IN THE
MISSOURI SUPREME COURT

MICHAEL TAYLOR,	**)**	
	)	
Appellant,	**)**	
	)	
vs.	**)**	**No. SC 88063**
	)	
STATE OF MISSOURI,	**)**	
	)	
Respondent.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE LUCY D. RAUCH, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

***RULES*:**

***OTHER*:**

JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

Michael Taylor killed his Potosi Correctional Center cellmate, Shackrein Thomas, and was sentenced to death(Tr.811,822,883-84).[1] When Michael killed his cellmate, he was serving life without parole at Potosi Correctional Center for his murder conviction arising out of Christine Smetzer's 1995 death(Tr.295-96). The Thomas case is the subject of this appeal. The only issue in the Thomas case was whether Michael was not guilty by reason of mental disease or defect or faking/malingering mental illness(Tr.1452-53). In rebuttal, respondent called Potosi snitch inmate Perschbacher to testify that inmate Jerome White-Bey had advised Michael in "kites/cadillacs" to play "the nut role" to beat his case(Tr.1267,1269-70).

A. Perschbacher Pretrial

On November 12, 2002, counsel moved for disclosure of Perschbacher credibility information(T.L.F.214-18). The motion sought (1) prior instances where Perschbacher provided information to law enforcement(T.L.F.214-16); and (2) any favorable actions taken on behalf of Perschbacher(T.L.F.217). Inmate Miller's deposition testimony included he had witnessed Perschbacher throwing human excrement at other inmates and scamming them(T.L.F.215).

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[1] The record is as follows: (1) Tr. – trial transcript; (2) T.L.F. – trial legal file; (3) 11/12/02Mot.Tr. –transcript hearing from that date; (4) 29.15Tr. – 29.15 transcript; (5) 29.15L.F. – 29.15 legal file; (6) Ex. – 29.15 exhibits.

Perschbacher's Corrections file was sought because it might be relevant to Perschbacher's reputation for truthfulness, credibility, and whether Perschbacher had a history of seeking to provide information for favorable treatment(T.L.F.214-18;11/12/02Mot.Tr.38,44-45). The records might indicate respondent had brought Perschbacher's cooperation to prison or parole officials' attention or had gotten other special consideration(T.L.F.215). They might be relevant to Perschbacher's competency, credibility, and believability(T.L.F.215). Ahsens opposed disclosing them(11/12/02Mot.Tr.45-46). [2]

At the November 12th hearing, counsel noted Perschbacher had written a disclosed letter to Ahsens'Attorney General Investigator Dresselhaus offering to help on numerous matters including "the meth business in Jefferson County"(11/12/02Mot.Tr.37-38;T.L.F.216). Ahsens represented Perschbacher had "no deal"(11/12/02Mot.Tr.41).

Counsel urged Perschbacher's file might contain racial prejudice evidence since Michael is African-American and Perschbacher is white(11/12/02Mot.Tr.46). Ahsens argued against the racial animus motive: "the victim is black, the defendant is

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[2] Assistant Attorney General Ahsens and Washington County Prosecutor Rupp represented respondent. Ahsens has since retired. *See* Jefferson City News Tribune http://www.newstribune.com/articles/2007/02/19/community/315commonnews05.prt. Public Defenders Wolfrum and Turlington represented Michael.

black. So, I'm having a hard time understanding why he has a particular bias against one black man over another…."(11/12/02Mot.Tr.46).

Counsel also urged Perschbacher's Corrections file should be disclosed because if during Perschbacher's deposition he denied matters that his Corrections file contradicted, then counsel would not know valuable impeachment(11/12/02Mot.Tr.47). The motion for Perschbacher's entire Corrections file was denied(11/12/02Mot.Tr.47-48). The court required respondent disclose anything in Perschbacher's Corrections file relating to requests for favorable treatment, deals, or references to Michael's case(11/12/02Mot.Tr.47-48,51).

Perschbacher was deposed December 19, 2002(Ex.49-pg.1)

Trial began January 13, 2003, and counsel moved for additional Perschbacher disclosure(T.L.F.263-67;Tr.11). Perschbacher's psychiatric records were sought because pending St. Louis County prosecution documents showed Perschbacher had escaped from St. Anthony's Hospital's psychiatric ward and was re-hospitalized(T.L.F.264-65). Those were relevant to demonstrating Perschbacher was an incompetent witness(T.L.F.265). Disclosure was denied(Tr.19-21).

Perschbacher's Corrections' file was sought again because at his deposition Perschbacher represented he had provided respondent useful information in multiple cases(T.L.F.266). If Perschbacher's file showed he had given past false information, it was relevant to credibility(T.L.F.266). Perschbacher's Corrections' file was

relevant to credibility because he had testified he had hundreds of conduct violations(T.L.F.266;Tr.23;Ex.49-pg.134).

Perschbacher's Corrections records were ordered to be produced the first day of trial and they were two days later(T.L.F.271,278;Tr.23-24,736-37).

After lunch on January 15, 2003, counsel noted Perschbacher's entire Corrections' file had not been produced(Tr.854-55). Missing were parts relating to Perschbacher's prison conduct(Tr.855). Counsel was particularly interested in violations for false statements to correctional officers(Tr.856). The court recognized that could relate to Perschbacher having made false accusations against other inmates(Tr.856). Ahsens represented that Perschbacher had testified he had no such violations(Tr.856). It took a second order to get all Perschbacher's file(29.15Tr.569-70;Tr.854-55).

The first day of trial, Ahsens represented he had turned over to the defense **"everything"** he had on Perschbacher(Tr.15)(emphasis added).

B. Counsel's Opening Statement

Michael had mentally retarded range verbal test scores(Tr.779). The jury would hear Michael's mental illness manifested when he was a very young child(Tr.780-81). Michael heard his Father of Darkness' voice telling him to hurt himself and kill his cellmate(Tr.782-86). Michael's Biggs State Psychiatric Hospital treating doctors diagnosed him as paranoid schizophrenic(Tr.786-88). Michael should be found not guilty by reason of insanity(Tr.789).

C. Respondent's Case-in-Chief

On October 3, 1999, Potosi officer Muse was doing count(Tr.799,802). Potosi is a maximum security prison(Tr.752-53). Michael and Thomas were cellmates(Tr.974). The B 28 cell panic button went off(Tr.802-05). "B" cells were administrative segregation(Tr.794). Muse asked Michael several times why he pushed the button, but Michael did not answer(Tr.806-08). Eventually, Michael told Muse that his Father told him to do it(Tr.811,822). Thomas died from lack of oxygen due to neck compression(Tr.883-84,930).

Potosi investigator King interrogated Michael on October 4th(Tr.958,971-73,976). Michael told King his Father from the Dark Side told Michael to send Thomas to Him(Tr.974-76). Michael admitted choking Thomas because his Father made him(Tr.974-75). Michael told King he had been giving Thomas his psychiatric medicines(Tr.985-86). Michael had a self-inflicted swollen abrasion because his Father told him to(Tr.987-88). Michael referred to his body's burn marks as the Dark Side's different levels(Tr.988). Michael and Thomas got along and had had consensual sex(Tr.988-89).

D. Defense Guilt Phase

1. Rabun

Psychiatrist Rabun evaluated Michael for responsibility and reviewed records(Tr.1013-14).

Michael was born March 13, 1979(Ex.38). Michael's father's family had a psychotic illnesses genetic predisposition because several were bipolar or schizophrenic(Tr.1015-16). Between two and six, Michael's father physically abused him, including hitting Michael with a tape wrapped coat hanger for normal, age appropriate behaviors(Tr.1018). Michael witnessed his father physically abuse his mother, Vera Jackson(Tr.1018).

When Michael was eight and on the school bus, several boys forced him to perform oral sex and one urinated in his mouth(Tr.1020).

When Michael was twelve, he received residential treatment at Hawthorn Children's Psychiatric Hospital because he heard voices telling him to kill himself(Tr.1023-24).

Michael's Potosi psychiatric records reflected that prior to killing Thomas, and as recently as August, 1999, that he was having Father of Darkness auditory hallucinations(Tr.1030-31). The voices commanded Michael to harm himself or others(Tr.1042). Michael has a delusional hallucination belief system, that requires he move forward in seven levels to get closer to his Father of Darkness(Tr.1042). Cigarette burns on Michael's arms are level keys(Tr.1042-43).

The day Michael killed Thomas, his Father of Darkness told him that '"It's time,"' which Michael understood was a command to kill Thomas(Tr.1035-37,1039). Michael told Thomas that he was going to send Thomas to his Father(Tr.1040). Michael also heard Tashua's voice(Tr.1036).

After killing Thomas, Michael was hospitalized eight months, from November, 1999 through July, 2000, at Fulton State Hospital's Biggs psychiatric unit(Tr.1044-46). Potosi's psychologist requested Michael's transfer because of head-banging, suicidal behavior(Tr.1044-45).

Michael's Biggs' diagnosis included paranoid schizophrenia, but not malingering(Tr.1050). Michael engaged in self-mutilating behavior there requiring restraints(Tr.1050). A variety of commonly prescribed anti-psychotics were tried unsuccessfully(Tr.1052). Clozaril, an anti-psychotic of last resort, was used despite its potentially life threatening side effects(Tr.1052-53).

Michael told Rabun that he does not need anti-psychotics because he is not mentally ill(Tr.1053-54). Michael was not malingering because he was not feigning psychotic symptoms(Tr.1037-39,1055). Michael's entire treatment history established non-malingering(Tr.1071-73). Schizophrenics often have an attenuated pain response, which explains why Michael can burn himself and head bang(Tr.1068-69).

When Michael killed Thomas, he suffered from schizophrenia and lacked appreciation for the nature, quality, or wrongfulness of his conduct(Tr.1075-76).

Respondent elicited that Drs. Vlach and Scott had found Michael was malingering(Tr.1079). Those who treated Michael, while he was held in jail for the prior homicide, found malingering(Tr.1086). Rabun conceded having a murder charge could be incentive to malinger(Tr.1091).

2. Eikermann

Psychiatrist Eikermann treated Michael at Biggs and later(Tr.1124-25). Eikermann was called to address malingering(Tr.1114-15,1118). Michael was not malingering because Eikermann would not treat someone with Clozaril unless they were paranoid schizophrenic and alternative medications had failed(Tr.1128,1134). On cross-examination, Eikermann indicated that he had never seen other doctors' malingering findings(Tr.1138).

3. Selbert

Potosi's Chief of Mental Health in October, 1999, Selbert, arranged Michael's Biggs transfer(Tr.1142,1145,1149-50). Selbert only recounted having conversations with Michael talking about his Father of Darkness(Tr.1148-49).

4. Harry

Psychiatrist Harry covered Michael's Biggs paranoid schizophrenia treatment for Michael's attending psychiatrist(Tr.1151,1159,1161-63).

5. Syed

Psychiatrist Syed evaluated Michael twice in May-June, 1998 at Fulton Reception and Diagnostic when Michael was new to Corrections(Tr.1167;Ex.33-pgs.5-6) Michael had mildly retarded I.Q. scores(Tr.1167;Ex.33.-pg.7). Michael's records showed an auditory hallucinations history(Tr.1167;Ex.33-pg.8). Michael told Syed that he talked with his Father of Darkness, "Omen"(Tr.1167;Ex.33-pg.11). His Father of Darkness told him to hurt himself and others(Tr.1167;Ex.33-pg.11).

Michael had twenty suicide attempts(Tr.1167;Ex.33-pg.11). Michael was psychotic, hearing voices(Tr.1167;Ex.33-pg.11). On cross-examination, Syed acknowledged Scott's malingering finding(Tr.1167;Ex.33-pgs.18-19).

E. Respondent's Guilt Rebuttal

1. Scott

Scott did court ordered competency to proceed and responsibility evaluations for Michael's prior case(Tr.1179-81;Ex.39;Ex.40). Scott's February, 1996 report found Michael competent to proceed and not suffering from a mental disease or defect at the time of that offense(Ex.39-pgs.28-29;Tr.1188,1199-1200). Scott's 1996 diagnoses were conduct and adjustment disorders and neither constituted a mental disease(Tr.1189,1191-92).

Testing established Michael was neither psychotic nor hallucinating(Tr.1190,1195,1197). There was one unconfirmed hallucination, when Michael was twelve(Tr.1198-99). There was no objective evidence Michael responded to or acted upon hallucinations(Tr.1199). Michael's thoughts were logical and goal oriented(Tr.1190).

Scott's second June, 1997 evaluation report (Ex.40) for only competence to proceed was done when defense psychologist Dr. Caul found Michael was incompetent to proceed(Tr.1181,1213). Michael spoke extensively about his hallucinations, although he did not during Scott's first evaluation(Tr.1202-03). Scott relied on Michael's St. Louis County jail treating psychologist's and psychiatrist's

findings from the Smetzer case to conclude Michael was malingering and faking psychoses(Tr.1203-12). Scott's diagnoses were unchanged, except he added malingering(Tr.1212-14).

Scott testified Michael was adult certified in the prior case(Tr.1232).

2. <u>Perschbacher</u>

Before Perschbacher was called, counsel objected Perschbacher would be testifying to hearsay statements in "kite/cadillac" letters inmate Jerome White-Bey purportedly wrote Michael(Tr.1247-50,1253). "Kites/cadillacs" are passed along cell lines from their authors to intended recipients(Tr.1248-49). Perschbacher would testify that he was celled between White-Bey and Michael and he read purported "kites/cadillacs" as they passed(Tr.1248-49).

Ahsens argued Perschbacher was being called to testify the "kites/cadillacs" contained "instructions by Mr. White-Bey to the defendant as to how to fake symptoms of mental disease."(Tr.1250). Rupp argued Perschbacher's testimony should be allowed because: "This is rebuttal, Your Honor, to the issue of whether or not he suffers from a mental disease or defect, or whether this is malingering."(Tr.1250). Rupp argued Perschbacher would testify that "Jerome White-Bey was giving him information or tips on how to appear to be crazy, including how to behave in court so it appeared that he was crazy…."(Tr.1250-51). Ahsens argued Perschbacher would testify Michael "was receiving some assistance from Mr. White-Bey in how to act in the case, that he intended to act crazy, that he

wasn't crazy…."(Tr.1251-52). Rupp argued Perschbacher's testimony was offered to rebut Michael is mentally ill and to show Michael had received tips on how to fake mental illness(Tr.1252-53). Perschbacher's testimony was ordered allowed because it related to "the issue of defendant's mental state."(Tr.1253-55).

Perschbacher testified White-Bey sent "kites/cadillacs" to Michael and he read them all before passing them to Michael(Tr.1266-69). White-Bey's "kites/cadillacs" told Michael he needed to play "the nut role" and do "crazy things" to beat his case(Tr.1267,1269-70). Perschbacher claimed to have discussed with Michael the contents of the "kites/cadillacs"(Tr.1267).

Perschbacher testified he had a drug treatment deal on his pending cases and one year to eighteen months sentence(Tr.1276-77). Perschbacher represented he was not given favorable treatment on his cases for testifying against Michael(Tr.1285-89,1294-95). Perschbacher represented neither Ahsens nor Rupp intervened to get him favorable dispositions(Tr.1295).

3. Blanchard

In October, 2001, Blanchard gave Michael the M.M.P.I. II for Vlach and found malingering(Tr.1301-02,1311-13,1317-18).

4. Vlach

Vlach did a court ordered competency to proceed evaluation in October, 2001(Tr.1327-28;Ex.34). Vlach found Michael was competent for trial and he did not have a mental disease or defect(Tr.1361-62). Michael was malingering, not

schizophrenic(Tr.1339,1346-62). Vlach relied on Blanchard's M.M.P.I. II and Vlach's Structured Interview of Reported Symptoms (SIRS) testing(Tr.1360-61).

Vlach did a second court ordered examination and found Michael was responsible at the time of the offense, not schizophrenic(Tr.1363,1365-66).

F. Guilt Closing Arguments

1. Respondent's Argument

Rupp argued Scott's and Vlach's testimony established Michael was sane(Tr.1419).

2. Defense Argument

Counsel argued Perschbacher should not be believed because Potosi's physical set-up made "kite/cadillac" use improbable(Tr.1435-36).

3. Rebuttal Argument

Ahsens argued Michael was malingering and faking based on Vlach's, Blanchard's, Scott's, and the St. Louis County Jail's providers' opinions(Tr.1448-49,1452-53). Ahsens argued their opinions should be believed over the defense's experts because Perschbacher confirmed Michael was faking(Tr.1452-56).

Ahsens argued Michael's hallucinations were fabricated because there was "one isolated report at 12 [of hallucinations]"(Tr.1448). The next time Michael reportedly had hallucinations was in jail after Scott's first evaluation(Tr.1448-49).

G. Jury Request

During guilt deliberations, the jury requested Michael's psychiatric records(T.L.F.316;Tr.1463). They were not admitted, so could not be sent(T.L.F.317;Tr.1463-66).

H. Defense Penalty Phase

The entire defense penalty phase was Ex.P, a videotape deposition of Crossroads Correctional Center's Superintendent Kemna(Tr.1517-20;Ex.37-pg.3). Michael was transferred from Biggs to Crossroads in July, 2000(Ex.37-pg.10). Kemna testified Michael's opportunity to harm anyone was limited because he was housed in administrative segregation at a high security prison(Ex.37-pgs.5,12-22). Respondent elicited it was possible for Michael to return to general population(Ex.37-pg.24).

I. Penalty Closing Arguments

1. Respondent's Argument

Ahsens argued that the jury had rejected Michael's mental disease defense because he was faking(Tr.1533). Death was appropriate to protect other inmates from Michael(Tr.1537-38).

2. Defense Argument

Counsel argued Michael could not harm anyone because of Crossroads' administrative segregation restrictions(Tr.1539-43). The jury was asked to reconsider Michael's mental illness and abuse history guilt evidence(Tr.1543-47). Perschbacher was unbelievable(Tr.1548).

3. Rebuttal Argument

Ahsens argued for death because Kemna had testified Michael could progress to general population, and therefore, kill again(Tr.1551-53). Perschbacher was believable despite his history of racism because Perschbacher would not fabricate against Michael in a case where the victim was African-American(Tr.1555). Perschbacher got a good deal, but Perschbacher testified Ahsens and Rupp had nothing to do with it(Tr.1555).

J. 29.15 Perschbacher Evidence

Trial counsel deposed Perschbacher on December 19, 2002(Ex.49-pg.1). Perschbacher was questioned about Ex.B, a letter he had written Ahsens' Attorney General Investigator Dresselhaus(Ex.49-pg.35 and pg.5 of exs. to Ex.49). Perschbacher's letter told Dresselhaus that he needed to talk to someone in Dresselhaus' office who handles drug investigations and he had "serious things" to discuss about "police corruption (Dirty Cops)"(pg.5 of exs. to Ex.49). Perschbacher told Dresselhaus they needed to meet soon before he left Fulton(*Id.*).

Dresselhaus interviewed Perschbacher on April 12, 2001 at the Fulton Diagnostic Center and did a memo(Ex.2). Ex.2 stated Dresselhaus told Pershchbacher then that he might testify against Michael(Ex.2-pg.1). Perschbacher told Dresselhaus that Jefferson County Deputy Steck was involved in methamphetamine distribution and porno movies(Ex.2). Ex.2 recounted Perschbacher claimed Jefferson County canine officer "Curt Aynes" was seizing and

reselling drugs(Ex.2-pg.2). Perschbacher claimed Aynes was "sexually involved with female minors"(Ex.2-pg.2).

Respondent vigorously opposed disclosing Ex.2 to 29.15 counsel(29.15Tr.268-69,283-84). Ex.2 was ordered disclosed(29.15Tr.268-69,283-84). Postconviction counsel learned about Ex. 2's existence from Dresselhaus' 29.15 discovery deposition(29.15Tr.268-69;Ex.137-pgs.4-5). Ahsens admitted he had seen Ex.2 and did not disclose it(29.15Tr.303-04).

Steck testified he had arrested Perschbacher several times(Ex.79-pgs.5-6). Perschbacher was a constant problem breaking into houses(Ex.79-pg.11). Steck testified Perschbacher's accusations about him were false(Ex.79-pgs.12-17,21).

Kirk Ainley, not "Curt Aynes," was a Jefferson County canine officer whose dog bit and pulled Perschbacher from some woods while arresting him(Ex.78-pgs.6-8,10-11). Ainley testified that Perschbacher's accusations about him were false(Ex.78-pgs.8-10).

The jury voted for death on January 18, 2003(Tr.1481). **Three weeks later, on February 7, 2003, and one month before sentencing**, Ahsens wrote Jefferson County Prosecutor Wilkins about Perschbacher's pending Jefferson County charges(Ex.63-pg.44)(Ex.7A-pg.28;Ex.7B-pgs.373-77). Ahsens told Wilkins that Perschbacher "has provided assistance to my office" by testifying against Michael(Ex.63-pg.44). Ahsens wrote:

“That testimony was helpful in attacking the defendant’s claim of mental disease or defect and aided us in successfully prosecuting the case.”

(Ex.63-pg.44)(emphasis added). Ahsens added: “**fundamental fairness dictates** I inform you of his cooperation for whatever weight you think it deserves.”(Ex.63-pg.44)(emphasis added). Ahsens closed thanking Wilkins for considering these matters(Ex.63-pg.44).

Jerome White-Bey testified he never sent Michael “kites/cadillacs” telling him to act crazy or play “the nut role” to beat his case and Perschbacher is lying(Ex.116-pgs.9-11).

Potosi Investigator King testified Perschbacher contacted him about “[a]nything and everything” and Perschbacher was “a self-proclaimed snitch”(Ex.115-pg.7). King considered “most” information Perschbacher provided to “have no merit”(Ex.115-pg.10). Perschbacher was an unreliable informant who provided “unfounded” information(Ex.115-pgs.11-12). Perschbacher was an attention seeking inmate who tried to “become staff’s pet”(Ex.115-pg.12).

Linda Edgar was Perschbacher’s Potosi caseworker(Ex.101-pgs.6-7). Perschbacher was an attention seeker and displayed manic behavior(Ex.101-pgs.8-10-11). Perschbacher had a reputation for flooding his cell and with it the entire wing(Ex.101-pgs.13-14). If Perschbacher did not get staff’s immediate attention, he threatened to flood his cell(Ex.101-pgs.13-14). Perschbacher was never in general population because staff worried other inmates would hurt Perschbacher for

"taunt[ing]" them(Ex.101-pg.15). Perschbacher "fabricat[ed]" stories about inmates being child molesters or homosexuals and tried to convince other inmates his fabrications were true(Ex.101-pg.15).

Potosi staff member Haney testified Perschbacher had spent time in Potosi's "rubber room"(Ex.104-pgs.6-7). Potosi staff member Glore described Perschbacher's wide mood swings(Ex.105-pgs.7-8).

Perschbacher denied at trial having possessing intoxicating substances violations(Tr.1283), but he had many(Ex.54).

Perschbacher denied at trial he had an assault of a law enforcement charge pending, but he did in Jefferson County(Tr.1275;Ex.65-pgs.1,14,17).

Perschbacher testified at trial he did not have any tattooing violations, but he did(Tr.1284)(Ex.18).

Perschbacher testified he had helped authorities solve several murders, including one in Tarkio, Missouri(Tr.1277-78). In fact, however, Missouri Highway Patrol Colonel Sottlemyre testified he had investigated the never solved Tarkio case, a high school hunter found the body, and Perschbacher was not involved(29.15Tr.544-50).

At Perschbacher's pretrial deposition, he denied having throwing feces and urine violations, but he did(Ex.49-pgs.73-74)(Ex.55).

