IN THE
MISSOURI SUPREME COURT

MARK GILL,	**)**	
	)	
Appellant,	**)**	
	)	
vs.	**)**	**No. SC 89831**
	)	
STATE OF MISSOURI,	**)**	
	)	
Respondent.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF NEW MADRID COUNTY, MISSOURI
THIRTY-FOURTH JUDICIAL CIRCUIT
THE HONORABLE J. MAX PRICE, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Mark Gill was convicted as follows: (1) Count I – first degree murder, §565.020; (2) Count II – kidnapping, §565.110; (3) Count III – armed criminal action, §571.015; (4) Count IV – first degree robbery, §569.020; and (5) Count V – first degree tampering, §569.080(T.L.F.219-23,282-86).

He was sentenced as a prior offender as follows: (1) Count I – death; (2) Count II – fifteen years; (3) Count III – thirty years; (4) Count IV – life; and (5) Count V – seven years(T.L.F.143-44,282-86). Counts II through V were ordered served consecutively(T.Tr.1473-74;T.L.F.282-86).

Because death was imposed, this Court has exclusive jurisdiction of this 29.15 appeal. Art. V, Sec.3, Mo. Const.

STATEMENT OF FACTS

Representation History

On August 2, 2002, Mark Gill was charged with the first degree murder of Ralph Lape which was alleged to have happened on or about July 7, 2002(T.L.F.14-17;138-42).[1] A local Public Defender entered on August 26, 2002(T.L.F.2).

Capital Public Defenders Berman and Estes entered on October 10, 2002 (T.L.F.4;T.Tr.83-84) and withdrew on June 4, 2003(T.Tr.84;T.L.F.6-7).

On June 26, 2003, Capital Public Defenders Kenyon and Turlington entered(T.L.F.8). At a August 7, 2003 hearing, Kenyon and Turlington requested the September 15, 2003 trial be continued(T.L.F.7;T.Tr.84-92). Prior capital counsel, had done "insufficient" preparation(T.Tr.86). No depositions were done and almost no penalty phase records were compiled(T.Tr.86-87).

Prosecutor Swingle would not agree to a continuance because Lape's family wanted the case tried as scheduled, even though he had noticed that Gill's counsel had done little preparation(T.Tr.87-88). Counsel needed a one year continuance until August, 2004(T.Tr.88-89). The case was reset for six months later on March 1, 2004 and tried then(T.Tr.89-92,116).

Guilt Opening Statements

[1] The record is referenced: (1) trial transcript (T.Tr.); (2) trial legal file (T.L.F.); (3) 29.15 transcript (29.15Tr.); (4) 29.15 legal file (29.15L.F.); and (5) 29.15 exhibits (29.15Ex.).

In Swingle's opening statement, he told the jury that Lape had been "a [G]ood [S]amaritan" who had afforded Gill the opportunity to live on his property because Gill "was down and out and needed a place to stay"(T.Tr.587). Swingle stated that Gill lived with Lape because Attorney Pat Davis was a mutual friend who had made Lape aware of Gill's circumstances(T.Tr.587).

In Turlington's opening statement, she told the jury that it would hear evidence that Lape had not acted as "a [G]ood [S]amaritan"(T.Tr.626).

Respondent's Guilt Phase

Lape lived alone(T.Tr.636). He lived on State Highway 177 in a Fruitland mobile home(T.Tr.629-31,651-52). Lape had a garage where he kept a camper(T.Tr.633). Lape retired early from railroad employment because of ankle problems and received a $200,000 settlement(T.Tr.634-35).

Lape had a sister, Diane Miller, and a brother, Steven Lape(T.Tr.629). Lape and his wife had divorced when their daughter Megan was a third or fourth grader(T.Tr.651-52). Megan had lived off and on with both parents(T.Tr.652).

Lape's ATM card was used numerous times starting with and following July 9, 2002(T.Tr.731-36). On July 15th , there were three withdrawals from Lape's bank account totalling $55,000 (T.Tr.729). That money was transferred to a second Lape account(T.Tr.729-31).

Mary Cates worked for Davis' law firm(T.Tr.636,697-98). Mary, her husband Scott, and Lape were close friends who owned a Kentucky Lake trailer(T.Tr.635-36,698-99,714-15). July 4th was a Thursday and July 7th a Sunday and that Sunday

was the last time Mary and Scott saw Lape(T.Tr.700-01,715-16). Lape did not show-up for a party two to three weeks later and Mary called Lape's family concerned(T.Tr.704-05,717-18).

Mary testified Davis had asked Lape if Gill could stay in Lape's camper(T.Tr.700,706,720). Davis had represented Lape on his injury case(T.Tr.710).

On July 22, 2002, Diane Miller received a call from Mary that caused Diane to be concerned Lape was missing(T.Tr.636-37). Diane called several of Lape's friends and Megan(T.Tr.637-38). None had seen Lape(T.Tr.637-38). Diane's husband, Mitch Miller, left an unreturned message on Lape's cell phone (T.Tr.672-73). Also, on July 22nd, Diane called Lape's house and Gill answered(T.Tr.646). Gill told Diane that Lape had left on July 18th for the Lake(T.Tr.646).

On July 22nd, Megan and her mother went to Lape's home(T.Tr.655). Gill answered the door and stated Lape was at the Lake(T.Tr.655-56). Megan indicated that Gill was African-American and that a second African-American male, Justin Brown, was there(T.Tr.655-56,660).

On July 23rd, Mitch Miller went to Lape's home(T.Tr.675). Gill and co-defendant Brown were there(T.Tr.675-77). Gill told Mitch that Lape had been going back and forth to the Lake(T.Tr.677-78).

On July 25th, Diane reported Lape missing(T.Tr.638-39). Diane learned that Lape's computer banking account and ATM card were being used(T.Tr.639-43). Lape's Discover bill had Illinois and St. Louis charges(T.Tr.641-43).

Scott Cates testified that Lape disapproved of Megan's boyfriend because he was African-American(T.Tr.725). Lape was prone to making racially offensive remarks(T.Tr.725). Lape had joked to Scott that while Gill lived with him that he had "his own nigger"(T.Tr.725).

Lape was also upset with Megan's boyfriend because Megan had lied to Florida police to protect him and then pled guilty to making a false police statement(T.Tr.665). Megan testified that she had heard rumors that Lape was trying to hire someone to beat-up her boyfriend(T.Tr.666).

On July 30, 2002, the New Mexico Highway Patrol stopped Gill and his wife, Katina, in her Nissan Altima and arrested Gill for unlawful credit card use(T.Tr. 822,876-89,964-65). Inside the car were Lape's ATM card and computer hard drive(T.Tr.961-63).

Missouri Highway Patrol Officer Gregory interrogated Gill on July 31st (T.Tr.816-17,822). Gill initially told Gregory that Lape had authorized him using Lape's ATM card in exchange for Gill beating-up Megan's boyfriend(T.Tr.821).

Gill later recounted that Brown started going through Lape's banking papers and checkbook and found documents showing Lape had a large sum of money in his accounts(T.Tr.824-25,847). On July 7th, when Lape returned from the Lake, Gill and Brown restrained Lape with duct tape and drove Lape in Lape's pickup truck to a Portageville cornfield(T.Tr.825-26). Lape told them the PIN for his ATM(T.Tr.827). Brown shot Lape(T.Tr.826). They buried Lape's body in the cornfield(T.Tr.826).

Brown and Gill went to East St. Louis clubs(T.Tr.826-27). They used Lape's ATM and credit cards and spent the night at the Adams Mark(T.Tr.826-27,829).

Gill and Brown used Lape's computer to transfer money from one account to another so it could be accessed with Lape's ATM card(T.Tr.828). Because of ATM withdrawal limits, they had problems withdrawing money(T.Tr.829). Someone told them ATM cards in Las Vegas did not have limits(T.Tr.829). They decided that Gill and Katina would drive to Las Vegas to make large ATM withdrawals(T.Tr.829). On the trip, Gill used Lape's cards for expenses(T.Tr.829-30).

Gill told Gregory that Davis arranged for him to live with Lape(T.Tr.850). Gill also told Gregory that he wished that he had severed ties with Davis long ago as others had advised(T.Tr.865-67).

Respondent sought death against Brown, but he was sentenced to life without parole for first degree murder. *State v. Brown*, 246S.W.3d519,522(Mo.App.,S.D.2008).

Guilt Closing Arguments

During initial closing argument, Swingle argued that Lape "had given this man a place to stay, a roof to have over his head," and that resulted in his death(T.Tr.1084).

Defense counsel noted that Swingle in opening characterized Lape as "a [G]ood [S]amaritan" because he had allowed Gill to live with him(T.Tr.1102). Counsel urged that the reason Lape allowed Gill to live with him was because he wanted Gill to beat-up Megan's boyfriend and not because Lape was "a [G]ood

[S]amaritan"(T.Tr.1102-05). Counsel urged the jury not be mislead by the "[G]ood [S]amaritan" characterization(T.Tr.1113).

Respondent's Penalty Phase

Without Swingle's request, Diane prepared a photo album that she brought him because she "wanted [Swingle] to see the person" he was representing(T.Tr.1171).

Diane testified that Lape went to St. Ambrose Catholic School(T.Tr.1170). There was a picture of Lape at Diane's First Communion(T.Tr.1172).

Another picture was taken at Easter at the family home(T.Tr.1173). Picture #16 was a Christmas picture of Lape(T.Tr.1174). Picture #35 was a picture of Lape opening a Christmas present(T.Tr.1183).

There was another picture of Lape at Christmas with Diane's interracial grandson, Keegan(T.Tr.1176). Diane testified that Lape never had any problems with her daughter's marriage to an African-American(T.Tr.1176-77).

There were many pictures of Lape with his daughter Megan. Those pictures were: (1) at the hospital with Megan the day she was born(T.Tr.1173); (2) playing with Megan at Lape's parents' house on a holiday(T.Tr.1173); (3) with Lape's ex-wife Karen(T.Tr.1173-74); (4) playing outside on a holiday(T.Tr.1174); (5) eating ice-cream at the zoo(T.Tr.1174); (6) Megan's first day of school when Lape had gotten her ready(T.Tr.1174); (7) at Thanksgiving(T.Tr.1181); (8) at a Christmas Eve gathering (Picture #30)(T.Tr.1181); (9) a Christmas picture together (Picture #31)(T.Tr.1182); (10) a summer picture together (Picture #32)(T.Tr.1182); and (11) two pictures from Megan's high school graduation(Pictures #36 and #37)(T.Tr.1183).

There was a picture of Lape with Diane's daughter, Tara, Lape's godchild(T.Tr.1175).

Picture #33 was a Mother's Day picture of the opening of Diane's pool after their father died(T.Tr.1182). Normally their father handled the opening, but Lape took over and helped Diane's son(T.Tr.1182).

Diane testified that Lape was not the type of person who "gossip[ed]" about people(T.Tr.1184).

Diane read a prepared statement(T.Tr.1185). Growing-up Lape defended Diane from other children(T.Tr.1186). Diane read: "the proudest and happiest day of Ralph's life was the day his daughter Megan was born"(T.Tr.1187). Lape behaved like "Mr. Mom"(T.Tr.1187). Diane read that she "heard stories about Ralph's generosity"(T.Tr.1190). Diane indicated Lape loved to go boating and several months before his death Lape had purchased a pontoon boat(T.Tr.1189-90).

Mitch Miller testified that he had studied with Lape the "valuable good life lessons" of the old west culture and characters(T.Tr.1195). Those lessons were "You don't cheat at cards, you don't start any trouble, but you stand up to it when it comes. You never shoot a man in the back, and, two against one is never a good program"(T.Tr.1195).

Mitch testified that the first day he met Lape that Lape helped him push his car to a gas station(T.Tr.1196). Even though Mitch and Diane married young, Lape told him: "the only thing I want you to do is take care of her"(T.Tr.1196). Mitch portrayed Lape as someone whose racial attitudes had changed(T.Tr.1199).

Steven read a prepared statement(T.Tr.1218). When Steven was a first grader there was a deep snow and he was afraid to walk to school(T.Tr.1219-20). Lape walked in front of him clearing a path and reassuring him(T.Tr.1219-20). Steven described how Ralph Lape's school teachers had held him in high regard(T.Tr.1220). Steven recounted how he broke his arm at a pond and Lape carried him home to care for and comfort him(T.Tr.1220).

Several years before his death, Steven could tell something was wrong, but Lape would not say what(T.Tr.1220-21). Steven later learned that Lape was having serious financial problems, but did not seek help(T.Tr.1220-21).

Steven testified that after Lape's death he learned "how generous" Lape had been(T.Tr.1221). Lape loaned a friend money to pay for the friend's wife's funeral(T.Tr.1221). Steven concluded invoking a quote from Lincoln's Gettysburg address as epitomizing Lape's character(T.Tr.1221-22). The Lincoln quote was: "The world will little note, or long remember what we say here. But they will never forget what we did here"(T.Tr.1221-22).

Megan testified that Lape did not "hate" her African-American boyfriend because of his race(T.Tr.1224). Lape had them over for dinner and went to restaurants with them(T.Tr.1224). Lape showed Megan's boyfriend how to repair her car(T.Tr.1224). Megan testified that Lape was rightfully upset with them about what happened in Florida and that Lape was not upset because her boyfriend was African-American(T.Tr.1225).

Penalty Argument

Defense counsel argued that Lape allowed Gill to live with him not because he was a "[G]ood [S]amaritan," but because Lape wanted Gill to beat-up Megan's boyfriend(T.Tr.1432-33).

Postconviction Evidence

Berman and Estes

Berman's and Estes' preparation focus was obtaining a death waiver(29.15L.F.431-32). They obtained state and federal immunity agreements for Gill to provide statements about Davis' wrongdoings(29.15L.F.431-32,451-52). Those agreements would not have been entered unless there was substantial reason to believe death would be waived(29.15L.F.451-52,457,460-61).

Swingle also gave Gill immunity to do a deposition for Attorney Mass who had brought a lawsuit on behalf of Robert McLain(29.15L.F.437-39).[2] Mass had provided copies of checks Davis had written on McLain's trust account for outrageous charges(29.15L.F.438).

Counsel Kenyon

The only work Kenyon inherited from prior counsel was investigation of Davis(29.15Tr.116-20,157). No depositions were done(29.15Tr.120). About 75% of Kenyon's and Turlington's investigation focused on Davis, which was time wasted(29.15Tr.157-59). Kenyon's and Turlington's conversations with Gill focused

[2] The record spells his name both "McLain" and "McLean," for consistency McLain is used throughout(29.15L.F.437-39;29.15Tr.293-94).

on obtaining information Gill knew about Davis so that charges could be brought against Davis to get a deal(29.15Tr.202-03).

Even though Officer David James prepared the probable cause to charge statement, James was never interviewed(29.15Tr.123-24;29.15Ex.69). The probable cause statement included that Attorney Davis was "a personal friend, drinking buddy and sometime-employer" of Gill(29.15Ex.69). James was not interviewed because James was not listed on any state's witness endorsements for a long time and Kenyon and Turlington believed James did not contribute significantly to the case(29.15Tr.123-24,143,148-49).

James' probable cause statement recited that the car Gill was arrested in "had Lape's computer in the car"(29.15Ex.69). On February 16, 2004, Swingle filed a Second Amended Information listing James as a witness and counsel knew that two weeks before trial(29.15Ex.67-68;29.15Tr.126-28).

Kenyon did not recall seeing any discovery that indicated James was a computer expert(29.15Tr.129). James' name in fact appeared on many police report discovery pages(29.15Tr.129-53). Kenyon testified that as to those pages that they appeared to be leads and that James was assigning other officers tasks(29.15Tr.138-39). Kenyon felt it was more useful to speak to officers who were doing actual investigating(29.15Tr.138-39,141). In contrast, during Mary Cates' pretrial deposition, Kenyon explained to her that he "like[s] to take depositions of anybody that has <u>any kind of familiarity</u> with the case <u>at all</u>…."(29.15L.F.403 transcript at p.4)(emphasis added).

Discovery page 807 showed James obtained Diane Miller's consent to search Lape's computer(29.15Tr.142-43). Discovery page 919 was a Missouri Highway Patrol list of seized evidence that listed Lape's computer as seized from the trunk of the car Gill was arrested in(29.15Tr.147-48). Discovery page 926 listed James as the investigation's "officer in charge"(29.15Tr.148).

Kenyon and Turlington met with Swingle on July 21, 2003 and discussed plea possibilities(29.15Tr.154-55;29.15Ex.60). Gill had given statements to the Highway Patrol about Davis(29.15Ex.60). Swingle represented that while Lape's family wanted Gill to get death, they were open to life without parole, if the information Gill provided led to charges against Davis(29.15Ex.60;29.15Tr.156-57). Davis "had a very seedy kind of history of doing [a] lot of unscrupulous things"(29.15Tr.156).

Kenyon indicated they were furnished the Encase report documenting Lape's computer's contents(29.15Tr.165-66). On February 4, 2004, about one month before trial, Swingle sent counsel a letter stating: "I have also enclosed the Encase report from David James, [and] a card about Pat Davis' priors"(29.15Tr.166-67;29.15Ex.72). James' Encase report was the first Kenyon ever handled(29.15Tr.166).

Officer James prepared the Encase report on August 27, 2002(29.15Tr.176-77;29.15Ex.15 at 5125). Page 1 of the Encase report stated that the Encase information "was acquired by Lt. David James"(29.15Ex.15 at 5125). The Encase report did not alert Kenyon to the need to depose James(29.15Tr.177-78). While

counsel received the Encase report, they were not provided copies of the texts of Lape's on-line sex chats(29.15Tr.185).

Kenyon reviewed the Encase report before trial and did not notice anything that alerted him there was pornography on Lape's computer(29.15Tr.167-69). Since trial Kenyon has reviewed the Encase report more closely and there were entries whose names should have alerted him to the possibility of pornography on Lape's computer(29.15Tr.167-69;29.15Ex.15 at 5128). The Encase report included:

(29.15Ex.15 at 5128).

Kenyon thought that respondent painted Lape in penalty as "a saint"(29.15Tr.172-74). The child pornography, video bestiality, and on-line chats would have "cast [Lape] in a much different light than what the State was trying to paint in the penalty phase"(29.15Tr.171).

The bestiality included an image of a woman and dog having sex(29.15Tr.171). The graphic child pornography included images of men having sex with girls clearly under the age of consent(29.15Tr.171-72).

Kenyon was not certain how he would have used Lape's computer's content because what he did would have depended on how the state portrayed Lape(29.15Tr.172-74). Kenyon would not have presented the computer evidence in the defense case-in-chief to avoid being perceived as "kick[ing] a corpse"(29.15Tr.172-74).

Kenyon thought that the evidence on Lape's computer would have been used to dissuade respondent from having portrayed Lape as a person of great character(29.15Tr.172-74,194). If the state still choose to portray Lape glowingly, then Kenyon would have used the evidence on Lape's computer as rebuttal evidence or cross-examined the state's witnesses about the computer's contents(29.15Tr.172-74,194). Kenyon probably would not have played the pornographic images for the jury, but would have called the computer expert who had viewed the computer's contents to describe what he saw(29.15Tr.195).

One of Lape's sex chats on July 2, 2002 pertained to Lape's sexual attraction for his daughter's anatomy(29.15Tr.180;29.15Ex.11 at 3855-56). That sex chat and others were the type of material Kenyon would have used to dissuade the state from portraying Lape as a "saint"(29.15Tr.180-81,187). This evidence was *Brady* exculpatory evidence(29.15Tr.181).

Kenyon believed that had the jury learned about the sexual content on Lape's computer it likely would not have voted for death(29.15Tr.195-96). In Kenyon's experience, more often than not, the decision whether or not to impose death has turned more on the victim's character than anything associated with the defendant(29.15Tr.196). In other cases where the victim had a history of unscrupulous conduct, Kenyon has had much success obtaining a life sentence(29.15Tr.196,198-99).

Even though juries are not supposed to make a punishment decision based on the victim's character, Kenyon has found they do(29.15Tr.196). Kenyon believes such matters are appropriate for the jury to consider(29.15Tr.197). That evidence is appropriate for the jury to consider even though Kenyon would never argue to the jury to compare a victim's and defendant's lives to one another(29.15Tr.197-98). That kind of argument would cross the line to "kicking a corpse," but would not be unethical(29.15Tr.198).

Kenyon never asked Swingle the nature of the contents of Lape's computer(29.15Tr.175). The only discussions with Swingle about the computer's contents focused on whether the computer contained anything incriminating Gill(29.15Tr.175-76). Swingle told counsel that there was nothing important on Lape's computer(29.15Tr.175-76).

Counsel Turlington

When Turlington and Kenyon got Gill's case, little trial preparation had been done(29.15Tr.278-79).

Turlington recounted that a significant portion of their work was devoted to investigating Davis trying to get a deal(29.15Tr.289-92). Counsel talked quite a bit with Swingle about a deal surrounding Davis being charged(29.15Tr.292-93). Gill had provided much information about Davis that appeared true(29.15Tr.292-93). Much of the information Gill supplied related to Davis' involvement in quadriplegic Robert McLain's trust(29.15Tr.293-94).

James was not deposed(29.15Tr.295-96). Even though James was in charge of the investigation, he was not interviewed because he did not do a lot of hands on investigation(29.15Tr.296). There was nothing in the discovery to cause Turlington to want to depose James(29.15Tr.297).

There was nothing in James' probable cause statement or the Second Amended Information that endorsed James to cause Turlington to want to depose James(29.15Tr.299-301;29.15Ex.68;29.15Ex.69).

On February 4, 2004, Swingle sent a letter addressed to counsel informing them that "I have also enclosed the Encase report from David James"(29.15Tr.302;29.15Ex.72). Turlington acknowledged that the Encase report contained file names that "hint[ed] at porn"(29.15Tr.303). Turlington did not talk to Swingle about the Encase report after they received it(29.15Tr.303-04).

In discussions with Swingle about Lape's computer, Swingle had represented it contained nothing relevant(29.15Tr.304-05). Turlington did not ask Swingle about Lape's computer containing pornography because Turlington had not found any reason to believe that it might(29.15Tr.305).

Turlington has reviewed chat room material from Lape's computer(29.15Tr.306). Lape's sexual chats could have been used to rebut the state's portrayal of Lape as a person of great character(29.15Tr.307). The portions of the chats Turlington thought especially went to these matters were those that dealt with rebutting the state's presentation of Lape as a good father(29.15Tr.307). Lape's chat conversations involved inappropriate sexual content about his daughter(29.15Tr.307).

The child pornography evidence and evidence that suggested Lape was sexually involved with 13 to 15 year old girls would have rebutted the state's portrayal of Lape as a person of great character and upstanding citizen(29.15Tr.307-08).

There is a difference between comparing the relative lives of a victim and a defendant and putting on evidence that rebuts the state's inaccurate glowing portrayal of a victim(29.15Tr.315-17). "[T]rashing the victim" and rebutting the state's inaccurate portrayal of a victim's character are different(29.15Tr.333-34). In other capital cases Turlington has tried, where there has been evidence that caused the victim to be viewed as less than a person of great character, death was avoided(29.15Tr.315-18).

Turlington would have wanted to selectively present the assorted sexual content(29.15Tr.318,334). Turlington would not have argued to impose life based on the relative value of Lape's life to Gill's life, but such argument was not unethical(29.15Tr.319-20).

Turlington would have concluded that it was Lape using Lape's computer for chats that had a profile with a picture of Lape denoted "dogday__afternoon"(29.15Tr.334-35). When "dogday___afternoon" talked about having a seventeen year old "daughter" who lives with her mother, then Turlington would have concluded that it was not Gill authoring the chat(29.15Tr.335-36). When "dogday___afternoon" referred to his "daughter" as Megan, then Turlington would have concluded Gill was not responsible for the chat(29.15Tr.335).

Computer Expert Chatten

Greg Chatten is a computer forensics expert who reviewed Lape's computer's hard drive's contents and the 29.15 court found he was a forensic expert(29.15Tr.598-604). Chatten first worked on Lape's hard drive for the co-defendant's case(29.15Tr.604). Chatten reviewed that hard drive using Encase(29.15Tr.605).

Chatten decoded Lape's sexual chats(29.15Ex.11 at 3850-63). For these chats there was the name "dogday____afternoon2002"(29.15Tr.607). The name "unknown" would be individuals responding to "dogday____afternoon2002"(29.15Tr.607).

