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 REPLY 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

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JURISDICTION AND STATEMENT OF FACTS

The Jurisdictional Statement and Statement of Facts from the original brief are incorporated here.

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.

Respondent argues that the constitutionality of § 562.076 and MAI-CR3d 310.50 was well-settled law under *Montana v. Egelhoff*, 518 U.S. 37 (1996), at the time of trial, and therefore, counsel was not ineffective in failing to challenge them. (Resp. Br. 16). Respondent also asserts that a defendant's "personal, subjective moral culpability for the offense" concerns only the penalty question and not the question of defendant's guilt. (Resp. Br. 19). As a result, Respondent suggests that the fact Christopher's jury was prevented by statute and instruction from evaluating his *actual* intent is irrelevant, and counsel could not be ineffective for failing to present evidence of Christopher's intoxication as relevant to his mental state. (Resp. Br. 19, 21).

Respondent's logic is contrary to basic Supreme Court death penalty precedent, which acknowledges that, "a critical facet of the individualized determination of culpability required in capital cases is *the mental state with which the defendant commits the crime*. *Tison v. Arizona*, 481 U.S. 137, 156 (1987) (emphasis added). Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished. *Id.* Therefore, it was critical that the jury evaluate Christopher's *actual* mental state and not the mental state possessed by a generic sober person before making decisions about his guilt and punishment.

The evaluation of the effect of Christopher's severe intoxication on his ability to form memories and accurately recall events was also highly relevant to the jury's determination of the weight to give to his "confessions" – the only real evidence against him. Several inferences about Christopher's intent were taken directly from

his confessions, but if his confessions are unreliable due to severe intoxication at the time of the crime, (i.e., his memories were suggested to him, invented, or falsely associated to him rather than to David Spears who also confessed to the crime inconsistently with Christopher's account), then the jury could not accurately assess the reliability of his confessions and thus, his criminal intent.

Section 562.076 and Instruction No. 9, based on MAI-CR3d 310.50, violated Christopher's due process right to have the jury determine his personal culpable mental state. The statute places an intoxicated person in the shoes of a sober person "*as to the mental elements of an offense* and places limitations on the defense of diminished capacity due to intoxication." *State v. Erwin*, 848 S.W.2d 476, 483–84 (Mo. banc 1993). A capital jury cannot be restricted in such manner. Christopher's counsel should have challenged the statute as unconstitutional and put on evidence of Christopher's overwhelming intoxication in support of his defense.

While Respondent suggests that counsel cannot be ineffective for failing to anticipate a change in the law (Resp. Br. 21), this is not a change in the law. *Montana v. Egelhoff* was not a capital case and the state of Montana was not trying to put Mr. Egelhoff to death. Death penalty jurisprudence, however, on this issue is clear, and Christopher's counsel should have known that a capital jury is required to evaluate Christopher's *actual* mental state as it bears directly on their determination, as ultimate factfinders, of his personal and moral culpability.

Death is different. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).[1] And because "death is different," in several respects, the United States Supreme Court has imposed protections that the Constitution nowhere else provides. *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (Marshall, J., plurality opinion) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.... This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring in judgment) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases"); *Gardner v. Florida*, 430 U.S. 349, 357–358 (1977) (Stevens, J., plurality opinion) ("From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to

[1] The penalty of death is qualitatively different from a sentence of imprisonment, however long. *Id.* Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. *Id.* Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. *Id.*

the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion").

A process that accords no significance to relevant facets of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of mitigating factors stemming from the diverse frailties of humankind. *Woodson*, 428 U.S. at 303–04. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the ultimate penalty of death. *Id.*

Further, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). But if the jury is prevented from hearing and evaluating the full circumstances surrounding Christopher's mental state at the time of the crime and his ability to deliberate, which affect not only his mental state but the voluntariness of his later confessions, the limitation has expanded beyond "extreme culpability" into the legal fiction that Christopher may be judged, and thus, executed, as a generic sober person. If his jury was not permitted to fully evaluate the circumstances surrounding the specific intent mental element of deliberation, his culpability could not be accurately determined.

Again, because the State of Montana was not seeking to execute Mr. Egelhoff, a heightened standard of reliability for fact-finding may not have been necessary.

