IN THE
MISSOURI SUPREME COURT

VINCENT McFADDEN,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC97737**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION IX
THE HONORABLE DAVID LEE VINCENT III, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

I. Procedural History

Vincent McFadden was charged with the first degree murder of Todd Franklin based on having acted with another person, Michael Douglas(T.L.F.315-20).[1] Vincent's two first degree murder convictions and two death sentences for the deaths of Todd Franklin and Leslie Addison, obtained in separate trials, were reversed because of *Batson* violations. *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006) ("Franklin" case) and *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007) ("Addison" case).

The Franklin retrial occurred in July, 2007 before Judge Ross. The Addison retrial occurred later in March, 2008 before Judge Gaertner.

In a December, 2004 trial, Vincent was convicted in St. Louis County of first degree assault and armed criminal action involving a shooting of Darryl Bryant and Jermaine Burns (Bryant/Burns). *State v. McFadden*, 193 S.W.3d 305 (Mo.App., E.D. 2006) (E.D.85858). The Bryant/Burns convictions were aggravators in the Franklin re-trial.

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[1] The record on appeal is referenced as follows: (1) Trial Legal File (T.L.F.); (2) Trial Transcript (T.Tr.); (3) 29.15 Legal File (29.15L.F.#___p.___); (4) 29.15 Transcript (29.15Tr.) (5) 29.15 Exhibits (29.15Ex.); and (6) 29.15 Quash Testimonial Writ Transcript (29.15WritTr.). On July 9, 2019, this Court judicially noticed Vincent's other cases this Court decided.

This is an appeal of the denial of 29.15 relief arising from the Franklin re-trial.

II. Respondent's Guilt Evidence

Mark Silas testified that he was walking through Pine Lawn on July 3, 2002, with Todd Franklin and was standing in front of Franklin's house(T.Tr.1042,1044-45). Silas testified somebody pulled out a gun and he ran when he heard shots(T.Tr.1043-44).

Officer Stone obtained a recorded statement from Silas on July 3, 2002(T.Tr.1414-16). Silas' recorded statement (TrialEx.78A) was played for the jury and the jury followed along with a transcript(TrialEx.78C) (T.Tr.1101-03). Silas reported a tall slim, light complexioned African-American male shot Franklin and that was followed by Vincent shooting Franklin(TrialExs.78A,78C).

Silas testified that he made-up everything in his recorded statement so that the police would allow him to leave(T.Tr.1109,1118). Silas testified that he did not know why he said Vincent shot Franklin when Vincent did not(T.Tr.1119). Respondent asked Silas whether when he was at the Pine Lawn Police Station he pointed at a picture of Vincent on the wall and identified Vincent as the second shooter, which Silas denied(T.Tr.1059-60).

Officer Stone testified that Silas identified Vincent in a picture on the Pine Lawn police station wall (TrialEx.75A) as the second shooter of Franklin(T.Tr.1414-17).

Gary Lucas testified that he was helping to do siding work on the house next door to Franklin's house, at Greg Hazlett's house(T.Tr.1147-48,1155,1178). Lucas

heard what sounded like firecrackers and Franklin ran up pursued by a light complexioned African-American male and Vincent(T.Tr.1148). The three of them asked if they could do some work(T.Tr.1148-49). The light complexioned male shot Franklin and then Vincent, using the same gun, shot Franklin(T.Tr.1149-51).

Greg Hazlett recounted that on July 3, 2002, he, Kent Rainey, Glenn Zackary, and Gary Lucas were at Hazlett's house at 6215 Lexington in Pine Lawn doing roofing and siding work(T.Tr.1190-91,1239). Hazlett saw Franklin running from a lot across the street pursued by two males, "Michael" and Vincent (also referred to as "J.R.") (T.Tr.1191,1224).

Hazlett reported that he saw "Michael" shoot Franklin and then Vincent took the gun from "Michael" and shot Franklin in the head while Franklin was on the ground(T.Tr.1193,1196). Hazlett reported "Michael" and Vincent each shot Franklin twice(T.Tr.1199-1200,1258-59). Hazlett did a photo lineup identification of Vincent as the second shooter for Officer Stone on June 15, 2003, but declined to sign it (T.Tr.1204-07,1225,1419-20). Hazlett also picked out "Michael" from a photo lineup as the first shooter and declined to sign it(T.Tr.1225-27).

Glenn Zackary was putting shingles on Hazlett's roof when Franklin came by at 6:30 p.m.(T.Tr.1447-48). Zackary heard noises that sounded like fireworks and later saw Franklin on the ground(T.Tr.1452). Zackary made photo lineup identifications ten months after Franklin was shot with Michael Douglas as the first shooter and Vincent as the second shooter(T.Tr.1452-58,1460,1475,1478).

A new cigar in its wrapper was found near Franklin's body(T.Tr.1281-82,1285-86,1288-96,1305). Fingerprint examiner Burke obtained a fingerprint from the wrapper(T.Tr.1306-10). Burke ran the wrapper's print through the Automated Fingerprint Identification System and obtained 15 candidates(T.Tr.1309-10). Burke compared the wrapper's print to fingerprints for Vincent that were "on file" and found they matched(T.Tr.1315).

Lorenzo and Corey Smith were charged with acting together to rob and assault Franklin in Pine Lawn(T.Tr.1363-64). Franklin was the only witness to the acts(T.Tr.1365). Attorney Goldstein represented Lorenzo and deposed Franklin on November 5, 2001(T.Tr.1363-64). Franklin's deposition implicated Lorenzo and Corey(T.Tr.1364). Lorenzo pled guilty on December 6, 2001, and was sentenced to 10 years(T.Tr.1364-65).

Eva Addison has one child with Vincent, Vincent McFadden III(T.Tr.1373-75). Eva knew Vincent as J.R. and Scooby Deuce(T.Tr.1375). Corey, Lorenzo, Vincent, and Michael Douglas all hung around together(T.Tr.1376-77,1395-96). Franklin did not hang-out with them(T.Tr.1391,1395-96).

Evelyn Carter is Eva's first cousin and knew Vincent because of Eva's relationship with him(T.Tr.1394-95). The day after Franklin was killed Vincent called Carter(T.Tr.1398-99). Carter asked Vincent why people were saying that Vincent had killed Franklin(T.Tr.1398-99). Vincent never said he killed Franklin, but made statements that caused Carter to believe that he had(T.Tr.1398-99,1400,1403).

Carter reported that Vincent said Franklin was killed because Franklin was a soft snitch who had told on Corey and Lorenzo(T.Tr.1398-99,1410).

Officer Lancaster testified that Exhibits 402, 403, 404, 502, 503, 504, 505, 506, 507, 508, 509 were letters and envelopes seized from the jail institution where Vincent was confined(T.Tr.1520-34).

Known writing samples done by Vincent were admitted into evidence(T.Tr.1537-39).

Officer Brownlee testified that exhibits 401, 405, 406, 407, 408, 409, 501 were letters and envelopes seized from Douglas' jail cell at the institution where he was confined(T.Tr.1541-45).

Respondent admitted into evidence Douglas' 24.035 casefile which contained his *pro se* 24.035 motion(T.Tr.1546-47) (TrialEx.500).

Handwriting expert Storer testified that Exs. 401, 402, 403, 405, 406, 407, 408, 409 were authored by Vincent(T.Tr.1551-64). Storer testified that Exs. 501, 502, 503, 504, 505, 506, 507, 508, 509 were authored by Douglas(T.Tr.1564-69).

Before respondent rested its guilt case, it read from some of the letters identified as Vincent having authored and written to Douglas(T.Tr.1571-76). Vincent wrote Douglas that he had everything covered on legal matters to help them both(T.Tr.1573). Vincent stated that the medical examiner was the key to both of their freedom(T.Tr.1573-74). Vincent wrote that he was putting something together to help Douglas organize matters(T.Tr.1574). Vincent wrote that he was going to make something happen(T.Tr.1575). Vincent wrote that Douglas should be sure not

to say anything about Zo and Corey(T.Tr.1575-76). Vincent's writings included repetition of the phrases: "Love-N-Loyalty. Love is love. Loyalty is royalty. Yung Hood."(T.Tr.1574-76).

III. Defense Guilt Evidence

Officer Menzenwerth interviewed Hazlett the night Franklin was shot(T.Tr.1590,1593). Hazlett told Menzenwerth on the night of the shooting he did not know the person who was with Vincent(T.Tr.1596-97). Hazlett also reported on the night of the shooting that the person he did not know put a gun to Franklin's head and fired(T.Tr.1598-99). It was only about one year later that Hazlett identified the person who was with Vincent as "Michael"(T.Tr.1596-97).

Menzenwerth interviewed Zackary months after the shooting and Zackary reported that he was on the ground when the shooting occurred and not on the roof(T.Tr.1600-01,1618). Zackary reported that he did not see more than one shooter(T.Tr.1618).

A. Douglas' Trial Testimony

Before Douglas testified, respondent moved to exclude evidence Douglas pled guilty to murder second and was sentenced to 20 years and that was sustained(T.Tr.1578-88). After Douglas' testimony concluded, counsel made an offer of proof through Douglas that he had told counsel the only reason he had said that he acted with Vincent to kill Franklin was to get a murder second plea deal for twenty years(T.Tr.1686-87). Also, after Douglas testified the jury heard a stipulation that Douglas pled guilty on December 29, 2005(T.Tr.1715-16).

B. Douglas' Direct Examination

Douglas testified that on the day Franklin was shot, he was with Vincent and his brother, Kyle Dismukes, and they came across Franklin at Lexington Avenue(T.Tr.1624-27). Franklin was with two other guys and one of them shot at Douglas first in front of Greg Hazlett's house(T.Tr.1626-29).

Douglas chased the shooter, but he got away so Douglas shot Franklin in the head at Hazlett's house(T.Tr.1627,1629-30). Douglas testified that he shot Franklin 3-4 times and passed the gun to Vincent who shot Franklin(T.Tr.1630-31).

Douglas testified that Vincent's counsel, Kraft and Turlington, talked to him on February 7, 2007, at the jail about his involvement(T.Tr.1623). When Douglas talked to Vincent's counsel, he told them that Vincent was present when Franklin was shot, but Vincent did not shoot Franklin(T.Tr.1631-32,1637). Douglas told counsel that the second shooter was Douglas' brother, Kyle Dismukes(T.Tr.1631-32). Douglas also wrote a letter dated February 7, 2007, to Kraft (Defense Ex.A), on the same day after they finished meeting, in which Douglas admitted that he and Dismukes killed Franklin and it stated Vincent was present, but had nothing to do with Franklin's death(T.Tr.1632-33,1637).

On April 19, 2007, Vincent's counsel, the prosecutor, and a court reporter were present for a phone deposition conducted with Douglas(T.Tr.1633-35,1637-38). During that phone conversation, Douglas admitted that he and Dismukes shot Franklin and that Dismukes was the second shooter(T.Tr.1634-35). Douglas said that Vincent was present, but did not shoot Franklin(T.Tr.1634-35). When Douglas'

deposition was taken, he declined to swear to tell the truth because he was afraid to say anything different from his guilty plea(T.Tr.1638-39).

Douglas testified that he had pled guilty to killing Franklin and that he swore to tell the truth at the plea(T.Tr.1638). Douglas testified that he did not want to be charged with perjury and get up to a life sentence(T.Tr.1639-40). When Douglas testified that he could get up to a life sentence, Prosecutor Larner objected that life was not possible, as suggested by defense counsel's question, because perjury was a Class C felony and the maximum was seven years(T.Tr.1639). Douglas did not get the maximum sentence on his guilty plea(T.Tr.1640).

C. Cross-examination of Douglas

Douglas testified that Dismukes did not shoot anyone and the letter Douglas sent Vincent's counsel was untrue(T.Tr.1648-51).

Douglas testified that he was the first to shoot Franklin and that Vincent then shot Franklin(T.Tr.1673). Douglas testified that Dismukes did not shoot Franklin(T.Tr.1648,1651,1673).

The letter Douglas wrote defense counsel (Ex.A) that Dismukes shot Franklin was a lie(T.Tr.1648-51). Respondent cross-examined Douglas about the letter and read from it to the jury(T.Tr.1650-71).

D. Redirect of Douglas

Douglas testified that all his statements, including letters, that Vincent did not shoot Franklin were a lie(T.Tr.1674).

E. Re-cross of Douglas

Douglas testified that when he pled guilty he was under oath and he testified truthfully(T.Tr.1680). Douglas testified that "today" he was also testifying truthfully that he shot Franklin first and that was followed by Vincent shooting Franklin second(T.Tr.1680).

IV. Respondent's Guilt Argument

In guilt rebuttal, respondent argued the gang references "Love-N-Loyalty" and "Loyalty Is Royalty," found in Vincent's and Douglas' exchanges of letters, was "their motto"(T.Tr.1787,1791).

V. Defense Penalty Opening Statement

In the defense penalty opening statement, the jury was told that it would hear evidence that Vincent grew-up in very violent neighborhoods and in very unstable environments(T.Tr.1838).

VI. Respondent's Penalty Evidence

Eva Addison's sisters are Leslie, Shonte, and Jessica(T.Tr.1841-42). Leslie was killed on May 15, 2003, and was 18 years old(T.Tr.1841-42,1880).

Eva testified that Vincent said to her that the Addisons needed to leave Pine Lawn because Shonte had told on him for shooting Darryl Bryant and that one of the Addisons was going to die(T.Tr.1842-43,1885). Vincent left in a car driven by BT (Brandon Travis)(T.Tr.1843,1859).

After Vincent left, Eva saw Leslie and Jessica and told them that they all needed to leave Pine Lawn because of what Vincent had said(T.Tr.1843-44). Jessica left with Eva's son and nephew(T.Tr.1844).

Eva and Leslie were at 31 Blakemore in Pine Lawn, which was Maggie Jones' house(T.Tr.1844). Vincent returned in a car driven by BT(T.Tr.1845). "Smoke" was in another car(T.Tr.1845). At the time, the Addisons had a brother who was deceased(T.Tr.1847-48). Eva testified that Vincent asked Leslie if she loved her brother and said that she would see him that night(T.Tr.1847-48). Eva reported that Vincent pulled a gun out and clicked it at Leslie(T.Tr.1847-48). Eva reported that she pushed Vincent and said she would call the police(T.Tr.1848). Smoke told Vincent to leave because he was already wanted for murder(T.Tr.1849). Vincent got in a silver Altima and left with BT driving(T.Tr.1849-50).

Leslie wanted to use a pay phone at Skate King and walked down the street on Kienlen(T.Tr.1850). Eva saw Vincent and BT coming from Dardenella and warned Leslie, but Leslie kept walking(T.Tr.1850-51). Vincent got out of the car and argued with Leslie and then he shot her(T.Tr.1851). When Vincent shot Leslie, Eva watched from behind some bushes(T.Tr.1855). After Vincent shot Leslie, Eva ran back to Maggie Jones' house(T.Tr.1856-57). Eva and Maggie then went to where Leslie was lying(T.Tr.1857).

After Vincent shot Leslie, he called Eva and told her to stop asserting he shot Leslie(T.Tr.1865). Eva testified that she said she was not going to do that because Vincent had killed her sister and Vincent responded threatening to harm her(T.Tr.1865-66).

On May 27, 2003, Vincent called Eva from jail(T.Tr.1866). On that call, Eva said that she saw Vincent kill Leslie and Vincent responded threatening Eva and her family(T.Tr.1877-78).

Eva went to see Vincent at the jail to ask him why he killed Leslie(T.Tr.1879-80). Eva reported that Vincent wrote on a piece of paper and held it up to the glass separating them that he was sorry for killing Leslie(T.Tr.1879-80).

Stacy Stevenson lived at 2501 Kienlen and was at home at 11:45 p.m. on May 15, 2003(T.Tr.1979). Stevenson could hear arguing outside followed by a gunshot(T.Tr.1979-81). Stevenson saw a woman lying on the ground who said that he shot me and Stevenson called 911(T.Tr.1982-83).

Vincent called Evelyn Carter on the day he was arrested(T.Tr.2001-02). Carter said to Vincent that he had killed Leslie(T.Tr.2002). Vincent responded saying that he did not know about that(T.Tr.2002). Carter testified that Eva saw Vincent kill Leslie(T.Tr.2002). Vincent threatened Carter and the Addisons(T.Tr.2002). Carter had her sister call 911(T.Tr.2003-04).

Carter recounted an incident where Vincent threw a can of beer at Leslie and hit her in the head(T.Tr.2004-06). That resulted in Eva and Leslie fighting with Vincent(T.Tr.2006-07). Vincent responded by chasing them with a gun in each hand(T.Tr.2006-07). Carter reported that Vincent's father prevented Vincent from firing the gun(T.Tr.2006-08).

Officer Akers testified that when Vincent was arrested that he possessed 17 packets with crack(T.Tr.1910-14).

Respondent offered records of Vincent's prior convictions in four cases(T.Tr.2024-32). Those were: (1) TrialEx.101 - the Bryant/Burns assault(T.Tr.2024-25,2028-29); (2) TrialEx.102 - tampering and stealing(T.Tr.2026,2030); (3) TrialEx.103 - possession of a controlled substance and unlawful use of a weapon(T.Tr.2026,2031); and (4) TrialEx.104 - third degree assault(T.Tr.2026,2032).

Franklin's mother, Patricia, recounted the family's feelings of loss and pain(T.Tr.2035-39,2043-44,2054). Franklin had been the man of the house because Patricia was divorced(T.Tr.2039,2041). When Patricia's mother died, Franklin moved in with her father to help him cope(T.Tr.2042-43).

Patricia recounted how as a young child Franklin gave away his lunch at school for weeks to another student because he did not have a lunch(T.Tr.2046-47). Patricia also recounted how when a neighbor girl's mother died he gave money from his piggy bank because the family did not have any food(T.Tr.2047). Patricia described Franklin as a non-violent, "clean cut," very friendly person who always kept a smile and made friends easily(T.Tr.2047-48,2052). The jury saw pictures of Franklin at Christmas and ones that focused on his smile(T.Tr.2050-53). Franklin had obtained a GED and was attending a community college(T.Tr.2048-49). Franklin was working at MCI(T.Tr.2049).

Patricia testified on cross-examination that she did not know that when Franklin was shot he had cocaine in his pocket(T.Tr.2055).

Candace Hosea was Franklin's girlfriend and they worked together at MCI(T.Tr.2057). Candace asked Franklin to go to Homecoming and that was when she fell in love with him(T.Tr.2059-60). They had talked about getting married and having children(T.Tr.2057). Franklin was a happy, friendly person who was respectful and cared about everyone(T.Tr.2057-58). Franklin had helped Candace's mother to move and paint when Candace had only known Franklin for one month(T.Tr.2058-59).

On cross-examination, Candace testified that she did not know that Franklin was involved in drugs(T.Tr.2060).

Franklin's sister, Tara, was younger than him and described him as a "father figure" who was the best of friends(T.Tr.2062-63,2073). Because Franklin's middle name was Eric, Tara named her daughter Erica(T.Tr.2070).

