IN THE MISSOURI SUPREME COURT

EDWARD HOEBER,	)	
	)	
Appellant,	)	
	)	**SC95079**
vs.	)	
	)	**10BU-CV001476**
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Rule 29.15 Appeal from the Circuit Court of Buchanan County, Missouri
Fifth Judicial Circuit, Division 4
The Honorable Daniel F. Kellogg, Judge

SUBSTITUTE APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the denial of post-conviction relief.

Edward Hoeber was convicted after a jury trial in Buchanan County Circuit Court of two counts of statutory sodomy in the first degree, §566.062,RSMo(Supp.2006). On January 13, 2010, the trial court sentenced Edward to two consecutive 40-year imprisonment terms. On direct appeal, this Missouri Court of Appeals/Western District affirmed the judgment and sentence on May 17, 2011, and issued its mandate on June 8, 2011. *State v. Hoeber*, 341 S.W.3d 145 (Mo.App.,W.D.2011).

Edward timely filed a *pro se* Rule 29.15 motion on March 24, 2010. On September 6, 2011, counsel timely filed an amended motion. The motion court held an evidentiary hearing on May 3, 2013, and denied relief on September 25, 2013. Edward timely filed a notice of appeal on November 1, 2013. On appeal, the Missouri Court of Appeals/Western District affirmed the denial of post-conviction relief on April 28, 2015. *Hoeber v. State*, 2015 WL 1925414 (Mo.App.,W.D.4/28/15).

Upon Edward's application, this Court ordered transfer of this case on August 19, 2015. Mo.Const.,Art.V,§9; Rule 83.04. Therefore, jurisdiction lies in this Court.

STATEMENT OF FACTS

In 2004, Edward Hoeber and Diana Hensley began dating (TTr222,419).[1] Edward moved in with Diana and her 1-year old daughter, S.M.[2] (TTr223,420). Eventually, Edward and Diana ended their romantic relationship, but Edward continued to live with Diana and S.M. (TTr223-224). Edward became S.M.'s primary caregiver because of Diana's health issues (TTr224). Edward would bathe, dress, feed, and entertain S.M., while Diana sat in the living room recliner almost round-the-clock (TTr225-226).

In 2007, Edward, Diana, and 4-year old S.M. moved to 619 North 19th Street, St. Joseph, Buchanan County, Missouri (TTr223-224). Although the home had a bedroom, everyone slept in the living room—Diana in the recliner, Edward on the couch, and S.M. on the loveseat (TTr225-226). Edward continued to be S.M.'s caregiver (TTr226).

At one point, Diana had a doctor examine S.M.'s genital area (TTr227). The doctor gave Diana a cream that was to be applied to S.M.'s vaginal area twice daily (TTr227-228). Diana had Edward apply the medication to S.M., and, according to Diana, Edward would use his finger to do so (TTr227-228).

In August 2007, Edward was arrested and jailed (TTr249,388,State'sEx.6). At the

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[1]The record on appeal consists of: direct appeal legal file (DALF), trial transcript (TTr), post-conviction legal file (PCLF), and post-conviction hearing transcript (HTr). Appellant submitted Movant's Exhibits (MEx) 1-4 and 6 and requests that the state submit the State's Exhibits referred to in this brief.

[2]S.M. was born on March 13, 2003 (TTr223,420).

same time, S.M. was taken from Diana's home and placed in foster care (TTr227,231,262). S.M. told her foster mother about being sexually abused by Edward (TTr262).

On September 13, 2007, S.M. met with Joyce Estes, a therapist at Northwest Missouri Child Advocacy Center ("CAC") (TTr260,262). Estes had S.M. identify body parts and asked S.M. if anyone had touched her anywhere she didn't like (TTr264). S.M. pointed to her vaginal area and bottom (TTr264). When Estes asked her if anyone had touched her in those areas, S.M. said, "Eddie," but then said, "No he doesn't" (TTr264). Estes asked S.M. if anyone told her not to talk about the touching, and S.M. said, "Mommy did;" her mother said, "Don't talk about Eddie because he's going to be around" (TTr265).

On September 20, S.M. told Estes that Eddie washes her private area during her bath (TTr266). Estes told S.M. that someone thought that S.M. might've been touched somewhere in her private area, but S.M. responded, "No one is touching me. I don't know who is touching me" (TTr 266). Then, S.M. said that her mother told her not to talk about Eddie (TTr266).

On September 28, Estes again asked S.M. about bathing (TTr266). S.M. said that Eddie washes her "pee pee" with a rag (TTr266). Estes asked S.M. if she'd ever seen Eddie's "pee pee;" S.M. said she had touched it with her hand and tickled it, because Eddie sleeps "butt naked" (TTr266).

Estes gave S.M. a pair of fully-clothed anatomical dolls (Tr. 267). S.M. undressed the male doll, pointed at the penis, and said, "This is Eddie and this is his private"

(TTr267). S.M. undressed the female doll, pointed to the vaginal area, and said, "This is where Eddie touches me" (TTr267). Estes asked S.M. if she liked it when Eddie touched her private, and S.M. said, "yes….It feels good. It tickles" (TTr267). S.M. said that "Mommy and Penny" also tickled her private (TTr285). S.M. said that she also tickles Eddie's penis, and he laughs (TTr267).

Before the October 10 counseling session, S.M.'s foster mother called Estes and said that S.M. had a secret that she needed to tell Estes (TTr268). At the October 10 session, Estes asked S.M. if S.M. had a secret to tell (TTr268). S.M. said, "Yeah. Eddie has been touching me in my private area" (TTr268). S.M. said that the touching happened at home in her mother's room (TTr268).

Estes asked S.M. if she knew why Eddie was in jail, and S.M. replied, "Mommy said Eddie touched me, but he really didn't. Eddie didn't touch me. If he does something wrong, he will go to jail" (TTr268). Estes asked S.M. if she wanted Eddie to go to jail, and S.M. said, "No, I want him home till daddy gets out of jail or prison" (TTr268).

Estes asked S.M. again whether anyone told her not to talk about Eddie, and S.M. said, "Mom did because she's mad" (TTr268). Estes asked S.M. who S.M.'s mother was mad at, and S.M. said, "Me;" S.M. didn't know why her mother was mad at her (TTr268).

After the October 10 session, Estes continued to see S.M. weekly (TTr268). Around Thanksgiving, S.M. returned to Diana's home from foster care (TTr231). On December 18, Estes dismissed S.M. from counseling, because S.M. was doing well with her mother (TTr169).

On the night of January 2, 2008, Diana was sleeping in her recliner, and S.M. was sleeping on the love seat (TTr231). Diana heard S.M. yell, "Stop it. Stop it" (TTr231). Diana woke S.M. up and asked S.M. what was wrong (TTr231). S.M. said, "Eddie hurt me….He touched me down there….He touched my pee pee" (TTr231). S.M. pulled down her pajamas and showed Diana how Eddie touched her by touching her "pee pee area" and moving her hand around (TTr231-232).

On January 4, Estes received a phone call from a DFS worker and consequently spoke to S.M. again (TTr269). Estes asked S.M. if she had something to tell Estes, and S.M. pointed at her vaginal area and said, "Yeah, Eddie touched me here" (TTr269). S.M. said that Eddie touched her with his hand, that it happened in the kitchen, and that it happened more than once (TTr269). S.M. said that while S.M.'s mother was asleep in her chair, Eddie took her pajamas off and touched her without saying anything, (TTr269).

On January 16, St. Joseph Police Department Detective Trenny Wilson performed a videotaped forensic interview of S.M. at CAC (TTr300-303,306). S.M. told Det. Wilson where Eddie touched her and pointed at her vaginal area (TTr308).

On January 22, S.M. met with Estes again and told Estes that in S.M's mother's room, Eddie told S.M. to lie down and put his hand on her "pee pee" (TTr270). S.M. said that Eddie didn't make S.M. touch him (TTr270).

On February 7, Det. Wilson met with Edward in jail (TTr309,321). After advising Edward of his *Miranda* rights[3] and receiving Edward's waiver of those rights, Det.

[3]*Miranda v. Arizona*, 384 U.S. 436 (1966).

Wilson wrote a 3-page statement based on what Edward told her (TTr314). Edward signed and dated the bottom of each page of the statement (TTr315,State'sEx.7).

In the statement, Edward denied touching S.M. in a sexual manner (State'sEx.7). Edward said that S.M.'s mother asked him to apply medicine to S.M.'s vaginal area, which he did using a Q-Tip and when S.M.'s mother was present (State'sEx.7). Edward said that he was willing to take a lie detector test (State'sEx.7). He also said that he was a registered sexual offender based on a 1990 St. Louis case in which a 4-year old girl said Edward lied on top of her; that he got 3 years prison for that conviction; and that S.M.'s mother, Diana, knew that he was a registered sexual offender (State'sEx.7). At the end of the interview, Det. Wilson scheduled Detective Scott Coates to perform a polygraph examination of Edward on February 13 (TTr320).

On February 13, Det. Coates took Edward to an interview room, gave Edward a booklet of paperwork concerning the polygraph examination, and left Edward there to complete the paperwork (TTr353). Det. Coates then took Edward to the room where the polygraph machine was set up (TTr354). Det. Coates went over a *Miranda* rights form and a permission form for the polygraph test with Edward and explained how the test worked (TTr354,356).

