IN THE
MISSOURI SUPREME COURT

DAVID ZINK,	**)**	
	)	
Appellant,	**)**	
	)	
vs.	**)**	**No. SC 88279**
	)	
STATE OF MISSOURI,	**)**	
	)	
Respondent.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CLAIR COUNTY, MISSOURI
TWENTY-SEVENTH CIRCUIT
THE HONORABLE WILLIAM J. ROBERTS, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

William J. Swift, MoBar #37769
Assistant Public Defender
Attorney for Appellant
Woodrail Centre
1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 882-9855
FAX: (573) 882-9468

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JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

Public Defender Case Staffing Crisis Neglect

David was charged on July 13, 2001, with the July 12th first degree murder of Amanda Morton(T.L.F.48).[1] K.C. Capital Public Defenders, Short and Budesheim, entered September 27, 2001(T.L.F.19,56).

In January, 2002, the court wanted to schedule trial(T.Tr.81). Short's responsibilities made a setting anytime soon impossible(T.Tr.81-91). Short's office had only two other attorneys(T.Tr.89). Trial was set for September, 2002(T.Tr.85-86).

At a May, 2002 hearing, Budesheim, without Short, informed the court counsel could not be ready because of trial schedules and "staffing issues"(T.Tr.92-93). The office was 25% understaffed(Tr.102-03). The office had just completed a five count murder, *State v. Beach*, and had other responsibilities(T.Tr.94-101,103,107). The court had sent Short a letter about a trial setting, but Short never responded(T.Tr.93-94,108). That was unlike Short(T.Tr.93-94). Budesheim continued: "Miss Short has indicated that when we have completed the *Boyd* trial, because of exhaustion and burnout she is taking off June and July and try to recover her own equilibrium and

[1] The record is referenced: (a) trial transcript (T.Tr.); (b) trial legal file (T.L.F.); (c) Trial Exhibit (Trial Ex.) (d) 29.15 transcript (29.15Tr.); (e) 29.15 Legal File (29.15L.F.); and (f) 29.15 exhibits(29.15Ex.)

ability to go forward"(T.Tr.103-04). It was impossible to be ready in September, 2002(T.Tr.106-07).

In June, 2002, Short and Budesheim moved to continue(T.L.F.101-05). Counsel could not be ready in September, 2002, because: (a) K.C. Capital Office had been cut from four attorneys to three; (b) the April, 2002 *Beach* penalty phase lasted eleven days; (c) in May 2002, counsel tried *Boyd*; (d) Short was on leave June and July due to "exhaustion and burn out"; (e) Budesheim's *Vance* case was set for July, 2002; (f) Short's *Rauch* case was set for September, 2002; and (g) other responsibilities(L.F.101-105).

Budesheim appeared at the July, 2002 continuance hearing(T.Tr.112-13). The court wanted to set trial for March, 2003(T.Tr.114). Short was not working during August(T.Tr.114). Budesheim, referring to Short, stated: "Her reporting her own need to recover from a continuous program extending back several years without much of an interval at all"(T.Tr.114). A further continuance from March, 2003 would be needed because Short was gone for a month(T.Tr.115). Budesheim recounted other responsibilities and indicated if trial was set for March, 2003, a continuance would be needed(T.Tr.114-17).

On October 17, 2002, David filed a pleading complaining counsel was not investigating his case and not providing him documents(T.L.F.121-25).

In January, 2003, Public Defender counsel Jacquinot and Short moved to continue trial from March, 2003(T.L.F.134-48). Jacquinot, "a newcomer" recounted: (a) Budesheim was being transferred reducing the office to two attorneys and would

not be replaced because of budget cuts; and (b) after six weeks of two 2002 intensive trials, Short reduced her office hours, did not work weekends, and her leave lasted through the summer for "a much needed rest"(T.L.F.134-46). The court was informed "the demands and energy of resolving other matters diverted precious time and energy away from Mr. Zink's case…."(T.L.F.140). Trial was continued to October, 2003(T.L.F.149).

On June 12, 2003, the court noted that David had filed the October, 2002 pleading asking it require counsel provide him copies of documents(T.Tr.138-39). David informed the court counsel had made repeated representations that materials he requested would be provided, but they were not(T.Tr.149-50). David apprised the court Defender staff budget cuts were negatively impacting his case(T.Tr.152). Jacquinot informed the court that because of budget cuts David's case was going to be "restaff[ed]"(T.Tr.161). Jacquinot told the court the mitigation investigator closest to David's case "was just basically taken from our office"(T.Tr.161). The office had lost one-and-a-half additional employees(T.Tr.161). Jacquinot stated David's case "has been adversely affected by things that are, you know unfortunately, in my opinion out of our control"(T.Tr.161-62).

On June 25, 2003, counsel moved to continue the October, 2003 setting(T.L.F.338-49). There was only one attorney on David's case and no mitigation investigator(T.L.F.339). Because of a 2.5 million dollar budget cut, the Public Defender Director decided in May, 2003 to reduce capital staff through layoffs and transfers(T.L.F.340-41). Mitigation investigator Schneider was

transferred(T.L.F.340-41). In June, 2002, Jacquinot was assigned to David's case to replace Short(T.L.F.341-42). Because of Jacquinot's other responsibilities, he had not become an "active" lead counsel until 2003, when Budesheim was transferred(T.L.F.342). Because Budesheim was not replaced, Short by "default" was the only available co-counsel(T.L.F.342).

On July 15, 2003, St. Louis Capital Public Defender Kenyon entered(T.L.F.418).

On July 22, 2003, Jacquinot, filed additional suggestions to continue the October, 2003 setting that included:

> "First and foremost, staffing reductions in the Missouri Public Defender have been substantial if not drastic. Of all pending capital cases in the Western District, Mr. Zink's has far and away been the most directly affected by staffing issues."

(T.L.F.429).

On August 28, 2003, David moved to remove the Public Defender and to appoint other counsel(T.L.F.456-87).

On August 29, 2003, Jacquinot and Kenyon filed a brief in support of continuing the October, 2003, setting(T.L.F.488-512). Kenyon was on the case only one month(T.L.F.489). Staffing issues negatively impacting David's case included counsel "have come and gone from his case with limited input from [David]"(T.L.F.488). Short and Budesheim had left and mitigation investigator Schneider was forced into early retirement by budget cuts(T.L.F.500). Jacquinot was

a one attorney office(T.L.F.503). The pleading continued: "The deficient performance of counsel cannot be attributed to any fault of Mr. Zink"(T.L.F.488). From the beginning of the year, David had only one active attorney(T.L.F.489). David's case was contrasted to two other cases Jacquinot had worked on, one with four attorneys and the other, three(T.L.F.489).

The August, 2003 brief stated:

> [T]his office in the past year has literally been clobbered with turnover, conflicts of interests related to this case, and elimination of a. A trial attorney position, b. An in-house investigator position, c. its managing attorney, d. And the elimination of a half time secretary's position.

(T.L.F.498). It continued:

> [T]his case has proceeded as if it can prepare itself and have new people jump on board without severely sacrificing the level of representation that Mr. Zink will receive in both phases….

(T.L.F.499). "Zink's defense team has consistently been below this [ABA Guideline 4.1] standard, and the case has only recently been restaffed"(T.L.F.499). The pleading added David's "beliefs about his relationship with his attorneys have some basis in reality"(T.L.F.505).

In September, 2003, Short was no longer employed and withdrew(T.Tr.496-97,508-09,513).

In September, 2003, trial was set for April, 2004(T.L.F.31).

On December 5, 2003, Public Defender Winegarner entered(T.L.F.533).

In February and March, 2004, David filed notices of his self-representation desires(T.L.F.569-70,604-07). On March 1, 2004, David waived counsel(T.L.F.576;T.Tr.553-96). David told the court he had not set out intending to represent himself(T.Tr.605).

On March 24, 2004, David filed a motion to compel Defender counsel to provide materials they had not(T.L.F.679-85). For three years David's Defender counsel had done nothing timely and failed to do things when they promised(T.L.F.682-83).

David's June 25, 2004, filing apprised the court that if his Defender attorneys had diligently represented him from the outset, then he would not have felt compelled to take over(T.L.F.888).

On July 8, 2004, Jacquinot wrote the court stating he "cannot proffer that manslaughter is a rational, reasonable, or viable option"(T.L.F.974-75). Presenting manslaughter was "a self-destructive act" greatly enhancing the likelihood of first degree murder and death(T.L.F.975).

David moved on July 12, 2004, to appoint other counsel(T.L.F.1050-60). That pleading accused Jacquinot of lying about the viability of a manslaughter defense in his July 8th letter(T.L.F.1052,1056-58).

Trial began July 12, 2004(T.L.F.44). The court encouraged David to abandon self-representation(T.Tr.898). David told the court he would, if counsel would present his manslaughter defense(T.Tr.898). David reiterated Jacquinot "lied" in his letter(T.Tr.898-99).

Immediately following jury selection, the court urged David to allow counsel to represent him(T.Tr.1729-30). David again expressed dissatisfaction with Jacquinot having written the court saying a manslaughter instruction would not be supported(T.Tr.1735). Before opening statements, David indicated he would be presenting his defense with Jacquinot's and Winegarner's assistance(T.Tr.1751-52). Counsel was going to also present diminished capacity(T.Tr.1756-58).

Respondent's Guilt Case

At 1:00 a.m. on July 12, 2001, Amanda Morton and David were involved in a non-injury, rear-end accident at the I-44 and Route OO Strafford exit(T.Tr.1866-71,1903-07,1929-30,1940-41,2063-65,2082-89)[2]. Amanda phoned police to report the accident(T.Tr.1959,2169). Amanda's car was found with its lights on, engine running, her purse inside, and no one present(T.Tr.1934,1948-49,2120).

At 5:30 a.m., David and Amanda checked into the Camdenton El Kay Motel(T.Tr.2006-11,2013). The owner saw the evening news reporting Amanda's disappearance and contacted police(T.Tr.2018-19).

The Highway Patrol contacted St. Clair County Sheriff Snodgrass and asked him to contact David, who was living with his father(T.Tr.2221-22). In February, 2001, David had been paroled from the federal penitentiary for two 1980 rapes(T.Tr.2222-23,3663,4006-07,4014-15,4028-29,4038-39,4046,4050-51). At

[2] Assistant Attorney General Ahsens and St. Clair County Prosecutor Reed represented respondent.

about 7:15 p.m., Snodgrass, accompanied by Deputy Stewart, told David the Patrol wanted to talk to him(T.Tr.2223,2225,2227).

David went to the Sheriff's office where he was interrogated, admitted killing Amanda, and said Amanda's body could be found behind the Mt. Zion Cemetery, near his father's house(T.Tr.2227-30,2284-85,2349). David recounted he tied Amanda up, broke her neck, choked and strangled her, and stabbed her in the back of the neck(T.Tr.2384). David wanted death(T.Tr.2395). David led the police to where he buried Amanda(T.Tr.2129-33,2230,2287-89).

Amanda died from a broken neck which injured her spinal cord and caused breathing to stop(T.Tr.2469). An anal swab of Amanda recovered D.N.A. consistent with David's D.N.A.(T.Tr.2571-74).

In August, 2001, David asked to talk to Deputy Stewart(T.Tr.2631-32). David gave videotaped admissions to Stewart and that was played(T.Tr.2636-40;Trial Ex.67). David said he knew when his truck struck Amanda's car he was drunk and he was worried he would be sent back to prison for a DUI parole violation(Trial Ex.67). David had Amanda get in his truck and they left(Trial Ex.67). They spent the night at the El Kay(Trial Ex.67). David decided to kill Amanda because his involvement with her could cause his parole to be revoked(Trial Ex.67).

Fulton Department of Mental Health psychologist Brooks did a competency to proceed examination(T.Tr.3581,3585-86).[3] David did not suffer from mental illness(T.Tr.3602). Brooks' diagnoses included anti-social personality disorder(T.Tr.3589,3594Trial Ex.69;29.15Ex.72-pg.15). David had the ability to deliberate(T.Tr.3605).

Combined Guilt Defense

Counsel called neuropsychologist Dr. Benedict(T.Tr.2948-49). David presented a childhood hyperactivity history(T.Tr.2971). Benedict's testing identified problems with impulse control suggestive of Attention Deficit Hyperactivity Disorder (ADHD)(T.Tr.2976-81). Bendict diagnosed David as having ADHD(T.Tr.2988-89,3011). Benedict's testing did not uncover brain damage evidence(T.Tr.2983).

ADHD is a neurodevelopmental genetically influenced disorder(T.Tr.3017). The brains of children with ADHD function differently from normal children's brains(T.Tr.3018). The part of the brain impacted in the frontal lobe is the prefrontal cortex(T.Tr.3021). On cross-examination, respondent elicited Benedict was a Ph.D., not M.D., and therefore, cannot perform medical procedures(T.Tr.3133-34).

Benedict indicated the portions of the brain impacted by ADHD's chemical abnormality regulate impulse control(T.Tr.3022-25). David's ADHD was a mental illness that went untreated and progressed to the adult impulse control disorder of

[3] Brooks' report states the court entered an order for a "second examination"(29.15Ex.72-pg.1). There was not any prior court ordered evaluation.

Intermittent Explosive Disorder(T.Tr.3026-30). Intermittent Explosive Disorder is an adult manifestation of untreated ADHD(T.Tr.3034).

Benedict's diagnoses were a mixed personality disorder, paranoid and narcissistic types(T.Tr.3073,3085). David had a long-standing pattern of distrust and suspiciousness(T.Tr.3072). Benedict believed David displayed anti-social traits and behavior, but did not have anti-social personality disorder(T.Tr.3080). David's aggressive behaviors were unplanned(T.Tr.3080-84). David's personality disorder combined with the stress he felt caused his thinking to approach psychosis such that he was unable to coolly reflect(T.Tr.3110-12).

David's school records showed he was in remedial reading and repeated second grade(T.Tr.2992-94). In kindergarten, a school treatment referral was made because David wanted to kill himself and for loss of control(T.Tr.2995-96). In kindergarten, David's parents were divorcing and his father had spent time in a state mental institution(T.Tr.2997). David's father had threatened suicide and had encouraged David to give his teachers a hard time(T.Tr.2997-98).

Television news reporter Bielawski sent David letters requesting an interview and David wrote back(T.Tr.3155-58). David directed Jacquinot to introduce statements David wrote to her which contained highly inflammatory statements(T.Tr.3160-61,3178-79). David's correspondence described for Bielawski how he allegedly killed a transient person named Bryan(T.Tr.3167-73). It also expressed hope that someone who wanted him executed for killing Amanda would try to shoot him, but miss and inadvertently kill a bystander(T.Tr.3167-73). The court

was so astounded it made a record David had directed Jacquinot to introduce those materials because it believed no competent attorney would have introduced them(T.Tr.3179). According to David, the letter's content was all untrue, but explained why he formerly wanted the death penalty, but no longer wanted death(T.Tr.3177,3179). The court strongly urged David to consult Jacquinot about relinquishing self-representation because David had caused aggravation to be introduced during guilt(T.Tr.3178-80).

Psychologist Dr. Reuterfors evaluated David on his federal charges(T.Tr.3424,3427,3458). While David was in federal custody, a psychiatrist diagnosed him as having a paranoid personality disorder(T.Tr.3446,3470-72;Ex.61). Reuterfors believed if David had received ADHD treatment he might have avoided all criminal acts(T.Tr.3450,3455-56).

David's testimony focused on Amanda's use of her cell phone close in time to their accident with much of that based on Amanda's cell phone records(T.Tr.3558-77,3806-07). David asserted those records had been altered to help respondent claim David kidnapped Amanda(T.Tr.3809-17,3849-50). While with Amanda, David became concerned Amanda would cause him to get into trouble which would result in him going back to prison and he snapped, acting with sudden passion, not cool reflection(T.Tr.3792,3797-98,3858-59). What he wrote to reporter Bielawski was untrue and was motivated by his then desire to get the death penalty(T.Tr.3775-76,3781). He also gave his statement to Stewart because he then wanted death and he made up matters to accomplish that(T.Tr.3781-82,3786,3788,3838).

Penalty Phase

Respondent called two witnesses to testify to David having sexually assaulted them in Texas which resulted in David's federal time(T.Tr.4006-24,4038-51). Amanda's family described their loss(T.Tr.4058-81).

Defense counsel was solely responsible for penalty(T.Tr.3984). Witnesses testified about deprivation David had experienced and positive attributes he had displayed(T.Tr.4342-4423,4445-53).

Psychologist Dr. Smith diagnosed David as having a narcissistic personality disorder and alcohol dependence(T.Tr.4460). People with narcissistic personality disorders misinterpret and misperceive what is happening to them and do not recognize their thinking options are impaired(T.Tr.4468-69). When a narcissistic person is placed in a stressful situation, they see the situation through their distorted thinking(T.Tr.4472-73). In a stressful situation, narcissistic individuals respond extremely impulsively and overreact with aggression or hostility(T.Tr.4473).

Post-Verdict Defender Case Crisis Filing

Jacquinot's and Winegarner's post verdict motion for sentence reduction stated because of David's mental health diagnoses counsel:

> should have worked diligently to establish a relationship of trust with Mr. Zink from the outset. Given Mr. Zink's background these efforts should have been more diligent and not less; looking at the totality of the representation since July 13, 2001 counsel must concede that efforts

> in this area, especially during [the] case's insidious beginning fell short of these standards….

(T.L.F.1228). Counsel referenced "the series of motions for continuance" and "the continuous turnover of counsel that occurred throughout [David's] case"(T.L.F.1228).

29.15 Evidence

Budesheim recounted that after Short had tried *DeLong*, *Boyd*, and *Beach* she was exhausted and emotionally drained(29.15Tr.902-03). The best indicator of Short's physical and mental condition happened in *Boyd* where Short collapsed and could not come to court(29.15Tr.902-03). Short's condition adversely impacted her in court and as office manager(29.15Tr.903).

Budesheim recounted Short decided what resources were available in every case(29.15Tr.904). David's case did not get comparable resources allocated others because Short was "most fixated" on *Wood*, *Beach*, and *Boyd*(29.15Tr.907-08). Short did not like David and his case and Short's commitment to any case "was very much influenced by her personal preferences"(29.15Tr.909).

K.C. Capital Investigator Hedges recounted *DeLong* had just finished when David's case arrived(29.15Tr.164-65). *DeLong* had "drained the mental and physical and economic resources of everybody in the office"(29.15Tr.165). In Boyd's trial, Short "ran out of gas" and never recovered emotionally(29.15Tr.174). Short had been "swamped" and had more work than a person could reasonably be expected to do(29.15Tr.180).

Hedges recounted that in response to the announcement there would be significant Capital Division cuts, necessitated by state budget cuts, Short, in May, 2003, e-mailed Director Robinson about staffing problems(29.15Tr.181-82). In June or July, 2003, Short was demoted to a trial office and resigned(29.15Tr.187-88). Mitigation investigator Schneider was taken from Short's office in summer, 2003(29.15Tr.187-88). Schneider had done the bulk of the mitigation investigation on David's case and her departure "kicked the slats out of the mitigation [investigation]"(29.15Tr.187). In summer, 2003, Jacquinot was the office's only attorney and there was no mitigation specialist working on David's case(29.15Tr.188-89).

Hedges indicated there was an uncharacteristic delay in attempting to prepare David's case(29.15Tr.193). Shortly after David's case arrived, David requested some materials David believed went to guilt be retrieved from David's father's house(29.15Tr.195). A year or more went by before they were picked up(29.15Tr.195-96).

Jacquinot recounted he was assigned David's case late summer, 2002, but did not start working on it until January, 2003(29.15Tr.949-50). When Short assigned Jacquinot to David's case, she stopped working on it(29.15Tr.950-51).

While mitigation investigator Schneider worked on David's case, Short had discussions with Dr. Merikangas about doing a brain scan(29.15Tr.244).[4] Schneider had recognized the need for a brain scan based on David's hospitalization as a three year old with a high fever for an extended period of time and with the mumps(29.15Tr.244-45).

Psychologist Dr. Hough recounted Short and Budesheim retained him in July or August, 2001(29.15Tr.645-47). During Hough's association, it was agreed that because of David's history of a high fever and meningitis a brain scan was needed(29.15Tr.649-52).

Benedict had a phone conference with Jacquinot and Short in February, 2003(29.15Tr.89-90). Benedict recommended a PET scan be done because it might confirm his ADHD diagnosis(29.15Tr.89-91). David's history of meningitis also concerned Benedict because some of Benedict's neuropsychological findings identified impulse control problems(29.15Tr.91).

In a January or June, 2004 call, or possibly both, Jacquinot asked Benedict if a PET scan might show David's brain was abnormal(29.15Tr.100-02). Benedict told Jacquinot a PET scan might identify abnormalities associated with Benedict's diagnosis(29.15Tr.100-02). Benedict told Jacquinot a PET was likely to identify

[4] Dr. Merikangas is a neurologist and psychiatrist(29.15 Tr.244). *See* http://www.georgetownuniversityhospital.org/body.cfm?id=590.

abnormalities in the prefrontal cortical areas and subcortical areas and the connections between the two(29.15Tr.100-02).

In January, 2004, Dr. Preston received an e-mail from replacement mitigation specialist McCulloch inquiring about Preston's availability to do a brain scan for David's case(29.15Tr.342-44,818-19;29.15Ex.55). Preston responded he was available(29.15Tr.344,818-19).

On January 13, 2004, McCulloch e-mailed Jacquinot urging he obtain a PET scan based on Short's Merikangas consultation and David's childhood medical history and childhood impulsive behavior(29.15Tr.816-17;29.15Ex.87). David told McCulloch he would do a PET(29.15Tr.816).

On January 20, 2004, McCulloch e-mailed Jacquinot urging that a brain scan, using Preston, be done(29.15Tr.709-11,819;29.15Ex.88). McCulloch's e-mail noted Preston's work had been used before and he had been "very persuasive in court"(29.15Ex.88). Jacquinot "veto[ed]" McCulloch's suggestion because the remaining work presented "a daunting enough task"(29.15Tr.710,819-20;29.15Ex.88).

McCulloch had been involved with Preston in three other cases where Preston testified in penalty and all ended in life(29.15Tr.821). In those, Preston was able to show and explain to the jury pictures of deficits identified(29.15Tr.821).

McCulloch recounted the ease with which scans were obtained in other cases(29.15Tr.822). McCulloch handled all radiology scheduling(29.15Tr.822). The attorneys only had to file a motion to have the client transported(29.15Tr.822).

Winegarner had another first degree murder case where a brain scan was obtained and the expert was able to say the deficits identified impacted impulse control and the ability to make rational decisions under stress(29.15Tr.707-08). Because of that scan, the prosecutor agreed to a second degree murder plea and the same information was used to mitigate punishment(29.15Tr.707-09). Getting the scan done was not time intensive(29.15Tr.776-77). The expert made the hospital arrangements(29.15Tr.776-77). Winegarner prepared a motion to transport, which did not involve much time, and then obtained court approval(29.15Tr.776-77).

Kenyon's experience is that mitigation specialists often make recommendations and attorneys give great weight to those(29.15Tr.832-33). Kenyon would have had access to the motions filed in other cases to get PET scans done and could have modified those(29.15Tr.838).

Budesheim recounted that in *DeLong* a brain scan was done because that was something that was "always" done when a brain disorder was suspected(29.15Tr.905). DeLong killed five people in Greene County and he still was sentenced to life(29.15Tr.223).

Jacquinot conceded Benedict told him a PET might show frontal lobe abnormalities that would assist in verifying ADHD and explain why David had an explosive disorder(29.15Tr.945). Jacquinot recalled McCulloch had "strongly advocate[ed]" doing a PET(29.15Tr.946-48).

