

**IN THE
MISSOURI SUPREME COURT**

TERRANCE ANDERSON,)	
)	
Appellant,)	
)	
vs.)	No. SC96548
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI
32nd JUDICIAL CIRCUIT
THE HONORABLE KELLY W. PARKER, JUDGE**

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Because death was imposed, this Court has exclusive jurisdiction of this 29.15
appeal. Art. V, Sec.3, Mo. Const.

RECORD COMPOSITION AND DESIGNATIONS

The lengthy and complicated case record is referenced: (1) First Trial Transcript (1stTrialTr.); (2) First Trial Exhibits (1stTrialEx.); (3) First 29.15 Transcript (1st29.15Tr.); (4) First 29.15 Legal File (1st29.15L.F.) (5) First 29.15 Exhibits (1st29.15Ex.); (6) Second Trial Transcript (2ndTrialTr.); (7) Second Trial Legal File (2ndTrialL.F.); (8) Second Trial Exhibits (2ndTrialEx.) (9) Second 29.15 Transcript (2nd29.15Tr.) (10) Second 29.15 Legal File (2nd29.15L.F.); (11) Second 29.15 Exhibits (2nd29.15Ex.); (12) Third 29.15 Transcript (3rd29.15Tr.); (13) Third 29.15 Legal File (3rd29.15L.F.); and (14) Third 29.15 Exhibits (3rd29.15Ex.).

Exhibits A through GG from the second 29.15 hearing remained as A through GG at the third 29.15, and therefore, are referenced as “2nd29.15Ex.”. Exhibits A through GG are included in the materials this Court has judicially noticed.

Exhibits HH through OO were exhibits new to the third 29.15 hearing, and therefore, designated “3rd29.15Ex.”.

Pursuant to respondent’s hearing request, the second 29.15 hearing evidence was deemed part of the third’s evidence(3rd29.15Tr.290-95).

The 29.15 trial court took judicial notice of Terrance’s prior related casefiles(3rd29.15Tr.6-17).

On December 12, 2017, this Court took judicial notice of Terrance’s prior appeals’ records.

STATEMENT OF FACTS

Procedural History

Terrance Anderson was convicted of two counts of first degree murder involving Debbie and Stephen Rainwater's July 25, 1997 deaths. *State v. Anderson*, 79S.W.3d420,427,429(Mo.banc2002). For the count involving Stephen, Terrance was life sentenced, but for the count involving Debbie death. *Id.*429.

Abbey Rainwater is Debbie's and Stephen's daughter. *Id.*427. Abbey and Terrance have a daughter together, Kyra. *Id.*427.

After affirming the direct appeal, this Court ordered a new penalty phase in Terrance's 29.15 appeal because counsel was ineffective for failing to strike for cause a biased juror who expressed a preference for death and would require a defendant to persuade him death wasn't appropriate. *Anderson v. State*, 196S.W.3d28,38-42(Mo.banc2006). On penalty retrial, Terrance was resentenced to death for the count involving Debbie and this Court affirmed. *State v. Anderson*, 306S.W.3d529(Mo.banc2010). At the penalty retrial, Terrance was represented by Assistant Public Defenders Beth Davis-Kerry and Sharon Turlington and assisted by mitigation specialist Catherine Luebbering.

Terrance brought a 29.15 action challenging the retrial death sentence and it was denied after a hearing. This Court reversed and remanded the denial of relief finding the 29.15 judge, Judge Syler, should've recused himself. *Anderson v. State*, 402S.W.3d86(Mo.banc2013). The present appeal is from that remand.

First Trial Guilt Defense

Terrance attended Missouri Valley for one year on a basketball scholarship(1stTrialTr.1381-83). Terrance moved in with the Rainwaters when Abbey learned she was pregnant(1stTrialTr.1383-84). Linda Smith, Terrance's mother, disapproved of Terrance living with the Rainwaters because Terrance and Abbey were unmarried, the Rainwaters are white, and Terrance is African-American(1stTrialTr.1384). Terrance was proud Abbey wanted Kyra to have his last name(1stTrialTr.1387). Terrance moved back with his mother after he was forced to leave the Rainwater's house(1stTrialTr.1385).

Linda was married to Robert Smith, but Timothy Smith is Terrance's father(1stTrialTr.1389-90). After Linda became pregnant with Terrance, her relationship with Timothy ended(1stTrialTr.1390). Terrance became sad when he learned Robert wasn't his father and he never met his biological father(1stTrialTr.1391,1393).

Donald Brandon's son, Jason, and Terrance were close friends(1stTrialTr.1396-97). Donald was Rowe's Furniture shipping supervisor and hired Terrance in May, 1995(1stTrialTr.1397). Initially, Terrance was a very good employee, but his job performance suffered because of absences and calls from Abbey(1stTrialTr.1398-1401). Terrance left work before shifts were over to be with Abbey because of pregnancy complications(1stTrialTr.1399-1401). In December, 1996, Donald fired Terrance for excessive absences and leaving early(1stTrialTr.1401-02).

Terrance told a friend he wasn't being allowed to see his daughter, even though he loved her very much(1stTrialTr.1414). Terrance's family and friends knew him to be an upstanding, hard-working, law-abiding, non-violent person(1stTrialTr.1393-94,1403-04,1413-15,1478-81,1506-07,1510).

Neurologist Dr. Pincus determined Terrance couldn't read above sixth grade level and what he read wasn't comprehended(1stTrialTr.1419-20,1423-27,1429-30,1438). Pincus found defects in Terrance's frontal and parietal lobes(1stTrialTr.1435). The frontal lobe is important to insight, judgment, and capacity to predict outcomes(1stTrialTr.1435-36).

Pincus concluded Terrance's neurological problems made it impossible for him to have coolly reflected given the emotionally stressful circumstances he was experiencing(1stTrialTr.1454,1462-63). At the time of the killings, Terrance had frontal and parietal lobe deficits and was depressed(1stTrialTr.1440-41). Terrance's reading problems were likely the result of birth related brain damage(1stTrialTr.1444-45).

Dr. Dorothy Lewis, M.D. psychiatrist, testified by videotape(1stTrialExs.D and E;1stTrialTr.1489-1503) because she was already scheduled to testify in Tennessee before Terrance's case's setting(1stTrialEx.E at 10-11).

Lewis was a Professor of Psychiatry at NYU's School of Medicine and a Yale School of Medicine Clinical Professor(1stTrialEx.E at 6-8). Lewis isn't a psychologist(1stTrialEx.E at 69-71). Lewis had received recognition for her research in the area of neuropsychiatric effects of abuse and how that can precipitate violent

behavior(1stTrialEx.E at 9-10,70). Lewis had received an award from the National District Attorney's Association and juvenile and family court judges(1stTrialEx.E at 9-10).

Lewis noted Terrance's records showed he was born prematurely and experienced fetal distress, including an infection(1stTrialEx.E at 15-18). Terrance's birth records also indicated periods of anoxia, where such trauma has long-term brain effects(1stTrialEx.E at 17-19). Also, when Terrance was sixteen months, he swallowed rubbing alcohol, which is toxic to the brain(1stTrialEx.E at 19-21). Terrance's school records reflected a learning disability characteristic of brain damage(1stTrialEx.E at 21-25).

Terrance's step-father, Robert Smith, reported to Lewis that Terrance's mother, Linda, was periodically and cyclically depressed causing her to withdraw from the world(1stTrialEx.E at 28-29). Linda's depressive history was significant as to Terrance because depression is genetically linked(1stTrialEx.E at 28-29). Family members described to Lewis that Terrance was periodically extremely depressed(1stTrialEx.E at 29-30).

Lewis' background history investigation of Terrance found no prior history of violence until these events(1stTrialEx.E at 33-35). Terrance was depressed and withdrawn because of losing his job and being forced-out of the Rainwater's(1stTrialEx.E at 31). Terrance was encountering many stressful circumstances causing him to be increasingly depressed, suspicious, and paranoid(1stTrialEx.E at 35-41). Terrance was depressed about the possibility of

losing his daughter and her not knowing him, like he didn't know his father(1stTrialEx.E at 38-43). Terrance insisted someone else shot Debbie and he shot Stephen only(1stTrialEx.E at 43-44).

At the time of the offense, Terrance was paranoid, delusional, severely depressed, and in an altered state such that he was suffering from a mental disease or defect that prevented cool reflection(1stTrialEx.E at 43-47,58). Terrance's altered state caused him to be unable to remember the charged acts(1stTrialEx.E at 46-47). Lewis found Terrance's state at the time of the offense was such that it was either amnesic or an impaired memory so as to constitute an altered state(1stTrialEx.E at 58-59). Lewis didn't believe Terrance lied about what he remembered(1stTrialEx.E at 61-62).

In guilt closing argument, counsel urged the mental health evidence supported Terrance was unable to have deliberated, and therefore, was guilty of murder second, not first(1stTrialTr.1607-09,1617,1620-21,1625-26).

Dr. Lewis - First Trial Competency To Proceed Issues

For purposes of Terrance's competency to proceed only, a second separate deposition of Lewis was done the same day as her trial deposition and submitted to the court, but not the jury(1stTrialTr.1489-1499;1stTrialEx.E-1 at 5). Lewis noted as to the issue of Terrance's competency to proceed his paranoia was so extreme it extended to her(1stTrialEx.E-1 at 9). Terrance said to Lewis "there were things that he knew and things about that had happened in his home and in his childhood **that he just could not reveal**...."(1stTrialEx.E-1 at 9)(emphasis added).

Also for competency to proceed purposes only, counsel offered for the court's consideration Lewis' Preliminary Report of June, 1998(1stTrialTr.1494-95;1stTrialEx.E-3;2nd29.15Ex.D) and Lewis' Addendum of March, 1999(1stTrialTr.1494-95;1stTrialEx.E-4;2nd29.15Ex.E). Lewis' Preliminary Report noted that although Robert Smith denied having a temper "both of his children [Terrance and Shaneka] recalled periodically being frightened by his rages."(1stTrialEx.E-3 at 4;2nd29.15Ex.D at 4)(emphasis added). The Preliminary Report continued recounting that Shaneka reported one incident Robert became so angry at Terrance for eating a Cornish hen that Robert "overturned a table, causing it to crash into a chandelier and causing glass to fly."(1stTrialEx.E-3 at 4;2nd29.15Ex.D at 4).

Lewis' Preliminary Report recounted Terrance "described constant disagreements" with Robert(1stTrialEx.E-3 at 5;2nd29.15Ex.D at 5). Lewis said Terrance was "extremely protective of his parents" while Terrance denied being hit or beaten by either(1stTrialEx.E-3 at 5;2nd29.15Ex.D at 5).

Lewis recounted Robert denied ever striking Terrance(1stTrialEx.E-3 at 5;2nd29.15Ex.D at 5). Lewis noted that when Terrance was about five, he was treated for a right tibial spiral fracture(1stTrialEx.E-3 at 2;2nd29.15Ex.D at 2). The purported cause of that fracture was being struck by a car(1stTrialEx.E-3 at 2;2nd29.15Ex.D at 2). However, spiral fractures are the result of intentional twisting movements and not impact injuries(1stTrialEx.E-3 at 2;2nd29.15Ex.D at 2). When

Terrance was eight, he was treated for a puncture wound to his left thigh(1stTrialEx.E-3 at 2;2nd29.15Ex.D at 2).

Lewis noted Terrance denied choking Abbey on July 22, 1997, which led to Abbey going to the police on July 25th(1stTrialEx.E-3 at 11;2nd29.15Ex.D at 11). It was “puzzling” to Lewis that Terrance admitted to committing the far more serious act of shooting Stephen, and therefore, had little reason to deny a much less serious assaultive act involving Abbey, if he remembered it(1stTrialEx.E-3 at 11;2nd29.15Ex.D at 11). Such inconsistency suggested Terrance wasn’t malingering, but rather had partial amnesia for what happened(1stTrialEx.E-3 at 13;2nd29.15Ex.D at 13).

Terrance described for Lewis problems between Robert and his mother that required Terrance getting between them to prevent fights(1stTrialEx.E-4 at 1;2nd29.15Ex.E at 1). Robert’s military records and his former wife Earline Smith’s and their daughter Deborah’s reporting indicated Robert had an extremely violent past(1stTrialEx.E-4 at 2;2nd29.15Ex.E at 2). Robert was discharged from the military because of episodic violent rages(1stTrialEx.E-4 at 2;2nd29.15Ex.E at 2). Earline reported extreme violence by Robert towards her both during and after their marriage(1stTrialEx.E-4 at 2;2nd29.15Ex.E at 2). Earline reported Robert raped her shortly after child-birth, twisted her breast after she had surgery on it, and made threatening calls to her, which she taped and brought to court(1stTrialEx.E-4 at 2;2nd29.15Ex.E at 2). Terrance refused to talk about Robert’s behaviors except to say

he knew things Robert did in the military, but those had to remain secret(1stTrialEx.E-4 at 2;2nd29.15Ex.E at 2).

First Trial Penalty

The first penalty phase was devoted to calling family, friends, and a jail administrator(1stTrialTr.1670-1703). That evidence was limited to focusing on Terrance's polite and respectful behavior, good work ethic, athletic accomplishments and people's inability to comprehend what caused Terrance's actions(1stTrialTr.1670-1703).

During Terrance's step-father Robert's first trial penalty phase testimony, he portrayed himself as a model caring father involved in Terrance's life in a normal family(1stTrialTr.1670-80). In particular, Robert identified himself as Terrance's stepfather who had raised him since he was ten months(1stTrialTr.1670). Robert had only learned a couple of years before testifying that Terrance knew he wasn't Terrance's biological father, something Robert didn't want Terrance to know(1stTrialTr.1670).

Robert testified about having coached Terrance in Little League and having attended all of Terrance's basketball games(1stTrialTr.1673). Through Robert, assorted family pictures were presented, along with various awards Terrance received(1stTrialTr.1671-77). One photo showed five year old Terrance with a broken leg, which Robert represented happened when Terrance was hit by a car(1stTrialTr.1672). The photos included celebrating Christmas and attending church(1stTrialTr.1671-73).

Robert testified the tragedy involving the Rainwaters has caused all of the family to become closer(1stTrialTr.1678-79). Robert has applied this experience to try to help other young people(1stTrialTr.1679).

First 29.15

Dr. Cross evaluated Terrance for the first 29.15(1st29.15Tr.105). Cross recounted Terrance's medical records reflected when Terrance was very young he had a spiral tibial fracture, reportedly caused by being hit by a car(1st29.15Tr.119). Spiral fractures, as noted in Lewis' June, 1998 report, are caused by twisting(1st29.15Tr.136-37;1st29.15Ex.4 at 1158 and 2nd29.15Ex.D at 2). Spiral fractures are not impact fractures, but rather are caused by child abuse(1st29.15Tr.119-120;1st29.15Ex.4 at 1158 and 2nd29.15Ex.D at 2).

Cross concluded cigarette burns on Terrance's back, multiple scars on Terrance, a puncture wound to Terrance's left thigh, and the tibial spiral fracture evidenced child abuse(1st29.15Tr.134-36). Cross noted the secrecy Robert imposed on the family was symptomatic of abuse(1st29.15Tr.135-36). Cross recounted it was unsurprising Terrance had not disclosed the abuse because that was part of the family's secrecy system(1st29.15Tr.142).

Cross concluded on the day of the offense, Terrance not only suffered from depression, paranoid thinking, and paranoid personality disorder, but also Post-Traumatic Stress Disorder (PTSD) Robert caused(1st29.15Tr.131-32,149-50).

Cross found documentation of Robert's violent history he reviewed for the first 29.15 was significant for explaining the very violent act Terrance

committed(1st29.15Tr.121-27). Those records were significant because our parents are models and people incorporate into their personalities the problem resolution strategies and methods their parents' displayed(1st29.15Tr.121-27). Robert, as Terrance's step-father, was Terrance's model and Terrance was predisposed to solve problems the way Robert did(1st29.15Tr.121-27,147-49).

Cross' testing found Terrance had longstanding intrusive thoughts, a strong indicator of physical and emotional abuse(1st29.15Tr.145-46). Cross also did testing finding Terrance wasn't malingering on his abuse trauma history(1st29.15Tr.146).

Cessie Alfonso is a licensed clinical social worker who testified at the first 29.15(1st29.15Tr.23-24,34,79). Alfonso recounted Terrance grew-up in a household with a step-father who had a history of blowing-up, hitting people, and practicing infidelity(1st29.15Tr.59).

Alfonso recounted Robert had a history of abusive behavior and used coercive control, intimidation, and violence to control the household(1st29.15Tr.56). In response, Terrance either tried to intervene or isolated himself by withdrawing and locking himself in his room(1st29.15Tr.56,60-61,63). Terrance still was bed-wetting when he was twelve, which was indicative of the intensity, duration, and frequency of family conflict(1st29.15Tr.56-57).

Alfonso reviewed documents showing Robert's violent behavior towards his former wife, Earline, including dislocating her shoulder, causing her black eyes, twisting her breasts following surgery, and raping her while pregnant(1st29.15Tr.58). While Robert was married to Linda, he had relationships with other

women(1st29.15Tr.58-59). Robert was assaultive in a relationship he had with another woman, while he was married to Linda(1st29.15Tr.59-60). Alfonso noted Robert “is a batterer who used violence, coercive control, and intimidation”(1st29.15Tr.58).

Penalty Retrial State’s Evidence

Abbey’s and Terrance’s relationship was off-and-on(2ndTrialTr.665-67). Terrance was excited about being a father(2ndTrialTr.661). When Abbey learned she was pregnant, her parents invited Terrance to live with them(2ndTrialTr.661).

There was tension with Abbey’s parents though over her relationship with Terrance because Terrance was older than Abbey and because Terrance is African-American and Abbey is white(2ndTrialTr.657-58). There was a time where Abbey’s parents separated and Stephen moved into an apartment(2ndTrialTr.664). Stephen was on disability and suffered from bipolar manic depression(2ndTrialTr.665). During Abbey’s relationship with Terrance, she overdosed on prescription medication(2ndTrialTr.658-60). Terrance began living with the Rainwaters in September, 1996 and was told to leave that November because of conflict(2ndTrialTr.644,664).

In December, 1996, when Abbey was four months pregnant, Stacey Turner-Blackmon and Abbey were driving around looking for Terrance because Abbey was upset with Terrance and Kelly McDowell(2ndTrialTr.681-82,704-05) When they saw Terrance, they chased him which resulted in Abbey driving into someone’s lawn(2ndTrialTr.704-05).

Abbey broke an apartment's glass to get inside where Terrance was alone with McDowell(2ndTrialTr.681-82). The police were called because the neighbors thought Abbey was breaking-in(2ndTrialTr.681-82). During that incident, Terrance grabbed Abbey's throat(2ndTrialTr.681-82).

Abbey knew Terrance wanted a significant role in their daughter's life because of Terrance's biological father's absence from his life(2ndTrialTr.662,667). Abbey and Terrance agreed to name their daughter Kyra Nicole Anderson(2ndTrialTr.670). For Kyra's birth certificate, Abbey changed Kyra's name to Rainwater because Abbey thought Anderson gave Terrance more influence(2ndTrialTr.670-71).

On July 25th, Abbey and her father obtained an ex parte protective order against Terrance(2ndTrialTr.645). Abbey obtained the order because Terrance allegedly struck and injured her the night before(2ndTrialTr.678,683). Terrance was supposed to care for Kyra on July 25th, while Abbey worked at Sonic(2ndTrialTr.675). Terrance paged Abbey, when Abbey failed to bring Kyra by, but Abbey didn't respond(2ndTrialTr.675-76).

Terrance stopped by the Rainwater's house and Stephen told Terrance to leave(2ndTrialTr.676). Abbey talked to Terrance later on July 25th on the phone and told him about the court order and told him the courts would decide visitation(2ndTrialTr.645-46,676). Abbey told Terrance he had to do a paternity test(2ndTrialTr.676). Terrance was angry and asked Abbey about visitation(2ndTrialTr.645-46). Abbey told Terrance she had no intention to prevent Terrance from seeing Kyra(2ndTrialTr.646,679-80). Stacey, however, was familiar

with conversations involving Debbie where there were discussions about Abbey and Kyra moving to California(2ndTrialTr.707).

Abbey, Abbey's sister, Whitney, Stephen and Debbie, Abbey's friends Amy Dorris and Stacey Turner-Blackmon, and Kyra were at the Rainwater's house (2ndTrialTr.623,626,687,716-17). Abbey was seventeen and her sister, Whitney, was ten(2ndTrialTr.642-44). Kyra, was born in April and was three months old(2ndTrialTr.643,671).

Abbey, Amy, and Stacey went to the basement to smoke(2ndTrialTr.688). There were knocks on the downstairs door, but no one was there(2ndTrialTr.625,688-90). Stephen went outside with a gun to look around, but found no one(2ndTrialTr.690,717). Stephen drove around the neighborhood to investigate and took a gun(2ndTrialTr.626-27,690,717-18).

Terrance rang the front door bell and was there pointing a gun at the glass(2ndTrialTr.627-28,648,690-91,718). Terrance forced the front door open(2ndTrialTr.580,628,648,692,718). Debbie and Terrance argued while she held Kyra and Debbie asked Terrance not to shoot(2ndTrialTr.628-29). Debbie told Abbey to run and Abbey ran to a neighbor's house where Abbey called the police(2ndTrialTr.649-50). Whitney heard a gunshot fired at Debbie(2ndTrialTr.609,719-21).

Stephen returned and Whitney observed Terrance and Stephen argue, which was followed by a gunshot(2ndTrialTr.723-24).

Amy heard gunfire and she ran out the front door(2ndTrialTr.630-31). Terrance ordered Amy to stop and threatened to shoot her if she didn't(2ndTrialTr.630-31).

Whitney hid in the laundry room(2ndTrialTr.721). Whitney heard the phone ringing in her parents' bedroom and she went there with Kyra(2ndTrialTr.721). Amy's boyfriend, Robert, was calling and Whitney told him what happened(2ndTrialTr.721-22). Terrance came in and hung-up the phone(2ndTrialTr.632,722). Terrance took Kyra from Whitney(2ndTrialTr.632). That was followed by Terrance, Whitney, Amy, and Kyra going outside(2ndTrialTr.722). Terrance called for Abbey and Stacey to come out(2ndTrialTr.632,722). Terrance made Amy yell that he was going to kill Whitney and Amy, if Abbey and Stacey didn't appear(2ndTrialTr.631,633).

Stacey hid in a closet in Stephen's and Debbie's bedroom(2ndTrialTr.692-94). At some point, Stacey ran across to Abbey's bedroom and looked out the window(2ndTrialTr.694-95). Stacey saw Terrance outside with Amy, Whitney, and Kyra(2ndTrialTr.694-95).

Stacey ran back to Stephen and Debbie's bedroom and called 911(2ndTrialTr.695). Stacey hid in Stephen's and Debbie's shower(2ndTrialTr.695-96). Terrance directed Whitney to check if anyone was in Stephen's and Debbie's bedroom(2ndTrialTr.696,724-25). Whitney saw Stacey hiding in the shower, but told Terrance no one was there(2ndTrialTr.696,724-25).

Officer Clark was dispatched to the Rainwater's Poplar Bluff neighborhood on Montclair St.(1stTrialTr.1026-31).¹ One of the Rainwater's neighbors called the police because at 11:10 p.m., someone pulled into her driveway, aimed their headlights at the front window, and pounded on the door while ringing(1stTrialTr.1026-27,1061-62).

Clark heard a gunshot from the Rainwater's address at 1005 Montclair(1stTrialTr.1032). Clark saw Stephen lying in the front yard and he appeared dead(1stTrialTr.1040-41;2ndTrialTr.697).

Terrance held Kyra with a gun in his hand and stood in an open window yelling at the police to put down their guns(1stTrialTr.1041-43;2ndTrialTr.551-52,725-26). The police ordered Terrance to surrender and Terrance complied(1stTrialTr.1044-45,1057-58). Terrance was directed to hand Kyra to Whitney and he did(1stTrialTr.1057;2ndTrialTr.725-26).

Abbey and Whitney described how losing their parents impacted them(2ndTrialTr.651-55,726-29).

Retrial Defense Case

Counsel called Terrance's friends and coaches, Jason Brandon, Donald Brandon, Timothy McMillan, Larry Morgan, Kevin Pruitt, and Mike Brey(2ndTrialTr.730-40,742-46,798-803,804-14,840-43,883-90). They recounted how Terrance was a good friend, quiet, polite, mild-mannered, non-confrontational,

¹ Officer Clark's first trial testimony was read(2ndTrialTr.544).

good teammate, upbeat, ideal to coach, and respected by teammates and peers for leading by example(2ndTrialTr.730-40,742-46,798-803,804-14,840-43,883-90).

Louis Buchanan and Terrance were roommates about three months before the shootings(2ndTrialTr.835). During that time, Terrance became withdrawn(2ndTrialTr.835-36).

Buchanan had experiences answering the phone where Stephen thought he was talking to Terrance and would insult Buchanan for that reason(2ndTrialTr.836-37). Stephen would address Buchanan, who he thought was Terrance, as “nigger” and say he was going to “whoop your ass”(2ndTrialTr.836-37). Stephen would state the “black and white thing” didn’t work and Terrance and Abbey shouldn’t be together and Abbey needed “to be with her own kind”(2ndTrialTr.836-37). Buchanan also overheard a phone conversation where Stephen was talking to Terrance and Stephen threatened to “whoop Terrance’s ass”(2ndTrialTr.836-37).

There was an incident at Buchanan’s and Terrance’s apartment where Stephen threateningly pulled-up and sped-up in his Jeep(2ndTrialTr.837-38).

Buchanan, like all those who knew Terrance, was shocked by the shooting because it was so out-of-character for Terrance(2ndTrialTr.839).

Terrance told the jury he was testifying because he wanted everyone to know what happened(2ndTrialTr.751). Terrance recounted that the day before the shooting he received a call from Abbey informing him that she needed him to watch Kyra the next day(2ndTrialTr.752). Terrance had a job interview then, but told Abbey she could leave Kyra with his mother(2ndTrialTr.752).

Terrance recounted that when he finished his interview, Kyra wasn't with his mother(2ndTrialTr.752). Terrance paged Abbey, but he didn't hear back(2ndTrialTr.752).

