IN THE
MISSOURI SUPREME COURT

VINCENT McFADDEN,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC96453**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION VIII
THE HONORABLE TOM W. DePRIEST, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction of this 29.15 death penalty appeal. Art. V, Sec.3, Mo. Const.

STATEMENT OF FACTS

I. Case History

Vincent McFadden's two first degree murder convictions and two death sentences for the deaths of Todd Franklin and Leslie Addison, obtained in separate trials, were reversed because of *Batson* violations. *State v. McFadden*,191S.W.3d648(Mo.banc2006)("Franklin" case) and *State v. McFadden*,216S.W.3d673(Mo.banc2007)("Addison" case).

Vincent was retried, convicted, and death sentenced in July, 2007 for the Franklin case. *State v. McFadden*,369S.W.3d727(Mo.banc2012). (*See* SC88959 Transcript Vol.1 at 1)

Vincent was retried and convicted of first degree murder and death sentenced for shooting Leslie with trial commencing in March, 2008. *State v. McFadden*,391S.W.3d408,416-17(Mo.banc2013)(V.1Tr.1).[1] This 29.15 appeal is from the Addison retrial.

[1] The record is as follows: (1) Addison retrial transcript (V.#Tr.); (2) Addison retrial Legal File (T.L.F.); (3) 29.15 Legal File (29.15L.F.); (4) 29.15 First Supplemental Legal File (29.15Supp.L.F.); (5) 29.15 Juror Hearing Transcript (29.15Jur.Hrg.Tr.); (6) 29.15 evidentiary hearing (29.15Tr.); (7) 29.15 Exhibits (29.15Ex.); and (8) First Addison trial transcript (1stAddisonTr.). Pursuant to this Court's August 17, 2017, orders, Vincent's multiple case records are before it.

In a December, 2004 trial, Vincent was convicted in St. Louis County of first degree assault and armed criminal action involving a shooting of Darryl Bryant and Jermaine Burns(Bryant/Burns). *State v. McFadden*,193S.W.3d305(Mo.App.,E.D.2006)(E.D.85858). The Bryant/Burns convictions were aggravators at the Addison retrial(V.9Tr.827-28;T.L.F.704-05).

On direct appeal of the Addison retrial, this Court addressed the claim Juror Jimmy Williams, who served on Vincent's jury here, failed to disclose on voir dire that three years earlier he was a venire member, but did not serve, on the Bryant/Burns assault case. *McFadden*,391S.W.3d at 417-19. Williams had indicated in a written questionnaire that he was a prospective juror in an assault and armed criminal action trial, but did not disclose he knew or recognized Vincent. *Id*.418.

This Court rejected Vincent's claim a new trial was required because Williams intentionally failed to disclose having gone through voir dire in the Bryant/Burns assault case. *McFadden*,391S.W.3d at 418-19. That claim was rejected because the intentional non-disclosure claim was premised solely on the assumption it was unreasonable for Williams to have failed to recognize Vincent when three years earlier Williams was questioned on voir dire at Vincent's assault case. *Id.*418. Vincent offered no evidence to prove Williams recalled Vincent was the assault case defendant and intentionally failed to disclose that fact. *Id.*418. Vincent failed to show prejudice. *Id.*418.

II. Voir Dire

A. Death Qualification

Williams was venireperson #44 and juror #3 who actually served convicting and sentencing Vincent to death(V.2Tr.100-06;V.5Tr.245-47;T.L.F.619). Judge Gaertner asked Williams' panel whether anyone recognized Vincent and no one responded(V.2Tr.7). Gaertner asked Williams' panel whether anyone had acquired any information about Vincent from any source and no one responded(V.2Tr.8-9).

Prosecutor Larner told Williams' panel that in 2005 Vincent was convicted in a separate jury trial of two counts of second degree assault and two counts of armed criminal action(V.2Tr.21).

Erin Elswick was venireperson #71 and juror #4 (and foreperson) who actually served convicting and sentencing Vincent to death(V.3Tr.8-9,71-80;V.5Tr.245-47;T.L.F.619,657-59,705).

Venireperson Ward #129 did not serve on Vincent's jury sentencing him to death(V.4Tr.253-54;T.L.F.619). Ward indicated that she wanted to change her juror questionnaire response that she did not recognize Vincent's name(V.4Tr.253-54). Ward indicated that after completing her questionnaire, when she arrived home she remembered having seen in the newspaper months back, a picture of a man named McFadden(V.4Tr.253-54).

III. 29.15 Case

A. Pre-Amended Motion

Vincent's 29.15 case was assigned to Judge Goldman, because Judge Gaertner was no longer a circuit judge(29.15L.F.19-21). A 30 day extension to file an amended motion was granted until September 18, 2013(29.15L.F.21,23-25).

On August 27, 2013, 29.15 counsel moved to contact jurors(29.15L.F.29-34). Contacting the jurors was critical for determining whether Williams was biased against Vincent based on intentionally failing to disclose knowledge of Vincent based on having served on the Bryant/Burns assault panel case three years before - something this Court found lacking on direct appeal(29.15L.F.29-34). The investigation was also directed at determining whether Williams contaminated the jury panel with knowledge of the assault case tried in December, 2004(29.15L.F.29-34).

On August 27, 2013, Goldman granted in part the motion to contact jurors(29.15L.F.35). Goldman directed that Williams and one other juror be contacted(29.15L.F.35). Goldman directed the parties to submit proposed questions and he would do the questioning(29.15L.F.35).

On September 6, 2013, Goldman questioned in chambers only Williams and Juror Elswick(29.15L.F.35,43,45). Goldman stated Elswick was "random[ly]" selected by the St. Louis County Court Administrator(29.15Jur.Hrg.Tr.3).

In response to Goldman limiting the inquiry to Williams and Elswick, 29.15 counsel indicated they had asked to contact and interview all the jurors to determine whether Williams had contaminated some or all the jurors(29.15Jur.Hrg.Tr.9). Also, the purpose in wanting to question Williams was to determine whether he was biased based upon having gone through voir dire on Vincent's assault case(29.15Jur.Hrg.Tr.9). Postconviction counsel filed a proposed question list(29.15Jur.Hrg.Tr.10)(29.15Supp.L.F.1-5). Counsel also indicated the following:

"Our motion did request that we be able to contact or talk with or the Court interview all the jurors who sat on the jury, even the individuals who were the alternates...."(29.15Jur.Hrg.Tr.10). Counsel continued: "our request was to talk to all of them, and we object to only getting to speak to Mr. Williams and one other."(29.15Jur.Hrg.Tr.11). Goldman stated he was denying that request commenting: "I'm certainly doing more than the supreme court did."(29.15Jur.Hrg.Tr.11).

Elswick testified she did not become aware of any juror recalling knowing Vincent or recognizing Vincent(29.15Jur.Hrg.Tr.14). Elswick did not remember Williams(29.15Jur.Hrg.Tr.14). Elswick did not hear any juror discussing any prior knowledge of Vincent(29.15Jur.Hrg.Tr.14).

Williams testified that at no time during trial did he recall knowing Vincent from his assault case experience(29.15Jur.Hrg.Tr.16-17). Williams testified that he did not remember participating in the assault voir dire and not being selected to serve(29.15Jur.Hrg.Tr.17-18). Williams testified he never recognized Vincent and did not tell anyone during trial that he had prior exposure to Vincent(29.15Jur.Hrg.Tr.18-19).

Goldman found Williams and Elswick credible and truthful(29.15Jur.Hrg.Tr.19-20). Goldman stated that Williams seemed to not remember the assault case voir dire(29.15Jur.Hrg.Tr.19-21).

Goldman noted that there were additional questions 29.15 counsel wanted asked that he was not allowing(29.15Jur.Hrg.Tr.21-22). Goldman indicated that

counsel would be allowed to present evidence on any Williams-based claim raised in the amended motion, which had not yet then been filed, despite what had transpired at the September 6, 2013 hearing(29.15Jur.Hrg.Tr.22).

Goldman placed under seal Movant's Notice of Juror Contact Information which had the contact information (addresses and phone numbers) for the 12 jurors who served(29.15Jur.Hrg.Tr.23). *See*, sealed documents filed with this Court October 10, 2017.

B. 29.15 Amended Motion

On September 18, 2013, the amended motion was filed(29.15L.F.46-258).

1. Claim 8(A)

Claim 8(A) alleged the limited juror hearing Goldman conducted was inadequate to determine whether Williams recalled his juror service on the assault case and was biased and/or shared information about the assault case with other jury members(29.15L.F.50-58).

Counsel had sought to speak to other jurors who may have had contact with Williams, but Goldman denied that request(29.15L.F.56). The action of denying contact with other jurors denied Vincent the opportunity to prove his constitutional claims(29.15L.F.56-57).

Claim 8(A) renewed the request to question other jurors to further investigate any statements Williams might have made to them(29.15L.F.58). The refusal to allow juror investigation denied Vincent the opportunity to prove his Williams claim(29.15L.F.56-58).

Corresponding Paragraph 9(A) alleged those on the petit jury would testify about their interactions with Williams(29.15L.F.206).

2. Claim 8(B)

Claim 8(B) alleged counsel was ineffective for failing to thoroughly question Williams(29.15L.F.59). When the venire was seated Vincent advised counsel he recognized Williams, but was uncertain why(29.15L.F.59-60). Despite having advised counsel Williams was familiar to him neither attorney questioned Williams about any familiarity or bias that Williams had towards Vincent(29.15L.F.59-60). Vincent was prejudiced by counsel's failure to make appropriate inquiries of Williams which resulted in a biased juror serving(29.15L.F.66).

Corresponding Paragraph 9(B) alleged petit jurors would testify about their interactions with Williams(29.15L.F.215-23).

3. Claim 8(F)

Claim 8(F) alleged counsel was ineffective for failing to present mitigating evidence through an expert such as St. Louis University Criminology Professor Dr. White testifying about how growing up in Pine Lawn (P.L.) and surrounding communities impacted Vincent's development and decision making(29.15L.F.83-84,86-87). White's work focused on urban at-risk communities and youth development(29.15L.F.83-84,87). White's work concentrated on the causes and results of criminal behavior on children raised in impoverished areas(29.15L.F.87). White's evidence would have included how education, poverty, illegitimate births, and urban environment impact individuals like Vincent and their

development(29.15L.F.83-84). White would testify about how P.L.'s at-risk factors influenced Vincent's life(29.15L.F.95-96).

4. Claim 8(G)

Claim 8(G) alleged counsel was ineffective for failing to investigate and present lay witness mitigating sociological evidence about the impact of Vincent growing up in P.L. and surrounding north St. Louis County which were characterized by poverty, lack of economic opportunity, violence, crime, drug addiction, drug dealing, high incidence of female single parent headed households, parental incarceration, police brutality, misconduct, and corruption, and governmental misconduct and corruption(29.15L.F.130-33).

C. Post-Amended Motion Proceedings

On May 5, 2014, Goldman, on his own motion, disqualified himself because he "now recalls he may have had discussions about this trial with the prosecuting attorney, Keith Larner, at the time he was in trial in this case."(29.15L.F.265).

The case was reassigned to Judge Dolan, on May 7, 2014(29.15L.F.266,274).

On July 13, 2015, Goldman testified at a deposition that he occasionally talked with Prosecutor Larner about cases Larner was prosecuting(29.15L.F.310). Goldman testified he had no specific recall of having discussed Vincent's case with Larner, but it was possible that he had, so he disqualified himself(29.15L.F.308-11). Larner talked to Goldman about case related issues in Larner's cases to get Goldman's input(29.15L.F.310-11).

On July 30, 2015, counsel filed a renewed motion to contact the jurors(29.15L.F.294-318). That motion urged that at the time Goldman ruled on the original motion to contact jurors that any existing conflict, based on Goldman's dealings with Larner, must have existed when Goldman ruled on the original motion to contact jurors(29.15L.F.299). For that reason, any Goldman rulings had to be reconsidered(29.15L.F.299).

On September 14, 2015, 29.15 counsel filed supplemental suggestions to support the renewed motion with Larner's August 20, 2015 deposition attached(29.15L.F.351-74). Larner tried the two homicide case retrials prosecuted against Vincent and handled the 29.15 arising from Vincent's assault case(29.15L.F.360). Larner testified that because of how long Vincent's three cases were pending that he "probably discussed the facts of those cases with Judge Goldman"(29.15L.F.361). Larner knew Goldman had recused himself here as Goldman told Larner that he recused himself because he had learned some of the facts of Vincent's cases from Larner(29.15L.F.369-70). Larner testified that he would have talked to Goldman after Vincent's trials about "some of the highlights"(29.15L.F.373).

On January 25, 2016, Dolan denied the renewed request to contact jurors(29.15L.F.414-15).

On June 2, 2016, this 29.15 was reassigned to Judge Cohen because Dolan was appointed to the Court of Appeals(29.15L.F.418-23). Because of Cohen's impending retirement, the case was then reassigned to Judge DePriest(29.15L.F.423-28).

On November 28, 2016, 29.15 counsel filed a renewed motion to contact jurors and reasserted all the grounds set forth in the prior motions, including all Goldman rulings had to be revisited because of disqualifying himself on his own motion(29.15L.F.446-55). On January 4, 2017, DePriest denied the renewed motion(29.15L.F.484).

IV. Trial Proceedings

A. Respondent's Guilt Phase

Eva Addison has a young child with Vincent (J.R.) whose name is also Vincent(V.6Tr.61-62). On Thursday, May 15, 2003, at 11 p.m., Vincent came by Maggie Jones' house at 31 Blakemore in P.L. with "B.T." (Brandon Travis) in a silver Altima(V.6Tr.61-63,96-101,114,138-39). Vincent said Eva's sisters told on him for something he had done(V.6Tr.64). Vincent struck Eva and told her that she and her sisters needed to leave P.L.(V.6Tr.62-64). Vincent left in B.T.'s car(V.6Tr.65).

Eva's sisters, Jessica Addison and Leslie Addison, came to Jones' 31 Blakemore Street house(V.6Tr.65-66). The Addisons' other sister, Shonte, was not present(V.6Tr.114-15). Eva was there with her son, Vincent, and her nephew, Isaiah(V.6Tr.65). Eva told Jessica and Leslie that they had to get out of P.L. because of what Vincent said(V.6Tr.66). Eva had Jessica take Eva's car with Eva's son and nephew along, while Eva and Leslie remained at Jones' house(V.6Tr.66).

Eva testified that Vincent returned to Jones' house in B.T.'s car(V.6Tr.66-67). Vincent got out and said that he had told the Addisons to leave P.L.(V.6Tr.67). "Smoke" was in another car(V.6Tr.67). Vincent pointed a gun at Leslie and pulled

the trigger, but it did not fire(V.6Tr.68,75). Smoke told Vincent to leave the women alone(V.6Tr.68-69). Vincent threatened to kill Leslie that night(V.6Tr.68-69).

Eva testified that she and Leslie went inside the house(V.6Tr.69-70). Vincent returned on foot, but went towards an alley when police sirens could be heard(V.6Tr.70). Eva and Leslie went inside Jones' house, but Leslie decided she was ready to leave(V.6Tr.70-71). Leslie said she was going to walk to the Skate King rink on Kienlen to use the pay phone(V.6Tr.70-71,131-32). Eva encouraged Leslie to not walk in the direction Vincent went(V.6Tr.70-71). Leslie started walking down the alley on Kienlen and Eva went after Leslie to tell her to come back because she had seen Vincent and B.T. coming from Dardenella(V.6Tr.70-71,131-32). Leslie did not want to go back with Eva(V.6Tr.Tr.71).

Eva testified that from behind some bushes by Dardenella, she saw Leslie and Vincent argue at Naylor and Kienlen(V.6Tr.72,76). Leslie asked Vincent not to shoot her, but he did multiple times(V.6Tr.73). The shooting happened on Kienlen across from P.L. School(V.6Tr.149). Vincent got back in the car and drove off(V.6Tr.73).

Eva testified she returned to Jones' house and told Jones that Vincent had killed Leslie(V.6Tr.74). Eva and Jones then went together to where Leslie was(V.6Tr.74,177).

Eva recounted that the day after Vincent shot Leslie he called Eva and told Eva to get his name out of things and threatened her(V.6Tr.104-05,132-35). Twelve days after Vincent shot Leslie, while in jail, Vincent called Eva(V.6Tr.106-09). Vincent

wanted Eva to sign documents and to testify that he was not responsible for shooting Leslie(V.6Tr.106-09,126-27,135).

Eva testified she visited Vincent 2-3 times in jail because she wanted to know why Vincent killed her sister and he apologized for shooting Leslie(V.6Tr.135-36).

On May 15, 2003, at 11:45 p.m., Stacy Stevenson heard a man arguing with a woman on the hill at Naylor(V.6Tr.178-79). Stevenson heard a scream and multiple gunshots(V.6Tr.179). Stevenson went outside and saw a woman on the ground bleeding(V.6Tr.180-81). Leslie said that "he" had shot her(V.6Tr.181).

Stevenson indicated there was no street light on Kienlen where Leslie's body was found(V.6Tr.187). There was lighting by the P.L. School and on Naylor(V.6Tr.196). Stevenson had seen the man follow Leslie from Naylor to Kienlen(V.6Tr.188). Stevenson could not say Vincent was the shooter(V.6Tr.191).

Evelyn Carter and the Addisons are cousins(V.6.Tr.202). The day after Leslie was killed Vincent called Carter(V.6.Tr.203). Vincent said to tell the Addisons to get his name out of reporting about Leslie being shot(V.6Tr.204). Carter said to Vincent that Eva saw him kill Leslie(V.6Tr.204-05). Vincent denied responsibility(V.6Tr.203-05).

Normandy fireman Farwell responded to the scene where there was not much light(V.6.Tr.207).

Officer Hunnius testified that, in the area of bushes where Eva reportedly hid, there was sufficient lighting to see someone walking up Naylor(V.6Tr.217-18,238-39). As a person proceeds along Kienlen, lighting decreases(V.6Tr.239).

Hunnius had to illuminate the scene where Leslie's body was to take pictures there, which is normally very dark(V.6Tr.229-30). There were no street lights in the area where Leslie's body and purse were found(V.6Tr.237). Hunnius testified the P.L. School had three street lights in front of it(V.6Tr.218). There was a light on the south side of Naylor and east of Kienlen(V.6Tr.218-19). Hunnius estimated the distance between the bushes and where Leslie's purse was recovered was several hundred feet(V.6Tr.232-37). There was lighting up the hill on Naylor, but there was not lighting down on Kienlen(V6.Tr.230-31).

B. Penalty Phase Evidence

1. Respondent's Penalty Phase

At the beginning of penalty phase, respondent admitted Exhibits 100-104, which were Vincent's prior convictions(V.8Tr.460-65). Ex. 100 was the Franklin murder conviction(V.8Tr.464-65). Ex.101 was Vincent's convictions involving the Bryant/Burns shooting(V.8Tr.463-64). Ex.102 was a conviction for second degree tampering and stealing under $150(V.8Tr.462-63). Ex.103 was a conviction for felony possession of a controlled substance, cocaine, and unlawful use of a weapon(V.8Tr.461-62). Ex.104 was a conviction for third degree assault(V.8Tr.460-61).

Attorney Goldstein represented Lorenzo Smith who, along with Corey Smith, were charged with robbing Todd Franklin(V.8Tr.490,493-94). Goldstein deposed Franklin on November 5, 2001 and Franklin's testimony implicated the Smiths(V.8Tr.490). Both Smiths pled guilty in 2001(V.8Tr.491,494).

Todd Franklin died on July 3, 2002, from five gunshots(V.8Tr.500,555-64).

Gary Lucas and two others were roofing and siding the house next to Franklin's house(V.8Tr.466,484). Lucas saw Vincent and another man chasing Franklin(V.8Tr.466-67). The other man shot Franklin(V.8Tr.468). Franklin fell to the ground(V.8Tr.469). Vincent took the gun from the other man and shot Franklin three times(V.8Tr.469).

Jessica Addison testified Vincent had made statements he intended to kill Franklin(V.8Tr.613-15).

Evelyn Carter recounted that Vincent was good friends with Corey and Lorenzo Smith in 2001-02(V.8Tr.585). Vincent called Evelyn the day after Franklin was killed(V.8Tr.585-86). Evelyn asked Vincent why people were saying that Vincent killed Franklin(V.8Tr.585-86). Vincent said Franklin was a snitch because of how Franklin handled the Smiths' robbing him(V.8Tr.586-88,595).

Officers Akers and Krey testified that when Vincent was arrested at the St. Charles Travel Lodge he had 17 individually packaged crack bags(V.8Tr.572-75,579-81).

Officer Stone saw a wanted poster for Vincent at the P.L. police department(V.8Tr.533-34). The wanted was for the April 4, 2002 assault on Bryant/Burns(V.8Tr.534). When Leslie was killed, Vincent was wanted for the Bryant/Burns assault and for killing Franklin(V.8Tr.536).

Shonte Addison reported that their cousin, Jermaine Burns, and Darryl Bryant were in a van at Jones' house, on April 4, 2002, at 5:30 p.m.(V.8Tr.624-25). Vincent

walked in the driveway and threatened Bryant with a gun(V.8Tr.625). Bryant and Vincent each drove off(V.8Tr.626).

Shonte then heard gunshots(V.8Tr.626). Shonte drove in the shots' direction and found Bryant's van's windows shot out(V.8Tr.626). Burns was driving the van and Shonte followed it to Barnes Hospital(V.8Tr.626-27). Shonte testified Bryant had a large bloody wound, and she assisted him getting into the hospital(V.8Tr.627).

Shonte reported to the police that she believed Vincent was responsible for the shooting involving Bryant/Burns(V.8Tr.624-28). Shonte testified against Vincent at his trial for the assault shooting charges involving Bryant/Burns(V.8Tr.628).

2. Defense Penalty Phase

Elaine Hood lived near Blakemore and saw Vincent daily(V.8Tr.646-48). Vincent babysat Hood's grandsons 4-5 times per week(V.8Tr.648-49). They talked about such things as church, jobs, and staying out-of-trouble and Vincent was good company(V.8Tr.648-49).

Hood testified P.L. was "rough" because she heard "all the shootings"(V.8Tr.649). When Hood heard gunshots she hit the floor(V.8Tr.649). Because of the shootings, Hood moved out of P.L.(V.8Tr.649-50).

On cross-examination, Hood acknowledged she moved out of P.L. because of so many shootings and murders there(V.8Tr.658,660). The prosecutor asked whether Hood was aware Vincent did some of those shootings and Hood responded she did not know about Vincent's involvement(V.8Tr.658). Hood acknowledged during respondent's questioning there are a lot of good people in P.L.(V.8Tr.659).

Gwendolyn McFadden is Vincent's aunt and Vincent's father's sister(V.8Tr.661-62). Vincent's mother, Theresa Brown, and Vincent's father, Vincent McFadden Sr., were both less than 20 when Vincent was born and they never married(V.8Tr.663-64). When Vincent was born, Theresa and his father were not living together because his father was in the military in Germany(V.8Tr.663). After Vincent Sr. returned from military service, Vincent's parents lived together off-and-on(V.8Tr.664).

Gwendolyn recounted that Vincent's mother worked two jobs leaving early in the morning and coming home late(V.8Tr.665-66). Vincent's mother left Vincent and his two younger sisters alone at home to go to work when Vincent was 9-10 years old(V.8Tr.666-67). The children would call to say they were alone and they then stayed with Gwendolyn(V.8Tr.666-67). Vincent was protective of his sisters, going to school to get them(V.8Tr.668-69).

Gwendolyn recounted that Vincent was small for his age and often got picked on and beat-up(V.8Tr.669). Vincent's father was a severe alcoholic, who did not support the family(V.8Tr.669-70). Gwendolyn tried to help Vincent, getting him involved in sports, but his parents never attended his games(V.8Tr.670-71).

