IN THE
MISSOURI SUPREME COURT

MICHAEL TISIUS,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC 95303**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
BOONE COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION III
THE HONORABLE KEVIN M.J. CRANE, JUDGE

APPELLANT'S REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***RULES*:**

JURISDICTION AND STATEMENT OF FACTS

The Jurisdictional Statement and Statement of Facts from the original brief are incorporated here.

POINTS RELIED ON

I.

BOOT SHANK AGGRAVATION

The motion court clearly erred denying the claim counsel was ineffective for failing to present evidence mitigating Michael's *Alford* plea to possession of a prohibited item, a boot shank, when counsel failed to investigate and present evidence inmate Hurt was responsible for the shank being in Michael's radio and coerced Michael to keep it there because inmate O'Hara's and mitigation specialist Miller's hearsay testimony was both highly relevant to the jury's punishment decision and reliable, and therefore, admissible under *Green v. Georgia*.

Further, counsel was ineffective for failing to present the shank *Alford* plea transcript highlighting the prosecutor's statement the plea was done as an *Alford* plea because Michael had reported another inmate put the shank in his radio and coerced Michael to keep it and Michael's *Alford* plea meant he was not admitting guilt and pleading only because he believed that the state might be able to persuade a jury to convict.

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

State v. Phillips,940S.W.2d512(Mo.banc1997);

North Carolina v. Alford,400U.S.25(1970).

II.

FAILURE TO REBUT PETRI'S REPORTING OF STATEMENT AS "BRAGGING"

The motion court clearly erred denying counsel was ineffective for failing to rebut Michael's question to Boone County guard Petri reflected "bragging" that he killed two guards by calling Dr. Peterson to testify another interpretation was Michael was telling the listener he was frightened because the amended motion in fact pled: Peterson should have been called to testify Michael suffers from PTSD and his associated "lack of maturity and increased impulsivity makes him more likely to say the first thing that comes to his mind when he is fearful" such that Peterson's finding on Michael's statement would have mitigated Petri's testimony.

Peterson's testimony was the proper subject of expert testimony because it explained how Michael's statement to Petri was a reflection of his PTSD diagnosis, and therefore, a subject lay jurors are not conversant on.

Peterson's testimony was critical as Dr. Taylor was not even aware of the Petri statement until it was brought out on cross-examination and her testimony was discredited for not knowing about it.

Petri testified that she interpreted Michael's statement as "bragging" so that counsel's closing argument directly contradicting Petri's testimony was unreasonable and incredible.

State v. Rios,314S.W.3d414(Mo.App.,W.D.2010).

III.

ALLEGED GUN HAND GESTURES

The motion court clearly erred denying counsel was ineffective for failing to investigate and present evidence rebutting Michael made hand gestures from his cell toward guard Harmon mimicking firing a gun in that reasonable counsel would have investigated and presented pictures Harmon was mistaken as both party's investigators photos, which accurately duplicate the correct lighting conditions of lights out in Michael's cell, as testified to by Harmon, on their face without opinion testimony from those investigators as to what they considered viewable establish Harmon could not have seen what she reported and Michael was prejudiced by the failure to rebut Harmon's aggravation.

Ervin v. State,80S.W.3d817(Mo.banc2002).

IV.

TAYLOR UNPREPARED

The motion court clearly erred denying the claim counsel was ineffective for failing to prepare Dr. Taylor so that she knew about the alleged Chariton and Boone County Jail occurrences, because the claim pled and the claim briefed are the same as the claim pled was that "counsel was ineffective for failing to adequately prepare their expert witness, Dr. Shirley Taylor, for cross-examination" by not having apprised her of the two alleged jail occurrences as a failure to prepare for cross-examination is the same claim as failing to prevent impeachment since the impeachment of Taylor occurred on cross-examination.

Dorsey v. State,448S.W.3d276(Mo.banc2014).

XII.

INSTRUCTIONAL ERROR INEFFECTIVENESS

The motion court clearly erred denying the claim counsel was ineffective for failing to offer alternative penalty instructions or modified instructions to the MAI submitted instructions because the pleadings included an allegation of ineffective assistance of counsel.

Rompilla v. Beard,545U.S.374(2005);

Wiggins v. Smith,539U.S.510(2003).

ARGUMENT

I.

BOOT SHANK AGGRAVATION

The motion court clearly erred denying the claim counsel was ineffective for failing to present evidence mitigating Michael's *Alford* plea to possession of a prohibited item, a boot shank, when counsel failed to investigate and present evidence inmate Hurt was responsible for the shank being in Michael's radio and coerced Michael to keep it there because inmate O'Hara's and mitigation specialist Miller's hearsay testimony was both highly relevant to the jury's punishment decision and reliable, and therefore, admissible under *Green v. Georgia*.

Further, counsel was ineffective for failing to present the shank *Alford* plea transcript highlighting the prosecutor's statement the plea was done as an *Alford* plea because Michael had reported another inmate put the shank in his radio and coerced Michael to keep it and Michael's *Alford* plea meant he was not admitting guilt and pleading only because he believed that the state might be able to persuade a jury to convict.

Respondent has argued that inmate O'Hara's and mitigation specialist Miller's testimony was inadmissible hearsay and not shown to be reliable(Resp.Br.19-20). While their testimony was hearsay, it was relevant and reliable, and therefore, admissible under *Green v. Georgia*,442U.S.95,95(1979).