Terrance testified he went by the Rainwater's house and Stephen came out acting hostile and wanting to fight(2ndTrialTr.753). Terrance left the Rainwater's house, but then called there(2ndTrialTr.753-54). Stephen answered the phone and called Terrance names(2ndTrialTr.754-55). Stephen put Abbey on the phone(2ndTrialTr.755). Abbey apologized for going to court and Terrance didn't know what she was talking about(2ndTrialTr.755). Before Abbey could explain, Stephen grabbed the phone and hung-up(2ndTrialTr.755). Terrance was angry and he thought the Rainwaters were trying to separate him from Kyra(2ndTrialTr.756). During the time Terrance lived with the Rainwaters, Debbie directed racially charged comments at him(2ndTrialTr.756-57).

Terrance recounted he wanted to be present for Kyra and be a good father(2ndTrialTr.758-59). Being a good father to Kyra was important because of Terrance's feelings about knowing who his real father was(2ndTrialTr.758-59). Terrance didn't want Kyra to have a similar experience about the identity of her father(2ndTrialTr.759-60).

Terrance testified Stacey had told him that Debbie and Stephen were plotting to kill him and Kyra(2ndTrialTr.767-71). That conversation with Stacey occurred 2-3 weeks before this incident(2ndTrialTr.770).

Terrance admitted he went to the Rainwater's house angry intending to hurt Debbie and Stephen(2ndTrialTr.795-96). Terrance told the jury he was sorry(2ndTrialTr.784-85).

Terrance's mother, Linda, recounted Robert Smith is Terrance's stepfather and Robert acted as Terrance's father for his entire life(2ndTrialTr.818). Linda's father, Phillip Anderson, told Terrance that Timothy Smith was Terrance's father(2ndTrialTr.821-23). After Linda became pregnant with Terrance, her relationship with Timothy ended(2ndTrialTr.822-23). Terrance was a good, quiet, child growing-up(2ndTrialTr.824). Linda loves Terrance and wants the best for him and Kyra(2ndTrialTr.828).

Deborah Moore is Terrance's step-sister and Robert is her father(2ndTrialTr.829). Terrance and Deborah were raised as siblings and have a good relationship(2ndTrialTr.829-30). Terrance was always polite, pleasant, and respectful(2ndTrialTr.830-31). Deborah was stunned by the shooting and felt sad for both families(2ndTrialTr.831).

Terrance's cousin, Mark Hunt, and Terrance had discussions growing-up about their desires to have successful jobs, care for their families, and being productive citizens(2ndTrialTr.846). Hunt felt sad and frustrated for Terrance because Terrance's plans were destroyed(2ndTrialTr.847-48). Hunt couldn't believe what happened because Terrance was nice, humble, and athletic(2ndTrialTr.848-49). Terrance hadn't been violent(2ndTrialTr.848-49).

Robert testified he is Terrance's stepfather(2ndTrialTr.849-50). Robert treated Terrance like his own son(2ndTrialTr.850). Robert never discussed with Terrance that he wasn't Terrance's biological father because it was unnecessary(2ndTrialTr.852-53). Terrance was ten months when Robert entered Terrance's life(2ndTrialTr.850). Robert and Terrance's mother had one child together, Shaneka, and Terrance was the better behaved(2ndTrialTr.850). Robert recounted Terrance played basketball, baseball, football, and track(2ndTrialTr.851). Robert regularly attended Terrance's games(2ndTrialTr.851). Robert works for the Poplar Bluff School District and was on the City Council(2ndTrialTr.851).

Robert identified Exhibit C as a picture of Terrance on crutches with a broken leg, when Terrance was five, after getting struck by a car(2ndTrialTr.853).

A picture of Terrance and Robert when Terrance was about two on a cold winter day was presented(2ndTrialTr.853-54). A picture of Terrance, at age 13 (Ex.G) dressed in an Easter Bunny suit, done to entertain their church's younger children was presented(2ndTrialTr.854-55).

A picture of Robert giving Terrance a piggyback ride (Ex.E) was presented(2ndTrialTr.856). There were also pictures of Terrance and Shaneka presented during Robert's testimony(2ndTrialTr.855-56). A picture of Terrance (Ex.N) at age 6 was also presented(2ndTrialTr.856).

Robert reported Terrance was well-adjusted growing-up(2ndTrialTr.856-57). Terrance was popular in school and had no behavioral problems(2ndTrialTr.857).

Robert recounted that when Terrance told him Abbey was pregnant, Terrance was happy about being a father(2ndTrialTr.857-58). Terrance was protective of Kyra(2ndTrialTr.857). The Rainwaters left Kyra at the Smith's house and Terrance cared for Kyra(2ndTrialTr.858). Robert reported he was saddened because he didn't know whether Kyra realizes he is her grandfather(2ndTrialTr.858).

Robert recounted that since the shooting Terrance's mother has become reserved and keeps to herself(2ndTrialTr.859).

Robert stated he still loves Terrance and that these events have made the family closer(2ndTrialTr.859-60).

The prosecutor's initial closing argument included:

And you've heard a good bit about the defendant's background. I am prepared to believe that **his parents and his friends are decent people**, just as I'm prepared to believe that the Rainwaters were decent people. **What he did does not reflect on any of them**, but it is his actions that we must analyze. **There is nothing in his background**, according to what we've been told, to suggest he would do this.

(2ndTrialTr.900)(emphasis added).

The jury sentenced Terrance to death for Debbie's death(2ndTrialL.F.189;2ndTrialTr.935).

29.15 Case

The 29.15 amended motion alleged counsel was ineffective in failing to present mitigation evidence of Robert's violent behavior through records documenting

Robert's history as analyzed through mental health experts(3rd29.15L.F.38-39,57-61,63-70). That mental health evidence was pled to include calling Lewis to testify about Robert's violence(3rd29.15L.F.38,38n.2).

The pleadings also alleged evidence of Robert's violence towards his prior wife Earline should've been presented(3rd29.15L.F.52-54). Additionally, the pleadings alleged evidence of Robert's violent behavior towards his girlfriend, Shirley Pratt, should've been presented(3rd29.15L.F.54-57).

Dr. Lewis' testimony from the second 29.15 hearing was resubmitted for this third 29.15 hearing(3rd29.15Tr.7).

Lewis reviewed Robert's arrest, military, and school records documenting Robert's violent history(2nd29.15Ex.FF at 19,36). Robert's records reflected he was episodically and extraordinarily violent(2nd29.15Ex.FF at 36-40;2nd29.15Exs.M,N,O). Robert's military records reflected a psychiatrist's finding Robert has an explosive personality disorder(2nd29.15Ex.FF at 37-38).

Lewis interviewed Robert's ex-wife, Earline(2nd29.15Ex.FF at 40). Earline described sadistic extreme violence Robert directed at her, including beating and raping(2nd29.15Ex.FF at 40). Lewis interviewed Earline's and Robert's daughter, Deborah, who confirmed Robert's extreme violence(2nd29.15Ex.FF at 41).

Lewis noted that when Terrance was five, he sustained a spiral tibial fracture(2nd29.15Ex.FF at 27-28;2nd29.15Ex.H at 9). The hospital history report was Terrance was struck by a car, but spiral fractures are caused by intentional twisting acts(2nd29.15Ex.FF at 27-28).

Robert's documented history as to Shirley Pratt and Earline Smith was significant as to Terrance's life circumstances because an individual with Robert's domestic violence history would be expected to continue that behavior(2nd29.15Ex.FF at 46). Terrance was protective of both his mother and Robert, but at the same time reported he had to physically separate them to prevent violence(2nd29.15Ex.FF at 46). Lewis noted there was violence in the home that was denied, while Robert maintained they were the perfect family(2nd29.15Ex.FF at 46). Fantasies Shaneka reported evidenced a severely traumatized child resulting from violence between parents(2nd29.15Ex.FF at 49-51). A parent's entire past behavior impacts and influences who a child raised by that parent becomes(2nd29.15Ex.FF at 35-36).

Earline and Robert were married eleven years(2nd29.15Ex.GG at 1). Robert frequently beat Earline and frightened their children(2nd29.15Ex.GG at 1-2). Robert verbally abused their children and that caused their daughter, Deborah, to require mental health treatment(2nd29.15Ex.GG at 1-2). Robert's beating Earline caused her to have multiple shoulder surgeries(2nd29.15Ex.GG at 1;3rd29.15Ex.OO at 1). Robert raped Earline numerous times, including while she was pregnant and shortly after Deborah's birth(2nd29.15Ex.GG at 1-2;3rd29.15Ex.OO at 1). During one rape, Robert crushed Earline's glasses under his heel(3rd29.15Ex.OO at 1;2nd29.15Ex.GG at 1-2). After Earline had breast surgery, Robert twisted her breast causing her to need follow-up invasive treatment(2nd29.15Ex.GG at 1-2;3rd29.15Ex.OO at 1-2).

Robert intentionally broke objects, overturned tables, and struck walls(2nd29.15Ex.GG at 1-2;3rd29.15Ex. OO at 2). Earline called the police many times while married to Robert(2nd29.15Ex.GG at 2).

When Earline and Robert eventually divorced, Robert stalked and threatened Earline(2nd29.15Ex.GG at 2). Earline began carrying a gun for protection(2nd29.15Ex.GG at 2). Robert stopped harassing Earline only after an incident where Earline aimed her gun at him(2nd29.15Ex.GG at 2).

Robert fathered multiple children with multiple women while married to Earline(3rd29.15Ex.OO at 2). Robert was involved with Linda while Earline and Robert were still married(3rd29.15Ex.OO at 2). Robert's violent acts included hitting his high school principal so hard with a chair that it broke(3rd29.15Ex.OO at 2).

Counsel testified they didn't present evidence of Robert's violence because it was presented at the first trial and they wanted to do something "different"(3rd29.15Tr.164,172-76,217-18,269;2nd29.15Tr.374). In fact, the first trial's jury never heard evidence about Robert's violence, rather they heard he was the model father(1stTrialTr.1670-80;2ndTrialTr.849-61).

The motion court entered findings denying relief after a hearing(3rd29.15L.F.375-411). This appeal followed.

POINTS RELIED ON

I.

ROBERT'S VIOLENCE

The motion court clearly erred denying the claim counsel was ineffective for failing to call Dr. Lewis solely to testify about the impact on Terrance of his stepfather Robert's violent, abusive behaviors because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel who wanted a "different" strategy from the original trial would have known and not replicated the first trial's failed strategy portraying Robert as a model father because predecessor counsel uncovered evidence of actual abuse Robert inflicted on Terrance and Terrance's mother, Linda, as well as a longstanding history of Robert's violence. Terrance was prejudiced because evidence of an abusive, disadvantaged background is inherently mitigating, lessening moral culpability, and would have mitigated Terrance's actions which were so inconsistent with Terrance's non-violent, law-abiding past.

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

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

Griffin v. Pierce, 622 F.3d 831 (7th Cir. 2010);

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

II.

EARLINE SMITH - ROBERT'S VIOLENCE

The motion court clearly erred in denying the claim counsel was ineffective for failing to call Earline Smith, Terrance's stepfather Robert's ex-wife, to testify about Robert's violent and abusive behaviors Robert inflicted on she and her daughter, Deborah, because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Earline for the jury to hear firsthand the intensity and magnitude of the domestic violence Robert inflicted on Earline and Deborah for the jury to consider in conjunction with hearing from Dr. Lewis (Point I) that Robert's domestic violence history would be expected to continue as to Terrance and his mother, Linda. Terrance was prejudiced because all of Robert's violent abusive past behavior shaped and influenced Terrance and was inherently mitigating evidence lessening Terrance's moral culpability supporting life.

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

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

Griffin v. Pierce, 622 F.3d 831 (7th Cir. 2010);

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

III.

FAILURE TO CALL DR. LEWIS - TERRANCE'S **PSYCHIATRIC DIAGNOSES**

The motion court clearly erred in denying the claim counsel was ineffective for failing to call Dr. Lewis because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called her to provide mitigating evidence Terrance suffered from a psychotic depression characterized by paranoia and delusions while living in dysfunctional family circumstances all of which would have supported the §565.032.3 statutory mitigators extreme emotional disturbance (given) and substantial impairment (not offered). Lewis also would have presented testimony Terrance had impaired intellectual functioning. Terrance was prejudiced because there is a reasonable probability if Lewis was called he would have been life sentenced.

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

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004);

Glass v. State, 227 S.W.3d 463 (Mo. banc 2007);

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

§565.032.3.

IV.

FAILURE TO CALL DR. HOLCOMB

The motion court clearly erred denying the claim counsel was ineffective for failing to call Dr. Holcomb because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have apprised Holcomb Terrance was testifying he remembered shooting Debbie, asked Holcomb the significance of that testimony as it impacted his opinions/diagnoses and learned from Holcomb Terrance's testimony did not change Holcomb's opinions/diagnoses as Terrance's recall at trial is consistent with the course of psychogenic amnesia, and then called Holcomb to testify. Terrance was prejudiced because Holcomb providing mitigation Terrance suffered from a psychotic depression, characterized by paranoia and delusions, would have supported the §565.032.3 statutory mitigators extreme emotional disturbance (given) and substantial impairment (not offered), and there is a reasonable probability if Holcomb testified Terrance would have been life sentenced.

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004);

Glass v. State, 227 S.W.3d 463 (Mo. banc 2007);

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

§565.032.3.

V.

WITNESSES TO TERRANCE'S

DISORIENTED STATE

The motion court clearly erred in denying the 29.15 claim counsel was ineffective for failing to call Tim Jones, Adrienne Dionne Webb, Larry Woods, and Steven Stovall because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called them to testify about their observations of Terrance's disoriented, distressed mental state. Terrance was prejudiced because this evidence would have highlighted Terrance's mental state both shortly before and after the offense and there is a reasonable probability the jury would have voted for life had they heard this evidence.

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

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

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

VI.

CROSS-EXAMINING TERRANCE - RESPONDENT'S

WITNESSES LYING

The motion court clearly erred in denying the claim counsel was ineffective for failing to properly, timely object to cross-examination of Terrance asking Terrance whether the jury should believe Terrance over respondent's witnesses as respondent's witnesses must be lying because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected as respondent is prohibited from asking a witness if another witness lied. Terrance was prejudiced because this questioning injected arbitrariness in the sentencing decision and there is a reasonable probability Terrance otherwise would have been life sentenced.

State v. Roper, 136 S.W.3d 891 (Mo.App., W.D. 2004);

Saffle v. Parks, 494 U.S. 484 (1990);

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

VII.

ADMISSION OF EX PARTE ORDER AND ITS ALLEGATIONS

The motion court clearly erred in denying the claim counsel was ineffective for failing to properly object to the wholesale admission of a copy of Abbey's ex parte petition for protection and the accompanying protective order, Exhibit 38, containing a finding of good cause for the order based on the supporting factual allegations for the order because Terrance was denied effective assistance, 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 Exhibit 38's admission or at minimum requested the good cause finding with its factual allegations be redacted because Terrance was not afforded the opportunity to challenge the accusations. Terrance was prejudiced because respondent used the order to argue it established Terrance had lied when he denied having physically abused Abbey injecting arbitrariness when there otherwise was a reasonable probability Terrance would have been life sentenced.

State v. Clevenger, 289 S.W.3d 626 (Mo.App., W.D. 2009);

State v. Jackson, 155 S.W.3d 849 (Mo.App., W.D. 2005);

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

VIII.

ADVISING TERRANCE TO TESTIFY

The motion court clearly erred in denying the claim counsel was ineffective for advising Terrance to testify when his testimony as a matter of law was not mitigating and failed to advise him during trial not to testify that other witnesses could effectively humanize him to the jury because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would not have advised Terrance to testify to show he accepted responsibility because the first trial's jury had already found as a matter of law he was responsible and reasonable counsel would have advised him other witnesses could humanize him and reasonably competent counsel would have during trial advised Terrance not to testify. Terrance was prejudiced because respondent repeatedly portrayed Terrance as a liar, especially deserving death.

Marshall v. Hendricks, 307 F.3d 36 (3rd Cir. 2002);

U.S. v. Henriques, 32 M.J. 832 (1991);

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

IX.

ADOPTING PRIOR FINDINGS

The motion court clearly erred in overwhelmingly adopting Judge Syler's findings as written because Terrance was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that when this Court ruled Syler should have disqualified himself this Court must have intended a remand that was more than the meaningless act of a different judge simply adopting verbatim a multitude of Syler's findings.

Thomas v. State, 808 S.W.2d 364 (Mo. banc 1991);

Anderson v. State, 402 S.W.3d 86 (Mo. banc 2013);

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

X.

APPELLATE COUNSEL PROPORTIONALITY

The motion court clearly erred in denying the claim direct appeal counsel was ineffective for failing to challenge proportionality under §565.035.3 because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have briefed this issue since proportionality review is statutorily mandated and this Court has found death sentences disproportionate. Terrance was prejudiced because there is a reasonable probability this Court would have found Terrance's death sentence disproportionate and imposed life.

Evitts v. Lucey, 469 U.S. 387 (1985);

Williams v. State, 168 S.W.3d 433 (Mo. banc 2005);

Mylar v. Alabama, 671 F.2d 1299 (11th Cir. 1982);

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

§565.035.3.

APPLICABLE STANDARDS

Throughout, there are repeating governing standards. 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*, 850 S.W.2d 348, 350 (Mo. banc 1993).

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*, 466 U.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*, 68 S.W.3d 418, 426 (Mo. banc 2002). A reasonable probability sufficiently undermines confidence in the outcome. *Id.* 426. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo. App., S.D. 1994); *Butler v. State*, 108 S.W.3d 18, 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*, 428 U.S. 280, 305 (1976); *Lankford v. Idaho*, 500 U.S. 110, 125 (1991).

ARGUMENT

I.

ROBERT'S VIOLENCE

The motion court clearly erred denying the claim counsel was ineffective for failing to call Dr. Lewis solely to testify about the impact on Terrance of his stepfather Robert's violent, abusive behaviors because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel who wanted a "different" strategy from the original trial would have known and not replicated the first trial's failed strategy portraying Robert as a model father because predecessor counsel uncovered evidence of actual abuse Robert inflicted on Terrance and Terrance's mother, Linda, as well as a longstanding history of Robert's violence. Terrance was prejudiced because evidence of an abusive, disadvantaged background is inherently mitigating, lessening moral culpability, and would have mitigated Terrance's actions which were so inconsistent with Terrance's non-violent, law-abiding past.

Although professing a desire for a "different" strategy from the first trial team, counsel merely replicated it. Predecessor counsel uncovered evidence of documented severe abuse Robert inflicted on Terrance and Terrance's mother, Linda, as well as, a longstanding violent history the jury never heard. Robert's abusive history was inherently mitigating and would have tipped the balance for life.

Robert's First Trial Penalty Testimony

During Robert's first trial penalty testimony, he portrayed himself as a model, caring father involved in Terrance's life in a stable family(1stTrialTr.1670-80).

Robert identified himself as Terrance's stepfather who raised him since he was ten months(1stTrialTr.1670). Robert only learned recently before testifying Terrance knew Robert wasn't his biological father - something Robert hadn't want Terrance to know(1stTrialTr.1670).

Robert coached Terrance in Little League and attended all his basketball games(1stTrialTr.1673). Through Robert family pictures and various awards Terrance received were presented(1stTrialTr.1671-77). One photo showed five year old Terrance with a broken leg, which Robert claimed happened when Terrance was hit by a car(1stTrialTr.1672). The photos included celebrating Christmas and attending church(1stTrialTr.1671-73).

Robert testified this tragedy has brought the family closer and he's used it to try to help others(1stTrialTr.1678-79).

Robert's Penalty Retrial Testimony

Robert's retrial testimony duplicated the first.

Robert testified he treated Terrance as his own son, never discussing with Terrance that he wasn't Terrance's biological father(2ndTrialTr.850,852-53). Terrance was ten months when Robert entered Terrance's life(2ndTrialTr.850). Robert and Linda have one child together, Shaneka, and Terrance was better behaved(2ndTrialTr.850). Robert recounted Terrance played basketball, baseball, football, and track(2ndTrialTr.851). Robert regularly attended Terrance's

games(2ndTrialTr.851). Robert works for the Poplar Bluff School District and is on the City Council(2ndTrialTr.851).

Robert identified Exhibit C as a picture of five year old Terrance on crutches with a broken leg caused by a car hitting him(2ndTrialTr.853).

Pictures of Terrance and Robert, when Terrance was two years old on a wintery day, were presented(2ndTrialTr.853-54). A picture of thirteen year old Terrance (Ex.G) dressed in an Easter Bunny suit to entertain their church's younger children was presented(2ndTrialTr.854-55).

A picture of Robert giving Terrance a piggyback ride (Ex.E) was presented(2ndTrialTr.856). There were also pictures of Terrance and Shaneka presented during Robert's testimony(2ndTrialTr.855-56). A picture of six year old Terrance (Ex.N) was also presented(2ndTrialTr.856).

Robert reported Terrance was well adjusted growing-up(2ndTrialTr.856-57). Robert was saddened because he didn't know whether Kyra realized he's her grandfather(2ndTrialTr.858). Robert loves Terrance and this tragedy has made the family closer(2ndTrialTr.859-60).

Abuse Of Terrance Developed In First 29.15

Dr. Cross evaluated Terrance for the first 29.15(1st29.15Tr.105). Cross recounted Terrance's medical records reflected when Terrance was about four he had the spiral tibial fracture, reportedly from being hit by a car(1st29.15Tr.119). Spiral fractures, as noted in Dr. Lewis' June, 1998 report, are not impact fractures and are caused by intentional child abuse, twisting acts(1st29.15Tr.119-20,136-

37;1st29.15Ex.4 at 1158 and 2nd29.15Ex.D at 2). Cross found this fracture evidenced child abuse(1st29.15Tr.134-36).

Cross saw cigarette burns on Terrance's back, which Dr. Pincus' September, 1998 report identified, and evidenced abuse(1st29.15Tr.134-36). Cross noted Pincus had identified unaccounted for scars on Terrance and the puncture wound to Terrance's left thigh, both evidencing abuse(1st29.15Tr.134-36). Cross noted the secrecy Robert imposed on the family was symptomatic of abuse(1st29.15Tr.135-36).

Cross concluded that on the day of the offense, Terrance not only suffered from depression, paranoid thinking, and paranoid personality disorder, but also Post-Traumatic Stress Disorder (PTSD) Robert's violence caused(1st29.15Tr.131-32,149-50).

Cross' testing showed Terrance had longstanding intrusive thoughts - a strong indicator of physical and emotional abuse(1st29.15Tr.145-46). Cross' testing also found Terrance wasn't malingering on his abuse trauma(1st29.15Tr.146).

Licensed clinical social worker, Cessie Alfonso, testified Terrance grew-up in a household with a step-father who had a history of blowing-up, hitting people, and practicing infidelity(1st29.15Tr.23-24,34,59,79). In response, Terrance either tried to intervene or isolated himself by withdrawing and locking himself in his room(1st29.15Tr.56,60-61,63). Terrance still had a bed-wetting problem at twelve, which was indicative of the intensity, duration, and frequency of family conflict(1st29.15Tr.56-57). Alfonso noted Robert's history of abusive behavior such

that he “is a batterer who used violence, coercive control, and intimidation” in the household(1st29.15Tr.56,58).

Robert’s Violent History - Before And With Terrance

Robert was born September 4, 1952(2nd29.15Ex.N at 144). Terrance was born November 19, 1975(2nd29.15Ex.H at 18). Robert married Linda Anderson, and therefore, was Terrance’s stepfather(3rd29.15Tr.106). Terrance was ten months when Robert entered their lives(2ndTrialTr.850;3rd29.15Tr.106). Terrance spent his entire childhood in Robert’s household(3rd29.15Tr.106).

Mitigation specialist Catherine Luebbering worked on Terrance’s penalty retrial until October, 2008, when she left the Defender’s Office(2nd29.15Tr.203;3rd29.15Tr.75-76,81-82,127), and Terrance’s retrial occurred in November, 2008(2nd29.15Ex.A Index;3rd29.15Tr.75-76,82,127). The retrial team had everything from the first trial team’s representation, including Robert’s school, military, and police reports(2nd29.15Exs.M,N,O;3rd29.15Tr.107,109,143,147-48,165-66,216).

Luebbering recounted counsel early-on decided they wanted to present Robert as an upstanding citizen of high moral character(3rd29.15Tr.127-29,142).

On December 8, 1967, Robert’s school principal informed the school board fifteen-year-old Robert was expelled(2nd29.15Ex.N at 144;2nd29.15Ex.M at 1). The principal had “worked very hard” to help Robert succeed, but Robert “has been nothing but trouble all year”(2nd29.15Ex.M at 1;3rd29.15Tr.125-26). The incident

culminating in expulsion was fighting with a teacher(2nd29.15Ex.M at 1;3rd29.15Tr.126-27).

On January 2, 1968, Robert's principal authored a letter recounting incidents where Robert threw books out a window, cursed at and fought with a teacher, and fought with another student(2nd29.15Ex.M at 2;3rd29.15Tr.126-27).

On December 11, 1969, seventeen-year-old Robert was permanently suspended from school because of "continuous disturbances"(2nd29.15Ex.N at 144;2nd29.15Ex.M at 5;3rd29.15Tr.127).

While in the Air Force Robert was married to Earline Smith(2nd29.15Ex.N at 139). Luebbering recounted that the first trial's mitigation specialist, Linda Wohleber, obtained information from both Earline and the daughter Earline had with Robert, Deborah, that Robert was very violent and abusive to Earline and their children(3rd29.15Tr.104-05). That abuse included beating and raping Earline while pregnant(3rd29.15Tr.104-05). Deborah didn't trust Robert fearing he would sexually assault her and her brothers feared him(3rd29.15Tr.105). Earline reported Robert had girlfriends while married to her(3rd29.15Tr.105). Earline told Luebbering that Robert was abusive to Linda(3rd29.15Tr.108).

Luebbering indicated Robert's actions involving Earline and Deborah were mitigating because:

WELL IT SPEAKS TO HIS CHARACTER. IT SPEAKS TO THE TYPE OF PERSON THAT HE WAS. IT SPEAKS TO THE TYPE OF FATHER THAT HE WAS AND THIS IS THE PERSON WHO RAISED TERRANCE

ANDERSON. THIS IS A PERSON WHO HAD A GREAT IMPACT ON TERRANCE'S PERSONALITY DEVELOPMENT AND HIS CHARACTER AND MORAL DEVELOPMENT. IT'S ALL VERY IMPORTANT IN PRESENTING THE WHOLE PICTURE OF TERRANCE'S LIFE.

