IN THE
MISSOURI SUPREME COURT

TERRANCE ANDERSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC 92101**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI
32nd JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE WILLIAM L. SYLER, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

***RULES*:**

OTHER

JURISDICTIONAL STATEMENT

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

RECORD CITATION DESIGNATIONS

The lengthy case record is referenced: (1) First Trial Transcript (1stTrialTr.); (2) First Trial Exhibits(1stTrialEx.); (3) First 29.15 Transcript (1st29.15Tr.); (4) First 29.15 Exhibits (1st29.15Ex.); (5) Second Trial Transcript (2ndTrialTr.); (6) Second Trial Legal File (2ndTrialL.F.); (7) Second Trial Exhibits (2ndTrialEx.) (8) Second 29.15Transcript (2nd29.15Tr.) (9) Second 29.15 Legal File (2nd29.15L.F.); and (10) Second 29.15 Exhibits (2nd29.15Ex.).

STATEMENT OF FACTS

Procedural History

Terrance Anderson was convicted of two counts of first degree murder involving the July 25, 1997 deaths of Debbie and Stephen Rainwater. *State v. Anderson*,79S.W.3d420,427,429(Mo.banc2002). For the count involving Stephen, Terrance was life sentenced, but for the count involving Debbie death. *Id.*429.

Abbey Rainwater is Debbie's and Stephen's daughter. *Id.*427. Abbey and Terrance have a daughter together, Kyra. *Id.*427.

This Court ordered a new penalty phase because counsel was ineffective for failing to strike for cause a juror who expressed a preference for death and would require a defendant to persuade him death was not appropriate. *Anderson v. State*,196S.W.3d28,38-42(Mo.banc2006). On penalty retrial, Terrance was resentenced to death for the count involving Debbie and this Court affirmed. *State v. Anderson*,306S.W.3d529(Mo.banc2010). At the penalty retrial, Terrance was represented by Assistant Public Defenders Beth Davis-Kerry and Sharon Turlington who were assisted by mitigation specialist Catherine Luebbering.

Terrance brought a 29.15 action challenging the retrial death sentence and it was denied after a hearing.

First Trial Guilt Defense

Terrance attended Missouri Valley for one year on a basketball scholarship(1stTrialTr.1381-83). Terrance moved in with the Rainwaters when Abbey learned she was pregnant(1stTrialTr.1383-84). Linda Smith, Terrance's

mother, disapproved of Terrance living with the Rainwaters because Terrance and Abbey were unmarried and the Rainwaters were white(1stTrialTr.1384). Terrance was proud that Abbey had wanted Kyra to have his last name(1stTrialTr.1387). Terrance moved back with his mother after he was made to leave the Rainwaters' house(1stTrialTr.1385).

Linda was married to Robert Smith, but Timothy Smith was Terrance's father(1stTrialTr.1389-90). After Linda became pregnant with Terrance, her relationship with Timothy ended(1stTrialTr.1390). Terrance had a special relationship with Linda's father, until he died when Terrance was fourteen(1stTrialTr.1388-89). Terrance became sad when he learned Robert was not his father and he never met his biological father(1stTrialTr.1391,1393).

Donald Brandon's son, Jason, and Terrance were good friends and Terrance was like family(1stTrialTr.1396-97). Donald was a furniture shipping supervisor and hired Terrance in May, 1995 at Rowe Furniture(1stTrialTr.1397). Initially, Terrance was a very good employee, but his job performance suffered because of absences and calls from Abbey(1stTrialTr.1398-1401). Terrance left work before shifts were over to be with Abbey because of problems she had with her pregnancy(1stTrialTr.1399-1401). In December, 1996, Donald had to fire Terrance because of excessive absences and leaving early(1stTrialTr.1401-02).

Terrance told a friend that he was not being allowed to see his daughter, even though he loved her very much(1stTrialTr.1414). Terrance's family and friends knew

him to be an upstanding, hard-working, law-abiding, non-violent person(1stTrialTr.1393-94,1403-04,1413-15,1478-81,1506-07, 1510).

Neurologist Dr. Pincus determined Terrance could not read above sixth grade level and what he read he did not comprehend(1stTrialTr.1419-20,1423-27,1429-30,1438). Pincus found defects in Terrance's frontal lobe and likely deficits in his left parietal lobe(1stTrialTr.1435). The frontal lobe is important to insight, judgment, and capacity to predict outcomes(1stTrialTr.1435-36).

Pincus concluded Terrance's neurological problems made it impossible for him to have coolly reflected given the emotionally stressful circumstances he was experiencing(1stTrialTr.1454,1462-63). At the time of the killings, Terrrance had frontal lobe and parietal lobe deficits and was depressed(1stTrialTr.1440-41). Terrance's reading problems were likely the result of brain damage caused at birth(1stTrialTr.1444-45).

Dr. Dorothy Lewis, M.D. psychiatrist, testified by videotape(1stTrialExs.D,E). Terrance's records showed he was born prematurely and experienced fetal distress(1stTrialEx.E at 15-18). Evidence of the fetal distress included foul smelling amniotic fluid suggestive of an infection(1stTrialEx.E at 15-18). Also, when Terrance was sixteen months old, he swallowed rubbing alcohol, which is toxic to the brain(1stTrialEx.E at 19-20). Terrance's school records reflected a learning disability(1stTrialEx.E at 23-25).

Terrance was depressed and withdrawn because of having lost his job and being thrown-out of the Rainwaters' house(1stTrialEx.E at 31). Terrance was

encountering many stressful circumstances which caused him to be increasingly depressed, suspicious, and paranoid(1stTrialEx.E at 35-41). Terrance was depressed about the possibility of losing his daughter and her not knowing him, like he did not know his father(1stTrialEx.E at 38-43). Terrance insisted that someone else shot Debbie and that he only shot Stephen(1stTrialEx.E at 43-44). At the time of the offense, Terrance was paranoid, delusional, severely depressed, and in an altered state such that he was suffering from a mental disease or defect that prevented cool reflection(1stTrialEx.E at 43-47,58). Terrance's altered state caused him to be unable to remember the charged acts(1stTrialEx.E at 46-47).

In guilt closing argument, counsel urged that the mental health evidence supported that Terrance was unable to have deliberated, and therefore, was guilty of second degree murder and not first(1stTrialTr.1607-09,1617,1620-21,1625-26).

First Trial Penalty Phase

The first penalty phase was devoted to calling family, friends, and a jail administrator where Terrance was confined(1stTrialTr.1670-1703). That evidence was limited to focusing on Terrance's athletic accomplishments, his good work ethic, his polite and respectful behavior, and people's inability to comprehend what caused Terrance to do the shooting(1stTrialTr.1670-1703).

During Terrance's step-father Robert's first trial penalty phase testimony, he portrayed himself as a model caring father involved in Terrance's life as part of a normal family(1stTrialTr.1670-80). In particular, Robert identified himself as Terrance's stepfather who had raised him since he was ten months(1stTrialTr.1670).

Robert had only learned a couple of years before testifying that Terrance had learned that he was not Terrance's biological father(1stTrialTr.1670). Robert testified he had never really wanted Terrance to know that he was not Terrance's biological father(1stTrialTr.1670).

Robert testified about having coached Terrance in Little League and having attended all of Terrance's basketball games(1stTrialTr.1673). Through Robert, assorted family pictures were presented, along with various awards Terrance received(1stTrialTr.1671-77).

Robert testified that the tragedy involving the Rainwaters has caused all of the family to become closer(1stTrialTr.1678-79). Robert has applied this experience to try to help other young people(1stTrialTr.1679).

First 29.15

Dr. Cross evaluated Terrance for the first 29.15(1st29.15Tr.105). Cross recounted Terrance's medical records reflected when Terrance was very young he had a spiral tibial fracture, reportedly caused by being hit by a car(1st29.15Tr.119). Spiral fractures, as noted in Dr. Lewis' June 24, 1998 report, are caused by twisting(1st29.15Tr.136-37;1st29.15Ex.4 at 1158 and 2nd29.15Ex.D at 2). Spiral fractures are not impact type fractures, but rather are caused by child abuse(1st29.15Tr.119-120;1st29.15Ex.4 at 1158 and 2nd29.15Ex.D at 2).

Cross saw cigarette burns on Terrance's back, which Dr. Pincus' report discussed, and evidenced Terrance was abused(1st29.15Tr.134-36). Cross noted the secrecy Robert imposed on the family was symptomatic of abuse(1st29.15Tr.135-36).

Cross concluded that on the day of the offense, Terrance not only suffered from depression, paranoid thinking, and paranoid personality disorder, but also Post-Traumatic Stress Disorder (PTSD)(1st29.15Tr.149-50). Abuse Terrance's stepfather Robert inflicted produced the PTSD(1st29.15Tr.131-32).

Cross found that documentation of Robert's violent history he reviewed for the first 29.15 was significant for explaining the very violent act Terrance committed(1st29.15Tr.121-27). Those records were significant because our parents are models and people incorporate into their personalities many of the strategies and methods their parents display to resolve problems(1st29.15Tr.121-27). Robert, as Terrance's step-father, was Terrance's model and Terrance was likely to solve problems the way Robert did(1st29.15Tr.121-27). Cross explained that Terrance's exposure to Robert's violent behavior as Robert's method for problem solving served as Terrance's problem solving model(1st29.15Tr.121-27,147-49).

Cross recounted that it was not surprising that Terrance had not disclosed having been abused because that was part of the family's secrecy system(1st29.15Tr.142). Cross did testing that found Terrance had longstanding intrusive thoughts, a strong indicator of physical and emotional abuse(1st29.15Tr.145-46). Cross also did testing that found Terrance was not malingering on his abuse trauma history(1st29.15Tr.146).

Cessie Alfonso is a licensed clinical social worker who testified at the first 29.15(1st29.15Tr.23-24,34,79). Alfonso recounted that Terrance had grown-up in a

household with a step-father who had a history of blowing-up, hitting people, and practicing infidelity(1st29.15Tr.59).

Alfonso recounted that Robert had a history of abusive behavior and used coercive control, intimidation, and violence to control the household(1st29.15Tr.56). In response, Terrance either tried to intervene or isolated himself by withdrawing and locking himself in his room(1st29.15Tr.56,60-61,63). Terrance still had a bed wetting problem when he was twelve, which was indicative of the intensity, duration, and frequency of family conflict(1st29.15Tr.56-57).

Alfonso reviewed documents that showed Robert's violent behavior towards his former wife, Earline, included dislocating her shoulder, giving her black eyes, twisting her breasts following surgery, and raping her while she was pregnant(1st29.15Tr.58). While Robert was married to Linda, he had relationships with other women(1st29.15Tr.58-59). Robert was assaultive in a relationship he had with another woman, while he was married to Linda(1st29.15Tr.59-60). Alfonso noted Robert "is a batterer who used violence, coercive control, and intimidation"(1st29.15Tr.58).

Penalty Retrial State's Evidence

Abbey's and Terrance's relationship was off and on(2ndTrialTr.665-67). Terrance was excited about being a father(2ndTrialTr.661). When Abbey learned she was pregnant, her parents invited Terrance to live with their family(2ndTrialTr.661).

There was tension with Abbey's parents though over her relationship with Terrance because Terrance was older than Abbey and because Terrance is African-

American and Abbey is white(2ndTrialTr.657-58). There was a time where Abbey's parents separated and her father moved into an apartment(2ndTrialTr.664). Abbey's father was on disability and suffered from bipolar manic depression(2ndTrialTr.665). During Abbey's relationship with Terrance, she overdosed on prescription medication(2ndTrialTr.658-60). Terrance began living with the Rainwaters in September, 1996 and was told to move out in November, 1996 because of conflict(2ndTrialTr.644,664).

In December, 1996, when Abbey was four months pregnant, Stacey Turner Blackmon and Abbey were driving around looking for Terrance because Abbey was upset with Terrance and Kelly McDowell(2ndTrialTr.681-82,704-05) When they saw Terrance, they chased him which resulted in Abbey driving into someone's lawn(2ndTrialTr.704-05).

Abbey broke the glass at an apartment to get inside where Terrance was alone with McDowell(2ndTrialTr.681-82). The police were called because the neighbors thought Abbey was breaking in(2ndTrialTr.681-82). During that incident, Terrance grabbed Abbey's throat(2ndTrialTr.681-82).

Abbey knew that Terrance wanted to play a significant role in their daughter's life because of the absence of Terrance's biological father from his life(2ndTrialTr.662,667). Abbey and Terrance had agreed to name their daughter Kyra Nicole Anderson(2ndTrialTr.670). For Kyra's birth certificate, Abbey changed Kyra's last name to Rainwater(2ndTrialTr.670). Abbey kept Terrance's name off

Kyra's birth certificate because Abbey thought the Anderson name gave Terrance more rights(2ndTrialTr.670-71).

On July 25th, Abbey and her father obtained an ex parte protective order against Terrance(2ndTrialTr.645). Abbey obtained the order because Terrance allegedly struck and injured her the night before(2ndTrialTr.678,683). Terrance was supposed to care for Kyra on July 25th, while Abbey worked at Sonic(2ndTrialTr.675). Terrance paged Abbey when Abbey failed to bring Kyra by, but Abbey did not respond(2ndTrialTr.675-76).

Terrance stopped by the Rainwater's house and Stephen told Terrance to leave(2ndTrialTr.676). Abbey talked to Terrance later on July 25th on the phone and told him about the court order and told him that the courts would decide visitation(2ndTrialTr.645-46,676). Abbey told Terrance he would have to do a paternity test(2ndTrialTr.676). Terrance was angry and asked Abbey about visitation(2ndTrialTr.645-46). Abbey told Terrance she had no intention to prevent Terrance from seeing Kyra(2ndTrialTr.646,679-80). Stacey, however, was familiar with conversations involving Debbie where there were discussions about Abbey and Kyra moving to California(2ndTrialTr.707).

Abbey, Abbey's sister Whitney, Stephen and Debbie, Abbey's friends Amy Dorris and Stacey Turner Blackmon, and Kyra were at the Rainwater's house (2ndTrialTr.623,626,687,716-17). Abbey was seventeen years old(2ndTrialTr.642). Abbey's sister, Whitney, was ten(2ndTrialTr.643-44). Kyra, was born in April and was three months old(2ndTrialTr.643,671).

Abbey, Amy, and Stacey went to the basement to smoke cigarettes(2ndTrialTr.688). There were knocks on the downstairs door, but no one was there(2ndTrialTr.625,688-90). Stephen went outside to look around with a gun, but found no one(2ndTrialTr.690,717). Stephen left the house to drive around the neighborhood to investigate and took a gun(2ndTrialTr.626-27,690,717-18).

The front door bell rang and Terrance was there pointing a gun at the door's glass(2ndTrialTr.627-28,648,690-91,718). Terrance forced the front door open(2ndTrialTr.580,628,648,692,718). Debbie and Terrance argued while she was on her knees holding Kyra and Debbie asked Terrance not to shoot her(2ndTrialTr.628-29). Debbie told Abbey to run and Abbey ran to a neighbor's house where Abbey called the police(2ndTrialTr.649-50). Whitney heard a gun shot(2ndTrialTr.719-21). Debbie was shot while on her knees(2ndTrialTr.609).

Stephen returned and Whitney observed Terrance and Stephen argue which was followed by a gunshot(2ndTrialTr.723-24).

A baby's blanket and baby's bottle, both blood stained, were found alongside Debbie(2ndTrialTr.561,581-82). Stephen and Debbie both died from head gunshot wounds(1stTrialTr.1049;2ndTrialTr.558-59,581-82,601-09).

Amy heard the gunfire and she ran out the front door(2ndTrialTr.630-31). Terrance ordered Amy to stop and threatened to shoot her if she did not(2ndTrialTr.630-31).

Whitney had to move Debbie's body off Kyra(2ndTrialTr.721). Whitney tried to hide in the laundry room(2ndTrialTr.721). Whitney heard the phone ringing in her parents' bedroom and she went there(2ndTrialTr.721). Amy's boyfriend, Robert, was on the phone and Whitney told him what happened(2ndTrialTr.721-22). Terrance came in the bedroom and hung up the phone(2ndTrialTr.722). That was followed by Terrance, Whitney, Amy, and Kyra going outside(2ndTrialTr.722). Terrance called for Abbey to come out(2ndTrialTr.722). Terrance told Whitney and Amy that if they ran, then he would shoot them(2ndTrialTr.723).

Terrance made Amy yell for Abbey and yell that he was going to kill Amy(2ndTrialTr.631). Amy and Terrance went where they could hear Kyra crying(2ndTrialTr.632). Whitney was with Kyra in Stephen's and Debbie's bedroom(2ndTrialTr.632). Terrance took Kyra from Whitney(2ndTrialTr.632).

Terrance took Amy, Whitney, and Kyra outside where he yelled for Stacey and Abbey(2ndTrialTr.632). Terrance threatened to shoot them, if Abbey and Stacey did not appear(2ndTrialTr.633).

Stacey ran and hid in a closet in Stephen's and Debbie's bedroom(2ndTrialTr.692-94). At some point, Stacey ran across to Abbey's bedroom and looked out the window(2ndTrialTr.694-95). Stacey saw Terrance outside with Amy, Whitney, and Kyra(2ndTrialTr.694-95).

Stacey ran back to Stephen and Debbie's bedroom and called 911(2ndTrialTr.695). Stacey hid in Stephen's and Debbie's shower(2ndTrialTr.695-96). Terrance directed Whitney to check if anyone was in Stephen's and Debbie's

bedroom(2ndTrialTr.696,724-25). Whitney saw Stacey hiding in the shower, but told Terrance no one was there(2ndTrialTr.696,724-25).

Officer Clark was dispatched to the Rainwater's neighborhood on Montclair St. in Poplar Bluff(1stTrialTr.1026-31).[1] One of the Rainwater's neighbors, who lived at 943 Montclair St., called the police because at 11:10 p.m. on July 25, 1997, someone pulled into her driveway, aimed his headlights at the front window, and pounded on the door while ringing the doorbell(1stTrialTr.1026-27,1061-62).

Clark heard a gunshot from the Rainwater's address at 1005 Montclair(1stTrialTr.1032). Clark saw Stephen lying in the front yard and he appeared dead(1stTrialTr.1040-41;2ndTrialTr.697).

Terrance, while holding his daughter in front of his midsection and with a gun in his hand, stood in an open window and yelled at the police to put down their guns(1stTrialTr.1041-43;2ndTrialTr.551-52,725-26). The police ordered Terrance to put down his gun and surrender and Terrance did(1stTrialTr.1044-45). Terrance did not resist the police arresting him(1stTrialTr.1057-58). Terrance was directed to hand his daughter to Whitney and he did(1stTrialTr.1057,2ndTrialTr.725-26).

Abbey and Whitney described how losing their parents has impacted them(2ndTrialTr.651-55,726-29).

Retrial Defense Case

[1] Officer Clark's first trial testimony was read to the retrial jury(2ndTrialTr.544).

Counsel called Terrance's friends and coaches, Jason Brandon, Donald Brandon, Timothy McMillan, Larry Morgan, Kevin Pruitt, and Mike Brey(2ndTrialTr.730-40,742-46,798-803,804-14,840-43,883-90). They recounted how Terrance was a good friend, good teammate, quiet, polite, mild mannered, non-confrontational, upbeat, ideal to coach, and respected by teammates and peers for leading by example(2ndTrialTr.730-40,742-46,798-803,804-14,840-43,883-90).

Louis Buchanan and Terrance were roommates about three months before the shooting(2ndTrialTr.835). During that time, Terrance became withdrawn(2ndTrialTr.835-36).

Buchanan had experiences answering the phone where Stephen thought he was talking to Terrance and would be disrespectful to Buchanan for that reason(2ndTrialTr.836-37). In that context, Stephen would address who he thought was Terrance as "nigger" and say he was going to "whoop your ass"(2ndTrialTr.836-37). Stephen would state the "black and white thing" did not work and Terrance and Abbey should not be together and Abbey needed "to be with her own kind"(2ndTrialTr.836-37). Buchanan also overheard a phone conversation where Stephen was talking to Terrance and Stephen threatened to "whoop Terrance's ass"(2ndTrialTr.836-37).

There was an incident at Buchanan's and Terrance's apartment where Stephen pulled up and sped up in his Jeep in a threatening manner(2ndTrialTr.837-38).

Buchanan, like all those who knew Terrance, was shocked by the shooting because it was so out of character for Terrance(2ndTrialTr.839).

Terrance told the jury he was testifying because he wanted everyone to know what happened(2ndTrialTr.751). Terrance recounted that the day before the shooting he had received a call from Abbey informing him that she needed him to watch Kyra the next day(2ndTrialTr.752). Terrance had a job interview then, but told Abbey that she could leave Kyra with his mother(2ndTrialTr.752).

Terrance recounted that when he finished his job interview, Kyra had not been left with his mother(2ndTrialTr.752). Terrance paged Abbey, but he did not hear back(2ndTrialTr.752).

Terrance testified that he went by the Rainwaters' house and Stephen came out acting hostile and wanting to fight(2ndTrialTr.753). Terrance left the Rainwaters' house, but then called there(2ndTrialTr.753-54). Stephen answered the phone and called Terrance names(2ndTrialTr.754-55). Stephen put Abbey on the phone(2ndTrialTr.755). Abbey apologized for having gone to court and Terrance did not know what she was talking about(2ndTrialTr.755). Before Abbey could explain, Stephen grabbed the phone and hung up(2ndTrialTr.755). Terrance was angry and he thought the Rainwaters were trying to separate him from Kyra(2ndTrialTr.756). During the time Terrance lived with the Rainwaters Debbie directed racially offensive comments at him(2ndTrialTr.756-57).

Terrance recounted that he wanted to be present for Kyra and be a good father(2ndTrialTr.758-59). Being a good father to Kyra was important because of Terrance's feelings about knowing who his real father was(2ndTrialTr.758-59).

Terrance did not want Kyra to have a similar experience about the identity of who her father was(2ndTrialTr.759-60).

Terrance testified that Stacey had told him that Debbie and Stephen were plotting to kill him and Kyra(2ndTrialTr.767-71). That conversation with Stacey occurred two to three weeks before this incident(2ndTrialTr.770).

Terrance admitted that he went to the Rainwater's house to kill Debbie and Stephen because he was angry(2ndTrialTr.795-96). Terrance told the jury that he was sorry(2ndTrialTr.784-85).

Terrance's mother, Linda Smith, recounted that Robert Smith is Terrance's stepfather and Robert acted as Terrance's father for his entire life(2ndTrialTr.818). Linda's father, Phillip Anderson, told Terrance that Timothy Smith was Terrance's father(2ndTrialTr.821-23). After Linda became pregnant with Terrance, her relationship with Timothy ended(2ndTrialTr.822-23).

Terrance was a good quiet, child growing-up(2ndTrialTr.824). Linda loves Terrance and wants the best for him and Kyra(2ndTrialTr.828).

Deborah Moore is Terrance's step-sister and Robert is her father(2ndTrialTr.829). Terrance and Deborah were raised as siblings and have a good relationship(2ndTrialTr.829-30). Terrance was always polite, pleasant, and respectful(2ndTrialTr.830-31). Deborah was stunned by the shooting and felt sad for both families(2ndTrialTr.831).

Terrance's cousin, Mark Hunt, and Terrance had discussions growing-up about their desires to have successful jobs, care for their families, and being productive

citizens(2ndTrialTr.846). Hunt felt sad and frustrated for Terrance because Terrance's plans were destroyed(2ndTrialTr.847-48). Hunt could not believe what happened because Terrance was nice, humble, and athletic(2ndTrialTr.848-49). Terrance had not been violent(2ndTrialTr.848-49).