In *Green*, defendant Green and co-defendant Moore were charged with the rape and murder of Teresa Allen. Moore was separately tried and convicted of both and death sentenced. *Green*, 442 U.S. at 95. Green was also convicted of murder and sentenced to death. *Id.*95. The evidence at Green's trial showed that he and Moore abducted Allen from her work and acting either in concert or separately raped and murdered her. *Id.*96.

At Green's penalty phase, he attempted to prove that he was not present when Allen was killed and had not participated in her death. *Green*, 442 U.S. at 96. Green attempted to introduce testimony from Thomas Pasby, but that evidence was excluded as hearsay. *Id.*96. Green had sought to introduce that Moore had told Pasby that Moore shot Allen twice after ordering Green to run an errand. *Id.*96. Pasby had testified for the state at Moore's trial to Moore's statement of sole responsibility for shooting Allen while Green was gone. *Id.*96-97. In closing argument, the state argued that in the absence of direct evidence as to the circumstances of the crime, the jury could infer that Green participated directly in Allen's murder. *Id.*96.

The Court found in *Green* that the exclusion of the Pasby evidence violated due process because it was highly relevant to a critical issue in the punishment phase and there were substantial reasons to assume its reliability. *Id.*97. The evidence was reliable because Moore made the statement spontaneously to a close friend, there was evidence corroborating Moore's confession, and the statement was against Moore's interest. *Id.* 97. On the issue of reliability the *Green* Court stated the following: "Perhaps most important, the State considered the testimony sufficiently reliable to

use it against Moore, and to base a sentence of death upon it." *Id.*97. Under circumstances like those presented in *Green*, the Court held "'the hearsay rule may not be applied mechanistically to defeat the ends of justice."' *Id.*97(quoting *Chambers v. Mississippi*,410U.S.284,302(1973)).

This Court had the occasion to apply *Green* to order a new penalty phase in *State v. Phillips*,940S.W.2d512,516(Mo. banc1997). In *Phillips*, respondent failed to disclose a police audiotaped statement given by witness Hagar in which Hagar reported that the homicide co-defendant (Minster) told Hagar that Minster and his defendant mother (Phillips) killed the victim (Plaster) and that Phillips drove while Minster scattered the victim's body parts from a car. *Id.*516. The recorded statement included Hagar's recounting that Minster said that he killed Plaster and dismembered her body. *Id.*516.

This Court rejected Phillips' failure to disclose exculpatory evidence, required under *Brady v. Maryland*,373U.S.83(1963), as to guilt phase because the fact that Phillips may have committed the homicide with Minster did not exonerate her. *Phillips*, 940 S.W.2d at 517. However, this Court found that Minster's statements that it was him who dismembered the victim's body was exculpatory and material to Phillips' punishment. *Id.*517. The evidence of Minster's role in the dismemberment was exculpatory because it showed Phillips' involvement in the dismemberment, if any, was tangential, and that Minster, more than Phillips, was the depraved actor. *Id.*517. Further, the undisclosed evidence was exculpatory because the only

aggravating circumstance found to warrant death against Phillips was depravity of mind based on dismemberment of the victim's body. *Id.*517.

This Court ordered a new penalty phase for Phillips, despite respondent's argument that any testimony from Hagar about Minster's role in the dismemberment was hearsay, and therefore, inadmissible. *Phillips*, 940 S.W.2d at 517. This Court agreed that Hagar's recitation of Minster's statements was hearsay and did not fall within any recognized hearsay exception. *Id.*517. In an all concur opinion, this Court rejected respondent's hearsay argument because the evidence was admissible in penalty phase as required under *Green v. Georgia*,442U.S.95(1979). *Phillips*, 940 S.W.2d at 517. Under *Green*, hearsay testimony cannot be excluded where the testimony was highly relevant to a critical issue in the punishment phase and substantial reasons exist to assume the reliability of the hearsay statements. *Phillips*, 940 S.W.2d at 517. This Court noted that in *Green* the particular indicia of reliability factors were: (1) the statements were made spontaneously to a close friend; (2) the statements were corroborated by other evidence; and (3) the statements were against interest. *Id.*517 (also citing to *Chambers v. Mississippi*,410U.S.284,300-01(1973)). This Court determined that Minster's statements were relevant and reliable such that they would have been admissible and a new penalty phase was required. *Phillips*, 940 S.W.2d at 517-18.

In analyzing how Minster's statements were reliable, this Court took a practical substantial satisfaction approach, rather than a rigid strict one, to applying factors highlighted in *Green*. *Phillips*, 940 S.W.2d at 517-18. Minster was not a close friend

to Hagar. *Id.*517-18. The content of what was contained on the audiotape, as to the gruesome details of the offense as reported by Minster to Hagar, was consistent with what the police investigation uncovered. *Id.*517-18. Statements that Hager could testify about were against Minster's penal interest. *Id.*517-18.

In the direct appeal *State v. McLaughlin*,265S.W.3d257,274(Mo.banc2008) and the corresponding postconviction action *McLaughlin v. State*,378S.W.3d328,347-48(Mo.banc2012) (Resp.Br.20), this Court rejected claims evidence was admissible under *Green* (and *Phillips*) because that evidence did not exculpate McLaughlin as the evidence did not prove McLaughlin's brother committed the homicide, the evidence was not shown to be reliable, and the evidence was not highly relevant to a critical punishment issue.

Michael's case is like *Phillips*, and unlike *McLaughlin*, because O'Hara's testimony was highly relevant to punishment and was reliable. O'Hara's testimony was relevant because the boot shank was a centerpiece of respondent's case. The shank was highlighted from start to finish in respondent's case. In opening statement, the jury heard that while Michael was confined at Potosi on this case that he "decides he needs a weapon" and he was found in possession of "a boot shank, a weapon you would cut up somebody with."(Ex.1p.553). In closing argument, the jury was told death was appropriate because of the boot shank(Orig.App.Br.55-56). Additionally, O'Hara's testimony was relevant because respondent used the shank to repeatedly attack Dr. Taylor's opinions during cross-examination(Orig.App.Br.56-57).