(3rd29.15Tr.105-6).²

On June 26, 1972, Robert chased and hit Air Force Sergeant Keene with a piece of wood(2nd29.15Ex.N at 45,70). On July 4, 1972, Robert was not allowed to sign a woman onto base and told the officer "[t]hat all cops are a bunch of mother fuckers" and told the officer "to kiss his ass"(2nd29.15Ex.N at 68-69).

A July 18, 1972, Air Force physician's report recounted Robert was in several fights and had a personality disorder(3rd29.15Tr.119;2nd29.15Ex.N at 42). The same physician on July 20, 1972, submitted a report noting Robert was involved in "numerous violent outbursts" and concluded Robert has "an aggressive personality disorder"(3rd29.15Tr.119-20;2nd29.15Ex.N at 161). An Air Force psychiatrist evaluated Robert on July 25, 1972 and noted Robert had "numerous violent outbursts" and provided a diagnosis of "[c]haracter and behavior disorder, explosive personality as manifested by **gross outbursts of rage** or physical aggressiveness."(3rd29.15Tr.117-18,120-21;2nd29.15Ex.N at 16-17,43-44)(emphasis added). Discharge was recommended because of Robert's behavioral personality disorder(3rd29.15Tr.120-21;2nd29.15Ex.N at 43-44).

² The entire 29.15 transcript was reported in capital letters.

Robert's military behaviors included destruction of property and assault(2nd29.15Ex.N at 16-17). An August 14, 1972, letter from Commander Morris to Robert indicated Robert intentionally yanked telephone wires from the wall and struck Sergeant Eversole with his fists and a five foot wooden board containing nails(3rd29.15Tr.118-19;2nd29.15Ex.N at 27,41). Robert's Air Force superiors recommended terminating him; rehabilitation was impossible(2nd29.15Ex.N at 16-17,43-44).

Luebbering noted Robert's military records documented multiple incidents of Robert's explosiveness, impulsivity, violent disposition, and uncontrolled temper(3rd29.15Tr.121). The military records diagnosed Robert as behaviorally disordered with an explosive personality(3rd29.15Tr.121). Luebbering noted Robert's military records were significant because they say so much about the person who was "a significant parent figure" to Terrance(3rd29.15Tr.121).

On March 31, 1981, when Terrance was five, there was a disturbance involving Robert and three other men, starting at the Smith household(3rd29.15Tr.112-14,167-68;2nd29.15Ex.O at 17-23). That incident evolved into Robert chasing the three in his car and using it to strike and force the other car off the road(3rd29.15Tr.112-14,167-68;2nd29.15Ex.O at 17-23). A fight ensued where Robert used a knife and tire iron(3rd29.15Tr.112-14,167-68;2nd29.15Ex.O at 17-23). Luebbering explained this incident's mitigating value:

IT SPEAKS TO THE CHARACTER OF ROBERT SMITH AND AGAIN
DEMONSTRATES HIS VERY POOR IMPULSE CONTROL AND HE HAS

A VERY SHORT FUSE AND IS VERY POOR AT PROBLEM SOLVING
AND DOESN'T HESITATE TO THREATEN VIOLENCE.

(3rd29.15Tr.114).

Samuel Norris reported to the police that on August 17, 1986, when Terrance was ten, Norris was at Robert's house and Robert fired a gun at him three times while saying "Fuck you" and "I kill you"(2nd29.15 Ex.O at 12;3rd29.15Tr.110-12).

Luebbering explained the Norris incident was mitigating because:

WELL GOODNESS YOU KNOW AGAIN TERRANCE WOULD HAVE
BEEN NINE OR TEN YEARS OLD AT THIS POINT IN HIS LIFE AND I
MEAN THIS DOCUMENTS CLEARLY HOW UNSTABLE ROBERT
SMITH IS, HIS STEP-FATHER. HE HAS EXTREMELY POOR IMPULSE
CONTROL, HE CANNOT DO ANY PROBLEM SOLVING, HE'S
CURSING, HE'S THREATENING THE MAN'S LIFE, HE'S ACTUALLY
SHOOTING A GUN. ALL OF THIS IS JUST REALLY SPEAKS TO HIS
VERY POOR STATE OF MIND, ROBERT SMITH AND IT CLEARLY
DOCUMENTS THAT ROBERT SMITH CAN YOU KNOW USE A GUN
WITH NO THOUGHT AT ALL YOU KNOW TO THE CONSEQUENCES
OR THE IMPACT ON THE PEOPLE AROUND HIM.

(3rd29.15Tr.112). Luebbering indicated even assuming Terrance didn't see the Norris shooting, it happened at 7:15 a.m., so Terrance would've been home while Robert was outside shooting(3rd29.15Tr.139;2nd29.15 Ex.O at 8).

While Robert was married to Linda, he had a girlfriend, Shirley Pratt(3rd29.15Tr.114-16). On August 22, 1989, when Terrance was thirteen, Shirley was transported by ambulance to the hospital because Robert inflicted injuries following an argument(3rd29.15Tr.114-16;2nd29.15Ex.O at 5-7). Shirley was unable to stand or walk because Robert side-swiped her with his car(3rd29.15Tr.114-16;2nd29.15Ex.O at 5-7). The police report corroborated Robert was unfaithful to Linda and violent during their marriage(3rd29.15Tr.116).

On February 6, 1990, when Terrance was fourteen, Shirley Pratt, told police Robert appeared at her house cursing and yelling at her(3rd29.15Tr.114-16;2nd29.15Ex.O at 1-4). Robert pulled a gun and struck Shirley in the head with it knocking her to the ground, while she was naked(3rd29.15Tr.114-16;2nd29.15Ex.O at 1-4). Robert proceeded to choke and hit Shirley in the face and head(3rd29.15Tr.114-16;2nd29.15Ex.O at 1-4).

Shirley's brother, Milton, arrived and found Robert choking Shirley and slamming her against a wall(3rd29.15Tr.114-16;2nd29.15Ex.O at 1-4). When Milton intervened, Robert pulled a gun on him(3rd29.15Tr.114-16;2nd29.15Ex.O at 1-4). The responding police officer noted "obvious signs of physical abuse" to Shirley, including facial and head bruises and her eyeglasses were broken(3rd29.15Tr.114-16;2nd29.15Ex.O at 1-4). Luebbering noted this Shirley Pratt incident confirmed Robert's affair with Pratt, while married to Linda, and was relevant mitigation because it showed the unstable chaotic home environment in which Terrance was raised(3rd29.15Tr.115,139-40).

Luebbering noted the police records were significant because from when Terrance was living with Robert at a very young age Robert engaged in violent behaviors(3rd29.15Tr.122). Robert's violent behaviors didn't stop at the door and were not turned off-and-on as to Linda because he had a personality disorder, even though Linda didn't disclose Robert's violence(3rd29.15Tr.121-22). From Luebbering's meetings with Linda she determined Linda was withholding Robert's violence towards her because Robert was very threatening, controlling, and manipulative(3rd29.15Tr.122-23). Moreover, personality-disordered individuals, like Robert, simply don't get better(3rd29.15Tr.124).

Luebbering explained Linda's and Terrance's non-reporting of Robert's violence as attributable to that it is common for abuse victims to not want to disclose abuse(3rd29.15Tr.124-25).

Luebbering indicated even if Terrance wasn't actually in Robert's physical presence, as he inflicted violence on Linda, it still impacted Terrance(3rd29.15Tr.129-30). Luebbering conveyed to both trial counsel that all the information compiled established Terrance was being raised in an extremely violent environment(3rd29.15Tr.130-31). Luebbering felt strongly the jury should've learned about Robert's violence because of all the documentation of it(3rd29.15Tr.131). Luebbering summarized why it was important for the jury to hear about Robert's violence:

HOW COULD TERRANCE NOT HAVE BEEN IMPACTED BY A FATHER
WHO, FATHER FIGURE WHO WAS SO VIOLENT OVER SO MANY

YEARS. THERE'S NO WAY THAT HE COULD NOT HAVE BEEN IMPACTED IN A VERY HARMFUL AND NEGATIVE WAY BY THAT. (3rd29.15Tr.131).

Luebbering testified that while Terrance told her he did not see any home violence, it was important for the jury to learn about Robert's violence because:

WELL THIS AGAIN IS THE GENTLEMAN WHO PARTICIPATED IN RAISING TERRANCE AND HIS CHARACTER, THAT OF ROBERT SMITH, IT SPEAKS TO WHO HE WAS, THE PERSON THAT HE WAS AND THE TYPE OF PERSON RAISING TERRANCE. TERRANCE DID NOT ASK TO BE RAISED BY A VIOLENT AGGRESSIVE AND VERY EXPLOSIVE INDIVIDUAL FATHER FIGURE. TERRANCE DID NOT ASK TO BE RAISED IN A CHAOTIC HOME ENVIRONMENT WHICH HE WOULD HAVE BEEN BY BEING RAISED BY A MAN WITH THIS TYPE OF PERSONALITY WHO IS DOCUMENTED CLEARLY TO HAVE BEEN VIOLENT TOWARD THE WOMEN IN HIS LIFE AND OTHER RANDOM MEN.

(3rd29.15Tr.137).

Luebbering noted the police reports established a history of Robert's violence during the time Terrance resided with Robert and violent propensities don't just stop and start or turn on a dime(3rd29.15Tr.141). While Terrance and Linda didn't report Robert directing violence at them, that violence would've been expected to be going on "behind closed doors"(3rd29.15Tr.141).

Counsel Professed to Doing Something “Different”

Turlington testified they wanted to pursue a “different approach” from the original trial’s mitigation that relied on Robert’s violence(2nd29.15Tr.374).

Turlington was aware, through the first trial team, that Earline and Deborah furnished background regarding Robert’s extreme violence and abuse towards Earline and their children(3rd29.15Tr.161-63;3rd29.15Ex.OO).

Turlington testified Terrance’s family, except for Robert, were uninvolved and distant(3rd29.15Tr.163-64). Robert had positive things to say about Terrance and was involved(3rd29.15Tr.163-64). They decided to go in the “direction” Robert was a positive influence(3rd29.15Tr.164,172-76). Turlington believed evidence of Robert’s abusive past could’ve come into evidence, but they chose not to present it(3rd29.15Tr.164).

Turlington knew families where abuse occurred are reluctant to disclose it(3rd29.15Tr.165).

Turlington acknowledged personality disorders don’t simply get remedied(3rd29.15Tr.171-72). Turlington acknowledged that problematic behaviors, like aggressiveness and lack of impulse control, for personality-disordered individuals are static, and external factors only exacerbate manifestations of dysfunctional behavior(3rd29.15Tr.172).

Turlington acknowledged a jury could’ve concluded from the available information Robert was violent in the household with Linda and Terrance(3rd29.15Tr.173-74). They didn’t present evidence of Robert’s violent

history because the Earline acts were old, Terrance, Linda, and Shaneka denied any abuse, Linda and Terrance's sister, Shaneka, were withdrawn, and Robert was the only immediate family who could offer positive information about Terrance(3rd29.15Tr.174-75,207).

Davis-Kerry testified what was done in the first trial failed and they wanted something "different"(2nd29.15Tr.320-21,335-36;3rd29.15Tr.217-18,269).

Davis-Kerry testified they met with Earline who disclosed Robert's physical abuse(3rd29.15Tr.230-31).

Davis-Kerry testified evidence of Robert's violent propensities wasn't presented because Linda, Terrance, and Shaneka never reported Robert abused them and people in the community viewed Robert favorably(3rd29.15Tr.231-35). They had many records evidencing Robert's violent acts(3rd29.15Tr.236,240). Evidence about Robert's violent behaviors weren't presented because they wanted someone who could say good things about Terrance and Linda and Shaneka were emotionally detached(3rd29.15Tr.235, 283-84).

Davis-Kerry testified Lewis was difficult to work with and she wanted an excessive fee to work on Terrance's case again - something the Defender's Office wouldn't authorize(3rd29.15Tr.237-38,242-44,272). Other attorneys in Davis-Kerry's office considered Lewis difficult to work with(3rd29.15Tr.238-39,272-73). Davis-Kerry's immediate reaction after getting Terrance's casefile boxes and learning Lewis had been a witness was "an inward groan" and to think "oh great we've got to work with Dr. Lewis"(3rd29.15Tr.272-73). Davis-Kerry complained that, once

contacted, Lewis was getting Terrance's case facts wrong, but acknowledged never having utilized Lewis before, and 6-7 years had passed since Lewis testified at the original trial and the retrial team's contact with Lewis(3rd29.15Tr.237-39). Davis-Kerry acknowledged Lewis had helped obtain successful capital outcomes(3rd29.15Tr.239).

Davis-Kerry didn't know whether at the original trial guilt phase that Lewis didn't testify about Robert's violence(3rd29.15Tr.241). Counsel decided much in advance of trial not to call Lewis because she was unhelpful(3rd29.15Tr.243).

Dr. Lewis' Knowledge Of Robert's Violent History

For purposes of Terrance's competency to proceed only, a separate Lewis video deposition was done for the original trial(1stTrialTr.1489-1499;1stTrialEx.E-1 at 5). Terrance's paranoia was so extreme it extended to Lewis(1stTrialEx.E-1 at 9). Lewis noted Terrance said to her "there were things that he knew and things about that had happened in his home and in his childhood **that he just could not reveal**...."(1stTrialEx.E-1 at 9)(emphasis added).

Also for competency to proceed purposes only, counsel offered Lewis' Preliminary Report of June, 1998(1stTrialTr.1494-95;1stTrialEx.E-3;2nd29.15Ex.D) and Lewis' Addendum of March, 1999(1stTrialTr.1494-95;1stTrialEx.E-4;2nd29.15Ex.E). Lewis' Preliminary Report noted that although Robert denied having a temper "both of his children [Terrance and Shaneka] recalled **periodically** being frightened by his **rages**."(1stTrialEx.E-3 at 4;2nd29.15Ex.D at 4)(emphasis added). The Preliminary Report continued recounting Shaneka reported on one

occasion Robert became so angry at Terrance for eating a Cornish hen that Robert “overturned a table, causing it to crash into a chandelier and causing glass to fly.”(1stTrialEx.E-3 at 4;2nd29.15Ex.D at 4).

Lewis’ Preliminary Report recounted Terrance “described constant disagreements” with Robert(1stTrialEx.E-3 at 5;2nd29.15Ex.D at 5). Terrance was “extremely protective of his parents” while Terrance denied ever being hit or beaten by either(1stTrialEx.E-3 at 5;2nd29.15Ex.D at 5).

Lewis recounted Robert denied ever striking Terrance(1stTrialEx.E-3 at 5;2nd29.15Ex.D at 5). When Terrance was about to turn five he was treated for a right spiral tibial fracture(1stTrialEx.E-3 at 2;2nd29.15Ex.D at 2). The cause of the fracture was allegedly the result of being struck by a car(1stTrialEx.E-3 at 2;2nd29.15Ex.D at 2). However, spiral fractures are the result of intentional twisting movements and not impact injuries(1stTrialEx.E-3 at 2;2nd29.15Ex.D at 2). When Terrance was eight, he was treated for a puncture wound to his left thigh(1stTrialEx.E-3 at 2;2nd29.15Ex.D at 2).

In preparation for the first trial, Lewis accompanied the first trial team’s mitigation investigator, Wohleber, on October 19, 1998, for 4-5 hours to meet with Earline and other members of Earline’s family in Malden, Missouri(3rd29.15Tr.162-63;3rd29.15Ex.OO at 1). Earline reported to them Robert beat her so badly she had to have many shoulder surgeries(3rd29.15Ex.OO at 1). Robert raped Earline on multiple occasions, including while pregnant and after Deborah’s birth(3rd29.15Ex.OO at 1). During one rape, Robert crushed Earline’s glasses under his heel(3rd29.15Ex.OO at

1). After Earline had breast surgery, Robert twisted her breast, which caused her to need additional invasive treatment(3rd29.15Ex.OO at 1-2). Robert fathered multiple children with multiple women while married to Earline(3rd29.15Ex.OO at 2). Robert's frequent acts of violence involving Earline included destroying objects, overturning tables, and hitting walls(3rd29.15Ex.OO at 2). Robert's violent acts included hitting his high school principal so hard with a chair that it broke(3rd29.15Ex.OO at 2). Robert was involved with Linda while Earline and Robert were still married(3rd29.15Ex.OO at 2).

Lewis' first trial's testimony before the jury didn't include any evidence about Robert's violence(3rd29.15Tr.241;1stTrialExs.D and E).

Lewis' 29.15 Testimony

Lewis testified for the second 29.15 hearing and that same testimony was resubmitted for the third(3rd29.15Tr.7). Lewis reviewed Robert's arrest, military, and school records documenting Robert's violence(2nd29.15Ex.FF at 19,36;2nd29.15Exs.M,N,O). Robert's records reflected he was episodically and extraordinarily violent(2nd29.15Ex.FF at 36-40;2nd29.15Exs.M,N,O). Lewis noted Robert's military records reflected a psychiatrist's finding Robert has an explosive personality disorder(2nd29.15Ex.FF at 37-38).

Lewis interviewed Robert's ex-wife Earline(2nd29.15Ex.FF at 40). Earline described sadistic extreme violence Robert directed at her, including beating and raping(2nd29.15Ex.FF at 40). Lewis interviewed Earline's and Robert's daughter, Deborah, who confirmed Robert's extreme violence(2nd29.15Ex.FF at 41).

Lewis noted when Terrance was five, he sustained a spiral tibial fracture(2nd29.15Ex.FF at 27-28;2nd29.15Ex.H at 9). The hospital history report said Terrance was struck by a car, but spiral fractures are caused by intentional twisting acts(2nd29.15Ex.FF at 27-28). Fantasies Shaneka reported evidenced a severely traumatized child resulting from violence between parents(2nd29.15Ex.FF at 49-51).

Robert's documented history as to Shirley Pratt and Earline Smith was significant as to Terrance's life circumstances because an individual with Robert's domestic violence history would be expected to continue that behavior(2nd29.15Ex.FF at 46). Terrance was protective of both his mother and Robert, but at the same time reported he had to physically separate them to prevent violence(2nd29.15Ex.FF at 46). Lewis noted there was violence in the home that was denied, while Robert maintained they were the perfect family(2nd29.15Ex.FF at 46). A parent's entire past behavior impacts and influences who a child raised by that parent becomes(2nd29.15Ex.FF at 35-36).

Findings

Lewis didn't establish how Robert's violent history related to Terrance(3rd29.15L.F.382). There was only the Cornish hen violent outburst(3rd29.15L.F.382 relying on 2nd29.15Ex.D at 4 Lewis Preliminary Report June 24, 1998;3rd29.15L.F.391).

Counsels' strategy was to not rely on abuse evidence because Robert was a supportive witness who expressed positive views about Terrance when other family

didn't(3rd29.15L.F.382,394,398). Terrance and his family denied any knowledge of Robert directing violence at them(3rd29.15L.F.382,394,398).

Davis-Kerry testified they reviewed what was done at the first trial which was unsuccessful and decided to do something different(3rd29.15L.F.397).

Davis-Kerry testified Lewis had a Defender difficult-to-work with reputation, wanted an excessive fee, recited incorrect facts, and was unhelpful(3rd29.15L.F.398-99).

The third findings, like the second, state that not presenting Robert's violent history was strategic because "**it was offered in the first trial with no success.**"(3rd29.15L.F.403;2nd29.15L.F.201-02)(emphasis added). There was no evidence Terrance witnessed Robert's violence(3rd29.15L.F.391,403-04). There was no evidence of how these matters were admissible(3rd29.15L.F.403-04).

The third findings, like the second, state Luebbering "paused, stammered, and was clearly searching for a cogent explanation as to how this [Robert's violent past] would be helpful."(3rd29.15L.F.391-92;2nd29.15L.F.192). Robert's character was neither relevant nor mitigating and Luebbering failed to explain its value(3rd29.15L.F.391,403).

Counsel Was Ineffective

In *Wiggins v. Smith*,539U.S.510,524-26,534-35 (2003), counsel's failure to conduct thorough investigation that would've uncovered abuse evidence reflected only a partial mitigation case. That partial case was the result of inattention, not reasoned strategic judgment, and constituted ineffective

assistance. *Id.*524-26,534-35. In finding Wiggins’ counsel ineffective the Court observed:

Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability. *Penry v. Lynaugh*, [numerical citation omitted] (“[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background... may be less culpable than defendants who have no such excuse”).

*Id.*535. *Wiggins* reasoned that if the jury had been able to place Wiggins’ “excruciating life history” on the mitigating side of the scale there was a reasonable probability a different balance would have been struck. *Id.*537. The mitigating evidence that could’ve been presented might’ve influenced the jury’s appraisal of Wiggins’ moral culpability. *Id.*538.

In *Williams v. Taylor*, 529U.S.362,369,395(2000), trial counsel presented mitigating evidence through the defendant’s mother, his friends, and a psychiatrist, but failed to conduct investigation that would’ve uncovered extensive abuse and childhood deprivation. Similarly, Williams was denied effective assistance under *Strickland*. *Id.*396-98. Likewise, in *Rompilla v. Beard*, 545U.S.374,390-93(2005) counsel was ineffective in failing to uncover and present abuse evidence.

An expert can rely on and give opinions based upon hearsay even though the hearsay isn’t independently admissible. *State v.*

Gladden, 294S.W.3d73,75(Mo.App.,S.D.2009). In responding to the *Wiggins*

dissenters, the majority rejected the dissent's labeling abuse of Wiggins, recounted in a social worker's social history, as "uncorroborated gossip." *Wiggins*, 539 U.S. at 537. The evidence about Robert's violent history was admissible through Lewis, even though its reporting was hearsay based, and the contrary findings are clearly erroneous (3rd 29.15 L.F. 403-04). See *Gladden* and *Wiggins*.

In *Porter v. McCollum*, 130 S.Ct. 447, 448 (2009), the defendant was convicted of two counts of first degree murder for killing his former girlfriend and her boyfriend, but sentenced to death only for the former girlfriend. Porter's counsel didn't present any evidence regarding Porter's abusive childhood. *Id.* 449. Had counsel been effective, the judge and the jury "would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Id.* 454 (quoting *Wiggins*, 539 U.S. at 535). That troubled history included Porter's abused background. *Porter*, 130 S.Ct. at 454. The *Porter* Court reasoned such history was critical and relied on the *Penry v. Lynaugh*, 492 U.S. 302 (1989) rationale, as contained in *Wiggins*, *supra*, that there is a long held societal belief that a disadvantaged background may make a defendant less culpable. *Id.* 454. The *Porter* Court added the jury and judge hadn't heard evidence "which 'might well have influenced the jury's appraisal of [Porter's] moral culpability.'" *Id.* 454 (alteration in *Porter*).

The *Porter* Court found it particularly significant the sentencing judge accepted the jury's death recommendation for Porter's former girlfriend, but rejected it for the former girlfriend's boyfriend noting:

Had the judge and jury been able to place Porter's life history “on the mitigating side of the scale,” and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury—and the sentencing judge—“would have struck a different balance,” *Wiggins*, [numerical citation omitted], and it is unreasonable to conclude otherwise.

Porter, 130 S.Ct. at 454. *Porter* added: “It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with [his former girlfriend].” *Id.* 455.

In *Griffin v. Pierce*, 622 F.3d 831, 833, 837 (7th Cir. 2010), a jury convicted Griffin of murder, he waived jury sentencing, and a judge imposed death. The Illinois Supreme Court found counsel's not presenting abuse evidence strategic. *Id.* 838. The Illinois Court added information about Griffin's personal history was in the presentence report. *Id.* 838. That report stated Griffin had a normal childhood and good parental relationships. *Id.* 845. In fact, Griffin's father had inflicted severe abuse. *Id.* 844-45. The Illinois Court in *Griffin* also found the postconviction evidence was either cumulative to what was presented or “not inherently mitigating.” *Id.* 839.

The Seventh Circuit found counsel ineffective and Griffin prejudiced because the sentencing court would've learned of the kind of troubled history the Supreme Court has found relevant to assessing a defendant's moral culpability. *Id.* 844 (relying

on *Porter* and *Wiggins*). The *Griffin* Court found the Illinois Court's conclusion the abuse evidence was not "inherently mitigating" was "unreasonable." *Id.*845.

What *Wiggins*, *Penry*, *Williams*, *Rompilla*, *Porter*, and *Griffin* uniformly stand for is that there is a societal belief abuse is inherently mitigating. Retrial counsel had Lewis' competency findings, reports, and interview record with Earline documenting Robert's violence(1stTrialTr.1489-1499;1stTrialExs.E-1,E-3,E-4;2nd29.15Exs.D,E;3rd29.15Ex.OO). Terrance told Lewis there were events at home "**that he just could not reveal**"(1stTrialEx.E-1 at 9)(emphasis added). Lewis' Preliminary Report noted that both Terrance and Shaneka "recalled **periodically** being frightened by [Robert's] **rages**."(1stTrialEx.E-3 at 4;2nd29.15Ex.D at 4)(emphasis added). Retrial counsel had the information that Cross identified as child abuse - the cigarette burns to Terrance's back, his multiple bodily scars, puncture wound to his thigh, and spiral tibial fracture(1st29.15Tr.134-36). Retrial counsel had the information from Alfonso that Robert "is a batterer who used violence, coercive control, and intimidation" in the household(1st29.15Tr.56,58).

Cross explained Terrance's family had a lot of family secrecy about Robert's abuse because Robert made family members feel that if they disclosed his abuse, then they'd be harmed further(1st29.15Tr.135-36). Similarly, Lewis' June, 1998 report noted the "entire Anderson-Smith family was extremely secretive" (2nd29.15Ex.D at 6) and explains why Lewis testified what was known could create the appearance Robert limited his violence towards adults(2nd29.15Ex.FF at 95). Lewis' March, 1999 Addendum noted after Terrance informed Lewis about needing to separate

Robert and Linda to prevent violence that he then backtracked to say he shouldn't be talking about family(2nd29.15Ex.E at 1). Cross' testing on Terrance found intrusive thoughts symptomatic of abuse and Terrance wasn't malingering on abuse(1st29.15Tr.145-46). Counsel also had from the prior representation Robert's school, military, and police records(2nd29.15Exs.M,N,O;3rd29.15Tr.216).