The Internet History Parser documented each site visit on Lape's computer(29.15Tr.607-08;29.15Ex.11 at 3865-79). The items on the History are cookies(29.15Tr.607-08). The History has a column "Server Modified" which specifies the date and time the file was last modified on the remote web server that a user visited(29.15Tr. 609; 29.15Ex.11 at 3865-79). The "User Accessed" column

contains the last date that the particular cookie was accessed on the local (Lape's) computer(29.15Tr.609-10; 29.15Ex.11 at 3865-79).

The cookie "shylolita.com" (Line 229) was last accessed on March 11, 2002(29.15Tr.611;Ex.11 at 3875). The cookie "beastxxxpics.com" (Line 235) was last accessed on March 12, 2002(29.15Tr.611). The cookie "topincest.com" (Line 274) was last accessed on April 26, 2002(29.15Tr.610;Ex.11 at 3876-77).

Ex. 92 was a disc that contained samples of sexually explicit material recovered from Lape's hard drive(29.15Tr.611-12). Ex. 92 contained chat logs, child pornography, a collection of movies and Yahoo profiles(29.15Tr.612).

One Yahoo profile was "dogday____afternoon2002"(29.15Tr.613). Chatten went to the Yahoo site and downloaded that profile(29.15Tr.613). A profile is information that a user sets up to describe himself(29.15Tr.613). The purpose is so that people with similar interests can communicate through their profiles(29.15Tr.613).

The "dogday____afternoon2002" profile was last updated on March 20, 2002(29.15Tr.613). The image displayed is a standing **white** male with his erect penis exposed from the navel downward(29.15Tr.613-14;29.15Ex.92). The profile shows an email address of dogday____afternoon2002@yahoo.com(29.15Tr.614). The "real name" appears as "Ralph"(29.15Tr.614). The information continues: "Location, Missouri. Age, 45. Marital status, divorced. Sex, male. Occupation, retired."(29.15Tr.614). Listed as "hobbies" were the following: "boating , fishing, camping, socializing with friends, drinking beer on my boat, and … Oh, and sex, all

kinds, except I don't do men. So guys don't ask."(29.15Tr.614). "Latest news" contained the entry "a new boat, come take a ride with me"(29.15Tr.614). Favorite quote was "yunt to"(29.15Tr.614).

Chatten also went to the profile "prisonerr2001" on Lape's hard drive(29.15Tr.617). This profile contains a facial picture with the name "Ralph"(29.15Tr.617). That picture is a head and shoulders picture of a white male in his late 40's or 50's with a mustache sitting in a chair(29.15Tr.617;29.15Ex.92). This profile was last updated on February 1, 2002(29.15Tr.618). The "real name" of "prisonerr2001" is "Ralph"(29.15Tr.618). The profile continues: "Marital status, divorced. Sex, male"(29.15Tr.618). That profile states as "hobbies:" "fishing, boating, camping sex. No males, just females, one or more okay"(29.15Tr.618). Favorite quote is "want to"(29.15Tr.618).

There were several chats by "dogday____afternoon2002" on July 2, 2002.

The chat "lobowolf1960" took place on July 2, 2002 at 11:44 a.m.(29.15Tr.620;29.15Ex.11 at 3855-56). That entire chat was as follows:

dogday_afternoon2002 (11:44:45): yes, but my daughter lives with her mom
dogday_afternoon2002 (11:44:51): how about you
unknown (11:44:54): how old is she?
unknown (11:45:00): i have a 17 year old daughter
dogday_afternoon2002 (11:45:08): mine is 17 too
unknown (11:45:21): she pretty hot?
unknown (11:45:44): ?
dogday_afternoon2002 (11:45:53): you bet, really stacked
dogday_afternoon2002 (11:45:56): yours
unknown (11:46:19): same here...5'7"...140..blonde hair....long legs...blue eyes...that tight teen girl ass...38c
unknown (11:46:22): yours?
dogday_afternoon2002 (11:47:31): dirty blonde, blue eyes, 59" I dont know her weight but she has terriffic tits
unknown (11:47:49): MMMMMmmmmmmmmmm...my daughter is cory.....your daughters name?
dogday_afternoon2002 (11:47:57): megan
unknown (11:48:12): megan have a nice ass??
dogday_afternoon2002 (11:48:31): yes really tight and firm and round
unknown (11:48:43): how often you get to see her?
dogday_afternoon2002 (11:48:57): bout 1once a week
unknown (11:49:15): does she ever wear short shorts...shorts skirts when she is around you??
unknown (11:49:27): cory does al of the time.....drives me nuts....
dogday_afternoon2002 (11:50:03): mine too, and those little half tops, her tits are so big, they wont hardly stay in
unknown (11:50:24): mmmmmmmmmmmmmmmmmmmm...she kike to give you nice views of her tits??
dogday_afternoon2002 (11:51:01): yeh, she teases me alot, how about cory
unknown (11:51:49): oooohhhhhhhhhyes....sh eloves showing off her ass..she is a swimmer and her ass is sooooooooo smooth and firm....and those tits.....man....so firm and big.....gets me hard just thinking of them..
unknown (11:52:01): you ever jo thinkg about megan??
unknown (11:52:36): maybe??
dogday_afternoon2002 (11:52:49): all the fucking time
dogday_afternoon2002 (11:52:57): you ever messed with cory
unknown (11:53:20): she has let me jo on her tits....and ass cheeks....we just started.....you and megan do anything?
unknown (11:53:52): you there?
dogday_afternoon2002 (11:54:13): mmmmmmmmmmmmmmmmmmmmm
dogday_afternoon2002 (11:54:26): corry, like you suckin on her tits
unknown (11:54:38): yesssssssss.....you and megan do much??
dogday_afternoon2002 (11:55:05): just touchy feely things, but I sure want more
unknown (11:55:29): are you hard right now??
dogday_afternoon2002 (11:55:51): working on it, LOL
dogday_afternoon2002 (11:56:02): does cory live with you
unknown (11:56:15): yes
unknown (11:56:29): ever get a nice close view of megans ass???
dogday_afternoon2002 (11:56:58): yeh, she lays on the floor and watches, TV nice shot of her ass then
unknown (11:57:17): what doess he wear doing that????
unknown (11:57:36): cory does the same thing...that is how i started jo on her ass cheeks
dogday_afternoon2002 (11:57:38): usually shorts
dogday_afternoon2002 (11:57:46): sometimes her panties
unknown (11:57:55): you get hard looking at that????
dogday_afternoon2002 (11:58:11): hell, yes, wouldnt you
unknown (11:58:32): yesssssssssssss...does she know that???
dogday_afternoon2002 (11:58:54): well, I dont know, I try to be pretty careful
dogday_afternoon2002 (11:59:01): you ever seen cory in her panties
dogday_afternoon2002 (12:00:54): is cory home now
dogday_afternoon2002 (12:01:50): ok then

(29.15Ex.11 at 3855-56).

The chat "daddoesme15" took place on July 2, 2002 at 6:31 p.m.(29.15Tr.619;29.15Ex.11 at 3850). That entire chat was as follows:

dogday_afternoon2002 (18:31:51): hi baby girl
dogday_afternoon2002 (18:31:59): you like dads cock

(29.15Ex.11 at 3850).

The chat "sweetpiece123" took place on July 2, 2002 at 6:30 p.m.(29.15Tr.620;29.15Ex.11 at 3857-60). Lape's chat about his prior involvement with 13 and 15 year old girls included:

dogday_afternoon2002 (18:34:10): you ever been with older guy for real
unknown (18:34:15): yep
dogday_afternoon2002 (18:34:31): cool
unknown (18:34:42): u ever ben with a younger girl for real?
dogday_afternoon2002 (18:34:52): yes
dogday_afternoon2002 (18:34:57): a couple of them
unknown (18:34:58): kewl
unknown (18:35:04): how old?
dogday_afternoon2002 (18:35:22): 13 and 15
unknown (18:35:34): kewl ur girls?
dogday_afternoon2002 (18:35:55): no a neighbor girl and her friend
unknown (18:36:06): hot
unknown (18:36:19): u still do them?
dogday_afternoon2002 (18:36:27): you bet, they have the sweetest little pussies

(29.15Ex.11 at 3857).

Additionally, during "sweetpiece 123," "dogday____afternoon2002" had the following exchange:

unknown (18:47:58): i need a hard cock
dogday_afternoon2002 (18:48:02): did you see my pic on profile

(29.15Ex.11 at 3858).

The child pornography images were given names on Lape's hard drive(29.15Tr.621). The file "1344.jpg," created February 5, 2002, is a picture of a male penetrating a young sexually undeveloped girl(29.15Tr.624-25). The girl's eyes are covered with her hands and her mouth is open while in a painful position(29.15Tr.625).

The file called "Ashley4" was created on Lape's computer on February 20, 2002(29.15Tr.621-22). This is a picture of a female baring her breast(29.15Tr.622).

The image "Ashley1.BMP" was created on February 20, 2002(29.15Tr.623). That image shows a blonde female with one hand on her right breast with her nipple between two fingers(29.15Tr.623). The other hand has her panties pulled back to totally expose her vagina(29.15Tr.623).

The females pictured in "Ashley4" and "Ashley1.BMP" were definitely under eighteen years old(29.15Tr.623).

The file "cumshower.jpg" was created on February 21, 2002 and is a picture of a sexually undeveloped white female with her breast and vagina exposed(29.15Tr.625). Her legs are spread open and backward revealing no pubic hair and her chest and belly have a white milky substance(29.15Tr.625).

The file "10ondad.jpg" was created March 15, 2002 displays a female who is much younger than those in "Ashley4" and "Ashley1.BMP"(29.15Tr.623). That female is being penetrated by a male by her sitting on top of him(29.15Tr.623). The male is lying down and the female's hands are on his shoulders(29.15Tr.623). The female is small breasted and the male's penis is inside her(29.15Tr.624-25).

The file "fuck_hardcore_Asian_sex_suck_fucking_gum_animals_gay_lesbian_dog_cat_fish_chicken_horse_good_music_blur_oasis_swayed (1.jpg)" was created on March 20, 2002(29.15Tr.625-26). That file shows a young female with her legs spread sitting on top of a male penis with another male who has at least one hand around one of her arms(29.15Tr.625-26).

The file "0105.jpg" was created on May 12, 2002(29.15Tr.624). This file shows a young girl with her mouth open and tongue out sitting on a sofa with a white male's penis ejaculating onto her face and the ejaculate running down her chest(29.15Tr.624).

Lape's computer also had deleted images(29.15Tr.626). Because the images were deleted, the forensic software used cannot determine when the images were downloaded onto Lape's computer(29.15Tr.626-27). There were approximately eleven deleted images(29.15Tr.627). The deleted images file contained pictures of sexually undeveloped female minors in sexually enticing poses exposing their genitalia(29.15Tr.627-28). One picture showed a very young girl with a penis in her mouth(29.15Tr. 627-28). Another photo had a young girl with either a penis or a dildo in her mouth(29.15Tr.628). Another image showed two boys and one girl with the girl having one boy's penis in her mouth and the other boy is inserting an object into her vagina(29.15Tr.627-28). Another image has a sexually undeveloped girl with a penis in her mouth and a man standing(29.15Tr.628). Another image shows a minor male holding himself up with his hands and with an erect penis(29.15Tr.628).

Lape's hard drive contained twenty-nine movies(29.15Tr.628-29). The movie creation dates are as follows: (1) June 8, 2000 – two; (2) February 12, 2002 – one; (3) March 20, 2002 – twelve; (4) March 21, 2002 – eight; (5) April 3, 2002 – one; (6) April 27, 2002 – four; and (7) April 28, 2002 – one(29.15Tr.629,633). The file names depicted bestiality(29.15Tr.629). Those names included: "pretty teen girl gets anal sex from dog," "animal sex horse rape," "bestiality dog cums on woman's face," and "animalpornmovie – bestiality – prettyteengirlgetsanal.mpg"(29.15Tr.629-30).

When the Ex. 92 disc of Lape's computer was offered, the court sustained respondent's foundation objection(29.15Tr.630-33,664). The court then was asked to reconsider after viewing the disc's contents, which it agreed to do(29.15Tr.664-65).

Respondent's cross-examination of Chatten focused on that he cannot say who was sitting at Lape's computer putting sexually objectionable material on it(29.15Tr.634). Chatten testified the "prisonerr2001" account was never used to send chats(29.15Tr.635).

Officer James' Deposition

Officer James testified that he was the officer in charge of the police investigation(29.15Ex.93 at 7). James testified that when Gill was arrested that he had Lape's computer and Gill had admitted taking Lape's computer(29.15Ex.93 at 6-8,43-44). James' Encase report states that Lape's computer was seized from the car Gill was arrested in(29.15Ex.15 at 5125). James had custody of the computer during Gill's and co-defendant Brown's trials(29.15Ex.93 at 8).

On August 27, 2002, James generated an Encase report of Lape's computer(29.15Ex.93 at 18-19 and Depo. Ex.#3;29.15Ex.15 at 5125-30). The Encase report was printed for Attorney Zembles, co-defendant Brown's counsel(29.15Ex.93 at 20-21).

James learned there was much pornography, including child pornography, on Lape's computer the day of his Encase report, August 27, 2002 or within a few days of the report(29.15Ex.93 at 22-24). Before Gill's trial, James opened the picture of the penis thought to be Lape's and the sexual chats(29.15Ex.93 at 27-29). James did not call to Swingle's attention Lape's sexual chat about Lape's daughter because he did not believe it was relevant(29.15Ex.93 at 30). From his computer investigation, James concluded Lape authored the sex chats and not someone else sitting at Lape's computer(29.15Ex.93 at 26). James had known Lape before he was killed, and concluded from his review of Lape's computer that Lape was "a pervert"(29.15Ex.93 at 38-39).

There was nothing in Lape's computer to link Gill to placing child pornography on Lape's computer(29.15Ex.93 at 48). James determined that the pornography was placed on Lape's computer before Gill began living with Lape, and therefore, Gill could not have placed it on Lape's computer(29.15Ex.93 at 48). If James would have found any evidence to connect Gill or Brown to the placing of illegal pornography on Lape's computer, then he would have alerted Swingle(29.15Ex.93 at 48-49).

Lape's hard drive's contents were not put on a disc until counsel for co-defendant Brown, Zembles, requested them(29.15Ex.93 at 32-38,45-46). The sexual contents of Lape's computer hard drive were never disclosed to anyone until after Gill's trial and that disclosure was to Brown's counsel(29.15Ex.93 at 32-38, 45-46). The first time James told Swingle about there being child pornography was after Gill's trial and when Brown's counsel requested Lape's computer's contents(29.15Ex.93 at 32-38). James told Swingle that the computer contained child pornography, bestiality, and chats(29.15Ex.93 at 38).

Swingle's Testimony

Swingle and James worked on the probable cause statement together and it was based on what James reported(29.15Ex.95 at 8-9).

Swingle viewed Lape's computer sometime prior to September 9, 2003(29.15Ex.95 at 11-14). Swingle again saw Lape's computer when Turlington and Kenyon came to view respondent's exhibits on January 20, 2004(29.15Ex.95 at 12-13,31). Swingle remembered Kenyon or Turlington asking him on January 20, 2004 whether there was anything important on Lape's computer and he told them no, but they were welcome to look(29.15Ex.95 at 31). Kenyon and Turlington decided not to look(29.15Ex.95 at 31).

In Swingle's Answer to Request For Discovery, filed on September 10, 2003, he listed Lape's computer as something he might introduce(T.L.F.91;29.15Ex.95 at 20-21). Swingle knew from James that there was pornography on Lape's computer the first occasion that Swingle saw the computer – sometime before September 9,

2003(29.15Ex.95 at 11-14,23-26). The pornography seemed unimportant to Swingle because Gill had confessed to taking Lape's computer(29.15Ex.95 at 23-24,35-36,38). Even though Swingle knew about the pornography when he sent his February 4, 2004 letter to Gill's counsel, with the Encase report, he did not advise them about the pornography(29.15Ex.72:29.15Ex.95 at 23-26).

After Gill's trial, Brown's attorneys requested Lape's computer's contents(29.15Ex.95 at 36). Swingle asked James to make a copy of Lape's computer's contents and James initially declined because Lape's computer contained child pornography(29.15Ex.95 at 36). Initially, Swingle opposed turning over Lape's computer's contents to Brown's attorneys, but Judge Storie ordered that be given to them for expert review(29.15Ex.95 at 37).

Swingle testified that he first learned about the sexual chats relating to Lape's daughter when Brown's attorney Zembles told Swingle(29.15Ex.95 at 40-41). Swingle learned about the pictures of Lape and someone's penis from Brown's attorney Zembles when Swingle was in-court on Brown's case(29.15Ex.95 at 41-42). Zembles gave Swingle an envelope which Swingle said he never opened and which Swingle believes contains bestiality materials(29.15Ex.95 at 42-43).

Swingle filed a motion in Brown's case before Judge Storie to exclude all Lape's computer's sexual content(29.15Ex.95 at 44-47). In Brown's case, Swingle opposed the computer evidence because it "trash[ed] the reputation" of Lape and was irrelevant(29.15Ex.95 at 44-46). Judge Storie ruled in *Brown* that the defense could

not present the computer evidence unless the victim impact cast Lape as "a saint"(29.15Ex.95 at 46-47).

In *Brown*, no evidence was presented that opened the door to the computer evidence(29.15Ex.95 at 46-47). Even if the door had been opened, Swingle would have opposed the computer evidence because no one could say "with certainty" that Lape was responsible for his computer's sexual content(29.15Ex.95 at 47-48). The Millers, Megan, and Steven were all alerted not to cast Lape as "a saint" or the sexual content evidence would be admissible(29.15Ex.95 at 48-52,68).

Unlike in *Gill*, the victim impact witnesses did not talk about Lape's generosity in Brown's penalty phase(29.15Ex.95 at 62). Unlike in *Gill*, Mitch did not get into the statements about how the old west had taught him and Lape valuable character lessons(29.15Ex.95 at 67). In *Brown*, there was no mention of Lape having loaned a friend money for the friend to pay for his wife's funeral(29.15Ex.95 at 70-71).

Swingle does not believe there was anything relevant or exculpatory on Lape's computer requiring disclosure(29.15Ex.95 at 89-91).

Swingle gives strong consideration to what a victim's family wants as to seeking death(29.15Ex.95 at 71-72). Diane Miller was the family contact and leader(29.15Ex.95 at 71-73). Swingle kept Diane apprised that Gill was wanting to provide information about Davis(29.15Ex.95 at 71-73). Swingle testified he thought Diane might be willing to forego seeking death against Gill in exchange for Davis being prosecuted(29.15Ex.95 at 71-73).

Swingle had discussions with Berman about a plea deal in exchange for evidence against Davis(29.15Ex.95 at 73-76).

On January 9, 2003, Swingle wrote Diane informing her that there had been discussions with Gill's attorneys about Gill's providing information against Davis in exchange for waiving death(29.15Ex.94 Depo. Ex.1). That letter stated that Gill's attorneys had advised Swingle that they were prepared to have Gill meet with an investigator to discuss what he knew about Davis(29.15Ex.94 Depo. Ex.1;29.15Ex.95 at 73-74). That letter stated that Gill's attorneys had informed Swingle that they had discussed the case in detail with Gill and "no one else was involved in the killing of your brother, but that he does have information of other crimes that have been committed"(29.15Ex.94 Depo. Ex.1).

On April 22, 2003, Swingle wrote Diane stating the following: "Just as I feared, the defense lawyers are already talking about wanting a continuance in Mark Gill's murder case because of the matters being investigated in regard to Pat Davis"(29.15Ex.94 Depo. Ex.2 at 1). Swingle continued that he intended to oppose a continuance because counsels' efforts had been directed at "this **tar baby** of a Pat Davis investigation"(29.15Ex.94 Depo. Ex.2 at 1)(emphasis added). Swingle added that he would do his "best to prevent" a continuance based on the Davis investigation(29.15Ex.94 Depo. Ex.2 at 1).

On April 22, 2003, Swingle wrote Berman two letters(29.15Ex.94 at 3-6).[3] Swingle informed Berman that he would oppose a continuance on the grounds counsel was unprepared because of efforts directed at obtaining evidence against Davis(29.15Ex.94 Depo.Ex.2 at 5). Swingle wrote that he was not going to allow the case to "get delayed or screwed up by the interests anybody else has in making a criminal case on this attorney"(29.15Ex.94 Depo.Ex.2 at5). Swingle stated that he had "repeatedly promised the victim's family that this case will not be postponed"(29.15Ex.94 Depo.Ex.2 at 5). In the letter, Swingle stated that the case had been set nine months in advance of the trial date and the trial date was still five months away(29.15Ex.94 Depo.Ex.2 at 5).

In Swingle's April 22, 2003 correspondence with Berman he offered Gill immunity for deposition testimony he would give to Attorney Mass who was suing Davis in the handling of an estate and immunity for other matters relating to Davis(29.15Ex.94 Depo. Ex.2 at 3). Swingle wrote that the information Gill "has been providing and his continued cooperation are facts that may help me and Ralph Lape's family decide whether the death penalty would be waived."(29.15Ex.94 Depo. Ex. 2 at 3).

Scott Cates

[3] One letter to Diane Miller and two letters to Berman were all dated April 22, 2003 and all were stapled together as a single deposition Exhibit #2 to 29.15 Ex.94.

Scott Cates testified at his pretrial deposition that Lape arrived at the Lake on Wednesday, July 3, 2002 at 2:00 – 3:00 p.m., which was after the sex chats of July 2, 2002(29.15L.F.406 at transcript p.60). Lape left on Monday, July 8, 2002(29.15L.F.407 at transcript p.63-64).

Davis and Lape were drinking buddies and Davis arranged for Gill to live with Lape(29.15L.F.405 at transcript p.54-56). Lape's relationship with his daughter was "[s]potty"(29.15L.F.405 at transcript 56). Megan only came to see Lape when she needed money(29.15L.F.412 transcript at 83-84).

Diane Miller

Diane had discussions with Swingle about a deal for Gill if Gill provided information about Davis having some role in Lape's death(29.15Ex.94 at 5-6). During 2002, Diane was involved in meetings with the Cape County Sheriff's office and Officer James relating to Davis' involvement in Lape's death(29.15Ex.94 at 6-7). Her discussions with Swingle about waiving death were directed at such a result if there was evidence Davis had been involved in Lape's death(29.15Ex.94 at 18). Diane was not interested in any other Davis crimes besides Lape's death that Gill could provide information about(29.15Ex.94 at 9-10).

Respondent's 29.15 Evidence

Officer James' In-Court Testimony

The "prisonerr2001" profile was created in October, 2001(29.15Tr.642).

The "dogday____afternoon2002" profile was not used for chats prior to July 2, 2002(29.15Tr.643-44).

From James' work, it was determined Lape was killed on July 7, 2002(29.15Tr.644). James determined that on July 9, 2002 and July 12, 2002 that the "dogday____afternoon2002" profile was used to engage in other chats(29.15Tr.644).

The messages sent using "dogday____afternoon2002" on July 2, 2002 were deleted from Lape's computer, but were recovered using Encase(29.15Tr.644-45). Messages sent using the profile "dogday____afternoon2002" on July 9, 2002 and July 12, 2002 were not deleted(29.15Tr.644-45).

Gill began living with Lape in June, 2002(29.15Tr.646). The sexual images on Lape's computer were last accessed before Gill lived with Lape(29.15Tr.646-47).

After Lape was killed, Gill and Brown purchased pornographic movies on Lape's satellite dish(29.15Tr.648-49).

Lape had computer pornography images of children as young as two to three years old(29.15Tr.650-51).

James personally knew Lape and the photo on the "prisonerr2001" profile was Lape's picture(29.15Tr.651).

Megan Lape

Megan Lape testified that Lape never said or did anything sexually inappropriate to her(29.15Tr.652-53).

Megan met Gill for the first time when she went to her father's house on July 22, 2002 in response to Diane's concerns about Lape's disappearance(29.15Tr.654-56;T.Tr.636-38,654-56).

Megan testified that in July, 2002 she was eighteen and that Lape knew her age(29.15Tr.655).

During the Attorney General's 29.15 questioning of Megan the A.G. stated as fact that she knew that Lape had left to go to the Lake on July 2nd and Megan responded that she did not know that at the time(29.15Tr.657). On cross-examination, however, Megan testified that she did not know when Lape left to go to the Lake(29.15Tr.658).

