced. If proved, these facts would show that David was denied due process, effective assistance of counsel, a fundamentally fair trial and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, 18(a) and 21 of the Missouri Constitution. Trial counsel's failures to object were unreasonable, cannot be deemed strategic, especially based merely on the cold record, and it cannot be stated with any degree of certainty that the jury did not consider this inadmissible evidence in ultimately finding that David deliberated in killing his grandparents.

State v. Burns, 978 S.W.2d 759 (Mo.banc 1998);

Wilkes v. State, 82 S.W.3d 925 (Mo.banc 2002);

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

IV.

The motion court clearly erred in refusing a hearing on David's claim that counsel was constitutionally ineffective for not conducting an adequate voir dire into the critical facts of this case—that David had murdered his elderly grandparents and that he had three prior convictions—because this ruling denied David's rights to due process, a fundamentally fair trial, a fair and impartial jury, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that by not exploring these issues on voir dire, counsel lost the opportunity to expose bias in potential jurors, these were facts that were likely to have created insurmountable bias in jurors against David, and, because of the lack of voir dire, unqualified jurors may well have sat on David's case.

Morgan v. Illinois, 529 U.S. 719 (1992);

Wilkes v. State, 82 S.W.3d 925 (Mo.banc 2002);

State v. Clark, 981 S.W.2d 143 (Mo.banc 1998).

V.

The motion court clearly erred in denying a hearing on David's claim that counsel was ineffective for failing to call Clifford and Leona Barnett's children, John Barnett, Lana Barnett-Campbell and Polly Barnett-Hargett, to testify that they, as Christians and raised in a Christian family, did not believe in the death penalty and wanted David to be sentenced to life without probation or parole not death because this ruling denied David's rights to due process, a fundamentally fair trial, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that the State repeatedly argued and presented evidence that the Barnetts were Christians and the State called Lana Barnett-Campbell in penalty phase as a victim impact witness to testify about her loss upon her parents' death. The State thus opened the door to evidence that, as Christians, the Barnetts' children did not condone the sentence that the State was seeking.

Lockett v. Ohio, 438 U.S. 586 (1978);

Wilkes v. State, 82 S.W.3d 925 (Mo.banc 2002);

State v. Bolds, 11 S.W.3d 633 (Mo.App.,E.D. 1999).

VI.

The motion court plainly erred in failing to vacate David's death sentences because that ruling violated David's rights to due process, a fundamentally fair trial, effective assistance of counsel, freedom from cruel and unusual punishment and his privilege against self-incrimination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a), 19 and 21 of the Missouri Constitution in that David testified in neither guilt or penalty phase; counsel extensively voir dired about David' right not to testify and the jury's obligation not to hold that fact against him and the "no-adverse-inference" instruction was given in guilt phase but not in penalty phase. Trial counsel failed to request it in penalty phase. Had she done so, the trial court would have had to give it. But for trial counsel's error, David's failure to testify would not have been "inescapably impressed upon the jury's consciousness." A reasonable probability exists that the jury would not have rendered death sentences but instead would have voted for life without probation or parole. This error was obvious from the record and controlling caselaw yet post-conviction counsel failed to raise it in the amended motion. Because post-conviction counsel abandoned David in his first appeal of right as to his right to effective counsel, this Court must excuse the default.

Carter v. Kentucky, 450 U.S. 288 (1981);

State v. Mayes, 63 S.W.3d 615 (Mo.banc 2001);

State v. Storey, 986 S.W.2d 462 (Mo.banc 1999).

VII.

The motion court clearly erred in failing to reappoint motion counsel before reaching the merits of David's motion and denying relief without a hearing because that decision violated David's rights to due process, a full and fair hearing in state court, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that Missouri courts categorically refuse to review claims of ineffective assistance of counsel on direct appeal but rather, delegate those claims exclusively to post-conviction review, during which post-conviction movants are granted the right to counsel and post-conviction counsel has sole responsibility for and control over what claims are raised. Since Rule 29.15 provides Missouri defendants with their first appeal of right as to their constitutional right to counsel, post-conviction counsel must provide effective assistance to ensure that the amended motion includes both all claims known and sufficient facts. David's post-conviction counsel did not include all claims known to them since they failed to raise any claim about trial counsel's failure to offer a no-adverse-inference instruction in penalty phase, despite that four months before they filed their amended motion, this Court decided *State v. Storey* and granted a new penalty phase because that instruction had not been given.

Carter v. Kentucky, 450 U.S. 288 (1981);

Douglas v. California, 372 U.S. 353 (1963);

Luleff v. State, 807 S.W.2d 495 (Mo.banc 1991).

ARGUMENT

I.

The motion court clearly erred in denying a hearing on David's claim that counsel was ineffective for failing to investigate and then provide information about David's background, specifically regarding his mother and her family, because this ruling denied David's rights to due process, a fundamentally fair trial, effective assistance of counsel, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that while counsel investigated parts of David's background and provided information to her expert witnesses, she neglected even to pursue significant aspects of his background related to his mother and her family. Had counsel considered those areas, she would have discovered, and then made available to her expert witnesses: David's birth family's extensive history of alcohol and other substance abuse; David's biological mother's alcohol abuse and lack of pre-natal care during her pregnancy with David; David's birth family's extensive history of Depression and other mental illnesses; and the genetic and environmental effect these factors had upon David's development. Had any expert witnesses had access to this information, they would have explained to the jury who David was and why events unfolded as they did and thus have given the jury reasons not to impose death, but to choose life.

The jury in David's case deliberated for more than sixteen hours, over a period of two full days, before finally making a decision in penalty phase. (Tr1292-1301).

Although counsel adduced evidence in mitigation of punishment and argued vigorously for a life without parole verdict, she never provided her expert witnesses with information about David's birth and birth family, information that would have helped her experts explain to the jury who David was and thus why events unfolded as they did. That information would have given the jury the critical information it needed to choose life, and the motion court clearly erred in denying this claim without an evidentiary hearing. This Court must give David the opportunity to prove his claim at an evidentiary hearing.

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); *Hall v. State*, 16 S.W.3d 582, 585 (Mo.banc 2000); *Rule 29.15(k)*. Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo.banc 1996).

A motion court need not hold an evidentiary hearing unless (1) the movant cites facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record, and (3) the matters complained of prejudiced the movant. *State v. Ferguson*, 20 S.W.3d 485, 503 (Mo.banc 2000); *State v. Moss*, 10 S.W.3d 508, 511 (Mo.banc 2000). This review, however, must bear in mind that

> the rules encourage evidentiary hearings. *See Rule 29.15(h).* Nothing in the text of Rule 29.15 suggests that the pleading requirements are to be construed more narrowly than other civil pleadings. Thus, a movant may successfully plead a claim for relief under Rule 29.15 by providing the motion court with allegations

sufficient to allow the motion court to meaningfully apply the *Strickland* standard and decide whether relief is warranted.

Wilkes v. State, 82 S.W.3d 925, 929 (Mo.banc 2002), citing *Morrow v. State*, 21 S.W.3d at 824. The *Wilkes* Court further explained that "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Wilkes v. State*, 82 S.W.3d at 928(emphasis in original).

Since the gravamen of this claim is that counsel provided ineffective assistance, we must look to *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000) to determine whether counsel fulfilled her constitutionally-mandated duty. To establish ineffective assistance, David must show that counsel's performance was deficient and that it prejudiced his case. *Strickland v. Washington*, 466 U.S. at 689; *Williams v. Taylor*, 529 U.S. at 390.

Under the first prong of the test, counsel has a duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. at 691; *Kenley v. Armontrout*, 937 F.2d 1298, 1304-09 (8th Cir. 1991). While the Sixth Amendment does not require that criminal defense lawyers leave no stone un-turned and no witness un-pursued, it requires a reasoned judgment as to the amount of investigation the particular circumstances of a given case require. *Jermyn v. Horn*, 266 F.3d 257, 307 (3rd Cir. 2001). Strategic choices made after less than complete investigation are only reasonable to the extent that reasonable professional decisions support the limited nature of the investigation. *Strickland v. Washington*, 466 U.S at 691.

Under the second prong of the test, David must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694; *State v. Butler*, 951 S.W.2d 600, 608 (Mo.banc 1997). As to penalty phase, this is satisfied if a reasonable probability exists that even one juror would have been sufficiently influenced by the mitigation evidence to vote against the death penalty. *United States ex rel. Emerson v. Gramley*, 883 F.Supp. 225, 242 (N.D.Ill.1995); *Laird v. Horn*, 159 F.Supp.2d 58, 117 (E.D.Pa.2001); *Simmons v. Luebbers*, 299 F.3d 929, 939 (8th Cir. 2002).

In *Williams v. Taylor, supra*, the Court found Williams' counsel constitutionally ineffective for failing to conduct a thorough investigation of Williams' background. Counsel did not investigate pre-trial and did not present available records that documented Williams' childhood, borderline mental retardation, limited schooling and good prison behavior. *Id*. at 395-96. After reviewing the evidence that had been omitted and that which had been adduced and noting that the evidence could not be viewed in isolation, the Court found prejudice resulted from counsel's deficient performance. *Id*. at 397-98. The Court granted relief because "had competent counsel … presented and explained the significance of all the available evidence" it "might well have influenced the jury's appraisal of [the defendant's] moral culpability." *Id.* at 398-99.

Although counsel investigated David's life once he was adopted by John Barnett, counsel entirely failed to investigate and then provide the jury with information about David's biological mother, her family, and thus the environmental and genetic factors

that created David and affected his development. Confirming David's claims in the amended motion, Counsel Blau stated that

> I did not contact or interview David's mother, Shirley Acree, prior to trial. I, therefore, was unaware of the portions of David's social history provided by Ms. Acree, and not provided through other sources, as described in portions of claims 8(A) and 9(A) of his post-conviction motion. I would have considered presenting this new evidence, available only through Ms. Acree, to the jury if I had been in possession of this information. (PCRLF460).

