

IN THE
MISSOURI SUPREME COURT

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

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

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL AND FACT STATEMENTS

Appellant, Richard Strong, adopts the Jurisdictional Statement and the Statement of Facts in his original brief.

POINTS RELIED ON

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

The motion court abused its discretion in denying Strong's request to interview jurors and then denying him relief on his claim of ineffectiveness because he did not call the jurors; juror interviews to discover information regarding jurors' answers during voir dire are appropriate because they do not seek to impeach the verdict.

Williams v. Taylor, 529 U.S. 420 (2000); and

United States v. Wright, 506 F.3d 1293 (10th Cir. 2007).

II. Counsel's Ineffectiveness – Failure to Object to Improper Argument

Counsel's failure to object to improper closing argument can constitute ineffective assistance of counsel; Strong presented evidence of emotional reactions to the improper closing argument through trial counsel who heard sighs and gasps in the courtroom and saw a spectator run out of the courtroom; Strong could not present additional evidence of the jurors' emotional reactions since the motion court would not allow him to interview the jurors.

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

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

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

III. Counsel Failed to Object to the Prosecutor's Exclusion of Jurors

For Religious Reasons

The law at the time of trial should have put counsel on notice that jurors could not be stricken based on their religious persuasion or belief; the prosecutor admitted that he struck Venirepersons Sylvia Stevenson and Luke Bobo for religious reasons, and the trial court approved the strikes based on the religious reasons; and Strong was prejudiced because his jury selection was discriminatory and unfair and religious persons were not allowed to serve.

State v. Parker, 836 S.W.2d 930, 942 (Mo. banc 1992);

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

Davis v. Minnesota, 511 U.S. 1115 (1994);

Miller-El v. Dretke, 545 U.S. 231 (2005);

Mo. Const., Article I, Section 5; and

Section 494.400.

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

Counsel did not adequately investigate Strong's background and all reasonably available mitigation; counsel did not adequately investigate Strong's mental illness; and without a thorough investigation, counsel could not make reasonable decisions about what mitigating evidence to present.

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

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

Strong's videotape statement to police was admissible in penalty phase to mitigate the penalty imposed; jurors should have as much information as possible in assessing punishment in a death penalty case; and Strong's statements to police showed he was remorseful and other mitigating circumstances such as Strong and Washington's tumultuous relationship, Washington's mental illness and violent history, Washington's threats to selectively enforce her *ex parte* order and to take his children from him.

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

State v. Phillips, 940 S.W.2d 512 (Mo. banc 1997); and

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

VI. Unreasonable Defense

Defense counsel's defense – that the State had not proven its case beyond a reasonable doubt was unreasonable; and counsel developed the strategy without thoroughly investigating Strong's background, mental illness and the circumstances of the offense.

McLuckie v. Abbott, 337 F.3d 1193 (10th Cir. 2003);

Eldredge v. Atkins, 665 F.2d 228 (8th Cir. 1981);

Battenfield v. Gibson, 236 F.3d 1215 (10th Cir. 2001); and

Seidel v. Merkle, 146 F.3d 750 (9th Cir. 1998).

VII. Crawford Violation

Strong did not forfeit his Sixth Amendment confrontation rights because there was no evidence that he killed Washington to prevent her from testifying.

Giles v. California, ___ S.Ct. ___, 2008 WL 109701 (2008);

State v. Bell, 950 S.W.2d 482 (Mo. banc 1997).

ARGUMENT

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

The motion court abused its discretion in denying Strong's request to interview jurors and then denying him relief on his claim of ineffectiveness because he did not call the jurors; juror interviews to discover information regarding jurors' answers during voir dire are appropriate because they do not seek to impeach the verdict.

At issue is whether a motion court can deny post-conviction counsel any contact with jurors and then rule that counsel has failed to meet its burden of proof in proving a claim of ineffectiveness precisely because counsel did not call the jurors to testify. The State never addresses the motion court's ruling that Strong failed to meet its burden by not calling the jurors (L.F. 476-77). The court faulted postconviction counsel, ruling:

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 State must realize the unfairness of prohibiting all contact with jurors and then faulting counsel for not calling jurors to prove that counsel was ineffective during voir dire.

The State tries to avoid the motion court's error by arguing that Strong's post-conviction counsel's request to interview jurors was an attempt to impeach the verdict and was thus improper (Resp. Br. at 14-16). The State cites *United States v. Wright*, 506 F.3d 1293 (10th Cir. 2007) in support of its argument. *Wright* is distinguishable.

