

**IN THE
MISSOURI SUPREME COURT**

CARMAN DECK,)	
)	
Appellant,)	
)	
vs.)	No. 91746
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, MISSOURI
23rd JUDICIAL CIRCUIT, DIVISION 2
THE HONORABLE GARY P. KRAMER, JUDGE**

APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

In 1996, the State charged Appellant Carman Deck with two counts of first-degree murder, §565.020. In the direct appeal, this Court affirmed Deck's convictions and sentences. *State v. Deck*, 994 S.W.2d 527 (Mo.banc 1999). In the appeal from the denial of postconviction relief, however, this Court remanded for a new sentencing trial. *Deck v. State*, 68 S.W.3d 418 (Mo.banc 2002). On retrial, the jury again recommended death, and Judge Kramer imposed two death sentences. On appeal, this Court affirmed Deck's sentences. *State v. Deck*, 136 S.W.3d 481 (Mo.banc 2004). The Supreme Court, however, found constitutional error and remanded, *Deck v. Missouri*, 544 U.S. 622 (2005), and this Court ordered a new sentencing trial. After the retrial, the jury again recommended death, and Judge Kramer imposed two death sentences. This Court affirmed the death sentences on appeal. *State v. Deck*, 303 S.W.3d 527 (Mo.banc2010).

After his direct appeal, Carman filed a Rule 29.15 motion that was amended by appointed counsel. The circuit court denied the motion after an evidentiary hearing. Because a death sentence was imposed in the underlying case, this Court has jurisdiction of this Rule 29.15 appeal. Art. V., Sect. 3, Mo. Const.

STATEMENT OF FACTS

Carman's convictions and sentences were affirmed on direct appeal. *State v. Deck*, 303 S.W.3d 527 (Mo.banc1999). A full recitation of the facts regarding Carman's convictions is available at the first direct appeal, *State v. Deck*, 994 S.W.2d 527, 531-32 (Mo.banc1999).

Carman's 29.15 motion included allegations that counsel failed to investigate and call mitigation witnesses and other claims relating to mitigation (PCRL.F.20-140).¹

During postconviction counsel's investigation of the case, they sought to review the juror questionnaires but learned that the questionnaires had been destroyed (PCRL.F. 96,145-48,153;PCRTr.Vol.I,8). Counsel later filed a "Motion to Remand for New Trial Because the Juror Questionnaires Have Been Destroyed," but the Court denied the motion (PCRL.F.164-71,291;PCRTr.Vol.I,34-5).

Postconviction counsel also moved for leave to contact jurors in order to prove claim 8(F) of the Amended Motion (PCRL.F.141-44,155-61), and the Court denied the motions (PCRL.F.153,291;PCRTr.Vol.I,10,31-33).

¹ Record citations are as follows: 29.15 hearing transcript (PCR Tr.); 29.15 legal file (PCR L.F.); 29.15 supplemental legal file (Supp. PCR L.F.); trial transcript (Tr.); direct appeal legal file (L.F.); exhibits admitted at the underlying trial by the State (St. Ex. __) and by the Defense (Def. Ex. __); and the legal file of the second direct appeal (2nd L.F.). Undersigned counsel will also file with this Court the exhibits admitted at the 29.15 hearing (Mov. Ex. __).

The record of the underlying criminal trial and the postconviction hearing shows the following:

The Penalty Phase, State's Evidence

Before trial, the court admitted State's Exhibit 57, which was Carman's 1985 conviction for aiding an escape (2ndL.F.117;L.F.155;Tr.677-80; St.Ex.57). That conviction stemmed from a charge that Carman obtained a saw blade and used it to help two other inmates cut through the county jail bars (Tr.677-78;St.Ex.57). The State also adduced evidence demonstrating Carman's guilt of the murders (Tr. 497-05,506-18,519-29,530-44,546-77,577-82,583-91,593-608,611-14,615-26,626-75, 676). The State also called three victim impact witnesses (Tr.480-96,682-90,691-708).

The Penalty Phase, Defense Evidence

At trial, the two "live" witnesses called by the defense were retained experts, Dr. Wanda Draper, a child development expert, and Dr. Eleatha Surratt, a psychiatrist (Tr. 721-97,797-852).

They testified that Carman's mother, Kathy, was seventeen and unwed to Carman's father, Pete, when Carman was born (Tr.732,806-07). When Carman was three months old, he was taken to the hospital for dehydration (Tr.733,808). Kathy and Pete had three other children, Tonia, Latisha, who was mentally retarded, and Mike (Tr.733,736,737).

Up to the age of three years old, Kathy slapped Carman a great deal (Tr.733,808). Up through the age of five, he was also neglected (Tr.734-35). The Deck children were often left with babysitters (Tr.733).

When Carman was six years old, he entered school (Tr.736). At this time, there was a lot of fighting between his mom and dad (Tr.736). During this time period, Kathy still left the children frequently (Tr.736).

When Carman was seven or eight years old, Pete traveled as a truck driver and was gone for several days at a time (Tr.737). When Pete was gone, Kathy pursued other men and did not take care of the kids (Tr.737). She had sex with other men in front of the children (Tr.738,744-45).

Carman parented his younger siblings (Tr.739). Carman learned to steal or beg for food (Tr.739). Kathy slapped Carman and Tonia and hit them with shoes, a coat hanger, and her hands (Tr.740).

When Carman was eight years old, Pete left Kathy and the children (Tr.741). Carman was the primary parent figure for his younger siblings (Tr.742).

Kathy also shoplifted (Tr.762). She taught Carman how to steal and told him that it was okay as long as he was not caught (Tr.763).

Kathy left her children with the Division of Family Services (“DFS”) and also left them at times with Uncle Gene and other babysitters (Tr.742). During this period of time, Carman was reported to have been molested by one of the caregivers and Tonia was sexually abused by Uncle Gene (Tr.744).

On Thanksgiving in 1974, when Carman was nine years old, the Sheriff’s Department called Pete and told him that the children had been left alone without food (Tr.742-43). Pete took the children to the home of his brother and sister-in-law, Norman

and Elvina Deck (Tr.743,809-10). Michael was so hungry that he ate his food fast, vomited, and then tried to eat that (Tr. 743,810).

Carman was placed for a short period of time with DFS, and the Deck children next lived with Pete and his girlfriend, Rita, at Norman and Elvina's home (Tr.745-46).

When Carman was ten years old, Rita became pregnant and Pete left her (Tr.747). Pete married Marietta, who was a mean alcoholic and did not like the Deck children (Tr.747,811). Marietta did not properly feed the Deck kids, and she physically abused them (Tr.748,811). On one occasion, Marietta smeared feces on Carman's face (Tr.750-51,812).

Eventually, Marietta dropped off the Deck children at DFS, and they were separated (Tr.751). Carman, who was about twelve years old, was placed in a foster home with Carol and Arturo Misserocchi (Tr.752). Carman had difficulties making new attachments there and did not stay very long, as Kathy came to get him (Tr.752-53). He lived with Kathy for a bit, and then Kathy left him with a woman named June (Tr.753).

DFS placed Carman in various foster homes (Tr.753,755,756). When Carman was fifteen years old, he lived with Major Puckett and his wife (Tr.757). The Pucketts cared for other foster children and provided a very structured environment (Tr.758). Carman made progress, and the Pucketts loved him (Tr.759,820). However, after one year, though, Kathy took Carman to live with her and Ron Wurst, who was an abusive alcoholic (Tr.759-60,820,Mov.Ex.3).

Both experts opined that Carman's childhood was horrendous and shaped him into the person that he became (Tr.768,770,825,826-27).

Trial counsel also presented the prior testimony of four lay witnesses (Def.Exs.C,D,E;Tr.853-68;876-88).

Mike Deck testified via a videotaped deposition that he was Carman's younger brother (Tr.853,855;Def.Ex.E). When he was four or five years old, Kathy and Pete were never home, and Carman "pretty much took care of us" (Tr.856;Def.Ex.E). Carman acquired things they needed and stole food (Tr.857;Def.Ex.E).

Michael recalled the Thanksgiving Day, where Pete came to get the kids because they had been abandoned (Tr.858;Def.Ex.E). Mike had not eaten in a few days, and he was so hungry that he threw up his food and then tried to re-eat it (Tr.858;Def.Ex.E).

Later, the Deck kids lived with Pete and Marietta (Tr.859-62). Marietta was very mean to them, but she was harder on Carman and Tonia (Tr.861-62,869;Def.Ex.E). She fed them cold hotdogs, and she spanked and slapped them, pulled their hair, and made them kneel on broomsticks (Tr.861-62;Def.Ex.E). Mike recalled the "feces incident"(Tr.861;Def.Ex.E). Mike also recalled that Marietta eventually told Pete to choose between her and the kids, and Pete chose her (Tr.862;Def.Ex.E).

Mary Banks testified via a videotaped deposition that she was married to Carman's oldest uncle, Dorman, who was killed in 1978 (Def.Ex.C, p.5-6). When Carman was about three weeks old, Carman's grandmother, Josie, called Mary and Dorman and said that there was something wrong with Carman (Def.Ex.C,p.8). Carman was not responsive, and his stomach was swollen (Def.Ex.C,p.8,10). Josie said she had been feeding him powdered, commodity milk (Def.Ex.C,p.10). Dorman bought the appropriate formula for an infant (Def.Ex.C,p.10). When Mary fed Carman, Carman was

nursing very hard, it was hard to take the bottle from him, and Carman drank a lot (Def.Ex.C,p.11). Mary was there with Carman for about two or two and one-half hours (Def.Ex.C,p.12). During that time, Kathy and Pete were at a bar (Def.Ex.C,pp.9,12).

At one point, Mary and Dorman wanted to adopt Carman (Def.Ex.C,p.17). They talked to Kathy, and she said that if they paid her the amount of money that she received from the State, then she would sign him over (Def.Ex.C,p.17). Mary and Dorman ultimately had to drop it (Def.Ex.C,p.18).

Pete later married Marietta (Def.Ex.C,p.19). Marietta showed Mary a photograph depicting Carman with feces covering his face (Def.Ex.C,p.20). Marietta put the Deck kids in the car and told Pete that she was taking them to DFS (Def.Ex.C,p.23-4). Pete just let her do it (Def.Ex.C,p.24).

Beverly Dulinsky's prior testimony was read to the jury, and she previously testified that she is Kathy's sister and Carman's aunt (Tr.876). After Kathy and Pete split up, Beverly visited the Deck kids and found them alone on several occasions (Tr.879-80). There was nothing for them to eat, and they were shabby looking, dirty, and either did not have clean clothes on or did not have clothes on (Tr.880,885).

At one point, the kids were found alone, and Pete was directed to pick up the kids (Tr.881). At some point after that, Pete married Marietta, and the kids lived with Pete and Marietta (Tr.882). After that, all of the Deck kids went into foster care (Tr.882,887). Carman stayed at several different foster homes, and the younger three Deck kids went to live with Norman and Elvina (Tr.883).

Reverend Major Puckett testified via a videotaped deposition that at age 15, Carman spent about a year in his foster home (Tr.888, Def.Ex.D). Reverend Puckett described Carman as a wonderful teenager, and a “likeable, lovable and sociable” boy who did well in school, got along well with other children, and never caused him problems (Def.Ex.D). Carman was a lonely boy with no parents he could call mom and dad and no future (Def.Ex.D). Carman did well there, but DFS placed Carman back with Kathy (Def.Ex.D).

29.15 Proceedings

On March 1, 2011, the case was called for hearing (PCRL.F.153,284;PCRTr.Vol.I,14). The Court considered the St. Francois County Public Administrator’s motion to quash the subpoena issued for the appearance of Latisha Deck, and a motion for protective order prohibiting Carman’s attorneys from calling Latisha to testify and Carman’s response (PCRL.F.175-78,185-90;Supp.PCRL.F.1-9). The Public Administrator asserted that Latisha was not competent to testify and attached a 1998 Judgment of Incapacity and Disability (Supp.PCRL.F.1-9). The Court permitted postconviction counsel to call Latisha as a witness in order for the Court to later determine competency and possibly consider the substance of her testimony (PCRL.F.185-90;PCRTr.Vol.I,14-23).

Latisha testified that she was forty-one years old and had completed her education through the twelfth grade (PCRTr.Vol.I,23). She was able to read and write, and she understood the difference between a truth and a lie (PCRTr.Vol.I,24).

She recalled the period of time when she was a little girl and lived with her sister, her brothers, and her mom (PCRTr.Vol.I,24). Latisha recalled that her mother was not there a lot when she was little (PCRTr.Vol.I,25). She was asked who would take care of her when her mother left, and she responded “[m]y brother... Carman” (PCRTr.Vol.I,25). When asked what Carman would do for her to take care of her, she testified “[h]e would give me a bath and cook me something to eat. Take care of us” (PCRTr.Vol.I,25). When she was about four or five, her dad picked up the children after they had been left again by their mother (PCRTr.Vol.I,26). Carman was still taking care of her then (PCRTr.Vol.I,26).

When she was about seven or eight years old, she lived with her dad and Marietta (PCRTr.Vol.I,26-7). Marietta was mean and made Latisha “sit on a broomstick on her knees” (PCRTr.Vol.I,27). During the summer, she would lock the Deck kids out of the house, and Latisha was “hungry” (PCRTr.Vol.I,27). On one occasion, Carman defecated in his pants, and Marietta “rubbed it right on his face” (PCRTr.Vol.I,28). At some point, Marietta took Latisha and Mike to the Division of Family Services, and Latisha did not see Carman after that (PCRTr.Vol.I,28). She and her brothers and sister were placed in different foster homes (PCRTr.Vol.I,28).

Postconviction counsel called Michael Johnson, Carman’s stepbrother, and he testified as follows: His mother was Marietta Johnson, and she married Pete when Michael was about fifteen years old and Carman was about eleven (PCRTr.Vol.II,97). Michael, the Deck kids, Pete, and Marietta lived together for one year and moved around a lot (PCRTr.Vol.II,97-99).

When they lived in Piedmont, their home was an old wooden shack with no running water (PCRTTr.Vol.II,100). Because the home was way back in the woods towards Mark Twain National Forest, they had to catch the bus to school in the dark (PCRTTr.Vol.II,100). At that time, Michael's maternal grandfather lived nearby (PCRTTr.Vol.II,103). Michael's grandfather hated him and "hated Carman with a passion" (PCRTTr.Vol.II,103-04). His grandfather never said anything nice about Carman and would tell everybody that Carman would "end up in jail or be dead" (PCRTTr.Vol.II,104-05).

Michael testified that Pete and Marietta left the children alone "more than I can remember," so that they could go to bars and party (PCRTTr.Vol.II,103).

Marietta was a "very outspoken person," who "did everything loud" (PCRTTr.Vol.II,101). Marietta would send the children to their room and if they made any noises, she would bring them back out and whip them (PCRTTr.Vol.II,101).

Michael described the Deck children as being "closed off" and testified that they kept to themselves, "you could tell there was something wrong," and "people just, they had nothing to do with them" (PCRTTr.Vol.II,105-06).

Postconviction counsel called Elvina Deck, Carman's aunt, and she testified as follows: After Elvina met Norman Deck in 1968, she met Pete, Kathy, and Carman, who would have been about two years old (PCRTTr.Vol. II,23,24). On one occasion, when Carman was a toddler, Elvina observed Kathy beat Carman with a belt, throw him on the floor, and tell him to sit there (PCRTTr.Vol.II,26-7).

After she and Norman got married in 1972, Elvina and Norman lived with Pete and Kathy (PCRVol.II,23). Not only did Kathy have boyfriends outside her relationship with Pete, Kathy also prostituted herself (PCRTr.Vol.II,24). When Pete would go to work, Kathy would leave the house to meet a “certain person” and come back with three or four hundred dollars (PCRTr.Vol.II,26). When Kathy left, Elvina often watched the children (PCRTr.Vol.II,26).

In addition to corroborating the trial testimony regarding the abuse and neglect suffered by the Deck kids, Elvina testified that Marietta also asked Carman and Tonia to steal for her (PCRTr.Vol.II,35-6). Marietta would pull up to a store and tell Carman to go in and get cigarettes (PCRTr.Vol.II,35-36). After Carman came back, she would send Tonia and Latisha in to get cigarettes (PCRTr.Vol.II,36).

Postconviction hearing called Wilma Laird, Carman’s aunt, and she testified as follows: On one occasion when Carman was little, Wilma saw Kathy hit Carman in the temple with a flip flop (Mov.Ex.43,pp.16-7,34-6). Carman was only one or two years old (Mov.Ex.43,pp.35-6). Wilma thought hitting Carman in the head was inappropriate and told Kathy that (Mov.Ex.43,p.17). Kathy told Wilma that it was her kid, and she could do what she wanted to him (Mov.Ex.43,p.17). Kathy shoved Wilma, and Wilma shoved her back (Mov.Ex.43,pp.17-8). Carman cried a little bit and had a small red mark on his head (Mov.Ex.43,pp.18,36).

Postconviction counsel called Stacey Tesreau-Bryant, Carman’s former fiancée, and she testified as follows: When Stacey was twenty-one, she dated Carman (PCRTr.Vol.II,200). She had a son, Dylan, who was two years old (PCRTr.Vol.II,200-

01). She and Carman moved in together and were together for one year (PCRTr.Vol.II,201). Carman helped her take care of Dylan and treated Dylan well (PCRTr.Vol.II,201). Carman treated Dylan like a son, and Dylan called him “Daddy Pete” (PCRTr.Vol II,201-02).

During their relationship, the two shared secrets of what had happened to them as children (PCRTr.Vol.II,204-05). Carman confided in Stacey that his mom used to date a lot of men when he was young, and he had been molested by some of the men (PCRTr.Vol.II,204). When Carman discussed this with Stacey, he was very emotional, both angry and crying; he was “like he hated her” (PCRTr.Vol.II,205).

Postconviction counsel called Carol Misserocchi, Carman’s former foster mother, and she testified as follows: When Carman was approximately 11 years old, he was placed with the Misserocchis and lived with them for about six to eight months (Mov.Ex.29,pp.8,9,10). DFS did not provide him with any counseling (Mov.Ex.29,p.12). No family member visited Carman (Mov.Ex.29,p.12-13,15).

Despite the fact that his family did not visit him, Carman did not appear to be sad but rather showed “very little emotion” (Mov.Ex.29,pp.14,16). Carman also did not talk about how he was doing in school or anything personal (Mov.Ex.29,p.23). Carman did not bond with Carol, did not hug her, and did not talk about his feelings (Mov.Ex.29,p.16). After Carman left, the other foster children told Carol that Carman said, on one occasion, that he wanted to have sex with a pig, and on another occasion, said that he wanted to have sex with the vacuum cleaner (Mov.Ex.29,p.23).

Postconviction counsel called Arturo Misserocchi, one of Carman's former foster parents, and he testified as follows: He never saw any of Carman's relatives visit Carman (Mov.Ex.28,p.17,18). Carman talked about his sister and "said how great she was" (Mov.Ex.28,p.19). Arturo believed that Carman's mom or dad may have tried to call him when he was at their home or that Carman tried to call them (Mov.Ex.28,p.21). Carman was "a cute little kid, and he had a wonderful personality, but he never talked about his life..." (Mov.Ex.28,p.22).

Postconviction counsel presented the deposition testimony of Tonia Cummings, Carman's sister and co-defendant, and she testified as follows: When she was little and Kathy and Pete were still together, they moved from place to place and the house was always dirty (Mov.Ex.9,p.8). Kathy and Pete constantly fought (Mov.Ex.9,p.8-10).

Kathy disciplined the kids by spanking them, throwing objects at them, and hitting them with a switch, her hands, or her fists (Mov.Ex.9,p.10). Kathy also verbally abused the kids (Mov.Ex.9,p.11). Kathy was the worst to Carman (Mov.Ex.9,p.11).

The children were left alone four or five days out of the week (Mov.Ex.9,p.14). Carman, who was 9 or 10 years old, would take care of Tonia, Latisha, and Mike (Mov.Ex.9,p.13). When they were left alone, the home was filthy and there was no food in the house (Mov.Ex.9,p.14). Mike wore the same diaper for two days at a time (Mov.Ex.9,p.14). Latisha got into their uncle's medication (Mov.Ex.9,p.14). The kids had nothing to wear but their dad's t-shirts (Mov.Ex.9,p.14). Carman would take care of them by stealing food from stores or by going to the neighbors and asking for food (Mov.Ex.9,p.15).

When Tonia was six or seven years old, her dad left (Mov.Ex.9,p.18-9,22). Carman was the primary caregiver (Mov.Ex.9,p.22-3). Carman would play with his siblings, try to keep them occupied, and try to keep them in the house (Mov.Ex.9,p.23).

Kathy continued to bring her boyfriends to the home (Mov.Ex.9,p.20). She had sex with them in her room, and the kids could see and hear it (Mov.Ex.9,p.21).

Kathy continued to discipline the children by hitting them, and she continued to be verbally abusive (Mov.Ex.9,p.21-2). She hit Carman a lot more than the other kids (Mov.Ex.9,p.21). Kathy would also steal constantly (Mov.Ex.9,p.22).

The Deck kids next lived with their dad, who was with Rita at the time (Mov.Ex.9,p.26). Shortly after that, Pete married Marietta (Mov.Ex.9,p.27). Marietta abused the Deck kids physically, mentally, and emotionally (Mov.Ex.9,p.27-8):

Like, every day at 5:00 she would each give us a hot dog. And after we ate that, we'd have to go to bed for the rest of the evening.

Or she would make us stay outside all day long, use the bathroom outside. She wouldn't give us any water. We were constantly hungry. She wouldn't give us anything to eat.

She hit us. She spanked us with belts. She hit us with switches. She would put me and Carman in the corner and make us kneel on a broomstick.

... I don't know, she just punished us constantly all the time. She would squirt dish soap in our mouths and make us swallow it. (Mov.Ex.9,p.30).

Carman and Tonia would sneak out in the middle of the night to get food from the refrigerator (Mov.Ex.9,p.30). On one occasion, Carman found a big bag of dog food, and they ate that because they were so hungry (Mov.Ex.9,p.40).

Marietta did not like Carman, and she told him “he’s never going to amount to nothing, he’s a piece of shit...” (Mov.Ex.9,p.36).

Marietta and Pete went to bars all the time and left the children alone a lot (Mov.Ex.9,p.31).

At some point, Marietta left the Deck kids at the DFS Office (Mov.Ex.9,p.35). The Deck kids were separated and went into different foster homes (Mov.Ex.9,p.38). Tonia was placed with Margaret Manning, who was the only adult in her life that showed her love (Mov.Ex.9,p.38-9). Unfortunately, Pete and Marietta came back (Mov.Ex.9,p.39).

