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 REPLY BRIEF

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SUBSTANTIAL PENITENTIARY TIME OF TEN TO TWENTY YEARS WHEN THAT WAS NOT THE CASE.

Clay v. Bowersox,No.98-8006-CV-W-1 (W.D. Mo. May 16, 2002 Document No. 63);

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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 BECAUSE MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV IN THAT THE REASON COUNSEL SHOULD HAVE STRUCK MS. HOLT FOR CAUSE WAS THAT SHE TESTIFIED THAT THERE ARE TRULY NOT AS MANY MENTAL HEALTH REASONS THAT SHOULD MITIGATE PUNISHMENT AS THE LAW ALLOWS SUCH THAT WHAT MS. ADAMS AND MS. HOLT AGREED UPON DOES NOT RELATE TO WHY MS. HOLT SHOULD HAVE BEEN STRUCK BY COUNSEL AND THE FACT COUNSEL WAS "SURPRISED" HE HAD NOT SOUGHT TO STRIKE MS. HOLT ESTABLISHES IT WAS NOT COUNSEL'S STRATEGY TO LEAVE MS. HOLT ON THE JURY.

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

State v. Clark,981S.W.2d143(Mo.banc1998); and

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III. FAMILY AND EMPLOYER MITIGATION

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL EMPLOYER AND FAMILY MITIGATION WITNESSES CHARLES WEBB, VERN WEBB, VIRGINIA WEBB, RUBY SMITH, SYLVIA PURDIN, AND GLENN WILLIAMS BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT ALL OF THIS MITIGATING EVIDENCE THAT SHOULD HAVE BEEN PRESENTED WAS DIFFERENT FROM WHAT COUNSEL PRESENTED AND THERE IS A REASONABLE PROBABILITY THAT HAD THIS EVIDENCE BEEN PRESENTED MR. MIDDLETON WOULD HAVE BEEN SENTENCED TO LIFE.

Jermyn v. Horn,1998W.L.754567, aff'd., Jermyn v. Horn,266F.3d257 (3rdCir.2001);

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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 TESTIFY THAT AS A RESULT OF DRUG ABUSE MR. MIDDLETON WAS SUFFERING PSYCHOSIS AT THE TIME OF THE ALLEGED ACTS BECAUSE MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV IN THAT THEIR TESTIMONY WAS ADMISSIBLE BECAUSE § 552.010 AUTHORIZES THE INTRODUCTION OF DRUG ABUSE ACCOMPANIED BY PSYCHOSIS EVIDENCE TO ESTABLISH A MENTAL DISEASE OR DEFECT AND THE ARGUMENTS THAT COUNSEL PRESENTED INCONSISTENT THEORIES FROM GUILT TO PENALTY PHASE IS NOT A NEW CLAIM ON APPEAL, BUT INSTEAD ESTABLISHES WHY COUNSEL DID NOT ACT REASONABLY AND MR. MIDDLETON WAS PREJUDICED BY COUNSEL'S FAILURE TO CALL THESE WITNESSES IN GUILT PHASE.

State v. Roberts,948S.W.2d577(Mo.banc1997);

State v. Williams,812S.W.2d518(Mo.App.,E.D.1991);

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

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

§ 552.010; and

§ 562.076.