Voluntary intoxication statutes, however, abrogate the long-held legal concept of individualized determination of culpability in capital cases. When a guilty verdict and death sentence rest completely upon Christopher's alleged confessions, and when critical evidence has been kept from the jury – preventing them from fully evaluating his confessions or his mental state – justice is not served. Christopher's trial counsel should have distinguished *Egelhoff* and argued that the heightened reliability necessary in capital cases required his jury to determine his culpability based on his *actual* mental state. This, of course, would have required putting on evidence of his actual intoxication, and the effect it would have on his ability to develop the specific intent of deliberation, through an expert like Dr. Piasecki, which they wholly failed to do. This Court must find that they were ineffective.

Alternatively, there is a way to reconcile Missouri's voluntary intoxication statute and instruction with the necessity for the jury to consider evidence of intoxication on specific intent in a capital case, without declaring the statute unconstitutional. Other death penalty states with similar voluntary intoxication statutes or common law, such as Oklahoma and North Carolina have acknowledged a caveat or an exception to the general statute or law. In these states, despite the statute or rule, voluntary intoxication becomes a viable defense if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense.

In Oklahoma, by statute, "no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in

such condition." Okla. Stat. Ann. Title 21, §153. Oklahoma courts acknowledge that voluntary intoxication, by statute, is not a defense to criminal culpability. *See Patton v. State*, 973 P.2d 270, 286 (Okla. 1998); *Miller v. State*, 567 P.2d 105, 109 (Okla. Crim. App. 1977). However, their courts also "recognize an exception to this rule where the accused was so intoxicated that his mental abilities were totally overcome and it therefore became impossible for him to form criminal intent. *Patton*, 973 P.2d at 286. If voluntary intoxication is relied upon as an affirmative defense, the defendant must introduce sufficient evidence to raise a reasonable doubt as to his ability to form the requisite criminal intent. *Id.* When a defendant raises the defense of voluntary intoxication, an expert may properly offer his or her opinion on whether the defendant's actions were intentional. *Coddington v. State*, 142 P.3d 437, 450 (Okla. 2006). This question of intoxication to the point where the accused is unable to form the requisite intent is a question for the jury on proper instructions from the bench. *Miller*, 567 P.2d at 109.

Similarly, in North Carolina, like Missouri, on the element of a deliberate and premeditated specific intent to kill in a first degree murder case, the defendant has no burden of persuasion at all; the burden of persuasion on the existence of this element remains throughout the trial on the state. *State v. Wilson*, 187 S.E.2d 22 (N.C. 1972). The state must persuade the jury beyond a reasonable doubt that every essential element of a homicide exists. *Id.* Further, voluntary intoxication is not a legal excuse for any criminal act. *State v. Ash*, 668 S.E.2d 65, 70 (N.C. Ct. App. 2008).

However, a judicial exception exists for a viable affirmative defense if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense. *Id.* A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. *State v. Walls*, 463 S.E.2d 738, 761–762 (N.C. 1995). Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. *Id.* He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill. *Id.* The evidence must show that, at the time of the murder, defendant's "mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *State v. Mash*, 372 S.E.2d 532, 536-537 (N.C. 1988).

Here, both the determination of Christopher's "mental state" at the time of the crime, and his ability to have accurate memory or recall of events for purposes of the jury evaluating his confessions, could not be made accurately without consideration of his severe intoxication levels and its effects on his brain. Christopher's "mental state" at the time of the alleged crime bears directly upon his memory of events and the

accuracy of his confession.[2] If the effects of Christopher's intoxication were as Dr. Piasecki described them to be,[3] then the reliability and accuracy of his confessions are in doubt. The accuracy of his confessions is dependent upon the consideration of his intoxication at the time of the crime and his ability to form accurate memories of the events. Since his conviction was based primarily, if not exclusively, upon his confessions, due process required the fact-finder to evaluate the entirety of the circumstances surrounding the crime.

Finally, Respondent argues Christopher suffered no prejudice by counsel's failure to challenge the statute because: 1) it was counsel's strategy not to argue intoxication in the guilt phase; 2) this Court concluded on direct appeal that the evidence established that Christopher was capable of deliberation; and 3) his attorneys could have argued that he was not morally or subjectively responsible for the crimes in the penalty phase. (Resp. Br. 21-23).

First, if it was counsel's strategy not to argue intoxication in the guilt phase, it is puzzling why counsel specified in opening statement that Christopher "had 30

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[2] There may be situations where evidence of intoxication is also relevant to issues other than the defendant's state of mind. *Erwin*, 848 S.W.2d at 482.

