IN THE
MISSOURI SUPREME COURT

GARY BLACK,	)	
Appellant,	)	
vs.	)	No. SC 85535
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
TWENTY-NINTH JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE JON DERMOTT, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Gary Black, was jury tried and convicted of first degree murder, § 565.020 RSMo 2000,[1] in the Circuit Court of Jasper County. The court sentenced him to death. This Court affirmed in *State v. Black*, 50 S.W.3d 778 (Mo. banc 2001), with Judge Wolff dissenting. Mr. Black filed his *pro se* motion for post-conviction relief under Rule 29.15,[2] which appointed counsel amended. The motion court heard evidence on the claims and denied relief. Mr. Black now appeals. Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo. Const. (as amended 1982); Standing Order, June 16, 1988.

[1] All statutory references are to RSMo 2000, unless otherwise indicated.

[2] All references to rules are to VAMR, unless specified otherwise.

STATEMENT OF FACTS

Appellant, Gary Black, was charged with first degree murder for the stabbing death of Jason Johnson. *See*, *State v. Black*, 50 S.W.3d 778 (Mo. banc 2001)[3] for a detailed summary of the facts of the charged offense.

The evidence showed that, on October 2, 1998, Andrew Martin, Mark Wolfe, and Jason Johnson went to Garfield's where they drank beer (T.Tr. 581-82, 673-75).[4] Martin and Wolfe said that Johnson was not drunk; he had drunk one to three beers that evening (T.Tr. 582-83, 585, 675). However, his blood alcohol content was .29 (T.Tr. 917). At approximately 9:30 p.m., they left the bar, and stopped at a convenience store where Johnson bought more beer and tobacco (T.Tr. 587-89, 593). Tammy Lawson, Gary Black's girlfriend, was inside the store when Johnson went inside (Exs. F-H; T.Tr. 810-11, 919-21). They stood in line together. *Id.*

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[3] Appellant requests this Court take judicial notice of its files in Mr. Black's direct appeal, *State v. Black*, S.Ct. No. 82279. The motion court judicially-noticed the underlying criminal files (H.Tr. 2).

[4] Record references are as follows: trial transcript (T.Tr.); direct appeal legal file (D.L.F.); evidentiary hearing transcript (H.Tr.); postconviction legal file (L.F.); supplemental legal file (S.L.F.); and exhibits (Ex.). Six witnesses testified by deposition in lieu of live testimony (H.Tr. 3-5). References to witnesses' testimony are by last name.

Lawson went outside to Black's car and pointed Johnson out as he left the store (T.Tr. 590-93, 594, 681-82). Johnson got into the passenger side of Martin's pickup and Wolfe followed them in his Camaro (T.Tr. 682-83). They were driving to a nightclub in downtown Joplin (T.Tr. 598-99). Black and Lawson followed them in Black's car for 1.2 miles (T.Tr. 803).

When Martin stopped at the stoplight at 5th and Joplin, Black pulled alongside in the right lane (T.Tr. 686-87). The cars were stopped in front of the Dolphin Club, a nightclub (T.Tr. 598, 600, 686-87). Black and Johnson exchanged words (T.Tr. 687). According to Martin and Wolfe, Black got out of his car, reached through the passenger window of the pickup and stabbed Johnson in the neck, severing the jugular vein, and nearly severing the carotid artery (T.Tr. 607, 644, 651, 657-58, 689, 699-700, 893-95). James Brandon, a bar patron, also said that Black put his right hand in the window of the pickup (T.Tr. 717, 719-21). Black returned to his car (T.Tr. 690). Johnson went after Black, throwing a beer bottle at Black and trying to hit him (T.Tr. 690-91, 721-22). Black drove away (T.Tr. 692, 724).

Johnson returned to the pickup, bleeding profusely, from the stab wound, 4.5-6 inches deep, to the left side of his neck (T.Tr. 692, 886, 897-98). Bystanders used towels and clothing to compress the wound (T.Tr. 692, 726, 729). Paramedics arrived and administered first aid (T.Tr. 767-74). They took Johnson to the hospital where he underwent surgery (T.Tr. 775, 890, 907-09). He died three days later (T.Tr. 910).

Black was arrested in Oklahoma (T.Tr. 789). Police recovered an empty knife sheaf in his car (T.Tr. 792). Based on Lawson's statement, they seized a knife in a grassy area near a cemetery, about 20 blocks from the crime scene (T.Tr. 784-87).

The defense presented three eyewitnesses whose accounts differed from Martin, Wolfe and Brandon's (T.Tr. 930-37, 960-63, 1019-22). When Martin stopped at the intersection, he talked to two women he knew, Michelle Copeland and Gloria Norman (T.Tr. 961-62, 1020-21). Even though they were standing by the driver's side of Martin's pickup, they did not see Black stick his hand through the window (T.Tr. 962-63, 1021, 1031).

Ronald Friend, who worked at the Dolphin Club, also saw the altercation (T.Tr. 933-36). Friend heard one person say, "do you want some"? (T.Tr. 938, 945). Both men got out of their vehicles at the same time, met in the middle of the street and yelled at each other (T.Tr. 933-35). Friend saw Black swing at Johnson and Johnson chase Black toward his car (T.Tr. 935). Johnson was holding a big object and tried to get Black out of his car (T.Tr. 936). Black sped away and Johnson returned to the pickup (T.Tr. 936).

In a prior statement, Friend had said that Black reached Johnson first and swung at him while he was getting out of the pickup (T.Tr. 940-41). Friend later explained that Black was pointing, not really reaching into the window (T.Tr. 945-46).

The State argued that Black deliberated upon killing Johnson, since he followed him for a mile and stabbed him in the neck while he was still inside the pickup (T.Tr. 1060-61, 1066-69, 1070). The defense maintained that Black acted in self-defense, arguing that Black only stabbed Johnson after he attacked him with a beer bottle in the middle of the street (T.Tr. 1073, 1075, 1082, 1084-92). The court submitted no lesser-included offense instructions (D.L.F. 552-81). During their deliberations, jurors circled the term, "cool reflection," asking the judge to define it (D.L.F. 563). The court advised them: "Please read the instructions and enter a verdict in accordance with the forms submitted" (D.L.F. 564). Minutes later, they returned a verdict, finding Black guilty of first degree murder (L.F. 583; T.Tr. 1111).

In penalty phase, the State submitted two aggravators, torture or depravity of mind, and serious assaultive criminal convictions, based on Black's convictions of armed robbery and felonious assault (D.L.F. 574; T.Tr. 1148). The State also introduced Black's Department of Corrections (DOC) records to show that he had assaulted others while incarcerated (T.Tr. 1148-50). The State called Lawson, who said that Black made racial epithets before and after the stabbing, first saying he was "going to hurt that nigger" and later saying "one nigger down" (T.Tr. 1155, 1157). Finally, the State called a jail guard, Robert Saltkill, who said that, while Black was in jail awaiting trial, Black threatened him and hit him with his fist (T.Tr. 1182-83).

The defense presented no evidence in penalty phase. The jury found both aggravators and rendered a death verdict (T.Tr. 1241; D.L.F. 572).

This Court affirmed the conviction and sentence on appeal, although it found the depravity of mind aggravator was not supported by sufficient evidence. *Black, supra* at 790. Judge Wolff dissented, finding the evidence did not support deliberation. *Id.*, at 793-99. Judge Wolff suggested also that *de novo* review should apply in death penalty cases. *Id.*

Black filed a Rule 29.15 motion (L.F. 21-82) that appointed counsel amended, raising claims of ineffective assistance of trial counsel and the constitutional requirement of *de novo* review (L.F. 94-203). Postconviction counsel withdrew and new counsel was appointed (L.F. 204-08). Black filed a *pro se* motion, under Rule 29.16(a), to reject the appointment of counsel (L.F. 211-12). The motion court summarily denied that motion (L.F. 213). Black then moved to disqualify assigned counsel and to proceed *pro se* (L.F. 219-20). He also asked the judge to recuse himself, because of this prior comments that he thought counsel was effective (L.F. 225-27).

The motion court made no findings about whether Black could competently decide whether to reject the appointment of counsel and whether he understood the legal consequences of that decision. The court summarily denied his motions to disqualify counsel and for change of judge (L.F. 228, 242; H.Tr. 242).

Post-conviction counsel presented the following evidence to support Black's claims.

Gene Gietzen, a blood spatter expert, reviewed the crime scene photos, police, lab, autopsy, and medical reports, and the trial transcript (Gietzen Depo, at 16). Johnson had been stabbed on the left side of his neck; his carotid artery was almost severed and his jugular vein was severed. *Id*., at 18-19. When a major artery like a carotid artery is severed, the blood actually spurts, causing a unique blood stain pattern -- an arterial spurt. *Id*., at 11, 20-21. The only arterial spurt present was on the *outside* of the pickup not the inside (Gietzen Depo, at 28, 38, 53). Thus, Johnson must have been outside the pickup when he was stabbed. *Id*., at 32-33, 38, 46-47, 53-54, 58-59, 62. The physical evidence established the wound could not have been inflicted while Johnson was inside the pickup. *Id*.

Dr. Martinez, a toxicologist, also reviewed materials and found that Johnson was extremely intoxicated (Martinez Depo, at 21). His blood alcohol content was .29, indicating he had consumed at least12.3 beers, given his weight of 214 pounds. *Id*., at 18-21. This high level of alcohol would cause lessened inhibitions, inappropriate behavior, and increased aggression. *Id*., at 25-26.

Counsel testified about her failures to investigate the physical evidence and consult with experts (H.Tr. 40-41, 44). Counsel acknowledged that she should have offered a second degree murder instruction, and if she could retry the case, she would offer one (H.Tr. 46, 47, 68). She had extensive conversations with Black, who did not want one submitted (H.Tr. 46-47). Counsel deferred to him and that was the only reason she did not offer the instruction (H.Tr. 47).

Counsel had no strategic reason for her failure to impeach witnesses with their prior inconsistent statements (H.Tr. 19, 20, 21, 23, 25, 26, 28, 28-29). Wolfe and Brandon told police that both Black and Johnson got out of the cars and exchanged blows, contrary to their trial testimony that Black stabbed Johnson through the pickup's window (H.Tr. 22-23, 26-27). Copeland had told an investigator that Johnson yelled at Black, opened the passenger door, and got out before he was injured, as opposed to her trial testimony that he remained inside (H.Tr. 35-37). Wolfe told Detective Gallup that Johnson hit Black in the head or arm, different from his trial testimony that Johnson swung a brown bag toward Black but it hit the ground and broke (H.Tr. 24-25). Both Wolfe and Martin told investigators that they went to Garfield's and started drinking much sooner than they admitted at trial (H.Tr. 18-19, 25). Martin admitted to investigators that he saw nothing happen at the Snak-Atak, contrary to his detailed trial testimony (H.Tr. 20-21).

In penalty phase, Lawson testified for the State. Counsel failed to cross-examine Lawson about her testimony at the preliminary hearing and her statements to police. During the preliminary hearing, Lawson said she was mad, talking loudly, and cursing when she came out of Snak-Atak (H.Tr. 50-52, Exs. 25, 32). She told Black that Johnson had done something "perverted" to her while she was inside. *Id*. In her statements to police, she said that Black got mad and wanted to confront Johnson (H.Tr. 56-57). His anger increased when Johnson yelled at Lawson, calling her a "bitch" and "whore" (H.Tr. 49, 58). Martin joined

Johnson, calling Lawson names and asking whether she thought she was better than they (H.Tr. 49-50). When they stopped at an intersection, Johnson yelled at Black to get out of the car (H.Tr. 55). They got out of their vehicles and fought in the street (H.Tr. 55-56, 59-60). After the fight, Black and Lawson left town, but they had planned to leave before the incident occurred (H.Tr. 52).

Counsel admitted that she failed to elicit this evidence from Lawson (H.Tr. 49-60). She had no reason for failing to elicit some of these statements (H.Tr. 49, 50, 57). As for others, she reasoned, it was penalty phase and the jury had already determined Black's guilt (H.Tr. 53, 56, 59). Counsel acknowledged, however, that the statements could have been used to argue residual doubt (H.Tr. 55), the very theory of the penalty phase closing (T.Tr. 1228-30).

Counsel had no explanation for her failure to object to Black's Department of Corrections records and acknowledged the business records affidavit was dated December 1, 1999 (Shaw Depo 11-14). The trial began on December 6, 1999 (T.Tr. 195). The State never disclosed the witnesses listed in the records, yet counsel did not object to the failure to comply with Section 490.692.2's seven-day notice requirement and its requirement that records be made by one with a duty to record and transmit the information (Shaw Depo 12-13). Counsel did not object to the multiple levels of hearsay or the violation of Black's right to confrontation. *Id*. at 13-14. Jurors saw that Black had exercised his rights to remain silent and counsel. *Id*. at 13.

The motion court entered findings of fact and conclusions of law denying the motion for postconviction relief (L.F. 243-52). This appeal follows.

POINTS RELIED ON

I. Blood Spatter Expert

The motion court clearly erred in denying Black's claim that counsel was ineffective for failing to investigate, consult and call a blood spatter expert, such as Gene Gietzen, because counsel's failure denied Black effective assistance of counsel, U.S. Const., Amends. 6, 14, Mo. Const., Art. I, Section 18(a) in that such an expert would have explained that, given the nature of the wound to Johnson's carotid artery, blood would have spurted out, causing a unique bloodstain pattern -- arterial spurt. The crime scene photos show that the arterial spurt was on the exterior of the vehicle, not on the inside; thus, Gietzen opined Johnson must have been outside the pickup when he was stabbed. This expert analysis would have refuted the State's suggestion that Black deliberated on the killing, by stabbing Johnson while he was sitting in the pickup, and would have supported the defense that this was a street fight.

Moore v. State, 827 S.W.2d 213 (Mo. banc 1992);

Wolfe v. State, 96 S.W.3d 90 (Mo. banc 2003);

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

State v. Butler, 951 S.W.2d 600 (Mo. banc 1997).