In *Wright*, immediately after the verdict was returned, the jury foreperson approached defense counsel in the hallway. *Id.* at 1303. The foreperson was very upset. *Id.* The judge saw the juror approach the lawyer and called them back into the courtroom. *Id.* Like St. Louis County, the federal district court had a local rule providing that no attorney or party was to talk to any juror without permission of the court. *Id.* The judge interviewed the juror in chambers and determined that the juror's information went to the jury's internal process. *Id.* Thus, the court denied counsel leave to interview the juror. *Id.* The Tenth Circuit affirmed the judges' ruling. *Id.* The judge did not abuse its discretion because he interviewed the juror and found the interview yielded nothing that would have been admissible into evidence. *Id.*

In contrast, here, counsel did not seek to impeach the verdict and delve into the jury's internal process. Rather, counsel sought to inquire about trial counsel's voir dire and how the jurors would have responded to questions about gory photos and inquiries about their religious affiliations (L.F. 22-27). Jurors' disclosure or nondisclosure of information during voir dire is a proper subject of post-trial inquiry. *See, Williams v. Taylor*, 529 U.S. 420, 440-41 (2000) (post-trial inquiry

concerned juror's bias in failing to answer voir dire question about her relationship to one of the State's witnesses, a deputy sheriff). The State never addresses *Williams v. Taylor* and the duty it imposes on state post-conviction counsel to diligently investigate and produce factual support for all constitutional claims.

Here, counsel tried to investigate and present factual evidence to support Strong's claims of ineffective assistance. The motion court prevented counsel from talking to the jurors and then faulted them for not calling the jurors to testify. 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. Counsel's Ineffectiveness – Failure to Object to Improper Argument

Counsel's failure to object to improper closing argument can constitute ineffective assistance of counsel; Strong presented evidence of emotional reactions to the improper closing argument through trial counsel who heard sighs and gasps in the courtroom and saw a spectator run out of the courtroom; Strong could not present additional evidence of the jurors' emotional reactions since the motion court would not allow him to interview the jurors.

The State argues that since Strong's direct appeal counsel raised a plain error closing argument point, Strong cannot raise counsel's ineffectiveness for failing to object to the improper argument (Resp. B r. at 21-22). This Court rejected this argument in *State v. Storey*, 901 S.W.2d 886, 901-03 (Mo. banc 1995) where it found no plain error in the prosecutor's closing argument, but found counsel ineffective for failing to object to the improper argument. *See also, Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002) (finding counsel ineffective for submitting an erroneous mitigating circumstance instruction even though the instructional error did not constitute plain error on direct appeal). Here, Strong is complaining about counsel's failure to object to improper argument and failing to establish the jurors' emotional response. That is different than the direct appeal which focused solely on the prosecutor's closing argument.

The State acknowledges that trial counsel did testify about the closing argument and its emotional impact (Resp. Br. at 26). But, the State minimizes counsel's testimony and suggests it was not sufficient to prove the claim. The State makes the bold argument that Strong presented no evidence that "a single one of the jurors express[ed] any emotional impact whatsoever to the display." (Resp. Br. at 26). The record shows otherwise.

Co-counsel, Patrick Malone, provided compelling evidence of the emotional reaction to the closing argument. He heard courtroom spectators, seated in the first pew behind the jury, gasp and sigh during the presentation (Ex. 39, at 46-47). One person stood up during the presentation and ran out of the courtroom. *Id.*

Trial counsel, Brad Dede, explained why the slideshow was so prejudicial. Strong was depicted in an orange jumpsuit. (Ex. 38, at 140-41). The photos were displayed on a large, five-foot by five-foot screen. *Id.* at 139. The State manipulated the photos – enlarging and superimposing them on one another. *Id.* at 243.

According to the State, this evidence was insufficient to prove the jurors' had an emotional reaction to the closing argument (Resp. Br. at 26). Spectators gasped, sighed and fled in response to the prejudicial display. The jurors were not immune to this prejudicial display. This Court should reject the State's argument and find prejudice from the evidence admitted at the evidentiary hearing.

Noticeably absent from the State's brief is any mention of *Stringer v. State*, 500 So.2d 928, 935 (Miss. 1986) discussed in appellant's original brief. That court warned that slide shows during closing argument "take the pictures far beyond their evidentiary value and use them as a tool to inflame the jury." *Id.* Unlike *Stringer*, here, the prosecutor did not simply present photos of the victim which would have been prejudicial itself. Instead, the prosecutor manipulated gruesome photos, the murder weapon and pictures of Strong in an orange jumpsuit precisely to create an emotional response.

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 law at the time of trial should have put counsel on notice that jurors could not be stricken based on their religious persuasion or belief; the prosecutor admitted that he struck Venirepersons Sylvia Stevenson and Luke Bobo for religious reasons, and the trial court approved the strikes based on the religious reasons; and Strong was prejudiced because his jury selection was discriminatory and unfair and religious persons were not allowed to serve.

