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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Carman Deck, incorporates the jurisdictional statement from his original brief.

STATEMENT OF FACTS

Appellant, Carman Deck, incorporates the statement of facts from his original 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);

Eddings v. Oklahoma, 455 U.S. 104 (1982);

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.

Strong v. State, 263 S.W.3d 636 (Mo. banc 2008);

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

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

Mo. Supreme Court Rule 29.15;

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).

State v. Allison, 845 S.W.2d 642 (Mo.App.,W.D.1992);

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

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

Section 491.060, RSMo.

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.

Taylor v. State, 262 S.W.3d 231 (Mo. banc 2008);

State v. Kidd, 900 S.W.2d 175 (Mo.App., W.D. 1999);

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. Constituton, 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. banc 2002);

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, Sec. 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. banc 2007);

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

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. banc 1995);

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.

The State first asserts in its brief that Carman's postconviction allegations were insufficient to state a claim for relief: "Defendant's motion consists of a bare conclusion: that one or more biased jurors *might* have sat on the jury because a particular question that *might* have revealed bias was not asked" (Resp. Br., pp. 30-33). However, at the Circuit Court level, the State did not move to deny the claim without a hearing or otherwise respond to the amended motion, pursuant to Rule 29.15(g). After the Court set the claim for an evidentiary hearing, the State never asserted that Carman was not entitled to a hearing on the claim.

In any event, postconviction counsel asserted in the amended motion that "[a]s a result of counsel's [failure to conduct an adequate voir dire] in this regard, one or more

biased jurors served on his jury" (PCR L.F. 95). Postconviction counsel did *not* assert that a biased juror *might* have served; counsel asserted that a biased juror *actually served* on the jury (PCR L.F. 95). That of course asserts a basis for relief, as a defendant is entitled to a fair and impartial jury. *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998). After holding a hearing, the Circuit Court denied the claim on other grounds, never finding that the claim asserted in the amended motion did not provide a basis for an evidentiary hearing (PCR L.F. 307-08).

The State next asserts that "Defendant failed to rebut the strong presumption that counsel's actions constituted reasonable trial strategy" (Resp. Br., pp. 33-37). First, the trial attorneys testified at the evidentiary hearing, and neither offered any trial strategy reason for failing to ask prospective jurors whether they could consider Carman's childhood experience and give that meaningful consideration as a reason to vote against the death penalty (PCR Tr. Vol. II, 165-66, 268). And what strategy reason could an attorney have for not voir-diring on the heart of the defense case?

It is true that the trial attorneys objected when the State, during general voir dire, asked: if any member believed that child abuse "is an excuse for having committed some sort of crime;" and if any member believed that a poor childhood "can effect someone's ability to choose right from wrong" (Tr. 200). But trial counsel, Attorney Tucci, objected on the basis that the form of the prosecutor's questions was improper and sought a commitment (Tr. 200). Attorney Tucci testified at the postconviction hearing that he in fact did *not* have any trial strategy reason for failing to ask, during death qualification,

whether the veniremembers could give consideration to child abuse and neglect evidence as mitigation (PCR Tr. Vol. II, 165-66).

As such, the underlying record does not provide any basis for this Court to find, independently of the Circuit Court, that the attorneys had a trial strategy reason for failing 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. In fact, the Circuit Court denied the claim on the basis that postconviction counsel did not prove that any biased juror served on the jury; the Circuit Court did not deny this claim on "trial strategy" grounds (PCR L.F. 307-08).

In its brief, the State last asserts that Carman failed to prove prejudice, because there is no presumption of prejudice under these circumstances and no evidence was presented that a biased juror served on the jury (Resp. Br., pp. 37-47).