When Carman was about 15 years old and lived with Kathy, Kathy would throw things at him, hit him, fist fight with him (Mov.Ex.9,p.49). When Carman was 17 years old, he moved out on his own (Mov.Ex.9,p.49).

When they were teenagers, Carman confided to Tonia that he was a “worthless piece of ----, that he’s never going to amount to anything, that nobody ever loved him, all he wanted was for somebody to love him” (Mov.Ex.9,p.56).

Postconviction counsel called Rita Deck, Carman’s stepmother, and she testified as follows: On Thanksgiving Day 1975, she first met Pete’s four children (PCRTTr.Vol.II,7-9). Carman was approximately ten years old (PCRTTr.Vol.II,7-9). Pete received a call and was told to pick up his children, who were living with their mother

(PCRTr.Vol.II,8). Pete brought the kids to Norman's home (PCRTr.Vol.II,8). The kids were dirty and hungry (PCRTr.Vol.II,8). The children said that for three or four days, they had only bread and butter to eat (PCRTr.Vol.II,9).

In approximately February 1976, Rita was pregnant with Pete's child (PCRTr.Vol.II,13). But Pete met Marietta and left Rita and the Deck kids (PCRTr.Vol.II,11-14).

Rita did not know where Kathy was, so she continued to care for the Deck children and moved with the kids to her parents' home (PCRTr.Vol.II,11,14). Then Kathy's sister went to Rita's house to pick up the children (PCRTr.Vol.II,11,14). Kathy's sister told Rita that Pete and Marietta had taken the children, and Rita "just fell apart, because [she] really cared for the kids" (PCRTr.Vol.II,15).

From Thanksgiving 1975, until Kathy's sister came to take the Deck children, Rita was the children's primary caregiver (PCRTr.Vol.II,12,14). Carman was "a good kid" (PCRTr.Vol.II,12).

Pete Deck, Carman's father, testified at a deposition on August 11, 2000 (Mov.Ex.31). At the postconviction hearing, the parties stipulated that if Pete had been deposed in 2008 and if he had been called at the hearing, he would have provided the same testimony as he did in 2000 (Mov.Ex.31;PCRTr.Vol.I,38-39).

Pete left Kathy and the kids after he found out that Kathy was cheating (Mov.Ex.31,p.22). On Thanksgiving, 1976, Pete received a phone call from the Sheriff, who told him that he needed to pick up his children (Mov.Ex.31,p.33). He found out that Kathy had been leaving the children alone (Mov.Ex.31,p.33). On this occasion, Kathy

had left them for two days (Mov.Ex.31,pp.33-4). Carman was about eleven (Mov.Ex.31,pp.33-4).

When Pete went to pick up the kids, the house was a mess, and there were clothes strewn everywhere and dirty dishes piled up (Mov.Ex.31,p.37). There was little, if any, food (Mov.Ex.31,p.37-8).

After Pete married Marietta, he found out that Marietta was not watching the Deck children when he was at work and was not nice to them (Mov.Ex.31,pp.28,31). Marietta drank alcohol all the time (Mov.Ex.31,p.44). Marietta would feed the Deck kids “when she decided to and if she didn’t want to, she didn’t” (Mov.Ex.31,p.31). When she did feed them, she did not feed them enough (Mov.Ex.31,p.31).

At some point in 1976 or 1977, Carman went to a foster home (Mov.Ex.31,p.43). Marietta “suggested” foster care in front of Carman (Mov.Ex.31,pp.43-4). Pete asked Carman how he felt about going to a foster home, and Carman said that he would rather go into foster care than live with Marietta (Mov.Ex.31,p.44).

When Carman was fourteen, Kathy allowed him to “run the streets” late at night and was not watching over him or providing for him (Mov.Ex.31,pp.38-9,47).

Postconviction counsel presented the deposition of D.L. Hood (Mov.Ex.4). D.L. testified at a deposition on August 11, 2000 (Mov.Ex.5;PCRTTr.Vol.I,37). After that deposition and before the trial in September 2008, D.L. passed away (Mov.Ex.4; PCRTTr.Vol.I,37).

D.L. testified that when Carman was about eight years old, D.L. met Kathy and the two started a country rock band (Mov.Ex.5,p.6-8,11,12-13). At one point, Kathy told

D.L. that she took her kids to the welfare office (Mov.Ex.5, p.12). At another time, Kathy said that Pete had the kids (Mov.Ex.5,p.12).

D.L. knew Kathy for approximately three years, and they eventually dated and then lived together for a year (Mov.Ex.5,p.11-13). When they were together as a couple, Kathy had relationships with other men, and D.L. heard that she was engaged in prostitution (Mov.Ex.5,p.14-15).

D.L. testified that Kathy was “crazy” (Mov.Ex.5,p.21,22). She tried to stab him one night, and on one occasion, she broke his door down (Mov.Ex.5,p.21-22). D.L. became afraid of Kathy (Mov.Ex.5,p.23,30-31).

Postconviction counsel also called Dr. Michael Gelbort, a clinical neuropsychologist, who conducted testing of Carman in August 2010, at the request of postconviction counsel (PCRTr.Vol.I,41-2,46-7). Dr. Gelbort administered to Carman: a version of the Halstead Reitan neuropsychological battery, including the Category Test, the Trail Making Test, and the Lateral Dominance Examination, the Tapping Test, the Sensory Perceptual Examination, the Aphasia Screening, the Wechsler Adult Intelligence Scale, Third Edition, and the Wechsler Memory Scale, Third Edition; and a diagnostic interview that included mental status testing (PCRTr.Vol.I,48-9,80-1).

Carman had a performance IQ score of 87, a verbal IQ score of 95, and full-scale IQ of 91 (PCRTr.Vol.I,89). Dr. Gelbort did not find significant impairment or moderate impairment on any of the tests (PCRTr.Vol.I,105). However, some of his scores were lower than most people demonstrate (PCRTr.Vol.I,105).

Carman scored within the borderline deficiency range on the Category Test, which is focused more on the frontal lobes of the brain (PCRTTr.Vol.I,106,113). The Category Test looks at conceptual abilities, problem-solving abilities, and taps into new learning capabilities, judgment, and reasoning (PCRTTr.Vol.I,84,143). On that test, Carman had 46 errors, which put him in the borderline defective range (PCRTTr.Vol.I,105,106,142-43). Carman was “on the border between someone who is with 95 percent assurance coming from a population that does not have normal brain function” (PCRTTr.Vol.I,107). With 80 percent assurance, there is an impairment demonstrated (PCRTTr.Vol.I,107).

Carman’s difficulties, as demonstrated by the Category Test, also showed up in the vocabulary testing, where he demonstrated difficulty seeing the connection between things (PCRTTr.Vol.I,92,107). And with the Visual Scan, “he could get something that was missing, but he couldn’t figure out what was the most or obvious thing that was missing. He didn’t abstract properly” (PCRTTr.Vol.I,107-08).

Dr. Gelbort concluded that the overall pattern of Carman’s test results illustrated that “he has trouble with these more complex abstract reasoning skills...” (PCRTTr.Vol.I,108). Dr. Gelbort testified that the pattern of Carman’s test results is also illustrated in patients who are better off when dealing with things that are much more concrete, structured, and specific (PCRTTr.Vol.I,117). When things become more abstract, they have difficulty (PCRTTr.Vol.I,117).

Dr. Gelbort opined that at the time of the crimes, Carman’s “cognition was impaired,” and it would have been more difficult for him, as compared to a normal person, to make the right decision (PCRTTr.Vol.I,145,146).

Postconviction counsel also called trial counsel, John Tucci and Stephen Reynolds, and they testified as follows:

Before trial, counsel was aware that Carman had suffered head injuries in the past, for which he received treatment at the hospital (PCRTTr.Vol.II,64-5,70-1,77-8,228 ; Mov. Exs. 9, pp.57-8;Mov.Ex.16;Mov.Ex.18). This included, but was not limited to, the following: When Carman was six years old, he was treated for a one-inch laceration on his forehead above his right eye (PCRTTr.Vol.II,74-5,231;Mov.Ex.20). When Carman was thirteen years old, he was in a car accident and suffered a possible concussion (PCRTTr.Vol.II,73-74,230-31;Mov.Ex.19). When Carman was nineteen years old and incarcerated, he hit his head on the bars; his head was spinning, his vision was blurred in his right eye, and there was an abrasion on the right side of his forehead (PCRTTr.Vol.II,78,233-34;Mov.Ex.24). When Carman was twenty years old and incarcerated, he was unable to be awakened for breakfast, had little memory of the day before, and had a one-inch tender enlarged spot above his right eye (PCRTTr.Vol.II,76,231-32;Mov.Ex.21). In 1992, Carman went to the hospital for treatment of a laceration that required six stitches to his head (PCRTTr.Vol.II,80-1;Mov.Ex.27).

Trial counsel was also aware that Carman was malnourished and hungry during his childhood (PCRTTr.Vol.II,41-53;Tr.733,857-858,880,885;Def.Ex.C,p.8;Mov.Ex.13; Mov.Ex.14;Mov.Ex.31,p.31). Trial counsel was aware that Carman had been physically abused during his childhood (PCRTTr.Vol.II,55-58;Tr.733-735,740,808). Trial counsel was aware that Carman had a sister who was mentally retarded, an uncle who was

mentally retarded and epileptic, and that Kathy's IQ was once tested at 70, which is borderline mentally retarded (PCRTr.Vol.II,83-85).

Trial counsel determined that there was not a sufficient basis to seek neuropsychological testing (PCRVol.II,41,54-55,59-63,83,86,188-189,237,240-241,279). Therefore, trial counsel did not request funding for or seek neuropsychological testing of Carman (PCRTr.Vol.II,63,86,92).

There were notes in the trial file that a previous trial team interviewed Carman's stepbrother, Michael Johnson, in 1997 (PCRTr.Vol.II,135-36,152;Mov.Ex.8). The notes included Mike's comments that: Pete and Marietta were alcoholics; the "kids never had nothing;" Marietta "hated Carman and called him all kinds of names;" there was "a lot of screaming and yelling;" "hand and belt" beatings; and "Carman never had a chance" (Mov.Ex.8). When asked if they attempted to interview or contact Michael Johnson, in relation to the trial, Attorney Tucci did not recall attempting to contact him prior to the trial in 2008 (PCRTr.136-38). But Tucci could not recall if he tried to contact him back in 2000 during the first postconviction case (PCR Tr.137-38). The attorneys offered no trial strategy reason or explanation for not contacting Michael (PCRTr.136-38,145,250).

Before trial, Tucci was aware of Carman's sister, Latisha Deck (PCR Tr. 140). He believed that he must have made a determination back during the first postconviction case in 1999 that Latisha was not able to verbalize what happened (PCR Tr. 141). He did not try to contact her when he was retained to represent Carman from 2006 through 2008, in preparation for the most recent penalty phase (PCR Tr. 142). Attorney Reynolds

testified that they did not want to call Latisha as a witness, because “how does that come across to a jury? Is that on point, or is it manipulative? ...” (PCRTr.Vol.II,252-53).

Attorney Tucci wanted to contact Elvina Deck, but he was not able to locate her (PCRTr.122-23). He had some vague contact information that she may have been in the State of Washington, but no one pinned that down (PCRTr.123). His investigator and he asked family members where they could find Elvina (PCRTr.123). The trial file contained an undated memo written by counsel, which indicated that Elvina called Carman’s other aunt, Mary Banks, every once in a while (PCRTr.124;Mov.Ex.44). They had a possible address and telephone number for Elvina, and the investigator left a message for Elvina (PCRTr.124-25;Mov.Ex.44). But no further efforts were noted after that (Mov.Ex.44). Tucci testified that Elvina never called, and contact was never made (PCRTr.125).

Attorney Tucci testified that Wilma Laird, Carman’s aunt, was deposed in 2000 for the first postconviction case (PCRTr.Vol.II,126,246). They did not contact her prior to trial, because she “didn’t have anything to add to what....Doctor Surratt and Doctor Draper had known” (PCRTr.Vol.II,126-27,190).

Trial counsel testified that an investigator went to Stacey Tesreau-Bryant’s home in January 2007, and Stacey’s husband was hostile to the investigator (PCRTr.Vol.II,133,Mov.Ex.45). Stacey’s husband refused to provide Stacey’s employer or work number (PCRTr.Vol.II,133;Mov.Ex.45). The trial team made no further effort to contact or subpoena Stacey (PCRTr.Vol.II,135;Mov.Ex.83). Tucci testified that, given

the hostile nature of Stacey's husband and the tangential nature of her testimony, he decided to bring out Stacey's information through the experts (PCRTr.Vol.II,133).

Trial counsel testified that they did not want to call Carol and Arturo Misserocchi, because their testimony was tangential and could be brought out through the defense experts (PCRVol.II,129,248-49).

Attorney Tucci testified that he did not want to call Tonia Cummings as a witness because the prosecutor would cross-examine her about the murders (PCRTr.Vol.II,139-40). Attorney Reynolds testified that he did not want to call Tonia because she could be perceived as another victim, since she was in prison for the crimes that she committed with Carman (PCRTr.Vol.II,251).

Trial counsel testified that they subpoenaed Rita and Pete Deck to the trial, and the record indicated that they subpoenaed them to the trial when it was set in October 2007 (L.F.297-98, 301-02;PCRTr.Vol.II,114,121). After Rita and Pete were subpoenaed, Rita called counsel to report that Pete was ill and could not testify (PCRTr.Vol.II, 14,242-43). Later, Attorney Tucci received a letter from a physician stating that testifying in court would be hazardous to Pete's health (PCRTr.Vol.II,115). Rita called again, and trial counsel informed her that it would be up to the Judge whether the medical excuse was sufficient (PCRTr.Vol.II,115). Trial counsel had doubts that Pete was ill and considered Rita and Pete to be uncooperative (PCRTr.Vol.II,114-16,182-84,242-243). Rita and Pete did not appear at the trial, and trial counsel did not ask for a writ of body attachment (PCRTr.Vol.II,118-21,185,244). Trial counsel did not ask Pete to sign a release form or

order Pete's medical records to verify Pete's medical condition (PCRTr.Vol.II,117,243).

Trial counsel did not try to meet with Rita (PCRTr.Vol. I,182-84).

Trial counsel testified that they did not try to locate D.L. Hood before trial (PCRTr.Vol.II,128,247-48). They did not want to call him as a witness, because he was not in Carman's life very long (PCRTr.Vol.II,127,247-48).

The hearing court denied Carman's postconviction claims (PCRL.F.277-308).²
This appeal follows (PCRL.F.311-12).

² The specific findings of the hearing court and additional facts and evidence, related to the postconviction claims, are set forth in the Arguments of this Brief.

POINT I

The hearing court clearly erred in denying Carman's postconviction claim regarding counsel's failure to adequately voir dire jurors on mitigation because the inadequate voir dire denied him his rights to due process, a fair trial, an impartial jury, the effective assistance of counsel and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends. 5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that counsel failed to ask the jurors whether they were willing to meaningfully consider mitigation childhood experience evidence proffered by the defense, where Carman's entire case for life was based on the extreme abuse and neglect he suffered during his formative years. Carman was prejudiced because there is a real probability of injury -- that one partial juror, who could not consider abuse and neglect evidence, sat on his jury.

State v. Clark, 981 S.W.2d 143 (Mo.banc1998)

Morgan v. Illinois, 504 U.S. 719 (1992);

Presley v. State, 750 S.W.2d 602 (Mo.App.,S.D.1988);

State v. Davis, 318 S.W.3d 618 (Mo.banc 2010);

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

Mo.Const. Art.I,Secs.10,18(a),21.

POINT II

The hearing court abused its discretion in denying Carman's requests to interview jurors pursuant to local court Rule 53.3 because the absolute prohibition denied him due process and precluded him from proving the constitutional violations of his rights to an impartial jury, due process, a fair trial, and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that questioning jurors was necessary to prove the constitutional claim of ineffective assistance of counsel for failing to adequately voir dire the jury. Under Local Rule 53.3, Carman had shown good cause for the interviews. To interpret Rule 53.3 to allow a blanket prohibition against any post-trial interviews renders the rule unconstitutional.

State v. Jones, 979 S.W.2d 171 (Mo.banc1988);

Strong v. State, 263 S.W.3d 636 (Mo.banc2008);

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

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

Mo.Const. Art.I,Secs.10,18(a),21;

23rd Judicial Circuit Rule 53.3.

POINT III

The hearing court abused its discretion in determining that Carman’s sister, Latisha Deck, was not competent to testify as a witness, in violation of Carman’s right to due process and to present evidence in support of his postconviction claims, as guaranteed by the U.S. Constitution, Amends.5,14, and Missouri Constitution, Art. I,Sec.10, and Rule 29.15, in that Latisha’s testimony demonstrated that she understood the difference between a truth and a lie and had the ability to independently remember and recount her childhood experiences, which was the subject postconviction counsel sought to adduce. Although Section 491.060, RSMo creates the presumption that a mentally incapacitated person is incompetent to testify, Latisha’s testimony rebutted that presumption and demonstrated that she was competent to testify at the hearing (and at the underlying criminal trial).³

Clark v. Reeves, 854 S.W.2d 28 (Mo.App.,W.D.1993);

State v. Robinson, 835 S.W.2d 303 (Mo.banc1992);

U.S.Const.,Amends.V,XIV;

Mo.Const. Art.I,Secs.10;

Section 491.060,RSMo.

³ The hearing court also denied the claim that counsel was ineffective for failing to call Latisha Deck to testify at trial, on the basis that her testimony was cumulative to other testimony offered at trial (PCRL.F.290-91). Appellant addresses that issue in Point/Argument IV.

POINT IV

The hearing court clearly erred in denying Carman's claim that counsel was ineffective for failing to call available mitigation witnesses, Michael Johnson, Latisha Deck, Elvina Deck, Wilma Laird, Carol and Arturo Misserocchi, Stacey Tesreau-Bryant, Tonia Cummings, Rita Deck and present the deposition testimony of Pete Deck and D.L. Hood, in violation of Carman's right to the effective assistance of counsel, due process, a fair trial, and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art. I, Secs.10,18(a),21, in that the mitigation witnesses would have: a) provided additional detail of the abuse and neglect suffered by Carman during his formative years; b) provided additional detail of the care that Carman provided to his younger siblings when they were abandoned as children; c) provided additional detail of the bad character of Carman's caregivers during his childhood; and d) provided the jury with live lay witness testimony, where the only live witnesses called were expert witnesses. Carman was prejudiced; had the jury heard the additional detail and that Carman's life had value, from live lay witnesses, there is a reasonable probability that they would not have assessed death.

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

Taylor v. State, 262 S.W.3d 231 (Mo.banc2008);

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

Mo.Const. Art.I,Secs.10,18(a),21.

POINT V

The hearing court clearly erred in denying Carman's claim that counsel was ineffective for failing to obtain neuropsychological testing of Carman because this denied Carman effective assistance of counsel, due process and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that trial counsel should have known that such testing was warranted, based on Carman's history of head injuries and of being malnourished and abused as a child. Carman was prejudiced because, had counsel obtained neuropsychological testing, it would have shown that Carman was borderline defective in his abstract reasoning skills. Had the jury heard this mitigating evidence, a reasonable probability exists that they would not have recommended death sentences.

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

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

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

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

Mo.Const. Art.I,Secs.10,18(a),21.

POINT VI

The hearing court abused its discretion in denying Carman’s Motion to Remand for a New Trial due to the Destruction of the Jury Questionnaires, in violation of Carman’s right to due process, as guaranteed by the U.S. Constitution, Amends.5,14, and Missouri Constitution, Art.I,Sec.10, in that the destruction of the juror questionnaires prevented Carman from investigating and presenting all postconviction claims and from full and meaningful appellate review of all postconviction claims. Postconviction counsel exercised due diligence to obtain a copy of the questionnaires but learned that the court had collected and then destroyed the questionnaires, contrary to the dictates of Missouri Supreme Court Rule 27.09.

Knese v. State, 85 S.W.3d 628 (Mo.banc2002);

Dobbs v. Zant, 506 U.S. 357 (1993);

Parker v. Dugger, 498 U.S. 308 (1991);

U.S.Const.,Amends.V,XIV;

Mo.Const. Art.I,Secs.10;

Rule 27.09.

POINT VII

The hearing court clearly erred in denying Carman’s claim that trial counsel was ineffective for failing to object, during the cross-examination of the defense expert, to the prosecutor’s reference to Carman as a “no-good s.o.b.,” who wanted the victims dead, because the prosecutor’s name-calling violated Carman’s right to due process, a fair trial, and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that the prosecutor engaged in an ad hominem personal attack designed to inflame the jury. Carman was prejudiced by the name-calling as it injected emotion and caprice into the jury’s determination of punishment.

State v Banks, 215 S.W.3d 118 (Mo.banc2007);

State v. Storey, 901 S.W.2d 886 (Mo.banc1995);

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

Mo.Const. Art.I,Secs.10,18(a),21.

POINT VIII

The hearing court clearly erred in denying Carman’s claim that trial counsel was ineffective for failing to object to the prosecutor’s closing argument that Carman had “prior escapes” and helped inmates serving life sentences to escape, because the prosecutor’s argument violated Carman’s right to due process, a fair trial, and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21 in that the prosecutor thereby misstated the evidence, implied to the jury that the prosecutor was aware of multiple escapes and additional facts concerning those escapes, and improperly injected fear into the jury’s considerations. Carman was prejudiced by the argument as it infused the jurors’ deliberations with misstatements of facts, fear and emotion rather than reason, and false issues.

State v. Burnfin, 771 S.W.2d 908 (Mo.App.,W.D.1989);

State v. Storey, 901 S.W.2d 886 (Mo.banc1995);

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

Mo.Const. Art.I,Secs.10,18(a),21;

ARGUMENT I

The hearing court clearly erred in denying Carman's postconviction claim regarding counsel's failure to adequately voir dire jurors on mitigation because the inadequate voir dire denied him his rights to due process, a fair trial, an impartial jury, the effective assistance of counsel and to be free from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that counsel failed to ask the jurors whether they were willing to meaningfully consider mitigation childhood experience evidence proffered by the defense, where Carman's entire case for life was based on the extreme abuse and neglect he suffered during his formative years. Carman was prejudiced because there is a real probability of injury -- that one partial juror, who could not consider abuse and neglect evidence, sat on his jury.