Counsel on Notice that Religious-Based Strikes were Improper

The State argues that *Batson*'s¹ equal protection analysis has never been extended to religious-based strikes and therefore, counsel could not have been ineffective for failing to object to peremptory strikes based on religion (Resp. Br. at 32-33). The State ignores the plain language of Article I, Section 5, of the Missouri Constitution which provides: “that no person shall, on account of his religious persuasion or belief . . . be disqualified from testifying or serving as a juror” Similarly, the State ignores Section 494.400, which 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.”

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

(emphasis added). The State never explains how counsel's failure to know about these state constitutional and statutory provisions could be reasonable.

As for an equal protection violation, the United States Supreme Court has not directly addressed the issue. But, other courts have spoken to this issue and at least some justices of the Supreme Court have indicated religious based strikes are impermissible. The State cites Justice Thomas' denial of certiorari in *Davis v. Minnesota*, 511 U.S. 1115 (1994) as authority for the proposition that *Batson's* equal protection analysis does not extend to religion (Resp. Br. at 32). A denial of certiorari is not a merits ruling and therefore, has no precedential value. *United States v. Carver*, 260 U.S. 482, 490 (1923).

If anything, Justice Thomas' dissent should have put counsel on notice that he should object to religious-based strikes. Thomas believed that *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994) shattered any notion that *Batson's* equal protection analysis applies solely to racially based peremptory strikes. *Id.* "Given the Court's rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause." *Id.* "It is at least not obvious, given the reasoning in *J.E.B.*, why peremptory strikes based on religious affiliation would survive equal protection analysis." *Id.* Thus, far from showing that *Batson* did not extend to religious strikes, *Davis* suggests the opposite.

Justice Ginsburg’s concurrence in the denial of certiorari in *Davis* further illustrates why denials of certiorari should not be considered merits rulings.

Justice Ginsburg wrote to clarify two key observations made by the Minnesota Supreme Court in its decision:

(1) “[R]eligious affiliation (or lack thereof) is not as self-evident as race or gender,” 504 N.W.2d 767, 771 (Minn. 1993); (2) “Ordinarily ..., inquiry on voir dire into a juror’s religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper,” *Id.* at 772 (adding that “proper questioning ... should be limited to asking jurors if they knew of any reason why they could not sit, if they would have any difficulty in following the law as given by the court, or if they would have any difficulty in sitting in judgment”).

Davis, 511 U.S. 115 (Ginsburg, J. concurring in the denial of certiorari). The Minnesota Supreme Court believed it was improper to even inquire about religious affiliation, let alone strike a juror because of it. *Id.* Thus, a majority of justices may have believed that the Minnesota state court decision was not a good vehicle to decide the issue of whether *Batson* prohibits religious-based strikes.

The State acknowledges this Court’s opinion in *State v. Parker*, 836 S.W.2d 930, 942 (Mo. banc 1992), but seeks to minimize Judge Price’s concurring opinion, saying it only “suggests” that religious-based strikes may be prohibited (Resp. Br. at 32-33). The concurrence not only suggested the equal protection violation, but outlined Missouri law that specifically prohibited religious-based

discrimination. *Parker*, 836 S.W.2d at 942. Judge Price cited Article I, Section 5 of the Missouri Constitution which provides that no person shall be disqualified from jury service on the basis of his religious belief. *Id.* The Missouri Constitution does not merely “suggest” one not discriminate based on religion, it forbids it.

Mixed Motive

The State also argues that even if the prosecutor struck the jurors because of their religion, that discrimination is permissible since he had other bases for the strikes (Resp. Br. at 34). The State relies on *Weaver v. Bowersox*, 241 F.3d 1024, 1032 (8th Cir. 2001) for this mixed motive analysis (Resp. Br. at 34-35). The *Weaver* Court’s analysis has been called into question by *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005). There, the Court refused to accept some non-discriminatory reasons for strikes that accompanied discriminatory reasons, when those explanations seemed only after-thoughts and were not supported by questioning on the subject. *Id.* That the prosecutor “suddenly came up with Fields’s brother’s prior conviction as another reason for the strike,” did not negate the discriminatory nature of the strike. *Id.* Given *Miller-El*’s analysis, the presence of a non-discriminatory reason for a strike does not eliminate the discriminatory nature of the strike when it is acknowledged by the prosecutor and found by the trial judge.