VIII. APPELLATE COUNSEL'S INEFFECTIVENESS

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

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

ARGUMENT

I. THOMAS' UNDISCLOSED DEAL

THE MOTION COURT CLEARLY ERRED DENYING THE CLAIM RESPONDENT FAILED TO DISCLOSE THE DEAL THERE WAS AN UNDERSTANDING THOMAS WOULD BE TREATED LENIENTLY AND THAT UNDERSTANDING WAS NOT DISCLOSED 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 THE DOCKET ENTRY THAT RESPONDENT WAS DELAYING PROSECUTION DUE TO THOMAS' PARTICIPATION AS A WITNESS IN COMPANION PROCEEDINGS, THE HARRISON COUNTY PROSECUTOR'S REFUSAL TO BE FORTHCOMING ABOUT WHY THOMAS' CASE HAD BEEN DELAYED, AND THE ESPECIALLY LENIENT TREATMENT THOMAS RECEIVED LESS THAN ONE MONTH AFTER HIS TESTIMONY IN MR. MIDDLETON'S SECOND CASE ALL ESTABLISH THERE WAS AN UNDERSTANDING THOMAS WOULD BE TREATED LENIENTLY AND THAT UNDERSTANDING WAS NOT DISCLOSED. FURTHER, MR. MIDDLETON WAS DENIED ALL THE NOTED RIGHTS AND PREJUDICED BY THE PROSECUTOR CONSCIOUSLY MISLEADING THE JURY IN ARGUMENT TO BELIEVE THE STATE WAS COMMITTED TO THOMAS SERVING

SUBSTANTIAL PENITENTIARY TIME OF TEN TO TWENTY YEARS WHEN THAT WAS NOT THE CASE.

This Court should reverse Mr. Middleton's convictions because respondent failed to disclose its understanding that John Thomas would be treated with leniency if he testified favorably for respondent against Mr. Middleton in his Callaway and Adair County cases. Mr. Middleton was also prejudiced because the prosecutor consciously misled the jury in argument to believe the State was committed to Thomas serving substantial penitentiary time of ten to twenty years when that was not the case. The nondisclosure and argument 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.

The February 27, 1998 docket entry "state advises delay in prosecution due to Ä's participation as witness in companion proceedings" see App.Br.35, when viewed in conjunction with other matters, establishes there was the kind of non-disclosure here that required reversal in Commonwealth v. Strong,761A.2d1167(Pa.2000). See App.Br.39-41 discussion. Thomas testified that even though he was charged in 1995 his case had never gone to a preliminary hearing (T.Tr.2355). Thomas also 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) involving Mr. Middleton. Thomas also testified it was "their decision" to allow his case to sit around even though he was charged in June of 1995 (T.Tr.2356).

Unlike Mr. Middleton's Callaway County Rule 29.15 action, the Adair County 29.15 case included testimony from Ms. Holden that when she asked 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). The prosecutor's refusal to reveal why Thomas' case was allowed to remain in Associate Circuit for as long as it did establishes, along with the other matters discussed, there was an understanding that Thomas could expect to be treated with leniency if the State believed his performance furthered the State's case against Mr. Middleton. The existence of this fact sets this case apart from this Court's recent decision in Mr. Middleton's Callaway County case. See Middleton v. State,No. SC 83909 slip op. at 4-6 (Mo banc June 11, 2002).

The prosecutor's argument in the present 29.15 claim also establishes the prejudice to Mr. Middleton. That argument included the following:

> 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.

(T.Tr.2910) (emphasis added).

In Clay v. Bowersox,No.98-8006-CV-W-1 slip op. at 1-10 (W.D. Mo. May 16, 2002 Document No. 63) (opinion of Whipple, J.) Repl.Br. Appendix A1-10, the District Court found that the prosecutor's argument was "[c]losely related" to the Brady violation that occurred for failing to disclose an understanding of leniency for a State's witness. In Clay, the State had presented evidence that it would recommend that its witness be sentenced to ten years imprisonment. Clay, slip op. at 10; Repl.Br.App. at A 10. During closing argument, the prosecution told the jury that the State's witness would be sentenced to ten years. Id. The actual agreement was more flexible and allowed the witness to spend no time in jail. Id. Because of these differences, the District Court found there was a violation under Giglio v. U.S.,405U.S.150(1972). Id. See App. Br. 37-42.

The arguments made in Mr. Middleton's case closely track those made in Clay. Here, the jury was told that Thomas was "facing 10 to 20 years" when in fact he received probation. Like in Clay, the jury was led to believe the State's witness was going to be subjected to substantial penitentiary time, but in fact that witness served no prison time. Mr. Middleton, like Clay, has established a Giglio violation that is closely related to his Brady claim. See App. Br. 37-42 for discussion of claim under Brady v. Maryland, 373U.S.83(1963) and Giglio v. U.S., supra.