After a 4-6 minute break, Det. Coates placed the polygraph machine attachments on Edward and administered a pre-test (TTr364-365). Det. Coates showed the pre-test results to Edward, told him the results indicated that the machine was working, and said, "[S]o if there's anything that you haven't told the investigators or me here today, now would be a good time for you to be honest with me and tell me, tell me the truth about

anything that you may have been involved in, particularly about why you're here today" (TTr369). When Det. Coates asked, "Is there anything that you feel that you need to tell me with regard to the case that you're here on today?," Edward didn't respond (TTr370). After 20-30 seconds of silence, Det. Coates questioned Edward about whether or not Edward had more to tell him (TTr370). Over the next 2 hours, Det. Coates questioned Edward and did "rapport building" (TTr383). Edward remained attached to the polygraph machine, but Det. Coates never performed a polygraph test (TTr381,392-393).

Edward initially said that he didn't touch S.M. at all (TTr375). After more questioning, Edward said that he touched S.M. in order to apply medication to S.M. because of an infection (TTr378). Later, Edward said that he touched S.M.in the bathroom on two different times for a couple minutes each time, while Diana was in the other room (TTr379). Edward said he was sorry and needed help (TTr379-380).

After asking Edward if he had anything to add, Det. Coates wrote the following statement based on what Edward said:

> I, Edward Hoeber, state that I dated Diana Hensley for about a year. I lived with Diana in 2004, this is December, to September 2005. Then I would say I have lived with Diana off and on since December of 2004. I came to jail in August of 2007.
>
> During the time I lived with Diana, she would have me take care of her daughter, [SM]. I would give her a bath and sometimes wipe her after she got done in the bathroom. [SM] is 4, she will be 5 next month.
>
> About a month before I got arrested, we were living at 619 N. 9th.

> Around that time, there were two times where [SM] was in the bathroom and had gotten off the toilet with her pants down. Before she would pull her pants up I would rub her clitoris with my fingers. She would kind of laugh. I would rub her for about 2 minutes or so. Diana would be sitting in the front room. I never told her anything about this. As far as I know, Diana never knew.
>
> I only did it two times. I am sorry for what I did. I really need help.

(TTr379,385,State'sEx.6).

Det. Coates had Edward read the statement out loud and told Edward to make any corrections that he needed to make, but Edward didn't make any (TTr387). Edward initialed the beginning and end of the statement and signed the bottom of the statement (TTr385,387).

S.M. continued to meet with Estes regularly between February 22, 2008-January 20, 2009 (TTr270-272). On February 22, 2008, S.M. told Estes, "Eddie told me to come in the kitchen and then he touched me. He touched me in the living room, too. Eddie told me to be quiet" (TTr270-271). On February 29, S.M. told Estes, "Eddie rubbed my private area with his hand. It feeled (sic) good" (TTr271). On April 10, S.M. told Estes that Eddie was "mean," because, while sitting on the couch, "he touched me in my private area" with his hand (TTr271). On November 18, S.M. told Estes that Eddie put his finger in her private area (TTr271). Before the January 20, 2009 session, S.M. was again placed into foster care (TTr271-272). On January 20, Estes asked S.M. if there was something in the bathroom that scared S.M., since S.M. was having problems taking a

shower at her foster home (TTr272). SM said that she was scared, because Eddie touched her private area in the bathtub at Diana's house (TTr272).

On March 12, 2009, the state charged Edward by Felony Information with two identical counts (I-II) of statutory sodomy in the first degree, §566.062,RSMo(Supp. 2006), for allegedly touching S.M.'s genitals with his hand between July 1-August 29, 2007; and two identical counts (III-IV) of child molestation in the first degree, §566.067,RSMo(Supp.2006) (DALF2,8-9,51-52,A9-A10,A48).

On December 2, 2009, the state charged Edward by First Amended Felony Information with counts I and III of first-degree statutory sodomy for allegedly touching S.M.'s genitals with his hand between July 1-August 29, 2007, and, in the alternative, counts II and IV of first degree child molestation (DALF5,16-17,51-52,54-55,A11-A12,A48). The state also charged Edward as a prior offender, §558.016.3,RSMo(Supp. 2005), in that he was convicted in 1990 in the City of St. Louis of sexual abuse in the first degree[4] (DALF16-17,A11-A12,A45).

A jury trial was held on December 7-8, 2009 (DALF5-6,PCLF64,A4). The trial court found Edward to be a prior offender (TTr60,PCLF64,A4).

At trial, S.M. was six years old and testified that "Eddie" lived with her and her mother and took care of her, because her mother wouldn't do anything besides sit in her chair (TTr209,211). She testified that Eddie touched her with his hand more than one time when they were in the kitchen together (TTr213-216,219). Her mother, Diana, was

[4]§566.100,RSMo(1986).

in her chair when SM yelled for help, but Diana didn't respond (TTr214,220).

S.M. was asked twice if she saw "Eddie" in the courtroom, but both times, S.M. said she didn't see him (TTr210,217). Diana identified Edward in the courtroom and testified that Edward was the person who lived with her and took care of S.M.; he was the only "Eddie" that took care of S.M. (TTr225).

Det. Coates testified that Edward was told several times that he was free to leave the polygraph room (TTr381). At any point, Edward could have asked to stop the questioning and to have the polygraph examination conducted, but Edward never made those requests (TTr380,407). According to Det. Coates, Edward never requested an attorney or indicated that he wanted to stop the interview (TTr381).

Edward testified that he only actually lived with Diana and S.M. for two time periods: March-August, 2004 and September 2005 to sometime in 2006 (TTr419,421). In 2006, he moved to another nearby house but occasionally visited Diana and S.M. at their home (TTr424,426-427). When Edward visited, he helped around Diana's house and took care of S.M. (TTr427). Sometimes, Edward spent the night at Diana's home, but not every night (TTr248).

Edward testified that he never touched S.M. inappropriately (TTr429). Edward testified that he signed and filled out all the forms during his interview with Det. Coates, even though Edward had questions, because Edward wanted to just get the polygraph examination over with and prove his innocence (TTr434,436). Edward testified that the questioning started civilly, but Det. Coates eventually began yelling and cursing at Edward, which made Edward nervous and scared (TTr437-438). Edward said that he

stood up three times during the interview and said he wanted to leave the room, but Det. Coates responded, "If you leave, that means you're guilty" (TTr440). So, Edward sat back down and stayed in the room (TTr440). Edward testified that Det. Coates would ask the same questions over and over, and Edward repeatedly denied touching S.M. (TTr441). Edward testified that he eventually told Det. Coates what he thought Det. Coates wanted to hear—that Edward touched S.M. and needed help (TTr441).

Before the case was submitted to the jury, the state dismissed counts II and IV of first-degree child molestation (TTr467,DALF2,16-17,51-52,PCLF64,A4,A11-A12).

The court instructed the jury with Instructions 3-13 (TTr467-470, DALF32-42). These instructions included: Instruction 6—definition of deviate sexual intercourse; Instruction 8—verdict director for count I of first-degree statutory sodomy; Instruction 9—converse to Instruction 8; Instruction 10—verdict director for count II (renumbered) of first-degree statutory sodomy; and Instruction 11—converse to Instruction 10 (DALF35,37-39,A13-A17).

The jury found Edward guilty of both counts of first-degree statutory sodomy (DALF1,-2,6,43-44,51-56,TTr505,PCLF64,A4,A37-A38,A40-A44). On January 13, 2010, the trial court sentenced Edward to two consecutive imprisonment terms of 40 years on each count (DALF2,6,51-56,A37-A42).

With leave of this Court, Edward filed a notice of appeal (DALF7,57-60). On direct appeal, this Court affirmed the judgment and sentence on May 17, 2011, and issued its mandate on June 8, 2011 (PCLF64,A4). *State v. Hoeber*, 341 S.W.3d 145 (Mo.App., W.D.2011).

On March 24, 2010, Edward timely filed a *pro se* Rule 29.15 motion, Rule 29.15(b)(PCLF1,7-29,65,A5,A50). On September 6, 2011, appointed counsel timely filed an amended motion, Rule 29.15(g)(PCLF1,6,30-62,65,A5,A51-A52). Edward alleged that trial counsel was ineffective for failing: 1) to object to Instructions 8 and 10—the verdict directors for counts I and III of first-degree statutory sodomy, because Instructions 8 and 10 failed to specify a particular incident of hand-to-genital deviate sexual intercourse that occurred during the charging period, thereby making it unclear as to which incidents Edward was found guilty (PCLF31-46,65,A5); and 2) to present testimony at sentencing of a mental health expert, such as that of Dr. Bill Geis, regarding the mitigating evidence of Edward's mental disability (PCLF33,53-58,65,A5).

The motion court held an evidentiary hearing on May 3, 2013, and denied relief on September 25, 2013 (PCLF4,63-69,HTr1,3,A3-A8). Edward timely filed a notice of appeal on November 1, 2013 (PCLF4-5,70-72).

On appeal, the Missouri Court of Appeals/Western District affirmed the denial of post-conviction relief on April 28, 2015. *Hoeber v. State*, 2015 WL 1925414 (Mo.App.,W.D.4/28/15). Upon Edward's application, this Court ordered transfer of this case on August 19, 2015.

POINTS

I

The motion court clearly erred in denying Edward's Rule 29.15 motion, because the record leaves the firm conviction that a mistake was made, in that Edward established that trial counsel failed to act as a reasonably competent attorney and violated Edward's rights to due process, fair trial, a properly instructed jury, a unanimous verdict, and effective assistance of counsel, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I, §10,18(a),22(a), when counsel failed to object to Instructions 8 and 10—the verdict directors for counts I and II of first-degree statutory sodomy, because Instructions 8 and 10 failed to specify a particular incident of hand-to-genital deviate sexual intercourse that occurred during the charging period after the state presented evidence of multiple acts of hand-to-genital deviate sexual intercourse, thereby making it unclear as to which incidents Edward was found guilty. Edward was prejudiced, because if counsel had objected to Instructions 8 and 10 on the basis that these verdict directors failed to specify a particular incident of hand-to-genital deviate sexual intercourse, the objection would have been sustained; and but for counsel's ineffectiveness, there is a reasonable probability that the result of the trial would have been different.