Franklin taught Tara to skate, took her to cheerleading, and gave her money for her prom dress(T.Tr.2063-64). Franklin was proud of Tara for having graduated from high school and was supportive of her pregnancy(T.Tr.2065). Franklin was a non-violent person who handled a situation at school where a guy was giving Tara trouble by talking to him(T.Tr.2064-65). When their father returned to the family for one year from West Virginia, he struck Tara and Franklin told him that he could not do that(T.Tr.2066).

Tara recounted that Franklin always had a job(T.Tr.2067). They had planned to open a hair salon together(T.Tr.2067).

Tara described how their grandmother loved Pepsi and M&Ms and how Franklin always got those for her(T.Tr.2065). Tara recounted that Franklin took their grandfather to play golf and introduced him to Michael Jordan shoes that he still wears(T.Tr.2068). Their grandfather called Franklin "Hollywood" because he always dressed nicely(T.Tr.2068). When their grandmother died, Franklin moved in with their grandfather and took him everywhere, like church on Sunday(T.Tr.2068-69). Franklin persuaded their grandfather to give away their grandmother's clothing to people who could use it(T.Tr.2069). When their grandfather wanted the freezer moved at 6:00 a.m., Franklin did that(T.Tr.2069-70). Even though Franklin was scared of heights, he put tar on his grandfather's roof for him(T.Tr.2071-72). Franklin and his grandfather were best friends(T.Tr.2069).

Tara described Franklin's having done chores for free for their grandparent's neighbor, Ms. Rogers(T.Tr.2070-71).

VII. Defense Penalty Phase

Fay McFadden is Vincent's father's sister(T.Tr.2080-82). Vincent's mother, Theresa Brown, was 20-21 years old when Vincent was born and she and Vincent's father never married(T.Tr.2082). Vincent's mother was not at home much because she worked from early in the morning until late at night(T.Tr.2085-86). When Vincent was a child, he was "bounced" between multiple families that included Fay, Fay's parents, and Lisa Northern(T.Tr.2083-84). Vincent's father lived with him off-and-on for two years and came-and-went from Vincent's life(T.Tr.2085). Vincent's

father had a serious alcohol problem and provided very little financial support(T.Tr.2090-92).

Minnie McFadden, Vincent's grandmother, provided descriptive background about Vincent's youth that tracked Fay's testimony(T.Tr.2103-06,2108-09,2113-14).

The jury heard Vincent's aunt and uncle, Lisa and Don Northern's, recounting of Vincent having spent time living with them(T.Tr.2118-26,2129,2134-35). Vincent wanted to live permanently with the Northerns, but Vincent's mother would not agree to Vincent doing that(T.Tr.2125-26,2141-42). Eventually, Vincent was placed at a state boys' home - Tarkio(T.Tr.2125-26,2141-42). Don testified that Vincent grew-up in rough, violent neighborhoods(T.Tr.2139).

Lynette Elaine Hood lived in Pine Lawn and had a mother-son type relationship with Vincent(T.Tr.2147-49,2151-52,2154). Lynette became especially concerned about Vincent after he got shot(T.Tr.2152-53). Lynette moved out of Pine Lawn because of its violence, and in particular gun violence, that caused her to hit the floor when gunshots fired(T.Tr.2154-55).

Richard Nelson was a St. Louis City Juvenile Officer who supervised Vincent(T.Tr.2162-64,2167). Pine Lawn was violent and economically depressed(T.Tr.2172-73). Nelson described the family instability which led to supervision problems(T.Tr.2171,2173-75,2180-81,2196-97). Vincent was placed in residential treatment at Tarkio and showed progress, but that placement was terminated prematurely because of budget cuts(T.Tr.2177-79). When Vincent

returned from Tarkio, there were no counseling services Nelson could offer(T.Tr.2181-82).

Vincent's father, Vincent Sr., described his physical and emotional absence from Vincent's life and failure to be a good role model(T.Tr.2204-12).

Child development expert, Dr. Wanda Draper, evaluated the unstable family situation Vincent endured and the violent community in which Vincent was raised which resulted in him having an attachment disorder(T.Tr.2223-25,2234-37,2240-46,2247-52).

There was a stipulation that when Franklin died that he possessed one gram of cocaine(T.Tr.2332).

VIII. Respondent's Initial Penalty Argument

Respondent's initial closing argument included telling the jury that Vincent was "the king of Pine Lawn, the self-appointed king of Pine Lawn"(T.Tr.2380-81). The jury was told that Vincent and Franklin grew-up in the same neighborhood and had similar childhoods, but their lives took different paths(T.Tr.2383-84). Vincent's father's absence from his life was dismissed because his father tried having Vincent live with him, while Franklin did not even have a father in his life(T.Tr.2392).

IX. Verdict and Sentencing

The jury found five aggravators - the two assault counts and two armed criminal action counts arising from Bryant/Burns and depravity of mind in killing Franklin(T.L.F.684-85). Vincent was sentenced to death(T.L.F.740-44).

X. 29.15 Case

Rule 29.15 counsel was appointed September 10, 2013 (29.15L.F.#100p.11) (29.15L.F.#125p.1). An extension to file the amended motion was granted until December 11, 2013(29.15L.F.#122p.1-5).

Douglas appeared for an October 24, 2013 deposition (29.15Exs.48,49) (29.15L.F.#130p.1) (29.15L.F.#120p.1-3) (29.15Tr.284-85). At the deposition, and at the direction of his attorney, Kim Freter, Douglas invoked the Fifth Amendment as to all questions, including his name and even taking an oath(29.15L.F.#118p.9-43).

On November 18, 2013, Judge Goldman denied a motion to compel answers on the grounds that answering would violate Douglas' Fifth Amendment right not to incriminate himself(29.15L.F.#100p.12) (29.15L.F.#115p.1) (29.15L.F.#118p.1-52). On January 12, 2018, Judge Vincent denied a renewed motion to compel answers(29.15L.F.#178p.1) (29.15L.F.#168p.1-5). The amended motion alleged the refusal to allow 29.15 counsel to get Douglas' deposition answers denied a fair opportunity to present Vincent's claims(29.15L.F.#130p.9-13).

The amended motion alleged counsel was ineffective for calling Douglas who testified that he and Vincent shot Franklin because counsel was on notice that Douglas would not testify while under oath that someone other than Vincent was the second person who shot Franklin(29.15L.F.#130p.25-37).

Douglas sent counsel a February 7, 2007 letter in which Douglas stated that he and Kyle Dismukes shot Franklin and not Vincent(29.15Tr.45-48,53,462) (29.15Ex.84).

Before the July, 2007, trial began counsel deposed Douglas on April 19, 2007 by phone(29.15Tr.47-54,462-65) (29.15Ex.85). Douglas refused to be sworn(29.15Tr.49,463) (29.15Ex.85p.5-6). Repeatedly Douglas asserted he needed to speak to his attorney, Kim Freter(29.15Ex.85p.4-9,11). Douglas testified that Vincent was present when Franklin was shot, but Vincent did not shoot Franklin(29.15Tr.51) (29.15Tr.463-64) (29.15Ex.85p.11). Douglas testified that he and his brother, Kyle Dismukes, shot Franklin(29.15Tr.51) (29.15Ex.85p.11).

Kim Freter represented Douglas on his 2005 guilty plea to having acted in concert with Vincent to kill Franklin(29.15Tr.245).

Freter represented Douglas when he was called to testify at the Franklin retrial(29.15Tr.247). Freter told all of Vincent's attorneys and was clear that Douglas would never testify inconsistent with his plea agreement - that he and Vincent shot Franklin(29.15Tr.250-53).

The amended motion alleged counsel was ineffective for failing to object on hearsay and relevancy grounds to respondent's admitting letters that Douglas wrote to Vincent when Douglas had not been called as a witness by respondent(29.15L.F.#130p.21-23).

Douglas' letters contained references to gang activities and affiliations. *See* (TrialExs.502,503,504,505,506) (29.15Exs.57,58,59,60,61). Those references included: (1) "Love & Loyalty" "Love is Love Loyalty is Royalty"(29.15Ex.57); (2) "Lawn Life" (29.15Ex.58); (3) "Love is Love Loyalty is Royalty" and "Lawn In

Lawn Out" (29.15Ex.59); (4) "Love is Love Loyalty is Royalty"(29.15Ex.60); and (5) "Love and Loyalty" (29.15Ex.61).

The amended motion also alleged that counsel was ineffective for failing to object to respondent offering letters that Vincent wrote to Douglas as irrelevant when Douglas had not testified(29.15L.F.#130p.19-21). Those letters were prejudicial because they referred to Pine Lawn life and "Love-N-Loyalty" constituting gang association evidence(29.15L.F.#130p.19-21).

Vincent's letters contained gang affiliation evidence(TrialExs.401,402,403,405,407,409) (29.15Exs.51,52,53,54,55,56). Those references included: (1) "Love-N-Loyalty" "Love is Love" "Loyalty is Royalty" "Yung-Hood"(29.15Ex.51); (2) "love-N-loyalty "Yung H_ _ D"(29.15Ex.52); (3) "Love-N-Loyalty" "Love Is Love" "Loyalty Is Royalty" "Yung Hood" (29.15Ex.53); (4) Envelope postmarked 9/1/06 from Vincent to Douglas(29.15Ex.54); (5) "Love-N-Loyalty" "Yung Hood" "Love is Love" "Loyalty Is Royalty"(29.15Ex.55); and (6) "love-N-loyalty" "Hood"(29.15Ex.56).

Counsel acknowledged that from Douglas' and Vincent's letters the jury would infer gang involvement(29.15Tr.588-90). Likewise, counsel acknowledged from the other evidence presented at trial that the jury would infer gang association(29.15Tr.588-90).

The amended motion alleged counsel was ineffective for failing to impeach Douglas with his *pro se* 24.035(29.15L.F.#130 p.59-61). Respondent admitted into evidence at trial Douglas' 24.035 casefile which contained his *pro se* 24.035

motion(29.15L.F.#130p.59-61) (TrialEx.500) (T.Tr.1546-47). Douglas' *pro se* motion asserted that he was not present when Franklin was shot and had alibi witnesses who would account for where he was when Franklin was shot(29.15L.F.#130p.59-61). The pleadings alleged Douglas should have been impeached with his *pro se* 29.15 because if Douglas was not present when Franklin was shot, he could not have seen who shot Franklin(29.15L.F.130p.59-61).

The amended motion alleged counsel was ineffective for failing to rebut respondent's good character evidence about Franklin(29.15L.F.#131p.149-158) (29.15L.F.#132p.1-9). That evidence would have included that Franklin was a drug dealer who had pled guilty to drug distribution(29.15L.F.#131p.149-158) (L.F.#132p.1-9). Evidence of Franklin's drug trafficking conviction should have been presented(29.15L.F.#131p.149-158) (L.F.#132p.1-9). Taneisha Kirkman-Clark could have testified about Franklin's involvement in drug dealing(29.15L.F.#131p.149-158) (L.F.#132p.1-9). It was alleged that respondent could not have set up a comparison of Franklin's good character to be contrasted against Vincent's character(29.15L.F.#131p.149-158) (L.F.#132p.1-9). Further, it was alleged that the jury was left with a false perspective about Franklin's character(29.15L.F.#131p.149-158) (L.F.#132p.1-9).

Counsel knew from this case's first trial the jury heard evidence about Franklin's good character and they expected that again(29.15Tr.126-27,132,513-14,517).

Franklin had pled guilty to second degree drug trafficking(29.15Ex.46).

Kirkman-Clark recounted Franklin was a drug dealer and associate of drug dealer Pelle and a gang member(29.15Ex.86Ap.13-15). Franklin carried a gun(29.15Ex.86Ap.15). Franklin was part of a drive by shooting directed at Kirkman-Clark's mother's house with Arnell "Smoke" Jackson as the intended target(29.15Ex.86Ap.15-16). Kirkman-Clark described Franklin as "nice" when he complied with her request not to deal drugs in her mother's yard(29.15Ex.86Ap.13-14,32).

The motion court (Judge Vincent) held an evidentiary hearing and denied relief(29.15L.F.#222p.1-90).

From the denial of 29.15 relief this appeal followed.

POINTS RELIED ON

I.

CALLING DOUGLAS

The motion court clearly erred denying counsel was ineffective for calling Douglas when Franklin's counsel, Freter, told Vincent's counsel that Douglas would never testify contrary to his guilty plea where Douglas said he and Vincent shot Franklin because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would not have called Douglas after respondent called Mark Silas who testified he was present and Vincent did not shoot Franklin, and therefore, Vincent was not guilty of killing Franklin. Vincent was prejudiced because Douglas' identifying Vincent as having shot Franklin contradicted Vincent's defense he did not shoot Franklin.

State v. McCarter, 883 S.W.2d 75 (Mo.App., S.D. 1994);

Poole v. State, 671 S.W.2d 787 (Mo.App., E.D. 1983);

Gant v. State, 211 S.W.3d 655 (Mo.App., W.D. 2007);

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

II.

FAILURE TO REBUT INACCURATE

FRANKLIN PORTRAYAL

The motion court clearly erred denying counsel was ineffective for failing to present evidence of Franklin's second degree trafficking guilty plea and Taneisha Kirkman-Clark's knowledge of Franklin's drug dealing, gun carrying, and drive by shooting actions because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented this evidence to rebut respondent's upstanding person portrayal of Franklin. Vincent was prejudiced because the jury was left with the false impression Vincent was more deserving of death based on Franklin's high moral character.

Ervin v. State, 80 S.W.3d 817 (Mo. banc 2002);

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

Parker v. Bowersox, 188 F.3d 923 (8th Cir. 1999);

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

III.

DOUGLAS' LETTERS TO VINCENT

The motion court clearly erred denying counsel was ineffective for failing to object to respondent introducing Douglas' letters (TrialExs.502, 503, 504, 505, 506) (29.15Exs.57, 58, 59, 60, 61) written to Vincent because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected as irrelevant inadmissible hearsay and Vincent was prejudiced because those letters placed before the jury gang affiliation evidence counsel sought to keep out.

State v. Kemp, 212 S.W.3d 135 (Mo. banc 2007);

State v. Robinson, 196 S.W.3d 567 (Mo.App., S.D. 2006);

State v. Hoover, 220 S.W.3d 395 (Mo.App., E.D. 2007);

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

IV.

VINCENT'S LETTERS TO DOUGLAS

The motion court clearly erred denying counsel was ineffective for failing to object to respondent introducing Vincent's letters and an envelope written to Douglas (TrialExs.401, 402, 403, 405, 407, 409) (29.15Exs.51, 52, 53, 54, 55, 56) because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected to the letters as irrelevant and Vincent was prejudiced because those letters placed before the jury gang affiliation evidence counsel had sought to keep out and led the jury to believe Vincent was directing Douglas what to do and say.

State v. McCarter, 883 S.W.2d 75 (Mo.App., S.D. 1994);

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

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

V.

DOUGLAS' 24.035

The motion court clearly erred denying counsel was ineffective for failing to impeach Douglas with his 24.035 *pro se* motion because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have impeached Douglas with his 24.035 *pro se* because in his 24.035 Douglas asserted he was innocent of shooting Franklin and not present when Franklin was shot, and therefore, could not identify Vincent as having shot Franklin. Vincent was prejudiced as there is a reasonable probability he would not have been convicted.

Black v. State, 151 S.W.3d 49 (Mo. banc 2004);

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

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

VI.

DOUGLAS' DEPOSITION - COMPEL ANSWERS

The motion court (Judges Goldman and Vincent) clearly erred denying 29.15 counsel the opportunity to fully investigate by overruling/denying the motions to compel Douglas to answer deposition questions because Vincent was denied due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that he was denied the opportunity to properly prepare for the 29.15 evidentiary hearing on the Douglas claims.

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

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

State v. Rollen, 133 S.W.3d 57 (Mo.App., E.D. 2003);

Luckett v. State, 845 S.W.2d 616 (Mo.App., E.D. 1993);

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

VII.

Wanted Poster

The motion court clearly erred denying counsel was ineffective for failing to object to respondent presenting evidence Silas identified Vincent in a Pine Lawn police "Wanted" wall photo as a shooter because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected because Vincent's picture displayed in the Pine Lawn police station created the automatic inference Vincent had a criminal record or was in trouble with the police.

Barnes v. U.S., 365 F.2d 509 (D.C. Cir. 1966);

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

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

VIII.

"ON FILE" FINGERPRINTS

The motion court clearly erred denying counsel was ineffective for failing to object to respondent's fingerprint examiner's testifying she compared a fingerprint found on a crime scene cigar wrapper and it matched "on file" fingerprints belonging to Vincent because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected because use of the "on-file" fingerprints conveyed that Vincent had a criminal record or was in trouble with the police.

Barnes v. U.S., 365 F.2d 509 (D.C. Cir. 1966);

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

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

IX.

PENALTY ARGUMENTS - FAILURE TO PROPERLY OBJECT

The motion court clearly erred denying counsel was ineffective for failing to properly object to arguments: (1) Vincent would have killed Eva except he was arrested; (2) in an earlier time the Franklin and Addison families would have been given the opportunity for personal retribution, but instead Vincent got a fair trial; (3) urging the jury to think of the terror that Franklin, Franklin's mother, Leslie, and Eva felt; (4) if anyone believes in the death penalty it is Vincent; and (5) hold, hug, and love but do not let Franklin and Leslie Addison down because Vincent was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to these arguments as appealing to passion, prejudice, caprice, and emotion and Vincent was prejudiced as there is a reasonable probability had the jury not heard them Vincent would have been life sentenced.

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

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995);

Caldwell v. Mississippi, 472 U.S. 320 (1985);

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

X.

DR. WHITE - CULTURAL MITIGATION

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

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

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

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

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

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

XI.

LAY WITNESS CULTURAL MITIGATION

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

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

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

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

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

XII.

FAILURE TO FURNISH WHITE'S FINDINGS TO DRAPER

The motion court clearly erred denying counsel was ineffective for failing to furnish Dr. Draper with Dr. White's Pine Lawn cultural mitigation analysis for Draper to incorporate into Draper's disorganized Lifepath attachment disorder findings because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have so provided Draper with that information and Vincent was prejudiced as there is a reasonable probability the jury would have voted for life had they heard Vincent's attachment disorder was linked to Pine Lawn's cultural conditions.

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

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

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

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

XIII.

PROSECUTORIAL MISCONDUCT GETTING WRIT RECALLED

The motion court clearly erred in granting respondent's motion to recall Vincent's writ to attend the 29.15 evidentiary hearing based on respondent's false representations and in refusing to disqualify the St. Louis County Prosecutor's office based on having made such false representations because such actions denied Vincent his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that Vincent's presence at the hearing consulting with counsel was critical to the fairness of the hearing and the Prosecutor's office should have been disqualified having gotten Vincent's writ recalled based on its false representations.