At Michael's shank guilty plea, the court asked the prosecutor to recite what respondent's evidence would show had the case proceeded to trial(Ex.68p.11). The prosecutor informed the court that respondent's case would have been as follows. On June 6, 2006, Michael was housed at Potosi Correctional Center(Ex.68p.11). The evidence would show that Correctional Officer Arthur Warren acted "on a tip from a reliable informant" when he was told that Michael had a weapon hidden in his radio in his cell(Ex.68p.11). Officers at Potosi seized Michael's radio and took it apart(Ex.68p.11). Inside the radio there was recovered a long narrow sharpened at one end piece of metal, a boot shank, which can be used as a cutting weapon(Ex.68p.11). The Potosi staff then wrote-up Michael for possession of dangerous contraband and a disciplinary hearing was conducted(Ex.68p.12). At the disciplinary hearing, Michael acknowledged being aware of the shank, but indicated another inmate put it in his radio while that inmate directed Michael to leave it there because it was in Michael's best interest(Ex.68p.12). The prosecutor stated that Michael thereby acknowledged that he knowingly possessed the boot shank, which was a cutting type weapon(Ex.68p.12).

The plea court asked Michael whether what the prosecutor had recited reflected his understanding of what the state's evidence would be if the case proceeded to trial and Michael acknowledged it was(Ex.68p.12). The court also asked Michael if the state's recitation of what its evidence would show entered into his decision to enter an *Alford* plea and Michael indicated that was the case(Ex.68p.12-13).

The prosecutor informed the court that the plea agreement was that Michael would be sentenced to five years to be served concurrently with any and all other sentences Michael already had(Ex.68p.13). Michael indicated that was his understanding(Ex.68p.13).

O'Hara's testimony was reliable and was admissible under *Green* and *Phillips*. Like in *Phillips* there are substantial reasons to assume the reliability of O'Hara's testimony.

Hurt's official court casefile reflected that in July, 1981, he killed his prison cellmate using **"a home-made knife"** to stab him many times(Ex.73p.2-3)(emphasis added). Hurt was convicted of capital murder and sentenced to life in prison and ineligible for parole for fifty years(Ex.73p.14). At Michael's shank guilty plea, the prosecutor told the court that inside Michael's radio there was found a long narrow sharpened at one end piece of metal, a boot shank, which can be used as a cutting weapon(Ex.68p.11). The similarity between Hurt's having used an improvised "home-made knife" (Ex.73p.2-3) to stab and kill his cellmate and a boot shank which could be used as a cutting weapon for the same purposes (Ex.68p.11) demonstrates the reliability in what O'Hara reported about Hurt. Further, Hurt's history of using an improvised stabbing instrument to kill his cellmate explains why Michael would have acquiesced to Hurt's directive to leave the shank in Michael's radio.

Another factor demonstrating the reliability of O'Hara's reporting that Hurt was responsible for the shank being in Michael's radio is shown through the prosecutor telling the plea court that the shank came to Corrections officials' attention

based "on a tip from a reliable informant"(Ex.68p.11). O'Hara testified that Hurt had a reputation for violence within the prison system and for being a snitch who set up other inmates for charges(2ndPCRTr.226-27). The shank coming to the attention of Corrections officials from an informant and Hurt's reputation as a snitch informant, who sets up other inmates to get charges, demonstrates further the reliability of O'Hara's hearsay testimony that Hurt was responsible for the shank being in Michael's radio.

Moreover, the reliability of O'Hara's reporting that Hurt was responsible for the shank is bolstered by Michael's Corrections records. Counsel Slusher acknowledged that they did not request a copy of Michael's Corrections property records, which reflected Michael never owned a pair of boots(Ex102p.59 relying on property records Ex.16). Because Michael never owned any boots, the source of the shank had to be someone other than Michael.

Additionally, what O'Hara reported Hurt did to Michael was reliable because of the potential consequences to O'Hara in coming forward to testify as he did. Inmate witnesses place in jeopardy their own personal safety while in prison. *See*, *e.g.*, risk discussion in *State v. Juarez*,26S.W.3d346,352(Mo.App.,W.D.2000). There was substantial risk to O'Hara's personal safety in coming forward to offer testimony exposing Hurt as the person responsible for the shank being in Michael's radio and that Hurt had a reputation for violence and setting up other inmates for charges(2ndPCRTr.226-27). The risk to O'Hara was particularly significant because

of Hurt's history of stabbing to death his prison cellmate using "a home-made knife"(Ex.73p.2-3).

This Court should consider these multiple factors in conjunction with one another and treat this case in the same manner it did Phillips' case. In *Phillips*, this Court looked to a collection of factors and employed a practical substantial satisfaction approach. Like in *Phillips*, there are multiple independent circumstances that support the reliability of what O'Hara reported as to Hurt's role in the shank being found in Michael's radio.

