IN THE

MISSOURI SUPREME COURT

MICHAEL TISIUS,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC86534**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION TWO
THE HONORABLE GARY OXENHANDLER, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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INDEX

AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

INSTRUCTIONS

MISCELLANEOUS

JURISDICTIONAL STATEMENT

The appellant, Michael Tisius, was jury-tried and convicted in Boone County Circuit Court, on change of venue from Randolph County, Missouri, of two counts of first degree murder, in violation of §565.020 RSMo 2000, for the shooting deaths of Leon Egley and Jason Acton on June 22, 2000. This Court affirmed Michael's conviction and sentences on direct appeal. *State v. Tisius*, 92 S.W.3d 751 (Mo.banc 2002).

Michael timely filed his *pro se* and amended motions for post-conviction relief, pursuant to Rule 29.15. Following an evidentiary hearing, the motion court, the Honorable Gary Oxenhandler, granted penalty phase relief and remanded for a new penalty phase trial, because the State failed to disclose material evidence and failed to disclose a co-defendant's oral statement, and defense counsel failed to search the co-defendant's car, failed to call the officers who searched the car, and failed to request a "no-adverse-inference" instruction in penalty phase. Judge Oxenhandler denied relief upon all claims raised with respect to the guilt phase of Michael's trial. Michael appeals from that adverse ruling.

Because the State seeks the death penalty against Michael, this Court has exclusive appellate jurisdiction. Mo.Const., Art. V, §3 (as amended, 1982).

STATEMENT OF FACTS

Michael was charged by information with two counts of first degree murder, §565.020, arising out of the shooting deaths of Jason Acton and Leon Egley on June 22, 2000 in the Randolph County Jail. (LF13-15).[1] On July 11, 2001, the State filed its Notice of Intent to Seek the Death Penalty. (LF187-88). On July 30, 2001, the case proceeded to trial. (T123 et seq.).

Prior to trial, in October, 2000, and in February, 2001, the defense filed requests for discovery, pursuant to Rule 25. (LF28-30,37-42,43-46). In early March, 2001, defense counsel Kenyon argued his motion to reveal agreements between the State and its witnesses. (T2). Assistant Attorney General Bob Ahsens acknowledged that the Rules entitle the defense to disclosure of whether "there has been any plea bargain entered into with any witness for the prosecution in return for their testimony." (T3). The Court sustained the defense's motion. (T3). Although he disputed the State's obligation to disclose much of the material requested by the defense, Ahsens stated that "any statements of the defendant are disclosable and we will disclose them if we've not already done so." (T4). He then stated that, "Number 2 talks about all statements made by any co-defendants. Those are in the reports. I'm not going to produce any new ones. And it also asks

[1]References to the record will be made as follows: (LF): Direct appeal legal file; (T): Direct appeal transcript; (MLF): Post-conviction legal file; (MT): Post-conviction transcript; (Ex): Trial Exhibit; (MEx): Post-conviction exhibit.

for similar information from the prior paragraph. This goes on asking for a number of things which would require the State to construct reports which it didn't make. For example names and addresses of all persons who have given oral statements to a prosecutor or to a law enforcement officer. If there's no report, I'm not obliged to disclose it. The rules simply do not require me to do so." (T5). Ahsens said that "there are those things that I must disclose, whether they're written or oral. And I will do so if I have not already done so." (T6). Finally, Ahsens asserted that, "We do not play hide-the-ball with reports. We give them all." (T12) and "Your Honor, we are obliged to follow the rules of disclosure and will do so if we've not already done so." (T21).

In voir dire, without objection by defense counsel, Ahsens told the panel that "Randolph County has not had the misfortune of having that many murders so it is not something with which he [the local prosecutor] comes into contact with regularly. And that is why he asked for assistance and that is why I'm here." (T187). Also in voir dire, defense counsel never questioned the jurors about their ability to consider murder second degree, especially since the victims were law enforcement officers. (T132-538). At trial, the following evidence was adduced:[2]

In 1996 or 1997, Michael moved to Moberly to live with a friend, Stan.

[2] This Court's opinion sets forth the facts substantially as testified to at trial. *State v. Tisius*, 92 S.W.3d 751, 757, 759 (Mo.banc 2002). The following facts are presented to clarify the allegations raised in the post-conviction action.

(T1103). Then, in June, 2000, Michael, then 19, was incarcerated in the Randolph County jail (T794-95; 1062), where he shared a cell with other inmates, including 27-year-old Roy Vance (T796,804,1062). Roy and Michael concocted a plan, which began as a joke, calling for Michael to get a gun, enter the jail and order the guards into a cell (T835; Ex61). Michael would then give Roy the gun, and Roy would "take over" (T835; Ex61).

Counsel attempted to introduce a letter, purportedly authored by Roy, about the plan and addressed to “Karl.” (T870-71). The court refused to admit the letter because counsel had not demonstrated who wrote it. (T873).

Roy also recruited the help of his 27-year-old girlfriend, Tracie Bulington, telling her "that he was facing 50 or 51 years" in prison and "couldn't do that" (T1051,1062). At first Tracie refused, but Roy ultimately got her to help (T1051-52).

Roy discussed this plan with Michael at least ten times while Michael was still in jail (T835). Before his release, on June 13th, Michael told Roy that he would get him out of jail (T795,797).

Roy gave Michael phone numbers for Tracie's mother and a friend of Roy's and Tracie's, Karl, so Michael could contact Tracie (T1016). Michael contacted Tracie upon his release (T1016).

Tracie, with her friend, Heather Douglas, picked Michael up at the Quik Trip in Columbia, Missouri on June 17, 2000. (T1018,1108). Tracie and Michael began discussing the plan—to get a gun, take it into the jail, use it to intimidate the

guards, lock them in a holding cell, give Roy the gun, get the keys and let everyone open their cell doors. (T835,1018; Ex61).

Shortly after midnight on June 22, 2000, Michael and Tracie went to the jail, ostensibly to deliver cigarettes to Roy. (T835,1032). Sgt. Platte testified that Michael talked with Jason Acton for about ten minutes, then pulled out the gun and shot Acton and Leon Egley. (T836). Tracie testified that Michael spoke to Acton for two minutes, then "put the gun over the counter" and the "[f]irst shot was fired." (T1035).

Michael then ran to the cells to free Roy but the keys wouldn't work. (T836; Ex61). He ran back to where the jailers had been to look for more keys (Ex61). Egley grabbed Tracie's leg, she screamed, so Michael fired more shots at him. (T836; Ex61).

Tracie and Michael ran to Tracie's car and, as she drove out of Huntsville, Michael threw the jail keys out of the car window. (T837,1039-40; Ex61). Tracie later wrapped the gun in a blue handkerchief and threw it out also. (T837-38,1040; Ex61). They had reached Kansas when Tracie's car died. (T837). They were subsequently apprehended in Kansas on arrest warrants for the officers' deaths. (T811-12,818).

While Tracie was with Michael before the attempted jail break, Michael talked constantly about Roy, speaking "very highly" of him. (T1054,1062-63). Tracie thought Michael was a nice, meek kid. (T1063). After her arrest, Tracie told the officers that, while driving to Kansas, Michael repeatedly said, "I'm sorry,

Roy." (T1056).

Pertinent to Michael's post-conviction claims, the following evidence was also adduced. In guilt phase, Ahsens called Tracie Bulington's mother, Patsy. He elicited that Patsy and Tracie left Michael alone in Patsy's house two to three days before the homicides, while Patsy and Tracie went to pick up child support money. (T697-99). Patsy testified that she and her husband kept a .22 pistol in their bedroom and that, after the homicides, when she looked for the gun and a box of ammunition, both were missing. (T699-700).

In Ahsens' guilt phase closing, he argued, over objection that he was misstating the evidence:

> Let's talk about deliberation since that is the only difference. And they admit, they admit that he did everything else. *Let's talk just about deliberation. This weapon was taken by stealth. We know that because Patsy Bulington told us that.*

(T940)(emphasis added). Tracie Bulington had told police on June 22, 2001 that she, not Michael, had obtained the gun from her parents' bedroom and had put it in a bag while Michael slept. (MEx13 at9). In her pre-trial deposition on July 12, 2001, she reiterated that she had stolen the gun from her parents' home because Roy had asked her to. (MEx13 at49-50). In penalty phase, Ahsens finally elicited that she, not Michael, had obtained the gun from her parents' house. (T1018-19).

In Fusselman's guilt phase closing, without objection, he argued that Michael "gave her [Tracie] the directions for Willie White [another officer] who's

outside at that point watching, saying 'Get him. Get him. Get him.'" (T919). Ahsens later stated, with no timely objection, "Did you hear, were you listening when it was suggested to you that if this had been deliberation then Leon Egley would not have been moving after the first shot? Well, if that's true, then since Jason Acton was shot dead with the first shot and never moved, does that mean there must have been deliberation there? Do you see the inconsistency in the argument? See the attempt to fool you?...Cool, been cool reflection, it would have been successful. What incredible sophistry is that?" (T943).

Ahsens further argued, without objection, "He said he was sorry. I think that's going to be precious little consolation to deputy Acton and deputy Egley. He said he was sorry after he was caught." (T938) and "[S]omehow because he shows remorse there's no deliberation? Well, he didn't show remorse until he got caught." (T943).

In guilt phase and during guilt phase closing argument, the prosecutor displayed to the jury, on a movie-type screen, autopsy photos and an x-ray of Acton and Egley's bodies. (T584,920-21). Although counsel objected to the initial display, he gave no legal basis for the objection. (T584).

Officer Hall, who interrogated Michael and searched Tracie's car, testified that, when Michael was arrested, he was wearing a t-shirt that bore the legend "Guardians of Paradise." (T708;Ex52). Defense counsel did not object to this testimony.

At the guilt phase instruction conference, defense counsel did not renew his objections to the first degree verdict directors offered by the State. (T904-05). Counsel had filed a pretrial motion to dismiss, alleging that no meaningful distinction exists between first and second degree murder, as submitted in the Approved Instructions. (LF101-11). Counsel also did not object to the reasonable doubt instruction, Instruction 4, although he had objected to it pre-trial and had requested that a modified instruction be submitted. (T44,904-05). The jury marked Instruction 4, underlining "common sense" and bracketing "The law does not require proof that overcomes every possible doubt."(T953). Counsel included the challenge to the instruction in the new trial motion but direct appeal counsel did not preserve it before this Court.

On direct appeal to this Court, Michael argued that the trial court erred in overruling his objection to the "introduction of a rap song with the refrain of 'mo'murda' (more murder), which was played to the jury in the penalty phase." *State v. Tisius*, 92 S.W.3d at 759. This Court accepted the State's argument that Michael had used the tape to "psych" himself up to commit the murders. It held that the song, which Ahsens played in its entirety to the jury, with its "mo' murda" refrain, was thus relevant to prove Michael's mental state—that he deliberated. It further held that the murders therefore were vile, horrible or inhuman, involving depravity of mind. *Id.* at 760-61.

On post-conviction review, Judge Oxenhandler found and concluded that the State had failed to disclose evidence and had presented false and misleading

evidence. (MLF460-85). He further found that defense counsel were constitutionally ineffective for not adequately investigating the physical evidence and for failing to request a no-adverse-inference instruction in penalty phase. (MLF485-95,540-44). Judge Oxenhandler granted penalty phase relief based on those findings and conclusions. (MLF485,495,544). Judge Oxenhandler denied relief on the remaining claims asserting error affecting penalty phase.

Judge Oxenhandler also denied relief on all of Michael's claims asserting error affecting the guilt phase of his trial. He found that counsel had not rendered ineffective assistance of counsel, either because counsel's actions were reasonable or because no prejudice had resulted, and, as to some claims, found that they were not cognizable on post-conviction review.

Based on Judge Oxenhandler's findings about the State's misconduct and trial counsels' ineffective assistance, he granted penalty phase relief and remanded for a new penalty phase. Michael filed notice of appeal from Judge Oxenhandler's denial of all of his claims of constitutional error arising out of the guilt phase of his trial. This appeal follows.

Further facts will be adduced as necessary for the Argument portion of this appeal.

POINTS RELIED ON

I. WHO OBTAINED THE GUN?

The motion court clearly erred in denying relief on Michael's claim that counsel did not properly object to the State's knowing presentation of false and misleading testimony and argument during guilt phase that Michael obtained the gun by stealth and thus deliberated because this denied Michael due process, a fundamentally fair trial and effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that (1) despite the State's knowledge that its witness, Tracie Bulington, stole the gun on Roy Vance's order, it misled the jury by calling Patsy Bulington, who found her gun was missing after the homicides and inaccurately concluded that Michael took it while he was alone in her house before the homicides, and the State argued in closing that Michael stole the gun, thus proving that Michael deliberated, and (2) Counsel Estes objected, stating the argument misstated the evidence but not that the State knowingly misled the jury, and Counsel Wafer did not raise the issue on appeal. A reasonable likelihood exists that the State's misconduct and Counsels' ineffectiveness affected the jury's guilt phase decision, since the State relied on this evidence to prove deliberation. Confidence in the outcome is undermined.

