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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

The original Jurisdictional Statement is incorporated by reference.

STATEMENT OF FACTS

Respondent's Statement of Facts does not comply with Rule 84.04(c) as it does not include the facts relevant to questions presented for determination on this post-conviction appeal. Rather, eleven of the twelve pages focus exclusively on the evidence adduced at trial and only the final four sentences refer to the 29.15 proceedings (Resp.Br.7-18).

POINTS RELIED ON

I. Expert Testimony Regarding Diminished Capacity

The motion court clearly erred in denying relief because Earl 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 Earl's diminished capacity during the crime. Had counsel acted reasonably, an expert, like Dr. Smith, would have testified that Earl suffered from Post-Traumatic Stress Disorder, Depression, and a learning disability, and reacted impulsively, based on past abuse and recurring trauma, when he shot Mr. Poyser. The evidence would have supported counsel's defense that Earl did not deliberate and was guilty of second degree murder.

Wiggins v. Smith, 123 S.Ct. 2527 (2003);

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

Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995);

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

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

Rule 29.15.

II. Expert Testimony Providing Mitigation

The motion court clearly erred in denying relief because Earl 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 Earl'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 Earl's childhood abuse, his alcoholic father, and these factors' impact on his development. The jury would have known that Earl suffered from Post-Traumatic Stress Disorder, Depression, and a learning disability, and that he reacted impulsively, based on past abuse and the recurring trauma, when he shot Mr. Poyser. The evidence would have provided mitigation and reasons for the jury to sentence Earl to life.

Wiggins v. Smith, 123 S.Ct. 2527 (2003);

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

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

Ouber v. Guarino, 293 F.3d 19 (1st Cir.2002);

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

Section 565.032; and

Rule 29.15.

III. Jury Claim Adequately Pled

The motion court clearly erred in denying Claim 8(c) relating to counsel's agreement to change venue, because the ruling denied Earl 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 Earl, since he was tried by an all-white jury and was more likely to be sentenced to death and convicted for the killing of white victims.

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

Georgia v. McCollum, 505 U.S. 42 (1992);

Riley v. Taylor, 277 F.3d 262 (3rd Cir.2001);

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

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

Harper Lee, *To Kill a Mockingbird*, 233 Warner Books (1960); and

Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, Chi. Trib., Nov. 14, 1999, Sec. 1, p.16.

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

The motion court clearly erred in proceeding on Earl'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 Earl notified the Court that he wanted all his claims heard.

Fields v. State, 572 S.W.2d 477 (Mo.1978);

Hutchison v. Cannon, 29 S.W.3d 844 (Mo.App.S.D.2000);

Murray v. Missouri Highway and Transp. Com'n, 37 S.W. 3d 228 (Mo. banc 2001);

Hovis v. Daves,14 S.W.3d 539 (Mo.banc 2000)

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

Rules 29.15 and 55.03.

ARGUMENT

I. Expert Testimony Regarding Diminished Capacity

The motion court clearly erred in denying relief because Earl 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 Earl's diminished capacity during the crime. Had counsel acted reasonably, an expert, like Dr. Smith, would have testified that Earl suffered from Post-Traumatic Stress Disorder, Depression, and a learning disability, and reacted impulsively, based on past abuse and recurring trauma, when he shot Mr. Poyser. The evidence would have supported counsel's defense that Earl did not deliberate and was guilty of second degree murder.

Did the motion court clearly err in finding counsel effective, despite her failure to investigate and present evidence of Earl's diminished capacity, his Post-Traumatic Stress Disorder, Depression, and learning disability? Rather than address this finding, the State argues the credibility of experts testifying at the 29.15 hearing (Resp.Br.at 20-24). The State's argument might make a nice closing argument before a jury, but does not respond to the issue facing this Court, the motion court's error.

Jury Should Decide Credibility of Experts

In deciding counsel's ineffectiveness, the Court asks whether counsel performed deficiently and if the unreasonable performance prejudiced the defendant. *Williams v. Taylor,* 529 U.S. 362 (2000); *Wiggins v. Smith,* 123 S.Ct. 2527,2535 (2003). To prove prejudice, Earl must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*., at 2542. In assessing prejudice, the reviewing court should look to how the *jury* would have considered the evidence. *Id*., at 2543. Thus, in *Wiggins*, the Court held:

> Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability *that at least one juror* would have struck a different balance. *Cf. Borchardt v. Maryland*, 367 Md. 91, 139-140, 786 A.2d 631, 660 (2001) (noting that as long as a single juror concludes that mitigating evidence outweighs aggravating evidence, the death penalty cannot be imposed) . . .