Respondent has argued that Michael's own reporting that another inmate put the shank in his radio was inadmissible hearsay so that mitigation specialist Miller's recounting of Michael's reporting to her that he only kept the shank there because another inmate threatened to harm him if he did not keep it (Orig.App.Br. 46 relying on 2ndPCRL.F.194) would not have been allowed(Resp.Br.19). In reciting the evidence at the shank *Alford* plea, the prosecutor informed the plea court that at a Corrections disciplinary hearing Michael reported that another inmate had put the shank in Michael's radio and told Michael that it was in Michael's "best interest" not to remove the shank(Ex.68p.12). In *Green*, the Court considered the Pasby reporting of the Moore hearsay particularly reliable to be admissible in *Green* because the state had relied on the Pasby evidence in its case against Moore. *Green*, 442 U.S. at 97. Here, the state **agreed** to an ***Alford*** guilty plea[1], that did not require Michael admit

[1] *North Carolina v. Alford*,400U.S.25(1970).

guilt, and did so because of Michael's reporting that another inmate had told Michael to leave the shank in his radio and not to remove it(Ex.68p.12). The state's acknowledgment of Michael having reported at the Corrections hearing on the shank that someone placed it in his radio and coerced him to leave it there as a part of respondent's agreement to doing an *Alford* plea (Ex.68p.12) is analogous to the prosecution having relied on Pasby's evidence in its case against Moore so as to make Pasby's evidence then admissible in *Green*, and thereby, lends credibility to the reliability of Michael's reporting to mitigation specialist Miller. *See, Green, supra*. For these reasons under *Green*, Miller's testimony would have been admissible, despite its hearsay nature.

Respondent relies on *State v. Marshall*,410S.W.3d 663,669-73(Mo.App.,S.D.2013) to argue that Michael's reporting that he was coerced into keeping the shank in his radio was inadmissible self-serving hearsay. While *Marshall* does state such a general rule because the prosecutor at the shank *Alford* plea included Michael's recounting that he was coerced into maintaining the shank in his radio, as an explanation for why the plea was being done as an *Alford* plea without an admission of guilt, Michael's reporting became admissible under *Green*.

Respondent presented its shank evidence by reading from a docket entry on the plea (State's Ex.53) and the amended complaint (State's Ex.48). *See* (Orig.App.Br.42).

Even if O'Hara's and Miller's testimony were not admissible under *Green*, the jury still could have learned that Michael was coerced to keep the shank in his radio

by another inmate had counsel admitted the plea transcript into evidence as the 29.15 motion pled counsel should have done(2ndPCRL.F.48). *See* plea transcript Ex.68p.11-12. The jury would have heard that the prosecutor told the plea court that an *Alford* plea was being entered because Michael had said that another inmate put the shank in his radio and Michael kept the shank there because that inmate directed him to do that. *See* plea transcript Ex.68p.11-12.

Respondent has argued that counsel's failure to admit the plea transcript was not prejudicial because the jury heard Dr. Taylor testify that Michael had told her that he was holding the shank for another inmate, and therefore, evidence in the plea transcript was cumulative(Resp.Br.23 relying on Ex.1p.1150-51). Taylor's opinions and credibility, however, were significantly undermined through respondent's cross-examination of her about the shank(Orig.App.Br.56 and Ex1p.1150-51). When Taylor testified that she knew that Michael was holding the shank for someone else the prosecutor countered stating that was what Michael had told Taylor and asked Taylor "should we believe him?"(Ex1p.1150-51). On re-cross, the prosecutor attacked Taylor stating that Taylor did not have the information about Michael's mimicking shooting a guard, "bragging about killing," and having "a boot shank" (Ex.1p.1163). Taylor agreed that she would have liked to have known about those matters and the prosecutor countered that he had given the information to counsel(Ex.1p.1164). Taylor's testimony about Michael's reporting to her on the shank was not cumulative because of how the prosecutor discredited Taylor's reporting of what Michael had told her.

Presenting the content of the plea transcript to the jury was also critical because it would have conveyed to the jury the significance of Michael having entered an *Alford* plea when considered in the context of the prosecutor's having informed the court that an *Alford* plea was being entered, rather than a plea admitting guilt, because Michael had maintained that another inmate had put the shank in his radio and coerced him to keep it there(Ex.68p.11-12).

The shank plea court's examination included the following:

> THE COURT: You said Mr. Tisius was going to be an Alford plea; is that correct?
>
> MR. HEDGECORTH (DEFENSE COUNSEL): That's correct, Judge.
>
> Q. (By the Court): Mr. Tisius, I have been advised that you wish to enter an Alford plea of guilty to this charge. I want to take a moment here and go over an Alford plea with you and be sure you understand what an Alford plea of guilty is.
>
> An Alford plea of guilty is entered in a case where the defendant does not wish to admit his guilt to the offense that is charged. However, he's aware of what the State's evidence would be against him if the matter were to proceed to a jury trial. He's discussed that evidence with his attorney, and he thinks there's a good chance that he might be convicted on that evidence if he were to take his chances with a jury.

Therefore, rather than do so, he decides to enter what we call an Alford plea of guilty. The legal consequences of an Alford plea of guilty are the same as a regular plea.

Frequently there is a plea bargain involved, and I'm sure there is one in your case, and we'll talk about that in a little bit, but that basically is what an Alford plea of guilty is.

Is that what you understood it to be, sir?

A.(Defendant Tisius): Yes.

Q. And is that the kind of plea that you wish to enter to this charge after discussing all the evidence with your attorney?

A.(Defendant Tisius): Yes.

Q. I'll ask you then, Mr. Tisius, how do you plead to this charge, the class B felony of possession of a prohibited article in the Department of Corrections? Do you enter an Alford plea of guilty to that charge?

A. Yes.

Q. Hereafter, Mr. Tisius, any time I refer to your plea or plea of guilty, I want you to understand that I'm referring to it as the Alford plea of guilty that we have discussed. Do you understand?

A. Yes.

(Ex.68p.7-9).

