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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Brandon Hutchison, incorporates the jurisdictional statement from his original brief.

STATEMENT OF FACTS

Respondent's Statement of Facts does not comply with Rule 84.04(c) as it does not include the facts relevant to questions presented for determination. Rather, the eight pages focus exclusively on the evidence adduced at trial and only the final two sentences are devoted to the record of the 29.15 proceedings. (Resp.Br.8-15)

POINTS RELIED ON

I. and II.[1]

FREDDY LOPEZ HAD A DEAL AND JUSTICE WAS FOR SALE

The motion court clearly erred in denying Brandon's 29.15 motion or alternatively, an evidentiary hearing, because the claims: 1) that the prosecutor failed to reveal the deal he made with Freddy Lopez, allowed the jury to consider Lopez's 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; and 2) that justice was for sale because the prosecutor recommended a ten year sentence at the request of the victims' families since Lopez was paying the victims' family $200,000.00 in violation of Brandon's 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, are cognizable in a Rule 29.15 proceeding as they are not trial errors that could have been raised on direct appeal, but are constitutional claims that should be litigated in a 29.15 action.

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

Commonwealth v. Strong, 761 A.2d 1167(Pa.2000)

State v. Phillips, 940 S.W.2d 512(Mo.banc1997);

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

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

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

Rule 29.15.

[1] Appellant retains the numbers for the Points used in his original brief.

III.

COUNSEL DID NOT INVESTIGATE BRANDON'S BACKGROUND

The motion court clearly erred in denying the Rule 29.15 motion because trial counsel failed to investigate and present mitigating evidence regarding Brandon's background, not for any strategic reason, but simply because counsel did not have time to adequately investigate mitigation and focused on the guilt phase, and counsel admitted that the mitigation case suffered as it did not include much available background information.

Brandon was prejudiced because the jury never heard this mitigating evidence that was entirely consistent with counsels' theory that Brandon was a follower, duped by Lopez and Salazar, and was not deserving of the death penalty.

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

Kenley v. Armontrout, 937 F.2d 1298(8th Cir.1991);

Green v. Georgia, 442 U.S. 95(1979);

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

Rule 29.15.

IV.

EXPERT TESTIMONY

The motion court clearly erred in denying the Rule 29.15 motion because Dr. Bland failed to conduct an adequate evaluation and trial counsel failed to provide him background information, ask him to evaluate Brandon for mitigation and present credible expert testimony that went well beyond the testimony of Dr. Bland, identifying Brandon's learning disability, Attention Deficit Hyperactivity Disorder, Bi-Polar Disorder, drug and alcohol addiction, brain damage and inadequate functioning, sexual abuse and the effects of these deficits on Brandon. This expert testimony would have provided mitigation and would have reduced Brandon's culpability, with the result likely being a life sentence.

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

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

State v. Storey, 986 S.W.2d 462(Mo.banc1999); and

Section 565.030.4(4), RSMo1994.

VII.

COUNSEL'S FAILURE TO OBJECT TO PREJUDICIAL ERROR

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's failure to object to prejudicial evidence and argument is cognizable and the standard for determining prejudice is governed by *Strickland*, not plain error review.

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

United States v. Span, 75 F.3d 1383(9thCir.1996)

Darden v. Wainwright, 477 U.S. 168(1986);

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

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

Section 565.032.2(12), RSMo2000; and

Rule 29.15.

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.

State v. Owsley, 959 S.W.2d 789(Mo.banc1997);

State v. Clay, 975 S.W.2d 121(Mo.banc1998)

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

Rule 29.16(d).

ARGUMENTS

I.

FREDDY LOPEZ HAD A DEAL AND JUSTICE WAS FOR SALE

The motion court clearly erred in denying Brandon's 29.15 motion or alternatively, an evidentiary hearing, because the claims: 1) that the prosecutor failed to reveal the deal he made with Freddy Lopez, allowed the jury to consider Lopez's 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; and 2) that justice was for sale because the prosecutor recommended a ten year sentence at the request of the victims' families since Lopez was paying the victims' family $200,000.00 in violation of Brandon's 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, are cognizable in a Rule 29.15 proceeding as they are not trial errors that could have been raised on direct appeal, but are constitutional claims that should be litigated in a 29.15 action.

The state suggests that its failure to disclose its plea agreement with Freddy Lopez is not cognizable in a postconviction proceeding (Resp.Br.27). According to the State this claim is trial error that should have been raised on direct appeal. *Id*. However, the State knows otherwise. In appellant's original brief, Brandon cited *Hayes v. State*, 711 S.W.2d 876(Mo.banc1986) which held that the State's failure to disclose a bargain with a witness constituted withholding of material evidence, entitling Hayes to postconviction

relief. *See also, State v. Phillips*, 940 S.W.2d 512,516-18(Mo.banc1997) (granting postconviction relief because of the State's failure to disclose statement that Phillips' son dismembered the victim's body).