123 S.Ct. at 2543 (emphasis added). Similarly, in determining prejudice from the State's failure to disclose *Brady* material, the reviewing court should ask how the jury would have considered the evidence, not a post-conviction court's credibility determination. *Kyles v. Whitely,* 514 U.S. 419,449, n.19 (1995). There, the majority ruled:

> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles' postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Post, at 1583-1584. Of course neither observation could possibly have affected *the jury's appraisal* of Burns's credibility at the time of Kyles's trials.

Id. (emphasis added); *see also, Antwine v. Delo,* 54 F.3d 1357,1365 (8th Cir. 1995) (a reviewing court should be "concerned, then, with whether the jury- not the motion court – would have found the evidence credible").

The jury never heard evidence that Earl suffered from severe mental disorders, Post-Traumatic Stress Disorder, Depression, and a learning disability. In deciding whether he could deliberate, the jury could not consider how Earl's mental problems impacted him. A jury should decide whether such evidence was persuasive and credible, and consider the demeanor and qualifications of the respective experts. This jury never had the chance.

Motion Court Did Not Address Experts' Credibility

The motion court made no credibility findings regarding the experts at the 29.15 hearing. It never mentioned Dr. Kline's testimony and only briefly mentioned Dr. Smith:

> 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). Although the motion court never determined whether Dr. Smith was credible, the State now asks this Court to make that finding. The State's invitation is contrary to well-established law. The motion court, not the appellate court, must determine witnesses' credibility. *Gallimore v. State*, 660 S.W.2d 458, 459 (Mo.App.S.D.1983); and *Bradley v. State*, 494 S.W.2d 45,48 (Mo. 1973).

The motion court had the opportunity to observe both experts testify and consider their experience (H.Tr.116-220,414-560,562-662,Resp.Ex.D). The court knew that Dr. Smith had nineteen years experience as a clinical psychologist, spent the last ten years working with children and treated hundreds of children who suffered from PTSD, due to childhood abuse (H.Tr.116-20,562-65). In contrast, Dr. Kline received his doctorate in December, 1996 and had only become a certified forensic examiner in 1999, nearly a year after the crime (H.Tr.419-22). He estimated that he treated 30-50 patients with PTSD and had worked on only one or two cases raising the issue of diminished capacity (H.Tr.421-22,518).

Dr. Kline admitted that the testing he administered, and that of Dr. Briggs, Dr. Smith and the Department of Corrections showed valid responses and

indicated that Earl had experienced significant trauma (H.Tr.440,441,443, 446). Dr. Kline disregarded all this objective data in reaching his diagnosis, saying it was not "determinative" or a "definitive measure" (Tr. 441). Dr. Kline's diagnosis of no mental disease differed from Dr. Smith, and Dr. Selbert, who works for the Department of Corrections (H.Tr.577-78). Dr. Selbert found chronic depression and described symptoms consistent with PTSD, even though he lacked background material demonstrating trauma and abuse. *Id*.

Perhaps the court did not mention Dr. Kline in its findings, because he was inexperienced, he disregarded objective data, and other evidence in the record refuted his diagnosis. Whatever the reason, the motion court did not see fit to mention Dr. Kline. This Court should reject the State's invitation to decide that Dr. Kline is credible and Dr. Smith is not.

State's Effort to Discredit Mental Illness Is Not Convincing

Evaluation Conducted Post-Trial

The State criticizes Dr. Smith, "who only met appellant after he was convicted in preparation for his post conviction action" (Resp.Br.at20).[1] The Eighth Circuit addressed this precise issue in *Antwine v. Delo*, *supra* at 1365-66. There, examinations conducted *several years after the offense at the request of post-conviction counsel* produced evidence that Antwine suffered from bipolar

[1] The same criticism could be leveled at Dr. Kline, the State's expert at the 29.15 hearing.

disorder. *Id*. at 1365. The motion court found the diagnosis not credible, because it was based on an exam conducted five years past the offense. *Id*. at 1366.

The Court rejected the motion court's credibility determination. *Id*. Had counsel been effective, the examination would have been completed shortly after the offense. *Id*. To prove prejudice from the failure to conduct an appropriate investigation, post-conviction counsel must obtain the evaluation that trial counsel should have obtained before trial. *Id*. The question for a reviewing court is whether the failure to present the evidence undermines its confidence in the proceeding. *Id*.

As in *Antwine*, counsel failed to evaluate Earl for PTSD and other psychological disorders. The evidence of severe trauma and its impact on Earl was substantial. Counsel's failure to investigate and present this evidence in support of her defense that Earl did not deliberate undermines confidence in the proceeding.