Kentucky v. Stincer, 482 U.S. 730 (1987);

Martinez v. Ryan, 566 U.S. 1 (2012);

U.S. v. Washington, 705 F.2d 489 (D.C. Cir. 1983);

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

XIV.

FAILURE TO PRESENT PET SCAN

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

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

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

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

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

XV.

FAILURE TO CALL GELBORT

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

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

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

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

Tisius v. State, 183 S.W.3d 207 (Mo. banc 2006);

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

XVI.

BRYANT/BURNS AGGRAVATION

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

Ervin v. State, 80 S.W.3d 817 (Mo. banc 2002);

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

Parker v. Bowersox, 188 F.3d 923 (8th Cir. 1999);

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

XVII.

FAILURE TO DISPROVE ADDISON OFFENSE

The motion court clearly erred in denying counsel was ineffective for failing to call Maggie Jones, Margaret Walsh, and Arnell "Smoke" Jackson, and in failing to present other lighting conditions and distance measurements evidence all to impeach/discredit Eva Addison's aggravation evidence reporting of Vincent shooting Leslie Addison because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented all this evidence and there is a reasonable probability death would not have resulted.

Ervin v. State, 80 S.W.3d 817 (Mo. banc 2002);

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

Parker v. Bowersox, 188 F.3d 923 (8th Cir. 1999);

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

XVIII.

MEMORANDA OF LAW CLAIMS - TIMELINESS

The motion court clearly erred in treating the memoranda of law claims relating to the Drs. Gur and Gelbort claims as untimely amendments to the amended motion because the 29.15 time limits arbitrarily denied Vincent his rights to due process, freedom from cruel and unusual punishment, and effective assistance of 29.15 counsel, U.S. Const. Amends. VI, VIII and XIV, in that the time limits are unreasonably short.

Rinaldi v. Yeager, 384 U.S. 305 (1966);

Martinez v. Ryan, 566 U.S. 1 (2012);

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

XIX.

MEMORANDA OF LAW CLAIMS - ABANDONMENT

Vincent McFadden was abandoned by 29.15 counsel and the motion court clearly erred in failing to make a finding that 29.15 counsel abandoned Vincent as reflected in the memoranda of law claims submitted as to Drs. Gur 8(L) and Gelbort 8(I) as those claims should have been pled to include ineffectiveness as to guilt phase in order to show lack of deliberation/cool reflection or a mental disease or defect defense and further the 29.15 pleadings should have included an ineffectiveness claim that Vincent's mental age was less than 18 years old for purposes of guilt deliberation and penalty mitigation because Vincent was denied his rights to due process, freedom from cruel and unusual punishment and effective assistance of 29.15 counsel, U.S. Const. Amends. VI, VIII and XIV, in that 29.15 counsels' failure to timely so plead was in violation of their Rule 29.15(e) duty to sufficiently allege facts and claims.

Martinez v. Ryan, 566 U.S. 1 (2012);

Riley v. State, 364 S.W.3d 631 (Mo.App., W.D. 2012);

State v. Bradley, 811 S.W.2d 379 (Mo. banc 1991);

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

XX.

COUNSEL CONCEDED GUILT

The motion court clearly erred denying counsel was ineffective for calling Douglas when Franklin's counsel, Freter, told Vincent's counsel that Douglas would never testify contrary to his guilty plea where Douglas said he and Vincent shot Franklin because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would not have called Douglas knowing he would testify that he and Vincent shot Franklin because calling Douglas amounted to admitting Vincent was guilty when Vincent asserted he was innocent.

McCoy v. Louisiana, 138 S.Ct. 1500 (2018);

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

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

APPLICABLE STANDARDS

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

Appellate Review

Review is for whether the 29.15 court clearly erred. *Barry v. State*, 850 S.W.2d 348, 350 (Mo. banc 1993).

Ineffectiveness

To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A movant is prejudiced if there is reasonable probability but for counsel's errors the result would have been different. *Deck v. State*, 68 S.W.3d 418, 426 (Mo. banc 2002). A reasonable probability sufficiently undermines confidence in the outcome. *Id.* at 426. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994); *Butler v. State*, 108 S.W.3d 18, 25 (Mo.App., W.D. 2003).

Eighth and Fourteenth Amendments

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

ARGUMENT

I.

CALLING DOUGLAS

The motion court clearly erred denying counsel was ineffective for calling Douglas when Franklin's counsel, Freter, told Vincent's counsel that Douglas would never testify contrary to his guilty plea where Douglas said he and Vincent shot Franklin because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would not have called Douglas after respondent called Mark Silas who testified he was present and Vincent did not shoot Franklin, and therefore, Vincent was not guilty of killing Franklin. Vincent was prejudiced because Douglas' identifying Vincent as having shot Franklin contradicted Vincent's defense he did not shoot Franklin.

Counsel called Douglas, even though Douglas' counsel, Freter, told them he would testify as he did at his guilty plea that both he and Vincent shot Franklin. Reasonable counsel would not have called Douglas after the jury heard Silas testify Vincent did not shoot Franklin because the jury had heard evidence Vincent did not shoot Franklin. Calling Douglas resulted in the jury hearing Douglas testify that he and Vincent shot Franklin.

I. Douglas' Letter And Pretrial Deposition

Douglas sent counsel a February 7, 2007 letter in which Douglas stated that he and Kyle Dismukes shot Franklin and not Vincent(29.15Tr.53,462) (29.15Ex.84).

Before trial began, counsel phone deposed Douglas on April 19, 2007 (29.15Tr.47-54,462-65) (29.15Ex.85). Douglas refused to be sworn(29.15Tr.49,463) (29.15Ex.85p.5-6). Repeatedly Douglas asserted he needed to speak to his attorney, Kim Freter(29.15Ex.85p.4-9,11). Douglas testified that Vincent was present when Franklin was shot, but Vincent did not shoot Franklin (29.15Tr.51) (29.15Tr.463-64) (29.15Ex.85p.11). Douglas testified that he and his brother, Kyle Dismukes, shot Franklin(29.15Tr.51) (29.15Ex.85p.11).

II. Respondent's Motion *In Limine*

Before Douglas testified, respondent moved to exclude evidence Douglas pled guilty to murder second and was sentenced to 20 years and that was sustained(T.Tr.1578-88).

III. Douglas' Trial Testimony

A. Douglas' Direct Examination

Douglas testified that on the day Franklin was shot that he was with Vincent and his brother, Kyle Dismukes, and they came across Franklin at Lexington Avenue(T.Tr.1624-27). Franklin was with two other guys and one of them shot at Douglas first in front of Greg Hazlett's house(T.Tr.1626-29).

Douglas chased the shooter, but he got away so Douglas shot Franklin in the head at Hazlett's house(T.Tr.1627,1629-30). Douglas testified that he shot Franklin 3-4 times and passed the gun to Vincent who shot Franklin(T.Tr.1630-31).

Douglas testified that Vincent's counsel, Kraft and Turlington, talked to him on February 7, 2007 at the jail about his involvement(T.Tr.1623). When Douglas talked to Vincent's counsel, he told them that Vincent was present when Franklin was shot, but Vincent did not shoot Franklin(T.Tr.1631-32,1637). Douglas told counsel that the second shooter was Douglas' brother, Kyle Dismukes(T.Tr.1631-32). Douglas also wrote a letter dated February 7, 2007 to Kraft (Defense Ex.A), on the same day after they finished meeting, in which Douglas admitted that he and Dismukes killed Franklin and it stated Vincent was present, but had nothing to do with Franklin's death(T.Tr.1632-33,1637).

On April 19, 2007, Vincent's counsel, the prosecutor, and a court reporter were present for a phone deposition conducted with Douglas(T.Tr.1633-35,1637-38). During that phone conversation, Douglas admitted that he and Dismukes shot Franklin and that Dismukes was the second shooter(T.Tr.1634-35). Douglas said that Vincent was present, but did not shoot Franklin(T.Tr.1634-35). When Douglas' deposition was taken, he declined to swear to tell the truth because he was afraid to say anything different from his guilty plea(T.Tr.1638-39).

Douglas testified that he had pled guilty to killing Franklin and that he swore to tell the truth at the plea(T.Tr.1638). Douglas testified that he did not want to be charged with perjury and get up to a life sentence(T.Tr.1639-40). When Douglas testified that he could get up to a life sentence, Prosecutor Larner objected that life was not possible, as suggested by defense counsel's question, because perjury was a

Class C felony and the maximum was seven years(T.Tr.1639). Douglas did not get the maximum sentence on his guilty plea(T.Tr.1640).

B. Cross-examination of Douglas

Douglas testified that Dismukes did not shoot anyone and the letter Douglas sent Vincent's counsel was untrue(T.Tr.1648-51).

Douglas testified that he was the first to shoot Franklin and that Vincent then shot Franklin(T.Tr.1673). Douglas testified that Dismukes did not shoot Franklin(T.Tr.1648,1651,1673).

The letter Douglas wrote defense counsel (Defense Ex.A) that Dismukes shot Franklin was a lie(T.Tr.1648-51). Respondent cross-examined Douglas about the letter and read from it to the jury(T.Tr.1650-71).

C. Redirect of Douglas

Douglas testified that all his statements, including letters, that Vincent did not shoot Franklin were a lie(T.Tr.1674).

D. Re-cross of Douglas

Douglas testified that when he pled guilty he was under oath and he testified truthfully(T.Tr.1680). Douglas testified that "today" he was also testifying truthfully that he shot Franklin first and that was followed by Vincent shooting Franklin second(T.Tr.1680).

IV. Counsels' 29.15 Testimony

Douglas pled guilty to murder second in December, 2005(29.15Tr.462).

Counsel received a February 7, 2007 letter from Douglas in which he said that he and Kyle Dismukes shot Franklin(29.15Tr.45-48,53,462).

After Douglas' April 19, 2007 deposition, counsel communicated with Douglas' counsel Kim Freter(29.15Tr.51-52).

Counsel was aware respondent had endorsed Douglas as its witness(29.15Tr.53,464-65). Vincent gave counsel a letter that he wrote to Douglas telling Douglas to follow Douglas' attorney's advice to do whatever he needed to keep his 20 year sentence and that would not upset him(29.15Tr.54-55,464-65). Someone from the defense team gave Vincent's letter to Freter for Freter to give to Douglas(29.15Tr.55). The defense team did not know whether Douglas ever got that letter(29.15Tr.55).

Counsel wanted to elicit from Douglas that Vincent did not shoot Franklin(29.15Tr.57,462). Counsel knew Douglas gave conflicting accounts as to whether Vincent shot Franklin and did not know which account Douglas would testify to at trial(29.15Tr.56). Counsel knew all of Douglas' statements that Vincent did not shoot Franklin were not under oath(29.15Tr.56-57).

Counsel called Douglas because Vincent wanted the defense he did not shoot Franklin(29.15Tr.58,113-14). Counsel wanted to present Douglas' 20 year sentence as evidence Vincent did not shoot Franklin and also to support the jury finding murder second(29.15Tr.57-59,466-67). Counsel knew there was unfavorable caselaw on presenting the 20 year sentence(29.15Tr.59). Counsel knew respondent had succeeded in getting the 20 year sentence excluded through a motion *in*

limine(29.15Tr.467). Counsel knew they were not required to call Douglas(29.15Tr.59).

Counsels' strategy was to call Douglas to testify Douglas and Kyle Dismukes shot Franklin(Tr.146-47,546-47). If Douglas said Vincent shot Franklin, then counsel would impeach Douglas with his prior statements(29.15Tr.146-47,546-47). Counsel believed that calling Douglas was the only way to get into evidence Dismukes was the other shooter(29.15Tr.156-57,547).

Counsel believed they told Douglas that he could be sentenced to 30 years for perjury(29.15Tr.468-69).

V. 29.15 Findings

At Douglas' guilty plea, he testified that he and Vincent shot Franklin(29.15L.F.#222p.23).

Counsel considered that Douglas could testify that Vincent shot Franklin or that Vincent did not shoot Franklin(29.15L.F.#222p.24). If Douglas testified Vincent shot Franklin, then counsel intended to use as their strategy Douglas' prior statements that Vincent was not the shooter to impeach Douglas(29.15L.F.#222p.24). Calling Douglas was the only way to get before the jury that Vincent did not shoot Franklin(29.15L.F.#222p.24-25). Counsel made the reasonable strategic decision to call Douglas understanding the advantages and disadvantages of calling Douglas(29.15L.F.#222p.24-25).

VI. Douglas' Attorney Kim Freter's Testimony

Kim Freter represented Douglas on his 2005 guilty plea to having acted in concert with Vincent to kill Franklin(29.15Tr.245).

Freter represented Douglas when he was called to testify at the Franklin retrial(29.15Tr.247). Freter told all of Vincent's attorneys and was clear that Douglas would never testify inconsistent with his plea agreement - that he and Vincent shot Franklin(29.15Tr.250-53).

Vincent's counsel gave Freter a letter Vincent authored and Freter showed it to Douglas(29.15Tr.253). The letter's substance was that Vincent wanted Douglas to know that he did not object to Douglas' testifying(29.15Tr.253-54).

VII. Mark Silas' Trial Testimony

Mark Silas testified he was walking through Pine Lawn on July 3, 2002, with Todd Franklin and in front of Franklin's house(T.Tr.1042,1044-45). Somebody pulled out a gun and Silas ran(T.Tr.1043-44).

Officer Stone obtained a recorded statement from Silas on July 3, 2002(T.Tr.1414-16). Silas' recorded statement (Trial Ex.78A) was played for the jury and the jury followed along a transcript(TrialEx.78C)(T.Tr.1101-03). Silas reported a tall slim, light complexioned African-American male shot Franklin and that was followed by Vincent shooting Franklin(TrialExs.78A,78C).

Silas testified that he made-up everything in his recorded statement so that the police would allow him to leave(T.Tr.1109,1118). Silas testified that he did not know why he said Vincent shot when Vincent did not(T.Tr.1119).

VIII. Counsel Was Ineffective

In *State v. McCarter*, 883 S.W.2d 75, 75 (Mo.App., S.D. 1994), the defendant was convicted of sexual abuse. Counsel offered into evidence documents recounting accusations of sexual abuse of other children which would have been inadmissible had the state offered them. *Id.* at 76-78. Strategy decisions can be so unsound as to constitute ineffectiveness. *Id.* at 77-79. Offering those documents was not reasonable strategy. *Id.* at 77-79.

In *Poole v. State*, 671 S.W.2d 787, 789 (Mo.App., E.D. 1983), counsel was ineffective for calling two police officer witnesses who gave hearsay testimony highly damaging to Poole's innocence claim.

In *Gant v. State*, 211 S.W.3d 655, 658-60 (Mo.App., W.D. 2007), counsel was ineffective for introducing evidence at the motion to suppress hearing without which the critical evidence against the defendant would have been required to be suppressed. Admitting evidence supporting the state's case "can be a significant factor" in finding counsel ineffective as such action falls below that of a reasonably competent attorney calling into question the trial's reliability. *Id.* at 659-60.

What *McCarter*, *Poole*, and *Gant* all stand for is that counsel's offering evidence that is harmful to the defendant's innocence is not reasonable and is ineffective. That is what Vincent's counsel did. Freter told Vincent's counsel that Douglas would never testify inconsistent with Douglas' plea that he and Vincent shot Franklin(29.15Tr.250-53). Douglas' prior statements that Vincent did not shoot Franklin were all unsworn statements (29.15Tr.49,463) (29.15Ex.85p.5-6) (29.15Tr.45-48,53,462) (T.Tr.1632-33,1637,1638-39) and when prior sworn

testimony was sought, Douglas refused to be sworn(29.15Tr.49,463) (29.15Ex.85p.5-6). Reasonable counsel who was on notice from Douglas' counsel, Freter, that Douglas would never testify differently from his sworn plea testimony and that all of Douglas' prior desirable statements were unsworn would not have called Douglas. *See McCarter*, *Poole*, *Gant* and *Strickland*. Further, reasonable counsel would not have called Douglas because the jury had already heard Silas in respondent's case say that Vincent did not shoot Douglas(T.Tr.1119) and that Silas' prior reporting Vincent was the shooter was done to get the police to let him go(T.Tr.1109,1118). Further, reasonable counsel would not have called Douglas because the court had sustained respondent's motion *in limine* that the jury would not hear Douglas pled guilty to murder second and was sentenced to 20 years(T.Tr.1578-88). Before Douglas was called, the jury already heard from respondent's witness, Silas, that Vincent had not shot Franklin, and therefore, there was evidence before the jury Vincent did not shoot Franklin.

Vincent was prejudiced because the jury got to hear repeatedly from Douglas that he and Vincent shot Franklin (T.Tr.1630-31,1648,1651,1673,1680). *See McCarter*, *Poole*, *Gant* and *Strickland*. That prejudice was accentuated because in respondent's initial guilt closing argument the jury heard that the defense had called Douglas "to confirm everything the State's witnesses said."(T.Tr.1734). *See McCarter*, *Poole*, *Gant* and *Strickland*. In respondent's guilt rebuttal, the jury was told that the defense's calling Douglas made respondent's case "that much stronger"

because if the jury did not believe Vincent was guilty during respondent's case, then it had to believe Vincent was guilty after hearing Douglas(T.Tr.1777).

The prejudice in calling Douglas carried over to respondent's initial penalty argument where respondent argued that Vincent had drawn Douglas into becoming involved in Franklin's death(T.Tr.2384). *Strickland*.

A new trial is required.

II.

FAILURE TO REBUT INACCURATE

FRANKLIN PORTRAYAL

The motion court clearly erred denying counsel was ineffective for failing to present evidence of Franklin's second degree trafficking guilty plea and Taneisha Kirkman-Clark's knowledge of Franklin's drug dealing, gun carrying, and drive by shooting actions because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented this evidence to rebut respondent's upstanding person portrayal of Franklin. Vincent was prejudiced because the jury was left with the false impression Vincent was more deserving of death based on Franklin's high moral character.

In penalty, respondent portrayed Franklin as an upstanding person. Counsel failed to present available evidence to rebut that inaccurate portrayal leaving the jury to believe that Vincent was more deserving of death for a person with Franklin's upstanding character.

Respondent's Penalty Evidence

Franklin's mother, Patricia, described Franklin as the man of the house she relied on because she was divorced(T.Tr.2039,2041). When Patricia's mother died, Franklin moved in with her father to help him cope(T.Tr.2042-43).

Patricia recounted how as a young child Franklin gave away his lunch at school for weeks to another student because he did not have a lunch(T.Tr.2046-47). Patricia also recounted how when a neighbor girl's mother died he gave his piggy bank money for the family to get food(T.Tr.2047). Patricia described Franklin as non-violent, "clean cut," a very friendly person who always kept a smile and made friends easily(T.Tr.2047-48,2052). The jury saw pictures of Franklin at Christmas and ones that focused on his smile(T.Tr.2050-53). Franklin had obtained a GED and was attending a community college(T.Tr.2048-49). Franklin was working at MCI(T.Tr.2049).

