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 REPLY BRIEF

William J. Swift, MOBar #37769
Assistant Public Defender
Attorney for Appellant
Woodrail Centre
1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977
FAX: (573) 777-9974
William.Swift@mspd.mo.gov

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JURISDICTION AND STATEMENT OF FACTS

The Jurisdictional Statement and Statement of Facts from the original Appellant's Brief are incorporated here.

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 in that calling Douglas was unreasonable because Silas testified he did not see Vincent shoot Franklin, Silas testified that what he told the police in his recorded statement that Vincent shot Franklin was untrue, the prosecutor argued to the court that he ought to be allowed to play Silas' recorded police statement because on cross-examination the jury heard Silas testify that Vincent "didn't shoot anyone," Silas testified on redirect that in his police statements he had lied and "made that all up" as Silas' trial testimony constituted evidence that supported the actual innocence defense that Vincent did not shoot Franklin and made calling Douglas an unreasonable strategy.

Gardner v. State, 96 S.W.3d 120 (Mo.App., W.D. 2003);

Porter v. State, 575 S.W.3d 731 (Mo.App., E.D. 2019);

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 Franklin was convicted of "trafficking" which is drug dealing and not simple possession, counsel failed to conduct reasonable investigation to locate Kirkman-Clark because she lived in and around Pine Lawn until she moved to Florida in 2014 where 29.15 counsel located her to obtain her 29.15 testimony, and Kirkman-Clark's long-term presence in Pine Lawn provided her firsthand knowledge of Franklin's drug dealing and gang related activities.

State v. Flores-Moreno, 866 P.2d 648 (Wash. Ct. App. 1994);

Gill v. State, 300 S.W.3d 225 (Mo. banc 2009);

Gennetten v. State, 96 S.W.3d 143 (Mo.App., W.D. 2003);

Green v. Georgia, 442 U.S. 95 (1979);

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's introducing Douglas' letters (TrialExs.502, 503, 504, 505, 506) (29.15Exs.57, 58, 59, 60, 61) written to Vincent because counsels' reasons for not objecting to the letters were based on defense counsels' calling Douglas to testify and calling Douglas as a defense witness was an unreasonable strategy. Further, failing to object to Douglas' letters was unreasonable because counsels' strategy was to keep out evidence of Vincent having gang affiliation and Douglas' letters contained readily apparent gang association evidence.

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

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's 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 the gang affiliation evidence contained in those letters was not legally relevant. The gang references were not "vague" and the prosecutor argued the gang references were Vincent's and Douglas' "motto" and that Vincent was the "king" of Pine Lawn.

State v. Anderson, 306 S.W.3d 529 (Mo. banc 2010);

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 cultural conditions specific opinions, including the Pine Lawn mitigation video, because the caselaw and the recognized legal Standards for Capital Case Representation, relied on in Vincent's original brief showing counsel did not as a matter of law act as reasonable counsel under *Strickland* in failing to present the evidence available through Dr. White, was not required to be pled in the 29.15 amended motion because Rule 29.15 requires fact pleading and does not require pleading law demonstrating how counsel failed to act as reasonable counsel that expressly refutes counsels' 29.15 testimony on the law.

State v. Shafer, 969 S.W.2d 719 (Mo. banc 1998);

Buchli v. State, 242 S.W.3d 449 (Mo. App., W.D. 2007);

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

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 in that calling Douglas was unreasonable because Silas testified he did not see Vincent shoot Franklin, Silas testified that what he told the police in his recorded statement that Vincent shot Franklin was untrue, the prosecutor argued to the court that he ought to be allowed to play Silas' recorded police statement because on cross-examination the jury heard Silas testify that Vincent "didn't shoot anyone," Silas testified on redirect that in his police statements he had lied and "made that all up" as Silas' trial testimony constituted evidence that supported the actual innocence defense that Vincent did not shoot Franklin and made calling Douglas an unreasonable strategy.

The jury heard evidence from Silas that Vincent did not shoot Franklin, and therefore, Silas provided an actual innocence defense that Vincent could not be guilty of killing Franklin. Douglas' counsel, Freter, told Vincent's counsel that Douglas would never testify inconsistent with his plea agreement - that he and Vincent shot Franklin(29.15Tr.250-53). It was unreasonable to call Douglas to testify when the jury already had heard from Silas that Vincent did not shoot Franklin when Douglas'

counsel, Freter, had put Vincent's counsel on notice that Douglas would testify Vincent and Douglas shot Franklin.

Respondent relies on counsels' testimony that Douglas was called knowing he might provide unfavorable testimony because that was the only way to present that Kyle Dismukes, and not Vincent, shot Franklin(Resp.Br.25-26). To present the defense that Vincent did not shoot Franklin it was unnecessary to establish who shot Franklin and that it was Dismukes who did. Counsel only had to present Vincent did not shoot Franklin.