In any event, *Weaver* is distinguishable. There, the prosecutor used two of nine peremptory strikes to remove African Americans from the jury. *Id.* at 1026. Three African Americans served on the jury. *Id.* The prosecutor told the trial

attorney he struck the two African Americans because they were weak on the death penalty. *Id.* at 1027. Ms. Burns was hesitant, she failed to maintain eye contact with the prosecutor, they had “bad vibrations and bad chemistry.” *Id.* He did not think she could give the death penalty, particularly to a fellow black person. *Id.* Similarly, the prosecutor thought Ms. Newsome was weak on the death penalty, was not bright, and took the whole matter frivolously.” *Id.*

The Eighth Circuit emphasized that it must “defer to the fact-findings of trial courts because those courts are uniquely positioned to observe the manner and presentation of evidence.” *Id.* at 1030. The State trial judge observed the venirepersons’ demeanor during voir dire and the prosecutor when he explained his conduct in striking the jurors. *Id.* at 1031. With such deference in mind, the Court ruled that the prosecutor had not struck Burns solely upon race, but based on her demeanor and weakness on the death penalty, race-neutral reasons. *Id.* at 1032. This showed a non-discriminatory reason for the strike. *Id.*

Here, in contrast, if this Court is to defer to the trial court’s findings about the prosecutor’s strikes, it will find they were based on religious reasons, and the trial court specifically ruled religion was a proper basis for striking a juror. The prosecutor did not hide that religion was the basis for the strikes. Rather, he said: “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). The State wants to ignore the record and specifically, the trial court's finding that Mr. McCulloch struck Mr. Bobo for "being the assistant dean, director of Covenant Seminary, which the Court is aware of, is a race-neutral reason." (Tr. 921). The court went on to find 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).

This Court must defer to the trial court's fact finding at the time of the trial which shows the strikes of Bobo and Stevenson were for religious reasons. Even if some non-discriminatory reasons were included in the record, these reasons do not eliminate the finding of religious discrimination. *See e.g., State v. Hopkins*, 140 S.W.3d 143, 155-57 (Mo.App.E.D.2004) (state's invalid reason along with a valid reason for a strike can provide evidence of discrimination).

Prejudice

The State suggests that *Strickland*² prejudice is required in evaluating ineffectiveness of counsel claims in jury selection (Resp. Br. at 35-37). According to the State, Strong's reliance on *Knese v. State*, 85 S.W.3d 628 (Mo. banc 2002) is wrong because there, this Court discussed both the structural error of a *Witherspoon*³ error on direct appeal and a deficient performance and prejudice in

² *Strickland v. Washington*, 466 U.S. 668 (1984).

³ *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

a post-conviction proceeding. (Resp. Br. at 36). The State neglects to discuss *Anderson v. State*, 196 S.W.3d 28, 42 (Mo. banc 2006),⁴ another postconviction proceeding where this Court ruled counsel was ineffective in voir dire. There, counsel failed to strike a juror whose statements indicated that he would vote for a death sentence unless the defense could convince him otherwise. *Id.* at 39. This Court found counsel's actions were neither reasonable, nor strategic. *Id.* at 39-41. Rather, they were part of a note-taking error. *Id.* In assessing prejudice, this Court found “*structural error.*” *Id.* at 41. The Court explained,

It is important to note that the *structural error* in this case could have been easily cured. Anderson's counsel, the prosecutor, or the trial court could have followed up to ask Juror Dormeyer whether, despite his belief that the death penalty was automatically appropriate unless the defense convinced him otherwise, he could put aside his personal beliefs and follow the instructions of the court.

⁴The State ignores this Court's precedent in *Anderson* and instead relies on an Eighth Circuit decision decided eight years earlier. *See, Young v. Bowersox*, 161 F.3d 1159 (8th Cir. 1998). This Court's decision controls. The State also relies on *Hamilton v. State*, 31 S.W.3d 124, 126-27 (Mo.App.S.D.2000) (Resp. Br. at 37). *Hamilton* has been overruled by *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002).

Failure to do so denied Anderson his right to a fair and impartial jury and constituted ineffective assistance of counsel.

Id. at 42, citing *Knese*, 85 S.W.3d at 632-33 (emphasis added).

This Court's analysis makes sense and is consistent with Missouri case law suggesting that to prove a claim of ineffective assistance of counsel in voir dire, one must show the underlying claim has merit, i.e. counsel failed to strike a biased juror, *State v. McKee*, 826 S.W.2d 26, 27-29 (Mo.App.W.D.1992); *Presley v. State*, 750 S.W.2d 602, 604-08 (Mo.App.S.D.1988). One still must show the underlying structural error from the trial.⁵

This Court should adhere to its precedent in *Knese* and *Anderson* and find counsel unreasonably failed to object to religious strike based on not knowing the law and that Strong was prejudiced due to the structural error in jury selection. This Court should reverse the motion court's denial of relief and remand for a new trial.

