IN THE
MISSOURI SUPREME COURT

DAVID HOSIER,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC97231
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
19TH JUDICIAL CIRCUIT
THE HONORABLE PATRICIA S. JOYCE, JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

I. Procedural History

David Hosier was indicted in Cole County, Missouri, for murder in the first degree, §565.020, armed criminal action, §571.015, burglary in the first degree, §569.160, and unlawful possession of a firearm by a felon, §571.070, RSMo Supp.2009 (LF.24-26). David was convicted on all counts and sentenced to death. *State v. Hosier*, 454 S.W.3d 883 (Mo.banc2015). Thereafter, David timely filed a 29.15 post-conviction action and this appeal is taken from the motion court's denial of that action. (D40:1-12).[1]

II. David's Trial

A. Guilt Phase

David lived in an apartment building on West Main Street in Jefferson City, and Angela Gilpin lived in a nearby apartment building on West High Street. (Tr.843-84). The buildings were separated by a parking lot. (Tr.848). Dennis Prenger owned both buildings. (Tr.843-84). David did odd jobs in the apartment complex for Prenger and had access to the storage room where the keys were kept. (TR.853, 855, 868-69).

David and Angela became involved in a relationship during 2008-2009. (Tr.782-83, 787-89, 803, 807, 816, 828-29, 865-66). But in July or August, 2009, Angela decided to stay with her husband, Rodney Gilpin (Tr.789-90, 817, 828, 877).[2] David was upset and said that if he could not have Angela, then nobody would. (Tr.789-90, 817, 828, 877). He said that if she "would not come back with him" then he "would put a stop to it somehow." (Tr.790).

Around August, Angela called Prenger and told him that David had entered her apartment, so she was changing the dead bolt lock on her door. (Tr.852, 866-68, 871).

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[1] The Record: trial transcript(Tr.); direct legal file(LF); evidentiary hearing transcript (PCRTR.); post-conviction legal file(D); trial exhibits(Ex.); and hearing exhibits (Mov.Ex.).

[2] Further dates are to 2009 unless otherwise noted. David's brief will reference Angela and Rodney by their first names. No disrespect is intended.

Prenger spoke with David about this. (Tr.854). David told him that Angela had given him the keys to her apartment. (Tr.854, 868). He had used keys to enter Angela's apartment to take a gun away from her after she threatened to kill herself. (Tr.869). He gave the keys to Prenger so that they could be returned to Angela. (Tr.854, 868).[3] David no longer had Prenger's permission to enter that building. (Tr.855). Prenger also removed David's numeric code to the keypad of a storage room. (Tr.854-55, 869, 871). By mid-August, Angela had the keys back from David, David's key code was disabled, and Angela had changed the dead bolt on her door – not even Prenger had a key to her new lock. (Tr.871). Prenger had also re-keyed the doors to the common area in Angela's building. (Tr.871).

Around the middle of September, David told Steve Armstrong that Angela wanted to go back to Rodney. (Tr.781-82). Armstrong told him to "let her go" because she would never leave Rodney. (Tr.781,783). David was also upset because he had received a restraining order and an eviction notice for his apartment. (Tr.781-82). David said he was going to move away. (Tr.782).

About a week later, David told Jodene Scott, a neighbor, who lived in the same apartment building as Angela, that he was upset because Angela would not talk to him. (Tr.823-25, 834, 1045). He might have told Scott that he was tired of "getting blamed for shit." (Tr.823-25, 834).

Around September 21, Prenger received a letter from Angela. (Tr.856-857; Ex.199-A). In the letter, Angela indicated she was afraid of David and had filed a restraining order against him. (Tr.857). She requested a different apartment. (Tr.857). Prenger also learned from Scott that David had a 1993 felony conviction from Indiana, so he called David on September 22. (Tr.775-76,858-59,1297,1309-10,1315-16;Ex.280A). Prenger told David that he had learned about David's prior conviction and asked him to move out of his apartment by the end of the month. (Tr.859). The

[3] There was also a separate key to the apartment building (Tr.855).

next day, Prenger wrote to Angela and told her that he had asked David to be out of his apartment by the end of the month, and he asked Angela to stay. (Tr.857-58).

On September 25, David called Prenger to ask if he could stay since Angela was going to move. (Tr.860). Prenger told David that he still had to move out. (Tr.860).

On September 27, Geralyn Bleckler received several voicemails from David. (Tr.791). He wanted to know if she had talked to Angela about Rodney. (Tr.791;Ex.10). Later that night, David called Bleckler and told her that he knew Bleckler was not going to try to get Angela and David back together. (Tr.792). Bleckler told David to leave Angela alone because Angela and Rodney were going to remain together and Angela did not want to have anything to do with David. (Tr.792). David called again, but Bleckler let the calls go to voicemail. (Tr.792).

Also on September 27, shortly before 10:00 p.m., Scott received a phone call from David. (Tr.819-20). David wanted to go to Scott's apartment to give her something. (Tr.820-21). When Scott said she was too tired, David said he was going to leave some keys and instructions for her on her car; the instructions were about taking care of his belongings if anything happened to him. (Tr.821, 1049-50). He mentioned that he was going to "eliminate his problems." (Tr.824, 1052).

Sometime around 3:00-3:30 a.m. on September 28, a woman who lived in Angela's apartment building used her key to enter the building, where she saw two bodies on the floor. (Tr.762-64). She called 911. (Tr.764, 941). Other neighbors had heard "pops, like gunfire" between 3:15-3:30 a.m. (Tr.767, 769, 771).

When officers responded shortly after 3:30 a.m., they saw Angela lying partially in the open foyer and partially in her apartment with 9-millimeter shell casings in the foyer and another one in her apartment. (Tr.941-44, 946, 949-50, 960, 962-63, 973-74, 991-93, 996, 1016-17, 1041-42). Angela was dead; she had been shot

several times. (Tr.942, 975-76).[4] Rodney had also been shot to death and was lying near Angela but he was inside the apartment. (Tr.949, 960, 962-63, 968, 971-72, 986, 1017).

The door to the building was locked and there were no signs of forcible entry. (Tr.944-45). There were bullet holes in a wall to the right of the entry door and in the doorway leading into Angela's apartment. (Tr.950, 963-64, 967-68). Officers found several projectiles in various locations at the scene. (Tr.974, 976-77, 979, 993-94). In Angela's purse were a .38 handgun and a petition for an order of protection filled out by Angela against David. (Tr.979-80, 987-88;Exs. 57,200).

Armstrong heard about the double homicide, and he drove to the apartment building. (Tr.777). Armstrong told police that David could be heavily armed; he had seen several weapons in David's apartment after helping him move from Indiana sometime between 2004-2007. (Tr.780). Prenger also told the police that Angela had problems with David. (Tr.862). Prenger gave them copies of the letter Angela had written to him and a national criminal check Prenger had run. (Tr.862).

Officers retrieved some voicemail messages David had left on Bleckler's phone. (Tr.792-802, 1043-44;Exs.10,12,198). One said, in part:

> I told you to tell her to get her fuckin ass out of my sight for good. Get the fuck away from here. Move back with fuckin Rodney. Get out of that god damn apartment. You didn't tell her that. I'm gonna fuckin finish it. I'm tired of the shit. You don't believe me. I'm tired of the shit.

(Ex.12).

At about 7:00 a.m., officers contacted Scott. (Tr.1046). She told them about the phone call she received from David the night before. (Tr.1047). Scott also mentioned

[4] Angela died from four gunshot wounds to her torso and two to her head.(Tr.1325, 1327-28,1330-31,1339-40). There was no evidence of soot or stippling, which could indicate the gun had been at least 12-24 inches away.(Tr.1334-35,1347,1350-51,1353). Two bullets were recovered during the autopsies.(Tr.1034-36).

that the Thursday before the murders, David had told her Angela had "fucked him over" and he was going to "fuck her over." (Tr.826, 834, 1053).

On Scott's car, officers found a note along with a key ring with a set of keys. (Tr.956-58, 990;Exs.14-18). The note requested Scott call one of David's sisters if anything happened to him. (Tr.959).

Jefferson City police officers obtained search warrants for David's apartment, Angela's apartment and a phone ping order for David's cell phone. (Tr.1018-19). At about 8:15 a.m., officers searched David's apartment. (Tr.1019-20, 1026). No one answered, and the officers gained entry using a key provided by Prenger. (Tr.1019-20). Inside the apartment was a gun safe, which contained some ammunition, including 9-millimeter ammunition, a receiver for a long gun, and an owner's manual for a rifle. (Tr.1020-23, 1025-27, 1029, 1031). An empty 9-millimeter box of shells was on top of the safe. (Tr.1021, 1026, 1029, 1031). Inside a wooden chest was a schematic or paper template for a STEN 9-millimeter submachine gun, which could be used to make a weapon that would fire 9-millimeter ammunition. (Tr.1021, 1023, 1026-28, 1030, 1039, 1303, 1305-06). Officers did not find a 9-millimeter handgun. (Tr.1039).

Around 9:45 a.m., the Oklahoma Highway Patrol received information from the Jefferson City Police Department about a "wanted car and person." (Tr.899, 927). The last location that they had for David as a result of the ping order was in the Kansas/Oklahoma area. (Tr.899).

Oklahoma officers began pursuing David near Tahlequah. (Tr.899-901). It was a "moderate-speed" pursuit, which was around the speed limit. (Tr.920, 932-33). During the pursuit, one law enforcement vehicle partially blocked the road, but David went around it and continued to drive southbound. (Tr.921-22).

Between 10:30-11:00 a.m., David stopped his car. (Tr.923, 927). When he got out, the officers commanded him to get on the ground, and David said, "Shoot me, and get it over with" or "end it." (Tr.924). They were eventually able to handcuff him. (Tr.924-925).

Jefferson City officers flew to Tahlequah, Oklahoma, where David's car was being held. (Tr.1054). They searched David's car after obtaining a search warrant (Tr.1054-55).

In the front passenger compartment, officers found a STEN submachine gun, three other firearms, a fully loaded magazine that would go to the STEN, two speedloaders for a .38 revolver, an ammo can with about 400 rounds of ammunition, a homemade police baton, two cell phones, a green duffel bag, and a handwritten note. (Tr.1066-68, 1070-71, 1076, 1078, 1086-87, 1096, 1108, 1114-15). The note read:

> If you are going without [sic.] someone, do not lie to them, do not play games with them, do not fuck them over by telling other people things that are not true, do not blame them for things that they have not done. Be honest with them and tell them if there is something wrong. If you do not, this could happen to you. People do not like being fucked with, and after so much shit they can go off the deep end. Had to [sic] much shit!!!

(Tr.1056-61, 1067, 1081-82;Exs.104 and 223).

Among the items in the green duffel bag found in the passenger compartment were: a pistol holder, 12 or 14 magazines, a bandoleer with ammunition in it, a "leather sleeve with magazine and ammo," two clips, and 17 boxes and one bag of ammunition. (Tr.1069-70, 1076-78, 1087-89, 1091-94). Under a blue blanket in the rear seat were two loaded rifles and a loaded shotgun. (Tr.1073). In the trunk of the car were some clothing, an ammo can, and another green duffel bag. (Tr.1074, 1109). Inside that duffel bag were eight long guns. (Tr.1074-1075).

Aside from the STEN, there were a total of 14 other guns in the car; however, there was no 9-millimeter handgun. (Tr.1144). But the STEN machine gun could fire

9-millimeter ammunition. (Tr.1150). All of the weapons were loaded except for the STEN submachine gun. (Tr.1067, 1097-1101).

Missouri State Highway Patrol criminalist Evan Garrison examined the shell casings and bullets seized from the crime scene and autopsy and compared them to the 9-millimeter STEN submachine gun seized from David's car. (Tr.1184, 1185-87, 1191, 1202-1218). The firearm did not fire reliably or consistently. (Tr.1265). Garrison had to repeatedly pull out the gun's magazine and shake a bullet out when it failed to detonate. (Tr.1265-1266). It took Garrison several attempts before he could get the gun to fire. (Tr.1266).

There were nine 9-millimeter caliber expended cartridge cases found at the murder scene that could have been fired from the STEN, but because of the lack of the presence of individual characteristics, Garrison could not be certain that they were fired from the STEN. (Tr.1204-05). Based upon extractor and ejector marks found on some of the cartridges, Garrison could say to a reasonable degree of scientific certainty that some of the cartridge cases had been *extracted or ejected* from that firearm. (Tr.1205-12;Exs.58,158,159). He could not say, however, that they had been *fired* from that firearm. (Tr.1293-94).

When Garrison examined some of the unknown expended bullets, he found that they possibly had been fired from that submachine gun, but it did not rise to a level of identification. (Tr.1214-19, 1270-71). He could not say to a degree of reasonable scientific certainty that those bullets were fired from the STEN machine gun. (Tr.1215, 1218-19).

Officers obtained a search warrant for David's storage shed in Holts Summit. (Tr.1110, 1153). Among the items in the shed were ammo cans, ammunition, two stocks for a STEN gun, magazines that appeared to be consistent with the STEN gun, bandoleers that contained live ammunition, and shell casings. (Tr.1111, 1117-21, 1123-24, 1308-09). No 9-millimeter weapon was found in David's apartment or storage shed. (Tr.1311).

After David was incarcerated, a fellow inmate claimed that David said he had been "done wrong" by his girlfriend and that he was capable of killing somebody; but David did not admit that he had killed anybody. (Tr.1159-60, 1175).

Before trial, defense counsel moved in limine to exclude evidence of uncharged crimes (TR.122;LF.190). In paragraph #5 of this motion, counsel specifically argued that any prior assaults committed by David were not "permissible in the guilt/innocence phase of the trial." (LF.190). The trial court agreed and sustained paragraph #5. (TR.130;LF.190).

Just before voir dire, the parties discussed Ex.280 – the certified judgment of David's prior Indiana conviction[5] for the battery of Nancy Marshall and his resulting 8-year prison sentence. (TR.171;Ex.280A;PCREx.11;AppendixA15-22). During this discussion, defense counsel Zembles worried that this exhibit "contained documents that shouldn't have been in [it]…a lot of stuff in the exhibit that was beyond just the sentence and judgment." (TR.171). The trial court declared that such information "will never be shown to the jury." (TR.171). The prosecutor, however, argued that this information "may have to be [shown to the jury] because of the count that alleges the defendant was a felon in possession of a weapon." (Count IV). (TR.172).

The prosecutor reminded the court that, at David's prior mistrial, they had discussed redacting a second count from Ex.280 as it had been dismissed. (TR.172). The parties agreed that, for purposes of a prior offender finding, the entire exhibit was admissible; however, the prosecutor stated that, "[f]or purposes of what goes to the jury if they do not stipulate to him having a prior felony conviction, then the State would certainly be happy to mask out whatever the Court instructs." (TR.172).

The court then found David to be a prior offender, but the parties and the court agreed that Ex.280 would not be published to the jury until there had been further

[5] In addition to being the underlying felony for Count IV, this prior conviction was also used in penalty phase as the serious assaultive conviction for aggravation (LF.402).

review of the document because, as Counsel Zembles stated, "I do have objections to some pages of the exhibit." (TR.172-73).

Before opening statements, counsel renewed an objection to David's prior offender status, which was overruled. (TR.726). Zembles also complained that they had never received a copy of the documents that the prosecutor was relying on for prior offender status. (TR.726). The prosecutor wanted to introduce Ex.280 during his opening statement, understanding that the Court would still need to "review it and determine what can be published to the jury. (TR.726-27). He did not intend to publish Ex.280 during his opening. (TR.727). Defense counsel opposed the prosecutor's reference to anything from Ex.280 during opening. (TR.727). In response, the prosecutor said he just wanted to tell the jury that David has a felony conviction from Indiana from 1993, and "they'll find out later what it is when you allow it to be published to them." (TR.727). Defense counsel agreed to the prosecutor's generic reference to a felony conviction in opening statement, but asked for a copy of Ex.280 "prior to him introducing it into evidence to make our objections." (TR.727).

During opening, the prosecutor told the jury that David was "convicted of a felony in Indiana in 1993." (TR.756).

In defense opening, counsel noted the lack of any "credible physical evidence from the scene there in that hallway that links David to this murder in any way." (TR.757). Counsel mentioned the absence of any fingerprint, DNA, physical or other trace evidence, or any witnesses to who killed Angela Gilpin. (TR.757).

After the first three witnesses testified, the State moved to admit Ex.280. (TR.774). Counsel Zembles specifically objected that the State was only "entitled to introduce from Exhibit 280…the sentence and judgment, essentially what Mr. Hosier pled guilty to, what his sentence was," but that Exhibit 280 "contains an amended information for criminal confinement, an amended information for battery" and "[t]hose should not be in this exhibit." (TR.775).

The Court asked if the prosecutor wanted to show Ex.280 to the jury, and the prosecutor said, "[n]ot at this point," aware that "the Court is going to redact out of there the things that the Court will not allow to the jury," and that he would like to publish it later in the trial. (TR.775). Zembles responded, "I just don't want any references to anything in this document other than the sentence and judgment which comprises one page of this document." (TR.776). The trial court received Ex.280 into evidence, but indicated "we will go through and redact everything before anything is shown" and "it will be by agreement of counsel what shows up." (TR.776). The Court assured, "I will keep it somewhere where no one can get ahold of it." (TR.776).

Before Jodene Scott's testimony, defense counsel asked to approach, concerned that the State would ask Scott about finding David's Indiana felony conviction on the Internet. (TR.812). The State replied that it only wanted Scott to say that she told David's landlord that he had a prior felony conviction from Indiana. (TR.813). Defense counsel asked if the prosecutor would elicit "none of the circumstances of the conviction?" and the Court stated, "That's right." (TR.813). The prosecutor asked for time to talk to the witness to make sure she did not say anything she shouldn't. (TR.813). Later, landlord Prenger testified that he had learned from Scott that David had this prior conviction. (TR.858).

Later in the trial, the parties revisited admitting Ex.280. (TR.1297). The prosecutor indicated he had redacted portions indicated by the Court, and made clear he "had been willing to stipulate that the defendant had a prior felony conviction in Indiana in 1993." (TR.1297). He noted, however, that in lieu of a stipulation by the defense, "the State is compelled to put in the redacted exhibit, State's Ex.280." (TR.1297). Zembles indicated that redacted Ex.280 "should have eight pages," including an "Amended Information Battery Count II" (TR.1297). The Court admitted the edited document as Ex.280A. (TR.1297,1315).

At the close of evidence, the defense moved to dismiss Count IV, asserting it listed the wrong date for the Indiana conviction. (TR.1384). The defense also objected that the Count IV instruction contained the wrong date of the prior conviction, which

was overruled. (TR.1394). Instruction #13 was submitted to the jury, which referenced David's conviction of "the felony of Battery in the Circuit Court of Cass County, Indiana." (LF.352;TR.1396;AppendixA45).

In the State's closing argument, the prosecutor urged the jury to request the exhibits, specifically Ex.280A:

> A thing we've talked about some is the prior felon status of the defendant. That's an exhibit that hasn't been passed to you, 280A, certified records from Indiana, felony battery, eight-year sentence. This man was a defendant who should have never had a firearm with him.

(TR.1408).

In defense closing, counsel argued there were no witnesses or physical evidence that put David at the scene, and the evidence did not show the 9-millimeter bullets found at the scene were from any gun found in David's possession. (TR.1422,1430). Further, none of the State's evidence put a 9-millimeter handgun anywhere near David. (TR.1432). Finally, the STEN submachine gun could not possibly be the murder weapon because it could not fire properly and the state could not prove that any of the cartridges found at the scene were fired from that gun. (TR.1417-1432).

