IN THE
MISSOURI SUPREME COURT

EARL RINGO,	)	
Appellant,	)	
vs.	)	No. SC 84987
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE ELLEN ROPER, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Before trial, counsel agreed to a change of venue from Boone County to Cape Girardeau County, to try Mr. Ringo, an African-American, for the killing of two white people at Ruby Tuesday's Restaurant in Columbia, Missouri. The all-white jury convicted Mr. Ringo of two counts of first degree murder, § 565.020 RSMo 2000,[1] and sentenced him to death. This Court affirmed in *State v. Ringo*, 30 S.W.3d 811 (Mo. banc 2000). Mr. Ringo filed his *pro se* motion for post-conviction relief under Rule 29.15,[2] which appointed counsel amended. The amended motion raised five claims and did not include many claims raised in the *pro se* motion. The motion court denied three claims without a hearing and counsel presented no evidence on one of the two remaining claims. The motion court heard evidence on trial counsel's failure to present expert testimony about Mr. Ringo's mental state in both guilt and penalty phases. The court denied relief and Mr. Ringo now appeals. Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo. Const. (as amended 1982); Standing Order, June 16, 1988.

[1] All statutory references are to RSMo 2000, unless otherwise indicated.

[2] All references to rules are to VAMR, unless specified otherwise.

STATEMENT OF FACTS

The State charged Mr. Ringo, an African-American, with two counts of first degree murder for shootings at Ruby Tuesday's in Columbia on July 4, 1998 (D.L.F. 89-93).[3] The victims were white (Tr. 155).

Mr. Ringo was appointed two public defenders, Ruth O'Neill and Kimberly Shaw (H.Tr. 246, 361-62). O'Neill was primarily responsible for guilt phase and Shaw was responsible for punishment phase (H.Tr. 246, 361-62). However, the two attorneys worked together and discussed the case (H.Tr. 246, 361-62). O'Neill handled some penalty phase investigation, since Shaw had a high caseload and an upcoming trial in another capital case (H.Tr. 246, 361-62).

Defense counsel moved for a change of venue due to pretrial publicity (D.L.F. 110-625). Counsel agreed to a change of venue from Boone to Cape Girardeau County (D.L.F. 683). Before trial, counsel expressed concern about the issue of race, since this was an interracial crime (Tr. 123,128,155-56,163,186,210,370-71,431-32,465-66,740-43,1185-86).

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[3] Record references are as follows: Motion Hearing Transcript (H.Tr.); Trial Transcript: (Tr.); Direct Appeal Legal File: (D.L.F.); Post-conviction Legal File: (L.F.); and Exhibits (Ex.). Mr. Ringo requests that this Court take judicial notice of its own files, specifically the record on direct appeal in *State v. Ringo*, S.Ct. 81892.

In October or November, 1998, O'Neill traveled to Indiana to meet Mr. Ringo's family and discovered that he had suffered childhood abuse (H.Tr. 254). Counsel, therefore, hired a neuropsychologist, Dr. Briggs, to test Mr. Ringo for brain damage (H.Tr. 256). Briggs found Mr. Ringo was learning disabled, but neither brain damaged, nor antisocial (H.Tr. 257). Briggs believed that some of the elevated scales merited further investigation (H.Tr. 258). The finding of no brain damage surprised O'Neill, as she believed that Mr. Ringo had cognitive problems (H.Tr. 257-58). He had trouble with legal concepts and she had to explain them repeatedly (H.Tr. 247-48). O'Neill referred Dr. Briggs to co-counsel, since Ms. Shaw was in charge of the penalty phase (H.Tr. 258).

In the spring of 1999, trial was approaching, and counsel's in-house investigator was busy with other cases and was not completing investigation on Mr. Ringo's case (H.Tr. 285). Accordingly, counsel hired James Dempsey, a social worker, to investigate Mr. Ringo's background (H.Tr. 255, 315). Counsel was concerned because Dempsey was taking so long to complete his investigation (H.Tr. 315). Counsel called him several times and left messages, asking him about the progress of his investigation and for a report (H.Tr. 315). When Dempsey's reports finally came in, counsel realized how much abuse and trauma Mr. Ringo had suffered (H.Tr. 255-56, 315). O'Neill became concerned about the amount of trauma and its effect on Mr. Ringo (H.Tr. 256, 315-316).

O'Neill witnessed symptoms consistent with Post-Traumatic Stress Disorder. Mr. Ringo was restless (H.Tr. 245-46), frightened (H.Tr. 247), and had

nightmares (H.Tr. 262). He was guarded, fidgety and depressed (H.Tr. 300-01). He had a bad memory of his childhood and did not want to discuss traumatic events in his life (H.Tr. 253). He had difficulty trusting counsel (H.Tr. 300). Mr. Ringo consistently recounted that Mr. Poyser had rushed at him and he had reacted by shooting him; he was frightened and startled (H.Tr. 262, 305, 308). Mr. Ringo was sorry and ashamed of what he had done (H.Tr. 262-63).

O'Neill believed that Mr. Ringo might be suffering from Post-Traumatic Stress Disorder, but she was under a time crunch (H.Tr. 256, 269, 311, 315-16). The scheduled trial was only six weeks away; counsel did not believe she could get a continuance (H.Tr. 265, 269, 274, 311). Accordingly, she did not have Mr. Ringo evaluated to determine the psychological effects of all his childhood trauma and abuse (H.Tr. 265, 269, 315). Nor did she seek a continuance. *Id*.

In April, 1999, less than two months before trial, counsel hired a childhood development expert, Dr. Wanda Draper, to investigate mitigation and to testify in penalty phase (H.Tr. 14-16, 263, Ex. 9). Draper could not provide a medical diagnosis, since her degree was in education, and she was not a licensed psychologist (H.Tr. 27, 274, 367). Draper received Dempsey's reports (H.Tr. 16-20, Exs. 5 and 6) and some school records (H.Tr. 16, 21, Ex. 7). Draper received Mr. Ringo's high school records one week before trial and Dempsey's final report shortly before trial (H.Tr. 23-24, Ex. 8). The report was dated May 21, 1999; the trial began on June 1, 1999 (Ex. 6, Tr. 479).

Dr. Draper saw trial counsel twice, once in April and once during trial (H.Tr. 31). She conducted a five to six hour interview with Mr. Ringo; called and talked to family members, and prepared a life path, which outlined Mr. Ringo's childhood development (H.Tr. 32). Counsel subpoenaed Dr. Draper to testify (H.Tr. 380).

On June 1, 1999, less than one year after the offense, jury selection began in Cape Girardeau County (Tr. 479). Counsel asked venirepersons whether they knew Dr. Wanda Draper, a defense witness (Tr. 729). Counsel told venirepersons that this was an interracial crime and asked their views on race (Tr. 740-43, 1185-86). So they would not have to question a fourth panel, counsel waived their client's strikes to alternates (Tr. 1305-06). Mr. Ringo was tried by an all-white jury (L.F. 313).

At trial,[4] the State's evidence was as follows: Mr. Ringo had been working in Columbia, but was unemployed, so he returned home to his family in Jeffersonville, Indiana (Tr. 1739). On July 3, 1998, Mr. Ringo and Quentin Jones traveled to Columbia in a U-Haul truck to move Mr. Ringo's personal belongings back to Indiana (Tr. 1712, 1739, 1814-15). On the evening of July 3rd, Mr. Ringo and Jones loaded Mr. Ringo's belongings in a U-Haul truck and stayed all night

[4] The facts of the crime are set forth in more detail in this Court's opinion in *State v. Ringo*, 30 S.W.3d 811 (Mo. banc 2000).

with a friend, Tiger Leonhardt, Mr. Ringo's former roommate (Tr. 1735, 1740, 1748, 1827).

On July 4th, Mr. Ringo and Jones got up and went to Ruby Tuesday's (Tr. 1828-29). Mr. Ringo, a former employee, believed that a manager would be there alone and that the manager had access to the safe (Tr. 1421-30, 1646-51, 1815-18). However, Dennis Poyser arrived at Ruby Tuesday's to make a delivery shortly after Mr. Ringo and Jones arrived (Tr. 1839). Mr. Ringo and Jones hid behind some dumpsters at the back of the restaurant (Tr. 1840). When Mr. Poyser knocked on the door, and Joanna Baysinger, the manager, opened it, Mr. Ringo followed Mr. Poyser in with a gun drawn (Tr. 1842-43). After entering, Mr. Ringo shot Mr. Poyser in the front of his face, below his right eye (Tr. 1595, 1843). In his statement to police, Mr. Ringo said that Mr. Poyser scared him as he charged toward him and that he shot him in a panic (Tr. 2027).

Jones entered and saw Mr. Poyser on the floor, bleeding (Tr. 1843). Mr. Ringo and Jones took Ms. Baysinger to the office containing the safe (Tr. 1848-50). She retrieved money from the top half of the safe, but had trouble unlocking the bottom safe (Tr. 1851-53). Mr. Ringo gave Jones the gun and left to move Mr. Poyser's body to the cooler (Tr. 1853). At trial, Jones claimed that Mr. Ringo asked him if he wanted to "do the bitch" and handed him the gun (this statement never appeared in Jones' original statements to police) (Tr. 1858). Jones admitted that he shot Ms. Baysinger when Mr. Ringo was not present (Tr. 1860).

The defense was that Mr. Ringo never deliberated before he shot Mr. Poyser (Tr. 1377, 1382). As to Ms. Baysinger, the defense argued felony murder; disputing Jones' new statement that Mr. Ringo suggested that Jones kill her (Tr. 1378, 1380-81). In support of the defense, counsel called Tiger, who said that Mr. Ringo had clothing for all seasons at his apartment (accounting for the ski mask used) and he did not hear Mr. Ringo and Jones plan a robbery (Tr. 2055-57). A detective recounted how Jones lied in August, 1998, saying that Mr. Ringo killed Ms. Baysinger (Tr. 2067-68). Jones was angry with Mr. Ringo while they were in jail (Tr. 2069). Defense counsel also called the interrogating officer to play portions of the tape of Jones, highlighting the inconsistencies between his trial testimony and prior statements (Tr. 2075-81).

The jury deliberated 2 ½ hours and convicted Mr. Ringo of two counts of first degree murder (Tr. 2199, 2219-20). The case moved directly into penalty phase. The State called five victim impact witnesses, Ms. Baysinger's mother and father, and Mr. Poyser's wife, and two daughters (Tr. 2288-2324).

Counsel Shaw asked for 15-20 minutes for closing; the prosecutor wanted at least 25 (Tr. 2337). Shaw did not think the defense case would take two hours, because she decided not to call Dr. Draper in penalty phase (Tr. 2337-38). This surprised O'Neill, since she thought Dr. Draper had good insight into Mr. Ringo and how his development had been stunted by his father's death and the horrific abuse he suffered (H.Tr. 278-80).

True to Shaw's word, the defense case was short. Four family members testified: Mr. Ringo's mother, Carletta Ringo (Tr. 2341-56); his paternal grandmother, Fannie Ringo (Tr. 2360-69); his sister, Tonya Ringo (Tr. 2372-83); and his maternal grandmother, Bernice Smith (Tr. 2385-89).

After the defense rested, the prosecutor again asked for more time for argument, but Shaw preferred only twenty minutes to argue, saying "I don't even know that I'm going to take that long." (Tr. 2394-95).

Defense counsel presented their case, the court gave instructions, counsel did closings and the case was submitted to the jury before noon (Tr. 2326-2427). The jury began deliberations at 11:28 a.m. (Tr. 2427). At 1:10 p.m., the jury asked: "If we give death on Count I and life without the possibility of parole on Count II, how will the counts be carried out? Is there a chance that our Count I verdict will/could be changed?" (Tr. 2432). The court told the jurors that it could give them no further instructions, which was "agreeable" to the defense (Tr. 2432-33). The jury then returned verdicts of death on both counts (Tr. 2435-37).

On direct appeal, counsel raised several issues, including: the trial court's plain error in failing to answer the jurors' question; and the prosecutor's improper closing (some error was preserved and some was raised as plain error). This Court affirmed. *State v. Ringo*, 30 S.W.3d 811 (Mo. banc 2000).

