IN THE
MISSOURI SUPREME COURT

JOHNNY JOHNSON,	)	
Appellant,	)	
vs.	)	No. SC91787
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE MARK SEIGEL, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Johnny Johnson, was jury-tried and convicted of first degree murder, § 565.020 RSMo 2000,[1] kidnapping, § 565.110, attempted forcible rape, § 566.030 and armed criminal action, § 571.015, in the St. Louis County Circuit Court (D.L.F. 778-781).[2] The trial court sentenced Johnny to death and three life sentences, to be served consecutively (D.L.F. 884-888). This Court affirmed in *State v. Johnson*, 207 S.W.3d 24 (Mo. banc 2006).

Johnny filed a *pro se* Rule 29.15[3] motion (L.F. 7-12), which appointed counsel amended (L.F. 27-306). The motion court held an evidentiary hearing and denied relief (L.F. 608-655). Johnny timely appealed from the denial of postconviction relief (L.F. 658-660).

Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo. Const. (as amended 1982); Standing Order, June 16, 1988.

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[1] All statutory references are to RSMo 2000, unless otherwise indicated.

[2] Record citations are as follows: evidentiary hearing transcript (H.Tr.); legal file of 29.15 appeal (L.F.); trial transcript (Tr.); direct appeal legal file (D.L.F.); and exhibits (Ex.). Johnson requests that this Court take judicial notice of its files in *State v. Johnson*, S.Ct. No. 86689. The motion court took judicial notice of the underlying criminal case (H.Tr. 7).

[3] All references to rules are to VAMR, unless specified otherwise.

STATEMENT OF FACTS

Guilt Phase

Trial counsel began the defense of Johnny Johnson by admitting he committed homicide on July 26, 2002 and informing the jurors that he inherited his mental illness from both sides of his family (Tr. 813-814). Schizophrenia, limited intellectual capacity, childhood trauma, drug and alcohol use and a diminished ability to coolly reflect on his actions became the central themes of the defense strategy (Tr. 813-819). The first witness for the defense was a psychiatrist; Dr. John Rabun (Tr. 1446).

As part of a presentence evaluation conducted for a St. Louis County Court in 2001, Dr. Rabun determined that Johnny suffered from schizophrenia, undifferentiated type (Tr. 1450, 1473). He started having problems when he attempted suicide at age thirteen (Tr. 1454). Johnny had been hospitalized for depression and drug use at several mental hospitals (Tr. 1454). The doctor testified that medical professionals diagnosed Johnny with depression as a young teenager and then more psychotic diagnoses appeared as he got older (Tr.1455). Defense witnesses concentrated primarily on providing the jury the facts necessary to find mental disease or defect. The defense provided facts on issues such as poor mental functioning, sexual abuse and physical trauma (Tr. 1528-1532, 1546-1555, 1560-1564,1600-1607, 1754-1761).

The state offered the testimony of forensic psychologist Dr. Byron English in rebuttal (Tr. 1797). Dr. English conducted mental health examinations of Johnny

first pursuant to section 552.020 to determine whether he was competent to proceed to trial and later pursuant to 552.030 to determine responsibility at the time of the crime (Tr. 1803, 1817). Dr. English discussed stealing (Tr.1808), fire setting (Tr.1809), drug and alcohol abuse (Tr.1810-1812), and IQ testing (Tr.1812-1815). His diagnoses were major depressive disorder recurrent with psychotic features in partial remission, polysubstance dependency, antisocial personality disorder and borderline intellectual functioning (Tr. 1815). Dr. English opined that a person with true command hallucinations would not be able to refrain from acting upon them for any length of time (Tr. 1824). A command hallucination to kill a person would have to be acted upon "fairly immediately" (Tr. 1824). The doctor believed that the hallucinations were the result of methamphetamine use and that Johnny enjoyed these voices, sought them out and knew he did not have to follow them (Tr. 1825-1826). Because Johnny did not feel he had to act immediately the hallucinations were not the result of psychosis (Tr. 1826). English could separate Johnny's psychotic visual hallucinations from drug abuse hallucinations (Tr. 1838-1840). Because other doctors had used the diagnosis of schizoaffective disorder, Dr. English found it was in remission because Johnny was being medication compliant, even though he was still experiencing hallucinations two years later (Tr. 1841, 1862). English found Johnny was able to deliberate at the time of the crime and, in fact, planned the crime as well (Tr. 1843).

The state argued that Johnny was not normal but the mental disease evidence was nonsense (Tr. 1920-1921). In rebuttal argument the state asked the jurors to "Pick out whatever mental disease you want…" from all the myriad of labels Johnny has received from all the doctors, but the real question was "was he able to coolly reflect." (Tr.1946). The state argued that Johnny was "smart enough" and "had succeeded in manipulating the mental health system his whole life." (Tr.1956). The jury found Johnny guilty of all charges (Tr. 1871). Throughout the trial and at the time of the verdict Johnny was receiving doses of Novane an antipsychotic, Imipramine an antidepressant/antianxiety medication, Seroquel a second antipsychotic, and Valium a second antianxiety medication (Tr. 2236-2344).

Penalty Phase

The state presented evidence of what life was like for the family after losing C.W. (Tr. 1991-2033). The defense presented seventeen witnesses, five of whom were not family members (Tr. 2033-2265).

Katie Johnson testified her brother Johnny was a loner who got teased growing up for being different (Tr. 2034). She described Johnny as seeing people who were not there, hearing things and experiencing "episodes" (Tr. 2036). Johnny was sexually abused by a boy named Doug and a man named Jeff Gibbs (Tr. 2036, 2039-2040). Johnny was helpful with her kids when he was not in mental institutions (Tr. 2036-2037). She considered herself a friend of the victim's

mother and went to a memorial for C.W. (Tr. 2041). A teenaged Johnny used a lot of drugs around her (Tr. 2041).

Dr. Wanda Draper testified about the developmental stages of the average person and how Johnny's development was dramatically different (Tr. 2042-2061, 2070-2141). She studied records, interviewed family and Johnny himself before writing a report (Tr. 2046-2047). Johnny's mother was very young when she began having children and she had little time for her third child, Johnny (Tr. 2076). Little parental bonding left Johnny without a secure attachment to anyone so he suffered emotionally from neglect (Tr. 2077). Dr. Draper referred to several head injuries Johnny suffered as a child but couldn't draw any conclusion about significance because she was not a medical doctor (Tr. 2070). In addition to neglect Johnny suffered physical and verbal abuse and his mother's boyfriend tried to drown him (Tr. 2080-2081). Academic and social troubles plagued Johnny's schooling years (Tr. 2081-2082). Bed wetting continued from childhood to the present (Tr. 2082). Sexual abuse, physical abuse, drug use and alcohol use coupled with untreated mental illness and cognitive deficiencies interfered with Johnny's development (Tr. 2083-2124).

Shirley McCulloch testified she was a member of Johnny's special education team (Tr. 2064). Johnny had to repeat Kindergarten (Tr. 2065). He was sweet and loved storytelling even though he was "challenged" academically (Tr. 2066). He clung to her and she never met his father (Tr. 2067). Johnny lived in an unstable

home while many kids in the school were from very stable backgrounds (Tr. 2068).

Chris Reeves, an assistant principal at Northwest Middle School, testified that he knew Johnny was learning disabled (Tr. 2146). He looked at Johnny's IQ scores and found him to be average to below average in intelligence (Tr. 2149). Because he was in the special education program, the school administration advanced Johnny from one grade to the next for social reasons and not for academic ones (Tr. 2150).

Additional school teachers testified for Johnny, but they remembered very little about his past. Linda White testified that she taught Johnny in her special education class during the 1993 to 1994 school year (Tr. 2152). She described Johnny as a quiet kid who did not disrupt class (Tr. 2153). She did not have a definite recollection of Johnny as a student (Tr. 2154). Karen Gilbert, school counselor from North Jefferson Middle School testified she worked with Johnny and his special education teacher (Tr. 2157). She followed up with Johnny's mother when he attempted suicide (Tr. 2159). She remembered he was afraid he would go to hell if he took his own life (Tr. 210). She remembered he had red hair and brothers (Tr. 2160). Susan Betts knew Johnny at a time when he was vulnerable in seventh grade (Tr. 2162- 2163). She taught special education classes (Tr. 2163). She remembered the other children calling Johnny names like stupid, dumb and evil (Tr. 2165). The kids also said that he would someday kill someone because he was so bad (Tr. 2165). Johnny did not react; he just put his head down

and withdrew (Tr. 2165). No educator recalled the day to day life of Johnny during his school years.

Family members testified for Johnny that they still loved him no matter what he had done (Tr.2173-2265). Family members testified to instances of trauma, abuse and history of mental issues during Johnny's life (Tr. 2185, 2186, 2198, 2206, 2211, 2214, 2225, 2245, 2252, 2259, 2262). The defense recalled social worker Dahley Dugbatey to testify about times when Johnny spoke up for her while she was working with him (Tr. 2237-2243). The defense strategy in penalty phase was to prove that Johnny's mental illness colored every facet of his life (Tr. 2286-2302). The jury sentenced Johnny to death (Tr. 2318, D.L.F. 797-798).

Post-conviction

Johnny filed a *pro se* Rule 29.15 motion (L.F. 7-12), which appointed counsel amended (L.F. 27-306). The motion court, the Honorable Mark Seigel, held an evidentiary hearing on November 30, 2009; December 1 and 2, 2009 and July 30, 2010 (L.F. 608-655).

Psychiatrist, Dr. Pablo Stewart, testified that Johnny suffered from chronic psychotic disorder not otherwise specified, mood disorder not otherwise specified, polysubstance dependence, post-traumatic stress disorder and, cognitive disorder not otherwise specified (H.Tr.196-198). Dr. Stewart determined Johnny was not responsible for his actions at the time of the crime (H.Tr.198). In reference to statutory mitigating circumstances, the doctor found Johnny was under the

influence of extreme mental and emotional disturbance and his ability to conform his conduct to the requirements of law was substantially impaired (H.Tr. 199).

Pamela Strothkamp testified she was Johnny's special education teacher during the 1991 to 1992 school-year (H.Tr. 400). She remembered Johnny in detail, just as she remembered all of her students (H.Tr. 400). Johnny was in her first special education class and he stood out from the other students because he suffered from auditory processing disorder (H.Tr. 402-403). Ms. Strothkamp studied the condition because of her own son and worked especially hard to get Johnny the help he required to be able to achieve in school (H.Tr. 406-410). She observed that Johnny came from poverty, he often smelled of urine and sex, and had bruises on his body consistent with abuse (H.Tr. 410,417-418, 443). She called child protective services a number of times concerning Johnny and talked with her principal about her concerns (H.Tr. 442-444). Johnny was about two years older than the other children because he had been held back on two different occasions in school (H.Tr. 414). She remembered that Johnny attempted suicide during the year and never returned to school (H.Tr. 473). She was ready willing and available to testify at Johnny's trial had the trial attorneys contacted her (H.Tr. 445). Lisa McCulloch, the Mitigation Specialist for the trial team, testified she discovered Ms. Strothkamp's name in school records but did not follow up after a couple of failed attempts to contact her by telephone (H.Tr. 571-573).

Social Worker, Vito Bono, evaluated a seventeen year old Johnny in 1995 (H.Tr. 476). Mr. Bono met Johnny after he was admitted to the emergency room

suffering from suicidal thoughts (H.Tr. 477). Mr. Bono wrote a psycho-social assessment after Johnny was admitted for his own safety and treatment (H.Tr. 479). Johnny was living in a dysfunctional situation with an abusive man, felt constantly suicidal and had been purposely injuring himself (H.Tr. 479, 485).

Dr. Brooke Kraushaar evaluated Johnny to determine if he understood his right to remain silent in the face of questioning by the police (H.Tr. 498). Through her testing she looked at Johnny's intelligence, emotional functioning and actual understanding of the language used by police in the standard *Miranda* warnings (H.Tr. 499). Dr. Kraushaar found Johnny was deficient in reading comprehension, had very poor memory and did not understand the words used by the police when they explained his rights (H.Tr. 501, 505,509-510). She determined that Johnny did not have the capacity to validly waive his constitutional rights at the time he made his statements to the police (H.Tr. 512-513).