Patricia testified on cross-examination that she did not know that when Franklin was shot he had cocaine in his pocket(T.Tr.2055).

Candace Hosea was Franklin's girlfriend and they worked together at MCI(T.Tr.2057). Candace asked Franklin to go to Homecoming and that was when she fell in love with him(T.Tr.2059-60). They had talked about getting married and having children(T.Tr.2057). Franklin was a happy, friendly person who was respectful and cared about everyone(T.Tr.2057-58). Franklin had helped Candace's mother to move and paint when Candace had only known Franklin for one month(T.Tr.2058-59).

On cross-examination, Candace testified that she did not know that Franklin was involved in drugs(T.Tr.2060).

Franklin's sister, Tara, was younger than him and described him as a "father figure"(T.Tr.2062-63). Tara described their relationship as being very close and they

were the best of friends(T.Tr.2073). Because Franklin's middle name was Eric, Tara named her daughter Erica(T.Tr.2070).

Franklin taught Tara to skate, took her to cheerleading, and gave her money for her prom dress(T.Tr.2063-64). Franklin was proud of Tara for having graduated from high school and was supportive of her pregnancy(T.Tr.2065). Franklin was a non-violent person who handled a situation at school where a guy was giving Tara trouble by talking to him(T.Tr.2064-65). When their father returned to the family for one year from West Virginia, he struck Tara and Franklin told him that he could not do that(T.Tr.2066).

Tara recounted that Franklin always had a job(T.Tr.2067). They had planned to open a hair salon together(T.Tr.2067).

Tara described how their grandmother loved Pepsi and M&Ms and how Franklin always got those for her(T.Tr.2065). Franklin took their grandfather to play golf and introduced him to Michael Jordan shoes that he still wears(T.Tr.2068). Their grandfather called Franklin "Hollywood" because he always dressed nicely(T.Tr.2068). When their grandmother died, Franklin moved in with their grandfather and took him everywhere, like church on Sunday(T.Tr.2068). Franklin persuaded their grandfather to give away their grandmother's clothing to people who needed clothing(T.Tr.2069). When their grandfather wanted the freezer moved at 6:00 a.m., Franklin did that(T.Tr.2069-70). Even though Franklin was scared of heights, he put tar on his grandfather's roof(T.Tr.2071-72). Franklin and his grandfather were best friends(T.Tr.2069).

Tara described how Franklin did chores for their grandparent's neighbor, Ms. Rogers and was not paid for that(T.Tr.2070-71).

At the conclusion of the defense's penalty evidence, the jury heard a stipulation that when Franklin died that he possessed one gram of cocaine(T.Tr.2332).

Counsels' Testimony

Counsel knew from this case's first trial the jury heard evidence about Franklin's good character and they expected that again(29.15Tr.126-27,132,513-14,517).

If counsel had obtained a certified copy of Franklin's guilty plea to the Class A felony of second degree trafficking (29.15Ex.46), then they would have admitted it(29.15Tr.134,518-19). There was no strategy for failing to investigate Franklin's criminal history(29.15Tr.517-18).

Vincent supplied counsel Kirkman-Clark's name as someone who should be contacted(29.15Tr.96,491-92). Counsel made limited unsuccessful phone attempts to contact Kirkman-Clark(29.15Tr.96-97,491-92). Had counsel investigated Kirkman-Clark, they would have called her to rebut respondent's portrayal of Franklin's good character(29.15Tr.134,519).

29.15 Findings

Kirkman-Clark would have presented both favorable and unfavorable information about Franklin(29.15L.F.#222p.81). Kirkman-Clark would have revealed Vincent's drug and gang history which counsel wanted to avoid(29.15L.F.#222p.81).

At trial, the jury heard that Franklin possessed drugs at the time of death(29.15L.F.#222p.80-81). Counsel were concerned that presenting evidence of Franklin's conviction would offend the jury(29.15L.F.#222p.80). Evidence of Franklin's drug conviction would not have outweighed respondent's aggravation(29.15L.F.#222p.81).

Available Rebutting Evidence

Franklin had pled guilty to second degree drug trafficking(29.15Ex.46).

Kirkman-Clark recounted Franklin was a drug dealer and associate of drug dealer Pelle and gang member(29.15Ex.86Ap.13-15). Franklin carried a gun(29.15Ex.86Ap.15). Franklin was part of a drive by shooting directed at Kirkman-Clark's mother's house with Arnell "Smoke" Jackson as the intended target(29.15Ex.86Ap.15-16). Kirkman-Clark described Franklin as "nice" when he complied with her request not to deal drugs in her mother's yard(29.15Ex.86Ap.13-14,32).

Counsel Was Ineffective

"One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002). *See, also, Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel has duty to investigate and rebut aggravation); *Parker v. Bowersox*, 188 F.3d 923, 929-31 (8th Cir. 1999) (counsel was ineffective for failing to present evidence rebutting aggravation that victim was potential witness against Parker).

In *Gill v. State*, 300 S.W.3d 225, 228-29, 233 (Mo. banc 2009), this Court found counsel was ineffective for failing to rebut evidence portraying the victim as a person of high moral character when in fact he possessed child pornography and other sexually oriented matterials. In *Gill*, the jury was left with the false impression that Gill was more deserving of death because of the victim's high moral character. Vincent's jury was left with a similarly false impression as Gill's jury.

That false impression was driven home in respondent's initial penalty argument. Respondent told the jury that Vincent and Franklin had similar childhoods(T.Tr.2383,2392). Franklin did not have a father(T.Tr.2383,2392). Franklin worked, got a GED, planned for the future, and was non-violent while Vincent, "[t]he other one," was not like that(T.Tr.2383). Franklin did things "the right way," which was "nonviolently"(T.Tr.2383). Franklin "stood up" for his sister(T.Tr.2383-84). Franklin "didn't want to spread violence"(T.Tr.2383-84). Vincent relied on violence - threats, guns, and shootings(T.Tr.2384). Vincent drew others "into his web of violence"(T.Tr.2384).

Reasonable counsel would have presented Franklin's guilty plea and Kirkman-Clark's evidence to rebut how Franklin was portrayed. *See Ervin*, *Wiggins*, *Parker*, *Gill* and *Strickland*. Vincent was prejudiced because the jury was left believing Vincent was more deserving of death for killing someone who respondent presented as being of high moral character. *See Gill* and *Strickland*.

It was critical for the jury to hear about Franklin's drug dealing, association with drug dealer Pelle, gang membership, and drive by shooting

involvement(29.15Ex.46) (29.15Ex.86Ap.13-16,32). The jury only heard on cross-examination some non-descript evidence that Franklin was involved in drugs (T.Tr.2055,2060) and that he died possessing a single gram of cocaine (T.Tr.2332) - an amount associated with personal use, rather than drug dealing and the violence that comes with being a drug dealer. Further counsels' actions were not reasonable to avoid Kirkman-Clark's knowledge of Vincent's drug dealing, gang history because the jury was exposed to that evidence in the letters exchanged between Vincent and Douglas. *See* Points III and IV(29.15Tr.588-90). Likewise, counsels' actions of wanting to avoid Kirkman-Clark's knowledge of Vincent's drug dealing and gang history was unreasonable because, as counsel acknowledged, the jury would have inferred that association from other evidence it heard here, like the letters Vincent and Douglas exchanged (Points III and IV) (29.15Tr.588-90). Further, it was not reasonable to fail to present evidence of Franklin's drug dealing conviction to avoid offending the jury because counsel had elicited on cross-examination from Franklin's mother (T.Tr.2055) and Franklin's girlfriend (T.Tr.2060) evidence that Franklin was involved in drugs and counsel introduced at the end of their defense penalty phase a stipulation that when Franklin died he possessed a gram of cocaine(T.Tr.2332).

Vincent was prejudiced because the jury was left with the impression that Vincent was more deserving of death because of having killed someone of especially high moral character. *See Gill* and *Strickland*.

A new penalty phase is required.

III.

DOUGLAS' LETTERS TO VINCENT

The motion court clearly erred denying counsel was ineffective for failing to object to respondent introducing Douglas' letters (TrialExs.502, 503, 504, 505, 506) (29.15Exs.57, 58, 59, 60, 61) written to Vincent because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected as irrelevant inadmissible hearsay and Vincent was prejudiced because those letters placed before the jury gang affiliation evidence counsel sought to keep out.

Counsel was ineffective for failing to object to Douglas' irrelevant inadmissible hearsay letters he wrote to Vincent that included gang affiliation evidence which counsel sought to exclude.

Trial Evidence

Trial Exs.502, 503, 504, 505, 506 were identified as letters Douglas wrote to Vincent and seized by jail staff and which were admitted into evidence(T.Tr.1520-34) (T.Tr.1541-45) (T.Tr.1564-69).

Counsels' Testimony

Counsel wanted Douglas' letters before the jury because they showed Vincent did not tell Douglas what to testify to(29.15Tr.145,545). Counsel acknowledged that from the letters the jury would infer gang association(29.15Tr.588-90).

29.15 Findings

Counsel was not ineffective because they wanted the letters admitted to support Vincent did not coach Douglas' testimony(29.15L.F.#222p.20-21).

Counsel Was Ineffective

The amended motion alleged counsel was ineffective for failing to object to respondent's admitting Douglas' letters written to Vincent (TrialExs.502,503,504,505,506) (29.15Exs.57,58,59,60,61) as irrelevant inadmissible hearsay(29.15L.F.#130p.21-23 see T.Tr.1524,1533).

Hearsay is an out-of-court statement relied on to prove the truth of the matter asserted and depends on the statement's veracity for its value. *State v. Kemp*, 212 S.W.3d 135, 146 (Mo. banc 2007). Inadmissible hearsay that goes to the substance of respondent's case requires reversal. *See State v. Robinson*, 196 S.W.3d 567, 573 (Mo.App., S.D. 2006); *State v. Hoover*, 220 S.W.3d 395, 407-08 (Mo.App., E.D. 2007).

Douglas' letters contained references to gang activities and affiliations. *See* (TrialExs.502,503,504,505,506) (29.15Exs.57,58,59,60,61). Those references included: (1) "Love & Loyalty" "Love is Love Loyalty is Royalty"(29.15Ex.57); (2) "Lawn Life" (29.15Ex.58); (3) "Love is Love Loyalty is Royalty" and "Lawn In Lawn Out" (29.15Ex.59); (4) "Love is Love Loyalty is Royalty"(29.15Ex.60); and (5) "Love and Loyalty" (29.15Ex.61).

In guilt rebuttal, respondent argued the gang references "Love-N-Loyalty" and "Loyalty Is Royalty," found in Vincent's and Douglas' exchanges of letters, was

"their motto"(T.Tr.1787,1791). Counsel testified they worked hard to keep out gang evidence(29.15Tr.171,557).

In respondent's initial penalty argument, the jury was told Vincent was "the king of Pine Lawn, the self-appointed king of Pine Lawn."(T.Tr.2381).

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994). Reasonable counsel who sought to keep out gang evidence would have objected to Douglas' letters which were offered in respondent's case before Douglas testified in the defense case and which contained gang references. *See Strickland, McCarter*. Counsels' strategy was unreasonable because they sought to keep out gang evidence (29.15Tr.171,557), but these letters highlighted gang affiliation. Moreover, counsels' strategy to show Vincent did not tell Douglas how to testify was unreasonable (29.15Tr.145,545) because the letters' focused on "Loyalty," and therefore, suggested the exact opposite that Vincent was directing Douglas what to do. Vincent was prejudiced because the jury was presented with Douglas' inadmissible irrelevant hearsay gang related evidence.

A new trial is required.

IV.

VINCENT'S LETTERS TO DOUGLAS

The motion court clearly erred denying counsel was ineffective for failing to object to respondent introducing Vincent's letters and an envelope written to Douglas (TrialExs.401, 402, 403, 405, 407, 409) (29.15Exs.51, 52, 53, 54, 55, 56) because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected to the letters as irrelevant and Vincent was prejudiced because those letters placed before the jury gang affiliation evidence counsel had sought to keep out and led the jury to believe Vincent was directing Douglas what to do and say.

Counsel was ineffective for failing to object to irrelevant letters and an envelope Vincent wrote to Douglas which placed before the jury gang affiliation evidence which counsel had sought to exclude. Further, the letters' contents left the jury believing Vincent was directing Douglas what to do.

Trial Evidence/Argument

Trial Exs.401, 402, 403, 405, 407, and 409 were identified as letters that Vincent wrote to Douglas and were admitted into evidence(T.Tr.1520-34) (T.Tr.1541-45) (T.Tr.1551-64).

Before respondent rested its guilt case, it read from some of the letters identified as Vincent having authored and written to Douglas(T.Tr.1571-76). Vincent wrote Douglas that he had everything covered on legal matters to help them

both(T.Tr.1573). Vincent stated that the medical examiner was the key to both of their freedom(T.Tr.1573-74). Vincent wrote that he was putting something together to help Douglas organize matters(T.Tr.1574). Vincent wrote that he was going to make something happen(T.Tr.1575). Vincent wrote that Douglas should be sure not to say anything about Zo and Corey(T.Tr.1575-76). Vincent's writings included repetition of the phrases: "Love -N-Loyalty. Love is love. Loyalty is royalty. Yung Hood."(T.Tr.1574-76).

In guilt rebuttal, respondent argued the gang references "Love-N-Loyalty" and "Loyalty Is Royalty," found in Vincent's and Douglas' exchanges of letters, was "their motto"(T.Tr.1787,1791).

Counsels' Testimony

Counsel testified there were some things in the letters Vincent wrote that were helpful - that Vincent did not tell Douglas how to testify(29.15Tr.142-43,545).

Counsel acknowledged that from the letters the jury would infer gang activity(29.15Tr.588-90).

29.15 Findings

Counsels' strategy was for the jury to learn that Vincent had not told Douglas how to testify(29.15L.F.#222p.19-20).

Counsel Was Ineffective

The amended motion alleged counsel was ineffective for failing to object to the admitting and reading of letters and an envelope Vincent wrote to Douglas

(TrialExs.401,402,403,405,407,409) (29.15Exs.51,52,53,54,55,56) as irrelevant(29.15L.F#130p.19-21).

Vincent's letters contained gang affiliation evidence(TrialExs.401,402,403,405,407,409) (29.15Exs.51,52,53,54,55,56). Those references included: (1) "Love-N-Loyalty" "Love is Love" "Loyalty is Royalty" "Yung-Hood"(29.15Ex.51); (2) "love-N-loyalty "Yung H_ _ D"(29.15Ex.52); (3) "Love-N-Loyalty" "Love Is Love" "Loyalty Is Royalty" "Yung Hood" (29.15Ex.53); (4) Envelope postmarked 9/1/06 from Vincent to Douglas(29.15Ex.54); (5) "Love-N-Loyalty" "Yung Hood" "Love is Love" "Loyalty Is Royalty"(29.15Ex.55); and (6) "love-N-loyalty" "Hood"(29.15Ex.56).

In guilt rebuttal, respondent argued the gang references "Love-N-Loyalty" and "Loyalty Is Royalty," found in Vincent's and Douglas' exchanges of letters, was "their motto"(T.Tr.1787,1791). Counsel testified they worked hard to keep out gang evidence(29.15Tr.171,557).

In respondent's initial penalty argument, the jury was told Vincent was "the king of Pine Lawn, the self-appointed king of Pine Lawn."(T.Tr.2381).

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994). Reasonable counsel who sought to keep out gang evidence would have objected to Vincent's letters as irrelevant. *Strickland* and *McCarter*. Counsels' strategy was unreasonable because they sought to keep out gang evidence (29.15Tr.171,557), but these letters highlighted gang affiliation. Moreover, counsels' strategy to show Vincent did not tell Douglas how to

testify was unreasonable (29.15Tr.145,545) because the letters' focus on "Loyalty" suggested the exact opposite - that Vincent was directing Douglas what to do and say. Additionally, the content of the letters respondent read and highlighted to the jury left the jury believing that Vincent directed Douglas what to do(T.Tr.1571-76).

Vincent was prejudiced because the jury heard irrelevant gang affiliation in Vincent's letters to Douglas that respondent relied on in guilt rebuttal closing argument(T.Tr.1787,1791). That gang affiliation evidence was also the subject of respondent's initial penalty argument that Vincent regarded himself as the king of Pine Lawn(T.Tr.2381). Further, Vincent was prejudiced because the letters presented Vincent as directing Douglas what to do. *Strickland* and *McCarter*.

A new trial is required.

V.

DOUGLAS' 24.035

The motion court clearly erred denying counsel was ineffective for failing to impeach Douglas with his 24.035 *pro se* motion because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have impeached Douglas with his 24.035 *pro se* because in his 24.035 Douglas asserted he was innocent of shooting Franklin and not present when Franklin was shot, and therefore, could not identify Vincent as having shot Franklin. Vincent was prejudiced as there is a reasonable probability he would not have been convicted.

Counsel was ineffective for failing to impeach Douglas with his *pro se* 24.035 in which Douglas alleged he did not shoot Franklin and was not present when Franklin was shot, and therefore, could not identify Vincent as a shooter.

29.15 Pleadings

The amended motion alleged counsel was ineffective for failing to impeach Douglas with his *pro se* 24.035(29.15L.F.#130 p.59-61). Respondent admitted into evidence Douglas' 24.035 casefile at trial which contained his *pro se* 24.035 motion(29.15L.F.#130p.59-61) (TrialEx.500) (T.Tr.1546-47). Douglas' *pro se* asserted that he was not present when Franklin was shot and had alibi witnesses who would account for where he was when Franklin was shot(29.15L.F.#130p.59-61). The pleadings alleged Douglas should have been impeached with his *pro se* because if

Douglas was not present when Franklin was shot, he could not have seen who shot Franklin(29.15L.F.130p.59-61).

29.15 Findings

At trial, Douglas was impeached with his prior statements that Kyle Dismukes and not Vincent shot Franklin(29.15L.F.#222p.30). The defense theory was that Vincent did not shoot Franklin and Douglas' prior statements that Vincent did not shoot Franklin supported that theory(29.15L.F.#222p.30). A statement Douglas was not at the shooting scene would not have supported the defense theory(29.15L.F.#222p.30). The jury was less likely to accept that Vincent did not shoot Franklin if Douglas had provided three differing accounts: (1) that Dismukes not Vincent shot Franklin; (2) that Douglas was not present when Franklin was shot; and (3) that Vincent shot Franklin(29.15L.F.#222p.30-31). Vincent's claim is that counsel failed to impeach Douglas in a particular manner, rather than counsel did not impeach Douglas at all, which was strategy(29.15L.F.#222p.30-31).