Mr. Ringo filed a *pro se* motion, raising fifteen claims (L.F. 7-65). Counsel filed an amended motion raising five claims, including counsel's ineffectiveness:

- failing to present experts regarding Mr. Ringo's mental state and childhood development and in failing to present school records to rebut the state's theory that Mr. Ringo was the leader;
- failing to object and request appropriate relief when the jury asked about split verdicts of life and death;
- agreeing to a change of venue to Cape Girardeau County, knowing that African Americans were underrepresented there and failing to object or quash the panel once they discovered that African-Americans were underrepresented;
- failing to object to the prosecutor's improper gestures and comments; and
- lethal injection was unconstitutional.

(L.F. 70-342(a)).

The motion court granted the State's motion to deny three claims without an evidentiary hearing, ruling that counsel's ineffectiveness regarding the jury note and the prosecutorial misconduct were decided on direct appeal and that counsel's ineffectiveness in agreeing to a change of venue was not adequately pled (L.F. 375). No evidence was presented on the lethal injection claim.

On November 15, 2001, Mr. Ringo filed a *pro se* application for writ of habeas corpus ad testificandum to produce a witness to prove his *pro se* claims (L.F. 380-82). Post-conviction counsel proceeded without Mr. Ringo at the evidentiary hearing (H.Tr. 2, 227, 408). Mr. Ringo wrote to the court asking that

his *pro se* claims be heard or, alternatively, for a hearing regarding counsel's actions (L.F. 420-437). The motion court read Mr. Ringo's letter into the record (H.Tr. 411-12), but deferred to post-conviction counsel, who did not want the court to take further action (H.Tr. 412). Mr. Ringo wrote to the court again and asked that all his claims be heard (L.F. 575, 577-79).

Post-conviction counsel presented evidence in support of the claim that counsel should have consulted and called expert witnesses. Dr. Draper explained Mr. Ringo's childhood development (Ex. 1, H.Tr. 28, 35) and Dr. Smith described Mr. Ringo's mental state at the time of the crime (H.Tr. 124-63).

Mr. Ringo's mother, Carletta Ringo, was dependent and depressed (H.Tr. 36, 40, 88). She was uneducated, and could not handle finances (H.Tr. 36, 39-40, 42, 92). The house was filthy, with roaches and vermin (H.Tr. 48, 89). The children were dirty and poorly dressed (H.Tr. 41, 89-90). School officials worried that they were not receiving proper care (H.Tr. 41).

Mr. Ringo's parents did not give him sufficient attention or meet his needs, especially during his early childhood years (H.Tr. 47-48). Mr. Ringo's parents fought often, including hitting each other in front of the children (H.Tr. 40, Ex. 1, at 1-2, Ex. 6, at 4, 5-6, 8, 10, 14). Mr. Ringo's father's family had a history of alcoholism (H.Tr. 37-39).

When Mr. Ringo was ten, his father died of chronic alcoholism and liver failure (H.Tr. 44). His father's death bed request that - - Mr. Ringo be the man of

the house and take care of his mother and siblings - - profoundly affected him (H.Tr. 44).

Shortly after his father's death, Mr. Ringo's mother met William Vaughn, a pimp and heavy drug user, who was very abusive (H.Tr. 59-60, 61-63, 93). The house soon became a place for sex, drugs and alcohol (H.Tr. 61-62). Vaughn demanded that Mr. Ringo and his sister, Tonya, hustle for him and bring in a daily quota of money (H.Tr. 62, 64). If they did not make their quota, he beat them (H.Tr. 63-64). Vaughn beat Earl with combs until his head bled (H.Tr.63). He pounded him with his fist and an aluminum baseball bat (H.Tr.63). Vaughn struck Earl with his hand or extension cords (H.Tr. 63). Vaughn threatened to kill Carletta and the children if they called the authorities (H.Tr. 63).

They moved frequently, and lived in filth (H.Tr. 65, 66, 95). No one did laundry or provided adequate food (H.Tr. 66). The children did not see their mother for days at a time and constantly were exposed to strange people (H.Tr. 66). Earl and Tonya were forced to feed a naked woman tied up in the basement (H.Tr. 69). She was bound in a chair and beaten severely, supposedly because she owed Vaughn money for drugs (H.Tr. 689). She later disappeared (H.Tr. 69-70).

Mr. Ringo felt helpless and hopeless during this period (H.Tr. 67). He tried to protect his mother, but could not (H.Tr. 67). He was preoccupied with survival, not normal childhood activities (H.Tr. 67). His grades began to fall (H.Tr. 71-72). He was in Special Education classes (H.Tr. 72).

Tonya finally reported some of the abuse to school officials and police threatened to remove the children (H.Tr. 73, Ex. 5, at 15). Carletta called her family in Jeffersonville, Indiana, for help and they came, armed with guns, to rescue Carletta and the children (H.Tr. 73).

Mr. Ringo's high school years were not as normal and happy as the family told the jury (H.Tr. 77). Earl became quiet, withdrawn and was extremely sad (H.Tr. 77). Instead of making As and Bs, as his mother had testified at trial (Tr. 2354), Earl was in 24 remedial classes in high school (H.Tr. 76, Ex. 8). Mr. Ringo graduated with a 1.85 GPA (H.Tr. 78, Ex. 8). School officials diagnosed him as learning disabled (H.Tr. 141, Ex. 10). He had high absenteeism, and began using marijuana and alcohol (H.Tr. 78). Mr. Ringo had some minor scrapes with the law (H.Tr. 78-79).

Mr. Ringo could not focus on tasks and had problems interacting with others (H.Tr. 80). The major factors impacting his development were: 1) his alcoholic father and 2) the abuse and neglect suffered in his childhood (H.Tr. 80-83).

Dr. Robert Smith interviewed Mr. Ringo twice, reviewed numerous materials, and interviewed many witnesses (H.Tr. 124, 127). Mr. Ringo's social history was fraught with trauma (H.Tr. 128). His alcoholic father displayed bouts of aggression towards Mr. Ringo's mother and the children (H.Tr. 129, 136, 137). Vaughn terrorized the family and often beat Earl (H.Tr. 129-30). Vaughn locked

the children in a closet for a day at a time (H.Tr. 129, 132). Earl witnessed his mother being raped (H.Tr. 134).

Dr. Smith administered testing for trauma (H.Tr. 145). The results of the Trauma Symptom Inventory showed Mr. Ringo's intrusive thoughts and avoidance symptoms (H.Tr. 149). Mr. Ringo showed hyper-vigilance and defensiveness (H.Tr. 154).

The repeated trauma Mr. Ringo suffered caused Post-Traumatic Stress Disorder (H.Tr. 138). Significant to this finding: 1) the trauma Mr. Ringo suffered; 2) Mr. Ringo himself, and his ability to cope; and 3) Mr. Ringo's recovery environment (H.Tr. 139). Mr. Ringo's trauma was severe and lasted four years. It was outside the normal experience (H.Tr. 139). He felt ashamed, guilty and afraid; he could talk to no one about it and thus, felt isolated and alone (H.Tr. 140). Since Mr. Ringo was just a child when the trauma occurred, he was less able to cope than of he had been older (H.Tr. 140). He received no support or intervention, no medical or psychological care (H.Tr. 140-41). When he escaped Vaughn, his mother went into another abusive relationship and told him not to discuss Vaughn and those experiences (H.Tr. 141).

In addition to Post-Traumatic Stress Disorder, Mr. Ringo suffered from a learning disability and a dysthymic disorder, moderate, long-term depression at the

time of the crime.[5] (H.Tr. 157-58, 163). These mental diseases and defects combined to interfere with and diminish Mr. Ringo's ability to deliberate (H.Tr. 163). When Mr. Poyser rushed toward him, Mr. Ringo reacted impulsively and defensively by shooting him (H.Tr. 152-54).

The State called Officer Liebhart, who testified that during Mr. Ringo's interrogation, he was calm and relaxed, not hyper-vigilant, jumpy, or easily startled (H.Tr. 342-43). He did not have outbursts, but was responsive (H.Tr. 343). He had no problems concentrating (H.Tr. 344). Police investigation into Mr. Ringo's legal history revealed no prior traumatic situations in the past (H.Tr. 347-48).

Shaw testified about her investigation, preparation and reasons for not calling Dr. Draper and for not consulting and calling an expert regarding Mr. Ringo's mental health (H.Tr. 364-82). Shaw had subpoenaed Dr. Draper for trial and considered using her to talk about Mr. Ringo's childhood development (H.Tr. 380). She called four family members, and decided not to call an expert (H.Tr. 380-81). Shaw said she wanted Mr. Ringo's mother to testify and was concerned that Dr. Draper's testimony might not work with it. Shaw wanted the emphasis to be on Carletta (H.Tr. 381).

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[5] Dr. Smith also found cannabis dependence, but since Mr. Ringo was not under the influence at the time of the offense, it was irrelevant and not a factor supporting diminished capacity (H.Tr. 160).

The State hired Dr. Kline to evaluate Mr. Ringo during the post-conviction action (H.Tr. 425). Kline concluded that Mr. Ringo had no mental disease or defect at the time of the crimes (H.Tr. 425-26). He opined that Mr. Ringo had an antisocial personality disorder, cannabis abuse - in remission, and alcohol abuse - in remission (H.Tr. 426, 498). According to Kline, Mr. Ringo did not suffer from Post-Traumatic Stress Disorder, Depression, or a Learning Disorder (H.Tr. 450-86, 487-94, 494-98).

Dr. Smith testified in rebuttal, disputing Dr. Kline's findings and highlighting the flaws in his evaluation (H.Tr. 562-607).

At the conclusion of the evidentiary hearing, Judge Roper complained that the case had gone on so long (H.Tr. 663). She was concerned that the Supreme Court wanted the case resolved, so she gave counsel ten days to draft proposed findings (H.Tr. 663). When counsel stated that they could complete them in such a short time, Judge Roper told them to "work weekends" (H.Tr. 663). The court ordered the transcript and gave counsel until October 15, 2002 to submit findings and ordered that they be provided on a disk (H.Tr. 664-66). On November 13, 2002, the motion court entered fourteen pages of findings and conclusions (L.F. 561-74, A-1 – A-14). The findings focused on the procedural history, and quoted the claims in the amended motion (L.F. 561-71, A-1 – A-11). Three pages dealt with the issues raised in the amended motion (L.F. 571-73, A-11 – A-13). Mr. Ringo appeals from these findings and conclusions.

POINTS RELIED ON

I. Expert Testimony Regarding Diminished Capacity

The motion court clearly erred in denying relief because Mr. Ringo was denied effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution in that counsel failed to adequately investigate and present expert testimony regarding Mr. Ringo's diminished capacity during the crime. Had counsel acted reasonably, an expert, such as Dr. Smith, would have testified that Mr. Ringo suffered from Post-Traumatic Stress Disorder, Depression, and a learning disability, and reacted, based on past abuse and recurring trauma, in an impulsive way when he shot Mr. Poyser. The evidence would have supported counsel's defense that Mr. Ringo did not deliberate and was guilty of second degree murder.

Boyko v. Parke, 259 F.3d 781 (7th Cir. 2001);

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

Eichelberger v. State, 71 S.W.3d 197 (Mo. App. W.D. 2002);

State v. Coney, 2003 WL 838149, ___ So.2d ___ (Fla. 2003);

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

Rule 29.15.

II. Expert Testimony Providing Mitigation

The motion court clearly erred in denying relief because Mr. Ringo was denied effective assistance of counsel and mitigation guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that counsel failed to adequately investigate and present expert testimony, through Dr. Draper, regarding Mr. Ringo's childhood development; and through Dr. Smith, regarding his mental state at the time of the crime. Had counsel acted reasonably, the jury would have learned of Mr. Ringo's childhood abuse, his alcoholic father, and these factors' impact on his development. The jury would have known that Mr. Ringo suffered from Post-Traumatic Stress Disorder, Depression, and a learning disability, and that he reacted based on past abuse and the recurring trauma in an impulsive way when he shot Mr. Poyser. The evidence would have provided mitigation and reasons for the jury to sentence Mr. Ringo to life.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

Simmons v. Luebbers, 299 F.3d 529 (8th Cir. 2002);

Wallace v. Stewart, 184 F.3d 1112 (9th Cir. 1999);

Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992);

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

Section 565.032;

Rule 29.15; and

MAI-CR 3d 313.44, Notes on Use 5.