Dr. Craig Beaver, a neuropsychologist, also evaluated Johnny as part of the postconviction process (H.Tr. 584, 602-603). He reviewed thousands of records, conducted neuropsychologial testing on Johnny and conducted numerous interviews before arriving at his conclusions about Johnny's brain function (H.Tr. 603-608). Dr. Beaver found that Johnny suffered from organic brain syndrome, and neurocognitive deficits and disabilities that exacerbate his psychiatric diseases (H.Tr. 607-612, 621-622). The doctor noted "red flags" for severe neuropsychological issues with Johnny including: developmental delays, numerous head injuries, learning disabilities, psychiatric hospital admissions and

family genetic traits (609-620). Johnny also exposed his brain to alcohol, illegal drugs, and toxic chemicals such as gasoline and butane which affect brain development and function (H.Tr. 623-629). Dr. Beaver found that Johnny suffered from organic brain syndrome starting as early as kindergarten and his later drug abuse as a teenager would have exacerbated the disease (H.Tr. 721). Johnny's organic brain syndrome, combined with psychiatric disorders was a permanent condition that affected Johnny's ability to think, problem solve, act rationally, and deal with stress (H.Tr. 641).

Johnny's trial attorneys, Bevy Beimdiek and Beth Kerry testified about their representation (L.F. 360-481, 482-584). Both attorneys understood from the beginning of the case that Johnny suffered from a severe mental disease and diminished intellectual functioning (L.F. 368-369, 488, 492). Possible mental retardation was indicated in at least twelve documents in the records the trial team collected (L.F. 492). Through investigation they determined Johnny was physically, sexually and psychologically abused (L.F. 489-490).

Neither attorney could remember why the possibility of brain damage (indicated by early head injuries and suggested by defense experts) was not investigated by hiring a neuropsychologist nor could they state a strategic reason for failing to do so (L.F. 373, 498, 518, 531). They testified they knew Johnny suffered head injuries as a child (L.F. 371, 489). Each attorney recalled a discussion with one or more of their experts suggesting a neuropsychological evaluation of Johnny (L.F. 371-372, 491-492). Attorney file notes indicated that

both Dr. Draper and Dr. Dean suggested a neuropsychological evaluation (L.F. 517-518, 372-373, Ex. 12.pp. 3295-3296). Ms. Beimdiek recalled obtaining the name of Dr. Terry Price, a neuropsychologist from Kansas City, but did not remember why she did not contact him (L.F. 372-373). Her normal practice was to make a list and note why an action was taken or not taken on the case (L.F. 373). Neither trial attorney made notes in the file indicating why a neuropsychologist was not contacted (L.F. 374-375, 531).

On April 5, 2011, the motion court issued its Findings of Fact, Conclusions of Law, Order, Judgment and Decree of Court denying relief on the postconviction action (L.F. 608-657). This appeal follows.

POINTS RELIED ON

I. Counsel Failed to Adduce Readily-Available Evidence of Johnny's Brain Damage

The motion court clearly erred in denying Johnny's claim that counsel was ineffective for failing to adduce readily-available evidence of his brain damage and neuropsychological impairments because this denied him effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§ 10, 18(a), 21, in that both experts counsel hired suspected brain damage and recommended that counsel obtain neuropsychological testing for brain impairment.

Johnny was prejudiced because, had counsel consulted with a neuropsychologist, they would have discovered Johnny's brain damage and his neuropsychological impairments which affected Johnny's ability to think, problem solve, act rationally and deal with stress. Had jurors heard this evidence, a reasonable probability exists that they would not have found Johnny deliberated and would have likely imposed a life sentence.

Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995);

Powell v. Collins, 332 F.3d 376 (6th Cir. 2003);

Porter v. McCollum, 130 S.Ct. 447 (2009); and

Sears v. Upton, 130 S.Ct. 3259 (2010).

II. Counsel Failed to Investigate and Present Testimony of Pamela Strothkamp, one of Johnny's Teachers who Witnessed the Abuse and Neglect he Suffered as a Child

The motion court clearly erred in denying Johnny's claim that counsel was ineffective for failing to investigate and present the testimony of Pamela Strothkamp, one of Johnny's Special Education teachers, because this denied him effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§ 10, 18(a), 21, in that Ms. Strothkamp was listed in the school records and was readily available and willing to testify, counsel's investigator did not interview Ms. Strothkamp, relying on Johnny's assessment that Ms. Strothkamp did not like him and would be unhelpful, and counsel made no strategic decision not to investigate.

Johnny was prejudiced because Ms. Strothkamp witnessed the abuse and neglect Johnny suffered as a child, reported the abuse to a child advocacy hotline, saw how other students ridiculed and harassed Johnny, opined that he had an auditory processing disorder, making it hard for him to understand and deliberate, and detected neurological problems that needed to be addressed. Ms. Strothkamp's testimony would have supported counsel's defense that Johnny could not deliberate and would have supported a life sentence. Ms. Strothkamp was not cumulative to other teachers who testified, because she witnessed his neglect and abuse, which the State

disputed at trial, she called a hotline to report the abuse, and she noted his auditory process disorder which was not presented at trial.

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

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

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004); and

Simmons v. Luebbers, 299 F.3d 929 (8th Cir. 2002).

III. Failure to Adduce Evidence in Support of Johnny's Motion to Suppress His Statements

The motion court clearly erred in denying Johnny's claim that counsel was ineffective for failing to present evidence in support of his motion to suppress his statements and evidence at trial to support the instruction on determining voluntariness of statements because this denied Johnny effective assistance of counsel, his rights against self-incrimination, a fair trial and due process and non-arbitrary or capricious sentencing, U.S. Const., Amend. V, VI, VIII, XIV; Mo. Const., Art. I, §§ 10, 18(a), 19, and 21; and MAI-CR3d 310.06, in that trial counsel knew Johnny had problems understanding his rights, was slow, lacked education, and had a history of mental illness. Johnny's mental condition was relevant to whether his statements were voluntary and whether he could knowingly and intelligently waive his rights.

Johnny was prejudiced because, had counsel presented evidence of Johnny's mental condition and his inability to understand his rights, the motion to suppress would likely have been granted and alternatively, the jury could have considered this evidence in determining whether his statements were voluntary and reliable and whether his waiver of his rights were knowing and intelligent. The State emphasized the statements and the jury considered them in finding Johnny guilty. Had counsel adduced this

evidence, the jury likely would not have found Johnny guilty of first degree murder and would not have sentenced him to death.

Colorado v. Connelly, 479 U.S. 157 (1986);

Blackburn v. Alabama, 361 U.S. 199 (1960);

Fikes v. Alabama, 352 U.S. 191 (1957); and

State v. Flower, 539 A.2d 1284 (N.J. Sup. 1987).

IV. Motion Court Did Not Issue Findings on Claim 8 (f)

The motion court clearly erred in denying Claim 8 (f) of Johnny's Rule 29.15 motion without entering specific findings of fact and conclusions of law because this failure denied Johnny due process of law, U.S. Const., Amend. IV; Mo. Const., Art. I, § 10, in that the motion court skipped from its findings on Claim (e) to Claim (g) and the other findings are not sufficient to enable meaningful appellate review of the claim on counsel's failure to adduce evidence to rebut the state's expert testimony.

Barry v. State, 850 S.W.2d 348 (Mo. banc 1993);

Ervin v. State, 80 S.W.3d 817 (Mo. banc 2002);

Parker v. Dugger, 498 U.S. 308 (1991);

Ford v. Wainwright, 477 U.S. 399 (1986); and

Rule 29.15 (j).

V. Counsel Failed to Rebut State's Expert Testimony that Suggested Johnny's Actions Resulted From Substance Abuse, Not His Mental Illness

The motion court clearly erred in denying Johnny's claim that counsel was ineffective for failing to rebut Dr. English's testimony, because this denied him effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§ 10, 18(a), 21, in that English's testimony that Johnny's actions resulted from his drug use and not his mental illness should have been refuted by a qualified expert who would testify that mental illness and substance abuse are interrelated, hallucinations are real whether induced by drugs or by a psychotic illness, command hallucinations are not always followed immediately, and when a patient suffers from a psychotic disorder such as schizophrenia, a personality diagnosis is inappropriate.

Johnny was prejudiced because English's testimony went unrebutted and the jurors were instructed that Johnny's drug use would not relieve him of responsibility and that mental disease or defect did not include antisocial conduct. Based on English's testimony, the jury found Johnny guilty of first degree murder and imposed death, disregarding Johnny's mental illness and his inability to conform his conduct to the requirements of law. Had counsel rebutted his testimony, the jury likely would have found that Johnny could not deliberate and likely would have imposed a life sentence.

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

Ervin v. State, 80 S.W.3d 817 (Mo. banc 2002);

Parker v. Bowersox, 188 F.3d 923 (8th Cir. 1999); and

Kangail v. Barnhart, 454 F.3d 627 (7th Cir. 2006).

ARGUMENT

I. Counsel Failed to Adduce Readily-Available Evidence of Johnny's Brain Damage

The motion court clearly erred in denying Johnny's claim that counsel was ineffective for failing to adduce readily-available evidence of his brain damage and neuropsychological impairments because this denied him effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§ 10, 18(a), 21, in that both experts counsel hired suspected brain damage and recommended that counsel obtain neuropsychological testing for brain impairment.

Johnny was prejudiced because, had counsel consulted with a neuropsychologist, they would have discovered Johnny's brain damage and his neuropsychological impairments which affected Johnny's ability to think, problem solve, act rationally and deal with stress. Had jurors heard this evidence, a reasonable probability exists that they would not have found Johnny deliberated and would have likely imposed a life sentence.

Trial counsel knew that Johnny was slow and not very smart (L.F. 367-368, 488, 515-516). He had trouble understanding basic concepts and could not remember things (L.F. 367, 516). Counsel thought he might be mentally retarded (L.F. 367-368). School records confirmed most of counsel's impressions. Johnny failed Kindergarten and First Grade and was in special education classes until he

dropped out of school in the Eighth Grade (H.Tr. 608-609). He had a Learning Disorder (H.Tr. 609). The records noted other neuro-cognitive limitations such as Dyslexia, and Attention Deficit Disorder (H.Tr. 621). Johnny's medical records also raised red flags about Johnny's functioning (H.Tr. 610, 613-614). He had sustained head injuries when he was 2, 3, and 4 years old (H.Tr. 610). At least two of these injuries required stitches (H.Tr. 610). When counsel asked Johnny about his head injuries, he confirmed that he had fallen down the stairs when his mother was holding him and hit his head on a wood burning, pot bellied stove (L.F. 489).

Trial counsel hired two experts, a psychologist to evaluate Johnny's mental state at the time of the crime and a child development expert (L.F. 373, 491). Both experts told counsel that Johnny should be tested by a neuropsychologist to determine whether he suffered from brain damage (L.F. 371-372, 373, 452, 453, 491, 517). Dr. Dean even provided counsel with the name of a trial attorney who was working with a neuropsychologist in a civil case (L.F. 372, 491, 517). Counsel called the attorney, got the name and contact information of the expert, Dr. Terry Price, but failed to follow-up (L.F. 372, 491). Counsel could not justify their failure (L.F. 373, 491, 498, 531). If counsel would have had a strategic reason, they would have documented it in their file, but they did not (L.F. 373-374, 498).

Had counsel consulted a neuropsychologist such as Dr. Craig Beaver, they would have discovered that Johnny does have brain damage. Dr. Beaver evaluated

Johnny and conducted neuropsychological testing (H.Tr. 603). He interviewed relatives and teachers (H.Tr. 603-604). He reviewed background records (H.Tr. 604). Dr. Beaver administered the following tests:

Weschler Adult Intelligence Scale, Third Edition

Rey 15-Item Memory Test

Test of Memory Malingering (TOMM)

SIRS

Grooved Pegboard

Controlled Oral Word Fluency Test

Wechsler Test of Adult Reading

Rey Complex Figure Test

Rey Auditory Verbal Learning Test

Weschler Memory Scales, Third Edition, Abbreviated form

Stroop Test

Trail-Making Test

Consonant Trigrams

Categories Test

Wisconsin Card Sorting Test

(H.Tr. 606).

The testing showed clear evidence of organic syndrome and significant difficulties in Johnny's thinking abilities (H.Tr. 607, 629). The tests for malingering showed that Johnny's tests were reliable (H.Tr. 626).

Dr. Beaver found many deficits. Johnny's intellectual functioning was in the low average range, consistent with his prior IQ tests (H.Tr. 607). He was particularly weak in language areas (H.Tr. 608). But, Dr. Beaver explained that IQ scores in and of themselves are not a predictor of brain damage; instead a number of specific, objective tests are necessary to assess brain functioning (H.Tr. 626-627).

Johnny had significant delays in motor development, coordination, attentional problems and auditory processing problems (H.Tr. 608). Johnny had a substantial auditory processing deficit (H.Tr. 612). His brain's ability to process information quickly and effectively was impaired (H.Tr. 612). As a result, he missed a lot of information (H.Tr. 612). He could understand information if it was provided one-on-one and slowly, but group settings were much more difficult (H.Tr. 612-613). He did particularly poorly on testing requiring intentional tasks, particularly if auditory information was involved (H.Tr. 628).