Counsel continued that "I also would have provided the new information, available only through Ms. Acree, described in portions of claims 8(A) and 9(A) to my experts and/or I would have used the new information in consideration of retaining additional experts to testify in David's case." (PCRLF460). Finally, counsel stated, her failure to present this evidence was not part of a strategic decision. (PCRLF461).

A wealth of mitigating evidence was available but went un-noticed at trial because counsel failed to even look for it. Had counsel done minimal investigation in this area, she would have discovered that David's mother, Shirley, became pregnant with him while she was drinking hard liquor to excess as well as abusing LSD, cocaine and amphetamines. (PCRLF33). Shirley believes that David's biological father is Joseph Michael Castaldi. (PCRLF33). Mr. Castaldi's former wife, Sue Castaldi McBride, affirms that her ex-husband was having an affair with Shirley at the time and that David bears a great facial resemblance to Mr. Castaldi. (PCRLF415). Mrs. McBride also could confirm that Mr. Castaldi was a "very heavy drinker." (PCRLF416). The facts behind

David's conception and his mother's own alcoholism may have led to his mother's abandonment of him to the alcoholic and repeat-felony offender, Robert Biggerstaff, when David was only one week old. (PCRLF487,3851,3934).

Counsel also failed to discover that, while Shirley was ingesting alcohol and other drugs, she neglected to obtain any prenatal care. (PCRLF33,37). Her best friend, Mary Melton, would have confirmed seeing Shirley abuse drugs and alcohol throughout her pregnancy and would have confirmed that Shirley obtained no prenatal care. (PCRLF37,412).

Minimal investigation by counsel would also have revealed that Shirley's substance abuse was generational. Available through Shirley and her family members was information about her family, including that, when her grandfather Wilbur Pullen brought his family to the St. Louis area in the early 1950's, he, his wife and his children drank alcohol heavily every day. (PCRLF34). Wilbur ended up dying after he drank anti-freeze, mistakenly believing it to be alcohol; his wife drank daily, beginning in the morning as soon as her husband left for work and continuing until she passed out; his son George drank daily; his son Walter drank daily, had to be hospitalized because of his alcohol consumption and now lives, homeless, on the streets of St. Louis and suffers from mental illness; and his son Wendell abused alcohol heavily and ultimately committed suicide. (PCRLF34-35). Shirley's mother was usually too hung-over in the morning to awaken the children, feed them breakfast and send them to school, so, when she finally awakened from her drunken stupor, she took them with her to local bars and truck stops to drink and meet men, with whom she then had indiscriminate sex. (PCRLF35). Mary

Melton, one of Shirley's best friends growing up, would have testified about Shirley's mother's drunkenness and the impact this had upon her children and their home-life. (PCRLF411).

Substance abuse was not confined to Shirley's parents' generation. Shirley and her brother, Charles, would have testified, for example, that their brother, Randy, abused drugs, was frequently incarcerated, and may now be dead, as a result of HIV infection from his intravenous drug use. (PCRLF36,454). Their brother Shelby, who suffers from mental illness, has also had substance abuse problems, drinking very heavily. (PCRLF36,455). Shirley herself had a long-term substance abuse problem. By the time she was 17, for example, she was drinking a fifth of Jack Daniel's every day and was using illicit drugs like marijuana, LSD, cocaine and amphetamines. (PCRLF36).

Had counsel discovered and then given this readily available information to her expert witnesses, they could and would have told the jury that this extensive family history of drug and alcohol abuse has a genetic component. (PCRLF470-71). They could and would have informed the jury that research of drug and alcohol addiction demonstrates that children of drug and alcohol abusers are at extreme risk for developing an addiction—500% more likely. (PCRLF471). They could further have told the jury that this family history of substance abuse placed David at great risk for developing an addiction. (PCRLF471). They could also have told the jury that David's addiction, resulting from genetic and environmental factors, played a role in these tragic events. (PCRLF471).

From the outset of David's life, Shirley rejected him, giving him away when he was just one week old. (PCRLF487,3851,3934). She refused to have contact with her newborn son, refusing to hold or feed him or change his diapers. (PCRLF37,412). Shirley gave David to a friend, Mary Jane Cook, known to her friends as "Crazy Janie," a woman deemed emotionally unstable and thus an unsafe person with whom to leave David. (PCRLF38,413). Janie herself would have testified that Shirley "just wanted to dump the kid off with someone," and had told Janie "'take the bastard. I don't want the fucking kid.'" (PCRLF477). Four of Shirley's other children she ultimately abandoned to the Division of Family Services. (PCRLF39).

With her last husband, Michael Acree, Shirley had another child, Bradley, who suffers from Major Depression, for which he receives medication. (PCRLF39). Even the children separated from Shirley at a relatively early age have suffered from Major Depression, for which many of them have been and continue to be treated. (PCRLF39-40). Minimal investigation would have revealed that David's maternal family, his mother and her relatives, had a history of Depression and other psychiatric disorders. (PCRLF472).

One of counsel's penalty phase witnesses, Dr. Ahmad Ardekaani, a psychiatrist who testified about David's hospitalizations in June and August, 1992, had noted that David suffered from Depression and further noted that Depression has a genetic basis. (Tr1110). Because counsel never even investigated David's biological heritage, she did not know and thus could not present to the jury documentation of David's family history of Depression. Had counsel discovered and then given this readily available information

to her experts, they could have told the jury that this family history of Depression increased David's susceptibility to Depression. (PCRLF472). They could further have told the jury that research has identified specific brain chemistry related to Depression and that these imbalances can be passed from one generation to the next. (PCRLF472). They could have told the jury that David suffered from Major Depression at the time of the offenses and that this Depression stemmed from genetic sources, as well as the environmental effect of a series of losses in his life. (PCRLF472).

Had counsel discovered this evidence, she could and would have made it available to her expert witnesses. (PCRLF461). Since she did not, the jury never heard anything about David's maternal family and how genetics influenced who he is.

Claims 8(a) and 8(c) of David's amended motion pled that this information was critical in penalty phase for the jury to make "an informed and appropriate punishment" decision. (PCRLF57). The motion pled that the information was readily available through a basic investigation of David's life, including interviewing his family members and reviewing his records. (PCRLF57). It pled that the defense experts lacked complete background information as well as other critical information and this rendered them unable to give the jury a complete and logical picture of David's life and psychological problems. (PCRLF26,28). It further pled that, had counsel obtained the information and made it available to a qualified mental health professional, that witness could have utilized the information to explain David's history to the jury so that a different sentence would have resulted. (PCRLF57-59,117-18,121-22,126). The motion stated that "but for trial counsel's ineffectiveness for not properly preparing and questioning their experts at

trial, and/or by not providing complete information to their experts, the outcome of David's proceedings would have been different and the jury would have recommended life imprisonment without possibility of probation or parole instead of the death sentence." (PCRLF28).

The motion specifically pled that

> Interviews by Dr. Smith of David's birth mother and maternal relatives revealed a history of depression and psychiatric disorders within the family. Dr. Smith would have testified that this positive family history indicates a genetic susceptibility that David had to developing depression. Dr. Schultz did not have this information when she assessed David and when she testified at trial. A reasonably competent attorney would have provided this information to Dr. Schultz so she could accurately and completely assess David's psychological problems at the time of the offense… But for trial counsel's ineffectiveness for not properly preparing and questioning their experts at trial, and/or by not providing complete information to their experts about David's extensive history of drug abuse, history of depression and psychiatric disorders within David's family, the outcome of David's proceedings would have been different and the jury would have recommended life imprisonment without possibility of probation or parole instead of the death sentence.

(PCRLF121-22, see also PCRLF126). As the *Williams* Court noted, this evidence "might well have influenced the jury's appraisal of his moral culpability." *Williams v. Taylor*, 529 U.S. at 397.

The motion court denied relief on these claims without granting an evidentiary hearing. As to Claim 8(a), the court held that the claim "does not allege sufficient facts for this Court to grant an evidentiary hearing." (PCRLF4321). The court further held that the claim "does not connect a specific portion of the narrative to a particular witness, does not allege that counsel was informed of their existence, and does not state that any of these witnesses were available to testify." (PCRLF4321). Finally, the court held that "the record refutes Movant's claim that this evidence should have been presented through a qualified mental health professional. Dr. Rosalyn Schultz, a psychologist, included many of the facts contained in the narrative in her testimony during the penalty phase." (PCRLF4321). These findings are clearly erroneous.

Contrary to the court's findings, the claim specifies which facts will be elicited from which witnesses. For example, as to the family's history of alcoholism, the motion pleads

> Charles Pullen, Shirley's brother, recalls, that his Uncle Walter also drank alcohol on a daily basis and needed to be hospitalized for effects of excessive consumption. Charles believes his Uncle Walter is living on the streets of St. Louis, homeless and suffering from a mental illness. Shirley remembers that her Uncle Wendell heavily abused alcohol. She recalls his death from suicide in the 1980's. Charles and Shirley recall their grandfather, Wilbur Sr., dying from the consumption of antifreeze, mistakenly believing it was alcohol.

(PCRLF34)(emphasis added). Thus, the motion clearly specifies the testimony alleged to be available from specific witnesses.

Further, the finding that the narrative does not allege that counsel was informed of the witnesses' existence ignores that the motion specifically pleads that "the information was readily available to trial counsel through a basic investigation of David's life, including interviews with his family and review of records." (PCRLF57). It also ignores that this evidence has its genesis in David's mother, certainly a witness that any trial counsel would expect to possess information about her own and her family's life history. The other witnesses, such as David's uncle and his mother's best friends recite events of which Shirley knew or in which she was a participant. David's mother is key, and it strains credulity to assert that counsel would not have known that she existed.