The respondent argues that there was no Rule 29.15 evidence of "discussions with Thomas" about favorable treatment for him. Resp. Br. 20-21. In Strong, the Pennsylvania Court relied on "circumstantial evidence of an understanding" to find a Brady violation. See Strong,761 A.2d at 1174. All of the matters here, including the

prosecutor's refusal to be forthcoming about why Thomas' case was allowed to remain in Associate Circuit Court for as along as it did are sufficient circumstantial evidence of an understanding to establish a Brady violation here.

In challenging the docket entry of February 27, 1998, respondent asserts there was no evidence that the "companion proceedings" were those in Mr. Middleton's case (Resp.Br. at 22). Trial in this, the Adair case, had occurred nearly one year before. See App.Br. at 35. Thomas testified in both the Adair trial and the Callaway case that he had a single pending drug charge (Adair T.Tr.2354-56; Callaway T.Tr.556,559,560-64,573-74). The only "companion proceedings" that existed at the time of the February 27, 1998 docket entry was Mr. Middleton's Callaway case.

Respondent also asserts that even if the "companion proceedings" referred to Mr. Middleton's case that a delay followed by Thomas' plea does not prove there was deal (Resp.Br. at 22). In the same vein, respondent contends that there was no deal because both Thomas and the prosecutor said there was no deal (Resp.Br. at 22). Because no one is willing to admit there was an understanding for leniency, this Court should look to the circumstances surrounding Thomas' deal, and conclude there is sufficient circumstantial evidence to find there was an understanding that Thomas would be treated leniently if his performance satisfied the State.

According to respondent, even if there was a deal, Mr. Middleton failed to establish under Hayes v. State,711S.W.2d 876,879(Mo.banc1986) that Thomas' testimony was "material" (Resp.Br. at 22-24). In making this argument, respondent relies on alleged admissions Mr. Middleton made to Douglas Stallsworth (Resp.Br. at 23-24).

Stallsworth's testimony had serious credibility problems. When Mr. Middleton allegedly made admissions to Stallsworth, Stallsworth was being held in the Harrison County Jail 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 being held in the State mental hospital in St. Joseph (T.Tr.2878). Thomas' testimony was material because Stallsworth was not a credible witness.

Respondent also points to testimony of Richard Purdun to argue that Thomas' testimony was not "material" (Resp.Br. at 23-24). Purdun, however, was an acquaintance of all the individuals who were arrested on drug charges on June 10, 1995 for possession and sale of methamphetamine in Harrison County (T.Tr.2028). See State v. Middleton, 995S.W.2d443,451(Mo.banc1999). That association with all these individuals created its own credibility problems for Purdun's testimony, and therefore, Thomas' testimony was material to respondent's case.

Respondent argues that Thomas' testimony was not material because a Wal-Mart employee identified Mr. Middleton as someone he sold ammunition to during the afternoon Mr. Pinegar disappeared (Resp.Br. at 24). The Wal-Mart employee's testimony, however, did no more than identify Mr. Middleton as someone who purchased gun ammunition.

There was an undisclosed deal to treat Thomas with leniency. Respondent misled the jury to believe that Thomas was "facing 10 to 20 years" imprisonment, when in fact Thomas received probation. Thomas' testimony was critical to respondent's case. For

these reasons, it was essential that the jury hear there was an understanding Thomas would be treated with leniency.

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 BECAUSE MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV IN THAT THE REASON COUNSEL SHOULD HAVE STRUCK MS. HOLT FOR CAUSE WAS THAT SHE TESTIFIED THAT THERE ARE TRULY NOT AS MANY MENTAL HEALTH REASONS THAT SHOULD MITIGATE PUNISHMENT AS THE LAW ALLOWS SUCH THAT WHAT MS. ADAMS AND MS. HOLT AGREED UPON DOES NOT RELATE TO WHY MS. HOLT SHOULD HAVE BEEN STRUCK BY COUNSEL AND THE FACT COUNSEL WAS "SURPRISED" HE HAD NOT SOUGHT TO STRIKE MS. HOLT ESTABLISHES IT WAS NOT COUNSEL'S STRATEGY TO LEAVE MS. HOLT ON THE JURY.