During guilt-phase deliberations, the jury requested Ex.280A, which was given to them. (TR.1439). It informed them David's prior felony was a battery against Nancy Marshall, giving her a concussion, and he received eight years' imprisonment. (Ex.280A;PCREx.11). Thereafter, the jury found David guilty on all counts. (TR.1439-40;LF.392-395).

B. Penalty Phase

During the penalty phase, the State presented: victim impact evidence through testimonies from Angela's mother and two adult children. (Tr.1574-1579); evidence that David had assaulted an ex-wife in 1986 and violated an order of protection involving her (Tr.1464-67, 1482-83); and, that in 1992, he assaulted a former

girlfriend, Nancy Marshall, by handcuffing her and hitting her face until she was unconscious. (Tr.1514-18, 1521-31). Regarding the 1992 assault, the jury heard again that David was convicted of battery and sentenced to eight years in prison. (Tr.1517-18, 1521;Ex.280-A).

There was also evidence that in 1986 David told former prosecutor's investigator Richard Lee that he was upset about how the Sheriff's Department was attempting to serve him with "civil process." (Tr.1485-88, 1492-94). Shortly thereafter, Lee learned that an order had been issued for a 96-hour commitment for a mental evaluation for David. (Tr.1487-88). Lee and another deputy attempted to serve David with the commitment order. (Tr.1487-88, 1491, 1505-06, 1508). The deputies had to negotiate with David for about four hours before he would come out of his residence. (Tr.1489-91, 1509-11). When David came outside, they took him into custody. (Tr.1490-92, 1512-13).

In about 2004 or 2007, David was staying in a camper on a couple's property when he was going through a divorce. (Tr.1536,1604). David talked about killing his soon-to-be ex-wife. (Tr.1537,1570,1572,1622). Later, when the couple asked him to leave their property, he threatened the husband with a handgun. (Tr.1538-40,1562).

In mitigation, David presented a video deposition of his mother. (Tr.1580, Def.Ex.FF), and testimony from one of his sisters, who recounted how their father, an Indiana State patrolman, had been killed in the line of duty when David was sixteen years old. (Tr.1624-1637); testimony from a pastor who met David after he was incarcerated. (Tr.1588-95); and testimony of the ex-wife of the man at whom David had pointed the gun in 2004 or 2007. (Tr.1601-23).

The jury recommended a sentence of death after finding two statutory aggravating circumstances: 1) David had a serious assaultive conviction in that he was convicted of battery on March 17th, 1993, in the Circuit Court of Cass County, Indiana, because David beat Nancy Marshall about the face while she was handcuffed; and, 2) Angela's murder was committed while David was engaged in the commission of another unlawful homicide (Rodney). (Tr.1672;LF.412).

On November 26, 2013, the trial court overruled David's motion for new trial and sentenced him to death according to the jury's recommendation. (Tr.1681, 1692-93;LF.533-34). It also sentenced David to terms of imprisonment of fifteen years for armed criminal action and burglary and seven years for unlawful use of a weapon. (Tr.1693-94;LF.533-34).

III. The 29.15 Case

Following his direct appeal, David filed timely pro se and amended motions. (D2:1-6;D18:1-110). His amended raised multiple claims challenging counsel's effectiveness during both phases. (D18:1-110).

In Claim 8(A), David alleged that trial counsel was ineffective in failing to stipulate to the felony underlying Count IV pursuant to *United States v. Old Chief*, 519 U.S. 172 (1997), and that he was prejudiced by having evidence of a prior felony of assault/battery against a woman introduced during the guilt phase of his capital murder trial. (D18:3-13) (Point I).

In Claim 8(B), David alleged that trial counsel was ineffective for failing to properly move to sever Count IV, Unlawful Possession of a Firearm by a Felon, for a separate trial, and that he was prejudice by having evidence of the prior felony underlying Count IV introduced at his trial, and that Count IV also allowed the jury to consider the additional fourteen weapons as fourteen additional uncharged crimes. (D18:13-25) (Point II).

In Claim 8(C), David alleged that appellate counsel was ineffective for failing to raise on appeal that the trial court should have granted counsel's oral motion to sever, even if not fully preserved, and that he was prejudiced for the same reason alleged in Claim 8(B), and would have received a new trial by this Court on appeal. (D18:25-32) (Point III).

In Claim 8(D), David alleged that trial counsel was ineffective in failing to individually question and move to strike two unqualified jurors, Randy Mouton (#14) and Marc Oden (#38), each of whom indicated that they were predisposed in favor of the death penalty, and prejudice is presumed. (D18:32-42) (Points VII & VIII).

In Claim 8(G), David alleged that trial counsel was ineffective in failing to investigate and call a medical doctor or psychiatrist in support of mitigation in penalty phase, and he was prejudiced because the jury heard no expert testimony during penalty phase, but they should have heard that David had a stroke in 2007 which caused brain damage and exacerbated the symptoms of depression and bipolar disorder, making them significantly worse close in time to the murder. (D18:55-63) (Point IV).

In Claim 8(H), David alleged that trial counsel was ineffective in failing to object to references in penalty phase to Rodney as the victim, as he was not a charged victim in this case. (D18:63-70) (Points IX&X).

In Claim 8(J), David alleged that he was denied a fair trial because the trial judge had a conflict of interest which precluded her from presiding over the guilt and penalty phases of his trial, in that Judge Joyce was the attorney of record for a State's penalty phase witness – David's ex-wife, Mary Hosier – in a civil case filed against David in 1988. (D18:78-81) (Point VI).

Motion counsel also moved to disqualify Judge Joyce from presiding over David's post-conviction case because he had pled that she had a conflict of interest in presiding over David's capital trial (D17:1-5). This Court appointed the Honorable Gary M. Oxenhandler to determine the issue of disqualifying Judge Joyce from presiding over David's post-conviction case (D20:1;D24:1). An evidentiary hearing on this issue was held before Judge Oxenhandler on December 1, 2015 (D36:1-24). Following the hearing, Judge Oxenhandler denied David's motion to disqualify Judge Joyce. (D29:1-2) (Point V).

A one-day evidentiary hearing was held on October 5, 2017, where four witnesses were called to testify: Dr. Bruce Harry, Appellate counsel Craig Johnston, trial counsel Don Catlett and trial counsel Jan Zembles. (PCRTr.1-121). Several exhibits were also introduced (Mov.Exs.1-43).

On May 17, 2018, Judge Joyce signed the State's proposed findings of fact and conclusions of law, and denied relief on all claims. (D39:1-12;D40:1-12;A1-12). This appeal follows (D44:1-2).

Further specific facts necessary for the disposition of this appeal will be set out in the Argument sections of the brief.

POINTS RELIED ON

I.

COUNSEL FAILED TO STIPULATE TO UNDERLYING FELONY IN CT. IV

The motion court clearly erred in denying David's claim that counsel were ineffective for failing to stipulate to his prior battery conviction – the felony underlying Ct. IV, unlawful possession of a firearm by a felon – because this denied him effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have stipulated to this felony to prevent the jury from hearing prejudicial evidence of a violent conviction during guilt phase, and David was prejudiced because his prior conviction, Ex.280A, was requested by the jury during guilt phase deliberations, informing them he had been imprisoned before for battering a different woman in the head, and there is a reasonable probability that without being exposed to highly prejudicial propensity evidence, the jury would have harbored reasonable doubt in this circumstantial case.

U.S. v. Old Chief, 519 U.S. 172 (1997);

Kenner v. State, 709 S.W.2d 536 (Mo.App.E.D.1986);

Timms v. State, 54 So.3d 310 (Miss. Ct. App. 2011);

State v. Rivera, 871 N.W.2d 692 (Wis. App. 2015);

U.S.Const.AmendsVI,VIII,XIV;

MAI-CR331.28; and

Rule 29.15.

II.

FAILURE TO PROPERLY MOVE TO SEVER COUNT IV

The motion court clearly erred in denying David's claim that counsel was ineffective for failing to properly move to sever Ct. IV – unlawful possession of a firearm by a felon – for a separate trial, because this denied him due process, a fair trial, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have filed a written motion to sever this count to prevent the jury from hearing prejudicial evidence of the underlying violent felony conviction, and David was prejudiced because if they had properly moved to sever Ct. IV, the trial court would have granted it and the jury would never have been exposed, in guilt phase, to evidence that David had been sent to prison before for assaulting another woman, battering her in the head, and that he possibly had committed multiple other uncharged crimes of possessing numerous other unrelated firearms that the State introduced at trial.

State v. Tobias, 873 S.W.2d 650 (Mo.App.E.D.1994);

State v. Couvion, 655 S.W.2d 80 (Mo.App.E.D.1983);

State v. McCrary, 621 S.W.2d 266 (Mo.banc1981);

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

U.S.Const.AmendsVI,VIII,XIV;

Section 545.885;

Section 565.004; and

Rule 24.07 & 29.15.

III.

FAILURE TO APPEAL CT. IV SHOULD HAVE BEEN SEVERED

The motion court clearly erred in denying David's claim that appellate counsel was ineffective for failing to appeal the trial court's refusal to sever Ct. IV – unlawful possession of a firearm by a felon – because this denied him effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonable counsel would have recognized that the trial court abused its discretion in failing to sever Ct. IV, which count allowed the State to introduce prejudicial evidence of a prior violent domestic battery conviction, in addition to the jury being exposed to evidence that David possessed fourteen other unrelated guns, leading them to believe that he had committed fourteen other uncharged crimes of possessing a firearm, and a reasonable probability exists that this Court would have reversed David's conviction and ordered a new trial without the prejudicial Count IV.

State v. Tobias, 873 S.W.2d 650 (Mo.App.E.D.1994);

State v. Couvion, 655 S.W.2d 80 (Mo.App.E.D.1983);

Moss v. State, 10 S.W.3d 508 (Mo.banc2000);

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

U.S.Const.AmendsVI,VIII,XIV;

Section 547.070;

Rules 24.07, 29.15 & 30.20.

IV.

FAILURE TO CALL PSYCHIATRIST TO EXPLAIN MITIGATING EVIDENCE OF DAVID'S STROKE AND ITS EFFECT ON HIS DEPRESSION

The motion court clearly erred in denying the claim counsel was ineffective for failing to call a psychiatrist, such as Dr. Harry, in penalty phase because David was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonably competent counsel would have called such doctor to provide significant mitigating evidence that David has areas of brain damage and lesions from a stroke, that this type of injury exacerbates pre-existing depression, and that David's behavior over the years was symptomatic of increasing depression with psychotic features which was made worse by his having a stroke, all of which would have supported the §565.032.3 statutory mitigators of extreme mental or emotional disturbance and substantial impairment. David was prejudiced because there is a reasonable probability if Dr. Harry testified, David would have been life-sentenced.

Hutchison v. State, 150 S.W.3d 292 (Mo.banc2004);

Glass v. State, 227 S.W.3d 463 (Mo.banc2007);

Taylor v. State, 262 S.W.3d 231 (Mo.banc2008);

Tennard v. Dretke, 542 U.S. 274 (2004);

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

§565.032; and

Rule 29.15.

V.

SPECIAL JUDGE OXENHANDLER SHOULD HAVE RULED JUDGE JOYCE WAS DISQUALIFIED AS MOTION COURT

Special Judge Oxenhandler abused his discretion in denying David's claim that Judge Joyce should have been disqualified from presiding over his post-conviction case because this denied him due process of law, U.S.Const.Amend XIV, and violated Code of Judicial Conduct, Rule 2-2.11, in that Judge Joyce, (also the trial judge), was the attorney of record for David's ex-wife, Mary Hosier, in a child support enforcement case filed against David in 1988, and Mary was a key penalty phase witness against David, where she testified about their marriage and divorce as well as an alleged assault on her during the marriage which led to David's involuntary commitment to Fulton State Hospital, and Judge Joyce's previous representation of Mary, as "attorney for Petitioner," created an appearance of impropriety, and made her a witness to claims made in the amended motion, requiring her disqualification from David's post-conviction case, and David was deprived of a fair hearing.

In the Interest of K.L.W., 131 S.W.3d 400 (Mo.App.W.D.2004);

Anderson v. State, 402 S.W.3d 86 (Mo.banc2013);

Moore v. Moore, 134 S.W.3d 110 (Mo.App.S.D.2004);

State v. Smulls, 935 S.W.2d 9 (Mo.banc1996);

U.S.Const.AmendXIV; and

Rule 2-2.11.

VI.

JUDGE JOYCE SHOULD HAVE RECUSED AS TRIAL JUDGE DUE TO CONFLICT OF INTEREST

The motion court clearly erred in denying David's claim that the trial judge should have been disqualified from presiding over his trial due to a conflict of interest, because this denied him due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, and violated the Code of Judicial Conduct, Rule 2-2.11, in that the trial judge was the attorney of record for David's ex-wife, Mary Hosier, in a child support enforcement case filed against David in 1988, and Mary was a key penalty phase witness against David at his trial, where she would testify about their marriage and divorce as well as an alleged assault on her during the marriage which led to David's involuntary commitment to Fulton State Hospital, and the trial judge's previous representation of Mary created an appearance of impropriety and requiring her recusal from David's trial, and deprived him of a fair trial.

In the Interest of K.L.W., 131 S.W.3d 400 (Mo.App.W.D.2004);
Anderson v. State, 402 S.W.3d 86 (Mo.banc2013);
Moore v. Moore, 134 S.W.3d 110 (Mo.App.S.D.2004);
State v. Smulls, 935 S.W.2d 9 (Mo.banc1996);
U.S.Const.AmendsVI,VIII,XIV; and
Rule 2-2.11.

VII.

FAILURE TO STRIKE JUROR MOULTON (#14)

The motion court clearly erred when it denied the claim that counsel was ineffective for failing to strike Juror Moulton who was heavily biased towards imposing death because David was denied effective assistance, due process, right to a jury trial before a fair and impartial jury, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonably competent counsel under similar circumstances would have moved to strike Moulton and David was prejudiced because a juror who could not realistically consider life served on his jury.

Butler v. State, 108 S.W.3d 18 (Mo.App.W.D.2003);

Irvin v. Dowd, 366 U.S. 717 (1961);

Knese v. State, 85 S.W.3d 628 (Mo.banc2002);

Morgan v. Illinois, 504 U.S. 719 (1992); and

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

VIII.

FAILURE TO STRIKE JUROR ODEN (#38)

The motion court clearly erred when it denied the claim that counsel was ineffective for failing to strike Juror Oden who was heavily biased towards imposing death because David was denied effective assistance, due process, right to a jury trial before a fair and impartial jury, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonably competent counsel under similar circumstances would have moved to strike Oden and David was prejudiced because a juror who could not realistically consider life served on his jury.

Butler v. State, 108 S.W.3d 18 (Mo.App.W.D.2003);

Irvin v. Dowd, 366 U.S. 717 (1961);

Knese v. State, 85 S.W.3d 628 (Mo.banc2002);

Morgan v. Illinois, 504 U.S. 719 (1992); and

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

IX.

FAILURE TO OBJECT TO DAKOTA GILPIN'S VICTIM IMPACT TESTIMONY ABOUT RODNEY GILPIN

The motion court clearly erred in denying David's claim that counsel was ineffective for failing to object to Dakota Gilpin's penalty phase testimony about his father, Rodney Gilpin because David was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends. VI,VIII,XIV, in that reasonably competent counsel would have objected that Rodney was not the victim of the murder charged in this case and Dakota's testimony amounted to improper victim impact testimony, and there is a reasonable probability that if counsel had objected, it would have been excluded and David would have been life-sentenced.

State v. Parker, 886 S.W.2d 908 (Mo.banc1994);

Payne v. Tennessee, 501 U.S. 808 (1991);

State v. Banks, 215 S.W.3d 118 (Mo.banc2007);

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

§565.030; and

U.S.Const.AmendsVI,VIII,XIV.

X.

FAILURE TO PROPERLY OBJECT TO ARGUMENT ABOUT DEATH CASES PROSECUTOR WORKED ON AND HOW ALL WERE EXECUTED

The motion court clearly erred in denying David's claim that counsel was ineffective for failing to properly object to the prosecutor's penalty phase closing argument about how he works on death penalty cases and the last four to five he has worked on have been executed, because David was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI, VIII,XIV, in that reasonably competent counsel would have objected that the prosecutor was arguing facts outside of the evidence and attempting to lessen the responsibility of the jurors, and there is a reasonable probability that if counsel had properly objected, it would have preserved this issue for appeal and this Court would have reversed for a new penalty phase.

Newlon v. Armontrout, 885 F.2d 1328 (8thCir.1989);

Brooks v. Kemp, 762 F.2d 1383 (11thCir.1985);

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

U.S.Const.AmendsVI,VIII,XIV.

APPLICABLE STANDARDS

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

Appellate Review

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

Sixth Amendment Ineffectiveness

To establish ineffectiveness under the Sixth Amendment, 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.banc2002). A reasonable probability sufficiently undermines confidence in the outcome. *Id.* at 426. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d75, 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).

ARGUMENTS

I.

COUNSEL FAILED TO STIPULATE TO UNDERLYING FELONY IN CT. IV

The motion court clearly erred in denying David's claim that counsel were ineffective for failing to stipulate to his prior battery conviction – the felony underlying Ct. IV, unlawful possession of a firearm by a felon – because this denied him effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.AmendsVI,VIII,XIV, in that reasonable counsel would have stipulated to this felony to prevent the jury from hearing prejudicial evidence of a violent conviction during guilt phase, and David was prejudiced because his prior conviction, Ex.280A, was requested by the jury during guilt phase deliberations, informing them he had been imprisoned before for battering a different woman in the head, and there is a reasonable probability that without being exposed to highly prejudicial propensity evidence, the jury would have harbored reasonable doubt in this circumstantial case.

The state charged David with murder in the first degree (Count I), armed criminal action (Count II), burglary in the first degree (Count III), and unlawful possession of a weapon by a felon (Count IV), for the events occurring September 28, 2009. (LF.24-26). Count IV resulted from David's possession of a 9mm STEN machine gun, and having a prior felony – a 1993 Indiana conviction for battery. The State's theory was that the STEN was the murder weapon, as it was the only weapon in David's possession that fired 9mm ammunition.

Trial counsel were ineffective for not stipulating to David's prior felony conviction for purposes of Count IV. Counsel knew the State had to prove David's status as a felon for that count, and that David had an assaultive conviction for battering another woman. (Ex.280A). Yet counsel failed to stipulate to his prior felony to prevent this highly prejudicial propensity evidence from poisoning the jury during guilt phase. Prejudice resulted as the State introduced David's prior felony

conviction, detailing that David had battered Nancy Marshall, giving her a concussion. The jury asked for Ex.280A while deliberating David's guilt. No reasonable attorney would have allowed this evidence to come before the jury during guilt phase. The prejudice of introducing a violent assault of a woman, in a first degree murder of another woman, is clear. In a wholly circumstantial case, where David's presence at the scene was highly contested, confidence in the verdict is undermined by counsels' unreasonable actions.

Trial Proceedings

Counsel initially tried to exclude David's prior felony from guilt phase

Before trial, defense counsel moved in limine to exclude evidence of uncharged crimes (TR.122;LF.190). In paragraph #5 of this motion, counsel specifically argued that any prior assaults committed by David were not "permissible in the guilt/innocence phase of the trial." (LF.190). The trial court agreed and sustained paragraph #5. (TR.130;LF.190).

Just before voir dire, the parties discussed Ex.280 – the certified judgment of David's prior Indiana conviction[6] for the battery of Nancy Marshall and his resulting 8-year prison sentence. (TR.171; Ex.280;PCREx.11). During this discussion, defense counsel Zembles worried that this exhibit "contained documents that shouldn't have been in [it]…a lot of stuff in the exhibit that was beyond just the sentence and judgment." (TR.171). The trial court declared that such information "will never be shown to the jury." (TR.171). The prosecutor, however, argued that this information "may have to be [shown to the jury] because of the count that alleges the defendant was a felon in possession of a weapon." (Count IV). (TR.172).