In claim 8(F) of the Amended Motion, Carman alleged that his attorneys were ineffective for failing to ask the veniremembers whether they could look at Carman's childhood experience and give that meaningful consideration as a reason to vote against the death penalty (PCRL.F.92-96).

It was essential for counsel to discover whether any veniremember would not be able to at least give child abuse or neglect meaningful consideration in determining the evidence in mitigation, because Carman's case for life was based on the abuse and neglect he suffered during his formative years. The question was necessary so that counsel could make appropriate challenges for cause and ensure that Carman received a fair jury.

The motion court denied the claim regarding counsel's inadequate voir dire for the following reasons: Post-conviction counsel did not present any evidence that any juror was unwilling or unable to do so (PCRL.F.307). In the Amended Motion, counsel acknowledged that proceeding with this claim would be contingent upon questioning each of the jurors (PCRL.F.307-08). There is no reason to believe any juror was unable to follow the law as given to the jury or held any bias or prejudice that made the juror unfit to serve (PCRL.F.308).

This Court must review the motion court's findings for clear error. *Sanders v. State*, 738 S.W.2d 856,857(Mo.banc1987). To establish ineffective assistance of counsel, Carman must show that his counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668(1984); and *Williams v. Taylor*, 120 S.Ct.1495,1511-12(2000). To prove prejudice, Carman must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997); *Williams v. Taylor, supra*.

In a capital case, the standard for determining when a prospective juror may be excluded for cause is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Davis*, 318 S.W.3d 618,639(Mo.banc 2010), quoting *Wainwright v. Witt*, 469 U.S. 412,424(1985). For example, if it "appears that a juror cannot consider the range of punishment, apply the correct burden of proof, or follow the court's instructions in a murder case, then a challenge for cause will be sustained." *State v. Davis, supra, quoting State v. Johnson*, 244 S.W.3d 144,158(Mo.banc2008). The determinative question is

whether a venireman's opinion is of "such intensity and holds such sway over the mind ... that it will not yield to the evidence presented at trial." *Davis*, quoting *State v. Leisure*, 749 S.W.2d 366,372(Mo.banc1988).

In *Davis*, the defendant on appeal asserted that the trial court erred in denying defense counsel's challenge for cause of a venireman, who the defense alleged was unwilling to give meaningful consideration to childhood experiences. *Davis*, 318 S.W.3d at 638. The Court considered the totality of the venireman's answers on his pretrial questionnaire and during voir dire and determined that he was willing to meaningfully consider mitigation childhood experience evidence proffered by the defense. *Id.* at 626-627,639. Because the venireman never indicated that he would ignore such evidence, the Missouri Supreme Court held that the trial court did not err in denying defense counsel's challenge for cause. *Id.* Cf. *State v. Simmons*, 737 S.W.2d 473,473-74(Mo.App.,E.D.1987) (no error where court denied strike of venireperson who initially expressed a tendency to give greater weight to police officer's testimony, but upon further questioning demonstrated an inability to evaluate all of the testimony).

As such, the unwillingness to evaluate all the testimony and meaningfully consider mitigation childhood experience evidence warrants the removal of a venireperson for cause. And here, where counsel's case for life was based on Carman's childhood experiences, counsel was required to ask potential jurors if they would give meaningful consideration to such evidence, in order to ensure a fair jury and trial.

Counsel Tucci acknowledged at the postconviction hearing that in his experience as a prosecutor and defense counsel, it is common for capital defendants to have a history

of child abuse and neglect (PCRTr.Vol.II,163). Counsel also testified that a “textbook” argument by the State in those cases is that a person can overcome child abuse and neglect through willpower (PCRTr.Vol.II,164). Counsel further testified that there exists a belief among certain individuals in our society that a person can and should become a productive citizen, despite abuse and neglect that person may have suffered as a child (PCRTr.Vol.II,164). Counsel also agreed that in the opening and rebuttal portions of closing argument, the prosecutor argued that the defense was using Carman’s bad childhood as an “excuse” and that a bad childhood was not a reason to spare Carman’s life (PCRTr.Vol.II,164;Tr.950-51,964-66). Counsel testified that that they had no trial strategy reason for failing to ask veniremembers whether any member would ignore or be unwilling to meaningfully consider mitigation childhood experience evidence (PCRTr.Vol.II,165-66,268).

Counsel can be ineffective in jury selection. *Presley v. State*, 750 S.W.2d 602,608(Mo.App.,S.D.1988) (counsel ineffective for failing to challenge for cause a juror who said he would be partial to the State because of his experience as a victim of a crime); *State v. McKee*, 826 S.W.2d 26,28-2 (Mo.App.,W.D.1992) (counsel ineffective for failing to challenge for cause jurors who admitted they would hold it against the defendant if he did not testify); *James v. State*, 222 S.W.3d 302,307-308(Mo.App.,W.D.2007) (counsel ineffective for failing to challenge a juror who indicated that she would draw a negative inference from a defendant’s failure to testify); *White v. State*, 290 S.W.3d 162,166-167(Mo.App.,E.D.2009) (counsel ineffective for failing to strike a juror who stated that he could not be fair to the defendant). *See also*

Winn v. State, 871 S.W.2d 756,763(Tx.App.1993) (counsel ineffective for conducting inadequate voir dire, asking most venirepersons only a few questions and asking most, “any reason you could not be fair?” The cursory questioning resulted from a lack of preparation).

In *State v. Anderson*, 196 S.W.3d 28(Mo.banc2006), this Court held that counsel was ineffective for failing to challenge for cause a juror who indicated that he would put the burden on the defense to convince him that Anderson did not deserve the death penalty. *Id.* at 40. This Court wrote that the failure to strike a juror that is unfit to serve, due to an improper predisposition or partiality, is structural error. *Id.*, citing *Knese v. State*, 85 S.W.3d 628,633 (Mo.banc2002). “A death sentence imposed by a jury tainted with structural error must be vacated.” *Id.*, citing *Gray v. Mississippi*, 481 U.S. 648,660(1987).

Carman was entitled to a fair and impartial jury. *State v. Clark*, 981 S.W.2d 143146(Mo.banc1998). U.S.Const. Amend. VI, XIV. One aspect of “the guarantee of a defendant’s right to an impartial jury is an adequate voir dire to identify unqualified jurors.” *Id.* (quoting). *Morgan v. Illinois*, 504 U.S. 719,729(1992). The purpose of voir dire is to select a fair and impartial jury by discovering bias or prejudice. *Clark, supra* (citations omitted). Due process requires the court to undertake sufficient voir dire questioning “to produce in light of the factual situation involved in the particular trial, some basis for a reasonably knowledgeable exercise of the right to challenge.” *Johnson v. Armontrout*, 961 F.2d 748,75 (8th Cir.1992), quoting *United States v. Price*, 888 F.2d 1206,1211(7th Cir.1991). “Without an adequate voir dire the trial judge’s responsibility to

remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Clark, supra* at 146, quoting *Morgan*, 504 U.S. at 729-30. The failure to accord an accused a fair trial violates even the minimal standards of due process. *Irvin v. Dowd*, 366 U.S. 717(1961).

Applying these fundamental principles, counsel had a duty to *thoroughly* investigate potentially biased views of venirepersons. *State v. Clark, supra* at 147. A defendant's Sixth Amendment right to an impartial jury is meaningless without the opportunity to prove bias. *Id.* (citing *Dennis v. United States*, 339 U.S. 162(1950)). Since the trial court allowed the attorneys to voir dire potential jurors, the onus was on counsel to prove bias through an adequate voir dire. *Clark, supra*.

In the case at bar, counsel did not do so. During the death qualification, trial counsel did not ask the venire members whether they could look at Carman's childhood experience and give that meaningful consideration as a reason to vote against the death penalty. Counsel's only discussions regarding their considerations of mitigation with venirepersons that actually served on the jury (Tr. 459-460) included the following:

During the first death qualification panel, counsel informed the members that mitigation is any evidence that "would give you or another juror reason not to give death" (Tr.290-91). Counsel then asked Wheeler, who served on the jury, whether she could consider mitigation in the case and whether she could consider both sentences, and she said "yes" (Tr.292-93).

During the second panel, counsel told the members that mitigating circumstances are circumstances that we put forward for life (Tr.340,345). Counsel provided an

example that a mitigating circumstance present in every case is that the defendant is a human being (Tr.345-46). Counsel asked Koranda, Johnson, Kienemann, and Maiden, who served on the jury, whether they could consider the mitigating circumstances in this case, whether they could weigh the aggravating and mitigating circumstances, and whether they could give realistic consideration to both penalties (Tr.347,355-56,357-58,362-63). Each of them stated that they could do so (Tr.347,355-56,357-58,362-63).

During the third panel, counsel informed the members that mitigation can be anything that a jury believes is a reason to sentence a person to life without parole (Tr.400-01). When questioning member Nuspl, who did not serve on the final jury, counsel stated that mitigation can be a lot of things, including “family members coming in... evidence of psychology... evidence of childhood” (Tr.401-02). Counsel did not ask *any* questions of six members, who served on the jury, including Jurors Peters, Fererro, Edwards, Griffard, Hayden, and Holt (Tr.369-404).

Counsel did not ask any juror whether he or she could look at Carman’s childhood experience and give that meaningful consideration as a reason to vote against the death penalty. This was necessary, because Carman’s entire argument for life was based on the abuse and neglect he suffered during his formative years (Tr.955-64). This was a critical and necessary inquiry under *Morgan v. Illinois, supra*.

In *Clark, supra* at 144, this Court reversed a first degree murder conviction and death sentence due to inadequate voir dire. There, the trial court prohibited any voir dire regarding the age of the three-year-old victim. *Id.* at 145. This Court found a real probability of injury since the prosecutor emphasized the victim’s age in opening and

closing and one juror left the room crying after viewing the autopsy photos. *Id.* at 147-48. “Even one partial juror constitutes a real probability of injury.” *Id.* at 148 (citing *Morgan*, 504 U.S. at 729, 734 n.8).

Here, the prosecutor argued to the jury that child abuse and neglect can be overcome by willpower, that the defense was using child abuse and neglect as an excuse, and that Carman’s childhood was not a reason to spare Carman’s life (PCR Tr.Vol.II,163-64;Tr.950-51,964-66). Counsel was also aware that there exists a belief among certain individuals in our society that a person can become a productive citizen, despite abuse and neglect that person may have suffered as a child (PCRTr.Vol.II,164). And counsel had no strategy reason for not voir-diring on child abuse and neglect as possible mitigation (PCRTr.Vol.II,165-66,268).

As in *Clark, supra*, Carman was prejudiced as there is a real probability of injury - - that one partial juror sat on his jury. The motion court clearly erred in ruling otherwise. This Court should reverse and remand for a new penalty phase.

ARGUMENT II

The hearing court abused its discretion in denying Carman's requests to interview jurors, pursuant to local court Rule 53.3, because the absolute prohibition denied him due process and precluded him from proving the constitutional violations of his rights to an impartial jury, due process, a fair trial, and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that questioning jurors was necessary to prove the constitutional claim of ineffective assistance of counsel for failing to adequately voir dire the jury. Under Local Rule 53.3, Carman had shown good cause for the interviews. To interpret Rule 53.3 to allow a blanket prohibition against any post-trial interviews renders the rule unconstitutional.

The hearing court denied Carman's motions to contact the jurors and then ruled that he had failed to prove the claim set forth in 8(F) of the Amended Motion, because he did not present any evidence that any juror was unwilling to consider mitigation childhood experience evidence proffered by the defense (PCRL.F.153,291,307-08; PCRTTr.Vol.I,10,33).

This Court must review the motion court's denial of juror contact for an abuse of discretion. *State v. Jones*, 979 S.W.2d 171,183(Mo.banc1988); *Strong v. State*, 263 S.W.3d 636,643(Mo.banc2008).

In claim 8(F) of the Amended Motion, postconviction counsel asserted that Carman's trial attorneys were ineffective for failing to ask the veniremembers whether

they could look at Carman's childhood experience and give that meaningful consideration as a reason to vote against the death penalty, where Carman's entire case for life was based on extreme abuse and neglect that he suffered during his formative years (PCRL.F. 92-96). Because the Court of Appeals has previously held that it was necessary also to prove that a biased venireperson ultimately served on the jury, postconviction counsel also alleged in the Amended Motion that they intended to seek leave of court to contact or subpoena the jurors, pursuant to Twenty-Third Judicial Circuit Local Rule 53.3 (PCRL.F.95-96). *See Hultz v. State*, 24 S.W.3d 723,726(Mo.App.,E.D.2000) and *State v. Pierce*, 927 S.W.2d 374,377(Mo.App.,W.D.1996) ("To be entitled to a presumption of prejudice resulting from defense counsel's ineffective assistance during the jury selection process, a post-conviction motion must show that a biased venireperson ultimately served as a juror.").

Prior to the evidentiary hearing on Carman's postconviction claims, postconviction counsel filed two motions to permit contact with the jurors (PCRL.F.141-44,155-161). In each motion, postconviction counsel sought permission to ask the twelve jurors the following questions:

If you had been asked during the voir dire proceedings, the following questions, what would your response have been:

Can you look at Movant's childhood experience and give that meaningful consideration as a reason to vote against the death penalty?

Would you automatically not consider child abuse and neglect as mitigation?

(PCRL.F.142,156).

The hearing court denied the motions but set a hearing on all claims in the Amended Motion, including claim 8(F) (PCRL.F.153,291;PCRTTr .Vol.I,10,33).

Rule 53.3.2, Rules of the Twenty-third Judicial Circuit, provides that a post service interview of a juror can be acceptable and that “[g]eneral questions of an abstract nature unrelated in context to a particular case may be addressed to a juror after his or her service.” However, absent leave of court, the post-service interview shall not include matters proscribed by Rule 53.3.1(b). Rule 53.3.1(b) provides that “[w]hile a juror may be questioned about relevant matters of fact, under appropriate circumstances, one may not probe into or compromise the mental processes employed in formulating the verdict in question.”

The Missouri Supreme Court has recognized that a postconviction court can, in its discretion, order limited contact with the jurors. *See State v. Jones, supra*, 979 S.W.2d at 183 (The local rules of the 22nd Judicial Circuit permitted the motion court to allow contact with the jurors, and postconviction counsel was allowed limited contact with the jurors).

Jurors may be contacted and testify when necessary to prove the constitutional violations in an amended motion. *See Lytle v. State*, 762 S.W.2d 830,834 (Mo.App.,W.D.1988) (A jury foreman testified at a Rule 27.26 proceeding on the issue of shackling). *See also Storey v. State*, 175 S.W.3d 116,129-130(Mo.banc2005) (The trial

judge held a special hearing to take testimony from the jurors in order to determine whether any juror, during the trial or deliberations, had learned that the defendant had previously received the death sentence.).

In *Strong v. State*, *supra*, 263 S.W.3d at 643-44, this Court upheld the postconviction court's denial of contact with the jurors. *Id.* at 643-44. The motion court denied the motion but indicated that it would reconsider the motion upon a showing of reasonable cause to believe, from actual factual allegations, that defendant's rights had been violated. *Id.* at 643. This Court affirmed the motion court because Strong's grounds to contact the jurors appeared to be "a pretextual argument in an attempt to gain access to the jury's thought processes, an act that is strictly prohibited." *Id.* at 644.

In the case at bar, postconviction counsel specifically set forth the questions that they intended to ask the jurors, which concerned responses that the jurors would have provided during voir dire questioning (PCRL.F.142,156). Postconviction counsel did not seek to gain access to the jury's thought process during deliberations (PCRL.F.142,156). As such, the request was not a "pretextual" reason to speak to the jurors. Rather, it was actually necessary to contact the jurors in order to prove claim 8(F) of the amended motion.

Because the hearing court did not allow contact with the jurors, Carman was denied the opportunity to prove his constitutional claim, set forth in claim 8(F), due to a failure of proof (PCRL.F.307-08). *See Taylor v. State*, 728 S.W.2d 305,306-07(Mo.App.,W.D.1987) (Motion court's refusal to grant writ of habeas corpus ad testificandum of inmate witness to prove allegation of counsel's ineffectiveness in not

calling inmate witness at trial denied Taylor his right to a full and fair hearing and his opportunity to meet his burden of proof).

The hearing court's prohibition against any juror interviews under Local Rule 53.3 cannot stand. Without such interviews, Carman was precluded from developing and proving the constitutional violation in state court. This Court should remand to give Carman a reasonable opportunity to develop, litigate and prove his claim.

The right of a criminal defendant to be tried by an impartial jury is one of the most significant guaranteed by our Constitution. *Remmer v. United States*, 350 U.S. 377, 379 (1955). When reasonable grounds exist to believe that the jury may have been biased, questioning of jurors must be undertaken. *Id.*

In addition, constitutional issues should be litigated in state post-conviction proceedings. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). In *Williams*, a juror failed to disclose her bias during voir dire. *Id.* at 440-42. The claim was not raised in state court, but the juror provided an affidavit in the federal habeas proceedings. *Id.* The court found that the juror misconduct claim could result in federal constitutional violations. *Id.* At an evidentiary hearing, Williams could establish that the juror was not impartial under the Sixth and Fourteenth Amendments. *Id.* at 441-42. A juror's silence about a factor like bias could so infect the trial as to deny a defendant due process. *Id.* The Court excused Williams' failure to raise the claim in state court because the Commonwealth had precluded contact with the jury. *Id.* at 442-43. By disallowing investigation of the factors surrounding the bias, the defendant could not develop the claim. *Id.* The Court concluded that "if the prisoner had made a reasonable effort to discover the claims to

commence or continue state proceedings, Sec. 2254(e)(2) will not bar him from developing them in federal court.” *Id.* at 443.

As in *Williams*, Carman tried to investigate his claim that his attorneys rendered ineffective assistance of counsel by failing to conduct an adequate voir dire, but the motion court denied him the opportunity, imposing a blanket prohibition on juror contact. This prohibition was an abuse of discretion.

Missouri decisions have also implicitly found blanket prohibitions of post-trial contacts with jurors to be an abuse of discretion. In *State v. Babb*, 680 S.W.2d 150,152(Mo.banc1984), this Court ruled that jurors at a motion for new trial hearing may testify regarding the presence or absence of outside influences. Similarly, in *State v. Harvey*, 730 S.W.2d 271(Mo.App.,E.D.1987), two jurors testified at a motion for new trial hearing about juror misconduct. *Id.* at 272, *overruled on other grounds by State v. Kelly*, 851 S.W.2d 693,695(Mo.App.,E.D.1993) and *State v. Babb, supra*. The sequestered jurors had reconnected a combination radio-television in the motel room and heard television newscasts of the trial in violation of the Court’s instruction. *Id.* at 272-73. The inconvenience to the jurors was outweighed by the interest in ensuring that the defendant had received a fair trial. *Id.* at 276.

The motion court abused its discretion by prohibiting any contact with jurors. It further erred in denying claim 8(F) of the Amended Motion because postconviction counsel had not presented evidence regarding the jurors. This Court should reverse and remand with instructions that postconviction counsel be allowed to contact jurors

regarding claim 8(F) and present any additional testimony from the jurors at an evidentiary hearing.

ARGUMENT III

The hearing court abused its discretion in determining that Carman's sister, Latisha Deck, was not competent to testify as a witness, in violation of Carman's right to due process and to present evidence in support of his postconviction claims, as guaranteed by the U.S. Constitution, Amends.5,14, Missouri Constitution, Art.I,Sec.10, and Rule 29.15, in that Latisha's testimony demonstrated that she understood the difference between a truth and a lie and had the ability to independently remember and recount her childhood experiences, which was the subject postconviction counsel sought to adduce. Although Section 491.060, RSMo creates the presumption that a mentally incapacitated person is incompetent to testify, Latisha's testimony rebutted that presumption and demonstrated that she was competent to testify at the hearing (and at the underlying criminal trial).⁴

Before postconviction counsel called Carman's sister, Latisha Deck, to testify, the Court considered: the Public Administrator's motion to quash the subpoena issued for the appearance of Latisha, a motion for protective order prohibiting Carman's attorneys from calling Latisha, and Carman's written response to the motion (PCRL.F.175-78,185-90;Supp.PCRL.F.1-9). The Public Administrator asserted that Latisha was not competent

⁴ The hearing court also denied the claim that counsel was ineffective for failing to call Latisha Deck to testify at trial, on the basis that her testimony was cumulative to other testimony offered at trial (PCRL.F.290-91). Appellant addresses that issue in Point/Argument IV.

to testify and attached a 1998 Judgment of Incapacity and Disability (Supp.PCR L.F.1-9). After hearing argument, the Court permitted postconviction counsel to call Latisha as a witness in order for the Court to later determine competency and if so, then consider the substance of her testimony (PCRL.F.185-90; PCRTr.14-23).

Latisha testified as follows: She was forty-one years old and had completed her education through the twelfth grade (PCRTr.Vol.I,23). She was able to read and write, and she understood the difference between a truth and a lie (PCRTr.Vol.I,24).

Her siblings are Carman, Tonia, and Mike (PCRTr.Vol.I,24). She recalled the period of time when she was a little girl and lived with her sister, her brothers, and her mom (PCRTr.Vol.I,24). When she was asked to describe what that was like, she responded: "...Mom took off and left us. She took off with a truck driver...[o]ne of her boyfriends that she was ...seeing at the time" (PCRTr.Vol.I,25). Latisha recalled that her mother was not there a lot when she was little (PCRTr.Vol.I,25). When asked how old she was, when her mother would leave, she testified that she was two or three years old (PCRTr.Vol.I,25). She was asked who would take care of her when her mother left, and she responded "[m]y brother... Carman" (PCRTr.Vol.I,25). When asked what Carman would do for her to take care of her, she testified "[h]e would give me a bath and cook me something to eat. Take care of us" (PCRTr.Vol.I,25). When she was asked whether there was a period of time that she and her siblings were taken from their mother, she testified that "my dad came and got...us" (PCRTr.Vol.,26). She was about four or five years old then, her mother was gone, and Carman was still taking care of her

(PCRTTr.Vol.I,26). The next thing she recalled was that she lived with her Aunt Elvina and Uncle Norman Deck (PCRTTr.Vol.I,26).