Counsel should have struck juror Ms. Holt because she testified that there are truly not as many mental health reasons that should mitigate punishment as the law allows. 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.

Respondent's argument misconstrues the substance of Mr. Middleton's claim. Respondent casts Mr. Middleton's claim as somehow premised on what matters juror Ms. Holt and Ms. Adams agreed upon as to what would be mitigating evidence for them (Resp.Br. at 30-32). The complete 29.15 examination of counsel Slusher on the issue shows the following:

[MR. CARTER]: Mr. Slusher, please refer to page 1541. For the record, I will note that this is voir dire of Venireperson Holt.

A. Okay.

MR. CARTER: If I may approach the witness, Your Honor?

THE COURT: Yes, you may.

Q. Do you see where - - - First of all, let me refer you to the juror just before that, Ms. Adams?

A. Yes.

Q. Do you see where Ms. Adams refers to stating the mitigating circumstances such as someone's background "would have not a lot of weight in my consideration"?

A. Yes, I see that on page 1541.

Q. Referring you to Ms. Holt's statement beginning on page 1553 and continuing on to 1555. I'll tell you this is during your voir dire on Ms. Holt.

A. Okay.

Q. Do you see where, beginning at page 1553 she states - - - You ask, “Ms. Holt, do you have an opinion about the death penalty?” And she answers, “I think it is appropriate in certain circumstances.” Do you see that?

A. Yes, I do.

MR. CARTER: If I may approach the witness again, Your Honor?

THE COURT: Yes, you may.

Q. Starting at page 1553 and continuing on to 1555 these are the questions and responses of Ms. Holt. Would you read those, please?

A. Do you want me to read those out loud, or just to myself?

Q. Just read them to yourself, please.

A. Yes, I’ve read to the top of page 1556.

Q. Do you see where Ms. Holt refers to Ms. Adams, as agreeing with her opinion?

A. Yes, I do.

Q. Do you see also where Ms. Holt states, "There are certain situations, certain circumstances that don't warrant the death penalty and I think there are some that do"?

A. Yes.

Q. Do you also see where Ms. Holt, when referring to the mitigating circumstances, states that she thinks that sometimes lawyers find ways to manipulate the system?

A. Yes, sir.

Q. And also she refers to - - refers to - - mitigating evidence that, "Yes, there are some. There are not as many as what we allow, I think."?

A. Yes, I see that.

Q. Do you also see where Ms. Holt qualifies her answer about whether she would consider the mitigation issue of drug and alcohol abuse? She states that, "I can't say for sure. I can't say - - I can say 'yes' but I just don't know."?

A. I see that response, yes.

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.

Q. Mr. Slusher, I think we're done with the voir dire questions.

I'm going to switch over to another topic.

(R.Tr.441-43) (emphasis added).

At the 29.15 hearing, counsel Slusher testified he reviewed Juror Ms. Holt's testimony from the relevant pages 1553-56 of the trial transcript. Contrary to respondent's representation, counsel Slusher did have the "full context" of the voir dire of Ms. Holt (Resp.Br. at 32). Mr. Slusher testified that he was "surprised" that he had not acted to remove Ms. Holt from the jury. That testimony clearly established it was not his strategy to leave Ms. Holt on the jury. Ms. Adams' relevance to this claim is limited to demonstrating as additional evidence it was not counsel's strategy to leave someone who displayed similar views to hers about mitigating evidence, Ms. Holt, on the jury. In particular, counsel moved to disqualify for cause Ms. Adams based on such considerations (T.Tr.1574), but failed to move to strike Ms. Holt.