Douglas' *Pro Se* 24.035

At trial, respondent admitted into evidence Douglas' 24.035 casefile which contained his *pro se* 24.035 motion(T.Tr.1546-47) (TrialEx.500). The motion court took judicial notice of Douglas' *pro se* 24.035(29.15Tr.289) (29.15Ex.67). On June 12, 2006, before Vincent's case was tried in July, 2007, Douglas filed his *pro se* 24.035(29.15Ex.67). Douglas' *pro se* alleged counsel was ineffective in failing to contact witnesses to "prove my innocence." (29.15Ex.67). The *pro se* further alleged there was "no substantial evidence" to prove Douglas had anything to do with

shooting Franklin and Douglas had alibi witnesses who would account for where he was when Franklin was shot. Douglas asked to withdraw his guilty plea and go to trial(29.15Ex.67).

Counsel Was Ineffective

In *Black v. State*, 151 S.W.3d 49, 55-58 (Mo. banc 2004), counsel was ineffective for failing to impeach state witnesses through cross-examining them about prior inconsistent statements. Counsel was ineffective in *Black* because the subject of the impeachment went to the central controverted issue of whether Black acted with deliberation or a self-defense fit of rage. *Id*. at 56, 58.

During the state's case, respondent admitted Douglas' *pro se* motion at trial as part of Douglas' 24.035 casefile(T.Tr.1546-47) (TrialEx.500). Reasonable counsel would have impeached Douglas with his 24.035 *pro se* pleadings in which he asserted he was innocent and not present when Franklin was shot. *Strickland* and *Black*. That impeachment went to the central controverted issue of Douglas' ability to identify Vincent as a shooter when Douglas was not present for the shooting. *Strickland* and *Black*. The prejudice to Vincent is highlighted by respondent's rebuttal guilt closing argument that Douglas pled guilty because he was guilty (T.Tr.1778), but if counsel had impeached Douglas with his 24.035, then respondent could not have made that argument. Vincent was prejudiced because there is a reasonable probability he would not have been convicted. *Strickland* and *Black*.

A new trial is required.

VI.

DOUGLAS' DEPOSITION - COMPEL ANSWERS

The motion court (Judges Goldman and Vincent) clearly erred denying 29.15 counsel the opportunity to fully investigate by overruling/denying the motions to compel Douglas to answer deposition questions because Vincent was denied due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that he was denied the opportunity to properly prepare for the 29.15 evidentiary hearing on the Douglas claims.

The motion court (Judges Goldman and Vincent) denied Vincent the opportunity to prepare for his Douglas evidentiary hearing issues when they denied motions to compel Douglas to answer deposition questions.

Douglas' Refusal To Answer Deposition Questions

Rule 29.15 counsel was appointed September 10, 2013(29.15L.F.#100p.11) (29.15L.F.#125p.1). An extension to file the amended motion was granted until December 11, 2013(29.15L.F.#122p.1-5).

Douglas appeared for a October 24, 2013 deposition(29.15Exs.48,49) (29.15L.F.#130p.1) (29.15L.F.#120p.1-3) (29.15Tr.284-85). At the deposition, and at the direction of his attorney, Kim Freter, Douglas invoked the Fifth Amendment as to all questions, including his name and even taking an oath(29.15L.F.#118p.9-43). The questioning included, but was not limited to whether: (1) Douglas pled guilty to murder second for killing Franklin and sentenced to 20 years in December, 2005(29.L.F.#118p.17-19); (2) Kraft/Turlington phone deposed Douglas in April,

2007 and he refused to be sworn(29.15L.F.#118p.22); (3) a letter from Vincent was delivered to Douglas at the St. Louis County Jail before Douglas testified at the Franklin retrial and its contents(29.15L.F.#118p.25); (4) Douglas filed a 24.035 and what allegations he made(29.15L.F.#118p.19); (5) in February, 2007 Douglas wrote a letter to Vincent's attorneys Kraft/Turlington, and if he did, its contents(29.15L.F.#118p.19-21); (6) Kraft/Turlington or anyone provided any information about potential perjury charges and punishments of 7 years or life(29.15L.F.#118p.25-27); (7) before testifying in the Franklin re-trial the prosecutor or his investigators talked to Douglas(29.15L.F.#118p.23-25); and (8) Roderick Jones and Little Tony were present when Franklin was shot(29.15L.F.#118p.31);

On November 18, 2013, Judge Goldman denied a motion to compel answers on the grounds that answering would violate Douglas' Fifth Amendment right not to incriminate himself(29.15L.F.#100p.12) (29.15L.F.#115p.1) (29.15L.F.#118p.1-52). On January 12, 2018, Judge Vincent denied a renewed motion to compel answers(29.15L.F.#178p.1) (29.15L.F.#168p.1-5). The amended motion alleged the refusal to allow counsel to get Douglas' deposition answers denied a fair opportunity to present Vincent's claims(29.15L.F.#130p.9-13).

29.15 Findings

Douglas could invoke the Fifth Amendment because of Douglas' potential to implicate himself in criminal conduct for which the statute of limitations had not run(29.15L.F.#222p.14).

Douglas Was Required to Answer

The Eighth Amendment and due process clause apply to all stages of a capital case, including post-conviction discovery. *See Ford v. Wainwright*, 477 U.S. 399, 413-18 (1986) (as to competency to be executed the Eighth Amendment's reliability requirements apply and Florida statute was procedurally defective).

An individual sentenced to death is entitled to a complete record on appeal to avoid arbitrariness and caprice. *Dobbs v. Zant*, 506 U.S. 357, 358-60 (1993). Obtaining a complete record here meant being able to compel answers from Douglas. *See Dobbs*.

The Fifth Amendment protects a witness from being required to give incriminating evidence of prior crimes. *State v. Benson*, 633 S.W.2d 200, 202 (Mo.App., E.D. 1982). The Fifth Amendment "does not protect a person from being presented with the opportunity to commit possible future perjury." *Id.* at 202. A guilty plea waives the privilege against self-incrimination. *State v. Shafer*, 969 S.W.2d 719, 731 (Mo. banc 1998). A guilty plea waives the privilege as to the details of the crime to which the witness was convicted. *State v. Rollen*, 133 S.W.3d 57, 65 (Mo.App., E.D. 2003). Once a defendant pleads guilty he can be forced to testify to the details of the crime to which he pled guilty. *Luckett v. State*, 845 S.W.2d 616, 618 (Mo.App., E.D. 1993). Douglas could not invoke the Fifth Amendment because he had pled guilty to killing Franklin. *See Benson*, *Shafer*, and *Rollen*.

In *State ex rel. Robinson v. Corum*, 716 S.W.2d 376, 377 (Mo.App., W.D. 1986), the petitioner brought a parole violation revocation habeas action. Witnesses respondent intended to rely on were subpoenaed for depositions and refused to answer

questions. *Id.* at 377-78. A motion to compel answers was denied. *Id.* at 377-78. The refusal to compel answers denied Robinson the ability to fully and properly prepare for the revocation hearing and violated due process. *Id.* at 378. A new hearing with the opportunity to first get answers to the deposition questions was ordered. *Id.* at 379. The same was true as to Douglas - refusing to compel answers denied Vincent the opportunity to fully present his Douglas claims. *See Robinson*.

A new hearing where Douglas is first required to answer deposition questions is required.

VII.

Wanted Poster

The motion court clearly erred denying counsel was ineffective for failing to object to respondent presenting evidence Silas identified Vincent in a Pine Lawn police "Wanted" wall photo as a shooter because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected because Vincent's picture displayed in the Pine Lawn police station created the automatic inference Vincent had a criminal record or was in trouble with the police.

Counsel was ineffective for failing to object to evidence that Silas had identified Vincent as a shooter based on seeing Vincent's photo on the wall at the Pine Lawn police station. That evidence created the automatic inference that Vincent had a criminal record or was in trouble with the police.

Trial Evidence

Respondent asked Silas whether when he was at the Pine Lawn Police Station he pointed at a picture of Vincent on the wall and identified Vincent as the second shooter, which Silas denied(T.Tr.1059-60).

Officer Stone testified that Silas had identified the person in a picture on the Pine Lawn Police wall as having shot Franklin(T.Tr.1416).

During the defense case, and on cross-examination, respondent elicited from Officer Menzenwerth that Silas had identified a picture of Vincent on the Pine Lawn Police station wall as having shot Franklin(T.Tr.1609).

Counsels' Testimony

Counsel testified that because of their objections "Wanted" and the charge description were redacted from Vincent's photo(29.15Tr.64-65). There were no direct references to the photo being a "Wanted" photo(29.15Tr.161,552-53). Counsel did not have a strategy reason for failing to object(29.15Tr.67,475).

29.15 Findings

There was no evidence that Vincent's photo was a "Wanted" poster or why it was on the police station's wall(29.15L.F.#222p.27). On direct appeal, this Court considered evidence from three witnesses who saw Vincent's photo at the police station and their evidence was not offered as evidence of other bad acts by Vincent(29.15L.F.#222p.27).

Counsel Was Ineffective

In *Barnes v. U.S.*, 365 F.2d 509, 510 (D.C. Cir. 1966), the defendant's conviction was reversed because the jury was shown a typical police mug shot with prison numbers redacted. The *Barnes* Court reasoned that the police mug shot was like a "Wanted" poster displayed in post offices and movies that could only create the prejudicial "automatic" inference that the person pictured has a criminal record or was in trouble with the police. *Id.* at 510-11.

Redacted from the original photo was "Wanted" for "Assault 1st" - the Bryant/Burns charges(29.15Exs.69,69A). On Silas' direct examination, respondent asked him about having identified Vincent as a shooter based on Vincent's picture on the wall of the Pine Lawn Police station(T.Tr.1059-60). During respondent's initial guilt closing argument, the prosecutor argued that Silas had identified Vincent as the shooter based on seeing Vincent's photo on the wall at the Pine Lawn Police station(Tr.Tr.1746-47). Reasonable counsel would have objected because the automatic inference was Vincent had a criminal record or was in trouble with the police. *See Barnes* and *Strickland*. Vincent was prejudiced because evidence of Silas' photo identification injected other crime evidence that Vincent had a criminal record or was in trouble with the police. *See Barnes* and *Strickland*.

A new trial is required.

VIII.

"ON FILE" FINGERPRINTS

The motion court clearly erred denying counsel was ineffective for failing to object to respondent's fingerprint examiner's testifying she compared a fingerprint found on a crime scene cigar wrapper and it matched "on file" fingerprints belonging to Vincent because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected because use of the "on-file" fingerprints conveyed that Vincent had a criminal record or was in trouble with the police.

Counsel was ineffective for failing to object to evidence that fingerprints found on a crime scene cigar wrapper matched "on-file" fingerprints belonging to Vincent. The "on-file" fingerprints evidence conveyed to the jury that Vincent had a criminal record or was in trouble with the police.

Trial Evidence

A new cigar in its wrapper was found near Franklin's body(T.Tr.1281-82,1285-86,1288-96,1305). Fingerprint examiner Burke obtained a fingerprint from the wrapper(T.Tr.1306-10). Burke ran the wrapper's print through the Automated Fingerprint Identification System and obtained 15 candidates(T.Tr.1309-10). Burke compared the wrapper's print to fingerprints for Vincent that were "on file" and found they matched(T.Tr.1315).

Counsels' Testimony

Counsel did not have a strategy reason for failing to object(29.15Tr.63,470). There was no direct reference to an uncharged crime(29.15Tr.158-59,551-52).

29.15 Findings

Burke's testimony did not reference other arrests or crimes involving Vincent, and therefore, was not prejudicial(29.15L.F.#222p.26). On direct appeal, this Court stated that fingerprint cards alone do not constitute evidence of other crimes(29.15L.F.#222p.26).

Counsel Was Ineffective

In *Barnes v. U.S.*, 365 F.2d 509, 510 (D.C. Cir. 1966), the defendant's conviction was reversed because the jury was shown a typical police mug shot with prison numbers redacted. The *Barnes* Court reasoned that the police mug shot was like a "Wanted" poster displayed in post offices and movies that could only create the prejudicial "automatic" inference that the person pictured has a criminal record or was in trouble with the police. *Id.* at 510-11.

The inference created here, through Burke comparing the cigar wrapper prints to Vincent's prints "on file" prints, was to convey Vincent had a criminal record or was in trouble with the police. *See Barnes*. Reasonable counsel would have objected to Burke's testimony. *See Barnes* and *Strickland*. Vincent was prejudiced because Burke's testimony injected other crime evidence that Vincent had a criminal record or was in trouble with the police.

A new trial is required.

IX.

PENALTY ARGUMENTS - FAILURE TO PROPERLY OBJECT

The motion court clearly erred denying counsel was ineffective for failing to properly object to arguments: (1) Vincent would have killed Eva except he was arrested; (2) in an earlier time the Franklin and Addison families would have been given the opportunity for personal retribution, but instead Vincent got a fair trial; (3) urging the jury to think of the terror that Franklin, Franklin's mother, Leslie, and Eva felt; (4) if anyone believes in the death penalty it is Vincent; and (5) hold, hug, and love but do not let Franklin and Leslie Addison down because Vincent was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to these arguments as appealing to passion, prejudice, caprice, and emotion and Vincent was prejudiced as there is a reasonable probability had the jury not heard them Vincent would have been life sentenced.

Counsel was ineffective for failing to object to respondent's improper penalty arguments. Those arguments injected passion, prejudice, caprice, and emotion which prejudiced the jury such that Vincent would not have been death sentenced absent the improper arguments.

Trial Record

Counsel did not object to argument: (1) Vincent would have killed Eva except he was arrested (29.15Tr.521) (T.Tr.2380); (2) in an earlier time the Franklin and Addison families would have been given the opportunity for personal retribution, but instead Vincent got a fair trial (29.15Tr.525-26) (T.Tr.2409); (3) urging the jury to think of the terror that Franklin, Franklin's mother, Leslie Addison, and Eva Addison felt (29.15Tr.524-25) (T.Tr.2413); (4) if anyone believes in the death penalty it is Vincent (29.15Tr.522-23) (T.Tr.2404); and (5) hold, hug, and love but do not let Franklin and Leslie Addison down (29.15Tr.525) (T.Tr.2414).

Counsel's Testimony

Counsel had no reason for failing to object to these arguments (29.15Tr.522,523,525,526).

29.15 Findings

The claims raised in the 29.15 were presented on direct appeal and rejected(29.15L.F.#222p.81-87). Counsel cannot be ineffective for failing to make a meritless objection(29.15L.F.#222p.81-87).

Counsel Was Ineffective

The Eighth Amendment requires that any decision to impose death be based on reason and not passion, prejudice, caprice, and emotion. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Failure to make timely proper objections to arguments can constitute ineffectiveness. *State v. Storey*, 901 S.W.2d 886, 900-03 (Mo. banc 1995).

A prosecutor is allowed to argue the evidence and all reasonable inferences from it, but not allowed to make speculative arguments that likely mislead the jury.

State v. Brown, 337 S.W.3d 12, 14, 16 (Mo. banc 2011). Respondent's argument that Vincent would have killed Eva except he was arrested (29.15Tr.521) (T.Tr.2380) was speculative argument that misled the jury. *See Brown*.

Argument lessening a jury's sense of responsibility for imposing death is improper. *Caldwell v. Mississippi*, 472 U.S. 320, 325, 328-29 (1985). Respondent's argument that in an earlier time the Franklin and Addison families would have been given the opportunity for personal retribution, but instead Vincent got a fair trial (29.15Tr.525-26) (T.Tr.2409) lessened the jury's sense of responsibility because it legitimated voting for death because in earlier times there was no legal process victims' families adhered to and no limits as to the extremes of conduct that could be pursued, so the jury could take comfort in voting death. *See Caldwell*.

A prosecutor's statement of personal opinion or belief not based on the evidence is improper. *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995). A prosecutor is prohibited from arguing facts outside the record. *Id.* at 900-01. The arguments urging the jury to think of the terror that Franklin, Franklin's mother, Leslie, and Eva felt (29.15Tr.524-25) (T.Tr.2413); if anyone believes in the death penalty it is Vincent (29.15Tr.522-23) (T.Tr.2404); and hold, hug, and love but do not let Franklin and Leslie Addison down (29.15Tr.525) (T.Tr.2414) were improper opinions and argued facts outside the record. *See Storey*.

All of the discussed arguments injected passion, prejudice, caprice, and emotion. *Gardner*. Reasonable counsel would have objected to all. *Strickland*.

Vincent was prejudiced because absent these arguments either individually or in combination with one another he would have been life sentenced. *Strickland*.

A new penalty phase is required.

X.

DR. WHITE - CULTURAL MITIGATION

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

Counsel was ineffective for failing to call Dr. White or someone with similar expertise to testify about the cultural conditions Vincent experienced growing-up in Pine Lawn and how they impacted Vincent's development. Along with White's testimony, the Pine Lawn video he was a part of should have been presented to explain the cultural conditions Vincent endured growing-up in Pine Lawn.[2]

Dr. White

[2] This Court considered and rejected a similar claim in *McFadden v. State*, 553 S.W.3d 289, 308, 311 (Mo. banc 2018). This Court is requested to reconsider that result.

Dr. White is a criminologist whose focus is factors that cause young people to become involved in crime(29.15Ex.43p.459). White's work centers on urban at-risk communities and the effects on children(29.15Ex.43p.459-60).

White looked at what life was like in Pine Lawn and the surrounding communities for Vincent growing-up there in the 1980s and 1990s(29.15Ex.43p.466-67).

White applied all the information gathered through interviews with people connected to Pine Lawn to formulate his conclusions and opinions as they applied to Vincent and Pine Lawn and to prepare a report(29.15Ex.43p.470-71). That investigation revealed Pine Lawn has war zone like qualities(29.15Ex.43p.487-88).

White explained the conditions existing in poor African-American communities are predictors of crime, violence, and other social problems and place everyone at risk(29.15Ex.43p.473-75). Lack of education, poverty, and teen pregnancy are predictive of high crime rates for young African-American males(29.15Ex.43p.473-74). White noted that it has been known through research for almost 200 years that the social and economic environment Vincent was born into posed a high risk for criminal activity(29.15Ex.32Ap.36).

Vincent was born in 1980 and White reviewed conditions within Pine Lawn for the time period of the later 1980s as well as 1990s(29.15Ex.43p.476-77). In that time frame, especially in African-American communities, there was an exploding crack epidemic fueling gang proliferation and violence(29.15Ex.43p.477).

Pine Lawn and the surrounding North County communities were hyper-segregated, impoverished, predominantly African-American and characterized by high unemployment, high crime, single-parent households, and illiteracy(29.15Ex.43p.478-83,492-93). Men in Vincent's age group from Pine Lawn and nearby were disproportionally dead or in prison(29.15Ex.43p.494).

White participated in and was present for a video created about Pine Lawn life(29.15Ex.43p.468,497). In formulating his opinions, White relied on that video's content(29.15Ex.43p.497-501).

Vincent was at greater risk for committing the offenses at issue because of having been raised in Pine Lawn's environment(29.15Ex.43p.630-32,669).

