IN THE
MISSOURI SUPREME COURT

CHRISTOPHER COLLINGS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC96118
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF PHELPS COUNTY, MISSOURI
TWENTY-FIFTH JUDICIAL CIRCUIT, DIV. II
THE HONORABLE JOHN BEGER, JUDGE

APPELLANT'S BRIEF

Amy M. Bartholow, Mo.Bar No. 47077
Attorney for Respondent
Woodrail Centre
1000 West Nifong
Building 7 Suite 100
Columbia, Missouri 65203
(573) 777-9977
Fax (573) 777-9974
Email: Amy.Bartholow@mspd.mo.gov

INDEX

	Page
INDEX	2
TABLE OF AUTHORITIES	3
JURISDICTIONAL STATEMENT	8
STATEMENT OF FACTS	9
POINTS RELIED ON	21
ARGUMENTS	35
CONCLUSION	158
CERTIFICATE OF COMPLIANCE AND SERVICE	159
APPENDIX	A-1

TABLE OF AUTHORITIES

Page

***CASES*:**

Abdul–Kabir v. Quarterman, 550U.S.233(2007) 71

Antwine v. Delo, 54 F.3d1357(8thCir.1995) 81,118,134,139

Arizona v. Fulminante, 499U.S.279(1991) 82

Barry v. State, 850S.W.2d 348(Mo.banc1993)..... *passim*

Blankenship v. State, 23S.W.3d848(Mo.App.E.D.2000) 105

Bruton v. United States, 391U.S.123(1968) 82,101

Butler v. State, 108S.W.3d18(Mo.App.W.D.2003)..... 34

California v. Brown, 479U.S.538(1987)..... 71

Clay v. State, 954S.W.2d344(Mo.App.E.D.1997)..... 133,139

Cravens v. State, 50 S.W.3d290(Mo.App.S.D.2001) 117,123,132,138

Deck v. State, 68S.W.3d418(Mo.banc2002) 34,105,118,128,144

Doe v. Phillips, 194S.W.3d833(Mo.banc2006)..... 47

Doe v. Roman Catholic Diocese of Jefferson City, 862S.W.2d338(Mo.banc1993)... 47

Eddings v. Oklahoma, 455U.S.104(1982) 49,71

Eldridge v. Atkins, 665F.2d228(8thCir.1981)..... 133,138

Enmund v. Florida, 458U.S.782(1982) 22,49,50,52

Ervin v. State, 80S.W.3d817(Mo.banc2002) 32,48,49

Ferguson v. Dormire, 413S.W.3d40(Mo.App.W.D.2013)..... 54

Ford v. Wainwright, 477U.S.399(1986) 49

Furman v. Georgia, 408U.S.238(1972) 153,154

Glass v. State, 227S.W.3d463(Mo.banc2007) 143

Godfrey v. Georgia, 446U.S.420(1980) 33,153,154

Green v. Georgia, 442U.S.95(1979) 24,87

Gregg v. Georgia, 428U.S.152(1976) 22,48,49-53,81,153,154

Hardwick v. Sec'y, Fla. Dep't of Corr., 803F.3d 541(11th Cir. 2015) 23,78-80

Hicks v. Oklahoma, 447U.S.343(1980) 48

House v. Balkcom, 725F.2d608(11thCir.1984) 78

Hutchison v. State, 150S.W.3d292(Mo.banc2004) ..... *passim*

In re Winship, 397U.S.358(1970) 47

Joy v. Morrison, 254S.W.3d885(Mo.banc2008) 73

Kenley v. Armontrout, 937F.2d1298(8th Cir.1991) 26,29,30,31,71,118,132,138,144

Kyles v. Whitley, 514U.S.419(1995) 26,81,118,133,139

Lankford v. Idaho, 500U.S.110(1991) 34

Leone v. State, 797N.E.2d743(Ind.2003) 33,155

Lockett v. Ohio, 438U.S.586(1978) 22,36,49,70,87

Maynard v. Cartwright, 486U.S.356(1988) 33,153-155

McCoy v. North Carolina, 494U.S.433(1990) 89

Middleton v. State, 80S.W.3d799(Mo.banc2002) 74

Montana v. Egelhoff, 518U.S.37(1996) 22,45,46,50,52

Morissette v. United States, 342U.S.246(1952) 47

Mullaney v. Wilbur, 421U.S.684(1975) 48

Parker v. Bowersox, 188F.3d923(8th Cir.1999) 148

Parker v. Dugger, 498U.S.308(1991) 71

Pennsylvania ex rel. Sullivan v. Ashe, 302U.S.51(1937) 71

Penry v. Lynaugh, 492U.S.302(1989) 75,81

Powell v. Collins, 332F.3d376(6thCir.2003) 23,77,80

Rompilla v. Beard, 545U.S.374(2005) 23,38,70-71,73,117

Sandstrom v. Montana, 442U.S.510(1979) 47

Sears v. Upton, 561U.S.945(2010) 70,81-82

Simmons v. Luebbers, 299F.3d929(8th Cir.2002) 90

Skipper v. South Carolina, 476U.S.1(1990) 77

Smith v. Cain, 565U.S.73(2012) 105

Smith v. Robbins, 528U.S.259(2000) 88,153

State v. Candela, 929S.W.2d852(Mo.App.E.D.1996) 24,87

State v. Celis-Garcia, 344S.W.3d150(Mo.banc2011) 156

State v. Collings, 450S.W.3d741(Mo.banc2014) 9,46,104,116

State v. Davis, 814S.W.2d593(Mo.banc1991) 52

State v. Ervin, 848S.W.2d476(Mo.banc1993) 45

State v. Griffin, 756S.W.2d475(Mo.banc1988) 27,123,132,138

State v. Griffin, 810S.W.2d956(Mo.App.E.D.1991) 155

State v. Johnson, 968S.W.2d686(Mo.banc1998) 73

State v. Johnston, 957S.W.2d734(Mo.banc1997) 74,104

State v. Knese, 985S.W.2d759(Mo.banc1999) 74

State v. LaRette, 648S.W.2d96(Mo.banc1983).....155

State v. McCarter, 883S.W.2d75(Mo.App.S.D.1994) 34,144

State v. Preston, 673S.W.2d1(Mo.banc1984).....33,154-155

State v. Richardson, 923S.W.2d301(Mo.banc1996) 73

State v. Simmons, 955 S.W.2d729(Mo.banc1997).....104

State v. Wise, 879S.W.2d494(Mo.banc1994) 73

Strickland v. Washington, 466U.S.66(1984) .....*passim*

Taylor v. State, 262S.W.3d231(Mo.banc2008) 24,88-91,153

Tennard v. Dretke, 542U.S.274(2004) 72,77,88,143-144

Tennessee v. Street, 471U.S.409(1985) 25,101

U.S. v. Tucker, 533F.3d711(8th Cir.2008).....25,101

Vidauri v. State, 515S.W.2d562(Mo.banc1974).....46

Wiggins v. Smith, 539U.S.510(2003) 31,32,52,83

Williams v. State, 168S.W.3d433(Mo.banc2005).....88

Williams v. Taylor, 529U.S.362(2000).....31,32,83

Woodson v. North Carolina, 428U.S.280(1976) 34,49,90

***CONSTITUTIONAL PROVISIONS*:**

U.S.Const.,Amend.VI .....*passim*

U.S.Const.,Amend.VIII .....*passim*

U.S.Const.,Amend.XIV .....*passim*

***STATUTES*:**

§490.063 88

§490.130 88

§490.692 88

§562.076 16,21,35-39,45-51,55-56

§565.020 48

§565.021 48

§565.032 15-16,23,56-59,61-63,69,71-74,80-81

***MISSOURI SUPREME COURT RULES*:**

Rule 29.15 8-9,34,46

***MISSOURI APPROVED INSTRUCTIONS*:**

MAI-CR3d 310.50 16,21,35-37,39,45-47,49-51,55-56

***OTHER*:**

1 ABA Standards for Criminal Justice(2d ed.1982 Supp.) 117

Black's Law Dictionary 155

JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction over Christopher's 29.15 death penalty appeal. Art.V,Sec.3,Mo.Const.

STATEMENT OF FACTS

I. Procedural History

Christopher Collings was convicted of first-degree murder and sentenced to death. *State v. Collings*,450S.W.3d741(Mo.banc2014). Christopher filed a 29.15 action and this appeal is taken from the motion court's denial.(PCRLf.144-194).[1]

II. Christopher's Trial

A. Guilt Phase

Respondent's trial evidence and this Court's direct appeal opinion focused on Christopher's confessions to law enforcement – the critical evidence against him.

Nine-year-old Rowan Ford was reported missing from her Stella, Missouri, home on Nov.3, 2007.(Tr.3694). Her body was found in a cave on Nov.9. (Tr.4055,4088). The cause of death was ligature strangulation; she'd been sexually assaulted with injuries to her vaginal area causing significant bleeding and pain.(Tr.4239,5222,5209-12;Ex.190).

That day, Christopher made inculpatory statements about raping and killing Rowan, first to Wheaton Police Chief Clint Clark, then to six assembled officers at the Wheaton Police Department, and in two video-recorded statements at the Barry

[1] The Record: trial transcript(Tr.); pretrial transcript(PTr.); motion to suppress transcript(MTS); sentencing transcript(Sent.Tr.); legal file(LF); evidentiary hearing (PCRTr.); post-conviction legal file(PCRLf); Bolinger deposition(B.Depo.); trial exhibits(Ex.); and hearing exhibits(Mov.Ex.).

County Sheriff's Office – the first video was made before Rowan's step-father, David Spears, gave a confession inconsistent with Christopher's, and the second video was made after.(Tr.455574;Exs.94,748;Mov.Ex.27&28).

Christopher said on the evening of Nov.2, he drank five six-packs of Smirnoff Ice and smoked marijuana; Spears and Nathan Mahurin were also drinking. (Mov.Ex.27,p.15-16). The three drank and shot pool at Spears' house, then left Rowan alone[2] in the house and went to Christopher's trailer in Wheaton to smoke a "hog leg" of marijuana.(Tr.4520;Mov.Ex.27,p.15-16). They made at least three trips for alcohol that evening.(Tr.3754).

Around 11:30 p.m., Mahurin and Spears left Christopher's trailer; Mahurin drove the back roads to Spears' house because he was intoxicated.(Tr.3728). Mahurin dropped Spears off and returned to his house around midnight.(Tr.3735). Christopher told police he knew if he hurried, he could beat Spears home.(Tr.4561; Mov.Ex.27,p.17).[3] He was "really, really fucked up."(Mov.Ex.27,p.36). He said he drove the direct route to Spears' house.(Tr.4561). He walked through the house,

---

[2] Rowan's mom, Colleen, worked an overnight shift.(Tr.3643-47).

[3] FBI-Agent Stonecipher spoke to Christopher on Nov.7, and asked whether he'd have the ability to leave his home on Nov.3 and beat Spears and Mahurin back to Spears' residence before they got there; Stonecipher said he was the one who brought up this possibility, and Christopher said he wouldn't have had enough time.(Tr.3980,3983-84). Two days later, Christopher said this is what he did.(Mov.Ex.27,p.17).

looking in rooms and used the bathroom.(Tr.4562;Mov.Ex.27,p.34). He went into Rowan's room, picked her up and carried her to his truck.(Tr.4562-63;Mov.Ex.27,p.37).

Christopher said he probably started to think about having sex with her on the way home.(Mov.Ex.27,p.52). At his camper, he carried her, still sleeping, inside and put her on the bed.(Tr.4563,4690-91;Mov.Ex.27,p.18). He took her pants and underwear off, "used his finger on her a little" and then had sex with her for 4-5 minutes, possibly ejaculating.(Tr.4563-64;Mov.Ex.27,p.18,38). Rowan awoke when he penetrated her, and she struggled.(Tr.4564,4690-91;Mov.Ex.27,p.41).

Christopher stated he intended to return Rowan home,(Tr.4574-75), and he led her outside facing away from him so she couldn't see his face.(Tr.4564). He made sure to keep the lights off and didn't speak so she wouldn't recognize his voice.(Tr.4691;Mov.Ex.27,p.40). However, Christopher said on the way to his truck, there was moonlight; she looked back and saw him. (Tr.4565;Mov.Ex.27,p.20). He knew she had recognized him and he "freaked out."(Tr.45665,4572;Mov.Ex.27,p.21). Seeing a coil of cord in the bed of a pickup next to him, he took the cord, looped it around her neck and started pulling real hard.(Tr.4565;Mov.Ex.27,p.21). She struggled a little and fell to the ground; he went to the ground with her and held tight until she stopped moving.(Tr.4566;Mov.Ex.27,p.22).

Christopher said when he realized what he'd done, he knew he was in a lot of trouble and had to do something.(Mov.Ex.27,p.21-22). He put her body in his pickup bed, without covering her, and took off; he drove around trying to think of where to

put her, and he wound up putting her in a cave/sinkhole on Fox Hollow hill.(Tr.4566-70;Mov.Ex.27,p.22-24).

Christopher said he returned home and burned his clothes, her pants and underwear, the rope and his mattress in a wood stove and a burn barrel. (Tr.4571;Mov.Ex.27,p.26).

When Colleen returned home from her overnight shift at 9:00 a.m., she couldn't find Rowan; after searching the house, she woke Spears and asked him where Rowan was.(Tr.3650-53). Spears told Colleen Rowan was staying with a friend, but he couldn't identify the friend.(Tr.3652-53). Colleen walked the neighborhood searching for Rowan to no avail; Colleen wanted Spears to call the police, but he insisted she was at a friend's house and he wouldn't let her have the phone.(Tr.3653). When Rowan didn't return that afternoon, Colleen contacted the Sheriff to report her missing.(Tr.3655).

Officers were surprised by Christopher's confession because they assumed Spears' had killed Rowan and Christopher merely knew what happened.(Tr.4688-89). After Christopher's first three statements, Newton County deputies questioned Spears again, at which time Spears implicated himself.(Tr.3836). Upon learning this, Christopher was questioned again in a second recorded interview. (Tr.4830;Mov.Ex.29). The deputies and Chief Clark told Christopher that Spears stated he called his mother, had her bring a vehicle to his home, and then he joined Christopher back at his trailer.(Mov.Ex.29,p.70). Spears stated he also had sex with

Rowan, was there when Christopher killed her,[4] and helped Collings dispose of her body.(Mov.Ex.29,p.12-15). Christopher denied Spears involvement. (Mov.Ex.29,p.17,19,69-72,76-77). The jury found him guilty of first-degree murder.(Tr.5664).

B. Penalty Phase

During penalty, Respondent presented victim-impact testimony from six witnesses: family, friends and teachers, who testified about the impact of Rowan's life and death on them.(Tr.5731-5839).

The defense called two witnesses to buttress a theory of lingering doubt regarding David Spears' involvement in Rowan's death: Myrna Spears testified that on the night Rowan disappeared, David called her around midnight; in response, she drove her Suburban to his house.(Tr.5887-88). David left in his pickup, returned a short while later, and took the Suburban, while she stayed at the house.(Tr.5888-89). David returned by 7:00 a.m.(Tr.5889). Alicia Brown testified that two dogs, trained to alert at human remains' scent, alerted on Spears' Suburban.(Tr.5905,5913). Both dogs separately alerted at the driver's side door and the left rear quadrant.(Tr.5913-14). They also alerted at the driver's seat and rear cargo area.(Tr.5917-18).

[4] This was a false recounting of Spears confession – Spears said, after having sex with her, he put the rope around Rowan's neck and strangled her after Christopher told him it had to be done.(Mov.Ex.31,p.3-4). The deputies also told Christopher they found blood in his truck, which was untrue.(Mov.Ex.29,p.52).

Defense counsel also called Christopher's biological father and brother and two adoptive siblings to discuss his childhood.(Tr.5934-5987).

As the final defense witness, counsel called Dr. Draper, an educator in human development, to explain the phases and events in Christopher's childhood.[5] Draper is neither a psychiatrist (medical doctor), nor a psychologist, and Respondent emphasized this to the jury.(Tr.6276). She doesn't treat patients nor is she qualified to prescribe medication.(Tr.6276).

Dr. Draper used a "LifePath" to focus on Christopher's emotional development, concluding that he suffered severe emotional neglect during the first six months of life; he then experienced confusion in his connections with other people in his natural and adoptive family, which brought about severe disorganized dissociative attachment.(Tr.6274;Ex.901). Christopher's foster/adoptive parents experienced a traumatic loss of a child, and Christopher suffered through their eventual separation and divorce.(Tr.6162,6186). His birth parents came in and out of his life for years.(D.Ex.901,p.3-4;Tr.5948-49,5955,6168,6174,6179,6181). Even within his adoptive family, Christopher was shuttled between parents.(Tr.6049-50,6187).

Draper further testified that, at 6, Christopher was sexually molested by a babysitter's 13-year-old son.(Tr.6170). At 15, he was sodomized by his birth mother's

[5] Counsel also tried to admit the records Dr. Draper relied on, but the trial court excluded them.(Tr.6080-96). Direct appeal counsel failed to raise this as error.(PCRTr.289-321)(See Point III).

new husband.(Tr.6241;D.Ex.901,p.4). Christopher admitted fondling his step-sister when she was 11, 14 and 16.(Tr.6263). This behavior was consistent with having personally experienced sexual abuse.(Tr.6264). Although she talked about this sexual abuse, Draper didn't explain how it can cause trauma, producing neurobiological impacts on Christopher's brain, causing dysfunction.

Draper focused on Christopher's development, concluding, to a reasonable degree of developmental certainty, that he suffered emotional neglect, which brought about severe disorganized dissociative attachment.(Tr.6274). In adolescence he was ill-equipped socially and emotionally to contend with what you would expect in self-discipline and guidance.(Tr.6274). He didn't have consistent guidance, and as a result, his behavior wasn't modulated and he didn't receive the necessary grounding he needed.(Tr.6274).

Draper provided no information about Christopher's severe lifetime alcohol and drug addiction, making only a passing reference to heavy alcohol use in his early-twenties.(Tr.6268,6270). She provided no information supporting the statutory mitigator, "whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."*§565.032.3(6)*.

The jury recommended death.(Tr.6510). The jury found Rowan's murder involved torture, and, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman, and Rowan was killed as a result of her status as a potential witness.(Tr.6510). The court imposed death.(Sent.Tr.38).

III. The 29.15 Case

Christopher filed timely pro se and amended motions.(PCRLf.6-139). His amended raised multiple claims challenging counsel's effectiveness during both phases.(PCRLf.13-139).

In Claims 8(A)&(B), he challenged the constitutionality of *§562.076* and *MAI-CR3d310.50* – the voluntary intoxication statute and instruction – and that counsel was ineffective in failing to present evidence adequately challenging them.(PCRLf.15-25)(Point I).[6] And in Claim 8(F), he raised ineffectiveness of counsel for failing to investigate and call an expert psychiatrist (medical doctor) to present addiction and trauma mitigation and how they impacted him at the time of the crime.(PCRLf.68-73)(Point II). Specifically, Missouri's statutory mitigating circumstances include: whether at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.*§565.032.3(6)*, and non-statutory mitigating circumstances include: difficult childhood or abusive background; history of substance abuse or intoxication; and defendant's mental or emotional development – including mental conditions, disorders and disturbances not rising to the level of mental diseases, defects or incompetency.

[6] Counsel objected to *MAI-CR3d 310.50* as limiting the defense, but presented no evidence of Christopher's lifelong addiction and its effects.(PCRTr.335).

To support these claims, he presented Dr. Melissa Piasecki, a board-certified forensic psychiatrist specializing in addiction neurobiology and the effect of trauma and how people respond or adapt to stress.(PCRTR.19). In her expert opinion, the jury couldn't accurately assess Christopher's mental state at the time of the crime without considering the effects of alcohol and drug use on his brain.(PCRTr.69). Christopher's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense.(PCRTr.70). His ability to appreciate the consequences of his actions would've been compromised by his high BAC in the context of his chronic alcohol and acute marijuana use.(PCRTr.70).

In Claim 8(C), Christopher challenged counsel's failure to present Spears' irreconcilable confession in both phases as evidence of the unreliability of Christopher's confession, as neither story was credible because they couldn't both be true and both may be false, and the use of Spears' statement would show law enforcement was willing to accept incompatible stories and twist what Spears actually said to coerce Christopher into a compatible story, and the jury couldn't fully evaluate the credibility of Christopher's statements without the context of Spears' statement.(PCRLf.25-55)(PointIV).

In Claim 8(D), Christopher challenged counsel's failure to investigate and present the testimony of Joni Blake, Lisa Blevins, Alicia Brown, and a forensic internet history analysis, in that this evidence would cast doubt on Christopher's

police statements, show activity at Spears' house possibly involving others early on Nov.3, and implicate Spears in Rowan's rape/murder.(PCRLf.55-61).

Joni Blake, Spears' neighbor, testified she saw Spears in a different colored car than Mahurin's on the night of Nov.2, and this car was at Spears' house the next morning, contradicting Christopher's and Spears' and Mahurin's accounts.(PCRTr.122-131)(PointIX).

Lisa Blevins, another neighbor, testified there were numerous cars with out-of-state plates and not the best people in and out of Spears' house at all hours, almost daily; it was a "party house."(PCRTr.135;Resp.Ex.B). On the night of Nov.2-3, there were people at Spears' house working on a vehicle; engines were revving all night and she couldn't sleep.(PCRTr.136). She went to smoke on her porch and cars were going in and out, squealing tires, revving motors, and it didn't settle down until close to daylight.(PCRTr.136). Blevins' testimony contradicts the stories told by Christopher, Spears and Mahurin.(PointVIII).

Alicia Brown also should've been presented in guilt-phase because the search dogs alerting on human remains' scent at Spears' Suburban cast doubt on the truth of Christopher's confession to transporting Rowan's body in his pickup.(PointVII).

The forensic internet history analysis of Spears' computer, showed someone's activity on the internet on a MySpace webpage between 1:54:19 and 3:36:03 a.m. on Nov.3, 2007.(PCRTr.209;Movant'sEx.23). This casts doubt on Christopher's confession and shows someone else was in the house when Rowan disappeared.(PointVI).

In Claim 8(E), Christopher alleged counsel was ineffective in not challenging the hair DNA (Item 19.4) found in the back of his pickup with expert testimony.(PCRLf.62-68)(PointV). Trial counsel gave up investigating the DNA when they couldn't open the State's data disk.(PCRTr.225-29). Respondent's lab analyst testified she found a partial DNA profile at 4 of 13 loci in Item 19.4,(Tr.5437,5456), and the approximate frequency of such profile in the Caucasian population is 1 in 328,700.(Tr.5441-42). The partial profile from 19.4 was consistent with Rowan's alleles' profile.(Tr.5439).

At the evidentiary hearing, Dr. Russ Stetler, professor of molecular biosciences, testified Respondent's expert used improper loci for her statistical determinations based on the allele peak heights.(PCRTr.107-108). Also, at one locus, an allele was inconsistent with Rowan's profile and couldn't be contributed by her; therefore, Rowan was excluded entirely from contributing DNA to the partial profile.(PCRTr.103-04). This creates doubt about Christopher's statement that he transported her body in his truck.

In Claim 8(G), Christopher alleged counsel was ineffective in failing to call mitigation witnesses Julie Pickett (his step-mom)(PointX), and Bobby Thomas (his step-brother-in-law)(PointXI)(PCRLf.74-78). They would've testified about his lifelong substance addiction; Julie would've testified about Christopher disclosing his childhood sexual trauma; and Bobby would've testified Christopher saved his life when he tried to commit suicide by hanging – actually holding him until someone could cut down the rope.(PCRTr.148-170).