Johnny had repeated head injuries (H.Tr. 613-614, 615). When Johnny was only two years old, he fell off a bunkbed and hit his head on a nightstand (H.Tr. 615). This injury required several stitches (H.Tr. 615). The following year he fell down some concrete steps and appeared dazed afterwards (H.Tr. 615). The next injury was particularly significant (H.Tr. 615). When Johnny was little, his mother was carrying him down the stairs and dropped him (H.Tr. 615). Johnny fell and hit the stairs and then a stove (H.Tr. 615). Like his earlier injury, this one required a number of stitches (H.Tr. 615). He was treated at Meacham Clinic

(H.Tr. 615). Johnny also sustained injuries outside the home. Once, he was kicked in the head until he was bleeding out of one of his ears (H.Tr. 615). On another occasion, he got in a fight and the boys slammed boards on his head and knocked him out (H.Tr. 615). During another fight at 19 years old, he was knocked out (H.Tr. 615). Like NFL players who sustain many minor head injuries, over time they have a cumulative effect on brain functioning (H.Tr. 614-615).

Dr. Beaver noted Johnny's significant psychiatric problems, but his focus was on Johnny's brain dsyfunction (H.TR. 621-622). Johnny suffered from Depression, a Psychotic Disorder, Post Traumatic Stress Disorder, neurological damage and cognitive limitations (H.Tr. 635).

Johnny's poly-substance dependency issues exacerbated his psychological, neurological and cognitive problems (H.Tr. 622, 637). Johnny started drinking at a young age (H.Tr. 623). He started using other drugs, such as IV methamphetamine, cocaine, LSD and huffing toxic chemicals (H.Tr. 623). People are at greater risk for having significant chemical dependency problems when they have a family history of chemical dependency or abuse, psychiatric problems, significant cognitive limits and abusive and unstable family situations. Johnny had all these risk factors (H.Tr. 624). His drug abuse added insult to injury from a neuro-developmental perspective (H.Tr. 624-625). He already had an impaired brain as evidenced by his failing Kindergarten and first grade, but his later alcohol and drug use exacerbated the problem (H.Tr. 625, 632, 721).

Johnny's organic brain syndrome, combined with psychiatric disorders was a permanent condition that affected Johnny's ability to think, problem solve, act rationally, and deal with stress (H.Tr. 641).

Findings

The motion court denied this claim (L.F. 623-631). The court found that counsel adequately investigated Johnny's brain damage by hiring Dr. Dean, whose testing showed no brain damage (L.F. 627). Counsel reasonably relied on Dean's testing and did not pursue further evaluations (L.F. 628). Counsel need not shop for experts (L.F. 629). The court discounted Dr. Beaver's findings, since he was the first doctor to find organic brain damage in more than 20 years of mental health evaluations (L.F. 628). Dr. Beaver failed to consult with state experts (L.F. 628). Johnny's drug abuse could have caused his brain damage (L.F. 629). Dr. Beaver was paid for his testing, calling into question his bias and neutrality (L.F. 629). Dr. Beaver failed to specifically provide a diagnosis on guilt phase issues (L.F. 629). Dr. Beaver's testimony would not have aided Johnny's defense or changed the outcome (L.F. 630).

These findings are clearly erroneous and should be reversed.

Standard of Review

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has

the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

To establish ineffective assistance, Johnny must show counsel's performance was deficient and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." . . ." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original). In deciding if prejudice resulted, this Court must "evaluate the totality of the evidence - - 'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Id.* at 536, quoting *Williams*, 529 U.S. at 397-398 (emphasis in original).

Even though both trial attorneys testified they had no strategic reason for failing to conduct neuropsychological testing, the motion court found they must have relied on Dr. Dean's testing – a Shipley test that provided a general estimate of one's IQ and a Stroop test (L.F. 627). The court ignored that counsel was not even familiar with these tests and thought it would be better to have a full battery of testing to determine brain damage (L.F. 455, 530-531). Counsel could not say that Dean's testing was the reason they did not follow-up with a neuropsychologist to test for brain damage (L.F. 376, 531). Dr. Dean was not a neuropsychologist qualified to assess for brain damage (L.F. 375, 456). Her general estimate of Johnny's IQ was no substitute for neuropsychological testing.

Neuropsychologists would never use the Shipley test to determine if a patient had brain damage (H.Tr. 691). The Shipley is a self-administered IQ test, and not properly used to determine neuropsychological functioning (H.Tr. 718). The test is a gross screening device to obtain a general estimate of one's IQ (H.Tr. 718). A qualified neuropsychologist would not make a diagnosis of brain damage based on the limited tests Dr. Dean administered (H.Tr. 691).

Thus, counsel failed to present evidence of Johnny's organic brain damage, not because they investigated it and made a strategic decision not to pursue it. The information was not presented to the jury because counsel never took the time to follow-up on their experts' advice and pursue it. Counsel's actions are like those in *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995).

In *Glenn*, Glenn's family always considered him "slow." *Id.* at 1208. His school history indicated problems, starting in the first grade, when he was assigned to a program for "educable mentally-retarded children." *Id.* Glenn had a difficult home life where he was beaten. *Id.* He was a hyperactive child. *Id.* A neuropsychologist who tested Glenn during postconviction proceedings found that Glenn had brain damage. *Id.* His neurological deficits would affect his behavior. *Id.* Glenn would not have been able to plan the crime. *Id.*

Glenn's trial counsel was ineffective for failing to seek expert testimony regarding defendant's organic brain problem. *Id.* at 1211. Court-appointed evaluations by a psychiatrist and psychologist that found the "offense was not the product of psychosis, mental retardation, organic brain disease, other mental

illness, lack of education, unusual emotional pressure or inadequate coping skills on the part of Mr. Glenn" did not excuse counsel's failure to test for organic brain damage. *Id*. at 1210. Instead, counsel should have scrutinized the court-ordered evaluations, much of which was inconsistent with Glenn's history. *Id.* Had counsel done their homework, they would have been prepared to challenge the superficial reports and produce evidence of organic brain disease. *Id*.

Here, too, counsel failed to follow-up on Johnny's history of head injuries, his struggles in school, their impressions that he was slow, and their experts' recommendations to test for brain damage. *Id*. Like Glenn's counsel, court-appointed experts found Johnny competent, though mentally ill and in need of extra guidance and support to understand the proceedings. *Id*. This should have alerted counsel to the need for further testing.

The motion court ignores that Dr. Beaver was the first doctor to find organic brain damage in more than 20 years of mental health evaluations, because he was the first and only doctor who tested for it. And, whether Dr. Beaver was credible was for the jury, not the state postconviction judge, to determine. *Kyles v. Whitley*, 514 U.S. 419, 449, n.19 (1995) (a state postconviction's judge's finding that a witness is not convincing does not defeat a claim of prejudice. That observation could not substitute for the jury's appraisal at trial). Credibility of a witness is for the jury, not the postconviction court. *Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995).

What is particularly troubling is counsel's failure to follow-up on their own experts' opinions that Johnny needed independent neuropsychological testing to determine whether he had brain damage. Counsel's failures are similar to those found ineffective in *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003).

Powell was convicted of aggravated murder arising from his kidnapping, attempted rape and murder of a seven-year-old girl. *Id*. at 381-382. Counsel had reviewed juvenile court records and psychological evaluations revealing mental deficiencies. *Id*. The evaluations suggested a "neurological component underlying some of his acting out behavior." *Id*.

The court appointed a psychiatrist to evaluate Powell. *Id*. At the competency hearing, the psychiatrist testified that Powell was competent, but had psychological deficits, including Conduct Disorder and Anti-Social Personality Disorder. *Id*. at 383. He was impulsive, did not subject his acts to critical thinking, and acted just because he felt like it. *Id*. The expert testified in guilt phase that Powell lacked a nurturing environment as a child, had taken anti-psychotic medications, his IQ was within the mild and borderline ranges of mental retardation, he expressed antisocial behavior and had psychological deficits. *Id*. Counsel recognized the need for a neuropsychologist to examine Powell, but failed to obtain the testing because the court denied a continuance. *Id*.

Counsel was ineffective. Counsel had a duty to hire a qualified expert to assess Powell's organic brain damage. *Id*. at 400. Powell was prejudiced. The psychological evidence presented differed from neuropsychological testing. *Id*. at

395. An expert qualified to conduct such testing may have provided jurors facts and information to consider as mitigation that may have led to a different sentencing recommendation. *Id*. Had the neuro-psychological testing and brain damage been presented, a reasonable probability existed the outcome would have been different. *Id*.

Here, too, counsel got it wrong. Counsel's psychologist was not an expert qualified to determine brain damage, as she herself indicated to counsel. Both Dr. Dean and Dr. Draper told counsel they needed to follow-up with a qualified expert to test for brain damage, but they simply failed to do it. The motion court's suggestion that other experts, not qualified to test for brain damage, were an adequate substitute is simply wrong. The jury did not hear readily available evidence of Johnny's brain damage that would impact his ability to deliberate, calling into question his conviction for first degree murder and whether he was deserving of death.

Prejudice Analysis

Contrary to the motion court's findings, Johnny was prejudiced. Dr. Beaver's testimony about Johnny's brain damage and difficulty in functioning likely would have made a difference. "[E]vidence of impaired intellectual functioning is inherently mitigating…." *Hutchison v. State*, 150 S.W.3d 292, 308 (Mo. banc 2004) (relying on *Tennard v. Dretke*, 542 U.S. 274, 288 (2004)). Brain abnormality and cognitive defects are mitigating evidence jurors should consider. *Porter v. McCollum*, ____ U.S. ____, 130 S.Ct. 447, 455 (2009).

Evidence of brain damage is relevant and counsel should present it. *Sears v. Upton*, ___ U.S. ___, 130 S.Ct. 3259 (2010). Sears' counsel failed to adequately investigate and present evidence of Sears' frontal lobe abnormalities. *Id*. at 3262. On postconviction, neuro-psychological testing showed Sears' cognitive functioning was severely impaired. *Id*. His pronounced frontal lobe damage diminished his judgment and reasoning. *Id*. at 3263.

Sears' state postconviction judge incorrectly applied the law in determining prejudice. *Id*. at 3264-3265. Since counsel presented some mitigation, Sears' judge found it impossible to determine what effect the brain damage evidence would have had on jurors. *Id*. That was not the proper inquiry. The judge should have considered both the evidence at trial and on habeas and reweighed it. *Id*. at 3266. A proper prejudice analysis requires a probing inquiry that considers all the evidence, not just that presented at trial. *Id*.

Here, too, the motion court incorrectly applied the law in determining prejudice. Because Johnny had multiple psychological evaluations and the jury heard much evidence about his mental problems, the court found this adequate (L.F. 630-631). The court clearly erred. It should have reviewed what counsel did present, and then add the evidence of brain damage to determine prejudice. Had the court engaged in such an analysis, it would have found prejudice, both in the guilt and penalty phases.

In guilt phase, the prosecutor had questioned the defense's expert, saying Dr. Dean had an interest, bias, and was against the death penalty (Tr. 1907, 1947-

1948). The prosecutor accused her of "cooking her report" (Tr. 1947). The state suggested it was "nonsense" to argue how mentally disturbed this guy is (Tr. 1920-1921, 1956). Even though he had some problems, the State suggested he was thinking clearly that morning and knew what he was doing (Tr. 1921). He was "smart enough" (Tr. 1956).

Had counsel presented the objective evidence of brain damage, the jury would have realized that Johnny does not think clearly, he does not reason normally, he cannot problem solve and act rationally because of brain dysfunction (H.Tr. 641). His organic brain damage could not have been dismissed as "nonsense." His head injuries, requiring stitches could not have been portrayed as "cooked up" by some biased expert. The neuropsychological test results, when added to the evidence counsel did present, supported counsel's defense that Johnny did not deliberate.

In penalty phase, the brain damage would have been compelling mitigating evidence the jury never heard. The entire theme of the State's penalty phase closing argument was that Johnny made his own choices and it was time for him to pay for those choices (Tr. 2307, 2309, 2310, 2311). But, what the jury did not know is that like Sears, Johnny had organic brain damage that diminished his judgment and reasoning. *Sears, supra* at 3263. He did not choose to have his head cracked open at age two and go to the doctor to have it stitched up. Johnny did not choose to fall down a flight of stairs while in his mother's arm and hit his head on a pot-belly stove, again requiring stitches. He did not choose all the pain

and damage to his brain while just a child. He did not choose to fail Kindergarten and First Grade. Johnny never chose special education. The jury should have known that Johnny's brain was damaged and that damage impacted the choices he made.