When she was about seven or eight years old, she lived with her dad and a woman named Marietta (PCRTTr.Vol.I,26-7). When asked, “can you describe Marietta,” Latisha responded, “she was mean. She was mean to us” (PCRTTr.Vol.I,27). She made Latisha “sit on a broomstick on her knees,” and Latisha was “hungry” when she lived with Marietta (PCRTTr.Vol.I,27). Marietta was also mean to Carman, Tonia, and Mike (PCRTTr.Vol.I,27). During the summer, she would lock them out of the house (PCRTTr.Vol.I,27). On one occasion, Carman defecated in his pants, and Marietta “rubbed it right on his face” (PCRTTr.Vol.I,28). At some point, Marietta took Latisha and Mike to the Division of Family Services, and Latisha did not see Carman after that (PCRTTr.Vol.I,28). She, Carman, Tonia, and Mike were placed in different foster homes (PCRTTr.Vol.I,28). At some point after that, Latisha lived again with Elvina and Norman Deck (PCRTTr.Vol.I,28).

Latisha testified that she presently lives in a boarding home in Farmington , Missouri and has lived at the boarding home for sixteen years (PCRTTr.Vol.I,28-9). Several years before, someone had come to talk to her about Carman (PCRTTr.Vol.I,29). If an attorney had been introduced to her and had spoken with her in 2008, she would have talked to that attorney about Carman and their childhood (PCRTTr.Vol.I,29). And if she had been asked the same questions that she was asked at the hearing, she would have provided the same responses (PCRTTr.Vol.I,30).

In denying the claim that trial counsel was ineffective for failing to call Latisha as a witness at the trial, the hearing court first found that Latisha was not competent to testify (PCRL.F.290-91). The hearing court abused its discretion in so finding.

Determination of competency of a witness to give testimony is for the discretion of the trial court and will not be reversed except for clear abuse. *State v. Robinson*, 835 S.W.2d 303,307(Mo.banc1992), *citing State v. Feltrop*, 803 S.W.2d 1,10(Mo.banc), *cert. denied*, 501 U.S. 1262(1991); *State v. Robertson*, 480 S.W.2d 845,846(Mo.1972).

Missouri presumes that a witness is competent to testify, except for a few statutory exceptions including mental incapacity. Section 491.060, RSMo 2000; *State v. Robinson*, 835 S.W.2d at 307. Pursuant to Section 491.060(1), RSMo, a person who is mentally incapacitated at the time of his or her production for examination shall be incompetent to testify.

A person adjudicated as mentally ill is generally presumed to be incompetent as a witness. *Clark v. Reeves*, 854 S.W.2d 28(Mo.App.,W.D.1993). However, “a prior *adjudication of mental incompetence ... is not conclusive; a witness must exhibit some mental infirmity and fail to meet the traditional criteria for witness competence.*” *Robinson*, 835 S.W.2d at 307, *quoting State v. Beine*, 730 S.W.2d 304,307-08 (Mo.App.,E.D.1987)(emphasis in original). A witness is competent to testify if the witness shows: 1) a present understanding of, or the ability to understand upon instruction, the obligation to speak the truth; 2) the capacity to observe the occurrence about which the testimony is sought; 3) the capacity to remember the occurrence about

which the testimony is sought; and 4) the capacity to translate the occurrence into words.

Robinson, supra at 307, quoting *Feltrop, supra* at 10.

Where a party objects to a witness's competence to testify, the opposing party can present evidence, including the testimony of the witness, in an attempt to show that the witness is competent. *Robinson, supra* at 307. The party asserting the incompetence of the witness can cross-examine the witness or present its own evidence, if any. *Id.* Where the question of a witness's competency is raised in a post-conviction case, the determination of both the competency and the credibility of the witness must be made by the postconviction court because it is acting as the court and the fact finder. *See Clark v. Reeves, supra* at 30 (The administrative tribunal determined both the competency and credibility of a witness, because it was acting as fact finder and a quasi-judicial body.).

In the case at bar, Latisha's testimony demonstrated that she was competent to testify. Latisha was sworn in by the court and acknowledged that she would tell the truth and understood the difference between a truth and a lie (PCRTr.Vol. I,23-4). She was forty-one years old and had completed her education through the twelfth grade (PCRTr.Vol.I,23). She was able to read and write (PCRTr.Vol.I,24). At the time of the hearing, she lived at a boarding home in Farmington, Missouri and had lived at the boarding home for sixteen years (PCRTr.Vol.I,28-9).

Latisha also demonstrated that she had the ability to independently remember her childhood experiences and to translate those experiences into words. She recalled the period of time when she was a little girl and lived with Carman, Tonia, Mike, and her mom (PCRTr.Vol.I,24). She recalled that her mom was gone a lot and that Carman took

care of her when she and her siblings were abandoned (PCRTr.Vol.I,25). When asked how Carman took care of her, she testified “[h]e would give me a bath and cook me something to eat. Take care of us” (PCRTr.Vol.I,25). When she was approximately four or five years old, her dad came and got her, Carman, Tonia, and Mike (PCRTr.Vol.I,26). The next thing she recalled was that she lived with her Aunt Elvina and Uncle Norman Deck (PCRTr.Vol.I,26).

She also remembered that when she was about seven or eight years old, she lived with her dad and a woman named Marietta, who Latisha described as “mean” (PCRTr.Vol.I,26-7). She was able to describe some of the cruelties that Marietta inflicted upon the Deck children. Marietta made Latisha “sit on a broomstick on her knees,” and Latisha was “hungry” (PCRTr.Vol.I,27). During the summer, Marietta locked them out of the house (PCRTr.Vol.I,27). On one occasion, Carman defecated in his pants, and Marietta “rubbed it right on his face” (PCRTr.Vol.I,28).

Last, Latisha recalled that Marietta took her and Mike to the Division of Family Services, and Latisha did not see Carman after that (PCRTr.Vol.I,28).

Although Latisha had been adjudicated to be an incapacitated and disabled person and in need of a guardian (Supp.PCRL.F.1-9), Latisha demonstrated, through her testimony, that she had the ability to tell the truth and remember her childhood experiences, which was the reason that her testimony was sought by postconviction counsel.

In *Robinson, supra*, the defense asserted that the complaining witness was not competent to testify. *Id.* at 307-08. The trial judge held a competency hearing and

determined that she was competent to testify. *Id.* at 308. The complaining witness had a history of mental illness, schizophrenia, excessive alcohol intake, hearing voices, and other behavioral problems, for which she received medication. *Id.* at 305. The supervisor of the sex crimes unit for the St. Louis City police testified that the complainant had filed between six and seven complaints of alleged rapes, only one which resulted in charges being filed. *Id.* The supervisor labeled her a “chronic victim” or “chronic reporter.” *Id.*

This Court upheld the trial judge’s determination based on the complainant’s testimony at the competency hearing. *Id.* This Court wrote that the complainant testified at the hearing that she knew the difference between telling the truth and telling a lie and that she would not lie. *Id.* at 308. She described her mental condition, including having delusions and hearing voices, though she stated she was not hearing voices at the time of testifying. *Id.* She had been prescribed medication, but it did not affect her memory. *Id.*

In *Clark v. Reeves, supra*, Mr. Clark asserted that the trial court should not have considered the testimony of the alleged victim, because the victim’s treating physician testified that the victim suffered from a schizophrenic disorder, hypomania, hiding alcohol abuse, manic paranoia, and that the victim had been institutionalized for over twenty years. *Id.* at 30. The Director of Forensic Nursing for the victim’s unit testified that there were occasions when the victim would tell the truth but “there are a lot of occasions you can’t believe anything he says.” *Id.* Mr. Clark also argued that the victim’s testimony itself indicated his inability to tell the truth, because the victim’s testimony was not corroborated and the victim testified inconsistently (i.e., he first

testified that he had been injured on his side but later testified that he was kicked in the jaw). *Id.*

The Court of Appeals, Western District, upheld the trial court's determination that the victim was competent to testify. *Id.* at 31. In reaching that determination, the Court of Appeals considered the following: the victim's doctor opined that the victim had the mental capacity to observe and retain an independent recollection of the event; the victim could read and write and was verbally communicative; and much of the victim's testimony was corroborated. *Id.*

As in the aforementioned cases, Latisha demonstrated the capacity to observe and remember her childhood. She also demonstrated the ability to independently recall her childhood experiences and to describe those experiences. In addition, portions of her testimony are corroborated by other witnesses. For example, Latisha's aunt testified that she often found the Deck children abandoned (Tr.880). Latisha siblings also testified that their parents abandoned them frequently (Tr.856;Def.Ex.E;Mov.Ex.9,p.13-4). Latisha's siblings and aunt also described that one of Marietta's punishments was to force the Deck kids to kneel on broomsticks (Tr.861-62;Def.Ex.E;PCRTTr.Vol.II,33-4;Mov.Ex.9,p.30). Latisha also recalled additional information, including that Carman cooked food for her, gave her a bath, and played games with her (PCRTTr.Vol.I,25-6).

Latisha had valuable mitigation to offer, because she was able to recount that, as far back as she could remember, Carman was her primary caregiver in her early years (PCRTTr.Vol.I,25). She remembered and was able to put into words that her mother was gone all the time and Carman took care of her (PCRTTr.Vol.I,25-6). The hearing court

abused its discretion in finding Latisha to be incompetent to testify. The hearing court's determination prevented counsel from presenting evidence in support of all of Carman's postconviction claims, in violation of Carman's right to due process, as guaranteed by the U.S. Const., Amends. V, XIV, Mo. Const., Art. I, Sec. 10.

Carman respectfully requests that this Court: find that the hearing court abused its discretion in determining that Latisha was incompetent to testify; and consider the substance of Latisha's testimony in reviewing Carman's claim that trial counsel was ineffective for failing to call Latisha to testify at trial (set forth in Point/Argument IV).

ARGUMENT IV

The hearing court clearly erred in denying Carman's claim that counsel was ineffective for failing to call available mitigation witnesses, Michael Johnson, Latisha Deck, Elvina Deck, Wilma Laird, Carol and Arturo Misserocchi, Stacey Tesreau-Bryant, Tonia Cummings, Rita Deck and present the deposition testimony of Pete Deck and D.L. Hood, in violation of Carman's right to the effective assistance of counsel, due process, a fair trial, and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that the mitigation witnesses would have: a) provided additional detail of the abuse and neglect suffered by Carman during his formative years; b) provided additional detail of the care that Carman provided to his younger siblings when they were abandoned as children; c) provided additional detail of the bad character of Carman's caregivers during his childhood; and d) provided the jury with live lay witness testimony, where the only live witnesses called were expert witnesses. Carman was prejudiced; had the jury heard the additional detail and that Carman's life had value, from live lay witnesses, there is a reasonable probability that they would not have assessed death.

At trial, trial counsel called two "live" expert witnesses and presented the prior testimony of four lay witnesses (Tr.721-797,797-852,876;Def.Ex.C,D,E). Counsel failed to present the testimony of other available mitigation witnesses. These witnesses would have provided additional detail and a first-hand account of Carman's childhood. Also,

the presence of “live” lay witnesses would have conveyed to the jury that Carman’s life had value.

Trial counsel may be found ineffective for the failure to call a witness, where a postconviction movant can demonstrate each of the following: 1) counsel knew or should have known of the existence of the witness; 2) the witness could be located through reasonable investigation; 3) the witness would testify; and 4) the witness’ testimony would have produced a viable defense. *Hutchison v. State*, 150 S.W.3d 292,304(Mo.banc2004), *citing State v. Harris*, 870 S.W.2d 798,817(Mo.banc1994). In a capital case, counsel can be found ineffective for failing to thoroughly investigate and present mitigation witnesses in support of a life sentence. *Williams v. Taylor*, 529 U.S. 362(2000).

Witnesses Called To Testify At Penalty Phase

At trial, the only two “live” witnesses called by the defense were retained experts, Dr. Wanda Draper, a child development expert, and Dr. Eleatha Surratt, a psychiatrist (Tr.721-797,797-852).

They testified that Carman’s mother, Kathy, was seventeen and unwed to Carman’s father, Pete, when Carman was born (Tr.732,806-07). When Carman was three months old, he was taken to the hospital for dehydration and possible pneumonia (Tr.733,808). Kathy and Pete had three other children, Tonia, Latisha, who was mentally retarded, and Mike (Tr.733,736,737).

Up to the age of three years old, Kathy slapped Carman a great deal (Tr.733,808). Up through the age of five, he was also neglected (Tr.734-35). The Deck children were

often left with babysitters, because Pete would go with Kathy to nightclubs, where Kathy would sing (Tr.733).

When Carman was six years old, he entered school (Tr.736). At this time, there was a lot of fighting between his mom and dad (Tr.736). During this time period, Kathy still left the children to sing (Tr.736). At times, Kathy took the children with her, and the kids would sit in the bar, play in the parking lot, or remain in the car (Tr.737).

After Carman was seven years old, the children were sometimes left with Uncle Gene, who was mentally retarded and had epilepsy (Tr.737). When Carman was seven or eight years old, Pete traveled as a truck driver and was gone for several days at a time (Tr.737). When Pete was gone, Kathy pursued other men and did not take care of the kids (Tr.737). She had sex with other men in front of the children (Tr.738,744-45).

Carman parented his younger siblings and many times changed Michael's diapers (Tr.739). Carman learned to steal or beg for food (Tr.739). Kathy was short-tempered with the kids, and Carman was often neglected and abused (Tr.739). Kathy slapped Carman and Tonia and hit them with shoes, a coat hanger, and her hands (Tr.740).

When Carman was eight years old, Pete left Kathy and the children (Tr.741). Carman was the primary parent figure for his younger siblings (Tr.742). Carman stole and begged for food for him and his younger siblings, and provided hugs, care, and emotional support for Latisha and Mike who were still little (Tr.744).

Kathy also shoplifted (Tr.762). She taught Carman how to steal and told him that it was okay as long as he was not caught (Tr.763).

Kathy left her children with the Division of Family Services (“DFS”) and also left them at times with Uncle Gene and other babysitters (Tr.742). During this period of time, Carman was reported to have been molested by one of the caregivers and Tonia was sexually abused by Uncle Gene (Tr.744).

On Thanksgiving in 1974, when Carman was nine years old, the Sheriff’s Department called Pete and told him that the children had been left alone for a couple of days without food and he needed to pick them up (Tr.742-43). Pete took the children to the home of his brother and sister-in-law, Norman and Elvina Deck (Tr.743,809-10). Michael was so hungry that he ate his food fast, vomited, and then tried to eat that (Tr.743,810).

Carman was placed for a short period of time with DFS, and the Deck children next lived with Pete and his girlfriend, Rita, at Norman and Elvina’s home (Tr.745-46).

When Carman was ten years old, Rita became pregnant and Pete left her (Tr.747). Pete married Marietta, who did not like the Deck children (Tr.747,811). Marietta was a mean alcoholic and would drink until she passed out (Tr.748,811). Marietta fed the Deck children cold hot dogs or bologna (Tr.748). Marietta physically abused and beat the Deck children (Tr.748,811). On one occasion, Marietta smeared feces on Carman’s face and took a photograph to further humiliate him (Tr.750-51,812).

Eventually, Marietta dropped off the Deck children at DFS, and they were separated (Tr.751). Carman, who was about twelve years old, was placed in a foster home with Carol and Arturo Misserocchi in Farmington (Tr.752). Carman had difficulties making new attachments there (Tr.752). He did not stay very long with the

Misserocchis, as Kathy came to get him (Tr.752-53). He lived with Kathy for a bit, and then Kathy left him with a woman named June, who he lived with briefly (Tr.753).

DFS placed Carman in various foster homes (Tr.753,755,756). When Carman was fifteen years old, he lived with Major Puckett and his wife (Tr.757). The Pucketts cared for other foster children and provided a very structured environment (Tr.758). One part of Major Puckett's routine with the children was to have an evening meeting, where each child was allowed to voice any concern (Tr.758). Carman made progress, and the Pucketts loved him (Tr.759,820).

After one year, though, Kathy took Carman to live with her and Ron Wurst, who did not like children and was an abusive alcoholic (Tr.759-60,820,Mov.Ex.3). Carman begged DFS to let him stay with the Pucketts, pleading "if you take me away, you are killing me inside" (Tr.767).

Both experts opined that Carman's childhood was horrendous and shaped him into the person that he became (Tr.768,770,825,826-27).

During cross-examination of the defense experts, the prosecutor brought out how much they were being paid to work on Carman's case and testify (Tr.778-79,830).

Trial counsel also presented the prior testimony of four lay witnesses: Carman's aunt, Mary Banks; Carman's aunt, Beverly Dulinsky; Carman's brother, Mike Deck; and Carman's former foster parent, Major Puckett (Def.Exs.C,D,E;Tr.853-68;876-88).

Mike testified via a videotaped deposition that he was Carman's younger brother (Tr.853,855;Def.Ex.E). When he was four or five years old, Kathy and Pete were never

home (Tr.856;Def.Ex.E). Carman “pretty much took care of us” (Tr.856;Def.Ex.E).

Carman acquired things they needed and stole food (Tr.857;Def.Ex.E).

Michael recalled the Thanksgiving Day, where Pete came to get the kids because they had been abandoned (Tr.858;Def.Ex.E). Mike had not eaten in a few days, and he was so hungry that he threw up his food and then tried to re-eat it (Tr.858;Def.Ex.E).

Later, the Deck kids lived with Pete and Marietta (Tr.859-862). Marietta was very mean to them, but she was harder on Carman and Tonia (Tr.861-62,869;Def.Ex.E). She fed them cold hotdogs, and she spanked and slapped them, pulled their hair, and made them kneel on broomsticks (Tr.861-62;Def.Ex.E). Mike recalled the “feces incident,” where Marietta forced Carman to wear feces on his face (Tr.861;Def.Ex.E). Mike also recalled that Marietta eventually told Pete to choose between her and the kids, and Pete chose her (Tr.862;Def.Ex.E). After that, the Deck kids, except Carman, went to live with Norman and Elvina (Tr.862-63;Def.Ex.E).

When Michael was twelve years old, he, Latisha, Tonia lived with Carman for the first time in seven years (Tr.863;Def.Ex.E). Michael “really enjoyed” being with Carman (Tr.864,866;Def.Ex.E).

Michael has children, and Carman was around his youngest daughter when she was two years old (Tr.864,868;Def.Ex.E). Carman was good to her and treated her like a princess (Tr.864-65;Def.Ex.E).

Michael testified that Carman was never supervised and was always on his own (Tr.866;Def.Ex.E). Michael believed that if Carman had been afforded better

opportunities, he would have been different (Tr.866;Def.Ex.E). Michael still loved Carman and always would (Tr.865;Def.Ex.E).

Mary Banks testified via a videotaped deposition that she was married to Carman's oldest uncle, Dorman, who was killed in 1978 (Def.Ex.C,p.5-6). When Carman was about three weeks old, Carman's grandmother, Josie, called Mary and Dorman and said that there was something wrong with Carman (Def.Ex.C,p.8). Mary went to the house, and there was no refrigerator or food (Def.Ex.C,p.8). Carman's stomach was swollen, and he was lying on the bed and taking hard breaths (Def.Ex.C,p.8).

Carman was not responsive and appeared to be sleepy (Def.Ex.C,p.10). Josie said she had been feeding him powdered, commodity milk (Def.Ex.C,p.10). Dorman bought the appropriate formula for an infant, along with syrup to relieve any constipation (Def.Ex.C,p.10). When Mary fed Carman, Carman was nursing very hard, it was hard to take the bottle from him, and Carman drank a lot (Def.Ex.C,p.11). Mary was there with Carman for about two or two and one-half hours (Def.Ex.C,p.12). During that time, Kathy and Pete were at a bar (Def.Ex.C,pp.9,12).

Kathy did not have a job at that time but spent her time going to bars (Def.Ex.C,p.13). Pete also frequented the bars and nightclubs (Def.Ex.C,p.13).

Kathy and Pete moved to various places and also lived at times with Norman (Def.Ex.C,p.15). Carman had many different homes, because the Deck kids "were just wherever Kathy ... would leave them" (Def.Ex.C,p.16). Carman stole food for himself and his siblings (Def.Ex.C,p.32).

Mary observed Kathy with Carman but she never saw Kathy pick him up or hug him (Def.Ex.C,p.16). Mary never saw Pete do anything with any of the kids (Def.Ex.C,p.17).

At one point, Mary and Dorman wanted to adopt Carman (Def.Ex.C,p.17). They talked to Pete, and he did not care (Def.Ex.C,p.17). They talked to Kathy, and she said that if they paid her the amount of money that she received from the State, then she would sign him over (Def.Ex.C,p.17). Mary and Dorman had children of their own and could not afford to make the payment, so they ultimately had to drop it (Def.Ex.C,p.18). Kathy was only interested in the money and did not care about Carman (Def.Ex.C,p.18).

Pete later married Marietta (Def.Ex.C,p.19). Marietta showed Mary a photograph depicting Carman with feces covering his face (Def.Ex.C,p.20). Marietta told Mary that this is what she did to Carman when he “---- his pants” (Def.Ex.C,p.21-2). Marietta put the Deck kids in the car and told Pete that she was taking them to DFS (Def.Ex.C,p.23-4). Pete just let her do it (Def.Ex.C,p.24).

Mary had a good relationship with Carman when they were together (Def.Ex.C,p.22). When they brought Carman to visit, Carman “was right under Dee and I’s feet, every step we made, talking to us, sitting on the couch and talking and just laughing” (Def.Ex.C,p.22). Carman thought Dorman and Mary were rich, because they had food in the house (Def.Ex.C,p.22). When Dorman died suddenly in 1978, Carman was “beside himself” (Def.Ex.C,p.23).

Mary corresponded with Carman and intended to continue to write to him (Def.Ex.C,p.25).

Beverly Dulinsky's prior testimony was read to the jury, and she previously testified that she is Kathy's sister and Carman's aunt (Tr.876). After Kathy and Pete split up, Kathy was left with the four kids (Tr.879). Beverly visited the Deck kids and found them alone on several occasions (Tr.879-80). She asked the kids where their mom was, but they did not know (Tr.880). There was nothing for them to eat, and they were shabby looking, dirty, and either did not have clean clothes on or did not have clothes on (Tr.880,885). There were also no diapers (Tr.880).

At one point, the kids were found alone and the authorities were notified (Tr.881). Pete was contacted, picked up the kids, and took them to Ste. Genevieve (Tr.881). At some point after that, Pete married Marietta, and the kids lived with Pete and Marietta (Tr.882). After that, all of the Deck kids went into foster care (Tr.882,887). Carman stayed at several different foster homes, and the younger three Deck kids went to live with Norman and Elvina (Tr.883).

Beverly identified a photograph of Carman, at 13 or 14 years of age, with Ron Wurst, who was one of Kathy's husbands (Tr.883-84,888;Def.Ex.F-1,Mov.Ex.3). The relationship among Kathy, Ron, and Carman was very rocky, as Ron had a very bad temper (Tr.884).