The prosecutor reminded the court that, at David's prior mistrial, they had discussed redacting a second count from Ex.280 as it had been dismissed. (TR.172). The parties agreed that, for purposes of a prior offender finding, the entire exhibit was

[6] In addition to being the underlying felony for Count IV, this prior conviction was also used in penalty phase as the serious assaultive conviction for aggravation (LF.402).

admissible; however, the prosecutor stated that, "[f]or purposes of what goes to the jury if they do not stipulate to him having a prior felony conviction, then the State would certainly be happy to mask out whatever the Court instructs." (TR.172).

The court then found David to be a prior offender, but the parties and the court agreed that Ex.280 would not be published to the jury until there had been further review of the document because, as Counsel Zembles stated, "I do have objections to some pages of the exhibit." (TR.172-73).

Before opening statements, counsel renewed an objection to David's prior offender status, which was overruled. (TR.726). Zembles also complained that they had never received a copy of the documents that the prosecutor was relying on for prior offender status. (TR.726). The prosecutor wanted to introduce Ex.280 during his opening statement, understanding that the Court would still need to "review it and determine what can be published to the jury. (TR.726-27). He did not intend to publish Ex.280 during his opening. (TR.727). Defense counsel opposed the prosecutor's reference to anything from Ex.280 during opening. (TR.727). In response, the prosecutor said he just wanted to tell the jury that David has a felony conviction from Indiana from 1993, and "they'll find out later what it is when you allow it to be published to them." (TR.727). Defense counsel agreed to the prosecutor's generic reference to a felony conviction in opening statement, but asked for a copy of Ex.280 "prior to him introducing it into evidence to make our objections." (TR.727).

During opening, the prosecutor told the jury that David was "convicted of a felony in Indiana in 1993." (TR.756).

In defense opening, counsel noted the lack of any "credible physical evidence from the scene there in that hallway that links David to this murder in any way." (TR.757). Counsel mentioned the absence of any fingerprint, DNA, physical or other trace evidence, or any witnesses to who killed Angela Gilpin. (TR.757).

After the first three witnesses testified, the State moved to admit Ex.280. (TR.774). Counsel Zembles specifically objected that the State was only "entitled to

introduce from Exhibit 280…the sentence and judgment, essentially what Mr. Hosier pled guilty to, what his sentence was," but that Exhibit 280 "contains an amended information for criminal confinement, an amended information for battery" and "[t]hose should not be in this exhibit." (TR.775).

The Court asked if the prosecutor wanted to show Ex.280 to the jury, and the prosecutor said, "[n]ot at this point," aware that "the Court is going to redact out of there the things that the Court will not allow to the jury," and that he would like to publish it later in the trial. (TR.775). Zembles responded, "I just don't want any references to anything in this document other than the sentence and judgment which comprises one page of this document." (TR.776). The trial court received Ex.280 into evidence, but indicated "we will go through and redact everything before anything is shown" and "it will be by agreement of counsel what shows up." (TR.776). The Court assured, "I will keep it somewhere where no one can get ahold of it." (TR.776).

Before Jodene Scott's testimony, defense counsel asked to approach, concerned that the State would ask Scott about finding David's Indiana felony conviction on the Internet. (TR.812). The State replied that it only wanted Scott to say that she told David's landlord that he had a prior felony conviction from Indiana. (TR.813). Defense counsel asked if the prosecutor would elicit "none of the circumstances of the conviction?" and the Court stated, "That's right." (TR.813). The prosecutor asked for time to talk to the witness to make sure she did not say anything she shouldn't. (TR.813). Later, landlord Prenger testified that he had learned from Scott that David had this prior conviction. (TR.858).

Later in the trial, the parties revisited admitting Ex.280. (TR.1297). The prosecutor indicated he had redacted portions indicated by the Court, and made clear he "had been willing to stipulate that the defendant had a prior felony conviction in Indiana in 1993." (TR.1297). He noted, however, that in lieu of a stipulation by the defense, "the State is compelled to put in the redacted exhibit, State's Ex.280." (TR.1297). Zembles indicated that redacted Ex.280 "should have eight pages,"

including an "Amended Information Battery Count II" (TR.1297). The Court admitted the edited document as Ex.280A. (TR.1297,1315).

At the close of evidence, the defense moved to dismiss Count IV, asserting it listed the wrong date for the Indiana conviction. (TR.1384). The defense also objected that the Count IV instruction contained the wrong date of the prior conviction, which was overruled. (TR.1394). Instruction #13 was submitted to the jury, which referenced David's conviction of "the felony of Battery in the Circuit Court of Cass County, Indiana." (LF.352;TR.1396;AppendixA45).

In the State's closing argument, the prosecutor urged the jury to request the exhibits, specifically Ex.280A:

> A thing we've talked about some is the prior felon status of the defendant. That's an exhibit that hasn't been passed to you, 280A, certified records from Indiana, felony battery, eight-year sentence. This man was a defendant who should have never had a firearm with him.

(TR.1408).

In defense closing, counsel argued there were no witnesses or physical evidence that put David at the scene, and the evidence did not show the 9-millimeter bullets found at the scene were from any gun found in David's possession. (TR.1422,1430). Further, none of the State's evidence put a 9-millimeter handgun anywhere near David. (TR.1432). Finally, the STEN submachine gun could not possibly be the murder weapon because it could not fire properly and the state could not prove that any of the bullets found at the scene were fired from that gun. (TR.1417-1432).

During guilt-phase deliberations, the jury requested Ex.280A, which was given to them. (TR.1439). It informed them David's prior felony was a battery against Nancy Marshall, giving her a concussion, and he received eight years' imprisonment. (Ex.280A;PCREx.11). Thereafter, the jury found David guilty on all counts. (TR.1439-40;LF.392-395).

The Post-conviction proceedings

David's amended motion alleged his trial counsel were ineffective in failing to stipulate to his prior Indiana felony battery conviction in guilt phase. (D18:3-13).

Counsel Catlett's Testimony

Counsel Catlett testified that he was responsible for the guilt phase and counsel Zembles was responsible for the penalty phase. (PCRTR.51). Catlett was aware of David's prior felony conviction and they had no question it was genuine. (PCRTR.51). Catlett explained, "our concern was trying to litigate how much depth the State would go into with the facts of that conviction." (PCRTR.51). They wanted fewer facts because more specific facts would prejudice David's chance for a fair trial. (PCRTR.52). Specifically, Catlett wanted to prevent the jury from hearing that the victim from the prior conviction was a woman, and that David had caused her a concussion. (PCRTR.56).

He testified there were discussions with the prosecutor about possibly admitting the prior conviction without getting into specific details. (PCRTR.52). There had been a discussion about the prospect of stipulating to it. (PCRTR.53). Catlett testified he would have attempted to shield the nature of the offense from the jury through a stipulation. (PCRTR.55). He admitted that, before trial, the prosecutor referenced the jury instruction's Notes on Use about what to do if the defendant stipulated to defendant's felon status, and that if the defense did not stipulate, there would be questions about how the State could prove that element with the exhibit. (PCRTR.56; Ex.43,p.6). Catlett knew the specifics of the prior felony were very prejudicial and that the State could admit the felony conviction without getting into the specifics that it was a domestic situation involving another woman. (PCRTR.56;Ex.43,p.4-5).

Catlett agreed the prosecutor was willing to stipulate to the prior felony, and Catlett could not think of a strategic reason why he would not want such a stipulation. (PCRTR.57). Catlett knew the prior conviction was prejudicial because "the facts of the Indiana assault could be characterized as similar to what had occurred in Missouri.

It was a domestic with a significant other, an intimate partner." (PCRTR.58). Because of that, the jurors might think David had a propensity for domestic violence, in addition to this simply being a prior bad act. (PCRTR.58). "The fact that [David] had a prior felony, had prior domestic issues, and lots of guns in his possession we thought might be prejudicial to the jury." (PCRTR.58). He recalled David agreeing with them that the less information about the Indiana offense, the better. (PCRTR.74). Strategically, they wanted to limit that evidence. (PCRTR.76).

Counsel Zembles' testimony

Counsel Zembles recalled Count IV of the Indictment was unlawful possession of a firearm by a felon, and the prior felony was David's 1993 Indiana conviction for battery of his live-in girlfriend. (PCRTR.80). Ex.280A showed David was convicted of battery by causing serious bodily injury to Nancy Marshall, and sentenced to eight years' imprisonment. (PCRTR.80;Mov.Ex.11). Zembles recalled filing motions and arguing on more than one occasion about the prejudicial effect of the prior conviction coming before the jury. (PCRTR.87). She testified she "didn't want the jury to hear in the first phase," the facts of that prior conviction. (PCRTR.87). She knew that the charging document in the Indiana case said David, "[d]id knowingly or intentionally touch Nancy S. Marshall in a rude, insolent, or angry manner, causing serious bodily injury to Nancy S. Marshall to wit did cause concussion." (PCRTR.89).

Zembles testified that, even though the State was willing to stipulate to David's prior felony in the guilt phase, which would have prevented Ex.280A from being admitted, they did not enter into such stipulation. (PCRTR85-86). She claimed she wanted the jury to see David's prior conviction, because she did not want them to be "surprised," when they got to the penalty phase "with information that they think was withheld from them in the first phase." (PCRTR.86). She was "pretty sure" they would hear from Nancy Marshall in the penalty phase. (PCRTR.86). On the last page of the exhibit, the trial judge had typed, "Defendant is remanded to the custody of the sheriff. Defendant is given 36 days jail time-good time credit. Court recommends Defendant be given psychiatric treatment." (PCRTR.86). Zembles thought the

reference to the Court recommending psychiatric treatment for David, in Ex.280A, "outweighed the bad stuff they would see in this exhibit." (PCRTR.87-88). Zembles also maintained that "the facts of what happened I didn't want the jury to hear in the first phase." (PCRTR.87).

Motion Court's findings

The motion court found "counsel was aware of the ability to stipulate" and that "the state offered said stipulation as suggested in the Notes on Use to the applicable pattern instruction in MAI-CR3d." (D40:7). It held counsel "did not enter into a stipulation based on their decision to oppose the admission of the prior certified conviction record" and that "[p]art of the record allowed the defense to argue that [the Indiana felony] was an SIS (suspended imposition of sentence) and therefore would not support a conviction for Felon in Possession." (D40:7). The motion court found it was part of counsel's trial strategy "to argue that the prior was a suspended imposition of sentence (SIS) so that [David] could not be found guilty of being a felon in possession of a firearm." (D40:7).

The motion court further found it was counsel's trial strategy to show the jury that "the prior felony was a domestic battery so that they would not be surprised by it in the second phase." (D40:7). The motion court held that the "jury would find out that the felony conviction was domestic battery not only by the certified record, but through the testimony of that victim as well." (D40:7-8).

Analysis

The motion court's findings are factually incorrect

The record wholly fails to support the motion court's finding that it was counsel's strategy not to stipulate to the prior conviction so that they could "argue that the prior was a suspended imposition of sentence (SIS) so that [David] could not be found guilty of being a felon in possession of a firearm." (D40:7). Neither counsel testified to having this strategy, and the trial transcript itself reflects no argument by counsel that David should not be found guilty of being a felon in possession of a firearm based on the prior being an SIS (TR.1413-1432). More importantly, the

exhibit itself reflects that David's prior conviction was not an SIS. (Ex.280A). Rather, David was sentenced to eight years' imprisonment upon his plea of guilty, and that sentence was executed. (Ex.280A).

It is difficult to fathom how the motion court came up with this finding. Judge Joyce signed the State's proposed findings of fact verbatim, with no changes. (See D39:1-12; D40:1-12). It is possible that when prosecutor Richardson drafted his proposed findings, he misremembered an argument the defense made in *penalty phase* closing that was based on the date of the prior being different than the date pled by the State. In her penalty phase closing, counsel Zembles made a tortured argument that the jury could not use the Indiana felony conviction for purposes of the serious assaultive conviction aggravator, because the conviction occurred on February 10, 1993, the day David pled guilty, but the instruction listed March 17, 1993, the date of David's sentencing, as the date of conviction. (TR.1663). Zembles argued that such mistaken date prevented the jury from using the prior felony as a serious assaultive conviction in aggravation of punishment because the conviction did not occur on March 17, 1993. (TR.1663).

No such argument was made in the guilt phase that the jury could not find him guilty of being a felon in possession of a firearm because his prior conviction was an SIS (which it was not). Therefore, all of the facts from the motion court's findings on this issue are incorrect and erroneous. Further, there is absolutely no logical reason why Zembles would need Exhibit 280A admitted in the guilt phase in order to make her convoluted penalty phase argument. The exhibit could have been admitted in the penalty phase – along with all of the other testimony from Nancy Marshall herself – without prejudicing David unnecessarily in the guilt phase.

The remaining finding is clearly erroneous

The only other finding by the motion court on this claim is that counsel's strategy was to allow David's prior felony conviction to be shown to the jury during guilt phase so "they would not be surprised by it in the second phase," and that such strategy was reasonable. (D40:7). This, too, is clearly erroneous.

While evidence of the defendant's status as a felon may be relevant to certain offenses, proof of the name or nature of that offense creates the risk of unfair prejudice. *U.S. v. Old Chief*, 519 U.S. 172, 179 (1997). In *Old Chief*, the defendant was accused of assault with a dangerous weapon and with being a felon in possession of a firearm. *Id.* at 174. Old Chief's lawyers offered to stipulate to the fact that their client had a prior felony without mentioning the name or nature of the prior, but the state refused and the trial court agreed the state was not compelled to stipulate. *Id.* at 177. The state submitted evidence that Old Chief "did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury," for which Old Chief was sentenced to five years' imprisonment. *Id.* at 177. The jury convicted Old Chief of the new assault and the firearm possession. *Id.*

The United States Supreme Court reversed Old Chief's convictions because, although the evidence of the prior crime was relevant, the form that evidence took created unfair prejudice to the accused. *Id.* at 191-192; *see also State v. Brown*, 457 S.W3d 772, 787 (Mo.App.E.D.2014)(citing *Old Chief* and concluding that "unfair prejudice," as to a criminal defendant, speaks to the capacity of some admittedly relevant evidence to entice the factfinder to declare guilt on a ground apart from proof specific to the offense charged.) The Supreme Court recognized the prior assault evidence would necessarily prejudice jurors against the accused. *Old Chief*, 519 U.S. at 185.

This Court adopted the rationale of *Old Chief* in promulgating the jury instruction for unlawful possession of a firearm by a felon. MAI-CR3d 331.28, Notes on Use 4, states:

> The choice of language in paragraph Second [1] as to whether to merely describe the prior conviction as "a felony" or to give its name and jurisdiction will depend upon whether the defendant is willing to stipulate that he has a felony conviction. Normally, the prosecution is entitled to prove its case free from any offer by the defense to stipulate to an element of the crime. The United States Supreme Court has made

> an exception to this general rule in regard to proof of the underlying conviction in a case where the defendant is being prosecuted for being a convicted felon in possession of a weapon. If the defense is willing to stipulate that the defendant has a prior felony conviction, the conviction should not be named. See Old Chief v. United States, 519 U.S. 172 (1997).

MAI-CR3d 331.28(AppendixA43-44). With this language, this Court recognized that the name and nature of the prior offense would necessarily prejudice jurors against the accused.

This very prejudice was visited upon David because of the unreasonable and ineffective actions of his attorneys in failing to stipulate. Charged with murdering an ex-lover, evidence David had previously battered another woman would naturally paint him with a propensity for domestic violence. No reasonable trial strategy explains the failure to stipulate to this felony in the guilt phase.

Counsel was ineffective

It is hard to imagine more damaging evidence to place before the jury in the guilt phase of David's capital trial for murdering an ex-lover, than he had violently assaulted another woman. This is why this Court has repeatedly held, as a general rule, "evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes." *State v. Barriner*, 34 S.W.3d 139, 144 (Mo.banc2000). And it is especially true when a significant factor in determining prejudice is the similarity of the charged offenses to the improperly admitted evidence. *Id.* at 150 (citing Imwinkelried sec. 9.85). The jury is more likely to attach significant probative value to the improperly admitted evidence if it relates directly to the charged offenses. *Id.* The *Old Chief* court recognized this well-worn concept, acknowledging that where the prior conviction was for one similar to the charges in the pending case "the risk of unfair prejudice would be especially obvious." 519 U.S. at 652.

In this case, the improperly admitted evidence of a prior assault/battery of a woman related directly to the charged offense of murdering another woman. Within minutes of requesting and receiving Ex.280A, the jury terminated their deliberations. Although the case against David was almost entirely circumstantial – no physical evidence or eyewitness testimony linked him directly to the crime scene – once the jury saw that he had attacked a woman before, this propensity evidence allowed them to abandon further inquiry on the sufficiency of the State's guilt-phase evidence. This type of evidence could certainly contribute to the jury's verdict, *see Barriner*, 34 S.W.3d at 151–52.

In David's case, the prejudicial evidence only came before the jury because his counsel was ineffective. No legitimate strategy reason explains placing prejudicial propensity evidence before the jury during guilt phase, and their performance fell outside the bounds of competent representation. Counsel knew David's prior felony conviction would show he had engaged in prior violent conduct against a woman. It would have been impermissible for the state to put this damaging propensity evidence before the jury in guilt phase, see *Old Chief*, supra, and MAI-CR3d 331.28, Notes on Use 4, and no competent defense attorney would have introduced such damaging evidence about his own client. *See Buck v. Davis*, 137 S. Ct. 759, 775–76 (2017) (Buck's capital case contained "bizarre and objectionable testimony" that was injected by his own attorney, requiring reversal). Indeed, "[t]here is no apparent strategic basis for disclosing a defendant's felonies instead of stipulating to the fact that he was a felon ineligible to possess a firearm." *People v. Goodwin*, No. 337329, 2018 WL 3039903, at 2 (Mich. Ct. App. June 19, 2018) (citing *Old Chief*, 519 U.S. at 185); See also *Butler v. State*, 108 S.W.3d 18, 25–27 (Mo.App.W.D.2003) (counsel's choice not to object to admission of testimony was not reasonable trial strategy when case law clearly revealed challenged testimony would have been found inadmissible).

In *Kenner v. State*, 709 S.W.2d 536, 539 (Mo.App.E.D.1986), the Court held that, by failing to object to the admission of testimony concerning evidence of another burglary for which movant was not charged, defense counsel did not exercise the

customary skill and diligence that a reasonably competent attorney would perform under similar circumstances. The Court noted "the law concerning the admissibility of crimes other than those for which a defendant is on trial is very basic and not obscure. The knowledge of this principle or the acquisition thereof along with actions reasonably taken in accordance with that knowledge are within the expected standard of an attorney defending a person accused of a crime." *Id.*

Kenner was prejudiced by his attorney's failure to keep the other crimes evidence from the jury because it gave the jury the opportunity to take this evidence into consideration when making a final decision on a verdict concerning the crimes for which he was on trial. *Id.* The case law prohibiting the admission of other crime and prior bad act evidence for propensity purposes is so "basic" that trial counsel's failure to object to the admission of such evidence constitutes ineffective assistance of counsel. *Id.*

Trial counsel can be ineffective for failing to stipulate to prior offender status in a prosecution for felon in possession. *Timms v. State*, 54 So.3d 310, 316 (Miss. Ct. App. 2011) (finding trial counsel ineffective for failing to seek a stipulation that defendant had a prior for drug possession). In *Timms*, trial counsel did not seek a stipulation and compounded his ineffectiveness by mistaking Timms' drug conviction for a stolen weapon offense when questioning witnesses. *Id.* Timms was prejudiced because the nature of the crime defense counsel wrongly thought his client had been convicted of was so similar to the offense for which he was on trial. *Id.* Timms was on trial for possession of a stolen firearm as well as unlawful possession of a firearm by a felon. *Id.* at 310.