In Claim 8(H&I), Christopher challenged appellate counsel's effectiveness in failing to raise error in: (H) – the trial court excluding all records Dr. Draper used in mitigation (Point III); and (I) – challenging the "torture" aggravator as unconstitutionally vague.(Point XII).

The motion court denied all claims after an evidentiary hearing.(PCRLf.144-194), and this appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the arguments.

POINTS RELIED ON

I.

§562.076 & MAI-CR3D 310.50 ARE UNCONSTUTIONAL AND COUNSEL MADE NO ADEQUATE CHALLENGE

The motion court clearly erred in denying Christopher's claim *§562.076* and its corresponding jury instruction, *MAI-CR3d 310.50,* unconstitutionally prohibit Christopher's right to present a defense and, alternatively, trial counsel were ineffective in failing to present evidence to challenge the statute's and instruction's constitutionality because these rulings denied Christopher effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,andXIV, in that the Federal Constitution requires the jury find beyond a reasonable doubt that Christopher, a capital defendant, personally acted with a knowing and deliberate mental state in causing the death of another person before he can be convicted and death-sentenced, and the jury cannot do so without considering Christopher's actual *mens rea* which likely was affected by intoxication; had reasonably competent counsel presented evidence and challenged the statute as precluding Christopher's right to present a defense and had the jury considered Christopher's intoxication on the issue of deliberation a reasonable probability exists of a different result.

Gregg v. Georgia,428U.S.152(1976);

Enmund v. Florida,458U.S.782(1982);

Lockett v. Ohio,438U.S.586(1978);

Montana v. Egelhoff,518U.S.37(1996).

II.

ADDICTION AND CHILDHOOD TRAUMA EXPERT

The motion court clearly erred in denying Christopher's claim that counsel was ineffective for failing to investigate/call a penalty-phase expert to testify about his substance abuse/addiction and childhood trauma because this denied him effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel should have been aware of Christopher's traumatic childhood and his consumption of large amounts of alcohol and marijuana the night of the offense consistent with his long-standing addiction, and relevant to the statutory mitigating circumstance of whether at the time of the offense the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, §565.032.3(6), and non-statutory mitigating circumstances include childhood trauma and mental/ emotional development, including conditions not rising to the level of mental diseases, and Christopher was prejudiced by counsel's failure to present this mitigating evidence as there is a reasonable probability the jury would have voted for life.

Rompilla v. Beard,545U.S.374,382 (2005);

Powell v. Collins,332F.3d376(6th Cir.2003);

Hutchison v. State,150S.W.3d292(Mo.banc2004);

Hardwick v. Sec'y,Fla. Dep't of Corr.,803F.3d541(11thCir.2015).

III.

EXCLUDED VITAL RECORDS SUPPORTING MITIGATION WOULD HAVE BEEN REVERSED ON APPEAL, IF RAISED

The motion court clearly erred in denying Christopher's claim appellate counsel was ineffective for failing to raise trial court error in excluding multiple historical, medical, educational and treatment records supporting Draper's penalty-phase testimony because this ruling denied Christopher's rights to due process, to present a defense, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const.Amends.VI,VIII,XIV, in that these records documented Christopher's life history and would have assisted the jury in weighing Draper's expert opinion and were admissible over hearsay objections and effective appellate counsel would have raised error in excluding the records because they were properly certified and, by statute, the court *shall* admit them, and there is a reasonable probability this Court would have reversed Christopher's death-sentence and ordered a new penalty-phase.

Green v. Georgia,442U.S.95(1979);

State v. Candela,929S.W.2d852 (Mo.App.E.D.1996);

Hutchison v. State,150S.W.3d292(Mo.banc2004);

Taylor v. State,262S.W.3d231(Mo.banc2008).

IV.

CO-DEFENDANT SPEARS' IRRECONCIABLE CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective in failing to present in guilt and penalty Co-Defendant David Spears' irreconcilable confession to show police coercion in obtaining Christopher's confession because this ruling denied Christopher effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have challenged the validity of Christopher's statements because they were the most critical evidence against him, and Spears' confession was admissible not for its truth but for the non-hearsay purpose of establishing police conduct used to obtain Christopher's confessions and the jury was unable to adequately assess the weight/credibility to give Christopher's statements without knowing officers had obtained a contradictory confession from co-defendant Spears, and had the jury been able to evaluate Christopher's statements in light of Spears' alleged confession, a reasonable probability exists they would not have convicted him of first-degree murder, or would have voted for life.

Tennessee v. Street,471U.S.409(1985);

U.S. v. Tucker,533F.3d711(8th Cir.2008);

Blankenship v. State,23S.W.3d848(Mo.App.E.D.2000).

V.

UNCHALLENGED HAIR DNA CREATES DOUBT ABOUT CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective for not investigating/calling an expert to challenge DNA evidence from Item 19.4, a hair allegedly found in Christopher's truck bed that Respondent's expert testified was consistent with Rowan's DNA profile, in both guilt and penalty-phases, because Christopher was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const.Amends.VI,VIII,XIV, in that effective counsel would have called an expert to refute these DNA findings because the analyzed data was different from the analysis/testimony given by Respondent's expert, Stacy Bolinger, when correctly excluding certain alleles and peak heights, but Christopher's counsel gave up investigating when they were unable to open the raw data disk, but had they challenged this evidence, there is a reasonable probability the jury would have doubts about Christopher's confession, as Rowan's body was not in his truck, and they would not have convicted him of first-degree murder, or would have voted for life.

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

Kenley v. Armontrout,937F.2d1298(8th Cir.1991);

Hutchison v. State,150S.W.3d292(Mo.banc2004);

Cravens v. State,50 S.W.3d290(Mo.App.S.D.2001).

VI.

FORENSIC INTERNET HISTORY REPORT CREATES DOUBT ABOUT CHRISTOPHER'S CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective in failing to investigate/present guilt-phase evidence of a Forensic Internet History Report obtained from Spears' computer showing someone was visiting MySpace between 1:58 and 3:42 a.m. on Nov.3, 2007, because this ruling denied Christopher effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have raised a question about who used Spears' computer during the time Rowan went missing, which would challenge Christopher's police statement that he returned to the Spears' home and took Rowan, and there is a reasonable probability had the jury been aware someone used Spears' computer after midnight, they would have had a reasonable doubt about his confession, culpability and guilt.

Strickland v. Washington,466 U.S.66(1984);

State v. Griffin,810S.W.2d956(Mo.App.E.D.1991);

Cravens v. State,50 S.W.3d290(Mo.App.S.D.2001).

VII.

BROWN'S DOG-HANDLER EVIDENCE CREATES DOUBT ABOUT CHRISTOPHER'S CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective in failing to call in guilt-phase Alicia Brown, a search-and-rescue dog handler who testified in penalty-phase that the dogs alerted on two areas of Spears' Suburban but didn't alert on Christopher's truck, because this ruling denied Christopher effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have challenged Christopher's police statements and raised doubt about who transported and disposed of Rowan's body, and there is a reasonable probability had the jury been aware the physical evidence was inconsistent with Christopher's statements, they would have had a reasonable doubt about his confession, culpability and guilt.

Strickland v. Washington,466 U.S.66(1984);

Deck v. State,68S.W.3d418(Mo.banc2002).

VIII.

BLEVINS' TESTIMONY ABOUT ACTIVITY AT SPEARS' RESIDENCE CREATES DOUBT ABOUT CHRISTOPHER'S CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective in failing to investigate/call Lisa Blevins, Spears' neighbor who observed different out-of-state vehicles at Spears' house, especially at night, and on the night Rowan was abducted, a car was revving its engine loudly between 1:30-2:00 a.m. in the direction of Spears' house, and between 2:00-4:00 a.m., she heard tires squealing, because this ruling denied Christopher effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have challenged Christopher's statements and Blevins' testimony would have raised doubt about Respondent's theory and the veracity of Christopher's statement recounting that night and there is a reasonable probability that had the jury known other evidence was inconsistent with Christopher's statement, they would have had reasonable doubt about his confession, culpability and guilt.

Strickland v. Washington,466 U.S.66(1984);

Kenley v. Armontrout,937F.2d1298(8th Cir.1991);

Cravens v. State,50 S.W.3d290(Mo.App.S.D.2001);

Clay v. State,954S.W.2d344(Mo.App.E.D.1997).

IX.

BLAKE'S TESTIMONY ABOUT WHEN SHE SAW SPEARS CREATES DOUBT ABOUT CHRISTOPHER'S CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective in failing to present guilt-phase witness Joni Blake, Spears' neighbor, who observed Spears, at 10:30 p.m., in the back seat of a silver/gray car without a shirt, and this same car was at Spears' house at 7:30 the next morning, because Christopher was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have challenged Christopher's statements and Blake's testimony would have raised doubts about Respondent's theory and the veracity of Christopher's statement recounting that night and who was present at Spears' house and there is a reasonable probability had the jury known Christopher's statement was inconsistent with other evidence, they would have had reasonable doubt about his confession, culpability and guilt.

Strickland v. Washington,466 U.S.66(1984);

Kenley v. Armontrout,937F.2d1298(8th Cir.1991);

Cravens v. State,50 S.W.3d290(Mo.App.S.D.2001);

Clay v. State,954S.W.2d344(Mo.App.E.D.1997).

X.

PICKETT – CHRISTOPHER'S SUBSTANCE ADDICTION & TRAUMA

The motion court clearly erred in denying Christopher's claim counsel was ineffective for not calling Julie Pickett, Christopher's step-mom, in penalty-phase because Christopher was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const.Amends.VI,VIII,XIV, in that effective counsel would have called Pickett who would highlight the severity of Christopher's substance abuse/ addiction and his disclosing childhood trauma, and there is a reasonable probability had the jury heard Pickett's testimony it would have voted for life.

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

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

Kenley v. Armontrout,937F.2d1298(8th Cir.1991);

Hutchison v. State,150S.W.3d292(Mo.banc2004).

XI.

THOMAS – CHRISTOPHER'S ADDICTION AND LIFE-SAVING ACT

The motion court clearly erred in denying Christopher's claim counsel was ineffective in not investigating/calling call Bobby Thomas in penalty-phase because Christopher was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const.Amends.VI,VIII,XIV, in that effective counsel would have called Thomas who would highlight the severity of Christopher's substance abuse/addiction and describe how Christopher saved him when he tried to commit suicide, and there is a reasonable probability had the jury heard Thomas' testimony it would have voted for life.

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

Ervin v. State,80S.W.3d817(Mo.banc2002).

XII.

FAILING TO CHALLENGE "TORTURE" AGGRAVATOR AS UNCONSTITUTIONALLY VAGUE

The motion court clearly erred in denying Christopher's claim appellate counsel was ineffective for failing to raise that Respondent's first aggravator, Instruction No.16, that the murder involved "torture," was erroneous because this ruling denied Christopher's rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const.Amends.VI,VIII,XIV, in that this instruction failed to define "torture" which is unconstitutionally vague and requires a limiting instruction, and had appellate counsel challenged the instruction, there is a reasonable probability Christopher's death sentence would have been reversed and remanded for a new penalty-phase with a properly-instructed jury.

Godfrey v. Georgia,446U.S.420(1980);

Maynard v. Cartwright,486U.S.356(1988);

State v. Preston,673S.W.2d 1(Mo.banc1984);

Leone v. State,797N.E.2d743(Ind.2003).

APPLICABLE STANDARDS

Throughout, there are repeating standards governing review. To avoid repetition these standards are set forth now and incorporated by reference into all briefed Points.

Appellate Review

Review is for whether the 29.15 court clearly erred. *Barry v. State*,850S.W.2d 348,350(Mo.banc1993).

Ineffectiveness

To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). A movant is prejudiced if there is reasonable probability but for counsel's errors the result would have been different. *Deck v. State*,68S.W.3d418,426(Mo.banc2002). A reasonable probability sufficiently undermines confidence in the outcome. *Id.*at426. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.S.D. 1994); *Butler v. State*,108S.W.3d18,25(Mo.App.W.D.2003).

Eighth and Fourteenth Amendment

The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S. 280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

ARGUMENTS

I.

§562.076 & MAI-CR3D 310.50 ARE UNCONSTUTIONAL AND COUNSEL MADE NO ADEQUATE CHALLENGE

The motion court clearly erred in denying Christopher's claim *§562.076* and its corresponding jury instruction, *MAI-CR3d 310.50,* unconstitutionally prohibit Christopher's right to present a defense and, alternatively, trial counsel were ineffective in failing to present evidence to challenge the statute's and instruction's constitutionality because these rulings denied Christopher effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,andXIV, in that the Federal Constitution requires the jury find beyond a reasonable doubt that Christopher, a capital defendant, personally acted with a knowing and deliberate mental state in causing the death of another person before he can be convicted and death-sentenced, and the jury cannot do so without considering Christopher's actual *mens rea* which likely was affected by intoxication; had reasonably competent counsel presented evidence and challenged the statute as precluding Christopher's right to present a defense and had the jury considered Christopher's intoxication on the issue of deliberation a reasonable probability exists of a different result.

Section 562.076, Missouri's voluntary intoxication statute, and its corresponding jury instruction, *MAI-CR3d 310.50*, are unconstitutional in first-degree murder cases where Respondent seeks death because their effect is to preclude relevant evidence, like chronic addiction, that individualizes the defendant's culpable mental state. Reliance on *§562.076* in a capital trial means "deliberation" no longer depends on whether the defendant coolly reflected; rather, the jury may infer "deliberation" from the defendant's objective conduct, combined with the false premise that he was sober, without regard to his true state of mind.

Because substance abuse/addiction research has evolved in the last twenty years and confirms addiction isn't necessarily "voluntary" for the addict, and because capital juries are required to find evidence of *subjective mens rea* of the defendant – not simply a finding of deliberation based on a hypothetical sober person, especially where lack of specific intent to cause death is a mitigating factor, *Lockett v. Ohio*, 438U.S.586,597(1978) – the statute and instruction shouldn't have been used to preclude evidence of intoxication.

Christopher was denied effective assistance when counsel failed to present any evidence of Christopher's long-term addiction and severe level of intoxication on the night of the crime to challenge the constitutionality of the statute and instruction. There is a reasonable probability had counsel made such a challenge, Christopher wouldn't have been convicted of first-degree murder or sentenced to death.

I. The Claims

In Claim 8(A), Christopher alleged *§562.076* on Voluntary Intoxication and its corresponding jury instruction are unconstitutional.(PCRLf.15-18). Specifically, he had a due process right to present evidence rebutting Respondent's evidence on every element, including his ability to deliberate – that is, coolly reflect on his actions because of his voluntary intoxication. Because *§562.076* and MAI-CR3d 310.50 prevented the jury from considering evidence on an essential element of the first-degree murder, Christopher was denied due process and subjected to cruel and unusual punishment.(PCRLf.15).

Claim 8(B) alleges Christopher received ineffective assistance because counsel failed to challenge *§562.076* and MAI-CR3d 310.50 as depriving defendants of the right to present a defense.(PCRLf.19). Specifically, counsel failed to investigate and present evidence to challenge the statute and instruction and Christopher was prejudiced because such evidence would have presented a reasonable doubt about his mental state and there is a reasonable probability he would not have been convicted of first-degree murder or sentenced to death.(PCRLf.19-25). Evidence about the effects of alcohol and drugs on the structure and functioning of the brain must be considered when determining the elements of first-degree murder – especially deliberation; there is an abundance of scientific research on addiction, the brain, and behavior supporting reconsideration of the fairness and constitutionality of the voluntary intoxication statute and instruction, because although beginning as a voluntary act, during the

development of addiction, voluntariness decreases from deficits in decision-making and substance use becomes increasingly automatic.(PCRLf.19-25).

II. Trial Evidence of Intoxication

Nathan Mahurin testified he was drunk when he drove Spears home from Christopher's.(Tr.3729). The three had been drinking for several hours and had made three trips to purchase multiple six-packs of Smirnoff Ice Triple Black and other alcohol; they also smoked a large amount of marijuana and Nathan was intoxicated and feeling the effects.(Tr.3717-28).

Christopher told multiple officers that he, David, and Nathan had been drinking that night.(Tr.3772,3878). With the alcohol and marijuana they consumed, they were "pretty fucked up."(Ex.94;Def.Ex.748;Tr.4828, 4849). He said he'd consumed the equivalent of thirty (30) beers and smoked a joint the size of his thumb.(Ex.94;Def.Ex.748;Tr.4828,4849).

Section 562.076 states:

> 1. A person who is in an intoxicated or drugged condition, whether from alcohol, drugs or other substance, is criminally responsible for conduct unless such condition is involuntarily produced and deprived him or her of the capacity to know or appreciate the nature, quality or wrongfulness of his or her conduct.
>
> 2. The defendant shall have the burden of injecting the issue of intoxicated or drugged condition.

3. Evidence that a person was in a voluntarily intoxicated or drugged condition may be admissible when otherwise relevant on issues of conduct but in no event shall it be admissible for the purpose of negating a mental state which is an element of the offense. In a trial by jury, the jury shall be so instructed when evidence that a person was in a voluntarily intoxicated or drugged condition has been received into evidence.

Respondent tendered Instruction No.9, patterned after *MAI-CR3d 310.50*:

INSTRUCTION NO. 9

The State must prove every element of the crime beyond a reasonable doubt. However, in determining the defendant's guilt or innocence, you are instructed that an intoxicated or a drugged condition whether from alcohol or drugs will not relieve a person of responsibility for his conduct.

(LF.677).

Defense counsel objected when Instruction No. 9 was submitted by Respondent and asked the court to declare *§562.076* unconstitutional because it is a rule of evidence and denies the right to present a defense; however, no evidence was adduced about how alcohol affected Christopher's mental state or his chronic addiction and counsel acknowledged this same instruction had been previously upheld.(LF.677;Tr.5557-60). The court overruled the objection.(Tr.5560). The Motion for New Trial, paragraph #71, claimed error in overruling the objection and giving Instruction No. 9, *MAI-CR3d 310.50*.(LF.746).

III. Evidentiary Hearing Testimony

A. Dr. Melissa Piasecki

Dr. Melissa Piasecki, a board-certified forensic psychiatrist educated at Washington University School of Medicine, testified at Christopher's evidentiary hearing.(PCRTr.17-83). Her specialty is addiction neurobiology.(PCRTR.19). She has published in the area of addiction and presented to the National Judicial College and National Council for Juvenile Courts.(PCRTr.21-22; Ex.16).

Dr. Piasecki testified[7] that, at the time of Christopher's trial, well-accepted scientific research acknowledged addiction as a brain disease.(PCRTr.22-23). This disease changes the brain's structure and functioning; over time, chemical exposure to addictive substances causes physical changes, thus changing behavior.(PCRTr.23). Addiction hijacks and alters the brain's circuitry and motivational system causing neurological changes, prompting the addict to use substances compulsively. (PCRTr.24). The structural and functional changes inducing compulsive behavior affect the addict's decision-making and inhibition, planning, and impulse control.(PCRTr.25). When a person transitions into addiction, the brain's frontal lobe, which controls executive functioning, is compromised.(PCRTr.25). These changes show up on neuroimaging where the frontal lobe shows decreased metabolism and less activity than normal.(PCRTr.26). The neurotoxic effects of substance abuse literally reduces the size of the brain, decreases grey matter, and changes the distribution of cells.(PCRTr.26-27).

[7] Her testimony is also relevant to Point II.

The prefrontal cortex of the brain is responsible for decision-making, judgment, consequential thinking, impulse control, organization, planning and emotion control.(PCRTr.28). The prefrontal cortex is highly evolved in humans, but there is a developmental lag in the young teenage years before that part of the brain develops.(PCRTr.27). Long-term addiction changes brain functioning and performance because the prefrontal cortex isn't working optimally; impulse and emotion control decrease while cravings and compulsive use increase.(PCRTr.27,29).

There are dose specific cognitive impairments with acute alcohol intoxication.(PCRTr.31). Impulse control becomes progressively compromised with increasing levels of alcohol, including the ability to inhibit queues that result in response inhibition.(PCRTr.31). Chronic and acute alcohol and cannabis use lead to cognitive impairments related to information processing, memory, motivation, impulsivity and decreased inhibition.(PCRTr.32-33). Both substances affect the frontal lobes' ability to control behavior and exercise judgment; a person with chronic use of both substances is at risk for ongoing maladaptive decision-making, especially around the substances.(PCRTr.33).

There is also a scientifically recognized genetic component to substance abuse that creates a higher risk for some people developing an addiction to drugs or alcohol. (PCRTr.36). Fifty percent of addiction is traceable to genetic factors and fifty percent to environment.(PCRTr.36). Genetic factors include having a biological relative with an addiction disorder; environmental factors include childhood trauma or abuse, loss of parental figures, domestic violence, and family members with substance abuse and

mental health disorders.(PCRTr.37-38). Other risk factors for addiction include early exposure to drugs and alcohol and peer groups who use substances.(PCRTr.38).

Research also has discovered alcohol affects the genome itself and the way DNA is expressed.(PCRTr.30). Activation of the epigenetic mechanisms in the brain contribute to the use of alcohol and increase alcohol self-administration and binge drinking.(PCRTr.29-30). There are two ways a person's genetic makeup can affect his ability to moderate the use of substances: 1) possible risk factors in his actual DNA; and 2) environmental risk factors interacting with the DNA that increase vulnerability for alcohol use disorder.(PCRTr.30).

Dr. Piasecki was retained to determine whether Christopher had a history of substance abuse/addiction.(PCRTr.39). She reviewed numerous records to form her expert psychiatric opinions.(PCRTr.46). Christopher was exposed to nicotine at a very young age and began using alcohol and marijuana at 14, which is young in terms of brain development and their effects on the brain.(PCRTr.47-48). Dr. Piasecki testified that Christopher was having trouble managing his emotions and behaviors and marijuana had a calming effect, making him feel less anxious.(PCRTr.50-51).

At 15, Christopher spent several weeks at Heartland Behavioral Center–an inpatient facility for adolescents with psychiatric problems.(PCRTr.48). He was prescribed a number of medications: Tofranil and Sinequan, antidepressants, and Serentil, a sedative.(PCRTr.49). Doctors recommended ongoing psychotherapy and remaining on Sinequan; however, Christopher's family didn't refill his prescription.(PCRTr.50-51). Instead, Christopher continued smoking marijuana to

ease his anxiety.(PCRTr.51). Self-medicating with alcohol and marijuana to manage his emotions and behaviors, his use of these substances progressed significantly over time.(PCRTr.51-52). He became a regular drinker and drank very heavily at times, consuming large volumes of alcohol in short periods of time; he was not exclusively a binge drinker, because he also drank moderate amounts regularly.(PCRTr.52).

People who use alcohol and marijuana together tend to use more of each substance because the inhibition effect of one increases use of the other; it is a cycle.(PCRTr.53). When Christopher would attempt to decrease alcohol use, he struggled with its absence.(PCRTr.53). He tried to use only marijuana, but then returned to large episodic uses of alcohol.(PCRTr.53). These patterns are consistent with substance abuse disorder.(PCRTr.54). He was required to attend substance abuse classes for his addiction by an employer after testing positive for marijuana.(PCRTr.53). A family service agency diagnosed Christopher with alcohol and cannabis abuse.(PCRTr.54).