At Perschbacher's pretrial deposition he represented that if he ever had a providing false information violation, he only had one, but he had many(Ex.49-

pg.134)(Ex.19-pg.2;Ex.96-pgs.7-10;Ex.13;Ex.100-pgs.7-9;Ex.16;Ex.98-pgs.6-7;Ex.97-pgs.6-10;Ex.18;Ex.95-pgs6-9;Ex.25-pg.1; Ex.99-pgs.7-20:Ex.70;Ex.56-pg.1;Ex.20;Ex.103-pgs.6-16).

At Perschbacher's deposition, he represented that he was providing information against Michael not for favorable treatment, but because murder is so offensive(Ex.49-pgs.57-58). Perschbacher's Corrections records contained letters threatening to kill a woman who was advising his girlfriend to end their relationship(Ex.57;Ex.58). Perschbacher signed a letter to her: "The Grim Reeper" and below was a knife dripping blood(Ex.57-pg.5). Underneath the knife was: "Fuck with me, and Your Life will End!! You Will Die"(Ex.57-pg.5 emphasis in original).

K. Absent Evidence Lessening Culpability

Michael was identified in school as learning, language, and behaviorally disordered(Ex.83-pg.34). Michael's seven year old verbal I.Q. score was 68(Ex.83-pg.38-40;Ex.1-pg.870) and ten year old score 69(Ex.83-pgs.38-40;Ex.1-pg.870).

Michael's school records at that time showed he "had unpredictable all day emotional outburst[s] where he would try to harm himself or others"(Ex.83-pgs.16-17,33;Ex.1-pg.48). Michael hit himself, attempted to jump out a second floor window, and talked about hanging himself(Ex.83-pgs.17-19). Shirley Williams, Michael's elementary school special education teacher, believed that Michael's actions intended to harm himself were genuine(Ex.83-pgs.5-14,19,29-30). Because

Michael's behavior was so severe, an aide was assigned to him everywhere all day(Ex.83-pgs.22,44-45).

Michael's aunts Matilda Hemphill, Joyce Stewart, and Yvonne Searcy and his mother, Vera, could have testified to Michael having told them about his Father of Darkness hallucinations(Ex.85-pgs.17-18;Ex.87-pgs.15-16), when he was still a child and before the St. Louis County Smetzer homicide happened(Ex.85-pgs.17-18;Ex.86-pg.18;Ex.87-pgs.15-16;Ex.91-pgs.32-34). Michael's condition was so severe an exorcism was attempted(Ex.86-pg.16).

The 29.15 court conducted a hearing and signed respondent's findings(29.15L.F.863,865-68).

POINTS RELIED ON

I.

DRESSELHAUS MEMO

The motion court clearly erred finding respondent did not violate *Brady v. Maryland* and Rule 25.03 by not disclosing Attorney General Investigator Dresselhaus' Ex.2 memo that would have led to critical impeaching evidence that Perschbacher had falsely accused Deputies Steck and Ainley of crimes and that counsel was ineffective in failing to uncover Ex.2 and then obtain that impeaching evidence based on information they had from Perschbacher's deposition because Michael 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 for Michael's mental disease defense to have succeeded the jury had to believe Michael was not faking and Ahsens' post-trial letter to the Jefferson County Prosecutor advocating leniency for Perschbacher, which expressly contradicts respondent's 29.15 representations, admitted Perschbacher's testimony was crucial to respondent's having persuaded the jury Michael was faking, and thus, respondent's non-disclosure and counsel's ineffectiveness were prejudicial.

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

State v. Long,140S.W.3d27(Mo.banc2004);

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

Smith v. Groose,205F.3d1045(8thCir.2000);

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

Rule 25.03.

II.

PERSCHBACHER'S FALSE INFORMATION VIOLATIONS

The motion court clearly erred denying counsel was ineffective for failing to impeach Perschbacher with his Corrections records showing he had many providing false information violations and for failing to call Corrections officials Armontrout, Rhodes(Lawson), Contis, Silvy, Dicus, Reeves, and Hall to testify about them and further clearly erred denying that if counsel was not ineffective then the trial court's pretrial refusal to order Perschbacher's Corrections records disclosed caused counsel to fail to properly impeach Perschbacher because Michael 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 effective counsel would have impeached Perschbacher with the documents and these witnesses and Michael was prejudiced because this pattern of violations would have shown Perschbacher was unbelievable. If counsel was not ineffective, then the trial court denied Michael a fundamentally fair trial when it refused to order Perschbacher's Corrections file disclosed pretrial.

Black v. State,151S.W.3d49(Mo.banc2004);

Hadley v. Groose,97F.3d1131(8thCir.1996);

State v. McCarter,883S.W.2d75(Mo.App.,S.D.1994);

State v. Long,140S.W.3d27(Mo.banc2004);

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

III.

PERSCHBACHER'S CORRECTIONS FILE IMPEACHMENT

The motion court clearly erred denying counsel was ineffective for failing to impeach Perschbacher with his Corrections file information that would have shown he gave false deposition testimony and was an attention seeking, incredible, and mentally ill inmate whose pattern of treating serious matters flippantly made him unbelievable and biased because Michael 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 effective counsel would have impeached Perschbacher this way and Michael was prejudiced because Perschbacher was the only witness who claimed to have objective faking evidence, the "kites/cadillacs."

Black v. State,151S.W.3d49(Mo.banc2004);

Hadley v. Groose,97F.3d1131(8thCir.1996);

State v. Pinkus,550S.W.2d829(Mo.App.,Spfld. D.1977);

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

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

IV.

PERSCHBACHER'S PRETRIAL LETTERS

The motion court clearly erred denying counsel was ineffective for failing to introduce Perschbacher's letters from his deposition because Michael 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 effective counsel would have impeached Perschbacher with them and Michael was prejudiced because they showed Perschbacher's bias through his desperate effort to get help on his cases and get out of prison.

Black v. State,151S.W.3d49(Mo.banc2004);

Hadley v. Groose,97F.3d1131(8thCir.1996);

State v. Anderson,79S.W.3d420(Mo.banc2002);

State v. McCarter,883S.W.2d75(Mo.App.,S.D.1994);

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

V.

PATROL COLONEL STOTTLEMYRE - IMPEACH PERSCHBACHER

The motion court clearly erred denying counsel was ineffective for failing to call Highway Patrol Colonel Stottlemyre to impeach Perschbacher's assertions that he helped solve a Tarkio, Missouri murder and that respondent failed to perform its duty to correct Perschbacher's false testimony because Michael 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 effective counsel would have called Stottlemyre to testify Perschbacher had nothing to do with the case and respondent was required to correct Perschbacher's contrary false representations such that Michael was prejudiced because establishing Perschbacher was incredible was critical.

Black v. State,151S.W.3d49(Mo.banc2004);

Hadley v. Groose,97F.3d1131(8thCir.1996);

State v. Long,140S.W.3d27(Mo.banc2004);

Banks v. Dretke,540U.S.668(2004);

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

VI.

PERSCHBACHER GOT A BENEFIT

The motion court clearly erred denying the claim Perschbacher told the jury he was getting nothing for his testimony when in fact Ahsens advocated leniency for Perschbacher on Perschbacher's Jefferson County charges because Ahsens believed Perschbacher's testimony was critical to convicting Michael and the motion court clearly erred further in denying discovery to prove this claim because Michael was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that Perschbacher got the benefit of Ahsens advocating leniency for Perschbacher which would have further demonstrated why Perschbacher was unbelievable and if Michael failed to prove this claim it was because discovery was improperly denied.

Banks v. Dretke,540U.S.668(2004);

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

Napue v. Illinois,360U.S.264(1959);

Kyles v. Whitley,514U.S.419(1995);

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

VII.

WHITE-BEY - NO "KITES/CADILLACS"

The motion court clearly erred denying counsel was ineffective for failing to call White-Bey to testify he never sent Michael "kites/cadillacs" advising Michael to act crazy to beat his case and Perschbacher is lying because Michael 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 effective counsel would have called White-Bey to rebut Perschbacher and Michael was prejudiced because White-Bey would have discredited respondent's critical faking/malingering witness.

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

State v. McCarter,883S.W.2d75(Mo.App.,S.D.1994);

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

Johnson v. Mississippi,486U.S.578(1988);

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

VIII.

UNCALLED POTOSI STAFF

The motion court clearly erred denying counsel was ineffective for failing to call Potosi staff King, Edgar, Haney, and Glore because Michael 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 effective counsel would have called them to provide evidence that Perschbacher was unbelievable and Michael was prejudiced because their familiarity with Perschbacher as Potosi law enforcement made them especially credible for discrediting Perschbacher.

Black v. State,151S.W.3d49(Mo.banc2004);

Hadley v. Groose,97F.3d1131(8thCir.1996);

State v. Long,140S.W.3d27(Mo.banc2004);

State v. Pinkus,550S.W.2d829(Mo.App.,Spfld. D.1977);

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

IX.

ANY INVESTIGATION OF STECK AND AINLEY AND RESULTS REQUIRE DISCLOSURE

The motion court clearly erred in denying the motion to reveal whether there was ever any investigation of Steck and Ainley and any such results because Michael was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that if there was never any investigation, then it was improper to deny relief based on Ahsens' testimony he did not disclose Dresselhaus' Ex.2 memo because doing so might impede an investigation and if there was an investigation, then Michael was entitled to know the results because Perschbacher's accusations must have been false because Steck and Ainley are still deputies.

Gardner v. Florida,430U.S.349(1977);

Kyles v. Whitley,514U.S.419(1995);

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

Napue v. Illinois,360U.S.264(1959);

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

Rule 75.01.

X.

IMPEACHING/CORRECTING PERSCHBACHER'S LIES

The motion court clearly erred denying counsel was ineffective for failing to impeach Perschbacher with documents that showed testimonial assertions he made were objectively false and respondent committed prosecutorial misconduct when it failed to correct Perschbacher's false testimony because Michael 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 effective counsel would have used the available documents to impeach Perschbacher to establish he was unbelievable and Michael was prejudiced because Perschbacher was the only witness who claimed to have objective evidence Michael was faking mental illness, the "kites/cadillacs," and respondent was required to use the documents to correct Perschbacher's false testimony.

Black v. State,151S.W.3d49(Mo.banc2004);

Hadley v. Groose,97F.3d1131(8thCir.1996);

Banks v. Dretke,540U.S.668(2004);

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

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

XI.

SIGNING STATE'S FINDINGS CONTRADICTING ITS EARLIER PERSCHBACHER POSITIONS

The motion court clearly erred in signing respondent's 71 page proposed findings that expressly contradicted the state's trial position and Ahsens' Jefferson County Prosecutor letter that Perschbacher was an especially credible witness critical to convicting Michael because Michael was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that adopting respondent's findings that expressly contradicted respondent's prior vouching for Perschbacher's credibility shows a lack of independent judicial judgment.

United States v. El Paso Natural Gas Co.,376U.S.651(1964);

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

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

Smith v. Groose,205F.3d1045(8thCir.2000);

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

XII.

PERSCHBACHER'S LETTERS DESTROYED

The motion court clearly erred finding respondent did not commit misconduct when it did not disclose Dresselhaus destroyed letters Perschbacher wrote him and respondent violated Rule 25.03 because Michael was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that this information would have impeached Perschbacher because the reasonable inference is there was information respondent did not want the jury to know and Rule 25.03 required their disclosure.

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

State v. Jamison,163S.W.3d552(Mo.App.,E.D.2005);

State v. Wilkinson,606S.W.2d632(Mo.banc1980);

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

Rule 25.03.

XIII.

APPELLATE COUNSEL - PERSCHBACHER'S HEARSAY

The motion court clearly erred denying appellate counsel was ineffective for failing to challenge the admission of Perschbacher's hearsay testimony as to the content of White-Bey's alleged notes because Michael was denied his rights to due process, freedom from cruel and unusual punishment, to confront the witnesses against him, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have raised this meritorious issue which required a new trial.

Evitts v. Lucey,469U.S.387(1985);

Williams v. State,168S.W.3d433(Mo.banc2005);

State v. Revelle,957S.W.2d428(Mo.App.,S.D.1997);

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

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

XIV.

FAMILY, FRIENDS, AND TEACHERS NOT PRESENTED

The motion court clearly erred denying counsel was ineffective for failing to call family and friends Searcy, Hemphill, Stewart (Steward), Wooten, Vera and Preston Jackson, and Tyler, and teachers Williams and Kimbrough because Michael 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 effective counsel would have called these witnesses because all established the severity of Michael's mental health problems and that they predated Michael ever being charged with any crime and Michael was prejudiced because he would not have been convicted of first degree murder or at minimum not death sentenced.

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

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

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

State v. Hayes,785S.W.2d661(Mo.App.,W.D.1990);

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

XV.

FAILURE TO INTRODUCE RECORDS AND ASSOCIATED WITNESSES

The motion court clearly erred denying counsel was ineffective for failing to introduce records in guilt and penalty documenting and confirming Michael's longstanding mental illness and for failing to call Gilner, Baetz-Davis, Krasnicki, Dunn, and Weber who generated some records because Michael 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 effective counsel would have introduced the records and called these witnesses because both independently verified Michael's longstanding mental illness and Michael was prejudiced because he would not have been convicted of first degree murder and not death sentenced.

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

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

State v. Hayes,785S.W.2d661(Mo.App.,W.D.1990);

Tennard v. Dretke,542U.S.274(2004);

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

XVI.

IMPROPER COMPETENCY EVIDENCE

The motion court clearly erred denying counsel was ineffective for failing to object to guilt evidence from Scott that he found Michael competent to proceed in the Smetzer case where Michael was adult certified and Michael had not suffered from a mental disease when that offense happened and that Vlach found Michael competent to proceed here because Michael 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 §552.020.14 prohibited any competency to proceed evidence and whether Michael was competent to proceed in any case, that he did not suffer from a mental disease when Ms. Smetzer was killed and there he was adult certified were unrelated to whether he was not guilty by reason of mental disease here and effective counsel would have objected and Michael would not have been convicted of first degree murder.

Anderson v. State,196S.W.3d28(Mo.banc2006);

State v. Bowman,681A.2d469(Me.1996);

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

§552.020.

XVII.

MICHAEL IS SCHIZOPHRENIC AND NOT A FAKER

The motion court clearly erred denying counsel was ineffective for failing to call experts Peterson, Gelbort, and Moldin because Michael 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 effective counsel would have called them because each would have presented testing evidence about Michael that demonstrated he was genuinely schizophrenic and not a faker/malingerer such that Michael would not have been convicted of first degree murder or at a minimum sentenced to life.

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

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

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

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

XVIII.

DR. CAUL - MICHAEL IS MENTALLY RETARDED AND SCHIZOPHRENIC

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Caul and for not requesting a mental retardation instruction because Michael 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 effective counsel would have called Caul and requested a mental retardation instruction because Caul would have established Michael genuinely suffers from schizophrenia and has mental retardation such that Michael would not have been convicted of first degree murder or at a minimum sentenced to life.

Atkins v. Virginia,536 U.S.304(2002);

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

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

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

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

XIX.

SELBERT - INCOMPLETE EVIDENCE

The motion court clearly erred denying counsel was ineffective for failing to present complete evidence through Potosi's Chief of Mental Health Services, Dr. Selbert, his reasons for sending Michael to Fulton State Hospital for psychiatric treatment and Selbert's records, because Michael 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 effective counsel would have presented this evidence because Selbert and his records established Michael's mental illness' genuineness.

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

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

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

XX.

FAILURES TO OBJECT/REQUEST APPROPRIATE RELIEF

The motion court clearly erred denying claims counsel was ineffective for failing to properly object and request appropriate relief as to:

A. The Prosecutor's voir dire that the problems that caused Illinois' Governor Ryan's death sentences commutations do not exist in Missouri;

B. The prosecutor's questioning of Dr. Eikermann that Michael was kept at Fulton Hospital so long solely because of Corrections' embarrassment at a killing occurring at its most secure prison, not because of Michael's need for treatment;

C. The prosecutor's argument equating Michael with Middle Eastern terrorist suicide bombers;

D. The prosecutor's argument that the punishment choice was between good versus evil;

E. Blanchard and Vlach expressing malingering opinions when Blanchard acquired information from Michael without advising him of his right to silence;

F. Argument the jury had a "duty" to convict Michael of first degree murder and impose death; and

G. The prosecutor's voir dire there would come a time in deliberations when satisfying beyond a reasonable doubt was not required

because Michael was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have properly objected and requested appropriate relief as to all these matters and Michael was prejudiced because he would not have been convicted of first degree murder or at minimum not death sentenced.

Banks v. Dretke,540U.S.668(2004);

Shurn v. Delo,177F.3d662(8thCir.1999);

State v. Banks,2007W.L.586742(Mo.banc2007);

Viereck v. United States,318U.S.236(1943);

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

XXI.

INCOMPETENT TO EXECUTE

The motion court clearly erred denying Michael is incompetent to be executed because Michael was denied his rights to due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, Mo. Const Art. I§21, and §552.060 in that the evidence established Michael is unaware of the punishment he is to suffer and why he is to suffer that punishment.

Ford v. Wainwright,477U.S.399(1986);

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

Mo. Const Art. I§21;

§552.060.

XXII.

ABUSE SIGNIFICANCE

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Vlietstra because Michael 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 effective counsel would have called Vlietstra to explain the significance of Michael's family abuse background and educational history to mitigate punishment and Michael would have been sentenced to life.

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

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

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

XXIII.

APPELLATE COUNSEL – ADELSTEIN'S HEARSAY

The motion court clearly erred denying appellate counsel was ineffective for failing to challenge the admission of Dr. Adelstein's hearsay testimony about Dr. Dix's autopsy because Michael was denied his rights to due process, freedom from cruel and unusual punishment, to confront the witnesses against him, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have raised this meritorious issue which required a new trial.

Evitts v. Lucey,469U.S.387(1985);

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

State v. March,2007W.L.828156(Mo.banc2007);

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

XXIV.

LETHAL INJECTION METHOD

The motion court clearly erred denying the claim Missouri's method of lethal injection violates the cruel and unusual punishments prohibition because that ruling denied Michael his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that respondent cannot conduct executions that do not cause unnecessary and wanton infliction of pain.

Taylor v. Crawford, No.05-4173-CV-C-FJG(Mo.W.D.);

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

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

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

XXV.

CONFUSING PENALTY INSTRUCTIONS

The motion court clearly erred rejecting Michael was denied his rights to effective assistance of counsel when counsel failed to object and present evidence to challenge the penalty instructions as failing to properly guide the jury denying Michael's rights to due process, a fair trial and impartial jury, and to be free from cruel and unusual punishment because Michael was denied all these rights, U.S. Const. Amends. VI, VIII, and XIV, in that jurors do not understand the instructions and counsel unreasonably failed to object and to present evidence to challenge them and Michael was prejudiced because the less jurors understand the more likely they are to impose death.

Lankford v. Idaho,500U.S.110(1991);

Woodson v. North Carolina,428U.S.280(1976);

Middleton v. Roper, No. 4:03CV543 CDP(E.D.Mo.)(Sept. 21, 2005);

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

ARGUMENT

I.

DRESSELHAUS MEMO

The motion court clearly erred finding respondent did not violate *Brady v. Maryland* and Rule 25.03 by not disclosing Attorney General investigator Dresselhaus' Ex.2 memo that would have led to critical impeaching evidence that Perschbacher had falsely accused Deputies Steck and Ainley of crimes and that counsel was ineffective in failing to uncover Ex.2 and then obtain that impeaching evidence based on information they had from Perschbacher's deposition because Michael 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 for Michael's mental disease defense to have succeeded the jury had to believe Michael was not faking and Ahsens' post-trial letter to the Jefferson County Prosecutor advocating leniency for Perschbacher, which expressly contradicts respondent's 29.15 representations, admitted Perschbacher's testimony was crucial to respondent's having persuaded the jury Michael was faking, and thus, respondent's non-disclosure and counsel's ineffectiveness were prejudicial.

Perschbacher's testimony that White-Bey had advised Michael in "kites/cadillacs" to play "the nut role" to beat his case was critical evidence respondent relied on for why its experts' malingering opinions, rather than Michael's

expert's schizophrenia opinions, should be believed(Tr.1267,1269-70,1452-56). Showing the jury why Perschbacher was an unbelievable snitch was crucial for the jury to believe and find Michael was not guilty by reason of mental disease or defect. Respondent failed to disclose Ahsens' Attorney General Investigator Dresselhaus' memo summarizing his meeting with Perschbacher. That Ex.2 memo would have provided counsel the means to uncover powerful impeachment of Perschbacher. That impeachment was police officers Steck and Ainley, who because of their employment as police officers would have been especially credible witnesses on why Perschbacher should not be believed. These police officers could have testified Perschbacher fabricated accusations of criminal conduct against them. If the jury had heard Steck and Ainley testify about these Perschbacher fabrications, then Michael would not have been convicted of first degree murder and not sentenced to death.

Jailhouse snitch testimony is among the leading causes of wrongful capital convictions with such witnesses' testimony later discovered as false. *Report of The [Illinois] Governor's Commission On Capital Punishment, George H. Ryan Governor* (April 15, 2002) at 122. *See also, State v. Beine*,162S.W.3d483,485(Mo.banc2005)("notorious unreliability of jailhouse snitches"). Michael was wrongfully convicted of first degree murder because there is a reasonable probability the jury would have found him not guilty by reason of mental disease, if Perschbacher had been effectively impeached. Three weeks after the jury's

death verdict and one month before sentencing, Ahsens wrote the Jefferson County Prosecutor advocating leniency for Perschbacher because his testimony:

> **"was helpful in attacking the defendant's claim of mental disease or defect and aided us in successfully prosecuting the case."**

(Ex.63-pg.44)(emphasis added)(Ex.7A-pg.28;Ex.7B-pgs.373-77).[3] Ahsens wrote "**fundamental fairness dictates** I inform you of his cooperation for whatever weight you think it deserves"(Ex.63-pg.44)(emphasis added). At Perschbacher's Jefferson County guilty plea, that happened three days before Michael was sentenced and for a case that was pending when he testified against Michael, Perschbacher's attorney brought Ahsens' letter to that court's attention(Ex.73-pg.17-18;Ex.123-pg.22;Ex.7B-pg.373-77;29.15Tr.668)

Schizophrenic vs. Faker

Drs. Rabun, Eikermann, Selbert, Harry, and Syed were all called to establish Michael killed Thomas because of his schizophrenia. Michael's acts were the product of his Father of Darkness auditory hallucinations directing him to kill Thomas(Tr.1023,1030-31,1035-37,1039-40,1042-43,1050,1159;Ex.33-pgs.8,11). Michael was not malingering/faking because an anti-psychotic drug of last resort, with potentially deadly side effects, Clozaril, was used to treat him(Tr.1050,1052-53,1128,1134). Michael's treatment history showed he was not malingering(Tr.1071-73,1142,1145,1149-50).

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[3] Ahsens' Jefferson County letter is at A-1 of this brief's Appendix.

Respondent's cross examination of Michael's doctors focused on the state's experts having found Michael was malingering/faking (Tr.1079,1086,1091,1138;Ex.33-pgs.18-19).

Scott, Blanchard, and Vlach were called to opine Michael was faking/malingering and merely conduct disordered, not schizophrenic(Tr.1189-92,1195,1197,1203-13,1301-02,1311-13,1317-18,1339,1346-63,1365-66). According to them, Michael had had only one unconfirmed hallucinatory experience(Tr.1198-99). There was no evidence Michael responded to or acted upon hallucinations(Tr.1199).