Respondent also asserts that Silas testified only that he did not see the shooting, so that he did not see anyone shoot Franklin(Resp.Br.26). The record reflects Silas' trial testimony included evidence Vincent did not shoot Franklin and that the prosecutor argued Silas' recorded statement should be played for the jury because the defense had just elicited testimony at trial that Silas had in his prior deposition testimony and at a prior court hearing (this case's first trial) testified "**that the defendant didn't shoot anyone**." (T.Tr.1096) (emphasis added).

I. Silas' Recorded Statement

On Silas' police questioning tape recorded statement (TrialEx.78A - the recording) he asserted that there were two guys that shot Franklin and Vincent was one(TrialEx.78 C at 2-6 - the transcript of TrialEx.78A).

II. Silas' Trial Testimony

A. Respondent's Direct

Silas was questioned about whether TrialEx.78A was the tape that the prosecutor played for Silas in his office three weeks before Silas testified(T.Tr.1047-1056,1060,1061). When Silas was questioned about what he said during the recorded police questioning, he testified that he did not remember(T.Tr.1049-56,1060-63).

During a recess, Silas' recorded statement was played for him and when he returned to testify he acknowledged that TrialEx.78A was the statement he made(T.Tr.1067,1074). Silas acknowledged that the recording reflected that he had said Vincent shot Franklin(T.Tr.1075,1076).

B. Defense's Cross-Examination

Defense counsel elicited that Silas had testified under oath twice before, (including this case's first trial)(T.Tr.1089-90). On the defense's cross-examination, Silas testified that he did not see Vincent shoot Franklin(T.Tr.1090 L.15-18). Silas testified that he did not see Vincent shoot anyone(T.Tr.1092 L.11-12). When Silas was asked whether what he told the police on the recording, that Vincent shot Franklin was "true," Silas responded that it was not(T.Tr.1092 L.19-23). Silas testified that in his recorded statement he was just telling the police what they wanted to hear so he could get leave the police station(T.Tr.1093 L.2-7).

C. Respondent's Redirect

Respondent requested to play Silas' recorded statement(T.Tr.1095-96). Defense counsel objected on hearsay and foundational grounds(T.Tr.1095-96).

Defense counsel also argued the tape should not be played because Silas had testified that the recording contained his voice and he made the statements on the recording(T.Tr.1095-96).

The prosecutor argued that the recording ought to be allowed to be played because its contents were prior inconsistent statements with how Silas just testified at trial(T.Tr.1095-96). The prosecutor argued that the police recording of Silas' statements should be allowed to be played because the defense had just elicited testimony at trial that Silas had in his prior deposition testimony and at a prior court hearing (this case's first trial) testified "**that the defendant didn't shoot anyone**." (T.Tr.1096) (emphasis added).

Defense counsel argued that Silas' recorded statement should not be allowed to be played because the prosecutor had gone through its transcript line-by-line asking Silas whether he said what appeared in that transcript(TrialEx.78C) (T.Tr.1097-98). In response, the court stated: "And Mr. Silas has either denied them or said he doesn't remember."(T.Tr.1098).

The trial court ruled that Silas' recorded statements (TrialEx.78A) could be played because the contents of the recorded statements were prior inconsistent statements as to what he had just testified to at trial(T.Tr.1097-99). The court also ruled that the jury would be allowed to follow along with the transcript of Silas' recorded statement, which had redacted reference to the Bryant/Burns assault allegations(TrialEx.78C) (T.Tr.1099-1102). Silas' recorded conversation was played with the jury following along with the transcript(T.Tr.1102-03) (TrialEx.78C).

Silas testified that in his police statement he had lied and "made that all up"(T.Tr.1108).

III. Counsel Was Ineffective

Counsels' actions in calling Douglas were unreasonable and parallel the unreasonable ineffective actions of counsel in *Gardner v. State*, 96 S.W.3d 120 (Mo.App., W.D. 2003). In *Gardner v. State*, 96 S.W.3d 120, 121 (Mo.App., W.D. 2003), the defendant was living with and paying rent to the married couple Phillip Hancock and Carol Drummond. Gardner was convicted of second degree murder. *Id.* at 121. Hancock had a history of domestic violence committed against Drummond. *Id.* at 121. The defense theory was that a confrontation between Hancock and Drummond occurred and Gardner shot and killed Hancock in self-defense and in defense of Drummond. *Id.* at 121, 125-26.

Prior to trial, the court sustained the defense's *motion in limine* to exclude evidence of statements Drummond made to others about wanting her husband killed. *Gardner*, 96 S.W.3d at 125. The state did not call Drummond during its case-in-chief, even though it had subpoenaed her. *Id.* at 125. Defense counsel called Drummond early in the defense case. *Id.* at 125. Defense counsel's examination was limited to eliciting from Drummond that the state had subpoenaed her to testify and she had been present for trial. *Id.* at 125. On respondent's cross-examination of Drummond, she denied having made statements that she wanted her husband killed. *Id.* at 125. In rebuttal, the state called witnesses to testify that Drummond had made statements to them that she wanted her husband killed. *Id.* at 126.