Christopher also had the genetic components for substance abuse, putting him at high risk for addiction.(PCRTr.59). He had "genetic loading" from both his maternal and paternal sides; records showed both biological parents had serious addictions and alcohol abuse, even affecting the liver.(PCRTr.59-60). Therefore, Christopher was predisposed to addiction before he ever took a drink or smoked marijuana.(PCRTr.61).

Dr. Piasecki gathered information indicating that, on the night of the crime, Christopher had consumed six six-packs of Smirnoff Ice Triple Black over the span of

six hours, yet consumed no food since lunchtime.(PCRTr.62-63). Therefore, he would've been under "acute significant alcohol intoxication" resulting in aggressive brain functioning impairments.(PCRTr.65-66). These impairments resulted in decreased inhibition, impaired comprehension – inability to process and apply information; his ability to pause and consider his actions was significantly compromised.(PCRTr.67). The subsections of the brain responsible for capturing and encoding memories are highly sensitive to alcohol's toxic effects, and will go "off-line" during periods of high intoxication.(PCRTr.67). People lose the ability to record memories and can "blackout"– still conscious and able to function, but without working memory.(PCRTr.68). Christopher experienced alcohol-induced blackouts.(PCRTr.69). The ability to process information, appreciate consequences of actions and remember them are all affected by a high BAC level.(PCRTr.69).

In Dr. Piasecki's expert opinion, the jury couldn't accurately assess Christopher's mental state at the time of the crime without considering his alcohol and drug use and their effects.(PCRTr.69). Christopher's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired at the time of the offense.(PCRTr.70). His ability to appreciate the consequences of his actions would've been compromised by his high BAC in the context of his chronic alcohol and acute marijuana use.(PCRTr.70). Had she been contacted, she would've provided the same testimony at trial.(PCRTr.71).

A. Attorney Zembles

Attorney Zembles, familiar with *§562.076*, believed voluntary intoxication couldn't be used to negate Christopher's state of mind; she couldn't argue Christopher's inability to deliberate.(PCRTr.182). Witnesses could've testified about Christopher's alcohol use that night, but they didn't consider calling an expert witness on intoxication/addiction to challenge the voluntary intoxication statute as unconstitutional.(PCRTr.184-85). It wasn't a strategy decision, they just didn't consider it.(PCRTr.185). They objected to Instruction No. 9 – the voluntary intoxication instruction.(PCRTr.184).

B. Attorney Moreland

Attorney Moreland, also familiar with *§562.076*, *MAI-CR3d 310.50*, and *Montana v. Egelhoff*, recalled objecting to Instruction No.9, but was overruled. (PCRTr.332-34;Tr.5557-5560;Lf.746). Moreland didn't dispute that, since 1993, when *State v. Ervin*,848S.W.2d476(Mo.banc1993), was decided, there have been advances in research regarding alcohol intoxication and the brain.(PCRTr.333). However, they didn't consider calling a medical doctor/psychiatrist with an addiction specialty to challenge §562.076.(PCRTr.335). He objected to the giving of the instruction, but they didn't do more to challenge the statute, such as putting on medical evidence.(PCRTr.335).

IV. <u>Court's Findings</u>

Denying Claims 8(A&B), the motion court held Missouri law doesn't allow negating the applicable mental state based on voluntary intoxication, and Dr. Piasecki presented no evidence or research to cause re-examination of that policy.

(PCRLf.181). The motion court found it is well-known that alcohol and marijuana negatively influence judgment and decision making, and that twenty years after *Montana v. Egelhoff,* the U.S. Supreme Court has yet to re-examine this long-standing legal principle.(PCRLf.181-182). Finally, the motion court found the direct appeal opinion articulated several evidentiary facts supporting a conclusion "that he coolly reflected when causing her death," *Collings*,450S.W.3dat760, and that these facts undermine the claim that intoxication levels rendered him unable to make judgments.(PCRLf.181-182).

V. Preservation and Standard of Review

The constitutionality of *§562.076* and *MAI-CR3d 310.50* and counsel's failure to present evidence to properly challenge them were pleaded in the amended motion.(PCRLf.15-25). Respondent didn't challenge the inclusion of these claims. *See Vidauri v. State*,515 S.W.2d562,569(Mo.banc1974), and the motion court ruled on the merits of both.(PCRLf.181-82).

Rule 29.15 allows Christopher to seek relief in the sentencing court for claims that his conviction or sentence violates the constitution and laws of this state or the Constitution of the United States. Claims 8(A&B) plead such claims – namely, the statute and instruction are unconstitutional because their effect is to preclude the defense from presenting relevant evidence of addiction that individualizes the defendant's culpable mental state at the time of the crime, and counsel should've presented evidence of Christopher's addiction to challenge them. Because addiction research confirms intoxication isn't necessarily "voluntary" for the addict, and

because capital juries are required to find evidence of a *subjective mens rea* on the part of the named defendant – not simply a finding of deliberation based on a hypothetical sober person –the statute and instruction are unconstitutional as applied to Christopher's case, and trial counsel failed to properly challenge them as such. Review is for clear error. *Barry*,850S.W.2dat350.

VI. §562.076 and MAI-CR3d 310.50 are Unconstitutional in this Case

Missouri's voluntary intoxication statute and instruction, *§562.076* and *MAI-CR3d 310.50*(Instruction No.9 herein), violate the Eighth and Fourteenth Amendments of the U.S. Constitution. Construction of a statute is a question of law, which this Court reviews *de novo. Doe v. Phillips*,194S.W.3d833,841(Mo.banc2006). A "statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision." *Id.*(quoting *Doe v. Roman Catholic Diocese of Jefferson City*,862S.W.2d338,340(Mo.banc1993)). "Further, 'it should be obvious that a statute cannot supersede a constitutional provision,' *id.*at341, and '[n]either the language of the statute nor judicial interpretation thereof can abrogate a constitutional right.'"*Id.*

The state must prove beyond a reasonable doubt "every fact necessary to constitute the crime," *In re Winship*,397U.S.358,364(1970), and this "extends to every element of the crime," including the *mens rea*. *Sandstrom v. Montana*,442U.S.510,522(1979)(quoting *Morissette v. United States*,342U.S.246,255-56(1952)). When the state sets a specific floor for *mens rea* in a capital case, the defendant has a constitutional right not to be sentenced to death when the state doesn't

meet that standard. When a state creates a protection for the accused – especially with respect to sentencing – it may not, without violating the Due Process Clause of the Fourteenth Amendment, arbitrarily withhold that protection when it would have some *practical effect* in a pending case. *Hicks v. Oklahoma*,447U.S.343,346(1980).

In Missouri, "deliberation" is a mandatory requirement first-degree murder. The *practical effect* of the "deliberation" element is limited solely to sentencing, as it is the sole distinction between first and second-degree murder. *Cf.§§565.020* and *565.021*. The only consequence of finding "deliberation" is to increase the penalty to life without parole or death. *Cf. Mullaney v. Wilbur*,421U.S.684,698(1975)(the difference between punishments among different offenses may be of greater moment than the difference between guilt and innocence). Therefore, *§562.076's* substitution of another *mens rea*, circumventing the element of the defendant's actual *mens rea*, violates the Fourteenth Amendment(under *Hicks*).

The Eighth Amendment requires that to be sentenced to death, the defendant must be found beyond a reasonable doubt to have personally acted knowingly and with a deliberate mental state in causing death; the death penalty is not per se excessive "when a life has been taken *deliberately by the offender*." *Gregg v. Georgia*,428U.S.152,187(1976)(emphasis added). But this specific mental state of "deliberation" cannot be simply the theoretical mental state of a generic sober person; rather, it must be the real and subjective mental state of the defendant charged with first-degree capital murder. It is unconscionable to impose a death sentence on the basis of a statutory presumption that his mental state is that of a reasonable, non-

intoxicated person. "The focus must be on *his* culpability…for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,'" *Enmund v. Florida*,458U.S.782,798(1982)(quoting *Lockett*,438U.S.at 605), "which means that we must focus on 'relevant facets of the character and record of the individual offender.'" *Id.*(quoting *Woodson*,428U.S.at304).

Imposing death against a defendant requires a "heightened standard of reliability" at every step of the process. *Ford v. Wainwright*,477U.S.399,411(1986). And because "extraordinary measures" are required by the Eighth Amendment to ensure the reliability of decisions regarding both guilt and punishment in a capital trial, *Eddings v. Oklahoma*,455 U.S.104,118(1982), there must be a finding of personal, subjective moral culpability for the crime. *Gregg*,428U.S.at177. Therefore, it is unconstitutional to impose death in a case where the statutes and instructions do not require a finding of a subjective culpable mental state, because his "punishment must be tailored to his personal responsibility and moral guilt." *Enmund*, 458U.S.at801.

In Missouri, *§562.076* and *MAI-CR3d 310.50* preclude capital juries from evaluating the defendant's personal, subjective moral culpability, by excluding relevant defense evidence of intoxication on the issue of his actual *mens rea*, before finding guilt and recommending death. This is especially troublesome where readily available expert testimony shows Christopher's addiction and the effect of intoxication on the night of the crime was not truly "voluntary;" the jury must consider this on the issue of his personal responsibility and moral guilt. *See Enmund.*

Therefore, as applied to this capital case, both the statute and instruction violate the Eighth and Fourteenth Amendments.

Montana v. Egelhoff,518 U.S.37(1996), upholding Montana's voluntary intoxication statute and instruction against a due process challenge, was not a death-penalty case, and the preclusive effect of such statutes hasn't been evaluated by the U.S. Supreme Court in the context of the "heightened standard of reliability" requirement in capital cases. And while, under *Egelhoff*, the definition of a substantive crime is within the purview of state legislatures, *Id.*at43-44, under *Gregg* and *Enmund*, the floor for evaluating the *mens rea* for a death sentence – as distinguished from the underlying substantive offense – is a matter of federal constitutional law. Missouri's statutes and instructions cannot dilute constitutional standards.

In a first-degree murder case with evidence of voluntary intoxication, *MAI-CR3d 310.50* instructs the jury that such intoxication doesn't relieve a person of responsibility for conduct and cannot be considered in determining guilt or innocence. Therefore, the resulting guilty verdict makes no finding about his subjective personal, moral culpability for the crime. No finding is made that the defendant possessed a subjectively culpable *mens rea* –only that, viewed as an objectively sober person, he is responsible. In such a case, the death penalty must be precluded.

By enacting *§562.076.3*, the Missouri Legislature has told juries they must ignore evidence which would – if taken into account along with the other evidence – negate the *mens rea* the Eighth and Fourteenth Amendments require to impose death.

Through this statutory and instructional presumption of sobriety, Christopher's jury was forbidden from referring to his severe intoxication in deciding whether he acted with a knowing, deliberate mental state, and therefore, a subjectively culpable mind.

When the "fact" of deliberation is established through the use of *§562.076* during the guilt-phase – as it was here – the jury would be required to nullify its own guilty verdict to not to view subjective "deliberation" as having been established when they reach the penalty-phase. This has the effect of putting a finger on the scale for death. The jurors shouldn't have been precluded from considering evidence of Christopher's addiction and intoxication in evaluating his mental state in the guilt-phase, and the statute is unconstitutional when Respondent seeks death.

VII. Counsel Should Have Correctly Challenged *§562.076* and *MAI-CR3d 310.50*

A. Counsel Acted Unreasonably

Trial counsel was ineffective in failing to argue *§562.076* and *MAI-CR3d 310.50* are unconstitutional as applied in death penalty cases and in not presenting readily available evidence from an expert, like Dr. Piasecki, to support the relevance of Christopher's addiction and severe intoxication on the issue of his subjective *mens rea*. Capital defendants cannot be convicted and sentenced to death on evidence of the *mens rea* of an objectively sober person, as this isn't evidence that "a life has been taken *deliberately by the offender*." *Gregg,supra.*

In claiming ineffective assistance for failure to present an expert, Christopher must prove that "such experts existed at the time of trial, that they could have been located through reasonable investigation, and that the testimony of these witnesses

would have benefited movant's defense." *State v. Davis*,814S.W.2d593,603–04 (Mo.banc1991); *see also Williams v. Taylor*,529 U.S.362,396(2000)(counsel failed to present evidence defendant was borderline mentally retarded and didn't go beyond sixth grade); *Wiggins v. Smith*,539U.S.510,535(2003)(counsel failed to present defendant's homelessness and diminished mental capacities).

Reasonable counsel would've investigated and presented Christopher's addiction and the effect of intoxication that night, as Dr. Piasecki testified to, and argued voluntary intoxication isn't "voluntary" for the chronically addicted, and must be considered in evaluating Christopher's personal responsibility and subjective moral guilt. *See Enmund*. Christopher was prejudiced. *See Strickland*.

The motion court concluded there is no new research since *Montana v. Egelhoff, supra,* and *State v. Erwin*,848S.W.2d476,482(Mo.banc1993), were decided that would necessitate revisiting the law of voluntary intoxication. (PCRLf.181-182). The motion court found that "it is well understood that the more one drinks, the more addictive alcohol can be" and that "everyone was aware that alcohol and marijuana have a negative influence on judgment and decision making."(PCRLf.181).

These findings are clearly erroneous in that this was not the substance of Piasecki's testimony. Rather, she testified about: the genetic component of alcoholism and how Christopher was predisposed to addiction; he had "genetic loading" with biological parents having serious addictions and abuse,(PCRTr.59-60); his genetics for substance abuse predisposed him to addiction before ever taking a drink or smoking marijuana.(PCRTr.59-61). She also testified about the effects of the

amount of alcohol Christopher consumed and how "acute significant alcohol intoxication" results in aggressive brain function impairment, black-outs and memory loss, and that Christopher had experienced such black-outs(PCRTr.65-66); his recorded memory would be disabled, even if he remained conscious and functioning; his ability to process information, appreciate the consequences of his actions and remember would be affected by such a high BAC.(PCRTr.69).

All of this testimony is relevant at a capital trial, where the jury must evaluate the defendant's *personal*, *subjective moral culpability*. *Gregg*,428U.S.at177. Counsel was ineffective in not presenting such evidence to challenge the statute and instruction as unconstitutional.

B. Prejudice

The motion court found, "while [Christopher] challenged the sufficiency of the evidence of his deliberation on direct appeal, [this Court] articulated several evidentiary facts that support a conclusion 'that he coolly reflected when causing her death.'"(PCRLf.182). While true that this Court recited such facts, it is also beside the point. Since the defense didn't challenge the statute, the jury was unable to consider evidence of Christopher's history of addiction and his level of intoxication that night – both of which would've affected a determination of whether he possessed a knowing and deliberate mental state.

The jury's ability to consider intoxication evidence also would've cast serious doubt on Christopher's "confessions," in that, according to Piasecki, it is unlikely he would have had such a distinct level of recall in the midst of acute, significant alcohol

intoxication.(PCRLf.67-70). Also, since evidence points towards Spears' involvement – Spears' confession to raping and murdering his step-daughter under different circumstances than Christopher recited, and evidence he transported her body in his mom's vehicle – it would've been a valid question for the jury whether Christopher's "memory" was simply a rehearsed retelling of what he'd been told. Christopher's confession to events he may not recall, doesn't mean events happened the way he said; sometimes, people confess to things they didn't do because, though lacking memory, they come to believe it happened.[8] Spears' involvement was part of counsel's "lingering doubt" strategy in penalty-phase (PCRTr.362,390), but doubt about the extent of Christopher's involvement, and challenging the accuracy of his confession should've started in guilt.

In any event, a capital jury must find the defendant is subjectively and personally morally responsible for the crime before he may be convicted and sentenced to death. Christopher's verdict was obtained through the use of the legal fiction of sobriety in *§562.076* and *MAI-CR3d 310.50*, preventing the jury from fully

[8] See *Ferguson v. Dormire*,413S.W.3d40,46(Mo.App.W.D.2013)(Ferguson was convicted and spent a decade in prison based on the false memory testimony of Erickson. Although Erickson was heavily intoxicated, "blacked out," and unable to remember his actions after leaving a bar, he later read articles about a murder and began to wonder whether he and Ferguson committed the crime, later confessing and implicating Ferguson, before recanting years later).

evaluating his personal deliberation and morally culpability. His conviction and death sentence violate the Eighth and Fourteenth Amendments. This error can be remedied in several ways: 1) a new guilt-phase where Respondent can either seek a first-degree murder conviction without the legal fiction of *MAI-CR3d 310.50,* and if a guilty verdict is obtained without it, thus satisfying the subjective culpability standard, continue to a penalty-phase; 2) a new penalty-phase where the jury is explicitly told that they may consider evidence of voluntary intoxication in evaluating the appropriate sentence; or 3) impose life without parole, since Christopher's guilt of first-degree murder was obtained without consideration of voluntary intoxication. This Court must reverse.

II.

ADDICTION AND CHILDHOOD TRAUMA EXPERT

The motion court clearly erred in denying Christopher's claim that counsel was ineffective for failing to investigate/call a penalty-phase expert to testify about his substance abuse/addiction and childhood trauma because this denied him effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel should have been aware of Christopher's traumatic childhood and his consumption of large amounts of alcohol and marijuana the night of the offense consistent with his long-standing addiction, and relevant to the statutory mitigating circumstance of whether at the time of the offense the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, §565.032.3(6), and non-statutory mitigating circumstances include childhood trauma and mental/ emotional development, including conditions not rising to the level of mental diseases, and Christopher was prejudiced by counsel's failure to present this mitigating evidence as there is a reasonable probability the jury would have voted for life.

If this Court finds *§562.076* and *MAI-CR3d 310.50* are constitutional in capital cases and counsel wasn't ineffective in failing to present evidence to adequately challenge them (Point I), then counsel was ineffective in failing to counteract the effect of this faux-finding of "deliberation" with penalty-phase evidence to support the highly relevant statutory mitigator: "whether the capacity of the defendant to

appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."*§565.032.3(6)*.

Piasecki would provide significant evidence that Christopher's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired at the time of the offense, and that his ability to appreciate the consequences of his actions was compromised by his high BAC level in the context of his chronic addiction.(PCRTr.70). If contacted, she would've provided this testimony.(PCRTr.71). Although significant expert evidence existed showing Christopher's genetic and environmental predisposition for addiction and, in fact, he was chronically addicted to alcohol and drugs and severely intoxicated and substantially impaired on the night of the crime, counsel failed to present this evidence to the jury to support a critical mitigating instruction. §*565.032.3(6).*

Further, Piasecki could testify about the non-statutory mitigator of Christopher's childhood trauma and how it affected his mental and emotional development, which is also relevant to his addiction. Counsel had no strategy reason for not presenting this substance abuse/addiction and trauma evidence, and such ineffectiveness prejudiced Christopher in that there is a reasonable likelihood that the jury would've voted for life.

I. <u>The Claim</u>

Christopher's amended motion alleged counsel was ineffective for not investigating and calling an expert psychiatrist (medical doctor) to present mitigation on addiction and trauma and how they impacted him at the time of the crime.(PCRLf.68-73). Specifically, Missouri's statutory mitigating circumstances include: whether at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.*§565.032.3(6).* Non-statutory mitigators include: difficult childhood or abusive background; history of substance abuse or intoxication; and the defendant's mental/emotional development – including mental conditions, disorders and disturbances not rising to the level of mental diseases, defects or incompetency. Evidence of alcohol dependence is mitigating. *See Rompilla v. Beard*,545U.S.374,382 (2005)(Rompilla's troubles with alcohol merited further investigation; counsel didn't look for evidence of history of alcohol dependence/overindulgence with extenuating significance).

The amended motion alleged counsel knew Christopher had consumed large amounts of alcohol on the night of the offense.(PCRLf.70). Counsel also knew about Christopher's long-standing alcohol and marijuana addiction, yet failed to investigate and call an addiction specialist or psychiatrist to examine him and testify in penalty-phase.(PCRLf.71). Testimony from such expert would've provided a wealth of non-statutory mitigating information, as well as scientific evidence to support the statutory mitigating circumstance that Christopher's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially

impaired. *§565.032.3(6).*(PCRLf.71). Such expert would've testified about Christopher's thinking and behavior at the time of the offense based on his profound intoxication.(PCRLf.72).

At the time of trial, it was well-accepted that addiction is a brain disease and the components of addiction – craving, compulsive use, and eroded judgment – are related to specific neurological changes.(PCRLf.72). There is a reasonable probability the result would've been different and Christopher wouldn't have been sentenced to death if counsel hadn't been ineffective in failing to investigate and present such evidence.(PCRLf.71-73).

II. The Mitigation Case at Trial

Counsel called two witnesses to buttress the theory of lingering doubt regarding Spears' involvement in Rowan's death: Myrna Spears and Alicia Brown – both of whom would reasonably establish that Rowan's body was transported in Myrna's Suburban. Myrna testified that the night Rowan disappeared, David called her around midnight; in response, she drove her Suburban to his house.(Tr.5887-88). David left in his pickup, returned a while later, and took the Suburban; she stayed at the house.(Tr.5888-89). David returned by 7:00 a.m.(Tr.5889). Alicia Brown testified that two trained dogs, who alert at the scent of human remains, both alerted, separately, on the Suburban's driver door, driver's seat, left rear quadrant, and rear cargo area.(Tr.5905,5913-14,5917-18).

Defense counsel also called Christopher's biological-father and brother and two adoptive siblings to discuss childhood events.(Tr.5934-5987).

As the final witness, counsel called Dr. Draper, an educator in human development, to explain the phases and events in Christopher's childhood. Draper is neither a psychiatrist nor a psychologist, and Respondent emphasized this to the jury.(Tr.6276). Draper doesn't treat patients nor is she qualified to prescribe medication.(Tr.6276). She is an educator.(Tr.6122).

Draper used a "LifePath" to focus on Christopher's emotional development, concluding that he suffered severe emotional neglect during the first six-months of life; he then experienced confusion in his connections with people in his natural and adoptive family, which brought about severe disorganized dissociative attachment.(Tr.6274;Ex.901). Christopher's foster/adoptive parents experienced a traumatic loss of a child, and Christopher suffered through their eventual separation and divorce.(Tr.6162,6186). His birth parents came in and out of his life for years.(D.Ex.901,p.3-4;Tr.5948-49,5955,6168,6174,6179,6181). Even within his adoptive family, Christopher was shuttled between parents.(Tr.6049-50,6187).

Draper further testified that, at 6, Christopher was sexually molested by a babysitter's 13-year-old son.(Tr.6170). At 15, he was sodomized by his birth mother's new husband.(Tr.6241;D.Ex.901,p.4). Christopher admitted to fondling his step-sister when she was between 11 and 16.(Tr.6263). This behavior was consistent with someone who had experienced sexual abuse.(Tr.6264). Although Draper talked about this sexual abuse, she didn't explain how this type of abuse causes trauma, producing neurobiological impacts on Christopher's brain, causing dysfunction.

Draper concluded to a reasonable degree of developmental certainty, Christopher suffered emotional neglect, which brought about severe disorganized dissociative attachment.(Tr.6274). In adolescence, he was ill-equipped socially and emotionally to contend with what you would expect in self-discipline and guidance.(Tr.6274). He didn't have consistent guidance, his behavior wasn't modulated and he didn't receive the grounding he needed.(Tr.6274).

Draper provided no information about Christopher's severe lifetime alcohol and drug addiction, making only a passing reference to heavy alcohol use in his early-twenties.(Tr.6268,6270). Nor did she provide information supporting the statutory mitigator of "whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."*§565.032.3(6)*.