Perschbacher testified that White-Bey sent Michael "kites/cadillacs" telling Michael that he needed to play "the nut role" and do "crazy things" to beat his case(Tr.1267,1269-70). Perschbacher claimed to have discussed with Michael the contents of White-Bey's "kites/cadillacs"(Tr.1267).

Ahsens argued to the jury respondent's doctors' malingering opinions should be believed over Michael's experts' opinions that his schizophrenia caused his acts **because Perschbacher's testimony confirmed respondent's doctors' opinions**(Tr.1452-56).[4]

Caselaw Standards

[4] Relevant portions of Ahsens' closing argument are at A-11-A15 of this brief's Appendix.

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)[5]. 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).

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.*

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

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)(1) requires respondent disclose the names and addresses of witnesses it intends to call "together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements." "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).

The right to present a defense requires the defendant be allowed to introduce a witness' prior false allegations to show the witness is incredible. *State v. Long*,140S.W.3d27,31-32(Mo.banc2004). The failure to pursue a single important item of evidence can constitute ineffectiveness. *State v. Wells*,804S.W.2d746,748(Mo.banc1991)(counsel ineffective for failing to obtain letter defendant turned over to prior counsel asserting someone else committed offense).

Perschbacher Lied - Deputies Committing Crimes

Perschbacher wrote Ahsens' Attorney General investigator Dresselhaus and told him that he wanted to provide information about "drug investigations" and he

had "serious things" to discuss about "police corruption (Dirty Cops)"(pg.5 of exs. to Ex.49)[6]. Perschbacher told Dresselhaus they needed to meet soon before he left Fulton(*Id*.). That letter caused Dresselhaus to meet with Perschbacher at Fulton on April 12, 2001(29.15Tr.267-68) and Dresselhaus generated Ex.2, a memo.[7] The letter was used at Perschbacher's pretrial deposition and provided in discovery to counsel(pg.5 of exs. to Ex.49;29.15Tr.672). Dresselhaus' memo stated that he told Pershchbacher then that he might testify against Michael(Ex.2-pg.1).

Respondent vigorously opposed disclosing Ex.2 to 29.15 counsel(29.15Tr.268-69,283-84). Ex.2 was ordered disclosed(29.15Tr.268-69,283-84). Postconviction counsel learned about Ex.2 through deposing Dresselhaus(29.15Tr.268-69;Ex.137-pg.4-5). Dresselhaus discussed pre-trial with Ahsens Ex.2's contents(29.15Tr.281). Dresselhaus gave Ex.2 to the Highway Patrol(29.15Tr.279-80).

Ahsens admitted he saw Ex.2 and did not turn it over because it might compromise a Highway Patrol investigation(29.15Tr.303-05). The first day of trial, Ahsens represented he had turned over to counsel **"everything"** he had on Perschbacher(Tr.15)(emphasis added).

Perschbacher told Dresselhaus that Jefferson County Deputy Steck was involved in methamphetamine distribution and porno movies(Ex.2). Perschbacher

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[6] The same document is Ex. F in Ex.137 - Dresselhaus' 29.15 discovery deposition. At Perschbacher's pretrial deposition (Ex.49), it was marked Ex.B.

[7] Dresselhaus Ex.2 memo appears at A-2-A-3 of this brief's Appendix.

claimed Jefferson County canine officer "Curt Aynes" was seizing drugs and reselling them(Ex.2-pg.2). Perschbacher also claimed that Aynes was "sexually involved with female minors"(Ex.2-pg.2).

Steck arrested Perschbacher several times(Ex.79-pgs.5-6). Steck testified Perschbacher's accusations were false(Ex.79-pgs.12-17,21).

Kirk Ainley, not "Curt Aynes," was a Jefferson County canine officer whose dog bit and pulled Perschbacher from some woods while arresting him(Ex.78-pgs.6-8,10-11). Ainley testified Perschbacher's accusations were false(Ex.78-pgs.8-10).

Counsel Would Have Impeached Perschbacher With His Lies

Counsel wanted all impeaching statements Perschbacher made to the prosecutors' offices(Ex.118A-pgs.130-31;29.15Tr.518). Ex.2 was not disclosed and counsel would have wanted it(Ex.118A-pg.131;Ex.118B-pgs.454-56;29.15Tr.519-22). Counsel would have wanted Ex.2, to interview Steck and Ainley, to confront Perschbacher with his lies about Steck and Ainley, and to call Steck and Ainley to impeach Perschbacher with his lies(Ex.118A-pgs.133-39;Ex.118C-pg.15-16;29.15Tr.522-25).

Perschbacher's pretrial deposition "Dirty Cops" letter to Dresselhaus told Dresselhaus that if Dresselhaus wanted his information, then Dresselhaus needed to meet with him soon, before he was moved from Fulton(pg.5 of exs. to Ex.49). Counsel never asked respondent if Perschbacher was interviewed at Fulton, even though they had Perschbacher's "Dirty Cops" letter(29.15Tr.528-30).

Counsel opined they did not believe the jury would have considered Perschbacher credible because he was so effectively impeached with his racial animus[8](Ex.118B-pgs.437-39,442-43;Ex.118C-pgs.8-10;Ex.142-pgs.12,26-27).

Counsel believed the case turned on whether Michael's Father of Darkness schizophrenic auditory hallucinations were believed(Ex.142-pg.28).

Findings

The findings held counsel considered Perschbacher incredible and fully impeached, with his past racial epithets history(29.15L.F.871-72,927). Perschbacher was incredible and not believed by the jury and counsel strategically decided not to impeach Perschbacher further(29.15L.F.871,875-76,877-78,926-29). Ahsens acted in good faith because he believed turning over Ex.2 might compromise a Patrol investigation(29.15L.F.928). Ex.2 did not contain exculpatory evidence(29.15L.F.928). It would not have been proper impeachment to show Perschbacher accused unrelated persons of unrelated crimes(29.15L.F.929).

Michael Was Prejudiced

Respondent was required to disclose Ex.2 because it contained evidence that would have led to compelling impeachment. *See Brady* and *Bagley*, *supra*. Ex.2 reported or summarized Perschbacher's pretrial statements to Ahsen's Investigator Dresselhaus. Thus, Rule 25.03(A)(1) required its disclosure.

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[8] Michael is African-American and Perschbacher is white(29.15Tr.565).

Michael's trial was a battle over whose experts to believe. Perschbacher was the pivotal witness because he purportedly provided concrete proof, through the "kites/cadillacs," that Michael was a malingerer, faking schizophrenia. Respondent argued its experts should be believed because of Perschbacher's testimony(Tr.1452-56).

It was critical the jury know Perschbacher lied and made false claims about police officers to Dresselhaus, the same investigator who spoke to Perschbacher about Michael. That importance is demonstrated by Ahsens' guilt rebuttal objected to, but overruled, argument made outside the evidence, vouching that Perschbacher was "a bonus" who came to their attention when he wrote to Ahsens' case Investigator Dresselhaus(Tr.1453-54).

Steck's and Ainley's testimony could have been presented to properly impeach Perschbacher and show Perschbacher has a pattern of making false claims to Dresselhaus. *Long*,140S.W.3d at 31-32. Counsel could have confronted Perschbacher with his Ex.2 statements and got Perschbacher to admit or deny their truth before calling Steck and Ainley to testify Perschbacher's accusations were false. *Id*. Because Steck and Ainley are law enforcement officers, they would have been especially credible in showing why Perschbacher was unbelievable. Counsel then could have argued Perschbacher has a pattern of making false accusations and specifically a pattern of providing false information to Dresselhaus. Counsel also could have argued that if Perschbacher would make false claims against police

officers, then he would also make false claims against Michael. Effectively impeaching Perschbacher was critical because he provided testimony Michael was faking auditory hallucinations, the issue counsel believed the case turned on(Ex.142-pg.28).

Ahsens' assserted good faith is irrelevant. *See Brady*. Moreover, Ahsens has a pattern of improperly withholding evidence. In two other death penalty cases, the circuit courts ordered reversals because of Ahsens' *Brady* and Rule 25.03 violations(*See* Ex.76-*Barton* new trial;Ex.77-*Tisius* new penalty hearing;29.15Tr.306-20).

Counsels' opinion that they did what they considered to be a thorough job impeaching Perschbacher with what they had does not refute Michael was prejudiced. Those opinions are taken out of context because counsel testified they would have wanted to impeach Perschbacher with Ex.2 and the information it led to in the 29.15(Ex.118A-pgs.133-39;Ex.118C-pgs.15-16;29.15Tr.522-25).

This Court should not condone the motion court signing the Attorney General's findings that Perschbacher was incredible and the jury did not believe him when Ahsens wrote the Jefferson County Prosecutor urging leniency for Perschbacher because Perschbacher

> **"was helpful in attacking the defendant's claim of mental disease or defect and aided us in successfully prosecuting the case."**

(Ex.63-pg.44). According to Ahsens, writing his letter was **"dictate[d]"** by considerations of **"fundamental fairness"**(Ex.63-pg.44)(emphasis added).

In *Smith v. Groose*,205F.3d1045,1051(8thCir.2000), the defendant's conviction violated due process and was reversed because respondent took contradictory positions as to critical facts in the co-defendant's trial. The inconsistent positions in *Smith* evidenced a disregard for fairness and the search for truth. *Id*.1051. Respondent has done the same again. Ahsens advocated leniency to the Jefferson County prosecutor for Perschbacher because he provided evidence Ahsens considered critical to convicting Michael of first degree murder, but in respondent's findings it claimed Perschbacher was incredible and unbelievable. Moreover, when counsel objected to Perschbacher's being allowed to testify, Rupp and Ahsens argued Perschbacher's testimony was proper rebuttal establishing Michael was malingering and faking mental illness(Tr.1250-54). Rupp and Ahsens were not calling a witness who they thought was unbelievable and that is why they vigorously argued Perschbacher's testimony be allowed(Tr.1250-54).[9] They argued it was admissible because it rebutted Michael was mentally ill(Tr.1250-54). The court ruled Perschbacher could testify because his testimony related to "the issue of defendant's mental state."(Tr.1253-55).

[9] Ahsens' and Rupps' vigorous arguments for allowing Perschbacher's testimony appear at A-4-A-10 of this brief's Appendix.

Moreover, Ahsens' told the court, on the first day of trial, he had turned over to the defense **"everything"** he had on Perschbacher(Tr.15)(emphasis added). Despite having made that representation, at the 29.15 Ahsens admitted he had seen Ex.2 and chose not to disclose it (29.15Tr.303-04) and Dresselhaus testified that he and Ahsens had discussed Ex.2's contents pre-trial(29.15Tr.281).

Counsel's cross-examination highlighting Perschbacher's use of racial epithets (Tr.1289-93) was ineffectual and entirely worthless. As Ahsens' penalty argument highlighted, Perschbacher's racist history was a non-factor because the victim, Thomas, was African-American(Tr.1555). Moreover, counsel should have known Ahsens would make this argument because when counsel sought Perschbacher's Corrections file pretrial, looking for evidence of racial animus, Ahsens opposed its disclosure arguing: "the victim is black, the defendant is black. So, I'm having a hard time understanding why he has a particular bias against one black man over another…."(11/12/02Mot.Tr.46).

Reasonably competent counsel would have followed up on Perschbacher's letter, obtained at his deposition(Ex.49 – attached letters at 5), by seeking discovery of whether Dresselhaus actually went to meet with Perschbacher at Fulton in response to Perschbacher's letter, and what Perschbacher said. *See Strickland*. *Cf. Wells, supra*. If counsel had been diligent, then they would have uncovered Dresselhaus' Ex.2 memo which would have in turn led to uncovering Steck's and Ainley's testimony. Michael was prejudiced because Ex.2 and its derivative evidence would

have substantially impeached Perschbacher on the only issue in the case: whether Michael was faking mental illness.

A new trial is required because respondent failed to disclose Ex.2 and alternatively because counsel was ineffective in failing to uncover Ex.2.

II.

PERSCHBACHER'S FALSE INFORMATION VIOLATIONS

The motion court clearly erred denying counsel was ineffective for failing to impeach Perschbacher with his Corrections records showing he had many providing false information violations and for failing to call Corrections officials Armontrout, Rhodes(Lawson), Contis, Silvy, Dicus, Reeves, and Hall to testify about them and further clearly erred denying that if counsel was not ineffective then the trial court's pretrial refusal to order Perschbacher's Corrections records disclosed caused counsel to fail to properly impeach Perschbacher because Michael 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 effective counsel would have impeached Perschbacher with the documents and these witnesses and Michael was prejudiced because this pattern of violations would have shown Perschbacher was unbelievable. If counsel was not ineffective, then the trial court denied Michael a fundamentally fair trial when it refused to order Perschbacher's Corrections file disclosed pretrial.

Counsel failed to impeach Perschbacher with his many providing false information violations and failed to call Corrections officials to testify about them. That Perschbacher had many providing false information violations would have shown that Perschbacher could not be believed.

This Court reviews for clear error. *See* Point I. 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).

Counsel is ineffective when they fail to impeach critical witnesses. *Black v. State*,151S.W.3d49,51(Mo.banc2004); *Hadley v. Groose*,97F.3d1131,1136(8thCir.1996). Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994).

This claim was rejected because counsel effectively impeached Perschbacher so that the jury did not believe him and cross-examination's scope is strategy(29.15L.F.933-34).

Getting Perschbacher's Corrections File

On November 12, 2002, counsel moved for disclosure of Perschbacher's Corrections file(T.L.F.214-18;29.15Tr.566-67). Those records were sought because they were relevant to Perschbacher's reputation for truthfulness, competency, and credibility(T.L.F.215;11/12/02Mot.Tr.38,44-45). Ahsens opposed disclosure(11/12/02Mot.Tr.45-46).

Counsel argued for disclosure of Perschbacher's Corrections file because if during Perschbacher's deposition he denied matters that his Corrections file contradicted, then counsel would not know valuable impeaching

information(11/12/02Mot.Tr.47). The court denied the motion for Perschbacher's entire Corrections file(11/12/02Mot.Tr.47-48).

Perschbacher was deposed December 19, 2002(Ex.49-pg.1).

On January 13, 2003, the day trial began, counsel again moved for disclosure of Perschbacher's Corrections file(T.L.F.263-67;Tr.11,23;29.15Tr.567-68). The court then ordered Perschbacher's Corrections' records produced(T.L.F.271;Tr.23-24;29.15Tr.568). Respondent produced them two days later, January 15th(Tr.736-37;29.15Tr.569;TL.F.278). All the records were not produced then and it took a second order to get them(29.15Tr.569-70;Tr.854-55). Missing were parts relating to Perschbacher's prison conduct(Tr.855). Counsel was particularly interested in violations for making false statements to correctional officers(Tr.856).

Perschbacher's complete records did not arrive until January 16th and he testified the next day(29.15Tr.570-71).

What Could Have Been Presented

At his pretrial deposition, Perschbacher testified that "maybe" he had one providing false information violation(Ex.49-pg.134). Perschbacher's Corrections records show he lied and had many false information violations(Ex.49-pg.134)(Ex.19-pg.2;Ex.96-pgs.7-10;Ex.13;Ex.100-pgs.7-9;Ex.16;Ex.98-pgs.6-7;Ex.97-pgs.6-10;Ex.18;Ex.95-pgs.6-9;Ex.25-pg.1; Ex.99-pgs.7-20:Ex.70;Ex.56-pg.1;Ex.20;Ex.103-pgs.6-16).

Perschbacher falsely claimed to have a medical emergency(Ex.19). The violation report noted Perschbacher "has abused claims of medical emergencies many times in the past"(Ex.19-pg.1). Guard Rhodes(Lawson) would have testified not only about the false information, but also Perschbacher calling the nurse "a stupid fucking bitch"(Ex.96-pgs.9-10).

Perschbacher falsely claimed he swallowed wire and nail clippers(Ex.13). Guard Contis could have testified about the details(Ex.100-pgs.8-9).

Perschbacher falsely claimed he swallowed his toothbrush and Guards Silvy and Dicus could have testified about that(Ex.16;Ex.98-pgs.7-8;Ex.97-pgs.6-10). When Dicus reviewed what happened, Perschbacher said: "Make up your own story. Don't drink and drive."(Ex.16;Ex.97-pgs.9-10).

Perschbacher falsely denied having a new tattoo and Guard Reeves could have testified about that(Ex.18;Ex.95-pgs.5-9).

Perschbacher falsely accused four guards of beating him and Warden Armontrout could have testified Perschbacher "lied"(Ex.25;Ex.99-pgs.6-20).

In a separate incident, Perschbacher falsely accused a guard of beating him(Ex.70). Perschbacher made this allegation against the guard while he and the superintendent were giving two legislators a tour(Ex.70).

Perschbacher falsely represented staff had authorized his school class absences(Ex.56).

Perschbacher made false allegations of staff misconduct and Potosi Investigator Hall could have testified about those(Ex.20;Ex.103-pgs.6-16).

Counsel said they did not impeach Perschbacher with the available documents and associated witnesses because Perschabacher's Corrections file was disclosed during trial, counsel believed the violations for providing false information were insignificant, and Perschbacher might assert the information he provided was true(Ex.118A-pgs.159-61,190-96,201-03;29.15Tr.590-92,594,596-97,599-610,612,670-71) The findings rejected Michael's claim because Perschbacher was incredible and not believed(29.15L.F.933-34).

Despite counsel's limited time to review Perschbacher's records, reasonable counsel, at minimum, would have questioned Perschbacher about his providing false information violations and would have confronted Perschbacher with his Corrections file. *State v. Long*,140S.W.3d27,31-32(Mo.banc2004)(right to present a defense requires defendant be allowed to introduce evidence of witness' prior false allegations to show witness incredible). Reasonable counsel would have confronted Perschbacher with his deposition testimony that he had, at most, one such violation(Ex.49-pg.134) and then used the many violations to show Perschbacher gave false deposition testimony. Reasonable counsel also would have called Armontrout, Rhodes(Lawson), Contis, Silvy, Dicus, Reeves, and Hall to testify about Perschbacher's providing false information violations. Michael was prejudiced because violations for providing false information show Perschbacher is incredible

and should not be believed as to whether there ever were any "kites/cadillacs" from White-Bey telling Michael to fake mental illness. Even if some of the violations could be construed as minor, that Perschbacher had many providing false information violations would have cumulatively been highly impeaching. *See Black* and *Hadley, supra*. Moreover, when counsel did not get all of Perschbacher's records during trial, counsel argued that it was critical to have the parts dealing with Perschbacher's prison conduct because violations for providing false information would be especially powerful impeachment(Tr.856).

It was unreasonable strategy to fail to impeach Perschbacher with his providing false information violations because respondent argued Perschbacher's testimony provided the grounds for believing its experts and not Michael's doctors(Tr.1452-56). *See McCarter*. The prejudice is demonstrated by Ahsens having advocated leniency for Perschbacher on his Jefferson County charges because he was so helpful against Michael(Ex.63-pg.44).

If this Court concludes counsel was not ineffective because they only got Perschbacher's Corrections file during trial, then the trial court denied Michael a fundamentally fair trial when it refused to ordered Perschbacher's Corrections file disclosed two months before trial. The trial court's actions deprived counsel of the opportunity to adequately prepare information that was critical for showing Perschbacher is a liar.

A new trial is required.

III.

PERSCHBACHER'S CORRECTIONS FILE IMPEACHMENT

The motion court clearly erred denying counsel was ineffective for failing to impeach Perschbacher with his Corrections file information that would have shown he gave false deposition testimony and was an attention seeking, incredible, and mentally ill inmate whose pattern of treating serious matters flippantly made him unbelievable and biased because Michael 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 effective counsel would have impeached Perschbacher this way and Michael was prejudiced because Perschbacher was the only witness who claimed to have objective faking evidence, the "kites/cadillacs."

Perschbacher's Corrections file contained many matters counsel could have used to impeach Perschbacher, but they did not.

This Court reviews for clear error. *See* Point I. 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).

Counsel is ineffective when they fail to impeach critical witnesses. *Black v. State*,151S.W.3d49,51(Mo.banc2004); *Hadley v.*

Groose,97F.3d1131,1136(8thCir.1996). Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994).

"[T]he pecuniary interest, bias or prejudice of a witness may always be shown." *State v. Anderson*,79S.W.3d420,437(Mo.banc2002). "Because the jury is to assess credibility, it is entitled to any information which might bear significantly on the veracity of a witness….[A]nything that has the legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness is proper for determining the credibility of a witness." *Wainwright v. State*,143S.W.3d681,689(Mo.App.,W.D.2004)(internal quotation marks and citations omitted). Mental derangement may be used to impeach since it can impair a witness' ability to accurately observe or remember. *State v. Pinkus*,550S.W.2d829,839-40(Mo.App.,Spfld.D.1977).

The findings rejected Michael's claims because Perschbacher was adequately impeached and he was incredible(29.15L.F.933). Counsel used parts of Perschbacher's Corrections records to impeach and cross-examination's scope is strategy(29.15L.F.933-34). The evidence was hearsay and inadmissible because impeaching testimony is limited to a witness' reputation for truth and veracity(29.15L.F.933-34).

At Perschbacher's deposition, he represented he was providing information against Michael not for favorable treatment, but because murder is so offensive(Ex.49-pgs.57-58). Perschbacher's Corrections records contained letters

threatening to kill a woman who was advising his girlfriend to end their relationship(Ex.57;Ex.58). Perschbacher signed one "The Grim Reeper" and below that signature was a knife dripping blood(Ex.57-pg.5). Underneath the knife was written: "Fuck with me, and Your Life will End!! You Will Die"(Ex.57-pg.5 emphasis in original). Counsel agreed these letters would have substantially impeached Perschbacher(29.15Tr.617-18). Reasonable counsel would have confronted Perschbacher with his pretrial deposition testimony and threatening letters. This would have impeached Perschbacher showing he gave false testimony.

Part of counsels' strategy was to show Perschbacher was an attention seeker(29.15Tr.622). Perschbacher's Corrections records showed suicide attempts(Ex.59). That history not only shows attention-seeking behavior demonstrating bias, but also mental derangement. *See Pinkus, supra.*[10]

Perschbacher flooded his cell numerous times(Ex.62). Perschbacher claimed he "was totally insane" when he flooded his cell(Ex.62-pg.3). Perschbacher also claimed he flooded his cell because an officer told him he could "go

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[10] *See ,also,* Point VIII discussing Perschbacher's Jefferson County and St. Louis County guilty pleas, done shortly after Michael's trial and before Michael's sentencing, where Perschbacher recounted a psychiatrist has diagnosed him as having bipolar disorder, attention deficit disorder, and anxiety attacks for which he is prescribed Lithium, Risperdal, and Ativan(Ex.73-pg.26;Ex.123-pg.30;Ex.129-pg.7-8; Ex.7B-pgs.373-77).

swimming"(Ex.62-pgs.1-2). As to one incident Perschbacher stated: "Can I pee in Sargent [sic] Kelly's butt[?]"(Ex.62-pg.4).

Perschbacher indicated he was "guilty as charged by reason of insanity" on a creating a disturbance violation(Ex.13). Perschbacher asserted he was "[g]uilty by reason of disease and mental defect" in response to a violation(Ex.60-pg.1). On another occasion, Perschbacher asserted "[n]ot guilty by reason of mental disease [and] defect"(Ex.60-pg.2). Perschbacher said he was "[g]uilty by reason of insanity" on a creating a disturbance violation(Ex.60-pg.3). Counsel thought these were matters that impeached Perschbacher(29.15Tr.623-25).