In reply, undersigned counsel first asserts that the question (i.e., whether the members would give meaningful consideration to child abuse and neglect evidence) was a critical inquiry under the circumstances of this case. A qualified juror in this case was required to hear and consider Carman's childhood as possible mitigation. The Supreme Court has ruled that a juror should be excluded for cause if "his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). And in a capital sentencing proceeding, a juror's duties include giving meaningful consideration to any mitigating evidence that the defendant can produce. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (observing that the sentencer may not refuse to consider any mitigating

factor). Thus, where voir dire examination reveals that a juror "will fail in good faith to consider the evidence of… mitigating circumstances as the instructions require him to do," he is excludable for cause. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

Attorney Tucci testified at the postconviction hearing that, in his experience with capital cases both as a prosecutor and defense attorney, it was not uncommon for capital defendants to have suffered from child abuse and neglect (PCR Tr. Vol. II, 162-63). Attorney Tucci also testified that a "textbook" argument by the State in those cases is that the effects of abuse and neglect can be overcome through willpower (PCR Tr. Vol. II, 164). Attorney Tucci agreed that people in the general public have different views about the effects of child abuse and neglect, and some individuals believe that abuse and neglect can and should be overcome and should not be later used as an "excuse" (PCR Tr. Vol. II, 164-65). And this is common knowledge, isn't it? Whether one agrees or disagrees with those individuals, there are individuals in our society who believe that criminal defendants all too often use the "abuse excuse" to avoid full responsibility for the charged offenses.

In addition, this Court must consider that defense counsel did not, during death qualification, ask *any* questions of six jurors (Tr. 369-404). And defense counsel did not provide the jurors with a concrete example of what mitigation evidence might consist of, such that asking the other six jurors whether they could consider "mitigation" would not have adequately probed into any possible areas of bias (Tr. 290-91, 292-93, 340, 345-47, 355-56, 357-58, 362-63, 400-02).

Given all of the above, the defense absolutely needed to ensure that any persons, who would automatically reject evidence of child abuse and neglect as mitigation, would not be on the jury. As in *State v. Clark*, *supra*, Carman was prejudiced by counsel's failure to do so, as there was a real probability of injury – that one partial juror, who could not consider abuse and neglect evidence, sat on his jury. *Id.* at 148. "[W]here a criminal defendant is deprived of the right to a fair and impartial jury, prejudice therefrom is presumed." *Strong v. State*, 263 S.W.3d 636, 647 (Mo. banc 2008) (Wolfe, J. dissenting opinion).

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.

In its brief, the State argued that the *Strong* court unequivocally held that Missouri law prohibits a postconviction defendant from contacting jurors for the purpose of proving *Strickland* prejudice because this would be tantamount to impeaching the verdict (Resp. Br. 50-1, *citing Strong v. State*, 263 S.W.3d 636 (Mo. banc 2008)). However, *Strong* is distinguishable from the case at bar and, in any event, does not support a blanket prohibition of juror contact in every case.

In *Strong*, postconviction counsel wanted to contact the jurors: 1) regarding a claim that counsel failed to question jurors about their ability to remain fair after viewing gruesome photographs; and 2) concerning the record made by trial counsel regarding the peremptory strikes of two veniremembers. *Id.* at 643. This Court wrote that the jurors

could not be allowed "to violate the secrets of the jury room… nor speak of the motives which induced or operated to produce the verdict." *Id., quoting State v. Babb*, 680 S.W.2d 150, 152 (Mo. banc 1984). As such, a post-conviction movant may not use the testimony of a juror to prove prejudice from his attorney's alleged incompetence because this would be permitting the juror to impeach the verdict. *Id., quoting Franklin v. State*, 156 S.W.3d 507 (Mo.App., S.D. 2005). As to the issue of the gruesome photographs, trial counsel provided a reasonable explanation for his decision not to ask the venire panel about the photographs, and counsel's actions were upheld as reasonable trial strategy. *Id.* at 644. As to the issue of the peremptory strikes against two veniremembers, Strong provided no indication of how information from the jurors would relate to that issue. *Id.* Counsel also made a general allegation of juror misconduct, which the Court held to be "a pretextual argument in an attempt to gain access to the jury's thought processes…" *Id.*

In the case at bar, postconviction counsel made clear to the Circuit Court that she did not intend to ask the jurors about any discussions in the jury room or any motives which induced or operated to produce the verdict; rather, postconviction counsel specifically set forth that she would only ask the jurors the following:

> If you had been asked during the voir dire proceedings, the following question, 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?

