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 REPLY BRIEF

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JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

Both original statements are incorporated here.

POINTS RELIED ON

I.

PET SCAN

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Preston to testify to the PET scan results showing David has organic anatomical physiological brain damage, and for failing to combine that with Dr. Logan's testimony that David's damage was caused by childhood meningeal encephalitis, and thereby, explained David's mental impairments' causes with two M.D.s' combined expertise because Preston and Logan would have provided "hard science" verification for psychologists' Benedict's and Smith's diagnoses which respondent disparaged for lacking the objective verifiability M.D.s' diagnoses have and refuted David's impairments were volitional, and therefore, was not cumulative.

Preston's testimony was admissible under *Frye* because the 29.15 findings stated PETs are generally accepted in the medical community and Preston's interpretation was credible. The PET results were not required to provide a mental health diagnosis standing alone because they are a diagnostic tool that verified Benedict's and Smith's diagnoses and provided anatomical bio-chemical grounds for Logan's findings. Effective counsel was required to present Preston and Logan and David was prejudiced because their combined testimony compellingly refuted respondent's deliberation and

aggravation evidence and Preston unequivocally found David's brain damage was not caused by illicit drug use.

State v. Kinder,942S.W.2d313(Mo.banc1996);

Ervin v. State,80S.W.3d817(Mo.banc2002);

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

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

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 represented General Sherman's father was sentenced to death for killing Sherman's mother, but despite that deprivation had not committed acts like David because the 29.15 amended motion alleged Ahsens argued matters not in evidence and presented personal opinion, and thus, the 29.15 pleadings encompassed that the representations about Sherman were egregiously factually false as 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.

State v. Storey,901S.W.2d886(Mo.banc1995);

U.S. Const. Amends. VI, VIII, 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 these are not claims of trial court error, they were not decided on direct appeal, and they could not have been presented on direct appeal because they required presenting evidence from mental health experts why David was incapable of making a knowing, intelligent, and voluntarily decision to self-represent, failure of the Public Defender to provide counsel who was available and equipped to address David's mental illnesses, and counsels' ineffectiveness in having failed to challenge David's competence to represent himself.

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.3d1006(8thCir1998);

Kyles v. Whitley,514U.S.419(1995);

Antwine v. Delo,54 F.3d1357(8thCir.1995);

U.S. Const. Amends. VI, VIII, 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 and there was no showing of a case specific need to restrain David.

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

Sochor v. Florida,504 U.S.527(1992);

U.S. Const. Amends. VI, VIII, 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 for failing to object because the trial court did not advise David of restrictions it was imposing on self-representation, including shackling and not allowing David to approach witnesses with exhibits, before David chose self-representation in that this claim alleged counsel was ineffective and required presenting evidence from counsel not part of the direct appeal record and, therefore, the claim is cognizable.

Tisius v. State,183S.W.3d207(Mo.banc2006);

U.S. Const. Amends. VI, VIII, 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, 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 and this claim is cognizable because it required presenting evidence from counsel and mental health experts, not part of the direct appeal record, to establish that counsel was ineffective for failing to challenge David's competency and that David was incompetent at trial.

Tisius v. State,183S.W.3d207(Mo.banc2006);

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

ARGUMENT

I.

PET SCAN

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Preston to testify to the PET scan results showing David has organic anatomical physiological brain damage, and for failing to combine that with Dr. Logan's testimony that David's damage was caused by childhood meningeal encephalitis, and thereby, explained David's mental impairments' causes with two M.D.s' combined expertise because Preston and Logan would have provided "hard science" verification for psychologists' Benedict's and Smith's diagnoses which respondent disparaged for lacking the objective verifiability M.D.s' diagnoses have and refuted David's impairments were volitional, and therefore, was not cumulative.

Preston's testimony was admissible under *Frye* because the 29.15 findings stated PETs are generally accepted in the medical community and Preston's interpretation was credible. The PET results were not required to provide a mental health diagnosis standing alone because they are a diagnostic tool that verified Benedict's and Smith's diagnoses and provided anatomical bio-chemical grounds for Logan's findings. Effective counsel was required to present Preston and Logan and David was prejudiced because their combined testimony compellingly refuted respondent's deliberation and

aggravation evidence and Preston unequivocally found David's brain damage was not caused by illicit drug use.