Perhaps the State ignored *Hayes* because it shows that Brandon is entitled to relief. In *Hayes*, the defendant was charged with second-degree murder and convicted of manslaughter for killing Cecil Gilley. *Id*. at 876-77. Larry Arnold, the victim's companion, testified for the prosecution. *Id*. at 877. He had assault charges pending at the time of trial, but the charges were later dismissed. *Id*. The prosecution had entered into an understanding with Arnold that in exchange for his testimony, the charges against him would be dismissed. *Id*. However, no one told Hayes' trial counsel about this understanding. *Id*. In his postconviction action, Hayes alleged that the failure to disclose the agreement violated his rights to due process under *Brady v. Maryland*, 373 U.S. 83(1963), *Napue v. Illinois*, 360 U.S. 264(1959) and *United States v. Agurs*, 427 U.S. 97(1976). *Hayes, supra*.

In granting postconviction relief, this Court found that the failure to disclose the deal with Arnold violated Hayes' rights to due process. *Id*. The prosecutor made it plain to Hayes' attorney that they would try Hayes' case and then determine what to do about Mr. Arnold. *Id*. at 878. The prosecutor indicated to Mayes' counsel that there was no bargain. *Id*. The defense was entitled to know about any understanding or agreement with the witness. *Id*. at 878-79. The prosecutor was watching Arnold as he testified to determine whether the pending charges should be dismissed. *Id*. at 879. This Court

found prejudice, since the bargain related directly to the quality and the substance of Arnold's trial testimony. *Id*.

Just as in *Hayes*, Brandon is entitled to raise the due process violation from the State's failure to reveal the deal with Lopez in his 29.15 proceeding. The prosecutor had engaged in negotiations with Lopez and was thinking that he would reduce the charges to second degree murder, but had not come to a final determination as to the number of years he would recommend (T.Tr.142). That depended on how well Lopez testified for the State. *Id*. As with the prosecutor in *Hayes*, here, the prosecutor watched Lopez as he testified to determine how good the deal should be. Apparently, the prosecutor considered Lopez's testimony really good, he recommended a 10-year sentence (Ex.79 at 9,48). Defense counsel was entitled to know about the State and Lopez's understanding about what he could expect for his testimony, and more importantly, the jury should have known. *Brady* and *Napue*, *supra*.

Like this Court in *Hayes*, the Pennsylvania Supreme Court has also held that the failure to disclose an understanding with a testifying witness regarding leniency is a *Brady* violation, entitling the defendant to postconviction relief. *Commonwealth v. Strong*, 761 A.2d 1167(Pa.2000). In *Strong*, the defendant was convicted of firstdegree murder and sentenced to death. *Id*. Strong and Alexander were hitchhiking and the victim picked them up. *Id*. at 1169. The victim was shot and killed. *Id*. Alexander agreed to cooperate and assist authorities in finding the victim's body. *Id*. at 1170. Prior to trial, the defendant requested the prosecution disclose any agreement it had with Alexander. *Id*. The prosecutor maintained that there were no deals. *Id*. At trial,

Alexander denied that his testimony against defendant was in exchange for favorable treatment, although he was also facing trial on murder and kidnapping for the same incident. *Id*. Subsequent to trial, Alexander pled guilty to charges of murder and kidnapping in exchange for 40 months incarceration. *Id*. Strong, on the other hand, was sentenced to death. *Id*.

At Strong's postconviction hearing, letters showed that Alexander's public defender and the District Attorney had been discussing an agreement prior to Strong's trial. *Id*. The motion court ruled that no actual deal was struck, so no material evidence was withheld under *Brad*y. *Id*.

The Pennsylvania Supreme Court reversed. Under *Brady*, *Napue* and *United States v. Giglio*, 405 U.S. 150,154(1972), "any implication, promise or understanding that the government would extend leniency in exchange for a witness's testimony is relevant to the witness's credibility." *Strong*, *supra* at 1171. *Brady* does not require a signed contract between the prosecution and its witnesses. *Id*. The prosecution had discussions regarding consideration, but followed its practice to avoid entering into a plea agreement until after cooperation by the testifying witness. *Id*. at 1172-73. The understanding that Alexander would be treated with considerable leniency in exchange for his testimony, although not articulated in an ironclad agreement, was sufficient to implicate the due process protections of *Brady*. *Strong*, *supra* at 1174.

Impeaching evidence that goes to the credibility of a primary witness against the accused is critical evidence and it is material to the case, whether that evidence is merely a promise or an understanding between the prosecution and the witness. *Id*. "Indeed, an

unconsummated agreement can create a greater incentive for a witness to testify in a manner that he perceives to be favorable to the government". *Id*. at 1178 (Castille, J., concurring) (citing *State v. Lindsey*, 621 So.2d 618(La.Ct.App.1993) (promise of favorable consideration, in exchange for testimony deemed credible, gave witness "a direct personal stake" in defendant's conviction). "The fact that a specific reward was not guaranteed through a promise or a consummated plea agreement, but was expressly contingent on the state's good faith and satisfaction with [the witness's] testimony served only to strengthen any incentive to testify falsely in order to secure [the defendant's] conviction." *Strong*, *supra* at 1178, quoting *United States v. Bagley*, 473 U.S. 667,683(1985) (plurality opinion by Blackmun, J.).