Dr. Preston, M.D., a nuclear medicine physician, had a PET scan performed for the 29.15(29.15Ex.17;29.15Tr.309). PET scans are used to diagnose brain

abnormalities of hyper or hypo functioning, even though a person's brain anatomy appears normal(29.15Tr.316-17). Glucose is the brain's energy source(29.15Ex.17-pg.1). Flurodeoxyglucose(FDG) is similar to glucose and is absorbed into the brain in a manner similar to glucose(29.15Ex.17-pg.1-2). FDG is administered intravenously and radioactively tagged(29.15Ex.17-pg.3;29.15Tr.318). FDG is not metabolized and is trapped where absorbed which allows PET imaging to record the amount and location of regional brain metabolism(29.15Ex.17-pg.2).

Most brain dysfunctional states are characterized by decreased FDG activity(29.15Ex.17-pg.2). If a part of the brain is damaged and is not functioning at the level expected, then there is decreased FDG tracer accumulation(29.15Tr.320). If a part of the brain is functioning at a level greater than expected, then increased FDG tracer accumulates there(29.15Tr.320). PET scans are universally relied on in medicine(29.15Tr.320).

A PET generates digital photographs(29.15Tr.321-22). The color differentiation on the photographs have specific clinical significance(29.15Ex.17-pg.3). Standardized algorithms are used in analyzing the photographs(29.15Tr.321).

David had an abnormal scan(29.15Tr.322). Preston used the photographic images to explain how those departed from a normal brain and pinpointed David's abnormality(29.15Tr.327-41; 29.15Exs.44-53). Preston provided example normal brain images to contrast those with David's scan(29.15Tr.328-29,340-41;29.15Ex.54).

The most significant finding was David's frontal lobes were intensely more active than normal(29.15Tr.322-23). The frontal lobes are involved in thinking and

executive function and planning behavior(29.15Tr.323-24). There was also an asymmetry between left and right frontal lobes(29.15Tr.323,331;29.15Ex.51). There was decreased activity in the left parietal lobes(29.15Tr.323).

Preston found decreased activity in the cingulate gyrus(29.15Tr.325-26,333-35:29.15Ex.17-pg.4;29.15Exs.44,45,47,48). The cingulate gyrus is the main connection between executive planning and higher intellectual functions of the prefrontal and frontal cortex and limbic system which is associated with emotional response(29.15Tr.325-26;29.15Ex.17-pg.4). The limbic system is associated with behavior and emotion(29.15Tr.326).

For the left amygdala, Preston found abnormal decreased activity(29.15Tr.326,338;29.15Ex.51,52,53). The amygdala is important for assessing risks(29.15Tr.326;29.15Ex.17-pg.5). A person with a deficient amygdala, like David, is not as capable of recognizing danger(29.15Tr.326;29.15Ex.17-pg.5).

Each abnormality Preston found can exacerbate others(29.15Tr.327). Preston does not use PETs to make diagnoses, that is left to professionals with different expertise(29.15Tr.350). Preston's findings were consistent with David's neuropsychological testing(29.15Tr.351). While a PET can neither confirm nor rule out a narcissistic or paranoid personality disorder diagnosis, it is generally accepted in the medical community the frontal lobe defects David displayed are consistent with explosive behavior(29.15Tr.354). ADHD is associated with frontal lobe impairment(29.15Tr.358-59).

Preston indicated David's increased frontal lobe activity can be associated with obsessive compulsive behavior, and possibly explosive behavior, and that there is "a definitive scientific comparison made in the research" for that attribution(29.15Tr.354-55). Preston would be surprised if David did not have obsessive compulsive behaviors(29.15Tr.355).

Benedict testified in the 29.15 that a PET cannot be used as the sole diagnostic determinant for the existence of a personality disorder or ADHD(29.15Tr.133-35) However, Preston's PET findings of excessive abnormal activity in the frontal lobes and a defect in the left amygdala corroborated Benedict's trial diagnoses(29.15Tr.113-14,116-17). Preston's findings of reduced cingulate gyrus metabolism was consistent with Benedict's findings because individuals like David, who have impulse control disorders and ruminative thinking have defects there(29.15Tr.115-16).

In the 29.15, psychiatrist Dr. Logan, M.D., found David's hospital records showed when he had a high fever as a child it was because he had meningeal encephalitis and mumps(29.15Tr.444-45). Encephalitis is an infection along the meninges or brain lining(29.15Tr.445). It can cause brain damage and residual neurological dysfunction(29.15Tr.445).

Logan indicated Preston's scan confirmed the consequences of David's childhood illness and presence of ADHD(29.15Tr.445-46). Preston's cingulate gyrus and frontal lobe findings were significant because of their role in modulating emotion(29.15Tr.514-15,517). The cingulate gyrus is the brakes when something makes a person angry(29.15Tr.517-18). The cingulate gyrus is critical to executive

planning and higher intellectual function(29.15Tr.517-18). Preston's amygdala findings were significant because of its role in evaluating information and making decisions(29.15Tr.515).

Logan noted the overstimulation of David's frontal lobes would not be offset by the understimulation of the cingulate gyrus(29.15Tr.518-19). Logan found David displays an obsessiveness and rigidity of thinking that causes him to focus on insignificant details and to lose sight of the larger picture(29.15Tr.439-41,518-19). That obsessiveness was evident from David's hyper-narrow focus on the events of the evening, and particularly, Amanda's cell phone calling and law enforcement attempting to shorten the time frame of those calls(29.15Tr.463-64).

Logan's diagnosis of personality disorder not otherwise specified combines narcissistic, paranoid, and compulsive features(29.15Tr.468,478,531). Preston's findings of frontal lobe hyperactivity is a typical condition found in persons who have obsessive compulsive disorder(29.15Tr.498). David does not have obsessive compulsive disorder, but he does have obsessive compulsive traits(29.15Tr.519-20,533-34).

Within Dr. Smith's field it is generally accepted practice to rely on PET scans as a diagnostic tool(29.15Tr.575-76). Preston's scan findings help explain David's personality disorder and its origin and identify his brain functioning problems that add to his personality impairments(29.15Tr.613-14). The overall impact of the deficits Preston identified are David does not have the ability to assess situations, anticipate consequences, weigh them appropriately, and know situations are

dangerous(29.15Tr.615-16). Preston's findings would have confirmed Smith's trial conclusions(29.15Tr.619). Preston's findings are consistent with obsessive compulsive behaviors David displays(29.15Tr.608).

Smith indicated while a PET scan cannot be used to make a diagnosis of a personality disorder, it can identify particular deficits which are related to a personality disorder and specific behavioral impairment(29.15Tr.621). A PET will give information that supports a diagnosis(29.15Tr.621-22,634). It is inappropriate to make a diagnosis based on any one test(29.15Tr.634). Even though David has above average intelligence, his deficits impact him in matters requiring weighing of information and considering options(29.15Tr.626-27).

Dr. Hough indicated Preston's findings confirmed there were "organic" underpinnings to David's problems(29.15Tr.671-72).

Winegarner indicated the decision not to seek a scan was not based on any trial strategy, but rather there was not enough time to get everything done(29.15Tr.710-11;29.15Ex.88). Preston's findings would have been helpful on diminished capacity and as mitigation(29.15Tr.712-13). Winegarner believed Preston's findings would have been especially helpful mitigation because whenever counsel can present a "tangible thing" showing a picture of impairment that has much more weight than hearing an expert's abstract testimony(29.15Tr.713). When the average juror sees a picture of someone's brain that looks abnormal, when compared to a normal brain, that juror can better identify, understand, and grasp the abnormality's

significance(29.15Tr.713). As a mitigation specialist, McCulloch believes Preston's testimony would have been compelling(29.15Tr.824).

Jacquinot testified a PET scan was not done because of "a time crunch" and he "veto[ed]" it(29.15Tr.947). Jacquinot recounted the failure to get a PET was not strategy(29.15Tr.1009-10).

Jacquinot would have called Preston to support Benedict's diminished capacity findings(2915Tr.948). Preston's findings also would have been helpful mitigation(29.15Tr.948-49).

The motion court signed the Attorney Generals' findings. This appeal followed.

POINTS RELIED ON

I.

PET SCAN

The motion court clearly erred denying counsel was ineffective for failing to obtain a PET scan, failing to call Dr. Preston to testify to its results showing David has organic anatomical physiological brain damage, and for failing to combine that with evidence from Dr. Logan the damage Preston identified was caused by David's childhood meningeal encephalitis, and thereby, explaining David's mental impairments' causes, because David 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 obtained a scan and called Preston whose findings would have objectively confirmed with "hard science" the disorders psychologists Benedict and Smith diagnosed David as suffering from are anatomically and physiologically based and caused by a serious childhood illness and presented that evidence such that David would not have been convicted of first degree murder or at minimum sentenced to life.

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

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

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

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

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

II.

FAILURES TO OBJECT TO PENALTY ARGUMENTS

The motion court clearly erred denying claims counsel was ineffective for failing to object to penalty arguments:

A. That falsely represented General Sherman's father was sentenced to death for killing Sherman's mother, but despite that deprivation had not committed acts like David, when in fact Sherman was the son of an Ohio Supreme Court Justice who predeceased his wife and Sherman was raised by a U.S. Senator because of the financial hardship his father's premature death caused;

B. That emphasized this prosecutor's charging discretion he would always seek death for killing a young girl;

C. That equated Amanda Morton's death to soldiers' deaths in battles;

D. That exercising mercy equaled weakness;

E. That the jury had to send a message about killing young girls; and

F. That the jury's duty was to impose death to show good triumphs over evil;

because David was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected and David was prejudiced because he would have been sentenced to life.

Shurn v. Delo,177F.3d662(8thCir.1999);

Newlon v. Armontrout,693F.Supp.799(W.D.Mo.1988), *aff'd.*,

885F.2d1328(8thCir.1989);

Weaver v. Bowersox,438F.3d832(8thCir.2006);

Viereck v. United States,318U.S.236(1943);

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

III.

INVOLUNTARY SELF-REPRESENTATION

The motion court clearly erred in rejecting David was denied his right to have counsel, his self-representation decision was not knowingly, intelligently, and voluntarily made, and counsel was ineffective in failing to give David's case the attention it required in light of David's mental illness to prevent self-representation, because David was denied his rights to due process, freedom from cruel and unusual punishment, counsel, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that the Public Defender's staffing problems denied David his right to have counsel, David's mental illness precluded him from weighing the risks and benefits of counsels' strategy and evaluating counsels' advice, and effective counsel furnished by an adequately staffed Defender would have addressed David's mental illness by giving David's case the attention it required, thereby, preventing self-representation. David was prejudiced because self-representation caused prejudicial evidence to be introduced that counsel would not have introduced.

Shafer v. Bowersox,168F.Supp.2d1055(E.D.Mo.2001),

aff'd., 329F.3d637(8thCir.2003);

Wilkins v. Bowersox,933F.Supp.1496(W.D.Mo.1996),

aff.'d., 145F.3d 1006(8thCir1998);

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

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

A.B.A. Guidelines For Capital Defense Counsel, 31 Hofstra L. Rev. 913(2003);

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

IV.

SHACKLING DAVID

The motion court clearly erred rejecting David was denied effective assistance of counsel, a fair trial, due process, his right to have counsel, and was subjected to cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that he was required to wear a shackling device, concealed under his clothing, that was made "visible" to the jury because it caused David to limp. The shackling device was inherently prejudicial structural error. Reasonable counsel would have objected to the device's use and David was prejudiced because the jury knew a shackling device was used.

Deck v. Missouri,544U.S.622(2005);

Holbrook v. Flynn,475U.S.560(1986);

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

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

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

V.

FAILURE TO ADVISE OF LIMITS IMPOSED ON SELF-REPRESENTATION

The motion court clearly erred denying David's decision to represent himself was not knowingly, intelligently, and voluntarily made, and that counsel was ineffective because David was denied his rights to due process, his rights to fully represent himself, his right to choose to be represented by counsel, and was subjected to cruel and unusual punishment in violation of U.S. Const. Amends. VI, VIII, and XIV, in that David did not make a knowing, intelligent, and voluntary self-representation decision because the trial court did not advise him of restrictions it was imposing on self-representation, including shackling and not allowing David to approach witnesses with exhibits, before David chose self-representation and reasonable counsel would have objected to the court having imposed these restrictions without having advised David of them and David was prejudiced because he was not afforded his full right to self-representation.

Gideon v. Wainwright,372U.S.335(1963);

Faretta v. California,422U.S.806(1975);

Johnson v. Zerbst,304U.S.458(1938);

State v. Black,223S.W.3d149(Mo.banc2007);

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

VI.

FAILURES TO OBJECT TO GUILT ARGUMENTS

The motion court clearly erred denying claims counsel was ineffective for failing to object to guilt arguments:

A. Jacquinot and David conspired through presenting dual defenses to deceive the jury;

B. The jury had a "duty" to convict of first degree murder; and

C. Reflection for a "millisecond" was sufficient for deliberation;

because David was denied effective counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected and David was prejudiced because he would not have been convicted of first degree murder.

State v. Harris,662S.W.2d276(Mo.App.,E.D.1983);

State v. Burnfin,771S.W.2d908(Mo.App.,W.D.1989);

Giglio v. U.S.,405U.S.150(1972);

Napue v. Illinois,360U.S.264(1959);

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

VII.

INCOMPETENT FOR TRIAL

The motion court clearly erred denying David was incompetent at trial and counsel was ineffective for failing to challenge competency because David 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 the 29.15 evidence established David lacked the ability to consult with counsel with a reasonable degree of rational understanding and effective counsel would have challenged David's competence to proceed and David was prejudiced because he was convicted while incompetent.

Pate v. Robinson,383U.S.375(1966);

Drope v. Missouri,420U.S.162(1975);

Dusky v. United States,362U.S.402(1960);

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

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

VIII.

SIGNING ATTORNEY GENERAL'S FINDINGS

The motion court clearly erred in signing the Attorney General's findings which found David's counsel and the 29.15 experts were infinitely credible when they furnished testimony harmful to 29.15 claims, but infinitely incredible when they furnished testimony supporting 29.15 claims with some findings expressly contradictory to witnesses' testimony and as to other claims witnesses were credible as to that portion of their testimony that helped to defeat a claim, but incredible as to other testimony that proved the claim because these actions denied David his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that all these witnesses were either credible or incredible and such findings caused David's 29.15 hearing to be a meaningless illusory formality ruled on by the Attorney General, not a judge, exercising independent judgment.

Thomas v. State,808S.W.2d364(Mo.banc1991);

United States v. El Paso Natural Gas Co.,376U.S.651(1964);

Massman Construction Co. v. Missouri Highway and Transportation Comm'n, 914S.W.2d801(Mo.banc1996);

State v. Kenley,952S.W.2d250(Mo.banc1997);

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

IX.

RESPONDENT'S WITNESSES AS COURTROOM SECURITY

The motion court clearly erred in dismissing the 29.15 claim counsel was ineffective for failing to object to Sheriff Snodgrass and Deputy Stewart occupying the dual roles of courtroom security and respondent's witnesses because David was denied his rights to due process, a fair and impartial jury, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that David was incompetent to dismiss the claim and the claim was meritorious and requires a new trial.

Turner v. Louisiana,379U.S.466(1965);

State v. Tyarks,433S.W.2d568(Mo.1968);

Woodson v. North Carolina,428U.S.280(1976);

Lankford v. Idaho,500U.S.110(1991);

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

X.

CRAWFORD VIOLATION

The motion court clearly erred denying counsel was ineffective for failing to object to Dr. Norton's hearsay testimony about Dr. Spindler's autopsy findings and for failing to object to argument based on that evidence because David was denied his rights to due process, freedom from cruel and unusual punishment, to confront witnesses against him, and effective assistance, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected to this hearsay as violating *Crawford v. Washington* and continued to object when respondent relied on it in argument. David was prejudiced because respondent relied on Spindler's hearsay findings to establish David acted with deliberation.

Crawford v. Washington,541U.S.36(2004);

State v.March,216S.W.3d663(Mo.banc2007);

Woodson v. North Carolina,428U.S.280(1976);

Lankford v. Idaho,500U.S.110(1991);

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

XI.

METHOD OF LETHAL INJECTION

The motion court clearly erred in denying discovery and a hearing on the claim Missouri's method of lethal injection constitutes cruel and unusual punishment because that ruling denied David his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that the Taylor case lethal injection litigation has identified defects in how Missouri conducts executions such that discovery should have been allowed on the method and the pleadings alleged facts which, if true warrant relief.

Gregg v. Georgia,428U.S.153(1976);

Louisiana v. Resweber,329U.S.459(1947);

Glass v. Louisiana,471U.S.1080(1985);

State ex rel. Ingrid Chandra v. Sprinkle,678S.W.2d804(Mo.banc1984);

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

XII.

RING/APPRENDI VIOLATION

The motion court clearly erred denying the penalty instructions, in violation of *Ring/Apprendi,* fail to make required factual findings, ensure respondent satisfied the beyond a reasonable doubt burden, and failed to instruct on what to do when mitigators and aggravators are equally balanced and appellate counsel was ineffective for failing to raise counsels' instruction objections because David was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that the penalty instructions violate *Ring's* /Apprendi's mandates and reasonable appellate counsel would have raised counsels' objections and David was prejudiced because the punishment decision is not reliable under *Ring/Apprendi.*

Apprendi v. New Jersey,530U.S.466(2000);

Ring v. Arizona,536U.S.584(2002);

State v. Whitfield,107S.W.3d253(Mo.banc2003);

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

§565.030.4;

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

ARGUMENT

I.

PET SCAN

The motion court clearly erred denying counsel was ineffective for failing to obtain a PET scan, failing to call Dr. Preston to testify to its results showing David has organic anatomical physiological brain damage, and for failing to combine that with evidence from Dr. Logan the damage Preston identified was caused by David's childhood meningeal encephalitis, and thereby, explaining David's mental impairments' causes, because David 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 obtained a scan and called Preston whose findings would have objectively confirmed with "hard science" the disorders psychologists Benedict and Smith diagnosed David as suffering from are anatomically and physiologically based and caused by a serious childhood illness and presented that evidence such that David would not have been convicted of first degree murder or at minimum sentenced to life.

David's case did not get the attention and preparation a capital case requires because of Defender staffing problems. Counsel was advised long before trial that because of David's medical history they needed to get a PET scan. Counsel did not get a scan done because they did not have the time to properly prepare David's case.

If a PET scan had been done, then the testimony of Drs. Preston and Logan could have explained David has organic anatomical physiological brain damage caused by a childhood disease that is responsible for David's mental impairments. Testimony from Preston and Logan would have provided objective "hard science" confirming David's mental disorders are anatomically and physiologically based, rather than volitional.

Caselaw Standards

Review is for clear error. *Barry v. State*, 850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). A movant is prejudiced if there is a reasonable probability that but for counsel's errors the result would have been different. *Deck v. State*,68S.W.3d418,426(Mo.banc2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*426. The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

No Follow Through on Scan Recommendations

Mitigation investigator Schneider was on David's case through May, 2003(29.15Tr.236-37). While Schneider worked on David's case, Short had discussions with neurologist and psychiatrist Dr. Merikangas about doing a brain scan(29.15Tr.244). Schneider recognized the need for a brain scan based on David's

hospitalization as a three year old with a long duration high fever and with the mumps(29.15Tr.244-45).

Short and Budesheim brought Dr. Hough into David's case in July or August, 2001(29.15Tr.645). While Hough worked on David's case, it was decided a brain scan would be done because of his history of high fever and meningitis(29.15Tr.649-52).

Benedict recommended a PET scan to Jacquinot and Short in February, 2003, because of David's meningitis history and because it might confirm Benedict's ADHD diagnosis(29.15Tr.89-91). In either January or June, 2004, or both, Benedict again urged Jacquinot to get a PET because it was likely to identify deficits in the prefrontal cortical areas and subcortical areas and the connections between the two(29.15Tr.100-02).

Capital attorneys give great weight to mitigation specialist recommendations(29.15Tr.832-33). Mitigation specialist McCulloch urged Jacquinot in January, 2004, to get a PET scan and McCulloch had contacted Preston who indicated he was available(29.15Tr.342-44,709-11,818-19;29.15Ex.55;29.15Ex.88). McCulloch's recommendation was based on Short's consultation with Merikangas and David's childhood medical history and childhood impulsive behavior(29.15Tr.816-17;29.15Ex.87). David told McCulloch he would do a PET scan(29.15Tr.816).

Scans were obtained with great ease in three other cases McCulloch worked on(29.15Tr.822). McCulloch handled all the Radiology Department

scheduling(29.15Tr.822). The attorneys only had to file a motion to transport the client(29.15Tr.822).

Winegarner had a case where he obtained a scan and getting it done was straightforward(29.15Tr.776-77). Winegarner prepared a motion to transport, which did not involve much time, and then obtained the court's approval(29.15Tr.776-77). Kenyon had access to the motions filed in other cases to get PET scans done and could have modified those(29.15Tr.838).

Despite all the urging, the compelling medical history, substantial lead time, the ease with which a scan could be obtained, and Preston's availability to do a scan, Jacquinot "veto[ed]" doing one because the other work that remained to be done presented "a daunting enough task"(29.15Tr.710,819-20;29.15Ex.88). The task of doing a scan, however, was only "daunting" because of the Defender System's failure to ensure David had counsel who was able to diligently give his case the attention it required and make on-going preparations for the July, 2004 trial.

Public Defender Neglect

In January, 2002, Short alerted the court that she had not read discovery provided and her office was hampered because it only had two other attorneys(T.Tr.84,89).

In May, 2002 Budesheim asked to continue the September, 2002, trial because of trial schedules and "staffing issues"(T.Tr.85-86,92-93). The office was 25% understaffed(Tr.102-03). The office had just completed a five count murder case in *Beach* and had other responsibilities(T.Tr.94-101,103,107). Short had failed to

respond to the court's letter about establishing a trial setting(T.Tr.93-94,108). That failure was unlike Short, but: "Miss Short has indicated that when we have completed the Boyd trial, because of exhaustion and burnout she is taking off June and July and try to recover her own equilibrium and ability to go forward"(T.Tr.103-04).

In June, 2002, Short and Budesheim moved to continue(T.L.F.101-05). Counsel could not be ready in September, 2002, because: (a) the K.C. Capital Office had been cut from four attorneys to three; (b) in April, 2002 the *Beach* penalty phase lasted eleven days; (c) in May 2002, counsel tried *Boyd*; (d) Short was on leave throughout June and July due to "exhaustion and burn out"; (e) Budesheim was counsel in *Vance* set for July, 2002; (f) Short was counsel in *Rauch* set for September, 2002; and (g) other responsibilities(L.F.101-105).

Budesheim appeared at the July, 2002 continuance hearing(T.Tr.112-13). The court wanted to set trial for March, 2003(T.Tr.114). Short was not working during August(T.Tr.114). Budesheim, referring to Short, stated: "Her reporting her own need to recover from a continuous program extending back several years without much of an interval at all"(T.Tr.114). A further continuance from March, 2003 would be needed because Short was going to be gone a month(T.Tr.115). Budesheim recounted his other responsibilities and informed the court that if trial was set for March, 2003, he would again need a continuance(T.Tr.114-17).

In January, 2003, Jacquinot and Short moved to continue trial from March, 2003(T.L.F.134-48). Jacquinot, "a newcomer" to David's case, recounted: (a) Budesheim was transferring offices reducing the office to two attorneys and

Budesheim would not be replaced because of budget cuts; and (b) after six weeks of two 2002 intensive trials, Short reduced her office hours, did not work weekends, and her leave lasted through the summer for "a much needed rest"(T.L.F.134-46). The court was informed: "the demands and energy of resolving other matters diverted precious time and energy away from Mr. Zink's case…."(T.L.F.140). Trial was continued to October, 2003(T.L.F.149).

On June 12, 2003, David apprised the court Defender budget cuts causing staff cuts were negatively impacting his case(T.Tr.152). Jacquinot informed the court that because of budget cuts David's case was going to have to be "restaff[ed]"(T.Tr.161). Jacquinot told the court the mitigation investigator closest to David's's case "was just basically taken from our office"(T.Tr.161). The office had lost one-and-a-half additional employees(T.Tr.161). Jacquinot stated David's case "has been adversely affected by things that are, you know unfortunately, in my opinion out of our control"(T.Tr.161-62).

