IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 83106
	)	
BRANDON HUTCHISON,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF LAWRENCE COUNTY, MISSOURI
39th JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE J. EDWARD SWEENEY, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Brandon Hutchison, was jury tried for two counts of first degree murder and sentenced to death in the Circuit Court of Lawrence County. This Court affirmed the conviction and sentence on appeal. *See State v. Hutchison,* 957 S.W.2d 757 (Mo.banc1997).

After his direct appeal, Brandon filed a Rule 29.15 motion that was amended by appointed counsel. The circuit court denied the motion after an evidentiary hearing on some of the claims. Because a death sentence was imposed in the underlying case, this Court has jurisdiction of this Rule 29.15 appeal. Art. V., Sect. 3 and 10 (as amended 1982); Standing Order, June 16, 1988.

STATEMENT OF FACTS

In January, 1996, Brandon Hutchison was charged with the murder of Ronald and Brian Yates (S.L.F.1).[1] He was 21 years old (Tr.251;T.Tr.1914) and lived at home with his parents, Lorraine and Bill (T.Tr.1915). Brandon was broke; he had no money (Tr.279). So his parents contacted Dee Wampler, a criminal defense attorney in Springfield, Missouri (Tr.279). Mr. Wampler interviewed Brandon and obtained a retainer of $15,000 from the Hutchisons (Tr.1043). However, he decided that he could not handle the case for that amount and Brandon's parents could not afford the additional fee (Tr.279). Mr. Wampler referred Brandon to Shane Cantin and William Crosby (Tr.280,1086).

Mr. Cantin had been admitted to practice law three years and this was his first murder in the first degree case (Tr.932-34). Mr. Crosby had been admitted five years, but had not handled any murder cases as a licensed attorney (Tr.1057,1059). They spent nearly all their time preparing for the guilt phase (Tr.981,990). They were concerned that the two codefendants, Freddy Lopez and Michael Salazar, might testify against Brandon. As a result, they asked for disclosure of any deals made with them (Tr.990). They also sought to admit evidence that Lopez and Salazar were members of a violent, Hispanic gang, arguing that this would impact their credibility and give them a motive to protect each other and to try to pin the offense on Brandon (T.Tr.239-46,252-90). The defense theory was that Lopez and Salazar were gang members "running herd" over their client (Tr.1016,1094). Counsel believed that Brandon was a follower, he was not making the decisions (Tr.1024,1068,1090).

[1] Record citations are as follows: evidentiary hearing transcript (Tr.); legal file of 29.15 appeal (L.F.); trial transcript (T.Tr.); supplemental legal file (S.L.F.); and 29.15 exhibits (Ex.).

The state told counsel they had no formal deal with either codefendant (T.Tr.141-2). The prosecutor had recommended life without probation or parole for Salazar (T.Tr.140). As for Lopez, the state had discussions with his attorney and told him that if he did a good job as a witness at Brandon's trial, the state would reduce the charges to murder in the second degree (T.Tr.142). The prosecutor said that they had not reached a formal agreement as to the sentence, but he was thinking 30 years (T.Tr.142). The trial court ordered the state to disclose any agreement, formal or informal, reached with either codefendant (T.Tr.143).

The trial was set to begin in October. A couple of months before trial, counsel realized that they were not ready for trial. They were up to their eyeballs in work (Tr.1030). They felt swamped and unprepared (Tr.1003). They knew that Brandon had grown-up and spent nearly all his life in the State of California, but they had been unable to investigate his background (Tr.1064). Counsel wanted to make a trip to California to investigate (Tr. 1064). They had not requested any background records, only getting some grade cards from Brandon's mother (Tr.974-78,1030,1042). They requested a continuance so that they could prepare for penalty phase (Tr.989,1003,1064;S.L.F.27-28). The trial court denied the request (S.L.F.3-4).

The next few weeks, defense counsel focused on the guilt phase of trial; they did not have the time to prepare for the penalty phase (Tr.1064,1083). They had hired Dr. Lester Bland to evaluate Brandon to decide whether he was competent and whether he had suffered from a mental disease or defect (Tr.986-89,1030,1069). Dr. Bland identified some deficits and problems in his report (Ex.12). He concluded that Brandon was competent and had no mental disease or defect, but that he had a personality disorder. *Id*. at 6, 8-10.

Counsel did not follow-up on any of the information in Dr. Bland's report or obtain any additional testing (Tr.1074). They did not have the money to hire additional experts (Tr.983,1048). The Hutchisons had paid $5-6,000 in additional fees (Tr.1047). They used this money for Dr. Bland and depositions. *Id*.

Jury selection began on October 4, 1996, less than eight months after counsel had entered (T.Tr.295). The State called Freddy Lopez (T.Tr.1068-1256). Lopez sold Terry Ferris methamphetamine the evening of December 31, 1995 (T.Tr.1080). Timmy Yates was with Ferris when he bought the drugs (Tr.87-88). Later in the evening, Ronnie and Brian Yates came to Lopez's garage looking for their brother, and stayed for a New Year's Eve party (T.Tr.1096). Lopez talked to the Yates and did a line of methamphetamine with them (T.Tr.1097). At 4:00 a.m. Lopez and his wife argued and went to their bedroom (T.Tr.1098). While he was gone, Salazar shot the Yates, claiming one had tried to stab him with a screwdriver (T.Tr.1105,1109). Brandon ran into the house asking Lopez to come to the garage; he said that something bad had happened (T.Tr.1101). When Lopez went to the garage, he saw the Yates lying on the floor (T.Tr.1106).

Lopez's testimony minimized his involvement and portrayed Brandon as the most culpable (T.Tr.1110, 1112-13,1121,1127,1129,1131,1133-34). They took the bodies to a farm road and shot them again (T.Tr.1127,1133-34). Lopez said he stayed in the car while Salazar and Brandon got out (T.Tr.1133), but later Lopez burned his shoes, because he was afraid they would incriminate him (T.Tr.1234).

Defense counsel did not believe that Brandon was actually making the decisions that night (Tr.1024,1094). Counsel believed Salazar was the shooter, both in the garage and on the farm road

(Tr.1090).[2] Thus, counsel tried to impeach Lopez with prior inconsistent statements (T.Tr.1162-68) and by questioning him about what he was getting for his testimony (T.Tr.1161-62,1242-43).

Lopez' lawyer said that the prosecutor was giving no deals (T.Tr.1242-43). He was just testifying to clear his conscience and prayed that he received leniency. *Id*. The prosecutor confirmed Lopez' understanding, saying that he was still charged with first degree murder and was not getting out of anything (T.Tr.1820). According to the State, Lopez convicted himself on the stand and was going to be held responsible (T.Tr.1820-21). After the prosecutor's argument, the jury convicted Brandon (T.Tr.1836) and the trial proceeded to penalty phase.

John Galvin claimed that Brandon had stabbed him months before the charged offense (Tr.938). The state first endorsed Galvin after jury selection during the guilt phase of trial (Tr.951,1063). Counsel objected to the late endorsement, but did not ask for a continuance (T.Tr.1466-79). Defense counsel wanted time to investigate this allegation and both attorneys thought they asked for a continuance because of the late disclosure (Tr.951-53,1064).

Brandy Kulow had seen Brandon with a gun (T.Tr. 1859). He pulled it out and pointed it at her. *Id*. It scared her. *Id*.

[2] The trial court refused to consider Salazar's admission that he was the actual shooter on the farm road (Ex.65), even though he was unavailable as a witness at the evidentiary hearing, invoking his right against self-incrimination (L.F.618).

Joyce Kellum, the victims' mother, testified about the impact the deaths had on her and the rest of her family, especially her grandchildren (T.Tr.1872-76). Several people, including the court reporter, cried (Tr.972,1079).

The defense called four witnesses in penalty phase, Dr. Bland, Brandon's parents, and a friend who had met Brandon seven months before the killings (T.Tr.1876-1935). Dr. Bland testified that Brandon was competent and did not suffer from a mental disease or defect, but had borderline intellectual functioning and a personality disorder (T.Tr.1885,1888). He revealed Brandon's IQ was 76 or 78, he read at the fourth grade level and had only completed the tenth grade (T.Tr.1881-83). He had been is special education (T.Tr.1881-82).

On cross-examination, the prosecutor established that Dr. Bland was relying soley on Brandon and had not received any other information from independent sources (T.Tr.1891-93,1898,1903). The state also elicited Brandon's substance abuse history and his substance abuse on the night of the offense (T.Tr.1893-1900). On redirect, defense counsel elicited Brandon's version of the events surrounding the charged offense (T.Tr.1904-05). Brandon was afraid of Lopez and Salazar (T.Tr.1904-05). He did not shoot anyone, but did help carry the bodies (T.Tr.1905).

Brandon's friend, Frankie Young, revealed that Brandon was good to her children, helped with chores and she considered him just like family (T.Tr.1910-11). She acknowledged that he was violent when he drank (T.Tr.1912).

Brandon's mother did not think her son deserved to die (T.Tr.1922-23). He was a loving boy with a big heart, close to his family (T.Tr.1918). He had two brothers and two children of his own (T.Tr.1913-14,1916). She mentioned his difficulties in school, he was in special education, had a

learning disability and was diagnosed with Attention Deficit Disorder (T.Tr.1919-21). As a result, he took Ritalin (T.Tr.1919).

Like Brandon's mother, Mr. Hutchison did not think his son's acts deserved death (T.Tr.1932-33). He had visited Brandon every Sunday at the jail, and would continue to visit Brandon (T.Tr.1934). He planned to take care of Brandon's two boys (T.Tr.1935).

Counsel would have liked to have done more in mitigation (Tr.990,1083). They wanted to present a full and complete story of Brandon's life for the jury to hear (Tr.1082-83). They did not have time (Tr.990,1083). The penalty phase suffered the most (Tr.1064).

The jury recommended a death sentence (T.Tr.1956). On November 12, 1996, the trial court sentenced Mr. Hutchison (T.Tr.1985). He appealed to this Court; counsel raised seven issues, three of which were unpreserved. *State v. Hutchison*, 957 S.W.2d 747 (Mo.banc1997). This Court denied relief. *Id*.

Meanwhile, a jury found Salazar guilty of first degree murder, but imposed a sentence of life without probation or parole (Ex.62J at 1747). Freddy Lopez did not testify at Salazar's trial (Ex.79 at 27).

Lopez obtained the services of Dee Wampler, Brandon's original attorney (Ex.79 at 1). On November 21, 1997, Lopez pled guilty to the reduced charge of second degree murder and, at the prosecutor's recommendation, received ten years on each count, to be served concurrently. *Id*. at 9,48. The state believed that he was guilty of first degree murder, but said it was recommending the ten year sentence at the request of the victims' family. *Id*. at 9,27,28,38. The court sentenced Lopez to ten years on December 10, 1997. *Id*. at 48.

The following month, the victims' family filed a wrongful death action against Lopez, who filed an answer the same day (Ex.84 at 1).[3] Six days later, the parties filed a settlement agreement with the court. *Id*. at 2. Lopez paid the Yates' family $200,000.00 and their attorney, Steven Hays, $30,000. *Id*. at 3-5,10-11. Hays incurred no expenses. *Id*. at 5.

Brandon challenged his conviction and sentence, filing a Rule 29.15 motion (L.F.9-14).[4] Appointed counsel filed an amended motion alleging numerous constitutional violations (L.F.20-156). The trial court denied a hearing on some claims including: that the prosecutor had not revealed the deal with Freddy Lopez; and that Freddy Lopez's payment of $200,000 to obtain a ten year sentence showed that justice was for sale and Brandon was arbitrarily sentenced to death (L.F.814).

The evidentiary hearing focused on the effectiveness of trial counsel and their failure to investigate and prepare for penalty phase. Brandon's mother smoked marijuana with her sons when they were small boys (Tr.413). An uncle sexually abused Brandon when he was only ten years old (Tr.169-71,183,190-93,201-02,250,262,370,422). Brandon had difficulties in school; he could not read and write very well and was placed in special education (Tr.187,197-98,257-59,Ex.53 at 52). Other kids made fun of him; he hated it (Tr.137,168-69,198-99,258). Brandon turned to alcohol and drugs (Tr.184-85,193,208-09,261,268-69,Ex.53 at 11,13,16-17,18,20-21,27,38-40,50). This was

[3] Certified copies of the wrongful death action were proffered at the evidentiary hearing, but the trial court refused to consider them (Tr.1138-39).

[4] In preparing Brandon's brief, counsel discovered that the legal file is misnumbered, with pages 780-89 repeated twice. Counsel apologizes for this error and the resulting inconvenience.

not unique to Brandon; his family had a history of alcoholism and substance abuse (Tr.180,209-10,253,389,413,414,415,426-27,461).

By age 16, Brandon was being treated by a psychiatrist (Tr.382,Ex.53). Dr. Jarrold Parrish concluded that he suffered from a Bipolar Disorder (Tr.383,Ex.53 at 11-13). He tried to treat him with Lithium (Tr.390). Brandon tried to quit drinking and using drugs. He went to three treatment centers (Exs.Tr.184-85,193,261,268-69,393,395,399,403,406,412). Dr. Parrish thought Brandon was a good kid, with a lot of problems (Ex.53 at 19,50,Tr.383,418).

Several experts analyzed and explained Brandon's problems (Tr.294-657,659-742,743-87,790-853,854-905).[5] These experts relied on background material, including school, medical, psychiatric, law enforcement and jail records (Exs.3-15,Tr.325). Brandon has mild brain damage (Tr.440,696,969). He suffers from a Learning Disorder, Attention Deficit Hyperactivity Disorder, Bipolar Disorder, Polysubstance Dependence and having been sexually abuse as a child (Tr.341-42,450-465). His functioning places him at the bottom 9% of the population (Tr.442-43,868-86). His mental age is between 8 and 12 years (Tr.444). These deficits impacted on Brandon's ability to deliberate and to appreciate the criminality of his conduct (Tr.481-83,499). They made him susceptible to the domination of others, such as Lopez and Salazar (Tr.350,359,362,381,394,473,476, 477,827). He wanted desperately to fit in; he was easily manipulated and used (Tr.369,476-77,827).

The experts' opinions were consistent with the views of Brandon's family and friends. They knew that Brandon was a follower, not a leader (Tr.53,66,81,136-37,161, 185,213,266,914). They knew that Lopez was a bad influence and was in control (Tr.51-53,66,73,81,141,188,213,277-

[5] The expert testimony is further detailed in Point IV, *infra*.

78,915-16). They cared for Brandon and thought he was a good person (Tr.48-49,97,138,908-09). Trial counsel agreed, saying, "he's a good kid" (Tr. 1050).

The trial court denied the 29.15 motion. (L.F.755-809,814). This appeal follows.

POINTS RELIED ON

I.

FREDDY LOPEZ HAD A DEAL

The motion court clearly erred in denying Brandon's 29.15 motion or alternatively, an evidentiary hearing, because the prosecutor allowed the jury to consider Freddy Lopez' false testimony that he had no deal and argued there was no deal in violation of Brandon's right to due process, Fourteenth Amendment, U.S. Constitution, in that the state had agreed to reduce the charges from first degree murder to second degree murder and to a sentence of a term of years. Brandon was prejudiced as Lopez was the only testifying witness present during the actual killing and attributed statements and acts to Brandon, which if believed, made Brandon guilty of first-degree murder. The record did not refute, but supported this claim.

Napue v. Illinois, 360 U.S. 264(1959);

People v. Savvides, 136 N.E.2d 853(N.Y.App.1956);

Hayes v. State, 711 S.W.2d 876(Mo.banc1986);

Barry v. State, 850 S.W.2d 348(Mo.banc1993);

U.S. Const., Amend. XIV; and

Rule 29.15.

II.

JUSTICE FOR SALE

The motion court clearly erred in denying Brandon's Rule 29.15 motion without affording him a hearing on the claim that justice was for sale in violation of his rights to due process, and not to be arbitrarily and capriciously sentenced to death, Eighth and Fourteenth Amendments, U.S. Constitution, and Article I, Section 14, Missouri Constitution, in that he pled that the prosecutor offered Freddy Lopez a more favorable plea bargain because Lopez was able to pay the victims' family money for their loss, whereas Brandon, an indigent, could not, and that wealth of a defendant is an arbitrary classification; these facts were not refuted by the record, rather Lopez's guilty plea transcript reveals that the prosecutor indeed recommended a ten year sentence at the request of the victims' families, even though the prosecutor thought the evidence supported first degree murder, which has a mandatory life without parole sentence, and evidence was offered to show that Lopez paid the victims' family $200,000.00 only a few weeks after he was sentenced to ten years; Brandon was prejudiced because he received death, not because he is the most culpable, but because he cannot pay a large sum of money to the victims' family.

Woodson v. North Carolina, 428 U.S. 280(1976);

McCleskey v. Kemp, 481 U.S. 279(1987);

Wayte v. United States, 470 U.S. 598(1985);

Barry v. State, 850 S.W.2d 348(Mo.banc1993);

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

Mo. Const. Art. I, Sec. 14; and

Rule 29.15.

III.

COUNSEL DID NOT INVESTIGATE BRANDON'S BACKGROUND

The motion court clearly erred in denying the Rule 29.15 motion because Brandon was denied his right to effective assistance of counsel, due process and was arbitrarily and capriciously sentenced to death, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution, in that trial counsel failed to investigate and present evidence of Brandon's background, including:

1. **Dr. Parrish, a psychiatrist, who had treated Brandon for 3 and ½ years when he was a teen, noting Brandon suffered from a Bi-Polar Disorder, was an alcoholic who tried to stop drinking and suffered withdrawal symptoms, had a family history of drug and alcohol use, was a victim of sexual abuse as a child, suffered from Attention Deficit Hyperactivity Disorder, was a follower, and was a good kid with a lot of problems;**
2. **School, medical, mental health, and jail records which further documented Brandon's troubled childhood, mental health problems, drug and alcohol addiction, sex abuse, ADHD, learning difficulties, memory problems, and other social and emotional problems that resulted in Brandon being easily influenced by others and being a follower;**
3. **His family, including his mother-Lorraine, his father-Bill, his brother-Matt, and other relatives, Marilyn Williamson, Shawna Alvery, and Jeff Beall, who would have testified about the family history of alcoholism, mental illness, Brandon's childhood, including his difficulties in school,**

sexual abuse, move from Fillmore to Palmdale, alcohol and drug use, the family's financial problems and Lopez's domination and influences on Brandon.

Counsel's failure to investigate and present this evidence was unreasonable, they wanted to do this investigation, but had focused their time on guilt-phase issues, and Brandon was prejudiced because had the jury heard this mitigating evidence there is a reasonable probability that they would have imposed a life sentence.

Williams v. Taylor, 120 S.Ct.1495(2000);

Carter v. Bell, 218 F.3d 581(6thCir.2000);

Eddings v. Oklahoma, 455 U.S. 104(1986);

State v. Butler, 951 S.W.2d 600(Mo.banc1997);

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

Rule 4-1.7, 4-1.8; and

Rule 29.15.

IV.

COUNSEL FAILED TO EFFECTIVELY CONSULT AND PRESENT EXPERT TESTIMONY

The motion court clearly erred in denying the Rule 29.15 motion because Brandon was denied his right to effective assistance of counsel, due process and was arbitrarily and capriciously sentenced to death, Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution, in that Dr. Bland failed to conduct an adequate evaluation and trial counsel failed to investigate, consult and present expert testimony as they:

1. **provided Dr. Bland no background information, did not refer any questions regarding mitigation and did not follow-up on any of the information in Dr. Bland's report;**
2. **failed to present psychiatric testimony of Brandon's learning disability, Attention Deficit Hyperactivity Disorder, Bi-Polar Disorder, Polysubstance Dependence, and sexual abuse that substantially impaired Brandon so that he could not deliberate, and mitigated his conduct;**
3. **failed to present neuropsychological evidence of Brandon's brain damage and inadequate functioning;**
4. **failed to present pharmacological testimony of Brandon's drug and alcohol addiction and its effects on him;**
5. **failed to present expert testimony regarding Brandon's learning disabilities and the extent of his deficits;**

6. **failed to present an expert in childhood development who would have explained Brandon's childhood, the effects of sexual abuse, and how and why Brandon turned to alcohol and drugs.**

This expert testimony would have provided mitigation and would have reduced Brandon's culpability, reasonably likely resulting in a life sentence.

