

IN THE  
MISSOURI SUPREME COURT

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RICHARD STRONG, )  
 )  
 )  
 Appellant, )  
 )  
 vs. ) No. SC 88311  
 )  
 STATE OF MISSOURI, )  
 )  
 )  
 Respondent. )

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI  
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION VI  
THE HONORABLE GARY GAERTNER, JUDGE

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APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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## JURISDICTIONAL STATEMENT

Appellant, Richard Strong, was jury tried and convicted of two counts of first degree murder, § 565.020 RSMo 2000,<sup>1</sup> in the Circuit Court of St. Louis County. The jury assessed punishment at death. This Court affirmed in *State v. Strong*, 142 S.W.3d 702 (Mo. banc 2004).

Mr. Strong filed a *pro se* Rule 29.15<sup>2</sup> motion, which appointed counsel amended. After an evidentiary hearing, the motion court entered findings of fact and conclusions of law denying relief on all claims (L.F. 400-488).<sup>3</sup>

Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo. Const. (as amended 1982); Standing Order, June 16, 1988.

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<sup>1</sup> All statutory references are to RSMo 2000, unless otherwise indicated.

<sup>2</sup> All references to rules are to VAMR, unless specified otherwise.

<sup>3</sup> Record citations are as follows: evidentiary hearing transcript (H.Tr.-Volume I; 2H.Tr.-Volume II); legal file of 29.15 appeal (L.F.); trial transcript (Tr.); direct appeal legal file (D.L.F.); and exhibits (Ex.). Mr. Strong requests that this Court take judicial notice of its files in *State v. Strong*, S.Ct. No. 85419. Judge Gaertner took judicial notice of the trial transcript, legal file, and this Court's opinion at the evidentiary hearing (H.Tr. 3-4).

## STATEMENT OF FACTS

On November 23, 2000, police received a 911 call from Eva Washington's apartment in St. Louis County (Tr. 999-1005).<sup>4</sup> Within one to two minutes, officers arrived at the apartment and knocked on the front and back doors (Tr. 1082-83, 1159). Richard Strong came out of the back door locking it behind him (Tr. 1089, 1090-91, 1169, 1241-43). He made inconsistent statements, telling one officer Washington was asleep and another that she was at work (Tr. 1090, 1168, 1169). When officers said they were going to kick the door in, Strong ran from them (Tr. 1097, 1172, 1246). They chased him and arrested him (Tr. 1097, 1101, 1105-06, 1246). Strong repeatedly said, "shoot me, shoot me." (Tr. 1098, 1143, 1174-75, 1247). Officers said Strong admitted killing Washington and her two-year-old daughter, Zandrea Thomas (Tr. 1139, 1141, 1283).<sup>5</sup> Officers found blood on Strong (Tr. 1171, 1245).

Inside the apartment, officers found Washington and Thomas, stabbed to death (Tr. 1018-1029, 1181, 1252-53, 1317-18, 1369, 1370, 1390). Strong and Washington's six-month-old baby, Alisha, was not hurt (Tr. 1184, 1250). Officers questioned Strong and videotaped the statement (Tr. 1227-34, Ex. B).

Strong's mother, Joyce Knox, hired Charlie Shaw to represent him, paying \$15,000 (Ex. 37, at 48-49). She borrowed \$11,000 of the fee from her employers,

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<sup>4</sup> For a detailed account of the evidence presented at trial, *see State v. Strong*, 142 S.W.3d 702 (Mo. banc 2004).

<sup>5</sup> This statement was not in the police reports (Tr. 1139).

for whom she had cleaned over the past 23 years (Ex. 37, at 50-51). Shaw told Knox he thought Strong would do seven years for manslaughter (Ex. 37, at 52). A few months later, Shaw died and one of his associates, Brad Dede, took over Strong's representation (Ex. 37 at 52). Patrick Malone assisted Dede (Ex. 38 at 13, Ex. 39 at 5-6).

Malone had graduated from law school the previous year and had never tried a case to a jury (Ex. 39 at 6). Malone did whatever Dede asked (Ex. 39 at 8). His primary responsibility was to interview penalty phase witnesses (Ex. 39 at 9).

Knox gave Dede money for some documents, but she could not afford to pay for experts or other expenses (Ex. 37 at 53). Dede thought the \$15,000 fee was too low for a first-degree murder case and would have charged at least \$50,000 (Ex. 38 at 9, 10). He did not hire mental health experts, a mitigation specialist, or any other expert for either phase (Ex. 38 at 15, 92-93). He considered hiring an expert. He wrote to Knox telling her the cost would be about \$5,000 (Ex. 38 at 92-93, Ex. 23). He never considered requesting funds for an expert under *Ake*.<sup>6</sup> Strong told him he did not want an expert anyway (Ex. 38 at 92-93).

Jury selection began on February 26, 2003 (Tr. 9). The prosecutor peremptorily struck jurors Luke Bobo and Sylvia Stevenson for religious reasons (Tr. 910-11, 919). Counsel objected, based on the jurors' races, but not because of the religious reasons (Tr. 908).

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<sup>6</sup> *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Guilt phase lasted two days (Tr. 930-1493). Dede called no witnesses (Tr. 1425). He offered Strong's videotaped statement into evidence, but the trial court rejected it (Tr. 1230-34, Ex. B). The court prohibited Dede from asking Officer Hawkins about the interrogation (Tr. 1232). In closing, Dede argued that the State had failed to prove its case beyond a reasonable doubt (Tr. 1453-67). The jury deliberated from 6:55 p.m. to 7:15 p.m., took a break to eat, and then returned guilty verdicts at 8:04 p.m. (Tr. 1484-85).

During penalty phase, the prosecutor presented Strong's prior bad acts against his ex-wife, Kimberly Strong, a girlfriend, Lutricia Braggs, and Washington (Tr. 1536-1610). He elicited, without objection, Washington's statements to police about a prior assault (Tr. 1573). He called two victim impact witnesses, Zandrea's father (Tr. 1611-12), and Washington's friend, Michelle Brady (Tr. 1583, 1602-05).

Defense counsel presented evidence to show that Strong was a hard worker and good to co-workers (Tr. 1614-17, 1620-23). He loved his family, loved children and was always good to children, whether his or someone else's (Tr. 1624-27, 1629, 1630-32, 1634-37, 1646-49, 1650-52, 1654-56, 1657-60, 1663-66). Strong attended church and brought Washington and his children with him (Tr. 1644-45). Since being jailed, he only had minor infractions and had adjusted well to confinement (Tr. 1638-40). He got along well with others and was not a trouble-maker (Tr. 1640).

During the State's closing, the prosecutor presented a power point presentation on a five foot by five foot screen (Tr. 1720-21, D.L.F. 580, Ex. 38 at 139-243. He superimposed pictures of Strong, including one of him in an orange jumpsuit, of Washington and Thomas, and other exhibits, like the knife used in the stabbings. *Id.* Courtroom spectators gasped when they saw the presentation (Ex. 39 at 46-47). One person had to get up and leave the courtroom (Ex. 39 at 47).

The jury sentenced Strong to death on both counts (Tr. 1759). This Court affirmed the convictions and sentences on direct appeal. *State v. Strong, supra.*

Strong filed a Rule 29.15 motion (L.F. 5-10). Appointed counsel asked leave of the court to interview Strong's petit jurors (L.F. 22-27). The court denied the request (L.F. 40). Counsel filed an amended motion alleging trial counsel's ineffectiveness (L.F. 42-382).<sup>7</sup> Counsel also challenged as unconstitutional Missouri's method of execution (L.F. 54, 285-302, 380-82). The court granted an evidentiary hearing on the claims (H.Tr.).<sup>8</sup>

Strong presented the following mitigating evidence.

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<sup>7</sup> The claims will be detailed in the argument portion of the brief.

<sup>8</sup> Only two witnesses testified at the hearing (H.Tr. 1-152, 2H.Tr.1-151). All other witnesses testified by deposition, by agreement of the parties and the court. The court accepted the depositions (Ex. 33-39) as substantive evidence (L.F. 399). The court also admitted Exhibits 1-7, 7A-7M, 8, 8A-8FFF, 9, 11-25, 25A-GG, 26-27, 32, and 40 into evidence (L.F. 391-396).

### **Lamont Neffer**

Lamont Neffer, who had known Strong for 29 years, since third grade was a good friend (H.Tr. 5-7). They attended school together and played sports (H.Tr. 7). Neffer knew about Strong's tough upbringing (H.Tr. 9-12). Neffer knew Strong's neighborhood was bad, with derelict apartments, empty lots and people hanging out on the streets (H.Tr. 12). Strong's parents were never home (H.Tr. 9-11, 13). Strong dressed in tattered clothes and his pants were too short (H.Tr. 11). He had no dress clothes for their school banquet (H.Tr. 9-11). Kids teased him all the time, calling him "butter teeth" and "orangutan" since he was so big for his age (H.Tr. 11).

Despite his tough childhood, Strong was thoughtful and kind. Once, when Neffer twisted his ankle, Strong carried him the one to two blocks home (H.Tr. 8). Strong always shared whatever he had with others (H.Tr. 15). Neffer had fond memories of their childhood friendship (H.Tr. 15).

### **Wayne Garner**

Wayne Garner, Joyce Knox's brother, recalled growing up in an abusive and chaotic household (Ex. 32, at 2). Their mother, Irnie, was paranoid schizophrenic, domineering and easily angered. *Id.* She was highly religious, burning candles throughout the house and constantly talking about the devil. *Id.* She criticized those who drank alcohol, but kept her own stash under the bed. *Id.* She kept the house dark and could tolerate neither noise nor sunlight. *Id.* Irnie trusted noone. *Id.*

Irnie beat all her children, but was especially abusive to Joyce. *Id.* at 3. As a teenager, Joyce tried to run away. *Id.* at 3, 5. She got pregnant and lived with Eugene Strong. *Id.* All of Irnie's children left the house as soon as possible. *Id.* at 3-4.

Eugene Strong was not much better than Joyce's mother. *Id.* at 5. He was a violent alcoholic who attacked Joyce while she was pregnant. *Id.* Garner once saw Eugene kick in a door, grab Joyce, and drag her outside. *Id.* at 5-6.

Joyce had many children and they moved frequently. *Id.* at 6. They lacked the basics, often having nothing to eat and living in deplorable housing in a violent crime-ridden neighborhood in which gunfire was routine. *Id.* Joyce drank and smoked marijuana in front of her children. *Id.* at 7.

Irnie refused to help Joyce, so she turned to abusive men like Richard Ishman, who beat and verbally abused her. *Id.* at 6-7. Ishman terrified Strong and his siblings who stayed away from him whenever possible. *Id.* at 7. Other men abused Joyce, too. *Id.* She accepted the abuse to get financial help in return. *Id.*

Garner recalled Strong was a quiet, shy child. *Id.* at 8. He was restless, but obedient. *Id.* Garner knew Strong had problems, but did not know what to do about it. *Id.*

Garner was willing to testify about Strong's childhood, but trial counsel never asked him about it (Ex. 35, at 6-7). Counsel telephoned him about his availability to testify, but they discussed nothing of substance (Ex. 32, at 1). Garner received some letters about trial dates and was subpoenaed to testify. *Id.*

He first talked to counsel about his trial testimony for five or six minutes at the courthouse during trial. *Id.* at 1-2. Counsel asked him how often he had seen Strong and how Strong interacted with children. *Id.* Counsel asked Garner nothing about Strong's troubled childhood. *Id.* at 2.

### **Joyce Knox**

Joyce Knox talked to Dede several times, but he never asked about Strong's background or childhood (Ex. 37 at 10-12). She would have given him the information had he requested it. *Id.* at 12-13. Knox told Dede she thought Strong might have mental impairments. *Id.* at 52. She told him her mother and sister suffered from schizophrenia. *Id.* at 53. Dr. Rabun, who conducted a court-ordered evaluation, never talked to Knox, who would have given him information about Strong had he asked. *Id.* at 57-58.

When Knox's children were young, they were very poor. *Id.* at 15-18. Sometimes they had to beg and other times, they did without. *Id.* Even though Irnie owned a grocery store, she gave little to Knox and her family, saying she was not running a Goodwill or welfare office. *Id.* at 17-18.

Knox confirmed that she and her kids moved often, living in 26 different places during Strong's childhood. (Ex. 37, at 18-28, Ex. 8B). They could not afford to live in safe neighborhoods (Ex. 37, at 18). The children had to learn to fight or die. *Id.* at 20. Knox hated raising her kids like that, but she had no choice. *Id.* Although she tried to move to a better place, it never turned out as she planned. *Id.* at 19. The apartments they lived in were horrible and dangerous.

*Id.* at 25. One had holes in the roof, so rain came in. *Id.* The ceiling and stairs were falling in and roaches crawled everywhere. *Id.* at 25-26.

Because of their frequent moves, the kids were always the “new kids on the block,” outsiders. *Id.* at 19. This made it hard to make friends. *Id.* Strong changed schools a lot and his grades fell. *Id.*

Knox acknowledged her family’s history of mental illness. Her mother, Irnie, suffered from paranoid schizophrenia (Ex. 37, at 36-37, Ex. 4, at 1712, 1734). Her sister, Wilma,<sup>9</sup> also was paranoid schizophrenic and had a Bipolar Disorder (Ex. 37, at 31, 33, 37, 42, 43). Her personality changed drastically. One minute she was sweet and kind, and the next she went off the deep-end. *Id.* at 37-38. Wilma could be violent, pulling a gun on Joyce at their mother’s nursing home and again the night before her mother’s funeral. *Id.* at 36-37.

Knox thought Strong sometimes behaved similarly, since age twelve, one minute being loving and kind, and the next, flying into a rage. *Id.* at 38. After an episode, he would sweat profusely, shake, and not remember what happened. *Id.* at 39. He then wanted to sleep. *Id.*

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<sup>9</sup> Wilma assisted the State at Strong’s evidentiary hearing, passing notes to the prosecutor while Dr. Hutchison testified (Ex. 37 at 41-42). Wilma wrote Strong at Potosi, and referenced her psychiatrist and the family’s “demons” (Ex. 37, at 42-44, Ex. 31). Wilma’s numerous lawsuits showed her need for control and paranoia (Ex. 11-23, Ex. 33 at 102-08).

Knox saw Strong have a seizure in her kitchen about ten years earlier, when he was in his twenties. *Id.* at 44. He shook uncontrollably at the kitchen sink. *Id.* He promised Knox he would go to a doctor, but never did. *Id.* at 45. She lacked the money to take him to a doctor when he was growing up. *Id.* at 46.

Counsel did not ask Knox about Strong's childhood. *Id.* After guilt phase, he gathered the family together in a little room at the courthouse. *Id.* at 56. He told them they were getting ready to go and the order he would call them to testify. *Id.* He never talked to them individually, discussed their testimony or told them what he intended to ask. *Id.* at 55-57.

### **Dr. Draper**

To assess Strong's development, Dr. Wanda Draper, a childhood development specialist, investigated his background, family and social history, and interviewed his family (Ex. 33, at 4-12). She reviewed numerous records, including school records, police records, mental health records, witness interviews, Knox's income records, and Stroud's numerous lawsuits (Ex. 33 at 17, 19-22, Ex. 1-22). Draper interviewed Strong's mother, Joyce Knox, his sister, Tracy, his brothers, Eric and Eugene, his maternal aunt, Brenda Fonville, his ex-wife, Kim Strong, and a school administrator and Principal, Bob Hudson (Ex. 33 at 18, 45).

Dr. Draper found that Strong grew up in extreme poverty (Ex. 33, at 25, 28, 30, 46, 85-86, 87, 88, 91, 92, 93). Knox earned a pittance so the family lived in squalor and violent neighborhoods (Ex. 33, at 25). While Knox was pregnant with

Strong, she was malnourished, lacked health care, and received no prenatal care (Ex. 33 at 57, 84). At times, Knox prostituted herself to get money to feed her family (Ex. 33, at 28, 30). She gambled with welfare money (Ex. 33 at 57). Knox was desperate (Ex. 33 at 46). When Strong was four, in 1971, Knox's father died and she tried to hang herself (Ex. 33 at 84, 87).

Knox moved her family to 26 different locations (Ex. 33 at 54, 55, 99, Ex. 7, Ex. 8, Ex. 8A-FFF). This meant Strong never had grounding or a secure place (Ex. 33 at 55-56). Where they lived was horrific. The neighborhoods were extremely violent (Ex. 33 at 35, 46, 46-47, 99). In Cabanne Courts, drugs, shootings and fights were endemic (Ex. 33 at 35). The violence was so bad that buses, UPS trucks and police refused to come (Ex. 33 at 35). Similarly, when they lived on Vernon Street, the neighborhood was so violent, it was named "little Korea." (Ex. 33 at 68). Strong watched his friend, Darrell, get shot and die (Ex. 33 at 68, 92).

The family responded to violence with violence (Ex. 33 at 99, Ex. 7). Knox once stabbed a female neighbor during a neighborhood ruckus (Ex. 33 at 59). When Knox discovered that Strong's teacher had thrown water in his face, she went to school and threw water in the teacher's face (Ex. 33 at 60).