Pine Lawn Video Interviews Including

Dr. White

Dr. White interviewed on video Jamala Rogers at the Rowan Community Center where she worked(29.15Ex.37 at 0:01-0:22). Rogers described how in the 1980s and 1990s people living in Pine Lawn, who had any financial means, moved out and those who did not were "penalized and sentenced to a life in Pine Lawn"(29.15Ex.37 at 0:01-0:22). Rogers described how when drugs arrived in the 1980s communities like Pine Lawn and North St. Louis were decimated(29.15Ex.37 at 15:49-17:23).

Rogers explained that why some individuals get caught up in Pine Lawn criminal activity while others do not, depends on their support system(29.15Ex.37 at

18:49-19:54). For those families that need more support and are vulnerable and do not get it, they are "left in the cold"(29.15Ex.37 at 18:49-19:54).

Lisa Hubbard described that by the time she moved out of Pine Lawn 20 people she knew from there were killed(29.15Ex.37 at 1:41-1:54). In the 1990s, Pine Lawn was riddled with crime connected to the drug explosion(29.15Ex.37 at 9:21-10:08). Pine Lawn is like a ghost-town hit by a tsunami(29.15Ex.37 at 25:28-26:06).

Taneisha Kirkman-Clark described growing up in Pine Lawn in the 1990s as rough because the young males saw drugs as a means to make money which created territoriality for block control(29.15Ex.37 at 4:41-6:11;18:15-18:43). Pine Lawn police were brutal and no one called them for help(29.15Ex.37 at 14:22-15:48). Pine Lawn officers were officers kicked-off other forces(29.15Ex.37 at 14:22-15:48).

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

Clara Wings, an elderly Pine Lawn resident, recounted how crack and PCP were everywhere(29.15Ex.37 at 7:38-8:22). Clara sadly commented that with a few exceptions the Pine Lawn young men of Vincent's generation are in jail(29.15Ex.37 at 26:08-26:20).

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

Counsels' Testimony

The mitigation theory was Vincent came from a poor home life and grew-up in neighborhoods where there were drugs, violence, and poverty(29.15Tr.70,72,477). Counsel did not consider hiring an expert to gather information about Pine Lawn and surrounding areas relating to drugs, violence, and poverty(29.15Tr.72).

Counsel was not aware of sociologists being called in capital cases to testify about at-risk communities(29.15Tr.169-71,556). Counsel agreed with the prosecutor's statements that not until the 2008 ABA Guidelines did this type of evidence get mentioned and this case was tried in 2007(29.15Tr.169-70,556). Counsel considered hiring a gang expert, but decided against that because they had worked hard to keep out gang evidence(29.15Tr.171,557). Calling White could have led to evidence of Vincent's gang associations(29.15Tr.557-59).

Counsel acknowledged that the Vincent/Douglas letters would have caused the jury to infer gang activity(29.15Tr.588-90). Counsel also acknowledged that the jurors would have inferred from the facts of the Franklin shooting itself that gang activity was involved(29.15Tr.588-90).

Respondent argued that there were many children from the same neighborhood as Vincent who did not grow-up to be multiple murderers(29.15Tr.71-73,87,477-78) (T.Tr.2383).

29.15 Findings

In 2007, counsel was unaware of any cases where someone with White's expertise was called to testify, the ABA Guidelines at that time did not recommend

use of such evidence, and only in recent times has such evidence been considered(29.15L.F.#222p.37-38).

White's testimony was based on hearsay and speculation(29.15L.F.#222p.38).

Counsel's strategy was to keep out Vincent's gang involvement and White could have been questioned about those matters(29.15L.F.#222p.36-37). By calling family, counsel avoided the cross-examination White would have encountered(29.15L.F.#222p.37).

There is not a reasonable probability White's evidence would have resulted in a different sentence(29.15L.F.#222p.38-39).

Counsel Was Ineffective

The **1989** ABA Guidelines For Representation in Death Penalty Cases in Guideline 11.8.3 F provided that counsel should consider presenting "sociological" expert witnesses. *See* americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/1989guidelines.authcheckdam.pdf.[3]

In 2003, The Hofstra Law Review published the ABA's Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases. *See* 31 Hofstra L.R. 913. Guideline 10.11 (F) (2) directs counsel should consider including expert and lay witnesses with supporting documentation "to provide medical, psychological, **sociological, cultural or other insights** into the client's mental and/or

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

emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)…." 31 Hofstra L.R. at 1055 (emphasis added).

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Hutchison v. State*, 150 S.W.3d 292, 302 (Mo. banc 2004). That mitigating evidence includes: '"medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and **cultural influences**."' *Hutchison*, 150 S.W.3d at 302 (quoting *Wiggins*, 539 U.S. at 524) (italics in *Wiggins*) (bold and underlining added).

In the **1997** *State v. Dixon*, 1997 W.L. 113756 *34-35 (Ohio Ct.App. 8th Dist. Mar. 13, 1997) case, the defendant's death sentence was reversed because the trial court excluded cultural mitigation evidence from two experts, See and Roth. See would have testified about assorted factors in the contemporary urban environment that contribute to and impact the lifestyle, life course, and life direction of African-American children raised in that setting. *Id.* *34-35. See's testimony would have highlighted the community crime rate, the drug culture, and family background. *Id.* *34-35. Roth would have testified about familial problems common in an urban environment similar to the one where Dixon was raised. *Id.* *34-35. The *Dixon* Court found it was error to have excluded this cultural mitigation because such evidence was admissible under *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and there was a reasonable possibility the jury's decision could

have been affected. *See also U.S. v. Wilson*, 493 F.Supp.2d 491, 507 (E.D. N.Y. 2007) (expert evidence about hip hop culture and lyrics found with Wilson were admissible).

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

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

Vincent was prejudiced because there is a reasonable probability that had the jury heard the comprehensive picture - poverty, teenage pregnancy, single parent households without positive male role models, police brutality, fighting, crimes of all kinds, easy access to guns, shootings, and drug dealing - he would not have been death sentenced. *See Strickland*.

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994). It was unreasonable to fail to present White's evidence for fear of the jury learning of Vincent's gang affiliation because counsel conceded the jury learned about such affiliation from the Vincent/Douglas letters(29.15Tr.589-90) (*See* Points III and IV) and the jurors would have inferred gang association based on the circumstances surrounding the shooting of Franklin(29.15Tr.588-90). It was unreasonable to fail to present White's evidence because it would have countered respondent's argument others grew-up in Pine Lawn and did not commit acts similar to Vincent's acts(29.15Tr.71-73,87,477-78)(T.Tr.2383).

Vincent was prejudiced because there is a reasonable probability that had the jury heard Dr. White's testimony, including the Pine Lawn video Dr. White was part of, that Vincent would have been sentenced to life. *See Strickland*, *Wiggins*, *Williams v. Taylor*, and *Hutchison*. Additionally, Vincent was prejudiced because had the jury heard all the available evidence from Dr. White in conjunction with the lay witnesses who could testify about the conditions in Pine Lawn (Point XI) there is a reasonable probability Vincent would have been sentenced to life. *See Strickland*, *Wiggins*, *Williams v. Taylor*, and *Hutchison*.

A new penalty phase is required.

XI.

LAY WITNESS CULTURAL MITIGATION

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

Counsel was ineffective for failing to call lay cultural mitigation witnesses to testify about the adverse social conditions of growing-up in Pine Lawn and nearby North St. Louis County. Vincent otherwise would have been sentenced to life had the jury heard this evidence about the adversity Vincent encountered growing-up in Pine Lawn.[4]

I. Lay Witnesses

[4] This Court considered and rejected a similar claim in *McFadden v. State*, 553 S.W.3d 289, 308, 310-11 (Mo. banc 2018). This Court is requested to reconsider that result.

A. Kirkman-Clark

Taneisha Kirkman-Clark lived most of her life in Pine Lawn and grew-up friends with Vincent(Addison 29.15Tr.155-58)[5] (29.15Ex.86Ap.7-10). Pine Lawn was geographically small, surrounded by Hillsdale, Velda Village, and Beverly Hills(Addison 29.15Tr.156). Pine Lawn was like "the bad part" of St. Louis City(Addison 29.15Tr.157).

During the mid 1980s and 1990s, drugs and gangs in Pine Lawn transformed it from "beautiful" to"[g]hetto"(Addison 29.15Tr.158) (29.15Ex.86Ap.16-18). There was much stealing, robbery, and killing in Pine Lawn(Addison 29.15Tr.159-60). Shooting deaths fostered "hopelessness"(Addison 29.15Tr.164) (29.15Ex.86Ap.19-20,26-27).

Positive male role models were absent with many men being crack and alcohol abusers(Addison 29.15Tr.160-61) (29.15Ex.86Ap.23-24).

Pregnant sixth grade girls were common(Addison 29.15Tr.164). A feeling of poverty was evoked from boarded-up houses(Addison 29.15Tr.164-65).

The Pine Lawn Police were known for brutality and employing officers discharged from other forces as racists(Addison 29.15Tr.159-60) (29.15Ex.86Ap.21-

[5] At respondent's request, the 29.15 court here (Judge Vincent) took judicial notice of the Addison case's 29.15 record(29.15Tr.21-22). The appeal of the Addison case was SC96453. On July 9, 2019, this Court judicially noticed Vincent's other cases this Court decided, which included the Addison case 29.15.

22). The Pine Lawn Police had a reputation for planting drugs on arrestees and stealing from them(Addison 29.15Tr.162-63) (29.15Ex.86Ap.22).

B. Elwynn Walls

Elwynn Walls lived in Pine Lawn, grew-up in the areas surrounding Pine Lawn (Velda Village), owned a barber shop in Pine Lawn, attended Normandy schools, and was on the Pine Lawn city council with his Pine Lawn association commencing in the 1960s(29.15Tr.434-35,443). Commencing in the 1980s and going forward, Walls witnessed increased crime, violence, drug dealing, gang related activity, abusive police behavior, and government corruption in Pine Lawn(29.15Tr.436-45). There was a lack of positive male role models in Pine Lawn(29.15Tr.444).

C. Sean Nichols

Sean Nichols is African-American and a St. Louis City Public Schools administrator whose work has focused on high-risk north St. Louis students(29.15Tr.256-60,262). Nichols highlighted that he believes that his students who come from at-risk communities lack positive male father role models(29.15Tr.262-64). Violence and gangs are an outgrowth of being raised in at-risk communities and undermine opportunities for learning at school(29.15Tr.264-65, 269-70).

D. Willabea Blackburn

Willabea Blackburn has, since 1970, lived in Velda Village, adjacent to Pine Lawn(29.15Ex.44p.386-87). The police in Pine Lawn and Velda Village target

African-Americans for mistreatment(29.15Ex.44p.388). Starting in the 1980s, gang presence became a Pine Lawn problem(29.15Ex.44p.389).

Blackburn's children and grandson attended Normandy High School which was known as especially violent(29.15Ex.44p.390-91). Blackburn's grandson was killed in Pine Lawn(29.15Ex.44p.388-89). Vincent and Blackburn's grandson were friends(29.15Ex.44p.392).

II. Counsels' Testimony

Counsel would have considered calling Kirkman-Clark (29.15Tr.96-98,492), Elwynn Walls (29.15Tr.104-05,498-99), Sean Nichols (29.15Tr.98-99,492-93), and Willabea Blackburn(29.15Tr.91,488).

Counsel did not investigate calling community leaders(29.15Tr.487).

III. 29.15 Findings

The testimony of Kirkman-Clark, Elwynn Walls, Sean Nichols, and Willabea Blackburn was cumulative to what was presented at trial, was hearsay, opinion, and speculation, and would have caused the jury to hear harmful gang evidence(29.15L.F.#222p.58-59)

Counsel called witnesses who supported the defense theory relating to the adversity Vincent encountered at home and in growing up in Pine Lawn(29.15L.F.#222p.54-55). Counsels' decisions on who to call were based on avoiding gang and criminal activity evidence(29.15L.F.#222p.55). Counsel made reasonable strategic decisions as to which mitigation witnesses to call(29.15L.F.#222p.59).

IV. Counsel Was Ineffective

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v.Smith*, 539 U.S. 510, 524-25(2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Hutchison v. State*, 150 S.W.3d 292, 302 (Mo. banc 2004). That mitigating evidence includes: '"medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and **cultural influences**."' *Hutchison*, 150 S.W.3d at 302 (quoting *Wiggins*, 539 U.S. at 524) (italics in *Wiggins*) (underlining and bolding added).

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

The lay witnesses could have presented a comprehensive picture of the deprivation that characterized everyday life in Pine Lawn - poverty, teenage pregnancy, single parent households without positive male role models, police brutality, racist police targeting, fighting, crimes of all kinds, easy access to guns, shootings, drug dealing, and exploitive government corruption. What these witnesses had to say about gang involvement was merely an aside to all the weighty problems youthful African-American males encountered growing-up in Pine Lawn. Moreover, as discussed in Points III and IV the jury heard about gang evidence from the letters

exchanged between Vincent and Douglas(29.15Tr.588-90). Additionally, counsel acknowledged that from the evidence the jury heard at the Franklin trial the jury would have inferred gang association(29.15Tr.588-90).

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

A new penalty phase is required.

XII.

FAILURE TO FURNISH WHITE'S FINDINGS TO DRAPER

The motion court clearly erred denying counsel was ineffective for failing to furnish Dr. Draper with Dr. White's Pine Lawn cultural mitigation analysis for Draper to incorporate into Draper's disorganized Lifepath attachment disorder findings because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have so provided Draper with that information and Vincent was prejudiced as there is a reasonable probability the jury would have voted for life had they heard Vincent's attachment disorder was linked to Pine Lawn's cultural conditions.

Counsel was ineffective for failing to furnish Dr. Draper with Dr. White's Pine Lawn cultural mitigation analysis for Draper to incorporate into Draper's disorganized Lifepath attachment disorder findings. Had the jury heard such evidence from Draper there is a reasonable probability the jury would have voted for life.

Draper's Trial Testimony

Draper described how Vincent lacked nurturing and emotional stability because he was shuffled between households(T.Tr.2234-37,2244). Draper described Vincent growing-up in a very violent neighborhood and becoming involved in alcohol and drugs at a young age(T.Tr.2240-42). Vincent's ability to make good decisions

was compromised by his overall unstable living situation(T.Tr.2251-52). Vincent's unstable living situation produced a severe attachment disorder(T.Tr.2235).

Respondent elicited that many children grew-up in neighborhoods, like Vincent grew-up in, and they turned-out just fine(T.Tr.2303-04).

Draper's 29.15 Testimony

The 29.15 motion alleged counsel was ineffective for failing to furnish Dr. Draper with Dr. White's findings because his findings viewed in conjunction with Draper's findings would have explained for the jury the magnitude of Vincent's traumatic childhood(29.15L.F#131p.96-97).

Draper's case work has included incorporating the reports of other experts into formulating her opinions(29.15Tr.298). White's risk immersion analysis chronicling Pine Lawn's at-risk "war zone" factors highlighted the special vulnerabilities Vincent encountered that lead to his drug and gang association, and thereby, supported Draper's findings presented at trial(29.15Tr.294,301-19). White's Pine Lawn analysis supported Draper's disorganized Lifepath attachment disorder findings(29.15Tr.319-25,327-28,341) (29.15Ex.45).

Counsels' Testimony

Draper's testimony did not address the particularized problems at-risk communities pose for individuals like Vincent(29.15Tr.82-83). Counsel would have shared White's findings with Draper so that Draper could have provided a more detailed assessment of Vincent's development(29.15Tr.83,484-85). Counsel would

have presented through Draper how the factors White identified placed Vincent at greater risk for becoming involved in criminal activity(29.15Tr.84).

29.15 Findings

Dr. White's social profile analysis was not available at trial time(29.15L.F.#222p.43). Counsel was not aware of sociologists being called in penalty to testify about at-risk communities(29.15L.F.#222p.43).[6] Work like White's was not being done at the time of the 2007 Franklin retrial(29.15L.F.#222p.43-44,46).

Providing Draper with White's findings would not have altered the penalty result(29.15L.F.#222p.46-47). Counsel pursued a reasonable strategy highlighting certain themes and witnesses(29.15L.F.#222p.46). The jury heard through other witnesses information about the circumstances of Vincent's growing-up in Pine Lawn and the surrounding community(29.15L.F.#222p.47).

Counsel Was Ineffective

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Hutchison v. State*, 150 S.W.3d 292, 302 (Mo. banc 2004). That mitigating evidence includes: '"medical history, educational history, employment and training history, *family and social history*, prior adult and

[6] The argument in Point X (Dr. White claim) demonstrating the long-standing requirement to present such cultural mitigation and its ready availability is incorporated here.

juvenile correctional experience, and religious and **cultural influences**.''' *Hutchison*, 150 S.W.3d at 302 (quoting *Wiggins*, 539 U.S. at 524) (italics in *Wiggins*) (bold and underlining added).

It is recognized "that an expert acquires his knowledge and expertise from a number of sources, some of which may include inadmissible hearsay, an expert can rely on hearsay information in forming an opinion." *In re Whitnell v. State*, 129 S.W.3d 409, 416 (Mo.App., E.D. 2004). The expert can rely on such information as background for his opinion. *Id* at .416.

Reasonable counsel would have obtained White's Pine Lawn cultural conditions findings and supplied them to Draper for Draper to link to her Lifepath attachment disorder findings. By doing so, counsel would have countered respondent's actions of casting many children as growing-up in neighborhoods like Pine Lawn, but turning out fine and not committing offenses like Vincent(T.Tr.2303-04). *See Strickland* and *Whitnell*. Vincent was prejudiced because there is a reasonable probability that had counsel supplied Draper with White's findings the jury would have imposed life. *See Strickland*.

A new penalty phase is required.

XIII.

PROSECUTORIAL MISCONDUCT GETTING WRIT RECALLED

The motion court clearly erred in granting respondent's motion to recall Vincent's writ to attend the 29.15 evidentiary hearing based on respondent's false representations and in refusing to disqualify the St. Louis County Prosecutor's office based on having made such false representations because such actions denied Vincent his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that Vincent's presence at the hearing consulting with counsel was critical to the fairness of the hearing and the Prosecutor's office should have been disqualified having gotten Vincent's writ recalled based on its false representations.

The St. Louis County Prosecutor's Office had Vincent's writ to attend the 29.15 hearing recalled by making false representations about him and it should have been disqualified for having made such representations.

Prosecutorial Misconduct In Recalling Vincent's Writ

On January 16, 2018, Judge Vincent entered a writ for Vincent to attend the May 21 - May 24, 2018 postconviction evidentiary hearing(29.15L.F.#179p.1).

On May 16, 2018, respondent filed a motion to recall the writ and it was heard May 17, 2018 (29.15L.F.#183p.1-2) (29.15L.F.#185p.1) (29.15L.F.#187p.1). The purported grounds for quashing the writ was Vincent was "remorseless" for the

homicides he was convicted of, he "is one of the most dangerous felons in the State of Missouri," and "presents an unwarranted risk to the safety of jail personnel, court personnel, other inmates, and the attorneys in the case"(29.15L.F.#183p.1).