Barmettler v. State, 399 S.W.2d 523 (Mo.App.,E.D.2013);

State v. Goucher, 111 S.W.3d 915 (Mo.App.,S.D.2003);

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

State v. Schaal, 806 S.W.2d 659 (Mo.banc1991);

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

Mo.Const.,Art.I,§§10,18(a),22(a);

§§491.075,566.010,566.062,566.067,RSMo;

Rules 29.01,29.15;

MAI-CR3d 304.02,308.02,320.11,333.00.

II

The motion court clearly erred in denying Edward's Rule 29.15 motion, because the record leaves the firm conviction that a mistake was made, in that Edward established that trial counsel failed to act as a reasonably competent attorney and violated Edward's rights to due process, fair trial, individualized sentencing, and effective assistance of counsel, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I, §§10,18(a), when counsel failed at sentencing to present testimony of a mental health expert, such as that of Dr. Bill Geis, regarding mitigating evidence of Edward's mental disability. Edward was prejudiced, because had counsel presented such mitigating evidence and testimony, there is a reasonable probability that the result of the sentencing would have been different.

Cravens v. State, 50 S.W.3d 290 (Mo.App.,S.D.2001);

Penry v. Lynaugh, 492 U.S. 302 (1989);

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

State v. Schaal, 806 S.W.2d 659 (Mo.banc1991);

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

Mo.Const.,Art.I,§§10,18(a);

§§537.036,558.016,565.024,566.062,566.100,566.147,568.050,RSMo;

Rule 29.15.

STANDARDS OF REVIEW (Arguments I-II)

Under Rule 29.15, a person convicted of a felony after trial may seek relief in the sentencing court for claims that: the conviction or sentence imposed violates Missouri constitution and laws or the U.S. constitution, including claims of ineffective assistance of counsel; the court imposing the sentence was without jurisdiction to do so; or the sentence imposed was in excess of the maximum sentence authorized by law. Rule 29.15(a)(A50); *Hudson v. State*, 248 S.W.3d 56,58 (Mo.App.,W.D.2008).

A claim included in an amended motion is preserved for appellate review. *Hill v. State*, 181 S.W.3d 611,620 (Mo.App.,W.D.2006).

Appellate review of a motion court's decision in Rule 29.15 proceedings is limited to determination of whether the motion court's findings and conclusions are clearly erroneous. Rule 29.15(k)(A52). A motion court's actions are clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake was made. *State v. Schaal*, 806 S.W.2d 659,667 (Mo.banc1991).

The right to the effective assistance of counsel is a fundamental right guaranteed to state defendants. *Gideon v. Wainwright*, 372 U.S. 335,342-343 (1963); U.S.Const., Amends.VI,XIV; Mo.Const.,Art.I,§18(a). To establish ineffectiveness of trial counsel, a movant must demonstrate that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances, and that movant was prejudiced. *Strickland v. Washington*, 466 U.S. 668,687,689 (1984). To show prejudice, a movant must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Id*., at

687. A reasonable probability is a probability sufficient to undermine confidence in the trial's outcome. *Id.*, at 694.

ARGUMENTS

I

The motion court clearly erred in denying Edward's Rule 29.15 motion, because the record leaves the firm conviction that a mistake was made, in that Edward established that trial counsel failed to act as a reasonably competent attorney and violated Edward's rights to due process, fair trial, a properly instructed jury, a unanimous verdict, and effective assistance of counsel, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I, §10,18(a),22(a), when counsel failed to object to Instructions 8 and 10—the verdict directors for counts I and II of first-degree statutory sodomy, because Instructions 8 and 10 failed to specify a particular incident of hand-to-genital deviate sexual intercourse that occurred during the charging period after the state presented evidence of multiple acts of hand-to-genital deviate sexual intercourse, thereby making it unclear as to which incidents Edward was found guilty. Edward was prejudiced, because if counsel had objected to Instructions 8 and 10 on the basis that these verdict directors failed to specify a particular incident of hand-to-genital deviate sexual intercourse, the objection would have been sustained; and but for counsel's ineffectiveness, there is a reasonable probability that the result of the trial would have been different.

Statutory Provisions

"A person commits the crime of statutory sodomy in the first degree if he has deviate sexual intercourse with another person who is less than fourteen years old." §566.062.1,RSMo(Supp.2006)(A48); *see also*, MAI-CR3d 320.11 (A77-A84). Deviate

sexual intercourse is "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object, done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim." §566.010(1),RSMo(Supp.2006)(A47); *see also*, MAI-CR3d 333.00 (A85-A86).

First-degree statutory sodomy or an attempt to commit first-degree statutory sodomy is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years. §566.062.3,RSMo(A48). However, if the victim is less than twelve years of age, the authorized term of imprisonment is life imprisonment or a term of years not less than ten years. §566.062.3,RSMo(A48).

Facts

On March 12, 2009, the state charged Edward by Felony Information with two identical counts (I-II) of statutory sodomy in the first degree, §566.062,RSMo(Supp. 2006); and two identical counts (III-IV) of child molestation in the first degree, §566.067,RSMo(Supp.2006) (DALF2,8-9,A9-A10,A48). More specifically, the state charged that:

> Count I: …[B]etween July 1, 2007 and August 29th, 2007, in the County of Buchanan, State of Missouri, the defendant for the purpose of arousing or gratifying his sexual desire, had deviate sexual intercourse with S.M., who was then less than twelve years old, by touching the genitals of S.M. with his hands….

> Count II: …[B]etween July 1, 2007 and August 29th, 2007, in the County of Buchanan, State of Missouri, the defendant for the purpose of arousing or gratifying his sexual desire, had deviate sexual intercourse with S.M., who was then less than twelve years old, by touching the genitals of S.M. with his hands….

(DALF8,A9).

On December 2, 2009, the state charged Edward by First Amended Felony Information with two identical counts (I and III) of first-degree statutory sodomy and two identical counts (II and IV) of first degree child molestation (DALF5,16-17,A11-A12). More specifically, the state charged that:

> Count I: …[B]etween July 1, 2007 and August 29th, 2007, in the County of Buchanan, State of Missouri, the defendant for the purpose of arousing or gratifying his sexual desire, had deviate sexual intercourse with S.M., who was then less than twelve years old, by touching the genitals of S.M. with his hands….
>
> Count II: …[B]etween July 1, 2007 and August 29th, 2007, in the County of Buchanan, State of Missouri, the defendant for the purpose of arousing or gratifying his sexual desire, had deviate sexual intercourse with S.M., who was then less than twelve years old, by touching the genitals of S.M. with his hands….

(DALF8,16-17,A11-A12).

At trial, the state presented evidence of multiple acts of deviate sexual intercourse

over the course of July 1-August 29, 2007. The acts were alleged to have occurred in a bedroom, a bathroom, the living room and the kitchen (TTr214,236,264-272,330,333). The jury was instructed to find Edward guilty if it found that he placed his hand on the S.M.'s genitals during that two-month period (DALF37,39).

Although the jury heard evidence of multiple acts in various places, the jury was not instructed as to which incident to consider as the actual charged crime. In pertinent part, the jury was instructed with:

> INSTRUCTION NO. 6
>
> The following term as used in these instructions is defined as follows:
>
> "deviate sexual intercourse" means any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person.
>
> MAI-CR3d 333.00[5]
>
> Submitted by the State
>
> (DALF35,A13).

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[5]*See*, A85-A86.

INSTRUCTION NO. 8

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that between July 1, 2007 and August 29, 2007, in the County of Buchanan, State of Missouri, the defendant knowingly touched the genitals of S.M. with his hands,

and

Second, that such conduct constituted deviate sexual intercourse,

and

Third, that at the time S.M. was a child less than twelve years old, then you will find the defendant guilty under Count I of statutory sodomy in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR3d 320.11[6]

Submitted by the State

(DALF37,A14).

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[6]*See*, A77-A84.

INSTRUCTION NO. 9

If you have a reasonable doubt as to whether the Defendant had deviate sexual intercourse with S.M., you must find the defendant not guilty of statutory sodomy in the first degree as submitted in Instruction No. 8.

MAI-CR3d 308.02[7]

Submitted by Defendant

(DALF38,A15).

INSTRUCTION NO. 10

As to Count II,[8] if you find and believe from the evidence beyond a reasonable doubt:

First, that between July 1, 2007 and August 29, 2007, in the County of Buchanan, State of Missouri, the defendant knowingly touched the genitals of S.M. with his hands,

and

Second, that such conduct constituted deviate sexual intercourse,

and

Third, that at that time S.M. was a child less than twelve years old,

then you will find the defendant guilty under Count II of statutory sodomy

[7]*See*, A68-A76.

[8]Count III was renumbered in the jury instructions to count II (DALF39,A16).

in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR3d 320.11[9]

Submitted by the State

(DALF39,A16).

INSTRUCTION NO. 11

If you have a reasonable doubt as to whether the Defendant had deviate sexual intercourse with S.M., you must find the defendant not guilty of statutory sodomy in the first degree as submitted in Instruction 10.

MAI-CR3d 308.02[10]

Submitted by Defendant

(DALF40,A17).

Counsel neither objected to Instructions 8 and 10 and nor argued Instructions 8 and 10 failed specify a particular incident of deviate sexual intercourse by Edward's hand touching S.M.'s genitals (TTr462-470). The State presented evidence of multiple acts of alleged hand-to-genital sodomy, yet the verdict directors did not specify any one of these

[9]*See*, A77-A84.

[10]*See*, A68-A76.

incidents, thereby making it unclear as to which incident the jury was to find happened if they were to render a guilty verdict. The jury returned verdicts of guilty on both counts (TTr505).