This is a case where counsel failed to strike a juror who could not fairly serve and which thereby deprived Mr. Middleton of effective assistance of counsel. See Presley v. State,750S.W.2d602,606-09(Mo.App.,S.D.1988). Juror Holt testified "There are not as many as what we allow, I think." See App.Br. at 46 (quoting T.Tr. 1555). That statement in its complete context, see App.Br.44-48, reflects that Juror Holt believed that there are truly not as many mental health reasons that should mitigate punishment as the law authorizes. That response indicates that Ms. Holt was unable to follow the law. This Court has indicated that "[a]ny veniremember who cannot be impartial is unfit to serve, whether the partiality is due to an aversion to the death penalty, an excessive zeal for

death, or any other improper predisposition." State v. Clark,981S.W.2d143,148 (Mo.banc1998). Juror Holt stated that she believed that the law allowed too many mental health factors to be taken into account for mitigating punishment. Her testimony established that she could not follow the law as to mitigating factors, and therefore, could not fairly serve. Thus, Mr. Middleton was prejudiced by Ms. Holt serving on the jury. Counsel was ineffective for failing to strike her. See Presley.

Mr. Middleton's counsel relied on a substance abuse mitigation theory. Ms. Holt testified that she did not know if she could consider this type of evidence as mitigating and she said there should not be as many mental health mitigating circumstances as the law allows. See App.Br. at 45-47 (quoting Ms. Holt's testimony). Reasonably competent counsel under similar circumstances who were relying on substance abuse mental health evidence as mitigating would have moved for cause or peremptorily struck Ms. Holt. See Strickland v. Washington,466U.S.668,687(1984). Since Ms. Holt could not consider Mr. Middleton's mitigating evidence, he was prejudiced. Moreover, because a juror who could not fairly serve was allowed to serve prejudice is presumed. See Presley v. State,750S.W.2d602,606-09(Mo.App.,S.D.1988).

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 OF COUNSEL WHEN COUNSEL FAILED TO CALL EMPLOYER AND FAMILY MITIGATION WITNESSES CHARLES WEBB, VERN WEBB, VIRGINIA WEBB, RUBY SMITH, SYLVIA PURDIN, AND GLENN WILLIAMS BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT ALL OF THIS MITIGATING EVIDENCE THAT SHOULD HAVE BEEN PRESENTED WAS DIFFERENT FROM WHAT COUNSEL PRESENTED AND THERE IS A REASONABLE PROBABILITY THAT HAD THIS EVIDENCE BEEN PRESENTED MR. MIDDLETON WOULD HAVE BEEN SENTENCED TO LIFE.

The motion court denied Mr. Middleton's claim counsel was ineffective for failing to present mitigating evidence from Charles Webb, Vern Webb, Virginia Webb, Ruby Smith, Sylvia Purdin, and Glenn Williams. That ruling was clearly erroneous because Mr. Middleton was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV. There is a reasonable probability Mr. Middleton would have been sentenced to life had these witnesses testified because their testimony was different from the evidence counsel did present.

Respondent argues that counsel was not ineffective because counsel's strategy was to present mitigating evidence to support Mr. Middleton had acted with a methamphetamine-induced psychosis (Resp.Br. at 40-41). According to respondent because the witnesses who should have been called would have not furthered this strategy, counsel must have been effective (Resp.Br. 40-41). In Jermyn v. Horn, 1998W.L.754567 at *17, aff'd., Jermyn v. Horn,266F.3d257,303-12(3rdCir.2001) the Court noted that "[p]resentation of some mitigating evidence does not excuse the failure to provide evidence of different mitigating circumstances." That is what counsel failed to do here. Counsel did present evidence to support a theory of methamphetamine-induced psychosis. That theory, however, did not authorize counsel to fail to present mitigating evidence of a different kind that could have been presented through all these witnesses.

Respondent attempts to distinguish Terry Williams v. Taylor,529U.S.362(2000) and Jermyn v. Horn, supra because in those cases counsel did not begin investigating mitigating evidence until the eve of when they had to present that evidence, whereas there was not evidence here counsel engaged in similar behavior (Resp.Br. at 41, 45). The decision in Williams and Jermyn, however, did not turn on when the attorneys in those cases began their mitigation investigation. In both cases, counsel failed to present evidence that was different from what the jury heard. In Williams, the Court found counsel was ineffective because "counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." Williams v. Taylor,529U.S. at 396. Similarly, in Jermyn, that Court noted that "[t]he complete failure to present a certain type of mitigating evidence at the penalty phase when there is no strategic reason

to omit it has generally resulted in habeas relief." Jermyn,1998W.L. 754567 at *16 (relying on Kenley v. Armontrout,937F.2d1298(8thCir.1991)). There was no strategic reason to omit the evidence that was available from all these witnesses.