Gardner's counsel's strategy in calling Drummond was to put the jury on notice that Drummond was available to the state. *Gardner*, 96 S.W.3d at 126. In deciding counsel's actions in calling Drummond were unreasonable, the *Gardner* Court reasoned that a court reviewing a claim of ineffectiveness "must 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."' *Id.* at 127 (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). The *Gardner* Court concluded under "the entire circumstances" the decision to call Drummond was "completely unreasonable." *Gardner*, 96 S.W.3d at 128. It was only counsel's unreasonable strategy that led to the admission of the statements that Drummond had made about wanting her husband, Hancock, killed. *Id.* at 131. "Allowing the jury to hear, over and over, that Carol Drummond was trying to kill her husband would not be helpful to the defense." *Id.* at 129.

Silas had testified in respondent's case before Douglas was called in the defense case. At the time counsel called Douglas, the jury had already heard evidence that Silas had said that Vincent did not shoot Franklin. Evaluating counsel's conduct at the time Douglas was called, counsel's conduct was unreasonable because Freter had told counsel that Douglas would testify that he and Vincent shot Franklin(29.15Tr.250-53). *Cf. Gardner*. Like in *Gardner*, it was only because of counsel's unreasonable strategy that the jury got to hear co-defendant Douglas testify that Vincent shot Franklin. Moreover, like in *Gardner*, the jury got to hear over and

over from Douglas that Vincent shot Franklin(T.Tr.1630-31,1648-51,1673,1674,1680).

Respondent relies on counsel's testimony that calling Douglas to attribute the shooting to Douglas and Dismukes was "a Hail Mary" defense (29.15Tr.58) done at Vincent's urging(Resp.Br.23). Whether to a call a witness is matter of trial strategy and is left to the professional judgment of the attorney. *Porter v. State*, 575 S.W.3d 731 (Mo.App., E.D. 2019). *See also*, *Smith v. State*, 736 S.W.2d 516, 517 (Mo.App., E.D. 1987). A decision not to call a witness to testify as a matter of trial strategy is virtually unchallengeable. *Porter v. State*, 575 S.W.3d at 736. It was counsels' responsibility to exercise professional judgment on whether to call Douglas or not. Counsels' testimony that calling Douglas was "a Hail Mary" defense (Resp.Br. 23) shows the decision to call Douglas was facially unreasonable because Freter had told them that Douglas would never testify that he and Dismukes shot Franklin and would say that he and Vincent shot Franklin(29.15Tr.250-53). Counsel had the responsibility to exercise their professional judgment not to call Douglas, regardless of Vincent's expressed desires for Douglas to be called, when the jury had already heard from Silas that Vincent had not shot Franklin. *Cf. Gardner*. When Silas testified, and before Douglas testified in the defense case, the jury heard evidence that Vincent did not shoot Franklin, and therefore, Vincent's desire that the jury hear he did not commit this offense was met.

Respondent relies on counsels' testimony that they did not know whether Douglas would testify that Vincent or Dismukes shot Franklin(Resp.Br.22-23).

Counsel knew which version the jury would hear from Douglas because Douglas' counsel, Freter, told them that Douglas would never testify inconsistent with his plea - that he and Vincent shot Franklin(29.15Tr.250-53). Calling Douglas after the jury heard from Silas was unreasonable. *Cf. Gardner*.

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 Franklin was convicted of "trafficking" which is drug dealing and not simple possession, counsel failed to conduct reasonable investigation to locate Kirkman-Clark because she lived in and around Pine Lawn until she moved to Florida in 2014 where 29.15 counsel located her to obtain her 29.15 testimony, and Kirkman-Clark's long-term presence in Pine Lawn provided her firsthand knowledge of Franklin's drug dealing and gang related activities.

Respondent argues counsel was not ineffective for failing to admit evidence of Franklin's conviction for the Class A felony of second degree drug trafficking, under §195.223, because that conviction was merely for possession, and not drug dealing and the jury heard other evidence of Franklin possessed illegal drugs(Resp.Br.32-33).

The information charged Franklin with: "TRAFFICKING SECOND DEGREE - CLASS A FELONY"(29.15Ex.46). The information alleged:

> That Todd E. Franklin, in violation of Section 195.223, RsMo, committed **the class A felony of trafficking in the second degree**, punishable upon conviction under Section 558.011.1(1), RSMo, in that on or about

> Monday, August 2, 1999, at approximately 9:15 p.m., at 6230 Stillwell, **in the City of Pine Lawn**, in the County of St. Louis, State of Missouri, the defendant **possessed 6 grams or more** of a mixture or substance containing a cocaine base, a controlled substance, knowing of its presence and illegal nature.

(29.15Ex.46)(emphasis added). Franklin pled guilty to second degree trafficking. (29.15Ex.46).

Section 195.202, RSMo 1994 prohibited simple possession of a controlled substance and declared such offense a Class C felony. Further, §195.202, RSMo 1994 declared that possession of thirty-five grams or less of marijuana was a Class A misdemeanor.