On cross-examination of Gwendolyn, Larner elicited that Vincent was not beaten or sexually abused(V.8Tr.678-79). Larner also elicited that Vincent always had a place to live, was not in foster care, and had food and clothing(V.8Tr.679). Respondent also presented through Gwendolyn that she was a good role model for

Vincent and made sure Vincent got to his activities(V.8Tr.681-82). Gwendolyn also testified that Vincent's father tried to care for him(V.8Tr.681).

Vincent's paternal grandmother, Mini McFadden, recounted Vincent often stayed with her because Vincent's mother was working(V.8Tr.683-85). From birth through his teens, Vincent stayed with Mini often for several months and without seeing his mother or knowing where she was(V.8Tr.685-87). Mini described Vincent's father's alcoholism(V.8Tr.687). Vincent was small for his age and got picked-on(V.8Tr.688).

On cross-examination of Mini, Larner elicited that the reason Vincent's mother was absent was that she was working to support him and not because she was a prostitute or addict(V.8Tr.690). Respondent elicited Vincent's mother did what most mothers do - care for their children(V.8Tr.691). Larner presented through Mini that she and her husband were always good to Vincent(V.8Tr.691-92).

Also on cross-examination of Mini, respondent elicited that even though Vincent's father was alcoholic he still loved Vincent trying to be the best father he could and was not aggressive, violent, or in prison(V.8Tr.692). Larner presented through Mini that Vincent always had food, clothing, and a "nice" house(V.8Tr.692-93). Through Mini, respondent presented that she and her husband were hard-working people, who did the best they could for Vincent(V.8Tr.693).

Lisa Northern is Vincent's aunt and Vincent's mother's sister(V.8Tr.693-94). Lisa's husband, Donald, was a church minister who got Vincent involved in church activities(V.8Tr.698-99).

Lisa recounted that when Vincent was growing-up, he was shuffled between relatives' homes to live(V.8Tr.696). When Vincent was 13-14 years old, he asked the Northerns if he could permanently move-in, but Vincent's mother refused(V.8Tr.699). Growing-up Vincent spent time living with the Northerns and Donald took Vincent to fun activities(V.8Tr.695-96). Vincent did chores and did things without being asked(V.8Tr.697-98,701). Donald did more with Vincent than Vincent's father or grandfather(V.8Tr.696-97). Vincent got picked-on by other children and Donald intervened(V.8Tr.697).

On cross-examination of Lisa, Larner elicited that the Northerns took Vincent to fun activities(V.8Tr.702-03). Respondent elicited that her husband Don treated Vincent like a son(V.8Tr.704).

Respondent asked Lisa if she was aware the reason the court ordered Vincent to go to Tarkio Academy was his mother was unable to control him(V.8Tr.707). Lisa did not know why Vincent went to Tarkio(V.8.Tr.707). Larner elicited from Lisa that her husband had been "a very fine man" and that they had both done "the best" they could(V.8Tr.707).

Because Donald Northern was deceased, his prior testimony was read(V.8Tr.708-09). Vincent grew-up in some dangerous, violent neighborhoods(V.8Tr.711). When Vincent was about 13, he wanted to live with the Northerns, but he could not get parental permission(V.8Tr.713). When Vincent got out of Tarkio, Donald helped him get a job(V.8Tr.716). Vincent was respectful and

attended church(V.8Tr.714-15,717-18). Vincent was picked-on because he was small(V.8Tr.711-13).

Vincent's father, Vincent Sr., recounted that he and Vincent's mother, Theresa Brown, never married(V.8Tr.719). Vincent Sr. and Theresa lived together off-and-on until Vincent was 4-5 years old(V.8Tr.719-20). After Vincent Sr. and Theresa stopped living together, Vincent Sr. got calls from the children that they did not have food and he would go over to be sure they got fed(V.8Tr.720-21). Vincent Sr. promised to do things with Vincent, but then never showed-up, leaving Vincent disappointed(V.8Tr.721-22).

When Vincent was about 13, he wanted to live with his father(V.8Tr.722-24). Vincent got picked-on by other kids and got into fights for that reason(V.8Tr.722). Vincent ended up at Tarkio at a time when Vincent Sr. did not have time for Vincent (V.8Tr.722-24). Vincent Sr. did not believe that he was a good father to Vincent(V.8Tr.724-25).

On cross-examination, Larner elicited from Vincent Sr. that when the children needed food he brought it to them and when they called saying they were alone he spent time with them(V.8Tr.725). Respondent questioned Vincent Sr. about his familiarity with Vincent's fighting at multiple schools suggesting it was that behavior which resulted in Tarkio being Vincent's last stop(V.8Tr.725-27). Respondent also injected with Vincent Sr. that he did not know whether Vincent was the one getting picked on by others or whether Vincent was the one picking on others(V.8Tr.725-26).

Respondent elicited from Vincent Sr. that he neither physically nor sexually abused Vincent(V.8Tr.727).

C. Penalty Closing Arguments And Sentence

1. Respondent's Initial Argument

The jury was urged to impose death because Vincent has six serious assaultive convictions(V.9Tr.769). Larner argued he had presented detailed evidence about Vincent's priors, not just supporting documents, so that the jury would learn "what that man is all about"(V.9Tr.769). The jury was urged to ask for Vincent's conviction records(V.9Tr.769-70) and it requested and was given them all, Exhibits 100-104(V.9Tr.824-26).

Larner argued Vincent came from a good family that tried to do the best for him(V.9Tr.771). There was nothing mitigating about what the jury heard because Vincent did not come from a family where he was physically or sexually abused, so he did not have it "rough"(V.9Tr.771). The evidence presented was not mitigating because Vincent came from a family that tried to do the best for him, so as mitigation that evidence was "bizarre" (V.9Tr.771). That Vincent had a supportive family where no one else had convictions was aggravating, but defense counsel will call that mitigating(V.9Tr.794). Vincent was not sexually abused, but he will kill anyone who crosses him(V.9Tr.795).

Larner told the jury Vincent shot three people in three incidents during a 13 month period and posed: "You think people moved out of the neighborhood?"(V.9Tr.781-82,788-89). Larner said Vincent "owned" P.L. and it was

his "domain"(V.9Tr.781-82). Larner argued the Franklin and Leslie Addison killings were "retaliation murder[s]"(V.9Tr.794). Larner argued Vincent "terrorized" the P.L. community so that no one in P.L. felt safe in 2002-2003(V.9Tr.796).

Larner argued Vincent had an assault conviction at age 16 for hitting and striking Corey Jackson(V.9Tr.791). The aggressive one picking neighborhood fights was Vincent(V.9Tr.791). Vincent was a "bully."(V.9Tr.791).

2. Defense Argument

Defense counsel argued Vincent did not choose to be born to unprepared parents and bounced between homes(V.9Tr.799). Consistent guidance for Vincent's moral upbringing was lacking(V.9Tr.800).

Vincent grew-up in a violent neighborhood and that was how he learned to live(V.9Tr.804-06). Counsel argued Elaine Hood was hitting the ground before the shootings Vincent was alleged to have done(V.9Tr.805). The prevalence of gunshots in P.L. started before anything Vincent was alleged to have done(V.9Tr.805).

3. Respondent's Rebuttal

Larner argued there were lots of children who grew-up in the same neighborhood as Vincent who did not commit multiple murders(V.9Tr.812). Vincent was not crazy, insane, or retarded(V.9Tr.812-13). Vincent knew right from wrong and showed no remorse(V.9Tr.813-14).

D. Penalty Verdict

In voting for death, the jury found as aggravators convictions for: (1) first degree murder of Todd Franklin; (2) armed criminal action for Franklin's death; (3)

assault of Darryl Bryant; (4) armed criminal action for the Bryant assault; (5) assault of Jermaine Burns; and (6) armed criminal action for shooting at Burns(V.9Tr.827-28;T.L.F.704-05).

V. 29.15 Evidence And Findings

A. Dr. White

Dr. White is the Associate Dean for Community Engagement in Partnership at St. Louis University(29.15Tr.457). White's doctorate is in Criminology and Criminal Justice(29.15Tr.458). White came to St. Louis and began teaching in 1997 at UMSL(29.15Tr.457,633). White's teaching duties include a course on race and crime, as well as theory of crime and juvenile justice(29.15Tr.458).

White is a criminologist whose focus is factors that cause young people to become involved in crime(29.15Tr.459). White's work focuses on urban at-risk communities and the effects on children(29.15Tr.459-60). He looks at families, peers, and institutions as to how they interact and impact choices(29.15Tr.463-64). Testifying in Vincent's case was the first time White ever was in court(29.15Tr.633).

White looked at what life was like in P.L. and the surrounding communities for Vincent growing-up there in the 1980s and 1990s(29.15Tr.466-67). White interviewed prison inmates George Wells and Thurman Shelton who came from P.L. and nearby(29.15Tr.467-68,492). White's interview of Wells and Shelton gave him a better understanding of the gravity of the pain African-American males experienced growing-up in P.L.(29.15Tr.626-29). White interviewed Vincent four

times(29.15Tr.468,484). White spoke to P.L. residents Taneisha Kirkman-Clark, Al Jackson, and James Hubbard(29.15Tr.468-69).

White also spoke to Jamala Rogers, who White has known since coming to St. Louis(29.15Tr.469). Rogers worked in the St. Louis Mayor's Office in the 1990's addressing youth services in North St. Louis areas close to P.L.(29.15Tr.469-70,629). Rogers provided information about how the proliferation of gangs when Vincent was growing-up made everyday activities like going to school, recreation centers, or the store a dangerous endeavor(29.15Tr.629-30).

It was important to White to interview Vincent and others with ties to P.L. during the time Vincent grew-up there so as to avoid generalized assumptions about P.L. life(29.15Tr.470). White applied all the information gathered through interviews with people connected to P.L. to formulate his conclusions and opinions as they applied to Vincent and P.L. and to prepare a report(29.15Tr.470-71). That investigation revealed P.L. has war zone like qualities(29.15Tr.487-88).

White explained the conditions existing in poor African-American communities are predictors of crime, violence, and other social problems and place everyone at risk(29.15Tr.473-75). Lack of education, poverty, and teen pregnancy are predictive of high crime rates for young African-American males(29.15Tr.473-74). White noted that it has been known through research for almost 200 years that the social and economic environment Vincent was born into posed a high risk for criminal activity(29.15Ex.32Ap.36).

Vincent was born in 1980 and White reviewed conditions within P.L. for the time period of the later 1980s as well as 1990s(29.15Tr.476-77). In that time frame, especially in African-American communities, there was an exploding crack epidemic fueling gang development and violence(29.15Tr.477). During the 1980s and 1990s, gang organizing centered around members' city blocks and defending those blocks(29.15Tr.490-91). Attending P.L. schools was dangerous because of gang presence(29.15Tr.493).

White's review included examining census demographics beginning in 1990 (29.15Tr.478-82). P.L. is a hyper-segregated impoverished predominantly African-American community(29.15Tr.478-82). In 1990, P.L. was 93% African-American(29.15Tr.479). P.L. had a high crime rate(29.15Tr.482-83). Hyper-segregation is true of surrounding communities like Beverly Hills, Northwoods, Velda City, and Hillsdale(29.15Tr.478-80). P.L. and these North County communities were characterized by high unemployment, single-parent households, and illiteracy(29.15Tr.478-82,492-93).

White found that men in Vincent's age group from P.L. and surrounding communities were disproportionally dead or in prison(29.15Tr.494). White took into account Dr. Draper's work used in Vincent's earlier trials and it was consistent with his findings(29.15Tr.483-84).

White participated in and was present for a video created about P.L. life(29.15Tr.468,497). In formulating his opinions, White relied on that video's content(29.15Tr.497-501). When the video was offered, respondent objected on

hearsay and opinion grounds and the objection was sustained with the video taken as an offer of proof(29.15Tr.499-502).

White found it is not guaranteed that someone growing-up in P.L. will commit the type of crimes Vincent is alleged to have committed, but rather they are at greater risk for committing such offenses because of having been raised in that environment(29.15Tr.630-32,669).

B. Pine Lawn Video Interviews White Relied On

Jamala Rogers was interviewed on video by Dr. White at the Rowan Community Center where she worked and described how in the 1980s and 1990s people living in P.L., who had any financial means, moved out and those who did not were "penalized and sentenced to a life in Pine Lawn"(29.15Ex.37 at 0:01-0:22). Rogers described seeing children clothed in only Pampers in the streets at night as symptomatic of P.L.'s depth of conditions(29.15Ex.37 at 10:42-11:30). Rogers described how when drugs arrived in the 1980s, communities like P.L. and North St. Louis were decimated(29.15Ex.37 at 15:49-17:23).

Rogers explained that how some individuals get caught up in P.L. criminal activity, while others do not, depends on their support system(29.15Ex.37 at 18:49-19:54). Rogers explained there will always be success stories from hostile environments like those who grew-up in the 1950s and 1960s projects and became elected officials and CEOs(29.15Ex.37 at 18:49-19:54). For those families that need more support and are vulnerable and do not get it they are "left in the cold"(29.15Ex.37 at 18:49-19:54).

Rogers described how in the 1980s many moms were teen moms who raised their children like siblings, which is fraught with dysfunction and devoid of respect(29.15Ex.37 at 20:18-21:27). Situations of a 35-36 year old grandma, herself a single mom, who also has a teen mom daughter presents overwhelming struggles(29.15Ex.37 at 20:18-21:27).

Lisa Hubbard described that by the time she moved out of P.L. she knew 20 people from there who had been killed(29.15Ex.37 at 1:41-1:54). In the 1990s, P.L. was riddled with crime connected to the drug explosion(29.15Ex.37 at 9:21-10:08). Lisa would be jumping rope and when she heard shooting would not stop because shooting was the norm(29.15Ex.37 at 9:21-10:09). P.L. is like a ghost-town that was hit with a tsunami(29.15Ex.37 at 25:28-26:06).

Taneisha Kirkman-Clark described growing up in P.L. in the 1990s as rough because the young males saw drugs as a means to make money which created city block territoriality control(29.15Ex.37 at 4:41-6:11;18:15-18:43). P.L. police were brutal and no one called them for help(29.15Ex.37 at 14:22-15:48). P.L. officers were officers kicked-off other forces(29.15Ex.37 at 14:22-15:48). People who grew-up in P.L. have moved away to give their children hope for a better life(29.15Ex.37 at 22:25-23:02).

Kelly Crowder described how in the 1980s there was a prevalence of youths from single parent households selling drugs (crack), doing shootings, and fighting to make money(29.15Ex.37 at 6:12-6:29;7:20-7:38;8:23-8:50).

Clara Wings, an elderly P.L. resident, recounted how crack and PCP were everywhere(29.15Ex.37 at 7:38-8:22). None of the male youths were getting an education and schools were unsafe because of drugs, fighting, and gangs(29.15Ex.37 at 11:31-12:05). Clara sadly commented that with a few exceptions the P.L. young men of Vincent's generation are in jail(29.15Ex.37 at 26:08-26:20).

James Hubbard described how drugs in P.L. changed the character of the community whether a person was involved in them or not(29.15Ex.37 at 10:10-10:42).

C. Pine Lawn Lay Witnesses

The 29.15 evidence also included in-court lay witnesses who described the deprivation characterizing everyday life in P.L. - poverty, teenage pregnancy, single parent households without positive male role models, police brutality, racist police targeting, fighting, crimes of all kinds, easy access to guns, shootings, drug dealing, and exploitive government corruption(29.15Tr.142-48,157-65,197-205, 356-63,388-91).

D. Hearing And Findings

The motion court (Judge DePriest) conducted an evidentiary hearing and entered findings denying all claims(29.15L.F.728-807).

This appeal followed.

POINTS RELIED ON

I.

GOLDMAN'S TWO JUROR HEARING

The motion court (Judge Goldman) clearly erred denying 29.15 counsel the opportunity to fully investigate by examining at the Goldman in-court hearing all the petit jurors about evidence intended to establish Williams was biased and/or Williams discussed prior knowledge of Vincent's assault case with other jurors and further the motion court (Judge DePriest) clearly erred in denying the separately pled amended motion claim Vincent should have been allowed to examine all the petit jurors for the same purposes because Vincent was denied due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that examining all petit jurors was critical for determining whether Williams was biased and/or had ever discussed with other jurors knowing or being familiar with Vincent from Vincent's assault case in order to prove Williams' intentional or unintentional non-disclosure either of which required a new trial.

Gardner v. Florida,430U.S.349(1977);

Dobbs v. Zant,506U.S.357(1993);

State v. Jones,979S.W.2d171(Mo.banc1998);

Taylor v. State,728 S.W.2d305(Mo.App.,W.D.1987);

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

II.

PROSECUTOR LARNER'S ADMISSIONS - UNFAIR GOLDMAN JUROR HEARING

The motion court (Judges Dolan and DePriest) clearly erred denying the renewed motions to examine all the petit jurors because Vincent was denied due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that the Goldman hearing was a nullity both as to limiting the jurors examined to two and also the findings made based on the jurors who testified because after the hearing Goldman disqualified himself because of extrajudicial contacts with Prosecutor Larner about Vincent's case and Larner testified that he had discussed with Goldman facts constituting the "highlights" of Vincent's cases.

Anderson v. State,402S.W.3d86(Mo.banc2013);

State v. Nicklasson,967S.W.2d596(Mo.banc1998);

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

III.

COUNSEL INEFFECTIVE - WILLIAMS

The motion court clearly erred denying counsel was ineffective for failing to question Juror Williams about his familiarity with Vincent because Vincent was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have questioned Williams about his familiarity with Vincent after Vincent alerted counsel he recognized Williams and counsel would have uncovered Williams went through Vincent's assault case voir dire. Vincent was prejudiced because Williams was biased against Vincent with that bias arising from hearing details during the alleged assaults case's voir dire such that he was unqualified to serve here and Vincent was denied an entire qualified panel of jurors.

Knese v. State,85S.W.3d628(Mo.banc2002);

Anderson v. State,196S.W.3d28(Mo.banc2006);

Brecht v. Abrahamson,507U.S.619(1993);

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

IV.

DR. WHITE - CULTURAL MITIGATION

The motion court clearly erred denying counsel was ineffective for failing to call Dr. White to testify to all his P.L. specific opinions he relied on to explain the totality of the 1980s and 1990s P.L. cultural conditions Vincent grew-up in, including relying on the P.L. mitigation video White was part of, and Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented this as penalty cultural mitigating evidence and Vincent was prejudiced as there is a reasonable probability the jury would have voted for life had they heard such evidence.

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

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

State v. Dixon,1997W.L.113756 (Ohio Ct.App.8th Dist. Mar. 13, 1997);

U.S. v. Wilson,493F.Supp.2d491(E.D.N.Y.2007);

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

V.

LAY WITNESS CULTURAL MITIGATION

The motion court clearly erred denying counsel was ineffective for failing to call penalty mitigation lay witnesses Lisa Thomas, Tanesia Kirkman-Clark, Elwynn Walls, Sean Nichols, and Willabea Blackburn because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have called them as cultural mitigation witnesses to testify about the all-encompassing, adverse, hostile disadvantaged social conditions of growing-up in P.L. and neighboring North St. Louis County communities and Vincent was prejudiced as there is a reasonable probability the jury otherwise would have voted for life.

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

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

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

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

VI.

UNPROVEN PRIORS' ALLEGATIONS

The motion court clearly erred denying counsel was ineffective for failing to object to portions of Exhibits 103 (29.15Ex.38) and 104 (29.15Ex.39) on the grounds these exhibits contained prejudicial allegations not proven by a preponderance of the evidence because Vincent was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected on such grounds and Vincent was prejudiced as there is a reasonable probability had the jury not heard such allegations in aggravation that he would not have been death sentenced.

State v. Clark,197S.W.3d598(Mo.banc2006);

State v. Fassero,256S.W.3d109(Mo.banc2008);

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

VII.

FAILURE TO CALL DRAPER

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Draper, or a similarly qualified expert, in penalty phase mitigation to testify about Vincent's P.L. chaotic childhood background because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented this as penalty phase mitigating evidence to support a life sentence and Vincent was prejudiced as there is a reasonable probability the jury would have voted for life had they heard such evidence.

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

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

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

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

VIII.

FAILURE TO CALL GELBORT

The motion court clearly erred denying counsel was ineffective for failing to call neuropsychologist Dr. Gelbort, or a similarly qualified expert, to testify about Vincent's brain limitations pretrial to bar the death penalty and/or in penalty phase mitigation because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented these matters pretrial and/or as penalty mitigating evidence to support a life sentence coupled with an instruction requiring the jury find Vincent was mentally 18 or older and Vincent was prejudiced as there is a reasonable probability death would have been precluded pretrial or the jury would have voted for life had they heard Gelbort's evidence.

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

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

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

IX.

PENALTY ARGUMENTS - FAILURE TO PROPERLY OBJECT

The motion court clearly erred denying counsel was ineffective for failing to properly object to arguments: (a) if there is anyone who believes in the death penalty it is Vincent; and (2) to hold, hug, and love Leslie Addison and Todd Franklin so as not to let them down, because Vincent was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to these arguments as appealing to passion, prejudice, caprice, and emotion and Vincent was prejudiced as there is a reasonable probability had the jury not heard them Vincent would have been life sentenced.

Berger v. United States,295U.S.78(1935);

State v. Storey,901S.W.2d 886(Mo.banc1995);

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

X.

FAILURE TO PRESENT PET SCAN

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Gur, or a similarly qualified expert, in penalty mitigation to present PET scan brain evidence showing Vincent's brain's functional limitations because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented this as penalty mitigating evidence to support life and Vincent was prejudiced as there is a reasonable probability the jury would have voted for life had they heard such evidence.

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

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

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

XI.

FAILURE TO DISCREDIT EVA

The motion court clearly erred in denying counsel was ineffective for failing to call Maggie Jones, Margaret Walsh, and Arnell Jackson to impeach/discredit Eva Addison's reporting of events surrounding Leslie's death because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have called these witnesses who would have impeached/discredited Eva's reporting. Vincent was prejudiced because Eva's credibility was critical to respondent's case and Vincent would not have been convicted had she been impeached/discredited.

Black v. State,151S.W.3d49(Mo.banc2004);

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

U.S. Const. Amends. VI, VIII, and XI.

XII.

BRYANT/BURNS AGGRAVATION

The motion court clearly erred denying counsel was ineffective for failing to present evidence rebutting Vincent committed assaults on Bryant and Burns, and in particular that Kyle Dismukes was the responsible shooter, and that Bryant was seriously injured because Vincent was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have presented evidence to rebut this aggravation evidence Vincent deserved death because of the Bryant/Burns events and Vincent was prejudiced as there is a reasonable probability he would not have been death sentenced.

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

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

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

XIII.

ABSENCE OF LIGHTING PHOTOS AND DISTANCE MEASUREMENTS

The motion court clearly erred denying counsel was ineffective for failing to rely on crime scene photos area lighting and distance measurements between where Eva reported she viewed the shooting and Leslie stood because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented such photos and distance measurements which would have called into question Eva's ability to accurately identify it was Vincent who shot Leslie and Vincent was prejudiced because respondent's case was premised on Eva's reporting she saw Vincent shoot Leslie.

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

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

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

APPLICABLE STANDARDS

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

Appellate Review

Review is for whether the 29.15 court clearly erred. *Barry v. State*,850S.W.2d348,350(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.*426. 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).

ARGUMENT

I.

GOLDMAN'S TWO JUROR HEARING

The motion court (Judge Goldman) clearly erred denying 29.15 counsel the opportunity to fully investigate by examining at the Goldman in-court hearing all the petit jurors about evidence intended to establish Williams was biased and/or Williams discussed prior knowledge of Vincent's assault case with other jurors and further the motion court (Judge DePriest) clearly erred in denying the separately pled amended motion claim Vincent should have been allowed to examine all the petit jurors for the same purposes because Vincent was denied due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that examining all petit jurors was critical for determining whether Williams was biased and/or had ever discussed with other jurors knowing or being familiar with Vincent from Vincent's assault case in order to prove Williams' intentional or unintentional non-disclosure either of which required a new trial.