While the pleading itself does not specifically state that these witnesses were available to testify, in support of David's Motion for Reconsideration, motion counsel filed various affidavits from the witnesses pled within the motion. Among them were affidavits from Charles Pullen, David's uncle, and Mary Mellon, Mary Jane Cook, and Sue McBride. (PCRLF411-17,453-56,476-78). In each of those affidavits, the witnesses affied that, had they been asked to testify at trial, they would have done so. (PCRLF411-17,453-56,476-78). Thus, it is incorrect to state that the witnesses would not have been available and willing to testify in support of David's claims. Moreover, this Court's decision in *Wilkes v. State*, 82 S.W.3d at 929, suggests that a hyper-technical reading of the pleadings merely to avoid giving a hearing is not appropriate, given that "the rules encourage evidentiary hearings." *Id.* Since the allegations here are sufficient to allow the motion court to apply the *Strickland* standard in a meaningful way and decide if relief is warranted, a hearing should have been granted. *Id*.

Finally, as to this claim, contrary to the court's findings, the record does **not** refute David's claim that the evidence should have been presented through a qualified mental health professional. (PCRLF4321). Although Dr. Schultz testified about part of David's life history, she never testified about his mother or his mother's family and their history of mental illness and substance abuse or the resulting genetic and environmental factors that made David more susceptible to both. As Counsel Blau noted, "I did not contact or interview David's mother, Shirley Acree, prior to trial. I, therefore, was unaware of the portions of David's social history provided by Ms. Acree, and not provided through other sources, as described in portions of claims 8(A) and 9(A) of his post-conviction motion." (PCRLF460). Counsel Blau also noted that she did not provide information that would have been acquired through David's mother to her experts but would have done so had she known of it. (PCRLF460).

The court's findings as to claim 8(c) are also clearly erroneous. The court found, as to that claim, that "The claim that counsel did not prepare the expert witnesses is refuted by the record. The transcript shows that trial counsel provided Dr. Schultz with the records necessary to render her opinions." (PCRLF4323). Preliminarily, the transcript demonstrates that Dr. Schultz never received any information about David's mother or the history on his maternal family. Counsel Blau's affidavit confirms this, as she affied that she did not provide that information to her experts, but, had she had it available, she would have done so. (PCRLF460).

The motion court's findings are thus clearly erroneous since David's motion states facts, not conclusions, that would entitle him to relief; his factual allegations are not

refuted by the record and he was prejudiced by counsel's failure to investigate this critical aspect of his background. After all, David's jury deliberated for over sixteen hours in penalty phase. The evidence that counsel presented had the jury out for what was essentially two work days. The scales between life and death were thus clearly delicately balanced. The question becomes what might have pushed the balance toward life. Had the jury heard this compelling evidence, it "might well have influenced the jury's appraisal of [David's] moral culpability." *Williams v. Taylor*, 529 U.S. at 397; *Boyde v. California*, 494 U.S. 370, 387 (1990). As in *Simmons v. Luebbers, supra,* "had this evidence been presented, there is a reasonable probability that at least one of the jurors would have voted against the imposition of the death penalty." 299 F.3d at 939.

This Court must, therefore, remand for an evidentiary hearing on these claims.

II.

The motion court clearly erred in refusing a hearing on David's claim that counsel was ineffective for not timely objecting to the state's late disclosure of Officer Granat's testimony that David's shoes only became available for sale in the St. Louis area three days before he killed his grandparents because that ruling violated David's rights to due process, effective assistance of counsel, a fundamentally fair trial and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that the state failed to disclose Granat's information, which directly contradicted his deposition testimony, and, had counsel timely objected, a reasonable probability exists that the court would have taken remedial action. Granat's testimony formed the foundation for the state's argument that David deliberated in killing his grandparents since, it asserted, he sneaked into their house through the bathroom window, which evinced his motive in entering the house that morning. Since the defense theory was that David killed his grandparents but had not deliberated and the jury was out over 19 hours in guilt phase, this testimony and argument were highly prejudicial. But for this testimony, a reasonable probability exists that the result would have been different. The motion states facts not refuted by the record, that, if proved, would warrant relief.

David's attorneys argued in guilt phase opening that, although David killed his grandparents, "He never planned to attack or kill them. David did a terrible thing and

you should find him guilty for what he did. But it wasn't planned, it wasn't premeditated, it wasn't coolly deliberated on, and it was not murder in the first degree." (Tr596). The state's theory was that David deliberated. It argued that its theory was supported because that morning David entered his grandparents' home through the bathroom window. (Tr945-46,949-41,966,968). It argued this theory based on the never-disclosed testimony of Officer Granat, that David's shoes became available for purchase only three days before his grandparents' deaths and those shoes matched a shoeprint found atop the air conditioner outside the bathroom window. (Tr768-69). Inexplicably, counsel did not object contemporaneously to this undisclosed evidence. (Tr801-13). David alleged that counsel's failure to object timely denied him effective assistance of counsel, due process, a fundamentally fair trial and freedom from cruel and unusual punishment under the state and federal constitutions. (PCRLF155-161).

This Court must determine whether the motion court clearly erred in denying this claim without an evidentiary hearing. *Rule 29.15(k).* To be entitled to an evidentiary hearing: (1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must not be conclusively refuted by the record, and (3) the alleged ineffectiveness must have resulted in prejudice. *State v. Driver,* 912 S.W.2d 52, 55 (Mo.banc 1995). David met these requirements. The court clearly erred in denying a hearing.

As this Court has recently noted,

> the rules encourage evidentiary hearings. *See Rule 29.15(h).* Nothing in the text of Rule 29.15 suggests that the pleading requirements are to be construed more narrowly than other civil pleadings. Thus, a movant may successfully plead a

claim for relief under Rule 29.15 by providing the motion court with allegations sufficient to allow the motion court to meaningfully apply the *Strickland* standard and decide whether relief is warranted.

Wilkes v. State, 82 S.W.3d 925, 929 (Mo.banc 2002), citing *Morrow v. State*, 21 S.W.3d 819, 824 (Mo.banc 2000). The *Wilkes* Court further observed, "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Wilkes v. State*, 82 S.W.3d at 928 (emphasis in original).

Officer Smith, a crime scene detective assigned to the case, found a shoeprint atop the air conditioner outside the Barnetts' bathroom window. He took the print because of the "shoe print on it [which] to me indicates that the person stood on the air conditioner, touched the electrical box, scaled the wall and might have climbed in the window." (Tr697). Officer Granat later compared the shoeprint and David's shoes. (Tr764-66). He testified that David's shoes and the print atop the air conditioner were similar in tread design and pattern. (Tr768). Granat finally stated on direct that David's shoes were manufactured in October, 1995 and were only available for sale on February 1, 1996. (Tr769).

After Granat testified, the state called another witness. Not until after that witness was released did counsel finally move for a mistrial, request a curative instruction and ask that Granat be available for recall by the defense. (Tr801-13). Counsel also asked that the state be prohibited from arguing based on Granat's testimony. (Tr813). Counsel requested this relief because Granat's testimony about the dates of manufacture and sale of David's shoes had not been disclosed to the defense, despite a discovery request.

(LF32-34;Tr802). In fact, Granat's deposition testimony had indicated he knew nothing about this information. (Tr807). His testimony was a complete surprise but the court denied counsel's untimely requests for relief. (Tr802-09).

On direct appeal, this Court acknowledged that the state "was obligated to make this information available to [David] as part of discovery proceedings." *State v. Barnett*, 980 S.W.2d 297, 304 (Mo.banc 1998). However, it found that counsel waived the objection because counsel's protest was late. "In this case, the objection was not timely because it could have, and should have, been made when the expert testified. The trial court would have been able to take remedial action at that time. Instead, defense counsel delayed an objection until long after the witness had been excused. The point is denied." *Id*. at 305.

The motion court denied relief without a hearing stating David could not show prejudice. (PCRLF4326). The court believed that excluding Granat's testimony would not have altered the outcome of trial because the jury would still have heard that David's shoes were consistent with the prints at the scene and Smith's testimony that "the probable point of entry was the bathroom window;" how David got into the house was of minimal significance," and the Barnetts were stabbed multiple times and beaten. (PCRLF4326). Counsel Blau affied that "it was not trial strategy that neither I nor co-counsel made a timely objection to the State's failure to disclose expert testimony regarding the shoe print and the availability of the shoe in St. Louis as described in portions of 9(E) of David's post-conviction motion." (PCRLF461). Trial counsel's statements, the motion court's findings and this Court's statements on direct appeal leave

little doubt that the performance prong for showing ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) has been met. The question thus becomes whether the motion court's finding of no prejudice can be sustained. It cannot.

To reach a finding of no prejudice, the motion court ignores the state's theory and evidence at trial. First, as even the motion court acknowledges, David consistently told the authorities that he entered his grandparents' house through the front door that day. (see PCRLF1496,1501,4326—David consistently told authorities that he entered the house through the unlocked front door that morning). The jury also heard that David had told authorities that he had entered the home through the bathroom window on previous occasions. (Tr866-67). Second and most significantly, in the state's guilt phase rebuttal closing argument, the prosecutor emphasized that the jury could find that David had deliberated precisely because David had entered the house that morning through the bathroom window, not through the front door. (Tr945-46,949-51,966,968). Third, the trial court, which was also the motion court, had noted Granat's testimony would have been "very fertile ground for cross-examination." (Tr807). Fourth, Granat's testimony, which narrowed the possible time frame within which the shoe print would have been made to within three days of the Barnetts' deaths, was of critical importance to the state's theory. It bolstered the state's theory that David entered the home through the bathroom window, not through the door, as he alleged, and that therefore, consistent with the state's argument of deliberation, he had the purpose to kill his grandparents, since he snuck into their house that morning. Especially in a case in which only the defendant's mental state is contested, (Tr596), and in which, despite the brutality of the killings, the jury is out for

over 19 hours in guilt phase alone, it cannot be said with any confidence that the outcome was not affected by Granat's testimony.

This case is substantially similar to *State v. Whitfield*, 837 S.W.2d 503 (Mo.banc 1992). There, this Court found that the defendant suffered prejudice when the state failed to disclose the bullet-ridden coat of one of the victims. This Court found prejudice because the jury likely had inferred that the holes in the coat were fired during the killing of the other victim. *Id*. at 508. Here, because of Granat's testimony, the jury likely inferred that David entered the house through the bathroom window, thus had an evil motive—and had deliberated—instead of, as he told police, that he had just snapped and had not planned to kill his grandparents.

