IN THE
MISSOURI SUPREME COURT

JOHN MIDDLETON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 84005
	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ADAIR COUNTY, MISSOURI
SECOND JUDICIAL CIRCUIT
THE HONORABLE RUSSELL E. STEELE, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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INDEX

Page

TABLE OF AUTHORITIES

CASES **Page**

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER

JURISDICTIONAL STATEMENT

Because death was imposed, this Court has exclusive jurisdiction of this Rule 29.15 appeal. Art. V, Sec. 3, Mo. Const.

STATEMENT OF FACTS

Mr. Middleton was convicted of one count of first degree murder and sentenced to death in Adair County for killing Mr. Pinegar in Harrison County on June 23, 1995. State v. Middleton,995S.W.2d443,451-52(Mo.banc1999); (T.L.F.23). Following affirmance, Mr. Middleton filed a Rule 29.15 motion (R.L.F.4-19,35-175). After an evidentiary hearing, the motion court entered findings denying all claims (R.L.F.276-304).

Mr. Middleton was also convicted of two counts of first degree murder and sentenced to death on each count following a trial in Callaway County. State v. Middleton,998S.W.2d520,523(Mo.banc1999). Mr. Middleton's Callaway County case, involving victims Randy Hamilton and Stacey Hodge, arose in Mercer County from an offense alleged to have occurred on June 11, 1995 (See, e.g., Callaway T.L.F.382-83).[1]

The Adair case went to trial on February 24, 1997. State v. Middleton,995S.W.2d at 452. The Callaway case went to trial approximately one year later on March 30, 1998 (Callaway T.Tr. Vol. I at iii).[2]

The Attorney General's Office represented respondent in the trial of both cases (See Vol I transcript each case). The local prosecutor for Harrison and Mercer Counties

[1] Throughout, the two cases will be referenced according to the counties where they were tried, rather than where the charges arose.

[2] On March 21, 2002, this Court took judicial notice of the entire contents of this Court's file in both of Mr. Middleton's direct appeals.

each also represented the State on the charges from their respective counties (See Vol. I transcript each case).

Respondent presented evidence that Mr. Middleton, accompanied by his co-defendant girlfriend, Margaret Hodges, shot and killed Mr. Pinegar. State v. Middleton,995S.W.2d at 451-52. On June 10, 1995, several people were arrested for the possession and sale of methamphetamine in Harrison County. State v. Middleton, 995S.W.2d at 451. Evidence was presented that both Mr. Middleton and Mr. Pinegar were involved in selling methamphetamine. State v. Middleton,995S.W.2d at 451. Mr. Middleton allegedly made statements, about ten days after the June 10th arrests, that there were snitches who he needed to deal with and that Mr. Pinegar was on his hit list. State v. Middleton,995S.W.2d at 451.

Respondent presented evidence that on June 23, 1995, Mr. Middleton, Margaret Hodges, and Mr. Pinegar went to the Wal-Mart in Bethany, Missouri. State v. Middleton,995S.W.2d at 451. At Wal-Mart, the group purchased some gun ammunition. State v. Middleton,995S.W.2d at 451. The group left Wal-Mart and drove several miles to the town of Ridgeway where they parked in a field. State v. Middleton,995S.W.2d at 451. At the field, Mr. Middleton shot Mr. Pinegar three times. State v. Middleton, 995S.W.2d at 451.

In guilt, John Thomas testified that he was among those arrested on June 10, 1995, for drug offenses (T.Tr.2296). Thomas reported that on June 25, 1995, he went to Mr. Middleton's house to alert him that he had sold methamphetamine to Billy Worley and he thought Worley was the confidential informant who caused him to get arrested

(T.Tr.2304-06). Thomas represented that Mr. Middleton said that he had Mr. Pinegar's shotgun and that Mr. Pinegar would not need it anymore (T.Tr.2308-09). Thomas testified that the charges against him were pending, that no promises were made to him, and he did not expect leniency (T.Tr.2314).

In penalty, Thomas reported that he was at Mr. Middleton's house and there was a small black box that belonged to Mr. Hamilton on the coffee table (T.Tr.3160). Thomas represented that he asked Mr. Middleton how he came to have Mr. Hamilton's box and Mr. Middleton allegedly said that the person it belonged to would not need it anymore (T.Tr.3161).

Thomas was charged by complaint on June 8, 1995, by the Harrison County prosecutor with the Class B felony sale of a controlled substance, methamphetamine, alleged to have occurred on August 23, 1994 (Exs. 1 and 18). Thomas testified against Mr. Middleton at the Adair trial on March 4, 1997, and March 11, 1997 (T.Tr.2291-2376,3159-71). On guilt cross-examination, Thomas testified that even though he was charged in 1995, his case had never gone to a preliminary hearing (T.Tr.2355). Thomas testified that he was told his case would be dealt with "[a]fter these trials" (T.Tr.2355) and "[a]fter all of [the trials]" (T.Tr.2356). It was "their decision" to allow Thomas' case to sit around even though he was charged in June, 1995 (T.Tr.2356).

On February 27, 1998, Thomas appeared in Harrison County court (Ex.1). The docket entry from that date includes: "state advises delay in prosecution due to Ä's participation as witness in companion proceedings" (Ex.1). On March 31, 1998, Thomas testified for respondent at Mr. Middleton's Callaway trial (Callaway Vol. I T.Tr. at iv).

Three weeks later, on April 27, 1998, Thomas pled guilty to an amended information with a reduced charge of the Class C felony of an attempt to sell methamphetamine (Exs. 1 and 18). On September 10, 1998, the court considered the PSI and recommendations made, suspended imposition of sentence, and placed Thomas on five years probation (Exs.1 and 18).

The Missouri Highway Patrol Confidential Narcotics report, contained in the Harrison County prosecutor's file stated that Confidential Informant 1352 had "purchased the methamphetamine from John Thomas in Thomas's shop near Thomas's residence for three hundred dollars ($300.00)" (Ex.18 and page 1 of report). Also in the prosecutor's file was a handwritten statement signed by Billy Worley, dated August 23, 1994, stating that he had purchased the methamphetamine from Thomas (Ex.18). The Highway Patrol's Forensic Laboratory Report, contained in the prosecutor's file, identified what Thomas had sold as methamphetamine (Ex.18). During his PSI interview, Thomas admitted he had sold methamphetamine to an undercover agent (Ex.18, PSI at 1).

Counsel Ms. Zembles and Ms. Holden testified respondent represented no deals were made with Thomas (R.Tr.487,573). When Ms. Holden asked respondent, and in particular the Harrison County prosecutor, why Thomas' case was allowed to remain pending in Associate Circuit Court for two years she was not given an answer (R.Tr.487-88,493-94).

In guilt, jailhouse informant Douglas Stallsworth testified that he was confined in the Harrison County Jail along with Mr. Middleton in September, 1995 (T.Tr.2871). Stallsworth was being held in the Harrison County Jail in 1995 on a forgery charge, for

which he was found not guilty by reason of insanity (T.Tr.2874-75). When Stallsworth testified against Mr. Middleton, he was in the State mental hospital in St. Joseph (T.Tr.2878). Stallsworth testified that Mr. Middleton admitted to having killed Mr. Pinegar (T.Tr.2871-74). Stallsworth also testified that Mr. Middleton had said that Mr. Pinegar had been on his "hit list" and that he killed Mr. Pinegar because he was afraid that Mr. Pinegar would snitch on him about his methamphetamine involvement (T.Tr.2874). Stallsworth claimed to have heard Mr. Middleton's admissions on September 11, 1995, informed his parole officer of these statements on September 18, 1995, and met with Sheriff Martz on September 19, 1995 to discuss what he heard (T.Tr.2880-83).

Counsel did not present any guilt phase evidence (T.Tr.2891). During guilt closing argument, counsel argued Mr. Middleton was not guilty and respondent's evidence was not credible so as to satisfy its burden of proof (T.Tr.2919-60).

In penalty, Stallsworth was recalled to testify that on September 11, 1995, Mr. Middleton allegedly made admissions to killing Mr. Hamilton and Stacey Hodge (T.Tr.3178-82). Stallsworth also represented that Mr. Middleton had said that he killed Mr. Hamilton and Stacey Hodge because he was afraid Mr. Hamilton would snitch on him for selling methamphetamine (T.Tr.3179,3182).

The penalty phase defense focused on presenting that as a result of methamphetamine use Mr. Middleton was suffering from a methamphetamine psychosis. After arguing in guilt Mr. Middleton did not commit the charged acts, counsel called in penalty Drs. Murphy and Lipman. Dr. Murphy is a neuropsychologist (T.Tr.3409). Dr.

Murphy found that Mr. Middleton suffers from an organic paranoid thought disorder and brain damage that were associated with his drug use (T.Tr.3423-25,3532-33). Dr. Murphy also found that at the time Mr. Pinegar was killed, Mr. Middleton was suffering from extreme mental or emotional disturbance and Mr. Middleton was substantially impaired as to his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law (T.Tr.3537-38).

Dr. Lipman is a neuropharmacologist (T.Tr.3607). He found that Mr. Middleton suffers from a substance induced (methamphetamine) psychotic disorder with delusions and hallucinations and has organic brain damage (T.Tr.3656-57). Dr. Lipman found that at the time in question, Mr. Middleton was under the influence of extreme mental or emotional disturbance and Mr. Middleton was substantially impaired as to his ability to appreciate the criminality of his conduct or to conform it to the requirements of law (T.Tr.3707-08).

Dr. Murphy would have testified in guilt that at the time of this offense, Mr. Middleton could not form the requisite mental state for first degree murder and was unable to coolly reflect (Ex.2 at 100-01). Dr. Lipman would have testified in guilt that Mr. Middleton could not have coolly reflected or deliberated because of his chronic state of methamphetamine psychosis, paranoia, and delusions (Ex.2 at 28-31).

Even though the penalty phase defense was focused on Mr. Middleton suffering from a methamphetamine psychosis, counsel failed to move to strike for cause or peremptorily strike juror Ms. Holt. During voir dire, Ms. Holt testified that she did not

know whether she would be able to consider drug and alcohol use as mitigating evidence (T.Tr.1553-57).

The jury never heard any mitigating evidence from former employers Charles Webb, Vern Webb, Virginia Webb, and Ruby Smith. The jury also never heard any evidence from Mr. Middleton's relatives Sylvia Purdin and Glenn Williams. The Webbs could have testified about having employed Mr. Middleton at their livestock auction, the Leon Sale Barn, and his diligence as an employee, despite his cognitive impairments (Exs.23,24, and 25). Ruby Smith, who owned Smith Feeder Supply Elevator and had employed Mr. Middleton, could have testified in a similar manner (Ex.22). Mr. Middleton's uncle, Glenn Williams, and his aunt, Sylvia Purdin, could have testified about how as a young child Mr. Middleton was mentally slow (Ex.26 at 5-6; Ex.31 at 10-12).

The Rule 29.15 amended motion pleadings included multiple claims. The pleadings included allegations respondent failed to disclose deals it had made with Thomas (R.L.F.170,173-74). The pleadings also alleged counsel was ineffective for failing to move to strike for cause or peremptorily remove venireperson and later juror, Ms. Holt (R.L.F.80-82,161-62). The pleadings also alleged that Drs. Murphy and Lipman should have been called to testify in guilt phase in order to support a not guilty by reason of mental disease or defect or diminished capacity defense (R.L.F.40-42,47-48,137-39,147-49). Additionally, the pleadings alleged that counsel was ineffective for failing to present mitigating evidence through Mr. Middleton's family members and former employers (R.L.F.42-45,139-46).

From the denial of these claims and other claims Mr. Middleton raised, he brings this appeal.

POINTS RELIED ON

I. THOMAS' UNDISCLOSED DEAL

THE MOTION COURT CLEARLY ERRED DENYING THE CLAIM RESPONDENT FAILED TO DISCLOSE A DEAL MADE WITH JOHN THOMAS IN EXCHANGE FOR HIS TESTIMONY BECAUSE THAT RULING DENIED MR. MIDDLETON HIS RIGHTS TO DUE PROCESS, TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AND TO CONFRONT THE WITNESSES AGAINST HIM, U.S. CONST. AMENDS VI, VIII, AND XIV, IN THAT THOMAS RECEIVED FAVORABLE DISPOSITION OF CHARGES BROUGHT AGAINST HIM IN EXCHANGE FOR HIS TESTIMONY, HE AFFIRMATIVELY REPRESENTED OTHERWISE, AND RESPONDENT ARGUED THERE WERE NO DEALS, THUS MISLEADING THE JURY.

Hayes v. State,711S.W.2d876(Mo.banc1986);

Hutchison v. State,59S.W.3d494(Mo.banc2001);

Brady v. Maryland,373U.S.83(1963);

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

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

Rule 29.15.

II. JUROR HOLT COULD NOT FAIRLY SERVE

THE MOTION COURT CLEARLY ERRED DENYING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO MOVE TO STRIKE FOR CAUSE OR EXERCISE A PEREMPTORY CHALLENGE AGAINST JUROR MS. HOLT WHO TESTIFIED SHE DID NOT KNOW WHETHER SHE COULD CONSIDER MITIGATING EVIDENCE OF SUBSTANCE ABUSE BECAUSE THIS DENIED MR. MIDDLETON EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE SO ACTED BECAUSE THEIR MITIGATION STRATEGY WAS BUILT AROUND MR. MIDDLETON'S HAVING SUFFERED FROM A METHAMPHETAMINE INDUCED PSYCHOSIS.

Gardner v. Florida,430U.S.349(1977);

Irvin v. Dowd,366U.S.717(1961);

Presley v. State,750S.W.2d602(Mo.App.,S.D.1988);

McGurk v. Stenberg,163F.3d470(8thCir.1998);

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

Rule 29.15.

III. FAMILY AND EMPLOYER MITIGATION

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO CALL EMPLOYER AND FAMILY MITIGATION WITNESSES CHARLES WEBB, VERN WEBB, VIRGINIA WEBB, RUBY SMITH, SYLVIA PURDIN, AND GLENN WILLIAMS TO TESTIFY ABOUT HIS IMPAIRED COGNITIVE ABILITIES WHICH PRECEDED HIS HEAVY DRUG USE, AND THEREBY, OFFERED AN EXPLANATION FOR WHY HE MAY HAVE BECOME INVOLVED IN DRUGS; HIS WORK-ETHIC DILIGENCE TO DEMONSTRATE WHY HE WOULD BE A HARD-WORKING GOOD INMATE; AND HIS MOTHER'S INHALANT ABUSE WHICH MIGHT HAVE EXPLAINED WHY AS A CHILD HE WAS COGNITIVELY IMPAIRED BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND CALLED THESE WITNESSES AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THEIR TESTIMONY LIFE WOULD HAVE BEEN IMPOSED.

Gardner v. Florida,430U.S.349(1977);

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

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

Jermyn v. Horn, 1998 W.L. 754567 (M.D.Pa. Oct. 27, 1998), aff'd., Jermyn v. Horn, 266 F.3d 257 (3rd Cir. 2001); and

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

IV. PRIOR CONFINEMENT MITIGATION

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIMS MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL HIS IOWA CORRECTIONS COUNSELOR, JAKE NOONAN, AND TO INTRODUCE HIS IOWA CORRECTIONS FILE IN PENALTY TO SUPPORT A LIFE SENTENCE TO ESTABLISH HE HAD BEEN A WELL-BEHAVED AND WELL-ADJUSTED PRISONER IN IOWA, AND THEREFORE, COULD BE EXPECTED TO BE EQUALLY SUCCESSFUL IF SENTENCED TO LIFE BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND PRESENTED THIS EVIDENCE AND MR. MIDDLETON WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THIS EVIDENCE THEY WOULD HAVE IMPOSED LIFE.

Gardner v. Florida,430U.S.349(1977);

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

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

Skipper v. South Carolina,476U.S.1(1986); and

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

V. MR. MIDDLETON LACKED THE REQUIRED MENTAL STATE FOR FIRST DEGREE MURDER

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL IN GUILT DRS. MURPHY, LIPMAN, AND DANIEL TO SUPPORT THE DEFENSE HE WAS NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT OR SUFFERED FROM A DIMINISHED CAPACITY AS EACH OF THESE WITNESSES WOULD HAVE TESTIFIED AT TRIAL IN GUILT THAT HE WAS PSYCHOTIC AT THE TIME OF THE OFFENSES SO AS TO HAVE SUPPORTED THESE DEFENSES BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE CALLED THESE WITNESSES IN GUILT TO TESTIFY ABOUT HIS PSYCHOSIS TO SUPPORT THESE GUILT DEFENSES AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY THAT HE WOULD NOT HAVE BEEN CONVICTED OF FIRST DEGREE MURDER OR AT MINIMUM NOT SENTENCED TO DEATH.

State v. McCarter,883S.W.2d75(Mo.App.,S.D.1994);

State v. Harris,870S.W.2d798(Mo.banc1994);

Ross v. Kemp,393S.E.2d244(Ga.1990);

State v. Preston,673S.W.2d1(Mo.banc1984);

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

§ 552.010; and

§ 552.030.

VI. "SELL THIS ADDRESS"

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN COUNSEL FAILED TO OBJECT TO PAUL OGLESBEE'S TESTIMONY THAT HE THOUGHT THE PHRASE "SELL THIS ADDRESS" IN A LETTER MR. MIDDLETON SENT MEANT MR. MIDDLETON WAS PLACING "A HIT" ON OGLESBEE AND HIS WIFE BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE OBJECTED TO THIS ERRONEOUSLY SPECULATIVE OPINION AND HE WAS PREJUDICED BECAUSE THE PHRASE IS NOT A THREAT AND THERE IS A REASONABLE PROBABILITY IF THE JURY HAD NOT HEARD THIS EVIDENCE THEY WOULD HAVE IMPOSED LIFE.

ALTERNATIVELY, THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE WHEN TRIAL COUNSEL FAILED TO CALL BRIAN FIFER TO TESTIFY THAT AN INMATE USING THIS EXPRESSION MEANS THE INMATE NO LONGER INTENDS TO WRITE THE PERSON BECAUSE THAT PERSON HAD NOT WRITTEN BACK AND DOES NOT CONSTITUTE A THREAT BECAUSE HE WAS DENIED ALL THE NOTED CONSTITUTIONAL

RIGHTS IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE PRESENTED SUCH EVIDENCE FROM FIFER AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THIS EVIDENCE THEY WOULD HAVE IMPOSED LIFE.