(PCR L.F. 142). Postconviction counsel was not attempting to impeach the verdict; rather, she sought to ask the question that trial counsel should have asked during voir dire (in order to ensure that Carman's case was heard by a fair and impartial jury, as set forth in Point/Argument I). As such, *Strong* does not support the denial of juror contact in this case.

In its brief, the State also argued that if contact were permitted in situations similar to the within case, "the harassment of jurors to prove speculative claims of post-conviction prejudice would be commonplace" (Resp. Br. 53). However, the overwhelming majority of the forty-five judicial circuits in Missouri do *not* prohibit juror contact.[1] A survey of Missouri appellate opinions, stemming from those judicial circuits permitting contact, demonstrates that there are seldom any issues, if ever any issues at all, involving contact with jurors in postconviction cases. And it is also rare that a

[1] Undersigned counsel's review of the Local Court Rules for each judicial circuit indicates that all of the judicial circuits, except for three, do not prohibit contact with jurors. The three circuits that prohibit contact without leave of court are the 21st Circuit (St. Louis County), the 22nd Circuit (St. Louis City), and the 23rd Circuit (Jefferson County). If undersigned counsel is interpreting the 19th Judicial Circuit's Local Court Rule correctly, a juror can be contacted without leave of court after the term of the panel has expired.

postconviction counsel calls a juror as a witness at a postconviction hearing. So, the State's slippery-slope argument is not evidenced by what actually takes place in the numerous judicial circuits where juror contact is not prohibited by a local court rule.

Last, in its brief, the State asserts that postconviction counsel did not seek to contact the jurors until after the amended motion was filed and therefore, it was too late (Resp. Br., p. 54). The Circuit Court made no such findings. And as set forth in Point/Argument I, undersigned counsel sufficiently pleaded a claim for relief by asserting that a biased juror served on Carman's jury (PCR L.F. 95). Where counsel sufficiently stated a claim for relief and the Circuit Court granted a hearing on the claim, counsel needed to contact the jurors, prior to the *hearing.* Rule 29.15(i).

In addition, counsel made efforts to obtain the juror questionnaires for the jurors' contact information (but was unable to obtain those prior to the due date of the amended motion). Prior to the hearing, counsel's motion to contact the jurors was denied, but *not* because the Circuit Court deemed such request to be untimely – rather, the Circuit Court found that undersigned counsel was attempting to impeach the verdict (which is now one of the substantive issues before this Court) (PCR Tr. 4-10).

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).

In its brief, the State asserted that "Latisha's testimony had to be prompted by leading questions, which is evident from the transcript…" (Resp. Br., p. 58). But the record actually shows that the majority of undersigned counsel's questions to Latisha were non-leading questions. For example, undersigned counsel asked her:

"…can you name your brothers and sister?"

"Do you remember when you were little, and there was a time when you and your brothers and sister were just living with your mom… are you able to describe what that was like?"

"Was your mom there a lot when you were little?"

"…how old were you…during this period of time?"

"…who would take care of you when your mother would leave the house?"

"…which brother was that?"

"What would Carman do for you when your mother was not there?"

"…was there a period of time when you Deck children were taken from your mother?"

"Do you remember what happened then?"

"…was your mom home when your dad came and got you, or had you been left alone?"

"…Who did you live with next?"

"Do you remember ever living with your dad and a woman named Marietta?"

"…about how old were you then?"

"…can you describe Marietta?"

"…what would she do that was mean?"

"…did Marietta feed you, or were you hungry when you lived with Marietta?"

"…was Marietta mean to [your siblings] also?"

(PCR Tr. Vol. I, 23-30).