Strickland v. Washington, 466 U.S. 668 (1984);

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

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

United States Constitution, Amendments VI, XIV;

Missouri Constitution, Article I, §§10, 18(a).

II. FAILURE TO CALL HANDWRITING EXPERT

The motion court clearly erred in denying Michael's claim that counsel was ineffective for not investigating and calling a handwriting expert to testify that Roy Vance had written a letter addressed to "Karl" because this denied Michael due process, a fundamentally fair trial and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that the defense theory was that the jail-break plan was hatched by Roy Vance and Tracie Bulington, with Michael as their dupe, and that the plan never included harming or killing the jailers. Counsel's failure to have the letter properly authenticated caused the trial court to reject its admission and thus counsel lacked critical evidence that would have shown the jury, from the pen of a co-defendant, Michael's role in the offenses and his lack of deliberation.

Strickland v. Washington, 466 U.S. 668 (1984);

United States v. Tarricone, 996 F.2d 1414 (2nd Cir. 1993);

United States v. Davis, 939 F.Supp. 810 (D.Kan. 1996);

United States Constitution, Amendments VI, XIV;

Missouri Constitution, Article I, §§10, 18(a).

III. GUARDIANS OF PARADISE T-SHIRT

The motion court clearly erred in denying Michael's claim that counsel was ineffective for failing to object to references to and the admission of Michael's t-shirt, which depicted and bore the legend "Guardians of Paradise," because this denied Michael due process, freedom of speech and association, a fundamentally fair trial and effective assistance of counsel, guaranteed by the First, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§8, 10 and 18(a) of the Missouri Constitution, in that the reference to the "Guardians of Paradise" allowed the jury to speculate about and utilize as evidence of guilt Michael's association with that group, which, they may have believed, had anti-social connotations to which Michael ascribed. That evidence was irrelevant to any issue for determination in guilt phase and prejudiced Michael's defense since it allowed the jury to convict Michael, not based on his actions but on his association with an unrelated group.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Driscoll, 55 S.W.3d 350 (Mo.banc 2001);

Dawson v. Delaware, 503 U.S. 159 (1992);

United States Constitution, Amendments VI, XIV;

Missouri Constitution, Article I, §§10, 18(a).

IV. MURDER FIRST VS. MURDER SECOND INSTRUCTIONS

The motion court clearly erred in denying Michael's claim that counsel was ineffective for not objecting at the instruction conference to the first and second degree murder verdict directors because that denied Michael due process, a fundamentally fair trial before a properly-instructed jury and effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that the instructions fail to meaningfully distinguish between first and second degree murder, since the first degree murder verdict director focuses on the passage of time and, by that focus, eliminates consideration of "cool reflection," which is the essence of "deliberation." It thus blurs to extinction the difference between first and second degree murder and relieves the State of its burden of proof on an element of the offense.

Strickland v. Washington, 466 U.S. 668 (1984);

Deck v. State, 68 S.W.3d 418 (Mo.banc 2002);

State v. Thompson, 65 P.3d 420 (Ariz. 2003);

United States Constitution, Amendments VI, XIV;

Missouri Constitution, Article I, §§10, 18(a).

V. REASONABLE DOUBT INSTRUCTION

The motion court clearly erred in denying Michael's claim that counsel was ineffective for failing to object at the instruction conference to Instruction No. 4, the reasonable doubt instruction, and thereafter to move for a mistrial and preserve the issue for appeal because that denied Michael due process, a fundamentally fair trial with a properly instructed jury and effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution in that the instruction lowered the State's burden of proof below that required by due process, and let the jury equate its "firmly convinced" standard with the clear and convincing evidence standard of civil cases. Counsel was put on notice that this jury may have misunderstood the instruction since the trial court brought to counsels' attention that the jury had underlined "common sense" in the instruction's third paragraph and had bracketed the sentence beginning with, "the law does not require proof that overcomes every possible doubt," yet, despite that notice, counsel failed to take corrective action.

Cage v. Louisiana, 498 U.S. 39 (1990);

Victor v. Nebraska, 511 U.S. 1 (1994);

Deck v. State, 68 S.W.3d 418 (Mo.banc 2002);

United States Constitution, Amendments VI, XIV;

Missouri Constitution, Article I, §§10, 18(a).

VI. AUTOPSY PHOTOS ON MOVIE-SIZE SCREEN

The motion court clearly erred in denying Michael's claim that appellate counsel was constitutionally ineffective by not challenging on appeal the admission and display on a movie-screen of autopsy photos of the deceased men because that denied Michael due process, a fundamentally-fair trial and effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, in that the photographs were irrelevant to any issue in the case; their prejudicial effect far exceeded any probative value they may have had, and the prejudice was unfairly amplified by the State's display of them on a movie-size screen.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Robinson, 328 S.W.2d 667 (Mo. 1959);

State v. McMillin, 783 S.W.2d 82 (Mo.banc 1990);

United States Constitution, Amendments VI, XIV;

Missouri Constitution, Article I, §§10, 18(a).

VII. IMPROPER STATEMENTS ON VOIR DIRE AND IN ARGUMENT

The motion court clearly erred in denying Michael's claims that the prosecutor committed misconduct in making the following arguments and trial counsel was ineffective for failing to object, object timely or properly preserve objection to those arguments or counsel improperly argued in

VOIR DIRE

1. That Randolph County rarely had cases such as this one and the rarity caused the Attorney General's Office to be involved (T187);

2. And trial counsel failed to voir dire about whether the jurors could consider the different mental states for first and second degree murder, especially in killings of law enforcement officers but merely asked what sentence the jurors could consider if they convicted Michael of first degree murder (T337,346,353-54,357-58,402-03,415,459,516,521).

GUILT PHASE CLOSING

1. That the jurors could convict Michael of second degree murder only if they first found him not guilty of first degree murder (T913,940) and suggesting that second degree murder need not even be considered because it was included in any finding of first degree murder (T939-40);

2. That Michael told Tracie Bulington to "get" Officer White, who was outside, (T919) suggesting that Officer White was another intended victim;

3. That the jurors should consider the photos and an x-ray of the victims' bodies in death in making their guilt phase decisions (T920-21);

4. That the defense argument about deliberation was an "attempt to fool you" and was "incredible sophistry," (T943);

5. That Michael's statements that he was sorry only came after he was caught and were "precious little consolation" to the victims (T938,943);

because this denied Michael effective assistance of counsel, a fundamentally fair trial and due process, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that the arguments were grossly improper, misstated the facts and the law; commented on Michael's failure to testify; implied that Michael had committed uncharged offenses; attempted to inflame the jury's passions and prejudices; attacked defense counsel and Michael; implied the prosecutor had outside, personal knowledge and commented on facts outside the evidence. Counsel's failures to act were not supported by strategic reasons.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

Donnelly v. DeChristoforo, 416 U.S. 637 (1974);

United States Constitution, Amendments VI, XIV;

Missouri Constitution, Article I, §§10, 18(a).

ARGUMENT

I. WHO OBTAINED THE GUN?

The motion court clearly erred in denying relief on Michael's claim that counsel ineffectively did not properly object to the State's knowing presentation of false and misleading testimony and argument during guilt phase that Michael obtained the gun by stealth and that he therefore deliberated because this denied Michael due process, a fundamentally fair trial and effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that (1) despite the State's knowledge that its witness, Tracie Bulington, stole the gun on Roy Vance's order, it misled the jury by calling Patsy Bulington, who found her gun was missing after the homicides, and inaccurately concluded that Michael took it while he was alone in her house before the homicides and the State argued in closing that Michael stole the gun, thus proving that Michael deliberated, and (2) Counsel Estes objected, stating the argument misstated the evidence but not that the State had knowingly misled the jury, and Counsel Wafer did not raise the issue on appeal. A reasonable likelihood exists that the State's misconduct and Counsels' ineffectiveness affected the jury's guilt phase decision, since the State relied on this evidence to prove deliberation. Confidence in the outcome is undermined.

The sole issue in guilt phase was whether Michael deliberated and thereby committed first degree murder. By knowingly presenting false and misleading testimony and argument, the State struck foul blows, *Berger v. United States*, 295 U.S. 78, 88 (1935), in its attempt to establish deliberation. Its argument "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Counsel's failures to object and properly preserve the issue for appellate review denied Michael a fair trial and effective assistance of counsel. *State v. Storey*, 901 S.W.2d 886 (Mo.banc 1995).

Michael challenged the State's misconduct and counsel's ineffective assistance in his post-conviction motion. (MLF98-106). The motion court denied relief. (MLF465-67). Review of the motion court's findings is for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo.banc 1993); *Rule 29.15(k).* Findings and conclusions are clearly erroneous if, after reviewing the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *Storey*, 901 S.W.2d at 900.

To establish ineffective assistance of counsel, Michael must show that counsel's performance was deficient—that it did not conform to the degree of professional skill and diligence of a reasonably competent attorney—and that the performance affected his case—i.e., that it created prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To prove prejudice, Michael must show "a reasonable probability that, but

for counsel's errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at 405-06*; State v. Butler*, 951 S.W.2d 600, 608 (Mo.banc 1997). Counsel's failure to object to argument can be grounds for a finding of constitutionally ineffective assistance. *Storey*, 901 S.W.2d at 900-03.

During guilt phase, the State called co-defendant, Tracie Bulington's mother, Patsy Bulington. On direct examination, Patsy testified that, two to three days before the homicides, she and Tracie left the house to pick up child support money, leaving Michael in the house alone. (T697-99). Patsy and her husband kept a .22 pistol in their bedroom and, after the homicides, she looked for it but could not find it. (T699-700). A box of .22 ammunition also was missing. (T700).

In the initial portion of its closing, the prosecutor argued that deliberation was shown because "they also were looking for a gun." (T917). Thereafter, in his final closing, he argued,

> Let's talk about deliberation since that is the only difference. And they admit, they admit that he did everything else. Let's talk just about deliberation. This weapon was taken by stealth. We know that because Patsy Bulington told us that.
>
> [Defense Counsel]: I'm going to object, Your Honor. Again a misstatement of the evidence.
>
> [Prosecutor]: Reasonable inference.

THE COURT: The objection will be overruled. Let's proceed please.

[Prosecutor]: He took the weapon out and fired it in the air to make sure it worked.

(T940).

In penalty phase, the State called Tracie Bulington. She testified that she, not Michael, had stolen the gun from her parents' house at Roy Vance's direction. (T1018-19). This testimony was no surprise to the State since Tracie had given a pre-trial statement about this very issue and was testifying pursuant to a plea agreement. (T1015). At her pre-trial deposition, she acknowledged having taken the gun from her parents' house, at Roy's direction. (MT470-71; MEx9,43).

Counsel Estes unsuccessfully objected to the State's argument as misstating the evidence. (T940). Counsel Wafer did not raise the issue on direct appeal. Michael asserted the State's argument was prosecutorial misconduct since it was false and misleading evidence and argument. He asserted counsel were constitutionally ineffective for failing properly to challenge the State's actions through objection and on appeal. (MLF98-106).

Counsel Estes stated that he knew pre-trial that Tracie had stolen her parents' gun at Roy's insistence. (MT529). He thought Ahsens' argument was improper and wanted to object on all possible grounds. (MT533). He objected solely on the grounds that it misstated the evidence. (T940). Counsel Wafer was "disturbed by what had happened," since she believed Ahsens' argument was

"false and misleading," but, since the new trial motion contained no such claim, she did not believe she could raise it on appeal. (MT379-82). Had it been properly preserved, she "absolutely" would have raised it. (MT382).

The motion court denied the claim, finding that the argument was proper since "the record does not reveal that the prosecutor said Movant took the weapon, but merely that the weapon was taken without Patsy Bulington's knowledge, establishing stealth." (MLF466). The court found that failure to adequately preserve issues for appeal is not cognizable under Rule 29.15. (MLF466). Thus, counsel was not ineffective for failing to preserve the point for appeal. (MLF466). Those findings are clearly erroneous.

The motion court attempts to avoid error by parsing Ahsens' language. It concludes that Ahsens did not suggest to the jury that Michael had stolen Patsy Bulington's pistol. This attempt does not survive scrutiny. While Ahsens did not specifically state that **Michael** had stolen the gun, that is, clearly, the message he sent. After all, he reminded the jury of Patsy's testimony, that a. she and her husband owned a pistol, b. Michael was alone in the house before the homicides and the pistol was there and c. after the homicides, the pistol was missing. Ahsens encouraged the jury to connect the dots—straight to Michael. He misled the jury although he knew full-well that Tracie, not Michael, had stolen the gun. He then argued that deliberation, the sole issue in guilt phase, was proved by this stealing.

