IN THE
MISSOURI SUPREME COURT

WALTER STOREY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 85980
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
11TH JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE NANCY SCHNEIDER, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

A. Case Procedural History

Walter Tim Storey was convicted of first degree murder and other crimes involving Ms. Jill Frey's death and sentenced to death. *State v. Storey*,901S.W.2d886(Mo.banc1995)(*Storey I*). In a consolidated appeal, the convictions were affirmed, but a new penalty phase ordered based on counsel's failure to object to improper penalty arguments. *Id.*900-03. The death sentence imposed in the penalty retrial was reversed because the trial court failed to give a "no adverse-inference" instruction. *State v. Storey*,986S.W.2d462,464-65(Mo.banc1999)(*Storey II*). When the penalty phase was retried again, this Court affirmed death. *State v. Storey*,40S.W.3d898(Mo.banc2001)(*Storey III*). This 29.15 action followed *Storey III.*

B. Original Guilt And Penalty Trial

In guilt, Tim testified his ex-wife Kim's father, Lonnie Harnage and he did not get along and Lonnie created problems in their marriage(1stTrialTr.756-58). Tim said he saw someone who resembled Lonnie's brother, Tony, kill Ms. Frey(1stTrialTr.770-76,788-89). On cross-examination, Tim admitted having a Georgia burglary conviction(1stTrialTr.790).

In guilt closing, defense counsel Dorothy Hirzy argued two foreign pubic hairs found on Ms. Frey were different from the sample pubic hairs obtained from Tim, and therefore, someone else killed Ms. Frey(1stTrialTr.900-01,914).

In penalty, respondent call Tim's ex-wife, Kim Storey, to testify that they had a bad marriage that included violent physical and sexual acts he inflicted(1stTrialTr.947-54). On cross-examination, Kim read into the record from cards and letters (Exs.A,B,C) she had sent to Tim while he was held for trial(1stTrialTr.956-63). Kim expressed her love for Tim, including her desire to have sex with him in sexually explicit detail(1stTrialTr.956-63;Ex.B). Respondent had no objection to any of the impeaching evidence(1stTrial Tr.957-63).

C. First 1993 PCR

Berrien County Georgia Sheriff Jerry Brogden testified his office responded to Lonnie Harnage's residence many times to Lonnie engaging in assaultive behavior directed at his ex-wife, Sally(1stR.Tr.535). Lonnie's criminal record includes numerous assault charges and a murder conviction for killing his brother(1stR.Tr.542-43).

Tim and Kim lived in a trailer next to Lonnie(1stR.Tr.578). Kim complained to Brogden about problems she and Tim were having with her father and on one occasion Brogden talked to her father about those problems(1stR.Tr.572-74). Brogden encouraged Lonnie to stay out of Tim's and his daughter's lives(1stR.Tr.572-74). Brogden never received any calls Tim was abusing Kim and saw no abuse by Tim(1stR.Tr.575-78). Brogden felt Lonnie caused much of the marital problems between Tim and Kim(1stR.Tr.578). Brogden never received a call to go to the Harnage property because of anything

Tim had done(1stR.Tr.580). Brogden did not consider Tim to be violent(1stR.Tr.583).

There was expert testimony from: (1) Jill Miller M.S.W.(1stR.Tr.51-171); (2) Dr. Cowan(1stR.Tr.211-84); (3) Dr. Straub(1stR.Tr.363-434);(4) Dr. Jolly(1stR.Tr.661-713); and (5) Dr. Vandenberg(1stR.Tr.606-60).

D. First Penalty Only 1997 Retrial

Because of respondent's objections, counsel was prohibited from questioning Kim about the contents of her birthday card and letters and not allowed to admit them into evidence(2ndTrialTr.845-47,874-80). Counsel was only allowed to elicit Kim sent Tim love letters when he was confined before the original trial(2ndTrialTr.874).

E. Second Penalty Only 1999 Retrial

Tim's case was set for trial on September 13, 1999(3rdTrialTr.158). During pretrial hearings held on September 8, 1999, the respondent requested a list of the exhibits from the first 29.15 case(3rdTrialTr.203-04). While counsel David Kenyon indicated his willingness to do so he commented that "I'd also like to comment that I'm actually kind of pleased because it appears that based on some of the things that Mr. Moss said, some of [the] things they didn't have kind of pleased to know they are as disorganized as we are"(3rdTrialTr.204).

Kenyon informed Judge Cundiff they had received sixteen boxes of materials that were a mess and he had only given them three months to prepare(3rdTrialTr.216). Based on not having completed preparing Tim's case for

trial and putting it together “at the last minute,” Kenyon requested a continuance(3rdTrialTr.217). Kenyon informed Cundiff there were witnesses they intended to call that they had not spoken to(3rdTrialTr.225-27). Co-counsel, Beverly Beimdiek, was “horribly concerned” about their ability to be ready(3rdTrialTr.227). A continuance was denied(3rdTrialTr.228).

Dr. Case described Ms. Frey’s injuries(3rdTrialTr.892-912). The cause of death was stab wounds to her neck(3rdTrialTr.913-16).

On February 5, 1990, some of Ms. Frey’s colleagues at United Services, an agency which provided educational services to children with special needs, went to her apartment because she had not shown-up for work and could not be reached(3rdTrialTr.919-23). Ms. Frey’s blood covered body was found in her bedroom(3rdTrialTr.924). She was found with a pajama top on, but was naked from the waist down(3rdTrialTr.936). Tim’s palmprint in blood was found on a dresser top(3rdTrialTr.938-39,1052). Based on mud smears, the police hypothesized Ms. Frey’s apartment was entered by someone climbing up on her balcony(3rdTrialTr.946-47). A bloody shoeprint was found on Ms. Frey’s pajama top’s back(3rdTrialTr.991-93). Some personal items belonging to Ms. Frey, including a briefcase with her documents, were found in a dumpster at the apartment complex(3rdTrialTr.956-57,1007). Also found in the dumpster were some men’s bloodstained clothes(3rdTrialTr.1015). Tim was staying in an apartment across from Ms. Frey’s apartment(3rdTrialTr.927-28,987).

Tim gave a police statement. He told the police he had received documents on Friday informing him Kim was seeking a divorce and the documents accused him of violent and abusive behavior(3rdTrialTr.1066-67). In response, Tim drank lots of beer(3rdTrialTr.1066-67). Tim told the police that during the night he took a knife and climbed from his balcony to Ms. Frey's balcony(3rdTrialTr.1067-68). Ms. Frey's sliding glass door was unlocked and he entered through it(3rdTrialTr.1067-68). He said the reason he went to Ms. Frey's apartment was to get money for more beer(3rdTrialTr.1092-93). He said he entered Ms. Frey's bedroom where he struggled with her on the bed(3rdTrialTr.1069). The next thing he remembered was being in Ms. Frey's car driving to Wentzville(3rdTrialTr.1069). The following day Tim went back to her apartment(3rdTrialTr.1071-72). He used a toothbrush to clean underneath her fingernails to remove any skin because she had scratched him(3rdTrialTr.1072). He threw Ms. Frey's keys into a lake at the apartment complex(3rdTrialTr.1073).

Kim Storey's second trial's testimony, with its very restricted cross, was what the jury heard because she was unavailable(3rdTrialTr.1116-23).

During trial, counsel informed Cundiff that Brogden could not appear to testify because his father had had a heart attack and was not expected to live(3rdTrialTr.978). Cundiff directed counsel to take a telephone deposition(3rdTrialTr.981-82).

Defense counsel called corrections expert James Aiken, who based on reviewing Tim's correctional records, believed Tim could be housed at Potosi for

the rest of his life without risk of harm to anyone(3rdTrialTr.1220-27,1230-34,1240-43).

Judy Robart, the Potosi librarian, hired Tim to work with her and he did not commit any violent acts directed at anyone(3rdTrialTr.1292-94,1296).

Psychologist Dr. Vandenberg recounted Tim has borderline personality disorder, but that was then less pronounced(3rdTrialTr.1323-24). Tim's Post-Traumatic Stress Disorder (PTSD) had gotten better with time(3rdTrialTr.1334-35). He explained why Tim does not display anti-social personality disorder(3rdTrialTr.1326-28,1335). He found Tim acted under the influence of extreme mental or emotional disturbance and his ability to conform his behavior to the requirements of law was impaired(3rdTrialTr.1331-33). The magnitude of the injuries to Ms. Frey indicated the crime was committed when an unknown event triggered a rage in Tim(3rdTrialTr.1380,1394).

During Vandenberg's testimony, counsel complained respondent had not disclosed Dr. Givon's report(3rdTrialTr.1336-37). Respondent indicated it had not received that report(3rdTrialTr.1337). Counsel asked respondent not be allowed to call Givon to testify to undisclosed opinions(3rdTrialTr.1338). Cundiff noted the state had conducted a late examination because the defense had done a late examination(3rdTrialTr.1338). Beimdiek conceded she was "not telling [the court] that we have totally clean hands on this"(3rdTrialTr.1338).

Pat Basler, Tim's mother, testified about abuse Tim's adoptive father, Carroll Storey, perpetrated on Tim(3rdTrialTr.1409-20,1422,1429-30). Basler

also testified about abusive behavior Tim was subjected to during her involvement with other men, Robinette and Corbett(3rdTrialTr.1439-48). She also testified, in an offer of proof only, how her other son, Keith Storey, had a stabilizing relationship with his biological father, Carroll Whitley, something Tim did not have with his biological father(3rdTrialTr.1434-39).

Faye Kerfoot, Carroll Storey's sister, and Faye's daughter, Sheila Eubanks, testified about abuse Carroll Storey perpetrated on Tim(3rdTrialTr.1473-77,1480-85). Sharon Stacey, Tim's cousin, testified about abuse Carroll Storey inflicted on Tim(3rdTrialTr.1494-1507).

Pat Basler's brother, Jimmy Dees, described how happy Tim was about his daughter(3rdTrialTr.1489-90).

The court ruled on the admissibility of certain portions of Brogden's deposition testimony and counsel offered the entire deposition as an offer of proof(3rdTrialTr.1527-35).

Keith Storey and his wife Carol described how they and their children maintain their relationship with Tim, despite him being confined at Potosi(3rdTrialTr.1535-40,1575-77). Keith described how Carroll Storey abused Tim(3rdTrialTr.1544-56). On cross-examination, respondent elicited Carroll Storey beat and abused Keith(3rdTrialTr.1581-82).

In rebuttal, respondent called Givon. Givon testified he did a 1990 court ordered examination of Tim and at respondent's request re-examined him in 1999 for that penalty re-trial(3rdTrialTr.1608-11). In 1990, Givon found there was no

mental disease or defect and his diagnoses were alcohol and marijuana abuse and anti-social personality(3rdTrialTr.1613,1618). The jury heard anti-social personality was equated with sociopath(3rdTrialTr.1620-21). Givon found no evidence of PTSD(3rdTrialTr.1624). He further stated Tim had not acted while under extreme mental or emotional disturbance, had the ability to appreciate the criminality of his conduct, and was able to conform his conduct to the requirements of law(3rdTrialTr.1626-29). Givon said his anti-social personality disorder finding had changed to personality disorder not otherwise specified(3rdTrialTr.1637).

Respondent argued in rebuttal Keith had an upbringing that was the same "in every pertinent respect" including Keith was beaten and sexually abused(3rdTrialTr.1694-95). Respondent also argued a person makes his own choices and Keith Storey chose not to do what Tim has done(3rdTrialTr.1694-95).

After the jury's verdict, Cundiff told the jurors this was the third death verdict(3rdTrialTr.1713). Cundiff heard "loud and clear" one juror respond: "I knew that"(3rdTrialTr.1713-14). Two months later a hearing was held in front of Judge Schneider at which the jurors who deliberated were briefly questioned, but no misconduct was found(Jur.Hrg.Tr.7-13,15-16,35-36)

F. Second (Present) 29.15[1]

[1] The first PCR's movant's exhibits were re-admitted(2ndR.Tr.2-7,520-22). To distinguish exhibits presented in the two PCRs, the second PCR's exhibit numbers

Beimdiek's goal was to rebut Tim had been violent to Kim(2ndR.Tr.196). Beimdiek prepared a memo which indicated she intended to cross Kim on the birthday card (Ex.A) and two letters (Exs.B,C) (Ex.325 at 2;2ndR.Tr.195,370-71). Beimdiek testified that after Kim's 1997 testimony was read she should have offered the birthday card and letters and she failed to do so through oversight(2ndR.Tr.377-78).

Andy Posey, Kim's ex-husband, could have testified Kim made claims against him that he had been violent towards her and those claims were false(Ex.269). While Andy and Kim were married, Kim's father, Lonnie, threatened to beat up and kill Andy(Ex.269). Beimdiek would have wanted to present evidence Kim had made false claims against Andy he was violent towards Kim and believed this evidence was relevant and not collateral(2ndR.Tr.197-98).

There was a defense team disagreement about whether Brogden's deposition should be submitted because Cundiff ordered parts redacted(2ndR.Tr.201-03). Beimdiek wanted to offer Brogden's deposition because she thought it was important to have someone from law enforcement testify(2ndR.Tr.202). Beimdiek's view was rejected, and therefore, the jury did not hear Brogden's 1999 deposition(2ndR.Tr.201-02).

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began with 200(2ndR.Tr.2-7,520-22). Thus, exhibit numbers from the first PCR are 1-110 and those for the second are 200-351.

Kenyon testified they did not offer Brogden's 1999 deposition because Cundiff had sustained respondent's objections to parts and they did not want the jury to hear about Tim's motorcycle theft conviction(Ex.350 at 12-13). Counsel did not object to evidence about the motorcycle burglary conviction case, even though that conviction was set aside(Ex.350 at 13-14).

Bailiff Paulson was with Cundiff when Cundiff spoke to the jurors and Paulson saw a juror nodding his head indicating he knew about the prior death sentences(Ex.349 at 5-6,12).

The motion court, Judge Schneider, denied relief and this appeal followed.

POINTS RELIED ON

I. FAILURE TO IMPEACH TIM'S EX-WIFE KIM AND OBJECT TO TESTIMONY

The motion court clearly erred denying claims counsel was ineffective for failing to impeach Tim's ex-wife Kim's abuse accusations that included sexually assaultive behavior, like that Ms. Frey allegedly suffered, by using Kim's love letters and birthday card sent to Tim while he was incarcerated awaiting the original 1991 trial, failing to offer Sheriff Brogden's testimony to establish the abuse never happened, and failing to call Kim's other ex-husband, Andy Posey, to testify she fabricated abuse accusations against Andy and that counsel should have objected to Kim's testimony she could no longer say words sexual in nature because she had become an upstanding Christian because Tim was denied 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 used all this evidence to impeach Kim to mitigate punishment and objected to her Christian testimony and Tim was prejudiced because there is a reasonable probability the jury would have imposed life.

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

State v. Black, SC 85535(Mo.banc Nov. 23, 2004);

Wiggins v. Smith,123S.Ct.2527(2003);

State v. Long,140S.W.3d27(Mo.banc2004);

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

II. JURY KNEW PRIOR DEATH RESULT

The motion court clearly erred overruling Tim was denied his rights to due process, freedom from cruel and unusual punishment, a fair trial, a fair and impartial jury, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, when counsel failed to call Judge Cundiff at the juror misconduct hearing before Judge Schneider to testify after he told the jurors Tim was previously death sentenced a juror stated "I knew that" and failed to call Bailiff Paulson to testify he saw a juror nodding affirmatively in response to Cundiff because their testimony, viewed together, established jury misconduct. Reasonably competent counsel would have called Cundiff because he had disclosed what was said and would have subpoenaed and called Paulson to confirm it. Tim was prejudiced because both together required a new trial.

Alternatively, the motion court clearly erred overruling Tim was denied a fair trial, a fair and impartial jury, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, when the juror indicated what he already knew and Cundiff failed to immediately investigate that knowledge and/or disclose to counsel what happened so counsel could immediately investigate, entered orders prohibiting investigation, and prevented a hearing for two months because Tim was improperly denied the opportunity to establish jury misconduct.

State v. Coy,550S.W.2d940(Mo.App.,K.C.D.1977);

State v. Smith,944S.W.2d901(Mo.banc1997);

State v. Suschank,595S.W.2d295(Mo.App.,E.D.1979);

State v. Tirado,599S.E.2d515(N.C.2004);

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

§547.020.

III. JUROR TESTIMONY PROHIBITED

The motion court clearly erred prohibiting 29.15 counsel from calling jurors to testify at depositions and at the 29.15 hearing because those actions denied Tim his rights to due process, a full and fair hearing, to be free from cruel and unusual punishment, and to prove ineffective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that to prove his claims a juror knew that he was previously death sentenced and counsel was ineffective in establishing that matter it was necessary to obtain the jurors' testimony.

Nunley v. State,56S.W.3d468(Mo.App.,S.D.2001);

State v. Jones,979S.W.2d171(Mo.banc1998);

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

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

§547.020.

IV. FAILURES TO OBJECT AND PRESERVE - VICTIM IMPACT

The motion court clearly erred denying claims counsel was ineffective for failing to properly object to and preserve the following:

A. Victim impact evidence was not admissible because when this offense occurred *Booth* and Missouri law prohibited it;

B. Ms. Frey's mother's testimony "the only way" she gets to "see" her daughter is at the cemetery which appealed to passion and prejudice;

C. Witnesses Marshall and Stepson expressing opinions the killing was highly aggravated such that the depravity aggravator existed;

D. Respondent's victim impact from Gladys and Timothy Frey and Robert and Trinje Reidelberger exceeded *Payne's* bounds, was hearsay, opinion, and speculation;

E. The religious impact Ms. Frey's death caused because that is contrary to *Debler* and *Whitfield* ;

F. Admission of Ms. Frey's three year old picture which appealed to passion and prejudice; and

G. Respondent's argument the entire community was a victim which expanded the universe of victims beyond *Payne*

because Tim was denied 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 properly objected and preserved and Tim was prejudiced as he would have been sentenced to life.

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

State v. Baublits,27S.W.2d16(Mo.1930);

State v. Cavener,202S.W.2d 869(Mo.1947);

State v. Metz,887P.2d795(Or.Ct.App.1994);

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

§565.030.

V. ABSENT LAY WITNESS AND RECORDS MITIGATION

The motion court clearly erred denying claims counsel was ineffective for failing to present evidence through non-family witnesses, Hughes, Watsons, Sumner, Whitley, Chester, Hansen, Raver, Marshall, Pafford, McGees, Wetherington, and Kinchen, and family witnesses, Susie Storey, Johnny Dees, and Patricia Dees Heath, and failed to present complete evidence through family witnesses Pat Basler and Sharon Stacey, and failed to present at all employment records from Chaparral Boat and Vocational Rehabilitation because Tim was denied 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 presented a comprehensive complete mitigation case through all these witnesses and employment records and Tim was prejudiced because there is a reasonable probability the jury would have imposed life.

Smith v. Texas,2004W.L.2578461(U.S.S.Ct. Nov.15, 2004);

Wiggins v. Smith,123S.Ct.2527(2003);

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

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

VI. UNDISCLOSED IMPEACHMENT AND INDEPENDENT TESTING

The motion court clearly erred finding respondent did not fail to disclose evidence that would have impeached Highway Patrol chemist Smith's 1991 trial hair comparison testimony, in overruling the motion to reopen the judgment to present additional evidence from 1991 trial counsel Hirzy to prove prejudice, and in finding 1999 counsel was not ineffective for failing to uncover the impeaching information and obtain independent microscopic hair testing to support a motion to recall the guilt mandate and to present this evidence at the retrial to support life because Tim was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that respondent was required to disclose evidence that impeached Smith and called into question Tim's conviction's reliability, Hirzy would establish why the non-disclosures were prejudicial, and reasonably competent 1999 counsel would have uncovered the Smith impeaching information and had independent microscopic hair testing done to support a motion to recall the mandate and Tim was prejudiced because the undisclosed impeaching evidence and independent microscopic testing excluding Tim call into question the guilt verdict's reliability and require recalling its mandate and at minimum supports life.

Banks v. Dretke,124S.Ct.1256(2004);

Brady v. Maryland,373U.S.83(1963);

Moore v. State,827S.W.2d213(Mo.banc1992);

Wolfe v. State,96S.W.3d90(Mo.banc2003);

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

VII. EXPERT TESTIMONY AND DOCUMENTS

The motion court clearly erred denying claims counsel was ineffective for failing to present mitigating evidence through experts with expertise like Cowan, Vlietstra, Straub, Smith, Jolly, Miller, and Pierce and to introduce document Exhibits 2, 4-6, and 13-15 supporting their findings because Tim was denied 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 presented these witnesses and evidence as mitigation and Tim was prejudiced because there is a reasonable probability the jury would have imposed life.

Brownlee v. Haley,306F.3d1043(11thCir.2002);

Hardwick v. Crosby,320F.3d1127(11thCir.2003);

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

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

VIII. PROSECUTORIAL PERSONAL GAIN AND FREY FAMILY'S AND FRIENDS' DEMANDS

The motion court clearly erred denying death continued to be sought as part of a larger pattern of prosecutorial misconduct throughout, and after *Storey I*, for the improper reasons Tim's case advanced Prosecutor Hulshof's 1996 Congressional campaign and his personal finances and Ms. Frey's family demanded Tim's case retried "as often as necessary" to get death such that Tim was never afforded the opportunity to plead to life without parole because Tim was denied his rights to a fair trial, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that respondent's continued death pursuit and refusal to settle was part of a larger pattern of prosecutorial misconduct throughout and resulted from the noted improper arbitrary considerations.

Maynard v. Cartwright,486U.S.356(1988);

State v. Harrington,534S.W.2d44(Mo.banc1976);

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

IX. APPELLATE COUNSEL'S INEFFECTIVENESS

The motion court clearly erred denying the claims direct appeal counsel was ineffective for failing to raise the trial court erred in:

A. Allowing any victim impact because it was prohibited at the time of the offense;

B. Excluding evidence of Keith Storey's ongoing relationship with his biological father to highlight the difference between Tim's and Keith's lives because it was relevant mitigation;

C. Allowing testimony about Tim invoking counsel because it was contrary to *Dexter* and *Zindel;*

D. Refusing to allow Tim to waive a jury trial because Mo. Const. Art. I §22(a) does not require respondent's consent;

E. Denying a new guilt phase because evidence of Tim's vacated Georgia conviction was highly prejudicial

because Tim was denied his rights to effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent appellate counsel would have raised these claims and there is a reasonable probability Tim's sentence would have been reversed.

Booth v. Maryland,482U.S.496(1987);

State v. Baublits,27S.W.2d16(Mo.1930);

State v. Cavener,202S.W.2d 869(Mo.1947);

State v. Metz,986P.2d714(Or.Ct.App.1999);

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

Mo. Const. Art. I §22(a);

§565.006.3.

X. MISLEADING JURY - FAILURES TO OBJECT/PRESERVE

The motion court clearly erred when it denied claims counsel was ineffective for failing to properly object to and preserve:

A. Officer Plummer testifying to Tim's interrogation statement he used to believe in the death penalty, but not anymore, because this injected irrelevant information engendering passion and prejudice suggesting that under Tim's own view death was appropriate;

B. Givon making predictions on Tim's behavior once he was "in a free community" because this suggested life without parole was actually paroleable;

C. Respondent's voir dire about a punishment preference "for people who go around committing murder first" because this suggested Tim committed other murders;

D. Givon's testimony Tim was competent to proceed because it was irrelevant to the punishment decision;

E. Cross-examination of corrections expert Aiken about prison killings at Jefferson City Correctional Center because it was irrelevant and the prosecutor made factually false representations about those killings which in addition constituted prosecutorial misconduct

because Tim was denied 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 properly objected and preserved and Tim was prejudiced as he would have been sentenced to life.