On June 25, 2003, a motion to continue the October, 2003 trial was filed (T.L.F.338-49). There was then only one attorney on David's case and no mitigation investigator(T.L.F.339). Because of a 2.5 million dollar budget cut, the Defender Director's Office decided in May, 2003 it was reducing capital staff through layoffs and involuntary transfers(T.L.F.340-41). Mitigation investigator Schneider was transferred(T.L.F.340-41). In June 2002, Jacquinot was assigned to replace Short(T.L.F.341-42). Because of Jacquinot's other responsibilities, he had not become an "active" lead counsel until 2003, when Budesheim was

transferred(T.L.F.342). Because Budesheim was not replaced, Short by "default" was the only available co-counsel(T.L.F.342).

In July, 2003, Jacquinot, filed additional suggestions to continue the October, 2003, setting admitting and emphasizing David's case had not received the attention it required(T.L.F.429).

In August, 2003, Jacquinot and Kenyon filed a brief in support of continuing the October, 2003, setting(T.L.F.488-512). The brief outlined in detail staffing problems and that David's case was not being prepared appropriately for a capital case(T.L.F.498-99). Kenyon was on the case for only one month(T.L.F.489). Staffing issues negatively impacting David's case included counsel "have come and gone from his case with limited input from him [David]"(T.L.F.488). Short and Budesheim were no longer with the office and budget cuts forced mitigation investigator Schneider into early retirement(T.L.F.500). Jacquinot was a one attorney office(T.L.F.503). The pleading continued: "The deficient performance of counsel cannot be attributed to any fault of Mr. Zink"(T.L.F.488). From the beginning of the year, David had only one active attorney on his case(T.L.F.489). David's case was contrasted to two other cases Jacquinot had worked on, one with four attorneys and the other three(T.L.F.489).

DeLong had just finished when David's case arrived(29.15Tr.164-65). *DeLong* had "drained the mental and physical and economic resources of everybody in the office"(29.15Tr.165). In Boyd's trial, Short "ran out of gas" and never recovered emotionally(29.15Tr.174). Short had been "swamped" and had more work

than a person could reasonably be expected to do(29.15Tr.180). In September, 2003, Short was no longer a Defender employee and withdrew(T.Tr.496-97,508-09,513).

Jacquinot testified a PET scan was not done because of "a time crunch" and he "veto[ed]" it(29.15Tr.947). The failure to get a PET was not a strategy decision(29.15Tr.1009-10).

Findings

The findings stated Preston presented a large amount of scientific testimony about the PET scan and its results(29.15L.F.1043). The findings continued that the general acceptance of PET scans within the medical community was uncontested and accepted as true(29.15L.F.1044). Preston's interpretation of the PET was credible(29.15L.F.1044).

The findings stated Preston's assertions Zink suffered from obsessive compulsive disorder were not supported by any other expert testimony and were not consistent with its diagnostic criteria(29.15L.F.1044).

The findings continued that Preston's testimony that he could not link the problems identified to any specific mental disease or defect was credible(29.15L.F.1044). The various doctors' conclusions that Preston's findings corroborate their diagnoses are not credible because there is no generally accepted scientific method or evidence the deficits identified were the cause of or related to any of Zink's mental problems(29.15L.F.1044). Under the findings, none of the experts expressed any credible scientific evidence that "definitely linked" the PET findings to Zink's mental condition(29.15L.F.1044-45). "The most that can be said is that the

PET scan results were consistent with, but not definitively related to, Zink's diagnosed conditions"(29.15L.F.1045).

According to the findings, counsel made a reasoned strategic decision not to do a PET scan(29.15L.F.1045).[5]

Preston was cumulative to Benedict because both identified problems in the prefrontal cortex, frontal lobe, limbic system, the cingulate gyrus, and the amygdala(29.15L.F.1045-46).

The findings continued stating Preston's testimony was inadmissible to support diminished capacity because Benedict could only testify the PET results were consistent with Benedict's diagnoses and not that they demonstrated any connection to Zink's behavior at the time of the offense and Preston's testimony was the same(29.15L.F.1046). Other experts' contrary 29.15 testimony was not credible(29.15L.F.1046). Without any scientific evidence specifically connecting the

[5] As discussed in Point VIII, the Attorney General's strategy finding here has no support in the 29.15 evidence and is expressly refuted by counsels' testimony. In *Anderson v. State*,196S.W.3d28,39-42(Mo.banc2006), the motion court signed the Attorney General's strategy findings that similarly lacked any evidentiary support and were expressly refuted by counsels' testimony. *See* Point VIII. Despite those *Anderson* findings, this Court found counsel was ineffective and it should do the same here. *Id.*.

PET scan to Benedict's diagnosis, Preston's findings would not have aided establishing diminished capacity and were irrelevant(29.15L.F.1046-47).

Failure to get a PET was not prejudicial because of the strength of the guilt evidence and because a PET would have been cumulative to Benedict(29.15L.F.1047-48).

Under the findings, the failure to obtain a PET scan was not prejudicial in penalty because of the strength of guilt and aggravation evidence(29.15 L.F.1048-49). The PET evidence was cumulative to Smith's penalty testimony and Benedict's guilt testimony(29.15L.F.1048-49).

Unreasonable Counsel

Counsel's strategy under *Strickland* must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). Failing to conduct investigation relates to preparation, not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). Lack of diligence in investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*.1304.

"[E]vidence of impaired intellectual functioning is inherently mitigating…." *Hutchison v. State*,150S.W.3d292,308(Mo.banc2004)(relying on *Tennard v. Dretke*,542U.S.274,288(2004)). In *Hutchison*, counsel was ineffective in failing to present mitigation because they limited the scope of investigation into potential mitigation. *Hutchison*,150S.W.3d at 307. Hutchison's counsel failed to leave time to prepare adequately. *Id.*302.

David's ever changing Defender counsel was told early and throughout his case a PET scan needed to be done because of David's meningitis childhood medical history, but Jacquinot ultimately "vetoed" doing one because there was not time. Jacquinot admitted a scan was not done because of a failure to investigate and not because of strategy. *See McCarter* and *Kenley*. Like Hutchison's counsel, David's counsel failed to leave adequate time to get a PET done. *See Hutchison*.

The unreasonableness of counsels' actions in failing to get a scan done is highlighted by McCulloch's having been involved in three other cases where Preston did scans, all resulting in life(29.15Tr.821). McCulloch took care of all the required arrangements(29.15Tr.822). The attorneys only needed to file a motion to transport(29.15Tr.822). The motions used in the other cases were available to Kenyon and could have been easily modified(29.15Tr.838).

Counsels' unreasonableness is further highlighted through Winegarner's recounting that his one prior experience of getting a scan was as straightforward as McCulloch's experiences and it resulted in a second degree murder plea(29.15Tr.707-09,776-77). Moreover, counsels' unreasonableness is shown by Budesheim indicating that in *DeLong* , which resulted in a life sentence for killing five people, a brain scan was done because that is something that was "always" done when a brain disorder is suspected(29.15Tr.905).

Jacquinot conceded Benedict told him a PET scan might show brain abnormalities in the frontal lobe that would assist in verifying the existence of ADHD and explain why David had an explosive disorder(29.15Tr.945).

Reasonably competent counsel who was repeatedly advised to get a PET scan because of David's childhood meningitis medical history would have obtained that scan. *See Strickland*.

David Was Prejudiced

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*,539U.S.510,524-25(2003); *Williams v. Taylor*,529U.S.362,395-96(2000). In *Hutchison*, this Court, noted counsel's duty is "to 'discover *all reasonably available* mitigating evidence"' *Hutchison*,150S.W.3d at 302(quoting *Wiggins*,539U.S. at 524 and *Wiggins*' emphasis). Hutchison's counsel obtained a mental health expert, Dr. Bland, but they failed to obtain additional testing needed to follow-up on Bland's findings. *Hutchison*,150S.W.3d at 306-08.

Expert scientific testimony can take two forms: "hard" science or "soft" science. *See, e.g., Wright v. State*,2007W.L.1726253 *2(Tex.Ct.App. June 14, 2007). "Hard" sciences are areas where precise measurement, calculation, and prediction are generally possible such as mathematics, physical science, earth science, and life science. *Id.**2 n.3. "Soft" sciences include fields such as psychology, economics, political science, anthropology, and sociology. *Id.**2 n.3.

It is common for the "soft" sciences to be disparaged for not having the concrete verifiability characteristic of "hard" sciences. *See ,e.g., Kromka v. Mankoff*, 2006W.L.1071566 *1-4(N.J.Super.2006)(affirming grant of summary judgment where trial court characterized neuropsychologist's conclusions as "psycho-babble" because conclusions did not constitute "objective medical evidence"). The "soft"

sciences, like psychology, are viewed with skepticism in criminal cases. Pennuto, *Murder And The MMPI-2: The Necessity Of Knowledgeable Legal Professionals*,34 Golden Gate U.L.Rev.349,364(2004); *See, also*, McKay, *What All Experts Have In Common: A Five-Step Analytic Approach To Dealing With Expert Testimony*, 30 July Champion 28,31(2006)("soft sciences" presented through mental health experts are more vulnerable to challenge than the "hard sciences"). In penalty phase, capital defense counsel must do more than present "dry psychobabble testimony." John Blume[6] and Pamela Blume Leonard, Capital Cases 24 November Champion 63,68(2000).

In guilt, psychologist Benedict was called to support diminished capacity. Benedict diagnosed David as having ADHD based on a history of hyperactivity and impulse control(T.Tr.2948-49,2971,2976-81,2988-89,3011). The portions of the brain impacted by the brain chemistry abnormality in ADHD are responsible for impulse control(T.Tr.3022-25). Because David's ADHD had gone untreated, his impulsive behavior progressed to the adult impulse control disorder of Intermittent Exposive Disorder(T.Tr.3027-30,3034). Benedict also diagnosed David as having a mixed personality disorder, paranoid and narcissistic types(T.Tr.3073,3085).

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[6] John Blume is the Director of Cornell University's Law School's Death Penalty Project which represents death sentenced individuals on appeal. *See* http://library2.lawschool.cornell.edu/death/ and http://library2.lawschool.cornell.edu/death/about.html.

Benedict's testing did not uncover any brain damage evidence(T.Tr.2983). On cross-examination, the prosecutor elicited Benedict was a Ph.D, not an M.D., and therefore, cannot perform medical procedures(T.Tr.3133-34).

In penalty, psychologist Dr. Smith testified he diagnosed David as having a narcissistic personality disorder and alcohol dependence(T.Tr.4460). Narcissistic personality disordered people misinterpret and misperceive what is happening to them and overreact(T.Tr.4468). People with narcissistic personality disorders, like David, do not recognize their thinking options are impaired(T.Tr.4468-69). In a stressful situation, narcissistic individuals respond extremely impulsively and overreact with aggression or hostility because they view things through their distorted thinking(T.Tr.4472-73). Like with Benedict, on cross-examination of Smith, the prosecutor emphasized he was Ph.D. and not an M.D.(T.Tr.4484).

Preston found David had an abnormal scan(29.15Tr.322). The most significant finding was David's frontal lobes were intensely more active than normal(29.15Tr.322-23). The frontal lobes are involved in thinking and executive function and planning of behavior(29.15Tr.323-24). There was also asymmetry between left and right frontal lobes(29.15Tr.323,331;29.15Ex.51).

Preston found decreased activity in the cingulate gyrus(29.15Tr.325-26,333-35;29.15Ex.17-pg.4;Exs.44,45,47,48). The cingulate gyrus is the main connection between the executive planning and higher intellectual functions of the prefrontal and frontal cortex and limbic system which is associated with emotional

response(29.15Tr.325-26;29.15Ex.17-pg.4). The limbic system is associated with behavior and emotion(29.15Tr.326).

For the left amygdala, Preston found abnormal decreased activity(29.15Tr.326,338;29.15Ex.51,52,53). The amygdala is important for assessing and learning what is risky behavior(29.15Tr.326;29.15Ex.17-pg.5). A person like David with a deficient amygdala is not as capable of recognizing something is dangerous(29.15Tr.326;29.15Ex.17-pg.5).

Benedict noted Preston's PET scan findings of excessively abnormal activity in the frontal lobes and a defect in the left amygdala corroborated Benedict's trial diagnoses(29.15Tr.113-14,116-17). Preston's finding of reduced metabolism in the cingulate gyrus was also consistent with Benedict's findings because individuals like David, who have impulse control disorders and ruminative thinking, have defects there(29.15Tr.115-16).

Within Dr. Smith's field it is generally accepted to rely on PET scans as a diagnostic tool(29.15Tr.575-76). Preston's scan findings help explain David's personality disorder and its origin and identify his brain functioning problems(29.15Tr.613-14). The overall impact of the deficits Preston identified are David does not have the ability to assess situations, anticipate the consequences, to weigh them appropriately, and know situations are dangerous(29.15Tr.615-16). Preston's findings would have confirmed Smith's trial diagnoses(29.15Tr.619).

Smith indicated that while a PET cannot be used to make a diagnosis of a personality disorder, it can identify particular deficits which are related to a

personality disorder and specific behavioral impairment(29.15Tr.621). A PET will give information that helps support a diagnosis(29.15Tr.621-22,634). Even though David has above average intelligence, his deficits impact him in matters requiring weighing of information and considering of available options(29.15Tr.626-27).

Expert testimony is admissible if it aids the jury in understanding the issues it has to decide. *State v. Taylor*,663S.W.2d235,239(Mo.banc1984). Preston's testimony was unquestionably admissible because it aided the jury in understanding that Benedict's and Smith's "soft" science diagnoses had objective confirmation with Preston's "hard" science nuclear medicine scans which procedure is universally relied on in medicine(29.15Tr.320). The jury would have heard Preston explain radioactively tagged FDG is administered and its corresponding levels trapped in areas of the brain correlate with how a person's brain is functioning(29.15Ex.17;29.15Tr.318,320). Preston would have then explained the scan's results using digital photos whose analysis is premised on standardized algorithms(29.15Ex.17;29.15Tr.321-22,327-41;29.15Exs.44-54).

Winegarner and Jacquinot believed Preston's findings would have been helpful on both diminished capacity and mitigation and would have called Preston(29.15Tr.712-13,948-49). Winegarner believed Preston's findings would have been especially helpful as mitigation because whenever counsel can present a "tangible thing" showing a picture of impairment, it has much more weight than hearing an expert abstractly talk about an impairment(29.15Tr.713). When the average juror sees a picture of someone's brain that looks abnormal when compared

to a normal brain, that juror can better understand the abnormality's significance(29.15Tr.713). Mitigation specialist, McCulloch, likewise, believed that Preston's testimony would have been compelling mitigation(29.15Tr.824).

That Preston's scan results were consistent with Benedict's and Smith's diagnoses would have provided objective concrete nuclear medicine "hard" science data which would have strengthened for the jury the perception the "soft" science diagnoses were accurate. That is important because it is inappropriate to make a diagnosis based on any one test(29.15Tr.634). That Preston identified brain damage in the same areas of David's brain as Benedict did makes Preston's evidence that much more critical to have presented because Preston's evidence confirms **with an M.D.'s expertise** what Ph.D. Benedict found.

For the 29.15 Dr. Logan, M.D. identified from David's childhood medical records that he had a high childhood fever of 106 degrees associated with meningeal encephalitis and the mumps(29.15Tr.444-45;29.15Ex.78-pg.1,3,27,30). That illness is an infection along the meninges or lining of the brain(29.15Tr.445). Frequently, there is residual neurological dysfunction, brain damage(29.15Tr.445). Preston's PET scan results confirmed the consequences of David's childhood meningitis illness and presence of ADHD(29.15Tr.445-46). Thus, Preston's testimony would have demonstrated David's personality disorders were not a personal volitional choice. Preston's findings would have refuted respondent's initial penalty argument disparaging David's mental illnesses as "some behavioral problem that he has"(T.Tr.4526). Moreover, Preston's testimony, in combination with Logan's

meningitis damage testimony, would have explained David's brain damage was the product of his unfortunate childhood meningeal encephalitis. Because Preston could show David had impaired intellectual functioning, Preston's testimony was inherently mitigating. *See Hutchison and Tennard*, *supra*.

Logan would have explained Preston's cingulate gyrus and frontal lobe findings were significant because of their role in modulating emotion(29.15Tr.514-15,517). The cingulate gyrus is the brakes when something makes a person angry(29.15Tr.517-18). The cingulate gyrus is critical to executive planning and higher intellectual function(29.15Tr.517-18). Preston's amygdala findings were significant because of its role in evaluating information and making decisions(29.15Tr.515).

In *Commonwealth v. Zook*,887A.2d1218,1230-35(Pa.2005), evidence of the defendant's organic brain damage impacting his impulse control was compelling mitigation for rebutting an antisocial personality disorder diagnosis and counsel was ineffective for failing to present it. David's counsel could have presented evidence David has organic brain dysfunction caused by meningeal encephalitis. Evidence David suffered from an organic brain disorder caused by his childhood illness would have made the case for diminished capacity, or at least a life sentence, compelling. *See Zook*. Instead, contrary to reasonable capital defense practice, counsel was content to present only "dry psychobabble testimony." *See* Blume, *supra*. In contrast, Preston could have utilized color digital photos of David's brain and

compared those to photos of a normal brain to identify David's deficits and the deficits' consequences.[7]

One of capital counsel's primary duties is to neutralize respondent's damaging evidence. *Ervin v. State*,80S.W.3d817,827(Mo.banc2002). State expert Brooks' evidence was David did not have a mental illness and had an anti-social personality disorder(T.Tr.3602;3589,3594Trial Ex.69;29.15Ex.72-pg.15). In *Zook*, evidence of organic brain damage would have rebutted an anti-social personality disorder diagnosis. *Zook*,887A.2d at 1230-35. Preston's testimony establishing organic brain damage similarly would have substantially rebutted Brooks' evidence. *Id.*

Preston's testimony was not cumulative. Benedict testified that his own testing had not uncovered any brain damage(Tr.2983). In contrast, Preston found significant organic anatomical physiological damage in David's brain.

On cross-examination of Benedict and Smith, respondent emphasized they were Ph.D.s, not M.D.s, capable of performing medical procedures(T.Tr.3134,4484). Preston would have provided the findings of an M.D. who confirmed Benedict's and Smith's diagnoses who were attacked for not having an M.D.'s expertise. Likewise,

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[7] For this Court's convenience, a color copy of two representative pages of Dr. Preston's digital photos of David's brain (29.15Exs.45,48) are included at the end of this Point. All of the digital photographs of David's brain and those of a normal brain that Preston used during his testimony have been filed with this Court(29.15Exs.44-54).

Logan, as an M.D., would have explained the significance of Preston's findings as they relate to David's particular mental illness diagnoses.

Contrary to the 29.15 findings, none of the 29.15 experts said David had obsessive compulsive **disorder.** Instead, Logan and Smith indicated that David displays some obsessive compulsive **behaviors**, but he does not satisfy the required diagnostic criteria for obsessive compulsive **disorder**(29.15Tr.519-20,533-34,608). Preston indicated David's increased frontal lobe activity can be associated with obsessive compulsive **behavior** and possibly **explosive behavior** and that there is "a definitive scientific comparison made in the research" for that attribution(29.15Tr.354-55). Preston expected David to exhibit some obsessive compulsive **behaviors**(29.15Tr.355). Thus, Preston's scan would have confirmed Benedict's Intermittent Explosive Disorder diagnosis and would have demonstrated an organic explanation was its root cause. *See Zook, supra*.

The strength of respondent's guilt and penalty cases does not lessen the impact of failing to present Preston's evidence. Preston, as an M.D., would have provided necessary quantifiable scientific data that supported and made Benedict's and Smith's conclusions more compelling for countering respondent's evidence in both phases. Like in *Hutchison*, David's counsel obtained mental health expert testimony, but failed to obtain additional testing needed to follow-up on the experts' findings. *See Hutchison, supra*.

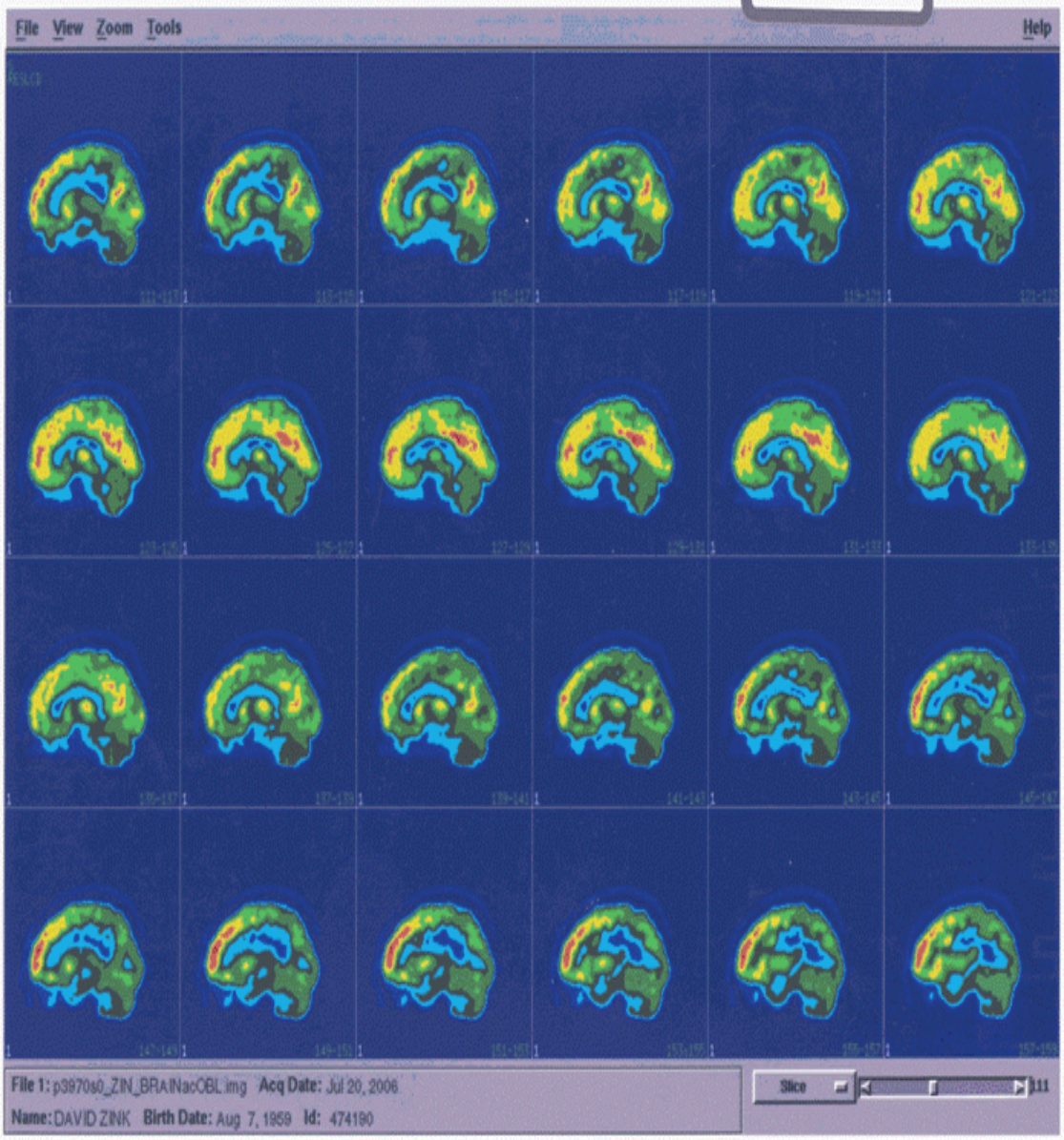
David was prejudiced without Preston's findings because there is a reasonable probability the jury would have found he had acted with a diminished capacity and

was not guilty of first degree murder. *See Strickland* and *Hutchison*. At a minimum, the jury would have voted for life, if it had heard Preston's findings of David's brain damage, which Logan traced to his childhood meningitis encephalitis. *Id*.