According to respondent, counsel were not ineffective for failing to call the Webbs and Ms. Smith to testify about Mr. Middleton's employment history because Mr. Middleton's mother mentioned some of his employment history (Resp.Br. at 47). On the issue of Mr. Middleton's employment background, the jury only heard from Mr. Middleton's mother that when Mr. Middleton was 15 he had a job cleaning a bar (T.Tr.3367), he had joined the army at age 16 (T.Tr.3369-71), briefly did construction work (T.Tr.3372), and worked at the Sale Barn (T.Tr.3372). The jury only heard about the fact of Mr. Middleton having been employed. That evidence simply did not include a recounting of the positive attributes Mr. Middleton had displayed as an employee while working for the Webbs and Ms. Smith. Moreover, the Webbs and Ms. Smith would have been particularly persuasive witnesses because, unlike Mr. Middleton's mother, they could present their perspective as non-family members which would be more compelling than the perspective of Mr. Middleton's mother because she is his mother.

Respondent asserts that presenting the employment history evidence would have hindered the effort to present evidence that Mr. Middleton's acts were the product of mental disease or defect (Resp.Br. 48). The favorable information that Mr. Middleton's employers could have furnished would not have undermined the mental disease or defect theory because that theory was premised on the mental disease or defect having been methamphetamine induced.

This Court should order 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 TESTIFY THAT AS A RESULT OF DRUG ABUSE MR. MIDDLETON WAS SUFFERING PSYCHOSIS AT THE TIME OF THE ALLEGED ACTS BECAUSE MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV IN THAT THEIR TESTIMONY WAS ADMISSIBLE BECAUSE § 552.010 AUTHORIZES THE INTRODUCTION OF DRUG ABUSE ACCOMPANIED BY PSYCHOSIS EVIDENCE TO ESTABLISH A MENTAL DISEASE OR DEFECT AND THE ARGUMENTS THAT COUNSEL PRESENTED INCONSISTENT THEORIES FROM GUILT TO PENALTY PHASE IS NOT A NEW CLAIM ON APPEAL, BUT INSTEAD ESTABLISHES WHY COUNSEL DID NOT ACT REASONABLY AND MR. MIDDLETON WAS PREJUDICED BY COUNSEL'S FAILURE TO CALL THESE WITNESSES IN GUILT PHASE.

Drs. Murphy, Lipman, and Daniel all would have testified that Mr. Middleton lacked the requisite mental state for first degree murder because at the time of the alleged acts he was suffering from a psychosis resulting from drug abuse. This evidence was

admissible under § 552.010 because a mental disease or defect includes drug abuse with psychosis. That counsel presented inconsistent theories from guilt to penalty is not a new claim on appeal, but rather establishes how counsel did not act reasonably and Mr. Middleton was prejudiced by counsel's failure to call these witnesses in guilt phase. Mr. Middleton was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Respondent has argued that this Court's decisions in State v. Nicklasson, 967S.W.2d596,617(Mo.banc1998), State v. Roberts,948S.W.2d577,588 (Mo.banc1997), and State v. Rhodes,988S.W.2d521,526(Mo.banc1999) prohibit the testimony that should have been presented through these witnesses (Resp.Br. at 74-75). According to respondent, decisions such as those discussed in Mr. Middleton's brief (App.Br.79) were superseded by the 1984 amendment to § 562.076 (Resp.Br. at 74-75).

All three doctors would have testified that as result of drug abuse Mr. Middleton was continuously and chronically psychotic. See App. Br. 70-73. Section 552.010 (bold typeface in original) (emphasis added) provides:

> **552.010. Mental disease or defect defined.**
>
> —— The terms **"mental disease or defect"** include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms **"mental disease or defect"** do not

include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy as defined in section 202.700, RSMo, nor shall anything in this chapter be construed to repeal or modify the provisions of sections 202.700 to 202.770, RSMo.