III. Evidentiary Hearing Testimony

A. Attorney Zembles

Before trial, Attorney Zembles knew Christopher was a "drunk" and smoked a lot of marijuana.(PCRTr.229). She suspected he had an addiction.(PCRTr.230). She also knew: Christopher had ingested large amounts of alcohol and pot the night of the offense; he had risk factors for developing addiction, including childhood trauma and parents that abused alcohol; and that cognitive impairments were associated with acute and chronic intoxication.(PCRTr.30).

Zembles was aware of the statutory mitigator in *§565.032.3(6)* and would've wanted evidence of any statutory or non-statutory mitigator.(PCRTr.231-32).

Zembles thought the jury would believe Christopher's police statements, so her strategy was to try for second-degree murder based on an impulsive, unplanned act and subsequent remorse.(PCRTr.242-43,264-65). Although the jury heard Christopher and the others had been drinking and smoking marijuana, Zembles knew the court wouldn't allow an argument he was unable to deliberate because of voluntary intoxication.(PCRTr.254). She also thought the jury might hear it as an excuse.(PCRTr.243-44,254). However, she didn't apply the same rationale in penalty-phase; she would've wanted to offer evidence leading to statutory or non-statutory mitigators.(PCRTr.244,255).

B. Attorney Moreland

Attorney Moreland knew of Christopher's lifelong alcohol and marijuana addiction, that he drank to acute intoxication more than once, and had ingested large amounts of alcohol and marijuana that night.(PCRTr.355,360,391). Moreland also knew Christopher had a history of alcoholic black-outs.(PCRTr.395). He knew Christopher had genetic and environmental risk factors making it more likely he'd develop an addiction to alcohol and drugs: childhood trauma and parents who were substance abusers.(PCRTr.356). He knew there are cognitive impairments associated with acute and chronic intoxication.(PCRTr.356). However, they didn't investigate or retain a psychiatrist with expertise in addiction to testify about Christopher's addiction.(PCRTr.356). Nor did they present evidence of Christopher's addiction in penalty-phase to support the *§565.032.3(6)* mitigator.(PCRTr.391).

Although they consulted with other experts and obtained an MRI,(PCRTr.392-393), none of these were geared towards addiction. (PCRTr.398). They didn't consult any expert regarding the effects of acute intoxication on Christopher's brain.(PCRTr.397-98). Draper isn't a medical doctor, psychiatrist, or psychologist; she cannot make psychological or Axis I diagnoses.(PCRTr.397).

Diminished capacity was something they considered in guilt-phase but decided against.(PCRTr.396). Diminished capacity is a different concept than the statutory mitigator regarding capacity at the time of the crime.(PCRTr.396).

Moreland also testified Christopher's confession was redundant, and much of it didn't match the physical evidence.(PCRTr.395). They decided to argue Christopher admitted to more than he did, because things he said happened were inconsistent with the other evidence.(PCRTr.395).

C. Dr. Piasecki – Addiction & Trauma

Dr. Piasecki's testimony about addiction was fully discussed in Point I and her testimony is incorporated herein.(PCRTr.17-83). Piasecki has significant expertise and specialized training in addiction neurobiology and the effect of childhood trauma on development and how people respond or adapt to stress.(PCRTR.19).

Addiction

Piasecki testified addiction is a brain disease affecting its structure and functioning; over time, as the brain is chemically exposed to addictive substances, it changes; then the person's behavior changes.(PCRTr.22-23). Addiction actually reduces brain size.(PCRTr.26).

Addiction hijacks and alters the brain's circuitry and motivational system causing neurological changes and compulsive substance use; it affects decision-making, inhibition, planning, and impulse control.(PCRTr.24-25). With long-term addiction, self-control over substance use erodes because impulse and emotion control decrease and compulsive motivational signaling increases.(PCRTr.27). Chronic and acute alcohol and cannabis use leads to cognitive impairments related to information processing, memory, motivation, impulsivity and decreased inhibition.(PCRTr.32-33). Both substances affect the brain's functional braking system – its ability to control behavior and exercise judgment – and a person chronically using both is at risk for ongoing maladaptive decision-making, especially around the substances.(PCRTr.33).

Research has discovered that an environment of alcohol affects the genome and the way DNA is expressed.(PCRTr.30). Activation of epigenetic mechanisms in the brain contribute to alcohol use and increase self-administration and binge drinking.(PCRTr.29-30). This recognized genetic component to substance abuse creates a higher risk for some people developing addiction.(PCRTr.36).

There are two ways a person's genetics affect his ability to moderate substance use: 1) risk factors in his actual DNA; and 2) environmental risk factors interacting with his DNA increasing his vulnerability to having alcohol use disorder.(PCRTr.30). Fifty-percent of addiction is traceable to genetic factors and fifty-percent to environmental.(PCRTr.36). Genetic factors include biological relatives with addiction; environmental factors include childhood trauma/abuse, loss of parental figures, home violence; and family members with substance abuse/mental health

disorders.(PCRTr.37-38). Additional risk factors include early exposure to drugs and alcohol and high risk peers who use.(PCRTr.38).

Piasecki examined Christopher's substance abuse history.(PCRTr.39). She relied on numerous records to form her expert psychiatric opinions.(PCRTr.46). Christopher began using alcohol and marijuana at 14, very young in terms of brain development and the effects of those substances.(PCRTr.47-48). At 15, Christopher spent 4-5 weeks at Heartland Behavioral Center – an adolescent psychiatric facility.(PCRTr.48). He was prescribed Tofranil and Sinequan, antidepressants, and Serentil, a sedative. (PCRTr.49). At discharge, ongoing treatment with psychotherapy was recommended, as well as continuing Sinequan; however, Christopher's family didn't refill his prescription.(PCRTr.50-51). Christopher continued to self-medicate with alcohol and marijuana trying to manage his emotions and behaviors, increasing his use significantly over time.(PCRTr.51). He became a regular drinker, drinking heavily at times; he would drink large volumes of alcohol in short periods, although he wasn't exclusively a binge-drinker because he also drank moderate amounts regularly.(PCRTr.52).

People who use alcohol and marijuana together tend to use more of both because the inhibition effect of one increases use of the other – creating a cycle.(PCRTr.53). Christopher would try decreasing his alcohol use, but struggled with its absence.(PCRTr.53). He tried only using marijuana, but would return to large episodic alcohol use.(PCRTr.53). An employer required him to attend substance abuse/addiction classes after testing positive for marijuana.(PCRTr.53). A family

service agency diagnosed him as having alcohol and cannabis abuse.(PCRTr.54). Christopher's pattern of drinking and marijuana use was consistent with substance abuse and alcohol disorder.(PCRTr.54).

Christopher also had the genetic components for substance abuse placing him at higher risk to develop addiction.(PCRTr.59). Records show both biological parents had serious addictions and alcohol disorders, even affecting the liver.(PCRTr.59-60). Therefore, "genetic loading" predisposed Christopher to having an addiction before he ever took a drink or smoked marijuana.(PCRTr.61).

Piasecki gathered information indicating, on the night of the crime, Christopher had consumed six six-packs of Smirnoff Ice Triple Black over six hours, last consuming food at lunchtime.(PCRTr.62-63). Therefore, he would've been under "acute significant alcohol intoxication" resulting in aggressive brain functioning impairment.(PCRTr.65-66). Such impairment results in decreased inhibition and impaired comprehension – inability to absorb information, process, understand and apply it; his ability to stop and consider his actions was significantly compromised.(PCRTr.67). The subsections of the brain responsible for capturing and encoding memories are very sensitive to alcohol's toxic effects and go off-line during periods of high intoxication.(PCRTr.67). People lose the ability to record memories and experience blackouts – remaining conscious and able to function, but without working memory.(PCRTr.68). Christopher experienced alcohol-induced blackouts before.(PCRTr.69). The ability to process information, appreciate the consequences of actions and remember are affected by high BAC.(PCRTr.69).

In Piasecki's expert opinion, the jury couldn't accurately assess Christopher's mental status without considering his alcohol and marijuana use around the time of the crime and their effects on his brain.(PCRTr.69). Piasecki testified Christopher's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired at the time of the offense.(PCRTr.70). His ability to appreciate the consequences of his actions was compromised by his high BAC in the context of his chronic alcohol and acute marijuana use.(PCRTr.70). She would've testified to this.(PCRTr.71).

Trauma

In addition to expert testimony about addiction, Piasecki could testify about developmental trauma in Christopher's life that produced neurobiological impacts on his brain, causing dysfunction.(PCRTr.54). Like addiction, childhood trauma affects the developing brain's ability to regulate emotions and has neurobiological effects on its ability to calibrate stress hormones.(PCRTr.33-34). Childhood developmental trauma leads to an abnormal stress response with dysregulated and uncontrolled emotional reactions, difficulty with self-soothing and responding more dramatically given the same amount of stress.(PCRTr.34-35). The long-term impact of childhood trauma is increased risk of physical and mental health problems, including depression, anxiety and suicidal behavior.(PCRTr.35). Importantly, it results in increased problems with addiction and drug dependence.(PCRTr.36). Childhood trauma resulting from physical and sexual abuse, neglect, loss of important figures in the

home and parental absence also causes neurobiological changes in the brain.(PCRTr.36).

As an infant, because of high parental dysfunction, Christopher was being raised by older siblings.(PCRTr.55). Upon his parents imprisonment, the siblings were separated and Christopher lost his caregivers.(PCRTr.55). Around 6, Christopher experienced sexual abuse from a babysitters' son, and at 15, he was physically and psychologically abused by his biological mom's husband, Moses Reecher, during a visit.(PCRTr.55-56). Reecher tried to manipulate Christopher into transgender identification, suggesting he have a sex change; Christopher reported this was very confusing to a 15-year-old boy.(PCRTr.56). Reecher threatened Christopher's family members if he told.(PCRTr.56). About a month after this visit, Christopher was placed into the psychiatric facility.(PCRTr.57).

IV. Court's Findings

The motion court found:

- trial counsel presented Dr. Draper, who offered extensive history about Christopher and her opinions suggesting events in his life mitigated his responsibility; the defense isn't required to hire a particular expert witness and the decision about which expert to call was strategic.(PCRLf.187).
- Dr. Piasecki's opinions and testimony were not surprising; there was little she said that the jurors wouldn't already believe concerning the impact of alcohol on decision-making, and it was cumulative.(PCRLf.187-88).

- Piasecki's conclusions regarding Christopher's claims of sexual abuse when he was younger was risky, given that there wasn't a lot of evidence Christopher had revealed the abuse to many people, and these people weren't credible. Seeking sympathy based on claims of sexual abuse could be counterproductive.(PCRLf.187-88).

Review is for clear error. Barry,850S.W.2dat350.

V. Analysis

The jury didn't hear significant available mitigating evidence about the substantial impairment in Christopher's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law at the time of the crime. They also didn't have the opportunity to consider his long-term alcohol and drug-addiction and childhood trauma and effects upon his brain and behavior. This was especially devastating since they were instructed in guilt-phase that they couldn't consider evidence of his severe intoxication on his mental state.(Instruction No.9)(LF.677). While this was also error in the guilt-phase (See Point I), failure to present this evidence in the penalty-phase to mitigate the crime was inexcusable. Without such evidence, the jury couldn't be instructed on a critical statutory mitigator-*§565.032.3(6),* and was unable to evaluate the effects of Christopher's childhood trauma on his addiction and behavior to mitigate his sentence. There is a reasonable probability that the result would've been different with this evidence.

The Sixth Amendment guarantees capital defendants the effective assistance of counsel during penalty-phase. This right includes counsel's "obligation to conduct a

thorough investigation of the defendant's background," *Williams*,529U.S.at396, so as "to uncover and present ... mitigating evidence" to the jury at sentencing. *Wiggins*,539U.S.at522. A "tactical decision" is a precursor to concluding that counsel has developed a "reasonable" mitigation theory to include or exclude evidence in a particular case. *Sears v. Upton*,561U.S.945,954(2010).

The defendant must also demonstrate that counsel's failures prejudiced his defense. In *Strickland*,466U.S.at694, the Court explained a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In capital sentencing, to assess prejudice, the Court "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*,539U.S.at534; *see also Sears v. Upton*; *Porter v. McCollum*,558U.S.30,41(2009); *Rompilla*,545U.S.at393. The critical question is whether "there is a reasonable probability that at least one juror would've struck a different balance" in weighing the evidence for and against sentencing the defendant to death. *Wiggins*,539 U.S.at537.

A capital jury must be given a full opportunity to consider as mitigating, "any aspect of a defendant's character or record," and "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*,438U.S.at604. *Lockett* emphasized the "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual."*Id.*at605. This rule "recognizes that 'justice ... requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the

offender,'" as part of deciding whether the defendant is to live or die. *Eddings*,455U.S.at112(quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302U.S.51,55(1937)). And it ensures that "'the sentence imposed at the penalty stage...reflect[s] a reasoned moral response to the defendant's background, character, and crime.'" *Abdul–Kabir v. Quarterman*,550U.S.233,252(2007)(quoting *California v. Brown*,479U.S.538,545(1987)(O'Connor, J., concurring)).

Counsel's Duty to Investigate

Missouri's statutory mitigators include whether at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. *§565.032.3(6)*. Non-statutory mitigators include: a difficult childhood; abusive background; history of substance abuse/intoxication; and a defendant's mental/emotional development – including mental conditions, disorders and disturbances not rising to the level of mental diseases, defects or incompetency. *Parker v. Dugger*,498U.S.308(1991); *Eddings*, 455U.S.104; *Kenley v. Armontrout*,937F.2d1298,1307(8th Cir.1991). Evidence of voluntary intoxication is mitigating. *Rompilla*,545U.S.at382.

It is incumbent upon trial counsel to investigate and present evidence of mental incapacity, substance abuse, and childhood trauma. Before trial, counsel knew the amount of alcohol Christopher consumed that night and his history of alcohol/marijuana abuse and addiction. Despite this, counsel failed to investigate and call a credible, qualified addiction specialist or psychiatrist, like Piasecki, to examine Christopher. Such expert would have provided jurors with a wealth of non-statutory

mitigating information. Additionally, testimony from an addiction expert would've provided scientific evidence to support the giving of the statutory mitigator – *§565.032.3(6)*. Counsel's investigation and presentation of mitigating evidence was incomplete, and there is a reasonable probability the result of penalty-phase would've been different with such evidence.

"Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Hutchison v. State*,150S.W.3d292,304(Mo.banc2004)(*quoting Tennard v. Dretke*, 542U.S.274(2004)). The Sixth Amendment and prevailing professional standards for capital defense work require trial counsel to "discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*,539U.S.at 524. This evidence includes "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Id*.at524. *§565.032.3* outlines mitigating circumstances, including extreme mental or emotional disturbance, extreme distress or domination by another, and substantial impairment of capacity to appreciate the criminality of his or her conduct or conform it to the law.

Counsel who fail to present evidence of diminished mental abilities are ineffective. *See Williams*,529U.S.at396(counsel failed to present evidence defendant was borderline mentally retarded and didn't go beyond sixth grade); *Wiggins*, 539U.S.at 535(counsel failed to present evidence of defendant's homelessness and

diminished mental capacities);*Rompilla*,545U.S.at 391(even though counsel retained three mental health professionals they failed to present mental health evidence including test scores showing third grade achievement after nine years of schooling).

Clearly, Christopher's counsel had no strategy for not investigating and presenting penalty-phase evidence of Christopher's chronic and life-long addiction to alcohol and marijuana and how his severe intoxication affected him that night. They knew of his condition, and testified they would've wanted any evidence to support a statutory mitigator. An expert like Dr. Piasecki would have supported the statutory mitigator under *§565.032.3(6)*. This Court has approved of the submission of this statutory mitigating circumstance in the context of voluntary intoxication. *See State v. Johnson*,968S.W.2d686,701-02(Mo.banc1998) (had Dr. Parwatikar's testimony been presented to the jury, no legal impediment existed prohibiting the court from instructing on the statutory mitigator under *§565.032.3(6)*); *State v. Wise*,879S.W.2d494,518(Mo.banc1994)(overruled on other grounds by *Joy v. Morrison*,254S.W.3d885(Mo.banc2008))(submitted instruction properly instructed jury and allowed them to decide mitigating effect of appellant's cocaine use).

But this statutory mitigator requires expert evidentiary support, and it is clear that the evidence adduced from Draper would *not* have supported a submission of this mitigator; Draper barely spoke of Christopher's alcohol use, nor did she mention or render conclusions about his severe intoxication that night. *See State v. Richardson*,923S.W.2d301,325–26(Mo.banc1996) (Appellant didn't adduce evidence showing any of these general allegations affected his mental state such that his ability

to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired; therefore, the trial court wasn't required to instruct); *Middleton v. State*,80S.W.3d799,815(Mo.banc2002)(Counsel didn't ask Dr. Lipman if defendant could appreciate the criminality of his conduct or conform his conduct to the law. Such testimony could've supported a mitigator under *§565.032.3(6)*); *State v. Knese*,985S.W.2d759,777–78(Mo.banc1999) (psychiatric testimony demonstrating the factors outlined in *§565.032.3(6)* is required before an instruction on this mitigating factor is warranted. Evidence of cocaine use, wild behavior and claimed delusions weren't enough); and *State v. Johnston*, 957S.W.2d734,752(Mo.banc1997)(As to the second mitigator sought – that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired – while some evidence showed Johnston was a problem drinker, no evidence showed his alcohol consumption on the night he beat his wife to death impaired his ability to appreciate the wrongfulness of his conduct and conform his conduct to law.)

These cases illustrate expert testimony was required on the actual substance of the mitigator trial counsel said they would've wanted. But Draper isn't an expert in this area. Not only did she *not* testify about Christopher's addiction or his severe impairment, she couldn't render any type of diagnostic testimony about Christopher's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, because she isn't a medical professional.

Draper also couldn't put Christopher's identified childhood trauma in the context of his development of addiction, as well as its neurobiological effects on Christopher's brain. Respondent pointed this out during Draper's cross-examination, eliciting she isn't a psychologist and cannot treat patients, isn't a psychiatrist and cannot prescribe medication, and didn't administer standardized tests because she is unqualified.(Tr.6276-80). Then, in closing argument, the prosecutor urged the jury that there was nothing wrong with Christopher on the night of the crime(Tr.6479), and he was in control and he made the decisions about what happened(Tr.6463).

Defense counsel had no strategy for not investigating and presenting evidence that would've warranted this statutory mitigating instruction, and helped explain Christopher's alleged actions. In *Wiggins*, the Court found counsel's failure to conduct a thorough investigation that would've uncovered evidence of physical and sexual abuse reflected only a partial mitigation case. 539U.S.at524-26,534-35. That partial case was the result of inattention, not reasoned strategic judgment and constituted ineffective assistance. *Id*. In finding Wiggins's counsel ineffective, the Court observed:

> Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability. *Penry v. Lynaugh*, 492U.S.302,319 (1989)("'[E]vidence 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...may be less culpable than defendants who have no such excuse'").

*Id.*at535. *Wiggins* reasoned that if the jury had been able to place his "excruciating life history" on the mitigating side of the scale there was a reasonable probability a different balance would've been struck. *Id.*at537. The mitigating evidence that could've been presented might've influenced the jury's appraisal of Wiggins' moral culpability. *Id.*at538.

It is precisely this type of mitigating evidence of Christopher's addiction and severe intoxication that night that likely would've influenced the jury's appraisal of his subjective moral culpability(See,Point I). His addiction is linked to self-medicating his mental health issues as a child, and Christopher's adoptive mother and birth mother both died very proximately to this crime (2 weeks before and 5 months before, respectively)(MTS.1249-50,1349), a plausible reason for an increase in his maladaptive alcohol and drug use. And the night before he confessed, he had found out that his wife in Arkansas had divorced him, and said that his "life's steadily going to shit anyway, so… ."(Mov.Ex.29,p.58-59).

Here, as in *Wiggins,* Christopher's claim of ineffective assistance arises from counsel's limiting the scope of their investigation into potential mitigating evidence. Counsel in *Wiggins* knew some details of the defendant's background from the defendant and from a pre-sentence report and social service documents, but did no further investigation. The U.S. Supreme Court held counsel was obligated to conduct

a thorough investigation of the defendant's background and the cursory investigation from a "narrow set of sources" was unreasonable. *Wiggins*,539U.S.at524.

Furthermore, evidence of impaired intellectual functioning is inherently mitigating and "obviously evidence that 'might serve as a basis for a sentence less than death.'" *Tennard*,542U.S.at285(quoting *Skipper v. South Carolina*, 476U.S.1,5(1990); *Hutchison*,150S.W.3dat308. In *Hutchison*, although counsel called a psychologist and Hutchison's mother to testify about his learning disability and special education, counsel was ineffective for failing to investigate and present records and additional expert testimony. 150S.W.3dat304-05.

In *Powell v. Collins*, 332F.3d376(6thCir.2003), counsel was deemed ineffective for not retaining an independent psychiatric expert for sentencing. Powell was convicted of aggravated murder arising from kidnapping, attempted rape and murder of a 7-year-old-girl. *Id.* at 381-82. Counsel had reviewed juvenile court records and psychological evaluations revealing mental deficiencies. *Id.* The evaluations suggested a "neurological component underlying some of his acting out behavior."*Id.* A court-appointed psychiatrist evaluated Powell, found him competent, and testified at trial about Powell's psychological deficits and diagnoses, his medications and his lack of a nurturing environment as a child. *Id.*

Counsel requested a neuro-psychologist to examine Powell, but the court refused a continuance for more testing. *Id.* On appeal, the court found that counsel had a duty to hire a qualified expert to assess Powell's diminished mental capacity due to organic brain damage. *Id.* at 400. Powell was prejudiced because the

psychological evidence presented at trial differed from the neuro-psychological testing. *Id.* at 395. An expert qualified to conduct such testing may have provided facts and information considered mitigating that may have led to a different sentence; a reasonable probability existed the outcome would have been different. *Id.*

In *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803F.3d 541,553–54(11th Cir. 2015), a doctor, court-appointed to evaluate competency, authored a report recounting the defendant's description of the crime, including his heavy ingestion of drugs and alcohol before committing the murder, and a blow-by-blow account of the killing. The report gave pieces of Hardwick's family background; an alcoholic father; both parents married and divorced multiple times; his mother, unable to care for him, placed him in a boys' home when he was 6; when not in institutions, he was shuttled between various parents and stepparents, sometimes subjected to abuse. *Id.* By 12-13, he was using alcohol and various drugs regularly, and by 13, he was experiencing alcohol-induced blackouts. *Id.*

Counsel was found ineffective in *Hardwick* because, despite counsel's awareness of the doctor's report, he didn't follow up. *Id.* Critically, counsel failed to provide this information to a mental health expert, or seek an opinion as to the presence of mitigating evidence, despite the availability of mental health experts who could've rendered such an opinion. *Id.* While the obligation to conduct a reasonable investigation doesn't require defense counsel to "discern every possible avenue which may hurt or help the client," it does require counsel to "make an effort to investigate the obvious." *Id.*(quoting *House v. Balkcom*,725F.2d608,618(11thCir.1984).

"[C]ounsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on [defendant's] voluntary confessions, because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background.'" *Id.*(citing *Wiggins*, 539U.S.at522(quoting *Williams*,529U.S.at396)).