Counsel professed their approach to mitigation was intended to be "different" from the first trial(3rd29.15Tr.164,217-18,269;2nd29.15Tr.374). The first penalty phase was devoted to calling family and friends to testify about Terrance's, polite and respectful behavior, his good work ethic, athletic accomplishments, and people's inability to comprehend what caused Terrance to do the shootings(1stTrialTr.1670-1703).

The retrial penalty witness friends and coaches focused on these same themes(2ndTrialTr.730-40,742-46,798-803,804-14,839-43,883-90). Terrance's mother, Linda, testified at penalty retrial about Terrance's positive personal qualities and that she wanted the best for Terrance and Kyra(2ndTrialTr.818,821-24,828). Robert's daughter, Deborah, (Terrance's step-sister) highlighted at the retrial Terrance's positive personality qualities and how out-of-character what happened here was(2ndTrialTr.829-31). Terrance's cousin, Mark Hunt, highlighted the same as Deborah(2ndTrialTr.846-49).

At the first penalty phase, the jury heard from Robert, as it did in the retrial, about the model father he was(1stTrialTr.1670-80;2ndTrialTr.849-61). Thus, the approach to mitigation witnesses was **the same, not "different."**

At the second 29.15 hearing, **Davis-Kerry testified** that at the first trial **evidence of Robert's violent propensities was presented** and at the retrial the defense team "wanted to try a different approach"(2nd29.15Tr.272). At the third 29.15 hearing, Davis-Kerry did not know whether at the original trial Lewis didn't testify about Robert's violent behavior(3rd29.15Tr.241). Moreover, the current findings and the second hearing's finding both erroneously stated evidence of Robert's violent past was presented at the original trial(2nd29.15L.F.201-02;3rd29.15L.F.403). Instead, both juries heard Robert was the model father(1stTrialTr.1670-80;2ndTrialTr.849-61).

On the second 29.15 appeal, respondent argued Davis-Kerry's testimony didn't establish whether counsel held the mistaken belief they were doing something "different" while they prepared for trial or at the time of the second 29.15 hearing(Resp.Br.40 n.9). Davis-Kerry's testimony was unmistakably clear their mistaken belief they were doing something "different" was at the time of trial preparation. Davis-Kerry testified:

Q In this particular case, in representing Mr. Anderson, did **you and Ms. Turlington** then come up with an approach in presenting your evidence to the jury?

A Yes, we did.

Q And what was that?

A **We wanted to take a different approach than what had been done before.** We wanted to –

(2nd29.15Tr.320-21)(emphasis added).

Terrance and his family's non-reporting of Robert's violence(3rd29.15L.F.382,394,391,398) doesn't mean it was reasonable to fail to present Robert's battering. In the first 29.15, Cross and Alfonso found evidence Robert abused Terrance and everyone in the household(1st29.15Tr.56,58,105,119-20,134-37,145-46;1st29.15Ex.4 at 1158;2nd29.15Ex.D at 2).

Lewis' findings would've accurately presented to the jury Terrance's tibial fracture was the product of Robert's violent twisting and they wouldn't have heard Robert's rendition(2ndTrialTr.853).

Even setting aside what Cross and Alfonso found, Robert's arrest records reflected four violent incidents which occurred while Terrance was a child between the ages of five and fourteen and residing with Robert. On March 31, 1981, there was an altercation beginning at the family home involving Robert and three other individuals that escalated into Robert using his car to force them off the road and then Robert fighting with them using a tire iron and knife(2nd29.15Tr.183-84;2nd29.15Ex.O at 17-23). On August 17, 1986, Robert while at the family residence fired shots at Samuel Norris saying "Fuck you" and "I kill you"(2nd29.15Ex.O at 12;2nd29.15Tr.180-81). On August 22, 1989, Robert intentionally side-swiped his girlfriend, Shirley Pratt, injuring her(2nd29.15Tr.185-86;2nd29.15Ex.O at 5-7). On February 6, 1990, Robert struck Shirley Pratt in the head and face with a gun while she was naked and threatened her brother with a

gun(2nd29.15Tr.185;2nd29.15Ex.O at 1-4). Such violence couldn't have by-passed Terrance's family's household.

Turlington thought from the available materials a reasonable inference was there was violence in Terrance's household(3rd29.15Tr.172-76). Reasonable counsel who believed Robert's background records history supported an inference Robert was violent at home would've presented this evidence. *See Wiggins, Penry, Williams, Rompilla, Porter, and Griffin.*

Robert's violent school and military past, likewise, were probative Terrance was exposed to and suffered extreme violence at home. In the military, Robert was diagnosed as having an explosive personality disorder manifested by gross outbursts of rage or physical aggressiveness(3rd29.15Tr.117-18,120-21;2nd29.15Ex.N at 16-17,43-44). Mitigation specialist Luebbering indicated Robert's personality traits and violent behaviors didn't just simply go away(3rd29.15Tr.121-22).

At the second 29.15, Davis-Kerry testified she knew that personality disordered individuals can become violent and irrational and a defendant relying on such a disorder wouldn't be a good defense(2nd29.15Tr.267). Davis-Kerry indicated the reason a personality disorder defense isn't a good one is a personality disorder is hard to treat and not persuasive for a jury giving life(2nd29.15Tr.267-68). Turlington acknowledged personality disorders and their associated behavior don't lend themselves to being remedied(3rd29.15Tr.171-72). For both counsel to have this knowledge of personality disorders, it was unreasonable for them to fail to present evidence of Robert's violence. *See Strickland.* A defendant being victimized by

someone with a violent personality disorder is compelling mitigation, minimizing his moral culpability. *See Wiggins*.

As Lewis testified, an individual with Robert's domestic violence history can be expected to continue that conduct(2nd29.15Ex.FF at 46). Further, Lewis noted a parent's entire past behavior shapes and influences who the child becomes(2nd29.15Ex.FF at 35-36).³ Robert's violent history was reasonably expected to continue with Linda and Terrance and provided a framework for explaining why Terrance responded with violence to conflict with the Rainwaters. Moreover, calling Lewis as a retrial mitigation witness is a vastly different purpose from her original trial's testimony supporting a guilt phase diminished capacity inability to deliberate defense(1stTrialTr.1607-09,1617,1620-21,1625-26).

For trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *See, Butler and McCarter*. Strategic choices are only reasonable "after thorough investigation of law and facts relevant to plausible options." *Edwards v. State*,200S.W.3d500,516(Mo.banc2006)(quoting *Strickland*,466U.S. at 690). Counsels' reasons for not presenting evidence of Robert's violent abusive behaviors was they were doing something "different" from the first trial, but instead were doing

³ If this Court concludes counsel wasn't ineffective for failing to call Lewis solely to testify about Robert's violence and its impact on Terrance, then Lewis should have been called to testify about both her psychotic depression and dissociative disorder diagnoses (Point III) and Robert's violence.

the same - repeating the theory Terrance was well-liked and thought of and inexplicably committed these acts and **repeated portraying Robert as the model father**. Presenting the same theory because counsel believed evidence of Robert's violence was presented at the first trial, when it wasn't, establishes lack of thorough investigation of law and facts relevant to plausible options. *See, Edwards v. State*. Counsels' failure was the result of inattention, not reasoned judgment. They failed to know the first trial's evidence didn't include Robert's violence(2nd29.15Tr.272,320-21).

Counsel testified they portrayed Robert favorably because Terrance's other family were uninvolved and distant(3rd29.15Tr.163-64,174-75,283-84), while Robert had positive things to say about Terrance and Robert was a positive force in Terrance's life(3rd29.15Tr.163-64,235,283). What counsel did at trial expressly contradicts their 29.15 testimony about Terrance's family - they called Terrance's mother Linda(2ndTrialTr.818,821-24,828), Robert's daughter, Deborah, (Terrance's step-sister)(2ndTrialTr.829-31), and Terrance's cousin, Mark Hunt(2ndTrialTr.846-49) **all to testify to the same things Robert testified to.**

Davis-Kerry(3rd29.15Tr.243) and Luebbering(3rd29.15Tr.129) testified retrial counsel decided early on not to call Lewis. That early-on decision wasn't about wanting to portray Robert positively, but instead because Davis-Kerry at the outset had "an inward groan" and thought "oh great we've got to work with Dr. Lewis"(3rd29.15Tr.272-73). Davis-Kerry's reasons for not wanting to work with Lewis were other attorneys in her office considered Lewis difficult to work

with(3rd29.15Tr.238-39,272-73), she required too much money(3rd29.15Tr.237-38), and she got the facts of Terrance's case wrong(3rd29.15Tr.237-38).

Davis-Kerry's Lewis complaints are refuted by the record. The Public Defender authorized payment for Lewis twice - at the original trial and then for the 29.15 from the penalty retrial that followed Davis-Kerry's/Turlington's representation. Separate Defenders in both the original trial and the 29.15 from the penalty retrial worked with Lewis so the problem was not with Lewis, but instead Davis-Kerry's attitude about Lewis. Indeed, Lewis accompanied the original trial team's mitigation specialist for 4-5 hours to Malden, Missouri, personally gathering evidence about Robert's violent history from Earline(3rd29.15Tr.162-63;3rd29.15Ex.OO). Davis-Kerry never utilized Lewis before and 6-7 years had passed between when Lewis testified at the original trial and the retrial team's contact with Lewis - a passage of time that explained why Lewis didn't immediately have a perfect recall of the facts(3rd29.15Tr.238-39).

Counsels' decision to present Terrance as part of a good family, who loved him, to the exclusion of presenting evidence of Robert's violence was objectively unreasonable. Evidence from a defendant's family about the defendant's positive attributes in penalty phase conveys "the obvious" - the defendant's family doesn't want him executed. *People v. Stanley*,897P.2d481,519(Ca.1995). *See also, People v. Avery*,592N.E.2d29,39(Ill.App.1991)(defendant's family's testimony contradicting state's witnesses reflected "an obvious desire to see the head of the family escape

punishment.”). Counsels’ theory did no more than convey “the obvious” that people part of Terrance’s life didn’t want him executed. *See Stanley and Avery*.

In *People v. Edwards*, 745 N.E.2d 1212, 1230 (Ill. 2001), the death sentenced defendant argued counsel were ineffective in failing to object to the prosecutor’s argument evidence of the defendant’s good family that the defense had offered in mitigation was actually aggravation. The argument wasn’t objectionable because it was permissible for the prosecutor to “argue that the defendant’s later criminal conduct shows that he rejected his upbringing, and that he turned to crime despite his favorable background.” *Id.* 1230. *See, also, Johnson v. Bell*, 344 F.3d 567, 574-75 (6th Cir. 2003) (counsel not ineffective in efforts to “humanize” defendant when counsel failed to call witnesses to testify defendant came from a family who loved him where defendant murdered his wife because such evidence would’ve made defendant appear even more culpable).

In like manner, this Court rejected a claim of improper closing argument where respondent argued the defendant’s family were “good people.” *State v. McFadden*, 391 S.W.3d 408, 424 (Mo. banc 2013). This Court reasoned such argument is a “legitimate argument” because it supports respondent’s position “there were no mitigating circumstances.” *Id.* 424.

Respondent did in Terrance’s case what was authorized in *McFadden* and *People v. Edwards* turn the “good family” so called “mitigation” into aggravation. The prosecutor’s initial closing argument included:

And you've heard a good bit about the defendant's background. I am prepared to believe that **his parents and his friends are decent people**, just as I'm prepared to believe that the Rainwaters were decent people. **What he did does not reflect on any of them**, but it is his actions that we must analyze. **There is nothing in his background**, according to what we've been told, to suggest he would do this.

(2ndTrialTr.900)(emphasis added). Reasonable counsel wouldn't have foregone mitigating evidence of Robert's violent history to present the "good family" evidence. *See Wiggins, Penry, Williams, Rompilla, Porter, and Griffin.*

In *Gill v. State*, 300S.W.3d225,228-29,233(Mo.banc2009), respondent portrayed through its penalty evidence the victim was an upstanding individual with impeccable character when in fact he possessed child pornography and other sexually oriented matters. This Court found Gill's counsel was ineffective for failing to present evidence rebutting such victim portrayal. *Id.* 228,233-34. In the same way the jury was given a totally false impression of the *Gill* victim, that weighed in favor of imposing death, here the jury was given the equally false impression Terrance came from a home with an ideal father and was more deserving of death because he had rejected his upbringing, and turned to crime, despite his favorable background. *See McFadden and People v. Edwards.*

Lack of diligent investigation isn't protected by a presumption in favor of counsel and cannot be justified as strategy. *Kenley v. Armontrout*, 937F.2d1298,1304(8th Cir.1991). In *State v.*

Herring, 28 N.E.3d 1217, 1220, 1222 (Ohio 2014), the defendant committed 1996 acts which resulted in him being death sentenced for three murder counts. 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 Herring had been involved in a life of crime would've given the jury "more ammunition" to vote death. *Id.* 1227-28. The *Herring* Court found counsels' investigation incomplete, and therefore, unreasonable because they failed to present details of Herring's dysfunctional childhood and his family's substance abuse history. *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, where unlike Herring, Terrance had a non-violent, law-abiding past. *See, Herring*.

Counsel failed to investigate calling Lewis because they mistakenly believed evidence of Robert's violence was presented at the original trial when it wasn't (2nd 29.15 Tr. 272; 2nd 29.15 Tr. 374). *See, Kenley*. In fact, both juries heard Robert was the model father (1st Trial Tr. 1670-80; 2nd Trial Tr. 849-61). There was a failure to investigate because early-on (3rd 29.15 Tr. 129, 243) counsel decided they weren't going to work with Lewis as Davis-Kerry had "an inward groan" and thought "oh great we've got to work with Dr. Lewis" (3rd 29.15 Tr. 272-73). *See, Kenley*.

In deciding not to present evidence of Robert's violent history, counsel relied on Terrance, his mother, and his sister Shaneka not having reported Robert's abuse (3rd 29.15 Tr. 174-75, 207, 231-35). Luebbering indicated it's common for abuse

victims not to disclose abuse(3rd29.15Tr.124-25). Turlington acknowledged that families where abuse occurred are reluctant to disclose it(3rd29.15Tr.165). It is a well recognized principle that “victims and abusers hide the abuse or deny its existence at all.” Davis, *Mediating Cases Involving Domestic Violence: Solution or Setback?*, 8 Cardozo J. Conflict Resol. 253, 269 (2007). *See also*, Stevenson, *Federal Antiviolence And Abuse Legislation: Toward Elimination Of Disparate Justice For Women And Children*, 33 Willamette L.Rev. 847,883(1997)(the “typical” abuse victim “conceals the abuse from others out-of-fear of the abuser’s increased aggression”). Robert was involved with Linda while Earline and Robert were still married(3rd29.15Ex.OO at 2) and Earline told Luebbering that Robert was abusive to Linda(3rd29.15Tr.108). Based on Luebbering’s meetings with Linda she determined Linda wasn’t disclosing Robert’s violence because of Robert’s threatening, controlling, manipulative behavior(3rd29.15Tr.122-23). Moreover, **Terrance told Lewis** “there were things that he knew and things about that had happened in his home and in his childhood **that he just could not reveal**....”(1stTrialEx.E-1 at 9)(emphasis added). Counsel possessed concrete evidence of the significance of Terrance’s spiral fracture, the cigarette burns on Terrance’s back, puncture wound to his thigh, and multiple scars and Cross’ and Alfonso’s findings on Robert’s abuse of Terrance, Linda, and Shaneka. Counsel also had evidence of Robert’s abuse of Earline and through Earline had evidence of Robert’s abuse of Linda. Reasonable counsel armed with all this information would’ve presented evidence of Robert’s violence towards Terrance, Linda, and Shaneka.

In *Rompilla*, the Court noted counsel had found Rompilla uninterested in helping uncover helpful abuse evidence and **even actively obstructed obtaining it**, but still counsel was ineffective. *Rompilla*, 545 U.S. at 381. Failing to present evidence of Robert's violent history because Terrance, his mother, and Shaneka didn't report abuse was unreasonable. See *Rompilla* and *Mediating Cases Involving Domestic Violence and Federal Antiviolence And Abuse Legislation*, *supra*.

Moreover, counsel's unreasonableness is underscored by Lewis' Preliminary Report noting that although Robert Smith denied having a temper "both of his children [Terrance and Shaneka] recalled **periodically** being frightened by his **rages**." (1st Trial Ex. E-3 at 4; 2nd 29.15 Ex. D at 4) (emphasis added). The violent "Cornish hen" incident wasn't an isolated occurrence, but just merely one example of Robert's total behavior (3rd 29.15 L.F. 382 relying on 2nd 29.15 Ex. D at 4).

Judge Wolff's dissent didn't endorse the mitigation case presented as especially well done (3rd 29.15 L.F. 379). The majority found a verdict director error on how mitigating evidence was to be considered wasn't prejudicial. *State v. Anderson*, 306 S.W.3d 529, 534-36 (Mo. banc 2010). Wolff found there was **adequate** mitigation evidence to the extent the failure to properly instruct the jury was prejudicial to the jury being able to fully consider that evidence. *Id.* 549-50. Notably, the evidence Wolff's dissent identified was how the acts here were so out-of-character for Terrance and Terrance's distress about being excluded from his daughter's life and not evidence casting Robert as an ideal father because Robert "the good father"

evidence is actually aggravating, not mitigating. *Id.* 549-50. See *McFadden and People v. Edwards*.

Terrance was prejudiced because Lewis could've given the jury an accurate, mitigating rendition of the violent abusive environment in which Terrance was raised and the violence inflicted on him and not the misinformation Terrance was raised by a model caring father. See *Wiggins, Penry, Williams, Rompilla, Strickland, Porter, and Griffin*. Moreover, respondent wouldn't have been able to cast Terrance as having rejected his upbringing in committing this offense so as to make the offense even more aggravated(2ndTrialTr.900). Cf. *McFadden and People v. Edwards*.

Mitigation specialist Luebbering spoke with unmistakable clarity, throughout, *supra*, why Robert's violence's absence was prejudicial and expressly contradicted the erroneous identical second and third hearings' "stammering" to articulate explanations finding(3rd29.15L.F.391-92;2nd29.15L.F.192). Luebbering clearly explained how Robert's violent lack of impulse control character was very damaging to Terrance's emotional development where Terrance had no choice in being raised by someone who inflicted such abuse(3rd29.15Tr.106,112,114,121-22,131,137).

A new penalty phase is required.

II.

EARLINE SMITH - ROBERT'S VIOLENCE

The motion court clearly erred in denying the claim counsel was ineffective for failing to call Earline Smith, Terrance's stepfather Robert's ex-wife, to testify about Robert's violent and abusive behaviors Robert inflicted on she and her daughter, Deborah, because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Earline for the jury to hear firsthand the intensity and magnitude of the domestic violence Robert inflicted on Earline and Deborah for the jury to consider in conjunction with hearing from Dr. Lewis (Point I) that Robert's domestic violence history would be expected to continue as to Terrance and his mother, Linda. Terrance was prejudiced because all of Robert's violent abusive past behavior shaped and influenced Terrance and was inherently mitigating evidence lessening Terrance's moral culpability supporting life.

Earline Smith could've described firsthand the intensity and magnitude of Robert's violence she and their daughter, Deborah, endured while married to Robert. The abuse perpetrated against Earline could've been considered in conjunction with Dr. Lewis' testifying (Point I) that Robert's violent past would be expected to continue with Terrance and his mother Linda and that all of Robert's violent abusive past behavior shaped and influenced the person that Terrance was.

Violence Directed At Former Wife Earline

Earline and Robert were married eleven years(2nd29.15Ex.GG at 1). Robert frequently beat Earline and frightened their children(2nd29.15Ex.GG at 1-2). Robert verbally abused their children and that caused their daughter, Deborah, to require mental health treatment(2nd29.15Ex.GG at 1-2). Robert's beating Earline caused her to have multiple shoulder surgeries(2nd29.15Ex.GG at 1;3rd29.15Ex.OO at 1). Robert raped Earline numerous times, including while she was pregnant and shortly after Deborah was born(2nd29.15Ex.GG at 1-2;3rd29.15Ex.OO at 1). During one rape, Robert crushed Earline's glasses under his heel(3rd29.15Ex.OO at 1;2nd29.15Ex.GG at 1-2). After Earline had breast surgery, Robert twisted her breast, causing her to need follow-up invasive treatment(2nd29.15Ex.GG at 1-2;3rd29.15Ex.OO at 1-2).

Robert intentionally broke objects, overturned tables, and struck walls(2nd29.15Ex.GG at 1-2;3rd29.15Ex.OO at 2). Earline called the police many times while married to Robert(2nd29.15Ex.GG at 2).

When Earline and Robert eventually divorced, Robert stalked Earline and threatened her(2nd29.15Ex.GG at 2). Earline began carrying a gun for protection(2nd29.15Ex.GG at 2). Robert stopped harassing Earline only after an incident where Earline had to aim her gun at him(2nd29.15Ex.GG at 2).

Robert fathered multiple children with multiple women while married to Earline(3rd29.15Ex.OO at 2). Robert was involved with Linda while Earline and Robert were still married(3rd29.15Ex.OO at 2). Earline told Luebbering that Robert

was abusive to Linda(3rd29.15Tr.108). Robert's violent acts included hitting his high school principal so hard with a chair that it broke(3rd29.15Ex.OO at 2).

Counsels' Testimony

Turlington's and Davis-Kerry's reasons for not calling Earline to testify about Robert's violence as set forth in Point I are incorporated here(*See, e.g.,* 3rd29.15Tr.163-64,231-32).

Findings

Earline's testimony related to events preceding Terrance's birth was irrelevant(3rd29.15L.F.403). In the first trial, Lewis testified to this background information on Robert and it wasn't persuasive(3rd29.15L.F.403). Luebbering didn't explain its mitigating value(3rd29.15L.F.403). Counsel made the decision not to present evidence of Robert's abusive conduct(3rd29.15L.F.403).

Counsel Was Ineffective

There is a long held societal belief a disadvantaged abused background may make a defendant less morally culpable and is inherently mitigating. *See* Point I – *Wiggins, Penry, Williams v. Taylor, Rompilla, Porter, and Griffin*.

Evidence from a defendant's family about the defendant's attributes in penalty conveys "the obvious" to a jury that the defendant's family doesn't want him executed. *People v. Stanley*, 897P.2d481,519(Ca.1995). *See also, People v. Avery*, 592N.E.2d29,39(Ill.App.1991)(defendant's family's testimony contradicting state's witnesses reflected "an obvious desire to see the head of the family escape punishment.").

Reasonable counsel would've presented evidence of the intensity and magnitude of the domestic violence Robert inflicted on Earline and Deborah so that it could be considered in conjunction with Lewis' findings that Robert's history of violence would be expected to continue with Terrance and his mother, and Robert's past behaviors influenced the person Terrance became. *See Wiggins, Penry, Williams, Rompilla, Porter, Griffin*, and Point I incorporated here. Terrance was prejudiced because had the jury had this inherently mitigating evidence on the mitigating side of the scale and reduced the ballast on the aggravating side there's a reasonable probability the jury would've struck a different balance. *See Griffin*, 622 F.3d at 845; *Porter*, 130 S.Ct. at 454; and *Strickland*.

No one testified at the first trial about Robert's violent abusive history. *See Point I* incorporated here. Rather, both juries heard the same misinformation - Robert was the model caring father (1st Trial Tr. 1670-80; 2nd Trial Tr. 849-61). Further, Luebbering explained with poignant, compelling clarity that presenting Robert's violence was critical because Robert's violent lack of impulse control was very damaging to Terrance's emotional development where Terrance had no choice in being raised by someone who inflicted such abuse (3rd Trial Tr. 106, 112, 114, 121-22, 131, 137). *See, Point I* incorporated here.

For trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *See, Butler and McCarter*. Here counsel's strategy to do something "different" was unreasonable because they did the same as the first trial, repeating the theory Terrance was well-liked and thought of and inexplicably

committed these acts, and repeated portraying Robert as the model father. *See* Point I incorporated here.

Reasonable counsel would've presented evidence of Robert's abuse of Earline and her daughter and Terrance was prejudiced. Instead, the jury was given a totally false impression of Robert in contravention of *Wiggins*, *Penry*, *Williams*, *Rompilla*, *Porter*, and *Griffin* which have held abuse is inherently mitigating. *See* Point I. The false impression the jury was left with was no different than the unrebutted distinctly false portrayal of the victim in *Gill v. State*, 300S.W.3d225(Mo.banc2009). *See* Point I.

A new penalty phase is required.

III.

FAILURE TO CALL DR. LEWIS - TERRANCE'S **PSYCHIATRIC DIAGNOSES**

The motion court clearly erred in denying the claim counsel was ineffective for failing to call Dr. Lewis because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called her to provide mitigating evidence Terrance suffered from a psychotic depression characterized by paranoia and delusions while living in dysfunctional family circumstances all of which would have supported the §565.032.3 statutory mitigators extreme emotional disturbance (given) and substantial impairment (not offered). Lewis also would have presented testimony Terrance had impaired intellectual functioning. Terrance was prejudiced because there is a reasonable probability if Lewis was called he would have been life sentenced.

Counsel failed to call Dr. Lewis to testify Terrance suffered from a psychotic depression characterized by paranoia and delusions. Reasonable counsel would've called Lewis because Lewis' testimony would've supported the §565.032.3 statutory mitigators extreme emotional disturbance (given) §565.032.3(2) and substantial impairment (not offered) §565.032.3(6). Lewis also could've provided evidence Terrance had impaired intellectual functioning. Terrance was prejudiced because there's a reasonable probability he would've been life sentenced if Lewis testified.

“Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (quoted in *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004) and *Glass v. State*, 227 S.W.3d 463, 468 (Mo. banc 2007)). 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*, 542 U.S. at 284.

Dr. Lewis’ 29.15 Testimony

Dr. Lewis is an M.D. general psychiatrist and not a forensic psychiatrist (2nd 29.15 Ex. FF at 6).

When Terrance was seventeen months old, he ingested rubbing alcohol, which is toxic to the nervous system (2nd 29.15 Ex. FF at 26-27). On Terrance’s I.Q. scores he scored in the normal range, but his school grades were much lower than expected for someone with his I.Q. (2nd 29.15 Ex. FF at 32). There was significant disparity between Terrance’s achievement tests scores as to performance and verbal skills with his performance skills being significantly better (2nd 29.15 Ex. FF at 32-33). That disparity supported a neurological problem with resulting learning disabilities (2nd 29.15 Ex. FF at 33).