Ake v. Oklahoma, 470 U.S. 68(1985);

Wallace v. Stewart, 184 F.3d 1112(9thCir.1999);

Williams v. Taylor, 120 S.Ct.1495(2000);

Glenn v. Tate, 71 F.3d 1204(6th Cir.1995);

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

Section 565.032.3.

V.

CONTINUANCE NEEDED TO PREPARE MITIGATION CASE

The motion court clearly erred in denying the Rule 29.15 motion because Brandon was denied his right to effective assistance of counsel, due process, equal protection, and to be free from cruel and unusual punishment, Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution, in that the trial court abused its discretion and appellate counsel was ineffective for failing to raise the trial court's error in overruling the defense motion for continuance since the claim had significant merit since trial counsel did not have time to investigate and prepare for the penalty phase; the law supported the claim; the claim was preserved for review; and appellate counsel pursued weaker issues, including three claims based on plain error standard of review, and claims requiring an abuse of discretion to warrant relief. Brandon was prejudiced because had the claim been raised there is a reasonable probability that this Court would have granted a new trial, and with a continuance a substantial amount of mitigation could have been presented to the jury, just as in Salazar's case, creating a reasonable probability of a life sentence.

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

State v. Whitfield, 837 S.W.2d 503(Mo.banc1992);

State v. McIntosh, 673 S.W.2d 53(Mo.App.W.D.1984);

Williams v. Taylor, 120 S.Ct.1495(2000);

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

Rule 29.15.

VI.

COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE OF LOPEZ'S DOMINATION AND CONTROL OVER BRANDON

The motion court clearly erred in denying the Rule 29.15 motion because Brandon was denied his right to effective assistance of counsel, due process and was arbitrarily and capriciously sentenced to death, Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution, in that trial counsel failed to investigate and present testimony of Frankie Young (Smith), Terry Ferris, Brandy Kulow (Morrison), Marcella Hillhouse, and Phillip Reidle that: Freddy Lopez was a drug dealer that bragged about his gang, showed off his stab wounds, considered Salazar a close gang brother, his hit man and enforcer; dominated and controlled Brandon, who was child like; Lopez instigated the stabbing of John Galvan and Brandon was sorry it happened; Lopez tried to force Brandon to shoot Marcella Hillhouse, but he refused; and the victims were known as heavy drug users who did anything and everything such as marijuana, crank and pills. Brandon was prejudiced because this evidence would have refuted the State's theory that Brandon was in charge on the night of the offense and made the decision to kill the Yates, and would have provided mitigation supporting a life sentence.

State v. Herrera, 850 P.2d 100(Az.1993);

Mak v. Blodgett, 970 F.2d 614(9thCir.1992);

Glenn v. Tate, 71 F.3d 1204(6thCir.1995);

Williams v. Taylor, 120 S.Ct. 1495(2000);

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

§ 565.032.3;

Rule 29.07; and

Rule 29.15.

VII.

COUNSEL'S FAILURE TO OBJECT TO PREJUDICIAL ERROR AND PERSERVE ERROR FOR REVIEW

The motion court clearly erred in denying the Rule 29.15 motion because Brandon was denied his right to effective assistance of counsel, due process and was arbitrarily and capriciously sentenced to death, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution, in that trial counsel failed to properly object and preserve the claims of error:

1. **the State's late endorsement of penalty phase witness, John Galvan, during the trial;**
2. **the prosecutor's opening statement that the victim, Ronald Yates was "sprawled out there like Christ crucified on the cross;"**
3. **closing argument that the Troy Evans, the one man that linked all three defendants to the crime, was destroyed - - suggesting that he was killed to prevent him being called as a witness;**
4. **closing argument that Lopez had no deal when in fact, if he testified favorably for the State, he would have his charges reduced from first to second degree murder and would receive a term of years; and**
5. **expert opinion that Brandon was competent and not suffering from a mental disease or defect, which was not relevant or admissible in the penalty phase.**

Brandon was prejudiced because these errors denied him a fair trial and a reliable sentencing proceeding and there is a reasonable probability that had counsel properly objected, his case would have been reversed and remanded for a new trial.

Kenner v. State, 709 S.W.2d 536(Mo.App.E.D.1986);

Copeland v. Washington, 232 F.3d 969(8thCir.2000);

State v. Storey, 901 S.W.2d 886(Mo.banc1995);

Antwine v. Delo, 54 F.3d 1357(8th Cir.1995);

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

Rule 29.11; and

Rule 29.15.

VIII.

BRANDON'S DEATH SENTENCE IS DISPROPORTIONATE

The motion court clearly erred in rejecting Brandon's claim that this Court's proportionality review violates his rights to due process, Fourteenth Amendment, U.S. Constitution, because: 1) this Court fails to consider codefendants' sentences, Salazar - life without parole, and Lopez - ten years, even when the accomplice is more or equally culpable; 2) this Court's database does not comply with § 565.035.6 and is missing numerous cases; 3) this Court fails to consider all similar cases required by § 565.035.3(3); and 4) Brandon did not have adequate notice and opportunity to be heard.

Parker v. Dugger, 498 U.S. 308(1991);

Richmond v. Lewis, 506 U.S. 40(1992);

Ex Parte Burgess, 2000 WL 1006958 (Ala.July 21,2000);

Scott v. Dugger, 604 So.2d 465(Fla.1992);

U.S. Const., Amend. XIV; and

Section 565.035.

IX.

PENALTY PHASE INSTRUCTIONS

The motion court clearly erred in denying Brandon's claim that the penalty instructions are not understood by jurors and counsel failed to object to the instructions in violation of Brandon's rights to due process, effective assistance of counsel and to individualized sentencing not imposed arbitrarily or capriciously, Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution, in that Brandon proved that jurors' comprehension is low, around 50%, and the instructions can easily be improved by rewriting to reduce redundancy, legal jargon, ambiguity and complex language, and counsel believed the instructions were objectionable, but unreasonably failed to offer evidence to support their objection, and Brandon was prejudiced because the less jurors understand, the more likely they are to impose death.

Boyde v. California, 494 U.S.370(1990);

Free v. Peters,12 F.3d 700(7th.Cir.1993);

Gray v. Lynn, 6 F.3d 265(5thCir.1993);

State v. Wheat, 775 S.W.2d 155(Mo.banc1989);

U.S. Const., Amend. V, VI, VIII and XIV;

Rule 29.15; and

"Comprehensibility of Approved Jury Instructions in Capital Murder Cases," *Journal of Applied Psychology*, Vol.No.80, No.4.

X.

REASONABLE AND NECESSARY LITIGATION EXPENSES

The motion court clearly erred in denying Brandon's motion for postconviction relief in violation of Brandon's rights to due process, Fourteenth Amendment, U.S. Constitution, and Rule 29.16(d) in that the state public defender failed to provide counsel with reasonable and necessary litigation expenses, denying counsel money to investigate witnesses and records located in the State of California where Brandon and his codefendants grew up and spent the majority of their lives, evidence relevant to both the guilt and penalty phase claims.

Ford v. Wainwright, 477 U.S. 399(1986);

Wolff v. McDonnell, 418 U.S. 539(1974);

State v. Hunter, 840 S.W.2d 850(Mo.banc1992);

State v. Ervin, 835 S.W.2d 905(Mo.banc1992);

U.S. Const., Amend. XIV; and

Rule 29.16(d).

ARGUMENTS

I.

FREDDY LOPEZ HAD A DEAL

The motion court clearly erred in denying Brandon's 29.15 motion or alternatively, an evidentiary hearing, because the prosecutor allowed the jury to consider Freddy Lopez' false testimony that he had no deal and argued there was no deal in violation of Brandon's right to due process, Fourteenth Amendment, U.S. Constitution, in that the state had agreed to reduce the charges from first degree murder to second degree murder and to a sentence of a term of years. Brandon was prejudiced as Lopez was the only testifying witness present during the actual killing and attributed statements and acts to Brandon, which if believed, made Brandon guilty of first degree murder. The record did not refute, but supported this claim.

The State cannot use false testimony to obtain a conviction. *Napue v. Illinois*, 360 U.S. 264,269-70(1959). Nor can the state stand silently and do nothing to correct false testimony of its witness. *Id*. Here, the state stood silent as Lopez lied to the jury and said he was getting no deal (T.Tr.1162,1242,1243). The state embraced Lopez's false testimony, arguing that Lopez was still charged with first degree murder and was not getting out of anything (T.Tr.1820-21). The state's use of false testimony to gain a conviction violated Brandon's rights to due process. The motion court clearly erred in denying this claim, and in denying an evidentiary hearing.

Before trial, defense counsel repeatedly requested disclosure of any deals with testifying witnesses, including Freddy Lopez (T.Tr.139-43,235). The court ordered disclosure of any formal or informal agreements (T.Tr.143). The state admitted that it had plea discussions with Lopez's attorney

and had told him that if Lopez was a good witness for the state at Brandon's trial, the state would reduce the charges of first degree murder to second degree murder (T.Tr.142). They had not reached an agreement on a term of years, but the prosecutor was thinking about 30 years. *Id*.

Freddy Lopez did testify at Brandon's trial (T.Tr.1068-1252). He did everything possible to make Brandon the most culpable and to reduce his own involvement. After Salazar shot the victims in the garage, Lopez said that he wanted to call an ambulance, but Brandon told him no (T.Tr.1110,1112-13). According to Lopez, it was Brandon's idea to use Lopez's car to move the bodies (T.Tr.1113). Lopez claimed that Brandon kicked Brian on the upper part of his body and Lopez tried to stop him (T.Tr.1121). Brandon supposedly had the gun and said, "we got to kill them, we got to kill them" (T.Tr.1129,1131,1133). Lopez said that he stayed in the car while Salazar and Brandon got out (T.Tr.1133). After the Yates were shot, Brandon tried to run the victims over, according to Lopez (T.Tr.1134). Lopez took the steering wheel and swerved around the bodies (T.Tr.1134). Later, Brandon wanted to brag about the killing, but Lopez stopped him (T.Tr. 1146).

Lopez was the centerpiece of the state's case. It was undisputed that Salazar shot the victims first. Brandon had not given a statement, admitting any involvement. Nor had he made any admissions. So at most, the state would have had a circumstantial case based on Brandon's presence at the scene near the time of the crime, the physical evidence linking him to the crime and his fleeing to California after the crime. While this evidence was significant, it paled in comparison to Lopez's allegations.

Lopez's credibility was key. Counsel tried to impeach him with prior inconsistent statements (T.Tr.1162-68). They also asked about any deals he was receiving in exchange for his testimony. Lopez told the jury that he was still charged with two counts of first-degree murder, two charges of armed criminal action, and sale of methamphetamine (T.Tr.1161-62). He knew of no agreements with

the state (T.Tr.1162,1242,1242-43). When pressed on the question, Lopez said "the prosecutor is not giving no deals" [sic]; rather Lopez testified to clear his conscience and he prayed he got a deal (T.Tr.1242-43). His prayers came true; after trial, he pled to two counts of second degree murder and got ten years. (Ex.79 at 9,48).

The prosecutor did not correct Lopez's false testimony. Rather, he embellished it during his closing argument. The prosecutor said: "But we have an eyewitness that says he went along and he could have continued to lie about it if he'd wanted to. But remember this, ladies and gentlemen, *Freddy Lopez is charged with murder in the first degree too. He didn't get out of anything*. If anything he convicted himself on the stand because he is responsible also. He went along also" (T.Tr.1820) (emphasis added).

Brandon's 29.15 motion alleged that the state violated Brandon's rights to due process, first, by failing to reveal the deal they had actually struck with Lopez; and secondly, by using false evidence to obtain a conviction (L.F.46-47). The motion court denied a hearing on the claim, but, in its original findings, the court found that Brandon failed to adduce evidence to support the claim (L.F.769-70). When Brandon's counsel objected, because no hearing had been allowed (L.F.810-11), the court struck its earlier findings, ruled that the claim was refuted by the record, and denied the request to present evidence (L.F.814).

This Court reviews the trial court's findings and conclusions for clear error. *Sanders v. State*, 738 S.W.2d 856,857(Mo.banc1987). The motion court clearly erred. Far from refuting the claim, the record supports the allegation. At the very least, Lopez had been promised that if he was a good witness for the state, the charges would be reduced to second degree murder (T.Tr.142). Even the trial judge recognized that Lopez certainly would not testify out of the goodness of his heart. "I cannot

conceive that Lopez is going to testify without having some idea that he's going to get a recommendation that's favorable to his present position" (T.Tr.237). The record established that Lopez lied, saying the prosecutor was giving no deals for his testimony (T.Tr.1242-43). Then the prosecutor further misled the jury, saying Lopez was not getting out of anything - - he was still charged with first degree murder (T.Tr.1820).

Based on this record, Brandon established a due process violation. The prosecutor may not use false evidence to obtain a conviction. *Napue v. Illinois, supra*. In *Napue*, an important government witness in a murder prosecution testified that he had received no promise of consideration in return for his testimony. 360 U.S. at 265. In fact, the government had promised consideration. *Id*. The prosecutor's failure to do anything to correct the false testimony of the witness denied Napue due process. *Id*. at 269-70. The government has an affirmative duty to correct false evidence when it appears, even if it has not solicited it. *Id*. at 269. This duty remains even when the false testimony goes only to the credibility of the witness. *Id*. The jury's estimate of the truthfulness and reliability of a given witness may well determine the finding of guilt or innocence. *Id*.

In deciding *Napue*, the Supreme Court cited, with approval, a New York case almost identical to Brandon's situation. *Id*. at 269-70. In *People v. Savvides*, 136 N.E.2d 853,854(N.Y.App.1956) the principal witness against Savvides testified falsely. He denied that he expected any consideration in return for his testimony. *Id*. In reality, the prosecutor had agreed that upon the witness' cooperation, the prosecutor would permit him to withdraw his plea and plead guilty to a lesser crime, one carrying no mandatory minimum. *Id*. Yet the prosecutor remained silent as the witness testified that he was getting no deal. *Id*.

In granting a new trial, the court rejected the argument that the court and jury would have known the witness had reason to expect lenient treatment. *Id*. at 855. The testimony that he was "hoping" for leniency, was a far cry from the positive knowledge that Mantzinos had actually been assured consideration in return for his cooperation and had deliberately lied about the matter on the stand. *Id*. at 855. It also was of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. *Id*. "A lie is a lie, no matter what its subject, and if it is any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Id*. at 854.

Here too, the state had a duty to correct Lopez when he said the prosecutor was giving no deals. The state continued the deception in its closing argument. The danger in *Savvides*, is lurking here. "Where a promise of leniency or other consideration is held out to a self-confessed criminal accomplice for his co-operation, there is grave danger that, if he be weak or unscrupulous, he will not hesitate to incriminate others to further his own self-interest." *Savvides, supra* at 855. Lopez did exactly that, minimizing his own involvement at every opportunity and maximizing Brandon's guilt. On this record, the motion court should have found a due process violation and granted a new trial.

Alternatively, the court erred in failing to grant an evidentiary hearing on this claim. Brandon had alleged that a plea agreement had been reached to reduce the charges to second degree murder (L.F. 26). The motion alleged that the prosecutor was offering fifteen years on both charges, Lopez was asking for ten. *Id*.

To obtain a hearing, the motion must allege facts, not conclusions, which, if true would warrant relief; the allegations must not be refuted by the record; and the matters complained of must have resulted in prejudice. *Belcher v. State*, 801 S.W.2d 372, 375(Mo.App.E.D.1990). The failure to

disclose a bargain made with a state witness is constitutional error that is properly raised in a postconviction action. *Hayes v. State*, 711 S.W.2d 876(Mo.banc1986). As with substantive claims, this Court reviews for clear error in determining if a hearing should have been granted. *Barry v. State*, 850 S.W.2d 348, 350(Mo.banc1993).

Brandon's motion had specific factual allegations regarding a specific plea agreement (L.F.46-47). The record did not refute the claim, it supported it. The state admitted that it had agreed to reduce the charges if Lopez did a good job, the only sticking point was the term of years. The prosecutor was "thinking" about recommending thirty years prior to trial, but that number got smaller and smaller as time went on.

Lopez landed a sweetheart of a deal, ten years for this double homicide in which the state had originally sought death. Lopez's prior criminal activity qualified him for harsher treatment. He had been arrested for robbery, fighting in public, battery and possession of marijuana and hashish (T.Tr.215-16). He had been convicted of possession of cocaine, battery, obstructing and delaying a police officer, driving while intoxicated, and driving while revoked (T.Tr.1074). He was a prior offender. By his own admission, he was a drug dealer and had sold drugs on the night of the offense (T.Tr.1080). He was the oldest of the three defendants, 28 years old at the time of the killings (T.Tr.1073). Yet, he got the best deal.

Just as *Napue* and *Savvides* were prejudiced, Brandon was prejudiced. His guilt or innocence turned on whether the jury believed that Lopez was telling the truth. Under Lopez's version, Brandon decided not to call an ambulance, but chose to shoot and kill the victims. Under Lopez's scenario, Brandon kicked one of the victims and tried to run over their bodies. Lopez's story made

Brandon a bragger, expressing no remorse. Lopez's testimony was key to establishing deliberation and to providing aggravation to support a death sentence.

This Court should reverse and grant a new trial or, in the alternative, remand for a hearing on this claim.

II.

JUSTICE FOR SALE

The motion court clearly erred in denying Brandon's Rule 29.15 motion without affording him a hearing on the claim that justice was for sale in violation of his rights to due process, and not to be arbitrarily and capriciously sentenced to death, Eighth and Fourteenth Amendments, U.S. Constitution, and Article I, Section 14, Missouri Constitution, in that he pled that the prosecutor offered Freddy Lopez a more favorable plea bargain because Lopez was able to pay the victims' family money for their loss, whereas Brandon, an indigent, could not, and that wealth of a defendant is an arbitrary classification; these facts were not refuted by the record, rather Lopez's guilty plea transcript reveals that the prosecutor indeed recommended a ten year sentence at the request of the victims' families, even though the prosecutor thought the evidence supported first degree murder, which has a mandatory life without parole sentence, and evidence was offered to show that Lopez paid the victims' family $200,000.00 only a few weeks after he was sentenced to ten years; Brandon was prejudiced because he received death, not because he is the most culpable, but because he cannot pay a large sum of money to the victims' family.

Freddy Lopez had quite a resume when he was charged with first-degree murder. At 28 years, he was an original founding member of the violent Party Boys gang, a self-admitted drug dealer, and had numerous prior convictions (T.Tr.1074). He was deeply involved in the Yates killings. The prosecutor thought Lopez was guilty of first degree murder (Ex.79 at 27-28). He had initially sought the death penalty against him (Ex.78).

Lopez's active involvement in the crime supported this decision. The victims were shot by Salazar at Lopez's garage (T.Tr.1106) with guns kept at his house (T.Tr.1090-93,1200). Lopez gave the victims drugs, having sold drugs earlier in the evening (T.Tr.1080,1097). He provided the car used to transport the victims to the farm road where they were shot a second time (T.Tr.1113,1116,1203). He did not stay behind, but went with the other defendants (T.Tr.1123). He directed the codefendants on what to do with the guns, drug paraphernalia, and other incriminating evidence (T.Tr.1118,1121,1122,1201,1218-19). He ordered Hutchison and Salazar to clean up his shop (T.Tr.1122). He told them to make sure no bullets were left in the shop (T.Tr.1139,1201). He admitted burning his shoes, an unnecessary act had he not been involved (T.Tr.1234). Lopez made sure the others kept quiet (T.Tr.1144,1146). After the shooting, Lopez made telephone calls to California, where Salazar and Hutchison then fled (T.Tr.1147). He gave Salazar $300 to leave town (T.Tr.1152). He was guilty as sin.

The prosecutor said he agreed to the ten year sentence at the insistence of the victims' family members (Ex.79 at 9,27,28,38).

Brandon's 29.15 counsel filed an amended motion alleging that justice was for sale in this case (L.F.97-98). The prosecutor treated codefendants differently, because Lopez could pay the victims restitution for their loss. *Id*. Wealth is an arbitrary factor in determining who should receive death and thus violates the Eighth Amendment (L.F. 98). The motion alleged the additional Missouri constitutional violation that "justice shall be administered without sale." Article I, Section 14. (L.F.98).