[3] She testified that he would have been under "acute significant alcohol intoxication" resulting in aggressive brain functioning impairments. (PCRTr.65-66). These impairments would result in an inability to process and apply information, and the loss of ability to record memories. (PCRTr.67-68).

bottles of Smirnoff Ice Triple Black and smoked a joint the size of his thumb" on the night of the crime, (TR.3606), then proceeded to question Nathan Mahurin about the amount of alcohol purchased and consumed that evening, (TR.3748-3754), and objected to Instruction No. 9 as limiting the defense (TR.5557-5560).

Second, this Court's conclusion on direct appeal that Christopher's statements established that he was capable of deliberation, *State v. Collings*, 450 S.W.3d 741, 760 (Mo. banc 2014), simply reflects the evidence, or lack thereof, put on at his trial to challenge his mental state. The absence of any expert testimony on the issue of Christopher's intoxication prevented any factfinder or reviewing court from accurately determining his mental state or the accuracy of his confessions.

It is critical to remember that while the "evidence" of Christopher's deliberation came solely from the evidence of his confessions, his capacity to form accurate memories which were the basis of those confessions was never challenged. Moreover, his confessions were inconsistent with David Spears' confession to killing his step-daughter. If Christopher had no accurate memories for the events, then his "memories" could have been suggested to him by David – who had independent knowledge of the circumstances of his step-daughter's death. It is also possible that Christopher had no accurate memories based on his severe intoxication, but decided to take on the entirety of the blame for this crime because of what was occurring in his life – i.e., the death of two of his parents and his wife divorcing him, all around this same time (Ex. 901). Unless the jury, and this Court, was fully informed about Christopher's inability to deliberate, the conclusions are not surprising.

Finally, having already been told they could not consider Christopher's intoxication in determining his mental state, the jury could not have ignored this direction in the penalty phase when deciding to impose death. They were not told differently. This simply illustrates why capital juries must be allowed to consider intoxication evidence in guilt – Christopher's actual mental state is part of the culpability determination. The stakes are too high to preclude this evidence from the jury's consideration under the heightened reliability standard required in the death penalty context.

Christopher asks this Court to find that §562.076 and MAI-CR3d 310.50 are unconstitutional in capital cases, or that an exception exists in capital cases for the jury to evaluate evidence of intoxication as it relates to the defendant's ability to deliberate, and that counsel was ineffective in failing to present evidence to make such challenge. He asks this Court to reverse so that a jury may evaluate his confessions in light of his severe intoxication and determine his *actual mental state* at the time of the crime. *Tison*, *supra*.

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.

Respondent portrays this claim and argument as one of "expert-shopping." (Resp. Br. 38-39). To make such a claim, Respondent mischaracterizes the record by saying that attorney Moreland "conduct[ed] an investigation explicitly on how appellant's brain was affected by alcohol," (Resp. Br.33), and "explicitly stated that he investigated whether there was information to support the "substantially impaired"

statutory mitigating circumstance." (Resp. Br. 36). The record reflects exactly the opposite.

Attorney Moreland explicitly stated that he did *not* conduct this type of investigation, nor direct any experts to this theory:

> Q. If you would have had testimony from an expert psychiatrist who's an expert in addiction and who would have provided scientific evidence to support that statutory mitigating circumstance, that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time of the offense was substantially impaired, would you have submitted that statutory mitigating circumstance to the jury?
>
> A. I would have to speculate.
>
> Q. You don't know?
>
> A. No.
>
> Q. Because you didn't investigate and didn't get that information first?
>
> A. Oh, I investigated.
>
> Q. Okay. But you didn't hire an expert -- investigate an expert?
>
> A. That type of expert?
>
> Q. Right.
>
> A. No.

(PCRTr.357-358).

Q: In regard to the diminished capacity, I don't remember you saying that on direct, but you might have. But would you agree that that's different than the statutory mitigator that we talked about, about his capacity at the time --

A. Oh.

Q. -- of the offense? Those are two different things, right?

A. Oh, absolutely.

Q. Diminished capacity is something that's in the guilt phase?

A. Right.

Q. But I asked you about special mitigators at penalty phase?

A. Right.

Q. Okay. And Dr. Draper, who was your only expert, testified in the penalty phase, correct?

A. Yes.

Q. She is not a medical doctor, is she?

A. No, she's not.

Q. She's not a psychiatrist?

A. No.

Q. She's not a psychologist?

A. No.

Q. She is more of a social scientist type of person, would you say that?

A. She's a development -- she's a specialist in developmental -- human development. She's a specialist in human development.