Their living conditions were awful (Ex. 33 at 58). The family's apartment on Sara Avenue had a leaky roof and lacked part of the ceiling (Ex. 33 at 58). At 4229 Cote Brillante, they lived with roaches and rats (Ex. 33 at 59). Although the apartment had been condemned following a fire, they lived there anyway. *Id.* at

65. Their apartment at 4000 Fairfax was derelict, had no electricity or working furnace (Ex. 33 at 59). The apartment on Cottage Street was rat infested (Ex. 33 at 65). Their only water came from the toilet tank. *Id.*

Other kids teased Strong and his family (Ex. 33 at 68). He dressed poorly and had to share clothes with his siblings (Ex. 33 at 68). He missed school a lot because he had nothing to wear (Ex. 33 at 68).

Knox had a series of relationships with abusive men (Ex. 33, at 24, 25-29, 32, 39). Knox's children lived in a violent, hostile environment (Ex. 33, at 29, 38, 48). They constantly saw their mother bloodied and pummeled (Ex. 33 at 29, 32-33, 48). She often had bruises, black eyes, and once, had to go to the emergency room for stitches (Ex. 33 at 32-33). The children tried to intervene and protect their mother (Ex. 33 at 34).

Eugene Strong, her first husband, drank and abandoned her when she was pregnant with Richard (Ex. 33, at 35, 45, 57, 99, Ex. 7). He never paid child support (Ex. 33 at 57).

Knox later became involved with Richard Ishman, an abusive alcoholic (Ex. 33, at 25, 32-33, 57, 58). He raped Knox while her children were in the next room (Ex. 33, at 25, 58) Knox hit him in the head with a baseball bat in front of her mother's store (Ex. 33, at 26, 58).

Knox met Charles Brown at a gambling house and moved to Mississippi in 1972 (Ex. 33, at 26, 58). He abused Knox and her children (Ex. 33 at 26, 58). Brown had affairs and beat Knox (Ex. 33, at 27, 58). Knox shot at Brown when

she was eight months pregnant, and her children were in the bedroom next door (Ex. 33 at 58). Strong was only three at the time (Ex. 33 at 58). Knox secretly left Mississippi and escaped to St. Louis with her children (Ex. 33, at 27, 58, 88)

Knox became involved with “Red Cap,” who was nicer, but dealt drugs (Ex. 33 at 27, 29, 67). He provided some food and money for the family (Ex. 33, at 27). Knox was involved with Sylvester Thompson for two years (Ex. 33 at 27). She later met Roger Knox, whom she married and then divorced (Ex. 33 at 27-28).

Knox lacked time to spend with Strong (Ex. 33 at 39). Knox and Brown worked on a catfish farm, and she left the children with their older siblings or neighbors (Ex. 33, at 26-27, 33). When Strong was born, she had four children under the age of nine (Ex. 33 at 39). Two of his older brothers put Strong in a closet with his stuffed toy, Tigger, locking him in the dark and refusing to let him out (Ex. 33 at 61). He screamed and screamed, and became terrified of the dark (Ex. 33 at 39, 61, 87-88). When Knox discovered what they were doing, she threw Tigger away (Ex. 33 at 61).

When Strong was five, he started wetting the bed and became withdrawn (Ex. 33 at 62). Strong’s babysitter terrified him, he did not want to be left alone, and constantly cried (Ex. 33 at 62-63, 87). His sister, Paula, was convinced the babysitter sexually abused him (Ex. 33 at 64). When Strong was 12, a stranger forced him into his car and sexually abused him (Ex. 33 at 76).

When Strong entered school, he had problems. With all the moves, his grades dropped (Ex. 33 at 69, 77, 92). At one point, he missed five months of

school and had to repeat first grade (Ex. 33 at 74, 88). He got into trouble for fighting and attended an alternative school (Ex. 33 at 69, 93). He graduated with a 1.864 grade point average (Ex. 33 at 70). Strong was the first of five siblings to graduate (Ex. 33 at 94).

Strong's best time was the few months when he lived with Knox's brother, Wayne (Ex. 33 at 66). He was good to the children, helped them with homework, and provided food for them. *Id.* But, it was too little, too late, to make up for all that Strong had suffered. (Ex. 33 at 66, 76).

Dr. Draper concluded that Strong suffered from a severe disorganized attachment (Ex. 33 at 38, 78, 79, Ex. 6). Knox could not provide the nurturing that Strong needed (Ex. 33, at 39-40, 49, 96).<sup>10</sup> As a result, his brain did not develop normally (Ex. 33 at 42-43). Strong did not receive adequate food and shelter (Ex. 33 at 70, 71, 72). He was surrounded by violence (Ex. 33 at 71-73). His father abandoned him before he was born, and again, when he was ten, when he denied that Strong was his child (Ex. 33 at 75).

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<sup>10</sup> Knox herself had experienced much violence as a child (Ex. 33 at 51). Her mother beat her and engaged in unusual religious activities involving voo doo and potions. *Id.* at 50-51. Their minister raped children and told them his semen was a potion for medicinal and magical purposes. *Id.* Once, he placed a spider in Knox's vagina. *Id.*

Strong had seizure-like actions, shaking, trembling, and sweating so severely that he was soaking wet (Ex. 33 at 74-75, 77). He lost bladder control and urinated on himself (Ex. 33 at 75, 77). Strong developed obsessive-compulsive behaviors and amnesia, a common occurrence for those with attachment disorders (Ex. 33 at 78, 97-98, 110).

Strong never developed necessary coping skills and had low self-esteem and self-worth (Ex. 33 at 99, 107). He felt more comfortable around children, since he never developed past childhood (Ex. 33 at 100).

### **Dr. Hutchison**

Dr. Marilyn Hutchison, a psychologist, also evaluated Strong (H.Tr. 23, 32-33, Ex. 24). She reviewed the same background materials as had Dr. Draper (H.Tr.33-34, 41 Ex. 24-appendix, Exs. 1-22). Hutchison spent seven hours with Strong (H.Tr. 34-35). Hutchison found Strong suffered from: Major Depression, Recurrent; Obsessive Compulsive Disorder; Post-Traumatic Stress Disorder; Adjustment Disorder, subject to incarceration; Reading Disorder; Dissociative Identity Disorder (H.Tr. 40, Ex. 24 at 26). She needed further study to determine whether Strong suffered from Bi-Polar Disorder, Intermittent Explosive Disorder and Personality Change Due to a General Medical Condition (H.Tr. 41, Ex. 24 at 26). Strong also had Schizotypal Personality Disorder with Dependent Features (H.Tr. 41, Ex. 24 at 26). Hutchison determined that, at the time of the offense, Strong suffered from extreme mental distress or emotional disturbance (H.Tr. 40,

Ex. 24 at 27- 28). He had impaired capacity to conform his conduct to the requirements of the law (H.Tr. 40, Ex. 24 at 28).

The motion court issued findings of fact and conclusions of law<sup>11</sup> denying relief (L.F. 400-488). This appeal follows.

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<sup>11</sup> The findings are set forth in detail in the argument portion of the brief.

## **POINTS RELIED ON**

### **I. Court Would Not Allow Post-conviction Counsel to Talk to Jurors**

**The motion court abused its discretion in denying, pursuant to Local Court Rule 53.3, Mr. Strong's request to interview jurors because the prohibition denied him due process and precluded him from proving the constitutional violations of his rights to effective assistance of counsel, equal protection, a fair trial by an impartial jury, and freedom from cruel and unusual punishment, U.S. Const., Amends. 6, 8, 14, and Article I, Sections 2, 10, 18(a) and 21 of the Missouri Constitution, in that questioning jurors was necessary to prove the constitutional claims of ineffective assistance of counsel for failing to voir dire jurors about gruesome photos, and any claims of juror misconduct. The court's ruling was fundamentally unfair since it denied relief on the claim that counsel was ineffective in voir dire and failing to prove prejudice on the inflammatory argument claims because Strong failed to introduce evidence, the jurors' testimony, to support these allegations.**

*Remmer v. United States*, 350 U.S. 377 (1955);

*State v. Jones*, 979 S.W.2d 171 (Mo. banc 1998);

*Lytle v. State*, 762 S.W.2d 830, 834 (Mo. App. W.D. 1988); and

*Taylor v. State*, 728 S.W.2d 305 (Mo. App. W.D. 1987).

## **II. Prosecutor's Appeal to Emotion**

**The motion court clearly erred in denying Mr. Strong's claim that trial counsel was ineffective for failing to object to the prosecutor's improper argument and that the argument violated Strong's rights to due process, a fair trial, and freedom from cruel and unusual punishment, U.S. Const., Amends. 6, 8, 14, and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that the prosecutor used a power point presentation of a montage of Strong's mugshot, photographs of the knife and the victims in a calculated effort to have the jury decide the case on emotion, rather than make a reasoned decision based on the facts and law. Counsel unreasonably failed to object to the improper argument and failed to make a record about the improper nature of the power point presentation and the jurors' emotional reaction to it. Strong was prejudiced by the improper argument as it injected emotion and caprice into the jury's determination of punishment.**

*State v. Taylor*, 944 S.W.2d 925 (Mo. banc 1997);

*Gardner v. Florida*, 97 S.Ct. 1197 (1977);

*Stringer v. State*, 500 So.2d 928 (Miss. 1986); and

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

**III. Counsel Failed to Object to the Prosecutor's Exclusion of Jurors**  
**For Religious Reasons**

The motion court clearly erred in denying the claim that trial counsel was ineffective for failing to object to the prosecutor's striking of venirepersons Sylvia Stevenson and Luke Bobo for religious reasons, and the prosecutor's improper strikes violated Strong's and the jurors' rights to free exercise of religion, equal protection, due process, a fair trial, and freedom from cruel and unusual punishment, U.S. Const., Amends. 1, 5, 6, 8, 14, Article I, Sections 2, 5, 19, 18(a) and 21 of the Missouri Constitution, and Article 26 of the Universal Declaration of Human Rights, in that counsel unreasonably failed to object to the strikes because he was unfamiliar with the law prohibiting religious-based strikes. Strong was prejudiced because excluding the jurors for religious reasons harmed Stevenson and Bobo and undermines confidence in the fairness of the proceeding and the outcome.

*State v. Parker*, 836 S.W.2d 930 (Mo. banc 1992);

*J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419 (1994);

*McDaniel v. Paty*, 435 U.S. 618 (1978); and

*Anderson v. State*, 196 S.W.3d 28 (Mo. banc 2006).

**IV. Counsel Did Not Investigate Strong's Background and  
All Reasonably Available Mitigating Evidence**

The motion court clearly erred in denying Strong's claim of trial counsel's failure to investigate and present all available mitigating evidence because this denied Strong effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amends. 6, 8, 14, Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that trial counsel unreasonably failed to investigate and present evidence of Strong's background, including the testimony of family members and friends, such as his mother, Joyce Knox, his uncle, Wayne Garner, and his friend, Lamont Netter, and experts, such as child development specialist, Dr. Wanda Draper, and a psychologist, Dr. Marilyn Hutchinson. Strong's family had a history of mental illness. Strong's impoverished childhood was filled with neglect, violence and abuse. Strong's father abandoned him. Strong suffered from seizures, disorganized attachment and mental impairments. Strong was prejudiced because, had the jury heard this mitigating evidence, a reasonable probability exists that it would have imposed a life sentence.

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

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

*Tennard v. Dretke*, 124 S.Ct. 2562 (2004); and

*Hutchison v. State*, 150 S.W.3d 292 (Mo. banc 2004).

**V. Counsel's Failure to Present Strong's Videotaped Police Interview in Penalty Phase to Show His Remorse and Other Mitigation**

The motion court clearly erred in denying the claim that trial counsel was ineffective for failing to present Strong's videotaped interview with police to show he was remorseful and other mitigating evidence because this denied Strong effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amends. 6, 8, 14, and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that Strong and Washington's tumultuous relationship, Washington's mental illness and violent history, Washington's threats to selectively enforce her *ex parte* order to get her way with Strong and to take his children from him were circumstances surrounding the offense that mitigated Strong's culpability. Despite the difficult relationship, Strong loved Washington and was remorseful. Strong was prejudiced because, had the jury heard this mitigating evidence, a reasonable probability exists that they would have imposed a life sentence.

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

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

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

## **VI. Unreasonable Defense**

**The motion court clearly erred in denying the claim that counsel was ineffective for presenting an unreasonable defense in the guilt phase – that the State had not proved guilt beyond a reasonable doubt - because this denied Strong due process and effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel’s strategy was unreasonable since overwhelming evidence showed that Strong was involved in the killings, the only question was what triggered the reaction and his state of mind. Had counsel presented the circumstances surrounding Strong and Washington’s relationship, their argument and Strong’s reaction, there is a reasonable probability that the jury would have found that Strong did not deliberate and at the very least, did not deserve a sentence of death.**

*Florida v. Nixon*, 125 S.Ct. 551 (2004);

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

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

ABA Guidelines for the Appointment and Performance of Defense Counsel

in Death Penalty Cases, Section 10.9.1, Commentary (rev. ed. 2003);

and

Sundby, “The Capital Jury and Absolution: the Intersection of Trial Strategy, Remorse, and the Death Penalty,” 83 Cornell L. Rev. 1557 (1998).

## VII. Crawford Violation

The motion court clearly erred in denying the claim that counsel was ineffective for failing to object to the admission of Washington's out-of-court statements, in which she told police officers that Strong had assaulted her, as violating Strong's rights to confrontation because this denied Strong confrontation, a fair trial and effective assistance of counsel, U.S. Const., Amends. 6, 8, 14, and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that when one officer questioned Washington, another officer had already detained Strong, and the first officer asked Washington what happened, who was the suspect, all to prove past events for a future prosecution. Counsel was ineffective since *Crawford* was being litigated while counsel represented Strong and because counsel's inaction allowed Washington's statements to go unchallenged to the jury like a voice from the grave. Counsel's failure to object prejudiced Strong as the prosecutor emphasized Washington's statements in his opening statement and closing argument, and relied on this evidence to obtain a death sentence.

*Crawford v. Washington*, 541 U.S. 36 (2004);

*Davis v. Washington*, 126 S.Ct. 2266 (2006); and

*State v. Kemp*, 212 S.W.3d 135 (Mo. banc 2007).

### **VIII. Lethal Injection Is Cruel and Unusual Punishment**

**The motion court clearly erred in denying the claim that Missouri's method of lethal injection is unconstitutional, because it thereby denied Mr. Strong due process and freedom from cruel and unusual punishment, U.S. Const., Amends. 8 and 14, and Article I, Sections 10 and 21 of the Missouri Constitution, in that a sentence that creates an unnecessary risk of pain and suffering is unconstitutional. Further, all constitutional claims known to Strong should be raised in his postconviction action and such claims are not limited to direct appeal since the protocol for executions may change, thereby making the claim ripe closer in time to execution.**

*Baze v. Rees*, 2007 WL 2850507 (October 3, 2007);

*In re Kemmler*, 136 U.S. 436 (1890);

*State v. Morrow*, 21 S.W.3d 819, 828 (Mo. banc 2000); and

*Worthington v. State*, 166 S.W.3d 566 (Mo. banc 2005).

## ARGUMENT

### I. Court Would Not Allow Post-conviction Counsel to Talk to Jurors

The motion court abused its discretion in denying, pursuant to Local Court Rule 53.3, Mr. Strong's request to interview jurors because the prohibition denied him due process and precluded him from proving the constitutional violations of his rights to effective assistance of counsel, equal protection, a fair trial by an impartial jury, and freedom from cruel and unusual punishment, U.S. Const., Amends. 6, 8, 14, and Article I, Sections 2, 10, 18(a) and 21 of the Missouri Constitution, in that questioning jurors was necessary to prove the constitutional claims of ineffective assistance of counsel for failing to voir dire jurors about gruesome photos, and any claims of juror misconduct. The court's ruling was fundamentally unfair since it denied relief on the claim that counsel was ineffective in voir dire and failing to prove prejudice on the inflammatory argument claims because Strong failed to introduce evidence, the jurors' testimony, to support these allegations.

The motion court denied Mr. Strong the opportunity to interview jurors and then ruled that he had failed to prove his claim of counsel's ineffectiveness during voir dire because he did not call the jurors at the hearing to show prejudice. The court erred, denying Strong's rights to due process and his right to prove the constitutional claims in his amended motion.

Before filing Strong's amended motion, postconviction counsel asked the court's permission to contact and interview petit jurors (L.F. 22-27). Counsel informed the court that juror interviews were necessary to investigate and prove Strong's claims that counsel was ineffective in jury selection (L.F. 23). Postconviction counsel alleged that trial counsel had failed to voir dire jurors on the gruesome photos of the victims and jurors' ability to consider mitigating circumstances given these photos, that counsel was ineffective in failing to object to the prosecutor's striking venirepersons Luke Bobo and Sylvia Stevenson because of their religious beliefs, and to investigate any other claims regarding the jurors (L.F. 23).

The motion court denied the motion to interview jurors (L.F. 40). The court then rejected Strong's claim that counsel was ineffective for failing to voir dire jurors about the gruesome photos (L. F. 475-78). The court found that postconviction counsel "has failed to introduce any evidence to support his allegation. *Movant did not call any of the venire persons from the original trial.* Movant/PCR counsel did not establish that any of these members of the jury would have provided answers to any question which would have resulted in their exclusion as jurors." (L.F. 476-77) (emphasis added). The motion court cannot deny a movant the opportunity to prove his allegations and then fault him for this failure. This Court must reverse.