The court denied a hearing on the claim and refused to admit an exhibit that showed that just weeks after he was sentenced to ten years (Ex.79), Freddy Lopez paid $200,000.00 to the victims' families (Ex.84). The families were represented by Steven Hays, the same attorney who requested that

the prosecutor recommend a ten year sentence for Lopez and urged the court to accept the recommendation (Ex.79). The court found that the Justice for Sale claim was refuted by the record and thus denied the request to present evidence to support the claim (L.F. 814).

To obtain a hearing, a motion must allege facts, not conclusions, which, if true would warrant relief; the allegations must not be refuted by the record; and the matters complained of must have resulted in prejudice. *Belcher v. State*, 801 S.W.2d 372,375(Mo.App.E.D.1990). This Court reviews for clear error in determining whether a hearing should have been granted. *Barry v. State*, 850 S.W.2d 348,350(Mo.banc1993).

Here, the motion court clearly erred. The motion alleged specific facts, that Brandon and Lopez were similar in their culpability, but treated very differently due to an arbitrary factor, their respective wealth. Brandon received death; Lopez got ten years. The record supported this claim. Evidence would have shown that the payment of $200,000.00 to the victims' families and $30,000.00 to their attorney was the deciding factor in what sentences Lopez received.

As alleged, the Eighth and Fourteenth Amendments require heightened reliability in determining a death sentence. *Woodson v. North Carolina*, 428 U.S. 280,305(1976). Who lives or dies should not depend on arbitrary factors such a wealth. *McCleskey v. Kemp*, 481 U.S. 279,309, n 30(1987); *Wayte v. United States*, 470 U.S. 598,608 (1985) (race is improper factor in sentencing). Thus, if Brandon had been allowed to adduce the facts that his death sentence was based on the arbitrary factor of wealth, he would have been entitled to relief.

The court clearly erred in denying a hearing on this claim; a remand should result.

III.

COUNSEL DID NOT INVESTIGATE BRANDON'S BACKGROUND

The motion court clearly erred in denying the Rule 29.15 motion because Brandon was denied his right to effective assistance of counsel, due process and was arbitrarily and capriciously sentenced to death, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution, in that trial counsel failed to investigate and present evidence of Brandon's background, including:

1. **Dr. Parrish, a psychiatrist, who had treated Brandon for 3 and ½ years when he was a teen, noting Brandon suffered from a Bi-Polar Disorder, was an alcoholic who tried to stop drinking and suffered withdrawal symptoms, had a family history of drug and alcohol use, was a victim of sexual abuse as a child, suffered from Attention Deficit Hyperactivity Disorder, was a follower, and was a good kid with a lot of problems;**
2. **School, medical, mental health, and jail records which further documented Brandon's troubled childhood, mental health problems, drug and alcohol addiction, sex abuse, ADHD, learning difficulties, memory problems, and other social and emotional problems that resulted in Brandon being easily influenced by others and being a follower;**
3. **His family, including his mother-Lorraine, his father-Bill, his brother-Matt, and other relatives, Marilyn Williamson, Shawna Alvery, and Jeff Beall, who would have testified about the family history of alcoholism, mental illness, Brandon's childhood, including his difficulties in school,**

sexual abuse, move from Fillmore to Palmdale, alcohol and drug use, the family's financial problems and Lopez's domination and influences on Brandon.

Counsel's failure to investigate and present this evidence was unreasonable, and they wanted to do this type of investigation, but had focused their time on guilt-phase issues, and Brandon was prejudiced because had the jury heard this mitigating evidence there is a reasonable probability that they would have imposed a life sentence.

On August 24, 1989, when he was only 16 years old, Brandon saw Dr. Jerrold Parrish, a psychiatrist who specialized in adolescent psychiatry (Ex. 53, at 5-7). Dr. Parrish had fine credentials graduating from Georgetown Medical School in 1973, and being a Diplomate of American Board of Psychiatry and Neurology and of Adolescent Psychiatry. *Id*., at 5-6. He treated Brandon for three and one-half years and had a wealth of information about him.

Brandon suffered from a Bi-Polar Disorder, a major mental illness that caused a disorder of his moods. *Id*. at 13. Brandon also suffered from alcoholism, his dependence was illustrated by his heavy drinking of 6-12 cans of beer daily; sometimes he drank as much as 24 cans a day. *Id*. Brandon came from an alcoholic family; his father was alcoholic and his grandfather died of alcoholism. *Id*. at 14. Additionally, Brandon had an Attention Deficit Hyperactivity Disorder, which made it difficult for Brandon to deal with large groups, wait his turn and follow directions. *Id*. at 11-12. All of these illnesses had a genetic basis; the same chromosome accounts for alcoholism and Bi-Polar Disorder and the two illnesses are often transmitted together. *Id*. at 14.

Dr. Parrish treated Brandon with medication and with counseling. *Id*. at 14-16. When Brandon stopped drinking in June, 1990 he suffered from withdrawal symptoms. He had tremors for four days, ran fevers and had horrible nightmares, during which he woke-up screaming. *Id*. at 16, 20-21.

These illnesses were not Brandon's only problems. He was sexually abused as a child. *Id*. at 17. As with most victims of sexual abuse, it had a devastating effect on his self-image. *Id*. Brandon followed a common pattern for abuse victims, he got involved in alcohol and drugs to escape from the pain. *Id*. at 17-18. Using alcohol and drugs was also his family's pattern of dealing with stress, it was the expected thing to do. *Id*. at 18.

Based on his 3 and ½ years of treating Brandon, Dr. Parrish concluded that Brandon was a good kid, who was well-motivated and had good intentions. *Id*. at 19. He tried to do the right thing, but did not have the parental guidance as to how he should handle situations. *Id*. He was definitely a follower, not a leader. *Id*. at 19-20.

Despite all the information, no one contacted Dr. Parrish prior to Brandon's trial. *Id*. at 21-22. No one requested the records, documenting Dr. Parrish's treatment of Brandon. *Id*.

Trial counsel admitted that they were not aware of Dr. Parrish (Tr.979,1073). They should have known about him, as Dr. Bland had reported that Brandon had seen a psychiatrist in California from 1989-1993 (Tr.979, Ex.12 at 3). Yet neither attorney followed up on this information (Tr.979-80,1042,1073). Counsel did not provide any strategic reason for not conducting this investigation. Rather, they candidly admitted that they would have liked more time to follow-up on Bland's report (Tr. 1029) and that they would have liked to present a full and complete life story for mitigation (Tr. 1082-

83). Dr. Parrish's assessment that Brandon was a good kid and was definitely a follower was information counsel would have wanted to present in penalty phase (Tr. 980).

Dr. Parrish's information was consistent with all of Brandon's background records. His school records documented many of the troubles that he had (Exs.4,5,6,8,9). Brandon struggled in special education with learning disabilities (Exs.4-5). In the 1st and 2nd grades, he performed below average. *Id*. Teachers recognized his social and emotional problems; he lacked confidence and was overly dependent. *Id*. Brandon was easily influenced by disruptive peers, especially older boys. *Id*.

Brandon suffered from an Attention Deficit Hyperactivity Disorder and was prescribed Ritalin. *Id*. The medication helped, but did not solve his problems. (Exs.3,5). He had attention and memory deficits (Ex.4, at 19,25). Brandon could not keep up in spelling and math. *Id*. He was embarrassed, and vulnerable to those that manipulated him. *Id*. School officials recognized that as a result of his Attention Deficit Disorder, he exercised bad judgment and put himself in bad situations. *Id*.

After four years of special education, Brandon's functioning got worse (Ex. 4, at32). When he was in the 7th Grade, he made one C, the rest of his grades were Ds and Fs. *Id*. Officials recommended education for the severely emotionally disturbed. *Id*. Brandon was sad, he cried and gave up easily. *Id*. He was depressed. *Id*.

His medical records also illustrated his difficulties (Exs.3,7). Brandon's pediatrician recognized his trouble playing at 7 years of age (Ex.3). He could not complete tasks and sit still. *Id*. Brandon's mother was inconsistent in her discipline. *Id*. Brandon's problems worsened as he aged. He self-mutilated (Ex.7). He started having behavioral problems (Ex. 7). Brandon tried to get treatment (Exs.7,10,11). He was admitted to three different alcohol and drug treatment centers. *Id*. In 1995, he

was hospitalized (Exs.10-11,40-41). Jail records also documented Brandon's depression and history of mental illness (Ex.14).

Counsel did not obtain any of these records (Tr.974-77,1067-68,1030). They only got some grade reports from Brandon's mother (Tr.976). Counsel acknowledged that they wanted the records and would have considered using them (Tr.1068,1030).

Brandon's family members also could have provided mitigating information regarding his background. His parents, Lorraine and Bill, testified briefly at trial, but had much more information, had they been asked. Brandon's brother Matt traveled from Kansas City for the trial, but did not testify (Tr.236-37). Marilyn Williamson, Brandon's aunt, Jeff Beall, Brandon's uncle, and Shawna Alvery, a cousin, all lived in California, close to Brandon, as he was growing up (Tr. 135-36,155-56,167-68). Marilyn saw Brandon daily; they were real close (Tr.136).

Bill recounted that both his grandfather and father were alcoholics; he drank daily (Tr.180). Bill's mother was really strict and he left home when 17 years old, joining the marines (Tr.180-81). He met Lorraine and they married in 1971 (Tr.181). They lived in Fillmore, California where they had three sons, Matthew, Brandon and Scotty (Tr.181,186). Fillmore was a farming community (Tr.182,245-46).

Lorraine's mother had during childbirth, making Lorraine's pregnancies stressful (Tr.246-47). When she was pregnant with Brandon, she had a lot of anxiety, fainted and vomited (Tr.246-47). Her anxiety attacks worsened as the children grew older and eventually she had to be hospitalized (Tr.247). She took medication for her problems (Tr.247).

Brandon was a sweet, hyperactive little boy (Tr.136). He tried to fit in, but he had few friends (Tr.161). He was shy and followed along with others (Tr.136-37,161). As Brandon grew up, he

appreciated any love and attention he got from his family (Tr.138). He needed reassurance that his family loved him (Tr.138). He always apologized if he did something wrong. *Id*.

When Brandon was in Special Education, he was treated like he was retarded (Tr.156,197,258). Brandon hated it and was embarrassed (Tr.198,257). He pleaded not to go and wanted to be normal (Tr.258). He was overweight; the other children teased him, taunted him, and made sarcastic remarks (Tr.137,156,168-69,198,257). Even his coaches made fun of him; calling him names like "potato thighs" and yelling at him in front of others. *Id*. So Brandon hung out with Matt and his friends, but they made fun of him too; he did not fit in (Tr.198-99).

When he was 10 years old, Brandon visited Bill's mother in Iowa (Tr.182,259-60). When he returned, he was more distant, closed and quiet (Tr.182,201). He became angry and rebellious (Tr.260). Later, they learned that, while in Iowa, an uncle had molested Brandon (Tr.183,190-93,250,262). He told Matt about the sexual abuse, but did not share details until years later (Tr.202). Brandon also confided in Shawna Alvery, his cousin (Tr.169-71). She told him to tell his mother what happened (Tr.172).

This was especially hard for Lorraine. She had been molested by a cousin when she was 5 or 6 years old (Tr.248). She felt ashamed and embarrassed (Tr.248). Eventually she went for psychiatric help, but still felt embarrassed and did not want others, including family to know (Tr.249-50,286). It was painful (Tr.293). Lorraine's problem[6] affected Brandon. She experienced great anxiety about going to school conferences (Tr.251-52). She took Elavil, Valium and Xanax and drank alcohol

[6] Lorraine's family had a history of mental problems, including commitments to mental health facilities (Tr.254). Her family also had a history of alcoholism (Tr.253).

(Tr.252-53). She and her husband smoked marijuana to help with their anxiety (Tr.253,287). They used alcohol in front of their sons (Tr.286).

When Brandon was a teenager, they moved to Palmdale, an urban area (Tr.184,263). The move was not good, the city had gangs and lots of drugs (Tr.138-41,184,203-05,207,264). The kids hated it and wanted to move back to Fillmore (Tr.267). They felt like lower "white trash" and had trouble making friends (Tr.205). They started using drugs and alcohol (Tr.208-09). Brandon became addicted to alcohol and drugs; his parents tried to get him treatment (Tr.184-85,193,261,268-69).

In 1993 or 1994, the Hutchisons moved to Missouri (Tr.186,194,270). They had lost their house in Palmdale; it was condemned for being built close to an earthquake fault (Tr.185,269-70). Financially, they lost everything; they had put all their money into their home (Tr.270).

Bill worked as a carpenter with his son Matthew (Tr.186-87). However, Brandon could not become part of the Carpenter's Union (Tr.187,271,283). He had not graduated from high school and could not get his GED (Tr.187,271,283). Brandon's learning disability caused problems with reading and writing (Tr.187). He could not get a driver's license (Tr.271).

The Hutchisons did not like Freddy Lopez and Michael Salazar (Tr.187-88,189-90,212-13). Lopez was cocky and tried to impress others (Tr.188). He pulled-up his shirt and showed off a gun (Tr.188). He bragged about his gun-shot wounds, his battle scars from gang wars (Tr.277-78). Similarly, Salazar always carried a gun and had one on New Year's Eve, 1995 (Tr.219-20). Lorraine was afraid of Lopez; he thought snitches deserved to die (Tr.278).

Lopez and Salazar were like family and both were part of a gang (Tr.232-34,241). They made fun of Brandon and called him names in Spanish (Tr.239-40). Brandon did not speak Spanish and could not understand them (Tr.240,242). Yet, he seemed to latch onto Lopez (Tr.185,266,277).

Lopez ordered him around (Tr.141,213). He had him fetch beer and ice and take out trash (Tr.213,226).

Brandon's drug use continued in Missouri and he went to Mount Vernon Rehabilitation Center (Tr.272,274). When he came home, he acted strange, twitching and jerking (Tr.274). He saw things and screamed (Tr.274-75). He thought Lopez had shot him and he tried to run from him (Tr.275). His parents took him to the hospital and he eventually went to Bridgeway Treatment Center. *Id*.

Both Bill and Lorraine talked to Brandon's attorneys (Tr.194,280). They paid a retainer of $15,000; Brandon had no money (Tr.279-80,282). They told them about Brandon's troubles and gave them names of other relatives, doctors and counselors (Tr.194-95,281,282,284,291). Matt also talked to Brandon's attorneys, but they did not ask him about their childhood at all (Tr.220-21,241). Rather, the interview centered around the night of the offense and what happened at Lopez's party (Tr.220,230-32). Brandon's trial attorneys did not contact Marilyn, Jeff, or Shawna to testify (Tr.142,163,172-3). Marilyn did see them when they talked to her sister, Lorraine (Tr.142), but she was only present for moral support for her sister (Tr.147).

Standard of Review

This Court must review the trial court's findings for clear error. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987). To establish ineffective assistance of counsel, Brandon must show that his counsel's performance was deficient and that such performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); and *Williams v. Taylor*,120 S.Ct.1495,1511-12(2000). To prove prejudice, Brandon must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Butler*, 951 S.W.2d 600,608

(Mo.banc1997); *Williams v. Taylor, supra*. Applying these standards, the court's findings and conclusions are clearly erroneous.

Dr. Parrish

As to Dr. Parrish, the court ruled: 1) since he treated Brandon almost three years before the charged offense, the mitigating value of his testimony was undermined by its remoteness; 2) since he was unfamiliar with the facts of the case his opinion had little relevance; 3) he provided no opinion regarding Brandon's state of mind at the time of the crime, giving his testimony little relevance; 4) Brandon's family did not want the details of Brandon's sex abuse disclosed, thus, his testimony would have violated the patient–physician privilege; and 5) Dr. Parrish's treatment records were virtually illegible, and had harmful information, including Brandon's threatening a teacher, skipping school, fighting, and vandalizing a car (L.F.799-800).

The court erred in ruling that background evidence was too remote and irrelevant because it was not directly connected to the crime. The United States Supreme Court has rejected such reasoning, finding that mitigation that does not undermine or rebut the prosecution's death eligibility case still may alter the jury's selection of penalty. *Williams v. Taylor, supra* at 1516.

In *Williams*, counsel was ineffective for failing to investigate and present substantial mitigating evidence. Had counsel adequately investigated, he could have presented records of Williams' nightmarish childhood. *Id*. at 1514. Evidence of Williams' borderline mental retardation and that he did not advance beyond the sixth grade in school were mitigating. *Id*. So were prison records showing good behavior in prison, prison officials' testimony that Williams was not likely to be violent in the future, and testimony that Williams seemed to thrive in a regimented, structured environment. *Id*.

The mitigation provided by Dr. Parrish also may have altered the jury's selection of penalty. Just as records of Williams' nightmarish childhood was mitigating, so was evidence of Brandon's troubled childhood. He was sexually abused as a child. He suffered from a Bi-Polar Disorder and alcoholism. Dr. Parrish thought that Brandon was a good kid that was easily influenced and followed along. The jury heard none of this compelling testimony. As with *Williams*, it may have altered the penalty the jury selected.

The court also rejected Dr. Parrish's testimony because Brandon's family, especially his mother, did not want the family's history of sex abuse revealed (L.F.799,803,806). Certainly, Mrs. Hutchison had difficulty discussing this topic, it was painful and she had kept her own abuse secret for 30 years (Tr.249-50,286,293). Yet it had a major impact on Brandon; it explained why he mutilated himself and turned to alcohol and drugs as an escape (Ex.53,17-18). Counsel's duty of loyalty was to their client, Brandon, not his family, even though they were paying the attorney's fees. Rule 4-1.7. A lawyer can be paid from a source other than the client, but the arrangement should not compromise the lawyer's duty of loyalty to the client. *Id*. citing Rule 4-1.8(f). Thus, it was unreasonable not to admit this mitigation.

Finally, the court disregards Dr. Parrish's testimony because it included harmful information. The Supreme Court addressed this problem in *Williams*, *supra* at 1514. Williams had a juvenile record for larceny, pulling a false fire alarm and breaking and entering. *Id*. But the failure to introduce the comparatively voluminous amount of evidence in Williams' favor was not justified by counsel's so-called strategy. *Id*.

Similarly, here, counsel failed to present vast amounts of favorable mitigating evidence. The unfavorable evidence cited by the court did not outweigh the favorable. Rather, nearly every

unfavorable fact mentioned by the court had already come out at trial. Appellant's drug and alcohol use were discussed during both the guilt phase and penalty phase. The jury knew that Brandon was hanging out with Lopez and Salazar. They heard that he had a gun on more than one occasion. That he skipped school, vandalized a car and fought in school was not that harmful, especially given the way Lopez portrayed Brandon at trial. This negative evidence was much less damaging than that in *Williams*. The motion court should have found counsel ineffective for failing to investigate and present Dr. Parrish's testimony.

Background Records

The court ruled that the failure to obtain and admit background records was not prejudicial, because the records contained both helpful and detrimental information; they were remote in time, some 14 years prior to the offense; they contained inadmissible hearsay; and Exhibits 3 and 11 had been refused at the evidentiary hearing (L.F.800-01).

These findings are clearly erroneous. Background records, such as school records will always be several years old. Contrary to the court's finding, such records are not remote and irrelevant. *Williams, supra* at 1514 (records graphically describing childhood relevant and mitigating). *See also Eddings v. Oklahoma*, 455 U.S. 104(1986) (evidence of defendant's turbulent family history is mitigating evidence). Indeed, such records provide an objective look at the defendant's childhood, from many perspectives--such as teachers, counselors, nurses, and doctors.

Additionally, the court did admit the records into evidence. When Brandon's post-conviction counsel provided proper custodians' record affidavits, the court reconsidered its earlier ruling and admitted Exhibits 3A, 6A, 9A, and 14A, 17, 26, 27, 31, and 33 (Tr.1055-56).

Family Members

The court also rejected the claims of ineffectiveness for failing to present mitigation through family members (L.F.801-06). According to the court, Mr. Hutchison had some helpful information, but could have been cross-examined about appellant's drug and alcohol use and his spending time with Lopez and Salazar (L.F.804). He did not know that Brandon had hid a gun (L.F.804). His additional testimony would not have changed the result of the trial (L.F.805).