In response to a creating a disturbance violation Perschbacher said: "I never did like Mrs. Butterworth Syrup"(Ex.17). In response to a disobeying an order violation Perschbacher said: "Green eggs and ham, Sam I am on a train in the rain"(Ex.53B-pg1429). Perschbacher responded to a creating a disturbance violation stating: "Who's count? What count? What is a count? Count Dracula?"(Ex.53B-pg.1434). Perschbacher wrote on a violation report form "I LOVE YOU TOO!" (capitalization in original)(Ex.53B-pg.1306).

Perschbacher became violent when contraband was found in his cell (Ex.75-pg.1334). Perschbacher said: "The devil made me do it and COI Wood made me do it."(29.15Tr.630;Ex.75-pg.1334).

During a body search, Perschbacher "deficated [sic] in the shower" and stated: "Officer Wood can suck my penis erectus"(Ex.75-pg.1328;29.15Tr.630).

Perschbacher got a violation for cutting holes in his mattress and his response was: "Hickory Dickory Dock"(Ex.75-pg.1445).

Perschbacher claimed he did not have any arms in response to violations for putting his arms outside his cell(Ex.61-pgs.1-2). Perschbacher has arms(Ex.118A-pg.217).

Counsel attributed the failure to impeach Perschbacher with matters here to the late disclosure of his Corrections file which caused them to rely on the things they did question Perschbacher about(29.15Tr.621-22,623-28,630-33). [11]

Counsel unsuccessfully sought disclosure of Perschbacher's psychiatric records during trial because they had St. Louis County documents showing he had escaped from a psychiatric ward and Perschbacher's records were relevant for showing he was an incompetent witness(T.L.F.264-65;Tr.19-21). Reasonable counsel would have impeached Perschbacher with the statements contained in his Corrections file. Perschbacher's remarks about his own insanity were admissible to show that he was not credible because of his insanity. *See Pinkus*. Alternatively, Perschbacher's remarks about being insane or having a mental disease or defect would have established Perschbacher's bias that mental illness claims are baseless.

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[11] The arguments set forth in Point II are incorporated here as to the trial court having caused counsel to not fully use Perschbacher's Corrections records to impeach because it refused to order them disclosed until during trial.

Perschbacher's conduct violation remarks, such as he did not have any arms and a guard told him he could flood his cell to "go swimming," would have impeached Perschbacher's veracity due to the statements' obvious falsity. His bizarre remarks in response to conduct violations, such as the Dr. Seuss' green eggs and ham reference, would have impeached Perschbacher's veracity showing the flippancy with which he treats serious matters such as conduct violations and, thus, would have called into question how seriously he treated accusing Michael of faking mental illness.

Michael was prejudiced because all of Perschbacher's statements establish he was incredible and should not be believed on the "kites/cadillacs." While Perschbacher's statements individually might be treated as minor, cumulatively they significantly call into question Perschbacher's veracity. *See Hutchison v. State,*150S.W.3d292,306(Mo.banc2004)(in deciding prejudice from counsel's failure to act, the totality of evidence which counsel failed to present must be considered). Failing to impeach Perschbacher with the available evidence was not reasonable strategy. *See McCarter.*

A new trial is required.

IV.

PERSCHBACHER'S PRETRIAL LETTERS

The motion court clearly erred denying counsel was ineffective for failing to introduce Perschbacher's letters from his deposition because Michael 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 effective counsel would have impeached Perschbacher with them and Michael was prejudiced because they showed Perschbacher's bias through his desperate effort to get help on his cases and get out of prison.

Counsel did not introduce Perschbacher's letters desperately seeking help for himself, even though the letters were part of Perschbacher's pretrial deposition. Reasonable counsel would have introduced them to impeach Perschbacher.

This Court reviews for clear error. *See* Point I. 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).

Counsel is ineffective when they fail to impeach critical witnesses. *Black v. State*,151S.W.3d49,51(Mo.banc2004); *Hadley v. Groose*,97F.3d1131,1136(8thCir.1996). "[T]he pecuniary interest, bias or prejudice of a witness may always be shown." *State v.*

Anderson,79S.W.3d420,437(Mo.banc2002). Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994).

In Perschbacher's first June, 2000 letter to Dresselhaus, he claimed to have information helpful to respondent against Michael and asked if Dresselhaus knew anyone at the "main parole office" who could help him get on house arrest(Ex.49-attachment pg.1,3-4). Perschbacher wanted to know "if you or anyone you know has any influence at that office?"(Ex.49–attachment pgs.1-2). Perschbacher claimed he could help solve a murder(Ex.49-attachment pg.2). He claimed he could help with methamphetamine cases "when I get out"(Ex.49-attachment pg.2). Perschbacher concluded his letter stating "If there's any way you can help me, I'd appreciate it."(Ex.49–attachment pg.4)

In a subsequent letter Perschbacher sent to Highway Patrol Officers Wilfong and Crump, Perschbacher asked for help getting "out by the beginning of the Summer"(Ex.49-attachment pg.8;Ex.49-pg.104). Perschbacher claimed he could help the state on a West Plains murder(Ex.49-attachment pg.8). Perschbacher asked for help on his Jefferson County charges(Ex.49-attachment pg.8). Perschbacher stated he could "be out and off parole immediately (legally) with a little help"(Ex.49 attachment pg.8-parenthetical in original).

Perschbacher's July, 2001 letter to Dresselhaus, asserted Michael was faking(Ex.49-attachment pgs.12-13). Perschbacher asked if a deal could be worked

out for probation on his Jefferson County charges(Ex.49-attachment pgs.19-20). Perschbacher offered to help on methamphetamine cases if he could get probation in Jefferson County(Ex.49-attachment pg.22). Perschbacher offered that if Dresselhaus helped him get probation, then Perschbacher would "return the favor by helping you on another murder"(Ex.49-attachment pgs.22-23).

Counsel believed the information in Perschbacher's letters was consistent with their defense, but some contained Perschbacher vouching for his credibility(29.15Tr.635,637-41).

This claim was rejected because Perschbacher was impeached, he was not credible, and counsels' strategy was reasonable(29.15L.F.934).

The letters scream bias and motivation to help respondent, because Perschbacher so desperately wanted respondent's help with his own cases and to get out of prison. *See Anderson*. Perschbacher repeatedly offered to help respondent if it helped him. On cross-examination, Perschbacher denied having asked for favorable treatment(Tr.1286). The letters would have directly refuted Perschabacher's untruthful testimony. *See Black* and *Hadley*. It was unreasonable strategy to fail to introduce Perschabacher's letters in the face of his assertions he had not sought help on his cases. *See McCarter*. Moreover, counsels' actions were unreasonable, contradicting their earlier actions, because they had successfully obtained a pretrial order that required respondent disclose any Perschbacher requests for favorable treatment(T.L.F.214-18;11/12/02Mot.Tr.38,44-45,47-48,51).

The letters also would have caused jurors to disbelieve Perschbacher because Perschbacher had offered to solve so many other crimes. Even if respondent did not help Perschbacher, the fact that Perschbacher repeatedly asked for help showed *he* thought or hoped help would be forthcoming.

Reasonable counsel would have introduced the letters to impeach Perschbacher. *See Strickland*. Michael was prejudiced because the letters show Perschbacher's bias and desperation to try to help himself. *Id*.

A new trial is required.

V.

PATROL COLONEL STOTTLEMYRE - IMPEACH PERSCHBACHER

The motion court clearly erred denying counsel was ineffective for failing to call Highway Patrol Colonel Stottlemyre to impeach Perschbacher's assertions that he helped solve a Tarkio, Missouri murder and that respondent failed to perform its duty to correct Perschbacher's false testimony because Michael 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 effective counsel would have called Stottlemyre to testify Perschbacher had nothing to do with the case and respondent was required to correct Perschbacher's contrary false representations such that Michael was prejudiced because establishing Perschbacher was incredible was critical.

Highway Patrol Colonel Stottlemyre would have testified Perschbacher had no involvement in a never solved Tarkio murder and respondent was required to correct Perschbacher's testimony that he had.

This Court reviews for clear error. *See* Point I. 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).

Counsel is ineffective when they fail to impeach critical witnesses. *Black v. State*,151S.W.3d49,51(Mo.banc2004); *Hadley v. Groose*,97F.3d1131,1136(8thCir.1996).

In his pretrial deposition, Perschbacher testified he had provided information used to solve several murder cases, including the Tarkio, Missouri case where John Caudill was a suspect(Ex.49-pgs.30-34,121-22). Perschbacher testified at trial that the body in the Tarkio case "was found exactly where I said it would be."(Tr.1277-78). Also at trial, Perschbacher testified he helped solve four or five homicides(Tr.1277).

Stottlemyre, the Highway Patrol's Superintendent, would have testified he investigated a never solved Tarkio, Missouri murder for which John Caudill was questioned(29.15Tr.544-50). A high school hunter found the body and it was not found because of any information Perschbacher supplied(29.15Tr.544-49).

This impeaching evidence to show Perschbacher's representations were false was admissible. *State v. Long*,140S.W.3d27,31-32(Mo.banc2004)(right to present a defense requires defendant be allowed to introduce evidence of witness' prior false allegations to show witness is incredible). Counsel did not interview or investigate Stottlemyre(Ex.118C-pg.7;29.15Tr.651,654). Counsel would have wanted to impeach Perschbacher with evidence Stotlemyre provided that Perschbacher fabricated he was responsible for solving the Tarkio case(Ex.118C-pg.7;29.15Tr.652-53). Failing to interview witnesses relates to preparation and not strategy. *Kenley v.*

Armontrout,937F.2d1298,1304(8thCir.1991). Lack of diligence in investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*.1304. Counsel failed to act reasonably when they did not investigate Stottlemyre. Michael was prejudiced because it was critical to impeach Perschbacher when he bolstered his testimony claiming to have solved other murders. *See Strickland*.

This claim was rejected because Stottlemyre would have confused and '"turn[ed] off"' the jury(29.15L.F.877-78). Perschbacher was the state's critical witness on whose experts to believe. Stottlemyre would not have confused the jury, his testimony was simple and straightforward. The Patrol's Superintendent would not have been a '"tur[n] off."'

The '"deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice."' *Banks v. Dretke*,124S.Ct.1256,1274(2004)(quoting *Giglio v. United States*,405U.S.150,153(1972)). The State is not allowed to stand by silently and do nothing to correct its witness' false testimony. *Napue v. Illinois*,360U.S.264,269-70(1959). Due process requires the State disclose evidence that would impeach state's witnesses, and to disclose any material which would show that a defendant's conviction is based on false evidence. *See Kyles v. Whitley*,514U.S.419,433(1995); *Giglio*,405U.S. at 154-55; *Napue*,360U.S. at 269. A prosecutor is responsible for the failure to disclose impeaching evidence known to the police, but not brought to the prosecutor's attention. *Kyles*,514U.S. at 421. Under *Kyles* and *Napue*, the

prosecutors were responsible for knowing Perschbacher's testimony was false and for disclosing what Stottlemyre knew and for correcting Perschbacher's false testimony. Perschbacher bolstered his testimony by representing he was responsible for finding a body and it was critical to impeach him on that issue. *See Black* and *Hadley*.

A new trial is required.

VI.

PERSCHBACHER GOT A BENEFIT

The motion court clearly erred denying the claim Perschbacher told the jury he was getting nothing for his testimony when in fact Ahsens advocated leniency for Perschbacher on Perschbacher's Jefferson County charges because Ahsens believed Perschbacher's testimony was critical to convicting Michael and the motion court clearly erred further in denying discovery to prove this claim because Michael was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that Perschbacher got the benefit of Ahsens advocating leniency for Perschbacher which would have further demonstrated why Perschbacher was unbelievable and if Michael failed to prove this claim it was because discovery was improperly denied.

Perschbacher testified that he was not given any favorable treatment because he was testifying against Michael. In fact after Perschbacher testified, Ahsens wrote the Jefferson County Prosecutor advocating leniency for Perschbacher.

Review is for clear error. *See* Point I. The '"deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice."' *Banks v. Dretke*,124S.Ct.1256,1274(2004)(quoting *Giglio v. United States*,405U.S.150,153(1972)). The State is not allowed to stand by silently and do nothing to correct its witness' false misleading testimony. *Napue v.*

Illinois,360U.S.264,269-70(1959); *Giglio*,405U.S. at 153. Due process requires the State disclose evidence that would impeach State's witnesses, and to disclose any material which would show that a defendant's conviction is based on false evidence. *See Kyles v. Whitley*,514U.S.419,433(1995); *Giglio*,405U.S. at 154-55; *Napue*,360U.S. at 269. 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).

During redirect of Perschbacher, Ahsens elicited: (1) Perschbacher sought favors from Ahsens' office, but got none; and (2) any deals Perschbacher got from Jefferson County were the product of Perschbacher's attorney's work and not Ahsens' or Rupp's intervention(Tr.1294-95). In penalty rebuttal, Ahsens argued that Perschbacher got a good deal, but Perschbacher testified Ahsens and Rupp had nothing to do with it(Tr.1555).

Three weeks after the jury's death verdict and one month before sentencing, Ahsens wrote the Jefferson County Prosecutor advocating leniency for Perschbacher because his testimony:

> **"was helpful in attacking the defendant's claim of mental disease or defect and aided us in successfully prosecuting the case."**

(Ex.63-pg.44)(emphasis added)(Ex.7A-pg.28;Ex.7B-pgs.373-77). Ahsens wrote: "**fundamental fairness dictates** I inform you of his cooperation for whatever weight you think it deserves"(Ex.63-pg.44)(emphasis added).

Counsel would have wanted to know Ahsens was going to write such a letter, if he was pleased with Perschbacher's testimony(Ex.118A-pg.238-39;29.15Tr.642-44). Ahsens did not disclose that intention(Ex.118A-pgs.238-39;29.15Tr.642-44). If counsel had known Ahsens' intention, then counsel would have cross-examined Perschbacher about it(Ex.118A-pgs.238-39;29.15Tr.642-44).

Ahsens' failure to disclose his intention to write such a post-trial letter, if he was pleased with Perschbacher's testimony, constituted the presentation of false and misleading evidence and violated due process. *See Giglio*, *Napue*, *Kyles*, and *Banks*, *supra.* Ahsens' questioning left the impression respondent had not granted Perschbacher any favors **and would not be granting any** and his closing arguments drove home the same point. Yet Ahsens' post-trial letter showed the contrary.

This claim was rejected because no deal was proven(29.15L.F.934).

If this Court concludes this claim was not proven, then that was because 29.15 discovery was improperly prohibited. The motion court denied discovery seeking to require respondent disclose its prosecutors' files in this case against Michael and all prosecutors' files for cases pending against Perschbacher at the time this case was pending against Michael(29.15L.F.69-74,222-23). Also denied was a motion to require respondent disclose all exculpatory and impeachment evidence about Perschbacher known both before and after trial(29.15L.F.77-84,222-23).

The state's failure to disclose exculpatory evidence requires postconviction relief. *Hayes v. State*,711S.W.2d876,877-80(Mo.banc1986);*State v.*

Phillips,940S.W.2d512,516-18(Mo.banc1997). Respondent argued the discovery was a "fishing expedition"(29.15L.F.127-43). Ahsens' post-trial letter to the Jefferson County Prosecutor advocating leniency for Perschbacher appeared in Perschbacher's Jefferson County court file(Ex.63-pg.99). That letter's content and its presence in the court's file demonstrate why there was substantial grounds for ordering the discovery sought and it was not a "fishing expedition." Moreover, respondent's track record of withholding the Dresselhaus memo, Ex.2, while viogorously opposing its disclosure in this 29.15(29.15Tr.268-69,283-84) is further evidence why the discovery should have been allowed. Further Ahsens' track record of *Brady* and Rule 25.03 violations resulting in reversals (Ex.76-*Barton* new trial;Ex.77-*Tisius* new penalty hearing;29.15Tr.306-20) also required this discovery be permitted. Additional evidence why that discovery should have been allowed is that at Perschbacher's Jefferson County guilty plea his attorney brought Ahsens' leniency letter to the plea court's attention(Ex.73-pg.18;Ex.123-pg.22;29.15Tr.668).

A new trial is required. Alternatively, this case should be remanded to allow discovery that will show respondent failed to disclose exculpatory Perschbacher evidence.

VII.

WHITE-BEY - NO "KITES/CADILLACS"

The motion court clearly erred denying counsel was ineffective for failing to call White-Bey to testify he never sent Michael "kites/cadillacs" advising Michael to act crazy to beat his case and Perschbacher is lying because Michael 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 effective counsel would have called White-Bey to rebut Perschbacher and Michael was prejudiced because White-Bey would have discredited respondent's critical faking/malingering witness.

White-Bey would have testified Perschbacher was lying and he never sent Michael "kites/cadillacs" advising him to play "the nut role." Effective counsel would have called White-Bey.

This Court reviews for clear error. *See* Point I. 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).

One of capital counsel's primary duties is to neutralize the State's damaging evidence. *Ervin v. State*,80S.W.3d817,827(Mo.banc2002). Even when counsel make strategy decisions after preparation and investigation, their strategy must be

objectively reasonable and sound. *State v. McCarter*, 883S.W.2d75,78(Mo.App.,S.D.1994).

29.15 Evidence

White Bey's 29.15 testimony was he never sent Michael "kites/cadillacs" advising him to act crazy or to play "the nut role"(Ex.116-pgs.9-10). Perschbacher is lying about the "kites/cadillacs"(Ex.119-pg.11). White-Bey emphatically told trial counsel he never sent Michael "kites/cadillacs" advising Michael to fake mental illness(Ex.116-pgs.11-12;Ex.118A-pgs.141-43;Ex.118C-pg.15;29.15Tr.534-35,543)[12]. White-Bey was writted for trial, but not called(Ex.116-pgs.12-13;29.15Tr.534-35).

Counsel did not want the jury to believe Perschbacher's "kites/cadillacs" testimony and they knew Perschbacher was going to testify about them(Ex.118A-pgs.140-43;29.15Tr.534). Counsel decided not to call White-Bey because White-Bey told counsel that Michael had told White-Bey that Michael's Father of Darkness had directed Michael to kill Ms. Smetzer(Ex.118A-pg.141;29.15Tr.541-43;Ex.118B-pg.444). Michael's defense to killing Ms. Smetzer was not that his Father of Darkness had directed Michael to kill her, and therefore, counsel believed Michael's

[12] Unlike Ahsens, who knowingly failed to disclose Dresselhaus' Perschbacher Ex.2 memo, Michael's counsel disclosed their notes of their meeting with White-Bey, who they considered calling to rebut Perschbacher, because they believed the discovery rules required that(29.15Tr.534-41;Ex.50).

statements to White-Bey were inconsistent with the defense actually presented there(Ex.118A-pgs.141-42;29.15Tr.541-43).

Findings

The findings held counsel was not ineffective because Perschbacher was incredible and not believed(29.15L.F.871-72,876,927-28,931). Because Perschbacher was incredible, counsel made the strategic decision not to call White-Bey(29.15L.F.872,927-28). That strategic decision was based on statements Michael made to White-Bey about killing Ms. Smetzer that were inconsistent with Michael's defense to killing Thomas(29.15L.F.875-76).

Counsel Was Ineffective

Michael's case was a battle over whether to believe the defense experts who said Michael's schizophrenia caused him to kill Thomas or the state's experts that Michael was a faker/malingerer. Perschbacher was the pivotal witness. Perschbacher was so critical that the jury was told the state's experts should be believed because Perschbacher's "kites/cadillacs" testimony confirmed its experts' opinions(Tr.1452-56). That pivotal role is unmistakable because three weeks after Michael's trial and one month before sentencing, Ahsens wrote the Jefferson County Prosecutor advocating leniency for Perschbacher because Perschbacher's testimony was so critical in convicting Michael(Ex.63-pg.44)(Ex.7A-pg.28;Ex.7B-pgs.373-77).

Counsel's decision not to call White-Bey was unreasonable. *See Hutchison v. State*,150S.W.3d292,305(Mo.banc2004)(foregoing presentation of evidence because

it contains something harmful is unreasonable when its harm is outweighed by its helpful value). White-Bey was the only witness who could refute and contradict Perschbacher's claim that White-Bey sent Michael "kites/cadillacs" advising him to play "the nut role" to beat his case, and thereby, establish Perschbacher was lying(1267,1269-70). It violates the Eighth Amendment for a jury to impose a death sentence premised on materially inaccurate evidence. *See Johnson v. Mississippi*,486U.S.578,590(1988). Michael's conviction is based on materially inaccurate evidence because White-Bey would have established he never wrote any "kites/cadillacs" advising Michael to play "the nut role."

Michael's guilt phase was not about how the Smetzer case was tried. It was, however, about whether Michael had a mental disease when he killed Thomas. Even if White-Bey would have provided testimony "inconsistent" with the Smetzer case's details, his testimony, considered in its entirety, would have been more helpful than harmful because it would have contradicted and refuted Perschbacher's highly damaging testimony Michael was a faker/malingerer. *See Hutchison*.

Reasonably competent counsel would have called White-Bey. *See Strickland*. Michael was prejudiced because White-Bey would have refuted Perschbacher on the "kites/cadillacs" that were relied on to prove faking/malingering *Id*.

A new trial is required.

VIII.

UNCALLED POTOSI STAFF

The motion court clearly erred denying counsel was ineffective for failing to call Potosi staff King, Edgar, Haney, and Glore because Michael 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 effective counsel would have called them to provide evidence that Perschbacher was unbelievable and Michael was prejudiced because their familiarity with Perschbacher as Potosi law enforcement made them especially credible for discrediting Perschbacher.

Counsel did not call Potosi staff who could have provided evidence demonstrating Perschbacher was incredible.

This Court reviews for clear error. *See* Point I. 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).

Counsel is ineffective when they fail to impeach critical witnesses. *Black v. State*,151S.W.3d49,51(Mo.banc2004); *Hadley v. Groose*,97F.3d1131,1136(8thCir.1996).

Perschbacher was the key piece respondent argued for why its experts' malingering opinions should be believed and Michael's experts' opinions should be rejected(Tr.1452-56). Perschbacher's pivotal role is unmistakable because three weeks after Michael's trial and one month before sentencing, Ahsens wrote the Jefferson County Prosecutor advocating leniency for Perschbacher because Ahsens believed Perschbacher's testimony was critical to respondent's success(Ex.63-pg.44)(Ex.7A-pg.28;Ex.7B-pgs.373-77).

Investigator King

Respondent called Potosi Investigator King at trial. King testified about Michael having admitted that he killed Thomas in response to his Father of Darkness' commands(Tr.958,971-76,985-89). Counsel did not question King about Perschbacher (Tr.983-89) and did not recall King in the defense case(Tr.1002-1169).

King's 29.15 testimony included Perschbacher contacted him about "[a]nything and everything" and Perschbacher was "a self-proclaimed snitch"(Ex.115-pg.7). "[M]ost" information Perschbacher provided "ha[d] no merit"(Ex.115-pg.10). Perschbacher was an unreliable informant and most information Perschbacher provided was "unfounded"(Ex.115-pg.11-12). Perschbacher was an attention seeking inmate who tried to "become staff's pet"(Ex.115-pg.12). Perschbacher would try to work out privileges or special treatment for being a snitch(Ex.115-pg.9).

Counsel had deposed King and King had given similar testimony(Ex.51-pgs.28-30). Counsel did not call King because they believed Perschbacher's cross-examination had gone so well, and they did not want King to repeat his case-in-chief testimony(Ex.118A-pgs.146-47;29.15Tr.556-57). Counsel did not cross-examine King about these matters because Perschbacher had not yet testified(29.15Tr.556-57).