When Terrance was about thirteen, he began hearing persecutory, berating voices and he also became depressed (2nd 29.15 Ex. FF at 51-53). When Terrance dropped-out of college he became severely depressed (2nd 29.15 Ex. FF at 54). Terrance went to work at a furniture factory and became involved with Abbey about

that same time(2nd29.15Ex.FF at 55). Because of taking calls from Abbey and leaving work early to be with her when she was pregnant, Terrance was fired(2nd29.15Ex.FF at 55).

When Terrance moved-in with the Rainwaters, there was much tension between Terrance and Debbie as Terrance felt Debbie demeaned him(2nd29.15Ex.FF at 56). There was an incident where Debbie accused Terrance of having threatened her and Debbie obtained a restraining order against Terrance based on that alleged occurrence(2nd29.15Ex.FF at 56). Those events confused Terrance because within a few days of the order, Debbie invited Terrance and Terrance's sister to a picnic(2nd29.15Ex.FF at 56).

Terrance became depressed his daughter would be taken from him(2nd29.15Ex.FF at 60). Terrance attended prenatal classes with Abbey, but was excluded from Kyra's delivery(2nd29.15Ex.FF at 58-59).

Terrance felt he was rejected by his biological father and wanted to be a better father to Kyra(2nd29.15Ex.FF at 60). Stephen and Debbie sent Terrance contradictory signals, they asked Terrance to babysit Kyra, but then prohibited Terrance from seeing her(2nd29.15Ex.FF at 60-61). Such contradiction created chaos for Terrance as to his role in Kyra's life(2nd29.15Ex.FF at 61).

In the days leading-up to the shooting, Terrance became increasingly depressed and obsessed with the idea the Rainwaters were intending to deny him all access to Kyra(2nd29.15Ex.FF at 62). Terrance ruminated over his biological father

abandoning him and the thought of him being forced to abandon Kyra(2nd29.15Ex.FF at 62).

Terrance's paranoia was manifested by his belief Debbie and Stephen wanted to kill him(2nd29.15Ex.FF at 61). Terrance also believed the Rainwaters were planning to move Kyra to California so that he'd never see her(2nd29.15Ex.FF at 61).

The day before the shootings Abbey arranged with Terrance's mother to babysit Kyra the next day, while Terrance was at a job interview(2nd29.15Ex.FF at 62-63). When Terrance arrived home Kyra wasn't there and Terrance was unable to reach Abbey(2nd29.15Ex.FF at 62-63). That played into Terrance's obsession and delusion the Rainwaters were intending to deny him all access to Kyra and move her away(2nd29.15Ex.FF at 62-63). Terrance believed the Rainwaters left town with Kyra and he drove around looking for Abbey(2nd29.15Ex.FF at 63-64).

Terrance's behavior in shooting the Rainwaters was entirely out-of-character for the behavior people expected of him, which was non-violent and withdrawn(2nd29.15Ex.FF at 68). People who saw Terrance within a short time of the shooting described behavior consistent with Terrance being in an altered state(2nd29.15Ex.FF at 65-67). Public Defender investigator, Larry Woods, had seen Terrance about two weeks before the shooting and also saw him about one week after(2nd29.15Ex.FF at 67). Terrance presented contrasting demeanors to Woods on each occasion(2nd29.15Ex.FF at 67). In particular, Terrance presented as unaware of why he was jailed(2nd29.15Ex.FF at 67).

Lewis found Terrance suffered from a psychotic depression which included symptoms of paranoia and hallucinations(2nd29.15Ex.FF at 69-70,95). At the time of the offense, Terrance acted under an extreme mental disturbance(2nd29.15Ex.FF at 70). Terrance was substantially impaired as to his ability to appreciate the criminality of his conduct and to conform to the requirements of law(2nd29.15Ex.FF at 70). Terrance was misinterpreting behaviors and was delusional(2nd29.15Ex.FF at 70).

Terrance's history of hearing voices spoke to the severity of Terrance's psychoses and delusional disorder(2nd29.15Ex.FF at 88). Lewis didn't believe Terrance's acts here were in any way connected to auditory hallucinations(2nd29.15Ex.FF at 88). That Terrance never asserted that his acts were caused by voices telling him what to do supports he wasn't malingering(2nd29.15Ex.FF at 87). Further, that Terrance's trial testimony got the facts wrong when compared to what the eyewitnesses reported supported Terrance wasn't malingering(2nd29.15Ex.FF at 104-05).

Terrance reported to Lewis he shot Stephen(2nd29.15Ex.FF at 64). Terrance insisted to Lewis though he didn't shoot Debbie and he didn't know who did(2nd29.15Ex.FF at 64-65). Terrance wasn't malingering/lying because he wouldn't have confessed to shooting Stephen(2nd29.15Ex.FF at 66-67). Terrance was truly convinced he didn't shoot Debbie(2nd29.15Ex.FF at 66-67). Terrance never asserted he had amnesia, instead that was an opinion Lewis held(2nd29.15Ex.FF at 85).

Lewis opined there were two possibilities to explain why Terrance testified at the retrial to having remembered shooting Debbie when he previously had told Lewis that he didn't remember(2nd29.15Ex.FF at 64-65,71-73). One was Terrance didn't really remember shooting Debbie, but instead confabulated events to fill in his memory gaps and he never intended to deceive(2nd29.15Ex.FF at 71-73). An alternative was Terrance heard so much about what happened that he pieced together what he came to believe happened based on others' reporting(2nd29.15Ex.FF at 71-73). No matter which explanation applied, Lewis found it significant that the rendition Terrance provided was inaccurate as to its details when that was compared to what eyewitnesses and forensic witnesses reported(2nd29.15Ex.FF at 71-73,96-97). For these reasons, Lewis believed Terrance was in an altered dissociated state(2nd29.15Ex.FF at 77). That altered state, however, wasn't a primary diagnosis(2nd29.15Ex.FF at 95-96). While Terrance professed to remembering what happened with Debbie, he in fact doesn't(2nd29.15Ex.FF at 96-97).

Lewis noted Stephen and Debbie's own relationship was marred with conflict(2nd29.15Ex.FF at57-58). Lewis observed Stephen suffered from manic depressive disorder and periodically moved in-and-out of the household(2nd29.15Ex.FF at 57-58). Lewis took note of all Robert's violent history and that when Terrance moved in with the Rainwaters he was simply moving from one turbulent, unstable family situation to another(2nd29.15Ex.FF at 34-46,57-58).

Counsels' Testimony

Turlington testified Lewis' testimony would've supported the statutory mitigator whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, §565.032.3(6) (3rd29.15Tr.181). Turlington didn't know why that mitigator wasn't submitted in Instruction 8(3rd29.15Tr.184;2nd29.15.Ex.B at 167)

Turlington testified they decided to call Holcomb, and not Lewis, because Lewis reported Shaneka heard voices and Terrance was in a dissociative state, both of which Terrance disliked(3rd29.15Tr.181-82,206-07). With Holcomb they were able to avoid matters Terrance disliked(3rd29.15Tr.182-83). Lewis and Holcomb agreed on Terrance's diagnoses being psychogenic amnesia, major depression, and paranoia(3rd29.15Tr.182-83).

Davis-Kerry testified they planned to call Holcomb to testify to Terrance's psychogenic amnesia, depression, and paranoia(3rd29.15Tr.235-37). Lewis and Holcomb agreed on their diagnoses(3rd29.15Tr.243).

Davis-Kerry testified Lewis was very difficult to work with and she wanted an excessive fee to work on Terrance's case again, something the Public Defender's Office wouldn't allow(3rd29.15Tr.237-39,242-44,272-73). Davis-Kerry's immediate reaction after getting Terrance's casefile boxes and learning Lewis had been a witness was "an inward groan" and to think "oh great we've got to work with Dr. Lewis"(3rd29.15Tr.272-73). Davis-Kerry complained that once contacted Lewis was getting Terrance's case facts wrong, but acknowledged never having utilized Lewis before and 6-7 years had passed between when Lewis testified at the original trial and

the retrial team's contact with Lewis(3rd29.15Tr.237-39). Davis-Kerry acknowledged that while Lewis could be difficult to work with, she also got successful outcomes(3rd29.15Tr.239).

Davis-Kerry(3rd29.15Tr.243) (and Luebbering(3rd29.15Tr.129)) testified retrial counsel decided early-on not to call Lewis.

Davis-Kerry didn't know whether Lewis' testimony would've supported the statutory mitigator whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired or whether they considered submitting it(3rd29.15Tr.241-42,245-46).

Findings

The findings state Lewis is a forensic psychologist(3rd29.15L.F.381). Based on only Terrance's reporting, Lewis testified Debbie and Stephen Rainwater's relationship was violent and Stephen was manic-depressive(3rd29.15L.F.382). Such assertion would have angered the jury(3rd29.15L.F.382).

Lewis' testimony that Terrance was in an altered state and not malingering lacked logic because Lewis relied on Terrance having admitted shooting Stephen, but denied shooting Debbie(3rd29.15L.F.382-83).

Lewis testified she doesn't know whether Terrance understood right from wrong at the time of the offenses, but that he couldn't conform his conduct to the law(3rd29.15L.F.383). Lewis acknowledged there was no corroborative evidence Terrance heard voices, other than his self-reporting, and couldn't opine whether he heard voices at the time of the offense(3rd29.15L.F.383). Lewis is "gullible" to

believe Terrance heard voices(3rd29.15L.F.404). Lewis' testimony Terrance was hearing voices is at odds with Holcomb(3rd29.15L.F.404).

Lewis lacked support Terrance was in an altered state that made Terrance unable to conform his conduct to law(3rd29.15L.F.383).

Lewis described Terrance as descending into an altered state due in part to a court order Abbey obtained(3rd29.15L.F.383). The order of protection actually issued the day of the shootings July 25, 1997(3rd29.15L.F.383-84 relying on 2ndTrial Ex.38 order of protection and 2ndTrialTr.645). Lewis didn't grasp the facts because she relied on statements Terrance attributed to Stacey Turner-Blackmon, which Blackmon denied making(3rd29.15L.F.383-84).

Lewis reported Terrance's younger sister suffered from auditory hallucinations, but his sister disputed this and denied having told Lewis she had such experiences(3rd29.15L.F.395).

Davis-Kerry indicated Lewis initially indicated she had no recall of Terrance's case, recited incorrect facts, insisted on an unreasonably high fee, and had a reputation of being difficult to work with(3rd29.15L.F.383,397-98).

Lewis testified at the first trial to the same matters that are claimed should've been presented here(3rd29.15L.F.404). Lewis isn't credible and the best evidence of that was the original trial's outcome(3rd29.15L.F.383). Counsel wasn't ineffective for concluding diminished mental capacity was unsuccessful at the first trial and would be unsuccessful on retrial(3rd29.15L.F.383,404).

EEG and MRI results refuted Lewis' suspicion Terrance has brain damage(3rd29.15L.F.405).

Statutory Mitigation

Section 565.032.3 provides that statutory mitigating circumstances shall include:

- (1) The defendant has no significant history of prior criminal activity;
- (2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;

.....

- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
- (7) The age of the defendant at the time of the crime.

In Terrance's case, Instruction #8 submitted no significant prior criminal history, extreme emotional disturbance §565.032.3(2), and age, but didn't submit, substantial impairment§565.032.3(6)(2ndTrialL.F.167;2nd29.15.Ex.B at 167).

Counsel Was Ineffective

In *Hutchison v. State*,150S.W.3d292,307(Mo.banc2004), this Court concluded counsel was ineffective for failing to present a thorough comprehensive expert presentation. Here the jury got no expert evidence.

In *Glass v. State*,227S.W.3d463,470-71(Mo.banc2007), counsel was ineffective for failing to call multiple expert witnesses who could've provided mitigating evidence. Counsel was ineffective for failing to call a neuropsychologist,

who had evaluated Glass before trial, and found Glass had brain impairment that caused him to have difficulty with learning, memory, and impulse control. *Id.*470. The failure to call the neuropsychologist was prejudicial because the psychological evidence had powerful inherently mitigating value and was especially prejudicial because the jury heard no penalty phase experts. *Id.*470. Counsel was also ineffective for failing to call a toxicology pharmacologist because that witness would've provided a powerful factual basis for supporting the statutory mitigating circumstances of substantial impairment and extreme emotional distress as provided for under §565.032.3(2) and (6). *Id.*471. Additionally, counsel was ineffective for failing to call a learning disability expert, who identified Glass' learning deficits. *Id.*471. The failure to present the learning disability expert was prejudicial because evidence of impaired intellectual functioning is mitigating regardless of whether a defendant has established a nexus between his mental capacity and the crime. *Id.*470-71. *See also, Hutchison*, 150S.W.3d at 305(same)(relying on *Tennard*, 524U.S. at 289).

Like in *Hutchison* and *Glass* the jury didn't hear compelling expert mitigating evidence. Lewis is an M.D. general psychiatrist (2nd29.15Ex.FF at 6), not a forensic psychologist(3rd29.15L.F.381). Lewis would've explained Terrance had impaired intellectual functioning in the form of learning disabilities caused by Terrance as a seventeen month old having ingested rubbing alcohol(2nd29.15Ex.FF at 26-27,32-33). *Cf. Glass*. That learning disability was established through the disparity between Terrance's performance and verbal achievement test scores(2nd29.15Ex.FF at 26-

27,32-33). That the MRI and EEG testing didn't locate pathology simply didn't refute Terrance has brain damage(3rd29.15L.F.405).

Evidence of a troubled history is relevant to assessing a defendant's moral culpability. *Wiggins v. Smith*, 539 U.S. 510, 535 (2003). Terrance was not the "only" source for Stephen's bipolar condition/disorder(3rd29.15L.F.382). Abbey testified on cross-examination at the retrial that her father Stephen was diagnosed as bipolar manic depressive and was on disability(2ndTrialTr.665). The issue of Stephen's bipolar disorder was already in front of the jury with Abbey as the source of that information. Lewis didn't malign Stephen for being bipolar. Instead, Lewis explained that the Rainwater household was tumultuous because of Stephen's and Debbie's marital discord and Stephen's bipolar disorder(2nd29.15Ex.FF at 57-58). Lewis explained that Terrance was moving from his own turbulent, unstable family with Robert's history into another unstable family situation(2nd29.15Ex.FF at 34-46,57-58). Terrance's troubled history of living in two turbulent households was relevant mitigation. *See Wiggins*.

Lewis provided mitigating evidence and background explaining Terrance's mental impairment in the context of the two volatile households in which he lived. Lewis explained Terrance was receiving conflicting confusing messages from the Rainwaters about what role they'd allow him to have in his daughter's life. That started with being excluded from the delivery room(2nd29.15Ex.FF at 58-59), prohibiting him at times from seeing Kyra (2nd29.15Ex.FF at 60-61) and culminating in his daughter not being at his house as was planned on the day of the shootings and

not being able to contact the Rainwaters when Kyra wasn't there(2nd29.15Ex.FF at 62-64). Terrance believed the Rainwaters had permanently left town with his daughter(2nd29.15Ex.FF at 62-64).

Lewis found Terrance was increasingly depressed and obsessed with the idea the Rainwaters would deny him all access to his child(2nd29.15Ex.FF at 60,62). Terrance ruminated over being abandoned by his biological father and he didn't want to do the same to his daughter(2nd29.15Ex.FF at 60,62).

Lewis found Terrance suffered from a psychotic depression with paranoia and hallucinations(2nd29.15Ex.FF at 69-70,95). Lewis also found Terrance was in a dissociative state based upon remembering shooting Stephen, but not remembering shooting Debbie(2nd29.15Ex.FF at 64-65,77).

Lewis explained that while Terrance reported at trial recalling having shot Debbie that was inaccurate(2nd29.15Ex.FF at 71-73). Terrance was either confabulating to fill in gaps in his memory or relying on what he heard others reported(2nd29.15Ex.FF at 71-73). Terrance in fact didn't remember because what he testified to was so vastly different from what eyewitnesses reported and forensic evidence showed(2nd29.15Ex.FF at 71-73,96-97).

Lewis explained there were multiple reasons for concluding Terrance wasn't malingering. Those reasons were that Terrance wouldn't have admitted to having shot Stephen, the disparate manner in which Terrance presented himself to Investigator Woods on separate occasions, Terrance could've, but didn't, claim voices he heard directed him to do the shooting, and the facts as reported by Terrance were

wrong when compared to what eyewitnesses reported(2nd29.15Ex.FF at 66-67,82,87,105). All of these considerations supported Terrance was delusional(2nd29.15Ex.FF at 66-67,82,87,105).

The DSM-IV-TR Section 300.12 details the diagnosis of dissociative or psychogenic amnesia. DSM-IV-TR at 520-23. The disorder arises from traumatic or stressful events. *Id.*520. This disorder presents as a gap or series of gaps in recall. *Id.*520. The disorder “involves a reversible memory impairment.” *Id.*520. The DSM-IV-TR tracks what Lewis testified to at the 29.15 that a dissociative disorder involves gaps in memory and a potential for a person to believe he can recall.

Reasonable counsel would’ve called Lewis. *See Tennard, Hutchison, and Glass*. In deciding prejudice from failing to present mitigating evidence courts are required to evaluate the totality of the evidence. *Hutchison v. State*,150S.W.3d at 306(relying on *Wiggins*,539U.S. at 536). “The question is whether, when all the mitigation evidence is added together, is there a reasonable probability that the outcome would have been different?” *Hutchison v. State*,150S.W.3d at 306. The jury would’ve heard compelling mitigation evidence Terrance suffered from a psychotic depression characterized by paranoia and delusions which would’ve supported the §565.032.3 statutory mitigators extreme emotional disturbance and substantial impairment(3rd29.15Tr.181). *Cf. Glass, supra* (failure to call toxicology pharmacologist who supported same mitigators). Lewis also could’ve presented evidence of impaired intellectual functioning. *See Tennard, Hutchison, and Glass*. Lewis also explained the interrelationship between Terrance’s tumultuous family

background, the Rainwater family's own dysfunctional family circumstances, and this offense.

Foregoing presenting mitigating evidence because it contains something harmful is unreasonable when its mitigating value outweighs its harm.

Hutchison, 150 S.W.3d at 305; *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). For trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *See, Butler and McCarter*. Lewis' mitigating evidence clearly outweighed any harm caused by Terrance having testified he remembered shooting Debbie, while Lewis had concluded Terrance was in an altered dissociated state, that wasn't a primary diagnosis (2nd 29.15 Ex. FF at 95-96). Lewis was able to explain this discrepancy as Terrance either confabulating or having relied on what he heard others reported happened (2nd 29.15 Ex. FF at 71-73). Moreover, Lewis concluded the discrepancies between what Terrance and the eyewitnesses reported established Terrance didn't truly remember shooting Debbie, despite his trial testimony (2nd 29.15 Ex. FF at 71-73, 96-97). Further, Lewis could've countered the prosecutor's strategy of questioning Terrance and making argument so as to cast Terrance as a "liar" because what he reported didn't coincide with what eyewitnesses reported (2nd Trial Tr. 786-97, 897-99, 923-24). Even if Terrance's reporting that he remembered shooting can be construed as harmful, it was unreasonable to fail to call Lewis because she was able to explain why Terrance didn't truly remember shooting Debbie. *See Butler and McCarter*.

Contrary to the findings (3rd29.15L.F.406), there was no ethical dilemma posed for counsel to call either Lewis or Holcomb, if counsel had only asked them whether their opinions had changed based on Terrance’s testimony, as both explained why they concluded Terrance didn’t truly remember having shot Debbie, and therefore, Terrance hadn’t “fabricated” or “lied.”

Counsel’s decision not to call a witness is presumptively a matter of strategy and won’t support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise. *Hutchison*, 150S.W.3d at 304. The failure to call Lewis was unreasonable because the jury heard no expert testimony that would’ve supported the statutory mitigators extreme emotional disturbance and substantial impairment, §565.032.3(2) and (6). *Cf. Glass*.

Lewis didn’t testify Terrance went into an altered state over time based on Abbey having obtained a restraining order(3rd29.15L.F.383-84 relying on 2ndTrial Ex.38 order of protection and 2ndTrialTr.645). Lewis noted in passing a separate earlier restraining order occurrence, not sought by Abbey, where Debbie obtained a restraining order for Debbie’s benefit against Terrance for Terrance allegedly threatening Debbie(3rd29.15Ex.FF at 56;2ndTrialEx.38).⁴ Abbey testified at the

⁴ As discussed in Point VII, second trial Ex. 38 is the July 25, 1997, petition and order Abbey obtained against Terrance which recites Debbie obtained an earlier order against Terrance. At trial, Terrance testified about the separate occurrence involving Debbie(2ndTrialTr.762-63).

retrial that she obtained an order of protection for her protection against Terrance on the day of the shooting, July 25, 1997(2ndTrialTr.644-45).

The first trial's result isn't a reliable indicator of the value of Lewis' testimony(3rd29.15L.F.383). That jury's verdict was unreliable because a juror who served expressed "a strong preference for the death penalty" and would require the defense prove death wasn't appropriate, which was why the penalty phase was reversed. *Anderson v. State*,196S.W.3d28,41(Mo.banc2006). Further, at the first trial, Lewis' testimony was presented as a guilt defense Terrance was unable to deliberate such that he was guilty of second degree murder and not as mitigating evidence for punishment(1stTrialTr.1607-09,1617,1620-21,1625-26).

The findings assert Lewis didn't grasp the facts because she relied on Terrance's reporting of statements Terrance attributed to Stacey Turner-Blackmon which Stacey denied(3rd29.15L.F.383-84). Terrance testified at the retrial Stacey told him Debbie and Stephen were plotting to kill him and Kyra(2ndTrialTr.767-71). Stacey testified she never said such things to Terrance(2ndTrialTr.707-08). The findings treat this matter as though Lewis accepted as true what Terrance reported when in fact Lewis took as true Stacey's denial she made such statements. Lewis found Terrance's testimony on this matter, rather than accurately reporting reality, reflected Terrance's paranoia(2nd29.15Ex.FF at 61).

Lewis' testimony wasn't at odds with what Holcomb found on whether Terrance heard voices(3rd29.15L.F.404). Holcomb testified there was nothing that led him to believe Terrance suffered from auditory hallucinations around the time of

the offense(2nd29.15Tr.63-64). Holcomb continued though there may have been a time in Terrance's life when he had auditory hallucinations(2nd29.15Tr.64). Lewis found that at about thirteen Terrance had experienced auditory, persecutory hallucinations(2nd29.15Ex.FF at 51-53). Lewis, like Holcomb, found Terrance's actions here had nothing to do with auditory hallucinations(2nd29.15Ex.FF at 88).

The findings attacked Lewis' testimony Terrance was in an altered state and not malingering because Lewis relied on Terrance having admitted shooting Stephen, but denied shooting Debbie(3rd29.15L.F.382-83). Lewis' point was if Terrance was being untruthful and malingering, then he would have denied shooting both Stephen and Debbie in order to evade all responsibility and wouldn't have admitted shooting Stephen(2nd29.15Ex.FF at 66-67).

Reasonable counsel would've called Lewis. *See Hutchison, Glass, and Strickland*. Terrance was prejudiced because the jury didn't hear substantial mitigation to support extreme emotional disturbance §565.032.3(2) (given) and substantial impairment §565.032.3(6) (not offered) for which there's a reasonable probability Terrance would've been life sentenced. *See Tennard and Strickland*.

A new penalty phase is required.

IV.

FAILURE TO CALL DR. HOLCOMB

The motion court clearly erred denying the claim counsel was ineffective for failing to call Dr. Holcomb because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have apprised Holcomb Terrance was testifying he remembered shooting Debbie, asked Holcomb the significance of that testimony as it impacted his opinions/diagnoses and learned from Holcomb Terrance's testimony did not change Holcomb's opinions/diagnoses as Terrance's recall at trial is consistent with the course of psychogenic amnesia, and then called Holcomb to testify. Terrance was prejudiced because Holcomb providing mitigation Terrance suffered from a psychotic depression, characterized by paranoia and delusions, would have supported the §565.032.3 statutory mitigators extreme emotional disturbance (given) and substantial impairment (not offered), and there is a reasonable probability if Holcomb testified Terrance would have been life sentenced.

Reasonable counsel would've apprised Holcomb Terrance was testifying he remembered shooting Debbie, asked Holcomb the significance of that testimony as it impacted his opinions/diagnoses and learned from Holcomb Terrance's testimony didn't change Holcomb's opinions/diagnoses as Terrance's recall at trial is consistent

with the course of psychogenic amnesia. Armed with that complete information reasonable counsel would've called Holcomb to testify.

Holcomb could've provided testimony Terrance suffered from a psychotic depression characterized by paranoia and delusions. That testimony would've supported the §565.032.3 statutory mitigators extreme emotional disturbance (given) and substantial impairment (not offered). If Holcomb testified, there's a reasonable probability Terrance would've been life sentenced.

"Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (quoted in *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004) and *Glass v. State*, 227 S.W.3d 463, 468 (Mo. banc 2007)). 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*, 542 U.S. at 284.

Holcomb's Testimony

Holcomb is a forensic psychologist that counsel retained (3rd 29.15 Tr. 54; 2nd 29.15 Tr. 34, 52-53). Holcomb reviewed Lewis' reports, which found Terrance suffered from depression, paranoia, and delusions (3rd 29.15 Tr. 43-44; 2nd 29.15 Tr. 41-42).

Terrance reported getting information from one of Abbey's friends that Kyra was in danger or Kyra would be taken away from him (3rd 29.15 Tr. 52; 2nd 29.15 Tr. 47).

Such things reflected Terrance's paranoia and delusional state(3rd29.15Tr.52;2nd29.15Tr.47-48,50-51).

Holcomb found mitigating Terrance suffered from major depression, delusional paranoia, and psychogenic amnesia(3rd29.15Tr.47-48,57,65;2nd29.15Tr.48,50-51,55-56). Terrance's extreme paranoia coupled with the stress he felt caused him to become delusional to the point of psychoses(3rd29.15Tr.53;2nd29.15Tr.45,50-51).