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

Simmons v. South Carolina,512U.S.154(1994);

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

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

§565.032.

XI. FAILURE TO OBJECT - PROSECUTOR'S ARGUMENTS

The motion court clearly erred when it denied claims counsel was ineffective for failing to properly object to argument and preserve the following:

A. Imposing life equated to weakness because that violated *Rousan*;

B. Comparing the value of Ms. Frey's life to Tim's life which violated *Storey I*

because Tim was denied 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 properly objected and preserved and Tim was prejudiced as absent these arguments he would have been sentenced to life.

State v. Rousan,961S.W.2d831(Mo.banc1998);

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

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

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

XII. LESSENING RESPONDENT'S BURDEN OF PROOF - FAILURE TO OBJECT/PRESERVE

The motion court clearly erred denying claims counsel was ineffective for failing to properly object to and preserve:

A. The prosecutor's voir dire burden of proof shifting and contrary to the MAI instructions representations telling the jury it would have to unanimously find life without was appropriate;

B. The prosecutor's voir dire there would come a time in deliberations when satisfying beyond a reasonable was not required when that is always respondent's burden;

C. Tim's guilt conviction was obtained when intoxication instruction MAI-CR3d 310.50 was given contrary to *Erwin*

because Tim was denied 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 properly objected and preserved these matters and Tim was prejudiced as his guilt conviction would have been set aside or at minimum life imposed.

In re Winship,397U.S.358(1970);

Sandstrom v. Montana,442U.S.510(1979);

State v. Erwin,848S.W.2d476(Mo.banc1993);

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

MAI-CR3d 310.50.

XIII. CONFUSING PENALTY INSTRUCTIONS

The motion court clearly erred rejecting Tim was denied his rights to effective assistance of counsel when counsel failed to object and present evidence to challenge the penalty instructions as failing to properly guide the jury denying Tim's rights to due process, a fair trial and impartial jury, and to be free from cruel and unusual punishment when those were given because Tim was denied all these rights, U.S. Const. Amends. VI, VIII, and XIV, in that the evidence established jurors do not understand the instructions and counsel unreasonably failed to object and to present evidence to support a challenge and Tim was prejudiced because the less jurors understand, the more likely they are to impose death.

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

State v. Deck,994S.W.2d527(Mo.banc1999);

U.S. ex rel. Free v. Peters,806F.Supp.705(N.D.Ill.1992),*rev'd*.12F.3d 700(7thCir.1993);

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

I. FAILURE TO IMPEACH TIM'S EX-WIFE KIM AND OBJECT TO TESTIMONY

The motion court clearly erred denying claims counsel was ineffective for failing to impeach Tim's ex-wife Kim's abuse accusations that included sexually assaultive behavior, like that Ms. Frey allegedly suffered, by using Kim's love letters and birthday card sent to Tim while he was incarcerated awaiting the original 1991 trial, failing to offer Sheriff Brogden's testimony to establish the abuse never happened, and failing to call Kim's other ex-husband, Andy Posey, to testify she fabricated abuse accusations against Andy and that counsel should have objected to Kim's testimony she could no longer say words sexual in nature because she had become an upstanding Christian because Tim was denied 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 used all this evidence to impeach Kim to mitigate punishment and objected to her Christian testimony and Tim was prejudiced because there is a reasonable probability the jury would have imposed life.

The motion court rejected claims counsel was ineffective for failing to impeach Tim's ex-wife, Kim Posey, to mitigate punishment and to object to her testimony that she had become an upstanding Christian. Tim was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984); *Williams v. Taylor*,529U.S.362,390-91(2000).

The "findings" should be given no deference on this and all other claims raised. Judge Nancy Schneider adopted respondent's findings(2ndR.L.F.675-815). This Court has criticized judges adopting a party's findings because it creates the appearance the judiciary is a mere rubber stamp. *Weeks v. State*,140S.W.2d39,49(Mo.banc2004). The rubber stamp nature of the findings here is highlighted because Schneider did not even correct respondent's findings which referenced her first name as Leslie, not Nancy, and misspelled her last name(2ndR.L.F.779).

A. 1991 Trial

At the 1991 penalty phase, respondent called Tim's ex-wife, Kim, to testify about Tim's alleged violent and abusive behavior(1stTrialTr.947-54). To refute those accusations, Hirzy cross-examined Kim about a birthday card and two letters she sent Tim while he was incarcerated pre-trial(1stTrialTr.956-63). Respondent had no objection to any of that impeaching evidence(1stTrialTr.957-63).

The birthday card contained both preprinted and handwritten sentiments. The printed material elaborated on the meaning of love and included: (1) "Above all, love is sharing everything together"; (2) "Loving you is the greatest joy That I

have ever known, And with each hour, each passing day, My love for you has grown"; and (3) "…the happiest of all my dreams Is being loved by you." (1stTrialTr.956-58;Ex.A(now Ex.218)). Personal handwritten material included: "every word is true. I love you so much. Love, Kim"(1stTrialTr.956-58;Ex.A;Ex.218).

A May, 1990 letter included: (1) "Hey Sweetheart"; (2) "It was so good talking to you this weekend I just wish we could talk every day and you hold me and make love to me every day"; (3) "I wish you never would have left to start with"; (4) "Tim I hope you just know how much I do love you. I am really the only one who does truly love you."; and (5) "I LOVE YOU !!!"(1stTrialTr.958-60;Ex.B(now Ex.219).

Accompanying the May, 1990 letter was a page containing a hand drawn heart and inside the heart was written "2 lovers 2 gether 4 ever" and "Tim You're my #1 man"(1stTrialTr.960;Ex.B;Ex.219). That page also contained Tim's ex-wife's handwritten statements regarding her desires to have sex with Tim, including sexually explicit details(1stTrialTr.960-61;Ex.B;Ex.219).

The second letter included: (1) "Tim, I want you to know that I will always love you for as long as I live"; and (2) I love you forever and always. Love, Kim."(1stTrialTr.962-63;Ex.C(now Ex.220)).

This Court reversed *Storey I* because counsel was ineffective for failing to object to Hulshof's improper penalty arguments. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995). Hulshof's penalty argument had

four types of errors including the "grossly improper" one of asking the jury to put itself in Ms. Frey's place. *Id.*900-03.

B. 1997 Trial

According to Kim, Tim had become very violent during their marriage(2ndTrialTr.857). Kim claimed, while she was pregnant, Tim had jumped on her and broke everything in the living room(2ndTrialTr.859). When Kim locked herself in the bathroom, Tim allegedly broke down the door, knocked her down in the bathtub, and she required medical treatment(2ndTrialTr.859).

Kim alleged Tim put a gun to their six month old daughter's head and threatened to kill everyone(2ndTrialTr.860).

Kim alleged there was an incident where Tim raped her(2ndTrialTr.860-61).

According to Kim there was an incident where Tim used a butcher knife to stab a tree, threatening to kill Kim's father(2ndTrialTr.861).

Kim alleged that while they were having sex, and she was pregnant, Tim cut her so that she was bleeding everywhere(2ndTrialTr.861-62). She claimed she did not report this incident, but told people "something I can't say cause I'm a Christian"(2ndTrialTr.862).

On cross-examination, counsel was allowed to elicit Kim had sent Tim love letters while confined pretrial(2ndTrialTr.874). When counsel sought to question Kim about their content, respondent objected on hearsay grounds, collateral matters, and their sexually explicit content(2ndTrialTr.874-76;*See, also*,

2ndTrialTr.845-47). Objections to Exhibits B and C were sustained(2ndTrialTr.875-78).

After counsel established Kim sent Tim a birthday card (Ex.A), respondent objected to the card being read to the jury on hearsay and relevancy grounds and that objection was sustained(2ndTrialTr.878-79). Kim agreed in the birthday card she had reiterated her love for Tim(2ndTrialTr.879).

When counsel offered Exhibits A, B, and C respondent renewed its objections and those exhibits were refused(2ndTrialTr.880).

When Kim was asked if she could remember what she told her parents about the incident when she got cut she did, but stated: "I do but I cannot say what I told my parents. I'm now a Christian, I cannot say words like that" (2ndTrialTr.880). Pressed to answer, Kim refused stating she could not because she is a Christian(2ndTrialTr.880-81). Later, she reported Tim cut her "privates" using a knife(2ndTrialTr.882-83).

On redirect, and over Kenyon's improper bolstering objection, respondent elicited Kim was then a church goer(2ndTrialTr.887).

C. Brogden's 1993 PCR Testimony

Brogden is the Berrien County Georgia Sheriff(1stR.Tr.532). Brogden recounted having to respond to and deal with Kim's father, Lonnie Harnage's, violent conduct(1stR.Tr.532-54,560-62). Lonnie's record includes a murder conviction for killing Lonnie's brother(1stR.Tr.542-43).

While Tim and Kim were married they talked with Brogden about personal matters(1stR.Tr.569-72). Kim complained to Brogden about problems they were having with her father and Brogden spoke to Lonnie about them once(1stR.Tr.572). Brogden told Lonnie he needed to stop interfering in Tim's and Kim's lives(1stR.Tr.572-74).

Brogden never saw any injuries on Kim or received any complaints from Kim suggesting Tim was abusive(1stR.Tr.575-78). Tim and Kim lived in a trailer next to Lonnie(1stR.Tr.578). Brogden felt Lonnie caused much of Tim and Kim's problems(1stR.Tr.578). Brogden had to respond to many calls involving Lonnie's actions, but never to anything involving Tim(1stR.Tr.578-81). If Tim had engaged in any violent acts, then Brogden would have known and Brogden does not believe Tim is violent(1stR.Tr.582-83).

D. Brogden's 1997 Trial Testimony

Brogden recounted Kim had reported to him domestic problems involving her father(2ndTrialTr.964-65). Kim never reported to Brogden any abuse by Tim(2ndTrialTr.965).

E. Brogden's 1999 Deposition

Beimdiek took Brogden's phone deposition during trial because his father was critically ill(Ex.262 at 79;2ndR.Tr.199-200). Brogden did not consider Tim to be violent and did not regard Tim as having a prior significant criminal history(Ex.262 at 84-85).

Kim talked to Brogden about her relationship with Tim and their marital problems(Ex.262 at 87-88,94-95). Kim never reported to Brogden Tim assaulted her(Ex.262 at 88). Kim did talk to Brogden about her father's abusive, violent acts(Ex.262 at 89).

F. Brogden - This 2nd PCR

Brogden would have testified at the 1999 trial to anything from his 1993 PCR and 1997 trial testimony(Ex.262;2ndR.Tr.200).

G. Andy Posey

Andy Posey would have testified he was married to Kim after she and Tim divorced(Ex.269). Subsequently, Andy and Kim divorced(Ex.269). Kim exaggerates and makes trivial events into something more(Ex.269). There was an incident in which Kim was aggressive towards him where she slapped him in front of his children(Ex.269). Kim made claims against Andy he had been violent towards her while they were married and those claims were false(Ex.269). While Andy and Kim were married, Kim's father, Lonnie, threatened to beat up and kill Andy(Ex.269).

H. 1999 Trial Record

Kim's 1997 testimony was read to the 1999 jury because she was unavailable(2ndR.Tr.368-70,376).

Cundiff sustained respondent's objections to Brogden's 1999 deposition testimony he did not consider Tim to be violent(3rdTrial Tr.1529-30;Ex.262 at 84-85) and Tim does not have a significant criminal history(3rdTrialTr.1531-

32;Ex.262 at 86-87). Cundiff overruled the defense's lack of personal knowledge objection to Brogden testifying about Tim having stolen a motorcycle because Brogden testified he personally investigated it(3rdTrialTr.1533;Ex.262 at 92-93). Cundiff overruled the defense's objection to Brogden testifying the motorcycle was recovered in Missouri, but counsel subsequently withdrew her objection(3rdTrialTr.1533-34;Ex.262 at 93-94). Beimdiek asked Brogden's entire deposition be considered as an offer of proof(3rdTrialTr.1534-35).

Respondent presented evidence Ms. Frey was found naked from the waist down(3rdTrialTr.936), died from stab wounds (3rd TrialTr.913-16), and then argued Tim attempted to rape her(3rdTrialTr.1669-70,1696).

I. Beimdiek's Testimony

Beimdiek's goal was to rebut Tim had been violent to Kim(2ndR.Tr.196). Beimdiek prepared a memo for her intended cross which indicated Beimdiek intended to cross Kim on the birthday card (Ex.A) and two letters (Exs.B,C) (Ex.325 at 2;2ndR.Tr.195,370-71).

Immediately before Kim's 1997 testimony was read (3rdTrialTr.1122), Beimdiek made a record indicating she wanted the birthday card and two letters read to the jury and the jury should hear more than the mere fact of the letters(3rdTrialTr.1118). Beimdiek told Cundiff that should be allowed because they "directly impeac[h] [Kim's] credibility on these acts of violence that she claims to have been perpetrated against her"(3rdTrialTr.1118). Cundiff decided to rule when the matter came up(3rdTrialTr.1118-19). Despite having made a

detailed record on the letters and birthday card, Beimdiek did nothing further to put their details in front of the jury(2ndR.Tr.376-77). Beimdiek testified that after Kim's 1997 testimony was read she should have offered the birthday card and letters and she failed to do so through oversight(2ndR.Tr.377-78). Beimdiek thought the birthday card and letters would be "effective tools" for challenging Kim's veracity, even though Hirzy had used them in 1991 and Tim was sentenced to death then(2ndR.Tr.407).

Beimdiek knew Brogden testified at the 1993 PCR and 1997 trial(2ndR.Tr.199). In Brogden's 1999 deposition he testified Tim was not a law enforcement problem, Kim never reported any abuse by Tim, and Kim's father Lonnie was a source of conflict in Tim's and Kim's marriage(2ndR.Tr.200-01). There was a defense team disagreement about whether Brogden's deposition should be submitted because Cundiff ordered parts redacted(2ndR.Tr.201-03). Beimdiek wanted to offer Brogden's deposition because she thought it was important to have someone from law enforcement testifying for Tim(2ndR.Tr.202). Beimdiek's view was rejected, and therefore, the jury did not hear Brogden's 1999 deposition(2ndR.Tr.201-02).

Beimdiek agreed evidence of Tim's motorcycle theft conviction should have been something the jury did not hear because it was vacated(2ndR.Tr.203-04). *Storey II*,986S.W.2d462,465-66(Mo.banc1999)(State "concede[d]" it was error to admit vacated conviction).

Based on Brogden's 1993 PCR testimony, Beimdiek had no reason for failing to have elicited in 1999 Tim and Kim had asked Brogden to get Kim's father, Lonnie, to stop interfering in their marriage(2ndR.Tr.205-06). Beimdiek did ask Brogden in 1999 whether Kim ever reported violence by Tim and Brogden testified Kim never made any such reports(2ndR.Tr.206).

Beimdiek knew Kim had married Andy Posey and they were divorced by 1999, but did not consider calling Andy(2ndR.Tr.195-96). Beimdiek would have wanted to present evidence Kim had made false claims of violence against Andy (Ex.269), he was violent towards Kim and she believed this evidence was relevant, not collateral(2ndR.Tr.197-98).

Beimdiek did not object to the reading of Kim's 1997 Christian testimony because she felt it diminished Kim's credibility and the jury might suppose Kim had previously lied(2ndR.Tr.380).

J. Kenyon's Testimony

Counsel did not offer Brogden's 1999 deposition because Cundiff had sustained respondent's objections to parts and they did not want the jury to hear about Tim's motorcycle theft conviction(Ex.350 at 12-13). They did not object to evidence about the motorcycle case, even though that conviction was vacated(Ex.350 at 13-14).

Kenyon thought much of what Andy Posey could have said (Ex.269) was collateral(Ex.350 at 9-10). Kenyon thought that as Kim's ex-spouse Andy's views

would not have had much credibility, but conceded calling Andy would not have hurt(Ex.350 at 10-11).

K. Findings

The evidence did not show the witnesses would have provided persuasive or helpful information and they were not credible(2ndR.L.F.787). Counsel made a strategic decision, after thorough preparation, to call certain mitigation witnesses and the uncalled witnesses would have been cumulative(2ndR.L.F.787-88).

Kim's letters were used in 1991, with death imposed then, so there was no prejudice(2ndR.L.F.810).

Beimdiek testified she did not object to Kim's Christian testimony because she believed it diminished Kim's credibility(2ndR.L.F.810).

L. Counsel Was Ineffective

Counsel can be ineffective for failing to impeach. *Hadley v. Groose*,97F.3d1131,1133-36(8thCir.1996); *Driscoll v. Delo*,71F.3d701,709-11(8thCir.1995). "One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*,80S.W.3d817,827(Mo.banc2002). *See, also, Wiggins v. Smith*,123S.Ct.2527,2537(2003)(counsel has duty to investigate and rebut aggravating evidence).

In *Black v. State*,SC85535 slip op. at 1,8-15(Mo.banc Nov. 23, 2004), counsel was ineffective for failing to impeach witnesses with their prior

inconsistent statements. That failure was prejudicial because the prior inconsistent statements went to a central, controverted issue, whether Black acted with deliberation. *Id.*11,15. A trial court is required to allow impeachment on matters "related to a paramount issue or that affected [the witnesses'] accuracy, veracity, or credibility…."*Id.*10. Such issues are not collateral. *Id.*10. A matter is not collateral "if the alleged discrepancy involves a crucial issue directly in controversy…."*Id*.9-10.

Counsel was ineffective for failing to impeach Kim with her letters and birthday card and evidence from Sheriff Brogden and Andy Posey and thereby failed to mitigate punishment. The letters and birthday card would have painted a very different picture for the jury which only heard in the most generalized terms that Kim had conveyed to Tim she cared for him. The card's and letters' conveyed sentiments of overwhelming intense love for Tim which was entirely inconsistent with the abusive person Kim portrayed Tim as. Moreover, it was important for the jury to hear the explicit sexual desire content of Kim's writings because they were totally inconsistent with her portrayal of Tim as a rapist who had used a knife to cut her genitals. Respondent called Kim to present her rape and sexual cutting accusations to support Tim had committed similar sexually violent acts - stabbing and attempting to sexually assault Ms. Frey. Like *Black* whether Tim had engaged in similar sexually assaultive behavior was a central controverted issue of whether he deserved death which was directly in controversy and counsel was ineffective for failing to impeach. Moreover, Beimdiek testified

she intended to use the card and letters to impeach because she thought they would be effective impeachment and even had prepared a cross memo that relied on them(Ex.325;2ndR.Tr.195,370-71,377-78,407).

The failure to impeach Kim with her card and letters was prejudicial, even though in the first trial she was impeached with them and Tim got death then(2ndR.L.F.810). This Court decided the penalty decision was not reliable because of Hulshof's four brands of improper argument, including one that was "grossly improper." *See Storey I, supra*. Without Hulshof's improper arguments, that impeachment might otherwise have prevented death. Moreover, in the first trial, like this third one, the jury did not hear Brogden's and Andy Posey's impeaching evidence which when they are combined with Kim's letters and card make Kim's accusations appear even more incredible.

Kims' evidence was especially prejudicial because the prosecutor argued for death as follows:

> what kind of father he is, I'll tell you the kind of father he is. He is the kind of father that would put a gun to his own child's head and use her as a pawn, as an argument with his ex-wife. That's the kind of father he is.
>
> Now, maybe he can't do that to her anymore, but it does give us some idea of his character.

(3rdTrialTr.1702-03). It was essential the jury have heard Kim was not credible.

Brogden had assumed the role of a counselor/confidant who would have refuted Kim's abuse accusations because Kim had not reported them to him, but

had complained about her father's abusive acts. Because he was the local Sheriff, Brogden would have been a highly credible witness as a member of law enforcement. Brogden also would have refuted the abuse accusations because he regarded Tim's and Kim's problems as caused by her father.

For trial strategy to be a proper basis to deny relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003). It was not reasonable for counsel to fail to use Brogden's deposition based on what Cundiff ordered redacted and the jury hearing evidence about Tim having had the motorcycle theft conviction (2ndR.Tr.201-03;Ex.350 at 12-13). Cundiff did not order excluded evidence contained in Brogden's 1999 deposition that established Kim's abuse accusations against Tim were fabricated, and therefore, it was not reasonable to fail to offer that evidence. *See Butler*. Also, it was unreasonable for counsel to have failed to present through Brogden his prior testimony Tim and Kim had asked Brogden to have her father stop interfering in their lives to explain the primary source of their marital problems(2ndR.Tr.205-06). Likewise, because respondent had conceded in *Storey II, supra*, the motorcycle theft conviction evidence was improper, failing to offer Brogden's testimony because it included this matter was not reasonable. *Butler*.

In *State v. Long*,140S.W.3d 27,30-32(Mo.banc2004), extrinsic evidence of prior false accusations was held admissible to impeach. Such evidence is admissible when a witness' credibility is a key factor in determining guilt or acquittal and the evidence has legal relevance. *Id*.30-32. Additionally,

documents, witnesses, and other such evidence can constitute the form by which such evidence is presented. *Id.*32.

Kim's credibility was a key factor for determining punishment under *Long* and not collateral. Andy Posey would have severely challenged Kim's abuse accusations testifying she had fabricated abuse accusations against him and caused the jury to believe that was what Kim was doing to Tim. Andy's status as Kim's ex-spouse did not make him any less credible (Ex.350 at 10-11) because respondent called Kim whose status was that of Tim's ex-spouse. The jury should have been given the chance to decide which ex-spouse to credit after hearing Andy. *Long*.

Counsel can be ineffective for failing to object. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995)(*Storey I*). A death sentence must appear to be based on reason, not caprice or emotion. *Gardner v. Florida*,430U.S. at 358. The decision between life and death "should not turn on the most compelling Scriptural parallel." *State v. Debler*,856S.W.2d641,656(Mo.banc1993) *See, also, State v. Whitfield*,837S.W.2d503,513(Mo.banc1992)(arguments injecting Scripture "troubling"). *Debler*, prohibits "excessive Biblical" references. *Debler*,856S.W.2d at 656. What this Court's decisions have recognized is religious appeals should not be injected into deciding punishment.

The same considerations identified in *Debler* and *Whitfield* are equally applicable to Kim's efforts to bolster her own testimony. Here, Kim sought to

bolster and vouch for her credibility in her 1997 testimony, read in 1999, by presenting herself as someone whose abuse accusations should be believed because she had become an upstanding Christian. Whether Kim should be believed or not has nothing to do with whether she is a good Christian and this appeal was improper. The respondent saw this as a desirable means for furthering its goal because after Kim injected her Christianity on cross, respondent on redirect, and over Kenyon's 1997 improper bolstering objection, elicited Kim was a church goer(2ndTrialTr.887). Contrary to Beimdiek's PCR testimony (2ndR.Tr.380), Kim's Christian testimony did not make her appear less credible because respondent wanted it emphasized in 1997 and Kenyon in 1997 had objected to respondent's redirect efforts to highlight it as improper bolstering(2ndTrialTr.887). Thus, counsel did not act as reasonable counsel when they allowed Kim's testimony without objecting.