Counsel's choice of strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). Counsel's strategy was unreasonable. King could have established Perschbacher was constantly trying to be a snitch to benefit himself, Perschbacher was unreliable, and Perschbacher's reputation for truth was not good. It would have been particularly beneficial to call King because he had been respondent's witness. Defense counsel could have argued that even respondent's witnesses knew Perschbacher was unbelievable. Even if King had repeated his entire testimony, what he had testified to was not disputed, and therefore, not harmful. *See Hutchison v. State*,150S.W.3d292,305(Mo.banc2004)(foregoing presentation of evidence because it contains something harmful is not reasonable when its harm is outweighed by its helpful value).

Caseworker Edgar

Linda Edgar was Perschbacher's Potosi caseworker(Ex.101-pg.6-7). Perschbacher was an attention seeker and displayed manic behavior(Ex.101-pg.8-10-11). Perschbacher had a reputation for flooding his cell and with it the entire

wing(Ex.101-pgs.13-14). If Perschbacher did not get staff's immediate attention, he threatened to flood his cell(Ex.101-pgs.13-14). Perschbacher was never in general population because staff feared other inmates would hurt Perschbacher for "taunt[ing]" them(Ex.101-pg.15). Perschbacher "fabricat[ed]" stories about inmates being child molesters or homosexuals and tried to convince other inmates his fabrications were true(Ex.101-pg.15).

Counsel did not interview Edgar(Ex.118A-pg.151;29.15Tr.560;Ex.101-pgs.18-19). Counsel knew of Edgar because they had deposed another Potosi worker, Haney, who told them that Perschbacher had telephoned Edgar after Perschbacher was released(Ex.52-pg.21;Ex.118A-pgs.150-51). Counsel did not know why they did not interview Edgar(Ex.118A-pg.151). Counsel might have wanted to call Edgar(Ex.118A-pgs.151-52;29.15Tr.561).

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. It was critical for the jury to hear Perschbacher's habit was to fabricate stories about other inmates. *See State v. Long*,140S.W.3d27,31-32(Mo.banc2004)(right to present a defense requires a defendant be allowed to introduce evidence of prior false allegations of a witness to show witness is incredible).

Mental derangement may be used to impeach a witness since it can impair the witness' ability to accurately observe or remember events. *State v. Pinkus*,550S.W.2d829,839-40(Mo.App.,Spfld. D.1977). Edgar could have provided evidence that Perschbacher should not be believed because he is mentally ill. In fact, at Perschbacher's Jefferson County and St. Louis County guilty pleas, done shortly after Michael's trial and before Michael's sentencing, **Perschbacher testified a psychiatrist has diagnosed him as having bipolar disorder, attention deficit disorder, and anxiety attacks for which he is prescribed Lithium, Risperdal, and Ativan**(Ex.73-pg.26;Ex.123-pg.30;Ex.129-pgs.7-8;Ex.7B-pgs.373-77).

Haney And Glore

Haney testified Perschbacher had spent time in Potosi's "rubber room"(Ex.104-pgs.6-7). Glore described Perschbacher's wide mood swings(Ex.105-pgs.7-8). Perschbacher made unwanted calls to Glore at her home and at Potosi after he was released(Ex.105-pgs.8-10).

Counsel did not consider calling Haney because being placed in the rubber room was not a diagnosis(Ex.118A-pg.150;29.15Tr.559).

Counsel knew of Glore because Perschbacher testified in his deposition he had maintained contact with Glore, but counsel did not contact Glore because of time constraints(Ex.105-pg.10;Ex.49-pg.112;29.15Tr.553-54). Counsels' failure to interview Glore is a failure to investigate, which cannot be justified. *See Kenley*, *supra*.

Haney's and Glore's testimony about Perschbacher's mental health could have been used to impeach Perschbacher because mental derangement may be used to impeach. *See Pinkus*, supra. Calling these two witnesses was especially critical to have done because the court had denied counsels' request to get Perschbacher's mental health records and counsel obviously recognized the importance of impeaching Perschbacher with his mental infirmities(Ex.118A-pgs.149-50,166-67;29.15Tr.559;Tr.13-21).

Clearly Erroneous Findings

This claim was rejected because "all" the witnesses pled were not called(R.L.F.932). Perschbacher never asked King for special treatment(R.L.F.932). The testimony these witnesses could offer did not impeach Perschbacher and much was inadmissible(29.15R.L.F.932). The evidence presented did not establish "derangement"(29.15L.F.932-33). There was no evidence Perschbacher stayed in contact with Edgar(29.15L.F.932-33).

These findings are clearly erroneous for all the reasons discussed and because the supporting witnesses were called. Because respondent made Perschbacher its pivotal witness, counsel was required to impeach him with readily available compelling evidence showing he was incredible. As members of law enforcement, Potosi staff was especially credible on why Perschbacher cannot be believed. Respondent admitted Perschbacher's pivotal role when Ahsens relied on Perschbacher's testimony in closing argument (Tr.1452-56) and urged the Jefferson

County Prosecutor to exercise leniency for Perschbacher because of his critical role in defeating Michael's defense(Ex.63-pg.44).

The failure to call any one of these witnesses alone or in combination with others was unreasonable under *Strickland*. Michael was prejudiced because these witnesses' status as law enforcement personnel with first hand knowledge of why Perschbacher was incredible made them powerful impeachment witnesses. *See Black and Hadley, supra*.

A new trial is required.

IX.

ANY INVESTIGATION OF STECK AND AINLEY AND RESULTS REQUIRE DISCLOSURE

The motion court clearly erred in denying the motion to reveal whether there was ever any investigation of Steck and Ainley and any such results because Michael was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that if there was never any investigation, then it was improper to deny relief based on Ahsens' testimony he did not disclose Dresselhaus' Ex.2 memo because doing so might impede an investigation and if there was an investigation, then Michael was entitled to know the results because Perschbacher's accusations must have been false because Steck and Ainley are still deputies.

The non-disclosure of Dresselhaus' Ex.2 memo was rejected, in part, because Ahsens testified he was concerned disclosure might impede a Highway Patrol investigation(29.15L.F.928,934-35;*See* Ahsens' testimony 29.15Tr.305). In response to that finding, a motion for disclosure of whether there ever was an investigation and its results was filed(29.15L.F.941-46). The motion was denied as untimely and because no prejudice was shown(29.15L.F.955).

This Court reviews for clear error. *See* Point I. It violates due process for a death sentence to be imposed on the basis of information which a defendant had no opportunity to rebut, deny or explain. *Gardner v. Florida*,430U.S.349,362(1977).

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). Due process requires the State disclose evidence that would impeach state's witnesses, and to disclose any material which would show a defendant's conviction is based on false evidence. *See Kyles v. Whitley*,514U.S.419,433(1995); *Giglio v. United States*, 405U.S.150,154-55(1972); *Napue v. Illinois*,360U.S.264,269(1959).

Under Rule 75.01, the motion court retained control over the judgment for thirty days. *State v. Nicks*,883S.W.2d65,69-70(Mo.App.,S.D.1994). The findings were the first instance when Ahsens' testimony was relied on to deny relief. The motion for disclosure was filed during the thirty days after the findings were signed(29.15L.F.869,939,941). Therefore, the motion was timely.

Michael cannot show prejudice without knowing whether there was an investigation and if there was, its results. Ahsens testified he did not know what the Highway Patrol did with Ex.2 or whether Perschbacher's claims were investigated, and if they were, then the results(29.15Tr.305-06). Steck and Ainley were still deputies when they testified(Ex.78-pgs.5-6;Ex.79-pg.5). If there was an investigation, then the Highway Patrol must have concluded there was no basis for Perschbacher's allegations against Steck and Ainley; otherwise they could not have continued employment as law enforcement officers. Such a Patrol conclusion would show Perschbacher made false claims in Ex.2 and would impeach Perschbacher.

Thus, the State is now, and was before trial, required to disclose the results of such investigation. *See Kyles, Giglio, and Napue.*

This is not a matter of seeking additional discovery as respondent asserted(29.15L.F.948-50). Michael is entitled at any time in his case to know whether his conviction was based on false evidence. *See Kyles, Giglio, and Napue.*

Even if there was no investigation, Michael is entitled to that information. If there was never any investigation, then it was clear error to deny relief on grounds of an investigation that never occurred. *See Gardner.*

This Court should reverse and remand with directions that respondent disclose whether there ever was any investigation of Steck and Ainley and if there was, then the results.

X.

IMPEACHING/CORRECTING PERSCHBACHER'S LIES

The motion court clearly erred denying counsel was ineffective for failing to impeach Perschbacher with documents that showed testimonial assertions he made were objectively false and respondent committed prosecutorial misconduct when it failed to correct Perschbacher's false testimony because Michael 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 effective counsel would have used the available documents to impeach Perschbacher to establish he was unbelievable and Michael was prejudiced because Perschbacher was the only witness who claimed to have objective evidence Michael was faking mental illness, the "kites/cadillacs," and respondent was required to use the documents to correct Perschbacher's false testimony.

Throughout Perschbacher made testimonial assertions that documents establish were patently false. Counsel failed to impeach those assertions with available documents. Respondent failed to correct Perschbacher's false assertions.

This Court reviews for clear error. *See* Point I. 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).

Counsel are ineffective when they fail to impeach critical witnesses. *Black v. State*,151S.W.3d49,51(Mo.banc2004); *Hadley v. Groose*,97F.3d1131,1136(8thCir.1996).

Perschbacher's Corrections file was ordered disclosed during trial(Tr.21-24,736-37).

On cross-examination, Perschbacher testified he had never been in St. Anthony's psychiatric ward(Tr.1281). The court had ordered counsel be provided a police report that showed Perschbacher had escaped from St. Anthony's psychiatric ward(Tr.19-27;Ex.14-pg.4;Ex.118A-pgs.166-69). Counsel did not know why they did not confront Perschbacher with the police report and they could have called the report's author, Officer Wood(Ex.118A-pgs.168-69;Ex.107;29.15Tr.576-77).

On cross-examination, Perschbacher testified he had no prison violations for possessing intoxicating substances(Tr.1283). Perschbacher's Corrections file showed he had many(Ex.54). Counsel was not sure whether they would have wanted to confront Perschbacher with his violations because it would have made his testimony longer and they were not convictions(Ex.118A-pgs.176-77;29.15Tr.581).

On direct, Ahsens asked Perschbacher what charges he had pending(Tr.1257). Perschbacher did not tell the jury that he had pending an assault of a law enforcement charge(Tr.1257). On cross-examination, Perschbacher denied he had a pending assault of a law enforcement officer charge(Tr.1275). Counsel did not impeach Perschbacher with Jefferson County Circuit Court records showing Perschbacher had

such a pending charge(Ex.65-pg.1-2;Ex118A-pgs.177-80). Counsel did not know why Perschbacher was not confronted with those court records(Ex.118A-pg.180;29.15Tr.584-85).

On cross-examination, Perschbacher denied having any tattooing violations(Tr.1284), but he did(Ex.18). Counsel did not know why Perschbacher was not impeached with his Corrections file, except Perschbacher might deny what was shown(Ex.118A-pg.186;29.15Tr.587-88).

At Perschbacher's deposition, he denied having throwing feces or urine violations(Ex.49-pg.73-74), but he did(Ex.55). Counsel did not confront Perschbacher at trial with his deposition testimony and violations(Tr.1270-94). Counsel did not know why Perschbacher was not impeached with his Corrections file, except Perschbacher refused to sign the violations(Ex.118A-pg.183;29.15Tr.586-87).

Reasonably competent counsel who on cross-examination was confronted with a witness who denied matters that documents objectively refuted would have confronted the witness with those documents. To fail to impeach such a witness is unreasonable because the jury was left believing counsel was making up accusations about Perschbacher, and thereby, counsel was entirely discredited. *See Strickland, Black*, and *Hadley, supra*. Even if Perschbacher would have denied the violations when confronted with supporting documents, the jury would have realized that cumulatively the documents must reflect truthful reports about Perschbacher. The same is true for Perschbacher's failure to acknowledge on direct his assaulting a law

enforcement officer charge. Michael was prejudiced because demonstrating why Perschbacher was incredible was critical for persuading the jury not to believe Perschbacher on the "kites/cadillac" faking evidence. *Id*.

This claim was denied because Perschbacher was adequately impeached and discredited(29.15L.F.933). Ahsens' letter to the Jefferson County Prosecutor advocating leniency for Perschbacher (Ex.63-pg.44) establishes that finding is clearly erroneous.

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). It was unreasonable to fail to impeach Perschbacher with these matters.

Ahsens testified he did not correct Perschbacher's lies because he did not know Perschbacher was lying and it was up to Michael's counsel to impeach Perschbacher(29.15Tr.321-27,333-37,342). The record expressly shows Ahsens knew Perschbacher was lying when Perschbacher denied having been in St. Anthony's psychiatric ward. Ahsens was present when counsel recited that there was a police report showing Perschbacher had been in St. Anthony's psychiatric ward and the court ordered that police report disclosed(Tr.19,27). Ahsens had opposed counsel's request for an order to get Perschbacher's psychiatric records(Tr.19-21). Respondent had possession, knowledge and control of the above-listed documents. The '"deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice."' *Banks v.*

Dretke,124S.Ct.1256,1274(2004)(quoting *Giglio v. United States*,405U.S.150,153(1972)). The State is not allowed to stand by silently and do nothing to correct its witness' false testimony. *Napue v. Illinois*,360U.S.264,269-70(1959). Under these decisions, respondent was required to correct Perschbacher's false testimony. Perschbacher wrongfully bolstered his credibility by denying and failing to acknowledge facts in response to questioning.

In the death penalty case *Barton v. State*, the 29.15 court granted a new trial where Ahsens failed to correct a state's witness' false testimony about her prior convictions(Ex.76-pgs.21-22). At Barton's 29.15 hearing, Ahsens offered excuses for not correcting his witness' false testimony(Ex.76-pgs.21-22). Barton's 29.15 court rejected Ahsens' excuses because "it was incumbent upon the prosecutor to correct the false impression created by [the witness'] testimony."(Ex.76-pg.22). Even though under *Banks*, *Napue*, and *Giglio* it was "incumbent upon" Ahsens to correct Perschbacher's false testimony, he did not.

A new trial is required.

XI.

SIGNING STATE'S FINDINGS CONTRADICTING ITS EARLIER PERSCHBACHER POSITIONS

The motion court clearly erred in signing respondent's 71 page proposed findings that expressly contradicted the state's trial position and Ahsens' Jefferson County Prosecutor letter that Perschbacher was an especially credible witness critical to convicting Michael because Michael was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that adopting respondent's findings that expressly contradicted respondent's prior vouching for Perschbacher's credibility shows a lack of independent judicial judgment.

The motion court signed respondent's findings regarding Perschbacher. Those findings directly contradicted respondent's prior assertions that Perschbacher was an especially credible witness critical to convicting Michael.

Review is for clear error. *See* Point I. 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).

The findings respondent prepared and the 29.15 court signed repeatedly rejected the Perschbacher claims because Perschbacher was incredible, not believed

by the jury, and Perschbacher played no role in the jury's decision(29.15L.F.865-68,871-73,875,877-78,926-35).[13]

When counsel objected to Perschbacher's being allowed to testify, Rupp and Ahsens strenuously argued Perschbacher's testimony was proper, critical rebuttal establishing Michael was malingering and faking(Tr.1250-54). Ahsens argued to the jury that respondent's doctors' malingering opinions should be believed over Michael's experts' opinions because Perschbacher's testimony confirmed the state's doctors' opinions(Tr.1452-56).

Three weeks after the jury's death verdict and one month before sentencing, Ahsens wrote the Jefferson County Prosecutor advocating leniency for Perschbacher because his testimony:

> **"was helpful in attacking the defendant's claim of mental disease or defect and aided us in successfully prosecuting the case."**

(Ex.63-pg.44)(emphasis added)(Ex.7A-pg.28;Ex.7B-pgs.373-77). Ahsens wrote "**fundamental fairness dictates** I inform you of his cooperation for whatever weight you think it deserves"(Ex.63-pg.44)(emphasis added).

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[13] After respondent submitted its proposed findings, the motion court entered an order directing respondent to insert the word "not" in a sentence where it was obviously omitted and also to omit entirely one other sentence(29.15L.F.865-68). These were the only changes to respondent's seventy-one (71) pages of findings(29.15L.F.865-939).

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.

In *Smith v. Groose*,205F.3d1045,1051(8thCir.2000), the defendant's conviction violated due process and was reversed because the state took contradictory positions as to critical facts in the co-defendant's trial. The inconsistent *Smith* positions evidenced a disregard for fairness and the search for truth. *Id*.1051. Respondent did the same thing here and the 29.15 judge sanctioned its behavior. In Michael's case there is a similar disregard for fairness and the search for truth. The state argued to the jury that its experts should be believed because Perschbacher provided direct evidence Michael was faking mental illness(Tr.1452-56). Ahsens told the Jefferson County prosecutor that Perschbacher deserved leniency because he provided evidence that was critical to convicting Michael of first degree

murder(Ex.63-pg.44). These behaviors stand in stark contrast to respondent's 29.15 Perschbacher findings.

The 29.15 judge did not exercise independent judgment when she signed respondent's findings that expressly contradicted respondent's trial position and Ahsens' Jefferson County Prosecutor letter. *See Kenley*. Respondent's contradictory Perschbacher positions violate due process. *See Smith v. Groose*.

This Court should reverse and remand with directions that Michael's 29.15 case be reheard by a judge, other than Judge Rauch, who will then exercise independent judgment and not just sign respondent's findings.

XII.

PERSCHBACHER'S LETTERS DESTROYED

The motion court clearly erred finding respondent did not commit misconduct when it did not disclose Dresselhaus destroyed letters Perschbacher wrote him and respondent violated Rule 25.03 because Michael was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that this information would have impeached Perschbacher because the reasonable inference is there was information respondent did not want the jury to know and Rule 25.03 required their disclosure.

Attorney General Investigator Dresselhaus destroyed letters Perschbacher sent him that should have been turned over to Michael's attorneys.

Review is for clear error. See Point I.

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. 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).

Written witness statements must be disclosed. *State v. Jamison*,163S.W.3d552,557(Mo.App.,E.D.2005). Rule 25's rights are rooted in due process. *State v. Wilkinson*,606S.W.2d632,636(Mo.banc1980).

Dresselhaus threw away many letters Perschbacher wrote him that he thought had nothing to do with Perschbacher's anticipated testimony(29.15Tr.285-90,294-97,346).

This claim was rejected because some letters predated Michael killing Thomas and they were not connected to Perschbacher's testimony(29.15L.F.931). Dresselhaus' motives were innocent and not intended to hide relevant evidence(29.15L.F.931).

Counsel did not know Dresselhaus destroyed letters from Perschbacher to him(Ex.118A-pg.140;29.15Tr.533). Counsel would have wanted the jury to know Dresselhaus destroyed letters from Perschbacher because the reasonable inference is that there was evidence respondent did not want the jury to know(Ex.118A-pg.140;29.15Tr.533).

Respondent failed to disclose critical impeaching evidence, see *Brady*, and violated Rule 25.03. The 29.15 evidence refutes Dresselhaus acted innocently. Ahsens' Perschbacher redirect left the impression respondent had not granted Perschbacher any favors and would not be granting any. *See* Point VI. After creating that false impression, Ahsens then wrote the Jefferson County Prosecutor advocating

leniency for Perschbacher. *See, e.g.,* Points I and VI. These behaviors are contrary to any reasonable view respondent's representatives acted innocently.

A new trial is required.

XIII.

APPELLATE COUNSEL – PERSCHBACHER'S HEARSAY

The motion court clearly erred denying appellate counsel was ineffective for failing to challenge the admission of Perschbacher's hearsay testimony as to the content of White-Bey's alleged notes because Michael was denied his rights to due process, freedom from cruel and unusual punishment, to confront the witnesses against him, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have raised this meritorious issue which required a new trial.

Appellate counsel failed to challenge the admission of Perschbacher's hearsay testimony.

This Court reviews for clear error. *See* Point I. 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).

A defendant is entitled to effective appellate counsel. *Evitts v. Lucey*,469U.S.387,396-97(1985). To be entitled to relief, a movant must establish competent and effective appellate counsel would have raised the error and there is a reasonable probability the appeal's outcome would have been different. *Williams v. State*,168S.W.3d433,444(Mo.banc2005).

The claim was rejected because appellate counsel provided reasonable explanations for all she did(29.15L.F.935).

Perschbacher's Hearsay

Perschbacher testified that White-Bey sent "kites/cadillacs" to Michael and that he read all of them before passing them to Michael(Tr.1266-69). White-Bey's "kites/cadillacs" told Michael that he needed to play "the nut role" and do "crazy things" to beat his case(Tr.1267,1269-70). Perschbacher claimed to have discussed with Michael the "kites/cadillacs" contents(Tr.1267). Trial counsel objected to Perschbacher's hearsay as violating Michael's rights to confront and cross-examine the witnesses against him and included that in the new trial motion(Tr.1247-55,1267,1269;T.L.F.356-57).

Appellate counsel initially testified she did not raise this claim because she did not believe the evidence was being offered for its truth, but then was uncertain why she did not raise it(Ex.82-pgs.14,25-26).

Reasonable appellate counsel would have recognized that this testimony was offered for its truth that White-Bey had told Michael to play the "nut role" to beat his case. Counsel did not get to cross-examine White-Bey because respondent did not call White-Bey. Reasonable appellate counsel would have recognized this claim's merit. *See State v. Revelle*,957S.W.2d428,431-34(Mo.App.,S.D.1997)(reversible error to admit victim wife's hearsay note on her troubled marriage in husband's homicide prosecution); *Crawford v. Washington*,541U.S.36,61-62(2004). Appellate

counsel was ineffective. *See Roe v. Delo*,160F.3d416,418-19(8thCir.1998)(failure to raise viable appellate issues constitutes ineffective assistance). Michael must be granted a new trial. *See Williams and Roe*.

A new trial is required.

XIV.

FAMILY, FRIENDS, AND TEACHERS NOT PRESENTED

The motion court clearly erred denying counsel was ineffective for failing to call family and friends Searcy, Hemphill, Stewart (Steward), Wooten, Vera and Preston Jackson, and Tyler, and teachers Williams and Kimbrough because Michael 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 effective counsel would have called these witnesses because all established the severity of Michael's mental health problems and that they predated Michael ever being charged with any crime and Michael was prejudiced because he would not have been convicted of first degree murder or at minimum not death sentenced.

Counsel failed to call family, friends, and teachers. All would have established the severity of Michael's mental health problems and that they predated Michael ever being charged with any crime.

This Court reviews for clear error. *See* Point I. 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).

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). Foregoing presenting evidence because it contains something harmful is unreasonable when its harm is outweighed by its helpful value. *See Hutchison v. State*,150S.W.3d292,305(Mo.banc2004).

A. Teachers

Williams

When Michael was ten, Shirley Williams taught him in a special classroom setting because he was diagnosed as learning, language, and behaviorally disabled(Ex.83-pgs.6,9,11-14,34). Michael's language deficits were so extreme that he needed help putting together thoughts and sentences(Ex.83-pg.34). Michael could not answer questions about classroom information presented to him(Ex.83-pgs.41-42). Michael's verbal I.Q. scores at ages seven and ten were 68 and 69 respectively(Ex.83-pgs.38-40;Ex.1-pgs.864,870).

Michael's problems were so severe an aide was assigned to him all day, wherever he went(Ex.83-pg.22). Michael engaged in serious suicidal behaviors that included standing on a second floor window ledge(Ex.83-pgs.17-19,29-30). Michael's mother was in denial over his problems because she thought she could whip Michael to get change(Ex.83-pg.31).