Hardwick's attorney had ample information signaling significant mitigating evidence, including long-term drug and alcohol abuse and Hardwick's particularly heavy drug and alcohol use immediately before the murder. *Hardwick*,803F.3dat554. Counsel was aware of witnesses who would have provided support for these facts. *Id.* It was "abundantly evident that statutory and nonstatutory mitigating factors existed that [counsel] should have presented to provide Hardwick a defense at sentencing and to make a case for sparing his life." *Id.* Most importantly, had counsel presented this readily available evidence, he could've argued the statutory mitigating circumstance that, at the time of the murder, Hardwick's capacity "to conform his conduct to the requirements of the law was substantially impaired." *See Fla.Stat.§921.141(6)(f). Id.* The length and magnitude of Hardwick's substance abuse and dependency were well-established, and at the time of the murder, Hardwick had been drinking and ingesting drugs and alcohol on a regular basis his entire adult life, beginning as a young teen. *Id.* At the evidentiary hearing, a doctor testified that when substance abuse begins at such a young age and lasts an extended period of time, it generally results in significant psychological and functional impairment; the end result is "an individual who is unable to function effectively, i.e., in terms of what we call executive

functioning[:] weighing alternatives, projecting consequences, managing what we call high order thought....". *Id.*

Here, Christopher could be Hardwick. He suffered from the same alcohol and drug abuse and addiction, starting at an early age, and similarly experienced a childhood of neglect, instability, trauma and intermittent sexual abuse. As in *Hardwick*, *Powell* and *Hutchison*, counsel should have presented this readily available expert evidence. Then, as in *Hardwick*, counsel could have argued the statutory mitigating circumstance that, at the time of the murder, Christopher's capacity "to conform his conduct to the requirements of the law was substantially impaired." *See §565.032.3(6).* Although Attorney Moreland thought they'd offered this mitigating instruction, he was incorrect (PCRTr.357); however, his belief they did shows their failure to investigate and present evidence wasn't strategic.

Similarly, Christopher's addiction and its effect on him that night is evidence entirely different than the developmental challenges that Draper presented, and is also inherently mitigating. Christopher's claim isn't that counsel should have chosen Piasecki over Draper; the motion court's findings that this was a strategy choice between experts, or that Piasecki's testimony was cumulative, are clearly erroneous.(PCRLf.187-88). Christopher's claim is that Draper was *not* an expert in substance abuse/addiction, or childhood trauma and its neurological effects on the brain, and an expert was required to submit the mitigator. The issue in penalty isn't whether Christopher was capable of deliberating, but whether his capacity "to appreciate the criminality of his conduct or to conform his conduct to the

requirements of law was substantially impaired."*§565.032.3(6)*. Expert testimony on that issue was required.

Finally, the motion court's finding that Piasecki's testimony was "not new or surprising" is clearly erroneous. A post-conviction judge's finding that a witness in the proceeding isn't convincing doesn't defeat a claim of prejudice. *Kyles v. Whitley*, 514U.S.419,449,n.19(1995). It cannot substitute for the jury's appraisal at the time of trial. *Id*. Credibility is for the jury, not the post-conviction court. *Antwine v. Delo*,54 F.3d 1357,1365(8thCir.1995). Counsel was ineffective.

Prejudice

Christopher has shown a reasonable probability of a different outcome had counsel obtained an expert in addiction and childhood trauma. *Strickland.* Christopher was prejudiced because Piasecki's expert testimony – not provided through any other witness – would've formed the basis for a statutory mitigating instruction under *§565.032.3(6)*. This mitigator was critically important because it went to the heart of the issue of the defendant's moral culpability and the imposition of the death penalty. *Wiggins*,539U.S.at513; *Penry*,492U.S.at319. Evidence of any type of impaired intellectual functioning, brain abnormality/damage, cognitive defects or severe impairments is inherently mitigating because it evidences diminished judgment and reasoning abilities at the time of the crime. *Sears v. Upton, Porter v. McCollum, Hutchison.* This evidence may separate out those who are more morally culpable and deserving of the harshest punishment. *Gregg*,428U.S.at184.

Here, Respondent's case in aggravation was minimal. It called only family members, neighbors and teachers to testify how Rowan's life and death affected their lives. Although Rowan's sister testified Christopher had made inappropriate sexual comments/gestures to her when she was a teenager, there was no evidence of any prior sexual convictions. The aggravation case came from the facts of this crime alone, and the jury didn't unanimously find one of the three aggravators submitted – that Rowan was killed during the commission of a rape.

The defense presented residual doubt about Spears' involvement, arguing Christopher confessed to more than he was responsible for. Piasecki's addiction/abuse/trauma testimony would've explained why Christopher's capacity to appreciate the criminality of his conduct or conform his conduct to requirements of the law was substantially impaired. This evidence would provide a plausible explanation why he took more responsibility and why his confession differed from both Spears' confession and the physical evidence – namely, he didn't remember the events due to severe intoxication. Any evidence diminishing the force of Christopher's confessions was critical because "[a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him… .'"*Arizona v. Fulminante*, 499U.S.279,296(1991)(quoting *Bruton v. United States*,391U.S.123,139–40(1968) (White, J., dissenting)). While addiction/intoxication evidence might not have made Christopher more likable to the jury, it might well have helped them understand his mindset at the time of the crime. *See Sears v. Upton*,561U.S.at951.

Because this unpresented "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Christopher's] culpability," *Wiggins*,539 U.S.at538(quoting *Williams v. Taylor*,529U.S.at398), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland*, 466U.S.at694, Christopher asks this Court to reverse the motion court's judgment and remand for a new penalty-phase.

III.

EXCLUDED VITAL RECORDS SUPPORTING MITIGATION WOULD HAVE BEEN REVERSED ON APPEAL, IF RAISED

The motion court clearly erred in denying Christopher's claim appellate counsel was ineffective for failing to raise trial court error in excluding multiple historical, medical, educational and treatment records supporting Draper's penalty-phase testimony because this ruling denied Christopher's rights to due process, to present a defense, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const.Amends.VI,VIII,XIV, in that these records documented Christopher's life history and would have assisted the jury in weighing Draper's expert opinion and were admissible over hearsay objections and effective appellate counsel would have raised error in excluding the records because they were properly certified and, by statute, the court *shall* admit them, and there is a reasonable probability this Court would have reversed Christopher's death-sentence and ordered a new penalty-phase.

I. The Claim

Christopher pleaded his appellate attorney failed to raise trial court error in excluding Christopher's historical, medical, educational, and treatment records. (PCRLf.85-93). Christopher was harmed because the admissible documents: (a) contained evidence of his life that was independently admissible; and (b) they supported Draper's penalty-phase testimony.(PCRLf.85-93). Had this appellate issue

been raised, there is a reasonable probability this Court would have remanded for a new trial, or a new penalty-phase.(PCRLf.85-93).

II. The Ruling at Trial

In penalty, trial counsel tried to admit various records from which Dr. Draper generated her "Life Path"(Ex.901) and her opinions; the trial court excluded them but allowed Draper to testify she reviewed them(Tr.6080-96). They included:

- Christopher's Arkansas Children's Hospital records (Def.Ex.920)(Mov.Ex.3)(Tr.6097;PCRTr.286-290);
- Redacted Barry County DFS records(Def.Exs.922&923)(Mov.Exs.4&5) (Tr.6100-04;PCRTr.291-92);
- Barry County Special Master report on adoption file of Tammy Pion (Def.Ex.924)(Mov. Ex. 6)(Tr.6101-04;PCRTr.293);
- Christopher's adoption records (Def.Ex.925)(Mov.Ex.7)(Tr.6105;PCRTr.295);
- Christopher's records from Heartland Behavioral Health Services (Def.Ex.926)(Mov.Ex.8)(Tr.6106;PCRTr.297);
- Barry County divorce records of Christopher's parents Betty Collings v. Clarence Collings(Def.Ex.927)(Mov.Ex.9)(Tr.6106PCRTr.298);
- Christopher's DYS records(Def.Ex.929)(Mov.Ex.10)(Tr.6108;PCRTr.299);
- Christopher's Univ. of Arkansas medical center records (Def.Ex.930)(Mov. Ex.11)(Tr.6109;PCRTr.300);

- Christopher's Employment records from A.Tenenbaum Co.(Def.Ex.931)(Mov.Ex.12)(Tr.6110;PCRTr.301);
- Benton County, AR court records, *State v. Dale Pickett*, No.CR1975-167-1 (Def.Ex.932)(Mov.Ex.13)(Tr.6111;PCRTr.302);
- Partial trial transcript from *State v. Dale Pickett*(Def.Ex.932) wherein Christopher's biological mother, Barbara Pickett, testified for the State, and his biological father, Dale Pickett, testified for the defense.(Tr.6086-96). This transcript contains information about the Pickett household in 1975. (Def.Ex.911)(Tr.6086-96;PCRTr.377,401-03,407).
- Christopher's school records from Wheaton R-II.(Def.Ex.933)(Mov.Ex.14)(Tr.6112;PCRTr.301);
- Stone County court file from State v. Barbara Pickett.(Def.Ex.934)(Mov.Ex.15)(Tr.6114;PCRTr.303).

III. Evidentiary Hearing Testimony

Christopher's appellate attorney, Rosemary Percival, testified that the trial court's ruling, excluding the above records, was preserved in the motion for new trial.(PCRTr.289-303). However, she didn't raise this issue on direct appeal. (PCRTr.289-303,306). She testified Christopher's case was overwhelming, with transcripts and legal files totaling 12,000+ pages.(PCRTr.290,313-15). She was running short on time and "scrambling" under pressure, so she gave short shrift to this issue.(PCRTr.290;315-16). There was a strict word limit that she had to follow. (PCRTr.316). After filing his brief, she thought she had made a mistake in not raising

this issue.(PCRTr.290). Her decision was a knee-jerk reaction without much analysis (PCRTr.322). She reviewed the exhibits quickly and did brief research.(PCRTr.321). She believed the foundation for each exhibit was sufficient.(PCRTr.304-05).

IV. Court's Findings

The motion court found Percival spent a significant amount of time deciding which claims to raise, and made sound strategy decisions based on her time constraints and word limitations.(PCRLf.190). Admitting evidence is within the trial court's discretion and the trial court allowed Draper to testify about the content of the records, if she relied on them.(PCRLf.191-192). The records contained information that wasn't helpful and wouldn't have been mitigating.(PCRLf.192). The issue wouldn't have been reversed on appeal. (PCRLf.192). Review is for clear error. *Barry*,850S.W.2dat350.

V. Analysis

The hearsay rule cannot be rigidly applied to exclude relevant reliable mitigation because to do so violates *Lockett*,438U.S.at604-05. *Green v. Georgia*, 442U.S.95,97(1979). These records would've been important mitigation when used in conjunction with Draper's testimony, and the jury was entitled to review the evidence upon which an expert's opinion is based. *State v. Candela*,929S.W.2d852 (Mo.App.E.D.1996); the records also would've provided important mitigating evidence by themselves because they would've documented Christopher's life history, including his family history and record of psychiatric hospitalization. *See e.g.*, *Williams*, 529U.S.at395,n.19(noting importance of juvenile records). Further, the

records were admissible over Respondent's hearsay objection because they either had a business records affidavit, *§490.692*, a certificate of true copy, *§490.130*, or were reviewed by the special master and were unchanged, *§490.063*.

IAC of Appellate Counsel

"To prevail on a claim of ineffective assistance of appellate counsel, the movant must establish that counsel failed to raise a claim of error that was so obvious that a competent and effective lawyer would have recognized and asserted it." *Williams v. State*,168S.W.3d433,444(Mo.banc2005). Movant must demonstrate that had appellate counsel raised the allegation of error, a reasonable probability exists that the outcome of the appeal would have been different. *Taylor v. State*,262S.W.3d231, 253(Mo.banc2008)(*citing Smith v. Robbins*,528U.S.259,285(2000)).

In *Hutchison*,150S.W.3dat303-04, readily available records would've documented Hutchison's troubled childhood, mental health problems, drug and alcohol addiction, history of sex abuse, attention deficit hyperactivity disorder, learning disabilities, memory problems and social and emotional problems. The motion court found that the absence of these documents didn't prejudice Hutchison because the information in these background documents was cumulative or too remote in time to be relevant and in some cases actually detrimental. *Id.* Therefore, counsel couldn't be ineffective for failing to offer them into evidence. *Id.*

This Court reversed, noting "[v]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Id.*at 304(quoting *Tennard*,542U.S.at284(quotation omitted)). It

further noted that the facts the motion court cited as detrimental, such as drug use and gun possession, were introduced at some point during the trial. *Id.* The documents wouldn't have added anything new that was unfavorable, but could've demonstrated the problems Hutchison had growing up and his intellectual and emotional deficits far more effectively than the rudimentary information actually presented during penalty-phase. *Id;See, Wiggins,*539U.S.at524–525. And records from remote time are useful to show that a claim of impaired intellectual functioning isn't a recent discovery for the purpose of the defense. *Hutchison,*150S.W.3dat304. A state cannot bar "the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death." *McCoy v. North Carolina,*494 U.S.433,441(1990). Finally, this Court held that "[f]oregoing mitigation because it contains something harmful is not reasonable when its prejudicial effect may be outweighed by the mitigating value." *Id.*at304–05. The records were useful and admissible for mitigation, and counsel was ineffective in not utilizing them.

Similarly, in *Taylor*, counsel was found ineffective in failing to introduce any of the records on which their expert, Dr. Rabun, relied in reaching his conclusions regarding Taylor's abusive background, history of mental illness, and eventual diagnosis. 262S.W.3dat251-252. These records were replete with statements showing Taylor had long-standing mental illness. *Id.* While counsel testified they didn't want to introduce the records because they felt they contained some harmful information, such records seldom contain completely helpful information, and where the only basis of defense is that one's client has long had a mental illness that reduces his

responsibility, the failure to introduce records that present not only support for his history of mental health evaluations and treatment beginning at the extremely young age of 7, but also a treasure trove of mitigation regarding Taylor's abusive childhood, simply isn't a reasonable strategy. *Id.* "Foregoing mitigation because it contains something harmful is not reasonable when its prejudicial effect may be outweighed by the mitigating value." *Id.*at251(citing *Hutchison, Williams*).

Having concluded that counsel's performance was deficient, this Court evaluated the prejudice. *Id.*at252. While the evidence in aggravation was significant and serious – the jury was presented with evidence that Taylor twice committed premeditated murder, both times strangling his victims to death, both times having sexual encounters with the victims either prior to or during the killing – the presence of significant aggravation doesn't foreclose the prejudice inquiry. *Id.* There is no crime that, by virtue of its aggravated nature standing alone, automatically warrants death. *Id., citing Woodson,*428U.S.at303(holding that Eighth Amendment requires "the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death").

The available evidence in mitigation was extensive. *Id.* While some of the details of this testimony were presented at the guilt-phase through Dr. Rabun, "[a] vivid description of [the defendant's] poverty-stricken childhood, particularly the physical abuse, and the assault ..., may have influenced the jury's assessment of his moral culpability." *Id.*at253 (quoting *Simmons v. Luebbers,*299F.3d929,939(8th Cir.2002)). The records would have provided the jury with independent validation of

the guilt-phase experts: that Taylor had been suffering from intense mental health problems for many years before he killed the victim. *Taylor*,262S.W.3dat253. These contemporaneous records documenting Taylor's mental health problems, more than any other testimony offered at in guilt-phase, could've persuaded the jury that the mental health evidence had mitigating value, and that, perhaps, Taylor deserved a punishment other than death. *Id.*

If competent counsel had presented and explained the significance of all the available mitigation evidence, there is a "reasonable probability that the result of the sentencing proceeding would have been different." *Id.(*quoting *Williams*, 529U.S.at399). The motion court clearly erred in concluding otherwise. *Id.*

In *Taylor*, counsel didn't offer the records because Dr. Rabun testified about the same information based on his review of the records; but as in *Hutchison*, 150S.W.3dat304-05, even though counsel called a psychologist and Hutchison's mother to testify about his learning disability/special education, counsel was ineffective for not investigating and presenting records and additional expert testimony. Rabun's testimony without the records was insufficient. Verifying Rabun's findings with Taylor's records and witnesses responsible for generating those records was critical.

The same is true here – Respondent emphasized to the jury that Draper wasn't even a psychiatrist or psychologist, and was unqualified to render any diagnoses or prescribe medication. The records that counsel wanted to admit – providing independent mitigating evidence of Draper's conclusions – were admissible and

critically important. The records showed Christopher's long-term behavior problems were produced by unstable homes and upbringing. Reasonable appellate counsel would've raised this issue of excluding these admissible records. *Strickland.* Had counsel done so, there's a reasonable probability that the outcome of the appeal would've been different and this Court would've ordered a new trial or new penalty-phase. *Id.* This Court must reverse.

IV.

CO-DEFENDANT SPEARS' IRRECONCIABLE CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective in failing to present in guilt and penalty Co-Defendant David Spears' irreconcilable confession to show police coercion in obtaining Christopher's confessions because this ruling denied Christopher effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have challenged the validity of Christopher's statements because they were the most critical evidence against him, and Spears' confession was admissible not for its truth but for the non-hearsay purpose of establishing police conduct used to obtain Christopher's confessions and the jury was unable to adequately assess the weight/credibility to give Christopher's statements without knowing officers had obtained a contradictory confession from co-defendant Spears, and had the jury been able to evaluate Christopher's statements in light of Spears' alleged confession, a reasonable probability exists they would not have convicted him of first-degree murder, or would have voted for life.

Two people confessed to this crime: Christopher Collings and David Spears. Yet their statements are irreconcilable and cannot both be true. While Christopher was adamant that Spears didn't participate in the crime, and that he had not told Spears any details, Spears' confession to Newton County officers provided details only

someone who participated in the crime would know. As the prosecutor admitted, "they've made statements that are at odds with each other, both of these defendants" (PTR.86,159). The prosecutor acknowledged, "[at Christopher's trial,] [t]he state argued that Collings' statement was an accurate account of the events surrounding Rowan's murder even though Collings said Spears was not involved in the actual rape and murder," [but] "[i]n David Spears' trial the state would be in a position to have to present David Spears' statement and argue its validity," [and] "[t]his would put the state in a position of arguing inconsistent theories of who actually strangled Rowan Ford."[9] Respondent was also seeking death against Spears.(PTR.1119).

The crucial evidence against Christopher was his confession, and trial counsel were ineffective in failing to introduce Spears' inconsistent and irreconcilable confession – not as substantive evidence – but as evidence that Christopher's statements were manipulated by law enforcement and were, therefore, unreliable. Spears' confession isn't hearsay since it was admissible, not for its truth, but to show that it was made and was inconsistent with Christopher's. This would've shown the jury it didn't have the complete story because of the inconsistencies, and at least one, or both, were false. Admitting Spears' confession was consistent with trial counsel's strategy in guilt and penalty to introduce evidence that Spears' confession was inconsistent with Christopher's; indeed, in penalty, counsel attempted to show the

[9] Schlichtman, Lisa. "Murder Charges against David Spears are Dismissed." *Monett Times*, Sept. 26, 2012. http://www.monett-times.com/story/1898156.html (7/7/17).

victim's body was transported in Spears' vehicle, when Christopher had stated he acted alone. Had counsel planted doubt that Christopher's confession was unreliable, there's a reasonable probability he wouldn't have been convicted of first-degree murder or death-sentenced.

I. The Claims

Christopher was denied effective assistance of counsel, due process, a fair trial, and freedom from cruel and unusual punishment because his attorneys failed to offer Spears' full and complete confession, taken at the same time as Christopher's, as evidence that neither was credible.(PCRLf.25-29). Christopher was harmed because the jury couldn't correctly assess the weight to give to Christopher's confession, and had they been able to evaluate it in light of Spears', a reasonable probability of a different outcome exists.(PCRLf.25-29).

Christopher also was denied effective assistance in penalty-phase when they failed to offer Spears' recorded confession to show Christopher didn't plan the victim's death alone as mitigation.(PCRLf.25-29). Christopher was harmed because if it had been offered, the court would've admitted it and, it is reasonably probable the jury wouldn't have imposed death.(PCRLf.25-29).

II. Trial Proceedings

Before trial, Respondent didn't want Spears' confession admitted, arguing it was hearsay, not exonerating of Christopher and inadmissible.(LF.470-476; PTr.908).

At the Motion to Suppress hearing, defense counsel was interested in law enforcement manipulating Spears, eliciting that Newton County coroner, Mark

Bridges, helped interrogate Spears on Nov.9th; Bridges had worked with Spears and knew him quite a while.(MTS.95-96). Spears made contact with Bridges and Bridges helped Chris Jennings question him while Christopher was interrogated in Barry County.(MTS.98,103). When Barry County authorities received information that Spears' was confessing in Newton County, they wanted to "clear up the discrepancies quickly."(MTS.387;TR.3859,4853). They were "big discrepancies," and they brought Chief Clark back for Christopher's second interview.(MTS.387-88). They knew Clark and Christopher were friends for 17 years.(MTS.392).

During the second interview, Det. Evenson lied to Christopher, telling him Spears' was confessing, and "putting himself there, but he's saying you did it."(MTS.393,397). Spears was confessing, but he never said Christopher killed Rowan; Spears said he killed her.(MTS.397-399). Evenson denied intentionally lying to Christopher about that.(MTS.399-400). Also during the second interview, Det. Evenson told Christopher the FBI found blood in the back of Christopher's truck, and later they found blood on his trailer floor – but neither statement was true.(MTS.407-410).

When Clark returned for the second interview, he told Christopher he "needed" him to clear up the discrepancies between his statement and Spears'.(MTS.696). Clark knew Spears' was confessing, but Christopher had told Clark he acted alone, and Clark wanted to find out from Christopher who was being truthful.(MTS.690;TR.4785-86). Clark believed Spears did something to Rowan and Christopher knew.(Tr.4547).

Clark is an important character in Christopher's case because the first time Christopher allegedly admitted involvement in Rowan's disappearance and death was when he was alone with Clark on Nov.9.(MTS.831). Clark denied applying pressure, coercion or promises to Christopher to obtain a confession.(MTS.831-32,846). However, in a third videotaped-interview with Clark on Nov.14, Christopher repeatedly tells Clark that he has an attorney who told him not to speak with law enforcement, and "I can't really talk to you about this."(MTS.848). Over this invocation, Clark repeatedly stated, "I'm not pressuring you, I'm not coercing you"(MTS.848). Defense counsel argued that Clark's definition of coercion was relevant since his earlier interactions with Christopher weren't recorded. (MTS.849).

At a pretrial hearing, Respondent wanted references to Spears' confession – anything against Spears' penal interest – redacted from Christopher's second videotaped-interview, which the defense wanted to admit.(PTr.918-919,946-50,954-57). Respondent agreed that what Spears' actually confessed to, and what officers told Christopher Spears' said, were different.(PTr.957). The defense didn't want Christopher's second videotaped-interview because references to Spears' statements were necessary for context – what Christopher was saying didn't match what Spears said, and they wanted to know who was telling the truth.(PTr.959). The defense argued the jury needed the complete picture of what happened and a lot of Spears' statements "hurts the State's theory of the case."(PTR.969-72).

After the Court granted Respondent's motion to redact, defense counsel moved to continue and impanel a separate jury for penalty-phase because they prepared a

case where the jury wouldn't hear about Spears' confession in guilt-phase, denying them an area of evidence and argument giving the true facts to sort out, and that information about Spears' confession would be a "complete surprise to them in the penalty-phase," but is admissible because it provides mitigation support (PTr.1092-1096,1125-28).

During defense opening at trial, counsel said law enforcement was trying to get Christopher to implicate Spears.(Tr.3609). It was a mystery because Spears was confessing, saying he participated and had sex with her too, but Christopher was saying nobody else was involved and the first person he told was Clark.(Tr.3609-3611). The defense told the jury that police gave Christopher false information–that they found blood in his truck–but Christopher wouldn't deviate from his story.(Tr.3611).