Reasonably competent counsel under similar circumstances would have impeached Kim's claims of abuse with her letters and birthday card and presented complete testimony from Sheriff Brogden and Andy Posey. Further, that counsel would have objected to Kim bolstering her testimony through her vouching for her high morals as a Christian. Tim was prejudiced by counsel's failure to properly act on each of these matters both individually and in combination with one another and there is a reasonable probability the jury would have imposed life. *Strickland* and *Williams v. Taylor*.

A new penalty phase is required.

II. JURY KNEW PRIOR DEATH RESULT

The motion court clearly erred overruling Tim was denied his rights to due process, freedom from cruel and unusual punishment, a fair trial, a fair and impartial jury, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, when counsel failed to call Judge Cundiff at the juror misconduct hearing before Judge Schneider to testify after he told the jurors Tim was previously death sentenced a juror stated "I knew that" and failed to call Bailiff Paulson to testify he saw a juror nodding affirmatively in response to Cundiff because their testimony, viewed together, established jury misconduct. Reasonably competent counsel would have called Cundiff because he had disclosed what was said and would have subpoenaed and called Paulson to confirm it. Tim was prejudiced because both together required a new trial.

Alternatively, the motion court clearly erred overruling Tim was denied a fair trial, a fair and impartial jury, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, when the juror indicated what he already knew and Cundiff failed to immediately investigate that knowledge and/or disclose to counsel what happened so counsel could immediately investigate, entered orders prohibiting investigation, and prevented a hearing for two months because Tim was improperly denied the opportunity to establish jury misconduct.

The motion court denied Tim's claims counsel was ineffective in failing to establish juror misconduct based on a juror knowing Tim was previously death sentenced and alternatively Judge Cundiff's improper actions prevented establishing that misconduct. Tim was denied his rights to due process, freedom from cruel and unusual punishment, a fair trial, a fair and impartial jury, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

A. Caselaw Standards

Review is for clear error. *Barry v.State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*,366U.S.717,722(1961). The failure to grant a fair hearing violates minimal due process standards. *Id*.722.

Receipt by a juror of possibly prejudicial information during trial requires the verdict be set aside unless harmlessness is shown. *State v. Suschank*,595S.W.2d295,298(Mo.App.,E.D.1979); see also §547.020. Additionally, prospective jurors have an obligation to answer all questions fully and truthfully. *State v. Coy*,550S.W.2d940,942(Mo.App.,K.C.D.1977). Intentional concealment gives rise to an inference of prejudice because the failure to answer deprives the defendant of the opportunity to challenge for cause or peremptorily. *Id.*942.

"When juror misconduct occurs during a felony trial, a new trial is required unless the State affirmatively shows that the jurors have not been improperly influenced as a result of the misconduct." *State v. Smith*,944S.W.2d901,921(Mo.banc1997). That burden shifts to the State once misconduct is established. *Id.*921. *See also*, *Travis v. Stone*,66S.W.3d1,3-4(Mo.banc2002)(once established juror has acquired extraneous evidence prejudice is presumed and burden is on party seeking to enforce verdict to show no prejudice).

B. <u>The Trial Record</u>

At 12:06 a.m. on the night of September 17, 1999 and early morning of September 18th the jury returned its death verdict(3rdTrialTr.1708). On September 20th, Judge Cundiff entered an order directing the parties not to contact the jurors or members of the Sheriff's Department responsible for sequestration without a motion and order(Ex.298-Depo.Ex.A). On September 23rd, Cundiff sent the parties a letter asking them to appear on September 29th(Ex.298-Depo.Ex.B).

When the parties appeared on September 29th, Cundiff informed them following the verdict he had spoken to the jurors in the juryroom(3rdTrialTr.1712-14). Some jurors were crying(3rdTrialTr.1712-13). To ease their feelings, Cundiff told them the final decision was his(3rdTrialTr.1713). He also told them that this was the third death verdict(3rdTrialTr.1713). In response, a male juror said: "I knew that"(3rdTrialTr.1713-14). Cundiff indicated he "heard it loud and

clear"(3rdTrialTr.1714). He also stated he did not know whether the juror was responding to him or another juror(3rdTrialTr.1714). Respondent argued the statement was ambiguous such that it could mean the juror had inferred there had been a prior death verdict(3rdTrialTr.1714). Cundiff directed the parties that if they wanted to question the jurors, then a motion was needed(3rdTrialTr.1714-15).

The day after Cundiff made his disclosure, September 30th, counsel filed a motion requesting a hearing to question jurors and deputies responsible for sequestration(3rdTrialTr.1731-32;Ex.333).

On October 27th, Cundiff denied the motion(Ex.298-Depo.Ex.C; Ex.298 at 30-31;3rdTrialTr.1714-15;Ex.333). In arguing for a hearing, counsel urged a timely hearing was critical because the longer a hearing was delayed the less likely they were to get honest, truthful, and complete information(3rdTrialTr.1731-32). Cundiff also denied the State's request to disqualify him(Ex.298-Depo.Ex.C). Cundiff told the parties there was a bailiff with him in the juryroom who did not recall hearing the statement(3rdTrialTr.1718). Cundiff stated though: "I'm confident that one of those jurors or more of those jurors is going to have heard the same thing that I heard"(3rdTrialTr.1722). Cundiff noted he had been meticulous during voir dire to not ask any question that would have indicated Tim was previously death sentenced(3rdTrialTr.1724-25). Respondent again argued a juror could have reasoned Tim was previously death sentenced(3rdTrialTr.1726-27).

On November 17th, the parties appeared, Cundiff reversed his rulings denying a hearing and to disqualify him, and the case was assigned to Judge

Schneider for a limited hearing(Ex.298-Depo.Ex.F). On November 22nd, Schneider limited the inquiry to four questions respondent submitted and to those jurors who actually deliberated(Jur.Hrg.Tr.7-13,15-16). All jurors questioned indicated the following: (1) they served; (2) they did not have any prior death verdicts knowledge; (3) they did not read any article or see or hear any program during trial reporting prior death verdicts; and (4) no one, other than another juror, told them during trial about the prior death sentences(Jur.Hrg.Tr.16-35). Schneider found no misconduct(Jur.Hrg.Tr.35-36).

C. Cundiff And Paulson Testimony

Cundiff testified he thought he heard a man's voice say "I knew that"(Ex.298 at 12-13). He did not hear any other juror make a statement that would have caused someone to say "I knew that"(Ex.298 at 14-15). He qualified his testimony stating that in the juryroom everyone was talking at the same time and he has a hearing problem for which two hearing aids were recommended, but he wears none(Ex.298 at 12-13). However, he added "Had I not been pretty sure of what I heard, I certainly would not have brought it to everybody's attention and gone through what we've gone through"(Ex.298 at 16). Cundiff did not inform counsel what was said on the same evening as the verdict because it was a highly emotionally charged situation where jurors were upset and he did not want to cause more distress(Ex.298 at 20). Instead, Cundiff went to his office to contemplate what to do(Ex.298 at 20). Cundiff did at some point question the

bailiff who was standing by him and the bailiff indicated he did not hear anything(Ex.298 at 28).

Jeffrey Paulson testified he was a bailiff who was in the juryroom with Cundiff(Ex.349 at 5). He was with Cundiff when Cundiff told the jurors Tim was previously death sentenced(Ex.349 at 5). Paulson did not recall hearing any specific comment in response to Cundiff informing the jurors of the prior death verdicts, but did see a male juror nodding his head in a manner indicating he had known that information(Ex.349 at 5-6,12). He may have told the 29.15 investigator for Tim that he did hear someone say "I knew that"(Ex.349 at 11-12). No one, other than the prosecutor, contacted Paulson in 1999 or 2000 about what took place(Ex.349 at 8,10,16). Paulson's memory of what happened was better in 1999 than when he testified(Ex.349 at 16).

D. Counsels' Testimony

Cundiff did not tell counsel the night of the verdict what happened and counsel would have wanted to know then to conduct an immediate hearing(2ndR.Tr.280-84;Ex.350 at 62-64). Counsel first learned what happened on September 29th(2ndR.Tr.289;Ex.350 at 66-67). Counsel would have wanted to corroborate what Cundiff heard through any bailiff, but they did not subpoena any bailiffs(2ndR.Tr.301;Ex.350 at 74-75).

E. Motion Court Findings

Schneider ruled a hearing at which all the jurors were called was conducted in November, 1999 and there was no evidence then the jurors knew Tim was

previously death sentenced(R.L.F.807). Counsel acted competently(R.L.F.807,814). Schneider also found Cundiff testified at the 29.15 that he had "no way of knowing or assuming the comment the juror made was in response to him telling the jurors about movant's past trials"(R.L.F.814 relying on Ex.298 at 12-14).

F. Counsel Was Ineffective

Cundiff informed counsel what he had heard(3rdTrialTr.1713-14). Counsel filed a motion that stated they wanted a hearing that included questioning the sheriff's bailiffs(3rdTrialTr.1731-32;Ex.333). At the hearing conducted in front of Schneider, counsel did not call Cundiff. The prosecutor spoke to bailiff Paulson, but no one else did(Ex.349 at 8,10,16). Schneider heard no evidence independently confirming what Cundiff said he had heard "loud and clear" (3rdTrialTr.1714) and that Cundiff was "confident" one or more jurors heard what he heard(3rdTrialTr.1722).

Schneider, relying on Cundiff's deposition testimony, (R.L.F.814 referencing Ex.298 at 12-14), found he had no way of knowing if the juror's statement was made in response to him telling the jurors of the prior death verdicts. Cundiff's testimony, however, does not support that assertion(Ex.298 at 12-14). Those pages show Cundiff only referenced his hearing limitations as to what it was he had heard, but shortly after the occurrence knew he had "heard it loud and clear"(3rdTrialTr.1714).

Reasonably competent counsel under similar circumstances who had requested a hearing that would include calling the deputies responsible for sequestration would have called both Cundiff and Paulson at the hearing conducted before Schneider. *Strickland, supra*. It was critical for Schneider to have heard from Cundiff what he heard and to then have Paulson independently confirm that he saw a male juror acknowledge that he had already known Tim was previously death sentenced before having heard that information from Cundiff. Tim was prejudiced because at least one juror knew the harmful information Tim was previously death sentenced. *Strickland*, *supra*. This information was prejudicial because, as Cundiff noted, he had been meticulous in avoiding any questioning that would have conveyed to the jury Tim was previously death sentenced(3rdTrialTr.1724-25).

G. <u>Cundiff's Own Actions Were Prejudicial</u>

When the juror made the statement, Cundiff had an affirmative duty to find out which juror made the statement and to immediately act to address what was said. Further, Cundiff had a duty to also immediately inform Tim's counsel so they could take prompt, immediate action to investigate. Additionally, Cundiff's order expressly directing counsel not to contact jurors or the deputies and only relenting in allowing a hearing two months after the verdict resulted in a hearing in front of Schneider that failed to uncover the details of one juror knowing Tim was previously death sentenced(*See* Jur.Hrg.Tr.16-35). What happened at the hearing in front of Schneider was what counsel feared - the longer a hearing was delayed

the less likely they were to get honest, truthful, and complete information(3rdTrialTr.1731-32).

In *State v. Tirado*,599S.E.2d515,537(N.C.2004), codefendants Tirado and Queen were tried together in a single guilt phase, but the death phase was bifurcated so Queen's unredacted statement could be read to the jury without prejudicing Tirado. The jury was not polled immediately after Tirado's death verdict, in violation of statute, instead the verdict was sealed. *Id.*537. Queen was sentenced to death four days later and after the jury heard Queen's unredacted statement containing evidence prejudicial to Tirado. *Id.*537-38. The jury was not polled on Tirado's verdict until Queen's verdict. *Id.*537-38.

Tirado's penalty was reversed because the jury was not polled immediately. *Id.*537-38. Conducting the polling later was prejudicial because that polling failed to measure the jurors' intentions at the time of the verdict, rather than after they had heard evidence inadmissible as to Tirado. *Id.*537-38. It was unlikely that any juror(s) who had wavered in their verdict would have expressed their doubts when the polling was finally done. *Id.*537-38. It was noted that when a jury "is dispersed after rendering its verdict and later called back, it is not the same jury that rendered the verdict." *Id.*538.

The same considerations identified in *Tirado* apply here. After Tim's jury had been dispersed for two months, it clearly was not the same jury. If any juror would have been willing to come forward the night of the verdict with information establishing knowledge of the prior death result, time's passage prevented it from

happening. *Tirado*. Moreover, failing to hold a hearing for two months, as counsel feared, made it less likely truthful information would be obtained because that timing sent a message to the jurors misconduct questions had been raised and they better be sure to present themselves as having acted properly.

A new penalty phase is required.

III. JUROR TESTIMONY PROHIBITED

The motion court clearly erred prohibiting 29.15 counsel from calling jurors to testify at depositions and at the 29.15 hearing because those actions denied Tim his rights to due process, a full and fair hearing, to be free from cruel and unusual punishment, and to prove ineffective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that to prove his claims a juror knew that he was previously death sentenced and counsel was ineffective in establishing that matter it was necessary to obtain the jurors' testimony.

The motion court prohibited 29.15 counsel from obtaining the jurors' testimony at depositions and at the 29.15 hearing. That action denied Tim his rights to due process, a full and fair hearing, to be free from cruel and unusual punishment, and to prove ineffective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, because he could not prove his claims involving juror misconduct without calling the jurors.

Review is for clear error. *Barry v.State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). Postconviction allegations are not self-proving and require evidence. *Nunley v. State*,56S.W.3d468,470(Mo.App.,S.D.2001).

The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976). The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*,366U.S.717,722(1961).

In response to the State's request (2ndR.L.F.581-82), the motion court entered orders prohibiting 29.15 counsel from deposing the jurors and calling them at the 29.15 hearing(2ndR.L.F.640-41;2ndR.Tr.11-13;1stSupp.2ndR.L.F.1-6).

As discussed in greater detail in Point II, Judge Cundiff informed counsel he heard a juror say he had known Tim was previously death sentenced(3rdTrialTr.1712-15)[2]. At the hearing Schneider conducted, she limited inquiry to four questions respondent submitted and to those jurors who actually deliberated(Jur.Hrg.Tr.7-13,15-16). The questions asked were did you: (1) serve; (2) know before being sworn Tim was previously death sentenced; (3) during trial learn from media about prior results; and (4) learn from any person, other than another juror, about prior results(*See*,*e.g*.,Jur.Hrg.Tr.16-17). Schneider found no misconduct(Jur.Hrg.Tr.35-36).

Claim 8(F) alleged counsel was ineffective for failing to: (1) question the jurors telling them when Cundiff came to the juryroom a juror indicated he knew Tim was previously death sentenced and to ask who the juror was who made that

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[2] As discussed in Point II, juror misconduct was proven. If, however, Point II is rejected, then Schneider should have allowed juror questioning.

disclosure; and (2) ask jurors whether another juror told them information about Tim's prior death sentences(2ndR.L.F.119-20). The pleadings alleged this questioning would have led to the discovery of the juror who knew Tim was previously death sentenced(2ndR.L.F.120).

The pleadings also alleged counsel should not have agreed to the alternates being excused without being questioned(2ndR.L.F.120). If the alternates had been questioned, they would have testified that they knew about the prior death punishment, explained how they knew, and at least one other juror knew that(2ndR.L.F.120). Also, the pleadings alleged such questioning would have led to the discovery of the juror Cundiff heard say "I knew that."(2ndR.L.F.120).

The motion court should have allowed the jurors to be questioned either at depositions and/or in court on the narrow matters as they were pled. In *State v. Jones*,979S.W.2d171,183(Mo.banc1998), the 29.15 court entered an order allowing the movant to interview jurors, but limited that inquiry to specific matters. The 29.15 court's actions were proper because it limited the inquiry to matters that are proper subjects to question jurors about. *Id.*183.

Receipt by a juror of possibly prejudicial information during trial requires the verdict be set aside unless harmlessness is shown. *State v. Suschank*,595S.W.2d295,298(Mo.App.,E.D.1979); see also §547.020. The proposed subjects of inquiry were limited to matters that were proper subjects, whether and how a juror knew Tim was previously death sentenced and counsel's failure to prove a juror did know the prior result. *See Jones*. Because

postconviction allegations are not self-proving, *Nunley*, *supra*, the motion court should have allowed the jurors to be questioned to satisfy *Strickland's* burden.

This Court should reverse to allow all jurors to be questioned about one of them knowing Tim was previously death sentenced.

IV. FAILURES TO OBJECT AND PRESERVE - VICTIM IMPACT

The motion court clearly erred denying claims counsel was ineffective for failing to properly object to and preserve the following:

A. Victim impact evidence was not admissible because when this offense occurred *Booth* and Missouri law prohibited it;

B. Ms. Frey's mother's testimony "the only way" she gets to "see" her daughter is at the cemetery which appealed to passion and prejudice;

C. Witnesses Marshall and Stepson expressing opinions the killing was highly aggravated such that the depravity aggravator existed;

D. Respondent's victim impact from Gladys and Timothy Frey and Robert and Trinje Reidelberger exceeded *Payne's* bounds, was hearsay, opinion, and speculation;

E. The religious impact Ms. Frey's death caused because that is contrary to *Debler* and *Whitfield* ;

F. Admission of Ms. Frey's three year old picture which appealed to passion and prejudice; and

G. Respondent's argument the entire community was a victim which expanded the universe of victims beyond *Payne*

because Tim was denied 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 properly objected and preserved and Tim was prejudiced as he would have been sentenced to life.

The motion court rejected claims counsel was ineffective in handling matters related to respondent's victim impact. Tim was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984); *Williams v. Taylor*,529U.S.362,390-91(2000). Counsel can be ineffective for failing to object. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995)(*Storey I*).

Introduction - *Storey III* Victim Impact

Storey III unsuccessfully challenged portions of respondent's victim impact evidence as exceeding what *Payne v. Tennessee*,501U.S.808(1991) permitted. *State v. Storey*,40S.W.3d898,908-09(Mo.banc2001). The challenged evidence included: (1) Ms. Frey's neighbor Marshall heard the killing occur, failed to call police, and was so traumatized she gave up her job needing four years of counseling; (2) Ms. Frey's co-worker, close friend, Stepson described her emotional trauma and how well liked Ms. Frey was as a handicapped child teacher; and (3) eleven exhibits (Exs.87-93 and 105-08) devoted to celebrating, commemorating, and remembering Ms. Frey's life and achievements were admitted. *Id.*908-09. A photograph of Ms. Frey's tombstone was improper

because it "inappropriately drew the jury into the mourning process," but was not prejudicial. *Id.*908-09.

There were many other exhibits whose use was not challenged in *Storey III.* Those were photos of Ms. Frey: (1) Ex.95 - Ms. Frey at three with Santa(3rdTrial.Tr.1161-62); (2) Ex.96 - standing by first car purchased in college(3rdTrialTr.1168); (3) Ex.97 - college graduation(3rdTrialTr.1169); (4) Ex.98 - with her students in Hawaii(3rdTrialTr.1172); (5) Ex.99 - with write-up about her receiving Jaycee Award (3rdTrialTr.1173); (6) Ex.100 - with work colleague and her students(3rdTrialTr.1175); (7) Ex.101 - with her special education students (3rdTrialTr.1175); (8) Exs.102-103 - with her students trying to get them to hang-up their coats (3rdTrialTr.1178); (9) Ex.104 - sitting on Santa's lap with student Bobby Reidelberger(3rdTrialTr.1179).

Exhibits 95-103, were offered into evidence, but Ex.104 was not(3rdTrialTr.1179; Vol 3 Index of Exhibits). Exhibit 104 was prejudicial anyway because respondent questioned Bobby Reidelberger about it and elicited he will never stop missing Ms. Frey(3rdTrialTr.1208-09).

Exhibit 94 was a picture of Ms. Frey at 3-4 that trial counsel did not object to(3rdTrialTr.1160).

Exhibits 94-104 were all presented through calling Ms. Frey's mother, Gladys Frey(3rdTrialTr.1160-80). Gladys recounted having nightmares in which her daughter is calling for help(3rdTrialTr.1184). Portions of other witnesses' testimony are discussed *infra*.

A. Victim Impact Inadmissible Because Prohibited At Time Of Offense

This offense occurred in February, 1990(1stTrialL.F.18-21) when *Booth v. Maryland*,482U.S.496(1987) was the controlling law and prohibited victim impact evidence. It was only a subsequent decision, *Payne v. Tennessee*,501U.S.808(1991), that overruled *Booth* to allow victim impact.

It was not until 1993, that the Missouri Legislature amended §565.030 to allow victim impact. Missouri law at the time Ms. Frey was killed prohibited introduction of a victim's character or reputation. *See*, *e.g.*, *State v. Cavener*,202S.W.2d 869,872-74(Mo.1947)(deceased victim's wife testimony he had been Masonic Lodge and Methodist Church member served only to bolster good reputation and required reversal); *State v. Baublits*,27S.W.2d16,19(Mo.1930)(evidence from deceased victim's widow about their children should not be admitted on retrial).

Counsel testified the issue the controlling law at the time of the offense prohibited victim impact surfaced for the first time during the *Storey III* appeal, that objection should have been made at trial and included an ex post facto argument, and there was no strategic reason for failing to make the objection(2ndR.Tr.324-26;Ex.350 at 125-27). The motion court found victim impact evidence is admissible and counsel was not ineffective(2ndR.L.F.794).

In *State v. Metz*,887P.2d795,800-03(Or.Ct.App.1994), the defendant's punishment for aggravated murder was reversed because even though *Payne* had overruled *Booth* to allow victim impact evidence to be admitted, that evidence was

not admissible under Oregon law. Because the Oregon Legislature subsequently enacted laws making victim impact admissible, it was admitted at the penalty retrial. *State v. Metz*,986P.2d714,716(Or.Ct.App.1999). Metz's penalty was reversed, again, because allowing the jury to consider evidence it was previously prohibited from considering violated Oregon's prohibition against ex post facto laws. *Id.*720-21.

The facts here are the same as *Metz*. When this offense was committed in 1990, *Booth* prohibited victim impact, this Court's decisions in cases such as *Cavener* and *Baublits* did not allow it and the Legislature had not authorized it.

Reasonably competent counsel under similar circumstances would have objected to respondent presenting any victim impact because at the time this offense was committed it was not admissible under federal or state law. *See Metz*. Tim was prejudiced because there is a reasonable probability without all the highly emotionally charged victim impact evidence he would have been sentenced to life. *Strickland* and *Williams*.

B. <u>Ms. Frey's Mother's Testimony</u>

Counsel failed to object to questioning and testimony of Ms. Frey's mother that "the only way" she gets to "see" her daughter is at the cemetery where her tombstone is located(3rdTrialTr.1186-87). The question and the answer it elicited was intended to appeal purely to passion, prejudice, caprice, and emotion. *See, e.g., Gardner v. Florida*,430U.S.349,358(1977). The jury knew the Frey family could no longer "see" Ms. Frey because she was deceased and Tim was convicted

of killing her. This testimony was especially prejudicial because it was the last testimony the jury heard from Ms. Frey's mother(3rdTrialTr.1187).

Counsel had no reason for failing to object(Ex.350 at 98-99). Schneider found counsel was not ineffective for failing to make a baseless objection(2ndR.L.F.792).

Reasonably competent counsel under similar circumstances would have objected to this evidence because it appealed purely to passion, prejudice, caprice, and emotion. *Gardner*. Tim was prejudiced because there is a reasonable probability without this emotional victim impact evidence he would have been sentenced to life. *Strickland* and *Williams*.