Section 195.222.3, RSMo Cum. Supp. 1998 (Resp.Br.32-33), first degree trafficking, provided that if the quantity of cocaine base possessed involved was six grams or more that the person shall be sentenced to a Class A felony term which **was to be served without probation or parole**.

Section 195.223.3, RSMo Cum. Supp. 1998, second degree drug trafficking, provided that for possessing six grams or more of cocaine base a person was guilty of a Class A felony, but unlike 195.222.3 RSMo Cum. Supp. 1998, did not provide that the sentence imposed was to be served without probation or parole.

First degree drug trafficking 195.222.3, RSMo Cum. Supp. 1998 and second degree drug trafficking 195.223.3, RSMo Cum. Supp. 1998 as defined were both drug dealing Class A felonies, but distinguished from one another by whether the imposed

sentence was probation or parole eligible or not so eligible. Thus, Respondent's proffered contrasting of first and second degree trafficking (Resp.Br.32-33) does not establish that Franklin was convicted of mere simple possession, rather than drug dealing. Moreover, if Franklin had been guilty of simple possession, then respondent would have charged him with the Class C felony of possession under Section 195.202, RSMo 1994.

Trafficking was not defined in Chapter 195 or §195.223. *See* §195.010, RSMo Cum Supp. 1998 and §195.223, RSMo. Cum. Supp. 1998. In *State v. Flores-Moreno*, 866 P.2d 648, 653-54 (Wash. Ct. App. 1994), the defendant challenged his enhanced punishment for a possession offense where statutes the state relied on to enhance prohibited "trafficking." While the trial court was allowed to enhance *Flores-Moreno's* punishment by relying on case specific aggravating factors, it could not rely on the "trafficking" statute because "trafficking" does not mean "simple possession." *Id.* at 653-54. To determine the meaning of "trafficking" the *Flores-Moreno* Court relied on Black's Law Dictionary which defined "trafficking" as "the trading or dealing in certain goods." *Id.* at 653-54. That Court also relied on Webster's Dictionary which defined "trafficking" as "to engage in commercial activity: buy and sell regularly." The *Flores-Moreno* Court indicated that "trafficking" "excludes simple possession." *Id.* at 654. That Court also noted that that possession of one half gram of cocaine is a "typical" quantity for a possession offense. *Id.* at 654.

Franklin's conviction under §195.223 was for drug dealing, and not possession, because he was charged with "trafficking" and "trafficking" is not "simple

possession" as respondent has asserted. *See Flores-Moreno*. Evidence that the jury heard about Franklin possessing drugs for personal use was not the same as it hearing that Franklin was a drug dealer. The possession evidence the jury heard did not rebut respondent's portrayal of Franklin as the upstanding person he was cast as in penalty when compared to the evidence Franklin was a drug dealer. Like in *Gill v. State*, 300 S.W.3d 225, 228-29, 233 (Mo. banc 2009) counsel was ineffective for failing to rebut the state's evidence that portrayed the victim as a person of especially high moral character when there was readily available evidence rebutting such portrayal.

Respondent asserts that evidence of Franklin's drug possession conviction was cumulative to the evidence of his drug possession that the jury did hear(Resp.Br.33-34). Evidence of Franklin's drug dealing conviction was not cumulative because drug dealing is treated more harshly than possession because of the unique dangers drug dealing, "trafficking," presents compared to "simple possession." *See Flores-Moreno,* 866 P.2d at 653-54. That Franklin was charged with and convicted of a Class A felony, the highest class of felony and not the Class C felony of possession, underscores the distinction recognized in *Flores-Moreno*(29.15Ex.46).

Respondent asserts counsel was not ineffective for failing to call Taneisha Kirkman-Clark because counsel testified that they tried to locate her and conducted reasonable investigation(Resp.Br.34). When it is alleged counsel was ineffective for failing to locate and call a witness the movant is required to prove: '"(1) the witness could have been located through reasonable investigation; (2) the witness would have testified if called; and (3) the testimony would have provided a viable defense."'

Gennetten v. State, 96 S.W.3d 143, 148 (Mo.App., W.D. 2003) (quoting *Williams v. State*, 8 S.W.3d 217, 219 (Mo.App., E.D. 1999)). All of these requirements necessary to establish ineffectiveness were proven here.

In *Gennetten v. State*, 96 S.W.3d 143 (Mo.App.,W.D.2003), Judge Breckenridge, writing for the Western District, found counsel was ineffective for failing to interview and call a physician who counsel was on notice of as a potential witness. Genetten was convicted of second degree murder in a shaken baby case where the child had head injuries and burns. *Id.* at 145-46. The state presented Dr. Berkland's autopsy findings that the victim's head injuries were consistent with shaken baby syndrome and the burns were consistent with intentional infliction. *Id.* at 145-46. In addition, respondent introduced evidence from two of the victim's treating physicians whose findings supported respondent's position. *Id.* at 145-46. The victim's medical records included a death summary with Dr. Sharp's signature. *Id.* at 146.