III. Jury Claim Adequately Pled

The motion court clearly erred in denying Claim 8(c) relating to counsel's agreement to a change of venue to Cape Girardeau County and failure to object to the petit jury panel that under-represented African-Americans, without an evidentiary hearing, because the ruling denied Mr. Ringo his rights to due process, a full and fair hearing, a fair trial drawn from a fair cross-section of the community, effective assistance of counsel, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief; specifically, that counsel was aware that Cape Girardeau County had a history of under-representing African-Americans, and that the interracial nature of the case made race an important factor; the allegations were not refuted, but were supported by the record; and counsel's actions prejudiced Mr. Ringo, since he was tried by an all-white jury and was more likely to be sentenced to death and convicted for the killing of the white victims.

Wilkes v. State, 82 S.W.3d 925 (Mo. banc 2002);

Azania v. State, 778 N.E.2d 1253 (Ind. 2002);

Turner v. Murray, 476 U.S. 28 (1986);

Georgia v. McCollum, 505 U.S. 42 (1992) (O'Connor, J., dissenting);

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

Section 565.035;

Rule 29.15;

Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 458 (1995);

Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 St. Louis U. L.J. 479, 482-83 (1995); and

Lenza, Keys, and Guess, *The Prevailing Injustices in the Application of the Death Penalty in Missouri (1978-1996),* http://www.umsl.edu/divisions/artscience/forlanglit/mbp/Lenza1.html

IV. Hearing on Ineffectiveness: Court Applied the Wrong Standard

The motion court clearly erred in denying, without an evidentiary hearing, Claims 8(b) and 8(d) relating to counsel's failure to object to the court's inaccurate and misleading response to the jury's question regarding verdicts of death and life, and counsel's failure to object to the prosecutor's improper comments and gestures, because the ruling denied Mr. Ringo his rights to due process, a full and fair hearing, effective assistance of counsel, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief, the allegations were not refuted by the record and counsel's inactions prejudiced Mr. Ringo. The motion court erroneously ruled, contrary to *Deck v. State*, that if a claim was raised on direct appeal as plain error, subsequent courts could not review whether counsel's failure to object was ineffective assistance of counsel.

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

Wilkes v. State, 82 S.W.3d 925 (Mo. banc 2002);

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

Carpenter v. Vaughn, 296 F.3d 138 (3rd Cir. 2002);

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

Rules 29.15 and 30.20.

V. Rule 29.15(e): Amended Motion Must Raise Additional Claims

The motion court clearly erred in proceeding on Mr. Ringo's amended motion and not considering his *pro se* claims because this violated his rights under Rule 29.15(e), to due process, a full and fair hearing, and freedom from cruel and unusual punishment and effective counsel under U.S. Const., Amends. VIII and XIV in that counsel failed to include all claims known to movant as required by Rule 29.15(e) and Mr. Ringo notified the Court that he wanted all his claims heard.

State v. Rue, 811 A2d 425 (N.J. 2002);

Reynolds v. State, 994 S.W.2d 944 (Mo. banc 1999);

Bittick v. State, 2003 W.L. 1698217, ___ S.W.3d ___, W.D. No. 60885 (Mo. App., W.D. April 1, 2003);

McDaris v. State, 843 S.W.2d 369 (Mo. banc 1992);

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

Sections 547.370 and 600.042;

Rules 29.15 and 29.16; and

Rule 3:22-6, N.J. Rev. Rules, 2002.

ARGUMENT

I. Expert Testimony Regarding Diminished Capacity

The motion court clearly erred in denying relief because Mr. Ringo was denied effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution in that counsel failed to adequately investigate and present expert testimony regarding Mr. Ringo's diminished capacity during the crime. Had counsel acted reasonably, an expert, such as Dr. Smith, would have testified that Mr. Ringo suffered from Post-Traumatic Stress Disorder, Depression, and a learning disability, and reacted, based on past abuse and recurring trauma, in an impulsive way when he shot Mr. Poyser. The evidence would have supported counsel's defense that Mr. Ringo did not deliberate and was guilty of second degree murder.

Before trial, defense counsel discovered that their client had mental problems (H.Tr. 254). He could not understand legal concepts and counsel spent a lot of time, repeatedly covering the same ground, meeting after meeting (H.Tr. 247-48). O'Neill suspected brain damage (H.Tr. 257-58). When brain damage was ruled out, she still believed Mr. Ringo had mental problems (H.Tr. 257-58).

However, counsel's investigation was being hampered. O'Neill was spending nearly all of her time in depositions, trying to determine which state

witnesses had useful, material information (H.Tr. 260). The prosecutor had endorsed 100 witnesses and refused to narrow that list for counsel (H.Tr. 260).

Counsel's in-house investigator was not completing the investigation into Mr. Ringo's background (H.Tr. 285). Therefore, shortly before trial, counsel hired a social worker, James Dempsey, to do background investigation (H.Tr. 255, 315). Counsel had problems getting Dempsey to work on the case and report back to her (H.Tr. 315). Accordingly, even though Dempsey's investigation ultimately revealed enormous trauma and abuse, counsel only learned about it a few weeks before trial (H.Tr. 255-56, 315). Dempsey's final report was completed only ten days before trial (Ex. 6, Tr. 479).

Mr. Ringo suffered severe trauma as a child (H.Tr. 128). His alcoholic father abused Earl's mother and the children (H.Tr. 129, 136, 137). After his father died, matters worsened. His mother met Vaughn and the abuse escalated (H.Tr. 129-30). Vaughn terrorized the family (H.Tr. 129-30). He took over their home and exposed them to alcohol, drugs and prostitution (H.Tr. 129). He threatened to kill Carletta and the children (H.Tr. 129). Vaughn beat Mr. Ringo, once even pounding his head with a baseball bat (H.Tr. 129). Mr. Ringo's head was swollen, bruised and bleeding (H.Tr. 129-30, 132). When Carletta tried to intervene, Anne, a prostitute, held her back so she could not help (H.Tr. 132). Vaughn locked the children in a closet for a day at a time (H.Tr. 129, 132). Mr. Ringo saw Vaughn rape his mother (H.Tr. 134).

Mr. Ringo's older sister, Tonya, finally reported the abuse to school officials (H.Tr. 130). Since Carletta was afraid she would lose custody, she called family members who lived in Indiana (H.Tr. 130). Armed with guns, Carletta's family traveled to Detroit and rescued them (H.Tr. 130-131, 136). Vaughn and his friends tried to stop them, blasting a gun through the front door, but they got away (H.Tr. 130-31, 136-37).

When O'Neill learned of this trauma, she believed Mr. Ringo might suffer from Post-Traumatic Stress Disorder. She observed that Earl seemed restless (H.Tr. 245-46) and frightened (H.Tr. 247). He was guarded, fidgety and depressed (H.Tr. 300-01). He had a bad memory of his childhood and did not want to discuss traumatic events in his life (H.Tr. 253). He had nightmares (H.Tr. 262). He had difficulty trusting counsel (H.Tr. 300). He consistently recounted that Mr. Poyser had rushed at him and he had reacted by shooting, since he was frightened and startled (H.Tr. 262, 305, 308). Mr. Ringo was sorry and ashamed of what he had done (H.Tr. 262-63).

Nonetheless, counsel did not have Mr. Ringo evaluated for Post-Traumatic Stress Disorder or other mental problems (H.Tr. 259). She thought the evidence warranted such an evaluation, but she did not think the court would grant a continuance for an evaluation (H.Tr. 259).

Had counsel hired an expert, such as Dr. Smith, she could have presented evidence to support her defense that Mr. Ringo did not deliberate (H.Tr. 157-58,

163). Dr. Smith's evaluation was thorough. He reviewed substantial materials, including:

- affidavit by defense counsel, Ruth O'Neill,
- affidavit by John Davis,
- preliminary report by James Dempsey,
- final report by James Dempsey,
- neuropsychological evaluation by Dr. Briggs,
- amended motion,
- trial transcript (vol. 8-13),
- criminal records from Clarksville,
- direct examination of Carletta Ringo,
- Detroit Public School records,
- employment records,
- Chrysler Corporation employment record of Earl, Sr.,
- Mr. Ringo's statement to police,
- psycho-educational report by Teri Burns,
- deposition of Dr. Dix,
- autopsy reports, and
- Quinton Jones' guilty plea transcript

(H.Tr. 124). Dr. Smith also interviewed several witnesses with personal knowledge of Mr. Ringo and the trauma he suffered. These witnesses included

Fannie Ringo, Kenny Ringo, Lawrence Ringo, Preston Ringo, Sammy Ringo, Rose Ringo, Jessie Smith, Frank Smith, Carletta Ringo, Tonya Ringo, Joyce Smith, and Jessie Smith, Jr. (H.Tr. 127).

Dr. Smith also administered testing for trauma (H.Tr. 145). The results of the Trauma Symptom Inventory showed that Mr. Ringo had intrusive thoughts and avoidance symptoms (H.Tr. 149). He was hyper-vigilant and defensive (H.Tr. 154). He viewed the world as violent and dangerous (H.Tr. 134-35). He felt the need to protect himself, so he purchased a gun (H.Tr. 135). He learned to respond defensively (H.Tr. 135). Thus, when Mr. Poyser rushed toward him, Mr. Ringo reacted by shooting him (H.Tr. 152-54). He was extremely remorseful for his actions (H.Tr. 154).

Dr. Smith explained how Mr. Ringo's repeated trauma caused Post-Traumatic Stress Disorder (H.Tr. 138). Mr. Ringo's trauma was severe and continued for four years. It was outside the normal experience, and included being locked in closets, beaten about the head with a baseball bat, and watching his mother being raped (H.Tr. 139). Mr. Ringo felt ashamed, guilty and afraid, and could talk to no one (H.Tr. 140). He was young, isolated and alone, unable to cope (H.Tr. 140). He received no support or intervention, no medical or psychological care (H.Tr. 140-41). When he finally escaped Vaughn, his mother entered another abusive relationship and told him not to discuss Vaughn and their experiences (H.Tr. 141).

Dr. Smith concluded that, at the time of the crime, Mr. Ringo suffered from Post-Traumatic Stress Disorder, a learning disability, and dysthymic disorder-moderate, long-term depression (H.Tr. 157-58, 163). These mental defects combined to interfere with and diminish Mr. Ringo's ability to deliberate (H.Tr. 163).

Dr. Smith's findings supported counsel's defense that Mr. Ringo did not deliberate (H.Tr. 303-06). As counsel admitted, while she made that argument, she had no evidence to support it, since she had not requested an evaluation (H.Tr. 314). Nevertheless, the motion court found that counsel was effective and denied relief on this claim (L.F. 572-73, A-12 – A-13). As to O'Neill's conduct, the court ruled:

> Claim 8(a)(II) faults counsel for failing to engage and call Dr. Smith in both the guilt and penalty phases of trial. Dr. Smith's expertise on substance abuse would not have assisted in the defense of this case. Ms. O'Neill was able in the guilt phase of the trial to present evidence to the jury from which it could have found a factual basis for finding Movant guilty of Murder in the Second Degree and Felony Murder. The jury's rejection of Murder in the Second Degree does not establish that counsel was ineffective.

(L.F. 573, A-13). These findings and conclusions are clearly erroneous and must be reversed.

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Hall v. State*, 16 S.W.3d 582, 585 (Mo. banc 2000); *Rule 29.15(k).* Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

To establish ineffective assistance of counsel, Mr. Ringo must show that his counsel's performance was deficient and that her performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984); and *Williams v. Taylor*, 120 S.Ct.1495, 1511-12 (2000). 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. banc 1997); *Williams v. Taylor, supra*.

Here, counsel admitted that she had every reason to believe that Mr. Ringo had mental problems that affected his ability to deliberate. She worried that the horrific abuse that he had suffered had damaged him. She observed symptoms that were consistent with Post-Traumatic Stress Disorder. She wanted to investigate his mental problems and his ability to deliberate. She did not, because she ran out of time. She believed that the court would not grant a continuance, although the trial was set for June 1, 1999, less than one year after the charged offense had occurred.