### **Standard of Review**

A criminal defendant's right to a jury trial is one of the most significant our Constitution guarantees. *Remmer v. United States*, 350 U.S. 377, 379 (1955). A defendant is entitled to be tried by an impartial jury, one unprejudiced by extraneous influence. *Id.* When reasonable grounds exist to believe that the jury may have been exposed to such an influence, questioning of jurors must be broad enough to permit "the entire picture" to be explored. *Id.*

### **Post-Trial Interviews Necessary to Investigate Juror Misconduct and Other Claims**

Consistent with *Remmer*, this Court has recognized "proper subjects of inquiry to jurors" after trial include potential juror misconduct. *State v. Jones*, 979 S.W.2d 171, 183 (Mo. banc 1998). Postconviction counsel may contact jurors when necessary to prove the constitutional violations in an amended motion. *See, e.g., Lytle v. State*, 762 S.W.2d 830, 834 (Mo. App. W.D. 1988) (a jury foreman testified at a Rule 27.26 proceeding on the issue of shackling). Thus, while a motion court has *discretion* to limit contact with jurors, *Jones, supra*, it cannot prohibit it altogether. This Court must review the motion court's blanket denial of juror interviews for an abuse of discretion. *Id.*

Here, pursuant to St. Louis County's local Rule 53.3, counsel asked to interview jurors (L.F. 22-27). That Rule provides, in relevant part:

(2) Petit Jurors. Petit jurors shall not be required to provide any information concerning any action of the petit jury, unless ordered to do so by the Court.

Attorneys and parties to an action shall not, directly or indirectly, communicate with any petit juror, relative, friend or associate thereof at any time concerning the action, except with the leave of Court. If an attorney or party receives evidence of misconduct by a petit juror, the attorney or party shall inform the Court and the Court may conduct an investigation to establish the accuracy of the misconduct allegations.

Twenty-First Judicial Circuit Local Rule 53.3(2), effective November 13, 1996.

The motion court denied counsel the right to contact the jurors, even for the limited purpose of interviewing them to prove the claims of ineffectiveness alleged in the amended motion (L.F. 40). Having denied counsel the opportunity to contact the jurors, the court then criticized counsel for failing to call the jurors to prove their claim of ineffectiveness in voir dire (L.F. 476-77). The motion court erred.

A motion court cannot deny a movant the opportunity to prove his constitutional claim and then deny that claim because of a failure of proof. *See, Taylor v. State*, 728 S.W.2d 305, 306-07 (Mo. App. W.D. 1987) (motion court's refusal to grant writ of habeas corpus ad testificandum of inmate witness to prove allegation of counsel's ineffectiveness in not calling inmate witness at trial denied

Taylor his right to a full and fair hearing and his opportunity to meet his burden of proof).

Here too, the court denied Strong the opportunity to prove his claim of ineffective assistance of counsel. A defendant must have an impartial jury. Part of that constitutional guarantee is an adequate voir dire to identify unqualified jurors. *Morgan v. Illinois*, 529 U.S. 719, 729 (1992). Without adequate voir dire, “the trial judge’s responsibility to remove prospective jurors who will not be able impartially to follow the court’s instructions and evaluate the evidence cannot be fulfilled.” *Id.* at 729-30, citing *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Counsel must voir dire on the case’s critical facts to uncover bias and prejudice among venirepersons. *State v. Clark*, 981 S.W.2d 143, 147 (Mo. banc 1998). General questions asking if jurors can be fair and impartial, without specifics, are inadequate. *Id.*; see also, *Morgan v. Illinois*, *supra* at 734-75 (asking all empaneled jurors general “fairness” and “follow-the-law” questions is insufficient to detect those who automatically would vote for death). The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor, any aspect of a defendant’s character or record that the defendant proffers as a basis for a sentence less than death. *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Here, counsel failed to ask specific questions about gruesome photos and whether jurors could consider mitigating circumstances in light of these photos. But, as the motion court found, Strong could not prove his claims of prejudice,

that any jurors were biased, without calling them at the 29.15 hearing (L.F. 477). Thus, it was unfair, denying Strong the ability to prove his claims, to prohibit Strong's postconviction counsel from all contact with the jurors.

Counsel also should have been allowed to interview the jurors to determine if misconduct occurred. Constitutional issues, including issues of juror misconduct, should be litigated in state post-conviction proceedings. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). In *Williams*, a juror failed to disclose her bias during voir dire. *Id.* at 440-42. The claim was not raised in state court, but the juror provided an affidavit in the federal habeas proceedings. *Id.* The Court found that juror misconduct claim could result in federal constitutional violations. *Id.* At an evidentiary hearing, Williams could establish that juror was not impartial under the Sixth and Fourteenth Amendments. *Id.* at 441-42 (citing *Smith v. Phillips*, 455 U.S. 209, 217, 219-21 (1982)). A juror's silence about a factor like bias could so infect the trial as to deny a defendant due process. *Williams, supra* (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)).

The Court excused Williams' failure to raise the claim in state court because the Commonwealth had precluded contact with the jury. *Williams, supra* at 442-43. By disallowing investigation of the factors surrounding the misconduct, the defendant could not develop the claim. *Id.* The Court concluded that "if the prisoner has made a reasonable effort to discover the claims to commence or continue state proceedings, §2254(e)(2) will not bar him from developing them in federal court." *Williams, supra* at 443. Strong's counsel made

reasonable efforts to investigate claims of misconduct by asking leave to contact jurors (L.F. 22-27). This Court should remand so that all of the factual investigation and proof can be submitted in the state courts.

The motion court's blanket prohibition of juror interviews was an abuse of discretion. In *State v. Babb*, 680 S.W.2d 150, 152 (Mo. banc1984), this Court ruled that jurors at a motion for new trial hearing may testify regarding the presence or absence of outside influences. Similarly, in *State v. Harvey*, 730 S.W.2d 271, 272 (Mo. App. E.D. 1987), two jurors testified at a motion for new trial hearing about juror misconduct. The sequestered jurors had reconnected a radio-television in the motel room and heard television newscasts of the trial, in violation of the Court's instruction. *Id.* at 272-73. Any inconvenience to the jurors was outweighed by the interest in ensuring that the defendant had received a fair trial. *Id.* at 276.

To interpret Local Rule 53.3 as a blanket prohibition on counsel contacting petit jurors would be unconstitutional. *Sears v. State*, 493 S.E.2d 180 (Ga.1997) (trial court improperly restricted Sears from contacting jurors to investigate claim of misconduct); and *State v. Thomas*, 813 S.W.2d 395 (Tn.1991) (local rule prohibiting post-trial communications with jurors except with permission of trial court held unenforceable). The movant must have the opportunity to meet his burden of proof and thus have a full and fair hearing in state court.

In *Sears, supra* at 187, the trial court banned all post-trial interview of jurors, until Sears proffered what he hoped to learn by those interviews. "Jurors

are competent to testify about improper influences that intrude upon their deliberations.” *Id.* “The possibility that information learned from jurors may not require a new trial should not preclude appellate counsel from exploring all avenues of challenge.” *Id.* The trial court’s order that counsel disclose what such contact would uncover created an untenable burden. *Id.* The Court found error in the prohibition and remanded to allow contact with jurors. *Id.*

Similarly, in *State v. Thomas*, 1990 WL29286 at 7 (Tenn. Cr. App. 1990), a local court rule limited contact with jurors except with the court’s permission. As here, counsel moved for permission to interview the jurors. *Id.* The motion was denied. *Id.* The appellate court stated the obvious, “the only way to learn of outside influences in juror disqualification may be from talking to those who served on the jury.” *Id.* The appellate court recognized, as essential to the judicial process, that juror impartiality be safeguarded. *Id.* at 8.

The motion court abused its discretion in prohibiting any contact with jurors. It further erred in denying Strong’s claims because he failed to present jurors’ testimony. This Court should reverse and remand with instructions that Strong’s postconviction counsel be allowed to contact jurors and to adduce evidence to support his constitutional claims.

## **II. Prosecutor's Appeal to Emotion**

**The motion court clearly erred in denying Mr. Strong's claim that trial counsel was ineffective for failing to object to the prosecutor's improper argument and that the argument violated Strong's rights to due process, a fair trial, and freedom from cruel and unusual punishment, U.S. Const., Amends. 6, 8, 14, and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that the prosecutor used a power point presentation of a montage of Strong's mugshot, photographs of the knife and the victims in a calculated effort to have the jury decide the case on emotion, rather than make a reasoned decision based on the facts and law. Counsel unreasonably failed to object to the improper argument and failed to make a record about the improper nature of the power point presentation and the jurors' emotional reaction to it. Strong was prejudiced by the improper argument as it injected emotion and caprice into the jury's determination of punishment.**

Prosecutors should not encourage jurors to decide a case on emotion. *State v. Taylor*, 944 S.W.2d 925, 937 (Mo. banc 1997). But, that is what happened here during the State's penalty phase closing argument. Trial counsel failed to properly object and to make a record on the improper argument and resulting prejudice. Counsel was ineffective. This Court should reverse for a new penalty phase.

During guilt phase, the State introduced numerous photographs of the victims over defense counsel's objection (Trial Ex. 10-35, 43-45, 52-54). The State introduced these same photographs in the penalty phase (Tr. 1535-36). When asked if he had an objection to admission of the photographs in penalty phase, counsel said, "No. I have made my record on that" (Tr. 1535-36). The court admitted the exhibits (Tr. 1536).

At the conclusion of the penalty phase evidence and the instruction conference, the prosecutor informed the court that he intended to use a power point presentation during penalty phase argument (Tr. 1720-21). He had scanned exhibits, primarily photographs, into the computer and put them into a power-point format (Tr. 1720-21). Defense counsel objected:

My objection is that due to the gruesome nature of the photographs, that enlarging them highlights and prejudices the jury, and makes them unduly inflammatory.

(Tr. 1721). The court overruled the objection and adjourned for the evening (Tr. 1721). Closing argument began the following morning (Tr. 1722). During the state's penalty phase closing argument, the prosecuting attorney used the power point presentation, without objection (Tr. 1726-40, 1753-59). Counsel made no record on the emotional reaction to the power point presentation.

In the new trial motion, counsel claimed:

The trial court committed prejudicial error in overruling Defendant's objection to the State utilizing, in closing argument, the

photographs displayed, enlarged, and in the form of a montage as being unduly prejudicial, inflammatory, gruesome and were permitted to remain on the screen while the jury was in the jury box after the State ended its closing argument and the jury was escorted from the courtroom during the penalty phase of the trial.

Furthermore, the displayed photos were not merely the admitted exhibit, but were enhanced and superimposed over one another, including an image of a knife in the background.

(D.L.F. 580).

On appeal, this Court denied the claim that the power point was improper because nothing in the record showed that the images were prejudicial or that the presentation “prompted the jury to act other than on the basis of reason.” *State v. Strong*, 142 S.W.3d 702, 721 (Mo. banc 2004).

Strong claimed that trial counsel was ineffective for failing to properly object to the power point presentation and failing to make a record on the jurors’ emotional reaction to it (L.F. 52-53, 271-78). The presentation included numerous autopsy photographs, the knife, the bodies on the bedroom floor, photographs of the victims while alive, and Strong’s mugshot (L.F. 274). Some photographs were superimposed on others (L.F. 274). The prosecutor superimposed Strong’s booking photograph, showing him in an orange jumpsuit, over the victims’ dead bodies (L.F. 274). The prosecutor also superimposed the autopsy photographs

over a photograph of the knife (L.F. 274). The victims' photographs while alive were contrasted with Richard's mugshot (L.F. 274).

Trial counsel, Brad Dede, believed the power point was objectionable and that is why he objected in chambers (Ex. 38, at 141). He did not renew his earlier objection during the closing argument, because he believed that he need not keep objecting to evidence or argument during the trial. *Id.* Dede remembered seeing Strong in his orange jumpsuit and believed the image was prejudicial. *Id.* at 140-41. For dramatic effect, the photos were displayed on a five-foot by five-foot screen. *Id.* at 139. Although the crime scene and autopsy photos had been admitted, Dede thought the State's manipulation of them – enlarging and superimposing them on others- was prejudicial. *Id.* at 243.

Co-counsel, Patrick Malone, heard courtroom spectators gasp and sigh during the presentation (Ex. 39, at 46-47). The spectators were seated in the first few pews behind the jury box. *Id.* at 47. At least one person stood up during the presentation and ran out of the courtroom. *Id.*

The motion court denied relief on this claim, ruling that Strong had failed to present evidence of the courtroom observers'<sup>12</sup> reaction to the power point (L.F. 478). The court found that the slide show depicted photographs that were properly

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<sup>12</sup> Strong could not call the jurors to testify about their emotional reactions since the motion court prohibited postconviction counsel from contacting them (L.F. 40). *See*, Point I, *supra*.

admitted at trial, thus their display in the power point presentation was proper (L.F. 479). As a result, the court concluded, the result of the second phase would not have been different had counsel objected (L.F. 479).

### **Standard of Review**

This Court reviews for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Strong must show that his counsel's performance was deficient and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Counsel can be ineffective for not objecting to prejudicial argument, *Copeland v. Washington*, 232 F.3d 969, 974-75 (8th Cir. 2000); *State v. Storey*, 901 S.W.2d at 901-03.

### **Closing Arguments Unconstitutional**

Improper arguments can deny a defendant due process, a fair trial, and violate the Eighth Amendment when they encourage the jury to decide the case on emotion, not the evidence. Prosecutorial argument is unconstitutional if it “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); and *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Penalty arguments must receive greater scrutiny. *See, Caldwell v. Mississippi*, 472 U.S. 320, 340 n. 7 (1985) (death sentence vacated because prosecutor’s improper penalty closing made it appear that responsibility for the death penalty would be borne by appellate court rather

than the jury). Courts conduct a more searching review of the penalty phase since the Eighth Amendment is implicated. *Copeland v. Washington*, 232 F.3d 969, 974, n.2 (8th Cir. 2000), quoting *California v. Ramos*, 463 U.S. 992, 998-999 (1983).

Jurors should not base their penalty phase decision on emotion. Rather, they should rely on reason to guide them in the decision making process. *State v. Taylor*, 944 S.W.2d 925, 937 (Mo. banc 1997). “It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.” *Id.*, quoting *Gardner v. Florida*, 97 S.Ct. 1197, 1204 (1977). In *Taylor*, during closing argument, the prosecuting attorney told the jurors that it was time for them to “put your emotion into it” and “you can show your outrage.” *Id.* This Court condemned the argument and reversed the death sentence. *Id.* at 938.

Here, the prosecutor intentionally blew up a multitude of photographs on a five-foot by five-foot screen and superimposed those images to create an overwhelming flood of emotion in the jurors so that they would be unable to rationally contemplate any other evidence. See, *Stringer v. State*, 500 So.2d 928, 935 (Miss. 1986). Slide shows during closing argument “take the pictures far beyond their evidentiary value and use them as a tool to inflame the jury.” *Id.* Color slides of victims that are projected on a large screen create an unnecessarily dramatic effect that can only be intended to inflame and prejudice a jury. *Id.* Any death sentence obtained by such improper appeals to emotion are suspect. *Id.*

Contrary to the motion court's finding, Strong presented evidence of the emotional response to the State's closing argument. Spectators sighed and gasped (Ex. 39 at 46-47). At least one person fled the courtroom (Ex. 39, at 47). Undoubtedly, the presentation also produced an extreme emotional response in the jurors who were not free to leave the courtroom. The improper manipulation of gruesome photos, the murder weapon and pictures of Strong in an orange jumpsuit was designed to upset the jury, to create an emotional response. To obtain full dramatic effect, the prosecutor left the images on the screen while the jurors left the courtroom (D.L.F. 58). Courtroom spectators were emotional. This prosecutor's manipulation of evidence was just as improper and prejudicial as were Taylor's prosecutor's pleas for emotion.

This Court should reverse and remand for a new penalty phase. Alternatively, should this Court conclude the jurors' testimony about their reactions is necessary to prove prejudice, this Court should remand with instructions that Strong's counsel be allowed to contact and call the jurors.

**III. Counsel Failed to Object to the Prosecutor's Exclusion of Jurors**  
**For Religious Reasons**

**The motion court clearly erred in denying the claim that trial counsel was ineffective for failing to object to the prosecutor's striking of venirepersons Sylvia Stevenson and Luke Bobo for religious reasons, and the prosecutor's improper strikes violated Strong's and the jurors' rights to free exercise of religion, equal protection, due process, a fair trial, and freedom from cruel and unusual punishment, U.S. Const., Amends. 1, 5, 6, 8, 14, Article I, Sections 2, 5, 18(a), 19, and 21 of the Missouri Constitution, and Article 26 of the Universal Declaration of Human Rights, in that counsel unreasonably failed to object to the strikes because he was unfamiliar with the law prohibiting religious-based strikes. Strong was prejudiced because excluding the jurors for religious reasons harmed Stevenson and Bobo and undermines confidence in the fairness of the proceeding and the outcome.**

At trial, the prosecutor peremptorily struck venirepersons Sylvia Stevenson and Luke Bobo for religious reasons (Tr. 910-11, 919). Ms. Stevenson said she could consider the death penalty (Tr. 57-58), but the prosecutor ignored that individual response in favor of group stereotypes of religious people. Because she mentioned her church and religion, the prosecutor assumed that she "may very well be weak on the death penalty" (Tr. 910-911). As for Mr. Bobo, the prosecutor ignored his responses that he could consider death (Tr. 245-246). The

prosecutor did not want religious people to serve on the jury. He put it this way: Bobo was “the assistant dean of Covenant Seminary, and as much respect as I have for religious people, *I don’t want religious people*, very religious, and I would have to assume because he’s the dean of a seminary that he is a very religious person. I don’t think he would make a particularly good death penalty juror in this case, but - - or in any case for that matter” (Tr. 919) (emphasis added).