The motion court signed the A.G.'s findings(29.15Tr.666;29.15L.F.510-43). The A.G.'s findings asserted that the sexual content on Lape's computer could be attributed to Gill and that there was no evidence establishing Lape was responsible for Lape's computer's sexual contents(29.15L.F.514,521-22,526,532-33,535-37). The A.G.'s findings were signed even though James, the state's computer expert and officer in charge, had concluded Lape authored the sexual chats, James' overall review of Lape's computer had caused him to conclude Lape was "a pervert," and James determined the pornography on Lape's computer was put on Lape's computer before Gill lived with Lape(29.15Ex.93 at 26,38-39,48).

This appeal followed.

POINTS RELIED ON

I.

BRADY VIOLATION – COMPUTER'S SEXUAL CONTENT

The motion court clearly erred in overruling Gill's postconviction motion because Gill was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, as respondent failed to disclose in violation of *Brady v. Maryland* and Rule 25.03 all the sexual content that was on Lape's computer in that this evidence was proper rebuttal to respondent's having portrayed Lape as a "Good Samaritan," "saint," "Mr. Mom," and a person with Lincolnesque character such that there is a reasonable probability that Gill would not have been convicted of first degree murder and sentenced to death and counsel testified they would have used the evidence as rebuttal or to prevent the state from misrepresenting Lape as a person of extraordinary character and counsel were entitled to do so.

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

Booth v. Maryland,482U.S.496(1987);

Payne v. Tennessee,501U.S.808(1991);

Simmons v. South Carolina,512U.S.154(1994);

U.S. Const. Amends. VIII, XIV.

II.

INEFFECTIVE ASSISTANCE – COMPUTER'S SEXUAL CONTENT

The motion court clearly erred in overruling Gill's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have uncovered Lape's computer's sexual content by interviewing or deposing Officer James, the police officer in charge of the investigation and state's computer expert, or through careful review of James' Encase report and then requested the contents of Lape's computer for review by a defense computer expert, as co-defendant Brown's counsel did, and would have presented the sexual content as rebuttal evidence to the state's inaccurate portrayal of Lape's character or used the computer's information, as the codefendant did, to dissuade the state from inaccurately and unfairly portraying Lape as a person of exceptional personal character.

Gennetten v. State,96S.W.3d143(Mo.App.,W.D.2003);

Clay v. State,954S.W.2d344(Mo.App.,E.D.1997);

Knese v. State,85S.W.3d628(Mo.banc2002);

Taylor v. State,262S.W.3d231(Mo.banc2008);

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

III.

FOUNDATION OBJECTION – COMPUTER SEXUAL CONTENT

The motion court clearly erred in ruling the *Brady* and ineffective assistance claims involving Lape's computer's sexual content lacked merit because there was a lack of foundation for admitting Lape's computer's sexual content at trial as it was not established Lape put the sexual content on his computer and in sustaining respondent's hearing objection on the same grounds to the admission of Ex. 92, a disc containing Lape's computer's sexual content, because Gill was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV in that the state's own police officer in charge and computer forensic expert, Police Officer James, testified his analysis showed Lape authored the sexual chats, his overall computer analysis showed that Lape was "a pervert," and Gill could not have put the sexual content on Lape's computer because that was done before Gill lived with Lape. Further, any contention the state might have that someone else put the sexual content on Lape's computer is not a foundational problem, but a weight of the evidence question for the jury to resolve.

State v. Robinson,106S.W.2d425(Mo.1937);

State v. Rockett,87S.W.3d398(Mo.App.,W.D.2002);

State v. Griffin,810S.W.2d956(Mo.App.,E.D.1991);

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

IV.

SIGNING STATE'S FINDINGS

The motion court clearly erred in signing respondent's findings because that denied Gill his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that respondent's findings were expressly contrary to how multiple witnesses' testified, and most notably contrary to Officer James' testimony, the state's own computer expert and officer in charge of the investigation, that Lape authored the sexual chats and James' overall computer analysis had caused him to conclude Lape was "a pervert," and adopting them shows a lack of independent judicial judgment.

Massman Construction Co. v. Missouri Highway and Transportation Comm'n, 914S.W.2d801(Mo.banc1996);

State v. Kenley,952S.W.2d250(Mo.banc1997);

Taylor v. State,262S.W.3d231(Mo.banc2008);

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

V.

SWINGLE'S NEGOTIATION DECEPTION

The motion court clearly erred finding Swingle did not commit prejudicial prosecutorial misconduct when he deceived counsel and caused them to believe a death waiver was possible through Gill's providing information against Attorney Davis because Gill was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII and XIV, in that Swingle never intended to waive death since he knew that Diane Miller opposed life for Gill unless Davis was charged for acts involving Lape's death and Swingle knew that Gill's information against Davis had nothing to do with implicating Davis in Lape's death. Gill was prejudiced because his counsel expended enormous resources to the detriment of failing to uncover Lape's computer's sexual content which would have been used to prevent respondent from inaccurately casting Lape as a "Good Samaritan," "saint," "Mr. Mom," and a person with Lincolnesque character, as the co-defendant's counsel did, or to rebut such a portrayal and Gill would not have been convicted of first degree murder and death sentenced.

Berger v. United States,295U.S.78(1935);

Sheppard v. Rees,909F.2d1234(9thCir.1989);

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

VI.

DYSFUNCTIONAL FAMILY AND ABUSE

The motion court clearly erred because Gill was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel failed to investigate and present a comprehensive complete mitigation case in failing to call as witnesses Derek Fitgerald, a mitigation specialist such as Cessie Alfonso, and Gary Riley, to testify about Gill's dysfunctional family background and abuse he endured, failing to present complete evidence through Mary Alice Gill about her role in that family dysfunction and abuse, failing to rely on Gill's family members' mental health records documenting serious family mental illness, and failing to rely on Gill's medical records. Gill was prejudiced because had the jury heard a comprehensive mitigation case he would not have been sentenced to death.

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

Hutchison v. State, 150S.W.3d292(Mo.banc2004);

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

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

VII.

ABUSE AND FAMILY DYSFUNCTION CAUSED PTSD

The motion court clearly erred denying Gill's 29.15 motion because Gill was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel was ineffective for failing to call an expert with expertise like Dr. Cross to testify to the mitigating evidence that the abusive dysfunctional environment Gill was raised in caused him to suffer from Post-Traumatic Stress Disorder (PTSD) which was mitigating evidence that warranted a life sentence and Gill was prejudiced because had the jury heard this diagnosis in conjunction with complete evidence of his dysfunctional family background and the abuse he sustained (Point VI), he would have been sentenced to life.

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

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

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

VIII.

LETHAL INJECTION METHOD

The motion court clearly erred denying Gill's 29.15 motion because that ruling denied Gill his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that Missouri's lethal injection process violates the cruel and unusual punishments prohibition because respondent cannot conduct executions that do not cause unnecessary and wanton infliction of pain and cannot conduct them without a substantial risk of maladministration.

Gregg v. Georgia,428U.S.153(1976);

Louisiana v. Resweber,329U.S.459(1947);

Baze v. Rees,128S.Ct.1520(2008);

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

ARGUMENT

I.

BRADY VIOLATION – COMPUTER'S SEXUAL CONTENT

The motion court clearly erred in overruling Gill's postconviction motion because Gill was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, as respondent failed to disclose in violation of *Brady v. Maryland* and Rule 25.03 all the sexual content that was on Lape's computer in that this evidence was proper rebuttal to respondent's having portrayed Lape as a "Good Samaritan," "saint," "Mr. Mom," and a person with Lincolnesque character such that there is a reasonable probability that Gill would not have been convicted of first degree murder and sentenced to death and counsel testified they would have used the evidence as rebuttal or to prevent the state from misrepresenting Lape as a person of extraordinary character and counsel were entitled to do so.

The motion court signed the A.G.'s findings denying Mr. Gill's claim that the state failed to disclose Lape's computer's sexual content and that he was prejudiced. That evidence was proper admissible rebuttal evidence to the state's portrayal of Lape as a "Good Samaritan," "saint," "Mr. Mom," and person of Lincolnesque character. Its absence was prejudicial to reliable guilt and penalty phase determinations. Counsel testified they would have used this evidence as rebuttal or to prevent the state from casting Lape as a person of such extraordinary personal character and counsel were entitled to do so.

Standard Of Review

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

A.G.'s 29.15 Findings

The findings state that the undisclosed evidence was not exculpatory because it was inadmissible as not relevant and the door was not opened to it(29.15L.F.513, 515,538-39). Cases from assorted jurisdictions hold a defendant cannot impugn a victim's reputation(29.15L.F.516,525-26). The evidence was not admissible to compare Lape's life's value to Gill's life(29.15L.F.516).

Respondent disclosed the Encase report(29.15L.F.524). Also, Swingle testified that he did not think there was anything relevant on the computer and that was Swingle's honest, accurate assessment(29.15L.F.524,526). The first time Swingle allegedly knew there was child pornography on the computer was after Gill's trial(29.15L.F.524-25). In the co-defendant's case, the evidence was disclosed, but was excluded as irrelevant(29.15L.F.525).

The findings assert Gill's attorneys allegedly testified that they "could not ethically argue that Mr. Lape's life had less value"(29.15L.F.516). Kenyon allegedly testified he would not have wanted to use the evidence because that would be "kick[ing] a corpse"(29.15L.F.521,525). Neither Attorney would have wanted to present the sexual content(29.15L.F.526-27).

According to the findings, respondent was not obligated to provide the computer's entire contents to counsel(29.15L.F.521). The sexual chats occurred on July 2, 2002 and Lape had left his house that day for the Lake and the evidence supported that Gill did them(29.15L.F.522,532).

Gill failed to establish Lape put the sexual evidence on the computer(29.15L.F.513-14,522). There was no evidence that Lape downloaded the child pornography and therefore no foundation to admit it(29.15L.F.533). Chatten could not prove who created Lape's computer profiles(29.15L.F.535). Chatten could not establish Lape put the sexual content on Lape's computer(29.15L.F.536).

The findings relied on Lape's daughter having testified Lape never engaged in any sexually inappropriate behavior with her(29.15L.F.533,537). Lape knew his daughter was 18 and the sexual chat about her misstated her age(29.15L.F.537).

The findings were clearly erroneous.

Brady And Rule 25.03 Were Violated

The prosecution must disclose favorable evidence material either to guilt or punishment. *Brady v. Maryland*,373U.S.83,87(1963). For purposes of due process, no distinction between exculpatory and impeachment evidence exists. *U.S. v. Bagley*,473U.S.667,676-78(1985). Nondisclosure of *Brady* evidence violates due process "irrespective of the good faith or bad faith of the prosecution." *Brady*,373U.S. at 87. Claims of non-disclosure and counsel's ineffectiveness require this Court consider the totality and cumulative effect of all the evidence which the jury failed to hear. *Kyles v. Whitley*,514U.S.419,440-41(1995)(cumulative effect of

undisclosed *Brady* evidence must be considered);*Hutchison v. State*,150S.W.3d292,306(Mo.banc2004)(prejudice from counsel's failure to act must be assessed from totality of evidence counsel failed to present).

Rule 25.03 (A) (9) requires respondent disclose: "Any material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment." "The rules of criminal discovery are not mere etiquette nor is compliance to be at the discretion of the parties." *State v. Greer*, 62S.W.3d501,504(Mo.App.,E.D.2001). It is not the prosecutor's prerogative to determine whether witnesses or information would help the defense. *Kern v. State*,507S.W.2d8,13(Mo.banc1974). The rules of disclosure are not "'prosecutor may hide, defendant must seek.'" *Banks v. Dretke*,540U.S.668,696(2004).

In *Taylor v. State*,262S.W.3d231,237-48(Mo.banc2008), the state failed to disclose evidence that would have impeached its critical jailhouse snitch witness and required reversing the penalty phase. A *Brady* violation has three components: '"The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."' *Id.*240(quoting *Strickler v. Greene*,527U.S.263,281-82(1999)). A defendant is prejudiced and his due process rights are violated if the suppressed evidence '"is material to either guilt or to punishment." *Taylor*,262S.W.3d at 243(quoting *Brady*,373U.S. at 87). Evidence is

material if there is a reasonable probability that the result would have been different if the evidence had been disclosed. *Taylor*,262S.W.3d at 243.

This Court found that a *Brady* violation occurred in *Taylor* when the state failed to disclose an investigative memo detailing a conversation its investigator had with the snitch. *Taylor*,262S.W.3d at 241. The prosecutor testified he made a conscious choice not to disclose the memorandum because he saw no relevance to Taylor's case. *Id.*241. While finding a *Brady* violation happened, this Court stated: "Despite this evidence, the motion court adopted the prosecution's self-serving [29.15] finding that [the prosecutor's] failure to disclose this memorandum was made in good faith. This was clear error." *Id.*241-42. This Court held that the 29.15 court had further clearly erred in adopting respondent's findings that the snitch had been sufficiently impeached such that Taylor was not prejudiced. *Id.*243-45.

There was nothing in the Encase report that directly informed counsel that there was sexual content on Lape's computer(29.15Tr.167-69). Kenyon and Turlington recounted that Swingle informed them that there was nothing important on Lape's computer(29.15Tr.175-76,304-05).

Swingle testified that he told Kenyon and Turlington there was nothing important on Lape's computer(29.1529.15Ex.95 at 31). Swingle testified that he knew there was pornography on Lape's computer sometime prior to September 9, 2003 when he saw the computer(29.15Ex.95 at 13-14,23-26). Even though Swingle knew about the pornography when he sent his letter of February 4, 2004 to Gill's counsel, accompanied by the Encase report, he did not advise them about the

pornography(29.15Ex.72:29.15Ex.95 at 23-26). Swingle does not believe there was anything relevant or exculpatory on Lape's computer that he was required to disclose(29.15Ex.95 at 89-91).

Officer James learned that there was much pornography, including child pornography, on Lape's computer the day of his Encase report, August 27, 2002 or within a few days of the report(29.15Ex.93 at 22-24). Before Gill's trial, James opened a picture of a penis believed to be Lape's and the sexual chats(29.15Ex.93 at 27-29).

Trial did not begin until March, 2004(T.Tr.2).

The sexual content on Lape's computer was evidence that was favorable to guilt and punishment. *See Brady* and discussion *infra*. Like the *Taylor* prosecutor, James and Swingle made a conscious choice not to disclose Lape's computer's sexual content because they thought it irrelevant. Good faith is irrelevant. *See Brady*. The state was required to disclose all the sexual content on Lape's computer. *See Brady* and *Taylor*.

Lape's Computer's Sexual Content Was Proper Rebuttal To Respondent's Inaccurate Portrayal Of Lape

In *Gardner v. Florida*,430U.S.349,351,353(1977), the trial judge imposed death while basing that decision in part on a presentence report where portions of the report were withheld from the defense as confidential. That action violated due process and the death sentence was reversed. *Id.*351. Due process was violated because death "was imposed, at least in part, on the basis of information which he had

no opportunity to deny or explain." *Id.*361. *See also*, *Simmons v. South Carolina*,512U.S.154,161(1994)(quoting this language from *Gardner* while holding where future dangerousness is an issue defendant was entitled to inform jury he was parole ineligible).

In *Booth v. Maryland*,482U.S.496,501-02(1987), the Court held that the Eighth Amendment prohibited the admission of victim impact evidence. In *Payne v. Tennessee*,501U.S.808,811,825(1991), the Court overruled *Booth* to the extent that *Booth* created a per se Eighth Amendment prohibition against victim impact. The *Booth* dissenting Justices, who favored allowing victim impact evidence, stated that "**[n]o doubt** a capital defendant **must be allowed to introduce relevant evidence in rebuttal** to a victim impact statement, but Maryland has in no wise limited the right of defendants in this regard." *Booth*,482U.S. at 518(emphasis added)(opinion of White, J. joined by Rehnquist, C.J., O'Connor, J. and Scalia, J.). *See also Simmons v. South Carolina*,512U.S. at 164(post *Payne* decision holding where state relies on particular evidence to ask for death "elemental due process principles operate to **require admission** of the defendant's relevant evidence in **rebuttal**")(emphasis added). *Payne* adopted the *Booth* dissenting Justices' views as the Court's new majority view. *Payne*,501U.S. at 851(Marshall, J. dissenting). The *Booth* dissenters did note that counsel's decision whether to rebut victim impact evidence or not is not an easy one. *Booth*,482U.S. at 518(White, J. dissenting).

"Good Samaritan," "Mr. Mom," "Saint," And Lincolnesque

Moral Character

In guilt opening statement Swingle told the jury that Lape was "a [G]ood [S]amaritan" who gave Gill a place to live because he "was down and out and needed a place to stay"(T.Tr.587). In Swingle's guilt closing argument he reiterated his opening statement theme that it was Lape's generosity that "had given this man a place to stay, a roof to have over his head"(T.Tr.1084).

Counsel's defense theory, commencing from guilt opening statement, was devoted to rebutting Lape was "a Good Samaritan," and only had allowed Gill to live with him because he wanted Gill to beat-up his daughter's boyfriend because the boyfriend was African-American(T.Tr.587,665-66,725,1102-05,1113). In the defense guilt closing argument, counsel told the jury that Swingle's opening statement characterization of Lape as "a [G]ood [S]amaritan" was contrary to Lape's agenda to have Gill beat-up Lape's daughter's boyfriend because he was African-American(T.Tr.1102-05,1113).

In penalty, Diane testified that she had assembled a photo album for Swingle because she "wanted [Swingle] to see the person" he was representing(T.Tr.1171).

Diane testified that Lape went to St. Ambrose Catholic School(T.Tr.1170). There was a picture of Lape at Diane's First Communion(T.Tr.1172). There were also photos of Lape from Christmas and Easter(T.Tr.1173-74,1176,1183).

The pictures of Lape with his daughter Megan were: (1) at the hospital with Megan on the day she was born(T.Tr.1173); (2) playing with Megan at Lape's parents' house on a holiday(T.Tr.1173); (3) with Lape's ex-wife Karen(T.Tr.1173-74); (4) playing outside on a holiday(T.Tr.1174); (5) eating ice-cream at the

zoo(T.Tr.1174); (6) Megan's first day of school when Lape had gotten her ready(T.Tr.1174); (7) at Thanksgiving(T.Tr.1181); (8) at a Christmas Eve gathering (Picture #30)(T.Tr.1181); (9) a Christmas picture together (Picture #31)(T.Tr.1182); (10) a summer picture together (Picture #32)(T.Tr.1182); and (11) two pictures from Megan's high school graduation(Pictures #36 and #37)(T.Tr.1183).

Diane testified: "the proudest and happiest day of Ralph's life was the day his daughter Megan was born"(T.Tr.1187). Lape behaved like "Mr. Mom"(T.Tr.1187).

Lape took over the job of opening Diane's pool when their father died(T.Tr.1182). Diane characterized Lape as someone who did not "gossip" about people(T.Tr.1184). Growing-up, Lape defended Diane from other children(T.Tr.1186). Diane testified that she "heard stories about Ralph's generosity"(T.Tr.1190).

Mitch testified that he had studied with Lape the "valuable good life lessons" of the characters of the old west culture(T.Tr.1195). Those lessons were: "You don't cheat at cards, you don't start any trouble, but you stand up to it when it comes. You never shoot a man in the back, and, two against one is never a good program"(T.Tr.1195). Mitch recounted meeting Lape for the first time and Lape helping him push his car to a gas station(T.Tr.1196). Even though Mitch and Diane married young, Lape told him: "the only thing I want you to do is take care of her"(T.Tr.1196).

Steven recounted how Lape had cleared a path in front of him to walk to school in a deep snow while providing him reassurance(T.Tr.1219-20). Steven

described how Ralph Lape's school teachers had held him in high regard(T.Tr.1220). Steven recounted how he broke his arm at a pond and Lape carried him home to care for and comfort him(T.Tr.1220). Steven described how when Lape was having financial problems Lape did ask for help(T.Tr.1220-21). Steven described "how generous" Lape was(T.Tr.1221). Steven concluded invoking a quote from Lincoln's Gettysburg address as epitomizing Lape's character(T.Tr.1221-22). The Lincoln quote was: "The world will little note, or long remember what we say here. But they will never forget what we did here"(T.Tr.1221-22).

Evidence is proper rebuttal if it tends to explain counteract, repel, or disprove evidence the opposing party offered. *State v. Gardner*,8S.W.3d66,72(Mo.banc1999). All of Lape's computer's sexual content was proper to rebut Swingle's and the victim impact witnesses' portrayal of Lape as a "Good Samaritan," "Mr. Mom," "saint" and having Lincolnesque moral character. *See Booth*, *Payne* and *Simmons*. The sexual content, generalized pornography, child pornography, Lape's computer profiles of himself, bestiality, and sexual chats, were all proper rebuttal to the state's characterizations and evidence relating to Lape. The sexual content was proper because it counteracted and disproved the state's portrayal of Lape.

The A.G.'s findings cite cases for the proposition that even if the sexual content Lape placed on his computer had been disclosed, it was inadmissible(29.15L.F.516,525-26). A careful reading of those cases shows otherwise, undoubtedly because the *Booth* dissent, now the majority view under *Payne* and *Simmons*, *supra*, recognized the absolute right to rebut victim impact.

None of the cases cited in the findings held proper rebuttal evidence can be excluded. Gill had the right to rebut the state's inaccurate portrayal of Lape.

For example, in *State v. Powers*,101S.W.3d383,401(Tn.2003)(emphasis added), "[t]he trial court **ruled** that Powers **had a right to rebut** the victim impact evidence introduced by the State." What the *Powers* trial court properly excluded was evidence that did not rebut the state's evidence. *Id.*401-03. In fact, Swingle testified that in co-defendant Brown's case Judge Storie ruled the same way – that the defense could not present the evidence found on Lape's computer unless the victim impact cast Lape as "a saint"(29.15Ex.95 at 46-47).

In *State v. Southerland*,447S.E.2d862,867(1994)(overruled on other grounds in *State v. Chapman*,454S.E.2d317,320 n.2(S.C.1995)) that court noted that *Payne* had held that as a matter of due process a defendant has a right to present evidence that rebuts the state's victim impact evidence. Because the state had presented no victim impact evidence in *Southerland*, the defendant could not introduce negative evidence about the victim. *Southerland*,447S.E.2d at 867.

The issue here is not one of comparing the value of Lape's life to Gill's life(*See* 29.15L.F.516). The issue is Gill was entitled to rebut respondent's inaccurate portrayal of Lape as a person of sterling character. *See Booth* and *Payne*, *supra*.

Gill Was Prejudiced

The failure to disclose all the sexual content prejudiced Gill.

Kenyon thought respondent painted Lape in penalty as "a saint"(29.15Tr.172-74). The child pornography, video bestiality, and on-line chats would have "cast

[Lape] in a much different light than what the State was trying to paint in the penalty phase"(29.15Tr.171).

Kenyon thought Lape's computer's sexual content would have been used to dissuade respondent from having portrayed Lape as the person of great character(29.15Tr.172-74,194). Lape's sexual chats, and in particular the one about Lape's daughter, would have been used to dissuade the state from portraying Lape as a "saint"(29.15Tr.180-81,187;29.15Ex.11 at 3855-56). If the state still choose to portray Lape in glowing terms, then Kenyon would have used the evidence on Lape's computer as rebuttal evidence or cross-examined the state's witnesses about the computer's contents(29.15Tr.172-74,194). Kenyon probably would not have played the pornographic images for the jury, but would have called the computer expert who had viewed the computer's contents to describe what he had seen(29.15Tr.195). That is in fact how the evidence was presented at the 29.15 hearing – Chatten was called and he recounted what he viewed on Lape's computer(29.15Tr.610-11,613-14,617-30,633;29.15Ex.11 at 3850,3855-58,3875-77).

In Kenyon's experience, more often than not, the decision whether or not to impose death has turned more on the victim's character rather than anything associated with the defendant(29.15Tr.196). In cases where the victim had a history of unscrupulous conduct, Kenyon has had much success obtaining a life sentence(29.15Tr.196,198-99).

Even though juries are not supposed to make a punishment decision based on the victim's character, Kenyon has found they do(29.15Tr.196). Kenyon believes

such matters are appropriate for the jury to take into account(29.15Tr.197). That evidence is appropriate for the jury to consider even though he would never make argument to the jury to directly compare the victim's and defendant's lives to one another(29.15Tr.197-98). That kind of argument would cross the line to "kicking a corpse," but would not be unethical(29.15Tr.198).

Turlington, likewise, indicated Lape's sexual chats could have been used to rebut the state's portrayal of Lape as a person of great personal character(29.15Tr.307). The portions of the chats Turlington thought especially went to these matters were those that dealt with rebutting the state's presentation of Lape as a good father(29.15Tr.307). Lape's chat conversations involved inappropriate sexual content about his daughter(29.15Tr.307). The child pornography evidence and evidence that suggested Lape was sexually involved with 13 to 15 year old girls would have rebutted the state's portrayal of Lape as a person of great personal character and an upstanding citizen(29.15Tr.307-08).