If the plea transcript had been presented for the jury's consideration, it would have learned that Michael did not admit guilt and maintained from the outset that

someone had placed the shank in his radio and coerced him to keep it there. Counsel Slusher believed that the jury knowing that Michael's plea had been an *Alford* plea would have been powerful mitigation(Ex.102p.115). Moreover at trial, Slusher had objected to the evidence of the shank conviction because Michael had entered an *Alford* plea where he did not concede guilt(Ex.1p.886-87).

Respondent asserts that counsel "succeeded" in preventing the state from reading to the jury language found in the amended complaint (State's Ex.48) that the shank could be used to endanger the safety of other inmates and Corrections staff and that introducing pictures showing the shank was unsharpened would have opened the door to the evidence of dangerousness(Resp.Br.22 relying on Ex.1p.886,888-89). In the prosecutor's opening statement, the jury heard that very same information contained in the shank charging document when the prosecutor told the jury that while Michael was confined at Potosi on this case he "decides he needs a weapon" and he was found in possession of "a boot shank, a weapon you would cut up somebody with."(Ex.1p.553). Counsel did not have to fear opening the door to any unfavorable evidence because the prosecutor told the jury in opening statement about the information contained in the charging document about the shank's dangerousness and why it was a basis for respondent seeking death.

Respondent also asserts the failure to admit photos of the unsharpened shank would not have altered the result because the jury could have concluded that in its then form, or if altered, the shank could have been used to cause serious injury(Resp.Br.21-22). The photos of the boot shank were not as bad as Slusher

thought because he was expecting the shank to be sharpened into a weapon-looking instrument and that was not the case(Ex.102p.62). Slusher thought the jurors' mental image of the shank would have been the same as his - sharpened into a weapon(Ex.102p.62). It was critical for the jury to have seen the unsharpened shank pictures in order to counter the image that Slusher said was created for him and the jury that the shank was already sharpened and useable as a stabbing instrument, when it was not. The jury seeing that the shank was in an unsharpened state would have reinforced the view of Hurt having coerced Michael into keeping it in Michael's radio since it was not immediately capable of being used as a stabbing instrument.

Throughout respondent argues counsels' strategy was to not contest the shank matters(Resp.Br.18,23). Respondent asserts that contesting the shank evidence was contrary to counsel's strategy to keep the shank information away from the jury and avoid the jury learning Michael knowingly possessed the shank(Resp.Br.23). Both Slusher and McBride testified that they knew respondent intended to use the shank evidence as aggravation(Ex.102p.41-42;2ndPCRTr.366). The jury was told in opening statement that while Michael was confined at Potosi on this case that he "decides he needs a weapon" and he was found in possession of "a boot shank, a weapon you would cut up somebody with."(Ex.1p.553). The shank evidence was not going to be kept away from the jury. Counsel had a duty to neutralize the aggravating quality of the shank evidence under *Ervin v. State*,80S.W.3d817(Mo.banc2002). (Orig.App.Br.49-51). Moreover, foregoing presenting evidence because it contains something harmful is unreasonable when its harm is outweighed by its helpful value.

Hutchison v. State,150S.W.3d292,305(Mo.banc2004) (overruled on grounds not relevant here *Mallow v. State*,439S.W.3d764,770 n.3(Mo.banc2014)). *See Williams v. Taylor*,529U.S.362,395-96(2000)(counsel ineffective in failing to present evidence of severe abuse and defendant's limited mental capabilities where not all the evidence was favorable to defendant). The evidence counsel could have presented through O'Hara, Miller, the shank pictures, the guilty plea transcript, and Michael's own statements themselves were all favorable when compared to allowing respondent's shank evidence and closing arguments to go unchallenged. In any event, to the extent that respondent might have tried to cast these matters unfavorably, the helpful value of such evidence, individually and in conjunction with one another, outweighed any potential harm. *See*, *Hutchison* and *Williams v. Taylor*.

Respondent relies on *Worthington v. State*,166S.W.3d566,577-78(Mo.banc2005) to assert that omitted evidence that fails to unqualifiedly support a defense is not ineffectiveness(Resp.Br.23). In *Worthington*, counsel failed to contest the misreporting of a single incident that was part of many incidents, relied on by the state's psychological expert, and which was not critical to the expert's opinion. *Id.*576-77. The shank evidence was a particularly critical piece of evidence respondent relied on to argue for death and counsel was obligated to rebut it. The proper portrayal of Michael as victimized by Hurt, rather than someone who was calculating how to hurt people at Potosi, was crucial to avoiding a death sentence. *See, Ervin* (Orig.App.Br.49-51).

Respondent asserts that apprising the jury about the nature of an *Alford* plea would have furthered the prosecutor's theme that Michael was unremorseful(Resp.Br.24 relying on Ex.1p.1140,1146-51). For this proposition, respondent references the cross-examination of Dr. Taylor about Michael's purported question to jail guard Petri as bragging about having shot the jail guards as evidence of lack of remorse. Counsel's duty under *Ervin* was to show Hurt victimized Michael and that Michael was not a threat to others at Potosi which would have happened had counsel investigated Michael's *Alford* plea. Establishing Michael was coerced to possess the shank by another inmate who killed his cellmate would not have caused the jury to perceive Michael as unremorseful.

Respondent asserts that even if the jury had heard that Hurt coerced Michael to keep the shank and believed it, this evidence would have shown that Michael was willing to commit crimes in Corrections at the request of another inmate(Resp.Br.24). The evidence that could have been presented would have cast Michael as having been victimized by another inmate who had stabbed to death his cellmate such that Michael did not voluntarily participate in committing a prison crime.