"A leading question is one which *suggests the answer* to the witness." *State v. Allison*, 845 S.W.2d 642, 648 (Mo.App., W.D. 1992), *citing* Black's Law Dictionary 800 (5th ed. 1979) (italics added). A review of Latisha's testimony demonstrates that she independently recalled her childhood and answered the questions in her own words; her testimony was not prompted by leading questions (PCR Tr. 23-30). For example, counsel asked "…at some point did Marietta or your dad take all you kids, Carman, Tonia, and

you and Mike, and drop you off at the Division of Family Services?" (PCR Tr. Vol. I, 28). Latisha responded, "No, it was just me and my brother Mike" (PCR Tr. Vol. I, 28). When asked what Marietta did that was mean, Latisha responded "Make me sit on a broomstick on my knees" (PCR Tr. Vol. I, 27). She was describing, in her own words, that Marietta forced her to kneel on a broomstick. Further, the State never objected during Latisha's testimony to undersigned counsel allegedly "leading" the witness (PCR Tr. Vol. I, 23-30).

The hearing court's determination that Latisha was incompetent to testify violated Carman's right to due process and to present evidence in support of his claims, as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Missouri Constitution.[2]

[2] The hearing court's determination also violated Carman's right to be free from cruel and unusual punishment, as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 21 of the Missouri Constitution. *See Lockett v. Ohio,* 438 U.S. 586 (1978) (The Eighth and Fourteenth Amendments prohibit a sentencer from being precluded from considering relevant mitigating evidence as a basis for a sentence less than death.). Undersigned counsel has cited the Eighth and Fourteenth Amendments of the United States Constitution and Art. I, Sec. 21of the Missouri Constitution, in Point/Argument IV, which also addresses the denial of the claim regarding trial counsel's failure to call Latisha as a witness.

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.

In its brief, the State argued that the testimony provided by the mitigation witnesses presented in the postconviction case was cumulative to the evidence presented at trial (Resp. Br., pp. 59-60, 91). "Evidence is said to be cumulative when it relates to a matter so fully and properly proved by other testimony as to take it out of the area of

serious dispute." *State v. Kidd*, 900 S.W.2d 175, 180 (Mo.App., W.D. 1999). While an appellate court will normally defer to a trial court's determination as to what evidence fits within this rule, a trial court does not have discretion to reject the evidence "as cumulative when it goes to the very root of the matter in controversy or relates to the main issue, the decision of which turns on the weight of the evidence." *Id.*

In the case at bar, the extent of the abuse and neglect suffered by Carman and the psychological impact of the abuse and neglect were in dispute at the trial. The State cross-examined the defense experts that a defendant and his family would have a motive to exaggerate abuse and neglect, that there are no scientific tests establishing a definite nexus between child abuse and murder, and that the child abuse really was not "a big deal" to Carman (Tr. 790-92, 834-36, 850-51). Although the State acknowledged in closing argument that Carman had a bad childhood, the State argued that: Carman's bad childhood "is just an excuse in this case. …[I]t's not a reason to … spare him his life…;" and Carman chose to commit crimes, despite his childhood (Tr. 951, 964, 966). As such, matters in dispute at trial, and for the jury's consideration, included the extent of the abuse and neglect that Carman suffered and, more important, its resulting psychological damage.

Because the additional witnesses' testimony provided additional weight to the child abuse and neglect evidence (Michael Johnson, Latisha Deck, Elvina Deck, Tonia Cummings, Rita Deck, Pete Deck, D.L. Hood) and even more important, its psychological impact on Carman (Tonia Cummings, Stacey Tesreau-Bryant, Carol and Art Misserocchi), the evidence cannot be rejected as cumulative.

In addition, counsel can be ineffective for failing to present *additional* evidence of abuse and mental illness. In *Taylor v. State*, 262 S.W.3d 231 (Mo. banc 2008), trial counsel presented the testimony of five experts during the guilt phase, where the guilt-phase defense was that Taylor lacked the capacity to appreciate the wrongfulness of his conduct at the time of the crime. *Id.* at 250. One of those experts testified regarding Taylor's abusive upbringing and other difficulties in childhood, so some of the available mitigation regarding Taylor's life was before the sentencing jury. *Id.* at 251. However, because the evidence could have been expanded upon during the penalty phase, counsel was deemed ineffective for failing to adduce additional evidence of Taylor's abusive childhood and mental illness. *Id.* at 252-53. Specifically, counsel was ineffective for failing to call several of Taylor's family members, who actually witnessed the abuse of Taylor and would have also buttressed the expert's testimony regarding the early onset of mental illness. *Id.* at 252. This Court acknowledged the significance of the aggravating evidence against Taylor, including the first degree murder of a cellmate in prison and his prior first degree murder of a fifteen-year old girl. *Id.* Despite the serious facts in aggravation, this Court held that had counsel presented the additional evidence and explained the significance of all the available mitigation, there was a reasonable probability that the result of the sentencing proceeding would have been different. *Id.* at 253.