Respondent asserts throughout that the PET scan evidence from Dr. Preston was unhelpful and otherwise inadmissible because there was 29.15 evidence PET scan results cannot be used alone to render a conclusive definitive mental health diagnosis and PETs are not used diagnostically in the everyday situation(Resp.Br.23-26,32).

Trial Evidence And Respondent's Challenges to Psychologists' Testimony

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). 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).

Unlike Preston, Benedict's testing **did not uncover any brain damage** evidence(T.Tr.2983). On cross-examination, the prosecutor highlighted 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). On cross-

examination of Smith, the prosecutor emphasized he was Ph.D. and not an M.D.(T.Tr.4484).

Respondent's initial penalty argument disparaged David's mental illnesses as "some behavioral problem that he has"(T.Tr.4526). In rebuttal penalty argument, respondent repeated this theme, stating the mitigation could be summarized as "some sort of behavioral problems"(T.Tr.4552).

Critical 29.15 Evidence

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). Benedict testified that there are "significant correlations" between certain PET findings and certain patterns of behavior(29.15Tr.134). Benedict testified that a PET would be valuable as one of many multifaceted diagnostic tools, even though it would not be the sole determinant in making a diagnosis(29.15Tr.134-35).

Within Dr. Smith's field it is generally accepted to rely on PET scans as a diagnostic tool supportive of a diagnosis(29.15Tr.575-76,621-22,634). 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). Preston's scan

findings help explain David's personality disorder and its origin and identify his brain functioning problems(29.15Tr.613-14). Preston's findings would have confirmed Smith's trial diagnoses(29.15Tr.619).

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). 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).

Logan would have explained Preston's cingulate gyrus and frontal lobe findings were significant because of their role in modulating emotion, executive planning, and higher intellectual function(29.15Tr.514-15,517-18). Preston's amygdala findings were significant because of its role in evaluating information and making decisions(29.15Tr.515).

Respondent's Frye Argument

According to respondent, Preston's testimony was inadmissible under the *Frye* test(Resp.Br.30-33). *See Frye v. United States*,293F.1013(D.C.Cir.1923). Respondent claims that Preston's testimony was inadmissible because the PET scan could not, standing alone, show David suffered from a mental disease or defect(Resp.Br.32-33).

This Court has recognized that under the *Frye* test that "results of scientific procedures 'may be admitted only if the procedure is sufficiently established to

have gained general acceptance in the particular field in which it belongs.'" *State v. Kinder*,942S.W.2d313,326(Mo.banc1996)(quoting *State v. Davis*,814S.W.2d593(Mo.banc1991)). Preston testified that PET scans are universally relied on in medicine(29.15Tr.320). The 29.15 findings stated that the general acceptance of PET scans within the medical community was uncontested and accepted as true(29.15L.F.1044). The findings also stated that Preston's interpretation of David's PET was credible(29.15L.F.1044). Preston's testimony, and the 29.15 findings based on them, establish that the PET scan results are admissible under *Frye*. *See Kinder*. Preston's testimony and the findings both concluded that PETs are generally accepted within nuclear medicine. *See Kinder*.

In *Kinder*, evidence of criticisms directed at how the D.N.A. statistical evidence was generated went only to the weight to be given the D.N.A. evidence by the jury and not its admissibility. *Kinder*,942S.W.2d at 327. Evidence that PET scans cannot be used alone to formulate mental health diagnoses, but are a diagnostic tool in aid of making diagnoses, would only go to the weight to be given to that evidence and not its admissibility. *See Kinder*.