Without this evidence, the jury struggled with the decision of whether to assess punishment at death or life (Tr. 2314-2318). The jury deliberated for more than seven hours (Tr. 2314, 2318). More than five hours into their deliberations, they wondered if they were unable to come to a unanimous conclusion, what would be the next step (Tr. 2317). The jurors even considered giving the decision over to the judge, because at one point they could not reach a decision (D.L.F. 882-883). But, they decided that would be a mistake (D.L.F. 882-883) and kept deliberating. Finally, at 10:25 p.m., the jury returned a death verdict (Tr. 2318). Can this Court really say that all the evidence of brain damage does not undermine the confidence in that outcome, as did the motion court? A fair review of the entire record, leaves the firm conviction that a mistake has been made, that a life sentence was a reasonable probability.

This Court should reverse.

II. Counsel Failed to Investigate and Present Testimony of Pamela Strothkamp, one of Johnny's Teachers who Witnessed the Abuse and Neglect he Suffered as a Child

The motion court clearly erred in denying Johnny's claim that counsel was ineffective for failing to investigate and present the testimony of Pamela Strothkamp, one of Johnny's Special Education teachers, because this denied him effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§ 10, 18(a), 21, in that Ms. Strothkamp was listed in the school records and was readily available and willing to testify, counsel's investigator did not interview Ms. Strothkamp, relying on Johnny's assessment that Ms. Strothkamp did not like him and would be unhelpful, and counsel made no strategic decision not to investigate.

Johnny was prejudiced because Ms. Strothkamp witnessed the abuse and neglect Johnny suffered as a child, reported the abuse to a child advocacy hotline, saw how other students ridiculed and harassed Johnny, opined that he had an auditory processing disorder, making it hard for him to understand and deliberate, and detected neurological problems that needed to be addressed. Ms. Strothkamp's testimony would have supported counsel's defense that Johnny could not deliberate and would have supported a life sentence. Ms. Strothkamp was not cumulative to other teachers who testified, because she witnessed his neglect and abuse, which the State

disputed at trial, she called a hotline to report the abuse, and she noted his auditory process disorder which was not presented at trial.

Counsel's investigator, Lisa McCulloch, learned that Pamela Strothkamp was Johnny's 6th grade teacher (H.Tr. 570, 571). She left two messages at two different telephone listings she found with that name, but did not follow-up, because Johnny told McCulloch not to call Ms. Strothkamp (H.Tr. 573). She dropped the investigation and made no further attempts to find her (H.Tr. 573). McCulloch never told Johnny's trial attorneys she had dropped this investigation (H.Tr. 578).

Counsel interviewed each potential penalty phase witness before deciding whether to call them to adduce mitigating evidence (L.F. 463, 528). They talked to several teachers and had many testify (L.F. 463). But none of these teachers testified about witnessing physical abuse or neglect (L.F. 493).

Counsel knew that Johnny was not very smart, was very depressed and probably mentally ill (L.F. 488). Johnny was soft-spoken, quiet and not an active participant in the case (L.F. 367). He did not direct the attorneys' activities (L.F. 367). Counsel did not rely on Johnny to direct their investigation as he had trouble understanding the most basic legal concepts and had a bad memory (L.F. 367-368). Counsel initially believed Johnny could be mentally retarded (L.F. 367-368).

Had the defense made reasonable efforts, they could have contacted Ms. Strothkamp; she was not hard to reach (Tr. 565-568). She responded to the single

letter written to her about Johnny Johnson and his case (Tr. 566). Once Ms. Strothkamp was interviewed, she provided information about Johnny that none of the other teachers had provided (L.F. 493). Ms. Strothkamp remembered Johnny, because he was in the first class she had taught (H.Tr. 400). She only had 10-12 students in that first Special Education class (H.Tr. 400).

Johnny was dirty, he smelled and reeked of body odor and urine (H.Tr. 417). He wore filthy clothes, urinated on himself, and did not change into clean clothes (H.Tr. 417-418). Ms. Strothkamp tried to help Johnny. She called his mother, but she blew her off, saying "boys will be boys" and he was hard to control (H.Tr. 418-419). Ms. Strothkamp realized that Johnny's mother had many problems and was overwhelmed by her parenting responsibilities (H.Tr. 419). Ms. Strothkamp brought clothes for Johnny to wear (H.Tr. 444). On picture day, she brought combs, brushes, and clothes for Johnny and made him go to the bathroom to clean up (H.Tr. 444). She remembered combing his hair for the picture (H.Tr. 445). While Ms. Strothkamp felt sorry for Johnny and wanted to help him, she felt relieved when he missed school (H.Tr. 418). She was able to breathe in her own classroom without being overcome by his smell (H.Tr. 418).

Ms. Strothkamp knew Johnny was neglected, but became even more concerned for his safety when she saw bruises on his body (H.Tr. 442-443). She saw bruises the size of thumbprints on the back of neck, at the side of his throat and on his back (H.Tr. 443). She also noticed bruises on his legs (H.Tr. 444). She went to her principal and told him about her concerns (H.Tr. 458-461). He told

her to make sure the nurse saw Johnny and then she should call Child Protective Services Hotline, so she did (H.Tr. 442, 458-461, 470-471).

Johnny was two years older than his classmates, since he had failed Kindergarten and First Grade (H.Tr. 409-12, 414). Johnny was 13 years; the others were 11 (H.Tr. 414). Johnny's classmates picked on Johnny, ridiculed him, and made fun of him (H.Tr. 416-417). They treated him like he was stupid (H.Tr. 417). Johnny responded in a socially awkward way (H.Tr. 438). He did not understand social boundaries (H.Tr. 438). He walked around and smiled with a goofy or dumb grin on his face (H.Tr. 438). He just did not seem to fit in and was not with the program (H.Tr. 416-417, 438).

Ms. Strothkamp tried to reach out to Johnny's mother and made home visits, because she would not come to school (H.Tr. 410-411). Strothkamp tried to involve Johnny in activities, like skating, baseball and movies that she arranged for impoverished kids (H.Tr. 411-12). She even arranged for another parent to pick him up and take him to the activities, but he did not attend a single activity (H.Tr. 411-412). As the school year wore on, Johnny seemed more confused and started missing school (H.Tr. 471). He was not forthright when she asked why he was absent (H.Tr. 471). He seemed tired every morning (H.Tr. 471). He eventually tried to commit suicide (H.Tr. 414).

Ms. Strothkamp reviewed Johnny's school records from Kindergarten to Sixth Grade (H.Tr. 423-26). He displayed neurological problems and school personnel thought he needed to see a doctor (H.Tr. 427). He had problems with

spatial, perceptual, fine motor coordination, gross motor skills and eye-hand coordination (H.Tr. 427). His IQ tests consistently placed him in the 80s or low-average range (H.Tr. 431-434). He was Learning Disabled (H.Tr. 431).

Ms. Strothkamp also thought Johnny had an Auditory Processing Disorder (H.Tr. 402-403). She was familiar with the disorder and its symptoms, because her own son had a head injury and she had researched it (H.Tr. 402-403). Johnny could not respond to spoken words and lacked an understanding of language (H.Tr. 406). Strothkamp recommended testing – a full school evaluation including tests to determine his academic functioning, cognitive functioning, and his speech, language and auditory processing difficulties (H.Tr. 406-407).

Ms. Strothkamp did not remember Johnny's grades (mostly Bs and Cs), but the grades were based on special education goals and they worked at a third grade level (H.Tr. 452-456, 466, 469-470). Johnny had been in Special Education classes since Kindergarten (H.Tr. 456). He was able to complete his assignments with assistance (H.Tr. 466).

Johnny got along with others, did not pick fights, did not argue with her, and was compliant (H.Tr. 466, 469). If she asked Johnny to sit up, he did it without arguing (H.Tr. 468). He followed authority and caused no problems (H.Tr. 468).

Ms. Strothkamp cared about Johnny, like all her students (H.Tr. 446). When she learned that Johnny was in prison she visited him two or three times (H.Tr. 449). When Johnny was her student, Ms. Strothkamp recognized his

problems, asked for help, but it never happened (H.Tr. 473). She wondered, "could we have done more"? (H.Tr. 473). She thought about whether they could have rescued this child and kept him from what happened (H.Tr. 473).

Findings

The motion court found that counsel's investigator interviewed many witnesses and counsel called many to testify at trial, including teachers, principals and counselors (L.F. 632, 633). Counsel's investigation was reasonable given the numerous witnesses called and Johnny's instructions not to contact Ms. Strothkamp (L.F. 632). Attorneys need not scour the globe on the off-chance something will show up (L.F. 632-633).

The court also found no prejudice (L.F. 633). Ms. Strothkamp's testimony did not provide a defense to the charge since her contact occurred 10 years before the crime (L.F. 633). She was not a psychologist and thus, unqualified to make a diagnosis of Auditory Processing Disorder (L.F. 633). The court found Ms. Strothkamp incredible since she had a clear memory of teaching Johnny, nothing confirmed her hotline call and she traveled to Potosi to visit Johnny (L.F. 633). Her testimony was cumulative to other school personnel who testified at trial (L.F.633). The court concluded that there was no probability that the outcome would have been different had Ms. Strothkamp testified (L.F. 633).

These findings are clearly erroneous and should be reversed.

Standard of Review

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15(k).

Reasonable Performance

The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." . . ." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original). The motion court ignored this standard in rejecting Johnny's claim of ineffectiveness. According to the motion court, because counsel called several teachers, counselors and a principal, they were excused from not interviewing or investigating Ms. Strothkamp. The court correctly concluded that counsel need not scour the globe, but a simple letter to Ms. Strothkamp would have been just fine. She was readily available and not hard to unearth.

The court ignores that counsel did not make a reasonable decision not to contact Ms. Strothkamp. Trial counsel wanted to talk to all potential witnesses before deciding who to call (L.F. 463, 528). Instead, their mitigation investigator unilaterally decided not to follow-up on readily available leads because Johnny told her Ms. Strothkamp did not like him and would not be helpful (H.Tr. 573, 578). But, counsel knew they could not rely on Johnny, a severely depressed client, with limited intellect and poor memory to direct their investigation (L.F. 367-368).

Prejudice

The motion court clearly erred in finding that Johnny was not prejudiced. The court's finding - that since Ms. Strothkamp taught Johnny 10 years earlier, her testimony would not have provided a defense – does not withstand scrutiny. Ms. Strothkamp's observations of Johnny's deficits, his inability to respond to spoken words and lack of understanding of language (H.Tr. 402-03, 404) would have provided an important factual basis for Dr. Beaver's expert opinion that Johnny had a auditory processing disorder (H.Tr. 612).

The motion court found that since she was not an expert qualified to give a diagnosis of this disorder, her observations had no relevance (L.F. 633). This finding is clearly erroneous. A lay person may be allowed to testify to another's mental condition if the testimony is based on adequate observations. *State v. Raine*, 829 S.W.2d 506, 510 (Mo. App. W.D. 1992). In *Raine*, the defense proffered evidence of medical records of Raine's accident when he was six years old and testimony from Raine's brothers, father, and brother's girlfriend about his abnormal behavior such as stealing women's underwear and self-mutilation. *Id*. This evidence was relevant, because it tended to confirm or refute a fact in issue, whether he suffered from a mental disease or defect. *Id*. at 511. However, the trial court did not err in excluding it, because defense counsel improperly included inadmissible facts in his offer of proof, and failed to present an expert on mental disease or defect. *Id*. Lay testimony is admissible to support the factual basis for a mental disease or defect, but cannot provide the ultimate conclusion that the defendant suffers a mental disease or defect. *Id*. at 510-11.

In *State v. Windmiller*, 579 S.W.2d 730 (Mo. App. E.D. 1979), the court reversed a murder case because of the trial court's exclusion of lay witnesses' testimony about the defendant's character and behavior prior to the crime which supported the defense that he suffered from a mental disease or defect. Unlike *Raine*, Windmiller presented psychiatric testimony to support his defense of mental disease or defect. *Id*. at 731-33. The lay witnesses' testimony about Windmiller's behavior and character was proffered to support this testimony. *Id*. at 733. The behavior showed a marked change in Windmiller's attitude, demeanor, and personality in the last few months before the charged offense. *Id*. The jury might have considered the defense of mental disease or defect more favorably, had the jurors heard from witnesses familiar with Windmiller's life and behavior. *Id*. To exclude such evidence to support his sole defense was fundamentally unfair. *Id*.