Similarly, in the case at bar, trial counsel had available mitigation witnesses, some of whom witnessed the abuse and deprivation of Carman's childhood and some of whom saw the psychological damage Carman suffered as a result of the abuse and neglect.

Thus, counsel could have expanded upon the evidence of abuse, neglect, and its effect, which were matters in dispute. Despite the serious facts in aggravation, had counsel presented the additional witnesses and explained the impact of the abuse and neglect on Carman's psyche, there was a reasonable probability that that result of the sentencing proceeding would have been different.

In its brief, the State asserted that "a bad or difficult childhood is not sufficient grounds on which to set aside a death penalty, especially in a case as heinous as this one" (Resp. Br., p. 92). However, "[t]here is no crime that, by virtue of its aggravating nature standing alone, automatically warrants a punishment of death." *Taylor v. State, supra,* 262 S.W.3d at 252. 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." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

In its brief, the State argued that two previous juries sentenced Carman to death and "[i]t strains credulity to believe there exists a reasonable probability that the result of this retrial would have been different if 'additional' evidence about his troubled childhood would have been offered" (Resp. Br., pp. 61, 85-8, 92). However, there were issues with the prior penalty phase trials.

In the first penalty phase, trial counsel omitted from MAI-CR3d 313.44A, two paragraphs, which told the jurors that they must consider circumstances in mitigation of punishment and need not be unanimous. *Deck v. State*, 68 S.W.3d 418, 429 (Mo. banc 2002). This Court held that "[t]he submission of faulty instructions on the critical issue

of mitigation was a 'substantially egregious' error that it deprived Mr. Deck of 'reasonably effective assistance' of counsel." *Id.* This Court also held that on the particular facts of the case in which substantial mitigation was offered, "counsel's errors have so undermined this Court's confidence in the outcome of the trial that the Court concludes there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 431.

The second penalty-phase jury viewed Carman shackled with leg irons, handcuffs, and a belly chain. *Deck v, Missouri*, 544 U.S. 622, 625-26 (2005). The appearance of the defendant during the penalty phase in shackles "undermines the jury's ability to weigh accurately all relevant considerations…when it determines whether a defendant deserves death." *Id.* at 634. Because shackling Carman was "inherently prejudicial," the case was ultimately remanded for a new penalty phase. *Id.* at 635.

Further, the testimony of the following available mitigation witnesses was not presented at any prior penalty phase: Michael Johnson, Latisha Deck, Wilma Laird, Carol and Art Misserocchi, Stacey Tesreau-Bryant, Tonia Cummings, Pete Deck, and D.L. Hood. (The mitigation witnesses called at the first penalty phase were: Mike Deck, Rita Deck, Major Puckett, and Beverly Dulinski (1st Tr. 878-921). The mitigation witnesses called at the second penalty phase were: Rita Deck, Beverly Dulinski, Major Puckett, Elvena Deck, Dr. Eleatha Surratt, and the prior testimony of Mike Deck (2nd Tr. 454-531).)

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.

Appellant, Carman Deck, incorporates Argument V from his original brief.

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.

After undersigned counsel wrote her brief in this case, the Attorney General's Office located a copy of the juror questionnaires from the underlying penalty phase trial. The Attorney General's Office has forwarded a copy to undersigned counsel, and undersigned counsel will stipulate that those appear to be copies of the juror questionnaires that she was seeking to review in the underlying postconviction case.

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.

Appellant, Carman Deck, incorporates Argument VII from his original brief.

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.

Appellant, Carman Deck, incorporates Argument VIII from his original brief.

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 March 22, 2012, 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 approximately 6,500 words, which does not exceed the 7,750 words allowed for an appellant's brief.

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