⁵ Appellant recognizes that this Court has not addressed the precise question of counsel's ineffectiveness in failing to make a meritorious *Batson* objection. This issue was before this Court, but this Court retransferred the case to the Court of Appeals. *Scott v. State*, 183 S.W.3d 244 (Mo. App. E.D. 2006).

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

Counsel did not adequately investigate Strong's background and all reasonably available mitigation; counsel did not adequately investigate Strong's mental illness; and without a thorough investigation, counsel could not make reasonable decisions about what mitigating evidence to present.

Inadequate Investigation into Strong's Background

The State argues that trial counsel conducted a thorough investigation into Strong's background (Resp. Br. at 58-60). The State blames Strong's family for counsel's failure to discover relevant mitigation (Resp. Br. at 59). According to the State, Strong's family "lied" or refused to "share relevant information upon [counsel's] questioning of them." (Resp. Br. at 59). Thus, the State reasons, that evidence of Strong's traumatic childhood was not reasonably available (Resp. Br. at 59).

The record tells a different story. The truth is that Strong's mother paid \$15,000 for this case, not nearly enough for a first degree murder case that normally would cost at least \$50,000 (Ex. 37, at 48-49, Ex. 39 at 9, 10). Trial counsel delegated the penalty phase investigation to a new associate, Patrick Malone, who had graduated from law school the previous year (Ex. 38 at 13, Ex. 39 at 6-9). Malone had never tried a case, let alone a capital case (Ex. 39 at 6). He had no capital experience whatsoever (Ex. 39 at 11).

Malone started interviewing penalty phase witnesses in February, 2003, the month the trial began (Ex. 39 at 36, Tr. 9). He did not get to interview most of the witnesses until March, 2003 (Ex. 39 at 35). Voir dire began on February 26, 2003 and the penalty phase started on March 5, 2003 (Tr. 9, 1495). Malone had no training about how to interview family members and investigate his client's background. He had not even heard of the term, "social history," let alone know how to investigate it (Ex. 39, at 41, 43).

So when Malone interviewed family members, he never even asked them about Strong's childhood (Ex. 39, at 16-17, 24, 29). He did not even discuss Strong's upbringing with his mother, Joyce Knox (Ex. 39 at 33). He asked no family members questions about mental illness in their family. *Id.* at 36. He asked no questions about any violence. *Id.* at 37. Malone made no inquiry into their financial status, and thus never learned about the extreme poverty they suffered. *Id.* Malone never asked about Joyce's relationships, so he never learned about the violent men who beat her and the children. *Id.* at 37-38. Malone said the subject of abuse may have come up, but he did not follow-up with any specific questions. *Id.* at 38. Malone asked nothing about racism, the neighborhoods in which Strong lived, or his medical history. *Id.*

Counsel did not make any efforts to investigate Strong's background from other sources. *Id.* He did not ask for any releases for records. *Id.* at 39, 41. Since he started interviewing most of the penalty phase witnesses during the trial, he could not have followed-up on any leads even had he wanted to investigate

further. Counsel did not have the benefit of any medical records, mental health records, employment records or social security records when he went to trial.

Counsel did not know how to investigate Strong's childhood, so he did not even think about investigating Strong's parents and their backgrounds. *Id.* at 39-40. Malone learned no information about Strong's mother or her attempted suicide when Strong was four years old. *Id.* at 40. Counsel knew nothing about the violence in the home. *Id.* at 41.

Strong's family never lied nor refused to share relevant information with trial counsel. Instead, counsel waited until the trial began in March, 2003 to conduct perfunctory interviews. Counsel did not conduct an adequate investigation into Strong's background or social history. What he did hardly meets the Sixth Amendment requirement that counsel "discover *all reasonably available* mitigating evidence . . ." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original).

Inadequate Investigation into Strong's Mental Illness

The State also suggests that counsel's investigation into Strong's mental health was reasonable, because counsel requested a court appointed evaluation, Strong was not cooperative, and Strong did not want a psychiatric defense (Resp. Br. at 59). The State ignores *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005), which found counsel ineffective for failing to investigate even though Rompilla and his family indicated that his childhood was "normal," and where Rompilla obstructed counsel's efforts and sent him off on false leads.