Q. So she can't diagnose from the DSM-IV?

A. Well --

Q. I mean, she can read the book and look at it?

A. She can make developmental diagnoses, but as far as psychological diagnoses, no.

Q. Or any diagnosis that is on the -- the Axis I, which is a medical diagnosis?

A. Right.

Q. She cannot do that, whereas a medical doctor could, or a psychiatrist?

A. Right.

Q. And none of the experts that you consulted with were psychiatrists or medical doctors who were addiction specialists, correct?

A. That's right. I think Dr. Logan was just – not just, but I mean he's a -- a general psychiatrist -- forensic psychiatrist. But as far as I know, no, he doesn't specialize.

Q. Like Dr. Logan, you didn't have him do any scientific research on the effects of alcohol or acute intoxication on the brain?

A. I did not draw his attention to that theory, no.

(PCRTr.396-398).

Despite the fact that counsel consulted with experts in other areas, the record leaves no doubt that counsel did not conduct an investigation into the theory of acute alcohol intoxication and its applicability to the "substantially impaired" mitigating circumstance. Even the experts they did hire were not consulted regarding this

theory. (PCRTr.398). Nor was Dr. Draper even qualified to give an opinion on this theory. (PCRTr.397).

Counsel must make an effort to investigate the obvious. *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984). Evidence of voluntary intoxication is mitigating. *Rompilla v. Beard*, 545 U.S. 374, 381-382 (2005). But this statutory mitigator requires expert evidentiary support. *See State v. Richardson*, 923 S.W.2d 301, 325–26 (Mo. banc 1996); *Middleton v. State*, 80 S.W.3d 799, 815 (Mo. banc 2002); *State v. Knese*, 985 S.W.2d 759, 777–78 (Mo. banc 1999); *State v. Johnston*, 957 S.W.2d 734, 752 (Mo. banc 1997). Christopher's counsel did not investigate the obvious and inquire about or present expert testimony on his intoxication.

Ronald Rompilla had been drinking heavily at the time of his offense, and although one of the three mental health experts counsel consulted reported that Rompilla's troubles with alcohol merited further investigation, Rompilla's counsel did not present evidence of a history of dependence on alcohol that might have extenuating significance. Rompilla received a new trial. Christopher's counsel similarly never discussed this theory of intoxication at the time of the crime with the experts they did hire (TR.357-358, 397-398). Respondent's assertions to the contrary are not accurate. Christopher must have a new penalty phase trial.

Evidence of Christopher's addiction and severe intoxication on that night would have influenced the jury's appraisal of his subjective moral culpability and the accuracy of his confessions (See Point I) – especially considering counsel's injection at sentencing of David Spears' involvement. Christopher's addiction is linked to self-

medicating his mental health issues as a child, and his parents dying proximately to this crime (2 weeks before and 5 months before, respectively) (MTS.Tr. 1249-50, 1349; Ex. 901), a plausible reason for an increase in his maladaptive alcohol and drug use. And on the night before he confessed, he found out that his wife in Arkansas had divorced him, and he told the officer that his "life's steadily going to shit anyway, so…" (Mov.Ex.29, p.58-59). Although Christopher may not have remembered the circumstances of the crime, he could have easily adapted a story to take on all of the blame because he believed his life was not worth living.

The *§565.032.3(6)* statutory mitigator and evidence of Christopher's overwhelming intoxication was critically important because it went to the heart of the issue of the Christopher's moral culpability and the imposition of the death penalty. *Wiggins v. Smith*, 539 U.S. 510, 513 (2003); *Penry*, 492 U.S. 302, 319 (1989). 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*, 561 U.S. 945 (2010). This evidence may separate out those who are more morally culpable and deserving of the harshest punishment. *Gregg*, 428 U.S. at 184.

Dr. Piasecki's testimony would have 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 explain why his confession differed from both Spears' confession and the physical evidence – namely, he didn't remember the events due to severe intoxication. Evidence diminishing the force of

Christopher's confessions was critical because they were truly the only evidence against him. Without them, David Spears likely would be sitting on death row, not Christopher.

Counsel was ineffective in failing to make any attempt to show why Christopher's statements were unreliable in light of his addiction and his intoxication that night and why 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)*. Indeed, Dr. Piasecki's testimony would have informed the jury that Christopher's brain was severely compromised in its ability to record events or create memories, and likely would have been in a state of black-out, after he had consumed 30 beers in approximately six hours. (PCRTr.32-33, 67-68).