In *Strong*, the *Brady* violation was material. The circumstantial evidence at trial placed Alexander and Strong in exactly the same position regarding culpability for the death of the victim. *Strong*, *supra* at 1175. The crucial fact that altered the equation was Alexander's testimony. *Id*. He was the key witness that put the gun in Strong's hands at the moment of the murder and was decisive to the jury's finding as to Strong's guilt. *Id*.

As in *Strong*, here we know that the State and Lopez had engaged in negotiations for his testimony against Brandon (T.Tr.142). The prosecutor was going to reduce the charges to second-degree murder and he was thinking of recommending 30 years depending on how well Lopez testified for the State. *Id*. Thus, there was an understanding between the State and Lopez that he would be treated with considerable leniency in exchange for his testimony. Yet, the State insisted that no final deal had been reached and told Brandon's attorney that there was no deal (T.Tr.1820,Tr.993). As

with Alexander, Lopez had every incentive to testify in a manner he perceived favorable to the prosecution. He had a direct personal stake in Brandon's conviction, to land a good deal for himself - - ten years rather than death (Ex.79,at 9,48).

Lopez testified extensively at trial (T.Tr.1068-1256). One need only read Respondent's Statement of Facts to recognize how critical Lopez was to the State's case (Resp.Br.8-14). As with Alexander in *Strong*, Lopez's testimony was key to obtaining Brandon's conviction.

The circumstantial evidence placed Lopez and Brandon in the same position regarding culpability for the victims' deaths. Both were at the scene of the shootings: first, at Lopez's garage, and second, on the farm road (T.Tr.1106,1123,1127,1133-34). Both had access to the guns kept at Lopez's house (T.Tr.1090-93,1200). However, much of the physical evidence pointed to Lopez. His car was used to transport the victims (T.Tr.1113,1116,1203). The victims' blood was found in Lopez's garage and human blood was in his car (T.Tr.1011,1016,1019-20,1022,1024,1347-48,1637-38,1640-44,1660-61,1670-75,1677-78). Lopez burned his own shoes, afraid they would link him to the crime (T.Tr.1234). He had Brandon and Salazar clean his garage and instructed them to get rid of the gun and bullets (T.Tr.1118,1121-22,1201,1218-19). Lopez helped make arrangements for Salazar to travel to California and he gave him money to leave town (T.Tr.1147,1152).

Without Lopez's testimony, the only evidence against Brandon was his presence at the scene, some physical evidence, and his going to California with Salazar. Guns were found wrapped in his shirt and he had blood on him shortly after the offense (T.Tr.1032-

36,1510,1540). Certainly, this evidence suggested his involvement in the homicide and the effort to hide it, but did not prove deliberation or even his active involvement in the killing. Rather, the crucial fact that altered the equation between Lopez and Brandon was Lopez's testimony. He put the gun in Brandon's hands at the moment of the murder; his credibility was decisive to the jury's finding of Brandon's guilt.

The State had a duty to disclose its understanding with Lopez and his expectation for leniency. *Brady*, *supra*. The State had a duty to correct Lopez when he told the jury the prosecutor was giving no deals for his testimony. *Napue* and *Giglio*, *supra*. The State had a duty not to mislead the jury by arguing that Lopez was facing first-degree murder and that he was not getting out of anything. *Id*. The State has a duty to acknowledge *Hayes* and the cognizability of this *Brady/Napue* claim in the 29.15 proceeding. The State "has a duty to serve justice, not merely to win the case." *State v. Storey*, 901 S.W.2d 886,901(Mo.banc1995), citing *Berger v. United States*, 295 U.S. 78,88(1935).

Rather than acknowledge this Court's decision in *Hayes*, the State relies on distinguishable cases that stand for the general proposition that trial court errors should be raised on direct appeal (Resp.Br.27-28), citing *State v. Tolliver*, 839 S.W.2d 296,298(Mo.banc1992) (double jeopardy issue that was subject of motion to dismiss and ruled upon by trial court should be raised on direct appeal); *Schneider v. State*, 787 S.W.2d 718,721(Mo.banc1990) (instructional error challenging MAI on mitigation should be raised on direct appeal); *State v. Carter*, 955 S.W.2d 548,555-56(Mo.banc1997) (state's failure to disclose information, that was public knowledge

revealed one year before Carter's trial, about Dr. Mitruka was trial error that could have been raised on direct appeal); *Burgin v. State*, 847 S.W.2d 836,839(Mo.App.W.D.1992) (state's failure to disclose actual photos shown to victim in this case was trial error that could have been raised on direct appeal); and *State v. White*, 790 S.W.2d 467,474(Mo.App.E.D.1990) (allegation that the state failed to disclose evidence to the defense and used false testimony at trial was trial error that could have been raised on direct appeal).

While *Carter*, *Burgin*, and *White* show that some disclosure issues can be raised on direct appeal, *Hayes* and *Phillips* show that others cannot. Here, the trial court ordered the state to disclose any formal or informal agreements (T.Tr.143). The prosecutor told defense counsel there was no deal (Tr.993). The trial court did not err in ruling that the State must disclose any formal or informal deals (T.Tr.143). Brandon could not raise trial court error on direct appeal. Rather, as in *Hayes* and *Phillips*, the due process violation was properly raised in the 29.15 proceeding.