The *Gennetten* defense called Dr. Stevens who had read the victim's CT scan and prepared a death summary report the state had admitted into evidence. *Gennetten,* 96 S.W.3d at146,148. The *Gennetten* Court found counsel was ineffective for failing to call Dr. Sharp to testify that the victim's burns were consistent with an accident, which would have countered respondent's case the burns were part of a pattern of abusing the victim. *Id.* at 148. Gennetten's counsel had reviewed the victim's death summary which contained Dr. Sharp's signature. *Id.* at 148. Through the death certificate, counsel could have located Sharp because he was a doctor at the

hospital where the victim was treated. *Id.* at 148-49. Counsel failed to make a reasonable professional investigation or a reasonable decision not to investigate Dr. Sharp. *Id.* at 151. Trial counsel should have realized Sharp was a key witness and investigated him. *Id.* at 152. If counsel had investigated Dr. Sharp, then counsel would have discovered favorable defense evidence. *Id.* at 152.

Respondent argues counsel was not ineffective because they conducted reasonable investigation to locate Kirkman-Clark(Resp.Br.34).[1] The record shows counsel's investigation was not reasonable. Counsels' actions here are like Gennetten's counsel because counsel did not conduct a reasonable investigation to locate Kirkman-Clark.

Taneisha Kirkman-Clark's video deposition testimony was obtained by phone on June 29, 2018 and she was then living in Florida(29.15Ex.86Ap.4,6). Kirkman-Clark was born December 26, 1978 in Pine Lawn(29.15Ex.86Ap.6-7). Kirkman-Clark moved from Pine Lawn in 2000(29.15Ex.86Ap.7). Kirkman-Clark had purchased a home in Dellwood, twenty minutes from Pine Lawn(29.15Ex.86Ap.8). Although she moved from Pine Lawn, she visited numerous family, almost daily in Pine Lawn, until moving to Florida in 2014, because the route she drove to work at

[1] Respondent has made the same arguments as to counsels' efforts to locate Taneisha Kirkman-Clark in Point XI (Resp.Br.83) - the failure to call her as a mitigation witness as to the conditions existing in Pine Lawn. The responsive arguments in this Point II as to Kirkman-Clark are equally applicable to Point XI.

Anheuser-Busch took her close to Pine Lawn(29.15Ex.86Ap.7-8). When Kirkman-Clark testified, her mother was living in the Dellwood home she had purchased(29.15Ex.86Ap.8).

Kirkman-Clark's testimony showed she lived nearby Pine Lawn, in Dellwood, and almost daily was in Pine Lawn to visit family and when she testified for this 29.15, her mother was living in the house she had owned in Dellwood. Counsels' failure to locate Kirkman-Clark was like counsel's failure in *Gennetten* to locate Dr. Sharp whose named appeared in the victim's medical records. That counsel's efforts to locate Kirkman-Clark were not reasonable is underscored by the fact that 29.15 counsel located Kirkman-Clark in Florida to testify after she had moved there in 2014. *Cf. Gennetten*.

Respondent asserts Kirkman-Clark's testimony about Franklin's drug dealing, drive-by shooting involvement, and gun possesion was speculative hearsay based on conclusions(Resp.Br.34-35). The record shows that Kirkman-Clark had firsthand non-speculative knowledge about Franklin's drug dealing and gang affiliation.

Kirkman-Clark knew Franklin as a 17-18 year old, so she was around him(29.15Ex.86Ap.11-13). Kirkman-Clark knew that Franklin was a drug dealer and gang member based on being around him and observing the context of how he used his phone(29.15Ex.86Ap.13-14). Kirkman-Clark testified that she "saw" Franklin deal drugs(29.15Ex.86Ap.32). Kirkman-Clark had seen Franklin with his gun(29.15Ex.86Ap.15,33). Kirkman-Clark recounted that Franklin was an associate of drug-dealer Pelle(29.15Ex.86Ap.14-15). Kirkman-Clark knew Franklin was part

of the drive-by shooting at her mother's house, where Arnell "Smoke" Jackson was the intended target, because she investigated who was responsible(29.15Ex.86Ap.15-16,34). Kirkman-Clark knew Franklin was a gang member based on conversations she had with him and clothes that identified him as belonging to a particular gang(29.15Ex.86Ap.32-33).

Even if some portion of Kirkman-Clark's testimony could be deemed hearsay, it was still admissible. In *Green v. Georgia*, 442 U.S. 95, 95 (1979) defendant Green and co-defendant Moore were charged with the rape and murder of Teresa Allen. Moore and Green were tried separately and both sentenced to death. *Id* at 95.

At Green's penalty phase, he attempted to prove he was not present when Allen was killed and had not participated in her death. *Green*, 442 U.S. at 96. Green had sought to introduce that Moore had told Thomas Pasby that Moore shot Allen twice after ordering Green to run an errand, but that was excluded as hearsay. *Id.* at 96. In closing, the state argued that in the absence of direct evidence as to the circumstances of the crime, the jury could infer that Green participated directly in Allen's murder. *Id.* at 96.