To support its arguments respondent relies on *United States v. Purkey*,428F.3d738,752-753(8thCir.2005) where that court concluded that the District Court properly excluded Preston's testimony(Resp.Br.32). The District Court had found '"although Dr. Preston is qualified in the field of nuclear medicine, he is not qualified to testify regarding defendant's state of mind and actions at the time of the offenses or at the time that Mr. Purkey gave his

statements to the investigators."' *Id.*752(quoting the District Court). The Eighth Circuit stated that the District Court had properly excluded Preston's testimony from the guilt phase because Preston had testified "the images produced by the tests could not predict behavior and did not have a causal relationship to criminal behavior." *Id.*753. The reason the District Court was correct was because there was no record evidence connecting Preston's testimony to Purkey's state of mind and actions at the time of the offense or Purkey's state of mind when he gave police interrogation statements. *Id.*752. Unlike in *Purkey*, Drs. Benedict, Smith, and Logan all provided testimony that Preston's PET findings supported and corroborated their mental health diagnoses. *See supra*. Moreover, Benedict, Smith, and Logan linked their diagnoses with Preston's findings, something Purkey's counsel failed to do.

Respondent relies on *State v. Brown*,998S.W.2d 531,549(Mo.banc1999), to support its assertion Preston's testimony was inadmissible(Resp.Br.31-32). In *Brown*, this Court held it was proper for the trial court to have excluded a forensic social worker recounting statements the defendant made to her because the same evidence could have been presented without an expert. *Brown*,998S.W.2d at 549. The findings of a nuclear medicine test are not something which can be presented without the expertise of a nuclear medicine physician, and therefore, *Brown* is irrelevant.

According to respondent, Preston's 29.15 testimony was cumulative to Benedict's trial testimony(Resp.Br.29-30). To support that assertion respondent

has reproduced trial testimony from Benedict in which Benedict testified that David's ADHD can be traced to deficits in the prefrontal cortex area(Resp.Br.29-30 relying on T.Tr.3023-24). The jury repeatedly heard from the prosecutor that what Benedict and Smith had to say was irrelevant because their findings lacked the concrete data an M.D. can supply(T.Tr.3133-34,4484). Because of how their testimony was disparaged it was not cumulative to Preston. Most importantly, unlike Preston, Benedict **found no evidence of brain damage as to how David's brain works,** and thus, Preston's testimony in combination with Logan's testimony would not be cumulative(T.Tr.2983).

Preston testified he does not use PETs to make diagnoses, that is left to other professionals with different expertise(29.15Tr.350). Because Preston's training and expertise is in nuclear medicine (29.15Tr.309), it would be inappropriate for him to render mental health diagnoses based on PET scan results. Thus, Preston's analysis is appropriately limited to identifying brain damage and bio-chemical deficiencies revealed in a PET scan. Preston's findings have value when they are combined with the expertise of mental health experts whose function it is to make diagnoses as could have been done with Benedict, Smith and Logan.

Respondent states that Logan's testimony included that PETs are not diagnostic tools used "in everyday situations"(Resp.Br. 25 relying on 29.15Tr. 535). A death penalty case is not the everyday situation. 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).

Preston Found David's Brain Damage Was Not Caused By Illegal Drug Use

Respondent asserts that Preston's testimony would not have been helpful because Preston testified that the brain damage the PET scan identified could have been caused by illicit drug use(Resp.Br.36 relying on 29.15Tr.353). Respondent stated that Preston testified that "the asymmetry could have been due to prior cocaine or amphetamine use"(Resp. Br. 23 relying on 29.15Tr.353). After Preston stated it was "possible" that David's brain abnormalities were the product of drug use, Preston then explained why **he did not believe that was the case**(29.15Tr.353). Preston indicated cocaine and amphetamine use produces PET results scattered in all lobes(29.15Tr.353). In contrast, Preston's testing found localized frontal lobe abnormalities(29.15Tr.353,358). Preston unequivocally testified that David's PET scan results as to his frontal lobe deficits were not consistent with being caused by illicit drug use(29.15Tr.358).[1] Instead, Preston identified David's deficits as somehow associated with a traumatic brain injury(29.15Tr.353).

[1] The relevant pages of Preston's testimony (29.15Tr.353,358) on this subject are included in the Appendix to this reply brief at A-1 - A-2.