Presenting false and misleading evidence and argument is prosecutorial misconduct, depriving the defendant of his state and federal constitutional rights to

a fair trial and due process. *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). A new trial is warranted if such false evidence and argument could, in any reasonable likelihood, have affected the jury's judgment. *Giglio*, 405 U.S. at 154.

As Ahsens himself recognized, the sole issue in guilt phase was whether Michael deliberated. The jury was out for more than six hours. (T945-49). During their deliberations, they underlined that portion of the reasonable doubt instruction which states the law "does not require proof that overcomes every possible doubt." (T953). Whether Michael deliberated was a close question. A reasonable likelihood exists that Ahsens' misleading evidence and argument tipped the scales toward finding Michael guilty of first degree murder.

The motion court also attempts to avoid error by stating that the failure adequately to preserve an issue for review, by objecting—at all, in a timely fashion, or on the correct grounds, and then continuing to preserve the issue for the appellate court—is not cognizable under Rule 29.15. (MLF466). That conclusion is also erroneous. This Court's decisions demonstrate that such issues are cognizable. *State v. Debler*, 856 S.W.2d 641, 652 (Mo.banc 1993); *Storey*, 901 S.W.2d at 900. Since the failure adequately to preserve an issue for appeal can change the standard under which it is reviewed, making it more difficult to obtain relief, such a failure can affect a movant's right to a fair trial. *Deck v. State*, 68 S.W.3d 418, 425 (Mo.banc 2002).

While Counsel Estes correctly believed that Ahsens' argument was problematic, he did not object to it on the correct grounds and thus did not give the trial court the opportunity to rule on the correct motion. If Counsel Estes stated the correct grounds, Counsel Wafer ineffectively failed to preserve the challenge on appeal.

Michael is entitled to effective assistance on his first appeal of right. *Evitts v. Lucey*, 469 U.S. 387(1985); *State v. Sumlin*, 820 S.W.2d 487, 490 (Mo.banc 1991). The standard for effectiveness of appellate counsel is the same as that for trial counsel: Michael must show that counsel's performance was deficient and that performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668(1984). *See*, *Smith v. Robbins*, 528 U.S. 259, 285(2000) (proper standard for evaluating petitioner's claim of ineffective assistance for not filing a merits brief is *Strickland*). The Court must determine whether counsel ignored issues clearly stronger than those presented. *Id*. at 288, *citing, Gray v. Greer*, 800 F.2d. 644, 646 (7th Cir.1986). *Strickland* does not require that the issue be a "dead-bang winner," *Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001), since that requirement would be more onerous than *Strickland's* reasonable probability standard.

The "failure to raise a claim that has significant merit raises an inference that counsel performed beneath professional standards." *Sumlin*, 830 S.W.2d at 490. The presumption of reasonableness afforded an appellate attorney can be overcome if she 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).

In death penalty cases, appellate counsel should not winnow claims. Death penalty appeals differ from non-capital appeals. "Although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence *mandates careful scrutiny in the review of every colorable claim of error*." *Zant v. Stephens*, 462 U.S. 862, 885(1983) (emphasis added). "Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). The American Bar Association advocates raising "all arguably meritorious issues." American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, §11.9.2D (1989). These Guidelines form the standard of practice in death penalty cases and are constitutionally-required. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). See also ABA Guidelines, (February 2003), Guideline 10.15.1.C. The Commentary regarding direct appeal counsel's duty reveals the danger of "winnowing" claims:

> "Winnowing" issues in a capital appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited.

Id.

Ahsens ignored the truth and presented false and misleading evidence and argument in his quest for Michael's conviction and death sentence. He did not misstate the evidence, as Estes suggested, since he did not tell the jury that Patsy Bulington had accused Michael of stealing her gun. What Ahsens did was more subtle, but no less damaging. He misled the jury by suggesting to them that it was Michael who stole the gun when he knew the truth was something entirely different. Ahsens knew about Tracie Bulington's pretrial statement and her deposition. He knew that she, not Michael, had stolen the gun. This Court must condemn Ahsens' false and misleading suggestion. *Giglio*, 405 U.S. at 153.

This Court must reverse and remand for a new trial because of the State's presentation of false and misleading evidence and argument and because defense counsel failed adequately to object.

II. FAILURE TO CALL HANDWRITING EXPERT

The motion court clearly erred in denying Michael's claim that counsel was ineffective for not investigating and calling a handwriting expert to testify that Roy Vance had written a letter addressed to "Karl" because this denied Michael due process, a fundamentally fair trial and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that the defense theory was that the jail-break plan was hatched by Roy Vance and Tracie Bulington, with Michael as their dupe, and that the plan never included harming or killing the jailers. Counsel's failure to have the letter properly authenticated caused the trial court to reject its admission and thus counsel lacked critical evidence that would have shown the jury, from the pen of a co-defendant, Michael's role in the offenses and his lack of deliberation.

Counsels' defense was that Roy Vance and Tracie Bulington, with Michael as their dupe, hatched "a plan. And there was deliberation with regards to the plan. Cool reflection with regards to the plan. But the plan was for a jail break. The plan was not to shoot anyone." (T922). But, the jury only heard this theory through Michael's statement, which the State discounted. The jury heard that "they were prepared to do that by force of arms because he brought the weapon hidden in his clothing. Is that deliberation? That's planning, friends. That's more

than deliberation. He planned to use whatever force was necessary." (T941). They never heard the defense theory from the one person who could have explained the plan and should have taken responsibility for his actions but never did—Roy Vance. This evidence was readily available yet counsel could not present it because he did not do his homework. Thus, the jury lacked critical evidence to support the defense theory and rebut the State's argument. This denied Michael's state and federal constitutional rights to due process, a fundamentally fair trial and effective assistance of counsel.

The motion court denied Michael's claim of ineffective assistance of counsel. (MLF529). Review of that court's findings is for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo.banc 1993); *Rule 29.15(k).* Findings and conclusions are clearly erroneous if, after reviewing the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *State v. Storey*, 901 S.W.2d 886, 900 (Mo.banc 1995).

To establish ineffective assistance of counsel, Michael must show that counsel's performance was deficient—that it did not conform to the degree of professional skill and diligence of a reasonably competent attorney—and that the performance affected his case—i.e., that it created prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To prove prejudice, Michael must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different."

Strickland, 466 U.S. at 694; *Williams*, 529 U.S. at 405-06; *State v. Butler*, 951 S.W.2d 600, 608 (Mo.banc 1997).

The State called Officer Platte, who testified that Michael made a statement to him shortly after his arrest in Kansas. (T826-34). Michael stated that the plan, made with Roy Vance, was for Michael and Tracie to enter the jail, lock the jailers in another cell, hand the gun to Roy and let Roy take over from there. (T835). Platte read portions of Michael's written statements to the jury. Michael accepted responsibility and expressed remorse. Ahsens commented that it was "somewhat different from what he told you verbally?" (T843).

On cross-examination, Counsel Estes elicited that Michael had told Platte that the plan was to put the guards in the holding cell and free Roy Vance, but that the plan did not include killing the guards. (T855). Michael told Platte that he was to blame but that Roy had planned the break-out. (T860).

Counsel Estes also asked Platte to identify a letter and envelope found in Tracie Bulington's car in Kansas. (T870). The letter, addressed to Karl and signed "Roy," read:

> Karl,
>
> I know what Tracie is talking to you about sounds crazy but if done right it could be really simple with atleast [sic] an hour or two to get away.
>
> There's no button for help and the cameras don't record anything so they wouldn't even have a clue who did it. Under normal circumstances I would never ask but we're family me, you, and Tracie and need to be together as

one. There isn't any of them that work here with enough heart to play hero as long as it's done right. I hate to even ask but it isn't anything that I wouldn't do for you and Carl with your situation with Betty they wouldn't give you any warning. You'd just be arrested and never see daylight again. Why let that happen when we could all be together. Think about it and if you decide to Tracie will explain the lay out.

Love ya my brother, Roy

P.S. Keep your head up and your heart strong.

(MEx83 at 12). Counsel Estes sought to introduce the letter as statements of a co-conspirator in furtherance of the conspiracy, as Roy attempted to enlist another person into his escape plot. (T871).

Judge Conley sustained the State's hearsay objection. He noted "there's a signature here but there's no proof that's who wrote the document. That's the reason I'm not letting the exhibit in. I don't have the faintest idea who wrote that document. … And I don't think you do either. It's signed and you have an envelope that's addressed to Roy Vance or typewritten name Roy Vance. But I don't know where either of these documents, who created either of these documents at this point. .. If you have somebody that will say I recognize that's Roy Vance's signature then we'll see where we are." (T873-74).

Michael asserted trial counsel was ineffective for not investigating and calling a handwriting expert who could have identified the handwriting as Roy's so that the letter could be admitted. (MLF201-02). He maintained the letter would

have supported the defense theory that they had not planned to kill because Roy did not believe any of the jailers had "enough heart to play hero." He further alleged the letter would have rebutted the State's theory that Michael deliberated. (MLF201).

Counsel Estes acknowledged that the letter was not admitted because he did not demonstrated its authorship. (MT608). He admitted that he erred by not making an offer of proof and by not having a handwriting expert testify that Roy wrote the letter. (MT609-10). Post-conviction counsel and the State stipulated that Robin Russell, a handwriting examiner with the Highway Patrol Crime Lab, examined the letter to "Karl" in December, 2001, and "concluded that Roy Dale Vance wrote the questioned writing of 33Q3 [letter to "Karl"]." (MEx83 at 2). The parties also stipulated that the State called Russell to testify about this information in Roy Vance's trial in 2002. *Id*. at 3.

The motion court denied relief, finding no prejudice from counsel's failures to act. (MLF533). It found, "The letter does not establish that Movant did not intend to kill the jailers or deliberate before doing so, and considering the strength of the State's evidence on Movant's deliberation, there is no reasonable probability that the outcome would have been different had the letter been admitted." (MLF533). This finding is clearly erroneous.

In the State's closing, the prosecutor argued at length that the jury could find deliberation because

> first, … they talked about a plan. And this was a plan that was formulated by Roy Vance and Mr. Tisius. … Now as I said they're going on a mission. And that mission is to get Roy out. And what they know is they have to go into the jail where there's always the risk of armed guards. And we know that in any jail there are going to be weapons because you don't know which deputies are going to be in and out. … So they know the patterns of the officers. They know they have guns in there. In fact, they've been able to size up many things now about the way this system works. … Because after all, Mr. Tisius also spent a considerable amount of time inside that facility. And he knows when things are slow. When is the least likelihood of other opposition being there so he can get in and get his boy out.

(T915-16). This was not, as the motion court suggested, an isolated comment. Rather, it formed a substantial and integral part of the State's argument about what constituted deliberation. Thus, it was critically important for counsel to rebut it. And that rebuttal could have occurred through Roy's letter to Karl.

The letter explained Roy's, and by extension, Michael's, thinking. It explained—to a potential co-conspirator—that their purpose was to break Roy out **without** causing any loss of life, **without** even alerting the authorities about who had done the jail-break until they were long gone. (MEx83). It further explained that they had analyzed the situation and did not believe the risk was great, as long as it "was done right." (MEx83). Contrary to the State's argument, their plan, their deliberation, was to accomplish a jail-break, not to commit a murder. The

letter would have helped to prove this. But, since counsel did not properly authenticate it, the trial court would not admit it.

The motion court appears not to dispute that counsel's failure to consult a handwriting expert to determine who authored the "Karl" letter was deficient. (MLF533). Indeed, as the court suggested in *United States v. Tarricone*, 996 F.2d 1414, 1417-18 (2nd Cir. 1993), this failure could be deemed a *prima facie* case of deficient performance. *See also United States v. Davis*, 939 F.Supp. 810 (D.Kan. 1996). The document was excluded precisely because counsel failed to establish its author. Had counsel established authorship, Judge Conley would have admitted it. The question is whether prejudice resulted from counsel's deficient performance. It did.

The State focused, in its guilt phase opening argument, on Roy and Michael's "plan" and argued that their plan encompassed shooting the officers. Roy's letter directly refutes this. Their true desire was to avoid confrontation and to break Roy out of jail. Contrary to the motion court's findings, the letter also demonstrates that the plan was Roy and Tracie's, not Roy and Michael's. After all, the letter to Karl, one of Roy's friends, expressed that **Tracie,** not Michael, had been discussing the plan with Karl and that, if Karl would help, he should consult **Tracie**, not Michael. The letter, therefore, would have helped to establish that Michael was a follower; that he acted as Roy and Tracie's dupe, not as one of the planners of the jailbreak.