The Green Court found that excluding the Pasby evidence violated due process because it was highly relevant to a critical issue in the punishment phase and there were substantial reasons to believe its reliability. *Green*, 442 U.S. at 97. Under circumstances like those presented in *Green*, the Court held "'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'" *Id.* at 97 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

This Court applied *Green* to order a new penalty phase in *State v. Phillips*, 940 S.W.2d 512, 516 (Mo. banc 1997). In *Phillips*, respondent failed to disclose a police audiotaped statement given by witness Hagar in which Hagar reported that homicide co-defendant (Minster) told Hagar that Minster and his defendant mother (Phillips) killed the victim (Plaster) and that Phillips drove while Minster scattered the victim's body parts from a car. *Id.* at 516. The recorded statement included Hagar's recounting that Minster said that he killed Plaster and dismembered her body. *Id.* at 516.

This Court found Minster's statements it was him who dismembered the victim's body were exculpatory and material to Phillips' punishment because it showed Phillips' involvement in the dismemberment was tangential. *Phillips*, 940 S.W.2d at 517. The undisclosed evidence was exculpatory because the only aggravating circumstance found to warrant death against Phillips was depravity of mind based on dismembering the victim's body. *Id.* at 517.

This Court ordered a new penalty phase for Phillips, despite respondent's argument that any testimony from Hagar about Minster's role in the dismemberment was hearsay, and therefore, inadmissible. *Phillips*, 940 S.W.2d at 517. This Court agreed that Hagar's recitation of Minster's statements was hearsay and did not fall within any hearsay exception. *Id.* at 517. In an all concur opinion, this Court rejected respondent's hearsay argument because the evidence was admissible in penalty as required under *Green v. Georgia*. *Phillips*, 940 S.W.2d at 517. Under *Green*, hearsay testimony cannot be excluded where the testimony was highly relevant to a critical

punishment issue and substantial reason exists to assume the hearsay statements' reliability. *Phillips*, 940 S.W.2d at 517. The same is true here. Kirkman-Clark's long-time presence living in and around Pine Lawn and continuous contact with her family in Pine Lawn coupled with her detailed description of Franklin's actions based on her observations constitute sufficient reasons to believe the reliability of any evidence that might be deemed to constitute hearsay. *See Green* and *Phillips*. Moreover, Franklin's conviction for "trafficking" for acts committed in Pine Lawn (29.15Ex.46) underscores the reliability of Kirkman-Clark's testimony about Franklin's Pine Lawn drug dealing and gang related activities.

Respondent asserts that as contemplated under *Payne v. Tennessee*, 501 U.S. 808, 823 (1991) victim impact evidence is not offered to encourage comparative judgments of worth between the victim's and defendant's lives(Resp.Br.36). The record here, however, shows in fact that was how the prosecutor argued in initial penalty respondent's victim impact evidence. The prosecutor 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 unlike 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).

Respondent asserts it was reasonable strategy for counsel not to have presented evidence of Franklin's drug dealing and gang affiliation to avoid alienating the jury(Resp.Br.36-37). That action did not reflect reasonable strategy 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). Evidence of Franklin's drug dealing and gang association was critical because of the prosecutor's initial penalty argument directed at the comparative value of Franklin's life to Vincent's life. *See* Prosecutor's comparative lives argument (T.Tr.2383-84,2392), *supra*. The jury heard evidence of Franklin's personal drug use, but not the substantial evidence of his more serious drug dealing, "trafficking," and gang association. *See Flores-Moreno, supra*. Franklin's drug dealing and gang affiliation were critical for how the prosecutor portrayed Franklin as a person of high moral character when compared to Vincent's character. This Court in *Gill v. State*, 300 S.W.3d 225, 228-29, 233 (Mo. banc 2009) found counsels' failure to rebut such factually false comparisons was ineffective and this Court should do the same here.

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's introducing Douglas' letters (TrialExs.502, 503, 504, 505, 506) (29.15Exs.57, 58, 59, 60, 61) written to Vincent because counsels' reasons for not objecting to the letters were based on defense counsels' calling Douglas to testify and calling Douglas as a defense witness was an unreasonable strategy. Further, failing to object to Douglas' letters was unreasonable because counsels' strategy was to keep out evidence of Vincent having gang affiliation and Douglas' letters contained readily apparent gang association evidence.

Respondent asserts counsel were not ineffective for failing to object to Douglas' letters on the grounds that they were irrelevant inadmissible hearsay because Douglas testified at trial and defense counsel intended to call Douglas when his letters were admitted(Resp.Br.41-42). Respondent also maintains counsel were not ineffective for failing to object to Douglas' letters because counsels' strategy relied on Douglas' out-of-court statements that Douglas and Dismukes shot Franklin and the letters allowed counsel to impeach Douglas, if he testified that Vincent shot Franklin(Resp.Br.43). Respondent's arguments are premised on the idea that defense counsel calling Douglas to testify was reasonable strategy. Calling Douglas was not a reasonable strategy. *See* Point I.