ALTERNATIVELY, THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM DIRECT APPEAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL TRIAL COUNSEL'S OBJECTIONS TO RESPONDENT'S USE OF THE LETTER BECAUSE MR. MIDDLETON WAS DENIED ALL THE PREVIOUSLY NOTED CONSTITUTIONAL RIGHTS IN THAT REASONABLY COMPETENT APPELLATE COUNSEL WOULD HAVE RAISED THIS MATTER AND THERE IS A REASONABLE PROBABILITY MR. MIDDLETON'S DEATH SENTENCE WOULD HAVE BEEN REVERSED.

LASTLY, THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIM THAT MR. MIDDLETON WAS DENIED HIS RIGHT TO NOTICE OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES WHEN THE LETTER, EXHIBIT 106, WAS NOT DISCLOSED UNTIL THE DAY OGLESBEE TESTIFIED BECAUSE HE WAS DENIED HIS RIGHTS TO DUE PROCESS AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VIII AND XIV, IN THAT HAD TIMELY DISCLOSURE BEEN MADE COUNSEL COULD HAVE CALLED FIFER TO TESTIFY ACCURATELY

ABOUT THE PHRASE'S MEANING AND MR. MIDDLETON WOULD HAVE BEEN SENTENCED TO LIFE.

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

State v. Thompson,985S.W.2d779(Mo.banc1999);

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

State v. Storey,901S.W.2d886(Mo.banc1995);

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

Rule 29.15.

VII. FAILURE TO OBJECT

THE MOTION COURT CLEARLY ERRED OVERRULING CLAIMS MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT AND/OR OTHERWISE REQUEST APPROPRIATE RELIEF IN RESPONSE TO EVIDENCE, ARGUMENT, AND INSTRUCTION DURING PENALTY WHEN RESPONDENT:

A. RELIED ON MATTERS RELATING TO THE DEATH OF MR. HAMILTON AND STACEY HODGE, THE VICTIMS IN THE CALLAWAY COUNTY CASE BROUGHT AGAINST MR. MIDDLETON;

B. ARGUED MATTERS OUTSIDE THE EVIDENCE;

C. ASKED DEFENSE EXPERT, DR. LIPMAN, TO EXPRESS AN OPINION ON WHETHER MR. MIDDLETON WAS TRUTHFUL IN HIS DENIAL OF HAVING COMMITTED THE HOMICIDE OFFENSES HE WAS CHARGED WITH COMMITTING;

D. SUBMITTED INSTRUCTION 15 WITHOUT THE MENTAL STATE OF "KNOWINGLY" FOR AN AGGRAVATOR;

BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV IN THAT REASONABLY COMPETENT COUNSEL WOULD NOT HAVE SO ACTED AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY THAT HE WOULD HAVE BEEN SENTENCED TO LIFE.

In re Winship,397U.S.358(1970);

State v. Whitfield,837S.W.2d503(Mo.banc1992);

Berger v. United States,295U.S.78(1935);

State v. Candela,929S.W.2d852(Mo.App.,E.D.1996);

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

Rule 29.15.

VIII. APPELLATE COUNSEL'S INEFFECTIVENESS

THE MOTION COURT CLEARLY ERRED DENYING THE CLAIMS DIRECT APPEAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE: (A) THE TRIAL COURT ERRED IN DENYING THE MOTION THAT SOUGHT DISMISSAL OR ALTERNATIVELY EXCLUSION OF CERTAIN WITNESSES BECAUSE ATTORNEYS WHO HAD REPRESENTED MR. MIDDLETON ALSO HAD REPRESENTED STATE WITNESSES ON CHARGES AGAINST THEM; AND (B) THE CLAIM INSTRUCTION 15, THE PENALTY VERDICT DIRECTOR, OMITTED THE "KNOWINGLY" MENTAL STATE REQUIREMENT FROM ONE AGGRAVATOR THE JURY FOUND BECAUSE MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV IN THAT REASONABLY COMPETENT APPELLATE COUNSEL WOULD HAVE RAISED THESE CLAIMS AND THERE IS A REASONABLE PROBABILITY MR. MIDDLETON'S CONVICTION OR SENTENCE WOULD HAVE BEEN REVERSED.

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

Gardner v. Florida,430U.S.349(1977);

State v. Risinger,546S.W.2d563(Mo.App.,SpfldDist.1977);

Roe v. Delo,160F.3d416(8thCir.1998); and

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

IX. CLEMENCY ARBITRARINESS

THE MOTION COURT CLEARLY ERRED DENYING MR. MIDDLETON'S CLAIM MISSOURI'S CLEMENCY PROCESS VIOLATES HIS RIGHTS TO DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND EQUAL PROTECTION, U.S. CONST. AMENDS. VIII AND XIV, IN THAT THE PROCESS IS WHOLLY ARBITRARY AND CAPRICIOUS AS THE CLEMENCY OF TRIPLE MURDERER MEASE EVIDENCES. MEASE WAS GRANTED CLEMENCY NOT ON THE MERITS OF HIS CASE, BUT BECAUSE OF THE POPE'S APPEAL ON RELIGIOUS GROUNDS.

Gardner v. Florida, 430 U.S. 349 (1977);

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998);

Duvall v. Keating, 162 F.3d 1058 (10th Cir.), cert. denied, 525 U.S. 1061 (1998);

State v. Mease, 842 S.W.2d 98 (Mo. banc 1992); and

U.S. Const., Amends. VIII and XIV.

X. JURORS DO NOT UNDERSTAND THE PENALTY INSTRUCTIONS

THE MOTION COURT CLEARLY ERRED IN REJECTING THE CLAIM THAT MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO PRESENT EVIDENCE TO CHALLENGE THE PENALTY PHASE JURY INSTRUCTIONS ON THE GROUNDS THAT THEY FAIL TO PROPERLY GUIDE THE JURY AS WELL AS REJECTING HIS CLAIM THAT HIS RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JURY, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED WHEN THOSE INSTRUCTIONS WERE GIVEN BECAUSE MR. MIDDLETON WAS DENIED THOSE RIGHTS, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT THE EVIDENCE PRESENTED ESTABLISHED JURORS DO NOT UNDERSTAND AND COUNSEL UNREASONABLY FAILED TO PRESENT EVIDENCE TO SUPPORT A CHALLENGE AND MR. MIDDLETON WAS PREJUDICED BECAUSE THE LESS JURORS UNDERSTAND, THE MORE LIKELY THEY ARE TO IMPOSE DEATH.

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

Mills v. Maryland, 486 U.S. 367 (1988);

Gardner v. Florida, 430 U.S. 349 (1977);

United States ex rel. Free v. Peters, 806 F.Supp. 705 (N.D.Ill.1992), rev'd. 12F.3d 700 (7th Cir.1993);

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

Richard Wiener, Comprehensibility of Approved Jury Instructions in Capital Murder Cases, Journal of Applied Psychology, 455-67(1995).

I. THOMAS' UNDISCLOSED DEAL

THE MOTION COURT CLEARLY ERRED DENYING THE CLAIM RESPONDENT FAILED TO DISCLOSE A DEAL MADE WITH JOHN THOMAS IN EXCHANGE FOR HIS TESTIMONY BECAUSE THAT RULING DENIED MR. MIDDLETON HIS RIGHTS TO DUE PROCESS, TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AND TO CONFRONT THE WITNESSES AGAINST HIM, U.S. CONST. AMENDS VI, VIII, AND XIV, IN THAT THOMAS RECEIVED FAVORABLE DISPOSITION OF CHARGES BROUGHT AGAINST HIM IN EXCHANGE FOR HIS TESTIMONY, HE AFFIRMATIVELY REPRESENTED OTHERWISE, AND RESPONDENT ARGUED THERE WERE NO DEALS, THUS MISLEADING THE JURY.

The motion court denied the claim respondent failed to reveal the deal it made with John Thomas for his testimony. That ruling denied Mr. Middleton his rights to due process, freedom from cruel and unusual punishment, and to confront the witnesses against him. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). The pleadings alleged respondent failed to disclose deals it had made with John Thomas in exchange for his testimony (R.L.F.170,173-74). This Court has recognized the State's failure to disclose deals to its witnesses is the proper subject of a 29.15 challenge. Hayes v. State,711S.W.2d876,879 (Mo.banc1986); Hutchison v. State,59S.W.3d494,496 (Mo.banc2001).

The Sixth Amendment guarantees a defendant the right to confront the witnesses against him. Pointer v. Texas,380U.S.400,406(1965). A primary interest the Confrontation Clause secures is the right of cross-examination. Davis v. Alaska, 415U.S.308,315(1974).

Sentencing someone to death is cruel and unusual punishment if the punishment is meted out arbitrarily and capriciously. Furman v. Georgia,408U.S.238(1972). Both phases in a capital trial must comport with the requirements of the Due Process Clause. Gardner v. Florida,430U.S.349,358(1977).

A. MR. MIDDLETON'S TRIAL

Before Thomas testified in guilt, Mr. Slusher objected to respondent's calling Thomas on the grounds that there was an undisclosed deal (T.Tr.2290-91). In support of excluding Thomas, Mr. Slusher informed the court that at Thomas' deposition, Thomas had testified that his Harrison County charges were to remain in Harrison County Associate Circuit Court until after he testified in Mr. Middleton's Adair County case (T.Tr.2290-91). The trial court overruled the objection (T.Tr.2290-91).

On direct examination in guilt, Thomas testified that he was charged with distributing methamphetamine and admitted he had sold methamphetamine (T.Tr.2299-2300). Thomas reported that on June 25, 1995, he went to Mr. Middleton's house to warn him that he had sold methamphetamine to Billy Worley and he thought Worley was the confidential informant who caused Thomas to be charged (T.Tr.2304-06). According to Thomas, Mr. Middleton said that he had Mr. Pinegar's shotgun and that Mr. Pinegar would not be needing it any more (T.Tr.2308-09). Thomas testified that the charges

against him were pending, that no promises had been made to him, and he had no expectations of leniency (T.Tr.2314).

On guilt cross-examination, Thomas testified that even though he was charged in 1995, his case had never gone to a preliminary hearing (T.Tr.2355). Thomas denied any promises of favorable treatment were made to him and represented that he did not expect any lenient treatment for testifying (T.Tr.2354-55,2364). Thomas testified that he was told his case would be dealt with "[a]fter these trials" (T.Tr.2355)(emphasis added) and "[a]fter all of [the trials]" (T.Tr.2356)(emphasis added). It was "their decision" to allow Thomas' case to sit around even though he was charged in June of 1995 (T.Tr.2356). Thomas maintained that he had not asked for any deal and none had been offered (T.Tr.2356).

During respondent's initial guilt phase argument, it relied on Thomas' testimony that Mr. Middleton allegedly said that the guy whose shotgun he had would not need it anymore (T.Tr.2907). Respondent's additional argument included:

> John Thomas -- had extensive cross-examination of Mr. Thomas regarding the fact that he's facing 10 to 20 years and he may expect something in return. Well, the evidence was clear that he was promised nothing. He says he doesn't expect anything, but does he hope to get something? He probably does -- he's facing 10 to 20 years - he probably does expect to get something back. But he is testifying against the defendant in order not to go to prison; but compare him to the defendant who murdered Al Pinegar to avoid going to prison.

> And when you evaluate Mr. Thomas's testimony and his potential bias or his motive, think about Mr. Thomas. If he's going to make up a story in order to get a deal from the State, wouldn't he come up with something better than he gave us? I mean, what he gave us was good. I mean, he said, yeah, he was there, he saw a shot gun, and the defendant said whose shot gun it is won't be needing it anymore. But if he was making up a story, wouldn't he come up with something better than that -- like Middleton said he did it, he confessed to me? That's not a made-up story. In addition, note the fact that he told the police about Mr. Middleton's statement before Mr. Pinegar's body was even identified. So how would he know to make up a story?

(T.Tr.2910-11).

In penalty, Thomas reported that he was at Mr. Middleton's house and there was a small black box that belonged to Mr. Hamilton on the coffee table (T.Tr.3160). According to Thomas, he asked Mr. Middleton how he came to possess Mr. Hamilton's box and Mr. Middleton allegedly said that the person it belonged to would not need it anymore (T.Tr.3161).

B. THOMAS' CHARGES - 29.15 EVIDENCE

Evidence was presented at the 29.15 of John Thomas' Harrison County deal. That evidence is summarized as follows:

DATE	OCCURRENCE	EX. #/RECORD
June 8, 1995	Harrison County Complaint filed - charging Thomas with Class B felony sale of a controlled substance, methamphetamine, alleged to have occurred August 23, 1994 and made to a confidential informant.	1, 18
March 4, 1997 and March 11, 1997	Thomas testifies for respondent at Mr. Middleton's Adair trial (in guilt and penalty)	T.Tr.2291-2376,3159-3171
February 27, 1998	Harrison County Docket entry: "ρ appears with counsel, Mr. Garry Allen, and waives preliminary hearing in open court. State appears by Ms. Chris Stallings, and state advises delay in prosecution due to ρ's participation as witness in companion proceedings. ρ band over [sic] to Div. I and to appear at 9 a.m., March 17, 1998 and file to be certified to said division."	1

DATE	OCCURRENCE	EX. #/RECORD
March 16, 1998	Information filed against Thomas - same charge as complaint.	1, 18
March 31, 1998	Thomas testifies for respondent at Mr. Middleton's Callaway trial.	Vol. I Callaway T.Tr. at iv.
April 27, 1998	Amended Information decreasing charge of Thomas to Class C felony of an attempt to sell methamphetamine is filed and Thomas pleads guilty.	1, 18
September 10, 1998	Docket entry: "State appears by Pros. Atty. Defendant appears in person by atty. PSI is considered and recommendations are made. Court suspends imposition of sentence and places defendant on probation for a period of five (5) years under supervision rules and regulations. The court[']s regular special conditions [illegible] #1-6 [illegible]"	1, 18

C. MOTION COURT'S FINDINGS

The motion court found the documentary exhibits offered on Thomas' case failed to establish there was any undisclosed deal (R.L.F.282-83). The motion court also referenced Thomas' trial testimony as rebutting any claim of a deal (R.L.F.283).

D. COUNSELS' TESTIMONY

Ms. Zembles testified that respondent repeatedly represented no deals had been made with Thomas (R.Tr.573). Ms. Zembles would have wanted to impeach Thomas with his probation disposition (R.Tr.576).

Ms. Holden testified respondent represented to her that there were no deals for Thomas (R.Tr.487). When Ms. Holden asked respondent, and in particular the Harrison County prosecutor, why Thomas' case was allowed to remain pending in Associate Circuit Court for two years she was not given an answer (R.Tr.487-88,493-94). Ms. Holden would have wanted to impeach Thomas with the reduced charge he pled guilty to which resulted in a probation disposition (R.Tr.500). Ms. Holden would have wanted to impeach Thomas with evidence of a deal (R.Tr.531-32).

E. THOMAS HAD AN UNDISCLOSED DEAL

Respondent failed to disclose the deal Thomas received in exchange for his testimony. This failure denied counsel the opportunity to fully challenge this witness' credibility on cross-examination.

The prosecution must disclose favorable evidence that is material either to guilt or punishment. Brady v. Maryland,373U.S.83,87(1963). For purposes of the Due Process Clause, no distinction between exculpatory and impeachment evidence exists. U.S. v. Bagley,473U.S.667,676-78(1985). See, also, State v. Robinson,835S.W.2d303,306

(Mo.banc1992). Nondisclosure of Brady evidence violates due process "irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland,373U.S. at 87. See, also, U.S. v. Agurs,427U.S.97,110(1976). Under Brady, the focus is whether Mr. Middleton was prejudiced. State v. Whitfield,837S.W.2d503,508(Mo.banc1992).

A government attorney, in Giglio v. U.S.,405U.S.150,150-53(1972), promised the defendant's co-conspirator that he would not be charged. The co-conspirator testified against Giglio while representing there were no deals, and a different government attorney argued the government had made no promises to the co-conspirator. Id.151-52. The failure to disclose that promise violated due process. Id.154-55. It did not matter different prosecutors were involved in the promise of leniency and the trial because "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government." Id.154.

In Napue v. Illinois,360U.S.264,265-67(1959), a co-participant in the charged homicide testified no promises had been made in exchange for his testimony. In fact, the State's Attorney had promised the co-participant that he would recommend a sentence reduction. Id.265-67. The State's Attorney allowed that testimony to go uncorrected. Id.265-67. Napue's right to due process was violated by the State's allowing this false evidence to go uncorrected. Id.269-70. The Court reasoned that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Id.269.

This Court, in Hayes v. State,711S.W.2d876,877(Mo.banc1986), granted the movant relief because the State failed to disclose to his counsel that it had agreed to dismiss charges against a co-participant in exchange for his testimony. While so ruling, this Court reasoned the deal "related directly to the quality and substance of [the co-participant's] trial testimony." Id.879.

In Commonwealth v. Strong,761A.2d1167(Pa.2000), the death sentenced postconviction movant's conviction was reversed. The State's attorneys had represented no deal had been made with the co-defendant and the co-defendant testified there were no deals. Id.1170. After testifying for the State at Strong's trial, the co-defendant pled guilty and was sentenced to 40 months in prison. Id.1170. The evidence at the postconviction proceedings indicated there were discussions about a deal for the co-defendant before Strong's trial. Id.1170. The postconviction court rejected the failure to disclose a deal claim finding "there was no actual deal struck. . . ." Id.1170.

The Pennsylvania Supreme Court agreed with the finding that there was no deal struck, but still reversed. Strong,761A.2d at 1174. Relief was required because the record established the existence of "an understanding" that the codefendant would be treated with leniency in exchange for his testimony. Id.1174. That Court went on to indicate it is unnecessary for there to be "an ironclad agreement" in order to impose a due process duty to disclose under Brady and Giglio. Id.1174-75. That Court reasoned that in circumstances where there is no binding agreement, disclosure is even more critical because when a deal is only contingent and dependent on the government's satisfaction with the final result, the witness has a greater motive to testify favorably for the

government. Id.1175(relying on U.S. v. Bagley,473U.S.667,683(1985))(Blackmun and O'Connor, J.J) "The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction").