Counsel was ineffective and a new penalty phase is required.

II.

FAILURE TO REBUT PETRI'S REPORTING OF STATEMENT AS "BRAGGING"

The motion court clearly erred denying counsel was ineffective for failing to rebut Michael's question to Boone County guard Petri reflected "bragging" that he killed two guards by calling Dr. Peterson to testify another interpretation was Michael was telling the listener he was frightened because the amended motion in fact pled: Peterson should have been called to testify Michael suffers from PTSD and his associated "lack of maturity and increased impulsivity makes him more likely to say the first thing that comes to his mind when he is fearful" such that Peterson's finding on Michael's statement would have mitigated Petri's testimony.

Peterson's testimony was the proper subject of expert testimony because it explained how Michael's statement to Petri was a reflection of his PTSD diagnosis, and therefore, a subject lay jurors are not conversant on.

Peterson's testimony was critical as Dr. Taylor was not even aware of the Petri statement until it was brought out on cross-examination and her testimony was discredited for not knowing about it.

Petri testified that she interpreted Michael's statement as "bragging" so that counsel's closing argument directly contradicting Petri's testimony was unreasonable and incredible.

Respondent asserts that the claim pled is not the same as the one briefed(Resp.Br.26-30 relying on 2ndPCRL.F.55-56). Respondent's brief focuses on only one portion of a multi-faceted claim. Respondent's argument is directed at the portion of the claim pled that Dr. Peterson should have been called to testify about Michael's fears associated with threats from another inmate(2ndPCRL.F.55). That portion of the claim **ends at 2ndPCRL.F.55**.

Respondent's brief ignores that a separate distinct claim **begins at 2ndPCRL.F.56**. The claim pled there, which is the claim briefed here, was the following:

> **Counsel was ineffective for failing** to contact Dr. Stephen Peterson, a psychiatrist, and to call Dr. Peterson to testify. Dr. Peterson would have testified that if Michael Tisius had made these statements to Ms. Petri, this was nothing more than adolescent-type behavior and meant nothing in regard to whether Michael is now a danger to others at a correctional facility. Dr. Peterson would have testified that this type of behavior fits with his diagnosis referred to elsewhere in this motion that Michael is **suffering from PTSD** and stuck developmentally in **the latent stage of adolescence. Michael is fearful as the result of the abuse he suffered as a child. His lack of maturity and increased impulsivity makes him more likely to say the first thing that comes to his mind when he is fearful.** If this information had been presented to the jury, it would have mitigated the aggravating evidence of Jacqueline Petri's testimony.

(2ndPCRL.F.56).

The retrial jury was read Dr. Peterson's prior testimony of multiple diagnoses which included childhood onset PTSD(Orig.App.Br.15 relying on Ex.5p.235,265-66,268). At the most recent 29.15 hearing, Dr. Peterson was asked right out of the quoted portions of the pleading, *supra*, whether Michael's statement to Petri reflected "latency stage, maturity, and so forth?"(2ndPCRTr.324). Dr. Peterson responded that Michael's statement to Petri was subject to an interpretation other than "bragging"(2ndPCRTr.324). That interpretation was that Michael was telling the listener he was frightened and why it was important for him to leave the Boone County Jail(2ndPCRTr.324).

Respondent asserts Peterson's testimony was inadmissible because it was within the realm of the jurors' general knowledge(Resp.Br.30). The test for whether expert testimony is proper is whether the subject is one for which lay jurors are not conversant. *State v. Rios*,314S.W.3d414,423(Mo.App.,W.D.2010). Lay jurors are not conversant in how the Petri statements were linked to Peterson's diagnosis of PTSD, and therefore, Michael was not bragging. For that reason, Peterson's testimony was admissible.

Respondent also argues that Peterson's testimony was inadmissible as speculative (Resp.Br.30-31 citing *Vittengl v. Fox*,967S.W.2d269,279(Mo.App.,W.D.1998). In Peterson's testimony he merely acknowledged that one interpretation of Michael's Petri statement was the one Petri and the prosecutor attributed to it(2ndPCRTr.324). Peterson then offered his own

alternative explanation of Michael's statement(2ndPCRTr.324). Peterson's testimony did not become speculative simply because he acknowledged one explanation could be respondent's version. The precise point of Peterson's testimony as mitigation was that there was an alternative to respondent's version and the jury needed to hear the alternative.

Peterson's testimony is unlike the *Vittengl* case testimony. Vittengl sued her apartment complex owner on a lack of lighting negligence theory for a violent, vicious criminal assault perpetrated against her outside her apartment. *Vittengl*,967S.W.2d at 273. The perpetrator was never identified. *Id.*272-73. Vittengl called a psychologist to testify that the responsible person was a "psychopath." *Id.*273. That testimony was impermissible because the psychologist was not applying any specialized knowledge as the jury could have arrived at the same conclusion without his testimony and the psychologist's opinion did not involve the practice of psychology. *Id.*279. In contrast, Dr. Peterson's testimony linked Peterson's PTSD diagnosis and Michael's documented personal experiences with explaining how Michael's Petri statement could be reflective of Michael's fears and not "bragging."

Respondent asserts counsel was not ineffective because Dr. Taylor testified that the Petri statement could have been "an identification factor"(Resp.Br.31 relying on Ex.1p.1163). That answer was given in response to the prosecutor's following question:

> Q: Well, you didn't have information about him trying to mimic shooting a guard. You didn't have the information about bragging about killing. You didn't have the information about a boot shank.