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994). Respondent asserts that

counsels' allowing Douglas' letters to be admitted was reasonable because of the value of statements in those letters attributing the shooting to Dismukes, and not Vincent(Resp.Br.43-44). Respondent asserts that the gang related matters were "vague" and "familial" like those in *State v. Davidson*, 242 S.W.3d 409, 415-16 (Mo.App., E.D. 2007). In *Davidson*, respondent admitted evidence that in a letter Davidson referred to himself as "a 'G' deep down inside" *Davidson*, 242 S.W.3d at 415-16. The *Davidson* Court concluded that Davidson's reference to himself as a "G" was a "vague" reference that did not highlight gang association. *Id.* at 415-16.

Counsel testified their strategy was to keep out gang related evidence(29.15Tr.171,557). 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). These references, unlike in *Davidson*, were neither "vague" nor "familial" as shown by how the prosecutor invoked them in closing arguments as constituting obvious evidence of gang association. 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). 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). Moreover, counsel conceded that from the letters the jury would have inferred gang association(29.15Tr.588-90).

Counsels' stated purpose for wanting Douglas' letters admitted were they showed Vincent did not tell Douglas what to testify to(29.15Tr.145,545). Respondent argues that Douglas' letters "contained no explicit direction" from Vincent telling Douglas how to testify (Resp.Br.44). The prosecutor's argument that "Love-N-Loyalty" and "Loyalty Is Royalty," found in Vincent's and Douglas' exchanges of letters, was "their motto" expressly told the jury that it was obvious that Vincent was directing Douglas how to testify(T.Tr.1787,1791). Counsel did not act reasonably in wanting Douglas' letters admitted. *See State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994) and *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

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's 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 the gang affiliation evidence contained in those letters was not legally relevant. The gang references were not "vague" and the prosecutor argued the gang references were Vincent's and Douglas' "motto" and that Vincent was the "king" of Pine Lawn.

Respondent argues Vincent's letters were relevant and admissible to show consciousness of guilt(Resp.Br.47-48).

To be admissible evidence must be relevant. *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. banc 2010). Relevance is a two tiered inquiry: logical and legal. *Id.* at 538. Evidence is logically relevant if it tends to make the existence of a material fact more or less probable. *Id.* at 538. Logically relevant evidence is only properly admitted, though, if it is likely to make the existence of a material fact more or less probable. *Id.* at 538. Legal relevance balances the probative value of evidence against its costs in terms of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. *Id.* at 538. Logically relevant evidence is excluded if its prejudice outweighs its probative value. *Id.* at 538.

Respondent's guilt case included testimony from Gary Lucas, Greg Hazlett, and Glenn Zackary identifying Vincent as having shot Franklin(T.Tr.1149-51)

(T.Tr.1193,1196,1199-1200,1258-59) (T.Tr.1452-58,1460,1475,1478). Evelyn Carter testified that Vincent made statements that caused her to believe he shot Franklin(T.Tr.1398-99,1400,1403). While Vincent's letters may have been logically relevant, they were not legally relevant because they injected unfair prejudice, confused the issues, misled the jury, and were cumulative. *See Anderson*.

Counsel testified they worked hard to keep out gang evidence(29.15Tr.171,557). Despite wanting to keep out gang evidence, counsel did not object to Vincent's letters and an envelope written to Douglas, which were replete with gang association material(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). 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).

The prosecutor's use of the letters' and the envelope's contents in closing arguments highlights how the gang affiliation evidence found in those documents

injected unfair prejudice, confused the issues, mislead the jury, and were cumulative. *See Anderson*. In balancing the probative value of this evidence against the costs in terms of unfair prejudice, confusion of the issues, misleading the jury, and cumulativeness, the trial court would have been required to exclude this evidence, if counsel had objected. Counsel did not act as reasonable counsel when they failed to object to the admission of Vincent's letters and the envelope. *See State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994).

As it did in Point III, respondent asserts the gang references were "vague" and relies on *State v. Davidson*, 242 S.W.3d 409 (Mo.App., E.D. 2007). The gang references were not "vague" and *Davidson* is distinguishable for the reasons set forth in Point III and incorporated here.

Respondent also relies on *State v. Wren*, 317 S.W.3d 111 (Mo.App., E.D. 2010) where gang evidence was admissible to show bias. The *Wren* Court noted that "affiliation with a gang is normally improper character evidence." *Wren*, 317 S.W.3d at 124. In *Wren*, there was a "brief acknowledgement" of gang affiliation. In Vincent's case, the gang affiliation evidence was not offered to show bias and there was not a brief acknowledgment of such association, rather the prosecutor focused on it in guilt and penalty closing arguments for its improper character purposes(T.Tr.1787,1791) (T.Tr.2381).