The evidence as to Thomas is like that presented in Strong. Thomas was first charged on June 8, 1995 (Exs.1 and 18). The docket entry from February 27, 1998 indicates that the "state advises delay in prosecution due to 's participation as witness in companion proceedings." See supra. This docket entry reflects that there was "an understanding" that Thomas would be treated with leniency. That "understanding" is further evidenced by Thomas' trial testimony that his case would be dealt with after all of the trials involving Mr. Middleton were completed (T.Tr.2355-56). The "understanding" is also evidenced by Thomas' testimony that it was "their decision" to allow Thomas' case to sit around despite him having been charged in June of 1995 (T.Tr.2356). In fact, less than one month after Thomas testified in Mr. Middleton's second and final trial in Callaway County, an amended information reducing Thomas' charges from the Class B felony of sale of a controlled substance to the Class C felony of an attempted sale was filed on April 27, 1998 and he pled guilty (Exs. 1 and 18). While there is not evidence of "an ironclad agreement" there still was a duty under Brady to disclose the understanding.

Thomas received a very good deal. The Missouri Highway Patrol Confidential Narcotics Report, contained in the prosecutor's file, recounted that Confidential Informant 1352 had "purchased the methamphetamine from John Thomas in Thomas's

shop near Thomas's residence for three hundred dollars ($300.00)" (Ex.18 and page 1 of report). The prosecutor's file also contained a handwritten statement signed by Billy Worley dated August 23, 1994, stating that he had purchased the methamphetamine from Thomas (Ex.18). Worley testified as a penalty phase witness for respondent (T.Tr.3058-65). The Highway Patrol's Forensic Laboratory Report, again contained in the prosecutor's file, identified what Thomas had sold as methamphetamine (Ex.18). Thomas admitted during his PSI interview that he sold methamphetamine to an undercover agent (Ex.18,PSI at 1). Even though Thomas actually sold methamphetamine, he pled guilty to an attempted sale and was placed on probation (Exs. 1 and 18). Counsel would have wanted to impeach Thomas with this especially good disposition (R.Tr.500,531-32,576). Attacking Thomas' credibility was critical and Mr. Middleton was entitled to the undisclosed information to use for that purpose. See Giglio and Napue, supra.

Respondent's failure to disclose these matters was especially harmful because Thomas testified he had no deals (T.Tr.2314). See Giglio and Napue. Counsel was precluded from cross-examining Thomas about the deal he received in violation of Mr. Middleton's right to confront the witnesses against him. See Pointer and Davis, supra. Moreover, the prejudice of the nondisclosure was exacerbated because the prosecutor argued there was no deal and thus mislead the jury (T.Tr.2910-11). See Napue, supra (failure of State to correct misinformation on a deal). Additionally, this nondisclosure was prejudicial because it precluded counsel from fully presenting their defense that Mr. Middleton was not guilty of the crime charged.

This Court should order a new trial.

II. JUROR HOLT COULD NOT FAIRLY SERVE

THE MOTION COURT CLEARLY ERRED DENYING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO MOVE TO STRIKE FOR CAUSE OR EXERCISE A PEREMPTORY CHALLENGE AGAINST JUROR MS. HOLT WHO TESTIFIED SHE DID NOT KNOW WHETHER SHE COULD CONSIDER MITIGATING EVIDENCE OF SUBSTANCE ABUSE BECAUSE THIS DENIED MR. MIDDLETON EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE SO ACTED BECAUSE THEIR MITIGATION STRATEGY WAS BUILT AROUND MR. MIDDLETON'S HAVING SUFFERED FROM A METHAMPHETAMINE INDUCED PSYCHOSIS.

Claim 8(T)(m) alleged that counsel was ineffective for failing to move to strike for cause or peremptorily remove juror Ms. Holt (R.L.F.80-82,161-62). The motion court rejected this claim. Mr. Middleton was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment. U.S. Const., Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and

prejudice. Strickland v. Washington,466U.S.668,687(1984). The trial and sentencing phases of a capital case must satisfy the requirements of the Due Process Clause. Gardner v. Florida,430U.S.349,358(1977).

Sentencing someone to death is cruel and unusual punishment if the punishment is meted out arbitrarily and capriciously. Furman v. Georgia,408U.S.238(1972). The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. Irvin v. Dowd,366U.S.717,722(1961). The failure of counsel to strike a juror who cannot fairly serve constitutes ineffective assistance. Presley v. State,750S.W.2d602,606-09(Mo.App.,S.D.1988). When counsel fails to strike such a juror, a movant is not required to show prejudice that there was a reasonable probability the outcome would have been different. Presley,750S.W.2d at 603-07. Instead, the circumstance presented is one under Strickland, where prejudice is presumed. Presley,750S.W.2d at 607. See, also, McGurk v. Stenberg,163F.3d470,474-75(8thCir.1998)(failure to inform defendant of his right to a jury trial constituted a structural error where prejudice was presumed and showing Strickland prejudice was not required).

Venireperson Adams testified that potentially mitigating evidence relating to someone's background could not be used to excuse conduct and she would not attach a lot of weight to such evidence (T.Tr.1540-41).

The questioning of Ms. Holt then proceeded as follows:

> Q. Is your views of the death penalty -- do you have strong views on the death penalty?

A. Yes. I think that I agree with this lady here in the green pants.

Q. Ms. Adams?

A. Yeah. We're talking in generalities right now, and we haven't discussed exactly what we're talking about. And I think sometimes we have to view what the circumstances are before we can say what we would choose to do.

Q. We're not asking you to tell us what you would choose to do. And I understand, it's frustrating. And I understand your frustration. And it's a difficult thing to question people about, but we need to have an idea of people's views on this issue.

A. I understand. You've had some really difficult questions and we're talking about something very serious. It's a tremendous responsibility. And to just say what I think I would do in that situation would be you can't really know until you view all of those things. And there are certain situations, certain circumstances that don't warrant the death penalty and I think there are some that do.

Q. Do you think -- And I'll ask you some of the questions I've asked others about mitigating factors. Do you think if you were asked to evaluate mitigating factors, that mental health type of evidence is something you could consider?

A. Yes. I think I could, but I also think that sometimes it's used by lawyers to manipulate the system. You know what I'm saying? And I think that you have to really look at all the evidence and all of the things that are posed to you. But I think, yes, there are some. There are not as many as what we allow, I think.

Q. And it sounds like you're saying what you said earlier, that sometimes you need to really evaluate something before you can know how you can react?

A. Yes.

Q. Do you think if you were asked to consider, as mitigation, issues of drug and alcohol use, is that something you could consider?

A. I can't say for sure. I can't say -- I can say "yes" but I just don't know.

Q. Do you have an opinion now, as you sit here, about that type of evidence, if it were used to explain someone's actions?

MR. COSGROVE: Object. May we approach?

THE COURT: Yes, indeed.

[Proceedings at the bench:]

MR. COSGROVE: This is seeking a commitment with regard to specific evidence in this case. I can get up there and spend all day talking to them hypothetically, although, it really isn't hypothetical, about my evidence in aggravation and what they feel about that and what they'd

consider. And basically, we'd be taking a poll here, just as to who the best jurors are for our particular case. And these jurors, I think, by their answers, are making my objections for me in explaining why these questions are improper.

THE COURT: And explaining to each other, perhaps, as well.

MR. COSGROVE: Yes.

MR. SLUSHER: Judge, I think that the law gives us the right to explore the opinions of the venire people on these issues and that we have to be able to explore those opinions to exercise our strikes for cause and our pre-emptory challenges.

THE COURT: What is the precise question here, Chris?

MR. SLUSHER: Whether she can consider as a mitigating issue drug and alcohol use. If a venire person cannot even consider --

THE COURT: She's already answered that. She said that she didn't know whether she could consider drug and alcohol.

MR. SLUSHER: I think she's answered the question.

THE COURT: The objection's sustained. Repetitious.

MR. SLUSHER: Well, I didn't ask it again. I believe I asked it once.

THE COURT: I thought you said that's what you were going to ask -- what you're asking now. What is the question you're asking now?

MR. SLUSHER: That was the question I just asked. I think we have a response from the juror.

THE COURT: She answered. She didn't know if she could consider that or not.

(T.Tr.1554-57)(emphasis added).

Counsel did move to disqualify for cause Ms. Adams (T. Tr.1574). Counsel argued that Adams had said she would view mental health evidence as an excuse (T.Tr.1574). Counsel did not, however, move to strike Ms. Holt for cause (T.Tr.1572-77). Ms. Holt served in guilt and penalty (T.Tr.2978-79,3793).

The penalty phase defense focused on presenting that as a result of methamphetamine use Mr. Middleton was suffering from a methamphetamine psychosis (T.Tr.3254-55,3268-69,3271,3273-75,3299,3423-24,3522-23,3532-33,3537-38,3656-58,3684-89,3696-97,3705-09).

When counsel Slusher was asked why Ms. Holt was not struck the following occurred:

Q. My question to you is: Why -- Why did you not move to strike Ms. Holt?

A. Again, you have to take the entire jury selection in context. With respect to the answers that you referred me to here I would be surprised, and I guess I am surprised, that we would not have moved to strike this venireperson, especially because of her agreement with Venireperson Adams in light of the response that Venireperson Adams

gave that you've just referred me to. I didn't see all of Adams[']
responses. She certainly provides answers that would concern me about her ability to act as a good defense venireperson during the death penalty phase.

(R.Tr.443).

On this claim the motion court ruled that counsel was unable to recall why they failed to take the actions alleged should have been taken (R.L.F.298). Also, the motion court ruled that such actions were either without merit or did not create any fundamental unfairness (R.L.F.298).

Reasonably competent counsel under similar circumstances who were relying on a substance abuse mitigation theory would have moved to disqualify for cause or peremptorily struck Ms. Holt. This is because Ms. Holt did not know if she could consider the type of mitigation Mr. Middleton offered. The totality of her answers indicated she could not. She said there should not be as many mitigating circumstances as the law allows (T.Tr.1555). She then said that she did not know if she could consider drug use (T.Tr.1555) implying this was one of the factors she believed should not be allowed. That reasonably competent counsel would have so acted is also highlighted by how counsel acted as to Ms. Adams who was on the same panel as Ms. Holt (T.Tr.1492) and who counsel moved to disqualify for cause (T.Tr.1574). Because a juror who could not fairly serve was allowed to serve prejudice is presumed. See Presley, supra.

This Court should reverse for a new trial or at minimum a new penalty phase.

III. FAMILY AND EMPLOYER MITIGATION

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO CALL EMPLOYER AND FAMILY MITIGATION WITNESSES CHARLES WEBB, VERN WEBB, VIRGINIA WEBB, RUBY SMITH, SYLVIA PURDIN, AND GLENN WILLIAMS TO TESTIFY ABOUT HIS IMPAIRED COGNITIVE ABILITIES WHICH PRECEDED HIS HEAVY DRUG USE, AND THEREBY, OFFERED AN EXPLANATION FOR WHY HE MAY HAVE BECOME INVOLVED IN DRUGS; HIS WORK-ETHIC DILIGENCE TO DEMONSTRATE WHY HE WOULD BE A HARD-WORKING GOOD INMATE; AND HIS MOTHER'S INHALANT ABUSE WHICH MIGHT HAVE EXPLAINED WHY AS A CHILD HE WAS COGNITIVELY IMPAIRED BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND CALLED THESE WITNESSES AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THEIR TESTIMONY LIFE WOULD HAVE BEEN IMPOSED.

The motion court rejected the claim counsel was ineffective for failing to call former employers and family to mitigate punishment. Reasonably competent counsel

would have investigated and called these witnesses and Mr. Middleton was prejudiced because the jury did not hear evidence warranting life. Mr. Middleton was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984). Sentencing someone to death constitutes cruel and unusual punishment if that punishment is imposed arbitrarily and capriciously. Furman v. Georgia,408U.S.238(1972). The trial and sentencing phases of a capital case must satisfy the requirements of the Due Process Clause. Gardner v. Florida,430U.S.349,358(1977).

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. Kenley v. Armontrout,937F.2d1298,1304(8thCir.1991). In Terry Williams v. Taylor,529U.S.362,369(2000), trial counsel presented mitigating evidence through the defendant's mother, his friends, and a psychiatrist. Williams' counsel, however, failed to conduct investigation that would have uncovered extensive evidence of his abusive and deprived childhood. Id.395. The jury also did not hear that Williams was borderline mentally retarded and his mental impairments were likely organic in origin. Id.370,395-98. The Court concluded Williams was denied effective assistance under Strickland. Id.396-98.

The pleadings, 8(E), alleged counsel was ineffective for failing to call former employers Charles Webb, Vern Webb, Virginia Webb, and Ruby Smith (R.L.F.44-45,141-46). Also, the pleadings alleged counsel was ineffective for failing to call Mr. Middleton's aunt, Sylvia Purdin, 8(C), (R.L.F.42-43,139-40) and his uncle Glenn Williams, 8(D), (R.L.F.43-44,140-41).

The motion court found as to both the failure to call family members and employers that there was no reasonable probability that the evidence that could have been presented would have altered the outcome (R.L.F.287). Additionally, as to the former employers the motion court found that their testimony would have been "counterproductive" because it would have shown Mr. Middleton could conform his conduct to the requirements of law for extended periods of time (R.L.F.287).

During penalty, Mr. Middleton's mother, Janice Middleton testified (T.Tr.3300-3392). Counsel did not call any former employers. Janice recounted medical complications associated with her pregnancy with Mr. Middleton and the medical problems he experienced immediately following his birth (T.Tr.3302-06,3309-11). She also described how when Mr. Middleton was five years old he had sustained a head injury that required medical treatment (T.Tr.3312-13). Janice described the abuse that was inflicted on her and her children by Mr. Middleton's alcoholic father and one of her boyfriends, Ken Harding (T.Tr.3317-28,3331,3334-63).

In Jermyn v. Horn,1998W.L.754567 at *8 - *17 (M.D.Pa. Oct.27, 1998), aff'd., Jermyn v. Horn,266F.3d257,303-12(3rdCir.2001), the petitioner was granted relief on counsel's failure to present penalty mitigating evidence. The Commonwealth argued

counsel was not ineffective by characterizing the challenge as one of counsel's failure to present all available mitigating evidence. Jermyn,1998W.L.754567 at *17. Rejecting this argument the District Court reasoned: "[p]resentation of some mitigating evidence does not excuse the failure to provide evidence of different mitigating circumstances." Id.*17. The same is true here - counsel failed to present evidence of different mitigating circumstances.

Vern Webb, his wife Virginia, and their son Charles (Vern), Jr., ran the Leon Sale Barn in Leon, Iowa, from 1955-60 and again from 1966-83 (Ex.23 at 2-5,10; Ex.24 at 4-6; Ex.25 at 3-4,6). The Leon Sale Barn was a livestock auction that dealt in cattle, hogs, and sheep (Ex.24 at 4-5;Ex.23 at 5). Mr. Middleton worked for the Webbs for a little more than two years until the Sale Barn closed in 1983 (Ex.25 at 7; Ex.23 at 10). Mr. Middleton was the only full-time employee and the Webbs paid minimum wage or close to minimum wage with no benefits (Ex.24 at 8; Ex.23 at 5).

Mr. Middleton's work was limited to doing manual labor that included cleaning pens, hauling manure, feeding, working, delivering, and castrating cattle (Ex.23 at 6-7; Ex.24 at 9,11; Ex.25 at 9,11). The Webbs limited Mr. Middleton to doing these types of activities because he was not very bright and was intellectually low functioning (Ex.23 at 6; Ex.24 at 10-11; Ex.25 at 9). Charles had nick-named Mr. Middleton "John Boy" because of the similarity of his character to the television character by that name (Ex.24 at 8). Mr. Middleton simply was not mentally equipped to be able to run the business' computer (Ex.24 at 10-11).

Mr. Middleton was an excellent worker who did work up to his fullest potential (Ex.23 at 6,9-10; Ex.25 at 7-9). Mr. Middleton was quiet and reserved (Ex.25 at 8). Mr. Middleton was very dependable and followed orders (Ex.25 at 7; Ex.24 at 13). He would do what he was asked, but lacked the ability to act independently without direction on a job (Ex.24 at 12; Ex.23 at 9). He had a good work ethic so that the Webbs never had to worry about him sitting around doing nothing (Ex.23 at 9). Charles once said that if they had told Mr. Middleton to move the barn he would have done his best to move it (Ex.24 at 10).

Mr. Middleton was definitely someone who was a follower (Ex.24 at 12; Ex.23 at 7; Ex.25 at 8). That manifested itself particularly in his relationship with his girlfriend, Teresa, who displayed the same level of intelligence and for whom he did whatever she wanted (Ex.23 at 7-9; Ex.25 at 10).

Vern and Virginia Webb had so much confidence in Mr. Middleton that they co-signed a note and advanced money for him to purchase a pick-up truck (Ex.23 at 11; Ex.25 at 12-13). The Webbs never did that for any other employee (Ex.23 at 11; Ex.25 at 13). Mr. and Mrs. Webb helped Mr. Middleton to purchase the pick-up because Mr. Middleton tried to please them and they wanted to help him (Ex.25 at 13).

Ruby Smith owned Smith Feeder Supply Elevator (Ex.22 at 3). Mr. Middleton worked for the Supply Elevator at the same time he worked for the Leon Sale Barn (Ex.22 at 4). He bagged grain, cracked corn, ground feed, and loaded feed on customers' pick-up trucks (Ex.22 at 5). Mr. Middleton's duties were limited to these chores because he had to be supervised in all the details of his work (Ex.22 at 5). In particular, if Ms.

Smith asked him to load chicken feed she would have to tell him to take the package with the picture of the baby chickens or if feed was needed for hens she had to tell him it was the bag with the big hen (Ex.22 at 5). Mr. Middleton would wait at the counter until given directions as to what to do (Ex.22 at 7). His intellectual abilities were limited so that he was incapable of handling matters that required he write-out customer sales tickets (Ex.22 at 8). Ms. Smith could rely on Mr. Middleton, however, to come to work on time and do what he was asked to do and never to argue about doing his job (Ex.22 at 5-6,8). Mr. Middleton presented the appearance of someone who was "removed from reality" and who required "a wake-up call" to tell him what you wanted him to do (Ex.22 at 10). Ms. Smith considered Mr. Middleton to be someone who was "a space cadet" whom you had to bring back by speaking to him directly (Ex.22 at 10).

While he worked for Ms. Smith, he drove a pick-up that could have been entered in an "ugly pickup contest" (Ex.22 at 8-9). At the Supply Elevator, Mr. Middleton was known by the "demeaning" name of "Sale Barn John" (Ex.22 at 6-7). This nick-name was attached to him because he would work at the Supply Elevator with manure from the Sale Barn on his pant legs and shoes (Ex.22 at 7).