II. Witnesses' Prior Inconsistent Statements Show the Fight Occurred in the Middle of the Street

The motion court clearly erred in denying Mr. Black's claims that counsel was ineffective for failing to impeach Andy Martin, Mark Wolfe, Jamie Brandon, and Michelle Copeland with their prior inconsistent statements, because counsel's failure denied Mr. Black effective assistance of counsel, due process, confrontation, and a fair trial, U.S. Const., Amends. 6, 14; Mo. Const., Art. I, Sections 10, 18(a), and Section 491.074, in that Wolfe and Brandon originally told officers that both Black and Johnson got out of the cars and exchanged blows, contrary to their trial testimony that Black stabbed Johnson through the window of Martin's pickup; Copeland originally told an investigator that Johnson yelled outside the pickup window, opened the passenger door, and got out before he was injured, contrary to her trial testimony that Johnson remained in the truck; Wolfe originally told Detective Gallup that Johnson hit Black in the head or arm, contrary to his trial testimony that Johnson swung a brown bag toward Black but it hit the ground and broke; Wolfe and Martin told investigators that they went to Garfield's and started drinking much sooner than they admitted at trial, and Martin admitted to investigators that he saw nothing happen at the Snak-Atak.

These prior inconsistent statements supported the defense that Black never deliberated, but he and Johnson argued and then fought in the street.

The inconsistent statements also showed that the witnesses were drinking more than they ultimately admitted, calling into question their ability to observe and recollect events. Counsel had no strategic reason for failing to impeach. Given that the witnesses' credibility was key, these failures to impeach harmed Mr. Black, resulting in his first degree murder conviction.

Hadley v. Groose, 97 F.3d 1131 (8th Cir. 1996);

Beltran v. Cockrell, 294 F.3d. 730 (5th Cir. 2002);

Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995); and

State v. McCauley, 831 S.W.2d 741 (Mo. App. E.D. 1992).

III. Lesser Included Offense Instructions Supported by the Evidence

The motion court clearly erred in denying Mr. Black's claim that counsel was ineffective for failing to offer lesser included offense instructions for second degree murder and voluntary manslaughter, because counsel's failure denied Mr. Black due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S. Const., Amends. 6, 8, and 14; Mo. Const., Art. I, Sections 10, 18(a), and 21, in that counsel believed the instructions should be submitted, but unreasonably deferred to her client. She thereby left him with no credible defense and increased his chances for an unwarranted conviction of first degree murder and a death sentence.

Beck v. Alabama, 447 U.S. 625 (1980);

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

State v. Ervin, 835 S.W.2d 905 (Mo. banc 1992); and

State v. Dexter, 954 S.W.2d 332 (Mo. banc 1997).

IV. Trial Counsel's Failure to Elicit From Tammy Lawson a Full Account of the Incident Deprived the Jury of Evidence Showing no Deliberation

The motion court clearly erred in denying Mr. Black's claim that counsel was ineffective for failing adequately to cross-examine Tammy Lawson, because counsel's failure violated Mr. Black's rights to effective assistance of counsel, due process, confrontation, and a fair trial, U.S. Const., Amends. 6, 14, Mo. Const., Art. I, §§ 10 and 18(a), and Section 491.074, in that cross-examination of Lawson could have established that she yelled, cursed and told Black that Johnson had done something perverted to her while inside the convenience store, stirring her boyfriend's anger; when she left the store, Johnson yelled and called her names, like "bitch" and "whore," which made Black angry; Black was upset and wanted to confront Johnson, but did not intend to kill him; Johnson yelled at Black to get out of his car; the two fought in the middle of the street; and Lawson planned to leave town before the crime, she and Black did not flee to avoid apprehension.

Mr. Black was prejudiced in that Lawson's testimony would have weakened the State's case for deliberation, and mitigated the case, likely resulting in a life, rather than death sentence.

Hadley v. Groose, 97 F.3d 1131 (8th Cir. 1996);

Beltran v. Cockrell, 294 F.3d 730 (5th Cir. 2002);

Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995); and

State v. Chaney, 967 S.W.2d 47 (Mo. banc 1998).

V. Trial Counsel's Failure to Call a Toxicologist Kept From the Jury Crucial Facts That Would Have Supported the Defense and Cast Doubt on the State's Theory of How the Offense Occurred

The motion court clearly erred in denying Mr. Black's claims that counsel was ineffective for failing to investigate, consult, and call to testify a toxicologist, like Dr. Martinez, about Johnson's blood alcohol content of .29 because counsel's failure denied Mr. Black to effective assistance of counsel, U.S. Const., Amends. 6, 14, Mo. Const., Art. I, § 18(a) in that counsel had no strategic reason for her failure, and she thought Johnson's intoxication was important. Mr. Black was prejudiced since Johnson had to consume 12.3 beers to reach this alcohol content, given his weight of 214 pounds. It would have shown that Martin and Wolfe lied in saying Johnson only drank 1-3 beers; and Johnson's level of intoxication would likely produce lessened inhibitions, inappropriate behavior, and increased aggression, all of which impacted the issue of self-defense and the lack of Black's deliberation.

Moore v. State, 827 S.W.2d 213 (Mo. banc 1992);

Wolfe v. State, 96 S.W.3d 90 (Mo. banc 2003);

State v. McCauley, 831 S.W.2d 741 (Mo. App. E.D. 1992); and

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

VI. Counsel's Failure to Challenge the Inadmissible, Unreliable and Unconstitutional DOC Records Introduced by the State

The motion court clearly erred in denying Mr. Black's claim that counsel was ineffective for failing to properly object to the Department of Corrections records, and the State's closing arguments based on those records, because counsel's failure and the admission of the records denied Mr. Black his rights to effective assistance of counsel, due process, confrontation, and his rights to be free from self-incrimination, and cruel and unusual punishment, U.S. Const., Amends. 6th, 8th, and 14th, and Mo. Const., §§ 10, 18(a) and 21 in that the exhibit:

1) **was not timely served with a business records affidavit;**
2) **contained statements by individuals lacking a business duty to transmit the information;**
3) **contained multiple hearsay, giving Black no opportunity to confront his accusers, and**
4) **included inadmissible references to Black's post-Miranda silence.**

Black was prejudiced since the State argued the records for the truth of the matters asserted, that Black was dangerous, had assaulted others in prison, and thus should be sentenced to death.

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

Ervin v. State, 80 S.W.3d 817 (Mo. banc 2002);

State v. Kreutzer, 928 S.W.2d 854 (Mo. banc 1996); and

State v. Dexter, 954 S.W.2d 332 (Mo. banc 1997).

VII. 8th Amendment Requires *De Novo* Review

The motion court clearly erred in denying Mr. Black's claims that this Court's failure to apply *de novo* review in conducting proportionality review violated his rights under the Eighth and Fourteenth Amendment of the U.S. Const. and Art. I, §§ 10, 18(a) and 21 in that the death penalty is cruel and unusual here in that a *de novo* review would have led the Court to conclude that the evidence does not establish deliberation, that Black coolly reflected on killing Johnson; rather, the evidence shows Johnson made a pass at Black's girlfriend, Black flew into a rage, Johnson and Black argued and fought, and Johnson was killed in the heat of the fight.

Cooper Industries v. Leatherman Tool Group, Inc., 523 U.S. 424 (2001);

Furman v. Georgia, 408 U.S. 239 (1972);

Enmund v. Florida, 458 U.S. 782 (1982); and

State v. Black, 50 S.W.3d 778 (Mo. banc 2001).

VIII. Movant's Right to Reject Appointed Counsel Under Rule 29.16

The motion court erred in denying Mr. Black's motions to reject the appointment of counsel, to appoint conflict free counsel, or allow him to proceed *pro se*, thereby denying Mr. Black due process, meaningful access to the courts, self-representation, and conflict-free counsel, U.S. Const., Amends. 6 and 14, Mo. Const., Art. I, §§ 10 and 18(a), and his rights under Rule 29.16, in that the court failed to determine whether Black was competent to reject the appointment of counsel and whether he did so understanding its legal consequences, as required by Rule 29.16(a). The record shows he is competent and understands the legal consequences, and should have been allowed to reject appointed counsel.

Bittick v. State, 105 S.W.3d 498 (Mo. App. W.D. 2003);

Faretta v. California, 422 U.S. 806 (1975);

State v. Taylor, 1 S.W.3d 610 (Mo. App. W.D. 1999); and

State v. Griddine, 75 S.W.3d 741 (Mo. App. W.D. 2002).

IX. Change of Judge

The motion court erred in denying Mr. Black's motion for a change of judge thereby denying Black due process, a full and fair hearing, and reliable sentencing U.S. Const., Amends. 6, 8, and 14, Mo. Const., Art. I, §§ 10, 18(a) and 21 in that Judge Dermott's prior statements reveal he prejudged the issues of effective assistance of counsel. After the jury rendered its guilty verdict, Judge Dermott volunteered that he thought counsel did a "fine job," Mr. Black's complaints notwithstanding; and at the 29.15 hearing, he stated he did not want to consider the testimony of seven witnesses who supported Mr. Black's claims of ineffective assistance. A reasonable observer would question whether the judge could be fair and impartial. Since Mr. Black has been sentenced to death, due process and the Eighth Amendment require heightened reliability and careful review, not a decision-maker who does not want to consider all the relevant evidence.

State v. Smulls, 935 S.W.2d 9 (Mo. banc 1996);

In Re Murchison, 349 U.S. 133 (1955);

Thomas v. State, 808 S.W.2d 364 (Mo. banc 1991); and

Aetna Life Co. v. Lavoie, 475 U.S. 813 (1985).

ARGUMENT

I. Blood Spatter Expert

The motion court clearly erred in denying Black's claim that counsel was ineffective for failing to investigate, consult and call a blood spatter expert, such as Gene Gietzen, because counsel's failure denied Black effective assistance of counsel, U.S. Const., Amends. 6, 14, Mo. Const., Art. I, Section 18(a) in that such an expert would have explained that, given the nature of the wound to Johnson's carotid artery, blood would have spurted out, causing a unique bloodstain pattern -- arterial spurt. The crime scene photos show that the arterial spurt was on the exterior of the vehicle, not on the inside; thus, Gietzen opined Johnson must have been outside the pickup when he was stabbed. This expert analysis would have refuted the State's suggestion that Black deliberated on the killing, by stabbing Johnson while he was sitting in the pickup, and would have supported the defense that this was a street fight.

At trial, the primary disputed factual issue was whether Black stabbed Mr. Johnson while he was sitting in Martin's pickup, or whether they fought in the middle of the street. Where the fight occurred was important because the State argued Black attacked Johnson before Johnson could defend himself, thus establishing the deliberation element of first degree murder. The defense claimed the fight occurred in the middle of the street, with Black trying to retreat as Johnson attacked him with a 40 ounce bottle of beer, and Black then stabbing

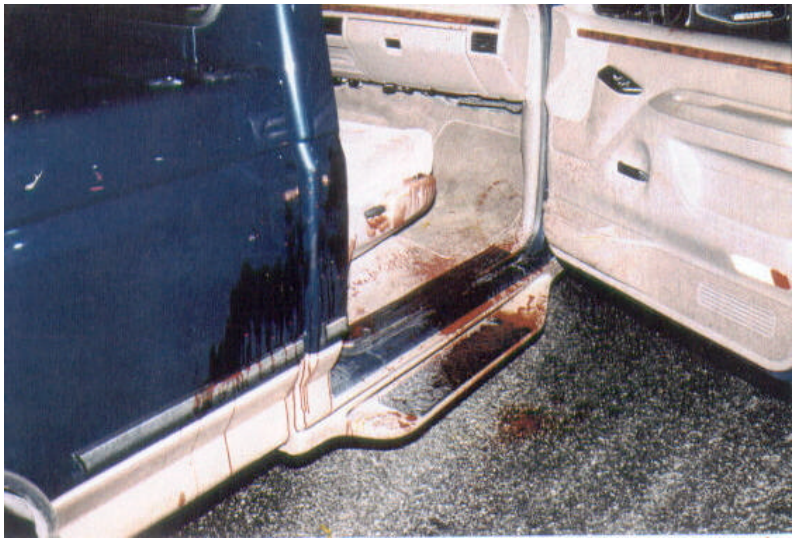
Johnson in self-defense. At most, the two engaged in a street-fight, which was either second degree murder or manslaughter.

Notwithstanding its theory of self-defense, counsel did not fully investigate the physical evidence to support that theory. The crime scene photos depict blood spattered in patterns. Those patterns show that the injury occurred outside the truck, not inside.

Gene Gietzen, a blood spatter expert reviewed the crime scene photos; police, lab, autopsy, and medical reports, and the trial transcript (Gietzen Depo, at 16). That review showed Johnson had been stabbed on the left side of his neck. His carotid artery was almost severed and his jugular vein was severed. *Id*., at 18-19. When a major artery, like the carotid, is severed, the blood spurts, causing a unique blood stain pattern -- an arterial spurt. *Id*., at 11, 20-21. Below is an example of an arterial spurt:

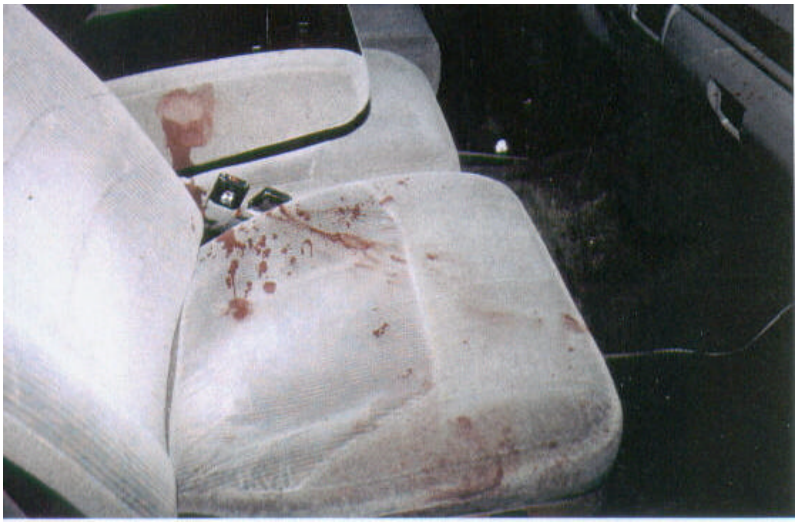
(Ex. 8).