The court ruled that Mrs. Hutchison's testimony would not have changed the outcome (L.F.806). Lorraine and her family's struggle, with sex abuse was not relevant. *Id*., citing *State v*. *Nicklasson*, 967 S.W.2d 596,620(Mo.banc1998). Much of the testimony was duplicative of what had been offered in penalty phase (L.F.806). Many people live in cities and do not commit murders. *Id*. The court was sympathetic to the family's financial set backs, but this did not cause Brandon to kill the victims. *Id*. The jury would reject this evidence as an attempt to shift blame. *Id*. Since Mrs. Hutchison did not want the details of her family's sexual abuse aired in public, counsel was not ineffective in failing to present it. *Id*. She had not been forthcoming with details to Brandon's attorneys. *Id*.

As for Brandon's brother, Matt, the court found that the family did not want to publicize sexual abuse in the courtroom; evidence of appellant's alcohol and drug use was introduced; the balance of his testimony would not have changed the result, and could have harmed the defense; and the attorneys had

spoken to Matt, decided he was not believable, so their decision not to call him was strategic (L.F.803-04).

The court found that Marilyn Williamson's testimony about boyhood events would not have changed the outcome; she knew little of appellant's activities since he moved to Missouri; and the prosecutor could have produce unflattering evidence of appellant's drug involvement (L.F.801-02).

Similarly, the court dismissed Jeff Beall's account of his nephew's problems: evidence that appellant was in special education and was a follower would not have changed the outcome; this evidence was cumulative (L.F.802-03).

Finally, the court found Shawna Alvery's testimony unhelpful: she only recently moved to Missouri and was not familiar with Brandon's recent activities; counsel was not familiar with her name, so they could not be ineffective; the family did not want to air the history of sex-abuse publicly; and helpful information about teasing appellant suffered and his good deeds was relatively minor and came in through other witnesses (L.F.802).

These findings are clearly erroneous for many of the same reasons discussed above. Background information, by definition, will have occurred years before the crime. Yet it is highly relevant and admissible. *Williams* and *Eddings*, *supra*. Contrary to the court's ruling, a defendant need not show a causal connection in order to admit such evidence. *Id*.

As in *Williams*, the favorable testimony far outweighed the negative. Every single fact cited by the court: Brandon's drug use, his association with Lopez and Salazar, and possession of a gun, had already been introduced at trial. Thus the family testimony would have been favorable.

The court concluded that since the attorneys had spoken to Matt and decided he was not believable, the decision not to call him was a reasonable strategic decision (L.F.804). Certainly Mr.

Crosby testified that Matt was not very believable (Tr.1071). However, the court ignores that counsel spent almost all their time focusing on guilt phase issues (Tr.1064,1083). They spent nearly the entire interview with Matt discussing the night before the shootings and Matt and his brother's activities (Tr.220-21,230-32,241). Mr. Cantin could not recall any details of appellant's life history, if they obtained them, from Matt (Tr.966-67). Thus, counsel could not have made a reasoned decision not to call Matt in the penalty phase, even if they reasonably chose not to call him in the guilt phase.

"[T]he mere incantation of the word 'strategy' does not insulate attorney behavior from review. The attorney's choice of tactics must be reasonable under the circumstances." *Cave v. Singletary*, 971 F.2d 1513,1518(11thCir.1992). Even tactical decisions can be so unsound that they amount to ineffectiveness. *State v. McCarter*, 883 S.W.2d 75,76-77(Mo.App.S.D.1994); *Poole v. State*, 671 S.W.2d 787,788 (Mo.App.E.D.1983). The question of whether a tactic was reasonable is a question of law and the motion court's findings are not entitled to deference. *Cave v. Singletary*, *supra*. Here counsel's so-called strategy was unreasonable; it was based on an interview in which counsel had not discovered any facts relative to penalty phase.

The court makes the illogical finding that since counsel was unfamiliar with Shawna Alvery's name, they could not be ineffective for failing to call her (L.F.802). If this Court were to accept such reasoning, counsel could never be ineffective for failing to investigate since they would never know the names of witnesses they did not investigate.

Counsel admitted that they failed to investigate and prepare for penalty phase. They wanted to present Brandon's complete life history. Evidence of mental deficits, sexual abuse, his good qualities, Lopez's domination and control of Brandon would have been helpful mitigation. Instead, counsel called only four witnesses whose testimony was brief. For example, Bill Hutchison's testimony covered less

than four pages (Tr.1932-35). Counsel knew their mitigation case suffered (990,1064,1083); the court should have too.

Thus, counsel was constitutionally ineffective, much like the attorneys in *Carter v. Bell*, 218 F.3d 581(6thCir.2000). There, Carter killed a 72-year-old man who he abducted at a rest stop. *Id*. at 587. He shot him four times in the head and rolled him off a cliff. Carter's co-defendant, Price, testified against him and received thirty-five years for second-degree murder. *Id*. Carter's attorneys had been licensed seven and three years respectively. *Id*. at 588. Neither had prepared a penalty phase prior to Carter's trial. *Id*. They spent 90-95% of their time on guilt phase evidence. *Id*. They did meet with family members, but they could not recall if they discussed mitigation. *Id*. They did not get releases from Carter for records of Carter or his family. *Id*. at 588-89. Their strategy was to create a reasonable doubt through the impeachment of the co-defendant, and show the co-defendant's testimony was not sufficiently reliable to establish aggravation. *Id*. at 589.

The Court found counsel was ineffective. Mental health evidence, childhood poverty, neglect and instability, poor education and Carter's positive relationship with his stepchildren, adult family and friends was helpful mitigation. *Id*. at 592-93. Carter had borderline intelligence, his IQ was 79 or 87. *Id*. at 593. Even though this evidence might have opened the door to Carter's extensive criminal record in which he assaulted his former wives and stepdaughter and stabbed an inmate in jail, the court found prejudice. *Id*. at 592. The mitigating evidence would have humanized Carter and at least one juror may have found that he did not deserve death. *Id*.

As with *Williams* and *Carter*, Brandon's counsel had a duty to investigate. Like Carter's attorney, they were inexperienced and spent almost all their time on guilt phase issues. They did not get releases for background records. Their focus was to challenge the co-defendant's testimony (Tr.1092).

As a result, the jury never heard that Brandon had seen a psychiatrist for 3 years and was diagnosed with a Bi-Polar Disorder. The jury never knew that when he was a 10-year-old boy, he was sexually molested by his uncle. They never knew about his family's history of drug and alcohol use or Brandon's own family's use. They never knew that teachers, counselors and doctors believed that Brandon could be easily influenced and dominated by others, that he was a follower, susceptible to the likes of Freddy Lopez. The jury never heard the family accounts of their loved one, that would have humanized him and made him less deserving of death. The jury never heard that Brandon was a good kid, with lots of problems.

Counsel should have presented this mitigation. Brandon was prejudiced. A new penalty phase should result.

IV.

COUNSEL FAILED TO EFFECTIVELY CONSULT AND PRESENT EXPERT TESTIMONY

The motion court clearly erred in denying the Rule 29.15 motion because Brandon was denied his right to effective assistance of counsel, due process and was arbitrarily and capriciously sentenced to death, Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution, in that Dr. Bland failed to conduct an adequate evaluation and trial counsel failed to investigate, consult and present expert testimony as they:

1. **provided Dr. Bland no background information, did not refer any questions regarding mitigation and did not follow-up on any of the information in Dr. Bland's report;**
2. **failed to present psychiatric testimony of Brandon's learning disability, Attention Deficit Hyperactivity Disorder, Bi-Polar Disorder, Polysubstance Dependence, and Sexual Abuse that substantially impaired Brandon so that he could not deliberate, and mitigated his conduct;**
3. **failed to present neuropsychological evidence of Brandon's brain damage and inadequate functioning;**
4. **failed to present pharmacological testimony of Brandon's drug and alcohol addiction and its effects on him;**
5. **failed to present expert testimony regarding Brandon's learning disabilities and the extent of his deficits;**

6. failed to present an expert regarding childhood development who would have explained Brandon's childhood, the effects of sexual abuse, and how and why Brandon turned to alcohol and drugs.

This expert testimony would have provided mitigation and would have reduced Brandon's culpability, reasonably likely resulting in a life sentence.

Brandon's trial attorneys hired a psychologist, Dr. Bland, four months before trial, to determine whether Brandon was competent to stand trial and whether he was suffering from a mental disease or defect. The issue now is whether Dr. Bland's evaluation was adequate and whether counsel was ineffective in their consultation with Dr. Bland and the presentation of his testimony. Additionally, this Court must decide whether counsel should have investigated and presented expert testimony from a competent psychiatrist, neuropsychologist, pharmacologist, speech or language pathologist, or childhood development expert.

Dr. Bland

Counsel hired Dr. Lester Bland to evaluate Brandon for competence and whether he suffered from a mental disease or defect (Tr.986-89,1030,1069, Ex.59). They did not ask Dr. Bland to look for mental problems that were mitigating. *Id*. Counsel did not provide the doctor any material, such as school, medical, psychiatric, jail or drug and alcohol records (Ex.12,at 2). Counsel had not even requested any of these records (Tr.974-79,985,1030-31). Counsel admitted that they wanted the records, they simply failed to get them (Tr.1030-31).

Dr. Bland spent 2-3 hours with Brandon (T.Tr.1891) and administered a Quick Test, an I.Q. test, and a reading recognition subtest (T.Tr.1882-83). Dr. Bland determined that Brandon had some deficits; his IQ was 76 or 78, and he could read only at a fourth grade level. *Id*. at 7. Brandon had

been in special education, diagnosed with Attention Deficit Hyperactivity Disorder when in the third grade, and was prescribed Ritalin for six years. *Id*. at 2. As a teen, he had seen a psychiatrist, who prescribed Lithium and diagnosed Brandon with a Bipolar Disorder or "manic depressant." *Id*., at 2,4,7.

Counsel did not know what the term Bi-Polar Disorder meant to explain it with any intelligence (Tr.1042). He did not discuss it with Dr. Bland. *Id*. Counsel had no strategic reason for not referring Brandon to a medical doctor or a psychiatrist (Tr. 981-2). Mr. Cantin admitted that he wished he would have (Tr.982).

Counsel also failed to obtain any additional testing as a result of Brandon's low I.Q., history in special education and ADHD (Tr.981,985). Counsel discussed the special education with Brandon and his family, but did not hire an expert, because of the lack of money (Tr.981). They saw no indication of brain damage, so did not see any need for a neuropsychological evaluation (Tr.981,985).

Brandon revealed to his attorneys and to Dr. Bland, that a family member sexually molested him when he was a young boy (Tr.986,1094,Ex.12 at 3). Yet counsel did not present this evidence and did not obtain any additional evaluations (Tr.986). Since the family did not want to talk about it and down played the incident as a one-time thing, counsel did not feel a sex abuse evaluation was a necessary expense (Tr.986).

Brandon also gave Dr. Bland a history of his alcohol and substance abuse problems. *Id*. at 3-4. Counsel was aware of Brandon's addiction, but did not consider any additional testing necessary (Tr.982,985). Dr. Bland's evaluation gave counsel answers (Tr.982). However, counsel admitted that they did not know the extent of Brandon's drug use, such as smoking marijuana with his mother when

he was 8 or 9 years old (Tr.1034, 1104), or use of LSD when a juvenile (Tr.1103). Counsel would have looked at the drug use more thoroughly had they had more time (Tr.1104).

Dr. Bland concluded that Brandon was competent and had no mental disease or defect, but that he had a personality disorder (Ex.12at6,8-10,Tr.1106). He provided no opinions on mitigation.

Psychiatrist

Dr. Stephen Peterson, a psychiatrist, analyzed and explained Brandon's problems (Tr.294-657). Dr. Peterson relied on background material, including school, medical, psychiatric, law enforcement and jail records (Exs.3-15,Tr.325). Brandon has mild brain damage (Tr.440). He suffers from a Learning Disorder, Attention Deficit Hyperactivity Disorder, Bipolar Disorder, Polysubstance Dependence and having been sexually abused as a child (Tr.341-42,450-465). His functioning places him at the bottom 9% of the population (Tr.442-43). His mental age is between 8 and 12 years (Tr.444). These deficits impacted Brandon's ability to deliberate, to appreciate the criminality of his conduct (Tr.481-83,499). They made him susceptible to the domination of others, such as Lopez and Salazar (Tr.350,359,362,381,394,473,476,477). He wanted desperately to fit in, he was easily manipulated and used (Tr.369,476-77).

Neuropsychologist

Dr. Dennis Cowan, a neuropsychologist, reviewed numerous records of Brandon (Tr.664-65,Ex.51at 1). Brandon had two head injuries, one from a hammer and another from a fall off a motorcycle (Ex.51at 2). Brandon was taking Klonopin and Elavil for anxiety and depression. *Id*. Based on his history, Dr. Cowan administered a battery of psychological testing to Brandon to determine his brain functioning (Tr.680-88). The tests included the WAIS-R, Halstead-Reitan, Memory Assessment Scale, Wisconsin Card Sorting and Test of Memory Malingering (Ex.51,at3).

Brandon suffered brain damage, in the mild range of impairment (Tr.696). His full scale IQ was 76 (Tr.697). Brandon's memory function was mildly to moderately impaired (Ex. 51,at 6).

Dr. Cowan reviewed Dr. Bland's report and determined that it was not adequate to assess brain function (Tr.706). The Quick Test is not recognized in the scientific community as a reliable means of testing (Tr.707). Several studies show it is not accurate and does not have good correlational coefficients. *Id*. Its norms and manual are out of date. *Id*. The Wide Range Achievement Test only measured reading. *Id*. An IQ test alone is not helpful, rather, one must look at how test scores "fall out." *Id*. Dr. Bland should have reviewed background materials; the history of substance abuse was a red flag for potential brain dysfunction; and Brandon's borderline intelligence highlighted the need to look at his problem areas (Tr.708-710).

Pharmacologist

Dr. James O'Donnell, a pharmacologist, evaluated Brandon regarding his drug use (Tr.743-45). He reviewed numerous background records, Exhibits 3-15 and interviewed Brandon (Tr.744-45,747). Brandon had a family history of alcoholism and alcohol abuse (Tr.750). His great grandfather, grandfather and father all had problems with alcohol. *Id*. Not surprisingly, Brandon first used alcohol at an early age, 11 years old. *Id*. He used marijuana daily and experimented with cocaine, LSD and occasionally morphine. *Id*. By age 15, Brandon was an excessive methamphetamine user; he was chronically intoxicated. *Id*.

Brandon's addiction was diagnosed and he had gone through treatments (Tr.751). The intoxication was involuntary due to the severity of his addiction (Tr.752-53). He did not have the ability to abstain (Tr.752-53). Brandon had a genetic and an environmental predisposition (Tr.754-55).

Brandon's addiction had obvious effects on his behavior (Tr.752). Alcohol can cause seizures, brain damage, and depression (Tr.754-55). Alcohol depresses the inhibition system, causing an eventual loss of control and judgment (Tr.756). The first effects are on the reasoning functions (Tr.756-57). Methamphetamine is a nervous system stimulant (Tr.757). With continued use, it can cause delusions, paranoia, psychosis, depression, psychiatric changes, and organic brain syndrome (Tr.758). Consistent with these effects, Brandon had suffered brain damage (Tr.758).

On the night of the offense, Brandon was severely intoxicated and was impaired in his ability to think, perceive, make judgments and deliberate (Tr.758-61). He had a loss of judgment and control (Tr.761). He had a diminished capacity, could not deliberate and suffered from an extreme mental or emotional disturbance (Tr.761-64).

Language or Speech Pathologist

Ms. Teri Burns, a speech and language pathologist, did a psycho-educational evaluation of Brandon to determine if he had learning disorders, which interfere with socialization skills and one's ability to function in society (Tr.854-59). Those who suffer from a learning disability have a discrepancy between cognitive ability and achievement (Tr.858). Brandon's school records were the most significant (Tr.862). Early in Brandon's childhood, he had special needs and was placed in special education. *Id*. School was always difficult for Brandon (Tr.863).

Burns administered several tests (Tr.864,Ex.56). Brandon had limited proficiency in reading, math and written language aptitude (Tr.868,870,874,877-78). Oral language achievement was very low, in the bottom 1 % (Tr.878-80). His skills in reading, math written language, and writing were all low, ranging from the bottom ½ of 1% to 9% (Tr.880-85). As a result, Brandon had problems with attention, concentration, memory, problem solving, reasoning, judgment, organization and planning

(Tr.892). The test results were consistent with his school records (Tr.893). Brandon's deficits were not acquired, he was born with them (Tr.893).

Childhood Development or Sexual Abuse Expert

Dr. Alice Vlietstra, a child development psychologist, evaluated Brandon (Tr.790-803). She interviewed his family including his mother, father and brother, Matt (Tr.796). The family provides the context and nurturing for a child (Tr.797). Dr. Vlietstra found several facts significant: the family history of alcohol abuse (Tr.798); Lorraine's history of sexual abuse, fear of childbirth, and anxiety attacks (Tr.798-99); the Hutchisons' move from Fillmore to Palmdale (Tr.799,822-23); and family members'sexually inappropriate behavior. *Id*.

Dr. Vlietstra explained that children need two things to grow well: genuine love and discipline (Tr.800). Brandon received neither. The parents were distant, did not express their feelings, minimized problems, and were permissive (Tr.800-02,809-10). Brandon could not connect to either parent emotionally (Tr.800-02).

Dr. Vlietstra examined Brandon in terms of three developmental states: from birth to 6 years; 7-12 years; and 13-18 years (Tr.803-27). She identified numerous problems, from struggles at school (Tr.807-11) to nightmares at home (Tr.808). Brandon was insecure, anxious, lacked self-confidence, was overly dependent, impulsive and influenced by other children (Tr.811). He was embarrassed by his low performance at school and blamed himself (Tr.812-13). He was inappropriate and disruptive in groups (Tr.813). He benefited from encouragement and reinforcement, but did not receive enough of either (Tr.813).

Compounding all his problems, was the sexual abuse he suffered (Tr.813-14). Brandon was confused by this abuse and started to blame himself. *Id*. This led to alcohol and drug abuse to cover

up his feelings of shame. *Id*. After the abuse, Brandon became even more distant and rebellious (Tr.817). He cut his body (Tr.819-20). He could not trust authority figures (Tr.817).

On the Developmental Asset Scale, Brandon had only 4-6 assets, out of a potential 40, needed for a healthy life (Tr.826-27). He did not have the building blocks to make good decisions and was susceptible to risky behavior (Tr.826). Brandon could not resist group influences (Tr.827).

Standard of Review

This Court reviews the trial court's findings and conclusions for clear error. *Sanders v. State*, 738 S.W.2d 856,857(Mo.banc1987). As discussed in Point III, *supra*, the standard for ineffective assistance of counsel requires that counsel's performance be deficient and that such performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 120 S.Ct.1495,1511-12(2000). To prove prejudice, Brandon must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*. and *State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997). Applying these standards, the trial court's findings and conclusions are clearly erroneous.

Motion Court's Findings and Conclusions

Dr. Bland: Due Process Violation

The court found that Brandon failed to prove that Dr. Bland's evaluation was inadequate (L.F.799-80). According to the court, *Ake v. Oklahoma*, 470 U.S. 68,83(1985) does not require a psychologist to do certain things and no Missouri law sets forth a checklist for an evaluation (Tr.780). The court found much of the evidence at the hearing non-persuasive and the absence of expert testimony did not prejudice Brandon (Tr. 780).

Certainly, neither *Ake*, nor any Missouri case, sets forth a particular checklist for a competent psychiatric evaluation. However, *Ake* provides some guidance. The Fourteenth Amendment's due process guarantee of fundamental fairness stems from the belief that "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding where his liberty is at stake." *Id*. at 76. Also present is a compelling interest in the "accuracy" of a criminal proceeding that places an individual's life at risk. *Id*. at 78. Accordingly, "when the State has made the defendant's mental condition relevant to his criminal culpability and to *the punishment he might suffer*, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id*., at 80 (emphasis added).

"Psychiatrists gather facts, through professional examination, interviews, *and elsewhere*." *Id*. (emphasis added). They analyze the information and draw plausible conclusions about the defendant's mental condition and the effects of the disorder on behavior. *Id*. Through investigation, interpretation, and testimony, psychiatrists assist lay jurors to make a sensible and educated determination about the mental condition of the defendant. *Id*. at 80-81.