Dr. Briggs Hired to Test for Brain Damage Not Other Mental Disorders

The State's argument repeatedly relies on counsel's having hired Dr. Briggs to test for brain damage, as if this one act made counsel effective (Resp.Br.at22-23,26,27). The State ignores that Dr. Briggs' expertise was in assessing brain function, and he was not hired to assess, or rule out other psychological disorders (Resp.Ex.B at 4).

Dr. Briggs thought "it might be prudent for a clinical psychologist who specializes in interpretation of [MMPI-2] to review the results." *Id*. He also

observed symptoms warranting further evaluation, like Earl's hyperactivity, agitation, impulsivity, emotional lability, and view that relationships are threatening and harmful. *Id*. Dr. Briggs could not rule out mental illnesses, like Bipolar Disorder. *Id*. at 5. The Pk scale on the MMPI-2 was elevated and beyond the recognized clinical cut-off. *Id*. Dr. Briggs found "evidence of the presence of Post-Traumatic Stress Disorder." *Id*.

Nonetheless, counsel did not follow-up on Dr. Briggs' findings and arrange additional testing of Earl's mental state. They did not obtain his raw test data or adequately discuss his findings. They did not understand the need for additional testing. Counsel simply had Dr. Briggs test for brain damage, and when those results were negative, did nothing more to investigate and discover Earl's mental problems.

The State suggests that, by hiring Dr. Briggs, all counsel's decisions were reasonable (Resp.Br.at 26). Under the State's theory, the hiring of any mental health expert would insulate an attorney's subsequent behavior from challenge. *Id*. The Supreme Court ruled otherwise in *Wiggins v. Smith*.

Wiggins' counsel hired a psychologist who tested Wiggins and concluded he had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder. *Id.* at 2536. Counsel reviewed a written PSI that referenced Wiggins' "misery as youth" and he spent most of his life in foster care. *Id.* Counsel also obtained social service records documenting Wiggins' foster care placement. *Id.* This investigation was insufficient. *Id.* at 2536-38.

Counsel had a duty to pursue leads to make informed choices about how to proceed and what evidence to present. *Id.*

When assessing the reasonableness of an attorney's investigation, a court must not only consider the quantum of evidence known to counsel, but whether the known evidence would lead a reasonable attorney to investigate further. *Id.* at 2538. Wiggins' counsel failed to follow-up on leads and never discovered readily available evidence of severe physical and sexual abuse. *Id.* The Sixth Amendment guarantee of effective assistance requires counsel to "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 123 S.Ct. at 2537 (emphasis in original).

Like *Wiggins*, here, counsel hired an expert who found features of a personality order, evidence of PTSD, and other mental disorders. Counsel knew that Earl scored high on the Pk scale and evidenced PTSD (H.Tr.258). Counsel knew that Dr. Briggs' testimony was limited and that additional testing was needed (H.Tr.258).

Dr. Briggs' information, records and interviews revealed that Earl suffered an enormous amount of trauma as a child (Ex.5,6). William Vaughn, the boyfriend of Earl's mother, kicked, punched, and beat him (Ex.5,at 3-5,12,18-20,22). The beatings were severe, he pounded his head with an aluminum baseball bat, hit him with a pick comb until his head bled, and threw him across the room. *Id*. Vaughn also abused Earl's sister and his mother (Ex.5 at 4).

Counsel learned about much of this information just before trial (H.Tr.255-56,315). Dempsey's final report was completed only ten days pre-trial (Ex.6,Tr.479). Counsel thought an evaluation was necessary (H.Tr.259), since she had witnessed disturbing symptoms herself - Earl seemed restless, frightened, guarded, fidgety, depressed, had bad memories of his childhood, did not want to discuss traumatic events, had nightmares, and difficulty trusting others (H.Tr.300) (H.Tr.245-47,253,262,300-01).

Under *Wiggins*, the issue is whether this known evidence of trauma and likelihood of mental problems would have led a reasonable attorney to investigate further. Counsel had a duty to pursue these leads, to discover readily available evidence to support her defense that Earl did not deliberate. She did not only because trial approached and she believed the court would deny a continuance (H.Tr.259). Counsel was ineffective. All the signs of mental problems were there; she simply failed to investigate them. The only real issue is prejudice.

Prejudice

The State argues that Earl was not prejudiced because Dr. Smith could have been impeached and the jury's verdict shows they rejected Earl's defense that he was startled when Mr. Poyser rushed toward him (Resp.Br.at 28-30). The motion court, however, did not base its decision on the likelihood that the jury would not have believed Dr. Smith. The court found that since the defense "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," counsel was not ineffective (L.F.573,A-13).