Gietzen reviewed all crime scene photos the police took. They revealed that the only arterial spurt was on the *outside* of the pickup (Gietzen Depo, at 28, 38, 53-54, 58-59, 62):



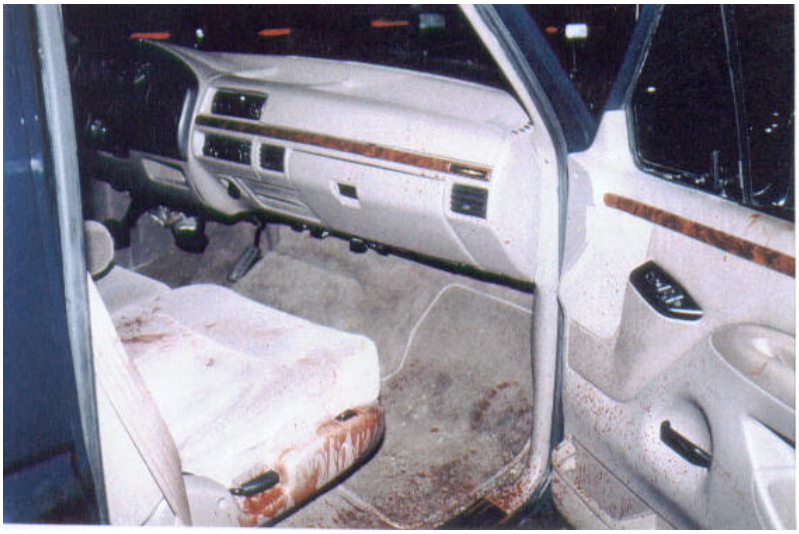
(Ex. 11).

The evidence reveals no arterial spurts occurred inside the truck (Gietzen Depo, at 28, 38, 53, Ex. 7). Had Johnson been sitting inside the truck, looking out the front window when he was stabbed, an arterial spurt would have gone to the left, toward the driver's side (Gietzen Depo, at 25). No blood was on the driver's seat or floor board area. *Id*. at 25-26.



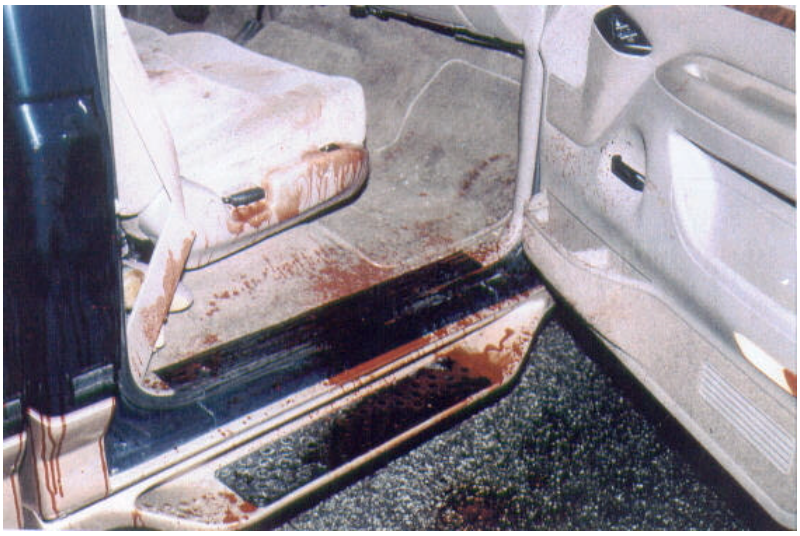
Rather, the bloodstains on the pickup's seat were the result of dripping, not spurting (Gietzen Depo, at 37). The blood on the arm rest and seat was not caused by arterial spurting. Rather, the wipe mark or contact pattern on the seat is consistent with someone in bloody clothing, sitting on the seat and transferring blood there. *Id.*, at 37-39.

Alternatively, if Johnson had been looking out the passenger window, facing the door, when he was stabbed, blood would have spurted atop the dash or the door area. *Id*., at 27-28. No arterial spurting appears on the dash or door. *Id*. at 28, 38, 53.



(Ex. 10).

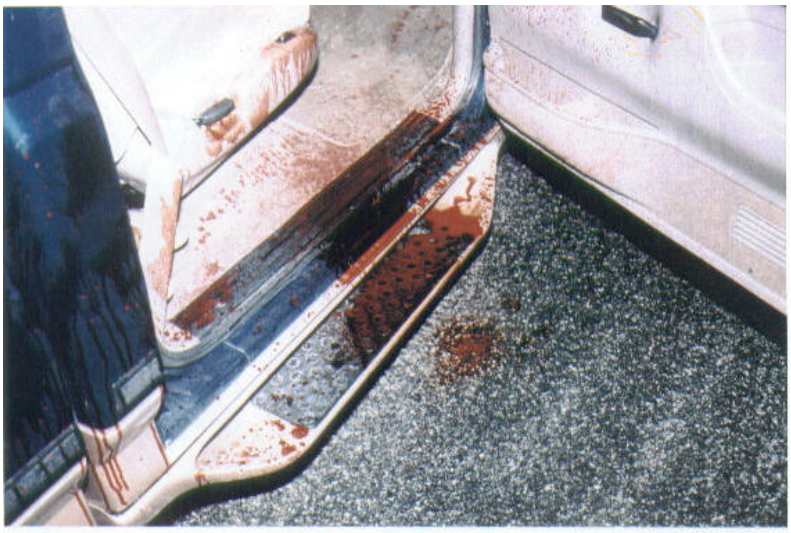
All of the evidence shows arterial spurting on the outside passenger-side of the pickup, not the inside (Gietzen depo, at 45-48, 53).



(Ex. 14).

The evidence shows a large deposit of blood on the passenger doorstep. This is consistent with someone, bleeding heavily standing in that area and depositing blood (Gietzen Depo at 44).

While the seat adjustment area has some characteristics of arterial spurt, the evidence is not conclusive in that regard. *Id.*, at 5, 64. It is consistent with Johnson having deposited blood in that area as he returned to the truck after being injured. *Id.*, at 64-65.



(Ex. 13).

Even if the pattern on the seat adjustment area could be deemed arterial spurt, it could not have been deposited while Johnson was seated in the pickup. The wound was to the left side of his neck, not his right. This blood pattern could only have been made when Johnson was getting back into the pickup.

All the physical evidence showed arterial spurting occurred outside the pickup, not inside. Johnson had to have been outside the pickup when he was

stabbed. *Id*., at 32-33, 38, 46-47, 53-54, 58-59, 62. The wound could not have been inflicted while he was inside the pickup. *Id*.

Gietzen could not determine *where* outside the pickup the injury occurred since the blood patterns on the street were relatively dark and hard to discern. *Id*., at 57. Additionally, arterial spurt does not happen only once. It continues while the heart pumps oxygenated blood. *Id.* at 64.

Gietzen could say with certainty that the blood evidence proved Johnson was outside, not inside, when he was stabbed. *Id.*, at 32-33, 38, 46-47, 53-54, 58-59, 62. Unfortunately, the jury never considered this testimony, because defense counsel did not fully investigate the physical evidence, did not consult with a blood spatter expert, and did not call an expert to testify (H.Tr. 38). Counsel admitted that she did not even consider consulting a blood spatter expert (H.Tr. 40). Based on conversations with co-counsel had with a medical doctor[5] who investigated the cause of death, they believed a blood spatter expert would not be helpful (H.Tr. 40-41). However, counsel admitted that she would have wanted to present a blood spatter expert if he had something helpful to say (H.Tr. 41). Counsel simply failed to pursue this evidence (H.Tr. 41).

Despite Gietzen's clear and unambiguous testimony, the motion court made the following "findings of fact":

[5] This medical doctor was not a blood spatter expert (H.Tr. 41).

> Mr. Gietzen testified on deposition the blood pattern showed no splatter [sic] ("arterial spurt") while the victim was seated inside the truck facing either to the front or looking out of the right side door. This indicated to him the victim got out of the cab before he was stabbed and tended to support movant's claim he acted in self defense. He conceded the photographs did not show splatter [sic] on the road and that the blood found inside the cab could be consistent with the state's argument defendant [sic] was stabbed inside the cab, then got out, and then got back inside. He also testified the only area of splatter [sic] shown in the photographs was inside the cab along the right side of the seat. He emphasized the photographs of other areas were dark, inferring any splatter [sic] could not therefore be seen on the outside of the vehicle. The foregoing notwithstanding, and following discussion of trial counsel with their own medical expert, counsel determined a "spatter" expert would not be helpful. The court agrees because of the state's theory the victim may have gotten out of and back inside the vehicle and because the only physical evidence of splatter [sic] was on the right side of the seat, inside the truck. Such a pattern was consistent with the State's version of the facts.

(L.F. 247-48). These findings are contrary to Gietzen's testimony and the physical evidence.

Standard of Review

The motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. Findings and conclusions are "clearly erroneous" if, after reviewing of the entire record, the court has the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

Ineffective Assistance of Counsel

To establish ineffective assistance, Mr. Black must show that counsel's performance was deficient and that it prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). Black must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.*; *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id*.

In *Moore v. State*, 827 S.W.2d 213, 215-16 (Mo. banc 1992), counsel failed to request blood tests, readily available evidence. *Id*. Had such tests been conducted, they would have shown that Moore could not be the source of semen found on the victim's sheet. *Id*. The evidence could not have been exonerated Moore and created a reasonable probability of a different result. *Id*.

In *Wolfe v. State*, 96 S.W.3d 90, 93-95 (Mo. banc 2003), counsel failed to investigate and test physical evidence, a hair, that would have connected the accomplice Cox, not Wolfe, to the crime scene (the hair was in the car where the

shooter sat, and in an ammunition box, consistent with the ammunition used in the crime). The State's case relied on Cox. *Id.* Had counsel obtained readily available scientific testing, the results would have cast doubt on Cox's credibility. *Id*., at 94-95. A reasonable probability existed that the outcome would have been different. *Id.*, at 95.

Like both *Moore* and *Wolfe*, here, counsel failed to investigate the physical evidence. Counsel did not consult with a scientific expert regarding blood spatter. Contrary to the court's findings, the physical evidence shows that Johnson could not have been stabbed while inside the pickup. No arterial spurts were inside the pickup (Gietzen Depo, at 32-33, 38, 46-47, 53-54, 58-59, 62; Ex. 7). No blood spatters existed to support the State's argument that Johnson was stabbed while sitting inside the cab. The finding that Gietzen found arterial spurt inside the cab, on the right side of the seat is flat wrong. *Id*. at 64. Since Johnson was stabbed on the left side of his neck, he could not have deposited the blood on the right side while he was sitting in the passenger seat. It is physically impossible.

Johnson was outside the pickup when he was stabbed. He deposited blood on the right side of the seat as he got back in. *Id*., at 65. Since he was stabbed on the left, not the right, side of his neck, this is the only explanation that is consistent with the physical evidence.

The motion court concedes that the blood evidence tended to show Johnson got out of the cab before he was stabbed and thus supported the claim of self-defense (L.F. 247). The court then reaches the unsupportable conclusion that a

blood spatter expert would have neither helped the defense, nor refuted the State's theory of events (L.F. 247-48). Nothing could be further from the truth.

The State opened its case by arguing that before Johnson, who was in the passenger seat, could open the door, Black threw a punch through the window and stabbed him in the neck (T.Tr. 562-64). According to the State, this stab severed Johnson's carotid artery and jugular vein and *then* Johnson got out of the truck (T.Tr. 564). The physical evidence adduced at trial made this scenario implausible, since the stab wound was to the left side of Johnson's neck, not to the right or center. The blood evidence shows the State's story was impossible.

Had Johnson's carotid artery been severed, physics dictates that blood would have spurted out immediately (Gietzen Depo, at 66-67). But no arterial spurting occurred inside the pickup. *Id.*, at 28, 38, 53. No blood spurted on the dash. Ex. 10. No spurting was on the inside of the passenger's door. *Id.* Reality is vastly different from the story the State told the jury.

Defense counsel maintained that both Black and Johnson got out of their vehicles and fought in the middle of the street (T.Tr. 572). Yet, counsel supported this theory with no objective, physical evidence, nor did counsel present to the jury the initial statements of the State's own witnesses that the fight occurred in the middle of the street, not while Johnson was inside the truck.[6]

Because of counsel's failures, the jury was misled. Andy Martin testified that he saw blood coming from Johnson's neck when he stepped out of the pickup,

while he was still inside (T.Tr. 607, 644, 651, 657-58). This differed vastly from his original statement to the police that both Johnson and Black got out of their vehicles and that he saw blood spurting out when Johnson was stumbling back to the truck (T.Tr. 646, 651-52). The blood evidence supported Martin's original statement. Yet, the jury heard none of the physical evidence that corroborated it.

Similarly, Mark Wolfe claimed to have seen Black jab Johnson through the pickup window as he was opening the door, while Johnson was still inside (T.Tr. 687, 689, 699-700). The jury never heard Wolfe's original statement to Officer Beil - who responded to the crime scene - that both Johnson and Black got out of their vehicles and exchanged blows in the middle of the road (H.Tr. 27). The blood spatter evidence corroborated Wolfe's original statement, not his trial testimony. Yet the jury heard only his trial testimony, which was not supported by the physical evidence.