C. Opinions On Aggravated Nature

Counsel failed to properly object to Marshall's and Stepson's opinion testimony as to the aggravated nature of the offense, and thus, the existence of depravity of mind aggravating circumstance respondent alleged existed and the jury found(3rdTrialL.F.181,194). During Marshall's testimony, she referred to the "heinous" acts that resulted in Ms. Frey's death(3rdTrialTr.1111). While counsel objected to Marshall's testimony as "nonresponsive"(3rdTrialTr.1111), counsel did not object as opinion. Stepson referred to the acts committed against Ms. Frey as "incomprehensible" and referenced their "brutality"(3rdTrialTr.1158).

Counsel testified he should have objected(Ex.350 at 143-45). Schneider found counsel was not ineffective for failing to object(2ndR.L.F.795).

Reasonably competent counsel under similar circumstances would have objected to this evidence because it constituted opinion evidence the depravity of mind aggravator existed. Tim was prejudiced because there is a reasonable probability without these opinions he would have been sentenced to life. *Strickland* and *Williams*.

D. Exceeding *Payne*, Hearsay, Opinion, and Speculation

Counsel failed to properly object to multiple occurrences of respondent's victim impact evidence on the grounds it exceeded what *Payne* allowed, constituted hearsay, opinion, and speculation.

During Gladys Frey's testimony, she reported one little girl had written a letter and placed it on her daughter's grave(3rdTrial Tr.1179). Also, she reported the girl credited her daughter with helping her to learn to turn off a faucet(3rdTrialTr.1179).

Gladys testified to a lengthy rendition of unfortunate circumstances in the life of her husband, and Ms. Frey's father, which Mr. Frey has experienced and which Gladys attributed to Ms. Frey's death(3rdTrialTr.1183-84). Although counsel objected on hearsay grounds, that was the only grounds asserted(3rdTrialTr.1183) and it was not carried through in the motion for new trial(3rdTrialL.F.203-44). Gladys' testimony included attributing Mr. Frey's medical problems, bypass surgery and strokes, to Ms. Frey's death which had occurred 10 years before his medical problems(3rdTrialTr.1183). Attributing Mr.

Frey's medical problems 10 years later to his daughter's death was highly attenuated and speculative.

Gladys also testified about the impact of Ms. Frey's death on Ms. Frey's grandparents(3rdTrialTr.1185). Gladys also recounted that at Christmas "everybody" is thinking about her daughter(3rdTrialTr.1186).

Gladys also described how the school where Ms. Frey taught would "tir[e]" of her advocacy efforts on behalf of her students(3rdTrialTr.1186-87).

Timothy Frey, Ms. Frey's brother, testified about his son's feelings about his sister's death(3rdTrialTr.1189-94). He also testified about how Christmas celebrations have changed(3rdTrialTr.1192-93). He testified about how he attributed his father's medical problems to Ms. Frey's death(3rdTrialTr.1193).

Robert Reidelberger testified about Ms. Frey having "fought the school" to get him a wheelchair when he was ages 3-6, even though he was 18 when he testified(3rdTrialTr.1205,1208).

In a similar vein, Trinje Reidelberger, Robert's mother, testified about efforts Ms. Frey had made to facilitate her son's learning and to accommodate his handicaps when he was very young(3rdTrialTr.1210-12). Trinje recounted how when her son was four, Ms. Frey was especially helpful when he underwent three surgeries(3rdTrialTr.1212). Trinje was allowed to testify she did not believe her son would "ever get over" Ms. Frey's death(3rdTrialTr.1214).

Counsel had no reason for failing to object to this victim impact evidence(Ex.350 at 145-46,163-73). Schneider found counsel was not ineffective for failing to object(2ndR.L.F.795).

Reasonably competent counsel under similar circumstances would have objected to all this evidence because it exceeded what *Payne* allowed, constituted hearsay, opinion, and speculation. Tim was prejudiced because there is a reasonable probability without this evidence he would have been sentenced to life. *Strickland* and *Williams*.

E. <u>Religious Impact</u>

Counsel failed to object to the prosecutor's question and testimony from Ms. Frey's friend, Harrison, in response to a question about the "spiritual" impact Ms. Frey's death had on her(3rdTrialTr.1198-99). Harrison responded Ms. Frey was "a spiritual being" for her as reflected in the eulogy she would later read(3rdTrialTr.1198-99,1200-04). Counsel also failed to object to testimony from Trinje Reidelberger that after learning of Ms. Frey's death she "kept praying to God" for Ms. Frey's family(3rdTrialTr.1214) and failed to fully and properly object to Exhibit 107, a poem she authored containing religious references that also appears on Ms. Freys' tombstone(3rdTrialTr.1214-19).

Counsel testified he should have objected to this evidence improperly injecting religion into the punishment decision(Ex.350 at 147-49). Schneider found the evidence did not overtly suggest Ms. Frey was religious and counsel was not ineffective(2ndR.L.F.795).

This Court has recognized religious appeals should not be injected into deciding punishment. *State v. Debler*,856S.W.2d641,656(Mo.banc1993); *State v. Whitfield*,837S.W.2d503,513(Mo.banc1992). Reasonably competent counsel under similar circumstances would have objected to this evidence because it improperly injected the religious impact on these witnesses. *Debler* and *Whitfield*. Tim was prejudiced because there is a reasonable probability without this evidence he would have been sentenced to life. *Strickland* and *Williams*.

F. Ms. Frey's Three Year Old Picture

When Exhibit 94, a photograph of Ms. Frey when she was three and a family portrait, was offered defense counsel had no objection(3rdTrialTr.1160-61).

Counsel testified he should have made clear he objected to Ex.94(Ex.350 at 121-23). Schneider found victim impact is admissible and counsel was not ineffective(2ndR.L.F.794).

Reasonably competent counsel under similar circumstances would have objected to this evidence because a picture of Ms. Frey as a three year old was not proper victim impact evidence under *Payne* and merely appealed to passion and prejudice. *Gardner*. Tim was prejudiced because there is a reasonable probability without this evidence he would have been sentenced to life. *Strickland* and *Williams*.

G. Entire Community As Victim

Counsel failed to object to the prosecutor's rebuttal penalty argument the victim impact in this case was a loss to the entire community(3rdTrialTr.1695). Counsel should have objected to this argument on the grounds this argument was outside the evidence and expanded the universe of those impacted to the entire community.

Schneider found counsel testified she thought whether she should have objected was a close call and she did not believe preserving the objection would have resulted in relief(2ndR.L.F.797). The argument was proper(2ndR.L.F.797).

Counsel testified whether to object was "a close call"(2ndR.Tr.357). She also questioned whether an appellate court would ever grant relief, but stated: "We probably should have posed an objection anyway"(2ndR.Tr.357).

Reasonably competent counsel under similar circumstances would have objected to this argument which was "a close call" because it expanded the universe of victims beyond what *Payne* authorized. Tim was prejudiced because there is a reasonable probability without this argument he would have been sentenced to life. *Strickland* and *Williams*.

A new penalty phase is required.

V. ABSENT LAY WITNESS AND RECORDS MITIGATION

The motion court clearly erred denying claims counsel was ineffective for failing to present evidence through non-family witnesses, Hughes, Watsons, Sumner, Whitley, Chester, Hansen, Raver, Marshall, Pafford, McGees, Wetherington, and Kinchen, and family witnesses, Susie Storey, Johnny Dees, and Patricia Dees Heath, and failed to present complete evidence through family witnesses Pat Basler and Sharon Stacey, and failed to present at all employment records from Chaparral Boat and Vocational Rehabilitation because Tim was denied 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 presented a comprehensive complete mitigation case through all these witnesses and employment records and Tim was prejudiced because there is a reasonable probability the jury would have imposed life.

The motion court rejected claims counsel was ineffective in the mitigation case presented. Counsel failed to present a complete and comprehensive mitigation case and Tim was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence

reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). In *Wiggins v. Smith*,123S.Ct.2527,2537,2542(2003), the Court found counsel's failure to conduct a thorough investigation that would have uncovered abuse evidence reflected only a partial mitigation case. That partial case was the result of inattention and not reasoned strategic judgment and constituted ineffectiveness. *Id.*2537,2542. *See also, Williams v. Taylor*,529U.S.362,369,395(2000)(partial mitigation case constituted ineffectiveness). For trial strategy to be a proper basis to deny relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003).

A. <u>Evidence Applicable to All Witnesses And Exhibits</u>

Counsel had the 1993 postconviction exhibits and that hearing's transcript(2ndR.Tr.117,421). Counsels' investigator Kim Corbett (Gray) prepared a contacts memo (Ex.324) she made with potential witnesses who were identified in the 1993 PCR(2ndR.Tr.120-21,424-26). There was not much investigation done beyond the 1993 PCR(2ndR.Tr.425-26). When Corbett was investigating Tim's case, Kenyon believed she was being thorough, but since has seen other investigators' work and no longer believes Corbett's work was adequate(Ex.350 at 178-80).

The mitigation case theory was directed at presenting the adversity Tim encountered and his good qualities(2ndR.Tr.119-20,423-24). Except for the Potosi librarian, the lay witnesses were all relatives(2ndR.Tr.150). Beimdiek agreed jurors might perceive non-relatives as more disinterested and give such testimony greater weight(2ndR.Tr.150). Tim and his mother Pat cooperatively worked with furnishing counsel any information they requested(2ndR.Tr.138,444).

Biemdiek prefers live testimony over reading a transcript to a jury(2ndR.Tr.399). Beimdiek did not consider doing video depositions of witnesses so that there would be more than a written deposition(2ndR.Tr.413). Kenyon felt their time constraints prohibited doing video depositions such that telephone depositions should have been considered(2ndR.Tr.499-501).

B. Findings

The absent witnesses would not have been persuasive, helpful, or credible and counsel made a strategic decision, after investigating, to call certain witnesses to present certain evidence they hoped would be mitigating and not cumulative(2ndR.L.F.787-88,811). As to Pat Basler and Sharon Stacey, counsel was not ineffective for failing to elicit additional matters because these witnesses were not persuasive to the jury, it was not established the additional matters they could have testified to were admissible, and they were not credible or persuasive(2ndR.L.F.788-89). As to Johnny Dees, counsel was not ineffective for failing to depose because his testimony would not have been persuasive or helpful and counsel's testimony was not persuasive(2ndR.L.F.806). Kenyon's testimony

that he should have called certain witnesses was not credible(2ndR.L.F.811). There was no evidence the witnesses not called were made known to counsel with the substance of their testimony, except for their 1993 testimony and affidavits(2ndR.L.F.811-12).

Employment documents would not have been helpful and the Chaparral records showed Tim quit in December, 1988(2ndR.L.F.792).

C. Clearly Erroneous Findings As To All Witnesses and Documents

The substance of testimony available from all witnesses who either provided 1993 affidavits or testified was known to counsel because counsel had those materials (2ndR.Tr.117,421). Counsel felt the investigation Corbett did, and they were ultimately responsible for overseeing, was not thorough(Ex.350 at 178-80) and, therefore, counsel did not make their decisions after reasonable investigation. *Wiggins*, *Williams*, *Kenley*, and *Butler*.

D. Non-Family

1. The Hughes, the Watsons, And Nancy Sumner

Albert (Ex.28) and Mary Hughes (Ex.27) and Donna (Ex.22) and Bobby Watson (Ex.17) provided 1993 PCR affidavits(Exs.240,241). The Hughes are Donna's grandparents(Ex.241). Albert was deceased and Mary's health problems prevented her from appearing to testify in 1999(Ex.241,324).

The Hughes rented a trailer to Pat, Tim's mother, while she lived with Corbett(Exs.27,28). Corbett knocked a hole in the trailer's wall and cut down a

tree(Exs.27,28). Tim restrained Corbett during one incident when Corbett was beating up Pat and tearing up the trailer(Ex.28).

Pat came to the Watsons' house when Corbett beat her up(Exs.17,22). Tim was quiet and well mannered(Exs.17,22).

Beimdiek would have wanted to present the available evidence from one member of the Hughes and Watson families(2ndR.Tr.148-52). Kenyon would not have wanted to offer Albert's affidavit because it lacked useful information and mentioned Tim's drinking, even though the State had presented evidence Tim was drinking the night in question(2ndR.Tr.460-61). Mary's affidavit was not useful because she was more familiar with Pat and Corbett, but it would have supported Tim was raised in a turbulent home(2ndR.Tr.461-62). Kenyon believed the Watsons' affidavits did not contain sufficient information(2ndR.Tr.462-65).

Nancy Sumner was Pat's friend and knew Tim since birth(Ex.243). When Tim was born, his biological father, Walter Harris, was in prison(Ex.243). Tim was a good child growing-up who was respectful and not violent(Ex.243). Tim protected Pat from Robinette's abusive behavior(Ex.243). Sumner knew Pat and Robinette smoked marijuana around Tim(Ex.243).

Pat's behavior led Sumner to conclude Corbett was abusing her(Ex.243).

Sumner found that within Tim's and Kim's marriage the dominant person was Kim(Ex.243). Sumner never saw anything that would have caused her to suspect any abuse involving Kim and Tim(Ex.243). Tim's behavior reflected he loved Kim and their daughter, Telicia(Ex.243). Sumner's health would have

prevented her from traveling to Missouri, but she would have done a deposition(Exs.243,324).

Counsel would have wanted to present the information Sumner knew(2ndR.Tr.154-57,469-70).

Reasonably competent counsel would have presented the evidence available from the Hughes, the Watsons, and Sumner because they could have confirmed the adversity and abuse in which Tim was raised that was presented through Tim's relatives, but as non-family members they would have had credibility with the jury Tim's family did not. Additionally, Sumner would have presented testimony that refuted respondent's aggravation portraying Tim as having abused his wife. *See* Point I. The Hughes' and the Watsons' evidence was readily available and they were known to counsel because counsel had their 1993 PCR affidavits. Sumner was readily identifiable because she was listed as a family friend source for mitigation specialist Miller's 1993 report(Ex.61 at 51). Tim was prejudiced because there is a reasonable probability life would have been imposed when these witnesses are considered collectively with all the other evidence counsel failed to present *infra*. *Strickland*.

2. <u>Carroll Whitley</u>

Carroll Whitley is Keith Storey's biological father(Ex.245). After Pat ended her marriage to Carroll Storey, Whitley began to have weekly weekend visitation with Keith, who was about ten(Ex.245). Keith would stay with Whitley and his wife of thirty years(Ex.245). Tim would remain with Pat during those

visitations(Ex.245). Keith moved in with Whitley when Pat and Robinette lived in New Mexico(Ex.245). In Whitley's home there was no alcohol and drug problems(Ex.245).

Counsel wanted to present the contrast between Keith's relationship with his biological father and Tim's lack of a comparable relationship(2ndR.Tr.159-60,475). Counsel felt that even though Whitley had had limited contact with Tim (Ex.324), his testimony would have been valuable for presenting Tim's and Keith's contrasting experiences(2ndR.Tr.474-76).

Reasonably competent counsel would have presented the evidence available from Whitley in order to counteract respondent's portraryal of Tim's brother Keith as having experienced the same adversity, yet he had not killed anyone(3rdTrialTr.1581-82,1694-95).[3] Tim was prejudiced because there is a reasonable probability life would have been imposed when Whitley's evidence is considered in conjunction with all other evidence counsel failed to present *supra* and *infra*. *See Strickland*.

3. Teachers and Coaches

[3] As discussed in Point IX, appellate counsel was ineffective for failing to raise Cundiff prohibiting eliciting similar evidence from Tim's mother about Keith's relationship with Whitley. To have excluded like testimony from Whitley would have been error as discussed in Point IX.

Counsel had educational records that identified Tim's school teachers' names(2ndR.Tr.259-60;Exs.4,5,6). Louis Chester (Ex.264), Billy Hansen (Ex.266), and Janice Raver (Ex.267) were junior and senior high school teachers who all remembered Tim as respectful and well behaved and that Tim's academic difficulties were due, in part, to his dysfunctional family circumstances, outside his control.

Counsel would not have called these teachers because presenting evidence of good school behavior would have diminished the significance of the dysfunctional family evidence and what the witnesses had to say was not compelling(R.Tr.261,265,269;Ex.350 at 21-22,27-29). Kenyon may have wanted to call Raver, though because she described Tim as a person who had sensitivity and compassion(Ex.350 at 25-26).

James Marshall was Tim's football coach when he was 10-12(Ex.250). He knew Tim had a poor home life(Ex.250). He took Tim home after games because his parents did not come(Ex.250). He knew substance abuse was a family problem(Ex.250). Tim's clothes were old and worn(Ex.250). Tim did not get adequate attention at home and wanted Marshall as his friend(Ex.250). Marshall would take Tim out to eat so that he would have food and companionship(Ex.250). Marshall also bought Tim's cleats because his parents could not afford them(Ex.250). Tim was a good kid who was polite and respectful and neither mean nor violent(Ex.250). Tim got along well with teammates and was always appropriate(Ex.250).

Counsel would have wanted to call Marshall, but he was not contacted(2ndR.Tr.168-70,484-87). Counsel's file contained notes from a prior attorney that identified Marshall as a potential witness along with how to contact him(2ndR.Tr.168,484-86;Ex.95 at 3A).

Buddy Pafford was Tim's football coach and neighbor(Ex.251). He knew Tim came from a broken home(Ex.251). Tim's mother had a drinking problem, her husbands or boyfriends were not good people, and there was no appropriate father figure(Ex.251). Tim would come over to Pafford's house crying about things at home and he would try to include Tim in his family's activities(Ex.251). Tim tried hard, was respectful, polite, and not a problem(Ex.251).

Notes from a prior attorney identified Pafford as a potential witness, but he was not contacted(2ndR.Tr.170,487;Ex.95 at 3A). Beimdiek believed what Pafford had to say was helpful, but probably would have only called Marshall because Marshall could furnish more detail(2ndR.Tr.170-71). Kenyon would have called Pafford(2ndR.Tr.487-90).

Reasonably competent counsel would have called these teachers and coaches because they would have confirmed the adversity in which Tim was raised, were able to talk about Tim's positive qualities, were readily identified from prior representation, and had credibility as non-family members that the family witnesses did not. Tim was prejudiced because there is a reasonable probability life would have been imposed when this evidence is considered

together with all other evidence counsel failed to present *supra* and *infra*. *See Strickland*.

4. Employers

Tim was a good, hard worker on Willie and Alice McGee's tobacco farm(Exs.26,31,256,257). Counsel would have called one, but not both to avoid cumulative testimony(2ndR.Tr.180-83).

Greg Wetherington and Lee Kinchen supervised Tim at Chaparral Boats(Ex.260,268). Tim was a chopper gun operator, building boat decks or hulls, and was responsible for decision making and assigning duties to team members(Ex.260,268). Tim was a hard worker with a good attitude who displayed interest in his work and a willingness to work late(Ex.260,268). Tim had to leave his job as a result of a non-work injury that required he wear a neck brace(Ex.260,268). Kinchen's written evaluation (Ex.8 at 8), which counsel had(2ndR.Tr.270;Ex.350 at 29), described Tim as a conscientious worker with a good attitude. Tim's 1988 Chaparral employment application disclosed a history of "head or spinal injuries"(Ex.8 at 14). While the Chaparral records showed Tim had quit(2ndR.L.F.792), he left for legitimate justifiable reasons, he had medical problems(Ex.260,268).

If counsel had properly investigated Robert Trowell at Chaparral, who furnished a 1993 affidavit (Ex.33), they would have learned the initials "L.K." on Tim's favorable evaluation belonged to Kinchen(Exs.8,33,259;2ndR.Tr.186-

89;Ex.350 at 29-32). Wetherington's name appeared in records prior counsel had passed along, but he was not contacted(2ndR.Tr.189-90,507-08).

Beimdiek would have wanted to call Wetherington and Kinchen(2ndR.Tr.269-72). Kenyon may have wanted to call Wetherington and would have wanted to call Kinchen(2ndR.Tr.507-09;Ex.350 at 32). Counsel testified they should have offered Tim's Chaparral records(Ex.8;2ndR.Tr.270-71;Ex.350 at 29-30). Kenyon believed how the Chaparral records were mishandled, failing to identify "L.K.," was an example of investigator Corbett's lack of thoroughness(Ex.350 at 179-80).

Reasonably competent counsel would have presented the evidence available from these former employers and the employment records (Ex.8) because all were readily identifiable from the 1993 PCR documents counsel had and the witnesses were non-family able to present positive personal background information and the documents were not generated for litigation. Tim was prejudiced because there is a reasonable probability life would have been imposed when this evidence is considered together with all other evidence counsel failed to present *supra* and *infra*. *Strickland*.

E. Missing Family Mitigation

The 1993 PCR included Carroll Storey's mother, Susie Storey's (1stR.Tr.178-89), Pat Basler's (1stR.Tr.715-800), and Sharon Stacey's (1stR.Tr.871-96) testimony and Johnny Dees' (Ex.35,223) affidavit.

1. Susie Storey

Susie Storey is Carroll Storey's mother (Ex.226). One time when Susie bathed Tim she saw belt loop lace bruises on his legs and back(1stR.Tr.182). When she asked Tim who did that to him, he said "Daddy did it"(1st.R.Tr.182). When Susie's husband and Carroll's father found out, he told Carroll if he did that again to Tim he would "whip him" and he better not see any more bruises on Tim(1stR.Tr.181-82). Susie's son did not treat Keith badly, but did treat Tim badly(1stR.Tr.183). Tim was a sweet boy who acted hungry for love his whole life and did not get that from her son or Pat(1stR.Tr.183-84). Susie would get on her son about how he treated Tim(1stR.Tr.184). Susie talked to her son and Pat about their alcohol and marijuana use(1stR.Tr.185-86).

Counsels' investigator contacted Susie Storey and was told she was ill and unable to travel(Ex.324). Susie was willing and able to do a deposition (Ex.226). Counsel testified they should have either relied on Susie's prior PCR testimony or deposed her and believed she would have testified to whatever she had said before(2ndR.Tr.132,433-36,438).

Reasonably competent counsel would have presented the evidence available from Susie Storey because as Carroll Storey's mother she was especially credible in reporting the abuse Carroll inflicted on Tim, compared to the other family members who testified, and she was known to counsel because she testified in the 1993 PCR. Tim was prejudiced because there is a reasonable probability life would have been imposed when what she would have testified about is

considered together with all other evidence counsel failed to present *supra* and *infra*. *See Strickland*.

2. Pat Basler

Shortly before Ms. Frey was killed, Pat had helped Tim look for work(1stR.Tr.763). Tim had problems finding work because of his neck injury(1stR.Tr.764). Vocational Rehabilitation had arranged for an orthopedic evaluation(1stR.Tr.764;Ex.82). Counsel had no reason for failing to elicit this information(2ndR.Tr.447-48). Also, counsel had no reason for failing to present Tim's supporting Vocational Rehabilitation records(Ex.82) to show he was attempting to improve his life(Ex.350 at 36-37). The records (Ex.82) were part of the 1993 PCR.

The Eighth Amendment requires jurors be allowed to give effect to relevant mitigation evidence. *Smith v. Texas*,2004W.L.2578461 *4(U.S.S.Ct. Nov.15, 2004). This evidence was relevant to mitigating punishment, and therefore, contrary to the findings was admissible.