Beverly put limits on her own children's relationship with Kathy, because Kathy had a habit of stealing (Tr.885). Kathy also taught Carman how to steal (Tr.885).

Reverend Major Puckett testified via a videotaped deposition that at age 14 or 15, Carman spent about a year in his foster home (Tr.888,Def.Ex.D). Reverend Puckett described Carman as a wonderful teenager, and a "likeable, lovable and sociable" boy

who did well in school, got along well with other children, and never caused him problems (Def.Ex.D). Carman was a lonely boy with no parents he could call mom and dad and no future (Def.Ex.D). Major Puckett held a family meeting every evening, and all of the children were permitted to discuss anything (Def.Ex.D). Carman was especially close with Puckett's wife, Linnie (Def.Ex.D). He loved to spend time with her in the kitchen helping her cook and clean (Def.Ex.D).

Unfortunately, DFS placed Carman back with Kathy (Def.Ex.D). Carman begged the caseworker not to take him, pleading, "you are killing me inside" (Def.Ex.D).

About three months later, Carman drove to Major Puckett's home and asked if he could spend the night and live with him (Def.Ex.D). Major Puckett had too many children in his home at that time and could not take another child (Def.Ex.D).

Available Mitigation Testimony Not Presented at Trial

Michael Johnson, Carman's stepbrother: Michael testified that his mother was Marietta Johnson, and she married Pete when Michael was about fifteen years old and Carman was about eleven (PCRTr.Vol.II,97). Michael, the Deck kids, Pete, and Marietta lived together for one year and moved around a lot (PCRTr.Vol.II,97-9). The summer before Michael's freshman year, they lived in Dexter for a semester (PCRTr.Vol.II,99). Then they moved to Piedmont and lived there for a semester (PCRTr.Vol.II,99). They moved to Ste. Genevieve after that, but Michael could not remember how long they were there (PCRTr.Vol.II,99).

When they lived in Piedmont, their home was an old wooden shack with no running water (PCRTr.Vol.II,100). Because the home was way back in the woods

towards Mark Twain National Forest, they had to catch the bus to school in the dark (PCRTTr.Vol.II,100). At that time, Michael's maternal grandfather lived nearby (PCRTTr.Vol.II,103). Michael's grandfather was a "mean, arrogant, ornery" man, whose "verbal abuse [was] worse than somebody hitting you" (PCRTTr Vol II,103-04). He knew how to "mentally put you in a disadvantage, to where he ... could make you cry" (PCRTTr.Vol.II,105). Michael's grandfather hated him and "hated Carman with a passion" (PCRTTr.Vol.II,103-04). His grandfather never said anything nice about Carman and would tell everybody that Carman would "end up in jail or be dead" (PCRTTr.Vol.II,104-05).

Pete and Marietta drank all the time (PCRTTr.Vol.II,100-01,107-08). Michael testified that Pete and Marietta left the children alone "more than I can remember," so that they could go to bars and party (PCRTTr.Vol.II,103).

His mother was a "very outspoken person," who "did everything loud" (PCRTTr.Vol.II,101). Everyone was afraid of his mother, and she was very strict with the children (PCRTTr.Vol.II,101). Marietta would send the children to their room and if they made any noises, she would bring them back out and whip them (PCRTTr.Vol.II,101). Latisha, who was retarded, wet the bed almost every night, and Marietta would beat her in the morning to try to get her to stop (PCRTTr.Vol.II,101-02). The other children witnessed this (PCRTTr.Vol.II,102).

The family was very poor and would ration food (PCRTTr.Vol II,102). At times, they ate beans and potatoes for weeks (PCRTTr.Vol.II,102).

Michael described the Deck children as being “closed off” and testified that they kept to themselves (PCRTr.Vol.II,105-06):

It seems like when you meet them, they are very quiet. They are very shy. It seems like they are too – there is as far as outgoing or anything, like that, you never seen it. They keep to their self, you know, it just – you could tell there was something wrong, you know, I mean it just, people knew it. I mean even ride the bus and stuff like that, people just, they had nothing to do with them.

(PCR Tr. Vol. II, 105-06).

Michael recalled that in 1997, a representative of Carman called and spoke to him over the telephone (PCRTr.Vol.II,106). After that, he was not contacted again by any attorney, until the most recent postconviction team contacted him (PCRTr.Vol.II,106). If he had been contacted and subpoenaed to come to court in 2008 for the most recent trial, he would have been available to testify and would have testified as he did at the postconviction hearing (PCRTr.Vol.II,106-07).

Michael described how he could have been easily located for the trial. He presently lives on Gifford Lane in Ste. Genevieve, Missouri and has lived in Ste. Genevieve for nineteen years (PCRTr.Vol.II,96). Approximately six months before the postconviction hearing, postconviction counsel called him on his home telephone number (PCRTr.Vol.II,96). He has had the same home telephone number and has lived at the same address, on Gifford Lane, since 1994 (PCRTr.Vol.II,97). He has worked at the same employer for twenty years (PCRTr.Vol.II,107).

At the postconviction hearing, trial counsel offered no trial strategy reason for failing to interview and call Michael at the trial (PCRTr.Vol.II,136-38,250;Mov.Ex.8).

Latisha Deck, Carman's sister: Carman took care of Latisha when the Deck kids were abandoned (PCRTr.Vol.I,25). From as far back as she could remember, Carman took care of her when she was little (PCRTr.Vol.I,25-6). Carman continued to take care of her until she was about four or five years old (PCRTr.Vol.I,25-6). Carman “would give me a bath and cook me something to eat.” (PCRTr.Vol.I,25). Carman also played games with her (PCRL.F.Vol.I,25-6).

At the postconviction hearing, the attorneys testified that they did not attempt to interview Latisha for the most recent trial (PCRTr.Vol.II,142,252-53). Attorney Tucci believed that he must have made a determination back in 1999, when he represented Carman in the first postconviction case, that Latisha was not able to verbalize childhood events (PCRTr.Vol.II,141). Attorney Reynolds testified that they did not want to call Latisha because calling a mentally retarded witness would appear manipulative (PCRTr.Vol.II,252-53).

Elvina Deck, Carman's aunt: After Elvina met Norman Deck in 1968, she met Pete, Kathy, and Carman, who would have been about two years old (PCRTr.Vol.II,23,24). When Elvina was around Kathy, she was upset by the way that Kathy treated her children (PCRTr.Vol.II,24). On one occasion, when Carman was a toddler, Elvina observed Kathy beat Carman with a belt, throw him on the floor, and tell him to sit there (PCRTr.Vol.II,26-7). Kathy did not interact with her children too often

(PCRTr.Vol.II,26). She did not play games with them or read to them

(PCRTr.Vol.II,26).

After she and Norman got married in 1972, Elvina and Norman lived with Pete and Kathy (PCRVol.II,23). Not only did Kathy have boyfriends outside her relationship with Pete, Kathy also prostituted herself (PCRTr.Vol.II,24). This occurred when Carman was nine or ten years old (PCRTr.Vol.II,25). When Pete would go to work, Kathy would leave the house to meet a “certain person” and come back with three or four hundred dollars (PCRTr.Vol.II,26). When Kathy left, Elvina often watched the children (PCRTr.Vol.II,26). The Deck kids were good kids (PCRTr.Vol.II,26).

Elvina and Norman lived near and with Pete during Carman’s childhood, and Elvina corroborated the trial testimony and provided a first-hand account that Kathy left the children alone or with Uncle Gene, that Carman took care of his younger siblings, and of the “Thanksgiving Day incident,” where the children were brought to her home, tired, dirty, and starving (PCRTr.Vol.II,28-30). Elvina also corroborated the trial testimony and provided a first-hand account of Marietta’s abuse of the Deck kids, including Marietta locking the kids out of the house, “bend[ing] them down on a broomstick ... [until] their knees would bleed,” and of the “feces incident” (PCRTr.Vol.II,33-5).

In addition, Elvina testified that Marietta asked Carman and Tonia to steal for her (PCRTr.Vol.II,35-6). They lived in Piedmont at the time, and there was a little store there (PCRTr.Vol.II,35). Marietta would pull up and tell Carman to go in and get cigarettes (PCRTr.Vol.II,36). After Carman came back, she would send Tonia and

Latisha in to get cigarettes (PCRTr.Vol.II,36). Marietta did not have the money for cigarettes because she had spent all of her money on alcohol (PCRTr.Vol.II,36).

Elvina still loved Carman “very much” (PCRTr.Vol.II,37).

Elvina testified at a deposition in 2000 for the first postconviction case and in 2003 at a prior penalty phase (PCRTr.Vol.II,37). After 2003 and before the most recent trial in 2008, no one contacted her to testify at Carman’s most recent trial (PCRTr.Vol.II,37). In 2008, she lived in the state of Washington (PCRTr.Vol.II,38). If someone had contacted her, she would have been available to testify (PCRTr.Vol.II,38).

At the postconviction hearing, counsel testified that they made some attempts to locate Elvina, but they never got in touch with her (PCRTr.Vol.II,122-25,244). The trial file contained an undated memo written by counsel, which indicated that Elvina called Carman’s family every once in a while (PCRTr.Vol.II,124;Mov.Ex.44). The memo indicated an address and telephone number for Elvina in the state of Washington and that an investigator left a message on an answering machine and would continue to try to reach her (PCRTr.Vol.II,124-25;Mov.Ex.44). After the message was left on the answering machine, there was no documentation that any further steps were taken to contact Elvina and counsel testified to no further efforts to contact her (PCRTr.Vol.II,125;Mov.Ex.44). There was no motion filed to seek an out-of-state subpoena (L.F.43-52).

Wilma Laird, Carman’s aunt: When Carman was little, she had occasion to see Kathy with Carman (Mov.Ex.43,pp.10,24). On one occasion, Wilma saw Kathy hit Carman in the temple with a flip flop (Mov.Ex.43,pp.16-7,34-6). Carman was only one

or two years old (Mov.Ex.43,pp.35-6). Wilma thought hitting Carman in the head was inappropriate and told Kathy that (Mov.Ex.43,p.17). Kathy told Wilma that it was her kid, and she could do what she wanted to him (Mov.Ex.43,p.17). Kathy shoved Wilma, and Wilma shoved her back (Mov.Ex.43,pp.17-8). Carman cried a little bit and had a small red mark on his head (Mov.Ex.43,pp.18,36).

At the postconviction hearing, Attorney Tucci testified that they did not contact her prior to trial, because she “didn’t have anything to add to what....Doctor Surratt and Doctor Draper had known” (PCRTTr.Vol.II,126-27,190,246).

Stacey Tesreau-Bryant, Carman’s former fiancée: When Stacey was about twenty-one, she dated Carman (PCRTTr.Vol.II,200). She had a son, Dylan, who was approximately two years old at that time (PCRTTr.Vol.II,200-01). She and Carman moved in together and were together for one year (PCRTTr.Vol.II,201). Dylan’s biological father was not present in Dylan’s life, and Carman helped her take care of Dylan and treated Dylan well (PCRTTr.Vol.II,201). Carman treated Dylan like a son, and Dylan called him “Daddy Pete” (PCRTTr.Vol.II,201-02). After their relationship ended in 1994 or 1995, Dylan continued to have a relationship with Carman and Carman’s family (PCRTTr.Vol.II,202).

During their relationship, Stacey and Carman also got very close with each other (PCRTTr.Vol.II,204). Stacey had been abused by an uncle when she was young, and the two shared secrets of what had happened to them as children (PCRTTr.Vol.II,205). Carman confided in Stacey that his mom used to date a lot of men when he was young, and he had been molested by some of the men (PCRTTr.Vol.II,204). When Carman

discussed this with Stacey, he was very emotional, both angry and crying; he was “like he hated her” (PCRTTr.Vol.II,205).

At the postconviction hearing, trial counsel testified that an investigator went to Stacey’s home in January 2007, and Stacey’s husband was hostile to the investigator (PCRTTr.Vol.II,133,Mov.Ex.45). Stacey’s husband refused to provide Stacey’s employer or work number (PCRTTr.Vol.II,133;Mov.Ex.45). The trial team made no further effort to contact or subpoena Stacey (PCRTTr.Vol.II,135;Mov.Ex.83). Attorney Tucci testified that, given the hostile nature of Stacey’s husband and the tangential nature of her testimony, he decided to bring out Stacey’s information through the experts (PCRTTr.Vol.II,133).

Stacey testified that Carman’s representatives could have contacted her, in 2008, away from her husband, and she would have testified at the trial in September 2008 (PCRTTr.Vol.II,208-09).

Carol Misserocchi, one of Carman’s former foster parents: When Carman was approximately 10 or 11 years old, he was placed with the Misserocchis and lived with them and five other children for about six to eight months (Mov.Ex.29,pp.8,9,10). During Carman’s stay with the Misserocchis, DFS did not provide him with any counseling (Mov.Ex.29,p.12). During the six to eight-month stay, no family member or friend visited Carman, although other foster children’s parents visited (Mov.Ex.29,p.12-3, 15). Carol specifically recalled that Carman’s family never contacted him (Mov.Ex.29,p.15-6).

Despite the fact that his family did not visit him, Carman did not appear to be sad but rather showed “very little emotion” with anything pertaining to his family and did not talk about it (Mov.Ex.29,pp.14,16). Carman also did not talk about how he was doing in school or anything personal (Mov.Ex.29,p.23). Carman did not bond with Carol, did not hug her, and did not talk about his feelings (Mov.Ex.29,p.16). Rather, Carman was detached and distant (Mov.Ex.29,p.16). The other kids at the home did not like him, and he was “sassy” (Mov.Ex.29,p.22).

After Carman left, the other foster children told Carol that Carman said, on one occasion, that he wanted to have sex with a pig, and on another occasion, said that he wanted to have sex with the vacuum cleaner (Mov.Ex.29,p.23). If Carman had been living with her at that time, Carol would have reported those incidents to DFS and would have talked with Carman about it (Mov.Ex.29,pp.25-6). Carman never acted violently when he lived with the Misserocchis (Mov.Ex.29,p.17).

At the postconviction hearing, trial counsel testified that they did not want to call Carol, because the testimony was tangential and could be brought out through the defense experts (PCRVol.II,129,248-49).

Arturo Misserocchi, one of Carman’s former foster parents: Although Arturo saw some of the parents of the other foster children, he never saw any of Carman’s relatives visit Carman (Mov.Ex.28,p.17,18). Arturo recalled that Carman talked about his sister and “said how great she was” (Mov.Ex.28,p.19). Arturo believed that Carman’s mom or dad may have tried to call him when he was at their home or that Carman tried to call them (Mov.Ex.28,p.21). When Carman lived with Arturo and Carol, he did not open up

to or bond with Arturo (Mov.Ex.28,p.22). Carman was “a cute little kid, and he had a wonderful personality, but he never talked about his life...” (Mov.Ex.28,p.22). Carman was “a good kid,” and Arturo never saw him fighting with the other kids or acting violently (Mov.Ex.28,p.22-3).

At the postconviction hearing, trial counsel testified that they did not want to call Arturo, because the testimony was tangential and could be brought out through the defense experts (PCRVol.II,129,248-49).

Tonia Cummings, Carman’s sister and co-defendant: Tonia corroborated the trial testimony of the abuse and neglect that the Deck children suffered and that Carman took care of her, Latisha, and Mike when they were abandoned (Mov.Ex.9).

In addition, Tonia testified that when she was little and Kathy and Pete were still together, they moved from place to place and the house was always dirty (Mov.Ex.9,p.8). Kathy and Pete constantly fought and argued about bills, money, the kids, and Kathy sleeping around with other men (Mov.Ex.9,p.8-9). The fights would occur almost every day (Mov.Ex.9,p.10). Kathy had men over when Pete was at work (Mov.Ex.9,p.16-7).

Kathy disciplined the kids by spanking them, throwing objects at them, and hitting them with a switch, her hands, or her fists (Mov.Ex.9,p.10). There was “a lot of physical abuse” and she verbally abused the kids and would cuss at them (Mov.Ex.9,p.11). Kathy was the worst to Carman, and she constantly physically abused him (Mov.Ex.9,p.11).

Tonia recalled that her dad switched jobs a lot and was frequently gone (Mov.Ex.9,p.9,11). Her dad was an alcoholic, and he was constantly drinking

(Mov.Ex.9,p.9-10). He would ask the kids to get him a beer from the refrigerator and give the kids drinks of beer (Mov.Ex.9,p.10).

The children were left alone four or five days out of the week (Mov.Ex.9,p.14). Carman, who was 9 or 10 years old, would take care of Tonia, Latisha, and Mike (Mov.Ex.9,p.13). When they were left alone, the home was filthy and there was no food in the house (Mov.Ex.9,p.14). Mike wore the same diaper for two days at a time (Mov.Ex.9,p.14). Latisha got into their uncle's medication (Mov.Ex.9,p.14). The kids had nothing to wear but their dad's t-shirts (Mov.Ex.9,p.14). Carman would take care of them by stealing food from stores or by going to the neighbors and asking for food (Mov.Ex.9,p.15).

When Tonia was six or seven years old, her dad left (Mov.Ex.9,p.18-9,22). Kathy continued to leave the children alone, and Carman was the primary caregiver (Mov.Ex.9,p.22-3). The children would share clothes or would wear their dad's t-shirts (Mov.Ex.9,p.24). Carman would play with his siblings, try to keep them occupied, and try to keep them in the house (Mov.Ex.9,p.23). On one occasion, when Kathy worked across the street as a waitress, Carman walked over to get food for the kids (Mov.Ex.9,p.13,23). Mike followed Carman and almost got hit by a car (Mov.Ex.9,p.23).

Kathy continued to bring her boyfriends to the home (Mov.Ex.9,p.20). She had sex with them in her room, and the kids could see and hear it (Mov.Ex.9,p.21).

Kathy continued to discipline the children by hitting them (Mov.Ex.9,p.21). She hit Carman a lot more than the other kids (Mov.Ex.9,p.21). She hit him with her hands,

her fist, a cane, sticks, whatever she had, and she would throw things at him (Mov.Ex.9,p.21). She was also verbally abusive (Mov.Ex.9,p.22). Kathy would also steal constantly (Mov.Ex.9,p.22).

The Deck kids next lived with their dad, who was with Rita at the time (Mov.Ex.9,p.26). Rita became pregnant, but Pete denied that the baby was his and left her and the Deck kids (Mov.Ex.9,p.26-7).

Shortly after that, Pete married Marietta (Mov.Ex.9,p.27). Tonia was approximately eight years old at this time, and Carman was about eleven years old (Mov.Ex.9,p.28). Marietta, Pete, and the kids moved around a lot and stayed in various homes (Mov.Ex.9,p.29). The Deck children often had to sleep in the same bed (Mov.Ex.9,p.29). The Deck children were close and looked out for each other (Mov.Ex.9,p.30).

Marietta abused the Deck kids physically, mentally, and emotionally (Mov.Ex.9,p.27). Tonia described that she “had lots of hate towards us” (Mov.Ex.9,p.27-8):

Like, every day at 5:00 she would each give us a hot dog. And after we ate that, we’d have to go to bed for the rest of the evening.

Or she would make us stay outside all day long, use the bathroom outside. She wouldn’t give us any water. We were constantly hungry. She wouldn’t give us anything to eat.

She hit us. She spanked us with belts. She hit us with switches.

She would put me and Carman in the corner and make us kneel on a broomstick.

... I don't know, she just punished us constantly all the time. She would squirt dish soap in our mouths and make us swallow it.
(Mov.Ex.9,p.30).

Carman and Tonia would sneak out in the middle of the night, get food from the refrigerator, and hide under the table and eat some of it (Mov.Ex.9,p.30). They would take the rest back to Latisha and Mike (Mov.Ex.9,p.30). On one occasion, when they lived out in the country, Carman found a big bag of dog food that was kept in the shed (Mov.Ex.9,p.40). Carman gave the kids bowls of it, and they ate the dog food because they were so hungry (Mov.Ex.9,p.40).

Marietta did not like Carman, and she told him "he's never going to amount to nothing, he's a piece of shit, we're bastards, our mother's a whore. She told him he's no good. I mean, she was really hard on him" (Mov.Ex.9,p.36).

Marietta was a very bad alcoholic (Mov.Ex.9,p.28). Marietta and Pete went to bars all the time and left the children alone a lot (Mov.Ex.9,p.31). Marietta and Pete also argued and fought a lot (Mov.Ex.9,p.29).

At some point, Marietta left the Deck kids at the DFS Office (Mov.Ex.9,p.35). The Deck kids were separated and went into different foster homes (Mov.Ex.9,p.38). Tonia was placed with Margaret Manning, who was the only adult in her life that showed her love: "She loved me, loved on me every day. She taught me how to make cookies.

She let me help make cookies with her. She bought me dolls and new clothes, things I never had, and my own room. She just gave me so much love” (Mov.Ex.9,p.38-9).

Unfortunately, Pete and Marietta came back (Mov.Ex.9,p.39). Tonia remembered this well: “because I remember throwing a fit and I was holding on to her, Margaret, Margaret, because I didn’t want to go, but they made me go” (Mov.Ex.9,p.39).

When Carman was about 15 years old and lived with Kathy, Kathy would throw things at him, hit him, fist fight with him (Mov.Ex.9,p.49). Carman and Tonia did not listen to Kathy, because “she did what she wanted to do, she was bringing different people in, staying out all night” (Mov.Ex.9,p.50,59). When Carman was 17 years old, he moved out on his own (Mov.Ex.9,p.49).

When they were teenagers, Carman confided to Tonia that he was a “worthless piece of ----, that he’s never going to amount to anything, that nobody ever loved him, all he wanted was for somebody to love him” (Mov.Ex.9,p.56).

Carman and Tonia remained close, and Carman also confided in Tonia that he hated his mom and had a lot of bitterness towards her (Mov.Ex.9,p.54,55). He told Tonia that she did not know some of the things that he went through with Kathy and began crying (Mov.Ex.9,p.55).

At the postconviction hearing, Attorney Tucci testified that he did not want to call Tonia as a witness because the prosecutor would cross-examine her about the murders (PCRTr.Vol.II,139-40). Attorney Reynolds testified that he did not want to call Tonia because she could be perceived as another victim, since she was in prison for the crimes that she committed with Carman (PCRTr.Vol.II,251).