In the amended motion, Edward alleged that trial counsel was ineffective by failing to object to Instructions 8 and 10—the verdict directors for counts I and III of first-degree statutory sodomy, because Instructions 8 and 10 failed to specify a particular incident of hand-to-genital deviate sexual intercourse that occurred during the charging period, thereby making it unclear as to which incident Edward was found guilty; Edward was prejudiced, because there is a reasonable probability that, but for counsel's ineffectiveness, the result of the trial would have been different; and Edward suffered violations of his constitutional rights, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§10,18(a),22(a) (PCLF31-46).[11]

At the evidentiary hearing, counsel testified, "Our main theory of defense was to attack the credibility of the witnesses" (HTr72). Counsel testified that the incidents "were alleged to have occurred in the home where Mr. Hoeber and the victim and her mother stayed" (HTr73). Counsel testified that at trial, there was evidence of multiple incident of hand-to-genital contact between Edward and S.M. at the house (HTr78-79).

[11]Edward raised a cognizable claim, preserved for appellate review. *Hudson v. State*, 248 S.W.3d 56,58 (Mo.App.,W.D.2008); *Hill v. State*, 181, S.W.3d at 611,620 (Mo.App.,W.D.2006); Rule 29.15(a)(A50).

Counsel testified:

Q. And do you recall what the evidence was as to what particular parts of the house these acts occurred in?

A. The evidence was the testimony of the victim?

Q. And where did she say—what parts of the house?

A. I believe she said it happened in the kitchen, in the living room or the front room, and in the bathroom of the house.

Q. And if there was also something on the record saying she stated that it happened in the bedroom, would you have any reason to disagree with that?

A. I would not.

(HTr79).

Counsel testified about the jury's verdict:

Q. …What do the jurors have to agree on?

A. Specific act, specific time, and that it's committed by the defendant.

Q. All right. So they would have to agree to what I'll refer to as all the elements of the charged crime?

A. Correct.

Q. And how many of the jurors in this judicial system have to agree in order to return a guilty verdict?

A. It has to be unanimous vote.

Q. And did the jurors have to find…that each and every element

happened beyond a reasonable doubt?

A. Correct.

Q. What happens in your experience if the jurors cannot reach unanimous verdict?

A. In some cases, the person is found not guilty or you have a hung jury or a mistrial.

(HTr79-80).

Counsel testified that there is a uniform set of instructions for a criminal case: MAI-CR3d (HTr80). Counsel was familiar with these instructions at the time of Edward's trial (HTr80). Counsel testified that the Notes on Use to the MAI-CR3d Instructions were "a guideline for using the instruction and they provide an example, as well (HTr80-81). Counsel testified that MAI-CR3d 302.04 (including Notes on Use 5 and 6) was an instruction that helped with how to write/structure a verdict directing instruction (HTr81-82,Movant'sEx6,A53-A67,A124-A135).

Counsel testified further about MAI-CR3d 302.04:

Q. …And with regard to Notes on Use 5 and 6, do Notes on Use 5 and 6 emphasize the importance—in fact, they call it the decisive importance of sometimes specifying in the verdict director where the offense happened?

A. Yes.

Q. And does it say that in a situation such as that—this is Notes on Use 5, that the Court, on its own motion or the defendant, can ask for the

instruction to be modified in such a way as to include where the act happened?

A. Yes, it does.

(HTr82). Counsel did not recall if, at the time of Mr. Hoeber's trial, he was familiar with any case law concerning the need to specify in the verdict director where the particular act happened (HTr83).

Counsel testified that Instructions 8 and 10 were submitted by the state (HTr85). Regarding Instruction 8, counsel testified that Edward's alleged conduct was "[k]knowingly touched the genitalia of S.M. with his hands" (HTr84). Counsel testified:

Q. …[D]oes [Instruction 8] give an specificity to the jury as to which act among the many or several the victim testified to, which act in the house does that act pertain to…[?]

A. No, it doesn't.

(HTr84).

Regarding Instruction 10, counsel testified that Edward's alleged conduct was "knowingly touched the genitals of S.M. with his hands (HTr85). Counsel testified:

Q. Does Instruction No. 10 give any more specific language to the jury in order to determine where this event happened in the home or which event that alleged touching specifically pertains to?

A. No, it doesn't.

(HTr85).

Counsel testified that it was his general practice to review the state's instructions

before the instructions were read to the jury, and counsel believed he performed such a review in Edward's case (HTr85). Counsel testified:

> Q. …Did you consider objecting to Instructions 8 and 10 on the basis the verdict directors did not specify a particular incident or place where the incident happened?
>
> A. No.
>
> Q. And did you fail to make an objection based on any trial strategy?
>
> A. No.

(HTr86).

The motion court denied relief on this claim (PCLF66-67,A6-A7).

The most recent case addressing this issue is *State v. Barmettler*, 399 S.W.3d 523 (Mo.App.,E.D.2013). In that case, as well as the instant case, to be entitled to relief the Movant must establish that the vagueness of the verdict directors caused prejudice. Given that any uncharged acts of the movant were not the emphasis or focus of the State in Movant's case, there was no risk that the jurors would be misled about which incident of abuse applied to a particular count.

The victim in Movant's case testified as to two particular incidents: one in the bedroom and one in the kitchen. This is in contrast to the facts in *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo.banc2011). In that case the State placed emphasis on multiple uncharged acts, creating a risk of misleading the jurors that did not exist in Movant's case. As there is no

reasonable likelihood that the jury was misled, Movant's claim fails. (PCLF66-67,A6-A7).

Argument

The motion court was clearly erroneous in denying relief. *State v. Schaal*, 806 S.W.2d 659,667 (Mo.banc1991); Rule 29.15(k)(A52). The errors in the verdict directors was evident, obvious, and clear, and any objection to Instructions 8 and 10 would have been sustained. *State v. Ralston*, 400 S.W.3d 511,521 (Mo.App.,S.D.2013); *State v. Dean*, 382 S.W.3d 218,324 (Mo.App.,S.D.2012).

Jury verdicts in criminal cases are required to be unanimous. Mo.Const.,Art.I, §22(a); *State v. Goucher*, 111 S.W.3d 915,917,920 (Mo.App.,S.D.2003). A criminal defendant has a "fundamental right [to] a trial by twelve people that unanimously concur in the guilt of the defendant before he or she can be legally convicted." *Id*., at 917, *citing State v. Hadley*, 815 S.W.2d 422,425 (Mo.banc1991); *State v. Schumacher*, 85 S.W.3d 759,761 (Mo.App.,W.D.2002)(jury's verdict must be "unanimous, in writing, signed by the foreperson, and returned in open court"); Rule 29.01(a)(A49)("The verdict shall be unanimous and be in writing.").

"The unanimity rule…requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged." *U.S. v. Gipson*, 553 F.2d 453,457-458 (5thCir.1977); *State v. Gardner*, 231 S.W. 1057, 1058 (Mo.App.,Sprngfld.1921)(verdict must be clear and unambiguous, and must show that all twelve of the jurors agreed on finding the same thing); *see also*, *State v. Marks*, 721 S.W.2d 51,54 (Mo.App.,W.D.1986)(instructing in

disjunctive is error where "submission was as to the very act which was the gravamen of the offense" because jury "must agree on "just what the defendant did").

This Court recognized that when the state presents evidence of multiple acts by the defendant, the verdict director must specify the one incident that is charged. MAI-CR3d 304.02 (Movant'sEx.6,A53-A67,A124-A135) sets forth general rules for instructing on the principal offense. Note on Use 5 (Movant'sEx.6,A58,A128) warns trial courts of the need to instruct jurors specifically about the incident they are to consider. It stresses the importance of including the place of the offense in the verdict director when evidence of multiple acts is presented to the jury:

> The place of the offense may become of "decisive importance" under certain circumstances, such as … (c) where the defendant may have committed several separate offenses against the same victim at the same general location within a short space of time. In such a situation, upon request of the defendant or on the Court's own motion, the place should be more definitely identified, such as "the front bedroom on the second floor," "the southeast corner of the basement," etc.

(Movant'sEx.6,A58,A128)

If the jurors need not find that a specific incident occurred, but just that a type of conduct occurred, there would be no need for the verdict director to specify a time or place of the incident, and Notes on Use 4 (as to time) or 5 to MAI-CR3d 304.02

(Movant'sEx.6,A57-A58,A127-A128) would make no sense.

This Court recognized the need for specificity in verdict directors, when it reversed and remanded for a new trial in *State v. Oswald*, 306 S.W.2d 559,563 (Mo.1957). There, the state alleged several acts within the same count. *Id*. The verdict director told the jury to find the defendant guilty if it found that he put his penis in the victim's mouth and rectum or if he did either of those acts. *Id*. The court held that there was no assurance that the jurors were unanimous that the same act occurred:

> The State refers us to no case holding a general verdict proper upon the trial of an indictment or information charging an appellant with the commission of two offenses in one count. An accused is entitled to the concurrence of twelve jurors upon one definite charge of crime. Under the charge and the verdict some of the jurors may have agreed appellant was guilty of an offense committed with the mouth of the [victim], while others may have reached the same result with respect to an offense committed with the rectum. It cannot be determined that there was a concurrence of twelve jurors upon one definite charge of crime.

Id.; *see also State v. Pope*, 733 S.W.2d 811,812-813 (Mo.App.,W.D.1987)(reversing because verdict directors didn't state specific act charged). A similar situation arose in *State v. D.W.N.*, 290 S.W.3d 814,827 (Mo.App.,W.D.2009)(enbanc), where the jury was instructed to find the defendant guilty if it found that he touched the victim's genitals *or*

breast.