Under § 552.010, mental disease or defect does not encompass "drug abuse without psychosis." When the Legislature sought to exclude drug abuse as a mental disease or defect, it did so for those situations without psychosis. In cases such as Mr. Middleton's case, where there is drug abuse with psychosis, the Legislature must have intended that such impairment would constitute a mental disease or defect. For that reason, these doctors' testimony would have been admissible.

This view of § 552.010 is entirely consistent with the decisions that respondent has cited. Respondent's argument is premised on § 562.076 (Resp.Br. at 74-75). In Roberts, this Court stated: "Section 562.076.3 prohibits a defendant from introducing evidence of voluntary intoxication as per se proof of an inability to form a culpable mental state." State v. Roberts,948S.W.2d at 58 (emphasis added). The decision in Roberts indicates that the effect of the amendment to § 562.076 was to preclude a defendant from presenting evidence of an intoxicated state per se to negate a requisite mental state for an offense. This distinction was recognized in State v. Williams,812S.W.2d518,520 (Mo.App.,E.D.1991) (emphasis added) when that Court noted: "Certainly, merely being intoxicated as a result of alcohol or drug use does not provide a defense under the law unless it has resulted in psychosis."

Respondent has asserted that Mr. Middleton's arguments that counsel was ineffective for presenting inconsistent theories across guilt and penalty constitutes a new claim on appeal (Resp.Br. at 77-78). Mr. Middleton's arguments are not a new claim, but rather simply show why counsel did not act reasonably and he was prejudiced under this Court's decision in State v. Harris,870S.W.2d798,816(Mo.banc1994). In Harris, this Court emphasized the importance of presenting defense theories that are consistent from guilt to penalty phases. Here, counsel presented inconsistent theories across guilt and punishment. In guilt, the jury heard Mr. Middleton did not commit the Pinegar homicide. See App.Br.76-78. In penalty, the jury then heard that Mr. Middleton's acts should be excused because of his mental impairments. See App.Br.76-78.

The respondent also argues that presenting inconsistent defenses was permissible under Clayton v. State,63S.W.3d201(Mo.banc2002) (Resp.Br. at 78). The decision in Clayton, however, does not support the inconsistent theories counsel presented here across guilt and penalty phases. Counsel in Clayton presented alternative, guilt phase defense theories. Id. at 206-07. One guilt phase theory was that a reasonable doubt of guilt existed. Id. at 206-07. The other guilt phase theory was that the defendant had acted with a diminished capacity. Id. at 206-07. Counsel acted reasonably in Clayton because "[b]oth can be equally true and exist at the same moment in time." Id. at 207.

Unlike Clayton, counsel here did not act reasonably. The theories counsel presented here, unlike Clayton, cannot be equally true and exist at the same moment in time. More particularly, it is not possible for Mr. Middleton to be not guilty for purposes of guilt phase because he did not commit the charged acts and to also be guilty of having

done the charged acts for purposes of penalty phase, but his acts should be excused because of his mental impairments that resulted from his drug use. For these reasons, Clayton is inapplicable.

As discussed in Mr. Middleton's original brief, the controlling decision here is State v. Harris, supra. See App.Br.76-78. In particular, Harris recognized the need for consistent theories across the guilt and penalty phases. Harris,870S.W.2d at 815-16. That consistency was lacking in Mr. Middleton's case.

This Court should reverse for a new trial.

VIII. APPELLATE COUNSEL'S INEFFECTIVENESS

THE MOTION COURT CLEARLY ERRED DENYING THE CLAIM THAT DIRECT APPEAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT 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 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 RESPONDENT'S TRIAL COUNSEL CONCEDED THE THREE ATTORNEYS FROM THE CHILLICOTHE PUBLIC DEFENDER'S OFFICE VIOLATED THE RULE PROHIBITING AN ATTORNEY FROM REPRESENTING SOMEONE WHO HAS AN ADVERSE INTEREST TO A FORMER CLIENT AND HE ADMITTED MR. WALLACE HAD REPRESENTED STATE'S WITNESS STALLSWORTH. BASED ON SUCH ADMISSIONS OF RESPONDENT'S COUNSEL, REASONABLY COMPETENT APPELLATE COUNSEL WOULD HAVE RAISED THIS CLAIM AND THERE IS A REASONABLE PROBABILITY THAT MR. MIDDLETON'S CONVICTION OR SENTENCE WOULD HAVE BEEN REVERSED.