Terrance reported to Holcomb he killed Stephen, but couldn't remember shooting Debbie(3rd29.15Tr.46;2nd29.15Tr.43,47,54). Holcomb found psychogenic amnesia or dissociative amnesia(3rd29.15Tr.49-50;2nd29.15Tr.49-51,71). Holcomb noted that characteristic of this disorder is a repression or forgetting of events that normally wouldn't be forgotten because they're frightening(3rd29.15Tr.49-50;2nd29.15Tr.49). Commonly the disorder manifests with someone who's very depressed or extremely anxious, and therefore, is mitigating(2nd29.15Tr.49,60-61). Terrance's amnesia was just one piece in a larger puzzle of his emotional instability(3rd29.15Tr.65;2nd29.15Tr.68-69).

Holcomb found Terrance was under extreme mental or emotional disturbance at the time of the offense(3rd29.15Tr.52-53,57;2nd29.15Tr.51-52). Terrance was also substantially impaired as to his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law(3rd29.15Tr.53,57;2nd29.15Tr.51-52).

Holcomb was brought in from California(3rd29.15Tr.57). Holcomb was at a coffee shop, across the street from the courthouse waiting to be directed to come to court(3rd29.15Tr.57-58;2nd29.15Tr.56). One attorney called Holcomb to say Terrance had already testified, and therefore, Holcomb was unneeded(3rd29.15Tr.58,69-70). Counsel didn't discuss with Holcomb, before he returned to California, their reasons for releasing him without testifying(3rd29.15Tr.58;2nd29.15Tr.63). Neither attorney conferred with Holcomb about what the substance of Terrance's testimony would be in advance of Terrance's testimony and whether Terrance's anticipated testimony would impact Holcomb's opinions before Holcomb was told he should return to California(3rd29.15Tr.58-59,70-72). After Holcomb was back in California, one attorney then told him Terrance testified he recalled killing Debbie and Holcomb told her his opinions were unchanged(3rd29.15Tr.58-59). If counsel had informed Holcomb of Terrance's reporting he remembered having shot Debbie, then Holcomb would've told counsel that didn't change his diagnoses/opinions and Holcomb would've so testified(3rd29.15Tr.64,71).

Terrance has no genuine recall of killing Debbie(3rd29.15Tr.56-57;2nd29.15Tr.58-59). Terrance's testimony was inaccurate when compared to other witnesses' testimony(3rd29.15Tr.60,62;2nd29.15Tr.58-59,70-71).

Holcomb indicated that with psychogenic amnesia there are reasons why years later Terrance would "remember" shooting Debbie(3rd29.15Tr.60;2nd29.15Tr.57-58). That included the many repetitions of reporting about what happened, which is

characteristic in psychogenic amnesia(3rd29.15Tr.50,60,62-63;2nd29.15Tr.58-59).

Holcomb explained confabulation occurs where a person has access to some facts and then tries to fill in gaps, with no intention to deceive(3rd29.15Tr.61-62). Terrance's form of amnesia is commonly described as "patchy amnesia" because a person begins to recall details when they have heard repeated reporting of what happened(3rd29.15Tr.48,62;2nd29.15Tr.57-58). It is common for individuals with psychogenic amnesia to regain their memory, and thus, not "lied" about memory loss(3rd29.15Tr.64). Holcomb believed Terrance's psychogenic amnesia was true, not faked(3rd29.15Tr.64).

Counsels' Testimony

During trial, Terrance told Turlington that Turner-Blackmon was lying and he remembered what happened(2nd29.15Tr.294,309-10,416,418;3rd29.15Tr.187-88). After court that night, counsel met with Terrance discussing what he reported(3rd29.15Tr.187). Terrance was scheduled to testify the next day(2nd29.15Tr.309-10).

Turlington testified that if they called Holcomb and then called Terrance, it would make both their testimony problematic(3rd29.15Tr.204-05). Counsel decided they had to choose one over the other and it was more beneficial to have Terrance testify than Holcomb(2nd29.15Tr.421;3rd29.15Tr.204-05). Counsels' assessment was Terrance "lied" about amnesia to experts(2nd29.15Tr.416-17;3rd29.15Tr.187,249,287-88). Destroying both Terrance's and Holcomb's

credibility was why counsel didn't call Holcomb or any other mental health expert(2nd29.15Tr.313,326-27,416-17;3rd29.15Tr.187,204-05,252,286-87).

Counsel acknowledged they didn't ask Holcomb whether Terrance's reporting he remembered what happened would impact Holcomb's opinions and diagnoses(2nd29.15Tr.313,417-18;3rd29.15Tr.264-65). Before anyone ever contacted Holcomb a decision was made not to present him as a witness(3rd29.15Tr.250-51,266). Counsels' Holcomb contact, post-Terrance's comments, was limited to just telling Holcomb he was unneeded(3rd29.15Tr.189,250-52,264-66,288-89). There was no consideration or discussion with Holcomb whether Terrance's "remembering" was confabulation, and not actually remembering, and how Holcomb's opinions might be impacted by Terrance's reporting(3rd29.15Tr.264-66).

Turlington testified that only Lewis reported Terrance had auditory hallucinations which factored into not presenting mental health evidence(3rd29.15Tr.206).

Turlington considered that if Holcomb was called respondent might call respondent's competency to proceed examiner, Dr. English, in rebuttal(2nd29.15Tr.423).

Davis-Kerry testified the prosecutor's questioning of Terrance and his strategy was to paint Terrance as a liar because what Terrance reported happened didn't match the eyewitnesses' testimony(2nd29.15Tr.338-39;3rd29.15Tr.266-67)).

Counsel believed Holcomb would've supported both mitigators that the killing of Debbie happened while Terrance was under the influence of extreme mental or emotional disturbance and whether Terrance had the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired(2nd29.15Tr.308,415,418;3rd29.15Tr.185-86,248).

Findings

Because Holcomb wasn't called, the jury never learned Terrance lied for years to multiple doctors about having amnesia(3rd29.15L.F.387). Holcomb's conclusions were inconsistent with Lewis' because, unlike with Lewis, Terrance never reported to Holcomb he suffered auditory hallucinations(3rd29.15L.F.387). Holcomb was "duped" by Terrance and isn't credible(3rd29.15L.F.387).

During a state's witness' testimony, Terrance told Turlington he remembered everything about both killings and lied about having amnesia(3rd29.15L.F.395). Terrance was upset about the witness' testimony and said she was lying(3rd29.15L.F.395). Counsel decided not to call Holcomb in light of Terrance's statement because doing so would prejudice Holcomb's credibility(3rd29.15L.F.395).

Terrance's disclosure created a dilemma for counsel as to strategy, ethics, and which witnesses to call(3rd29.15L.F.397).

Davis-Kerry testified that during Stacey Turner-Blackmon's testimony Terrance disclosed he lied about the details of the killing because he remembered all the details(3rd29.15L.F.399). Terrance indicated he lied for years about having amnesia(3rd29.15L.F.399). Counsel was relieved that during Terrance's testimony

nothing was brought-up about Terrance reporting he didn't remember killing Debbie(3rd29.15L.F.399-400).

One factor in not calling Holcomb was Dr. English was available as a rebuttal witness and counsel didn't want to open that up(3rd29.15L.F.405).

Holcomb wasn't credible as he relied on Lewis' conclusions and reports Terrance was delusional or suffering from amnesia(3rd29.15L.F.405). Holcomb was unable to explain why Terrance's amnesia was selective and didn't explain why Terrance was able to testify he killed Debbie after years of claiming amnesia(3rd29.15L.F.405).

Counsel made the strategic decision to call Terrance rather than present mental health experts(3rd29.15L.F.406). Holcomb and Lewis were "overly gullible" - too accepting of Terrance's selective amnesia(3rd29.15L.F.406).

Holcomb's and Lewis' amnesia findings and dissociation behavior couldn't be altered without being severely impeached(3rd29.15L.F.406).

It was unnecessary to decide whether counsel could've ethically called Holcomb and Lewis when their opinions were based on Terrance's "fabrication"(3rd29.15L.F.406).

Counsel Was Ineffective

Section 565.032.3 provides that extreme emotional distress and substantial impairment are mitigating circumstances. *See*, Point III. Instruction #8 submitted no significant prior criminal history, extreme emotional disturbance, and age, but didn't submit, substantial impairment(2ndTrialL.F.167;2nd29.15Ex.B at 167).

Failing to interview witnesses relates to preparation and not strategy. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). Lack of diligence in investigation isn't protected by a presumption in favor of counsel and cannot be justified as strategy. *Id.* 1304. Counsel and Holcomb both testified that counsel never asked Holcomb whether Terrance's reporting that he remembered shooting Debbie would change Holcomb's opinions/diagnoses before releasing him to go home (2nd 29.15 Tr. 56-57, 313, 417-18; 3rd 29.15 Tr. 57-58, 69-70). Holcomb testified that had counsel posed that question to him he would've explained his opinions/diagnoses were unchanged and Holcomb would've so testified (2nd 29.15 Tr. 57-60; 3rd 29.15 Tr. 64, 71). Moreover, Holcomb would've explained Terrance's reported "remembering" having shot Debbie was consistent with the nature of psychogenic amnesia in which a person will recall details because of having heard repeated reports about an event and that Terrance, hadn't "lied" about memory loss (2nd 29.15 Tr. 57-59; 3rd 29.15 Tr. 48, 50, 60-62, 64). *See also*, DSM-IV-TR at 520 (the disorder "involves a reversible memory impairment" as discussed in detail Point III).⁵

Stacey Turner-Blackmon, the witness counsel maintained prompted Terrance's disclosure he "lied" testified on November 10, 2008 (2nd Trial Tr. Index at 2-4). Terrance was the first defense witness called on November 11, 2008 (2nd Trial Tr. Index at 4). After Terrance testified, the defense presented nine other witnesses' testimony

⁵ The same reasons that calling Lewis didn't pose an ethical dilemma are equally applicable for why calling Holcomb didn't pose such dilemma. *See Point III.*

on November 11th(2ndTrialTr.Index at 4-5). On November 12, 2008, the defense presented one more witness(2ndTrialTr.Index at 5). There was ample opportunity from when Turner-Blackmon testified on November 10th, Terrance testified first on November 11th, and the last defense witness testified on November 12th to ask Holcomb what impact Terrance's testimony had on his opinions/diagnoses.

The failure to call Holcomb cannot be properly justified as strategy. *See Kenley*. Counsel testified they had to choose between Terrance testifying and Holcomb testifying(2nd29.15Tr.421;3rd29.15Tr.204-05). This was a false choice because Terrance's testimony and Holcomb testifying weren't mutually exclusive. If counsel had only asked Holcomb what impact Terrance's testimony had on his opinions/diagnoses, they'd learned Holcomb's opinions/diagnoses were unchanged and Holcomb could explain why Terrance unexpectedly professed to "remembering" shooting Debbie when he didn't. *See Kenley*.

Holcomb opined Terrance doesn't have a genuine recall of killing Debbie because the nature of psychogenic amnesia is that hearing repetitions of reports can cause a recall of details and the person "remembering" doesn't mean they were lying about memory loss(2nd29.15Tr.57-59;3rd29.15Tr.48,50,60-63-64). Holcomb concluded Terrance's psychogenic amnesia was genuine(3rd29.15Tr.64). That conclusion is supported by Terrance's testimony which was inaccurate when compared to eyewitnesses' testimony(2nd29.15Tr.58-59,70-71;3rd29.15Tr.60,62). These matters establish the findings Holcomb was "overly gullible," (3rd29.15L.F.406) and "duped" (3rd29.15L.F.387) were clearly erroneous.

For trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler* and *McCarter*. Counsels’ “strategy” of choosing between Terrance and Holcomb testifying was unreasonable because that choice was brought about by counsels’ failure to investigate by discussing with Holcomb whether his opinions/diagnoses had changed. *See Butler* and *McCarter*.

In *Hutchison v. State*, 150S.W.3d292,307(Mo.banc2004), this Court concluded counsel was ineffective for failing to present a thorough comprehensive expert presentation. In *Glass v. State*, 227S.W.3d463,470-71(Mo.banc2007), counsel was ineffective for failing to call multiple expert witnesses who could’ve provided mitigating evidence. Like here, in *Glass*, no experts were called. *Id.*470. The expert testimony in *Glass* would’ve supported the §565.032.3 mitigating circumstances extreme emotional distress and substantial impairment. *Id.*471.

Like in *Hutchison* and *Glass*, the jury didn’t hear compelling expert mitigating evidence. Holcomb would’ve provided testimony about Terrance’s psychotic major depression, delusional paranoia, and psychogenic amnesia(2nd29.15Tr.48,50-51,55-56;3rd29.15Tr.47-50,52,57,65). Holcomb would’ve testified Terrance’s delusions reached the point of psychoses(2nd29.15Tr.45,50-51;3rd29.15Tr.53). Holcomb also found Terrance’s mental impairments supported the §565.032.3 mitigating circumstances extreme emotional disturbance and substantial impairment(2nd29.15Tr.51-52;3rd29.15Tr.52-53,57).

Contrary to the findings, Holcomb’s testimony wasn’t inconsistent with Lewis as to Terrance having auditory hallucinations(3rd29.15L.F.387). Lewis found when

Terrance was thirteen he experienced auditory hallucinations(2nd29.15Ex.FF at 51-53). Holcomb found there may have been a time where Terrance experienced auditory hallucinations, Terrance just didn't evidence having those at the time Holcomb examined him(2nd29.15Tr.64,75). Both Lewis and Holcomb **agreed** Terrance's actions here **had nothing to do with** him experiencing auditory hallucinations(2nd29.15Ex.FF at 88;2nd29.15Tr.64,75).

On Terrance's first 29.15 appeal, this Court held respondent having called the state's competency to proceed examiner at the first trial, Dr. English, as a rebuttal witness to psychological evidence that Terrance suffered from a mental disease or defect at the time of the offense was improper and prohibited under §552.020.14. *Anderson v. State*,196S.W.3d28,34-35(Mo.banc2006). Thus, it was unreasonable strategy to fail to call Holcomb because counsel feared respondent might call English in rebuttal (2nd29.15Tr.423;3rd29.15L.F.405) since this Court already held having English in rebuttal was improper and first trial's counsel should've objected. *Anderson*, 196S.W.3d at 34-35.

Foregoing presenting mitigating evidence because it contains something harmful is unreasonable when its mitigating value outweighs harm. *See Hutchison*,150S.W.3d at 305. Even if it could somehow be construed it was harmful for Holcomb to have found psychogenic amnesia and for Terrance to have testified he then remembered having shot Debbie, the other mitigating evidence Holcomb offered on Terrance that he suffered from psychotic major depression and delusional paranoia

outweighed calling no mental health expert. *See Glass*. Terrance was prejudiced by the failure to call Holcomb. *See Strickland and Glass*.

A new penalty phase is required.

V.

WITNESSES TO TERRANCE'S

DISORIENTED STATE

The motion court clearly erred in denying the 29.15 claim counsel was ineffective for failing to call Tim Jones, Adrienne Dionne Webb, Larry Woods, and Steven Stovall because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called them to testify about their observations of Terrance's disoriented, distressed mental state. Terrance was prejudiced because this evidence would have highlighted Terrance's mental state both shortly before and after the offense and there is a reasonable probability the jury would have voted for life had they heard this evidence.

Counsel failed to call Tim Jones, Adrienne Dionne Webb, Larry Woods, and Steven Stovall to testify about their observations of Terrance's disoriented, distressed mental state. All would've furnished mitigation highlighting Terrance's mental state and there's a reasonable probability the jury would've voted life.

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*, 529 U.S. 362, 395-96 (2000). "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (quoted in *Hutchison v.*

State,150S.W.3d292,304(Mo.banc2004) 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.

I. Available Mitigating Evidence

A. Tim Jones

Tim Jones grew-up with Terrance and worked with him at Rowe Furniture(2nd29.15Tr.141-42;3rd29.15Tr.19-22). Terrance believed the Rainwaters were trying to prevent him from seeing his daughter(2nd29.15Tr.149;3rd29.15Tr.23-24). Jones met with the first trial team and reported Terrance had begun acting oddly after he lost his Rowe Furniture job and after Kyra’s birth(2nd29.15Tr.149-50;3rd29.15Tr.22,24-26). Terrance’s behavior changed so that he was distracted, depressed, and out-of-it(2nd29.15Tr.148,150;3rd29.15Tr.23-24).

The details of the first trial team meeting were in a case memorandum, but the second trial team didn’t contact Jones(2nd29.15Ex.AA;2nd29.15Tr.150-51).

Terrance and Jones grew-up on Alice Street and Jones’ parents still lived there at retrial time(3rd29.15Tr.20,26-27). The second and third 29.15 teams communicated with Jones through his parents’ address and he always returned their communications(3rd29.15Tr.27).

Jones testified Terrance never expressed anger in the form of saying that if the Rainwaters wouldn’t let him see Kyra, then the Rainwaters wouldn’t get to either(3rd29.15Tr.32).

Luebbering testified there was a memorandum (2nd29.15Ex.AA) done by the first trial team indicating there was a meeting with Jones(2nd29.15Tr.161-65;3rd29.15Tr.83-85). The memo recounted Jones reported Terrance appeared down, off in another world, and that things started to go bad when Terrance lost his Rowe Furniture job(2nd29.15Tr.161-65;2nd29.15Ex.AA;3rd29.15Tr.85-86). Terrance had expressed concern to Jones that the Rainwaters would obtain an order so he couldn't see Kyra(2nd29.15Tr.161-65;2nd29.15Ex.AA;3rd29.15Tr.86-87). Luebbering explained Jones' information was mitigating, because it went to Terrance's state of mind at the time of the shootings, but she thought she was unable to locate Jones(2nd29.15Tr.161-65;2nd29.15Ex.AA;3rd29.15Tr.87-88).

Luebbering created a grid (2nd29.15Ex.BB) of potential witnesses(3rd29.15Tr.89). That grid indicated someone from the trial team should contact Harold Brown, Jones' cousin, about how to reach Jones(3rd29.15Tr.89). Luebbering had a home phone for Jones(3rd29.15Tr.89-90). On March 25, 2008, Luebbering tried to reach, Jones and after that no additional attempts were made(3rd29.15Tr.90-91). Luebbering believed additional efforts should've been made to contact Jones(3rd29.15Tr.144). A file memo of Luebbering's interview with Donnell Anderson identified Jones as good friends with Terrance(3rd29.15Tr.91;2nd29.15Ex.BB).

B. Adrienne Dionne Webb

Adrienne Dionne Webb grew-up with Terrance(2nd29.15Tr.346-47;3rd29.15Ex.KK at 346-47). In 1995, Adrienne was pregnant with her second

child, separated from her husband, Maurice, and depressed(2nd29.15Tr.345-47;3rd29.15Ex.KK at 345-47). Terrance was a good friend who made efforts to cheer her up, like a sibling might do(2nd29.15Tr.347-48;3rd29.15Ex.KK at 347-48). Adrienne noticed during the time leading-up to this offense Terrance appeared increasingly, uncharacteristically unkept, agitated, and depressed(2nd29.15Tr.349-51;3rd29.15Ex.KK at 349-51). Terrance became suspicious believing everyone was out-to-get him(2nd29.15Tr.351;3rd29.15Ex.KK at 351). Adrienne saw Terrance on the day of the offense and noticed his changed behaviors were heightened(2nd29.15Tr.352-53;3rd29.15Ex.KK at 352-53).

Adrienne had ovarian cancer surgery in late 2007, and didn't do well for sometime post-surgery(2nd29.15Tr.353-54;3rd29.15Ex.KK at 353-54). Adrienne was unaware the defense team tried to reach her during that time period(2nd29.15Tr.354;3rd29.15Ex.KK at 354). When Adrienne recovered from surgery she was working full-time for the Poplar Bluff School System(2nd29.15Tr.354-55;3rd29.15Ex.KK at 354-55). Adrienne's parents lived in Poplar Bluff and they would've gotten a message to her(2nd29.15Tr.355-56;3rd29.15Ex.KK at 355-56).

Luebbering recounted that she met with Maurice Webb and was trying to reach Adrienne through Maurice(2nd29.15Tr.167-70). Luebbering knew the trial team wanted to speak to both Adrienne and Maurice and they never reached Adrienne(2nd29.15Tr.170). On a memo Luebbering created (2nd29.15Ex.BB at 2-3), there was a notation that "he," Maurice, was "avoiding

us”(2nd29.15Tr.169;3rd29.15Tr.95-96). While Luebbering created the memo, she didn’t know who entered the “avoiding us”(2nd29.15Tr.169;2nd29.15Ex.BB). No efforts were made to contact Adrienne at a time and place apart from Maurice(3rd29.15Tr.96). The memo indicated Adrienne had surgery in October, 2007(2nd29.15Tr.169;2nd29.15Ex.BB at 2-3;3rd29.15Tr.95). Luebbering knew Adrienne saw Terrance the night of the shootings and could testify Terrance wasn’t himself(3rd29.15Tr.93-94). Luebbering felt the information contained in Adrienne’s testimony, *supra*, was mitigating(3rd29.15Tr.96-97).

C. Larry Woods

Larry Woods didn’t testify in-court at the third 29.15 because he had died and his second 29.15 testimony was admitted(3rd29.15Tr.12;3rd29.15Exs.II and LL). Woods’ died of a heart attack in November, 2014(3rd29.15Ex.LL)

Woods was a Poplar Bluff Public Defender investigator who a couple of weeks before Terrance’s offense subpoenaed Terrance to testify as a witness in a misdemeanor case(2nd29.15Tr.85-86,92;3rd29.15Ex.II at 85-86,92). Terrance wasn’t the misdemeanor charged defendant(3rd29.15Tr.99). When Woods subpoenaed Terrance, he responded appropriately and appeared mentally alert(2nd29.15Tr.93;3rd29.15Ex.II at 93;3rd29.15Tr.99).

Woods met with Terrance within days of this offense(2nd29.15Tr.94-95;3rd29.15Ex.II at 94-95). Woods met with Terrance 3-4 times and Terrance never grasped the seriousness of his charges(2nd29.15Tr.109-11;3rd29.15Ex.II at 109-11). Terrance was unable to answer Woods’ questions and didn’t know why he was

jailed(2nd29.15Tr.96;3rd29.15Ex.II at 96). The only subject Terrance talked about was his daughter, Kyra, and he told Woods to tell Kyra that he loved her(2nd29.15Tr.96;3rd29.15Ex.II at 96). Woods noted that his conversation was often met with blank stares from Terrance, which created concerns for Woods about Terrance's mental health(2nd29.15Tr.96;3rd29.15Ex.II at 96). Woods urged his supervisor to arrange a psychiatric examination(2nd29.15Tr.97-100;3rd29.15Ex.II at 97-100).

Woods testified at the first trial's guilt and penalty phases and was always cooperative with the first trial team(2nd29.15Tr.100-01;3rd29.15Ex.II at 100-01). Woods testified at the first trial's penalty about what he observed from meeting with Terrance as it reflected on Terrance's mental state(2nd29.15Tr.100-01,114-15;3rd29.15Ex.II at 100-01,114-15).

Woods even notified the first trial team, during that trial, that Judy Wolfe came to the office volunteering information Wolfe thought might be helpful to Terrance(2nd29.15Tr.101-05;3rd29.15Ex.II at 101-05).

Woods was always cooperative with Terrance's second trial's attorneys(2nd29.15Tr.106-07;3rd29.15Ex.II at 106-07). Woods spoke with the second trial's mitigation specialist Luebbering(2nd29.15Tr.107;3rd29.15Ex.II at 107). In 2008, Woods had a heart attack, but still was able to testify at Terrance's November, 2008 penalty retrial(2nd29.15Tr.107;3rd29.15Ex.II at 107). Woods also met with Terrance's second 29.15 counsel about his anticipated testimony there(2nd29.15Tr.107-08;3rd29.15Ex.II at 107-08). Woods indicated that as to

anyone who represented Terrance throughout he was always cooperative and helpful(2nd29.15Tr.100;3rd29.15Ex.II at 100).

Luebbering recounted and memorialized in an October 19, 2007 memorandum that **Woods called her** because Woods had heard the second trial team had attempted to contact him the previous week in Poplar Bluff(2nd29.15Tr.171-73;2nd29.15Ex.CC;3rd29.15Tr.100). Woods called Luebbering because she had left word with the Public Defender's Office asking him to call her(3rd29.15Tr.100;2nd29.15Ex.CC). When Luebbering was asked whether Larry Woods was "uncooperative" with them she responded "No"(2nd29.15Tr.173;3rd29.15Tr.102). Luebbering also indicated that the trial file reflected that Woods was "always" cooperative(2nd29.15Tr.173;3rd29.15Tr.102). Luebbering regarded Woods' information as mitigating(3rd29.15Tr.99-100).

Luebbering's memorandum reflected Woods met with Terrance after Terrance was arrested and Terrance didn't recognize Woods, Terrance appeared to be in shock, and Terrance didn't know why he was jailed(3rd29.15Tr.101-02;2nd29.15Ex.CC). Woods made requests to his office supervisor and an upper-level manager to get a psychiatric evaluation of Terrance(3rd29.15Tr.101-02;2nd29.15Ex.CC).

D. Steven Stovall

Steven Stovall knew Terrance growing-up and Terrance had encouraged Steven to stay out-of-trouble by playing sports(2nd29.15Tr.77-78;3rd29.15Ex.MM at 77-78). Stovall was confined in the Butler County jail on a probation violation in August, 1997, while Terrance was there(2nd29.15Tr.78;3rd29.15Ex.MM at 78).

Stovall saw Terrance at the jail and Terrance didn't seem to understand why he was jailed(2nd29.15Tr.78-79;3rd29.15Ex.MM at 78-79). Terrance presented himself mentally as different from the person Stovall knew(2nd29.15Tr.79;3rd29.15Ex.MM at 79).

Luebbering indicated Stovall was never contacted(3rd29.15Tr.103).

II. Counsels' Testimony

Counsel testified there were problems contacting Jones(2nd29.15Tr.240-41,358-60). The information Jones could have provided was possibly mitigating(3rd29.15Tr.149,151-52,220-22). There were no efforts to locate Jones after March 25, 2008(3rd29.15Tr.151).

Counsel testified the Webbs were uncooperative(2nd29.15Tr.242-44,248). They went to the Webbs' on November 1, 2007, and Maurice said Adrienne was sick, and therefore, unavailable(3rd29.15Tr.153-54). They would've considered calling Adrienne to testify about what she knew, *supra*(3rd29.15Tr.154-55,222-23).