Rita Deck, Carman's stepmother: On Thanksgiving Day 1975, she first met Pete's four children (PCRTr.Vol.II,7-9). Carman was approximately ten years old (PCRTr.Vol.II,7-9). Pete received a call and was told to pick up his children, who were living with their mother, Kathy, in Farmington (PCRTr.Vol.II,8). Pete brought the kids to Norman's home (PCRTr.Vol.II,8). The kids were dirty and hungry (PCRTr.Vol.II,8). The children said that for three or four days, they had only bread and butter to eat (PCRTr.Vol.II,9). Pete and Rita gave the children baths and fed them (PCRTr.Vol.II,9).

In approximately February 1976, Rita was pregnant with Pete's child (PCRTr.Vol.II,13). But Pete met Marietta and left Rita and the Deck kids (PCRTr.Vol.II,11-14).

Rita did not know where Kathy was, so she continued to care for the Deck children and moved with the kids to her parents' home (PCRTr.11,14). Then Kathy's sister went to Rita's house to pick up the children (PCRTr.11,14). Kathy's sister did not return the children to Rita, because Pete and Marietta took them from her (PCRTr.14). Kathy's sister told Rita that Pete and Marietta had taken the children, and Rita "just fell apart, because [she] really cared for the kids" (PCRTr.15).

From Thanksgiving 1975, until Kathy's sister came to take the Deck children, Rita was the children's primary caregiver (PCR Tr.12,14). Carman was "a good kid" (PCRTr.12). Rita "had no trouble with him. He gave me no problems. He done all I asked him to do..." (PCRTr.12). Carman was never violent (PCRTr.14). Carman did not express to Rita that he was sad to be separated from his mom and never asked about his

mom (PCRTTr.12-13). The four Deck children were “very close” to one another (PCRTTr.12).

Later, Rita had a daughter, Deana (PCRTTr.Vol.II,15). Pete never provided any support for Deana and did not meet her until she was seven years old (PCRTTr.Vol.II,15). Rita got back together with Pete in 1984, and the two married in 1988 (PCRTTr.Vol.II,17).

Rita had previously testified on Carman’s behalf at the penalty phase in 1998, at a deposition in 2000, and at the penalty phase in 2003 (PCRTTr.Vol.II,17-8). After 2003 and before the most recent postconviction case, she did not recall anyone trying to call her or serve her with a subpoena (PCRTTr.Vol.II,18,19).

The deposition of Pete Deck, Carman’s father: Pete Deck testified at a deposition on August 11, 2000 (Mov.Ex.31). At the postconviction hearing, the parties stipulated that if Pete had been deposed in 2008 and if he had been called at the hearing, he would have provided the same testimony as he did in 2000 (Mov.Ex.31;PCRTTr.Vol.1,38-9).

Pete left Kathy and the kids after he found out that Kathy was cheating (Mov.Ex.31,p.22). He continued to take money over to Kathy to take care of the kids, but he found out that she was not spending the money for the kids (Mov.Ex.31,pp.26-7).

On Thanksgiving, 1976, Pete received a phone call from the Sheriff, who told him that he needed to pick up his children (Mov.Ex.31,p.33). He found out that Kathy had been leaving the children alone (Mov.Ex.31,p.33). On this occasion, Kathy had left them for two days (Mov.Ex.31,pp.33-4). Carman was about eleven (Mov.Ex.31,pp.33-4).

When Pete went to pick up the kids, his brother, Gene, was there (Mov.Ex.31,p.35). Gene is mentally retarded, has epileptic seizures, and is not capable of

watching children (Mov.Ex.31,p.35). The house was a mess, and there were clothes strewn everywhere and dirty dishes piled up (Mov.Ex.31,p.37). There was little, if any, food (Mov.Ex.31,p.37-8).

After Pete married Marietta, he found out that Marietta was not watching the Deck children when he was at work and was not nice to them (Mov.Ex.31,pp.28,31). Marietta would feed the Deck kids “when she decided to and if she didn’t want to, she didn’t” (Mov.Ex.31,p.31). When she did feed them, she did not feed them enough (Mov.Ex.31,p.31). On one occasion, Pete’s sister-in-law reported to Pete that Marietta has spread feces on Carman’s face and made him wear it for a while (Mov.Ex.31,p.31).

Marietta drank alcohol all the time (Mov.Ex.31,p.44). When Pete worked out of town, Marietta would drink when he was gone (Mov.Ex.31,pp.44-5). Marietta would pick up his paycheck at the company and “was more or less drinking it up” (Mov.Ex.31,p.45).

At some point in 1976 or 1977, Carman went to a foster home (Mov.Ex.31,p.43). Marietta “suggested” foster care in front of Carman (Mov.Ex.31,pp.43-4). Pete asked Carman how he felt about going to a foster home, and Carman said that he would rather go into foster care than live with Marietta (Mov.Ex.31,p.44). Pete was unable to name any of the foster parents who took care of Carman (Mov.Ex.31 p.43).

When Carman was fourteen years old, Kathy allowed him to “run the streets” late at night and was not watching over him or providing for him (Mov.Ex.31,pp.38-9,47).

When Pete was asked how many places Carman lived in from birth to sixteen years of age, he responded “four or five” (Mov.Ex.31,p.48-9). He was surprised to hear

that Carman lived in over twenty places and did not know why that occurred (Mov.Ex.31,p.49).

Pete had met with prior counsel and had previously testified on Carman's behalf (Mov.Ex.31,pp.50,63). He was also present at Carman's first trial, but the trial attorney did not call him due to his high blood pressure issues (Mov.Ex.31,p.50-1,68-9). In 2008, Pete's health was not good and he suffered from hypertension, emphysema, and chronic obstructive lung disease (PCRTr.Vol.II,19).

Trial counsel testified that they subpoenaed Rita and Pete to the trial, and the record indicated that they subpoenaed them to the trial when it was set in October 2007 (L.F.297-98,301-02;PCRTr.Vol.II,114,121). After Rita and Pete were subpoenaed, Rita called counsel to report that Pete was ill and could not testify (PCRTr.Vol.II,114,242-43). Later, Attorney Tucci received a letter from a physician stating that testifying in court would be hazardous to Pete's health (PCRTr.Vol.II,115). Rita called again, and trial counsel informed her that it would be up to the Judge whether the medical excuse was sufficient (PCRTr.Vol.II,115). Trial counsel had doubts that Pete was ill and considered Rita and Pete to be uncooperative (PCRTr.Vol.II,114-16,182-84,242-43). Rita and Pete did not appear at the trial, and trial counsel did not ask for a writ of body attachment (PCRTr.Vol.II,118-21,185,244). Trial counsel did not ask Pete to sign a release form or order Pete's medical records to verify Pete's medical condition (PCRTr.Vol.II,117,243). Trial counsel did not try to meet with Rita (PCRTr.Vol.II,182-84).

The deposition of D.L. Hood, one of Kathy's former boyfriends: D.L. testified at a deposition on August 11, 2000 (Mov.Ex.5;PCRTTr.Vol.I,37). After that deposition and before the trial in September 2008, D.L. passed away (Mov.Ex.4;PCRTTr.Vol.1,37).

D.L. testified that when Carman was about eight years old, D.L. met Kathy at a bar and the two started a country rock band, the Country Drifters (Mov.Ex.5,p.6-8,11,12-3). At one point, Kathy told D.L. that she took the kids to the welfare office and left them on the steps (Mov.Ex.5,p.12). At another time, Kathy said that Pete had the kids (Mov.Ex.5,p.12).

D.L. knew Kathy for approximately three years, and they eventually dated and then lived together for a year in 1977 (Mov.Ex.5,p.11-3). When they were together as a couple, Kathy had relationships with other men, and D.L. heard that she was also engaged in prostitution (Mov.Ex.5,p.14-5). Kathy also admitted to D.L. that she was having sex with her uncle (Mov.Ex.5,p.17-8).

D.L. testified that Kathy was “crazy” and “definitely had a mental problem” (Mov.Ex.5,p.21,22). She tried to stab him one night, and D.L. decided to quit the band (Mov.Ex.5,p.21). After that, it took him six months to get Kathy to leave him alone (Mov.Ex.5,21). On one occasion, she broke his door down (Mov.Ex.5,p.22). D.L. became afraid of Kathy and did not want to have anything more to do with her (Mov.Ex.5,p.23,30-1).

At the postconviction hearing, trial counsel testified that they did not want to call D.L. Hood because he was not in Carman's life that long (PCRTTr.Vol.II,127-28,247-48).

The Hearing Court's decision

The hearing court found as follows: Michael Johnson's testimony was inconsequential (PCRL.F.296,303).

Latisha Deck was not able to communicate effectively and did not provide any testimony that was different from what the jury heard at trial (PCRL.F.290-91,297).

Attorney Tucci made reasonable efforts to locate Elvina Deck but was unable to find her (PCRL.F.295-96). Further, Elvina Deck's testimony would not have changed the outcome of the case (PCRL.F.293).

Counsel's decision not to call Wilma Laird was reasonable, because: Wilma's knowledge of Carman was limited; she only described one incident where Kathy hit Carman and did not describe Kathy knocking him down; and she described Pete as a good father (PCRL.F.289-90,296).

Postconviction counsel failed to prove that Stacey could have been located before trial and would have been available to testify at trial (PCRL.F.297). In any event, Stacey's testimony would not have changed the outcome of the case (PCRL.F.296, 297).

Trial counsel's decision not to call Carol Misserocchi was reasonable, because: she indicated an unwillingness to testify; her testimony contained some damaging information as Carman acted sexually inappropriate when he was little and the other kids did not care for Carman; and there was nothing compelling about her testimony (PCRL.F. 288-89,296,303).

Trial counsel's decision not to call Arturo Misserocchi was reasonable, because: he did not want to testify; he believed that Carman would have spoken to his parents

when Carman lived with him; and there was nothing compelling about his testimony (PCR L.F.288-89,296,303).

Trial counsel's decision not to call Tonia Cummings was wise, because she was a co-defendant in the crimes and her testimony would have caused the jury to focus on the murders (PCRL.F.286-87,302).

Trial counsel subpoenaed Rita and Pete Deck to the trial, but they did not appear (PCR L.F. 295). Rita telephoned counsel and said that Pete was too ill to appear and that they did not want to be involved (PCRL.F.295,298). In addition, Rita did not provide any new or different information about Carman's upbringing or the poor care he received from his caretakers (PCRL.F.293).

Trial counsels' decision not to present the testimony of D.L. Hood was reasonable strategy, because his testimony was tangential (PCRL.F.296).

Standard of Review

This Court must review the motion court's findings for clear error. *Sanders v. State*, 738 S.W.2d 856,857(Mo.banc1987). To establish ineffective assistance of counsel, Carman must show that his counsel's performance was deficient and that such performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668(1984). To prove prejudice, he must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997).

The Hearing Court's Findings were Clearly Erroneous

In *Williams v. Taylor*, 529 U.S. 362(2000), counsel was ineffective for failing to investigate and present substantial mitigating evidence of Williams' nightmarish childhood. *Id.* at 399. Evidence of Williams' borderline mental retardation and that he did not advance beyond the sixth grade were mitigating factors the jury never heard, as were records and evidence of his parents' imprisonment for neglect of Williams, his father's repeated abuse of Williams, and prison records showing good behavior in prison. *Id.* 395-398. In finding counsel ineffective, the Supreme Court held that trial counsel has an "obligation to conduct a *thorough* investigation of the defendant's background." *Id.* at 396 (emphasis added). Because of the unique nature of capital sentencing – both the stakes and the character of the evidence to be presented – capital defense counsel have a heightened duty to present mitigation evidence to the jury. *Taylor v. State*, 262 S.W.3d 231,249(Mo.banc2008).

In the case at bar, counsel failed to conduct a thorough investigation and failed to present the aforementioned available mitigation witnesses. The mitigation witnesses called at the postconviction hearing would have: a) provided additional detail of the abuse and neglect suffered by Carman during his formative years; b) provided additional detail of the care that Carman provided to his younger siblings when they were abandoned as children; c) provided additional detail of the bad character of Carman's caregivers during his childhood; and d) provided the jury with live lay witness testimony, where the only live witnesses called were expert witnesses. The deposition testimony of D.L. Hood and Pete would have also provided the jury with additional detail of the abuse

and neglect Carman suffered during his formative years and of the apathetic and cruel nature of Carman's parents.

The hearing court clearly erred in finding that Michael Johnson's testimony was inconsequential (PCRL.F.296,303). Michael's testimony would have provided the jury with detail that the jury did not hear, including that: Marietta's father was verbally abusive to Carman and told everybody that Carman would end up in jail or be dead (PCRTr.Vol.II,103-05). Michael's mom, Marietta, beat Latisha, who was mentally retarded, for wetting the bed, and Carman witnessed the beatings (PCRTr.Vol.II,101-02). Marietta and Pete drank all the time and left the children alone frequently (PCRTr.Vol.II,103).

Another sad observation by Michael was that the Deck kids were "closed off" (PCRTr.Vol.II,105-06). "[Y]ou could tell there was something wrong...people just knew it. I mean even ride the bus and stuff..., people just, they had nothing to do with them" (PCRTr.Vol.II,105-06). Thus, Michael's testimony would have informed the jury that the abuse and neglect suffered by the Deck children was so extreme that other people knew that there was something wrong (PCRTr.Vol.II,105-06). It would have emphasized to the jury that these kids were outcasts, through no fault of their own (PCRTr.Vol.II,105-06).

Because Michael was Marietta's son, his testimony would have lent credibility to evidence of Marietta's cruelty toward the Deck kids.

The hearing court clearly erred in his assessment that Latisha Deck was not able to communicate effectively (PCRL.F.297). A review of Latisha's testimony at the hearing

demonstrates that she was able to understand questions about her childhood and respond to those questions appropriately (PCRTTr.Vol. I,24-9).

The hearing court also clearly erred in determining that Latisha did not provide any testimony that was different from what the jury heard at trial (PCRL.F.290-91). While there was evidence at trial that the Deck kids were frequently abandoned by Kathy and that Carman parented his younger siblings, the detail provided by Latisha, live, at the trial, would have been persuasive mitigating evidence. Latisha was able to remember and articulate that Carman would give her a bath and cook for her (PCRL.F.Vol.I,25). This would have provided a much clearer picture of what efforts Carman made, as a child, to try to take care of his younger siblings. Because Latisha was credible and remembered clearly that Carman was her primary caregiver when she was little, this would have lent strong credibility to the fact that Carman took care of his younger siblings all the time.

The hearing court clearly erred in finding that Attorney Tucci made reasonable efforts to locate Elvina Deck but was unable to find her (PCRL.F.295-96). “[A]ll that is required is investigation that is adequate under the circumstances.” *Hogshooter v. State*, 681 S.W.2d 20,21(Mo.App.,S.D.1984), *quoting Pickens v. State*, 549 S.W.2d 910,912 (Mo.App.,St.L.D.1977). However, leaving a telephone message should not be deemed sufficient in a capital case, and counsel did not confirm any efforts to contact Elvina, beyond a telephone message left for her from the investigator (PCRTTr.Vol.II,124-25;Mov. Ex. 44). There was no motion filed to seek an out-of-state subpoena (L.F.43-52). Elvina had testified on two prior occasions on Carman’s behalf, and the record

therefore demonstrates that she would have appeared if further attempts to contact her were made (PCRTTr.Vol.II,37).

The hearing court's conclusion, that Elvina's testimony would not have been persuasive and would not have changed the outcome of the case, was also clearly erroneous (PCRL.F.293). The additional evidence provided by Elvina, live, would have been persuasive mitigation, as it depicted Carman's caregivers as engaging in prostitution and directing him to steal (PCRTTr.Vol II,24,35-6). Elvina would also have provided the jury with testimony from a person who actually witnessed the physical abuse of Carman (PCRTTr.Vol.II,26-7,33-4). Elvina lived with and near Carman during his childhood. She saw the abuse that Marietta inflicted on the Deck children, and she witnessed Kathy abuse Carman when he was a toddler (PCRTTr.Vol. I,26-7,33-5).

In addition, Elvina testified that she still loved Carman "very much" (PCRTTr.Vol. II,37). As such, the jury would have known that Carman had relatives, who believed Carman's life had value and who were willing to come to court on his behalf.

The hearing court's determination, that the decision not to call Wilma Laird was reasonable, was clearly erroneous. The hearing court determined that counsel's decision was reasonable, because Wilma had little to offer and Wilma opined that Pete was a good father (PCRL.F.289-90,296).

"The question of whether a decision by counsel was a tactical one is a question of fact." *Collier v. Turpin*, 177 F.3d 1184,1199(11th Cir.1999), *quoting Bolender v. Singletary*, 16 F.3d 1547,1558 n.12 (11th Cir.1994). Whether the tactic was a reasonable

one, however, is a question of law and is reviewed *de novo*. *Collier*, 177 F.3d at 1199, citing *Horton v. Zant*, 951 F.2d 1449,1462(11th Cir.1991).

Counsel's decision not to call Wilma was not a reasonable tactic. Wilma would have been another direct, live witness to physical abuse suffered by Carman (Mov. Ex. 43, pp. 16-17, 34-36). Further, Wilma testified that she was not around Carman a lot when he was younger (Mov.Ex.43,pp.10,24). So her testimony about the abuse she observed would have been beneficial, especially where she saw Kathy hit Carman on the head when Carman was only one or two years old (Mov.Ex.43,pp.16-7,34-6). Wilma's opinion that Pete was a good father would not have carried any weight with the jury, as such opinion was not supported by her direct observations and would have been contradicted by substantial evidence that Pete repeatedly rejected and neglected Carman and permitted his son to be abused (Mov.Ex. 43,p 27).

The hearing court's determination, that postconviction counsel failed to prove that Stacey could have been located before trial and would have been available to testify at trial, was clearly erroneous (PCRL.F.297). Trial counsel's investigator went to Stacey's home in January 2007, and Stacey's husband was hostile to the investigator (PCRTr.Vol.II,133;Mov.Ex.45). The trial team made no further effort to contact or subpoena Stacey to the trial in September 2008 (PCRTr.Vol.II,135;Mov.Ex.83). Attorney Tucci testified that, given the hostile nature of Stacey's husband and the tangential nature of her testimony, he decided to bring out Stacey's information through the experts (PCRTr.Vol.II,133).

Stacey testified that she testified at a deposition in 2000 (PCRTTr.Vol.II,206). In 2007 and 2008, she lived with her husband on Rocky Place in St. Clair, Missouri, and then lived in Imperial after leaving her husband (PCRTTr.Vol.II,206). Carman's representatives could have contacted her away from her husband by contacting her after she left him (PCRTTr.Vol.II,208). Further, Carman knew Stacey's grandmother and her aunt (PCRTTr.Vol.II,208). Had Carman's representatives contacted Stacey's relatives, Stacey's relatives would have provided information in order for them to contact and subpoena Stacey (PCRTTr.Vol.II,208).

Based on the above, postconviction counsel proved that had the trial team made additional efforts to contact Stacey after their attempt in January 2007, such efforts would have been successful and Stacey would have testified at the trial in September 2008.

The hearing court's finding, that Stacey's testimony would not have changed the outcome of the case, was also clearly erroneous (PCRL.F.296-97). Although there was testimony offered at trial from a defense expert that Carman had a good relationship with Stacey and her son, the detail provided by Stacey was not heard by the jury (Tr.765; PCRTTr.Vol. I,200-05). This was persuasive mitigating evidence, as it demonstrated that Carman was nurturing to Stacey's son (PCRTTr.Vol.II,201-02). Stacey's testimony would have also provided the jury with evidence that Carman suffered psychologically from the child abuse and that Carman had also been sexually abused, because Carman confided to her that he had been abused and became upset (PCRTTr.Vol.II,204-05).

The hearing court's determination, that the decision not to call Carol Misserocchi was reasonable, was clearly erroneous (PCRL.F.288-89,296,303). The hearing court

determined that counsel did not call Carol, because: she indicated an unwillingness to testify; her testimony contained some damaging information; and there was nothing compelling about her testimony (PCRL.F.288-89,296,303).

First, Carol offered compelling testimony, which was not heard by the jury. Although a defense expert briefly testified at trial regarding Carman's stay with the Misserocchis (Tr.752), the jury did not hear that no relative came to visit Carman, when he was only 12, during the entire six to eight months that he lived with Carol (Mov.Ex.29,p.12-3,15). That fact alone is persuasive mitigating evidence of the extreme rejection that Carman would necessarily have felt from his parents. Further, Carol's testimony that Carman was detached and distant would have been evidence to demonstrate that Carman, at the approximate age of 12, was suffering the psychological consequences of abuse, neglect, and multiple placements (Mov.Ex.29,p.16).

Carol's testimony that the other foster children indicated that Carman made bizarre statements about having sex with a pig and a vacuum cleaner, are not aggravating evidence, in light of Carman's age and the abuse he had suffered (Mov.Ex.29,p.23). In fact, Carol testified that if she had learned that, while Carman was still living with her, she would have reported it to DFS and tried to talk with Carman about it (Mov.Ex.29,p.25-6). Carman may have talked "sassy" at times, but the jury would have also considered that he just came from the home of Marietta and, for the first time, had been separated from his three younger siblings (Mov.Ex.29,p.22).

But even if that evidence was harmful, "[f]oregoing mitigation because it contains something harmful is not reasonable when its prejudicial effect may be outweighed by

the mitigating value.” *Taylor v. State*, *supra*, 262 S.W.3d at 251, *quoting Hutchinson v. State*, 150 S.W.3d 292,304-05(Mo.banc2004). Even if Carman’s bizarre sexual references and “sassy” talk were harmful evidence, the prejudicial effect of such evidence was outweighed by the mitigating value of Carol’s testimony.

Last, although Carol admitted that she did not want to come to court, she would have cooperated and been truthful if subpoenaed (Mov.Ex.29,pp.19-22).

The hearing court also determined that trial counsel’s decision not to call Arturo Misserocchi was reasonable, because: he did not want to testify; he believed that Carman would have spoken to his parents when Carman lived with him; and there was nothing compelling about his testimony (PCRL.F.288-89,296,303).

Similar to Carol’s testimony, Arturo would have told the jury that no relative came to visit Carman during the entire six to eight months that he lived with them (Mov. Ex.28,pp.17,18). Further, Arturo’s testimony that Carman was “cute” but did not bond with them would have been evidence to demonstrate that Carman, at the approximate age of 12, was suffering the psychological consequences of abuse, neglect, and multiple placements (Mov.Ex.28,p.22). Last, although Arturo did not want to come to court, he would have cooperated if subpoenaed (Mov.Ex.28,pp.27-30). As such, the hearing court’s findings are clearly erroneous (PCRL.F.288-89,296,303).