Given the bright line the State shone on the planning of the jailbreak, and its argument that the planning established deliberation, counsel's failure to ensure that the jury saw the letter had devastating consequences. This Court must reverse and remand for a new trial.

III. GUARDIANS OF PARADISE T-SHIRT

The motion court clearly erred in denying Michael's claim that counsel was ineffective for failing to object to references to and the admission of Michael's t-shirt, which depicted and bore the legend "Guardians of Paradise," because this denied Michael due process, freedom of speech and association, a fundamentally fair trial and effective assistance of counsel, guaranteed by the First, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§8, 10 and 18(a) of the Missouri Constitution, in that the reference to the "Guardians of Paradise" allowed the jury to speculate about and utilize as evidence of guilt Michael's association with that group, which, they may have believed, had anti-social connotations to which Michael ascribed. That evidence was irrelevant to any issue for determination in guilt phase and prejudiced Michael's defense since it allowed the jury to convict Michael, not based on his actions but on his association with an unrelated group.

The state elicited in guilt phase that, when he was arrested, Michael was wearing a t-shirt that bore the legend "Guardians of Paradise," with its accompanying graphics design. (T708; Exh52). Counsel did not object to the testimony or to the admission of the shirt. (T708,710). By denying Michael's assertion of resulting error, the motion court violated Michael's state and federal constitutional rights to due process, freedom of speech and association, a fundamentally fair trial, and effective assistance of counsel.

Review of the motion court's findings is for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo.banc 1993); *Rule 29.15(k).* Findings and conclusions are clearly erroneous if, after reviewing the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *State v. Storey*, 901 S.W.2d 886, 900 (Mo.banc 1995).

To establish ineffective assistance of counsel, Michael must show that counsel's performance was deficient—that it did not conform to the degree of professional skill and diligence of a reasonably competent attorney—and that the performance affected his case—i.e., that it created prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To prove prejudice, Michael must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at 405-06; *State v. Butler*, 951 S.W.2d 600, 608 (Mo.banc 1997). Counsel's failure to object to irrelevant evidence can constitute constitutionally ineffective assistance. *See, State v. Weaver*, 912 S.W.2d 499, 516 (Mo.banc 1995).

The prosecutor asked Officer Hall, a criminal investigator with the Highway Patrol, what clothing he had recovered from Michael upon his arrest. (T707). Hall stated that he had recovered a black t-shirt that said "Guardians of Paradise" on both back and front. (T708). Counsel did not object to the description and only objected to the t-shirt's admission as a product of a

warrantless arrest and seizure without probable cause. (T710). The court overruled the objection. (T710).

Michael asserted counsel was ineffective for not objecting to the reference to the image and slogan and to the admission of the t-shirt on that basis as irrelevant to any issue before the jury and as inflammatory and highly prejudicial. (MLF183-84). He asserted that it suggested that Michael was a member of or endorsed an anti-social group and that its prejudicial effect outweighed any probative value it might have had. (MLF183-84). He further asserted that the State's use of the image and slogan encouraged the jury to convict, based on his association with or endorsement of that group and its purported beliefs. (MLF183-84).

Counsel Estes did not believe the slogan and image were objectionable and thus did not object. (MT594). The motion court denied relief, stating that no evidence was adduced about the meaning of "Guardians of Paradise" or how the jury

> would have possibly taken that to mean that Movant was a member of an "anti-social" group. Moreover, Movant offers no evidence to support his assertion that this phrase somehow was evidence of his guilt or caused the jury to sentence him to death. Considering the strength of the evidence adduced by the State, there is no reasonable probability that this isolated evidence would have any effect on the jury's determination.

(MLF528-29). This finding is clearly erroneous.

At the outset of this proceeding, the motion court took judicial notice of the underlying file. (MT37). Thus, the motion court presumably took judicial notice of the t-shirt that made up part of Exhibit 52. As the image set forth in this brief reveals, the front of the t-shirt bears the slogan "Guardians of Paradise." On the back, this image is joined with the image of a snarling winged tiger-like animal, his talons extended over the yin and yang sign, and his taloned wings encircling his body. Completing the image, the yin and yang sign is superimposed upon red flames. The motion court's conclusion that the jury could not possibly have considered this evidence to mean that Michael was part of or supported some anti-social group is belied by the image itself, which contains violent, demonic figures. Further, that the reference was relatively limited does not resolve the issue. Instructive is this Court's decision in *State v. Driscoll*, 55 S.W.3d 350 (Mo.banc 2001).

In *Driscoll*, a prison stabbing case, in both phases the state introduced evidence of Driscoll's membership in the Aryan Brotherhood. The evidence was adduced through testimony about Driscoll's membership, testimony about Driscoll's tattoo—a revolver and a clenched fist with "Wis Mach" and "AB" around it—and testimony that, for membership, one had to kill a black man. *Id.* at 353.

Driscoll alleged that the evidence was inadmissible in both phases because it was irrelevant to any issue presented and because it adversely impacted his First Amendment rights. *Id.* This Court noted that Driscoll cited *Dawson v. Delaware*,

503 U.S. 159 (1992), which, it stated, stands for the proposition that "penalty phase evidence of a defendant's membership in the Aryan Brotherhood and references to that organization as a 'white racist prison gang,' without more, violates a defendant's First Amendment constitutional rights." *Driscoll*, 55 S.W.3d at 353, citing *Dawson*, 503 U.S. at 166. This Court then noted *Dawson's* rationale was limited to its facts and did not provide Driscoll with a basis for penalty phase relief. It found, however, that, as to guilt phase, whether the evidence was admissible was "quite another question." *Driscoll*, 55 S.W.3d at 354.

This Court concluded that "the holding of *Dawson*—that mere evidence of a defendant's membership in a racist prison gang is a First Amendment violation if not otherwise relevant—appears equally applicable to guilt phase." *Id*. As to guilt phase, Driscoll contended that the evidence was adduced to show his propensity to commit crimes. As such, this Court stated, it is generally inadmissible unless it is logically and legally relevant to establish the defendant's guilt of the charged crime. *Id*.; *State v. Bernard*, 849 S.W.2d 10, 13 (Mo.banc 1993). Logical relevance means that the evidence has some legitimate tendency to establish directly the defendant's guilt of the charges. Legal relevance means that its probative value outweighs its prejudicial effects. *Driscoll*, 55 S.W.3d at 354. This Court concluded that the logical relevance of the evidence was "tenuous at best" and that it had no legal relevance since its prejudicial effect "far outweighed its probative value." *Id*.

This Court noted that "the prosecutor's use of this evidence was minimal." *Id.* at 353. Nonetheless, this Court concluded, because of the nature of the contested evidence and the attendant constitutional issues, "ultimately, the question is whether the jury would have convicted Driscoll in the absence of the Aryan Brotherhood evidence. Despite the fact that the prosecutor made no reference to the evidence in the guilt phase closing argument, it was highly prejudicial…." *Id*. at 358.

This Court determined that the *Chapman v. California*, 386 U.S. 18, 24 (1967) standard of determining prejudice in the erroneous admission of evidence must be applied in *Driscoll* because "the error was compounded by the fact that the propensity evidence was also a First Amendment violation. … As such, the judgment of guilt can be affirmed only if it is shown that the error was harmless beyond a reasonable doubt." *Driscoll*, 55 S.W.3d at 356, *Dawson*, 503 U.S. at 166-67; *Chapman*, 386 U.S. at 24. This Court further noted that, under the Supreme Court's teachings in *Neder v. United States*, 527 U.S. 1, 15-16 (1999), the proper test for deciding if a constitutional error is harmless is whether "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Driscoll*, 55 S.W.3d at 356.

Here, this Court cannot be confident that the error created by the improper reference to and admission of the t-shirt bearing the Guardians of Paradise slogan and image did not contribute to the guilt phase verdict. The jury was out for six hours in guilt phase, (T945-49), deciding the sole issue before them—whether

Michael deliberated. Although the evidence that Michael shot the two jailers was undisputed, the question of deliberation was clearly at issue. The slogan and image of the snarling, taloned, winged beast proved no issue before the jury in guilt phase. Rather, it created the image for the jury that Michael, who, by wearing the t-shirt, was displaying the slogan and image, supported and condoned the message that they projected. Like the Aryan Brotherhood evidence in *Driscoll*, the Guardians of Paradise evidence here "may well have been sufficient to convince one or more of the jurors to convict rather than acquit." *Id.* at 358. Moreover, had Michael been wearing a "Sponge Bob Square Pants" t-shirt, it is highly unlikely that the prosecutor would have displayed it to the jury. It is only because of the violence of the image that the t-shirt bore that the prosecutor wanted that image firmly in the mind's eye of the jury.

Under these facts, this Court cannot be confident that the error—in admitting the evidence and in failing to object to it—did not contribute to the verdict. This Court must, therefore, reverse and remand for a new trial.

IV. MURDER FIRST VS. MURDER SECOND INSTRUCTIONS

The motion court clearly erred in denying Michael's claim that counsel was ineffective for not objecting at the instruction conference to the first and second degree murder verdict directors because that denied Michael due process, a fundamentally fair trial before a properly-instructed jury and effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that the instructions fail to meaningfully distinguish between first and second degree murder, since the first degree murder verdict director focuses on the passage of time and, by that focus, eliminates consideration of "cool reflection," which is the essence of "deliberation." It thus blurs to extinction the difference between first and second degree murder and relieves the State of its burden of proof on an element of the offense.

Did Michael coolly reflect? That is the question that the jury *should* have been deciding in this case because, as Mr. Fusselman told them, "really everything else about this case is a given." (T912). Instead, the jury was told it could find deliberation if time passed and Michael had the *opportunity* to deliberate. This resulted in a blurring of distinction between first and second degree murder and relieved the State of the burden of proving deliberation. Because counsel did not preserve his objection to the instructions at the instruction conference, as required by Rule 28.03, Michael was denied his state and federal constitutional rights to

due process, a fundamentally fair trial before a properly instructed jury and effective assistance of counsel.

The motion court denied Michael's claim. (MLF532). The motion court's findings are to be reviewed for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo.banc 1993); *Rule 29.15(k)*. Findings and conclusions are clearly erroneous if, after reviewing the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *State v. Storey*, 901 S.W.2d 886, 900 (Mo.banc 1995).

To establish ineffective assistance of counsel, Michael must show that counsel's performance was deficient—that it did not conform to the degree of professional skill and diligence of a reasonably competent attorney—and that the performance affected his case—i.e., that it created prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To prove prejudice, Michael must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at 405-06; *State v. Butler*, 951 S.W.2d 600, 608 (Mo.banc 1997). Failing to challenge an instruction or to offer a factually and legally correct instruction can constitute ineffective assistance of counsel. *Deck v. State*, 68 S.W.3d 418, 429-30 (Mo.banc 2002); see *Love v. State*, 670 S.W.2d 499, 502 (Mo.banc 1984); *Ellis v. State*, 773 S.W.2d 194, 199 (Mo.App., S.D. 1989). Michael established both deficient performance and prejudice.

Pre-trial, counsel filed a Motion to Dismiss Charge of Murder First Degree and Objections to MAI-Cr3d 313.02 (MEx72 at 101-04) and a Motion to Dismiss Charge of Murder First Degree and Objections to MAI-Cr3d310.50 and 313.02. *Id*. at 105-11. In those motions, counsel attacked the pattern instructions, because they eliminate the distinction between first and second degree murder by defining "deliberation" in terms of passage of time and not "cool reflection." At the instruction conference, counsel failed to object to the verdict directors. (T904-05). Counsel included the challenge in the new trial motion. (LF235-36).

Michael asserted that counsel was ineffective for failing to object to the instructions at the instruction conference and thus not complying with Rule 28.03's preservation requirements. (MLF194-97). The motion court denied relief, because such claims are "not cognizable" and because this Court "has repeatedly denied the claim that the instructions fail to 'meaningfully' distinguish between first-degree and second-degree murder." (MLF532). These findings are clearly erroneous.

When a homicide occurs in Missouri, without more, it is presumed to be second degree murder. *State v. Gassert*, 65 Mo. 352 (Mo.1877); *Love v. State*, 670 S.W.2d 499, 505 (Mo.banc 1984); *State v. Little*, 601 S.W.2d 642 (Mo.App.,E.D. 1980). To elevate a homicide charge to first degree murder, the State must also prove the murder was deliberate. §§565.020 and .030 RSMo. "Deliberation [is] the distinctive quality which separates murder in the first degree from murder in the second degree…." *State v. Garrett*, 207 S.W. 784 (Mo.1918).