Turlington indicated that there is a difference between comparing the relative lives of a victim and a defendant and putting on evidence that rebuts the state's inaccurate glowing portrayal of a victim(29.15Tr.315-17). "[T]rashing the victim" and rebutting the state's inaccurate portrayal of a victim's character are different(29.15Tr.333-34). In other capital cases Turlington has tried, where there has been evidence that caused the victim to be viewed as less than a person of great character, sentences less than death were imposed(29.15Tr.315-18).

Turlington would have wanted to selectively present the assorted sexual content(29.15Tr.318,334). Even though Turlington would not have argued to impose life based on the relative value of Lape's life to Gill's life, such argument was not unethical(29.15Tr.319-20).

Swingle testified that after Gill's trial, Brown's attorneys requested the contents of Lape's computer(29.15Ex.95 at 36). Judge Storie ordered that the contents of Lape's computer be given to co-defendant Brown's attorneys so that an expert could review them(29.15Ex.95 at 37)

Swingle testified that in response to his motion to exclude the sexual content evidence in the co-defendant's case Judge Storie ruled the defense could not present that evidence unless the victim impact cast Lape as "a saint"(29.15Ex.95 at 46-47). Swingle testified that he did not present any evidence in *Brown* that would have opened the door to the sexual content evidence(29.15Ex.95 at 46-47). The Millers, Megan, and Steven were all alerted in *Brown* not to cast Lape as "a saint" or the sexual content evidence would be admissible(29.15Ex.95 at 48-52,68). Unlike in *Gill*, the victim impact witnesses did not talk about Lape's generosity in Brown's penalty phase(29.15Ex.95 at 62). Unlike in *Gill*, Mitch did not get into the statements about how the old west had taught him and Lape valuable character lessons(29.15Ex.95 at 67). In *Brown*, there was no mention of Lape having loaned a friend money for the friend to pay for his wife's funeral(29.15Ex.95 at 70-71).

As in *Taylor*, Mr. Gill was prejudiced because there was undisclosed evidence which could have been used to discredit the state's penalty, and in particular, its

portrayal of Lape. Moreover, Swingle's testimony that in *Brown* he did nothing to open the door to the sexual content evidence and his witnesses were alerted not to portray Lape as a "saint" for that reason demonstrates how Gill was prejudiced. Brown's attorneys kept Swingle and his witnesses from casting Lape as the "Good Samaritan," a "saint," "Mr. Mom," and Lincolnesque in character because they had the computer evidence and Brown was sentenced to life without parole where death was also sought. *See, State v. Brown*,246S.W.3d519,522(Mo.App.,S.D.2008). Gill's attorneys testified that having the computer's sexual content would have allowed them to dissuade the state from portraying Lape as a person of stellar personal integrity and that is in fact what happened in Brown's case.

The portrayal of Lape as "Mr. Mom" in his dealings with his daughter Megan and the numerous pictures of them together is contrary to Lape's detailed sexual chat descriptions of Megan's anatomy, his sexual attraction for her, and his self-reported sexual activities with her. *See Gardner v. Florida.* All of the above require a new penalty phase.

The withholding of Lape's computer's contents was also prejudicial to a reliable determination Gill was guilty of first degree murder, rather than second degree. Swingle characterized Lape in guilt opening statement as "a [G]ood [S]amaritan" who furnished Gill a place to live when Gill "was down and out"(T.Tr.587). The defense responded it would learn Lape was not "a [G]ood [S]amaritan"(T.Tr.626). Swingle's guilt closing argument portrayed Lape as having generously provided Gill a place to live(T.Tr.1084). Gill's counsel argued that while

Brown was guilty of first degree murder, Gill was guilty of second degree murder and Lape was not "a [G]ood [S]amaritan"(T.Tr.1102-07,1110). All the undisclosed computer evidence could have been used to rebut respondent's guilt phase "[G]ood [S]amaritan" portrayal or to dissuade respondent from such portrayal and the first degree murder guilt determination was, likewise, fundamentally unfair. *See State v. Gardner*.

This Court should order new guilt and penalty phases.

II.

INEFFECTIVE ASSISTANCE – COMPUTER'S SEXUAL CONTENT

The motion court clearly erred in overruling Gill's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have uncovered Lape's computer's sexual content by interviewing or deposing Officer James, the police officer in charge of the investigation and state's computer expert, or through careful review of James' Encase report and then requested the contents of Lape's computer for review by a defense computer expert, as co-defendant Brown's counsel did, and would have presented the sexual content as rebuttal evidence to the state's inaccurate portrayal of Lape's character or used the computer's information, as the codefendant did, to dissuade the state from inaccurately and unfairly portraying Lape as a person of exceptional personal character.

The motion court rejected the claim counsel was ineffective for failing to uncover Lape's computer's sexual content. Reasonable counsel would have uncovered this evidence and utilized it to rebut and impeach the state's false and inaccurate portrayal of Lape. Counsel alternatively would have utilized the computer evidence to dissuade the state, as the co-defendant did, from inaccurately and unfairly portraying Lape as a person of extraordinary and exceptional personal character.

Standard Of Review

Review is for clear error. *Barry v.State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).[4] A movant is prejudiced if there is a reasonable probability that but for counsel's errors the result would have been different. *Deck v. State*,68S.W.3d418,426(Mo.banc2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*426. The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

A.G.'s 29.15 Findings

The findings state that counsel could not be ineffective because it is unreasonable to assume someone will have pornography on their computer(29.15L.F.515-16). There was nothing in the police records, reports, or disclosures that would lead reasonable counsel to depose or interview Officer James(29.15L.F.520-21).

Kenyon could not articulate how he would have used the computer's sexual content(29.15L.F.521). No reasonable counsel would ever use this evidence because

[4] Hereinafter, the *Strickland v. Washington*,466U.S.668,687(1984) standard will be referenced without specifying its two prongs.

it would be "kick[ing] the corpse," as Kenyon testified(29.15L.F.521-22). Neither counsel would have seriously considered introducing it(29.15L.F.527).

Further, the findings assert that the evidence was inadmissible as irrelevant because other courts have ruled such evidence inadmissible and of tenuous value(29.15L.F.516,525-26,539). Reasonable counsel would not have used this evidence because it could not be established Lape put the sexual content on Lape's computer(29.15L.F.522).

Officer James

Officer James testified that he was the officer in charge of the investigation(29.15Ex.93 at 7). James testified that when Gill was arrested, and during Gill's and co-defendant Brown's trials, he had custody of Lape's computer(29.15Ex.93 at 6-8).

On August 27, 2002, James generated an Encase report of Lape's computer(29.15Ex.93 at 18-19 and Depo. Ex.#3;29.15Ex.15 at 5125-30). At the top of the Encase report, it stated that it was James who acquired the data contained therein(29.15Ex.15 at 5125). James' Encase report stated that Lape's computer was seized from the car Gill was arrested in(29.15Ex.15 at 5125). James learned that there was much pornography, including child pornography, on Lape's computer the day of his Encase report, August 27, 2002 or within a few days of the report(29.15Ex.93 at 22-24).

The Encase report was printed for Gill's co-defendant, Brown's counsel, Attorney Zembles(29.15Ex.93 at 20-21). The contents of Lape's hard drive were not

put on a disc until Brown's counsel requested them(29.15Ex.93 at 32-38,45-46). The sexual contents of Lape's computer hard drive were never disclosed to anyone until after Gill's trial and that disclosure was made to Brown's counsel(29.15Ex.93 at 32-38, 45-46).

Swingle's Testimony

Swingle testified that he and James worked on the probable cause statement and it was based on what James reported(29.15Ex.95 at 8-9). James' probable cause statement recited that the car Gill was arrested traveling in "had Lape's computer in the car"(29.15Ex.69). In Swingle's Answer to Request For Discovery filed on September 10, 2003, he listed Lape's computer as something he might introduce(T.L.F.91;29.15Ex.95 at 20-21). James was endorsed in the Second Amended Information(29.15Ex.68).

Swingle testified that after Gill's trial, Brown's attorneys requested the contents of Lape's computer(29.15Ex.95 at 36). Swingle testified that in *Brown*, no evidence was presented that opened the door to the computer evidence(29.15Ex.95 at 46-47). The Millers, Megan, and Steven all were cautioned for *Brown* not to cast Lape as "a saint" or the sexual content evidence would be admissible(29.15Ex.95 at 48-52,68).

Counsels' Testimony

Counsel never interviewed or deposed James, even though James prepared the probable cause statement and was the State's computer expert who generated the Encase report that counsel received(29.15Tr.123-24,165-67,295-

96,302;29.15Ex.69;29.15Ex.72). Counsel did not interview or depose James because they concluded from the discovery that James had not significantly contributed to the investigation(29.15Tr.123-24,138-39,141,143,148-49,296-97). The Encase report did not alert counsel to the need to depose James(29.15Tr.177-78). There was nothing in James' probable cause statement or the Second Amended Information that endorsed James that would have caused counsel to want to depose James(29.15Tr.299-301;29.15Ex.68;29.15Ex.69).

Kenyon did not recall seeing anything in the discovery that indicated James was a computer expert(29.15Tr.129). James' name in fact appeared on many police report discovery pages(29.15Tr.129-53). Discovery page 807 showed James obtained Diane Miller's consent to search Lape's computer(29.15Tr.142-43). Discovery page 926 listed James as the investigation's "officer in charge"(29.15Tr.148). Page 1 of the Encase report reflects the Encase information "was acquired by Lt. David James"(29.15Ex.15 at 5125).

Counsel Was Ineffective

Counsel Did Not Act Reasonably

In *Gennetten v. State*,96S.W.3d143(Mo.App.,W.D.2003), Judge Breckenridge, writing for the Western District, found counsel was ineffective for failing to interview and call a physician who counsel was on notice as a potential witness. Genetten was convicted of second degree murder in a shaken baby case where the child had head injuries and burns. *Id.*145-46. The state presented Dr. Berkland's autopsy findings that the victim's head injuries were consistent with shaken baby syndrome and the

burns were consistent with intentional infliction. *Id.*145-46. In addition, the state introduced evidence from two of the victim's treating physicians whose findings supported respondent's position. *Id.*145-46. The victim's medical records included a death summary with Dr. Sharp's stamped signature. *Id.*at 146.

The *Gennetten* defense called Dr. Stevens who had read the victim's CT scan and prepared a death summary report the state had admitted into evidence. *Gennetten,*96S.W.3d at146,148.

The *Gennetten* Court found that counsel was ineffective for failing to call Dr. Sharp to testify that the victim's burns were consistent with an accident which would have countered the state's case that the burns were part of a pattern of abusing the victim. *Gennetten,*96S.W.3d at 148. Gennetten's counsel had reviewed the victim's death summary which contained Dr. Sharp's stamped signature. *Id.*148. Through the death certificate, counsel could have located Sharp because he was a doctor at the hospital where the victim was treated. *Id.*148-49. Counsel failed to make a reasonable professional investigation or a reasonable decision not to investigate Dr. Sharp. *Id.*151. Trial counsel should have realized that Sharp was a key witness and investigated him. *Id.*152. In arriving at that conclusion, the *Gennetten* Court relied on *Clay v. State,*954S.W.2d344(Mo.App.,E.D.1997) citing *Clay* as standing for the following: "a 'prudent lawyer' 'would be expected' to interview the police officers who investigated his client." *Gennetten,*96S.W.3d at152. The *Clay* Court found counsel was ineffective because the police officers there were "easily ascertainable and quite available for interview or deposition." *Clay,*954S.W.2d at 347. If counsel

had investigated Dr. Sharp, then counsel would have discovered favorable defense evidence. *Gennetten*,96S.W.3d at 152.

Counsels' actions here are like Gennetten's counsel who failed to investigate Dr. Sharp. James was the officer in charge of the investigation who was responsible for the probable cause statement and was identified in the disclosed Encase report as responsible for having generated that report(29.15Ex.93 at 7;29.15Ex.95 at 8-9;29.15Ex.15 at 5125). James' name repeatedly appeared in the discovery(29.15Tr.129-53). The discovery showed it was James who obtained Diane's consent to search Lape's computer(29.15Tr.142-43). James was an endorsed witness(29.15Ex.68). On February 4, 2004, about one month before trial, Swingle sent counsel a letter that stated: "I have also enclosed the Encase report from David James…."(29.15Tr.166-67;29.15Ex.72). As *Clay*, and *Gennetten*, recognize a "prudent lawyer" "would be expected" to interview the police officers who investigated his client. *See*, *Genetten* and *Clay*, *supra*. Counsel did not act as prudent lawyers when they failed to interview or depose James.

Certainly, reasonable counsel ought to be expected to interview or depose the officer in charge of the investigation. *See Gennetten* and *Clay*. Moreover, reasonable counsel ought to be expected to interview or depose the state's computer expert who prepared the disclosed Encase report. *See Gennetten* and *Clay*. Further, counsel that had notice that the state might introduce Lape's computer (T.L.F.91;29.15Ex.95 at 20-21) because it was with Gill when he was arrested (T.Tr.961-63), would have interviewed or deposed its police custodian (29.15Ex.93 at 6-8) who was responsible

for doing an Encase examination (29.15Ex.15 at 5125) of it. Counsels' failure to interview or depose James must be contrasted with Kenyon's statement during Mary Cates' pretrial deposition where he explained to her that he "like[s] to take depositions of anybody that has <u>any kind of familiarity</u> with the case <u>at all</u>…."(29.15L.F.403 transcript at p.4)(emphasis added).

The Encase report includes the following:

(29.15Ex.15 at 5128).

James' Encase report was the first Kenyon handled(29.15Tr.166). Kenyon reviewed the Encase report before trial and did not notice anything that alerted him there was sexual content on Lape's computer(29.15Tr.167-69). Both attorneys reviewed the Encase report post-trial and determined there were file names that should have alerted them to the computer's sexual content(29.15Tr.167-69,303;29.15Ex.15 at 5128). Reasonable counsel who reviewed the above Encase report information would have had reason to suspect that there was sexual content on Lape's computer.

In *Knese v. State*,85S.W.3d628,631-33(Mo.banc2002), counsel was ineffective when he failed to read jury questionnaire responses that showed two jurors could not fairly serve. Gill's case is like *Knese* because reasonable counsel who was supplied the Encase report would have recognized above file names as suggesting Lape's computer contained sexual content.

Swingle testified that after Gill's trial, Brown's attorneys requested Lape's computer's contents(29.15Ex.95 at 36). Judge Storie ordered Lape's computer's contents be given to co-defendant Brown's attorneys for expert review(29.15Ex.95 at 37). Counsels' failure to act reasonably is underscored by Gill's co-defendant's counsel's actions of having requested Lape's computer's contents. Co-defendant's counsel obtained the Encase report and then requested and obtained Lape's computer's content for expert review(29.15Ex.95 at 36-37).

Gill Was Prejudiced

Gill was prejudiced through counsels' failure to interview and depose James.

As discussed in Point I, the state cast Lape as a "Good Samaritan," "saint," "Mr. Mom," and a person with Lincolnesque character. *See* Point I evidence.

James would have provided powerful and compelling rebuttal testimony. James testified that he concluded from his analysis of Lape's computer that Lape authored the sex chats and not anyone else(29.15Ex.93 at 26). James testified that from his entire review of Lape's computer he had concluded Lape was "a pervert"(29.15Ex.93 at 38-39).

Kenyon thought all the sexual content "cast [Lape] in a much different light than what the State was trying to paint in the penalty phase"(29.15Tr.171). Lape's computer's sexual content would have been used to dissuade respondent from having portrayed Lape as a person of extraordinary character(29.15Tr.172-74,194). Lape's sexual chats, and in particular the one about Lape's daughter, would have been used to dissuade the state from portraying Lape as a "saint"(29.15Tr.180-81,187;29.15Ex.11 at 3855-56). If the state still chose to portray Lape glowingly, then Kenyon would have used Lape's computer's contents as rebuttal evidence or cross-examined the state's witnesses about the computer's contents(29.15Tr.172-74,194). Kenyon would have called the computer expert who had viewed the computer's contents to describe what he had seen(29.15Tr.195).

In Kenyon's experience, more often than not, the decision whether or not to impose death has turned more on the victim's character rather than anything associated with the defendant(29.15Tr.196). In cases where the victim had a history

of unscrupulous conduct, Kenyon has had much success obtaining a life sentence(29.15Tr.196,198-99).

Even though juries are not supposed to make a punishment decision based on the victim's character, Kenyon has found they do(29.15Tr.196). That evidence is appropriate for jury consideration(29.15Tr.197-98). Kenyon would never argue for the jury to directly compare the victim's and defendant's lives(29.15Tr.197-98). That kind of argument would cross the line to "kicking a corpse," but would not be unethical(29.15Tr.198).

Turlington indicated Lape's sexual chats could have been used to rebut the portrayal of Lape as a person of extraordinary character(29.15Tr.307). The portions of the chats Turlington thought especially went to these matters were those that dealt with rebutting the state's presentation of Lape as a good father because of the sexual chat about his daughter(29.15Tr.307). The child pornography evidence and evidence that suggested Lape was sexually involved with 13 to 15 year old girls would have rebutted the state's portrayal of Lape as a person of exceptional personal character(29.15Tr.307-08). In other capital cases Turlington has tried, where there has been evidence that caused the victim to be viewed as less than a person of great character, sentences less than death were imposed(29.15Tr.315-18).

Turlington would have selectively presented the assorted sexual content(29.15Tr.318,334). Turlington would not have argued to impose life based on the relative value of Lape's life to Gill's life, but such argument was not unethical(29.15Tr.319-20). In any event, the issue here is not one of comparing the

value of Lape's life to Gill's life (29.15L.F.516). Instead, the issue is Gill was entitled to rebut respondent's inaccurate portrayal of Lape. *See* Point I discussion of *Booth v. Maryland*,482U.S.496(1987), *Payne v. Tennessee*,501U.S.808(1991), *Simmons v. South Carolina*,512U.S.154(1994), and *State v. Gardner*,8S.W.3d66(Mo.banc1999).

After Gill's trial, Brown's attorneys requested Lape's computer's contents(29.15Ex.95 at 36). Judge Storie ordered Lape's computer's contents disclosed to co-defendant Brown's attorneys for expert review(29.15Ex.95 at 37).

In response to Swingle's motion to exclude the sexual content evidence in the co-defendant's case, Judge Storie ruled the defense could not present that evidence unless the victim impact cast Lape as "a saint"(29.15Ex.95 at 46-47). Swingle testified that he did not present any evidence that would have opened the door in *Brown* to the sexual content evidence(29.15Ex.95 at 46-47). The Millers, Megan, and Steven were all alerted in *Brown* not to cast Lape as "a saint" or the sexual content evidence would be admissible(29.15Ex.95 at 48-52,68). Unlike in *Gill*, the victim impact witnesses did not talk about Lape's generosity in Brown's penalty phase(29.15Ex.95 at 62). Unlike in *Gill*, Mitch did not get into how the old west had taught him and Lape valuable character lessons(29.15Ex.95 at 67). In *Brown*, there was no mention of Lape having loaned a friend money to pay for the friend's wife's funeral(29.15Ex.95 at 70-71).

Gill was prejudiced because there was evidence which could have been used to rebut the state's witnesses on punishment. *See Taylor v. State*,262S.W.3d231,237-

48(Mo.banc2008)(defendant was prejudiced by absence of evidence that could have been used to contradict state's witness). Moreover, Swingle's testimony that in *Brown* he did nothing to open the door to the sexual content evidence and his witnesses were alerted not to portray Lape as a "saint" for that reason, demonstrate how Gill was prejudiced. Brown's attorneys kept Swingle and his witnesses from casting Lape as the "Good Samaritan," a "saint," "Mr. Mom," and Lincolnesque in character because they had the computer evidence. Gill's attorneys testified that having the computer's sexual content would have allowed them to dissuade the state from portraying Lape as a person of stellar personal integrity, and that is in fact, what Brown's attorneys successfully did.

The portrayal of Lape as "Mr. Mom" in his dealings with his daughter Megan and the numerous pictures of them together is contrary to Lape's detailed sexual chat descriptions of Megan's anatomy and his sexual attraction for her.

Reasonably competent counsel under similar circumstances would have interviewed or deposed James. *See Gennetten*, *Clay*, and *Strickland.* Gill was prejudiced as to penalty because had counsel had the sexual content evidence they would have rebutted the state's casting of Lape as a "Good Samaritan," "saint," "Mr. Mom," and a person with Lincolnesque character. *See Gennetten*, *Clay*, and *Strickland*. Further, Gill was prejudiced because had his counsel had the computer's sexual content, they would have used that material in the same way Gill's co-defendant's counsel did to dissuade the state from casting Lape as person of sterling

character. *See Gennetten, Clay,* and *Strickland*. There is a reasonable probability Gill would not have been death sentenced.

The withholding of Lape's computer's contents was also prejudicial to a reliable determination Gill was guilty of first degree murder, rather than second degree. Swingle characterized Lape in guilt opening statement as "a [G]ood [S]amaritan" who furnished Gill a place to live when Gill "was down and out"(T.Tr.587). The defense responded it would learn Lape was not "a [G]ood [S]amaritan"(T.Tr.626). Swingle's guilt closing argument portrayed Lape as having generously provided Gill a place to live(T.Tr.1084). Gill's counsel argued that while Brown was guilty of first degree murder, Gill was guilty of second degree murder and Lape was not "a [G]ood [S]amaritan"(T.Tr.1102-07,1110). All the undisclosed computer evidence could have been used to rebut respondent's guilt phase "[G]ood [S]amaritan" portrayal or to dissuade respondent from such portrayal and the first degree murder guilt determination was, likewise, fundamentally unfair. *See State v. Gardner*.

This Court should order new guilt and penalty phases.

III.

FOUNDATION OBJECTION – COMPUTER SEXUAL CONTENT

The motion court clearly erred in ruling the *Brady* and ineffective assistance claims involving Lape's computer's sexual content lacked merit because there was a lack of foundation for admitting Lape's computer's sexual content at trial as it was not established Lape put the sexual content on his computer and in sustaining respondent's hearing objection on the same grounds to the admission of Ex. 92, a disc containing Lape's computer's sexual content, because Gill was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV in that the state's own police officer in charge and computer forensic expert, Police Officer James, testified his analysis showed Lape authored the sexual chats, his overall computer analysis showed that Lape was "a pervert," and Gill could not have put the sexual content on Lape's computer because that was done before Gill lived with Lape. Further, any contention the state might have that someone else put the sexual content on Lape's computer is not a foundational problem, but a weight of the evidence question for the jury to resolve.

The motion court signed the A.G.'s findings rejecting Gill's *Brady* and ineffective assistance of counsel claims because there was a lack of foundation for admitting Lape's computer's sexual content at trial as it was not established that Lape put the sexual content on his computer. The motion court also excluded Ex. 92, a disc containing Lape's computer's sexual content, on the same grounds. These rulings are

entirely divorced from the evidence from **the state's police officer in charge and computer forensic evidence, Police Officer James,** who found Lape authored the sexual chats and that his overall computer review caused him to conclude that Lape was "a pervert." James also testified Gill was not responsible for the sexual content placed on Lape's computer because that happened before Gill lived with Lape. Moreover, that someone else could have put the sexual content on Lape's computer is not a foundation problem, but rather a weight of the evidence issue for the jury.

Standard Of Review

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

A.G.'s Findings And Ruling on Ex. 92

The findings assert that Gill failed to establish Lape put the sexual evidence on the computer(29.15L.F.513-14,522). There was no evidence that Lape downloaded the child pornography, and therefore, no foundation to admit it(29.15L.F.533).

Chatten could not prove who created Lape's computer profiles(29.15L.F.535). Chatten could not establish it was Lape that put the sexual content on Lape's computer(29.15L.F.535-36).

According to the findings the sexual chats occurred on July 2, 2002 and Lape had left his house that day for the Lake and the evidence supported Gill had done the sexual chats(29.15L.F.522,532). Gill did the sexual chats because he had access to

Lape's computer passwords(29.15L.F.522). Also, Gill did the chats because he used Lape's credit cards to purchase pornographic videos on Lape's satellite dish(29.15L.F.522,532). The fact that the sexual chats had been deleted, but other chats done after the time of Lape's death were not deleted established Gill authored the sexual chat about Lape's daughter(29.15L.F.532,536).