David pled deficient performance in counsel's failure to object timely to Granat's testimony and resulting prejudice. His pleading met the requirements of Rule 29.15. The record does not conclusively show that he is not entitled to relief. *Wilkes v. State*, 82 S.W.3d at 928. A review of the record leaves the definite and firm impression that the motion court erred in denying this claim without a hearing. *State v. White*, 798 S.W.2d 694, 697 (Mo.banc 1990). This Court must remand for an evidentiary hearing.

III.

The motion court clearly erred i n denying an evidentiary hearing on David's claim that counsel was constitutionally ineffective in failing to object to repeated references to alleged prior bad acts because that claim states facts not refuted by the record, that, if proved, would warrant relief. David alleged that counsel failed to object to testimony by Officer Morris that John Barnett had told him that David had been "arrested by Ladue the other day;" to testimony by Rhonda James that David had been smoking marijuana in the days leading up to the killings, and to testimony by Detective Nelke that he had shown David's mug shot when doing a neighborhood canvass. David also alleged that counsel did not object to this testimony, which raised the inference of prior bad acts, and that, especially in a case in which the jury deliberated for over 19 hours in guilt phase, David was prejudiced. If proved, these facts would show that David was denied due process, effective assistance of counsel, a fundamentally fair trial and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, 18(a) and 21 of the Missouri Constitution. Trial counsel's failures to object were unreasonable, cannot be deemed strategic, especially based merely on the cold record, and it cannot be stated with any degree of certainty that the jury did not consider this inadmissible evidence in ultimately finding that David deliberated in killing his grandparents.

Throughout guilt phase, the state adduced testimony about David's prior bad acts or prior criminal misconduct. (Tr618-19,658-59,843-45). It followed the testimony with argument focusing on some of that misconduct. (Tr948). Incredibly, however, counsel never objected to the testimony or the argument. Even after it heard and then improperly considered this evidence, the jury deliberated for over 19 hours in guilt phase alone. (Tr969-81). Had counsel objected to this evidence and argument, it is reasonably likely the jury's decision would have been affected. Counsel was constitutionally ineffective and the motion court clearly erred in not granting an evidentiary hearing on this claim. This Court must remand for an evidentiary hearing.

Officer Henry Morris was dispatched to the Barnetts' home on February 4, 1996. (Tr616). While there, he spoke to John Barnett and asked John who he thought could have killed John's parents. (Tr618). Morris testified that John responded, "I think my son David did it, he's always been in trouble with the law. He was just arrested by Ladue the other day." (Tr618-19;PCRLF1416). Counsel did not object.

Rhonda James, one of David's friends, testified that, in the days preceding the murders, she, David, and some other friends had been hanging out together. She stated, "we would get high, drink, and that's it." (Tr658). When pressed, she stated that they had been smoking marijuana. (Tr659;PCRLF1516). Counsel did not object to her testimony. In guilt phase closing, the state reminded the jury of James' testimony, stating that David returned to her house where he has been "the whole week before partying with them, drinking and smoking pot." (Tr948). Again, counsel did not object.

Finally, Detective Steve Nelke, a member of the Major Case Squad who was assigned to check leads on David, testified that he went to Texas Avenue where the Barnetts' car was found and began an area canvass. (Tr843-44). Nelke described his actions, "And I had a mug shot of David Barnett, and I said, 'That's David Barnett.' As a matter of fact, he was wearing the same clothes that he was wearing in the mug shot." (Tr844-45). Yet again, counsel did not object.

David challenged counsel's failures to object to this testimony and asserted they constituted ineffective assistance of counsel. (PCRLF162-165). David's lead counsel, Ellen Blau, affied that "it was not trial strategy that neither I nor co-counsel objected to prior bad acts…." (PCRLF461).

The motion court denied this claim without a hearing, finding that David's claim "fails to overcome [the] presumption" that "the failure to object was a strategic choice by competent counsel." (PCRLF4327). It also found that, "viewed in the light of all the evidence, the testimony about prior arrests and marijuana use did not alter the outcome of the trial, and thus the failure to object did not prejudice Movant. Movant is not entitled to an evidentiary hearing on this claim." (PCRLF4327). The court's findings are clearly erroneous. *Rule 29.15(k).* David is entitled to an evidentiary hearing.

In guilt phase, evidence of prior bad acts is inadmissible unless it is logically and legally relevant to the charged offense. *State v. Barton*, 998 S.W.2d 19, 28 (Mo.banc 1999); *State v. Goodwin*, 43 S.W.3d 805,817 (Mo.banc 2001). Prior bad acts evidence is generally inadmissible because the defendant has the right to be tried only for the crimes for which he is being tried. *State v. Burns*, 978 S.W.2d 759, 761 (Mo.banc 1998); *State v.*

Watson, 968 S.W.2d 249, 253 (Mo.App.S.D., 1998); *State v. Mahoney*, 70 S.W.3d 601, 605 (Mo.App.,S.D.2002); Mo.Const., Art. I, §17. Prior bad acts evidence can be highly prejudicial, tending "to run counter to the rule that prevents using a defendant's character as the basis for inferring guilt." *Id,* citing *State v. Watson*, 968 S.W.2d at 253.

A motion court need not hold an evidentiary hearing unless (1) the movant cites facts, not conclusions, that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record, and (3) the matters complained of prejudiced the movant. *State v. Ferguson*, 20 S.W.3d 485, 503 (Mo.banc 2000); *State v. Moss*, 10 S.W.3d 508, 511 (Mo.banc 2000). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Wilkes v. State*, 82 S.W.3d 925, 928 (Mo.banc 2002)(emphasis in original). The *Wilkes* Court further observed that

> the rules encourage evidentiary hearings. *See Rule 29.15(h).* Nothing in the text of Rule 29.15 suggests that the pleading requirements are to be construed more narrowly than other civil pleadings. Thus, a movant may successfully plead a claim for relief under Rule 29.15 by providing the motion court with allegations sufficient to allow the motion court to meaningfully apply the *Strickland* standard and decide whether relief is warranted.

Wilkes v. State, 82 S.W.3d at 929, citing *Morrow v. State*, 21 S.W.3d 819, 824 (Mo.banc 2000).

Strickland v. Washington, 466 U.S. 668 (1984) provides the standard by which an attorney's performance must be measured. To establish ineffective assistance, David must show that counsel's performance was deficient and that prejudice resulted.

Prejudice is established if a reasonable probability exists that, but for counsel's errors, the result would have been different. *Id*; *State v. Butler*, 951 S.W.2d 600, 608 (Mo.banc 1997).

David's motion pled facts, not conclusions, that, if true, would entitle him to relief and the factual allegations are not refuted by the record. Indeed, the record demonstrates that counsel objected to none of the challenged statements. Counsel Blau's affidavit demonstrates that counsel had no strategic reason for failing to object. The question is, therefore, whether David was prejudiced.

The motion court's finding that, "in light of all the evidence," the prior bad acts evidence did not affect the result was clearly erroneous. The defense did not contest that David killed his grandparents. Indeed, from beginning to end, counsel's sole contention was that David did not deliberate and should not be convicted of first degree murder. (Tr596). The jury heard graphic evidence about the Barnetts' deaths and knew those deaths could only be attributed to David. Nonetheless, the jury spent over 19 hours in guilt phase deliberating whether and **of what** David should be convicted. Especially in a case in which the defense was that David's actions were totally out of character—that he snapped and killed his grandparents whom he dearly loved—evidence that suggested that David was a bad person with a criminal history may well have tipped the scales for the jury toward a finding of deliberation. Prejudice resulted from counsel's repeated failures to object to clearly inadmissible evidence and argument.

Counsel's performance was inadequate. The facts pled in David's motion would entitle him to relief, are not refuted by the record, and counsel's inaction prejudiced him. David is entitled to an evidentiary hearing on this claim.

IV.

The motion court clearly erred in refusing a hearing on David's claim that counsel was constitutionally ineffective for not conducting an adequate voir dire into the critical facts of this case—that David had murdered his elderly grandparents and that he had three prior convictions—because this ruling denied David's rights to due process, a fundamentally fair trial, a fair and impartial jury, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that by not exploring these issues on voir dire, counsel lost the opportunity to expose bias in potential jurors, these were facts that were likely to have created insurmountable bias in jurors against David, and, because of the lack of voir dire, unqualified jurors may well have sat on David's case.

The Sixth and Fourteenth Amendments guarantee a criminal defendant an impartial jury. But, how do we ensure that occurs? Primary among the tools available is an adequate voir dire. If counsel does not ask questions designed to ferret out the important information or the court makes rulings precluding those discussions, the constitutional right to a fair and impartial jury is effectively foreclosed. That is what occurred here. Counsel failed to ask the most basic questions about critical facts that had substantial potential for disqualifying bias. Since those questions were never asked, counsel never discovered who in the venire may have considered those facts an impediment to acquittal or a life without parole verdict. The motion court clearly erred in

denying relief without a hearing. This Court must remand for an evidentiary hearing on this claim.

As he began to question each panel, Judge Kendrick explained that they would cover three areas—sequestration, pre-trial publicity and punishment—in small group voir dire. For each panel, directing the question specifically toward their knowledge of pre-trial publicity, Judge Kendrick stated substantially the following: "The second area we need to cover is the subject of pre-trial publicity. The victims in this case were an older couple, Clifford R. and Leona Barnett, husband and wife, who lived in the City of Glendale here in St. Louis County. They were killed in their home by stabbing a little over one year ago on February 4th, 1996. The defendant, Mr. Barnett, is their grandson and was arrested on the following day, February 5th, 1996." (Tr140-41,117-18, 227,280-81,326-27,375-76,419,STr.8-9,56,101-02,166). Based on this statement, the veniremen were simply asked if they had heard of the incident in question, nothing more. Defense counsel never mentioned the Barnetts' age or David's prior criminal history during their voir dire.