The limited Goldman hearing "randomly" selecting Elswick from other jurors denied Vincent his rights to due process and freedom from cruel and unusual punishment. Further, the separate findings' denial of the pled amended motion claim to call all jurors (DePriest 29.15 ruling) violated those same rights. "Randomly" limiting the hearing to examining Elswick and Williams was arbitrary and capricious.

I. Underlying Facts

Jimmy Williams was Juror #44 on the second venire panel in this capital case and Juror #3 of 14 who actually served(V.2Tr.100-06)(Supp.T.L.F.1)(T.L.F.619).

On the juror questionnaire for this case, Williams indicated he had prior experience as a juror in 2004(Supp.T.L.F.1). Judge Gaertner asked the second panel whether anyone recognized Vincent or had acquired information about him from any source and no one responded(V.2Tr.7-8).

Prosecutor Larner told the panel in a separate case Vincent was convicted of two counts of first degree assault and two counts of armed criminal action(V.2Tr.21).

Williams testified he could consider both death and life without parole(V.2Tr.100-06). During counsel Turlington's questioning, she asked Williams whether he would automatically impose death for aggravators that included convictions for first degree murder and first degree assault and Williams said he would not(V.2Tr.105).

Williams was panelist #6 on Vincent's assault case and his juror questionnaire reflected that he had no prior jury experience and that he was struck from the juror panel(Supp.T.L.F.5). The assault case was St. Louis County case 04CR-2658, heard before Judge Ross, and became Eastern District Appeal ED85858 (193S.W.3d305Mo. App.E.D.2006)(Supp.T.L.F.3-15).

Ross (Supp.T.L.F.20), Prosecutor Bishop (Supp.T.L.F.24-25), and defense counsel Chastain (Supp.T.L.F.70,78-79,89) all informed the venire Vincent was charged with three counts of first degree assault, three counts of armed criminal action, and one count of unlawful use of a weapon (firing into a minivan). The panel

learned the alleged victims were Darryl Bryant, Jermaine Burns, and Samuel Simpson (Supp.T.L.F.78-79).

II. Direct Appeal

On direct appeal, it was alleged plain error occurred because Williams, who served here, failed to disclose that three years prior to trial he was on the venire panel for Vincent's assault case, but did not serve there. *State v. McFadden*,391S.W.3d408,417(Mo.banc2013). The trial court "clearly and specifically" asked Williams and other prospective jurors whether they recognized Vincent. *Id*.417-18. While Williams had acknowledged in a written questionnaire he was a prospective juror in a trial for assault and armed criminal action, he did not indicate he recognized Vincent. *Id*.417-18.

This Court noted there can be intentional or unintentional nondisclosure by a juror and explained the different standards for requiring a new trial. *McFadden*,391S.W.3d at 418-19. Intentional non-disclosure occurs when: (1) there is no reasonable inability to comprehend the information solicited by the question asked of the juror and (2) the prospective juror remembers the experience or that it was of such significance that the juror's purported forgetfulness is unreasonable. *Id*.418-19. Bias and prejudice are presumed in the case of intentional nondisclosure and a new trial is required. *Id*.418-19.

Unintentional non-disclosure occurs when the experience forgotten was insignificant or remote in time or where the venireperson reasonably misunderstood questioning. *McFadden*,391S.W.3d at 418-19. Where unintentional disclosure has

occurred a showing of prejudice that the non-disclosure may have influenced the jury's verdict must be shown to require a new trial. *Id.*418-19. *See, also, State v. Mayes*,63S.W.3d615,625(Mo.banc2001).

This Court rejected Williams intentionally failed to disclose he had been on the assault panel because no evidence was presented to establish intentional non-disclosure. *McFadden*,391S.W.3d at 418-19. Vincent's claim assumed it was unreasonable for Williams to have failed to have recognized him. *Id.*418-19. It was as plausible to assume Williams would have remembered Vincent as it was Williams' memory had faded. *Id.*418-19. No evidence was presented to establish Vincent was prejudiced as is required for a new trial with unintentional disclosure. *Id.*418-19.

III. 29.15 Proceedings

On August 27, 2013, 29.15 counsel moved to contact jurors(29.15L.F.29-34). Contacting the jurors was critical for determining whether Williams intentionally failed to disclose knowledge of Vincent based on having served on the assault panel case three years before - something this Court found lacking on direct appeal(29.15L.F.29-31). The investigation was directed at determining whether Williams was biased such that he intentionally failed to disclose his involvement on the December, 2004 assault case trial and/or he contaminated the jury panel with knowledge of the assault case(29.15L.F.29-34).

On August 27, 2013, Goldman granted in part the motion to contact jurors(29.15L.F.35). Goldman directed Williams and one other member of the jury be

contacted(29.15L.F.35). Goldman directed the parties submit proposed questions and he would do the questioning(29.15L.F.35).

On September 6, 2013, Goldman questioned in chambers only Williams and Juror Elswick(29.15L.F.35,43,45). Goldman stated Elswick was "random[ly]" selected by the St. Louis County Court Administrator(29.15Jur.Hrg.Tr.3).

In response to Goldman limiting inquiry to Williams and Elswick, 29.15 counsel indicated they had asked to contact and interview all the jurors to determine whether Williams had contaminated some or all(29.15Jur.Hrg.Tr.9). Also, the purpose in wanting to question Williams was to determine whether he was biased based upon having gone through voir dire on Vincent's assault case(29.15Jur.Hrg.Tr.9). Postconviction counsel filed a proposed question list(29.15Jur.Hrg.Tr.10)(29.15Supp.L.F.1-5). Counsel also indicated the following: "Our motion did request that we be able to contact or talk with or the Court interview all the jurors who sat on the jury, even the individuals who were the alternates...."(29.15Jur.Hrg.Tr.10). Counsel continued: "our request was to talk to all of them, and we object to only getting to speak to Mr. Williams and one other."(29.15Jur.Hrg.Tr.11). In response, Goldman stated: "I'm certainly doing more than the supreme court did."(29.15Jur.Hrg.Tr.11).

Elswick testified she did not become aware of any juror recalling knowing Vincent or recognizing Vincent(29.15Jur.Hrg.Tr.14). Elswick did not remember Williams(29.15Jur.Hrg.Tr.14). Elswick did not hear any juror discussing prior knowledge of Vincent(29.15Jur.Hrg.Tr.14).

Williams testified that at no time during trial did he recall knowing Vincent from his assault case experience(29.15Jur.Hrg.Tr.17). Williams testified he did not remember participating in the assault voir dire and not being selected to serve there(29.15Jur.Hrg.Tr.17-18). Williams testified that he did not tell anyone during trial that he had prior exposure to Vincent(29.15Jur.Hrg.Tr.18-19).

Goldman found Williams and Elswick credible and truthful(29.15Jur.Hrg.Tr.19-20). Goldman stated that Williams seemed to not remember the assault case voir dire(29.15Jur.Hrg.Tr.19-21).

Goldman noted that there were additional questions 29.15 counsel wanted to ask that he was not allowing(29.15Jur.Hrg.Tr.21-22). Goldman indicated that counsel would be allowed to present evidence on any Williams based claim raised in the amended motion, not yet filed, despite what transpired at the September 6, 2013 hearing(29.15Jur.Hrg.Tr.22).

Goldman placed under seal Movant's Notice of Juror Contact Information which had the contact information (addresses and phone numbers) for the jurors who actually served and rendered verdicts(29.15Jur.Hrg.Tr.23). *See*, sealed documents filed with this Court October 10, 2017.

IV. 29.15 Amended Motion Pleadings - Claim 8(A)

Claim 8(A) alleged the limited juror hearing Goldman conducted was inadequate to determine whether Williams recalled his juror service on the assault case and was biased and/or shared any information about the assault case with other jurors(29.15L.F.50-58).

Counsel had sought to speak to other jurors who may have had contact with Williams, but Goldman denied that request(29.15L.F.56). The action of denying contact with other jurors denied Vincent the opportunity to prove his constitutional claims(29.15L.F.56-57).

Claim 8(A) renewed the request to question other jurors to further investigate any statements Williams might have made to them(29.15L.F.58). The refusal to allow the juror investigation denied Vincent the opportunity to prove his Williams claim(29.15L.F.56-58).

Corresponding Paragraph 9(A) alleged that those on the petit jury would testify about their interactions with Williams(29.15L.F.206).

V. 29.15 Findings

The findings state Judge Goldman conducted a hearing at which Williams and another juror "chosen at random" testified(29.15L.F.738). Williams testified that at no time did he recall knowing Vincent or recognizing him(29.15L.F.740). Williams testified he did not tell anyone during trial about his prior exposure to Vincent(29.15L.F.740).

A second juror "chosen at random" by Goldman testified she did not recall any jurors during trial or deliberations indicating they had prior knowledge of Vincent(29.15L.F.740-41).

Goldman conducted "a thorough investigation" because two jurors' testimony was sufficient(29.15L.F.741). Williams' testimony showed an unintentional faded memory nondisclosure(29.15L.F.741).

VI. Arbitrarily Limiting Juror Misconduct Investigation

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*,366U.S.717,722(1961). Bias or prejudice by even one juror violates a defendant's right to a fair trial. *Dyer v. Calderon*,151F.3d970,973(9thCir.1998).

A prospective juror must have an open mind free from bias and prejudice. *State v. Mayes*,63S.W.3d615,624(Mo.banc2001). Prospective jurors have a duty to answer all questions fully, fairly, and truthfully. *Id*.624-25. Failure to respond to an applicable question can deprive counsel of information necessary to making peremptory or cause challenges. *Id*.625.

A prospective juror's qualifications to serve are not judged by a single response, but rather the entire voir dire. *State v. Ess*,453S.W.3d196,204(Mo.banc2015).

This Court has recognized that post-trial contact with jurors can be critical for identifying juror misconduct. *See Fleshner v. Pepose Vision Institute*,304S.W.3d81,85-90(Mo.banc2010)(trial court should have conducted hearing on juror misconduct based on post-verdict contact with jurors showing a juror made anti-Semitic remarks about defendant's witness). In *State v. Post*,804S.W.2d862,862(Mo.App.,E.D.1991), the defendant was granted a new trial because of juror misconduct during a sequestered jury trial.

In *State v. Jones*,979S.W.2d171,183(Mo.banc1998), this Court recognized that the 29.15 trial court had discretionary power to grant 29.15 counsel permission to

contact jurors. *See, also, Strong v. State*,263S.W.3d636,643(Mo.banc2008)(same). While this Court endorsed a 29.15 court could enter an order confining the subject of inquiry to proper subjects, it did not endorse the idea that the trial court could arbitrarily limit which jurors 29.15 counsel was allowed to make proper inquiries. *Jones*,979S.W.2d at 183.

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). "The foremost concern of the Eighth Amendment is that the death sentence not be imposed in an arbitrary and capricious manner." *Saffle v. Parks*,494U.S.484,507(1990). In *Furman v. Georgia*,408U.S.238,309-10(1972) Justice Stewart concurred in finding the death sentences there were cruel and unusual because how those selected for the punishment of death was as arbitrary, capricious, wanton, and freakish as being struck by lightning.

The act of "cho[osing] at random" (29.15Jur.Hrg.Tr.3;29.15L.F.738,740-41) one other juror besides Williams to examine and prohibiting inquiry of the other petit jurors was as arbitrary, capricious, wanton, and freakish an act as being struck by lightning. *See, Saffle* and *Furman*. In *Gardner v. Florida*,430U.S.349,351,354(1977), the trial judge imposed death while relying on confidential portions of a presentence investigation report that was undisclosed to counsel. Relying on that confidential information violated due process and the Eighth Amendment as a death sentence must be based on reason rather than caprice or

emotion. *Id.*358,362. Limiting the inquiry to one other petit juror, besides Williams, reflects the kind of arbitrariness and caprice that *Gardner* prohibits. Goldman justified his arbitrariness on the grounds that "I'm certainly doing more than the supreme court did."(29.15Jur.Hrg.Tr.11). The Eighth Amendment forbids such arbitrariness. *See*, *Saffle* and *Furman*.

In *Dobbs v. Zant*,506U.S.357,358-60(1993), the Court held that an individual sentenced to death is entitled to a complete record on appeal to avoid arbitrariness and caprice. The record here is incomplete, but could have been complete, except Goldman limited the inquiry to one juror, besides Williams, "chosen at random"(29.15Jur.Hrg.Tr.3;29.15L.F.738,740-41). *See*, *Gardner* and *Zant*.

In *Taylor v. State*,728S.W.2d305,306(Mo.App.,W.D.1987), the postconviction movant alleged counsel was ineffective for failing to call inmate witnesses who could have provided critical evidence for his defense to killing another penitentiary inmate. The postconviction court denied writs for the inmate witnesses to testify and then denied Taylor's claim for failing to present supporting evidence. *Id.*306-07. In reversing that decision, the *Taylor* Court reasoned that a motion court cannot deny the movant the opportunity to present evidence to support his claim and then deny the claim for failing to present supporting evidence. *Id.*307. The motion court's action denied Taylor a fair hearing through taking away the opportunity to meet his burden of proof. *Id.*307. The same is true here Vincent was denied the opportunity to satisfy his burden when the opportunity to examine all petit jurors was prohibited when one was selected at "random." That randomness reflects an arbitrariness and

capriciousness that violates due process and the Eighth Amendment. See, *Furman*, *Saffle*, and *Gardner*.

The 29.15 judgment should be reversed for a hearing at which Williams and all the other petit jurors are examined.

II.

PROSECUTOR LARNER'S ADMISSIONS - UNFAIR GOLDMAN JUROR HEARING

The motion court (Judges Dolan and DePriest) clearly erred denying the renewed motions to examine all the petit jurors because Vincent was denied due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that the Goldman hearing was a nullity both as to limiting the jurors examined to two and also the findings made based on the jurors who testified because after the hearing Goldman disqualified himself because of extrajudicial contacts with Prosecutor Larner about Vincent's case and Larner testified that he had discussed with Goldman facts constituting the "highlights" of Vincent's cases.

Judges Dolan and DePriest clearly erred in denying the renewed motions to examine all the petit jurors. The Goldman hearing was a nullity both as to limiting the jurors examined to two and also the findings made based on the jurors who testified because after the hearing Goldman disqualified himself because of extrajudicial contacts with Prosecutor Larner. Furthermore, the Goldman hearing was a nullity because Larner testified that he had discussed with Goldman facts constituting the "highlights" of Vincent's cases.

I. Post-Amended Motion Proceedings

On May 5, 2014, Goldman, on his own motion, disqualified himself because he "now recalls he may have had discussions about this trial with the prosecuting attorney, Keith Larner, at the time he was in trial in this case."(29.15L.F.265).

The case was reassigned to Judge Dolan, on May 7, 2014(29.15L.F.266,274).

On July 13, 2015, Goldman testified at a deposition that he sometimes talked with Prosecutor Larner about Larner's cases(29.15L.F.310). Goldman testified he had no specific recall of having discussed Vincent's case with Larner, but it was possible that he had, so he disqualified himself(29.15L.F.308-11). Larner talked to Goldman about case related issues in Larner's cases to get Goldman's input(29.15L.F.310-11).

On July 30, 2015, counsel filed a renewed motion to contact the jurors(29.15L.F.294-318). That motion urged that at the time Goldman ruled on the original motion to contact jurors that any existing conflict, based on Goldman's dealings with Larner, must have existed when Goldman ruled on the original motion to contact jurors(29.15L.F.299). For that reason, any rulings entered by Goldman had to be reconsidered(29.15L.F.299).

On September 14, 2015, 29.15 counsel filed supplemental suggestions to support the renewed motion with Larner's August 20, 2015 deposition attached(29.15L.F.351-74). Larner tried the two homicide retrials against Vincent and handled the 29.15 arising from Vincent's assault case(29.15L.F.360). Larner testified that because of how long Vincent's three cases were pending that he "probably discussed the facts of those cases with Judge Goldman"(29.15L.F.361). Larner knew Goldman had recused himself here as Goldman told Larner that he

recused himself because he had learned some of the facts of Vincent's cases from Larner(29.15L.F.369-70). Larner testified that he would have talked to Goldman after Vincent's trials about "some of the highlights"(29.15L.F.373).

On January 25, 2016, Dolan denied the renewed request to contact jurors(29.15L.F.414-15).

On June 2, 2016, this 29.15 was reassigned to Judge Cohen because Dolan was appointed to the Court of Appeals(29.15L.F.418-23). Because of Cohen's impending retirement, the case was then reassigned to Judge DePriest(29.15L.F.423-28).

On November 28, 2016, 29.15 counsel filed a renewed motion to contact jurors and reasserted all the grounds set forth in the prior motions including all rulings needed reconsideration in light of Goldman's disqualification on his own motion(29.15L.F.446-55). On January 4, 2017, DePriest denied the renewed motion(29.15L.F.484).

II. Goldman Hearing - A Nullity

Due process requires a fair hearing. *Thomas v. State*,808S.W.2d364,367(Mo.banc1991); *In re Murchison*,349U.S.133,136(1955). "The test" and standard of review for disqualification is: "whether a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court." *State v. Smulls*,935S.W.2d9,17(Mo.banc1996); *Aetna Life Co. v. Lavoie*,475U.S.813,825(1986)("justice must satisfy the appearance of justice"). The benefit of any doubt is accorded a litigant, not a judge. *Smulls*,935S.W.2d at 26-27. Bias warranting disqualification must come from an extrajudicial source and not

from what a judge learned from serving on the case. *State v. Nicklasson*,967S.W.2d596,605(Mo.banc1998). When reviewing a disqualification claim, it is relevant to consider "all that has been said and done in the presence of the judge." *Haynes v. State*,937S.W.2d199,203(Mo.banc1996). Disqualification is required where there are facts showing prejudgment of an evidentiary issue which can be inferred. *Id.*204.

In *Anderson v. State*,402S.W.3d86,92-94(Mo.banc2013), this Court concluded the 29.15 judge should have recused himself because there was an appearance of impropriety based on the court having considered extrajudicial sources of information. The remedy for that finding was that the case was remanded for a new evidentiary hearing on the 29.15 claims before a different judge. *Id.*95.

Here, Goldman's stated reasons for disqualifying himself was that he may have acquired extrajudicial information from Larner about Vincent's case(29.15L.F.265,308-11). Goldman testified that Larner sought out Goldman's input on case related issues(29.15L.F.310-11). Larner testified that he talked to Goldman about the factual "highlights" of respondent's cases against Vincent(29.15L.F.361,373). A reasonable person would have factual grounds to find an appearance of impropriety in Goldman's limiting the scope of the juror hearing to Williams and a "random" juror because of Goldman's Larner contacts(29.15L.F.738,740-41). *Cf. Anderson.*

Goldman stated that he found Williams and Elswick credible and truthful(29.15Jur.Hrg.Tr.19-20). Goldman stated that Williams seemed to not

remember the assault case voir dire(29.15Jur.Hrg.Tr.19-21). A reasonable person, likewise, would have factual grounds to find an appearance of impropriety in Goldman's rulings on the evidence that was presented at the two juror hearings because of his contacts with Larner. *Cf. Anderson*.

Judges Dolan and DePriest clearly erred in failing to conduct an independent hearing at which all the petit jurors were called to testify because Goldman limited his hearing to two jurors. For all the reasons set forth in Point I, and incorporated here, Judges Dolan and DePriest were required to conduct a hearing at which all jurors who served were examined.

Moreover, Judge Goldman's hearing was a nullity since he later disqualified himself because of extrajudicial discussions he had with Larner about Vincent's case. *See, Anderson*. Because of Goldman's contacts with Larner a new hearing at which all jurors who served were examined was required.

This case should be remanded for a hearing at which all the jurors who served are examined.

III.

COUNSEL INEFFECTIVE - WILLIAMS

The motion court clearly erred denying counsel was ineffective for failing to question Juror Williams about his familiarity with Vincent because Vincent was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have questioned Williams about his familiarity with Vincent after Vincent alerted counsel he recognized Williams and counsel would have uncovered Williams went through Vincent's assault case voir dire. Vincent was prejudiced because Williams was biased against Vincent with that bias arising from hearing details during the alleged assaults case's voir dire such that he was unqualified to serve here and Vincent was denied an entire qualified panel of jurors.

Counsel was ineffective for failing to question Williams about his familiarity with Vincent after Vincent informed counsel that he recognized Williams. Williams was biased against Vincent because he learned about details of the assault charges from that case's voir dire.

I. 29.15 Pleadings

Vincent alerted counsel during voir dire that Williams was someone he recognized(29.15L.F.59-67). Counsel was ineffective for failing to probe Juror Williams about his familiarity with Vincent(29.15L.F.59-67). Williams was biased against Vincent because Williams had acquired knowledge about Vincent's assault

case by having been part of its voir dire(29.15L.F.59-67). Further, Vincent was prejudiced because of information Williams shared with other jurors about his assault case voir dire experiences(29.15L.F.59-67).

II. Assault Case Voir Dire

Judge Ross (Supp.T.L.F.20), Prosecutor Bishop (Supp.T.L.F.24-25), and defense counsel Chastain (Supp.T.L.F.70,78-79,89) all informed the venire Vincent was charged with three counts of first degree assault, three counts of armed criminal action, and one count of unlawful use of a weapon (firing into a minivan). The panel learned the alleged victims were Bryant, Burns, and Simpson(Supp.T.L.F.78-79).

III. Counsels' Testimony

A. Thompson

Janet Thompson represented Vincent on direct appeal(29.15Tr.177-78). Vincent alerted Thompson, like he did trial counsel, that Williams was familiar to him(29.15Tr.182-83). Thompson obtained from the Circuit Clerk the venire list from the Bryant/Burns assault and this Addison case and those documents reflected Williams was summoned for both(29.15Tr.183-85). Thompson filed those with this Court as a Supplemental Legal File(29.15Tr.183-85;29.15Ex.29).

In response to Vincent alerting trial counsel about Williams, trial counsel should have investigated who Williams was(29.15Tr.187-88,194). Thompson did the investigation identifying Williams as on Vincent's assault case voir dire(29.15Tr.194). The information Thompson acquired was more readily accessible to trial counsel than it was later to her(29.15Tr.194).

B. Kraft

Kraft was unaware at trial Williams was a venireperson at the assault trial(29.15Tr.510). At trial, Vincent pointed out a juror saying the juror looked familiar to him, but he was uncertain where from(29.15Tr.510-11). Kraft did nothing to follow-up on what Vincent reported(29.15Tr.510-11).

Kraft would have wanted to know Williams was on the assault voir dire to decide whether to strike him peremptorily or for cause(29.15Tr.512). That Williams was African-American would not have been a reason standing alone to keep him on the jury(29.15Tr.617).

C. Turlington

If Turlington had known Williams was on the assault venire, then she would have wanted him off the Addison trial(29.15Tr.685).

IV. 29.15 Findings

Kraft recalled Vincent pointed-out a juror he thought looked familiar, but Vincent did not know from where(29.15L.F.742). Kraft testified had she known about Williams' assault case service, she would have questioned him about it and depending on his answers would have decided whether to keep him(29.15L.F.742)

Counsel was not ineffective because Vincent only provided information Williams looked familiar(29.15L.F.742-43).

Nothing in the record indicated Williams had a bias against Vincent to support a strike for cause or Vincent was prejudiced(29.15L.F.743).

V. Counsel Was Ineffective

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*,366U.S.717,722(1961). Counsel's failure to strike a juror who cannot fairly serve constitutes ineffective assistance. *Presley v. State*,750S.W.2d602,606-09(Mo.App.,S.D.1988). *See also*, *State v. McKee*,826S.W.2d26,27-29(Mo.App.,W.D.1992)(same). When counsel fails to strike such a juror, a movant is not required to show as prejudice that there was a reasonable probability the outcome would have been different. *Id.*603-07. Instead, the circumstance presented is one under *Strickland*, where prejudice is presumed. *Id.*607. *See, also, Johnson v. Armontrout*,961F.2d748,754-56(8thCir.1992)(prejudice presumed when counsel fails to move to strike biased venireperson).