Robert testified he is Terrance's stepfather(2ndTrialTr.849-50). Robert treated Terrance like his own son(2ndTrialTr.850). Robert never discussed with Terrance that he was not Terrance's biological father because it was unnecessary(2ndTrialTr.852-53). Terrance was ten months when Robert entered Terrance's life(2ndTrialTr.850). Robert and Terrance's mother have had one child together, Shaneka, and Terrance was better behaved(2ndTrialTr.850). Robert recounted that Terrance had played basketball, baseball, football, and ran track(2ndTrialTr.851). Robert attended regularly Terrance's games(2ndTrialTr.851). Robert works for the Poplar Bluff School District and is on the Poplar Bluff City Council(2ndTrialTr.851).

Robert identified Exhibit C as a picture of Terrance on crutches with a broken leg when Terrance was five years old(2ndTrialTr.853). Robert testified that Terrance sustained the broken leg when he was struck by a car(2ndTrialTr.853).

A picture of Terrance and Robert when Terrance was about two years old on a cold winter day was presented(2ndTrialTr.853-54). A picture of thirteen year old Terrance (Ex.G) dressed in an Easter Bunny suit done to entertain their church's younger children was presented(2ndTrialTr.854-55).

A picture of Robert giving Terrance a piggyback ride (Ex.E) was presented(2ndTrialTr.856). There were also pictures of Terrance and Shaneka presented during Robert's testimony(2ndTrialTr.855-56). A picture of six year old Terrance (Ex.N) was also presented(2ndTrialTr.856).

Robert reported that Terrance was well adjusted growing-up(2ndTrialTr.856-57). Terrance was popular in school and had no behavioral problems(2ndTrialTr.857).

Robert recounted that when Terrance told him Abbey was pregnant, Terrance was happy about being a father(2ndTrialTr.857-58). Terrance was protective of Kyra(2ndTrialTr.857). The Rainwaters left Kyra at the Smith's house and Terrance cared for Kyra(2ndTrialTr.858). Robert reported that he was saddened because he did not know whether Kyra knows that he is her grandfather(2ndTrialTr.858).

Robert recounted that since the shooting that Terrance's mother has become reserved and keeps to herself(2ndTrialTr.859).

Robert stated that he still loves Terrance and that these events have made the family closer(2ndTrialTr.859-60).

The prosecutor's initial closing argument included:

> And you've heard a good bit about the defendant's background. I am prepared to believe that his parents and his friends are decent people, just as I'm prepared to believe that the Rainwaters were decent people. What he did does not reflect on any of them, but it is his actions that we must analyze.

There is nothing in his background, according to what we've been told, to suggest he would do this.

(2ndTrialTr.900).

The jury sentenced Terrance to death for Debbie's death(2ndTrialL.F.189;2ndTrialTr.935).

Penalty Retrial 29.15

Terrance filed a 29.15 challenging the re-imposition of death(2nd29.15L.F.5-10). Both of Terrance's trials and both his 29.15s were presided over by Judge Syler. *See State v. Anderson*,79S.W.3d at 420;*State v. Anderson*,306S.W.3d at 529; *Anderson v. State*,196S.W.3d at 28.

On September 13, 2010, before the 29.15 amended motion was filed, 29.15 counsel filed motions for orders to transport Terrance for MRI and EEG tests(2nd29.15L.F.16-30). At the hearing on the transport motions, respondent had no objection to the transport requests(2nd29.15Tr.6).

After respondent had indicated it had no objection, Judge Syler inquired "haven't we been down this road before?"(2nd29.15Tr.6). Terrance's 29.15 counsel explained that neither test had been performed before and that psychiatrist Dr. Lewis and a neurologist (Dr. Pincus) had recommended they be done and that no mental health evidence was presented at retrial(2nd29.15Tr.6-7). Syler responded that he believed the mental health evidence was "so discredited" at the first trial that there was no need to present it at retrial(2nd29.15Tr.7). Counsel responded there was no way to know whether the mental health evidence was "discredited" at the first trial

because the jury was not polled why it did not give life as to Debbie(2nd29.15Tr.7). Syler responded that he "can only speak about a conversation I had with the foreperson of the first jury, giving me his insight on the matter. He's no longer alive, however."(2nd29.15Tr.7-8). Syler added the juror viewed the mental health evidence as "pretty well trashed" and "they" did not believe it(2nd29.15Tr.8). Syler continued that his foreperson conversation was "just off the record conversation long after it happened."(2nd29.15Tr.8). Counsel made additional argument that the testing was needed based on Dr. Lewis' prior finding regarding the amniotic fluid, *see supra*, because such a finding could be indicative of brain structure abnormalities and Dr. Pincus' neurological testing, *see supra*, had found abnormalities(2nd29.15Tr.8).

Syler asked respondent whether it had any objection and respondent stated it "doesn't buy any of it," but it did not object to the testing(2nd29.15Tr.8). Syler then stated "I don't buy any of it, either," but to prevent a denial of request to do the testing from being an issue later he granted the transport request(2nd29.15Tr.8).

The amended motion was filed October 18, 2010(2nd29.15L.F.33). On October 25, 2010, counsel moved to disqualify Syler(2nd29.15L.F.149-67).

The motion to disqualify Syler was based on his September 13, 2010 hearing comments(2nd29.15L.F.149-67). Syler's comments and actions reflected he had prejudged the mental health evidence and could not be fair and impartial(2nd29.15L.F.149-67). Syler's comments about what he learned from the first trial's foreperson, as it related to Syler's view of the mental health evidence, demonstrated his inability to fairly serve(2nd29.15L.F.151). During the September

13th hearing, Syler handed Terrance's 29.15 counsel an article from the November 22, 2004, New Yorker Magazine which discussed Lewis(2nd29.15L.F.151-52,163-167). The New Yorker article included Lewis' frustration with a Broadway play having borrowed and incorporated parts of her professional life without having obtained Lewis' permission.[2] Lewis' victimization feelings were just one piece of an article devoted to the larger issue of plagiarism(2nd29.15L.F.163-67). Syler's actions reflected he had prejudged the mental health evidence(2nd29.15L.F.149-55).

On November 8, 2010, the motion to disqualify was heard(2nd29.15Tr.10). At the hearing, counsel highlighted that there would be mental health evidence presented at the 29.15 hearing which would include testimony from Drs. Lewis and Holcomb, as well as several lay witnesses(2nd29.15Tr.11). The motion to disqualify was premised on Syler's statements at the September 13, 2010 hearing and his contact with the first trial's foreperson(2nd29.15Tr.11). Syler indicated that he spoke to the foreperson years after the first trial(2nd29.15Tr.12-13). Counsel noted that such contact with the foreperson was an extrajudicial contact and there was no opportunity for Terrance's

[2] The copy Syler furnished 29.15 counsel did not contain all the article's pages(2nd29.15L.F.163-67). For a complete copy go to http://www.newyorker.com/archive/2004/11/22/041122fa_fact?printable=true. This Brief's Appendix includes a copy as Syler supplied it and attached to the motion to disqualify and as it appears on the web.

counsel to speak with that foreperson since Syler said he was deceased(2nd29.15Tr.13).

Syler stated that his comments reflected that the foreperson expressed the opinion that use of Lewis at the first trial was "ineffective"(2nd29.15Tr.13). Syler stated that he agreed with the juror, but that did not mean he could not fairly hear 29.15 evidence from Lewis(2nd29.15Tr.13). Syler said the foreperson was a member of his church(2nd29.15Tr.13-14). Syler stated "from time to time" the foreperson had asked him Terrance's case status and "made some comments from time to time."(2nd29.15Tr.13-14). Syler stated the foreperson was "curious and interested what all was going on"(2nd29.15Tr.13-14). The foreperson presented his views to Syler as though they were all the jurors' views(2nd29.15Tr.14). The motion to disqualify was denied(2nd29.15Tr.14).

The amended 29.15 motion included the claim counsel was ineffective in failing to present mitigation evidence of Robert's violent behavior through records documenting Robert's history as analyzed through mental health experts(2nd29.15L.F.36-37,55-59,61-68). That mental health evidence was pled to include calling Dr. Lewis to testify about Robert's violent history(2nd29.15L.F.36,36n.2). In rejecting the claim counsel was ineffective for failing to call Lewis as a witness the findings state "[t]he Court is aware that the first jury did not find Dr. Lewis credible and informed the parties of this fact." (2nd29.15L.F.203).

The pleadings also alleged evidence of Robert's violent behavior toward his prior wife Earline should have been presented(2nd29.15L.F.50-52). Additionally, the pleadings alleged evidence of Robert's violent behavior towards his girlfriend, Shirley Pratt, should have been presented(2nd29.15L.F.52-55).

Davis-Kerry testified generally they wanted to "take a different approach" from the first trial(2nd29.15Tr.320-21,335-36). Davis-Kerry testified that at the first trial there was evidence of Robert's violent propensities presented and at the retrial the defense team "wanted to try a different approach"(2nd29.15Tr.272). Turlington indicated that they decided to pursue "a different approach" from the first trial where Robert's violent history was presented(2nd29.15Tr.373-74).

One amended motion claim was that direct appeal counsel, Deborah Wafer, was ineffective for failing to brief that Terrance's sentence was disproportionate pursuant to the proportionality review required under §565.035. Syler injected at the conclusion of her testimony that "some years" after the jury's verdict the foreperson inquired about the status of Terrance's appeal(2nd29.15Tr.234-35). Syler continued that he was "curious" why Terrance got death on one count, but not the other(2nd29.15Tr.235). Syler stated the foreperson reported to Syler that the difference in result was attributable to "the grandmother, Debbie, was holding the baby at the time she was killed, and that's what put them over."(2nd29.15Tr.234-35). Terrance's counsel objected to injecting what the foreperson reported because the foreperson was deceased such that there was no opportunity to interview or cross-examine him(2nd29.15Tr.235).

At the 29.15 evidentiary hearing, the 29.15 court took judicial notice of all prior casefiles and transcripts(2nd29.15Tr.21-22). The motion court denied Terrrance's 29.15(2nd29.15L.F.179-209).

From the decision denying postconviction relief Terrance brings this appeal.

POINTS RELIED ON

I.

JUDGE SYLER - DISQUALIFICATION REQUIRED

The motion court, Judge Syler, clearly erred in denying the motion to disqualify him because Terrance was denied due process, freedom from cruel and unusual punishment, and a full and fair hearing, U.S. Const. Amends. VIII, and XIV, in that there was the appearance that Judge Syler could not fairly consider Terrance's 29.15 mental health claims when he volunteered that he had multiple extrajudicial conversations with the first trial's foreperson years after the first trial which caused Syler to believe that had the retrial jury heard any mental health evidence, as the first trial's jury did, that the result would not have been different because Syler believed that the mental health evidence at the first trial was "so discredited" such that Syler did not "buy any of it" and the first trial's foreperson told Syler that the different sentences for Debbie's versus Stephen's death was singularly attributable to Terrance having shot Debbie while she was holding Kyra and Dr. Lewis' first trial's testimony was "ineffective." Further, the appearance of Syler's inability to fairly serve was underscored when he inexplicably handed 29.15 counsel a New Yorker Magazine article discussing Dr. Lewis that had absolutely no relevance to any 29.15 issues.

State v. Smulls,935S.W.2d9(Mo.banc1996);

State v. Nicklasson,967S.W.2d596(Mo.banc1998);

State v. Harris,842S.W.2d953(Mo.App.,E.D.1992);

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

II.

STEPFATHER ROBERT'S VIOLENT ABUSIVE BEHAVIORS

The motion court clearly erred in denying the 29.15 postconviction claim counsel was ineffective for failing to call Dr. Lewis to testify for the limited purpose of the impact on Terrance of his stepfather Robert's violent, abusive behaviors because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel who wanted to pursue a "different" strategy from the original trial would have known and not duplicated the first trial's failed strategy of portraying Robert as a model father because the first 29.15 uncovered evidence of actual abuse Robert inflicted on Terrance and Terrance's mother, Linda, as well as a longstanding history of Robert's violent behavior. Terrance was prejudiced because evidence of an abusive, disadvantaged background is inherently mitigating for lessening moral culpability and would have mitigated Terrance's actions which were so inconsistent with Terrance's past.

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

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

Griffin v. Pierce,622F.3d831(7thCir.2010);

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

III.

EARLINE SMITH - VICTIM OF ROBERT'S VIOLENCE

The motion court clearly erred in denying the 29.15 postconviction claim counsel was ineffective for failing to call Earline Smith, Terrance's stepfather Robert's ex-wife, to testify about Robert's violent and abusive behaviors Robert inflicted on she and her daughter, Deborah, because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Earline for the jury to hear firsthand from one of Robert's victims the intensity and magnitude of the domestic violence Robert inflicted on Earline and Deborah for the jury to consider in conjunction with hearing from Dr. Lewis (Point II) that Robert's domestic violence history would be expected to continue as to Terrance and his mother. Terrance was prejudiced because all of Robert's violent abusive past behavior shaped and influenced Terrance and was inherently mitigating evidence lessening Terrance's moral culpability supporting life.

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

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

Griffin v. Pierce,622F.3d831(7thCir.2010);

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

IV.

FAILURE TO CALL DR. LEWIS - TERRANCE'S PSYCHIATRIC DIAGNOSES

The motion court clearly erred in denying the 29.15 postconviction claim that counsel was ineffective for failing to call Dr. Lewis because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called her to provide mitigating evidence that Terrance suffered from a psychotic depression characterized by paranoia and delusions while living in dysfunctional family circumstances all of which would have supported the §565.032.3 statutory mitigators extreme emotional distress and substantial impairment. Lewis also would have presented testimony Terrance had impaired intellectual functioning. Terrance was prejudiced because there is a reasonable probability if Lewis was called he would have been sentenced to life.

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

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

Glass v. State,227S.W.3d463(Mo.banc2007);

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

§565.032.3.

V.

FAILURE TO CALL DR. HOLCOMB

The motion court clearly erred in denying the 29.15 postconviction claim that counsel was ineffective for failing to call Dr. Holcomb because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called him to provide mitigating evidence that Terrance suffered from a psychotic depression characterized by paranoia and delusions which would have supported the §565.032.3 statutory mitigators extreme emotional distress and substantial impairment. Terrance was prejudiced because there is a reasonable probability if Holcomb was called he would have been sentenced to life.

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

Glass v. State,227S.W.3d463(Mo.banc2007);

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

§565.032.3.

VI.

MITIGATING EVIDENCE - WITNESSES TO TERRANCE'S DISORIENTED STATE

The motion court clearly erred in denying the 29.15 postconviction claim that counsel was ineffective for failing to call Tim Jones, Adrienne Dionne Webb, Larry Woods, and Steven Stovall because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called these mitigation witnesses to testify about their observations of Terrance's disoriented, distressed mental state. Terrance was prejudiced because this evidence would have highlighted Terrance's disoriented, distressed mental state both shortly before and after the offense and there is a reasonable probability the jury would have voted for life had they heard this evidence.

Wiggins v. Smith,539U.S.510,524-26(2003);

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

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

VII.

CROSS-EXAMINING TERRANCE WHETHER RESPONDENT'S WITNESSES WERE LYING

The motion court clearly erred in denying the 29.15 postconviction claim counsel was ineffective for failing to properly, timely object to cross-examination of Terrance asking Terrance whether the jury should believe Terrance over respondent's witnesses as respondent's witnesses must be lying because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected as a prosecutor is prohibited from asking a witness if another witness is lying. Terrance was prejudiced because this questioning injected arbitrariness in the sentencing decision and there is a reasonable probability Terrance otherwise would have been sentenced to life.

State v. Roper,136S.W.3d891(Mo.App.,W.D.2004);

Saffle v. Parks,494U.S.484(1990);

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

VIII.

ADMISSION OF EX PARTE ORDER AND ITS ALLEGATIONS

The motion court clearly erred in denying the 29.15 postconviction claim counsel was ineffective for failing to properly object to the wholesale admission of a copy of Abbey's ex parte petition for protection and the accompanying court's order of protection, Exhibit 38, containing a finding of good cause for the order based on the supporting factual allegations for the order because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to the admission of Exhibit 38 or at minimum requested the good cause finding with its factual premise allegations be redacted because Terrance was not afforded the opportunity to be present at the ex parte proceedings to challenge the accusations. Terrance was prejudiced because the prosecutor used the ex parte order to argue that order established Terrance had lied when he denied having physically abused Abbey, and thereby, injected arbitrariness when there otherwise was a reasonable probability Terrance would have been life sentenced.

State v. Clevenger,289S.W.3d626(Mo.App.,W.D.2009);

State v. Jackson,155S.W.3d849(Mo.App.,W.D.2005);

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

IX.

ADVISING TERRANCE TO TESTIFY WHEN HIS TESTIMONY WAS NOT MITIGATING AND FAILING TO ADVISE TERRANCE DURING TRIAL NOT TO TESTIFY

The motion court clearly erred in denying the 29.15 postconviction claim that counsel was ineffective for advising Terrance to testify when his testimony as a matter of law was not mitigating and failed to advise him during trial not to testify that other witnesses could effectively humanize him to the jury because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would not have advised Terrance to testify to show he accepted responsibility because the first trial's jury had already found as a matter of law he was responsible and reasonable counsel would have advised him that other witnesses could humanize him and reasonably competent counsel would have during trial advised Terrance not to testify. Terrance was prejudiced because the prosecutor was able to repeatedly portray Terrance as a liar, especially deserving death.

Marshall v. Hendricks,307F.3d36(3rdCir.2002);

U.S. v. Henriques,32M.J.832(1991);

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

X.

APPELLATE COUNSEL FAILED TO BRIEF PROPORTIONALITY

The motion court clearly erred in denying the 29.15 postconviction claim that direct appeal counsel was ineffective for failing to challenge Terrrance's sentence as disproportionate under §565.035.3 because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have briefed this issue since proportionality review is statutorily mandated and this Court has found death sentences disproportionate. Terrance was prejudiced because there is a reasonable probability this Court would have found Terrance's death sentence disproportionate and imposed life.

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

Williams v. State,168S.W.3d433(Mo.banc2005);

Mylar v. Alabama,671F.2d1299(11thCir.1982);

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

§565.035.3.

ARGUMENT

I.

JUDGE SYLER - DISQUALIFICATION REQUIRED

The motion court, Judge Syler, clearly erred in denying the motion to disqualify him because Terrance was denied due process, freedom from cruel and unusual punishment, and a full and fair hearing, U.S. Const. Amends. VIII, and XIV, in that there was the appearance that Judge Syler could not fairly consider Terrance's 29.15 mental health claims when he volunteered that he had multiple extrajudicial conversations with the first trial's foreperson years after the first trial which caused Syler to believe that had the retrial jury heard any mental health evidence, as the first trial's jury did, that the result would not have been different because Syler believed that the mental health evidence at the first trial was "so discredited" such that Syler did not "buy any of it" and the first trial's foreperson told Syler that the different sentences for Debbie's versus Stephen's death was singularly attributable to Terrance having shot Debbie while she was holding Kyra and Dr. Lewis' first trial's testimony was "ineffective." Further, the appearance of Syler's inability to fairly serve was underscored when he inexplicably handed 29.15 counsel a New Yorker Magazine article discussing Dr. Lewis that had absolutely no relevance to any 29.15 issues.

Judge Syler was required to disqualify himself because there was the appearance that he could not fairly serve. That appearance was evident because Syler made statements in which he reported having had extrajudicial conversations with the

first trial's foreperson, now himself deceased, years after the first trial. Syler made statements indicating he had prejudged all evidence regarding mental health issues, and in particular evidence available from Dr. Lewis. Those conversations caused Syler to conclude before he heard any evidence that the first trial's mental health evidence was "so discredited that he did not "buy any of it." The reason Syler did not "buy any of it" was because the first trial's foreperson told Syler the differences in sentences for Debbie's death versus Stephen's was solely that Debbie was holding Kyra when Terrance shot Debbie and Dr. Lewis' first trial's testimony was "ineffective." The appearance of unfairness is supported by Syler having handed 29.15 counsel an article discussing Dr. Lewis from the New Yorker Magazine that had absolutely no connection to any 29.15 issues.

This Court reviews 29.15 rulings for clear error. *Barry v. State*,850S.W.2d 348,350(Mo.banc1993). Due process requires a fair hearing. *Thomas v. State*,808S.W.2d364,367(Mo.banc1991); *In re Murchison*,349U.S.133,136(1955). "The test" and standard of review for disqualification is: "whether a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court." *State v. Smulls*,935S.W.2d9,17(Mo.banc1996); *Aetna Life Co. v. Lavoie*,475U.S.813,825(1986)("justice must satisfy the appearance of justice"). The benefit of any doubt is accorded a litigant, not a judge. *Smulls*,935S.W.2d at 26-27. Bias warranting disqualification must come from an extrajudicial source and not from what a judge learned from serving on the case. *State v. Nicklasson*,967S.W.2d596,605(Mo.banc1998). When reviewing a disqualification

claim, it is relevant to consider "all that has been said and done in the presence of the judge." *Haynes v. State*,937S.W.2d199,203(Mo.banc1996). Disqualification is required where there are facts showing prejudgment of an evidentiary issue which can be inferred. *Id.*204.

Pre-Amended Motion Facts - Appearance of Unfairness

On September 13, 2010, before the 29.15 amended motion was filed, 29.15 counsel filed motions for orders to transport Terrance for MRI and EEG tests(2nd29.15L.F.16-30). At the hearing on the motions to transport, respondent had no objection to the requests to transport for the tests(2nd29.15Tr.6).

After respondent had indicated it had no objection, Judge Syler inquired "haven't we been down this road before?"(2nd29.15Tr.6). Terrance's 29.15 counsel explained that neither test had been performed before and that psychiatrist Dr. Lewis and a neurologist (Dr. Pincus) had recommended that they be done and that no mental health evidence was presented at the retrial(2nd29.15Tr.6-7). Syler responded that he believed that the mental health evidence was "so discredited" at the first trial that there was no need to put it on at the retrial(2nd29.15Tr.7). Counsel responded there was no way to know whether the mental health evidence was "discredited" at the first trial because the jury was not polled as to why it did not give life as to Debbie's death(2nd29.15Tr.7). Syler responded that he "can only speak about a conversation I had with the foreperson of the first jury, giving me his insight on the matter. He's no longer alive, however."(2nd29.15Tr.7-8). Syler added that the juror viewed the mental health evidence as "pretty well trashed" and "they" did not believe

it(2nd29.15Tr.8). Syler continued that his conversation with the foreperson was "just off the record conversation long after it happened."(2nd29.15Tr.8). Counsel made additional argument that the testing was needed based on Dr. Lewis' prior finding regarding the amniotic fluid because such a finding could be indicative of brain structure abnormalities and Dr. Pincus' neurological testing, had found abnormalities(2nd29.15Tr.8).

Syler asked respondent whether it had any objection and respondent stated that it "doesn't buy any of it," but it did not object to the testing(2nd29.15Tr.8). Syler then stated "I don't buy any of it, either," but to prevent a denial of request to do the testing from being an issue later on, he granted the transport request(2nd29.15Tr.8).

Post-Amended Motion Filing Facts - Appearance of Unfairness

The amended motion was filed on October 18, 2010(2nd29.15L.F.33). That motion alleged that counsel was ineffective for failing to present mitigating mental health evidence from Drs. Lewis and Holcomb(2nd29.15L.F.36,61-73).

On October 25, 2010, counsel moved to disqualify Syler(2nd29.15L.F.149-67). The motion to disqualify Syler was based on his comments he made at the September 13, 2010 hearing(2nd29.15L.F.149-67). Syler's comments and actions reflected he had prejudged the mental health evidence and could not be fair and impartial(2nd29.15L.F.149-67). Syler's comments about what he learned from the first trial's foreperson, as it related to Syler's view of the mental health evidence, demonstrated his inability to fairly serve(2nd29.15L.F.151). During the September 13th hearing, Syler handed Terrance's 29.15 counsel an article from the

November 22, 2004 New Yorker Magazine(2nd29.15L.F.151-52,163-167). The New Yorker article coincidentally reported on Dr. Lewis' frustration with a Broadway play having plagiarized parts of her professional life without having obtained Lewis' permission(2nd29.15L.F.163-67;Brief Appendix A-15 - A-32). The article's focus was larger issues of plagiarism and not Lewis(2nd29.15L.F.163-67; Brief Appendix A-15 - A-32) Syler's actions reflected he had prejudged the mental health evidence(2nd29.15L.F.149-55).