Thus, if a defendant demonstrates his mental condition is a significant factor at trial, he is entitled, at a minimum, access to a "*competent* psychiatrist who will conduct an *appropriate* examination and assist in evaluation, preparation, and presentation of the defense." *Id*. at 83. (emphasis added). Contrary to the motion court's conclusion, Dr. Bland failed *Ake's* requirement that expert assistance be "competent" and the evaluation be "appropriate." He did not properly investigate from sources other than Brandon himself and he did not address Brandon's mental condition in context of mitigating circumstances.

Dr. Bland's failure to get any background records did not go unnoticed by the state. He was impeached for relying solely on Brandon (Tr.1891-93,1903,1906). The prosecutor repeatedly emphasized that Dr. Bland was relying on Brandon's words and this was the sole basis of his diagnosis. *Id*. He had no other evidence to compare (Tr.1906). Since, Dr. Bland failed to gather facts from sources other than his client; his examination was inadequate under *Ake*.

Dr. Bland simply addressed whether Brandon was competent to stand trial and whether he suffered from a mental disease or defect (Tr.1880,1885,Ex.12 at1,8-10). Yet he testified in penalty phase (Tr.1876-1907). He did not address any of the statutory mitigators relating to Brandon's mental health, such as 1) whether he was under the influence of extreme mental or emotional disturbance; 2) whether he acted under extreme duress or under the substantial domination of another person; or 3) whether his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Sections 565.032.3(2), (5) and (6), RSM0, 2000.

Dr. Bland simply reported Brandon's IQ of 76 or 78, and told the jury that Brandon read at the beginning 4th grade level (Tr.1882-83). He gave the jury his diagnostic conclusions that Brandon had borderline intellectual functioning and a personality disorder, non-specified (Tr.1888). But Dr. Bland did not draw any plausible conclusions about Brandon's mental condition and the effects of his disorder on his behavior, the very requirement of *Ake*. Dr. Bland did no investigation, gave no interpretation, and provided no testimony to assist lay jurors to make a sensible and educated determination about the mental condition of Brandon and whether it should mitigate the offense.

Forensic mental health professionals understand well that the scope of an evaluation for purposes of mitigation at a capital sentencing proceeding is far broader than that for competence or criminal responsibility at trial. *Jacobs v. Horn*, 129 F.Supp2d 390,403(M.D.Pa.2001). "Mental,

cognitive and emotional impairments and disturbances that do not render a person incompetent or insane are nevertheless highly relevant for purposes of mitigation." *Id*. An individual's background, including medical and other records, childhood abuse, history of drug or alcohol abuse are particularly important. *Id*. Yet, Dr. Bland conducted a very narrow and limited evaluation in which he evaluated Brandon only for competence and criminal responsibility. The evaluation and testimony was inadequate under the due process requirements as outlined in *Ake*. The trial court erred in ruling otherwise.

Dr. Bland: Ineffective Assistance of Counsel

The court also found that counsel was not ineffective for failing to provide Dr. Bland with independent sources of information so that he could reach a competent and accurate diagnosis (L.F.781). Since Dr. Bland did not testify at the hearing, Brandon failed to meet his burden (L.F.781).

This finding is clearly erroneous. Counsel admitted they had no legitimate reason for their failure to obtain background records; they simply did not have them. Thus, Brandon proved that counsel acted unreasonably.

The second issue is whether Brandon was prejudiced by counsel's failure. Brandon proved the prejudice by presenting expert testimony showing what an adequate evaluation would have shown (Tr.294-657,659-742,743-87,790-853,854-905).

In *Wallace v. Stewart*, 184 F.3d 1112(9thCir.1999), the court found ineffectiveness under similar circumstances where counsel failed to provide an expert with background materials relevant to evaluate the defendant. Wallace committed a brutal crime; he lay in wait at a mobile home he shared with his girlfriend and her two children. *Id*. at 1113. Wallace struck his girlfriend's 16-year-old daughter repeatedly with a baseball bat, breaking the bat. *Id*. As the girl lay moaning, he forced the broken bat through her throat until it hit the floor. *Id*. He then dragged her body into the bathroom. *Id*.

When the 12-year- old son arrived, Wallace struck him repeatedly with a pipe wrench, fracturing his skull and leaving brain matter on the floor. *Id*. As the mother arrived, he then struck her repeatedly with the wrench. *Id*. He then took money from her wallet, bought some liquor and drank it and spent the night at a friend's house. *Id*. The next day he turned himself in to the police. *Id*.

Despite this horrendous triple-murder, the court found counsel was ineffective. He had moved for a mental examination and the court-appointed clinical psychologist found Wallace competent to stand trial; he based his opinion on a review of police records, the result of an MMPI (psychological profiling) test and a brief interview with Wallace. *Id*. at 1114. The probation department had two psychiatrists examine Wallace before sentencing. They diagnosed Wallace with antisocial personality disorder and polysubstance abuse and noted that Wallace's mother appeared to have suffered from a mental illness of psychotic proportions. *Id*.

Counsel then retained another psychiatrist, Dr. Otto Bendheim, to testify on Wallace's behalf at the sentencing hearing. *Id*. Counsel did not provide Dr. Bendheim with Wallace's MMPI results or with any information about Wallace's background. *Id*. From a brief interview with Wallace and the presentence report, the doctor ascertained that Wallace's mother had been mentally ill, but was unable to diagnose Wallace with any type of mental infirmity and testified that Wallace had been aware of his actions. *Id*. His only explanation for his conduct was that "there must've been something that went wrong in [his] mind." *Id*. The court sentenced Wallace to death on all three counts. *Id*.

After a reversal for one count, counsel presented the testimony of a new psychiatrist, Dr. David Gurland at the resentencing. *Id*. at 1115. As with Dr. Bendheim, counsel gave him no information about Wallace's background or family history. *Id*. He did have police reports and Dr. Bendheim's testimony. *Id*. Dr. Gurland erroneously testified that Wallace had a brother and that his mother was

dead. *Id*. The doctor concluded that Wallace was in a disassociative state at the time of the murders and that he could not fully appreciate the wrongfulness of his acts. *Id*. The court again sentenced Wallace to death. *Id*.

In reviewing counsel's actions, the court first found that remarkably little time had been devoted to exploring Wallace's mental state or other mitigating factors. *Id*. Had they looked, they would have discovered a great deal about Wallace's family history, including a mother who was psychotic, alcoholic and anorexic. *Id*. at 1116. The family history was important, because psychosis and alcoholism are genetically passed from parents to children. *Id*. Wallace had a chaotic home life. *Id*. Wallace started sniffing glue and gasoline between the ages of ten and twelve; he had head traumas. *Id*. This was important, because children raised in profoundly dysfunctional environments like the Wallace household are prone to develop severe psychiatric disturbances. *Id*.

The appellate court went to the heart of the issue: "Does an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes." *Id*. at 1117. The Court cited two other cases also finding ineffectiveness for providing experts with scant information about the defendant and his background. *Clabourne v. Lewis*, 64 F.3d 1373(9th Cir.1995) (counsel barely prepared his own psychologist for his trial testimony and had provided him with scant information about the defendant and his background); and *Hendricks v. Calderon*, 70 F.3d. 1032(9th Cir. 1995) (counsel's failure to investigate client's drug problems and hard childhood and relay this information was deficient in penalty phase).

Just as in *Wallace*, *Clabourne*, and *Hendricks*, here counsel was ineffective in failing to investigate Brandon's background and provide Dr. Bland with that information, so that he could do a

complete and accurate evaluation. Adequate information, such as school, medical, mental health, and jail records and family interviews would have revealed Brandon's family's history of mental illness and alcoholism which are genetically passed to children. His chaotic childhood included sexual abuse. Records revealed the extent of his mental problems. Without this information, Dr. Bland could not make an accurate diagnosis. That is exactly what the State established in its cross-examination, discrediting the validity of Dr. Bland's evaluation.

Brandon was prejudiced. He was denied a full and complete mental health evaluation, but more importantly, the jury did not know about Brandon's background, his mental deficiencies and how they impacted his behavior at the time of the crime.

Contrary to the trial court's findings, the evidence at the evidentiary hearing did establish that with competent and adequate mental health evaluations, significant mitigating evidence could have been presented to the jury.

Ineffectiveness: Investigating, Consulting and Presenting Expert Testimony

As for the failure to investigate, consult, and hire additional experts, the court found that Brandon's family could not possibly afford all these experts; and defense counsel had already lost money on the case (L.F.781).

The court was correct that Brandon's family could not afford experts; Brandon was broke. But as an indigent defendant, he had the right to a competent, adequate mental health evaluation to assist in his defense against the death penalty. *Ake, supra*.

In a similar case, the court held that the retention of private counsel from a collateral source of funds, at no cost to the defendant, did not affect a defendant's ability to prove indigency. *State v. Jones*, 707 So.2d 975,977(La.1998). An indigent defendant is constitutionally entitled to a state-

funded expert, regardless of whether the defendant derives any assistance from an ancillary source. *Id*. Thus, Brandon was entitled to a state-funded mental health expert because he was indigent.

Yet, the court says denied him this right, precisely because he could not afford to pay for the expert. This Court has specifically rejected that reasoning. *Moore v. State*, 827 S.W.2d 213,216(Mo.banc1992) (counsel unreasonably failed to investigate by consulting serologist because he did not think money was available).

Additionally, the court found that since counsel was not familiar with the specific expert called by post-conviction counsel, they could not be ineffective for not calling that particular expert (L.F.788,796). The State established that counsel had not heard of Drs. Peterson, Cowan, O'Donnell, Burns or Vlietstra (Tr.1037-40,1099-1100). However, Brandon was not alleging that counsel should have consulted and called each of these particular experts, but rather, competent experts in their respective fields. Counsel can be ineffective for failing to present expert testimony, such as a serologist. *Moore, supra* at 214. The ineffectiveness results from the failure to call a qualified expert, whether she be a serologist or a psychiatrist, not the failure to call a specific doctor.

Psychiatrist

As to Dr. Peterson, the court found that he was not credible because he failed to consider facts contrary to his conclusions (L.F.784-85). The court found that records showed Brandon was antisocial; that he was not impaired, but lazy and uncooperative; that he was not learning disabled, but simply did not try or was lazy because he did not like special education classes; that he was a liar; and that his actions on the night of the offense showed he was in control and made his own decisions. *Id*. The court said Dr. Peterson looked for biological causes and refused to consider anything else (L.F.786).

This finding is unsupported by the record. Dr. Peterson was unquestionably thorough and considered in minute detail all of Brandon's background (Tr.320-430). He looked at the good, bad and the ugly. He did not selectively focus on favorable areas, but he also looked at the unfavorable, negative facts, the very facts the court points to in its conclusions. Dr. Peterson recognized that Brandon's mental problems led to acting out and negative behavior. However, simply because his testimony contained negative facts, counsel was unjustified in not presenting the overwhelmingly mitigating evidence. *Williams, supra* at 1514 (Williams' juvenile record for larceny, pulling a false fire alarm and breaking and entering did not justify the failure to introduce voluminous amounts of favorable evidence).

Further, all the objective evidence supports that Brandon was learning disabled and suffered from Attention Deficit Hyperactivity Disorder. All of his teachers, counselors and objective testing showed as much. For the trial court to suggest that all these experts are wrong, and that he was "lazy" is unsupported by the record.

The court is correct in concluding that the evidence presented at trial, i.e. the testimony of Lopez, suggested that Brandon was in control and made his own decisions (L.F.784-85). This is precisely why counsel should have presented expert testimony regarding Brandon's mental deficiencies, to explain that he was a follower, not a leader, who was "putty" in the hands of Lopez. *Glenn v. Tate*, 71 F.3d 1204,1211(6th Cir.1995).

In *Glenn*, the petitioner a young, mentally retarded man, acted at the instigation of an older brother. *Id*. at 1205. He was highly susceptible to suggestion by people he admired. *Id*. He suffered from global brain damage. *Id*. Yet the lawyers made no effort to acquaint themselves with their client's social history; they did not get school, medical or probation records. *Id*. at 1208. Had they consulted

a mental health expert, they could have presented evidence about their client's mental retardation, brain damage, and his inability to conform his conduct to the requirements of the law. *Id*. An expert could have explained how Glenn could not think up the planned killing and that his role was a follower and not a leader. *Id*. at 1208-09. The failure to present evidence of Glenn's mental history and mental capacity was ineffective. *Id*.

So too was counsel ineffective. A qualified expert such as Dr. Peterson would have testified about Brandon's brain damage, his Learning Disorder, Attention Deficit Hyperactivity Disorder, Bipolar Disorder, Polysubstance Dependence and having been sexually abused as a child (Tr.341-42,440,450-465). An expert could have explained his low functioning, at the bottom 9% of the population (Tr.442-43). An expert could have told the jury about Brandon's mental age -- between 8 and 12 years (Tr.444). These deficits impacted on Brandon's ability to deliberate, to appreciate the criminality of his conduct (Tr.481-83,499). They made him susceptible to the domination of others, such as Lopez and Salazar (Tr.350,359,362,381,394,473,476,477). He wanted desperately to fit in, he was easily manipulated and used (Tr.369,476-77). As with Glenn, he was putty in the hands or Lopez. Yet the trial court relies on Lopez's self-serving testimony to deny Brandon relief. Such a decision cannot stand.

The court also found that the failure of Dr. Peterson to draft a report was not commendable and diminished his credibility (L.F.786). However, a state postconviction's judge's finding that a witness in the proceeding is not convincing does not defeat a claim of prejudice. *Kyles v. Whitley*, 514 U.S. 419, 449, n.19 (1995). Such an observation could not substitute for the jury's appraisal at the time of the trial. *Id*. Credibility of a witness is for the jury, not the postconviction court. *Antwine v. Delo*, 54 F.3d 1357,1365(8th Cir.1995).

The court recognized that Dr. Peterson's testimony was lengthy and complicated, and the records he reviewed contained complex psychological concepts (L.F.786). The court then concluded that the jury would not have grasped much of testimony. *Id*. This finding directly conflicts with *Ake, supra*. Precisely, because such evidence is complex and complicated, an expert is needed to explain it to a jury.

The court also found that Dr. Bland reached some of the same conclusions, as to borderline intellectual function, Attention Deficit Hyperactivity Disorder, and history of substance abuse (L.F.786-87). The experts disagreed regarding Bi-Polar Disorder, but the court thought that Dr. Bland was "absolutely correct" in finding a personality disorder (L.F.787). Dr. Bland was not so off the mark that counsel was ineffective for retaining him (L.F.787-88).

The court's conclusion is not well-founded. Dr. Bland, while stating those conclusions, provided no explanation about the disorders or how they would impact Brandon's behavior. He provided no analysis whatsoever as to how they could be mitigating. Indeed, he did not even testify about the substance abuse history on direct, rather, the prosecutor elicited this on cross-examination. Whether, Dr. Bland was "absolutely correct" in finding a personality disorder is really beside the point. He did nothing to explain this mental problem to the jury. To any lay person, such a label sounds aggravating, not mitigating.

The court additionally found that: counsel need not shop for a more favorable expert; Cantin did not feel the need to go further after getting Dr. Bland's report, believing he was a good witness; and counsel was not required to investigate Brandon's mental condition in the first instance absent some suggestion that he was mentally unstable (L.F.788).

This finding is wrong, both factually and legally. First, Mr. Cantin testified that he should have done more investigation into Brandon's mental problems, especially getting his background records (Tr.974-78). He obviously knew Brandon was slow and had a suggestion that he had mental problems; that is why they contacted an expert to see if he was competent to begin with. Furthermore, Mr. Cantin candidly admitted that he had no good answer for not referring Brandon to a medical doctor, a psychiatrist (Tr.982). Rather, he wished that he would have. *Id*.

Brandon's claim was not that counsel should have shopped for a more favorable expert; rather it was that counsel should have hired a competent expert to conduct an adequate evaluation. See, *In re Brett*, 16 P.3d 601(Wash.banc2001) (where counsel hired a psychologist, but failed to consult and present expert testimony regarding fetal alcohol syndrome and diabetes and its impact on Brett, counsel was ineffective and death sentence vacated). As in *Brett*, here, counsel failed to consult with an expert that could talk about all of Brandon's impairments and explain why they mitigated his culpability. Simply hiring some expert does not make counsel effective. *Id*.

Finally, the court discounted Dr. Peterson's testimony because Brandon behaved admirably during the evidentiary hearing and at trial (L.F.788-89). He was attentive and not disruptive. *Id*. According to the trial court, this undercut the diagnosis of Attention Deficit Hyperactivity Disorder. *Id*. The court's reliance on demeanor is inappropriate. The physical demeanor of a person suffering from mental illness may shed no light on the extent to which he is impacted by his mental disorder. *Lafferty v. Cook*, 949 F.2d. 1546, 1555 (10th Cir.1991) (physical demeanor did not shed light on extent defendant was suffering from paranoid delusions).

Neuropsychologist

The court rejected the claim of ineffectiveness for failing to obtain neuropsychological evidence showing Brandon's brain damage, finding: counsel is not ineffective for failing to shop for a more favorable expert; Dr. Cowan and Dr. Bland's conclusions were similar, with the I.Q. being nearly identical; Dr. Cowan's opinions did not relate to the facts of the murder and therefore, lacked relevance; Brandon scored within the normal range on many tests; and voluntary intoxication is not a defense in Missouri (L.F.791-93).

As with Dr. Peterson, Brandon's claim was not that counsel should have shopped for a more favorable expert than Dr. Bland; rather it was that counsel should have hired the appropriate expert to begin with. *In re Brett, supra*. While Dr. Cowan and Bland's conclusions regarding I.Q. were nearly identical, Dr. Bland gave no opinion about Brandon's brain functioning. He couldn't. He had done no neuropsychological testing and the testing Dr. Bland did do was inappropriate (Tr.706-07). See *Jacobs v. Horn, supra* at 403 (to the extent there is an indication of possible organic impairment neuropsychological testing is dictated in a capital case; impairments may be present that are not immediately seen upon a standard psychiatric evaluation).

The court's finding that Dr. Cowan's opinions did not relate to the facts of the murder and therefore, lacked relevance is contrary to *Williams*, supra at 1516. There, the Court found that this mitigation that does not undermine or rebut the prosecution's death eligibility case, still can alter the jury's selection of penalty. *Id*. Brain damage and Brandon's borderline intellectual functioning is similar to Williams' mental retardation. Counsel was ineffective for failing to present this evidence.

The court's suggestion that since Brandon scored within normal range on some of the testing, his deficits were not mitigating is also erroneous. Brandon suffered brain damage, in the mild range of

impairment (Tr.696). His full scale IQ was 76 (Tr.697). These were significant deficits. Organic brain damage is mitigating evidence. *Glenn v. Tate, supra* at 1211.

The court's finding that voluntary intoxication is not a defense in Missouri so counsel could not be ineffective in failing to present it also is in error. While that may be correct for guilt phase, it is untrue for penalty phase. Alcohol or drug use, dependence or addiction is relevant mitigating evidence. *Parker v. Dugger*, 498 U.S. 308,314-16(1991); and *Mauldin v. Wainwright*, 723 F.2d 799,800(11th Cir 1984). Expert testimony from a neuropsychologist would have established how alcohol and drug use can damage the brain and further impair functioning. Counsel was ineffective in failing to investigate and present this evidence.

Alcohol and Drug Expert

As for Dr. O'Donnell, the court found: his opinion that Brandon's use of alcohol and drugs was involuntary in a pharmacological sense did not equate with involuntariness in a legal sense; intoxication cannot be used to prove diminished capacity; Dr. O'Donnell definition of deliberation as "ability to think in a clear mind" is not the proper legal definition in Missouri; the facts at trial refuted the opinion that Brandon was deficient in his ability to make decisions and judgment; jurors did not need an expert to explain the effects of alcohol and drugs, but could determine whether this was mitigating by themselves; and no evidence showed that Brandon was paranoid on the night of the offense, so Dr. O'Donnell's conclusion that Brandon's use of drugs and alcohol would have made him paranoid is rejected (L.F.790-92).

These findings are clearly erroneous. Alcohol and drug use or addiction are mitigating circumstances, even if not a legal defense to the crime itself. *Parker v. Dugger*; and *Mauldin v. Wainwright, supra*. That Brandon's was unable to think in a clear manner was also mitigating.

Focusing on Lopez's testimony, the court found that Brandon said that had to kill the victims, chose the deadly weapon, destroyed evidence, and fled the scene. *Id*. This is precisely why counsel should have presented expert testimony that would have established that Brandon had mental deficiencies, and was easily influenced by others, especially when intoxicated. *Glenn v. Tate, supra*.