Venirepersons are excludable "when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the court's instructions and their oaths." *State v. Smith*,32S.W.3d532,544(Mo.banc2000)(relying on *Wainwright v. Witt*,469U.S.412,424(1985)). A for cause challenge should be sustained if "it appears that [a] venireperson cannot 'consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions in a first degree murder case.'" *State v. Smith*,32S.W.3d at 544(quoting *State v. Rousan*,961S.W.2d831,839(Mo.banc1998)). A prospective juror's qualifications "are not determined conclusively by a single response, 'but are made on the basis of the entire examination."' *State v. Clayton*,995S.W.2d468,475(Mo.banc1999)(quoting *State v. Kreutzer*,928S.W.2d854,866(Mo.banc1996)).

In *Knese v. State*,85S.W.3d628(Mo.banc2002), this Court found counsel was ineffective for failing to move to strike for cause two jurors. Knese's counsel failed to read jurors Gray's and Maloney's questionnaires. *Id.*632. Counsel testified in the postconviction case that had he read the two jurors' questionnaires then he would have moved to strike them for cause. *Id.*632. The two jurors' questionnaire responses "suggest--although not conclusively establishing--that they would automatically vote to impose death after a murder conviction." *Id.*633.

Knese's counsel's failure to read the two jurors' questionnaires and to question them on their views on the death penalty established counsel had not performed as reasonably competent counsel under *Strickland*. *Knese*,85S.W.3d at 633. Counsel's deficient performance resulted in "a structural error," in jury selection. *Id.*633. This Court went on to find there was a reasonable probability sufficient to undermine confidence in the outcome that Knese was prejudiced. *Id.*633.

Like in *Knese*, counsel failed to conduct reasonable inquiries of Williams as to why he was familiar to Vincent after Vincent put counsel on notice that he recognized Williams. *See, Strickland*. Vincent was prejudiced because counsel Turlington would have wanted Williams off the jury if she had known about his prior service on Bryant/Burns(29.15Tr.685). *See, Strickland*.

Structural errors in the constitution of the trial mechanism "require[e] automatic reversal of the conviction because they infect the entire trial process." *Brecht v. Abrahamson*,507U.S.619,629-30(1993). A trial in which structural error has occurred "cannot reliably serve its function as a vehicle for determination of guilt or

innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminante*,499U.S.279,310(1991). In cases where there is a structural error *Strickland* prejudice is not required. *See*, *e.g.*, *Anderson v. State*,196S.W.3d28,39-42(Mo.banc2006)(failure to strike automatic death penalty and burden shifting juror on punishment denied defendant effective assistance of counsel without showing prejudice because error was structural). The failure to strike Williams was a structural error that requires reversal. *See Brecht*, *Fulminante*, and *Anderson*.

In *State v. Post*,804S.W.2d862,862-63(Mo.App.,E.D.1991), the defendant was granted a new trial because of juror misconduct involving improper influences during a sequestered jury trial. Like *Post*, there were improper influences on the jury here - Williams learned about Vincent's assault case by participating in that case's voir dire.

If this Court believes Vincent failed to prove any portion of the claim pled, then that is because he was denied the opportunity to examine all the jurors who served before a judge who could fairly serve at the juror hearing. *See*, Points I and II incorporated here.

A new trial is required.

IV.

DR. WHITE - CULTURAL MITIGATION

The motion court clearly erred denying counsel was ineffective for failing to call Dr. White to testify to all his P.L. specific opinions he relied on to explain the totality of the 1980s and 1990s P.L. cultural conditions Vincent grew-up in, including relying on the P.L. mitigation video White was part of, and Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented this as penalty cultural mitigating evidence and Vincent was prejudiced as there is a reasonable probability the jury would have voted for life had they heard such evidence.

Counsel was ineffective for failing to call Dr. White or someone with similar expertise to testify about the cultural conditions Vincent experienced growing-up in P.L. and how they impacted Vincent's development. Along with White's testimony, the P.L. video he was a part of should have been presented.

I. 29.15 Pleadings

The pleadings alleged counsel was ineffective for failing to call Dr. White or a similarly qualified expert in penalty phase mitigation to testify about the impact on Vincent of growing up in P.L.'s severely disadvantaged community(29.15L.F.83-87). White's professional background and expertise has been devoted to analyzing and explaining the impact of being raised in communities like P.L. and resultant criminal behavior(29.15L.F.83-87).

II. Respondent's Penalty Phase

At the beginning of penalty, respondent admitted Exhibits 100-104 - Vincent's priors(V.8Tr.460-65). Ex. 100 was the Franklin murder conviction(V.8Tr.464-65). Ex.101 was for the Bryant/Burns shooting(V.8Tr.463-64). Ex.102 was a conviction for second degree tampering and stealing under $150(V.8Tr.462-63). Ex.103 was a conviction for felony possession of a controlled substance, cocaine, and unlawful use of a weapon(V.8Tr.461-62). Ex.104 was a conviction for third degree assault(V.8Tr.460-61).

Attorney Goldstein represented Lorenzo Smith who along with Corey Smith were charged with robbing Todd Franklin(V.8Tr.490,493-94). Goldstein deposed Franklin on November 5, 2001, and Franklin's testimony implicated the Smiths(V.8Tr.490). Both Smiths pled guilty in 2001(V.8Tr.491,494).

Franklin died July 3, 2002 from five gunshots(V.8Tr.500,555-64).

Gary Lucas and two others were roofing and siding the house next to Franklin's house(V.8Tr.466,484). Lucas saw Vincent and another man chasing Franklin and saw both shoot Franklin(V.8Tr.466-69).

Jessica Addison testified Vincent made statements he intended to kill Franklin(V.8Tr.613-15).

Evelyn Carter recounted Vincent was good friends with Corey and Lorenzo Smith in 2001-02(V.8Tr.585). Vincent called Evelyn the day after Franklin was killed(V.8Tr.585-86). Evelyn asked Vincent why people were saying he killed

Franklin(V.8Tr.585-86). Carter testified Vincent said Franklin was a snitch because of how Franklin handled the Smiths' robbing him(V.8Tr.586-88,595).

Officers Akers and Krey testified that when Vincent was arrested at the St. Charles Travel Lodge he had 17 individually packaged crack bags(V.8Tr.572-75,579-81).

Shonte Addison reported that their cousin, Jermaine Burns, and Darryl Bryant were in a van at Jones' house, on April 4, 2002 at 5:30 p.m.(V.8Tr.624-25). Vincent walked in the driveway and threatened Bryant with a gun(V.8Tr.625). Bryant and Vincent each drove off(V.8Tr.626).

Shonte then heard gunshots(V.8Tr.626). Shonte drove in the shots' direction and found Bryant's van's windows shot out(V.8Tr.626). Burns was driving the van and Shonte followed it to Barnes Hospital(V.8Tr.626-27). Shonte testified Bryant had a large bloody wound, and she helped him get into the hospital(V.8Tr.627). Shonte reported to the police that she believed Vincent was responsible for the shooting involving Bryant/Burns and testified against Vincent on those charges(V.8Tr.624-28).

Officer Stone saw a wanted poster for Vincent at the P.L. police department(V.8Tr.533-34). The wanted was for the April 4, 2002 assault on Bryant/Burns(V.8Tr.534). When Leslie was killed, Vincent was wanted for the assault on Bryant/Burns and for killing Franklin(V.8Tr.536).

III. Elaine Hood - Penalty Evidence

Hood testified P.L. was "rough" because she heard "all the shootings"(V.8Tr.649). When Hood heard gunshots she hit the floor(V.8Tr.649). Because of the shootings, Hood moved out of P.L.(V.8Tr.649-50).

On cross-examination, Hood testified she moved out of P.L. because of so many shootings and murders there(V.8Tr.658,660). The prosecutor then asked whether Hood was aware Vincent had done some of those shootings and Hood responded that she did not know anything about Vincent's involvement(V.8Tr.658). Hood testified there are a lot of good people in P.L.(V.8Tr.659).

IV. Closing Arguments

During respondent's initial closing argument, Larner told the jury Vincent shot three people in three incidents during a 13 month period and posed the question: "You think people moved out of the neighborhood?"(V.9Tr.781-82,788-89). Larner said Vincent "owned" P.L. and it was his "domain"(V.9Tr.781-82). Larner told the jury the Franklin and Leslie Addison killings were "retaliation murder[s]"(V.9Tr.794). Larner argued Vincent "terrorized" P.L. so no one in P.L. felt safe in 2002-2003(V.9Tr.796).

Defense counsel argued Vincent grew-up in a violent neighborhood and that was how he learned to live(V.9Tr.804-06). The prevalence of gunshots in P.L. started before anything Vincent was alleged to have done(V.9Tr.805).

In respondent's rebuttal, the jury was told there were lots of children who grew-up in the same neighborhood as Vincent and they did not commit multiple murders(V.9Tr.812).

V. Penalty Verdict

In voting for death, the jury found as aggravators: (1) first degree murder of Franklin; (2) armed criminal action - Franklin's case; (3) assault of Bryant; (4) armed criminal action - Bryant assault; (5) assault of Burns; and (6) armed criminal action - Burns assault(V.9Tr.827-28;T.L.F.704-05).

VI. Dr. White

Dr. White is the Associate Dean for Community Engagement in Partnership at St. Louis University(29.15Tr.457). White's doctorate is in Criminology and Criminal Justice(29.15Tr.458). White came to St. Louis and began teaching in 1997 at UMSL(29.15Tr.457,633). White's teaching duties include a course on race and crime, as well as theory of crime and juvenile justice(29.15Tr.458).

White is a criminologist whose focus is factors that cause young people to become involved in crime(29.15Tr.459). White's work centers on urban at-risk communities and the effects on children(29.15Tr.459-60). He looks at families, peers, and institutions as to how they interact and impact choices(29.15Tr.463-64). Testifying in Vincent's case was the first time White ever was in court(29.15Tr.633).

White looked at what life was like in P.L. and the surrounding communities for Vincent growing-up there in the 1980s and 1990s(29.15Tr.466-67). White interviewed prison inmates George Wells and Thurman Shelton who came from P.L. and nearby(29.15Tr.467-68,492). White's interview of Wells and Shelton gave him a better understanding of the gravity of the pain that African-American males experienced growing-up in P.L.(29.15Tr.626-29). White interviewed Vincent four

times(29.15Tr.468,484). White spoke to P.L. residents Taneisha Kirkman-Clark, Al Jackson, and James Hubbard(29.15Tr.468-69).

White also spoke to Jamala Rogers, who White has known since coming to St. Louis(29.15Tr.469). Rogers worked in the St. Louis Mayor's Office in the 1990's addressing youth services in North St. Louis areas close to P.L.(29.15Tr.469-70,629). Rogers provided information about how gang proliferation, when Vincent was growing-up, made everyday activities like going to school, recreation centers, or the store dangerous endeavors(29.15Tr.629-30).

It was important to White to interview Vincent and others with ties to P.L. during the time Vincent grew-up there so as to not make generalized assumptions about P.L. life(29.15Tr.470). White applied all the information gathered through interviews with people connected to P.L. to formulate his conclusions and opinions as they applied to Vincent and P.L. and to prepare a report(29.15Tr.470-71). That investigation revealed P.L. has war zone like qualities(29.15Tr.487-88).

White explained the conditions existing in poor African-American communities are predictors of crime, violence, and other social problems and place everyone at risk(29.15Tr.473-75). Lack of education, poverty, and teen pregnancy are predictive of high crime rates for young African-American males(29.15Tr.473-74). White noted that it has been known through research for almost 200 years that the social and economic environment Vincent was born into posed a high risk for criminal activity(29.15Ex.32Ap.36).

Vincent was born in 1980 and White reviewed conditions within P.L. for the time period of the later 1980s as well as 1990s(29.15Tr.476-77). In that time frame, especially in African-American communities, there was an exploding crack epidemic fueling gang proliferation and violence(29.15Tr.477). During the 1980s and 1990s, gang organizing centered around members' city blocks and defending those blocks(29.15Tr.490-91). Attending P.L. schools was dangerous because of gang presence(29.15Tr.493).

White's review included examining census demographic data beginning in 1990(29.15Tr.478-82). P.L. is a hyper-segregated impoverished predominantly African-American community(29.15Tr.478-82). In 1990, P.L. was 93% African-American(29.15Tr.479). Hyper-segregation is true of surrounding communities like Beverly Hills, Northwoods, Velda City, and Hillsdale(29.15Tr.478-80). P.L. and these North County communities were characterized by high unemployment, single-parent households, and illiteracy(29.15Tr.478-82,492-93). P.L. had a high crime rate(29.15Tr.482-83).

White found that men in Vincent's age group from P.L. and nearby were disproportionally dead or in prison(29.15Tr.494). White took into account Dr. Draper's work used in Vincent's earlier trials and it was consistent with his findings(29.15Tr.483-84).

White participated in and was present for a video created about P.L. life(29.15Tr.468,497). In formulating his opinions, White relied on that video's content(29.15Tr.497-501). When the video was offered, respondent objected on

hearsay and opinion grounds and the objection was sustained with the video taken as an offer of proof(29.15Tr.499-502).

White found it is not guaranteed that someone growing-up in P.L. will commit the type of crimes Vincent is alleged to have committed, but rather they are at greater risk for committing such offenses because of having been raised in that environment(29.15Tr.630-32,669).

VII. Pine Lawn Video Interviews

Dr. White interviewed on video Jamala Rogers at the Rowan Community Center where she worked(29.15Ex.37 at 0:01-0:22). Rogers described how in the 1980s and 1990s people living in P.L., who had any financial means, moved out and those who did not were "penalized and sentenced to a life in Pine Lawn"(29.15Ex.37 at 0:01-0:22). Rogers described seeing children clothed in only Pampers out in the streets at night as symptomatic of P.L.'s depth of conditions(29.15Ex.37 at 10:42-11:30). Rogers described how when drugs arrived in the 1980s communities like P.L. and North St. Louis were decimated(29.15Ex.37 at 15:49-17:23).

Rogers explained that why some individuals get caught up in P.L. criminal activity while others do not, depends on their support system(29.15Ex.37 at 18:49-19:54). There will always be success stories from hostile environments like those who grew-up in the projects in the 1950s and 1960s and became elected officials and CEOs(29.15Ex.37 at 18:49-19:54). For those families that need more support and are vulnerable and do not get it, they are "left in the cold"(29.15Ex.37 at 18:49-19:54).

Rogers described how in the 1980s many moms were teen moms who raised their children like siblings, which is fraught with dysfunction and devoid of respect(29.15Ex.37 at 20:18-21:27). Situations of a 35-36 year old grandma, herself a single mom, who also has a teen mom daughter presents overwhelming struggles(29.15Ex.37 at 20:18-21:27).

Lisa Hubbard described that by the time she moved out of P.L. 20 people she knew from there were killed(29.15Ex.37 at 1:41-1:54). In the 1990s, P.L. was riddled with crime connected to the drug explosion(29.15Ex.37 at 9:21-10:08). Lisa would be jumping rope and when she heard shooting would not stop because shooting was the norm(29.15Ex.37 at 9:21-10:09). P.L. is like a ghost-town hit by a tsunami(29.15Ex.37 at 25:28-26:06).

Taneisha Kirkman-Clark described growing up in P.L. in the 1990s as rough because the young males saw drugs as a means to make money which created territoriality for block control(29.15Ex.37 at 4:41-6:11;18:15-18:43). P.L. police were brutal and no one called them for help(29.15Ex.37 at 14:22-15:48). P.L. officers were officers kicked-off other forces(29.15Ex.37 at 14:22-15:48). People who grew-up in P.L. have moved away to give their children hope for a better life(29.15Ex.37 at 22:25-23:02).

Kelly Crowder described how in the 1980s there was a prevalence of youths from single parent households selling drugs (crack), doing shootings, and fighting to make money(29.15Ex.37 at 6:12-6:29;7:20-7:38;8:23-8:50).

Clara Wings, an elderly P.L. resident, recounted how crack and PCP were everywhere(29.15Ex.37 at 7:38-8:22). None of the male youths were getting an education and schools were unsafe because of drugs, fighting, and gangs(29.15Ex.37 at 11:31-12:05). Clara sadly commented that with a few exceptions the P.L. young men of Vincent's generation are in jail(29.15Ex.37 at 26:08-26:20).

James Hubbard described how drugs in P.L. changed the character of the community whether a person was involved in them or not(29.15Ex.37 at 10:10-10:42).

VIII. Counsels' Testimony

A. Kraft

Kraft testified the mitigation theory was to deal with issues of neglect, abuse, growing up in a "rough neighborhood," and that Vincent had family who cared about him(29.15Tr.524). That theory was to encompass Vincent grew up in neighborhoods characterized by drugs, violence, and poverty, which she believed was somewhat addressed by Dr. Draper(29.15Tr.526). No consideration was given to hiring an expert to testify about the effects on children of growing-up in P.L.'s drugs, violence, and poverty(29.15Tr.527). That type evidence was presented through Elaine Hood(29.15Tr.527). It would have been consistent with their penalty phase mitigation to present expert testimony about the impact of growing-up in at-risk neighborhoods(29.15Tr.528). Local community leaders were not contacted about socioeconomic issues facing P.L. when Vincent was growing-up(29.15Tr.530).

Counsel opposed evidence of gang and drug activity in guilt and penalty and thought it aggravating(29.15Tr.592-93,599,604). They were successful in keeping out Vincent's gang tattoos and why they did not present gang evidence(29.15Tr.601-02,614). They considered using "a gang expert," but decided against it to keep out gang evidence(29.15Tr.600).

On cross, Kraft testified she was not aware of sociologists being called to testify about neighborhoods anytime during her capital case work(29.15Tr.598). The prosecutor stated as fact the ABA Guidelines did not mention until "well after 2008" anything like that and Kraft agreed(29.15Tr.598). Kraft agreed with respondent some of White's testimony would be objectionable as to relevance and hearsay(29.15Tr.599).

Kraft testified calling an expert witness who testified about gang culture could potentially result in evidence Vincent was a suspect in the 2000 Cara Davenport killing and charged with a 2001 dismissed shooting(29.15Tr.609-10).

B. Turlington

Turlington testified the mitigation theory was Vincent grew-up in poverty having a chaotic childhood without consistent parenting or role models(29.15Tr.698-99). That theory included Vincent grew-up in neighborhoods characterized by drugs, violence, and poverty and which was left to Draper(29.15Tr.700-01).

No consideration was given to retaining an expert to gather information about P.L. and how the risks inherent in its environment impact a child raised there(29.15Tr.701-03). They decided family members, Draper, and Gelbort covered

that subject, but Draper and Gelbort did not testify(29.15Tr.703,755-56). They considered hiring a gang expert, but thought that evidence would be more harmful than helpful(29.15Tr.702-03,751-52). Turlington had no reason for not contacting local community leaders about the socioeconomic issues facing P.L. and North County when Vincent was growing-up(29.15Tr.703-04).

Turlington was not aware of anyone having called a sociologist witness around 2008(29.15Tr.749). Turlington testified that some things that were available at the time of her testimony were not available in 2008 as it pertained to White's investigation(29.15Tr.751).

Their strategy was to keep gang information out at trial, including photos of Vincent's gang tattoos, because they thought a jury would consider it aggravating(29.15Tr.752-53,759). Gang evidence could have potentially opened up on cross-examination of White details of the Franklin case, that Vincent was a suspect in the Cara Davenport homicide, and had charges dismissed for shooting Alexander Robbins in P.L. in 2004(29.15Tr.753-54).

Larner who tried this case had the theme that Vincent was the "king of Pine Lawn," and therefore, felt he could shoot anyone and was above the law and calling a "gang expert" would have confirmed Vincent was the "king of Pine Lawn"(29.15Tr.754-55,759).

IX. 29.15 Findings

Dr. White's testimony does not satisfy *Frye v. United States*,293F.1013(D.C.Cir.1923) and was based on hearsay and

speculation(29.15L.F.755,758). Further, White's testimony was unpersuasive because of his lack of knowledge of the shootings of Leslie and Franklin(29.15L.F.755). White was unable to provide an opinion that was specific to the impact of growing-up in P.L. and the killings of Leslie and Franklin(29.15L.F.756,759).

Counsel testified their mitigation strategy was to emphasize issues of neglect, abuse, the neighborhood in which Vincent was raised, and that he had family who cared about him(29.15L.F.756). Counsel sought to avoid witnesses who might discuss Vincent's other crimes, bad acts, and gang affiliation(29.15L.F.756-57). Counsels' strategy was reasonable and Vincent was not prejudiced(29.15L.F.756-59).

White and counsel testified that much of the information and research about at risk communities was not available in 2008 when this case was tried(29.15L.F.756-57). Counsel testified that they were unaware of any capital defenses using a sociologist in 2008 and such defenses have only been used in more recent times(29.15L.F.757).

Counsel conducted a thorough investigation of Vincent's childhood, family, development, criminal background, and environment through his family and Dr. Draper(29.15L.F.757).

Cross-examination of White could have brought out gang evidence, tattoos, acts of intimidation, drug dealing, and violence(29.15L.F.757-59).

X. Counsel Was Ineffective

The first day of individual voir dire was March 31, 2008(V.1Tr.at cover).

The 1989 ABA Guidelines For Representation in Death Penalty Cases in Guideline 11.8.3 F (emphasis added) provided:

> In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:
>
> 2. **Expert witnesses** to provide medical, psychological, **sociological** or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;

See, americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/1989guidelines.authcheckdam.pdf. [2]

In 2003, The Hofstra Law Review published the A.B.A.'s Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases. *See* 31 Hofstra Law Review 913. Guideline 10.11 (F) (2) directs that in deciding on which witnesses and evidence to present in penalty the areas counsel should consider include expert and lay witnesses with supporting documentation "to provide medical, psychological, **sociological, cultural or other insights** into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)…." 31 Hofstra Law Review at 1055(emphasis added).

[2] Web introductory letters are removed throughout to prevent hyperlinking.

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*,539U.S.510,524-25(2003); *Williams v. Taylor*,529U.S.362,395-96(2000); *Hutchison v. State*,150S.W.3d292,302(Mo.banc2004). That mitigating 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**."' *Hutchison*,150S.W.3d at 302(quoting *Wiggins*,539U.S. at 524)(italics in *Wiggins*)(bold and underlining added). "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*,542U.S.274,285(2004)(quoted in *Hutchison*,150S.W.3d at 304) and *Glass v. State*,227S.W.3d463,468(Mo.banc2007). Relevant mitigating evidence "is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard*,542U.S. at 284. Evidence of a turbulent childhood is relevant mitigating evidence. *Eddings v. Oklahoma*,455U.S.104,115(1982).

In the **1997** *State v. Dixon*,1997W.L.113756 *34-35 (Ohio Ct.App.8th Dist. Mar. 13, 1997) case, the defendant's death sentence was reversed because the trial court excluded cultural mitigation evidence from two experts, See and Roth. See would have testified about assorted factors in the contemporary urban environment that contribute to and impact the lifestyle, life course, and life direction of African-American children raised in that setting. *Id*. at *34-35. See's testimony would have highlighted the community crime rate, the drug culture, and family background. *Id*. at

*34-35. Roth would have testified about familial problems common in an urban environment similar to the one where Dixon was raised. *Id*. at *34-35. The *Dixon* Court found it was error to have excluded this cultural mitigation evidence because such evidence was admissible under, *Lockett v. Ohio*,438U.S.586(1978) and *Eddings v. Oklahoma*,455U.S.104(1982), and there was a reasonable possibility the jury's decision could have been affected.