Similarly, the justice for sale claim could not be raised on direct appeal. Brandon was tried in October, 1996 and sentenced on November 12, 1996 (T.Tr.295,1985). His case was submitted to this Court and ultimately decided on November 21, 1997. *State v. Hutchison*, 957 S.W.2d 757(Mo.banc1997). Lopez did not even enter his guilty plea until November 21, 1997, after Brandon's appeal was under submission (Ex.79,at9,48). Lopez was sentenced on December 10, 1997. *Id*. at 48. The victims' families filed their wrongful death action the following month, in January, 1998; Lopez filed his answer on the same day (Ex.84,at1). They settled six days later, with Lopez paying the victims'

families $200,000.00 and attorney's fees of $30,000.00. *Id*. at 2-5,10-11. Brandon could not have raised this claim on his direct appeal, and surely the State knows as much. He would have had to be clairvoyant and go outside the record from the trial.

The State fails to address the merits of Brandon's claims that the State failed to reveal its agreement with Freddy Lopez and that justice was for sale. However, this Court's decisions in *Hayes* and *Phillips* show that such due process violations are cognizable. The State's failure to disclose its agreement with Lopez and then misleading the jury that Lopez had no deal or expectation of leniency was wrong, it violated Brandon's rights to due process. Further, that Lopez paid the victims' families and got 10 years in return, shows justice was for sale. This Court should reverse and remand for a new trial, or alternatively, remand for an evidentiary hearing on these claims.

III.

COUNSEL DID NOT INVESTIGATE BRANDON'S BACKGROUND

The motion court clearly erred in denying the Rule 29.15 motion because trial counsel failed to investigate and present mitigating evidence regarding Brandon's background, not for any strategic reason, but simply because counsel did not have time to adequately investigate mitigation and focused on the guilt phase, and counsel admitted that the mitigation case suffered as it did not include much available background information.

Brandon was prejudiced because the jury never heard this mitigating evidence that was entirely consistent with counsels' theory that Brandon was a follower, duped by Lopez and Salazar, and was not deserving of the death penalty.

The issue before this Court is whether counsel was ineffective for failing to investigate mitigating circumstances. Counsel admitted that they did not have adequate time to investigate and as a result the mitigation case suffered (Tr.990,1064,1083). Yet, respondent suggests that counsel's failure to interview witnesses and to get background records was "strategic" (Resp.Br.29). This assertion is contrary to the trial attorneys' own admissions and to well-established legal principles that counsel cannot make reasonable strategic decisions without an adequate investigation. *Kenley v. Armontrout*, 937 F.2d 1298,1304(8th Cir.1991). Failure to interview witnesses or discover evidence relates to trial preparation, not trial strategy. *Id*.

Counsel admitted that they should have investigated Dr. Parrish, the psychiatrist who treated Brandon as a teen, yet they never contacted him (Tr.979-80,1073). Counsel

admitted they should have obtained background records (Tr.974-78,1030,1042,1067-68). They wanted the records and would have considered using them (Tr.1030,1068). Counsel wanted to conduct a more complete investigation into family and friends, including making a trip to California where Brandon had grew up and spent nearly his entire life; they simply did not have time (Tr.1064). Counsel admitted their failures and could not recall having any discussions regarding mitigation with witnesses who testified at the 29.15 hearing (Tr. 999,1001). In light of counsels' admissions, respondent's assertion that the failure to interview witnesses, such as Bill Hutchison, Marilyn Williamson, and Jeff Beall could somehow be strategic (Resp.Br.51-52,56-57,60) should be rejected.

Apparently, respondent recognizes the weakness of its position. So, it argues that the failure to investigate and present mitigating evidence was not prejudicial. In so arguing, respondent exaggerates the mitigation case presented at trial (Resp.Br.34-36,46). While the defense only called four witnesses who gave brief, limited testimony (Tr.1876-1935), respondent characterizes the testimony as "extensive," "complete" and "comprehensive" (Resp.Br.35,36).

For example, respondent suggests that Brandon's parents' testimony provided a complete life history (Resp.Br.35), but Brandon's father's testimony covers less than four pages (T.Tr.1932-35). He told the jury that he did not believe his son deserved to die, that he visited him every Sunday at the jail, he took care of Brandon's children who would visit Brandon and he did not want Brandon executed. *Id*. Similarly, Lorraine barely touched on Brandon's characteristics and his background in her short direct

examination, covering 11 pages (T.Tr.1913-23). Counsel admitted that they were unprepared and they did not present a full and complete picture of Brandon's life (Tr.990,1064,1082-83). Respondent should admit it as well.