Respondent claims that "other doctors acknowledged" David's brain damage could have been caused by illegal drug use(Resp.Br.36 relying 498,514). The pages respondent referenced simply reflect that only Logan, not multiple doctors, recounted that he and Preston had **consulted and discussed the question Preston had raised** about the possibility of illegal drug use as the cause of David's brain damage(29.15Tr.498,514). Logan did not acknowledge on the referenced pages David's brain damage could have been caused by illegal drug use as now asserted by respondent.

According to respondent David was not prejudiced because it could have argued, based on Preston's testimony, that "Zink's drug use, not his personality disorders, was responsible for his brain deficits."[2] Since Preston affirmatively explained why David's brain damage was not caused by illegal drug use (29.15Tr.353,358) such an argument could not have been based on any testimony from Preston.

Counsel Was Ineffective And David Was Prejudiced

[2] As discussed in both appellant's briefs, Preston identified brain damage and Logan found it was caused by David having 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). It is because of that brain damage David suffers from certain mental illnesses – David's diagnosed illnesses could not be the cause of "brain deficits" as respondent now asserts.

Respondent has argued that David was not prejudiced as to either guilt or penalty because of respondent's substantial evidence of deliberation and the seriousness of the aggravation evidence(Resp.Br.33-37). One of capital counsel's primary duties is to neutralize respondent's damaging evidence. *Ervin v. State*,80S.W.3d817,827(Mo.banc2002).

Assuming respondent had significant evidence as to both deliberation and aggravation, it was even more incumbent on trial counsel to obtain Preston's and Logan's findings and to present them in conjunction with Benedict and Smith's findings. *See Ervin*. The *DeLong* case, involving the same K.C. Capital Defender Office, was highly aggravated because there were five homicide victims(29.15Tr.905). Despite *DeLong's* highly aggravated nature, a brain scan was obtained and DeLong was sentenced to life(29.15Tr.905). DeLong demonstrates that even with substantial aggravation, a result better than that obtained for David is possible. In fact, *DeLong* had just finished when David's case arrived and it had "drained the mental and physical and economic resources of everybody in the [Kansas City Capital] office"(29.15Tr.164-65).

Preston's and Logan's testimony would have refuted respondent's initial and rebuttal penalty arguments that David's mental illnesses were not mitigating because David's acts were merely a volitional "behavioral problem" divorced of any anatomical defects and bio-chemical disturbance(T.Tr.4526,4552).

According to respondent counsel, was not ineffective because they reasonably stopped investigating (Resp.Br.27-29). Respondent also asserts

counsel acted reasonably because counsel did not have unlimited time and resources(Resp.Br.27-29).

In *Hutchison v. State*,150S.W.3d292,302(Mo.banc2004), counsel failed to leave time to prepare adequately and were ineffective. Counsel did the same thing here. David's case is not about a failure to investigate (Resp.Br.28-29), but rather a failure to do a test it was decided early on needed to be done and would be done. It likewise is not a case, as respondent wants to cast it as requiring the investigation that would be done by the best criminal defense attorney in the world (Resp.Br.28). Respondent claims counsel acted reasonably in light of the "time pressures" of the case(Resp.Br.28-29). Dr. Hough was brought into David's case in July or August 2001 and Hough's last contact with any defense team member was August 2003(29.15Tr.645,664). While Hough was on the case it was decided a brain scan would be done because of David's history of high fever and meningitis(29.15Tr.649-52).

Mitigation investigator Schneider was on David's case from its outset and through May, 2003, and recognized a brain scan was needed because of David's medical history(29.15Tr.236-37,244-45). 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). 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 Dr. Merikangas, while Schneider was on the case, and David's childhood medical history and childhood impulsive behavior(29.15Tr.244,816-17;29.15Ex.87).

Despite the early and repeated recommendations that a PET be done, it was not done when David's case went to trial in July, 2004(T.L.F.44). A PET was not done because of the Public Defender's staffing and resource crises. *See* Orig. App.Br. at 42-46. That was established when Jacquinot testified a PET scan was not done because of "a time crunch" and the failure to get a PET was not a strategy decision(29.15Tr.947,1009-10).