Producing "some evidence" was insufficient, since additional evidence was readily available. *Wiggins, supra*. Counsel recognized that only Earl's statement to police supported her defense (H.Tr.314). Thus, while she argued "no deliberation," she had no evidence to support a diminished capacity defense, since she had not requested an evaluation (H.Tr.314). And, without expert testimony, she could not proffer an instruction on diminished capacity. *See*, *Nicklasson v. State*, 105 S.W.3d 482,484-85 (Mo.banc2003) and other cases discussed in appellant's original brief.

In assessing prejudice, the motion court looked only at what counsel presented at trial. However, a reviewing court must "evaluate the totality of the evidence - - 'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Wiggins, supra* at 2543, quoting *Williams v. Taylor*, 529 U.S. at 397-98 (emphasis in opinion).

The only evidence presented at trial was Earl's statement to police that Mr. Poyser scared him when he rushed towards him (Tr.2027). However, the evidence at the post-conviction hearing included Earl's childhood trauma and its psychological impact on him. 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. Vaughn raped his mother in front of Earl.

He forced Earl to feed a naked woman who had been tied to a chair in the basement. Surely, jurors would have recognized the lasting impact of this abuse.

Expert testimony revealed that Earl learned to view the world as violent and dangerous. He reacted defensively. He had PTSD, Depression and a learning disability. Because of years of abuse, when Mr. Poyser came at him, Earl overreacted to a perceived threat. His reaction was impulsive, not deliberate. Thus, objective evidence supported counsel's argument that Earl did not deliberate. Without this evidence, the prosecutor discounted Earl's statement as self-serving:

> Let me tell you something, ladies and gentlemen. This thing, this claim he made to detectives when they caught up with him in Indiana about Poyser rushing him is ludicrous. That's a joke. That didn't happen. There's no evidence of it. There's no self-defense in this case. Okay?

(Tr.2158).

Defense counsel later explained that this was not a case of self-defense (Tr.2168). She again argued that Mr. Poyser came toward Earl and he "reacted" (Tr.2169). But, as the prosecutor told the jury, counsel's argument was not evidence, and to accept the defense argument, the jury had to rely on what Earl told them (Tr.2185).

Contrary to the State's argument (Resp.Br.at 27,n.4), *Boyko v. Parke*, 259 F3d 781,784 (7thCir.2001) is instructive. It shows that failing

to present evidence of PTSD due to childhood sexual abuse can be ineffective. *Id*. at 784-86. *Boyko* also reveals that seemingly overwhelming evidence of deliberation takes on a whole new light when considering a defendant's PTSD. Boyko obtained a gun, lured the victim to a secluded area, shot him in the chest, put him in the trunk, and fled. *Id*. at 783. Nevertheless, the Seventh Circuit remanded for a hearing on counsel's ineffectiveness for not presenting evidence of Boyko's PTSD. *Id*. at 784.

Like *Boyko*, Earl suffered PTSD, resulting 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. The jury should have considered this evidence to determine whether Earl deliberated when he shot Mr. Posyer.

Even had the jury rejected this evidence in guilt phase, it could and should have considered it in deciding whether death was warranted and in considering mitigating circumstances (D.L.F.1588,1589). Both instructions tell the jury that in deciding these questions, "you may consider all the evidence presented in both *guilt* and the punishment stages of trial." *Id*. (emphasis added).

The jury considered life for one count, where Earl was not the shooter (Tr.2432,D.L.F.1579). Had counsel provided mitigating reasons for the shooting he did, the jury likely would have considered life on this count too. A reasonable

probability exists “that at least one juror would have struck a different balance.” *Wiggins*, at 2543. A new trial should result.

II. Expert Testimony Providing Mitigation

The motion court clearly erred in denying relief because Earl 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 Earl'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 Earl's childhood abuse, his alcoholic father, and these factors' impact on his development. The jury would have known that Earl suffered from Post-Traumatic Stress Disorder, Depression, and a learning disability, and that he reacted impulsively, based on past abuse and the recurring trauma when he shot Mr. Poyser. The evidence would have provided mitigation and reasons for the jury to sentence Earl to life.

The State acknowledges that the Supreme Court recently found counsel ineffective for failing to investigate and present mitigating evidence in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) (Resp.Br.at 37). It argues, however, that *Wiggins* is not controlling. *Id*. Appellant disagrees.

Duty to Discover All Reasonably Available Mitigating Evidence

Wiggins' counsel investigated mitigating circumstances. They discovered that, at 27, Wiggins had no prior convictions. *Id*. at 2532. Counsel hired a

psychologist who tested Wiggins, finding he had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder. *Id.* at 2536. Counsel reviewed a written PSI that referenced Wiggins' "misery as youth," his description of his "disgusting" background, and that he spent his life in foster care. *Id.* Counsel tracked down social service records documenting foster care placement. They revealed that Wiggins' mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed emotional difficulties; Wiggins had frequent lengthy absences from school; Wiggins' mother once left him and his siblings alone for days without food. *Id*. at 2537. Counsel also consulted with a criminologist, who testified about inmates serving life sentences, their adjustment and lack of future violence. *Id*. at 2538.