The record shows that respondent's counsel conceded that the three Public Defender attorneys from the Chillicothe Office violated the rule regarding representing someone who has an adverse interest to a former client. Respondent's counsel also conceded Mr. Wallace had represented respondent's witness Stallsworth. Reasonably competent appellate counsel knowing respondent had made such concessions would have raised this matter on direct appeal and Mr. Middleton was prejudiced. 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.

Respondent has argued that the record on this claim is insufficient because it is based on trial counsel's pleadings and argument (Resp.Br. at 110-11). In particular, respondent argues that neither attorney Mr. Wallace from the Chillicothe Public Defender's Office nor respondent's witness Stallsworth were called at the 29.15 hearing to establish Mr. Wallace had represented Stallsworth (Resp.Br. at 110-11). It was unnecessary to present such evidence because respondent's trial counsel had conceded this fact.

On February 19, 1997, Mr. Middleton's Adair trial counsel filed their motion on this matter and the trial court heard argument on February 21, 1997. See App.Br.109-10.[1]

During argument on the motion, respondent's counsel's argument included the concession that Mr. Wallace had "represented" Stallsworth (T.Tr.907). Later in respondent's counsel's argument, he asserted Mr. Middleton had not been prejudiced (T.Tr.909). While arguing a lack of prejudice, respondent's counsel conceded the following:

> Did these three attorneys violate the rule regarding representing someone who has an adverse interest to a former client? Yes, they did; there's no doubt about that -- no doubt about that.

(T.Tr.909).

Reasonably competent appellate counsel under similar circumstances who had in the record such a concession from respondent's counsel would have raised this matter on appeal and Mr. Middleton was prejudiced because Stallsworth testified to alleged admissions of Mr. Middleton. See Roe v. Delo,160F.3d416,418-20(8thCir.1998) (finding

[1] The first sentence of the second paragraph on page 109 of Mr. Middleton's brief stated that the "motion court noted" (emphasis added) that Mr. Middleton was arrested June 28, 1995 (relying on T.L.F.541-42). That sentence should have stated that the "motion noted" as this did not involve anything the 29.15 motion court did. Undersigned counsel apologizes for any confusion this misstatement has caused.

of appellate counsel ineffectiveness for failing to raise plain error claim). Further, Mr. Middleton was prejudiced because there is a reasonable probability that Mr. Middleton's conviction or at a minimum his sentence would have been reversed on appeal had appellate counsel presented this matter.

Respondent has now filed with this Court docket sheets from when Mr. Middleton's case was in Harrison County (Resp.Br. at 111-12). Those docket sheets are now offered to dispute the trial court having judicially noticed that counsel from the Public Defender Capital Trial Division did not enter until September 19, 1995 (T.Tr.914-16). See App.Br.110. From these docket sheets respondent has argued that the Capital Division entered on July 27, 1995 (Resp.Br. at 112-13). Specifically, respondent has argued that part of the docket entry of July 27, 1995, states that the Central Unit of the Capital Division was entering (Resp.Br. at 112-13). At the hearing before the trial court, Mr. Middleton's trial counsel noted that specific portion of the docket entry did not accurately reflect what actually transpired as to when the Central Capital Division entered on Mr. Middleton's behalf (T.Tr.914-15). When the Capital Division entered an appearance is not dispositive, or as respondent has argued "crucial" (Resp.Br. at 110), because respondent's own counsel conceded that all three of the attorneys from the Chillicothe Office of the Public Defender had violated the rule regarding representing someone who has an adverse interest to a former client. See T.Tr.909, supra.

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

CONCLUSION

For the reasons discussed in the original brief and this reply brief, 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 reply 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 reply brief contains _____ words, which does not exceed the 7,750 (25% of 31,000) words allowed for an appellant's reply brief.

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

_____

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 _____, 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 REPLY BRIEF

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