A new trial or at minimum a new penalty phase is required.

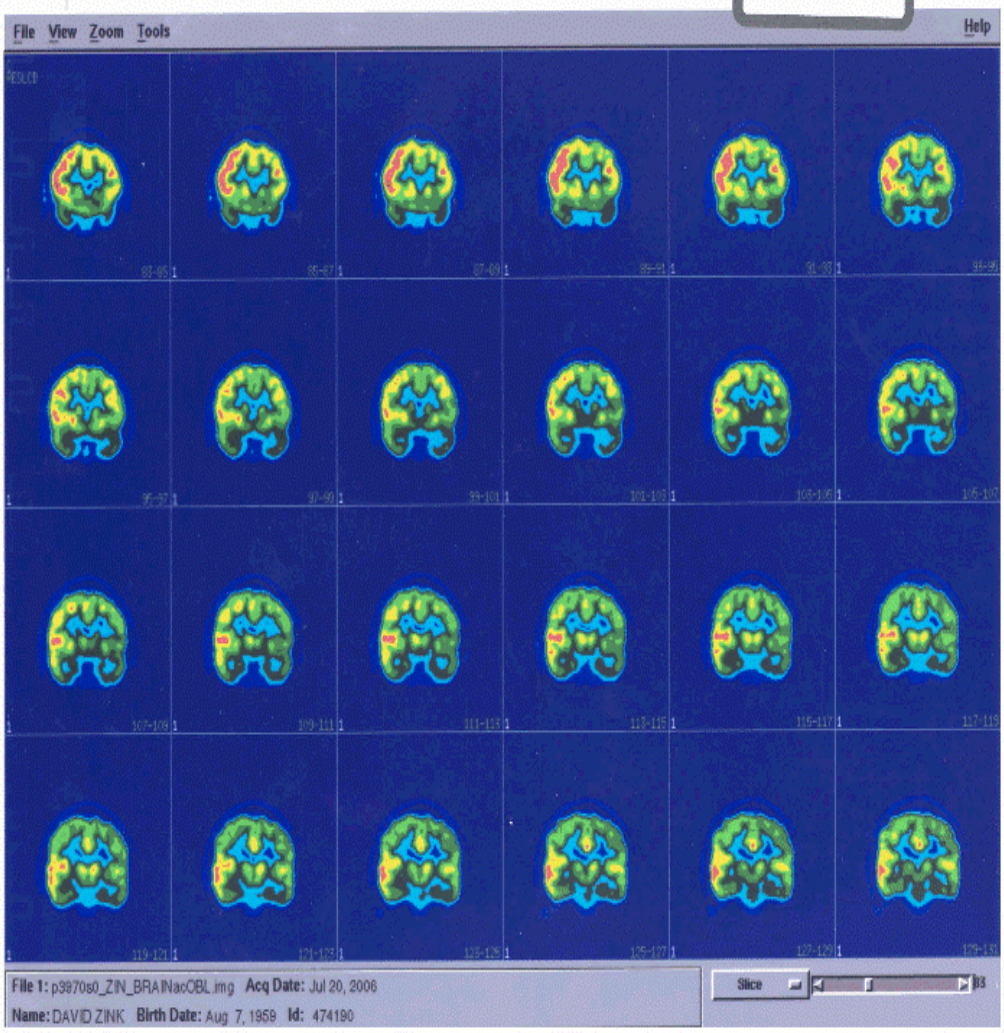
SAGITTAL II MID COLOR

mot. EXHIBIT 45



CORONAL II MID ANTERIOR COLOR

EXHIBIT
48



II.

FAILURES TO OBJECT TO PENALTY ARGUMENTS

The motion court clearly erred denying claims counsel was ineffective for failing to object to penalty arguments:

A. That falsely represented General Sherman's father was sentenced to death for killing Sherman's mother, but despite that deprivation had not committed acts like David, when in fact Sherman was the son of an Ohio Supreme Court Justice who predeceased his wife and Sherman was raised by a U.S. Senator because of the financial hardship his father's premature death caused;

B. That emphasized this prosecutor's charging discretion he would always seek death for killing a young girl;

C. That equated Amanda Morton's death to soldiers' deaths in battles;

D. That exercising mercy equaled weakness;

E. That the jury had to send a message about killing young girls; and

F. That the jury's duty was to impose death to show good triumphs over evil;

because David was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected and David was prejudiced because he would have been sentenced to life.

Counsel failed to object to multiple improper penalty closing arguments.

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

A. Sherman False Representations

In penalty, Psychologist Cunningham testified to why probabilities showed David would do well in prison serving life(T.Tr.4262-68,4271-73,4275-76,4280-88,4297-4305,4314-15).

On cross-examination, Prosecutor Ahsens asked Cunningham whether a person whose father murdered his mother and the father was convicted and executed would have substantial risk factors for problems(T.Tr.4322-23). Cunningham agreed there would be(T.Tr.4323). The line of questioning continued as to whether if that individual lived with relatives who were highly structured and not fond of him would that cause problems(T.Tr.4323). Ahsens then suggested the types of risks factors this individual had were like those David had(T.Tr.4324). The individual was never identified by name on Cunningham's cross-examination(T.Tr.4315-41).

In rebuttal penalty argument, Ahsens argued:

> Now remember I questioned one of the doctors a little bit about the man whose father had killed his mother, who has been prosecuted, convicted and executed; how he had to go live with an overbearing uncle and all of these

other things. Of course, we didn't get to the end of that. I will now. There's a lot more I could tell you about it, including the nervous breakdown as an adult.

His name was William Techumseh [sic] Sherman. Probably one of the greatest military minds of his times. Unless you're a Southerner, then you don't like him at all.

But people who come up rough can do just fine. And the overpowering majority of them do.

(T.Tr.4553-54).

The findings stated this argument was proper because the facts were presented during Cunningham's cross(29.15L.F.1082 relying on Cunningham's testimony T.Tr.4322-24). The prosecutor's point was people from rough backgrounds do not necessarily commit the kinds of acts Zink committed(29.15L.F.1082). The argument was not prejudicial because there was overwhelming evidence and Zink made police statements he wanted death(29.15L.F.1082).

Ahsens arguments were improper because they were based on facts not in evidence, personal opinion, and appealed solely to passion and prejudice. *See State v. Storey*,901S.W.2d886,900-03(Mo.banc1995); *Gardner v. Florida*,430U.S.349,358(1977). Moreover, the truth about Sherman shows Ahsens falsely represented Sherman overcame the adversity of his father having killed his mother, his father being executed, and Sherman having to live with relatives not fond of him. Thus, the Sherman arguments have no basis in reality.

General Sherman's father was a successful lawyer who served on the Ohio Supreme Court. *See* William Tecumseh Sherman at Wikipedia on-line encyclopedia at http://en.wikipedia.org/wiki/William_Tecumseh_Sherman.
Sherman's father died unexpectedly and **predeceased his wife** and Sherman's mother. *Id*. Sherman's father's death left Sherman's mother to raise eleven children without adequate financial resources. *Id*. Because of those circumstances, Sherman was raised by a prominent attorney family friend, Thomas Ewing. *Id*. When Ewing became a U.S. Senator, he secured for Sherman a West Point appointment. *Id*. Sherman went on to be a successful military general. *Id*.

Jacquinot testified he had used analogy in argument so he did not think he could object(29.15Tr.997-98). Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). A prosecutor cannot argue an analogy not based on evidence and whose factual premises are objectively false, and therefore, Jacquinot's reasons for failing to object are not reasonable. *See* Sherman history *and McCarter supra*.

Reasonable counsel would have objected to this argument because it was based on facts not in evidence, personal opinion, and appealed solely to passion and prejudice. *See Storey* and *Gardner*. David was prejudiced because Ahsens told the jury Sherman had endured deprivation comparable to or worse than what David had endured and Sherman overcame it and David should have too. This argument was prejudicial because it minimized the value of David's deprivation mitigating evidence

(T.Tr.4342-4423,4445-53), while relying on objectively false factual representations and resulted in death.

That David initially told police he wanted death (T.Tr.2395) does not make the improper arguments non-prejudicial. In his self-representation David presented a manslaughter defense, so he no longer wanted death(T.Tr.3792,3797-98,3858-59).

B. Emphasizing Prosecutorial Charging Discretion And Larger Societal Problems

Ahsens' initial penalty argument included:

> The only thing I can tell you is that if this is not a situation for the death penalty, all these facts and aggravation taken as a whole, I cannot imagine what is.

(T.Tr.4524). It continued:

> I'll tell you what I think before we're done here. It's up to you. But I will tell you that on my watch, *I will always seek the death penalty when you kill a little girl*. And, on your watch, I think that's the verdict you should return. Not because it's easy, but because it's the right thing to do.

(T.Tr.4527)(emphasis added). Ahsens continued death was warranted because it is a "societal self-defense" needed "to remove the predators from the sheep." (T.Tr.4528). The jury was "who will decide whether this society is going to defend itself from this man (pointing)"(T.Tr.4528).

The findings stated the arguments were permissible and any objection lacked merit(29.15l.F.1080-81). Even if the argument about always seeking death for killing

a little girl was improper, it was not prejudicial because there was overwhelming evidence against Zink and Zink made police statements he wanted death(29.15L.F.1080-81).

Jacquinot did not know why he failed to object because he should have(29.15Tr.997).

These arguments were improper because they injected the prosecutor's personal opinions. *Storey*,901S.W.2d at 900-03.

They were objectionable because they improperly emphasized the prosecutor's charging discretionary authority and what cases most deserve death. *See Shurn v. Delo*,177F.3d662,665(8thCir.1999)(prosecutor emphasized prosecutor's decision making authority to seek death) and *Newlon v. Armontrout*,693F.Supp.799,804-05(W.D.Mo.1988), *aff'd*., 885F.2d1328,1335-38(8thCir.1989)(prosecutor emphasized he had never sought death before and he never saw a man who deserved death more than Newlon which unfairly played on jurors' willingness to credit prosecutor's viewpoint and asserted special outside record knowledge).

These arguments were improper because they urged the jury to sentence David to death for reasons unrelated to his responsibility, but to solve larger societal problems. In *Weaver v. Bowersox*,438F.3d832,840-42(8thCir.2006), the defendant's death sentence was reversed because of several improper penalty arguments. One was Weaver ought to be executed to further the societal effort on the "War on Drugs." *Id.*840. Arguing a signal must be sent from one case to affect other cases puts an improper burden on the defendant as it prevents an individualized punishment

determination. *Id.*841. Moreover, *Weaver* added: "Using the conscience of the community as a guiding principle for punishment puts too significant of a burden on a single defendant." *Id.*841. Ahsens' arguments to impose death on David to further society's interests were improper under *Weaver*. *See also, Newlon v. Armontrout*,693F.Supp at 807, *aff'd*., 885F.2d1328,1335-38(8thCir.1989)(improper send a message argument); *Commonwealth v. DeJesus*,860A.2d102,113-19(Pa.2004)(even where an instruction to disregard the send a message argument was given new penalty phase was required because of impact on jury's weighing of aggravation and mitigation).

Reasonable counsel would have objected. *See Shurn*, *Weaver*, and *Newlon*. David was prejudiced because these improper arguments resulted in death. *Id*.

As discussed *supra*, David initially telling police he wanted death (T.Tr.2395) does not make the improper arguments non-prejudicial.

C. Who Deserves To Die

Ahsens commenced a segment of rebuttal penalty argument stating: "The story of the intruder."(T.Tr.4555). The argument immediately continued stating that many people, like Amanda Morton, did not deserve to die(T.Tr.4555). Those who did not deserve to die included those who had died "on the beaches in Normandy, the snows of Bastogne, the seas around Midway, and hundreds of other places, fields and hills around Gettysburg, if you wish. None of those men deserved to die"(T.Tr.4555).

The findings stated this argument responded to Zink's "intruder story" that some who die do not deserve to die and others who deserve to die do

not(29.15L.F.1082). The argument told the jury it could look at Zink's life and decide the appropriate punishment(29.15L.F.1082). The argument was non-prejudicial because there was overwhelming evidence and Zink made police statements he wanted death(29.15L.F.1082).

Jacquinot in penalty made an intruder story analogy argument whose point was that sometimes mercy should be given to those who do not appear to deserve mercy(T.Tr.4546-48).

The military events argued were improper because they were based on facts not in evidence, personal opinion, and appealed solely to passion and prejudice. *Storey*,901S.W.2d at 900-03 and *Gardner v. Florida*,430U.S. at 358. The argument was improper, and not properly responsive to Jacquinot's argument, because it equated Amanda's death to soldiers' battle deaths.

Jacquinot testified he had used analogy in argument so that he did not think he could object(29.15Tr.997-98). Counsel's strategy must be objectively reasonable and sound. *McCarter*,883S.W.2d at 78. A prosecutor cannot argue an analogy outside the evidence, and therefore, Jacquinot's reasons for failing to object are not reasonable. *See McCarter*.

Reasonable counsel would have objected to this argument because it was based on facts not in evidence, personal opinion, and appealed solely to passion and prejudice. *See Storey* and *Gardner*. David was prejudiced because this argument injected matters that prevented an appropriate individualized punishment decision. *See Woodson* and *Lankford*, *supra*. As discussed, *supra*, David initially telling police

he wanted death (T.Tr.2395) does not make the prosecutor's improper arguments non-prejudicial.

D. Mercy Equals Weakness

Ahsens' rebuttal penalty argument included:

> What you have heard from the defense in their argument is a plea for mercy. What you didn't hear, but was still there, was the prayer for weakness. That is what is really going on there.

(T.Tr.4559).

The findings stated if this argument was improper, then it was non-prejudicial because it was brief and because of overwhelming evidence against Zink(29.15L.F.1084-85).

In *State v. Rousan*,961S.W.2d831,850-51(Mo.banc1998), this Court found Ahsens' argument there that imposing life equated to weakness was improper. Ahsens' argument here is the same as his *Rousan* argument. Despite what this Court found in *Rousan,* Ahsens has continued to make the same argument. This Court should not condone a prosecutor continuing to engage in the same behavior this Court had previously ruled he had done was improper.

Jacquinot testified he should have objected because the argument was improper and inflammatory(29.15Tr.999-1000).

Reasonable counsel would have objected to this argument as prohibited under *Rousan* where the same prosecutor made the same argument. *See Rousan*. David was

prejudiced because the jury was told to disregard a legitimate reason for imposing life and that argument appealed to passion and prejudice. *See Storey* and *Gardner.*

E. Send A Message

Ahsen's penalty rebuttal argument included:

> This is a process by which you decide what must be done -- what must be done. And there is **more to it than just punishing the Defendant**.
>
> Consider what message will come out of this courtroom with your verdict. I hope the message will be is you don't get to kill little girls on our watch and not face the ultimate penalty.

(T.Tr.4559-60)(emphasis added).

The findings stated the argument was proper because it was specific to arguing Zink deserved death(29.15L.F.1085). Even if the argument was improper, it was not prejudicial because it was brief and followed other arguments that were proper as to why Zink deserved death(29.15L.F.1085).

Jacquinot did not know why he did not object(29.15Tr.1000).

Send a message arguments are improper because they put an improper burden on the defendant as it prevents an individualized punishment determination. *See Weaver*, *Newlon*, and *DeJesus supra*. The argument there was "**more to it than just punishing the Defendant"** shows this was not specific to David, but about larger societal issues. Reasonable counsel would have objected. *Id*. David was prejudiced because his death sentence was based on improper arguments about larger societal concerns. *Id*.

F. Duty to Choose Good Over Evil

Ahsens concluded his penalty argument:

> A much smarter man than I once said – and I suggest this to you -- that the only thing necessary for evil to thrive on is for good men and women to do nothing. Sending him home to prison is doing nothing. Do your duty.
>
> Thank you.

(T.Tr.4560).

The findings stated *State v. Forrest*,183S.W.3d218,228(Mo.banc2006), allowed this(29.15L.F.1086). The argument was also proper under *State v. Newlon*,627S.W.2d606,619(Mo.banc1982)(29.15L.F.1086-87). Instruction 22 (T.L.F.1117) told the jury it had a duty to return a verdict proper under the law and evidence(29.15L.F.1086-87). Even if the argument was improper, David was not prejudiced because it was brief and followed proper argument(29.15L.F.1087). There was no prejudice because of the facts of the offense and David's confessions(29.15L.F.1087).

In *Forrest*, the prosecutor made the Edmund Burke argument, but did not couple that argument with it was the jury's duty to impose death, as done here. *Forrest*,183S.W.3d at 228. Having made this improper argument, respondent should not now be heard to claim Instruction 22 (T.L.F.1117) cured the improper argument. *See Newlon v. Armontrout*,885F.2d at 1337(rejecting state's argument instruction cured improper argument because it contained only broad sweeping rule). Like in *Newlon*, Instruction 22 (T.L.F.1117) contained only a broad sweeping rule.

In light of *Newlon v. Armontrout*,693F.Supp.799(W.D.1988), *aff'd*., 885F.2d1328(8thCir.1989) reversing because of improper prosecutorial argument, it was clearly erroneous to assert the argument here was permissible under *State v. Newlon*,627S.W.2d606,619(Mo.banc1982).

The argument here was not brief and it immediately followed the "**Send A Message"** argument discussed above. Moreover, this argument was the very last thing the jury heard before deliberating(T.Tr.4559-60). The argument was improper because the jury was told it had a duty to impose death to show good triumphs over evil.

Jacquinot believed he should have objected(29.15Tr.1002).

Telling the jury it has a duty to convict is improper because it appeals to passion and prejudice. *Viereck v. United States*,318U.S.236,247-48(1943).

In *Evans v. State*,28P.3d498,515-17(Nev.2001), trial and appellate counsel were ineffective for failing to properly challenge the prosecutor's "highly improper" penalty closing argument asking whether the jury had the resolve, courage, and commitment to do its legal duty and impose death. That argument created an impermissible risk of an arbitrary and capricious decision. *Id.*517. *See, also*, *State v. Cockerham*,365S.E.2d22,23(S.C.1988)(penalty argument defense counsel wanted to take advantage of jury's softness and lack of courage improper).

Similarly, in *People v. Castaneda*,701N.E.2d1190,1192(Ill.Ct.App.1998), the conviction was reversed because the prosecutor argued the jury had a duty under their oath and to the people of Illinois to convict. That conclusion was premised on *United*

States v. Young,470U.S.1(1985). The *Young* Court recognized prosecutorial argument exhorting the jury to 'do its job' "has no place in the administration of criminal justice…." *Young*,470 U.S. at 18(citing to and relying on A.B.A. Standards for Criminal Justice).

In *People v. Johnson*,803N.E.2d405,421(Ill.2003) the prosecutor, like the prosecutor here, quoted Edmund Burke's '"All it takes for evil to thrive [is] for good men and women to do nothing."' Also, like the prosecutor here that argument was followed by telling the jury it had to do something. *Id.*421. This argument is improper because it diverts the jury's attention from the issues it is to consider and casts the jury's decision as a choice between "good and evil." *Id.* 421.

David's prosecutor improperly challenged the jurors to have the resolve, courage, and commitment to do their legal duty and to impose death when he told them that they had to impose death because sending him to prison was doing nothing. *See Viereck* and *Evans.* The prosecutor in David's case cast the choice as between "good and evil." *See Johnson.*

Reasonable counsel would have objected to the argument here. *See Newlon v. Armontrout, Viereck, and Young*. David was prejudiced because this argument appealed to passion and prejudice. *Id*.

For all the reasons discussed, both individually and cumulatively, this Court should order a new penalty phase.

III.

INVOLUNTARY SELF-REPRESENTATION

The motion court clearly erred in rejecting David was denied his right to have counsel, his self-representation decision was not knowingly, intelligently, and voluntarily made, and counsel was ineffective in failing to give David's case the attention it required in light of David's mental illness to prevent self-representation, because David was denied his rights to due process, freedom from cruel and unusual punishment, counsel, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that the Public Defender's staffing problems denied David his right to have counsel, David's mental illness precluded him from weighing the risks and benefits of counsels' strategy and evaluating counsels' advice, and effective counsel furnished by an adequately staffed Defender would have addressed David's mental illness by giving David's case the attention it required, thereby, preventing self-representation. David was prejudiced because self-representation caused prejudicial evidence to be introduced that counsel would not have introduced.

David was not given counsel the Constitution mandates. David's reluctant self-representation choice was the product of an understaffed Defender System providing him counsel who failed to take into account his mental illness. David's case was not staffed at the levels mandated for capital cases and the staff that was provided was "burned out."

Standards

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). Where there is structural error *Strickland* prejudice is not required. *See Anderson v. State*, 196S.W.3d28,39-42(Mo.banc2006)(failure to strike automatic death penalty and burden shifting juror on punishment denied defendant effective assistance without showing prejudice because error was structural). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

The Sixth and Fourteenth Amendments guarantee a defendant the right to counsel. *Gideon v. Wainwright*,372U.S.335(1963). A defendant has the right to represent himself, but the decision to waive counsel must be knowingly, intelligently, and voluntarily entered. *Faretta v. California*,422U.S.806(1975). "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*,304U.S.458,464(1938).

Inadequate Attention

David was charged in July, 2001(T.L.F.48). In January, 2002, Short told the court it would be impossible to set David's case for trial anytime soon because of

other responsibilities and the office had only two other attorneys(T.Tr.81-91).[8] Trial was set for September, 2002(T.Tr.85-86).

In May, 2002 Budesheim apprised the court because of "staffing issues" involving the office being 25% understaffed and other on-going responsibilities it would be impossible to be ready in September, 2002(T.Tr.92-103,106-07). The court had sent Short a letter about a setting, but Short never responded(T.Tr.93-94,108). It was unlike Short not to respond(T.Tr.93-94). Budesheim continued: "Miss Short has indicated that when we have completed the Boyd trial, because of exhaustion and burnout she is taking off June and July and try to recover her own equilibrium and ability to go forward"(T.Tr.103-04).

In June, 2002, Short and Budesheim moved to continue(T.L.F.101-05). The motion set forth in detail the office's recent work and continuing responsibilities and that it had been cut from four attorneys to three(T.L.F.101-05). *Boyd* was tried in May, 2002 and Short was on leave throughout June and July due to "exhaustion and burn out"(T.L.F.101-05).

Budesheim recounted that after Short had tried *DeLong*, *Boyd*, and *Beach* she was exhausted and emotionally drained(29.15Tr.902-03). The most significant indicator of Short's physical and mental condition happened in *Boyd* where Short

[8] Because so many of the facts in the Point I PET scan claim overlap, whenever possible a shortened version of those same facts is presented and supplemented as required.

collapsed and could not get to court one morning(29.15Tr.902-03). Short's condition adversely impacted her in court and as office manager(29.15Tr.903).

Budesheim recounted Short decided what resources would be available in every case(29.15Tr.904). David's case did not get comparable resources allocated because Short was "most fixated" on *Wood*, *Beach*, and *Boyd*(29.15Tr.907-08). Short did not like David and Short's commitment to any particular case "was very much influenced by her personal preferences"(29.15Tr.909). Short was not open to listening to David(29.15Tr.901-02).

DeLong had just finished when David's case arrived(29.15Tr.164-65). *DeLong* "drained the mental and physical and economic resources of everybody in the office"(29.15Tr.165). In *Boyd*, Short "ran out of gas" and never emotionally recovered(29.15Tr.174). Short had been "swamped" and had more work than a person could reasonably be expected to do(29.15Tr.180).

There was an uncharacteristic delay in attempting to prepare David's case(29.15Tr.193). Shortly after David's case arrived, David requested some materials David believed went to guilt defense be retrieved from David's father's house(29.15Tr.195). A year or more went by before those were picked up(29.15Tr.195-96;T.Tr.2221-22).

At the July, 2002 continuance hearing, Budesheim recounted Short was not working in August because of her "need to recover from a continuous program extending back several years without much of an interval at all"(T.Tr.114). Trial was set for March, 2003(T.L.F.22).