On November 8, 2010, the motion to disqualify was heard(2nd29.15Tr.10). At the hearing, counsel highlighted that there would be mental health evidence presented at the 29.15 hearing which would include testimony from Drs. Lewis and Holcomb, as well as several lay witnesses(2nd29.15Tr.11). The motion to disqualify was premised on Syler's statements at the September 13, 2010 hearing and his contact with the foreperson from the first trial(2nd29.15Tr.11). Syler indicated that he spoke to the foreperson years after the first trial(2nd29.15Tr.12-13). Counsel noted that such contact with the foreperson was an extrajudicial contact and there was no opportunity for Terrance's counsel to speak with that foreperson since Syler said he was deceased(2nd29.15Tr.13).

Syler stated at the disqualification hearing that his comments reflected that the foreperson expressed the opinion that use of Lewis at the first trial was "ineffective"(2nd29.15Tr.13). Syler stated that he agreed with the juror, but that did not mean he could not fairly hear 29.15 evidence from Lewis(2nd29.15Tr.13). Syler said that the foreperson was a member of his church(2nd29.15Tr.13-14). Syler stated

that "from time to time" the foreperson had asked him the status of Terrance's case and "made some comments from time to time."(2nd29.15Tr.13-14). Syler stated that the foreperson was "curious and interested what all was going on"(2nd29.15Tr.13-14). The foreperson presented his views to Syler as though they were all the jurors' views(2nd29.15Tr.14). The motion to disqualify was denied(2nd29.15Tr.14).

Evidentiary Hearing Facts - Appearance of Unfairness

One amended motion claim was that direct appeal counsel was ineffective for failing to make any argument in her briefs that Terrance's sentence was disproportionate pursuant to the proportionality review required under §565.035. Syler injected at the conclusion of appellate counsel Deborah Wafer's testimony that "some years" after the jury's verdict the foreperson inquired about the status of Terrance's appeal(2nd29.15Tr.234-35). Syler continued that he was "curious" why Terrance got death on one count, but not the other(2nd29.15Tr.235). Syler stated that the foreperson reported to Syler that the different result was attributable to "the grandmother, Debbie, was holding the baby at the time she was killed, and that's what put them over"(2nd29.15Tr.234-35). Terrance's counsel objected to the injecting of what the foreperson reported because the foreperson was deceased such that there was no opportunity to interview or cross-examine the foreperson(2nd29.15Tr.235).

There Was The Appearance of Unfairness

Judge Syler's pre-amended motion, post-amended motion, and evidentiary hearing statements and actions establish that a reasonable person would have factual

grounds that there was the appearance that he could not fairly serve. *See Smulls*. Because Judge Syler did not disqualify himself, a new 29.15 hearing is required.[3]

Courts have consistently recognized that the extrajudicial source rule is implicated when a judge's bias is based on events originating outside the courtroom. *See,e.g., Hanger v. U.S.*,398F.2d91,101(8thCir.1968); *U.S. v. Vampire Nation*,451F.3d189,208(3rdCir.2006); *Prince v. Stewart*,2011WL722494 *2(N.D.Ill.2011);*Binsack v. Lackawanna County District Attorney's Office*,2009WL3739408 *1(M.D.Pa.2009).

Judge Syler's bias came from the extrajudicial source of talking to the first trial's foreperson numerous times years after the first trial(2nd29.15Tr.7-8,12-13). *See Nicklasson*. The foreperson was a member of Syler's church who had "from time to time" and "some years" after the jury's verdict had asked Syler about the status of Terrance's case and "made some comments from time to time"(2nd29.15Tr.13-14,234-35). *See Nicklasson*. Syler's contacts with the foreperson occurred outside the courtroom, and therefore, were extrajudicial. *See Hanger, Vampire Nation, Prince,* and *Binsack, supra.*

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[3] Terrance's burden is only to establish there was the appearance to a reasonable person that Judge Syler could not fairly serve and not that Judge Syler actually was unfair. *State v. Smulls*,935S.W.2d9,17(Mo.banc1996). That standard aside, Terrance believes Judge Syler's actions and statements which establish there was the appearance that he could not fairly serve also establish he in fact did not fairly serve.

In *State v. Harris*,842S.W.2d953,956(Mo.App.,E.D.1992), the defendant alleged in his 29.15 that his rights were violated when the trial judge overruled his objection to that judge entering the jury room while the jury deliberated. The judge made a trial record of the conversation he had with the jurors which dealt with the subject of whether the jury would have dinner. *Id.*955. Fundamental fairness required the trial judge be disqualified from the 29.15 because the defendant was entitled to the opportunity to present evidence of what the trial judge said and did in the jury room. *Id.*956-57. It was error for the trial judge to have denied a 29.15 evidentiary hearing because "[t]he judge acted as a witness when he based his ruling on the transcript; the transcript was derived solely from his own recollection." *Id.*957. Here the record shows Syler rejected Terrance's claims, involving the failure to call mental health witness Lewis, based on his extrajudicial conversations with the foreperson. In rejecting the claim counsel was ineffective for failing to call Lewis as a witness the findings state that "[t]he Court is aware that the first jury did not find Dr. Lewis credible and informed the parties of this fact."(2nd29.15L.F.203). Syler was required to disqualify himself because he acted like a witness relying on what the foreperson reported to him. *See Harris*.

A reasonable person would have grounds to find an appearance of impropriety in Syler serving. *See Smulls*. Prior to the amended motion being filed, when counsel sought leave to have Terrance transported for testing, Syler questioned the need for that testing because it was "so discredited" at the first trial that Syler thought it was unnecessary to have presented mental health evidence at the retrial(2nd29.15Tr.7).

Syler's prejudgment of any mental health evidence is highlighted by his pointed question on the request to transport of "haven't we been down this road before?"(2nd29.15Tr.6). At that same hearing, Syler stated that the first jury's foreperson, who was since deceased, had given Syler "insight" on the first trial's mental health evidence(2nd29.15Tr.7-8). Syler reported that based on conversing with that juror Syler had concluded that the mental health evidence was "pretty well trashed" and "they" did not believe it(2nd29.15Tr.8). Moreover, Syler indicated that his conversations with the foreperson were "just off the record conversation[s] long after it happened."(2nd29.15Tr.8). Additionally, at the hearing on the motion to transport, Syler stated that as to any mental health evidence "I don't buy any of it"(2nd29.15Tr.8).

Syler's statements at the motion to disqualify hearing simply confirm a reasonable person would have grounds to find an appearance of impropriety in Syler serving. *See Smulls*. Syler recounted that the foreperson had told him that the first trial's counsel's use of Lewis was "ineffective" and Syler stated that he agreed(2nd29.15Tr.13). Moreover, the foreperson had presented his views to Syler as though they were all the jurors' views(2nd29.15Tr.14).

Syler's statements at the evidentiary hearing to direct appeal counsel Wafer reinforce that a reasonable person would have grounds to find an appearance of impropriety in Syler serving. *See Smulls*. Syler indicated that he was "curious" why Terrance got death on the count involving Debbie, but not the other involving Stephen and the foreperson told him why(2nd29.15Tr.234-35). Syler told direct appeal

counsel the foreperson reported the different result was caused by "the grandmother, Debbie, was holding the baby at the time she was killed, and that's what put them over."(2nd29.15Tr.234-35).

Syler's action of handing 29.15 counsel a copy of a New Yorker Magazine article that discussed Dr. Lewis' frustration with a Broadway play having plagiarized parts of her professional life without having obtained Lewis' permission simply underscores Syler's inability to fairly consider the mental health evidence, and in particular, evidence from Dr. Lewis(2nd29.15L.F.151-52,163-67). Moreover, that Syler would take the extraordinary step of injecting an article devoted to the larger issue of plagiarism, which coincidentally discussed Lewis' feelings of having had her life story plagiarized, demonstrates an inability to fairly consider Lewis' expert testimony. The New Yorker article simply had no relevance to any issue in the 29.15 and Syler's injecting it into the record is grounds to find an appearance of unfairness in Syler serving. *See Smulls*.

Multiple defendants were charged with offenses arising from complex real estate transactions in *In re Faulkner*,856F.2d716,718-20(5thCir.1988). The trial judge was the first cousin of an uncharged participant in the real estate transactions. *Id.*718-70. The *Faulkner* Court held the trial judge was required to disqualify himself on multiple grounds. The first ground was that the judge was a close relative of an important participant in the transactions giving rise to the indictments against the defendants. *Id.*721. The second ground, which the court considered "even more importan[t]," was the judge's relative had communicated to the judge material facts

and her opinions and attitudes about those facts. *Id.*721. Here, the foreperson communicated material facts, opinions, and attitudes about the mental health evidence at the first trial, specific to Dr. Lewis, and presented those to Syler as held unanimously by all the jurors(2nd29.15Tr.8,14). Judge Syler was required to disqualify himself.

Syler's actions at the 29.15 hearing of apprising direct appeal counsel that the first trial's foreperson had explained to Syler the reason for the different sentencing results as to Debbie versus Stephen demonstrates the appearance of unfairness in Syler serving. At the hearing and in the findings, Syler professed that even though he was telling direct appeal counsel what the first trial foreperson had reported to Syler, he was not taking the foreperson's reporting into account in deciding the 29.15 case(2nd29.15Tr.234-35;2nd29.15L.F.193). If Syler was in fact not taking this information into account, then there was no reason for Syler to have sua sponte injected it, but he did anyway. The benefit of any doubt is accorded a litigant, not a judge, see *Smulls*, and Syler's injecting with direct appeal counsel what the foreperson reported demonstrates why a reasonable person would conclude there was the appearance of unfairness in Syler serving. *See Smulls*.

It is telling that in rejecting the claim counsel was ineffective for failing to call Lewis as a witness the findings state that "[t]he Court is aware that the first jury did not find Dr. Lewis credible and informed the parties of this fact."(2nd29.15L.F.203). The source of this assertion is what the jury foreperson reported to Syler(2nd29.15Tr.7-8,13). Thus, while Syler professed to be able to fairly serve,

despite his conversations with the foreperson(2nd29.15Tr.13), Syler invoked as a grounds for rejecting the claim Lewis should have been called what the first trial's foreperson reported to him. Syler's self-serving assertion that he could fairly consider Dr. Lewis' testimony (2nd29.15Tr.13) simply does not square with Syler's reporting that the foreperson had reported the use of Lewis was "ineffective" (2nd29.15Tr.13) and Syler's handing 29.15 counsel a copy of the unrelated New Yorker plagiarism article(2nd29.15L.F.151-52,163-67)

A new hearing before a different judge is required.

II.

STEPFATHER ROBERT'S VIOLENT ABUSIVE BEHAVIORS

The motion court clearly erred in denying the 29.15 postconviction claim counsel was ineffective for failing to call Dr. Lewis to testify for the limited purpose of the impact on Terrance of his stepfather Robert's violent, abusive behaviors because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel who wanted to pursue a "different" strategy from the original trial would have known and not duplicated the first trial's failed strategy of portraying Robert as a model father because the first 29.15 uncovered evidence of actual abuse Robert inflicted on Terrance and Terrance's mother, Linda, as well as a longstanding history of Robert's violent behavior. Terrance was prejudiced because evidence of an abusive, disadvantaged background is inherently mitigating for lessening moral culpability and would have mitigated Terrance's actions which were so inconsistent with Terrance's past.

Counsel stated they wanted to pursue a "different" strategy from the first trial, but instead duplicated the first trial's strategy that Terrance's stepfather Robert was an ideal father. Counsel pursued that same strategy, even though the first 29.15 uncovered evidence of actual abuse Robert inflicted on Terrance and Terrance's mother Linda, as well as, a longstanding violent history. Robert's abusive history was

inherently mitigating evidence that would have tipped the balance as to Terrance's moral culpability and produced a life sentence.

Review Standards

This Court reviews 29.15 findings for clear error. *Barry v. State*,850S.W.2d 348,350(Mo.banc1993). 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). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised and he was prejudiced. *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 of the proceeding would have been different. *Deck v. State*,68S.W.3d418,426(Mo.banc2002)(discussing *Strickland*). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*426.

Robert's First Trial Penalty

Testimony

During Robert's first trial penalty phase testimony, he portrayed himself as a model caring father involved in Terrance's life as part of a normal family(1stTrialTr.1670-80). At the first trial, Robert identified himself as Terrance's stepfather who had raised him since he was ten months(1stTrialTr.1670). Robert had only learned a couple of years before testifying that Terrance had learned that Robert

was not Terrance's biological father(1stTrialTr.1670). Robert testified he had never really wanted Terrance to know that he was not Terrance's biological father(1stTrialTr.1670).

Robert testified about having coached Terrance in Little League and having attended all of Terrance's basketball games(1stTrialTr.1673). Through Robert, assorted family pictures and various awards Terrance received were presented(1stTrialTr.1671-77).

Robert testified that this tragedy has caused the family to become closer(1stTrialTr.1678-79). Robert testified that he has applied this experience to try to help other young people(1stTrialTr.1679).

Robert's Penalty Retrial Testimony

Robert's retrial testimony was a carbon copy of the first.

Robert testified that he treated Terrance like he was his own son(2ndTrialTr.850). Robert never discussed with Terrance that he was not Terrance's biological father because it was unnecessary(2ndTrialTr.852-53). Terrance was ten months when Robert entered Terrance's life(2ndTrialTr.850). Robert and Terrance's mother have one child together, Shaneka, and Terrance was better behaved(2ndTrialTr.850). Robert recounted that Terrance had played basketball, baseball, football, and ran track(2ndTrialTr.851). Robert attended regularly Terrance's games(2ndTrialTr.851). Robert works for the Poplar Bluff School District and is on the City Council(2ndTrialTr.851).

Robert identified Exhibit C as a picture of Terrance on crutches with a broken leg caused by a car hitting Terrance when he was five years old(2ndTrialTr.853).

A picture of Terrance and Robert when Terrance was about two years old on a cold winter day was presented(2ndTrialTr.853-54). A picture of thirteen year old Terrance (Ex.G) dressed in an Easter Bunny suit done to entertain their church's younger children was presented(2ndTrialTr.854-55).

A picture of Robert giving Terrance a piggyback ride (Ex.E) was presented(2ndTrialTr.856). There was also pictures of Terrance and Shaneka presented during Robert's testimony(2ndTrialTr.855-56). A picture of six year old Terrance (Ex.N) was also presented(2ndTrialTr.856).

Robert reported that Terrance was well adjusted growing-up(2ndTrialTr.856-57). Robert reported that he was saddened because he did not know whether Kyra knows that he is her grandfather(2ndTrialTr.858). Robert recounted that since the shooting that Terrance's mother has become reserved and keeps to herself(2ndTrialTr.859). Robert stated that he still loves Terrance and that this tragedy has made the family closer(2ndTrialTr.859-60).

Documented Abuse Of Terrance Uncovered

In First 29.15

Dr. Cross evaluated Terrance for the first 29.15(1st29.15Tr.105). Cross recounted Terrance's medical records reflected when Terrance was about four years old he had a spiral tibial fracture, reportedly caused by being hit by a car(1st29.15Tr.119). Spiral fractures, as noted in Dr. Lewis' June, 1998 report, are

not impact fractures and are caused by intentional child abuse twisting acts(1st29.15Tr.119-20,136-37;1st29.15Ex.4 at 1158 and 2nd29.15Ex.D at 2).

Cross saw cigarette burns on Terrance's back, which Dr. Pincus' report discussed, and evidenced Terrance was abused(1st29.15Tr.134-36). Cross noted the secrecy Robert imposed on the family was symptomatic of abuse(1st29.15Tr.135-36).

Cross concluded that on the day of the offense, Terrance not only suffered from depression, paranoid thinking, and paranoid personality disorder, but also Post-Traumatic Stress Disorder (PTSD)(1st29.15Tr.149-50). Abuse Robert inflicted was significant in producing the PTSD(1st29.15Tr.131-32).

Cross' testing showed Terrance had longstanding intrusive thoughts - a strong indicator of physical and emotional abuse(1st29.15Tr.145-46). Cross' testing also found Terrance was not malingering on his abuse trauma history(1st29.15Tr.146).

Cessie Alfonso is a licensed clinical social worker who testified at the first 29.15 hearing(1st29.15Tr.23-24,34,79). Alfonso recounted that Terrance had grown-up in a household with a step-father who had a history of blowing-up, hitting people, and practicing infidelity(1st29.15Tr.59).

Alfonso recounted that Robert had a history of abusive behavior and used coercive control, intimidation, and violence to control the household(1st29.15Tr.56). In response, Terrance either tried to intervene or isolated himself by withdrawing and locking himself in his room(1st29.15Tr.56,60-61,63). Terrance still had a bed wetting problem when he was twelve, which was indicative of the intensity, duration, and

frequency of family conflict(1st29.15Tr.56-57). Alfonso noted Robert "is a batterer who used violence, coercive control, and intimidation"(1st29.15Tr.58).

Robert's Violent History - Pre and Contemporaneous With Terrance

Robert was born September 4, 1952(2nd29.15Ex.N at 144). Terrance was born November 19, 1975(2nd29.15Ex.H at 18). Terrance was ten months when Robert entered Terrance's life and lived with Terrance and Terrance's mother, Linda(2nd29.15Tr.197-98;2ndTrialTr.850). Robert married Terrance's mother Linda Anderson, and therefore, was Terrance's stepfather(2nd29.15Tr.178).

Catherine Luebbering was the retrial mitigation specialist(2nd29.15Tr.156-57). The first 29.15 team had acquired school, military, and police reports involving Robert, which were available to the retrial team (2nd29.15Exs.M,N,O;2nd29.15Tr.178-79,186-87).

On December 8, 1967, Robert's school principal informed the school board that fifteen year old Robert was expelled for the year(2nd29.15Ex.N at 144;2nd29.15Ex.M at 1). The principal stated that he had "worked very hard" to help Robert succeed, but Robert "has been nothing but trouble all year"(2nd29.15Ex.M at 1;2nd29.15Tr.194-95). The incident that culminated in Robert's expulsion was he fought with a teacher(2nd29.15Ex.M at 1;2nd29.15Tr.194-95).

On January 2, 1968, Robert's principal authored a letter that recounted incidents in which Robert had thrown books out a window, cursed at and fought with a teacher, and fought with another student(2nd29.15Ex.M at 2; 2nd29.15Tr.196).

On December 11, 1969, seventeen year old Robert was permanently suspended from school because of "continuous disturbances"(2nd29.15Ex.N at 144;2nd29.15Ex.M at 5;2nd29.15Tr.196-97).

When Robert was in the Air Force he was married to Earline Smith(2nd29.15Ex.N at 139). Luebbering recounted that the first trial's mitigation specialist, Linda Wohleber, obtained information from both Earline and the daughter Earline had with Robert, Deborah, that Robert was very violent and abusive to Earline(2nd29.15Tr.175-76). That abuse included beating and raping Earline(2nd29.15Tr.175-76). Robert's acts included breaking objects, turning over tables, and hitting walls(2nd29.15Tr.175-76). Robert was also abusive to his daughter Deborah(2nd29.15Tr.175-76). Earline reported that Robert had girlfriends while married to her(2nd29.15Tr.176). Earline reported having to call the police several times about Robert's actions(2nd29.15Tr.176).

On June 26, 1972, Robert chased and hit Air Force Sergeant Keene with a piece of wood(2nd29.15Tr.191,379;2nd29.15Ex.N at 45,70). On July 4, 1972, Robert was not allowed to sign a woman onto base and told the officer "[t]hat all cops are a bunch of mother fuckers" and told the officer "to kiss his ass"(2nd29.15Tr.192;2nd29.15Ex.N at 68-69).

A July 18, 1972, Air Force physician's report recounted that Robert had been in several fights and had a personality disorder(2nd29.15Tr.189;2nd29.15Ex.N at 42). The same physician on July 20, 1972 submitted a report noting that Robert had been involved in "numerous violent outbursts" and concluded Robert has "an aggressive

personality disorder"(2nd29.15Tr.190;2nd29.15Ex.N at 161). An Air Force psychiatrist evaluated Robert on July 25, 1972 and noted that Robert had had "numerous violent outbursts" and provided a diagnosis of "[c]haracter and behavior disorder, explosive personality as manifested by gross outbursts of rage or physical aggressiveness."(2nd29.15Tr.187,190-91;2nd29.15Ex.N at 16-17,43-44).

Robert's military behaviors included destruction of property and assault(2nd29.15Tr.187;2nd29.15Ex.N at 16-17). An August 14, 1972, letter from Commander Morris to Robert indicated that Robert had intentionally yanked a telephone's wires from the wall and had struck Sergeant Eversole with a wooden board and his fists(2nd29.15Tr.188;2nd29.15Ex.N at 27). Sergeant Eversole's statement added that the board was five feet long and contained nails(2nd29.15Tr.188-89;2nd29.15Ex.N at 41). Robert's Air Force superiors recommended terminating his service as rehabilitation was not an option(2nd29.15Ex.N at 16-17,43-44;2nd29.15Tr.378-79).

On March 31, 1981, when Terrance was five years old, there was a disturbance involving Robert and three other men that started at the Smith family household(2nd29.15Tr.183-84;2nd29.15Ex.O at 17-23). That incident evolved into Robert chasing the three in his car and Robert used his car to strike and to force the other car off the road(2nd29.15Tr.183-84;2nd29.15Ex.O at 17-23). A fight ensued where Robert used a knife and a tire iron(2nd29.15Tr.183-84;2nd29.15Ex.O at 17-23).

Samuel Norris reported to the police that on August 17, 1986, when Terrance was ten years old, Norris was at Robert's house and that Robert fired a gun at him two or three times while saying "Fuck you" and "I kill you"(2nd29.15 Ex.O at 12;2nd29.15Tr.180-81).

While Robert was married to Linda, he had a girlfriend, Shirley Pratt(2nd29.15Tr.185). On August 22, 1989, when Terrance was thirteen, Shirley had to be transported by ambulance to the hospital because Robert inflicted injuries following an argument(2nd29.15Tr.185-86;2nd29.15Ex.O at 5-7). Shirley was unable to stand or walk because Robert side swiped her with his car(2nd29.15Tr.185-86;2nd29.15Ex.O at 5-7).

On February 6, 1990, when Terrance was fourteen, Shirley Pratt, reported to the police that Robert appeared at her house cursing and yelling at her(2nd29.15Tr.185;2nd29.15Ex.O at 1-4). Robert pulled a gun and struck Shirley in the head with the gun knocking Shirley to the ground while Shirley was naked(2nd29.15Tr.185;2nd29.15Ex.O at 1-4). Robert proceeded to choke and hit Shirley in the face and head(2nd29.15Tr.185;2nd29.15Ex.O at 1-4).

Shirley's brother, Milton, arrived and found Robert choking Shirley and slamming Shirley against a wall(2nd29.15Tr.185;2nd29.15Ex.O at 1-4). When Milton intervened to help Shirley, Robert pulled a gun on Milton(2nd29.15Tr.185;2nd29.15Ex.O at 1-4). The responding police officer noted there was "obvious signs of physical abuse" to Shirley which included bruises and

swelling to her face and head and her eyeglasses were broken(2nd29.15Tr.185;2nd29.15Ex.O at 1-4).

Luebbering considered Robert's documented history of violence mitigating(2nd29.15Tr.183-86,192-94,197,206-07,210). Luebbering explained that Terrance lived with Robert at the time of the incidents that were the subject of police reports(2nd29.15Tr.192-93). Under the DSM IV, personality disorders are not easily modified and linger(2nd29.15Tr.192-93). Robert's personality traits and behaviors simply did not just go away(2nd29.15Tr.197-98). Because of Robert's extensive violent history towards Earline and his girlfriends, it is expected Robert's behaviors continued with Terrance's mother, and thereby, exposed Terrance to domestic violence(2nd29.15Tr.192-93,207).