Defense counsel objected to the prosecutor’s strike of Stevenson and Bobo based on their race, but made no objection to the strikes for religious reasons (Tr. 908). The trial court found that the prosecuting attorney’s reasons for the strikes were *race-neutral* (Tr. 911-912, 920-921). The trial court found religion a permissible basis for the strikes:

Most importantly, the race-neutral reason the Court believes for striking Mr. Bobo beyond the other reasons that Mr. McCulloch has mentioned is clearly that being the assistant dean, director of Covenant Seminary, which the Court is aware of, is a race-neutral reason.

(Tr. 921).

In light of that fact the logical relevance between striking Mr. Bobo, who’s assistant dean, director of Covenant Seminary, and the relevance between that and the fact that the State of Missouri has elected to proceed with attempting to obtain the death penalty, it’s clear to the Court that *individuals in often religious avocations are*

*more apt to – it’s a very relevant issue between those two and the effect that it would have upon an individual sitting in a case involving the death penalty.*

(Tr. 923) (emphasis added).

On direct appeal, this Court affirmed the trial court’s finding that the strikes were not “race-based” under *Batson*.<sup>13</sup> *State v. Strong*, 142 S.W.3d 702, 712-13 (Mo. banc 2004). Since trial counsel never objected to the strikes for religious affiliation, that claim was not preserved for review. *Id.* at 713, 714. This Court recognized that when defense counsel fails to raise claims at trial, the claim is “waived.” *Id.* at 714. This Court did not find plain error. *Id.* at 713, 714.

Strong alleged that counsel was ineffective in failing to object to the religious based strikes, because they violated his rights under the Missouri and U.S. Constitution, and international law (L.F. 43-44, 55-71).

Trial counsel acknowledged that, if the transcript showed he failed to object on religious grounds, he failed to preserve the claim (Ex. 38, at 82-83). Counsel was unaware of any cases holding that religion is an impermissible reason to strike someone for jury service. *Id.* at 160. He did not believe that *Batson* applied to religious-based strikes. *Id.*

The motion court found that trial counsel’s ineffectiveness for failing to object to the prosecutor’s strikes was a cognizable claim in a 29.15 action (L.F. 409). But, the court ruled that Strong had failed to show prejudice because he

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<sup>13</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

failed to show that a biased person served on the jury (L.F. 410). The court concluded that *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 1430 (1994) strongly “intimates” that *Batson* does not extend to religious discrimination (L.F. 441). The court noted that this Court had found no *Batson* violation on direct appeal (L.F. 411). The court found that the prosecutor had given several reasons for its strikes and concluded:

At no time did the State strike those two individuals for any specific religious purposes nor did the State strike those two individuals on a particular or specific religion that they followed nor did they strike the two venire persons for belonging to a particular religious group. (L.F. 411-12). While not specifically addressing the Missouri Constitution, federal Constitution or international law, the court found that any objection to religious-based strikes would have been meritless (L.F. 412).

### **Standard of Review**

This Court must review the motion court’s findings and conclusions for clear error. *See*, Point II, *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); 29.15. To establish ineffective assistance, Strong must show counsel’s performance was deficient and that performance affected his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To prove prejudice, Strong must show “a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Id.*; *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997).

### **Ineffectiveness in Voir Dire**

Counsel can be ineffective during jury selection. For example, counsel's failure to read jury questionnaires suggesting two jurors would automatically vote to impose death was ineffective assistance and structural error requiring penalty phase reversal. *Knese v. State*, 85 S.W.3d 628, 631-33 (Mo. banc 2002).

Similarly, failing to strike an automatic death penalty juror upon counsel's note-taking error was ineffective assistance, requiring penalty phase reversal. *Anderson v. State*, 196 S.W.3d 28, 39-42 (Mo. banc 2006). Failing to strike for cause two jurors who stated it would bother them if the defendant did not testify also constitutes ineffective assistance, *State v. McKee*, 826 S.W.2d 26, 27-29 (Mo. App. W.D. 1992); as is failing to challenge for cause a juror who admitted bias against the defendant. *Presley v. State*, 750 S.W.2d 602, 604-08 (Mo. App. S.D. 1988).

### **Religious Discrimination**

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This right to free exercise of religion is applicable to the States through the Fourteenth Amendment. *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940).

Exercising peremptory strikes to discriminate for racial reasons violates the defendant's and jurors' rights to equal protection under the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991). See also, Article I, Section 2 of the Missouri Constitution.

Peremptory strikes based on gender are similarly unconstitutional. *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994).

The Missouri Constitution provides: “that no person shall, on account of his religious persuasion or belief . . . be disqualified from testifying or serving as a juror . . .” Article I, Section 5, Mo. Const. Similarly, Section 494.400, states: “A citizen of the county or of a city not within a county for which the jury may be impaneled shall not be excluded from selection for possible grand or petit jury service on account of race, color, *religion*, sex, national origin, or economic status.” (emphasis added).

Article 26 of The Universal Declaration of Human Rights states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The United States is a signatory state to The Universal Declaration of Human Rights, adopted on December 10, 1948. By virtue of the Supremacy Clause, this treaty is applicable to state courts: “This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby,

anything in the constitution or laws of any state to the contrary notwithstanding.”  
U.S. Const., Art. VI, Clause 2.

Here, counsel had no strategic reason for not objecting to the religious based strikes. He simply did not know the law supported such an objection. He was unfamiliar with the constitutional provisions and the cases applying them.

Nearly a decade before trial, in *State v. Parker*, 836 S.W.2d 930, 942 (Mo. banc 1992) (Price, J. concurring), Judge Price specifically discussed religious based strikes. Judge Price concluded that, “[t]he elevated protection required by these cases of the rights of individuals to serve as jurors may extend beyond racial discrimination to *religious*, gender-based, or ethnic discrimination as well, either under the United States or the Missouri Constitutions.” *Id.* at 942 (emphasis added). Since Article I, Section 5 of the Missouri Constitution provides that no person shall be disqualified from jury service on the basis of his religious belief, “whether *Batson*, *Powers*, *Edmondson* and *McCollum* directly prohibit the use of peremptory strikes based upon religion or sex, they certainly suggest such a result when coupled with Missouri’s Constitution.” *Parker*, at 942. A religious-based *Batson* challenge was not before the Court, but Judge Price alerted attorneys to be cognizant of the issue. *Id.* at 943

Given the specific prohibition in Article I, Section 5, Section 494.400, and Judge Price’s warning in *Parker, supra*, counsel’s failure to object to the religious based strikes was unreasonable. Contrary to the motion court’s finding, this claim had merit and was supported by the law.

The motion court's conclusion that J.E.B. "strongly intimates" *Batson* does not extend to religious discrimination is clearly erroneous. First, the court ignores that *Parker, supra*, suggests precisely the opposite conclusion. Second, J.E.B.'s language that extended *Batson* to gender applies equally to religious-based strikes. "The community is harmed by the State's participation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *J.E.B.*, 511 U.S. at 140. Contrary to the motion court's ruling, the Supreme Court never intimated religious strikes were permissible.

Contrary to *Parker*, the motion court ruled that "[i]t is well settled law that *Batson* protections do not cover religious-based strikes and failure to predict a change of law does not constitute ineffective assistance of counsel." (L.F. 412). The motion court cited *State v. Brown*, 902 S.W.2d 278, 298 (Mo. banc 1995) and *O'Haren v. State*, 927 S.W.2d 447, 450 (Mo. App. W.D. 1996), but neither case addresses religious-based strikes.

The motion court ruled that Strong could not prove prejudice, because he could not show how the strikes resulted in unfairness (L.F. 409-10). According to the court, he must show a biased juror served. *Id.* This ruling misses the point. Strong's complaint was not with the jury, but with the process by which jurors were selected. People with religious beliefs were denied their right to serve. "The exclusion of even one juror for impermissible reasons harms that juror and

undermines public confidence in the fairness of the system.” *J.E.B.*, 511 U.S. at 142, n. 13.

The motion court’s finding that the prosecutor did not strike Stevenson and Bobo for “specific religious purposes” or based on a particular religion is contrary to the record. At trial, the judge specifically found the prosecutor struck Bobo because he was the assistant dean, director of Covenant Seminary and, thus, had a “religious avocation” (Tr. 923). The court found that religion was “very relevant” to a “case involving the death penalty” (Tr. 923). The court ruled that group stereotypes about religious people could trump that individual’s response that he would consider the death penalty as a legitimate punishment.

The motion court’s suggestion that in order to prove a strike is based on religion, a prosecutor must have stated he struck a juror because he or she belongs to “a specific religion” is nonsensical. The United States Supreme Court has rejected such reasoning. *McDaniel v. Paty*, 435 U.S. 618, 621-22 (1978).

In *McDaniel*, a candidate for delegate to a Tennessee constitutional convention brought a declaratory judgment action. Under the State’s constitutional provision that barred “ministers of the Gospel or priests of any denomination whatever,” the candidate sought to disqualify an opposing candidate who was a Baptist minister. *Id.* The Court held that the Tennessee provision was unconstitutional, violating the Free Exercise Clause. *Id.* at 629. Justice Brennan noted that a classification based on religious conviction was just as unconstitutional as one based on denominational preference:

*A law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants.*

*Id.* at 1330-1331 (Brennan, J. concurring) (emphasis added)

The prosecutor's use of peremptory strikes against Stevenson because she attended church and against Bobo for being assistant dean of Covenant Seminary are as repugnant to the Free Exercise Clause as the statute banning ministers and priests from holding political office. Here, the state conditioned jury service upon the suppression of constitutionally-protected religious expression – church attendance and employment with a seminary.

Neither Bobo nor Stevenson indicated that their religious beliefs would interfere with their ability to fairly and impartially decide the issues in the case or their ability to follow the court's instructions. Rather, both venirepersons said they could consider the death penalty (Tr. 57-58, 245-46). The prosecutor struck them jurors based on the impermissible assumption that all religious people would be opposed to the death penalty. The peremptory strikes were in direct violation of the Missouri and federal Constitutions and international law.

This Court should reverse the motion court's denial of relief and remand for a new trial.

**IV. Counsel Did Not Investigate Strong's Background and  
All Reasonably Available Mitigating Evidence**

**The motion court clearly erred in denying Strong's claim of trial counsel's failure to investigate and present all available mitigating evidence because this denied Strong effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amends. 6, 8, 14, Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that trial counsel unreasonably failed to investigate and present evidence of Strong's background, including the testimony of family members and friends, such as his mother, Joyce Knox, his uncle, Wayne Garner, and his friend, Lamont Netter, and experts, such as child development specialist, Dr. Wanda Draper, and a psychologist, Dr. Marilyn Hutchinson. Strong's family had a history of mental illness. Strong's impoverished childhood was filled with neglect, violence and abuse. Strong's father abandoned him. Strong suffered from seizures, disorganized attachment and mental impairments. Strong was prejudiced because, had the jury heard this mitigating evidence, a reasonable probability exists that it would have imposed a life sentence.**

At trial, the State and the defense presented two completely different pictures of Richard Strong. The State portrayed him as a big bully, who beat the women he supposedly loved. He had beaten his ex-wife, Kim Strong and his girlfriends, Lutricia Braggs and Eva Washington (Tr. 1536-1610). This picture

was in stark contrast to the defense portrayal of Strong as a devoted family man, hard worker, and someone who was good to children (Tr. 1614-66). The defense did nothing to explain the conflicting accounts – to help the jury to understand this disconnect. How could such a good man commit such violent acts? Without any explanation, the jury likely discounted Strong’s family’s portrayal as a biased view, and accepted the State’s picture of Strong as a violent man, deserving of death.

Defense counsel could not counter the State’s portrayal because he did not know the facts. He had not investigated Strong’s background at all. Counsel neglected to learn about Strong’s family history of mental illness, Strong’s seizures, Strong’s impoverished childhood filled with abuse and neglect. Counsel failed to consult with experts, not because they were unnecessary, but because of their cost (Ex. 23). He delegated the investigation into mitigating circumstances to a new associate fresh out of law school (Ex. 38 at 13, Ex. 39, at 5, 6, 9). Because of counsel’s failures, the jury did not get a full and fair picture of Richard Strong. They could not consider all relevant mitigating circumstances in deciding whether he deserved to live or die.

### **Mitigating Evidence**

Strong’s family had a history of mental illness. His maternal grandmother, Iرنie, was paranoid schizophrenic (Ex. 32, at 2, Ex. 37, at 36-37, Ex. 4, at 1712, 1734). His maternal aunt, Wilma Stroud, also was paranoid schizophrenic and had

a Bipolar Disorder (Ex. 37, at 31, 33, 37, 42, 43). His mother had attempted suicide when Strong was only four years old (Ex. 33 at 84, 87).

Strong grew up extremely poor, often not having anything to eat and the basic necessities (H.Tr. 9-12, Ex. 32 at 6, Ex. 33, at 25, 28, 30, 46, 85-86, 87, 88, 91, 92, 93, Ex. 37 at 15-18). He lived in derelict apartments in violent neighborhoods (H.Tr. 9-12, Ex. 32 at 6, Ex. 37, at 18-28, Ex. 8B, Ex. 33 at 35, 46, 46-47, 58-59, 99). They could not afford to live in safe neighborhoods (Ex. 37, at 18). Strong's parents were never home (H.Tr. 9-11, 13). Strong dressed in tattered clothes and had no dress clothes (H.Tr. 9-11, Ex. 33 at 68). He missed school a lot because he had nothing to wear (Ex. 33 at 68). Kids teased him all the time (H.Tr. 11, Ex. 33 at 68).

Strong's father abandoned him before he was born, and again, when he was ten, when he denied that Strong was his child (Ex. 33, at 35, 45, 57, 75, 99, Ex. 7). He never paid child support (Ex. 33 at 57).

Strong's mother had a series of violent relationships (Ex. 32 at 5-6, 6-7, Ex. 33, at 24, 25-29, 32, 38-39, 48). Strong constantly saw his mother bloodied and bruised (Ex. 33 at 29, 32-33, 48). The men abused the children too (Ex. 33 at 26, 58).

Strong's babysitter sexually abused him when he was five (Ex. 33 at 64). He started wetting the bed and became withdrawn (Ex. 33 at 62). When Strong was 12, a stranger forced him into his car and sexually abused him (Ex. 33 at 76).

Strong's had low intellectual functioning (Ex. 33 at 69, 77, 92). He had to repeat first grade (Ex. 33 at 74, 88). He graduated with a 1.864 grade point average (Ex. 33 at 70). A Department of Corrections doctor at Potosi Correctional Center found Strong's IQ at 74 (Ex. 1 at 142). He read at a third grade level (Ex. 1 at 143). His spelling was at a second grade level. *Id.*

Strong had seizure-like actions, shaking, trembling, and sweating so severely that he was soaking wet (Ex. 33 at 74-75, 77, Ex. 37 at 44). He lost bladder control and urinated on himself (Ex. 33 at 75, 77).

Dr. Draper concluded that Strong suffered from a severe disorganized attachment (Ex. 33 at 38, 78, 79, Ex. 6). He did not receive the nurturing necessary for healthy development (Ex. 33, at 39-40, 49, 96). As a result, his brain did not develop normally (Ex. 33 at 42-43). Strong never developed necessary coping skills and had low self-esteem and self-worth (Ex. 33 at 99, 107). He felt more comfortable around children, since he never developed past childhood (Ex. 33 at 100).

Dr. Hutchison found Strong suffered from: Major Depression, Recurrent; Obsessive Compulsive Disorder; Post-Traumatic Stress Disorder; Adjustment Disorder, subject to incarceration; Reading Disorder; Dissociative Identity Disorder (H.Tr. 40, Ex. 24 at 26). Strong also had Schizotypal Personality Disorder with Dependent Features (H.Tr. 41, Ex. 24 at 26). Hutchison determined that, at the time of the offense, Strong suffered from extreme mental distress or

emotional disturbance (H.Tr. 40, Ex. 24 at 27- 28). He had impaired capacity to conform his conduct to the requirements of the law (H.Tr. 40, Ex. 24 at 28).

### **Counsel's Failure to Investigate**

Trial counsel, Brad Dede, acknowledged that, he had an obligation to investigate thoroughly and obtain all information possible (Ex. 38, at 50, 72, 73, 74, 123). He knew he must consider all available evidence before deciding what to present in mitigation (Ex. 38, at 51-52). Counsel thought he did a competent job in representing Strong (Ex. 38 at 177). The proof, however, lies in his actions, not his words.

Counsel spoke to Strong's mother, Joyce Knox, and Strong's brothers at Knox's house, but he did not learn much about Strong's background (Ex. 38, at 95). Counsel did not know that Strong's father Eugene was an alcoholic, gambled and was unfaithful (Ex. 38 at 97). Dede was not sure if he knew that Eugene was in prison when his first son was born (Ex. 38 at 100). He never learned that Eugene had abandoned Knox while she was four months pregnant with Strong and never paid child support (Ex. 38 at 102).

Counsel knew nothing about Knox's prenatal care when she was pregnant with Strong (Ex. 38 at 100). He never learned that Joyce was malnourished and not eating properly while pregnant with Strong (Ex. 38 at 102).

Counsel had no idea how poor Strong was growing up. He had not inquired about Knox's financial circumstances or obtained any income records

(Ex. 38 at 99). He never discovered that Knox gambled and sold herself to men to keep the family afloat (Ex. 38 at 103).