Glenn Williams was Mr. Middleton's uncle and his mother Janice's brother (Ex.26 at 3-4). He remembered that as a child Mr. Middleton was mentally slow (Ex.26 at 5-6). Mr. Middleton was also a follower (Ex.26 at 6). Mr. Williams recalled that when Mr. Middleton's mother was growing-up she had a serious habit where she would remove the gas cap from the family tractor and inhale the fumes (Ex.26 at 11-12).

Mr. Middleton's mother was involved in relationships with about three men when he was growing-up (Ex.26 at 12). One of those men was Ken Harding (Ex.26 at 12). Harding took Mr. Middleton to bars (Ex.26 at 13).

Sylvia Purdin is Mr. Middleton's aunt and his mother's sister (Ex.31 at 3-4). Ms. Purdin would see Mr. Middleton as a young child, because he, his mother, and his sister, stayed with her when his mother went to visit Harding at the Anamosa Penitentiary (Ex.31 at 4,8-9).

When Ms. Purdin babysat Mr. Middleton, he was quiet and reserved (Ex.31 at 9-10,13-15). Mr. Middleton had difficulty as a child expressing himself (Ex.31 at 10). He did not play with the other children, and instead, isolated himself playing with a toy (Ex.31 at 10-11). As a child, Mr. Middleton acted like he was "in a daze" and would sit and stare at things (Ex.31 at 11-12). It was common for her to notice Mr. Middleton displaying "a blank expression" (Ex.31 at 12). When Mr. Middleton did play with other children, he was a follower and not a leader (Ex.31 at 12). Ms. Purdin also remembered that as a child Mr. Middleton's mother had a habit of inhaling gasoline fumes and then passing-out (Ex.31 at 16-17).

Counsel did not contact any of these witnesses (R.Tr.358-59,553-555). These witnesses could have presented evidence that from the time Mr. Middleton was a young child, and prior to his extensive involvement in drugs at the time of this offense, he had displayed limited cognitive abilities. Those limited cognitive abilities included that his employers regarded work that he did, including shoveling cow manure, as Mr. Middleton having worked to his fullest intellectual capacity and ability.

In making its punishment decision, it was important for the jury to understand that Mr. Middleton's intellectual capacity was already severely limited before his extensive drug use and not solely the product of that drug use. Mr. Middleton's preexisting limited intellectual abilities also would have offered an explanation for why he had drifted into the extensive drug use that surrounded this offense. Also, it was important for the jury to have heard evidence that while Mr. Middleton was intellectually limited he still was a conscientious and diligent worker at the jobs he was assigned, and therefore, could be expected to perform that way in the penitentiary where he would be drug-free. Additionally, evidence of Mr. Middleton's mother's inhalant use would have offered the jury an explanation for why he was cognitively impaired as a child and before he became extensively involved in drugs. This is a case where counsel failed to present evidence of different mitigating circumstances, see Jermyn and Terry Williams, supra, and requires the same relief.

Evidence that Mr. Middleton was a good worker would not have been "counterproductive" as the motion court found (R.L.F.287). While Mr. Middleton was a good worker, he was also an extremely limited, cognitively impaired one. It was critical for the jury to hear about Mr. Middleton's limited cognitive ability. Also, that Mr. Middleton was a good worker when he was not extensively abusing drugs, which would be the case in prison, would have highlighted for the jury that he could be expected to do well in the prison setting, and thus, supported life.

Reasonably competent counsel under similar circumstances would have investigated and called all of these witnesses. Mr. Middleton was prejudiced because

there is a reasonable probability that had the jury heard all of this evidence Mr. Middleton would have been sentenced to life.

This Court should order a new penalty phase.

IV. PRIOR CONFINEMENT MITIGATION

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIMS MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL HIS IOWA CORRECTIONS COUNSELOR, JAKE NOONAN, AND TO INTRODUCE HIS IOWA CORRECTIONS FILE IN PENALTY TO SUPPORT A LIFE SENTENCE TO ESTABLISH HE HAD BEEN A WELL-BEHAVED AND WELL-ADJUSTED PRISONER IN IOWA, AND THEREFORE, COULD BE EXPECTED TO BE EQUALLY SUCCESSFUL IF SENTENCED TO LIFE BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE INVESTIGATED AND PRESENTED THIS EVIDENCE AND MR. MIDDLETON WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THIS EVIDENCE THEY WOULD HAVE IMPOSED LIFE.

The motion court denied the claims counsel was ineffective for failing to call Mr. Middleton's Iowa Corrections counselor, Jake Noonan, and to introduce his Iowa Corrections file in penalty. Reasonably competent counsel would have investigated and presented this evidence. Mr. Middleton was prejudiced because the jury did not hear evidence warranting life. Mr. Middleton was denied effective assistance, due process,

and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984). A death sentence constitutes cruel and unusual punishment if imposed arbitrarily and capriciously. Furman v. Georgia,408U.S.238(1972). The trial and punishment phases of a capital case must satisfy the requirements of the Due Process Clause. Gardner v. Florida,430U.S.349,358 (1977).

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. Kenley v. Armontrout,937F.2d1298,1304(8thCir.1991). In Terry Williams v. Taylor,529U.S.362,369,395(2000), trial counsel presented mitigating evidence through the defendant's mother, his friends, and a psychiatrist, but failed to conduct investigation that would have uncovered extensive evidence of his abusive and deprived childhood. The jury also did not hear that Williams was borderline mentally retarded and his mental impairments were likely organic in origin. Id.370,395-98. The Court concluded Williams was denied effective assistance under Strickland. Id.396-98.

The pleadings, 8(K) and 8(L), alleged counsel was ineffective for failing to present Mr. Middleton's Iowa prison records and call Mr. Noonan because this evidence was relevant mitigation under Skipper v. South Carolina,476U.S.1(1986) (R.L.F.57-58,153-55). This evidence should have been presented because it demonstrated Mr.

Middleton's past good adjustment to incarceration, and therefore, he could have been expected to adjust-well to incarceration for life (R.L.F.57-58,153-55).

Mr. Noonan was the treatment services director for the Iowa Department of Corrections at Anamosa State Penitentiary (Ex.27 at 4,8). His duties include chairing the classification committee, overseeing institutional transfers, and making parole board recommendations (Ex.27 at 8). He is also responsible for an in-patient therapeutic community program, an out-patient program at Anamosa, an out-patient program at Luster Heights, and grant writing for the State of Iowa (Ex.27 at 8).

In his counseling duties, Mr. Noonan has supervised 800-900 inmates, including Mr. Middleton (Ex.27 at 9-10). Mr. Middleton was cooperative and took advantage of available opportunities (Ex.27 at 12). He obtained his G.E.D., completed substance abuse programs, and attended substance abuse groups (Ex.27 at 12). During Mr. Middleton's confinement he did not have any disciplinary reports (Ex.27 at 13). Mr. Middleton was initially confined at Anamosa and transferred to Luster Heights (Ex.27 at 14). Luster Heights was a live-out camp without any fence (Ex.27 at 13-14). Mr. Middleton could not have been transferred to Luster Heights any sooner because he had a mandatory minimum sentence for a drug conviction (Ex.27 at 14). Mr. Middleton was sent to Luster Heights because his attitude, behavior, and adjustment were good and he needed substance abuse treatment (Ex.27 at 15-16). Mr. Middleton was eligible for transfer to Luster Heights because he had not had any violent episodes or escapes at Anamosa (Ex.27 at 17). Mr. Middleton was quiet and had a good attitude (Ex.27 at 17). He had an above average adjustment to incarceration and above average work reports

(Ex.27 at 17-18,26). Because Mr. Middleton had a particularly good custody level that made him low-risk, he was allowed to work outside the prison (Ex.27 at 17-18).

Mr. Middleton's Iowa Corrections records contained similar impressions (Ex.28). Those records included a psychological report that concluded Mr. Middleton had a "low" potential for institutional violence (Ex.28).

The motion court ruled that counsel exercised reasonable strategy in not presenting this evidence (R.L.F.293-94). That strategy was reasonable because counsels' focus in the penalty phase was to corroborate Drs. Murphy's and Lipman's diagnoses of methamphetamine induced psychosis (R.L.F.293-94). Presenting evidence of other confinements was viewed as not sound strategy (R.L.F.293-94).

Ms. Zembles was primarily responsible for investigating mitigation evidence (R.Tr.553). Ms. Zembles testified that defendants do not understand what constitutes mitigating evidence (R.Tr.551). She was uncertain whether the defense team had obtained Mr. Middleton's Iowa corrections records (R.Tr.568). Ms. Zembles only would not have wanted to utilize Mr. Middleton's Iowa prison records if those records contained unfavorable materials about Mr. Middleton (R.Tr.569). Ms. Zembles was unfamiliar with Mr. Noonan (R.Tr.569).

In penalty, counsel called Adair County Sheriff Randall Forquer. He testified that Mr. Middleton had not made any attempts to escape while being held in Adair County (T.Tr.3240). Also, Sheriff Forquer recounted that while held in Adair County, Mr. Middleton had not been disruptive and never assaulted anyone (T.Tr.3240-41).

During respondent's penalty phase opening statement, it apprised the jury that it would present evidence regarding Mr. Middleton's Iowa conviction for possession of amphetamine with the intent to manufacture or deliver (T.Tr.3021). Respondent also told the jury, again in penalty opening statement, that the jury would hear evidence that Mr. Middleton had attempted to escape from the Harrison County Jail (T.Tr.3021).

Respondent introduced in penalty evidence documenting Mr. Middleton's Iowa conviction for possession of amphetamine with intent to manufacture or deliver (T.Tr.3039-43,3126-27).

Respondent called in penalty Highway Patrol Officer Forck to testify about the alleged attempted escape from the Harrison County Jail by Mr. Middleton. The men's and women's jail are located on separate sides of the third floor of the courthouse (T.Tr.3194,3197). Mr. Middleton's codefendant was being held in the women's jail (T.Tr.3197). Forck heard a noise on the third floor and found Mr. Middleton standing outside the locked area (T.Tr.3198). Forck had Mr. Middleton handcuffed and returned to the locked area because he was in an area where prisoners were not allowed to be (T.Tr.3198-99,3212).

In Skipper v. South Carolina,476U.S.1,9,14-15(1986), Justice Powell concurred that the petitioner's jail conduct should have been admitted. That conduct, however, was relevant not as mitigating evidence, but rather to rebut evidence and argument used against him. Skipper,476U.S. at 9,14-15(Powell, J., concurring). Justice Powell took this approach reasoning that a person awaiting trial or sentencing in a capital case could be

expected to behave flawlessly in hope that the sentencing authority would not impose death. Skipper,476U.S. at 14-15(Powell, J., concurring).

The motion court's reasonable strategy finding is clearly erroneous. As Kenley and Terry Williams recognize, the failure to discover mitigating evidence relates to trial preparation and not strategy. There was nothing bad in Mr. Middleton's Iowa prison records so there was no reasonable strategy for failing to present them. While counsel's strategy of presenting evidence to corroborate Drs. Murphy and Lipman may itself be reasonable, it does not excuse the failure to investigate and present Mr. Noonan and Mr. Middleton's Iowa prison records. The finding that presenting evidence of other confinements is not sound strategy is simply contrary to the holding in Skipper.

Reasonably competent counsel under similar circumstances would have investigated and presented evidence of Mr. Middleton's Iowa incarceration through Mr. Noonan and Mr. Middleton's Iowa Correction records (Ex.28). This evidence was crucial because not only would it have apprised the jury of Mr. Middleton's ability to adjust to incarceration well, but also when he was held in Iowa facilities where escape would have been easy, he had not attempted to escape. This evidence would have countered respondent's evidence on Mr. Middleton's alleged attempted escape from the Harrison County Jail. In particular, this evidence would have supported the reasonable inference that Mr. Middleton had not attempted to escape from the Harrison County Jail, but instead had only attempted to visit his codefendant girlfriend in the women's jail. Also, this evidence was more persuasive than the evidence the jury heard for the reasons Justice Powell identified in Skipper. When Mr. Middleton was confined in Iowa, he did

not have any incentive to be well-adjusted in order to hope to persuade a sentencer to not impose death. In contrast, while Mr. Middleton was being housed in the Adair County Jail, that incentive Justice Powell identified, existed and made the evidence presented through the Adair County Sheriff not compelling. Moreover, it was critical to present evidence of Mr. Middleton's adjustment in Iowa correctional facilities to counteract the jury learning from respondent about his prior Iowa conviction. Mr. Middleton was prejudiced because there is a reasonable probability had the jury heard this evidence a life sentence would have been imposed.

This Court should reverse for a new penalty phase.

V. MR. MIDDLETON LACKED THE REQUIRED MENTAL STATE FOR FIRST DEGREE MURDER

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL IN GUILT DRS. MURPHY, LIPMAN, AND DANIEL TO SUPPORT THE DEFENSE HE WAS NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT OR SUFFERED FROM A DIMINISHED CAPACITY AS EACH OF THESE WITNESSES WOULD HAVE TESTIFIED AT TRIAL IN GUILT THAT HE WAS PSYCHOTIC AT THE TIME OF THE OFFENSES SO AS TO HAVE SUPPORTED THESE DEFENSES BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE CALLED THESE WITNESSES IN GUILT TO TESTIFY ABOUT HIS PSYCHOSIS TO SUPPORT THESE GUILT DEFENSES AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY THAT HE WOULD NOT HAVE BEEN CONVICTED OF FIRST DEGREE MURDER OR AT MINIMUM NOT SENTENCED TO DEATH.

The motion court denied claims counsel was ineffective for failing to call in guilt Drs. Murphy, Lipman, and Daniel. These witnesses should have been called to testify in guilt that at the time in question Mr. Middleton was psychotic. That evidence would

have supported the jury finding he was not guilty by reason of mental disease or defect or suffered from a diminished capacity so as to not be guilty of first degree murder and would have served to mitigate his punishment to a life sentence. Mr. Middleton was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984).

It is recognized that "[t]he wide latitude trial counsel has in matters of trial strategy does not amount to unconstrained discretion." State v. McCarter,883S.W.2d75, 78(Mo.App.,S.D.1994). Counsel's trial strategy "must be reasonable under prevailing professional norms." McCarter,883S.W.2d at 78(relying on Strickland)(emphasis in McCarter). In particular, counsel is required "to exercise 'sound trial strategy.'" McCarter,883S.W.2d at 78(quoting Porter v. State,682S.W.2d16,19(Mo.App., W.D.1984)). Some trial strategy decisions may be so unsound as to constitute ineffectiveness. McCarter,883S.W.2d at 78.

Counsels' actions here are like those in Dumas v. State,903P.2d816(Nev.1995) and similarly require finding counsel were ineffective. The defendant in Dumas was convicted of first degree murder in a case, like Mr. Middleton's case, where the most viable issue was mental state at the time of the killing. Dumas,903P.2d at 816. Counsel failed to present evidence through a state employed psychiatrist that Dumas "suffered

'organic damage to [his] intellectual capabilities and was incapable of premeditating an act such as the killing . . . .'" Id.817. Counsel was ineffective because proper investigation, preparation, and presentation of this evidence could have provided a complete defense or one that Dumas' mental state was inconsistent with a deliberated first degree murder. Id.817.

A. THE CLAIMS PLED

The amended motion, 8(A), alleged counsel was ineffective for failing to investigate and to call Dr. Murphy to testify in guilt that Mr. Middleton was not guilty by reason of mental disease or defect (R.L.F.40-42,137-39). Dr. Murphy would have provided evidence that would have allowed the jury to find that Mr. Middleton was not responsible because he did not know and appreciate the nature, quality, or wrongfulness of his conduct as provided for in § 552.030 (R.L.F.40-42,137-39). The pleadings also alleged, 8(F), that counsel failed to investigate and Dr. Murphy should have been called in guilt phase to support a diminished capacity defense (R.L.F.46,146-47).

The pleadings also alleged counsel failed to investigate and Dr. Lipman should have been called in guilt phase, 8(G), to support a diminished capacity defense (R.L.F.47-48,147-49).

Additionally, the pleadings alleged that counsel failed to investigate a psychiatrist, such as Dr. Daniel, 8(H), who should have been called to testify in guilt (R.L.F.48-49,149-153). Dr. Daniel, or a similarly qualified psychiatrist, would have testified in guilt that Mr. Middleton's mental diseases precluded him from knowing and appreciating

the nature, quality, or wrongfulness of his actions under Chapter 552 (R.L.F.48-49,149-53).

B. TRIAL MENTAL HEALTH EVIDENCE

Counsel did not present any guilt defense evidence (T.Tr.2891). The guilt phase defense theory was Mr. Middleton was not guilty and respondent's evidence was not credible so as to satisfy its burden of proof (T.Tr.2919-60).

In penalty, counsel called neuropharmacologist Dr. Lipman (T.Tr.3607). Dr. Lipman found that at the time of the alleged acts Mr. Middleton was psychotic, delusional, and paranoid (T.Tr.3656-58,3709). Mr. Middleton has organic brain damage (T.Tr.3655). Mr. Middleton's symptomology is a product of the combination of his brain damage and his methamphetamine use (T.Tr.3655-56,3709). Dr. Lipman recounted some of the behaviors that Mr. Middleton had displayed which caused him to arrive at his conclusions about Mr. Middleton's mental status (T.Tr.3684-89,3692-97,3703). The types of symptoms Mr. Middleton displayed were similar to those a schizophrenic would display and both should be treated with anti-psychotic drugs, but Mr. Middleton's symptoms were caused by his methamphetamine use (T.Tr.3646,3705). Because of Mr. Middleton's psychosis, delusions, and paranoia, he was substantially impaired as to his ability to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of law (T.Tr.3707-09).

Dr. Murphy testified in penalty that at the time of the alleged acts Mr. Middleton was suffering from an organic paranoid thought disorder that causes him to be psychotic (T.Tr.3423-24,3532-33). That psychosis was caused by Mr. Middleton's

methamphetamine use (T.Tr.3423-24). Mr. Middleton is brain damaged (T.Tr.3424-25). Dr. Murphy believes that Mr. Middleton suffers from an organic paranoid thought disorder independent of his methamphetamine use along with a mixed personality disorder that includes schizotypal behavior (T.Tr.3425,3428-29). Mr. Middleton has a though disorder whose symptoms resemble those schizophrenics display (T.Tr.3504-05). At the time Mr. Pinegar was killed, Mr. Middleton was suffering from extreme mental or emotional disturbance (T.Tr.3537-38). Additionally, Mr. Middleton was substantially impaired as to his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law (T.Tr.3538).