Christopher was prejudiced because there is a "reasonable probability that at least one juror would have struck a different balance" about Christopher's relative culpability or had doubts about his confession upon hearing this evidence. *See Wiggins*, 539 U.S. at 513. This is lower than the "more likely than not" standard for preponderance of the evidence because the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. *Strickland v. Washington*, 466 U.S. 668, 693-694 (1984). Because Christopher's sentencing was unreliable due to counsel's ineffectiveness, this Court must reverse.

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.

Whether Rowan's body was ever in the back of Christopher's truck was critical to the State's case because it tended to corroborate Christopher's confession that he transported her body. That is certainly why the State presented Stacey Bolinger's DNA testimony about a hair found in the back of Christopher's truck being consistent with Rowan's. That is why defense counsel wanted to investigate that testimony, but

simply gave up when they could not open the State's disk after "years" of trying. (PCRTr.227). However, this "years" worth of trying never included simply asking Bolinger print the raw data from the software; indeed, Bolinger testified that if someone had asked her to do so, she would have. (B.Depo.38, 43). She also 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).

Respondent's claim that defense counsel could not access the data "even with Bolinger providing information attempting to help the defense expert access the disk," (Resp. Br. 74), mischaracterizes Bollinger's testimony. Bollinger testified that she offered, in an email to the prosecutor, 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; PCR.Ex.25), not that she actually did so. (B.Depo.38). Regardless, defense counsel never investigated the DNA evidence, even though they could have done so. (PCRTr.225). They proffered no "trial strategy" reason for not doing so (PCRTr.227-228), despite Respondent's assertion to the contrary.

Respondent also argues that the motion court did not clearly err in finding that Dr. Stetler was not credible because his testimony was "not true" – i.e., contradicted by the facts – and that counsel has no obligation to present false testimony (Resp.Br. 77-78). Respondent's argument and the motion court's finding reflect a fundamental misunderstanding of Dr. Stetler's testimony. Dr. Stetler was able to easily print the data from the State's disk and came up with different results. Therefore, the substance of his testimony was that Bolinger's results were based on a different data

analysis and that the alleles she relied on as being above 50 RFU, were actually below 50 RFU, as his data analysis showed. This does not make his data "untrue" or "false" as Respondent and the motion court suggest. Rather, it reflects what Bollinger acknowledged, which is that there are different smoothing options that can change the peak height; therefore, someone else could analyze it another way, still using the same data. (B.Depo.48-49).

If the motion court's standard for "truth" is that Movant's post-conviction evidence must match the State's evidence at trial, then post-conviction counsel would be hard-pressed to ever prove a claim of failure to investigate and challenge the State's evidence. The point is that Dr. Stetler had a different interpretation or analysis of the physical data, which Bollinger acknowledged could happen. This was an issue for the jury to decide – i.e., which analysis was more accurate.

Respondent and the motion court further conflate and misquote Dr. Stetler's testimony regarding the D18 locus to make it sound as though he routinely considers alleles under 50 RFU, and that his testimony, therefore, was false. (Resp. Br. 72, 77-78; PCRLf.163). As the record reflects, this was not Dr. Stetler's testimony. Dr. Stetler testified that at the D18 locus there was an allele of 14 RFU which was not consistent with Rowan's profile, and if the State was going to use alleles under 50 RFU for analysis – which he believed the State did based upon his analysis of the data – then the State should also consider the 14 RFU at the D18 locus because it would have excluded Rowan altogether as a contributor to the hair sample. (PCRTr.103-104,

114-115). Indeed, Rowan's DNA did not contain a marker at that location. (PCRTr.114).

Dr. Stetler's actual testimony is much different than the motion court's characterization that Stetler improperly disregarded the rule of not considering peaks less than 50 (PCRLf.163). Rather, his actual testimony was that if the State lab is going to consider RFUs below 50 – as he believed they did in this case – then they also would have excluded Rowan at that locus; but if they did not use RFU below 50, then they should have removed all the other loci used, except for the one above 50. (PCRTr.115). Both State's Ex. A and Stetler's Ex. 22 were produced from the electronic data. (PCRTr.116). There is a discrepancy between the two interpretations of the electronic data, which Bolinger acknowledged was possible.

Therefore, this issue involves a battle of experts, and counsel should have investigated and presented this evidence so that a jury could determine which interpretation of the DNA was correct. The jury could have heard all of this evidence and determined whether to believe Bolinger's analysis or Dr. Stetler's analysis. Just because Dr. Stetler challenged the State's analysis and interpretation of the data, does not mean his testimony was false.