At the May 17, 2018, hearing, respondent represented that when Vincent was previously writted in to St. Louis County in January, 2017, that he assaulted a jail guard(29.15WritTr.3-4). Respondent also represented that in 2017 Vincent assaulted a Department of Corrections guard(29.15WritTr.4).

Vincent's counsel opposed the motion on the grounds that it prevented Vincent from meaningfully participating and assisting counsel at his 29.15 evidentiary hearing(29.15WritTr.5-7,9-10). Counsel also informed the court she had no knowledge of Vincent assaulting a Corrections guard(29.15WritTr.6). There was no record made in January, 2017, of Vincent having any problems then when he was in the St. Louis County Jail(29.15WritTr.6-7,11-12).

On May 17, 2018, respondent filed a supplement to its motion to recall the writ(29.15L.F.188p.1). Respondent's Supplement conceded that there were no documented assaultive incidents when Vincent was held in the St. Louis County Jail in January, 2017, and no records that he assaulted a Corrections guard(29.15L.F.#188p.1). The Supplement asserted Vincent was in a fight with another inmate in September, 2016, at the Department of Corrections(29.15L.F.#188p.1).

On May 18, 2018, Judge Vincent ordered Vincent's writ recalled (29.15L.F.#191p.1).

On May 18, 2018, 29.15 counsel moved to disqualify the St. Louis County Prosecutor's Office and noticed up the motion for May 21, 2018(29.15L.F.#192p.1-8) (29.15L.F.#194p.1). The motion set forth that when Vincent was brought to St. Louis County in January, 2017, no security issues were reported(29.15L.F.#192p.2). On May 17, 2018, respondent represented to the court that in January, 2017, Vincent engaged in assaultive behavior at the St. Louis County Jail and assaulted a Department of Corrections Officer in 2017(29.15L.F.#192p.3). Respondent's Supplemental filing established the falsity of such accusations and were made to prejudice the court against Vincent(29.15L.F.#192p.3) (29.15Tr.11-12). Because of respondent's false and misleading information counsel moved to disqualify the St. Louis County Prosecutor's Office(29.15Tr.12,14). Failing to bring Vincent in for the hearing denied him the opportunity to meaningfully participate in his case(29.15Tr.14). Respondent's false representations about Vincent's actions constituted a personal animus against Vincent(29.15L.F.#192p.6).

Respondent admitted that there was no documentation for the alleged assaults in Corrections and the Jail(29.15Tr.17) (29.15L.F.#188p.1).

On May 21, 2018, the court denied the motion to disqualify the St. Louis County Prosecutor's Office(29.15L.F.#196p.1) (29.15Tr.17).

Counsel requested on May 24, 2018, that the court direct that the 29.15 transcript be prepared so that Vincent could meaningfully participate and review it to decide whether his testimony was needed in light of not being allowed to attend the hearing and that was denied(29.15L.F.#197p.1) (29.15Tr.658-60).

On May 25, 2018, Vincent filed a letter setting out his concerns with his lawyers representing him without him being present(29.15L.F.#198p.1).

In *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987), the Court recognized "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." In *Martinez v. Ryan*, 566 U.S. 1, 7-18 (2012), the Court recognized that ineffective assistance of postconviction counsel can establish cause for defaulting a postconviction claim. A defendant's right to be present is essential to a defendant's right to effective assistance of counsel. *U.S. v. Washington*, 705 F.2d 489, 497 (D.C. Cir. 1983). *Martinez*'s recognition of the right to effective assistance of postconviction counsel means that Vincent must be allowed to attend his hearing in order to consult with and assist his counsel so that counsel can be effective.

Disqualification of a prosecutor's office is called for when that office has an interest of a personal nature which might preclude fair treatment of the defendant. *State v. Stewart*, 869 S.W.2d 86, 90 (Mo.App., W.D. 1993). Respondent's admitted false accusations about Vincent (29.15Tr.17) (29.15L.F.#188p.1) used to have his writ recalled reflected such a personal interest that required disqualifying the St. Louis County Prosecutor's Office.

This Court should reverse for a new hearing where Vincent attends and the St. Louis County Prosecutor's Office is disqualified.

XIV.

FAILURE TO PRESENT PET SCAN

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

Counsel was advised by their retained expert, Dr. Preston, in 2004, to obtain a PET scan of Vincent's brain, but counsel did not obtain one. Counsel was ineffective for failing to obtain a PET scan whose results when considered individually and in combination with the evidence that could have been presented through Drs. Draper and Gelbort (Points XII and XV) would have resulted in life.[7]

29.15 Pleadings

The 29.15 motion alleged counsel was ineffective for failing to call Dr. Preston, or a similarly qualified expert, in penalty mitigation to present PET scan

[7] This Court considered and rejected a similar claim in *McFadden v. State*, 553 S.W.3d 289, 313-15 (Mo. banc 2018). This Court is requested to reconsider that result.

evidence demonstrating Vincent's brain deficits(29.15L.F.#131p.93-101). Further, it was alleged the Preston/PET evidence would have provided concrete support for Draper's and Gelbort's testimony such that the testimony of all three experts considered collectively by the jury would have resulted in life(29.15L.F.#131p.97-99).

On December 27, 2017, 29.15 counsel moved to endorse Dr. Gur(29.15L.F.#152p.1-3) (29.15L.F.#154p.1-2). The motion set out Preston would have been available to review PET scan results and to testify during the Franklin retrial(29.15L.F.#152p.1). Preston was 82 years old and had retired, so he no longer was doing PET interpretations(29.15LF.#152p.2). On January 4, 2018, the motion court granted the motion to endorse Gur(29.15L.F.#175p.1) (29.15L.F.#100p.18).[8]

Gur's Testimony

Dr. Gur is a licensed neuropsychologist who analyzed Vincent's 2015 PET scan(29.15Tr.370-72,424). Vincent's PET was abnormal in the brain cortex, which is responsible for processing information and deciding on a course of action(29.15Tr.379-80,385-86). The pattern in Vincent's PET results is often seen with someone with a head injury history(29.15Tr.390,410).

[8] In *McFadden v. State*, 553 S.W.3d 289 (Mo. banc 2018) (SC96453) (Addison 29.15), respondent consented to the substitution of Gur for Preston. *See* SC96453 at 29.15L.F.440-41,484.

Gelbort's and Gur's findings were consistent with one another(29.15Tr.391-92).

Counsels' Testimony

Counsel obtained a brain MRI that was normal(29.15Tr.105-06,499). The MRI results were sent to Dr. Preston(29.15Tr.106-07,499-500)(29.15Ex.33). Preston's November 11, 2004 letter to counsel indicated a person can have a normal MRI, but have an abnormal PET(29.15Ex.33). Preston recommended obtaining a PET scan(29.15Tr.107-08). Counsel decided not to get a PET done because they had an MRI with normal finding results and obtaining a normal PET would have undermined Gelbort's opinions(29.15Tr.108-09,572-73).

29.15 Findings

Counsel already had a normal MRI scan and did not want to risk obtaining a normal PET(29.15L.F.222p.66). Counsel made the reasonable strategic decision not to obtain a PET to avoid the risk of getting a normal PET and avoided cross-examination about the normal MRI(29.15L.F.222p.66,68-69). Counsels' decision avoided undercutting the neuropsychological testing(29.15L.F.222p.68-69). Any testimony from Gur would have been cumulative to Gelbort(29.15L.F.222p.69).

Counsel Was Ineffective

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*, 539 U.S.510, 524-25 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Hutchison v. State*, 150 S.W.3d 292, 302 (Mo. banc 2004).

In *Hutchison v. State*, 150 S.W.3d 292, 307 (Mo. banc 2004), this Court concluded counsel was ineffective for failing to do a thorough, comprehensive expert presentation. This Court indicated, when assessing reasonableness of attorney investigation, a court is required to consider not only the quantum of evidence already known, but also whether the known evidence would lead a reasonable attorney to investigate further. *Id.* at 305.

Reasonable counsel who were advised by Preston to obtain a PET would have done so. *See Strickland* and *Hutchison*. Counsels' stated reasons for not doing a PET was fear that it would come back normal, and thereby, undermine Gelbort's findings of Vincent's brain dysfunction(29.15Tr.108-09,572-73). But counsel also testified they had decided not to call Gelbort because of problems they had with his prior testimony(29.15Tr.73-76,180-83,479-81,566). *See* Point XV. Thus, the failure to get a PET because of concerns that a normal PET would undermine Gelbort's findings was unreasonable because counsel had decided not to call Gelbort. *See State v. McCarter*, 883 S.W.2d 75 (Mo.App., S.D. 1994). Likewise, Gur and Gelbort could not be cumulative (29.15L.F.#222p.69) because Gelbort did not testify.

Vincent was prejudiced because the jury did not hear he has brain dysfunction impacting impulse control and judgment consistent with head injuries(29.15Tr.379-80,385-86). *See*, *Strickland* and *Hutchison*. Moreover, Vincent was prejudiced because the PET findings reinforced Gelbort's findings (29.15Tr.391-92) (*See* Point XV).

A new penalty phase is required.

XV.

FAILURE TO CALL GELBORT

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

Counsel was ineffective for failing to call Dr. Gelbort, or a similarly qualified expert, to testify about Vincent's brain limitations.[9] Gelbort should have been called to support a pretrial motion and to testify about Vincent's brain limitations to support barring the death penalty(29.15L.F.#131p.31-33). Alternatively, Gelbort's testimony should have been presented as penalty mitigating evidence considered in conjunction

[9] This Court considered and rejected a similar claim in *McFadden v. State*, 553 S.W.3d 289, 308, 312-13 (Mo. banc 2018). This Court is requested to reconsider that result.

with an instruction the jury was required to find Vincent was mentally eighteen years or older before recommending death(29.15L.F.#131p.9-10, 29-33).

Counsels' Testimony

Gelbort testified at the first Franklin and first Addison trials, but was not called here because he was not persuasive and did poorly on cross-examination in those trials(29.15Tr.73-76,180-83,479-81,566).

No consideration was given to calling Gelbort to support a pretrial motion to prohibit respondent from seeking death(29.15Tr.77-78,481) or to support a jury instruction requiring the jury find that Vincent had the intellectual maturity of someone over 18 before recommending death(29.15Tr.78-79,481-83).

29.15 Findings

Counsel testified Gelbort's prior testimony was not particularly strong and his presentation was not good detracting from his persuasiveness(29.15L.F.#222p.41-42). Gelbort could have been cross-examined about Vincent's normal MRI(29.15L.F.#222p.41). Counsel made the reasonable strategic decision not to call Gelbort based on their prior experience with Gelbort(29.15L.F.#222p.41-43).

Gelbort's Testimony

Dr. Gelbort is a clinical neuropsychologist(29.15Tr.591). Gelbort found deficits as to Vincent's abstract reasoning, problem solving abilities, verbal abstract reasoning and comprehension, decision-making, impulse control, and academic skills needed to function as an adult(29.15Tr.606-07,617-20,638). Those deficits are specific to Vincent's frontal lobe executive functioning, and thereby, produce

abnormal, impaired brain functioning(29.15Tr.606-08). Individuals with Vincent's deficits have an increased tendency to misunderstand and difficulty with planning and functioning(29.15Tr.621-22).

Counsel Was Ineffective

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Hutchison v. State*, 150 S.W.3d 292, 302 (Mo. banc 2004). Evidence of impaired mental capacity is mitigating. *Wiggins*, 539 U.S. at 535.

To prevail on a claim of ineffective assistance for failing to retain expert testimony, a movant is required to show such expert existed at the time of trial, the expert could have been located through reasonable investigation, and the expert would have benefited the defense. *Tisius v. State*, 183 S.W.3d 207, 213-14 (Mo. banc 2006). Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994).

There is no question Gelbort existed and could be located through reasonable investigation because he testified at two of Vincent's earlier trials. *See Tisius*. Gelbort's testimony would have benefited Vincent's defense either to support a pretrial motion to preclude death or as mitigating evidence coupled with an instruction requiring the jury find Vincent was mentally over 18 before imposing death. *See Tisius*.

Vincent was prejudiced because either a pretrial motion based on Gelbort's findings or the jury hearing Gelbort's mitigating findings coupled with an instruction requiring the jury find Vincent was mentally 18 or older before imposing death would have resulted in a life sentence. *See Strickland* and *Hutchison*.

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

The reasoning of *Simmons* has been extended to find a mandatory life without parole sentence should not apply to a defendant who was nineteen years old at the time of the alleged homicide. *People v. House*, 72 N.E.3d 357, 386-390 (Ill.App.1st Dist. 2015) (relief granted on other grounds *People v. House*, 2019W.L.2718457 *14-*16 (Ill.App. 1stDist. May 16, 2019)). The *House* Court found that designating someone as a mature adult after age eighteen was "arbitrary" because research in neurobiology and developmental psychology have concluded the brain does not finish developing until the mid-twenties and young adults are more similar to adolescents. *House*, 72 N.E.3d at 386-87. Gelbort's testimony would have supported the jury finding Vincent's mental age was not 18 or older such that he was not subject to the death penalty. *See Simmons* and *House.*

A new penalty phase is required.

XVI.

BRYANT/BURNS AGGRAVATION

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

Counsel was ineffective for failing to rebut aggravation Vincent committed the assault against Bryant/Burns and for failing to rebut Bryant was seriously injured. There is a reasonable probability rebutting this aggravation would have avoided death.[10]

Penalty Evidence

From Exhibit 101 (Bryant/Burns assault) the jury learned Vincent was convicted on February 4, 2005, and sentenced as follows: (1) first degree assault - 15 years; (2) armed criminal action - 30 years; (3) first degree assault - 10 years; and (4)

[10] This Court considered and rejected a similar claim in *McFadden v. State*, 553 S.W.3d 289, 315-16 (Mo. banc 2018). This Court is requested to reconsider that result.

armed criminal action - 10 years(T.Tr.2027-29). The jury found as aggravators all four of the Bryant/Burns convictions(T.L.F.684-85).

Investigator Johnson

Butch Johnson investigated and testified at the 29.15 case arising out of the Bryant/Burns events(29.15Ex.36p.5-6,20) (Addison 29.15Ex.35p.112-85). Johnson reviewed Bryant/Burns crime scene photos(29.15Ex.36p.21). Police reports described what happened as Vincent having jumped out of his car to shoot at the minivan Burns drove while Vincent stood at the minivan's right front(29.15Ex.36p.23). Johnson's investigation, however, reflected that in order for Bryant to have gotten shot in his buttocks the shooter would have had to have been standing towards the back of the minivan when he fired(29.15Ex.36p.24).

Michael Douglas completed an affidavit on September 26, 2006, recounting that Kyle Dismukes told Douglas that Dismukes shot Bryant/Burns (Addison 29.15Ex.18;29.15Ex.36p.25,28-29). Johnson later personally turned over all his Bryant/Burns 29.15 postconviction investigation, including the Douglas affidavit, to Vincent's counsel responsible for the trial of this case(29.15Ex.36p.27-28).

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

Counsels' Testimony

Counsel knew Vincent testified at the Bryant/Burns assault trial that Kyle Dismukes was the shooter(29.15Tr.112,503-04). Counsel received a packet of materials from investigator Johnson relating to the Bryant/Burns case(29.15Tr.112-13,504). Counsel received information from Douglas that his brother, Kyle Dismukes, was the Bryant/Burns shooter(29.15Tr.112-13).

Counsel did not challenge the Bryant/Burns convictions at the Franklin retrial(29.15Tr.113). Counsel testified that respondent presenting certified documents evidencing the Bryant/Burns convictions avoided respondent calling live witnesses to testify about them(29.15Tr.192-95,504-05,573-74).

29.15 Findings

The 29.15 court reviewed Judge Ross' 29.15 findings from the Bryant/Burns assault case about investigator Johnson's testimony there(29.15L.F.#222p.72). Judge Ross found Johnson's testimony about crime scene photos and an experiment he conducted to be unreliable and the physical evidence refuted(29.15L.F.#222p.72-73). The 29.15 court reviewed the findings on this claim as it was presented in the Addison case (Judge DePriest) (29.15L.F.#222p.72). The 29.15 court agreed with the findings made on this claim in the Bryant/Burns and Addison 29.15 cases(29.15L.F.#222p.72).

Counsel exercised reasonable strategy in their handling of the Bryant/Burns assault evidence(29.15L.F.#222p.74).

Counsel testified that respondent could have called live witnesses from the Bryant/Burns assault case, who would have been more harmful, rather than presenting the document certified copy evidence it relied on(29.15L.F.#222p.73).

The seriousness of Bryant's injuries would not diminish that Vincent was convicted of two counts of first degree assault and two counts of armed criminal action in the Bryant/Burns case(29.15L.F.#222p.74).

Counsel Was Ineffective

"One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002). *See*, *also*, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel has duty to investigate and rebut aggravation); *Parker v. Bowersox*, 188 F.3d 923, 929-31 (8th Cir. 1999) (counsel was ineffective for failing to present evidence rebutting aggravation that victim was potential witness against Parker).

Reasonable counsel would have presented the available evidence Vincent did not shoot Bryant/Burns. *See Strickland, Ervin*. Reasonable counsel would have relied on Bryant's Barnes medical records showing Bryant sustained superficial injuries(29.15Ex.36p.32;29.15Ex.21). Vincent was prejudiced because presenting all the available evidence would have neutralized four of the five aggravators that the jury found(T.L.F.684-85). *See Strickland* and *Ervin*.

A new penalty phase is required.

XVII.

FAILURE TO DISPROVE ADDISON OFFENSE

The motion court clearly erred in denying counsel was ineffective for failing to call Maggie Jones, Margaret Walsh, and Arnell "Smoke" Jackson, and in failing to present other lighting conditions and distance measurements evidence all to impeach/discredit Eva Addison's aggravation evidence reporting of Vincent shooting Leslie Addison because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented all this evidence and there is a reasonable probability death would not have resulted.

Counsel was ineffective for failing to call Maggie Jones, Margaret Walsh, and Arnell "Smoke" Jackson, and for failing to present other lighting conditions and distance measurements evidence all to impeach/discredit Eva Addison's aggravation evidence reporting Vincent shot Leslie Addison.[11]

Respondent's Penalty Evidence

[11] This Court considered and rejected a similar claim in *McFadden v. State*, 553 S.W.3d 289, 305-08 (Mo. banc 2018). This Court is requested to reconsider that result.

Respondent's penalty evidence included the following. Eva Addison testified that she hid behind bushes and saw Vincent shoot her sister, Leslie Addison(T.Tr.1855). Eva testified that she, Leslie, and Vincent had argued at Maggie Jones' house (31 Blakemore) shortly before Vincent shot Leslie(T.Tr.1842-48,1885). Arnell "Smoke" Jackson was present for the argument and had traveled there in a car separate from Vincent(T.Tr.1845,1849). Stacy Stevenson reported hearing a gunshot at 11:45 p.m. in the area where Leslie was shot and called 911 to get Leslie help(T.Tr.1979-83).