C. RULE 29.15 EVIDENCE

1. Dr. Murphy

Dr. Murphy is a clinical psychologist whose expertise includes evaluating for organic brain damage (Ex.2 at 45-46). He was contacted to evaluate Mr. Middleton by Ms. Zembles (Ex.2 at 50). He evaluated Mr. Middleton in November, 1996, utilizing psychological and neuropsychological testing (Ex.2 at 50).

Dr. Murphy's testing found Mr. Middleton suffers from an organic paranoid thought disorder (Ex.2 at 96-98). Mr. Middleton has organic brain damage that is the product of chronic methamphetamine use (Ex.2 at 93-94). Mr. Middleton is in a chronic methamphetamine paranoid state such that he is continuously and chronically psychotic (Ex.2 at 94-95). Dr. Murphy concluded Mr. Middleton suffers from a mental disease or defect - organic paranoid thought disorder, methamphetamine induced, in a chronic fashion (Ex.2 at 97-98). At the time of this offense, Mr. Middleton was suffering from

this mental disease or defect (Ex.2 at 98). Also, at the time of this offense, Mr. Middleton could not form the requisite mental state for first degree murder and was unable to coolly reflect (Ex.2 at 100-01). Mr. Middleton acted based on his delusions (Ex.2 at 100-01). Mr. Middleton's acts were fueled by his psychotic thought disorder (Ex.2 at 106-07). Dr. Murphy concluded Mr. Middleton is not schizophrenic (Ex.2 at 108). Individuals with test results similar to Mr. Middleton's test results often are successful with a not guilty by reason of insanity defense (Ex.2 at 84-86).

Dr. Murphy also identified Mr. Middleton as suffering from chronic depression since he was a child (Ex.2 at 98-99). Also, Dr. Murphy found Mr. Middleton suffers from a chronic anxiety disorder (Ex.2 at 98-99).

2. <u>Dr. Lipman</u>

Dr. Lipman explained that neuropharmacology deals with the effects of drugs on the brain and resulting behavior (Ex.2 at 1). Methamphetamine's effects on an individual varies according to whether usage was acute or chronic (Ex.2 at 3-6).

Individuals who suffer from depression and who have used methamphetamine have an increased vulnerability for becoming a chronic user (Ex.2 at 12-13). Methamphetamine provides a temporary relief for depression and at one time was prescribed for depression (Ex.2 at 12). Dr. Lipman noted that Mr. Middleton has experienced a life-long mood disorder, and thus, would have been predisposed to chronic methamphetamine abuse (Ex.2 at 13).

Dr. Lipman indicated the symptoms that characterize paranoid schizophrenia are the same as those presented by someone suffering the effects of chronic

methamphetamine use (Ex.2 at 4-6). Because the symptoms are the same for both, making a differential diagnosis can be difficult (Ex.2 at 4-6,35-36). At the time of this offense, Mr. Middleton was suffering from hallucinations and delusions (Ex.2 at 19-24).

Dr. Lipman believed Mr. Middleton could not have coolly reflected or deliberated because of his chronic state of methamphetamine psychosis, paranoia, and delusions (Ex.2 at 28-31). Dr. Lipman also believed Mr. Middleton's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired because of his noted mental infirmities (Ex.2 at 31-34).

Dr. Lipman stated that methamphetamine psychosis and schizophrenia are "behaviorally indistinguishable" but differ in their causes (Ex.2 at 35-36).

3. <u>Dr. Daniel</u>

Dr. Daniel is a psychiatrist who examined Mr. Middleton during the 29.15 proceedings (R.Tr.26). He found Mr. Middleton suffers from a substance induced chronic psychosis or psychotic disorder with delusions and hallucinations caused by his methamphetamine use (R.Tr.62-66). At the time of this offense, Mr. Middleton was suffering from that psychotic disorder and was experiencing delusions and hallucinations which constituted a mental disease or defect (R.Tr.62-66). Dr. Daniel would treat Mr. Middleton with the same class of drugs prescribed to schizophrenics because his symptomology is the same (R.Tr.70,107). Mr. Middleton is not schizophrenic, however, the clinical manifestations of his mental illness are the same as for schizophrenia (R.Tr.92-93,107-08). Mr. Middleton's drug use has caused brain damage (R.Tr.64). Mr.

Middleton's mental disease has multiple causes and is not solely the product of his drug use (R.Tr.71).

Mr. Middleton has a family history that predisposed him to psychotic conditions (R.Tr.42-43). That family history included treatment his mother received for recurrent depression with psychotic features (R.Tr.42-43). He also concluded Mr. Middleton suffers from a schizoid personality disorder (R.Tr.66,68-69,105). This disorder makes individuals more susceptible to psychotic disorder and substance abuse (R.Tr.105).

At the time of the offense, Mr. Middleton was suffering from a paranoid psychosis such that he was unable to coolly reflect and deliberate, and therefore, acted with a diminished capacity (R.Tr.71-72,96). Dr. Daniel was unable to form an opinion whether Mr. Middleton was unable to know the nature, quality, and wrongfulness of his actions because he did not discuss the crime with Dr. Daniel (R.Tr.92,98-99). Dr. Daniel disagreed with Dr. Murphy's finding on the issue of Mr. Middleton's ability to know the nature, quality, and wrongfulness of his actions because Dr. Daniel did not have sufficient information to address that issue (R.Tr.98-99).

D. TRIAL COUNSELS' 29.15 TESTIMONY

1. Jan Zembles

Ms. Zembles testified that Drs. Murphy and Lipman were not called in guilt because doing so would have required admitting Mr. Middleton committed the charged acts (R.Tr.562-63). These doctors were not called because Mr. Middleton opposed any defense that conceded he committed the acts alleged and had indicated he would act out if such a defense was presented (R.Tr.563). Counsel deferred to Mr. Middleton's wishes

not to present a mental health guilt phase defense (R.Tr.564-65). Counsel, however, was never confident that Mr. Middleton understood that they were recommending a defense of not guilty by reason of mental disease or defect or diminished capacity (R.Tr.652,655-56). Ms. Zembles also testified that she felt calling Drs. Murphy and Lipman in guilt was not desirable because while Dr. Murphy believed Mr. Middleton was not guilty by reason of mental disease or defect, Dr. Lipman was only able to find a diminished capacity (R.Tr.563-64). Counsel felt that while such a dichotomy was not inconsistent, it would not be persuasive to the jury (R.Tr.564). Ms. Zembles did not believe it was necessary to retain a psychiatrist because she had acquired all the information that was needed as to Mr. Middleton's mental status from Drs. Murphy and Lipman and from Mr. Middleton's acquaintances (R.Tr.566-67). One juror even asked Ms. Zembles for Dr. Lipman's card because the juror had a child who had drug problems and was so impressed by Dr. Lipman's testimony (R.Tr.657).

2. <u>Chris Slusher</u>

Mr. Slusher was aware that Drs. Murphy and Lipman believed that Mr. Middleton was psychotic at the time of the alleged acts (R.Tr.362-64). Mr. Slusher was also aware that Drs. Lipman and Murphy had concluded Mr. Middleton was brain damaged (R.Tr.364,464). Drs. Murphy and Lipman would have supported a diminished capacity defense (R.Tr.366). Mr. Slusher agreed with the decision not to call Drs. Lipman and Murphy during guilt (R.Tr.367). Mr. Slusher did not recall why a psychiatrist was not consulted (R.Tr.367-68). Mr. Slusher testified that the team did not believe that testimony from Drs. Murphy and Lipman could be adduced during guilt to support a

Chapter 552 defense because Mr. Middleton's mental health problems resulted from voluntary intoxication (R.Tr.370-71,455,457). Also, Mr. Slusher felt that a not guilty by reason of mental disease or defect defense was a difficult defense to present and to prove and was contrary to Mr. Middleton's wishes (R.Tr.371). Mr. Slusher believed that a defendant's requested choice of defense was to be considered, but was not controlling (R.Tr.371-72). Mr. Slusher did believe that because Mr. Middleton is brain damaged that less weight should be given to his wishes on a theory of defense (R.Tr.464).

E. MOTION COURT'S FINDINGS

The motion court rejected these claims as follows.

On Claim 8(A), the motion court ruled counsel exercised reasonable strategy in not pursuing a not guilty by reason of mental disease or defect defense (R.L.F.286). That strategy was reasonable because Mr. Middleton had maintained he was not guilty and counsel feared he might act out if an insanity defense was presented in guilt (R.L.F.286).

On Claim 8(F), the motion court ruled counsel had exercised reasonable strategy in not calling Dr. Murphy in guilt because Mr. Middleton had maintained he was innocent (R.L.F.288). Also, that strategy was reasonable because counsel was concerned that evidence of Mr. Middleton's other two homicide charges from Callaway County would come into evidence (R.L.F.288-89). The motion court also reasoned that because Mr. Middleton's mental state was caused by methamphetamine use, his resulting mental impairments were caused by voluntary intoxication which cannot be used to negate a mental state (R.L.F.289). Additionally, the motion court ruled that presenting evidence of insanity would not have been persuasive to the jury (R.L.F.289).

On Claim 8(G), the motion court ruled counsel exercised reasonable strategy because calling Dr. Lipman would likely have necessitated admitting Mr. Middleton committed the charged acts and, thus, was contrary to Mr. Middleton's innocence claim (R.L.F.290). The motion court found that since Dr. Lipman was not persuasive to the jury in penalty, he also would not have persuaded the jury deciding guilt (R.L.F.290). Counsel also acted reasonably because they wanted to avoid presenting contradictory opinions as Dr. Lipman could only find diminished capacity whereas Dr. Murphy would testify that Mr. Middleton was not guilty by reason of mental disease or defect (R.L.F.290).

On Claim 8(H), counsel was not ineffective for failing to call a psychiatrist because Dr. Daniel's diagnosis of schizophrenia was contradicted by Drs. Murphy's and Lipman's findings (R.L.F.290). Also, Dr. Daniel contradicted Dr. Murphy's diagnosis of mental disease or defect because Dr. Daniel was unable to express an opinion on whether Mr. Middleton knew of the wrongfulness of his conduct (R.L.F.290-91). Counsels' decision to only present mental health evidence in penalty was reasonable (R.L.F.291). Additionally, the motion court found counsel cannot be found ineffective for failing to choose a particular expert (R.L.F.291).

F. COUNSEL PRESENTED INCONSISTENT GUILT AND PENALTY THEORIES

This Court has recognized the importance of presenting defense theories that are consistent from guilt to penalty phases. In State v. Harris,870S.W.2d798,816 (Mo.banc1994), counsel presented a guilt phase defense of self-defense. Harris'

postconviction motion alleged counsel was ineffective for failing to present mental health penalty evidence that he had suffered from post-traumatic stress. Id.815. In rejecting this claim, this Court noted the guilt phase defense theory presented can determine the evidence that can be "credibly" presented in penalty. Id.816. This Court went on to reason:

> The injection of evidence of a mental disease or defect during the penalty phase risks alienating a jury that has consistently heard a different theory of the case during the guilt phase. It is a reasonable strategic decision by trial counsel to avoid presenting a defense *du jour* to the jury.

Id.816.

Other courts have similarly emphasized the importance of counsel presenting consistent defense theories. See, e.g., Bland v. California,20F.3d1469,1479 (9thCir.1994), overruled on other grounds, Schell v. Witek,218F.3d1017,1024-25(9thCir.2000)(petitioner was denied his right to counsel in non-capital case when state court failed to furnish substitute counsel and prejudice occurred because counsel presented inconsistent theories on guilt issue); Ross v. Kemp,393S.E.2d244,245-46(Ga.1990)(counsel was ineffective in capital case where in guilt defendant was represented by two attorneys who each presented inconsistent defense theories - not guilty because the state failed to satisfy its burden and a mental illness defense).

Counsel failed to act as reasonably competent counsel under similar circumstances when they failed to present in guilt the mental health evidence that could have been presented through Drs. Murphy, Lipman, and Daniel. Presenting this evidence in guilt

was crucial to ensure there was consistency across the guilt and penalty phases. Instead of consistency, the jury was presented with inherently contradictory theories in guilt and penalty. The jury first heard Mr. Middleton did not commit the Pinegar homicide and then heard that his acts should be excused because of his mental impairments. The jury never heard in guilt evidence why Mr. Middleton lacked the requisite mental state for first degree murder. See Dumas, supra.

Mr. Middleton was prejudiced because there is a reasonable probability that the jury would not have found him guilty of first degree murder if these witnesses had been called in guilt. Even if the jury had convicted Mr. Middleton of first degree murder, there is a reasonable probability that had the jury heard this evidence in guilt that the jury would have sentenced Mr. Middleton to life because it would have heard a consistent "credible" explanation for his behavior. See Harris, supra. By presenting inconsistent theories, counsel "alienated" the jury so that they were unwilling to impose a life sentence. See Harris, supra.

Counsels' strategy of denying Mr. Middleton committed the offenses was not a reasonable strategy. See McCarter, supra. Drs. Lipman and Murphy both believed Mr. Middleton is subject to a chronic psychotic state (Ex.2 at 28-31,94-95). Because Mr. Middleton is in a chronic psychotic state, it was counsels' responsibility to pursue a viable guilt phase defense and not to acquiesce to Mr. Middleton's insistence on a not guilty theory. That was particularly true in a situation where counsel was uncertain whether Mr. Middleton understood counsel was recommending that he pursue a mental health guilt defense (R.Tr.652,655-56). Counsel Slusher acknowledged that Mr.

Middleton's choice of defenses as to guilt were to be considered, but were not controlling (R.Tr.371-72), and should be given less weight because he is brain damaged (R.Tr.464). Further, counsel Zembles' concern that Dr. Lipman was only able to find Mr. Middleton had acted with diminished capacity, when Dr. Murphy was able to go further and find Mr. Middleton was not guilty by reason or mental disease or defect (R.Tr.563-64), was unreasonable. Both Drs. Lipman and Murphy would have supported a diminished capacity defense (R.Tr.366). Even Ms. Zembles acknowledged that Drs. Murphy's and Lipman's findings were not inconsistent (R.Tr.564). Thus, the motion court's finding on counsel's concern about contradictory opinions (R.L.F.290) is clearly erroneous.

The motion court was clearly erroneous in relying on State v. Nicklasson, 967S.W.2d596(Mo.banc1998) (R.L.F.289) for the general proposition voluntary intoxication cannot excuse or negate a mental state. Counsel Slusher was also incorrect in believing a Chapter 552 defense was unavailable because Mr. Middleton had voluntarily injested methamphetamine (R.Tr.370-71,455,457). Drs. Murphy and Lipman agreed that at the time of the offense Mr. Middleton was in a psychotic state (Ex.2 at 19-24,28-31,97-98,99-101,106-07). What the motion court and counsel Slusher ignored was that intoxication accompanied by psychosis can serve to excuse or negate a mental state. See, §552.010,RSMO 2000; Joyce v. State,684S.W.2d553,554-55(Mo.App.,E.D.1984); State v. Preston,673S.W.2d1,8 (Mo.banc1984); State v. Williams,812S.W.2d518,520 (Mo.App.,E.D.1991). Because Drs. Murphy and Lipman would have testified Mr. Middleton was suffering from psychosis at the time of the offense this evidence would have been admissible.

Dr. Daniel did not diagnose Mr. Middleton as suffering from schizophrenia (R.L.F.290). He did testify that he would treat Mr. Middleton with the same class of drugs used to treat schizophrenics (R.Tr.70,107). Dr. Daniel, like Drs. Murphy and Lipman, found that Mr. Middleton suffers chronic psychosis caused by methamphetamine use (R.Tr.62-66). Dr. Daniel did find that Mr. Middleton suffers from an additional mental infimity schizoid personality disorder (R.Tr.66,68-69,105). Schizoid personality disorder is not the same as schizophrenia (R.Tr.92-93). See, also, DSM IV at 273-96,638-41. Thus, Dr. Daniel did not contradict Drs. Lipman and Murphy (R.L.F.290). Because Dr. Daniel's testimony was consistent with Drs. Murphy's and Lipman's testimony, the credibility of their testimony would have only been enhanced and the lack of mental state defense made that much more credible.

Dr. Daniel did not contradict Drs. Lipman and Murphy on the issue of whether Mr. Middleton knew the wrongfulness of his conduct (R.L.F.290-91). Dr. Daniel was only unable to form an opinion on that issue because Mr. Middleton did not discuss the crime with Dr. Daniel (R.Tr.92,98-99).

There was no testimony by Mr. Middleton's counsel to support the finding that counsel was concerned that presenting a mental health defense in guilt would have opened up introduction of evidence related to the Callaway County homicide charges (R.L.F.288-89)

The motion court's finding that presenting a mental health defense in guilt would not have been persuasive and that because Dr. Lipman's testimony did not persuade in penalty it would not have done so in guilt is contrary to the evidence. At least one juror

who heard Dr. Lipman's testimony found it so compelling that the juror asked for Lipman's card (R.Tr.657). While the penalty verdict was unfavorable to Mr. Middleton when the jury heard Dr. Lipman's testimony, that result may have been caused by counsel presenting inherently contradictory defenses in guilt and penalty.

Counsel presented inherently inconsistent and contradictory guilt and penalty phase defenses, and thereby failed to act as reasonably competent counsel under similar circumstances. Mr. Middleton was prejudiced because there is a reasonable probability that if these three mental health experts had been called in guilt phase Mr. Middleton would not have been convicted of first degree murder or at worst would have been sentenced to life in penalty.

This Court should reverse for a new trial.

VI. "SELL THIS ADDRESS"

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN COUNSEL FAILED TO OBJECT TO PAUL OGLESBEE'S TESTIMONY THAT HE THOUGHT THE PHRASE "SELL THIS ADDRESS" IN A LETTER MR. MIDDLETON SENT MEANT MR. MIDDLETON WAS PLACING "A HIT" ON OGLESBEE AND HIS WIFE BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE OBJECTED TO THIS ERRONEOUSLY SPECULATIVE OPINION AND HE WAS PREJUDICED BECAUSE THE PHRASE IS NOT A THREAT AND THERE IS A REASONABLE PROBABILITY IF THE JURY HAD NOT HEARD THIS EVIDENCE THEY WOULD HAVE IMPOSED LIFE.