Reasonably competent counsel who had Basler's prior testimony would have elicited Tim's efforts to obtain employment and how his neck injury impeded those efforts and presented the Vocational Rehabilitation records (Ex.82) to present Tim in a positive light. Tim was prejudiced because there is a reasonable probability life would have been imposed when all this evidence about his employment circumstances is considered together with all the other evidence counsel failed to present *supra* and *infra*. *Strickland*.

3. Sharon Stacey

Tim's cousin Sharon Stacey, starting when she was 9, lived with Pat and Carroll Storey during summers to babysit Tim and Keith(1stR.Tr.872-74,878). Carroll Storey touched her in sexually inappropriate ways(1stR.Tr.878). In response to Sharon reporting those acts to Pat, Carroll ripped the phone from the wall, grabbed Sharon by the throat while throwing her on the floor, kicked her so that she had bruises up and down her sides, and threatened to rape her(1stR.Tr.878-79). The incident ended when Sharon got free while using a butcher knife to keep Carroll away and Pat, sensing something was wrong, appeared with a male co-worker(1stR.Tr.878-79).

Counsel did not elicit this information because he thought the prosecutor would object to its relevance, he felt the objection probably would have been sustained, and his presentation would have been interrupted(2ndR.Tr.447).

Like the Basler evidence, this evidence was relevant mitigation, and therefore, admissible. *Smith v. Texas*, *supra*.

Reasonably competent counsel would have elicited this information, known from the 1993 PCR, to explain why Carroll Storey's abuse went unreported and to enhance the presented abuse's credibility. Tim was prejudiced because there is a reasonable probability life would have been imposed when this evidence is considered together with all other evidence counsel failed to present *supra* and *infra*. *Strickland*. Counsel's reason for failing to elicit this evidence was not

reasonable because the credibility of the reporting of Carroll Storey's abuse was critical. *Butler.*

4. Johnny Dees and Patricia Dees Heath

Tim's uncle Johnny Dees knew Tim's biological father, Walter Harris, was a drunk(Exs.35,223). Johnny saw Carroll Storey use drugs(Ex.35). Johnny saw Tim with black eyes Carroll inflicted(Ex.35). Tim was a happy person who did not get into fights and was not a bully(Ex.35).

Johnny planned to be at the retrial, but his son became ill and he was the only person who could care for him(Exs.223,324). Counsel had intended to call Johnny and had no reason for failing to depose him(2ndR.Tr.126,427-29).

Patricia Dees Heath is Johnny's daughter and Tim's cousin(Ex.228). Even though Tim was older than Patricia, he took time to play with her and was always nice and thoughtful(Ex.228). Tim was polite, respectful, and did not cause trouble(Ex.228).

Counsel knew how Patricia and Johnny were related, but did not contact her(2ndR.Tr.133-34,438-39). Beimdiek felt Patricia fit within counsel's strategy, but was uncertain whether she would have been cumulative to what they presented(2ndR.Tr.134). Kenyon would have wanted to call her(2ndR.Tr.439).

Reasonably competent counsel who had intended to call Johnny would have deposed him when he became unavailable. Reasonable counsel would have presented Johnny and Patricia's testimony to establish the adversity Tim experienced and to highlight the positive personal characteristics Tim displayed.

Patricia was readily identifiable because she was Johnny's daughter. Tim was prejudiced because there is a reasonable probability life would have been imposed when this evidence is considered together with all the other evidence counsel failed to present *supra*. *Strickland*.

Based on all absent mitigation, both individually and collectively, a new penalty phase is required.

VI. UNDISCLOSED IMPEACHMENT AND INDEPENDENT TESTING

The motion court clearly erred finding respondent did not fail to disclose evidence that would have impeached Highway Patrol chemist Smith's 1991 trial hair comparison testimony, in overruling the motion to reopen the judgment to present additional evidence from 1991 trial counsel Hirzy to prove prejudice, and in finding 1999 counsel was not ineffective for failing to uncover the impeaching information and obtain independent microscopic hair testing to support a motion to recall the guilt mandate and to present this evidence at the retrial to support life because Tim was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that respondent was required to disclose evidence that impeached Smith and called into question Tim's conviction's reliability, Hirzy would establish why the non-disclosures were prejudicial, and reasonably competent 1999 counsel would have uncovered the Smith impeaching information and had independent microscopic hair testing done to support a motion to recall the mandate and Tim was prejudiced because the undisclosed impeaching evidence and independent microscopic testing excluding Tim call into question the guilt verdict's reliability and require recalling its mandate and at minimum supports life.

The motion court denied claims respondent failed to disclose evidence that would have impeached the testimony of its guilt phase microscopic hair expert

Smith and that 1999 counsel was ineffective for failing to uncover that impeaching evidence and obtain independent microscopic hair testing. Tim was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, because of the undisclosed impeaching Smith evidence and counsel's failure to obtain independent hair testing. The impeaching evidence and independent hair testing require a new guilt phase and at minimum would have supported life.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

A. Smith's 1991 Trial Testimony

Highway Patrol chemist Jenny Smith testified at the 1991 guilt phase(1stTrialTr.620-49). Smith had prepared a report that found two pubic hairs found on Ms. Frey were foreign to her(Ex.300 at 5). Smith's report stated those hairs were found "to be different" from Tim's pubic hairs(Ex.300 at 5).

When Smith testified, however, she would not say the hairs were "different." On cross-examination, Smith testified the two hairs had "differences" from Tim's hair and the two hairs "did not have all the characteristics" of Tim's hair(1stTrialTr.641). Smith was asked if she did any other hair analysis and stated

she "did a lot of hair comparisons in this case and only those that are notable are mentioned in my report."(1stTrialTr.642).

On redirect, Smith testified she found "similarities and differences" between the foreign hairs and Tim's hair(1stTrialTr.642). Smith testified she could not testify the foreign hairs did not come from Tim(1stTrialTr.644-45).

On recross, Smith acknowledged she had put in her report the foreign hairs were "different" from Tim's hair(1stTrialTr.646-47).

On redirect, Smith testified she found "[s]imilarities and differences" between the foreign hairs and Tim's hair(1stTrialTr.648-49).

B. 1991 Guilt Defense Theory

In guilt closing, Hirzy argued the two foreign pubic hairs found were different from the sample pubic hairs obtained from Tim, and therefore, someone else killed Ms. Frey(1stTrialTr.900-01,914).

C. Smith's 29.15 Testimony

In 1990, Smith prepared a report for pubic hair testing done on Ms. Frey's boyfriend Daniel Cruz which indicated the foreign hairs were not Cruz's hair(2ndR.Tr.40-42;Ex.301;Ex.337 at 2).

On February 6, 1991, Smith spoke with Assistant St. Charles Prosecutor Groenweghe(Ex.302;2ndR.Tr.46-47). Groenweghe was worried about Smith's terminology "differences found" between Tim's hair and the foreign hairs(Ex.302 at 1;2ndR.Tr.46-47). Smith's notes (Ex.302) reflected Groenweghe was concerned that his case "will **collapse** on the pubic hair report since he cannot

establish sexual contact otherwise."(Ex.302 at 1;2ndR.Tr.47-48)(emphasis added). Groenweghe asked the F.B.I. evaluate the pubic hair slides(Ex.302 at1;2ndR.Tr.47-48).

Smith contacted the F.B.I which did its own review and report (2ndR.Tr.49-56;Ex.302 at 2,10;Ex.338;Ex.303). The F.B.I. report found "[s]imilarities and differences" between the foreign hairs and Tim's hair such that "no conclusion could be reached as to whether or not these hairs originated from Storey."(Ex.338;Ex.302 at 10;2ndR.Tr.55). Smith's file did not contain a copy of the F.B.I report(2ndR.Tr.56). Respondent's 29.15 counsel, however, provided a copy of the F.B.I. report to present 29.15 counsel(2ndR.Tr.522-23).

Smith had a Missouri Highway Patrol report (Ex.304), not disclosed to counsel (Ex.350 at 44-45), that the hair analysis done "did not provide positive proof linking suspect to victim."(2ndR.L.F.56-57).

On December 4, 1995, Smith wrote a memo (Ex.305)(2nd.R.Tr.60-61) to Assistant Attorney General Ahsens relating to her work in *State v. Chaney*,967S.W.2d47(Mo.banc1998). The memo was a script to use in questioning her and has a cover letter to Ahsens(Ex.305). At the 29.15 hearing, Smith refused to answer specific questions stating: "[I] [t]hink this is self-incriminating. You are putting me [sic] a corner here and I don't appreciate this." (2ndR.Tr.61-62). The cover letter said: "I want to help you all I can. . . . I feel confidant [sic] that your charming ways will inspire a lucid, coherent and utterly convincing testimony out of me. (!!!)"(Ex.305). The script includes this

commentary: "….YOU COULD REALLY DO SOME DAMAGE HERE.)" (Ex.305 at 13;2ndR.Tr.62). Someone at the Attorney General's Office wrote on the cover letter "TRIAL PREPARATION DO NOT DISCLOSE"(2ndR.Tr.63;Ex.305 at 1). Smith complained her letter and script were not "discoverable" and not intended to be in 29.15 counsel's possession(2ndR.Tr.65). The *Chaney* letter and script were not disclosed to counsel(Ex.350 at 49-52).

D. Kenyon's Testimony

Kenyon was responsible for hair matters(2ndR.Tr.420). Kenyon had a list of discovery (Ex.93) Hirzy received(Ex.350 at 38-39). That list indicated Smith had done a report on Cruz's hair(Ex.93 at 4). Kenyon had Smith's report (Ex.300) findings(Ex.350 at 39-41). In 1999, Kenyon did not realize Smith had analyzed the Cruz hairs and the foreign hairs did not match Cruz, but would have wanted that information(Ex.350 at 42,45). Kenyon did not have, but would have wanted the Highway Patrol "positive proof" (Ex.304) report(Ex.350 at 44-45). Kenyon did not know the F.B.I. had done hair comparisons(Ex.350 at 46). Kenyon did not have, but would have wanted the F.B.I. report(Ex.338)(Ex.350 at 46).

Kenyon used Smith's *Chaney* letter and memo to impeach Smith at the *Travis Glass* trial, was not aware of those documents when he retried Tim's case, and would have wanted to have a copy for Tim's case because they show Smith's State bias(Ex.350 at 49-52).

Kenyon knew 1993 PCR counsel had filed a motion to allow independent pubic hair testing, but Kenyon did not hire an independent examiner(Ex.350 at 53-54). Kenyon thought it would have been helpful to have a hair examiner testify the foreign hairs neither belonged to Tim nor Cruz(Ex.350 at 55). If Kenyon had had evidence the foreign hairs were neither Tim's not Cruz's hair, then Kenyon would have sought to reopen guilt phase with a motion to recall the mandate(Ex.350 at 57). If Kenyon had had the F.B.I. report and Smith's *Chaney* letter and memo to Ahsens, then he would have filed a motion to recall the mandate(Ex.350 at 57).

E. Palenik/Microtrace Microscopic Exclusion

Pursuant to a motion granted in this 29.15 (2ndR.L.F.21-26,426) Senior Microscopist Palenik, with Microtrace, examined microscopically the foreign hairs and Tim's hair, like Smith had done, and concluded they did not match(Exs.345,346). Palenik's findings had added significance because despite her 1991 trial testimony, Smith's 29.15 testimony was her hair testing "did not find an association" between Tim and this offense(2ndR.Tr.67).

F. 29.15 D.N.A. Testing

D.N.A. testing comparing the foreign hairs to Tim's hair, first done by Genetic Technologies using "pcr D.N.A.," for the 29.15 was unable to generate a D.N.A. profile(2ndR.L.F.545,551-52).

Later D.N.A testing by Microtyping Technologies using "mitochondrial D.N.A.(mtD.N.A)" found: "The mitochondrial DNA sequences of the 2310Q1,

2310Q2, and 2310K1 samples match. Therefore Walter Timothy Storey is not excluded as the contributor of the two questioned hairs."(2ndR.L.F.635). The DNA findings meant Tim was "not excluded" as the contributor of the two foreign hairs(2ndR.L.F.637). However, "[b]ecause mitochondrial DNA is not a unique identifier, it is possible that other people could have the same mitochondrial DNA profile"(2ndR.L.F.637).

G. Findings

Counsel was not ineffective for failing to call Smith because she had found similarities between Tim's hair and the foreign hairs(2ndR.L.F.803-04). Counsel was not ineffective for failing to have independent hair testing done because D.N.A. testing done for the 29.15 did not exclude Tim as the the foreign hairs' source(2ndR.L.F.812-13). There was no *Brady* violation for failing to disclose Smith's *Chaney* memo because Smith was not a 1999 witness(2ndR.L.F.813-14).

H. 1991 Counsel Hirzy's Affidavit To Reopen Evidence

After findings were entered, a motion to reopen the judgment was filed with an affidavit from 1991 trial counsel Hirzy(2ndR.Tr.821-27). That motion was denied(2ndR.L.F.824).

Hirzy wanted to establish hairs found on Ms. Frey were different from Tim's pubic hair to support her theory another person committed the crime(2ndR.L.F.825-26). Hirzy had expected Smith to testify Tim's hair was "different" from the hair recovered from Ms. Frey, because that is what Smith wrote in her pretrial report (Ex.300) (2ndR.L.F.825-26).

Hirzy was not provided: (a) discovery Groenweghe had requested Smith's work be reviewed by the F.B.I.; (b) Smith's notes (Ex.302) detailing her communications with Groenweghe and the F.B.I.'s review of her work; (c) the F.B.I.'s report (Ex.338) or its findings that no conclusion could be reached on the hairs recovered from Ms. Frey's body; and (d) the Missouri Highway Patrol's case summary (Ex.304) that found its hair analysis "did not provide positive proof linking suspect to victim."(2ndR.L.F.826).

Hirzy also would have wanted to examine Smith about her notes (Ex.302) Groenweghe thought the State's case would "collapse" because of Smith's findings(2ndR.L.F.826). Hirzy would have wanted to examine Smith about the Highway Patrol's hair analysis finding "did not provide positive proof linking suspect to victim."(2ndR.L.F.826-27). Hirzy would have wanted to do these things because Smith's trial testimony differed from her pretrial report (Ex.300) and would have wanted to confront Smith with the information in Exhibits 302 and 304(2ndR.L.F.827).

I. Respondent Failed To Disclose Impeaching Evidence

The Sixth Amendment guarantees a defendant the right to confrontation. *Pointer v. Texas*,380U.S.400,406(1965). A primary interest the Confrontation Clause secures is cross-examination. *Davis v. Alaska*,415U.S.308,315(1974). Sentencing someone to death is cruel and unusual punishment if the punishment is meted out arbitrarily and capriciously. *Furman v. Georgia*,408U.S.238(1972).

The prosecution must disclose favorable evidence material either to guilt or punishment. *Brady v. Maryland*,373U.S.83,87(1963). For purposes of due process, no distinction between exculpatory and impeachment evidence exists. *U.S. v. Bagley*,473U.S.667,676-78(1985). Nondisclosure of *Brady* evidence violates due process "irrespective of the good faith or bad faith of the prosecution." *Brady*,373U.S. at 87. *See, also, U.S. v. Agurs*,427U.S.97,110(1976). Under *Brady*, the focus is whether Tim was prejudiced. *State v. Whitfield*,837S.W.2d503,508(Mo.banc1992).

The State's failure to disclose impeaching *Brady* material is the proper subject of a postconviction challenge. *Hayes v. State*,711S.W.2d876,879(Mo.banc1986); *Hutchison v. State*,59S.W.3d494,496(Mo.banc2001); *State v. Phillips*,940S.W.2d512,516-17(Mo.banc1997).

Respondent failed to disclose Groenweghe was pressuring Smith to alter her findings because he was concerned her findings would cause the State's case to "collapse." Groenweghe's pressure was so intense the State went shopping for a better opinion with the F.B.I., which it did not disclose. Moreover, respondent did not disclose a Highway Patrol report Smith's hair analysis failed to "provide positive proof" linking Tim. Additionally, respondent never disclosed Smith's *Chaney* letter and memo showing she was a witness biased towards the State.

All the undisclosed matters constituted *Brady* impeaching evidence respondent was required to disclose. These non-disclosures were prejudicial

because Smith provided responses fashioned in response to Groenweghe's pressuring her to avoid making the State's case "collapse," rather than that she had found the foreign hairs were "different" (Ex.300 at 5), as stated in her report. The prejudice is highlighted because Hirzy's argument theory and cross-examination of Smith were intended to show the hair evidence supported someone else committed this offense. Even though Smith's *Chaney* memo did not occur until 1995, respondent had a duty to disclose it to subsequent counsel because it established Smith's State bias and later counsel could have employed it with the other undisclosed matters to seek to recall the guilt mandate.

The '"deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice."' *Banks v. Dretke*,124S.Ct.1256,1274(2004)(quoting *Giglio v. United States*,405U.S.150,153(1972)). The State is not allowed to stand by silently and do nothing to correct its witness' false testimony. *Napue v. Illinois*,360U.S.264,269-70(1959).

Smith falsely testified when she testified that the only "notable" hair examinations she conducted were those discussed in Ex. 300. Smith had done hair examinations for Ms. Frey's boyfriend Cruz (Ex.301) and concluded he was not the source of the foreign hairs. In fact, the Cruz results and Smith's conclusions the foreign hairs were "different" from Tim's hair were "notable" because they supported Hirzy's defense theory someone other than Tim did this crime by excluding Tim and Ms. Frey's boyfriend.

The motion court should have allowed the evidence to be reopened. Hirzy was able to demonstrate respondent's *Brady* violation non-disclosures prejudiced Tim because she would have used the undisclosed matters to challenge Smith's credibility.

J. Counsel Was Ineffective

Counsel failed to act reasonably both in failing to discover the Smith impeachment information and to obtain independent microscopic hair testing that would have concluded Tim was not the foreign hairs' source.

1. Impeachment Material

Counsel had a list of discovery Hirzy had received which indicated Hirzy had gotten the Cruz hair testing report(Ex.93 at 4;Ex.350 at 38-39). That list should have put counsel on notice Smith needed to be investigated further because Smith had testified in 1991 she had not done any "notable," testing when in fact she had done Cruz's testing. If counsel had investigated Smith, then they would have uncovered all the impeachment evidence respondent failed to disclose, *supra*. Tim was prejudiced because 1999 counsel would have used that material to file a motion to recall the mandate (Ex.350 at 57) and which *Brady* required be granted.

Reasonably competent counsel under similar circumstances would have uncovered the Smith *Brady* impeachment materials. Tim was prejudiced because there is a reasonable probability had counsel found this information the guilt verdict would have been found unreliable and a new guilt phase ordered or at a

minimum this evidence could have been presented to produce a life verdict. *Strickland*.

2. <u>Independent Testing</u>

In *Moore v. State*,827S.W.2d213,214-15(Mo.banc1992), appointed counsel was ineffective for failing to obtain blood testing supporting innocence. Counsel had argued to the jury the defendant had requested the blood testing, but could not afford it. *Id.*215.

In *Wolfe v. State*,96S.W.3d90(Mo.banc2003) counsel was ineffective for failing to have hair testing done to establish recovered hairs did not belong to Wolfe and impeach the State's critical witness. Wolfe's counsel had merely argued, without any supporting evidence, the hairs were not Wolfe's. *Id.*93-94.

Palenik's/Microtrace's microscopic hair testing confirmed the foreign hairs were not Tim's hairs(Exs.345,346). That finding is not undermined by the D.N.A. test results because the D.N.A. results only established Tim was "not excluded" (2ndR.L.F.635,637) which is significantly different from D.N.A. testing that affirmatively finds the questioned material belongs to a suspect. In particular, because mitochondrial D.N.A. "is not a unique identifier" (2ndR.L.F.637), the microscopic hair test results would have been compelling evidence to support Hirzy's theory someone else did the crime.

Kenyon would have wanted to reopen guilt with Palenik's results by filing a motion to recall the mandate(Ex.350 at 57). Counsel's inaction here is like *Moore* and *Wolfe* because counsel should have obtained testing supporting

someone else committed the offense. Reasonably competent counsel under similar circumstances would have had Tim's hairs and the foreign hairs tested, especially since 1993 PCR counsel had filed a motion to allow independent testing that was denied(Ex.350 at 53-54). Tim was prejudiced because there is a reasonable probability the guilt phase would have been set aside by filing a motion to recall the mandate or at a minimum, if microscopic hair evidence had been presented to the jury life would have been imposed. *Wolfe* and *Moore*.

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

VII. EXPERT TESTIMONY AND DOCUMENTS

The motion court clearly erred denying claims counsel was ineffective for failing to present mitigating evidence through experts with expertise like Cowan, Vlietstra, Straub, Smith, Jolly, Miller, and Pierce and to introduce document Exhibits 2, 4-6, and 13-15 supporting their findings because Tim was denied 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 presented these witnesses and evidence as mitigation and Tim was prejudiced because there is a reasonable probability the jury would have imposed life.

The motion court rejected claims counsel was ineffective in failing to present expert mitigation testimony and documents supporting their findings. Counsel failed to present a complete and comprehensive expert case with supporting documents and Tim was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

A. Failure to Present Expert Testimony/Records

1. Cowan And Records

Dr. Cowan conducted a neuropsychological exam, testified at the 1993 PCR, and was not contacted(Ex.294 at 5-18,21,25).

Tim's educational records (Exs.4,5,6) showed declining academic performance and his medical records (Exs.2,13,14,15) were consistent with a 1987 car accident head injury(Ex.294 at 28).

Tim's global brain functioning placed him in the brain damaged range with mild impairment(Ex.294 at 63-64). Tim has a verbal learning disability(Ex.294 at 70-74). His impairments are specific to his brain's frontal lobes(Ex.294 at 74-78). While Tim had a normal MRI and CT scan, those results are not inconsistent with Cowan's findings because those tests identify only extreme anatomical structural abnormalities, unlike Cowan's testing which assesses functional ability(Ex.294 at 26-27,90-93;1stR.Tr.280-81).

Tim's deficits cause decreased ability to control emotions and judgment(Ex.294 at 77-78). As stimuli become increasingly complex, Tim's functioning deteriorates proportionality and adding drugs and alcohol exacerbates those problems(Ex.294 at 77-78).

In 1987, Tim was involved in a vehicle rollover, sustaining a cervical spine fracture(Ex.294 at 83). There would have been a great deal of brain movement analogous to what occurs in shaken baby syndrome(Ex.294 at 83-87). Tim's medical records showed as a result of the accident he suffered headaches, dizziness, and passing-out - all consistent with brain injury(Ex.294 at 87-88

relying on Ex.2 at 6). That rollover was not the cause of all of Tim's brain dysfunction because Tim's school records showed he already had problems(Ex.294 at 115). Tim's mother drank while pregnant with him and that can adversely impact brain development(Ex.294 at 82).

2. Vlietstra

Dr. Vlietstra is a child development psychologist(Ex.295 at 6). Early childhood development plays a significant role in adulthood(Ex.295 at 61).

Tim's biological father, Walter Harris, was alcoholic which greatly increased Tim's alcoholism genetic predisposition risk(Ex.295 at 29-31). Carroll Storey's abusive behavior impaired Tim's sense of emotional security, self-esteem, and coping(Ex.295 at 31-35). That abuse left Tim with a fragile personality and shame something was wrong with him(Ex.295 at 33-37). Those experiences put Tim at greater risk for substance abuse(Ex.295 at 36-37,48).