Despite the requirement of proof of deliberation, deliberation has been legislatively-defined and judicially-applied to render meaningless any rational distinction between first and second degree murder. Especially here, where the jury's instructions told them that deliberation could be calculated in terms of time and the prosecutor argued, "if you decide that this defendant over here did not deliberate **during that ten minutes or so** that he was exchanging pleasantries with Mr. Acton before he took the gun he brought into that jail and pointed it at his forehead…" (T913); "in mid-June, at least a couple weeks before the death of these two deputies…" (T915); "So we're still involved within that next week…" (T915); "…and over the next couple of days…" (T915); "Now he's sitting here looking at Mr. Acton exchanging pleasantries. And then he takes that shot and then as he says it, about 10 to 20 seconds passed and then he shoots Mr. Egley…" (T918); "…was it the first time that he shot Mr. Egley after 20 seconds of cooling and calming reflecting on what he had done to Mr. Acton…" (T918), deliberation was defined as the passage of time and NOT cool reflection. This abrogation of an element of the offense eliminates any distinction between first and second degree murder and relieves the State of its burden on that element.

Section 565.020 RSMo provides that "A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." Section 565.002 defines deliberation as "cool reflection for any length of time no matter how brief." Despite this seeming

clarity, the definition and how it has been interpreted have blurred the line between first and second degree murder to extinction.

This Court has stated that, when a defendant "with the purpose of causing serious physical injury" causes a death, that is second degree murder. "Both second degree murder and first degree murder require that the act be intentionally done. Only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation." *State v. O'Brien*, 857 S.W.2d 212, 218 (Mo.banc 1993); *State v. Black*, 50 S.W.3d 778, 797 (Mo.banc 2001)(Wolff, J., dissenting). Yet, this Court, through its opinions and Approved Instructions, has repeatedly found deliberation by focusing on the temporal component, rather than the mental process inherent in the word's definition. *See, e.g., Id.* at 788; *State v. Tisius*, 92 S.W.3d 751, 764 (Mo.banc 2002); *State v. Clemmons*, 753 S.W.2d 901, 906 (Mo.banc 1988); *State v. Ervin*, 979 S.W.2d 149, 159 (Mo.banc 1998); *State v. Feltrop*, 803 S.W.2d 1, 11 (Mo.banc 1991); *State v. Ingram*, 607 S.W.2d 438, 443 (Mo.1980); *see also State v. Samuels*, 965 S.W.2d 913, 922 (Mo.App.,W.D.1998) ("The deliberation necessary to support a conviction of murder in the first degree need only be momentary; it is only necessary that the Appellant considered taking the victim's life in a deliberate state of mind.") This focus misdirects the jury, blurring the distinction between first and second degree murder. Since for the statute to be constitutional, the definition of premeditation must provide a meaningful distinction between first and second degree murder, the

legislative and judicial definitions violate due process. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966).

Because a defendant's mental state is difficult to prove by direct evidence, the state often resorts to proof by circumstantial evidence. *See, e.g., Black*, *supra* at 788-89. But the circumstantial evidence upon which convictions rest is not necessarily proof of the essence of deliberation—cool reflection. That aspect of deliberation is ignored or mistakenly combined with a discussion of intent and premeditation.

"The obvious point to be drawn from this discussion is that even if intent (or 'purpose to kill') and premeditation ('design') may be formed in an instant, deliberation requires some period of reflection, during which the mind is 'free from the influence of excitement, or passion.'" *State v. Brown*, 836 S.W.2d 530, 540 (Tenn. 1992), *citing, Clarke v. State*, 218 Tenn. 259, 402 S.W.2d 863, 868 (1966). Courts frequently use "premeditation" and "deliberation" to refer to the same concept. *Brown*, *supra* at 540. Recent opinions "overemphasize the speed with which premeditation may be formed" converting the analysis from one which determines whether the defendant acted with a "cool purpose" to one which merely asks whether he had time within which to act. *Id.* at 540, *citing Dale v. State*, 18 Tenn. (10 Yer.) 551, 552 (1837).

The confusion of premeditation and deliberation was not unique to Tennessee but was documented, and participated in, by the commentators. *Brown*,

supra at 540-41. More recent versions of the learned treatises, however, note the distinction between the concepts. Wharton's Criminal Law states:

> Although an intent to kill, without more, may support a prosecution for common law murder, such a murder ordinarily constitutes murder in the first degree only if the intent to kill is accompanied by premeditation and deliberation.
>
> "Premeditation" is the process simply of thinking about a proposed killing before engaging in the homicidal conduct; and "deliberation" is the process of carefully weighing such matters as the wisdom of going ahead with the proposed killing, the manner in which the killing will be accomplished, and the consequences which may be visited upon the killer if and when apprehended. "Deliberation" is present if the thinking, i.e., the "premeditation," is being done in such a cool mental state, under such circumstances, and for such a period of time as to permit a "careful weighing" of the proposed decision.

C. Torcia, *Wharton's Criminal Law*, §142 (15th ed. 1994). Similarly, 2W. LaFave and A. Scott, *Criminal Law*, §7.7 (1986), states, "perhaps the best that can be said of 'deliberation' is that it requires a cool mind that is capable of reflection…." "It is not enough that the defendant is shown to have had time to premeditate and deliberate. One must actually premeditate and deliberate, as well as actually intend to kill, to be guilty of…first degree murder." *Id.*

Courts have further blurred the distinction between first and second degree murder by relying upon "repeated blows" as circumstantial evidence of premeditation. *Brown*, 836 S.W.2d at 541. This usage is not unique to Tennessee, since Missouri courts also find multiple blows prove deliberation. *See e.g.*, *State v. Tisius*, 92 S.W.3d 751, 764 (Mo.banc 2002); *State v. Samuels*, 965 S.W.2d 913, 922 (Mo.App.,W.D. 1998). Nonetheless, "[l]ogically, of course, the fact that repeated blows (or shots) were inflicted on the victim is not sufficient, by itself, to establish first-degree murder. Repeated blows can be delivered in the heat of passion, with no design or reflection. Only if such blows are inflicted as the result of premeditation and deliberation can they be said to prove first-degree murder." *Brown*, 836 S.W.2d at 542; LaFave & Scott, §7.7 ("The mere fact that the killing was attended by much violence or that a great many wounds were inflicted is not relevant in this regard, as such a killing is just as likely (or perhaps more likely) to have been on impulse").

The Arizona Supreme Court recently re-visited the meaning of premeditation[3] to determine whether reducing proof of premeditation to mere

[3] Premeditation exists if "the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection. Proof of actual reflection is not required, but an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion." A.R.S. §13-1101(1).

passage of enough time to permit reflection renders the statute vague and unenforceable, and eliminates the difference between first and second-degree murder. *State v. Thompson*, 65 P.3d 420, 424 (Ariz.2003). The Court found the verdict-directors and the state's argument that it did not have to prove actual reflection, but only that enough time had elapsed to allow reflection erroneous. But, it concluded, the errors were harmless since the evidence of the defendant's "reflection" was overwhelming. *Id.* at 429. The Court stated, however,

> [I]f the only difference between first and second degree murder is the mere passage of time, and that length of time can be "as instantaneous as successive thoughts of the mind" then there is no meaningful distinction between first and second degree murder. Such an interpretation would relieve the state of its burden to prove actual reflection" and would, therefore, violate due process.

Id. at 427. The Arizona Legislature intended premeditation "and the reflection that it requires, to mean more than the mere passage of time." *Id*. The Court "discourage[d] the use of the phrase 'as instantaneous as successive thoughts of the mind.' We continue to be concerned that juries could be misled by instructions that needlessly emphasize the rapidity with which reflection may occur." *Id*. at 428.

In *State v. Guthrie*, 461 S.E.2d 163 (W.Va. 1995), the West Virginia Supreme Court addressed these issues and modified its definitions of premeditation and deliberation to clarify the difference between first and second

degree murder. The court concluded that instantaneous premeditation and momentary deliberation is not satisfactory to prove first degree murder. *Id.* at 181. Part of the basis for the *Guthrie* Court's decision was the analysis of the Court in *Bullock v. United States*, 122 F.2d 213 (D.D.C.1941). There, the Court stated:

> To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the statutory distinction between first and second degree murder. At common law there were no degrees of murder. If the accused had no overwhelming provocation to kill, he was equally guilty whether he carried out his murderous intent at once or after mature reflection. Statutes … which distinguish deliberate and premeditated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder. The deliberate killer is guilty of first degree murder; the impulsive killer is not.

Id. at 214.

Although the evidence adduced at trial was sufficient to sustain Michael's conviction for second degree murder it was insufficient to establish that additional element—after deliberation—to elevate the charge to first degree murder. For instance, although the State established that there was **time** for deliberation, that

alone did not establish "cool reflection." *Brown*, 836 S.W.2d at 540-41; *Thompson*, 65 P.3d at 427; *Wharton*, §142; LaFave & Scott, §7.7; *Black*, 50 S.W.3d at 797 (Wolff, J, dissenting). Similarly, although the State established that multiple shots were fired, that, too, alone did not establish cool reflection. *Brown*, 836 S.W.2d at 543-44; *Midgett v. State*, 729 S.W.2d 410 (Ark. 1987); Lafave & Scott, §7.7. Indeed, multiple shots are "just as likely (or perhaps more likely) to have been on impulse." *Id.*

The Approved Instructions given here, to which Counsel Estes made no objection at the instruction conference, misled jurors. They so confused the concept of deliberation that the jury found Michael guilty of first degree murder despite no evidence on that critical element of the offense. Particularly, the jury is instructed that, to convict of first degree murder, it must find, "Third, that defendant did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief." As the Tennessee and Arizona Courts have found, the commentators have stated, and this Court should find, this portion of the verdict director misled the jury about a fundamental point of law and created reversible constitutional error.

Whether a jury is properly instructed is a question of law. *Rice v. Bol*, 116 S.W.3d 599, 606 (Mo.App.,W.D. 2003); *Hosto v. Union Elec. Co*., 51 S.W.3d 133, 142 (Mo.App.,E.D. 2001). To reverse because of instructional error, the instruction must have misdirected, misled or confused the jury, resulting in prejudice to he who challenges the instruction. *Williams v. Fin. Plaza, Inc.*, 23

S.W.3d 656, 658 (Mo.App.,W.D. 2000). To determine whether a jury was misdirected, misled or confused, it must be determined whether "an average juror would correctly understand the applicable rule of law" that the instruction attempts to convey. *Lashmet v. McQueary*, 954 S.W.2d 546, 550 (Mo.App.,S.D. 1997). Prejudice exists if the error materially affected the case's merits and outcome. *Hill v. Hyde*, 14 S.W.3d 294, 296 (Mo.App.,W.D. 2000).

A jury instruction creates a "roving commission" if it fails to advise the jury what acts or omissions by the defendant create his liability. *Lashmet*, 954 S.W.2d at 550; *Paisley v. K.C. Pub. Serv. Co.*, 351 Mo. 468, 173 S.W.2d 33, 38 (1943). A jury instruction may also create a roving commission when it is "too general." *Id*. at 38.

The Approved Instructions given here, without objection, misled the jury because they were so general as to not advise the jury what constitutes deliberation. They thus created a roving commission, letting the jury give its own, unguided interpretation to that element. Merely because they are based on the Approved Instructions does not render them beyond reproach.

As Justice Cardozo once observed, the distinction between first and second degree murder based upon the existence or non-existence of deliberation, especially when defined as it is here, is too vague and obscure for any jury to understand. B. Cardozo, *Law and Literature and Other Essays*, 99-100 (1931). The Arizona Supreme Court recognized that the statutory definition "may not explain it in an easily understandable way and, indeed, might mislead the jury."

Thompson, 65 P.3d at 428. It continued "to be concerned that juries could be misled by instructions that needlessly emphasize the rapidity with which reflection may occur." *Id.* In postulating an instruction to alleviate this concern, the court noted that the instruction "merely clarifies that the state may not use the passage of time as a proxy for premeditation. The state may argue that the passage of time *suggests* premeditation, but it may not argue that the passage of time *is* premeditation." *Id.*

The instructions here did precisely what Justice Cardozo and the Arizona Supreme Court warned against—they combined two concepts that would appear to be mutually exclusive—cool reflection that occurs instantaneously. Since deliberation requires some period of reflection during which the mind is free from excitement or passion, *Brown*, 836 S.W.2d at 540; *Clarke*, 402 S.W.2d at 868, and requires some time to permit careful weighing of the proposed decision, *Wharton's Criminal Law*, §142, the instructions misled the jury, letting them convict Michael of first degree murder absent any evidence of "cool reflection upon the matter." Indeed, all the jury was told it must consider was whether Michael thought about his actions "for any length of time no matter how brief." The prosecutor's closing argument, that also focused upon the passage of time as the bell-weather for determining deliberation, rammed that concept home.