On October 17, 2002, David filed a pleading complaining counsel was not investigating his case and not providing him documents(T.L.F.121-25).

In January, 2003, Jacquinot and Short moved to continue(T.L.F.134-48). Budesheim was transferred to a different office reducing the office to two attorneys and budget cuts meant Budesheim would not be replaced(T.L.F.134-46). Because of Short's trial schedule, she reduced her office hours, did not work weekends, and her leave lasted through the summer for "a much needed rest"(T.L.F.134-46). The court learned "the demands and energy of resolving other matters diverted precious time and energy away from Mr. Zink's case…."(T.L.F.140). Trial was continued to October, 2003(T.L.F.149).

At a June, 2003 hearing, the court took up David's October, 2002, pleading asking it require counsel provide him copies of documents(T.Tr.138-39). David informed the court counsel had made repeated representations materials he requested would be provided, but they were not(T.Tr.149-50). David apprised the court Defender budget cuts to staff were negatively impacting his case(T.Tr.152). Jacquinot informed the court because of budget cuts David's case was going to have to be "restaff[ed]"(T.Tr.161). Jacquinot told the court the mitigation investigator closest to David's's case "was just basically taken from our office"(T.Tr.161). The office had lost one-and-a-half additional employees(T.Tr.161). Jacquinot stated David's case "has been adversely affected by things that are, you know unfortunately, in my opinion out of our control"(T.Tr.161-62).

In response to the announcement there would be significant cuts to the Capital Division, necessitated by state budget cuts, Short, in May, 2003, e-mailed Director Robinson about staffing problems(29.15Tr.181-82). In June or July, 2003, Short was demoted and resigned(29.15Tr.187-88). Mitigation investigator Schneider was taken from Short's office in summer, 2003(29.15Tr.187-88). Schneider had done the bulk of the mitigation investigation on David's case and her departure "kicked the slats out of the mitigation [investigation]"(29.15Tr.187). In summer, 2003, the only attorney in the office was Jacquinot and there was no mitigation specialist working on David's case(29.15Tr.188-89).

The June, 2003, continuance motion recounted there was only one attorney on David's case and no mitigation investigator(T.L.F.339). Because of a 2.5 million dollar budget cut, the Defender decided in May, 2003, it was reducing capital staff through layoffs and transfers(T.L.F.340-41). Mitigation investigator Schneider was transferred(T.L.F.340-41). In June 2002, Jacquinot was assigned to replace Short(T.L.F.341-42). Because of Jacquinot's other responsibilities, he had not become an "active" lead counsel until 2003, when Budesheim was transferred(T.L.F.342). Because Budesheim was not replaced, Short by "default" was the only available co-counsel(T.L.F.342).

In July, 2003, Jacquinot's suggestions in support of continuing the October, 2003, trial date emphasized David's case was the most directly impacted by staffing issues(T.L.F.429).

On August 28, 2003, David filed a motion to remove the Public Defender and to appoint other counsel(T.L.F.456-87).

On August 29, 2003 Jacquinot and Kenyon filed a brief in support of continuing the October, 2003, setting(T.L.F.488-512). The brief highlighted David's case was not being prepared in the manner appropriate for a capital case(T.L.F.498-99). Staffing issues negatively impacting David's case included counsel "have come and gone from his case with limited input from" David(T.L.F.488). Short and Budesheim were no longer with the office and mitigation investigator Schneider was forced into early retirement by budget cuts(T.L.F.500). Jacquinot was a one attorney office(T.L.F.503). The pleading continued: "The deficient performance of counsel cannot be attributed to any fault of Mr. Zink"(T.L.F.488). From the beginning of the year, David had only one active attorney(T.L.F.489). David's case was contrasted to two other cases Jacquinot worked on, one with four attorneys and the other three(T.L.F.489).

The August, 2003 brief included: "Zink's defense team has consistently been below this [ABA Guideline 4.1] standard, and the case has only recently been restaffed"(T.L.F.499). The pleading added David's "beliefs about his relationship with his attorneys have some basis in reality"(T.L.F.505).

On September 1, 2003, Dr. Benedict prepared a report. Benedict's recommendations included:

> The prisoner's relationship with his attorneys strikes me as being rather tenuous and at risk for complicating future legal proceedings. Given his

> proneness to paranoia, irrational and idiosyncratic reasoning under stressful circumstances, and impulsive behaviors and decision making, I would recommend that his legal team maintain frequent contact with him, give him as much information and control as is feasible given the obvious limitations in this regard, and use 'active listening' approaches that allow him to feel understood without implying agreement when there is none.

(29.15Ex.16-pg.17).

When David waived counsel on March 1, 2004, he told the court he had not set out intending to represent himself(T.Tr.605).

On March 24, 2004, David filed a motion to compel Defender counsel to provide materials not provided(T.L.F.679-85). The motion complained that for three years Defender counsel had not done anything timely and had failed to do things when they said they would(T.L.F.682-83).

David's June 25, 2004 filing, apprised the court if his Defender attorneys had been diligently representing him from the outset, then he would not have felt compelled to take over responsibility(T.L.F.888).

Trial began July 12, 2004(T.L.F.44).

Jacquinot and Winegarner's post verdict motion for sentence reduction noted counsel had failed to give David's case the attention it required, especially early on, in light of his mental impairments(T.L.F.1228).

29.15 Psychological Evidence

Logan concluded David was not competent to represent himself and that decision was not knowingly, intelligently, and voluntarily made(29.15Tr.493-97). David's mental illnesses were so substantial he could not intelligently decide to represent himself because he could not weigh the risks and benefits of Jacquinot's strategy, incorporate Jacquinot's advice, and consider Jacquinot's warnings about evidence David wanted admitted(29.15Tr.493-97).

Smith also found David could not knowingly, intelligently, and voluntarily make the self-representation decision(29.15Tr.582-87). Because of David's mental illnesses, he was not able to work collaboratively with counsel(29.15Tr.584-87). Particularly problematic was David's rigid circular reasoning(29.15Tr.592). David could not knowingly choose self-representation because he could not consider opposing views on strategy(29.15Tr.597-98). David's decision was involuntary because he perceived he had only one option and could not consider others(29.15Tr.598). Smith indicated counsel could have worked effectively with David had they maintained open and consistent communication and established that relationship early on(29.15Tr.606-07).

Budesheim and Short retained Hough in July or August, 2001 because David was then wanting death(29.15Tr.645-47). Hough met with David four times between September and November, 2001(29.15Tr.647-48). Hough's advice was to meet with David often, to be clear and consistent with David, to share all information with David so he knew exactly where his case stood, and to give David an active sense of participation(29.15Tr.648).

Hough met with David again in August, 2003(29.15Tr.657). Initially, David was reluctant to meet because he only vaguely remembered Hough and no one had told David that Hough would be coming(29.15Tr.657). David was very angry and disillusioned with the defense team, and especially Jacquinot(29.15Tr.658-59). David was not trying to stall the proceedings because David wanted the case to move expeditiously(29.15Tr.660). Hough concluded David's and Jacquinot's relationship was over(29.15Tr.660). Hough advised Jacquinot a competency to proceed evaluation was needed(29.15Tr.661). Hough never heard any more from Jacquinot(29.15Tr.663).

Hough concluded David's decision to represent himself was not knowingly, intelligently, and voluntarily made(29.15Tr.668). David's decision was based on his view there was incompetence and deception permeating the defense team(29.15Tr.668-69).

After Benedict did his September, 2003, report, he had several defense team phone conferences emphasizing his report's advice(29.15Tr.86-87,92-93,96-97). Benedict found David's self-representation decision was not rational and resulted from mental illness and counsels' lack of appropriate attention to David's case(29.15Tr.120,122).

Counsels' Testimony

Winegarner believed efforts directed at building trust and communication might have prevented David's self-representation and more damaging decisions(29.15Tr.715-21). Winegarner was concerned about David's self-

representation decision, but Winegarner did not have authority to retain experts(29.15Tr.721-22).

Kenyon felt that as a member of St. Louis Capital, and not K.C, he had an advantage because David felt K.C. had irreparably damaged his case by failing early to focus on guilt issues(29.15Tr.855-56). David's dissatisfaction with Jacquinot was accentuated because of David's experiences with other K.C. attorneys who preceded Jacquinot(29.15Tr.855-56).

Jacquinot recounted he was assigned David's case late Summer, 2002, but did not start working on it until January, 2003(29.15Tr.949-50). When Short assigned Jacquinot to David's case, she stopped working on it(29.15Tr.950-51).

Findings

The findings stated, this claim was rejected on direct appeal and to the extent it was not it should have been raised because Zink knew about counsels' inattention(29.15L.F.1053-54). Zink's trial court colloquy (T.Tr.553-603) establishes his self-representation decision was knowing, intelligent, and voluntary(29.15L.F.1054). The findings continued Zink was not forced to waive counsel because counsel did not investigate(29.15L.F.1054). Zink chose to waive counsel because he wanted to pursue a defense counsel could not ethically pursue(29.15L.F.1054). Counsel did a thorough investigation after completing other cases(29.15L.F.1054).

The findings stated from observing Zink in-court, he understood the legal system and was not coerced to waive counsel(29.15L.F.1054). The 29.15

psychological testimony was not credible based on Zink's in court abilities and grasp of the law(29.15L.F.1055).[9] Kenyon "was a very credible witness" and his testimony Zink appeared competent was credible(29.15L.F.1055).

Denial Of Right To Counsel

David's case was assigned to a Defender office that failed to give his case the attention it required because it was understaffed, overworked, and "burned out." Starting in January, 2002, counsel apprised the court on many occasions they could not be ready for multiple settings because of other obligations and staffing problems(T.Tr.81-91,92-103,106-07,114,161-62;T.L.F.101-05,134-48,339-41,429,488-89,498-500,503). David's case was continued four times and finally went to trial on the fifth setting in July, 2004(T.Tr.85-86:T.L.F.22,31,44,149).

Short took extended leave "to recover her own equilibrium" because she was "burned out" and "out of gas" from her demanding trial schedule(T.Tr.103-04,114;T.L.F.101-05,134-46;29.15Tr.174). Short's exhausted state adversely impacted her office management and eventually she was demoted and resigned(29.15Tr.187-88,903). When David's case arrived, the entire office was drained because of *DeLong*(29.15Tr.165).

Because of Defender budget cuts, David's case went for substantial periods without having two active attorneys, a mitigation specialist and other essential

[9] *See* Point VIII explaining why no deference should be given to the findings because the court signed the Attorney General's findings.

investigative and office support(T.Tr.152,161-62;29.15Tr.181-82,187-89;T.L.F.339-42,488-89,498-99,500,503). David's case was unlike others where there were three and four attorneys(T.L.F.489). David's case was the most adversely impacted by budget cuts and staffing shortages(T.L.F.429,488).

Besides the Defender's budget problems, David's case was not given the attention other cases received because Short determined what resources were allocated to particular cases and Short was "fixated" on other cases(29.15Tr.904,907-08). Moreover, David's case did not get the attention it required because Short's case commitment was dictated by Short's personal preferences and Short disliked David(29.15Tr.909).

There was uncharacteristic delay in investigating guilt matters David wanted pursued(29.15Tr.193,195-96;T.Tr.2221-22). Counsels' lack of timely preparation caused David to complain counsel was not providing him documents they had represented they would(T.L.F.121-25;T.Tr.149-50). David told the court he had never set out intending to represent himself, but only decided that was required because for three years the Public Defender had done nothing timely and failed to do things when they said they would(T.Tr.605;T.L.F.682-83,888).

David was denied his right to counsel because the Defender's staffing and budget crises failed to provide him with the counsel guaranteed under the Constitution. *See Gideon.* The denial of counsel is a structural error requiring reversal. *Arizona v. Fulminante*,499U.S.279,309-10(1991). *See Anderson v. State,*

supra. David's counsel was unequipped to handled David's case because of staffing and funding problems. Thus, David was denied his right to counsel.

In *Wiggins v. Smith*,539U.S.510,524(2003), the Court recognized the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases are the constitutional yardstick against which counsel's representation must be measured. A.B.A. Guideline 4.1 A (1) provides the defense team should consist of "no fewer than two attorneys," an investigator, and a mitigation specialist. *See* A.B.A. Guidelines reproduced at 31 Hofstra L. Rev. 913,952(2003). These standards were violated throughout David's case, and therefore, David was denied his right to counsel(T.Tr.161;29.15Tr.187-89;T.L.F.339,342,489,498-99,503).

A.B.A. Guideline 6.1 provides the agency responsible for providing counsel implement effectual mechanisms to ensure attorney workload is maintained at a level enabling counsel to provide each client with high quality legal representation. 31 Hofstra L. Rev. at 965. The Commentary to 6.1 provides the responsible agency in assessing counsel's workload must consider whether counsel has adequate access to essential support staff such as investigators, mitigation specialists, paralegals, and secretaries. *Id*.967. Throughout David's case counsels' case responsibilities were excessive and counsel lacked access to essential support staff(T.Tr.81-103,106-07,114,161-62;T.L.F.101-05,134-46,140,339,342,488,489,498-99,503;29.15Tr.165,174,180,187-89,902-03).

Guideline 10.7 provides counsel "at every stage" have a duty to conduct thorough investigation as to guilt and penalty, even when there are admissions by the

defendant about the facts of the crime and there is "overwhelming evidence of guilt." 31 Hofstra L. Rev. at 1015. Counsels' failure to timely investigate guilt contributed substantially to David's dissatisfaction with counsel(29.15Tr.193,195-96,855-56).

David was denied his right to counsel, guaranteed under *Gideon*. *See Wiggins* and A.B.A. Guidelines.

Involuntary Self-Representation Decision

In *Shafer v. Bowersox*,168F.Supp.2d1055(E.D.Mo.2001), *aff'd*., 329F.3d637(8thCir.2003), Shafer waived counsel and pled guilty to death. Shafer's Public Defender attorneys failed to properly communicate with him and his original Defender counsel ultimately resigned when given the option of resigning or being terminated. *Shafer*,168F.Supp.2d at 1085. Shafer's multiple attorneys early on failed to investigate his case and allowed his case to go on without working on it. *Id.*1088. Counsels' early failure to communicate with Shafer and investigate his case, coupled with his mental health problems, caused his counsel waiver not to be knowing, intelligent, and voluntary. *Id.*1079.

In *Wilkins v. Bowersox*,933F.Supp.1496(W.D.Mo.1996), *aff'd*.,145F.3d1006(8thCir1998), the defendant waived counsel, pled guilty, requested death, and was death sentenced. Wilkins had a long history of mental illness. *Wilkins*,933F.Supp. at 1510. There was expert testimony Wilkins had emotional impairments that caused him to act against his own best interests that could interfere with his decision making process. *Id.*1511. The evidence included Wilkins was very

impulsive. *Id.*1511. Because of Wilkins' deficits, Wilkins had not knowingly, intelligently, and voluntarily waived counsel. *Id.*1515.

In fall, 2001, Hough advised David's counsel that because of David's mental illnesses, they needed to meet with David frequently, be clear and consistent with him, be diligent in keeping him informed about his case, and provide him an active sense of participation(29.15Tr.648). In September, 2003, Benedict conveyed to counsel the same advice(29.15Ex.16-pg17).

Despite the advice counsel received on how to approach David's case, counsel did not follow it. Instead, David got counsel that was "fixated" on other cases(29.15Tr.907-08), allocated resources based on personal preferences and disliked David (29.15Tr.909), suffered "burn out," (T.Tr.103-04,114;T.L.F.101-05,134-46), permitted uncharacteristic delay in preparing for trial and investigating guilt(29.15Tr.193,195-96;T.Tr.2221-22), did not timely provide David with requested materials(T.L.F.121-25,679-85;T.Tr.149-50), did not listen to any of David's suggestions(29.15Tr.901-02), and relegated his representation to only one attorney without a mitigation specialist and adequate support staff(T.Tr.161;29.15Tr.187-89;T.L.F.339,342,489,498,503).

Counsels' post-verdict motion apprised the court counsel had fallen short on their duty to establish a trusting relationship with David(T.L.F.1228). Counsel could not expect to build trust when they failed to provide David documents in a timely manner as promised and did not even inform David when Hough was coming to meet with him(29.15Tr.657;T.L.F.121-25,679-85;T.Tr.149-50).

Drs. Logan, Smith, Benedict, and Hough all concluded David was incompetent to undertake self-representation. Logan and Smith concluded David's mental illnesses prevented him from working collaboratively with counsel because he could not weigh the risks and benefits of their advice(29.15Tr.493-97,582-87,592,597-98). Smith found that had counsel maintained open and consistent communication early on they could have effectively worked with David(29.15Tr.606-07). Benedict found David's self-representation decision was not rational and resulted from his mental illness and counsels' lack of appropriate attention to David's case(29.15Tr.120,122).

Like *Shafer*, David has serious mental illnesses and had counsel who failed to appropriately communicate with him and failed to investigate his case. Similarly, like *Wilkins*, David had a history of impulsive behavior(T.Tr.3026-30,4473). David did not knowingly, intelligently, and voluntarily decide to represent himself because of his history of mental illness and counsels' failure to undertake representation that accommodated David's mental illness. *See Shafer* and *Wilkins*, *supra*.

It is irrelevant David understands the legal system because his mental illnesses impact his ability to consult with counsel(29.15L.F.1054). Moreover, the waiver of counsel colloquy between David and trial court (T.Tr.553-603) that the findings reference never addressed David's ability to consult with counsel(29.15L.F.1054). The trial court focused on apprising David it did not think it was in David's best interest to self-represent because it was going to hold him to the same standards as an experienced capital attorney(T.Tr.553-96).

When the court on its own motion felt compelled to make a record that no competent attorney would have caused the contents of David's letters to reporter Bielawski to be introduced, and advised David to abandon self-representation, it established David's self-representation decision and continued self-representation was not knowing, intelligent, and voluntary(T.Tr.3160-61,3178-80,3189). That self-representation was the product of David's mental illness and being assigned counsel not equipped to address that mental illness. *See Shafer* and *Wilkins*.

Counsel Was Ineffective

Reasonably competent counsel who had been advised by Hough and Benedict it was crucial to maintain frequent contact with David, to provide David information, listen to David's concerns, and include him as an active participant in strategizing would have followed this advice and prevented the relationship breakdown that culminated in self-representation. *See Strickland*. Winegarner and Jacquinot both admitted greater efforts directed at building trust, necessitated by David's mental illness, likely would have avoided self–representation or at least minimized its harm(29.15Tr.715-21;T.L.F.1228).

Moreover, David was prejudiced under *Strickland* because David's self-representation resulted in him presenting objectively harmful evidence alienating and inflaming the jurors' passions and prejudices, and thereby, caused them to convict him of first degree murder and impose death.

On David's cross-examination of Officer Stewart, he elicited and highlighted the circumstances surrounding the recovery of Amanda's body(T.Tr.2661) and

Stewart's familiarity with the matters David included in letters he sent to reporter Bielawski(T.Tr.2683).

David directed Jacquinot to introduce statements from David's letters and the letters themselves to reporter Bielawski that contained highly inflammatory statements(T.Tr.3160-61,3178-79). The court was so astounded it made a record David had directed Jacquinot to introduce those materials because it did not believe any competent attorney would have introduced them(T.Tr.3179). The court strongly urged David to consult Jacquinot about relinquishing self-representation because David had caused aggravation to be introduced during guilt(T.Tr.3178-80).

David called and had counsel call an array of witnesses to offer evidence on Amanda's cell phone calling records and the details of police investigation that involved enlisting the help of local businesses where the accident happened(T.Tr.3257-59,3270-71,3272-75,3278-82,3283-91,3293-3317).

None of this evidence David caused to be introduced proved anything helpful and it served only to infuriate the jurors and appealed to their passions and prejudices. David has established prejudice. *See Strickland*.

The claims presented here were not and could not have been presented on direct appeal The direct appeal brief challenged the voluntariness of David's decision to undertake self-representation because the trial court's questioning of David was not thorough and the court failed to advise David counsel could present a defense that conflicted with the defense he was presenting(29.15Ex.37-pgs.96,100-01). Moreover, the claim presented here could not have been presented on direct because it required

David be represented by counsel who would call experts to testify how his trial counsels' inattention, coupled with David's mental illness, caused his self-representation decision to be defective. Trial counsel could not have pursued such a claim against themselves.

Hough concluded David's decision was based on his view there was incompetence and deception permeating the defense team(29.15Tr.668-69). Counsel apprised the court David's "beliefs about his relationship with his attorneys have some basis in reality"(T.L.F.505). David's view about counsels' competence had a basis in reality because of the repeated representations counsel made to the court about staffing problems and their inability to be ready for trial (T.Tr.81-103,106-07,114,161-62;T.L.F.101-05,134-46,339-42,429,488,498-99,500,503). Those problems were given real meaning by counsel representing to David they would do things, like provide documents, but then not doing them(T.L.F.121-25,679-85;T.Tr.149-50), and taking a year or more to retrieve items from David's father that David felt went to guilt(29.15Tr.195-96). That incompetence was further evident to David when counsel arranged for Hough to meet with David, without informing David in advance Hough would be coming, and thereby, causing David's reluctance to speak with Hough(29.15Tr.657). David made clear he never set out to self-represent and sought to deal with the Defender's problems by asking other counsel be appointed(T.L.F.456-87;T.Tr.605;T.L.F.888).

David was denied his right to counsel. Alternatively David did not knowingly, intelligently, and voluntarily choose self-representation. Lastly, counsel was

ineffective because their inattention to David's mental illness caused him to opt for self-representation. A new trial is required.

IV.

SHACKLING DAVID

The motion court clearly erred rejecting David was denied effective assistance of counsel, a fair trial, due process, his right to have counsel, and was subjected to cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that he was required to wear a shackling device, concealed under his clothing, that was made "visible" to the jury because it caused David to limp. The shackling device was inherently prejudicial structural error. Reasonable counsel would have objected to the device's use and David was prejudiced because the jury knew a shackling device was used.

The trial court improperly required David to wear a shackling device in the jury's presence which was inherently prejudicial. Counsel was ineffective for failing to object.

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

Respondent's Witness – Deputy Evans

Respondent called Deputy Evans, who had provided trial courtroom security(29.15Tr.361-62). The shackling device contains a round release lever adjacent to a hinge(29.15Tr.365-66,368).[10] David's pant leg covered the device(29.15Tr.366). The device's manufacturer's labeled it a "humane restraint"(29.15Tr.364-65). This device was selected because David was representing himself and it allowed David some mobility(29.15Tr.365).

The shackling device prevents the wearer from moving with any speed and it locks when straight(29.15Tr.369-70). In order to walk around the courtroom and keep the device from locking, David had to walk with bent knees(29.15Tr.369-70). During trial, Evans observed David sit down and reach to release the lever so he could bend his leg(29.15Tr.372).

Juror Testimony

Juror Fiegenbaum recounted multiple jurors had expressed they believed David was wearing a shackling device which was not openly visible(Ex.3-pgs.13-16).

Juror McCandless testified that while the shackling device was not visible, he knew from when David stood up and the manner of his gait David was restrained because David was not able to fully straighten his leg(Ex.4-pg.14,24-25). McCandless did not believe David wearing the device impacted the verdicts(Ex.4-

[10] Respondent's 29.15 Exhibits B, C, and D are photographs of the shackling device(29.15Tr.1225-26). David wore the shackling device on one leg(29.15Tr.370,372-73).

pg.14-15). On cross-examination, McCandless conceded it was possible David was wearing a knee brace for a medical condition, such as those caused by polio, and that his belief about shackling was an assumption based on observing David's gait and seeing him standing(Ex.4-pg.14,24-25).

Counsels' Testimony

Winegarner thought he heard the shackling device during trial(29.15Tr.728-30). The shackling device caused David to walk with an unnatural gait(29.15Tr.730-31). Winegarner did not have any strategy reason for failing to object to David having to wear the device(29.15Tr.731). Winegarner did not object because such matters were Jacquinot's responsibility(29.15Tr.731-32).