FBI Agent Stonecipher spoke to Christopher on Nov.7, and asked whether he would have the ability to leave his home on Nov.3 and beat Spears and Mahurin back to Spears' residence before they got there; Stonecipher said he was the one who brought this possibility up, and Christopher said he wouldn't have had enough time.(Tr.3980,3983-84). Stonecipher knew Spears had tried to develop an alibi for that night.(Tr.3985).

Respondent showed the jury Christopher's first videotaped-statement (Tr.4828;Ex.94). The defense then introduced the second videotaped-statement containing information about co-defendant Spears' confession.(Tr.4848-

49;Def.Ex.748). Defense stated it was their strategy to bring in the statements of the co-defendant.(Tr.4832-35,4841-42).

The defense also called David Spears at trial; outside the jury's presence, he invoked his right not to testify.(Tr.4988-89).

In closing, defense counsel argued Christopher was given every opportunity to implicate Spears, the officers pleaded with him that Spears was involved and that Spears was confessing, but Christopher wouldn't implicate him (Tr.5608-09). Counsel also noted there was no blood in Christopher's truck, and it hadn't been cleaned out, asking the jury, if the victim had blood on her body, then why is there no blood in the truck?(Tr.5610).

In penalty-phase, the defense presented evidence showing lingering doubt about Spears' involvement: Myrna Spears testified David called her around midnight the night Rowan disappeared; she drove her Suburban to his house.(Tr.5887-88). David left in his pickup, returned soon after, took the Suburban, and she stayed at the house.(Tr.5888-89). David returned by 7:00 a.m.(Tr.5889). Alicia Brown testified that two dogs, trained to alert at the scent of human remains, alerted on Spears' Suburban's driver's side door, driver's seat, left rear quadrant, and rear cargo area.(Tr.5905,5913-14,5917-18).

In penalty-closing, counsel reminded the jury that Spears also confessed to this, and both confessions cannot be true: Christopher cannot have sole responsibility for everything when Spears participated.(TR6488-89). Either: 1) the officers were lying when they said Spears was confessing, and they were trying to get Christopher

to frame an innocent man(Tr.6490); 2)Spears is an innocent man confessing to a crime and caved under pressure from interrogators(Tr.6491-92); or 3) the officers were truthful and Spears did confess to participating in the crime, and if that is true, then Christopher is taking responsibility for more than he did (Tr.6492-93).

In rebuttal, Respondent argued Spears wasn't on trial and the jury shouldn't worry about Spears; the defense is trying to distract and confuse.(Tr.6503-04).

III. Evidentiary Hearing

Post-conviction counsel introduced Spears' audio-recorded confession and transcript into evidence as Movant's Exs.30&31.(PCRTr.191-197,258). Counsel also introduced Christopher's first and second videotaped-interviews and transcripts as Movant's Exs.26-29.(PCRTr.187-190).

Zembles testified there were irreconcilable discrepancies between Christopher's and Spears' statements; however, she believed David's statement made Christopher sound worse because he said: 1) Rowan was killed inside the trailer; 2) he raped her, but when he walked in, Christopher was on top of her; 3) when it was over, Christopher handed him a cord and told him it "had to be done," and Spears strangled her.(PCRTr.198-202). They never thought about admitting Spears' statement because they never wanted the jury to hear Spears' statement for any reason.(PCRTr.202-203).

Moreland testified they considered and rejected the idea of presenting Spears' confession in guilt-phase, deciding to simply admit what the police were telling Christopher Spears was saying.(PCRTr.337-338). They considered Spears' statement could be false, possibly coerced, and an argument could be made that Christopher's

was too, since they couldn't both be true, but they decided it was better not letting the jury hear Spears' talk.(PCRTr.340-341).

Moreland also testified he wanted the jury to know what Spears said for penalty-phase, because if the jury believed he was involved, that was mitigating; he wanted any evidence to support Spears' involvement, in addition to Spears' statement.(PCRTr.341-42). His theory was to add doubt into what Christopher said, and argue Christopher was inflating his role, admitting to more than he did, and that Spears participated.(PCRTr.362). Moreland put on evidence of search dogs hitting on Myrna's Suburban and Myrna told police that Spears had borrowed it and was gone most of the night.(PCRTr.363).

IV. Court's Findings

The motion court ruled counsel had a reasonable strategy for not wanting Spears' confession in because it wasn't exonerating, and suggested more deliberation on Christopher's part.(PCRLf.166-67,172-173,182-183). Review is for clear error. *Barry*,850S.W.2dat350.

V. Analysis

Testimonial out-of-court statements of a co-defendant are admissible, over a *Bruton* objection when offered for purposes other than their truth. *Tennessee v. Street*,471U.S.409,414(1985). *See,U.S. v. Tucker*,533F.3d711,714-15(8thCir.2008). In *Street*, the defendant objected to the State introducing the accomplice's confession. 471U.S.at413-14. The State's most important piece of substantive evidence was defendant's confession; however, defendant testified his confession was coerced,

therefore, the focus turned to the State's ability to rebut defendant's testimony. *Id.*at415. The Court held the introduction of the accomplice's confession for a nonhearsay purpose – not to prove what happened at the murder scene but to prove what happened when respondent confessed – raised no constitutional concern. *Id.* Had the prosecutor been denied the opportunity to present the co-defendant's confession in rebuttal so as to enable the jury to make the relevant comparison, the jury would've been impeded in its task of evaluating the truth of defendant's testimony and handicapped in weighing his confession.*Id.*

The same is true for Christopher, except defense counsel would be the proponent of co-defendant's confession; it was admissible for the non-hearsay purpose of establishing manipulation/coercion of Christopher's statement by officers so the jury could weigh the reliability of Christopher's confession. Without a doubt, Respondent's most critical piece of evidence were the confessions and defense counsel was obligated to challenge them.

Counsel's "strategy" reason for not introducing Spears' actual confession to challenge the reliability of Christopher's confession isn't reasonable. They lost the motion to suppress Christopher's statement as coerced by officers generally through the use of Clark; they clearly wanted to exclude Christopher's statements, and failing that, they were obligated to make the best argument for why Christopher's statements were unreliable. Both parties knew Spears' confession was irreconcilable with Christopher's; indeed, defense counsel used the substance of Spears' confession, filtered through law enforcement, by admitting Christopher's second confession.

Zembles' testimony that "they never wanted the jury to hear Spears' statements at all for any reason" is inaccurate.(PCRTr.202-203). The jury heard the entire substance of Spears' confession during the playing of Def.Ex.748(Mov.Ex.28) – Christopher's second videotaped-statement, where the officers told him what Spears' was allegedly confessing to. But the substance of Spears' alleged statement was filtered and changed by law enforcement. Without admitting Spears' actual confession, and hearing Spears' voice, the jury was led to believe law enforcement was simply using an interrogation tactic – telling Christopher Spears was confessing to trick him into implicating Spears. The irreconcilable nature of Spears' confession, and thus, the possibility that one or both confessions was false, is only apparent through the admission of Spears' actual statement.

Had counsel truly been worried about the prejudicial nature of the substance of Spears' confession – being more incriminating of Christopher's actions – they wouldn't have admitted his statement through the officers during Christopher's second videotaped-statement – it was the defense, not Respondent, that introduced the second videotape. And, of course, counsel could've argued Spears' was attempting to minimize his involvement by making Christopher look worse. The point is that the statements are irreconcilable, yet the jury was unable to evaluate this when evaluating Christopher's confession.

Further, once Christopher was convicted, the perceived negative effect[10] of Spears' audiotaped confession on Christopher's guilt or innocence was no longer relevant. Moreland testified he wanted the jury to know what Spears said in penalty-phase, because if the jury believed Spears was involved, it was mitigating; he wanted any evidence supporting that, including Spears' statement.(PCRTr.341-42). His penalty-phase theory was to add doubt into Christopher's statement, and argue Christopher inflated his role and admitted to more than he did, and Spears participated,(PCRTr.362). If this was their strategy, they didn't follow it, because Spears' audiotaped confession was not presented in penalty-phase either.

Christopher was prejudiced because a reasonable probability exists that the jury wouldn't have found him guilty of first-degree murder or wouldn't have imposed death had they been aware law enforcement obtained an irreconcilable confession

[10] Zembles testified she was trying for second-degree murder based on an "impulsive" act, lacking deliberation.(PCRTr.242, 265). But as this Court noted, "Where a defendant commits a murder which, because of the particular method of attack, required some time to complete (i.e., manual strangulation), this Court has permitted an inference of deliberation." *State v. Collings*,450S.W.3d741,760(Mo.banc2014) (citing *Johnston*,957S.W.2dat747); *State v. Simmons*,955S.W.2d729,739 (Mo.banc1997). Challenging the accuracy of Christopher's statements is reasonable, but trying to convince a jury, or this Court, that manual strangulation doesn't equate to first-degree murder, is unreasonable.

from Spears and possibly obtained an unreliable confession from Christopher. After all, Christopher's first two "confessions" weren't recorded. It was only the retelling of what he told Clark that was recorded. Counsel was ineffective in failing to present Spears' confession to challenge the reliability of Christopher's police statements.

It is not the purpose of *Strickland* to set an impossible standard. *Blankenship v. State*,23S.W.3d848,851(Mo.App.E.D.2000). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Deck*,68S.W.3dat426 (quoting *Strickland*,466U.S.at694). "Reasonable probability" doesn't mean the defendant "would more likely than not have received a different verdict," only that the likelihood of a different result is great enough to "undermine [ ] confidence in the outcome of the trial." *Smith v. Cain*,565U.S.73,75(2012); *Williams*,529 U.S.at375(referring to "errors that undermine confidence in the fundamental fairness of the...adjudication...").

Without challenging the reliability of Christopher's statements with Spears' recorded confession, this Court's confidence in the jury's verdict should be undermined, and it must reverse for a new trial or new penalty phase.

V.

UNCHALLENGED HAIR DNA CREATES DOUBT ABOUT CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective for not investigating/calling an expert to challenge DNA evidence from Item 19.4, a hair allegedly found in Christopher's truck bed that Respondent's expert testified was consistent with Rowan's DNA profile, in both guilt and penalty-phases, because Christopher was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const.Amends.VI,VIII,XIV, in that effective counsel would have called an expert to refute these DNA findings because the analyzed data was different from the analysis/testimony given by Respondent's expert, Stacy Bolinger, when correctly excluding certain alleles and peak heights, but Christopher's counsel gave up investigating when they were unable to open the raw data disk, but had they challenged this evidence, there is a reasonable probability the jury would have doubts about Christopher's confession, as Rowan's body was not in his truck, and they would not have convicted him of first-degree murder, or would have voted for life.

I. The Claim

Claim 8(E) alleged counsel's ineffectiveness in failing to investigate and present expert evidence to challenge Respondent's DNA testing of Item 19.4 – a hair found in Christopher's truck bed – and the statistical calculation reached.(PCRLf.62-68). This evidence was used to connect Christopher and his truck to Rowan, and

discrediting it would present lingering doubt about whether Christopher killed Rowan, and whether he acted alone.(PCRLf.62-68). It would also support counsel's penalty-phase theory that Rowan's body was transported in Spears' Suburban and that Spears inculpated himself.(PCRLf.62-68).

II. Bolinger's DNA Trial Testimony

At trial, Missouri Highway Patrol DNA analyst Stacey Bolinger testified she examined two hair roots – Items 19.1 and 19.4.(Tr.5349,5433-34). A full DNA profile would have peaks present at all 16 locations.(Tr.5436-37). No profile was developed from 19.1; a partial DNA profile was developed from 19.4, which was collected from the back of Christopher's truck.(Tr.5037,5398,5435,5444). The partial profile from Item 19.4 exhibited DNA at 6 of 16 possible loci, but she could only use 4 out of 13[11] – at one of the 6 loci there was only 1 allele which made it incomplete, and the other was the gender loci.(Tr.5437,5456). That is why she only used 4 for the statistical analysis.(Tr.5455). The approximate frequency of the partial profile in the Caucasian population is 1 in 328,700.(Tr.5441-42).

Bolinger testified her lab doesn't have a threshold that evidence must meet before reporting a partial profile.(Tr.5437). After a profile was developed from Item 19.4, she developed a profile from Rowan's sample.(Tr.5438-39). The partial profile from 19.4 is consistent with Rowan's profile at the alleles represented.(Tr.5439).

III. Evidentiary Hearing Testimony & Bolinger's Deposition

[11] There are only 13 in the statistical database.(Tr.5440).

A. Attorneys Zembles & Moreland

Zembles received Bolinger's printed lab reports and a disk with raw data in discovery and sent them to Forensic Bioinformatics for independent analysis.(PCRTr.217;Ex.20). She wanted them reviewed, because MSHP analysts don't indicate which alleles are discarded; only the raw data shows that.(PCRTr.222-23,226). The analyst can make peaks disappear on the report, but not from the raw data.(PCRTr.224).

Bioinfomatics wasn't able to open the data file from MSHP's disk.(PCRTr.219-20). Zembles said she corresponded with Respondent many times about the disk's functionality.(PCRTr.225;Ex.25). The defense was informed about the software required and Bolinger offered to talk with the defense expert about how to access the data.(Ex.25). The defense was never able to get the disk opened for their expert; therefore, they never independently investigated the DNA.(PCRTr.225). Zembles said she attempted "for years" to get the raw data, finally concluding it couldn't be found; then they ran out of time.(PCRTr.227-29). She wasn't able to cross-examine Bolinger about the raw data.(PCRTr.227). She decided to challenge the fact that Bolinger only found 3-4 of 16 loci on Item 19.4.(PCRTr.228).

Moreland thought they tried to minimize the DNA through Colleen Spears' testimony suggesting Rowan had been in the back of Christopher's truck because they

regularly visited him.(PCRTr.365).[12] Challenging the DNA, and whether it was even Rowan's hair, would've contradicted Christopher's statement that her body was transported in his truck.(PCRTr.365).

B. Dr. Dean Stetler

Dr. Stetler, professor of molecular biosciences, reviewed Bolinger's DNA lab report, worksheets, and electronic data disk.(PCRTr.89-91;Exs.19&20). He made printouts of the DNA results from the disk.(PCRTr.92). The electropherograms showed specific peak heights at certain locations reflecting specific allelic activity.(PCRTr.93). The electronic data is important because it contains information otherwise unavailable on the printed information from the State lab.(PCRTr.93). Some of the actual numbers on the disk weren't on the printed material he received.(PCRTr.94).

Stetler testified FBI protocol for peak height standards is the 60% rule; two peaks must be 60% of each other with respect to height to be considered sister alleles.(PCRTr.94). He believed MSHP standards were the same.(PCRTr.109). Also, 50 RFU is the minimum peak height used by MSHP and the FBI for comparison; anything under 50 RFU is usually not considered an allele.(PCRTr.95-96).

[12] Moreland was mistaken – Colleen testified she had been at Christopher's property only twice; her Mustang was parked there because she couldn't afford tags.(PCRTr.3643-46,3689).

Stetler reviewed the partial DNA profile developed on Item 19.4.(PCRTr.97). "Partial" means DNA for the loci didn't reflect at least two alleles.(PCRTr.97). In Bolinger's report, only 4 out of 13 loci were included on the partial profile: D3, TH01, D5 and VWA.(PCRTr.97-99,106). He determined RFU amounts for each peak from the information in the electronic data and put them in a table.(PCRTr.99-100;Ex.22). He found RFU peak heights at each of the four loci, but they weren't all over the 50 RFU cutoff.(PCRTr.101;Ex.22). At D3 locus, one allele was 125 RFU and the other was 86 RFU – (both over 50 and met the 60% rule).(PCRTr.101,105). At TH01 locus, one allele was 136 RFU, but the other was only 39 RFU (under 50, not 60%).(PCRTr.102,105). At D5 locus, one allele was 110 RFU and the other was 45 RFU (under 50, not 60%).(PCRTr.102). At VWA locus, one allele was 432 RFU and the other was only 36 RFU (under 50).(PCRTr.103). Therefore, only one locus, D3, contained a set of true allelic pairs.(PCRTr.105).

Also, at D18 locus, the 14 allele was 14 RFU, which wasn't consistent with Rowan's profile and couldn't be contributed by her.(PCRTr.103). If the 14 allele at D18 locus is accepted, Rowan would be excluded from contributing DNA to the partial profile.(PCRTr.104).

The paper discovery didn't contain information on the RFU peak heights; only the disk.(PCRTr.106). Stetler opined it was improper for Bolinger to include the 4 loci she used because they don't meet the 60% rule.(PCRTr.107). If Bolinger had only used the one true allelic pair at the D3 locus, the statistical frequency would only

be: 1 in 17.(PCRTr.108). If he had been contacted to testify, he would've provided this information.(PCRTr.108).

Respondent presented Stetler with Ex.A, allegedly part of the MSHP records, which he hadn't seen.(PCRTr.110). The peak heights on Ex.A were consistent with the standards being at least 50 RFU.(PCRTr.111). In Ex.A, the heights are all above 50; Stetler's Ex.22 would exclude Rowan only if you considered alleles below 50.(PCRTr.111). The guidelines say it is permissible to go below 50 RFU if it is deemed appropriate.(PCRTr.113). However, the data on the disk he received showed peak heights below 50 RFU, and the 14 allele with a 14 RFU would have excluded Rowan Ford from that hair because her DNA didn't contain that marker at that location.(PCRTr.114). Therefore, if the lab considered RFUs below 50, they would've excluded Rowan at that locus with the 14 allele, but if they didn't use RFU below 50, it would have removed all the other loci used, except for the one above 50.(PCRTr.115).

While State's Ex.A indicated allele peaks over 50, Stetler's Ex.22 also came from the electronic data, Ex.20.(PCRTr.116). Mov.Ex.21 is the printout of the data from the disk Stetler received; page 6 indicates the size and height of the markers.(PCRTr.117). There is a discrepancy between the two interpretations of the electronic data.

C. Bolinger's Deposition

Bolinger's deposition after the hearing was also submitted.(PCRTr.408).

Bolinger testified Ex.A is the DNA profile from Item 19.4.(B.Depo.7). This was the only hair root she obtained DNA from.(B.Depo.8). Mov.Ex.19 is a specific report referring to Item 19.4.(B.Depo.9-10).

Bolinger compared the DNA found on Item 19.4 to Rowan's hair sample.(B.Depo.11). At the time of testing, the minimum peak height for comparison was 50 RFUs.(B.Depo.13). In Ex.A, the alleles she thought were significant all have peak heights of at least 50.(B.Depo.13).

Stetler created Ex.22 – his analysis of the peak heights of the alleles.(B.Depo.13). Bolinger agreed it was important both alleles had peaks of at least 50 to be considered.(B.Depo.15). According to Bolinger, at TH-01 locus, both peaks were over 50.(B.Depo.15). Ex.22, however, indicated that one of the peaks at allele 9.3 was 39.(B.Depo.16). Bolinger didn't think this was accurate based on her software's analysis; she recorded peaks of 204 and 53.(B.Depo.14-16).

Bolinger testified the standard minimum peak heights today are different, based on different instrumentation and equipment.(B.Depo.16). The new minimum is 150 RFUs.(B.Depo.21). The new equipment has "smoothing software," so now, all peak heights are higher than MSHP was accustomed to.(B.Depo.17). Now, there is also a 60% rule, which requires the peaks to be within 60% of each other in order to consider them paired.(B.Depo.17-18). When she did her analysis, there was no 60% rule.(B.Depo.18). Had the 60% rule been in effect, it would've changed her conclusions about TH-01 because the peaks are not within 60%.(B.Depo.19,21). She

was unsure if the rule changed before or after trial, but it was after her analysis.(B.Depo.19).

The information in Ex.A came from electronic data that would've been on the disk provided to the defense (Ex.20); it wouldn't have been on the printed disclosure.(B.Depo.20). Ex. A was printed using GeneMapper-ID,X1.4.(B.Depo.22). The original printed disclosure used a different version – GeneMapper,3.2 –the version with which the samples were analyzed.(B.Depo.23).

Bolinger said you can "change" the appearance of the printout based on each analyst and each software version.(B.Depo.23). You can choose how to display and present data – peak heights, data point, allele calls – are all available.(B.Depo.23-24). Using a different version for printing shouldn't affect the analysis, unless it was reanalyzed.(B.Depo.24). She didn't reanalyze the data when she printed it – she just pushed a button.(B.Depo.24.). The data comes off the instrument in raw form, unanalyzed.(B.Depo.25). The raw profiles are placed on the disk, and then the raw data is put into the GeneMapper software and analyzed into a project, which is also placed on the disk.(B.Depo.25).

Theses "analyzed results" are the combination of the computer and her own loci calls.(B.Depo.25). The computer is programmed for specific parameters, which she can override.(B.Depo.26). As a practice, she doesn't override peak heights.(B.Depo.26). If somebody wanted to, they could take the disk, put it in a version of GeneMapper, and print out something like Ex.A if they push the right button.(B.Depo.26).

She doesn't take everything off the electronic data when she prints discovery for Respondent; the peaks, but not peak height numbers, are printed.(PCRTr.27). If the peaks are present, they are above the 50 RFU threshold.(B.Depo.27). In Nov.2007, the lab didn't have a stochastic threshold, so there was no reason to print out anything other than peaks above 50.(B.Depo.28). She could take information out with the software if she thought it was "stutter" or something that wasn't an actual peak height over 50.(B.Depo.28). If she took something out, it would still be in the electronic data with a note of what was changed.(B.Depo.29).

Mov.Ex.21 says it was printed with GeneMapper,4.0 – another version; the analyzed data should be the same, but it might look different.(B.Depo.29-30). Mov.Ex.21 refers to ".FSA" files, which is raw data; this is then placed into the software to determine peak heights.(B.Depo.31). On Stetler's exhibit, the height of one of the TH-01 alleles is 39, but the height on her printout says 53.(B.Depo.33). Bolinger said different smoothing or analysis parameters could cause different peak heights, or it may not be the same file she used to analyze the data; a different injection could've been used – she chooses the one with the most data.(B.Depo.33). There could be a different .FSA file at the same markers with alleles that do not fall above 50 RFU.(B.Depo.34). If she changed the analysis parameters, she might see peaks below 50 RFU.(B.Depo.35).

On State's Ex.A, the D5 locus has alleles at 183 and 70; on Mov.Ex.21, the D5 locus has alleles at 110 and 45.(B.Depo.35). Bolinger believes hers meets the

threshold.(B.Depo.36). She analyzed the data and disclosed the printed material using GeneMapper ID,3.2, but Ex.A uses GeneMapper ID,X1.4.(B.Depo.22,38).

She offered to talk to the defense expert for trial and let them know what software to use and where to look for it.(B.Depo.38). If someone had asked her to print the raw data from the software, she would have.(B.Depo.38,43). Ex.A shows the actual peak heights from the analyzed data, but it is hard to tell if the peaks are above or below 50 by looking at it; you need the numbers to determine actual height.(B.Depo.40). The software analyzes the data, and she looks at each peak to make sure it's actual DNA and not a spike, anomaly or stutter.(B.Depo.41).

To do a completely new analysis on the electronic data, it would be helpful to know peak heights.(B.Depo.42). If a defense expert used her data, it would be helpful to have the numbers/parameters she used to call the alleles, unless they were reanalyzing the samples.(B.Depo.42). If they were looking at the analyzed data to determine if there were mistakes, having the actual peak height numbers would be useful.(B.Depo.42).