The jury deliberated for just over six hours in guilt phase. (T945-49). Since the sole issue was deliberation, it cannot be said that the evidence was so overwhelming that the improper jury instructions, exacerbated by improper

argument, did not have a decisive effect on those deliberations. Counsel's failure to object to the instructions at the instruction conference and thus preserve his challenge to them was constitutionally ineffective. This Court must reverse and remand for a new trial before a properly-instructed jury.

V. REASONABLE DOUBT INSTRUCTION

The motion court clearly erred in denying Michael's claim that counsel was ineffective for failing to object at the instruction conference to Instruction No. 4, the reasonable doubt instruction, and thereafter to move for a mistrial and preserve the issue for appeal because that denied Michael due process, a fundamentally fair trial with a properly instructed jury and effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution in that the instruction lowered the State's burden of proof below that required by due process, and let the jury equate its "firmly convinced" standard with the clear and convincing evidence standard of civil cases. Counsel was put on notice that this jury may have misunderstood the instruction since the trial court brought to counsels' attention that the jury had underlined "common sense" in the instruction's third paragraph and had bracketed the sentence beginning with, "the law does not require proof that overcomes every possible doubt," yet, despite that notice, counsel failed to take corrective action.

In state criminal trials, the Fourteenth Amendment's Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *Cage v. Louisiana*, 498 U.S. 39 (1990); see also *Jackson v. Virginia*, 443 U.S. 307, 315-316 (1979). This reasonable doubt

standard "plays a vital role in the American scheme of criminal procedure." *Winship,* 397 U.S. at 363; *Cage,* 498 U.S. at 40. It is critically important in "reducing the risk of convictions resting on factual error." *Winship,* 397 U.S. at 363.

If the jury is mis-instructed about the state's burden of proof and counsel does not move to rectify the error, the accused's state and federal constitutional rights to due process, a fundamentally fair trial before a properly instructed jury and effective assistance of counsel are denied. That occurred here.

The error was compounded because the motion court denied relief on Michael's claim arising out of the error. The motion court's findings on these claims are to be reviewed for clear error. *Barry v. State,* 850 S.W.2d 348, 350 (Mo.banc 1993); *Rule 29.15(k).* Findings and conclusions are clearly erroneous if, after reviewing the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *State v. Storey,* 901 S.W.2d 886, 900 (Mo.banc 1995).

To establish ineffective assistance of counsel, Michael must show that counsel's performance was deficient—that it did not conform to the degree of professional skill and diligence of a reasonably competent attorney—and that the performance affected his case—i.e., that it created prejudice. *Strickland v. Washington,* 466 U.S. 668 (1984); *Williams v. Taylor,* 529 U.S. 362, 390-91 (2000). To prove prejudice, Michael must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different."

Strickland, 466 U.S. at 694; *Williams*, 529 U.S. at 405-06*; State v. Butler*, 951 S.W.2d 600, 608 (Mo.banc 1997). The failure to challenge an instruction or to offer a factually and legally correct instruction can constitute ineffective assistance of counsel. *See Love v. State*, 670 S.W.2d 499, 502 (Mo.banc 1984); *Ellis v. State*, 773 S.W.2d 194, 199 (Mo.App., S.D. 1989). Michael established both deficient performance and prejudice.

Pre-trial, the defense challenged the reasonable doubt instruction, through motions to modify and objecting to the current instruction. (MEx77,78,125 at 24; T44). At the instruction conference, however, counsel did not renew the objection. (T904-05). The court gave the instruction, as No.4. That instruction read as follows:

> The charge of any offense is not evidence, and it creates no inference that any offense was committed or that the defendant is guilty of an offense.
>
> The defendant is presumed to be innocent, unless and until, during your deliberations upon your verdict, you find him guilty. This presumption of innocence places upon the state the burden of proving beyond a reasonable doubt that the defendant is guilty.
>
> A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you will find him guilty. If you are not so convinced, you must give him the benefit of the doubt and find him not guilty.

(MEx69 at A-4).

After the guilt phase verdicts were rendered, in chambers the court informed the parties:

> On Instruction 4, the definition of burden of proof in the third paragraph a reasonable doubt is, based upon reason and common sense, the words *common sense* have been underlined. In paragraph four, proof beyond a reasonable doubt that leaves you firmly convinced, the words, the sentence beginning *the law does not require proof that overcomes every possible doubt* has been bracketed.

(T953). The court asked if anyone wanted to make a further record. Mssrs. Kenyon and Ahsens declined. (T953).

Michael challenged counsel's failure to preserve the challenge to the instruction, especially in light of the jury's notations. (MLF198-200). Appellate counsel Wafer stated that she did not raise the claim on appeal, despite that a claim

about it was in the new trial motion (LF237), since it was not preserved. (MEx125 at 26-28).

The motion court denied the claim because the failure to preserve a claim for appeal is not cognizable (MLF532), and the claim, often rejected by this Court, lacks merit. (MLF533). These findings are clearly erroneous.

The claim is cognizable. Rule 28.03 provides:

> Counsel shall make specific objections to instructions or verdict forms considered erroneous. No party may assign as error the giving or failure to give instructions or verdict forms unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Counsel need not repeat objections already made on the record prior to delivery of the instructions and verdict forms. The objections must also be raised in the motion for new trial in accordance with Rule 29.11.

Although counsel filed pre-trial motions challenging the instruction and offering a modified instruction, (MEx77,78), and then raised the claim in the new trial motion (LF235-36), counsel did not comply with Rule 28.03 and object to the instruction before the jury retired. That failure, were the instruction challenged on direct appeal, would render the claim reviewable only for plain error. *State v. Wurtzberger*, 40 S.W.3d 893, 898 (Mo.banc 2001). This Court has determined that the standard for assessing prejudice under plain error and *Strickland v. Washington*, 466 U.S. 668 (1984) is distinct, and a finding of no plain error does

not preclude a finding of *Strickland* prejudice. *Deck v. State*, 68 S.W.3d 418 (Mo.banc 2002). Failing to object to an improper instruction, according to this Court's rules, can constitute constitutionally ineffective assistance. *Love v. State*, 670 S.W.2d at 502; *Deck v. State*, 68 S.W.3d 418 (Mo.banc 2002).

The claim has merit, despite that this Court has rejected similar claims. In *Victor v. Nebraska*, 511 U.S. 1 (1994), the United States Supreme Court addressed whether California's and Nebraska's pattern instructions on reasonable doubt violated due process by allowing a finding of guilt based upon a quantum of proof less than that required by the Due Process Clause. Justice O'Connor, writing for the Court, noted that, in *Estelle v. McGuire*, 502 U.S. 62,72 n.4 (1991), the Court had "made clear that the proper inquiry is not whether the instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." *Victor*, 511 U.S. at 6. Justice O'Connor further stated that, "The constitutional question in the present cases, therefore, is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Id.* Justice O'Connor concluded that the phrase at issue—proof to a moral certainty—was not reasonably likely to have been understood by the jury as suggesting a standard lower than that guaranteed by due process. Nonetheless, the Court did not condone its use because of the change in meaning of the phrase. *Id.* at 16. Justice O'Connor also wrote that, while the phrase "substantial doubt" was problematic, in light of the explication given in the rest of the instruction, it did

not unconstitutionally lower the state's burden of proof. *Id.* at 20-21. "Taken as a whole," Justice O'Connor concluded, the instructions did not violate due process. *Id.* at 22-23.

Justice Ginsburg, in her concurring opinion, noted that the language used in the instructions could appear "circular" and "less [than] enlightening." *Id.* at 23-26. She suggested that the instruction proposed by the Federal Judicial Center offered "clear, straightforward, and accurate" language. *Id.* at 26. It stated:

> T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Federal Judicial Center, Pattern Criminal Jury Instructions, at 17-18 (instruction 21). *Victor*, 511 U.S. at 26-27 (Ginsburg, J., concurring).

This language, or the language Counsel proposed in the modified instruction, would have resulted in the jury understanding the state's burden of proof and not lowering it to find Michael guilty. Because Instruction 4 did not contain similar cautionary language, it is reasonably likely the jury understood the state's burden of proof to be lower than that required by due process.

As Justice O'Connor noted in *Victor*, the question is "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Id*. at 6. Given the jury's notations upon the instruction itself, such a likelihood exists. This Court must reverse and remand for a new trial before a properly-instructed jury.

VI. AUTOPSY PHOTOS ON MOVIE-SIZE SCREEN

The motion court clearly erred in denying Michael's claim that appellate counsel was constitutionally ineffective by not challenging on appeal the admission and display on a movie-screen of autopsy photos of the deceased men because that denied Michael due process, a fundamentally-fair trial and effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, in that the photographs were irrelevant to any issue in the case; their prejudicial effect far exceeded any probative value they may have had, and the prejudice was unfairly amplified by the State's display of them on a movie-size screen.

The sole issue in guilt phase was whether Michael acted with deliberation. (T912; MT374,526). That Michael shot the two officers was not contested. In fact, after reminding the court and the State of their pre-trial motion *in limine* on photographs, (LF140-43), and that no dispute existed as to cause of death or identity, the defense offered to stipulate to the cause of death and objected to any display of the ten autopsy photographs. (T580-81; Ex20-22, 24-30). These photographs depicted the officers on the gurney from various angles, with the intubation tubes still inserted in the nose and throat of one of the officers. (Ex24-29). Two of the photographs (Ex22,30) are of x-rays taken of the officers' heads. The court overruled the objection. (T581). Counsel thereafter objected to the display of these photographs on a movie-size screen. (T584). Counsel preserved

his objection in the new trial motion. (LF246-47). Appellate counsel did not raise this claim on direct appeal to this Court. Michael alleged that failure was constitutionally-ineffective assistance. (MLF180-83).

The motion court denied Michael's claim of ineffective assistance of counsel. (MLF527-28). Review of that court's findings is for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo.banc 1993); *Rule 29.15(k).* Findings and conclusions are clearly erroneous if, after reviewing the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *State v. Storey*, 901 S.W.2d 886, 900 (Mo.banc 1995).

To establish ineffective assistance of counsel, Michael must show that counsel's performance was deficient—that it did not conform to the degree of professional skill and diligence of a reasonably competent attorney—and that the performance affected his case—i.e., that it created prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To prove prejudice, Michael must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at 405-06; *State v. Butler*, 951 S.W.2d 600, 608 (Mo.banc 1997).

The standard of review for claiming ineffective appellate counsel is essentially the same as trial counsel: the movant must show deficient performance and resulting prejudice. *Strickland, supra*; *Evans v. State*, 70 S.W.3d 483, 485 (Mo.App.,W.D. 2002). Michael is entitled to effective assistance on his first

appeal of right. *Evitts v. Lucey*, 469 U.S. 387(1985); *State v. Sumlin*, 820 S.W.2d 487, 490 (Mo.banc 1991). The standard for effectiveness of appellate counsel is the same as that for evaluating trial counsel's performance: Michael must show that counsel's performance was deficient and the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984). *See*, *Smith v. Robbins*, 528 U.S. 259, 285(2000) (proper standard for evaluating Petitioner's claim of ineffective assistance for not filing a merits brief is *Strickland*). The Court must determine whether counsel ignored issues clearly stronger than those presented. *Id*. at 288, *citing*, *Gray v. Greer*, 800 F.2d. 644, 646 (7th Cir. 1986). *Strickland* does not require that the issue be a "dead-bang winner." *Neill v. Gibson*, 278 F.3d 1044, 1057(10thCir.2001). That requirement would be more onerous than *Strickland's* reasonable probability standard. *Id.*

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).

Furthermore, in death penalty cases, counsel should not winnow claims. Death penalty appeals differ from non-capital appeals. "Although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence *mandates careful scrutiny*

in the review of every colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885(1983)(emphasis added). "Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). The American Bar Association advocates raising "all arguably meritorious issues." American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, §11.9.2D (1989). These Guidelines form the standard of practice in death penalty cases and are constitutionally-required. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). See also ABA Guidelines, (February 2003), Guideline 10.15.1.C. The Commentary regarding direct appellate counsel's duty reveals the danger of "winnowing" claims:

> "Winnowing" issues in a capital appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited.

Id. The Commentary cites *Smith v. Murray*, 477 U.S. 527(1986). There, direct appellate counsel failed to assert that the testimony of a psychiatrist who examined the defendant, without warning him that the interview could be used against him, violated the defendant's Fifth Amendment rights. *Id*. The Court found the omitted claim meritorious in *Estelle v. Smith*, 451 U.S. 454 (1981), but

Smith was barred from raising it in federal habeas, because of direct appellate counsel's error. Smith was subsequently executed. Commentary, at n. 341.