This investigation was insufficient. *Id.* at 2536-38. The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence." *Id.* at 2537 (emphasis in original). When assessing the reasonableness of an attorney's investigation, a court must consider the quantum of evidence known to counsel, and whether that evidence would lead a reasonable attorney to investigate further. *Id.* at 2538. Counsel had a duty to pursue leads to make informed choices about how to proceed and what evidence to present. *Id.* Wiggins' counsel failed to pursue leads and never discovered readily-available evidence of severe physical and sexual abuse. *Id.*

Like *Wiggins*, Earl's counsel did some investigation, although most of it was last minute, right before trial. Two months pre-trial, counsel hired a

childhood development expert who investigated and provided her opinions about Earl's alcoholic father, his death, Vaughn's subsequent abuse, and Earl's mother's mental problems. Counsel's investigator discovered much physical abuse and trauma, but reported this just shortly before trial. Like *Wiggins*, counsel was on notice of childhood abuse and psychological problems.

The State argues that this Court should look simply at what counsel knew (Resp.Br.at 37). The Supreme Court rejected this approach. When assessing the reasonableness of counsel's investigation, this Court must not only consider what counsel knew, but whether it would lead a reasonable attorney to investigate further. *Wiggins,* at 2538. Like Wiggins' counsel, Earl's counsel failed to pursue leads and never discovered readily-available evidence of severe psychological impairment. *Id.*

Without A Full Investigation, Court Will Not Defer to Counsel's "Strategy"

The State and the motion court reasoned that counsel made a strategic decision not to call Dr. Draper or to obtain an evaluation based on the trauma Earl suffered, once "Brigg's evaluation did not turn out as she thought it might." (L.F.572-73, Resp.Br.at 33-35). As discussed in Point I, since counsel did not follow-up on the leads from Dr. Briggs' evaluation that Earl likely suffered from mental illness and PTSD, no "strategic" cloak can protect this failure to act.

Wiggins' counsel testified that, well before trial, they decided to focus their efforts on "retrying the factual case" and disputing Wiggins' direct responsibility for the murder. 123 S.Ct at 2533. Counsel testified that he knew about the sexual

and childhood abuse, including a hand-burning incident. *Id*. at 2539. Counsel hired a psychologist, investigated social service records, and obtained a PSI documenting Wiggins' troubled childhood. *Id*. at 2536. The Court rejected the argument that counsel acted reasonably and made a reasoned strategic judgment not to present evidence of Wiggins' abusive childhood. *Id*. at 2537-38.

The record at sentencing underscored that counsel's conduct was unreasonable. Counsel's opening told the jury it would "hear that Kevin Wiggins has had a difficult life." *Id*. at 2538. Yet, they never presented details of his childhood, but presented a "halfhearted" mitigation case, calling a criminologist to testify about inmates' adjustment to prison, and Wiggins' lack of criminal history. *Id*. The record demonstrated the "strategic decision" to limit their pursuit of mitigation was more a "*post-hoc* rationalization" "than an accurate description of their deliberations prior to sentencing." *Id*.

Here, counsel told jurors they would hear from a childhood development expert, Dr. Wanda Draper (Tr.729).[2] In her opening, counsel told jurors "before you make a decision about what kind of punishment a person should receive, that you would want to hear everything that you could about that individual. And I'm hoping, through Earl's family members, to be able to provide that for you, so that

[2] Promising testimony and then not delivering it can constitute ineffective assistance of counsel. *Ouber v. Guarino*, 293 F.3d 19, 27-28 (1st Cir. 2002).

you know everything that we can give you about Earl Ringo before you make this extremely serious decision" (Tr.2282).

Through family members, counsel tried to elicit details of Earl's father's alcoholism and its impact on him (Tr.2346,2367). She tried to show the negative impact of Vaughn's abuse once the family escaped to Indiana (Tr.2352-54,2382,2387). However, the family members minimized the father's drinking and the impact of abuse. *Id*.

Carletta suggested Earl was a good student, making A's and B's (Tr.2354). His school records showed he made mostly C's, D's, and F's, being held back repeatedly (Exs.7-8,H.Tr.71). He was 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 Earl struggled in school, because counsel presented a "halfhearted mitigation case" and later rationalized her actions as "strategic."