Counsel's failure to request a continuance and to obtain the necessary mental evaluation was unreasonable. That "an attorney believes a course of action might anger or irritate the trial judge does not universally make it reasonable for counsel not to take that course of action." *Eichelberger v. State*, 71 S.W.3d 197, 201 (Mo. App., W.D. 2002). Eichelberger's counsel thought that it would make the court mad if he presented supportive witnesses at sentencing. *Id.*, at 200-01. "Certainly, in some instances, an attorney must risk weathering the wrath of an angered court in order to best represent the interests of his or her client and failing to do so could constitute ineffective assistance." *Id*. Here, too, O'Neill should have risked Judge Roper's wrath by requesting a continuance to further investigate Mr. Ringo's mental health. O'Neill had a duty to protect Mr. Ringo's interest and determine whether his mental problems supported a diminished capacity defense.

Other courts have found similar conduct ineffective. *Catalan v. Cockrell*, 315 F.3d 491 (5th Cir. 2002) (counsel's failure to request a continuance to adequately prepare resulted in ineffective assistance); *State v. Howard*, 805 So.2d 1247, 1257-59 (La. App. 2002) (denying a continuance to allow counsel adequate time to prepare resulted in ineffective assistance); and *State v. Coney*, 2003 WL 838149, ___ So.2d ___ (Fla. 2003) (counsel ineffective in failing to conduct a timely mental health evaluation and failing to ask for additional time to complete it).

In *Coney*, counsel filed a motion for a mental evaluation months before trial, but the evaluation was never conducted due to a fee dispute. *Id*., at 7. A few

days before the penalty phase began, counsel had his client examined by two doctors, a psychiatrist and neurologist, but called neither to testify. *Id*. The evaluations were inadequate, since counsel furnished little or no background material to the experts. *Id.* Counsel was ineffective in two significant respects. *Id*., at 8. First, he failed to obtain a competent mental evaluation of his client sufficiently in advance of trial so that the expert opinions could be properly analyzed. *Id*. Second, he failed to provide the experts with sufficient background information from past court proceedings and prison records regarding the defendant's mental deficiencies and poor impulse control. *Id*. Counsel simply did not devote the time necessary to do a thorough investigation of his client's background. *Id*. Compounding this error, he failed to seek additional time and resources to remedy these shortcomings. *Id*.

Here, too, counsel failed adequately to prepare and obtain a mental evaluation, simply because she ran out of time and did not believe the court would grant a continuance. Counsel's failure was unreasonable.

Mr. Ringo was prejudiced. Contrary to the court's rulings that the jury had sufficient facts to find Mr. Ringo guilty of second degree murder and felony murder (L.F. 573), counsel herself acknowledged that, without a mental health evaluation, she lacked any tools to argue diminished capacity and lack of deliberation (H.Tr. 314). Without expert testimony, she could not proffer an instruction on diminished capacity. *See*, *State v. Anderson*, 515 S.W.2d 534, 540-42 (Mo. banc 1974) (defendant charged with first degree murder who presented

evidence of mental disease or defect entitled to instruction on manslaughter); *State v. Erwin*, 848 S.W.2d 476, 480 (Mo. banc 1993) (to prevail on a diminished capacity defense, a defendant must introduce evidence that he suffered from a mental disease or defect); and *Nicklasson v. State*, 2003 W.L. 21212779, S.Ct. No. 84496, slip op. at 2 (Mo. banc, May 27, 2003) (a finding of mental disease or defect permits the jury, in some cases, to conclude that the defendant was unable to form the necessary intent to convict of first degree murder).

During guilt phase, the jury heard no evidence about Mr. Ringo's childhood trauma and its psychological impact on him. Had counsel acted reasonably, the jury would have understood that Mr. Ringo suffered horrific trauma. Vaughn pounded his head with an aluminum baseball bat. He beat him with a comb until his head bled. He locked him in a closet for hours, without food or water. He raped Earl's mother in front of Earl. He forced Earl to feed a naked woman who had been tied to a chair in the basement. Earl, a young boy, was trapped and could not get help. He knew that, if he reported the abuse, Vaughn would kill him and his family. Even when they escaped Vaughn, his mother forbade him from discussing the trauma he suffered. He never received any medical or psychological help. Earl coped the best he could, but the emotional scars remained. He learned to view the world as violent and dangerous. He reacted defensively. So, when he was startled by Mr. Poyser's moving toward him, he reacted impulsively, he shot Mr. Poyser.

Dr. Smith's findings are well-supported in the literature. Arthur Green, *Childhood Sexual and Physical Abuse,* International Handbook of Traumatic Stress Syndromes, Chapter 49 (Plenum Press 1993). Child abuse is different from traditional types of trauma that is associated with Post-Traumatic Stress Disorder. *Id*., at 583. First, the parents or caregivers who inflict the abuse, in other traumatic situations, would be protective and supportive. *Id*. Thus, a child who suffers such abuse cannot rely on or expect nurturance and protection, and may dissociate in order to survive. *Id*. Second, the traumatic events are recurrent and of long duration. Abuse often goes on for years before it is disclosed or discovered. The ongoing nature of the trauma increases the likelihood that the victim will undergo pathological changes in character and personality. *Id*. Finally, since the trauma is on-going, it has a cumulative effect on the victim. *Id*., at 583-84.

Kamala Devi Harris, a Deputy District Attorney in San Francisco, has seen the effects of such abuse. May Chow, *Activism From The Heart,* The Examiner, April 4, 2003. Harris, a long-time champion for juvenile rights, has made it her priority to stamp out child exploitation. *Id*. She sees children who are the victims of abuse, rape and incest. *Id*. Harris describes the children:

> I've dealt with many child assault cases, in which these children were runaways because their fathers, uncles, mothers' boyfriends sexually abused them. *And many of these kids develop post-traumatic stress disorder and many of these victims find ways to self-medicate, to dull the trauma and pain.*

Id. (Emphasis added).

Other attorneys have advocated for such abused children. Howard Talenfeld sued the Florida Department of Children and Families and obtained a $525,000.00 settlement for a ten-year old boy who endured abuse while he lived in foster care. *Abused Child To Get $525,000 from DCF*, Tallahassee Democrat (February 27, 2003). The boy now suffers from Post-Traumatic Stress Disorder. *Id*.

Earl Ringo had no one like Harris and Talenfield to advocate for him before July 4, 1998. Therefore, he found himself in a situation like Boyko and Seidel's.

In *Boyko v. Parke*, 259 F3d 781, 784 (7th Cir. 2001) the Court reversed and remanded for an evidentiary hearing, because counsel had failed to present evidence of Post-Traumatic Stress Disorder that arose because of childhood sexual abuse. *Id*., at 784-86. When Boyko was 15, he was involved in a homosexual relationship with 21-year-old Lester Clouse. *Id*., at 783. The relationship had started when Boyko was only nine; Clouse had repeatedly raped and sexually abused Boyko. *Id*., at 784. Boyko wanted the relationship to end, but Clouse told him that if he could not have Boyko, no one could. *Id*., at 783. Boyko obtained a gun, lured Clouse to a secluded area, shot him in the chest, put him in the trunk, and fled. *Id*. Trial counsel presented a defense that the shooting was accidental. *Id*.

In his post-conviction action, Boyko asserted that counsel was ineffective for not presenting evidence that he suffered from Post-Traumatic Stress Disorder, the result of years of sexual abuse. *Id*., at 784. *Id*. In the expert's opinion, when Clouse touched Boyko's leg on the night of the shooting, Boyko reacted in an uncontrolled manner because the touch triggered a panic attack, a result of the Post-Traumatic Stress Disorder. *Id*.

Similarly, in *Seidel v. Merkle*, 146 F.3d 750, 756 (9th Cir. 1998), counsel was ineffective in failing to investigate the extent or possible ramifications of Seidel's psychiatric impairment. Seidel went to visit his girlfriend, Angela Davis, and Dorina Canfield, a neighbor arrived, reporting an argument between her and her husband, Bucholz. *Id*., at 752. *Id*. Canfield thought she was in danger, so Seidel and Davis encouraged her to stay with them for the evening. *Id*. Later that evening, when Seidel, Davis, and Canfield went to the grocery store, Bucholz approached the truck and screamed at Canfield. *Id*. Bucholz jerked at the door. *Id*. Seidel got out with a knife in hand and attacked Bucholz, stabbing him in the chest. *Id*. Seidel fled the scene and later was arrested. *Id*. Seidel told officers that he was "scared for his life" and "never meant to hurt him." *Id*. Counsel's theory at trial was self-defense. *Id*.

At his post-conviction action, Seidel asserted that counsel was ineffective for not investigating his mental state or presenting evidence that he suffered from Post-Traumatic Stress Disorder. *Id*., at 752-53. Counsel had failed to investigate his client's psychiatric history, despite abundant signs of mental illness. *Id*., at

755. A minimal review would have revealed pretrial treatment with medication by a prison psychiatrist, jail medical records showing treatment for a mental disorder at a V.A. hospital, and Seidel's own recognizance report for his bail hearing, which documented the prior hospitalization. *Id*.

Seidel's fear for his own safety during the fight with Bucholz could have been exacerbated by his history of multiple traumas. *Id*., at 756. "A combination of multiple traumas leaves victims excessively fearful and psychologically primed to overreact to perceived threats." *Id*. Seidel's Post-Traumatic Stress Disorder helped create "an excessive fear for his well being and subsequent impulsive, poorly thought out over-reaction." *Id*.

Like Seidel and Boyko, Mr. Ringo suffered Post-Traumatic Stress Disorder that resulted from horrific childhood abuse. The combination of the multiple traumas that he experienced left him excessively fearful and psychologically primed to overreact to perceived threats. Thus, when Mr. Poyser came at Mr. Ringo, he overreacted to a perceived threat, based on years of abuse. His reaction was impulsive, not deliberate.

Counsel was ineffective for failing to present this evidence in guilt phase. Had the jury known about the trauma that Mr. Ringo suffered, and the resulting Post-Traumatic Stress Disorder, Depression and learning disability, the jury would have had evidence to support counsel's argument that he did not deliberate. A new trial should result.

II. Expert Testimony Providing Mitigation

The motion court clearly erred in denying relief because Mr. Ringo was denied effective assistance of counsel and mitigation guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that counsel failed to adequately investigate and present expert testimony, through Dr. Draper, regarding Mr. Ringo's childhood development; and through Dr. Smith, regarding his mental state at the time of the crime. Had counsel acted reasonably, the jury would have learned of Mr. Ringo's childhood abuse, his alcoholic father, and these factors' impact on his development. The jury would have known that Mr. Ringo suffered from Post-Traumatic Stress Disorder, Depression, and a learning disability, and that he reacted based on past abuse and the recurring trauma in an impulsive way when he shot Mr. Poyser. The evidence would have provided mitigation and reasons for the jury to sentence Mr. Ringo to life.

Mr. Ringo alleged that counsel was ineffective in failing to present expert testimony regarding his childhood development and his mental state (L.F. 75-283). The motion court found that counsel's decision not to call Dr. Draper in penalty phase was a strategic decision made after thorough investigation (L.F. 572-73, A-12 – A-13). As to counsel's failure to call Dr. Smith and present evidence that Mr. Ringo suffered from Post-Traumatic Stress Disorder, Depression and a learning disability, the motion court ruled that "counsel was not required to continue to

search for a favorable expert after Brigg's evaluation did not turn out as she thought it might." (L.F. 573, A-13). The court found no reasonable basis for engaging another expert. *Id*. These findings do not withstand scrutiny; they are clearly erroneous.

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Hall v. State*, 16 S.W.3d 582, 585 (Mo. banc 2000); *Rule 29.15(k).* Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

To establish ineffective assistance of counsel, Mr. Ringo must show that his counsel's performance was deficient and that the performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984); and *Williams v. Taylor*, 120 S.Ct. 1495, 1511-12 (2000). 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. banc 1997); *Williams v. Taylor, supra*.