Counsels' Testimony

Counsel had deposed Maggie Jones and Jones testified that Eva did not tell her that she was in a fight with anyone the night Leslie Addison was killed(29.15Tr.118,509). Counsel called Maggie Jones at the first Addison trial to testify she did not hear any fighting at her 31 Blakemore home on the night Leslie Addison was killed(29.15Tr.509). Calling Jones would have resulted in corroborating Eva's emotional response to Vincent's allegedly shooting Leslie(29.15Tr.199-200,577-78).

Lack of blood on Vincent's clothing would not have helped because he was not arrested for shooting Leslie until two days after Leslie was shot(29.15Tr.208,510).

Counsel interviewed Jackson and concluded he had nothing helpful(29.15Tr.203-05).

Counsel went to the scene where Leslie was shot and concluded Eva's reporting was plausible(29.15Tr.207-08).

29.15 Findings

Counsel made the strategic decision not to call Jones because she could have testified about Eva's emotional reaction to Leslie being shot and Eva's reporting Vincent shot Leslie(29.15L.F.#222p.77).

Walsh's finding of lack of blood on Vincent's clothing testimony had minor impeachment value because it was not shown Vincent was wearing the same clothes when he was arrested as he wore when it was alleged he shot Leslie(29.15L.F.#222p.77-78).

Counsel did not call Jackson because he would have placed Vincent at the scene of Leslie's shooting(29.15L.F.#222p.76).

Counsel investigated the location where Leslie was shot and concluded Eva could have seen Vincent shoot Leslie with the lighting conditions and distances involved and counsel cross-examined witnesses about the lighting and distance from which Eva reported seeing Vincent shoot Leslie(29.15L.F.#222p.78-79).

29.15 Evidence

At the first Addison trial, counsel called Maggie Jones to testify she did not hear any fighting at her 31 Blakemore home on the night Leslie Addison was killed(29.15Tr.509).

St. Louis County Police forensic scientist Margaret Walsh tested Vincent's clothing(29.15Ex.42p.343-44). Walsh's findings and report found no blood present(29.15Ex.42p.346-48;29.15Ex.27).

Arnell "Smoke" Jackson was at 31 Blakemore (Maggie Jones' house) and observed an argument involving Vincent, Leslie, and Eva(29.15Ex.10Ap.7-9,12-13,48-51,53-54). Vincent left in a car that was followed by another car containing Jackson(29.15Ex.10Ap.8-10,12,53,55,60). Jackson did not see Vincent get out of the other car to pursue Leslie(29.15Ex.10Ap.13-14).

Photo exhibits supporting limited lighting around where Leslie was shot and the distance Eva reported viewing the shooting of Leslie from were relied on(29.15Tr.27-30) (29.15Exs.11,12,13,14,15,16,17A-17G,24,36p.10-19). When Officer Hunnius responded to the where Leslie's body was found, it was dark and he used a flashlight to investigate(29.15Ex.41p.319-22,342). Hunnius had to use a camera flash to take pictures(29.15Ex.41p.341-42).

Emergency records showed an ambulance arrived to provide care to Leslie at night at 11:45 p.m.(29.15Ex.25p.2).

Counsel Was Ineffective

"One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002). *See*, *also*, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel has duty to investigate and rebut aggravation); *Parker v. Bowersox*, 188 F.3d 923, 929-31 (8th Cir. 1999) (counsel was ineffective for failing to present evidence rebutting aggravation that victim was potential witness against Parker).

In *Black v. State*, 151 S.W.3d 49, 55-58 (Mo. banc 2004), counsel was ineffective for failing to impeach state witnesses through cross-examining them about prior inconsistent statements. Counsel was ineffective in *Black* because the subject of the impeachment went to the central controverted issue of whether Black acted with deliberation or a self-defense fit of rage. *Id*. at 56, 58. Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994).

Reasonable counsel would have called Maggie Jones, Margaret Walsh, and Arnell "Smoke" Jackson and presented lighting conditions and distance measurements evidence all to impeach/discredit Eva Addison's aggravation evidence reporting of Vincent shooting Leslie Addison. *See Strickland, Ervin*, and *Black*. Vincent was prejudiced because there is a reasonable probability he would not have been death sentenced had counsel rebutted evidence about shooting Leslie. *See Strickland, Ervin*, and *Black*. Counsels' failure to present this evidence was not reasonable strategy. *See McCarter*.

A new penalty phase is required.

XVIII.

MEMORANDA OF LAW CLAIMS - TIMELINESS

The motion court clearly erred in treating the memoranda of law claims relating to the Drs. Gur and Gelbort claims as untimely amendments to the amended motion because the 29.15 time limits arbitrarily denied Vincent his rights to due process, freedom from cruel and unusual punishment, and effective assistance of 29.15 counsel, U.S. Const. Amends. VI, VIII and XIV, in that the time limits are unreasonably short.

The motion court treated memoranda of law relating to the Drs. Gur and Gelbort claims as untimely amendments to the 29.15 amended motion. That treatment arbitrarily denied Vincent the right to have his 29.15 claims heard because the time limits are unreasonably short.[12]

29.15 Filings

The 29.15 amended motion was filed December 9, 2013 (29.15L.F.#130p.1) (29.15L.F.#100p.13).

Two Memoranda of law were filed on December 27, 2017 directed to the claims pled as to Drs. Gur 8(L) and Gelbort 8(I) (29.15L.F. #162p.1-8) (29.15L.F.#164p.1-15).

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[12] This Court has held amendments filed after the time for filing a first amended motion are untimely and not allowed. *See, e.g.*, *State v. White*, 873 S.W.2d 590, 599 (Mo. banc 1994). Reconsideration is requested.

The first December 27, 2017 Memorandum of Law urged that the 29.15 ineffectiveness claims pled as to Drs. Gur 8(L) and Gelbort 8(I) ought not be limited to penalty phase only as pled, but should also include guilt phase in order to show lack of deliberation/cool reflection or a mental disease or defect defense(29.15L.F.#162p.1-8).

The second December 27, 2017 Memorandum of Law urged that the 29.15 ineffectiveness claims pled as to Drs. Gur 8(L) and Gelbort 8(I) ought to include that counsel was ineffective for failing to present evidence that Vincent's mental age was less than 18 years old for purposes of both guilt deliberation and penalty mitigation under *Roper v. Simmons*, 543 U.S. 551 (2005) and *People v. House*, 72 N.E.3d 357, 386-90 (Ill.App. 1stDist. 2015) (relief granted on other grounds *People v. House*, 2019 W.L.2718457 *14-*16 (Ill.App. 1stDist. May 16, 2019) and not limited to penalty phase)) (29.15L.F.#164p.1-15).

Respondent objected that the filings were an untimely amendment(29.15L.F.173p.1-7).

The 29.15 court sustained respondent's timeliness objection, but granted leave to make offers of proof at the evidentiary hearing(29.15L.F.#178p.1) (29.15Tr.81).

An evidentiary hearing was conducted May 21, 2018 - May 24, 2018(29.15Tr.1).

On May 25, 2018, Vincent filed a letter complaining that his 29.15 attorneys failed to include claims in his 29.15 amended motion he told them he wanted included

and was denied the opportunity to appear in court to inform the court of that deficiency(29.15L.F.#198p.1).

Offers of Proof

In an offer of proof, mitigation specialist Belinda Davis Long indicated that Vincent had requested his 29.15 amended motion include a guilt phase claim counsel was ineffective for failing to present evidence of brain deficiencies associated with incomplete brain development(29.15Tr.25-26) (29.15Ex.71).

Dr. Gur testified that full, complete male brain development does not occur until the early twenties(29.15Tr.392-96).

Dr. Gelbort testified the male brain continues to develop until the mid-twenties(29.15Tr.620-21,631-34).

Turlington testified she did not give any consideration to presenting evidence at either phase through Gelbort of the studies the U.S. Supreme Court relied on in *Roper v. Simmons* showing that a young male's brain does not fully mature until his early to mid-twenties(29.15Tr.81). Turlington would have considered for purposes of guilt brain abnormality evidence from Gur that Vincent could not deliberate(29.15Tr.110-11).

If a PET was obtained showing brain abnormalities, Kraft would have considered relying on it in guilt to show lack of deliberation(29.15Tr.501-02). Kraft would have considered for either phase evidence from Gur that the male brain does not fully mature until the early twenties(29.15Tr.502-03).

Remand Required

Once a state establishes avenues of appellate review, "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). Rule 55.33(a) authorizes amended pleadings and provides that when leave is sought to amend it "shall be freely given." No other rules of civil procedure, relating to time limitations, have been applied to bar amendments for good cause and the 29.15 time limits are unreasonably short. This Court should reconsider its prohibition on amendments after the time for filing the amended motion in light of *Martinez v. Ryan*, 566 U.S. 1, 7-18 (2012) having recognized that ineffective assistance of postconviction counsel can establish cause for defaulting a postconviction claim. Under *Martinez*, the claims that were the subject of the two memoranda of law should have been addressed on the merits.

This Court should reverse and remand with directions that the motion court address the merits of the claims in the two memoranda filed while utilizing the offers of proof made.

XIX.

MEMORANDA OF LAW CLAIMS - ABANDONMENT

Vincent McFadden was abandoned by 29.15 counsel and the motion court clearly erred in failing to make a finding that 29.15 counsel abandoned Vincent as reflected in the memoranda of law claims submitted as to Drs. Gur 8(L) and Gelbort 8(I) as those claims should have been pled to include ineffectiveness as to guilt phase in order to show lack of deliberation/cool reflection or a mental disease or defect defense and further the 29.15 pleadings should have included an ineffectiveness claim that Vincent's mental age was less than 18 years old for purposes of guilt deliberation and penalty mitigation because Vincent was denied his rights to due process, freedom from cruel and unusual punishment and effective assistance of 29.15 counsel, U.S. Const. Amends. VI, VIII and XIV, in that 29.15 counsels' failure to timely so plead was in violation of their Rule 29.15(e) duty to sufficiently allege facts and claims.

The motion court clearly erred in failing to find 29.15 counsel abandoned Vincent. Counsel on the 29.15 abandoned Vincent when they failed to timely plead the memoranda of law claims submitted as to Drs. Gur 8(L) and Gelbort 8(I) as those claims should have been pled to include ineffectiveness as to guilt phase in order to show lack of deliberation/cool reflection or a mental disease or defect defense. Further, the 29.15 pleadings should have timely included a claim of ineffectiveness that Vincent's mental age was less than 18 years old for purposes of guilt deliberation and penalty mitigation.

29.15 Filings

The 29.15 amended motion was filed December 9, 2013 (29.15L.F.#130p.1).

Two Memoranda of law were filed on December 27, 2017 directed to the claims pled as to Drs. Gur 8(L) and Gelbort 8(I) (29.15L.F. #162p.1-8) (29.15L.F.#164p.1-15).

The first December 27, 2017, Memorandum of Law urged that the 29.15 ineffectiveness claims pled as to Drs. Gur 8(L) and Gelbort 8(I) ought not be limited to penalty phase only as pled, but should also include guilt phase in order to show lack of deliberation/cool reflection or a mental disease or defect defense(29.15L.F.#162p.1-8).

The second December 27, 2017, Memorandum of Law urged that the 29.15 ineffectiveness claims pled as to Drs. Gur 8(L) and Gelbort 8(I) ought to include that counsel was ineffective for failing to present evidence that Vincent's mental age was less than 18 years old for purposes of both guilt deliberation and penalty mitigation under *Roper v. Simmons*, 543 U.S. 551 (2005) and *People v. House*, 72 N.E.3d 357, 386-90 (Ill.App. 1stDist. 2015) (relief granted on other grounds *People v. House*, 2019 W.L.2718457 *14-*16 (Ill.App. 1stDist. May 16, 2019) and not limited to penalty phase)) (29.15L.F.#164p.1-15).

Respondent objected that the filings were an untimely amendment(29.15L.F.173p.1-7).

The 29.15 court sustained respondent's timeliness objection to the filings, but granted leave to make offers of proof at the evidentiary hearing(29.15L.F.#178p.1)

(29.15Tr.81). Counsel failed to timely allege the matters contained in the memoranda of law.

An evidentiary hearing was conducted May 21, 2018 - May 24, 2018(29.15Tr.1).

On May 25, 2018, Vincent filed a letter complaining that his 29.15 attorneys failed to include claims in his 29.15 amended motion he told them he wanted included and was denied the opportunity to appear in court to inform the court of that deficiency(29.15L.F.#198p.1).

Offers of Proof

In an offer of proof, mitigation specialist Belinda Davis Long indicated that Vincent had requested his 29.15 amended motion include a guilt phase claim counsel was ineffective for failing to present evidence of brain deficiencies associated with incomplete brain development(29.15Tr.25-26) (29.15Ex.71).

Dr. Gur testified that full, complete male brain development does not occur until the early twenties(29.15Tr.392-96).

Dr. Gelbort testified the male brain continues to develop until the mid-twenties(29.15Tr.620-21,631-34).

Turlington testified she did not give any consideration to presenting evidence at either phase through Gelbort of the studies the U.S. Supreme Court relied on in *Roper v. Simmons* showing that a young male's brain does not fully mature until his early to mid-twenties(29.15Tr.81). Turlington would have considered for purposes of

guilt brain abnormality evidence from Gur that Vincent could not deliberate(29.15Tr.110-11).

If a PET was obtained showing brain abnormalities, Kraft would have considered relying on it in guilt to show lack of deliberation(29.15Tr.501-02). Kraft would have considered for either phase evidence from Gur that the male brain does not fully mature until the early twenties(29.15Tr.502-03).

Remand Required

In Martinez v. Ryan, 566 U.S. 1, 7-18 (2012), the Court recognized that ineffective assistance of postconviction counsel can establish cause for defaulting a postconviction claim. This Court has recognized "a total default in carrying out the obligations imposed" on 29.15 counsel constitutes abandonment. *State v. Bradley*, 811 S.W.2d 379, 384 (Mo. banc 1991). Rule 29.15(e) provides that if the *pro se* motion "does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims." If a court concludes that a movant was abandoned, then the proper remedy is to put the movant in the place the movant would have been if abandonment had not occurred. *Riley v. State*, 364 S.W.3d 631, 636 (Mo.App., W.D. 2012).

Counsel failed to satisfy their Rule 29.15(e) duties to file an amended motion that sufficiently alleged the additional facts and claims as they were set forth in the two memoranda of law filed on December 27, 2017 (29.15L.F.#162p.1-8) (29.15L.F.#164p.1-15). Vincent was abandoned when counsel failed to carry out

their obligations imposed under Rule 29.15(e). *See Bradley*. Vincent was denied effective assistance of postconviction counsel. *See Martinez*.

Counsel failed to timely allege the matters contained in the memoranda of law. This Court should order the case remanded for a finding of abandonment while directing the 29.15 court to consider on the merits the claims set forth in the two December 27, 2017 memoranda of law and their supporting offers of proof.

XX.

COUNSEL CONCEDED GUILT

The motion court clearly erred denying counsel was ineffective for calling Douglas when Franklin's counsel, Freter, told Vincent's counsel that Douglas would never testify contrary to his guilty plea where Douglas said he and Vincent shot Franklin because Vincent was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would not have called Douglas knowing he would testify that he and Vincent shot Franklin because calling Douglas amounted to admitting Vincent was guilty when Vincent asserted he was innocent.

Counsel was ineffective in calling Douglas because Douglas' plea counsel told Vincent's counsel that he would never testify contrary to his guilty plea that he and Vincent shot Franklin. Vincent's chosen defense was that he was innocent. Counsel should not have called Douglas knowing that he would testify that he and Vincent shot Franklin. Calling Douglas to testify as he did constituted structural error requiring a new trial.

Douglas' Trial Testimony

When Douglas was called during the defense case he repeatedly testified that he and Vincent shot Franklin(T.Tr.1630-31,1673,1680).

Counsels' 29.15 Testimony

Counsels' strategy was to call Douglas to testify Douglas and Kyle Dismukes shot Franklin(Tr.146-47,546-47). If Douglas said Vincent shot Franklin, then counsel would impeach Douglas with his prior statements that Vincent did not shoot Franklin(29.15Tr.146-47,546-47).

29.15 Findings

Counsel considered that Douglas could testify that Vincent shot Franklin or that Vincent did not shoot Franklin(29.15L.F.#222p.24). Counsel made the reasonable strategic decision to call Douglas understanding the advantages and disadvantages of calling Douglas(29.15L.F.#222p.24-25).

Douglas' Attorney Kim Freter's Testimony

Kim Freter represented Douglas on his 2005 guilty plea to having acted in concert with Vincent to kill Franklin(29.15Tr.245).

Freter told all of Vincent's attorneys and was clear that Douglas would never testify inconsistent with his plea agreement - that he and Vincent shot Franklin(29.15Tr.250-53).

Counsel Was Ineffective

Counsel is prohibited from conceding a defendant's guilt in a capital case hoping such concession would avoid the death penalty where the defendant maintains his innocence. *McCoy v. Louisiana*, 138 S.Ct. 1500, 1506 (2018). The defendant's autonomy includes the right to maintain his innocence and counsel cannot override that decision by conceding guilt. *McCoy*, 138 S.Ct. at 1508-09. In *McCoy*, the Court recognized "a defendant has the right to insist that counsel refrain from admitting

guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *McCoy*, 138 S.Ct. at 1505.

Because conceding guilt against a defendant's stated wishes to maintain his innocence is contrary to the defendant's autonomy over his case, *Strickland* prejudice is not required to be shown. *McCoy*, 138 S.Ct. at 1510-11. Violation of a defendant's Sixth Amendment secured autonomy over his case representation is structural error requiring a new trial. *McCoy*, 138 S.Ct. at 1510-11.

Douglas' counsel told Vincent's counsel that Douglas would never testify contrary to his guilty plea that he and Vincent shot Franklin(29.15Tr.250-53). Despite that knowledge, counsel called Douglas to testify that he and Vincent shot Franklin, which was contrary to Vincent's defense that he did not shoot Franklin. Vincent wanted the defense he did not shoot Franklin(29.15Tr.58,113-14). Calling Douglas knowing that he would say that he and Vincent shot Franklin disregarded Vincent's autonomy to maintain his innocence. *Cf. McCoy*. Calling Douglas under such circumstances was structural error and requires a new trial. *See McCoy*.

A new trial is required.

CONCLUSION

For the reasons discussed this Court should order: (1) a new trial - Points I, III, IV, V, VII, VIII; XX; (2) a new penalty phase - Points II, IX, X, XI, XII, XIV, XV, XVI, XVII; (3) a new 29.15 hearing after Douglas is required to answer deposition questions - Point VI; (4) a new 29.15 hearing where the St. Louis County Prosecutor's Office is disqualified - Point XIII; (5) a remand where the 29.15 court is directed to consider on the merits the offers of proof - Point XVIII; and (6) a remand with a finding of abandonment and directions to consider the omitted claims and the related offers of proof - Point XIX.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 26,040 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in September, 2019. According to that program the brief is virus-free.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 20th day of September, 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/ William J. Swift
William J. Swift