Kimbrough

Ciby Kimbrough was Michael's grade school counselor(Ex.84-pgs.6,9-10). Williams asked Kimbrough to talk to Michael after Williams had to talk Michael out of jumping from a class window(Ex.84-pgs.10-11). Other children who presented Michael's kinds of handicaps were treated in a mental health setting(Ex.84-pg.16).

B. Family and Friends

Searcy

Yvonne Searcy is Michael's paternal aunt and she saw him twice a week and sometimes babysat overnight(Ex.87-pgs.6-7,14). Searcy saw Michael's father beat him with a hanger and the welts and bruises he suffered(Ex.87-pgs.8-10). Michael's mother tried to stop the beatings, but she also got beat(Ex.87-pg.10).

Michael would sit and rock and hit his head because he was "challenged"(Ex.87-pg.12). Searcy had to hide sharp objects because Michael told her that he heard voices telling him to do harmful things(Ex.87-pg.14). Michael started hearing his Father of Darkness' voice when he was eleven or twelve(Ex.87-pgs.15-16). There was an incident when Michael could not get off the school bus because his Father of Darkness was there(Ex.87-pg.15). Michael said that he was doing things because the voices told him to(Ex.87-pg.21). Michael's problems were so severe that a church exorcism was attempted when Michael was twelve or thirteen(Ex.87-pgs.23-24).

Hemphill

Matilda Hemphill is Michael's maternal aunt(Ex.85-pg.6). Hemphill witnessed a school incident where Michael was running into the wall with a chair on his head(Ex.85-pgs.12-13). Michael learned very slowly(Ex.85-pg.14). Michael told Hemplhill about his Father of Darkness when he was thirteen or fourteen before Michael was ever charged with any offense(Ex.85-pgs.17-18). Michael told Hemphill that his Father of Darkness was directing him to kill people and Hemphill told Michael's mother about that(Ex.85-pgs.17-18).

Stewart (Steward)

Joyce Stewart (Steward) is Michael's maternal aunt and saw Michael often(Ex.86-pgs.6-7). Stewart observed Michael as a young child engage in rocking and head banging(Ex.86-pgs.9-11). Michael said he did not feel any pain when he banged his head against the wall(Ex.86-pg.10). Michael would stop in the middle of a conversation with Stewart and go off into space(Ex.86-pg.11). Michael was a slow learner and lost in his own world(Ex.86-pg.12). Michael was twelve or thirteen when he started to talk about hearing his Father of Darkness' voice calling him(Ex.86-pgs.14-15). When Michael was eleven or twelve, a church exorcism was attempted(Ex.86-pgs.16-17). Michael ran away from home often because the voices told him to(Ex.86-pg.18).

Wooten

Hester Wooten (Taylor) is Michael's father, Michael Taylor Sr.'s, sister(Ex.89-pgs5-6). Wooten takes medications for bipolar disorder and her son is bipolar with

recurrent depression(Ex.89-pgs.7,9-10). Wooten's brother and Michael's uncle, Stephen Taylor, was institutionalized for schizophrenia(Ex.89-pgs.7-8). Wooten's mother was hospitalized for psychiatric problems at Malcolm Bliss(Ex.89-pg.8).

Tyler

Jacquelin Tyler and Michael's mother are good friends(Ex.88-pgs.5-6). In separate incidents, Tyler saw Michael's father strike Michael's mother with his hand and push her down stairs(Ex.88-pgs.7-8). Michael was present when his father pushed his mother down stairs(Ex.88-pgs.8).

Michael always seemed preoccupied, worried, and nervous(Ex.88-pg.12). Michael isolated himself and did not do normal child activities(Ex.88-pgs.12-13).

Michael's Mother (Vera Jackson)

Michael's mother, Vera Jackson, was married to Michael's father, Michael Taylor Sr.(Ex.91-pgs.12-13). Michael's father's practice was to hit Michael with a tape wrapped coat hanger(Ex.91-pg.15). Michael's father thought the hanger hitting was funny(Ex.91-pgs.15-16). If Michael's mother tried to intervene, then Michael's father hit her with the hanger(Ex.91-pgs.15-16). That practice started when Michael was two(Ex.91-pg.15). Michael's father also hit Michael with an extension cord(Ex.91-pg.15).

On two occasions, and in Michael's presence, Michael's father threatened his mother with a weapon(Ex.91-pg.18). During one incident, Michael's father held a knife to his mother's throat and threatened to cut it(Ex.91-pg.18).

Michael's father also pushed his mother's face against a brick wall(Ex.91-pgs.19-20).

After Michael's mother and father split up, he threatened to kill her and Michael(Ex.91-pgs.21-22). Michael and his mother then lived in an abuse shelter for a month(Ex.91-pgs.21-23).

After Michael's parents separated, when he was five, Michael saw his father hitting, kicking, and stomping his mother(Ex.91-pg.25). Later when Michael was twelve, he told his mother he had wished then that he was as big as his father so he could have defended her(Ex.91-pg.25).

When Michael was twelve, Vera had him admitted for psychiatric care at Hawthorn Hospital(Ex.91-pgs.35-37;Ex.42-pg.3). It took three staff to restrain Michael(Ex.91-pgs.35-37). The medication treatment did not help(Ex.91-pgs.37-39).

Michael began running away from home when he was very young(Ex.91-pgs.31-34). Michael told Vera that he ran away because the voices told him to(Ex.91-pgs.32-34).

Vera made herself available to testify(Ex.91-pgs.42-44,49).

Michael's Stepfather (Preston Jackson)

Preston Jackson is married to Michael's mother(Ex.92-pg.4).

When Michael was twelve or thirteen, he ran away and left a suicide note(Ex.92-pg.9). Preston noticed that Michael displayed a blank look(Ex.92-pg.11).

Michael never threatened family, but things got to where Preston removed all sharp objects(Ex.92-pgs.11-12).

Counsels' Testimony

Counsel knew about Williams, Kimbrough, Searcy, Hemphill, Stewart(Steward), and Tyler, but failed to interview them(Ex.118B-pgs.264,270,272-77,281-82,285-86;29.15Tr.682-84,685;Ex.1-pg.48,1083-84;Ex.47-pg.2). Counsel presented like testimony through the experts(29.15Tr.677-80,684-87).

Counsel interviewed Wooten, but did not call her because the experts would testify about similar information(Ex.118B-pgs.282-85;29.15Tr.689).

Counsel did not call Vera because she "minimized" her abuse of Michael, had not been good at getting Michael psychiatric treatment, knew about Michael's behavioral problems, and seemed emotionally disconnected(Ex.118B-pgs.287-89;29.15Tr.693). Vera, however, did not minimize Michael's father's abuse of her and Michael(Ex.118B-pgs.288;29.15Tr.694).

Counsel did not call Preston because he lacked "specific" information about Michael, and was emotionally disconnected(Ex.118B-pg.294). Counsel's approach was to present like information through the experts(29.15Tr.677-80,696-97).

Findings

Counsel was not ineffective because these witnesses' testimony was insignificant, cumulative, and would not have impacted the result(29.15L.F.919-24). Searcy and Vera were not called as a matter of strategy(29.15L.F.919-20,922-23).

Counsel Was Ineffective In Guilt

Evidence of Michael's life-long history of mental disease would have supported the guilt defense. All these witnesses would have testified to Michael having mental health problems since childhood. Searcy, Hemphill, and Stewart knew Michael had heard his Father of Darkness since childhood. Vera could have testified generally to Michael having heard voices since childhood. These witnesses' testimony would have shown Michael's claim of mental illness and of hearing voices, especially his Father of Darkness, was not a recent fabrication. Additionally, Wooten would have vividly shown how rife with mental illness Michael's paternal family side was.

Counsels' unreasonableness is highlighted by Ahsens' cross-examination of Eikermann which included: "Well, isn't it true, Doctor, that one of the reasons the defendant stayed at your facility [Fulton State Hospital] for so long was because of the uproar, the embarrassment that the Department of Corrections suffered because of a murder in their most secure institution, they didn't want him back?"(Tr.1135-36). Even though an objection was sustained(Tr.1136), the jury was left believing that Michael having a long Fulton hospitalization was more about Corrections' embarrassment than his need for psychiatric treatment.

The expert testimony was an inadequate substitute. The jurors' guilt phase deliberations note requested "all psychiatric and psychological records presented by the defense," but they were unavailable because counsel had not introduced

any(Tr.1463). The jurors wanted to see for themselves the records and information discussed. These witnesses could have confirmed Michael's longstanding mental health problems and would have been a source of information independent from Rabun and the other experts and refuted respondent's faking accusations. As the actual observers of the relevant events, their testimony would have been compelling. Their specific and detailed information was not heard from other sources.

The jury's note in guilt deliberations suggests the jurors were close to finding Michael not guilty by reason of mental disease or defect, but wanted to confirm independently Rabun's testimony. If jurors had heard these witnesses in guilt, they would have had direct evidence Michael had a long mental health history dating back to early childhood and a history of hearing voices that preceded the Smetzer case. Verifying Rabun's findings with testimony from witnesses who saw first hand Michael's condition was critical because in Ahsens' guilt rebuttal argument he contrasted respondent's experts as having no monetary stake in arriving at their opinions whereas Rabun had "a monetary reason to come to the wrong conclusion"(Tr.1453). That argument continued that the only experts who had reached opinions that supported Michael's defense were evaluators who were "hired" for Michael's two cases(Tr.1455).

Reasonably competent counsel would have called these witnesses because they would have confirmed Michael's mental health problems had a longstanding history and refuted respondent's arguments that the only opinions favorable to Michael's

defense came from the defense's "paid hacks." *Strickland*. Considering the jury's request for Michael's mental health records and the information these witnesses would have provided Michael was prejudiced and there is a reasonable probability he would not have been convicted of first degree murder. *Strickland*.

Counsel's failure to interview witnesses was a failure to investigate, which cannot be justified as strategy. *See Kenley*. Because Wooten, Vera Jackson, and Preston Jackson would have confirmed and legitimated Rabun's opinions, it was not reasonable strategy to fail to call them. *McCarter.*

The Penalty Phase Presented

The entire defense penalty phase was Ex.P, a videotape deposition of Michael Kemna, Superintendent of the Crossroads Correctional Center(Tr.1517-20;Ex.37-pg.3). Michael was transferred from Biggs to Crossroads in July, 2000(Ex.37-pg.10). Kemna testified about how limited Michael's opportunity to harm anyone else was because he was housed in administrative segregation at a high security prison(Ex.37-pgs.5,12-22). Respondent elicited that it was possible Michael could return to general population(Ex.37-pg.24).

Penalty Ineffectiveness

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). Additionally, counsel are obligated to investigate

and present evidence of impaired intellectual functioning, since this is "inherently mitigating." *Hutchison v. State*,150S.W.3d292,297(2004).

The same witnesses who should have been called in guilt, discussed *supra*, should have at minimum been called in penalty. They could have provided extraordinarily mitigating first hand accounts of Michael's impaired mental status and abuse history. *See Hutchison*. Moreover, as school officials with no stake in Michael's case, Kimbrough and Williams would have been particularly persuasive. *See State v. Hayes*,785S.W.2d661,663(Mo.App.,W.D.1990)(disinterested witnesses appear more credible because have no stake in outcome).

That Michael's mother might have "minimized" her abusive behavior does not diminish that Michael's father grossly abused Michael and her. Her overall testimony had more mitigating value than any potential "harm." "Foregoing mitigation because it contains something harmful is not reasonable when its prejudicial effect may be outweighed by the mitigating value." *Hutchison*,150S.W.3d at 305. *See Williams v. Taylor*,529U.S. at 395-96(counsel ineffective in failing to present evidence of severe abuse and defendant's limited mental capabilities). Even if Vera had appeared emotionally disconnected, that would have been mitigating because it showed Michael did not have the needed appropriate parental support. For the same reasons, it was unreasonable to fail to call Michael's step-father, Preston.

The defense penalty phase was patently unreasonable. Calling Kemna to say Michael could not harm anyone because he was in administrative segregation at a

maximum security prison is patently unreasonable because Michael had killed his cellmate when he was in administrative segregation at another maximum security prison(Tr.752-53,794). The ineffectual nature of that evidence was simply underscored when Kemna testified that it was possible Michael could return to general population(Ex.37-pg.24). Ahsens then argued for death because Kemna had testified that it was possible that Michael could progress at Crossroads to being in general population, and therefore, a potential opportunity for him to kill again(Tr.1551-53). This evidence's ineffectual nature is highlighted further through Ahsens' cross of Eikermann, *supra*, that Corrections was embarrassed because a killing had happened at its "**most secure institution**" (Tr.1135-36)(emphasis added).

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). Likewise, it cannot be reasonable strategy to fail to present the mitigating evidence all these witnesses could have

presented as to both Michael's longstanding mental illness and abuse history. Michael was prejudiced because there is a reasonable probability the jury would have voted for life if they had heard these witnesses.

Even though counsel in *Hutchison* called in penalty a mental health expert and the defendant's parents, counsel was ineffective because they failed to investigate and present evidence of Hutchison's neuropsychological deficits and brain damage, learning disabilities, school difficulties, history of mental illness, and abuse. *Hutchison*,150S.W.3d at 304-08. Michael's penalty phase of calling only Kemna to testify to matters that were patently unreasonable because Michael had killed his cellmate, while in administrative segregation, is even more unreasonable than Hutchison's counsel's actions.

Reasonably competent counsel would have called all these witnesses in penalty. Michael was prejudiced because there is a reasonable probability he would have been sentenced to life.

A new trial is required or at minimum a new penalty phase.

XV.

FAILURE TO INTRODUCE RECORDS AND ASSOCIATED WITNESSES

The motion court clearly erred denying counsel was ineffective for failing to introduce records in guilt and penalty documenting and confirming Michael's longstanding mental illness and for failing to call Gilner, Baetz-Davis, Krasnicki, Dunn, and Weber who generated some records because Michael 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 effective counsel would have introduced the records and called these witnesses because both independently verified Michael's longstanding mental illness and Michael was prejudiced because he would not have been convicted of first degree murder and not death sentenced.

Counsel did not introduce records documenting Michael's longstanding mental illness and did not call some witnesses responsible for generating those records.

This Court reviews for clear error. *See* Point I. 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).

Michael's special education school records included that he: (1) functioned "within the borderline of cognitive ability;" and (2) was learning disabled and language impaired(Ex.48-pgs.1,14;Ex.1-pg.48).

Gilner's St. Louis University Psychology evaluation, done when Michael was seven, found Michael: (1) functioned "in the Borderline range of intelligence"; (2) had verbal test scores "in the Mentally Deficient range"; and (3) had test results "suggest[ing] possible organic dysfunction"(Ex.43-pg.3). Gilner would have testified that it was extraordinarly rare to fail kindergarten as Michael had done(29.15Tr.409). Michael's aggressive behavior was a product of the frustration his learning deficits, particularly his verbal deficits, caused him(29.15Tr.410-11,415,439). That aggressive behavior was also attributable to the abuse his father perpetrated and its associated lack of appropriate modeling(29.15Tr.415, 439). Michael lacked the capacity to problem solve and anticipate consequences(29.15Tr.415).

Michael was nine when he was treated at Washington University's Adolescent Psychiatry Center(Ex.44). Those records reflected Michael had: (1) "Borderline intellectual functioning"; (2) a paternal aunt and uncle with significant psychiatric histories; and (3) lived in a household characterized by physical abuse of Michael and his mother(Ex.44-pgs.5-6,10).

Michael was twelve when he was treated at Hawthorn Children's Psychiatric Hospital(Ex.42-pg.3). The records showed: (1) a family history of schizophrenia; (2)

Michael was admitted with possible psychosis; and (3) Michael heard voices telling him to cut himself(Ex.42-pgs.3,12,16).

Family Service records Krasnicki (Kilby) kept showed Michael's mother beat him with a pipe when he was twelve and caused significant visible injuries(Ex.11-pg.7-10). Krasnicki would have testified that counseling with Baetz-Davis was made available because that abuse was substantiated(Ex.114-pgs.8-10,15-17).

Baetz-Davis' St. Louis County Child Mental Health Services records showed Michael's mother was defensive, resistant to therapy, and minimized and omitted important events(Ex.41-pg.1). Baetz-Davis would have testified Michael's prognosis was "guarded" because progress could not be made until his family was more open and honest(29.15Tr.748).

Michael's May, 1998 Potosi records showed he was diagnosed with major depression with psychotic features and "Borderline IQ"(Ex.12-pg.26). Michael had more than twenty suicide attempts and a schizophrenic family history(Ex.12-pg.27). In May 1998, Michael was hearing voices and talking to his Father of Darkness(Ex.12-pg.26). His Father told him to do things, such as cut his chest(Ex.12-pg.25).

Potosi records further showed that in August 1998, Michael was hearing voices(Ex.12-pg.19). He was diagnosed with major depression with psychotic features and put on medications(Ex.12-pg.19).

Potosi Correctional Supervisor Dunn would have testified that Michael's Potosi records in December, 1998 (Ex.12-pg.10) showed Michael was brought to him and Michael asked to speak to the Potosi psychologist because he was hearing voices(Ex.93-pgs.6-9;Ex.12-pg.10). Dunn informed psychologist Weber(Ex.93-pg.8;Ex.12-pg.10). Weber would have testified she saw Michael and referred him to Potosi psychiatrist Reddy(Ex.94-pgs.13-16;Ex.12-pg.10).

Michael's Fulton treatment records, after he killed his cellmate, were available(Ex.45A;Ex.45B).

Counsel did not offer Michael's records because Rabun testified about them(Ex.118A-pg.56;Ex.142-pg.29). Counsel believed some records contained information that was not helpful and they were either going to admit them all or none(Ex.118A-pgs.56,59-60,65;Ex.142-pg.29). The witnesses who were associated with generating the records were not called because Rabun and other experts would testify to the same information based on reviewing their records(Ex.118A-pgs.63,65;Ex118B-pgs.311-13,321).

This claim was rejected because counsel made the strategic decision not to introduce the records and call Gilner, Baetz-Davis, and Krasnicki to avoid the jury considering unfavorable evidence about Michael that included past violence(29.15L.F.924-26). It was undisputed Michael suffered abuse and had learning problems(29.15L.F.924-26). The only disputed item was the experts' opinions(29.15L.F.924-26). Any matters that could have been presented were

cumulative to what was presented(29.15L.F.924-26). The all or none decision was reasonable(29.15L.F.924-26). Weber and Dunn's testimony was inadmissible hearsay and would not have altered the result because it was undisputed Michael heard voices(29.15L.F.895).

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). 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. The records would have shown Hutchison's troubled childhood, mental health problems, history of sexual abuse, and learning disabilities. *Id*.304. The motion court had 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).

Counsel acted unreasonably. Counsel did not have to admit all records or none. That is not an objectively reasonable and sound strategy. *See McCarter*. Rabun's testimony without the records was not enough. Verifying Rabun's findings with Michael's records and witnesses responsible for generating those records was critical because in Ahsens' guilt rebuttal argument he contrasted the state's experts as having no monetary stake in arriving at their opinions whereas Rabun had "a monetary reason to come to the wrong conclusion"(Tr.1453). That argument continued that the only experts who had reached opinions that supported Michael's defense were evaluators who were "hired" for Michael's two cases(Tr.1455).

The pre-Potosi records and witnesses Gilner, Baetz-Davis, and Krasnicki**,** would have documented that Michael had serious longstanding mental health problems that even predated the Smetzer offense. The Potosi documents and Dunn and Weber would have shown Michael was reporting hearing voices, including his Father of Darkness, before he killed his cellmate on October 3, 1999 (Tr.799,802), and thereby, refuted respondent's faking accusations. The documents were prepared by "disinterested" professionals who could not be cast, as Rabun was, as the defense's "paid hack." *See State v. Hayes,*785 S.W.2d661,663(Mo.App.,W.D.1990) (disinterested witnesses appear more credible because they have no stake in outcome). All this evidence would have shown Michael's mental disease or defect defense and Michael hearing voices was not a recent fabrication.

Dunn and Weber's testimony was not hearsay. "A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value." *State v. Sutherland*,939S.W.2d373,376(Mo.banc.1997). However, "'If the relevance of the statement lies in the mere fact that it was made, no reliance is placed on the truth of the statement or the credibility of the out-of-court declarant, and the statement is not hearsay.'" *Id*.377(quoting O'Brien & Goldman, Federal Criminal Trial Evidence, 345 (1989)); *State v. Mallett*,732 S.W.2d527,536(Mo.banc.1987)(pawn tickets not offered to prove defendant pawned items, but to establish defendant at crime scene). Dunn and Weber's testimony was admissible to show that Michael had reported hearing voices prior to killing his cellmate and not for the truth that Michael actually did hear those voices. *See Sutherland.*

Even admitting records that respondent could have pointed to as supporting faking would not have been harmful. During guilt, respondent called Scott, Blanchard, and Vlach to testify Michael was faking(Tr.1212-13,1301-02,1311-13, 1317-18,1339,1346-62). Vlach testified to matters in Michael's Fulton records he claimed supported malingering(Tr.1351-55). Thus, the malingering evidence was already in front of the jury. *See Hutchison and Williams v. Taylor*. Moreover on balance even taking into account evidence of past violence, the helpful evidence from all these documents and witnesses outweighed any harm. *Id.* Furthermore, Gilner

would have explained Michael's learning deficits caused his aggressive behavior(29.15Tr.410-11,415,439).

Rabun's testimony was not an adequate substitute. The jurors' guilt phase deliberations note requested "all psychiatric and psychological records presented by the defense," but they were unavailable because counsel had not introduced any(Tr.1463). The jurors wanted to see the records and information Rabun had discussed. These documents and witnesses would have confirmed Michael's longstanding mental health problems and would have been a source of information independent from Rabun and refuted respondent's faking accusations.

Failing to interview witnesses relates to preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). Counsel did not contact these witnesses(Ex.118B-pgs.309-12,320-21;Ex.93-pg.9;Ex.94-pgs.16-17).

Reasonable counsel would have presented all this evidence and associated witnesses in guilt and Michael was prejudiced because there is a reasonable probability Michael would not have been convicted of first degree murder. *See Strickland*.

Moreover, after getting the jury's note requesting all this information during guilt deliberations (Tr.1463), reasonable counsel would have offered in penalty Michael's records and called these associated witnesses.

"[E]vidence of impaired intellectual functioning is inherently mitigating…." *Hutchison*,150S.W.3d at308(relying on *Tennard v. Dretke*,542U.S.274,288(2004)).

These records and all associated witnesses would have provided inherently mitigating evidence because all would have established Michael's impaired intellectual functioning. These witnesses could have explained that Michael's aggressive behavior was the product of his impaired intellectual abilities, abusive home, and unwillingness of his family to actively participate in available treatment. The missing evidence should be contrasted with the inherently non-mitigating evidence counsel presented through Crossroads Superintendent Kemna. *See* Point XIV. Reasonable counsel would have introduced the records and called the related witnesses in penalty and there is a reasonable probability Michael would not have been death sentenced.

A new trial or at a minimum a new penalty phase is required

XVI.

IMPROPER COMPETENCY EVIDENCE

The motion court clearly erred denying counsel was ineffective for failing to object to guilt evidence from Scott that he found Michael competent to proceed in the Smetzer case where Michael was adult certified and Michael had not suffered from a mental disease when that offense happened and that Vlach found Michael competent to proceed here because Michael 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 §552.020.14 prohibited any competency to proceed evidence and whether Michael was competent to proceed in any case, that he did not suffer from a mental disease when Ms. Smetzer was killed and there he was adult certified were unrelated to whether he was not guilty by reason of mental disease here and effective counsel would have objected and Michael would not have been convicted of first degree murder.