According to respondent counsel acted reasonably because counsel called three expert witnesses(Resp.Br.27-28). Counsel called two expert mental health witnesses, Benedict and Smith, to explain David's behavior in this case. Dr. Reuterfors was not called as an expert, but instead as an occurrence witness to recite David's federal prison diagnosis(T.Tr.3446,3470-72;Ex.61). This Court, has held counsel's duty is "to 'discover *all reasonably available* mitigating evidence"' *Hutchison*,150S.W.3d at 302(quoting *Wiggins v. Smith*,539U.S.510,524(2003) 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. Counsel did the same here. They obtained Benedict and Smith, but failed to connect-up their mental health diagnoses with Preston's "hard science" finding of brain damage and Logan's findings on the cause of that brain damage as flowing

from Preston's scan. That failure was especially prejudicial in light of respondent's repeated emphasis on Benedict's and Smith's diagnoses not having the same reliability that medicine provides with an M.D.'s findings(T.Tr.3133-34,4484) and casting David's actions in both penalty arguments as the product of a volitional "behavioral problem"(T.Tr.4526,4552).

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

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 represented General Sherman's father was sentenced to death for killing Sherman's mother, but despite that deprivation had not committed acts like David because the 29.15 amended motion alleged Ahsens argued matters not in evidence and presented personal opinion, and thus, the 29.15 pleadings encompassed that the representations about Sherman were egregiously factually false as 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.

Point II of the original brief raised multiple claims as to the penalty arguments. For purposes of this reply brief, it is only necessary to respond to respondent's arguments as to one of those claims.

A. Sherman False Representations

Respondent asserts that the factual falsity of Ahsens' representations about General Sherman having had a father who was sentenced to death and executed for killing his wife and Sherman's mother was not a claim included in the 29.15 action(Resp.Br. 38-40).

The 29.15 amended motion alleged counsel should have objected to Ahsens' having argued:

> William Sherman was a great military mind who grew up under adverse circumstances and Sherman's circumstances should be contrasted to Movant's circumstances as to why Movant's circumstances were not mitigating(Tr.4553-54) . . . . These arguments were improper because they were **based on facts not in evidence, personal opinion, and appealed solely to passion and prejudice.**

(29.15L.F.410)(emphasis added).

Sherman's father was a successful lawyer who served on the Ohio Supreme Court and died unexpectedly while predeceasing his wife. *See* Orig. App. Br.65. That Ahsens held out matters as purportedly true about Sherman's father to compare Sherman's purported life circumstances to David's life circumstances when in fact Ahsens' representations were flagrantly and blatantly false constitutes the presentation of matters based on facts not in evidence and personal opinion. *See State v. Storey*,901S.W.2d886,900-03(Mo.banc1995). Thus, the factual falsity of Ahsens' representations was encompassed within the 29.15 pleadings and is properly before this Court.

For all the reasons discussed in Point II of the original and reply briefs, 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 these are not claims of trial court error, they were not decided on direct appeal, and they could not have been presented on direct appeal because they required presenting evidence from mental health experts why David was incapable of making a knowing, intelligent, and voluntarily decision to self-represent, failure of the Public Defender to provide counsel who was available and equipped to address David's mental illnesses, and counsels' ineffectiveness in having failed to challenge David's competence to represent himself.

Respondent asserts that the claims David's 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 are not cognizable because they involve trial court error, could have been raised on direct appeal, and were decided on direct appeal(Resp.Br.55,57). Respondent's arguments ignore that the 29.15 claims go to David's mental competency to represent himself, matters that could not have

been and were not decided on direct appeal. Moreover, the claims alleged David's counsel was ineffective and required presentation of evidence in a 29.15 action.

Jacquinot testified at the 29.15 that he had concerns about David's competency, but never had David evaluated(29.15Tr.961-62,1012-13). The 29.15 evidence included that Hough had advised Jacquinot that a competency to proceed evaluation was needed, but that advise was ignored(29.15Tr.661,663). In the 29.15, evidence was presented from Drs. Logan, Smith, Hough, and Benedict that David was mentally incompetent to represent himself and that decision was not knowingly, intelligently, and voluntarily made(29.15Tr.120,122,493-97,582-87,668). *See* App.Br.83-84. The 29.15 hearing evidence also included evidence of the K.C. Capital Public Defender Office's staff and resource crises and how that crises made it unequipped to furnish David the counsel the Constitution guaranteed, while taking into account David's mental impairments. *See* App.Br.76-82. Without all this evidence in the record it was impossible to raise the claims presented here on direct appeal, and therefore, the matters presented here do not involve trial court error.