Counsel never learned of Strong's childhood living conditions. He never knew the family moved constantly, often in violent neighborhoods. (Ex. 38 at 112, 113, 114). He did not know that Strong lived at 26 different places in the City during his childhood, but acknowledged that this was a significant number (Ex. 38 at 120). Counsel never learned that Strong lived in dilapidated, rat-and-roach infested houses that lacked electricity (Ex. 38 at 111). Counsel never discovered that the Strong children were forced drink water from a toilet tank in one house (Ex. 38 at 112). He never learned that Strong saw a friend get shot in the back (Ex. 38 at 115). Counsel did not learn that Strong had found his best friend's mother dead (Ex. 38 at 116).

Counsel never investigated Knox's relationships with men. He never knew about Richard Ishman, Charles Brown, Sylvester Thompson, or Raymond Edmonson (Ex. 38 at 103, 105, 106, 107, 108, 109, 113). Counsel had no idea, that when Strong was two, his mother dated Richard Ishman, a violent drunk, who beat Knox, leaving her bloodied and bruised, in front of the children. *Id.* at 103, 105, 109. He did not know that Ishman assaulted and raped Joyce while the children listened to her scream (Ex. 38 at 106). He did not know that Knox tried to shoot Brown when she was pregnant with twins, and the children were in the next room (Ex. 38 at 107). Counsel knew nothing about Thompson, another

violent man (Ex. 38 at 112). He never learned about Raymond Edmondson, a drug dealer whom Knox dated (Ex. 38 at 113).

Counsel knew nothing about Strong's caregivers when he was little. When his mother was working, she left him at home with his siblings or with a babysitter. Counsel did not know that, his brothers locked him in the closet with a stuffed toy, Tigger, and refused to let him out (Ex. 38 at 109-10). Counsel never learned that this led to his fear of the dark and closed spaces (Ex.38 at 110). Counsel had no clue that, in kindergarten, Strong was terrified of his babysitter, started wetting the bed, and became withdrawn (Ex. 38 at 109). Counsel never learned that Strong was abused again when he was around ten or twelve (Ex. 38 at 114). He never learned that Ishman sexually abused Strong's sister, Paula (Ex. 38 at 103).

Counsel did not know of Strong's family history of mental illness (Ex. 38 at 110). He did not investigate Strong's seizures and head injuries, even though he was on notice about them (Ex. 38 at 117). He knew about Strong's spells, but did not know the details – their length, or severity (Ex. 38 at 117). He said that even had he known, he would not have presented them (Ex. 38 at 117). Counsel thought having seizures would make Strong seem like a monster, not a good man who treated children well (Ex. 38 at 117-18).

Counsel had Knox obtain Strong's school records for him, and, while he recalled Strong had problems at school, he never discovered that Strong had to repeat first grade (Ex. 38 at 112). He thought he learned about Strong's school

experiences from Dr. Rabun's report, rather than an independent investigation (Ex. 38 at 118-19).

Counsel did not investigate mental illness and could not say whether he would have presented Dr. Hutchison's findings of mental illness that supported statutory mitigators (Ex. 38 at 124-26). He would have considered the report leading to her conclusions (Ex. 38 at 125, 126).

### **Counsel Could Not Develop A Reasonable Strategy**

#### **Without An Adequate Investigation**

Counsel said his strategy for penalty phase was to show Strong and his family in a "good light" (Ex. 38 at 177, 193-94). He wanted to show Strong was good with kids and that his family loved him. *Id.* at 194-95. He was a man of faith who attended church. *Id.* at 195. He could serve a useful purpose if sentenced to life. *Id.* at 195-96.

Dede said that Strong would not cooperate and would not give him a list of witnesses. *Id.* at 178. Counsel did not know about Lamont Netter and Strong never shared his bad childhood with him. *Id.* at 178-79. Strong denied sustaining any abuse to Rabun, Fulton doctors, and the jail staff. *Id.* at 181, 185. His Fulton examination showed he was competent. *Id.* at 182-83. Pretrial evaluations did not show mental disease or defect. *Id.* at 184.

Counsel did not think that events from Strong's early childhood were mitigating. *Id.* at 189. He thought presenting evidence of a bad childhood would be viewed as making excuses. *Id.* at 190. He feared the jury would be offended

by an “abuse excuse” and such evidence would distract them from deciding punishment. *Id.* He preferred to focus on Strong as he was at the time of trial. *Id.* Counsel also believed expert testimony would have opened the door to more aggravation. *Id.* at 199-211. The “half-ton” the State presented was more than enough. *Id.* at 199.

### **Motion Court’s Findings**

The motion court found that trial counsel investigated Strong’s social history (L.F. 426). The court found that Strong did not volunteer that he had a bad childhood and did not help counsel investigate and present a defense (L.F. 426, 428). Strong had denied any family history of psychiatric problems or abuse when he talked to Dr. Rabun and the doctors at Fulton State Hospital (L.F. 426-27). Strong’s family members also did not volunteer information about Strong’s childhood poverty, abuse or neglect (L.F. 427, 428). They portrayed Strong’s background differently (L.F. 427, 428).

The motion court found that counsel adequately investigated Strong’s mental impairments by moving for a court-ordered evaluation (L.F. 429). Given this evaluation, counsel had no reason to believe Strong had any mental illness (L.F. 429-30). The court believed that Strong’s actions after the offenses- lying to police, changing clothes to hide the blood, locking the door, running away, and pulling the phone line- showed that he knew what he was doing, acting rationally and deliberately (L.F. 430-31, 450-51).

The court found counsel's failure to use psychological testimony in penalty phase reasonable. Counsel's failure was reasonable because, to blame a brutal murder of a 2-year old girl on Strong's bad childhood would be viewed as an excuse (L.F. 431-32, 439). Further, since Strong refused to cooperate with the court-appointed psychiatrist, counsel did not think Strong would cooperate with an expert (L.F. 432). Counsel's strategy, to portray Strong in a positive light, made ignoring all this information reasonable (L.F. 432).

The motion court found that mitigating evidence of Strong's troubled childhood and his psychological impairment would have been inconsistent with counsel's strategy "to portray [Strong] as a good person, a person who [sic] worthy of being saved" (L.F. 433). It was also inconsistent with the guilt phase defense that Strong was not guilty (L.F. 439-41). Trial counsel reasonably presented evidence of Strong "as a good man, loved by his family, helpful to his mother, close to his family and great with children." (L.F. 434). The court found that Strong's troubled background and mental impairments would have put him and his family in a "bad light" (L.F. 434).

The court noted that the two post-conviction experts were cross-examined about Strong's rage episodes, inability to control violence, and inability to remember his violent rages (L.F. 434-45, 446-48). They were examined about his trouble with relationships, lack of empathy, impulse control issues, all undercutting trial counsel's desire to portray him as a loving friend in healthy relationships, someone who loved children (L.F. 435). The experts testified about

Strong's prior bad acts as a child and an adult, much more aggravation than the prior bad acts the State presented (L.F. 435-6). The State could have emphasized his bad acts when cross-examining the experts (L.F. 436-38).

The court did not find Drs. Draper and Hutchison's testimony helpful (L.F. 441-52). The court found they were biased since they were paid by the public defender's office, had worked for the public defender in other cases, and obtained the information they relied on from post-conviction counsel (L.F. 441-42, 451-52). Since the experts lacked independent records to corroborate the family accounts of poverty, abuse, neglect and mental illness, the court gave the mitigating evidence no credence (L.F. 442-43). The court thought the witnesses should have interviewed non-family members, like police, and the victims' friends and family to get an "unbiased" account of Strong (L.F. 443-45).

The court also found Strong's background not mitigating because it did not cause him to kill the victims (L.F. 445-46, 448). His brothers and sisters, raised in the same household, did not commit violent murders (L.F. 445).

Since Strong made statements not accepting responsibility, the court rejected the experts' conclusions that he was remorseful (L.F. 448-49). The court concluded the experts' testimony was inconsistent with pretrial evaluations that found no mental impairments (L.F. 449-450). The court found any negative information about Washington would have offended and insulted the jury (L.F. 446).

The motion court found that, given the brutal nature of the crime, the mitigating evidence would not have changed the outcome of the death sentence (L.F. 452).

### **Standard of Review**

This Court reviews for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Strong must show that his counsel's performance was deficient and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000). The Sixth Amendment requires counsel to “discover *all reasonably available* mitigating evidence . . .” *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original).

To prove prejudice, Strong must show a “reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, at 534. When deciding if Strong established prejudice, this Court must “evaluate the totality of the evidence - - ‘both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*’” *Wiggins, supra* at 536, quoting *Williams v. Taylor*, 529 U.S. at 397-398 (emphasis in opinion).

### **Turbulent Childhood is Mitigating**

The court’s finding that evidence of an abusive and turbulent childhood would be viewed by jurors as an “excuse” is clearly erroneous (L.F. 431-32). It is relevant mitigating evidence jurors should consider. *Eddings v. Oklahoma*, 455

U.S. 104, 115 (1982). The Supreme Court has repeatedly found counsel ineffective when he fails to investigate and then present this type of evidence. *Wiggins v. Smith, supra; Williams v. Taylor, supra; and Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005).

In *Wiggins*, trial counsel was ineffective for failing to investigate Wiggins' life history, which included severe physical and sexual abuse. *Id.*, at 526-528. Wiggins' counsel hired a psychologist who tested Wiggins and concluded he had an IQ of 79, had difficulty coping with demanding situations, and exhibited personality disorder features. *Id.* Counsel reviewed a PSI that referenced Wiggins' "misery as youth" and documented his placement in foster care. *Id.* Counsel also obtained social service records regarding foster care. *Id.*

This investigation was insufficient. *Id.* Counsel had a duty to pursue leads so he could make informed choices about how to proceed and what evidence to present. *Id.* When assessing the reasonableness of an attorney's investigation, a court must not only consider the quantum of evidence known to counsel, but whether it would lead a reasonable attorney to investigate further. *Id.* Wiggins' counsel failed to follow leads and discover readily available evidence of severe physical and sexual abuse. *Id.*

In *Williams*, counsel was ineffective for not investigating and presenting substantial mitigation of Williams' nightmarish childhood. *Williams, supra.* Williams' intellectual functioning was in the borderline mental retardation range

and he did not advance beyond the sixth grade. *Id.* Counsel should have investigated and presented this mitigating evidence to the jury. *Id.*

In *Rompilla*, the Court again found counsel ineffective for failing to investigate his client's troubled childhood and mental impairments. Rompilla was reared in a slum environment, quit school at 16 and had a series of incarcerations, often assaultive and related to over-indulgence in alcohol. *Id.* Test results suggested mental illness and limited intellectual functioning. *Id.* Neither the jury, not the mental health experts who examined Rompilla heard this evidence. *Id.* at 392. Had counsel conducted a reasonable investigation, they could have presented mitigating evidence of Rompilla's difficult childhood, mental illness and impaired intellectual functioning. *Id.*

This Court has found counsel ineffective for failing to investigate and present evidence of medical, educational, family, and social history. *Hutchison v. State*, 150 S.W.3d 292, 308 (Mo. banc 2004). In *Hutchison*, counsel focused on guilt phase and failed to investigate their client's childhood and mental problems. *Id.* at 302-308. Counsel's failure was unreasonable and Hutchison was prejudiced, since the jury heard none of this mitigating evidence. *Id.*

In *Simmons v. Luebbers*, 299 F.3d 929, 936-938 (8th Cir. 2002), counsel was deemed ineffective for not investigating and presenting evidence of defendant's background. Simmons' home environment was very strict, and his alcoholic father beat his mother in front of him. *Id.* at 936. Simmons' mother beat him, and he so feared these beatings that he urinated on himself before they

occurred. *Id.* He ran away from home at a young age and was assaulted, and possibly raped. *Id.* He grew up in an impoverished neighborhood rife with violence, and his IQ was 83. *Id.* Simmons was prejudiced because there was a reasonable probability that at least one juror would have voted against imposing the death penalty, in that the evidence would have mitigated the state's portrayal of the Simmons as a violent person. *Id.* at 938.

Here, too, counsel unreasonably failed to investigate Strong's childhood. Counsel knew nothing about his extreme poverty, the horrible living conditions, or the violent neighborhoods. He did not learn about Strong's mother's series of violent relationships. Counsel did not investigate Strong's seizure disorders or his mental impairments. He knew nothing about Strong's family history, even though St. Louis County Jail records discussed his grandmother and aunt's paranoid schizophrenia (Ex. 1 at 24).

Just as in *Simmons*, here, the State portrayed Strong as an individual who responded violently to women. During the penalty phase, Strong's attorney could have presented evidence of Strong's background to demonstrate that his reactions were the result of an abusive and traumatic childhood. A vivid description of Strong's poverty stricken childhood, particularly rat and roach infested living conditions, water from the toilet tank, and all the violent physical abuse, may have influenced the jury's assessment of his moral culpability.

### **Nexus Argument Must Be Rejected**

The motion court found that since evidence of a traumatic childhood did not explain the killing, it would not be mitigating (L.F. 431-32, 439, 445-46, 448). The court noted that Strong's brothers and sisters, raised in the same household, did not commit murders (L.F. 445). This nexus argument has been rejected by the Supreme Court and this Court. *Tennard v. Dretke*, 124 S.Ct. 2562, 2573 (2004); *Hutchison*, 150 S.W.3d at 305. A defendant need not show a nexus between his mitigation and the crime to admit such mitigating evidence. *Tennard, supra*. "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Hutchison, supra* at 304, quoting, *Tennard*, 124 S.Ct. at 2570.

### **Counsel Has A Duty to Discover All Relevant Mitigating Evidence Even**

#### **If the Client Does Not Volunteer Helpful Information**

The motion court faults Strong for counsel's failure to investigate his troubled childhood, saying Strong's failure to "volunteer" this information, relieved counsel of his duty to investigate (L.F. 426-28). The Supreme Court has rejected this reasoning. *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005). Rompilla's counsel interviewed Rompilla and members of his family, and hired three mental health experts. *Id.* at 381. Rompilla was uninterested in counsel's attempts to investigate his life history for mitigation and told counsel that his childhood and schooling were "normal." *Id.* At times, he was actively obstructive, sending counsel off on false leads. *Id.*

Rompilla's counsel interviewed Rompilla's family, including his ex-wife, two brothers, a sister-in-law, and his son. *Id.* at 381-82. Counsel developed a good relationship with the family. *Id.* The family's knowledge of Rompilla was limited because of his time in custody, and their belief he was innocent. *Id.* The three mental health experts and their reports provided nothing useful for Rompilla's case. *Id.* As a result, counsel did not further investigate his mental condition. *Id.*

Even though Rompilla and his family indicated that his childhood was "normal," the Court found counsel ineffective for failing to investigate further. Specifically, counsel should have examined a file on Rompilla's prior conviction. *Id.* at 390-91. Had he done so, he would have discovered that Rompilla was reared in a slum environment, quit school at 16, and had a series of incarcerations, often assaultive and related to over-indulgence in alcohol. *Id.* Test results suggested mental illness and limited intellectual functioning. *Id.* This evidence was vastly different from the childhood portrait Rompilla and his family painted. *Id.* at 391. The jury and the mental health experts who examined Rompilla never heard this evidence. *Id.* at 392. Had counsel conducted a reasonable investigation, they could have presented mitigating evidence of Rompilla's difficult childhood, mental illness and impaired intellectual functioning. *Id.*

As in *Rompilla*, Strong and his family told counsel his childhood was "normal." Strong's counsel failed to follow leads and discover readily-available evidence of a traumatic, chaotic childhood, mental illness and low-intellectual

functioning. Red flags included the St. Louis County Jail Records that showed a history of mental illness (Ex. 1 at 24). Irnie's medical records also flagged the mental illness (Ex. 3 at 1516-17, 1712, 1805-06, Ex. 4 at 1910). Knox told counsel about the family history of mental illness (Ex. 37 at 52-53). School records showed Strong's low grades and his 1.8 GPA (Ex. 1 at 158-62). Income records showed Strong's family lived in extreme poverty (Ex. 3 at 1113). Records showed numerous addresses (Ex. 1-3). This should have put counsel on notice of the horrible neighborhoods where Strong lived and the extremely high number of moves during his childhood.

No one needed to volunteer this information; it was at counsel's fingertips. Unfortunately, Dede never looked at it. He delegated the task of investigating Strong's life history to someone who just graduated from law school and never tried a case, let alone a criminal or murder or death case. He had no idea how to investigate mitigation.

### **Witnesses' Credibility Is For the Jury**

The motion court found that Drs. Draper and Hutchison were not credible since the public defender's office hired them and they had worked on other public defender cases (L.F. 441-52). The court also criticized them for relying on post-conviction counsel to provide information about Strong's background and for not interviewing additional witnesses (L.F. 441-45, 451-52).

The court never indicates who should provide an expert background material, if not the attorney who hired the expert. The court ignores that records

provided to the experts came from independent sources and were certified as to their authenticity. The jail records were independent of the defense attorneys. Police reports were generated by the police, hardly a source biased for a defendant. School records were objective accounts from teachers and school officials, made long before the criminal case began. Court records were not generated by the defense, nor were Strong's grandmother's medical records, showing her mental illness. The motion court ignored all these independent sources of information.