Counsel did not even interview the majority of Strong's family until the trial had started. He asked them no questions about mental illness. Counsel obtained no releases for records. Counsel only got the school records that Strong's mother gave him. The St. Louis County Jail Records showed a history of mental illness (Ex. 1 at 24). Strong's grandmother's medical records also flagged the mental illness (Ex. 3 at 1516-17, 1712, 1805-06, Ex. 4 at 1910). 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). Had counsel conducted the most basic investigation, they would have learned about his traumatic and impoverished childhood. This information was critical to any mental health professional evaluating Strong. *See Brown v. Sternes*, 304 F.3d 677, 696-97 (7th Cir. 2002) (an evaluating psychiatrist's expert opinion concerning a defendant's mental status will be based primarily on "past psychiatric history, family history, criminal activity, and medical records").

The State says that Strong's counsel was not required to "shop" for an expert (Resp. Br. at 59). As counsel acknowledged, he was not in any position to hire, let alone shop, for experts since Strong's mother could not afford to pay for one (Ex. 38, at 92-93, Ex. 23). The funds were simply not available (Ex. 38, at 93). *See, Hutchison v. State*, 150 S.W.3d 292, 307 (Mo. banc 2004) (Hutchison's family could not afford experts, but that did not justify counsel's failure to investigate his mental health and did not satisfy *Wiggins'* mandate to discover all

“reasonably available mitigating evidence”). *See also, Bouchillon v. Collins*, 907 F.2d 589, 595-98 (5th Cir. 1990) (attorney’s decision not to investigate defendant’s mental health after learning of prior institutionalizations is not tactical decision where mental health was only defense); *Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987) (finding unreasonable counsel’s “tactical decision” to abandon investigation of medical records from mental institution where defendant had escaped, from which they could have easily learned defendant had been previously adjudicated insane, because counsel chose instead to rely on court appointed medical expert’s finding that defendant was not insane).

Here, too, counsel simply relied on the court appointed expert’s finding that Strong was not incompetent and not suffering from a mental disease or defect. That was especially problematic because the expert did not have background records that would have shown otherwise. The most basic investigation of family members would have shown the mental illness needed to be investigated.

Without a Thorough Investigation,

Counsel Could Not Make Reasonable Strategic Decisions

The State says counsel conducted a “thorough” investigation, and their decisions are “virtually unchallengeable” (Resp. Br. at 60). The record tells the true story. Counsel obtained no records of family history and past mental illness to determine Strong’s mental state. Counsel failed to interview most family members until the trial began. Counsel’s investigation was woefully inadequate. A new penalty phase must result.

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

Strong's videotape statement to police was admissible in penalty phase to mitigate the penalty imposed; jurors should have as much information as possible in assessing punishment in a death penalty case; and Strong's statements to police showed he was remorseful and other mitigating circumstances such as Strong and Washington's tumultuous relationship, Washington's mental illness and violent history, Washington's threats to selectively enforce her *ex parte* order and to take his children from him.

The State argues that a defendant's videotaped statement to police discussing the murder is not admissible during the penalty phase because it contains inadmissible hearsay (Resp. Br. at 62-65). The State asserts that the rules of evidence for any criminal trial apply to the penalty phases of a death penalty case, citing Section 565.030.4 (Resp. Br. at 65). The State fails to cite any death penalty cases in support of this argument, relying instead, on two felony criminal appeals (Resp. Br. at 66).

The State is correct that in the guilt phase of a trial, a defendant's self serving statements to the police are generally inadmissible and are not part of the *res gestae*. *State v. Wilkerson*, 616 S.W.2d 829, 834 (Mo. banc 1981). This Court has not applied this rule to penalty phase.

Rather, in penalty phase, a defendant is allowed to introduce any evidence that may mitigate the penalty imposed. *State v. Owsley*, 959 S.W.2d 789 (Mo. banc 1997). Accordingly, a trial judge has discretion to admit whatever evidence it deems helpful to the jury in assessing punishment. *State v. Richardson*, 923 S.W.2d 301, 320 (Mo. banc 1996); *State v. Kinder*, 942 S.W.2d 313, 332 (Mo. banc 1996). The jury is entitled to consider the circumstances of the crime and the character of the defendant. *Richardson, supra*. A defendant's remorse or lack thereof is relevant to the jury's sentencing decision. *Id.* at 322.

Consistent with these decisions, this Court has repeatedly approved of the admission of evidence in a penalty phase, even though that same evidence would not be admissible in a regular criminal trial. Unadjudicated bad acts which have not resulted in convictions are admissible in the penalty phase. *Kinder*, 942 S.W.2d at 332; *State v. Johns*, 34 S.W.3d 93, 113 (Mo. banc 2000). Court martial convictions are admissible. *State v. McMillin*, 783 S.W.2d 82, 95 (Mo. banc 1999). And, hearsay evidence is admissible. *State v. Phillips*, 940 S.W.2d 512, 516-17 (Mo. banc 1997) (an audiotaped statement that defendant's son admitted to another witness that he had dismembered the victim's body was material to punishment).