Jacquinot recounted it was "obvious" to people in the courtroom David was wearing some restraining device, even though it was not visible because David had to walk with a limp(29.15Tr.1026-28). Jacquinot did not object because he thought the shackling device did not substantially impair David's movement(29.15Tr.1027).

Findings

The findings state under *Tisius v. State*,183S.W.3d207,212(Mo.banc2006), this claim could have been raised on direct appeal because Zink's counsel was the same counsel in *Deck v. Missouri*,544U.S.622(2005) so she had to have been aware of the legal grounds for raising a shackling claim(29.15L.F.1057-58).

The findings continue there was no evidence the jury saw the shackling device(29.15L.F.1058). Deputies Evans and Hart testified the device was not visible

to the jurors(29.15L.F.1058). The device was not obvious or visible when Zink had to walk four feet from where he sat or stood to the bench(29.15L.F.1058).

The findings also state jurors testified they did not actually see the device(29.15L.F.1059). Juror Fiegenbaum testified some jurors thought, but were uncertain whether Zink was shackled(29.15L.F.1059). Juror McCandless assumed Zink was shackled because Zink could not fully straighten his leg and because Missouri prohibits visible restraints(29.15L.F.1059). McCandless also testified Zink could have been wearing a knee brace because of a medical condition(29.15L.F.1059). The jurors' testimony did not establish jurors "definitely knew" Zink was shackled(29.15L.F.1059). The jurors' testimony only established jurors had assumed a shackling device was employed, which is not the knowledge needed to establish a claim(29.15L.F.1059). Jurors who testified they "knew" Zink was shackled were not credible based on the court's trial observations and the law enforcement testimony(29.15L.F.1059). Under the findings, the concealed device is distinguishable from the visible handcuffs, leg irons, and belly chain worn in *Deck*(29.15L.F.1059).

Structural And Prejudicial Error

The Sixth and Fourteenth Amendments guarantee a defendant the right to counsel. *Gideon v. Wainwright*,372U.S.335(1963).

In *Deck v. Missouri*,544U.S.622,624-25(2005), the defendant was sentenced to death, but his case was remanded for a penalty retrial. At the penalty retrial, Deck was required to wear physically visible shackles. *Id.*624. The *Deck* Court reversed

the penalty retrial use of shackles noting shackling is inherently prejudicial. *Id.*635. That inherent prejudice to Deck did not require he establish actual prejudice. *Id.*635. When a courtroom arrangement is challenged as inherently prejudicial the test is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play."' *Holbrook v. Flynn*,475U.S.560,570(1986)(quoting *Estelle v. Williams*,425U.S.501,505(1976)). The reason that is the test, rather than what jurors might assert, is that "[e]ven though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused." *Holbrook*,475U.S. at 570.

In *Deck*, the Court recognized three considerations which make shackling inherently prejudicial. First, shackling undermines the presumption of innocence and the related fairness of the factfinding process. *Deck*, 544 U.S. at 630. Second, shackling interferes with a defendant's ability to participate in his defense. *Id.*631. Third, shackles are an affront to the dignity and decorum of the judicial proceedings the judge is charged to uphold. *Id.*631.

At various junctures, David had to approach the bench for conferences with the court(*See, e.g.*,T.Tr.2447,2480,2588,2592). Likewise whenever the jury came and went from the courtroom, the bailiff directed everyone to rise (*See, e.g.*,T.Tr.2578,2861,2892,2945). The jurors actually knew David was shackled because, as Jacquinot noted, it was "obvious" from how David limped a shackling device was being used(29.15Tr.1026-28). Winegarner similarly testified the jury

knew David was shackled because he walked with an unnatural gait(29.15Tr.730-31). The shackling device covered by David's clothing in fact was "visible" because the jurors had deduced David was shackled because of how his gait was impaired.

Juror Fiegenbaum recounted the jurors had discussed and concluded David was shackled(Ex.3-pgs.13-16). Juror McCandless testified the way the jurors knew David was shackled was his unnatural gait and his inability to straighten his leg(Ex.4-pgs.14,24-25). The jurors did not have to "definitely know" (29.15L.F.1059) by actually seeing the shackling device because the manner in which it impeded David's movement had led them to conclude he was shackled, and thus, the shackles were in reality "visible."

The shackling device used on David was no less prejudicial than handcuffs, leg irons, or a belly chain. As *Deck* ruled, shackling is inherently prejudicial. *See Deck*,544U.S. at 635. The use of the shackling device undermined the presumption of innocence David was not guilty of first degree murder. While the defenses David and counsel presented did not contest he had killed Amanda, both disputed he had acted with the required mental state of deliberation for first degree murder. Shackling David detracted from the presumption David was not guilty of first degree murder and treated him as though he was already convicted of first degree murder.

If the trial court had had security concern issues, then it could have taken measures like those authorized in *Holbrook*. In *Holbrook*, the defendant's rights were not violated when the customary courtroom security was supplemented with four uniformed state troopers seated in the first row of the spectator's section.

Holbrook,475U.S. at 562. The *Deck* Court noted that the *Holbrook* trooper presence differed from Deck's shackling because the deployment of security personnel does not have the same inherent prejudice as shackling. *Deck*,544U.S. at 628.

While Juror McCandless testified that knowing David was shackled did not negatively impact him(Ex.4-pg.14-15), *Holbrook* established such belief has no relevance. *Holbrook* recognized jurors are not going to be cognizant of the prejudicial impact shackling has on their attitude about a defendant. *See Holbrook*, *supra*.

In *Tisius*, the 29.15 movant sought to raise a claim of prosecutorial misconduct based on improper closing argument. *Tisius*,183S.W.3d at 212-13. The closing argument was apparent from the trial record, and therefore, the claim could have been raised on direct. *Id*.212-13. *Tisius* distinguished that circumstance from those which require the development of evidence in a 29.15, and therefore, can be properly raised on 29.15. Here, unlike *Tisius*, evidence was needed to be developed from David's jurors they knew David was shackled, even though the device was not outwardly visible. Thus, while appellate counsel Percival may have known the legal grounds for raising a shackling claim, because she was Deck's counsel, she did not have the factual record support to bring a *Deck* claim.

Structural errors in the constitution of the trial mechanism "require[e] automatic reversal of the conviction because they infect the entire trial process." *Brecht v. Abrahamson*,507U.S.619,629-30(1993). A trial in which structural error has occurred "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."

Arizona v. Fulminante,499U.S.279,310(1991). In cases where there is a structural error *Strickland* prejudice is not required. *See*, *e.g.*, *Anderson v. State*,196S.W.3d28,39-42(Mo.banc2006)(failure to strike automatic death penalty and burden shifting juror on punishment denied defendant effective assistance of counsel without showing prejudice because error was structural). It was structural error to use a shackling device making it obvious to the jury David was wearing such a device because of how it made him walk with an unnatural gait. For that reason, structural error occurred and a new trial is required. *See Deck*.

The denial of the right to counsel under *Gideon* is structural error. *See Fulminante,*499U.S. at 309. *Deck* recognized shackling is inherently prejudicial because it interferes with the defendant's ability to participate in his defense. *See Deck, supra*. Shackling David thereby denied him his right to counsel recognized in *Gideon* and was structural error requiring a new trial. *See Fulminante*.

Counsel did not have any reasonable strategy reason for failing to object to the use of the device(29.15Tr.731,1027). *See McCarter*, *supra*. Reasonably competent counsel would have objected to the use of the shackling device. *See Strickland* and *Deck*. David was prejudiced because shackling is inherently prejudicial. *See Deck*.

A new trial is required.

V.

FAILURE TO ADVISE OF LIMITS IMPOSED ON SELF-REPRESENTATION

The motion court clearly erred denying David's decision to represent himself was not knowingly, intelligently, and voluntarily made, and that counsel was ineffective because David was denied his rights to due process, his rights to fully represent himself, his right to choose to be represented by counsel, and was subjected to cruel and unusual punishment in violation of U.S. Const. Amends. VI, VIII, and XIV, in that David did not make a knowing, intelligent, and voluntary self-representation decision because the trial court did not advise him of restrictions it was imposing on self-representation, including shackling and not allowing David to approach witnesses with exhibits, before David chose self-representation and reasonable counsel would have objected to the court having imposed these restrictions without having advised David of them and David was prejudiced because he was not afforded his full right to self-representation.

David was not apprised if he chose self-representation he would be required to wear a shackling device and prohibited from approaching witnesses with exhibits. These restrictions violated David's rights to fully represent himself and his right to be represented by counsel. Counsel should have objected to the trial court imposing these restrictions on David without having first advised him of them.

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). Counsel's strategy

must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

The Sixth and Fourteenth Amendments guarantee a defendant the right to counsel. *Gideon v. Wainwright*,372U.S.335(1963). A defendant has the right to represent himself, but the decision to waive counsel must be knowingly, intelligently, and voluntarily entered. *Faretta v. California*,422U.S.806(1975). In *Faretta*, the Court recognized a defendant's right of self-representation includes "the right to make his defense." *Faretta*,422U.S. at 819. "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*,304U.S.458,464(1938).

Hearing On Self-Representation

When the trial court took up David's self-representation motion it advised David of some downsides(T.Tr.552-53,558,563-65,576-79,581-82,589-90). It told David the following: "So, I'm going to treat you in this trial, just as if you have a law degree and have tried death penalty cases before"(T.Tr.586-87). Further, it told David "you're not going to be cut any slack because you're not a lawyer"(T.Tr.587). The court asked David whether he understood he was "going to be treated as if you were a lawyer in the courtroom?"(T.Tr.589). It also read a list of rights document to David

and the document concluded with David asking to waive counsel and represent himself(T.Tr.594-96). David signed the waiver and the court indicated it had no choice, but to allow self-representation(T.Tr.596). The court never apprised David he would be shackled in the jury's presence and not allowed to approach witnesses to give them exhibits.

Shackling And Prohibiting Approaching Witnesses With Exhibits

As discussed previously, David was required to wear a shackling device and it was obvious to the jurors he was wearing such a device because it made him limp. *See* Point IV.

During David's cross-examination of Officer Stewart, he asked to approach Stewart to hand him some photograph exhibits(T.Tr.2681-82). The trial court denied David's request(T.Tr.2681). Instead, David had counsel hand Stewart the exhibits(T.Tr.2681-82). After David questioned Stewart, he requested the exhibits be returned to him(T.Tr.2682). The record then notes: "[Exhibits were handed from the Witness to the Defendant, via Mr. Jacquinot.]"(T.Tr.2682). When David sought to offer the exhibits and the prosecutors requested to see them, the record noted: "[Mr. Jacquinot handed exhibits to Mr. Reed.]"(T.Tr.2682).

In the defense case, David personally questioned Officer Browning(T.Tr.3272). Browning was questioned about a report exhibit(T.Tr.3273-74). At the end of direct, David told Browning: "I'll have the attorney come and collect that exhibit from you"(T.Tr.3276).

David personally questioned Officer Schoonmaker(T.Tr.3283-84). During David's questioning he asked counsel to hand Schoonmaker certain exhibits(T.Tr.3286). The record noted: "[Mr. Jacquinot complied.]"(T.Tr.3286). Before David sought to offer Exhibit 1073, the record noted: "[Mr. Jacquinot retrieving the exhibit from the witness and showing to the State's attorneys.]"(T.Tr.3287). After the court admitted Exhibit 1073, the following occurred:

Mr. ZINK: Hand that back to the witness, please.

Mr. JACQUINOT: Sure. [Complying.]

(T.Tr.3287-88). At the conclusion of David's direct, he stated: "I'd ask counsel to retrieve the exhibits"(T.Tr.3291). The record then noted: "[Mr. Jacquinot retrieved the exhibits.]"(T.Tr.3291).

David questioned Officer Bulyer(Tr.3368). During that questioning David stated: "I'd like to have my attorney hand you what's been marked as Defense Exhibit 1095, for identification"(T.Tr.3369). At the conclusion of David's direct examination he stated: "If I can get my attorney to pick up that exhibit, though"(T.Tr.3370).

The only Attorney General finding on this issue[11] is a generalized one that the pretrial colloquy between the trial court and David established his self-representation

[11] This claim was pled in both Claims 8(D) and (G) of the amended motion(29.15L.F.354-57,372-82).

decision was knowing, intelligent, and voluntary(29.15L.F.1054). That colloquy, however, did not apprise David he would be shackled and not allowed to approach witnesses with exhibits.

David was not allowed to make his defense, in violation of *Faretta*, when the court refused to allow him the same privileges accorded an attorney. An attorney would not be shackled and would be allowed to approach witnesses to present exhibits. The shackling and prohibiting of David from approaching witnesses to show them exhibits created the impression David presented a danger to those present. That impression deprived David of the presumption of innocence David was not guilty of first degree murder. While the defenses David and counsel presented did not contest he had killed Amanda, both disputed he had acted with the required mental state of deliberation for first degree murder.

David's decision to conduct self-representation was not knowingly, intelligently, and voluntarily entered because he was not apprised he would be shackled and not allowed to approach witnesses to present exhibits. *See Faretta* and *Johnson*. While the court told David it would hold him to the same standards as an attorney who had tried capital cases(T.Tr.586-87,589), it did not afford him the same rights as an attorney to make his defense. *See Faretta*. The denial of a defendant's right to self-representation is structural error. *State v. Black*,223S.W.3d149,153(Mo.banc2007)(relying on *Washington v. Recueno*,126S.Ct.2546(2006)). Furthermore, the trial court denied David his right to

choose to be represented by counsel under *Gideon* when it failed to fully apprise him he would be shackled and not allowed to approach witnesses with exhibits.

It did not occur to counsel to object to the trial court having never advised David that he would be required to wear a shackling device and could not present exhibits to witnesses(29.15Tr.731-32).

Reasonable counsel would have objected to the trial court not having advised David before he chose self-representation that he would be shackled and not allowed to approach witnesses with exhibits. *See Strickland* and *Faretta*. David was prejudiced because he was not afforded his full *Faretta* self-representation rights. *See Strickland and Black.*

A new trial is required.

VI.

FAILURES TO OBJECT TO GUILT ARGUMENTS

The motion court clearly erred denying claims counsel was ineffective for failing to object to guilt arguments:

A. Jacquinot and David conspired through presenting dual defenses to deceive the jury;

B. The jury had a "duty" to convict of first degree murder; and

C. Reflection for a "millisecond" was sufficient for deliberation;

because David was denied effective counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected and David was prejudiced because he would not have been convicted of first degree murder.

Counsel failed to object to multiple improper guilt closing arguments which prejudiced David and resulted in a conviction for first degree murder

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

A. Conspiracy to Deceive

On July 8, 2004, Jacquinot wrote the court stating he "cannot proffer that manslaughter is a rational, reasonable, or viable option"(T.L.F.974-75). Jacquinot

believed David's "concept of reasonable and adequate cause is guided by mental illness"(T.L.F.975). Presenting a manslaughter defense was "a self-destructive act" that would greatly enhance the likelihood of a first degree murder conviction and death(T.L.F.975). Jacquinot's letter was copied to respondent's two attorneys and David(T.L.F.977).

David's July 12, 2004, filing apprised the court he would not allow a diminished capacity defense(T.L.F.1049).

David also moved the court on July 12, 2004, to appoint other counsel(T.L.F.1050-60). That pleading accused Jacquinot of lying about the viability of a manslaughter defense in his July 8th letter(T.L.F.1052,1056-58). At the July 12th hearing, David told the court Jacquinot had lied(T.Tr.898). David told the court if counsel was going to pursue diminished capacity, then he was going to put on his manslaughter defense because it was a valid defense(T.Tr.899-900). Jacquinot told the court he believed David presenting manslaughter would destroy diminished capacity and substantially increase the likelihood of death(T.Tr.903).

In argument, Ahsens told the jury David presented a manslaughter defense based on sudden passion(T.Tr.3964-65). Ahsens argued counsel presented a second degree murder defense(T.Tr.3965). Ahsens continued counsel talked about sudden passion, but "there was a notable lack of enthusiasm there"(T.Tr.3965).

Ahsens' argument continued:

> Now, folks, what's going on? I've been sitting here and you have had infinite patience with what you have heard in this courtroom. And I have tried

-- I have sat here and listened to it as you have and said, what in the world are they doing?

Well, it finally occurred to me what's going on. And you have seen the defense tactics now laid bare before you in this courtroom today and what they are is very simple. The Defendant comes in here and attempts, with what he is doing, to feed counsel's theory of diminished capacity.

(T.Tr.3965). Ahsens continued that the dual defenses constituted "Manipulation. Smoke Screen."(T.Tr.3967). According to Ahsens, the dual defenses were "intended to fool you"(T.Tr.3967).

The findings stated the argument only attacked Zink on the grounds Zink would do anything to avoid conviction, and therefore, it was permissible(29.15L.F.1076).

Winegarner did not object to any closing arguments because he did not have authority to make objections(29.15Tr.743-44). Jacquinot believed this argument should have been objected to and a mistrial requested because the argument was false and offensive(29.15Tr.991-93). Jacquinot failed to object because of fatigue(29.15Tr.991-94).

This argument injected the prosecutor's personal opinions and attacked counsels' integrity asserting counsel pursued a course of conduct of intentional deception with David. The prosecutor's personal opinions were improper and he became an unsworn witness. *See State v. Storey*,901S.W.2d886,900-03(Mo.banc1995).

The attacks on counsels' integrity were likewise improper. "Arguing defense counsel suborned perjury or fabricated a defense is patently improper." *State v. Harris*,662S.W.2d276,277(Mo.App.,E.D.1983). In *State v. Burnfin*,771S.W.2d908,912-13(Mo.App.,W.D.1989), the prosecutor's arguments personally attacked counsel for having spent two days trying to hide the truth and coaching their witnesses. Reversal was required because "the effect of the multiple errors in the prosecutor's argument [were] *cumulative* and egregiously prejudicial." *Id*.912-13(emphasis added). Ahsens attacked David's counsels' integrity and that argument was improper and should have been objected to.

A government attorney, in *Giglio v. U.S.*,405U.S.150,150-53(1972), promised the defendant's co-conspirator he would not be charged. The co-conspirator testified against Giglio while representing there were no deals, and a different government attorney argued the government had made no promises to the co-conspirator. *Id*.151-52. The failure to disclose that promise violated due process. *Id*.154-55. It did not matter different prosecutors were involved in the promise of leniency and the trial because "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government." *Id*.154.

In *Napue v. Illinois*,360U.S.264,265-67(1959), a co-defendant testified no promises had been made in exchange for testimony. In fact, the state's attorney had promised a sentence reduction. *Id*.265-67. The state's attorney allowed that testimony to go uncorrected. *Id*.265-67. Allowing this false evidence to go uncorrected violated due process. *Id*.269-70. The Court reasoned: "[t]he jury's

estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id*.269.

Giglio and *Napue* stand for the proposition that the state cannot present matters which it knows are untrue. Ahsens' argument here attacking counsel's integrity by asserting counsel pursued a course of conduct of intentional deception in complicity with David was knowingly false in violation of *Giglio* and *Napue*. Ahsens and Reed knew from Jacquinot's letter to the court and the related pretrial hearing counsel and David were directly at odds as to what the defense theory should be. Ahsens and Reed knew from the pretrial proceedings the reason David chose self-representation was because counsel did not want to present David's manslaughter defense. Ahsens' argument violated *Giglio* and *Napue*.

Reasonably competent counsel would have objected because the argument accused counsel of being in complicity with David to deceive the jury. *See Harris*, *Burnfin*, *Giglio*, and *Napue*. David was prejudiced because this argument caused the jury to convict him of first degree murder on accusations Ahsens and Reed knew were false. *Id*.

B. <u>Duty To Convict</u>

Respondent concluded guilt rebuttal argument with the following: "Justice in this case is murder in the first degree. Your duty is to return justice. Do your duty"(T.Tr.3978).

The findings stated this is allowed under *State v. Newlon*,627S.W.2d606,619(Mo.banc1982) and *State v. Ross*,507S.W.2d348,354(Mo.1974)(29.15L.F.1079-80). In light of *Newlon v. Armontrout*,693F.Supp.799(W.D.1988), *aff'd.* ,885F.2d1328(8thCir.1989) reversing because of improper prosecutorial argument, it was clearly erroneous for the findings to assert the argument was permissible.

The findings also stated Instruction 13 told the jurors it was their duty to return a verdict under the law and the evidence(29.15L.F.1079-80). The argument portrayed it was the jury's duty to convict David of first degree murder in disregard of the jurors' sworn obligation and Instruction 13 to uphold the law(T.L.F.1092). Having made this improper argument, respondent should not now be heard to claim Instruction 13 cured the improper argument. *See Newlon v. Armontrout*,885F.2d at 1337(rejecting state's contention instruction cured improper argument because it contained only broad sweeping rule). Like in *Newlon*, Instruction 13 contained only a broad sweeping rule.

Jacquinot did not consider objecting, but the argument might be objectionable(29.15Tr.996).

Telling the jury it has a duty to convict is improper because it appeals to passion and prejudice. *Viereck v. United States*,318U.S.236,247-48(1943). In *People v. Castaneda*,701N.E.2d1190,1192(Ill.Ct.App.1998)(relying on *United States v. Young*,470U.S.1(1985)), the defendant's conviction was reversed because the prosecutor argued the jury had a duty to convict.

Reasonably competent counsel would have objected. *See Viereck and Castaneda*. David was prejudiced because the jury was told to convict David of first degree murder in disregard of the facts as applied to the law here.

C. Millisecond Equals Deliberation

During initial guilt closing, respondent argued:

> Deliberation means cool reflection upon the matter for any length of time, no matter how short. As long as he has a millisecond to reflect, that's enough for cool reflection; that's enough for deliberation.

(T.Tr.3883).

This Court has permitted a finding of deliberation through limiting its focus to the time and not the mental process involved. *See, e.g., State v. Tisius*,92S.W.3d751,763-64(Mo.banc2002). Other courts have recognized to allow a finding of deliberation based on no time lapse between the formation of the design to kill and the killing act does away with any constitutionally meaningful distinction between first and second degree murder. *State v. Brown*,836S.W.2d530,537-44(Tn.1992)(endorsing that more than "a split-second" intention to kill is required to constitute deliberation);*State v. Thompson*,65P.3d420,423-28(Az.2003)(the distinctive aspect of deliberation between first and second degree murder requires more passage of time than instantaneous successive thoughts).

The findings stated this argument was permissible because §565.002(3) defines deliberation as cool reflection no matter how brief and a millisecond is a brief time(29.15L.F.1069-70).

Jacquinot believed the argument was objectionable as a misstatement of the law(29.15Tr.986-87).

Reasonable counsel would have objected to the "millisecond" argument because that argument does away with any distinction between first and second degree murder. *See Brown, Thompson and Strickland*. David was prejudiced because the jury was told it could convict of first degree murder without respondent having proved deliberation. *Id*.

Each of these claims individually and collectively establishes David was prejudiced by the improper arguments. A new trial is required.

VII.

INCOMPETENT FOR TRIAL

The motion court clearly erred denying David was incompetent at trial and counsel was ineffective for failing to challenge competency because David 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 the 29.15 evidence established David lacked the ability to consult with counsel with a reasonable degree of rational understanding and effective counsel would have challenged David's competence to proceed and David was prejudiced because he was convicted while incompetent.

Counsel seriously questioned whether David was competent to proceed, but failed to act. David's mental impairments made it impossible for him to constitutionally consult with counsel.

Standards

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

It violates due process to convict an incompetent defendant. *Pate v. Robinson*,383U.S.375,378(1966); *Drope v. Missouri*,420U.S.162,172(1975);*Dusky v. United States*,362U.S.402,402(1960). The test for competency is "whether a criminal

defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him."' *Drope*,420U.S. at 172(quoting *Dusky*,362U.S. at 402). In *Drope*, it was error for the trial court to have failed to suspend the trial to obtain a competency evaluation in the face of accumulating evidence of incompetency. *Drope*,420U.S. at 179-80.