Jurors were not able to decide how this evidence mitigated Brandon's culpability. Alcohol and methamphetamine are both physically and psychologically addicting (Tr.753-54). Alcohol can cause seizures, brain damage and depression (Tr.754-5). Alcohol causes a loss of control and judgment and interferes with processing impulses and stimuli (Tr.756). Methamphetamine causes delusions, paranoia, psychosis, depression, psychiatric changes, and organic brain syndrome (Tr.758). Certainly, the average juror would not know about these effects and expert testimony would assist the jurors in understanding this evidence.

The real danger is that the average juror finds drug and alcohol use aggravating, not mitigating. An expert can dispel some of the myths surrounding "voluntariness," and can explain the physical and psychological effects of these addictions. Brandon's alcohol and drug use on the night of the offense was undisputed. His history of alcohol and drug use was introduced by the state (Tr.1893-97). Thus, it was incumbent on trial counsel to explain this evidence to the jury in a way that would be mitigating.

Language or Speech Pathologist

The court also rejected the claim that counsel should have presented evidence regarding Brandon's learning disability, finding: counsel is not ineffective for failing to shop for a more favorable

expert; Ms. Burn's opinion did not relate to the facts of the murder and therefore, lacked relevance; and evidence that Brandon functioned at the level of an 8-12 year old was not helpful as most youngsters know right from wrong and that murder is unacceptable (L.F.793-94).

As with the other experts, these findings are erroneous. Brandon's claim was not that counsel should have shopped for a more favorable expert than Dr. Bland; rather it was that counsel should have hired the appropriate expert. *In re Brett, supra*. That Ms. Burns' opinions did not relate to the facts of the murder and lacked relevance is contrary to *Williams v. Taylor, supra* at 1516. Finally, while 8-12 year olds may understand the difference between right and wrong, the law still finds children and those with mental impairments them less culpable. *Johnson v. Texas*, 509 U.S. 350 (1993) (a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury); and *Penry v. Lynaugh*, 492 U.S. 302 (1989) (defendant's mental retardation is a mitigating factor that the jury must be allowed to consider). See also, Section 565.032.3(7).

Child Development Expert

The court denied the claim that counsel should have presented evidence from a child development expert, finding: counsel need not shop for a more favorable expert; and that since much of Vlietstra's testimony explaining Brandon's development had no causal connection to the crime itself, it was not relevant and helpful (L.F.796-97). (L.F.795-98). Again these conclusions are directly refuted as discussed above. *In re Brett*; and *Williams, supra*.

Summary

Counsel were ineffective. They provided Dr. Bland with no background materials and did not follow up on any of the information in his report. They failed to have Dr. Bland or any expert evaluate Brandon's mental health for mitigation. They should have investigated and presented expert testimony

from a competent psychiatrist, neuropsychologist, pharmacologist, speech or language pathologist, or childhood development expert. Without this evidence, the jury sentenced Brandon to death. Had they heard such testimony, there is a reasonable probability they would have sentenced him to life. A new penalty phase should result.

V.

CONTINUANCE NEEDED TO PREPARE MITIGATION CASE

The motion court clearly erred in denying the Rule 29.15 motion because Brandon was denied his right to effective assistance of counsel, due process, equal protection, and to be free from cruel and unusual punishments, Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution in that the trial court abused its discretion and appellate counsel was ineffective for failing to raise the trial court's error in overruling the defense motion for continuance since: 1) the claim had significant merit since trial counsel did not have time to investigate and prepare for the penalty phase; 2) the law supported the claim; 3) the claim was preserved for review; and 4) appellate counsel pursued weaker issues, including three claims based on the plain error standard of review, and claims requiring an abuse of discretion to warrant relief. Mr. Hutchison was prejudiced because had the claim been raised there is a reasonable probability that this Court would have granted a new trial, and with a continuance a substantial amount of mitigation could have been presented to the jury, creating a reasonable probability of a life sentence.

Trial counsel entered their appearance on behalf of Mr. Hutchison in February, 1996 (L.F.626). Less than eight months later, counsel was trying their first capital case (Tr.934,1059). Cantin had been admitted to practice law three years (Tr.932-34). William Crosby had been admitted five years (Tr.1057,1059); neither had been involved in a first degree murder case. *Id*.

Counsel had requested a continuance to investigate and prepare for the penalty phase (L.F.627). The court denied this request. *Id*. As a result, trial counsel focused on the guilt phase

(Tr.1003,1083). They did not have time to prepare for penalty phase (Tr.1003,1029,1082-83,1103). Counsel did not obtain any school, medical or psychiatric records, except for a few grade reports from Mr. Hutchison's mother (Tr.974-77,1068). They wanted to get the records, they just didn't have time (Tr.1030).

Counsel were so rushed that they had no idea that Brandon had seen a psychiatrist as a teen and had been diagnosed as suffering from a bipolar disorder, even though Dr. Bland had put this in his report (Tr.978-80,1073). Counsel would have liked to interview witnesses, such as Dr. Parrish and others in California (Tr.979-80,1064). They wanted to prepare a full and complete life story for mitigation (Tr.1082-83), but the guilt phase preparation consumed all their time (Tr.989-90,1082-83). As Mr. Cantin put it, "we were swamped in work" (Tr.1003). Mr. Crosby said they felt very pressed and the penalty phase suffered (Tr.1064).

After Mr. Hutchison was convicted of first degree murder, trial counsel called only four witnesses - Brandon's parents, a friend and Dr. Bland (T.Tr.1876-1935). Mr. Hutchison received death (T.Tr.1957-58). Defense counsel included the trial court's denial of the continuance motion in its motion for new trial (D.L.F.118,L.F.627). Yet appellate counsel failed to raise this issue on direct appeal (L.F.627-29).

Appellate counsel could not recall why he did not raise the continuance issue on direct appeal (L.F.628,646). He knew that Brandon had spent the majority of his life in the State of California and that a lot of background material was there (L.F.625-26). Counsel recognized that it generally takes a lot of work to investigate mitigating circumstances and prepare for the penalty phase of trial (L.F.626). He recognized that trial counsel had less than eight months to prepare for their first death penalty trial

and had requested a continuance, because they needed more time to prepare for the penalty phase (L.F.626-27).

Although this issue was preserved, counsel did not raise the denial of the continuance on appeal. According to counsel, he generally limits issues to ones most likely to succeed (L.F.628). The standard of review for a ruling on a continuance is "abuse of discretion" and counsel was not familiar with any cases from Missouri or federal court that had reversed on this basis (L.F.629-30).

Based on this evidence, the motion court denied the claim of ineffective assistance of appellate counsel (L.F.770-71). The court found that "[c]ounsel's decision to 'winnow' out claims that have little chance of success in favor of stronger points is reasonable appellate strategy," citing *State v. Shive*, 784 S.W.2d 326,238(Mo.App.S.D.1990) (L.F.771). The motion court also denied the claim that the trial court violated Brandon's constitutional rights by failing to grant a continuance (L.F.768-69).

This Court reviews these findings to determine whether the court clearly erred. *Sanders v. State*, 738 S.W.2d 856,857(Mo.banc1987). Brandon is entitled to effective assistance of counsel on his first appeal of right. *Evitts v. Lucey*, 469 U.S. 387 (1985); *State v. Sumlin*, 820 S.W.2d 487,490(Mo.banc1991). The standard for effectiveness of appellate counsel is the same as the standard for evaluating trial counsel's performance: the movant must show that appellate counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Sanders, supra*. Counsel need not raise every possible claim on appeal, but the "failure to raise a claim that has significant merit raises an inference that counsel performed beneath professional standards." *Sumlin, supra* at 490.

The presumption of reasonableness afforded an appellate attorney can be overcome if he neglected to raise a significant and obvious issue while pursuing substantially weaker ones. *Bloomer v.*

United States,162 F.3d.187,193(2nd.Cir.1998). Other factors to consider include whether the error was objected to at trial and whether the omission was a reasonable strategic decision. *Mapes v. Coyle*, 171 F.3d. 408,427-28 (6thCir.1999).

Appellate counsel was ineffective. The continuance claim had significant merit. This was trial counsel's first death penalty case. They were on the case for less than eight months before trial. They had spent nearly all their time preparing for the guilt phase, leaving no time to investigate, let alone present mitigation. As a result, they had failed to conduct even the most basic investigation. They had not requested any background records.

These facts cried out for a continuance. Case law supported granting a continuance under these facts. Only a few years before the trial court's denial, this Court had reversed a death penalty case, finding an abuse of discretion, in the trial court's failure to grant a continuance for a discovery violation. *State v. Whitfield*, 837 S.W.2d 503,507 (Mo.banc1992). Thus, while the abuse of discretion standard is a difficult standard to meet, this Court certainly grants relief if the facts support the claim. Additionally, in *State v. McIntosh*, 673 S.W.2d 53,54-55(Mo.App.W.D.1984), the Court of Appeals held that a trial court abuses its discretion when it fails to grant a continuance which is necessary for the defense to prepare for trial. *See also, State v. Perkins*, 710 S.W.2d 889,893(Mo.App.E.D.1986)(court's failing to grant a continuance was an abuse of discretion). Although all these cases had been decided long before Mr. Hutchison's appeal, appellate counsel acknowledged he was not familiar with any of them (L.F.629-30).

Since the continuance claim was preserved for review, the failure to raise it on direct appeal was unreasonable, especially since counsel pursued much weaker, unpreserved claims. A review of counsel's brief shows that seven issues were raised (App.Br.). Three of those issues were unpreserved.

State v. Hutchison, 957 S.W.2d 757,760(Mo.banc1997). The preservation problem was highlighted by respondent (Resp.Br. at 20). Assistant Attorney General, Karen King Mitchell, prefaced her arguments with an introduction pointing out the preservation problems and urging this Court not to review for plain error. *Id*. This Court recognized that these claims had no merit, and certainly did not result in a manifest injustice. *Hutchison*, *supra* at 764-65.

Not only did counsel raise claims requiring a showing of manifest injustice, he raised claims requiring an abuse of discretion -- the standard he deplored. Point VI alleged an "abuse of discretion" in allowing a late endorsement of John Galvan as a penalty phase witness (App.Br.at15).

Point IV raised the trial court's failure to *sua sponte* to disallow State's improper opening statement (App.Br.at13-14). Even had the error been preserved, the trial court has considerable discretion in controlling argument of counsel and will not be reversed absent an abuse. *State v. Rousan*, 961 S.W.2d 831(Mo.banc1998). Surely, winning a claim that the trial court should have *sua sponte* limited improper argument would have been much more difficult than winning a claim regarding the denial of continuance, since it was supported by facts, case law and was preserved.

Mr. Hutchison was prejudiced by counsel's failure. As in *Sumlin*, this Court should be left in doubt as to the validity of the decision on Mr. Hutchison's original appeal to affirm the sentence. Counsel admitted that they did not have time to prepare and as a result, the jury never heard mounds of mitigating evidence. *See* Points III and IV, *supra*.

Brandon also was denied his constitutional rights to due process, equal protection and effective assistance of trial counsel and to be free from cruel and unusual punishment due to the trial court's error. The motion court clearly erred in ruling otherwise. The court cited *State v. Clark*, 859 S.W.2d 782,789(Mo.App.E.D.1993) for the proposition that a continuance claim is not cognizable in a 29.15

action (L.F.768). However, Clark was a consolidated appeal. The appellant tried to raise the very same issue on direct appeal and the post-conviction appeal. *Id*. Postconviction motions are not substitutes for direct appeals. *Id*. However, when exceptional circumstances show that a movant was justified in not raising the claim on direct appeal, the claim can be raised in the post-conviction proceeding. *Id*.

Here, exceptional circumstances exist. Appellate counsel made the decision not to raise the claim. This is a death penalty case. Brandon, with an IQ of 76 or 78 relied on his counsel to raise all issues with merit. Additionally, the plain language of Rule 29.15(a) supports raising all constitutional claims, especially since Brandon had evidence to support the claim.

Brandon was denied his rights to a fair trial because of the trial court's denial of a continuance. The most basic background information was not obtained. As counsel explained, they had to forego preparing for penalty phase in favor of guilt phase. Trial counsel is ineffective for failing to investigate and present substantial mitigating evidence during the sentencing phase. *Williams v. Taylor*,120 S.Ct.1495(2000). Brandon had a constitutional right to present evidence of his troubled childhood in mitigation. *Eddings v. Oklahoma*, 455 U.S.104,113-16(1982). This right was meaningless, because counsel had no time to obtain the information that was available. Brandon was also denied equal protection.

Had Brandon had money, counsel could have hired investigators or experts to assist in the case (Tr. 983). Whether someone lives or dies should not depend on their socio-economic status and their access to resources. *See McCleskey v. Kemp*, 481 U.S.279,309,n.30(1987) (cannot base a death sentence on an arbitrary classification such as race). Basing a death sentence on arbitrary factors also

violates the Eighth and Fourteenth Amendments which require heightened reliability in death sentence cases. *Woodson v. North Carolina*, 428 U.S. 280,305(1976).

The unfairness of denying Brandon a continuance is illustrated by his codefendant, Salazar's case. Unlike Brandon, Salazar's attorneys requested and received a continuance to adequately prepare for trial (Ex.64, at 11-12). They were able to go to California and investigate Salazar's background and upbringing. *Id*. They called at least eight out-of-state witnesses, at the state's expense. *Id*. at 17. The investigation yielded good results, Salazar received a sentence of life without probation or parole. *Id*. at 29-30.

The court's disparate treatment of Brandon and Salazar denied Brandon due process and equal protection of law, and subjected him to cruel and unusual punishment. No rational basis justified the disparate treatment.

The motion court tried to explain the differences, ruling that counsel in effect had similar amounts of time to prepare (L.F.769). The court ignores that this was Crosby and Cantin's first death penalty case (Tr.934,1059). In contrast, Salazar's counsel were experienced attorneys specializing in death penalty litigation.

The motion court suggests that Brandon's size and appearance may account for why he got death (L.F.769). He was much taller and bigger than Salazar. *Id*. If size is now an appropriate factor in deciding who gets death, we have reached the height of arbitrariness. *Woodson v. North Carolina, supra*.

The court also rationalizes the different treatment of the codefendants, saying evidence showed that Brandon was the final shooter (L.F.769). The court ignores that other evidence suggested just the opposite, that Salazar was the final shooter (Ex.65,L.F.618). Unquestionably, Salazar was the initial

shooter, placing in motion the events leading to the Yates deaths. At the very least, Salazar and Brandon were equally culpable, yet Salazar got life. The difference was the continuance to adequately prepare for penalty phase.

The motion court clearly erred in denying this claim. A new penalty phase should result.

VI.

COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE OF LOPEZ'S DOMINATION AND CONTROL OVER BRANDON

The motion court clearly erred in denying the Rule 29.15 motion because Brandon was denied his right to effective assistance of counsel, due process and was arbitrarily and capriciously sentenced to death, Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution, in that trial counsel failed to investigate and present testimony of Frankie Young (Smith), Terry Ferris, Brandy Kulow (Morrison), Marcella Hillhouse, and Phillip Reidle that Freddy Lopez was a drug dealer that bragged about his gang, showed off his stab wounds, considered Salazar a close gang brother, his hit man and enforcer, dominated and controlled Brandon, who was child-like; Lopez instigated the stabbing of John Galvan, Brandon was sorry it happened; Lopez tried to force Brandon to shoot Marcella Hillhouse, but he refused; and the victims were known as heavy drug users who did anything and everything such as marijuana, crank and pills. Brandon was prejudiced because this evidence would have refuted the State's theory that Brandon was in charge, made the decision to kill the Yates, and would have provided mitigation supporting a life sentence.

Counsel's defense theory at trial was that Freddy Lopez and Michael Salazar were gang members, running herd over their client (Tr.1016,1094). Brandon was a good kid who went along with others (Tr.1024,1050). Unfortunately, the group Brandon was following was not a good one, they bought and sold drugs and violence was an integral part of their world. Yet counsel failed to adequately

investigate witnesses who would have supported this theory. Frankie Young (Smith),[7] Terry Farris, Brandy Kulow (Morrison), Marcella Hillhouse, and Phillip Reidle could have provided helpful information to support counsel's defense in both the guilt and penalty phases.

Frankie Young

Ms. Young testified at trial about some of Brandon's good qualities (Tr.44,T.Tr.1907-11). The jury never heard about Lopez' relationship with Brandon. Lopez dominated, controlled, and made the decisions, while Brandon followed (Tr.51,55). Lopez bragged about being in a gang; he claimed Salazar was his gang brother and hit man from California (Tr.55).

Terry Farris

Farris was mentioned at trial; he had been at Lopez's house before the New Year's Eve party to buy methamphetamine (T.Tr.1080). The Yates knew Farris, their brother Tim had been with Farris when he went to Lopez's (T.Tr.1080).

Despite his association with both Lopez and the victims, trial counsel did not call Farris at trial. Farris knew Lopez well, he bought and sold drugs from him (Tr.79). He also had seen Lopez and Brandon together and knew that Lopez made the decisions (Tr.81).

Brandy Kulow

Kulow, a state witness at trial, knew both Lopez and Brandon (Tr.906-07). Like many others, she liked Brandon, but not Lopez (Tr.907). Brandon was good to her and her children (Tr.908-09). Lopez, on the other hand, bragged about being in a gang (Tr.911). He hung out with Michael Salazar, who was quiet, but violent (Tr.910-11). Kulow had seen Salazar pull a gun on people several times

[7] Smith and Morrison had married at the time of the hearing.

(Tr.910). Once, Salazar pointed a gun to her head (Tr.910-11). She was scared, but did not take Salazar seriously (Tr.911).

At trial, the State had Kulow testify about an incident where Brandon had a gun he pulled out of a bale of hay (T.Tr.1859). Had she been asked, she would have clarified that she was not threatened by Brandon at all, he did not scare her (Tr.912). Rather, the sight of a gun scared her (Tr.912).

Marcella Hillhouse

Hillhouse knew Brandon well, she saw him nearly every day a year before the offense (Tr.96-97). She liked Brandon and thought he was a good kid (Tr.97). However, Lopez was a different story -- he was domineering abusive and had sexually assaulted her (Tr.108). She was scared of him. *Id*.

Hillhouse recounted one incident in which Lopez accused her of stealing $500.00 from him (Tr.99-100). Lopez threatened her with a gun and wanted Brandon to shoot her (Tr.99,101). Brandon refused (Tr.101).

In an offer of proof, Hillhouse also provided details of the Galvan stabbing (Tr.101-06). Again, Lopez had started the fight and urged Brandon to stab him (Tr.104-05), Brandon felt bad afterwards and helped Hillhouse bandage Galvan (Tr.106).

Phillip Reidle

Phillip Reidle went to high school with one of the victims, Ronald (Tr.90). Brian was a good friend (Tr.91). They partied together for twelve years, from 1980-1992 (Tr.91,93). Brian did drugs--anything and everything (Tr.91). Like his brother, Ronald had a reputation as a drug user (Tr.92). Everyone knew he used marijuana, crank and pills (Tr.92). The Yates maintained these reputations until their deaths (Tr.95).

The motion court denied these claims of ineffectiveness (L.F.756-60). In reviewing these findings and conclusions, this Court determines whether the motion court clearly erred. *Sanders v. State*, 738 S.W.2d 856,857(Mo.banc1987). To prove ineffective assistance of counsel, Brandon must show that his counsel's performance was deficient and the performance prejudiced his case. *Id.*, citing *Strickland v. Washington*, 466 U.S. 668(1984). To prove prejudice, Brandon must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997). Applying these standards, the trial court's findings and conclusions are clearly erroneous.

"[C]ounsel must make a reasonable investigation in the preparation of a case or make a reasonable decision not to conduct a particular investigation." *Kenley v. Armontrout*, 937 F.2d 1298,1304(8thCir.1991). Counsel must exercise reasonable diligence to produce exculpatory evidence and strategy resulting from lack of diligence in preparation and investigation is not protected by a presumption in favor of counsel. *Id*., citing *Eldridge v. Atkins*, 665 F.2d 228,235-37(8thCir.1981). Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not to trial strategy. *Kenley, supra* at 1304; and *Chambers v. Armentrout*, 907 F.2d 825,828 (8thCir.1990).