The many military moves Tim experienced living with Robinette were stressful, depleted his emotional energy resources needed for school and other development, and deprived him of supportive peer group relationships(Ex.295 at 43-45,50). Robinette's abuse of Pat created insecurity that left Tim feeling powerless(Ex.295 at 44-45). Pat's and Robinette's marijuana use around Tim was not healthy modeling(Ex.295 at 46-48). Pat's abusive relationship with Corbett increased Tim's sense of insecurity and fragileness, while decreasing his coping ability(Ex.295 at 51-52).

Unlike Tim, Keith benefited from visits with a positive caring role model, his biological father, Carroll Whitley(Ex.295 at 41-42,56). When Keith left Tim behind in New Mexico with Pat and Robinette, Tim lost his closest source of emotional support(Ex.295 at 48-49). Keith's move was positive for him because it removed him from a drug abusing environment and he replaced that with the stable, appropriate Whitley family modeling(Ex.295 at 49). Keith had a different developmental outcome because he was born to a caring father and had the opportunity to live with a supportive family(Ex.295 at 59-60).

3. Straub

Psychologist Dr. Straub testified at the 1993 PCR and was not contacted(Ex.297 at 14,16,77-78;2ndR.Tr.236).

Carroll Storey was an abusive, unpredictable, explosive person who made Tim's world unpredictable with demeaning acts inflicted on everyone(Ex.297 at 43-48). The violence and substance abuse Robinette and Corbett brought to Tim's life caused further unpredictability(Ex.297 at 49-50,53). Tim abused substances to block out feelings and memories(Ex.297 at 53-54).

Tim had PTSD caused by abuse that included dissociative symptoms(Ex.297 at 55-58). Tim's behavior around the time of the crime is consistent with dissociation and he was suffering from significant mental disturbance(Ex.297 at 69-71). Tim's acts evidence a rage crime, inconsistent with having acted consciously(Ex.297 at 105-06,109-11).

In the 1993 PCR, Straub testified Tim might satisfy the DSM antisocial checklist, but that diagnosis did not apply(Ex.297 at 63-64,66,81-83,113). With the additional information Straub was furnished for this PCR, Tim does not even satisfy that checklist(Ex.297 at 81-83).

Straub opined Tim probably committed this offense(Ex.297 at 112).

Keith's shame and fear of getting in trouble caused his inconsistent reporting about Carroll Storey's sexual abuse(Ex.297 at 85-87).

4. Smith

Psychologist Dr. Smith's expertise is substance abuse(Ex.293 at 7,12).

Children with Tim's substance abuse family history have an increased genetic risk of being abusers(Ex.293 at 16-18,39-40). Tim's mother drank while pregnant with him(Ex.293 at 16). Drinking during pregnancy causes subtle developmental delays, learning disabilities, and minimal brain dysfunction(Ex.293 at 17-18).

Tim's repeated exposure to substance abuse within the home was significant because parents are role models(Ex.293 at 19,25-26). The message to Tim was that it was acceptable behavior and predisposed him to doing the same(Ex.293 at 19,25-26,40-41). The abuse Tim experienced also increased his likelihood of being a substance abuser(Ex.293 at 41-42). Carroll Storey encouraged substance use at such an early age Tim did not make a cognitive choice to engage in that behavior(Ex.293 at 43).

Tim's intoxication would have exacerbated the effects of his damaged frontal lobes(Ex.293 at 50-54). Tim suffered from diminished capacity, acted under the influence of extreme mental or emotional disturbance such that he could not have coolly reflected, and his ability to appreciate and conform his conduct to the requirements of law was substantially impaired(Ex.293 at 54-57).

5. Jolly

Psychologist Dr. Jolly, whose expertise is the effects of alcohol, testified at the 1993 PCR, but was not contacted(1stR.Tr.661-714;Ex.263;2ndR.Tr.243). Alcohol has the special effects on someone with the neuropsychological deficits Cowan identified of exacerbating already impaired abilities for problem solving, sound judgment, and inhibiting aggression(1stR.Tr.673-76,711;Ex.263). Tim acted under extreme emotional distress(1stR.Tr.679-82;Ex.263).

6. Miller

Miller is an M.S.W. forensic social worker licensed as a clinical social worker(Ex.203 at 5-10,13-19;Exs.200,201). For the 1993 PCR, Miller did an assessment, report (Ex.61), and testified(Ex.203 at 29-31).

Miller found an extensive history of alcohol abuse on both sides of Tim's family(Ex.203 at 39-42,46,105). When Tim was born his biological father was in prison(Ex.203 at 45-46). While Pat was pregnant with Tim she drank, which can adversely impact the central nervous system and could explain why Tim was treated for hyperactivity(Ex.203 at 48-49). Pat always had relationships with men

who were volatile and unstable, which was not a good family model and unsafe(Ex.203 at 92,105,107).

Carroll Storey's abuse of everyone was significant because of the feelings of powerlessness, unpredictability, and diminished self-esteem(Ex.203 at 53-57,62-63,105-06).

Tim's circumstance differed from Keith's situation because Tim did not have an on-going relationship with a biological father who was a stable, law abiding role model(Ex.203 at 69-72,88,108-09). That difference was significant because people learn appropriate behavior from their parents(Ex.203 at 70-72).

When Pat was married to Robinette, Tim was exposed to more violence and drug and alcohol use, an unhealthy environment for a child(Ex.203 at 75-78,82-83,89-90). Tim also had to move several times which impaired his peer relationships and trust and deprived him of stability and continuity(Ex.203 at 79-80,90-91). That pattern was repeated with Corbett(Ex.203 at 93-94).

Miller had problems with one counsel on the *Johnson* PCR case, but that counsel was satisfied with her work(Ex.203 at 111). Beimdiek contacted Miller, but was concerned about trying to call her because *State v. Brown*,998S.W.2d531,549(Mo.banc1999) upheld excluding her(Ex.203 at 113-16).

7. Pierce

Dr. Pierce is U.M.S.L.'s Social Work chairperson(2ndR.Tr.15). Social work includes diagnosis and treatment of mental illnesses(2ndR.Tr.20). Social

workers treat abused people and substance abusers(2ndR.Tr.20). Masters Degree education (M.S.W.) includes classes in how to perform a mental health assessment(2ndR.Tr.23). To perform a mental health assessment, social workers compile information from many sources(2ndR.Tr.23-24).

Miller's report's sources are the type social workers rely on for social histories and making assessments(2ndR.Tr.29). Miller's work was what social workers do, except it was more extensive than most social workers have time to do(2ndR.Tr.28-29). Miller was qualified to do the social history she performed as an M.S.W. and to assess what would be mitigating(2ndR.Tr.30-31). Miller's report was not deficient because it did not mention Tim was intoxicated when he sustained a head injury because what was important was the head injury's impact(2ndR.Tr.31-32).

B. Beimdiek's Testimony

1. Generally

Beimdiek was responsible for experts and she had Miller's 1993 PCR report(2ndR.Tr.116-18,206-07). She prefers lay witness anecdotal testimony to "hired gun" experts(2ndR.Tr.207-08). Beimdiek spoke to 1993 PCR counsel about the experts called and prepared a memo with individual comments(2ndR.Tr.210-11;Ex.326). Beimdiek called Vandenberg even though he was the "most hired gun" of the 1993 PCR experts and had written a book about testifying(2ndR.Tr.214-15;Ex.326;1stR.Tr.630). Beimdiek did not think the jury would care about Tim's school grades, but agreed those records would have

shown progressive decline(2ndR.Tr.263-64,268). If Beimdiek were going to present Tim's medical records, then she would have wanted to present them through an expert and she had ruled out Cowan(2ndR.Tr.274-75,277-78).

2. Cowan

Beimdiek's multi-expert memo on Cowan included: (a) good witness can "provide truly scientific info[.] on brain functioning"; (b) does not always testify for defendants and has told 1993 PCR counsel could not furnish helpful information for other movants' cases; (c) open to cross on number of Public Defender cases involved with; and (d) reason gave narrative answers in 1993 PCR was did not get objections and narrative could be avoided(Ex.326;2ndR.Tr.215-19,228-29).

Beimdiek's Cowan only memo included: (1) problem impairment is mild and I.Q. just below average may not be persuasive; and (2) admits no medical records to support head trauma(Ex.328;2ndR.Tr.228-29).

Beimdiek was concerned Cowan's evidence would be tedious, but she knows how to prevent witness narratives and realized PCR judge tried cases are different from jury trials(2ndR.Tr.216-17). She did not consider Cowan's findings compelling(2ndR.Tr.229). Beimdiek thought having brain damage could be perceived as Tim being "damaged goods"(2ndR.Tr.230).

3. Vliestra

Beimdiek had previously used and generally likes information a childhood development expert can provide(2ndR.Tr.208-09,256). Beimdiek did not consider

using such an expert because there was not time to go beyond 1993 PCR counsel's work(2ndRTr.256-57).

4. Straub

Beimdiek's group memo included: (a) no prior testifying experience so no "hired gun" problem; and (b) narrative testimony could be modified with direction(Ex.326;2ndR.Tr.231-32). Straub was not called because Vandenberg established what Straub could(2ndR.Tr.235-36).

5. Smith

Biemdiek did not consider hiring someone with alcohol expertise because she was not particularly interested in that part of the case, even though a mitigator she submitted was whether Tim had alcohol problems(2ndR.Tr.258-59).

6. Jolly

Beimdiek's group memo included: (a) personable to jury, little court work; and (b) vulnerable on cross as university administrator could be perceived as "bureaucrat not a scientist"(Ex.326;2ndR.Tr.239).

Beimdiek's Jolly only memo thought Jolly was vulnerable on cross for reasons that included: (a) had 1993 PCR testimony problems with lack of medical corroboration for head injury; and (b) not able to explain effects of alcohol when guilt not admitted(Ex.330;2ndR.Tr.239-40). Biemdiek acknowledged Jolly's 1993 PCR testimony included he is a psychologist who did alcohol research and its effects on memory, emotion, and behavior(2ndR.Tr.240-42;Ex.263 at 3-5). She

considered Jolly an alcohol expert, but did not call him because she thought the same information was presented through Vandenberg(2ndR.Tr.242-43).

7. Miller

Beimdiek's group memo included: (a) Miller wanted very much to testify; (b) 1993 PCR counsel said *Brown* decision did not foreclose Miller testifying if she furnished professional opinions without reciting hearsay; (c) 1993 PCR counsel agreed Miller "can give attitude"; and (d) there was a "blow up" with another attorney, but despite that Miller testified well(Ex.326;2ndR.Tr.244-45).

Beimdiek contacted Miller and felt "attitude" issues involved Miller wanting to make Beimdiek's decisions(2nd.R.Tr.247-49). Beimdiek was especially concerned about *Brown* because it named Miller(2ndR.Tr.249). Beimdiek had Miller's 1993 PCR report(R.Tr.250). Biemdiek did not call Miller because: (1) *Brown* did not permit her to testify; and (2) the same evidence could be presented through Vandenberg and Beimdiek preferred lay witnesses recounting what Miller uncovered(2ndR.Tr.252-54-55). Beimdiek did not consider having a pretrial hearing to determine the admissibility of what Miller could testify to and calling a social work expert to testify about what social workers do and what opinions they are competent to give(2ndR.Tr.254).

C. Findings

1. General

Beimdiek discussed with 1993 PCR counsel, who again represented Tim in this PCR, about the experts called then(2ndR.L.F.789). She generated a memo

(Ex.326) setting forth her assessments as to strengths and weaknesses(2ndR.L.F.789). The 1993 PCR judge found those experts not credible or persuasive and Schneider found the same(2ndR.L.F.789-90,798,801). Biemdiek prefers to call lay witnesses to provide "antidotal" [sic] evidence rather than "hired gun" experts and her decisions were reasonable(2ndR.L.F.807).

Counsel called Vandenberg and will not be ineffective for failing to "shop" for an expert(2ndR.L.F.789-90). Most experts would be subject to cross-examination about prior Public Defender cases and what they were paid(2ndR.L.F.789-90,791,798,802). Reliance on Miller's work and a supposed lack of medical records to support brain injury made other experts' findings unpersuasive(2ndR.L.F.790). Evidence Tim had brain damage would not have been mitigating because it was caused by his drunken driving accident(2ndR.L.F.799). Most expressed opinions similar to Vandenberg(2ndR.L.F.709, 791,797-98,800,802). Several could not express an opinion on whether Tim committed the offense which made them not credible(2ndR.L.F.798,799,800,801).

2. <u>Cowan</u>

Cowan's conclusions were based on assumptions Tim had serious head injuries(2ndR.L.F.789-90). Having a verbal learning disability is not necessarily mitigating(2ndR.L.F.799). Cowan opened the door to testimony Tim used drugs while in prison(2ndR.L.F.799). Tim has a normal MRI and CT scan(2ndR.L.F.799).

3. Vliestra

Testimony about Tim's tumultuous childhood intended to engender sympathy is not persuasive and could have angered the jury(2ndR.L.F.802-03). The prosecutor could have pointed out Ms. Frey had spent her life trying to help children(2ndR.L.F.802-03).

4. Straub

Straub changed his opinion on whether Tim had antisocial personality(2ndR.L.F.790,800). Straub's testimony would not have helped because it included Keith had been dishonest in his sexual abuse reporting(2ndR.L.F.801).

5. Smith

Smith's minimal brain dysfunction diagnosis is based on Cowan's findings(2ndR.L.F.798). Smith did not dispute Givon's findings or Dr. Shuler's evaluation (Ex.13) of Tim(2ndR.L.F.798).

6. Jolly

Biemdiek's memo reflected concern Jolly as a university administrator could be "perceived as a bureaucrat not a scientist"(2ndR.L.F.790).

7. Miller

1993 PCR counsel agreed Miller "can give attitude" and had "a blow-up" with different counsel on another case(2ndR.L.F.791). Miller's report (Ex.61) opinions are inaccurate because she reported a history of head injury from a 1987 car accident, but no medical records support that(2ndR.L.F.791,802). Miller's

report failed to specify the accident occurred when Tim drove drunk(2ndR.L.F.802). Some of the other experts relied on Miller's unsubstantiated head injury finding(2ndR.L.F.802).

8. Pierce

Pierce offered no relevant evidence and knew of no university that offers a forensic social work degree, which was how Miller referred to her work(2ndR.L.F.803). Pierce's testimony would not have qualified Miller to testify(2ndR.L.F.815).

D. Vandenberg's Testimony

Vandenberg testified at the 1993 PCR and the last retrial. Vandenberg recounted incidents of abuse and how these would have been traumatizing(3rdTrialTr.1317-21,1328-30). There was a family history of alcoholism(3rdTrialTr.1322). Tim has borderline personality disorder, but not anti-social(3rdTrialTr.1323-24,1326-28). Alcohol can generally increase aggressive tendencies(3rdTrial131-32). On cross, Vandenberg testified he relied on Miller's social history(3rdTrialTr.1344-45).

E. Counsel Was Ineffective

Any one of these experts alone or in combination with the others would have resulted in a life sentence.

1. Generalized Error

A state postconviction judge's finding a witness is not convincing does not defeat a claim of prejudice. *Kyles v. Whitley*,514U.S.419,449,n.19(1995). That

observation could not substitute for the jury's trial appraisal. *Id*. Witness credibility is for the jury, not postconviction court. *Antwine v. Delo*,54F.3d1357,1365(8thCir.1995). Because the standard is not whether the motion court found experts persuasive or credible, the findings are clearly erroneous.

For trial strategy to be a proper basis to deny relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003). Beimdiek's preference for lay "antidotal" witnesses to avoid "hired guns" experts was not reasonable because she called Vandenberg who she regarded as the "most hired gun" of the 1993 experts, someone who had written a book on testifying(2ndR.Tr.214-15;Ex.326;1stR.Tr.630). Cross-examination about prior Public Defender work of these experts is a trivial matter compared to having called the "most hired gun." Miller's work and those who relied on Miller, were not undermined by the lack of medical records to support a head injury because Cowan found support for a brain injury in Tim's medical records - Exs.2,13,14,15(Ex.294 at 28). Miller's work's credibility and those who relied on it cannot be dismissed because even the witness who Biemdiek called, Vandenberg, testified he had relied on Miller's work(3rdTrialTr.1344-45).

"Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*,124S.Ct.2562,2570(2004). Impaired intellectual functioning evidence is "inherently mitigating" and obvious evidence to support life. *Hutchison v.State*,

SC 85548(Mo.banc Dec.17,2004) slip op. at 25. Cowan indicated Tim's educational performance records(Exs.4,5,6), which preceded the 1987 drunken driving accident, showed declining academic performance(Ex.294 at 115). Even if the brain injury was alcohol related, it could still be mitigating because substance abuse can be mitigating. *State v.Roll*,942S.W.2d370,374(Mo.banc1997).

In *Hutchison* this Court concluded counsel was ineffective for failing to present a thorough comprehensive expert presentation and not to shop for a more favorable expert. *Hutchison*, slip op. at 23. That is true here. Counsel did not have to shop for experts Cowan, Straub, Jolly, and Miller since they were witnesses at the 1993 PCR and counsel had their prior testimony.[4] A thorough presentation did not happen because Vandenberg did not address with any specificity the subjects these experts would have addressed. *Hutchison*.

"Impaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately." *Tennard v. Dretke*,124S.Ct.2562,2572(2004). Experts who could not express an opinion on

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[4] Smith was not a 1993 witness, but if counsel was not going to call 1993 witness Jolly, then counsel should have found someone like Smith. Pierce was not a 1993 witness, but she would have provided the necessary background support for calling 1993 witness Miller, despite *Brown*. From the abuse record developed before the 1999 retrial, counsel should have known someone with Vlietstra's childhood development expertise was necessary.

whether Tim committed the offense had valuable testimony to provide because "a defendant need not show a nexus between his mental capacity and the crime to admit such mitigating evidence." *Hutchison*, slip op. at 20.

2. Cowan

Cowan had medical records (Exs.2,13,14,15) supporting Tim had a head injury (Ex.294 at 28), and therefore, his findings were not based on assumptions. Most importantly, Cowan's own testing placed Tim in the brain damaged range(Ex.294 at 63-64). Evidence of impaired intellectual functioning is "inherently mitigating" and obvious evidence to support life. *Hutchison*, slip op. at 25. It was unreasonable for counsel to not call Cowan because Tim could be viewed as "damaged goods" (2ndR.Tr.230) since brain damage is "inherently mitigating." *Id.*25. The supporting records should have been introduced because "records from remote time are useful to show that a claim of impaired intellectual functioning is not a recent discovery for the purpose of the defense." *Id.*19. Cowan could have explained how Tim's substance use would have exacerbated Tim's brain impairments(Ex.294 at 77-78).

Counsel's concern Cowan's testimony could be tedious (2ndR.Tr.216-17) was unreasonable because "[t]hat such testimony might be complex is not a sufficient reason for holding that there is no prejudice; expert testimony is often offered precisely because the subject is complex and the testimony is intended to assist the finder of fact." *Hutchison*, slip op. at 25. Counsel failed to call a

witness whose memo recognized Cowan as a good witness who could "provide truly scientific info[.] on brain functioning"(Ex.326).

3. Vlietstra

In *Wiggins v. Smith*,539U.S.510,516-17,526(2003), counsel was ineffective for putting on a "halfhearted mitigation case" that included failing to present social history a postconviction forensic social worker uncovered from such sources as medical and school records about the abuse the defendant had experienced. Counsels' social history investigation was limited to a psychologist's testing and PSI and social service records. *Id.*523-24. Vlietstra was able to explain the impact of the many traumatic events Tim experienced and how they figured into this offense. Vlietstra also would have explained how Keith's circumstances were sufficiently different making him better able to cope(Ex.295 at 41-42,49,56,59-60) something that was important to the defense. *See* Points V, IX. Under *Wiggins*, such evidence would not have angered the jury (2ndR.L.F.802-03) and the prosecutor did present much victim impact evidence about Ms. Frey's work with children(2ndR.L.F.802-03). *See* Point V.

Insufficient time to prepare does not excuse counsel failing to discover reasonably available mitigating evidence. *Hutchison*, slip op. at 12-13. Thus, lack of time to obtain someone like Vlietstra(2ndR.Tr.256-57) was not reasonable grounds to fail to present such testimony.

4. Straub

Straub would have explained how Tim's PTSD caused dissociative symptoms and Tim's behavior was consistent with dissociation such that he had not acted consciously(Ex.297 at 105-06,109-11) and suffered from significant mental disturbance(Ex.297 at 69-71). Straub in fact had not changed his opinion on antisocial (Ex.297 at 63-64,66,81-83,113) and he provided a highly credible explanation for why Keith was inconsistent in his sexual abuse reporting(Ex.297 at 85-87). Even if having an opinion on Tim's guilt somehow matters(2ndR.L.F.798,799,800,801), Straub offered his opinion on that(Ex.297 at 112).

5. <u>Smith And Jolly</u>

Because substance abuse can be mitigating, *State v. Roll*,942S.W.2d370,374(Mo.banc1997) counsel should have called either Smith or Jolly. Here this evidence was mitigating because Smith testified Carroll Storey had encouraged substance use at such a young age Tim had not made a cognitive choice to use(Ex.293 at 43).

In *Brownlee v. Haley*,306F.3d1043,1071-72(11thCir.2002), counsel was ineffective for failing to present expert mitigating evidence showing the defendant's pre-existing intellectual and psychiatric limitations would have been aggravated by substance use. That evidence would have supported the mitigating circumstances the crime was committed while under the influence of extreme mental or emotional disturbance and the defendant's capacity to appreciate the criminality of his conduct or conform to the requirements of law was substantially

impaired. *Id.*1071. Here counsel submitted as a mitigator Tim had alcohol problems (2ndR.Tr.258-59), but offered no expert testimony on the significance of Tim's alcohol problems. Counsel's failure to present Smith (Ex.293 at 50-54) or Jolly (1stR.Tr.673-76,711;Ex.263) who could have explained how Tim's substance abuse exacerbated his mental impairments constituted ineffectiveness. *Brownlee*.

6. Miller And Pierce

A strategic decision is unreasonable if it is based on a failure to understand the law. *Hardwick v. Crosby*,320F.3d1127,1163(11thCir.2003).

In ruling Miller's testimony in *Brown* was properly excluded, this Court found that had the objected to evidence been a basis for her opinions, then her testimony would have been admissible. *Brown*,998S.W.2d at 549. Counsel in the 1993 PCR made Beimdiek aware Miller could testify if *Brown's* directive was followed(Ex.326;2ndR.Tr.244-45). Counsel's failure to call Miller because of *Brown* was based on her failure to understand the law. *Hardwick*.

Pierce's testimony established Miller was qualified to give mitigation testimony, Miller's efforts were more thorough than most social workers have time to perform, and Miller not specifying Tim was driving drunk did not detract from her work(2ndR.Tr.28-32). In *Wiggins*, *supra*, it was counsel's failure to utilize the social history of a forensic social worker that rendered them ineffective. The same is true in failing to call Miller.

F. Conclusion

This Court has recognized "in deciding prejudice from counsel's failure to investigate a client's life history, courts should evaluate the totality of the evidence." *Hutchison*, slip op. at 20-21. "The question is whether, when all the mitigation evidence is added together, is there a reasonable probability that the outcome would have been different?" *Id.*21. Reasonably competent counsel under similar circumstances would have called these experts and presented Tim's school and medical records. *Wiggins* and *Hutchison*. Tim was prejudiced and there is a reasonable probability the outcome would have been different as any one of these experts alone or in combination with the others and these records would have resulted in a life sentence. *Wiggins* and *Hutchison*.