Excluding this type of evidence is fundamentally unfair because it denies a defendant a meaningful opportunity to present a complete defense under the Sixth and Fourteenth Amendments to the United States Constitution. *State v. Ray*, 945 S.W.2d 462, 469 (Mo. App. W.D. 1997), citing *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) and *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). "The denial of the opportunity to present relevant and competent evidence negating an essential element of the State's case may, in some cases, constitute a denial of due process." *Ray, supra, quoting, State v. Copeland*, 928 S.W.2d 828, 837 (Mo. banc 1996). After all, direct evidence of a culpable mental state is rarely available, and

it may be demonstrated with evidence of a defendant's conduct before the act. *Ray*, *supra*, at 468. Additionally, here the failure to present such evidence violated Johnny's rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments, as it deprived him of mitigating evidence that would have provided jurors with a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978).

Additionally, Trial counsel had a duty to investigate penalty phase witnesses regardless of their client's mistaken belief about Ms. Strothkamp. The attorneys were well aware Johnny had both memory and cognitive problems that interfered with his ability to assist in investigation (L.F. 376-368). Because Ms. Strothkamp was Johnny's special education teacher during the time he attempted suicide, this witness was even more crucial. An attorney has a duty to investigate regardless of the client's demands or commands and must independently determine if a witness may advance the argument for sparing the client's life. *Marshall v. Cathel*, 428 F.3d 452, 466-467 (3rd Cir. 2005).

Ms. Strothkamp's testimony about his inability to respond to the spoken word and to understand language would have been admissible at trial had counsel conducted a reasonable investigation and presented it. This testimony was based on the teacher's observations. Like *Windmiller*, the jury may have favorably considered his defense that he could not deliberate had jurors heard from those witnesses familiar with Johnny, years before the crime.

Abuse and Neglect is Mitigating

The court's finding that Johnny was not prejudiced because other teachers testified is also clearly erroneous. While school personnel testified about Johnny's academic functioning, not a single teacher or school official testified about the physical abuse he suffered (L.F. 493). Evidence of an abusive and turbulent childhood is relevant mitigating evidence jurors should consider. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). The Supreme Court has repeatedly found counsel ineffective when he fails to investigate and then present this type of evidence. *Wiggins v. Smith*, *supra*; *Williams v. Taylor*, *supra*; and *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005).

In *Wiggins*, trial counsel was ineffective for failing to investigate Wiggins' life history, which included severe physical and sexual abuse. *Id*., at 526-528. Wiggins' counsel hired a psychologist who tested Wiggins and concluded he had an IQ of 79, had difficulty coping with demanding situations, and exhibited personality disorder features. *Id*. Counsel reviewed a PSI that referenced Wiggins' "misery as youth" and documented his placement in foster care. *Id.* Counsel also obtained social service records regarding foster care. *Id.*

This investigation was insufficient. *Id*. Counsel had a duty to pursue leads so he could make informed choices about how to proceed and what evidence to present. *Id.* When assessing the reasonableness of an attorney's investigation, a court must not only consider the quantum of evidence known to counsel, but whether it would lead a reasonable attorney to investigate further. *Id.* Wiggins'

counsel failed to follow leads and discover readily available evidence of severe physical and sexual abuse. *Id.*

In *Williams*, counsel was ineffective for not investigating and presenting substantial mitigation of Williams' nightmarish childhood. *Williams, supra*. Counsel should have investigated and presented this mitigating evidence to the jury. *Id*.

In *Rompilla*, the Court again found counsel ineffective for failing to investigate his client's troubled childhood. Rompilla was reared in a slum environment, quit school at 16 and had a series of incarcerations, often assaultive and related to over-indulgence in alcohol. *Id.* Test results suggested mental illness and limited intellectual functioning. *Id.* Neither the jury, nor the mental health experts who examined Rompilla heard this evidence. *Id.* at 392. Had counsel conducted a reasonable investigation, they could have presented mitigating evidence of Rompilla's difficult childhood, mental illness and impaired intellectual functioning. *Id.*

This Court has also found counsel ineffective for failing to investigate and present evidence of medical, educational, family, and social history. *Hutchison v. State*, 150 S.W.3d 292, 308 (Mo. banc 2004). In *Hutchison*, counsel focused on guilt phase and failed to investigate their client's childhood and mental problems. *Id.* at 302-308. Counsel's failure was unreasonable and Hutchison was prejudiced, because the jury heard none of this mitigating evidence. *Id.*

In *Simmons v. Luebbers*, 299 F.3d 929, 936-938 (8th Cir. 2002), counsel was deemed ineffective for not investigating and presenting evidence of defendant's background. Simmons' home environment was very strict, and his alcoholic father beat his mother in front of him. *Id.* at 936. Simmons' mother beat him, and he so feared these beatings that he urinated on himself before they occurred. *Id*. He ran away from home at a young age and was assaulted, and possibly raped. *Id*. He grew up in an impoverished neighborhood rife with violence, and his IQ was 83. *Id.* Simmons was prejudiced because there was a reasonable probability that at least one juror would have voted against imposing the death penalty, in that the evidence would have mitigated the state's portrayal of the Simmons as a violent person. *Id*. at 938.

Here, too, counsel unreasonably failed to investigate Johnny's abuse and neglect. Ms. Strothkamp saw the awful bruises on Johnny's neck and back – she believed someone had tried to choke him (H.Tr. 443). She saw bruises on his legs that concerned her (H.Tr. 444).

Ms. Strothkamp witnessed the severe neglect Johnny suffered. He was dirty, he smelled and reeked of body odor and urine (H.Tr. 417). He wore filthy clothes, urinated on himself, and did not change into clean clothes (H.Tr. 417-418). When Ms. Strothkamp tried to help Johnny, his mother blew her off (H.Tr. 418-419).

Ms. Strothkamp felt sorry for Johnny and wanted to help him. She went to her principal and told him about her concerns (H.Tr. 458-461). She called Child Protective Services Hotline (H.Tr. 442, 458-461, 470-471).

In deciding if prejudice resulted, this Court must "evaluate the totality of the evidence - - 'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Wiggins*, *supra* at 536, quoting *Williams*, 529 U.S. at 397-398 (emphasis in opinion). The motion court did not add all this evidence of abuse and neglect to the testimony of the school teachers who testified at trial about Johnny's limited intellectual functioning and poor academic performance. Had the motion court applied the proper test, it would have found prejudice and remanded for a new trial.

The motion court's findings - that Ms. Strothkamp was not credible because she had a clear memory of teaching Johnny, nothing confirmed her hotline call and she traveled to Potosi to visit Johnny- are clearly erroneous (L.F. 633). The court ignores that Ms. Strothkamp had Johnny her first year of teaching and he was in a small class of only 10-12 students (H.Tr. 400). That she was a dedicated and caring teacher did not make her less credible. Rather it enhanced her credibility. Counsel, not the court, should decide what witnesses to call and whether the jury might find them credible. Without interviewing her, counsel could not make this strategic determination.

The court's other concerns, lack of DFS records to confirm Ms. Strothkamp's hotline calls and her visits to see Johnny, also did not justify a

finding of no prejudice. The jury, not the state postconviction judge, should determine whether an expert is credible. *Kyles v. Whitley*, 514 U.S. 419, 449, n.19 (1995) (a state postconviction's judge's finding that a witness is not convincing does not defeat a claim of prejudice. That observation could not substitute for the jury's appraisal at trial); and *Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995) (credibility of a witness is for the jury, not the postconviction court).

Ms. Strothkamp was the single witness who could confirm the severe neglect and abuse he suffered as a child. This independent evidence would have supported counsel's defense and was important, since the State suggested at trial that Johnny exaggerated his symptoms and tried to make himself look sick (Tr. 1664-1665). Prosecutor McCulloch told jurors not to let Johnny manipulate the system (Tr. 2285). He assured the jurors that Johnny had a "wonderful" family that would have done anything for him (Tr. 2304-2305). He scoffed at Johnny's mitigation, saying that it was "nonsense" and inexcusable to suggest that his childhood gave him no chance (Tr. 2306). His brother turned out okay and he had plenty of opportunities (Tr. 2306).

Ms. Strothkamp's account showed otherwise. Johnny was bruised, battered and beaten down. He reeked of urine. He was ridiculed and laughed at. Jurors should have heard this evidence so they could evaluate whether Johnny really had a wonderful family and many opportunities. Had they considered Johnny's

childhood abuse and neglect, they likely would have granted a life sentence. This Court should reverse.

III. Counsel's Failure to Present Evidence in Support of Motion to Suppress Johnny's Statements to Police

The motion court clearly erred in denying Johnny's claim that counsel was ineffective for failing to present evidence in support of his motion to suppress his statements and evidence at trial to support the instruction on determining voluntariness of statements because this denied Johnny effective assistance of counsel, his rights against self-incrimination, a fair trial and due process and non-arbitrary or capricious sentencing, U.S. Const., Amend. V, VI, VIII, XIV; Mo. Const., Art. I, §§ 10, 18(a), 19, and 21; and MAI-CR3d 310.06, in that trial counsel knew Johnny had problems understanding his rights, was slow, lacked education, and had a history of mental illness. Johnny's mental condition was relevant to whether his statements were voluntary and whether he could knowingly and intelligently waive his rights.

Johnny was prejudiced because, had counsel presented evidence of Johnny's mental condition and his inability to understand his rights, the motion to suppress would likely have been granted and alternatively, the jury could have considered this evidence in determining whether his statements were voluntary and reliable and whether his waiver of his rights was knowing and intelligent. The State emphasized the statements and the jury considered them in finding Johnny guilty. Had counsel adduced this evidence, the jury likely would not have found Johnny guilty of first degree murder and would not have sentenced him to death.

Trial counsel filed a motion to suppress his statements made to police (D.L.F. 477-479). Counsel alleged that the statements were not voluntary given Johnny's education, background, and physical and medical condition at the time (D.L.F. 478). Counsel alleged that Johnny had limited education and was induced to make statements (D.L.F. 478). Counsel alleged that Johnny could not make a knowing and intelligent waiver of his *Miranda*[4] rights (D.L.F. 478).

Counsel knew Johnny had a limited education and was "slow" (L.F. 367-368, 488, 515-516). He had failed Kindergarten and First Grade (H.Tr. 608-609). He spent most of his elementary education in special education classes. *Id*. He was Learning Disabled (H.Tr. 609). Counsel suspected he might be mentally retarded (L.F. 368). His IQ scores were consistently in the borderline or low-average range (H.Tr. 607). Yet counsel failed to present his educational background and his limited intellectual functioning to support the allegations they made in the motion to suppress.

Counsel knew Johnny was severely mentally ill (L.F. 368, 496-497, 499-501). The court had ordered competency evaluations to determine if he was competent to stand trial (D.L.F. 48). And while the court appointed examiner found him competent, that finding came with a caveat, counsel needed to explain simple concepts in simple terms and repeat things to Johnny (L.F. 368). Counsel heeded those warnings and found that even though they tried to explain matters in

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

basic, simple terms, Johnny often did not understand and counsel would have to repeat the same materials over and over (L.F. 367-368, 432-433).

Johnny's lack of understanding was not surprising given his psychiatric history. Counsel had obtained his mental health records and knew that he had been admitted to hospitals and treated for his mental illness since he was a teenager (L.F. 421-423):

1992 – St. John's Mercy Medical Center

1992 – St. John's Mercy Medical Center

1993 – St. John's Mercy Medical Center

1995 – ER at St. John's Mercy Medical Center

1995 - St. John's Mercy Medical Center

1996 – Southeast Missouri Mental Health Center

1996 – Metropolitan St. Louis Psychiatric Center

1996 – Athena House through COMTREA

1996 - Metropolitan St. Louis Psychiatric Center

1997 - Metropolitan St. Louis Psychiatric Center

1998 – Des Peres Hospital

1998 – Hillside Manor Treatment Center

2001 – St. Louis Psychiatric Rehabilitation Center

(Ex. 24). He was severely mentally ill (L.F. 368). He suffered from some type of major psychotic mental disorder (L.F. 380). He experienced auditory, visual and command hallucinations, and delusions (H.Tr. 380). He felt like bugs were

crawling all over him (L.F. 380). Counsel saw deep scratch marks where he tried to get rid of the bugs (L.F. 380).

Despite knowing his history, counsel did not present any of this evidence in support of their allegations that Johnny's mental condition at the time of interrogation rendered his statement involuntary. Counsel did not introduce any evidence to support their allegations that Johnny could not knowingly and intelligently waive his rights. At postconviction, counsel could not remember if they investigated Johnny's competence to waive his *Miranda* rights even though they believed he could be easily influenced by the police because of his mental condition (L.F. 399-400).