Lack Of Capacity To Consult Determination

Budesheim and Short retained Hough in July or August, 2001 because David then wanted death(29.15Tr.645-47). Budesheim arranged for Hough to be involved because Budesheim thought David needed someone who David felt he could talk to and to assess where things stood(29.15Tr.909-10).

Subsequently Hough again met with David on August 23, 2003(29.15Tr.662,666;29.15Ex.84). Hough advised Jacquinot on August 25, 2003 a competency to proceed evaluation needed to be done(29.15Tr.661-62;29.15Ex.85). Hough never heard any more from Jacquinot(29.15Tr.663).

Budesheim and Short hired Benedict to evaluate David(29.15Tr.84-85). Benedict was asked to look at four issues, but was not asked to evaluate competency to proceed(29.15Ex.16-pg.1;29.15Tr.85-86,123-24,1012-13). Benedict's report found David was significantly impaired as to stopping any on-going behavior or line of thinking to accommodate the circumstances presented(29.15Tr.94;29.15Ex.16-pgs.14-15). That inability to disengage reflects a problem with mental flexibility and rigid thinking(29.15Ex.16-pgs.14-15). David hyper-focuses on small details which causes

him to not integrate the larger picture(29.15Ex.16-pgs.13-14). Benedict believes David has the cognitive capacity to understand a diminished capacity defense(29.15Tr.125).

Benedict concluded once David had what he perceived was evidence his attorneys were not diligently working on his case he was unable to consult with counsel(29.15Tr.118-19). If counsel had asked Benedict's opinion on competence, then he would have opined David was incompetent to proceed because he was unable to rationally communicate with counsel(29.15Tr.124-25).

Logan indicated that in evaluating competence to proceed, the issue of a defendant's ability to incorporate their attorney's advice and make critical decisions based on that advice must be considered(29.15Tr.413-14). Many mental disorders do not adversely impact intellect(29.15Tr.542). David easily satisfies the formulaic cognitive tests going to competency to proceed, such as understanding the judge's and jury's function(29.15Tr.441-42).

Logan indicated David has problems with an obsessiveness for minor details such that he does not grasp the larger picture(29.15Tr.439,444). As to all the events in question, there was a hyper-focus on details(29.15Tr.465). Illustrative was David's preoccupation with the timing of calls from Amanda's cell phone that he thought could be used to show law enforcement was manipulating that timing to prove Amanda was kidnapped(29.15Tr.464-65).

Logan's diagnosis was personality disorder not otherwise specified (NOS)(29.15Tr.467-70). David's disorder is characterized by narcissistic, paranoid,

anti-social, and impulsive features(29.15Tr.467-71). David's disorder is not otherwise specified because he has features of several disorders, but not enough features of any one disorder to limit a diagnosis to one(29.15Tr.470-71,478). David's diagnosis is a mental disease or defect under Chapter 552 because it is not characterized exclusively by antisocial behavior(29.15Tr.471).

Logan noted David perceived evil motives directed at him personally because of counsel repeatedly needing his case continued, rather than an office problem(29.15Tr.461-62). There was also profound disagreement with David wanting to pursue one defense strategy and counsel wanting another(29.15Tr.462). Counsels' early efforts were more focused on preparing mitigation, rather than a guilt defense, and David opposed that approach(29.15Tr.463). When David reached the point he believed counsel was working against him, he was unable to incorporate their advice and understand their position and was unable to weigh the risks and benefits of the defense he wanted(29.15Tr.489-94,496).

Smith also found David lacked the ability to incorporate information and work with counsel collaboratively to make decisions(29.15Tr.584,586). David's rigid thinking is part of his mental illness(29.15Tr.609).

Counsels' Testimony

On July 15, 2003, St. Louis Capital Public Defender counsel Kenyon entered(T.L.F.418;29.15Tr.841). On December 5, 2003, Public Defender Winegarner entered(T.L.F.533). Once Winegarner entered, Kenyon stopped working(29.15Tr.683-85).

Because Winegarner felt some of the matters David was pursuing were so harmful and David was so rigid in pursuing them, Winegarner had concerns about David's competency(29.15Tr.699-700,714,721-22). Winegarner was not authorized to contact experts regarding competency(29.15Tr.700-02). Investigator Hedges noted Winegarner had "zero discretion" because Jacquinot was "in charge"(29.15Tr.191). There were issues Winegarner wanted to discuss with Jacquinot, but Jacquinot made clear he did not have time(29.15Tr.690). Winegarner had no reason for failing to have David's competency to proceed evaluated(29.15Tr.714).

On March 1, 2004, David waived counsel(T.L.F.576;T.Tr.553-96). Kenyon thought David was "crazy" because David "had some really nutty ideas"(29.15Tr.881). Kenyon did not have concerns about David's competency to proceed, but that was based on Kenyon's understanding of competency law(29.15Tr.875,880-81). Kenyon recounted "the brunt of the time" he spent talking to David was directed at trying to dissuade David from pursuing non-viable defenses(29.15Tr.880-82). Despite Kenyon's best efforts to dissuade David, they had "back-and-forth" conversations where David "rigidly" adhered to his unreasonable staked-out positions(29.15Tr.882-83)

Jacquinot had concerns about David's competency, but failed to have David evaluated because he thought the court would just adopt Brooks' findings(29.15Tr.961-62,1012-13,1016-20). Jacquinot disagrees with Brooks' findings David was competent to proceed because of David's inability to assist counsel(29.15Tr.1013-20).

Court's Shock

David directed Jacquinot to introduce statements from David's letters to reporter Bielawski and the letters that contained highly inflammatory statements(T.Tr.3160-61,3178-79). The court was so shocked about what happened it made a record David had directed Jacquinot to introduce those materials because it believed no competent attorney would have introduced them(T.Tr.3179).

According to David, the letters' were untrue, but their contents explained why he no longer wanted death(T.Tr.3177,3179). The court strongly admonished David to consult with Jacquinot about relinquishing self-representation because David had caused aggravation to be introduced during guilt(T.Tr.3178-80).

Findings

The findings stated all of the experts who testified Zink was incompetent to proceed were not credible(29.15L.F.1049). Brooks conducted a §552 evaluation and found David competent(29.15L.F.1049). Kenyon testified he thought David was competent and Kenyon is credible(29.15L.F.1049-50). Jacquinot and Winegarner are not credible because as experienced attorneys they would not have allowed an incompetent defendant to go to trial(29.15L.F.1050).

The findings also stated it was not credible Hough, Benedict, and Smith would not have notified counsel a competency evaluation was needed(29.15L.F.1050).

According to the findings, *State v. Tokar*,918S.W.2d753,764(Mo.banc1994) controls Zink's case(29.15L.F.1051). The trial and 29.15 judge are the same and saw no reason to question Zink's competency(29.15L.F.1051).

The findings continued Zink was not incompetent because all the 29.15 mental health experts and attorneys testified Zink has the cognitive ability to understand the role of the prosecutor, his attorneys, the judge, and possible defenses and that testimony is credible(29.15L.F1052). That cognitive ability was shown by Zink's interactions with the court, pro se filings, and defense Zink presented(29.15L.F.1052). Zink understood the significance and consequences of his trial decision as shown by the court's waiver(T.Tr.551) colloquy at T.Tr. 553-603(29.15L.F.1052-53).

The findings stated that Zink's ability to converse with the court about the law establishes Zink's ability to conduct a rational conversation with counsel(29.15L.F.1052-53). Kenyon testified he was able to have "back and forth" conversations with Zink on the law and defenses and Kenyon is credible(29.15L.F.1053). The testimony from Jacquinot and Winegarner and the experts that is contrary to Kenyon's testimony is not credible(29.15L.F.1053).

David Was Incompetent

Benedict and Logan found David was incompetent to proceed because his mental illness prevented him from rationally consulting with counsel(29.15Tr.118-19,489-94,496). David was unable to rationally consult with counsel because his rigid, inflexible thinking causes him to hyper-focus on insignificant details, and thereby, fail to grasp the larger picture(29.15Tr.94,439,444,464-65,584,586,609;29.15Ex.16-pg.13-15). David was unable to weigh counsels' advice once David reached the point he believed counsel was working against him(29.15Tr.489-94,496). That David has the cognitive ability to understand the

proceedings ignores he lacks the ability to consult with counsel. *See Drope* and *Dusky*, *supra*. David's conviction, while he was incompetent to proceed, violated due process. *See Pate*, *Drope*, and *Dusky*.

The waiver of counsel colloquy the findings referenced never addressed David's ability to consult with counsel. In fact during those exchanges David told the court that he and **Kenyon** had problems "communicating"(T.Tr.555). David complained he could not get Kenyon to respond to anything and that Kenyon "acts like he's got some sense, but he doesn't"(T.Tr.555). David told the court he did not want Jacquinot because Jacquinot was working with respondent to have him convicted and he intended to call Jacquinot as a witness to show he had been deprived of his rights(T.Tr.592-93,597). The trial court's focus was directed at apprising David it did not think self-representation was in David's best interest because it was going to hold him to the same standards as an experienced capital attorney(T.Tr.553-96). David's statements about counsel should have placed the court on notice David was incompetent because he could not consult with counsel. *See Drope* and *Dusky*.

This Court has indicated "[a]n appellate court should determine 'whether a reasonable judge, in the same situation as the trial court, should have experienced doubt about the accused's competency to stand trial."' *Tokar*,918S.W.2d at 762-63(quoting *Branscomb v. Norris*,47F.3d258,261(8thCir.1995)). David's counsel did not seek an expert opinion on David's competence to proceed, **even though Hough had advised Jacquinot he needed to**(29.15Tr.661-62;29.15Ex.85;29.15Ex.16-pg.1;29.15Tr.85-86,123-24,1012-13). Brooks' opinions were obtained in response to

the State's Motion for a "second" mental examination(T.L.F.525-28), but there was never a "first" competency evaluation. When Brooks found David competent she, unlike Logan, did not address David's ability to incorporate counsels' advice and make critical decisions based on that advice. *See* Brooks' report 29.15Ex.72-pgs.15-16,21-22. Unlike David's case, in *Tokar*, the trial court had evidence that Tokar's counsel had obtained two prior competency evaluations. *Tokar*,918S.W.2d at 764. A reasonable judge, who was so shocked at David having introduced the inflammatory news reporter information, who felt compelled to make a record it was done at David's direction because no competent attorney would have introduced that information, and who then urged the case be turned over to Jacquinot should have experienced doubt about David's competency. *See Tokar*. Those trial court actions should have caused a competency evaluation to be done during trial. *See Drope*.

Counsel's strategy under *Strickland* must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). Failing to conduct investigation relates to preparation, not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991).

In August, 2003, Hough advised Jacquinot to have a competency evaluation(29.15Tr.661-62;29.15Ex.85). Jacquinot had doubts about David's competency, but did not get an evaluation because he thought the court would just endorse Brooks' October, 2003 (29.15Ex.72) competency finding(29.15Tr.1016-20). In fact **on the first day of trial**, Jacquinot told the court he believed David's insistence on pursuing a manslaughter defense was "a by-product on some level of –

of Chapter 552 mental illness"(T.Tr.903). Because Winegarner lacked the authority to retain experts(29.15Tr.191,686-88,700-02), it was Jacquinot's duty to get an evaluation. Reasonably competent counsel who had doubts about David's competence would have obtained an evaluation assessing competency. *See Pate*, *Drope*, *Dusky*, and *Strickland*. Even if the court had adopted Brooks' findings, that decision could have been appealed and found wrong. *Cf. Drope*, *supra* (trial court's failure to hold inquiry into competency reversed). Failing to obtain a competency evaluation because the court might adopt Brook's view is not reasonable strategy. *See McCarter*.

Kenyon failed to challenge David's competency because Kenyon failed to understand the law. David was incompetent under Chapter 552 because he cannot rationally consult with counsel as a result of his rigid, hyper-focus on insignificant details. Kenyon found David "rigidly" stood by his unreasonable staked-out positions(29.15Tr.882-83). Thus, Kenyon knew the factual grounds why David was incompetent, but did not recognize under the law why David was incompetent. A strategic decision is unreasonable if it is based on a failure to understand the law. *Hardwick v. Crosby*,320F.3d1127,1163(11thCir.2003). Kenyon's reason for not challenging competency was due to a failure to understand the law. *See Hardwick.*

When respondent wrote the 29.15 findings the court signed, it included Kenyon had testified he had "back and forth" conversations with David on the law and defenses(29.15L.F.1053). What Kenyon's testimony **viewed in its entire context shows** is that Kenyon and David had "back-and-forth" conversations, but David

"rigidly" stood by his unreasonable staked-out positions(29.15Tr.882-83). Those "back and forth" conversations confirm Logan's and Benedict's findings David's rigid thinking made him incompetent because he could not consult with counsel.

Moreover, any views of Kenyon that could be construed as supporting David's competence lack any real relevance. This case was tried in July, 2004. When Winegarner entered on December 5, 2003, Kenyon stopped working on David's case(T.l.F.533;29.15Tr.683-85). Kenyon participated in David's case only from July 2003 until December, 2003(T.L.F.418,533;29.15Tr.683-85,841). Because Kenyon had stopped working on David's case eight months before trial, he had no contemporaneous to trial basis for any assessment of David's competence.[12] In contrast, Jacquinot and Winegarner, who represented David at trial, questioned whether David was competent to proceed, yet they never had a competency evaluation done(29.15Tr.699-700,714,721-22,961-62,1012-13).

[12] The total lack of independent judgment exercised, reflected in the Attorney General's signed findings, is especially apparent as to competency. Kenyon was found credible and Jacquinot and Winegarner not credible, even though Kenyon worked on the case only four and one-half months and stopped working on the case eight months before trial(T.L.F.418,533;T.Tr.892;29.15Tr.683-85,841;29.15L.F.1049-50). Unlike Jacquinot and Winegarner, Kenyon had no knowledge of David's competence even remotely close in time to trial.

Reasonably competent counsel who had doubts about David's competency would have had an evaluation done and contested Brooks' competency finding. *See Pate*, *Drope*, *Dusky*, and *Strickland*. David was prejudiced because he was convicted while incompetent. *Strickland*.

A new trial is required.

VIII.

SIGNING ATTORNEY GENERAL'S FINDINGS

The motion court clearly erred in signing the Attorney General's findings which found David's counsel and the 29.15 experts were infinitely credible when they furnished testimony harmful to 29.15 claims, but infinitely incredible when they furnished testimony supporting 29.15 claims with some findings expressly contradictory to witnesses' testimony and as to other claims witnesses were credible as to that portion of their testimony that helped to defeat a claim, but incredible as to other testimony that proved the claim because these actions denied David his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that all these witnesses were either credible or incredible and such findings caused David's 29.15 hearing to be a meaningless illusory formality ruled on by the Attorney General, not a judge, exercising independent judgment.

The motion court signed the Attorney General's findings. Those findings demonstrate a lack of independent judgment and rendered David's hearing a meaningless illusory formality.

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

Expert Credibility Rulings

The various doctors who testified Preston's PET findings corroborated their diagnoses are not credible(29.15L.F.1044,1046).

All experts who offered opinions Zink was incompetent to proceed were not credible(29.15L.F.1049). But, all of the experts testified Zink had the cognitive ability to understand the proceedings and they were credible(29.15L.F.1052).

Testimony from Benedict, Logan, Smith, and Hough that Zink was not competent to waive counsel was not credible(29.151054-55).

Counsel Credibility Rulings

Jacquinot's testimony, on why he did not get a PET scan, that he "decided not to expand the scope of the case in order to focus his resources on other issues" was credible(29.15L.F.1045). That decision was "fully-informed" and "strategic"(29.15L.F.1045).

Failing to get a PET scan was not prejudicial because Jacquinot and Winegarner "admitted" Zink's confessions showed Zink was "cold, callous, and calculating"(29.15L.F.1047).

Kenyon's testimony he believed Zink was competent was credible(29.15L.F.1049-50). Jacquinot's and Winegarner's contrary testimony on Zink's competency is not credible(29.15L.F.1049-50). Kenyon's testimony he had back and forth conversations about the law and defenses is credible and Jacquinot and Winegarner's contrary testimony is not credible(29.15L.F.1053). All the attorneys testified Zink had the cognitive ability to understand the proceedings and they all were credible(29.15L.F.1052).

Zink's waiver of counsel was voluntary because "all the credible evidence showed that Zink chose to waive counsel because he wanted to present a defense that counsel could not ethically present."(29.15L.F.1054). Testimony from Jacquinot and Winegarner Zink was not competent to self-represent was not credible(29.15L.F.1055). Kenyon's testimony Zink appeared competent to waive counsel was credible(29.15L.F.1055).

Jacquinot's testimony he investigated possible mitigation evidence from Zink's mother, June Fultz, was credible, and therefore, counsel made reasonable efforts to secure her mitigation(29.15L.F.1056-57).

Jacquinot testified Zink failed to supply James Durham's name, a witness Zink wanted, and Jacquinot was credible(29.15L.F.1060). Zink's failure to provide Jacquinot Durhan's name "defeats" this claim(29.15L.F.1060).

Kenyon and Jacquinot testified disparaging the prior conviction victims by calling Durham was very dangerous and potentially disastrous(29.15L.F.1061,1109). Jacquinot's testimony that taking into account those risks he might still have presented testimony similar to what Durham could have provided was not credible(29.15l.F.1061,1109).

Counsel was not ineffective through forcing Zink to choose self-representation "because counsel properly declined to present a defense that counsel believed had no foundation in law and would prejudice Zink"(29.15L.F.1088). Kenyon was credible when he testified he explained to Zink he could not ethically present a voluntary manslaughter defense and such a defense would make things worse for

Zink(29.15L.F.1088). Jacquinot was credible when he testified he advised Zink he did not believe the jury would convict Zink of voluntary manslaughter and such a defense might antagonize the jury(29.15L.F.1089).

Zink's pro se claims included in the amended motion alleged Jacquinot lied to him about presenting both voluntary manslaughter and diminished capacity defenses(29.15L.F.1097). Jacquinot testified he never lied to Zink and Jacquinot's testimony is credible and the claim is denied(29.15L.F.1097,1108).

Another pro se claim was Zink claimed counsels' inaction forced Zink to testify(29.15L.F.1107). Both Kenyon's and Jacquinot's testimony Zink insisted on a voluntary manslaughter defense was credible(29.15L.F.1107). Zink chose to testify in order to present his personal choice of defense and counsel did not compel Zink to testify(29.15L.F1107-08).

In a pro se claim, Zink alleged counsel had a conflict of interest because there was an irreconcilable personal conflict(29.15L.F.1110). Kenyon and Jacquinot both testified they were able to talk to Zink and their testimony was credible, and therefore no credible evidence of an irreconcilable breakdown existed(29.15L.F.1110-11). Further, both Jacquinot and Kenyon credibly testified they believed the only viable defense was diminished capacity and that decision of professional judgment did not create a conflict of interest(29.15L.F.1111).

Lack Of Independent Judgment

The Attorney General's findings, *supra*, show that within the very same claim witnesses were found credible as to matters which favored respondent, but also

incredible as to other aspects of that same claim where they provided testimony favorable to establishing the claim. The witnesses were either credible or they were not, independent of whether their testimony at any particular junction favored or disfavored proving a claim.

The evidence also shows the Attorney General's findings were expressly contradictory to witnesses' testimony. On cross-examination, respondent tried unsuccessfully to get Winegarner to concede the failure to get a PET scan done was a matter of resource allocation which respondent wanted equated with trial strategy(29.15Tr.759-61,764-68). Instead, Wingarner testified he could not express an opinion on resource allocation because he was only involved with representing David during the months immediately leading up to trial(29.15Tr.760-61,767-68). On cross-examination Jacquinot testified that he would not "categorize" and did not "view" failing to get a PET scan as strategy(29.15Tr.1009-10). Jacquinot's and Winegarner's testimony thus established there was no evidence to support the failure to obtain a PET was strategic.

On respondent's cross-examination, Winegarner acknowledged David's videotaped confession was detailed and disturbing(29.15Tr.758). Also on cross, Winegarner testified the preparation and presentation of the diminished capacity defense was not relegated to a position inferior to the mitigation case(29.15Tr.755-56). Continuing on cross, Winegarner testified if the jury had believed David's testimony, then there was evidence to support finding manslaughter(29.15Tr.762-63). In fact, the 29.15 judge, while sustaining 29.15 counsel's objection to respondent

questioning the adequacy of evidence to support manslaughter, stated: "As a matter of law, at the end of the evidence, I submitted a voluntary manslaughter"(29.15Tr.762-63).

On cross, Jacquinot testified David's confession was powerful and compelling evidence for respondent that would make obtaining a verdict less than first degree murder difficult(29.15Tr.1035-36). When respondent tried to get Jacquinot to concede the confession established deliberation, Jacquinot declined(29.15Tr.1035-36). Jacquinot testified the confession only provided a factual basis for finding deliberation because the jury could have found diminished capacity(29.15Tr.1036). Jacquinot disagreed the confession involved David berating Amanda(29.15Tr.1044).

Jacquinot and Winegarner, thus, did not testify David's confession proved David was "cold, callous, and calculating"(29.15L.F1047). Instead, both testified there was a basis to convict David of something less than first degree murder.

David's Hearing Was A Meaningless Formality

This Court has noted "credibility means capacity for being believed or credited at all . . . ." *State v. Madole*,148S.W.2d793,794(Mo.1941). *See, also*, *Nieberg Real Estate Co. v. Taylor-Morley-Simon, Inc.*,867S.W.2d 618,626(Mo.App.,E.D.1993)(citing *Madole* for this definition). Someone is a "truthful" witness if "the sense that the information put forth is 'believed or appropriately accepted by the affiant as true.'" *Moody v. St. Charles County*,23F.3d1410,1412(8th Cir.1994)(quoting *Franks v. Delaware*,438 U.S.154,165(1978)).

Truthfulness and credibility of a witness refer to the same quality - whether a witness should be believed. *See*, *e.g.*, *In the Interest of Q.D.D. v. J.I.D.*,144S.W.3d856,861(Mo.App.,S.D.2004)(deferring to court's findings on mother's "truthfulness" because it had a better opportunity to determine her "credibility"); *State v. Cole*,71S.W.3d163,170(Mo.banc2002)(prior convictions may be used to "to attack the defendant's truthfulness and credibility").

As the reproduced findings demonstrate, when David's counsel and the 29.15 experts provided testimony harmful to 29.15 claims they were infinitely credible. In contrast, when these witnesses provided testimony that was helpful to 29.15 claims, they suddenly became infinitely incredible. All of these witnesses either were credible or they were not credible. *See In the Interest of Q.D.D. v. J.I.D.* and *State v. Cole*.

Rule 4-3.3 "Candor Toward the Tribunal" mandates a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. This Court should, in the absence of compelling evidence to the contrary, presume when an attorney testifies the testimony satisfies this command. Here, counsel were truthful when they provided testimony favorable to respondent, but liars when they provided testimony helpful towards establishing the 29.15 claims.

Post-conviction proceedings must comport with due process notions of fundamental fairness. *Thomas v. State*,808S.W.2d364,367 (Mo.banc1991). The U.S. Supreme Court has viewed with contempt judges merely adopting a party's proposed

findings. *See United States v. El Paso Natural Gas Co*.,376U.S.651,656 n.4(1964). This Court has done similarly:

> Here the trial judge followed the often troublesome practice of adopting, without modification, significant portions of a proposed order prepared by respondent's counsel. Advocates are prone to excesses of rhetoric and lengthy recitals of evidence favorable to their side but which ignore proper evidence or inferences from evidence favorable to the other party. Trial judges are well advised to approach a party's proposed order with the sharp eye of a skeptic and the sharp pencil of an editor.

Massman Construction Co. v. Missouri Highway and Transportation Comm'n, 914S.W.2d801,804(Mo.banc1996). This Court has stated: "[t]he judiciary is not and should not be a rubber-stamp for anyone." *State v. Griffin*,848S.W.2d464,471(Mo.banc 1993).