Counsel's investigation was not thorough, but was last-minute. Counsel wanted to get through the case as quickly as possible. Counsel called four family members who minimized the childhood abuse that Mr. Ringo suffered: Mr. Ringo's mother, Carletta Ringo (Tr. 2341-56); his paternal grandmother, Fannie

Ringo (Tr. 2360-69); his sister, Tonya Ringo (Tr. 2372-83); and his maternal grandmother, Bernice Smith (Tr. 2385-89).

No expert testified about Mr. Ringo's background or its impact on him. Accordingly, the jury was not instructed on applicable statutory mitigating circumstances, like extreme mental or emotional disturbance or substantial impairment of his capacity to appreciate the criminality of his conduct. Section 565.032.3 (2) and (6).

Counsel requested only 15 or 20 minutes to argue for her client's life. Her lack of preparation, the paltry evidence she adduced, and her lackluster argument led to a predictable result, two death sentences. Had counsel acted reasonably, she could have presented mitigation that would have supported life sentences.

Counsel Had A Duty to Investigate and Present Mitigation

In *Williams v. Taylor*, *supra*, counsel was ineffective for failing to investigate and present substantial mitigating evidence of Williams' nightmarish childhood. *Id*. at 1514. The jury never considered evidence of Williams' borderline mental retardation, that he did not advance beyond the sixth grade, prison records showing his good behavior in prison, prison officials' testimony that Williams was unlikely to be violent in the future, and testimony that Williams seemed to thrive in a regimented, structured environment. *Id*. Under the Sixth Amendment guarantee to effective assistance of counsel, trial counsel has an "obligation to conduct a *thorough* investigation of the defendant's background." *Id*. at 1515 (emphasis added).

Counsel was also ineffective in *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999). There, counsel called ten penalty phase witnesses in a session that went late into the night and the entire penalty phase lasted only one and one-half hours. *Id*. at 1201. Although, counsel said he wanted to present a strong case in mitigation, his desire stood in stark contrast to his presentation. *Id*., at 1200. His examination of the witnesses was minimal. *Id.* at 1201. He sought to elicit little relevant evidence about Collier's character. *Id.* The court found counsel ineffective. "Counsel presented no more than a hollow shell of the testimony necessary for a 'particularized consideration of relevant aspects of the character and record of [a] convicted defendant before the imposition upon him of a sentence of death.'" *Id*. at 1201-02 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976)).

Here, too, counsel presented a hollow shell of the testimony necessary for the jury to understand Mr. Ringo. The jury only heard from four family members, and they minimized the abuse that Earl had suffered and its impact on him. His grandmother, Fannie Ringo, said her son, Earl's father, had no drinking problem, (Tr. 2367). She remembered Earl as a normal child (Tr. 2368).

His mother, Carletta, also described Mr. Ringo as a "normal, regular" child (Tr. 2354). She told the jurors that he graduated from high school, making As and Bs (Tr. 2354). Defense counsel knew that this was misleading, since Mr. Ringo's school records revealed an entirely different story (Ex. 7-8). He made mostly Cs and Ds or failed classes, held back repeatedly (H.Tr. 71). He was placed in

Special Education classes and was Learning Disabled (H.Tr. 72, 141). He had 24 remedial classes in high school (H.Tr. 76). The jury never knew the truth about Earl's struggles in school.

Carletta and Mr. Ringo's sister, Tonya, briefly described their time with Vaughn and the abuse they suffered. (Tr. 2348-49, 2376-81). However, they both suggested the abuse had no lasting impact on Mr. Ringo. Carletta said that once they escaped to Indiana, they picked up the pieces and moved on with their lives (Tr. 2351). Tonya also said that things improved once Vaughn was out of their lives and their family was okay when the offense was committed (Tr. 2384). This suggestion was buttressed by Bernice Smith, Carletta's mother (Tr. 2386). Bernice described Earl as "pretty good" when he came back from Detroit and did not notice him being withdrawn (Tr. 2387).

The four family members could not talk about the psychological impact that all of this abuse had on Mr. Ringo. Experts were necessary to describe the psychological impact and his mental state.

Psychological testimony can be critical in a penalty phase. *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). "Psychiatrists gather facts, through professional examination, interviews, and elsewhere." *Id*. They analyze the information and draw plausible conclusions about the defendant's mental condition and the effects of the disorder on behavior. *Id*. Through investigation, interpretation, and testimony, psychiatrists assist lay jurors to make a sensible, educated determination about the defendant's mental condition. *Id*. at 80-81.

Consistent with *Ake*, this Court has recognized the importance of expert testimony in penalty phase. *State v. Johnson*, 968 S.W.2d 686, 697 (Mo. banc 1998). In *Johnson*, counsel was ineffective for not presenting a psychiatrist's expert testimony in penalty phase. *Id*. Counsel failed to communicate with a psychiatrist who found that Johnson was suffering from cocaine intoxication delirium. This Court refused to countenance insufficient pretrial preparation with an expert witness who had helpful opinions for penalty phase. *Id*.

In *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999), counsel also failed to prepare and communicate with an expert in penalty phase. Counsel spent remarkably little time exploring Wallace's mental state or other mitigating factors. *Id*. Had counsel looked, they would have discovered a great deal about Wallace's family history, including a psychotic, alcoholic and anorexic mother. *Id*. at 1116. This family history was important, because psychosis and alcoholism have a genetic component, passing from parents to children. *Id*. Wallace had a chaotic home life. He started sniffing glue and gasoline between ages ten and twelve and he suffered head trauma. *Id*. This was important, because children raised in profoundly dysfunctional environments are prone to develop severe psychiatric disturbances. *Id*. Counsel presented the testimony of a psychiatrist, but gave him no information about Wallace's background or family history. *Id*. at 1115.

Mr. Ringo's counsel was similarly ineffective. She failed to present expert testimony to explain the significance of Mr. Ringo's childhood abuse, his alcoholic father and his psychiatric disturbances. The jury never understood his

childhood development or the mental problems he suffered. Counsel's failure to call Drs. Draper and Smith was unreasonable.

Dr. Draper

Counsel maintained that she decided not to call Dr. Draper because she wanted to focus on Carletta and she was unsure if the testimony of the expert and Carletta would fit well together (H.Tr. 381). Counsel never explained why the two witnesses were incompatible. Further, counsel did not follow her purported strategy of focusing on Carletta. Carletta's testimony was brief (Tr. 2341-56), like all the penalty phase witnesses. As with each witness, she testified about Earl and how much she loved him. The focus at trial was not on Carletta.

Strategy Must Be Reasonable

"[T]he mere incantation of the word 'strategy' does not insulate attorney behavior from review. The attorney's choice of tactics must be reasonable under the circumstances." *Cave v. Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992). Whether a tactic is reasonable is a question of law on which the motion court's findings are not entitled to deference. *Id*.

Courts have found counsel's purported trial strategy unreasonable. In *Simmons v. Luebbers*, 299 F.3d 529 (8th Cir. 2002), counsel was ineffective because they failed to introduce available mental health information in the penalty phase. *Id*., at 935. The attorneys could have introduced evidence that:

> (1) he was raised in a very strict home environment; (2) his father had a drinking problem and would beat Simmons's mother in

> front of him; (3) until he was 17 years of age, he was beaten by his mother so severely that he was left with welts and bruises; (4) he was so scared of being beaten that he would urinate on himself prior to the beatings; (5) he ran away from home at age 12 or 13 and was assaulted, and possibly raped, in Chicago; (6) he grew up in an impoverished neighborhood frequented by street violence; and (7) his IQ was 83.

Id., at 936. Simmons's attorneys introduced only one witness during the penalty phase: Simmons' mother. *Id*. Instead of testifying about her son's traumatic childhood, Mrs. Simmons merely stated that she loved her son and would draw value from their continued relationship. *Id*., at 936-37.

The Eighth Circuit concluded that Simmons' attorneys' actions were not reasonable trial strategy. *Id*., at 938. The jury was entitled to hear evidence of Simmons' terrible childhood. *Id*. Reliance on a plea from Simmons' mother to spare her son's life was insufficient. *Id*. Considering the aggravating evidence, mitigating evidence was essential to provide some sort of explanation for Simmons' behavior. *Id*., at 938-39.

Here, too, counsel's actions were unreasonable. The family minimized abuse and its impact on Mr. Ringo. His mother suggested that he performed well in school and that once they left Detroit, Mr. Ringo's life was normal and he was fine. Thus, like *Simmons*, the jury heard no explanation for Mr. Ringo's behavior at the time of the crime.

Dr. Draper would have provided the needed explanation. She could testify about Mr. Ringo's childhood development (Exs. 1, 2, 2A, 3, 3A, 4, 4A, H.Tr. 28, 35). Carletta was dependent and often times depressed (H.Tr. 36, 40, 88). Some days she did not get dressed and had trouble meeting her husband's demands (H.Tr. 40, 51, 88-89). She was uneducated, of marginal intelligence, and frustrated at home (H.Tr. 36, 39-40). She once dumped food onto the floor and blamed it on her husband's brothers (H.Tr. 40). The house was filthy, with roaches and vermin (H.Tr. 48, 89). The children were dirty and poorly dressed (H.Tr. 41, 89-90). School officials noted that they were not given proper care (H.Tr. 41). Carletta could not handle finances, so her husband gave the children money for safe-keeping (H.Tr. 42, 92).

Mr. Ringo's parents often fought. They hit each other in front of the children (H.Tr. 40, Ex. 1, at 1-2, Ex. 6, at 4, 5-6, 8, 10, 14). Mr. Ringo's uncles recognized their brother abused Carletta and the children (Ex. 6, at 10, 14). Mr. Ringo's Uncle Preston saw Carletta smack her husband with a spatula (Ex. 6, at 8). His Uncle Sammy recalled Carletta hitting her husband in the face with an iron frying pan, causing blood to fly (Ex. 6, at 10).

Mr. Ringo's father's family had a history of alcoholism (H.Tr. 37-38). His paternal grandfather lost both his legs; they were amputated due to gangrene (H.Tr. 38). He was diabetic, but could not stop drinking (H.Tr. 37). His father and uncles were habitual, heavy drinkers (H.Tr. 37-38). His father drank when he came from home, in part so he did not have to deal with Carletta (H.Tr. 41).

Mr. Ringo's parents gave him insufficient attention and did not meet his needs, especially during his early childhood years (H.Tr. 47-48). When Earl was ten, his father died of chronic alcoholism and liver failure (H.Tr. 44). His father's death bed request that Earl be "the man of the house" and care for his mother and siblings had a profound effect on Earl (H.Tr. 44). Earl felt abandoned (H.Tr. 57). He needed a father as a role model and a mother to lean on; someone to whom he could express grief and sadness about his loss (H.Tr. 57). Instead, Earl was forced to push back his feelings and be a strong "little man" - - he did not cry or speak at the funeral, totally withdrawing for 7-12 days (H.Tr. 58).

Shortly after his father's death, Mr. Ringo's mother met William Vaughn, a street-wise character, who swept her off her feet (H.Tr. 59-60, 93). Initially, he complimented her and was affectionate (H.Tr. 60, 93). However, he soon began taking advantage of her (H.Tr. 61). She had received a $25,000 lump sum from Chrysler, her husband's employer, and owned her house (H.Tr. 60). She could have had $100,000-150,000, but she failed to complete the necessary paperwork (H.Tr. 60).

Vaughn, a pimp and a heavy drug user, turned the Ringo house into a place for sex, drugs and alcohol (H.Tr. 61-63). Vaughn had two girlfriends, Anne and Pinky, who took control of the house and the Ringo children (H.Tr. 62). Vaughn demanded that Tonya and Earl hustle for him and bring in a daily quota of money (H.Tr. 62, 64).

If they did not make their quota, he beat them (H.Tr. 63-64). He beat Mr. Ringo with combs until his head bled (H.Tr. 63). He hit Mr. Ringo with his closed fist or his open hand (H.Tr.63). He used extension cords to strike Mr. Ringo (H.Tr. 63). He pounded Mr. Ringo's dead with an aluminum baseball bat (H.Tr. 63). Once, when Carletta tried to intervene, Anne locked her upstairs (H.Tr. 63). Vaughn threatened to kill Carletta and the children if they called the authorities (H.Tr. 63).