Had counsel investigated whether Johnny understood the *Miranda* warnings and knowingly and intelligently waived his rights, they would have discovered that Johnny had cognitive deficits and was unable to reason and make intelligent decisions about waiving his rights (H.Tr. 512-513, Ex. 13, at 3495-3496). He did not have the capacity to waive his rights. *Id.*

Dr. Brooke Kraushaar, a clinical psychologist, evaluated Johnny during the postconviction proceedings to determine whether he could understand the *Miranda* warnings and knowingly and voluntarily waive them (H.Tr. 491-498, Ex. 20, Ex. 13, at 3493-3496). Dr. Kraushaar reviewed Johnny's school records, psychiatric records, police reports, Johnny's statements to police, competency to proceed evaluation, mental state at time of crime evaluation, a summary report of Johnny's daily events, and neuropsychological test results (H.Tr. 498, Ex. 13, at

3493). Dr. Kraushaar tested Johnny for five hours over a two-day period (H.Tr. 499, Ex. 13, at 3493). She administered a Grisso Instrument that assessed his appreciation and understanding of the *Miranda* warnings (H.Tr. 499).

Johnny's cognitive functioning and academic skills were deficient (H.Tr. 500, Ex. 13, at 3494). He scored in the 3% for math, 22% for spelling and 21% for reading (H..Tr. 501, Ex. 13, at 3494). His intellectual functioning was in the low average range, functioning in the bottom 16% of the population (Ex. 3494). Johnny scored poorly on the Weschler Memory Scale, between the fourth and seventh percentile on most indices (Ex. 13, at 3494). His learning disability and cognitive deficits had been present for a long time (H.Tr. 504).

Johnny's understanding and appreciation of his *Miranda* rights were superficial and limited (H.Tr. 505-511, Ex. 13 at 3495-3496). He demonstrated an overall limited understanding of his rights. Ex. 13, at 3495). His understanding of *Miranda* vocabulary was in the 5th percentile compared to other adult offenders with low-average intelligence (H.Tr. 508, Ex. 13 at 3495). Johnny had poor comprehension when questioned about how his rights were applied during an interrogation or courtroom setting (H.Tr. 509-510, Ex. 13, at 3495). He scored in the 12th percentile compared to same age, low-average intelligence adult offenders when questioned about the nature of an interrogation. *Id.* He was especially confused about the right to counsel and the right to remain silent in a courtroom setting, scoring in the 5th percentile. *Id.* Johnny thought he had to talk to police or they would do "something to him" and the judge would put him in

prison if he failed to talk (Ex. 13, at 3495). Drs. Becker and English, the State's experts, also noted Johnny's lack of understanding of the roles of various individuals in the court proceedings. *Id.*

Johnny did not have the intelligence and capacity to waive his *Miranda* rights. *Id.* His knowledge was superficial. *Id.* He was psychotic. *Id.* He had little capacity to reason about circumstances and their applicability to the waiver decision. *Id.* He had little awareness of the meaning of the rights. *Id.*

Counsel knew Johnny was mentally ill and hired two experts, Dr. Dean and Dr. Draper to testify at trial, but failed to consult with these or other experts for the suppression hearing. Both doctors suspected that Johnny had brain damage and advised counsel to obtain neuropsychological testing (L.F. 371-373, 452-453, 491, 517). *See* Point I, *supra*. But, counsel never followed-up on their experts' recommendations and never investigated the brain dysfunction and how it impacted Johnny and his ability to provide voluntary, knowing and intelligent statements.

Had counsel investigated, they would have discovered Johnny's brain damage. Dr. Craig Beaver administered neuropsychological testing and determined that Johnny had organic syndrome or brain damage (H.Tr. 607, 629, 641). He was particularly weak in language areas (H.Tr. 607-608). He had a substantial auditory processing disorder, which caused him to miss lots of information especially when provided verbally (H.Tr. 612). His neuro-cognitive limits included a Learning Disabilty, Dyslexia, Attention Deficit Disorder and

Organic Brain Syndrome (H.Tr. 621). Johnny's memory was impaired and he missed a lot of detail (H.Tr. 628). His brain damage affected his ability to think, problem solve and act rationally (H.Tr. 641). Comprehension was his greatest difficulty (H.Tr. 680).

Counsel also failed to adduce evidence of Johnny's mental illness in support of their motion to suppress. Counsel asked Detective Neske if Johnny told him about being in the care of a mental health professional and taking medication for schizophrenia (Tr. 151,161). Counsel additionally inquired of Detective Newsham about Johnny's schizophrenia and his preoccupation with religious ideas (Tr. 183,185). The defense called no witnesses during the suppression motion (Tr. 190-191).

Counsel could have called an expert like Dr. Pablo Stewart to explain to the trial court the gravity of mental diseases and defects that affected Johnny's ability to understand and make knowing choices at the time he was speaking to police interrogators. Dr. Stewart, testified that Johnny suffered from chronic psychotic disorder not otherwise specified, mood disorder not otherwise specified, polysubstance dependence, post-traumatic stress disorder and, cognitive disorder not otherwise specified (H.Tr.196-198). When the doctor did his evaluation of Johnny in April of 2007, Dr. Stewart found he was still experiencing psychotic symptoms (H.Tr. 190-193). The auditory hallucinations continued to cause Johnny a great amount of anxiety even after years of antipsychotic medication in Potosi Correctional Center (H.Tr. 192-193, 285-289, D.L.F 884-888). The doctor

explained that after suicide attempts Johnny was diagnosed with depression during adolescence which is consistent with the premorbid stages of a psychotic disorder such as schizophrenia (H.Tr. 378). Drug use is a typical pattern for schizophrenia patients (H.Tr. 381). He found Johnny suffers from significant cognitive problems (H.Tr. 376). Dr. Stewart opined that Johnny could not have manipulated the mental health system in the form of fifteen different doctors to obtain a favorable diagnosis (H.Tr.376, 383). Dr. Stewart determined that separating Johnny's actions from his mental diseases and defects on the day of the crime was not a logical or possible proposition because his chronic illness "overrides everything he does." (H.Tr. 389).

Findings

The motion court denied Johnny's claim that counsel was ineffective for failing to adduce evidence in support of their motion to suppress (L.F. 646-652). According to the court, a defendant's mental condition is "irrelevant" to a motion to suppress (L.F. 646). The critical question is the conduct of the police and whether the police coerced the confession (L.F. 646). The court found Dr. Stewart's testimony unpersuasive, incredible and against the weight of the evidence (L.F. 647). The court found Dr. Beaver's testimony failed to address the suppression issue (L.F. 647). Dr. Kraushaar was too inexperienced for her testing to carry any weight with the court (L.F. 647-648, 650-651). Johnny's prior contacts with the criminal justice system and his conduct violations in prison

convinced the court that he understood his *Miranda* rights and knew how to waive them (L.F. 649).

The motion court found that Johnny never told counsel he was threatened by police, parts of his confession were helpful to the defense that he had not deliberated, and he appeared normal and coherent to police officers – all supporting the court's conclusion that the statements were properly admitted (L.F. 649-650). Given Johnny's age, previous criminal experience, education, background and the results of his competency evaluation, the court concluded that the statements were voluntary and the waiver was knowing and intelligent (L.F. 650).

The motion court found that none of the evidence postconviction counsel presented to support the suppression of his statements would have been helpful had it been presented at trial (L.F. 651). The court found it would actually be detrimental because it included Johnny's past criminal and prison histories, which would have been aggravating (L.F.652).

These findings are clearly erroneous and must be reversed.

Counsel Ineffective

Counsel can be ineffective for failing to file a meritorious suppression motion. *Kimmelman v. Morrison*, 477 U.S. 365 (1986); *Riley v. Wyrick*, 712 F.2d 382, 385 (8th Cir. 1983); *Bonner v. State*, 765 S.W.2d 286, 288 (Mo. App. W.D. 1989). So, it follows that counsel can be ineffective if they file a motion with factual allegations, but then fail to adduce readily available evidence to support the

suppression. Such claims, like any other claim of ineffectiveness, must be evaluated for reasonable conduct and prejudice. *Kimmelman, supra.*

Johnny's Mental Condition is Relevant

The Supreme Court has ruled that coercive police activity is a necessary predicate to finding a confession is not voluntary within the Due Process Clause of the Fourteenth Amendment. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). But, contrary to the motion court's ruling, the Court has not found a defendant's mental condition is "irrelevant." Rather, the Supreme Court held that "while ***mental condition is surely relevant*** to an individual's susceptibility to police coercion, mere examination of a defendant's state of mind can never conclude the due process inquiry." *Id*. at 165 (emphasis added). In *Connelly*, the record showed no evidence of police coercion. *Id*. at 170. The suspect walked up to a police officer on the street and told him he wanted to confess to a murder. *Id*. The police used no physical or psychological pressure to elicit the statements. *Id*. The police did not wear Connelly down with improper interrogation tactics, lengthy questioning, or intimidate or threaten him in any way. *Id.*

The analysis would differ had police overreached in any way. *Id*. at 164-165. For example, in *Blackburn v. Alabama*, 361 U.S. 199 (1960), the petitioner's mental illness was a significant factor. *Connelly*, 479 U.S. at 164-165. The police had learned during the interrogation of Blackurn that he had mental problems. *Id*. They exploited his weakness and interrogated him for 8-9 hours. *Id*. He did not have any family or friends present during the interrogation. *Id*. His confession

was composed by the Sherriff. *Id*. These police tactics combined to make the confession involuntary. *Id*.

Johnny's case is much more like *Blackburn* than *Connelly*. Like *Blackburn*, police learned during Johnny's interrogation that he was mentally ill – schizophrenic (Tr. 149, 150, 1257, 1315). Johnny told officers he was under a doctor's care (Tr. 149, 150, 1257, 1259, 1315). They knew he had been hospitalized for his mental illness (Tr. 151, 1257). He had not taken his medication in over a month (Tr. 1257, 1317). Yet, the officers interrogated him for hours without providing his medication (Tr. 151). See, *Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (police learned that Greenwald was suffering from high blood pressure, but did not give him his medication, a factor in determining his confession was involuntary).

Johnny's interrogation lasted longer than Blackburn's. Johnny was arrested at 8:10 or 8:15 a.m. (Tr. 126, 1242-1245). Johnny signed a waiver form at 9:30 a.m. (Tr. 135). Officers interrogated him "the whole day" (Tr. 135). Johnny gave an oral confession around 2:00 or 2:30 p.m., but it was unrecorded (Tr. 1311, 1315). His first recorded statement came at 8:33p.m. (Ex. 87A, Tr. 1294). His second statement was recorded at 12:30 a.m., some 16 hours after his arrest and 15 hours of interrogation throughout the day, night and early morning hours (Tr. 175). This was twice the time found coercive in *Blackburn*.

Johnny's relatives and friends were not present, a factor the Court found significant in *Blackburn*. Johnny was isolated the entire day.

While neither officer acknowledged composing the statements for Johnny, they did not record the hours of interrogation leading up to the statements (Tr. 157-158, 181-182, 1316). The failure to record the statements weigh against a finding of voluntariness, because police interrogations are inherently coercive and the police testimony did not account for all the interrogation. *See, In the Interest of S.H.*, 294 A.2d 181 (N.J. S.Ct. 1972) (police's failure to record 90 minute interview of juvenile resulted in the State only accounting for 10 minutes of this period). Here, the police recorded only 23 minutes and 8 minutes of the 16 hours he spent in custody (Tr. 157-158, 1329, 1381-1384, Ex. 87 and Ex. 90). The last statement ended at 12:58 a.m. (Tr. 1384). Johnny finally went to the jail at 1:30 or 1:45 a.m. (Tr. 1384).

The recorded statements themselves are not in narrative form, but instead contain mostly statements by police to which Johnny responds, yes or no (Ex. 87 and 90). During the second statement, Johnny said he decided to kill the victim at the glass factory after the victim freaked out, but the officer corrected him and led Johnny to say he had planned to kill her when he left the house with her (Ex. 90A, at 7-8). The officer led Johnny to make a statement that showed premeditation and deliberation, instead of one that showed he panicked when the victim screamed at him. *Id*.

Johnny's interrogation had even more police overreaching than Blackburn's. Officers took him to the scene where a mob of people searched for the little girl's body (Tr. 155-156, 1278-1279). Officers acknowledged they were

concerned about Johnny's safety and did not let him out of the car (Tr. 1278-1279, 1324). They talked about the news media and their large presence at the scene in front of Johnny (Tr. 138-139). They discussed hiding Johnny from the crowd and the media (Tr. 139). When they got to the scene, a dozen of officers were there along with media from newspapers and television stations (Tr. 155-156). Like the police, Johnny was scared for his safety and asked to be placed in a cell by himself as soon as he was taken to jail (Tr. 1393). The threat of mob violence is coercive. *Payne v. Arkansas*, 356 U.S. 560, 564-565 (1958) (Chief of Police told Payne that group of people wanted to come into the jail and get him, but if he told the truth, he could probably keep them outside).