ALTERNATIVELY, THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE WHEN TRIAL COUNSEL FAILED TO CALL BRIAN FIFER TO TESTIFY THAT AN INMATE USING THIS EXPRESSION MEANS THE INMATE NO LONGER INTENDS TO WRITE THE PERSON BECAUSE THAT PERSON HAD NOT WRITTEN BACK AND DOES NOT CONSTITUTE A THREAT BECAUSE HE WAS DENIED ALL THE NOTED CONSTITUTIONAL

RIGHTS IN THAT REASONABLY COMPETENT COUNSEL WOULD HAVE PRESENTED SUCH EVIDENCE FROM FIFER AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY IF THE JURY HAD HEARD THIS EVIDENCE THEY WOULD HAVE IMPOSED LIFE.

ALTERNATIVELY, THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM DIRECT APPEAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL TRIAL COUNSEL'S OBJECTIONS TO RESPONDENT'S USE OF THE LETTER BECAUSE MR. MIDDLETON WAS DENIED ALL THE PREVIOUSLY NOTED CONSTITUTIONAL RIGHTS IN THAT REASONABLY COMPETENT APPELLATE COUNSEL WOULD HAVE RAISED THIS MATTER AND THERE IS A REASONABLE PROBABILITY MR. MIDDLETON'S DEATH SENTENCE WOULD HAVE BEEN REVERSED.

LASTLY, THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIM THAT MR. MIDDLETON WAS DENIED HIS RIGHT TO NOTICE OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES WHEN THE LETTER, EXHIBIT 106, WAS NOT DISCLOSED UNTIL THE DAY OGLESBEE TESTIFIED BECAUSE HE WAS DENIED HIS RIGHTS TO DUE PROCESS AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VIII AND XIV, IN THAT HAD TIMELY DISCLOSURE BEEN MADE COUNSEL COULD HAVE CALLED FIFER TO TESTIFY ACCURATELY

ABOUT THE PHRASE'S MEANING AND MR. MIDDLETON WOULD HAVE BEEN SENTENCED TO LIFE.

The motion court denied multiple claims related to respondent's use of a letter Mr. Middleton wrote to Paul Oglesbee and his wife, Mr. Middleton's sister, Rose. Those rulings were clearly erroneous because Mr. Middleton was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984). Sentencing someone to death is cruel and unusual punishment if that punishment is imposed arbitrarily and capriciously. Furman v. Georgia,408U.S.238(1972). Both phases of a capital trial must comport with the requirements of the Due Process Clause. Gardner v. Florida, 430U.S.349,358(1977).

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. Kenley v. Armontrout,937F.2d1298,1304(8thCir.1991). This Court has held that evidence of unconvicted misconduct is inadmissible when the State fails to provide notice of its intent to rely on such evidence. State v. Thompson, 985S.W.2d779,792(Mo.banc1999). In Thompson, this Court found the non-disclosure to be plain error that required reversal of Thompson's death sentence. Id.792-93.

A defendant is entitled to effective assistance of appellate counsel. Evitts v. Lucey,469U.S.387,396-97(1985). To be entitled to relief on a claim of appellate ineffectiveness the error not raised must have been so substantial as to rise to the level of a manifest injustice or a miscarriage of justice. Moss v. State,10S.W.3d508,514-15(Mo.banc2000).

A. Trial Record

During penalty phase, defense counsel called Mr. Middleton's brother-in-law, Paul Oglesbee, who was married to Mr. Middleton's sister, Rose (T.Tr.3257-75). That testimony focused on Oglesbee having seen Mr. Middleton display symptoms associated with his methamphetamine use such as paranoia, delusions, and changes in his physical appearance (T.Tr.3268-75).

During respondent's cross-examination, it relied on Exhibit 106, a letter Mr. Middleton had written to his sister (T.Tr.3280-92). Respondent disclosed the letter for the first time on the morning of Oglesbee's testimony (T.Tr.3280). In objecting to the letter, counsel Slusher indicated that they had not had the opportunity to conduct investigation about the letter's contents because of the failure to disclose (T.Tr.3280). Defense counsel Slusher indicated that he believed respondent intended to introduce the P.S. as evidence of a threat directed at Mr. Middleton's sister (T.Tr.3284). Respondent sought to excuse its non-disclosure on the grounds that Oglesbee had found the letter the day before his testimony (T.Tr.3280-81). Respondent informed the court that it intended to rely on the P.S. portion of the letter because it included a threat directed at Mr. Middleton's sister (T.Tr.3281). Respondent claimed there was no prejudice because the

P.S. was "explicitly discussed" during Oglebee's deposition (T.Tr.3281,3283-84). The P.S. in the letter stated that if she did not write then Mr. Middleton would '"sell [her] address'" (T.Tr.3285,3288).

Initially, the trial court sustained defense counsel's objection on the grounds that respondent had failed to provide timely discovery, and therefore, counsel were unable to investigate the P.S. (T.Tr.3286,3288). The trial court considered it a failure of respondent to disclose a statement of Mr. Middleton (T.Tr.3288). Subsequently, the trial court reconsidered its ruling and ruled that because the letter was not previously available respondent should be allowed to present this evidence (T.Tr.3288-89). When the court reversed its ruling, defense counsel apprised the court that the defense had deposed Oglesbee because he was a witness respondent had endorsed for guilt phase (T.Tr.3289).

When respondent sought to rely on Exhibit 106 during Oglesbee's testimony, counsel renewed their objections (T.Tr.3289,3291). Oglesbee testified that the P.S. stated: '"She'll write or I'll sell this address'" (T.Tr.3292). When Oglesbee was asked how he had interpreted that language he responded: "That he was putting a contract on us for a hit" (T.Tr.3292). Counsel did not object to Oglesbee's construction of the meaning of the P.S. (T.Tr.3292).

B. <u>The 29.15 Claims</u>

The pleadings (Claim 8(V) 3(bb)) alleged that counsel was ineffective for failing to object to Oglesbee testifying to his interpretation of the phrase's meaning on the grounds that it was false, irrelevant, speculative, without foundation, and opinion (R.L.F.121). It was also alleged (Claim 8(M)) that Brian Fifer, who had been confined in

the Iowa Penitentiary with Mr. Middleton, could have explained that the phrase is not a threat to harm anyone (R.L.F.58-59). Also, it was alleged (Claim 8(W) 1) that direct appeal counsel was ineffective for failing to raise on appeal the objections that were made to respondent's use of Exhibit 106 (R.L.F.126-27). Lastly, the pleadings alleged (Claims 8(V) 3(bb) and 8(W) 1) that Mr. Middleton's right to notice of non-statutory aggravators was violated and thereby prevented him from preparing to rebut respondent's evidence (R.L.F.121-22,126-27).

C. Counsel's Testimony

Trial counsel Zembles testified that there are times when she has a strategy reason for not objecting, but because of the passage of time she could not remember whether she did or did not have reason at the time of trial for not making objections (R.Tr.648). Brian Fifer was not investigated and counsel Zembles would have wanted to present evidence to refute Oglesbee's erroneous speculation on the meaning of "sell your address" (R.Tr.569-70,583-84). Mr. Slusher would have liked to have had the opportunity to investigate the meaning of this phrase (R.Tr.446-47). Mr. Slusher did not contact anyone as to the phrase's meaning (R.Tr.378). Appellate counsel, Ms. Carlyle, testified that she did not raise the objections that trial counsel had made because she thought they lacked merit (R.Tr.154-55).

D. Motion Court Rulings

On the issue of trial counsel's failure to object, the motion court made general findings that counsel made a reasonable strategic decision not to object to all objectionable matters during penalty (R.L.F.300). On Claim 8(V) 3(bb), the motion court

noted that counsel testified that counsel could not recall why an objection was not made (R.L.F.301). While the motion court made findings on portions of Claim 8(M), it never expressly addressed the issue that Fifer should have been called to refute Oglesbee's interpretation of the "sell your address" language (R.L.F.293-94). The motion court found appellate counsel was not ineffective because she testified that she raised those issues which she felt had merit and did not raise those she felt lacked merit (R.L.F.303-04). The motion court did not address the claims that respondent failed to provide notice of this evidence as a non-statutory aggravator.

E. Respondent's Argument

During respondent's initial penalty argument, the prosecutor urged the jury to read the letters Mr. Middleton wrote to his sister (T.Tr.3758). The jury was told that the letters reflected "fairly sophisticated manipulations" (T.Tr.3758). According to the prosecutor, that same manipulation was what caused Drs. Murphy and Lipman to formulate opinions about Mr. Middleton's mental state, which could not be trusted (T.Tr.3758).

F. A New Penalty Phase Should Be Ordered

1. Failure to Object

Counsel's failure to make timely proper objections can constitute a basis for finding counsel was ineffective. State v. Storey,901S.W.2d886,900-03(Mo.banc1995) (counsel found ineffective for failing to object to penalty arguments). Oglesbee's testimony as to the meaning of "sell your address" should have been objected to on the grounds alleged in the amended motion, that it was false, irrelevant, speculative, without

foundation, and opinion. Reasonably competent counsel who had vigorously opposed this evidence, and who initially persuaded the trial court to rule in their favor, would have made these objections. Mr. Middleton was prejudiced because this phrase does not constitute a threat. See Fifer testimony infra. Further, Mr. Middleton was prejudiced because the prosecutor used this matter to argue Mr. Middleton was manipulative and had similarly succeeded in manipulating the doctors who had testified for him in penalty. Finally, Mr. Middleton was prejudiced because there is a reasonable probability that he would not have been sentenced to death if the jury had not heard he had threatened to have "hits" placed on his sister and her husband.

2. Failure to Call Fifer

Brian Fifer and Mr. Middleton were cellmates at Iowa's Anamosa Penitentiary for approximately two years (Ex.30 at 3-5). Mr. Fifer recalled that inmates looked forward to receiving mail because it is a link to the outside world (Ex.30 at 12). Because inmates do not earn much money, they cannot afford to send mail to people who do not write back (Ex.30 at 12-13). The phrase "sell your address" is an expression inmates use to mean they are not going to spend their money to write to people who do not write back (Ex.30 at 13-14). The phrase is "a prison slang" that does not in any way constitute a threat to physically harm anyone (Ex.30 at 13-14). People in the penitentiary understand the meaning of this phrase, but people outside do not (Ex.30 at 13-14).

Mr. Fifer's testimony would have been persuasive to the jury when it is viewed in conjunction with the text of Exhibit 106, the letter. The letter's first page contains a

margin entry that states: "Mom says Hi. So does my Wi[unreadable]." See Br. Appendix 6.[3] Page Two and the last paragraph of the letter included:

> Can we ever talk or you write back. I am your brother, are you allowed to talk or write your own brother.
>
> * * * *
>
> P.S. She'll write or I'll sell this address. Love you wheather [sic] you believe it or not.
>
> /s/ John

See Br. Appendix 7.

The reproduced portions of the letter are consistent with Mr. Fifer's testimony that Mr. Middleton was expressing his unhappiness with his sister not writing back to him when he wrote to her and that no threat was intended with the postscript. The letter states that Mr. Middleton's mother, who is also his sister Rose's mother, sends her greetings along with Mr. Middleton's wife doing the same. Those sentiments would not reasonably be expected to appear in a letter which also allegedly threatened to have a "hit" placed on Mr. Middleton's sister.

[3] The copy of Exhibit 106, contained in the Appendix, was made from a copy respondent furnished to undersigned counsel. Respondent will be asked to file the original of Exhibit 106.

The letter's last paragraph expressly states that Mr. Middleton is dismayed that his sister has not written letters back to him when he has written to her. See Br. Appendix 7. That text is entirely consistent with Mr. Fifer's testimony.

Finally, the postscript appeared alongside of the sentiments: "Love you wheather [sic] you believe it or not /s/ John." If Mr. Middleton had intended to threaten his sister, with the postscript, then he would not have alongside such a threat also expressed his love for his sister.

Reasonably competent counsel under similar circumstances would have investigated and called Mr. Fifer to refute Oglesbee's mistaken interpretation "sell your address" meant Mr. Middleton intended to have a "hit" placed on him and his wife because of Oglesbee's highly inflammatory construction, and thereby, minimized the adverse impact of respondent's argument. Reasonably competent counsel would have investigated Fifer, because, as respondent's counsel argued, from defense counsels' deposition of Oglesbee they had been put on notice of the substance of the postscript (T.Tr.3281,3283-84). Mr. Middleton was prejudiced because there is a reasonable probability the jury would have sentenced him to life if they had heard Mr. Fifer.

3. Appellate Counsel

Reasonably competent appellate counsel would have argued on appeal trial counsel's objection to respondent's non-disclosure of the letter, Exhibit 106, which served as the basis for a non-statutory aggravator. See State v. Thompson, supra. Moreover, reasonably competent appellate counsel would have raised this issue on appeal because in State v. Thompson, this Court concluded that such non-disclosure constitutes

plain error manifest injustice. Because such nondisclosure constitutes a manifest injustice, appellate counsel's failure to raise this matter itself rises to the level of a manifest injustice or a miscarriage of justice. See Moss v. State, supra. Mr. Middleton was prejudiced because there is a reasonable probability Mr. Middleton's death sentence would have been reversed.

4. Late Disclosure

In State v. Thompson,985S.W.2d779,792-93(Mo.banc1999), this Court, as a matter of plain error, ordered a new penalty phase when respondent failed to disclose evidence of unconvicted misconduct offered as a statutory aggravator. In Thompson, the undisclosed evidence involved the defendant having shot someone who he had seen '"messing with [his] car.'" Id.792. Here, respondent failed to disclose evidence which it claimed constituted a death threat. The evidence here was as prejudicial as the evidence in Thompson because the jury was told that this phrase meant Mr. Middleton was having a "hit" placed on his sister and her husband. If timely disclosure had been made, then counsel could have called Fifer to testify to the true meaning of the phrase and the prejudice of Oglesbee's testimony avoided.

For all the reasons discussed, a new penalty phase is required.

VII. FAILURE TO OBJECT

THE MOTION COURT CLEARLY ERRED OVERRULING CLAIMS MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT AND/OR OTHERWISE REQUEST APPROPRIATE RELIEF IN RESPONSE TO EVIDENCE, ARGUMENT, AND INSTRUCTION DURING PENALTY WHEN RESPONDENT:

A. RELIED ON MATTERS RELATING TO THE DEATH OF MR. HAMILTON AND STACEY HODGE, THE VICTIMS IN THE CALLAWAY COUNTY CASE BROUGHT AGAINST MR. MIDDLETON;

B. ARGUED MATTERS OUTSIDE THE EVIDENCE;

C. ASKED DEFENSE EXPERT, DR. LIPMAN, TO EXPRESS AN OPINION ON WHETHER MR. MIDDLETON WAS TRUTHFUL IN HIS DENIAL OF HAVING COMMITTED THE HOMICIDE OFFENSES HE WAS CHARGED WITH COMMITTING;

D. SUBMITTED INSTRUCTION 15 WITHOUT THE MENTAL STATE OF "KNOWINGLY" FOR AN AGGRAVATOR;

BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV IN THAT REASONABLY COMPETENT COUNSEL WOULD NOT HAVE SO ACTED AND HE WAS PREJUDICED BECAUSE THERE IS A REASONABLE PROBABILITY THAT HE WOULD HAVE BEEN SENTENCED TO LIFE.

The motion court denied claims counsel was ineffective for failing to object and/or otherwise request the necessary relief when respondent: (a) relied on matters dealing with the deaths of Mr. Hamilton and Stacey Hodge; (b) relied on matters outside the evidence; (c) questioned Dr. Lipman whether he believed Mr. Middleton's denial of responsibility for the charged homicides; and (d) omitted knowingly from Instruction 15. Mr. Middleton was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984). A death sentence constitutes cruel and unusual punishment if that punishment is imposed arbitrarily and capriciously. Furman v. Georgia,408U.S.238(1972). Both the trial and penalty phases of a capital case must satisfy the requirements of the Due Process Clause. Gardner v. Florida,430U.S.349,358(1977). The Supreme Court has recognized "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida,430U.S.349,358(1977).

A. The Hamilton and Hodge Matters

Claim 8(U) 4(i) (R.L.F.91-92) alleged that counsel was ineffective for failing to object to respondent's statements during opening statement in penalty that urged the jury

to impose death for not only the death of Mr. Pinegar, but also the deaths of Mr. Hamilton and Stacey Hodge (R.L.F.91-92). In particular, the objectional matters were:

> And at the conclusion of this penalty phase, after you have heard the evidence -- both the evidence last week as well as the evidence this week -- regarding the deaths of Al Pinegar, Randall Hamilton, Stacey Hodge, the State will ask you to return a verdict of death. Thank you.

(T.Tr.3021).

Claim 8(U)(4)(i) also alleged counsel was ineffective for failing to object to the prosecutor's initial penalty phase closing arguments which included: (a) ". . . he murdered three people" (T.Tr.3755); (b) that Mr. Middleton shot Mr. Hamilton and Stacey Hodge, loaded their bodies into a trunk, and disposed of them (T.Tr.3755); (c) three people were dead because Mr. Middleton feared going back to prison (T.Tr.3760-61); (d) Mr. Middleton killed three people and therefore death was warranted (T.Tr.3761-62); (e) Mr. Hamilton and Stacey Hodge would have "taken life without in a heartbeat" (T.Tr.3764); (f) death was warranted for killing three people because Mr. Middleton voluntarily used methamphetamine (T.Tr.3767).

Claim 8(U)(4)(i) also alleged counsel was ineffective for failing to object to the prosecutor's rebuttal penalty phase closing arguments which included: (a) the murders of Mr. Hamilton and Stacey Hodge were circumstances warranting death (T.Tr.3786-87); and (b) there was no trial on June 11th, the date when Mr. Hamilton and Stacey Hodge were allegedly killed (T.Tr.3789). All of the Claim 8(U)(4)(i) matters were improper

because Mr. Middleton was not then on trial for Mr. Hamilton's and Stacey Hodge's deaths (R.L.F.91-92). Ms. Zembles testified that she did not see how all these matters were objectionable (R.Tr.603-08).

Claim 8(U)(4)(r)(R.L.F.96) alleged counsel was ineffective for failing to object to initial penalty argument that the mitigating evidence was to be weighed against the lives of Mr. Hamilton, and Stacey Hodge as well as Mr. Pinegar and that this aggravating evidence outweighed the mitigation because it was improper to tell the jury to weigh the value of the victims' lives (T.Tr.3763-64). Ms. Zembles did not consider these matters objectionable (R.Tr.615).