Mr. Ringo could hardly attend school during this four-year period (H.Tr. 64, 67). He had to make money or be beaten (H.Tr. 62-64). To conceal the bruises from the abuse, Vaughn kept him from going to school (H.Tr. 63).

Eventually, they sold the house and moved from apartments, to motels, to brothels (H.Tr. 65, 95). They lived in roach-infested filth (H.Tr. 66). No one laundered clothes or provided adequate food (H.Tr. 66). The children did not see their mother for days on end and constantly were exposed to strange people (H.Tr. 66). Vaughn forced Mr. Ringo and his sister to feed a naked woman, who was tied up in the basement, bound in a chair and beaten severely, because she owed Vaughn money for drugs (H.Tr. 68-69). She later disappeared (H.Tr. 69-70).

Mr. Ringo felt helpless and hopeless during this period (H.Tr. 67). He tried to protect his mother, whom he saw beaten and raped, but could not (H.Tr. 67). Mr. Ringo's goal in life was to survive, he could not go to school or play, like normal children (H.Tr. 67). His grades began to fall during his father's illness,

and more severely during the Vaughn years (H.Tr. 71-72). School officials placed him in Special Education (H.Tr. 72).

Finally, Tonya reported some of the abuse to school officials and police threatened to take the children away (H.Tr. 73, Ex. 5, at 15). Carletta called her family in Jeffersonville, Indiana, for help and they came to Detroit, armed with guns, to rescue Carletta and the children (H.Tr. 73). Vaughn blasted a shotgun through the front door, but Carletta's brothers held him off with their guns until they escaped (H.Tr. 73).

Mr. Ringo's high school years were not quite as normal and happy as the family reported to the jury (H.Tr. 77). He became quiet, withdrawn and was extremely sad (H.Tr. 77). Instead of making A's and B's, Earl had 24 remedial classes in High School (H.Tr. 76, Ex. 8). He graduated with 1.85 GPA (H.Tr. 78, Ex. 8). School officials diagnosed him as Learning Disabled (H.Tr. 141, Ex. 10). He had high absenteeism, and began using marijuana and alcohol (H.Tr. 78). Mr. Ringo got into some minor scrapes with the law (H.Tr. 78-79). Carletta was not there for him. She became involved with another man, Marvin Lee, who was like Vaughn, and became pregnant with his child (H.Tr. 77, 98).

Dr. Draper concluded that Mr. Ringo's emotional development was that of a 12- year-old (H.Tr. 79). He had trouble focusing and interacting with others (H.Tr. 80). He could not hold a job for long periods of time (H.Tr. 80). The major factors impacting his development were: 1) his alcoholic father and 2) the childhood abuse and neglect he suffered (H.Tr. 80-83, Ex. 1, 2, 2A, 3, 3A, 4, 4A).

Dr. Draper's testimony would have provided compelling mitigation that the jury never heard. It would have been consistent with Carletta's testimony of her husband's alcoholism and Vaughn's abuse. Dr. Draper knew that Carletta loved her son and did the best she could. But Carletta's own problems left her unable to meet Mr. Ringo's needs or provide him with a normal, healthy environment to live and thrive. Counsel's decision not to call Dr. Draper was objectively unreasonable.

In *Mauldin v. Wainwright*, 723 F.2d 799, 800 (11th Cir. 1984), counsel failed to investigate that Mauldin suffered from chronic alcoholism and had been hospitalized. His attorneys could not have strategically chosen to present only lay witnesses regarding alcoholism because their investigation was legally insufficient. *Id.*

Like *Mauldin*, counsel did not present expert testimony regarding Mr. Ringo's father's alcoholism and its impact on him. Rather, the jury only heard his grandmother testify that Mr. Ringo's father had no drinking problem, even though he died from his alcohol abuse. The jury never knew about the family history of alcoholism, which genetically predisposed Mr. Ringo to alcoholism.

Missouri courts have found purportedly strategic reasons unreasonable. *Perkey v. State*, 68 S.W.3d 547 (Mo. App. W.D. 2002); and *State v. McCarter*, 883 S.W.2d 75, 76-77 (Mo. App. S.D. 1994). In *Perkey*, the court found counsel ineffective for failing to interview the victim's family doctor, who could have testified about the victim's numerous health problems that could have resulted in

her death. *Perkey*, *supra* at 549. Counsel testified that he did not contact the doctor because he believed a family doctor would have an "emotional attachment" to the victim and his testimony would not be favorable to the defense. *Id*. The appellate court reversed the motion court's finding that the decision not to call the doctor was a matter of trial strategy. *Id*., at 550-52. Counsel cannot make a reasonable strategic decision unless it is fully informed of the facts that should have been discovered by investigation. *Id*., at 552.

In *McCarter*, *supra* at 76-77, trial counsel offered the report of a social worker which included allegations of previous sexual abuse against the defendant. Counsel's so-called strategy for introducing the report was unreasonable, counsel must exercise "sound trial strategy." *Id.*

Here, too, counsel unreasonably ignored all of the mitigating evidence available through Dr. Draper, just because counsel wanted to focus on Carletta Ringo. As in *Simmons*, calling the mother to plead for her son's life was insufficient. Carletta loved her son, just as Simmons' mother loved him. Perhaps because of their love, both mothers minimized abuse and the impact it had on their sons. Mr. Ringo's jury was misled into believing that he was just fine after the abuse, that he made A's and B's, and that he had a perfectly normal life. The jury had no explanation for why Mr. Ringo committed this crime and what brought him to that day in July, 1998.

Dr. Smith

Counsel's failure to investigate and present psychological testimony regarding Mr. Ringo's mental state was also unreasonable. Contrary to the motion court's ruling that counsel had no basis for engaging an expert once Briggs found that Mr. Ringo was not brain damaged (L.F. 573, A-13), the record is replete with evidence that counsel knew of Mr. Ringo's mental problems.

Dr. Briggs reported to co-counsel that some of the elevated scales merited further investigation (H.Tr. 258). James Dempsey's reports detailed the trauma Mr. Ringo suffered (Ex. 5 and 6). Dr. Draper confirmed the abuse and resulting trauma and its severity (H.Tr. 62-64). School records showed that Mr. Ringo did not make A's and B's, but struggled (Exs. 7 and 8). Earl had 24 remedial classes in high school (H.Tr. 76, Ex. 8). He graduated with a 1.85 GPA (H.Tr. 78, Ex. 8). He had problems keeping a job (H.Tr. 80). He did not function normally, and had problems understanding legal concepts (H.Tr. 247-48).

Given this wealth of evidence, it was unreasonable not to have Mr. Ringo evaluated. Had counsel acted reasonably, the jury would have learned that he suffered from mental illness, from Post-Traumatic Stress Disorder, a learning disability, and dysthymic disorder-moderate, long-term Depression (H.Tr. 157-58, 163). These mental defects combined to impact Mr. Ringo and his moral culpability (H.Tr. 163).

Without such expert testimony, Mr. Ringo's jury could not consider statutory mitigating circumstances, like "extreme mental or emotional

disturbance" or "substantial impairment of his capacity to appreciate the criminality of his conduct." Sections 565.032.3 (2) and (6). (A-16). *See, State v. Richardson*, 923 S.W.2d 301, 325-26 (Mo. banc 1996), *citing* MAI-CR 3d 313.44, Notes on Use 5 (evidence of a mental disease or defect at the time of the murder supports giving the mitigating circumstance instruction).

As in *Simmons, supra*, here, the jury heard no explanation for Mr. Ringo's behavior. Considering the aggravating evidence, this mitigating mental health evidence was essential. Had the jury heard about all of the trauma Mr. Ringo suffered and its impact on him, the jury likely would have given him life, not death. Even without such evidence, the jury considered giving him life on Count II (Tr. 2432). With such evidence, a reasonable likelihood of a life verdict exists. As a result, this Court should reverse and remand for a new penalty phase.

III. Jury Claim Adequately Pled

The motion court clearly erred in denying Claim 8(c) relating to counsel's agreement to a change of venue to Cape Girardeau County and failure to object to the petit jury panel that under-represented African-Americans, without an evidentiary hearing, because the ruling denied Mr. Ringo his rights to due process, a full and fair hearing, a fair trial drawn from a fair cross-section of the community, effective assistance of counsel, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief; specifically, that counsel was aware that Cape Girardeau County had a history of under-representing African-Americans, and that the interracial nature of the case made race an important factor; the allegations were not refuted, but were supported by the record; and counsel's actions prejudiced Mr. Ringo, since he was tried by an all-white jury and was more likely to be sentenced to death and convicted for the killing of the white victims.

Mr. Ringo, an African-American, was charged with killing two white people (Tr. 155). Trial counsel knew that race was a critical factor and expressed concern about it before and during trial (Tr. 123,128,155-56,163,186,210,370-71,431-32,465-66,740-43,1185-86). Nevertheless, counsel agreed to a change of

venue to Cape Girardeau County (D.L.F. 683). Mr. Ringo's amended motion alleged that counsel was ineffective in agreeing to such a change because they knew the county had a history of under-representing African-American venirepersons on petit jury panels; and counsel failed to object when they discovered that African-Americans were under-represented in Mr. Ringo's case (L.F. 295-318). The motion raised counsel's ineffectiveness, as well as Mr. Ringo's other constitutional rights to a fundamentally fair trial, a jury drawn from a fair cross section of the community, due process, freedom from cruel and unusual punishment and reliable sentencing. *Id*.

The motion court denied the claim without an evidentiary hearing (L.F. 571, 573, A-11, A-13). The court found that "Claim 8(c) does not allege facts regarding the composition of the jury selected to hear the case, but states conclusions." (L.F. 571, A-11). Later, the court ruled that "Claim 8(c) fails to plead facts, which if true, would entitle Movant to relief which are not refuted by the files and records in this case. Claim 8(c) is denied." (L.F. 573, A-13). The ruling is clearly erroneous and must be reversed.

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Hall v. State*, 16 S.W.3d 582, 585 (Mo. banc 2000); *Rule 29.15(k).* Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

A motion court must hold an evidentiary hearing if (1) the movant cites facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record, and (3) the matters complained of prejudiced the movant. *State v. Ferguson*, 20 S.W.3d 485, 503 (Mo. banc 2000); *State v. Moss*, 10 S.W.3d 508, 511 (Mo. banc 2000). Rule 29.15(h) encourages evidentiary hearings. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id*., at 928 (emphasis in original).

Applying these standards, the motion court clearly erred. The court found that Mr. Ringo did "not allege facts regarding the composition of the jury selected to hear his case" (L.F. 571, A-11). This is patently inaccurate, since the motion alleged that African-Americans were underrepresented (L.F. 297, 311-13). Specifically, it alleged that of 163 venirepersons, only four were African-American (L.F. 312, 313). The motion also alleged that "not one African-American was seated on the jury that heard the case . . . Mr. Ringo was tried before an all white jury as a black man charged with murdering two whites." (L.F. 313). The motion court's finding that the jury's composition was not alleged in the amended motion is unsupported by the record.

The amended motion alleged other specific facts, not conclusions, that entitled him to relief. Specifically, it outlined that Mr. Ringo's trial counsel was on notice that Cape Girardeau County had a history of under-representing African-Americans in petit juries (L.F. 303-07). The motion detailed eighteen cases tried

by the Public Defender's Office between 1996 and 1998, including each defendant's name, counsel, date, and the racial composition of each jury (L.F. 303-06). Eleven of these venire panels had no African-Americans, even though African-Americans make up 4.5% of the population of Cape Girardeau County and 7.1% of the City of Cape Girardeau (L.F. 303). Four panels included only one African-American venireperson (L.F. 305). Again, each case was specified by the defendant's name, counsel, date, and racial composition (L.F. 305-06). Three cases included only two African-Americans on their panels (L.F. 306). African-Americans were never over-represented on petit jury panels (L.F. 306).

The factual allegations were not refuted, but were supported by the record. Before trial, defense counsel expressed concern about racial bias (Tr. 123,128,370-71). Counsel knew the issue of race was unavoidable, since the victims were white and Mr. Ringo is African-American (Tr. 155-56). Counsel intended to voir dire on the issue (Tr. 155-56,163). Counsel even filed a motion to prohibit the death penalty, because of racial discrimination (Tr. 186,210). The prosecutor knew counsel had concerns about how juries were selected in Cape Girardeau County and advised the court of counsel's concerns (Tr. 431-32, 465-66). Yet counsel agreed to the change of venue to Cape Girardeau County (D.L.F. 683) and made no objections to the petit jury panel, even when they realized that African-Americans were under-represented.