Bolinger agreed much of the data on the hair root was relatively small, close to 50, right above or below.(B.Depo.43). The MSHP 60% rule had gone into effect between the time she analyzed and when she testified,(B.Depo.44), however, the SWGDAM Guidelines used the 60% rule and they were effective Jan.2010 – before her analysis.(B.Depo.45). MSHP didn't yet have the 60% rule.(B.Depo.46). Under the 60% rule, the peak heights would remain the same, but it would change her opinion as to whether they were sister alleles.(B.Depo.44-45).

If someone analyzed the data not using the 50 RFU minimum, they would obtain different results; the size of the alleles wouldn't change, but the analysis of whether it was an allele would change.(B.Depo.47). Also, the .FSA raw data would be the same for each injection, but the data may be different for different injections.(B.Depo.48). Bolinger said there are different smoothing options that can change peak heights.(B.Depo.48). Someone else could analyze it another way, still using the same data.(B.Depo.49).

IV. Court's Findings

Defense counsel hired a laboratory to review Bolinger's analysis, but they lacked the technology and, specifically, the software, to interpret the raw data provided in discovery.(Ex.20)(PCRLf.185-87). Trial counsel didn't seek further examination; this was trial strategy, based on a strategic decision to not challenge Movant's responsibility for the murder.(PCRLf.185-86). "Collings admitted he put Rowan's body into the bed of his truck after he strangled her." *Collings*,450S.W.3dat 762, therefore, the strength of the DNA evidence wasn't of any significance and Movant wasn't prejudiced.(PCRLf.185-86).

The Court further found Stetler's testimony wasn't credible and was unreliable – his pauses and hesitations suggested he was "formulating" his answer to circumvent addressing flaws in his testimony – and Bolinger's deposition testimony refuted his claims.(PCRLf.185-86). Even if some jurors might somehow find Stetler credible, his opinion wouldn't have changed the outcome.(PCRLf.186-87). Review is for clear error. *Barry,supra*.

V. Analysis

Defense counsel's failure to investigate and call a DNA expert to challenge Bolinger's findings is wholly unreasonable. While trial counsel may make reasonable strategy decisions, they may not do so in the absence of a reasonable investigation. In *Rompilla*, in holding that a lawyer "is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial[,]" the Supreme Court quoted from 1 ABA Standards for Criminal Justice 4-4.1(2d ed.1982 Supp.):

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the case's merits and penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

545U.S.at387(emphasis added).

Here, counsel simply gave up when they couldn't get the data disk to open. But "'counsel has a duty to make reasonable investigations or to make a *reasonable decision* that makes particular investigations unnecessary.'" *Cravens v. State*,50 S.W.3d290,295(Mo.App.S.D.2001)(quoting *Strickland* 466U.S.at691)(emphasis added). Counsel's actions don't amount to a reasonable investigation or a reasonable

decision. "Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not yet obtained the facts on which such a decision could be made." *Kenley*,937F.2dat1308. The motion court's finding that this was a "strategy" is clearly erroneous.

The motion court also found that Stetler's testimony wasn't credible or reliable, that Bolinger's deposition testimony refuted his claims, and that even if some jurors might somehow find Stetler credible, his opinion would not have changed the outcome.(PCRLf.185-87). But these findings only reflect that the motion court was engaged in fact-weighing, which isn't for the court. A state post-conviction judge's findings that a witness in the proceeding is not convincing doesn't defeat a claim of prejudice. *Kyles*,514U.S.449,n.19. Such an observation couldn't substitute for the jury's appraisal. *Id.* Credibility of a witness is for the jury, not the post-conviction court. *Antwine*,54F.3dat1365.

The issue in the post-conviction case was not whether Stetler or Bolinger was correct about the appropriate standard for determining the peak heights for the alleles or which alleles should be considered. The question was whether there was a reasonable probability that a jury would give Stetler's evaluation and conclusion more weight. *Strickland*,466U.S.694. This is not an outcome-determinative test, as the motion court in essence applied. *Id.*at693-94; *Deck*,68S.W.3d427. The question is whether there exists "a reasonable probability that the outcome would have been different?" *Hutchison*,150S.W.3dat306. Any doubt cast on Respondent's evidence linking Rowan to Christopher's truck would've caused the jury to doubt Christopher's

statements and believe the defense theory that Spears transported her body in the Suburban and that, for whatever reason, Christopher was covering for him. This would have affected their determination of guilt and/or the evaluation of the correct penalty. There is more than a reasonable probability of a different outcome here. *Strickland*.

For the foregoing reasons, the motion court clearly erred in denying Christopher's claims that counsel should've investigated and presented evidence casting doubt on Respondent's evidence that Rowan's body was in Christopher's truck. This Court should reverse for a new trial or, at minimum, a new penalty phase.

VI.

FORENSIC INTERNET HISTORY REPORT CREATES DOUBT ABOUT CHRISTOPHER'S CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective in failing to investigate/present guilt-phase evidence of a Forensic Internet History Report obtained from Spears' computer showing someone was visiting MySpace between 1:58 and 3:42 a.m. on Nov.3, 2007, because this ruling denied Christopher effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have raised a question about who used Spears' computer during the time Rowan went missing, which would challenge Christopher's police statement that he returned to the Spears' home and took Rowan, and there is a reasonable probability had the jury been aware someone used Spears' computer after midnight, they would have had a reasonable doubt about his confession, culpability and guilt.

I. The Claim

Claim 8(D)(3) alleges that counsel failed to investigate and present the forensic internet history analysis report done on the hard drive of a computer at Spears' residence by Heart of America RCFL in guilt-phase to challenge Respondent's evidence of guilt including the truth of Christopher's police statements. The report

shows someone was using Spears' computer consistently between 1:58 and 3:42 a.m., visiting a MySpace website. Since someone was actively using Spears' computer at the house then, and according to Myrna Spears, David was gone until 7:00 a.m., and she doesn't know how to use the computer, this creates an inference that someone is lying and someone other than Christopher committed the crime.

II. Evidentiary Hearing Testimony

At the evidentiary hearing, the parties stipulated: 1) the Heart of America FCFL forensic internet history report dated Nov.7, 2007, shows information taken from Spears' computer; and 2) the report shows active internet use between 1:54:19 and 3:36:03 a.m. on Nov.3, 2007.(PCRTr.209;Movant's Ex.23).[13]

Attorney Zembles testified she remembered receiving the report. (PCRTr.210). She also remembered Myrna Spears claimed to be alone in the house at that time, but in her deposition, Myrna said she only knew how to turn the computer on and off and play games.(PCRTr.212-13). Zembles said that since David Spears didn't testify, the information wouldn't be impeaching, but agreed Spears' confession said he was out back-roading all night until 4-5 the next morning.(PCRTr.215). She said they weren't arguing Christopher was at the house at that time using the computer.(PCRTr.213).

Attorney Moreland testified they received the internet history report, and it showed, between the times indicated, someone was on the computer and there were

[13] The trial evidence showed officers seized a hard drive from Spears' computer containing pornography.(TR.3900).

many entries for MySpace.(PCRTr.346-47). Myrna Spears testified she only knew how to turn the computer on and off and play video games.(PCRTr.347). Given David Spears' statements about when he was home and not home, Moreland couldn't recall any strategy for not presenting the internet history report.(PCRTr.268).

Counsel argued Spears said he was gone from the home after borrowing his mom's Suburban, and his mom knew nothing about computers, so somebody is lying.(PCRTr.268-69). Since nobody knows exactly when Rowan was taken from the house, and there is evidence of a big time frame and some of these druggies coming and going from the house could've come in, used the computer, and took Rowan.(PCRTr.270).

III. Court's Findings

While forensic-examination of Spears' computer suggests someone was at Spears' house during the times indicated, it's not explained how this is relevant or beneficial to the defense.(PCRLf.184). Since Spears didn't testify and since trial counsel made a conscious decision to not use Spears' admission, there was nothing to impeach and no basis to try to somehow impeach Spears with this fact. We know that Myrna, the victim's grandmother, was in the home during this time and it may be that she was on the computer.(PCRLf.184-85). Review is for clear error. *Barry, supra.*

IV. Analysis

To prevail on a claim of ineffective assistance of counsel for failure to investigate and present certain evidence, Christopher must show that evidence could've been located through reasonable investigation and would've provided a viable defense. *State v. Griffin*,810S.W.2d956,958(Mo.App.E.D.1991). "As *Strickland* teaches, 'counsel has a duty to make reasonable investigations or to make a *reasonable decision* that makes particular investigations unnecessary.'"*Cravens*,50 S.W.3dat295(quoting *Strickland* 466U.S.at691)(emphasis added).

Here, counsel knew: 1) the report showed someone used the computer between 1:54:19 and 3:36:03 a.m. on Nov.3, 2007; 2) Myrna Spears didn't know how to use the computer; 3) David Spears said he wasn't at the house during that time. So, either David Spears is lying, and he was home during the time that Rowan went missing, or he was gone and someone else was present at the house and could've committed these crimes. Either option would challenge Christopher's police statement that he returned to Spears' home and took Rowan earlier, and there's a reasonable probability that had the jury been aware someone besides Christopher was using Spears' computer, they would've had a reasonable doubt about his confession, culpability and guilt. It was incumbent upon trial counsel to challenge Christopher's statements to police in any way possible – and that had been their strategy when they tried to exclude the statements altogether in the motion to suppress, and later when they attempted to introduce information about Spears' confession to challenge the reliability of Christopher's statements. Admitting the internet history report is strategically consistent with challenging Christopher's statement and creating doubt that someone

else was responsible for the crime. Therefore, this Court must reverse and remand for a new trial where this evidence can be presented to a new jury.

VII.

BROWN'S DOG-HANDLER EVIDENCE CREATES DOUBT ABOUT CHRISTOPHER'S CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective in failing to call in guilt-phase Alicia Brown, a search-and-rescue dog handler who testified in penalty-phase that the dogs alerted on two areas of Spears' Suburban but didn't alert on Christopher's truck, because this ruling denied Christopher effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have challenged Christopher's police statements and raised doubt about who transported and disposed of Rowan's body, and there is a reasonable probability had the jury been aware the physical evidence was inconsistent with Christopher's statements, they would have had a reasonable doubt about his confession, culpability and guilt.

I. The Claim

Claim 8(D)(4) alleged counsel failed to present Alicia Brown's testimony in guilt-phase.(PCRLf.61). Brown's penalty-phase testimony regarding the search and rescue dogs she handled at the search of Myrna Spears' Suburban challenged Respondent's guilt evidence, including the truth of Christopher's police statements.

II. Brown's Penalty-Phase Testimony

While investigating Rowans' disappearance, officers went to Myrna Spears' home at least twice.(Tr.3903). During one visit, they looked at her Suburban and noticed the gas needle was just above empty; they wanted to know if she'd loaned it to David.(Tr.3903-04,3910). The Suburban was very cluttered inside – piled full of clothing, CDs, junk, trash and fast food containers.(Tr.3914).

During penalty-phase, counsel presented Alicia Brown's testimony; she has trained and worked with search dogs for twenty years, helping find people alive or dead.(Tr.5896,5898). She is certified by the North American Police Work Dog Association, and was formerly a FEMA canine search specialist.(TR.5899). Her team helped search for Rowan, more than once, in Newton County.(Tr.5897).

Search dogs are trained to only focus on human remains; if none are present, they won't alert.(Tr.5905). Tissue cells start decomposing immediately when a person dies, and her dogs have found dead people within 30 minutes of a tornado that the dogs had alerted on.(Tr.5927). Her dogs have never failed a certification test.(Tr.5906).

Her team was instructed to search Spears' Suburban.(Tr.5908). Both dogs alerted to human remains' scent at the driver's side door seam by the handle and the left rear quadrant near the taillight.(Tr.5913-16). On an interior search of the Suburban, both dogs alerted to the scent of human remains on the driver's seat; they didn't alert on the passenger seat or middle section.(Tr.5917-18). Both dogs alerted to human remains' scent on the rear cargo section, left side.(Tr.5918).

III. The Evidentiary Hearing Evidence

Christopher's post-conviction counsel introduced the entire trial transcript as Ex.1.(PCRTr.8). Brown testified in penalty.(Ex.1,p.5896-5593).

Zembles testified she recalled Brown testified in penalty-phase about the search of Myrna Spears' Suburban with the dogs.(PCRTr.215). They alerted on two places on the Suburban, but not on Christopher's truck.(PCRTr.215-16). Zembles' testified she didn't call Brown in guilt-phase because she didn't want Spears' name mentioned in the first part of the trial, if possible.(PCRTr.216).

Moreland testified he called Brown in penalty-phase to show Spears was involved in this crime.(PCRTr.348). There was a conflict of opinion amongst the defense team; Zembles didn't want Brown's testimony in, but Moreland did, so he presented it in penalty-phase.(PCRTr.348).

IV. Court's Findings

The motion court held that, because Alicia Brown wasn't called at the hearing, this claim was abandoned.(PCRLf.185). Review is for clear error. *Barry*,*supra*.

V. Analysis

Counsel clearly thought Brown's dog-handler evidence was important in showing that Spears, not Christopher, transported Rowan's body, and therefore, Christopher's police statements weren't wholly accurate or believable. Counsel also fought vigorously to present evidence of Spears' confession through the testimony of the officers at trial, and this is because his confession clearly casts doubt on the reliability of Christopher's confession. Zembles' explanation, that she didn't call Brown in guilt-phase because she didn't want Spears' name mentioned in the first part

of the trial,(PCRTr.216), is simply not plausible given her guilt-phase opening and closing and the guilt evidence presented. In opening, she told the jury: "David Spears is saying, I participated in this. I had sex with her, too."(Tr.3610). She presented evidence of Spears' confession through officers' statements in Christopher's second videotaped-statement,(Mov.Ex.28&29). In closing, she argued at length that it was impossible Rowan's bloody body was in Christopher's truck because there was no blood found there.(Tr.5609-11). Clearly, Brown's dog-handler evidence would've supported this argument. There was no valid strategy reason for not also presenting Brown's dog-handler evidence in guilt-phase for the same reason – to cast reasonable doubt on Christopher's confession – the primary and definitely strongest evidence against him. Her purported "strategy" was unreasonable. *Strickland, Deck.*

The finding of waiver is clearly erroneous. The trial transcript was admitted as Mov.Ex.1, and the claim is that Brown's testimony contained therein should have been presented in guilt-phase. This Court must reverse.

VIII.

BLEVINS' TESTIMONY ABOUT ACTIVITY AT SPEARS' RESIDENCE CREATES DOUBT ABOUT CHRISTOPHER'S CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective in failing to investigate/call Lisa Blevins, Spears' neighbor who observed different out-of-state vehicles at Spears' house, especially at night, and on the night Rowan was abducted, a car was revving its engine loudly between 1:30-2:00 a.m. in the direction of Spears' house, and between 2:00-4:00 a.m., she heard tires squealing, because this ruling denied Christopher effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have challenged Christopher's statements and Blevins' testimony would have raised doubt about Respondent's theory and the veracity of Christopher's statement recounting that night and there is a reasonable probability that had the jury known other evidence was inconsistent with Christopher's statement, they would have had reasonable doubt about his confession, culpability and guilt.

I. The Claim

Counsel was ineffective in failing to investigate and present Lisa Blevins' testimony in guilt-phase to challenge Respondent's evidence, including Christopher's police statements, and show that other people were at Spears' house at the time Rowan disappeared, after Spears' returned home, which would've created an

inference someone other than Christopher committed the kidnapping and murder.(PCRLf.55-60). Had counsel presented this evidence, a reasonable probability exists the outcome of Christopher's trial would've been different and he wouldn't have been convicted of first-degree murder and death sentenced.(PCRLf.57).

II. Evidentiary Hearing Testimony

Alicia (Lisa) Blevins is Spears' neighbor and she knew who they were; she could look out her front door and see their front door.(PCRTr.133-34). There were numerous cars and people in and out of the Spears' house at all hours of the day and night, almost every day; the license plates were from Oklahoma, Arkansas and elsewhere.(PCRTr.135;Resp.Ex.B). It was a "party house," and not the best people.(PCRTr.135;Resp.Ex.B).

On the night of Nov.2-3, Blevins was home, and there were people at Spears' working on a vehicle; cars were being revved up all night and she couldn't sleep.(PCRTr.136). She went to smoke on her porch and cars were going in and out, there was lots of traffic, squealing tires, revving motors, and it didn't settle down until close to daylight.(PCRTr.136). She was outside most of the night. (PCRTr.139). She couldn't tell the exact color/make/models of the cars.(PCRTr.139). She gave this

information to the FBI.(Resp.Ex.B)[14]; she cannot remember if she told the FBI that she heard the cars or if she saw them, but she could see them.(PCRTr.140). She didn't remember being contacted by any attorneys or investigators; if she'd been subpoenaed, she would've testified to the same information.(PCRTr.137).

Zembles remembered an FBI interview report with Blevins, and Blevins stated that there were always different cars at Spears' house, with out-of-state plates, especially at night, and the people appeared to be druggies; they revved their motors and squealed tires.(PCRTr.207). They didn't interview Blevins and Zembles didn't know why, because Blevins was talking about a timeframe when virtually everyone was supposed to be out of the house.(PCRTr.207). Since they never interviewed her, they wouldn't have considered calling her to testify.(PCRTr.208).

Moreland, like Zembles, was familiar with Blevins' name, and what she told the FBI about cars and druggies at Spears' house.(PCRTr.345). Blevins heard a car revving its engine very loudly between 1:30-2:00 on the morning of Nov.3, from the direction of Spears' house, and a car revving and tires squealing between 2:00-4:00 a.m.(PCRTr.345). They didn't interview Blevins and had no strategy reason for not doing so.(PCRTr.346).

[14] The FBI report indicates Blevins heard a car revving its engine between 1:30-2:00 a.m. on Nov.3, and then she heard a car squealing its tires between 2:00-4:00 a.m., but was unsure which direction it come from.(PCRTr.251;Resp.Ex.B).

III. Court's Findings

At the time of the FBI interview, Blevins stated she heard cars roaring their engines and tires squealing during the night, but couldn't identify these cars' location.(PCRLf.184). At the hearing, Blevins claimed to have now seen these cars at Spears' house.(PCRLf.184). The Court found Blevins' improved memory of these details not credible and counsel wouldn't want to use a witness easily impeachable.(PCRLf.184). Review is for clear error. *Barry*,*supra.*

IV. Analysis

To prevail on a claim of ineffective assistance of counsel for failure to investigate and call a witness, Christopher must show the witness could've been located through reasonable investigation, would have testified if called, and her testimony would've provided a viable defense. *Griffin*,810S.W.2dat958. "As *Strickland* teaches, 'counsel has a duty to make reasonable investigations or to make a *reasonable decision* that makes particular investigations unnecessary.'" *Cravens*,50S.W.3dat295(quoting *Strickland*,466U.S.at691)(emphasis added).

Blevins was easy to find, counsel had an FBI report with her contact information. Counsel testified to no reasonable decision for not contacting her. In any event, counsel cannot make a strategic decision against pursuing a line of investigation when she hasn't yet obtained the facts upon which such a decision could be made. *Kenley*,937F.2dat1308. "'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts

relevant to guilt and degree of guilt or penalty.'" *Id.*at1304,n.5(quoting *Eldridge v. Atkins*,665F.2d228,232(8thCir.1981)).

Here, counsel lacked information to make an informed judgment because of inadequacies in their investigation; therefore, any argument regarding their trial strategy is inappropriate. *Clay v. State*,954S.W.2d344,349(Mo.App.E.D.1997). Blevins' testimony about activity at Spears' house during the late evening/early morning hours of Nov.2-3, and her general description of goings-on at the Spears' residence on a daily/nightly basis would've cast doubt on the truth of Christopher's inculpatory statements to law enforcement and would've created an inference that someone other than Christopher committed this crime. Blevins' testimony certainly would've provided a reasonable inference that much activity was occurring at the Spears' house after midnight, when Respondent's evidence had established that Christopher wasn't there after Mahurin took Spears home.

While the motion court held Blevins was vulnerable to impeachment based on the more specific details she provided at the hearing versus her FBI statement, this was not a reason trial counsel gave for not wanting to call her. More importantly, the FBI statement was not written by Blevins or signed by her; it was a summary report, written by an agent, who may have left out details.(Resp.Ex.B). Different, more specific details, provided by Blevins at the hearing doesn't support a credibility finding because they are not comparable statements. And, regardless, a post-conviction judge's finding a witness in the proceeding isn't convincing doesn't defeat a claim of prejudice. *Kyles*,514U.S.at449,n.19. It cannot substitute for the jury's

appraisal at trial. *Id*. Credibility is for the jury, not the post-conviction court. *Antwine*,54F.3dat1365.

The motion court's findings are clearly erroneous. Counsel should've investigated and called Blevins in guilt-phase and this Court must reverse for a new trial.

IX.

BLAKE'S TESTIMONY ABOUT WHEN SHE SAW SPEARS CREATES DOUBT ABOUT CHRISTOPHER'S CONFESSION

The motion court clearly erred in denying Christopher's claim counsel was ineffective in failing to present guilt-phase witness Joni Blake, Spears' neighbor, who observed Spears, at 10:30 p.m., in the back seat of a silver/gray car without a shirt, and this same car was at Spears' house at 7:30 the next morning, because Christopher was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have challenged Christopher's statements and Blake's testimony would have raised doubts about Respondent's theory and the veracity of Christopher's statement recounting that night and who was present at Spears' house and there is a reasonable probability had the jury known Christopher's statement was inconsistent with other evidence, they would have had reasonable doubt about his confession, culpability and guilt.

I. The Claim

Counsel was ineffective for failing to investigate and call Joni Blake to testify in guilt-phase.(PCRLf.59). Counsel had an FBI report of Blake's statement, which included information she saw Spears at the Wheaton FastTrip at 10:30 p.m., Nov.2, sitting in the back seat of a silver/gray car with Arkansas plates; he wasn't wearing a

shirt.(PCRLf.58). The next morning, the only car she saw at Spears' was the same silver/gray car.(PCRLf.58-59). This contradicts Respondent's evidence that Christopher, Spears and Mahurin were in Nathan's blue car at the FastTrip around 10:30 p.m. on Nov. 2.(PCRLf.59). If counsel would've called Blake in guilt-phase, there is a reasonable probability the result would've been different.(PCRLf.59).

II. Evidentiary Hearing Testimony

Joni Blake testified Spears lived "catty-corner" directly behind her, and she could see the front of their home from hers; she didn't personally know them.(PCRTr.123-24). Between 10:00-11:00 p.m. on Nov.2,2007, she and two co-workers were on the way to work and stopped at the Wheaton FastTrip.(PCRTr.125). Blake stayed in the car and there was a gray car with Arkansas plates in the parking lot to her right.(PCRTr.125-28). Spears, a large man, was sitting in the back of the gray car with his shirt off; this was odd because it was November and cold.(PCRTr.126). Christopher came out of the store and got into the passenger seat; she said the men gave them a weird look that made them uncomfortable. (PCRTr.126,130-31). She'd never met Christopher.(PCRTr.129). She assumed there was a third person, but she only saw Spears and Christopher.(PCRTr.132). When she got home the next morning at 7:30 a.m., the same gray car was in Spears' driveway.(PCRTr.127-28). She gave this information to the FBI, but she was never contacted by the defense; she would've testified the same at trial.(PCRTr.128).