The police handcuffed Johnny to a chair at one point during the interrogation (Tr. 1257), adding to the coercive atmosphere present in normal custodial interrogations. *Miranda v. Arizona*, 384 U.S. at 455 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals").

Detective Newsham seized on Johnny's religious beliefs and concerns about eternal salvation, telling Johnny he had to tell the truth (Tr. 186, 1367-1368). Newsham said that to be forgiven, Johnny had to be completely honest about every single detail (Tr. 1368). He exploited Johnny's history of mental illness and religiosity to obtain a confession. *See, State v. Wood*, 128 S.W.3d 913, 917 (Mo. App. W.D. 2004) (police activity coercive where police knew of Wood's mental illness and deep religiosity and exploited the pastoral relationship, using

Wood's priest as interrogator); and *Carley v. State*, 739 So.2d.1046 (Miss. App. 1999) (officer's strategy of procuring a confession from Carley by convincing him he might receive religious salvation for his sins and see his parents again if he told the truth was improper tactic and coercive).

In *Fikes v. Alabama*, 352 U.S. 191, 193 (1957), the Court found Fikes' age, education, and mental illness highly material to whether his confession was voluntary. Fikes was only 27 years old, had a third grade education, and had left school when he was 16 years old. *Id*. Three psychiatrists testified that he was schizophrenic and highly suggestible. *Id*. His mother characterized him as "thick-headed." *Id*. He had a prior burglary conviction. *Id*. Even though police repeatedly advised Fikes of his rights and told him he was entitled to counsel, the Court found his confession was not voluntary. *Id*. Police "brutality" is not a prerequisite to a finding of involuntariness. *Id*. at 197. Instead, the Court focused on the extended interrogation, his isolation without any family visits, and his confession consisting of mostly yes and no answers to suggestive and leading questions. *Id*. at 194-195. Given Fikes was uneducated, had low mentality, if not mental illness, and his isolation, the confessions were involuntary. *Id*. at 196-197.

Voluntariness had to be assessed in terms of the police exploiting the weak of will and mind.[5] *Id*. at 197-198.

The motion court clearly erred in failing to consider Johnny's mental condition in determining whether the police exploited his condition, overreached and coerced his confession. *Connelly* establishes that the mental condition is a relevant factor that must be considered. Counsel unreasonably failed to adduce Johnny's mental condition, his lack of education and his limited understanding to support the motion to suppress.

Had counsel acted reasonably, they would have presented evidence of to support the motion to suppress. Johnny was prejudiced because had this type of evidence been presented at the motion to suppress hearing, his confessions would have likely have been found involuntary, his waiver of his rights unknowing and unintelligent.

In *State v. Flower*, 539 A.2d 1284, 1285 (N.J. Sup. 1987), the defendant, a 26 year old was accused of aggravated sexual assault on a 3 and ½ year old child. Police interrogated Flower and gave him *Miranda* warnings. *Id.* Counsel called three high school teachers who taught Flower in special education classes seven years earlier. *Id*. They recalled him being polite, speaking "very slowly, with

[5] Courts must consider a defendant's vulnerability when determining whether a confession was coerced and extracted against his will. *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2409 (2011) (Alito, J., dissenting).

slurred speech. *Id.* His IQ was over 70, but the teachers had to repeat instructions over and over. *Id*. at 1285-1286. Flower's vocabulary was only at a 2nd or 3d grade level and he was unable to grasp concepts and abstractions. *Id*. at 1286. The teachers opined that Flower could not understand his *Miranda* rights. *Id.* He was easily led and would answer "yes" to avoid going to jail. *Id.* Similarly, Flower's foster guardian testified that Flower would say yes to anything. *Id.* Two psychologists testified that Flower did not have the mental capacity to understand the *Miranda* warnings. *Id*.

The court considered all this evidence along with the State's witnesses. *Id*. The State investigator testified that he informed Flower of his rights under *Miranda*, Flower said he understood, the investigator used no force, duress or coercion and the questioning lasted 30-45 minutes. *Id.* Similarly, a State psychiatrist opined that Flower understood the *Miranda* warnings. *Id*.

The court found Flower's waiver was not knowing and intelligent. *Id*. at 1287. One cannot waive a right he cannot understand or appreciate. *Id*. at 1288. The police knew of Flower's mental deficits. When an accused has mental deficits, the police should use the utmost care and not exploit him. *Id*. at 1287.

Similarly, in *People v. Bernasco*, 541 N.W.2d 774 (Il. App. 1989), the court found that Bernasco's waiver of his *Miranda* rights was not knowing and intelligent. *Id*. Bernasco was 17 years old. *Id.* Officers would not allow his father to be present during his interrogation. *Id*. at 775. Police read him his *Miranda* rights and obtained a waiver. *Id*. Officers indicated that he seemed to

understand the rights, they made no threats or promises and he was not under the influence of drugs. *Id*.

Bernasco's counsel called a school psychologist to testify at the suppression hearing. *Id*. at 776. The psychologist noted that Bernasco did not qualify for special education, his IQ was 80, in the slow or low-average range. *Id*. Bernasco's reading skills were at the beginning to middle of the fourth grade. *Id*. The psychologist opined that Bernasco did not have the ability to understand certain legal terms. *Id*. Bernasco's father testified that his son had dropped out of school in the ninth grade. *Id*. He had no prior experience and was not allowed to be present. *Id*. Bernasco, too, indicated he did not understand the *Miranda* warnings or waiver. *Id*.

Based on this evidence, the court found Bernasco's waiver unknowing and unintelligent. *Id*. at 776-777. The statement had been written by police. *Id*. Even if the police did not coerce the statement under *Connelly*, the court found the waiver inadequate. *Id*. at 780. To be knowing and intelligent, the accused must have a full awareness of the nature of the rights and the consequences of waiving them. *Id*. at 782. The psychological testimony was convincing. *Id*. Given Bernasco's limited intellectual capacity, he did not knowingly and intelligently waive his rights. *Id*.

Had Johnny's counsel presented the readily available evidence of Johnny's brain damage, low intellectual functioning, limited knowledge, lack of understanding and comprehension of the legal process and concepts, and his

mental illness, the court would have likely suppressed his statements. Since the motion court indicated that all this evidence of Johnny's mental condition was irrelevant and did not properly consider it, this Court should reverse and remand for a new trial.

Evidence to Support Defense Instruction - MAI-CR3d 310.06

Additionally, even if the court had not suppressed the statements, all the evidence of Johnny's lack of education, background, and mental condition at the time of the interrogation would have supported Instruction No. 8 which required the jury to determine whether Johnny "understood what he was saying and doing, and that the statement was freely and voluntarily made" (D.L.F. 76, Instruction 8 patterned on MAI-CR3d 310.06). The jurors were told to give the statements as much weight as they believed it deserved in arriving at their verdict. *Id.* But, without all the evidence of Johnny's brain damage, low intellectual functioning, limited knowledge, lack of understanding and comprehension of the legal process and concepts, and his mental illness, the jury was not provided with the information necessary to determine how much weight the statements deserved.

The motion court discounted Dr. Kraushaar's testimony because she was inexperienced, not board certified, did not conduct validity testing and was unaware of Johnny's prior criminal history (L.F. 647-649). The court ignores that one of its own court-appointed experts had credentials less impressive than Dr. Kraushaar. Dr. Becker evaluated Johnny to determine whether he was competent to stand trial and was criminally responsible (Tr. 1806). Like, Dr. Kraushaar, he

worked under the supervision of a more experienced doctor, Dr. English (Tr. 1806). Similarly, Dr. Kraushaar worked with an experienced supervisor, Dr. Gordon, the Director of St. Louis Behavioral Medicine Institute (H.Tr. 491, 515).

Dr. Kraushaar's credentials were quite impressive. She had obtained a doctorate from the University of Denver and interned at Yale University (Ex. 20). Dr. Kraushaar had substantial clinical experience at St. Louis Behavioral Medicine Institute, Northwest Arkansas Behavior Therapy Clinic, Yale University of Medicine, Yale University's Anxiety and Mood Center, Mental Health Corporation of Denver, Professional Psychology Center, CATCH, Incorporated in Philadelphia, Metropolitan Detention Center in Brooklyn New York, and in private practice (Ex. 20). Dr. Kraushaar had research experience from New York University Medical Center at Bellevue Hospital and the National Development and Research Institutes in New York (Ex. 20). She had published authoritative medical articles and gave numerous presentations (Ex. 20).

Dr. Kraushaar's credentials and experience were certainly factors the jury could consider in evaluating her testimony, but jurors should have had the opportunity to consider her testimony and her testing, just as the jury considered Dr. Becker's testing and evaluation. It is for the jury, not the state postconviction judge, to determine whether an expert is credible. *Kyles v. Whitley*, 514 U.S. 419, 449, n.19 (1995); *Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995), discussed *supra*.

As for Dr. Beaver, the motion court refused to address his testimony, because Dr. Beaver did not specifically opine whether Johnny's waiver was voluntary, knowing and intelligent (L.F. 647). The court ignored that Dr. Beaver found organic brain syndrome (H.Tr. 607, 629, 641). Johnny was weak in language areas, had a substantial auditory processing disorder, which caused him to miss lots of information especially when provided verbally (H.Tr. 607-608, 612). Johnny's memory was impaired and he missed a lot of detail (H.Tr. 628). Comprehension was his greatest difficulty (H.Tr. 680). Johnny's brain damage affected his ability to think, problem solve and act rationally (H.Tr. 641), all of which were relevant to whether his confessions were voluntary and whether he could knowingly and intelligently waive his rights.

Postconviction counsel specifically questioned Dr. Beaver about the diagrams Johnny drew during the police interrogation (H.Tr. 683-684), the variance in his statements to police as compared to the statements he made later to Dr. Dean (H.Tr. 710, 712) and the actual tape recordings made of Johnny's statements to police (H.Tr. 716). A review of Dr. Beaver's testimony proves he did address Johnny's mental condition as it related to his ability to act rationally, problem solve and understand his rights and the consequences in waiving them. The court erred in not considering Dr. Beaver's testimony.

The motion court concluded that Johnny never told counsel he was threatened by police, but threats are not necessary to find coercion, especially when someone is mentally ill, uneducated and vulnerable. *Fikes*, 352 U.S. at 197;

Flower, 539 A.2d at 286; and *Bernasco*, 541 N.W.2d at 775. As Justice Frankfurter remarked:

> For myself, I cannot see the difference, with respect to the 'voluntariness' of a confession, between the subversion of freedom of the will through physical punishment and the sapping of the will appropriately to be inferred from the circumstances of this case—detention of the accused virtually incommunicado for a long period; failure to arraign him in that period; horse-shedding of the accused at the intermittent pleasure of the police until confession was forthcoming.

Fikes, 352 U.S. at 198-199 (Frankfurter, J., concurring).

The motion court's finding that parts of Johnny's confession were helpful to the defense that he had not deliberated, so it was reasonable not to present evidence of his mental condition, is clearly erroneous. Counsel filed a motion to suppress and wanted the statements excluded (D.L.F. 477-479). Once the statements were admitted, counsel did use parts of the first statement to support that Johnny had not deliberated, but counsel could have made those same arguments without the statement. Indeed, most of the statements were harmful and the State emphasized them throughout the trial and especially in closing argument. The prosecutor argued Johnny's statements proved his intent to injure the victim and supported the kidnapping charge (Tr. 1912-1913). He argued Johnny's statements proved he deliberated (Tr. 1921-1922). Prosecutor told jurors

the police tactics did not matter since they needed to get as much information as possible:

> They lied to the man, they tricked him, they made references to the kids to get him to lie. So what. He's a cold-blooded killer so the cops lied to him, so they took a few liberties with him. So what. Those liberties are not vital to him anyway.

(Tr. 195). Counsel should have adduced evidence to show Johnny's statements were involuntary, that the police tactics did matter, and that Johnny's rights to Due Process were vital and should be protected.

Johnny's statements were important to the jury. During their deliberations, jurors asked to listen to the two confession tapes in full (D.L.F. 782).