David alleged in his amended motion that counsel was constitutionally ineffective for not exploring whether the critical facts that David was alleged to have murdered his elderly grandparents was something that would prejudice the veniremembers against him and whether similar disqualifying prejudice would arise because of David's three prior convictions. (PCRLF152-54).

The motion court denied relief on this claim without an evidentiary hearing. As to the failure to ask if venirepersons held any prejudice because of the Barnetts' age and

their status as David's grandparents, the court stated that "Movant is not entitled to an evidentiary hearing on this claim because it is refuted by the record and he fails to demonstrate prejudice on this claim." (PCRLF4324). The court then noted its statement of facts that "each panel"[2] heard and stated "The information complained of was clearly before the jury." (PCRLF4325).

As to the failure to inquire about David's prior convictions, the court stated,

> this was sound trial strategy. The record is clear that Movant was not going to testify in the guilt phase since counsel inquired at length about Movant's right not to testify, and thus his prior convictions would not have been brought up during the guilt phase. Counsel's strategy to obtain a not guilty or a conviction for second degree murder in the guilt phase would have been hampered had the jury known of the prior convictions. When the trial reached the penalty phase it was inevitable that the jury would hear about the prior convictions because they were proof of an aggravating circumstance. Movant does not state how he was prejudiced by this in the penalty phase. Movant does not identify a single biased juror who served because of this claimed failure of counsel. Movant is not entitled to an evidentiary hearing on this claim.

(PCRLF4325). These findings are clearly erroneous. This Court must remand for an evidentiary hearing.

[2]The court's citation is as set forth above, but does not reference any transcript page.

This Court must review 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(k).* Findings and conclusions are clearly erroneous if, upon reviewing the entire record, this Court has the firm and definite impression a mistake was made. *State v. Taylor*, 929 S.W.2d 209 (Mo.banc 1996).

> In order to ensure that claims are decided accurately, the rules encourage evidentiary hearings. *See Rule 29.15(h).* Nothing in the text of Rule 29.15 suggests that the pleading requirements are to be construed more narrowly than other civil pleadings. Thus, a movant may successfully plead a claim for relief under Rule 29.15 by providing the motion court with allegations sufficient to allow the motion court to meaningfully apply the *Strickland* standard and decide whether relief is warranted.

Wilkes v. State, 82 S.W.3d 925, 929 (Mo.banc 2002), citing *Morrow v. State*, 21 S.W.3d 819, 824 (Mo.banc 2000). The *Wilkes* Court further observed, "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief. *Wilkes v. State*, 82 S.W.3d at 928 (emphasis in original).

To establish ineffective assistance, David must show that counsel's performance was deficient—that counsel did not exercise the skill and diligence of a reasonably competent attorney under similar circumstances—and that he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Prejudice exists if, because of counsel's error, confidence in the outcome is undermined. *Moore v. State*, 827 S.W.2d 213, 215 (Mo.banc 1992). Confidence is lacking if a reasonable probability exists that,

but for counsel's error, the result would have been different. *State v. Butler*, 951 S.W.2d 600, 608 (Mo.banc 1997).

The state and federal constitutions entitle defendants to a fair and impartial jury. One component of that constitutional guarantee is an adequate voir dire to identify unqualified jurors. *Morgan v. Illinois*, 529 U.S. 719, 729 (1992). Voir dire is designed to "discover bias or prejudice in order to select a fair and impartial jury." *State v. Clark*, 981 S.W.2d 143, 146 (Mo.banc 1998); citing *State v. Leisure*, 749 S.W.2d 366, 373 (Mo.banc 1988). Without that adequate voir dire, "'the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.'" *Morgan v. Illinois*, 529 U.S. at 729-30, citing *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

Voir dire requires that "some portion of the facts of the case" be revealed. *State v. Clark*, 981 S.W.2d at 147; *State v. Leisure*, 749 S.W.2d at 373. As this Court has noted, "some inquiry into the critical facts of the case is essential to a defendant's right to search for bias and prejudice in the jury who will determine guilt and mete out punishment." *State v. Clark*, 981 S.W.2d at 147. If counsel does not address those critical facts with the jury, "the parties lose the opportunity directly to explore potentially biased views, which all concerned have a duty to investigate thoroughly." *Id.*; *cf. State v. Gary*, 822 S.W.2d 448, 451 (Mo.App.,E.D. 1991); *Littell v. Bi-State Transit Dev. Agency*, 423 S.W.2d 34, 38 (Mo.App.1967).

The motion court's finding about counsel's failure to voir dire about any bias that might be held because of the victims' advanced age and status as David's grandparents is

clearly erroneous. It incorrectly states that voir dire on the issue actually occurred. As the transcript reveals, while the court told the venire panels that the victims were an "older couple" and David's "grandparents," that information was only given in the context of questioning about pre-trial publicity. Never were the veniremembers asked if the Barnetts' ages or their status as David's grandparents would create such prejudice for them that they could not be fair and impartial jurors. No "inquiry into the critical facts of the case" was made. Counsel failed to investigate thoroughly whether the jurors suffered from a disqualifying bias against her client. (See PCRLF461).

Although not addressed by the motion court, the state will undoubtedly assert that, even if inquiry was not made, these were not "critical facts" under *State v. Clark, supra,* and thus no error resulted from counsel's failures. Such an assertion is nonsense.

This Court found in *State v. Clark* that a critical fact requiring voir dire to search for bias and prejudice is that the victim is a child. What is it that gives this fact such potential for prejudice? Clearly, that the victim is a very young person is critical because we, as a society, believe that the very young are relatively helpless and require enhanced protection. This same analysis can be applied to the elderly, who are less able to protect themselves and who, by virtue of their advanced years and potentially debilitated physical condition, require that we protect them from harm. In this case, therefore, that the Barnetts were of advanced years is a critical fact. It required exploration in voir dire. As in *Clark, supra,* where, upon re-trial and voir dire upon those critical facts, the defendant was not sentenced to death but received a life sentence upon conviction for

second degree murder for the child's death, here, too, exposure to these critical facts upon voir dire may well make the difference between life and death.

The motion court also clearly erred in finding that counsel's failure to voir dire about David's three prior convictions "was sound trial strategy." (PCRLF4325). The court cannot attribute counsel's failure to act to a strategic decision—reasonable or not—without counsel claiming such a strategy at a hearing. *State v. Tokar*, 918 S.W.2d 753, 768 (Mo.banc 1996). The motion court's finding is, at best, premature, and, at worst, factually incorrect. A hearing on this allegation must be had.

The motion court clearly erred in denying relief without a hearing. David's motion adequately pled the claims, they were not refuted by the record and David has been prejudiced as a result. Especially in a case such as this, where the jury deliberated in guilt phase for over 19 hours and in penalty phase for over 16 hours, lack of prejudice cannot be presumed. This Court must remand for an evidentiary hearing.

V.

The motion court clearly erred in denying a hearing on David's claim that counsel was ineffective for failing to call Clifford and Leona Barnett's children, John Barnett, Lana Barnett-Campbell and Polly Barnett-Hargett, to testify that they, as Christians and raised in a Christian family, did not believe in the death penalty and wanted David to be sentenced to life without probation or parole not death because this ruling denied David's rights to due process, a fundamentally fair trial, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that the State repeatedly argued and presented evidence that the Barnetts were Christians and the State called Lana Barnett-Campbell in penalty phase as a victim impact witness to testify about her loss upon her parents' death. The State thus opened the door to evidence that, as Christians, the Barnetts' children did not condone the sentence that the State was seeking.

The United States Supreme Court has recognized that the "principal justification" for capital punishment is retribution. *Harris v. Alabama*, 513 U.S. 504, 518 (1995); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). While society may have an interest in exacting retribution, the greatest interest in that regard rests with the victims' family. If the family does not wish to exact the ultimate punishment, should the State nonetheless seek to execute the offender? Our Constitutions forbid the arbitrary and capricious imposition of the death penalty. Seeking and imposing death in this case violates that

principle because no valid retributive purpose is furthered where the victims' family has specifically requested that death **not** be sought or imposed. Trial counsel was ineffective for failing to inform the jury of the Barnett family's wishes. The motion court clearly erred in denying this claim without an evidentiary hearing.

Four months before trial, on December 9, 1996, Clifford and Leona Barnett's children, John, Lana and Polly, sent a letter to the court requesting that David be sentenced, not to death, but to life without the opportunity for probation or parole. They stated, "As Christians, we believe in forgiveness, repentance, and atonement for sins. We feel that the death penalty would not allow for these necessary steps. David has some good in him. Possibly that good can grow as the years go by. We hope and pray so!" (LF78;PCRLF3397).

The jury did not hear from the Barnett family during penalty phase, except through Lana, whom the State called. Lana told the jury that her "life is never going to be the same. I'm never going to see my parents ever again. I can't work any more, I'm depressed, and I miss them." (Tr1040). Defense counsel asked Lana nothing. (Tr1041).

The jury deliberated over sixteen hours in penalty phase before finally returning death verdicts. (Tr1300-01).

About one month after trial and two weeks before sentencing, John Barnett wrote the court again, asking that, despite the jury's verdicts, David be sentenced to life without parole. (LF795). In support of that plea, John told the court that the family had "suffered enough;" the St. Louis County prosecutor had ignored the family's wishes by seeking death in the first place; he believed that, had he been called in penalty phase, the jury

would have voted for life; sentencing David to death would only cause further pain for David's bi-racial son, Sethan; and David had good qualities that should be allowed to come to fruition in prison. (LF795). The court also received a plea from Bishop Ann Sherer, of the United Methodist Church, that David not be sentenced to death. (PCRLF3167). Counsel thereafter urged that the court not impose death, based in part upon the letters that it had received from the family. (Tr1306-07). Despite those repeated pleas, the court sentenced David to death.

In David's amended Rule 29.15 motion, he alleged counsel was constitutionally ineffective for not calling John, Lana and Polly in penalty phase so that the jury could hear what the family's views were about David's fate. (PCRLF176). He also alleged that counsel had failed to cross-examine Lana about her statements to the court that David should receive a life sentence since her direct testimony left the jury with the mistaken impression that the family was not supportive of David and wanted him to die. (PCRLF177).