Respondent argues counsels' not objecting to Vincent's letters/envelope was in keeping with their overall strategy of calling Douglas in the defense case(Resp.Br.49-50). For the reasons discussed in Point I, and incorporated here, that strategy was

unreasonable. Counsel did not exercise reasonable strategy when they failed to object to Vincent's letters to Douglas. *See McCarter*, *supra*.

Respondent asserts counsel were not ineffective because Vincent's letters and the envelope did not contain "explicit direction" from Vincent to Douglas as to how Douglas should testify in order to exculpate Vincent(Resp.Br.49-50). The prosecutor's argument that "Love-N-Loyalty" and "Loyalty Is Royalty," found in Vincent's and Douglas' exchanges of letters, was "their motto" expressly told the jury that it was obvious that Vincent was directing Douglas how to testify(T.Tr.1787,1791). Counsel did not act reasonably in failing to object.

A new trial 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 cultural conditions specific opinions, including the Pine Lawn mitigation video, because the caselaw and the recognized legal Standards for Capital Case Representation, relied on in Vincent's original brief showing counsel did not as a matter of law act as reasonable counsel under *Strickland* in failing to present the evidence available through Dr. White, was not required to be pled in the 29.15 amended motion because Rule 29.15 requires fact pleading and does not require pleading law demonstrating how counsel failed to act as reasonable counsel that expressly refutes counsels' 29.15 testimony on the law.

Respondent asserts the caselaw and legal standards for capital case representation, relied on in Vincent's brief, were not pled in the 29.15 amended motion such that it constitutes a pleading defect and cannot be relied on to show counsel did not act as reasonable counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) (Resp.Br.75-76).

The amended motion alleged that counsel was ineffective because they failed to investigate and present a social profile of Vincent through Dr. White or a similarly qualified expert in penalty phase(29.15L.F.#130p.73). The jury did not learn about how Vincent's growing-up in Pine Lawn's "war zone" like environment impacted his development and decision making(29.15L.F.#130p.73). Dr. White would have

explained how lack of education, poverty, single parent households, and Pine Lawn's environment impacted Vincent's development(29.15L.F.#130p.73). Dr. White's testimony would have neutralized respondent's aggravation(29.15L.F.#130p.73-77). Reproduced in the text of the amended motion was Dr. White's report prepared for Vincent's case(29.15L.F.#130p.81-157) (29.15L.F.#131p.1-7).

Counsel testified that they were unaware 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).

To demonstrate that as matter of law counsel did not act reasonably in failing to present the evidence Dr. White could have presented Vincent's brief relied on law that showed that long before the 2008 ABA Guidelines reasonable counsel were expected to under the law, and did present, evidence like that which was available through Dr. White. *See* App.Br. at 89-91.

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.[2] *See also State v. Dixon*, 1997 W.L. 113756 *34-35 (Ohio Ct.App. 8th Dist. **Mar. 13, 1997**) (reversing penalty phase because the trial

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

court prohibited expert evidence of the contemporary urban environment highlighting the community crime rate, the drug culture, and family background that contribute to and impact the lifestyle, life course, and life direction of African-American children raised in that setting).

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 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).

Respondent asserts the law relied on in Vincent's brief showing counsel did not act reasonably when they failed to call Dr. White or a similarly qualified expert was required to be pled in the amended motion(Resp.Br.75-76).

Under the postconviction rules, a movant is required to plead facts and not legal conclusions. *State v. Shafer*, 969 S.W.2d 719, 738 (Mo. banc 1998). In *Buchli v. State*, 242 S.W.3d 449 (Mo. App., W.D. 2007) the Western District noted that "in the context of civil trials, Missouri is a fact-pleading state." In *Buchli*, the 29.15 trial court granted post-conviction relief where it reasoned that Detective Woods' retrieval of a surveillance video with its time stamp would have cast doubt on respondent's alternative timeline theory. *Id.* at 452. On appeal, respondent complained the amended motion contained no mention of Detective Woods and his confirmation of

the time stamp's accuracy when he retrieved the surveillance tape. *Id.* at 453-54. Respondent's argument was rejected because a 29.15 pleading is not required to allege "*every fact* underlying a claim." *Id.* at 453 (italics in original). The *Buchli* Court noted that a movant must allege facts not legal conclusions in support of his claims. *Id.* at 453. As *Shafer* and *Buchli* recognize, a movant is required to plead the underlying facts of a claim and that was done here. A movant is not required to plead law that refutes trial counsels' postconviction testimony's erroneous assertions as to their belief as to the status of the law when a case was tried. *See Shafer* and *Buchli*.

A new penalty phase is required.

CONCLUSION

For the reasons discussed in the original brief and this reply brief 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,

/s/ William J. Swift
William J. Swift, MOBar #37769
Assistant Public Defender
Attorney for Appellant
Woodrail Centre
1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977
FAX: (573) 777-9974
William.Swift@mspd.mo.gov

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 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,680 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in January, 2020. 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 15th day of January, 2020, on Assistant Attorney General Garrick Aplin at garrick.aplin@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