Claim 8(U)(4)(s)(R.L.F.96) alleged counsel was ineffective for failing to object to initial penalty argument that all three victims would have taken life without in a heartbeat, but all three got the death penalty (T.Tr.3764). Ms. Zembles did not consider these arguments objectionable (R.Tr.615-16).

Claim 8(V)(3)(b)(R.L.F.103-04) alleged counsel was ineffective for failing to object to penalty testimony and evidence that Mr. Middleton killed Mr. Hamilton and Stacey Hodge as presented through the following: (a) Officer Coon - Mr. Middleton was charged with killing Mr. Hamilton and Stacey Hodge (T.Tr.3043-44); (b) Ms. Marrs - mother of Stacey Hodge who testified she was 21 years old, she had been dating Mr. Hamilton, and she was last seen June 9, 1995 (T.Tr.3044-45); (c) Mr. Constable - Mr. Middleton told him there were snitches that needed to be taken care of, including Mr. Hamilton (T.Tr.3049); (d) Mr. Worley - Mr. Middleton made statements that he needed to kill Mr. Hamilton (T.Tr.3060-62); (e) Mr. Purdun - Mr. Middleton said Mr. Hamilton

was no longer on his hit list because Mr. Hamilton was no longer a problem and Purdun could take auto parts belonging to Mr. Hamilton because he no longer needed them (T.Tr.3118-20); (f) Mr. Clemonds - described his investigation of the crime scene where the bodies of Mr. Hamilton and Stacey Hodge were found (T.Tr.3151-55); (g) videotape testimony of Dr. Dix (Ex.202) regarding autopsies he performed on Mr. Hamilton and Stacey Hodge; (h) Ex. 105 - crime scene videotape where bodies of Mr. Hamilton and Stacey Hodge were found (T.Tr.3154-55); (i) Thomas' testimony that he had seen a small black box belonging to Mr. Hamilton at Mr. Middleton's house and Mr. Middleton had said Mr. Hamilton would no longer need that box (T.Tr.3160); (j) Mr. Rickert - testified that Mr. Middleton made statements that he had killed Mr. Hamilton and Mr. Middleton having possessed SKS guns allegedly used to kill Mr. Hamilton and Stacey Hodge (T.Tr.3171-74); (k) Stallsworth - statements Mr. Middleton allegedly made that he killed Mr. Hamilton and Stacey Hodge, put their bodies in the trunk of a car, and that SKS rifles were used to do commit those acts (T.Tr.3178-82); (l) Exs. 100 and 101 - the death certificates for Mr. Hamilton and Stacey Hodge. These matters were objectionable because they lacked the reliability of prior convictions and turned the penalty phase into a mini-trial on the homicide charges that had not been tried (R.L.F.103-04). Ms. Holden, who was responsible for the issues dealing with Mr. Hamilton and Stacey Hodge (R.Tr.477,503), did not know why she failed to object but thought that she may not have objected because the evidence went to some of the aggravators respondent was attempting to show (R.Tr.503-04).

Claim 8(V)(3)(m)(R.L.F.109-10) alleged counsel was ineffective for failing to object to evidence from Mr. Purdun that: (1) Mr. Middleton asked to buy from Purdun shells for an SKS; (2) Mr. Middleton said Mr. Hamilton was no longer on his hit list because he was no longer a problem; (3) Mr. Middleton told Purdun he could have auto parts belonging to Mr. Hamilton because Mr. Hamilton no longer needed them (T.Tr.3117-20). This evidence was objectionable because it lacked the reliability of a prior conviction and turned Mr. Middleton's trial into a mini-trial on Mr. Middleton's alleged responsibility for Mr. Hamilton's death (R.L.F.109-10). Ms. Holden did not know why she failed to object (R.Tr.509).

Claim 8(V)(3)(q)(R.L.F.112-13) alleged counsel was ineffective for failing to object to evidence from Thomas that he had seen a little black box belonging to Mr. Hamilton at Mr. Middleton's house and Mr. Middleton said the person the box belonged to would not need it anymore (T.Tr.3159-60). This evidence was objectionable because it did not have the reliability of a prior conviction and turned Mr. Middleton's trial into a mini-trial on Mr. Hamilton's death (R.L.F.112-13). Ms. Holden did not know why she failed to object (R.Tr.510-11).

Claim 8(V)(3)(t)(R.L.F.114-15) alleged counsel was ineffective for failing to object to evidence from Mr. Rickert that Mr. Middleton had said that he killed Mr. Hamilton (T.Tr.3174). This evidence was prejudicial because it lacked the reliability of a prior conviction and turned the penalty phase into a mini-trial on Mr. Hamilton's death (R.L.F.114-15). Ms. Holden did not know why she failed to object (R.Tr.512).

Claim 8(V)(3)(v)(R.L.F.115-17) alleged counsel was ineffective for failing to object to testimony from Stallsworth that Mr. Middleton allegedly admitting killing Mr. Hamilton and Stacey Hodge (T.Tr.3179-82). These matters should have been objected to because they lacked the reliability of prior convictions and turned the trial into a mini-trial on the death of Mr. Hamilton and Stacey Hodge (R.L.F.115-17). Ms. Holden did not know why she failed to object (R.Tr.513-14).

Claim 8(V)(3)(aa)(R.L.F.121) alleged counsel was ineffective for failing to object to respondent's cross-examination of Mr. Oglesbee that there was a rumor that Mr. Hamilton was a drug snitch (T.Tr.3278). This evidence should have been objected to because it created an inference that Mr. Middleton killed Mr. Hamilton for that reason (R.L.F.121).

On the 8(U) claims the motion court ruled that counsel exercised reasonable strategy (R.L.F.299). The motion court also found that the proposed objections were without merit or would have only highlighted arguments (R.L.F.299).

On the 8(V)(3)(b) claim the motion court ruled that counsel did not object as a matter of reasonable strategy (R.L.F.300-01). On the 8(V)(3)(aa) claim, the motion court only found that counsel did not recall why counsel failed to object (R.L.F.301).

On the matters that went to evidence of the death of Mr. Hamilton and Stacey Hodge, the motion court found counsel was not ineffective because these matters were admissible and proper for the jury to consider in rendering its punishment decision (R.L.F.301-02).

Prior to trial, counsel Ms. Zembles filed a motion to exclude evidence of nonstatutory aggravators (T.L.F.505-21;R.Tr.503-04). That motion argued that unadjudicated conduct should be excluded because it would inject arbitrariness and would produce a mini trial or a trial within a trial (T.L.F.505-21). The due process clause requires that a criminal charge be proven beyond a reasonable doubt. In re Winship,397U.S.358,361-64(1970). This Court has indicated that respondent cannot employ the penalty phase as "a mini trial" of a defendant's prior convictions. State v. Whitfield,837S.W.2d503,511-12(Mo.banc1992). The Adair case was tried before the Callaway case. See State v. Middleton,995S.W.2d443,452(Mo.banc1999) (Adair - Feb. 24, 1997); Callaway T.Tr.Vol. I at iii (Callaway March 30, 1998).

Reasonably competent counsel under similar circumstances would have objected to all these occurrences where the jury heard that Mr. Middleton was then accused of killing Mr. Hamilton and Stacey Hodge. Competent counsel would have objected because Mr. Middleton had not been convicted and found guilty beyond a reasonable doubt of committing the homicides involving Mr. Hamilton and Stacey Hodge. See Winship. Moreover, reasonably competent counsel would have objected at trial for the noted reasons because counsel had filed a pretrial motion seeking to exclude all references to the events surrounding Mr. Hamilton's and Stacey Hodge's deaths for the same reasons now alleged in the 29.15 case. Further, competent counsel would have objected because these matters injected arbitrariness, Gardner, supra, and resulted in a trial within a trial or a mini trial, Whitfield, supra, on the charges relating to Mr. Hamilton and Stacey Hodge. These matters injected arbitrariness because they urged the

jury to impose death for reasons other than for the individualized sentencing considerations related to Mr. Pinegar's death. In particular, the jury was urged to impose death for the deaths of Mr. Hamilton and Stacey Hodge as well as the death of Mr. Pinegar. Mr. Middleton was prejudiced because there is a reasonable probability he would have been sentenced to life if these matters had been properly objected to by counsel.

B. Matters Outside the Evidence

Claim 8(U)(4)(k)(R.L.F.92-93) alleged that counsel was ineffective for failing to object to the prosecutor's initial penalty argument that included:

> Paranoia is fear; it is fear. And did this defendant have or act paranoid, think paranoid things? Yes. Was he as paranoid as he led these doctors to believe? I doubt it, and I think you should doubt it.

(T.Tr.3758). The argument constituted improper personalization and implied the prosecutor had special knowledge Mr. Middleton's mental health evidence was untrue (R.L.F.92-93). Ms. Zembles agreed that this argument should have been objected to on grounds of improper personalization and amounted to testimony by the prosecutor (R.Tr.608).

Claim 8(U)(4)(n)(R.L.F.93) alleged counsel was ineffective for failing to object to respondent's initial penalty argument that Stacey Hodge was "moaning in agony" before the codefendant fired a shot that killed her (T.Tr.3760). This argument should have been objected to on the grounds there was no evidence to support it, was highly inflammatory,

and implied the prosecutor had knowledge outside the evidence (R.L.F.93). Ms. Zembles testified that if there was no evidence to support the argument, then it constituted speculation that was intended to inflame the passions of the jury to decide the case on something other than the facts and the law (R.Tr.610-11).

On Claim 8(U)(4)(k) and (n), the motion court found that counsel could not recall why she did not object (R.L.F.299). The motion court then stated objections that were alleged should have been made were without merit or would have highlighted the arguments (R.L.F.299).

In State v. Storey,901S.W.2d886,900-01(Mo.banc1995), the prosecutor argued that case was among the most brutal in St. Charles County's history. That argument was improper because it relied on facts outside the record. Id.900-01. Also, the argument was improper because "[a]ssertions of fact not proven amount to unsworn testimony by the prosecutor." Id.901. Because there was no evidence about the brutality of other St. Charles County murders, the argument was improper. Id.901. This Court noted that a prosecutor arguing facts outside the record is highly prejudicial "because the jury is aware of the prosecutor's duty to serve justice, not just win the case." Id.901 (relying on Berger v. United States,295U.S.78,88(1935)). This Court concluded counsel was ineffective for failing to object to this argument and other prosecutorial arguments. Storey,901S.W.2d at 900-03.

Reasonably competent counsel under similar circumstances would have objected to these improper arguments which injected arbitrariness through the prosecutor's injecting his opinion and matters not supported by evidence. See Storey. Mr. Middleton

was prejudiced because there is a reasonable probability that he would have been sentenced to life.

C. Respondent's Questioning - Dr. Lipman

Claim 8(V)(3)(ii)(R.L.F.123-24) alleged counsel was ineffective for failing to object to respondent's cross-examination of Dr. Lipman as to whether he believed Mr. Middleton's denials of having committed the three homicides (T.Tr.3724-25). Dr. Lipman testified he did not believe Mr. Middleton's denials (T.Tr.3724-25). This questioning was objectionable on the grounds that an expert cannot express an opinion on guilt or innocence (R.L.F.123-24). Ms. Zembles testified that she did not know why she failed to object (R.Tr.639-40).

The motion court's findings were limited to noting that counsel could not recall why she failed to object (R.L.F.301). Under portion 8(U) of the motion court's findings, however, it did rule that respondent's questioning of Dr. Lipman was proper and therefore any objection lacked merit (R.L.F.299-300).

An expert is not permitted to express an opinion on the guilt or innocence of the defendant. State v. Candela, 929 S.W.2d 852, 867 (Mo.App., E.D.1996). It is also improper for a witness to comment directly on someone else's truthfulness. State v. Link, 25 S.W.3d 136, 143 (Mo.banc 2000).

Reasonably competent counsel under similar circumstances would have objected to respondent's questioning of Dr. Lipman because an expert is not allowed to express an opinion on a defendant's guilt or innocence and because it is improper for a witness to

comment on someone else's truthfulness. See Candela and Link. Mr. Middleton was prejudiced because there is a reasonable probability he would have been sentenced to life.

D. "Knowingly" - Missing From Aggravator

Claim 8(W)(37) alleged trial counsel were ineffective for failing to object to the mental element of "knowingly" having been omitted from penalty verdict director, Instruction No. 15 (R.L.F.135-36).

Instruction 15, from penalty, provided:

> In determining the punishment to be assessed against the defendant for the murder of Alfred Pinegar, you must first unanimously determine whether one or more of the following statutory aggravating circumstances exists:
>
> 1. Whether the murder of Alfred Pinegar involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find that the defendant killed Alfred Pinegar as a part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of human life.
>
> 2. Whether the defendant murdered Alfred Pinegar for the purpose of concealing or attempting to conceal the defendant's delivery of methamphetamine, a controlled substance.

> A person commits the crime of delivery of a controlled substance when he delivers a controlled substance knowing that the substance is a controlled substance.
>
> You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.
>
> Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility of probation or parole.

(T.L.F.615). The jury found both aggravating circumstances (T.L.F.626).

MAI-CR 325.04.1 requires that the jury find a defendant "knowingly" delivered a controlled substance. That "knowingly" requirement was absent from this verdict director.

The failure of counsel to ensure the jury is properly instructed in penalty has resulted in finding counsel was ineffective. See Deck v. State,2002W.L.356703 *8-*10(Mo.bancFeb.26, 2002) (counsel was ineffective for failing to include mitigation paragraphs or failing to object to their absence). Reasonably competent counsel under similar circumstances would have objected to the absence of "knowingly" from the

verdict director. See Deck. Mr. Middleton was prejudiced because there is a reasonable probability he would have been sentenced to life.

For all the reasons discussed, a new penalty phase is required.

VIII. APPELLATE COUNSEL'S INEFFECTIVENESS

THE MOTION COURT CLEARLY ERRED DENYING THE CLAIMS DIRECT APPEAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE: (A) THE TRIAL COURT ERRED IN DENYING THE MOTION THAT SOUGHT DISMISSAL OR ALTERNATIVELY EXCLUSION OF CERTAIN WITNESSES BECAUSE ATTORNEYS WHO HAD REPRESENTED MR. MIDDLETON ALSO HAD REPRESENTED STATE WITNESSES ON CHARGES AGAINST THEM; AND (B) THE CLAIM INSTRUCTION 15, THE PENALTY VERDICT DIRECTOR, OMITTED THE "KNOWINGLY" MENTAL STATE REQUIREMENT FROM ONE AGGRAVATOR THE JURY FOUND BECAUSE MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV IN THAT REASONABLY COMPETENT APPELLATE COUNSEL WOULD HAVE RAISED THESE CLAIMS AND THERE IS A REASONABLE PROBABILITY MR. MIDDLETON'S CONVICTION OR SENTENCE WOULD HAVE BEEN REVERSED.

The motion court denied Mr. Middleton's claims direct appeal counsel was ineffective for failing to raise as error: (a) the trial court's denial of the motion to dismiss because of prosecutorial misconduct or alternatively to exclude certain witnesses because attorneys who had represented Mr. Middleton also had represented State witnesses on charges against them; and (b) Instruction 15, the penalty verdict director, omitted the

"knowingly" mental state requirement from one aggravator the jury found. Mr. Middleton was denied his rights to effective assistance of appellate counsel, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984).

A defendant is entitled to effective assistance of appellate counsel. Evitts v. Lucey,469U.S.387,396-97(1985). To be entitled to relief on a claim of appellate ineffectiveness the error not raised must have been so substantial as to rise to the level of a manifest injustice or a miscarriage of justice. Moss v. State,10S.W.3d508,514-15(Mo.banc2000). A death sentence constitutes cruel and unusual punishment if that punishment is meted out arbitrarily and capriciously. Furman v. Georgia, 408U.S.238(1972). Both the guilt and penalty phases of a capital trial must satisfy the requirements of the Due Process Clause. Gardner v. Florida,430U.S.349,358(1977).

The motion court found appellate counsel, Ms. Carlyle, raised the issues she believed had merit and did not appeal those she believed lacked merit (R.L.F.303-04). Also, the motion court ruled that this Court's Moss ineffectiveness standards were not met (R.L.F.303-04).

A. Attorney Conflict

Trial counsel filed a motion on February 19, 1997, to dismiss based on prosecutorial misconduct or alternatively to exclude respondent's witnesses, Stallsworth, Spurling, and Henderson (T.L.F.541-49). The motion's denial was included as an allegation of error in the motion for new trial (T.L.F.654-55). The relief sought was premised on attorneys from the Chillicothe Public Defender's Office having represented both Mr. Middleton and these other named individuals who respondent intended to call as witnesses against Mr. Middleton (T.L.F.541-49). At Mr. Middleton's Adair trial, Stallsworth, but not the other two, testified against Mr. Middleton.

The motion court noted that Mr. Middleton was arrested on June 28, 1995 (T.L.F. 541-42). On June 28, 1995, Chillicothe Assistant Public Defender Wallace approved Mr. Middleton's application for services (T.L.F.542). On June 29, 1995, Mr. Wallace and another Chillicothe Assistant Public Defender, Mr. Stephens, interviewed Mr. Middleton (T.L.F.542). Chillicothe District Public Defender, Mr. Miller, entered his appearance in Mr. Middleton's case (T.L.F.542). On July 27, 1995, Mr. Miller moved to withdraw and a docket entry was made that same day authorizing withdrawal (T.L.F.542). However, the Public Defender's Capital Division did not file an entry of appearance for Mr. Middleton until September 19, 1995 (T.L.F.542).

Henderson, represented by Mr. Miller, appeared on Harrison County charges for the first time on June 13, 1995 (T.L.F.542-43). On approximately September 18, 1995, Henderson provided Mr. Miller with a statement of alleged admissions Mr. Middleton made (T.L.F.543).

In June, 1995, Mr. Wallace represented Stallsworth (T.L.F.543). On September 19, 1995, Stallsworth furnished law enforcement with alleged admissions Mr. Middleton made (T.L.F.543).

In August 1995, Spurling provided statements implicating Mr. Middleton in the deaths of Mr. Hamilton and Stacey Hodge (T.L.F.544). Subsequently, Spurling was charged with crimes in Harrison County and represented by Mr. Stephens (T.L.F.544). Mr. Stephens represented Spurling until February 14, 1997, when concerns were raised about Mr. Stephens' conflict (T.L.F.544).