A state post-conviction's judge's finding that a witness is not convincing does not defeat a claim of prejudice. *Kyles v. Whitley*, 514 U.S. 419, 449, n.19 (1995). That observation could not substitute for the jury's appraisal at trial. *Id.* Credibility of a witness is for the jury, not the postconviction court. *Antwine v. Delo*, 54 F.3d 1357, 1365 (8<sup>th</sup> Cir. 1995). A jury should be able to hear these experts and determine their credibility.

### **Summary**

Counsel failed to investigate all reasonably available mitigating evidence. Without an adequate investigation, he could not make reasonable strategic decisions about what mitigating evidence to present. The jury did not get a full and accurate picture of Richard Strong. Had jurors been able to consider all the mitigating evidence, both the trial evidence, together with that adduced at the 29.15 hearing, they likely would have sentenced Strong to life. A new penalty phase should result.

**V. Counsel's Failure to Present Strong's Videotaped Police Interview in Penalty Phase to Show His Remorse and Other Mitigation**

**The motion court clearly erred in denying the claim that trial counsel was ineffective for failing to present Strong's videotaped interview with police to show he was remorseful and other mitigating evidence because this denied Strong effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amends. 6, 8, 14, and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that Strong and Washington's tumultuous relationship, Washington's mental illness and violent history, Washington's threats to selectively enforce her *ex parte* order to get her way with Strong and to take his children from him were circumstances surrounding the offense that mitigated Strong's culpability. Despite the difficult relationship, Strong loved Washington and was remorseful. Strong was prejudiced because, had the jury heard this mitigating evidence, a reasonable probability exists that they would have imposed a life sentence.**

Lieutenant Ron Hawkins interrogated Strong on October 23, 2000, the day of the stabbings, at approximately 10:00 p.m. (L.F. 326-79). He videotaped the interrogation (Ex. B). The interview could have provided the jury with important information to consider in assessing Strong's culpability.

Richard Strong and Eva Washington had a tumultuous relationship. Washington had been sexually abused as a young child and did not trust men (L.F. 374). She did not want anyone to touch her (L.F. 335, 338). She was mentally ill and had multiple or split personalities (L.F. 334, 342, 370). Washington's alter ego, Michelle, was violent (L.F. 347, 370). Strong and Washington always argued (L.F. 375).

Once, when Strong was getting ready to leave the house, Washington punched him in the nose (L.F. 347). Strong hit her back and was arrested for assault (L.F. 347-48). The court placed him on probation (L.F. 347).

Strong blocked out the stabbings and could not remember exactly what happened. He remembered Washington ordering him out of the house (L.F. 365). She always did that when things did not go her way (L.F. 365). When Strong started packing his things to leave, Washington pushed him (L.F. 365, 377). They argued about whether Strong could take their baby (L.F. 377-78). Washington told him he was going to go to jail anyway, because she had the *ex parte* order against him (365-66). Strong dialed 911, but Washington snatched the phone away (L.F. 360, 366). Washington ran into the kitchen, got a knife and cut him (L.F. 342, 359, 360, 364, 366, 370, 379). Strong could not remember what happened next, but acknowledged he must have stabbed her (L.F. 367-68, 379). He could not remember what happened to Zandrea, whom he loved and would never hurt (L.F. 370, 374, 379).

Strong could not come to terms with Washington's and Zandrea's deaths. He believed Washington was at home and would come get him out of jail (L.F. 343, 344). She was his best friend and he could not understand what had happened (L.F. 361-62). When Hawkins said he did not buy Strong's "mental act," Strong denied having mental problems, repeatedly saying he was not "crazy" (L.F. 345, 348, 364).

Even though Strong did not remember the stabbings, he took responsibility, concluding that he must have done it (L.F. 342, 353-54, 355, 361, 367, 368, 370). He felt like his life was over, he was dead inside (L.F. 351, 352).

Hawkins suggested that Washington had been with another man and that Strong had responded out of anger when he found out she cheated on him (L.F. 332-34, 338, 345, 349, 355, 359, 362-63, 375). Strong did not believe that she was unfaithful (L.F. 338, 345, 359, 363, 376).

During guilt phase, defense counsel requested that Strong's statement be admitted and stated he wanted to lay the foundation through Lieutenant Hawkins (Tr. 1227). The prosecutor objected, stating the statement was hearsay, and, while parts of it were inculpatory, others were "in the nature of a defense" (Tr. 1228-29). The court ruled the statement was inadmissible, because it was exculpatory and self-serving (Tr. 1231).

Throughout the interview, Strong's demeanor was subdued, and he frequently cried (Ex. B). He was neither cocky nor defiant. *Id.* He took responsibility for the killings even though he could not remember how they

occurred. He did not claim to be insane or to have acted out of a jealous rage over another man. He was sincere and did not try to make up defenses to the crime.

On postconviction, Strong claimed that trial counsel was ineffective for not offering the statement during penalty phase (L.F. 49-50, 233-39, 325-79). The statement showed Strong's remorse for the killings and provided mitigating circumstances surrounding the offense. *Id.* The trial court would have been hard-pressed to disallow its admission, notwithstanding the hearsay rules, since the statement contained compelling mitigating evidence. *Id.*

At the postconviction proceedings, trial counsel back-tracked from his actions at trial and the claims he made in his new trial motion. Counsel said that he did not really want the court to admit the videotape, although he had requested its admission and had argued it had mitigating weight in his new trial motion (Ex. 38, at 128-31). Counsel said the taped statement contained too many negatives and he thought it would do more harm than good (Ex. 38, at 128-29). He thought the discussion about Strong's prior troubles with Eva was "too dangerous" and inconsistent with his penalty phase evidence (Ex. 38, at 130).

The motion court found that trial counsel used sound trial strategy in not offering the videotape (L.F. 463-66). The statements were inadmissible, self-serving hearsay. Further, the court held that Strong needed to testify to show his remorse (L.F. 463-64). Even if the tape were admissible, it contained good and bad information (L.F. 464). Strong did not remember the killing, and denied getting the knife (L.F. 464). Hawkins questioned Strong's behavior and implied

he was faking mental illness (L.F. 464). The interview included a discussion of Strong's prior assault of Eva Washington, the order of protection, and his probation for the assault (L.F. 464). Since Strong did not remember the incident, the court did not ascribe much weight to Strong's expression of sorrow (L.F. 464).

The motion court found that introducing the tape would have opened the door to other evidence that showed that Strong did not remember the incident and had not accepted responsibility (L.F. 464-65). It would have opened the door to Strong's prior statements that Washington had killed her daughter, which the jurors might find offensive (L.F. 465).

### **Standard of Review**

This Court reviews the findings for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Strong must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000). The Sixth Amendment requires counsel to “discover *all reasonably available* mitigating evidence . . .” *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original).

To prove prejudice, Strong must show a “reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, at 534. When deciding if Strong established prejudice, this Court must “evaluate the totality of the evidence - - ‘both that adduced at trial, *and the*

*evidence adduced in the habeas proceeding[s].”* *Id.* at 536, quoting *Williams v. Taylor*, 529 U.S. 397-98 (emphasis in opinion).

“[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Mitigating evidence must be admitted in punishment phase, notwithstanding any exclusionary rule. *See Green v. Georgia*, 442 U.S. 95 (1979) (a third party’s exculpatory statements should have been admitted in punishment phase, notwithstanding the hearsay rule).

### **Tape Was Mitigating**

Strong’s videotaped statement provided compelling evidence of his character and the circumstances surrounding the offense. The video showed him crying, sad, and remorseful for the killings (Ex. B). Even though Strong blocked out the stabbings, he took responsibility, repeatedly acknowledging that he must have done it (L.F. 342, 353-54, 355, 361, 367, 368, 370).

The tape also provided helpful information about the offense itself. Washington was mentally ill and violent (L.F. 347, 370). She had split personalities (L.F. 334, 342, 370). Strong and Washington had a tumultuous and rocky relationship, filled with arguments and fighting (L.F. 347-48, 375). When they argued, Washington often ordered Strong out of the house (L.F. 365). She

obtained an *ex parte* order and selectively enforced it as leverage to threaten him with jail and losing access to his children (L.F. 365-66, 377-78). On the day of the offense, she pushed him, ran into the kitchen and got a knife (L.F. 342, 359, 360, 364, 365, 366, 370, 377, 379). She cut him (L.F. 342, 359, 360, 364, 366, 370, 379).

These circumstances showed that Strong reacted to a bad situation with violence. He did not exercise good judgment and walk away. But, the history of violence and her mental illness helped to explain how their arguments escalated and how they both lost control.

Counsel's excuse for not moving for the tape's admission, that the tape had "too many negatives," was too dangerous and was inconsistent with the penalty phase does, not withstand scrutiny. It is also contrary to the record since counsel actually offered the videotape at trial in guilt phase, and included it as a claim of error in his new trial motion (L.F. 579). Counsel now chooses to ignore the beneficial information the video contains and focuses on its negative contents. But neither counsel, nor the motion court, can point to any negative information in contains that was not already before the jury.

In the State's opening, it told jurors about Strong's prior assault on Washington and her order of protection (Tr. 1531-32). The State said that Strong had threatened to kill Washington and her baby (Tr. 1533). The State introduced evidence of the prior assault and Washington's allegations (Tr. 1570-78). A police officer testified about the *ex parte* order of protection against Strong and the State

introduced portions of that court file into evidence (Tr. 1577-78, 1579-80, Ex. 64). One of Washington's friends also testified about the prior assault (Tr. 1594-95). In closing, the State emphasized the assault and argued it as a basis for a death sentence (Tr. 1737). Since any negative information in the videotaped statement was already before the jury, it made no sense to not use the tape for its positive information, to show Strong's remorse and the mitigating circumstances surrounding the offense.

Counsel's decision to forego mitigation because it contains something harmful is not reasonable. *Williams*, 529 U.S. at 395-96. In *Williams*, counsel was found ineffective for not investigating and presenting substantial mitigation. *Id.* The mitigation included Williams' nightmarish childhood, that he was borderline mentally retarded, and had not advanced beyond the sixth grade. *Id.* His prison records showed good behavior and prison officials were willing to testify that he was unlikely to be violent in the future, and seemed to thrive in a regimented, structured environment. *Id.*

Not all the information in the records was favorable. It also included Williams' prior criminal history, including that he had been committed to juvenile custody at least three times, for larceny at age 11, pulling a false alarm at age 12 and for breaking and entering at age 15. *Id.* at 396. Counsel said he did not want the jury to hear this negative information. *Id.* The Supreme Court ruled that counsel was ineffective, since foregoing the mitigating evidence to avoid the negative criminal history was unjustified and unreasonable. *Id.*

Here, too, the mitigating evidence in Strong's statement far out-weighed any negatives, especially since all the negative information was already before the jury. The mitigating circumstances surrounding Strong and Washington's relationship, that he loved and cared for her despite their problems, and that he was remorseful was powerful mitigation that provided a basis for a life sentence. The motion court erred in denying this claim. A new penalty phase should result.

## **VI. Unreasonable Defense**

**The motion court clearly erred in denying the claim that counsel was ineffective for presenting an unreasonable defense in the guilt phase – that the State had not proved guilt beyond a reasonable doubt - because this denied Strong due process and effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel’s strategy was unreasonable since overwhelming evidence showed that Strong was involved in the killings, the only question was what triggered the reaction and his state of mind. Had counsel presented the circumstances surrounding Strong and Washington’s relationship, their argument and Strong’s reaction, there is a reasonable probability that the jury would have found that Strong did not deliberate and at the very least, did not deserve a sentence of death.**

The State had a strong case. Police received a 911 call from Washington’s apartment and within one or two minutes, officers were at the scene. They knocked on the apartment’s front and back doors. Strong came out, locked the door behind him, gave inconsistent statements about his girlfriend, Washington, and her daughter, and eventually ran away from police. He told the police to just shoot him, saying he had killed them. When police arrested Strong, they found blood on him.

Inside the apartment, the police found a horrific scene. Eva Washington and her two-year old daughter, Zandrea Thomas, were stabbed to death.

Washington had sustained 21 stab wounds and five slash wounds (Ex. 5, at 23).

Thomas had sustained eight stab wounds and 12 slash wounds (Ex. 5, at 23).

Unquestionably, Strong was involved in the killings. He was at the scene, had blood on him, made incriminating statements, and ran from police. The only real question was his mental state and what triggered the events leading to the stabbings.

Strong's videotaped statement to police provided some clues. He and Washington had a tumultuous relationship. Strong described Washington as mentally ill and violent. They argued and she tried to stab him. He took the knife away from her and stabbed her.

Counsel followed-up on some of this information. He requested some of Washington's psychiatric records (D.L.F. 121-24). The St. Louis Psychiatric Center's admission notes reveal that when Washington was 19, she was "well versed with the mental health system." (Ex. 2 at 684). Her agenda was to get herself admitted to the psychiatric hospital "just for one day." *Id.* She told the staff that she "got very angry today when her friend slapped her phone down." *Id.* She said she was always on the phone. *Id.* She had violent thoughts, saying: "I just wanted to drown her." *Id.* She self-reported her irritable mood, short temper, feelings of boredom and emptiness. *Id.* She had three prior suicide attempts. *Id.* She had had suicidal thoughts since age ten. *Id.* She repeatedly dreamt of being

touched inappropriately and had flashbacks of sexual abuse that occurred between ages five and ten. *Id.* Her mom’s boyfriend had repeatedly abused her. *Id.* Her mood changed quickly. *Id.* She went from being “fine and dandy” to “angry” and did not know why. *Id.*

The treating doctor found her hostile and demanding. *Id.* He found her paranoid. *Id.* Washington expressed aggressive thoughts in an attempt to get admitted, saying “you are pissing me off and I want to tear this office down.” *Id.* She calmed down when informed that this would land her in jail. *Id.* The doctor verified that Washington had been sexually abused when she was five to ten. *Id.* She grew up in foster homes. *Id.* She could trust no one. *Id.*

Washington was on Zoloft, and had taken Valium and Mellaril<sup>14</sup> in the past. *Id.* When conducting her mental status exam, the doctor found Washington hostile, irritable, evasive, manipulative, uncooperative, demanding, and angry. *Id.* at 685. Dr. Quadri concluded that she had borderline personality disorder with mixed borderline and narcissistic features. *Id.* at 683.

Records from St. John’s Mercy Medical Center showed Washington was a troubled teen (Ex. 2, at 691). She ingested several foreign objects, including a

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<sup>14</sup> Mellaril is thioridazine hydrochloride, and is usually prescribed for schizophrenia, a severe loss of contact with reality. See, Physician’s Desk Reference.

ring, a paper clip and bits of plastic. *Id.* She was taking Mellaril when she was only 14 years old. *Id.*

Despite these records, counsel did not follow-up with an investigation into Washington. He never learned that Strong's family thought she was dangerous and wanted Strong to end his relationship with her (Ex. 1 at 572-73, Ex. 3, at 983, H.Tr. 126-27). Strong's sister, Paula, had worked at a group home where Washington lived (2H.Tr. 94). Paula learned that Washington had tried to kill her fosterparents (Ex. 1, at 541, 2H.Tr. 94). Strong's mother, Joyce Knox, saw scratches on Strong's neck, cheeks and arms, and suspected that Washington had attacked him (Ex. 1, at 541). His aunt, Linda Johnson, thought Washington was strange and something was wrong with her (Ex. 1, at 572). Only two days before the offense, Strong's sister, Lynn, begged him to leave her (Ex. 3, at 983, H.Tr. 126-27).

Knox believed Washington was emotionally disturbed (Ex. 1, at 542). When Strong moved out of the apartment in 1999, Washington had said, I "won't kill you because I love you, but I will kill someone you love." *Id.*

Washington's behavior was erratic. She obtained an *ex parte* order against Strong, but stalked him the following day (Ex. 37, at 81, Ex. 1 at 542). She sat in front of Knox's house day after day (Ex. 37, at 81, H.Tr. 115). She repeatedly telephoned Strong (Ex. 37 at 81, H.Tr. 115). One day, she called him 21 times (Ex. 37 at 81). In response, Strong returned to the apartment, in violation of the *ex parte* order (H.Tr. 115-16).

Strong's family was concerned for Zandrea's safety (Ex. 3 at 983). They thought Washington, not Strong, would hurt her (Ex. 3, at 983). They had seen Washington hit Zandrea before (Ex. 37, at 79-82). Washington pinched Zandrea, leaving bruises (Ex. 37, at 79). When Washington took Zandrea into the bathroom, Zandrea let out the "ungodliest scream" Knox had ever heard (Ex. 37, at 79). Knox confronted her and told her never to touch Zandrea again while she was in Knox's house (Ex. 37 at 79-80). Zandrea was scared and ran to Knox, clutching her leg (Ex. 37 at 80). On another occasion, Knox saw Washington kick a fence and grab Zandrea (Ex. 37, at 81). The child often had bruises and black eyes, but Washington made excuses for the injuries (Ex. 1 at 541, Ex. 37, at 80, H.Tr. 116).

Strong worried that Washington might sexually abuse her daughter (H.Tr. 116, 2H.Tr. at 92). He had seen Zandrea engaging in inappropriate sexual behavior with a doll (H.Tr. 116, 2H.Tr. 96-97).

Given this information, Strong's statements that Washington had hurt her own daughter did not seem so far-fetched (Ex. 33, at 177-78, Ex. 37 at 66, 2H.Tr. 127-34).