Respondent presented guilt phase evidence that Michael was found competent to proceed in both his cases and that in the Smetzer case he was adult certified and had not suffered from a mental disease at the time.

This Court reviews for clear error. *See* Point I. 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).

Scott's Testimony

Scott testified he found Michael competent to proceed in the Smetzer case and did not suffer from a mental disease at the time of that offense(Tr.1188,1199-1200,1212-14).

Testing established Michael was not psychotic and not hallucinating(Tr.1190,1195,1197). There was one unconfirmed reference to hallucinations when Michael was twelve(Tr.1198-99). There was no objective evidence Michael responded to or acted upon hallucinations(Tr.1199).

Michael's thoughts were logical and goal oriented(Tr.1190). Scott "could understand what [Michael] said and his sentences and the way he organized his thoughts into what he told me made clear sense"(Tr.1190). When Scott spoke with Michael, he understood Scott and Michael's responses made sense(Tr.1190).

Scott re-examined Michael after defense psychologist Caul found Michael incompetent to proceed(Tr.1181). Michael discussed hallucinations for the first time during the re-examination(Tr.1202-03). Scott relied on Michael's St. Louis County Jail's treating psychologist's and psychiatrist's findings to conclude Michael was malingering and faking psychoses(Tr.1203-12).

Scott also testified Michael was adult certified in the Smetzer case(Tr.1232).

Vlach

Vlach did a court ordered competency to proceed evaluation in October, 2001 for this case(Tr.1327-28;Ex.34). Vlach found Michael was competent for trial and he did not have a mental disease or defect(Tr.1361-62). Michael was malingering, not schizophrenic(Tr.1339,1346-62). Vlach found malingering based on Blanchard's M.M.P.I. II testing and Vlach's Structured Interview of Reported Symptoms testing(Tr.1360-61).

Guilt Closing Arguments

Respondent argued in its initial and rebuttal arguments that Michael did not suffer from a mental disease or defect at the time of the offense based on Scott's and Vlach's testimony(Tr.1419,1448-49,1452-53). Ahsens' rebuttal argument expressly drew from Scott's testimony arguing Michael's hallucinations were defense fabrications because there was "one isolated report at 12 [of hallucinations]"(Tr.1198-99,1448).

Counsel Was Ineffective

Counsel had no reason for failing to object to Scott testifying at all because his findings went solely to the Smetzer case(Ex.118A-pgs.21-23). Counsel did not object to competency to proceed evidence because counsel believed that by calling defense witness Rabun it became admissible(Ex.118A-pg.29;29.15Tr.366-67). Counsel thought Michael's earlier adult certification should have been objected to(Ex.118A-pg.31).

Section 552.020.14 (emphasis added) provides:

14. **No statement** made by the accused in the course of any examination or treatment pursuant to this section and **no information received** by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, **shall be admitted in evidence against the accused on the issue of guilt** in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused **is mentally fit** to proceed **shall in no way prejudice** the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue **nor otherwise be brought to the notice of the jury**.

Section 552.020.14 prohibited Scott's and Vlach's competency to proceed testimony. In *Anderson v. State*,196S.W.3d28,34-35(Mo.banc2006), counsel performed unreasonably when counsel failed to object to the same type testimony heard here, but Anderson was not prejudiced. Unlike *Anderson*, Michael's jury heard not just one, but two examiners testify that Michael was competent to proceed.

Scott's testimony was especially prejudicial because his opinions that Michael was competent to proceed and not suffering from a mental disease were rendered for the earlier case, and therefore, were totally unrelated to whether Michael was not guilty by reason of mental disease or defect here. Moreover, the Smetzer case defense

was Michael did not commit the offense and was not premised at all on mental illness(Ex.118A-pg25). Scott's and Vlach's testimony confused the jury as to whether Michael was not guilty by reason of mental disease. *See State v. Bowman*,681A.2d469,470-71(Me.1996)(state's evidence of competency to proceed was confusing); *Tarantino v. Superior Court*,122Cal.Rptr.61,62-63(Ca.Ct.App.1975)(same); *People v. Arcega*,186Cal.Rptr.94,105(Ca.1982)(same). Likewise, the evidence Michael was adult certified in the Smetzer case only confused the jury as to what it meant to Michael's mental disease defense here because it conveyed that since Michael was then able to be charged as an adult that he did not suffer from a serious mental illness. The prejudice to Michael was driven home in respondent's closing arguments through its reliance on Scott and Vlach(Tr.1419,1448-49,1452-53).

Reasonable counsel would have objected to Scott's and Vlach's testimony. *Strickland* and *Anderson*. It was unreasonable for counsel to believe the competency to proceed evidence became admissible because they called Rabun when §552.020.14 prohibited it. Michael was prejudiced because there is a reasonable probability Michael would not have been convicted without Scott's and Vlach's testimony and the closing arguments that relied on their testimony.

A new trial is required.

XVII.

MICHAEL IS SCHIZOPHRENIC AND NOT A FAKER

The motion court clearly erred denying counsel was ineffective for failing to call experts Peterson, Gelbort, and Moldin because Michael 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 effective counsel would have called them because each would have presented testing evidence about Michael that demonstrated he was genuinely schizophrenic and not a faker/malingerer such that Michael would not have been convicted of first degree murder or at a minimum sentenced to life.

Counsel failed to call experts who would have established Michael's mental disease defense's veracity and why at a minimum Michael should be sentenced to life.

Review is for clear error. *See* Point I. 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).

Failing to interview witnesses relates to preparation, 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 choices must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994).

Foregoing presenting evidence because it contains something harmful is not reasonable when its helpful value outweighs harm. *See Hutchison v. State*,150S.W.3d292,305(Mo.banc2004). Evidence of impaired intellectual functioning is "inherently mitigating." *Hutchison*,150S.W.3d at 308(relying on *Tennard v. Dretke*,542U.S.274,288(2004)). In *Hutchison*, even though counsel presented one mental health expert, counsel was ineffective for failing to investigate and present evidence of Hutchison's neuropsychological deficits and brain damage that placed Hutchison in the "mild impairment range" and his learning disabilities. *Hutchison*,150S.W.3d at 304-08. It is unreasonable for counsel to fail to present helpful evidence out of fear that it will result in other harmful evidence being admitted when the jury has already heard that same harmful evidence. *Id.*304. It is unreasonable to fail to present expert testimony because a subject is complex as the reason for offering expert testimony is that complexity, and to thereby, assist the fact finder. *Id.*308. Counsel was not ineffective in *Hutchison* for failing to call the identical expert who was called at the 29.15, but was ineffective for failing to call an expert who had the same expertise to offer comparable opinions. *Id.*307.

Counsel who fail to present evidence of diminished mental abilities are ineffective. *See Williams v. Taylor*,529U.S.362,396(2000)(counsel failed to present evidence defendant was borderline mentally retarded and did not go beyond sixth

grade); *Wiggins v. Smith*,539U.S.510,535(2003)(counsel failed to present evidence of defendant's homelessness and diminished mental capacities);*Rompilla v. Beard*,545U.S.374,391(2005)(even though counsel retained three mental health professionals they failed to present mental health evidence that included test scores showing a third grade achievement level after nine years of schooling).

Findings

Counsel was not ineffective for failing to call Peterson because Peterson is not a SIRS expert, he was not credible, and Peterson never evaluated Michael (29.15L.F.897-98).

Counsel was not ineffective for failing to call Gelbort because Gelbort was not credible, the same information was presented at trial, and since 29.15 counsel did not identify Gelbort as a witness until 2006, trial counsel could not be ineffective(29.15L.F.918).

Counsel was not ineffective for failing to call Moldin because Moldin was not credible, Moldin's schizoaffective diagnosis contradicts Rabun's schizophrenia diagnosis, and Moldin's testimony was too technical to follow(29.15L.F.914-16). [14]

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[14] One factor Judge Stith's dissent focused on in *State v. Kenley*,952S.W.2d 250,281,284(Mo.banc1997), to conclude there was a lack of independent motion court judgment when it signed the state's findings, was that the movant's 29.15 experts were uniformly found incredible. The same happened here. *See, also,* Points XI, XVIII, and XXII.

Peterson

According to Vlach his SIRS Test results showed Michael scored very high for malingering(Tr.1360). Dr. Peterson would have testified the SIRS Test could not be properly administered to Michael and Vlach's conclusions were wrong(Ex.112-pgs.88-89). The SIRS Test manual directs it should not be given to someone with neuropsychological impairments or who is psychotic(Ex.112-pgs.22-24). SIRS could not produce valid results because of Michael's psychosis history and neurologically based learning disorder(Ex.112-pgs.89-92). Peterson would have testified that Vlach's scores actually put Michael "between indeterminate and low probability for malingering"(Ex.112-pg.93).

Counsel did not discuss with Rabun whether to have another expert examine whether Vlach administered SIRS correctly(Ex.118A-pgs.99-100). Counsel would have wanted the jury to hear Vlach's administration and conclusions were wrong(Ex.118A-pgs.97-98,100).

In *Wainright v. State*,143S.W.3d681,685-89(Mo.App.,W.D.2004), the movant was entitled to a hearing on a claim counsel was ineffective in failing to call an expert who would testify that a state's doctor had improperly administered an MMPI-2 Test

and had misrepresented its results.[15] That testimony would have impeached respondent's expert. *Id*.689.

Peterson would have impeached Vlach's use of SIRS and faking findings based on it. *See Wainwright.* Whether Michael had a mental disease was the critical issue. If jurors had heard Peterson's testimony, there is a reasonable probability they would have found him not guilty of first degree murder or at minimum imposed life. *See Hutchison*.

Gelbort

Gelbort's neuropsychological evaluation (Ex.135) would have shown Michael has left frontal lobe damage which adversely impacts his reasoning, judgment, language functioning, ability to plan, anticipate consequences, and problem solving(29.15Tr.127-28,138).[16] Michael has significant problems assimilating verbal information and also does not learn well with visual information(29.15Tr.128-29,133). Information must be repeated again and again for Michael to learn(29.15Tr.131,142-43). Michael's neuropsychological deficits adversely

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[15] Wainwright prevailed on this claim, a new trial was ordered, and respondent did not appeal. *See* Jackson Co. No.02CV-211423 Findings May 19, 2006. Michael should prevail for the same reasons.

[16] The amended motion pled that neuropsychologist Dr. Cowan would testify, but Gelbort had to be substituted because Cowan died(29.15L.F.327-29;29.15Tr.101-02;Ex.131). Respondent had no objection to this substitution(29.15Tr.102).

impacted his childhood development because Michael was unable to make sense of information he was exposed to(29.15Tr.145-46).

Counsel did not have a neuropsychological evaluation done because counsel believed identified problems "can come across as not being that big of a deal" and believed having such deficits could cut against having a mental disease(Ex.118A-pgs.125-27). Counsel knew that having neuropsychological deficits was not inconsistent with also having schizophrenia(Ex.118A-pg.126;Ex.118B-pg.451).

Counsel knew before trial from Dr. Caul's Smetzer case report, that Michael had a history of borderline intellectual functioning and a neurologically-based learning disability(29.15Tr.511-12,514;Ex.9-pg.17;Ex.118A-pgs.69,73-74,125). This should have been a red flag to do a neuropsychological evaluation. Counsel knew Rabun's evaluation was different from a neuropsychological evaluation(Ex.118A-pgs.76-77,122-23). Yet counsel failed to have a neuropsychological evaluation performed. *See Kenley v. Armontrout.* That Gelbort was not identified until 2006 is irrelevant because counsel was ineffective for failing to call an expert who could have expressed similar expert conclusions as Gelbort. *See Hutchison, supra*.

Such neuropsychological results could have been presented to support the guilt defense. There was no trial evidence that Michael had neuropsychological deficits. Indeed, the jury must have believed Michael had none because respondent's psychologist, Scott, testified that, even though Scott was "*not* a neuropsychologist," (Tr.1194)(emphasis added), Scott's screening tests indicated Michael was

neuropsychologically "normal"(Tr.1194-95). Gelbort's testing shows otherwise. Further, Gelbort's testing would have provided a necessary prerequisite for Peterson to contradict Vlach's SIRS based opinion, Michael has neuropsychological deficits. There is a reasonable probability the guilt result would have been different if counsel had presented evidence that Michael had neuropsychological deficits, in addition to schizophrenia. *See Hutchison, Williams, Wiggins, and Rompilla*. Likewise, there is a reasonable probability the penalty result would have been different because this evidence would have been inherently mitigating. *See Hutchison* and *Tennard*.

Moldin

Dr. Moldin's psychological testing, using the Diagnostic Interview For Genetic Studies(29.15Tr.27-30) and other tests, showed that Michael has schizoaffective disorder, a major psychotic illness which embodies schizophrenia with mood disorders(29.15Tr.31-33,38). Moldin's testing showed Michael suffered from delusions and hallucinations, including his Father of Darkness(29.15Tr.38-46). Schizoaffective disorder's typical onset is late teens to early twenties, but Michael had precursor symptoms when Michael heard voices to harm himself preceding the Smetzer offense(29.15Tr.54-56).

When Michael killed Thomas, he was psychotic, hearing voices telling him to kill Thomas, and Michael did not have a true appreciation for what he had done(29.15Tr.67-69). Michael was unable to deliberate because of his delusions of influence and command hallucinations(29.15Tr.70-71). Michael was acting under

extreme mental or emotional disturbance because he was actively psychotic with hallucinations and delusions(29.15Tr.71-72). Michael's capacity to appreciate the criminality of his conduct and conform his behavior to the requirements of law were substantially impaired(29.15Tr.72).

Counsel would have wanted to present standardized testing results that showed Michael has schizophrenia, but counsel had not heard of the Diagnostic Interview For Genetic Studies(Ex.118A-pgs.114-16;29.15Tr.503-04). Counsel did not rely on a psychologist because they had psychiatrist Rabun and counsel believed juries attach greater weight to a medical physician's testimony(Ex.118B-pg.437;29.15Tr.502-03:Ex.142-pg.30).

Michael was prejudiced by counsel's failure to investigate and call Moldin. *See Kenley v. Armontrout*. If Moldin had been called in guilt or penalty, there is a reasonable probability the results would have been different. While this is true of both phases, it is especially true of penalty because although Michael's counsel requested, and the Court submitted, an instruction on the statutory mitigator extreme mental or emotional disturbance and whether Michael's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired(T.L.F.331), counsel presented no specific supporting evidence. Moldin would have provided the jury with specific supporting evidence. *See Hutchison*. Michael was prejudiced because there is a reasonable probability the penalty result would have been different. *See Strickland*.

A new trial or at minimum a new penalty phase is required.

XVIII.

DR. CAUL - MICHAEL IS MENTALLY RETARDED AND SCHIZOPHRENIC

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Caul and for not requesting a mental retardation instruction because Michael 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 effective counsel would have called Caul and requested a mental retardation instruction because Caul would have established Michael genuinely suffers from schizophrenia and has mental retardation such that Michael would not have been convicted of first degree murder or at a minimum sentenced to life.

Counsel failed to call Dr. Caul who would have established Michael is genuinely schizophrenic and suffers from mental retardation. Dr. Caul also would have supported giving a mental retardation instruction.

This Court reviews for clear error. *See* Point I. 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).

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 choices must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994).

Foregoing presenting evidence because it contains something harmful is not reasonable when its helpful value outweighs harm. *See Hutchison v. State*,150S.W.3d292,305(Mo. banc 2004). Evidence of impaired intellectual functioning is "inherently mitigating." *Hutchison*,150S.W.3d at 308(relying on *Tennard v. Dretke*,542U.S.274,288(2004)). In *Hutchison*, even though counsel presented one mental health expert, counsel was ineffective for failing to investigate and present evidence of Hutchison's neuropsychological deficits and brain damage that placed Hutchison in the "mild impairment range" and his learning disabilities. *Hutchison*,150S.W.3d at 304-08. It is unreasonable for counsel to fail to present helpful evidence out of fear that it will result in other harmful evidence being admitted when the jury has already heard that same harmful evidence. *Id.*304. It is unreasonable to fail to present expert testimony because a subject is complex as the reason for offering expert testimony is that complexity, and to thereby, assist the fact finder. *Id.*308.

Counsel who fail to present evidence of diminished mental abilities are ineffective. *See Williams v. Taylor*,529U.S.362,396(2000)(counsel failed to present

evidence defendant was borderline mentally retarded and did not go beyond sixth grade); *Wiggins v. Smith*,539U.S.510,535(2003)(counsel failed to present evidence of defendant's homelessness and diminished mental capacities);*Rompilla v. Beard*,545U.S.374,391(2005)(even though counsel retained three mental health professionals they failed to present mental health evidence that included test scores showing a third grade achievement level after nine years of schooling).

Findings

Counsel was not ineffective for failing to call Caul because counsel believed Caul would highlight malingering and Caul was not credible(29.15L.F.896-97). Counsel was not ineffective for failing to request a mental retardation instruction because the evidence to support the instruction was not compelling, counsel believed neurological deficits evidence is generally not compelling, and on direct appeal the plain error claim the instruction should have been given, when it was not requested, was rejected(29.15L.F.903).

Caul

Dr. Caul evaluated Michael in 1996-97 for the Smetzer case when Michael was seventeen(Ex.9; Ex.111-pgs.8-9,61). Caul's review of Michael's history and own testing placed Michael in the mentally retarded range on some measures(Ex.111-pgs.27, 35-36,50-53), and borderline intellectual ability range on other measures(Ex.111-pgs.29,34,48,51-52). Michael also had a learning disability and language impairment history(Ex.111-pgs.37,41). Michael's auditory hallucinations

history dated from at least 1991(Ex.111-pgs.38-40). Among Caul's 1996-97 diagnoses were Michael had major depression with psychotic features, potential schizophreniform disorder, history of post-traumatic stress disorder, borderline intellectual functioning, and neurologically based learning disability(Ex.111-pgs.59,69-70). Caul believed in 1996-97 Michael was showing early schizophrenia signs, which is why Caul diagnosed him with potential schizophreniform disorder(Ex.111-pgs.60-63). Schizophrenia becomes more evident in late teens and early adulthood(Ex.111-pg.61).

Reasonable counsel would have called Caul in guilt(Ex.9). Caul would have supported the guilt defense Michael suffered from schizophrenia at the time of the Thomas killing and his defense was not a recent fabrication because Caul recognized in 1996-97 early schizophrenia signs.

Counsel testified Caul was not called in guilt because they did not think he could have added much and might raise malingering(Ex.118A-pgs.70-71;29.15Tr.466). Counsel's reasons are unreasonable. At trial, respondent's experts testified Michael was malingering(Tr.1212,1311,1362). Caul did not believe Michael was malingering(Ex.111-pgs.62,70-71). Given that jurors had already heard from respondent's experts their opinion that Michael was malingering, Michael could not have been harmed by calling Caul, who, if asked, would have testified that Michael was not malingering. *See Hutchison*. Michael's defense would have benefited from Caul because his testimony would have shown that Michael had emerging

schizophrenia in 1996-97, long before the Thomas killing. Thus, Michael's schizophrenia was not a recent fabrication. If jurors had heard from Caul about Michael's early schizophrenia signs, there is a reasonable probability the guilt outcome would have been different. *See Williams*, *Wiggins*, and *Rompilla*.

Counsel were unreasonable in failing to call Caul in penalty. The guilt phase focused on whether Michael had schizophrenia. Caul's testimony would have gone beyond that in penalty. Caul would have been able to testify that Michael functions in the mentally retarded range on some measures (Ex.111-pgs.27,35-36,50-53), and borderline intellectual range on others(Ex.111-pgs.29,34,48,51-52). Caul would have testified that Michael also has a history of neurologically-based learning disability and language impairment(Ex.111-pgs.37,41,69-70). Counsel did not call Caul in penalty because they did not believe he added anything compelling to the guilt experts(Ex.118A-pgs.72-73,80). Evidence of impaired intellectual functioning is "inherently mitigating," and critical to a jury's assessment of whether to impose death. *See Hutchison* and *Tennard*.

Caul's testimony Michael functions in the mentally retarded range on some measures (Ex.111-pgs.27,35-36,50-53), the borderline range on others (Ex.111-pgs.29,34,48,51-52), and that Michael has a history of neurologically-based learning disability and language impairment (Ex.111-pgs.37,41,69-70), is precisely the type of inherently mitigating evidence which defense counsel were found ineffective for failing to present in *Hutchison*, *Williams*, *Wiggins*, and *Rompilla*. Counsels' penalty

phase was paltry, presenting only prison superintendent Kemna(Tr.1517;Ex.37). If the jurors had heard Caul's "inherently mitigating" evidence, there is a reasonable probability the penalty outcome would have been different. *See Hutchison*.

There is further reason counsel were ineffective in failing to call Caul in penalty. That reason is *Atkins v. Virginia*,536 U.S.304,321(2002), which held defendants are ineligible for death if they are mentally retarded. Reasonable counsel would have wanted Michael's jury to hear Caul's testimony about Michael being in the mentally retarded range on some measures, since Michael would be ineligible for death if jurors found he was mentally retarded. In opening statement, counsel had told the jury Michael had mentally retarded range verbal test scores(Tr.779). Counsel were ineffective in failing to call Caul in penalty, and in failing to then request a mental retardation instruction supported by Caul's testimony. Caul's testimony would have warranted submission of such an instruction, since such an instruction is mandatory if there is any supporting evidence. *See Johnson v. State*,102S.W.3d535,541(Mo.banc2003); Notes on Use 2, MAI-CR3d 313.38. There is a reasonable probability the penalty outcome would have been different, if the jury had heard Caul and been instructed on mental retardation. *See Strickland*.

This Court should order a new trial or at minimum a new penalty phase.

XIX.

SELBERT - INCOMPLETE EVIDENCE

The motion court clearly erred denying counsel was ineffective for failing to present complete evidence through Potosi's Chief of Mental Health Services, Dr. Selbert, his reasons for sending Michael to Fulton State Hospital for psychiatric treatment and Selbert's records, because Michael 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 effective counsel would have presented this evidence because Selbert and his records established Michael's mental illness' genuineness.

Counsel failed to present complete evidence from Potosi's Chief of Mental Health Services, Dr. Selbert, and failed to admit his treatment records.

This Court reviews for clear error. *See* Point I. 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).

Counsel who fail to present evidence of diminished mental abilities are ineffective. *See Williams v. Taylor*,529U.S.362,396(2000)(counsel failed to present evidence defendant was borderline mentally retarded and did not go beyond sixth grade); *Wiggins v. Smith*,539U.S.510,535(2003)(counsel failed to present evidence of

defendant's homelessness and diminished mental capacities);*Rompilla v. Beard*,545U.S.374,391(2005)(even though counsel retained three mental health professionals they failed to present mental health evidence that included test scores showing a third grade achievement level after nine years of schooling).

Selbert testified that in October, 1999, he had arranged Michael's transfer to Fulton State Hospital's Biggs psychiatric unit(Tr.1142,1145,1149-50). Selbert only recounted having had conversations during which Michael talked about his Father of Darkness(Tr.1148-49).

Counsel testified they did not offer more through Selbert because they were relying on Rabun and they took an all nothing approach to admitting records(29.15Tr.386-93;118A-pgs.53-57). This claim was rejected because Selbert's testimony was inadmissible hearsay(29.15L.F.895).

For the 29.15, Selbert recounted he had Michael transferred to Fulton because Michael was banging his head, not taking his medications, afraid of a voice called, "Tashua," and saying he "still had people to bring to his father"(Ex.109-pg.27). Fulton would return an inmate within three days if the inmate did not have genuine mental health problems(Ex.109-pgs.27-28). Michael, however, was kept at Fulton for a substantial period(Ex.109-pg.28).