Counsel Wafer was aware of the issue regarding the display and admission of the autopsy photographs. (MT496-97). She stated that, while she understood the state's need to prove its case and that it was not required to stipulate to facts, she also recognized there was no issue about cause of death. Further, "I've started to rethink gruesome photos, and I—I really do think maybe we should all be paying more attention to them. I don't know if I would reach the same decision again or not." (MT498).

The motion court denied relief, finding that

> Appellate counsel testified that she decided not to raise this issue because, based on the record, it did not appear to be prejudicial to Movant, the issues did not appear to have merit on appeal, and although there may not have been an issue as to whether Movant killed the victims, the State had a duty to prove their case beyond a reasonable doubt and had a right to admit the photographs. This Court finds that appellate counsel had a reasonable strategy to decide not to raise this issue. This claim would not have been meritorious on appeal as the photographs were admissible to show the results of Movant's crime, the jury was entitled to have the admitted photographs sent to the jury room and the photographs were not so inflammatory or gruesome to have been prejudicial to Movant.

(MLF527-28). These findings were clearly erroneous.

Trial courts have broad, but not unfettered, discretion in admitting evidence. *State v. Bernard*, 849 S.W.2d 10,13 (Mo.banc 1993). Evidence must be relevant to be admissible. Relevance is two-pronged: logical relevance means the evidence tends to make the existence of a material fact more or less probable. *State v. Smith*, 32 S.W.3d 532, 546 (Mo.banc 2000); *State v. Anderson*, 76 S.W.3d 275, 276 (Mo.banc 2002). Legal relevance means the probative value of the evidence outweighs its prejudicial effect. *Id*. Prejudicial effect encompasses unfair prejudice, issue confusion, misleading the jury, undue delay, wasted time, or cumulativeness. *Id.; State v. Sladek*, 835 S.W.2d 308, 314 (Mo.banc 1992)(Thomas, J., concurring).

If a trial court abuses its discretion in admitting photographs, its decision may be overturned. *State v. Kincade*, 677 S.W.2d 361, 366 (Mo.App.,E.D. 1984); *State v. McMillin*, 783 S.W.2d 82,100 (Mo.banc 1990). If photographs of a victim's body are used solely to arouse the jury's emotions and prejudice the defendant, *State v. Wood*, 596 S.W.2d 394 (Mo.banc 1980), or their probative value is outweighed by their needlessly inflammatory nature, they should be excluded. *State v. Robinson*, 328 S.W.2d 667 (Mo.1959); *see also, State v. Floyd*, 360 S.W.2d 630 (Mo.1962). After all, prosecutors "have a greater responsibility than to assure the conviction of a defendant. It is their responsibility to assist the trial court in assuring that both the state and the defendants get a fair trial." *State v.*

Stevenson, 852 S.W.2d 858,865 (Mo.App.,S.D. 1993)(Parrish, J.,concurring). As Judge Blackmar stated in the penalty phase context, "It is suggested that a little more gore would make no difference. I cannot accept this argument when a man is on trial for his life." *State v. Leisure*, 749 S.W.2d 366, 384 (Mo.banc 1988).

The issue is thus whether these ten autopsy photographs, which showed the injuries inflicted from a variety of angles and further graphically demonstrated, through the intubation apparatus, the efforts made by the emergency medical personnel, have any logical relevance. Did they tend to prove or disprove a fact in issue? *State v. Rousan*, 961 S.W.2d 831, 848 (Mo.banc 1998). They did not. As Fusselman told the jury in guilt phase closing, the sole issue before them in guilt phase was whether Michael deliberated. (T912). This the photographs did not prove. At most, they tended to prove the *corpus delicti*, which was not disputed. Thus, even as to that prong, their admissibility is questionable. *See, State v. Conley*, 873 S.W.2d 233, 237 (Mo.banc 1994)(evidence must be related to "legitimate issues" to be admissible); *see also, State v. Revelle*, 957 S.W.2d 428, 438 (Mo.App.,S.D. 1997)(en banc).

Even assuming the exhibits are logically relevant, that does not make them legally relevant and thereby admissible. *Id.* Especially prejudicial were the photographs depicting the intubation apparatus since the focus of those photographs was not the wounds inflicted but the potential for suffering that the officer may have endured as a result of those injuries. This was not an appropriate issue in guilt phase. Fusselman's actions here demonstrate that his purpose was to

prejudice the jury against Michael. After all, why else would he enhance the photographs' size, by blowing them up on a movie-size screen?

If evidence diverts jurors' attention from their task or causes "prejudice wholly disproportionate" to its logical relevance, it should be excluded. *Rousan*, 961 S.W.2d at 848. These images tended "to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). They encouraged the jury to convict based on raw emotion, not proof beyond a reasonable doubt. The prejudice created was enormous.

This situation is similar to one the Illinois Supreme Court condemned in *People v. Blue*, 724 N.E.2d 920 (Ill. 2000); *see also People v. Johnson*, 803 N.E.2d 405 (Ill. 2003). In *Blue*, prosecutors "coerced the jury into returning a verdict more likely grounded in sympathy than on a dispassionate evaluation of the facts." *Blue*, 724 N.E.2d at 931. The court observed "a coalescence of facts that tip the evidentiary scale from items that are merely useful to those that are aimed directly at the sympathies, or outrage, of the jury." *Id*. at 934. To obtain Blue's first-degree murder conviction and death sentence, the state used the victim's "bloodied and brain-spattered uniform." *Id.* at 922, 931. Although the court agreed the uniform could establish the nature and location of a fatal wound, its "evidentiary value" was "minimal. *Id.* at 934. The court thus reversed. *Id.*

In *Stevenson, supra*, the Southern District strongly admonished prosecutors about using unduly-gruesome photographs. There, the state offered autopsy

photos of the victim's opened chest, arguing they were gruesome only because of the nature of the wound inflicted. 852 S.W.2d at 861-62. The court wrote, "we would be hard-pressed not to reverse the judgment because of the introduction of the two photographs were it not for two facts: punishment was assessed by the court and not the jury, and the evidence of the defendant's guilt was strong." *Id*. at 863. Because of those unique circumstances, the court found no legal prejudice and did not reverse. Chief Judge Parrish wrote separately to:

> Comment[] further on the admission into evidence of photographs that displayed the surgically exposed thoracic cavity and organs of the victim. The attempt of the prosecuting attorney to offer such evidence is, in my opinion, reprehensible. The admission of the evidence was erroneous.

Id. at 865 (Parrish, J., concurring).

Here, the cause of death was not at issue. Whether the officers were alive for a period of time before they died of their wounds was also not at issue in guilt phase. Since the issue, as even the prosecutor framed it, was whether Michael deliberated, the images projected by these photographs did not assist the jury in that determination. Unlike *Stevenson*, this Court cannot conclude that Michael was not prejudiced by the photographs' use and admission and appellate counsel's failure to challenge them. The jury assessed punishment and, even having considered these gruesome photographs, the jury was out for over six hours in guilt phase. Given that the sole issue was whether Michael had deliberated, it cannot be said that the evidence of guilt was strong.

Admission of evidence can be harmless. But the state must prove it harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). The State cannot meet that burden here because it cannot show beyond a reasonable doubt that the jury did not consider or could not have been influenced by these enlarged images through its six hours of deliberations. *See State v. Alexander*, 875 S.W.2d 924, 929 (Mo.App.,S.D. 1994).

This Court should reverse and remand for a new trial, from which this highly inflammatory evidence is excluded.

VII.IMPROPER STATEMENTS ON VOIR DIRE AND IN ARGUMENT

The motion court clearly erred in denying Michael's claims that the prosecutor committed misconduct in making the following arguments and trial counsel was ineffective for failing to object, object timely or properly preserve objection to those arguments or counsel improperly argued in

VOIR DIRE

1. That Randolph County rarely had cases such as this one and the rarity caused the Attorney General's Office to be involved (T187);

2. And trial counsel failed to voir dire about whether the jurors could consider the different mental states for first and second degree murder, especially in killings of law enforcement officers but merely asked what sentence the jurors could consider if they convicted Michael of first degree murder (T337,346,353-54,357-58,402-03,415,459,516,521).

GUILT PHASE CLOSING

1. That the jurors could convict Michael of second degree murder only if they first found him not guilty of first degree murder (T913,940) and suggesting that second degree murder need not even be considered because it was included in any finding of first degree murder (T939-40);

2. That Michael told Tracie Bulington to "get" Officer White, who was outside, (T919) suggesting that Officer White was another intended victim;

3. That the jurors should consider the photos and an x-ray of the victims' bodies in death in making their guilt phase decisions (T920-21);

4. That the defense argument about deliberation was an "attempt to fool you" and was "incredible sophistry," (T943);

5. That Michael's statements that he was sorry only came after he was caught and were "precious little consolation" to the victims (T938,943); because this denied Michael effective assistance of counsel, a fundamentally fair trial and due process, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that the arguments misstated the facts and the law; commented on Michael's failure to testify; implied that Michael had committed uncharged offenses; attempted to inflame the jury's passions and prejudices; attacked defense counsel and Michael; implied the prosecutor had outside, personal knowledge and commented on facts outside the evidence. Counsel's failures to act were not supported by strategic reasons.

The motion court clearly erred in denying Michael's claims that counsel was ineffective for failing to object, object timely and properly preserve for appeal, and that the prosecutors committed misconduct by making improper, inflammatory arguments during voir dire and guilt phase closing. Review of the motion court's findings is for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo.banc 1993); *Rule 29.15(k)*. Findings and conclusions are clearly erroneous if, after reviewing the entire record, the appellate court is left with the definite and

firm impression that a mistake has been made. *State v. Storey*, 901 S.W.2d 886, 900 (Mo.banc 1995).

To establish ineffective assistance of counsel, Michael must show that counsel's performance was deficient—that it did not conform to the degree of professional skill and diligence of a reasonably competent attorney—and that the performance affected his case—i.e., that it created prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To prove prejudice, Michael must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at 405-06; *State v. Butler*, 951 S.W.2d 600, 608 (Mo.banc 1997). Counsel's failure to object to argument can constitute constitutionally ineffective assistance. *Storey*, 901 S.W.2d at 900-03.

The prosecutor committed repeated misconduct in his arguments in both voir dire and guilt phase closing, yet counsel inexplicably did virtually nothing to stop the onslaught. Thus, the jury heard the improper statements unabated.

"The touchstone of due process analysis is the fairness of the trial." *Smith v. Phillips*, 455 U.S. 209, 219 (1982); *Wilkins v. Bowersox*, 933 F.Supp. 1496, 1524 (W.D.Mo.1996), *aff'd*, 145 F.3d 1006 (8thCir.1998). The accused is entitled to a fair trial and a prosecutor must not deprive him of one or obtain a wrongful conviction. *Berger v. United States*, 295 U.S. 78, 88 (1935); *State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524, 526-27 (banc 1947); *Rule 4.3.8*.

Prosecutorial misconduct in argument is unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). It may be so outrageous that it violates due process and the Eighth Amendment. *Newlon v. Armontrout*, 885 F.2d 1328, 1337 (8th Cir.1989); *Antwine v. Delo*, 54 F.3d 1357, 1364 (8th Cir.1995). Moreover, failing to object and properly preserve an issue for appellate review constitutes ineffective assistance if it substantially deprives the defendant of his right to a fair trial. *Storey*, *supra*. Here, the prosecutor's repeated, intentional misconduct denied Michael's state and federal constitutional rights to due process and a fair trial and counsel's failures properly to object to those comments deprived him of his state and federal constitutional right to effective assistance of counsel.

VOIR DIRE

Evidence Outside The Record:

Mr. Ahsens began his voir dire examination by telling the venire that he was an Assistant Attorney General and that Mr. Fusselman, the elected prosecutor, had requested his assistance because "Randolph County has not had the misfortune of having that many murders so it is not something with which he comes into contact with [sic] regularly." (T187). Counsel did not object (T187), because he did not believe it was objectionable. (MT628). Michael asserted that this constituted ineffective assistance of counsel. (MLF154).

The motion court denied relief on this claim, finding that "Although this statement does technically refer to matters outside the record, i.e., that Randolph County did not have a lot of murders, this statement would have had no effect on the jury's determination of Movant's guilt or punishment." (MLF520). That finding is clearly erroneous.