The jury heard none of this evidence about Washington and her relationship with Strong. Instead, trial counsel argued that the State had not proved Strong's guilt beyond a reasonable doubt. Trial counsel said he chose to attack the State's case from beginning to end (Ex. 38, at 83). Yet, he did not even consider presenting a murder second defense instead, conceding that Strong stabbed the

victims but did not plan the crime or deliberate (Ex. 38 at 84). Counsel said he feel uncomfortable with what actually happened since he had so many conflicting accounts (Ex. 38, at 84-85). Strong had made inconsistent statements, sometimes admitting that he killed both, other times saying he killed only Washington, and often not remembering what had happened (Ex. 38, at 85-87).

Counsel assessed the State's case and did not find the evidence overwhelming that Strong had committed the crimes (Ex. 38 at 88). He later conceded that, from the jurors' perspective, the evidence was overwhelming (Ex. 38 at 89). He had no credible evidence indicating someone else committed the crime (Ex. 38, at 90). He admitted that, while Strong was frustrating to deal with, he never forbid him from pursuing a murder second defense (Ex. 38, at 91). His frustration with Strong came from Strong's inability to remember, his inconsistent statements, his depression - he wanted to die, and not assisting his defense, since he did not want to put his family through a trial (Ex. 38, at 55-60, 94, 147-51).

Counsel claimed that pursuing a murder second defense would have opened the door to evidence, like prior threats to kill Washington and Zandrea (Ex. 38 at 163-64, 174).

Co-counsel believed that the State had significant evidence of Strong's guilt (Ex. 39 at 60). He did not agree with the State's assessment that the violent stabbings showed premeditation or deliberation (Ex. 39, at 60-61, 65). He thought the wounds showed someone in a "highly emotional," passionate and angry state (Ex. 39, at 65-66). He knew that Strong did not understand what had happened

and could not remember the crime (Ex. 39, at 55, 70). Since he did not remember what actually happened, Strong pointed to Washington as having killed her daughter (Ex. 39 at 67, 71, 72). Given her history of abusing Zandrea and her mental illness, Strong's conclusions were legitimate.

The motion court denied (L.F. 412-22) Strong's claim that counsel was ineffective for presenting an unreasonable defense (L.F. 44-45, 71-89). The court found counsel was an experienced, qualified criminal defense attorney (L.F. 413-14). It noted that Strong made inconsistent statements, wanted to plead guilty, and neither assisted nor actively participated in his defense (L.F. 414-15). It found the transcript showed a zealous and well-prepared attorney who made timely objections, "irrefutable proof" of counsel's competence and effectiveness (L.F. 415). It found counsel's investigation adequate and his decision to pursue a not guilty defense reasonable (L.F. 415-16). It said Strong's actions after the killing showed deliberation (L.F. 416-17, 419-20). It found "the nature of the wounds on both victims demonstrated a measured and controlled attack" and the number of wounds suggested premeditation, not a rage-like attack (L.F. 417-18).

Had counsel presented a defense that Strong did not deliberate, the court found that would have opened the door to Strong's prior bad acts to infer his intent (L.F. 418-19). In any event, the State's evidence of guilt was overwhelming, so Strong could not show prejudice from counsel's choice of defenses (L.F. 419). Given the overwhelming evidence of guilt and the brutal nature of the stabbings, the motion court did not believe the outcome in either phase would have been

different had counsel conceded involvement and challenged deliberation (L.F. 420-21).

### **Standard of Review**

As discussed, *supra*, the motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Strong must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

### **Counsel Has A Duty to Present Reasonable Defense**

In a death penalty case, counsel has a duty to present a reasonable defense in the guilt phase, keeping in mind the penalty phase that will follow. *Florida v. Nixon*, 125 S.Ct. 551, 563 (2004). Presenting consistent theories in guilt and penalty phase is important. *Id.*, quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Section 10.9.1, Commentary (rev. ed. 2003). Counsel also has a duty to investigate lesser included offenses. Guideline 1.1, Commentary, reprinted in 31 Hofstra L. Rev. 913, 926 (2003). "Counsel cannot responsibly advise a client about the merits of different courses of action" and "the client cannot make informed decisions . . . unless counsel has first conducted a thorough investigation with respect to both phases of the case." Guideline 10.7, Commentary, reprinted in 31 Hofstra L. Rev. at 1021.

Counsel's performance was deficient. He pursued and presented a not guilty/reasonable doubt guilt phase theory of defense even though, as the motion court explicitly found, the evidence of guilt was overwhelming (L.F. 419). Officers found Strong at the scene within minutes of the 911 call. He gave inconsistent statements, tried to conceal evidence, and ran from the officers. He had blood on him and admitted the killings. Under these circumstances, the only reasonable defense was to admit Strong's involvement but to challenge his mental state.

Counsel failed to advise Strong that pursuing a not guilty defense would negatively impact the ability to obtain a life sentence. Empirical studies show that juries in cases in which guilt is denied impose death sentences twice as often as life sentences, while juries in cases in which guilt is admitted choose life verdicts over death sentences by a three-to-two ratio. Sundby, "The Capital Jury and Absolution: the Intersection of Trial Strategy, Remorse, and the Death Penalty," 83 Cornell L. Rev. 1557, 1574-1575 (1998).

Counsel adopted his not guilty/reasonable doubt guilt phase strategy without conducting a thorough and adequate penalty phase investigation of potential mitigation. Strong's videotaped statement and Washington's psychiatric records should have put counsel on notice that more investigation needed to be done, to determine Strong's and Washington's frames of mind and whether she acted in conformity with her history. Without investigating their relationship, counsel could not possibly understand the circumstances of the offense. But,

Strong's family knew the relationship was a disaster waiting to happen, and they feared someone would get hurt.

The motion court rejected the claim that counsel's defense was unreasonable. It found that the transcript showed counsel was prepared and effective (L.F. 415). Its finding is contrary to this Court's opinion that numerous claims of error were unpreserved because counsel failed properly to object. *State v. Strong*, 142 S.W.3d 702, 713, 714, 715, 716, 717, 718, 718-19, 720, 725 (Mo. banc 2004). As this Court found, defense counsel failed to object throughout the trial, during voir dire, guilt phase and penalty phase. *Id.* Far from "irrefutable proof" of counsel's competence, the transcript shows an attorney who failed to object, failed to protect his client's rights, and failed to advocate for him with a reasonable defense.

The motion court also found that the nature of the wounds sustained demonstrates a "measured and controlled" attack (L.F. 417). The court cites no evidence or authority for this proposition and no forensic expert testified about the wounds and whether they establish the killer's state of mind. The only evidence on this issue came from co-counsel, Malone, who believed just the opposite (Ex. 39, at 65-66). He thought the wounds showed someone in a highly emotional state, very passionate and angry (Ex. 39, at 65-66).

The court's finding that Strong's actions after the murder also prove deliberation is clearly erroneous. People who kill, justifiably or not, may try to hide their actions. Someone may kill a loved one accidentally and then panic, and

try to get rid of evidence. Someone may kill a lover in a rage and then, after the rage subsides, try to conceal evidence. Actions, after the fact, surely point to guilt and involvement, but they are not proof of the mental state at the time of the crime. That is precisely why counsel unreasonably failed to concede Strong's involvement in the killings, and to argue guilt of a lesser offense.

The motion court also found that, had counsel challenged deliberation, it would have opened the door to all of Strong's prior bad acts to infer his intent (L.F. 418-19). The court ignores that this evidence came in during penalty phase, and since the state had told him, counsel knew it was coming. Had counsel fully addressed the evidence, the jury would have seen that Strong and Washington had a tumultuous relationship. They both could get violent and she often tried to provoke Strong. He reacted in a violent rage. He did not coolly reflect.

Had counsel conceded involvement, but challenged deliberation, even if jurors had found Strong guilty of first degree murder, they likely would have found him less deserving of death. Given the unreasonable defense at trial, the jury deliberated only 20 minutes, taking a break to eat at 7:15 p.m. and returning their verdict of guilt at 8:04 p.m. (Tr. 1484-85). If they only ate for ten minutes, they deliberated less than an hour before finding Strong guilty. Far from presenting a reasonable defense, counsel's theory that the State had failed to prove its case was patently unreasonable. He gave the jury no alternative to a guilty verdict.

Counsel was ineffective. This Court must reverse for a new trial.

Alternatively, if this Court finds prejudice only as to penalty phase, this Court should grant a new penalty phase trial.

## **VII. Crawford Violation**

**The motion court clearly erred in denying the claim that counsel was ineffective for failing to object to the admission of Washington's out-of-court statements, in which she told police officers that Strong had assaulted her, as violating Strong's rights to confrontation because this denied Strong confrontation, a fair trial and effective assistance of counsel, U.S. Const., Amends. 6, 8, 14, and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that when one officer questioned Washington, another officer had already detained Strong, and the first officer asked Washington what happened, who was the suspect, all to prove past events for a future prosecution. Counsel was ineffective since *Crawford* was being litigated while counsel represented Strong and because counsel's inaction allowed Washington's statements to go unchallenged to the jury like a voice from the grave. Counsel's failure to object prejudiced Strong as the prosecutor emphasized Washington's statements in his opening statement and closing argument, and relied on this evidence to obtain a death sentence.**

During the state's penalty phase, Officer Dan Patrick testified about statements Washington made when he responded to a 911 call and questioned her. On November 10, 1999, he and Officer Holland responded to a call at Washington's apartment (Tr. 1570-71). When they arrived, Patrick saw two black males getting into separate cars in the apartment complex's parking lot (Tr. 1571-

72). Holland detained the men outside, while Patrick entered the apartment to question Washington (Tr. 1572).

Patrick described Washington as “crying, shaken, visibly upset, borderline hysterical” (Tr. 1572-73). Patrick asked what had happened and Washington responded, “[H]e hit me, he hit me in the eye, and he hit me in the mouth, and he choked me until I passed out” (Tr. 1573). Patrick’s report verifies that Washington’s statement was made in response to his questioning and after Holland had detained Strong and his friend (Ex. 5 at 38). Patrick asked Washington to describe her attacker, and she provided a description and later, Strong’s name (Tr. 1575-76, Ex. 5 at 38). Following his investigation, Patrick helped Washington obtain an *ex parte* order (Tr. 1577).

The court let the prosecutor to read portions of State’s Exhibit 64, Washington’s *ex parte* order, into evidence. Trial counsel objected to the *ex parte* order, but not to Washington’s statements (Tr. 1507-08). The court ruled that those statements were admissible as excited utterances (Tr. 1510-11). The prosecutor emphasized Washington’s statements that detailed the alleged assault, in both his opening statement and closing arguments (Tr. 1531-32, 1727, 1728, 1735, 1737).

Defense counsel did not include in his new trial motion any claim of error about the admission of Washington’s statements and the details about the alleged 1999 assault (D.L.F. 578-97). On direct appeal, this Court noted counsel’s failures, both to object to the hearsay and to include the claim in the new trial

motion. *State v. Strong*, 142 S.W.3d 702, 718 (Mo. banc 2004). Since the claim was unpreserved, any review was for plain error. *Id.* This Court applied pre-*Crawford*<sup>15</sup> analysis and examined the hearsay for its “trustworthiness,” rather than by determining whether it was testimonial. *Id.* Since the claim was unpreserved, this Court provided limited review. *Id.*

Strong challenged trial counsel’s ineffectiveness for not objecting to Washington’s hearsay statements made in response to Officer Patrick’s questioning (L.F. 239-57). The amended motion included both the confrontation and ineffectiveness claims. *Id.*

Trial counsel did not object to Washington’s statements to the police because he believed they were admissible as excited utterances (Ex. 38 at 233-34). Even though Crawford’s counsel was litigating similar confrontation issues, since the United States Supreme Court had not finally decided *Crawford* by the time of trial, counsel was unfamiliar with it (Ex. 38 at 232).

The motion court ruled that counsel was not ineffective because Washington’s statements were admissible under the excited utterance exception to the hearsay rule (L.F. 467-68). Additionally, since *Crawford* was not decided until “numerous” years after the trial, it was inapplicable (L.F. 468). Finally, even if *Crawford* applied, the motion court ruled that *Crawford* did not obviate the excited utterance exception to the hearsay rule. In so ruling, the court relied on

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<sup>15</sup> *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

out-of-state cases, many of which have been vacated, overruled or called into question (L.F. 468-72).

### **Standard of Review**

This Court reviews the motion court's judgment denying relief for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

To establish ineffective assistance, Strong must show counsel's performance was deficient and that performance affected his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000). To prove prejudice, Strong must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.*; *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997).

Appellate courts review confrontation violations *de novo*. *Lilly v. Virginia*, 527 U.S. 116, 136 (1999). Admission of hearsay is reviewed for an abuse of discretion. *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006).

### **Confrontation Violation**

In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the Court held that, for testimonial evidence to be admissible, the Sixth Amendment demands that the witness be unavailable and the defendant have had a prior opportunity for cross-examination, regardless of whether a court deems the statements reliable. The

*Crawford* Court did not define “testimonial” and recognized statements police officers take in the course of interrogations qualify as testimonial under any definition. *Id.* at 52-53. The Court stated that it used “interrogation” in its “colloquial, rather than any technical, legal sense.” *Id.* at 53, n. 4.

In *Davis v. Washington*, 126 S.Ct. 2266 (2006), the Court clarified the meaning of “testimonial.” The Court held that statements are testimonial when the circumstances objectively indicate that there is no ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.* at 2273-74. Courts should look to see if the primary, not necessarily the sole, purpose is to investigate a possible crime. *Id.* at 2278.

In *Davis*, the Court reviewed two companion cases involving 911 calls. In *Davis*, Michelle McCottry called 911, but terminated the call before speaking. 126 S.Ct. at 2270-71. The operator reversed the call and spoke to McCottry. *Id.* McCottry told the operator about a domestic dispute, saying: “he’s here jumpin’ on me again.” *Id.* at 2271. The operator told McCottry that help was on its way and asked questions to deal with the emergency, like whether he had any weapons, had been drinking, and his name. *Id.* McCottry told the operator Davis had “just r[un] out the door” and was leaving in a car. *Id.* The operator told McCottry police would check the area for Davis and then talk to her. *Id.* Police arrived within four minutes of the call. *Id.*

The Court found that the trial court properly admitted the 911 call. *Id.* at 2276. “McCottry was speaking about events *as they were actually happening*, rather than describ[ing] past events.” *Id.*, quoting *Lilly v. Virginia*, 527 U.S. 116 (1999) (plurality opinion) (emphasis in original). McCottry was facing an ongoing emergency. *Davis*, 126 S.Ct. at 2276. The questions were necessary to resolve the present emergency rather than simply to learn what had happened in the past. *Id.* Since the primary purpose was to enable police assistance to meet an ongoing emergency, the statements were not testimonial for purposes of the Confrontation Clause. *Id.* at 2277.

In *Hammon*, the police responded to a domestic disturbance. *Davis*, 126 S.Ct. at 2272. Police found Amy Hammon alone on the front porch, frightened, but saying nothing was the matter. *Id.* She gave police permission to enter the house and they found broken glass from a gas heating unit. *Id.* Amy’s husband, Hershel, was in the kitchen and he told the police they had argued, but everything was fine now. *Id.* Amy returned inside. One officer remained with Hershel in the kitchen and the other officer went to the living room to talk with Amy and asked her what had occurred. *Id.* Hershel tried to participate in Amy’s conversation, but the police refused, keeping them separated so they could investigate what had happened. *Id.* Amy provided her account and filled out a battery affidavit. *Id.* She wrote: “Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn’t leave the house. Attacked my daughter.” *Id.* The

trial court admitted the affidavit as a “present sense impression,” and “excited utterance.” *Id.* The court also allowed the officer let the officer testify about Amy’s statements to him. *Id.* at 2272-73.

The Supreme Court reversed the trial court, holding these statements were testimonial. *Id.* at 2278. The officer’s questions were part of an investigation into possibly criminal past conduct. *Id.* There was no emergency in progress and no immediate threat to Amy. *Id.* The officer questioned Amy in a separate room, away from her husband. *Id.* When the husband tried to intervene, the officer stopped him. *Id.* The questioning took place after the events they described were over. *Id.* The statements were thus “inherently testimonial.” *Id.* The Court distinguished *Hammon* from *Davis*. While McCottry had been in immediate danger and seeking aid, Hammon was telling a story about the past. *Id.* at 2279. Police had separated the Hammons, ensuring no further danger. *Id.*

Strong’s case is like *Hammon*, not *Davis*. When police arrived at the scene, the altercation was over and Strong was trying to leave in a car (Tr. 1571-72). One officer detained Strong in the parking lot, away from Washington, who was in the apartment (Tr. 1571-72). Another officer questioned Washington about what had happened in the past, not to deal with an ongoing emergency (Tr. 1573, 1575-76, Ex. 5 at 38). The statements were testimonial and should have been excluded.

Even though *Davis* was decided on June 19, 2006, six months before the motion court issued its decision, it ignored *Davis*, choosing instead to rely on out-of-state cases that had found hearsay statements admissible under the excited

utterance exception. The motion court relied on *Anderson v. State*, 111 P.3d 350 (Ala. App. 2005) (L.F. 469), but that judgment has been vacated by *Anderson v. Alaska*, 126 S.Ct. 2983 (2006).<sup>16</sup> The motion court also relied on the reasoning and analysis in *State v. Staten*, 610 S.E.2d 823 (S.C. App. 2005) (L.F. 469-70), but, again, that case has been repudiated. In *State v. Staten*, 647 S.E.2d 207 (S.C. 2007), the court vacated that portion of the opinion discussing *Crawford v. Washington*, 541 U.S. 36 (2004).