The motion court denied the claim without a hearing, citing *Payne v. Tennessee*, 501 U.S. 808 (1991) and *State v. Roll*, 942 S.W.2d 370, 378 (Mo.banc 1997). It found that "Counsel is not ineffective for failing to present inadmissible evidence and Movant was not prejudiced." (PCRLF4328-4329). The motion court's findings are clearly erroneous. This Court should remand for an evidentiary hearing on this claim.

A motion court need not hold an evidentiary hearing unless (1) the movant cites facts, not conclusions, which, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record, and (3) the matters complained of prejudiced the

movant. *State v. Ferguson*, 20 S.W.3d 485, 503 (Mo.banc 2000); *State v. Moss*, 10 S.W.3d 508, 511 (Mo.banc 2000). As this Court has recently noted, "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Wilkes v. State*, 82 S.W.3d 925, 928 (Mo. banc 2002) (emphasis in original). After all,

> the rules encourage evidentiary hearings. *See Rule 29.15(h).* Nothing in the text of Rule 29.15 suggests that the pleading requirements are to be construed more narrowly than other civil pleadings. Thus, a movant may successfully plead a claim for relief under Rule 29.15 by providing the motion court with allegations sufficient to allow the motion court to meaningfully apply the *Strickland* standard and decide whether relief is warranted.

Wilkes v. State, 82 S.W.3d at 929, citing *Morrow v. State*, 21 S.W.3d 819, 824 (Mo.banc 2000). In this case, David's claim was adequately pled to warrant a hearing. The record does not conclusively show that he is not entitled to relief, his factual allegations are not refuted by the record and counsel's failure to adduce this evidence prejudiced David. A hearing should have been held.

Strickland v. Washington, 466 U.S. 668 (1984) provides the standard by which David's attorneys' performance is to be measured. To establish ineffective assistance, David must show that counsel's performance was deficient and prejudice resulted. As to the first prong of the test, it must be determined whether counsel acted reasonably under the circumstances. *Id*. at 689. As to the second prong, prejudice will be found if, because of counsel's error, confidence in the outcome is undermined. *Moore v. State*, 827 S.W.2d

213, 215 (Mo.banc 1992). Confidence is lacking if a reasonable probability exists that, but for counsel's deficient performance, the result would have been different. *Id.* David's motion adequately pled both prongs of the *Strickland* test.

The motion court's findings, that essentially address the two prongs of *Strickland*, are clearly erroneous in two critical respects. First, it found that David was not prejudiced by the failure to present this evidence. This finding disregards the facts and the applicable standard of review. David's jury deliberated in penalty phase for well over sixteen hours. Had the jury heard from the three people most affected by the deaths—Clifford and Leona's children, one of whom the state called as a victim impact witness—and known that **they** did not want David's death, a reasonable probability exists that the outcome would have been different.

Second, the court's finding that counsel was not ineffective for failing to present this "inadmissible" evidence is erroneous. While *Payne v. Tennessee* may at first blush seem to preclude the admission of this evidence, and thus protect counsel from a finding of ineffective assistance, two lines of analysis demonstrate that this is not the case.

First, as the courts of this State have repeatedly held, when one party injects an issue into a case, the opposing party "may offer otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue." *State v. Bolds*, 11 S.W.3d 633, 639 (Mo.App.,E.D. 1999), citing *State v. Petty*, 967 S.W.2d 127, 143 (Mo.App.,E.D. 1998). The Eighth Circuit has explained the doctrine as follows: "The doctrine of opening the door allows a party to explore otherwise inadmissible evidence on cross-examination when the opposing party has made unfair prejudicial use of related

evidence on direct examination. *United States v. Lum*, 466 F.Supp. 328, 334 (D.Del.)(citations omitted), *aff'd without opinion*, 605 F.2d 1198 (3rd Cir. 1979)." *United States v. Durham*, 868 F.2d 1010, 1012, (8th Cir. 1989). *See also State v. Ralls*, 918 S.W.2d 936, 939 (Mo.App.,.W.D. 1996)(applying the doctrine to allow the State to cross-examine and show that another person had been investigated and the police determined that he was not a suspect).

In this case, the state clearly opened the door to the Barnett family members' Christian-based views about the inappropriateness of the death penalty. Pre-trial, in arguing for the admission of Exhibit 29N, the prosecutor told the court, "the fact that these people were God-fearing is most definitely a relevant issue especially when you get to the penalty phase." (MTTr41-43). In guilt phase opening, the prosecutor told the jurors that "Clifford and Leona Barnett had a right to peacefully and sweetly live out their lives on **God's** terms." (T944)(emphasis added). Then, in guilt phase, the state presented Exhibit 29N, a photograph of the Barnetts' bedroom that showed the word "Jesus" appended to a picture on the wall and printed in large capital letters. (Exh29N). As this Court noted on direct appeal, through this and other evidence, "the jury was made well aware that the victims were religious…." *State v. Barnett*, 980 S.W.2d 297, 304 (Mo.banc 1998). Finally, in penalty phase, the state called Lana Barnett-Campbell. She testified on direct about the loss she had experienced because of her parents' deaths. (Tr1040-41). Lana did not explicitly state what penalty she desired in this case. But, the clear implication that the jury was to draw from her testimony was that, as a state's witness, she was supporting the state's goal—the death penalty. The state's goal was clear—to

present the Barnetts as a Christian couple for whose deaths Old Testament-style retribution must be exacted. Given this theme in both phases of trial, counsel was entitled to present the Christian beliefs of the Barnetts' children; that, consonant with the teachings of Christ and their parents, they neither required nor desired David's death as retribution for their parents' deaths.

The second line of analysis under which this testimony should also be considered admissible is the Eighth Amendment and the teachings of the United States Supreme Court in *Lockett v. Ohio*, 438 U.S. 586 (1978). In *Lockett*, the Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id*. at 604. It further held that a process that prevented the sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id*. at 605. Testimony that the Barnett children did not want David to be sentenced to death clearly falls within the parameters of that to which the Court was speaking in *Lockett*. The jury should have been allowed to hear the most mitigating of all testimony—that the victims' family did not want the death penalty and that the death penalty would make impossible repentance and atonement.

The motion court clearly erred in denying this claim without a hearing. The claim was valid, adequately pled and David was prejudiced by counsel's failure to adduce this critically important testimony. This Court should remand for an evidentiary hearing on this claim.

VI.

The motion court plainly erred in failing to vacate David's death sentences because that ruling violated David's rights to due process, a fundamentally fair trial, effective assistance of counsel, freedom from cruel and unusual punishment and his privilege against self-incrimination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a), 19 and 21 of the Missouri Constitution in that David testified in neither guilt or penalty phase; counsel extensively voir dired about David' right not to testify and the jury's obligation not to hold that fact against him and the "no-adverse-inference" instruction was given in guilt phase but not in penalty phase. Trial counsel failed to request it in penalty phase. Had she done so, the trial court would have had to give it. But for trial counsel's error, David's failure to testify would not have been "inescapably impressed upon the jury's consciousness." A reasonable probability exists that the jury would not have rendered death sentences but instead would have voted for life without probation or parole. This error was obvious from the record and controlling caselaw yet post-conviction counsel failed to raise it in the amended motion. Because post-conviction counsel abandoned David in his first appeal of right as to his right to effective counsel, this Court must excuse the default.

In voir dire, counsel questioned the jury extensively about its understanding of the right not to testify. (Tr528-38). Counsel repeatedly stated, "David has the right not to testify, and no presumption of guilt may be raised and no inference of any kind may be drawn from the fact that he did not." (Tr528). David did not testify in guilt phase and

counsel offered and the court submitted Instruction 5, the no-adverse inference instruction. (LF606). David did not testify in penalty phase yet counsel did not offer a no-adverse-inference instruction and the court did not, *sua sponte*, submit one to the jury. (see LF666-693;Tr1241-1262). The jury was not instructed that, in penalty phase, it could not consider David's failure to testify. The motion court plainly erred in failing to vacate David's death sentences.

The Fifth Amendment privilege against compelled self-incrimination guarantees that defendants have the right to remain silent and the right that the jury draw no adverse inferences from their silence. *State v. Storey*, 986 S.W.2d 462 (Mo.banc 1999); *State v. Mayes*, 63 S.W.3d 615 (Mo.banc 2001); *Carter v. Kentucky*, 450 U.S. 288, 305 (1981). The privilege extends to both the guilt and penalty phases of a capital trial. *State v. Storey*, 986 S.W.2d at 463; *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981).

The United States Supreme Court has recognized that the no-adverse-inference instruction is critically important because "It has been almost universally thought that juries notice a defendant's failure to testify. '[T]he jury will, of course, realize this quite evident fact, even though the choice goes unmentioned….[It is] a fact inescapably impressed on the jury's consciousness.'…'The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime.'" *Carter v. Kentucky*, 450 U.S. at 301 (1981), *citing Griffin v. California*, 380 U.S. 609, 621 (1965); 8 J. Wigmore, Evidence §2272, p. 426 (J. McNaughton rev. 1961). To ensure that jurors do not transform the defendant's failure to testify into an aggravating

circumstance, an instruction is necessary in penalty phase, just as in guilt phase. *Carter v. Kentucky*, 450 U.S. at 302; *State v. Storey*, 986 S.W.2d at 463.

If a defendant does not testify in penalty phase, the court is obligated to give the no-adverse-inference instruction upon the defendant's request. *State v. Storey*, 986 S.W.2d at 464. When a trial court's failure to give the instruction has been challenged, this Court has reversed the resultant death sentences. *State v. Storey, supra; State v. Mayes, supra*.