According to the findings: "A search of Mr. Lape's home found no evidence whatsoever of any pornography"(29.15L.F.532-33). From this the A.G.'s findings posited, respondent could argue that Gill authored the sexual chats regarding underage girls(29.15L.F.532-33).

Lape's daughter testified that Lape never engaged in any sexually inappropriate behavior with her(29.15L.F.533,537). Lape knew his daughter was 18 and the sexual chat about her misstated her age(29.15L.F.537). When Megan went to her father's house, Gill called her "Megan"(29.15L.F.537).

When the Ex. 92 disc of Lape's computer was offered, the court initially sustained respondent's foundation objection(29.15Tr.630-33,664). The court then was asked to reconsider after viewing the contents of the disc, which the court agreed to do(29.15Tr.664-65).

Police Officer James' Investigative Results

Police Officer James was the officer in charge of investigating Lape's death(29.15Tr.148). Officer James was also the state's computer forensics expert who prepared the Encase report Swingle disclosed to counsel(Ex.15 at 5125-30;29.15Tr.166-67,302;29.15Ex.72).

James testified that he concluded from his analysis of Lape's computer that Lape authored the sex chats and not anyone else(29.15Ex.93 at 26). James testified that from his entire review of Lape's computer he had concluded Lape was "a pervert"(29.15Ex.93 at 38-39).

James testified that there was nothing in Lape's computer to link Gill to placing the child pornography on Lape's computer(29.15Ex.93 at 48). James determined that the pornography was placed on Lape's computer before Gill began living with Lape, and therefore, could not have been placed on Lape's computer by Gill(29.15Ex.93 at 48). If James had found any evidence to connect Gill or Brown to the placing of illegal pornography on Lape's computer, then he would have alerted Swingle(29.15Ex.93 at 48-49).

Because the officer in charge, who was also the state's computer forensic expert, Officer James, concluded that Lape authored the sexual chats and that Lape was "a pervert" there was no foundational problem as to the admission of Lape's computer's sexual content. Furthermore, James testified Gill could not have put the sexual content on Lape's computer because that was done before Gill began living with Lape.

Jury Question – Not Foundational

In *State v. Robinson*,106S.W.2d425,427(Mo.1937), the defendant challenged the state having admitted comparison evidence of tire tracks found along the route the victim was transported in the defendant's car with other known tire tracks belonging to the defendant. Any dispute about that evidence was a question of weight for the

jury to resolve and not a foundational defect. *Id.*427. The same is true as to who put the sexual content on Lape's computer, it is a jury question and not a foundational question.

In *State v. Rockett*,87S.W.3d398,401-03(Mo.App.,W.D.2002), the defendant used a condom while raping the victim. Fingerprints found on condom packaging recovered at the scene matched the defendant. *Id.*402-03. The defendant argued that respondent was required to prove the fingerprints were placed on the condom packaging at the time of the sexual assault. *Id.*405. That argument was rejected because when the fingerprint was put on the packaging went to the weight of the evidence, which was a jury question. *Id.*405. Just as when the fingerprints were put on the condom packaging in *Rockett* was a jury question, who placed the sexual content on Lape's computer is a jury question, not a foundational question.

Inconsistencies in evidence go to the weight of the evidence and are a question for the jury. *State v. Griffin*,810S.W.2d956,958(Mo.App.,E.D.1991)(counsel was ineffective for failing to interview and call witnesses despite conflict in evidence they could provide). The same is true here. Even if the state were to claim in the face of Officer James' conclusions about Lape's responsibility that there was a conflict in the evidence as to who put the sexual content on Lape's computer, that was a matter for the jury to resolve.

Overwhelming Evidence Lape Was Responsible For Sexual Content

Finally, there was overwhelming evidence, besides James' testimony, that Lape put the sexual content on his computer.

The state's trial evidence was that until Gill lived with Lape that Lape had lived alone(T.Tr.636). Officer James testified that Gill began living with Lape in June, 2002(29.15Tr.646).

Megan testified that Gill and Brown are African-American(T.Tr.655-56,660). Diane testified that several months before his death, Lape had purchased a pontoon boat(T.Tr.1189-90).

The "dogday____afternoon2002" profile was last updated on March 20, 2002(29.15Tr.613). The image displayed is a standing **white** male with his penis exposed(29.15Tr.613-14). The real name appears as "Ralph"(29.15Tr.614). The information continues: "Location, Missouri. Age, 45. Marital status, divorced. Sex, male. Occupation, retired."(29.15Tr.614). Listed as "hobbies" was the following: "boating , fishing, camping, socializing with friends, drinking beer on my boat, and … Oh, and sex, all kinds, except I don't do men. So guys don't ask."(29.15Tr.614). "Latest news" contained the entry "a new boat, come take a ride with me"(29.15Tr.614). Favorite quote was "yunt to"(29.15Tr.614).

Officer James knew Lape before this case and had opened the profile pictures of Lape (prisonerr2001) and the other picture (dogday____afternoon2002) of a penis believed to be Lape's penis(29.15Ex.93 at 27-29,38-39). Lape was white and not African-American(T.Tr.725;29.15Tr.651;29.15Ex.92).

James testified the "dogday____afternoon2002" profile was created on Lape's computer(29.15Tr.642-43). The "dogday____afternoon2002" profile was last updated on March 20, 2002, before Gill began living with Lape in June,

2002(29.15Tr.613,646). Moreover, Gill and Brown would not have constructed a profile displaying a white male's erect penis(29.15Ex.92). In the chat "sweetpiece123" the following exchange occurred:

(29.15Ex.11 at 3858). Gill and Brown, as African Americans, would not have authored a chat referencing a profile photo of a white male's erect penis and referred to that photo as "my pic." That Lape identified as one of his "hobbies" as "sex, all kinds" is consistent with Lape having placed the other sexual content on his computer. The profile information about a new boat is consistent with Diane's trial testimony about Lape owning a new boat(T.Tr.1189-90).

The profile "prisonerr2001"contains a facial picture with the name "Ralph"(29.15Tr.617). That picture is a head and shoulders picture of a white male in his late 40's or 50's with a mustache sitting in a chair(29.15Tr.617;Ex.92). **Officer James testified that the photo on the profile for "prisonerr2001" was a picture of Lape(29.15Tr.651).** This profile was last updated on February 1, 2002(29.15Tr.618). The "real name" of "prisonerr2001" is "Ralph"(29.15Tr.618). The profile continues: "Marital status, divorced. Sex, male"(29.15Tr.618). That profile states as "hobbies:" "fishing, boating, camping sex. No males, just females, one or more okay"(29.15Tr.618). Favorite quote is "want to"(29.15Tr.618).

Officer James testified that the "prisonerr2001" profile was created in October, 2001(29.15Tr.642). Gill could not have created the "prisonerr2001" profile because he did not start living with Lape until June, 2002(29.15Tr.646).

Because the "prisonerr2001" profile was last updated on February 1, 2002, Gill could not have been responsible because he did not start living with Lape until June, 2002(29.15Tr.618,646). That Lape identified as one of his "hobbies" "sex…females, one or more okay" is consistent with Lape having placed the other sexual content on his computer(29.15Tr.618).

The textual content of the profiles "dogday____afternoon2002" and "prisonerr2001" considered together establish that even though the "dogday____afternoon2002" picture shows only a white male's penis from the waist down that "dogday____afternoon2002" was Lape. Both profiles identify their owner as "Ralph" and both list as "hobbies" sex, while specifying, but not with men.

It is critical that James testified that Gill did not start living with Lape until June, 2002 and that Lape lived alone until then(29.15Tr.646;T.Tr.636). The cookie "shylolita.com" (Line 229) was last accessed on March 11, 2002(29.15Tr.611;Ex.11 at 3875). The cookie "beastxxxpics.com" (Line 235) was last accessed on March 12, 2002(29.15Tr.611). The cookie "topincest.com" (Line 274) was last accessed on April 26, 2002(29.15Tr.610;Ex.11 at 3876-77). Thus, all were last accessed by Lape before Gill lived with Lape.

The creation dates for child pornography images also show they were created before Gill lived with Lape, and therefore, Lape was responsible. Those files and

their creation dates are as follows: (1) "1344.jpg" – February 5, 2002 (29.15Tr.624-25); (2) "Ashley4" – February 20, 2002 (29.15Tr.621-22); (3) Ashley1.BMP" – February 20, 2002 (29.15Tr.623); (4) "cumshower.jpg" – February 21, 2002 (29.15Tr.625); (5) "10ondad.jpg" – March 15, 2002 (29.15Tr.623); (6) "fuck_hardcore_Asian_sex_suck_fucking_gum_animals_gay_lesbian_dog_cat_fish_chicken_horse_good_music_blur_oasis_swayed (1.jpg)" – March 20, 2002(29.15Tr.625-26); and (7) "0105.jpg" – May 12, 2002 (29.15Tr.624).

Lape's hardrive contained twenty-nine movies(29.15Tr.628-29). The number of movies and their creation dates are as follows: (1) June 8, 2000 – two; (2) February 12, 2002 – one; (3) March 20, 2002 – twelve; (4) March 21, 2002 – eight; (5) April 3, 2002 –one; (6) April 27, 2002 – four; and (7) April 28, 2002 - one(29.15Tr.629,633). The file names depicted bestiality(29.15Tr.629). Those names included: "pretty teen girl gets anal sex from dog," "animal sex horse rape," "bestiality dog cums on woman's face," and "animalpornmovie – bestiality – prettyteengirlgetsanal.mpg"(29.15Tr.629-30). Once again the dates of creation preceded Gill living with Lape.

Additionally, James testified that the sexual images on Lape's computer were last accessed before Gill lived with Lape(29.15Tr.646-47).

Scott Cates owned the Kentucky Lake property with Lape(T.Tr.635-36,698,714-15). Scott Cates testified at his pretrial deposition that Lape arrived at the Lake on Wednesday, July 3, 2002 at 2:00 – 3:00 p.m., which was **after the sex chats of July 2, 2002**(29.15L.F.406 at transcript p.60).

During the A.G.'s 29.15 questioning of Megan, the A.G. stated as fact that Megan knew that Lape had left to go to the Lake on July 2nd and Megan responded that she did not know that at the time(29.15Tr.657). On cross-examination, however, Megan testified that she did not know when Lape left to go to the Lake(29.15Tr.658). Megan's testimony did not support the findings that Lape had left his house on July 2, 2002 and Scott Cates, who was with Lape at the Lake, established Lape was not at the Lake until July 3, 2002 – after the July 2, 2002 sex chats. Because the sexual chats happened on July 2, 2002 and Lape did not get to the Lake until the afternoon of July 3, 2002, it cannot be said that when Lape got to the Lake somehow precluded him from having authored the "dogday____afternoon2002" sexual chats.

Aside from Officer James' conclusion that Lape authored the sexual chats, the chats' content, viewed in the context of all the evidence, establish Lape authored them. The first line of the text of the sexual chat involving Lape's sexual attraction for his daughter begins with "dogday__afternoon" stating "yes, but **my daughter** lives with her mom"(Ex.11 at 3855)(emphasis added). That chat then continues with "dogday__afternoon" commenting on his the sexual attraction for his "daughter's" anatomy(Ex.11 at 3855-56). Gill and Brown would not have authored a sexual chat about Megan Lape's anatomy and referred to Megan as "my daughter."

The findings rely on Megan's testimony that Lape had never done anything that was sexually inappropriate. In Lape's chat about Megan's anatomy, the following occurred:

"unknown" asked "dogday__afternoon" whether Megan knew about Lape's sexual attraction for her and "dogday__afternoon" responded: "well, I dont [sic] know, I try to be pretty careful"(Ex.11 at 3856). Because Lape was "pretty careful" so that Megan did not know about his sexual attraction for her, Megan's testimony that Lape had not done anything sexually inappropriate does not establish Lape did not author the sexual chats. Lape having been "pretty careful" so that Megan did not know about his sexual attraction for her (29.15Ex.11 at 3856) also explains why the sexual chats that all happened on July 2, 2002 before Lape's death were erased, while other chats done after Lape's death were not erased(29.15L.F.532,536).

Megan's testimony also establishes Lape authored the chat about her. Megan testified that she met Gill for the first time when she went to her father's house on July 22, 2002(29.15Tr.654-56;T.Tr.636-38,654-56). The chat about Megan's anatomy happened on July 2, 2002(Ex.11 at 3855-56). The chat's detailed sexual commentary about Megan's anatomy could not have been made by someone who had not met Megan before, which Gill had not. The sexual chat about Megan's anatomy included:

> **unknown (11:56:29):** ever get a nice close view of megans ass???
> **dogday_afternoon2002 (11:56:58):** yeh, she lays on the floor and watches, TV nice shot of her ass then

(29.15Ex.11 at 3855). Since Megan had never met Gill before the sexual chat about her anatomy happened, Gill could not have written that he had viewed her anatomy while she was on the floor watching television.

The A.G's. findings rely on Lape having written in the sexual chat that Megan was 17 years old on July 2, 2002 and Megan having testified that she was 18 then and that Megan believed that Lape knew her age(29.15L.F.537;29.15Ex.11 at 3855). Scott Cates, who owned the Lake property with Lape, testified Lape's relationship with his daughter was "[s]potty"(29.15L.F.405 at transcript 56). Scott testified that Megan only came to see Lape when she needed money(29.15L.F.412 transcript at 83-84). Lape's "[s]potty" relationship with Megan, premised on her need for money, readily explains such an insignificant discrepancy. Moreover, the discrepancy is explainable because Lape could have misspoken referring to Megan as 17, after she had turned 18, or Lape simply made a computer keyboard stroke mistake.

It is clear Lape also authored the sexual chat about having been sexually involved with 13 and 15 year old girls(29.15Ex.11 at 3857-60). As discussed *supra*, the child pornography sexual visual images on Lape's computer were created before Gill lived with Lape and prior to that Lape had lived alone(T.Tr.636;29.15Tr.646;29.15Tr.621-26). Because Lape placed on Lape's computer child pornography, it logically follows that Lape authored the chat stating he had been sexually active with 13 and 15 year old girls.

Diane testified that Lape had purchased a pontoon boat(T.Tr.1189-90). In the "tiffyfremont11" chat from July 2nd "dogday____afternoon2002" talks about his past sexual experience with a 13 year old girl and that exchange included:

dogday_afternoon2002 (12:57:29): cool, good for you
dogday_afternoon2002 (12:57:44): I have a boat too
unknown (12:57:48): kool
unknown (12:57:57): ours is 24'
dogday_afternoon2002 (12:58:08): mine is 29ft, pontoon
unknown (12:58:10): it has a bunk
dogday_afternoon2002 (12:58:41): mine has couches and stuff, you can sleep on it
unknown (12:58:47): kool

(29.15Ex.11 at 3861). The "dogday____afternoon2002" reference to a "pontoon" boat as "mine" further demonstrates Lape authored the July 2nd chats.

While the findings asserted "A search of Mr. Lape's home found no evidence whatsoever of any pornography" undersigned counsel has found no record evidence to support such assertion(29.15L.F.532-33).

For all the reasons noted, the motion court clearly erred in rejecting Gill's *Brady* and ineffectiveness claims (Points I, II) regarding the sexual content on Lape's computer based on foundational grounds and having excluded Ex.92 because someone else could have placed the evidence on Lape's computer.

This Court should reverse the denial of the *Brady* and ineffectiveness claims and order new guilt and penalty phases.

IV.

SIGNING STATE'S FINDINGS

The motion court clearly erred in signing respondent's findings because that denied Gill his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that respondent's findings were expressly contrary to how multiple witnesses' testified, and most notably contrary to Officer James' testimony, the state's own computer expert and officer in charge of the investigation, that Lape authored the sexual chats and James' overall computer analysis had caused him to conclude Lape was "a pervert," and adopting them shows a lack of independent judicial judgment.

The 29.15 judge signed the A.G.'s findings that were expressly contrary to how multiple witnesses testified. Most notably the findings were contrary to Officer James' testimony, that Lape authored the sexual chats and that James' concluded Lape was "a pervert."

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

Post-conviction proceedings must comport with due process notions of fundamental fairness. *Thomas v. State*,808S.W.2d364,367(Mo.banc1991). The practice of judges merely adopting a party's proposed findings is viewed with contempt. *United States v. El Paso Natural Gas Co*.,376U.S.651,656 n.4(1964).

Accord Massman Construction Co. v. Missouri Highway and Transportation Comm'n, 914S.W.2d801,804(Mo.banc1996)(discussing "troublesome practice" of adopting a party's findings) and *State v. Griffin*,848S.W.2d464,471(Mo.banc 1993)("[t]he judiciary is not and should not be a rubber-stamp for anyone."). In *State v. Kenley*,952S.W.2d250,281(Mo.banc1997), Judge Stith dissented noting that when a motion court signs respondent's proposed findings there should be evidence it exercised independent judgment.

James' Testimony Contradicts A.G.'s Findings

The A.G.'s findings discuss how respondent would argue to a jury that it was Gill and not Lape who put the sexual content on Lape's computer(29.15L.F.521-22,526,532-33, 535-37). In light of Officer James' testimony, such findings demonstrate a lack of independent judicial judgment.

Police Officer James was the officer in charge of investigating Lape's death(29.15Tr.148). James was also the state's computer forensics expert who prepared the Encase report that Swingle disclosed to counsel(Ex.15 at 5125-30;29.15Tr.166-67,302;29.15Ex.72).

James testified that he concluded from his analysis of Lape's computer that Lape authored the sex chats and not anyone else(29.15Ex.93 at 26). James testified that from his entire review of Lape's computer he had concluded Lape was "a pervert"(29.15Ex.93 at 38-39).

James testified that there was nothing in Lape's computer to link Gill to placing the child pornography on Lape's computer(29.15Ex.93 at 48). James

determined that the pornography was placed on Lape's computer before Gill began living with Lape, and therefore, could not have been placed on Lape's computer by Gill(29.15Ex.93 at 48). If James had found any evidence to connect Gill or Brown to the placing of illegal pornography on Lape's computer, then he would have alerted Swingle(29.15Ex.93 at 48-49).

The A.G.'s findings include the following: "Movant failed to establish that Mr. Lape was the individual who wrote the messages or downloaded the pornography"(29.15L.F.514; *See, also,* 29.15L.F.526, 533,535). According to the findings, there was "scant 'evidence'" Lape's computer contained chats and pornography(29.15L.F.521-22). The findings state "there was insufficient evidence" to establish Lape authored the sexual chats or received the pornography(29.15L.F.522). The state's own computer expert, James found just the opposite.

According to the findings, respondent could argue to the jury it was Gill, and not Lape, who made "vulgar references" to Lape's daughter in the sexual chats that constituted "lascivious conduct"(29.15L.F.532). James found Lape authored the sexual chats.

Adopting the state's findings here calls for the same treatment this Court gave the state's adopted findings in *Taylor v. State*,262S.W.3d231,240-42(Mo.banc2008). There, the evidence showed that the prosecutor intentionally withheld evidence he was required to disclose. *Id.*240-42. Despite that evidence, the A.G. authored findings that the non-disclosure was made in good faith. *Id.*240-42. This Court found

it was clear error to adopt such "self-serving" A.G. findings. *Id.*at 242. This Court should similarly find here that in the face of the state's computer expert finding that Lape authored the sexual chats and that his overall review caused him to conclude Lape was "a pervert," the findings Gill was responsible for the sexual content are "self-serving" and must be rejected. The 29.15 judge did not follow this Court's directive that "Trial judges are well advised to approach a party's proposed order with the sharp eye of a skeptic and the sharp pencil of an editor." *Massman Construction Co. v. Missouri Highway and Transportation Comm'n,* 914S.W.2d801,804(Mo.banc1996).

In *Worthington v. Roper*,2009WL878704 *20,27,28,31(E.D.,Mo.2009), the District Court refused to defer to state court "findings" because they were unsupported by the factual record in the death sentenced petitioner's habeas corpus action. The District Court then conducted its own independent review of Worthington's claims because of that deficiency. *Id.*20,27,28,31. This Court should not sanction "findings" unsupported by the factual record. *See Worthington*.

According to the findings, James testified that "most" of the sexual content of Lape's computer was "corrupted," and therefore, "unreviewable" (29.15L.F.533). James actually testified that as to every computer that he has ever worked with some files are corrupted so that some files cannot be opened(29.15Ex.93 at 41-42). James also testified that he left Lape's computer content intact so that if someone reviewed it with Encase they could open its sexual content(29.15Ex.93 at 46). That is in fact

what Chatten did when Lape's computer's contents were released to him(29.15Tr.610-11,613-14,617-30, 633;29.15Ex.11 at 3850,3855-58,3875-77).

The A.G.'s findings attacked Chatten because he testified that he could not say Lape's computer, rather than another computer, was used to create the "dogday____afternoon2002" profile(29.15L.F.535). James, the state's own expert, testified that he had determined that profile must have been created on Lape's computer(29.15Tr.642-43).

Swingle's And Scott Cates' Testimony And No Search Evidence Contradict A.G.'s Findings

According to the findings, the sexual chats happened on July 2, 2002 when Lape was on his way to the Lake(29.15L.F.522,532)(relying on Ex. 97 Scott Cate [sic] depo. at 59-60). In fact, Scott Cates testified at his pretrial deposition that Lape arrived at the Lake on Wednesday, July 3, 2002 at 2:00 – 3:00 p.m., which was after the sex chats of July 2, 2002(29.15L.F.406 at transcript p.60).

According to the A.G.'s findings, Swingle testified that in Brown's trial the sexual content evidence "was fully revealed prior to trial, but was excluded and ruled irrelevant"(29.15L.F.525)(relying on Swingle Depo. at 46). In fact, Swingle testified that the *Brown* judge had ruled the computer evidence was irrelevant **unless** the victim impact witnesses opened the door to that evidence by painting Lape as "a saint"(29.15Ex.95 at 46-47). Swingle also testified that because of that ruling the Millers, Megan, and Steven were all alerted in *Brown* not to cast Lape as "a saint" or the sexual content evidence would be admissible(29.15Ex.95 at 48-52,68).

The A.G.'s findings assert "[a] search of Mr. Lape's home found no evidence whatsoever of any pornography"(29.15L.F.532-33). While the findings make such an assertion, undersigned counsel has found no record evidence to support such a search was done.

Counsels' Testimony Contradicts A.G.'s Findings

According to the findings, Kenyon and Turlington testified that they "could not ethically argue" that Lape's life had less value, even if they had had the computer's sexual content evidence(29.15L.F.516). In fact, Kenyon testified such an argument would be strategically "unwise," but it would not be unethical(29.15Tr.198). Turlington testified there was nothing unethical about such an argument, but she would not make such argument(29.15Tr.319).

According to the findings Kenyon "could not articulate" and "searched for a justification" how he would have used Lape's computer's contents(29.15L.F,521). The state's findings stated that Kenyon testified that he would not have used the computer evidence because "'you do not kick the corpse'"(29.15L.F.521). According to the A.G.'s findings, Kenyon and Turlington gave "half-hearted" responses to how they would have used the computer evidence as demonstrated by them "paus[ing] a significant period" before answering(29.15L.F.527).

Kenyon testified that he was not certain how he would have used Lape's computer's contents because what he did would have depended on how the state portrayed Lape(29.15Tr.172-74). Kenyon would not have presented the computer evidence in the defense's case-in-chief to avoid being perceived as "kick[ing] a

corpse"(29.15Tr.172-74). Kenyon's "kick the corpse" testimony did not reflect, as the A.G.'s findings asserted, that he would not have used the computer evidence at all, but rather how it was used had to be tempered so as not to be part of the defense case-in-chief.

Kenyon thought that respondent painted Lape in penalty as "a saint"(29.15Tr.172-74). The child pornography, video bestiality, and on-line chats would have "cast [Lape] in a much different light than what the State was trying to paint in the penalty phase"(29.15Tr.171).

Kenyon thought Lape's computer's sexual content would have been used to dissuade respondent from having portrayed Lape as the person of great character(29.15Tr.172-74,194). Lape's sexual chats, and in particular the one about Lape's daughter, would have been used to dissuade respondent from portraying Lape as a "saint"(29.15Tr.180-81,187;29.15Ex.11 at 3855-56). If the state still choose to portray Lape glowingly, then Kenyon would have used Lape's computer's contents as rebuttal evidence or cross-examined the state's witnesses about the computer's contents(29.15Tr.172-74,194). Kenyon probably would not have played the pornographic images for the jury, but would have called the computer expert who had viewed the computer's contents to describe what he had seen(29.15Tr.195). Kenyon's testimony reflects that he did know how he would have used the computer evidence, but how he used it depended on how the state portrayed Lape.