The two Texas cases the motion court cited have been called into question but not overruled. Their analysis is of limited usefulness since they were decided before *Davis, supra*, and are inconsistent with the Supreme Court's analysis. Both are distinguishable factually from Strong's case.

In *Spencer v. State*, 162 S.W.3d 877 (Tex. App. 2005), the police received a 911 call and arrived at the scene less than three minutes later. The victim was standing in her front yard holding her nine-month old baby. *Id.* She had red marks on her left cheek and blood coming from her nose and clothing. *Id.* She was visibly distraught. *Id.* She told officers that Spencer had punched her. *Id.* He had left the house. *Id.* The victim refused treatment and the officers left. *Id.* Shortly thereafter, another call came in from the same address and this time, officers found Spencer at the scene. *Id.* Without the benefit of the *Davis* analysis,

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<sup>16</sup> The judgment was vacated on June 30, 2006, nearly six months before the court issued its findings and conclusions.

the Texas court ruled that statements made to officers responding to a call during their initial assessment and securing of a crime scene are not testimonial. *Id.* at 882. In reaching this conclusion, the Texas court relied on *Hammon v. State*, 809 N.E.2d 945, 952 (Ind. App. 2004). *Hammon* was reversed in *Davis, supra*, where the Supreme Court held Amy Hammon's statements were testimonial since they were part of an investigation into past criminal conduct.

The critical factors to assess whether a statement is testimonial is whether it is made in the context of an ongoing emergency or whether the primary purpose of the interrogation is to prove past events that are potentially relevant to a later prosecution. In *Spencer*, the victim's statements were elicited in the context of an emergency. While her attacker had fled, she feared for her life. By contrast, here, officers had detained Strong and questioned Washington to establish what had happened in the past. Thus, Strong's case is much more like *Hammon* than *Spencer*.

*Wilson v. State*, 151 S.W.3d 694, 696 (Tx. App. 2004) did not address 911 calls, but a police chase of a suspect in a robbery. After the chase, Wilson and two others took off running through a field. *Id.* Wilson's girlfriend, who was visibly upset and shaken, approached the officers and asked them what happened to the car and the passengers. *Id.* She told the officers the car had been stolen and gave them information to identify Wilson. *Id.* The Texas court concluded that the girlfriend's statements were non-testimonial since she approached the police where her car had been wrecked and abandoned. *Id.* at 698. The officers did not

question her. *Id.* She was the one seeking information. *Id.* The police had no idea that she had any relationship to the driver until she told them and handed them Wilson's wallet. *Id.* Under these circumstances, her statements were non-testimonial. *Id.*

The motion court's reliance on *Spencer* and *Wilson* is misplaced. They are factually distinguishable from this case and are based on an incorrect reading of the law.

The motion court's reliance on *State v. Barnes*, 854 A.2d 208 (Me. 2004) is also questionable. In *Barnes*, a witness went to the police station to report that her son assaulted her. *Id.* at 211. The Maine court found significant that the victim went to the station on her own and the police did not seek her out for questioning. *Id.* She made the statements while she was under the stress of the alleged assault, and sought safety and aid. *Id.* Police did not question her about known criminal activity. *Id.* The court thus concluded the statements were not testimonial under *Crawford*.

Other courts have disagreed with *Barnes*. In *State v. Jensen*, 727 N.W.2d 518, 526 (Wis. 2007), the Court questioned the premise that the hallmark of testimonial statement should be whether they are made at the request or suggestion of the police. A formal interrogation is not required to find statements testimonial. *Id.* at 541. "The Framers were no more willing to exempt from cross-examination *volunteered testimony* or answers to open-ended questions than they were to exempt answers to detailed interrogation." *Id.*, quoting *Davis* at 2274, n. 1

(emphasis added by *Jensen* court). Once again, the critical inquiry is not whether the witness volunteered the statements since accusers might have every incentive to do that. Rather, the inquiry must be whether the police are investigating past events or dealing with an on-going emergency.

The motion court's reliance on *People v. Rivera*, 778 N.Y.S.2d 28 (N.Y.A.D. 2004), another case decided prior to *Davis*, is also misplaced. *Rivera* applied the excited utterance exception to allow the admission of a statement the victim's girlfriend made to the victim's sister. *Id.* at 29. The statement was made within minutes of the stabbing by a crying, screaming declarant under the continuing stress and excitement the startling event caused. *Id.* The statement was not made to a police officer investigating a past event. *Id.*

The motion court's reliance on *People v. Corella*, 122 Cal.App.4<sup>th</sup> 461 (Ca. App. 2004), another pre-*Davis* case, is perplexing. Other California courts<sup>17</sup> have disagreed with *Corella* and courts from Arizona, Texas, Minnesota, Utah and Georgia have declined to follow it.<sup>18</sup> In *Corella*, the California court said that, to

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<sup>17</sup> See, *People v. Kilday*, 20 Cal.Rptr.3d 161 (Cal. App. 1 Dist. 2004); *In re Fernando R.*, 40 Cal.Rptr.3d 61 (Cal. App. 6 Dist. 2006); *People v. Sanchez*, 41 Cal.Rptr.3d 892 (Cal. App. 2 Dist. 2006).

<sup>18</sup> *State v. Parks*, 116 P.3d 631 (Ariz. App. 2005); *Mason v. State*, 173 S.W.3d 105 (Tex. App. 2005); *State v. Wright*, 701 N.W.2d 802 (Minn. 2005); *Salt Lake City*

be testimonial, *Crawford* requires a “relatively formal investigation where a trial is contemplated.” 122 Cal. App. 4<sup>th</sup> at 468. Statements made during a 911 call and to a police officer responding to such a call were not part of a police interrogation and thus, not testimonial. *Id.* This ruling is contrary to *Davis/Hammons*, where the Supreme Court found statements made to an officer responding to a 911 can be testimonial.

The motion court cited only one Missouri case in support of its ruling that *Crawford* does not preclude admitting Washington’s statements and that they constitute an excited utterance. *State v. Kemp*, 2005 WL 2977790 (Mo. App. W.D. 2005).<sup>19</sup> On transfer, this Court analyzed out-of-court statements to neighbors and a portion of the 911 call that were admitted into evidence. *State v. Kemp*, 212 S.W.3d 135 (Mo. banc 2007).

On October 11, 2003, a woman, naked from the waist up, ran through her neighborhood, banged on a neighbor’s door, and screamed, “Help me, please help me.” *Id.* at 138. She ran down the street, was frantic and emotionally distraught. *Id.* The neighbor caught up to her and the victim said her boyfriend had been

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*v. Williams*, 128 P.3d 47 (Utah App. 2005); *Pitts v. State*, 627 S.E.2d 17 (Ga. 2006).

<sup>19</sup> This Court transferred *Kemp* on January 31, 2006, nearly a year before the motion court entered its findings.

holding her hostage at gunpoint all night. *Id.* The neighbor brought the woman back to his home. *Id.* She was still frantic, crying and breathing deeply. *Id.* at 138-39. The neighbors called the police and told them what was happening. *Id.* at 139-43. At trial, the court allowed the State to play a 39-second portion of the 911 call that dealt with the emergency. *Id.* at 144. The court also allowed the neighbors to testify about the victim's statements to them when she was hysterical, frantic and upset. *Id.* at 144-45. This Court found the statements were not testimonial and properly admitted as an excited utterance. *Id.* at 148-50. The victim was involved in an ongoing emergency. *Id.* at 148. She did not know where Kemp was and he had chased her when she escaped her apartment, held at gunpoint all night long. *Id.* He was armed and had been smoking crack. *Id.* at 149. She was scared and hysterical. *Id.* The 911 operator's questions were directed at enabling police assistance to meet the emergency. *Id.* Accordingly, the statements were not testimonial under *Davis/Hammon*. *Id.*

Here, Washington's statements were made while she was still upset and distraught, but there was no ongoing emergency. As in *Hammon*, the police had detained Strong, and had separated him from Washington. (Tr. 1571-72). Their questions were designed to find out what had happened in the past, not to deal with an ongoing emergency where they would have needed to protect the victim and others from the suspect. Accordingly, Washington's statements were testimonial and should have been excluded.

The motion court ruled that counsel was effective, since he could not predict a change in the law and anticipate the *Crawford* decision decided “numerous years” after the present case was heard (L.F. 467-68). Actually, counsel should have been aware of the confrontation objection. Strong was tried in March, 2003 (Tr. 930). Defense attorneys were litigating the issue before Strong’s trial began. *State v. Crawford*, 54 P.3d 656 (Wash. 2002). Crawford’s counsel filed his petition for certiorari on March 10, 2003, before Strong’s motion for new trial was filed and two months before his sentencing on May 9, 2003. The Supreme Court granted certiorari in *Crawford v. Washington*, No. 02-9410, on June 9, 2003. The *Crawford* litigation was pending at the time of Strong’s trial proceedings.

Strong was prejudiced by counsel’s failure to object. The prosecutor emphasized Washington’s statements in his opening statement and closing arguments (Tr. 1531-32, 1727, 1728, 1735, 1737). He put the statements front and center in his opening:

. . . you will hear evidence that in November of 1999, the evidence - - that the police also received a call to Treadway, that Officer Patrick sees Eva Washington hysterical, out in front of the apartment crying, crying hysterically, very upset. Richard Strong and someone else, another gentleman, were attempting to leave. At that point they were detained. And while Officer Patrick talked to

Eva Washington to find out what happened, she just kept saying he choked me, he choked me.

(Tr. 1531-32). During his closing argument, the prosecutor referred to the November, 1999 assault several times (Tr. 1727, 1728, 1735, 1737). He told the jurors they must consider whether the mitigating evidence outweighed the aggravating evidence; whether the mitigating evidence “outweighs the pounding and choking of Eva Washington, in November of ‘99” (Tr. 1728). The prosecutor used Washington’s exact words, evoking a voice from the grave, saying: And Eva Washington, who, in November of 1999, he choked her, choked her . . .” (Tr. 1735, 1737).

Since the State relied on Washington’s statements to obtain a death sentence, they were prejudicial. This Court should reverse and remand for a new penalty phase.

### **VIII. Lethal Injection Is Cruel and Unusual Punishment**

**The motion court clearly erred in denying the claim that Missouri’s method of lethal injection is unconstitutional, because it thereby denied Mr. Strong due process and freedom from cruel and unusual punishment, U.S. Const., Amends. 8 and 14, and Article I, Sections 10 and 21 of the Missouri Constitution, in that a sentence that creates an unnecessary risk of pain and suffering is unconstitutional. Further, all constitutional claims known to Strong should be raised in his postconviction action and such claims are not limited to direct appeal since the protocol for executions may change, thereby making the claim ripe closer in time to execution.**

Mr. Strong alleged that Missouri’s use of lethal injection is unconstitutional, violating the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 21 of the Missouri Constitution (L.F. 54, 285-305, 380-82). His motion challenged the lethal injection process, specifically, the three drugs used in the procedure, the problems with them and how they are administered. *Id.*

The motion court denied the claim, ruling that “Missouri’s death penalty statute is a matter for direct appeal and cannot be raised in a motion for postconviction relief” (L.F. 484-85). The motion court also denied the lethal injection claim, ruling that the “identical” claim had been considered and rejected,

without an evidentiary hearing, in *State v. Morrow*, 21 S.W.3d 819, 828 (Mo. banc 2000), and *Worthington v. State*, 166 S.W.3d 566, 582-583 (Mo. banc 2005) (L.F. 485).

Even though the motion court ruled the claim could not be raised in the state postconviction proceeding, it faulted Strong's counsel for not presenting evidence to support the claim (L.F. 484). The motion court also ruled that, since the issue is pending in federal court, the federal courts and this Court should be the courts to decide the issue (L.F. 485).

### **Standard of Review**

This Court reviews for clear error. *See*, Point II, *supra*.

### **Challenge to Lethal Injection Is Cognizable Claim**

The motion court's ruling that this is an issue for direct appeal and reliance on *State v. Jones*, 979 S.W.2d 171, 181 (Mo. banc 1998) is clearly erroneous. *Jones* is inapplicable. This Court denied Jones' claim that the decision to seek the death penalty was based on arbitrary and capricious considerations of race, affluence and gender. *Id.* This Court held that the motion court properly found this to be a challenge to the prosecutor's exercise of discretion in seeking death, and thus, was a matter for direct appeal. *Id.* Post-conviction motions should not be used as a substitute for direct appeal or to obtain a second shot at appellate review. *Id.*

The motion court also clearly erred in ruling that the "identical" claim has been rejected in *Morrow* and *Worthington*. This is a distinct claim from the one

this Court rejected as insufficiently pled in *Morrow* and *Worthington*. There, the pleadings focused on newspaper accounts of past flawed executions. Here, in contrast, the motion challenged the process, offering the testimony of Dr. Mark Heath, M.D., Assistant Professor of Clinical Anesthesiology at Columbia University (L.F. 286-92); a study examining lethal injection in states with similar or identical protocols to Missouri's (L.F. 292), and the testimony of Drs. Matjasko and Brunner, board-certified anesthesiologists (L.F. 292-93).

This Court has ruled that challenges to the method of execution can be raised in post-conviction proceedings if properly pled. *Morrow*, 21 S.W.3d at 828. Strong alleged that "Missouri's method and protocol for lethal injection subjects persons condemned to death to extreme pain, prolonged suffering and torture during the execution process and these problems are likely to recur." (L.F. 285). He pled that Missouri poisons prisoners with a lethal combination of three chemical substances: sodium pentothal, pancuronium bromide (Pavulon), and potassium chloride (KCl) (L.F. 286-87).

Sodium pentothal is an ultra-short-acting barbituate that induces unconsciousness and is usually used with surgical patients (L.F. 287-90). Because of its brief duration, it may not have a sedative effect and, as a result, the prisoner can suffer excruciating pain. *Id.*

The second chemical, pancuronium bromide, paralyzes the skeletal muscles, but does not affect consciousness or pain and suffering (L.F. 287-88). It can neutralize sodium pentothal and actually mask pain and suffering. *Id.* The

American Veterinary Medicine Association (AVMA) condemns using neuro-muscular blocking agents like pancuronium bromide to euthanize animals (L.F. 288-89). Since 1981, many states, including Missouri, have prohibited using pancuronium bromide on domestic animals (L.F. 288-89).

The motion court correctly noted that this claim is currently pending in federal court. The United States Supreme Court has granted a petition for certiorari to review whether lethal injection violates the prohibition against cruel and unusual punishment. *Baze v. Rees*, 2007 WL 2850507 (October 3, 2007). A similar issue is being raised in *Taylor v. Crawford* (07-303).

Strong understands that protocols may change, creating an issue of ripeness. The question is whether state courts should review Missouri's lethal injection process or leave this review to the federal courts. Federal courts can hear such claims in Section 1983 actions, litigation occurring closer in time to a prisoner's actual execution. *Hill v. McDonough*, 126 S.Ct. 2096 (2006); *Nelson v. Campbell*, 541 U.S. 637 (2004). Yet, Section 1983 actions may not provide a meaningful remedy if stays of execution are not granted and prisoners are executed before their claims can be litigated. *See, Hill v. McDonough*, 2006 WL 2641659 (11th Cir. 2006).

The challenge to Missouri's lethal injection procedure is a constitutional challenge to the sentence imposed. Thus, it should and may be raised in Rule 29.15 proceedings. Rule 29.15(a). The Eighth Amendment requires that punishment "not involve the unnecessary and wanton infliction of pain." *Gregg v.*

*Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, J.J.); *Louisiana v. Resweber*, 329 U.S. 459, 463 (1947). It cannot cause torture or lingering death. *In re Kemmler*, 136 U.S. 436, 447 (1890). Methods of execution must minimize the risk of unnecessary pain, violence, and mutilation. *Glass v. Louisiana*, 471 U.S. 1080, 1086 (1985) (Brennan, J. dissenting from certiorari denied).

This Court has given mixed signals on whether this claim is cognizable or ripe in a Rule 29.15 proceeding. *See, Morrow, supra, and Williams v. State*, 168 S.W.3d 433, 446 (Mo. banc 2005) (court focuses on inadequate pleadings to deny relief). But, in *Worthington*, 166 S.W.3d at 583, n.3, this Court recognized that, since methods of execution may change, “it is *premature* for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment.” (emphasis added).

Mr. Strong is in a classic Catch-22. Ruled 29.15(b) requires that he raise all meritorious constitutional claims known to him or risk waiving them. But, because the motion court ruled the claim is either for direct appeal or to be decided in federal court, he lacks a meaningful opportunity to litigate this meritorious claim in state court.

This Court should either conclude that Missouri courts can examine this constitutional issue and scrutinize Missouri’s lethal injection process fully, or clearly state the claim is not ripe, and should be raised in federal court. Since this issue is pending in the United States Supreme Court, this Court’s decision about

the merits of the claim should be guided by the *Baze* case. If this Court concludes the claim is ripe, it should remand the case to the motion court with directions to hear the evidence.

## CONCLUSION

Mr. Strong was denied a fair trial. His counsel was ineffective. Accordingly, he requests relief as follows:

Points III, VI, a new trial;

Points II, IV, V, VII, a new penalty phase;

Point I, a remand for further post-conviction proceedings; and

Point VIII, a remand for a hearing on the lethal injection claim or alternatively, vacate Mr. Strong's death sentence and resentence him to life without probation or parole.

Respectfully submitted,

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### **Certificate of Compliance and Service**

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, 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 27,142 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in November, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were hand-delivered this 5<sup>th</sup> day of November, 2007, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Melinda K. Pendergraph