While neither *State v. Storey, supra*, nor *State v. Mayes, supra,* had been decided at the time of David's trial, this Court had adopted MAI-Cr3d 313.30A and its applicable Notes on Use prior to David's trial. Note on Use 4 to MAI-Cr3d 313.30A specifically permitted that a penalty phase instruction, based on MAI-Cr3d 308.14, the guilt phase no-adverse-inference instruction, be given. That Note stated, "If any such instructions [from the first stage] are appropriate, they should be modified to properly reflect the law and circumstances as they exist in the second stage proceedings. *Among the instructions that might be applicable with necessary modifications are: 'Missouri Approved Instructions Criminal 3d 308.14.'"* (emphasis added). Thus, just as in guilt phase, the no-adverse-inference instruction is one that must be given in penalty phase, upon request.

In *State v. Mayes*, just as here, the defendant did not testify in guilt phase. Upon request, the court instructed the jury, in accordance with MAI-Cr3d 308.14, that "No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify." 63 S.W.3d at 634. In penalty phase, the defendant again elected not to testify and counsel requested, but did not receive, a no-adverse-

inference instruction. On appeal, the state conceded that failure was error. *Id*. at 635. The question before this Court was whether prejudice ensued. In finding prejudice, this Court noted the *Carter* Court had stated that '"it is arguable that a refusal to give an instruction similar to the one that was requested here can never be harmless….'" *State v. Mayes*, 63 S.W.3d at 636-37, *citing Carter v. Kentucky*, 450 U.S. at 304. This Court rejected the state's argument that the strength of the state's case limited the prejudice that resulted from the failure to instruct the jury. It noted that, since the jury never need impose death, and has discretion to impose life even if the mitigating circumstances outweigh the aggravating circumstances, prejudice is not speculative. *State v. Mayes*, 63 S.W.3d at 637. It further noted that, because the jury had heard the no-adverse-inference instruction in guilt phase but then not in penalty phase, "this discrepancy actually may have added to the prejudice…." *Id*.

Since trial counsel neglected to offer or request the no-adverse-inference instruction in penalty phase, despite that attorneys from the same office offered the instruction in 1997 in *State v. Storey*, *supra*,[3] this Court must determine whether counsel's inaction was reasonable under the circumstances. *Strickland v. Washington*, 466 U.S. 668 (1984). Whether counsel failed to request the instruction because they did

[3] David requests that this Court take judicial notice of its files from *State v. Storey*, 986 S.W.2d 462 (Mo.banc 1999). Those files will reveal that attorneys from the St. Louis Capital Litigation Office of the State Public Defender System represented Mr. Storey. In this case, David was represented by attorneys from that Office as well.

not know it applied in penalty phase or because they did not want to highlight David's failure to testify in penalty phase,[4] counsel's failure was unreasonable and it resulted in prejudice. Especially in a case such as this, where the jury was out over 16 hours on penalty phase alone, this factor may well have decided David's fate. Confidence in the outcome has been undermined. *Moore v. State*, 827 S.W.2d 213, 215 (Mo.banc 1992).

Had this claim been raised in David's amended motion, this Court undoubtedly would reverse and remand for a new penalty phase since a finding of prejudice is clear. But, post-conviction counsel did not include this claim in the amended motion. Thus, this Court must determine if sufficient cause and prejudice exists to excuse the default caused by post-conviction counsel. It does.

As fully discussed in Point VII, post-conviction counsel abandoned David in his first appeal of right regarding his constitutional right to effective assistance of counsel. Counsel failed to include all claims known to them, as Rule 29.15(e) mandates, despite that they knew or should have known of this claim's existence and validity.

Post-conviction counsel filed David's amended motion on June 30, 1999. (PCRLF1,23-220). *State v. Storey*, *supra*, was handed down by this Court on February

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[4] The United States Supreme Court has specifically rejected the contention that such an instruction emphasizes the defendant's failure to testify. In *Lakeside v. Oregon*, 435 U.S. 333, 339 (1978), for example, the Court noted that "[i]t would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect."

23, 1999, some four months earlier. Inexplicably, post-conviction counsel did not allege that counsel had rendered ineffective assistance by failing to offer the no-adverse-inference instruction.

David's post-conviction motion was the first—and only—place that he could gain review of his right to effective assistance of trial counsel. *State v. Wheat*, 775 S.W.2d 155, 157-58 (Mo.banc 1989). Since Rule 29.15 provided David with his first opportunity to obtain review of that substantial constitutional right, he was entitled to effective assistance in his post-conviction action as to that claim. See Point VII; *Cf. Coleman v. Thompson*, 501 U.S. 722, 755 (1991). David did not receive that effective assistance so review of trial counsel's effectiveness has been foreclosed.

Reasonably competent post-conviction counsel, trained and acting in accordance with this Court's Rule 29.16, would have raised this substantial, viable claim of trial counsel's ineffectiveness. Under the Sixth Amendment, the default must be imputed to the State. *Coleman, supra*, 501 U.S. at 754. This Court must vacate David's death sentences and remand for a new penalty phase.

VII.

The motion court clearly erred in failing to reappoint motion counsel before reaching the merits of David's motion and denying relief without a hearing because that decision violated David's rights to due process, a full and fair hearing in state court, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that Missouri courts categorically refuse to review claims of ineffective assistance of counsel on direct appeal but rather, delegate those claims exclusively to post-conviction review, during which post-conviction movants are granted the right to counsel and post-conviction counsel has sole responsibility for and control over what claims are raised. Since Rule 29.15 provides Missouri defendants with their first appeal of right as to their constitutional right to counsel, post-conviction counsel must provide effective assistance to ensure that the amended motion includes both all claims known and sufficient facts. David's post-conviction counsel did not include all claims known to them since they failed to raise any claim about trial counsel's failure to offer a no-adverse-inference instruction in penalty phase, despite that four months before they filed their amended motion, this Court decided *State v. Storey* and granted a new penalty phase because that instruction had not been given.

Before David's case was tried, this Court had promulgated Notes On Use to the Approved Instructions that told trial courts and counsel that the no-adverse-inference

instruction could be given in penalty phase. *MAI-Cr3d 313.30A Notes On Use 4*. Before post-conviction counsel filed David's amended motion, this Court held that such an instruction **must** be given, upon request, and that prejudice resulting from not giving it is not "purely speculative." *State v. Storey*, 986 S.W.2d 462, 465 (Mo.banc 1999); *Carter v. Kentucky*, 450 U.S. 288, 301 (1981). Nonetheless, trial counsel failed to offer the instruction and post-conviction counsel failed to challenge trial counsel's inaction in the amended motion. Post-conviction counsel's failure constitutes abandonment and ineffective assistance of counsel. This Court must, therefore, remand to the motion court for further proceedings so that David's constitutional rights will not be further abridged, or, in the alternative, reverse and remand for a new penalty phase.

To begin the Rule 29.15 proceeding, David filed his *pro se* motion for post-conviction relief. (PCRLF4-9). When he did so, he also completed an indigency affidavit (PCRLF8), which required that the motion court then appoint counsel. *Rule 29.15(e).* The court did so, and Tony Manansala and John Tucci then entered their appearance. (PCRLF1,10). Rule 29.15(e) requires that appointed counsel review the *pro se* motion and, if it "does not assert sufficient facts or allege all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims." This is required because, to promote finality, movants are deemed to waive all claims that could have been raised, but were not, in the amended motion. *Day v. State*, 770 S.W.2d 692, 696 (Mo.banc 1989). Post-conviction counsel neglected their duty under the Rule by not challenging trial counsel's failure to request that the no-adverse-inference instruction be given in penalty phase.

As fully discussed in Point VI, post-conviction counsel failed to include in the amended motion the claim that trial counsel rendered ineffective assistance by not offering or objecting to the failure to give the no-adverse-inference instruction in penalty phase. Had trial counsel requested the instruction, the trial court would have been obligated to give it. *State v. Storey*, 986 S.W.2d 462 (Mo.banc 1999). Had the trial court refused to give the instruction upon request, this Court undoubtedly would have granted David a new penalty phase. *Id.; State v. Mayes*, 63 S.W.3d 615 (Mo.banc 2001). Despite that post-conviction counsel filed David's amended Rule 29.15 motion some four months after *Storey* was decided, they inexplicably failed to include this viable claim in the amended motion. Post-conviction counsel thereby failed to comply with the mandate of Rule 29.15(e).

Missouri has not always provided counsel to post-conviction litigants. Because this Court and other appellate courts in this state had been confronted with unfortunate and unintended summary denials of *pro se* post-conviction claims where counsel had not been appointed, this Court granted post-conviction litigants the absolute right to counsel. *Fields v. State*, 572 S.W.2d 477, 482-83 (Mo.banc 1978). In granting that right, this Court noted:

> Appointed counsel has the duties and responsibilities enjoined upon [them] under the rule and petitioner has the correlative opportunity thereby provided to make a full disclosure of every fact he knows concerning his case to one who by [their] legal training [are] able to appreciate the legal significance. Additionally, an attorney is able *by training and experience*

> to ask probing questions and thereby elicit important information which the petitioner might otherwise fail to disclose through ignorance. These are important factors in enabling a strong measure of finality … where counsel has been appointed.

Id. at 482, n.3 (emphasis added).

Thirteen years after this Court created the right to counsel in *Fields*, it recognized that merely appointing counsel was insufficient. It decided that, once the motion court has appointed counsel, it must not allow post-conviction counsel to "abandon" their clients' efforts to obtain post-conviction relief. *Luleff v. State*, 807 S.W.2d 495, 498 (Mo.banc 1991). This Court has thus far identified two forms that abandonment can take—complete inaction and late action. *Moore v. State*, 934 S.W.2d 289, 291 (Mo.banc 1996). When either occurs, this Court has determined that the motion court must reappoint counsel, since failing to do so would deprive the movant of "meaningful review of post-conviction claims." *Id.*

This case presents the need for this Court to recognize a third form of abandonment—materially incomplete action. This third situation also warrants relief because post-conviction counsel are not the movant nor are they the movant's agents. When this Court decided *Luleff*, post-conviction movants had control of their cases. Under the Rule as it then existed, movants were required to verify the amended motion—to affirm that it contained all of the facts and claims known to them. *State v. Vinson*, 800 S.W.2d 444, 448 (Mo.banc 1990). In 1996, this Court removed that requirement. It thus gave post-conviction counsel essentially unfettered control of what was included in the

amended motion. *See Rule 29.15*. Since post-conviction counsel has control of what is raised, without requiring that the movant have any say-so, the concept of abandonment must be expanded to encompass situations in which post-conviction counsel provides materially incomplete action.