Prior cases have held that the disjunctive submission of an element of an offense in a single instruction runs afoul of a defendant's constitutional right to a unanimous concurrence in the verdict. *Id.* This is because an instruction that submits a proof element in the disjunctive creates a situation where some of the jurors may have agreed that he was guilty of the offense because he committed one act while the other jurors believed that he was guilty because he committed another act. *Id*., at 828. The instruction violated the defendant's right to a unanimous verdict. *Id.*

Although not a sex case, *State v. Mitchell*, 704 S.W.2d 280 (Mo.App.,S.D.1986) is also instructive. The defendant was charged with two counts of exhibiting a lethal weapon in an angry or threatening manner, one count for an incident at a house, and the other for an incident at a café. *Id*., at 282-283. The verdict directors, however, were identical, so there was no way for the jury to know which count referred to the house and which to the café. *Id*., at 283. Even though both verdict directors set forth the specific type of unlawful use of a weapon, the instructions were erroneous because "it was impossible for the jury to know which incident was the subject of" which verdict director. *Id*. at 284. The Southern District Court of Appeals reversed for a new trial. *Id*., at 287.

In the current case, the verdict directors set forth the type of sodomy alleged, *i.e.*, hand-to-genital contact. But it was impossible for the jurors to know which incident described at trial was the subject of which verdict director, because the verdict directors were identical. There was no indication of time or place of the incident. Thus, as in *Mitchell*, this Court should reverse and remand for a new trial.

Other Missouri cases have criticized the use of disjunctive verdict directors, or verdict directors that fail to instruct the jury as to which of the acts presented in evidence the jury should consider as the charged act. *See*, *State v. Pope*, 733 S.W.2d at 813 ("instruction which allows [the jury] to convict of [the charged act] or another which is not charged cannot stand"); *State v. Mackey*, 822 S.W.2d 933,936 (Mo.App.,E.D.1991)("To overcome the problem of the jury returning a non-unanimous verdict, disjunctive submissions of acts, especially those which constitute the gravamen of the offense, should be curtailed"); *State v. Rudd*, 759 S.W.2d 625,629 (Mo.App.,S.D.1988)("There is no doubt that when multiple offenses are submitted, they should be differentiated"); *but see*, *State v. Smith*, 32 S.W.3d 134,135 (Mo.App.,E.D.2000)(although appellate court has "no hesitation in saying that the prosecution should have made it clear that the two instructions applied to different incidents," the identical verdict directors were "legally correct").

Here, the verdict directors gave the jurors a roving commission to determine, each for him or herself, which specific incident to consider. In essence, the verdict directors told the jurors to find Edward guilty if they found that he placed his hand on S.M.'s genitals in the kitchen, or in the bedroom, or in the living room, or in the bathroom. An instruction results in a "roving commission" when "it assumes a disputed fact or posits an abstract legal question that allows the jury to roam freely through the evidence and choose any facts [that] suited its fancy or its perception of logic to impose liability." *State v. Scott*, 278 S.W.3d 208,214 (Mo.App.,W.D.2009), *quoting Newell Rubbermaid, Inc. v. Efficient Solutions, Inc.*, 252 S.W.3d 164,174 (Mo.App.,E.D.2007). "To avoid a roving

commission, the court must instruct the jurors regarding the specific conduct that renders the defendant liable." *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583,594 (Mo.App.,W.D.2008).

It is true that certain procedural rules are relaxed in sex cases, especially those involving children. Understandably, a child might not be able to relate the precise date that abuse occurred, so a wide time frame is permissible. *State v. Johnson*, 62 S.W.3d 61,67 (Mo.App.,W.D.2001). However, in a case of sodomy involving young children, this Court ruled that verdict directors are erroneous when they permit the jury to convict the defendant of multiple counts without identifying the acts the jurors were to agree were committed. *State v. Celis-Garcia*, 344 S.W.3d 150,158 (Mo.banc2011). This Court further stated that because it was impossible to determine whether the jury unanimously agreed on any one of these separate incidents, the verdict directors violated the defendant's constitutional right to a unanimous jury verdict under Article I, §22(a) of the Missouri Constitution. *State v. Celis-Garcia*, 344 S.W.3d at158. Thus, t

The motion court was clearly erroneous in finding absent counsel's failure to object, there wouldn't have been a difference in the trial's outcome. *State v. Schaal*, 806 at667; Rule 29.15(k)(A52). Without some differentiation in the verdict directors, the jury did not know which two specific incidents it was to consider. In this case, the verdict directors were not specific and permitted the jury to find that Edward touched S.M. without identifying the acts the jurors were to agree on. Some of the jurors could have found the acts occurred in the kitchen, or some could have disbelieved that Edward committed sodomy in the kitchen and found the acts happened in the bathroom, or in the

bedroom, or in the living room, or some combination of those rooms. The jury instructions in this case did not specify the particular acts the jury would have to unanimously agree on before they could convict Edward of counts I-II. There is no assurance that all twelve jurors agreed that Movant committed the same acts of hand to genitals sodomy.

Edward was prejudiced by counsel's failure to object to the jury instructions. Had counsel objected on the basis that the verdict directors did not identify the acts the jurors had to agree on if convicting Edward, there is a reasonable probability the outcome of the trial would have been different. Because the verdict directors did not require jurors to agree on the acts, there is a reasonable probability the jury would have acquitted Edward of one or both counts had it been properly instructed.

In *Barmettler v. State*, 399 S.W.3d 523,526 (Mo.App.,E.D.2013), Barmettler asserted that trial and appellate counsel were constitutionally ineffective because they did not challenge the verdict directors offered at trial. Barmettler specifically challenged defense counsels' omissions with respect to the verdict directors for statutory sodomy under Count I and child molestation as the lesser-included offense to statutory sodomy under Count II. *Id*., at 527.

Barmettler focused on the express warning and guidance provided by Notes on Use to MAI-CR3d 304.02 regarding the risks associated with non-specific verdict directors submitted in multiple acts cases. *Barmettler v. State*, 399 S.W.3d at 527. This Court's conclusion in *State v. Celis-Garcia*, 344 S.W.3d at 157-158, that the MAI Note on Use was insufficient to validate an otherwise deficient verdict director does not

preclude a finding that, before *Celis-Garcia*,[12] reasonable and effective defense counsel would have heeded the warning provided by the Note on Use and should have considered requesting that the verdict directors be supplemented with sufficient factual details allowing the jury to distinguish between the alleged incidences of alleged sexual abuse and the uncharged incidents of abuse to which the victim testified. *Barmettler v. State*, 399 S.W.3d at 529.

Here, the correct inquiry is whether reasonable trial counsel would have objected to the verdict directors in light of the express MAI warning that verdict directors in multiple act cases involve a risk for a non-unanimous verdict, and where Note on Use expressly suggested that such verdict directors be modified to factually distinguish between alleged criminal acts. *Id*. Absent a compelling strategic reason, reasonable and effective trial counsel would have acted upon the cautionary language of the Note on Use and objected to, or requested modification of, the verdict directors to ensure against the risk of a non-unanimous jury verdict. *Id*.

After reviewing the entire record, the Eastern District Court of Appeals found no evidence that the vagueness of the verdict directors caused Barmettler any prejudice. *Id*., at 530. The uncharged acts at issue in *State v. Celis-Garcia*, 344 S.W.3d at 158, were well-developed at trial through the presentation of evidence and testimony. *Barmettler v. State*, 399 S.W.3d at 530. Given the evidence presented at trial, the verdict directors at

[12]*State v. Celis-Garcia*, 344 S.W.3d 150 (Mo.banc2011) was handed down on June 14, 2011—after Edward's sentencing on January 13, 2010 (DALF2,6,51-56,A37-A42).

issue did not create any reasonable likelihood that the jury was misled. *Id.* The Eastern District Court of Appeal found no basis to conclude that Barmettler was convicted with a non-unanimous jury verdict in either count I or II. *Id.* Because Barmettler was not prejudiced by trial counsel's failure to object to the verdicts directors, he was not entitled to relief under Rule 29.15. *Id.*

Since *Celis-Garcia* was decided, the lower appellate courts have tended to find that any instructional error to be harmless if a defendant generally attacked the credibility of the complaining witness or pursued a "unitary defense." *State v. LeSieur*, 361 S.W.3d 458,465 (Mo.App.,W.D.2012); *State v. Payne*, 414 S.W.3d 52,56-57 (Mo.App.,W.D.2013); *State v. Rose*, 421 S.W.3d 522,529 (Mo.App.,S.D.2013).[13] These decisions are not consistent with this Court's decision in *Celis-Garcia* or fundamental concepts of due process and the right to a unanimous verdict.

The leading decision holding that a defendant is not prejudiced by unspecific verdict directors if the defense presents a "unitary defense," is the Western District's decision in *State v. LeSieur*, 361 S.W.3d 458,465 (Mo.App.,W.D.2012). The Western District Court of Appeals concluded that *Celis-Garcia* established a "clear" holding "that, to establish manifest injustice based on an insufficiently specific verdict director in a 'multiple acts' case, the defendant ***must*** have mounted an incident-specific defense,

[13]This type claim regarding the unanimity of the jury verdict was before this Court, which held that the issue was not preserved for appellate review. *State v. Mallow*, 439 S.W.3d 764, 770 (Mo.banc2014).

which would have given the jury a basis to distinguish among the various incidents mentioned in the evidence," and "that, where the defendant instead mounts a unitary defense to all alleged actions, attacking the victim's credibility generally, manifest injustice does not exist." *Id*., at 465 (emphasis added).