Respondent tells this Court that "Dr. Bland testified *extensively* regarding appellant's borderline intellectual functioning, his substance abuse, his account the night of the murders, and also presented his report which encompassed discussion of appellant' prior sexual abuse, his history of attention deficit disorder, bipolar disorder, and his learning problems" (Resp.Br.36), citing (Tr.1882-88) (emphasis added). A review of the transcript proves otherwise. Dr. Bland's testimony was short and did not even touch on many of the subjects in his report. Since Dr. Bland did not evaluate Brandon for mitigation, he did not address Brandon's deficits or the effect they had on him. Rather, he said that Brandon was competent and that he found nothing that relieved Brandon of responsibility (T.Tr.1903). He did not even address the history of substance abuse on direct examination, this was raised by the prosecutor on cross-examination (T.Tr. 1893-1900). As for Brandon's account of the night of the murders, that information only came to light in a brief 2-page redirect examination (T.Tr.1904-05). This is hardly the "extensive" testimony respondent makes it out to be.

Furthermore, Dr. Bland's report (Ex.12) was also short and only documented the history that Brandon provided, a defect not lost on the prosecutor or the jury (T.Tr.1891-93,1903,1906). Dr. Bland only spent 2 or 3 hours with Brandon, again a fact seized upon for cross-examination (T.Tr.1891). Dr. Bland admitted that no secondary sources were available (Ex.12,at 2), a defect the prosecutor emphasized to the jury (T.Tr.1891-

93,1903,1906). Dr. Bland concluded that Brandon was competent, not suffering from a mental disease or defect and was responsible for his actions (Ex.12,at 8-10). According to Dr. Bland, a diagnosis of bipolar disorder was not substantiated. *Id*. at 7.

While exaggerating the evidence presented at trial, respondent minimizes the mitigating evidence presented at the 29.15 hearing (Resp.Br.30-61). Respondent divides the background information into as many small categories as possible, to avoid a finding of prejudice. *Id*. This approach was rejected by the United States Supreme Court in *Williams v. Taylor*, 120 S.Ct.1495,1511-12(2000). There, the Court found that counsel was ineffective for failing to investigate and present substantial mitigating evidence: records of Williams' nightmarish childhood, Williams' borderline mental retardation, that he did not advance beyond the sixth grade in school, 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*. at 1514. In finding that Williams was prejudiced, the Court did not look at each category of evidence in isolation, but considered all of the mitigation as a whole. Perhaps respondent fails to mention *Williams*, because it shows that Brandon was prejudiced by counsel's failures.

Thirdly, respondent tries to dismiss all the mitigating evidence presented at the 29.15 proceeding, by labeling it cumulative (Resp.Br.35,45,57,61). In its zeal to argue against relief, the State even suggests that Dr. Parrish's conclusion that Brandon suffered from a bipolar disorder was "cumulative" to Dr. Bland's conclusion that Brandon did *not* suffer from such a mental illness (Resp.Br.34-35). Dr. Parrish's opinion was in direct

conflict with Dr. Bland's opinion, it could not be characterized as cumulative. In *State v. McCauley*, 831 S.W.2d 741,743 (Mo.App.E.D.1992), the court ruled that "evidence is said to be cumulative when it relates to a matter so 'fully and properly proved by other testimony' at to take it out of the area of serious dispute." Dr. Bland hardly proved mitigating circumstances, since he did not even address them.

A fair review of the mitigation presented at the 29.15 hearing shows that the jury never heard Dr. Parrish's diagnosis of bipolar disorder, a major mental illness (Ex.53,at13). The jury never knew that Brandon suffered from alcoholism. *Id*. Brandon's father was alcoholic and his grandfather died of alcoholism. *Id*. at 14. The jury did hear that Brandon had an Attention Deficit Hyperactivity Disorder, but no one explained the implications of this disorder. *Id*. at 11-12. The jury never knew that all of these illnesses had a genetic basis; the same chromosome accounts for alcoholism and bipolar Disorder and the two illnesses are often transmitted together. *Id*. at 14.

Brandon was sexually abused as a child. *Id*. at 17. While this was mentioned in Dr. Bland's report, the jury did not hear about the devastating effects of this abuse. 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. *Id*. at 18. But, the jury knew nothing about these problems.

The jury never heard that Dr. Parrish treated Brandon with medication and with counseling. *Id*. at 14-16. They never knew how hard Brandon tried to quit drinking, that

he suffered from withdrawal symptoms, had tremors for four days, ran fevers, had horrible nightmares, and woke-up screaming. *Id*. at 16, 20-21.

Dr. Parrish would have revealed that Brandon was a well-motivated, good kid, 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.

The jury never considered background records like those the Supreme Court found so compelling in *Williams v. Taylor*, *supra*. Brandon's school records documented many of the troubles that he had (Exs.4,5,6,8,9). Like Williams, Brandon struggled in school. *Id*. He had learning disabilities and was placed in special education. *Id*. Brandon needed personal acceptance and was overly dependent on individuals for emotional support (Ex.4,at12,22). He felt insecure and inadequate. *Id*. Disruptive peers, especially older boys, improperly influenced him (Ex.4). Brandon was embarrassed that he was academically slow, and acted out to divert attention from his poor functioning. *Id*. at 22. As his difficulties continued, his behavioral problems grew (Exs.4,5). He went from being a polite, honest and cooperative boy, to an angry frustrated boy with behavior problems (Ex.4, at 20,33-36;Ex.5, at 7,9-10).