Meaningful review of David's post-conviction claims requires that post-conviction counsel provide meaningful action. Post-conviction counsel did not provide that meaningful action. By failing to challenge counsel's failure to request or object to the failure to give the no-adverse-inference instruction in penalty phase, they provided materially incomplete action. The motion court clearly erred in failing to re-appoint counsel.

If this Court disagrees that incomplete action can constitute abandonment, it must nonetheless decide whether Rule 29.15 serves as the first appeal of right on a claim of effective assistance of counsel such that post-conviction counsel must also be effective in litigating that constitutional right. The answer clearly is yes.

No constitutional right to appeal a criminal conviction and sentence exists. *McKane v. Durston*, 153 U.S. 684, 687 (1894). The decision to allow an appeal is "wholly within the discretion of the state." *Id.* Every state, however, has exercised that discretion and has made the right to appeal part of the system that is designed to finally adjudicate a defendant's guilt or innocence. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Having exercised their discretion to create the right to appeal, the states must ensure that "the procedures used in deciding appeals … comport with … Due Process." *Evitts v. Lucey*, 469 U.S. 387, 393-94 (1985) (citations omitted).

Missouri has created an appeal of right with a bifurcated format. *See §547.070 RSMo and Rule 29.15(a).* On direct appeal, Missouri courts review every constitutional error **except** the right to effective assistance of counsel. *State v. Wheat*, 775 S.W.2d 155, 157-58 (Mo.banc 1989). Review of that constitutional claim is reserved to the exclusive domain of the Rule 29.15 action. *Id.; Rule 29.15(a).* Indeed, Rule 29.15 is "the exclusive procedure" that can be used to gain review of the constitutional right to effective assistance of both trial and appellate counsel. *Id*. Rule 29.15 thus provides criminal defendants their first appeal of right as to those claims. *Id*. The combination of the direct appeal—in which all constitutional claims except that to the effective assistance of counsel—and the post-conviction action—in which the constitutional claim about the effective assistance of counsel—are designed to ensure due process. But that design has a defect, as demonstrated by cases like this one.

Missouri must provide counsel for the first appeal of right. *Douglas v. California*, 372 U.S. 353, 358 (1963); *Ross v. Moffitt*, 417 U.S. 600, 607 (1974). It does so. §600.042.4(1) RSMo; *Rule 29.15(e).* But, mere appointment of counsel is insufficient. The right to counsel must also encompass the right to effective counsel. Just because the Rule provides that counsel be provided does not end the inquiry. *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987). "Rather, it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question." *Id*. In this case, what is at issue is whether David was afforded effective assistance of counsel. And, because Rule 29.15 is the first, and only, opportunity for those issues to be resolved, this proceeding is the first appeal of right as to those issues. Due process thus

demands that he have counsel **and** that counsel be effective. *Evitts v. Lucey*, 469 U.S. at 395. "A first appeal of right … is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Id.* at 397. Anything less would reduce the promise of counsel on appeal to a "futile gesture." *Id*.

This Court requires that direct appeal counsel provide effective assistance. *State v. Sumlin*, 820 S.W.2d 487, 490-91 (Mo.banc 1991); *Rule 29.15(a).* It does not, however, require that post-conviction counsel provide effective assistance. *See e.g., Pollard v. State*, 807 S.W.2d 498, 502 (Mo.banc 1991); *State v. Ervin*, 835 S.W.2d 905, 928-29 (Mo.banc 1992). Since Rule 29.15 provides Missouri defendants with their first appeal of right as to claims of trial and appellate counsel's effective assistance, *Pollard, Ervin*, and their progeny must be overruled.

Courts of appeals in Missouri have addressed and rejected this claim. *McCabe v. State*, 792 S.W.2d 694, 694-95 (Mo.App.,E.D. 1990); *Crandall v. State*, 785 S.W.2d 780, 781-82 n.5 (Mo.App.,S.D. 1990); *State v. Anderson*, 800 S.W.2d 465, 468 (Mo.App.,E.D. 1990). Both *McCabe* and *Crandall* rely on *Pennsylvania v. Finley* for the blanket rule that, since states need not provide defendants with any post-conviction remedy, they have no obligation to ensure that post-conviction counsel be effective. This holding misses the point. These cases must, therefore, be overruled as to this issue.

Although Missouri had no obligation to provide a first appeal of right, it did. Thus, *McCabe, Crandall* and *Anderson* miss the point. The real issue is whether, in structuring a first appeal of right, can Missouri extract one constitutional right—to effective assistance of counsel—and declare that, as to that specific right, no first appeal

of right exists? Of course not. Once Missouri made the choice to provide a right to appeal, due process required that the state-created right not be arbitrarily denied or abrogated. *Morrissey v. Brewer*, 408 U.S. 471, 481-83 (1972).

Pennsylvania v. Finley supports the proposition that, although Missouri was not obligated to provide a post-conviction remedy as to any issue for which a first appeal of right existed on direct appeal, it was obligated to provide a post-conviction remedy as to that issue exclusively reserved to the post-conviction action—the effective assistance of trial and appellate counsel. Missouri's bifurcated appellate process can provide due process. It will only do so, however, if post-conviction movants are allowed to challenge the effectiveness of trial and appellate counsel.

The United States Supreme Court has never addressed whether post-conviction counsel must provide effective assistance as to a first appeal of right. In *Coleman v. Thompson*, 501 U.S. 722, 755 (1991), the habeas petitioner tried to cast his question in terms of the right to effective counsel in habeas actions that serve as the first appeal of right as to trial and appellate counsel's effective assistance. The Court concluded that it need not answer this precise question since Coleman's real complaint focused on the representation he received in his second appeal. *Id.*

> [O]ne state court has addressed Coleman's claims: the state habeas trial court. The effectiveness of Coleman's counsel **before that court** is not at issue here. Coleman contends that it was the ineffectiveness of his counsel during the appeal from that determination that constitutes cause for his default. We thus need to decide only whether Coleman had a constitutional

> right to counsel on appeal from the state habeas trial court judgment. We conclude that he did not.

Id. (emphasis added). *Coleman* did not hold that post-conviction counsel in the first appeal of right need not be effective. Rather, it simply held that post-conviction counsel in the *second* appeal need not be effective. That holding flows from both *Douglas* and *Ross, supra.*

Unlike the situation in *Coleman,* David has challenged the representation of his post-conviction counsel in the motion court on his first appeal of right as to the issue of trial counsel's ineffectiveness. Especially since post-conviction counsel has virtually unfettered control of what goes into the post-conviction motion, since post-conviction movants, like David, no longer have oversight through their right to verify the motion, counsel is obliged to ensure that the motion includes all claims. Since this obligation rests upon counsel, not the movant, any sanctions flowing from inaction must be placed squarely upon counsel, not the movant.

This Court's decision that counsel be afforded cannot be a hollow gesture. This Court recognized in *Fields v. State, supra*, that counsel must be appointed to ensure finality. "[I]t would be absurd to have the right to appointed counsel who is not required to be competent." *Jackson v. Weber*, 637 N.W.2d 19, 22-23 (S.D.2002); *citing Lozada v. Warden*, 613 A.2d 818, 821 (Conn.1992); *accord Crump v. Warden*, 934 P.2d 247, 253 (Nev. 1997); *also In The Matter of Carmody*, 653 N.E.2d 977, 983 (Ill.App. 4th Dist. 1995). Appointing counsel for indigent post-conviction movants but then allowing counsel to provide ineffective assistance renders the appointment "a hollow gesture

serving only superficially to satisfy due process requirements." *Carmody*, 653 N.E.2d at 984; *accord Jackson, supra*. Especially since this Court has established specific qualifications with which post-conviction counsel must comply, it has implicitly recognized that post-conviction counsel must be effective. *See Rule 29.16(b); compare Lozada v. Warden*, 613 A.2d at 821 (there the court rejected the state's argument that counsel need not be effective since "there was no statutory reference to the qualifications of counsel.")

If this Court recognizes that due process requires that post-conviction counsel provide effective assistance, the courts of this state will not be inundated with claims and finality of the proceedings will not be disturbed. It will not be sufficient for a post-conviction movant to argue that the motion court proceedings were unfair because post-conviction counsel provided ineffective assistance. To be viable, claims of ineffective assistance of post-conviction counsel "must eventually be directed to error in the original trial or plea of guilty." *Jackson*, 637 N.W.2d at 23. Thus, as the *Lozada* court noted, for such a claim to succeed, the post-conviction movant must prove both that post-conviction counsel was ineffective **and** that trial counsel was ineffective. This task will be "herculean." *Lozada*, 613 A.2d at 823.

In most situations arising out of ineffective assistance of post-conviction counsel, the record will be insufficient on appeal, and the appellate court will be reduced to remanding the case to the motion court. In some situations, however, the error will be apparent on the record. That occurred here. Trial counsel's failure to request or object to the lack of the no-adverse-inference instruction in penalty phase was ineffective. Post-

conviction counsel's failure to raise trial counsel's ineffective assistance in the amended motion was likewise ineffective. This Court can, therefore, resolve this issue now, without having to remand for further evidence. David is entitled to a new penalty phase based on trial counsel's constitutional ineffective assistance. This Court must, therefore, either remand for reappointment of counsel or, to save judicial time and resources, reverse and remand for a new penalty phase.

CONCLUSION

For the reasons set forth in this appellant's brief, appellant requests that this Court remand for an evidentiary hearing. In the alternative, as to Point VI, appellant requests that this Court reverse and remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of November, 2002, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, Missouri.

_____
Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2002, in Times New Roman, size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 19,842 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

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Janet M. Thompson