Selbert's records documented his reasons for sending Michael to Fulton(Ex.109-pgs.9-27). Selbert's assessment included Michael "seems genuine" with his delusions(Ex.12-pg.21).

Selbert's documented reasons for why he decided to send Michael to Biggs and that he considered Michael's delusions "genuine" was evidence the jury needed to hear. Selbert's testimony was not hearsay because it was based on his personal observations of Michael which formed the basis for his assessments Michael was genuinely seriously mentally ill. Moreover, detailed Selbert testimony would have refuted Ahsens' cross-examination of Eikermann that Michael was kept at Fulton so long as a cover for Corrections' embarrassment about a killing at Potosi(Tr.1135-36). *See* Point XX. Reasonable counsel would have presented this information and introduced Selbert's records since the genuineness of Michael's mental illness was the key issue. There is a reasonable probability Michael would not have been convicted of first degree murder. *See Strickland*, *Williams, Wiggins,* and *Rompilla.*

Once the jury had sent their guilt note requesting records (Tr.1463), reasonable counsel would have sought to admit Michael's Selbert records in penalty to respond to their request. *See Williams,*529U.S. at 395 n.19(highlighting importance of records). There is a reasonable probability the outcome of penalty would have been different if Michael's records had been sent to the jury. *See Strickland*.

A new trial or at minimum a new penalty phase is required.

XX.

FAILURES TO OBJECT/REQUEST APPROPRIATE RELIEF

The motion court clearly erred denying claims counsel was ineffective for failing to properly object and request appropriate relief as to:

A. The Prosecutor's voir dire that the problems that caused Illinois' Governor Ryan's death sentences commutations do not exist in Missouri;

B. The prosecutor's questioning of Dr. Eikermann that Michael was kept at Fulton Hospital so long solely because of Corrections' embarrassment at a killing occurring at its most secure prison, not because of Michael's need for treatment;

C. The prosecutor's argument equating Michael with Middle Eastern terrorist suicide bombers;

D. The prosecutor's argument that the punishment choice was between good versus evil;

E. Blanchard and Vlach expressing malingering opinions when Blanchard acquired information from Michael without advising him of his right to silence;

F. Argument the jury had a "duty" to convict Michael of first degree murder and impose death; and

G. The prosecutor's voir dire there would come a time in deliberations when satisfying beyond a reasonable doubt was not required

because Michael was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have properly objected and requested appropriate relief as to all these matters and Michael was prejudiced because he would not have been convicted of first degree murder or at minimum not death sentenced.

Trial counsel failed to properly object and request appropriate relief throughout Michael's trial.

This Court reviews for clear error. *See* Point I. 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).

A. Missouri - Better Than Illinois

Ahsens assured the venirepersons on all four panels they could vote for death with confidence because Missouri's system was not plagued with the problems that caused Illinois' Governor Ryan to commute all Illinois' death sentences(Tr.2-3,69-70,241,373,510). As proof, Ahsens represented Missouri's governor had reviewed Missouri's practices and found no problems(Tr.69-70,249,373,510). Because all four panels heard these statements, all who served heard them(Tr.2-3,69-70,241,373,510;T.L.F.276).

Counsel believed Ahsens' statements went further than the law allowed, but despite that they did not object(Ex.142-pgs.34-36;Ex.118B-pgs.372-76). The claim was rejected because there has not been a showing Missouri has Illinois' problems and Ahsens' statements were proper(29.15L.F.882-83).

Jailhouse snitch testimony is among the leading causes of wrongful capital case convictions; such witnesses' testimony has often later been found to have been false. *Report of The [Illinois] Governor's Commission On Capital Punishment, George H. Ryan Governor* (April 15, 2002) at 122. *See also, State v. Beine*,162S.W.3d483,485(Mo.banc2005)("notorious unreliability of jailhouse snitches"). Ahsens' representations were false because respondent's case was premised on unreliable snitch Perschbacher. *See* all Perschbacher Points claims. Ahsens' claims were false and misleading and highly improper because there has not been any Missouri review, like that done in Illinois, finding Missouri's system does not have Illinois' problems. *See Banks v. Dretke*,124S.Ct.1256,1274(2004);*Giglio v. United States*,405U.S.150,153(1972); *Napue v. Illinois*,360U.S.264,269-70(1959)(presentation of false and misleading matters violates due process). Moreover, Ahsens' comments lessened the jury's sense of responsibility making it appear that Missouri's system is not fraught with Illinois' same problems. *See Caldwell v. Mississippi*,472U.S.320,341(1985).

Reasonably competent counsel would have objected. Michael was prejudiced because there is a reasonable probability he would not have been convicted of first degree murder or at a minimum not sentenced to death. *Strickland.*

B. <u>Corrections' Embarrassment</u>

Ahsens' Eikermann cross-examination included: "Well, isn't it true, Doctor, that one of the reasons the defendant stayed at your facility [Fulton State Hospital] for so long was because of the uproar, the embarrassment that the Department of Corrections suffered because of a murder in their most secure institution, they didn't want him back?"(Tr.1135-36). An objection was sustained, but a mistrial was not requested(Tr.1136).

Counsel believed a mistrial should have been requested(Ex.118A-pgs.19-20). The claim was rejected because a mistrial would have been denied(29.15L.F.891).

In *State v. Storey*,901S.W.2d886,900-01(Mo.banc1995), the prosecutor argued that case was among the most brutal in St. Charles County's history. That argument was improper because it relied on facts outside the record. *Id*.900-01. Ahsens injected highly prejudicial untrue assertions outside the record that the reason Michael was kept so long at Fulton was not because of his need for treatment, but to appease Corrections, providing cover for its embarrassment over a Potosi homicide.

Reasonably competent counsel would have requested a mistrial. *See Storey*. Michael was prejudiced because there is a reasonable probability he would not have been convicted of first degree murder and death sentenced. *Strickland*.

C. Middle East Suicide Bomber Comparison

In penalty, Ahsens compared Michael to Middle Eastern suicide bombers because both are motivated by a belief in a higher calling that requires killing others(Tr.1553-54). An objection was sustained, but counsel failed to request a mistrial(Tr.1553-54).

Counsel did not request a mistrial because the objection was sustained(29.15Tr.771-73). This claim was rejected because the argument did not equate Michael with mass murderers(29.15L.F.912-13).

This argument was especially improper given the public concern about terrorist attacks following September 11, 2001. In *Shurn v. Delo*,177F.3d662,667-68(8thCir.1999), the death sentence was reversed because the penalty argument attempted to link Shurn with mass murderer Manson and appealed to the jurors' fears and emotions. Ahsens did the same equating Michael with terrorist bombers, otherwise the trial court would not have sustained counsel's objection.

This Court recently reversed a defendant's conviction when the prosecutor called him "the Devil" because that argument was "an ad hominem personal attack designed to inflame the jury." *State v. Banks*,2007W.L.586742 *2(Mo.banc2007). This Court noted that an argument can be so improper that even where an objection was sustained and a curative instruction given that the prejudice was not cured. *Id*.*2. Only a mistrial could have adequately addressed comparing Michael to terrorist suicide bombers. *See Banks*.

Reasonably competent counsel would have requested a mistrial. *See Shurn*. Michael was prejudiced because there is a reasonable probability he would not have been death sentenced without such argument. *Strickland*.

D. <u>Good vs. Evil</u>

Ahsens' penalty argument included: "And all that is necessary for evil to triumph is for good men and women to do nothing. If you send him back to where he was, we're right back where we started. Is that nothing? It certainly hasn't accomplished anything"(Tr.1555-56).

Counsel did not object because counsel did not believe an objection would be sustained(29.15Tr.775-76). This claim was rejected because the argument was proper(29.15L.F.913-14).

In *People v. Johnson*,803N.E.2d405,421(Il.2003), the prosecutor, like Ahsens did here, quoted Edmund Burke's '"All it takes for evil to thrive [is] for good men and women to do nothing."' Also, like Ahsens, that argument was followed by telling the jury it had to do something. *Id.*421. This argument is improper because it diverts the jury's attention from the issues it is to consider and casts the jury's decision as a choice between "good and evil." *Id.*421. Ahsens cast the choice as one between "good and evil." *See Johnson*.

Reasonably competent counsel would have objected. *See Johnson*. Michael was prejudiced because there is a reasonable probability he would not have been death sentenced without such argument. *Strickland*.

E. Right To Silence - Blanchard Testing

Blanchard testified she gave Michael the M.M.P.I. II for Vlach and found malingering(Tr.1301-02,1311-13,1317-18). Vlach testified he relied on Blanchard's testing to conclude Michael was faking(Tr.1360).

Blanchard "believed" she did not advise Michael of his rights under *Miranda v. Arizona*,384U.S.436(1966)(Ex.113-pg.7-8). That failure violated Michael's rights guaranteed under *Estelle v. Smith*,451U.S.454,456-57(1981)(defendant not advised of silence right before mental examination deprived of rights to silence and counsel). Both Blanchard's pretrial report (Ex.10) and deposition (Ex.31) fail to show *Estelle* compliance.

Counsel did not consider objecting based on *Estelle*(Ex.118A-pgs.31-38;29.15Tr.370-75). This claim was rejected because Blanchard could not recall whether she gave *Miranda* warnings and Vlach's records indicated Michael was *Mirandized*(29.15L.F.891-92).

Reasonable counsel would have objected to Blanchard's and Vlach's testimony because Blanchard's testing was obtained in violation of *Miranda* and *Estelle*. Michael was prejudiced because both gave malingering opinions based on Blanchard's testing and there is a reasonable probability Michael would not have been convicted of first degree murder or at minimum not death sentenced. *Strickland*.

F. Duty To Convict/Impose Death

Ahsens argued the jury had a "duty" to convict Michael of first degree murder(Tr.1457). Ahsens repeated his "duty" argument in penalty(Tr.1538).

Turlington thought the guilt argument should have been objected to(Ex.118B-pgs.353-54). Wolfrum did not think any objection would be sustained(29.15Tr.764-66,845-46). This claim was rejected because both arguments were proper(29.15L.F.908,911).

Telling the jury it has a duty to convict is improper because it appeals to passion and prejudice. *Viereck v. United States*,318U.S.236,247-48(1943).

In *People v. Castaneda*,701N.E.2d1190,1192(Ill.Ct.App.1998)(relying on *United States v. Young*,470U.S.1(1985)), the defendant's conviction was reversed because the prosecutor argued the jury had a duty to convict.

Reasonably competent counsel would have objected to this argument. *See Viereck, Young, and Castaneda*. Michael was prejudiced because there is a reasonable probability he would not have been convicted of first degree murder and death sentenced. *Strickland*.

G. Lessened Burden Of Proof

During voir dire respondent told all four panels that for the final step involved in voting for death, the jury was not required to follow beyond a reasonable doubt(Tr.2-3,72,231,365,507). Because all four panels heard these statements, all who served heard them(Tr.2-3,72,231,365,507;T.L.F.276).

Counsel acknowledged respondent misstated its burden, but they did not object because respondent's burden might be greater than beyond a reasonable doubt(Ex.118B-pgs.364-66;29.15Tr.783-84). This claim was rejected because respondent correctly stated the law(29.15L.F.881).

The Due Process Clause requires respondent prove each factual element of the charged offense beyond a reasonable doubt. *In re Winship*,397U.S.358,364(1970). Respondent's burden is always beyond a reasonable doubt. *State v. Phegley*,826S.W.2d348,354-55(Mo.App.,W.D.1992).

Reasonable counsel who thought respondent was lessening its burden would have objected. *Winship* and *Phegley*. Michael was prejudiced because there is a reasonable probability he would have been sentenced to life. *Strickland*.

For all reasons discussed, a new trial or at minimum a new penalty phase is required.

XXI.

INCOMPETENT TO EXECUTE

The motion court clearly erred denying Michael is incompetent to be executed because Michael was denied his rights to due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, Mo. Const Art. I§21, and §552.060 in that the evidence established Michael is unaware of the punishment he is to suffer and why he is to suffer that punishment.

The 29.15 evidence established Michael is incompetent to be executed.

This Court reviews for clear error. *See* Point I. 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 *Ford v. Wainwright*,477U.S.399,422(1986)(Powell, J.,concurring), the Eighth Amendment forbids executing "those who are unaware of the punishment they are about to suffer and why they are to suffer it." *See also* §552.060.1 RSMo. 2000(same).

Dr. Ahmed is Michael's Potosi treating psychiatrist(29.15Tr.232,234). Michael has the chronic incurable psychotic illness schizoaffective disorder(29.15Tr.236). Schizoaffective disorder embodies the symptoms and effects of schizophrenia, while including the symptoms and effects of mood

disorders(29.15Tr.236). Ahmed treats Michael with high doses of antipsychotic drugs(29.15Tr.236-38).

Dr. Moldin evaluated Michael. Moldin also diagnosed Michael as having scizoaffective disorder(29.15Tr.31-36,38-39). Michael's psychosis and delusional beliefs cause him to have neither a reality-based understanding of what death is nor an understanding of why he has been sentenced to death(29.15Tr.38-39,45-48,69-70,75-79). Michael is incompetent to be executed(29.15Tr.75-79).

Corrections' Chief Counsel, Donna Coleman, wrote a letter that indicated Corrections had determined Michael has "serious mental health problems" which include Michael having delusions and hallucinations requiring Michael be "heavily medicated"(Ex.26-pg.1).

This claim was rejected as non-cognizable and unproven(29.15L.F.916-17). Rule 29.15(a) provides it is the vehicle for asserting a "conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States…." The claim Michael is incompetent to be executed asserts that his sentence violates the constitutional prohibitions against cruel and unusual punishment, and therefore, is cognizable.

Ahmed's and Moldin's testimony established Michael is unaware of the punishment he is to suffer and why he is to suffer it. *See Ford*. Coleman's letter reinforces Ahmed's and Moldin's findings.

This Court should order Michael sentenced to life without parole.

XXII.

ABUSE SIGNIFICANCE

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Vlietstra because Michael 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 effective counsel would have called Vlietstra to explain the significance of Michael's family abuse background and educational history to mitigate punishment and Michael would have been sentenced to life.

Dr. Vlietstra would have explained the significance of Michael's family abuse background and educational history to support a life sentence.

This Court reviews for clear error. *See* Point I. 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).

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 choices 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 the type of social history that a postconviction forensic social worker uncovered from such sources as medical and school records about the abuse the defendant had experienced. Counsels' social history investigation was limited to a psychologist's testing and PSI and social service records. *Id.*523-24.

In *Hutchison v. State*,150S.W.3d292,320-08(Mo.banc2004), counsel was ineffective for failing to present a comprehensive mitigation case. At Hutchison's postconviction hearing there was evidence from several experts who reviewed background material and then analyzed and explained Hutchison's problems. *Id.*307.

Findings

Counsel was not ineffective for failing to call Vlietstra because Vlietstra was not credible(29.15L.F.917-18).

Vlietstra

The abuse Michael endured caused insecurity and anxiety for him in an environment characterized by poor role modeling(29.15Tr.160-63,168-69,170,173). The many school transfers Michael experienced added instability to Michael's life(29.15Tr.182-83,208).

Counsel testified an expert like Vlietstra was not called because respondent did not dispute the abuse happened(29.15Tr.507-08). It was particularly unreasonable for counsel to fail to investigate and call an expert like Vlietstra because counsel knew

Michael was abused. It was critical for the jury to have heard an expert who analyzed and explained the significance of the abuse Michael endured, not just the fact of the abuse. *See Hutchison*. Michael was prejudiced when counsel failed to investigate and present childhood development and abuse testimony from Vlietstra and thereby presented a "halfhearted mitigation case." *See Wiggins* and *Hutchison*.

Counsel's failure to present any witnesses in penalty phase in support of mitigating circumstances from Michael's life history would have led jurors to believe none existed. There is a reasonable probability the outcome of penalty would have been different if Vlietstra was called. *See Wiggins and Hutchison*.

A new penalty phase is required.

XXIII.

APPELLATE COUNSEL – ADELSTEIN'S HEARSAY

The motion court clearly erred denying appellate counsel was ineffective for failing to challenge the admission of Dr. Adelstein's hearsay testimony about Dr. Dix's autopsy because Michael was denied his rights to due process, freedom from cruel and unusual punishment, to confront the witnesses against him, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have raised this meritorious issue which required a new trial.

Appellate counsel failed to challenge the admission of Dr. Adelstein's hearsay testimony about Dr. Dix's autopsy.

This Court reviews for clear error. *See* Point I. 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).

A defendant is entitled to effective assistance of appellate counsel. *Evitts v. Lucey*,469U.S.387,396-97(1985). To be entitled to relief, a movant must establish competent and effective appellate counsel would have raised the error and there is a reasonable probability the appeal's outcome would have been different. *Williams v. State*,168S.W.3d433,444(Mo.banc2005); *See Roe v. Delo*,160F.3d416,418-

19(8thCir.1998)(failure to raise viable appellate issues constitutes ineffective assistance).

The claim was rejected because appellate counsel provided reasonable explanations for all she did(29.15L.F.935).

Adelstein

Adelstein testified to Dr. Dix's autopsy results because Dix had died(Tr.912-30). Trial counsel objected to Adelstein's hearsay as violating Michael's rights to confront and cross-examine the witnesses against him and included that in the new trial motion(Tr.910,927;T.L.F.359).

Appellate counsel testified she did not challenge Adelstein's testimony because she thought at the time Missouri permitted it, but that under *Crawford v. Washington*,541U.S.36,61-62(2004) she wishes that she would have(Ex.82-pgs.17-18). Counsel's reply brief was filed in this Court about one week after *Crawford* was decided(Ex.82-pgs.18-19). Counsel did not consider filing a supplemental brief raising this matter in light of *Crawford*, but counsel has in subsequent cases presented *Crawford* claims(Ex.82-pgs.18-20).

In *State v. March*,2007W.L.828156 *1,1-4(Mo.banc2007), this Court held *Crawford* was violated when a records custodian testified to the results of a chemist's laboratory findings and the chemist was not called to testify. Like in *March*, Adelstein testified to someone else's findings, Dix. *Crawford* prohibited Adelstein's testimony. Reasonable counsel would have raised this claim because a like claim was

on certiorari during the pendency of Michael's case and *Crawford* was decided before Michael's appeal concluded. Michael was prejudiced because a new trial was required. *See Williams* and *Roe*.

A new trial is required.

XXIV.

LETHAL INJECTION METHOD

The motion court clearly erred denying the claim Missouri's method of lethal injection violates the cruel and unusual punishments prohibition because that ruling denied Michael his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that respondent cannot conduct executions that do not cause unnecessary and wanton infliction of pain.

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)).

This claim was ruled non-cognizable(29.15L.F.937).

Dr. Mark Heath, an Assistant Professor of Clinical Anesthesiology at Columbia University, has reviewed Missouri's execution procedures to the extent that discovery has been allowed in cases other than Michael's case(Ex.139-pgs.7-9,25-26). Discovery sought in Michael's case was denied and if additional discovery was provided Heath could provide additional opinions(Ex.139-pgs.2-3).

Heath found that the drugs used and procedures followed do not render the condemned unconscious such that he will experience excruciating pain associated with cardiac arrest and suffocation(Ex.139-pgs.10-14,17,21). Those performing executions lack sufficient training in administering the drugs used to insure a condemned person is rendered unconscious during the execution(Ex.139-pg.11). Veterinarians are prohibited from using the same chemicals Missouri employs to carry out executions when they euthanize animals because of the pain animals would otherwise experience(Ex.139-pgs.16-17).

In a case involving a different death sentenced individual, also named Michael Taylor, Judge Gaitan has ruled the manner in which Missouri conducts executions is unconstitutional. *See Taylor v. Crawford*, No.05-4173-CV-C-FJG(Mo.W.D.)(6/26/06,7/25/06,9/12/06,10/16/06 orders)(appeal pending *Taylor v. Crawford*, 8th Cir. No.06-3651). Michael's claim is cognizable because Rule 29.15(a) provides that it is the vehicle for challenging the constitutionality of a conviction or sentence. This Court should find that based on the opinions Dr. Heath was able to

formulate, despite discovery being denied, and Judge Gaitan's *Taylor v. Crawford* findings that Missouri cannot conduct constitutional executions. *See Gregg, Resweber, Glass, In re Kemmler.*

This Court should impose life without parole.

XXV.

CONFUSING PENALTY INSTRUCTIONS

The motion court clearly erred rejecting Michael was denied his rights to effective assistance of counsel when counsel failed to object and present evidence to challenge the penalty instructions as failing to properly guide the jury denying Michael's rights to due process, a fair trial and impartial jury, and to be free from cruel and unusual punishment because Michael was denied all these rights, U.S. Const. Amends. VI, VIII, and XIV, in that jurors do not understand the instructions and counsel unreasonably failed to object and to present evidence to challenge them and Michael was prejudiced because the less jurors understand the more likely they are to impose death.

The penalty instructions failed to properly guide the jury. Counsel did not object to and challenge them with evidence.

This Court reviews for clear error. *See* Point I. 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).

Counsel did not pursue this claim because this Court has rejected it(29.15Tr.829-30;Ex.118B-pgs.411-12). The claim was denied for that reason(29.15L.F.938).

Dr. Wiener studied and analyzed juror understanding of MAI form penalty instructions and the instructions given in Michael's case(Ex.140-Affid. at 2). Wiener's original study was available since 1994(Ex.140-Affid. at 2). The study found jurors do not understand the instructions and those who do not understand are more likely to impose death(Ex.140-Affid. at 2-3). Wiener's review of Michael's instructions found to a reasonable degree of scientific certainty that juror comprehension would have been no better than in his study(Ex.140-Affid. at 3).

Wiener also addressed criticisms in *State v. Deck*,994S.W.2d527,542-43(Mo.banc1999) that study participants were not deliberating jurors. Wiener completed a new National Science Foundation study(Ex.140 Tr. at 83-84). It found deliberation had little impact on jurors' comprehension of penalty instructions and all prior findings were unchanged(Ex.140 Tr. at 84-86). While this Court has rejected Wiener's study, Judge Perry granted a certificate of appealability on this issue in *Middleton v. Roper*, No. 4:03CV543 CDP slip op. at 97-99,113(E.D.Mo.)(Sept. 21, 2005) because Weiner's findings seriously call into question the penalty instructions' validity.

Reasonably competent counsel would have relied on Wiener's work to challenge the penalty instructions. Michael was prejudiced because the jurors did not understand them. *Strickland*.

A new penalty phase is required.

CONCLUSION

For the reasons discussed, Michael Taylor requests the following: Points I, II, III, IV, V, VI, VII, VIII, X, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXIII a new trial; Point VI a remand to allow discovery; Point IX a remand with directions to disclose whether Steck and Ainley were investigated and if so any results; Point XI a new 29.15 hearing before a different judge; Points XIV, XV, XVII, XVIII, XIX, XX, XXII, XXV a new penalty hearing; and Points XXI, XXIV impose life without parole.

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 30,817 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, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief with brief appendix and a floppy disk containing a copy of this brief were hand-delivered this 2nd day of May, 2007, to Office of the Missouri Attorney General, 221 West High St. Jefferson City, Missouri 65101.

_____
William J. Swift

APPENDIX

IN THE
MISSOURI SUPREME COURT

MICHAEL TAYLOR,	**)**	
	)	
Appellant,	**)**	
	)	
vs.	**)**	**No. SC 88063**
	)	
STATE OF MISSOURI,	**)**	
	)	
Respondent.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE LUCY D. RAUCH, JUDGE

APPELLANT'S APPENDIX TO BRIEF

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APPENDIX TO BRIEF CONTENTS