On February 21, 1997, the trial court heard argument (T.Tr.899-919). Mr. Miller represented Henderson at the same time he represented Mr. Middleton (T.Tr.901). Mr. Miller helped Henderson prepare a September, 1995 statement that incriminated Mr. Middleton (T.Tr.901). Henderson gave his statement in hopes of obtaining favorable treatment on his own charges (T.Tr.901). Mr. Wallace brought Stallsworth to the State as someone who could testify against Mr. Middleton (T.Tr.902).

The trial court judicially noticed that Mr. Miller entered his appearance on behalf of Mr. Middleton on June 29, 1995, moved to withdraw on July 27, 1995, and was permitted to withdraw on July 27, 1995 (T.Tr.914-16). The trial court also judicially noticed that counsel from the Public Defender Capital Trial Division did not enter until September 19, 1995 (T.Tr.914-16).

Respondent conceded that the three Chillicothe Public Defender attorneys had violated ethical rules governing representing someone who has an adverse interest to a former client (T.Tr.909). The trial court found that Mr. Miller violated his "fiduciary

duty" to Mr. Middleton through securing from another client an incriminating statement against Mr. Middleton (T.Tr.917-18). After hearing arguments, the trial court denied the motion on February 21, 1997 (T.Tr.919).

On February 27 and 28, 1997, the trial court took up the motion again and heard evidence. In the Summer of 1995, the Chillicothe Office included Mr. Miller, Mr. Stephens, and Mr. Wallace (T.Tr.1832). Mr. Wallace and Mr. Stephens met with Mr. Middleton on June 28, 1995 (T.Tr.1832-33). On June 29, 1995, Mr. Miller's office entered its appearance on behalf of Mr. Middleton (T.Tr.1833). Mr. Miller met with Mr. Middleton on June 29, 1995 following his initial court appearance (T.Tr.1833). Mr. Stephens met with Mr. Middleton on June 30, 1995 (T.Tr.1836). Mr. Stephens, along with Mr. Wallace, met with Mr. Middleton on June 29, 1995 or June 30, 1995 (T.Tr.1872-73). Mr. Stephens met with Mr. Middleton on at least one more occasion and possibly as many as three or four more times (T.Tr.1873). Mr. Miller filed a motion to withdraw on July 27, 1995 (T.Tr.1834-35).

Mr. Miller's representation of Henderson began on June 15, 1995 (T.Tr.1837). Mr. Wallace obtained Henderson's statement incriminating Mr. Middleton (T.Tr.1839-40). Mr. Miller helped Henderson to edit it and Mr. Miller turned the statement over to the State while seeking favorable treatment for Henderson (T.Tr.1839-44).

After hearing additional argument (T.Tr.1907-15), the trial court denied the motion again (T.Tr.1915-16).

The Chillicothe Office must have continued to represent Mr. Middleton after leave was granted to withdraw on July 27, 1995 until a representative of the Capital Division

entered an appearance on September 19, 1995; otherwise, Mr. Middleton would not have been represented by any attorney (See T.Tr.914-16 argument). On that same day, while Mr. Wallace represented Stallsworth, Stallsworth furnished law enforcement with inculpatory statements Mr. Middleton allegedly made (T.L.F.543;T.Tr.902). Moreover, on September 18, 1995 while Mr. Miller still represented Mr. Middleton, Henderson furnished a statement that incriminated Mr. Middleton.

Appellate counsel did not brief this issue because she did not believe it had merit (R.Tr.173-74).

A defendant's federal constitutional right to counsel is violated when an attorney represents clients with conflicting interests. State v. Risinger,546S.W.2d563,565(Mo. App.,SpfldDist.1977). When such a conflict is established, a showing of actual prejudice is not required. Id.565.

Stallsworth testified in guilt that Mr. Middleton admitted killing Mr. Pinegar (T.Tr.2871-74). In penalty, Stallsworth testified Mr. Middleton admitted killing Mr. Hamilton and Stacey Hodge (T.Tr.3178-82).

Reasonably competent appellate counsel under similar circumstances would have raised as error the trial court's denial of the motion to exclude testimony from Stallsworth. See Risinger. Reasonably competent appellate counsel would have presented the conflict of Mr. Wallace's representation of both Mr. Middleton and Stallsworth at the time Stallsworth furnished the State incriminating evidence as a grounds for excluding Stallsworth. Mr. Middleton was prejudiced because there is a

reasonable probability that his conviction or at minimum his sentence would have been reversed on appeal had appellate counsel presented this matter.

B. Verdict Director "Knowingly" Missing

As discussed in Point VII, the penalty verdict director lacked the mental element of "knowingly" and the jury found the aggravator that was missing this requirement (T.L.F.626). Claim 8(W)(37) alleged appellate counsel was ineffective for failing to raise this matter on appeal (R.L.F.135-36). Appellate counsel testified she did not realize that "knowingly" was missing from the verdict director, and therefore, did not consider presenting this issue on appeal (R.Tr.190-91).

In Roe v. Delo,160F.3d416,418-20(8thCir.1998), the Eighth Circuit found appellate counsel was ineffective for failing to raise as a matter of plain error that the verdict director misstated the required mental state for first degree murder. Reasonably competent appellate counsel under similar circumstances would have raised the failure to include the required mental element of "knowingly" in Instruction No. 15. See Roe. Mr. Middleton was prejudiced because there is a reasonable probability his death sentence would have been reversed.

A new trial or at minimum a new penalty phase is required.

IX. CLEMENCY ARBITRARINESS

THE MOTION COURT CLEARLY ERRED DENYING MR. MIDDLETON'S CLAIM MISSOURI'S CLEMENCY PROCESS VIOLATES HIS RIGHTS TO DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND EQUAL PROTECTION, U.S. CONST. AMENDS. VIII AND XIV, IN THAT THE PROCESS IS WHOLLY ARBITRARY AND CAPRICIOUS AS THE CLEMENCY OF TRIPLE MURDERER MEASE EVIDENCES. MEASE WAS GRANTED CLEMENCY NOT ON THE MERITS OF HIS CASE, BUT BECAUSE OF THE POPE'S APPEAL ON RELIGIOUS GROUNDS.

The motion court denied the claim that Missouri's clemency process is arbitrary and capricious. That ruling should be reversed because Missouri's clemency process violates Mr. Middleton's rights to due process, freedom from cruel and unusual punishment, and equal protection. U.S. Const. Amends. VIII and XIV. Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993).

The pleadings alleged Mr. Middleton's rights to due process, freedom from cruel and unusual punishment, and equal protection were violated because of the circumstances surrounding Governor Carnahan commuting Darrell Mease's death sentence (R.L.F.62-64,158). In particular, Governor Carnahan commuted Mease's death sentence because the Pope was in Missouri when Mease was scheduled to be executed and he personally appealed to Governor Carnahan to commute Mease's death sentence (R.L.F.62-64).

The motion court denied this claim on the grounds it is not ripe and clemency decisions are committed to the Governor's discretion (R.L.F.295-96).

The Eighth and Fourteenth Amendments require heightened reliability in assessing death. Woodson v. North Carolina,428U.S.280,305(1976). It is of vital importance that a death sentence be, and appear to be, based on reason rather than caprice or emotion. Gardner v. Florida,430U.S.349,357-58(1977). Discretion given to sentencers in death penalty cases must be suitably directed, limited and channeled to minimize the risk of wholly arbitrary and capricious action. Gregg v. Georgia,428U.S.153,189(1976). While clemency procedures are largely committed to the discretion of the Executive Branch, the Due Process Clause provides some constitutional safeguard to wholly arbitrary and capricious action. Ohio Adult Parole Authority v. Woodard,523U.S.272,288-90(1998)(O'Connor, J., concurring). Due Process requires that the procedures used in rendering a clemency decision "will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin." Duvall v. Keating,162F.3d1058,1061(10thCir.), cert. denied,525U.S.1061(1998), citing Woodard,523U.S. at 289(O'Connor, J., concurring). The use of criteria such as religion in deciding whether to grant or deny clemency violates the commands of the Equal Protection Clause. Woodard,523U.S. at 292(Stevens, J., concurring and dissenting).

Darrell Mease was convicted and sentenced to death for acts resulting in a triple homicide. State v. Mease,842S.W.2d98,102(Mo.banc1992). Governor Carnahan commuted Mease's death sentence to life. The commutation (Ex.29) states:

COMMUTATION OF SENTENCE

I, MEL CARNAHAN, GOVERNOR OF THE STATE OF MISSOURI, have had presented personally and directly to me by Pope John Paul II, a request for mercy in the case of Darrell Mease who was convicted of First Degree Murder on April 25, 1990 and sentenced to death on June 1, 1990. After careful consideration of the extraordinary circumstance of the Pontiff's direct and personal appeal for mercy and because of the deep and abiding respect I have for him and all that he represents, I hereby grant to Darrell Mease a commutation of the above sentence in the following respect: This commutation eliminates from the sentence the penalty of death and further causes Darrell Mease to remain incarcerated for the remainder of his life without the possibility of parole.

The grant of clemency to Mease establishes the arbitrary and capricious nature of Missouri's clemency process. The Governor commuted Mease's death sentence because of the Pope's personal appeal, not because of any specific factors in Mease's case that warranted a punishment reduction. While Mr. Middleton does not presently have an execution date and has not been denied clemency, he is required to present his constitutional claims challenging this State's clemency proceedings to this State's courts. For that reason, the claim is ripe and relief should be ordered. Because Missouri's clemency proceedings are wholly arbitrary and capricious, this Court should order Mr. Middleton be sentenced to life without parole.

X. JURORS DO NOT UNDERSTAND THE PENALTY INSTRUCTIONS

THE MOTION COURT CLEARLY ERRED IN REJECTING THE CLAIM THAT MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO PRESENT EVIDENCE TO CHALLENGE THE PENALTY PHASE JURY INSTRUCTIONS ON THE GROUNDS THAT THEY FAIL TO PROPERLY GUIDE THE JURY AS WELL AS REJECTING HIS CLAIM THAT HIS RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JURY, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED WHEN THOSE INSTRUCTIONS WERE GIVEN BECAUSE MR. MIDDLETON WAS DENIED THOSE RIGHTS, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT THE EVIDENCE PRESENTED ESTABLISHED JURORS DO NOT UNDERSTAND AND COUNSEL UNREASONABLY FAILED TO PRESENT EVIDENCE TO SUPPORT A CHALLENGE AND MR. MIDDLETON WAS PREJUDICED BECAUSE THE LESS JURORS UNDERSTAND, THE MORE LIKELY THEY ARE TO IMPOSE DEATH.

The penalty phase instructions failed to properly guide the jury. Yet counsel did not challenge them with any supporting evidence. Mr. Middleton was prejudiced because jurors who do not understand those instructions are more likely to impose death. Mr. Middleton was denied his rights to effective assistance of counsel, due process, a fair

trial, a fair and impartial jury, and to be free from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

The pleadings alleged (Claim 8(Q)) counsel was ineffective for failing to object to the Missouri form penalty phase instructions and to present evidence of the studies Dr. Richard Wiener has conducted of those penalty phase instructions (R.L.F.64-65,158-60). Besides alleging that counsel was ineffective, the pleadings alleged that Mr. Middleton's substantive rights to due process, a fair trial, a fair and impartial jury, and to be free from cruel and unusual punishment, U.S. Const. Amends. V, VI, VIII, and XIV, were violated (R.L.F.64-65,158-60). Evidence would show that jurors do not understand the penalty phase instructions and that such jurors are more likely to impose death (R.L.F.64-65,158-60). The penalty phase instructions precluded the jury from giving mitigating circumstance evidence the consideration that is required under such decisions as Godfrey v. Georgia,446U.S.420(1980); Lockett v. Ohio,438U.S.586(1978); and Mills v. Maryland,486U.S.367(1988) (R.L.F.159).

Review is for clear error. Barry v. State,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. Strickland v. Washington,466U.S.668,687(1984).

Sentencing someone to death is cruel and unusual punishment if the punishment is meted out arbitrarily and capriciously. Furman v. Georgia,408U.S.238(1972). The trial and sentencing phases of a capital case must satisfy the requirements of the Due Process Clause. Gardner v. Florida,430U.S.349,358(1977).

Prior to trial, counsel filed a motion challenging the MAI penalty phase instructions (R.Tr.376,578-80). No evidence, however, was presented in support of the challenges that were made (R.Tr.376-77,578-80).

Ms. Zembles was uncertain whether she was aware of the result of Dr. Wiener's study when Mr. Middleton's case was tried in 1997 (R.Tr.578-80). Although Ms. Zembles did not consider the motion that was filed challenging the penalty instructions to be self-proving, no evidence was presented to support that motion (R.Tr.579-80). Mr. Slusher believed he was aware of Dr. Wiener's study before Mr. Middleton's case was tried (R.Tr.376-77). He did not know why Dr. Wiener's study was not presented as evidence in support of establishing the invalidity of the Missouri penalty instructions (R.Tr.377). Mr. Slusher believed it would have been better to have evidence of Dr. Wiener's findings to support the motion that was filed (R.Tr.377).

The motion court ruled that Dr. Wiener's findings and conclusions failed to establish the penalty phase instructions were misleading or confusing (R.L.F.296). The motion court also relied on this Court's published criticisms of Dr. Wiener's 1994 study (R.L.F.296). Dr. Wiener's most recent study's findings done for the National Science Foundation were deemed irrelevant to the claims counsel was ineffective (R.L.F.296).

Dr. Wiener studied and analyzed the MAI form penalty phase instructions and the specific instructions that were given in Mr. Middleton's case (R.Tr.267-73). He studied jurors' understanding of the Missouri penalty phase instructions (R.Tr.267-73). That study was done in conjunction with the Missouri Public Defender System and made available to the Missouri Public Defender on February 1, 1994 (R.Tr.215-16). That study

found that jurors overall do not understand the Missouri penalty phase instructions and those jurors who do not understand the instructions are more likely to impose death than those who comprehend the instructions (R.Tr.267-73). Professor Wiener also found that it was possible to improve juror comprehension through rewriting the penalty phase instructions in language that lay people understand (R.Tr.267-73). The study was published as Richard Wiener, Comprehensibility of Approved Jury Instructions in Capital Murder Cases, Journal of Applied Psychology, 455-67(1995)(R.Tr.269-70)(Ex.69).

In United States ex rel. Free v. Peters,806F.Supp.705(N.D.Ill.1992),rev'd.12F.3d 700(7thCir.1993) a study of the Illinois penalty phase instructions was conducted and concluded that jurors did not understand those instructions. The Seventh Circuit reversed the granting of relief to the petitioner based on its view that the study was deficient in certain respects. Professor Wiener's study was free of the problems that the Seventh Circuit had identified as to the study in United States ex rel. Free v. Peters (R.Tr.273-74).

Based on Professor Wiener's review of the penalty phase jury instructions in Mr. Middleton's case, he concluded, to a reasonable degree of scientific certainty, that juror comprehension would have been no better than found in his study (R.Tr.273).

Dr. Wiener also addressed the criticisms this Court directed at his study in State v. Deck,994S.W.2d527,542-43(Mo.banc1999). In Deck, this Court criticized Dr. Wiener's study because those who participated in his study were not jurors who deliberated on the facts of Deck's case. Id.542-43. Dr. Wiener testified that this Court's criticism is not a valid one because researchers who have studied the same issues in other states have consistently found that penalty instructions presently in use are difficult for jurors to

comprehend and generate substantial confusion (R.Tr.272-73). Dr. Wiener noted that the research literature in the field has shown that deliberation does not improve jurors' understanding of penalty instructions (R.Tr.274-75). Dr. Wiener recently completed a new study that was funded by the National Science Foundation (R.Tr.275). That study had 711 death qualified Missouri residents participate (R.Tr.275). In Dr. Wiener's most recent study, these individuals watched a condensed videotape reproduction from a recently tried Missouri death penalty case (R.Tr.275-76). The study participants deliberated as jurors (R.Tr.276). The study found that deliberation had little impact on jurors' comprehension of penalty instructions (R.Tr.276-77). This most recent study came to the same conclusion as the 1994 study - there is low comprehension of the Missouri penalty instructions (R.Tr.276-77). Once again Dr. Wiener found that for those juries for which comprehension was low there was an increased likelihood the death penalty would be imposed (R.Tr.277). Again, Dr. Wiener found comprehension would be improved through simplifying the instructions' language (R.Tr.278). Dr. Wiener's National Science Foundation study was accepted for publication in the Journal of Psychology, Public Policy and Law (R.Tr.279).

Professor Wiener was not contacted, prior to Mr. Middleton's trial, by his attorneys and he was willing and able to testify about his study's findings (R.Tr.279-80).

The motion court's findings are clearly erroneous. Dr. Wiener's 1994 study and more recent National Science Foundation study both concluded there is poor juror comprehension and that poor juror comprehension increases the likelihood of a death verdict (R.Tr.267-73,276-77). This Court's prior criticisms simply are not scientifically

valid for the reasons Dr. Wiener explained at the hearing. Dr. Wiener's replication of his 1994 study findings in his later National Science Foundation study is relevant to counsel's ineffectiveness because the later study arrived at the same conclusions and disproved the criticisms this Court had made of the 1994 study. Thus, the later study establishes that counsel's failure to rely on the 1994 study was unreasonable.

Reasonably competent counsel who filed a motion challenging the penalty phase instructions and who was aware of Professor Wiener's study would have presented evidence of that study to support their motion. Mr. Middleton was prejudiced because the jurors did not understand the penalty phase instructions submitted in his case. Not only was Mr. Middleton denied effective assistance of counsel, but also he was denied his rights to due process, a fair trial, a fair and impartial jury, and to be free from cruel and unusual punishment. This Court should order a new penalty phase.

CONLCUSION

Mr. Middleton requests: Points I, II, V, VIII, a new trial; Points II, III, IV, VI, VII, VIII, X, a new penalty hearing; Point IX impose life without parole.

Respectfully submitted,

_____

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Certificate of Compliance

I, William J. Swift, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains _____ words, which does not exceed the 31,000 words allowed for an appellant's brief.

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William J. Swift

Certificate of Service

I, William J. Swift, hereby certify that two true and correct copies of the attached brief and floppy disk(s) containing a copy of this brief were hand delivered, on the ____ day of _____ 2002, to the Office of the Attorney General, 4th Floor of the Broadway Building, Jefferson City, Missouri 65101.

_____

William J. Swift

APPENDIX

INDEX TO APPENDIX TO BRIEF

MIDDLETON V. STATE, S. CT. NO. 84005