Counsel testified she decided not to call Dr. Draper because she wanted to focus on Carletta and was unsure if their testimony would fit together (H.Tr.381). Counsel never explained why the two were incompatible. As in *Wiggins*, at 2542, the "two sentencing strategies are not necessarily mutually exclusive." Likewise, counsel did not follow her purported strategy. Carletta's testimony was brief (Tr.2341-56), like all the penalty phase witnesses. Like the rest, she testified about Earl and how much she loved him. Counsel's focus at trial was not Carletta.

Strategy Must Be Reasonable

Even if counsel correctly thought Carletta's testimony conflicted with Dr. Draper's, it was unreasonable not to present compelling mitigating evidence of Earl's horrific abuse and its impact on him. *Simmons v. Luebbers*, 299 F.3d 929,936-38 (8th Cir.2002) (counsel's decision to focus on client's mother and her love for Simmons was unreasonable in light of abusive childhood and mental problems).[3] As in *Simmons*, calling Carletta to plead for her son's life was insufficient. Carletta loved her son, just as Simmons' mother loved him. Yet, both minimized the abuse and its impact on their sons. Earl's jury was misled to believe that he was just fine after the abuse. The jury never heard why he committed this crime.

[3] The State again argues this case is distinguishable, because Simmons' counsel presented only one witness, while Earl's counsel presented four (Resp.Br.at 36). The Supreme Court has rejected a simple counting analysis. It found counsel ineffective in *Williams v. Taylor*, 529 U.S. 362 (2000), although he called four witnesses. The issue is not how many witnesses counsel called, but whether counsel conducted a thorough investigation and discovered all readily-available mitigation.

Prejudice

Dr. Draper

The State suggests that Earl was not prejudiced, because Dr. Draper's testimony would have conflicted with Carletta's (Resp.Br.at 34). Had Dr. Draper testified, the jury might have learned that Carletta was not a good mother, neglected her children, and Earl struggled in school. *Id*. In other words, the jury would have learned the truth, that abuse and neglect did not begin, or end, with William Vaughn. The house was filthy, the children were dirty and poorly dressed (H.Tr.41,48, 89-90). School officials knew they were given inadequate care (H.Tr.41). Earl's parents often fought in front of the children (H.Tr.40,Ex.1,at 1-2,Ex.6,at 4,5-6,8,10, 14). These fights resulted in bloody injuries (Ex.6,at 10).

Jurors would have learned of Earl's paternal family history of alcoholism (H.Tr.37-38,44,47-48). Earl felt abandoned when his father died, but was forced to push back his feelings (H.Tr.44,57-58).

Dr. Draper would have provided details about William Vaughn, his abuse, and the environment in which Earl lived (H.Tr.59-60,93). Vaughn turned the Ringo house into a place for sex, drugs and alcohol (H.Tr.61-63). Prostitutes controlled the house and the Ringo children (H.Tr.62). Vaughn demanded Tonya and Earl hustle for him and if Earl did not make his quota, Vaughn beat him (H.Tr.62,64). Vaughn threatened to kill Carletta and the children, so Earl felt helpless and afraid (H.Tr.63, 67).

The jury could have heard about the lack of stability in his life. Carletta sold the house and spiraled from apartments, to motels, to brothels (H.Tr.65,95). They lived in roach-infested filth without clean clothes or adequate food (H.Tr.66). Earl's mother left them alone for days and constantly exposed them to strangers (H.Tr.66). Vaughn forced Earl to feed a naked woman, tied up in the basement and severely beaten, because she owed Vaughn money for drugs (H.Tr.68-69).

Earl tried to protect his mother when she was beaten and raped (H.Tr.67). His goal in life was to survive, not to attend school or play, like normal children (H.Tr.67). Even, after they escaped to Indiana, Carletta was not there for him because she became involved with another man, who was like Vaughn (H.Tr.77,98). Dr. Draper concluded that Earl's emotional development was stunted, because of his alcoholic father and the childhood abuse he suffered (H.Tr.79,80-83,Ex.1-4A).

Dr. Smith

The jury never heard about Earl's mental disorders, PTSD, Depression, and learning disability (H.Tr.157-58,163). These mental defects impacted Earl and his moral culpability (H.Tr.163). The State argues that Earl was not prejudiced because Dr. Smith was incredible (Resp.Br.at 38).[4] This ignores that without such

[4] As discussed in Point I, the jury should have had the opportunity to decide Dr. Smith's credibility.

expert testimony, the jury could not consider statutory mitigators, like "extreme mental or emotional disturbance" and "substantial impairment of his capacity to appreciate the criminality of his conduct." Sections 565.032.3 (2) and (6); *State v. Richardson*, 923 S.W.2d 301, 325-26(Mo.banc1996).