David's case differs from cases like *State v. Ferguson*,20S.W.3d485,509(Mo.banc2000)(Resp.Br.55). In *Ferguson*, the movant did not claim counsel was ineffective, but instead "challenged the trial court's actions and rulings as a matter of trial court error…."*Id*.509. Similarly in *State v. Brown*,902S.W.2d278,295(Mo.banc1995) (Resp.Br.55), the 29.15 motion

failed to allege counsel was ineffective. Here, unlike *Ferguson and Brown*, David has alleged counsel was ineffective.

Unlike *Tisius v. State*,183S.W.3d207(Mo.banc2006), this matter could not have been raised on direct appeal(Resp.Br.55). 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 appeal. *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 mental health experts, counsel, and the staff of the K.C. Capital Office.

The decision in *Henderson v. State*,786S.W.2d194,196(Mo.App.,E.D.1990), is, likewise, inapplicable(Resp.Br.55). In *Henderson*, the movant argued that his waiver of counsel was invalid because the trial court failed to explain the range of punishment. *Id*.196. That failure was apparent from the record, and therefore, the claim could have been presented on direct appeal. *Id*.195-97. Here because the claims involve David's mental impairments and the Public Defender's staff crises inability to handle David's case, in light of his mental impairments, the presentation of 29.15 evidence was required and David's claims could not have been presented on direct appeal. *See Tisius*.

Respondent also relies on *Phillips v. State*,214S.W.3d361(Mo.App.,S.D.2007)(Resp.Br.55). In *Phillips*, the movant alleged that he was denied his right to self-representation. *Id.364*. Phillips had filed with the court a letter stating that he was wanting to represent himself, but at trial he was represented by counsel. *Id*.364-65. Because Phillips knew of his own filing, his claim that he was denied his right to self-representation could have been raised on direct appeal. In contrast, David's 29.15 claim required the development of 29.15 evidence why his mental impairments and counsels' related ineffectiveness rendered his self-representation not knowing, intelligent, and voluntary**.**

Respondent also asserts that this Court already decided on direct appeal that David's self-representation decision was knowing and voluntary, and therefore, this matter cannot be relitigated(Resp.Br.57). A careful review of the direct appeal brief shows that it only 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). That brief did not challenge whether David's self-representation was knowing, intelligent, and voluntary in light of his mental illness(29.15Ex.37). Thus, when this Court decided David's direct appeal, it did not decide whether David's self-representation was knowing, intelligent, and voluntary in light of his mental

impairments and the Defender's incapacity to provide David the counsel he was constitutionally guaranteed in light of his mental illness.

The granting of relief on claims similar to those presented here in *Shafer v. Bowersox*,168F.Supp.2d1055(E.D.Mo.2001), *aff'd*., 329F.3d637(8thCir.2003) and *Wilkins v. Bowersox*,933F.Supp.1496(W.D.Mo.1996), *aff'd*.,145F.3d1006(8thCir1998) establish David's claim is cognizable. In *Shafer* and *Wilkins*, the claims resulting in relief were treated as cognizable postconviction claims and had to have been cognizable otherwise the subsequent granting of relief in federal court would have been procedurally forbidden. *See State v. Shafer*,969S.W.2d719,728-731(Mo.banc1998)(deciding adverse to movant on merits waiver of counsel postconviction claim) and *Wilkins v. State*,802S.W.2d491,500-02(Mo.banc1991)(deciding adverse to movant on merits postconviction claim waiver of counsel was not knowing, intelligent, and voluntary because of movant's mental incompetence where postconviction claim was "different" from direct appeal claim challenging competence).[3]

[3] The original appellant's brief discussed why on the merits of David's claims this Court should apply the rationale of the federal courts in both *Shafer* and *Wilkins* to grant David relief. *See* App.Br.89-92. Respondent has not attempted to distinguish the grants of habeas relief in *Shafer* and *Wilkins* and those cases are indistinguishable from David's case. *See* App.Br.89-92.