Luebbering also noted that Robert's background was significant because he had a long history of threatening, aggressive, explosive, and unpredictable behavior(2nd29.15Tr.206). Robert strongly influenced the formation of Terrance's personality, moral character, and values(2nd29.15Tr.206-07). Luebbering believed all of Robert's acts are important to consider as to who Terrance is(2nd29.15Tr.207). It was unnecessary for Terrance to have witnessed Robert's abusive violent behavior for it to have been mitigating(2nd29.15Tr.207). Robert's violent, aggressive, background would have humanized Terrance for having experienced and been exposed to a violent environment that was perhaps directed at him and definitely directed at others(2nd29.15Tr.210).

Counsel Professed to Doing Something "Different"

Davis-Kerry and Turlington provided the same reasons for presenting Robert as the model father. Counsel wanted to take a "different" approach from the first trial(2nd29.15Tr.320-21,335-36,374). Counsel wanted the jury to perceive, that Terrance was a person who was loved, who was part of a good family, and who was important to his family(2nd29.15Tr.260-61,271-72,323-24,340,370-71,384). Turlington testified she has found generally traumatic and violent childhood evidence has not been persuasive mitigation(2nd29.15Tr.425-26). Both acknowledged being aware of Robert's violent history, including his domestic abuse history and infidelity(2nd29.15Tr.250-54,258-66,270-71,300,369-70,372-79,381-83,385).

Both felt Robert was the only cooperative family member who displayed emotion about Terrance's circumstances(2nd29.15Tr.253,260-61,323-24,340,371,384-85). Counsel did not want to portray Robert negatively because local people held favorable opinions of Robert based on his local government ties(2nd29.15Tr.339-40). The family, including Terrance, did not report violent, abusive behavior by Robert(2nd29.15Tr.253-54,271-72,323,370-72,385).

Dr. Lewis - Robert's Violent History

Lewis reviewed Robert's arrest, military, and school records documenting Robert's violent history(2nd29.15Ex.FF at 19,36). Robert's records reflected that he was episodically and extraordinarily violent(2nd29.15Ex.FF at 36-40). Lewis noted Robert's military records reflected a psychiatrist's finding that Robert has an explosive personality disorder(2nd29.15Ex.FF at 37-38).

Lewis interviewed Robert's ex-wife Earline(2nd29.15Ex.FF at 40). Earline described sadistic extreme violence Robert directed at her which included beating and raping her(2nd29.15Ex.FF at 40). Lewis interviewed Earline's and Robert's daughter, Deborah, who confirmed Robert's extreme violence(2nd29.15Ex.FF at 41).

Lewis noted that when Terrance was five years old he sustained a spiral tibial fracture(2nd29.15Ex.FF at27-28;2nd29.15Ex.H at 9). The hospital history report was Terrance was struck by a car, but spiral fractures are associated with intentional twisting acts(2nd29.15Ex.FF at 27-28). Lewis' findings would have accurately presented to the jury that Terrance's tibial fracture was the product of Robert's violent twisting and they would not have heard Robert portraying himself as a loving concerned parent describing Exhibit C as a picture of Terrance with a broken leg caused by Terrance having been struck by a car(2ndTrialTr.853).

Robert's documented history as to Shirley Pratt and Earline Smith was significant as to Terrance's life circumstances because an individual with Robert's history of domestic violence would be expected to continue that behavior(2nd29.15Ex.FF at 46). Terrance was protective of both his mother and Robert, but at the same time reported he had to physically separate them to prevent violence(2nd29.15Ex.FF at 46). Lewis noted there was violence in the home that was denied, while Robert maintained they were the perfect family(2nd29.15Tr.46). A parent's entire past behavior impacts and influences what a child who is raised by that parent becomes(2nd29.15Ex.FF at 35-36). Lewis made these findings while

acknowledging there was no evidence Robert used spanking to discipline Terrance(2nd29.15Ex.FF at 95).

Findings

The 29.15 findings state Lewis reviewed records relating to Robert's violent history, but made no showing how this related to Terrance(2nd29.15L.F.185). There was only one violent outburst involving Robert getting angry over Terrance eating a hen(2nd29.15L.F.185). There is no evidence or reports that Robert struck or spanked Terrance(2nd29.15L.F.185).

The findings state that mitigation specialist Luebbering testified that counsel wanted to portray Robert as an upstanding citizen involved in local government(2nd29.15L.F.191-92). Luebbering was unable to explain how Robert's violent past was mitigating(2nd29.15L.F.192,201).

Evidence of Robert's violent background would not have been mitigating because there was no evidence Terrance was aware of it(2nd29.15L.F.192). Lewis testified Terrance reported to her that Robert never struck him(2nd29.15L.F.192).

The findings stated that Davis-Kerry testified they were aware of, but decided not to present any evidence of Robert's violent past, including calling Earline, because Robert was their most cooperative and helpful witness and Terrance never endorsed that Robert had been violent or abusive(2nd29.15L.F.194). Counsel wanted to present evidence Robert cared about Terrance, attended Terrance's games, and was a good person(2nd29.15L.F.194). Counsel considered what was presented at the first trial, which was unsuccessful(2nd29.15L.F.194).

The findings state that Turlington testified that she was aware of Earline and Robert's prior arrest, school, and Air Force records, but they chose not to introduce any evidence of Robert's violent, abusive past because Robert was the only family member who showed emotion and Robert was nice(2nd29.15L.F.197). All the family, including Terrance, denied any abuse or violence by Robert(2nd29.15L.F.197-98). Turlington testified that she had had cases of more extensive abuse than that shown by Robert(2nd29.15L.F.197-98).

The findings state that the decision to not present evidence of Robert's past was reasonable because that evidence was presented at the first trial(2nd29.15L.F.201-02). Such evidence would not have been persuasive because the jury would have been required to assume Terrance was exposed to the same behavior(2nd29.15L.F.202). The school and Air Force records predate Terrance's birth and no explanation was furnished how those were mitigating(2nd29.15L.F.202). It was not explained how documentation of Robert's violent history was admissible(2nd29.15L.F.202).

The findings state there was no evidence that Terrance witnessed or had knowledge of any matter involving Robert's behavior toward Earline and the events involving Earline preceded Terrance's birth(2nd29.15L.F.201). At the first trial, Lewis testified to these background matters and it was not persuasive(2nd29.15L.F.201). Trial counsel made a rational judgment not to present evidence of Robert's abusive history(2nd29.15L.F.201). The 29.15 evidence was that

Robert never struck Terrance(2nd29.15L.F.201). That Terrance may have seen Robert perpetrate violent acts was speculation(2nd29.15L.F.201).

The findings state that Judge Wolff's penalty retrial direct appeal dissent "indicated that Movant's trial presented strong evidence in mitigation"(relying on *State v. Anderson*,306S.W.3d529,549-50(Mo.banc2010)(2nd29.15L.F.183). Counsels' strategy was sound(2nd29.15L.F.194,197-98).

Counsel Was Ineffective

In *Wiggins v. Smith*,539U.S.510,524-26,534-35 (2003), the Court found counsel's failure to conduct a thorough investigation that would have uncovered evidence of physical and sexual abuse reflected only a partial mitigation case. That partial case was the result of inattention and not reasoned strategic judgment and constituted ineffective assistance. *Id.*524-26,534-35. In finding Wiggins' counsel was ineffective the Court observed:

> Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability. *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background... may be less culpable than defendants who have no such excuse'").

*Id.*535. *Wiggins* reasoned that if the jury had been able to place Wiggin's "excruciating life history" on the mitigating side of the scale there was a reasonable

probability a different balance would have been struck. *Id.*537. The mitigating evidence that could have been presented might have influenced the jury's appraisal of Wiggins' moral culpability. *Id.*538.

In *Williams v. Taylor*,529U.S.362,369,395(2000), trial counsel presented mitigating evidence through the defendant's mother, his friends, and a psychiatrist, but failed to conduct investigation that would have uncovered extensive evidence of his abusive and deprived childhood. Similarly, Williams was denied effective assistance under *Strickland*. *Id.*396-98. Likewise, in *Rompilla v. Beard*,545U.S.374,390-93(2005) counsel was ineffective in failing to uncover and present abuse evidence.

An expert can rely on and give opinions based upon hearsay even though the hearsay is not independently admissible. *State v. Gladden*,294S.W.3d73,75(Mo.App.,S.D.2009). In responding to the *Wiggins* dissenters, the majority rejected the dissent's labeling abuse of Wiggins, recounted in a social worker's social history report done for the postconviction hearing, as "uncorroborated gossip." *Wiggins*,539U.S. at 537. The evidence about Robert's violent history was admissible through Dr. Lewis even though its reporting was based on hearsay. *See Gladden* and *Wiggins*. The amended motion pled Dr. Lewis would be called to testify Robert's personality disorder based violent history would continue to be manifested in his treatment of Terrance and Terrance's mother, Linda(2nd29.15L.F.36).

In *Porter v. McCollum*,130S.Ct.447,448(2009), the defendant was convicted of two counts of first degree murder for killing his former girlfriend and her boyfriend, but sentenced to death only on the former girlfriend count. Porter's counsel did not present any evidence regarding Porter's abusive childhood background. *Id.*449. In finding Porter's counsel was ineffective, the Court reasoned that had counsel been effective the judge and the jury "would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Id.*454(quoting *Wiggins*,539U.S. at 535). That troubled history included Porter's abusive background. *Porter*,130S.Ct. at 454. The *Porter* Court reasoned that such history was critical and relied on *Penry's* rationale, as contained in *Wiggins*, *supra*, that there is a long held societal belief that a disadvantaged background may make a defendant less culpable. *Id.*454.[4] The *Porter* Court added that the jury and judge had not heard evidence "which 'might well have influenced the jury's appraisal of [Porter's] moral culpability.'" *Id.*454(alteration in *Porter*).

The *Porter* Court found it particularly significant that the sentencing judge accepted the jury's death recommendation for Porter's former girlfriend, but rejected the death recommendation for the former girlfriend's boyfriend noting:

> Had the judge and jury been able to place Porter's life history "on the mitigating side of the scale," and appropriately reduced the ballast on the

[4] *Penry* was overruled in *Atkins v. Virginia*,536U.S.304(2002) to the extent it allowed mentally retarded individuals to be executed.

> aggravating side of the scale, there is clearly a reasonable probability that the advisory jury—and the sentencing judge—"would have struck a different balance," *Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527, and it is unreasonable to conclude otherwise.

Porter,130S.Ct. at 454. The *Porter* Court added: "It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with [his former girlfriend]." *Id.*455.

In *Griffin v. Pierce*,622F.3d831,833,837(7thCir.2010), a jury convicted Griffin of murder, he waived his right to jury sentencing, and a judge imposed death. The Illinois Supreme Court in *Griffin* found that counsel's not presenting abuse evidence was strategic. *Id.*838. The Illinois Supreme Court added that information about Griffin's personal history was in the presentence report. *Id.*838. That report stated Griffin had a normal childhood and good parental relationships. *Id.*845. In fact, Griffin's father had inflicted severe abuse. *Id.*844-45.

The Illinois Supreme Court in *Griffin* also found the postconviction evidence was either cumulative to what was presented or "not inherently mitigating." *Id.*839. The Illinois Supreme Court also relied on the postconviction trial court having found the postconviction evidence would not have changed Griffin's sentence because the postconviction judge was the same judge who had imposed death. *Id.*839.

The Seventh Circuit found counsel was ineffective and Griffin was prejudiced because the sentencing court would have learned of the kind of troubled history the

Supreme Court has found relevant to assessing a defendant's moral culpability. *Id.*844(relying on *Porter* and *Wiggins*). The Seventh Circuit noted it could give weight to the identity of the sentencing and postconviction judge and that judge's finding the result would not have been different with the postconviction evidence, but that finding was not conclusive. *Griffin*,622F.3d at 845. The *Griffin* Court found the Illinois Supreme Court's conclusion that the abuse evidence was not "inherently mitigating" was "unreasonable." *Id.*845.

What *Wiggins*, *Penry*, *Williams*, *Rompilla*, *Porter*, and *Griffin* uniformly stand for is that there is a societal belief that abuse is inherently mitigating. Trial counsel knew from the first postconviction action that Cross and Alfonso had found Terrance had been abused because counsel had the first 29.15 counsels' file(2nd29.15Tr.253-54). Cross had identified Terrance's spiral tibial fracture, which had been noted in Lewis' June 24, 1998 report, and cigarette burns on Terrance's back as abuse inflicted on Terrance(1st29.15Tr.105,119-20,134-37;1st29.15Ex.4 at 1158;2nd29.15Ex.D at 2). Cross had done testing on Terrance that found intrusive thoughts symptomatic of abuse and other testing that Terrance was not malingering on abuse(1st29.15Tr.145-46). Alfonso had found Robert had used coercive control, intimidation, and violence to control the family household(1st29.15Tr.56). Counsel also had from the first 29.15 Robert's school, military, and police records(2nd29.15Exs.M,N,O;2nd29.15Tr.178-79,186-87).

Counsel professed that their approach to mitigation was intended to be "different" from the first trial(2nd29.15Tr.320-21,335-36,374). The first penalty

phase was devoted to calling family and friends to testify about Terrance's athletic accomplishments, his good work ethic, his polite and respectful behavior, and people's inability to comprehend what caused Terrance to do the shooting(1stTrialTr.1670-1703). The retrial penalty witnesses focused on these same themes(2ndTrialTr.730-40,742-46,798-803,804-14,839-43,883-90). At the first penalty phase, the jury heard from Robert, as it did in the retrial, about the model father that he was(1stTrialTr.1670-80;2ndTrialTr.849-61). Thus, the approach to mitigation witnesses was **the same, not "different**."

Davis-Kerry testified that at the first trial there was evidence of Robert's violent propensities presented and at the retrial the defense team "wanted to try a different approach"(2nd29.15Tr.272). Davis-Kerry's testimony and the findings that evidence of Robert's violent abusive conduct was presented to the first jury (2nd29.15L.F.201-02) is clearly erroneous since it never happened, rather both juries heard Robert was the model father(1stTrialTr.1670-80;2ndTrialTr.849-61). Likewise, the finding the jury would have had to assume Terrance was exposed to behavior similar to that found in Robert's records was clearly erroneous (2nd29.15L.F.202) because Cross and Alfonso for the first 29.15 actually found evidence that Robert had abused Terrance, so no assumption was necessary(1st29.15Tr.56,105,119-20,134-37,145-46;1st29.15Ex.4 at 1158;2nd29.15Ex.D at 2). Cross' finding was premised on Dr. Lewis' June 24, 1998 report identifying Terrance as having a spiral fracture caused by intentional twisting, not accidental impact(1st29.15Tr.119-20,136-

37;1st29.15Ex.4 at 1158 and 2nd29.15Ex.D at 2). Dr. Cross also saw cigarette burns on Terrance's back(1st29.15Tr.134-36).

Even setting aside what Cross and Alfonso found, Robert's arrest records reflected four violent incidents which occurred while Terrance was a child between the ages of five and fourteen and residing with Robert. On March 31, 1981, there was an altercation that began at the family home involving Robert and three other individuals that escalated into Robert using his car to force them off the road and then Robert fighting with them using a tire iron and a knife(2nd29.15Tr.183-84;2nd29.15Ex.O at 17-23). On August 17, 1986, Robert while at the family residence fired shots at Samuel Norris saying "Fuck you" and "I kill you"(2nd29.15 Ex.O at 12;2nd29.15Tr.180-81). On August 22, 1989, Robert intentionally side swiped his girlfriend Shirley Pratt injuring her(2nd29.15Tr.185-86;2nd29.15Ex.O at 5-7). On February 6, 1990, Robert struck Shirley Pratt in the head and face with a gun while she was naked(2nd29.15Tr.185;2nd29.15Ex.O at 1-4). During the February 6, 1990 incident, Robert pulled a gun on Shirley's brother when he came to her assistance(2nd29.15Tr.185;2nd29.15Ex.O at 1-4). Such violent incidents could not have gone unnoticed in the family household.

Turlington thought from the available materials a reasonable inference was there was violence in Terrance's household(2nd29.15Tr.384). Reasonable counsel who believed Robert's background records history supported an inference that Robert was violent at home would have presented this evidence. *See Wiggins*, *Penry*, *Williams*, *Rompilla*, *Porter*, and *Griffin.*

Robert's violent school and military past, likewise, were probative that Terrance was at a minimum exposed to extreme violence at home and more probably subjected to violence himself. In the military, Robert was diagnosed as having an explosive personality disorder manifested by gross outbursts of rage or physical aggressiveness(2nd29.15Tr.187,190-91;2nd29.15Ex.N at 16-17,43-44). Under DSM IV personality disorders are not easily modified and linger(2nd29.15Tr.192-93). As mitigation specialist Luebbering indicated Robert's personality traits and violent behaviors did not just simply go away(2nd29.15Tr.183-86,192-94,197-98,206-07,210).

As Dr. Lewis testified, an individual with Robert's domestic violence history can be expected to continue that conduct(2nd29.15Ex.FF at 46). Further, Lewis noted that a parent's entire past behavior shapes and influences what a child raised by that parent becomes(2nd29.15Ex.FF at 35-36).[5] Robert's violent history was reasonably expected to continue with Linda and Terrance and provided a framework for explaining why Terrance responded to conflict with the Rainwaters with violence. Calling Lewis as a retrial mitigation witness is a vastly different purpose from her having been called at the original trial to support a guilt phase diminished capacity

[5] Even if this Court concludes counsel was not ineffective for failing to call Lewis to testify about her psychotic depression and dissociative disorder diagnoses(*See* Point IV) Lewis should have been called at least to testify for the mitigating value about Robert's violent history and its impact on Terrance.

inability to deliberate defense (1stTrialTr.1607-09,1617,1620-21,1625-26), and therefore, the findings' reliance on the guilt phase result (2nd29.15L.F.201) to reject this claim was clearly erroneous.

Davis-Kerry knew that personality disordered individuals can become violent and irrational and a defendant relying on such a disorder would not be a good defense(2nd29.15Tr.267). The reason a personality disorder defense is not a good one is a personality disorder is hard to treat and not persuasive for a jury giving life(2nd29.15Tr.267-68). Turlington indicated that personality disorders tend to be a fixed characteristic and are difficult to treat because they do not respond to medication(2nd29.15Tr.380). For both counsel to have this knowledge of personality disorders, it was unreasonable for them to fail to present evidence of Robert's violent behaviors. *See Strickland*. Moreover, given that having a personality disorder is not a good defense, it follows that evidence a defendant was victimized by someone with a violent personality disorder is compelling mitigating evidence for minimizing a defendant's moral culpability. *See Wiggins*.

For trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003);*State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994). Counsels' reasons for not presenting evidence of Robert's violent abusive behaviors was they were doing something "different" from the first trial and wanted the jury to perceive, that Terrance was a person who was loved, who was part of a good family, and who was important to his family(2nd29.15Tr.260-61,271-72,323-24,340,370-71,384). Counsel

did the same and not something **"different"** through repeating the theory that Terrance was well liked and thought of and inexplicably committed these acts and **repeated portraying Robert as the model father**. Counsel also did not present evidence of Robert's violent history because Robert comes across as nice and with emotion for Terrance no other family member displayed(2nd29.15Tr.384-85). Counsels' strategies were not reasonable. Counsel's mitigation penalty phase witnesses did not present anything "different," and therefore, such strategy cannot be reasonable. *See Butler* and *McCarter*.

Counsels' decision to pursue presenting Terrance was part of a good family and who loved him was objectively unreasonable. Evidence from a defendant's family about the defendant's positive attributes in penalty phase conveys "the obvious" that the defendant's family does not want him executed. *People v. Stanley*,897P.2d481,519(Ca.1995). *See also, People v. Avery*,592N.E.2d29,39(Ill.App.1991)(defendant's family's testimony contradicting state's witnesses reflected "an obvious desire to see the head of the family escape punishment."). Counsels' theory did no more than convey "the obvious" that people part of Terrance's life did not want him executed. *See Stanley* and *Avery*.

In *People v. Edwards*,745N.E.2d1212,1230(Ill.2001), the death sentenced defendant argued counsel were ineffective in failing to object to the prosecutor's argument evidence of the defendant's good family that the defense had offered in mitigation was actually aggravation. The argument was not objectionable because it was permissible for the prosecutor to "argue that the defendant's later criminal

conduct shows that he rejected his upbringing, and that he turned to crime despite his favorable background." *Id.*1230. *See, also, Johnson v. Bell*,344F.3d567,574-75(6thCir.2003)(counsel was not ineffective in efforts to "humanize" defendant when counsel failed to call witnesses to testify defendant came from a family who loved him where defendant murdered his wife because such evidence would have made defendant appear even more culpable). Respondent did in Terrance's case what was authorized in *Edwards* turn the "good family" so called "mitigation" into aggravation. In Terrance's prosecutor's initial closing argument the jury was told:

> And you've heard a good bit about the defendant's background. I am prepared to believe that **his parents** and his friends **are decent people**, just as I'm prepared to believe that the Rainwaters were decent people. **What he did does not reflect on any of them**, but it is his actions that we must analyze. **There is nothing in his background**, according to what we've been told, to suggest he would do this.

(2ndTrialTr.900)(emphasis added). Reasonable counsel would not have foregone evidence of Robert's violent history to present the "good family" so called "mitigation" theory. *See Wiggins*, *Penry*, *Williams*, *Rompilla*, *Porter*, and *Griffin.*

In *Gill v. State*,300S.W.3d225,228-29(Mo.banc2009), respondent portrayed through its penalty evidence that the victim was an outstanding individual with impeccable character. This Court found Gill's counsel was ineffective for failing to present evidence that would have rebutted such portrayal of the victim's character. *Id.*228,233-34. In the same way the jury was given a totally false impression of the

Gill victim that weighed in favor of imposing death, here the jury was given the equally false impression that Terrance came from a home with an ideal father and was more deserving of death because he had rejected his upbringing, and turned to crime, despite his favorable background. *See Edwards.*

In deciding not to present evidence of Robert's violent history, counsel relied on Terrance and his mother not having reported abuse by Robert(2nd29.15Tr.253-54,271-72,372,385). Turlington acknowledged that it is "common" for clients to be reluctant to acknowledge abuse(2nd29.15Tr.383). It is a well recognized principle that "victims and abusers hide the abuse or deny its existence at all." Davis, *Mediating Cases Involving Domestic Violence: Solution or Setback?*, 8 Cardozo J. Conflict Resol. 253, 269 (2007). *See also*, Stevenson, *Federal Antiviolence And Abuse Legislation: Toward Elimination Of Disparate Justice For Women And Children*, 33 Willamette L.Rev. 847,883(1997) (the "typical" abuse victim "conceals the abuse from others out of fear of the abuser's increased aggression"). In *Rompilla*, the Court noted that counsel had found Rompilla to have been uninterested in helping uncover helpful abuse evidence and even actively obstructed obtaining it, but still counsel was ineffective. *Rompilla*,545U.S. at 381. Failing to present evidence of Robert's violent history because Terrance and his mother did not report abuse was not reasonable. *See Rompilla* and *Mediating Cases Involving Domestic Violence and Federal Antiviolence And Abuse Legislation, supra*. Turlington also testified that based on her past experience she did not find evidence of a traumatic and violent childhood particularly mitigating (2nd29.15Tr.425-26). Turlington's reporting is

contrary to the basic underpinnings of *Wiggins*, *Penry*, *Williams*, *Rompilla*, *Porter*, and *Griffin*, and therefore, cannot be reasonable.