Had counsel presented all reasonably available mitigating evidence, the jury likely would have considered imposing a life sentence. Without it, they considered life on one count. A reasonable probability exists "that at least one juror would have struck a different balance." *Wiggins*, at 2543. 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 change, because the ruling denied Earl 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 Earl, since he was tried by an all-white jury and was more likely to be sentenced to death and convicted for the killing of white victims.

A trial of an African-American defendant by an all-white jury is one of our most enduring symbols of injustice. Harper Lee, *To Kill a Mockingbird,* 233 Warner Books (1960). Wrongful convictions and death sentences by all-white juries continue today. Twenty-two percent of all African-Americans sentenced to death in Illinois between 1977 and November, 1999 were tried by all-white juries. Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, Chi. Trib., Nov. 14, 1999, Sec. 1, p.16. Since jurors have much discretion in death penalty

proceedings, "there is a unique opportunity for racial prejudice to operate but remain undetected . . . The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Turner v. Murray*, 476 U.S. 28, 35 (1986).

The State ignores the risk of prejudice identified in *Turner* and suggests that, to prove prejudice, Earl must show that a "biased juror sat on his case." (Resp.Br.at 41-43). How would Earl prove one of the twelve white jurors in his case was biased? The State would require the white juror to admit that prejudice during voir dire (Resp.Br.at 43). The State ignores that "*unconscious* racism can affect the way white jurors perceive minority defendants and the facts presented at their trials . . ." *Georgia v. McCollum*, 505 U.S. 42,69 (1992) (O'Connor, J., dissenting) (emphasis added).

The State cited the *Mallett* cases, but they are not controlling (Resp.Br. at 43). In *Mallett v. State*, 769 S.W.2d 77 (Mo.banc1989) and *State v. Mallett*, 732 S.W.2d 527,540 (Mo.banc1987), the issue was whether Mallett was denied due process by a change of venue to an all-white county. Thus, Mallett had to prove he was denied a "fundamentally fair trial." The voir dire examination was relevant to that claim. *Mallett*, 769 S.W.2d at 79. The jurors' responses, regarding their ability to be fair, provided evidence that they were not motivated by racism. *Id*.

Here, however, the issue is trial counsel's ineffectiveness in *agreeing* to a change of venue to a county with a history of under-representing African-Americans. Attorneys from counsel's own office were challenging selection

proceedings in that county (D.L.F.683). Earl need not prove that a biased juror sat on his case. He must only plead and then prove deficient performance and resulting prejudice--a reasonable probability of a different outcome. *Williams v. Taylor*, 529 U.S. 362 (2000); and *Wiggins v. Smith*, 123 S.Ct. 2527, 2535,2542 (2003). His motion alleged both deficient performance and prejudice.

PLEADINGS

Counsel's Deficient Performance

The amended motion pled that counsel had notice of Cape Girardeau County's 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, showing under-representation on every panel (L.F.303-06). Eleven venires had no African-Americans, even though African-Americans make up 4.5% of the county's population (L.F.303). The State concludes that these statistics were insufficient, but provides no support for its argument (Resp.Br.at 42). Two years of under-representation surely put counsel on notice that this county was not the best place to pick a jury for this interracial crime. *See*, *Riley v. Taylor*, 277 F.3d 262,281 (3rdCir.2001) (court found that evidence from the past year revealing four all-white juries in first degree murder cases was evidence of discrimination). The Riley court did not need "to have a sophisticated analysis by a statistician to conclude that there is little chance of randomly selecting four consecutive all white juries?" *Id*. Similarly, Earl's counsel did not

need a statistician to know that no African-Americans would be on this jury, given the historical record.

Prejudice

The amended motion alleged prejudice. Earl 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). These facts show a reasonable probability of a different outcome had counsel been effective and not agreed to a change of venue to a county where no African-Americans would likely serve as jurors.

The motion cited *Turner*, 476 U.S. at 33-35, which held racial attitudes and prejudices can profoundly impact capital sentencing decisions (L.F.313-14). The State ignores both *Turner* and *Azania v. State*, 778 N.E.2d 1253 (Ind.2002), discussed at length in Earl's original brief. In *Azania*, the defendant's statistical showing was not as compelling as here. There, African-Americans made up 8.5 % of the county's population, but comprised only 4.4% of the jury pool, hardly the 10 % that the State would require in every case. *Id*., at 1259. The Azania court reversed, because in a death penalty case, the Eighth and Fourteenth Amendments require a correspondingly greater degree of scrutiny. *Id*. at 1260.

Earl should have an opportunity to be heard. This Court should reverse and remand for a hearing.