Counsel testified, based on Luebbering's impressions, Woods wasn't called because he was uncooperative(2nd29.15Tr.366-68;3rd29.15Tr.158-59,276-77). Counsel considered what Woods could testify to mitigating(3rd29.15Tr.157-58). Woods wasn't contacted after his call to Luebbering(3rd29.15Tr.157-58;2nd29.15Ex.CC).

Woods was endorsed as a witness in late October, 2008, and trial was in November, 2008(3rd29.15Tr.228).

Counsel would've wanted to investigate what Stovall reported about Terrance and possibly called him(2nd29.15Tr.368-69;3rd29.15Tr.160,229-30).

III. Findings

A. Jones

Jones' testimony was similar to Linda Smith's (relying on 2ndTrialTr.821-22) and Louis Buchanan's (relying on 2ndTrialTr.836) testimony and not compelling(3rd29.15L.F.390,401). Also, 29.15 Exhibit AA said Jones heard Terrance say that "if the Rainwaters won't let him see the baby, 'then they wouldn't see the baby either'" and this statement could be viewed as "ominous" as Terrance having acted here with premeditation(3rd29.15L.F.390,401).

B. Adrienne Dionne Webb

The findings state as to Adrienne Dionne Webb, Luebbering's Ex. BB witness outline reflected she lived with Maurice Webb, but they avoided the trial team, and therefore, reasonable efforts were made to contact(3rd29.15L.F.390-91,393,402). Adrienne's testimony wouldn't have altered the result(3rd29.15L.F.402).

C. Woods

The findings state Woods testified in both phases of the first trial and that didn't persuade the jury(3rd29.15L.F.388,402). Counsel testified Woods was uncooperative, "dodging," the defense team, and therefore, strategically not called(3rd29.15L.F.388,393,398,400). Woods' testimony is inconsistent with Lewis who said Terrance was in a dissociative state for some time prior to the offense(3rd29.15L.F.388).

D. Stovall

The findings state Stovall's testimony wasn't persuasive(3rd29.15L.F.387,402).

IV. Counsel Was Ineffective

All these witnesses, Jones, Adrienne Webb, Woods, and Stovall would've provided testimony highlighting Terrance's disoriented, distressed mental state. Jones and Adrienne Webb would've provided testimony about that altered mental state immediately prior to the offense(2nd29.15Tr.148-50,161-65,349-53;2nd29.15Ex.AA;3rd29.15Tr.22-26,85-88,93-97;3rd29.15Ex.KK at 349-53). Woods and Stovall would've provided testimony about that altered mental state after the offense(2nd29.15Tr.78-79,96-102,109-11;2nd29.15Ex.CC;3rd29.15Ex.II at 96-102,109-11;3rd29.15Ex.MM at 78-79). Their testimony was important mitigating evidence the jury should've heard. *See Wiggins v. Smith* and *Williams v. Taylor*.

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

As to all these witnesses, the 29.15 evidence shows counsel's investigation wasn't diligent. *See Kenley*.

Locating Jones wasn't problematic. The first trial team met with Jones and that meeting was memorialized in a memorandum(2nd29.15Tr.149-51,161-65;2nd29.15Ex.AA;3rd29.15Tr.83-85). Terrance and Jones grew-up on the same

street and the second and third 29.15 teams communicated with Jones through his parents' address(3rd29.15Tr.20,26-27). No efforts were made to reach Jones after March 25, 2008, and Luebbering indicated there should've been(3rd29.15Tr.90-91,144).

Counsel relied on locating Adrienne Webb by trying to locate her through her husband, Maurice, from whom she was separated(2nd29.15Tr.167-70,345-47). Counsel didn't try to locate Adrienne at a time and place unconnected to Maurice(3rd29.15Tr.96). Adrienne was working for the Poplar Bluff School System and her parents lived in Poplar Bluff and she could've been located through both(2nd29.15Tr.354-56;3rd29.15Ex.KK at 354-56).

Mitigation expert Luebbering's testimony and her timely memorandum established Woods was cooperative. Luebbering's memorandum stated Woods **called her** after the defense team missed speaking with him in Poplar Bluff the previous week(2nd29.15Tr.171-73;2nd29.15Ex.CC;3rd29.15Tr.100). Woods called Luebbering in response to Luebbering's message left asking him to contact them(3rd29.15Tr.100;2nd29.15Ex.CC). When Luebbering was asked point blank whether Woods was "uncooperative" she responded "No" and testified he was "always" cooperative(2nd29.15Tr.173;3rd29.15Tr.102). Counsels' conclusion Woods was uncooperative, **as being premised on Luebbering's impression of Woods** (3rd29.15Tr.276-77) speaks volumes about counsels' overall lack of diligence in all aspects of this case.

Moreover, Terrance's case history establishes Woods wasn't the "uncooperative" witness. It was Woods who met with Terrance within days of the offense and Woods who urged his supervisor to get a psychiatric evaluation(2nd29.15Tr.94-95,97-100;3rd29.15Ex.II at 94-95,97-100). Woods testified at the first trial about his observations of Terrance(2nd29.15Tr.100-01;3rd29.15Ex.II at 100-01). During the first trial, Woods alerted the defense team about what Judy Wolfe was reporting(2nd29.15Tr.101-02;3rd29.15Ex.II at 101-02). Woods met with Terrance's second 29.15 counsel in preparation for his second 29.15 testimony(2nd29.15Tr.107-08;3rd29.15Ex.II at 107-08).

Second 29.15 counsel had no difficulty in locating and calling Stovall.

Contrary to the findings, Jones' testimony wasn't similar to Linda's and Buchanan's testimony(3rd29.15L.F.390,401 relying on 2ndTrialTr.821-22,836). Neither presented testimony Terrance was in a disoriented, distressed mental state. Linda merely related Terrance was spending time in his room and not talking much(2ndTrialTr.821-22). Buchanan merely stated Terrance was slightly more reserved than usual(2ndTrialTr.836).

The findings totally lift out-of-context from the memorandum the first trial team generated (2nd29.15Ex.AA) that Jones would have testified to an "ominous" statement from Terrance supporting premeditation(3rd29.15L.F.390,401). That memo recounted what was reported during a meeting with Harold Brown and Jones. The memo stated:

KYRA: TA spoke of them trying to keep him from seeing baby – of them threatening to get protective order to keep him from seeing the baby. TA talked of considering **taking the baby**, saying if they wouldn't let him see her, then they wouldn't see the baby, either. **Never heard him threaten any violence.**

(2nd29.15Ex.AA)(emphasis added). What this statement shows is that Terrance had indicated that if the Rainwaters intended to prevent him from seeing Kyra through a court order, he was contemplating taking and concealing Kyra's whereabouts before any such order was ever obtained. Moreover, nothing "ominous" was threatened because the memo stated: "**Never heard him threaten any violence.**"(2nd29.15Ex.AA)(emphasis added). Jones testified Terrance never expressed anger manifesting an intention to harm anyone(3rd29.15Tr.32).

Contrary to the findings, Woods' testimony wasn't inconsistent with Lewis who found Terrance was in a dissociative state for some time prior to the offense(3rd29.15L.F.388). Lewis recounted Woods saw Terrance when Woods served Terrance with a witness subpoena in a misdemeanor case(2nd29.15Ex.FF at 67-68). Lewis noted Woods found Terrance "totally changed" from the time Woods served Terrance with the subpoena and when Woods saw him post-shootings at the jail(2nd29.15Ex.FF at 67-68). Lewis noted Woods' polar opposite experiences with Terrance only reinforced her altered state findings(2nd29.15Ex.FF at 67-68).

That Woods testified at the first penalty phase and Terrance got death there doesn't establish the result would've been the same had Woods testified in the

retrial(3rd29.15L.F.388,402). The reason Terrance's penalty phase was reversed was a juror who served indicated a strong preference for death and would require the defense to convince him death wasn't appropriate. *See Anderson v. State*, 196S.W.3d28,38-42(Mo.banc2006). That fundamental unfairness cannot now be used to demonstrate a lack of prejudice in failing to call Woods.

Terrance was prejudiced by the failure to call all these witnesses. *See Wiggins v. Smith* and *Williams v. Taylor*.

Instruction No. 8 told the jury it could consider as mitigating evidence that the homicide of Debbie was committed while Terrance was under the influence of extreme mental or emotional disturbance(2ndTrialL.F.167;2nd29.15Ex.B at 167). All these witnesses would've provided evidence to support this statutory mitigator. Hearing from these witnesses to support this mitigating circumstance was especially important because the jury didn't hear any expert mental health witnesses. *See Points III and IV*.

There's a reasonable probability that had the jury heard this evidence of Terrance's disoriented, distressed mental state he would've been life sentenced. *See Strickland, Wiggins v. Smith*, and *Williams v. Taylor*. This evidence supported the submitted statutory mitigator Terrance was under the influence of extreme mental or emotional disturbance and there's a reasonable probability the jury would've imposed life.

A new penalty phase is required.

VI.

CROSS-EXAMINING TERRANCE - RESPONDENT'S

WITNESSES LYING

The motion court clearly erred in denying the claim counsel was ineffective for failing to properly, timely object to cross-examination of Terrance asking Terrance whether the jury should believe Terrance over respondent's witnesses as respondent's witnesses must be lying because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected as respondent is prohibited from asking a witness if another witness lied. Terrance was prejudiced because this questioning injected arbitrariness in the sentencing decision and there is a reasonable probability Terrance otherwise would have been life sentenced.

The prosecutor questioned Terrance whether the jury should believe Terrance over respondent's witnesses because respondent's witnesses lied. That questioning was improper and effective counsel would've properly and timely objected and Terrance was prejudiced.

Cross-Examination Of Terrance - Respondent's

Witnesses Lying

Cross-examination of Terrance included:

Q Okay. So everything that was said about the physical abuse of Abbey Rainwater by you is a lie. Is that what you're saying?

A The allegations that she made, I did not do those.

Q Beg your pardon?

A I did not do those.

Q All right. So it is a lie. Is that what you're saying?

A Yes.

.....(2ndTrialTr.787).....

Q Do you understand that Stacey sat where you're sitting right now yesterday and said she never said any of those things?

A Yes.

Q So she is lying on you, too?

A I don't know what she's doing.

Q Well, you're saying that's not true, so you must be calling her a liar.

MS. KERRY: Judge, I'm going to object at this time.

A It's a bad situation.

THE COURT: One at a time. Yes, ma'am.

MS. KERRY: My legal objection, commenting on another witness's testimony.

THE COURT: Sustained.

MR. AHSENS: I am allowed, sir, to explore inconsistencies in the evidence.

THE COURT: Sustained.

(2ndTrialTr.788).

Counsel testified at the second hearing there was no strategic reason for failing to timely object to this cross-examination of Terrance(2nd29.15Tr.283-84,393-94), but had no recall at the third hearing of whether objecting was considered(3rd29.15Tr.254,256).

The 29.15 findings state that while respondent's cross-examination was improper, it wasn't prejudicial(3rd29.15L.F.408).

A prosecutor is prohibited from asking one witness if another lied. *State v. Roper*,136S.W.3d891,900(Mo.App.,W.D.2004). Objections to such argumentative questioning should be sustained. *Id.*900-01. That questioning isn't intended to seek information, but instead is directed at "scor[ing] rhetorical points." *Id.*901. The purpose of such questioning is to make the defendant look bad through placing him in a no-win situation. *Id.*901. If a defendant says another witness lied, then the defendant is placed in the unenviable position of calling someone a liar. *Id.*901. If the defendant says the other witness isn't lying, then the jury will infer the defendant is lying. *Id.*901-02.

Reasonable counsel would've timely objected to all the prosecutor's line of questioning involving commenting on respondent's witnesses' veracity because the sole intent was to make Terrance look bad and not to seek relevant information. *See Roper* and *Strickland*.

"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). Respondent's questioning Terrance caused Terrance's

death sentence to be imposed for arbitrary and capricious reasons. *See Saffle*.

Terrance was prejudiced by counsels' failure to take proper timely action. *See Strickland*.

A new penalty phase is required.

VII.

ADMISSION OF EX PARTE ORDER AND ITS ALLEGATIONS

The motion court clearly erred in denying the claim counsel was ineffective for failing to properly object to the wholesale admission of a copy of Abbey's ex parte petition for protection and the accompanying protective order, Exhibit 38, containing a finding of good cause for the order based on the supporting factual allegations for the order because Terrance was denied effective assistance, 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 Exhibit 38's admission or at minimum requested the good cause finding with its factual allegations be redacted because Terrance was not afforded the opportunity to challenge the accusations. Terrance was prejudiced because respondent used the order to argue it established Terrance had lied when he denied having physically abused Abbey injecting arbitrariness when there otherwise was a reasonable probability Terrance would have been life sentenced.

Counsel failed to object to the wholesale admission of Abbey's ex parte petition for protection and the court's protective order, second trial Ex.38. At a minimum, counsel should've requested the good cause finding with its factual premise allegations be redacted. Terrance was prejudiced because the prosecutor used

the ex parte order to argue that order established Terrance lied when Terrance denied having physically abused Abbey.

Trial Ex Parte Proceedings Matters

On direct of Abbey, respondent elicited she and her father obtained an ex parte order of protection on behalf of Abbey and against Terrance on July 25, 1997(2ndTrialTr.644-46). Abbey testified she informed Terrance about the order by phone and it angered Terrance(2ndTrialTr.644-46). Exhibit 38 contained the order with its supporting factual allegations and was received into evidence over counsels' objection(2ndTrialTr.644-46). The grounds for objection were stated as being pursuant to previous objection(2ndTrialTr.644-46). The prior objections were the jury would consider its contents as non-statutory aggravation without burden of proof guidance(2ndTrialTr.11-16). Exhibit 38 was passed to the jury(2ndTrialTr.644-46,654-55).

On redirect, Abbey testified she obtained the ex parte order because Terrance beat her(2ndTrialTr.678).

The ex parte order contains the finding there was good cause for it to have issued(2ndTrialEx.38;3rd29.15Ex.NN).⁶ Exhibit 38 contains Abbey's allegations Terrance choked Abbey, pulled her hair, and caused her to be bruised, while describing Terrance as someone who has "a very volatile personality."(2ndTrialEx.38;3rd29.15Ex.NN). The allegations added Debbie

⁶ Second trial Ex.38 was 3rd29.15Ex.NN.

obtained a restraining order against Terrance on May 12, 1997, based on threats and harassment(2ndTrialEx.38;3rd29.15Ex.NN).

On cross-examination, Terrance denied having physically abused Abbey(2ndTrialTr.786-87). When Terrance denied having physically abused Abbey, respondent followed with: “All right. So it is a lie. Is that what you’re saying?”(2ndTrialTr.787).

The prosecutor argued in initial closing argument Terrance testified he never physically abused Abbey, but Abbey had succeeded in obtaining a restraining order based on injuries Terrance inflicted, and therefore, Terrance’s denial was untrue(2ndTrialTr.894).

29.15 Testimony And Findings

Counsel testified there was no strategic reason for failing to object to the admission of Exhibit 38 on the grounds that the order arose from a civil proceeding without notice to Terrance and the opportunity to defend against the allegations(2nd29.15Tr.281-82;3rd29.15Tr.195-96). There was no strategic reason for failing to at least request the factual allegations and associated good cause finding be redacted because of Terrance’s lack of opportunity to challenge the accusations found in the order(2nd29.15Tr.390-92;3rd29.15Tr.195-96).

The 29.15 findings state the ex parte order (Ex.38) was admissible because respondent’s theory was it was the catalyst for the shootings(3rd29.15L.F.407).

Counsel Was Ineffective

In *State v. Clevenger*, 289 S.W.3d 626, 627 (Mo.App., W.D. 2009), the defendant was convicted of second degree domestic assault and violation of a protective order. After Clevenger's ex-wife obtained an ex parte protective order, Clevenger entered her home and engaged in behaviors that gave rise to the charges for which he was convicted. *Id.* 628. The petition for a protective order and the associated ex parte order were exhibits sent to the jury. *Id.* 628. Respondent argued those documents were properly admitted because they established the existence of the order of protection, which Clevenger was alleged to have violated. *Id.* 629. The documents contained hearsay allegations of other incidents of alleged assaultive behavior Clevenger directed at his ex-wife. The Western District found the publishing of the documents without redaction or an instruction about their limited relevance was prejudicial and reversed. *Id.* 629-30.

As in *Clevenger*, the admission and publishing of Exhibit 38 without at a minimum redaction of the factual allegations and the order's finding of good cause based on those allegations was prejudicial standing alone. That prejudice was only accentuated when the prosecutor used in closing argument Exhibit 38's contents to argue Terrance lied when he denied having physically abused Abbey (2nd Trial Tr. 894).

The 29.15 findings were Exhibit 38 was admissible because it was alleged as the catalyst for the shootings (3rd 29.15 L.F. 407). Respondent made the identical contention in *Clevenger* that the violation of the protective order was the basis for the charge and the *Clevenger* Court rejected that contention. See *Clevenger*, 289 S.W.3d at

629. Like in *Clevenger*, there was also prejudicial inflammatory hearsay allegations in Exhibit 38 that Debbie had earlier obtained an order of protection because of threats and harassment. *See* 2ndTrialEx.38;3rd29.15Ex.NN.

In *State v. Jackson*, 155 S.W.3d 849, 851 (Mo.App., W.D. 2005), the defendant was convicted of statutory rape of his girlfriend's fourteen year old daughter. At trial, respondent admitted a civil paternity judgment showing Jackson was the father of the victim's child. *Id.* 851, 853. In closing argument, respondent argued as a matter of law Jackson was already proven guilty of statutory rape based on the civil paternity judgment. *Id.* 853. The *Jackson* Court found such unobjected to argument constituted plain error, manifest injustice requiring a new trial. *Id.* 853-54. Like in *Jackson*, respondent relied on in argument here (2ndTrialTr.894) accusations and findings in a civil proceeding as a basis for attacking the defense's case.

In *State v. Donley*, 607 S.E.2d 474, 478 (W.Va.Ct.App. 2004), the defendant was convicted of multiple counts of concealment of a minor child. At the trial of the criminal charges, a family court order containing inflammatory remarks about Donley was admitted. *Id.* 481. The *Donley* Court noted that while the order was relevant to the criminal charges, judicial notice of the existence of the order could've been taken or selected portions of the order could've been presented to the jury. *Id.* 484. Admission of the order in its entirety was prejudicial because the remarks were expressed by a judge and included in an official court document for which the jury could've attached substantial weight. *Id.* 484.

What happened in Terrance's case is no different than what happened in *Donley*. While the ex parte order entered in favor of Abbey may have had some relevance, counsel should've objected to the wholesale admission of the order with the supporting factual allegations and should've urged the inflammatory factual allegations and the finding of "good cause to issue an ex parte order" were redacted because Terrance had no opportunity to contest the allegations forming the basis for the order. *See Donley*.

Reasonable counsel would've objected to the admission of Exhibit 38 containing the factual allegations and ex parte order in its entirety. *See Strickland Donley, Clevenger, and Jackson*. At a minimum, reasonable counsel would've requested that the factual allegations and the order's good cause finding be redacted. *See Strickland, Donley, Clevenger, and Jackson*.

When counsel failed to object to the admission of Exhibit 38 or at a minimum failed to request redaction, Terrance was prejudiced. The admission of Exhibit 38 with its contents accompanied by the prosecutor's use of its contents in argument injected arbitrariness into the sentencing proceedings and was prejudicial. *See Saffle v. Parks*, 494 U.S. 484, 507 (1990) and *Strickland*.

On the second 29.15 appeal, respondent argued Ex.38 was in a plastic envelope with its Exhibit sticker attached outside and there was no evidence the jury took Ex.38 out of that plastic and read its entire contents (Resp.Br.78-81). Instruction 9 directed the jury "must consider all the evidence in deciding" punishment (2nd 29.15 Ex.B at 168) and Ex. 38 was passed to the jury (2nd Trial Tr. 644-46, 654-55). Jurors are

presumed to follow the instructions. *Grannemann v. State*, 748 S.W.2d 415, 417 (Mo.App., E.D. 1988). In order for the jury to have followed Instruction 9 and “consider[ed] all the evidence,” which it was presumed to have done, it must have taken Ex.38 out of its plastic envelope and read Ex.38’s entire contents. Terrance was prejudiced because respondent argued the order’s contents, *supra* (2nd Trial Tr. 894).

A new penalty phase is required.

VIII.

ADVISING TERRANCE TO TESTIFY

The motion court clearly erred in denying the claim counsel was ineffective for advising Terrance to testify when his testimony as a matter of law was not mitigating and failed to advise him during trial not to testify that other witnesses could effectively humanize him to the jury because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would not have advised Terrance to testify to show he accepted responsibility because the first trial's jury had already found as a matter of law he was responsible and reasonable counsel would have advised him other witnesses could humanize him and reasonably competent counsel would have during trial advised Terrance not to testify. Terrance was prejudiced because respondent repeatedly portrayed Terrance as a liar, especially deserving death.

Terrance's counsel advised him to testify to show he accepted responsibility when the first trial's jury had already found he was legally responsible. Counsel failed to advise Terrance during trial not to testify and should've advised Terrance not to testify because they could accomplish the purpose of humanizing him by doing that through witnesses other than himself. Terrance was prejudiced because respondent was able to repeatedly cast Terrance as a liar, especially deserving death.

Counsels' Testimony

Luebbering recounted counsel thought having Terrance testify would “humanize” him for the jurors(2nd29.15Tr.200). It was counsel who suggested to Terrance that he testify, rather than Terrance wanting to testify(2nd29.15Tr.200-01,203;3rd29.15Tr.132). Terrance expressed concern to Luebbering and counsel about testifying(2nd29.15Tr.201-02,398-99;3rd29.15Tr.132). Luebbering and Terrance were both concerned about Terrance’s basic ability to handle testifying(2nd29.15Tr.202;3rd29.15Tr.132-33).

Counsel testified it was their idea for Terrance to testify and not something that originated with Terrance(3rd29.15Tr.197-98). Terrance was a cooperative client who followed whatever counsel recommended(3rd29.15Tr.197-98). Counsel testified they wanted Terrance to testify so he could present to the jury how he felt about how the Rainwaters treated him(2nd29.15Tr.288). Counsel testified their purpose in advising Terrance to testify was to humanize him and because he would present himself as someone who wasn’t really violent(2nd29.15Tr.322-23,399,423). Counsel wanted the jury to see Terrance’s remorse and love for his daughter(3rd29.15Tr.200-01,257-58,267). Counsel testified that they didn’t advise Terrance to not testify and failed to advise him that they could present other witnesses, including mental health witnesses, to accomplish their intended purposes(2nd29.15Tr.289,293,402;3rd29.15Tr.260). Counsel advised Terrance generally about the advantages and disadvantages of testifying and prepared Terrance for cross-examination(2nd29.15Tr.289-90,321-22;3rd29.15Tr.202,259).

Counsel acknowledged that on cross-examination the prosecutor painted Terrance as a liar because his testimony was inconsistent with the eyewitnesses' accounts and forensic evidence(2nd29.15Tr.338-39,401-02;3rd29.15Tr.266-67).

Findings

Counsel had extensive discussions with Terrance about his right to testify, its associated risks, and whether to testify was his decision(3rd29.15L.F.396-97,399-401,410). Counsel competently advised Terrance(3rd29.15L.F.410). Counsel believed Terrance could show remorse for the offenses and love for his daughter(3rd29.15L.F.396).

Davis testified calling Terrance was intended to "humanize" him(3rd29.15L.F.410). Counsels' strategy was for the jury to hear what Terrance was experiencing to understand his stress, including how the Rainwaters treated him(3rd29.15L.F.397).

Counsel made the strategic decision to call Terrance because they believed it was more critical for the jury to hear from Terrance than mental health experts(3rd29.15L.F.406,410). That decision was necessitated by Terrance's reporting that he remembered shooting Debbie, which would have ruined Holcomb's and Lewis' credibility(3rd29.15L.F.406,410). Terrance's testifying allowed counsel to argue Terrance accepted responsibility(3rd29.15L.F.410).

Counsel Was Ineffective

"Absent any exceptional circumstances, the advice by counsel on whether or not to testify is a matter of trial strategy and not grounds for post-conviction relief."

Lawrence v. State, 160S.W3d825(Mo.App.,S.D.2005). Terrance’s case presents just such exceptional circumstances that counsel’s advice to testify and failure to advise Terrance not to testify was ineffective.

“The penalty phase focuses not on absolving the defendant from guilt, but rather on the production of evidence to make a case for life. The purpose of investigation is **to find witnesses to help humanize** the defendant, given that a jury has found him guilty of a capital offense.” *Marshall v.*

Hendricks, 307F.3d36,103(3rdCir.2002)(emphasis added). *See also, Johnson v. Mitchell*, 585F.3d923,940(6thCir.2009)(same quoting *Marshall v. Hendricks*); and *Morris v. Beard*, 2007WL1795689 *22(E.D.Pa.2007)(same quoting *Marshall v. Hendricks*).

Counsel had witnesses who were able both to humanize Terrance and explain how the Rainwaters treated him. Terrance’s counsel actually called Buchanan to testify about having answered the phone when Stephen called acting disrespectfully because Stephen thought he was speaking with Terrance(2ndTrialTr.836-37). Stephen would address Buchanan, who he thought was Terrance as “nigger” and say he was going to “whoop your ass” (2ndTrialTr.836-37). Stephen would state the “black and white thing” didn’t work and Terrance and Abbey shouldn’t be together and Abbey needed “to be with her own kind”(2ndTrialTr.836-37).

Buchanan recounted there was an incident at Buchanan’s and Terrance’s apartment where Stephen threateningly pulled-up and sped-up in his Jeep(2ndTrialTr.837-38).

Buchanan's testimony vividly conveyed to the jurors the conflict that existed between the Rainwaters and Terrance such that it was unnecessary for Terrance to testify about that conflict.

Moreover, Abbey testified during the state's case and conveyed the extent of the conflict and tumult that was the Rainwater household. Abbey recounted that there was tension with Abbey's parents over her relationship with Terrance because Terrance was older than Abbey and because Terrance is African-American and Abbey is white(2ndTrialTr.657-58). There was a time where Abbey's parents separated and her father moved-out of the family's house and into an apartment(2ndTrialTr.664). Abbey's father was on disability and had a diagnosis of bipolar manic depression(2ndTrialTr.665). During Abbey's relationship with Terrance, she overdosed on prescription medication(2ndTrialTr.658-60).