Turlington would have wanted to selectively present the assorted sexual content(29.15Tr.318,334). Turlington indicated Lape's sexual chats could have been

used to rebut the state's portrayal of Lape as a person of great personal character(29.15Tr.307). The portions of the chats Turlington thought especially went to these matters were those that dealt with rebutting the state's presentation of Lape as a good father(29.15Tr.307). The child pornography evidence and evidence that suggested Lape was sexually involved with 13 to 15 year old girls would have rebutted the state's portrayal of Lape as a person of great personal character and upstanding citizen(29.15Tr.307-08). Like Kenyon, Turlington knew how she would have used the computer evidence, but how she used it depended on how the state portrayed Lape.

Cessie Alfonso's Single Misspeaking Incident vs. A.G.'s Findings Replete With Errors

The A.G.'s findings asserted that mitigation specialist Cessie (Cecilia) Alfonso's testimony was not "compelling"(29.15L.F.519). A reason the findings gave for her not being compelling was an occasion when she misspoke stating that Gill's father was 58 years old when he was born, rather than 73 years old(29.15L.F.519).

Alfonso was testifying about Gill's mother and stated that his mother became pregnant with him by a man who was either 54 or 56 years old when she was 21 years old (29.15Tr.53). Alfonso's testimony was focused on recounting that Gill's mother became pregnant with Gill by a man (Max Hucherson) who was much older than she was and that man and his wife had baby-sat Gill's two older siblings(29.15Tr. 53-54). Alfonso subsequently corrected her testimony to state Hucherson was about 73 years

old when Gill was born(29.15Tr.60). Alfonso later recounted that Gill's mother had a relationship with Junior Criswell who died at age 52(29.15Tr.68-69). The subsequent testimony about Criswell readily explains why Alfonso misspoke. Moreover, Gill's mother testified that she had four children with four different men to whom she was never married(29.15Tr.223,224,228,231,234) and also readily explains why Alfonso misspoke as to Gill's father's age when Gill was born.

Alfonso's single incident of misspeaking, which she ultimately corrected, and the A.G.'s finding on it should be contrasted with the A.G.'s findings which are themselves replete with errors.

The A.G.'s findings, on multiple occasions, refer to Lape's sister, Diane "Miller," one of the state's chief trial witnesses, as Diane "Mitchell"(29.15L.F.514). The A.G.'s findings reference Swingle's deposition at page 30 for a statement about downloads to Lape's computer, which page contains no information regarding downloads, but instead relates to Swingle's rendition of his dealings with defense counsel(29.15L.F.523; 29.15Ex.95 at 30). The A.G.'s findings reference the testimony of Scott "Cates" as the testimony of Scott "Cate"(29.15L.F.522,532). The A.G.'s findings refer to 29.15 witness "Arvil" Skinner as "Arzil" (29.15L.F.528;29.15Tr.374-75). Before witness Rone testified she spelled her name as follows: "C-H-E-R-I-E, R-O-N-E" (29.15Tr.419-20), while the A.G.'s findings refer to her as "Cheri"(29.15L.F.529,541). The A.G.'s findings which are so critical of Alfonso for an incident of misspeaking also refer to Alfonso as "Cassie," rather than Cessie(29.15L.F.541).

While the A.G.'s findings fault Alfonso for misspeaking about how old Gill's father was when Gill was born, that should be contrasted with how the A.G.'s findings also affirmatively relied on Alfonso's reporting of other age information contained in Alfonso's report to reject Derek Fitzgerald's testimony(29.15L.F.518). The A.G.'s findings state Derek Fitzgerald's testimony was inconsistent and not credible(29.15L.F.518). That was immediately followed with: "[Derek] testified that he spoke to Movant about the abuse at the age of 14; yet he told Cecilia Alfonso that this occurred at age 12 (Movant's Exhibit **83**, p.5)."(29.15L.F.518)(quoting A.G.'s finding and emphasis added). It should be noted that this A.G. finding referenced Exhibit **83**, Alfonso's **C.V**., for this proposition when in fact Alfonso's discussion of what Derek Fitzgerald reported to her appears at Exhibit **84** at page 5, Alfonso's 29.15 evaluation **report**.

The motion court's adopting findings that expressly contradicted the state's computer expert, Officer James' testimony, that were contrary to Prosecutor Swingle's testimony, and that were contrary to state witness Scott Cates' testimony demonstrates a lack of independent judicial judgment. Further, a lack of independent judicial judgment is demonstrated by findings that were contrary to defense counsels' testimony. Finally, findings that reject witness Alfonso's testimony for a single incident of misspeaking, which she later corrected, but which are themselves so replete with errors about the record demonstrate a lack of independent judicial judgment.

This Court should reverse and remand with directions that Gill's 29.15 be reheard by a judge, other than Judge Price, to exercise independent judgment and not just sign the A.G.'s findings.

V.

SWINGLE'S NEGOTIATION DECEPTION

The motion court clearly erred finding Swingle did not commit prejudicial prosecutorial misconduct when he deceived counsel and caused them to believe a death waiver was possible through Gill's providing information against Attorney Davis because Gill was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII and XIV, in that Swingle never intended to waive death since he knew that Diane Miller opposed life for Gill unless Davis was charged for acts involving Lape's death and Swingle knew that Gill's information against Davis had nothing to do with implicating Davis in Lape's death. Gill was prejudiced because his counsel expended enormous resources to the detriment of failing to uncover Lape's computer's sexual content which would have been used to prevent respondent from inaccurately casting Lape as a "Good Samaritan," "saint," "Mr. Mom," and a person with Lincolnesque character, as the co-defendant's counsel did, or to rebut such a portrayal and Gill would not have been convicted of first degree murder and death sentenced.

All of Gill's counsel expended great resources directed at gathering information about Davis intended to lead to charges against Davis in exchange for a death waiver. Swingle knew that Gill could not provide information against Davis to implicate Davis in Lape's death such that Davis could be charged with any offense associated with Lape's death. Swingle attached great weight to Lape's family's

wishes who he knew would only consent to waiving death if Gill could provide information to support charging Davis in Lape's death. Swingle intentionally misled counsel to expend those efforts when he knew Gill could not provide information that Lape's family wanted to charge Davis in Lape's death. Swingle's actions prevented counsel from focusing their efforts and resources on uncovering Lape's computer's sexual content and then using that information to prevent respondent from presenting Lape as a person of extraordinary personal character or from rebutting such portrayal of Lape. If counsel had not been misled and devoted their efforts to investigating the case, then they would have uncovered Lape's computer's contents, like the co-defendant's counsel did, and similarly avoided death and a conviction for first degree murder.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

A.G.'s Findings

The A.G.'s findings assert that there was no evidence that Swingle misled counsel on the possibility of a deal(29.15L.F.534). There was no evidence Davis was ever charged so that condition was never met(29.15L.F.534). The state never promised Gill a deal in exchange for cooperating on Davis matters(29.15L.F.537-38). The claim was refuted by the witnesses' testimony(29.15L.F.539). Counsel prepared for the case and tried it professionally(29.15L.F.539).

Swingle Deceived Counsel To Believe A Deal Was Possible When He Knew It Was Not

The government denies a defendant due process and his right to effective counsel when the prosecution affirmatively misleads his counsel. *Sheppard v. Rees*,909F.2d1234,1236-38(9thCir.1989)(court agreed with government's concession that because of a pattern of government conduct affirmatively misleading the defense that such conduct denied defendant effective opportunity to prepare a defense). A prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States,295U.S.78,88(1935).

The ABA Standards For Criminal Justice Prosecution Function 3-4.1(c) provide as follows:

> A prosecutor should not knowingly make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused.

See Spencer v. State,118P.3d978,984(Wy.2005) and ABA Criminal Justice Section Standards at http://www.abanet.org/crimjust/standards/pfunc_blk.html and also at http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf.[5] The Comment to this Section provides that during the course of plea negotiations that "truth is required in the presentation of facts relating to the case." *Spencer*,118P.3d at 984(relying on Comment). That Comment also provides that during plea discussions a prosecutor must "avoid the use of deception." *Id.*984. The Comment continues that misrepresentation reflects on the prosecutor's integrity and jeopardizes achieving justice. *Id.*984. The Comment indicates that misrepresentation frustrates plea dispositions because lawyers "are understandably reluctant to negotiate with a prosecutor who cannot be trusted." *Id.*984.

Berman and Estes entered on October 10, 2002 (T.L.F.4;T.Tr.83-84). Berman and Estes withdrew on June 4, 2003(T.Tr.84;T.L.F.6-7). On June 26, 2003 Kenyon and Turlington entered(T.L.F.8).

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[5] *See also* ABA Standards For Criminal Justice: Pleas of Guilty Standard 14-3.1(f) (a prosecutor "should not knowingly make false statements or representations as to law or fact in the course of plea discussions with defense counsel") at http://www.abanet.org/crimjust/standards/guiltypleas_blk.html.

Berman's and Estes' preparation focused on obtaining a death waiver(29.15L.F.431-32). Berman and Estes obtained immunity agreements for Gill to provide statements about his knowledge of Davis' wrongdoings(29.15L.F.431-32,451-52). Such agreement would not have been entered unless there was substantial reason to believe death would be waived(29.15L.F.451-52, 457,460-61).

Swingle also gave Gill immunity to do a deposition for Attorney Mass who had brought a lawsuit on behalf of Robert McLain(29.15L.F.437-39). Mass had provided copies of checks Davis had written on McLain's trust account for outrageous charges(29.15L.F.438).

Kenyon and Turlington testified that when Gill's case was reassigned they only inherited work that involved investigating Davis(29.15Tr.116-20,157,278-79). No depositions had been taken(29.15Tr.120). About 75% of Kenyon's and Turlington's investigation was devoted to investigating Davis, which was wasted time(29.15Tr.157-59,289-92). Kenyon's and Turlington's conversations with Gill focused on obtaining from Gill information that he knew about Davis so that Davis could be charged to get Gill a life deal(29.15Tr.202-03).

On January 9, 2003, Swingle wrote Diane Miller about developments in the cases against Gill and Brown(29.15Ex.94 Depo. Ex.1). Swingle wrote that there had been discussions with Gill's attorneys about Gill providing information against Davis in exchange for waiving death(29.15Ex.94 Depo. Ex.1). That letter stated that Gill's attorneys had informed Swingle that they had discussed the case in detail with Gill and "no one else was involved in the killing of your brother, but that he does have

information of other crimes that have been committed"(29.15Ex.94 Depo. Ex.1). That letter stated that Gill's attorneys had advised Swingle that they were prepared to have Gill talk more with an investigator about what he knew about Davis(29.15Ex.94 Depo. Ex.1).[6]

On April 22, 2003, Swingle wrote Diane stating: "Just as I feared, the defense lawyers are already talking about wanting a continuance in Mark Gill's murder case because of the matters being investigated in regard to Pat Davis"(29.15Ex.94 Depo. Ex.2 at 1). Swingle's letter recounted that Berman had "told me that she might be wanting a continuance because all her efforts had been directed at helping her client give the statements regarding Pat Davis, rather than preparing his defense to the murder case"(29.15Ex.94 Depo. Ex.2 at 1). Swingle stated that he intended to oppose a continuance because counsels' efforts had been directed at "this **tar baby** of a Pat Davis investigation"(29.15Ex.94 Depo. Ex.2 at 1)(emphasis added). Swingle stated that he would do his "best to prevent" a continuance based on the Davis investigation(29.15Ex.94 Depo. Ex.2 at 1).

On April 22, 2003 Swingle also wrote Berman two letters(29.15Ex.94 Depo. Ex.2). Swingle noted that Larry Mass an attorney suing Davis in the handling of an

[6] While Davis' name is not used in Swingle's January 9, 2003 letter to Diane Miller (29.15Ex.94 Depo. Ex.1), Davis is expressly named in Swingle's April 22, 2003 letter to Diane Miller (29.15Ex.94 Depo. Ex.2 at 1-2) and in one of Swingle's two letters of April 22, 2003 to Berman(29.15Ex.94 Depo. Ex.2 at 3).

estate was wanting to take Gill's deposition about what he knew about the estate and other matters involving Davis(29.15Ex.94 Depo. Ex.2 at 3). Swingle wrote:

> As you know, the information your client has been providing and his continued cooperation are facts that may help me and Ralph Lape's family decide whether the death penalty would be waived in his case. At this point, though, no decision has been made.

(29.15Ex.94 Depo. Ex.2 at 3). Swingle promised that if a death waiver agreement was not reached, then testimony Gill gave in the Mass deposition would not be used against Gill(29.15Ex.94 Depo. Ex.2 at 3). Swingle added that Gill "cannot be hurt by giving the deposition and might be helped if it helps provide a sufficient reason to waive the death penalty"(29.15Ex.94 Depo. Ex.2 at 3).

Also on April 22, 2003, Swingle wrote Berman informing her that he would oppose a continuance on the grounds counsel was not prepared for trial because of efforts directed at obtaining evidence against Davis(29.15Ex.94 Depo.Ex.2 at 5). Swingle wrote that he was not going to allow the case to "get delayed or screwed up by the interests anybody else has in making a criminal case on this attorney"(29.15Ex.94 Depo.Ex.2 at 5). Swingle stated that he had "repeatedly promised the victim's family that this case will not be postponed"(29.15Ex.94 Depo.Ex.2 at 5). In his letter, Swingle stated that the case had been set nine months in advance of the trial date and the trial date was still five months away(29.15Ex.94 Depo.Ex.2 at 5).

Kenyon and Turlington met with Swingle on July 21, 2003 and discussed plea possibilities(29.15Tr.154-55;29.15Ex.60). Gill had given a statement to the Highway Patrol about Davis(29.15Ex.60). Swingle represented that while Lape's family wanted Gill to get death, they were open to life without parole, if the information Gill supplied led to charges against Davis(29.15Ex.60;29.15Tr.156-57).

At an August 7, 2003, hearing, Kenyon and Turlington requested the September 15, 2003 trial be continued(T.L.F.7;T.Tr.84-92). Prior capital counsel had done "insufficient" preparation(T.Tr.86). No depositions had been taken and almost no penalty phase records were compiled(T.Tr.86-87). Swingle would not agree to the continuance because Lape's family wanted the case tried as scheduled(T.Tr.87-88). The case was reset for trial six months later on March 1, 2004 and tried then(T.Tr.89-92,116).

From June, 2003 through December, 2003, Turlington spent 50% of her time working on matters related to Davis(29.15Tr.291-92). Turlington talked quite a bit with Swingle about a deal surrounding Davis' being charged(29.15Tr.292-93). The information Gill supplied focused on Davis' involvement in quadriplegic Robert McLain's trust(29.15Tr.293-94).

Swingle testified that he gives strong consideration to what a victim's family wants as to the death penalty(29.15Ex.95 at 71-72). Diane was the family contact and leader(29.15Ex.95 at 71-73).

Diane testified that she had discussions with Swingle about the possibility of a deal for Gill if Gill provided information about Davis' having some role in Lape's

death(29.15Ex.94 at 5-6). During 2002, Diane was involved in meetings with the Cape County Sheriff's office and Officer James relating to Davis' involvement in Lape's death(29.15Ex.94 at 6-7). Diane's discussions with Swingle about waiving death were directed at such a result if there was evidence of Davis having been involved in Lape's death(29.15Ex.94 at 18). Diane was not interested in any other Davis crimes besides Lape's death that Gill could provide information about(29.15Ex.94 at 9-10).

Swingle knew, at least as early as January 9, 2003, that Gill could not provide information to implicate Davis in Lape's death because Swingle told Diane in his letter of that day that Gill's counsel had talked to Gill and Gill had indicated only he and Brown were involved in Lape's death(29.15Ex.94 Depo. Ex.1). Even though Swingle knew that on January 9, 2003, he wrote Berman on April 22, 2003 that "no decision" had been made as to whether to waive death because of Gill's willingness to cooperate in providing information against Davis(29.15Ex.94 Depo. Ex.2 at 3). Swingle vigorously opposed a continuance in his April 22, 2003 letters and at the August 7, 2003 hearing because that was what Lape's family wanted(29.15Ex.94 Depo. Ex. 2 at 1,5;T.Tr.87-88). On July 21, 2003, Swingle made representations to Kenyon and Turlington that Lape's family was open to waiving death in exchange for charges against Davis(29.15Ex.60;29.15Tr.156-57). Swingle knew that such representations were untrue because Diane had told Swingle they were only agreeable to a death waiver, if Gill could provide information that would result in Davis being charged in Lape's death(29.15Ex.94 at 5-7,9-10,18).

Starting from at least as early as January 9, 2003, Swingle knew that counsel pursuing matters against Davis would not get Gill a death waiver because Davis could not be implicated in Lape's death, yet Swingle continued to hold out to Berman, Estes, Kenyon, and Turlington there was such a possibility. A death waiver deal was not possible because Swingle attaches great weight to the victim's family's wishes and Lape's family only was agreeable to a death waiver, if Gill could implicate Davis in Lape's death.

Swingle purposely misled counsel to believe there was the possibility of a deal, in violation of ABA Standards For Criminal Justice Prosecution Function 3-4.1(c) and ABA Standards For Criminal Justice: Pleas of Guilty Standard 14-3.1(f). Those actions denied Gill his right to due process and effective assistance of counsel. *See Sheppard v. Rees* and *Berger*, *supra*. Gill was prejudiced because his attorneys' preparation focused primarily on getting a death waiver when Swingle intentionally misled them that was a possibility, when it was not.

Through Swingle's misleading Gill's counsel, they failed to uncover Lape's computer's sexual content. Unlike Brown's counsel, who effectively used the computer's content to preclude Swingle from casting Lape as a person of sterling character, Gill's counsel could not. If Swingle had not misled Gill's counsel to expend their time and resources investigating Davis, they could have otherwise uncovered Lape's computer's content and avoided death and a first degree murder conviction. Death and a first degree murder conviction would have been avoided

through preventing respondent from casting Lape as a person of exceptional character or rebutting such portrayal of him. *See* Points I and II.

New guilt and penalty phases are required.

VI.

DYSFUNCTIONAL FAMILY AND ABUSE

The motion court clearly erred because Gill was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel failed to investigate and present a comprehensive complete mitigation case in failing to call as witnesses Derek Fitgerald, a mitigation specialist such as Cessie Alfonso, and Gary Riley, to testify about Gill's dysfunctional family background and abuse he endured, failing to present complete evidence through Mary Alice Gill about her role in that family dysfunction and abuse, failing to rely on Gill's family members' mental health records documenting serious family mental illness, and failing to rely on Gill's medical records. Gill was prejudiced because had the jury heard a comprehensive mitigation case he would not have been sentenced to death.

The jury did not hear a thorough mitigation case recounting Gill's dysfunctional family background and abuse he experienced.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991). "There is no crime that, by virtue of its aggravated

nature standing alone, automatically warrants a punishment of death." *Taylor v State*, 262 S.W.3d231, 252(Mo. banc2008)(relying on *Woodson v. North Carolina*,428U.S.280,303(1976)). For trial strategy to be a proper basis to deny relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003).

A. 29.15 Evidence

Derek Fitzgerald

Derek Fitzgerald and Gill are first cousins(29.15Tr.7). Derek's mother, Luvenia, is Gill's mother's sister(29.15Tr.7-8) Derek spent much time growing-up with Gill and his siblings(29.15Tr.9). Derek was familiar with Gill's life circumstances, until Gill left for the Navy(29.15Tr.38). Gill's household was dysfunctional(29.15Tr.10). Gill's mother was "just nasty"(29.15Tr.15-16).

Mary Alice called her children names all the time like "bitches, bastards, motherfuckers, assholes"(29.15Tr.17). Mary Alice called Gill "bighead bastard," "cocksucker," and "motherfucker"(29.15Tr.19). Mary Alice's violent incidents resulted in holes in walls and doors knocked down(29.15Tr.18). Mary Alice hit the children with extension cords, tree switches, shoes, and brooms(29.15Tr.19). While Gill was mean, Derek attributed that to his dysfunctional family situation, including sexual abuse Gill endured(29.15Tr.30-31). The Fitzgerald family had a reputation for being mentally ill and for incest(29.15Tr.35,37).

Typical of Mary Alice's behavior was a violent incident involving Gill's sister Lisa(29.15Tr.16-17). Lisa was about 13 years old and wanted to go to a football

game(29.15Tr.16-17). Mary Alice accused Lisa of wanting "to go out and fuck boys"(29.15Tr.16-17). Mary Alice then attacked Lisa(29.15Tr.17).

Dewayne Fraser taught Sunday school at the church next door to where Gill lived(29.15Tr.24). Fraser's reputation was that he liked young boys(29.15Tr.24-26). Gill told Derek that Fraser sexually abused him(29.15Tr.26-29).

Fraser gave Mary Alice things(29.15Tr.27). Fraser also gave Gill things to lure Gill over and to keep the sexual abuse secret(29.15Tr.27-28).

There was easy access to alcohol in Mary Alice's household and Gill began drinking very young(29.15Tr.32-33,35).

Cessie Alfonso

Cessie Alfonso is a mitigation specialist(29.15Tr.43-44).

Gill was an unwanted, unexpected child(29.15Tr.52). Mary Alice already had two children and they lived in extreme poverty(29.15Tr.52). Mary Alice spoke of Gill's birth as one of the worst times in her life(29.15Tr.53).

Gill's birth was the product of a one night stand(29.15Tr.53). Gill's mother became pregnant with him by Max Hucherson, when she was 21 years old (29.15Tr.53-54). Max and his wife Lula had babysat Gill's two older siblings(29.15Tr.53-54). Max was about 73 years old when Gill was born(29.15Tr.60).

When Max Hucherson died, Mary Alice and Lula lived together with Mary Alice's children, pooling their meager resources(29.15Tr.61). While Lula provided

some nurturing to Gill, because Gill was Lula's husband's son, that was met with Mary Alice's hostility(29.15Tr.59-62).

Self-esteem comes from being loved and valued by someone by whom you want to be loved and valued(29.15Tr.59). It was especially detrimental for Gill's self-esteem to hear Mary Alice say that she wished he was never born(29.15Tr.59). Even though Gill directed his youthful energies into sports and did well, his mother took no interest and disparaged his participation(29.15Tr.80-81).

Mary Alice's mother was Alene Fitzgerald(29.15Tr.54). Alfonso described how Alene addressed Mary Alice as follows:

> Mark Gill's grandma would refer to her daughter Mary Alice as a dumb – and **please forgive me, but the language that was used in this family**, it was not uncommon for her to be referred to as a son of a bitch, you know, you cock sucker, you dumb piece of shit.

(29.15Tr.54)(emphasis added). Mary Alice's own words about her mother, as recounted to Alfonso, included: '"She would always think that somehow or another we wanted to fuck her man"'(29.15Tr.54-55). Before testifying to this statement, Alfonso prefaced her recounting by informing the court that it was a "[q]uote"(29.15Tr.54-55).

Alfonso also testified that Mary Alice's exact words in referring to her mother '"**quote** would pimp her out"'(29.15Tr.54-55)(emphasis added). Alfonso testified that Mary Alice "was 14 years old when her mother would take her to men's houses, sit and wait while a man sexually violated her"(29.15Tr.55). While there may be

many mothers and women who have been sexually violated, that does not typically involve parental consent(29.15Tr.55).

Because of the circumstances that Mary Alice endured growing-up, it was not surprising that she was not nurturing(29.15Tr.57-59). The children dreaded Mary Alice coming home from work because her predictable behavior was that she started with "every name, every word, you big, **just venomous, venomous stuff**"(29.15Tr.67)(emphasis added). Even though Lula had nurturing qualities, those did not offset that people need to be nurtured and loved by their biological mothers(29.15Tr.59-60).[7] There was sibling competition for what little affection could be found(29.15Tr.69).

One of the things valued in the family "was light skin privilege"(29.15Tr.62-63). Gill was lighter skinned than his sister Lisa and his brother Carl(29.15Tr.62-63). To the extent that Gill's siblings considered him to have been mean to them that was understandable because Gill had benefited from being lighter skinned than his siblings(29.15Tr.63-64).

Gill's mother was involved in a relationship with Junior Criswell who died from liver cirrhosis associated with drinking when he was 52 years old(29.15Tr.68-69).

[7] The transcript refers to both "Lulu" and "Lula"(29.15Tr.59-60). For consistency, "Lula" is used here.