In *State v. Kenley*,952S.W.2d 250,281(Mo.banc1997), Judge Stith dissented noting when a motion court signs respondent's proposed findings there should be evidence it exercised independent judgment. There was reason to question whether the motion court had in fact exercised independent judgment and the case should have been remanded for a new 29.15 hearing and independent findings. *Id.*284. The factors showing a lack of independent judgment were: (1) adoption of respondent's 29 pages of complex findings; and (2) respondent's findings uniformly found every State's witness credible and every defense expert not credible. *Id.*284. It was "exceedingly indicative of a lack of independent judgment that the motion court made

all of them [the findings] in exactly the terms suggested by the attorney general." *Id.*284. The same thing happened here because the motion court signed respondent's findings as they were submitted without any change. The Attorney General submitted 74 pages of complex findings (29.15L.F.1040-1113) in which counsel was infinitely credible when they had testimony harmful to proving 29.15 claims, but incredible when furnishing testimony that proved a claim. The deference accorded findings actually made by a motion court is not appropriate here.

In *Anderson v. State*,196S.W.3d28,39-42(Mo.banc2006), this Court found counsel was ineffective for failing to move to strike for cause a juror who could not fairly serve in the punishment phase. In *Anderson*, counsel expressly testified it was not their strategy to leave that juror on and the juror was left on because of a note taking error. *Id.*40-41. This Court found "[n]othing in the record" to support counsel strategically left the juror on. *Id.*40-41. In *Anderson*, the motion court had signed the Attorney General's findings. *See Anderson v. State,* SC87060 Appellant's Original Brief at 58-59.[13] Even though Anderson's counsel had testified it was not their strategy to leave the juror on, the Attorney General wrote and the motion court signed findings stating it was counsels' strategy to leave the juror on. *Anderson*,196S.W.3d at 40-41. *See Anderson* Original Appellant's Brief at 58-59.

[13] Judicial notice of Appellant's original brief in *Anderson v. State*, SC87060 and the supporting case record references from that brief are requested.

The motion court here did the same thing Anderson's motion court did. Counsel testified here the failure to obtain a PET scan was not strategic (29.15Tr.759-61,764-68,1009-10). Despite that testimony, the Attorney General wrote and the motion court signed findings it was counsels' strategy not to obtain a PET scan(29.15L.F.1045).

To permit the findings here to stand renders David's 29.15 hearing a meaningless illusory formality devoid of any sense of due process. That is because the findings are the Attorney General's findings and not a judge exercising his responsibility and obligation of independent judgment as a neutral arbiter of facts. What the Attorney General did here is what it always does as to credibility findings on 29.15 witnesses.

This Court should reverse and remand with directions David's 29.15 case be reheard by a judge, other than Judge Roberts, who will then exercise independent judgment and not just sign respondent's findings.

IX.

RESPONDENT'S WITNESSES AS COURTROOM SECURITY

The motion court clearly erred in dismissing the 29.15 claim counsel was ineffective for failing to object to Sheriff Snodgrass and Deputy Stewart occupying the dual roles of courtroom security and respondent's witnesses because David was denied his rights to due process, a fair and impartial jury, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that David was incompetent to dismiss the claim and the claim was meritorious and requires a new trial.

The 29.15 evidence established David was incompetent to proceed. Because David was incompetent to proceed, the motion court should not have dismissed his claim counsel was ineffective for failing to object to Sheriff Snodgrass and Deputy Stewart occupying dual roles as courtroom security and respondent's witnesses, despite David's request it be dismissed

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

Snodgrass' and Stewart's Testimony

St. Clair County Sheriff Snodgrass recounted the Highway Patrol contacted him and asked him to make contact with David(T.Tr.2221-22). At about 7:15 p.m.,

Snodgrass, accompanied by Deputy Stewart, went to David's father's house, and told David the Patrol wanted to talk to him(T.Tr.2223,2225,2227). Snodgrass recounted David went to the Sheriff's office where he was interrogated, admitted having killed Amanda, and said Amanda's body could be found behind the Mt. Zion Cemetery(T.Tr.2227-30). Snodgrass recounted David led the police to where he buried Amanda(T.Tr.2230).

St. Clair County Deputy Stewart recounted that on August 6, 2001, David asked to talk to him(T.Tr.2631-32). David's videotaped statement to Stewart admitting the acts he committed was played(T.Tr.2636-40;Trial Ex.67). David said he knew when his truck struck Amanda's car he was drunk and he was worried he would be sent back to prison for a DUI parole violation(Trial Ex.67). David had Amanda get in his truck and they left(Trial Ex.67). They spent the night at the El Kay(Trial Ex.67). David decided to kill Amanda because his involvement with her after the accident could cause his parole to be revoked(Trial Ex.67). Stewart was involved throughout the case's investigation(T.Tr.2633). Stewart had accompanied Snodgrass to David's father's house when David was taken into custody(T.Tr.2633).

During David's cross-examination of Stewart, he denied he had agreed to make cigarettes available to David in exchange for statements from David on how to locate the knife connected with Amanda's death(T.Tr.2669), denied that in response to David's then stated desire to get death he told David that David needed to supply as an aggravator having kidnapped Amanda(T.Tr.2670), and denied he had advised David on how to establish he acted with deliberation(T.Tr.2670-71).

29.15 Allegations And Dismissal

The 29.15 alleged David was denied his rights to a fair trial, a fair and impartial jury, effective assistance of counsel, freedom from cruel and unusual punishment, and due process because counsel failed to object to Snodgrass and Stewart having been state witnesses and served as courtroom security(29.15L.F.358-60).

Before the 29.15 hearing began, David informed the motion court he was directing counsel to dismiss this claim(29.15Tr.76-77). David told the court he understood the legal effect of dismissing(29.15Tr.76-77). The court then dismissed with prejudice(29.15Tr.77;29.15L.F.1041).

Motion To Supplement the Record

Filed contemporaneously with this brief is a motion requesting this Court to consider Sheriff Snodgrass' 29.15 discovery deposition. Snodgrass testified that he and Stewart both provided courtroom security in the presence of the jury(Snodgrass Depo.pgs.17-25).

Dual Roles Require New Trial

In *Turner v. Louisiana*,379U.S.466,466-67,474(1965), the conviction was reversed because two state's witnesses also served as courtroom security. The two officers' testimony included admissions the defendant made. *Turner*,379U.S. at 467.

In *State v. Tyarks*,433S.W.2d568,569-70(Mo.1968) this Court stated:

> We now hold that, as a general rule, it is reversible error to permit an officer, who testifies about matters which are more than merely formal aspects

of the case, and whose testimony tends to prove the guilt of the defendant, to be in charge of the jury.

This Court reasoned it did "not believe the right to an impartial jury can be reconciled with a practice which permits a substantial witness for the State to maintain a custodial relationship with the members of the jury throughout the trial." *Id.*570. Because Deputy Wilkes provided testimony that tended to prove Tyarks' guilt and was responsible for the jury's security, Tyarks' conviction was reversed. *Id.*572. This Court added: "[t]he relationship is one which, 'could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial.'" *Id.*570(quoting *Turner*,379U.S. at 474).

At the 29.15 hearing, counsel presented evidence establishing David was incompetent for trial. *See* Point VII. Because David was incompetent to proceed for trial, he, likewise, was incompetent to direct a claim for which he was entitled to 29.15 relief be dismissed.

Snodgrass' and Stewart's testimony tended to prove David's guilt of first degree murder. *See Tyarks*. Their testimony, like the testimony in *Turner*, included admission evidence. Moreover, on David's cross-examination of Stewart, he denied matters David sought to establish(T.Tr.2669-71). Despite these witnesses' critical role in proving David's guilt, they served as courtroom security. Snodgrass' and Stewart's dual roles denied David the right to an impartial jury.

Reasonable counsel would have objected to Snodgrass' and Stewart's dual roles. *See Turner*, *Tyarks*, and *Strickland*. David was prejudiced because these

witnesses' dual roles denied him a fair and impartial jury. *See Turner*, *Tyarks*, and *Strickland*. A new trial is required.

If this Court is unwilling to order a new trial because the motion court was not presented with evidence Snodgrass and Stewart had provided courtroom security, then this Court should remand for an evidentiary hearing to present that evidence. A hearing should be ordered because Snodgrass' deposition testimony establishes this claim can be proven with in-court evidence.

A new trial or at minimum a remand for an evidentiary hearing is required.

X.

CRAWFORD VIOLATION

The motion court clearly erred denying counsel was ineffective for failing to object to Dr. Norton's hearsay testimony about Dr. Spindler's autopsy findings and for failing to object to argument based on that evidence because David was denied his rights to due process, freedom from cruel and unusual punishment, to confront witnesses against him, and effective assistance, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected to this hearsay as violating *Crawford v. Washington* and continued to object when respondent relied on it in argument. David was prejudiced because respondent relied on Spindler's hearsay findings to establish David acted with deliberation.

Counsel failed to object to Dr. Norton's testimony recounting Dr. Spindler's autopsy results. That testimony and the later argument based on it should have been objected to under *Crawford v. Washington*,541U.S.36(2004). This evidence, and related argument, was prejudicial because it was used to show David acted with deliberation.

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

In *Crawford,* the Court held that for testimonial evidence to be admissible the Sixth Amendment demands the witness be unavailable and the defendant have had a prior opportunity for cross-examination, regardless of whether a court considers the statements reliable. *Crawford*,541U.S. at 53-54. In *State v. March*,216S.W.3d663,664-67(Mo.banc2007), this Court held *Crawford* was violated when a records custodian testified to the results of a chemist's laboratory findings and the chemist did not testify.

Respondent's Evidence And Argument

Respondent called pathologist Norton to testify to the autopsy results of pathologist Spindler because Spindler was seriously ill with cancer(T.Tr.2404-15). Norton recounted Spindler's findings and Spindler's report and conclusions on the cause of death were introduced(T.Tr.2421-69). During initial guilt closing argument, respondent argued Spindler's findings, including those as to the cause of death, established David had acted with the deliberation required for first degree murder(T.Tr.3886-90). In rebuttal guilt argument, respondent again argued Norton's testimony supported deliberation(T.Tr.3965-66,3975-76).

Findings

The amended motion pled counsel was ineffective for failing to object to Spindler's autopsy findings being introduced as violative of *Crawford* and counsel should have "continued to object" based on *Crawford* to respondent's reliance on that evidence in argument (29.15L.F.398). The findings only stated the prosecutor properly argued Spindler's autopsy findings because the autopsy results were

admitted into evidence, and therefore, any closing argument objection lacked merit(29.15L.F.1071).

Counsel Was Ineffective

Like in *March, supra,* Norton improperly testified to someone else's findings, Spindler's. *Crawford* prohibited Norton's testimony and the subsequent closing argument, that Spindler's findings as adduced through Norton, established deliberation. In *Glass v. State*,2007W.L.1953413 *6(Mo.banc July 6, 2007), this Court rejected a claim similar to that presented here, solely because Glass' case was tried pre-*Crawford*. *Crawford* was decided March 8, 2004. *See Crawford* v. *Washington*,541U.S.36(2004). Because David's trial began July 12, 2004, *Glass* is inapplicable.

Jacquinot did not consider a *Crawford* objection(29.15Tr.988). Jacquinot did not know whether *Crawford* was decided prior to trial, but if it was, then they needed to have reassessed their approach(29.15Tr.988).

Reasonable counsel would have objected to both the admission of this evidence and its use during argument. *See Crawford*, *March,* and *Strickland*. David was prejudiced because respondent admitted this evidence and used it in arguments to establish deliberation. *See March* and *Strickland.*

A new trial is required.

XI.

METHOD OF LETHAL INJECTION

The motion court clearly erred in denying discovery and a hearing on the claim Missouri's method of lethal injection constitutes cruel and unusual punishment because that ruling denied David his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that the Taylor case lethal injection litigation has identified defects in how Missouri conducts executions such that discovery should have been allowed on the method and the pleadings alleged facts which, if true warrant relief.

Discovery and a hearing were required on the claim Missouri cannot perform executions that do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

This Court reviews for clear error. *See* Point I. The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991). Under the Eighth Amendment, a punishment "must not involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia*,428U.S.153,173(1976)(opinion of Stewart, Powell, and Stevens, J.J.). *See, also, Louisiana v. Resweber*,329U.S.459,463(1947)("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence"). A chosen method of execution must minimize the risk of unnecessary pain, violence, and mutilation. *Glass v.*

Louisiana,471U.S.1080,1086(1985)(Brennan, J. dissenting from certiorari denied). A punishment violates the Eighth Amendment if it causes torture or lingering death. *Id*.1086(citing *In re Kemmler*,136U.S.436,447(1890)).

A party is entitled to discovery of matters reasonably calculated to lead to the discovery of admissible evidence. *See State ex rel. Ingrid Chandra v. Sprinkle*,678S.W.2d804,807(Mo.banc1984). To be entitled to an evidentiary hearing, a movant must: (1) allege facts, not conclusions, that warrant relief; (2) the facts alleged must not be refuted by the record; and (3) the matters complained of must have resulted in prejudice. *State v. Driver*,912S.W.2d52,55(Mo.banc1995).

David's 29.15 counsel retained anesthesiologist Dr. Mark Heath, M.D., to review procedures Missouri follows in performing executions to determine if those procedures result in pain, prolonged suffering, and torture(29.15L.F.235). For Dr. Heath to evaluate that procedure, 29.15 counsel sought discovery of information and materials in respondent's custody(29.15L.F.234-48). The 29.15 court withheld ruling on the discovery request until Judge Gaitan took additional action in light of his order finding the state's execution procedures constitutionally deficient and directing the state to submit a revised execution protocol(29.15Tr.31-37). *See Taylor v. Crawford*, No. 05-4173-CV-C-FJG (W.D. Mo. June 26, 2006) order and subsequent orders of 7/25/06,9/12/06,10/16/06.

Respondent later filed a motion to dismiss without a hearing(29.15L.F.790-94;29.15Tr.56-59). The 29.15 court granted respondent's motion and never allowed discovery(29.15Tr.56-59,65;29.15L.F.805-08).

The grounds for dismissing the claim without a hearing and prohibiting discovery were the decisions in *Worthington v. State*,166S.W.3d566,582-83(Mo.banc2005) and *Morrow v. State*,21S.W.3d819,828(Mo.banc2000) have held such claims not cognizable(29.15L.F.806). In *Worthington*, this Court relied on *Morrow* to reject the lethal injection claim. *Worthington*,166S.W.3d at 582-83. While so holding, this Court noted the particular lethal injection claim raised was a per se challenge based on the Missouri incident at Emmitt Foster's execution and nine similar execution incidents from other states. *Id.*582-83.

The claim here and its related discovery, unlike *Morrow* and *Worthington*, were premised on the kinds of problems Judge Gaitan identified in *Taylor*(29.15L.F.234-48,425-27;29.15Tr.33-37). Some of the problems Judge Gaitan identified included: (a) there was no consistent written protocol followed; (b) the doctor responsible for doing the executions, "John Doe I," exercised total discretion over the execution protocol and no one monitored his changes or modifications; (c) "John Doe I" testified he was dyslexic and transposes numbers and he has sole responsibility for correctly mixing drugs used to perform executions; and (d) there was a lack of monitoring anesthetic depth to insure an adequate dose of anesthesia is given prior to administering the drugs that kill. *See Taylor* order of June 26, 2006 at 11-13.

The amended motion pled as follows. Missouri's process of performing executions subjects persons sentenced to death to extreme pain, prolonged suffering, and torture in violation of the Eight and Fourteenth Amendments and these problems

are likely to occur in executing David(29.15L.F.425). The process followed causes unnecessary pain and suffering because the paralytic, Pavulon, is used(29.15L.F.425). Pavulon does not impact consciousness or perception of pain and suffering(29.15L.F.425). It is illegal to use Pavulon to euthanize animals(29.15425). The amended motion noted Judge Gaitan's June 26, 2006 order had directed: (a) a board certified anesthesiologist mix the drugs used to perform executions; (b) the anesthesiologist either personally administer the drugs or supervise those who do; and (c) the anesthesiologist monitor anesthetic depth(29.15L.F.426-27).

While the Eighth Circuit reversed Judge Gaitan's decision in *Taylor v. Crawford*,487F.3d1072(8thCir.2007), Taylor's counsel filed a motion to stay that Court's mandate because Taylor will file with the U.S. Supreme Court a petition for certiorari and there is a reasonable probability that petition will be granted. *See* August 13, 2007 Motion to Stay *Taylor* Mandate.

In light of Judge Gaitan's *Taylor* findings, the requested discovery should have been allowed because the matters sought were reasonably calculated to lead to the discovery of admissible evidence. *See Chandra*. Likewise, in light of *Taylor*, the amended motion alleged matters entitling David to relief. *See Driver*. Moreover, Michael's claim is cognizable because Rule 29.15(a) provides it is the vehicle for challenging the constitutionality of a conviction or sentence.

This Court should remand with directions to allow discovery and a hearing.

XII.

RING/APPRENDI VIOLATION

The motion court clearly erred denying the penalty instructions, in violation of *Ring/Apprendi,* fail to make required factual findings, ensure respondent satisfied the beyond a reasonable doubt burden, and failed to instruct on what to do when mitigators and aggravators are equally balanced and appellate counsel was ineffective for failing to raise counsels' instruction objections because David was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that the penalty instructions violate *Ring's* /Apprendi's mandates and reasonable appellate counsel would have raised counsels' objections and David was prejudiced because the punishment decision is not reliable under *Ring/Apprendi.*

The penalty instructions and §565.030.4 failed to require the jury make fact findings at each of the four punishment decision's steps, ensure respondent has satisfied its burden beyond a reasonable doubt, and failed to instruct the jury how to decide punishment when mitigators and aggravators are equally balanced. Even though trial counsel raised these objections, appellate counsel failed to brief them.

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened

reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

A defendant is entitled to effective assistance of appellate counsel. *Evitts v. Lucey*,469U.S.387,396-97(1985). To be entitled to relief, a movant must establish competent and effective appellate counsel would have raised the error and there is a reasonable probability the appeal's outcome would have been different. *Williams v. State*,168S.W.3d433,444(Mo.banc2005).

The 29.15 findings denied this claim without a hearing under *State v. Gill*,167S.W.3d184,193(Mo.banc2005) and *State v. Glass*,136S.W.3d496,520-21(Mo.banc2004)(29.15L.F.791-92). Also, the findings stated trial counsel made the objections presented here(29.15L.F.791-92).[14]

In *Apprendi v. New Jersey*,530U.S.466,490(2000), the Court held any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a defendant is exposed. *Id*.

[14] This claim is presented to preserve it for future federal review. Reconsideration of prior decisions is requested.

The penalty phase jury instructions submitted in David's case (T.L.F.1110-16,1118)[15] and §565.030.4 violated David' s rights under *Apprendi* to have a jury determine all facts necessary to increase punishment to death. In *Ring v. Arizona*,536U.S.584,589(2002), the Court applied *Apprendi* to a capital case, and ruled the Sixth and Fourteenth Amendments require a jury determine any fact necessary to increase punishment to death.

Section 565.030.4 and the penalty phase instructions submitted in David's case set forth a "four step" procedure for whether a death sentence shall be imposed. *State v. Whitfield*,107S.W.3d253(Mo.banc2003). "Step 1" required the jury to find one or more statutory aggravators. *Id*.258-59. "Step 2" required the jury to find the evidence in aggravation warrants death. *Id*.259. In "Step 3," the jury was directed to determine whether the evidence in mitigation outweighed aggravation found in Steps 1 and 2. *Id*. If it does, the defendant is ineligible for death. *Id*. In "Step 4," the jury was directed it must assess and declare punishment at life if it decides under all the circumstances not to impose death. *Id*.

The scheme set forth by §565.030.4, on its face and as applied here, and the penalty phase jury instructions in David' case violated *Apprendi*. First, the instructions did not require a *specific*, written jury finding at each step. The instructions did require the jury to write out statutory aggravators found in Step 1

[15] As authorized in Rule 84.04(h)(3), the penalty instructions are included in this brief's Appendix and not reproduced in the text of the Argument.

(T.L.F.1115). But the instructions did not require the jury to make any specific, written findings for Steps 2 or 3. This violated *Apprendi* and David's right to reliable sentencing under the Eighth Amendment. *Woodson v. North Carolina*,428U.S.280,305(1976). Under the silent record, it is possible, the jury was not unanimous in finding the evidence in aggravation warranted death under Step 2, and yet proceeded on to Steps 3 and 4. It is also possible the jury failed to weigh aggravators and mitigators under Step 3, or the jury skipped Steps 2 and 3 altogether and proceeded from Step 1 to Step 4. Without specific written findings at each step, David's rights were violated.

Additionally, §565.030.4's, scheme on its face and as applied, and the penalty phase jury instructions failed to require respondent prove, and the jury unanimously find, all the necessary findings at each step beyond a reasonable doubt. Step 3 is particularly problematic and unconstitutional. That Step instructed jurors to "determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment"(T.L.F.1113). The instruction further stated: "It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment [at life without parole]" (T.L.F.1113);§565.030.4(3).

To be constitutional, Step 3 must require respondent prove, and the jury unanimously find, beyond a reasonable doubt aggravation outweighs mitigation. Step 3, however, did *not* do this. The instruction shifted the burden to David to prove or show mitigating circumstances outweighed aggravating. The Step 3 instruction did not tell the jury it must unanimously find aggravating circumstances outweighed mitigating beyond a reasonable doubt. Nor was the jury required to make a specific written finding of this. There was no discussion of reasonable doubt at all in the Step 3 instruction. The instruction is written in a confusing, misleading and backward fashion which reverses the weighing process and burden of proof.

The Step 3 instruction and §565.030.4(3) are further unconstitutional because they failed to instruct jurors what to do when aggravators and mitigators were equally balanced and that life without parole was required. Likewise, it is unconstitutional to not give the defendant the benefit of a non-unanimous decision which could conceivably result where 11 jurors find mitigators outweigh aggravators, and only one juror finds aggravators outweigh mitigators. Under such a scenario, jurors are currently instructed they must proceed to Step 4. Because §565.030.4(3) and the instructions allowed imposing death, even where most jurors believed mitigators outweighed aggravators, the instructions and statute are unconstitutional.

Trial counsel made objections asserting the grounds advanced here(T.Tr.4505-11) and renewed them in the new trial motion(T.l.F.1205-17). Reasonable appellate counsel would have raised them. *See Apprendi and Ring*. David was prejudiced

because the jury's punishment decision was not reliable as it was not made in compliance with *Apprendi* and *Ring* and therefore he was entitled to relief on appeal.

For the reasons discussed, life without parole should be imposed.

CONCLUSION

For the reasons discussed, David Zink requests the following: Points I, III, IV, V, VI, VII, IX, X, a new trial; Points I, II, a new penalty phase; Point VIII a new 29.15 hearing before a different 29.15 judge; Point IX remand for a 29.15 hearing on respondent's witnesses dual role as courtroom security; Point XI remand for a hearing and allow discovery on lethal injection procedure; and Point XII impose life without parole.

Respectfully submitted,

_____
William J. Swift, MOBar #37769
Assistant Public Defender
Attorney for Appellant
Woodrail Centre
1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 882-9855
FAX: (573) 882-9468

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 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 30,805 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in September, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief with brief appendix and a floppy disk containing a copy of this brief were hand-delivered this 10th day of September, 2007, to Office of the Missouri Attorney General, 221 West High St. Jefferson City, Missouri 65101.

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William J. Swift

APPENDIX

IN THE
MISSOURI SUPREME COURT

DAVID ZINK,	**)**	
	)	
Appellant,	**)**	
	)	
vs.	**)**	**No. SC 88279**
	)	
STATE OF MISSOURI,	**)**	
	)	
Respondent.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CLAIR COUNTY, MISSOURI
TWENTY-SEVENTH CIRCUIT
THE HONORABLE WILLIAM J. ROBERTS, JUDGE

APPELLANT'S APPENDIX TO 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) 882-9855
FAX: (573) 882-9468

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