In *U.S. v. Wilson*,493F.Supp.2d491,507(E.D.N.Y.2007), the government moved to preclude in the penalty phase of a capital trial testimony from expert Professor Payne about hip hop culture and the significance of handwritten lyrics found in Wilson's pocket when he was arrested. The *Wilson* Court ruled that such evidence was proper mitigating evidence. *Wilson*,493F.Supp.2d at 507.

The prosecutor's representations, counsels' agreement with them, and the findings adopting them that Dr. White's work and video was novel is contrary to the 1989 and 2003 ABA Guidelines, and this Court's 2004 *Hutchison* decision. Moreover, the 1997 *Dixon* case demonstrates that reasonable 1990s counsel were doing exactly what was done through Dr. White in this 29.15 and such evidence is relevant.

Because White's evidence explained the P.L. environment Vincent was raised in with its associated risks, there was no requirement that White link his findings to knowledge of the facts as to Leslie's and Franklin's deaths. *See, Lockett v. Ohio*,438U.S.586(1978) and *Eddings v. Oklahoma*,455U.S.104(1982). Contrary to the findings (29.15L.F.756-57) White did not testify that his information and research

were unavailable in 2008. Instead, White testified that his findings were based on matters known for 200 years (29.15Ex.32Ap.36) and after conducting case specific factual investigation of P.L. life in the 1980s and 1990s (29.15Tr.466-71,478-84,492,494,497-501,626-29), which included video Ex.37.

Reasonable counsel would have considered and pursued investigating and presenting P.L. cultural sociological evidence through someone like White. *See* 1989 and 2003 ABA Guidelines, *Dixon* (1997), Hutchison (2004), and *Wilson* (2007). Further, reasonable counsel would have pursued such evidence because for 200 years it has been established that the social and economic environment Vincent was born into posed a high risk for involvement in criminal activity(29.15Ex.32Ap.36).

Vincent was prejudiced because there is a reasonable probability that had the jury heard the comprehensive picture - poverty, teenage pregnancy, single parent households without positive male role models, police brutality, fighting, crimes of all kinds, easy access to guns, shootings, and drug dealing that he would not have been death sentenced. *See*, *Strickland*. Elaine Hood presented one narrow piece of the story, frequent shooting, but without any explanation about how that would have impacted Vincent.

Failing to interview witnesses relates to preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8th Cir.1991). Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*.1304. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). White was not a "gang" expert, but

instead someone with the perspective of an investigative criminologist/sociologist who could explain the multi-faceted conditions at play which placed Vincent at risk for criminal activity. *See*, ABA Guidelines 1989 and 2003. While counsel could make the decision not to call a gang expert, once that decision was made counsel was obligated to consider cultural sociological evidence of the kind Dr. White provided. White's work was based on investigating conditions as they existed in the 1980s and 1990s talking to people connected to P.L. during that period and reviewing data for that time frame. Failing to call someone like White was unreasonable in light of counsels' decision not to call Draper and Gelbort(29.15Tr.541). *See* Points VII and VIII.

Failing to call Dr. White to avoid respondent presenting gang/drug related evidence was unreasonable because the jury in fact heard that evidence and argument from respondent. Respondent's evidence considered in combination with its argument injected for the jury the idea Vincent was gang/drug connected. In reviewing how evidence and argument were received by the jury, the focus is how a "reasonable juror" interpreted them. *State v. Brightman*,388S.W.3d192,201-02(Mo.App.,W.D.2012).

Respondent's evidence included that Vincent and another individual shot Franklin because Franklin caused Vincent's friends Lorenzo and Corey Smith to go to prison for robbing Franklin(V.8Tr.466-69,484,490-91,493-94,500,555-64,585-88,595,613-15). The jury heard Officers Akers and Krey testify Vincent was arrested with 17 individually packaged crack bags(V.8Tr.572-75,579-81). The jury heard

Vincent was "wanted" for the Bryant/Burns shooting(V.8Tr.533-34,536). The jury heard Shonte testify that Vincent first threatened Bryant with a gun (V.8Tr.625) and then shot at the Bryant/Burns minivan(V.8Tr.624-28). The jury heard Shonte testified against Vincent on the Bryant/Burns matter(V.8Tr.624-28). The jury heard, in guilt, that Vincent had ordered the Addisons out of Pine Lawn because one of them had told on him for something he had done(V.6Tr.64).

Larner argued Vincent shot three people in three incidents during 13 months and asked: "You think people moved out of the neighborhood?"(V.9Tr.781-82,788-89). Larner said Vincent "owned" P.L. and it was his "domain"(V.9Tr.781-82). Larner told the jury the Franklin and Leslie killings were "retaliation murder[s]"(V.9Tr.794). Larner argued Vincent "terrorized" P.L. so no one in P.L. felt safe in 2002-2003(V.9Tr.796).

It was unreasonable to fail to present the type of cultural mitigation available from Dr. White to avoid gang/drug evidence because this retrial jury heard evidence and argument when taken together clearly put the jury on notice Vincent had such involvement. *See*, *Strickland* and *Brightman*. Counsels' unreasonableness in trying to avoid gang/drug evidence is underscored because in the first Addison trial that jury heard evidence and argument of the same matters that put this retrial jury on notice of Vincent having such involvement. In the first Addison penalty trial the jury heard: (1) respondent's opening - Franklin homicide, Bryant/Burns assault, hotel arrest with multiple crack baggies(1stAddisonTr.1268-70); (2) respondent's evidence - Bryant/Burns assault details and Franklin homicide(1stAddisonTr.1284-

89,1296,1302,1309,1314); (3) respondent's evidence - hotel arrest multiple crack baggies(1stAddisonTr.1318-23); and (4) respondent's closing argument - Bryant/Burns assault and Franklin homicide(1stAddisonTr.1545-47,1564) and Vincent is "the king of Pine Lawn"(1stAddisonTr.1567). The first jury heard matters that apprised it of gang/drug association, and therefore, counsel was on notice the retrial jury would hear the same.

Foregoing presenting evidence because it contains something harmful is unreasonable when its harm is outweighed by its helpful value. *Hutchison*,150S.W.3d at 305. *See Williams v. Taylor*,529U.S. at 395-96(counsel ineffective in failing to present evidence of severe abuse and defendant's limited mental capabilities where not all the evidence was favorable to defendant). Even assuming gang/drug evidence could have gotten before the jury by calling White it was unreasonable to fail to call White because White would have been able to explain how the confluence of factors in P.L. placed Vincent at risk for engaging in criminal acts, including gang/drug association.

Under *Frye v. United States*,293F.1013(D.C.Cir.1923), a party seeking to introduce a specific scientific test or process is required to show that evidence has gained general acceptance in the particular field in which it belongs. *State v. Hoy*,219S.W.3d796,808-09(Mo.App.,S.D.2007). Expert testimony is admissible if it aids the jury in understanding the issues it has to decide. *State v. Taylor*,663S.W.2d235,239(Mo.banc1984). The case specific detailed investigation

White conducted satisfies *Frye* and aids the jury in understanding Vincent's background. *See*, *Dixon* and *Wilson*.

In *State v. Pickens*,332S.W.3d303,325(Mo.App.,E.D.2011), the defendant urged respondent should not have been allowed to present evidence through its forensic psychologist that a particular diagnosis was inadmissible under *Frye* because that diagnosis had not gained general acceptance in its field. In rejecting that defense claim, the Court of Appeals looked to respondent's arguments that other jurisdictions had recognized the disorder as generally accepted. *Pickens*,332S.W.3d at 325. The same is true here as the ABA Guidelines, *Dixon, Wilson, and Hutchison, supra,* reflect general acceptance of what counsels' duties were here as to cultural mitigation.

It is recognized "that an expert acquires his knowledge and expertise from a number of sources, some of which may include inadmissible hearsay, an expert can rely on hearsay information in forming an opinion." *In re Whitnell v. State*,129S.W.3d409,416(Mo.App.,E.D.2004). The expert can rely on such information as background for his opinion. *Whitnell*,129S.W.3d at 416. White's reliance on the P.L. 1980s and 1990s time specific interviews, including the video interviews, and his independent research is a proper basis for his opinions. *See*, *Whitnell*.

In *State v. Gray*,887S.W.2d369,389(Mo.banc1994), this Court ruled it was proper victim impact capital case evidence for respondent to present a family Christmas video of the victims and their family(29.15Tr.500-01). The same considerations apply for the video Dr. White relied on in formulating his opinions.

In *State v. Herring*,28N.E.3d1217,1220,1222(Ohio2014), the defendant committed acts that occurred in 1996 which resulted in him being death sentenced for three counts of aggravated murder. Defense counsel's strategy was to present "positive evidence" about Herring and his family. *Id.*1225-27,1231,1234. Counsel's strategy of only presenting positive mitigation was pursued because evidence that Herring had been involved in a life of crime would have given the jury "more ammunition" to vote for death. *Id.*1227-28. The *Herring* Court found counsels' investigation was incomplete, and therefore unreasonable, because they failed to present details of Herring's dysfunctional childhood, gang involvement, and his family's history of substance abuse. *Id.*1233-34,1239,1241,1243-44. Failing to present such mitigating evidence was prejudicial. *Id.*1244. Counsel did the same here limiting the mitigation they presented to "positive evidence" through the witnesses they called. *See*, *Herring*.

The door to other evidence is opened when a party '"introduces part of an act, occurrence, or transaction, [such that] the opposing party is entitled to introduce or to inquire into other parts of the whole thereof, in order to explain or rebut adverse inferences which might arise..., or prove his version with reference thereto."' *State v. Watson*,391S.W.3d18,23(Mo.App.,E.D.2012)(quoting *State v. Odom*,353S.W.2d708,711(Mo.banc1962)). White would not have injected parts of other offenses Vincent was a suspect in, but not prosecuted for, and therefore, calling White would not have opened the door to other offense evidence. *See*, *Watson* and *Odom*.

Counsels' failure to investigate and call White to present all sociological cultural mitigation evidence was unreasonable. *See*, ABA Guidelines, *McCarter Strickland, Hutchison, Dixon,* and *Wilson*. Vincent was prejudiced as there is a reasonable probability he would have been sentenced to life. *See*, *Strickland*. Moreover, both individually and collectively the cultural mitigation available through both White and lay witnesses (Point V) would have resulted in life.

A new penalty phase is required.

V.

LAY WITNESS CULTURAL MITIGATION

The motion court clearly erred denying counsel was ineffective for failing to call penalty mitigation lay witnesses Lisa Thomas, Tanesia Kirkman-Clark, Elwynn Walls, Sean Nichols, and Willabea Blackburn because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have called them as cultural mitigation witnesses to testify about the all-encompassing, adverse, hostile disadvantaged social conditions of growing-up in P.L. and neighboring North St. Louis County communities and Vincent was prejudiced as there is a reasonable probability the jury otherwise would have voted for life.

Counsel was ineffective for failing to call lay cultural mitigation witnesses to testify about the adverse social conditions of growing-up in P.L. and nearby North St. Louis County(29.15L.F.130-34). Vincent otherwise would have been sentenced to life.

Because of the interrelationship between this Point and Point IV, respondent's penalty evidence, Elaine Hood evidence, closing arguments, and penalty verdicts are incorporated by reference to avoid wholesale duplication.

I. Lay Witnesses

A. Lisa Thomas

Lisa Thomas, Vincent's first cousin, was born in 1981 and was one year younger than Vincent(29.15Tr.139-40). Growing-up Lisa lived close-by P.L. and frequently visited her P.L. grandparents, who are also Vincent's grandparents(29.15Tr.140,151). Lisa and Vincent spent much time together(29.15Tr.141-42).

Lisa and Vincent had male friends growing-up who were shot and killed(29.15Tr.142-44). Vincent's role model friends were older youths(29.15Tr.144,147).

During the mid-1980s through 1990s, P.L. had high crime, shootings, fighting, easy access to guns, drug dealing, and gang activity(29.15Tr.145-46). The gang presence was territorially based such as Hillsdale, Pagedale, and separate P.L. blocks(29.15Tr.146). Thomas knew Vincent was involved in selling drugs, fighting, and gang affiliation(29.15Tr.153-54).

Normandy High School was plagued with fighting between Pagedale and P.L. students(29.15Tr.147-48). The relationship between P.L. residents and the police was adversarial(29.15Tr.148).

B. Kirkman-Clark

Taneisha Kirkman-Clark was born September, 1978(29.15Tr.155). Kirkman-Clark lived most of her life in P.L. and grew-up friends with Vincent(29.15Tr.155-58). P.L. was geographically small, surrounded by Hillsdale, Velda Village, and Beverly Hills(29.15Tr.156). P.L. was like "the bad part" of St. Louis City(29.15Tr.157).

During the mid 1980s and 1990s, drugs and gangs in P.L. transformed it from "beautiful" to"[g]hetto"(29.15Tr.158). There was much stealing, robbery, and killing in P.L.(29.15Tr.159-60). The shooting deaths fostered "hopelessness"(29.15Tr.164).

Positive male role models were absent with many men being crack and alcohol abusers(29.15Tr.160-61). To survive in that environment male youths assumed a tough guy image(29.15Tr.165).

It was common for sixth grade girls to be pregnant(29.15Tr.164). A feeling of poverty was evoked from boarded-up houses(29.15Tr.164-65).

Normandy High School had daily fights and the conflict centered around rivalries between Northwoods, Velda Village, Pagedale, and P.L.(29.15Tr.161-62).

P.L. Police was known for brutality and employing officers discharged from other forces as racists(29.15Tr.159-60). P.L. Police had a reputation for planting drugs on arrestees and stealing from them(29.15Tr.162-63). When people saw the police, the immediate response was to run, even though they had done nothing(29.15Tr.163). The police harassed Kirkman-Clark because she drove a 1981 Cutlass, which was considered "a gang car"(29.15Tr.162). When the police realized a woman was driving, they left her alone(29.15Tr.162).

On cross, Kirkman-Clark indicated she has a brother who, like her, grew-up in P.L., and went to college, and has not committed offenses(29.15Tr.168-69). Gangs were a problem in P.L. and Vincent was a gang member and involved in drug dealing(29.15Tr.170-71).

C. Elwynn Walls

Elwynn Walls presently lives in P.L. and owns a barber shop there(29.15Tr.195). During the 1980s and 1990s Walls was living around and frequenting P.L.(29.15Tr.196-97). In the 1980s and 1990s poverty, crime, drugs, and gang activity accelerated in and around P.L.(29.15Tr.197-98,200-02). Gang activity and drug sales were prevalent in the mid-1980s and 1990s and area youth were drawn in(29.15Tr.197-98,200).

Walls graduated from Normandy H.S. in 1973 and there were 24 stable district communities(29.15Tr.196,200-01). In the 1980s and 1990s, Normandy H.S. became known for violence(29.15Tr.201).

P.L. Police was a revenue generator and did "[s]hakedowns"(29.15Tr.199-200). Walls was active in a citizens coalition investigating P.L. government misconduct(29.15Tr.198-200,203). When Walls testified, he was a member of the P.L. City Council(29.15Tr.205).

On cross, Walls acknowledged that there are a lot of good people in P.L. who are crime victims(29.15Tr.206).

D. Sean Nichols

Sean Nichols is a St. Louis City Public Schools principal and has taught there since the 1990s(29.15Tr.352-53). All his students come from at-risk North St. Louis communities(29.15Tr.354-55). Nichols was familiar with the Normandy School District in the 1980s and 1990s and its problems(29.15Tr.359-60).

For African-American male youths, North St. Louis-like communities present significant hurdles making them "a prisoner in [their] own community"(29.15Tr.356).

Gang membership is forced on these youths and erects educational hurdles(29.15Tr.356-58).

In the majority of these male youths' households, the father is absent(29.15Tr.358). Males who do not have male father figures in their lives are more prone to join gangs(29.15Tr.360,362). The absence of strong male father figures exacerbates poverty found in communities like P.L.(29.15Tr.362-63). Because of the absence of a father, young males have to try to acquire money for food, clothing, and other necessities(29.15Tr.358). Nichols grew-up the product of the rural, impoverished South, but had a strong family/father background, which is a different environment than North St. Louis(29.15Tr.362-63).

On cross, respondent elicited that while all male youths in North St. Louis are at risk, there are success stories and Nichols himself is an example of such success coming from poverty(29.15Tr.366-67). Nichols indicated that his brother, who unlike himself was not raised in the South, but instead St. Louis, was a gang violence victim(29.15Tr.367).

E. Willabea Blackburn

Willabea Blackburn has, since 1970, lived in Velda Village, adjacent to P.L.(29.15Tr.386-87). The police in P.L. and Velda Village target African-Americans for mistreatment(29.15Tr.388). Starting in the 1980s, gang presence became a P.L. problem(29.15Tr.389).

Blackburn's children and grandson attended Normandy H.S. which was known as especially violent(29.15Tr.390-91). Blackburn's grandson was killed in P.L.(29.15Tr.388-89). Vincent and Blackburn's grandson were friends(29.15Tr.392).

II. Counsels' Testimony

A. Kraft

Kraft testified the mitigation theory was to deal with issues of neglect, abuse, growing up in a "rough neighborhood," and Vincent had family who cared about him(29.15Tr.524). That theory was to encompass Vincent grew-up in neighborhoods characterized by drugs, violence, and poverty which Kraft believed was somewhat addressed by Dr. Draper(29.15Tr.526). Counsel chose to present that type evidence through Elaine Hood(29.15Tr.527). Counsel did not contact local community leaders about the socioeconomic issues facing P.L. when Vincent was growing-up(29.15Tr.530).

Kraft testified that they had opposed evidence of Vincent's gang affiliation, including his gang tattoos, in guilt and penalty and thought it would be aggravating(29.15Tr.592-93,599,601-02,604,614). Elaine Hood's testimony about hitting the ground when she heard gunfire was done to present the "tough neighborhood" perspective(29.15Tr.603).

B. Turlington

Turlington testified the mitigation theory was Vincent grew-up in poverty having a very chaotic childhood without consistent parenting or role models(29.15Tr.698-99). Also, that theory included Vincent grew-up in

neighborhoods characterized by drugs, violence, and poverty(29.15Tr.700-01). Counsel decided family and Draper covered that type information (29.15Tr.701,703,759). Turlington had no reason for failing to contact local community leaders about socioeconomic issues facing P.L. and North County when Vincent was growing-up(29.15Tr.703-04).

Their strategy was to keep as much gang information out of the trial, including photos of Vincent's gang tattoos, because they thought a jury would consider gang evidence aggravating(29.15Tr.752-53,759).

The prosecutor who tried this case had the theme Vincent was the "king of Pine Lawn," and therefore, felt he could shoot anyone and was above the law(29.15Tr.754-55,759).

III. 29.15 Findings

Counsels' penalty phase was gauged towards showing Vincent grew-up in a difficult neighborhood(29.15L.F.767). To support that effort counsel spoke to Vincent's family and friends and hired Draper(29.15L.F.767). Counsel presented evidence of a rough neighborhood through Hood(29.15L.F.767-68,772-73).

Counsel's strategy in guilt and penalty was to keep out gang evidence(29.15L.F.768,771-72). Presenting gang evidence supported respondent's case that Vincent regarded himself as the King of Pine Lawn and would shoot anyone who got in his way(29.15L.F.768,771).

If a witness was called about gang membership, they could have been cross-examined about other offenses Vincent had committed, but was not convicted of, including the 2000 Cara Davenport murder and a 2001 shooting(29.15L.F.769,771).

Nichols' and Walls' testimony was speculative as to whether Vincent had similar experiences(29.15L.F.771). Clark-Kirkman, Thomas, and Blackburn would have been cumulative and constituted hearsay, opinion, and speculation(29.15L.F.771-72).

IV. Counsel Was Ineffective

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v.Smith*,539 U.S.510,524-25(2003); *Williams v. Taylor*,529U.S.362,395-96(2000); *Hutchison v. State*,150S.W.3d292,302(Mo.banc2004). That mitigating 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**."' *Hutchison*,150S.W.3d at 302(quoting *Wiggins*,539U.S. at 524)(italics in *Wiggins*)(underling and bolding added). "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*,542U.S.274,285(2004)(quoted in *Hutchison*,150S.W.3d at 304 and *Glass v. State*,227S.W.3d463,468(Mo.banc2007)). Relevant mitigating evidence "is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have

mitigating value." *Tennard*,542U.S. at 284. Evidence of a turbulent childhood is relevant mitigating evidence. *Eddings v. Oklahoma*,455U.S.104,115(1982).

Foregoing presenting evidence because it contains something harmful is unreasonable when its harm is outweighed by its helpful value. *Hutchison*,150 S.W.3d at 305. *See Williams v. Taylor*,529U.S. at 395-96(counsel ineffective in failing to present evidence of severe abuse and defendant's limited mental capabilities where not all the evidence was favorable to defendant).

The lay witnesses would not have been called to testify about gangs. Instead, they could have presented a comprehensive picture of the deprivation that characterized everyday life in P.L. - poverty, teenage pregnancy, single parent households without positive male role models, police brutality, racist police targeting, fighting, crimes of all kinds, easy access to guns, shootings, drug dealing, and exploitive government corruption. What these witnesses had to say about gang involvement was merely an aside to all the weighty problems youthful African-American males encountered growing-up in P.L.

The only thing the jury heard from Hood was shootings were a common occurrence and they caused her to move away. The jury did not hear about so many other factors evidencing deprivation P.L. African-American male youths confronted daily.

Failing to interview witnesses relates to preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8th Cir.1991). Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy.

Id.1304. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). Counsel failed to conduct reasonable investigation to locate lay witnesses who could have presented a comprehensive picture of what life was like growing-up in P.L. Hood only addressed one aspect of P.L. life - it was plagued by shootings. Relying on Draper was unreasonable because counsel had made the decision not to call Draper because she had testified badly at the third trial(29.15Tr.541). *See*, *McCarter*.

Presenting these lay witnesses would not have opened the door to other offenses for which Vincent had been a suspect, but not prosecuted for. The door to other evidence is opened when a party '"introduces part of an act, occurrence, or transaction, [such that] the opposing party is entitled to introduce or to inquire into other parts of the whole thereof, in order to explain or rebut adverse inferences which might arise..., or prove his version with reference thereto."' *State v. Watson*,391S.W.3d18,23(Mo.App.,E.D.2012)(quoting *State v. Odom*,353S.W.2d708,711(Mo.banc1962)). The lay witnesses would not have injected parts of other offenses Vincent was a suspect in, but not prosecuted for, and therefore, calling the lay witnesses would not have opened the door to other offense evidence. *See*, *Watson* and *Odom*.

Moreover, counsels' motion opposing gang evidence focused narrowly on excluding evidence of gang symbols and slang as bad character evidence(T.L.F.250-52). The lay witnesses' testifying about the adversity African-American males generally face in the total environment that is P.L., including gang culture, would not

have opened the door to respondent presenting evidence generally about Vincent's gang affiliation because the lay witnesses would not have been injecting part of an act, occurrence, or transaction. *See*, *Watson* and *Odom*.

The lay witnesses' testimony was not cumulative because Hood only testified about shootings and not the many other aspects of life in P.L. "Evidence of a different kind or of different circumstances tending to establish or disprove the same fact is not cumulative...." *State v. Green*,603S.W.2d50,51(Mo.App.,E.D.1980). The lay witnesses testified about many different aspects reflecting P.L. deprivation, more than just shootings, such that they were not cumulative to Hood. *See*, *Green*.

The lay witnesses' experiences were admissible because they explained the type of childhood experience Vincent had growing-up in P.L. *See Hutchison*, *Tennard*, and *Eddings*. A lay witness is permitted to state natural inferences from observed conditions or occurrences or the impression made on his mind by a number of connected facts whose details cannot reasonably be placed before the jury. *Shockley v. State*,147S.W.3d189,194(Mo.App.,S.D.2004). The lay witnesses' testimony was based upon their observations and knowledge of conditions in P.L., and surrounding communities, and therefore, was not excludable as hearsay, opinion, and speculation. *See*, *Shockley*.