The hearing court clearly erred in finding that trial counsel’s decision not to call Tonia Cummings was wise (PCRL.F.286-87). The hearing court agreed with counsel’s opinion that Tonia’s testimony would have caused the jury to focus on the murders (PCRL.F.286-87,302).

However, the first-hand account that Tonia could offer to the jury, of the severe neglect and abuse suffered by the Deck kids, would have outweighed the harmful evidence brought out during cross-examination, where the jury would have already heard evidence of the murders. The jury had heard and considered substantial evidence of the murders (Tr.497-676) and victim impact testimony (Tr.480-496,682-690,691-708). Under these circumstances, it was unreasonable for counsel to decide against presenting Tonia's testimony.

Tonia provided a first-hand account of the horrible abuse Carman suffered throughout his childhood. When Tonia was little and Pete and Kathy were together, Kathy and Pete fought daily, the house was dirty, and they moved from place to place (Mov.Ex.9,pp. 8-10). Kathy physically abused the kids but was the worst to Carman (Mov.Ex.9,11). Kathy verbally abused the kids and cussed at them (Mov.Ex.9,p.11). Tonia recalled that the Deck kids were left alone all the time, as often as four or five days out of the week (Mov.Ex.9,p.14). When they were left alone, the house was filthy dirty and there was no food (Mov.Ex.9,p.14). They had nothing to wear but their dad's t-shirts (Mov.Ex.9,p.14). Carman played with Tonia, Mike, and Latisha, tried to keep them occupied, and tried to keep them in the house (Mov.Ex.9,p.23). Once when Carman went out to look for food for them, Mike followed him and almost got hit by a car (Mov.Ex.9,23).

Kathy never gave them any positive attention or read a book to them (Mov.Ex.9,p.15).

When they lived with Marietta, Marietta would give them a hot dog at 5 p.m. and then tell them to go to bed (Mov.Ex.9,p.30). She inflicted various punishments on the Deck kids constantly, even making them swallow dish soap (Mov.Ex.9,30). She made them stay outside all day long and use the bathroom outside (Mov.Ex.9,30). She would not give them water, and the kids were constantly hungry (Mov.Ex.9, 0). Carman found dog food on one occasion, and the kids ate that because they were so hungry (Mov.Ex.9,p.40).

Marietta was really hard on Carman and told him that he was “a piece of ---- and would never amount to anything...” (Mov.Ex.9,36). Pete knew of Marietta’s abuse of his children but did nothing about it (Mov.Ex.9,p.34).

Similar to Carman’s placement with the Pucketts, when Tonia was placed in the care of a loving adult, Margaret Manning, she did not want to leave her (Mov.Ex.9,p.39; Def.Ex.D). This would have illustrated to the jury that Carman and Tonia wanted love and a structured home and did not want to go back to either parent.

Tonia’s testimony also brought out more detail of what occurred after Carman was taken from the Pucketts and placed with Kathy and Ron Wurst. She told of an occasion where Ron pulled a gun on Kathy, and Carman was able to knock out Ron (Mov.Ex.9,48).

Additionally, Tonia would have told the jury that Carman had a lot of bitterness towards Kathy, internalized the rejection and emotional abuse inflicted on him repeatedly, and felt that he was worthless (Mov.Ex.9,p.56).

The attorneys did not bring out the aforementioned detail from the defense experts (Tr.721-97,797-852).

In addition, despite being in prison for the crimes she committed with Carman, Tonia still loved and stood by Carman (Mov.Ex 9,p.71).

The hearing court's determination, that Rita and Pete Deck were uncooperative, was clearly erroneous (PCRL.F.295, 98). Undersigned counsel acknowledges that trial counsel subpoenaed Rita and Pete to the trial (in October 2007), and they ultimately did not appear for the trial in September 2008 (PCRL.F.295, 298). But the overall record demonstrates that Rita and Pete had cooperated in the past and would have cooperated if counsel had worked with them (PCRTTr.Vol.II,17-8,20).

Pete previously met with representatives for Carman, and they came to his home on two occasions to visit with him for a couple of hours (Mov.Ex.31,pp.50,63). He was present at Carman's first trial, but the trial attorney did not want to put him on the stand given his high blood pressure issues (Mov.Ex.31,pp.50-1,68-9). Rita had previously testified at on Carman's behalf at the penalty phase in 1998, at a deposition in 2000, and at the penalty phase in 2003 (PCRTTr.Vol.II,17-8).

Trial counsel's testimony was that Rita called them to let them know that Pete was ill and unable to appear (PCRTTr.Vol.II,242-43). Pete's health was not good in 2007 and 2008, and he suffered from hypertension, emphysema and chronic obstructive lung disease (PCRTTr.Vol.II,18-9). Despite Rita's phone call and a letter from a physician indicating that Pete was too ill to testify, trial counsel did not try to meet with Rita (PCRTTr.Vol.II,182-84). Rather, counsel considered her and Pete to be uncooperative and

told her that it would be up the Judge to determine if Pete's illness could excuse him from the subpoena (PCRTr.Vol.II,115). Counsel did not request medical records to verify Pete's illness (PCRTr.Vol.II,117,243).

Pete's medical records demonstrated that, at times leading up to the trial, Pete, who was 67 years old, was treated for: nausea, vomiting, and diarrhea in December 2007 (Mov.Ex. 1,pp.2-3;PCRTr.Vol. I, 38); recent upper gastrointestinal bleed with an irregularity in the part of the small intestine, and hiatal hernia in January 2008 (Mov.Ex.11,pp.1, 4-5); severe chronic obstructive lung disease in March 2008 (Mov.Ex.11,pp.7,8,23,24); and emphysema in March and June 2008 (Mov.Ex.11,pp.16,23). Pete's medical records from late 2006 and 2007 also demonstrate that he was treated and prescribed medication in 2007 for health issues, including chronic obstructive pulmonary disorder, hypertension, emphysema, dizziness, and heart problems (Mov.Ex.30,pp. 6-9,10-13,18,20,24-7,30,31;PCRTr.Vol.I,38).

As such, the record demonstrated that had counsel made efforts to work with Rita and Pete, Rita would have testified at trial and Pete would have testified by deposition.

In addition, the hearing court clearly erred in determining that Rita did not provide any new or different information about Carman's upbringing or the poor care he received from his caretakers (PCRL.F.293). Rita's testimony provided additional detail that the jury did not hear. For example, Rita testified that Pete left her and the kids for Marietta, after learning that Rita was pregnant (PCRTr.Vol. II,11-4). This illustrates Pete's complete lack of care or concern for his children and the apathetic nature of his character. And this was evidence that Rita provided yet another temporary home for the Deck kids.

In addition, Rita provided testimony that Carman was a “good kid,” and she cared for him and his siblings (PCRTr.Vol.II,12,15).

Pete’s deposition testimony also included additional detail that the jury did not hear. For example, Pete did not know who was caring for his son at various times, and he did not know how many different places his son had lived during his childhood (Mov.Ex.31,pp.43,48-9). Pete also testified that he asked Carman to consider foster care after Marietta suggested it (Mov.Ex.31,p 43-4). That testimony illustrates the extreme rejection Carman experienced.

The hearing court clearly erred in determining that D.L. Hood’s testimony was tangential (PCR L.F. 296). D.L.’s deposition testimony provided additional detail regarding Kathy’s violent nature and her mental instability, including that she tried to stab him and knocked his door down (Mov.Ex.5,p.21-3,30-1). His testimony also provided additional testimony that Kathy had previously left the Deck kids with DFS and that she engaged in prostitution (Mov.Ex.5,p.12,14-5).

Carman was prejudiced. “A vivid description of [the defendant’s] poverty-stricken childhood, particularly the physical abuse ... , may have influenced the jury’s assessment of his moral culpability.” *Taylor v. State, supra*, 262 S.W.3d at 253, *quoting Simmons v. Luebbers*, 299 F.3d 929,939(8thCir.2002). “In assessing prejudice, [this Court] reweighs the evidence in aggravation against the totality of the available mitigating evidence.” *Taylor v. State*, 262 S.W.3d at 252, *quoting Wiggins v. Smith*, 539 U.S. 510,534(2003). At trial, trial counsel called two “live” expert witnesses and presented the prior testimony of four lay witnesses (Tr.721-97,797-

852,876;Def.Ex.C,D,E). Counsel failed to present the testimony of other available mitigation witnesses. These witnesses would have provided additional detail and a first-hand account of Carman's childhood. The presence of "live" lay witnesses would have also conveyed to the jury that Carman's life had value.

Had the jury heard the additional detail and that Carman's life had value, from live lay witnesses, there is a reasonable probability that they would not have assessed death. A new penalty phase should be granted.

ARGUMENT V

The hearing court clearly erred in denying Carman's claim that counsel was ineffective for failing to obtain neuropsychological testing of Carman because this denied Carman effective assistance of counsel, due process and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a), in that trial counsel should have known that such testing was warranted, based on Carman's history of head injuries and malnourishment and abuse as a child. Carman was prejudiced because, had counsel obtained neuropsychological testing, it would have shown that Carman was borderline defective in his abstract reasoning skills. Had the jury heard this mitigating evidence, a reasonable probability exists that they would not have recommended death sentences.

Before trial, counsel was aware that Carman had suffered head injuries in the past, for which he received treatment at the hospital (PCRTTr.Vol.II,64-65,70-71,77-78,228 ; Mov. Exs. 9, pp.57-58;Mov.Ex.16;Mov.Ex.18). This included, but was not limited to, the following: When Carman was six years old, he was treated for a one-inch laceration on his forehead above his right eye (PCRTTr.Vol.II,74-75,231;Mov.Ex.20). When Carman was thirteen years old, he was in a car accident and suffered a possible concussion (PCRTTr.Vol.II,73-74,230-231;Mov.Ex.19). When Carman was nineteen years old and incarcerated, he hit his head on the bars; his head was spinning, his vision was blurred in his right eye, and there was an abrasion on the right side of his forehead (PCRTTr.Vol.II,78,233-234;Mov.Ex.24). When Carman was twenty years old and

incarcerated, he was unable to be awakened for breakfast, had little memory of the day before, and had a one-inch tender enlarged spot above his right eye (PCRTr.Vol.II,76,231-232;Mov.Ex.21). In 1992, Carman went to the hospital for treatment of a laceration that required six stitches to his head (PCRTr.Vol.II,80-81;Mov.Ex.27).

In addition, Carman reported to counsel that he had previously busted his head open during a car accident and that he had been struck in the head with a baseball bat during a fight (PCRTr.Vol.II,68-69).

Trial counsel was also aware that Carman was malnourished and hungry during his childhood (PCRTr.Vol.II,41-53;Tr.733,857-858,880,885;Def.Ex.C,p.8;Mov.Ex.13;Mov.Ex.14;Mov.Ex.31,p.31). Trial counsel was also aware that Carman had been physically abused during his childhood (PCRTr.Vol.II,55-58;Tr.733-735,740,808).

Trial counsel was aware that one of the defense experts opined that Carman was subject to more than one developmental stressor, which “literally causes the limbic system and the brain to change” (PCRTr.Vol.II,60;Tr.733-735).

Last, counsel was aware that Carman had a sister who was mentally retarded, an uncle who was mentally retarded and epileptic, and that Kathy’s IQ was once tested at 70, which is borderline mentally retarded (PCRTr.Vol.II,83-85).

Trial counsel did not request funding for or seek neuropsychological testing of Carman, even though they could have arranged for the testing and then decided not to use the results (PCRTr.Vol.II,63,86,92). Rather, counsel determined that there was not a

sufficient basis to seek neuropsychological testing (PCR Vol. II, 41, 54-55, 59-63, 83, 86, 188-189, 237, 240-241, 279).

In August 2010, Dr. Michael Gelbort, a clinical neuropsychologist, conducted neuropsychological testing of Carman at the request of postconviction counsel (PCR Tr. Vol. II, 41-2, 46-7). Dr. Gelbort administered to Carman: a version of the Halstead Reitan neuropsychological battery, including the Category Test, the Trail Making Test, and the Lateral Dominance Examination, the Tapping Test, the Sensory Perceptual Examination, the Aphasia Screening, the Wechsler Adult Intelligence Scale, Third Edition, and the Wechsler Memory Scale, Third Edition; and a diagnostic interview that included mental status testing (PCR Tr. Vol. I, 48-9, 80-1).

Carman had a performance IQ score of 87, a verbal IQ score of 95, and full-scale IQ of 91 (PCR Tr. Vol. I, 89). The average IQ score is 100, and the normal range is 91-110 (PCR Tr. Vol. I, 89). Low average IQ range is 80-89, and borderline deficient is 70-79 (PCR Tr. Vol. I, 89).

Carman's performance IQ was at the 19th percentile, so approximately 80 out of every 100 people will do better than he will in conglomeration of visual spatial tests (PCR Tr. Vol. I, 90). His verbal IQ is at the 37th percentile, so that 62 out of every 100 people do better than him on verbal abilities (PCR Tr. Vol. I, 90). His full-scale IQ was at the 27th percentile, so he does less well than approximately 75 percent of the population (PCR Tr. Vol. I, 90).

Dr. Gelbort did not find significant impairment or moderate impairment on any of the tests (PCR Tr. Vol. I, 105). Carman's scores were grossly within the normal range

(PCRTTr.Vol.I,105). However, some of his scores were lower than most people demonstrate (PCRTTr.Vol.I,105).

Carman scored within the borderline deficiency range on the Category Test, which is focused more on the frontal lobes of the brain (PCRTTr.Vol.I,106,113). The Category Test looks at conceptual abilities, problem-solving abilities, and taps into new learning capabilities, judgment, and reasoning (PCRTTr.Vol.I,84,143). On that test, Carman had 46 errors, which put him in the borderline defective range (PCRTTr.Vol.I,105,106,142-43). Carman was “on the border between someone who is with 95 percent assurance coming from a population that does not have normal brain function” (PCRTTr.Vol.I,107). With 80 percent assurance, there is an impairment demonstrated (PCRTTr.Vol.I,107).

In and of itself, the borderline impairment score on the Category Test does not mean anything, but it indicates to the neuropsychologist that he needs “to look there and see what’s going on and see if that shows up in other places. And it does.” (PCRTTr.Vol.I,107,150-51).

Carman’s difficulties, as demonstrated by the Category Test, also showed up in the vocabulary testing, where he demonstrated difficulty seeing the connection between things (PCRTTr.Vol.I,92,107). And with the Visual Scan, “he could get something that was missing, but he couldn’t figure out what was the most or obvious thing that was missing. He didn’t abstract properly” (PCRTTr.Vol.I,107-08).

Dr. Gelbort concluded that the overall pattern of Carman’s test results illustrated that “he has trouble with these more complex abstract reasoning skills. And it’s not that the light is off, but rather the light is flickering” (PCRTTr.Vol.I,108). Dr. Gelbort testified

that the pattern of Carman's test results is also illustrated in patients who are better off when dealing with commonsensical problems and things that are much more concrete, structured, and specific (PCRTr.Vol.I,117). When things become more abstract, they have difficulty (PCRTr.Vol.I,117).

Dr. Gelbort was unable to determine the cause of Carman's cognitive dysfunction (PCRTr.Vol.I,140). Dr. Gelbort testified that Carman understood the difference between right and wrong and was capable of making a decision to commit or not commit murder (PCRTr.Vol.I,140-41,143,146). However, Dr. Gelbort opined that Carman was less able "to make as adept, sound, reasonable, insightful decision as a normal person could" (PCRTr.Vol.I,141,143,146). At the time of the crimes, Carman's "cognition was impaired," and it would have been more difficult for him, as compared to a normal person, to make the right decision (PCRTr.Vol.I,145,146).

Dr. Gelbort would have been available, prior to the trial in September 2008, to administer neuropsychological testing to Carman and, in September 2008, to testify at the jury trial regarding the results of the testing (PCRTr.130). And if so, he would have provided the same testimony as he did at the hearing (PCRTr.130).

The hearing court denied the claim for the following reasons: Carman's scores on intelligence tests were in the average range (PCRL.F.291,295,300). There was only one test where Dr. Gelbort claimed that Carman had a "borderline deficit" in dealing with "categories," but he also testified that "in and of itself, it does not mean anything" (PCRL.F.292).

Dr. Gelbort concluded that Carman did not suffer from a mental disease and found that Carman understood the concepts of right from wrong (PCRL.F.292). Dr. Gelbort's presentation was dry, uninteresting and not compelling at all (PCRL.F.292). In fact, he does not come across as particularly credible and his explanations were difficult to comprehend (PCRL.F.292,300).

This Court reviews the findings for clear error. *Morrow v. State*, 21 S.W.3d 819,822(Mo.banc2000); Rule 29.15. To establish ineffective assistance, Carman must show counsel's performance was deficient and that performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668(1984); *Williams v. Taylor*, 529 U.S. 362,390-91(2000).

Counsel's failure to retain a neuropsychologist to conduct testing of Carman was unreasonable under the circumstances. *Strickland v. Washington, supra*. *Strickland* requires that counsel's strategy be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75 78(Mo.App.,S.D.1994). The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence . . ." *Wiggins v. Smith*, 539 U.S. 510,524(2003)(emphasis in original). Failing to conduct investigation relates to preparation, not strategy. *Kenley v. Armontrout*, 937 F.2d 1298,1304(8th Cir.1991). Lack of diligence in investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id.* at 1304.

In the case at bar, counsel knew that Carman had a history of head injuries, child abuse, and malnourishment (PCRTTr.Vol.II,41-53,55-58,64-65,68-6970-78,80-81,228,230-232,233-234,733-735,740,808,857-858,880,885;Def.Ex.C,p.8; Mov.Ex 9,

pp.57-58;Mov.Ex.13;Mov.Ex.14;Mov.Ex.16;Mov.Ex.18;Mov.Ex.19;Mov.Ex.20; Mov.Ex.21,Mov.Ex.24;Mov.Ex.27;Mov.Ex.31,p.31). The aforementioned information came from numerous sources, including relatives whose prior testimony counsel presented to the jury (Def.Exs.C,D,E;Tr.853-868,876-888). Counsel possessed hospital records demonstrating that Carman had previously suffered from head injuries (Mov.Exs.19,20,21,24,27).

Contrary to the hearing court's finding, the fact that counsel obtained and reviewed medical records does not excuse their failure to arrange for neuropsychological testing, because those records, which proved Carman's head injuries, actually provided support for neuropsychological testing (Mov.Exs.19,20,21,24,27).

Counsel's failure to investigate neuropsychological testing was especially unreasonable where counsel could have arranged to have the testing conducted and then determined not to use the results – in other words, there was nothing to lose by having the testing performed (PCRTr.Vol.II,63,86,92).

Last, although counsel testified that his experts never informed him that neuropsychological testing should be pursued, counsel also testified that a conversation with his experts about neuropsychological testing never occurred (PCRTr.Vol.II,61-62). In other words, counsel never discussed the possibility of neuropsychological testing with his experts. In addition, trial counsel was aware that one of the defense experts opined that Carman was subject to more than one developmental stressor, which “literally causes the limbic system and the brain to change” (PCRTr.Vol.II,60;Tr.733-735). As such, the

hearing court's finding, that counsel reasonably relied on their experts to let them know if further examination was needed, was clearly erroneous (PCR L.F. 301).

Carman was prejudiced by counsel's omission, because the jury never heard that Carman scored within the borderline deficiency range on a test, which is focused on the frontal lobes of the brain (PCRTr.Vol.I,105-106,113,142-143). Dr. Gelbort concluded that Carman "has trouble with these more complex abstract reasoning skills. And it's not that the light is off, but rather the light is flickering" (PCRTr.Vol.I,108). Dr. Gelbort testified that such pattern is illustrated in patients, who are better off when dealing with commonsensical problems and things that are much more concrete, structured, and specific (PCRTr.Vol.I,117). When things become more abstract, they have difficulty (PCRTr.Vol.I,117).

Undersigned counsel acknowledges that Dr. Gelbort found that Carman had a full-scale IQ of 91, which is within the normal range of intelligence (PCRTr.Vol.I,89). Undersigned counsel also acknowledges that Dr. Gelbort did not find significant impairment or moderate impairment on any of the tests (PCRTr.Vol.I,105). But the hearing court overlooked the fact that the jury heard testimony that Carman's IQ had been tested at 107 (Tr.789;PCRTr.Vol.II,90). Trial counsel agreed that the jury was not under the impression that Carman had any neurological deficit (PCRTr.Vol.II,90).

The hearing court also overlooked the fact that forgoing mitigation evidence because it contains something harmful is unreasonable. *Williams*, 529 U.S. at 395-96. Williams had an extensive juvenile record. He had committed larceny, had been convicted of breaking and entering, and caused problems in the jail. *Id.* Although his

records contained this harmful information, that did not justify counsel's failure to introduce other mitigating evidence from the records. *Id.*

Likewise, in the case at bar, while Carman fell within the average range for most of the testing, the mitigating value of a deficiency in one area outweighed the fact that he was otherwise within the normal range of intelligence. "[E]vidence of impaired intellectual functioning is inherently mitigating..." *Hutchison v. State*, 150 S.W.3d 292,308(Mo banc2004) (relying on *Tennard v. Dretke*, 542 U.S. 274,288(2004)).

In addition, that expert testimony of impaired intellectual functioning might be complex is not a sufficient reason for holding that there is no prejudice. *Hutchinson v. State*, 150 S.W.3d at 308. Neither should it be because the hearing court determines it to be "dry" or "uninteresting" (PCRL.F.292).

"The Eighth Amendment requires 'the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.'" *Id.* A new penalty phase should be granted.

ARGUMENT VI

The hearing court abused its discretion in denying Carman’s Motion to Remand for a New Trial due to the Destruction of the Jury Questionnaires, in violation of Carman’s right to due process, as guaranteed by the U.S. Constitution, Amends.5,14, and Missouri Constitution, Art.I,Sec.10, in that the destruction of the juror questionnaires prevented Carman from investigating and presenting all postconviction claims and from full and meaningful appellate review of all postconviction claims. Postconviction counsel exercised due diligence to obtain a copy of the questionnaires but learned that the court had collected and then destroyed the questionnaires, contrary to the dictates of Missouri Supreme Court Rule 27.09.

Upon conclusion of a criminal trial, the court “shall” retain the juror questionnaires under seal by the court, except as required to create the record on appeal or for post-conviction litigation. Missouri Supreme Court Rule 27.09(b). Missouri Supreme Court Operating Rule 4.21 also requires the trial court to maintain and seal the juror questionnaires in criminal cases.