In *State v. Rivera*, 871 N.W.2d 692 (Wis. App. 2015), the defendant stood trial for violating a domestic abuse injunction and bail jumping. After his conviction, he alleged that his trial attorney was ineffective in failing to obtain a stipulation to prevent the jury from hearing about the charges underlying the bail jumping offenses – strangulation and felony intimidation of a victim. *Id.* Rivera alleged that, had trial counsel offered a proper stipulation before trial, the jury could have been informed

simply that he had been charged with a felony and released on bond. Under *Old Chief*, the circuit court would have been required to accept such a stipulation and thereby avoid any mention to the jury of the specific charges.

The appellate court agreed and reversed for a new trial, finding that Rivera was denied the effective assistance of counsel when his counsel failed to obtain a stipulation that would have prevented the jury from hearing that Rivera had been charged with other violent crimes. *Id.* Rivera was prejudiced because the references to the charges of strangulation and intimidation of a victim presented Rivera as a dangerous and violent person of poor character, and "would be arresting enough to lure a juror into a sequence of bad character reasoning." *Id.* (quoting *Old Chief*, 519 U.S. at 185).

Again, "[t]he mere assertion that conduct of trial counsel was 'trial strategy' is not sufficient to preclude a movant from obtaining post-conviction relief based on a claim of ineffective assistance of trial counsel." *State v. Galicia,* 973 S.W.2d 926, 934 (Mo.App.S.D.1998). "For 'trial strategy' to be the basis for denying post-conviction relief, the strategy must be reasonable." *Id.* Counsel's actions must be reasonable under prevailing professional norms. *McCarter*, 883 S.W.2d at 79. The motion court found that Zembles' strategy was to avoid any "surprise" to the jury in penalty phase with evidence of the other assault. Not only is this claimed strategy inconsistent with every other action taken by both trial attorneys leading up to, and during, the trial, it is also patently ridiculous. Such strategy would justify the failure to object to any and all prejudicial evidence in the guilt phase if it was potentially admissible in the penalty phase – simply to avoid surprise. It is unclear how a capital jury would possibly be "surprised" to learn of additional negative information about the defendant in the penalty phase. That is precisely what a penalty phase is for. By pleading not guilty, David surely expected defense counsel to try and prove his innocence or lessened culpability in the guilt phase. Introducing penalty phase evidence in guilt phase to avoid "surprise," simply sabotages the guilt phase, for no strategic purpose.

Guilt was not a forgone conclusion in this case. Counsel Catlett heavily challenged the only direct evidence of guilt when cross-examining the firearms expert and in closing argument. But such argument was sabotaged by allowing the admission of Ex.280A. It told the jury that David had been charged and convicted of felony battery, that his victim was a woman, that he had caused her to have a concussion, and that he received eight years in prison for this crime. This is an extremely serious offense, and certainly "arresting enough to lure a juror into a sequence of bad character reasoning." *Old Chief*, 519 U.S. at 185. This is wholly improper in the guilt phase of David's capital trial. It is inconceivable that counsel would severely compromise their reasonable strategy to contest the State's evidence in guilt, where they argued that nothing tied David to this violent crime, by opting to tell the jury that he had committed a violent crime against a woman before. This was not a reasonable trial strategy.

David is not claiming that *Old Chief* requires counsel always to stipulate. Rather, there may be rare situations where there exists a legitimate strategic reason not to do so. See e.g. *State v. Brown*, 2018 WL 827183, at 2–3 (Wash. Ct. App. Feb. 12, 2018) (counsel reasonably did not stipulate to a prior violation of a no-contact order so that they could argue that the confusing nature of the terms of that order created reasonable doubt as to what Brown understood of the conditions of the other no-contact orders. Thus, introducing this document was a part of a defense strategy.)

Here, had trial counsel proffered a stipulation before trial, or accepted the State's offer to stipulate that David had a felony conviction, all references to the nature of the prior felony charges would have been excluded. Having a prior felony conviction is a status element of the charge as it is "dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." *Old Chief*, 519 U.S. at 190. The nature of David's prior conviction was not offered to prove anything other than the status element for Count IV, i.e. that he had been previously been convicted of a felony. Counsel had no other

reasonable strategy for admitting this poisonous information in guilt phase. It was unreasonable not to stipulate.

The test of whether defense counsel should stipulate to such evidence should mirror the test applied by the trial court when confronted with such evidence. If an evidentiary alternative has equal or greater probative value and poses a lower risk of unfair prejudice, the trial court should "discount" the probative value of the disputed evidence and exclude it if the risk of unfair prejudice substantially outweighs its discounted probative value. *United States v. Becht*, 267 F.3d 767, 773 (8th Cir. 2001). In the same manner, if stipulating to the existence of the prior felony poses a lower risk of unfair prejudice to the defendant, defense counsel should stipulate to it. It would be an extremely rare situation where a reasonable strategy would justify admitting highly prejudicial, and excludable, evidence in the guilt phase.

The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some admittedly relevant evidence to entice the factfinder to declare guilt on a ground apart from proof specific to the offense charged. *Old Chief*, 519 U.S. at 180. "Although ... 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." *Id.* at 181 (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir.1982)); *State v. Brown*, 457 S.W.3d 772, 787 (Mo.App.E.D.2014). "When jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact." *U.S. v. Jenkins*, 593 F.3d 480, 486 (6th Cir. 2010) (quoting *United States v. Johnson*, 27 F.3d 1186, 1193 (6th Cir. 1994)).

The State's case against David was entirely circumstantial, based upon prior angry statements made by David at the tumultuous end of a year-long relationship with Angela. But there was no physical evidence connecting David to the actual crime – to being in that hallway when Angela was shot. Highly disputed testimony by the firearms examiner connecting the cartridges to the STEN gun found in David's car

was the crux of the State's direct evidence of guilt. The legitimacy of this forensic evidence was the battleground at trial, and counsel Catlett spent the entirety of his closing argument outlining why the jury should not credit the extremely tenuous evidence. The State's case, though circumstantial, was not overwhelming.

Within minutes of requesting Ex.280A, the jury returned a guilty verdict. This Court cannot say evidence of David's attack on another woman did not sway the jury's decision on his guilt. Confidence in the verdict has been undermined. But for trial counsels' ineffectiveness in failing to stipulate to David's prior felony, the jury would not have been exposed to this prejudicial evidence in guilt, and there exists a reasonable probability the result would have been different. A new trial is required.

II.

FAILURE TO PROPERLY MOVE TO SEVER COUNT IV

The motion court clearly erred in denying David's claim that counsel was ineffective for failing to properly move to sever Ct. IV – unlawful possession of a firearm by a felon – for a separate trial, because this denied him due process, a fair trial, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const.AmendsVI,VIII,XIV, in that reasonable counsel would have filed a written motion to sever this count to prevent the jury from hearing prejudicial evidence of the underlying violent felony conviction, and David was prejudiced because if they had properly moved to sever Ct. IV, the trial court would have granted it and the jury would never have been exposed, in guilt phase, to evidence that David had been sent to prison before for assaulting another woman, battering her in the head, and that he possibly had committed multiple other uncharged crimes of possessing numerous other unrelated firearms that the State introduced at trial.

Trial counsel orally moved to sever Count IV, but they failed to file a written motion to sever. They had no strategic reason for failing to do so. Reasonably competent counsel in similar circumstances would have filed and litigated a motion to sever Count IV. Had they properly done so, no evidence of David's prior felony underlying Count IV would have come before the jury. Instead, David was tried for murder, along with a crime which required the State to prove he was a prior felon. And because David was arrested with fifteen firearms in his car, the joint trial permitted the state to offer evidence of fourteen counts of uncharged bad acts for all of the other guns he possessed. The State elicited evidence that fifteen guns were seized from David when he was apprehended in Oklahoma, yet only one gun could have been connected with the murder or unlawful possession offense.

The State attempted to prove that the STEN was the murder weapon, and thus possessed in Missouri by David at the time of the murder. Because of Count IV,

jurors learned that David was a prior offender with a prior battery conviction against a woman, but had no instruction from the Court that they could not consider that fact as propensity evidence. And the jury could not help but notice that David had committed fourteen additional counts of possessing a weapon, given the fourteen additional guns that were paraded before them. Had Count IV been severed for a separate trial, the jury could not have considered these additional fourteen uncharged crimes at his murder trial, or his prior battery conviction during the guilt phase.

Trial Proceedings

No written motion to sever Count IV appears in the trial record. However, in David's motion for new trial, counsel included a claim that the trial court failed to sever Count IV from the proceedings. (LF.418-419). The motion for new trial, counsel noted they had only made an oral motion to sever the charges. (LF.418-419).

Counsel's first motion in limine, filed January 11, 2013, asserted that David would be prejudiced by evidence relating to Count IV, and that the details of David's prior conviction constituted evidence of other crimes (LF.154-155). Counsel argued that although the prior felony conviction was the basis of Count IV, the prejudicial impact of presenting to the jury the battery on an intimate partner far outweighed any probative value of describing that conviction. (LF.154-155).

In the same motion in limine, counsel argued that evidence David was arrested in possession of multiple firearms injected further prejudice into the case. Because the State had provided discovery and endorsed a ballistics expert to testify that the empty cartridges found at the scene were from a STEN submachine gun, counsel argued that any evidence concerning the possession of other guns during the first phase of the trial would be irrelevant and highly prejudicial. (LF.159). Counsel continued that the possession of these other unrelated firearms by a felon is an uncharged offense and offers no probative value to any elements of the offenses charged. (LF.159).

29.15 Proceedings

Following his direct appeal, David filed a post-conviction action. (D18:1-110). Claim 8(B) of his amended motion alleged that trial counsel were constitutionally

ineffective for failing to move to sever Count IV for a separate trial because the prejudice to David of being tried for a crime which required the State to prove he was a felon outweighed the efficiency of a joint trial. (D18:13-25).

Counsel Catlett's hearing testimony

Counsel Catlett testified that the defense sought to prohibit evidence of David's prior felony from coming before the jury. (PCRTR.57). They moved in limine to exclude such evidence because "the facts of the Indiana assault could be characterized as similar to what had occurred in Missouri. It was a domestic with a significant other, an intimate partner." (PCRTR.58). Catlett thought the juror might think David had a propensity for domestic violence, in addition to the prior felony being a prior bad act. (PCRTR.58).

In the same motion, they also objected to evidence that the State found other guns in David's possession. (PCRTR.58). It was the defense position that the additional guns were not relevant to the case because there was nothing linking them to the actual offense. (PCRTR.58). As Catlett testified, "[t]he fact that David had a prior felony, had prior domestic issues, and lots of guns in his possession we thought might be prejudicial to the jury." (PCRTR.58).

Although it is stated in the trial transcript that the defense told the judge that they had filed a written motion to sever Count IV, in retrospect, they could not find that one had actually been filed. (PCRTR.59; TR.725). Catlett did not realize that the motion had to be in writing. (PCRTR.59). He testified that since David was a prior offender, "he wouldn't be eligible for severance based just on the exemption from the statute that prohibits trying other cases with a capital murder case," but "[a]s far as severance for just prejudicial reasons…that was the basis of our oral motion." (PCRTR.59). Catlett had no strategic reason to avoid moving for severance, and he was unaware that he had to file a written motion particularizing the prejudice. (PCRTR.60).

Counsel Zembles' hearing testimony

Counsel Zembles agreed that the record reflects that they filed a motion in limine to keep out evidence related to the prior felony underlying Count IV and the other guns because the details of the prior battery charge and the gun evidence would be prejudicial to David in the guilt phase of the trial. (PCRTR.89). She agreed that a written motion to sever is required under Rule 24.07, and that they only made an oral motion to sever the counts prior to trial. (PCRTR.89-90). She did not realize that they had not filed a written motion, and she had no strategy reason for not filing a written motion. (PCRTR.90).

Motion Court's Findings

The motion court found that, even though defense counsel did not file a written motion to sever Count IV, the court considered their oral motion and denied it. (D40:8). It also would have denied a written motion. (D40:8). The motion court held that, just as in Claim 8(A), there was no prejudice because it was reasonable trial strategy to let the jury know in advance of the penalty phase that David had a domestic battery conviction so they would not be surprised in the penalty phase. (D40:8). These findings are reviewed for clear error. *Barry, supra*

Analysis

David was entitled to effective counsel. *Strickland, supra.* And counsel's strategy must be objectively reasonable and sound. *McCarter, supra.* Effective counsel would have properly moved to sever Count IV, especially when they recognized the highly prejudicial nature of trying Count IV with the murder charge. Counsel clearly recognized the inherent prejudice from allowing David's prior felony to come before the jury, as well as evidence of the other weapons seized from David's car. They fought to prohibit this evidence from being presented to the jury in their

motion in limine, and they had no reasonable trial strategy not to attempt to sever Count IV.[7]

To effectively seek severance of otherwise properly joined counts, the moving party must take certain steps. Rule 24.07;(AppendixA39). First, counsel must file a written motion requesting a separate trial of the offense. Rule 24.07(a). Second, counsel must make a particularized showing of substantial prejudice if the offense is not tried separately. Rule 24.07(b); *State v. Tobias*, 873 S.W.2d 650, 653 (Mo.App.E.D.1994). Third, the court must find the existence of a bias or discrimination against the party requires a separate trial. Rule 24.07(c); *State v. Couvion*, 655 S.W.2d 80, 82 (Mo.App.E.D.1983).

Even though counsel Catlett testified that David would not be eligible for severance based on a statutory prior offender exemption from trying other cases with a capital case, this is not entirely accurate. It is correct that Section 565.004.1 states that "no murder in the first degree offense may be tried together with any offense other than murder in the first degree," and that there is an exemption to this rule when the defendant is a prior offender. Section 565.004.3 states that, "[w]hen a defendant has been charged and proven before trial to be a prior offender…that offense *may be tried* and submitted to the trier together with any murder in the first degree charge with which it is lawfully joined." (emphasis added). However, a trial court is not *required* to sever first-degree murder charges from other charges where defendant qualified as a prior offender. The trial court remains under a continuing duty, even during trial, to counter prejudice and order severance, but only if necessary in the exercise of its discretion to guard against fundamental unfairness. *State v. McCrary*, 621 S.W.2d 266, 272 (Mo.banc1981).

[7] Of course, as asserted in Point I, counsel also could have alleviated any prejudice arising from introduction of evidence regarding David's previous felony conviction by stipulating to it. *See United States v. Taylor*, 293 F. Supp. 2d 884, 902 (N.D. Ind. 2003), citing *Old Chief*. To that extent, this Point is raised in the alternative.

Further, a court's discretion with respect to severance is constrained to some degree by the fact that this is a capital case. *See United States v. Taylor*, 293 F. Supp. 2d 884, 891 (N.D. Ind. 2003). Because a defendant's life hangs in the balance, Eighth Amendment jurisprudence dictates that a capital case has a heightened need for reliability and requires vigilant protection of each defendant's constitutional right to an individualized sentencing decision. *Id. citing Lockett v. Ohio*, 438 U.S. 586, 604 (1978) and *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976). Based on the prejudice resulting from the specific facts of this case – the similarity of the circumstances of the underlying prior battery charge in Count IV to the murder charge, and the danger of fourteen additional guns being considered by the jury as fourteen additional uncharged crimes of unlawful possession of a firearm by a felon – the trial court, if properly petitioned by counsel, should have severed Count IV from the capital murder charge. It was unreasonable for counsel not to properly move to sever Count IV.

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.banc2002). A reasonable probability sufficiently undermines confidence in the outcome. *Id.* at 426. Here, there is a reasonable probability that had trial counsel properly moved to sever, the trial court would have done so.

The motion court found that trial counsel did not move to sever based on a reasonable trial strategy to let the jury know during guilt phase that David had a prior domestic battery conviction so that they would not be "surprised" in the penalty phase (D40:8). As fully discussed in Point I, allowing the introduction of harmful, violent propensity evidence against their own client during the guilt phase was not reasonable. Moreover, counsel did not testify that this was any part of their decision not to sever Count IV. Rather, both attorneys testified that they did not realize they had not filed a written motion to sever, and had no strategic reason for failing to do so. The trial court's finding on the reasonableness of counsel's actions is clearly erroneous.

Further, while the trial court also held that it would not have severed Count IV even if counsel had filed a written motion, stating there was no prejudice to David by the charges being tried together, such finding is also clearly erroneous. Such a decision would also have been an abuse of discretion at trial that could have been remedied by this Court on direct appeal. The prejudice was specifically unique to this case. It is not merely that the jury would have known that David was a prior felon. The particularized prejudice was that the State's case was based entirely on circumstantial evidence – there were no eyewitnesses and no confession. In order to convince the jury that David killed Angela, evidence that he previously beat a woman was impossible for the jury to ignore. Indeed, during their guilt phase deliberations, the jury requested just one item of evidence – the certified copy of David's Indiana felony conviction. (TR.1439). That document explicitly told them that David had caused "serious bodily injury to Nancy S. Marshall" by causing her a concussion. (Ex.280A). Minutes later, the jury convicted David on all counts.

Also, because Count IV alleged that David was a felon in possession of a firearm, the State was able to present evidence of multiple counts of uncharged crimes by showing that he was arrested in possession of fifteen firearms. To the jury, each weapon amounted to an additional crime, and it would be impossible to ignore. The prosecutor used its evidence as to Count IV to repeatedly argue David's bad character and dangerousness during guilt phase:

> This defendant selected a STEN machine gun from an arsenal of guns (TR.1403).
>
> ***
>
> He not only had the STEN machine gun, but numerous weapons, numerous ammunition (TR.1405-06).
>
> ***
>
> A thing we've talked about some is the prior felon status of the defendant. That's an exhibit that hasn't been passed to you, 280A, certified records from Indiana, felony battery, eight-year sentence.

> This man was a defendant who should have never had a firearm with him. (TR.1408).

The prosecutor also insinuated that David was a potential threat to law enforcement by reminding the jury that Steve Armstrong had warned police that David was "heavily armed" (TR.1409). The prosecutor congratulated Mr. Armstrong for "putting the safety of law enforcement officers above a friendship" (TR.1409).

If it appears that a defendant is prejudiced by the joinder of offenses, a court may grant severance if there is a particularized showing of substantial prejudice. *Tobias*, 873 S.W.2d at 653; Section 545.885.2, Rule 24.07(b). Here, counsel could have made such a particularized showing of substantial prejudice to warrant severance in this capital case. The motion court clearly erred in finding otherwise, and this Court must reverse for a new and fair trial.

III.

FAILURE TO APPEAL CT. IV SHOULD HAVE BEEN SEVERED

The motion court clearly erred in denying David's claim that appellate counsel was ineffective for failing to appeal the trial court's refusal to sever Count IV – unlawful possession of a firearm by a felon – because this denied him effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S.Const.AmendsVI,VIII,XIV, in that reasonable counsel would have recognized that the trial court abused its discretion in failing to sever count IV, which count allowed the State to introduce prejudicial evidence of a prior violent domestic battery conviction, in addition to the jury being exposed to evidence that David possessed fourteen other unrelated guns, leading them to believe that he had committed fourteen other uncharged crimes of possessing a firearm, and a reasonable probability exists that this Court would have reversed David's conviction and ordered a new trial without the prejudicial Count IV.