Further, a jury was entitled to hear that Bolinger did not employ the 60% rule[4] in performing her analysis, even though the FBI lab did at the time and so did Dr.

[4] Two peaks must be 60% of each other with respect to height to be considered sister alleles. (PCRTr.94).

Stetler. (PCRTr.94; B.Depo.17-18). The MSHP lab switched to the 60% rule after the testing was done on the DNA for Christopher's trial (B.Depo.18). Bolinger acknowledged that the 60% rule would have changed her opinion as to whether they were sister alleles. (B.Depo.44-45). If Bolinger had used the single true allelic pair that met the 60% rule – at the D3 locus – the statistical frequency would only be 1 in 17. (PCRTr.108).

This does not mean Bolinger's testimony at trial was false, but that it was based on a different interpretation of the data with different guidelines and rules. Because Dr. Stetler's lab was already using the 60% rule, the jury would have heard this ultimate discrepancy that Bolinger, by her own testimony at her post-conviction deposition, acknowledged existed. This was another issue for a jury to ultimately resolve.

Finally, challenging Bolinger's DNA evidence was not contrary to the defense, as Respondent suggests. (Resp. Br. 78). Counsel testified that she wanted to challenge Bolinger's interpretation of the raw data and hired Bioinfomatics to try to do just that. (PCRTr.219-220, 225). Counsel had, all along, been mounting a challenge to the validity of Christopher's confessions. Excluding them was the subject of lengthy pre-trial litigation. They later attempted to introduce information from David Spears' confession to challenge the reliability of Christopher's statements. The entire thrust of the penalty phase was an effort to show that David Spears was involved and that Christopher's confession could not be true and accurate.

Challenging the DNA evidence was consistent with the defense theory in guilt[5] and penalty, and there is a reasonable probability that a jury would have given Stetler's evaluation and conclusion more weight. *Strickland*, 466 U.S. at 694. This Court should find that counsel was ineffective and grant Christopher a new guilt and/or penalty phase trial.

XI.

[5] Respondent says counsel's strategy was that the crime was not second-degree murder (Resp. Br. 78), but counsel testified her strategy was that the crime was second-degree murder. (PCR Tr. 242).

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 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.

Respondent asserts that Christopher's trial counsel had never seen Bobby Thomas's name prior to trial, did not know that he existed, and that Dr. Draper did not identify Thomas as one of the relatives she interviewed. (Resp. Br. 118-119). Respondent suggests that Christopher failed to prove that anyone had ever told counsel about Thomas, and when counsel takes reasonable steps to discover the names of potential witnesses and did not know about a witness, counsel is not ineffective (Resp. Br. 119-120). Therefore, Respondent concludes that the motion court did not err in finding that trial counsel was never made aware that Thomas was a potential witness. (Resp. Br. 119).

Respondent is wholly incorrect on this issue. Contained in Dr. Draper's "LifePath" is a specific reference to the fact that Christopher "saved a man from hanging himself." (Ex. 901, page 15). This is how post-conviction counsel came to find out about Bobby Thomas. Clearly, if counsel's retained trial expert was aware of this incident and placed it in her trial exhibit, trial counsel was also aware of it. The problem is, though knowing about it, they failed to interview Thomas and present him at Christopher's trial as a penalty-phase witness. Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. This claim cannot be defeated on the assertion that trial counsel were not ineffective in failing to investigate this information; they were. The motion court clearly erred.

Respondent makes no argument regarding prejudice. While the trial court said Thomas' testimony was not "compelling," such finding is clearly erroneous. The fact that Christopher saved someone's life is highly material in a sentencing proceeding. *See Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002). There is a reasonable likelihood that the jury would have voted to spare his life had they heard the circumstances of Christopher saving Bobby's life. This Court should grant a new penalty phase trial.

CONCLUSION

For the reasons stated in Points I,IV,V,VI,VII,VIII,IX of his opening and reply briefs, 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

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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 reply brief complies with the limitations contained in Rule 84.06(b). The reply brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the reply brief contains **6,470** words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

A true and correct copy of the attached reply brief have been served electronically using the Missouri Supreme Court's electronic filing system this 31st day of October, 2017, on Assistant Attorney General Richard Starnes at Richard.Starnes@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ Amy M. Bartholow

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Amy M. Bartholow