No jury has ever heard all the mitigating evidence that could have been presented through these experts and records. A new penalty phase is required.

VIII. PROSECUTORIAL PERSONAL GAIN AND FREY FAMILY'S AND FRIENDS' DEMANDS

The motion court clearly erred denying death continued to be sought as part of a larger pattern of prosecutorial misconduct throughout, and after *Storey I*, for the improper reasons Tim's case advanced Prosecutor Hulshof's 1996 Congressional campaign and his personal finances and Ms. Frey's family demanded Tim's case retried "as often as necessary" to get death such that Tim was never afforded the opportunity to plead to life without parole because Tim was denied his rights to a fair trial, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that respondent's continued death pursuit and refusal to settle was part of a larger pattern of prosecutorial misconduct throughout and resulted from the noted improper arbitrary considerations.

Respondent's decision to pursue death, after *Storey I*, was based on arbitrary and capricious considerations. Those considerations were advancing prosecutor Hulshof's Congressional campaign as the tough on crime death penalty prosecutor and his finances and the Frey family's and friends' demands for death. The refusal to settle Tim's case for life without parole was part of a larger pattern of prosecutorial misconduct that has plagued Tim's case. Tim was denied his rights to a fair trial, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v.State*,850S.W.2d348,350(Mo.banc1993). Imposing death is cruel and unusual punishment if the punishment is imposed arbitrarily and capriciously. *Furman v. Georgia*,408U.S.238,309-10(1972). In *Furman*, the Court found Georgia's death penalty statute was applied arbitrarily and capriciously such that there was no principled way to distinguish those sentenced to death from those not. *Maynard v. Cartwright*,486U.S.356,362(1988). The facts show Tim's sentence is the product of the arbitrary and capricious considerations of advancing Hulshof's Congressional campaign, his finances, and Ms. Frey's family's and friends' demands for death.

Hulshof tried this case in 1991(Ex.292 at 6). *Storey I* found four types of errors in Hulshof's penalty argument that made counsel ineffective. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995). Hulshof's argument that asked the jury to put itself in Ms. Frey's place was "grossly improper." *Id.*901.

A. Facts Establishing Arbitrariness

In November, 1994, Hulshof ran unsuccessfully for Congress as the Republican nominee against Democratic incumbent Volkmer in the Ninth District, which includes part of St. Charles County(Ex.292 at 8-10,12,28). Hulshof continued to be employed at the Attorney General's Office while running(Ex.292 at 11-12). Hulshof's 1994 campaign emphasized his death penalty experience(Ex.292 at 12-13). Hulshof criticized Volkmer for having voted for the Racial Justice Act which would have allowed statistical evidence to prove racial discrimination in capital cases(Ex.292 at 13-16,99-100;Ex.271 at 2;Ex.289).

Hulshof's campaign advocated limiting death penalty appeals(Ex.292 at 16,99-100;Ex.271 at 2;Ex.289). Volkmer ran a television ad attacking Hulshof for mishandling a case where defendant Clark was allowed to avoid murder prosecution based on a speedy trial defense(Ex.292 at 20-28;Ex.270 at 5-14;Ex.271 at 11-12). Hulshof described Volkmer's ad as a "tough ad" which concluded with Volkmer slamming a prison door shut while asserting he was tough on crime(Ex.292 at 23;Ex.351).

After Hulshof's 1994 defeat, he returned to the Attorney General's Office(Ex.292 at 28). In 1995, Hulshof began exploring running for Congress again and sent out a June or July fund raising letter(Ex.292 at 28-29). After this Court issued *Storey I* in June 1995, Deputy Attorney General Don Downing, the number two ranking person in that office(Ex.281 at 24), gave a June 23, 1995 Post Dispatch interview stating respondent had not decided if it would seek death again(2ndR.Tr.8-9;Ex.221 at 2).

Attorney General Nixon was criticized for allowing Hulshof to return after the 1994 election(Ex.292 at 34). Hulshof's 1995 fundraising activities became an office issue(Ex.292 at 37;Ex.281 at 18-19,24). In August, 1995, Hulshof was asked to resign(Ex.292 at 38; Ex.281 at 20;Ex.282 at 30-31). Downing structured an arrangement in August, 1995 where Hulshof would leave at the end of December, 1995 and the office would retain Hulshof on three cases set for early 1996(Ex.292 at 42-46; Ex.281 at 29-32;Ex.283). Tim's case was not included(Ex.292 at 44).

Despite this, on September 21, 1995, Hulshof filed an entry as an Assistant Attorney General in Tim's case and a notice of intent to seek death(Ex.209A at 13-16). By October, 1995, Hulshof had decided he was going to run again(Ex.292 at 46-47).

On January 31, 1996, as a private attorney, Hulshof wrote to Judge Rauch and included a motion asking he be appointed as Special Prosecutor(Ex.282 at 1-7). Attached to the motion were many letters Ms. Frey's family and friends wrote Nixon in December, 1995(Ex.292 at 51,60;Ex.282 at 8-27,29). Those letters called on Nixon to allow Hulshof to handle the retrial because of their great satisfaction with Hulshof's work and that he was the best person to accomplish their wishes to obtain death again(Ex.282 at 8-27,29). Hulshof did not solicit people to write letters on his behalf, but told people if they wanted to that was "fine"(Ex.292 at 56-57).

Ms. Frey's family had conveyed their distress about *Storey I* to Hulshof(Ex.292 at 55). They had stayed in touch with Hulshof because there had been some Attorney General's Office statements death might not be sought again(Ex.292 at 55,59-60). In response, the Frey family submitted petitions to Nixon demanding he seek death again(Ex.292 at 55-56,59-60). Ms. Frey's parents and her aunt and uncle wrote letters to Nixon asking Hulshof continue on the case as "our attorney"(Ex.282 at 24;Ex.284 at 3).

On Febuary 14, 1996, Rauch held a hearing on Hulshof's motion to be appointed(Ex.285). Hulshof did not have an agreement with the Attorney

General's Office, but that Office was aware of his motion(Ex.285 at 10-11). Rauch declined to appoint Hulshof until the Attorney General designated him(Ex.285 at 10-12). The matter was continued until March 21, 1996(Ex.209A at 22).

On February 26, 1996, Chief Deputy Attorney General Layton wrote Rauch apprising her his office had no objection to Hulshof being appointed, but would not pay costs and expenses(Ex.209A at 31). On March 7, 1996, Rauch appointed Hulshof(Ex.209A at 23). On March 12, 1996, Assistant Attorneys General Ahsens and Koch moved to withdraw because Hulshof was appointed(Ex.209A at 34-35). Defense counsel filed a motion on March 18, 1996 to set aside the order appointing Hulshof which was set for April 18, 1996(Ex.292 at 76-77;Ex.209A at 26-33,34). On April 26, 1996, Rauch sustained the defense motion to disqualify her because she had been previously disqualified(Ex.286;Ex.209A at 35).

In the 1996 Republican primary, Dr. Eggleston was Hulshof's main opponent(Ex.292 at 84). In April 1996, Eggleston criticized Hulshof for his willingness to plea bargain(Ex.270 at 16). Hulshof felt Eggleston had perceived Volkmer's 1994 attacks as successful, and therefore, Eggleston was using similar tactics(Ex.292 at 85). Eggleston ran ads criticizing Hulshof's handling of three cases, including *Clark* and Tim's case(Ex.292 at 85-86). Responding to Eggleston's attacks in August, 1996, Hulshof said: "he was happy for a chance to take Storey before another jury to seek the death penalty again"(Ex.270 at 20). Hulshof won the Republican nomination in August, 1996(Ex.292 at 83).

In Volkmer's 1996 campaign, he ran two Clark ads (Ex.351;Ex.292 at 89;Ex.270 at 21). In Hulshof's 1994 campaign, he had done a specific Clark responsive ad(Ex.292 at 87). The 1996 Hulshof campaign employed a different strategy running a series of ads with crime victims and local prosecutors intended to lessen the impact of attacks on Hulshof's record(Ex.290;Ex.292 at 87,102-05). Hulshof's 1996 campaign touted his prosecutor record, and specifically, his death penalty work(Ex.290;Ex.292 at 88,103,106-07;Ex.287 at 2; Ex.288 at 1,7,10,13). Hulshof's 1996 campaign emphasized he had put twenty-nine murderers behind bars and seven on death row(Ex.289;Ex.290;Ex.292 at 99-101,105-08). Hulshof's 1996 ads attacked Volkmer for weakening the death penalty by having voted for racial quotas(Ex.292 at 108;Ex.290).

In August, 1996, Hulshof still had no agreement with the Attorney General's Office to pay his fees(Ex.292 at 80). Judge O'Toole was appointed and on August 9, 1996 heard the motion to set aside Hulshof's appointment(Ex.210A at 6-34). Counsel urged Hulshof should not be allowed on because it was his improper, not objected to argument that had required reversal, the Frey family's perception Hulshof was their personal attorney, and that there was no possibility of discretion being exercised to waive death because Volkmer's campaign was attacking Hulshof based on *Clark* and Hulshof was too willing to plea bargain(Ex.210A at 14-17,27). Counsel also argued to remove Hulshof because St. Charles County Executive Ortwerth was a witness who testified about having found Ms. Frey's body and Hulshof was circulating 1996 campaign literature in

which Ortwerth endorsed Hulshof based on Hulshof's work on Tim's case(Ex.210A at 17;Ex.287 at 1;Ex.292 at 90-92). On August 21, 1996, O'Toole sustained the motion to remove Hulshof (Ex.210A at 34;Ex.209A at 53).

Hulshof was replaced by Assistant Attorneys General Ahsens and Koch (Ex.209A at 53-57). On December 2, 1996, Ahsens sent counsel a letter which included:

> Lastly, the Frey family has made clear to me that they wish to retry this case, in whole or in part, *as often as necessary* to seek and secure the death penalty. I concur with the import and effect of their opinion. I do not think resolution short of retrial/rehearing should be anticipated.

(Ex.348)(emphasis added).

Hulshof testified the reason he sought to be appointed Special Prosecutor was he became personally close to Ms. Frey's family and wanted to see the case to a final result and because he needed the money(Ex.292 at 49,113). He stated he did not refile the notice to seek death to further his political career(Ex.292 at 113).

B. <u>Motion Court Findings</u>

The motion court treated this as a claim directed at a pattern of prosecutorial misconduct solely involving Hulshof(R.L.F.808). The motion court ruled Tim could not have been prejudiced because Hulshof did not represent the State at the two penalty retrials(R.L.F.808). There was no evidence of a continuing pattern of prosecutorial misconduct(R.L.F.808). The Court also found the claim lacked merit because Hulshof testified his actions were not motivated by

personal political considerations(R.L.F.808). Hulshof testified he never considered running for political office until June, 1994(R.L.F.808).

C. 29.15 Claims

The 29.15 pleadings relied on Hulshof's improper arguments in *Storey I*, Hulshof's pursuit of elected office as the death penalty prosecutor needing to deal with Volkmer's attacks on his competence, Downing's post *Storey I* press statement that reflected respondent might settle for life, Hulshof's efforts to be appointed for the retrial, the Frey family's demands for death, and Ahsens' letter to counsel(R.L.F.269-74). The pleadings also noted in *Storey III*, the pattern of prosecutorial misconduct continued when this Court found certain victim impact evidence and argument were improper, but this Court found no prejudice(R.L.F.273). The claim included Tim did not have a prosecutor exercise fair-minded independent discretion and the decision to seek death was improperly based on Ms. Frey's family's and friends' death demands(R.L.F.273).

D. Kenyon's Testimony

Kenyon represented Tim at the second and third penalty trials(Ex.350 at 84,86). A plea offer was never made, even though requests were made both times(Ex.350 at 86-87). Kenyon wanted a plea offer and believed Tim would have accepted(Ex.350 at 86-87).

E. Arbitrary Death Sentence

Tim's case has been plagued by a pattern of prosecutorial misconduct. In *Storey I,* this Court reversed because of Hulshof's improper penalty argument and

in *Storey III,* this Court again found there was improper argument and victim impact evidence, but no prejudice. *Storey III*,40S.W.3d at 908-09,911-12.

When *Storey I* was handed down in June 1995, Downing, as the Attorney General spokesperson, indicated respondent might consider settling Tim's case for life without parole(Ex.221 at 2). In August, 1995, Hulshof knew his employment was ending in December and that Tim's case was not a case contracted to him(Ex.292 at 42-46; Ex.281 at 29-32;Ex.283). Despite that knowledge, in September, 1995, Hulshof filed an entry and notice of intent to seek death(Ex.209A at 13-16). In October, 1995, Hulshof decided to run again in 1996 for Congress in the Ninth District, which includes parts of St. Charles County(Ex.292 at 10,46-47). Beginning in January, 1996, Hulshof attempted to have himself appointed to represent respondent and continued those efforts until denied by O'Toole in August, 1996. Hulshof ran his 1996 campaign as the "tough on crime" death penalty prosecutor while having to defend that reputation against Eggleston's and Volkmer's attacks. Eggleston's attacks specifically included attacking Hulshof for his improper argument in Tim's case. Hulshof had campaign literature in which St. Charles County Executive Ortwerth, a *Storey* case witness, endorsed Hulshof because of his work in *Storey*.

Tim was not afforded the opportunity to have his case settled for life without parole because Hulshof employed it as a vehicle for advancing his 1996 campaign as the "tough on crime," death penalty prosecutor. Hulshof expressly utilized Tim's case in his 1996 campaign literature. Further, Eggleston's specific

attacks on Hulshof's conduct that produced the *Storey I* opinion and that Hulshof settled too many cases meant Hulshof could not politically afford to settle Tim's case. Moreover, Hulshof knew Volkmer would be attacking his competence based on using Clark's case because it was especially effective in 1994. Resolving Tim's case for life without parole was not an option because Hulshof employed it to promote his death penalty, "tough on crime" campaign persona. The furtherance of Hulshof's political career is an arbitrary and capricious reason for Tim not being offered the opportunity to settle his case. *Furman* and *Maynard v. Cartwright*.

In *State v. Harrington*,534S.W.2d44,45,48-50(Mo.banc1976) the murder victim's father hired a private prosecutor to help prosecute the case. Private prosecutors are not authorized by statute and are "inherently and fundamentally unfair." *Id.*48. The public prosecutor is the people's representative who is expected to act without any motives of private gain and whose primary duty is not to convict, but see justice is done. *Id.*49. In contrast, the private prosecutor is paid to advance the interests of his client, and therefore, contradicts the public prosecutor's role. *Id.*49-50.

Hulshof's conduct typifies what this Court condemned in *Harrington*. The Attorney General refused to pay costs and expenses(Ex.209A) and its designated counsel moved to withdraw when Rauch appointed Hulshof(Ex.209A at 23,34-35). Hulshof's reasons for trying to get on the case were he had become the Frey's personal advocate and he needed the money(Ex.292 at 49,51,60,113;Ex.282

at 8-27,29;Ex.284 at 3). By his own admission (Ex.292 at 49,113), Hulshof was not acting as the people's representative without motives of private gain, but rather was acting to advance the Frey family's wishes and his financial gain. *See Harrington*.

The Frey family and friends letters Hulshof attached to his motion to be appointed and their petitions and other letters sent to Nixon to retain Hulshof (Ex.284) also reflect why respondent was not willing to offer to settle for life without parole. That was expressly stated by Ahsens in his letter to counsel that at the Frey family's and friends' insistence Tim's case would be retried "as often as necessary"(Ex.348).

This Court has held victims' family members' wishes, when the punishment options are either death or life, are not controlling. *State v. Jones*,979S.W.2d171,179(Mo.banc1998)(victim's family did not want death, but court imposed death); *State v. Barnett*,980S.W.2d297,308(Mo.banc1998)(same). In *Barnett*, this Court reasoned: "the basic tenet of the criminal justice system [is] that prosecutions are undertaken and punishments are sought by the state on behalf of the citizens of the state, and not on behalf of particular victims or complaining witnesses." *Id.*308. Here, respondent's continued pursuit of death was improperly based on the victim's family's and friend's demands for death such that their wishes controlled. *Jones* and *Barnett*. Ahsens' letter reflects death was sought not on behalf of the citizens of the state, but the particular victims here, and therefore, was arbitrary and capricious. *Furman* and *Maynard*.

This Court should reverse and impose life without parole.

IX. APPELLATE COUNSEL'S INEFFECTIVENESS

The motion court clearly erred denying the claims direct appeal counsel was ineffective for failing to raise the trial court erred in:

A. Allowing any victim impact because it was prohibited at the time of the offense;

B. Excluding evidence of Keith Storey's ongoing relationship with his biological father to highlight the difference between Tim's and Keith's lives because it was relevant mitigation;

C. Allowing testimony about Tim invoking counsel because it was contrary to *Dexter* and *Zindel;*

D. Refusing to allow Tim to waive a jury trial because Mo. Const. Art. I §22(a) does not require respondent's consent;

E. Denying a new guilt phase because evidence of Tim's vacated Georgia conviction was highly prejudicial

because Tim was denied his rights to effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent appellate counsel would have raised these claims and there is a reasonable probability Tim's sentence would have been reversed.

Direct appeal counsel failed to present meritorious issues that required Tim's conviction and sentence be reversed. Tim was denied his rights to effective

counsel, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984); *Williams v. Taylor*,529U.S.362,390-91(2000).

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 of appellate ineffectiveness the error not raised must have been so substantial as to rise to the level of a manifest injustice or a miscarriage of justice. *Moss v. State*,10S.W.3d508,514-15(Mo.banc2000).

A. <u>Victim Impact - Prohibited At Time Of Offense</u>

Respondent's victim impact evidence is discussed in detail in Point IV and incorporated here.

Deborah Wafer did not brief a claim victim impact evidence was inadmissible because when this offense occurred *Booth v. Maryland*,482U.S.496(1987), *State v. Cavener*,202S.W.2d 869,872-74(Mo.1947), and *State v. Baublits*,27S.W.2d16,19(Mo.1930) all prohibited it(2ndR.Tr.96-100). *See* Point IV. She did try to make those arguments for the fist time at oral argument and in her rehearing motion, but this Court's opinion did not address them and rehearing was denied(2ndR.Tr.96-100;Exs.311,312,313). Her rehearing

motion included relevant discussion of all these cases and other cases with similar holdings and also included *State v. Metz*,986P.2d714,720-21(Or.Ct.App.1999) which held allowing the jury to consider victim impact in penalty for a crime committed before the Oregon Legislature amended its statute to allow such evidence violated Oregon's prohibition against ex post facto laws(Ex.312).

Wafer did not brief this claim because it was not in the motion for new trial and she did not think of it until shortly before argument, but could have raised it as plain error(2ndR.Tr.100). The motion court found Wafer did not raise the claim because it was not raised at trial, she could cite no case that held *Payne v. Tennessee*,501U.S.808(1991) was prospective, and had no legal basis for believing it had merit(2ndR.L.F.805).

The findings are clearly erroneous. Wafer's rehearing motion expressly refutes the assertion there was no authority *Payne* should only be applied prospectively because it cited *Metz*, decided in 1999, which was before she filed her brief(Ex.308). Reasonably competent counsel under similar circumstances would have briefed this claim because *Booth, Cavener, Baublits*, and other cases (Ex.312) all prohibited victim impact when this offense occurred and *Metz* was authority *Payne* could not be applied to offenses committed before it was decided. Tim was prejudiced because there is a reasonable probability his penalty verdict would have been reversed. *Strickland* and *Williams*.

B. <u>Excluded Keith Storey Evidence</u>

Tim's mother was not permitted to testify about how Tim's brother Keith had an ongoing positive, relationship with his biological father, something Tim did not have(3rdTrialTr.1431-39). Counsel wanted to present this evidence to establish there were significant differences in Tim's and Keith's life experiences because respondent had previously argued in closing they had been subjected to the same abuse, but Keith had not killed(3rdTrialTr.1431-33,1438-39).

Respondent did what counsel anticipated. On cross-examination of Carroll Storey's sister, Faye Kerfoot, respondent elicited evidence Tim received the same love and affection as the other children(3rdTrialTr.1477-78). Respondent's cross-examination of Keith was devoted to establishing Keith and Tim were subjected to the same abuse, but unlike Tim, Keith had not committed a homicide(3rdTrialTr.1581-90). Respondent argued in rebuttal Keith had an upbringing that was the same "in every pertinent respect," including Keith was beaten and sexually abused(3rdTrialTr.1694-95). Respondent also argued a person makes his own choices and Keith Storey chose not to do what Tim has done(3rdTrialTr.1694-95).

Wafer testified she did not raise this matter because she did not think it was particularly strong(2ndR.Tr.86-87). The motion court found Wafer made a reasonable strategic decision(2ndR.L.F.804).

"Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*,124S.Ct.2562,2570(2004). For trial strategy to be a proper basis to deny

relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003). Reasonably competent counsel under similar circumstances would have briefed this claim because trial counsel considered it essential to highlight the difference between Keith's and Tim's experiences to address respondent's efforts to paint their experiences as the same. Counsel's strategy was not reasonable. *Butler*. Tim was prejudiced because there is a reasonable probability had counsel briefed this claim his sentence would have been reversed. *Strickland* and *Williams.*

C. Testimony About Exercising Right To Counsel

Officer Plummer testified that while interrogating Tim he told Tim they did not believe him, Tim agreed he had not been truthful, and Tim indicated he would tell police "what really happened," but first he needed to talk to a lawyer(3rdTrialTr.1062-66). Counsel objected to the reference to Tim's right to counsel, requested a mistrial, and included this matter in the motion for new trial(3rdTrialTr.1062-66;3rdTrialSupp.L.F.42).

Wafer testified that this was error, but was a quick reference and not significant(2ndR.Tr.80-81). Schneider found counsel made a conscious decision not to raise this matter because she did not think it required reversal(2ndR.L.F.804).

In *State v. Dexter*,954S.W.2d332,334-36(Mo.banc1997), the first degree murder conviction and death sentence were reversed as plain error because the respondent violated the defendant's right to due process through commenting on

his post-arrest silence and *Miranda* warnings. Like here, there was police testimony in *Dexter* recounting his unwillingness to talk to the police without counsel. *Id.*336.

In *State v. Zindel*,918S.W.2d239,240-41,243(Mo.banc1996), the first degree murder conviction was reversed as plain error because the State used Zindel's post-*Miranda* silence and request for counsel as evidence.

Storey II reversed because the trial court failed to give the no adverse inference instruction when Tim did not testify. *State v. Storey*,986S.W.2d462,463-65(Mo.banc1999). The error was not harmless because "the prejudice against a defendant who invokes the privilege - prejudice which is 'inescapably impressed on the jury's consciousness' - is not purely speculative . . . ." *Id.*464-65. Likewise, it is not purely speculative that referencing Tim exercising his right to counsel, when he was being interrogated, was prejudicial.