Although trial counsel failed to properly file a written motion to sever Count IV, thus failing to preserve such request (Point II, *supra*), they did orally move to sever Count IV and raised it in David's motion for new trial. (LF.418-419). Appellate counsel, however, failed to appeal as plain error the trial court's failure to sever Count IV for a separate trial. Reasonably competent appellate counsel in similar circumstances would have recognized and asserted a claim that the court plainly erred by failing to sever Count IV. This claim was "so obvious from the record that a competent and effective lawyer would have recognized and asserted it." *Moss v. State*, 10 S.W.3d 508, 514-515 (Mo.banc2000).

Trial Proceedings

Trial counsel orally moved to sever Count IV for a separate trial, in January 2013, during proceedings in Liberty, Missouri, arguing that the evidence pertaining to Count IV would prejudice David. (Tr.725). In the motion for new trial, counsel raised

that the trial court erred by not severing Counts II, III and IV, and admitted that they had only made an oral motion to sever the charges. (LF.418-419).

Trial counsel also moved in limine to exclude evidence of David's prior felony conviction relating to Count IV, asserting that David would be prejudiced by such conviction that constituted evidence of other crimes (LF.154-155). Counsel argued that although the prior felony conviction was the basis of Count IV, the prejudicial impact of presenting to the jury the battery on an intimate partner far outweighed any probative value of describing that conviction. (LF.154-155).

In the same motion in limine, counsel argued that evidence David was arrested in possession of multiple firearms injected further prejudice into the case. Because the State had provided discovery and endorsed a ballistics expert to testify that the empty cartridges found at the scene were from a STEN submachine gun, counsel argued that any evidence concerning the possession of other guns during the first phase of the trial would be irrelevant and highly prejudicial. (LF.159). Counsel continued that the possession of these other unrelated firearms by a felon is an uncharged offense and offers no probative value to any elements of the offenses charged. (LF.159).

In his direct appeal, David's appellate counsel, Craig Johnston, raised error in the admission of evidence of the other guns seized from David, but did not appeal the trial court's failure to sever Count IV.

Post-Conviction Proceedings

Following his direct appeal, David filed a post-conviction action. (D18:1-110). Claim 8(C) of his amended motion alleged that appellate counsel was constitutionally ineffective for failing to raise a claim on appeal that the trial court abused its discretion or plainly erred in failing to sever any of the counts (D18:25-32).

Appellate Counsel Johnston's hearing testimony

Counsel Johnston represented David in his direct appeal. (PCRTR.40). He raised eight claims of error, and could have raised more, if necessary, because he had not reached the maximum word count (PCRTR.41).

Johnston acknowledged that trial counsel included a claim in David's motion for new trial that the trial court failed to sever the counts for trial. (PCRTR.43). Johnston testified that Rule 24.07 specifically requires a written motion to sever to be filed in order to preserve the claim. (PCRTR.43). Because trial counsel had not filed such a written motion, the claim was unpreserved. (PCRTR.44).

Johnston testified that he did not raise the claim as plain error, even though he often raises plain error claims. (PCRTR.44). He did not believe that the claim would fit within the plain error rule, especially when a written motion was required. (PCRTR.44). He raised issues that he felt had the best chance of winning, and he did not believe that he failed to raise any issue that could have made a difference. (PCRTR.48).

Motion Court's Findings

The motion court found that appellate counsel Johnston made a reasoned decision not to appeal as plain error the denial of trial counsel's oral motion to sever Count IV, and that no prejudice resulted. (D40:8-9).

Analysis

David was entitled to effective counsel. *Strickland, supra.* Missouri provides an appeal of right after a final judgment on an indictment or information, Section 547.070. The Due Process Clause guarantees effective assistance of counsel on a first appeal as of right, a right similar to the *Strickland* requirement of effective assistance of trial counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). To prove ineffective assistance of appellate counsel, David must show that his counsel made an error in representation, and the error overlooked was "so obvious from the record that a competent and effective lawyer would have recognized and asserted it." *Williams v. State*, 168 S.W.3d 433, 444 (Mo.banc2005).

In addition to showing counsel's performance was deficient, the movant must also demonstrate the deficient performance resulted in prejudice to his defense. *Meiners v. State*, 540 S.W.3d 832, 836 (Mo.banc2018). Prejudice occurs when "there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (citing *Strickland* at 694).

Effective appellate counsel would have challenged on appeal the trial court's denial of the oral motion to sever Count IV. Counsel clearly recognized the inherent prejudice from allowing David's prior felony to come before the jury, as well as evidence of the other weapons seized from David's car, as he challenged the admission of the numerous guns and ammunition unrelated to the crimes charged. (Mov.Ex.3).

To effectively seek severance of otherwise properly joined counts, the moving party must take certain steps. Rule 24.07. First, counsel must file a written motion requesting a separate trial of the offense. Rule 24.07(a). Second, counsel must make a particularized showing of substantial prejudice if the offense is not tried separately. Rule 24.07(b); *State v. Tobias*, 873 S.W.2d 650, 653 (Mo.App.E.D.1994). Third, the court must find the existence of a bias or discrimination against the party requires a separate trial. Rule 24.07(c); *State v. Couvion*, 655 S.W.2d 80, 82 (Mo.App.E.D.1983).

Even though trial counsel failed to file a written motion requesting a separate trial of Count IV (Point II, supra), this issue could have been raised on appeal as plain error. Rule 30.20. Reversal on plain error grounds demands a determination that "'the error so substantially affected the defendant's rights that a manifest injustice or a miscarriage of justice'" resulted. *State v. Dillard,* 158 S.W.3d 291, 299 (Mo.App.S.D.2005) (quoting *State v. Deckard*, 18 S.W.3d 495, 497 (Mo.App.S.D. 2000)). For all of the reasons discussed in Point II, incorporated herein, the failure to grant David's oral motion to sever resulted in manifest injustice. Because Count IV was tried with David's murder charge, the jury learned that David had a prior felony of assaulting another woman, and because of the numerous guns recovered from his car, the jury could reasonably believe that David had committed fourteen other uncharged crimes, besides the one charged in Count IV. This error substantially

affected David's right to a fair trial and a miscarriage of justice resulted. Effective appellate counsel would have raised this plain error on appeal.

Further, a court's discretion with respect to severance is constrained to some degree by the fact that this is a capital case. *See United States v. Taylor*, 293 F. Supp. 2d 884, 891 (N.D. Ind. 2003). Because a defendant's life hangs in the balance, Eighth Amendment jurisprudence dictates that a capital case has a heightened need for reliability and requires vigilant protection of each defendant's constitutional right to an individualized sentencing decision. *Id. citing Lockett v. Ohio*, 438 U.S. 586, 604, (1978) and *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976). Based on the prejudice resulting from the specific facts of this case – the similarity of the circumstances of the underlying prior battery charge in Count IV to the murder charge, and the danger of fourteen additional guns being considered by the jury as fourteen additional uncharged crimes of unlawful possession of a firearm by a felon – the trial court should have severed Count IV from David's capital murder charge.

The motion court's finding that appellate counsel made a reasoned decision not to raise this issue on appeal, is erroneous. David has shown that substantial prejudice resulted for the joinder of these offenses and the trial court should have granted his motion to sever. *Tobias*, 873 S.W.2d at 653; Section 545.885.2, Rule 24.07(b). The trial court's failure to do so would have been reversed by this Court on appeal had effective appellate counsel raised the issue. The motion court clearly erred in finding otherwise, and this Court must reverse for a new and fair trial.

IV.

FAILURE TO CALL PSYCHIATRIST TO EXPLAIN MITIGATING EVIDENCE OF DAVID'S STROKE AND ITS EFFECT ON HIS DEPRESSION

The motion court clearly erred in denying the claim counsel was ineffective for failing to call a psychiatrist, such as Dr. Harry, in penalty phase because David was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonably competent counsel would have called such doctor to provide significant mitigating evidence that David has areas of brain damage and lesions from a stroke, that this type of injury exacerbates pre-existing depression, and that David's behavior over the years was symptomatic of increasing depression with psychotic features which was made worse by his having a stroke, all of which would have supported the §565.032.3 statutory mitigators of extreme mental or emotional disturbance and substantial impairment. David was prejudiced because there is a reasonable probability if Dr. Harry testified, David would have been life-sentenced.

Even though counsel purported to present a mental health case in penalty phase, no expert witness was called to testify about any of David's conditions or explain any of the medical records that were dumped into evidence without being read or interpreted for the jury. Counsel failed to call Dr. Harry to testify and explain how David had suffered a stroke in 2007, and how this could exacerbate his preexisting depression. Reasonable trial counsel would have called Dr. Harry because his testimony would have supported the §565.032.3 statutory mitigators of extreme emotional disturbance §565.032.3(2) and substantial impairment §565.032.3(6), both of which were submitted. David was prejudiced because there is a reasonable probability he would have been life-sentenced if the jury had heard this testimony. Without it, the jury was left with a stack of medical records that they did not hear, read or even take back with them to the jury room.

The State's Evidence in Aggravation in Penalty Phase

Mary Hosier

Mary Hosier testified that she and David married in 1979; their marriage was not always bad, and there were happy times too. (TR.1472,1477). However, in 1986, David assaulted her in the living room of their home. (TR.1465). He grabbed her hands and used them to hit her in the face. (TR.1465). He told her, "Don't f—k with things you know nothing about." (TR.1467). Their young children were in the room and Mary told David that he did not want the kids to see this. (TR.1466). Not very long after, he stopped and left. (TR.1466-67). They separated and Mary got an order of protection. (TR.1468). As a result of the 1986 incident, David was involuntarily committed to Fulton State hospital. (TR.1482).

Richard Lee & Les Jobe

In 1986, Richard Lee was an investigator in the Cole County prosecutor's office. (TR.1484). David had come to the prosecutor's office, because he was upset with the manner in which the Sheriff's Department was attempting to serve him with civil process. (TR.1485-86). Lee learned that there was an order for a 96-hour hold for David's mental evaluation. (TR.1488). Lee thought D was a potential threat to any law enforcement who tried to serve him, and he tried to diffuse the situation by telling David that it would be easier if David allowed the service to occur. (TR.1487-88).

Lee contacted Sheriff's Deputy Les Jobe and then they met with other officers about how to serve David with the order. (TR.1488). The initial plan was that Jobe had called David and told him that he needed to come to the Sheriff's office, and when David left the house, two city officers were going to serve him. (TR.1509). When David left his house and saw the police car, he returned home before they could serve him. (TR.1509). Law enforcement believed David had weapons and children in the home, and they were fearful for his children, the neighbors, and anyone that came in contact with him. (TR.1489). They evacuated the area around David's home, blocked the streets, and engaged in a four-hour negotiation to get him outside. (TR.1489-90,1511). Eventually, David came out to the front yard, and they took him

into custody. (TR.1490-91). No one was injured and David never fired shots at anyone. (TR.1513).

Nancy Marshall

Sometime before 1992, David and Nancy Marshall were in a romantic relationship, and David moved in with her. (TR.1518-19). However, different things had happened and Nancy was not happy with David and wanted him to move out. (TR.1514-15). She obtained an order of protection against David, but then rescinded it and let him stay longer. (TR.1515). Nancy had affixed a recording device to her phone and she was recording her conversations. (TR.1519).

She testified that on November 21, 1992, David was upset and he grabbed her and took her to the basement; he handcuffed her and started hitting her in the face, which cause her to go unconscious. (TR.1515-16). She did not remember how she got away from him, but she was treated and released from the hospital with bruises and a concussion. (TR.1517-18).

Rick Canfield

Rick Canfield was called to the Nancy Marshall incident. (TR.1521). He described it as a hostage situation and there was some negotiating with David to get her out of the house. (TR.1522). David never fired a gun at anyone during this standoff. (TR.1533). David let Nancy leave the house, because he felt she needed medical attention, but he continued making threats against law enforcement. (TR.1523,1530,1532).

Somehow, David was able to get out of the house by "alluding" officers who were watching the house. (TR.1523). David went to the Indiana State Police in Peru, Indiana, and talked to Sergeant Dave Redding. (TR.1524). Canfield asked Redding to tell David to call him. (TR.1523).

Thereafter, Canfield had numerous phone contacts with David. (TR.1524). David told him that Nancy and another woman were on a recorded phone conversation laughing at him. (TR.1525). When David confronted Nancy about it, she

lied, so he hit her in the head or face. (TR.1525). He said if she had not lied to him, he would not have done that. (TR.1525).

David told Canfield that he wanted to be left alone, that he wanted time to rest, and that if anyone started to mess with him, there would be consequences. (TR.1526). He was very upset. (TR.1526). His emotions were up and down. (TR.1527). Ultimately, Canfield established a meeting place with David to turn himself in. (TR.1528). He was arrested in the courthouse courtyard in Logansport. (TR.1528).

Ron Browning

Ron Browning had known David since 1999. (TR.1535). David had married Jo around 2000, and Ron and his wife, Lisa, were married shortly thereafter. (TR.1547). Lisa and Jo worked at K-mart together. (TR.1545). Not long after David and Jo got married, things started going downhill. (TR.1548). In 2004, David and Jo were going through a divorce and Ron and Lisa offered to let David stay on their 39-acre farm property in a camper in one of the buildings, so that he could get on his feet. (TR.1535-36). Ron thought that David would live there through the fall and winter and maybe move out the following summer, but that did not happen. (TR.1536).

While David lived there, he made threats about his soon-to-be-ex-wife, Jo. (TR.1537). David had thought about taking her life at one time. (TR.1537). Ron though David had been spiraling down even before he split from Jo. (TR.1558). Ron did not suggest to David that he get mental health counseling because he thought that would make David explode given what he had gone through with his ex-wife Mary and getting involuntarily committed. (TR.1559). He did suggest to David that he see a preacher or pastor. (TR.1559). Ron felt like David was stuck and could not move on. (TR.1561).

After David had been there for two years, Ron and Lisa decided to ask David to move on; he was being confrontational with the local police and a lot of stuff was happening. (TR.1537,1553). Ron asked David to stop by the house because they wanted to talk to him. (TR.1538). When David drove up to the house, Ron met him outside, and Lisa covered him with a high-powered rifle, in case David pulled a gun

on him. (TR.1538). When Ron told David that they wanted him to move, David pulled out a handgun and pointed it at Ron. (TR.1539). Ron told him it was a cowardly way of doing things and that Lisa was "in sight." (TR.1539). David left. (TR.1540).

Ron testified that, while David lived on their property, he would get very depressed; he would stop shaving, drink a lot of Mountain Dew and have a gray tinge to his face. (TR.1550). Fall seemed like a particularly hard season for David. (TR.1553). He would get depressed, then be okay, then boom, he would go spiraling down again. (TR.1550). During the low periods, David was hardly sleeping at all. (TR.1565). Ron knew about the circumstances of David's dad's death when David was a teenager, and every now and then, when David was down, it would help to talk to him about his dad. (TR.1554). Ron knew that David still carried his Dad's badge and his dad's ring. (TR.1556).

Ron testified that he saw David in 2009, just before the homicides in Missouri, when David had come to Rochester, Indiana for a reenactment that taught kids about the 1840s. (TR.1551). It looked like David had not shaved in a week, he had a gray look to his face, and seemed agitated. (TR.1551). He was worried about David and offered to get him a place to live in Montana with a friend, so he would not have to go back to Missouri. (TR.1552).

The Defense Mitigation Case in Penalty Phase

Counsel Zembles was in charge of the penalty phase case (PCRTR.51). No expert testimony was presented in the penalty phase of David's trial. Zembles placed Fulton State Hospital records (Def.Ex.YY;Mov.Ex.30), and Audrain Medical Center records (Def.Ex.ZZ;Mov.Ex.33), into evidence, but these records were not introduced through any witness. (PCRTR.104). None of the exhibits were explained to the jury. (PCRTR.107). Zembles did not read any of the medical exhibits to the jury. (PCRTR.108). The medical records were not passed to the jury, nor did they go back with the jury during their deliberations. (PCRTR.108).

Results of David's CT scan, (Mov.Ex.37), were not included in the records submitted at trial. (PCRTR.105). Although an MRI was scheduled and performed on David before trial, Zembles did not get the results or the report, and she does not know of any reason why she would not do so. (PCRTR.106). Therefore, no films or reports about the MRI were included in the trial exhibits that were placed into evidence. (Mov.Ex.38;PCRTR.107).

Zembles presented the following evidence:

Martha Hosier (by videotaped deposition)

David's mother, Martha Hosier, testified by videotaped deposition played for the jury. (Def.Ex.FF).[8] She testified about the circumstances of David's father, Glen, being shot in the head in the line of duty as an Indiana State Trooper, on April 13, 1971. Glen died in the hospital 13 days later, having never regained consciousness. David had just turned sixteen when his father was killed.

Before Glen was killed, their family had been extremely happy and well-adjusted. They often would go camping at Cook Lake, where extended family had a cottage, and where David loved to fish with his dad. Glen had taught David how to swim at the lake and he was a good swimmer. David and his dad were extremely close; Glen was David's best friend, his hero and his mentor. They had a closer relationship than most boys have with their fathers. David was their only son. They fished and hunted together and Glen taught David about guns and gun safety.

On the night Glen was summoned out on the fatal call, David had gone upstairs to get ready for bed. When he heard the phone ring and his dad getting ready, David came downstairs and asked if he could go with him. Glen told him that it was too dangerous, and David told his dad to be careful. Glen promised David that he would be okay, and to go on to bed. That was the last time David would talk to his father.

Glen's violent death at only 43 years old, was an obviously very traumatic experience for the entire family. Mrs. Hosier did not feel that she was functioning

[8] The description of Martha Hosier's testimony is taken entirely from Def.Ex.FF.

very well as a mother after that. She does not remember processing Glen's death with the children or allowing them to express their grief. She did not feel that she was helping them at all because of her own grief.

Mrs. Hosier remembered that people were telling David that he would have to be the man of the house now, which she thought was very cruel because David was still a child. David became more withdrawn into himself. He became quieter and she never heard him discuss Glen's death, or the effects it was having on him, with anybody. She felt that David did not want to discuss things with her that would be upsetting to her. Mrs. Hosier sent David and Barbara to a psychologist one time, but he was no help to them and they refused to go a second time. The children received no other grief counseling or psychological help.

She sent David to Culver military school the summer after Glen died in April. Mrs. Hosier felt that David missed his father so much and he should be around other men. She enrolled him in another military school that fall, which was an hour and a half away from home, and he graduated from that school. She did not remember David coming home during the summers while he was at military school.

After briefly attending a few weeks of college, David enlisted in the Navy and served for four years. David had a brief marriage that was annulled, then his marriages and divorces from Mary, and then Jo. Mrs. Hosier described her relationship with David over the years as having a coldness, but she was never afraid of him. She had not spoken with him directly for several years before he was jailed on the murder charge.

Chester Brown

Mr. Brown was an officer involved in getting David out of his house during the 1986 standoff where he was taken to Fulton State Hospital. (TR.1582). No one else was in David's house during the standoff. (TR.1585). They seized a large number of guns, over 30, from all around David's house, many loaded. (TR.1586). However, during the entire incident, no one fired a shot. (TR.1588).

David Avery

David Avery is a pastor at a local church. (TR.1589). He met David in the jail while he was visiting another church member, and invited David to have communion. (TR.1590). He continued visiting with David, and had visited with him 14-15 times while David was incarcerated in both in Morgan and Cole Counties. (TR.1591). David seemed to be an avid reader of the Bible and was genuinely interested in what was happening to him spiritually. (TR.1592-93). David cried during their conversations, but they were not tears of self-pity. (TR.1594-95).