His medical records[2] also illustrated his difficulties (Exs.3,7). Brandon's pediatrician identified problems when Brandon was only 7 years of age (Ex.3). Brandon's mother was inconsistent in her discipline. *Id*. Brandon's problems worsened as he aged. He mutilated himself (Ex.7). He started using drugs and alcohol (Exs.7,10). Brandon tried to get treatment. *Id*. In 1995, he was hospitalized (Exs.10,40-41).

Jail records also documented Brandon's depression and history of mental illness (Ex.14).[3] Just as in *Williams*, Brandon's records were important to show his troubled childhood, his learning difficulties and his mental problems.

Brandon's parents revealed their problems with alcoholism and mental illness, something the jury never heard (Tr.180,246-47,253-54). Lorraine took Elavil, Valium and Xanax and drank alcohol (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). Their mental problems affected Brandon. Lorraine experienced great anxiety about going to school conferences (Tr.251-52).

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[2] Respondent criticizes appellant's reference to Exhibit 11, because it was not admitted (Resp.Br.42,n.2). Respondent ignores however, that while not admitting the exhibit, the motion court ruled that experts could rely on the exhibit in their testimony (Tr.340).

[3] Contrary to Respondent's suggestion that Brandon did not plead jail records in his 29.15 motion, (Resp.Br. 44), page 92 of the motion specifically lists correctional records (L.F.112). Since Brandon had no prior convictions, the jail records were the only correctional records for Brandon.

Brandon hated being in Special Education, he felt like he was retarded (Tr.156,197,258). He pleaded not to go, he wanted to be normal and fit in (Tr.161,258). He was overweight; other children and coaches teased him (Tr.137,156,168-69,198,257). He was shy and followed along with others (Tr.136-37,161).

When he was 10 years old, Brandon visited his grandma in Iowa (Tr.182,259-60). An uncle molested him (Tr.183,190-93,250,262). Brandon became distant, angry and rebellious (Tr.182,201,260).

When Brandon was a teenager, they moved from Fillmore, a farming community to Palmdale, an urban area (Tr.182,184,245-46,263). The move was bad, the city had gangs and drugs (Tr.138-41,184,203-05,207,264). Brandon started using drugs and alcohol (Tr.208-09). Later, the Hutchisons moved to Missouri (Tr.186,194,270). They lost their house in Palmdale; it was condemned for being built close to an earthquake fault (Tr.185,269-70).

Brandon had problems finding work; he had not graduated from high school and could not get his GED (Tr.187,271,283). He could not get a driver's license (Tr.271).

Brandon latched onto Freddy Lopez and Michael Salazar (Tr. 185,187-90,212-13,266,277). Brandon's family did not like Lopez, he was cocky and tried to impress others. He brandished a gun and bragged about his gun-shot wounds, his battle scars from gang wars (Tr.188,277-78). Similarly, Salazar always carried a gun (Tr.219-20). Lorraine was afraid of Lopez; he told her that snitches deserved to die (Tr.278).

Lopez and Salazar were like brothers and both were part of a gang (Tr.232-34,241). They made fun of Brandon and called him names in Spanish, but he could not understand them (Tr.239-40,242). Lopez ordered him around (Tr.141,213,226).

Respondent ignores all this mitigation and selectively cites to damaging information in the records, taken out of context (Resp.Br.38-45). For example, in discussing school records, respondent details stories that Brandon supposedly told (Resp.Br.41). A review of the exhibit, however, shows that he was merely telling a psychological examiner what he saw when shown pictures (Ex.4,at33). Further, the very examiner that reported his aggressive tendencies, shown by his descriptions of the pictures, also reported his anxiety, rejection and depression. *Id*. These findings get no mention by respondent, because they refute respondent's out-of-context representations of the record.

Williams v. Taylor, *supra* at 1514, addresses respondent's contention that many records contain negative information. Unlike Brandon, who had told violent stories in response to pictures shown in psychologically testing, Williams had a juvenile record for larceny, pulling a false fire alarm and breaking and entering. *Id*. Yet the Supreme Court found counsel's failure to introduce the comparatively voluminous amount of evidence in Williams' favor was unreasonable. *Id*. Again, respondent's failure to acknowledge *Williams*, let alone try to distinguish it, speaks volumes about the weakness of the State's position.

Had respondent acknowledged *Williams*, perhaps it would not have insisted that background records are not admissible in penalty phase since they contain hearsay

(Resp.Br.38,43). Not only is this assertion contrary to *Williams*, but also to *Green v. Georgia*, 442 U.S. 95(1979) (exclusion of evidence at sentencing phase based upon Georgia's hearsay rule held unconstitutional). Indeed, jurors must be allowed to consider "as a mitigating factor, any aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586,604(1978). *Williams*, *supra*, illustrates how important these records are for jurors in deciding whether someone should live or die.

Respondent's reliance on *State v. Twenter*, 818 S.W.2d 628,637-38(Mo.banc1991) (Resp.Br.40,43) is misplaced. In *Twenter*, this Court reviewed whether counsel was ineffective for failing to present testimony of Twenter's sisters that they had heard that the victim was involved in a stolen goods ring. There was not a scintilla of evidence to corroborate the extra-judicial statements. *Id*. The hearsay did not have any relevance to Twenter's guilt or innocence. *Id*. Thus, this Court ruled that counsel was not ineffective for failing to offer this evidence in *guilt* phase. *Id*. In contrast, background records are admissible in *penalty* phase, even if they do contain hearsay. *See*, *Green*, *Lockett*, and *Williams*, *supra*.