Failing to present lay witness testimony to avoid introduction of gang evidence was unreasonable because respondent's penalty evidence and argument put the jurors on notice that Vincent had gang affiliation. *See*, *McCarter* and Point IV incorporated here. Moreover, these lay witnesses alone, as well as in conjunction with Dr. White,

(Point IV) would have provided valuable background explanations for why gang membership was forced on P.L. youths(29.15Tr.357-58).

Nichols would have provided valuable perspective on how he was able to become a successful professional school principal while his brother was the victim of gang violence(29.15Tr.362-63,367). Nichols' perspective would have countered respondent's rebuttal argument that there were lots of children who grew-up in Vincent's neighborhood, but did not commit murders(V.9Tr.812).

Foregoing presenting all the evidence these lay witnesses had to offer about African-American males growing-up in P.L. because harmful gang evidence might have come in was unreasonable because the helpful value of the P.L. evidence outweighed the harm of gang evidence. *Hutchison.*

Reasonable counsel would have called these witnesses to testify about what life was like for African-American male youths growing-up in P.L. *See*, *Strickland*, *Wiggins*, *Williams v. Taylor*, and *Hutchison*. Vincent was prejudiced because had the jury heard these lay witnesses alone, or in conjunction with Dr. White, then Vincent would have been life sentenced. *See*, *Strickland*, *Wiggins*, *Williams v. Taylor*, and *Hutchison.*

This Court should order a new penalty phase.

VI.

UNPROVEN PRIORS' ALLEGATIONS

The motion court clearly erred denying counsel was ineffective for failing to object to portions of Exhibits 103 (29.15Ex.38) and 104 (29.15Ex.39) on the grounds these exhibits contained prejudicial allegations not proven by a preponderance of the evidence because Vincent was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected on such grounds and Vincent was prejudiced as there is a reasonable probability had the jury not heard such allegations in aggravation that he would not have been death sentenced.

Vincent was denied effective assistance when counsel failed to object to portions of Exhibits 103 (29.15Ex.38) and 104 (29.15Ex.39) on the grounds these exhibits contained prejudicial allegations not proven by a preponderance of the evidence. There is a reasonable probability had the jury not heard such allegations in aggravation he would not have been death sentenced.

I. Record On Priors

At penalty, Vincent's prior convictions (State's Exhibits 100-104) were admitted(V.8Tr.460-65). Counsel objected to the jury hearing the sentences on all of Vincent's prior convictions, but Gaertner only sustained that objection as to the Franklin homicide case sentences and only those sentences were redacted(V.8Tr.460-

65). Gaertner stated that as to the Franklin convictions (Exhibit 100) that if it was necessary to use scissors to redact the sentences that was to get done(V.8Tr.457-58).

II. Exhibits 103 and 104 - Trial Contents

A. Exhibit 103 (29.15Ex.38)

Exhibit 103 (29.15Ex.38) contained the complaint that charged Vincent with possessing a pistol that was "loaded with live rounds"(29.15Ex.38p.13). [3]

The information's Count I charged Vincent with possession of cocaine base(29.15Ex.38p.11). Count II charged Vincent with unlawful use of a weapon in that he knowingly carried a concealed weapon, a semi-automatic pistol, capable of lethal use(29.15Ex.38p.12). Exhibit 103 reflected Vincent pled guilty to both counts(29.15Ex.38p.5).

The jury was told Ex.103 reflected Vincent pled guilty in St. Louis City in December, 1997, to felony possession of a controlled substance, cocaine, and unlawful use of a weapon and received an SIS with three years probation(V.8Tr.461-62). The jury was told that on September 19, 2003, Vincent's probation got revoked and he was sentenced to seven years for possession of cocaine and three years consecutive on unlawful use of a weapon(V.8Tr.461-62).

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[3] The amended motion reproduced that the complaint alleged the gun contained "live" rounds(29.15L.F.190) The amended motion then later contained a typographical error referring to "five" rounds rather than "live"(29.15L.F.190). Ex.103 reflects the jury learned Vincent possessed a gun loaded with "live" rounds(29.15Ex.38p.13).

The jury requested and was provided Ex.103(V.9Tr.825-26).

B. Exhibit 104 (29.15Ex.39)

Exhibit 104 reflected Vincent pled guilty to third degree misdemeanor assault(29.15Ex.39p.1,7-8).

The juvenile court petition alleged Vincent committed the Class C felony of second degree assault when he caused physical injury to Corey Jackson by using his hands and objects to strike Jackson's head and body(29.15Ex.39p.16-17). That petition alleged Jackson sustained head contusions and a broken nasal bone(29.15Ex.39p.16-17).

Exhibit 104 contained a motion to dismiss the Juvenile Court Class C felony second degree assault petition and to prosecute under general jurisdiction(29.15Ex.39p.14-15).

Exhibit 104 contained the order dismissing the juvenile court petition and transferring the case for prosecution under the general law(29.15Ex.39p.10-13). The order included Vincent was not a proper person under the juvenile code because of the following: (1) the offense's seriousness; (2) the "vicious, forceful and violent nature of the offense"; (3) the offense was against "persons" and personal injury resulted; (4) the offense was "part of a repetitive pattern of offenses which indicates that the juvenile may be beyond rehabilitation under the juvenile code"; (5) Vincent's Family Court history; and (6) Vincent's sophistication and maturity(29.15Ex.39p.10-13).

The jury heard Vincent pled guilty in St. Louis County to third degree assault on December 18, 1996, an SIS was imposed, and on July 21, 1999, probation was revoked(V.8Tr.460-61).

The jury requested and was provided Ex.104(V.9Tr.825-26).

III. Counsels' 29.15 Testimony

A. Kraft

Kraft did not object to Exhibit 103's (29.15Ex.38) complaint's content relating to "loaded with live rounds" going back to the jury as unproven by a preponderance of the evidence(29.15Tr.550-51).

Kraft did not object to Exhibit 104 (29.15Ex.39) on the grounds a felony assault was unproven by a preponderance of the evidence and that Vincent had not pled guilty to that felony(29.15Tr.551-53). Kraft did not object to Exhibit 104 (29.15Ex.39) on the grounds that it contained the juvenile transfer order and that the order's information was not proven by a preponderance of the evidence(29.15Tr.552-53). Kraft did not have any reason for failing to object on the noted grounds(29.15Tr.553). Kraft acknowledged they could have asked the offending parts of Exhibits 103 (29.15Ex.38) and 104 (29.15Ex.39) be redacted in the same way that the sentences (Exhibit 100) for the Franklin homicide were redacted(29.15Tr.622-23).

B. Turlington

Turlington acknowledged Exhibits 103 (29.15Ex.38) and 104 (29.15Ex.39) contained the alleged offending information and like the Franklin homicide

documents they could have requested redacting those offending parts because they were not proven beyond a preponderance of the evidence and were prejudicial(29.15Tr.718-25).

Turlington testified that presenting paper exhibits prior convictions can be less harmful than respondent calling witnesses about their details(29.15Tr.728). Turlington testified the Franklin homicide conviction posed greater problems for avoiding death than the priors contained in Exhibits 103 (29.15Ex.38) and 104 (29.15Ex.39)(29.15Tr.728,760).

IV. 29.15 Findings

Turlington testified she did not object because she was concerned it would be more inflammatory for the jury to hear testimony about the prior convictions and because those convictions were not as aggravating as Vincent's Franklin homicide conviction(29.15L.F.796).

Any objection to the prior convictions lacked merit under *State v. Anderson*,306S.W.3d529(Mo.banc2010) because it held respondent is not required to prove non-statutory aggravators by a preponderance of the evidence(29.15L.F.795-96). Vincent was not prejudiced by the admission of these priors because of his other convictions for assault and murder(29.15L.F.796).

V. Counsel Was Ineffective

While the state is allowed to present evidence of criminal conduct for which a defendant was not convicted in a penalty phase, that evidence can only be presented if

proven by a preponderance of the evidence. *State v. Clark*,197S.W.3d598,601-02(Mo.banc2006); *State v. Fassero*,256S.W.3d109,119(Mo.banc2008).

In *State v. Fassero*,256S.W.3d109,118-19(Mo.banc2008), this Court ordered a new penalty phase where the defendant was accused of child molestation and respondent admitted an Illinois indictment alleging acts similar to those that he was tried on. A new penalty phase was required because no evidence was presented to establish by a preponderance of the evidence Fassero committed the Illinois indictment's alleged acts. *Id*.118-19.

In *State v. Doss*,394S.W.3d486,494-97(Mo.App.,W.D.2013), respondent introduced juvenile records exhibits in penalty, but failed to present evidence that established by a preponderance of the evidence Doss committed the alleged acts. The admission of those juvenile documents was prejudicial, requiring a new penalty phase, because the state argued Doss' lengthy juvenile history was a basis for rejecting Doss' mitigating evidence where the jury had requested the juvenile records exhibits and imposed a harsh sentence. *Id*.497.

Failure to make timely proper objections can constitute ineffectiveness. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995). Under *Clark, Fassero*, and *Doss* respondent was required to prove beyond a preponderance of the evidence Exhibits 103's and 104's contents.

In Exhibit 103, the complaint, which was not what Vincent pled guilty to, asserted he possessed a pistol that was "loaded with live rounds"(29.15Ex.38p.13). In Exhibit 104, Vincent pled guilty to third degree misdemeanor

assault(29.15Ex.39p.1,7-8). Exhibit 104 contained the juvenile court petition which recited that he was charged with second degree felony assault and was responsible for head contusions and a broken nose the complainant sustained by having struck him in the head with hands and objects(29.15Ex.39p.16-17). Also, Exhibit 104 recited damaging conclusions for why Vincent was ordered and found not to be a proper person to remain under the juvenile court's jurisdiction(29.15Ex.39p.10-13).

Reasonable counsel would have objected to the noted portions of Exhibits 103 and 104 on the grounds they were not proven by a preponderance of the evidence and requested redaction. *See*, *Strickland, Clark, Fassero,* and *Doss.* Vincent was prejudiced because the jury heard matters that predisposed them to impose death when respondent did not prove by a preponderance of the evidence they occurred. *See*, *Strickland*, *Storey, Clark, Fassero*, and *Doss.*

While respondent was permitted to introduce the fact of prior convictions contained in Exhibits 103 and 104, and done as guilty pleas, it was not allowed to present these other matters included within those documents. This Court's decision in *Anderson* (29.15L.F.795-96) does not stand for the proposition respondent is not required to prove matters beyond a preponderance of the evidence. Instead, *Anderson* only held that the jury **was not required to be instructed** that it had to find non-statutory aggravators beyond a reasonable doubt. *Anderson*,306S.W.3d at 540-42.

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). Failing to object to Exhibit 103's and 104's offending portions was unreasonable because respondent could not call

witnesses to testify about them as those portions were not part of the ultimate convictions reflected in Exhibits 103 and 104. *See*, *McCarter*.

Counsels' failure to object and to seek redaction to the noted portions of Exhibits 103 and 104 was ineffective and a new penalty phase is required.

VII.

FAILURE TO CALL DRAPER

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Draper, or a similarly qualified expert, in penalty phase mitigation to testify about Vincent's P.L. chaotic childhood background because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented this as penalty phase mitigating evidence to support a life sentence and Vincent was prejudiced as there is a reasonable probability the jury would have voted for life had they heard such evidence.

Counsel was ineffective for failing to call Dr. Draper, or a similarly qualified expert, to testify about Vincent's P.L. chaotic childhood background to support a life sentence. There is a reasonable probability that had the jury heard Draper, then Vincent would have been life sentenced.

I. Draper's 29.15 Testimony

Draper evaluated Vincent for trial counsel in 2004, when Vincent was 24(29.15Tr.400-02,427). Draper testified in the three trials that preceded this one - both Franklin case trials and the first Addison trial(29.15Tr.427-28,435-37).

Vincent's mother worked two jobs, and therefore, he was shuffled from home to home without a consistent care-giver as a young child(29.15Tr.404-06,408,424). As a very young child, Vincent was often left with his younger sisters hungry and

crying and without adult supervision(29.15Tr.406-08). Vincent's father was absent from Vincent's life because of alcoholism(29.15Tr.409,412). Vincent did not have a secure attachment with a significant person in his life(29.15Tr.409). While Vincent had aunts and uncles who cared about him, without consistent parental figures Vincent had no anchor(29.15Tr.425-26).

Vincent grew-up in a neighborhood considered high risk(29.15Tr.414). Without parental structure Vincent became part of activities characteristic of street life(29.15Tr.414-15). Because of a lack of supervision, Vincent began using drugs and alcohol as an 11-12 year old(29.15Tr.416). Vincent got involved in selling drugs(29.15Tr.417).

During his early school years, Vincent was picked on and bullied because he was small in stature and responded by fighting(29.15Tr.415). When Vincent was 15, a group of youths beat him with a bat(29.15Tr.415). Older youths took advantage of Vincent getting him to steal for them(29.15Tr.415-16). Several of Vincent's P.L. friends were shot and killed(29.15Tr.416).

When Vincent was 13-14, his mother felt that he did not respond to her direction and she sought the juvenile court's help(29.15Tr.417). The court sent Vincent to Tarkio Academy(29.15Tr.417). Vincent's stay at Tarkio was short lived because of budgetary cuts and he was returned to his P.L. unstructured life(29.15Tr.418-20). Vincent's chaotic family situation caused him to seek protection on the streets and with gang friends(29.15Tr.421). When Vincent was 21, he was shot in the leg(29.15Tr.421).

II. Counsels' Testimony

A. Kraft

Draper testified in the three trials that preceded this one - both Franklin case trials and the first Addison trial(29.15Tr.540). Kraft thought that Draper's testimony in the prior trials was beneficial(29.15Tr.540).

Draper was not called in the Addison retrial because Vincent had gotten death at the three prior trials where Draper testifed(29.15Tr.541). Kraft testified that they decided to do something different(29.15Tr.541). Kraft felt that sometimes the value of family witnesses' testimony can get lost when there is expert testimony(29.15Tr.541). Vincent had indicated that he did not especially care for Draper's prior testimony(29.15Tr.541,607). Draper had not done well testifying at the third trial(29.15Tr.541). It was their strategy not to call Draper(29.15Tr.607).

B. Turlington

Turlington testified that Draper testified in the three prior trials, but not this one(29.15Tr.713-14,762). Draper was called in the prior trials because the information she had to offer was consistent with their mitigation theme(29.15Tr.714). Draper testified badly on cross-examination in the third (Franklin) trial(29.15Tr.714-15). Turlington believed Draper's poor third trial performance could have been used against her at this the fourth trial and that was why Draper was not called(29.15Tr.762-63,767).

III. 29.15 Findings

Draper was called in Vincent's first three trials, but not at the fourth trial(29.15L.F.773). Turlington believed Draper testified badly at the third trial(Franklin)(29.15L.F.774). Kraft expressed similar dissatisfaction with Draper's third trial testimony(29.15L.F.774-75). By not calling Draper, counsel was able to avoid damaging cross-examination including that Vincent threatened his mother with a shotgun(29.15L.F.775). Also by not calling Draper, evidence about Vincent's criminal history, gang affiliation, and other bad acts was not heard(29.15L.F.775). The decision to not call Draper was reasonable strategy(29.15L.F.774-77).

IV. Counsel Was Ineffective

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*,539U.S.510,524-25(2003); *Williams v. Taylor*,529U.S.362,395-96(2000); *Hutchison v. State*,150S.W.3d292,302(Mo.banc2004). That mitigating 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."' *Hutchison*,150S.W.3d at 302(quoting *Wiggins*,539U.S. at 524)(italics in *Wiggins*). Evidence of a turbulent childhood is relevant mitigating evidence. *Eddings v. Oklahoma*,455U.S.104,115(1982).

To prevail on a claim of ineffective assistance for failing to retain expert testimony, a movant is required to show such expert existed at the time of trial, could have been located through reasonable investigation, and would have benefited the defense. *Tisius v. State*,183S.W.3d207,213-14(Mo.banc2006).

Counsel's strategy choices 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).

In *Hutchison v. State*,150S.W.3d292,307(Mo.banc2004), this Court concluded counsel was ineffective for failing to do a thorough, comprehensive expert presentation. This Court indicated, when assessing reasonableness of attorney investigation, a court is required to consider not only the quantum of evidence already known, but also whether the known evidence would lead a reasonable attorney to investigate further. *Id.*305. Hutchison's counsel was ineffective in limiting the scope of investigation. *Id.*307-08. Even though counsel in *Hutchison* called in penalty a mental health expert and the defendant's parents, counsel was ineffective because they failed to investigate and present other experts' evidence of Hutchison's neuropsychological deficits and brain damage, learning disabilities, school difficulties, history of mental illness, and abuse. *Id.*304-08. Foregoing presenting evidence because it contains something harmful is unreasonable when its harm is outweighed by its helpfulness. *Id.*305.

There is no question Draper existed at the time of trial and could be located since she testified at the three previous trials. *See*, *Tisius*.

Because Draper was not called, the jury did not learn about the chaotic P.L. family situation Vincent grew-up in where basic adult supervision and providing for fundamental needs was lacking(29.15Tr.406-08). The jury actually heard the contrary. Had Draper been called Vincent's defense would have benefited. *See*,

Tisius. Vincent's chaotic P.L. family situation was compelling mitigating evidence of a turbulent childhood. *See, Eddings.*

On cross-examination of Gwendolyn McFadden and Mini McFadden, the jury heard Vincent always had a place to live with food and clothing(V.8Tr.679,692-93). From Gwendolyn and Vincent's father, Vincent Sr., the jury heard Vincent was not beaten or sexually abused(V.8Tr.678-79,727). On cross-examination of Mini, the jury learned Mini and her husband were always good to Vincent(V.8Tr.691-93). On cross-examination of Lisa Northern, the jury was told the Northerns made many childhood fun activities available to Vincent(V.8Tr.702-04). Lisa Northern testified about how her husband Don had treated Vincent like a son(V.8Tr.704). Respondent's questioning of Vincent's father, Vincent Sr., left the impression Vincent's school fighting and its resulting consequences were entirely self-inflicted (V.8Tr.725-27), rather than Vincent being victimized by others(29.15Tr.415).

The decision to call no experts to address the impact of the chaotic, unstable, unsafe P.L. home environment in which Vincent was raised was an unreasonable strategic decision in the same way that failing to present additional expert evidence in *Hutchison* was unreasonable. *See, McCarter* and *Butler*. Vincent was prejudiced because the jury was left with the erroneous belief that Vincent had followed a course of conduct that was contrary to having come from a stable secure home environment. *See, Strickland*. Moreover, Vincent was prejudiced because if the jury had had the collective benefits of Draper's testimony with Gelbort's and Preston/Gur, each of which buttressed the other (29.15L.F.174), see Points VIII and X, there is a

reasonable probability Vincent would have been sentenced to life. *See*, *Strickland*. Any harm that could have been created through cross-examination of Draper was outweighed by the helpfulness of Draper's testimony. *See*, *Hutchison.*

It was unreasonable to fail to call Draper to avoid cross-examination of her about Vincent having threatened his mother with a shotgun(29.15L.F.775). In the first Addison penalty opening statement, defense counsel told the jury it would hear evidence from Vincent's juvenile officer, Rick Nelson, about the shotgun incident(1stAddisonTr.1274) and Nelson testified on direct about his supervision of Vincent because of that act(1stAddisonTr.1403-05).

A new penalty phase is required.

VIII.

FAILURE TO CALL GELBORT

The motion court clearly erred denying counsel was ineffective for failing to call neuropsychologist Dr. Gelbort, or a similarly qualified expert, to testify about Vincent's brain limitations pretrial to bar the death penalty and/or in penalty phase mitigation because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented these matters pretrial and/or as penalty mitigating evidence to support a life sentence coupled with an instruction requiring the jury find Vincent was mentally 18 or older and Vincent was prejudiced as there is a reasonable probability death would have been precluded pretrial or the jury would have voted for life had they heard Gelbort's evidence.

Counsel was ineffective for failing to call Dr. Gelbort, or a similarly qualified expert, to testify about Vincent's brain limitations. Gelbort's testimony should have been used to support a pretrial motion to preclude death based on Vincent's brain limitations(29.15L.F.158,170). Alternatively, Gelbort's testimony should have been presented as penalty mitigating evidence considered in conjunction with an instruction that the jury was required to find Vincent was mentally 18 or older(29.15L.F.158, 170).

I. Gelbort's 29.15 Testimony

Neuropsychologist Gelbort testified in penalty at the 2005 Franklin trial and 2006 Addison trial(29.15Tr.251-52). Gelbort did not testify at the 2007 trial or 2008 retrials(29.15Tr.252).

Gelbort evaluated Vincent in 2004, when Vincent was 24(29.15Tr.219-20,230,287). Gelbort's 2004 evaluation identified head trauma incidents Vincent sustained(29.15Tr.224,284-85,296-97). Head trauma can cause a person to become more likely to engage in dysfunctional behavior(29.15Tr.297).

Vincent's I.Q. was 85 and placed him at the 16th percentile(29.15Tr.231). Vincent reads at the fourth grade level, spells at the fifth, and does math at the sixth(29.15Tr.303). Vincent has difficulty with abstract verbal reasoning and comprehension which causes him to not grasp verbal information(29.15Tr.241-43). Vincent's deficits means he lacks the cognitive mechanisms to problem solve like others do(29.15Tr.245). Gelbort's testing found brain dysfunction which is correlated with impulsive behavior(29.15Tr.239).

Vincent presents with frontal lobe deficits(29.15Tr.245-46). The frontal lobe is a part of the brain for young males in their 20s that is still maturing until age 24(29.15Tr.246).

In 2015, Gelbort recommended to 29.15 counsel a PET scan be done(29.15Tr.252). In 2004, Dr. Preston had recommended a PET scan to trial counsel(29.15Tr.253).

Dr. Gur's PET scan findings were consistent with Gelbort's findings(29.15Tr.255-56). Although Vincent had a normal MRI, someone with a normal MRI can have multi-faceted serious brain neuropathology(29.15Tr.292,318).

II. Counsels' Testimony

A. Kraft

Kraft testified Gelbort was not called at either of the retrials, despite having testified at the two earlier trials, because he testified badly on cross-examination(29.15Tr.543-44,605-06,608). Vincent agreed with counsel opting not to call Gelbort(29.15Tr.607).

If the defense team had done a PET scan, as Dr. Preston had recommended, and it came back abnormal, then such results would have been consistent with Gelbort's findings and Kraft would have considered calling Gelbort(29.15Tr.622-23).

No consideration was given to calling Gelbort at a pretrial motion hearing to preclude death based on Vincent's brain limitations(29.15Tr.545).

B. Turlington

Turlington testified that if they had gotten a PET scan done reflecting abnormal results, then she would have called Gelbort(29.15Tr.713).

Gelbort was called only in the first Franklin and the first Addison trial to testify about Vincent's abnormal results on Gelbort's neuropsychological testing(29.15Tr.715,763). Gelbort was not called at this Addison retrial because Gelbort's cross-examination did not go well in the second trial(29.15Tr.715-16,763-64).

No consideration was given to calling Gelbort to support a pretrial motion to preclude death based on Vincent's impaired mental functioning or to support an instruction requiring the jury find Vincent had a mental age of 18 or older before it could vote for death(29.15Tr.716-17).

III. 29.15 Findings

Gelbort was called to testify in the first Franklin and first Addison trial where Vincent got death and not called again(29.15L.F.777,780). Kraft and Turlington testified that Gelbort was not called here because he previously testified poorly(29.15L.F.778-79).

By calling neither Gelbort nor Draper damaging information was avoided(29.15L.F.779-80). Vincent was apprised of counsels' decision not to call Gelbort and he agreed(29.15L.F.779).