Admission of mitigating evidence, including Strong's statements to police is constitutionally required. The Eighth and Fourteenth Amendments require that the sentence consider all mitigating factors. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Mitigating evidence must be admitted in punishment phase,

notwithstanding any State's 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). The State never explains why *Green v. Georgia* should be limited to a third party's admission that he committed the crime (Resp. Br. at 66).

The State argues that the videotaped statement did not show remorse (Resp. Br. at 67). The jury, not the State, should decide what is mitigating. The tape showed Strong crying, sad, and sorry (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 mitigating 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 relationship (L.F. 347-48, 375). They often argued, Washington often ordered Strong out of the house, and threatened to selectively enforce an *ex parte* order so that he would go to jail and lose his children (L.F. 365-66, 377-78). On the day of the offense, they argued, she pushed him, she ran into the kitchen, got a knife and cut him (L.F. 342, 359, 360, 364, 365, 366, 370, 377, 379).

These circumstances mitigated the punishment Strong should receive. The jury should have considered this evidence. A new penalty phase should result.

VI. Unreasonable Defense

Defense counsel’s defense – that the State had not proven its case beyond a reasonable doubt was unreasonable; and counsel developed the strategy without thoroughly investigating Strong’s background, mental illness and the circumstances of the offense.

This Court’s opinion on direct appeal outlined the facts of the criminal offense. *State v. Strong*, 142 S.W.3d 702, 709-10 (Mo. banc 2004). The State quotes those facts in its brief (Resp. Br. at 8-11). Strong was at the apartment with the two dead victims, he told police officers inconsistent stories about the victims’ whereabouts, he locked the door so officers could not enter, he had blood on his jeans and hand, he ran from police, and he admitted he killed them. *Id.* Given the overwhelming evidence of guilt, it was ludicrous for the defense to argue the State had not proven Strong’s guilt beyond a reasonable doubt. The only real issue in this case was Strong’s mental state and the degree of guilt.

The State argues that counsel’s defense strategy was reasonable and this Court must defer to that strategy (Resp. Br. at 75-76). However, strategic decisions deserve deference only after counsel has conducted an adequate investigation. *Eldredge v. Atkins*, 665 F.2d 228, 232 (8th Cir.1981). Counsel has a duty to “explore all avenues leading to facts relevant to . . . degree of guilt.” *Id.* See also, *Battenfield v. Gibson*, 236 F.3d 1215, 1228- 29 (10th Cir.2001) (counsel’s failure to investigate rendered resulting strategy unreasonable); *Seidel v. Merkle*, 146 F.3d 750, 756 (9th Cir.1998) (where counsel has notice of a client’s mental

problems, he has a duty to conduct an investigation to make an informed decision regarding the possibility of a mental-state defense). Here, counsel did not fully investigate Strong's background and mental illness or the circumstances of the offense, including Washington's mental illness, and their tumultuous relationship (See Points IV and V). Thus, this Court should not defer to trial counsel's unreasonable strategy.

Strong's case is like *McLuckie v. Abbott*, 337 F.3d 1193 (10th Cir. 2003). There, the police executed a search warrant at McLuckie's apartment and found a grisly scene. *Id.* at 1194. They found McLuckie's boyfriend with 49 stab wounds to his head, back, neck and stomach. *Id.* at 1196. His body had been dismembered. *Id.* at 1194. Police found a saw in the kitchen, a bloody sheet in the bathtub, and rubber gloves in McLuckie's bedroom. *Id.* They found grocery bags containing body parts in trash dumpsters outside the apartment. *Id.*

Two public defenders assigned the case immediately consulted a mental-health expert who thought McLuckie had severe emotional problems, suffered from an impaired mental condition, but questioned whether she was legally insane or had a diminished mental capacity. *Id.* Another expert found that McLuckie suffered from Battered Woman Syndrome and her actions were consistent with a dissociative state and her inability to perceive reality. *Id.* This would negate the deliberation requirement for first-degree murder. *Id.*

McLuckie dismissed her public defenders and her father hired private counsel. *Id.* at 1195. Counsel did little preparation for trial, as he thought the case

would settle. *Id.* Shortly before trial, counsel started to prepare and began to doubt his client's mental state. *Id.* He sought leave to enter a guilty plea by insanity, but the court rejected the plea as untimely. *Id.* At trial, counsel presented self defense as the theory of his case. *Id.* The jury convicted McLuckie of first degree murder and abuse of a corpse and sentenced her to life imprisonment. *Id.*