Brandon's counsel was ineffective in failing to investigate and present mitigation. The evidence was entirely consistent with defense counsel's theory that Brandon was a follower, not a leader, that he was duped by Lopez and Salazar, and that he was not deserving of the death penalty. Had the jury heard all this mitigation, there is a reasonable probability that they would have sentenced Brandon to life. A new penalty phase should result.

IV.

EXPERT TESTIMONY

The motion court clearly erred in denying the Rule 29.15 motion because Dr. Bland failed to conduct an adequate evaluation and trial counsel failed to provide him background information, ask him to evaluate Brandon for mitigation, and present credible expert testimony that went well beyond the testimony of Dr. Bland, identifying Brandon's learning disability, Attention Deficit Hyperactivity Disorder, Bi-Polar Disorder, drug and alcohol addiction, brain damage and inadequate functioning, sexual abuse and the effects of these deficits on Brandon. This expert testimony would have provided mitigation and would have reduced Brandon's culpability, with the result likely being a life sentence.

In appellant's brief he complained that Dr. Bland's evaluation of Brandon was inadequate for two reasons: 1) Dr. Bland relied solely on Brandon and 2) did not conduct a thorough, complete evaluation regarding mitigation (App.Br.65-92). The State does not address these deficiencies (Resp.Br. 62-69).

Secondary Sources for Evaluation

Dr. Bland relied solely on Brandon, saying secondary sources were unavailable (Ex.12), and was impeached as a result (T.Tr.1891-93,1903,1906). Counsel admitted that they failed to get background records, not for any legitimate reason, but because they did not have time (Tr.974-78,1030,1042,1067-68). Respondent's brief does not even mention counsel's failure or the prejudice that resulted (Resp.Br.62-69). Respondent ignores the cases cited in appellant's brief finding counsel ineffective for failing to

investigate and provide an expert with background materials (App.Br.77-80). Respondent even ignores the United States Supreme Court decision of *Ake v. Oklahoma*, 470 U.S. 68,83(1985), even though it was discussed extensively in appellant's brief (App.Br.74-76), and more importantly, in the motion court's findings (L.F.779-80).

Competency v. Mitigation

Respondent ignores that Dr. Bland's evaluation was for competency and to determine whether Brandon suffered from a mental disease or defect, not mitigation (Ex.12). Indeed, respondent claims that Dr. Bland's did a complete life history and provided the jury with much mitigation, including his bipolar disorder (Resp.Br.64-65). This assertion is false, contrary to the trial transcript (T.Tr.1876-1907) and the record from the 29.15 hearing. Trial counsel admitted that the evaluation was not complete, he realized that he should have referred Brandon to a psychiatrist (Tr.982). As for the bipolar disorder, Dr. Bland rejected it (Ex.12,at7).

While exaggerating Dr. Bland's testimony, respondent minimizes the testimony of the five experts who testified at the 29.15 hearing (Resp.Br.68-69). Respondent does not even favor this Court with any discussion of their opinions. *Id*. However, more troubling is the State's misstatement of the motion court's findings (Resp.Br.at 62,68). In both its Point Relied On and its argument the State says that the motion court found that all the 29.15 experts were not credible. *Id*. The court's findings show otherwise. The court only found one of the five experts (Dr. Peterson) not to be credible (L.F.784-86). The court made no such findings in regard to Drs. Cowan, O'Donnell, Vliestra and Ms. Burns (L.F.789-798).

The experts testifying at the 29.15 hearing establish that Brandon had a troubled childhood, suffered from intellectual deficits, brain damage, mental illness, drug and alcohol addiction, and was sexually abused (App.Br.68-73). Moreover, the experts explained the effects of these deficits on Brandon. *Id*. This case is every bit as compelling as the mitigation discussed in *Williams v. Taylor*, 120 S.Ct.1495(2000).

The evaluation of the aggravating and the mitigating evidence is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt. *State v. Storey*, 986 S.W.2d 462,464(Mo.banc1999). The jury is never required to impose a sentence of death. *Id*. The jury has discretion to assess life imprisonment even if mitigating factors do not outweigh aggravating factors. *Storey, supra*; and Section 565.030.4(4) RSMo 1994.

In light of this discretion, the mitigating evidence of these experts likely would have changed the balance of aggravation and mitigation. The evidence would have established why Brandon would have followed Lopez and Salazar and how he could have been duped by them. The evidence would have shown that he should receive a life sentence. As a result, this Court should reverse and remand for a new penalty phase.

VII.

COUNSELS' FAILURE TO OBJECT TO PREJUDICIAL ERROR

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's failure to object to prejudicial evidence and argument is cognizable and the standard for determining prejudice is governed by *Strickland*, not plain error review.