James Brandon, a bar patron, testified he heard yelling, saw Black get out of a white car, swing his hands at the pickup window, and then back off (T.Tr. 717). He claimed Black threw his hands in the pickup window; Johnson's head jerked back, and Johnson then got out of the pickup (T.Tr. 719-721). The jury never heard Brandon's original statement to Detective Beil "that Mr. Black and Mr. Johnson both got out of their vehicles and exchanged blows in the middle of the road." (H.Tr. 27). The physical evidence supported Brandon's original statement, not his trial testimony. The jury never heard the truth, because counsel

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[6] Counsel's failure to impeach is discussed under Point II, *infra*.

did not conduct basic investigation of the physical evidence and did not present a blood spatter expert.

The State repeatedly argued that Johnson was sitting in the truck when he was stabbed and that stabbing Johnson through the window showed deliberation (T.Tr. 1061, 1069, 1070). The prosecutor told the jury:

> This man, in essence, *snuck* up to that car, the window was open, he does his deed with State's Exhibit # 10, and he's retreating to his car.

(T.Tr. 1100) (emphasis added). He later continued:

> Jason Johnson was literally bleeding to death *in the car*, in the street when he does get out. He's been violated at that point, but he's dying. In fact, he's a dead man still standing.

(T.Tr. 1101) (emphasis added). He asked jurors:

> Where is evidence of self-defense? I submit to you there is none. Absolutely none. But there is plenty of evidence that, unprovoked, Mr. Black cut Jason Johnson's throat, cut his life out.

(T.Tr. 1102). The prosecutor was correct, but only because defense counsel failed to present the jury with the readily available physical evidence.

The blood evidence told the true story; that Johnson and Black got out of their vehicles and fought in the middle of the street. Reasonable minds could disagree about whether this physical evidence established second degree murder, manslaughter, or even self defense. But the pictures don't lie, physical facts don't change, and reasonable minds cannot disagree that trial counsel failed to present

readily available evidence that would have effectively dismantled the State's case for deliberation. Evidence that trial counsel failed to present showed that Black did not sneak up and stab Johnson through the window while he was inside the truck. Rather, Black and Johnson argued and fought in the middle of the street.

Counsel's deficient performance left the jury without the evidence necessary to reach a just verdict. A reasonable probability exists that, had the jury considered this evidence, the outcome would have been different. A new trial must result.

II. Witnesses' Prior Inconsistent Statements Show the Fight Occurred in the Middle of the Street

The motion court clearly erred in denying Mr. Black's claims that counsel was ineffective for failing to impeach Andy Martin, Mark Wolfe, Jamie Brandon, and Michelle Copeland with their prior inconsistent statements, because counsel's failure denied Mr. Black effective assistance of counsel, due process, confrontation, and a fair trial, U.S. Const., Amends. 6, 14; Mo. Const., Art. I, Sections 10, 18(a), and Section 491.074, in that Wolfe and Brandon originally told officers that both Black and Johnson got out of the cars and exchanged blows, contrary to their trial testimony that Black stabbed Johnson through the window of Martin's pickup; Copeland originally told an investigator that Johnson yelled outside the pickup window, opened the passenger door, and got out before he was injured, contrary to her trial testimony that Johnson remained in the truck; Wolfe originally told Detective Gallup that Johnson hit Black in the head or arm, contrary to his trial testimony that Johnson swung a brown bag toward Black but it hit the ground and broke; Wolfe and Martin told investigators that they went to Garfield's and started drinking much sooner than they admitted at trial, and Martin admitted to investigators that he saw nothing happen at the Snak-Atak.

These prior inconsistent statements supported the defense that Black never deliberated, but he and Johnson argued and then fought in the street.

The inconsistent statements also showed that the witnesses were drinking more than they ultimately admitted, calling into question their ability to observe and recollect events. Counsel had no strategic reason for failing to impeach. Given that the witnesses' credibility was key, these failures to impeach harmed Mr. Black, resulting in his first degree murder conviction.

Successfully challenging the State's witnesses' accounts of the fight between Black and Johnson was the keystone of the defense. Counsel emphasized its importance during her opening statement and closing argument (T.Tr. 569-70, 1073-74, 1075, 1075-81, 1085-86, 1096). Despite the importance of these witnesses' credibility, counsel unreasonably failed to impeach them with their prior inconsistent statements (H.Tr. 17-27) and counsel had no strategic reasons for that failure (H.Tr. 19, 20, 21, 23, 25, 26, 28, 28-29).

Street Fight v. Stabbing Through a Window

Andy Martin, Mark Wolfe, and Jamie Brandon testified at trial that Black stabbed or jabbed at Johnson while Johnson was sitting in the pickup's passenger seat (T.Tr. 607, 644, 651, 657-58, 687, 689, 699-700, 717, 719, 720, 721). The State argued that stabbing a defenseless victim while he was inside the truck showed deliberation and warranted the death penalty (T.Tr. 1061, 1069, 1070, 1100-1101, 1223). This Court focused on these witnesses' testimony in finding the evidence sufficient to support a first degree murder conviction. *State v. Black,*

50 S.W.3d 778, 788 (Mo. banc 2001) (finding that defendant walked over to the victim, reached through the window and stabbed Johnson in the neck).

The jury and this Court never heard that, without exception, every eyewitness who testified at trial has stated that the fight occurred outside the pickup. Of the six witnesses who testified, counsel only impeached Martin with his initial statements indicating the injury occurred outside the pickup. She did not impeach Wolfe, Brandon, and Copeland. Counsel was ineffective.

Witness	Trial Testimony	Initial Statements
Martin	Blood spurted while Johnson inside pickup (T.Tr. 607, 644, 651, 657-58)	Johnson gets out of pickup, Martin sees blood as Johnson returns (T.Tr. 643, 646, 651-52)
Wolfe	Saw jab through window (T.Tr. 687, 689, 699-700)	Both got out of vehicles and exchanged words (H.Tr. 23)
Brandon	Defendant swung hand through window and then Johnson got out (T.Tr. 717, 719, 720, 721)	Both got out of vehicles and exchanged blows in the middle of the road (H.Tr. 27)
Friend	Both got out at same time and fought (T.Tr. 933, 935-36). Defendant got out first, pointed at Johnson as he got out (T.Tr. 938-40, 945-46).	

Copeland	Johnson remained in pickup. She did not see Black stick his hand through window (T.Tr. 962-63).	Johnson yelled at someone and got out of pickup before he was injured (H.Tr. 35-36).
Norman	Johnson got out of truck before bleeding. Didn't see jab through window (T.Tr. 1021, 1031).	

Counsel's failure to impeach Wolfe, Brandon, and Copeland with their prior inconsistent statements that the fight occurred outside the pickup was unreasonable. Wolfe told one of the first officers on the scene that he saw the men get out of their vehicles and exchange words (H.Tr. 23). Brandon told the officer that the men got out of their vehicles and exchanged blows in the middle of the road (H.Tr. 27). Copeland told an investigator, that she saw and heard Johnson yelling at someone, saw him open the passenger door and get out, and saw no injury (H.Tr. 35-36). These original statements differ radically from what the jury heard (T.Tr. 962-63).

Johnson Hits Black with Beer Bottle

Mark Wolfe testified that Johnson swung a brown bag at Black, but it fell to the ground (T.Tr. 690). Wolfe heard it break (T.Tr. 690). Wolfe's original statements were much different. Wolfe told Detective Gallup that a brown bag containing the beer bottle hit Black's head or arm (H.Tr. 24). Trial counsel did not find these two accounts inconsistent (H.Tr. 25) and did not elicit the prior

statement for the jury. Counsel also failed to impeach Wolfe with his earlier statement to investigator Wilburn that he saw Johnson connect with at least one blow, that Johnson staggered back to the pickup, fell inside and put his hand to his neck (T.Tr. 929-30).

When Martin, Wolfe and Johnson Started Drinking Beer

Johnson's blood alcohol content was .29 (T.Tr. 917). He had been drinking at Garfield's with Martin and Wolfe (T.Tr. 582-83, 585, 630, 634-35, 675, 706, 714). Whether Johnson and his friends were intoxicated and rowdy was important as it bore on the circumstances of the argument and fight, and on Martin and Wolfe's credibility as they recounted what transpired. Martin claimed at trial that he did not see Johnson drink more than one beer when they first went to Garfield's and another two when they returned to the bar (T.Tr. 582, 585, 630). Martin claimed they arrived at Garfield's at 6:30 or 7:00 p.m. (T.Tr. 581). He repeatedly claimed that Johnson was not intoxicated, drunk or rowdy (T.Tr. 583, 585, 634, 635). Wolfe also claimed that Johnson only had one beer and was not intoxicated (T.Tr. 675). He testified he was at Garfield's once that night (T.Tr. 673).

Contrary to their trial testimony, Martin and Wolfe's earlier statements showed they drank a whole lot more. Martin admitted that he saw Johnson at the mall as Johnson was getting off work and they went directly to the bar (H.Tr. 18). Johnson's work records revealed he worked until 4:19 p.m. (T.Tr. 952-53). They thus drank for two hours longer than they told the jury. Wolfe also admitted he

was at Garfield's twice, not once, remembering that Johnson was in a hurry to leave both times (H.Tr. 25).

Martin Saw Nothing

Andy told police that *he never saw Black* in the car at the convenience store, but Wolfe told him that the man had "scraggly, blondish-brownish hair" (H.Tr. 19-20). In his recorded statement, Martin said he heard from Wolfe "[t]hat girl walked out of the store, was sitting over there on the side of truck, she said that's the guy" and Martin admitted to the police that *"he didn't see nothin*"? (H.Tr. 20) (emphasis added).

The jury never knew that Martin admitted to police shortly after the incident that he never saw Black or his girlfriend at the convenience store. The jury heard instead that Martin noticed a woman standing near Black's car and identified the man as Black (T.Tr. 589-91, 592-93), and that he saw the man and woman talking and saw her point to the truck, where Johnson was sitting (T.Tr. 590, 592, 594). Because counsel failed to impeach Martin, he went from someone who saw "nothin" to an eyewitness providing incriminating details of the offense.

Counsel's Testimony

Counsel admitted that she had no strategic reason for failing to impeach Wolfe, Brandon and Copeland with their prior inconsistent statements that the fight occurred in the street (H.Tr. 23, 28, 37). Counsel wanted to impeach Wolfe about Johnson's blow to Black, but could not, since she had not disclosed his prior statements as required by Rule 25.02(2) (T.Tr. 708-711, 746-53, 757-62). Counsel

acknowledged she had no strategic reason for not impeaching Martin and Wolfe about when they started drinking and how long they were at Garfield's (H.Tr. 19, 26). Counsel had no strategic reasons for failing to impeach Martin with his earlier admission that he saw nothing at the Snak-Atak (H.Tr. 20, 21).

Motion Court's Findings

The motion court found that counsel had no trial strategy for failing to cross-examine each witness about prior inconsistent statements (L.F. 246). It found, however, no resulting prejudice (L.F. 246-47). Since Johnson's blood alcohol level of .29 was admitted, evidence of intoxication was before the jury (L.F. 246).

The court also found:

> Another witness, Jamie Brandon, testified he was in the front door of a nearby Club and said he saw Black get out and swing at Johnson after which Johnson got out and hit Black with a beer bottle while the two were in the middle of the road. On deposition Brandon had said nothing about seeing Black swing at Johnson. Movant complained about the failure to impeach the testimony of Michelle Copeland. The court finds the failure to confront Copeland or the other witnesses with a prior claimed inconsistent statement did not result in any prejudice to Black. Such evidence would have been cumulative to other testimony and does not form the basis for any error.

(L.F. 246-47).

Standard of Review and Constitutional Provisions

The motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Mr. Black must show counsel's performance was deficient and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000).

Counsel can be ineffective for failing to impeach witnesses. *Hadley v. Groose*, 97 F.3d 1131, 1133-36 (8th Cir.1996) (counsel ineffective in failing to impeach police officer with report that showed no footprints in the snow outside victim's trailer where footprints supposedly created a trail to Hadley); *Beltran v. Cockrell*, 294 F.3d. 730, 734 (5th Cir. 2002) (failure to impeach eyewitnesses' testimony that Beltran was the only person they chose from a photographic array with their prior, tentative identifications of other people ineffective. Tentative identification was exculpatory and would have raised doubts about Beltran's guilt); *Driscoll v. Delo*, 71 F.3d. 701,709-11 (8th Cir. 1995) (failure to impeach the state's eyewitness with prior inconsistent statement, in which Driscoll never admitted to stabbing the victim ineffective).

Contrary to the court's finding, counsel's failures created prejudice. *See Hadley*, *Beltran*, and *Driscoll*. Prejudice is established by a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Williams, supra* at 390-91; *State v. Butler*, 951 S.W.2d 600, 608

(Mo. banc 1997). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id*.

Street Fight

Wolfe and Brandon initially told officers that the fight began when both Black and Johnson got out of their cars and exchanged blows. This was contrary to their trial testimony that Black stabbed Johnson through the window of Martin's pickup. Copeland's prior statements also established that the fight occurred on the street and Johnson was not stabbed while sitting in the pickup.

Whether Johnson was stabbed while he was inside the pickup was key to the State's case. The State argued that stabbing Johnson while inside the truck proved deliberation (T.Tr. 1100, 1101, 1102). That two of the State's eyewitnesses originally stated that the initial blows occurred outside, on the street, would have destroyed the State's case for deliberation. Copeland's prior statements also would have showed that Johnson was yelling at Black, the argument escalated, Johnson got out of the pickup and was stabbed during a street fight.

Had the jury heard that all the eye witnesses said in their initial statements - that defendant and Johnson exchanged blows in the middle of the street - they would not have found deliberation and would have had evidence to support second-degree murder, manslaughter or self-defense.

Because counsel failed to impeach these witnesses, the prosecutor was free to argue that all four[7] witnesses said the stabbing occurred while Johnson was inside the pickup, and this showed deliberation (T.Tr. 1061).