Lisa Browning

She was Ron Browning's wife when David came to live on their farm; she had known David for 8 years. (TR.1604). Over the years, she had seen changes in David's mood and behavior. (TR 1605). "Regular David" was very outgoing and helpful. (TR.1605). During 2000-early 2001, David was depressed; he would get upset easily, was withdrawn, not talkative, and he had to think about answers to simple questions. (TR.1606-08). He was not sleeping, had dark circles under his eyes, his pallor was more grayish and not ruddy, like usual, and he became isolated, spending a lot of time alone. (TR.1608-09).

Lisa observed that David's moods would cycle, sometimes really low and then all of a sudden he would be gregarious, like his old self, and then he would spiral down again. (TR.1610).

Kay Schardein

Kay is David's oldest sister. (TR.1624). She is 7 years older than David. (TR.1624). Before their dad's death, they were very close and very happy. (TR.1627). Their dad loved David and they spent as much time together as they could. (TR.1636-37). She remembered that when their father was shot, and while he was still comatose in the hospital, David disappeared. (TR.1625). They lived a short distance from the river in the town where they grew up, and David took a gun and went and hid along the riverbank. (TR.1625). It was a few days before he was found by their uncle. (TR.1625).

At the very end of their penalty phase case, Counsel Zembles submitted Def.Ex.ZZ (Fulton State Hospital records) and Def.Ex.YY (Audrain County Medical Center records) into evidence, but she did not discuss them or pass them to the jury. (TR.1638-1639).

In her closing argument, Zembles referenced David's involuntary commitment and discharge diagnosis of recurrent depression. (TR.1652). She referenced Ex.280A, the Indiana sentence and judgment where the judge recommended that David be given psychiatric treatment. (TR.1653). Zembles argued to the jury that "There's something wrong with David Hosier. There's no doubt about that." (TR.1655). She continued, "his recurrent depression with psychotic features didn't magically disappear after his month in the Fulton State Hospital." (TR.1655). She provided her own psychological analysis that David's mental health needs were not met following his father's murder, and that this was not healthy for him. (TR.1659-61). There was no mention of David having a stroke or what impact that had on his pre-existing depression before the murders.

The Post-Conviction Case

Claim 8(G) of David's amended motion alleged his trial counsel were ineffective in failing to investigate or call a medical doctor/psychiatrist, such as Dr. Bruce Harry, to testify in support of and in addition to the mitigation evidence presented in the penalty phase (D18:55-63). Such expert would have explained that the medical records reflect that David has brain damage in the form of lesions on the right side of his brain, consistent with a stroke in 2007, and this can exacerbate symptoms of depression in patients with pre-existing depression. (D18:62).

Dr. Harry's Hearing Testimony

Dr. Harry is the former clinical director at Fulton State Hospital. (PCRTR.11). He has been a consultant or fully employed there since 1982. (PCRTR.11). He was hired by motion counsel to administer a general psychiatric evaluation on David. (PCRTR.12).

Dr. Harry testified that, in June 1986, David had a decline in his performance at his job at the Jefferson City Fire Department. (PCRTR.18). He was counseled about it, as he was having trouble with attendance at work. (PCRTR.18). David was having trouble finding energy or motivation; he technically could do his work tasks, but he did not have the energy to do them. (PCRTR.19). His supervisor told him to get help, because it appeared to the supervisor that David was suffering from some kind of emotional problems. (PCRTR.19). David did get help briefly from the Employee Assistance Program, but he discontinued it because he did not feel that it was helping. (PCRTR.19). He was ultimately fired from the fire department because of these problems. (PCRTR.18).

Within a month or two of his termination from the Fire Department, David was involved in an altercation with his then-wife, Mary. (PCRTR.17). David had allegedly threatened and assaulted her; Mary filed a complaint and David was taken to Fulton State Hospital on a 96-hour hold. (PCRTR.17).

The Fulton records indicate how depressed David was at that time. (PCRTR.20). His family had found three notes that they interpreted to be suicide notes, one of which resembled a will. (PCRTR.20). His family had been quite concerned about David's mental health because he appeared depressed. (PCRTR.20). One of the observations on his admission sheet was that David had a marked episode of psychotic depression, which meant that he would lose contact with reality. (PCRTR.20).

David's family was also concerned because of David's behavior from a previous divorce where he had become quite irritable and angry, which commonly happens in people who are depressed. (PCRTR.20). They were concerned because of the threats that David was making and also the notes he wrote indicating that he would kill himself. (PCRTR.20-21).

Upon his arrival at Fulton State Hospital, psychiatrists prescribed David a medication called Desyrel, an anti-depressant. (PCRTR.21). David took a few doses and then began refusing it. (PCRTR.21).

On July 7, 1986, at a court hearing in Callaway County, it was determined that David remained a danger to himself as a result of his mental health. (PCRTR.22). It was ordered he would remain under court commitment for an additional 21 days for further treatment, for his own safety and the safety of others. (PCRTR.22).

Dr. Harry noted one of the doctors wrote that David was suspicious of the intentions of others and was emotionally detached and guarded in his relationships with others. (PCRTR.23). David was on edge and always suspecting that people were going to do him wrong or was skeptical of how other people were treating him. (PCRTR.23).

Dr. Harry testified that David had average to above average intelligence, but had some serious episodes of dysphoria, which is a mental health term for depression or painful moods, and he likely overreacted to things because of the dysphoria. (PCRTR.23). David's dysphoria affected his ability to perceive situations and to respond in a manner that was appropriate to them based on overall societal values. (PCRTR.23). David's ability to deal with situations that were frustrating for him was quite limited, if not impaired; he handled frustration very poorly when he was depressed. (PCRTR.23-24).

Over the course of 21 days, David's behavior gradually improved such that he was able to be discharged and was no longer thought to be dangerous as a result of that mental illness. (PCRTR.24). His diagnosis at discharge was major depression, recurrent, with psychotic features, with a rule out diagnosis of bipolar disorder mixed with psychotic features, plus other contributions from marital and occupational problems. (PCRTR.25). A "rule out" diagnosis means that the doctor strongly suspected David had this condition, but not enough evidence of it at that time to determine objectively. (PCRTR.25). "Psychotic features" resulted in his impulsivity, violent behavior and loss of control. (PCRTR.25-26).

Dr. Harry then testified that in January, 2007, David suddenly became weak, prominently on his left side, and had problems standing or walking. (PCRTR.27). At the time, doctors believed that he might have had what is called a transient ischemic

attack (TIA), which is a temporary decrease in blood flow, oxygen and glucose to part of the brain. (PCRTR.27-28). A TIA can have symptoms that look like a stroke, and can progress to a stroke, but not always. (PCR.28). However, subsequent testing and evaluations showed that David had, indeed, had a stroke. (PCRTR.28).

David had a CT scan at the hospital and then an MRI on January 17. (PCRTR.28-29;Mov.Ex.37). The MRI showed that David had a lacunar infarct, a stroke, which is an area of his brain that had died. (PCRTR.29). "Infarct" means tissue died as a result of deprivation of blood. (PCRTR.30). David's brain damage occurred on the left side of his brain, and on the MRI, the damage appears as little white areas. (PCRTR.31-33;Mov.Ex.38-A).

Importantly, depression is a common complication after someone suffers from a stroke. (PCRTR.33). Even before suffering the stroke in January, 2007, David had been diagnosed with recurrent depression, and the stroke further increased his risk of subsequent episodes of depression. (PCRTR.33). Depression and brain damage can also affect memory. (PCRTR.37). David's stroke occurred relatively close in time to the murders. (PCRTR.33).

Dr. Harry's opinion was that David's behavior is consistent with depression and mixed-state bipolar disorder, which means he can rapidly alternate between mania and depression or almost have symptoms of both, simultaneously. (PCRTR.36). A person with these conditions can look very irritable, agitated and angry, when it is actually the symptoms of the mixed bipolar disorder that is causing it. (PCRTR.37). Dr. Harry explained that, the evidence shows that each time David had a breakup with a wife or a girlfriend, he had behavior that was consistent with diagnosis of major depression and bipolar disorder. However, his mental health issues can be treated with medication. (PCRTR.37).

In addition to the psychiatric medical records, Dr. Harry also explained that the records show that David suffers from venous insufficiency, which means that the veins in his legs that return the blood to the heart do not adequately convey enough blood, so it pools in his legs and causes swelling, pain and discoloration. (PCRTR.34).

David's military medical records, from 1969 when he was 19, also show that he has right-sided hearing loss, especially at higher frequencies, which is the beginning of deafness. (PCRTR.35;Ex.35).

David told Dr. Harry that he did not request or desire that his attorneys put on mental health evidence. (PCRTR.38). Dr. Harry explained that David is very skeptical of psychiatric and mental-health related issues, and does not have much faith in it, and this is because his mental health issues cause him to see himself very differently than other people see him. (PCRTR.38). These psychiatric and medical conditions are still present within David's brain and his personality, even though he does not have faith in the doctor's evaluations. (PCRTR.38-39).

Counsel Zembles' Testimony

Counsel Zembles was primarily responsible for the penalty phase case of David's trial. (PCRTR.79). This was the last death penalty case she tried before she retired. (PCRTR.77-78,115). Zembles testified that she submitted three mitigators to the jury:

> 1) Whether the murder of Angela Gilpin was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> 2) 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;
>
> 3) the age of the defendant at the time of the offense.

(PCRTR.103;LF403).

To support these mitigators, she placed some medical records into evidence, but she did not call a medical doctor from Fulton State Hospital to explain the exhibits to the jury. (PCRTR.107). Although an MRI had been performed on David, she did not obtain the results or the report, and she could not think of any reason why they would not have wanted to obtain them. (PCRTR.106). She had no strategic reason for not calling a medical doctor to educate the jury about David's medical records.

(PCRTR.108). She did not read the medical records to the jury. (PCRTR.108). None of the medical records were passed to the jury, nor did they go back to with the jury during deliberations. (PCRTR.108).

Zembles did not think that David asked her to pursue a mental health defense, but he never indicated to her that he did not want her to pursue a psychiatric or mental health defense. (PCRTR.116-117).

The Motion Court's Findings

The motion court found that Dr. Harry testified that David did not want a mental defect defense presented to the jury, and that there is nothing in the record to suggest that a mental defense expert would have helped at David's trial. (D40:10). Therefore, David was not prejudiced by his trial counsel following his wish to not present a mental defect expert to the jury. (D40:10). This Court reviews 29.15 rulings for clear error. *Barry*, 850S.W.2d at 350.

Statutory Mitigation

Section 565.032.3 provides that statutory mitigating circumstances include:

…

(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.

In David's case, Instruction #5 submitted both of the above mitigating circumstances. (LF.403).

Counsel Was Ineffective

The Eighth and Fourteenth Amendments require that the sentence not be precluded from considering, as a mitigating circumstance, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604

(1978). Defense counsel in a death penalty case are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510; *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000); *Kenley v. Armontrout*, 937 F.2d 1298, 1307-09 (8th Cir. 1991). "Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy." *Kenley*, 937 F.2d at 1304. Hence, lack of diligence in preparation and investigation of mitigating circumstances is not protected by a presumption in favor of counsel and cannot be justified as trial strategy. *Id.* Even when counsel make decisions on trial strategy after preparation and investigation, their choice of strategy must be objectively reasonable and sound. *McCarter*, 883 S.W.2d at 78. The failure to pursue a single important item of evidence may constitute ineffective assistance of counsel. *State v. Wells*, 804 S.W.2d 746, 748 (Mo.banc1991).

"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.banc2004) and *Glass v. State*, 227 S.W.3d 463, 468 (Mo.banc2007)). Relevant mitigating evidence "is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard*, 542U.S.at 284. Evidence of impaired intellectual functioning is "inherently mitigating." *Id.* at 287.

In *Hutchison*, 150 S.W.3d at 307 (Mo.banc2004), this Court concluded counsel was ineffective for failing to present a thorough comprehensive expert presentation. Counsel in *Hutchison* did not attempt to find the psychiatrist who treated the defendant, even though this information was made known to counsel before trial. *Id.* at 305. In David's case, even though defense counsel was clearly trying to put on a mental health defense – admitting hospital records and making an argument about his psychological diagnosis in her closing argument – the jury received no expert presentation about how David's psychiatric diagnosis affected his behavior, and, most importantly, how his stroke and resulting brain damage in 2007, caused a worsening

of his depressive symptoms which would help the jury understand why this violent act towards Angela was so much more severe than any previous act David had committed against the women (Mary Hosier and Nancy Marshall), that the State also presented in its penalty case. David's condition, as a result of his stroke, was deteriorating.

In *Glass v. State*, 227 S.W.3d 463, 470-71 (Mo.banc2007), counsel was ineffective for failing to call multiple expert witnesses who could have 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 have 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.* at 471. Additionally, counsel was ineffective for failing to call a learning disability expert, who identified Glass' learning deficits. *Id.* 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.* at 470-71. *See also, Hutchison*, 150 S.W.3d at 305 (same) (relying on *Tennard*, 524 U.S. at 289).

In *Taylor v. State*, 262 S.W.3d 231, 251 (Mo.banc2008), trial counsel failed to introduce into evidence any of the records on which their expert relied in reaching his conclusions regarding Mr. Taylor's abusive background, history of mental illness, and eventual diagnosis. This Court ruled that "[b]ecause of the unique nature of capital sentencing - both the stakes and the character of the evidence to be presented - capital defense counsel have a heightened duty to present mitigation evidence to the jury." *Id.* at 249, citing *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (because the focus of capital penalty phase proceedings is on the defendant's personal culpability, the

sentencing jury must have the opportunity to evaluate the "character and record of the individual offender," as well as the "circumstances of the particular offense."); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("evidence about the defendant's background and character is relevant because of the belief... that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse").

Accordingly, the Supreme Court has repeatedly found attorneys ineffective for failing to present mitigating evidence. *Williams v. Taylor*, 529 U.S. 362, 398-399 (2000) (counsel failed to present mitigation evidence regarding his life history); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (counsel has an affirmative obligation to investigate and present mitigation evidence to the jury at the penalty phase relating to the defendant's background); *Rompilla v. Beard*, 545 U.S. 374, 392-393 (2005) (counsel failed to present evidence relating to the defendant's background and mental health); *Porter v. McCollum*, 558 U.S. 30 (2009) (counsel's failure to uncover and present evidence of defendant's mental health, family background and military service was deficient); *Sears v. Upton*, 561 U.S. 945 (2010) (evidence of brain damage is relevant mitigating evidence the jury should consider).

Like in *Hutchison*, *Glass* and *Taylor*, the jury did not hear compelling and available expert mitigating evidence in David's trial. They heard *no* expert evidence whatsoever. And although counsel dumped the records into evidence at the very end of the defense case, she did not read any of the records to the jury, pass them to the jury, or encourage the jury to review them on their own during deliberations. The jury never saw the records at all, and they heard no expert testimony in this capital case, even though this evidence was available and vitally important to their decision about David's life or death.

Despite having the Fulton State Hospital records and the Audrain Medical Records (Def.Ex.YY&ZZ), counsel failed to investigate and present to the jury a credible and qualified medical/psychiatric expert to testify in the penalty phase. Evidence of a troubled history is relevant to assessing a defendant's moral culpability.

Wiggins v. Smith, 539 U.S. 510, 535 (2003). Dr. Harry would have shown the jury David's brain damage resulting from his stroke, which is apparent from the MRI films and CT scans. Zembles had not even requested or received the MRI films and reports, so she did not know or see that there were lacunar infarcts on the MRI scan showing that a portion of David's brain has died. Dr. Harry would have explained how David's stroke exacerbated his pre-existing depression, making it significantly worse, closer in time to the murder.

Dr. Harry also would have been able to pull together all of the anecdotal information from the lay witnesses who testified about David's "up and down" moods and rapid mood swings, and explained to the jury that these symptoms over the years and during the time leading up to the murder was consistent with depression and bipolar disorder. This information supported two of the three statutory mitigating circumstances submitted by the defense.

Reasonable counsel would have called Dr. Harry in the penalty phase. *See Tennard*, *Hutchison*, *Glass* and *Taylor*. In deciding prejudice from failing to present mitigating evidence courts are required to evaluate the totality of the evidence. *Hutchison v. State*, 150 S.W.3d at 306 (relying on *Wiggins*, 539 U.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*, 150 S.W.3d at 306. Here, the jury would have heard compelling mitigation evidence that David suffered from not only psychotic depression and bipolar disorder, but also a stroke and resulting brain damage which exacerbated his depression symptoms, making them significantly worse. This testimony would have supported the §565.032.3 statutory mitigators of extreme emotional disturbance and substantial impairment. *Cf. Glass, supra* (failure to call toxicology pharmacologist who supported same mitigators).

The motion court's findings are clearly erroneous. Dr. Harry did not testify that David explicitly told his trial attorneys that he did not want a mental defense presented (PCRTR.38), and Zembles testified that David never indicated that he did

not want her to pursue such a defense. (PCRTR.116-17). The most obvious evidence of this is that she *did* present a mental health defense, albeit with only anecdotal lay witnesses, no expert testimony, and medical records that were never seen or heard by the jury. Zembles basically attempted to give her own psychoanalytical conclusion about David during her closing argument, with no expert testimony to support it. This was unreasonable and the motion court's findings are clearly erroneous.

Reasonable counsel would have called Dr. Harry. *See Hutchison*, *Glass*, and *Strickland*. David was prejudiced because the jury didn't hear substantial mitigation to support extreme emotional disturbance §565.032.3(2) and substantial impairment §565.032.3(6) for which there's a reasonable probability David would have been life sentenced. *See Tennard* and *Strickland*. A new penalty phase is required.

V.

SPECIAL JUDGE OXENHANDLER SHOULD HAVE RULED JUDGE JOYCE WAS DISQUALIFIED AS MOTION COURT

Special Judge Oxenhandler abused his discretion in denying David's claim that Judge Joyce should have been disqualified from presiding over his post-conviction case because this denied him due process of law, U.S.Const.Amend, XIV, and violated the Code of Judicial Conduct, Rule 2-2.11, in that Judge Joyce, (also the trial judge), was the attorney of record for David's ex-wife, Mary Hosier, in a child support enforcement case filed against David in 1988, and Mary was a key penalty phase witness against David, where she testified about their marriage and divorce as well as an alleged assault on her during the marriage which led to David's involuntary commitment to Fulton State Hospital, and Judge Joyce's previous representation of Mary, as "attorney for Petitioner," created an appearance of impropriety, and made her a witness to claims made in the amended motion, requiring her disqualification from David's post-conviction case, and David was deprived of a fair hearing.

In his amended motion, David alleged that he was denied a fair trial because his trial judge, Judge Patricia Joyce, had a conflict of interest which precluded her from presiding over the guilt and penalty phases of his trial, in that Judge Joyce was listed as the attorney of record for David's ex-wife, Mary Hosier, a State's penalty phase witness, in a civil case filed against David in 1988. (D18:78-81) (Claim 8(J)).

Because of this claim, motion counsel also moved to disqualify Judge Joyce from presiding over David's post-conviction case. (D17:1-5). This Court appointed the Honorable Gary M. Oxenhandler to determine the issue of disqualifying Judge Joyce from presiding over David's post-conviction case. (D20:1; D24:1). An evidentiary hearing on this issue was held before Judge Oxenhandler on December 1, 2015 (D36:1-24). Following the hearing, Judge Oxenhandler denied David's motion to disqualify Judge Joyce. (D29:1-2;AppendixA13-14).