When a procedural rule that is not firmly established and regularly followed is applied to adversely impact a convicted defendant's rights, the due process clause is violated and the claim is reviewable for the first time in federal court. *Ford v. Georgia*,498U.S.411,422-24(1991). The Supreme Court has applied the *Ford* rule to find this Court's Rules 24.09 and 24.10, governing continuances, were not regularly followed so that the federal habeas petitioner was entitled to review of his claim for the first time in federal district court. *See Lee v. Kemna*,534U.S.362,376(2002). For this Court to review on the merits and treat as cognizable Shafer's and Wilkins' claims, but to decline to review David's like claims as not cognizable would impose a procedural rule that is not firmly established and regularly followed. *See Ford.* Like in *Kemna*, David's claims would be reviewable for the first time in federal court.

Respondent also relies on the findings that it wrote, and the 29.15 court signed, that the expert testimony was not credible(Resp.Br.56). As discussed in detail in Point VIII of the original brief (see also Point VII at App.Br. 128 footnote 12), the motion court failed to exercise independent judgment in signing respondent's findings. Moreover, a state postconviction finding a witness is not credible, however, does not defeat a claim of prejudice. *Kyles v. Whitley*,514U.S.419,449 n.19(1995). That observation could not substitute for the jury's trial appraisal. *Id.* Witness credibility is for the jury, not postconviction court. *Antwine v. Delo*,54 F.3d1357,1365(8thCir.1995).

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 and there was no showing of a case specific need to restrain David.

Respondent claims it was permissible to use the shackling device employed because the jurors could not see that device as David wore it underneath his clothing such that it was not outwardly and physically visible(Resp.Br.59-60).

In *Deck v. Missouri*,544U.S.622(2005), the Court found the outwardly and physically visible shackling used denied Deck his right to a fair capital sentencing determination. The *Deck* Court held that the Constitution forbids the use of "visible" shackles in guilt and penalty. *Id*.624. The *Deck* opinion did not state that "visible" shackles meant only those shackling devices which are outwardly and physically visible to the jurors.

Respondent called at the 29.15 Deputy Evans, who had provided trial courtroom security(29.15Tr.361-62). Evans recounted that 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 McCandless testified that while the shackling device was not outwardly and physically 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(29.15Ex.4-pg.14,24-25). Juror Fiegenbaum recounted multiple jurors had expressed they believed David was wearing a shackling device which was not openly visible(29.15Ex.3-pgs.13-16).

Counsel Winegarner recounted the shackling device caused David to walk with an unnatural gait(29.15Tr.730-31). Counsel Jacquinot recounted it was "obvious" to people in the courtroom David was wearing some restraining device, even though it was not outwardly and physically visible because David had to walk with a limp(29.15Tr.1026-28).

In *Deck*, the Court reasoned that the shackling in penalty adversely impacted the fairness of the process because the jurors would

> as a matter of common sense, [conclude] that court authorities consider the offender a danger to the community - often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point.

Deck,544U.S. at 633. The *Deck* Court further reasoned that shackling

> inevitably undermines the jury's ability to weigh accurately all relevant considerations - considerations that are often unquantifiable and elusive- when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb [on] death's side of the scale."

Deck,544U.S. at 633(quoting *Sochor v. Florida*,504 U.S.527,532(1992)).

The shackling device here was "visible" because it caused David to walk with a limp and bent knees which made it obvious to all the jurors he was shackled. The shackling device's use conveyed to the jury that court authorities considered David a danger to people in the courtroom and the community and undermined the jury's ability to accurately weigh the evidence in guilt and penalty. *See Deck*.

Respondent asserts that David's 29.15 evidence "speculates that the jury knew the State was the source of the restraint device."(Resp.Br.60). The evidence is not speculative because the jurors had concluded from David's limp and walking with bent knees that a shackling device was employed. As the *Deck* Court recognized, David's jurors must as a matter of common sense have attributed the use of the shackles to court authorities. *See Deck*, supra.