Unlike *Dexter* and *Zindel*, the reference here was fully preserved, but unbriefed(Exs.308,310). Counsel's strategy was not reasonable. *Butler*. Reasonably competent counsel under similar circumstances would have briefed and argued it was error for the trial court to have denied the mistrial request when Plummer referenced Tim exercising his right to counsel. *Dexter* and *Zindel*. Tim was prejudiced because there is a reasonable probability his death sentence would have been reversed. *Strickland* and *Williams.*

D. <u>Missouri Constitution Authorized Jury Waiver</u>

Trial counsel filed a request to waive jury trial(3rdTrialL.F.124-25). Respondent objected on the grounds §565.006.3 provides a defendant found guilty of first degree murder where death is sought cannot waive jury sentencing unless the State agrees(3rdTrialTr.106-09). Based on the State's objection, Tim was not allowed to waive a jury trial(3rdTrialTr.106-09; 3rdTrialL.F.124-25). That request's denial was included in the new trial motion(3rdR.L.F.Supp.L.F.).

Wafer did not raise this matter because she did not think there was a valid claim, but having given it additional thought she might raise it now(2ndR.Tr.100-02). The motion court found Wafer made a conscious choice not to raise this because the statute limited jury waiver to when the state agreed(2ndR.L.F.805).

Article I §22(a) provides a defendant can waive a jury trial "with the assent of the court," but it does not require the state's assent. If a statute conflicts with a constitutional provision, then "this Court must hold that the statute is invalid." *State ex rel. Upchurch v. Blunt*,810S.W.2d515,516(Mo.banc1991). Section 565.006.3 conflicts with Art. I §22(a), is invalid, and Tim was entitled to waive a jury without respondent's consent.

"The risk of a death sentence being imposed in an arbitrary and capricious manner is greatly reduced when the trial judge decides punishment." *State v. McMillin*,783S.W.2d82,96(Mo.banc1990). Reasonably competent counsel under similar circumstances would have briefed this claim because §565.006.3 conflicts with Mo. Const. Art. I §22(a). *Upchurch*. Tim was prejudiced because there is a

reasonable probability his penalty verdict would have been set aside. *Strickland*, *Williams* and *McMillin*.

E. Impeachment With Vacated Conviction

Trial counsel filed a motion for new trial based on Tim's guilt phase testimony having been impeached with an uncounseled Georgia conviction, but subsequently vacated for that reason(3rdTrialL.F.79-85). The motion acknowledged that in *Storey II* this Court had ruled this error was harmless. *State v. Storey*,986S.W.2d462,465-66(Mo.banc1999). However, it argued *Storey II* required reconsideration because it had overlooked "the strong prejudice" other crimes evidence creates as to guilt and cited relevant cases(3rdTrialL.F.81). The new trial motion reasserted this claim(3rdTrialSupp.L.F.16).

Wafer did not raise this motion's denial because of *Storey II*(2ndR.Tr.82-83). Schneider found this was reasonable strategy(2ndR.L.F.804).

Reasonably competent counsel under similar circumstances would have briefed this claim because trial counsel's motion had offered reasons why *Storey II* was wrongly decided. Tim was prejudiced because there is a reasonable probability his death sentence would have been reversed. *Strickland* and *Williams*

A new guilt or at minimum new penalty phase is required.

X. MISLEADING JURY - FAILURES TO OBJECT/PRESERVE

The motion court clearly erred when it denied claims counsel was ineffective for failing to properly object to and preserve:

A. Officer Plummer testifying to Tim's interrogation statement he used to believe in the death penalty, but not anymore, because this injected irrelevant information engendering passion and prejudice suggesting that under Tim's own view death was appropriate;

B. Givon making predictions on Tim's behavior once he was "in a free community" because this suggested life without parole was actually paroleable;

C. Respondent's voir dire about a punishment preference "for people who go around committing murder first" because this suggested Tim committed other murders;

D. Givon's testimony Tim was competent to proceed because it was irrelevant to the punishment decision;

E. Cross-examination of corrections expert Aiken about prison killings at Jefferson City Correctional Center because it was irrelevant and the prosecutor made factually false representations about those killings which in addition constituted prosecutorial misconduct

because Tim was denied 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 properly objected and preserved and Tim was prejudiced as he would have been sentenced to life.

The motion court rejected claims counsel was ineffective in failing to object to/preserve matters that misled the jury. Tim was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984); *Williams v. Taylor*,529U.S.362,390-91(2000). Counsel can be ineffective for failing to object. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995)(*Storey I*).

A. Tim's Death Penalty Views

Officer Plummer gave a narrative response about what Tim reported happened which included Tim told Plummer "he used to believe in the death penalty. He said he didn't believe in it anymore. He didn't think he should get off free"(3rdTrialTr.1086-87).

Counsel testified he knew Tim's police interrogation had included this statement and he should have moved pretrial to exclude it and should have objected to Plummer's narrative before he made this statement(Ex.350 at 99-101). Schneider found Tim's statement constituted proper evidence of guilt when it was

considered with the statement Tim said he did not think he should get off free(2ndR.L.F.793).

Schneider's finding is clearly erroneous because this was a penalty phase retrial, it was unnecessary for the jury to hear all this statement to establish Tim's guilt because the jury knew Tim was already found guilty. Even if it was proper to offer that portion of the statement that Tim did not think he should get off free, Tim's views on the death penalty were irrelevant and those should have been prohibited.

This testimony injected irrelevant information engendering passion, prejudice, caprice, and emotion. *See*, *e.g*., *Gardner v. Florida*,430U.S.349,358(1977). This testimony conveyed the jury should vote for death because Tim prior to being potentially exposed to death believed in the death penalty, and therefore, under Tim's own views death was appropriate. This testimony portrayed Tim as having a change in views only because of his own possible exposure to death when Tim's past or present views about the death penalty had no relevance to the punishment decision. Counsel should have objected.

Reasonably competent counsel under similar circumstances would have objected to such testimony. *Gardner*. Tim was prejudiced because there is a reasonable probability without it he would have been sentenced to life. *Strickland* and *Williams*.

B. Tim's Parole Eligibility

Counsel failed to object to Givon testifying he was uncertain whether his behavioral diagnosis and its manifestations of antisocial personality disorder would reappear "once [Tim] is in a free community"(3rdTrialTr.1637).

Counsel testified she should have objected to or cleared up on cross Givon's statement(2ndR.Tr.355-56). Schneider found Givon's statement was insignificant and not highlighted(2ndR.L.F.797).

It is critical a jury understand when the choice is between life and death that a life sentence is not paroleable. *Shafer v. South* Carolina,532U.S.36,49(2001); *Simmons v. South Carolina*,512U.S.154,162(1994).

Reasonably competent counsel under similar circumstances would have objected. *Shafer* and *Simmons*. Tim was prejudiced because there is a reasonable probability without Givon's statement he would have been sentenced to life. *Strickland* and *Williams*.

C. Tim Committed Other Murders

Counsel failed to object to respondent's voir dire questioning of Ms. Willis, whether she had a preference or leaning for a choice of punishment "for people who go around committing murder first"(3rdTrialTr.355).

Beimdiek testified she should have objected because the prosecutor's question suggested Tim committed other homicides besides that involving Ms. Frey, while Kenyon thought the question would have identified jurors who favored death and not caused jurors to make such a conclusion(2ndR.Tr.322-23;Ex.350 at

119-21). The motion court found the comment required a broad inference and counsel was not ineffective(2ndR.L.F.794).

Reasonably competent counsel under similar circumstances would have objected because the statement created the appearance Tim had committed other homicides. Tim was prejudiced because there is a reasonable probability without this statement he would have been sentenced to life. *Strickland* and *Williams*.

D. Testimony On Comptency To Proceed

Repondent elicited from Givon Tim was competent to proceed, and in particular, he understood the proceedings and could cooperate with counsel(3rdTrialTr.1614-15). Counsel only objected as improper rebuttal as not raised in the defense case which was overruled(3rdTrialTr.1614-15).

Counsel testified she should have objected because evidence of competence to proceed was irrelevant and improper(2ndR.Tr.352-53). The motion court found the questioning was not sufficiently improper or prejudicial and counsel objected(2ndR.L.F.796).

Evidence of competency to proceed is not relevant to the punishment decision. *State v. English*,367So.2d815,819-20(La.1979). Reasonably competent counsel under similar circumstances would have objected on the proper grounds this evidence was irrelevant and served only to confuse the jury as to whether death was appropriate. Tim was prejudiced because there is a reasonable probability without this evidence he would have been sentenced to life. *Strickland* and *Williams*.

E. Prison Killings

Corrections expert Aiken testified that based on reviewing Tim's correctional records, Tim could continue to be housed at Potosi for the rest of his life without risk of harm to anyone(3rdTrialTr.1230-34,1240-43). Counsel only made a late relevancy objection to respondent inquiring about homicides committed at the Jefferson City Correctional Center(3rdTrialTr.1268-71).

Even if the Jefferson City matters were relevant, counsel should have objected to the prosecutor's factually false representations about homicides there. The prosecutor represented inmate O'Neal killed a corrections officer(3rdTrialTr.1270), but actually killed another inmate. *State v. O'Neal*,718S.W.2d498,500(Mo.banc1986). While killing anyone while incarcerated constitutes a statutory aggravator, §565.032, the killing of a correctional officer engenders heightened fear of future dangerousness to law abiding people when it is compared to the killing of another inmate. For that reason, Aiken's testimony's persuasiveness was seriously undermined.

The prosecutor represented Nunnan killed fellow inmate Baker about ten years before Tim's penalty retrial(3rdTrialTr.1268-69). Baker was killed by two other inmates, Guinan and Smith, 14 years before Tim's penalty retrial. *State v. Guinan*,732S.W.2d174,175-76(Mo.banc1987). *See* Storey Vol. I Transcript Index. Through respondent misrepresenting this incident's timing and coupling it with the other homicide involving O'Neal *supra*, the prosecutor was able to create the misperception homicides at Jefferson City occurred frequently. That

misrepresentation and the resulting fears it generated was only aggravated through representing O'Neal's victim was a corrections officer.

Counsel testified he waited to object because he did not know where respondent was going, he should have continued to object, and failed to object to false information because he was unaware it was false, but would have wanted to object to false representations(Ex.350 at 149-54). Schneider found counsel could not have been expected to know the facts of these other cases and the discrepancies were not prejudicial(2ndR.L.F.795-96).

Reasonably competent counsel under similar circumstances would have timely objected and objected to respondent's false representations about critical facts that undermined Aiken's persuasiveness. Tim was prejudiced because there is a reasonable probability without this evidence and the false representations he would have been sentenced to life. *Strickland* and *Williams*. Additionally, the prosecutor's false and misleading representations constituted prosecutorial misconduct that denied Tim his rights to due process and to be free from cruel and unusual punishment.

A new penalty phase is required.

XI. FAILURE TO OBJECT - PROSECUTOR'S ARGUMENTS

The motion court clearly erred when it denied claims counsel was ineffective for failing to properly object to argument and preserve the following:

A. Imposing life equated to weakness because that violated *Rousan*;

B. Comparing the value of Ms. Frey's life to Tim's life which violated *Storey I*

because Tim was denied 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 properly objected and preserved and Tim was prejudiced as absent these arguments he would have been sentenced to life.

The motion court rejected claims counsel was ineffective for failing to object to improper arguments. Tim was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984); *Williams v. Taylor*,529U.S.362,390-91(2000).

Counsel can be ineffective for failing to object. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995)(*Storey I*).

A. <u>Life Verdict As Weakness</u>

At a pretrial hearing, counsel requested prosecutor Ahsens be directed not to argue that imposing life equated to weakness because in *State v. Rousan*,961S.W.2d831,850-51(Mo.banc1998) this Court found Ahsens' argument there was improper(3rdTrialTr.37-40). Cundiff informed Ahsens *Rousan* did so hold and cautioned Ahsens not to repeat his argument(3rdTrialTr.37-40). Ahsens repeated his *Rousan* argument while counsel only objected to it as "improper" without reminding Cundiff of his pretrial directive and *Rousan* and the objection was overruled(3rdTrialTr.1697 L.19-1698 L.8). The argument here included: "Well, they ask you for mercy and they're praying for weakness"(3rdTrialTr.1698). After the objection was overruled, Ahsens repeated the same argument adding: "This whole thing is an effort to fool you"(3rdTrialTr.1698 L.9-12). To that counsel objected to the "improper personalization" which was sustained(3rdTrialTr.1698 L.13-16).

Counsel testified she should have objected based on *Rousan*(2ndR.Tr.328). Schneider ruled counsel acted competently when her objection was sustained(2ndR.L.F.794). That objection, however, was only sustained as to the repeated argument portion that constituted improper personalization and not to equating a life verdict with weakness.

Reasonably competent counsel under similar circumstances would have objected to the weakness argument based on the trial court's pretrial admonition and again relied, as they had pretrial, on *Rousan*. Tim was prejudiced because there is a reasonable probability without this argument he would have been sentenced to life. *Strickland* and *Williams*.

B. <u>Comparing The Value of Ms. Frey's Life To Tim's Life</u>

In *Storey I*, one of Hulshof's improper arguments was comparing the value of Ms. Frey's life to Tim's life. *State v. Storey*,901S.W.2d886,902(Mo.banc1995). Despite *Storey I*, Ahsens' rebuttal argument included:

> I don't want to get into the business of measuring the value of one life against another, but I don't think there is any debate that Jill Lynn Frey was a fine woman. You know most of us in this life go through our lives and don't do a great deal of harm and we don't do a great deal of good either, but this woman was doing a lot of good. And another part of the tragedy is, that that's been seized from us and taken from us.

(3rdTrialTr.1700-01). While Ahsens framed his argument in the negative, stating that he did not want to compare life values, that argument in fact urged the jury to make such a comparison. The argument told the jury that while Ms. Frey was "a fine woman," Tim was not a fine young man.

Counsel testified she was not sure whether the argument was objectionable, but could see that it asked the jury to compare the two lives' value(2ndR.Tr.357-

58). Schneider found Ahsens did not repeat the *Storey I* argument and he only fairly commented Ms. Frey was a fine person(2ndR.L.F.797).

Reasonably competent counsel under similar circumstances would have objected to the comparison argument because it repeated the improper *Storey I* life value comparison. Tim was prejudiced because there is a reasonable probability without this argument he would have been sentenced to life. *Strickland* and *Williams*.

A new penalty phase is required.

XII. LESSENING RESPONDENT'S BURDEN OF PROOF - FAILURE TO OBJECT/PRESERVE

The motion court clearly erred denying claims counsel was ineffective for failing to properly object to and preserve:

A. The prosecutor's voir dire burden of proof shifting and contrary to the MAI instructions representations telling the jury it would have to unanimously find life without was appropriate;

B. The prosecutor's voir dire there would come a time in deliberations when satisfying beyond a reasonable was not required when that is always respondent's burden;

C. Tim's guilt conviction was obtained when intoxication instruction MAI-CR3d 310.50 was given contrary to *Erwin*

because Tim was denied 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 properly objected and preserved these matters and Tim was prejudiced as his guilt conviction would have been set aside or at minimum life imposed.

The motion court rejected claims counsel was ineffective in failing to object to/preserve matters that lessened respondent's burden. Tim was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984); *Williams v. Taylor*,529U.S.362,390-91(2000). Counsel can be ineffective for failing to object. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995)(*Storey I*).

A. <u>Burden Shifting - Life As Appropriate</u>

During voir dire, respondent stated the jury would have to unanimously find life without parole was the appropriate punishment(3rdTrialTr.534). While counsel objected as a misstatement of law that objection was not carried through to the motion for new trial, and therefore, not preserved(3rdTrialSupp.L.F.11-57).

Beimdiek testified there was no reason not to have preserved her objection in the new trial motion, while Kenyon thought respondent's statement was accurate(2ndR.Tr.330-31;Ex.350 at 130-31). Schneider found respondent's statement was proper(2ndR.L.F.794).

The state is prohibited from shifting its burden to the defendant. *Sandstrom v. Montana*,442U.S.510,520(1979); *State v. Erwin*,848S.W.2d476,481-84(Mo.banc1993). Reasonably competent counsel under similar circumstances would have objected to and included in the new trial motion respondent's burden shifting statement. *Sandstrom* and *Erwin*. Additionally reasonably competent, counsel should have objected because the prosecutor's statements were contrary to

the law as provided for in the MAI instructions which require life when the jury cannot unanimously agree on an aggravator(3rdTrialL.F.181-87). Tim was prejudiced because there is a reasonable probability without the jury having heard this he would have been sentenced to life. *Strickland* and *Williams*.

B. <u>Beyond Reasonable Doubt Not Required</u>

Respondent told the venire it was respondent's burden to prove beyond a reasonable doubt unanimously at least one aggravator before the jury could consider death(3rdTrialTr.525-27). Respondent then told the venire it would proceed to then consider weighing aggravators against mitigators(3rdTrialTr.528 L.14-19). Next, respondent told the venire after weighing "you reach a point where you are no longer talking about matters being proven beyond a reasonable doubt. It is simply a matter of deciding what the penalty should be"(3rdTrialTr.528 L.20-24).

Beimdiek thought they should have objected(2ndR.Tr.329-30) while Kenyon did not(Ex.350 at 127-29). Schneider ruled counsel testified the questioning was not obviously improper(2ndR.L.F.794).

The Due Process Clause requires respondent prove each factual element of the charged offense beyond a reasonable doubt. *In re Winship*,397U.S.358,364(1970). Respondent's burden is always beyond a reasonable doubt. *State v. Phegley*,826S.W.2d348,354-55(Mo.App.,W.D.1992).

Reasonably competent counsel under similar circumstances would have objected. *Winship* and *Phegley*. Tim was prejudiced because there is a reasonable

probability without the jury being told respondent's burden was not always beyond a reasonable doubt he would have been sentenced to life. *Strickland* and *Williams*.

C. Erwin Instruction Violation

In the guilt phase (*Storey I*) Instruction 17, based on MAICR3d 310.50, told the jury:

> In determining the defendant's guilt or innocence, you are instructed that an intoxicated or drugged condition whether from alcohol or drugs will not relieve a person of responsibility for his conduct.

(1stTrialL.F.291;Br.App.A39). In *State v. Erwin*,848S.W.2d476,481-84(Mo.banc1993), this instruction was found to violate due process under *Sandstrom v. Montana*,442U.S.510(1979) because it excused the state from proving mental state beyond a reasonable doubt.

1999 counsel did not object and seek a new guilt phase based on Tim's conviction being obtained in violation of *Erwin* and *Sandstrom* and without a proper guilt phase conviction the court could not validly retry penalty. Counsel had the 1993 PCR record containing motions to set aside Tim's guilt conviction based on *Erwin* and original counsel Hirzy was ineffective for failing to challenge MAI-CR3d 310.50's validity(1stR.L.F.442-78,1104-17;2ndR.Tr.316-17;Ex.350 at113-14).

Counsel testified they should have challenged Tim's guilt conviction because it was contrary to *Erwin* and done so by filing a motion to recall the mandate(2ndR.Tr.317-18;Ex.350 at 114-15). Schneider found counsel could not be ineffective because the claim was raised in the 1993 PCR and rejected when this Court affirmed(2ndR.L.F.793). *State v. Storey*,901S.W.2d886,896(Mo.banc1995).

This Court did reject this claim on the merits in *Storey I*. Since then, however, this Court decided *Deck v. State*,68S.W.3d418(Mo.banc2002). On Deck's direct appeal, this Court found omitted paragraphs in the form mitigating circumstance instruction was not plain error. *Id.*424-25. On Deck's postconviction appeal, however, counsel was ineffective for failing to insure the jury was correctly instructed. *Id*.429-31.

Like Deck's counsel, Tim's counsel failed to insure the jury was properly instructed. Reasonably competent counsel under similar circumstances would have objected and sought to recall the guilt mandate, relying on *Erwin*. *See Deck*. Tim was prejudiced because there is a reasonable probability the mandate would have been recalled with his guilt conviction set aside. *Strickland*, *Williams,* and *Deck*.

A new guilt or at minimum new penalty phase is required.

XIII. CONFUSING PENALTY INSTRUCTIONS

The motion court clearly erred rejecting Tim was denied his rights to effective assistance of counsel when counsel failed to object and present evidence to challenge the penalty instructions as failing to properly guide the jury denying Tim's rights to due process, a fair trial and impartial jury, and to be free from cruel and unusual punishment when those were given because Tim was denied all these rights, U.S. Const. Amends. VI, VIII, and XIV, in that the evidence established jurors do not understand the instructions and counsel unreasonably failed to object and to present evidence to support a challenge and Tim was prejudiced because the less jurors understand, the more likely they are to impose death.

The penalty instructions failed to properly guide the jury. Counsel did not object to and challenge them with evidence. Tim was prejudiced because jurors who do not understand them are more likely to impose death. Tim was denied his rights to effective counsel, due process, a fair trial and impartial jury, and to be free from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

Sentencing someone to death is cruel and unusual if the punishment is meted out arbitrarily and capriciously. *Furman v. Georgia*,408U.S.238(1972). Capital trial and sentencing phases must satisfy Due Process. *Gardner v. Florida*,430U.S.349,358(1977).

A. Counsels' Testimony

Counsel had no reason for failing to object to the instructions based on Dr. Wiener's work(2ndR.Tr.364-67;Ex.350 at 87-89).

B. 29.15 Findings

Schneider found counsel was aware of Wiener's work and it was biased, flawed, not credible, and rejected in *U.S. ex rel. Free v. Peters*,12F.3d700(7thCir.1993)(R.L.F.809).

C. Counsel Was Ineffective

Wiener studied and analyzed juror understanding of MAI form penalty instructions and the specific instructions given in Tim's case(Ex.216 Affid. at 2)(Br.App.A40-A46). The study was done in conjunction with the Missouri Public Defender and available February, 1994(Ex.216 Affid. at 2). The study found jurors overall do not understand the instructions and those who do not understand are more likely to impose death(Ex.216 Affid. at 2). Wiener also found it was possible to improve juror comprehension through substituting language lay people understand(Ex.216 Affid. at 2). Wiener's study was free of the problems identified in *U.S. ex rel. Free v.*

Peters,806F.Supp.705(N.D.Ill.1992),*rev'd*.12F.3d 700(7thCir.1993)(Ex.216 Tr. at 81-84).

Based on Wiener's review of Tim's instructions, he concluded, to a reasonable degree of scientific certainty, that juror comprehension would have been no better than in his study(Ex.216 Affid. at 3).

Wiener also addressed this Court's criticisms in *State v. Deck*,994S.W.2d527,542-43(Mo.banc1999) that study participants were not jurors who deliberated. Research literature has shown deliberation does not improve jurors' understanding(Ex.216 Tr. at 82-84). Wiener completed a subsequent new National Science Foundation study(Ex.216 Tr. at 83-84). The study found deliberation had little impact on jurors' comprehension of penalty instructions and all prior findings were unchanged(Ex.216 Tr. at 84-86).

Counsel did not contact Wiener and he would have testified(Ex.216 Affid. at 4).

Reasonably competent counsel under similar circumstances would have relied on Wiener's work to challenge the penalty instructions. Tim was prejudiced because the jurors did not understand his instructions. *Strickland*. Also, Tim was denied his rights to due process, a fair trial and impartial jury, and to be free from cruel and unusual punishment.

A new penalty phase is required.

CONCLUSION

Tim Storey requests: Points VI, IX, XII vacate his convictions and sentences; Points I, II, IV, V, VI, VII, IX, X, XI, XII, XIII vacate his death sentence; Point VIII impose life without parole; and Point III a remand to allow jurors to be questioned.

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 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains _____ words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0 program. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were _____ this ____ day of _____, 2005, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65102.

_____
William J. Swift

APPENDIX

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