Contrary to this reading of *Celis-Garcia*, the Western District's reference to unspecified hypothetical cases in which "the defense simply argues that the [victim] fabricated [her] stories" is *dicta.* Statements made by the Western District concerning hypothetical situations not before the Court is non-binding dicta. *See, In re C.W.*, 211 S.W.3d 93,98 (Mo.banc2007)(refusing to follow a statement in a prior opinion regarding the lack of prejudice conditioned upon a hypothetical situation), *abrogated on other grounds by In re B.H.*, 348 W.3d 770 (Mo.banc2011).

In addition to constituting *dicta,* the Western District's reference to hypothetical cases in which "the defense simply argues that the [victim] fabricated [her] stories," does not support the appellate courts' formulation of a rule that a defendant can never be prejudiced "where the defendant...mounts a unitary defense to all alleged actions, attacking the victim's credibility generally." At no point in *Celis-Garcia* did this Court make any reference to the presentation of "a unitary defense" or state that it is not possible that individual jurors may have convicted the defendant on the basis of different acts in a given case where a defendant "generally attacked the credibility" of the complaining witnesses.

Rather, this Court's reference to hypothetical cases in which the defense simply argued that the complaining witness fabricated her story seemed to suggest that the

defense presented was only a factor to consider in determining the likelihood that individual jurors convicted the defendant on the basis of different acts. *State v. Celis-Garcia*, 344 S.W.3d at 159. As stated this Court, "the fact that Ms. Celis-Garcia relied on evidentiary inconsistencies and factual improbabilities respecting each specific allegation of hand-to-genital contact makes it more likely that individual jurors convicted her on the basis of different acts." *Id*. (emphasis added). In making this assertion, this Court did not consider "the defense" asserted as necessarily dispositive. Rather, the issue was whether it was likely that individual jurors might have convicted the defendant based on different acts.

Although the nature of the defense asserted is a factor to consider, so too are other factors, such as the nature of the state's evidence. Here, the incidents of deviate sexual intercourse—in the kitchen, in the bedroom, in the living/front room, in the bathroom—all come from state's *evidence*: the testimony of Estes, Diana, and Det. Wilson and Det. Wilson's interview of S.M. all were allowed into evidence based on the *state's* motion under §491.075, RSMo(Supp.20008); as was the testimony Det. Coates and his interrogation of Edward (TTr iv-v).

Additionally, by looking solely at the defense presented, the courts misdirect the focus of the inquiry. The relevant inquiry is the likelihood that individual jurors did not reach an agreement as to the specific criminal act committed by the defendant. The defense asserted is a relevant factor, but is not dispositive.

The motion court was clearly erroneous in denying relief, because counsel failed to act as a reasonably competent attorney acting under similar circumstances. *State v.*

Schaal, 806 S.W.2d at 667; Rule 29.15(k)(A52); *Strickland v. Washington*, 466 U.S. 668,687,689 (1984). A reasonably competent attorney would have objected to verdict directors that allowed for a non-unanimous verdict. Had counsel objected on the basis that the verdict directors did not identify the acts the jurors had to agree on if convicting Edward, there is a reasonable probability the outcome of the trial would have been different. Because the verdict directors did not require jurors to agree on the acts, there is a reasonable probability the jury would have acquitted Edward of one or both counts had it been properly instructed.

Conclusion

The motion court was clearly erroneous in finding find that counsel was not entitled to relief in this claim (PCLF66-67,A6-A7). *State v. Schaal*, 806 S.W.2d at 667; Rule 29.15(k)(A52). Edward was prejudiced by counsel's failure to object to Instructions 8 and 10. Had counsel objected, the trial court would have sustained the objection, and there is a reasonable probability that the result of Edward's trial would have been different. Counsel's ineffectiveness violated Edward's constitutional rights, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§10,18(a),22(a). Thus, this Court should vacate the motion court's judgment and remand for a new trial.

II

The motion court clearly erred in denying Edward's Rule 29.15 motion, because the record leaves the firm conviction that a mistake was made, in that Edward established that trial counsel failed to act as a reasonably competent attorney and violated Edward's rights to due process, fair trial, individualized sentencing, and effective assistance of counsel, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I, §§10,18(a), when counsel failed at sentencing to present testimony of a mental health expert, such as that of Dr. Bill Geis, regarding mitigating evidence of Edward's mental disability. Edward was prejudiced, because had counsel presented such mitigating evidence and testimony, there is a reasonable probability that the result of the sentencing would have been different.

Facts

The state charged Edward two counts of first-degree statutory sodomy, §566.062,RSMo (Supp.2006) (DALF16-17,A11-A12). The state also charged Edward as a prior offender, §558.016,RSMo(Supp.2005)[14] (DALF16-17,A11-A12,A45). The trial court found Edward to be a prior offender, and thus, the trial court sentenced Edward after the jury found him guilty (TTr60,505,DALF2,6,51-56,A37-A42).[15]

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[14]A prior offender is someone who has pleaded guilty to or has been found guilty of one felony. §558.016.2,RSMo(A45).

[15]Prior offenders are ineligible for jury sentencing and, therefore, are sentenced by the trial court. §557.036.4(2),RSMo(Supp.2003)(A43-A44).

Evidence was adduced at trial that Edward had previously been convicted of two counts of sexual abuse,[16] involuntary manslaughter,[17] misdemeanor child endangerment,[18] and living within 1,000' of a school[19] (TTr418-419).

At sentencing, S.M.'s father, Charlie Moore, testified that he hoped Edward "rots in prison where he belongs" (TTr511,A22). Moore also testified on behalf of S.M's recently deceased grandmother, who had also hoped that Edward "rots and to make sure he stays where he belongs" (TTr511,A22).

The state argued that the previous two previous child abuse convictions involved 4-year old children (TTr512,A23). The state argued that Edward did not believe his behavior was wrong and, therefore, could not change his behavior and had a high chance of re-offending (TTr514-515,A25-A26).

At sentencing, trial counsel presented no evidence on Edward's behalf (TTr516-522,A27-A33). Counsel didn't present any evidence about Edward's mental disability. (TTr516-522, A27-A33). Counsel mentioned the fact that Edward had been in special education classes but didn't elaborate (TTr518,A29). Counsel argued that what Edward was convicted of was not as severe as it would be had it involved sexual intercourse with S.M. (TTr520,A31). Counsel also corrected and updated some of the negative

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[16]*See*, §566.100,RSMo(1986).

[17]*See*, §565.024,RSMo(2000).

[18]*See*, §568.050,RSMo(2000).

[19]*See*, §566.147,RSMo(Supp.2006).

Information that was in the Sentencing Assessment Report (TTr518-519,A29-A30).

The court sentenced Edward to two consecutive imprisonment terms of 40 years on each count (TTr522,A33). The court stated it believed Edward's history of sexually deviant behavior showed Edward had no understanding about the bounds of sexual relationships (TTr522).

In the amended motion, Edward alleged that counsel was ineffective in failing to present testimony at the sentencing hearing from a mental health expert, such as that of Dr. Geis, regarding the mitigating evidence of the effects of Edward's mental disability; Edward was prejudiced, because there is a reasonable probability that, but for counsel's ineffectiveness, the result of the trial would have been different; and Edward suffered violations of his constitutional rights, U.S.Const.,Amends.V,VI,XIV; Mo. Const.,Art.I,§10,18(a)(PCLF33,53-58).[20]

At the evidentiary hearing, counsel testified that the judge sentenced Edward (HTr71). Counsel's goal at sentencing was the "[l]east time as possible" (HTr87). Counsel did not present any evidence at sentencing (HTr88-89).

Counsel testified that there was evidence of Edward's prior convictions before the court as well as evidence in the Sentencing Assessment Report ("SAR") of his propensity to reoffend based on the Static-99 test (HTr90). Counsel recalled that Edward had prior

[20]Edward raised a cognizable claim, preserved for appellate review. *Hudson v. State*, 248 S.W.3d 56,58 (Mo.App.,W.D.2008); *Hill v. State*, 181, S.W.3d at 611,620 (Mo.App.,W.D.2006); Rule 29.15(a)(A66).

convictions for a sex offense, involuntary manslaughter, living within 1,000' of a school as a sex offender, and "some misdemeanors" (HTr90).

Counsel said that he was not surprised that the prosecutor argued to the court that Edward's two prior child abuse cases involved a 4-year old victim (HTr90). Counsel testified that he didn't recall having a strategic reason for failing to rebut that argument by the state (HTr90-91). Also, counsel wasn't surprised by the prosecutor's argument that Edward couldn't change his behaviors and thus had a high risk of reoffending (HTr91). Counsel testified that he did not have a strategic reason for failing to combat this argument (HTr91). Counsel testified that he did not consider argument or evidence to rebut argument that Edward had a history of sexual deviance and didn't understand the boundaries of sexual relationships (HTr92).

Before sentencing, counsel was aware that Edward was mentally retarded (HTr89). Counsel obtained Edward's school records but performed no other investigation into Edward's mental condition or any evidence in mitigation of Edward's sentence (HTr93-94). Counsel did not obtain any records regarding Edward from juvenile court or the Department of Corrections (HTr95). Counsel testified that he did not consider presenting a mental health expert at sentencing to testify in mitigation of Edward's punishment (HTr96). Counsel testified that he was familiar with Dr. Bill Geis and how to contact him at the time of Edward's trial (HTr96).

Counsel testified that argument that counsel's client would reoffend will have an effect on the sentence that the client receives (HTr87-88). Similarly, counsel testified that arguments that counsel's client is a danger to society and should rot in prison would

have an effect on the sentence that the client receives (HTr88). Counsel testified that arguments that counsel's client is a sexual deviant and is unable to conform his behavior to acceptable standards would also affect the length of a client's sentence (HTr88).