Disqualification Hearing Testimony

At the hearing on December 1, 2015, David presented a certified record showing that Judge Joyce was the attorney of record listed as representing Mary Hosier in a Child Support Enforcement case related to their divorce, *Mary Hosier vs. David Hosier*, Cole County, Case No. 1901A088152. (D36:4-7;D27:2;AppendixA23-36). Judge Joyce was also the trial judge at David's death penalty trial, where Mary was called as a State's penalty phase witness. (D36:6).

Judge Joyce herself testified at the hearing. (D36:10-23). She became a judge in the 19th Circuit in January, 1995, and has been a judge continuously since then. (D36:10). Before becoming a judge, she served as an assistant prosecuting attorney for the Cole County Prosecuting Attorney's Office from March 1, 1983 to December 31, 1994. (D36:10).

As an assistant prosecutor, she exclusively handled the child support cases, as well as felony and misdemeanor cases and also represented Cole County in civil matters. (D36:11). In the course of the child support cases, she represented the State of Missouri for the Child Support Enforcement Agency. (D36:11). Although she is listed as attorney of record for the Petitioner, she did not specifically represent the Petitioner and they had no attorney/client relationship with any of the people they were trying to collect child support for. (D36:15). However, if a case went to court, she might have talked to the Petitioners or had them testify. (D36:14). She mainly had to appear in court when there was a paternity issue. (D36:18). She had an active docket of 500 wage assignment cases, and possibly 3,000-5,000 cases where administrative orders had been filed to collect them. (D36:20).

In terms of this specific child support enforcement case involving Mary Hosier and David Hosier, Judge Joyce's name was listed as the attorney of record for the Petitioner, Mary Hosier, on the Petition. (D36:13; D27:2). Judge Joyce had no memory of having any contact with Mary or David during that case. (D36:12). Judge Joyce thought that it looked like their case was an administrative hearing at the State level, so the prosecutor's office would have had no enforcement action whatsoever.

(D36:16). Her name was just on the paperwork as representing Petitioner Mary Hosier, even though she was not actually representing Mary Hosier. (D36:17). She had no actual personal contact with Mary Hosier. (D36:17).

The motion to disqualify Judge Joyce also referenced that David had been charged with assaulting Mary in 1986 in Cole County, but she did not prosecute that case or review it in any way; she only had a fleeting memory of something about it in the news. (D36:12).

Judge Oxenhandler's findings

On December 15, 2015, Judge Oxenhandler issued an Order denying the disqualification of Judge Joyce in David's 29.15 case. (D29:1-2:AppendixA13-14). Judge Oxenhandler found that Judge Joyce represented the State of Missouri in a child support collection wherein David Hosier was the respondent. (D29:1). Twenty-five years later, David's spouse at the time of the child support collection case (ex-spouse at the time of trial) appeared as a State's witness in the penalty phase of David's criminal trial, where Judge Joyce was the presiding judge. (D29:1). Judge Oxenhandler found that Judge Joyce did not represent Mary in that matter, but represented the State of Missouri. (D29:1). She never met David's spouse, nor did she ever attend a hearing with regard to their child support collection matter. (D29:1). No evidence showed that Judge Joyce recalled her past representation or that she acted in any manner that indicated that her past representation of the State impacted any decisions that she made or might make in Movant's case. (D29:1).

Judge Oxenhandler held that there was no evidence of any factual basis that would lead a reasonable person to find an appearance of impropriety and doubt the impartiality of the court. (D29:1-2).

Analysis

Judge Oxenhandler was required to find that Judge Joyce should be disqualified from presiding over David's 29.15 post-conviction case, because there was an appearance of impropriety and that she could not fairly serve, given her prior representation of the listed Petitioner, Mary Hosier, in a child support enforcement

case against David, and the fact that she was also a fact witness to her conflict in presiding over David's trial (Claim 8(J) of Amended Motion). Once a defendant has been granted a postconviction hearing by statute or rule, he has a right to an unbiased judge. "Due process concerns permit any litigant to remove a biased judge." *Thomas v. State*, 808 S.W.2d 364, 367 (Mo.banc1991).

Rule 2-2.11(A)(1) also provides, "A judge shall recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," including situations when the judge "has a personal bias or prejudice concerning a party ... or knowledge of facts that are in dispute in the proceeding that would preclude the judge from being fair and impartial." (AppendixA37-38). And Rule 2-2.11(A)(5)(c) includes circumstances where the judge "was a material witness concerning the matter." In any event, under this Rule, a judge should recuse whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) to (5) apply. Rule 2-2.11, Comment [1]. And the existence of an appearance of impropriety under Rule 2, is based on the perception of a member of the general public, not one trained in the law. *Haynes v. State*, 937 S.W.2d 199, 203 (Mo.banc1996).

"One of the very objects of law is the impartiality of its judges in fact and appearance." *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring). "A fair and impartial judge is the cornerstone of the integrity of the judicial system. Even the appearance of partiality can erode the public's confidence in the integrity of the judiciary." *In re Judicial Disciplinary Proceedings Against Laatsch*, 727 N.W.2d 488, 491 (Wis.2007). "[T]o recuse where there is an appearance of impropriety, is a duty owed to the public in order to promote confidence in the impartiality of the judiciary." *Robin Farms, Inc. v. Bartholome*, 989 S.W.2d 238, 247 (Mo.App.W.D.1999). "Because litigants who present their disputes to a Missouri court are entitled to a trial which is not only fair and impartial, but which also appears fair and impartial, the test for recusal is not whether the court is actually biased or prejudiced. Rather, the test for recusal when the judge's impartiality is challenged is

"'whether a reasonable person would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court.'" *Moore v. Moore*, 134 S.W.3d 110, 115 (Mo.App.S.D.2004)

"It is presumed that a judge acts with honesty and integrity and will not undertake to preside in a trial in which the judge cannot be impartial." *Smulls v. State*, 10 S.W.3d 497, 499 (Mo.banc2000) (citation omitted). "This presumption can be overcome and disqualification is required if a reasonable person would find an appearance of impropriety and doubt the impartiality of the court," but there "must be a factual context that gives meaning to the kind of bias that requires disqualification of a judge." *Id.*, citing *Haynes*, 937 S.W.2d at 203.

In the case of *In the Interest of K.L.W.*, 131 S.W.3d 400 (Mo.App.W.D.2004), a family court commissioner received ex parte letters from a former foster parent whose interests were at odds with a child's current foster parent. *Id.* at 402–04. The commissioner subsequently permitted adoption of the child by the former foster parent who authored the ex parte letters, and denied a competing petition for adoption filed by the current foster parent. *Id.* at 403–04. The current foster parent appealed, and argued that the commissioner improperly denied a motion for change of judge filed by the guardian ad litem. *Id.* *K.L.W.* represents the classic scenario where objective facts established an appearance of a disqualifying bias or prejudice emanating from an extrajudicial source and resulting in an opinion on the merits on some basis other than what the commissioner learned from participation in the case. *Haynes*, 937 S.W.2d at 202.

In *Anderson v. State*, 402 S.W.3d 86, 92-93 (Mo.banc2013), a motion court made multiple on the record "references to the judge's out-of-court conversations with the foreperson of the jury" in Anderson's trial, on subjects implicated by Anderson's post-conviction motion. The record also established that the motion court gave counsel a magazine article implicating the credibility of Anderson's mental health expert under circumstances that suggested the judge had procured the article on his own. *Id.* at 93. This Court found the content of the conversations with the jury

foreperson and the magazine article to be clearly extrajudicial, and found that "[b]ased on the motion court's statements throughout the proceedings on [Anderson's] Rule 29.15 motion, a reasonable person would have factual grounds to believe the motion court relied on its conversations with the jury foreperson, the [magazine] article or both in deciding issues in the case." *Id.* at 94.

In *Moore v. Moore*, 134 S.W.3d 110 (Mo.App.S.D.2004), a family court commissioner received an investigative report from a domestic relations officer that no party had access to; the commissioner issued findings and recommendations on temporary custody the next day; and the investigative report "figured prominently in [the commissioner's] decision to transfer temporary custody," as the commissioner's order included a finding that referred to the investigative report. *Id.* at 112, and n. 4. Based on these objective facts, the court concluded that the commissioner's receipt of the investigative report was an ex parte communication that "created the appearance of impropriety which would cause a reasonable person to doubt [the commissioner's] ability to preside over the motion to modify as an impartial arbiter." *Id.* at 115.

These cases teach that proof of a disqualifying bias or prejudice requires the assertion of objective facts suggesting that as a result of an ex parte contact, a reasonable person could conclude that a judge received extra-judicial information which influenced a decision on the merits. Here, Judge Joyce's prior employment as a Cole County prosecutor, where she actually was entered as the attorney of record for Petitioner, Mary Hosier, (D27), are objective record facts, suggesting that as a result of that representation, a reasonable person could conclude that the judge received information from that case which influenced a decision on the merits at David's trial, or in this post-conviction case. The appearance of impropriety is the objective fact of her former representation of a witness in the case. *See State v. Cella,* 32 S.W.3d 114, 119 (Mo.banc2000) ("[A] disqualifying bias and prejudice is one with an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has learned from participation in the case."); see also *Robin Farms, Inc. v. Bartholome*, 989 S.W.2d at 250 (where the trial judge previously

represented one of the parties, out of an abundance of caution it may have been better for the judge here to have recused.)

A reasonable person would have factual grounds to believe that there was the appearance that Judge Joyce could not fairly serve as the motion court. Mary Hosier was a key witness for the State in seeking the death penalty against David. The State called Mary to testify to the facts and circumstances surrounding her marriage to David as well as the facts and circumstances surrounding his involuntary commitment to Fulton State Hospital, the order of protection against David she petitioned for and was granted in Cole County as a result of an alleged assault against her during their marriage, and his violations of that order of protection. (Tr.1472-82). Because Judge Oxenhandler did not disqualify Judge Joyce, a new 29.15 hearing is required.[9]

[9] David's burden is only to establish there was the appearance to a reasonable person that Judge Joyce could not fairly serve and not that Judge Joyce actually was unfair. *State v. Smulls*, 935 S.W.2d 9, 17 (Mo.banc1996).

VI.

JUDGE JOYCE SHOULD HAVE RECUSED AS TRIAL JUDGE DUE TO CONFLICT OF INTEREST

The motion court clearly erred in denying David's claim that the trial judge should have been disqualified from presiding over his trial due to a conflict of interest, because this denied him due process, and freedom from cruel and unusual punishment, U.S.Const.Amends VI,VIII,XIV, and violated the Code of Judicial Conduct, Rule 2-2.11, in that the trial judge was the attorney of record for David's ex-wife, Mary Hosier, in a child support enforcement case filed against David in 1988, and Mary was a key penalty phase witness against David at his trial, where she would testify about their marriage and divorce as well as an alleged assault on her during the marriage which led to David's involuntary commitment to Fulton State Hospital, and the trial judge's previous representation of Mary created an appearance of impropriety and requiring her recusal from David's trial, and deprived him of a fair trial.

In his amended motion, David alleged that he was denied a fair trial because his trial judge, Judge Patricia Joyce, had a conflict of interest which precluded her from presiding over the guilt and penalty phases of his trial, in that Judge Joyce was listed as the attorney of record for David's ex-wife, Mary Hosier, a State's penalty phase witness, in a civil case filed against David in 1988. (D18:78-81) (Claim 8(J)).

Because of this claim, motion counsel also moved to disqualify Judge Joyce from presiding over David's post-conviction case. (D17:1-5). This Court appointed the Honorable Gary M. Oxenhandler to determine the issue of disqualifying Judge Joyce from presiding over David's post-conviction case. (D20:1;D24:1). An evidentiary hearing on this issue was held before Judge Oxenhandler on December 1, 2015 (D36:1-24). Following the hearing, Judge Oxenhandler denied David's motion to disqualify Judge Joyce. (D29:1-2).

Disqualification Hearing Testimony

At the hearing on December 1, 2015, David presented a certified record showing that Judge Joyce was the attorney of record listed as representing Mary Hosier in a Child Support Enforcement case related to their divorce, *Mary Hosier vs. David Hosier*, Cole County, Case No. 1901A088152. (D36:4-7;D27:2;AppendixA23-36). Judge Joyce was also the trial judge at David's death penalty trial, where Mary was called as a State's penalty phase witness. (D36:6).

Judge Joyce herself testified at the hearing. (D36:10-23). She became a judge in the 19th Circuit in January, 1995, and has been a judge continuously since then. (D36:10). Before becoming a judge, she served as an assistant prosecuting attorney for the Cole County Prosecuting Attorney's Office from March 1, 1983 to December 31, 1994. (D36:10).

As an assistant prosecutor, she exclusively handled the child support cases, as well as felony and misdemeanor cases and also represented Cole County in civil matters. (D36:11). In the course of the child support cases, she represented the State of Missouri for the Child Support Enforcement Agency. (D36:11). Although she is listed as attorney of record for the Petitioner, she did not specifically represent the Petitioner and they had no attorney/client relationship with any of the people they were trying to collect child support for. (D36:15). However, if a case went to court, she might have talked to the Petitioners or had them testify. (D36:14). She mainly had to appear in court when there was a paternity issue. (D36:18). She had an active docket of 500 wage assignment cases, and possibly 3,000-5,000 cases where administrative orders had been filed to collect them. (D36:20).

In terms of this specific child support enforcement case involving Mary Hosier and David Hosier, Judge Joyce's name was listed as the attorney of record for the Petitioner, Mary Hosier, on the Petition. (D36:13; D27:2). Judge Joyce had no memory of having any contact with Mary or David during that case. (D36:12). Judge Joyce thought that it looked like their case was an administrative hearing at the State level, so the prosecutor's office would have had no enforcement action whatsoever.

(D36:16). Her name was just on the paperwork as representing Petitioner Mary Hosier, even though she was not actually representing Mary Hosier. (D36:17). She had no actual personal contact with Mary Hosier. (D36:17).

The motion to disqualify Judge Joyce also referenced that David had been charged with assaulting Mary in 1986 in Cole County, but she did not prosecute that case or review it in any way; she only had a fleeting memory of something about it in the news. (D36:12).

Judge Oxenhandler's findings

On December 15, 2015, Judge Oxenhandler issued an Order denying the disqualification of Judge Joyce in David's 29.15 case. (D29:1-2;Appendix13-14). Judge Oxenhandler found that Judge Joyce represented the State of Missouri in a child support collection wherein David Hosier was the respondent. (D29:1). Twenty-five years later, David's spouse at the time of the child support collection case (ex-spouse at the time of trial) appeared as a State's witness in the penalty phase of David's criminal trial, where Judge Joyce was the presiding judge. (D29:1). Judge Oxenhandler found that Judge Joyce did not represent Mary in that matter, but represented the State of Missouri. (D29:1). She never met David's spouse, nor did she ever attend a hearing with regard to their child support collection matter. (D29:1). No evidence showed that Judge Joyce recalled her past representation or that she acted in any manner that indicated that her past representation of the State impacted any decisions that she made or might make in Movant's case. (D29:1).

Judge Oxenhandler held that there was no evidence of any factual basis that would lead a reasonable person to find an appearance of impropriety and doubt the impartiality of the court. (D29:1-2).

After Judge Oxenhandler denied David's motion to disqualify Judge Joyce, an evidentiary hearing was held before Judge Joyce on October 5, 2017. (PCRTR.1-120). At the outset of that hearing, motion counsel renewed David's request for Judge Joyce to recuse herself from the case because of the specific Due Process claim in David's amended motion, which alleged Judge Joyce had a conflict which precluded her from

presiding over David's capital trial and penalty phase (Claim 8(J)). (PCRTR.6-7). Judge Joyce denied that motion, stated she "has no recollection whatsoever of the underlying child support case" and "I have no recollection of the other case other than what I had heard." (PCRTR.7).

Judge Joyce issued Findings of Fact and Conclusions of Law regarding Claim 8(J), adopting Judge Oxenhandler's findings regarding this case, stating that "[t]he same analysis shows there was no conflict of interest in the criminal case as well." (D40:12).

Analysis

This Court reviews 29.15 rulings for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo.banc1993). Due process requires a fair hearing. *Thomas v. State*, 808 S.W.2d 364, 367 (Mo.banc1991); *In re Murchison*, 349 U.S. 133, 136(1955). "The test" and standard of review for disqualification is: "whether a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court." *State v. Smulls*, 935 S.W.2d 9, 17 (Mo.banc1996); *Aetna Life Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("justice must satisfy the appearance of justice"). The benefit of any doubt is accorded a litigant, not a judge. *Smulls*, 935 S.W.2d at 26-27. Bias warranting disqualification must come from an extrajudicial source and not from what a judge learned from serving on the case. *State v. Nicklasson*, 967 S.W.2d 596, 605 (Mo.banc1998). When reviewing a disqualification claim, it is relevant to consider "all that has been said and done in the presence of the judge." *Haynes v. State*, 937 S.W.2d 199, 203 (Mo.banc1996).

For all of the reasons set out in Argument V above, and fully incorporated herein, Judge Joyce also should have recused herself from presiding over David's capital trial. A reasonable person would have factual grounds to believe that there was the appearance that Judge Joyce could not fairly serve as the trial judge, given her prior representation as "Attorney for Petitioner, Mary Hosier" in *Mary Hosier vs. David Hosier*, Cole County Case No. 1901A088152. (D36:4-7;D27:2). Mary Hosier was a key witness for the State in seeking the death penalty against David. The State

called Mary to testify to the facts and circumstances surrounding her marriage to David as well as the facts and circumstances surrounding his involuntary commitment to Fulton State Hospital, the order of protection against David she petitioned for and was granted in Cole County as a result of an alleged assault against her during their marriage, and his violations of that order of protection. (Tr.1472-82). Because she was disqualified from presiding over David's trial, a new trial, before a new judge is required.[10]

[10] David's burden is only to establish there was the appearance to a reasonable person that Judge Joyce could not fairly serve and not that Judge Joyce actually was unfair. *Smulls*, 935 S.W.2d at17.

VII.

FAILURE TO STRIKE JUROR MOULTON (#14)

The motion court clearly erred when it denied the claim that counsel was ineffective for failing to strike Juror Moulton who was heavily biased towards imposing death because David was denied effective assistance, due process, right to a jury trial before a fair and impartial jury, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonably competent counsel under similar circumstances would have moved to strike Moulton and David was prejudiced because a juror who could not realistically consider life served on his jury.

Trial Proceedings

Before trial, the parties submitted juror questionnaires to the prospective jurors. (PCRTR.61). Each questionnaire invited prospective jurors to rank, numerically, their opinion of the death penalty from 1 (Strongly Opposed) to 7 (Strongly in Favor). (PCRTR.61). Each questionnaire asked potential jurors to describe in detail their opinions and beliefs about the death penalty for a person found to have committed two deliberate first degree murders. (PCRTR.61). They were also asked to describe in detail their opinions and beliefs about the penalty of life without the possibility of parole if a person is found to have committed two deliberate first degree murders. (PCRTR.61).

Juror #14, Randy Mouton, indicated a numerical bias of 7 – strongly in favor of the death penalty. (Mov.Ex.39). He wrote: "I believe in the death penalty for a person who commits murder but I feel you would have to know the circumstances that drove them to this." (Mov.Ex.39). Concerning life without parole, he wrote, "life in prison doesn't seem like a fair sentence to me but again you would have to know the circumstances of the case." (Mov.Ex.39).

Prior to trial, trial counsel ranked the venirepersons' questionnaires. As to Moulton, trial counsel concluded he was a "wagon joiner – push off." (Mov.Ex.40).