IV. Counsel Was Ineffective

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*,539U.S.510,524-25(2003); *Williams v. Taylor*,529U.S.362,395-96(2000); *Hutchison v. State*,150S.W.3d292,302(Mo.banc2004). That mitigating 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."' *Hutchison*,150S.W.3d at 302(quoting *Wiggins*,539U.S. at 524)(italics in *Wiggins*). Evidence of impaired mental capacity is mitigating. *Wiggins*,539U.S. at 535.

To prevail on a claim of ineffective assistance for failing to retain expert testimony, a movant is required to show such expert existed at the time of trial, the expert could have been located through reasonable investigation, and the expert would have benefited the defense. *Tisius v. State*,183S.W.3d207,213-14(Mo.banc2006).

Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). Counsel's strategy choices 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).

In *Hutchison v. State*,150S.W.3d292,307(Mo.banc2004), this Court concluded counsel was ineffective for failing to do a thorough, comprehensive expert presentation. Foregoing presenting evidence because it contains something harmful is unreasonable when its harm is outweighed by its helpfulness. *Id*.305.

There is no question Gelbort existed and could be located through reasonable investigation because he testified at two of Vincent's earlier trials. *See, Tisius*.

Gelbort's testimony would have benefited Vincent's defense either to support a pretrial motion to preclude death or as mitigating evidence coupled with an instruction requiring the jury find Vincent was mentally over 18. *See, Tisius*. Gelbort could have highlighted the following: Vincent's head trauma, 85 I.Q., limited reading, spelling, and math capacities, problems with abstract verbal reasoning and comprehension, lack of mechanisms to problem solve, brain associated impulsive behavior, and frontal lobe deficits(29.15Tr.219-20,224,230-31,239,241-43,245-46,284-85,287,296-97,303).

All of these matters demonstrate mitigating impaired mental capacity. *See*, *Wiggins*. Reasonable counsel would have called Gelbort. *See*, *Strickland* and *Hutchison*. Vincent was prejudiced because either a pretrial motion based on Gelbort's findings or the jury hearing Gelbort's mitigating findings coupled with an instruction requiring the jury find Vincent was mentally 18 or older would have resulted in a life sentence. *See*, *Strickland* and *Hutchison*.

Counsels' reason for not calling Gelbort, that he had not done well on prior cross-examination at the second trial, was unreasonable(29.15Tr.620-21,764). *See*, *McCarter* and *Butler*. Counsel also testified that had they obtained a favorable PET scan, then they would have called Gelbort to testify to his findings(29.15Tr.622-23,713). In 2004, Dr. Preston had urged counsel to do a PET scan(29.15Tr.253). That favorable scan was available. *See* Point X. This lack of diligent investigation as to the PET cannot be justified as strategy. *See*, *Kenley*. The court and the jury heard no evidence relating to Vincent's limited mental capacities, and therefore, counsel was ineffective. *See*, *Wiggins*. Further, the benefit of Gelbort's testimony outweighed any harm. *See*, *Hutchison*.

In *Roper v. Simmons*,543U.S.551,569,574(2005), the Court recognized the Eighth Amendment prohibits executing juveniles for acts committed when they were less than eighteen. Because of the diminished culpability of juveniles, the penological justifications for the death penalty apply to them with lesser force than to adults. *Id.*571.

The reasoning of *Simmons* has been extended to find a mandatory life without parole sentence should not apply to a defendant who was nineteen years old at the time of the alleged homicide. *People v. House*, 2015 WL 9428803 *25-28 (Ill. App. 1st Dist. Dec. 24, 2015). The *House* Court found that designating someone as a mature adult after age eighteen was "arbitrary." *House*, 2015 WL 9428803 at *25. The age eighteen designation was "arbitrary" because research in neurobiology and developmental psychology have concluded the brain does not finish developing until the mid-twenties and young adults are more similar to adolescents. *Id*.*25. Gelbort's testimony would have supported the jury finding Vincent's juvenile brain mental age was not 18 or older such that he was not subject to the death penalty. *See*, *Simmons* and *House.*

A new penalty phase is required.

IX.

PENALTY ARGUMENTS - FAILURE TO PROPERLY OBJECT

The motion court clearly erred denying counsel was ineffective for failing to properly object to arguments: (a) if there is anyone who believes in the death penalty it is Vincent; and (2) to hold, hug, and love Leslie Addison and Todd Franklin so as not to let them down, because Vincent was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to these arguments as appealing to passion, prejudice, caprice, and emotion and Vincent was prejudiced as there is a reasonable probability had the jury not heard them Vincent would have been life sentenced.

Counsel was ineffective for failing to properly object to penalty arguments that injected passion, prejudice, caprice, and emotion. If the jury had not heard these arguments, Vincent would have been life sentenced.

I. Claims, Evidence, And Findings

A. Vincent Believes in Death Penalty

The amended motion (29.15L.F.203) alleged ineffectiveness for failing to object to the following argument:

> And on that day that he killed Todd, on the following May, there was one juror in Pine Lawn. That juror was the foreperson. Had no instructions of

law. There was no trial. There were no jury instructions. There was no evidence. There were no witnesses.

And that foreperson and that juror decided that the death penalty was appropriate then and that Todd and Leslie should not get a fair trial.

Because if there's one person in this courtroom that believes in the death penalty, it's that man right there.

(V.9Tr.810).

Counsel testified she did not have any reason for failing to object(29.15Tr.567-68).

The findings did not specifically address counsel's failure to object to this argument(29.15L.F.796-805).

B. <u>Hold, Hug, And Love</u>

The amended motion (29.15L.F.204) alleged ineffectiveness for failing to properly object to the following argument which was the last it heard before beginning deliberations:

Ladies and gentlemen, I leave you with Leslie and Todd. Hold them. Hug them. Tell them you love them. But most of all, don't let them down. This verdict is for Leslie and Todd.

Ladies and gentlemen, there's the third door that we referred to.

[DEFENSE COUNSEL]: Your Honor, I'm going to object. That was an improper argument with regard to Mr. Franklin.

THE COURT: That will be overruled.

> [THE PROSECUTOR]: Ladies and gentlemen, there's the third door that we referred to. And there can be only one conclusion: This case deserves the death penalty. Stand firm.

(V.9Tr.822-23).

Counsel testified she did not have a reason for failing to properly object to this argument(29.15Tr.570-71).

The findings stated that on direct appeal this Court noted the arguments were emotionally charged, but the facts of the case were also(29.15L.F.804). The findings stated this Court found on direct appeal that arguments prone to inflame and excite prejudice are not improper where they help the jury understand and appreciate evidence such that no plain error occurred(29.15L.F.804).

II. Counsel Was Ineffective

The Eighth Amendment requires that any decision to impose death be based on reason and not passion, prejudice, caprice, and emotion. *Gardner v. Florida*,430U.S.349,358(1977). Failure to make timely proper objections to arguments can constitute ineffectiveness. *State v. Storey*,901S.W.2d 886,900-03(Mo.banc1995)(counsel ineffective failing to object to penalty arguments asserting facts outside record). The *Storey* argument was improper and counsel was ineffective because "[a]ssertions of fact not proven amount to unsworn testimony by the prosecutor." *Id*.901. A prosecutor presenting facts outside the record is highly prejudicial "because the jury is aware of the prosecutor's duty to serve justice, not just win the case." *Id*.901 (relying on *Berger v. United States*,295U.S.78,88(1935)). The

argument in *Storey* was improper because it was calculated to inflame the jury and appealed to emotion. *Storey*,901S.W.2d at 902.

In *Deck v. State*,68S.W.3d418,422-24(Mo.banc2002), defense counsel submitted two defective penalty phase mitigating circumstances instructions that were given to the jury. On direct appeal, this Court rejected the defective instructions constituted plain error. *Id.*424-25.

In *Deck*, counsel was ineffective because the defective instructions went to a "critical issue" and the errors were "sufficiently egregious." *Deck*,68 S.W.3d at 429. The missing paragraphs were "pivotal" to the defense offered. *Id.*430. Thus, under *Deck*, a finding of no plain error on direct appeal as to a claim does not foreclose finding counsel was ineffective in their handling of that same matter.

Counsel's failure to object at all and failure to timely and properly object to the quoted arguments on the grounds they appealed to passion, prejudice, and emotion here was unreasonable. *See*, *Strickland*, *Gardner*, *Storey*, and *Deck*. Counsel's failure to object as to the argument, that if anyone believes in the death penalty it is Vincent, was particularly unreasonable because the identical argument was made at the first Addison trial(1stAddisonTr.1563). Vincent was prejudiced because all these arguments injected passion, prejudice, caprice, and emotion such that there is a reasonable probability that had the jury not heard these arguments Vincent would have been sentenced to life. *See*, *Strickland*, *Gardner*, *Storey*, and *Deck*.

A new penalty phase is required.

X.

FAILURE TO PRESENT PET SCAN

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Gur, or a similarly qualified expert, in penalty mitigation to present PET scan brain evidence showing Vincent's brain's functional limitations because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented this as penalty mitigating evidence to support life and Vincent was prejudiced as there is a reasonable probability the jury would have voted for life had they heard such evidence.

Counsel was advised by their retained expert, Dr. Preston, in 2004, to obtain a PET scan of Vincent's brain, but did not. Counsel was ineffective for failing to obtain a PET scan whose results when considered individually and in combination with the evidence that could have been presented through Drs. Draper and Gelbort (Points VII and VIII) would have resulted in life.

I. 29.15 Pleadings

The 29.15 motion alleged counsel was ineffective for failing to call Dr. Preston, or a similarly qualified expert, in penalty mitigation to present PET scan evidence demonstrating Vincent's brain deficits(29.15L.F.171-75). Further, it was alleged the Preston/PET evidence would have provided concrete support for Draper's

and Gelbort's testimony such that the testimony of all three experts considered collectively by the jury would have resulted in life(29.15L.F.173-74).

On November 28, 2016, 29.15 counsel moved to endorse Dr. Gur(29.15L.F.437-39). The motion set out Preston would have been available to review PET scan results and to testify during the Addison retrial(29.15L.F.437-39). Preston was 82 and had retired so he no longer was doing PET scan interpretations(29.15L.F.437-39).

By consent Dr. Gur was endorsed as Preston's substitute on the PET results done for this 29.15(29.15L.F.440-41,484).

II. Gur's Testimony

Dr. Gur is a neuropsychologist who has been analyzing PET scans for use in litigation since 1990(29.15Tr.11,15). PET scans are generally accepted tools used to assist doctors in making medical diagnoses(29.15Tr.33).

A scan of Vincent was done in September, 2015(29.15Tr.38). That scan produced findings made within a reasonable degree of neuropsychological certainty(29.15Tr.44). Gur would have been available to analyze Vincent's PET scan for use in this Addison trial(29.15Tr.51-52).

Gur found frontal lobe dysfunction in Vincent(29.15Tr.29-30). The frontal lobe controls executive functioning - it adjusts and directs behavior according to context and is responsible for impulse control and judgment(29.15Tr.28-29). The deficits Gur identified would impact Vincent's memory, impulse control and

were consistent with head injuries(29.15Tr.44-46). Gelbort's overall findings (Point VIII) were consistent with Gur's PET scan findings(29.15Tr.47-48).

Gur was aware an MRI done of Vincent was read as normal(29.15Tr.63). A brain MRI is limited to evaluating structural integrity(29.15Tr.63, 67-68). In contrast, a PET scan looks at brain functioning based on metabolism(29.15Tr.63,91-92).

Gur indicated young male brains are still maturing during ages 21-24 and the last part to mature is the frontal lobe(29.15Tr.50). Vincent was 23 when the Addison offense happened(29.15Tr.117).

III. Counsels' Testimony

A. Kraft

Kraft testified that after a normal MRI result was obtained for Vincent that on November 11, 2004, Dr. Preston recommended a PET scan be done(29.15Tr.537-39;29.15Ex.33). Dr. Preston's recommendation noted it was not uncommon for someone with Vincent's history of head trauma and drug use to have a normal MRI, but an abnormal PET scan(29.15Ex.33). Preston's November 11, 2004 letter recommendation (29.15Ex.33) expressly advised counsel that both St. Louis University and the Mallinckrodt Institute of Radiology had established experience doing the type of PET scan needed(29.15Ex.33). Preston indicated he knew a PET could be done in Columbia, Missouri at Boone Hospital(29.15Ex.33). Despite Preston having expressly identified in 2004 where to get the PET done, Kraft testified that she did not know where to obtain one in 2008 and that at the time of her 2017 testimony Washington University would not do them(29.15Tr.611).

Despite Preston's PET scan recommendation, one was not obtained(29.15Tr.539-40). Kraft acknowledged that had they obtained a PET with abnormal findings that such information would have been consistent with their mitigation case and supported Gelbort's findings(29.15Tr.540,623). Kraft testified that if they had obtained a PET that was normal respondent would have known those results and that potentially could have undermined Gelbort's findings(29.15Tr.610).

B. Turlington

Turlington believed that after the first two trials with the reversal of both cases in this Court that Vincent's case should have been assigned to new attorneys in the office so that new pairs of eyes with a fresh perspective could evaluate what was best for his defense(29.15Tr.681-82). That sentiment was not based on any conflict with Vincent as she and Kraft got along well with him(29.15Tr.681-82).

Turlington indicated they had information that members of Vincent's family had a genetic condition involving brain abnormalities(29.15Tr.709). Counsel also knew Vincent had a history of severe headaches and a history of head injuries(29.15Tr.709-10).

An MRI was done October 6, 2004, before any of Vincent's trials occurred(29.15Tr.710-11). The MRI results were sent to Dr. Preston in Kansas(29.15Tr.711). Preston advised counsel a PET could potentially show abnormalities that an MRI would not detect, but one was not done(29.15Tr.711-12).

Turlington testified that if they had obtained a PET with abnormal results, then that would have supported Gelbort's findings (Point VIII) and she would have wanted to use the PET results in conjunction with Gelbort at trial(29.15Tr.713).

Turlington testified that if they obtained a PET with normal results that would have undercut Gelbort which was a reason for not getting one(29.15Tr.768-70). Turlington testified that PETs are not commonly used in criminal cases and Washington University refuses to do them(29.15Tr.770-71).

IV. 29.15 Findings

Gur agreed quantitative analysis of neuropsychological and neuroimaging data cannot provide a link to specific behaviors(29.15L.F.783,785-87,791).

Counsel had a normal MRI, but neuropsychological testing showing some deficits(29.15L.F.787). Obtaining a PET with normal results would have undercut Gelbort and Gur's testimony was cumulative to Gelbort(29.15L.F.787,789-91). The decision not to obtain a PET scan was reasonable and strategic(29.15L.F.789).

V. Counsel Was Ineffective

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*,539U.S.510,524-25(2003); *Williams v. Taylor*,529U.S.362,395-96(2000); *Hutchison v. State*,150S.W.3d292,302(Mo.banc2004). That mitigating 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."' *Hutchison*,150S.W.3d at 302(quoting *Wiggins*,539U.S. at

524)(italics in *Wiggins*). Evidence of impaired mental capacity is mitigating. *Wiggins*,539U.S. at 535.

To prevail on a claim of ineffective assistance for failing to retain expert testimony, a movant is required to show such expert existed at the time of trial, could have been located through reasonable investigation, and would have benefited the defense. *Tisius v. State*,183S.W.3d207,213-14(Mo.banc2006).

Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8th Cir.1991). Counsel's strategy choices 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).

In *Hutchison v. State*,150S.W.3d292,307(Mo.banc2004), this Court concluded counsel was ineffective for failing to do a thorough, comprehensive expert presentation. This Court indicated, when assessing reasonableness of attorney investigation, a court is required to consider not only the quantum of evidence already known, but also whether the known evidence would lead a reasonable attorney to investigate further. *Id.*305.

Reasonable counsel who were advised by Preston to obtain a PET would have done so. *See Strickland* and *Hutchison*. Preston's November 11, 2004 PET recommendation letter (29.15Ex.33) expressly told counsel where they could get a PET done and Preston would have provided the necessary analysis of the results. One

place Preston identified is the Mallinckrodt Institute of Radiology (29.15Ex.33) - a Washington University Medical School facility. *See* mir.wustl.edu/. Moreover, it was unreasonable to fail to do the PET because PET scans are generally accepted tools to make medical diagnoses and have been used in litigation since 1990(29.15Tr.15,33).

Counsels' stated reasons for not doing a PET was fear that it would come back normal, and thereby undermine Gelbort's findings of Vincent's brain dysfunction(29.15Tr.610, 768-70). But counsel also testified that after the second trial they had decided not to call Gelbort at all because of problems they had with his testimony on cross-examination in the second trial(29.15Tr.543-44,605-06,620-21,715-16,763-64). Thus, the failure to get a PET because of concerns that a normal PET would undermine Gelbort's findings was unreasonable because counsel had decided not to call Gelbort. *See*, *McCarter* and *Butler*. Likewise, Gur and Gelbort could not be cumulative (29.15L.F.790-91) because Gelbort did not testify.

Vincent was prejudiced because the jury did not hear he has brain dysfunction impacting impulse control and judgment consistent with head injuries(29.15Tr.28-29,44-46). *See*, *Strickland* and *Hutchison*. Moreover, Vincent was prejudiced because the PET findings reinforced Gelbort's findings (29.15Tr.47-48), as well as Draper's findings (Points VII and VIII). Gur (and Preston) could both explain that a normal MRI was not inconsistent with Vincent's deficits the PET identified(29.15Tr.63,67-68,91-92;29.15Ex.33). Kraft and Turlington would have wanted to use the favorable PET results because they were consistent with their

mitigation case along with supporting Gelbort's findings and would then have chosen to call Gelbort and not omit Gelbort(29.15Tr.540,623,713). Because evidence of impaired mental capacity is mitigating, *Wiggins*, *supra*, the PET results should have been presented to offset respondent's aggravation.

In *Roper v. Simmons*,543U.S.551,569,574(2005), the Court recognized the Eighth Amendment prohibits executing juveniles for acts committed when they were less than eighteen. Because juveniles have diminished culpability, the penological justifications for the death penalty apply to them with lesser force than to adults. *Id.*571.

The reasoning of *Simmons* has been extended to find a mandatory life without parole sentence should not apply to a defendant who was nineteen years old at the time of the alleged homicide. *People v. House*, 2015 WL 9428803 *25-28 (Ill. App. 1st Dist. Dec. 24, 2015). The *House* Court found that designating someone as a mature adult after age eighteen was "arbitrary." *House*, 2015 WL 9428803 at *25. The age eighteen designation was "arbitrary" because research in neurobiology and developmental psychology have concluded the brain does not finish developing until the mid-twenties and young adults are more similar to adolescents. *Id.**25. Gur's brain deficit testimony would have supported the jury finding Vincent's juvenile brain mental age was not 18 or older such that he was not subject to the death penalty. *See*, *Simmons.*

A new penalty phase is required.

XI.

FAILURE TO DISCREDIT EVA

The motion court clearly erred in denying counsel was ineffective for failing to call Maggie Jones, Margaret Walsh, and Arnell Jackson to impeach/discredit Eva Addison's reporting of events surrounding Leslie's death because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have called these witnesses who would have impeached/discredited Eva's reporting. Vincent was prejudiced because Eva's credibility was critical to respondent's case and Vincent would not have been convicted had she been impeached/discredited.

Eva's credibility as to what she saw at Naylor and Kienlen was critical to respondent's case. Effective counsel would have impeached/discredited Eva on circumstances surrounding Leslie's death by calling Maggie Jones, Margaret Walsh, and Arnell Jackson.

I. Eva's Trial Testimony

Eva testified Vincent hit her in the face and ordered she and her sisters out of P.L. while at Maggie Jones', 31 Blakemore residence(V.6Tr.61-64,138-39). Eva reported Vincent pointed a gun at Leslie and Jackson told Vincent to stop(V.6Tr.67-69). Eva testified that after Vincent left Jones' Blakemore residence he returned there on foot and went towards an alley when police sirens could be heard(V.6Tr.70).

From behind some bushes by Dardenella, Eva saw Leslie and Vincent argue at Naylor and Kienlen(V.6Tr.72,76). Leslie asked Vincent not to shoot, but he shot her at close range(V.6Tr.72-73). Eva testified that Leslie fell to the ground and Vincent shot her again(V.6Tr.72-73).

II. Failure To Investigate/Impeach Witness Standards

To establish counsel was ineffective for failing to investigate and call witnesses the movant must establish the witnesses could have been located through reasonable investigation, would have testified if called, and would have provided a viable defense. *State v. Griffin*,810S.W.2d956,958(Mo.App.,E.D.1991).

In *Black v. State*,151S.W.3d49,55-58(Mo.banc2004), counsel was ineffective for failing to impeach state witnesses through cross-examining them about prior inconsistent statements. Counsel was ineffective in *Black* because the subject of the impeachment went to the central controverted issue of whether Black acted with deliberation or a self-defense fit of rage. *Id*.56,58.

In a similar vein, the central controverted issue here was whether Eva saw Vincent shoot Leslie at Naylor and Kienlen and her credibility was critical to respondent's guilt and penalty cases. Eva's role was underscored in respondent's initial and rebuttal penalty argument where it told the jury that killing Leslie was especially aggravated because Vincent shot Leslie in front of Eva(V.9Tr.796,819).

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).

III. Maggie Jones

A. 29.15 Maggie Jones Pleadings

The pleadings alleged Maggie Jones had testified at the first Addison trial that she did not hear any fighting or arguing at her Blakemore house(29.15L.F.73 relying on 1stAddisonTr.1117).

The 29.15 motion alleged Maggie Jones testified in a prior deposition that Eva had not reported having been in a fight with anyone the night in question(29.15L.F.73 relying on Jones depo. at 14).

B. Counsels' Testimony - Jones

Maggie Jones was a first Addison trial guilt phase witness(29.15Tr.516). Before the first Addison trial, counsel deposed Jones(29.15Tr.516). Jones testified at her deposition that Eva did not tell Jones she was in a fight with anyone the night Leslie was killed(29.15Tr.516-17). At the first Addison trial, Jones testified that she did not hear any fighting or arguing the night Leslie was killed(29.15Tr.516-17). Kraft indicated it would have been valuable impeachment of Eva to have Jones testify she did not hear any conflict involving Eva and Vincent(29.15Tr.593-94).

Turlington testified Jones was a first Addison trial guilt phase witness, but Jones did not testify at the second Addison trial(29.15Tr.689,691). Jones was deposed before the first Addison trial(29.15Tr.689-90). Jones testified at her deposition that Eva did not tell Jones she was in a fight with anyone the night Leslie was killed(29.15Tr.690). At the first Addison trial in March, 2006, Jones testified she did not hear any fighting or arguing outside her 31 Blakemore house the night Leslie

was killed(29.15Tr.690). Jones' prior testimony that she did not see any conflict between Vincent and Eva could have been used to impeach Eva's reporting of a fight(29.15Tr.741-42).

C. Findings - Jones

Counsel testified calling Jones was considered, but rejected because the benefit of impeaching Eva was outweighed by potentially bolstering Eva's testimony(29.15L.F.747-48). There would have been minor impeachment value to Jones' testifying she did not hear what went on outside her house the night of Leslie's death and that Eva did not tell Jones that she had been in a fight with anyone(29.15L.F.747).

D. Counsel Ineffective - Jones

Reasonable counsel would have called Jones to testify Eva did not tell Jones she was involved in a fight with anyone on the night Leslie was killed (29.15Tr.516-17) in order to discredit Eva's trial testimony that she and Vincent had fought at Jones' house (V.6Tr.62-64) and Vincent had threatened Leslie with a gun there(V.6Tr.67-69). *See, Strickland* and *Black*. Jones was easily located because she testified at the first Addison trial. *See, Griffin*. The failure to call Jones was unreasonable strategy because challenging Eva's credibility about what happened at Jones' house was critical for discrediting what she reported she saw happen at Naylor and Kienlen. *See, McCarter* and *Butler*. Vincent was prejudiced because discrediting Eva's reporting of the events at Jones' house was critical to calling into question

Eva's reporting that she saw Vincent shoot Leslie at Naylor and Kienlen. *See, Strickland.*

IV. Margaret Walsh

A. 29.15 Margaret Walsh Pleadings

The pleadings alleged St. Louis County Police Forensics investigator Margaret Walsh performed blood analysis testing on the clothes Vincent wore when arrested and no blood was detected(29.15L.F.74-76).