Respondent also argues that granting David relief, because of the use of shackling device, would foreclose necessary and appropriate security measures that would permit attacks on judges, court personnel, and attorneys(Resp.Br.60). The *Deck* opinion expressly addressed such matters and established why such concerns have no place in David's case. In *Deck*, the Court held that courts have

the discretion to shackle defendants in court in the jury's presence on a case specific basis to ensure the safety of everyone associated with the proceedings and the public. *Deck*,544U.S. at 624,632-33. The use of shackles in *Deck* was reversed because the trial court record failed to show any case specific reasons for shackling Deck. *Id.*634-35. Likewise, there is no case specific reason for why security concerns warranted shackling David. That David was engaging in self-representation did not constitute a case specific reason to shackle him.

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 for failing to object because the trial court did not advise David of restrictions it was imposing on self-representation, including shackling and not allowing David to approach witnesses with exhibits, before David chose self-representation in that this claim alleged counsel was ineffective and required presenting evidence from counsel not part of the direct appeal record and, therefore, the claim is cognizable.

In respondent's brief, it combined its responses to David's Points III, V, and VII into a single Point(Resp.Br.55-58). Point III of this reply brief has already discussed in detail why all the cases respondent cited as support for David's claims are not cognizable have no merit. That discussion is incorporated here and this Court is referred to Point III of this reply brief for a detailed discussion of why those cases do not apply.

In this Point, David argued counsel was ineffective for failing to object to the trial court having failed to inform David that he would be shackled and not allowed to approach witnesses with exhibits before David chose to proceed with self-representation. In *Tisius v. State*,183S.W.3d207(Mo.banc2006), this Court recognized that claims which could not have been presented on direct appeal or

which require the development of evidence in a 29.15 are cognizable. *See* Reply Brief Point III discussion.

Evidence was presented that 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). The present claim could not have been raised on direct appeal because it required evidence from counsel on the failure to object to the trial court's actions, and therefore, the claim is cognizable. *See Tisius*.

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, 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 and this claim is cognizable because it required presenting evidence from counsel and mental health experts, not part of the direct appeal record, to establish that counsel was ineffective for failing to challenge David's competency and that David was incompetent at trial.

As noted previously, respondent combined its responses to David's Points III, V, and VII into a single Point(Resp.Br.55-58). Point III of this reply brief has already discussed in detail why all the cases respondent cited as support for David's claims are not cognizable have no merit. That discussion is incorporated here and this Court is referred to Point III of this reply brief for a detailed discussion of why those cases do not apply.

In this Point, it was argued that counsel was ineffective for failing to challenge that David was incompetent and David was convicted while incompetent. In *Tisius v. State*,183S.W.3d207(Mo.banc2006), this Court recognized that claims which could not have been presented on direct appeal or

which require the development of evidence in a 29.15 are cognizable. *See* Reply Brief Point III discussion.

The 29.15 evidence included that 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).

Counsel Winegarner testified he had concerns about David's competency, but he was not authorized to contact experts regarding competency(29.15Tr.699-702,714,721-22). Winegarner had no reason for failing to have David's competency to proceed evaluated(29.15Tr.714). Counsel Jacquinot testified at the 29.15 that he had concerns about David's competency, but never had David evaluated(29.15Tr.961-62,1012-13).

Drs. Benedict, Logan, and Smith concluded David was incompetent to proceed because his mental illness prevented him from rationally consulting with counsel(29.15Tr.118-19,489-94,496,584,586,609).

Evidence was presented at the 29.15 that counsel had questioned David's competence, but took no steps to have his competency determined. Further, there was 29.15 expert testimony finding that David was not competent to proceed. The present claim could not have been raised on direct appeal because it required

evidence from counsel and the mental health experts, and therefore, the claim is cognizable. *See Tisius*.

A new trial is required.

CONCLUSION

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

_____
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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 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 _____words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply 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 October, 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 mailed postage prepaid this ____day of _____, 2007, to Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

_____
William J. Swift

APPENDIX

APPENDIX TO REPLY BRIEF CONTENTS