Johnson Hits Black with Beer Bottle

Wolfe's prior statements that Johnson hit Black in the head or arm, and connected with at least one blow was important evidence. Whether Johnson actually hit Black was relevant to show that Black was reacting to the blow and did not deliberate, it was also relevant to support defense counsel's theory of self defense.

When Johnson Started Drinking

How much Johnson and his friends drank that night was important to the defense (T.Tr. 570, 917, 952-53, 1003, 1014-15, 1076-77, 1078, 1079, 1082, 1084-85). Their drinking established the background for the argument and fight, and materially affected Martin and Wolfe's ability to recount the fight. Counsel unreasonably failed to establish that these witnesses minimized how much Johnson and they drank that evening.

The Court correctly found that Johnson's BAC of .29 was admitted at trial (L.F. 246). However, whether Johnson was intoxicated was a contested issue; thus, this evidence could not be cumulative. *State v. McCauley*, 831 S.W.2d 741,

[7] The prosecutor ignored Michelle Copeland and Gloria Norman as eyewitnesses and focused only on the male eyewitnesses, Martin, Wolfe, Brandon and Friend.

743 (Mo. App. E.D. 1992) ("evidence is cumulative when it relates to a matter so 'fully and properly proved by other testimony' as to take it out of the area of serious dispute"). Here, the prosecutor minimized Johnson's BAC, saying whether he was intoxicated depended on his size, height, weight and how long he drank (T.Tr. 1012). He then argued that the witnesses were consistent, saying Johnson only had "a couple" of beers (T.Tr. 1104).

The witnesses and Johnson drank heavily that night. Because they were rowdy and out of control, the fight escalated and spun out of control. Had counsel properly impeached these state witnesses with the truth, the jury would have known that this fight was like a barroom fight, spilling out into the street, not a cold, calculated murder warranting the death penalty.

Martin Saw Nothing

Counsel's failure to impeach Martin with his prior statements that he never saw Black at the convenience store was unreasonable. Since Martin's trial testimony "took on such remarkable detail and clarity over time," *Driscoll*, *supra* at 710, counsel could have argued that if Martin lied about what he saw at the convenience store, he may well have lied about what he saw at the intersection.

Contrary to the court's findings, counsel's failures to impeach created prejudice. How the fatal injury occurred was central to the issue of deliberation. A wound that occurs during a fight in which both parties take part equally is a lot different than a wound inflicted by one party suddenly reaching through a window and stabbing an unsuspecting victim. Had the jury heard these witnesses' prior

inconsistent statements, it likely would not have found deliberation. The witnesses' drinking bore on their credibility, also key to the defense. A new trial should result.

III. Lesser Included Offense Instructions Supported by the Evidence

The motion court clearly erred in denying Mr. Black's claim that counsel was ineffective for failing to offer lesser included offense instructions for second degree murder and voluntary manslaughter, because counsel's failure denied Mr. Black due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S. Const., Amends. 6, 8, and 14; Mo. Const., Art. I, Sections 10, 18(a), and 21, in that counsel believed the instructions should be submitted, but unreasonably deferred to her client. She thereby left him with no credible defense and increased his chances for an unwarranted conviction of first degree murder and a death sentence.

The State agrees that "the decision as to which instructions to submit is for counsel, not the defendant." (State's Brief on Direct Appeal, *State v. Gary Black*, S.Ct. 82279 at 45, citing *State v. Fowler*, 938 S.W.2d 894, 898 (Mo. banc 1997); *State v. Dexter*, 954 S.W.2d 332, 344 (Mo. banc 1997)). Thus, this Court must only decide whether counsel acted reasonably by failing to offer lesser-included offense instructions of second degree murder and voluntary manslaughter. Since no credible evidence supported a claim of self-defense, counsel acted unreasonably. By not offering the lesser-included offense instructions, counsel left her client with no defense at all.

Counsel Had No Reasonable Trial Strategy

Counsel acknowledged that she should have offered a second degree murder instruction, and if she could retry the case, she would offer one (H.Tr. 46, 47, 68). She had extensive conversations with Mr. Black, and he adamantly did not want one (H.Tr. 46-47). Counsel deferred to him and that was the only reason she did not offer the instruction (H.Tr. 47). Counsel acted against her better judgment, even though she believed decisions about what instructions to offer were counsel's (H.Tr. 47). She hoped that the prosecutor would be "prudent" and offer the instruction (H.Tr. 46). Counsel believed the court would have submitted the instruction if she had asked (H.Tr. 84).

The motion court found:

> Counsel testified at the hearing the decision to submit a lesser included instruction was her prerogative alone, not that of the client, and that in hindsight she should have offered a lesser included instruction and believed the court would have given it. In the context of this case, however, the court finds counsel's decision at the time of trial was reasonable.

(L.F. 248). This finding is clearly erroneous and must be reversed.

Standard of Review and Constitutional Provisions

The motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. *See*, Point I, *supra*. To establish ineffective assistance, Mr. Black must show that counsel's

performance was deficient and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). "Performance is deficient if it falls below an objective standard of reasonableness, which is defined in terms of prevailing professional norms. *Wiggins v. Smith*, 123 S.Ct. 2527, 2529-30 (2003), citing *Strickland*, at 688. This Court must conduct an objective review of the performance, "including a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time of that conduct." *Wiggins*, *supra* at 2530, citing *Strickland* at 688, 689.

An objective review of counsel's failure to submit lesser-included offense instructions, viewed from counsel's perspective at the time of trial, shows that performance was unreasonable. Mr. Black had a due process and Eighth Amendment right to have the jury consider lesser-included offenses, if supported by the evidence. *Beck v. Alabama*, 447 U.S. 625 (1980). Accordingly, the trial court was required to submit a lesser included offense instruction if "there [was] a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Section 556.046.2, RSMo 2000; *State v. Santillan*, 948 S.W.2d 574, 575 (Mo. banc 1997). If a reasonable juror could infer from the evidence that deliberation did not occur, the trial court must instruct down. *Id*., at 576. The trial court is required to resolve doubts in favor of submitting a lesser-included offense instruction. *Id*., at 577.

Second degree murder and manslaughter are lesser included offenses of first degree murder. Section 565.025.2(1)(a) and (b). Second degree murder

occurs if the defendant knowingly causes the death of another or, with the purpose of causing serious physical injury to another, causes that death. Section 565.021.1(2). Voluntary manslaughter occurs similarly, except there, the defendant causes the death while under the influence of sudden passion arising from adequate cause. Section 565.023.1(1).

Counsel correctly believed that the trial court would have submitted the lesser-included offense instructions had she offered them (H.Tr. 46). The evidence at trial, considered favorably to offering the instruction, established that Johnson was drunk, with a blood alcohol content of .29 (T.Tr. 917). He had been rowdy that evening and was mouthy to women at a bar (T.Tr. 818). While he was at a convenience store purchasing tobacco and beer (T.Tr. 587, 593), something happened that angered Tammy Lawson, Black's girlfriend (T.Tr. 590-94). Lawson pointed Johnson out to Black. *Id*. Black and Lawson followed Martin's pickup and when he caught up to them, Johnson and Black yelled at each other (T.Tr. 684-85, 687, 717). The two fought; Johnson hit Black with a 40-ounce beer bottle, and Black stabbed Johnson once in the neck (T.Tr. 611, 643, 891). As Black tried to leave, Johnson hung onto the car and tried to hit Black (T.Tr. 724, 734-35).

From this evidence, a rational fact-finder could have found that Black acted without deliberation. *See*, *State v. Black*, 50 S.W.2d 778 (Mo. banc 2001) (Wolff, J., dissenting). The evidence supported Black's intent to cause serious physical injury by stabbing Johnson in the neck, but it did not establish deliberation, cool

reflection. Rather, all of the evidence showed that Black was angry and out-of-control. He never coolly reflected on killing Johnson. They yelled at each other and fought in the middle of the street in front of many witnesses. The jury struggled with what deliberation meant, asking the trial court to further define "cool reflection." (D.L.F. 563). Since there was no deliberation, but arguably an intentional killing, the evidence supported second-degree murder.

The jury could have also found that Black acted under sudden passion arising from adequate cause. Lawson came out of the convenience store and pointed out Johnson. Black became angry and chased Johnson down the street, where they yelled at each other. Reasonable jurors could have inferred that Black's passions suddenly arose because a drunken Johnson sexually harassed Black's girlfriend.

The question then, is whether counsel was reasonable in deferring to Black's desire not to offer the lesser-included offense instructions. Counsel testified that decision was hers (H.Tr. 47). The State agrees. State's Direct Appeal Brief, at 45. This Court's decisions support counsel's belief. *Love v. State*, 670 S.W.2d 499, 502 (Mo. banc 1984); *State v. Lee*, 654 S.W.2d 876, 879 (Mo. banc 1983).[8] Counsel wanted to offer the instructions and hoped the

[8] *Love* and *Lee* are consistent with the Supreme Court's ruling that most decisions are counsel's and only a few, limited decisions are for the defendant. *Jones v.*

prosecutor would correct that error by prudently offering the instructions (H.Tr. 46).

At the time of trial, Counsel did not believe her decision was reasonable. Her failure to act was the one thing she would change about the case (H.Tr. 68). This Court found her proffered defense unreasonable, ruling, "it is undisputed that the defendant stabbed the victim after tailing him for blocks. The defendant presented no credible evidence of self-defense." *State v. Black*, 50 S.W.2d at 793. By failing to submit lessers, counsel left her client with no credible defense.

Under these circumstances, counsel was objectively unreasonable in deferring Black's desire for an all-or-nothing defense. In capital cases, the stakes are high, and that approach gambles with a client's life.

> For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense - - but leaves some doubt with respect to an element that would justify conviction of a capital offense - - the failure to give the jury the 'third option' of conviction on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Beck, *supra* 447 U.S. at 637. "Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Id*. Death is different and it is vital that a jury's

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Barnes, 463 U.S. 745, 751 (1983) (fundamental rights of the defendant include whether to plead guilty, waive a jury, testify, or take an appeal).

decision be based on reason, not emotion. *Id*., at 637-38, citing *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (opinion of Stevens, J.).

This Court has allowed such a gamble only in limited circumstances. In *State v. Ervin*, 835 S.W.2d 905, 932-33 (Mo. banc 1992), counsel was not deemed ineffective for failing to submit lesser-included offense instructions. There, the defense was that Mr. Ervin did not commit the murders, but that his accomplice, Bert Hunter, alone committed the crime. *Id*. at 920-21. Hunter provided the only direct evidence of Ervin's involvement in the murders. *Id*. Hunter did not consistently implicate Ervin. While under oath at his guilty plea, Hunter testified that he acted alone. *Id*., at 921. Deference to the client's desire for an all-or-nothing defense,[9] where counsel had a reasonable defense, supported by evidence showing that his client was not involved in the crime, was reasonable. *Id*. at 932-33.

[9] *Ervin* cited *Spaziano v. Florida*, 468 U.S. 447, 456-57 (1984) for the proposition that, in some cases, a client can take his chances with the jury and not offer a lesser-included offense instructions. *Ervin*, supra at 922. In *Spaziano*, the defendant wanted lesser-included offense instructions, but was unwilling to waive his statute of limitations defenses to those lessers. *Spaziano*, at 457. *Spaziano* does not rule under what circumstances it is reasonable to choose not to submit such instructions. Presumably, this is a determination to be made under the circumstances of each case. *Wiggins, supra*.

Similarly, in *State v. Dexter*, 954 S.W.2d 332, 335 (Mo. banc 1997), Dexter, charged with killing his wife, maintained his innocence and presented an alibi defense. Dexter testified that he did not kill his wife, but returning home from the grocery store, found his wife's body. *Id*. Counsel's decision not to offer lesser-included offense instructions was presumed to be reasonable trial strategy. *Id*. at 344. However, this Court left open the possibility that counsel could be found ineffective, if counsel had no reasonable trial strategy. *Id*.

Unlike *Ervin* and *Dexter*, counsel admitted that Black caused Johnson's death. The only issue was whether he acted in self-defense. All of the evidence established that Black chased Johnson for 1.2 miles and was the initial aggressor. As this Court cogently noted, "[t]he defendant presented no credible evidence of self-defense." *State v. Black*, *supra* at 793. Since no evidence supported self-defense, counsel unreasonably failed to offer lesser-included offense instructions. Counsel's failure deprived Mr. Black of any meaningful defense and enhanced the risk of an unwarranted conviction. She gambled with her client's life and lost.

Counsel acted unreasonably in failing to submit lesser-included offense instructions. This Court should reverse and remand for a new trial.

IV. Trial Counsel's Failure to Elicit From Tammy Lawson a Full Account of the Incident Deprived the Jury of Evidence Showing no Deliberation

The motion court clearly erred in denying Mr. Black's claim that counsel was ineffective for failing adequately to cross-examine Tammy Lawson, because counsel's failure violated Mr. Black's rights to effective assistance of counsel, due process, confrontation, and a fair trial, U.S. Const., Amends. 6, 14, Mo. Const., Art. I, §§ 10 and 18(a), and Section 491.074, in that Lawson could have established that she yelled, cursed and told Black that Johnson had done something perverted to her while inside the convenience store, stirring her boyfriend's anger; Johnson yelled and called her names, like "bitch" and "whore," which made Black angry; Black was upset and wanted to confront Johnson, but did not intend to kill him; Johnson yelled at Black to get out of his car; the two fought in the middle of the street; and Lawson planned to leave town before the crime, she and Black did not flee to avoid apprehension.

Mr. Black was prejudiced in that Lawson's testimony would have weakened the State's case for deliberation, and mitigated the case, likely resulting in a life, rather than death sentence.