Counsel testified that other evidence/argument could effect a client's sentence: a diagnosis of mild mental retardation (a positive effect); the label of being a pedophile (a negative effect); the inability to exhibit classic pedophile behaviors and tendencies—obsessing, planning, grooming (a positive effect); amenability to treatment strategic and ability to performed well in a highly structured treatment program; and lack of danger to society (a positive effect) (HTr97-99). Counsel testified:

> Q. …All those factors that I listed that you said would be helpful, no future dangerousness or a lessened sense of future dangerousness, amenability to treatment, not having the characteristics of a classic pedophile, in this case, in Ed Hoeber's case, did you have any strategy reason for failing to present any evidence that would show that and further that argument?
>
> A. No.

(HTr99).

At the evidentiary hearing, Dr. Bill Geis testified that he had worked as a clinical psychologist and psychiatry professor for 29 years (HTr5). At the request of appointed postconviction counsel, Dr. Geis performed a forensic psychological evaluation on Edward for purposes of sentencing, future dangerousness, amenability to treatment, ability to be in the community (HTr13,15). Before that evaluation, Dr. Geis had not been

contacted by the Public Defender's Office in St. Joseph or trial counsel about evaluating Edward (HTr15-16). Dr. Geis testified that if trial counsel had contacted him, he would have been willing and able to evaluate Edward for purposed of providing testimony in mitigation of punishment (HTr16-17). Furthermore, Dr. Geis would have been willing to testify at Edward's sentencing (HTr17).

Dr. Geis testified about factors that he found relevant in Edward's early life. Edward was born into poverty (HTr30,Movant'sEx3). He was sexually abused by his father; Edward's mother refused to do anything about this when Edward told her about the abuse (HTr31-32, Movant'sEx3). Edward's parents separated when he was 3-years old; his father left town, and Edward was raised by his mother (HTr30. Movant'sEx3). Edward was not well-supervised as a child; he was treated for numerous injuries, including broken bones, stab wounds, and swallowing batteries (HTr32. Movant'sEx3). At 10-years old, Edward was found by a school assessment to be mildly mentally retarded (HTr36, Movant'sEx3).

Dr. Geis testified about Edward's prior sexual offense:

Q. And, Doctor, in review of your records, were you aware that at age 22, Mr. Hoeber went to prison for fondling a four-year-old girl?

A. Yes. Yes.

Q. And he was released at approximately age 25…to a halfway house. At that time, did it appear that he had any MRDD [mental retardation/developmental disability regional center] training or post-incarceration training, specifically for sex offenders?

A. There is no, in any records that I examined, no history of him being offered or accepting any kind of sexual offender training, nor social skills until he was in the Department of Corrections. And he's been an avid user of those skill building kind of classes at [prison] and there's records of that, anger management, social skills that sort of thing.

(HTr37-38,Movant'sEx3).

Dr. Geis diagnosed Edward major depressive disorder, mild mental retardation, and recurrent stress induced by incarceration (HTr40,Movant'sEx3). Dr. Geis testified:

Mild mental retardation as a diagnosis is formed in two ways. There are two components of this. It's not just I.Q. I.Q. is one component of it. And I.Q. the generalized kind of capacity. And even I.Q. can be low and be caused by a head injury and not mental retardation.

So one has to look at carefully at what—why that person has that I.Q. He does not have a head injury, he doesn't have a neurological condition, this is not a condition of low-intellectual functioning that's absolutely consistent (sic) with mental retardation, and pretty consistent in that way.

Also, for the diagnosis of mild mental retardation, there has to be an assessment of social function that goes with that. So a person could actually be slightly more functional and have and I.Q. below 70, 69 and below, which is just the functional cut-off in terms of how we establish

> standards for how we establish standards for mild mental retardation range, and actually be judged not to be mentally retarded because they are higher social functioning or actually be at the borderline level and have very, very poor social functions.
>
> So social skills are actually part of that beyond just the diagnosis and not made on just the basis of I.Q. He conforms to both those kinds of difficulties….

(HTr42-43,Movant'sEx3).

Dr. Geis testified that Edward's verbal I.Q. was 69, his performance I.Q. was 72, and his full scale I.Q. was 69 (HTr44, Movant'sEx3). In 2010, Edward was tested, and his full scale I.Q. was 67 (HTr44, Movant'sEx3). Dr. Geis testified:

> …[A]s a child,…his full scale was 65, his verbal was 68 and his performance was 68. So there's a great consistency across time, which helps corroborate that this is a genetic condition.

(HTr44, Movant'sEx3).

Dr. Geis examined Edward to see if he fit the pattern of a true pedophile (HTr46,Movant'sEx3). Dr. Geis testified:

> Q. …Tell me what you mean as far as pedophiles by what "wiring is."
>
> A. This especially relates to the sentencing phase. The forensic expert—you know, there are several things we want to identify, certain mitigation factors. Dangerousness is something you might want to that decision process.

Whether or not they have the wiring to be a criminal, we are especially concerned with that. The two main domains are psychopath and pedophile. Those are clinical conditions that have inherent wiring, if you will, to criminal acts. It's built into them. It's woven into who they are. It's not situational.

And so they're really concerned at whether somebody meets that kind of standard. That's valuable information that we want to get in a sentencing phase.

Q. And did you find, did you form an opinion as to whether Mr. Hoeber's conduct was, as you called it, situational or whether it was…wired pedophile behavior?

A. …[A]bsolutely, I formed a conclusion about that.

Q. And what was that?

A. That he meets another designation that we make in looking at these sexual offender files. This is through some tradition and research and also a classification within Probation and Parole and other kind of entities as to whether somebody is a fixated offender or a regressed offender.

The fixated offender is much closer to the really technical understanding of pedophile. They have a very specific set of fantasies, ideas that drive them. It's a compulsive condition and they're very focused on a very narrow range of sexual interest of

pre-adolescent children. They don't tend to vary outside of that in terms of interest. They're the really dangerous person, because that is a compulsion that continues….

Q. What is the regressed offender?

A. …The focus of sexual interest tends to be wired and just powered by circumstance. If you're in the location, you're interested in having sex, then it may not—it just depends who's close to you in location.

That's very, very relevant in planning the potential for intervention or program for repeat offending, repeat offenders are—if you remove them from a context, almost invariably they're called acts of convenience, somebody close at hand, versus the fixated person who will seek out, induce, do a great deal of grooming to make a child into somebody who might be open and available, and then not talk to anybody as a sexual partner. There's a lot of planning and focused.

The regressed individual tends to be not very functional and not have good relationships in a lot of different areas and so opportunity is a primary guide where they have sexual relations. And if you look at the history, it conforms to that pattern.

Q. You mean, when you look at the history of Mr. Hoeber, specifically?

A. His—the reported romantic and sexual relationships are who is available.

Q. …So do you come to a conclusion of whether he was a regressed sexual offender?

A. Yes, I did?

Q. And is he?

A. Yes, he would be much closer to the profile of a regress[ed] than he would be a fixated. There is very little evidence of him being a fixated. And, in fact, you include the type of sexual misconduct that's identified, which has primarily been touching, and kind of exploration and mild stimulation, and there's no evidence that I can find, which is I find is very important information, of any kind of effort to have coitus with a child

Previously, there was laying on and fondling and in this situation, I can't find any record that he went beyond the touching.

Q. And did you find any evidence…[of] the fixated planning or grooming activity?

A. Well, you could see the relationship that he had with this little girl was grooming, but the issue about that grooming, it tends to be outside the family especially through the Internet and other kind of sources to actually make contact outside. That's part of the reason we make this distinction, because regressed individuals, you can actually remove or limit access to children and that's meaningful.

(HTr47-51).

Dr. Geis found Edward to be very amenable to treatment, as shown by the treatment Edward sought ought and participated in while in prison (HTr58,Movant'sEx3). Dr. Geis testified that he found no effort after either sex offense to provide Edward with sex offender training or even any training on functional skills (HTr52,Movant'sEx3). The only evidence of any kind of treatment was Edward reporting to Truman Medical Center to manage his anti-depressant medication (HTr53,Movant'sEx3). Dr. Geis found no evidence of Edward ever having a Department of Mental Health (DMH) forensic case manager (HTr54,Movant'sEx3). In Dr. Geis' opinion, Edward needed to live in a group home, receive mental retardation and living situation support, and have a high degree of structure in his life (HTr54-55,Movant'sEx3). Dr. Geis testified that Edward was someone who had "fallen through the cracks" (HTr54,Movant'sEx3).

Dr. Geis testified that Edward wasn't someone who would actively seek out children to molest (HTr55,Movant'sEx3). Dr. Geis believed that despite being told, Edward didn't fully grasp that he was not be around children when he lived within 1,000' of a school (HTr55, ,Movant'sEx3).

Dr. Geis discussed Edward receiving training and supervision from DMH:

> …I think a central kind of intervention could have been MRDD mental retardation group home where his time and location and where he is strictly regulated. There are two people who know where he is at all points. There can be an interface with probation and parole, but it's hard for probation and parole just given the resources to do that much.

> The forensic case managers in the mental health system can provide more in this case, but they're not always available in every jurisdiction in the case. In Kansas City, we have that as part of the mental health system, but not everybody has that.
>
> There real strong intervention could have been here that met MRDD that's in a residence that removes him from children….
>
> One of the strongest interventions as you look at this information would have been making sure he doesn't live in any situation where he is around children.

(HTr56,Movant'sEx3).

The motion court denied relief on this claim (PCLF67-68,A7-A8). The motion court stated, "There is no reasonable probability that had trial counsel called Dr. Geis to testify, the result of the sentencing would have been different" (PCLF68,A8).

Further Standard of Review

To show ineffective assistance by failing to locate and present expert witnesses, a movant has the burden to show such experts existed at the time of trial, that they could have been located through reasonable investigation, and the testimony would have benefitted the defense. *Cravens v. State*, 50 S.W.3d 290,298 (Mo.App.,S.D.2001), *citing State v. Johnson*, 968 S.W.2d 686,696-697 (Mo.banc1998); and *State v. Davis*, 814 S.W.2d 593,603 (Mo.banc1991).