The 10th Circuit concluded counsel was ineffective. *Id.* The record reflected a complete lack of preparation and investigation, resulting in a defense that was inconsistent with the facts of the case. *Id.* at 1199. The objective facts of the offense were undisputed, and the only disputed question was McLuckie's degree of guilt-first degree murder, second degree murder or manslaughter. *Id.* Given the disturbing nature of the case and the indications of mental problems, the failure to timely investigate and assert a mental-state defense was unreasonable. *Id.* The court was concerned about the negative effect of counsel's performance on the outcome. *Id.* at 1202.⁶

⁶ The federal court concluded that it could not provide habeas relief, however, because the state court's determination that McLuckie was not prejudiced was not "objectively unreasonable." *Id.* at 1202. Fortunately, Strong is in state court where this Court should find both counsel's unreasonable performance and prejudice.

Like *McLuckie*, Strong's trial counsel failed to adequately investigate his mental state. Given Washington's mental illness, Strong and Washington's tumultuous relationship, and Strong's mental illness, this failure was unreasonable. Had counsel investigate, he would have discovered that Strong suffered from mental defects (H.Tr. 40, Ex. 24 at 26). He was under extreme mental distress and was emotionally disturbed (H.Tr. 40, Ex. 24 at 28). His was unable to conform his conduct to the requirements of the law. *Id.* Had counsel adequately investigated and challenged Strong's mental state, there's a reasonable probability he would not have been found guilty of first-degree murder; and even if he were found guilty, he likely would have received a life sentence. This Court should reverse.

VII. Crawford Violation

Strong did not forfeit his Sixth Amendment confrontation rights because there was no evidence that he killed Washington to prevent her from testifying.

The State argues that Strong may have forfeited his right to confront Washington by killing her (Resp. Br. at 89). The State acknowledges that the law is not settled on forfeiture (Resp. Br. at 89-90). Indeed, on January 11, 2008, the Supreme Court granted certiorari on the following issue:

Does a criminal defendant “forfeit” his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant’s actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?

Giles v. California, ___ S.Ct. ___, 2008 WL 109701, *1 (2008). As the petitioner noted, ten state supreme courts and one federal circuit court of appeals have split on this question. *See*, Petition for Certiorari at 2007 WL 4729835, at 12-18. Five courts have ruled that the intent to silence the witness is an element of the forfeiture rule. *See*, *State v. Romero*, 156 P.3d 694, 703 (N.M.2007); *People v. Stechly*, 870 N.E.2d 333, 353 (Ill.2007); *People v. Moreno*, 160 P.3d 242, 247 (Colo.2007); *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass.2005); *State v. Fields*, 679 N.W.2d 341, 347 (Minn.2004). As discussed by the State, other

cases require no intent to silence the witness (Resp. Br. at 89). *See, State v. Mason*, 162 P.3d 396, 404 (Wash. 2007); *State v. Jensen*, 727 N.W.2d 518, 536 (Wis.2007); *State v. Mechling*, 633 S.E.2d 311, 326 (W.Va.2006); *State v. Meeks*, 88 P.3d 789, 794 (Kan.2004)⁷; and *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005).

But, if courts apply a broad forfeiture rule, they will eliminate the right to confrontation in all homicide cases. This has never been the rule in Missouri and would be contrary to this Court's decisions. *See e.g., State v. Bell*, 950 S.W.2d 482 (Mo. banc 1997) (Court reversed the defendant's murder conviction and death sentence where hearsay of the victim that the defendant had previously abused her was improperly admitted against him).

This Court should be leery about allowing all hearsay statements to be admitted. As the Giles' petitioner pointed out, a witness may have his or her own reasons for refusing to testify. *See Giles' Petition, supra* at 19, *citing State v. Mechling*, 433 S.E.2d at 325, n. 12 (some domestic violence complainants refuse to testify because initial accusations were untrue or exaggerated or an attempt to gain an advantage in other proceedings); and *State v. Romero*, 133 P.3d 842, 863-64 (N.M.Ct.App.2006).

⁷ *Meeks* was overruled on other grounds by *State v. Davis*, 158 P.3d 317, 322 (Kan. 2006).

This Court should reject the State's argument for such a broad forfeiture rule and reverse and remand for a new penalty phase. At the very least, this Court should wait to decide the issue until it receives guidance from the Supreme Court in *Giles*.

CONCLUSION

Based on the arguments in his original brief and his reply, Mr. Strong requests a new trial, a new penalty phase, a remand for further post-conviction proceedings, or alternatively, that this Court 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 7,733 words, which does not exceed the 7,750 words allowed for an appellant's reply 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 January, 2008. 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 mailed this 28th day of January, 2008, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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