(Ex.1p.1163). Taylor's answer was given in response to a question that challenged the premise of all her opinions favorable to imposing life as being incredible because she was unaware of these three items of aggravation and the subject of Points I - III. Thus, Taylor's testimony accomplished nothing for purposes of rebutting Petri's view of Michael's statement.

Respondent also asserts that counsel argued that Petri's statement did not constitute bragging based on counsel's characterization of Petri's demeanor(Resp.Br.31). At the original trial, respondent's guilt phase rebuttal closing argument finished with urging the jury to convict Michael of first degree murder based on the statements Petri attributed to Michael(Orig.TrialTr.944-45). *See* Orig.App.Br.60. That argument included that the statement to Petri showed Michael was "proud" of what he had done, it was "part of his identity," and it made him "a big man"(Orig.TrialTr.944-45). At the retrial, defense counsel McBride elicited from Petri on cross-examination "He was, like, you know, **Look at me**. I'm the one that killed those two jailers. That's how I took it."(Ex.1p.910)(emphasis added). Petri's testimony was that Michael's statement was clearly "bragging" so that McBride's argument directly contradicting Petri's testimony was illogical and incredible. Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994); *Butler v.*

State,108S.W.3d18,25(Mo.App.,W.D.2003). McBride's argument was not objectively reasonable and sound in light of Petri's testimony.

A new penalty phase is required.

III.

ALLEGED GUN HAND GESTURES

The motion court clearly erred denying counsel was ineffective for failing to investigate and present evidence rebutting Michael made hand gestures from his cell toward guard Harmon mimicking firing a gun in that reasonable counsel would have investigated and presented pictures Harmon was mistaken as both party's investigators photos, which accurately duplicate the correct lighting conditions of lights out in Michael's cell, as testified to by Harmon, on their face without opinion testimony from those investigators as to what they considered viewable establish Harmon could not have seen what she reported and Michael was prejudiced by the failure to rebut Harmon's aggravation.

Respondent asserts that reasonable counsel was not required to present photos that would have established Harmon could not have seen what she reported because the 29.15 evidence presented only competing testimony from each party's investigator as to what was visible(Resp.Br.37-38), counsel did enough on cross-examination of Harmon (Resp.Br.35-37), and counsel's strategy was to not have a mini trial on such matters(Resp.Br.35).

Respondent's investigator, Greene shot photo Exhibits 76, 77, and 78(2ndPCRTr.171-80). Exhibits 76 and 77 had lights on in the cell where Michael was housed, even though **Harmon testified at trial the lights in Michael's cell were off**(Ex.1p.899-900). Exhibit 78 had lights off in the cell where Michael was housed(Ex.78). Greene offered the opinion that in all three photos he shot that he

would have been able to see the hand gestures Harmon attributed to Michael(2ndPCRTr.177). Greene testified he **did not know** that Harmon's testimony was that **the lights were off** in Michael's cell(2ndPCRTr.180).

Greene's Exhibits 76 and 77 photos had no relevance here because they were taken with lights on when the lights were off. Thus, Greene's only photo with any relevance was Exhibit 78 with lights off. This Court can and should examine Exhibit 78 because facially standing alone, without testimony from anyone, demonstrates that Harmon could not have seen what she reported **with lights out** because of its darkness.

The investigator for Michael's 29.15 counsel took the Exhibit 74 photo with lights out(2ndPCRTr.184,188). Similarly, this Court can and should examine Exhibit 74 because it facially standing alone, without testimony from anyone, demonstrates that Harmon could not have seen what she reported **with lights out** because of its darkness.

The jurors could have viewed both parties' photos with lights out (Exhibits 74 and 78) and what those photos show in fact conclusively refute what Harmon reported. The motion court's finding that Michael's evidence was inconclusive(Resp.Br.35) was clearly erroneous when the two relevant pictures (Exhibits 74 and 78) are examined on their face without anyone's opinions. Respondent asserts that there was "a lack of clarity in any of the photos" (Resp.Br.37) that simply is untrue and underscores the need for this Court to examine Exhibits 74 and 78. Contrary to respondent's assertion that trial counsel would have had to rely

on investigator opinion testimony (Resp.Br.37) Exhibits 74 and 78 standing alone, without any opinion testimony from either sides' investigator, establish Harmon could not have seen what she reported.

Respondent relies on *Davis v. State*,486S.W.3d898,906(Mo.banc2016) to assert that counsel did enough in challenging Harmon's testimony through their cross-examination(Resp.Br.35-36). In *Davis*, this Court stated that

"the 'duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."'

Davis,486S.W.3d at 906 (quoting *Strong v. State*,263S.W.3d636,652 (Mo.banc2008) which quoted *Rompilla v. Beard*,545U.S.374,383(2005)). Taking photographs of Michael's cell with lights off was investigation reasonable counsel would have conducted. Michael was prejudiced because the lights off photos (Exhibits 74 and 78) do conclusively establish it was impossible for Harmon to have viewed what she claimed.

To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). A movant is prejudiced if there is reasonable probability but for counsel's errors the result would have been different. *Deck v. State*,68S.W.3d418,426(Mo.banc2002). A reasonable probability sufficiently undermines confidence in the outcome. *Id.*426. The failure to obtain lights out photos was a failure to exercise customary skill and diligence of

reasonably competent counsel. *Strickland*. Michael was prejudiced because the lights out photos standing alone establish Harmon could not have seen what she claimed. *Deck*.

The strategy of not wanting "mini trials" (Resp.Br.35) was not a reasonable strategy because: "One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*,80S.W.3d817,827(Mo.banc2002). *See* Orig.App.Br.74-75 detailed discussion.