Tammy Lawson, Black's girlfriend, testified in penalty phase (T.Tr. 1150-74). She claimed that Black made racial statements before and after the stabbing (T.Tr. 1155, 1157), contrary to her earlier statements that race had never come up

(T.Tr. 1166). She claimed that Black forced her to pack clothes, dispose of evidence and hide out with him in Oklahoma (T.Tr. 1158-60). She did not tell the jury the details of the initial encounter at the convenience store or what happened at the intersection. The jury did not hear these details, because defense counsel unreasonably failed to adequately cross-examine Lawson. The State relied on Lawson's incomplete and inaccurate testimony to secure Black's death sentence.

At the preliminary hearing, Lawson testified that she was mad, talking loudly, and cursing when she came out of the convenience store (H.Tr. 50-52, Exs. 25, 32). She told Black that Johnson had done something perverted to her while they were in the store. *Id*. In her statements to police, Lawson said Black got mad and wanted to confront Johnson (H.Tr. 56-57). His anger increased when Black heard Johnson yell at Lawson, calling her a "bitch" and a "whore" (H.Tr. 49, 58). Martin joined in, calling Lawson names and asking whether she thought she was better than they (H.Tr. 49-50). When they stopped at an intersection, Johnson yelled at Black to get out of the car (H.Tr. 55). The two got out and fought in the street (H.Tr. 55-56, 59-60). After the fight, Black and Lawson left town, which they were planning to do before the incident occurred (H.Tr. 52).

Counsel admitted that she failed to elicit this evidence, which would have undermined the State's case for deliberation and mitigated the offense (H.Tr. 49-60). She had no reason for failing to elicit many of these statements (H.Tr. 49, 50, 57). As for others, she reasoned that it was penalty phase and the jury had already determined Black's guilt (H.Tr. 53, 56, 59). However, she acknowledged that the

statements could have been used for residual doubt (H.Tr. 55), the very theory co-counsel argued in penalty phase (T.Tr. 1228-30).

The motion court denied relief, mischaracterizing the claim as a failure to call Lawson in guilt phase (L.F. 249-50). A review of the claim (LF. 103, 160-68) shows that the issue was pled as counsel's ineffectiveness for failing to "thoroughly and adequately cross-examine and impeach Tammy Lawson in the penalty phase." (L.F. 103). The motion court found that counsel had no strategy for her failures. It nevertheless, found she acted reasonably and no prejudice resulted (L.F. 251). These findings are clearly erroneous.

Standard of Review and Constitutional Provisions

The motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Mr. Black must show that counsel's performance was deficient and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000).

Failing to impeach and adequately cross-examine witnesses to elicit helpful exculpatory information is ineffective. *Hadley v. Groose*, 97 F.3d 1131 (8th Cir.1996) (prior police report showed no footprints in the snow, rebutting incriminating evidence); *Beltran v. Cockrell*, 294 F.3d. 730, 734 (5th Cir. 2002) (eyewitnesses identified others from a photographic array, contrary to their testimony that Beltran was the only person they had chosen); *Driscoll v. Delo*, 71

F.3d. 701,709-11 (8th Cir. 1995), (state's eyewitness's prior inconsistent statement showed that Driscoll never admitted to stabbing the victim).

Counsel possessed favorable evidence that she could have elicited from Lawson. Counsel unreasonably failed to adduce this helpful information, to impeach Lawson and as substantive evidence to prove Black's innocence. Section 491.074.

Lawson's preliminary hearing testimony and statements to police could have established that Lawson set events in motion, telling her boyfriend that Johnson accosted her in the store. Johnson and his friends escalated matters by calling her names with sexual connotations. Then, when the vehicles stopped in the street, Johnson challenged Black.

Had the jury heard this information, the State's case for deliberation would have been even weakened further.[10] The jury could have considered it in deciding whether death was warranted (D.L.F. 576). The court instructed the jury that it could "consider all of the evidence presented in both the guilt and the punishment stages of trial." *Id*. Counsel argued that, if the jury had any doubt about the State's case for guilt, it should give life, not death (T.Tr.1228-30). Had counsel

[10] Strength of evidence is a factor this Court also considers in deciding whether the death penalty is disproportionate. Section 565.035.3(3); *State v. Chaney*, 967 S.W.2d 47, 60 (Mo. banc 1998).

elicited this favorable evidence, she would have had evidentiary support for the argument.

Lawson's exculpatory statements that Johnson yelled at her, called her names, and told Black to get out of his car, establish that Black and Johnson had a heated argument and fought in the middle of the street. This was hardly the cold, deliberate murder the State claimed. Rather, it was akin to a bar fight that spilled out into the street. Impeaching Lawson would have changed the case from a deliberate killing to a heated argument, with both parties at fault. The failure to adequately cross-examine Lawson undermines confidence in the outcome. *Id*. A new penalty phase should result.

V. Trial Counsel's Failure to Call a Toxicologist Kept From the Jury Crucial Facts That Would Have Supported the Defense and Cast Doubt on the State's Theory of How the Offense Occurred

The motion court clearly erred in denying Mr. Black's claims that counsel was ineffective for failing to investigate, consult, and call to testify a toxicologist, like Dr. Martinez, about Johnson's blood alcohol content of .29 because counsel's failure denied Mr. Black to effective assistance of counsel, U.S. Const., Amends. 6, 14, Mo. Const., Art. I, § 18(a) in that counsel had no strategic reason for her failure, and she thought Johnson's intoxication was important. Mr. Black was prejudiced since Johnson had to consume 12.3 beers to reach this alcohol content, given his weight of 214 pounds. It would have shown that Martin and Wolfe lied in saying Johnson only drank 1-3 beers; and Johnson's level of intoxication would likely produce lessened inhibitions, inappropriate behavior, and increased aggression, all of which impacted the issue of self-defense and the lack of Black's deliberation.

Johnson had a blood alcohol content of .29 (T.Tr. 917). Defense counsel knew Johnson's drinking was important to the defense, that the fatal wound was inflicted during a heated street fight, during which Johnson carried his aggressive barroom behavior into the street. Counsel tried to establish that Johnson was drunk, rowdy, and harassing women on the night of the offense (T.Tr. 570, 634-

35, 818, 917, 952-53, 1003, 1014-15). Defense efforts were unsuccessful, since Andy Martin claimed that he did not see Johnson drink more than one beer the first time they went to Garfield's and two beers on their return trip, and that Johnson was not intoxicated either time (T.Tr. 582-85, 630, 634-35). Mark Wolfe also said Johnson had only one beer and was not intoxicated (T.Tr. 675). Wolfe admitted Johnson appeared buzzed; one could tell he was drinking, but he was not falling down (T.Tr. 706, 714).

Martin and Wolfe's testimony differed drastically from their initial statements. Wolfe said Johnson had four to five beers and was mouthy to girls (T.Tr. 818); Martin said Johnson had three beers the second time at Garfield's, and was "pretty rowdy" there (T.Tr. 818).

The jury heard that Johnson's BAC was .29, yet, according to the state's witnesses he wasn't drunk. What was the jury to make of this conflicting evidence? They were told that the then-legal limit for intoxication was .13 and at trial, .10 (T.Tr. 1003). Detective Gallup then qualified those numbers, saying intoxication depends on the person's size, height, weight, and how long he drank (T.Tr. 1012). Therefore, in his closing, the prosecutor argued that the evidence was consistent, that Johnson had a "couple" or three beers and had the right to do so (T.Tr. 1104, 1106).

Had defense counsel fully investigated and called a toxicologist, like Dr. Martinez, the jury would have known the truth -- that Johnson was extremely intoxicated (Martinez depo, at 21), and would have had to have consumed at least

12.3 beers, given his weight of 214 pounds, to result in a BAC of .29[11] (Martinez Depo, at 18-21). The effects of such a high level of alcohol included lessened inhibitions, inappropriate behavior and increased aggression (Martinez Depo, at 25-26), all of which were relevant to the central issues.

Counsel admitted that Johnson's intoxication was important to her defense. It supported her argument that he was the initial aggressor (H.Tr. 44), she wanted the jury to consider the effects of his intoxication, but, since she introduced his blood alcohol content without explaining its meaning (H.Tr. 44). She gave the jury no evidence upon which to base its conclusions. Counsel had no reason for not consulting or calling an expert; she hadn't even considered it (H.Tr. 44). Her failure was not trial strategy (H.Tr. 45).

The motion court did not specifically address this claim in its findings, skipping claim 8(h) (L.F. 243-52). However, at the end of those findings, the court generally finds that:

> Movant has satisfied neither the performance nor prejudice prong of the test to determine ineffective assistance of counsel.
>
> Movant was not denied effective assistance of counsel.
>
> Movant has not sustained the requisite burden of proof on all claims of ineffective assistance of counsel.

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[11] This amount of alcohol was in his body when his blood was drawn at 10:29 p.m. -- at least an hour after he had stopped drinking (Martinez Depo, at 14, 20).

> The failure to present cumulative evidence is not prejudicial. State v. Twenter, 818 S.W.2d 628 (Mo. banc 1981)
>
> As to the remaining written allegations the Motion court need not make findings of fact and conclusions of law and allegations when no substantial evidence is presented at the hearing to support the allegations. Barry v. State, 850 S.W.2d 348 (Mo. banc 1993). And allegations in which no evidence is presented at the post-conviction evidentiary hearing are deemed abandoned. State v. Silvey, 894 S.W.2d 662 (Mo. banc 1995).

(L.F. 251-52). If these findings addressed claim 8(h), they are clearly erroneous and must be reversed.

Standard of Review and Constitution

The motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, counsel's performance must be deficient and prejudice must result. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000).

Counsel's failure to consult and present expert testimony to explain physical evidence can be ineffective. *Moore v. State*, 827 S.W.2d 213,215-16 (Mo. banc 1992), (counsel's failure to request blood tests by a serologist, readily available evidence, fell outside the range of reasonably competent behavior); and

Wolfe v. State, 96 S.W.3d 90, 93-95 (Mo. banc 2003) (failure to test hair unreasonable and prejudicial).

Counsel failed to consult with and call a toxicologist to explain Johnson's blood alcohol content. Counsel admitted that she never even thought about hiring such an expert and had no strategic reason for failing not doing so (H.Tr. 44-45). This failure was unreasonable given that counsel thought Johnson's intoxication was such an important issue. She repeatedly argued it in her opening and closing (T.Tr. 570, 1076-77, 1078, 1079, 1082, 1084-85). However, without evidence regarding how much Johnson must have drank to reach a blood alcohol content of .29, state witnesses were free to minimize his drinking and the prosecutor could argue in closing that he only had a couple of beers (T.Tr. 1104, 1105-06).

Counsel's failure prejudiced Black. To the extent the motion court found that this evidence would have been cumulative, the finding is clearly erroneous and unsupported by the record. After all, "evidence is said to be cumulative when it relates to a matter so 'fully and properly proved by other testimony' as to take it out of the area of serious dispute." *State v. McCauley*, 831 S.W.2d 741, 743 (Mo. App., E.D. 1992).

The closing arguments show that Johnson's drinking and whether he was drunk and aggressive was hotly contested. The State suggested that a blood alcohol content of .29 was not dispositive, since intoxication depends on the person's size, height, weight, and how long he drank (T.Tr. 1012). The State said

the witnesses were consistent; that Johnson only had 2-3 beers (T.Tr. 1104, 1105-06).

The jury should have known the truth. The truth was that to have that blood alcohol level, Johnson had to have drunk more than twelve beers. The jury should have learned the effects of that sky-high blood alcohol level -- lessened inhibitions, inappropriate behavior, and increased aggression (Martinez Depo, at 25-26). That information would have assisted the jury since those characteristics were relevant to whether Black deliberated or whether Johnson was drunk, mouthy and argumentative and the argument spun out of control. This crime was a barroom brawl that spilled into the street. The jury should have heard this scientific evidence so that they could have accurately considered the evidence of Johnson's drinking and how it affected his behavior. A new trial should result.

VI. Counsel's Failure to Challenge the Inadmissible, Unreliable and Unconstitutional DOC Records Introduced by the State

The motion court clearly erred in denying Mr. Black's claim that counsel was ineffective for failing to properly object to the Department of Corrections records, and the State's closing arguments based on those records, because counsel's failure and the admission of the records denied Mr. Black his rights to effective assistance of counsel, due process, confrontation, and his rights to be free from self-incrimination and cruel and unusual punishment, U.S. Const., Amends. 6th, 8th, and 14th, and Mo. Const., §§ 10, 18(a) and 21 in that the exhibit:

1) was not timely served with a business records affidavit;

2) contained statements by individuals lacking a business duty to transmit the information;

3) contained multiple hearsay, giving Black no opportunity to confront his accusers, and

4) included inadmissible references to Black's post-Miranda silence. Black was prejudiced since the State argued the records for the truth of the matters asserted, that Black was dangerous, had assaulted others in prison, and thus should be sentenced to death.

The State improperly introduced Black's correction records, even though they contained hearsay, comments on his post-*Miranda* silence, and did not

comply with the business records exception to the hearsay rule. Since counsel failed properly to object to their admission, the prosecutor argued them for the truth, to show that Black had committed assaults while imprisoned and therefore should be sentenced to death. Counsel was ineffective. A new penalty phase should result.

Trial Proceedings

During penalty phase, the State offered Exhibit 24, records from DOC (T.Tr. 1148). The first page contains an affidavit, signed by the Corrections Records Manager and dated December 1, 1999 (Ex.4).[12] Trial counsel objected to the exhibit because it included uncharged and unadjudicated crimes and the jury would receive no guidance about how to consider the records (T.Tr. 1149). The court overruled counsel's objection, admitted the records, and published them to the jury (T.Tr. 1150). The State gave each juror a copy (T.Tr. 1150).

The records contain multiple levels of hearsay. They contain allegations that Black assaulted Inmate Hogue (Ex. 4, at 4, 9). They include a report with statements from Jerome Barnett, Eugene Williams, and Reese Germany. *Id*., at 9. The report's author is unidentified. *Id*. All three statements are in the same handwriting, so they are not first-hand accounts by the individual inmates. *Id*.