Contrary to the findings, Judge Wolff's dissent did not endorse the mitigation case presented as especially well done(2nd29.15L.F.183). The majority found that an error in the verdict director on how the jury was to consider mitigating evidence was not prejudicial. *State v. Anderson*,306S.W.3d529,534-36(Mo.banc2010). Wolff found that there was **adequate** mitigation evidence to the extent that the failure to properly instruct the jury was prejudicial to the jury being able to fully consider that evidence. *Id.*549-50. Notably, the evidence Wolff's dissent identified was how the acts here were so out of character for Terrance and Terrance's distress about being excluded from his daughter's life and not the evidence casting Robert as an ideal father because Robert "the good father" evidence is actually aggravating, not mitigating. *Id.*549-50. *See Edwards.*

Terrance was prejudiced because Lewis could have given the jury an accurate mitigating rendition of the violent abusive environment in which Terrance was raised and not the misinformation that Terrance was raised by a model caring father. *See Wiggins*, *Penry*, *Williams*, *Rompilla*, *Porter*, and *Griffin.* Moreover, respondent would not have been able to cast Terrance as having rejected his upbringing in committing this offense so as to make the offense even more aggravated. *Cf. Edwards.*

A new penalty phase is required.

III.

EARLINE SMITH - VICTIM OF ROBERT'S VIOLENCE

The motion court clearly erred in denying the 29.15 postconviction claim counsel was ineffective for failing to call Earline Smith, Terrance's stepfather Robert's ex-wife, to testify about Robert's violent and abusive behaviors Robert inflicted on she and her daughter, Deborah, because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Earline for the jury to hear firsthand from one of Robert's victims the intensity and magnitude of the domestic violence Robert inflicted on Earline and Deborah for the jury to consider in conjunction with hearing from Dr. Lewis (Point II) that Robert's domestic violence history would be expected to continue as to Terrance and his mother. Terrance was prejudiced because all of Robert's violent abusive past behavior shaped and influenced Terrance and was inherently mitigating evidence lessening Terrance's moral culpability supporting life.

Earline Smith could have told the jury firsthand about the intensity and magnitude of the violent abusive conduct she and her daughter Deborah endured while she was married to Robert. Earline's testimony should have been presented so that the jury heard from an actual victim of Robert's abuse. The abuse perpetrated against Earline could have been considered in conjunction with Dr. Lewis testifying

that Robert's violent past would be expected to continue with Terrance and his mother Linda and that all of Robert's violent abusive past behavior shaped and influenced the person that Terrance was.

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).

Violence Directed At Former Wife Earline

Earline was married to Robert for eleven years(2nd29.15Ex.GG at 1).[6] Robert frequently beat Earline and frightened their children(2nd29.15Ex.GG at 1-2). Robert verbally abused their children and that caused their daughter Deborah to require mental health treatment(2nd29.15Ex.GG at 1-2). Robert's beating Earline caused her to have multiple shoulder surgeries(2nd29.15Ex.GG at 1). Robert raped Earline numerous times, including while she was pregnant and shortly after she gave birth to their daughter(2nd29.15Ex.GG at 1-2). After Earline had breast surgery, Robert twisted her breast which caused her to have complications(2nd29.15Ex.GG at 1-2).

Robert intentionally broke objects, overturned tables, and struck walls(2nd29.15Ex.GG at 1-2). Robert intentionally crushed Earline's eye

[6] The testimony Earline would have presented was done by stipulation(2nd29.15Ex.GG).

glasses(2nd29.15Ex.GG at 1-2). Earline called the police many times while she was married to Robert(2nd29.15Ex.GG at 2).

When Earline and Robert eventually divorced, Robert stalked Earline and threatened her(2nd29.15Ex.GG at 2). Earline began carrying a gun for protection(2nd29.15Ex.GG at 2). Robert stopped harassing Earline only after an incident where Earline had to aim her gun at Robert(2nd29.15Ex.GG at 2).

Counsels' Testimony

Counsel testified that despite knowing Robert's violent history they chose not to present that evidence(2nd29.15Tr.250-54,258-66,270-71,300,369-70,372-79,381-83,385). Counsel testified they wanted a "different" approach from the first trial(2nd29.15Tr.320-21,335-36,374). Counsel wanted the jury to perceive that Terrance was a person who was loved, who was part of a good family, and who was important to his family(2nd29.15Tr.260-61,271-72,323-24,340,370-71,384). Robert was the only cooperative family member who displayed emotion about Terrance's circumstances(2nd29.15Tr.253,260-61,323-24,340,371,384-85).

Findings

The findings state there was no evidence that Terrance witnessed or had knowledge of any matter involving Robert's behavior toward Earline and the events involving Earline preceded Terrance's birth(2nd29.15L.F.201). At the first trial, Lewis testified to these background matters and it was not persuasive(2nd29.15L.F.201). Luebbering was unable to explain how any of Robert's violent history was mitigating(2nd29.15L.F.201). Trial counsel made a rational

judgment not to present evidence of Robert's abusive history(2nd29.15L.F.201). The 29.15 evidence was that Robert never struck Terrance(2nd29.15L.F.201). That Terrance may have seen Robert perpetrate violent acts was speculation(2nd29.15L.F.201).

Counsel Was Ineffective

There is a long held societal belief that a disadvantaged background, and in particular a background of abuse, may make a defendant less morally culpable. *See* as discussed in detail Point II - *Wiggins v. Smith*,539U.S.510(2003); *Penry v. Lynaugh*, 492 U.S.302,319(1989); *Williams v. Taylor*,529U.S.362(2000); *Rompilla v. Beard*,545U.S.374(2005); *Porter v. McCollum*,130S.Ct.447(2009); and *Griffin v. Pierce*,622F.3d831(7thCir.2010). Evidence of abuse is inherently mitigating. *Griffin v. Pierce*,622F.3d at 845.

Evidence from a defendant's family about the defendant's attributes in penalty phase conveys "the obvious" to a jury that the defendant's family does not want him executed. *People v. Stanley*,897P.2d481,519(Ca.1995). *See also*, *People v. Avery*,592N.E.2d29,39(Ill.App.1991)(defendant's family's testimony contradicting state's witnesses reflected "an obvious desire to see the head of the family escape punishment.").

Lewis interviewed Robert's first wife Earline(2nd29.15Ex.FF at 40). Earline described sadistic extreme violence Robert directed at her which included beating and raping her(2nd29.15Ex.FF at 40). Lewis interviewed Earline's and Robert's daughter,

Deborah, who confirmed Robert's extreme violence directed at Earline(2nd29.15Ex.FF at 41).

Lewis found that Robert's history of domestic violence both as to Earline and Shirley Pratt was significant because someone with Robert's history would be expected to continue that behavior(2nd29.15Ex.FF at 46). Lewis noted that a parent's past behavior impacts and influences what a child who is raised by that parent becomes(2nd29.15Ex.FF at 35-36).

Reasonable counsel would have presented evidence of the intensity and magnitude of the domestic violence Robert inflicted on Earline and Deborah so that it could be considered in conjunction with Lewis' findings that Robert's history of violence would be expected to continue with Terrance and his mother and that Robert's past behaviors influenced the person Terrance became. *See Wiggins*, *Penry*, *Williams*, *Rompilla*, *Porter*, and *Griffin.* Terrance was prejudiced because had the jury had this inherently mitigating evidence on the mitigating side of the scale and reduced the ballast on the aggravating side there is a reasonable probability the jury would have struck a different balance. *See Griffin*,622F.3d at 845; *Porter*,130S.Ct. at 454; and *Strickland*.

It should be noted that no one, and in particular Dr. Lewis, testified at the first trial about Robert's violent abusive history(*See* 1stTrialExs.D,E). Rather, both juries got the same misinformation that Robert was the model caring father(1stTrialTr.1670-80;2ndTrialTr.849-61).

For trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003); and *State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994). Here counsel's strategy to do something "different" was not reasonable because they did the same as the first trial repeating the theory that Terrance was well liked and thought of and inexplicably committed these acts and repeated portraying Robert as the model father. *See* detailed discussion Point II.

Contrary to the findings, Luebbering considered Robert's documented history of violence mitigating and explained why(2nd29.15Tr.183-86,192-94,197,206-07,210). Luebbering explained that Terrance lived with Robert at the time of the incidents that were the subject of police reports(2nd29.15Tr.192-93). Under the DSM IV, personality disorders are not easily modified and linger(2nd29.15Tr.192-93). Luebbering explained Robert's personality traits and behaviors simply did not just go away(2nd29.15Tr.197-98). Because of Robert's extensive violent history towards Earline and his girlfriends, Luebbering expected Robert's behaviors had continued with Terrance's mother, and thereby, exposed Terrance to domestic violence(2nd29.15Tr.192-93,207).

Luebbering also noted that Robert's background was significant because he had a long history of threatening, aggressive, explosive, and unpredictable behavior(2nd29.15Tr.206). Robert strongly influenced the formation of Terrance's personality, moral character, and personal values(2nd29.15Tr.206-07). All of Robert's acts are important to consider as to who Terrance is as a

person(2nd29.15Tr.207). Luebbering noted that it was not necessary for Terrance to have actually witnessed Robert's abusive violent behavior in order for that behavior to have been mitigating(2nd29.15Tr.207). Luebbering added Robert's violent, aggressive, background would have humanized Terrance for having experienced and been exposed to a violent environment that was perhaps directed at him and definitely directed at others(2nd29.15Tr.210).

Reasonable counsel would have presented evidence of Robert's abuse of Earline and her daughter and Terrance was prejudiced. Instead, the jury was given a totally false impression of Robert in contravention of *Wiggins*, *Penry*, *Williams*, *Rompilla*, *Porter*, and *Griffin* which have held abuse is inherently mitigating. That false impression the jury was left with was no different than the unrebutted distinctly false portrayal of the victim in *Gill v. State*,300S.W.3d225(Mo.banc2009). *See* Point II.

A new penalty phase is required.

IV.

FAILURE TO CALL DR. LEWIS - TERRANCE'S PSYCHIATRIC DIAGNOSES

The motion court clearly erred in denying the 29.15 postconviction claim that counsel was ineffective for failing to call Dr. Lewis because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called her to provide mitigating evidence that Terrance suffered from a psychotic depression characterized by paranoia and delusions while living in dysfunctional family circumstances all of which would have supported the §565.032.3 statutory mitigators extreme emotional distress and substantial impairment. Lewis also would have presented testimony Terrance had impaired intellectual functioning. Terrance was prejudiced because there is a reasonable probability if Lewis was called he would have been sentenced to life.

Counsel failed to call Dr. Lewis to testify that Terrance suffered from a psychotic depression characterized by paranoia and delusions. Reasonable counsel would have called Lewis because Lewis' testimony would have supported the §565.032.3 statutory mitigators extreme emotional distress and substantial impairment. Lewis also could have provided evidence Terrance had impaired intellectual functioning. Terrance was prejudiced because there is a reasonable probability he would have been sentenced to life if Lewis had testified.

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).

"Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*,542U.S.274,285(2004)(quoted in *Hutchison v. State*,150S.W.3d292,304(Mo.banc2004) and *Glass v. State*,227S.W.3d463,468(Mo.banc2007)). Relevant mitigating evidence "is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard*,542U.S.at 284.

Dr. Lewis' 29.15 Testimony

Dr. Lewis is an M.D. psychiatrist and is not a forensic pyschiatrist(2nd29.15Ex.FF at 6).

When Terrance was seventeen months old, he ingested rubbing alcohol, which is toxic to the nervous system(2nd29.15Ex.FF at 26-27). On Terrance's I.Q. scores he scored in the normal range, but his school grades were much lower than would be expected for someone with his measured I.Q.(2nd29.15Ex.FF at 32). There was a significant disparity between Terrance's achievement tests scores as to performance and verbal skills with his performance skills being significantly better(2nd29.15Ex.FF

at 32-33). That disparity supported a neurological problem with resulting learning disabilities(2nd29.15Ex.FF at 33).

When Terrance was about thirteen years old he began hearing persecutory berating voices and he also became depressed(2nd29.15Ex.FF at 51-53). When Terrance dropped out of college he became severely depressed(2nd29.15Ex.FF at 54). Terrance went to work at a furniture factory and became involved with Abbey about that same time(2nd29.15Ex.FF at 55). Because of taking calls from Abbey and leaving work early to be with her, when she was pregnant, Terrance lost his job(2nd29.15Ex.FF at 55).

When Terrance moved in with the Rainwaters, there was much tension between Terrance and Debbie as Terrance felt Debbie demeaned him(2nd29.15Ex.FF at 56). There was an incident where Debbie accused Terrance of having threated her and Debbie obtained a restraining order against Terrance based on that alleged occurrence(2nd29.15Ex.FF at 56). Those events created a confusing state for Terrance because within a few days of the restraining order having issued, Debbie invited Terrance and Terrance's sister to a picnic(2nd29.15Ex.FF at 56).

Terrance became depressed that his daughter would be taken from him(2nd29.15Ex.FF at 60). Terrance had attended prenatal classes with Abbey, but then was excluded from the delivery of their child(2nd29.15Ex.FF at 58-59).

Terrance felt he was rejected by his biological father and he wanted to be a better father to Kyra(2nd29.15Ex.FF at 60). Stephen and Debbie sent Terrance contradictory signals, they would ask Terrance to babysit Kyra, but then would

prohibit Terrance from seeing her(2nd29.15Ex.FF at 60-61). Such contradiction created ambiguity for Terrance as to his role in Kyra's life(2nd29.15Ex.FF at 61).

In the days leading up to the shooting Terrance was becoming increasingly depressed and obsessed with the idea the Rainwaters were intending to deny him all access to Kyra(2nd29.15Ex.FF at 62). Terrance ruminated over his biological father having abandoned him and the thought of him being forced to abandon Kyra(2nd29.15Ex.FF at 62).

Terrance's paranoia was manifested by his belief that Debbie and Stephen wanted to kill him(2nd29.15Ex.FF at 61). Terrance also believed that the Rainwaters were planning to move Kyra to California so that he would never see her again(2nd29.15Ex.FF at 61).

The day before the shootings Abbey had arranged with Terrance's mother to babysit Kyra the next day, while Terrance was at a job interview(2nd29.15Ex.FF at 62-63). When Terrance arrived home Kyra was not at his house and Terrance was unable to get in contact with Abbey(2nd29.15Ex.FF at 62-63). This occurrence played into Terrance's obsession and delusion that the Rainwaters were intending to deny him all access to Kyra and move her away(2nd29.15Ex.FF at 62-63). Terrance believed that the Rainwaters had left town with Kyra and he drove around looking for Abbey(2nd29.15Ex.FF at 63-64).

Terrance's behavior in shooting the Rainwaters was entirely out of character for the behavior people expected of him, which was non-violent and withdrawn(2nd29.15Ex.FF at 68). People who saw Terrance within a short time of

the shooting described behavior that was consistent with Terrance being in an altered state(2nd29.15Ex.FF at 65-67). A Public Defender investigator, Larry Woods, had seen Terrance about two weeks before the shooting and also saw him about one week after the shooting(2nd29.15Ex.FF at 67). Terrance presented contrasting demeanors to Woods on each occasion(2nd29.15Ex.FF at 67). In particular, Terrance presented as not cognizant of why he was in jail(2nd29.15Ex.FF at 67).

Lewis found that Terrance suffered from a psychotic depression which included symptoms of paranoia and hallucinations(2nd29.15Ex.FF at 69-70,95). At the time of the offense, Terrance was acting under an extreme mental disturbance(2nd29.15Ex.FF at 70). Terrance was substantially impaired as to his ability to appreciate the criminality of his conduct and to conform to the requirements of law(2nd29.15Ex.FF at 70). Terrance was misinterpreting behaviors and was delusional(2nd29.15Ex.FF at 70).

Terrance's history of hearing voices spoke to the severity of Terrance's psychoses and delusional disorder(2nd29.15Ex.FF at 88). Lewis did not believe that Terrance's acts here were in any way connected to any auditory hallucinations(2nd29.15Ex.FF at 88).

Terrance reported to Lewis that he shot Stephen(2nd29.15Ex.FF at 64). Terrance insisted to Lewis though that he did not shoot Debbie and he did not know who did(2nd29.15Ex.FF at 64-65).

Dr. Lewis opined that there were two possibilities to explain why Terrance testified at the retrial to having remembered shooting Debbie when he previously had

told Lewis that he did not remember shooting Debbie(2nd29.15Ex.FF at 64-65,71-73). One was that Terrance did not truly remember shooting Debbie, but instead confabulated events to fill in his memory gaps(2nd29.15Ex.FF at 71-73). An alternative was that Terrance had heard so much about what happened that he pieced together what he had come to believe happened based on others' reporting(2nd29.15Ex.FF at 71-73). No matter which explanation applied, Lewis found it significant that the rendition Terrance provided was inaccurate as to its details when that was compared to what eyewitnesses and forensic witnesses reported(2nd29.15Ex.FF at 71-73,96-97). For these reasons, Lewis believed that Terrance was in an altered dissociated state(2nd29.15Ex.FF at 77). That altered state, however, was not a primary diagnosis(2nd29.15Ex.FF at 95-96). While Terrance professed to remembering what happened with Debbie, he in fact does not remember(2nd29.15Ex.FF at 96-97).

Lewis noted that Stephen and Debbie's own relationship was marred with conflict(2nd29.15Ex.FF at57-58). Lewis observed that Stephen suffered from manic depressive disorder and periodically moved in and out of the family household(2nd29.15Ex.FF at 57-58). Dr. Lewis took note of all Robert's history of violent behavior and that when Terrance moved in with the Rainwaters he was simply moving from one turbulent, unstable family situation to another(2nd29.15Ex.FF at 34-46,57-58).

Counsels' Testimony

The defense team retained Lewis because she previously worked on Terrance's case(2nd29.15Tr.297,404-05). At the first trial, Lewis testified in support of a diminished capacity guilt defense(2nd29.15Tr.301). Counsel decided that they were going to present Lewis' findings through Holcomb who had reviewed Lewis' work, but Holcomb did not testify(2nd29.15Tr.303-04,410-11). Counsel wanted to streamline the mental health evidence such that it was not the focus of the penalty retrial, calling only Holcomb(2nd29.15Tr.321). Holcomb held the same opinions as Lewis(2nd29.15Tr.304,411).

Counsel testified that Lewis would have provided testimony that supported both the §565.032.3 statutory mitigators extreme emotional distress and substantial impairment(2nd29.15Tr.302-03,410). Davis-Kerry did not know why substantial impairment was not submitted(2nd29.15Tr.305-06). Turlington believed substantial impairment was not submitted because evidence to support it was absent(2nd29.15Tr.412-13).

29.15 Findings

The findings state Lewis is a forensic psychologist(2nd29.15L.F.184).

The findings state that Lewis' "only" source of information that Stephen was bipolar was Terrance(2nd29.15L.F.185). Evidence Stephen was bipolar would have only angered the jury and not been mitigating(2nd29.15L.F.185).

Lewis' testimony would not have been persuasive because it was not in the first trial and Lewis is not credible(2nd29.15L.F.184,186,202-03). The findings state

that Syler knew "the first jury did not find Dr. Lewis credible and informed the parties of this fact."(2nd29.15L.F.202-03).

The findings state that Lewis lacked a grasp of the facts because she reported that Terrance had gone into an altered state over time due to Abbey having obtained an order of protection while the order of protection was issued on the same day as the shootings(2nd29.15L.F.186 relying on 2ndTrial Ex.38 order of protection and 2ndTrialTr.645). Lewis also did not grasp the facts because she relied on statements Terrance attributed to Stacey Blackmon, which Blackmon denied having made(2nd29.15L.F.186).

Counsel made a decision not to call Lewis and instead planned to call Holcomb because counsel only wanted one mental health expert(2nd29.15L.F.195,198).

The findings state Davis-Kerry testified that Terrance's sister Shaneka had reported that Lewis had "fabricated" that Shaneka had reported to Lewis that Shaneka heard voices(2nd29.15L.F.196). Lewis was the only one who reported that Terrance heard voices(2nd29.15L.F.196). These matters demonstrate problems with Lewis' credibility(2nd29.15L.F.196).

Lewis' reporting that Terrance heard voices is at odds with Holcomb and Lewis is "gullible"(2nd29.15L.F.203).

The findings state the failure of the MRI and EEG testing to find pathology refutes Lewis' belief Terrance had brain damage(2nd29.15L.F.203).

The findings state Lewis was "gullible"(2nd29.15L.F.204). She reported amnesia so she could not alter her conclusions without being

impeached(2nd29.15L.F.204). For the jury to hear Lewis' conclusions along with Terrance's testimony would have been foolish(2nd29.15L.F.186,204). Lewis' testimony on why Terrance was delusional or in an altered state is not persuasive(2nd29.15L.F.203).

It was unnecessary to address whether counsel could have ethically called Lewis in light of Terrance's disclosure he had falsely maintained he did not remember shooting Debbie(2nd29.15L.F.204-05).

Statutory Mitigation

Section 565.032.3 provides that statutory mitigating circumstances shall include:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;

……..

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

In Terrance's case, Instruction #8 submitted no significant prior criminal history, extreme emotional distress, and age, but did not submit, substantial impairment(2ndTrialL.F.167;2nd29.15.Ex.B at 167)

Findings That The Factual Record Expressly Refutes

The findings are clearly erroneous and facially contradicted by the factual record.

The record reflects Lewis is an M.D. psychiatrist (2nd29.15Ex.FF at 6), not a forensic psychologist(2nd29.15L.F.184).

Terrance was not the "only" source for Stephen was bipolar(2nd29.15L.F.185). Abbey testified on cross-examination at the retrial that her father Stephen was diagnosed as bipolar manic depressive and was on disability(2ndTrialTr.665).

Lewis did not testify Terrance went into an altered state over time based on Abbey having obtained a restraining order(2nd29.15L.F.186 relying on 2ndTrial Ex.38 order of protection and 2ndTrialTr.645). Lewis noted in passing a separate earlier restraining order occurrence, not sought by Abbey, where Debbie obtained a restraining order for Debbie's benefit against Terrance for Terrance allegedly threatening Debbie(2nd29.15Ex.FF at 56;2ndTrialEx.38).[7] Abbey testified at the retrial that she obtained an order of protection for her protection against Terrance on the day of the shooting, July 25, 1997(2ndTrialTr.644-45).

The first trial's result is not a reliable indicator of the value of Lewis' testimony(2nd29.15L.F.184,186,202-03). That jury's verdict was unreliable because

[7] As discussed in Point VIII, second trial Ex. 38 is the July 25, 1997, petition and order Abbey obtained against Terrance which recites Debbie obtained an earlier order against Terrance. At trial, Terrance testified about the separate occurrence involving Debbie(2ndTrialTr.762-63).

a juror who served expressed "a strong preference for the death penalty" and would require the defense prove death was not appropriate and was why the penalty phase was reversed. *Anderson v. State*,196S.W.3d28,41(Mo.banc2006). Further, at the first trial Lewis' testimony was presented as a guilt defense that Terrance was unable to deliberate such that he was guilty of second degree murder and not as mitigating evidence for punishment(1stTrialTr.1607-09,1617,1620-21,1625-26). Lastly, in finding that Lewis was not credible in the first trial, and therefore, would not have been credible at the retrial(2nd29.15L.F.184,186,202-03), Syler stated: "[t]he Court is aware that the first jury did not find Dr. Lewis credible and informed the parties of this fact."(2nd29.15L.F.202-03). Thus, Syler used his extrajudicial contacts with the first trial's foreperson for the improper reason of ruling against Terrance and underscores why he was required to disqualify himself. *See* Point I.

The findings assert that Lewis did not grasp the facts because she relied on Terrance's reporting of statements Terrance attributed to Stacey Blackmon which Stacey Blackmon denied making(2nd29.15L.F.186). Terrance testified at the retrial that Stacey had told him that Debbie and Stephen were plotting to kill him and Kyra(2ndTrialTr.767-71). Stacey testified that she never said such things to Terrance(2ndTrialTr.707-08). The findings treat this matter as though Lewis accepted as true what Terrance reported when in fact Lewis took as true Stacey's denial that she made such statements. Lewis found that Terrance's testimony on this matter, rather than accurately reporting reality, reflected Terrance's paranoia(2nd29.15Ex.FF at 61).