Here, counsel was ineffective. Their defense was that Lopez dominated and controlled Brandon (Tr.1016,1094). They argued vigorously for the admission of evidence that Lopez and Salazar were members of a violent, Hispanic gang, the Party Boys (T.Tr.239-46,252-90). They were loyal to each other, such loyalty was beaten into them during their initiation (T.Tr.271-72). According to counsel, this evidence would show Lopez and Salazar's relationship and Lopez's motive to lie to protect his gang brother and to pin the offense on Brandon (T.Tr.269-70). Further, the victims were

not simply innocent bystanders, but drug users who were connected to Lopez (Tr.91-95). All of these witnesses could have provided helpful information in support of this defense.

Frankie Young

The trial court dismissed Young's first-hand account of Lopez's gang activity and his assertions that Salazar was his gang brother and hit man from California (L.F.756). The motion court ruled that gang evidence had been presented at trial (L.F.756). This finding ignores that Lopez minimized the gang activity at the trial, and denied that Salazar was a good friend of his (T.Tr.1070). Rather, he was a good friend of Lopez's brother's and Lopez only allowed him to stay there as a favor to his brother (T.Tr.1156). Indeed, Lopez pretended like his gang was simply a Mexican group taking pride in their neighborhood and that he had left that behind him in California (T.Tr.1153,1155,1156). Nothing could be further from the truth. Lopez continued his gang activity in Missouri, bragged about it to intimidate others, showing off his scars (Tr.55,911). It worked, others were scared of him (Tr.108). They felt intimidated. *Id*. And they knew that Brandon felt the same way and followed Lopez's directives (Tr.51,53,55,66,81,108,914). This was hardly the evidence presented at trial.

Secondly, the trial court denied the Frankie Young claim, ruling that the follower evidence was refuted by things in the record (L.F.756). That is exactly the point. Lopez tried to portray Brandon as taking charge after Salazar shot the victims (T.Tr.1110-1134). Lopez pretended that he was an innocent bystander who wanted to call an ambulance (T.Tr.1110,1112-13). Precisely because Lopez painted this picture, it was incumbent upon defense counsel to elicit evidence from those who knew both Brandon and Lopez to show the truth -- that Lopez was in control and Brandon, intimidated and scared, followed his lead.

In addition to supporting the defense theory that these gang members were running herd over Brandon and pinning their actions on him, this evidence would have provided compelling mitigation. One who acts under duress in committing murder should have his punishment mitigated. § 565.032.3(6). *See also, State v. Herrera*, 850 P.2d 100,113(Az.1993) (statutory mitigating circumstances of duress established where father coerced his son into shooting). Whether a defendant was the planner of the crime goes to a defendant's relevant culpability. *Mak v. Blodgett*, 970 F.2d 614,623(9thCir.1992). In *Mak*, the failure to investigate and discover that an unindicted individual actually planned the massacre of thirteen people constituted ineffective assistance of counsel. *Id*. at 617. One's role in the offense and information that a third party planned the offense is relevant mitigating evidence under the Eighth and Fourteenth Amendments to the United States Constitution. *Id*. at 622-23. Evidence that a defendant is a follower, not a leader, explains how he can be "putty" in the hands of another. *Glenn v. Tate*, 71 F.3d 1204,1211(6thCir.1995).

As in *Herrera*, *Mak*, and *Glenn*, counsel needed to present evidence showing that Brandon was a follower, not a leader. He was putty in the hands of the older, domineering Lopez who intimidated Brandon and others. Lopez was directing the activities, telling Brandon and Salazar to dispose of the guns, ammunition and drug paraphernalia. He certainly was not the innocent bystander he claimed to be.

Finally, the court found that since Crosby had deposed Young (Tr.1071-72), Brandon failed to show that counsel's failure to elicit this favorable evidence was not reasonable trial strategy (L.F.756). This conclusion ignores counsel's testimony that they believed Lopez and Salazar were gang members running herd over their client (Tr.1016,1094). They believed Brandon was a good kid, had not shot anyone, and was simply caught up with the wrong people (Tr.1050,1090). He was not making any

decisions that night (Tr.1024,1094). Thus, counsel unreasonably failed to elicit this favorable evidence from Frankie Young when she testified for the State.

Terry Farris

The court downplayed Farris' testimony about Lopez's controlling relationship with Brandon, because Farris acknowledged that Lopez did not have "complete" control over Brandon (L.F.756-57). Additionally, the court found that Mr. Crosby concluded Farris would not be helpful (L.F.757). And since Lopez admitted selling drugs, Farris' testimony would have been cumulative. *Id*.

Contrary to the court's finding, Mr. Crosby did not say Farris would not be helpful; he could not even remember the strategy reason for not asking Farris about these things at trial (Tr.1072). Crosby did recognize that Farris was not a pillar in the community and would not be a good character witness for Brandon (Tr.1073). Lopez's friends and drug buyers were not pillars, but they were the ones who knew Lopez and how he dominated Brandon. Farris' admission of buying drugs from Lopez was presented at trial, but evidence of Lopez's dominating relationship even if not complete control, was not. This evidence would have supported the defense and provided mitigating evidence. *See Herrera*, and *Mak*, § 565.032.3(6), discussed *supra*.

Brandy Kulow

As with Frankie, Brandy testified at trial as a State witness, yet counsel failed to elicit favorable information from her. The court acknowledges as much, but finds that any prejudice from the failure was overcome by the negative information that could have been elicited by the State (L.F.760). In support of this conclusion, the court points out that when Salazar threatened Brandy she did not take him seriously. *Id*. Brandon could converse with Brandy, she left her children with him, Brandon used

drugs, and Brandon hid a gun in a haystack -- dispelling the notion that he was not violent (L.F.759-60).

These findings are refuted by the record. First, Brandy testified for the State about Brandon hiding a gun in a haystack (T.Tr.1859) so this negative information was already before the jury. What Brandy could have done was lessened its impact by telling the jury that Brandon never threatened her. She was simply scared by the gun being close by (Tr.912). The jury had already heard that Brandon used drugs, by the defense's own expert (T.Tr.1893-1900). This was hardly a reason not to question Brandy about Salazar, his violent threats and how scared she was of Lopez. Brandy knew Brandon was easily led something counsel wanted the jury to know. They unreasonably failed to present this evidence.

Marcella Hillhouse

Trial counsel admitted that they never talked to Hillhouse prior to trial, but would have wanted to investigate the information she had about the Galvan incident and the Hoberg bridge incident (Tr.938-39,952,1016-18,1063-67,1076-77,1095-98). Nevertheless, the court found they were not ineffective based on the Rule 29.07 hearing, in which Brandon said "he didn't have no witnesses" (T.Tr.1993) (L.F.757-58). The court concluded that counsel could not be ineffective for not calling Hillhouse since Brandon did not disclose her, citing *State v. Lopez*, 836 S.W.2d 28,35 (Mo.App. E.D.1992).

Lopez does support the court's finding. However, that intermediary appellate court decision was decided before this Court's opinion in *State v. Driver*, 912 S.W.2d 52(Mo.banc1993). *Driver* discussed Rule 29.07 in detail. Questions of a defendant such as "did the attorney do everything" or "not do anything" were too broad to conclusively refute *Driver's* ineffectiveness of counsel claim. *Id*.

at 55-56. Rather, to refute such a claim the record must show that the defendant would have known of the claim and that it was a viable defense. *Id*. at 56.

Here, Brandon has borderline intellectual functioning, with an IQ of only 76 or 78 (T.Tr.1882-83). He can read at a 4th grade level (T.Tr.1883). His attorneys recognized his deficits and believed he tried to answer all their questions truthfully and give them the information they asked of him (Tr.1107,1109). Nothing suggests that Brandon would have known that Hillhouse could be helpful or that she would have provided a viable defense. Rather, the evidence shows that Brandon did not understand the severity of the charges and that he could be convicted (Tr.1093). The underlying current in every conversation with his attorneys was: "I didn't kill those boys" (Tr.1093). Brandon could not begin to understand accomplice liability, or what witnesses might rebut the State's aggravation and provide mitigation.

The attorneys had a duty to investigate independent of Brandon. *Baxter v. Thomas*, 45 F.3d 1501,1513-14(11thCir.1995); and *State v. Perez*, 952 N.E.2d 984,991 (Ill.S.Ct.1992). Clients with mental deficiencies may not even talk to their attorneys. *See e.g*., *Baxter*, *supra* at 1514. Still this does not alleviate counsel of their duty to investigate.

Additionally, the court found that Hillhouse's testimony about the Hoberg Bridge incident would have been damaging; it would have undercut counsel's theory that Brandon was dominated by Lopez (L.F.758). Hillhouse did provide information that could cut both ways. On the one hand, it did show that, when push came to shove, Brandon refused Lopez' directive to kill. On the other hand, it showed exactly how controlling Lopez tried to be and how he enlisted others to do his dirty work. The incident was consistent with the defense that Lopez dominated and controlled Brandon; that Brandon went along with things, but he drew the line at killing for Lopez -- Salazar was the man who did that.

The court improperly refused Hillhouse's testimony regarding the Galvan incident and made no findings about this (Tr.101-06; L.F.757-58). The court's stringent pleading requirements are unfair and denied Brandon a full and fair hearing. Missouri is a fact-pleading state. *State v. Harris*, 870 S.W.2d 798,815(Mo.banc1994). The 29.15 motion must plead with factual specificity, the name of witnesses and the nature of the claim. *Id*. Harris failed to identify the name of a mental health expert he intended to call at the hearing or what type of mental disease or defect he suffered. *Id*. Nevertheless, this Court reviewed the claim. *Id*.

In contrast, here, the motion alleged counsel's ineffectiveness in failing to investigate and call Hillhouse as a witness (L.F.24). It detailed that Hillhouse knew both Brandon and Lopez, that Lopez dominated and threatened Brandon, that he once tried to make Brandon kill her and that Lopez had sexually assaulted her (L.F.24). This adequately covered the Galvan incident, an example where Lopez dominated and threatened Brandon. If 29.15 motions must allege, word by word, every detail expected from a witness, there would be no point in a hearing -- provided by Rule 29.15 (h). The provisions of 29.15 should be read together. Here, Brandon's motion specifically identified the witnesses to be called and the claims of ineffectiveness, simply omitting some of the details of the witness' testimony. Thus, the court erred in denying this claim of ineffectiveness.

Phillip Reidle

Like Hillhouse, counsel admitted they were unaware of Reidle and had not talked to him before trial (Tr.941,1069). The court makes the astonishing finding that since counsel was unaware of the witness, they were not ineffective in failing to call a witness they did not know about (L.F.760). Under the court's analysis, counsel who fails to investigate could never be ineffective. They would never be aware of the witnesses they did not investigate. Numerous cases are to the contrary. *Kenley*,

Eldridge, and *Chambers*, *supra* (all finding the failure to investigate ineffective). Recently, the Supreme Court too, recognized that the failure to investigate and present helpful evidence constitutes ineffectiveness. *Williams v. Taylor*,120 S.Ct. 1495(2000).

The court downplays the helpfulness of Reidle's testimony about the victims' drug use, saying Reidle had no personal knowledge in the three years before the killing, Dr. Spindler testified he found drugs in the victims' systems so the information would have been cumulative, and the jury would have been inflamed had the defense attacked the victims (L.F.760). Reidle used drugs with Brian Yates for twelve years and he knew about his continued reputation as a drug user until his death (Tr.93,95). He knew that both the Yates would use anything and everything (Tr.91-92), much different evidence than Spindler's account of drugs in their systems after one New Year's Eve party. Spindler only found alcohol and marijuana residue in Brian Yates' urine (T.Tr.1398). He found alcohol, marijuana, amphetamine and methamphetamine residue in Ronald Yates' urine (T.Tr.1418).

Contrary to the court's suggestion that counsel would never use this evidence, because it would have inflamed the jurors, Cantin acknowledged that had he known about it, he possibly would have presented it in guilt phase (Tr.941). Counsel would have had to be sensitive in how they dealt with the victims' drug use. Reidle's testimony would have been helpful to show the victims' relationship with Lopez, a drug dealer, and their knowledge of the quality of drugs he was selling their brother. The jury should have known that the Yates were not two innocent bystanders who were killed. They used anything and everything they could -- crack, marijuana, pills -- and they ended up in a violent altercation with Salazar as a result. At the evidentiary hearing, counsel candidly recognized Reidle's importance, the court should have too.

Counsel was ineffective in failing to investigate and present this evidence. A new trial should result.

VII.

COUNSEL'S FAILURE TO OBJECT TO PREJUDICIAL ERROR AND PERSERVE ERROR FOR REVIEW

The motion court clearly erred in denying the Rule 29.15 motion because Brandon was denied his right to effective assistance of counsel, due process and was arbitrarily and capriciously sentenced to death, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution, in that trial counsel failed to properly object and preserve the claims of error:

1. **the State's late endorsement of penalty phase witness, John Galvan, during the trial;**
2. **the prosecutor's opening statement that the victim, Ronald Yates was "sprawled out there like Christ crucified on the cross;"**
3. **closing argument that the Troy Evans, the one man that linked all three defendants to the crime, was destroyed - - suggesting that he was killed to prevent him being called as a witness;**
4. **closing argument that Lopez had no deal when in fact, if he testified favorably for the State, he would have his charges reduced from first to second degree murder and would receive a term of years; and**
5. **expert opinion that Brandon was competent and not suffering from a mental disease or defect, which was not relevant or admissible in the penalty phase.**

Brandon was prejudiced because these errors denied him a fair trial and a reliable sentencing proceeding and there is a reasonable probability that had counsel properly objected, his case would have been reversed and remanded for a new trial.

Counsel failed to object to prejudicial evidence and arguments; counsel did not know how to properly preserve constitutional error for appellate review. Brandon was prejudiced in the first instance, because the errors denied him a fair trial and reliable sentencing proceedings and secondly, because had the issues been adequately preserved there is a reasonable probability that his conviction and sentence would have been reversed and remanded for a new trial.

Preservation Generally

Brandon's amended motion alleged ineffectiveness in counsel's failure to properly preserve claims for review (L.F.53). Mr. Crosby intended to preserve claims of error under the federal constitution (Tr.1060). He thought it was probably annoying to a jury to cite the entire constitution when objecting (Tr.1060-61). Crosby believed that if he simply made an objection and stated a legal ground, that would preserve the claim for all state and federal courts (Tr.1061). Crosby said that the claim need not be in the motion for new trial; an objection and record at trial would sufficiently preserve the issue. *Id*. Similarly, Mr. Cantin thought a simple objection, such as hearsay or relevancy would preserve a claim under the U.S. Constitution (Tr.935). He tried to preserve constitutional error the best way that he knew at the time. *Id*.

1. John Galvan, State's Penalty Phase Witness

The State called John Galvin who claimed that Brandon had stabbed him months before the charged offense (Tr.938). The State had not endorsed Galvin before trial, counsel received notice of this witness during the guilt phase of trial (Tr.951,1063). Counsel objected to the late endorsement, but did not ask for a continuance (T.Tr.1466-79). Defense counsel wanted time to investigate this allegation (Tr.951-3). Given the size and complexity of the case, they could not possibly begin investigating him during the trial (Tr.952,1064). Both attorneys thought they asked for a continuance because of the late disclosure; they absolutely wanted one (Tr.953,1064). They would have looked into Galvan in depth (Tr.1065-66). Allowing counsel to question Galvan was insufficient (T.1112,1116,T.Tr.1477).

On appeal, this Court denied the claim of error from the late endorsement of Galvan. *State v. Hutchison*, 957 S.W.2d 757,764 (Mo.banc1997). This Court found it "noteworthy that Hutchison did not seek a continuance from the trial court asking for more time to complete his investigation. Failure to seek a continuance leads to the inference that the late endorsement was not damaging to the complaining party." *Id*.

Had counsel requested time to investigate, they could have discovered that Marcella Hillhouse was present during the stabbing. In an offer of proof, Hillhouse provided details of the Galvan stabbing (Tr.101-06). Lopez had started the fight and urged Brandon to stab Galvan (Tr.104-05). Brandon felt bad afterwards and helped Hillhouse bandage Galvan (Tr.106). Galvan confirmed that both Lopez and Hillhouse were present during this incident (Tr.131). Had counsel asked Galvan, he would have told them about who else was there (Tr.134).

2. Ronald Yates was Sprawled Out Like Christ Crucified on the Cross

In the State's opening statement, the prosecutor said that Ronald Yates was sprawled out like Christ crucified on the cross (T.Tr.776). Counsel recognized that the statement was objectionable, but following his general rule, did not object unless the statement was "too far out of line" (Tr.944,946). On appeal, this Court recognized that the statement was offensive, but it did not constitute a manifest injustice or miscarriage of justice, so the Court did not review for plain error. *Hutchison, supra* at 765.

3. Troy Evans Was Destroyed.

Troy Evans died prior to trial, so his deposition was used in lieu of his live testimony (T.Tr.1532). No evidence was offered to show how he died or that Brandon was in any way responsible. Frankie Young simply said he died August 6th (Tr.1505). Yet, in his closing argument, the prosecutor argued that "[t]he one man that could link all three defendants to this crime scene was destroyed. Not by the State, but by the three defendants. Had to get rid of those shoes; the thing that linked them there" (T.Tr.1815). Again, trial counsel stood silent and did not object.

4. Prosecutor Tells The Jury That Lopez Has No Deal

The State argued that it had not made a deal with Lopez (T.Tr.1820). Counsel knew, or should have known that this was untrue; the prosecutor admitted, on the record, that it had plea discussions with Lopez's attorney and had told him that if Lopez was a good witness for the State at Brandon's trial, the State would reduce the charges of first degree murder to second degree murder (T.Tr.142). They had not reached an agreement on a term of years, but the State was thinking about 30 years. *Id*. Despite this statement, counsel maintained that the prosecutor never told them there was a deal (Tr.991,992-93). In an offer of proof, counsel said that if Lopez had this deal or expected to get a deal for second-degree murder and 30 years that would have been extremely important (Tr.992).

5. Brandon's Competence And Mental Disease Or Defect

During the penalty phase, the prosecutor cross-examined Dr. Bland about whether he believed that Brandon was competent and whether he had any mental disease or defect that relieved him of criminal responsibility (T.Tr.1902-03). Counsel did not object to this testimony. *Id*. Counsel explained that he did not know why he failed to object, but an objection probably would have given the prosecutor more time to talk about how competent Brandon was and he did not want to discredit his own expert (Tr.1082).

Standard of Review

This Court must review the trial court's findings for clear error. *Sanders v. State*, 738 S.W.2d 856, 857(Mo.banc1987). To establish ineffective assistance, Brandon must show that his counsel's performance was deficient and that such performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668(1984); and *Williams v. Taylor*, 120 S.Ct. 1495,1511-12(2000). To prove prejudice, Brandon must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*. and *State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997). Counsel can be ineffective for failing to object to prejudicial evidence, *Kenner v. State*, 709 S.W.2d 536,539(Mo.App.E.D.1986); and argument, *Copeland v. Washington*, 232 F.3d 969,974-75(8thCir.2000); *State v. Storey*, 901 S.W.2d 886,901(Mo.banc1995).

Applying these standards, the trial court's findings and conclusions are clearly erroneous. The trial court ruled that failure to preserve error and properly object to error was not cognizable in the 29.15 and even denied Brandon the right to present evidence on some claims (L.F.775,761-62,768,Tr.992). *Kenner* and *Copeland, supra* hold otherwise, both finding ineffectiveness for

failing to object. To the extent *State v. Loazio*, 829 S.W.2d 558,569-70(Mo.App.E.D.1992),[8] holds otherwise, it should be overruled.

The court brushes aside that counsel did not know how to properly object. "To preserve appellate review, constitutional claims must be made at the first opportunity, with citations to specific constitutional sections." *State v. Parker*, 886 S.W.2d 908,925 (Mo.banc1994). For example a hearsay objection does not preserve a violation of one's right to confrontation under the Sixth and Fourteenth Amendments. *Id*. Errors must be included in the motion for new trial. Rule 29.11(d). Counsel did not know how or when to object, and a review of Brandon's specific claims show how he was prejudiced.