[12] The records are attached to Kimberly Shaw's Deposition as Ex. 4.

The records also refer to a purported[13] assault of Lacy Whitman. *Id*., at 10-13. The records say that Charles Pritchard heard about the alleged assault "from a reliable source." *Id*., at 10, 13. They refer to statements by Lawrence Stojan, Richard Hampton, and Eugene Smith about the incident. *Id*., at 11.

The records also include *Miranda* warning forms that Black signed. *Id*., at 5, 8, 10, 19, 21, 22.

In closing, the State argued these records for their truth:

> What you need to remember is this is not something new for Mr. Black. Consider the Department of Correction's records, State Exhibit # 24, ladies and gentlemen. You've seen them. Look at them closely. You will see in there reference to a prior stabbing by Mr. Black in the Department of Corrections. You'll see in there repeated fights, assaults by Mr. Black. It's all there for you to look at. Look at those records. This is a man with two prior convictions out of Newton County. Did that stop him in 1976? Absolutely not. That man continued on through the penitentiary.

(T.Tr. 1222). Counsel did not object. In rebuttal, the State continued:

> When he was in prison he committed assaults. He knifed somebody while he was in prison. His last assault incident from 1995, if you

[13] The inmates' accounts differed. Smith said an argument, not a stabbing occurred. *Id*., at 11.

> will look at your reports, guess what he claimed? He claimed that it was done in self-defense. The same story that we heard from defense counsel here this week. It wasn't self-defense then and as you told us yesterday it's not self-defense now."

(T.Tr. 1236). Defense counsel again did not object. The State, then argued death was necessary to protect society:

> I want to conclude by telling you that by sentencing Gary Black to prison for the rest of his life will not keep society safe. That's the goal of prison. To keep people there and to keep society safe. How do we know that? Gary Black's been in prison. Did he commit assault? You bet he did. You've got the Department of Correction records to confirm that.

(T.Tr. 1239). Defense counsel still did not object. The jury considered these records and sentenced Black to death (T.Tr. 1241).

Postconviction Proceedings

Counsel had no explanation for failing properly to object to these records (Shaw Depo, at 12, 13, 14). The business records affidavit was dated December 1, 1999. *Id*. at 11. Trial began on December 6, 1999 (T.Tr. 195). The State never disclosed any witnesses listed in the records (Shaw Depo, at 12). Counsel did not object to the State's failures to comply with Section 490.692.2's seven-day notice requirement, and with its requirement that the records be made by someone having a duty to record and transmit the information. *Id*. at 12-13. Counsel did not

object to the multiple levels of hearsay or the denial of confrontation. *Id*. at 13-14. Counsel even let jurors hear Black's exercise of his rights to silence and counsel. *Id*. at 13. Counsel had no reason for her failures. *Id*., at 14.

The motion court summarily denied this claim (L.F. 252). It found Black had not sustained his burden of proof, presenting no substantial evidence to support his allegation, and thus, abandoning it. *Id*. This finding is clearly erroneous, since he proved his claim.

Standard of Review and Constitutional Provisions

This Court must review the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Black must show counsel's performance was deficient and that performance created prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91, 1511-12 (2000); *Wiggins v. Smith*, 123 S.Ct. 2527, 2535 (2003).

Counsel's Duty to Rebut Aggravator

The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 123 S.Ct. at 2537 (emphasis in original). "One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state." *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002), citing *Bell v. Cone*, 535 U.S. 685 (2002). Counsel's failure to investigate and rebut aggravating evidence

constitutes ineffective assistance of counsel. *Ervin, supra, citing Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999).

In *Ervin*, counsel failed to investigate a jail assault and rebut the State's contention that Ervin had threatened to kill his cellmate. *Ervin*, at 826. The State maintained this evidence showed that Ervin would pose a danger to others while incarcerated. *Id*. at 827. The potential for prejudice was strong because the State argued this nonstatutory aggravating evidence was a reason to give death. *Id*.

In *Parker*, the State suggested that Parker murdered the victim because she was a potential witness in other, pending cases. *Id*. A prosecutor testified that these other cases had been pending before the murder. *Id*. But Parker's former attorney would have testified that they had been resolved before the murder, and that Parker knew this. *Id*. at 930. The attorney had notified trial counsel about this information, but counsel failed to call her to rebut the State's aggravating evidence. *Id*. The Court found counsel ineffective, and ordered that Parker receive a new penalty phase. *Id*. at 931.

Here, counsel needed to do little to negate the aggravating evidence contained in DOC records. A proper objection would have done the trick since the State had not complied with the mandates of § 490.692. That Section requires a business record affidavit be served on counsel at least seven days before trial begins. Section 490.692 mandates:

> No party shall be permitted to offer such business records into evidence pursuant to this section unless all other parties to the action

> have been served with copies of such records and such affidavit at least seven days prior to the day upon which the trial of the cause commences.

This business records affidavit was dated December 1, 1999, only four days before trial began.

The records also contain many statements not made by one with "knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record." § 490.692. They also were not made "at or near the time of the act, event, condition, opinion, or diagnosis." *Id*.

The records contained multiple levels of hearsay,[14] with unknown authors referencing others' statements and sometimes, even what unidentified sources alleged occurred. For instance, Officer Pritchard purportedly heard about one alleged assault from a "reliable source" (Ex. 4, at 10, 13). Whitman told Hampton information that Hampton then told the author of the report. *Id*. at 13. The records are chock-full of witnesses' statements, sometimes reported by others (Ex. 4). Many reports are written by unidentified persons. *Id.* The records contain so much hearsay that any reasonable attorney would have objected.

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[14] A hearsay statement is any out-of-court statement used to prove the truth of the matter asserted therein, which depends on the statement's veracity for its value. *State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981).

This Court has upheld the exclusion of such hearsay in other death penalty cases. In *State v. Kreutzer*, 928 S.W.2d 854, 867-68 (Mo. banc 1996), the trial court excluded DFS records that appellant offered through Stanislaus, a DFS official who authored one of the reports. The records contained investigatory reports, medical records and interviews. *Id*. Even though Stanislaus relied on the reports, they were inadmissible under the business records exception. *Id*., at 868. The exception does not "make admissible any evidence within the record that would be incompetent if offered by the individual who initially recorded the information." *Id*. "The report must be shown to be either based on the entrant's observations or on the information of others with a business duty to transmit it to the entrant." *Id*. Most of the documents were reports of others' statements and were rife with hearsay, inadmissible even if the various authors had testified. *Id*. They were based upon information gathered from others who did not have a business duty to transmit it to the writer. *Id*.

In *State v. Nicklasson*, 967 S.W.2d 596, 616 (Mo. banc 1998), this Court upheld the exclusion of records containing hearsay. Even if a document falls under the business record exception, the document is inadmissible if the embedded statement is inadmissible hearsay. *Id*.

Just like *Kreutzer* and *Nicklasson*, these records were inadmissible. They were rife with hearsay statements by persons with no business duty to transmit them to the writer. The prosecutor argued these out-of-court statements to prove the matters asserted therein, that Mr. Black had assaulted others. Each juror

received a copy of the records and was told to read them carefully. The State argued the records showed why Mr. Black must be sentenced to death.

Given that these inadmissible records were full of prejudicial, unreliable aggravating evidence, counsel acted unreasonably in failing to object. See, *State v. McCarter*, 883 S.W.2d 75 (Mo. App. S.D. 1994) (counsel was ineffective for offering a report of a social worker that contained previous accusations of sexual abuse). The records contained accusations of assaults and harmed Black. Counsel did not want these records admitted (T.Tr. 1148-49); and she unreasonably failed to give the court proper grounds to exclude them. Prejudice resulted since the prosecutor used them as the reason to give death.

Admitting these records also denied confrontation under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). They lacked assurances of reliability, fit within no exception to the hearsay rule, and should have been excluded. *Kruetzer* and *Nicklasson*, *supra*.

The records also referred to the *Miranda*[15] warning forms, in which Black indicated he understood his rights, but refused to waive his rights to silence or counsel (Ex. 4, at 5, 8, 10, 19, 21, 22). Using his post-arrest post-*Miranda* silence,

[15] *Miranda v. Arizona*, 384 U.S. 436, 467-74 (1966) held that Fifth Amendment require warnings that a suspect has the right to remain silent, the right to counsel and anything they say can be used against them.

denied Black due process. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); *State v. Dexter*, 954 S.W.2d 332, 340-41 (Mo. banc 1997). The prosecutor gave each juror a copy of the records, including the *Miranda* forms. He instructed the jurors to look at the records closely. They considered Mr. Black's post-arrest silence for his guilt of prior assaults. The State then used these assaults to establish its case for death. As in *Dexter*, this Court should reverse and remand for a new trial.

VII. 8th Amendment Requires *De Novo* Review

The motion court clearly erred in denying Mr. Black's claims that this Court's failure to apply *de novo* review in conducting proportionality review violated his rights under the Eighth and Fourteenth Amendment of the U.S. Const. and Art. I, §§ 10, 18(a) and 21 in that the death penalty is cruel and unusual here in that a *de novo* review would have led the Court to conclude that the evidence does not establish deliberation, that Black coolly reflected on killing Johnson; rather, the evidence shows Johnson made a pass at Black's girlfriend, Black flew into a rage, Johnson and Black argued and fought, and Johnson was killed in the heat of the fight.

Mr. Black alleged that this Court's failure to grant *de novo* review when deciding whether his sentence was disproportionate denied him freedom from cruel and unusual punishment under the Eighth and Fourteenth Amendments, under *Cooper Industries v. Leatherman Tool Group, Inc.*, 523 U.S. 424 (2001). The motion court did not specifically rule on this claim, summarily denying several claims at the end of its findings, citing the failure to present substantial evidence[16] (L.F. 252). Since this claim is legal in nature, and no evidence was necessary, the motion court clearly erred.

[16] Mr. Black offered evidence on his claim that his sentence was disproportionate, specifically records from the State Court Administrator (Ex. 26) and a Declaration

Standard of Review and Constitutional Provisions

The motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. Even though States possess broad discretion with respect to imposition of criminal penalties, "the Due Process Clause of the Fourtheenth Amendment to the Federal Constitution imposes substantive limits on that discretion." *Cooper Industries*, *supra*, at 433. The Eighth Amendment's prohibition against cruel and unusual punishments applies to the States. *Id.* at 433-34.

In *Cooper*, the Court found that the Eighth and Fourteenth Amendments require appellate courts to apply a *de novo* review of the constitutionality of punitive damages. *Id.* at 440. The Court cited death penalty cases in reaching its conclusion. *Id.* at 434 citing *Furman v. Georgia*, 408 U.S. 239 (1972) (per curiam); *Enmund v. Florida*, 458 U.S. 782, 787 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (opinion of White, J.).

The standard of review can affect the result of the case. *Cooper*, *supra* at 441. Indeed, one need only consider Black's direct appeal to see the difference. *State v. Black*, 50 S.W.3d 778 (Mo. banc 2001). There, the majority reviewed his death sentence, finding it proportionate. *Id.*, at 792-93. This Court found that the

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of Kevin Buchek, who researched Missouri's death penalty processes from December 31, 1996 through June 30, 2002 (Ex. 27). The motion court refused to consider this evidence (H.Tr. 63-64).

sentence was not imposed under the influence of passion, prejudice or other arbitrary factor. *Id.* at 792. It found the serious assaultive conviction aggravator was supported by Black's two prior convictions. *Id.,* at 792-93.

In reviewing whether this sentence was excessive or disproportionate to the penalty in similar cases, this Court only compared this case to other death cases, *State v. Amrine*, 741 S.W.2d 665, 672 (Mo. banc 1987); *State v. Reuscher*, 827 S.W.2d 710, 715 (Mo. banc); *State v. Nave,* 694 S.W.2d 729, 738 (Mo. banc 1985), all of which shared a similar aggravating circumstance.[17] This Court also held that defendant's lack of remorse supported death. *Black, Supra,* at 793, citing *State v. O'Neal*, 718 S.W.2d 498, 503 (Mo. banc 1986). This Court found the evidence of deliberation was "compelling" and Black presented "no credible evidence of self-defense." *Black, supra,* at 793. This Court reviewed the evidence in the light most favorable to the verdict. *Id.* at 788-89.

By contrast, the dissent applied the *de novo* review procedure established in *Cooper*. *Black, supra* at 793-99 (Wolff, J. dissenting). The dissent found no evidence that Black coolly reflected. *Id.* at 796. Even viewed favorably to the

[17] One federal court recently found the Nebraska Supreme Court's similar review unconstitutional. *Palmer v. Clarke*, 2003 WL 22327180 Slip. At 23-24 (D.Neb. 2003). (Limiting proportionality review to death sentence cases is irrational and like "looking for race discrimination in public transportation by comparing only those riding in the back of the bus").

state, the dissent found no evidence of cool deliberation. *Id.* at 797. Rather, it found Black flew into a rage because Johnson made a pass at his girlfriend. *Id.* The jury knew "deliberation" was the key issue, asking the judge to define "cool reflection" *Id.* (see also D.L.F. 563). At most, the evidence showed an intentional killing, establishing guilt of second-degree murder. *Id.* Alternatively, Black should have been convicted of voluntary manslaughter, under § 565.023.1, since he acted under sudden passion arising from adequate cause.

De novo review shows this death penalty is disproportionate. Despite Black's criminal history, he did not act deliberately. He acted out of anger, in the heat of the moment. His sentence should be vacated and the cause remanded for sentencing on second-degree murder. *State v. Black*, *supra* at 799.

VIII. Movant's Right to Reject Appointed Counsel Under Rule 29.16

The motion court erred in denying Mr. Black's motions to reject the appointment of counsel, to appoint conflict free counsel, or allow him to proceed *pro se*, thereby denying Mr. Black due process, meaningful access to the courts, self-representation, and conflict-free counsel, U.S.Const., Amends. 6 and 14, Mo. Const., Art. I, §§ 10 and 18(a), and his rights under Rule 29.16, in that the court failed to determine whether Black was competent to reject the appointment of counsel and whether he did so understanding its legal consequences, as required by Rule 29.16(a). The record shows he is competent and understands the legal consequences, and should have been allowed to reject appointed counsel.