According to the findings, Davis-Kerry testified that Terrance's sister Shaneka reported that Lewis "fabricated" that Shaneka had reported to her having auditory hallucinations(2nd29.15L.F.196). Davis-Kerry in fact testified Shaneka told counsel she had "recanted" what Lewis reported and Shaneka cast what happened as Dr. Lewis failed to "accurately" report what Shaneka had said(2nd29.15Tr.341).

Lewis' testimony was not at odds with what Holcomb found on whether Terrance heard voices(2nd29.15L.F.203). Holcomb testified that there was nothing that led him to believe Terrance suffered from auditory hallucinations around the time of the offense(2nd29.15Tr.63-64). Holcomb continued though that there may have been a time in Terrance's life when he had auditory hallucinations(2nd29.15Tr.64). Lewis found that at about thirteen years old Terrnace had experienced auditory, persecutory hallucinations(2nd29.15Ex.FF at 51-53). Lewis, like Holcomb, found that Terrance's actions here had nothing to do with auditory hallucinations(2nd29.15Ex.FF at 88).

Counsel Was Ineffective

In *Hutchison v. State*,150S.W.3d292,307(Mo.banc2004), this Court concluded counsel was ineffective for failing to present a thorough comprehensive expert presentation. Here the jury got no expert evidence.

In *Glass v. State*,227S.W.3d463,470-71(Mo.banc2007), counsel was ineffective for failing to call multiple expert witnesses who could have provided mitigating evidence. Counsel was ineffective for failing to call a neuropsychologist, who had evaluated Glass before trial, and found Glass had brain impairment that

caused him to have difficulty with learning, memory, and impulse control. *Id.*470. The failure to call the neuropsychologist was prejudicial because the psychological evidence had powerful inherently mitigating value and was especially prejudicial because the jury heard no penalty phase experts. *Id.*470. Counsel was also ineffective for failing to call a toxicology pharmacologist because that witness would have provided a powerful factual basis for supporting the statutory mitigating circumstances of substantial impairment and extreme emotional distress as provided for under §565.032.3(2) and (6). *Id.*471. Additionally, counsel was ineffective for failing to call a learning disability expert, who identified Glass' learning deficits. *Id.*471. The failure to present the learning disability expert was prejudicial because evidence of impaired intellectual functioning is mitigating evidence regardless of whether a defendant has established a nexus between his mental capacity and the crime. *Id.*470-71. *See also*, *Hutchison*,150S.W.3d at 305(same)(relying on *Tennard*,524U.S. at 289).

Like in *Hutchison* and *Glass* the jury did not hear compelling expert mitigating evidence. Lewis would have explained that Terrance had impaired intellectual functioning in the form of learning disabilities caused by Terrance as a seventeen month old having ingested rubbing alcohol(2nd29.15Ex.FF at 26-27,32-33). *Cf. Glass*. That learning disability was established through the disparity between Terrance's performance and verbal achievement test scores(2nd29.15Ex.FF at 26-27,32-33). That the MRI and EEG testing did not locate pathology simply did not refute that Terrance has brain damage(2nd29.15L.F.203).

Evidence of a troubled history is relevant to assessing a defendant's moral culpability. *Wiggins v.Smith*,539U.S.510,535(2003). The issue of Stephen's bipolar disorder was already in front of the jury with Abbey as the source of that information. *See, supra*. Lewis did not malign Stephen for being bipolar. Instead, Lewis explained that the Rainwater household was tumultuous because of Stephen's and Debbie's marital discord and Stephen's bipolar disorder(2nd29.15Ex.FF at 57-58). Lewis explained that Terrance was moving from his own turbulent, unstable family with Robert's history into another unstable family situation(2nd29.15Ex.FF at 34-46,57-58). Terrance's troubled history of living in two turbulent households was relevant mitigating evidence. *See Wiggins*.

Lewis provided mitigating evidence and background that explained Terrance's mental impairment in the context of the two volatile households in which he lived. Lewis explained that Terrance was receiving conflicting confusing messages from the Rainwaters about what role they would allow him to have in his daughter's life. That started with being excluded from the delivery room(2nd29.15Ex.FF at 58-59), prohibiting him at times from seeing Kyra (2nd29.15Ex.FF at 60-61) and culminating in his daughter not being at his house as was planned on the day of the shootings and not being able to contact the Rainwaters when Kyra was not there(2nd29.15Ex.FF at 62-64). Terrance believed the Rainwaters had permanently left town with his daughter(2nd29.15Ex.FF at 62-64).

Lewis found that Terrance was increasingly depressed and obsessed with the idea the Rainwaters would deny him all access to his child(2nd29.15Ex.FF at 60,62).

Terrance ruminated over having been abandoned by his biological father and he did not want to do the same to his daughter(2nd29.15Ex.FF at 60,62).

Lewis found that Terrance suffered from a psychotic depression with paranoia and hallucinations(2nd29,15Ex.FF at 69-70,95). Lewis also found that Terrance was in a dissociative state based upon remembering shooting Stephen, but not remembering shooting Debbie(2nd29.15Ex.FF at 64-65,77).

Lewis explained that while Terrance reported at trial recalling having shot Debbie that was not accurate(2nd29.15Ex.FF at 71-73). Terrance was either confabulating to fill in gaps in his memory or relying on what he heard others report(2nd29.15Ex.FF at 71-73). Terrance in fact did not remember because what he testified to was so vastly different from what eyewitnesses reported and forensic evidence showed(2nd29.15Ex.FF at 71-73,96-97).

Lewis explained that there were multiple reasons for concluding Terrance was not malingering. Those reasons were that Terrance would not have admitted to having shot Stephen, the disparate manner in which Terrance presented himself to Investigator Woods on separate occasions, Terrance could have, but did not, claim voices he heard directed him to do the shooting, and the facts as reported by Terrance were wrong when compared to what eyewitnesses reported(2nd29.15Ex.FF at 66-67,82,87,105). All of these considerations supported Terrance was in a delusional state(2nd29.15Ex.FF at 66-67,82,87,105).

The DSM-IV-TR Section 300.12 details the diagnosis of dissociative or psychogenic amnesia. DSM-IV-TR at 520-23. The disorder arises from traumatic or

stressful events. *Id*.520. This disorder presents as a gap or series of gaps in recall. *Id*.520. The disorder "involves a reversible memory impairment." *Id*.520. The DSM-IV-TR tracks what Lewis testified to at the 29.15 that a dissociative disorder involves gaps in memory and a potential for a person to believe he can recall.

Reasonable counsel would have called Lewis. *See Tennard*, *Hutchison*, and *Glass*. In deciding prejudice from failing to present mitigating evidence courts are required to evaluate the totality of the evidence. *Hutchison v. State*,150S.W.3d at 306(relying on *Wiggins*,539U.S. at 536). "The question is whether, when all the mitigation evidence is added together, is there a reasonable probability that the outcome would have been different?" *Hutchison v. State*,150S.W.3d at 306. The jury would have heard compelling mitigation evidence that Terrance suffered from a psychotic depression characterized by paranoia and delusions which would have supported the §565.032.3 statutory mitigators extreme emotional distress and substantial impairment(2nd29.15Tr.302-03,410). *Cf. Glass*, *supra* (failure to call toxicology pharmacologist who supported same mitigators). Lewis also could have presented evidence of impaired intellectual functioning. *See Tennard*, *Hutchison*, and *Glass*. Lewis also explained the interrelationship between Terrance's tumultuous family background, the Rainwater family's own dysfunctional family circumstances, and this offense.

Foregoing presenting mitigating evidence because it contains something harmful is not reasonable when its mitigating value outweighs its harm. *Hutchison*,150S.W.3d at 305; *Williams v. Taylor*,529U.S.362,395-96(2000). For trial

strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D. 2003); *State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994). Lewis' mitigating evidence clearly outweighed any harm that was caused by Terrance having testified he remembered shooting Debbie, while Lewis had concluded Terrance was in an altered dissociated state, that was not a primary diagnosis (2nd29.15Ex.FF at 95-96). Lewis was able to explain this discrepancy as Terrance either confabulating or having relied on what he heard others reported had happened(2nd29.15Ex.FF at 71-73). Moreover, Lewis concluded that the discrepancies between what Terrance and the eyewitnesses reported established Terrance did not truly remember having shot Debbie, despite his trial testimony(2nd29.15Ex.FF at 71-73,96-97). Moreover, Lewis could have countered the prosecutor's strategy of questioning Terrance so as to cast Terrance as a "liar" because what he reported did not coincide with what eyewitnesses reported(2nd29.15Tr.338-39). Even if Terrance's reporting that he remembered shooting can be construed as harmful, it was not reasonable to fail to call Lewis because she was able to explain why Terrance did not truly remember shooting Debbie. *See Butler* and *McCarter*.[8]

[8] Contrary to the findings' suggestion (2nd29.15L.F.204-05), there was no ethical dilemma for counsel to call either Lewis or Holcomb because Terrance had "lied" to them because both explained why they concluded Terrance did not truly remember having shot Debbie, and therefore, had not "lied."

Counsel's decision not to call a witness is presumptively a matter of strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise. *Hutchison,*150S.W.3d at 304. The failure to call Lewis was not reasonable because the jury heard no expert testimony that would have supported the statutory mitigators substantial impairment and extreme emotional distress, §565.032.3(2) and (6). *Cf. Glass*. While the findings rely on counsel having decided to present Lewis' findings through Holcomb because they held the same opinions (2nd29.15Tr.303-04,410-11;2nd29.15L.F.195,198), counsel called neither as a witness such that the jury heard no expert testimony. *Cf. Glass*.[9]

Reasonable counsel would have called Lewis. *See Hutchison*, *Glass*, and *Strickland*. Terrance was prejudiced because the jury did not hear substantial mitigating evidence for which there is a reasonable probability Terrance would have been life sentenced. *See Tennard* and *Strickland*.

A new penalty phase is required.

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[9] Had counsel called Holcomb only, and not Lewis, the jury would have heard both their shared opinions, but neither was called. Counsel was obligated to call at least Lewis or Holcomb to testify as to their findings on Terrance's psychotic depression characterized by paranoia and delusions. *See* this Point IV and Point V. Moreover, as discussed in Point II, Lewis at minimum should have been called to testify about Robert's violent history and its significance.

V.

FAILURE TO CALL DR. HOLCOMB

The motion court clearly erred in denying the 29.15 postconviction claim that counsel was ineffective for failing to call Dr. Holcomb because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called him to provide mitigating evidence that Terrance suffered from a psychotic depression characterized by paranoia and delusions which would have supported the §565.032.3 statutory mitigators extreme emotional distress and substantial impairment. Terrance was prejudiced because there is a reasonable probability if Holcomb was called he would have been sentenced to life.

Dr. Holcomb could have provided testimony that Terrance suffered from a psychotic depression characterized by paranoia and delusions. That testimony would have supported the §565.032.3 statutory mitigators extreme emotional distress and substantial impairment. If Holcomb had testified, there is a reasonable probability Terrance would have been sentenced to life.

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).

"Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*,542U.S.274,285(2004)(quoted in *Hutchison v. State*,150S.W.3d292,304(Mo.banc2004) and *Glass v. State*,227S.W.3d463,468(Mo.banc2007)). Relevant mitigating evidence "is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard*,542U.S. at 284.

Holcomb's Testimony

Holcomb is a forensic psychologist(2nd29.15Tr.34). Turlington and Davis-Kerry retained Holcomb for Terrance's case(2nd29.15Tr.52-53). Holcomb reviewed Lewis' reports which had found Terrance suffered from depression, paranoia, and delusions(2nd29.15Tr.41-42).

Terrance reported getting information from one of Abbey's friends that Kyra was in danger or Kyra would be taken away from him(2nd29.15Tr.47). Holcomb found such things were a reflection of Terrance's paranoia and delusional state(2nd29.15Tr.47-48).

Terrance was ruminating about what would happen to Kyra(2nd29.15Tr.48,50-51). Holcomb found as mitigating circumstances that Terrance suffered from major depression and delusional paranoia(2nd29.15Tr.48,50-51,55-56). Terrance's extreme paranoia coupled with the stress that he felt caused him to become delusional to the point of psychoses(2nd29.15Tr.45,50-51).

Terrance also reported to Holcomb that he killed Stephen, but could not remember having shot Debbie(2nd29.15Tr.43,47,54). Holcomb found psychogenic amnesia or dissociative amnesia(2nd29.15Tr.49-51,71). Holcomb noted that characteristic of this disorder is a repression or forgetting of events that normally would not be forgotten because they are frightening(2nd29.15Tr.49). Commonly the disorder manifests with someone who is very depressed or extremely anxious, and therefore, is mitigating(2nd29.15Tr.49,60-61). Terrance's amnesia was just one piece in a larger puzzle of his emotional instability(2nd29.15Tr.68-69).

Holcomb found that Terrance was under extreme mental or emotional disturbance(2nd29.15Tr.51-52). Terrance was also substantially impaired as to his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law(2nd29.15Tr.51-52).

Holcomb was at a coffee shop waiting to be called to testify(2nd29.15Tr.56). One of the attorneys called Holcomb to say that Terrance would be testifying, and therefore, Holcomb was not needed(2nd29.15Tr.56,63). Counsel did not discuss with Holcomb their reasons for not calling him(2nd29.15Tr.63). Neither attorney conferred with Holcomb about what the substance of Terrance's testimony would be and whether Terrance's anticipated testimony would impact Holcomb's opinions(2nd29.15Tr.56). If counsel had informed Holcomb of what they expected Terrance to testify to, then he would have told them that would not have changed his diagnoses and opinions(2nd29.15Tr.57-60).

Holcomb believes Terrance has no genuine recall of killing Debbie(2nd29.15Tr.58-59). That Terrance does not remember what happened is actually established by the prosecutor's own questioning of Terrance highlighting how Terrance's testimony did not square with what respondent's eyewitnesses testified to in an effort to highlight Terrance was lying(2nd29.15Tr.58-59,70-71). Moreover, Terrance's testimony just was inaccurate when compared to other witnesses' testimony(2nd29.15Tr.58-59).

Holcomb indicated that with psychogenic amnesia there are reasons why years later Terrance would remember having shot Debbie(2nd29.15Tr.57-58). That included the many repetitions of reports about what happened(2nd29.15Tr.58-59). This form of amnesia is commonly described as "patchy amnesia" because a person begins to recall details when they have heard repeated reports of what happened(2nd29.15Tr.57-58).

Counsels' Testimony

During trial, in response to testimony from Stacey Turner that Terrance thought she was lying, he told Turlington that he remembered everything and had lied about not remembering(2nd29.15Tr.294,309-10,416,418). Terrance was scheduled to testify the next day(2nd29.15Tr.309-10). Counsels' assessment was that Terrance had been lying about the amnesia(2nd29.15Tr.416-17). Holcomb was not called because part of his testimony included testifying Terrance had psychogenic amnesia and Holcomb's credibility would be substantially undercut by what Terrance reported(2nd29.15Tr.313,326-27,416-17). Counsel acknowledged they did not

inquire of Holcomb whether Terrance's reporting that he remembered what happened would impact Holcomb's opinions and diagnoses(2nd29.15Tr.313,417-18).

Counsel decided that it was more beneficial to have Terrance testify than for Holcomb to testify if there had to be a choice(2nd29.15Tr.421). Counsel considered that if Holcomb was called that respondent might call the state's competency to proceed examiner, Dr. English, in rebuttal(2nd29.15Tr.423).

Davis-Kerry testified the prosecutor's questioning of Terrance and his strategy was to paint Terrance as a liar because what Terrance reported happened did not match the eyewitnesses' testimony(2nd29.15Tr.338-39).

Counsel believed that Holcomb would have supported both mitigators that the killing of Debbie happened while Terrance was under the influence of extreme mental or emotional disturbance and whether Terrance had the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired(2nd29.15Tr.308,415,418).

Findings

The findings state that counsel made a reasonable strategy decision not to call Holcomb when Terrance disclosed to them during trial that he had lied about not remembering having shot Debbie(2nd29.15L.F.195-96,198-99,203). Counsel properly believed Holcomb's credibility would be impaired having relied on Terrance's reporting that he did not remember shooting Debbie(2nd29.15L.F.199). One factor in not calling Holcomb was the state could have called Dr. English in rebuttal and trial counsel made a rational decision not to open that

door(2nd29.15L.F.203). Counsel made a strategic decision that it was more important to hear from Terrance than to hear from mental health experts(2nd29.15L.F.204).

The findings state Holcomb was "gullible"(2nd29.15L.F.204). Holcomb was not credible because he relied on Lewis' work(2nd29.15L.F.203-04). Holcomb was too willing to accept that Terrance had selective amnesia and to attribute that to Terrance having a diminished capacity(2nd29.15L.F.187,204). Holcomb reported amnesia so he could not alter his conclusions without being impeached(2nd29.15L.F.204). For the jury to hear Holcomb's conclusions along with Terrance's testimony would have been "foolish"(2nd29.15L.F.204). Holcomb offered no explanation for why Terrance had a selective amnesia and then was later able to testify to having killed Debbie after years of claiming amnesia(2nd29.15L.F.204).

Counsel Was Ineffective

As discussed in Point IV §565.032.3 provides that extreme emotional distress and substantial impairment are mitigating circumstances. Instruction #8 submitted no significant prior criminal history, extreme emotional distress, and age, but did not submit, substantial impairment(2ndTrialL.F.167;2nd29.15Ex.B at 167;*See* Point IV).

In *Hutchison v. State*,150S.W.3d292,307(Mo.banc2004), this Court concluded counsel was ineffective for failing to present a thorough comprehensive expert presentation. In *Glass v. State*,227S.W.3d463,470-71(Mo.banc2007), counsel was ineffective for failing to call multiple expert witnesses who could have provided mitigating evidence. Like here, in *Glass*, no experts were called. *Id.*470. The expert

testimony in *Glass* would have supported the §565.032.3 mitigating circumstances extreme emotional distress and substantial impairment. *Id.*471.

Like in *Hutchison* and *Glass,* the jury did not hear compelling expert mitigating evidence. Holcomb would have provided testimony about Terrance's psychotic major depression and delusional paranoia(2nd29.15Tr.48,50-51,55-56). Holcomb would have testified that Terrance's delusions reached the point of psychoses(2nd29.15Tr.45,50-51). Holcomb also found that Terrance's mental impairments supported the §565.032.3 mitigating circumstances extreme emotional distress and substantial impairment(2nd29.15Tr.51-52).

Contrary to the findings, Holcomb's testimony was not inconsistent with Lewis as to Terrance having auditory hallucinations(2nd29.15L.F.188). Lewis found that when Terrance was thirteen years old Terrance had experienced auditory hallucinations(2nd29.15Ex.FF at 51-53). Holcomb found there may have been a time in Terrance's life where he did experience auditory hallucinations, Terrance just did not evidence having those at the time Holcomb examined him(2nd29.15Tr.64,75). Both Lewis and Holcomb agreed that Terrance's actions here had nothing to do with him experiencing auditory hallucinations(2nd29.15Ex.FF at 88;2nd29.15Tr.64,75).

Failing to interview witnesses relates to preparation and 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. Counsel and Holcomb both testified that counsel never asked Holcomb whether Terrance's reporting that he remembered shooting Debbie would change

Holcomb's opinions and diagnoses(2nd29.15Tr.56-57,313,417-18). Holcomb testified that had counsel posed that question to him he would have told them that his diagnoses and opinions were unchanged(2nd29.15Tr.57-60). Moreover, Holcomb would have explained that Terrance's reported "remembering" having shot Debbie was consistent with the nature of psychogenic amnesia in which a person will recall details because of having heard repeated reports about an event(2nd29.15Tr.57-59). *See also*, DSM-IV-TR at 520 (the disorder "involves a reversible memory impairment" as discussed in detail Point IV).[10] The failure to call Holcomb cannot be properly justified as strategy. *See Kenley*. Counsel testified that they had to choose between Terrance testifying and Holcomb testifying(2nd29.15Tr.421). This was a false choice because there was no need to have to choose between the two as witnesses. If counsel had only asked Holcomb what impact Terrance's intended testimony would have, they would have learned Holcomb's opinions were unchanged and Holcomb could explain why Terrance unexpectedly professed to "remembering" having shot Debbie. *See Kenley*.

For trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D. 2003); *State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994). Counsels' "strategy" of choosing between Terrance and Holcomb testifying was not reasonable because that choice was

[10] The same reasons that calling Lewis did not pose an ethical dilemma are equally applicable for why calling Holcomb did not pose an ethical dilemma. *See Point* IV.

brought about by counsels' failure to discuss with Holcomb whether his opinions and diagnoses had changed. *See Butler* and *McCarter*.

On Terrance's first 29.15 appeal, this Court held that respondent having called the state's competency to proceed examiner at the first trial, Dr. English, as a rebuttal witness to psychological evidence that Terrance suffered from a mental disease or defect at the time of the offense was improper and prohibited under §552.020.14. *Anderson v. State*,196S.W.3d28,34-35(Mo.banc2006). Thus, it was unreasonable strategy to fail to call Holcomb because counsel feared respondent might call English as a rebuttal witness (2nd29.15Tr.423;2nd29.15L.F.203) since this Court already held having called English as a rebuttal witness was improper and the first trial's counsel should have objected. *Anderson*,196S.W.3d at 34-35.

Holcomb in fact opined that Terrance does not have a genuine recall of killing Debbie because the nature of psychogenic amnesia is that hearing repetitions of reports can cause a recall of details(2nd29.15Tr.57-59). That conclusion is supported by Terrance's testimony which was inaccurate when compared to eyewitnesses' testimony(2nd29.15Tr.58-59). Moreover, Holcomb indicated that the prosecutor's own questioning highlighting how Terrance's testimony diverged from eyewitnesses and casting Terrance as lying demonstrated Terrance did not truly remember shooting Debbie(2nd29.15Tr.58-59,70-71). These matters establish the findings that Holcomb was "gullible," because he relied on Lewis' findings, and it would have been "foolish" to call Holcomb were clearly erroneous(29.15L.F.203-04).

Foregoing presenting mitigating evidence because it contains something harmful is unreasonable when its mitigating value outweighs its harm. *See Hutchison*,150S.W.3d at 305. Even if it could somehow be construed that it was harmful for Holcomb to have found psychogenic amnesia and for Terrance to have testified he remembering having shot Debbie, the other mitigating evidence Holcomb offered on Terrance that he suffered from a psychotic major depression and delusional paranoia outweighed calling no mental health expert. *See Glass*. Terrance was prejudiced by the failure to call Holcomb. *See Strickland* and *Glass*.

A new penalty phase is required.

VI.

MITIGATING EVIDENCE - WITNESSES TO TERRANCE'S DISORIENTED STATE

The motion court clearly erred in denying the 29.15 postconviction claim that counsel was ineffective for failing to call Tim Jones, Adrienne Dionne Webb, Larry Woods, and Steven Stovall because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called these mitigation witnesses to testify about their observations of Terrance's disoriented, distressed mental state. Terrance was prejudiced because this evidence would have highlighted Terrance's disoriented, distressed mental state both shortly before and after the offense and there is a reasonable probability the jury would have voted for life had they heard this evidence.

Counsel failed to call Tim Jones, Adrienne Dionne Webb, Larry Woods, and Steven Stovall to testify about their observations of Terrance's disoriented, distressed mental state. These witnesses would have furnished mitigating evidence that highlighted Terrance's mental state and there is a reasonable probability the jury would have voted for life.

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).

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). "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*,542U.S.274,285(2004)(quoted in *Hutchison v. State*,150S.W.3d292,304(Mo.banc2004) and *Glass v. State*,227S.W.3d463,468(Mo.banc2007)). Relevant mitigating evidence "is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value."*Tennard*,542U.S. at 284.