While Gill and his siblings all suffered from the same environment, his siblings did not end up in the same situation as he, which was explainable(29.15Tr.64-66). Each child had a different father(29.15Tr.64-65). Each one manifests differently the consequences of the volatile, violent, and dysfunctional environment they were raised in(29.15Tr.65-66). Carl a/k/a Todd suffers from schizophrenia(29.15Tr.64-65,71). Lori is alcoholic(29.15Tr.65-66). Lisa continues to suffer the consequences of Junior Criswell's raping her(29.15Tr.69).

Gill learned in the household that men drink, men fight, women are abused, and human beings are disrespected(29.15Tr.70). Alfonso explained that Gill was not taught problem solving and delayed gratification because he was taught to handle stress by drinking(29.15Tr.84-85). Gill failed badly in the Navy and was unfavorably discharged because of drinking(29.15Tr.84-85). The Navy's culture, which rightly values problem solving and delayed gratification, was "an alien culture" to the one in which Gill was raised in that valued drinking over these skills(29.15Tr.84-85).

Gill came from a family of Fitzgeralds who were known as "the crazies" and as a family of incest(29.15Tr.71). Several of the men were schizophrenic(29.15Tr.71). In Portageville, black males were treated especially badly with racial epithets commonly applied to them(29.15Tr.80-81).

What Gill learned from the adult men and relatives he grew-up around was that the way to deal with racial discrimination and being threatened was to drink and do drugs(29.15Tr.71-73). Smokey, who was Derek Fitzgerald's mother's partner, introduced Gill to alcohol when Gill was five years old and Gill would get

drunk(29.15Tr.72-73). Exhibit 31 is a photo of Smokey and Luvenia that shows Smokey holding a beer can(29.15Ex.31;29.15Tr.261-62).

Mary Alice allowed Gill to be sexually abused because Fraser drove her places, as she did not drive(29.15Tr.75-76).

Gill grew-up surrounded by mental illness, violence, poor parenting skills, and substance abuse(29.15Tr.74).

Alfonso concluded that Gill was the victim of having been raised in an environment where he was repeatedly physically and emotionally assaulted(29.15Tr.89-90). There was little nurturance and support(29.15Tr.89-90). Gill was not loved and not respected growing-up(29.15Tr.90).

Mary Alice

Mary Alice testified that her mother prostituted her out when she was fourteen years old(29.15Tr.215-16). When Mary Alice protested, her mother called her "bitch" and "whore"(29.15Tr.216). Mary Alice did not report to anyone what her mother made her do because the authorities did not care what happened to African-American children(29.15Tr.218-19). When Mary Alice eventually refused to prostitute anymore, her mother called her "slut," "bitch," and "whore"(29.15Tr.219).

Mary Alice conceded that she had cursed-out Gill when he was growing-up(29.15Tr.248). She talked to Gill that way because that was how she was treated growing-up(29.15Tr.248). She admitted she threw things at Gill and beat him(29.15Tr.248).

When Gill was between the ages of two and seven, Mary Alice lived off and on with Junior Criswell(29.15Tr.250-52). Criswell was an alcoholic and when he drank he was violent, throwing things and turning over the kitchen table(29.15Tr.251,261-62). Criswell and Mary Alice cursed at one another(29.15Tr.251). Criswell cursed at the children(29.15Tr.251).

Fraser took Mary Alice shopping and bought things for her with credit and then Mary Alice repaid him(29.15Tr.259). Even though Mary Alice knew Fraser was a pedophile, she let Gill be with him(29.15Tr.257-58,260).

Mary Alice lived and continues to live in a racially segregated community where her family is treated badly because of their race(29.15Tr.265-66,268).

Mary Alice allowed her children to go to her sister Luvenia's and Smokey's house, even though she knew violence and drinking were prevalent(29.15Tr.262-63).

Mary Alice's family was known in the community as the "crazy Fitzgeralds" because of all the family mental illness(29.15Tr.264). There were no positive male family role models(29.15Tr.268).

Carl Gill's And Mark Gill's Records

Carl Gill's mental health records showed he was repeatedly hospitalized for paranoid schizophrenia(29.15Ex.3 at 602-890;29.15Ex.4 at 891-1182). His paranoid schizophrenia was characterized by auditory and visual hallucinations, including command hallucinations(29.15Ex.3 at 652;29.15Ex.4 at 1039). Carl's mental health problems were manifested as follows: (1) an ability to read other people's minds and to implant his thoughts in their minds(29.15Ex.3 at 607); (2) court ordered psychiatric

admissions(29.15Ex.3 at 609,653); (3) delusions that included believing he is the fifth angel sent from God who hears God's voice(29.15Ex.3 at 622,636), has "666" carved into his thigh to protect him(29.15Ex.3 at 626) and has "777" on his wrist, the mark of a beast(29.15Ex.3 at 649); (4) a history of setting fires and threatening to set fires as well as hearing voices to burn down churches(29.15Ex.3 at 628-29,646-47;29.15Ex.4 at 1047); and (5) a history of violent behavior that included an attack on Gill with a pitchfork(29.15Ex.4 at 1040). Carl was subdued with rubber bullets in a police standoff(29.15Ex.6 at 1964-65).

Gill's medical records show he received hospital treatment for stab wounds Carl inflicted with a pitchfork and a knife(29.15Ex.2 at 518).

Other Family Records

Alene Fitgerald was Mary Alice's mother(29.15Ex.84 at 2). Mary Alice had Fitzgerald siblings named Alfonzo (Alphonso), Eddie, and Luvenia(29.15Ex.84 at 2-3).

There were records of Fitzgerald family members for significant mental illnesses: Alene – schizophrenia(29.15Ex.9 at 3096;29.15Ex.10 at 3179-80), Alfonzo – schizophrenia and PTSD(29.15Ex.9 at 3062,3079-83,3096,3101), and Eddie – schizophrenia characterized by hallucinations(29.15Ex.10 at 3699-70,3703;29.15Ex.12 at 3933-34,3939). Luvenia Fitgerald had a history of auditory hallucinations(29.15Ex.6 at 1797). Carl's records showed he had three schizophrenic uncles(29.15Ex.10 at 3618).

Gary Riley

Gary Riley coached Gill in Little League for three years(29.15Tr.338-39). Riley recognized that Gill came from a dysfunctional family(29.15Tr.341-42). Gill never had spending money when the teams traveled and Riley had to provide that for Gill(29.15Tr.350). Because Gill's mother never took Gill to and from practice, Riley drove him(29.15Tr.351).

Riley had a son who was three years younger than Gill and Gill was like a big brother to him(29.15Tr.351-52,361). Riley had Gill over to his house so that his son and Gill could play(29.15Tr.352). Riley totally trusted Gill with his son and sometimes left them alone when he had to leave to do things(29.15Tr.352). Riley, who is white, described how racially segregated and divided Portageville was for Gill growing-up(29.15Tr.354-56). Riley thought so highly of Gill that he has taken vacation days to visit Gill during his incarceration(29.15Tr.357-58).

Sean Goliday

Sean Goliday, an investigator, compiled a few records intended for possible mitigation, but Gill's case did not have a mitigation specialist assigned to it(29.15Ex.96 at 46-48,87;29.15Ex.15 at 5143-47).

Catherine Luebbering

Catherine Luebbering is a Public Defender mitigation specialist(29.15Tr.389-90). When Luebbering obtained Gill's trial file, it contained few records about Gill and his family to be used for mitigation and she obtained many more records(29.15Tr.400;29.15Ex.88;29.15Ex.96 at46-48;29.15Ex.15 at 5143-47).

Luebbering conducted many interviews with many potential mitigation witnesses(29.15Tr.395-99;29.15Ex.87).

Luebbering used all the information she gathered to create a timeline of significant events relating to Gill(29.15Tr.407-10;29.15Ex.89). When all the timeline information is considered collectively, it contains substantial mitigating value(29.15Tr.411-14).

An example is Gill's maternal uncle Alfonzo Fitzgerald's educational records(29.15Tr.411-13;29.15Ex.89 at1). Those records showed Alfonzo was educable mentally retarded(29.15Tr.412). There were like records for other family members showing cognitive deficits(29.15Tr.412-13). Alfonzo also had a psychotic disorder and drug and alcohol addictions(29.15Tr.413-14). All the information relating to Alfonzo's impairments was particularly relevant to Gill because Gill viewed Alfonzo as a role model growing-up(29.15Tr.413-14). Gill's growing-up with Alfonzo as a role model had to negatively impact Gill's psychological and emotional development(29.15Tr.413-14).

Counsel Kenyon And Turlington

Kenyon indicated that in preparing a penalty phase it is necessary to thoroughly investigate every aspect of a client's background(29.15Tr.116). A mitigation specialist was not assigned to Gill's case(29.15Tr.181-84,281).

Turlington noted that a mitigation specialist does more than just bring counsel evidence(29.15Tr.331). A mitigation specialist's role is to compile a comprehensive background on the defendant to help explain how events in his background impacted

his adult behavior(29.15Tr.331). Mitigation experts have specialized training in how to compile that information(29.15Tr.331-32).

B. Trial Evidence

Mary Alice

In penalty phase, Mary Alice testified that she had four children, all had different fathers, and Gill's father died when Gill was two(T.Tr.1228-30). Lula was married to Gill's father(T.Tr.1237). Lula lived with Mary Alice and her children and was like the children's grandmother(T.Tr.1236-37).

There was a history of family mental illness and her son Carl is schizophrenic(T.Tr.1233-34).

Gill was taught right from wrong and Mary Alice could not believe that Gill had strayed so far from her teachings(T.Tr.1240-41).

On cross-examination, Mary Alice testified that she raised her children in a clean home, made sure they had clothing, and never had the same meal twice in a week(T.Tr.1242). She made sure that they went to church(T.Tr.1242). Her daughter Lisa has two college degrees(T.Tr.1244).

Teachers And Coaches

Teachers and high school coaches Jim Bidwell, Dick Atwell, and Patricia and James McKay described Gill as someone who got along with people at school and in his sports(T.Tr.1248-51,1298-99,1371-74,1383-84).

Gill's Siblings

Carl testified Gill was generous to family(T.Tr.1254 playing Trial Ex.L).

Gill's younger sister, Lori recounted Gill looked out for her(T.Tr.1255-57). Gill was never in trouble and was a church usher(T.Tr.1258). Their mother disciplined them using objects and never told them that she loved them(T.Tr.1259,1263). Growing-up the family was poor(T.Tr.1262).

Gill's Wife's Family

Gill's stepdaughter, Gabby, testified Gill was good to her(Tr.1272-74).

Mary Kinder is Gill's wife Katina's mother(T.Tr.1277-78). Gill was always respectful and considerate towards Mary(T.Tr.1282-84). Gill treated his step-daughters and daughter well(T.Tr.1284-85).

On cross-examination, the prosecutor asserted that Katina had Gill arrested for assaulting her in June, 2002, but Mary was unaware of any such events(T.Tr.1291).

Wanda Draper

Wanda Draper has a doctorate in human development(T.Tr.1303-04). She is an educator, not a practioner(T.Tr.1303-04).

Draper did not find that Gill had any mental health issues(T.Tr.1310).

Gill grew-up in a disintegrated family(T.Tr.1312-13). Gill was sexually molested and felt shame(T.Tr.1319-20). Gill tried to compensate by focusing on athletics(T.Tr.1322-23). Gill had an attachment disorder and he was unable to bond(T.Tr.1324-25). Gill's mother was neglectful and abusive and his grandmother was cruel to him(T.Tr.1325-26).

On cross-examination, it was established that Draper does not possess any psychological diagnostic or treatment license(T.Tr.1336).

Jail Guards

Three New Madrid County Jail personnel testified that Gill was a good inmate(T.Tr.1339-44,1348-49,1366-69).

C. A.G.'s Findings

Lay Witnesses

The findings stated that Derek Fitzgerald's testimony about Gill's dysfunctional family was not significantly different from what the jury heard(29.15L.F.518). Derek's testimony was inconsistent and not credible because he testified that Gill reported Frazier's sexual abuse to him when Gill was 14 whereas Derek told Alfonso that Gill was 12 when Gill told him about Frazier(29.15L.F.518 relying on Alfonso's 29.15Ex.83[sic] p.5).

According to the A.G.'s findings, Derek laughed inappropriately when he testified about Frasier's actions(29.15L.F.518). Derek also found some of Gill's conduct amusing so that Derek's testimony would not have been helpful(29.15L.F.518).

Derek's testimony that Gill got '"meaner"' as a teenager would not have been helpful(29.15L.F.518). Derek also testified that he had not been in touch with Gill since Gill was in the Navy(29.15L.F.518).

The findings stated it was "obvious" that Mary Alice "was coached" to reveal her '"insights"' into her past(29.15L.F.524). Her 29.15 testimony was not significantly different from her trial testimony(29.15L.F.524). Mary Alice "is very

unsympathetic as a witness" and she offered "nothing that a juror would consider as mitigating"(29.15L.F.524).

The findings also asserted that Gary Riley's testimony would not have altered the result and he testified that Gill had told him that he was involved in Lape's death because of financial motivation(29.15L.F.527).

All the 29.15 lay witnesses' testimony was cumulative to trial evidence(29.15L.F.540-41).

Mitigation Specialist Findings

The findings stated that Goliday gathered a great deal of information that trial counsel used(29.15L.F.517).

The findings stated that Catherine Luebbering is a '"mitigation specialist"' who compiled many records(29.15L.F.528). The A.G's findings continue: "it is difficult to imagine why time, money, and energy would be spent on much of this material." (29.15L.F.528). The records of Gill's relatives did not offer any relevant information and "no one" would ever reasonably expect those records to produce relevant or helpful information(29.15L.F.528). Luebbering's explanation for why the documents were relevant was unpersuasive(29.15L.F.529).

The findings faulted Alfonso for misspeaking when she got "wrong" the "details" of how old Gill's father was when Gill was born(29.15L.F.518-19). *See* Point IV. Alfonso was "rambling and very difficult to comprehend or understand"(29.15L.F.519). It was not clear why what Alfonso had to say was important(29.15L.F.519). Alfonso did not offer "any compelling information that any

reasonable jury would see as mitigating or otherwise relevant"(29.15L.F.519). The law does not require a mitigation expert be hired(29.15L.F.519). Alfonso was not a mitigation expert and she only related hearsay statements from Gill's family(29.15L.F.519). "For a trained social worker, Ms. Alfonso seemed to enjoy using colorful and vulgar language freely without consideration as to the impact her glee at word choices might have on the listener"(29.15L.F.519). What Alfonso had to say was not significantly different from other defense witnesses(29.15L.F.520). Alfonso testified that the military is an "alien culture"(29.15L.F.519). Alfonso did not provide testimony that would have made the outcome different(29.15L.F.541).

D. <u>Counsel Was Ineffective</u>

The jury never learned about the degree of familial dysfunction Gill was raised in and the seriousness of the abuse he experienced. Instead, the jury was left with an image of Gill as someone who had gone astray from the values of his hardworking mother, Mary Alice. The jury never learned accurate information because counsel failed to uncover these circumstances with reasonable efforts.

This Court should give no deference to the A.G.'s findings for the reasons discussed in Point IV.

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*,539U.S.510,524-25(2003); *Williams v. Taylor*,529U.S.362,395-96(2000). Failing to interview witnesses relates to preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). Lack of diligent investigation is not protected by a presumption in favor of counsel

and cannot be justified as strategy. *Id*.1304. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994).

In *Wiggins v. Smith*,539U.S.510,516-17,526(2003), counsel was ineffective for putting on a "halfhearted mitigation case" that included failing to present social history a postconviction forensic social worker uncovered from such sources as medical and school records about the abuse the defendant endured. Counsels' social history investigation was limited to a psychologist's testing and PSI and social service records. *Id*.523-24.

What happened in *Wiggins* happened here. Counsel did not acquire all the compelling mitigation information that could have been presented, at least in part, because they did not have a mitigation specialist to acquire and help integrate that information into a comprehensive and cohesive mitigation case. Gill's counsel normally rely on a mitigation specialist to perform that role, but Gill's case had none(29.15Tr.181-84,281,331-32). Gill's trial file had few mitigation records, but the postconviction investigation produced many more records that allowed Luebbering to compile a timeline of significant events in Gill's life(29.15Tr.400,407-10;29.15Ex.88;29.15Ex.96 at46-48;29.15Ex.15 at 5143-47;29.15Ex.89). Illustrative of the value of Luebbering's efforts was the information she uncovered that Gill's role model growing-up was his uncle Alfonzo who was educable mentally retarded and suffered from a psychotic disorder with drug and alcohol addiction(29.15Tr.412-14).

The A.G.'s finding's mock Luebbering and her efforts, referring to her as a mitigation specialist in quotation marks while commenting "it is difficult to imagine

why time, money, and energy would be spent on much of this material." (29.15L.F.528). In *Worthington v. Roper*,2009WL878704 *6-*24(E.D.,Mo.2009) the District Court granted Worthington penalty phase relief because properly prepared experts were not presented. The mitigating evidence that was absent involved Worthington's social and medical history records documenting his physical, emotional, and sexual abuse and mental illness. *Id*.*6-*24. The materials that the A.G. mocks Luebbering for collecting are the same kinds and volume of materials that required granting Worthington relief. *Id*.*6-*24 and 29.15Tr.400;29.15Ex.88;29.15Ex.96 at46-48;29.15Ex.15 at 5143-47).

Derek Fitzgerald had firsthand knowledge of how dysfunctional Gill's family was and the severity of the abuse he endured(29.15Tr.9-10). Derek was able to recount the abusive names and language Mary Alice directed at Gill and his siblings(29.15Tr.16-17,19). Derek described the objects that Mary Alice used to beat her children(29.15Tr.19). Derek was able to explain that Gill's mother facilitated Fraser's sexually abusing him because she benefited financially(29.15Tr.27). Derek provided a detailed account of the abuse that the jury never heard.

It is irrelevant that Derek had not had contact with Gill since Gill was in the Navy(29.15L.F.518) because Derek was able to provide firsthand details of the childhood abuse Gill sustained. Derek was able to provide valuable mitigating evidence because of his knowledge of Gill's childhood experiences. *Cf. Hutchison v. State*, 150S.W.3d292,305(Mo.banc2004)(defendant's psychiatric treatment history that was remote in terms of time of offense was relevant).

In *Hutchison*, even though counsel called a psychologist and called Hutchison's mother to testify about his learning disability and special education, counsel was ineffective for failing to investigate and present records and additional expert testimony. *Hutchison*,150S.W.3d at 304-05. The records would have shown Hutchison's troubled childhood, mental health problems, history of sexual abuse, and learning disabilities. *Id*.304. The motion court found counsel were not ineffective in failing to present the records because they contained some harmful information. *Id*.304 The jury, however, had already heard much of the harmful information. *Id*.304. Even assuming some information was harmful, "[f]oregoing mitigation because it contains something harmful is not reasonable when its prejudicial effect may be outweighed by the mitigating value." *Id*.305. *See also, Williams v. Taylor*,529U.S. at 395-96(counsel ineffective in failing to present severe abuse evidence and defendant's limited mental capabilities even where doing so would have resulted in harmful evidence being introduced because favorable outweighed harmful).

Derek explained that he felt the meanness that Gill displayed was caused by Gill's dysfunctional family and sexual abuse Gill suffered, which has its own mitigating value(29.15Tr.30-31). Even if Derek had anything harmful to say, his testimony's overall mitigating value outweighed that harm. *See Hutchison* and *Williams v. Taylor*.

In *Hutchison*, counsel presented cursory testimony from his parents that was not a complete presentation of his family background. *Hutchison*,150S.W.3d at 305.

The 29.15 court ruled that Hutchison's parents and other relatives' testimony was cumulative to what was presented at trial. *Id.*305. This Court rejected that ruling, because Hutchison's mother and father only testified briefly at trial, there was not detailed trial evidence about Hutchison having been sexually abused, his mental deficits, and his family's history of mental illness and substance abuse. *Id.*305. The same is true as to all the matters presented here and especially so as to Gill's mother, Mary Alice.

Mary Alice did not provide trial testimony about her having abused Gill or having been abused herself. It was important for the jury to hear that Mary Alice was prostituted out as a child and cursed at by her mother because that information provided a context for the abuse she inflicted on Gill(29.15Tr.215-16,219). Moreover, not only was it critical for the jury to hear about the abuse Mary Alice inflicted on Gill, but also the abuse others inflicted on him that she sanctioned. The abuse Mary Alice inflicted on Gill included abusive language and striking him with objects(29.15Tr.248). Mary Alice also provided evidence about the drunken, violent environment Gill experienced when she lived with Criswell(29.15Tr.251,261-62). Mary Alice was able to explain that she knowingly enabled Fraser to sexually abuse Gill because she benefited financially(29.15Tr.257-60). She also testified that she knowingly exposed Gill to violence and drinking at Luvenia's and Smokey's house(29.15Tr.262-63). Additionally, Mary Alice was able to explain the adversity Gill experienced because of Portageville's intense racial prejudice(29.15Tr.218-19,265-66,268). Further, it was critical that the jury have heard from Mary Alice that

her family, the Fitzgeralds, were known as the “crazy Fitzgeralds” because of all the family’s mental illness(29.15Tr.264).

Hearing this evidence from Mary Alice was important because it so differs from the impression Mary Alice left with the jury. At trial, the jury heard from Mary Alice that Gill was taught right from wrong and she could not explain why he had so strayed so far from how he had been taught better(T.Tr.1240-41). On cross-examination, Swingle elicited evidence that portrayed Mary Alice as having been a mother that had provided a secure, loving, stable, God-fearing home-life where a child could reach his full potential(T.Tr.1242,1244).

That theme that Gill was raised in a stable secure environment continued when Swingle argued in his initial penalty argument that Gill deserved death because he had come from a home that had “a hard working mother” whose only fault was that she “didn’t show a lot of affection”(T.Tr.1425). Moreover, the best Gill’s counsel could muster to argue to the jury was that Mary Alice had been “slightly physically abusive” (T.Tr.1440) when in fact the 29.15 evidence showed she was highly abusive and sanctioned others being equally abusive.

Alfonso was able to provide important context to the environment that Gill was raised in. She was able to explain that Gill was an unwanted product of a one night stand involving a 21 year old woman and a man in his 70’s who had babysat her other two children(29.15Tr.53-54,60). Alfonso was able to explain with accurate precise examples the “venomous” nature of the abusive vulgar language that was commonly invoked(29.15Tr.53-55,67). Alfonso was able to explain how Mary Alice’s treatment

so negatively impacted Gill's self-esteem(29.15Tr.59,80-81). The parent mandated prostituting for financial advantage that Mary Alice endured was significant because it explained why Mary Alice sanctioned for her financial advantage Gill's being with, and as a result, being sexually abused by known pedophile Fraser(29.15Tr.54-55,75-76).

Alfonso was able to explain that within Gill's family how all of Mary Alice's children, not just Gill, have been dysfunctional adults as a result of the dysfunctional environment in which they were raised(29.15Tr.64-66,69,71). Alfonso was able to explain that the reason Gill failed in his adult life, including his brief time in the Navy, was that he was not taught problem solving and delayed gratification, but instead was taught to drink and do drugs(29.15Tr.70-73,84-85). She was also able to describe the extreme racial prejudice Gill encountered growing-up in Portageville(29.1580-81).

All of Alfonso's testimony mitigated punishment because she was able to present a cohesive and comprehensive account of the physical and emotional assaults Gill endured growing-up and linked those to the events that led up to Lape's death.

The A.G.'s findings regarding Alfonso contain gratuitous ad hominem critiques of Alfonso claiming that she "enjoy[ed] using colorful and vulgar language freely without consideration as to the impact her glee at word choices might have on the listener"(29.15L.F.519). In fact, when Alfonso utilized offensive language she apologized for having to do so, indicated that she was quoting exactly what was said to her, and declared such language to be "venomous"(29.15Tr.54-55,67). The A.G.'s

findings on Alfonso should be dismissed out of hand for the same reason the A.G.'s findings that someone other than Lape was responsible for the sexually offensive material on Lape's computer should be given no credence. *See* Point IV.

The A.G.'s findings also cast Alfonso as flippant because she purportedly "called the military an 'alien culture'"(29.15L.F.519). In fact, what Alfonso said was that the Navy, as our society at large, rightly values problem solving and delayed gratification, but it was "an alien culture" to the one in which Gill was raised that valued drinking over these skills and that difference explained why Gill failed miserably in the Navy(29.15Tr.84-85).

At trial, Gill's high school coaches and teachers recounted that Gill was a person who got along well with others(T.Tr.1248-51,1298-99,1371-74,1383-84). The ineffectual nature of that evidence was demonstrated by Swingle's initial penalty argument that Gill should not be spared death because he was a good high school football player whose coaches liked him(T.Tr.1425). None of Gill's coaches at trial shed any light on the dysfunctional life circumstances Gill dealt with daily.