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

The motion court clearly erred in proceeding on Earl'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 Earl notified the Court that he wanted all his claims heard.

Earl maintains that Rule 29.15(e) only allows appointed counsel to *add* facts to support his claim, not delete claims raised in his *pro se* motion (App.Br.at 74-81), since it provides, in relevant part:

> If the motion does not assert sufficient facts or include all claims know to the movant, counsel *shall file an amended motion that sufficiently alleges the additional facts and claims*.

(Emphasis added).

The State responds that this Court should ignore the Rule's plain language, because of Rule 29.15(g)'s directive: "[t]he amended motion shall not incorporate by reference material contained in any previously filed motion. (Resp.Br.at 55). The State's argument negates well-established principles of statutory construction.

Rule 29.15(e)'s use of "shall" created an affirmative duty on appointed counsel to include in the amended motion all claims known to movant and

"additional" facts necessary to support them. *Hutchison v. Cannon*, 29 S.W.3d 844 (Mo.App.S.D.2000) ("shall" is mandatory). Courts must follow and apply the law as written. *State ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410 (Mo.App.E.D. 2000). Statutory terms must be given their plain and ordinary meaning. *Murray v. Missouri Highway and Transp. Com'n*, 37 S.W. 3d 228 (Mo.banc2001).

Contrary to the State's argument, Rule 29.15(e) does not conflict with 29.15(g)'s directive not to incorporate the *pro se* motion by reference. Rule 29.15(g) simply requires counsel to plead additional facts to support all claims, redraft claims so that they comply with pleading rules, and state claims in a lawyer like fashion, all well-established duties under Missouri's post-conviction rules. *Fields v. State*, 572 S.W.2d 477,482 (Mo.1978).

Rule 29.15(e) and (g) should be read consistently if possible. *Cf. Hovis v. Daves*, 14 S.W.3d 539 (Mo.banc2000) (statute should be construed to harmonize potential conflicts, if possible). Sections (e) and (g) express counsel's duty to file an amended motion that includes all claims known to movant and all facts necessary to support them.

Despite 29.15(e)'s plain language, counsel failed to include all claims known to movant, including Earl's *pro se* claim that counsel was ineffective for not investigating Quentin Jones and his criminal background of violence against women (L.F.9). Earl alleged "this error by the defense would of [sic] shown to the

jury that he could commit this crime, killing Joanna Baysinger himself and contradicting himself saying movant told him to murder." (L.F.9-10).

This *pro se* claim is not frivolous,[5] but requires additional facts to support it. Counsel should have pled Jones' criminal history and its admissibility at trial. It would have been admissible to impeach him and to rebut the prosecutor's argument that Jones acted at Earl's direction. This argument was critical to the jury finding deliberation for Ms. Baysinger's death and the aggravator that Jones shot and killed her at Earl's direction.

By filing an amended motion with only five claims (L.F.70-342(a)), omitting eleven claims from Earl's *pro se* motion (L.F.7-65), counsel did not comply with Rule 29.15(e). Earl protested, filing a *pro se* application for writ of habeas corpus ad testificandum (L.F.380-82); writing to the court asking that his *pro se* claims be heard or for a hearing on counsel's actions (L.F.420-437,575,577-79).

The motion court clearly erred in proceeding on an amended motion, not in compliance with Rule 29.15(e). The court knew the amended motion did not include all Earl's claims and that he wanted them considered. The court had a duty to rule on the *pro se* claims; conduct a hearing to determine whether counsel had violated Rule 29.15(e); or allow Earl to proceed *pro se* and hear all of his

[5] The State suggests Rule 55.03(b) allows counsel to ignore 29.15(e)'s directive (Resp.Br.at 56). Yet, the State never demonstrates these claims were frivolous.

claims. *Bittick v. State*, 105 S.W.3d 498 (Mo.App.W.D.2003). Noticeably absent from the State's brief is any mention of *Bittick*, ruling that a movant can proceed *pro se*.

This Court should reverse the denial of post-conviction relief and remand for appointment of new counsel, or proceed on all of Earl's *pro se* claims.

CONCLUSION

Based on the arguments in his original brief and reply brief, Earl requests the following relief:

Point I, a new trial, or alternatively, a new penalty phase;

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 reply brief complies with the limitations contained in Rule 84.06(b). The reply 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 reply brief contains 7482 words, which does not exceed the 7750 words allowed for an appellant's reply brief.

The floppy disk filed with this reply brief contains a complete copy of this reply brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in August, 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 reply brief were postage pre-paid this 3rd day of September, 2003, to Stephanie Morrell, Assistant Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65109.

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Melinda K. Pendergraph