Available Mitigating Evidence

A. Tim Jones

Tim Jones grew-up with Terrance and worked with him at Rowe Furniture(2nd29.15Tr.141-42). Terrance believed the Rainwaters were trying to prevent him from seeing his daughter(2nd29.15Tr.149). Jones met with a representative of the first trial team and reported to them that Terrance had begun acting oddly after he had lost his Rowe Furniture job and after Kyra's birth (2nd29.15Tr.149-50). Terrance's behavior changed so that he was distracted and out of it(2nd29.15Tr.148,150). The details of that meeting were in a case memorandum prepared for the first trial, but the second trial team did not contact Jones(2nd29.15Ex.AA;2nd29.15Tr.150-51).

Mitigation specialist Luebbering worked on Terrance's retrial until October, 2008 when she left the Public Defender's Office(2nd29.15Tr.203) and Terrance's retrial occurred in November, 2008 (2nd29.15Ex.A Index). Luebbering testified that there was a memorandum (2nd29.15Ex.AA) done by the first trial team that indicated there was a meeting with Tim Jones(2nd29.15Tr.161-65). The memo recounted that Jones reported Terrance appeared off in another world and that things started to go bad when Terrance lost his Rowe Furniture job(2nd29.15Tr.161-65;2nd29.15Ex.AA). Terrance had expressed concern to Jones that the Rainwaters would obtain an order so that he could not see Kyra(2nd29.15Tr.161-65;2nd29.15Ex.AA). Luebbering believed that what Jones could testify about was mitigating, but thought that she was unable to locate Jones(2nd29.15Tr.161-65;2nd29.15Ex.AA).

B. Adrienne Dionne Webb

Adrienne Dionne Webb grew-up with Terrance(2nd29.15Tr.346-47). When Adrienne was pregnant with her second child in 1995 she was separated from her husband Maurice and she was depressed(2nd29.15Tr.345-47). Terrance was a good friend who made efforts to cheer her up and was like a brother to her(2nd29.15Tr.347-48). Adrienne noticed during the time leading up to this offense Terrance started to appear increasingly, uncharacteristically unkept, agitated, and depressed(2nd29.15Tr.349-51). Terrance became suspicious believing that everyone was out to get him(2nd29.15Tr.351). Adrienne saw Terrance on the day of the offense and noticed that his changed behaviors were especially apparent(2nd29.15Tr.352-53).

Adrienne had had surgery in late 2007 and early 2008 for ovarian cancer and was not doing well for sometime following that surgery(2nd29.15Tr.353-54). Adrienne was not aware that the defense team had tried to reach her during that time period(2nd29.15Tr.354). When Adrienne recovered from her surgery she was working full time for the Poplar Bluff School System(2nd29.15Tr.354-55). Adrienne's parents also lived in Poplar Bluff and they would have gotten a message to her(2nd29.15Tr.355-56).

Luebbering recounted that she met with Maurice Webb and was trying to reach Adrienne through Maurice(2nd29.15Tr.167-70). Luebbering knew the trial team wanted to speak to both Adrienne and Maurice and they never reached Adrienne(2nd29.15Tr.170). On a memo Luebbering created (2nd29.15Ex.BB at 2-3), there was a notation that "he" was "avoiding us"(2nd29.15Tr.169). While Luebbering created the memo, she did not know who made the "avoiding us" entry(2nd29.15Tr.169;2nd29.15Ex.BB). Davis-Kerry testified that Ex.BB was a grid available to all trial team members(2nd29.15Tr.240). The memo indicated that Adrienne had had surgery in October, 2007(2nd29.15Tr.169;2nd29.15Ex.BB at 2-3).

C. Larry Woods

Larry Woods was a Public Defender investigator with the Poplar Bluff Office who a couple of weeks before Terrance's offense had subpoenaed Terrance to testify as a witness in a misdemeanor case(2nd29.15Tr.85-86,92). When Woods subpoenaed Terrance, he responded appropriately and appeared mentally alert(2nd29.15Tr.93).

When Woods' office heard about this offense, he met with Terrance within a few days of it happening(2nd29.15Tr.94-95). Woods met with Terrance three or four times and Terrance never seemed to grasp the seriousness of the charges against him(2nd29.15Tr.109-11). Terrance was unable to answer Woods' questions and did not know why he was in jail(2nd29.15Tr.96). The only subject Terrance talked about was his daughter, Kyra, and he told Woods to tell Kyra that he loved her(2nd29.15Tr.96). Woods noted that his conversation was often met with blank stares from Terrance which created concerns for Woods about Terrance's mental health(2nd29.15Tr.96). Woods urged his supervisor to arrange a meeting for Terrance with a psychiatrist(2nd29.15Tr.97-100).

Woods testified at the first trial's guilt and penalty phases and was always cooperative with the first trial's defense team(2nd29.15Tr.100-01). Woods testified at the first trial's penalty phase about what he observed from his meetings with Terrance as it reflected on Terrance's mental state(2nd29.15Tr.100-01,114-15).

Woods even notified the first trial team during that trial that an individual named Judy Janice Wolfe had come to his office volunteering information she believed might be helpful to Terrance(2nd29.15Tr.101,103-05). The first trial team decided not to call Wolfe and Woods prepared a memo of his conversation with her(2nd29.15Tr.103-05). Woods also testified at the first 29.15 about having brought Wolfe to the first trial team's attention(2nd29.15Tr.101-02).

Woods was always cooperative with Terrance's second trial's attorneys(2nd29.15Tr.106-07). Woods spoke with the second trial's mitigation

specialist Catherine Luebbering(2nd29.15Tr.107). In 2008, Woods had a heart attack, but he still was able to testify at Terrance's November, 2008 penalty retrial(2nd29.15Tr.107). Woods also met with Terrance's second 29.15 counsel about his anticipated second 29.15 testimony(2nd29.15Tr.107-08). Woods indicated that as to anyone who represented Terrance throughout he was always cooperative and helpful(2nd29.15Tr.100).

Luebbering recounted and memorialized in a memorandum that Larry Woods called her because Woods had heard the second trial team had attempted to find him in Poplar Bluff(2nd29.15Tr.171-73;2nd29.15Ex.CC). When Luebbering was asked whether Larry Woods was "uncooperative" with them she responded "No"(2nd29.15Tr.173). Luebbering also indicated that the trial file reflected that Woods was "always" cooperative(2nd29.15Tr.173).

D. Steven Stovall

Steven Stovall knew Terrance growing up and Terrance had encouraged Steven to stay out of trouble by playing sports(2nd29.15Tr.77-78). Stovall was confined in the Butler County jail on a probation violation in August, 1997 while Terrance was confined there for the shootings that happened on July 25, 1997(2nd29.15Tr.78). Stovall saw Terrance at the jail and Terrance did not seem to understand why he was in jail(2nd29.15Tr.78-79). Terrance presented himself mentally as different from the person Stovall had known(2nd29.15Tr.79).

Counsels' Testimony

Counsel testified that there were problems contacting Tim Jones(2nd29.15Tr.240-41,358-60).

Counsel testified that the Webbs were uncooperative(2nd29.15Tr.242-44,248).

Counsel testified that Woods was not called because they believed he was intentionally avoiding them(2nd29.15Tr.366-68).

Counsel testified they would have wanted to investigate what Steven Stovall reported about Terrance(2nd29.15Tr.368-69).

Findings

A. Tim Jones

The findings state that Tim Jones testified Terrance appeared "distracted"(2nd29.15L.F.190-91). This testimony was similar to the testimony of Linda Smith (relying on 2ndTrialTr.821-22) and Louis Buchanan(relying on 2ndTrialTr.836) and not compelling(2nd29.15L.F.190-91,199). Also, second 29.15 Exhibit AA said that Jones heard Terrance say that "if the Rainwaters won't let him see the baby, 'then they wouldn't see the baby either'" and this statement could be viewed as "ominous" by the jury as Terrance having acted here with premeditation(2nd29.15L.F.190-91,199).

B. Adrienne Dionne Webb

The findings state as to "Dianne" Webb, Luebbering's Ex. BB witness outline reflected "Dianne" lived with Maurice Webb, but they were "'avoiding us,'" so the trial team made reasonable efforts to contact(2nd29.15L.F.191,200). Davis-Kerry testified efforts were made to reach "Dianne" Webb, but the Webbs were

uncooperative and counsels' efforts were reasonable(2nd29.15L.F.193,196-97). Adrienne's denial of uncooperativeness was not credible(2nd29.15L.F.193).

C. Larry Woods

The findings state that Larry Woods testified in both phases of the first trial(2nd29.15L.F.189). Woods' opinions were not persuasive(2nd29.15L.F.189). The 29.15 findings believed Davis-Kerry's testimony that Woods was uncooperative and '"dodging"' the defense team(2nd29.15L.F.189). Woods' testimony is inconsistent with Lewis who said Terrance was in a dissociative state for some time prior to the offense(2nd29.15L.F.189). The findings state that Woods testified in the first penalty phase and that did not persuade that jury(2nd29.15L.F.200). Davis-Kerry and Turlington testified that Woods was not cooperative and avoiding them(2nd29.15L.F.194,197).

D. Steven Stovall

The findings state that Steven Stovall's testimony was neither compelling nor persuasive(2nd29.15L.F.188,200-01).

Counsel Was Ineffective

All of these witnesses, Tim Jones, Adrienne Dionne Webb, Larry Woods, and Steven Stovall would have provided testimony highlighting Terrance's disoriented, distressed mental state. Tim Jones and Adrienne Dionne Webb would have provided testimony about that altered mental state prior to, but close to the time of the offense(2nd29.15Tr.148-50,161-65,349-53;2nd29.15Ex.AA). Larry Woods and Steven Stovall would have provided testimony about that altered mental state after the

offense(2nd29.15Tr.78-79,96-100,109-11). Their testimony was important mitigating evidence the jury should have heard. *See Wiggins v. Smith* and *Williams v. Taylor*.

Failing to interview witnesses relates to preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*.1304.

As to all these witnesses, the 29.15 evidence shows that counsel was not diligent in their efforts. *See Kenley*.

Locating Tim Jones was not problematic as shown by the first trial team having met with Jones and that meeting having been memorialized in a memorandum(2nd29.15Tr.149-51;2nd29.15Ex.AA).

Counsel relied on locating Adrienne Dionne Webb by trying to locate her through her husband from whom she was separated(2nd29.15Tr.167-70,345-47). Adrienne was working for the Poplar Bluff School System and her parents lived in Poplar Bluff and she could have been located through both(2nd29.15Tr.354-56).

Mitigation expert Luebbering's testimony and her timely memorandum established that Larry Woods was a cooperative witness. Luebbering's memo stated that Woods had called her after the defense team had missed speaking with him in Poplar Bluff the previous week(2nd29.15Tr.171-73;2nd29.15Ex.CC). When Luebbering was asked point blank whether Woods was "uncooperative" she responded "No"(2nd29.15Tr.173).

Moreover, Terrance's case history establishes Woods was not the "uncooperative" witness. It was Woods who met with Terrance within days of the offense and Woods who urged his supervisor to have a psychiatrist meet with Terrance(2nd29.15Tr.94-95,97-100). Woods testified at the first trial about his observations of Terrance(2nd29.15Tr.100-01). During the first trial, Woods alerted the defense team about what Judy Janice Wolfe was reporting(2nd29.15Tr.101). Woods testified at the first 29.15 about having alerted the first trial team about Wolfe(2nd29.15Tr.101-02). Woods met with Terrance's second 29.15 counsel in preparation of his second 29.15 testimony(2nd29.15Tr.107-08).

Lastly, second 29.15 counsel had no difficulty in locating and calling Steven Stovall.

Contrary to the findings, Tim Jones' testimony was not similar to Linda Smith's and Louis Buchanan's testimony(2nd29.15L.F.190-91,199 relying on 2ndTrialTr.821-22,836). Neither of these witnesses presented testimony that Terrance was in a disoriented, distressed mental state. Linda Smith merely related Terrance was spending time in his room and not talking very much(2ndTrialTr.821-22). Louis Buchanan merely stated that Terrance was a little more withdrawn in his demeanor than he usually was(2ndTrialTr.836).

The findings totally lift out of context from the memorandum the first trial team generated (2nd29.15Ex.AA) that Jones would have testified to an "ominous" statement from Terrance supporting premeditation(2nd29.15L.F.190-91,199). That

memo recounted what was reported during a meeting with Harold Brown and Tim Jones. When considered in its entire context the memo stated as follows:

> KYRA: TA spoke of them trying to keep him from seeing baby – of them threatening to get protective order to keep him from seeing the baby. TA talked of considering **taking the baby**, saying if they wouldn't let him see her, then they wouldn't see the baby, either. **Never heard him threaten any violence**.

(2nd29.15Ex.AA)(emphasis added). What this statement shows is that Terrance had indicated that if the Rainwaters intended to prevent him from seeing Kyra through obtaining a court order, he was contemplating taking and concealing Kyra's whereabouts before any such order was ever obtained. Moreover, nothing "ominous" was threatened because the memo stated: "**Never heard him threaten any violence**."(2nd29.15Ex.AA)(emphasis added).

Contrary to the findings, Woods' testimony was not inconsistent with Lewis who found Terrance was in a dissociative state for some time prior to the offense(2nd29.15L.F.189). Lewis recounted in her testimony that Woods had seen Terrance when Woods served Terrance with a subpoena to be a witness in a misdemeanor case(2nd29.15Ex.FF at 67-68). Lewis noted that Woods had found Terrance "totally changed" from the time Woods served Terrance with the subpoena and when Woods saw him after the shootings at the jail(2nd29.15Ex.FF at 67-68). Lewis noted that Woods' polar opposite experiences with Terrance only reinforced her altered state findings(2nd29.15Ex.FF at 67-68).

That Woods testified at the first penalty phase and Terrance got death there does not establish the result would have been the same had Woods testified in the retrial(2nd29.15L.F.200). The reason Terrance's penalty phase was reversed was that a juror who served indicated a strong preference for death and would require the defense to convince him death was not appropriate, even though the burden of proof remained with the state. *See Anderson v. State*,196S.W.3d28,38-42(Mo.banc2006). That fundamental unfairness cannot not now be used to demonstrate a lack of prejudice in failing to call Woods.

Terrance was prejudiced by the failure to call all of these witnesses. *See Wiggins v. Smith* and *Williams v. Taylor.*

Instruction No. 8 told the jury that it could consider as mitigating evidence that the homicide of Debbie was committed while Terrance was under the influence of extreme mental or emotional disturbance(2ndTrialL.F.167;2nd29.15Ex.B at 167). All of these witnesses would have provided evidence to support this statutory mitigating circumstance. Hearing from these witnesses to support this mitigating circumstance was especially important because the jury did not hear any expert mental health witnesses. *See* Points IV, V.

There is a reasonable probability that had the jury heard this evidence of Terrance's disoriented, distressed mental state that he would have been sentenced to life. *See Strickland, Wiggins v. Smith,* and *Williams v. Taylor.* This evidence supported the submitted statutory mitigator that Terrance was under the influence of

extreme mental or emotional disturbance and there is a reasonable probability the jury would have imposed life.

A new penalty phase is required.

VII.

CROSS-EXAMINING TERRANCE WHETHER RESPONDENT'S WITNESSES WERE LYING

The motion court clearly erred in denying the 29.15 postconviction claim counsel was ineffective for failing to properly, timely object to cross-examination of Terrance asking Terrance whether the jury should believe Terrance over respondent's witnesses as respondent's witnesses must be lying because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected as a prosecutor is prohibited from asking a witness if another witness is lying. Terrance was prejudiced because this questioning injected arbitrariness in the sentencing decision and there is a reasonable probability Terrance otherwise would have been sentenced to life.

The prosecutor questioned Terrance whether the jury should believe Terrance over respondent's witnesses because respondent's witnesses were lying. That questioning was improper and effective counsel would have properly and timely objected to this questioning. Terrance was prejudiced because these actions injected arbitrariness which absent them happening there is a reasonable probability Terrance would have been sentenced to life.

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).

Cross-Examination Of Terrance - Respondent's

Witnesses Must Be Lying

Cross-examination of Terrance included:

Q Okay. So everything that was said about the physical abuse of Abbey Rainwater by you is a lie. Is that what you're saying?

A The allegations that she made, I did not do those.

Q Beg your pardon?

A I did not do those.

Q All right. So it is a lie. Is that what you're saying?

A Yes.

…….(2ndTrialTr.787)……

Q Do you understand that Stacey sat where you're sitting right now yesterday and said she never said any of those things?

A Yes.

Q So she is lying on you, too?

A I don't know what she's doing.

Q Well, you're saying that's not true, so you must be calling her a liar.

MS. KERRY: Judge, I'm going to object at this time.

A It's a bad situation.

THE COURT: One at a time. Yes, ma'am.

MS. KERRY: My legal objection, commenting on another witness's testimony.

THE COURT: Sustained.

MR. AHSENS: I am allowed, sir, to explore inconsistencies in the evidence.

THE COURT: Sustained.

(2ndTrialTr.788).

Counsel testified there was no strategic reason for failing to timely object to cross-examination of Terrance that asked him to comment on respondent's witnesses' veracity(2nd29.15Tr.283-84,393-94).

The 29.15 findings state that while the cross-examination of Terrance asking Terrance whether the jury should believe Terrance over respondent's witnesses because respondent's witnesses must be lying was improper, it was not prejudicial(2nd29.15L.F.206).

A prosecutor is prohibited from asking one witness if another was lying. *State v. Roper*,136S.W.3d891,900(Mo.App.,W.D.2004). Objections to such argumentative questioning should be sustained. *Id.*900-01. That questioning is not intended to seek information, but instead is directed at "scor[ing] rhetorical points." *Id.*901. The purpose of such questioning is to make the defendant look bad through placing him in a no-win situation. *Id.*901. If a defendant says another witness is lying, then the defendant is placed in the unenviable position of calling someone a liar. *Id.*901. If the defendant says the other witness is not lying, then the jury will infer the defendant is lying. *Id.*901-02.

Reasonable counsel would have timely objected to all of the prosecutor's line of questioning involving commenting on respondent's witnesses' veracity because the sole intent was to make Terrance look bad and not to seek relevant information. *See Roper* and *Strickland*.

"The foremost concern of the Eighth Amendment is that the death sentence not be imposed in an arbitrary and capricious manner." *Saffle v. Parks*,494U.S.484,507(1990). When the prosecutor injected questioning Terrance that asked Terrance to comment on respondent's witnesses' veracity he caused Terrance's death sentence to be imposed for arbitrary and capricious reasons. *See Saffle*. Terrance was prejudiced by counsels' failure to take timely action to properly object and there is a reasonable probability that absent these matters the jury would have voted for life. *See Strickland.*

A new penalty phase is required.

VIII.

ADMISSION OF EX PARTE ORDER AND ITS ALLEGATIONS

The motion court clearly erred in denying the 29.15 postconviction claim counsel was ineffective for failing to properly object to the wholesale admission of a copy of Abbey's ex parte petition for protection and the accompanying court's order of protection, Exhibit 38, containing a finding of good cause for the order based on the supporting factual allegations for the order because Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to the admission of Exhibit 38 or at minimum requested the good cause finding with its factual premise allegations be redacted because Terrance was not afforded the opportunity to be present at the ex parte proceedings to challenge the accusations. Terrance was prejudiced because the prosecutor used the ex parte order to argue that order established Terrance had lied when he denied having physically abused Abbey, and thereby, injected arbitrariness when there otherwise was a reasonable probability Terrance would have been life sentenced.

Counsel failed to object to the wholesale admission of Abbey's ex parte petition for protection and the court's order of protection, second trial Ex.38. At a minimum, counsel should have requested the good cause finding with its factual premise allegations be redacted. Terrance was prejudiced because the prosecutor used

the ex parte order to argue that order established Terrance had lied when Terrance denied having physically abused Abbey. The admission of the ex parte order with its good cause finding and factual allegations injected arbitrariness when there was a reasonable probability Terrance otherwise would have been sentenced to life.

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).

Trial Ex Parte Proceedings Matters

On direct examination of Abbey the prosecutor elicited from Abbey that she and her father had obtained an ex parte order of protection on behalf of Abbey and against Terrance on July 25, 1997(2ndTrialTr.644-46). Abbey testified that she informed Terrance about the order by phone and that it angered Terrance(2ndTrialTr.644-46). Exhibit 38 contained the order with its supporting factual allegations and was received into evidence over counsels' objection(2ndTrialTr.644-46). The grounds for objection were stated as being pursuant to previous objection(2ndTrialTr.644-46). The prior objections to Exhibit 38 were that the jury would consider its contents as non-statutory aggravation without burden of proof guidance(2ndTrialTr.11-16). Exhibit 38 was passed to the jury(2ndTrialTr.644-46,654-55).

On redirect, Abbey testified that she obtained the ex parte order because Terrance had beat her(2ndTrialTr.678).

The ex parte order contains the finding that there is good cause for it to have issued(2ndTrialEx.38). Exhibit 38 contains Abbey's allegations against Terrance(2ndTrialEx.38). The allegations included that Terrance choked Abbey, pulled her hair, and caused her to be bruised, while describing Terrance as someone who has "a very volatile personality."(2ndTrialEx.38). The allegations added that Debbie had obtained a restraining order against Terrance on May 12, 1997 based on threats and harassment(2ndTrialEx.38).

On cross-examination, Terrance denied having physically abused Abbey(2ndTrialTr.786-87). When Terrance denied having physically abused Abbey, the prosecutor followed with: "All right. So it is a lie. Is that what you're saying?"(2ndTrialTr.787).

The prosecutor argued in initial closing argument that Terrance testified that he never physically abused Abbey, but Abbey had succeeded in obtaining a restraining order based on injuries Terrance inflicted, and therefore, Terrance's denial was untrue(2ndTrialTr.894).

29.15 Matters

Counsel testified there was no strategic reason for failing to object to the admission of Exhibit 38 on the grounds that the order arose from a civil proceeding without notice to Terrance and the opportunity to defend against the allegations(2nd29.15Tr.281-82). There was no strategic reason for failing to at least

request the factual allegations and associated good cause finding be redacted because of Terrance's lack of opportunity to challenge the accusations found in the order(2nd29.15Tr.390-92).

The 29.15 findings state that the ex parte order (Ex.38) was admissible because respondent's theory was that it was the catalyst for the shootings(2nd29.15L.F.205-06).

Counsel Was Ineffective

In *State v. Clevenger*,289S.W.3d626,627(Mo.App.,W.D.2009), the defendant was convicted of second degree domestic assault and violation of an order of protection. After Clevenger's ex-wife obtained an ex parte order of protection, Clevenger entered her home and engaged in behaviors that gave rise to the charges for which he was convicted. *Id.*628. The petition for a protective order and the associated ex parte order were exhibits sent to the jury. *Id.*628. Respondent argued that these documents were properly admitted because they established the existence of the order of protection which Clevenger was alleged to have violated. *Id.*629. The documents contained hearsay allegations of other incidents of alleged assaultive behavior Clevenger had directed at his ex-wife. The Western District found that the publishing of the documents without redaction or an instruction about their limited relevance was prejudicial and reversed Clevenger's convictions. *Id.*629-30.

In the same fashion here, as in *Clevenger*, the admission and publishing of Exhibit 38 without at a minimum redaction of the factual allegations and the order's finding of good cause based on those allegations was prejudicial standing alone. That

prejudice was only accentuated when the prosecutor used in closing argument Exhibit 38's contents to argue that Terrance had lied when he denied having physically abused Abbey(2ndTrialTr.894).

The 29.15 findings are that Exhibit 38 was admissible because it was alleged to have been the catalyst for the shootings(2nd29.15L.F.205-06). Respondent made the identical contention in *Clevenger* that the violation of the order of protection was the basis for the charge and the *Clevenger* Court rejected that contention. *See Clevenger*,289S.W.3d at 629. Like in *Clevenger*, there was also prejudicial inflammatory hearsay allegations in Exhibit 38 that Debbie had earlier obtained an order of protection because of threats and harassment. *See* 2ndTrialEx.38.