In contrast, Gary Riley who coached Gill in Little League, offered insight into what Gill endured and the promise Gill displayed, despite that adversity. Riley had to drive Gill to and from practice and had to provide Gill money when the team traveled(29.15Tr.350-51). Riley recognized that Gill lacked a responsible father figure in his life(29.15Tr.341). Gill was like a big brother to Riley's son and Riley trusted Gill totally when he left his son with Gill(29.15Tr.351-52,361). Because Riley is white, he was especially credible in recounting the racial prejudice Gill encountered

growing-up in Portageville(29.15Tr.354-56). That Riley has taken vacation days to visit Gill, underscores how persuasive a witness Riley would have been(29.15Tr.357-58).

That Gill told Riley he participated in Lape's death because of financial motivation (29.15L.F.527) did not make Riley any less important because the jury already had heard that from Gill's police statement admissions(T.Tr.824-25,827-30,847). *See Hutchison, supra*. Moreover, that Gill made such statements to Riley actually would have been mitigating because it would not have been easy for Gill to make such admissions to Riley because Gill had wished that Riley had adopted him as a child(29.115Tr.358).

The mental health records for Carl Gill and other relatives would have furnished insight into the dysfunction which surrounded Gill as a child. Having to grow-up in a home with a schizophrenic sibling who experienced auditory and visual hallucinations, believed that he was the fifth angel from God who could implant his thoughts into other people's minds, had a history of setting fires, and had stabbed Gill so that Gill required hospital treatment all standing by themselves had significant mitigating value(29.15Ex.2 at 518;29.15Ex.3 at 607,622,628-29,636,646-47,652;29.15Ex.4 at 1039-40,1047). *See Hutchison, supra*. Gill's own medical records documented Carl's having stabbed Gill(29.15Ex.2 at 518). Moreover, the records for various Fitzgerald family members showed that Gill grew-up in an environment permeated with schizophrenic family which alone had mitigating

value(29.15Ex.9 at 3062,3079-83,3096,3101;29.15Ex.10 at 3179-80,3618,3699-70,3703;29.15Ex.12 at 3933-34,3939).

In *Wiggins* the Court found counsel's failure to conduct a thorough investigation that would have uncovered abuse evidence reflected only a partial mitigation case. *Wiggins*,539U.S. at 524-26,534-35. That partial case was the result of inattention and not reasoned strategic judgment and constituted ineffectiveness. *Id.*524-26,534-35. *See also, Williams v. Taylor*,529U.S.362,369,395(2000)(partial mitigation case constituted ineffectiveness). All the mitigation evidence that could have been presented demonstrates that a meager partial mitigation case was in fact presented. *See Wiggins* and *Williams v. Taylor*.

In *Simmons v. Luebbers*,299F.3d929,936-41(8thCir.2002) counsel was ineffective for failing to present penalty mitigating evidence about Simmons' background. This Court had ruled counsel's failure to present available evidence was strategic. *Id.*937. In ruling counsel was ineffective, the Eighth Circuit reasoned, "Simmons's attorneys' actions cannot be considered a product of a reasonable trial strategy because there was no justifiable reason to prevent the jury from learning about Simmons's childhood experiences." *Id.*938. The *Simmons* Court noted "a vivid description of Simmons's poverty stricken childhood, particularly the physical abuse, and the assault in Chicago, may have influenced the jury's assessment of his *moral culpability*." *Id.*939(emphasis added). The same is true here as happened in *Simmons*. The jury did not hear the details of the abusive dysfunctional environment Gill had to survive in as a child. *See Simmons*.

In evaluating counsel's failure to present evidence of a defendant's life history, courts must look at the totality of the evidence that was not presented, rather than each evidentiary item individually. *Hutchison*,150S.W.3d at 306. When all the omitted evidence is considered together, Gill was denied effective assistance of counsel. Reasonable counsel would have thoroughly investigated and presented the complete mitigating evidence available from Derek Fitgerald, Cessie Alfonso, Gary Riley, Mary Alice Gill, Gills' family's mental health records, and Gill's own medical records. *See Wiggins*, *Williams v. Taylor*, and *Hutchison*. Gill was prejudiced because there is a reasonable probability had the jury heard all the absent mitigating evidence he would have been sentenced to life. *See Hutchison.*

This Court should order a new penalty phase.

VII.

ABUSE AND FAMILY DYSFUNCTION CAUSED PTSD

The motion court clearly erred denying Gill's 29.15 motion because Gill was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel was ineffective for failing to call an expert with expertise like Dr. Cross to testify to the mitigating evidence that the abusive dysfunctional environment Gill was raised in caused him to suffer from Post-Traumatic Stress Disorder (PTSD) which was mitigating evidence that warranted a life sentence and Gill was prejudiced because had the jury heard this diagnosis in conjunction with complete evidence of his dysfunctional family background and the abuse he sustained (Point VI), he would have been sentenced to life.

The jury never learned that as a result of the dysfunctional environment and abuse Gill endured, he suffered from Post-Traumatic Stress Disorder (PTSD). Had the jury heard that Gill suffered from PTSD in conjunction with complete evidence about his dysfunctional family background and the abuse he sustained (Point VI), he would have been sentenced to life.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). The Eighth Amendment and the Fourteenth

Amendment's Due Process Clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991). "There is no crime that, by virtue of its aggravated nature standing alone, automatically warrants a punishment of death." *Taylor v State*, 262 S.W.3d231, 252(Mo. banc2008)(relying on *Woodson v. North Carolina*,428U.S.280,303(1976)).

Dr. Cross

Psychologist Dr. Cross interviewed Gill's family and reviewed records(29.15Tr.433-38).

Cross talked to Luvenia Fitzgerald and her son, Derek Fitzgerald(29.15Tr.446-47). Luvenia and Derek described the hostility and abusive environment Gill grew-up in(29.15Tr.446-47). Luvenia was married to Smokey who encouraged Mary Alice's children to drink such that Gill was drinking at Luvenia's house when he was five years old(29.15Tr.447). Gill was also exposed to Smokey's violent behavior(29.15Tr.448).

In Gill's own household, Junior Criswell was living with Mary Alice and making alcohol available to Gill when he was five years old(29.15Tr.447). By the time Gill was eight years old, he drank regularly(29.15Tr.461). Gill grew-up in a household characterized by violence(29.15Tr.455). There was much violence involving Mary Alice and Criswell that was associated with Criswell's drinking(29.15Tr.447-49). During those incidents, Gill was hit(29.15Tr.447-48). Gill and his siblings feared for their mother's and their own safety(29.15Tr.448-49).

Children between four to six years old are learning ways to regulate emotion and a sense of social inhibition(29.15Tr.461-62). Gill did not develop proper emotional regulation and social inhibition because he was drinking when he was five to eight years old(29.15Tr.462-63). Gill's family role models were alcoholic and drug addicted with low levels of social inhibition and emotional control(29.15Tr.463).

Gill was a victim of emotional, physical, and sexual abuse(29.15Tr.464). The sexual abuse Gill endured negatively impacted his sense of social inhibition(29.15Tr.463). Gill's mother failed to protect him from Fraser's sexual abuse and she facilitated it(29.15Tr.464).

Gill's failure in the military was attributable in part to drinking(29.15Tr.469-70). Gill also had difficulty following orders in the military because his athletic success had allowed him certain "privileges" other students did not get and he had the mistaken expectation those privileges would continue(29.15Tr.469-70). Gill's athletic accomplishments and his coaches served as buffers to the abuse he had sustained, but those were gone when Gill turned eighteen years old and that resulted in Gill then losing control of his life(29.15Tr.464-65,470,472,486-87).

The sheer number of mentally ill people in Gill's family impacted his perception of the appropriate and inappropriate(29.15Tr.473).

Carl stabbed Gill with a pitchfork(29.15Tr. 472). Mary Alice threw a screwdriver at Gill that imbedded in his knee(29.15Tr.473). Gill's sister Lori had an uncle who tried to rape her(29.15Tr.452).

Gill was subjected to Mary Alice's calling him names like "big head bastard" and "big head fucker"(29.15Tr.488-89). That verbal abuse negatively impacted Gill's self-image(29.15Tr.488-89).

All of the circumstances Gill experienced growing-up caused him to suffer from Post-Traumatic Stress Disorder(29.15Tr.491-92). Gill's PTSD was a product of Gill being raised in an environment that was not nurturing, observing his mother being beaten and his sister being sexually molested, being introduced to alcohol early in life, the sexual abuse he endured, and the loss of buffers like his coaches when he turned eighteen(29.15Tr.505-06,532-33).

Counsel Kenyon And Turlington

Prior counsel Berman and Estes retained Dr. Schultz(29.15Tr.188,285). Turlington would not have hired Schultz because she knows attorneys who had bad experiences with Schultz(29.15Tr.285-86,311). Kenyon and Turlington concluded Schultz had nothing useful to offer(29.15Tr.188-89,310).

A decision not to call Schultz was made after Kenyon's and Turlington's first meeting with Schultz(29.15Tr.189-90). Turlington, Kenyon, and Goliday met with Schultz two months before trial(29.15Tr.310-12). There was insufficient time prior to trial to replace Schultz(29.15Tr.190,329).

What Schultz had to say at their meeting "was the dumbest and lamest" experience Turlington ever had with an expert(29.15Tr.311). It was peculiar that Schultz thought it was mitigating that Gill did not have facial hair until he was twenty-seven years old(29.15Tr.188,310). Schultz was unable to discuss the

significance of Gill having been sexually abused, having a dysfunctional family background, and living with a schizophrenic brother(29.15Tr.311).

A continuance request was considered, but rejected because the state would have learned Schultz's opinions(29.15Tr.313). Another expert could have testified in a compelling manner about the significance of Gill having been sexually abused, living with a schizophrenic brother, and having endured abuse at home(29.15Tr.314). Cross' diagnosis that Gill suffered from PTSD would have been helpful(29.15Tr.314-15).

Dr. Draper could not give opinions or diagnoses to a reasonable degree of psychological certainty because she is neither a psychologist nor a psychiatrist(29.15Tr.189,309-10). For that reason, evidence of PTSD could not have been presented through Draper(29.15Tr.189).

Dr. Draper's Trial Testimony

Wanda Draper has a Ph.D. in human development(T.Tr.1303-04). She is an educator, not a mental health practioner(T.Tr.1303-04).

Draper found Gill did not have any documentation for any specific mental health conditions(T.Tr.1309-10).

Gill grew-up in a disintegrated family(T.Tr.1312-13). There were no normal interaction relationships with Gill's mother who was neglectful and abusive(T.Tr.1312-1313,1325-26). There were no emotional connections in Gill's family(T.Tr.1313-14). Gill was sexually molested and felt ashamed(T.Tr.1319-20). Gill tried to compensate for his circumstances by focusing on athletics and they were

a stabilizing force(T.Tr.1322-23). Gill was unable to bond with people(T.Tr.1324-25).

On cross-examination, it was established Draper does not possess any psychological diagnostic or treatment license(T.Tr.1336).

A.G.'s Findings

The A.G.'s findings stated Cross' testimony was not significantly different from Draper's testimony(29.15L.F.529). Cross has no forensic psychology training and is not a certified forensic psychologist(29.15L.F.529). Cross testified that Gill's sister Lisa declined to testify or cooperate because Gill was mean to her growing-up(29.15L.F.529). Kenyon and Turlington believed Draper was a good witness(29.15L.F.529-30).

Cross testified that his testing data was consistent with Schultz(29.15L.F.529-30). Cross revealed that his and Schultz's testing scales for Gill showed deception and invalidity(29.15L.F.530). Cross' explanation that Gill's results were attributable to drug use was implausible(29.15L.F.530).

The findings asserted that Cross provided inconsistent testimony about Gill's Navy problems(29.15L.F.530). Cross testified that Gill did not adjust well to the Navy because Gill had come to expect '"privileges,"' and therefore, was not inclined to follow orders(29.15L.F.530). Cross offered inconsistent testimony that Gill was under the control of people throughout his life, including his mother and coaches(29.15L.F.530).

According to the findings, Cross was defensive on cross-examination and was ineffectual(29.15L.F.531). It was not shown Cross would have done a better job than Draper(29.15L.F.541).

Counsel Was Ineffective For Failing To Obtain And Present PTSD Evidence

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*,539U.S.510,524-25(2003); *Williams v. Taylor*,529U.S.362,395-96(2000). Failing to interview witnesses relates to preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8th Cir.1991). Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*.1304. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994); *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003).

In *Hutchison v. State*,150S.W.3d292,304-05(Mo.banc2004), even though counsel called a psychologist and called Hutchison's mother to testify about his learning disability and special education, counsel was ineffective for failing to investigate and present records and additional expert testimony. Counsel did the same here when they failed to call an expert, like Dr. Cross, who could present a mental health diagnosis.

This Court should give no deference to the A.G.'s findings for the reasons discussed in Point IV.

Prior counsel Berman hired Schultz to evaluate Gill(29.15L.F.454;29.15Tr.188). Turlington and Kenyon entered in June 2003(T.L.F.8). The case was tried in March, 2004(T.Tr.89-92,116). Turlington would not have hired Schultz because she knew other attorneys who had bad experiences with Schultz(29.15Tr.285-86,311). Despite that knowledge, counsel waited until two months before trial after their first meeting with Schultz to decide to rule her out(29.15Tr.189-90,310-12). Schultz was not replaced then because it was too late(29.15Tr.190,329). Counsel did not request a continuance because the state would have learned Schultz's "dum[b] and lam[e]" opinions(29.15Tr.311,313).

A different expert could have provided compelling testimony about the significance of Gill's having been sexually abused, living with a schizophrenic brother, and the abuse Gill endured(29.15Tr.314). Counsel would have wanted to present the diagnosis Gill suffered from PTSD as a result of the dysfunctional, abusive environment in which he was raised(29.15Tr.314-15,505-06,532-33). Counsel knew that Draper could not provide any diagnosis because she is not a licensed psychologist or a psychiatrist(29.15Tr.189,309-10). In contrast because Cross is a psychologist, he had the expertise to provide the mitigating diagnosis that Gill suffers from PTSD resulting from the dysfunctional abusive environment he was raised in(29.15Tr.505-06,532-33).

Reasonably competent counsel who would not have hired Schultz at the outset, because of a history of problems with other attorneys, would have sought a different competent expert as soon as they entered in June, 2003, rather than waiting until two

months before trial to declare Schultz would not be a witness. *See Wiggins* and *Kenley*. Alternatively, reasonable counsel, who elected to wait until they met with Schultz to rule her out, would have had that meeting more than two months before trial to allow adequate time to obtain a substitute. Moreover, reasonable counsel who made the determination two months before trial that Schultz was not a viable witness had sufficient time to obtain a substitute expert and would have located someone such as Dr. Cross. *See Kenley*. Lastly, reasonable counsel who felt that they could not obtain a substitute expert, after determining Schultz was not a viable witness, would have requested a continuance. *See McCarter* and *Butler*.

Counsel's failure to request a continuance because respondent would learn Schultz's opinions was not a reasonable decision. *See McCarter* and *Butler*. Assuming that respondent would have learned Schultz's opinions, the only thing it would have learned was that Schultz was not being called because she held "dum[b] and lam[e]" opinions, about such non-factors as when Gill developed facial hair, and not because Schultz had objectively harmful opinions.

Gill was prejudiced because Draper could not provide any diagnosis that Gill suffered from PTSD(29.15Tr.189,309-10). *See Hutchison*. Moreover, Gill was prejudiced because even though Draper was unqualified to express a diagnostic opinion, she told the jury that Gill did not have any documentation for any specific mental health conditions when he in fact suffered from PTSD(T.Tr.1309-10). Further, Gill was prejudiced as demonstrated by Swingle's initial penalty argument where he argued:

> Are we going to save the death penalty for someone that Wanda Draper does not feel sorry for? Wanda Draper took the stand to tell you, oh, but his familie[']s a disintegrated family. Are we going to save the death penalty just to [sic] people that come from families that aren't disintegrated?

(T.Tr.1425-26). Without the PTSD evidence, Swingle was able to minimize the significance the jury should attach to the dysfunctional abusive environment in which Gill was raised. Further, Gill was prejudiced because the jury was deprived of the opportunity to consider the mitigating evidence that accurately portrayed the abusive dysfunctional environment Gill was raised (Point VI) in conjunction with Dr. Cross' PTSD finding. *See Hutchison*,150S.W.3d at 306(in evaluating counsel's failure to present evidence of defendant's life history, courts must look at the totality of evidence not presented, rather than each evidentiary item individually).

Cross is a licensed psychologist qualified to render the opinion Gill suffers from PTSD, and therefore, it is irrelevant that he is not a forensic psychologist(29.L.F.529;29.15Tr.425-31;29.15Ex.81).

Cross' testimony was in fact significantly different from Draper's testimony (29.15L.F.529) because, unlike Draper, he found a mental illness which he diagnosed as PTSD. The issue is not whether Cross would have done a better job than Draper (29.15L.F.541), rather Cross had a mental health diagnosis to offer that Draper was not qualified to render while Draper told the jury that Gill did not have any documentation for any specific mental health conditions, when he in fact suffered from PTSD(T.Tr.1309-10).

Evidence from Cross that Gill's sister Lisa had reported Gill had been mean to her (29.15L.F.529) does not excuse counsel's failure to call Cross because "[f]oregoing mitigation because it contains something harmful is not reasonable when its prejudicial effect may be outweighed by the mitigating value." *Hutchison v. State*,150S.W.3d at 305. *See also, Williams v. Taylor*,529U.S. at 395-96(counsel ineffective in failing to present severe abuse evidence and defendant's limited mental capabilities even where doing so would have resulted in harmful evidence being introduced because favorable outweighed harmful).

That counsel believed Draper was a good witness (29.15l.F.529-30), does not excuse counsel's failure to call someone such as Cross to state his finding Gill suffered from PTSD. Draper was not qualified to provide psychological diagnoses(29.15Tr.189,309-10). Moreover, failing to have someone like Cross state his PTSD finding was prejudicial because Draper told the jury that Gill did not have any documentation for any specific mental health conditions when he in fact suffered from PTSD(T.Tr.1309-10).

Cross was not inconsistent in his testimony about Gill's Navy experience. He explained that because of Gill's athletic success he had received "privileges" other students did not get and he had the mistaken expectation that those privileges would continue in the military(29.15Tr.469-70).

Cross did not provide inconsistent testimony about the role of Gill's coaches. Cross testified that Gill's coaches served as buffers to the horrific environment in

which he was raised and when those buffers were no longer there, when Gill turned eighteen, his life then catapulted out of control(29.15Tr.464-65,470,472,486-87).

In *Taylor v. State*,262S.W.3d231,242(Mo.banc2008), this Court found it was clear error to adopt the state's "self-serving" findings. The findings about Cross' credibility on his explanation for test scale results done on Gill and that Cross was defensive on the A.G.'s cross-examination are the type of "self-serving" findings that should be rejected for the reasons discussed in Point IV.

The jury did not learn that Gill suffered from PTSD as a result of the dysfunctional, abusive environment in which he was raised. When the totality of evidence not presented is considered, rather than each evidentiary item individually, this Court should conclude that counsel was ineffective and that Gill was prejudiced. *See Hutchison*.

A new penalty phase is required.

VIII.

LETHAL INJECTION METHOD

The motion court clearly erred denying Gill's 29.15 motion because that ruling denied Gill his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that Missouri's lethal injection process violates the cruel and unusual punishments prohibition because respondent cannot conduct executions that do not cause unnecessary and wanton infliction of pain and cannot conduct them without a substantial risk of maladministration.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993).

The Eighth Amendment and the Fourteenth Amendment's Due Process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991). Under the Eighth Amendment, a punishment "must not involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia*,428U.S.153,173(1976)(opinion of Stewart, Powell, and Stevens, J.J.). *See, also*, *Louisiana v. Resweber*,329U.S.459,463(1947)("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence"). A chosen method of execution must minimize the risk of unnecessary pain, violence, and mutilation. *Glass v. Louisiana*,471U.S.1080,1086(1985)(Brennan, J. dissenting from certiorari denied). A punishment violates the Eighth Amendment if

it causes torture or lingering death. *Id*.1086(citing *In re Kemmler*,136U.S.436,447(1890)).

The amended motion alleged that Missouri's lethal injection process exposes a person who is to be executed to substantial and serious risks of prolonged and extreme infliction of pain(29.15L.F.328). The process Missouri follows exposes the person who is to be executed to significant risks that the lethal injection will be incompetently performed(29.15L.F.328). This claim was denied because Gill did not show there is a problem with administering the death penalty by lethal injection(29.15L.F.542-43).

In *Taylor v. Crawford*,487F.3d1072,1083(8thCir.2007), the Eighth Circuit ruled that the state's written execution protocol does not violate the Eighth Amendment. However, that decision did not address the continuing problem of the Department of Corrections (DOC) implementing its protocol utilizing personnel who are incompetent, inadequately trained, and who suffer from disqualifying characteristics. An Eighth Amendment violation can be established if there is a "substantial risk" of "maladministration" of the state's intended execution protocol. *Baze v. Rees*,128S.Ct.1520,1526,1530-33(2008). The DOC's history of utilizing personnel who are incompetent, inadequately trained, and suffer from disqualifying characteristics is the subject of *Clemons v. Crawford*, No. 08-2895 (8th Circuit)(appeal pending). The state's history of utilizing incompetent personnel includes a dyslexic doctor (John Doe #1) who has been barred from practicing medicine at two Missouri hospitals. *See Clemons v. Crawford*, No. 08-2895 Appellant's Opening brief at 34-

35. That same doctor has given false testimony about his history of mistakes and disciplinary action taken against him, has an extensive history of medical malpractice claims against him, and has been reprimanded for professional misconduct. *See* St. Louis Post Dispatch July 30, 2006: Behind the Mask Of The Execution Doctor, at http://www.stltoday.com/stltoday/news/special/srlinks.nsf/story/ECAF42F10274CF79862573B5007E238C?OpenDocument. The DOC also has allowed John Doe #2, who has a criminal history of violent threats and aggravated stalking, to assist John Doe #1. *See Clemons v. Crawford*, No. 08-2895 Appellant's Opening brief at 49.

The motion court should have concluded that DOC's implementation of its execution protocol violates the Eighth Amendment. *See Resweber*, *Glass*, and *Baze*. This Court should vacate Gill's death sentence and impose life without parole.

CONCLUSION

For all the reasons discussed in Points I, II, III, and V, this Court should order new guilt and penalty phases. As discussed in Points VI and VII, a new penalty phase is required. As discussed in Point IV, this Court should remand for a new 29.15 hearing, before a judge other than Judge Price, to exercise independent judgment and not just sign the Attorney General's findings. Lastly, as discussed in Point VIII, life without parole should be imposed.

Respectfully submitted,

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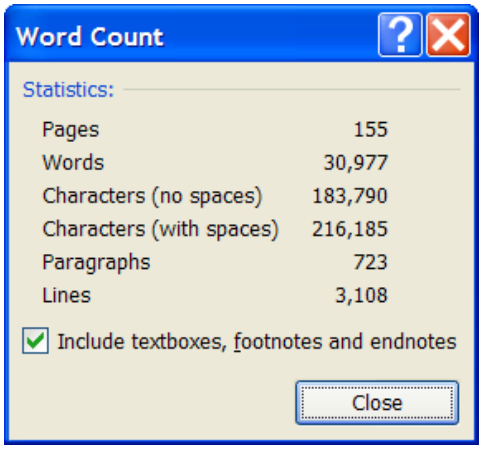
CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, 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 _____ 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 May, 2009. 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 with brief appendix and a floppy disk containing a copy of this brief were hand-delivered this ____ day of May, 2009, to Office of the Missouri Attorney General, 221 West High St. Jefferson City, Missouri 65101.

_____
William J. Swift

APPENDIX

IN THE
MISSOURI SUPREME COURT

MARK GILL,	**)**	
	)	
Appellant,	**)**	
	)	
vs.	**)**	**No. SC 89831**
	)	
STATE OF MISSOURI,	**)**	
	)	
Respondent.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF NEW MADRID COUNTY, MISSOURI
THIRTY-FOURTH JUDICIAL CIRCUIT
THE HONORABLE J. MAX PRICE, JUDGE

APPELLANT'S APPENDIX TO BRIEF

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APPENDIX TO BRIEF CONTENTS