Rule 29.16(a) allows a movant in a death penalty case to reject appointed counsel if the movant is competent and understands the legal consequences of rejecting appointed counsel. Gary Black tried to reject appointed counsel, pursuant to Rule 29.16. He filed motions, wrote to the court, and testified about his motions. The motion court summarily denied his motions, making no record findings regarding his competence to reject counsel and without addressing the alleged conflict of interest. The motion court erred. The record shows he is competent to decide to reject appointed counsel and understands the legal consequences. Thus, he should have been allowed to reject counsel.

Procedural History

Pursuant to Rule 29.16(a), on August 12, 2002, Black filed a *pro se* motion to reject the appointment of counsel (L.F. 211, 12). In a docket entry, the motion court summarily denied that motion, making no findings (L.F. 213).

Black wrote, telling the Court that he thought postconviction counsel had a conflict of interest (L.F. 214-18). Postconviction counsel who amended the motion were from the same office as his appellate counsel and the amended motion did not challenge appellate counsel's assistance (L.F. 214-18). The judge never responded.

Black then filed a motion to disqualify assigned counsel and to proceed *pro se* (L.F. 219-20). He testified about wanting to reject counsel. He again expressed his concerns that direct-appeal counsel, Rosemary Percival, worked in the same office as Laura Martin and Rebecca Kurz as they had the same address, Suite 2000, 818 Grand Avenue in Kansas City, Missouri (Black Depo, at 5-6). The amended motion included no claims challenging Percival's effectiveness. *Id*., at 6-7. Even though Martin and Kurz withdrew because of a conflict, new postconviction counsel filed no amended motion and had the same supervisor as Martin and Kurz. *Id*., at 7-8. Successor counsel had divided loyalties in litigating these conflict of interest claims. *Id*. at 9.

As with his letter to the judge, Black cited case law supporting his argument that postconviction counsel should not represent a movant if he has a conflict of interest. *Id*., at 8-9, citing *State v. Taylor*, 1 S.W.3d 610 (Mo. App.

W.D. 1999); *State v. Griddine*, 75 S.W.3d 741 (Mo. App. W.D. 2002); *Gordon v. State*, 684 S.W.2d 888 (Mo. App. W.D. 1985); *State v. Ross*, 829 S.W. 2d 948 (Mo. banc 1992); *Kahn v. Kahn*, 846 S.W.2d 219 (Mo. App. E.D. 1993); and *State v. Reisinger*, 546 S.W.2d 563 (Mo. App. S.D. 1977) (Black Depo, at 8-9).

Black requested independent, conflict-free counsel, outside the Public Defender's Office be appointed to represent him, or alternatively, that he be allowed to proceed *pro se*. (Black Depo at 11). Black supported his request with the following information. He had obtained his GED in the Marine Corps. *Id*. He had three sociology credits from Northeastern Oklahoma State College. *Id*. He had years of experience in criminal and civil litigation. *Id*. He was allowed to proceed *pro se* in Platte County in 1991 and was found not guilty of two felony charges. *Id*. He understood that he would be bound by the same rules and procedures as an attorney. *Id*., at 12.

Despite the specific requirements of Rule 29.16(a), despite Black's requests, and despite Black's supporting information and testimony, the motion court never found whether Black could competently decide to reject the appointment of counsel and whether he understood the legal consequences. The court never addressed the issue, summarily denying Black's motion to disqualify counsel (L.F. 242, H.Tr. 242). This violated Rule 29.16(a)'s plain terms. This Court should reverse and remand for the appointment of conflict-free counsel or, alternatively, with instructions that Mr. Black be allowed to proceed *pro se*.

Standard of Review and Constitutional Provisions

Due process requires a fair hearing in 29.15 proceedings. *Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991); *In re Murchison*, 349 U.S. 133, 136 (1955). Due process is implicated when the motion court fails to allow a litigant to reject appointed counsel. The right to represent oneself is fundamental for both criminal and civil litigation. *Bittick v. State*, 105 S.W.3d 498, 503-04 (Mo. App., W.D. 2003), citing *Faretta v. California*, 422 U.S. 806, 824 (1975). Denying movant's right to represent himself and proceed *pro se* denies him meaningful access to the courts. *Bittick, supra* at 504, n. 4.

This Court has codified the right to reject counsel. Rule 29.16(a)[18] provides:

> If movant seeks to reject the appointment of counsel, the court shall find on the record, after a hearing if necessary, whether the movant is able to competently decide whether to accept or reject the appointment and whether the movant rejected the offer with the understanding of its legal consequences.

[18] Rule 29.16(a) tracks 28 U.S.C., Section 2261. The procedures in Chapter 154 of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) are applicable only if the State has established a mechanism for appointment of counsel, including the right to reject the appointment of counsel. The relevant portion of Section 2261 is included in the appendix (A-17 to A-18).

Right to Reject Appointed Counsel

By ignoring Rule 29.16(a)'s plain language, the motion court erred. It made no finding whether Black could competently decide whether to accept the appointment or whether Mr. Black rejected the offer, understanding its legal consequences (L.F. 242, H.Tr. 2). The record supported a finding that Black is competent and understands the consequences of going *pro se*. He is educated, having obtained his GED in the Marine Corps, and having college credits from Northeastern Oklahoma State College (Black Depo, at 11). He also had years of experience in criminal and civil litigation. *Id*. He had represented himself in Platte County in 1991 and was found not guilty of two felony charges. *Id*. He understood that he would be bound by the same rules and procedures as an attorney. *Id*. at 12. The motion court should have found him competent to reject counsel and that he did so understanding the legal consequences. As in *Bittick*, this Court should reverse the motion court's denial of Black's right to represent himself and remand for further proceedings, in which Black is afforded the opportunity to file an amended motion and present evidence to support his claims.

Conflict of Interest

The motion court never addressed Black's complaints that his postconviction counsel had a conflict of interest. Certainly, his allegations that Kurz, Martin and Percival worked in the same office should have been investigated. *See*, *Taylor*, *supra* at 611-12 and *Griddine, supra,* at 742-43.

(Defendant's trial counsel represented him on direct appeal and advised him not to file a rule 29.15 motion).

In *Griddine* and *Taylor*, counsel had an actual conflict of interest, because counsel "was caught between his obligation to do his best for [Mr.] Taylor and a desire to protect his own reputation and financial interests." *Griddine*, *supra*, at 744, quoting, *Taylor* at 612. Because of the conflict, Taylor and Griddine could not obtain review of their ineffective assistance of counsel claims.

Similarly, here, if postconviction counsel had a conflict of interest, because they worked with appellate counsel, this adversely affected Black since they raised no claims against appellate counsel.

A public defender may represent a movant in postconviction proceedings that challenge another public defender's assistance, *State ex rel. Public Defender Commission v. Bonacker*, 706 S.W.2d 449 (Mo. banc 1986). However, if a potential conflict exists, the Public Defender Commission is authorized to cure and resolve it by employing private counsel under contract or on a case-by-case basis. *Id.*, at 451, citing Section 600.042.1(10), RSMo Cum. Supp. 1984.

The motion court refused to consider whether a conflict of interest existed and heard no evidence regarding the conflict. A remand is necessary to determine whether a conflict existed, and, if so, conflict-free counsel must be appointed.

This Court should reverse and remand, with directions to determine whether postconviction counsel had a conflict of interest and, if so, to appoint

conflict-free counsel. If no conflict existed, Mr. Black should be allowed to proceed *pro se*.

IX. Change of Judge

The motion court erred in denying Mr. Black's motion for a change of judge thereby denying Black due process, a full and fair hearing, and reliable sentencing U.S.Const., Amends. 6, 8, and 14, Mo. Const., Art. I, §§ 10, 18(a) and 21 in that Judge Dermott's prior statements reveal he prejudged the issues of effective assistance of counsel. After the jury rendered its guilty verdict, Judge Dermott volunteered that he thought counsel did a "fine job," Mr. Black's complaints notwithstanding; and at the 29.15 hearing, he stated he did not want to consider the testimony of seven witnesses who supported Mr. Black's claims of ineffective assistance. A reasonable observer would question whether the judge could be fair and impartial. Since Mr. Black has been sentenced to death, due process and the Eighth Amendment require heightened reliability and careful review, not a decision-maker who does not want to consider all the relevant evidence.

Mr. Black was dissatisfied with counsel during trial (T.Tr. 852-53). Counsel had not fully investigated the case and failed to disclose witness statements to the State. She therefore was not allowed to impeach witnesses with prior inconsistent statements (T.Tr. 121-22, 124, 708-11, 740, 746-53, 757-62, 929-30). Because of counsel's negligence, these statements were excluded and not considered as substantive evidence under Section 491.074, RSMo 2000. The jury did not know that Mark Wolfe had told an investigator that he saw Johnson

connect with at least one blow to Black that Johnson then staggered back to the pickup, fell inside and put his hand to his neck (T.Tr. 929-30). This would have supported Black's defense that he stabbed Johnson during the fight and rebutted any suggestion of deliberation.

Judge Dermott dismissed Black's complaints about his attorneys' performance, later asking counsel, "how are you doing with the defendant? Has he settled down since he made his record?" (T.Tr. 903). After the guilty verdict, Judge Dermott volunteered his belief that counsel had been effective (T.Tr. 1116). He opined, "incidentally you all did a fine job I thought, his complaints not withstanding." *Id*.

Judge Dermott's statements on the record at trial indicated he prejudged Black's claims of ineffective assistance. That prejudgment became clearer during the 29.15 hearing, when he told counsel he did not plan to consider the testimony of seven witnesses, taken by deposition in lieu of live testimony (H.Tr. 3-4). The prosecutor assured the judge that the testimony of five of these witnesses was short, so the court accepted the deposition testimony (H.Tr. 4). Judge Dermott's comments again revealed he had pre-judged the issues. Any reasonable person would have factual grounds to find an appearance of impropriety and doubt the court's impartiality. The motion court erred in denying (L.F. 228) Black's motion for change of judge (L.F. 225-26).

Standard of Review and Constitutional Provisions

Due process requires a fair hearing in 29.15 proceedings. *Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991). See, also, *In re Murchison*, 349 U.S. 133, 136 (1955). The test for disqualification is "whether a reasonable person would have a factual basis to find an appearance of impropriety and doubt the impartiality of the court." *State v. Smulls*, 935 S.W.2d 9, 24 (Mo. banc 1996). This Court reviews whether the trial judge erred in refusing to sustain a motion to recuse. *Id*.

In *Smulls*, the trial judge's statements on the record indicated racial bias and required his disqualification in the 29.15 proceedings. *Id*., at 25-27. The factual allegations in Smulls motion for disqualification were compelling in light of the trial record. *Id*., at 25. Even though this Court acknowledged benefits from having the judge who presided at trial rule on postconviction claims, it recognized fundamental fairness may require the trial judge to recuse in a postconviction proceeding. *Id*.

Fundamental fairness requires a trial judge to be free of the appearance of bias against the defendant. *Id*. The standard is not whether the judge is actually prejudiced. Due process and Rule 2, Canon 3D require a judge to recuse where his "impartiality might reasonably be questioned." *Smulls*, *supra* at 26, citing *In re Murchison*, 349 U.S. 133, 136 (1955). "Justice must satisfy the appearance of justice." *Aetna Life Co. v. Lavoie*, 475 U.S. 813, 825 (1985). The benefit of any doubt is accorded a litigant, not a judge. *Smulls*, 935 S.W.2d at 26-27.

Here, as in *Smulls*, the trial judge erred in not granting Black's motion for change of judge. During trial, he volunteered his views that counsel did a fine job, and that Black's complaints were illegitimate. Even though Black had been sentenced to death, the trial judge did not want to read seven witnesses' testimony that supported Black's ineffectiveness claims. He had already decided that counsel was effective. Under these facts, "a reasonable person would have a factual basis to find an appearance of impropriety and doubt the impartiality of the court." *Smulls*, *supra* at 24. Any doubt about Judge Dermott's ability to be impartial should be resolved in Black's favor. Judge Dermott erred in denying Black's motion for change of judge. This Court should remand for a new hearing before a fair and impartial judge.

Because this is a death case, due process and the Eighth Amendment require a heightened need for reliability. *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985). Instead of carefully reviewing all issues to ensure a reliable result, here, Judge Dermott did not want to read the testimony of seven witnesses. He said "I don't intend to read every line of every deposition of seven witnesses unless it's relevant." (H.Tr. 3). Postconviction counsel informed the court that it was relevant. The prosecutor reassured the court that its review could be quick, saying, "[a]nd I believe, Judge, that at least five out of the seven would be relatively short. There's only one or two maybe that went any length of time." (H.Tr. 4). Far from giving this case heightened review and careful scrutiny, the judge wanted it to be quick and easy. He should have granted his motion for

change of judge so that he could have a fair and impartial review of all his claims. A new hearing is required.

CONCLUSION

Mr. Black argued with Johnson. They fought in the middle of the street and Johnson died. This is not a first degree murder case that warrants the death penalty. Had counsel been effective, the jury would not have convicted Mr. Black of first degree murder and sentenced him to death. Accordingly, Mr. Black requests:

Point I, II, III, and V, a new trial;

Point IV and VI, a new penalty phase;

Point VII, vacate his conviction and sentence and remand for sentencing on second degree murder, or alternatively vacate his death sentence and impose a life sentence;

Point VIII, a remand for proceedings consistent with Rule 29.16;

Point IX, a remand with directions that Judge Dermott recuse himself and for postconviction proceedings before a new judge.

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 20,283 words, which does not exceed the 31,000 words allowed for an appellant's brief.

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

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of February, 2004, Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65102.

_____

Melinda K. Pendergraph