Mahurin testified he was with Spears and Christopher on the evening of Nov. 2.(PCRTr.143). He was driving a 1996 green Eagle, but it doesn't have Arkansas

plates.(PCRTr.144). More than once that night, the three of them bought alcohol at FastTrip.(PCRTr.145). He dropped Spears off at his house around midnight and he wasn't in the area later.(PCRTr.146). Mahurin's evidentiary hearing testimony was substantially similar to his trial testimony, except at trial, he didn't state his car's color.(Tr.3711,3745-48).

Zembles testified they received FBI reports and she received a report that Joni Blake, Spears' neighbor, had seen Spears in a silver car – a Lincoln or Mercury – with Arkansas plates at the Fast Trip around 10:30 p.m. on the night of Nov.2, 2007.(PCRTr.204). The report said the same car was in Spears' driveway on the morning of Nov. 3.(PCRTr.205). She didn't interview Blake, and she didn't know why.(PCRTr.205-06).

Moreland testified they were trying to find evidence to refute Christopher's statements to law enforcement, or at least make him less culpable. (PCRTr.343). He remembered they received an FBI interview report about Joni Blake and that she'd seen Spears in a silver or gray car with Arkansas plates at the Wheaton FastTrip at 10:30 on Nov.2.(PCRTr.343-44). The same car was at Spears' house the next morning at 7:45.(PCRTr.344). They didn't interview Blake, but they should've and they had no strategy for not doing so.(PCRTr.344).

III. Court's Findings

The motion court found Blake's testimony neither compelling nor beneficial, in that it only confirmed Mahurin's trial testimony.(PCRLf.183). Although she testified seeing a car in front of Spears' home the next morning when she returned from work,

in light of trial counsel's strategy to not challenge evidence Christopher committed the crime, this one fact wasn't significant and counsel wasn't ineffective in failing to call her.(PCRLf.183-84). Review is for clear error. *Barry*,*supra.*

IV. Analysis

To prevail on a claim of ineffective assistance of counsel for failure to investigate and call a witness, Christopher must show that the witness could have been located through reasonable investigation, she would have testified if called, and her testimony would have provided a viable defense. *Griffin*,810 S.W.2dat958. "As *Strickland* teaches, 'counsel has a duty to make reasonable investigations or to make a *reasonable decision* that makes particular investigations unnecessary.'" *Cravens*,50S.W.3d at295(quoting *Strickland*,466U.S.at691)(emphasis added).

Blake was easy to find and counsel had an FBI report with her contact information. Counsel testified to no reasonable decision for not contacting her. In any event, counsel cannot make a strategic decision against pursuing a line of investigation when they haven't yet obtained the facts upon which such a decision could be made. *Kenley*,937F.2dat1308. "'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.'" *Id.*at1304,n.5(quoting *Eldridge*,665F.2dat232.

Here, counsel lacked the information to make an informed judgment because of inadequate investigation; therefore, any argument regarding trial strategy is inappropriate. *Clay*,954S.W.2dat349. Blake's testimony about seeing Spears in a

different-colored car, with a different license plate than Mahurin's, on the night Rowan disappeared, and that the same car was at Spears' house the next morning, when Mahurin said he never went back over to Spears' house, would've created an inference that someone other than Christopher was with Spears and committed this crime, and that Christopher's statement is untrue and he's merely covering for Spears.

While the motion court held Blake's testimony wasn't compelling, merely confirming Nathan's, this is factually inaccurate, given their differing testimony about the color of the car and the license plates, nor was this a reason that trial counsel gave for not wanting to call her as a witness. And whether her testimony was "compelling" or "beneficial" goes to her credibility as a witness, and a post-conviction judge's finding that a witness in the proceeding isn't convincing doesn't defeat a claim of prejudice. *Kyles*,514U.S.at449,n.19. It cannot substitute for the jury's appraisal at trial. *Id*. Credibility is for the jury, not the post-conviction court. *Antwine*,54F.3dat 1365. The motion court's findings are clearly erroneous. Counsel should have investigated and called Blake as a guilt-phase witness and this Court must reverse for a new trial.

X.

PICKETT – CHRISTOPHER'S SUBSTANCE ADDICTION & TRAUMA

The motion court clearly erred in denying Christopher's claim counsel was ineffective for not calling Julie Pickett, Christopher's step-mom, in penalty-phase because Christopher was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const.Amends.VI,VIII,XIV, in that effective counsel would have called Pickett who would highlight the severity of Christopher's substance abuse/ addiction and his disclosing childhood trauma, and there is a reasonable probability had the jury heard Pickett's testimony it would have voted for life.

I. The Claim

Because counsel was ineffective in failing to call Julie Pickett, Christopher's step-mom, in mitigation, the jury didn't hear important evidence highlighting the severity of Christopher's alcohol addiction and sexual trauma he disclosed and consequences of those issues.

II. Counsel's Mitigation Evidence at Trial

The defense called two witnesses to buttress a theory of lingering doubt regarding Spears' involvement in Rowan's death (Tr.5887-89,5905-5918). They also called Christopher's biological father and brother and two of his adoptive siblings to discuss childhood events.(Tr.5934-5987). They also called Draper, a human development educator, to explain the phases and events in Christopher's life; she used

a "LifePath," focusing on Christopher's emotional development, concluding he suffered severe emotional neglect during his first six months; he then experienced confusion in connecting with others in his natural and adoptive family, which brought about severe disorganized dissociative attachment.(Tr.6274;Ex.901). No witness testified about Christopher's severe addiction or prior sexual trauma disclosure.

III. Evidentiary Hearing

A. Julie Pickett

Julie is Christopher's step-mom; she was married to his biological father, Dale Pickett, for twenty-nine years.(PCRTr.148-49). Christopher was 8-9 when they were married, and at 18, he came to live with them in Arkansas; he lived with them off and on until his arrest.(PCRTr.150). She developed a pretty close relationship with Christopher and they talked a lot; he calls her mom.(PCRTr.151).

Every other week, Julie saw Christopher drink large amounts of alcohol, black out, and not remember what he'd done.(PCRTr.151). Dale was an alcoholic; they met through AA.(PCRTr.152).

At some point, Christopher married Kim and they lived in Arkansas; Christopher would stay with them when he and Kim fought.(PCRTr.153). Christopher and Kim had two girls and he adored them; Julie observe good parenting between Christopher and the girls and she never saw him act inappropriately with them.(PCRTr.153-54). When Christopher and Kim broke up, he lived with them and the girls would visit on weekends.(PCRTr.157).

Christopher told her he was sexually abused by a babysitter and a family member when he was a child and a teenager.(PCRTr.154-57). He was in his twenties when he told her this; he literally broke down and cried while telling her.(PCRTr.156). He didn't want to tell his father, but said he had to talk to somebody and they talked about everything.(PCRTr.157). She told the trial attorneys this.(PCRTr.165).

She knew Christopher and David Spears were really close; they acted like brothers.(PCRTr.160). She'd been around them when they were together; David was always influenced Christopher.(PCRTr.160). She was contacted and deposed by defense counsel and she was at trial because they wanted her to testify, but they didn't call her; if they had, she could've testified to this information.(PCRTr.160-62).

B. Zembles & Moreland

Zembles testified that Moreland interviewed Julie and she could testify about Christopher's alcohol abuse intoxication history, as well as Dale's alcohol abuse history.(PCRTR.233).[15] They were also aware that Julie had information that Christopher made statements about being sexually abused by Reecher at 15 and being sexually abused at a baby-sitter's house at 5.(PCRTr.234). They subpoenaed her to testify because she had valuable mitigating evidence.(PCRTr.237).

[15] Moreland couldn't remember what information Julie had, but she was endorsed and they intended to call her.(PCRTr.358-360).

Zembles testified that, after Dale testified, it was reported to the judge that Dale and Julie and possibly others, ran into the jury in the hallway and there were verbal exchanges.(PCRTr.235-36). Zembles directed the entire Arkansas family be excluded from the courthouse and to return to Arkansas.(PCRTr.235).[16] She told her investigator to meet them and tell them they were no longer needed and to go home.(PCRTr.36). If Julie was scheduled to testify after that, that is why she didn't testify.(PCRTr.237). They didn't move for a mistrial based on this alleged contact.(PCRTr.238).

IV. Court's Findings

The motion court held that Julie Pickett was present and ready to testify at trial, but none of her testimony was compelling, and the decision not to call her was strategic based on the courthouse incident.(PCRLf.189). Review is for clear error. *Barry,supra*

V. Analysis

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins*,539U.S.at524-25; *Williams*,529U.S.at395-96. "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard*,542U.S.at285(quoted in *Hutchison*,150S.W.3dat304; *Glass v. State*,227S.W.3d463,468(Mo.banc2007)). Relevant mitigating evidence "is evidence which tends logically to prove or disprove

[16] Moreland could not recall why they didn't call Julie to testify.(PCRTr.360).

some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard*,542U.S.at 284.

Failing to interview witnesses relates to preparation and not strategy. *Kenley*,937F.2dat1304. Lack of diligent investigation isn't protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*. Counsel's strategy must be objectively reasonable and sound. *McCarter*,883S.W.2dat78. Not presenting evidence because it contains something harmful is unreasonable when its harm is outweighed by its helpful value. *Hutchison*,150S.W.3dat305. See *Williams*,529 U.S.at395-96 (counsel ineffective in failing to present evidence of severe abuse and defendant's limited mental capabilities where not all evidence was favorable).

Reasonable counsel would've called Julie, who was available to help make the case for life. *See Kenley*. Counsel was obligated to present this evidence which highlighted Christopher's severe adult alcohol abuse as well as his disclosure of childhood sexual abuse. *See Wiggins, Williams, and Tennard*. No other witness presented this information and Respondent challenged Draper's sexual abuse testimony, alleging that Christopher only told this after committing the crime because it doesn't appear in any records.(Tr.6325).

It was critical that the jury, in order to vote for life, hear of his sexual abuse history and his development of alcohol addiction, and to place that in the context of: 1) the development of self-medicating his mental health struggles with alcohol; and 2) the circumstances of the crime. *See Strickland* and *Deck*. Christopher was prejudiced by counsel's failure to call Julie, whom they'd endorsed. *See Strickland* and *Deck*.

The Pickett's alleged contact with the jury didn't rise to the level of counsel requesting a mistrial, nor was there any trial record made, and Zembles' reaction in completely dismissing Julie's testimony was unreasonable. This Court must reverse for a new penalty phase.

XI.

THOMAS – CHRISTOPHER'S ADDICTION AND LIFE-SAVING ACT

The motion court clearly erred in denying Christopher's claim counsel was ineffective in not investigating/calling call Bobby Thomas in penalty-phase because Christopher was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const.Amends.VI,VIII,XIV, in that effective counsel would have called Thomas who would highlight the severity of Christopher's substance abuse/addiction and describe how Christopher saved him when he tried to commit suicide, and there is a reasonable probability had the jury heard Thomas' testimony it would have voted for life.

I. The Claim

Because counsel was ineffective in failing to investigate and call Bobby Thomas, Christopher's step-brother-in-law, as a witness, the jury didn't hear mitigating evidence highlighting the severity of Christopher's alcohol addiction and that Christopher saved Bobby's life and his life is also worth saving.

II. Evidentiary Hearing

A. Bobby Thomas

Bobby Thomas is Christopher's step-sister's husband.(PCRTr.169). His wife of 16 years, Sonya, is Julie Pickett's daughter.(PCRTr.169). Christopher lived with

Bobby and Sonya for about two years and Bobby was around him daily.(PCRTr.169,173). He got along with Christopher; they worked together and Christopher was a good worker and friend.(PCRTr.170). Christopher also had a good relationship with his daughters, and they would climb all over him every chance he got to see them.(PCRTr.170).

Bobby observed Christopher's drinking problem; every time Christopher got a paycheck, he'd go to the liquor store.(PCRTr.170).

Christopher also saved Bobby's life.(PCRTr.171). In 2003, Bobby was going through a bad time and he and Sonya were fighting a lot.(PCRTr.171-72). Bobby tried to commit suicide by hanging himself in their basement; he had the rope around his neck.(PCRTr.171). Christopher found him and rescued him; he held him up until someone could cut the rope down.(PCRTr.171-72).

No one contacted him to testify; if they had, he would've testified to this information.(PCRTr.172).

B. Zembles & Moreland

Zembles didn't recognize Bobby Thomas' name.(PCRTr.238). She doesn't know if they investigated him or if they had a reason not to call him.(PCRTr.239). She didn't know what information he had.(PCRTr.240). Similarly, Moreland never interviewed Bobby Thomas.(PCRTr.361). He wasn't aware Bobby worked with Christopher, knew about Christopher's alcohol and marijuana use, or Christopher saved his life.(PCRTr.362).

III. Court's Findings

The Court found that it was never demonstrated that counsel was made aware of Thomas and his testimony wasn't compelling.(PCRTr.189). Review is for clear error. *Barry,supra*.

IV. Analysis

"One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*,80S.W.3d817,827(Mo.banc2002); *see also,Wiggins*, 539 U.S.524(counsel has duty to investigate and rebut aggravation);*Parker v. Bowersox*, 188F.3d923,929-31(8th Cir.1999)(counsel was ineffective for failing to present evidence rebutting aggravation that victim was potential witness against Parker).

At Ervin's penalty-phase, respondent introduced jail guard aggravation testimony Ervin assaulted his cellmate and threatened to kill him. *Ervin*,80S.W.3dat 821,825-26. In Ervin's 29.15, it was alleged counsel was ineffective for failing to conduct investigation that would've established that Ervin didn't commit those acts. *Id.*at825. Counsel testified he didn't interview witnesses that would've rebutted this aggravation "because he believed it was best to just let the state put on whatever evidence it had and then let the matter 'drop.'"*Id.*at825. If counsel had interviewed the victim, then counsel would've learned it wasn't Ervin who assaulted him. *Id.*at826. Further, if counsel had interviewed inmate Pearson, counsel would've learned Pearson admitted to having committed the assault and Ervin was not responsible. *Id.*at826.

This Court found Ervin's counsel ineffective for failing to investigate the cellmate incident and remanded for a finding on the issue of prejudice while "strongly suggest[ing]" finding prejudice. *Ervin*,80S.W.3dat826-28, and concurring opinion of Shrum, S.J. This Court indicated in *Ervin* "[t]he potential for prejudice is strong" based on how respondent used the alleged threat to kill the cellmate. *Id.*at827. That prejudice was highlighted because respondent relied on the incident to show Ervin posed a danger while incarcerated. *Id*. This Court added: "The characterization of Ervin as an inmate who would rescue a cellmate from harm versus an inmate who would kill his cellmate is highly material in a sentencing proceeding." *Id*.

Similarly, even though the jury found Christopher guilty, the circumstances of the crime weren't put in context with his severe and life-long addiction to substances which affected him the night of the crime. Bobby's testimony would support the statutory mitigator.(See Point II). Further, Bobby could present evidence that Christopher, besides taking a life, also saved a life and that he didn't have to be put to death. There is a reasonable likelihood that, hearing this evidence, the jury would have voted for life. This Court should reverse for a new penalty phase.

XII.

FAILING TO CHALLENGE "TORTURE" AGGRAVATOR AS UNCONSTITUTIONALLY VAGUE

The motion court clearly erred in denying Christopher's claim appellate counsel was ineffective for failing to raise that Respondent's first aggravator, Instruction No.16, that the murder involved "torture," was erroneous because this ruling denied Christopher's rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const.Amends.VI,VIII,XIV, in that this instruction failed to define "torture" which is unconstitutionally vague and requires a limiting instruction, and had appellate counsel challenged the instruction, there is a reasonable probability Christopher's death sentence would have been reversed and remanded for a new penalty-phase with a properly-instructed jury.

I. The Claim

In Claim 8(I), Christopher alleged ineffective assistance of appellate counsel in failing to challenge the instruction, namely, that the "torture" aggravator is unconstitutionally vague.(PCRLf.94-97).

II. Trial Facts

Trial counsel objected to Instruction No. 16, arguing the evidence wasn't sufficient to submit "torture," nor is "torture defined for the jury, leaving them without guidance and a unanimity problem.(Tr.6421-23). The objection was

overruled.(Tr.6428). Counsel renewed the objection to Instruction No. 16 in Christopher's New Trial Motion.(Lf.756-57,Claim#95).

Instruction No. 16 read:

INSTRUCTION NO. 16

In determining the punishment to be assessed against the defendant for the murder of Rowan Ford, you must first consider whether one or more of the following statutory aggravating circumstances exist:

1. Whether the murder of Rowan Ford involved torture and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman.
2. Whether the murder of Rowan Ford was committed while the defendant was engaged in the perpetration of rape.
3. Whether Rowan Ford was a potential witness is a pending investigation of the rape of Rowan Ford and was killed as a result of her status as a potential witness.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

The following term used in this instruction is defined as follows:

A person commits the crime of statutory rape in the first-degree if the person has sexual intercourse with another person who is less than fourteen years old. (Lf.688).

The jury found the first and third aggravating circumstances beyond a reasonable doubt and imposed death.(Lf.696). No challenge to Instruction No.16 was raised on appeal.

III. Evidentiary Hearing

Christopher's appellate attorney testified she didn't challenge Instruction No.16 in her opening brief.(PCRTr.307). She'd drafted the issue and wanted to raise it, but she had a word-count problem and couldn't. (PCRTr.307). Instead, she discussed it in the reply as part of proportionality review; however, this was insufficient to raise the merits.(PCRTr.307). She thought it was a valid issue and admitted there were other ways to save space.(PCRTr.308-309).

IV. Court's Findings

The motion court found appellate counsel's performance wasn't deficient as she raised the issue in her reply brief while addressing proportionality, she had a legitimate reason for not including it in the opening brief because of word limitations, and no authority suggests "torture" needs defined.(PCRLf.193). Review is for clear error. *Barry,supra.*

V. Analysis

"To prevail on a claim of ineffective assistance of appellate counsel, the movant must establish that counsel failed to raise a claim of error that was so obvious

that a competent and effective lawyer would have recognized and asserted it." *Williams*,168S.W.3dat444. Additionally, had counsel raised the issue, there is a reasonable probability the outcome of the appeal would have been different. *Taylor*,262S.W.3dat253(*citing Robbins*,528U.S.at285). Here, appellate counsel recognized this meritorious issue, but failed to assert it until the reply brief which precluded review. Had counsel raised this preserved instructional issue, there is a reasonable probability of a different appeal outcome.

"Torture" Aggravator is Vague

"Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment...."*Maynard v. Cartwright*,486U.S.356,36(1988). This means if a State wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. *Godfrey v. Georgia*,446U.S.420,428(1980).

Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." *Id.*(*quoting Gregg*,428 U.S.at196,n.47). A capital sentencing scheme must provide a "'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" *Id.*(quoting *Furman v. Georgia*,408U.S.238,313(1972)(White,J., concurring). It must channel the sentencer's discretion by "clear and objective standards" providing "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence

of death." *Godfrey*,446U.S.at 428(citations omitted). "As was made clear in *Gregg*, a death penalty 'system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.'" *Id.*(quoting *Gregg*,428U.S.at195,n.46). The jury must have a principled means to distinguish those cases in which the death penalty is appropriate from those in which it is not. *Maynard*,486U.S.at363-64.

Here, "torture" wasn't defined by statute and wasn't defined for the jurors in Instruction No.16, and thus was unconstitutionally vague. The jurors weren't adequately informed as to what they should consider "torture" to be, and thus their discretion wasn't properly channeled. *Gregg*,446U.S.at428. In *State v. Preston*,673S.W.2d 1,10-11(Mo.banc1984), this Court stated:

> In following the mandate of *Godfrey* to establish "clear and objective standards" as to what types of murders constitute "depravity of mind," this Court, while not expressly adopting a precise definition, has noted the following factors to be considered in finding "depravity of mind": mental state of defendant, infliction of physical or psychological torture upon the victim as when the victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse and the nature of the crime.

And to comply with *Maynard's* limiting instruction, this Court in *State v. Griffin*,756S.W.2d475,489–90(Mo.banc1988), expressly held "that at least one of the factors set out in *Preston* must be present before a finding of depravity of mind will be found to be supported by the evidence" and that this "is sufficiently definite to provide a principled means to distinguish cases in which the death penalty is imposed from those in which it is not."

Just like "depravity of mind," further limitation is also required for "torture" as an aggravator. Otherwise, "torture" covers too broad a spectrum; it can be physical or psychological. *Preston*,673S.W.2dat11. It can occur "when the victim has a substantial period of time before death to anticipate and reflect upon it." *Id., State v. LaRette*,648S.W.2d96,101-102(Mo.banc1983). "Torture" can be infliction of "intense pain to body or mind for purposes of punishment, or to extract a confession or information, or for sadistic pleasure." *Black's Law Dictionary*(6th Ed.1990). It can be "an appreciable period of pain or punishment intentionally inflicted and designed either to coerce the victim or for the torturer's sadistic indulgence…In essence, torture is the gratuitous infliction of substantial pain or suffering in excess of that associated with the commission of the charged crime." *Leone v. State*,797N.E.2d743(Ind.2003).

With the "depravity of mind" aggravator the jury is given specifics of what it must find. But as to torture, it's not. Torture could conceivably fall under several of the "depravity" subcategories:

- The infliction of physical pain or emotional suffering on the victim for the purpose of making the victim suffer before dying(MAI-CR3d 314.40, Note on Use 8(B)(1));
- Repeated and excessive acts of physical abuse upon the victim(MAI-CR3d 314.40, Note on Use 8(B)(2));
- Killing for the purpose of causing suffering to the victim(MAI-CR3d 314.40, Note on Use 8(B)(9));
- Killing the victim for the sole purpose of deriving pleasure from the act of killing(MAI-CR3d 314.40, Note on Use 8(B)(10)).

When "depravity of mind" is submitted to the jury, the jurors must unanimously agree on the same narrowing factor from MAI-CR3d 314.40, Note on Use 8(B). If more than one narrowing factor was submitted, the jurors must find each narrowing factor unanimously. Yet here, the jury didn't unanimously decide as to the "type of conduct" constituting torture. There's no assurance all twelve jurors agreed on the same narrowing factor or meaning and hence, no assurance the jurors were unanimous on this aggravator. *State v. Celis-Garcia*,344S.W.3d150,158-59(Mo.banc2011). It is also important here because the jury specifically didn't find that the murder was committed while the defendant was engaged in the perpetration of a rape.(Lf.688). Therefore, it's possible one juror's definition of "torture" included a circumstance involving rape, while another juror's didn't. Because Aggravator #1 wasn't a valid aggravator, it couldn't be used as a basis for imposing death.

As this was a meritorious issue appellate counsel thought about, but didn't eliminate for any valid strategy reason, admitting she could have saved words other ways,(PCRTr.308-09), counsel was ineffective, and there is a reasonable probability that the appeal's outcome would've been different and Christopher would have received a new penalty-phase trial. This Court should reverse.

CONCLUSION

For the reasons stated in Points I,IV,V,VI,VII,VIII,IX, Christopher asks for a new trial on guilt, or in the alternative, a new penalty trial. For the reasons stated in Points II,III,X,XI,XII, he asks for a new penalty trial.

Respectfully submitted,

/s/ Amy M. Bartholow

_____

Amy M. Bartholow, MOBar #47077
Assistant Public Defender
Attorney for Appellant
Woodrail Centre
1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977
FAX:(573) 777-9973
Amy.Bartholow@mspd.mo.gov

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains **30,827** words, which does not exceed the 31,000 words allowed for an appellant's brief.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 10th day of July, 2017, on Assistant Attorney General Shaun Mackelprang at Shaun.Mackelprang@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ Amy M. Bartholow

_____

Amy M. Bartholow