To show trial counsel provided ineffective assistance during sentencing, a movant must establish there is a reasonable probability that, but for trial counsel's error, a movant

would have received a lesser sentence. *Eichelberger v. State*, 134 S.W. 3d 790,792 (Mo.App.,W.D.2004); *see also, Eichelberger v. State*, 71 S.W.3d 197,199 (Mo.App.,W.D.2002)(Counsel's deficient performance at sentencing relevant to extent there is a reasonable probability that, absent counsel's error, movant would have received a lesser sentence).

Prejudice may be established because of errors affecting sentencing. *Blankenship v. State*, 23 S.W.3d 848,850 (Mo.App.,E.D.2000), *citing Williams v. Taylor*, 529 U.S. 362,390-391 (2000). *See*, *Vaca v. State*, 314 S.W.3d 331,336,n.3 (Mo.banc2010), *quoting State v. Prosser*, 186 S.W.3d 330,333 (Mo.App.,E.D.2005)("'The purpose of having a separate penalty phase in non-capital trials...is to permit a broader range of evidence relevant to the appropriate punishment to be imposed.'"). When examining prejudice for a claim of ineffective assistance based on a failure to investigate mitigation evidence for a sentencing hearing, "courts should evaluate the totality of evidence. The question is whether, when all the mitigation evidence is added together, is there a reasonable probability that the outcome would have been different?" *Hutchison v. State*, 150 S.W.3d 292,306 (Mo.banc2004)[21], *citing Wiggins v. Smith*, 539 U.S. 510,536 (2003)(citations omitted).

Argument

The motion court clearly erred in denying relief. *State v. Schaal*, 806 S.W.2d

[21]*Abrogated on other grounds by State v. Mallow*, 439 S.W.3d 764,770,fn.3 (Mo.banc2014).

659,667 (Mo.banc1991); Rule 29.15(k)(A52). Edward met the burden to show Dr. Geis was a practicing forensic psychologist at the time of trial, that counsel already knew of Dr. Geis, and Dr. Geis' testimony would have benefitted the defense. *Cravens v. State*, 50 S.W.3d 290,298 (Mo.App.,S.D.2001), *citing State v. Johnson*, 968 S.W.2d 686,696-697 (Mo.banc1998); and *State v. Davis*, 814 S.W.2d 593,603 (Mo.banc1991).

"Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *McKoy v. North Carolina*, 494 U.S. 433,440 (1990) (citations omitted); *see*, *Tennard v. Dretke*, 542 U.S. 274,285 (2004)(calling this a "low threshold"). While Edward's case is not a capital murder, the U.S. Supreme Court's body of death penalty jurisprudence is quite instructive on the issue of mitigation. The U.S Supreme Court stated:

> We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases.

Lockett v. Ohio, 438 U.S. 586,604-605 (1978); *see Penry v. Lynaugh*, 492 U.S. 302,319 (1989)("evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse,") *quoting California v. Brown*,

479 U.S. 538,545 (1987)(O'Connor,J.,concurring)(recognizing "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background...may be less culpable than defendants who have no such excuse[;]" that "the emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence[;]" and that "[*Lockett v. Ohio*, 438 U.S. 586,604-605 (1978)] and [*Eddings v. Oklahoma*, 455 U.S. 104,113-114 (1982)] reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant…Thus, the sentence imposed…should reflect a reasons *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.")(emphasis in original).

The motion court clearly erred in failing to find that counsel was ineffective. *State v. Schaal*, 806 S.W.2d at 667; Rule 29.15(k)(A52). Counsel failed to act as a reasonably competent attorney acting under similar circumstances. *Strickland v. Washington*, 466 U.S. 668,687,689 (1984). A reasonable competent attorney in the same circumstances would have investigated and consulted a mental health expert to truly discover the extent of the client's mental condition and its impact—in this case, very favorable—on the sentencing. Here, counsel failed completely to conduct such investigation. "'Counsel has a duty to make reasonable professional investigations.'" *Gennetten v. State*, 96 S.W.3d 143,151 (Mo.App.,W.D.2003), *quoting Moore v. State*, 827 S.W.2d 213,215 (Mo.banc1992). "'Strategic choices made after less than a thorough investigation are only reasonable to the extent that reasonable professional judgment would support the choice not to investigate further.'" *Kuehne v. State*, 107 S.W.3d 285,294

(Mo.App.,W.D.2003), *quoting Anderson v. State,* 66 S.W.3d 770,776 (Mo.App.,W.D.2002). "In instances where counsel fails to properly investigate, counsel may be found to have provided ineffective assistance of counsel." *Id*., *citing Clay v. State,* 954 S.W.2d 344,349 (Mo.App.,E.D.1997).

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. *Kenley v. Armontrout,* 937 F.2d 1298,1304 (8thCir.1991), *citing Chambers v. Armontrout,* 907 F.2d 825,828 (8thCir.1990)(enbanc). In *Williams v. Taylor*, 529 U.S. 362,368 (2000), trial counsel presented mitigating evidence through the defendant's mother, his friends, and a psychiatrist. Williams' counsel, however, failed to conduct investigation that would have uncovered extensive evidence of the abusive and deprived childhood Williams had experienced. *Id*., at 395. The jury also did not hear that Williams was borderline mentally retarded and his mental impairments were likely organic in origin. *Id*., at 396. The Court concluded that Williams was denied effective assistance of counsel.

The Southern District Court of Appeals reversed a conviction of murder in the second degree for ineffective assistance of counsel for failure to call a gunshot expert to counter the state's expert. *Cravens v. State,* 50 S.W.3d at 298. The Court stated that counsel could not have made a strategic decision against pursuing a line of investigation when he or she has not yet obtained the facts on which such a decision could be made. *Id*., at 295, *citing Kenley v. Armontrout,* 937 F.2d at 1308; *Eldgridge v. Atkins,* 665 F.2d 228,232 (8thCir.1981); and *Clay v. State,* 954 S.W.2d at 349.

Similarly, this Court held that the movant in *Wolfe v. State,* 96 S.W.3d 90,95

(Mo.banc2003), was denied effective assistance of counsel and reversed his conviction of first degree murder and sentence of death. This Court held that trial counsel's failure to use an expert to test hair samples found in the back seat of the victim's car fell outside the range of reasonably competent behavior. *Id*., at 94. This Court found that the reliability of Wolfe's conviction was seriously undermined, and Wolfe received a new trial. *Id*., at 94-95

There is a reasonable probability that had counsel presented mitigation evidence that Edward wished him to present at the sentencing hearing, he might have been sentenced to less of a term of imprisonment. Edward was sentenced to forty years on each count, running consecutively—amounting effectively to a life sentence with parole unlikely. Counsel was aware of Edward's learning disabilities and potential mental retardation but did not see fit to hire Dr. Geis or any other such expert to evaluate Edward. Edward was prejudiced by counsel's failure to present the testimony of Dr. Geis or some other such expert testimony at Edward's sentencing hearing. Had the trier of fact heard Dr. Geis' testimony about the effects of Edward's mental deficiency, there is a reasonable probability that Edward would have received a lesser sentence. After all, the U.S. Supreme Court has recognized that "our society views mentally retarded offenders as categorically less culpable than the average criminal." *Atkins v. Virginia*, 536 U.S. 304,316 (2002). Mentally disabled offenders, "by definition…have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id*., at 318.

Counsel's failure to present this evidence in mitigation was not the result of a strategic decision. This Court addressed this issue in *Vaca v. State*, 314 S.W.3d 331 (Mo. banc. 2010). There, counsel was aware that his client suffered from a mental disability, as he had investigated the matter and had in his possession a mental evaluation discussing his client's mental illness. *Id*., at 336. Counsel simply failed to consider the possibility of presenting that evidence in mitigation at the sentencing phase of the trial. *Id*., at 336-337. This Court held that counsel's failure to consider this presentation of mitigation evidence fell below the standard a reasonably competent attorney would have exhibited under similar circumstances, and remanded for a new sentencing proceeding. *Id*., at 337. In this case, counsel did not investigate having an evaluation done or presenting this mitigating evidence. There could be no trial strategy reason for failing to put on mitigation evidence at the sentencing of someone found guilty of two counts of statutory sodomy where there was the possibility of a sentence in a range that would effectively result in a sentence of life without parole.

Conclusion

The motion court was clearly erroneous in finding find that counsel was not entitled to relief in this claim (PCLF67-68,A7-A8). *State v. Schaal*, 806 S.W.2d at 667; Rule 29.15(k)(A52). Counsel's ineffectiveness violated Edward's constitutional rights, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§10,18(a). Thus, this Court should vacate the motion court's judgment and remand for a new sentencing.

CONCLUSION

Based on Argument I, this Court should vacate the motion court's judgment and remand for a new trial.

Based on Argument II, this Court should vacate the motion court's judgment and remand for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Laura G. Martin, hereby certify as follows:

1. The brief was completed in compliance with Rule 84.06 and using Microsoft Word, Office 2003, in Times New Roman size 13 point font. Excluding the cover page, the index, the signature block, the certificate of compliance and service, and the appendix, the brief contains 14,403 words, which does not exceed the 31,000 words allowed for an appellant's brief under Rule 84.06.

2. On September 23, 2015, a true and correct copy of Appellant's Substitute Brief was served on Evan Buccheim, Assistant Attorney General, Office of the Attorney General, PO Box 899, Jefferson City, MO 65102 (e-mail: evan.buchheim@ago.mo.gov), through the e-filing system of the Missouri Office of the State Courts Administrator.

/S/ Laura G. Martin
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