During postconviction counsel’s investigation of the case, they sought to review the juror questionnaires but learned that the questionnaires had been destroyed (PCRL.F.96,145-48,153;PCRTr.Vol.I,8). Counsel filed a “Motion to Remand for New Trial Because the Juror Questionnaires Have Been Destroyed” (PCRL.F.164-71;PCRTr.Vol.I,33-5).

The Motion to Remand set forth the efforts that postconviction counsel made to locate the questionnaires (PCRL.F.166-67;PCRTr.33-4). The motion asserted that postconviction counsel had an obligation to review the questionnaires, citing *Knese v. State*, 85 S.W.3d 628,632-33(Mo.banc2002) (Trial counsel held to be ineffective for failing to read the juror questionnaires and strike two jurors for cause due to their bias against the defense) (PCRL.F.166;PCRTr.33). Postconviction counsel also wanted to review the questionnaires in order to obtain contact information, so that they could contact the jurors⁵ (PCRL.F.166). Postconviction counsel asserted that they wanted to review the questionnaires of three jurors for the following reasons:

In addition to investigating and researching other issues, undersigned counsel had concerns with the following venire members, who eventually served on Movant's jury: a) Although she did not provide a verbal response that would support a strike for cause, a handwritten notation in the trial file indicated that venire member #9, Tracy Wheeler, was "staring down Carman Deck"; b) Although she did not provide a verbal response that would support a strike for cause, a handwritten notation in the trial file under venire member #28, Geralyn Hayden, indicated "Carman does not like her;" c) From a review of the transcript, undersigned counsel had concerns with venire member #66, Curtis Holt. During voir dire, he stated

⁵ The motions to contact the jurors were denied (PCRL.F.153,291;PCRTr.10,32-3). See Point/Argument II.

that he knew “a few bailiffs with the court,” including “Huskey and Butch Myers,” who were present in the courtroom (Tr.164). He also stated that he had “a couple of relatives that are police officers” (Tr.164).

In addition, when defense counsel asked the first small panel about their employment, the trial court prohibited the questions (Tr.299-303). The trial court ruled that such questions should have been asked during the general voir dire (of the large panel) and stated that employment was contained on the juror questionnaire forms (Tr.303).

[Postconviction] [c]ounsel wanted to review the juror questionnaire forms to find out Curtis Holt’s employment or to find out if there was any information about his connection with law enforcement in Jefferson County. Counsel also wanted to review the questionnaires of Ms. Wheeler and Ms. Hayden to determine whether there was any information contained therein that would indicate any bias against the defense.

[Postconviction] [c]ounsel attempted to otherwise investigate the voir dire issues that she noticed. Without information from the questionnaires, counsel did not have sufficient factual grounds to raise a postconviction claim concerning bias of jurors Wheeler, Hayden, and Holt. Counsel did try to otherwise discover juror Curtis Holt’s employment or other information that might shed light as to why he knew the Jefferson County bailiffs. On August 24, 2010, [postconviction] counsel called

Brenda [Pigg] with Division 2, to speak to Bailiff Mike Huskey. Brenda stated that Bailiff Mike Huskey was out on sick leave but she would pass on my message.⁶ Counsel did not hear back from Mr. Huskey. Counsel learned that former Bailiff Butch Myers was retired and called him. Mr. Myers said that he did not know or recall Curtis Holt.

(PCRL.F.165-68).

The hearing court denied the motion (PCRL.F.291;PCRTr.Vol.I,34-5).

Undersigned counsel asserts that this Court must review the hearing court's denial of the Motion to Remand for New Trial for an abuse of discretion. *See State v. Jones*, 979 S.W.2d 171,183(Mo.banc1988) and *Strong v. State*, 263 S.W.3d 636,643(Mo.banc2008) (The denial by a postconviction court of a motion to contact the jurors was reviewed by this Court for an abuse of discretion.). *See also Smulls v. State*,

⁶ At that time, undersigned counsel was unaware that a "Brenda Pigg," in 2003, had written a message on the victims' website, stating "... May the Devil have Carman's soul..." (L.F.431-32;PCRTr.4,8). If counsel had known that, counsel would not have left a message for Brenda Pigg, Division Clerk, to pass on to the bailiff, who counsel wanted to speak to in order to investigate. Further, any bias of the clerk of the trial court is unsettling where the questionnaires were not retained as required by Rule 27.09. Such bias of the trial court violated Carman's right to due process of law and his Eighth Amendment right to a reliable determination of his punishment.

71 S.W.3d 138,150-5 (Mo.banc2002) (This Court reviewed the postconviction court’s ruling on the State’s request for a stay of a deposition for an abuse of discretion.).

Juror questionnaires perform a valuable function in the jury-selection process by expediting and assisting a court’s voir dire. *Stephens Media, LLC, v. The Eighth Judicial District Court of State of Nevada, County of Clark*, 221 P.3d 1240,1249(Nev.2009). The use of juror questionnaires does not implicate a separate and distinct proceeding. *Id.* Rather, the use of the questionnaires is merely a part of the overall voir dire process. *Id.* citing *Forum Communications Co. v. Paulson*, 752 N.W.2d 177,185(N.D.2008) (concluding that a “written questionnaire serves as an alternative to oral disclosure of the same information in open court and is, therefore, synonymous with, and a part of, voir dire”). *Id.* See also *State v. Davis*, 318 S.W.3d 618,639(Mo.banc2010) (In considering whether venireman was biased, this Court considered the venireman’s written responses on his juror questionnaire, as well as his oral responses during voir dire questioning.). See also *Knese, supra*, 85 S.W.3d at 632-633 (Trial counsel held to be ineffective for failing to read the juror questionnaires and strike two jurors for cause due to their bias against the defense.).

Based on the above, the questionnaires constituted part of the criminal record, and the destruction of the record prevented an investigation and presentation of all Carman’s postconviction issues and full and meaningful appellate review. Meaningful and fair appellate review of Carman’s postconviction issues is required by the due process clause of the Fourteenth Amendment. *Parker v. Dugger*, 498 U.S. 308,321(1991). Although the Due Process Clause of the Fifth Amendment to the United States Constitution does

not establish any right to collaterally attack a final judgment or conviction, *United States v. MacCollum*, 426 U.S. 317,323(1976), state statutes can create interests that are entitled to procedural due process protection under the Fourteenth Amendment. *Vitek v. Jones*, 454 U.S. 480,488(1980). While one may not have a “constitutional or inherent right” to a particular liberty interest, once a state has afforded the opportunity for that interest, due process protections must be invoked to ensure that the state-created right is not arbitrarily denied or abrogated. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1(1979); *Morrissey v. Brewer*, 408 U.S. 471(1972); *Wolff v. McDonnell*, 418 U.S. 539(1974). The basic requirement of due process is to provide fair procedural safeguards against arbitrary deprivations of lawfully created interests. *Leis v. Flynt*, 439 U.S. 438,440-43(1979).

Since the juror questionnaires were destroyed, postconviction counsel could not review the record to determine whether the jurors indicated any bias on the forms. The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*, 366 U.S. 717,722(1961). One aspect of this right is adequate voir dire to identify unqualified jurors. *Knese, supra*, 85 S.W.3d at 632, *citing Morgan v. Illinois*, 504 U.S. 719,729(1992).

Counsel can be ineffective during jury selection. In *Knese*, one of the veniremembers had written on his questionnaire that our laws are “way too soft” on criminals, that society needs to “build more jails” and “make executions public...” *Id.* at 632. Another veniremember wrote that he disfavored “endless appeals,” “parole boards,” “good time,” and “if he is found guilty, do it.” *Id.* Counsel did not complete the initial inquiry – reading the questionnaires – to determine whether the two veniremembers were

qualified to be jurors. *Id.* This Court held that at a minimum, counsel should have read the questionnaires, and voir-dired to determine whether they could serve as jurors. *Id.* at 633. Failure to do so is ineffective assistance of counsel. *Id.* This complete failure in jury selection is a structural error. *Id.*, citing *Gray v. Mississippi*, 481 U.S. 648 668(1987), cf. *Arizona v. Fulminante*, 499 U.S. 279,310(1991). The Court held that there was a reasonable probability – sufficient to undermine confidence in the outcome – that Knese was prejudiced by counsel’s failure to read the questionnaires and voir dire the two jurors. *Id.*, citing *Strickland v. Washington*, 466 U.S. 668,694(1984).

Because the underlying trial court destroyed the questionnaires, Carman was prevented from investigating and presenting all postconviction claims and from full and meaningful appellate review.

An appellant is entitled to a review based upon a full, fair and complete record on appeal. *Lassen v. State*, 717 S.W.2d 538,539(Mo.App.,S.D.1986). In *Dobbs v. Zant*, 506 U.S. 357(1993), a Georgia jury sentenced Dobbs to death. *Id.* at 358. Later, Dobbs claimed that he received ineffective assistance of counsel at sentencing. *Id.* Because a transcript of the closing argument made at sentencing was unavailable, the district court relied on the testimony of Dobbs’ counsel regarding the content of the closing argument. *Id.* The Eleventh Circuit affirmed, also relying on counsel’s testimony. *Id.* Subsequently, petitioner located a transcript of the penalty phase closing argument, which flatly contradicted his counsel’s representations. *Id.* Petitioner sought to supplement the record but was unsuccessful. *Id.* The U.S. Supreme Court reversed and wrote: “We hold that the Court of Appeals erred when it refused to consider the full sentencing transcript.

We have emphasized before the importance of reviewing capital sentences *on a complete record.*” *Id.* (emphasis added).

As set forth in the Motion to Remand for New Trial and to the postconviction court, postconviction counsel exercised due diligence in attempting to locate the questionnaires (PCRL.F.166-67;PCRTr.Vol.I,34). However, the hearing court indicated that the questionnaires had been collected from the parties and destroyed (PCRTr.Vol.I,7-8).

A defendant is entitled to a new trial if he exercised due diligence in attempting to obtain a complete record and is prejudiced by the incomplete nature of the record. *In the interest of R.R.M. v. Juvenile Officer*, 226 S.W.3d 864,866(Mo.App.,W.D.2007), *citing State v. Cooper*, 16 S.W.3d 680,681(Mo.App.,E.D. 2000). “The appropriate remedy when ‘the record on appeal is inadequate through no fault of the parties’ is to reverse and remand the case to the trial court.” *Id.*, *quoting Goodman v. Goodman*, 165 S.W.3d 499,501-02(Mo.App.,E.D.2005). *See also Francisco v. Hendrick*, 197 S.W.3d 628(Mo.App.,S.D.2006) (Court of Appeals held that missing portion of transcript of all of Mother’s testimony regarding the parties’ income required reversal and remand to the trial court where the Court was unable to review the claims raised by the Mother in the appeal).

Carman respectfully requests that this Court remand the case for a new penalty phase.

ARGUMENT VII

The hearing court clearly erred in denying Carman’s claims that trial counsel was ineffective for failing to object, during the cross-examination of the defense expert, to the prosecutor’s reference to Carman as a “no-good s.o.b.,” who wanted the victims dead, because the prosecutor’s name-calling violated Carman’s right to due process, a fair trial, and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that the prosecutor engaged in an ad hominem personal attack designed to inflame the jury. Carman was prejudiced by the name-calling as it injected emotion and caprice into the jury’s determination of punishment.

During the prosecutor’s cross-examination of the defense expert, Dr. Surratt, at trial, he asked:

.... it also could have been pretty detrimental to Mr. Deck, if he had said, the reason I killed them is because *I’m a no-good s.o.b. and wanted them dead....?*

(Tr.841,emphasis added). Defense counsel did not object to the prosecutor’s reference to Carman as a “no-good s.o.b.,” who wanted the victims dead (Tr.841).

At the postconviction hearing, Attorney Tucci testified that he did not recall why he did not object (PCRTr.Vol.II,155). Attorney Reynolds speculated that Tucci did not object because he did not want to highlight it (PCRTr.Vol.II,260-61). Neither attorney offered any definite trial strategy reason for failing to object.

The hearing court found that the prosecutor was not engaging in name-calling (PCRL.F.305). Even if the question was not couched in the most appropriate language, the question was not a personal attack on Carman but was meant to attack the credibility of the defense expert (PCRL.F.305). Further, the question did not alter the outcome of the trial or deny Carman a fair trial (PCRL.F.305-06).

This Court must review the motion court's findings for clear error. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo.banc1987). To establish ineffective assistance, Carman must show that his counsel's performance was deficient and that it prejudiced his case. *Strickland v. Washington*, 466 U.S. 668(1984); *Williams v. Taylor*, 120 S.Ct. 1495,1511-12(2000). To prove prejudice, Carman must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*; and *State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997).

Counsel can be ineffective for failing to object. *Kenner v. State*, 709 S.W.2d 536,539(Mo.App.,E.D.1986); *Butler v. State*, 108 S.W.3d 18,27(Mo.App.,W.D.2003); *State v. Storey*, 901 S.W.2d 886,901(Mo.banc1995). Failing to object can constitute ineffective assistance of counsel if it resulted in a substantial deprivation of the accused's right to a fair trial. *Schnelle v. State*, 103 S.W.3d 165,176(Mo.App.,W.D.2003).

The hearing court's findings are clearly erroneous. The prosecutor could have cross-examined Dr. Surratt that she did not ask Carman about the crime, without injecting that Carman was a "no-good s.o.b." who wanted the victims dead (Tr.841). The hearing court clearly erred in determining that the prosecutor's name-calling was acceptable in this circumstance.

In *State v. Banks*, 215 S.W.3d 118(Mo.banc2007), this Court reversed Mr. Banks' conviction because the prosecutor called him the devil during closing argument. *Id.* The Court wrote that the prosecutor's attack was "wrong, unprofessional, and demeaning to a proper sense of justice and the legal system." *Id.* at 120. "The remark was pure hyperbole, an ad hominem personal attack designed to inflame the jury." *Id.* at 121. "The prosecutor may prosecute with vigor and strike blows but he is not at liberty to strike foul ones." *Id.*, quoting *State v. Burnfin*, 771 S.W.2d 908,912(Mo.App.,W.D.1989). Juries are "to decide cases on the evidence presented – not appeals to unreasoned emotion or name-calling." *Id.* at 123.

The *Banks* Court determined that the prosecutor's name-calling had a decisive effect on the jury's determination. *Id.* at 122. The credibility and reliability of the State's witnesses and their ability to accurately perceive and remember the events on the day in question were substantial issues in the case. *Id.* The prosecutor's improper argument strengthened the State's witnesses' credibility by calling Mr. Banks the "devil," i.e. the chief of a world where the scene and the witnesses were unsavory at best. *Id.* The State failed to distinguish legitimate and proper argument from a personal and inflammatory attack. *Id.* Further, the trial court did not rebuke the prosecutor in front of the jury after the improper remark was made. *Id.*

Similarly, in the case at bar, the State failed to distinguish proper and legitimate argument from a personal and inflammatory attack. In cross-examining the defense expert, the prosecutor injected that Mr. Deck would never have admitted to the expert that he was a "no-good s.o.b." who wanted the victims dead (Tr.841). The remark was

clearly an ad hominem personal attack designed to inflame the jury and strengthened the State's argument for death. The defense did not object, and the trial court did not rebuke the prosecutor for resorting to the improper tactic. Reasonable probability exists that the improper argument injected emotion and caprice and denied Carman a fair penalty phase trial.

This Court should reverse for a new penalty phase.

ARGUMENT VIII

The hearing court clearly erred in denying Carman's claim that trial counsel was ineffective for failing to object to the prosecutor's closing argument that Carman had "prior escapes" and helped inmates serving life sentences to escape, because the prosecutor's argument violated Carman's right to due process, a fair trial, and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that the prosecutor thereby misstated the evidence, implied to the jury that the prosecutor was aware of multiple escapes and additional facts concerning those escapes, and improperly injected fear into the jury's considerations. Carman was prejudiced by the argument as it infused the jurors' deliberations with misstatements of facts, fear and emotion rather than reason, and false issues.

At the State's request, the trial court admitted a sentence and judgment showing Carman's 1985 conviction for aiding an escape, but the State introduced no further evidence detailing that crime (Tr.679-80;St.Ex.57). The prosecutor advised the trial court that Carman was charged with procuring a saw blade and helping two inmates cut through the bars in the county jail (Tr.678), but the jury did not hear those facts. Further, no evidence was presented that the other inmates were serving life sentences or that they actually escaped.

During closing argument, though, the prosecutor, in arguing for death sentences, urged the jurors to consider "all [Carman's] prior escapes" (Tr. 949), knowing that the

jury heard evidence of only one aiding an escape conviction. Also, during closing argument, the prosecutor argued as follows:

... While he's going to be in prison for the rest of his life if you let him live, remember, he knows how to escape. He aided and abetted others trying to. ...

He knows how to escape, helping people that were in for the rest of their lives. ...

(Tr.968-69). Although counsel objected to the argument regarding the escape, on the grounds that it was not a noticed aggravator and was irrelevant (Tr.968), counsel failed to object on the grounds that the prosecutor misstated the evidence, implied to the jury that the prosecutor was aware of multiple escapes and additional facts concerning those escapes, and improperly injected fear into the jury's considerations.

At the postconviction hearing, Attorney Reynolds, who was responsible for making the objections during closing argument, testified that he should have objected to the arguments (PCRTTr.153,262-63).

The hearing court found that the prosecutor's argument regarding the escapes was not a blatant attempt to inject facts not in evidence (PCRL.F.306). The import of the argument was that Carman "knows how to escape" (PCRL.F.306). That was a fair

argument from the evidence, and the length of the sentences of the inmates that he sought to help was not significant (PCRL.F.306).⁷

This Court must review the motion court's findings for clear error. *Sanders v. State*, 738 S.W.2d 856,857(Mo.banc1987). To establish ineffective assistance, Carman must show that his counsel's performance was deficient and that it prejudiced his case. *Strickland v. Washington*, 466 U.S. 668(1984); *Williams v. Taylor*, 120 S.Ct. 1495,1511-12(2000). To prove prejudice, Carman must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*; and *State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997).

Counsel can be ineffective for failing to object. *Kenner v. State*, 709 S.W.2d 536,539(Mo.App.,E.D.1986); *Butler v. State*, 108 S.W.3d 18,27(Mo.App.,W.D.2003); *State v. Storey*, 901 S.W.2d 886,901(Mo.banc1995). Failing to object can constitute ineffective assistance of counsel if it resulted in a substantial deprivation of the accused's right to a fair trial. *Schnelle v. State*, 103 S.W.3d 165,176(Mo.App.,W.D.2003).

⁷ In the direct appeal, this Court reviewed these arguments for plain error and found no prejudice from the arguments. *State v. Deck*, 303 S.W.3d 527, 543 (Mo. banc 2010). Because the appropriate standard of prejudice in a postconviction proceeding is lower than the prejudice required when an issue is raised as plain error in the direct appeal, *Deck v. State*, 68 S.W.3d 418, 427-428 (Mo. banc 2002), this Court's opinion in the direct appeal case does not preclude this Court's consideration of this issue in this appeal.

The hearing court's findings are clearly erroneous. Although counsel has wide latitude in closing argument, the argument must not go beyond the evidence presented, misstate the evidence, or introduce irrelevant and prejudicial matters. *State v. Rush*, 949 S.W.2d 251,256(Mo.App.,S.D.1997). Closing argument must conform to the evidence and the reasonable inferences fairly drawn from the evidence. *State v. Hill*, 866 S.W.2d 160,164(Mo.App.,S.D.1993). A prosecutor's attempts to "inflame the passions and prejudices of the jury by reference to facts outside the record are condemned by ABA standards and constitute unprofessional conduct." *State v. Burnfin*, 771 S.W.2d 908,912(Mo.App.,W.D.1989).

It is highly prejudicial for a prosecutor to argue facts outside the record, because the jury is likely to give those assertions much weight when they should carry none. *Storey*, 901 S.W.2d at 900. Argument outside the record "essentially turns the prosecutor into an unsworn witness not subject to cross-examination. The error is compounded because the jury believes - properly - that the prosecutor has a duty to serve justice, not merely to win the case." *Id.*

The prosecutor unfairly led the jurors to believe Carman helped people escape who were serving sentences of life without parole and, because he once aided in an escape, he "knows how to escape." He argued that jurors should consider "all Deck's escapes," implying there were more escapes than the one "aiding an escape" that the jury heard about. Jurors were led to believe that, unless sentenced to death, Carman would be a great escape risk.

In *Storey*, this Court reversed the circuit court's denial of postconviction relief and held that counsel was ineffective for failing to object to four different aspects of the prosecutor's penalty-phase closing argument, which contained errors, each compounding the other. *Id.* at 900-903. The errors included the prosecutor injecting his personal opinions, arguing facts outside the record, personalizing to the jury, and misstating the law. *Id.* The Court found that the failure to object was prejudicial, because the errors were serious and there was a reasonable probability that the arguments affected the outcome of the penalty phase. *Id.* at 903.

Similarly, Carman was prejudiced by counsel's failure to object. Penalty phase is intended to provide the jury with accurate information so it can make an individualized sentencing determination based on the defendant's character and record and the circumstances of the offense. *Woodson v. North Carolina*, 428 U.S. 280,304(1976). Here, the prosecutor infused the jurors' deliberations with misstatements of facts and evidence, fear rather than reason, and false issues.

Further, as this Court recognized in *Deck v. State*, 68 S.W.3d 418,430-31(Mo.banc2002), Carman presented "substantial mitigating evidence." Reasonable probability exists that the argument injected emotion and caprice and denied Carman a fair penalty phase trial. This Court should reverse for a new penalty phase.

CONCLUSION

Based on Argument III, Appellant respectfully requests that this Court find that the hearing court abused its discretion in determining that Latisha Deck was incompetent to testify and consider the substance of her testimony in reviewing Appellant's claim set forth in Argument IV. Based on Arguments I, IV, V, VI, VII, and VIII, Appellant respectfully requests that the Court vacate the death sentences and remand the case for a new penalty phase. Based on Argument II, Appellant respectfully requests that this Court reverse remand the case to permit postconviction counsel to interview the jurors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Mr. Evan Buchheim, Assistant Attorney General, Office of the Attorney General, is a registered user of the electronic filing system and, on December 19, 2011, a complete copy of this document was delivered to Mr. Buchheim through the electronic filing system.

/s/ Jeannie Willibey
Jeannie Willibey

Certificate of Compliance

I, Jeannie Willibey, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. 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 certification, and the certificate of service, the brief contains 30,400 words, which does not exceed the 31,000 words allowed for an appellant's brief.

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