In *State v. Jackson*,155S.W.3d849,851(Mo.App.,W.D.2005), the defendant was convicted of statutory rape of his girlfriend's fourteen year old daughter. At trial, respondent admitted a civil paternity judgment showing Jackson was the father of the victim's child. *Id*.851,853. In closing argument, respondent argued that as a matter of law Jackson was already proven guilty of statutory rape based on the civil paternity judgment. *Id*.853. The *Jackson* Court found such unobjected to argument constituted plain error, manifest injustice that required a new trial. *Id*.853-54. Like in *Jackson*, respondent relied on in argument here (2ndTrialTr.894) accusations and findings in a civil proceeding as a basis for attacking the defense's case.

In *State v. Donley*,607S.E.2d474,478(W.Va.Ct.App.2004), the defendant was convicted of multiple counts of concealment of a minor child. At the trial of the criminal charges, a family court order containing inflammatory remarks about Donley

was admitted. *Id.*481. The *Donley* Court noted that while the order was relevant to the criminal charges, judicial notice of the existence of the order could have been taken or specific portions of the order could have been presented to the jury. *Id.*484. The admission of the order in its entirety was prejudicial because the remarks were expressed by a judge and included in an official court document for which the jury could have attached substantial weight. *Id.*484.

What happened in Terrance's case is no different than what happened in *Donley*. While the ex parte order entered in favor of Abbey may have had some relevance, counsel should have objected to the wholesale admission of the order with the supporting factual allegations and should have urged that the inflammatory factual allegations and the finding of "good cause to issue an ex parte order" were redacted because Terrance had no opportunity to contest the allegations that formed the basis for the order. *See Donley*.

Reasonable counsel would have objected to the admission of Exhibit 38 containing the factual allegations and ex parte order in its entirety. *See Strickland Donley, Clevenger,* and *Jackson*. At a minimum, reasonable counsel would have requested that the factual allegations and the order's good cause finding be redacted. *See Strickland, Donley*, *Clevenger,* and *Jackson*.

"The foremost concern of the Eighth Amendment is that the death sentence not be imposed in an arbitrary and capricious manner." *Saffle v. Parks*,494U.S.484,507(1990). When counsel failed to object to the admission of Exhibit 38 or at a minimum failed to request redaction, Terrance was prejudiced. The

admission of Exhibit 38 with its contents accompanied by the prosecutor's use of its contents in argument injected arbitrariness into the sentencing proceedings. *See Saffle*. Respondent's use of Exhibit 38 was prejudicial because there is a reasonable probability Terrance would have been sentenced to life. *See Strickland.*

A new penalty phase is required.

IX.

ADVISING TERRANCE TO TESTIFY WHEN HIS TESTIMONY WAS NOT MITIGATING AND FAILING TO ADVISE TERRANCE DURING TRIAL NOT TO TESTIFY

The motion court clearly erred in denying the 29.15 postconviction claim that counsel was ineffective for advising Terrance to testify when his testimony as a matter of law was not mitigating and failed to advise him during trial not to testify that other witnesses could effectively humanize him to the jury because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would not have advised Terrance to testify to show he accepted responsibility because the first trial's jury had already found as a matter of law he was responsible and reasonable counsel would have advised him that other witnesses could humanize him and reasonably competent counsel would have during trial advised Terrance not to testify. Terrance was prejudiced because the prosecutor was able to repeatedly portray Terrance as a liar, especially deserving death.

Terrance's counsel advised him to testify to show he accepted responsibility when the first trial's jury had already found he was legally responsible. Counsel failed to advise Terrance during trial not to testify and should have advised Terrance not to testify because they could accomplish the purpose of humanizing him by doing

that through witnesses other than himself. Terrance was prejudiced because the prosecutor was able to repeatedly cast Terrance as a liar, especially deserving death.

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).

Defense Team Testimony

Luebbering was a mitigation specialist who assisted in preparing Terrance's retrial(2nd29.15Tr.156-57). Luebbering recounted that counsel thought that having Terrance testify would "humanize" him for the jurors(2nd29.15Tr.200). It was counsel who suggested to Terrance that he testify, rather than Terrance wanting to testify(2nd29.15Tr.200-01,203). Terrance expressed concern to Luebbering and counsel about testifying(2nd29.15Tr.201-02,398-99). Luebbering was concerned about Terrance making inappropriate statements(2nd29.15Tr.202).

Counsel testified they wanted Terrance to testify so he could present to the jury how he felt about how the Rainwaters treated him(2nd29.15Tr.288). Counsel testified their purpose in advising Terrance to testify was to humanize him and because he would present himself as someone who was not really violent(2nd29.15Tr.322-23,399,423). Counsel testified that they did not advise Terrance to not testify and failed to advise him that they could present other witnesses, including mental health witnesses, to accomplish their intended purposes(2nd29.15Tr.289,293,402). Counsel

advised Terrance generally about the advantages and disadvantages of testifying and prepared Terrance for cross-examination(2nd29.15Tr.289-90,321-22).

Counsel acknowledged that on cross-examination the prosecutor painted Terrance as a liar because his testimony was inconsistent with the eyewitnesses' accounts and forensic evidence(2nd29.15Tr.338-39,401-02).

Findings

The findings state Davis-Kerry testified that the defense team had extended discussions with Terrance about whether he should testify or not(2nd29.15L.F.195). They discussed with Terrance the advantages and disadvantages of testifying(2nd29.15L.F.195). Counsel believed to effectively present how Terrance was treated by the Rainwaters it was necessary to call Terrance(2nd29.15L.F.195).

Davis-Kerry testified they wanted to "humanize" Terrance and advice on whether to testify or not testify is trial strategy(2nd29.15L.F.208-09). Counsel competently advised Terrance on his right to testify and the risks and benefits(2nd29.15L.F.208-09). Counsel made a sound strategic decision to advise Terrance to testify(2nd29.15L.F.209). That decision allowed counsel to argue Terrance accepted responsibility(2nd29.15L.F.209).

Counsel Was Ineffective

"Absent any exceptional circumstances, the advice by counsel on whether or not to testify is a matter of trial strategy and not grounds for post-conviction relief." *Lawrence v. State*,160S.W3d825(Mo.App.,S.D.2005). *State v. Dees*,916S.W.2d287,301(Mo.App.,W.D.1995)(same). Terrance's case presents just

such exceptional circumstances that counsel's advice to testify and failure to advise Terrance not to testify was ineffective.

"The penalty phase focuses not on absolving the defendant from guilt, but rather on the production of evidence to make a case for life. The purpose of investigation is **to find witnesses to help humanize** the defendant, given that a jury has found him guilty of a capital offense." *Marshall v. Hendricks*,307F.3d36,103(3rdCir.2002)(emphasis added). *See also*, *Johnson v. Mitchell*,585F.3d923,940(6thCir.2009)(same quoting *Marshall v. Hendricks*); and *Morris v. Beard*,2007WL1795689 *22(E.D.Pa.2007)(same quoting *Marshall v. Hendricks*).

Counsel had witnesses who were able both to humanize Terrance and explain how the Rainwaters treated him. Terrance's counsel actually called Louis Buchanan to testify about having answered the phone when Stephen called acting disrespectfully because Stephen thought he was speaking with Terrance(2ndTrialTr.836-37). In that context, Stephen would address who he thought was Terrance as "nigger" and say he was going to "whoop your ass" (2ndTrialTr.836-37). Stephen would state the "black and white thing" did not work and Terrance and Abbey should not be together and Abbey needed "to be with her own kind"(2ndTrialTr.836-37). Buchanan also overheard a phone conversation where Stephen actually was talking to Terrance and Stephen threatened to "whoop Terrance's ass"(2ndTrialTr.836-37).

Buchanan recounted that there was an incident at Buchanan's and Terrance's apartment where Stephen threateningly pulled up and sped up in his Jeep(2ndTrialTr.837-38).

Buchanan's testimony vividly conveyed to the jurors the conflict that existed between the Rainwaters and Terrance such that it was unnecessary for Terrance to testify about that conflict.

Moreover, Abbey testified during the state's case and conveyed the extent of the conflict and tumult that was the Rainwater household. Abbey recounted that there was tension with Abbey's parents over her relationship with Terrance because Terrance was older than Abbey and because Terrance is African-American and Abbey is white(2ndTrialTr.657-58). There was a time where Abbey's parents separated and her father moved out of the family's house and into an apartment(2ndTrialTr.664). Abbey's father was on disability and had a diagnosis of bipolar manic depression(2ndTrialTr.665). During Abbey's relationship with Terrance, she overdosed on prescription medication(2ndTrialTr.658-60).

For trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D. 2003); *State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994). It was unreasonable strategy to call Terrance to testify about the tumultuous nature of the Rainwater household when the jury heard that information from Abbey and Buchanan.

It was unreasonable to call Terrance because counsel believed he could present himself as someone who was non-violent(2nd29.15Tr.399). Numerous witnesses who

had known Terrance, including Jason Brandon, Donald Brandon, Timothy McMillan, Larry Morgan, Kevin Pruitt, Mike Brey, and Louis Buchanan conveyed exactly that sentiment(2ndTrialTr.730-40,742-46,798-803,804-14,839,840-43,883-90).

It, likewise, was unreasonable to advise Terrance to testify, fail to advise him during trial not to testify, and then call him to "humanize" him to show he accepted responsibility. The way to humanize a defendant is to find witnesses who can do that. *See Marshall*, *Johnson*, and *Morris*, *supra*. Counsel had found two expert witnesses, Lewis and Holcomb, who had found Terrance suffered from a psychotic depression characterized by paranoia and delusions. *See* Points IV, V. Counsels' stated rationale for not presenting expert testimony was Terrance had "lied" about not remembering having shot Debbie such that the experts could have been attacked for having relied on someone who had "lied." *See* Points IV, V. Those experts, however, did not believe that Terrance had lied about not remembering having shot Debbie. Instead, those experts concluded that Terrance's behavior was actually symptomatic of his mental disorders and they would have explained why Terrance's behavior was not uncommon for someone with his mental impairments. *See* Points IV, V.

Even if Lewis and Holcomb could have been attacked for having relied on a single matter that Terrance "lied" about, that was not nearly as damaging as what the jury got to hear from the prosecutor about how many different things Terrance had "lied" about in his testimony. Throughout the prosecutor's initial closing argument a recurrent theme was that Terrance had repeatedly lied. The prosecutor argued that Terrance testified that he only went to the Rainwaters to see his

daughter(2ndTrialTr.894). The prosecutor asked the jurors to "[r]emember [his] cross examination" when he asked Terrance why he brought a gun to see his daughter(2ndTrialTr.894).

The prosecutor argued that Terrance testified that he never physically abused Abbey(2ndTrialTr.894). That was followed by his argument that Abbey had obtained a restraining order based on injuries Terrance had inflicted(2ndTrialTr.894).

The prosecutor argued that Terrance testified that Stacey Turner had told him the Rainwaters had wanted to kill Terrance and Kyra(2ndTrialTr.894-95). That was followed by argument that Stacey testified denying what Terrance had reported(2ndTrialTr.894-95).

The prosecutor argued that Terrance testified that when he entered the house he did not have the gun out, but all the state's witnesses testified he displayed the gun before entering the house(2ndTrialTr.895). To emphasize that point, the prosecutor added that Terrance had testified that he had kept the gun in his pocket while he and Debbie each tried to prevent the other from taking Kyra in their arms(2ndTrialTr.895).

The prosecutor argued that Terrance testified that he moved Debbie's body off of Kyra, while Whitney testified it was she who did that(2ndTrialTr.896). To that the prosecutor added that Terrance testified that he answered a ringing telephone while Whitney said she answered it(2ndTrialTr.896).

The prosecutor argued that Terrance testified Whitney and Amy refused to leave, but in fact Terrance did not give them that choice(2ndTrialTr.896-97).

The prosecutor argued Terrance testified that Stephen lunged at him and Terrance said in response he shot him(2ndTrialTr.897). The prosecutor countered Terrance's reporting with Whitney testifying she was standing nearby and her father did not lunge at Terrance(2ndTrialTr.897).

The jury was told Terrance testified that he did not have a gun out when the police arrived, while Officer Clark said a gun was displayed(2ndTrialTr.897-98).

After highlighting these incidents the prosecutor's argument continued:

> What's the point of going through all this? The point is that in dealing with what you are being told about this situation, it is important to know who is telling you the truth and who isn't. The defendant sat right there, raised his hand, swore to tell the truth, and **lied to you over and over and over again.** It's not surprising that he would do so. He has a great deal to lose. But he did. After telling you that he was here to somehow comfort the family by telling them what really happened, **to take responsibility. Well, that's very good of him, but he's already been found to be responsible. The only issue is punishment. So it's very easy to take responsibility now.**
>
> But even that, even at that, he didn't really take responsibility, did he? Somehow this was all somebody else's fault for the way they treated him. I don't know how he was really treated. Unfortunately, the people who could give the other side of that story are very dead. Abbey knows, and she said it wasn't the way he says. Another lie? **Well, we know there have been so many, why not one more.**

(2ndTrialTr.898-99)(emphasis added).

In rebuttal closing argument, the prosecutor returned to the same theme. The prosecutor compared how Terrance's testimony was so different from respondent's witnesses and why Terrance was lying(2ndTrialTr.923-24). The prosecutor referred to Terrance having testified that he held the gun to his own head intending to kill himself (2ndTrialTr.782-83) and argued that Terrance testified that he was going to commit suicide, but Whitney did not report that happening, and therefore, it was "a lie"(2ndTrialTr.923). The prosecutor continued arguing that to believe Terrance's "version of things" the jury had to disbelieve Abbey, Amy, Stacey, and Whitney(2ndTrialTr.923-24).

Foregoing presenting mitigating evidence because it contains something harmful is not reasonable when its mitigating value outweighs its harm. *See Hutchison v. State*,150S.W.3d292,305(Mo.banc2004). Even if calling Lewis or Holcomb included something harmful in that Terrance could be portrayed as having "lied" to them about not remembering having shot Debbie, the mitigating value of their diagnoses outweighed calling Terrance who was then able to be portrayed as having "lied" about not just one thing, but everything. *See Hutchison.*

Calling Terrance to show he had accepted responsibility was not reasonable strategy. Counsel calling a defendant to testify to matters that as a matter of law do not constitute a defense when counsel perceived those matters to constitute a defense is ineffective assistance. *U.S. v. Henriques*,32M.J.832,834(1991)(calling defendant to testify on desertion charge that he intended to return to the Navy, but not return to his

unit was ineffective because expressing intent to return to only the Navy was not a defense). As noted, the prosecutor's initial closing argument included:

> After telling you that he was here to somehow comfort the family by telling them what really happened, to take responsibility. Well, that's very good of him, **but he's already been found to be responsible.** The only issue is punishment. So it's very easy to take responsibility now.

(2ndTrialTr.898-99)(emphasis added). In rebuttal argument, the prosecutor repeated that the issue was not whether Terrance admitted to doing the shootings because he was already found guilty of having done them(2ndTrialTr.923). As the prosecutor emphasized, the issue was not responsibility. Counsel relied on a defense theory of admitting responsibility when that was not a mitigating defense, and therefore, advising Terrance to testify and failing to advise him during trial not to testify were unreasonable. *See Henriques.*

In *U.S. v. Frappier*,615F.Supp.51,52(D.Mass.1985) counsel was ineffective for advising the defendant to testify where counsel was unaware of an alternative which would have avoided the defendant testifying and failed to furnish the defendant sufficient information on which to make an intelligent decision about whether to testify. In *Missouri v. Frye*,132S.Ct.1399,1408-09(2012) counsel was ineffective for failing to convey a plea offer to defendant and that failure constituted *Strickland* deficient performance. Here counsel, like in *Frappier* and *Frye*, never communicated critical information for Terrance to have in making a decision whether to testify or not. That information was that their reasons for calling Terrance to testify could be

accomplished through calling expert witnesses without Terrance testifying(2nd29.15Tr.293,402). Given the reluctance with which Terrance approached testifying(2nd29.15Tr.201-02,398-99), when counsel suggested to him that he consider testifying, made it that much more critical to advise him that the matters they wanted presented through him could be accomplished through experts.

Advising Terrance to testify and failing to advise him during trial not to testify was prejudicial because those actions enabled the prosecutor to argue that taking responsibility meant nothing since Terrance was already found guilty and to repeatedly skewer Terrance as a "liar" based on his testimony(2ndTrialTr.782-83,894-99,923-24). *See Strickland*. Further, Terrance was prejudiced because had Terrance not testified and the jury heard expert mental health testimony, there is a reasonable probability Terrance would have been sentenced to life. *See Strickland.*

This Court should order a new penalty phase.

X.

APPELLATE COUNSEL FAILED TO BRIEF PROPORTIONALITY

The motion court clearly erred in denying the 29.15 postconviction claim that direct appeal counsel was ineffective for failing to challenge Terrrance's sentence as disproportionate under §565.035.3 because Terrance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have briefed this issue since proportionality review is statutorily mandated and this Court has found death sentences disproportionate. Terrance was prejudiced because there is a reasonable probability this Court would have found Terrance's death sentence disproportionate and imposed life.

Direct appeal counsel did not make any argument that under the mandatory statutory review provided for in §565.035.3 that Terrance's sentence as to Debbie was disproportionate. Instead, this Court on its own motion addressed this issue. *State v. Anderson*,306S.W.3d529,544-47(Mo.banc2010). Effective counsel would have briefed this matter since it is statutorily mandated and this Court has set aside death sentences before based on proportionality grounds.

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 on a claim appellate counsel was ineffective, a movant must establish that competent and effective appellate counsel would have raised the error and that there is a reasonable probability that if the claim had been raised, the outcome of the appeal would have been different. *Williams v. State*,168S.W.3d433,444(Mo.banc2005).

Appellate Counsel's Testimony

Deborah Wafer represented Terrance on direct appeal(2nd29.15Tr.219). She did not brief the issue that Terrance's death sentence was disproportionate in violation of §565.035.3(2nd29.15Exs.S and T). Instead, she challenged proportionality for the first time in her rehearing motion after this Court conducted its own review without any argument from Wafer(2nd29.15Ex.W;2nd29.15Tr.227-28).

Wafer's rationale for not challenging proportionality was that she had never prevailed before and she did not raise it here "out of frustration" with how this Court historically conducted proportionality review(2nd29.15Tr.228-32). Wafer testified that she "gave up is basically what happened on it. Not a good thing to do."(2nd29.15Tr.232).

29.15 Findings

The findings state Wafer made a conscious decision not to raise proportionality(2nd29.15L.F.207-08). Terrance's sentence was not disproptionate

because Terrance would have killed Abbey had he found her, he shot Debbie while she was holding Kyra, and Terrance's mental health history was not long and documented, even if Lewis and Holcomb were believed(2nd29.15L.F.207-08).

Counsel Was Ineffective

For strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D. 2003); *State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994). Counsel's failure to brief this matter was not a matter of strategy, but instead she conceded and forfeited away a claim because she had not prevailed on this issue in the past and because of her personal "frustration" with how this Court conducts proportionality review(2nd29.15Tr.228-32). That was not reasonable because this Court has granted proportionality relief. *See State v. Chaney*,967S.W.2d47,59-61(Mo.banc1998); *State v. McIlvoy*,629S.W.2d333,341-42(Mo.banc1982). Reasonable appellate counsel would have briefed this issue. *See Williams.*

Section 565.035.3 provides:

3. With regard to the sentence, the supreme court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

Terrance was prejudiced because had counsel briefed this issue there is a reasonable probability this Court would have found his sentence disproportionate. *See Williams.* This case presents circumstances analogous to the situation where counsel filed no brief at all in *Mylar v. Alabama*,671F.2d1299,1300-02(11thCir.1982). To be effective counsel an attorney is required to be an "active advocate" on behalf of his client. *Id.*1301-02. An "active advocate" is one who "affirmatively promotes his client's position before the court." *Id.*1301. Moreover,

> A brief sets forth a partisan position and contains legal reasoning and authority supporting the defendant's position. The mere fact that appellate courts are obligated to review the record for errors cannot be considered a substitute for the legal reasoning and authority typically found in a brief.

*Id.*1302. A motion for rehearing is no substitute for a brief because a rehearing motion gets "summary consideration." *Id.*1302. An "active advocate" asserts his client's position "at the most opportune time by filing a brief…."*Id.*1302. Terrance's counsel was not an "active advocate" when she failed to file a brief arguing his sentence was disproportionate when §565.035.3 mandates proportionality review.

An "active advocate" would have briefed proportionality and relied on multiple first degree murder victim cases where death was not imposed.

Christopher Creed was convicted of two counts of first degree murder and sentenced to life without parole. *See* https://web.mo.gov/doc/offSearchWeb/searchOffender.do.[11]

Toby Viles killed his three younger siblings and pled guilty to life without parole. http://www.semissourian.com/story/122885.html

Pamela Burns was convicted of three counts of first degree murder and sentenced to life without parole. *See* https://web.mo.gov/doc/offSearchWeb/searchOffender.do.

Levi King was convicted of two counts of first degree murder and sentenced to life without parole. *See* https://web.mo.gov/doc/offSearchWeb/searchOffender.do.

Richard DeLong was convicted of five counts of first degree murder for the strangulation suffocation of four individuals, one of whom was pregnant with a nine month fetus, and sentenced to life without parole on all five counts(2nd29.15Ex.Z at 3).

James Schnick was charged with seven counts of first degree murder, four of which involved children. *State v. Schnick*,819S.W.2d330,331(Mo.banc1991). Four counts were dismissed without prejudice prior to trial and Schnick was convicted and sentenced to death on the three remaining counts. *Id.*331;(2nd29.15Ex.X). This Court

[11] This reference is a general one for the Missouri Department of Corrections' incarcerated individuals page. In order to locate a specific person, it is necessary to enter his/her name or inmate number.

reversed Schnick's conviction and he subsequently pled guilty and sentenced to life without parole. *Id.*334. *See Man Pleads Guilty Gets Life Sentence In Family Slayings* (A.P. story) at http://news.google.com/newspapers?nid=1891&dat=19920502&id=KMAfAAAAIBAJ&sjid=WNgEAAAAIBAJ&pg=5134,135165.

In *State v. Beishline*,926S.W.2d501,504-05(Mo.App.,W.D.1996), the defendant was convicted of killing an elderly woman by suffocating her while using chloroform to incapacitate her so as to prevent her resistance(2nd29.15Ex.Y). Beishline was also suspected of having committed other homicides. *Id.*505. The state sought death, but the jury imposed life(2nd29.15Ex.Y).

In *State v. Blankenship*,830S.W.2d1,4-5,13(Mo.banc1992) the defendant was charged with five counts of first degree murder, but convicted of five counts of second degree murder for killing five National Supermarket employees during a robbery.

Lorenzo Gilyard was convicted of six counts of first degree murder and sentenced to life without parole. *See State v.Gilyard*,257S.W.3d654(Mo.App.,W.D.2008)(memorandum opinion); Kansas City Man Gets Life sentence at: http://www.connectmidmissouri.com/news/story.aspx?id=32473; and https://web.mo.gov/doc/offSearchWeb/searchOffender.do.

Terrance was prejudiced because had Terrance had an "active advocate" on appeal there is a reasonable probability on direct appeal his sentence would have been

found disproportionate. *See Williams* and *Strickland*. Moreover, there is a reasonable probability Terrance's sentence as to Debbie would have been found disproportionate if counsel had relied on the noted cases where death was not imposed and the fact that as to one of the two counts, involving Stephen, he was already sentenced to life. *See Williams* and *Strickland.*

This Court should find Terrance's sentence was disproportionate and impose life without parole.

CONCLUSION

For the reasons discussed, this Court should order the following: (a) Points II through IX - a new penalty phase; (b) Point I - a new 29.15 hearing before a different judge; and (c) Point X - 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 30,914 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in June, 2012. According to that program the brief is virus-free.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 26th day of June, 2012, on Assistant Attorney General Shaun Mackelprang at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
William J. Swift