As this Court held in *Storey*, 901 S.W.2d at 900, prosecutors may not argue facts outside the record. *Rule 4.3.4*. Assertions of fact such as these amount to unsworn testimony by the prosecutor and are highly prejudicial. They are "apt to carry much weight against the accused when they should carry none" because the jury knows the prosecutor's duty is to serve justice, not just win the case. *Storey*, 901 S.W.2d at 901; *Berger*, 295 U.S. at 88; *see Rule 4.3.8.* Especially in a case like this, involving the homicides of two law enforcement officers, the spectre raised by Ahsens' statement—that, by comparison to other cases, this one was special and more deserving of the Attorney General's assistance, a reasonable probability exists that, but for counsel's failure to object, the result would have been different. Confidence in the outcome has been undermined. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

Failure To Voir Dire On Critical Issues:

Jeff Estes, Michael's trial attorney bearing responsibility for guilt phase, and Deborah Wafer, Michael's appellate attorney, acknowledged that the guilt phase theory was that Michael had not deliberated and thus, was guilty of second, not first, degree murder. (MT374,526). Despite this theory, and despite that the

case involved the homicides of two law enforcement officers, counsel did not question the venire about whether they could fairly and impartially consider the different mental states required for first and second degree murder and whether they would automatically convict of first degree murder because of the circumstances of the crime.

Michael challenged this failure in his amended motion. (MLF172-73). At the post-conviction hearing, Counsel Estes acknowledged that he had not questioned the jurors about those matters. (MT634-35). Counsel further acknowledged that he did not know why he had not done so. (MT634-35).

The motion court rejected this claim, finding that counsel was not ineffective. (MLF525). The court found that counsel's voir dire was thorough and "there is no indication in the record or any evidence that any juror did not follow the law or that any juror would have automatically rejected murder in the second degree. Jurors are presumed to follow instructions and Movant has failed to make any showing otherwise." (MLF525). That finding is clearly erroneous.

Voir dire plays a critical role in assuring criminal defendants that their Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire, the trial court cannot fulfill its responsibility to remove prospective jurors who may be biased and defense counsel cannot intelligently exercise peremptory challenges. *Roberts v. Bowersox*, 61 F.Supp.2d 896, 922 (E.D. Mo. 1999). Just as counsel must be allowed to voir dire on the critical facts of a case to uncover the potential bias and prejudice among venirepersons, *State v. Clark*, 981

S.W.2d 143, 147 (Mo.banc 1998), so, too, counsel must voir dire about those issues to determine which venirepersons can fairly and impartially determine the facts of the case. Here, since counsel did not ask if the venirepersons could fairly and impartially consider second degree murder when law enforcement officers were killed, counsel did not discover whether they were biased against the lesser-included offense. Thus, counsel could not intelligently exercise his peremptory and cause strikes. *See, Rosales-Lopez v. United States,* 451 U.S. 182, 188 (1981).

To avoid reversing, the motion court finds dispositive that Michael did not prove that a juror did not follow the law and that no juror would have automatically rejected a finding of second degree murder because of counsel's failure to voir dire. This mis-directs attention. The real question is not whether, *post hoc,* jurors might articulate their consciousness of some prejudicial effect of the failure to voir dire on that specific issue. It is whether "an unacceptable risk is presented of impermissible factors coming into play." *Estelle v. Williams*, 425 U.S. 501, 505 (1976). Since whether Michael deliberated was the only real issue in guilt phase, and that issue would be presented in light of the homicides of two law enforcement officers, counsel should have voir dired to ensure that the jurors *could* adequately consider the issue, in light of those specific circumstances. Without that voir dire, confidence in the outcome is undermined.

CLOSING ARGUMENT

Misinstruction On Murder First:

Without objection, the prosecutor argued,

> The other two instructions [on second degree murder] are what we call alternative and lesser-included counts which means only if after you look at Instruction 10 [on first degree murder] if you decide that this defendant over here did not deliberate … if you believe that he did not coolly reflect upon that matter for any length of time no matter how brief before he pulled that gun and shot him, then you will go to these other two instructions that we have that talk about alternative counts.

(T913). Later he argued, again without objection,

> Murder in the second degree. Did the defendant commit murder in the second degree? Yes. Because murder in the second degree is a lesser-included offense. What does that mean? That means that if you commit murder in the first degree, murder in the second degree has also been committed.

(T939-40). Finally, he argued, again without objection, "You look at murder second degree if and only if you do not believe that we proved those things [deliberation] beyond a reasonable doubt." (T940).

Michael asserted counsel's failures to object constituted ineffective assistance of counsel (MLF125-27). Counsel Estes acknowledged that he did not object to the acquittal-first instruction as violating *Beck v. Alabama*, 447 U.S. 625, 627 (1980), which requires that jurors be allowed to consider lesser-included offenses in death penalty cases. The motion court denied relief. He held that the argument was proper and that, since the jury was properly-instructed, to conclude

that it failed to consider second degree murder was "pure speculation." (MLF498). The court also found, considering the strength of the evidence, no reasonable probability that the remark affected the jury's verdict. (MLF498). That finding was clearly erroneous.

The prosecutor's argument was improper as it told the jurors that they could consider second degree murder only if they first acquitted Michael of first degree murder, by finding that he had not deliberated. The argument created the untenable risk that those who otherwise would vote in the minority would be coerced to vote with the majority. *State v. Allen*, 717 P.2d 1178, 1179 (Or. 1986). Distinct from *State v. Wise*, 879 S.W.2d 494 (Mo.banc 1994), where this Court implicitly recognized the possibility of a coerced verdict but found it had not occurred, *Id.* at 517, the prosecutor here argued that the jury would have to find Michael not guilty of first degree murder before they considered the second degree murder charge. As the *Wise* Court suggested, the prosecutor's language, that "if and only if" (T940) the jury acquitted on murder first could it consider murder second, was critical.

Even though the jury later received an instruction that tracked MAI-Cr3d 313.04, a reasonable probability exists that the jury's verdict was affected by the improper argument. In fact, one venireman had asked on voir dire, "I know you explained this at the very get-go. But let's say you think he's guilty but you don't think he's guilty in the first degree murder, right, so are we done and you guys say, okay, the crime is going to be on the second degree or does it go to another

court or how does that work?" (T512-13). The Court's instructions to that venireman merely referred him back to the instructions, which caused the initial confusion. (T513). The State's argument exacerbated the likelihood that the jurors, who had already indicated their confusion, would ignore second degree murder and convict Michael of first degree murder. Moreover, since the strength of the state's case of deliberation rested on improper evidence, *see Points I, III, VI, supra*, if that improper evidence is removed from the balance, the prejudicial effect of the state's argument becomes readily apparent.

Argument Contrary to the Evidence:

The prosecutor also argued, "He [Michael] gave her [Bulington] the directions for Willie White who's outside at that point watching, saying 'Get him. Get him. Get him.'" (T919). Michael asserted that this argument lacked evidentiary support and misstated the evidence. (MLF127-28). Counsel Estes acknowledged that he had erred in failing to object. (MT620). The motion court made no finding about deficient performance but found Michael had not proved prejudice. (MLF498-99).

The evidence in both phases demonstrated that the "get him" comments referred to one of the charged victims—Officer Egley—who grabbed Bulington's legs, causing her to scream, and that Michael did not see White, who was outside. (T606,611,836,843,1036-37). Nonetheless, the prosecutor argued, **contrary** to the evidence, that Michael had intended to kill White—another law enforcement officer. This argument misstated the evidence. *State v. Delaney*, 973 S.W.2d 152,

155 (Mo.App., W.D. 1998); *Tucker v. Kemp* 762 F.2d 1496, 1507 (11th Cir. 1985); *Storey*, 901 S.W.2d at 900-03. It violated due process because it was false and misleading evidence. *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Because it also implied that Michael had actually tried to kill—with deliberation—a third officer, thus raising the spectre of an uncharged, unsupported, offense, *State v. Burns*, 978 S.W.2d 759, 760 (Mo.banc 1998), it made it more likely that the jury would convict Michael of first degree murder. *See State v. Barriner*, 34 S.W.3d 139, 148 (Mo.banc 2000).

Inflammatory Evidence:

The prosecutor displayed an x-ray and photographs of the victims' bodies in death, Exhibits 22,24,25,30, in closing, without a continuing objection by Counsel Estes. (T920-21). Michael asserted counsel's failure to object was ineffective assistance since the prejudicial effect of the exhibits outweighed their probative value. (MLF128-29).

The motion court denied relief, finding that, even if the photographs were gruesome, they were not necessarily inadmissible since gruesome crimes produce gruesome photographs. (MLF499-500). The court also found, given the strength of the evidence, that Michael did not prove prejudice from their use. (MLF499-500). Those findings were clearly erroneous.

The exhibits graphically displayed the victims' anatomical injuries from gunshots. This was not at issue since the defense had conceded Michael shot the officers. The sole question in guilt phase was whether he had deliberated. (T921).

The photographs thus proved no fact at issue. Further, their prejudicial effect substantially outweighed any probative value they might have had. *See State v. McMillan*, 783 S.W.2d 82, 106-07 (Mo.banc 1990)(Nugent, Sp.J., concurring). As Justice Souter noted in *Old Chief v. United States*, 519 U.S. 172, 180 (1997), especially when a fact is not disputed by the parties, the question of legal relevance is critical. The prejudice arising from such evidence creates the risk that a defendant's conviction will rest upon improper considerations. *Id.* That occurred here. The prosecutors' graphic display created the likelihood that the jury would convict Michael of first degree murder based on this appeal to their passions and prejudices, not on the facts.

Attacks on Defense Counsel:

The prosecutor also argued, "Did you hear, were you listening when it was suggested to you that if this had been deliberation then Leon Egley would not have been moving after the first shot? Well, if that's true, then since Jason Acton was shot dead with the first shot and never moved, does that mean there must have been deliberation there? Do you see the inconsistency in the argument? *See the attempt to fool you?*" (T943). The prosecutor then stated, "Cool, been cool reflection, it would have been successful. *What incredible sophistry is that?*" (T943)(emphasis added). Following the entire closing argument, counsel objected and moved for a mistrial (T946-48). Counsel Estes acknowledged that he would have wanted to object to the arguments. (MT622). Michael asserted counsel was ineffective for not timely objecting. (MLF129-30). The motion court denied the

claim, finding the arguments were not improper attacks on counsel's character, but were directed at counsel's tactics or techniques. (MLF500). Those findings were clearly erroneous.

The argument was improper because it constituted an attack on defense counsel, suggesting that counsel had lied to the jury. As in *State v. Greene*, 820 S.W.2d 345 (Mo.App., S.D. 1991), where the prosecutor's suggestion that defense counsel lied or attempted to mislead the jury resulted in reversal, despite the strong evidence of guilt, this Court must condemn such argument. Especially since the prosecutor's argument implied that he had special, personal knowledge of Michael's guilt, reversal is required. *Storey*, 901 S.W.2d at 900-01. As Judge Parrish noted in his concurring opinion in *Greene, supra,* "Prosecuting officials have the duty to prosecute cases with vigor, but they have the duty to do so within the bounds of rules of evidence and within the procedural boundaries prescribed for the conduct of criminal trials. That was not done in this case." *Greene,* 820 S.W.2d at 348. The prosecutor's suggestion that defense counsel had lied to the jury, in his attempt to secure Michael's conviction of first degree murder, cannot be condoned.

Ad Hominem Attacks on Michael:

The prosecutor also argued, without timely objection, "He said he was sorry. I think that's going to be precious little consolation to deputy Acton and deputy Egley. He said he was sorry after he got caught. (T938). He also argued, "[S]omehow because he shows remorse there's no deliberation? Well, he didn't

show remorse until he got caught." (T943). Michael challenged counsel's inaction. (MLF131-32). Counsel stated that he had objected, albeit late. (MT624).

The motion court held that the argument was proper rebuttal to the defense's argument that Michael's remorse showed a lack of deliberation. (MLF501). The court also found that the argument was neither a comment on Michael's silence nor did it create prejudice. (MLF501-02). Those findings were clearly erroneous.

The argument was improper because first, it was irrelevant and highly inflammatory. By telling the jury that Michael's expressions of remorse were "precious little consolation" to the victims, the prosecutor encouraged the jury to ignore reason and common sense and appealed to their passions and prejudices. *See State v. Burnfin*, 771 S.W.2d 908, 911 (Mo.App., W.D. 1989). The argument also improperly told the jury to consider Michael's failure to come forward and to express remorse until he was caught. Thus, the argument constituted an impermissible comment on Michael's right to remain silent. *See Owen v. State*, 656 S.W.2d 458 (Tex.Crim.App., 1983); *see Doyle v. Ohio*, 426 U.S. 610, 617 (1976); *State v. Endicott*, 732 S.W.2d 239 (Mo.App., S.D. 1987).

The State's improper arguments, exacerbated by defense counsel's repeated, unreasonable failures to act, denied Michael a fair trial. Confidence in the outcome is undermined. This Court must, therefore, reverse and remand for a new trial.

CONCLUSION

For the reasons set forth in the above Points and Arguments, this Court should reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of May, 2005, 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, MO 65102.

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, 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, signature block, this certification and the certificate of service, this brief contains 21,235 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

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Janet M. Thompson