A new penalty phase is required.

IV.

TAYLOR UNPREPARED

The motion court clearly erred denying the claim counsel was ineffective for failing to prepare Dr. Taylor so that she knew about the alleged Chariton and Boone County Jail occurrences, because the claim pled and the claim briefed are the same as the claim pled was that "counsel was ineffective for failing to adequately prepare their expert witness, Dr. Shirley Taylor, for cross-examination" by not having apprised her of the two alleged jail occurrences as a failure to prepare for cross-examination is the same claim as failing to prevent impeachment since the impeachment of Taylor occurred on cross-examination.

Respondent has argued that the claim pled and the claim briefed are different(Resp.Br.43). Respondent asserts the claim pled was a failure to present evidence whereas the claim on appeal was the failure to prevent impeachment(Resp.Br.43). In fact, the claim pled and the claim briefed are the same.

The amended motion alleged the following:

> Trial counsel was ineffective for **failing to adequately prepare their expert witness, Dr. Shirley Taylor, for cross-examination** regarding aggravating evidence presented to the jury by the State. On cross-examination, Dr. Taylor was not prepared to respond to the State's questioning about two separate incidents that were alleged to have happened at the Chariton County Jail and the Boone County Jail. (Tr. 1149). **If Dr. Taylor had been aware of these incidents, she could have mitigated the State's aggravating evidence**

> **by explaining how Michael's background and mental health affected his behavior in those situations.** Counsel was aware or should have been aware that the State planned to use these two alleged incidents as aggravation to argue that the death penalty was appropriate for Michael; yet, made no attempt to provide this information to their expert before the penalty phase trial. Counsel's failure to provide the information to their expert resulted in prejudice to Mr. Tisius.

(2ndPCRL.F.67)(emphasis added).

The 29.15 pleading alleged that counsel was ineffective for "failing to adequately prepare their expert witness, Dr. Shirley Taylor, **for cross-examination**" by not making her aware of the Petri and Harmon matters(2ndPCRL.F.67) This portion of the pleading was a failure to prevent impeachment and respondent is wrong when it asserts the 29.15 pleadings did not include a claim of "failing to prevent impeachment." (Resp.Br.43). It was because Taylor was unprepared, through not knowing about the Petri and Harmon matters, that she was able to be impeached on cross-examination for not having taken into account those two matters.

The 29.15 pleadings linked the failure to prevent impeachment with the following: "If Dr. Taylor had been aware of these incidents, she could have mitigated the State's aggravating evidence by explaining how Michael's background and mental health affected his behavior in those situations." Because the amended motion alleged the claim that was briefed, the decision in *Dorsey v.*

State,448S.W.3d276,284(Mo.banc2014), relied on by respondent(Resp.Br.43), is inapplicable.

At the retrial Taylor testified Michael suffered from depression, anxiety, and PTSD(Ex.1p.1115). Taylor testified that the shootings were not in keeping with Michael's character and history of passivity and non-aggression, and his remorse(Ex.1p.1118). On cross-examination, Taylor's opinions were attacked as based on incomplete information because she was unaware of the two jail matters(Ex.1p.1149-50,1163-64).

If counsel had apprised Taylor of the allegations involving the two jail incidents, then Taylor could have testified that she had taken into account the reporting of the two alleged jail matters in formulating her findings on Michael's diagnoses, his passive non-aggressive character, and his remorse. The cross-examination attack on Taylor's findings as based on incomplete information would not have been possible had Taylor been informed of the two jail matters and had she known about those matters she could have testified they were accounted for as to her findings and opinions.

A new penalty phase is required.

XII.

INSTRUCTIONAL ERROR INEFFECTIVENESS

The motion court clearly erred denying the claim counsel was ineffective for failing to offer alternative penalty instructions or modified instructions to the MAI submitted instructions because the pleadings included an allegation of ineffective assistance of counsel.

Respondent has asserted that the pleadings did not include a claim of ineffectiveness(Resp.Br.89-91).

The pleadings began by setting forth that Michael was denied a fair trial, due process, right to a fair trial and impartial sentencing, to be free from cruel and unusual punishment, and reliable sentencing(2ndPCRL.F.76). The pleadings then set forth the ways in which the Missouri penalty phase instructions were deficient(2ndPCRL.F.76-77). That was followed by the statement that the U.S. Supreme Court looks to the A.B.A. Guidelines as to matters of effective assistance of counsel and the imposition of the death penalty as set forth in *Rompilla v. Beard*,545U.S.374(2005) and *Wiggins v. Smith*,539U.S.510(2003) (2ndPCRL.F.77). This assertion of ineffectiveness was then followed by a repeating of the ways in which the Missouri penalty phase instructions were deficient(2ndPCRL.F.77-78). This ineffectiveness statement coupled with its reliance on *Rompilla* and *Wiggins* followed by a listing of the deficiencies in the Missouri penalty instructions establishes a claim of ineffectiveness was pled.

A new penalty phase at which the jury is properly instructed is required.

CONCLUSION

For the reasons discussed in the original and reply briefs Michael Tisius requests the following, Points I through XII, this Court should order a new penalty phase. Alternatively, for the reasons set forth in Point XI, this Court should impose life without probation or parole. Lastly, at minimum for the reasons set forth in Point XIII, this Court should order a new penalty phase on the Jason Acton count.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,749 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in August, 2016. According to that program the brief is virus-free.

A true and correct copy of the attached reply brief has been served electronically using the Missouri Supreme Court's electronic filing system this 10th day of August, 2016, on Assistant Attorney General Richard A. Starnes at richard.starnes@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
William J. Swift