Mr. Ringo's amended motion also alleged prejudice. Mr. Ringo was tried by an all-white jury (L.F. 313). "In Missouri, African-American defendants are

twenty (20) times more likely to be sentenced to death if no persons of their own race are on their jury, than those defendants who have at least one member of their race on the jury." (L.F. 309). The motion cited *Turner v. Murray*, 476 U.S. 28, 33-35 (1986), and explained its conclusion that racial attitudes and prejudices can have a profound impact upon capital sentencing decisions (L.F. 313-14). In *Turner*, the Court recognized the risk that racial prejudice will influence a jury whenever a crime involves interracial violence. *Turner, supra*, at 35. *See also*, Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 458 (1995) (death penalty is much more likely to be imposed in cases tried before all-white juries than to more racially-diverse juries); Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 St. Louis U. L.J. 479, 482-83 (1995) (different results are reached when a capital case is tried before an all-white jury, rather than when tried before a more racially-diverse jury); and Lenza, Keys, and Guess, *The Prevailing Injustices in the Application of the Death Penalty in Missouri (1978-1996)*, Pre-publication excerpts found at:

http://www.umsl.edu/divisions/artscience/forlanglit/mbp/Lenza1.html

(African-Americans accused of killing white victims were five times more likely to be charged with capital murder than African-Americans accused of killing African-American victims).

The prejudice of all-white juries is not limited to the death penalty. Justice O'Connor has recognized the prejudice to defendants in determining guilt and innocence: "It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trial, perhaps in determining the verdict of guilt or innocence." *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting). "Minority representation is vital, since there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury." *Id*. Justice Thomas agrees, saying African-American defendants would want every device available to them to promote the presence of African-American jurors in cases, because "conscious and unconscious prejudice persists in our society" and may impact a jury's verdict. *Id*., at 61 (Thomas, J., concurring).

The Indiana Supreme Court has recognized the importance of having fair jury selection procedures that result in minority representation in death penalty cases. *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002). In *Azania*, the defendant, an African-American, was convicted of murder and sentenced to death for killing a police officer during a bank robbery. *Id*., at 1256. Counsel had moved for a change of venue due to pretrial publicity. *Id*., at 1261. The sentence was reversed due to ineffective assistance of counsel and the state's failure to disclose gunshot residue test results. *Id*., at 1256. On remand, defense counsel moved to strike the entire jury pool, because it did not represent a reasonable cross-section of the community. *Id*. The motion was overruled, a new jury was impaneled and Azania

was tried and sentenced to death. *Id*. The sentence was affirmed on direct appeal. *Id*. On post-conviction, evidence revealed abnormalities in the Allen County jury pool selection system. *Id*., at 1256-59. Because of a computer glitch, African-Americans were under-represented. *Id*., at 1258-59. Thus, even though African-Americans made up 8.5 % of the county, they comprised only 4.4% of the jury pool. *Id*., at 1259.

The court reversed, finding "[t]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Id*., at 1259, *quoting Taylor v. Lousiana*, 419 U.S. 522, 528 (1975). In a death penalty case, the right to a fair cross-section is even more important, since it is "critical to public confidence of the criminal justice system." *Id*., 419 U.S. at 530. Indiana's statute that required impartial and random selection demands no less than the Sixth Amendment. *Azania, supra* at 1259. Additionally, given the qualitative difference of the death penalty from all other punishments, the Eighth and Fourteenth Amendments require a correspondingly greater degree of scrutiny of the capital sentencing determination. *Azania, supra*, at 1260, *citing California v. Ramos*, 463 U.S. 992, 998-99 (1983).

As in *Azania*, Mr. Ringo raised the issue of the under-representation of African-Americans in jury selection. He was tried and convicted by an all-white jury. Given the inter-racial nature of this case, Mr. Ringo's rights to a fair cross-section of the community were more important than ever. The capital sentencing proceedings required heightened reliablilty. *California v. Ramos, supra*. *See also,*

Zant v. Stephens, 462 U.S. 862, 884 (1983); and *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Both Section 565.035.3(1) and the Due Process Clause require that a death sentence not be based on caprice or emotion. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Yet, by agreeing to change venue to a county with a history of under-representation of African-Americans, trial counsel failed to ensure that Mr. Ringo's rights were protected.

The motion court clearly erred in denying a hearing on this claim. This Court should reverse and remand for a hearing.

IV. Hearing on Ineffectiveness: Court Applied the Wrong Standard

The motion court clearly erred in denying, without an evidentiary hearing, Claims 8(b) and 8(d) relating to counsel's failure to object to the court's inaccurate and misleading response to the jury's question regarding verdicts of death and life, and counsel's failure to object to the prosecutor's improper comments and gestures, because the ruling denied Mr. Ringo his rights to due process, a full and fair hearing, effective assistance of counsel, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief, the allegations were not refuted by the record and counsel's inactions prejudiced Mr. Ringo. The motion court erroneously ruled, contrary to *Deck v. State*, that if a claim was raised on direct appeal as plain error, subsequent courts could not review whether counsel's failure to object was ineffective assistance of counsel.

Mr. Ringo's amended motion alleged that trial counsel was ineffective for failing to object and request the appropriate instruction when the jury asked what would happen if it sentenced Mr. Ringo to death on Count I, and to life without parole on Count II (L.F. 284-95). The amended motion also alleged that trial counsel was ineffective for failing to object to the prosecutor's prejudicial and inflammatory gestures and comments (L.F. 318-26). The motion court denied a

hearing on these claims, ruling they had been decided on direct appeal (L.F. 571, 573, A-11, A-13). These findings are clearly erroneous. Mr. Ringo's claims of ineffectiveness were not decided on direct appeal and the standards for plain error are different than those for ineffectiveness. *Deck v. State*, 68 S.W.3d 418, 426-29 (Mo. banc 2002). This Court should reverse and remand for an evidentiary hearing.

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Hall v. State*, 16 S.W.3d 582, 585 (Mo. banc 2000); *Rule 29.15(k).* Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

A motion court must hold an evidentiary hearing if (1) the movant cites facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record, and (3) the matters complained of prejudiced the movant. *State v. Ferguson*, 20 S.W.3d 485, 503 (Mo. banc 2000); *State v. Moss*, 10 S.W.3d 508, 511 (Mo. banc 2000). This Court's rules encourage evidentiary hearings. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002), *citing Rule 29.15(h).* Nothing in the text of Rule 29.15 suggests that the pleading requirements are to be construed more narrowly than other civil pleadings. *Wilkes, supra.* "An evidentiary hearing may only be denied when the record

conclusively shows that the movant is not entitled to relief." *Id*., at 928 (emphasis in original).

The motion court denied Mr. Ringo's claims of ineffectiveness, ruling that they had been decided on direct appeal (L.F. 571, 573, A-11, A-13). The court's decision directly conflicts with *Deck*, *supra*. There, this Court rejected the suggestion that a finding of no manifest injustice under the "plain error" standard on direct appeal serves to establish a finding of "no prejudice" under the test of ineffective assistance of counsel under *Strickland v. Washington*. *Deck*, *supra* at 426-27.

In *Strickland v. Washington*, 466 U.S. 668, 693 (1984), the Court decided that an outcome-determinative test cannot be applied in a post-conviction setting. In contrast, under Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. *Deck*, *supra* at 427. "Therefore, the two tests are not equivalents." *Id*. This Court found Deck's counsel ineffective for failing to object to an erroneous mitigation instruction, even though, on direct appeal, this court found that submitting that instruction did not result in manifest injustice. *Id*., at 429-31. As in *Deck*, while Mr. Ringo did not establish plain error on direct appeal, he can show that his counsel was ineffective.

Jury Question

During penalty phase deliberations, Mr. Ringo's jury asked how the counts would be carried out if it gave death on Count I, and life without parole on Count

II (D.L.F. 1579; Tr. 2432, A-15). The jury wanted to know if its verdict on Count I would be changed. *Id*. The court responded, "I can [give] you no further instructions at this time." (D.L.F. 1579). Defense counsel did not object to the court's failure to answer the question and failure to instruct the jury on the law. Mr. Ringo's appellate counsel raised the trial court's error on direct appeal. *State v. Ringo*, 30 S.W.3d 811, 818 (Mo. banc 2000). Review was limited to plain error, Rule 30.20, since trial counsel had not objected. *Ringo, supra*. Of course, "for instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error *affected* the verdict." *State v. Deck*, 994 S.W.2d 527, 540 (Mo. banc 1999). (emphasis added). Mr. Ringo could not meet this standard on direct appeal. *Ringo, supra* at 818.

Mr. Ringo's amended motion alleged that counsel ineffectively failed to object to the trial judge's response to the jury's question (L.F. 284-95). The issue then is whether counsel's inaction was reasonable and whether a reasonable probability exists that, had counsel been effective, the outcome would have been different. *Strickland; Deck, supra*. Mr. Ringo should have an opportunity to have this claim heard, showing he can meet the *Strickland* standard.

Counsel's failure is similar to that found to be ineffective in *Carpenter v. Vaughn*, 296 F.3d 138, 156-59 (3rd Cir. 2002). Carpenter was convicted of first degree murder. *Id*. During penalty phase deliberations, the jury asked: "Can we recommend life imprisonment with a guarantee of no parole." *Id*., at 156. Under

Pennsylvania law, a defendant convicted of first degree murder had to be sentenced to death or life imprisonment. *Id*. A defendant sentenced to life could not be paroled, unless the sentence was commuted by the governor to a term of years. *Id*. Nevertheless, the judge responded:

> The answer is that *simply, no absolutely not*. Moreover, ladies and gentlemen, you talk about recommendation. I don't know exactly what you mean, but I assume you remember what I told you before, that you as a jury at this point are not making a recommendation of death or life imprisonment. I hope you understand that.
>
> You folks are actually fixing the sentence, and not the Court. It is not the recommendation. Whether you mark on there death, that's the sentence and there is nothing this Court can do about it. The Court has nothing to do on it. If you mark life imprisonment, there is nothing this Court can do about it or wants to do about it, because that decision is entirely up to you as members of the jury. So, I hope you understand that it is not a recommendation, it is a sentence that will bind all of us here to whatever you fix and it's going to have to be very simply death or life imprisonment. And the question of parole is absolutely irrelevant. I hope you understand that.

Id., at 156.

Carpenter's counsel did not object, request clarification, or amplification of this response. *Id*. The Court found counsel ineffective. The judge's response was misleading and suggested that life without parole was not available under Pennsylvania law. *Id*., at 157. The jury was concerned about future parole and the judge's response gave a false and misleading message. *Id*. Assistance from counsel might have corrected the problem. *Id*., at 157-58. The failure to object fell below an objective standard of reasonableness. *Id*., applying *Strickland*, 466 U.S. at 687-96.

As in *Carpenter*, Mr. Ringo's jurors were concerned about how their sentences would be carried out. They wanted to know whether a sentence of life on Count II would cause their sentence of death on Count I to change (D.L.F. 1579). The court should have correctly responded that a sentence of life on one count would not cause a sentence of death on another count to be invalid. By refusing to answer the question, the judge left the jury confused and the result was two death verdicts. Counsel could have corrected the problem by providing the court with assistance; offering an instruction that adequately stated the law. Counsel unreasonably stood by and said nothing. Mr. Ringo was prejudiced, as the jury wanted to give life on Count II, but feared its other verdict might be changed if they did.

Prosecutor's Improper Comments and Gestures

Mr. Ringo's amended motion also alleged counsel was ineffective in not objecting or requesting appropriate relief based on the prosecutor's misconduct

during the trial (L.F. 318-26). Counsel filed a pretrial motion to prohibit improper arguments and conduct and proffered a special instruction should such improper conduct occur (D.L.F. 1203-18). According to the motion for new trial, counsel thought the prosecutor engaged in improper conduct and thought it had a prejudicial, adverse effect on the jury (D.L.F. 1638). The prosecutor was rude and inappropriate throughout the trial. *Id*. He distracted the jury during defense questioning and case presentation. *Id*. He whispered loudly about sketches seized from Mr. Ringo's bedroom, saying they showed Mr. Ringo was violent, with an affinity for guns (D.L.F. 1638, L.F. 322).