During voir dire, trial counsel did not confront Juror Moulton's statements. The State asked Juror Moulton if he could meaningfully consider a death verdict, a life verdict, and sign his name to a death or life verdict, if necessary. (Tr.298-99). Moulton responded, "Yes" (Tr.298-99). Counsel Catlett asked Juror Moulton's group whether they would consider life without parole "a meaningful sentence to be considered" (Tr.319). Moulton answered, "Yes." (Tr.319). Mr. Catlett asked Juror Moulton if he would hold it against David if he elected not to testify; Moulton said, "No." (Tr.331). Moulton also agreed he understood the burden was "all on the State" in guilt and penalty phase (Tr.331-32). Finally, Moulton agreed the fact of two murders would not change his mind about whether life without parole could be a meaningful sentence. (Tr.337). Catlett did not ask Juror Moulton why he thought "[l]ife in prison doesn't seem like a fair sentence to me[.]" (Mov.Ex.39).

Juror Moulton sat on David's jury that found him guilty and imposed the death penalty. (Tr.704,1440,1672).

Post-conviction Case

In Claim 8(D) of his amended motion, David alleged that his trial counsel were ineffective in failing to question and strike juror Randy Moulton (#14), who indicated on his questionnaire that he was in favor of the death penalty and resistant to imposing a sentence of life without parole. (D18:32-42).

Counsel Catlett's Testimony

Counsel Catlett testified that their jury consultant prepared a chart for each juror, which was like a scoring system. (PCRTR.64;Mov.Ex.40). The scoring system is 1-6, with 6 being an unfavorable juror that you want to get off the jury. (PCRTR.64). Moulton had a score of 6F, which was an unfavorable juror. (PCRTR.65;Mov.Ex.40). The chart indicated that juror Moulton is a "wagon joiner" and that they wanted to push him off. (PCRTR.65;Mov.Ex.40). A "wagon joiner" is a method of questioning where you ask one juror how they feel and then address the other juror to see whether he agrees. (PCRTR.65). You would not want to directly start off questioning with him, but get him to agree with the other's opinions. It is a

way of removing the juror as a strike for cause (PCRTR.65). But if you could not get a wagon going, you might still want to question that juror individually. (PCRTR.66).

Catlett could not think of any strategic reason why he would not want to question Moulton.[11] (PCRTR.66). Based on his score sheet, he is definitely somebody that they would want to address. (PCRTR.66).

Counsel Zembles' testimony

Counsel Zembles agreed that Moulton ranked himself as a "7," which is strong on the death penalty. (PCRTR.95). He was scored by their jury consultant as a 6F, which is a less desirable juror, so they wanted to try and get him off the jury. (PCRTR.96-97). Zembles could not think of a strategy reason they had for not questioning his support of the death penalty. (PCRTR.100-101).

Findings

The motion court found that the reasons counsel did not strike Juror Moulton was that he said, "you have to know the circumstances that drove a person to do it," and because he was a "wagon joiner" – someone who would go along with the rest, and that these choices were a matter of reasonable trial strategy. (D40:9).

Analysis

Review is for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo.banc1993). Here, the motion court's findings do not reflect any reasoning offered by counsel at the hearing, and they are erroneous. Both counsel testified to exactly the opposite of what the motion court found and the findings have no factual basis for support.

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).

[11] Any strategy that would place someone with such a strong preference for the death penalty on the jury is wholly unreasonable. *Anderson v. State*, 196 S.W.3d 28, 41 (Mo.banc2006).

David was denied his rights to effective assistance, due process, a trial before a fair and impartial jury, and freedom from cruel and unusual punishment because Juror Moulton served on his jury. U.S.Const.Amends.VI,VIII&XIV. Juror Moulton's responses are troubling, in that his numerical response shows he favored the death penalty in cases like David's, and believes life without parole is not "a fair sentence" for someone in David's position. (Mov.Ex.39).

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*, 366 U.S. 717,722 (1961). To be qualified to serve as a juror in a death penalty case, a juror must be able to consider imposing a punishment other than death. *Morgan v. Illinois*, 504 U.S. 719,728-29 (1992). A juror who would automatically vote for death is not qualified to serve because that juror cannot consider the mitigating circumstances required by the instructions. *Morgan*, 504 U.S. at 729. Similarly, when measuring the partiality of a juror, courts must determine "whether the juror's views [on capital punishment] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.'" *Ross v. Oklahoma*, 487 U.S. 81,85 (1988) (citing *Wainwright v. Witt*, 469 U.S. 412,424 (1984)).

Reasonably competent counsel under similar circumstances would have moved to strike Moulton for cause. David was prejudiced because a juror who arguably could not consider a punishment other than death served on his jury. *See Knese v. State*, 85 S.W.3d 628,631-33 (Mo.banc2002) (counsel was ineffective for failing to strike jurors whose questionnaires indicated they would automatically vote for death. At a minimum, counsel should have read the questionnaires, and voir dired to determine whether they could serve as jurors.). Failure to conduct such questioning is ineffective assistance of counsel. *See Knese. Anderson.* This complete failure in jury selection is a structural error. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987).

In order for trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108 S.W.3d 18, 25 (Mo.App.W.D.2003).

It was not a reasonable strategy to leave a juror on the case who realistically could not consider life. *See Knese, Anderson*.

This Court should order a new penalty phase.

VIII.

FAILURE TO STRIKE JUROR ODEN (#38)

The motion court clearly erred when it denied the claim that counsel was ineffective for failing to strike Juror Oden who was heavily biased towards imposing death because David was denied effective assistance, due process, right to a jury trial before a fair and impartial jury, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonably competent counsel under similar circumstances would have moved to strike Oden and David was prejudiced because a juror who could not realistically consider life served on his jury.

Trial Proceedings

Before trial, the parties submitted juror questionnaires to all the prospective jurors. (PCRTR.61). Each questionnaire invited prospective jurors to rank, numerically, their opinion of the death penalty from 1 (Strongly Opposed) to 7 (Strongly in Favor). (PCRTR.61). Each questionnaire asked potential jurors to describe in detail their opinions and beliefs about the death penalty for a person found to have committed two deliberate first degree murder. (PCRTR.61). They were also asked to describe in detail their opinions and beliefs about the penalty of life without the possibility of parole if a person is found to have committed two deliberate first degree murders (PCRTR.61).

Juror #38, Marc Oden, indicated a numerical bias of 5 – in favor of the death penalty. (Mov.Ex.41). Concerning life without parole, Oden wrote, "[u]nder the circumstances provided, I would say that a sentence of life in prison would represent a humanitarian gift." (emphasis in original). (Mov.Ex.41).

Prior to trial, trial counsel ranked all the venirepersons' questionnaires. As to Juror Oden, trial counsel ranked him as a "6," which meant that they wanted to try and open him up to push him off the jury. (Mov.Ex.42). They noted that they were not sure what he meant by a life sentence being "a humanitarian gift." (Mov.Ex.2).

During voir dire, trial counsel did not confront Juror Oden about his questionnaire. The State asked Oden if he could meaningfully consider a death verdict, a life verdict, and sign his name to a death or life verdict, if necessary. (Tr.563-564).[12] Oden responded, "Yes." (Tr.563-564). Counsel Catlett did not ask asked Oden whether his relationship with his brother and his brother's legal problems would affect how he viewed the evidence in penalty phase, and Oden did not think it would affect him. (Tr.599-601).

Juror Oden sat on David's jury that found him guilty and imposed the death penalty. (Tr.704,1441,1673).

Post-conviction Case

In Claim 8(D) of his amended motion, David alleged that his trial counsel were ineffective in failing to question and strike juror Marc Oden (#38), who indicated on his questionnaire that he was in favor of the death penalty and resistant to imposing a sentence of life without parole. (D18:32-42).

Counsel Catlett's Testimony

Counsel Catlett testified their jury consultant prepared a chart scoring system for each juror. (PCRTR.64;Mov.Ex.42). The scoring system is 1-6, with 6 being an unfavorable juror that you want to address to get off the jury. (PCRTR.64). Oden had a score of 6, which was an unfavorable juror. (PCRTR.68;Mov.Ex.42). On page 4 of his questionnaire, Oden wrote, "if Mr. Hosier was convicted of two deliberate murders that, if it can be proven beyond all reasonable doubt that an individual planned and committed two murders, then the death penalty is a just and appropriate punishment." (PCRTR.67). Oden also wrote, "[a] willful disregard for human life is not something that can be met with a great deal of leniency," and "[u]nder the circumstances as provided, I would say that a sentence of life in prison would represent a humanitarian gift." (PCRTR.68;Mov.Ex.41). He underlined the word "humanitarian." (PCRTR.68;Mov.Ex.41).

[12] The transcript reflects his name as "Manno," but in the context of the questioning, the person answering is Juror Oden. (TR.563-64).

The chart indicated that juror Oden was ranked as a "6," which is an unfavorable juror. (PCRTR.69). Their plan was to push him off the jury – he was somebody that they could go to directly to talk about his opinions on the death penalty. (PCRTR.69). Catlett could not think of any strategic reason why he would not have questioned Oden individually about his views of the death penalty. (PCRTR.69-70).[13]

Counsel Zembles' testimony

Counsel Zembles agreed that Oden ranked himself as a "5," but they thought he was probably a "sneaky 6." (PCRTR.97). He was scored by their jury consultant as a "6," and they did not want him on the jury. (PCRTR.99). They wanted to push him off the jury, and they also wanted to get answers to what he meant by "humanitarian gifts." (PCRTR.100). Zembles could not think of a strategy reason for not questioning him individually. (PCRTR.100-101).

Findings

The motion court found trial counsel testified to the reasons for not striking Juror Oden, and that their plan was to open up to push off, and the choices they made were a matter of reasonable trial strategy. (D40:9).

Analysis

Review is for clear error. *Barry v. State*, 850 S.W.2d 348,350 (Mo.banc1993). Here, the motion court's findings do not reflect any reasoning offered by counsel at the hearing, and they are erroneous. Both counsel testified to exactly the opposite of what the motion court found and the findings have no factual basis for support.

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).

[13] Any strategy that would place someone with such a strong preference for the death penalty on the jury is wholly unreasonable. *Anderson v. State*, 196 S.W.3d 28, 41 (Mo.banc2006).

David was denied his rights to effective assistance, due process, a trial before a fair and impartial jury, and freedom from cruel and unusual punishment because Juror Oden served on his jury. U.S.Const.Amends.VI,VIII&XIV. Juror Oden's responses are troubling, in that his numerical response shows he favored the death penalty in cases like David's, and believes life without parole would be "a humanitarian gift." (Mov.Ex.41).

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*, 366 U.S. 717,722 (1961). To be qualified to serve as a juror in a death penalty case, a juror must be able to consider imposing a punishment other than death. *Morgan v. Illinois*, 504 U.S. 719,728-29 (1992). A juror who would automatically vote for death is not qualified to serve because that juror cannot consider the mitigating circumstances as required by the instructions. *Morgan*, 504 U.S. at 729. Similarly, when measuring the partiality of a juror, courts must determine "whether the juror's views [on capital punishment] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.'" *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) (citing *Wainwright v. Witt*, 469 U.S. 412,424 (1984))

Reasonably competent counsel under similar circumstances would have moved to strike Oden for cause. David was prejudiced because a juror who arguably could not consider a punishment other than death served on his jury. *See Knese v. State*, 85 S.W.3d 628,631-33 (Mo.banc2002) (counsel was ineffective for failing to strike jurors whose questionnaires indicated they would automatically vote for death. At a minimum, counsel should have read the questionnaires, and voir dired to determine whether they could serve.). Failure to conduct such questioning is ineffective assistance of counsel. *See Knese, Anderson.* This complete failure in jury selection is a structural error. *Gray v. Mississippi*, 481 U.S. 648,668 (1987).

In order for trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*, 108 S.W.3d 18, 25 (Mo.App.W.D.2003).

It was not a reasonable strategy to leave a juror on the case who realistically could not consider life. *See Knese, Anderson*.

This Court should order a new penalty phase.

IX.

FAILURE TO OBJECT TO DAKOTA GILPIN'S VICTIM IMPACT TESTIMONY ABOUT RODNEY GILPIN

The motion court clearly erred in denying David's claim that counsel was ineffective for failing to object to Dakota Gilpin's penalty phase testimony about his father, Rodney Gilpin because David was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends. VI,VIII,XIV, in that reasonably competent counsel would have objected that Rodney was not the victim of the murder charged in this case and Dakota's testimony amounted to improper victim impact testimony, and there is a reasonable probability that if counsel had objected, it would have been excluded and David would have been life-sentenced.

In penalty phase, the State called three of Angela's relatives who testified about the impact her death has had on their lives: Barb Eicholz, Angela's mom; Joshua Eicholz, Angela's older son; and Dakota Gilpin, Angela's younger son. (Tr.1574-1580). However, in addition to telling the jury about his mom, the prosecutor elicited several statements from Dakota about the loss of his father, Rodney Gilpin, who the prosecutor did not to charge as a victim in this case. (LF.24-26).

Dakota, in his Navy uniform, told the jury that Rodney had served in the Army, and the prosecutor confirmed that Rodney had "actually served in Vietnam." (Tr.1577-78). Moments earlier, the prosecutor had elicited from Ron Browning that David had "lied about being a Vietnam veteran." (Tr.1572). Dakota testified about how the loss of both parents had affected him (Tr.1578-79).

Trial counsel did not object to Dakota's testimony about his father, and this was raised as ineffective in David's amended motion (Claim 8(H). (D18:65). At the evidentiary hearing, Zembles testified she wanted Dakota off the stand, and did not want him sitting there while they were at the bench. (PCRTR.110). The motion court

found this was reasonable strategy. (D40:11). This finding is clearly erroneous. *Barry, supra.*

Section 565.030.4 states: "evidence in aggravation…may include…evidence concerning *the murder victim* and the impact of the crime upon the family of the victim and others." (emphasis added)(AppendixA43-44). Rodney Gilpin was not named as "the murder victim" in the charging documents, jury instructions, or jury verdicts, and evidence related to the impact of Rodney's death on Dakota – in this case – goes beyond the scope of the statute and was inadmissible.

Victim impact evidence violates the Constitution if it is so "unduly prejudicial that it renders the trial fundamentally unfair." *State v. Parker,* 886 S.W.2d 908, 927 (Mo.banc1994)(quoting *Payne v. Tennessee*, 501 U.S. 808, 824-826 (1991)). Here, the prosecutor chose not to charge Rodney as a victim, and Dakota's testimony about Rodney was wholly inadmissible. The prosecutor purposefully sought to draw a distinction between Rodney, who "actually served in Vietnam," and David, who the prosecutor wanted to portray as lying about being a Vietnam veteran. Such distinction was clearly an ad hominem personal attack designed to inflame the jury. *State v. Banks*, 215 S.W.3d 118, 121 (Mo.banc.2007).

Despite this evidence being obviously inadmissible and objectionable, David's attorneys failed to object. *See State v. Storey,* 901 S.W.2d 886,902 (Mo.banc1995) (prosecutor improperly weighed the value of the defendant's life against the value of the victim's). Counsel's failure to object cannot be justified as trial strategy. *Id.* "A reasonably competent lawyer would have objected to the obviously improper [evidence]." *Id.* Had they done so, and prevented testimony about Rodney, there is a reasonable probability David would have been life sentenced. *See Strickland*. A new penalty phase is required.

X.

FAILURE TO PROPERLY OBJECT TO ARGUMENT ABOUT DEATH CASES PROSECUTOR WORKED ON AND HOW ALL WERE EXECUTED

The motion court clearly erred in denying David's claim that counsel was ineffective for failing to properly object to the prosecutor's penalty phase closing argument about how he works on death penalty cases and the last four to five he has worked on have been executed, because David was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const.Amends.VI,VIII,XIV, in that reasonably competent counsel would have objected that the prosecutor was arguing facts outside of the evidence and attempting to lessen the responsibility of the jurors, and there is a reasonable probability that if counsel had properly objected, it would have preserved this issue for appeal and this Court would have reversed for a new penalty phase.

During the State's penalty phase closing argument, the prosecutor told the jury:

STATE: …And in courts, jurors talk oftentimes -- or people talk and then talk about justice and doing one thing or the other and whether something would actually get done or not. And for purposes of making that decision, I've worked on death penalty cases as a prosecutor. And the last four to five that I've worked on have been executed.

DEFENSE: Judge, I'm going to object to this.

STATE: They've been executed.

DEFENSE: I'm going to object at this point. May I approach if you think it's necessary?

(Counsel approached the bench, and the following proceedings were had:)

DEFENSE: It's inappropriate closing argument. If Mr. Richardson is preparing to imply or explicitly state to this jury or even imply that

he has some special knowledge that hasn't been evidence in this courtroom --

STATE: The next sentence, Your Honor, is, "And you will have to accept that if you give him the death sentence he will be executed."

COURT: Okay.

(Proceedings returned to open court.)

(TR.1644).

Trial counsel made no further objection, and this was raised as ineffective in David's amended motion (Claim 8(H)). (D18:67-69). At the evidentiary hearing, Zembles testified that she had no reason for not properly objection and getting a ruling to preserve the issue. (PCRTR.111). She thought she made a terrible objection. (PCRTR.111). The motion court found it was reasonable, and no prejudice resulted. (D40:11). This finding is clearly erroneous. *Barry,supra.*

The prosecutor argued facts outside of the evidence in telling the jury that all of his last 4-5 death penalty prosecutions resulted in execution. A prosecutor may not argue facts outside the record. *State v. Storey*, 901 S.W.2d at 900. Counsel were ineffective in that they did not properly preserve the objection by having the Court make a ruling on her objection. The Court simply stated "okay," which is not an appealable ruling. The objection is also not included in the motion for new trial.

The prosecutor's argument had the effect of lessening the jurors' responsibility by telling them that in the other death cases he had prosecuted, the jury gave the death penalty. This implied a special knowledge outside the record and emphasized his position as the prosecutor of Cole County. As far as the jury would know those were all Cole County cases and his argument told the jury that juries in Cole County give the death penalty. This was an attempt to remove reason from the sentencing process, imply that his decision to seek death as the prosecutor of Cole County was followed by other jurors in Cole County in past cases, and unduly emphasized his role as prosecutor. *Newlon v. Armontrout*, 885 F.2d 1328 (8thCir.1989). Representations that the prosecutor's office only seeks the death penalty in cases deserving the death

penalty are irrelevant and prejudicial. *Brooks v. Kemp*, 762 F.2d 1383,1410 (11thCir. 1985). This also bore the stamp of higher court review, since the executions went forward, and it discouraged the jury from making an individualized determination that death was appropriate in this case. *See, e.g.*, *Jones v. United States*, 527 U.S. 373,381 (1999)(capital sentencing decisions rest upon an individual inquiry.")

Despite this argument being objectionable, David's attorney failed to properly object or obtain a ruling that could be appealed. *See Storey*, 901 S.W.2d at 900 (prosecutor argued facts outside the record by declaring that "[t]his case is about the most brutal slaying in the history of this county."). Counsel's failure to object cannot be justified as trial strategy. *Id.* "A reasonably competent lawyer would have objected to the obviously improper [evidence]." *Id.* Had they done so, there is a reasonable probability this Court would have reversed for a new penalty phase. *See Strickland*. A new penalty phase is required.

CONCLUSION

For the reasons stated in Points I,II,III&VI, David asks for a new trial on guilt, or in the alternative, a new penalty trial. For the reasons stated in Points IV,VII,VIII,IX&X, he asks for a new penalty trial. For the reasons stated in Point V, he asks for a new evidentiary hearing before a conflict-free judge.

Respectfully submitted,

/s/ Amy M. Bartholow

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains **30,995** words, which does not exceed the 31,000 words allowed for an appellant's brief.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 25th day of January, 2019, on Assistant Attorney General Shaun Mackelprang at Shaun.Mackelprang@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ Amy M. Bartholow

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Amy M. Bartholow