It was unreasonable strategy to call Terrance to testify about the tumultuous and hostile nature of the Rainwater household when the jury heard that information from Abbey and Buchanan. *See, Butler and McCarter.*

It was unreasonable to call Terrance because counsel believed he could present himself as someone non-violent(2nd29.15Tr.399). Numerous witnesses who knew Terrance, including Jason Brandon, Donald Brandon, Timothy McMillan, Larry Morgan, Kevin Pruitt, Mike Brey, and Louis Buchanan conveyed exactly that sentiment(2ndTrialTr.730-40,742-46,798-803,804-14,839,840-43,883-90).

It, likewise, was unreasonable to advise Terrance to testify, fail to advise him during trial not to testify, and then call him to "humanize" him to show he accepted

responsibility. The way to humanize a defendant is to find witnesses who can do that. *See Marshall, Johnson, and Morris, supra.* Counsel found two expert witnesses, Lewis and Holcomb, who found Terrance suffered from a psychotic depression characterized by paranoia and delusions. *See Points III and IV.* Counsels' stated rationale for not presenting expert testimony was Terrance "lied" about not remembering having shot Debbie such that the experts could've been attacked for having relied on someone who "lied." *See Points III and IV.* Those experts, however, didn't believe Terrance lied about not remembering having shot Debbie. Instead, those experts concluded Terrance's behavior was actually symptomatic of his mental disorders and they would've explained why Terrance's behavior was common for someone with his mental impairments. *See Points III and IV.*

Even if Lewis and Holcomb could've been attacked for relying on a single matter that Terrance "lied" about, that was not nearly as damaging as what the jury got to hear from the prosecutor about how many different things Terrance "lied" about in his testimony. Throughout the prosecutor's initial closing argument a recurrent theme was Terrance repeatedly lied. The prosecutor argued Terrance testified he only went to the Rainwaters to see his daughter(2ndTrialTr.894). The prosecutor asked the jurors to "[r]emember [his] cross examination" when he asked Terrance why he brought a gun to see his daughter(2ndTrialTr.894).

The prosecutor argued Terrance testified he never physically abused Abbey(2ndTrialTr.894). That was followed by argument Abbey had obtained a restraining order based on injuries Terrance inflicted(2ndTrialTr.894).

The prosecutor argued Terrance testified that Stacey Turner-Blackmon told him the Rainwaters wanted to kill Terrance and Kyra(2ndTrialTr.894-95). That was followed by argument that Stacey testified denying what Terrance reported(2ndTrialTr.894-95).

The prosecutor argued Terrance testified that when he entered the house he didn't have the gun out, but all the state's witnesses testified he displayed the gun before entering(2ndTrialTr.895). To emphasize that point, the prosecutor added Terrance testified he kept the gun in his pocket while he and Debbie each tried to prevent the other from taking Kyra in their arms(2ndTrialTr.895).

The prosecutor argued Terrance testified he moved Debbie's body off Kyra, while Whitney testified she did(2ndTrialTr.896). To that the prosecutor added Terrance testified he answered a ringing telephone while Whitney said she did(2ndTrialTr.896).

The prosecutor argued Terrance testified Whitney and Amy refused to leave, but in fact Terrance didn't give them that choice(2ndTrialTr.896-97).

The prosecutor argued Terrance testified Stephen lunged at him and Terrance said in response he shot him(2ndTrialTr.897). The prosecutor countered Terrance's reporting with Whitney testifying she was standing nearby and her father didn't lunge at Terrance(2ndTrialTr.897).

The jury was told Terrance testified that he didn't have a gun out when the police arrived, while Officer Clark said a gun was displayed(2ndTrialTr.897-98).

After highlighting these incidents the prosecutor's argument continued:

What's the point of going through all this? The point is that in dealing with what you are being told about this situation, it is important to know who is telling you the truth and who isn't. The defendant sat right there, raised his hand, swore to tell the truth, and **lied to you over and over and over again.** It's not surprising that he would do so. He has a great deal to lose. But he did. After telling you that he was here to somehow comfort the family by telling them what really happened, **to take responsibility. Well, that's very good of him, but he's already been found to be responsible. The only issue is punishment. So it's very easy to take responsibility now.**

But even that, even at that, he didn't really take responsibility, did he? Somehow this was all somebody else's fault for the way they treated him. I don't know how he was really treated. Unfortunately, the people who could give the other side of that story are very dead. Abbey knows, and she said it wasn't the way he says. Another lie? **Well, we know there have been so many, why not one more.**

(2ndTrialTr.898-99)(emphasis added).

In rebuttal closing argument, the prosecutor returned to the same theme. The prosecutor compared how Terrance's testimony was so different from respondent's witnesses and why Terrance lied(2ndTrialTr.923-24). The prosecutor referred to Terrance having testified that he held the gun to his own head intending to kill himself (2ndTrialTr.782-83) and argued Terrance testified that he was going to commit suicide, but Whitney didn't report that happening, and therefore, it was "a

lie”(2ndTrialTr.923). The prosecutor continued arguing that to believe Terrance’s “version of things” the jury had to disbelieve Abbey, Amy, Stacey, and Whitney(2ndTrialTr.923-24).

Foregoing presenting mitigating evidence because it contains something harmful isn’t reasonable when its mitigating value outweighs its harm. *See Hutchison v. State*,150S.W.3d292,305(Mo.banc2004). Even if calling Lewis or Holcomb included something harmful in that Terrance could be portrayed as having “lied” to them about not remembering having shot Debbie, the mitigating value of their diagnoses outweighed calling Terrance who was then able to be portrayed as having “lied” about not just one thing, but everything. *See Hutchison*.

Calling Terrance to show he’d accepted responsibility was unreasonable strategy. Counsel calling a defendant to testify to matters that as a matter of law don’t constitute a defense when counsel perceived those matters to constitute a defense is ineffective. *U.S. v. Henriques*,32M.J.832,834(1991)(calling defendant to testify on desertion charge he intended to return to the Navy, but not return to his unit was ineffective because expressing intent to return to only the Navy wasn’t a defense). As noted, the prosecutor’s initial closing argument included:

After telling you that he was here to somehow comfort the family by telling them what really happened, to take responsibility. Well, that's very good of him, **but he's already been found to be responsible.** The only issue is punishment. So it's very easy to take responsibility now.

(2ndTrialTr.898-99)(emphasis added). In rebuttal argument, the prosecutor repeated that the issue wasn't whether Terrance admitted to doing the shootings because he was already found guilty of having done them(2ndTrialTr.923). As the prosecutor emphasized, the issue wasn't responsibility. Counsel relied on a defense theory of admitting responsibility when that wasn't a mitigating defense, and therefore, advising Terrance to testify and failing to advise him during trial not to testify were unreasonable. *See Henriques*.

In *U.S. v. Frappier*, 615F.Supp.51,52(D.Mass.1985), counsel was ineffective for advising the defendant to testify where counsel was unaware of an alternative which would've avoided the defendant testifying and failed to furnish the defendant sufficient information on which to make an intelligent decision about whether to testify. In *Missouri v. Frye*, 132S.Ct.1399,1408-09(2012), counsel was ineffective for failing to convey a plea offer to defendant and that failure constituted *Strickland* deficient performance. Here counsel, like in *Frappier* and *Frye*, never communicated critical information for Terrance to have in making a decision whether to testify or not. That information was that their reasons for calling Terrance to testify could be accomplished through calling lay witnesses (who they did call) and expert witnesses (2nd29.15Tr.293,402) (who they failed to call) and thereby avoided Terrance testifying. Given the reluctance with which Terrance approached testifying(2nd29.15Tr.201-02,398-99;3rd29.15Tr.132) when counsel suggested to him he consider testifying, made it that much more critical to advise him the matters they

wanted presented through him could be accomplished through both lay and expert witnesses.

Advising Terrance to testify and failing to advise him during trial not to testify was prejudicial because those actions enabled the prosecutor to argue taking responsibility meant nothing since Terrance was already found guilty and to repeatedly attack Terrance as a “liar” based on his testimony(2ndTrialTr.782-83,894-99,923-24). *See Strickland*. Further, Terrance was prejudiced because had Terrance not testified and the jury heard expert mental health testimony in conjunction with the lay witnesses who testified, there is a reasonable probability Terrance would’ve been life sentenced. *See Strickland*.

This Court should order a new penalty phase.

IX

ADOPTING PRIOR FINDINGS

The motion court clearly erred in overwhelmingly adopting Judge Syler’s findings as written because Terrance was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that when this Court ruled Syler should have disqualified himself this Court must have intended a remand that was more than the meaningless act of a different judge simply adopting verbatim a multitude of Syler’s findings.

This Court remanded Terrance’s case for a new evidentiary hearing because certain actions of Judge Syler created an appearance of unfairness. *See, Anderson v. State*, 402 S.W.3d 86, 91-95 (Mo. banc 2013). Post-conviction proceedings must comport with due process notions of fundamental fairness. *Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991).

The motion court overwhelmingly adopted Judge Syler’s findings as written. When this Court ruled Syler should’ve disqualified himself this Court must have intended a remand that was more than a meaningless act of a different judge simply wholesale re-adopting Syler’s findings.

The findings are broken into two sections one devoted to factual findings (3rd 29.15 L.F. 375-401), but not labeled as such, and a second section as to legal conclusions expressly labeled as “Conclusions of Law” (3rd 29.15 L.F. 401-11). To distinguish the two here, the labels “fact findings” and “legal conclusions” are used. The findings compared here are those from the second and third 29.15 hearings.

I. Wholesale Adopting Syler Findings

Robert Smith

The conclusions of law as to failing to present evidence of Robert's violent propensities are verbatim the same(2nd29.15L.F.201-02;3rd29.15L.F.403-04).

Dr. Holcomb

The conclusions of law as to failing to call Holcomb are a verbatim reproduction of the second hearing(2nd29.15L.F.203-05;3rd29.15L.F.405-06). Both find Holcomb not "credible"(2nd29.15L.F.203-05;3rd29.15L.F.405-06).

Ex Parte Order

The conclusions of law as to ineffectiveness on the failure to take corrective action as to objectionable portions of the ex parte order (Point VII) are verbatim(2nd29.15L.F.205-06;3rd29.15L.F.407).

Improper Cross-Examination of Terrance

The conclusions of law as to two separate claims counsel was ineffective on failing to seek relief as to cross-examination of Terrance claims are verbatim(2nd29.15L.F.206;3rd29.15L.F.407-08).

Opening Statement Ineffectiveness

The conclusions of law as to counsel was ineffective for failing to object to opening statement are verbatim(2nd29.15L.F.206-07;3rd29.15L.F.408).

Proportionality Ineffectiveness

The conclusions of law as to counsel was ineffective for failing to brief proportionality were verbatim(2nd29.15L.F.207-08;3rd29.15L.F.409-10).

The fact findings from the second and third hearings are identical on the substantive claim as to appellate ineffectiveness except the third notes counsel Wafer's second hearing testimony was used in lieu of live testimony(2nd29.15L.F.192-93;3rd29.15L.F.392).

The third findings deleted efforts intended to justify why Syler's statements at the second hearing about his communications with the jury's foreperson to Wafer did not reflect why he should've disqualified himself(2nd29.15L.F.193;3rd29.15L.F.392).

Failure To Advise Not To Testify

The conclusions of law as to counsel was ineffective for failing to advise Terrance not to testify were verbatim, except "Davis" was substituted for "Davis-Kerry"(2nd29.15L.F.208-09;3rd29.15L.F.410).

Patricia Anderson

The conclusions of law as to mitigation witness Patricia Anderson are verbatim the same for the second and third hearings, except to note her prior testimony was considered in lieu of live testimony(2nd29.15L.F.199-200;3rd29.15L.F.401-02).

Stovall

The fact findings as to failing to call mitigation witness Lamont Stovall are verbatim except that the third hearing findings noted his second hearing's transcript testimony was submitted in lieu of in-person testimony at the third hearing(2nd29.15L.F.188;3rd29.15L.F.387).

The Stovall conclusions of law are verbatim the same(2nd29.15L.F.200-01;3rd29.15L.F.402).

Voir Dire Ineffectiveness

The conclusions of law as to two separate claims counsel was ineffective on voir dire matters are a verbatim reproduction except that as to counsel's name "Davis" was substituted for "Davis-Kerry"(2nd29.15L.F.205;3rd29.15L.F.406-07).

Abbey's And Amy Dorris' Marijuana Use

The amended motion included claims counsel was ineffective for failing to impeach Abbey and Amy Dorris about marijuana use(3rd29.15L.F.89-94).

The second and third 29.15 fact findings as to Abbey's marijuana use on the night in question are verbatim(2nd29.15L.F.187;3rd29.15L.F.384).

The conclusions of law as to both Amy and Abbey on the marijuana claim are verbatim except counsel's name "Davis" is substituted for Davis-Kerry(2nd29.15L.F.207;3rd29.15L.F.408-09).

The second and third 29.15 fact findings as to Amy are identical except that the third state that Amy was a witness "at the first PCR proceeding"(2nd29.15L.F.186-87;3rd29.15L.F.384). However, there was no such claim at the first 29.15(See 1st29.15L.F.19-279). Amy and Abbey both testified about such a claim at the second 29.15(2nd29.15Tr.23-33).

Woods

The Woods fact findings for the second and third 29.15 are identical except to indicate that at the second hearing Woods testified in-person and at the third hearing his prior testimony was submitted(2nd29.15L.F.188-89; 3rd29.15L.F.387-88).

The Woods conclusions of law are verbatim the same(2nd29.15L.F.200;3rd29.15L.F.402).

The third hearing fact findings stated Davis’ testimony that Woods was being uncooperative in their efforts to reach him and that Woods was “dodging” them was believed(3rd29.15L.F.388). While the fact findings disparaged Woods for “dodging” counsel they at the same time credited Woods’ testimony in order to reject Lewis’ conclusions stating: “Mr. Woods’ testimony about Movant’s demeanor prior to the murders is inconsistent with Dr. Lewis’ testimony that Movant was in the supposed dissociation state for some time prior to the crimes.”(3rd29.15L.F.388).

Jones

The fact findings as to mitigation witness Jones from the second to the third 29.15 are identical except the third findings added a sentence claiming counsel had difficulty contacting Jones before the 2008 trial and that is premised on “records produced”(2nd29.15L.F.190-91;3rd29.15L.F.389-90).

The third conclusions of law on Jones are verbatim the second(2nd29.15L.F.199;3rd29.15L.F.401).

Adrienne Dionne Webb

The content of the mitigation witness Adrienne Webb fact findings are identical on the substantive claim from the second to third hearing while pointing out her second hearing testimony was used(2nd29.15L.F.196;3rd29.15L.F.397). Also the fact findings describing Terrance as “became more messy” was changed to “became

messier” and adding the phrase “for the murders” was added to explain for what Terrance was arrested(2nd29.15L.F.196-97;3rd29.15L.F.397).

The conclusions of law as to Adrienne Webb are identical from the two hearings except to point out her prior testimony was considered for purposes of the third hearing(2nd29.15L.F.200;3rd29.15L.F.402). Both refer to her as “Dianne”(2nd29.15L.F.200;3rd29.15L.F.402).

Catherine Luebbering

The fact findings as to mitigation specialist Catherine Luebbering from the second to third hearing are identical in all material respects with minor alterations(2nd29.15L.F.191-92; 3rd29.15L.F.390-92). The second findings refer to “Dianne Webb”(2nd29.15L.F.191) while the third refer to “Dionne Webb”(3rd29.15L.F.390). The second fact findings say it was “unclear “ what Luebbering meant about the Rainwater household’s circumstances(2nd29.15L.F.192), while that is absent from the third(3rd29.15L.F.391). The third fact findings (3rd29.15L.F.391) added a sentence, not in the second(2nd29.15L.F.192), how Robert’s history was irrelevant.

Luebbering testified in-person at both the second and third hearing. The second and third fact findings both state that when Luebbering was asked how the evidence about Robert was mitigating: “Ms. Luebbering paused, stammered, and was clearly searching for a cogent explanation as to how this would be helpful.” (2nd29.15L.F.192;3rd29.15L.F.391). There was no “stammering” without “cogent explanation.” *See*, Point I.

Dr. Lewis

Paragraph 22 from the third hearing's fact findings (3rd29.15L.F.381-84), addressing Dr. Lewis' conclusions, reproduced verbatim Paragraph 18 of the second hearing's findings (2nd29.15L.F.184-86) adding only a strategy finding to one paragraph(2nd29.15L.F.185;3rd29.15L.F.382).

Both sets of fact findings erroneously refer to Lewis as a "forensic psychologist"(2nd29.15L.F.184;3rd29.15L.F.381) while Lewis testified she is an M.D. psychiatrist and is not a forensic psychiatrist(3rd29.15Ex.FF at 6).

Both sets of fact findings proclaim only Terrance claimed Stephen was manic-depressive(2nd29.15L.F.185;3rd29.15L.F.382). In fact, Abbey testified on cross-examination at the retrial that her father, Stephen, was diagnosed as bipolar manic depressive and was on disability(2ndTrialTr.665). *See* Point III.

Both sets of fact findings state Lewis is "not credible"(2nd29.15L.F.186;3rd29.15L.F.383).

Both sets of fact findings asserted Lewis "did not have a good grasp of the facts" because she described Terrance as descending into an altered state due in part to a court order Abbey obtained on the day of the shootings(2nd29.15L.F.186 and 3rd29.15L.F.383 relying on Trial Ex.38 and 2ndTrialTr.645). Lewis never did that. Lewis noted in passing a separate earlier restraining order occurrence, **not sought by Abbey**, where **Debbie** obtained a restraining order for **Debbie's benefit** against Terrance for Terrance allegedly **threatening Debbie**(3rd29.15Ex.FF at 56;2ndTrialEx.38). *See* Point III.

Both sets of fact findings assert Lewis didn't grasp the facts because she relied on Terrance's reporting of statements Terrance attributed to Stacey Turner-Blackmon, which Turner-Blackmon denied making(2nd29.15L.F.186;3rd29.15L.F.383-84). Terrance testified at the retrial Stacey told him that Debbie and Stephen were plotting to kill him and Kyra(2ndTrialTr.767-71). Stacey testified she never said such things to Terrance(2ndTrialTr.707-08). The fact findings treat this matter as though Lewis accepted as true what Terrance reported when in fact Lewis took as true Stacey's denial that she made such statements. Lewis found that Terrance's testimony on this matter, rather than accurately reporting reality, reflected Terrance's paranoia(3rd29.15Ex.FF at 61). *See* Point III.

The legal conclusions on Lewis are verbatim except for deleting Syler's contact with the first trial's foreperson as a basis for why Syler believed Lewis wasn't persuasive(2nd29.15L.F.202-03;3rd29.15L.F.404-05). Both assert Lewis was "frankly, gullible" to believe Terrance heard voices(2nd29.15L.F.203;3rd29.15L.F.404).

Adopting Syler's findings as to Lewis is especially problematic. It was Syler's endorsement of what the foreperson of the first jury told Syler about Lewis and Syler's actions of handing second 29.15 hearing counsel a 2004 New Yorker article about Lewis which caused this Court to rule Syler should've disqualified himself. *See, Anderson v. State*,402S.W.3d86,92-94(Mo. banc2013).

II. A New Hearing Is Required

The wholesale adopting of Syler's findings denied Terrance his rights to due process and to be free from cruel and unusual punishment because it violated notions of fundamental fairness. *See, Thomas, supra*. The practical consequence of such action rendered this Court's Syler disqualification a nullity and the remand was fundamentally unfair. *See, Anderson v. State*, 402S.W.3d at 92-94 and *Thomas*.

A new hearing before a judge who will give fair consideration to Terrance's claims and not simply wholesale adopt Syler's findings is required.

X.

APPELLATE COUNSEL PROPORTIONALITY

The motion court clearly erred in denying the claim direct appeal counsel was ineffective for failing to challenge proportionality under §565.035.3 because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have briefed this issue since proportionality review is statutorily mandated and this Court has found death sentences disproportionate. Terrance was prejudiced because there is a reasonable probability this Court would have found Terrance's death sentence disproportionate and imposed life.

Direct appeal counsel didn't make any argument that, under the mandatory statutory review provided for in §565.035.3, Terrance's sentence as to Debbie was disproportionate. Instead, this Court on its own motion addressed this issue. *State v. Anderson*, 306 S.W.3d 529, 544-47 (Mo. banc 2010). Effective counsel would've briefed this matter since it's statutorily mandated and this Court has set aside death before, based on proportionality.

A defendant is entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). To be entitled to relief on a claim appellate counsel was ineffective, a movant must establish competent and effective appellate counsel would've raised the error and there's a reasonable probability that if the claim had

been raised, the outcome of the appeal would've been different. *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005).

Appellate Counsel's Testimony

Deborah Wafer represented Terrance on direct appeal (3rd 29.15 Ex. HH at 219). She didn't brief Terrance's death sentence was disproportionate in violation of § 565.035.3 (2nd 29.15 Exs. S and T). Instead, Wafer challenged proportionality for the first time on rehearing after this Court conducted its own review without any argument from her (2nd 29.15 Ex. W; 3rd 29.15 Ex. HH at 227-28).

Wafer's rationale for not challenging proportionality was she'd never prevailed before and she didn't raise it here "out of frustration" with how this Court historically conducted proportionality review (3rd 29.15 Ex. HH at 228-32). Wafer testified that she "gave up is basically what happened on it. Not a good thing to do." (3rd 29.15 Ex. HH at 232).

29.15 Findings

The findings state Wafer made a conscious decision not to raise proportionality (3rd 29.15 L.F. 392, 409-10). Proportionality was raised on Terrance's first direct appeal (3rd 29.15 L.F. 392). Terrance's sentence wasn't disproportionate because Terrance would've killed Abbey had he found her, he shot Debbie while she held Kyra, and Terrance's mental health history wasn't long and documented, even believing Lewis and Holcomb (3rd 29.15 L.F. 409-10).

Counsel Was Ineffective

For strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *See, Butler and McCarter*. Counsel’s failure to brief this matter wasn’t strategy, but instead she conceded and forfeited away a claim because she’d not prevailed on this issue in the past and because of her personal “frustration” with how this Court conducts proportionality review(3rd29.15Ex.HH at 228-32). That was unreasonable because this Court has granted proportionality relief. *See State v. Chaney*,967S.W.2d47,59-61(Mo.banc1998); *State v. McIlvoy*,629S.W.2d333,341-42(Mo.banc1982). Reasonable appellate counsel would’ve briefed this issue. *See Williams*.

Terrance was prejudiced because had counsel briefed this issue there is a reasonable probability this Court would’ve found his sentence disproportionate. *See Williams*. This case presents circumstances analogous to the situation where counsel filed no brief at all in *Mylar v. Alabama*,671F.2d1299,1300-02(11thCir.1982). To be effective counsel an attorney is required to be an “active advocate” for the client. *Id.*1301-02. An “active advocate” is one who “affirmatively promotes his client's position before the court.” *Id.*1301. Moreover,

A brief sets forth a partisan position and contains legal reasoning and authority supporting the defendant's position. The mere fact that appellate courts are obligated to review the record for errors cannot be considered a substitute for the legal reasoning and authority typically found in a brief.

*Id.*1302. A motion for rehearing is no substitute for a brief because a rehearing motion gets “summary consideration.” *Id.*1302. An “active advocate” asserts his

client's position "at the most opportune time by filing a brief...."*Id.*1302. Terrance's counsel wasn't an "active advocate" when she failed to brief proportionality when §565.035.3 mandates proportionality review.

An "active advocate" would've briefed proportionality and relied on multiple first degree murder victim cases where death was avoided.

Christopher Creed was convicted of two counts of first degree murder and sentenced to LWOP. *See*, Missouri Department of Corrections incarcerated individuals web site (D.O.C. web site).⁷

Toby Viles killed his three younger siblings and pled guilty to LWOP. *See*, Southeast Missourian October 24, 2003 A.P. article of David Lieb.

Pamela Burns was convicted of three counts of first degree murder and sentenced to LWOP. *See*, D.O.C. web site.

Levi King was convicted of two counts of first degree murder and sentenced to LWOP. *See*, D.O.C. web site.

Richard DeLong was convicted of five counts of first degree murder for the strangulation suffocation of four individuals, one of whom was pregnant with a nine month fetus, and sentenced to LWOP(2nd29.15Ex.Z at 3).

James Schnick was charged with seven counts of first degree murder, four involved children. *State v. Schnick*,819S.W.2d330,331(Mo.banc1991). Four counts

⁷ To locate a specific person, it is necessary to enter his/her name or inmate number on Corrections' "Offender Search" page.

were dismissed without prejudice prior to trial and Schnick was convicted and sentenced to death on the three remaining counts. *Id.*331;(2nd29.15Ex.X). This Court reversed Schnick’s conviction and he subsequently pled guilty and was sentenced to LWOP. *Id.*334. *See Man Pleads Guilty Gets Life Sentence In Family Slayings* (A.P. story in “Gadsden Times” May 2, 1992).

In *State v. Beishline*,926S.W.2d501,504-05(Mo.App.,W.D.1996), the defendant killed an elderly woman by using chloroform to incapacitate and suffocate and was sentenced to LWOP(2nd29.15Ex.Y). Beishline was suspected in other homicides. *Id.*505.

In *State v. Blankenship*,830S.W.2d1,4-5,13(Mo.banc1992) the defendant was charged with five counts of first degree murder, but convicted of five counts of second degree murder for killing five National Supermarket employees.

Lorenzo Gilyard was convicted of six counts of first degree murder and sentenced to LWOP. *See State v. Gilyard*,257S.W.3d654(Mo.App.,W.D.2008)(memorandum opinion); *Kansas City Man Gets Life Sentence* KRCG TV news story - April 13, 2007 and D.O.C. web site.

Terrance was prejudiced because had Terrance had an “active advocate” there’s a reasonable probability his sentence would have been found disproportionate. *See Williams and Strickland*. There’s a reasonable probability Terrance’s death sentence would’ve been found disproportionate if counsel had relied on the noted cases, *supra*, and the fact that as to one of the two counts, involving Stephen, he was already life sentenced. *See Williams and Strickland*.

This Court should find Terrance's sentence was disproportionate and impose LWOP.

CONCLUSION

For the reasons discussed, this Court should order the following: (a) Points I through VIII - a new penalty phase; (b) Point IX - a new 29.15 hearing before a different judge; and (c) Point X - impose life without parole.

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 30,689 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 March, 2018. 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 29th day of March, 2018, 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
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