Nevertheless, counsel did not object to the improper conduct during the trial when it happened, but raised the error for the first time in Mr. Ringo's new trial motion. Mr. Ringo's amended motion alleged that counsel's failure to object was unreasonable and prejudicial (L.F. 318-26).

Yet the motion court denied a hearing on this claim, ruling that it had been decided on direct appeal (L.F. 571, 573, A-11, A-13). The findings are clearly erroneous. Mr. Ringo's direct appeal did not address the prosecutor's improper gestures and comments raised in the amended motion. *State v. Ringo*, 30 S.W.3d at 820-22. Even if the claims had been raised on direct appeal, the standard of review for improper argument, made without objection, would be for plain error. *Deck, supra*.

The motion court clearly erred in equating the review for plain error on direct appeal with the issue of whether counsel was ineffective in failing to object

to the court's response to the jury and failure to object to improper prosecutorial misconduct. This Court should reverse and remand for an evidentiary hearing on these issues.

V. Rule 29.15(e): Amended Motion Must Raise Additional Claims

The motion court clearly erred in proceeding on Mr. Ringo's amended motion and not considering his *pro se* claims because this violated his rights under Rule 29.15(e), to due process, a full and fair hearing, and freedom from cruel and unusual punishment and effective counsel under U.S. Const., Amends. VIII and XIV in that counsel failed to include all claims known to movant as required by Rule 29.15(e) and Mr. Ringo notified the Court that he wanted all his claims heard.

Mr. Ringo filed a *pro se* Rule 29.15 motion that raised 15 claims:

1) counsel failed to object to prosecutor being disrespectful;
2) his two attorneys were not present when the jury was sworn;
3) counsel failed to investigate Quentin Jones and his criminal background of violence against women, and that Jones acted on his own, not under Mr. Ringo's direction;
4) counsel agreed to a change of venue to a racially motivated community;
5) counsel failed to call Dr. Draper to discuss his childhood;
6) counsel failed to hire an independent medical examiner;
7) prosecutor mischaracterized in-concert liability and reasonable doubt;
8) court admitted a bullet proof vest that was not used in the crime;
9) Mr. Ringo's statements to police were involuntary;
10) counsel failed to object to improper arguments;

11) counsel failed to investigate and present Mr. Ringo's mental state and mental illness;

12) counsel failed to call an attorney, who came to the police station, but was not allowed to see Mr. Ringo, to support motion to suppress;

13) court refused to answer jury's question;

14) state improperly struck Ms. Boyd, an African American; and

15) the instructions regarding aggravators did not narrow the class of people eligible for the death penalty.

(L.F. 7-65).

Pursuant to Rule 29.15(e) (A-17 – A-18), the court appointed counsel to represent Mr. Ringo (L.F. 66). They initially had two tasks:

> Ascertain whether sufficient facts supporting the claims are asserted in the motion and whether movant has included all claims known to movant as a basis for attacking the judgment and sentence.

Rule 29.15(e). If the *pro se* motion had insufficient facts or did not include all claims known to movant, counsel was required to "file an amended motion that sufficiently alleges the *additional* facts and claims." *Id.* (emphasis added).

Appointed counsel did not comply with Rule 29.15(e). Rather, they filed an amended motion that raised only five claims: 1) counsel did not investigate and call mental health experts in a pretrial suppression hearing, and in both guilt and penalty phases; 2) counsel did not object and request appropriate relief when the

jury asked what would happen if it gave life on one count and death on the other; 3) counsel agreed to a change of venue to a county where African-Americans were underrepresented in juries; 4) counsel failed to properly object to the prosecutor's improper gestures and comments; and 5) lethal injection was unconstitutional (L.F. 70-342(a)).

On its face, the amended motion was inadequate, since it did not include all claims known to Mr. Ringo. The first four claims were in the *pro se* motion; the lethal injection claim was new. Despite the directive to file a motion containing additional claims and additional facts, counsel discarded numerous claims. Counsel did not even attach Mr. Ringo's pro se motion so that all his claims would be properly before the court. *See Reynolds v. State*, 994 S.W.2d 944 (Mo. banc 1999) (Stapling photocopies of *pro se* motion to amended motion did not violate rule prohibiting incorporation by reference of material from prior motions).

The motion court ruled the amended motion was inadequate, and denied an evidentiary hearing on claims 8(b), 8(c), and 8(d) (L.F. 375). Thus, counsel proceeded on a single claim, the failure to investigate and present expert testimony (8(a)) (H.Tr. 3).[6]

Mr. Ringo did everything he could to have his claims heard. On November 15, 2001, he filed a *pro se* application for writ of habeas corpus ad testificandum

[6] Counsel presented no testimony to support the challenge to lethal injection, claim 8(e) of the amended motion.

to produce a witness to prove his *pro se* claims (L.F. 380-82). He followed this application by asking for confirmation that it had been submitted (L.F. 383). Yet counsel ignored his wish. Counsel continued to ignore him, even proceeding without Mr. Ringo at the evidentiary hearing, although the court was willing to allow his presence (H.Tr. 2, 227, 408). Mr. Ringo again asked to be heard. He wrote to the court asking that his *pro se* claims be heard or, alternatively, for a hearing on counsel's actions (L.F. 420-437). He tried to raise claims regarding counsel's ineffectiveness in failing to object to improper victim impact testimony and the faulty definitions of the mental states in the homicide statutes (L.F. 421-37). The motion court read his letter into the record (H.Tr. 411-12), but then deferred to postconviction counsel, who did not want the court to take further action (H.Tr. 412). Excluded from the hearing, his claims omitted from the amended motion, Mr. Ringo could only write to the court, and plead that his claims be heard (L.F. 575, 577-79).[7] They were not. The motion court denied relief on the five claims in the amended motion, having heard evidence on a single claim (L.F. 561-74, A-1 – A-14). The motion court clearly erred.

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Hall v. State*, 16

[7] Mr. Ringo did everything possible to have his claims heard, as did the petitioner in *Clemmons v. Delo*, 124 F.3d 944, 948, 953-55 (8th Cir. 1997). Thus, his claims should be heard.

S.W.3d 582, 585 (Mo. banc 2000); *Rule 29.15(k).* Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

Rule 29.15(e) explicitly requires counsel to file an amended motion if a *pro se* motion does not: 1) include all claims known to movant, or 2) include sufficient facts to support the claims. The amended motion can raise *additional* facts and claims, but the Rule provides counsel no authority to delete claims. Rule 29.15(e)'s inclusive nature is appropriate, since any claims not included in a timely filed pleading are waived. *Winfield v. State*, 93 S.W.3d 732, 737 (Mo. banc 2002); and *Barnett v. State*, 103 S.W.3d 765, 773 (Mo. banc 2003). Furthermore, since a movant has no right to challenge the effectiveness of his post-conviction counsel, *Id*., all claims known to movant must be included in properly-filed pleadings.[8]

[8] Ironically, Mr. Ringo would have been in a better position had counsel filed no amended motion at all. Under Rule 29.15(e), counsel would have been required to file a statement that all facts supporting the claims were included in the *pro se* and all claims known to Mr. Ringo were included in the *pro se*. Then Mr. Ringo could have responded to the statement. *See, McDaris v. State*, 843 S.W.2d 369, 371, n.1 (Mo. banc 1992), overruled on other grounds in *State v. Carson*, 941 S.W.2d 518, 523 (Mo. banc 1997).

The motion court clearly erred in proceeding on this amended motion, which did not comply with Rule 29.15(e). Mr. Ringo notified the court that the amended motion did not include all the claims known to him and that he wanted his *pro se* claims considered. The court had a duty to either rule on the *pro se* claims or conduct a hearing to determine whether counsel had failed to include all claims known to movant, in violation of Rule 29.15(e). Alternatively, the court could have allowed Mr. Ringo to proceed *pro se* and hear all of his claims. *Bittick v. State*, 2003 W.L. 1698217, ___ S.W.3d ___, W.D. No. 60885 (Mo. App., W.D. April 1, 2003) (motion court erred in denying Bittick's motion to disqualify appointed 29.15 counsel and to proceed *pro se*).

Rule 29.15(e) is similar to New Jersey's Rule governing post-conviction relief. Rule 3:22-6, like Rule 29.15(e), provides mandatory appointment of counsel. *State v. Rue*, 811 A2d 425, 427 (N.J. 2002). Counsel cannot withdraw because the petition lacks merit. *Id*. Counsel must advance all claims the petitioner advances, even if counsel does not believe they have merit. *Id*. The New Jersey Supreme Court reversed the denial of post-conviction relief in Rue's case, because appointed counsel did not advance Rue's *pro se* claims, but told the motion court why the claims lacked merit. *Id*., at 429-31. In reversing, the Court reasoned that:

> PCR is a defendant's last chance to raise constitutional error that may have affected the reliability of his or her criminal conviction. It is not a *pro forma* ritual.

Id., at 436. Counsel must advance his client's claims and make the best supporting arguments. *Id*. Counsel may never dismiss the client's claims, negatively evaluate them, or render aid and support to the state. *Id*. The court reversed and remanded for assignment of counsel, as if on a first post-conviction petition. *Id*.

This Court should do the same. Appointed counsel violated the plain directive of 29.15(e) to include all grounds known to movant. Since Rule 29.15(e) creates a mandatory duty, due process requires that it be properly enforced and not arbitrarily denied. *Morrisey v. Brewer*, 408 U.S. 471, 481-83 (1972).

Additionally, since Mr. Ringo was sentenced to death, Rule 29.16 and Section 547.370 provide additional safeguards that should be afforded. Under the Eighth and Fourteenth Amendments, the death penalty cannot be applied in an arbitrary and capricious manner. *Deck v. State*, 68 S.W.3d 418, 430 (Mo. banc 2002); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Yet here, Mr. Ringo received no safeguards required by the Rule, let alone *additional* safeguards to ensure all his claims would be reviewed. Rather, counsel ignored his wishes and the directives of Rule 29.15(e).

Should this court affirm, Mr. Ringo would be denied his right to effective assistance of counsel on his first appeal of right. *Douglas v. California*, 372 U.S. 353, 358 (1963); *Ross v. Moffitt*, 417 U.S. 600, 607 (1974); § 600.042.4(1); and Rule 29.15(e). Since ineffective assistance claims cannot be raised on direct appeal, *State v. Wheat*, 775 S.W.2d 155, 157-58 (Mo. banc 1989), such claims

must be raised for the first time in Rule 29.15 proceedings. Due process requires that such counsel be effective. *Evitts v. Lucey* 469 U.S. 387, 393-94 (1985). Appellant recognizes that this court recently rejected this claim. *Winfield* and *Barnett, supra*. However, as Justice Konenkamp so aptly put it:

> I agree with the majority that when a habeas corpus applicant is statutorily entitled to mandatory appointment of counsel, the appointment implicitly includes the right to effective assistance of counsel. To the extent that my concurrence in Krebs can be understood to say the opposite, then I must regretfully confess my oversight. Like so many judges have said in the past in acknowledging a mistake, all I can say is that having now realized it, I choose not to remain in error.

Jackson v. Weber, 637 N.W.2d 19 (S.D. 2002) (J. Konenkamp, concurring).

The motion court clearly erred in proceeding on the amended motion that did not include all claims known to Mr. Ringo. This Court should reverse the denial of post-conviction relief and remand for the assignment of new counsel as if on the first post-conviction petition, or, alternatively, proceed on all of his *pro se* claims.

CONCLUSION

Based on the arguments in Point I, Mr. Ringo requests a new trial; Point II, a new penalty phase; Points III and IV, a remand for an evidentiary hearing; and Point V, a remand for the assignment of new counsel as if on the first post-conviction petition, or, alternatively, a remand with instructions to proceed on all of his *pro se* claims.

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 18,342 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in June, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of June, 2003, to John M. Morris, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

_____
Melinda K. Pendergraph