Respondent claims that the failure to properly object to prejudicial argument cannot constitute ineffective assistance of counsel unless it constitutes plain error (Resp.Br.94). In support of this proposition, respondent cites *State v. Sidebottom*, 781 S.W.2d 791,796-97(Mo.banc1989) and several lower appellate court opinions (Resp.Br.94).

In *Sidebottom, supra*, this Court found the failure to object to a prisoner data sheet did not constitute ineffective assistance of counsel. While noting that the admission of the evidence was not plain error, this Court still reviewed the error under *Strickland v. Washington*, 466 U.S.668,687(1984). This Court concluded that there was not a reasonable probability that the result of the proceeding would have been different. *Sidebottom, supra* at 797.

However, in a subsequent decision, this Court has found ineffectiveness of counsel for failing to object to prejudicial argument, even though that argument did not constitute plain error, resulting in a manifest injustice. *State v. Storey*, 901 S.W.2d

886,901(Mo.banc1995) (court found prosecuting attorney's improper closing argument was not plain error, but found counsel ineffective for failing to object to improper argument). Similarly, in *United States v. Span*, 75 F.3d 1383,1389(9thCir.1996), the Court found counsel was ineffective in failing to request proper self-defense instructions, even though the appellate court had not found plain error on direct appeal.

This Court should review counsels' failures to object under the *Strickland* standard, not the plain error standard of review. Like *Storey*, the State made improper arguments, saying the victim was "sprawled out there like Christ crucified on the cross," and that the one man that linked all three defendants to the crime was destroyed, and that Lopez had no deal, when in fact he was receiving leniency for his testimony (App.Br.119-20).

Counsel had no reasonable justification for not objecting to these prejudicial arguments. The reference to Christ was inflammatory, and counsel admitted that he would object to opening statements if they "got too far out of line" (Tr.944). It is hard to imagine something more out-of-line than this prejudicial 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." (T.Tr.1815) (emphasis added). The State makes the incredible argument that the prosecutor "misspoke" when he said "one man"and was referring to the defendants burning their shoes (Resp.Br.97). Unfortunately for Brandon, the jury heard that "one man" was destroyed (T.Tr.1815). Respondent cannot change the facts in the transcript to suit its purposes.

Furthermore, it is nonsensical to suggest that shoes would link all the defendants to the crime scene, since the officers did not find three shoe prints. Troy Evans was the one man who could link all three defendants to the crime, since they went to his trailer immediately after the shooting. The jury knew that Evans had died before trial, but they had no idea how he died (T.Tr.1505,1532). The prosecutor's argument suggested that the three defendants, including Brandon, killed him or had him killed. The argument was prejudicial, it suggested that Brandon not only participated in the charged offense, but would kill those witnesses who could incriminate him, even a witness who was his friend. Eliminating witnesses is so prejudicial that the Legislature has found it to be an aggravating circumstance warranting death. Section 565.032.2(12), RSMo 2000. *Darden v. Wainwright*, 477 U.S. 168(1986) (arguments that infect the trial with unfairness deny a defendant due process).

Finally, the failure to object to the prosecutor's suggestion that Lopez was not getting anything in return for his testimony was unreasonable. Respondent claims that since the State and Lopez had not "struck the final deal," (Resp.Br.98), it was permissible to mislead the jury. Counsel knew that the prosecutor intended to reduce the charges to second-degree murder, but had not determined the number of years to recommend (T.Tr.142). That depended on how well Lopez did for the State. *Id*. Counsel should not have allowed the prosecutor to mislead the jury by saying Lopez was charged with first degree murder and was not getting out of anything.

Brandon was prejudiced. The State's case hinged on the jury believing Lopez. Had the jury known that Lopez would benefit by helping garner Brandon's conviction,

the jurors may well have determined that he was not credible and found Brandon not guilty of first degree murder. *Napue v. Illinois*, 360 U.S. 264, 269(1959) (the jury's estimate of the truthfulness and reliability of a given witness may well determine the finding of guilt or innocence).

Counsel was ineffective in failing to object to these prejudicial arguments. A review under the *Strickland* standard shows that a new trial 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.

In appellant's brief, Brandon challenged the trial court denial of his claim that he was denied reasonable and necessary litigation expenses, as it relied on cases decided before Rule 29.16 was enacted (App.Br.135-36). Respondent takes issue with this statement and suggests that *State v. Owsley*, 959 S.W.2d 789,799 (Mo.banc1997) and *State v. Clay*, 975 S.W.2d 140(Mo.banc1998) somehow govern this Court's interpretation of 29.16 (Resp.Br.at 109) While both *Owsley* and *Clay* were decided after July 1, 1997, the effective date of Rule 29.16(d), they both were consolidated appeals governed by the former Rule 29.15 before it was amended. Certainly, neither case interpreted Rule 29.16(d) and appellant is unaware of any case that has.

Rule 29.16(d) requires that the state public defender provide counsel with reasonable and necessary litigation expenses. The motion court clearly erred in ruling that the claim was not cognizable (L.F.808). This provision is meaningless if a movant

cannot enforce the provision. This Court should reverse and remand for further proceedings under Rule 29.16.

CONCLUSION

Based on the argume nts in this and Brandon's original brief 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 16th day of July, 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 Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 7,639 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

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

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Melinda K. Pendergraph