The pleadings alleged Walsh should have been called to impeach Eva's testimony that Vincent put a large semi-automatic pistol to Leslie's chest and shot her at close range and shot Leslie a second time while Leslie was on the ground(29.15L.F.75-76). Walsh's findings would have impeached Eva because if Vincent had shot Leslie in the manner Eva reported, then some blood would have been expected to be found on Vincent's clothing(29.15L.F.75-76).

B. 29.15 Evidence - Walsh

St. Louis County Police forensic scientist Margaret Walsh tested Vincent's clothing(29.15Tr.343-44). Walsh's findings and report found no blood present(29.15Tr.346-48;29.15Ex.27).

C. Counsels' Testimony - Walsh

Kraft and Turlington testified the lack of blood on Vincent's clothing was consistent with their defense(29.15Tr.520,693). Walsh's evidence was not presented because Vincent was not arrested for some time after Leslie was shot and Vincent had the opportunity to change clothes(29.15Tr.520,595,693,744-45).

D. Findings - Walsh

Whether to impeach a witness is strategy(29.15L.F.748). Trial counsel acknowledged the lack of blood on Vincent's clothing was consistent with their defense, but had only minimal impeachment value because counsel could not prove that clothing was the same clothing Vincent was wearing when Leslie was shot(29.15L.F.748).

E. Counsel Ineffective - Walsh

Reasonable counsel would have called Walsh to testify no blood was recovered on Vincent's clothing(29.15Tr.346-48;29.15Ex.27) to refute Eva's testimony Vincent shot Leslie at close range(V.6Tr.72-73). *See, Strickland* and *Black*. Walsh was easily located since she did the forensic testing. *See, Griffin*. Vincent was prejudiced because the lack of blood on his clothing supported he did not shoot Leslie and called into question Eva's reporting of what she saw at Kienlen and Naylor. *See, Strickland.*

V. Jackson Matters

A. 29.15 Jackson Pleadings

The pleadings alleged Arnell (Smoke) Jackson would testify he did not see Vincent hit Eva (29.15L.F.71) and did not see Vincent point a gun at Leslie(29.15L.F.71).

Further, it was alleged Jackson would impeach Eva's testimony that after Vincent drove away from Jones' Blakemore address Vincent then returned because Jackson did not see anyone get out of B.T.'s car and go on foot(29.15L.F.72).

B. 29.15 Testimony - Jackson

On May 15, 2003, Jackson was riding on Blakemore and observed Vincent, Leslie, and Eva involved in a dispute and arguing at a house on Blakemore(29.15Ex.10Ap.7-9,12,48-51,53-54). Jackson did not see Vincent have any physical altercation with Eva(29.15Ex.10Ap.13).

Jackson told Vincent he ought to leave before any trouble developed and Vincent and Brandon Travis (B.T.) got in a car together and left(29.15Ex.10Ap.8-10,12,53,55,60). Jackson was in a separate car and left there too(29.15Ex.10Ap.12). The car Jackson went in drove behind the car Vincent was in (B.T.'s car) and Jackson did not see anyone get out of B.T.'s car(29.15Ex.10Ap.13-14).

In March, 2008, Turlington talked to Jackson and Jackson told her everything he knew about the evening of May 15, 2003(29.15Ex.10Ap.16-18).

C. Counsels' Testimony - Jackson

Kraft testified Turlington spoke to Jackson and Jackson reported he had not stopped at Blakemore, at Maggie Jones' house, and therefore, he did not see anything(29.15Tr.512-16,591-92).

Turlington testified that if Jackson would have testified he was at Jones' Blakemore house and his car followed the car Vincent was in to Naylor and Kienlen without anyone getting out of that car, then she would have wanted to call Jackson(29.15Tr.689). Turlington concluded that based on what Jackson told her that he had no useful information and that was why he was not called(29.15Tr.743).

D. Findings - Jackson

Turlington testified that she interviewed Jackson on the phone(29.15L.F.745-46). Jackson told Turlington that all he remembered about the night in question was he drove down Blakemore and he did not see anything(29.15L.F.746). Jackson was not called because he had not provided any useful information to Turlington(29.15L.F.746).

Jackson would not have provided Vincent with a defense or changed the outcome as Jackson's proposed testimony would have provided minimal impeachment(29.15L.F.746). Jackson was not credible(29.15L.F.746).

E. Counsel Ineffective - Jackson

Reasonable counsel would have called Jackson to testify he did not see an altercation involving Eva(29.15Ex.10Ap.13) and that Jackson left Jones' house and was in a car behind Vincent and Jackson and did not see anyone get out of the car containing Vincent(29.15Ex.10Ap.13-14). *See*, *Strickland* and *Black*. Jackson's testimony would have contradicted Eva's reporting that she and Vincent were involved in an altercation at Jones' house where Vincent pointed a gun at Leslie(V.6Tr.62-64,67-69). Jackson's testimony would have contradicted Eva's reporting that after Vincent left Jones' house he returned on foot to that area(V.6Tr.70). Vincent was prejudiced because Jackson would have discredited Eva's reporting of what happened in and around Jones' house, and thereby, called into question Eva's reporting credibility that she saw Vincent shoot Leslie at Naylor and Kienlen. *See, Strickland*.

A new trial is required.

XII.

BRYANT/BURNS AGGRAVATION

The motion court clearly erred denying counsel was ineffective for failing to present evidence rebutting Vincent committed assaults on Bryant and Burns, and in particular that Kyle Dismukes was the responsible shooter, and that Bryant was seriously injured because Vincent was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have presented evidence to rebut this aggravation evidence Vincent deserved death because of the Bryant/Burns events and Vincent was prejudiced as there is a reasonable probability he would not have been death sentenced.

Counsel was ineffective for failing to rebut aggravation Vincent committed the assault against Bryant/Burns as it was done by Kyle Dismukes and for failing to rebut Bryant was seriously injured. There is a reasonable probability rebutting this aggravation would have avoided death.

I. 29.15 Pleadings

The pleadings alleged counsel was ineffective for failing to present evidence to rebut Vincent committed assaults and armed criminal action against Darryl Bryant and Jermaine Burns when Kyle Dismukes committed those acts(29.15L.F.175-86). The pleadings alleged the failure to rebut the Bryant/Burns assault charges was prejudicial because those convictions were submitted as four statutory aggravators(29.15L.F.177-78). Further, it was alleged Shonte Addison's descriptive

testimony that Bryant was seriously injured should have been rebutted by Bryant's medical records(29.15L.F.180-81).

II. Trial Evidence

The jury was told Exhibit 101 (Bryant/Burns assault) reflected Vincent was convicted on February 4, 2005, and sentenced as follows: (1) first degree assault - 15 years; (2) armed criminal action - 30 years; (3) first degree assault - 10 years; and (4) armed criminal action - 10 years(V.8Tr.463-64). The jury found all four of the Bryant/Burns convictions to be aggravators(V.9Tr.827-28;T.L.F.704-05).

Shonte Addison testified Bryant sustained a large bloody wound, and she helped him get into the hospital(V.8Tr.627).

III. Johnson's Testimony At This Addison Homicide 29.15

Butch Johnson testified he investigated the 29.15 case arising out of the Bryant/Burns events(29.15Ex.36p.5-6,20).

Johnson reviewed crime scene photos of the Bryant/Burns events(29.15Ex.36p.21). Police reports described what happened as Vincent having jumped out of his car to shoot at the minivan Burns was driving while Vincent stood at the minivan's right front(29.15Ex.36p.23). Johnson's investigation, however, reflected that in order for Bryant to have gotten shot in his buttocks, as he did, the shooter would have had to have been standing towards the back of the minivan when he fired(29.15Ex.36p.24).

For the Bryant/Burns events 29.15, Johnson interviewed Michael Douglas who was incarcerated(29.15Ex.36p.25). Douglas completed an affidavit on September 26,

2006, that Johnson notarized, in which Douglas recounted that Kyle Dismukes told Douglas that Dismukes shot Bryant/Burns(29.15Ex.18; 29.15Ex.36p.28-29). Douglas and Dismukes were family members related as brothers(29.15Ex.36p.28-29). Dismukes died on November 27, 2003, and therefore, Dismukes was deceased when Douglas did the affidavit(29.15Ex.19; 29.15Ex.36p.29). The record from the trial and postconviction case involving the Bryant/Burns events reflects the assault against Bryant/Burns happened April 4, 2002, and therefore, Dismukes was alive at the time of the Bryant/Burns events(29.15Ex.36p.29-30;29.15Ex.22).

Johnson gave the Douglas affidavit to the attorney responsible for the Bryant/Burns 29.15 case(29.15Ex.36p.26-27). Johnson later personally turned over all his Bryant/Burns 29.15 postconviction investigation, including the Douglas affidavit, to Vincent's counsel responsible for the trial of this Addison case(29.15Ex.36p.27-28).

Johnson testified that Bryant's Barnes Hospital records reflected he sustained a superficial abrasion to his right buttocks(29.15Ex.36p.31;29.15Ex.21). Johnson recounted that Bryant's Barnes' medical records reflected he walked into the hospital and did not have significant bleeding(29.15Ex.36p.32;29.15Ex.21). Bryant's Barnes records reflected he was there less than two hours(29.15Ex.36p.32-33).

Johnson indicated that when he testified in this 29.15 case, arising from Leslie's death, he had already testified at the 29.15 postconviction case arising out of the Bryant/Burns events(29.15Ex.35p.112-85) and his testimony in this case involving

Leslie's death was the same as it was in the Bryant/Burns 29.15 case(29.15Ex.36p.24-25).

IV. Turlington's Testimony - Bryant/Burns 29.15 Case

On February 24, 2009, Turlington testified at the Bryant/Burns 29.15 case(29.15Ex.35p.288-328).

Turlington recounted she attended parts of the evidentiary portion of the Bryant/Burns trial(29.15Ex.35p.291). Vincent got upset with his Bryant/Burns trial counsel, Charlie Chastain(29.15Ex.35p.293). Vincent wanted to testify and he talked to Turlington about that desire and Turlington advised him not to testify, but Vincent testified anyway(29.15Ex.35p.293). During the discussions Turlington had with Vincent about testifying, he indicated that he was going to testify Dismukes was the shooter in the Bryant/Burns matters(29.15Ex.35p.295-96).

Before the Bryant/Burns case went to trial, Vincent told Turlington about Dismukes being the shooter in the Bryant/Burns matters(29.15Ex.35p.294-97,309).

V. Counsels' 29.15 Testimony - This (Addison) Homicide 29.15

A. Kraft

Kraft knew Vincent was convicted of two assault and two armed criminal action charges arising from an April 4, 2002 incident involving Bryant/Burns(29.15Tr.508-09). Kraft testified they received a packet of investigation material from Butch Johnson's 29.15 investigation of the Bryant/Burns assault case(29.15Tr.545-46). That packet included Michael Douglas' affidavit reciting Douglas' brother, Kyle Dismukes, told Douglas that Dismukes was responsible for

shooting Bryant/Burns(29.15Tr.546). Kraft was aware Vincent testified at the Bryant/Burns assault charges trial that Dismukes was responsible for that shooting(29.15Tr.546). Kraft did not recall any reason for failing to challenge Vincent's convictions arising from the Bryant/Burns matters(29.15Tr.546).

B. Turlington

Turlington attended part of Vincent's Bryant/Burns assault case trial(29.15Tr.682-84). Turlington remembered Vincent testified at that trial that the person who did the Bryant/Burns shooting was Dismukes(29.15Tr.717).

Turlington received a packet of information from Butch Johnson relating to his investigation done for the 29.15 case arising from the Bryant/Burns assault case(29.15Tr.717-18). Turlington recalled those materials included an affidavit from Michael Douglas reciting that his brother, Kyle Dismukes, told Douglas that he was the Bryant/Burns assault shooter(29.15Tr.718). That affidavit was consistent with Vincent's testimony at the Bryant/Burns assault trial(29.15Tr.718).

Turlington testified that because Vincent had the Franklin murder conviction it was a greater problem than the assault case and attributing the Bryant/Burns assault shooting to Dismukes did not seem reasonable because Dismukes was being blamed for multiple shootings(29.15Tr.772). The Bryant/Burns assault was not challenged with evidence because the potential adverse impact on the jury of it receiving documents evidencing the assault convictions was less damaging than hearing state witnesses testify about the Bryant/Burns facts(29.15Tr.772-73).

VI. 29.15 Findings

The claim here is the same as one made in Vincent's Bryant/Burns 29.15 case(29.15L.F.793). This 29.15 court reviewed Judge Ross' findings issued in the Bryant/Burns 29.15 case and the Eastern District's resulting memorandum opinion(29.15L.F.793). In the Bryant/Burns 29.15 case, Judge Ross found investigator Johnson's testimony, as to his examination of the crime scene photos and an experiment he conducted, unreliable and refuted by physical evidence(29.15L.F.793).

The 29.15 court here agreed with Judge Ross' findings in the Bryant/Burns 29.15 case(29.15L.F.793). Johnson lacked qualifications needed to render an opinion regarding evidence from the Bryant/Burns assault case and his findings were speculative(29.15L.F.793). Johnson's testimony was unreliable because he went to the crime scene five years after the shooting, relied on a single photo of glass found on the street, and failed to interview witnesses to the shootings or crime scene(29.15L.F.793).

Turlington testified they objected to Vincent's convictions for the Bryant/Burns matters, but felt those were not especially significant when considered in light of Vincent's conviction for the Franklin homicide(29.15L.F.793-94). Turlington and Kraft believed that by not contesting the Bryant/Burns matters they were able to avoid respondent calling witnesses which would be more aggravating than respondent presenting a certified copy of those convictions(29.15L.F.793-94).

VII. Counsel Was Ineffective

"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 v. Smith*,539U.S.510,524(2003)(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).

Reasonable counsel would have presented the Dismukes as shooter evidence that was available. *See*, *Strickland*. Counsel was on notice of the available Dismukes evidence(29.15Ex.36p.27-28;29.15Ex.35p.294-96,309;29.15Tr.546,717). Further, reasonable counsel would have relied on Bryant's Barnes medical records showing Bryant sustained superficial injuries(29.15Ex.36p.32;29.15Ex.21) to counter Shonte's evidence Bryant was seriously injured(V.8Tr.627). *See*, *Strickland*. Vincent was prejudiced because presenting all the available evidence would have helped neutralize four of the six prior conviction aggravators that the jury ultimately found arising from the Bryant/Burns events(V.9Tr.827-28;T.L.F.704-05). *See*, *Strickland*, *Ervin*, *and Parker*.

This Court should order a new penalty phase.

XIII.

ABSENCE OF LIGHTING PHOTOS AND DISTANCE MEASUREMENTS

The motion court clearly erred denying counsel was ineffective for failing to rely on crime scene photos area lighting and distance measurements between where Eva reported she viewed the shooting and Leslie stood because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented such photos and distance measurements which would have called into question Eva's ability to accurately identify it was Vincent who shot Leslie and Vincent was prejudiced because respondent's case was premised on Eva's reporting she saw Vincent shoot Leslie.

Counsel was ineffective for failing to present photos of the crime scene area lighting and distance measurements between where Eva reported she viewed the shooting and Leslie stood. Vincent was prejudiced because respondent's case was premised on Eva's reporting accurately she saw Vincent shoot Leslie.

I. 29.15 Pleadings

The 29.15 pleadings alleged counsel was ineffective for failing to present evidence calling into question Eva's ability to see it was Vincent who shot Leslie because of the lack of lighting in the shooting area(29.15L.F.76-80). Also, it was alleged counsel should have presented evidence as to the distance of the bushes from

where Eva reported she hid to where Leslie's purse was found to question Eva's ability to see it was Vincent who shot Leslie(29.15L.F.76-80). Presenting this evidence was critical because it went to Eva's credibility whether she was able to see who shot Leslie(29.15L.F.76-80).

II. Respondent's Trial Evidence

Officer Hunnius testified that in the area of bushes Eva reported she hid that there was a dusk-to-dawn light(V.6Tr.217-18). Hunnius testified there was sufficient lighting in the area where Eva hid in the bushes to see someone walking up Naylor(V.6Tr.238-39). As a person proceeds along Kienlen, the lighting decreases(V.6Tr.239).

Hunnius testified the P.L. School had three street lights in front of it(V.6Tr.218). There was a light on the south side of Naylor and east of Kienlen(V.6Tr.218-19). Hunnius estimated the distance between the bushes and where Leslie's purse was recovered was several hundred feet(V.6Tr. 219-20,226-27,232-37). Hunnius had to illuminate the scene where Leslie's body was in order to photograph the area, which is normally very dark(V.6Tr.229-30). There were no street lights near where Leslie's body and purse were found(V.6Tr.237). There was lighting up on the hill on Naylor, but there was not lighting down on Kienlen(V6.Tr.230-31).

III. Hunnius' 29.15 Testimony

Hunnius responded to Kienlen and Naylor where Leslie's body was found on the sidewalk on the night of May 15, 2003, when it was dark(29.15Tr.319-21).

Respondent's Trial Exhibit 120 (29.15 Ex.24) was a photograph of the area Hunnius took that night(29.15Tr.322). The crime scene area was dark and Hunnius had to use a camera flash to take pictures(29.15Tr.341-42). Hunnius used a flashlight to investigate the area where Leslie was found(29.15Tr.342).

In May, 2003, there were lights on the P.L. Elementary School and a couple of street lights along Naylor(29.15Tr.325-27).

IV. Investigator Butch Johnson - 29.15 Testimony

Public Defender 29.15 investigator Butch Johnson went to the P.L. streets connected to the shooting of Leslie - Blakemore, Naylor, Kienlen, and Greer(29.15Ex.36p.5-7). Naylor and Kienlen was the closest intersection to where Leslie's body was found and was across from the old P.L. School(29.15Ex.36p.7,9-10). Johnson went to Blakemore because that was where the events were alleged to have begun(29.15Ex.36p.7-8).

Johnson took pictures of an alley that ran behind the house on Blakemore, around the former P.L. School, and the corners of Kienlen and Naylor(29.15Ex.36p.7-8,11)(*See* 29.15Exs.12 through 16 photos).

Johnson took his pictures for purposes of focusing on the quality of lighting in the area where Leslie's body was found(29.15Ex.36p.15-17). 29.15 Exhibit 16 depicted a security style nightlight at the P.L. Elementary School which projected minimal lighting and was not a large floodlight(29.15Ex.36p.16-17).

Johnson took his photos during the daylight in the later part of 2013, which was ten years after Leslie's death(29.15Ex.36p.12-13,52,56-57). Johnson recounted

that after Leslie's 2003 death the intersection of Kienlen and Naylor was upgraded from two to four lanes(29.15Ex.36p.16-20). Johnson's photos were taken after that upgrade(29.15Ex.36p.19).

Exhibit 17A-G were photos of the roadway around the crime scene and were taken by the St. Louis County Highway Department before the road was widened(29.15Ex.36p.18-19). Johnson testified that 29.15 Exhibit 17C, a County Highway Department photo, demonstrated that the street lighting sources around the scene were unaltered by the widening of the road when compared to the lighting sources as documented in the 29.15 Exs.12-16 photos Johnson took(29.15Ex.36p.56-57).

Using information found in police reports, Johnson took measurements, of the areas, memorialized in his photographs, for where Leslie's body was found(29.15Ex.36p.14-15).

V. Counsels' 29.15 Testimony

A. Kraft

Kraft testified that getting accurate pictures of the lighting at the crime scene could have been beneficial(29.15Tr.522). Based on viewing the crime scene, counsel believed it was possible for Eva to have seen what happened(29.15Tr.522). Challenging Eva on her ability to see during Eva's testimony would have been upsetting to Eva and potentially resulted in Eva testifying to harmful matters(29.15Tr.590-91). However, counsel did not go to the crime scene at

night(29.15Tr.523). An ambulance arrived to provide care to Leslie at 11:45 p.m.(29.15Tr.523-24;29.15Ex.25p.2).

B. Turlington

Turlington testified she went to the crime scene, but not at night(29.15Tr.694). Counsels' investigator did go there at night(29.15Tr.739-41). Turlington did not ask their investigator to take pictures of the crime scene as to where lights were located(29.15Tr.695).

VI. 29.15 Findings

Counsel cross-examined respondent's witnesses about lighting(29.15L.F.751,753). Counsel had an investigator go to the crime scene(29.15L.F.751,753). Counsel visited the crime scene and it was their opinion Eva could have witnessed the shooting of Leslie(29.15L.F.751). Counsel did not have their own photos taken of the crime scene because counsel believed it was possible Eva saw what she reported(29.15L.F.751). The investigation counsel conducted showed lights on P.L. School and area street lights(29.15L.F.751).

Johnson's photos lacked foundation or relevance without evidence that the lighting had not been altered between the time of the shooting and when Johnson's photos were taken(29.15L.F.751-52). Johnson was not qualified as an expert to give lighting testimony and his testimony was not credible(29.15L.F.751-52).

There was no evidence presented to suggest a lighting or distance expert would have provided a viable defense(29.15L.F.752). Anything such an expert could have

provided would have been cumulative to what trial witnesses said regarding the lighting and distances(29.15L.F.752).

Counsel conducted reasonable investigation into the lighting and distances and made reasonable strategic decisions on how to handle these matters(29.15L.F.753). It was not shown how the 29.15 photos would have provided a viable defense(29.15L.F.753).

VII. Counsel Was Ineffective

Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8th Cir.1991). Counsel's strategy choices 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).

The findings rejected this claim based upon Johnson, the 29.15 investigator, not being qualified as an expert and roadway construction changes to where Leslie was shot(29.15L.F.751-52). Johnson was not offered as an expert witness. A lay witness is allowed to testify to perceptible facts - what he hears, feels, tastes, smells, and sees. *Roy v. Missouri Pacific Railroad Company*,43S.W.3d351,359(Mo.App.,W.D.2001); *Peterson v. National Carriers, Inc.*,972S.W.2d349,356(Mo.App.,W.D.1998). Johnson would have been allowed to identify the photos he took of sources of lighting and measurements he made as to Eva's distance away from where Leslie was shot as these were perceptible facts from a lay witness. *See*, *Roy* and *Peterson*.

The findings also rejected this evidence because of roadway changes to the area involved(29.15L.F.751-52). Changes in a scene do not affect the admissibility of photos of it, but instead only go to the weight the jury attaches to them. *State v. Shipman*,568S.W.2d947,954(Mo.App.,Spfld.1978). Johnson's photos would have been admissible because roadway changes only went to weight and not admissibility. *See*, *Shipman*.

Reasonable counsel would have obtained and relied on photos of the light quality in the area and presented evidence as to the distance between Eva and Leslie. *See*, *Kenley*, *McCarter*, and *Strickland*. Counsels' investigation was not diligent and cannot be justified as strategy. *See*, *Kenley*. Vincent was prejudiced, through counsel failing to rely on photos and distance measurements, because respondent's case was premised on Eva's reporting she saw the shooting as it happened and calling into question Eva's ability to see was critical. *See*, *Strickland*.

This Court should order a new trial.

CONCLUSION

For the reasons discussed this Court should order: (1) a new trial - Points III, XI, and XIII; (2) a new penalty phase - Points IV, V, VI, VII, VIII, IX, X, and XII; and (3) a new hearing at which all petit jurors are questioned - Points I and II.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, 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, 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 30,965 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in October, 2017. According to that program the brief is virus-free.

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 18th day of October, 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/ William J. Swift
William J. Swift