1. John Galvan, State's Penalty Phase Witness

Counsel admitted that they wanted a continuance and thought they had asked for one when the State endorsed Galvan during the trial. The court dismissed their ineffectiveness, saying Brandon could have told them who else was there and Brandon failed to proved prejudice (L.F.766-67). This finding ignores that what Brandon told counsel was of no importance, since counsel had no time to investigate once the trial began (Tr.951-53,1064). Both attorneys thought they asked for a continuance because of

[8] Loazio ruled that ineffective assistance of counsel claims are limited to errors which prejudice the movant by denying him the right to a fair trial and cannot include claims regarding the failure to object. *Id*. Loazia was a consolidated appeal under former Rule 29.15. Rule 29.15 (a) has been amended to specifically include claims of ineffective assistance of trial and appellate counsel. Claims about the appeal are now to be included in the 29.15 proceedings. *Walker v. State*, 34 S.W.3d 297, 301(Mo.App.S.D.2000).

the late disclosure; they absolutely wanted one (Tr.953,1064). They would have looked into Galvan in depth (Tr.1065-66).

The prejudice from counsel's failure to ask for a continuance is established by this Court's own opinion. *State v. Hutchison, supra* at 764. The Court found it "noteworthy that Hutchison did not seek a continuance from the trial court asking for more time to complete his investigation." *Id*. The failure led this Court to the inference that the late endorsement was not damaging to Brandon. *Id*. Nothing could have been more untrue.

Brandon also established what investigation could have revealed, but the trial court rejected its offer of proof by Marcella Hillhouse (Tr.101-06). Lopez had started the fight and urged Brandon to stab Galvan (Tr.104-05). Brandon felt bad afterwards and helped Hillhouse bandage Galvan (Tr.106). Galvan confirmed that both Lopez and Hillhouse were present during this incident (Tr.131). The court ignores all this helpful evidence in finding no prejudice.

2. Ronald Yates was Sprawled Out Like Christ Crucified on the Cross

The court rejected this claim on four grounds: 1) not cognizable; 2) not plain error, thus it wasn't prejudicial; 3) counsel's testimony established it was strategic; and 4) since the jury was instructed that arguments were not evidence, there could be no harm (L.F.761-62). Numerous cases establish that the claim was cognizable. *See e.g. State v. Storey*, 901 S.W.2d 886,901(Mo.banc1995); *Copeland, supra*. This Court has found that counsel can be ineffective for failing to object to improper argument, even if the arguments are not plain error. *Storey, supra*. These cases found harm, even though the jury was instructed that the arguments are not evidence. Id.

The Eighth Circuit has explicitly rejected this reasoning. *Antwine v. Delo*, 54 F.3d 1357,1364(8th Cir.1995).

As for the finding of strategy, it does not withstand scrutiny. Counsel recognized that the statement was objectionable, but following his general rule, did not object unless the statement was "too far out of line" (Tr.944,946). If saying a victim is spread out like Jesus Christ on the cross is not out of line, what is? Courts routinely find religious arguments violate the Eighth and Fourteenth Amendments. *Sandoval v. Calderon*, 231 F.3d.1140,1149-51(9thCir.2000) and cases cited therein. These arguments are so prejudicial that some courts do not even require a showing of prejudice. *Commonwealth v. Chambers*, 599 A.2d 630,644(Pa.1991). This Court also found this statement offensive, but without an objection would not review for plain error. *Hutchison, supra* at 765. Since counsel had no good reason for not objecting, this Court should reverse.

3. Troy Evans Was Destroyed.

Perhaps the most egregious argument was the prosecutor's suggestion that Troy Evans was destroyed by the three defendants since he could link them to the crime (T.Tr.1815). Again, trial counsel stood silent and did not object. Yet the trial court denied this claim, because counsel failed to specifically question Mr. Crosby about why he did not object (L.F.768), ignoring that counsel had asked Mr. Cantin about Troy Evans (Tr. 966). There could be no legitimate reason for failing to object to the suggestion that Brandon had destroyed or killed a witness because he could implicate him. The failure to object to other crimes is ineffective and prejudicial. *Kenner, supra*. The court erred in ruling otherwise.

4. Prosecutor Tells The Jury That Lopez Has No Deal

The court denied this claim, saying that counsel failed to ask counsel why he did not object (L.F.768). This finding is contrary to the record, and ignores that the court refused to accept the offer of proof when Brandon tried to question counsel about why he did not object (Tr.991,992-93). Counsel maintained that the prosecutor never told them there was a deal (Tr.991,992-93), contrary to the record made at trial (T.Tr.142). In an offer of proof, counsel admitted that this was extremely important (Tr.992). As discussed in Point I, *supra*, the failure to inform the jury of a snitch's deal is prejudicial. *Napue v. Illinois*, 360 U.S. 264,269-70(1959); *People v. Savvides*, 136 N.E.2d 853,854 (N.Y.App.1956).

5. Brandon's Competence And Mental Disease Or Defect

The court found that counsel was not ineffective in failing to object to the prosecutor's cross-examination of Dr. Bland about whether he believed that Brandon was competent and whether he had any mental disease or defect that relieved him of criminal responsibility (L.F.788-89). The court accepted counsel's explanation that he did not want to discredit Dr. Bland and he wanted him to testify to get Brandon's version of events before the jury. *Id*. Neither counsel, nor the court explains how an objection to an improper question by the prosecutor would have discredited the expert.

Furthermore, without an objection, the jury was misled about the relevance of this mental health evidence. The evidence that Brandon was competent to stand trial and not suffering from a mental disease or defect was not relevant to any issue in penalty phase. It was prejudicial as it suggested that he was responsible for his actions and was death eligible. It encouraged the jury to ignore mitigation, contrary to the Eighth Amendment and due process rights under the Fourteenth Amendment. *Lockett v. Ohio*, 438 U.S. 586(1978) (the jury must be allowed to consider, as a mitigating factor, any aspect

of the defendant's character that is proffered as a basis for a sentence less than death). Counsel should have objected to the improper questions.

Counsel's failure to object to all of this improper evidence and argument was unreasonable and prejudiced Brandon. A new trial should result.

VIII.

BRANDON'S DEATH SENTENCE IS DISPROPORTIONATE

The motion court clearly erred in rejecting Brandon's claim that this Court's proportionality review violates his rights to due process, Fourteenth Amendment, U.S. Constitution because: 1) this Court fails to consider codefendants' sentences, Salazar - life without parole, and Lopez - ten years even when the accomplice is more or equally culpable; 2) this Court's database does not comply with § 565.035.6 and is missing numerous cases; 3) this Court fails to consider all similar cases required by § 565.035.3(3); and 4) Brandon did not have adequate notice and opportunity to be heard.

Brandon alleged that this Court's inadequate proportionality review violated his rights to due process under the Fourteenth Amendment to the U.S. Constitution (L.F.42-44). The motion court denied relief ruling that this Court had rejected this claim (L.F.768) citing *State v. Clay*, 975 S.W.2d 121,146(Mo.banc1998). On appeal, this Court reviews the motion court for clear error. *Barry v. State*, 850 S.W.2d 348,350 (Mo.banc1993).

The court's findings are clearly erroneous given the vast disparity of the co-defendant's sentences, the evidence of this Court's inadequate database, the evidence showing similar cases could

and should be considered, and the lack of adequate notice and opportunity for Mr. Hutchison to be heard.

Initially, Mr. Hutchison recognizes that *Clay*, cited by the trial court, did find this Court's proportionality review adequate and ruled that "co-actor's plea agreements and convictions for crimes other than first degree murder are not to be considered in the proportionality review of a death sentence." *Clay*, 975 at 146, citing *State v. Roll*, 942 S.W.2d 370,378(Mo.banc1997). However, the facts before the trial court require a change in that rule. Here, Salazar received a life sentence (Ex.77), even though he shot the victims in the garage -- placing into motion the events that led to this horrible crime (T.Tr.1106,1188). Evidence suggested that he was the actual shooter on the farm road too (Ex.65,L.F.618).

More shocking, however, is Lopez's ten year sentence for second degree murder (Ex.79). The prosecutor admitted that he thought Lopez was guilty of first degree murder (Ex.79at 7-28) and had initially sought the death penalty against him (Ex.78). Lopez's active involvement in the crime supported this decision. The victims were shot at his garage (T.Tr.1106) with guns kept at his house (T.Tr.1090-93,1200). He had provided the victims with drugs (T.Tr.1097) and had sold drugs on the night of the offense (T.Tr.1080). He provided the car used to transport the victims (T.Tr.1113,1116,1203). He did not stay behind, but went with the other defendants to the farm road where the victims were killed (T.Tr.1123). He directed the codefendants on what should be done with the guns, drug paraphernalia, and other incriminating evidence (T.Tr.1118,1121,1122,1201,1218-19). He admitted burning his shoes - fearing they would incriminate him (T.Tr.1234). Lopez made sure the others kept quiet (T.Tr.1144,1146). After the shooting Lopez made telephone calls (T.Tr.1147) and gave Salazar $300 to leave town (T.Tr.1152). He was very culpable. Yet the State agreed to the ten year sentence at the insistence of the victim's family members (Ex.79at 9,27,28,38) who were paid $200,000 by Lopez, a drug dealer (Ex.84).

The unique facts of this case show that the codefendants' sentences can and must be considered in deciding whether a death sentence is disproportionate. The United States Supreme Court agrees that the comparison of a codefendant's treatment is constitutionally required. *Parker v. Dugger*, 498 U.S. 308,314-16(1991) (sentences given to Parker's accomplices were relevant mitigating evidence which should be considered not only by the sentencer, but by the appellate court reviewing the death sentence); and *Richmond v. Lewis*, 506 U.S. 40,43-44 (1992) (codefendants' conduct and disposition of their cases were relevant mitigators which should be weighed against aggravators). The trial court erred in not following the U.S. Supreme Court's directive, this Court's opinion in *Clay* notwithstanding. See also, *Ex Parte Burgess*, 2000 WL 1006958 (Ala.July 21,2000) (court should have taken into account in mitigation all other participants' complete immunity from prosecution); and *Scott v. Dugger*, 604 So.2d 465,468(Fla.1992) (Florida Supreme Court considered codefendant's sentence in granting defendant collateral relief).

This Court should also consider a codefendant's sentence in deciding whether a death sentence is disproportionate. Under the Eighth Amendment, the codefendant's disposition is mitigation that must be considered. *Parker* and *Richmond*, *supra*. To the extent this Court excludes such consideration, *Clay*, *supra*, its proportionality review is constitutionally flawed. The court, thus, erred in denying relief on this claim.

Appellate comparative *proportionality* review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37,44-51(1984); *State v. Ramsey*, 864S.W.2d 320,238 (Mo.banc1993). However, some form of meaningful *appellate* review may well be constitutionally required. *Pulley*, 465 U.S. at 54 (Stevens, J.concurring). Once a State provides for mandatory state Supreme Court review, that review is subject to ultimate review by the United States Supreme Court. *McCleskey v.*

Kemp, 481 U.S. 279,313-14,n.37(1987). Section 565.035.3(3) requires a determination as to "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant." By requiring independent proportionality review, the Legislature has created a protected liberty interest. *Ford v. Wainwright*, 477 U.S. 399,428(1986) (O'Connor, J.,concurring and dissenting); and *Wolff v. McDonnell*, 418 U.S.539,557-58(1974).

Section 565.035.6 requires this Court to "accumulate the records of all cases in which the sentence of death or *life imprisonment without probation or parole* was imposed after May 26, 1977. . ." (emphasis added). Evidence established noncompliance with the statute. In May, 1994, this Court did not have 189 life cases as required by § 565.035.6 (L.F.264). This Court cannot conduct the proportionality review mandated by statute without the relevant data that the Legislature explicitly requires.

This Court fails to consider all similar cases as required by § 565.035.3(3). This Court has limited the pool of cases contrary to the statute (L.F.288-90). It compares only those cases in which the death penalty has been imposed. *State v. Ramsey*, *supra* at 328. The Court simply finds other cases that had the same statutory aggravator, regardless of how dissimilar the cases might be (L.F.294-95). Limited proportionality review to death-sentenced cases is irrational, contrary to § 565.035, and violates Brandon's rights to due process.

In *Harris v. Blodgett*, 853 F.Supp. 1239 (W.D.Wa.1994), the court found that Washington's proportionality review violated procedural due process. Similarly, Brandon does not have adequate notice of the procedure to be followed and a meaningful opportunity to be heard.

Brandon followed the directives of Lopez. He panicked when Salazar shot the victims. Even though he was not the most culpable of the defendants he is the only one condemned to die. The reason: he could not afford high-priced attorneys and could not pay the victims' families $200,000 to spare his life. His sentence is disproportionate; this Court's proportionality review is unconstitutional. This Court should find clear error and impose a sentence of life without probation and parole.

IX.

PENALTY PHASE INSTRUCTIONS

The motion court clearly erred in denying Brandon's claim that the penalty instructions are not understood by jurors and counsel failed to object to the instructions in violation of Brandon's rights to due process, effective assistance of counsel and to individualized sentencing not imposed arbitrarily or capriciously, Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution in that Brandon proved that jurors' comprehension is low, around 50%, and the instructions can easily be improved by rewriting to reduce redundancy, legal jargon, ambiguity and complex language, and counsel believed the instructions were objectionable, but unreasonably failed to offer evidence to support their objection, and Brandon was prejudiced because the less jurors understand, the more likely they are to impose death.

The penalty phase instructions are confusing and unconstitutional. Counsel was ineffective; they objected, but failed to present any evidence to prove the claim that the instructions are unconstitutional. Brandon was prejudiced because the less jurors understand the instructions, the more likely they are to give death.

The 29.15 motion alleged counsel's ineffectiveness with regard to the penalty phase instructions and the constitutional infirmities they pose (L.F.26-28). Brandon proved his claim. Dr. Richard Wiener[9] tested jurors comprehension (L.F.399). Juror comprehension of the penalty phase instructions

[9] The motion court considered Dr. Wiener's affidavit and related exhibits (L.F.398-618).

was low, the mean accuracy rate failed to reach the 60% level (L.F.613). Jurors did not understand the concepts of individualized consideration of mitigation, proof beyond a reasonable doubt, burdens of proof, guided discretion and that the responsibility for sentencing rested with the jurors (L.F.474). *See*, "Comprehensibility of Approved Jury Instructions in Capital Murder Cases," *Journal of Applied Psychology*, Vol.No.80, No.4, 455-67. The study contained a control group and model instructions which gave a baseline level of comprehension and showed that comprehension could be improved (L.F.400,474,475,606,614), addressing the problems discussed in *Free v. Peters*, 12 F.3d 700, 705-06(7th.Cir.1993). The less jurors understand the instructions, the more likely they are to give death (L.F.399,475,613).

The court denied this claim, ruling that allegations of instructional error are not cognizable in a 29.15 proceeding and are for direct appeal (L.F.761). This finding is clearly erroneous. Brandon specifically alleged counsel's ineffectiveness in failing to properly object to and to adduce evidence to support his objections to the penalty phase instructions (L.F.26-28). Counsel can be ineffective for failing to properly object to an improper instruction. *Gray v. Lynn*, 6 F.3d 265,269-71(5thCir.1993). Claims of ineffectiveness must be raised in the 29.15 and cannot be raised on direct appeal. *State v. Wheat*, 775 S.W.2d 155(Mo.banc1989). Further, the plain language of Rule 29.15(a) supports raising all constitutional claims, especially since Brandon had evidence to present to support the claim.

The court also ruled that trial counsel acted reasonably by filing motions challenging instructions (L.F.761). However, factual allegations in motions are not self-proving, but require evidence to support them. *State v. Gray*, 926 S.W.2d 29,33 (Mo.App.W.D.1996).

Additionally, the trial court cited this Court's decision in *State v. Deck*, 994 S.W.2d 527,542-43(Mo.banc1999) for the proposition that Dr. Wiener's study must be discounted (L.F.761). In *Deck*,

this Court was reviewing a completely different issue -- whether the trial court abused its discretion in failing to define "mitigation" based on questions the jury had asked. Trial counsel should have focused on Deck's particular jurors, rather than relying on Dr. Wiener's more generalized study. *Id*.

In contrast, here, the issue is whether trial counsel was ineffective in failing to present evidence *before* trial, in support of the motions counsel filed. In deciding that issue, this Court reviews for whether the trial court clearly erred. *Barry v. State*, 850 S.W.2d 348,350(Mo.banc1993). To establish counsel was ineffective, a movant must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances and he was prejudiced. *Strickland v. Washington*, 466 U.S. 668,687(1984).

Here, trial counsel made factual allegations in motions challenging the penalty phase instructions, but provided no evidentiary support (T.Tr.1843). Counsel merely objected. *Id*. Counsel acted unreasonably in failing to provide evidentiary support for its motion challenging the penalty phase instructions.

Brandon was prejudiced by counsel's failures. The instructions were constitutionally defective because a reasonable likelihood exists that they misled jurors into sentencing Brandon to death. *Boyde v. California*, 494 U.S.370, 380(1990). Jurors do not understand the basic legal principles necessary to decide punishment (L.F.613,474). Aggravators must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358(1970). A juror must be free to consider any potentially mitigating factors. *Lockett v. Ohio*, 438 U.S. 586,604(1978). Requiring the jury to agree unanimously on a mitigating factor violates the Eighth Amendment. *Mills v. Maryland*, 486 U.S. 367(1988). The ultimate decision for imposing a sentence of death rests with the jury. *Caldwell v. Mississippi*, 472 U.S. 320(1985). The confusion creates the risk that the death sentence may be

imposed arbitrarily and capriciously, in violation of *Furman v. Georgia*, 408 U.S. 238(1972), and *Gregg v. Georgia*, 428 U.S.153(1976). The risk is great since the greater the jurors' confusion, the more likely they are to impose death (L.F.399,473,613).

The motion court clearly erred in denying Brandon's motion to vacate his sentence. A new penalty phase should result.

X.

REASONABLE AND NECESSARY LITIGATION EXPENSES

The motion court clearly erred in denying Brandon's motion for postconviction relief in violation of Brandon's rights to due process, Fourteenth Amendment, U.S. Constitution, and Rule 29.16(d) in that the state public defender failed to provide counsel with reasonable and necessary litigation expenses, denying counsel money to investigate witnesses and records located in the State of California where Brandon and his codefendants grew up and spent the majority of their lives, evidence relevant to both the guilt and penalty phase claims.

Brandon's counsel informed the court, both in his amended motion and by affidavit that the State Public Defender denied them reasonable and necessary litigation expenses in violation of Rule 29.16(d). (L.F.98-99, Ex.63). The State Public Defender denied counsel funds necessary for investigating claims (Ex.63). Much of the evidence, including witnesses and records was located in the State of California where both Brandon and his codefendants grew up and spent a majority of their lives (L.F.98-99). Counsel requested $15,000.00 to investigate Brandon's claim, the Public Defender provided approximately half of that (L.F.99,Ex.63, at 3-4).

The court denied this claim, finding that the effectiveness of postconviction counsel is unreviewable (L.F.808). The motion court's findings are erroneous. While cases do hold that the effectiveness of postconviction counsel is not cognizable, *State v. Hunter*, 840 S.W.2d 850,871(Mo.banc1992); *State v. Ervin*, 835 S.W.2d 905,928-929(Mo.banc1992); none of those cases were decided since Rule 29.16 was enacted.

Rule 29.16(d) provides: "As to any counsel appointed as provided in this Rule 29.16, the state public defender *shall* provide counsel with reasonable compensation and shall provide reasonable and necessary litigation expenses." (emphasis added). Since the rule contains language of unmistakable mandatory character, it creates an expectation protected by the Due Process Clause. *Ford v. Wainwright*, 477 U.S. 399,428(1986) (O'Connor, J., concurring and dissenting). Under the Due Process Clause, a state-created right cannot be arbitrarily abrogated. *See Wolff v. McDonnell*, 418 U.S. 539,557-58(1974).

Since Brandon's attorneys were denied reasonable and necessary litigation expenses, this Court should remand, with instructions that the expenses be provided and counsel should be given the opportunity to adduce additional evidence to support his claims.

CONCLUSION

Based on the arguments in Points I, IV, VI, and VII, Brandon requests a new trial; Points III, V, and IX, a new penalty phase; Point II, an evidentiary hearing; Point VIII, this Court vacate his death sentence and impose life without probation or parole; and X, remand for further proceedings consistent with Rule 29.16.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of April, 2001, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, Missouri 65102.

_____
Melinda K. Pendergraph

Certificate of Compliance

I, Melinda K. Pendergraph, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 29,667 words, which does not exceed the 31,000 words allowed for an appellant's brief.

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Melinda K. Pendergraph