The motion court also found that Johnny appeared normal and coherent to police officers, again supporting the court's conclusion that the statements were properly admitted (L.F. 649-650). Similar testimony by police officers in *Blackburn* did not defeat a finding that a confession was involuntary. *Blackburn*, 361 U.S. at 208-209. There, the Chief Deputy testified that Blackburn "talked sensible," was clear-eyed, and did not appear nervous. *Id.* Blackburn's medical records established that while Blackburn was schizophrenic, he answered questions "relevantly and coherently." *Id*. at 209, n. 8. Accordingly, the officers' testimony that a mentally ill defendant appears "normal" does not necessarily defeat a claim of involuntariness, particularly where the observed facts do not bear any relation to the mental disease. *Id.*

The motion court found that none of the evidence postconviction counsel presented to support the suppression of his statements would have been helpful had it been presented at trial (L.F. 651). The court found it would actually be detrimental because it included Johnny's past criminal and prison histories, which would have been aggravating (L.F.652). The court overlooks that Johnny's prior criminal history was already before the jury. Trial counsel provided their experts with his jail records and they testified about his previous incarcerations (Tr. 1462-1463, 1583-1584, 1606-1608, 1650). A jail psychologist testified about her treatment of Johnny in 2001, during his previous incarceration for an unrelated offense (Tr. 1771, 1775). Dr. Rabun testified about a court ordered evaluation in another criminal case (Tr. 1449). The jury knew Johnny was on probation in the stealing case (Tr. 1450, 1539, 1541). Thus, counsel would not have risked much had it put on evidence of Johnny's mental condition and his inability to understand and waive his *Miranda* rights. His criminal history was for nonviolent offenses such as stealing and burglary were already known to the jury.

Foregoing favorable evidence because it contains something harmful is not reasonable. *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Williams had a juvenile record for larceny, pulling a false fire alarm, and breaking and entering. *Id*. But failing to introduce the comparatively voluminous mitigating evidence was not justified by counsel's strategy. *Id*. Here, counsel did not even have to make a difficult decision whether to risk opening up Johnny's past experience with the police, because they had already put his prior incarcerations into the record.

Counsel should have adduced evidence showing Johnny's statements were involuntary and his waiver of his *Miranda* rights was unknowing and unintelligent.

Because of counsel's ineffectiveness, Johnny should receive a new trial.

IV. Motion Court Did Not Issue Findings on Claim 8 (f)

The motion court clearly erred in denying Claim 8 (f) of Johnny's Rule 29.15 motion without entering specific findings of fact and conclusions of law because this failure denied Johnny due process of law, U.S. Const., Amend. IV; Mo. Const., Art. I, § 10, in that the motion court skipped from its findings on Claim (e) to Claim (g) and the other findings are not sufficient to enable meaningful appellate review of the claim on counsel's failure to adduce evidence to rebut the state's expert testimony.

Johnny's amended motion contained Claim 8 (f) alleging that counsel was ineffective in failing to rebut the testimony of State expert, Dr. Byron English, who testified at the guilt phase of trial (L.F. 40-42, 197-244). The claim pled that Dr. English testified Johnny's actions resulted from his alleged methamphetamine intoxication, not his mental illness (L.F. 40). The amended motion alleged trial counsel failed to rebut English's erroneous conclusions:

1) that Johnny was under the influence of methamphetamine at the time of the crime;
2) that Johnny's hallucinations were not real;
3) that if Johnny were truly having command hallucinations, he would have had to act on them immediately;
4) that Johnny's hallucinations had been caused by illegal drugs and not his mental illness.

(L.F. 40-41). The claim alleged that Johnny did not fit the criteria for Amphetamine Intoxication with Perceptual Disturbances as enumerated in the Diagnostic and Statistical Manual 4th Edition – TR (DSM-IV-TR); and that Dr. English did not comply with the American Psychological Association's Specialty Guidelines for Forensic Psychology (L.F. 41).

The motion court failed to issue findings on Claim (f)[6]. The court addressed Claim 8 (e) in Paragraph 5 of its findings (L.F. 645-646). At the end of its findings on Claim 8 (e), the court incorrectly referenced the claim as 8 (f) and 9 (f) and said the claim was denied (L.F. 646). The court than addressed Claim 8 (g), skipping (f) entirely (L.F. 646).

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996). Judge Seigel filed his decision on this issue on April 5, 2011 (L.F. 608). Should this Court find that the error is not preserved for

[6] It is notable that in the Report of the Trial Judge, Judge Seigel determined in question number 11 that there was no evidence the defendant was under the influence of alcohol, narcotics or dangerous drugs at the time of the offense (Direct Appeal Appendix A30).

appeal because counsel did not comply with Rule 78.07(c), Appellant requests plain error review. *Gerlt v. State,* 339 S.W.3d 578, 584 (Mo.App. W.D. 2011).

Failure to enter specific findings and conclusions disregards the mandate of Rule 29.15 (j) which requires that "[t]he court shall issue findings of fact and conclusions of law on all issues presented." *See Brown v. State*, 810 S.W.2d 716, 717 (Mo. App., W.D. 1991). The only exception is that finding of facts are not required if the issue before the motion court is one of law, but some conclusions of law by the motion court are still required. *Barry v. State*, 850 S.W.2d 348, 349-350 (Mo. banc 1993). Here, the claim was factually specific and the issue was not one of law, so that exception could not apply.

Findings of fact and conclusions of law must be specific enough to permit meaningful appellate review. *Ervin v. State*, 80 S.W.3d 817, 825 (Mo. banc 2002). In *Ervin*, this Court found the motion court's findings were not specific enough on the claim that counsel failed to investigate and rebut Ervin's alleged threat and attack of his cellmate, introduced at the penalty phase of trial. *Id*. at 825-827. The motion court had recapped Ervin's evidence about two jail cell incidents, but did not make specific findings about counsel's failure to rebut the evidence presented on one of those incidents, the alleged attack of the cellmate. *Id*. at 825. This Court remanded for more specific findings so that it could adequately review the claim.

Here, the motion court never even addressed Claim (f), counsel's failure to rebut Dr. English's testimony. The typographical error at page 30 of the motion

court's findings suggests the court simply missed the claim and skipped ahead to Claim (g). The court's order never explains the basis of the denial of relief. Having failed to comply with the requirements of the rule, the motion court has left Johnny unable to challenge the motion court's ruling, and has left this Court nothing to review.

"The Constitution prohibits the arbitrary or irrational imposition of the death penalty." *Parker v. Dugger*, 498 U.S. 308, 321(1991). The Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Id.* (citations omitted). Furthermore, Rule 29.15 (j) requires findings on all issues, directing the "court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held." When a state statute or rule includes "language of an unmistakable mandatory character," the statute creates an expectation protected by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (O'Connor, J., concurring and dissenting). Under the Due Process Clause, a state-created right cannot be arbitrarily abrogated. *See Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

Since the court failed to enter specific findings of fact and conclusions of law addressing each allegation raised in Johnny's amended motion, the judgment of the motion court must be reversed and the cause remanded to the motion court for entry of findings of fact and conclusions of law on Claim 8 (f).

V. Counsel Failed to Rebut State's Expert Testimony that Suggested Johnny's Actions Resulted From Substance Abuse, Not His Mental Illness

The motion court clearly erred in denying Johnny's claim that counsel was ineffective for failing to rebut Dr. English's testimony, because this denied him effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§ 10, 18(a), 21, in that English's testimony that Johnny's actions resulted from his drug use and not his mental illness should have been refuted by a qualified expert who would testify that mental illness and substance abuse are interrelated, hallucinations are real whether induced by drugs or by a psychotic illness, command hallucinations are not always followed immediately, and when a patient suffers from a psychotic disorder such as schizophrenia, a personality diagnosis is inappropriate.

Johnny was prejudiced because English's testimony went unrebutted and the jurors were instructed that Johnny's drug use would not relieve him of responsibility and that mental disease or defect did not include antisocial conduct. Based on English's testimony, the jury found Johnny guilty of first degree murder and imposed death, disregarding Johnny's mental illness and his inability to conform his conduct to the requirements of law. Had counsel rebutted his testimony, the jury likely would have found that Johnny could not deliberate and likely would have imposed a life sentence.

Trial counsel knew that Dr. English and Dr. Becker, the court appointed experts who found Johnny competent to stand trial, would likely testify at the guilt phase of trial (D.L.F. 670-691). Counsel had deposed English on December 15, 2004, less than a month before trial (D.L.F. 201, L.F. 515). And, as a result of that testimony, counsel filed a motion to exclude his testimony because he lacked expertise in diminished capacity (D.L.F. 670-691, L.F. 515). Counsel believed English was unqualified because he did not understand diminished capacity (L.F. 417, 449).

Counsel also knew that Johnny had reported using drugs (L.F. 459, Ex. 11, at 2941-2942). English diagnosed methamphetamine intoxication, with perceptual disturbances, and Polysubstance Dependence, (Alcohol, Cannabis, Methamphetamine, Hallucinogens, Cocaine, and Inhalants), in Remission, Within a Controlled Environment (Ex. 11, at 2947). English reported that "although Mr. Johnson does suffer from a mental disease as described in the provisions of Chapter 552 of the Revised Statutes of Missouri, it is the opinion of this examiner that the client's apparent auditory hallucinations at the time of the alleged offenses were not a production of his mental disorder, but a sequel to his intravenous methamphetamine/alcohol abuse." (Ex. 11, at 2948). English opined that because Johnny said he wanted to use drugs to hallucinate, he appreciated the nature of his conduct and was capable of conforming it to the requirements of law. *Id.*

According to English, Johnny's Schizoaffective Disorder, Depressive Type, was in remission, Johnny was partially malingering, and he had an Antisocial Personality Disorder (Ex. 11, at 2947).

The State called English to testify at trial (Tr. 1797-1884). English chronicled Johnny's drug and alcohol use as reported by Johnny (Tr. 1809-1811). He opined that on the day before the crime, Johnny abused alcohol and injected methamphetamine (Tr. 1821).[7]

While English accepted Johnny's reports of drug use without question, he dismissed Johnny's accounts of the voices he heard (Tr. 1822). English found that Johnny malingered, producing false or grossly exaggerated physical and psychological symptoms, and the effects voices had on him (Tr. 1842). English said that if Johnny had really received command hallucinations, he would not have walked a mile to the glass factory before acting on those commands (Tr. 1822-1823). English told the jury that Johnny would have been overwhelmed by anxiety (Tr. 1823-24). Truly psychotic individuals follow commands they hear and must act immediately (Tr. 1823-1824).

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[7] The State's witnesses confirmed that Johnny and others drank alcohol the night before the crime (Tr.843-844, 893). Testing confirmed that Johnny had smoked marijuana (L.F. 598, 601). No eyewitnesses corroborated the methamphetamine use. The jury had no substantive evidence, only second-hand statements (Tr. 1348, 1575-1579, 1620, 1821).

English reasoned that because Johnny said he understood the voices were not real, they must have stemmed from his methamphetamine use a day or two prior to the incident (Tr. 1825, 1845). English found that Johnny used methamphetamine because he liked the voices and wanted to hallucinate while under the influence (Tr. 1825). English concluded that Johnny had contact with reality, because a truly psychotic individual in a psychotic state would not understand that the voices were not real (Tr. 1825, 1826, 1845).

English diagnosed Johnny with Antisocial Personality Disorder and opined that he could deliberate (Tr. 1827-1828). He also found Johnny suffered from Schizoaffective Disorder, but his symptoms were in remission because Johnny was taking his medication (Tr. 1841). Johnny's main problem was his Methamphetamine Intoxication with Perceptual Disturbance (Tr. 1839-1840). The voices Johnny heard were caused by his drug abuse, not his mental illness (Tr. 1839-1840).

Despite knowing Dr. English did not understand mental illness and that Johnny's drug use was going to be an issue, counsel took no steps to rebut Dr. English's trial testimony, either in guilt or penalty phase. Had counsel properly prepared, they could have rebutted Dr. English's testimony.

Given Johnny's history, his hallucinations were symptoms of his mental illness. He theoretically could have heard voices from some drugs, but he also heard voices when he was confined and drug free (H.Tr. 82, 102, 104, 105, 111, 143-144). A hallucination is a hallucination, and experts cannot distinguish voices

caused by drugs as opposed to a psychotic disorder (H.Tr. 103, 195). Psychotic symptoms present the same, regardless of their etiology (H.Tr. 195).

Doctors treated Johnny since 1996 for his psychotic symptoms and his depression (H.Tr. 80, 83-84, 93, 104, 106, 108, 109-110, 114, 116, 128, 147, 150, 151). Johnny received Thorazine, Haldol, Mellaril, Zyprexia, Trazadone, Paxil, Elavil, Loxitane, Cogentin, Perphenazine, Chlorpromazine, Antivan, Trifalin, Lithium, Doxepin, Novane, (H.Tr. 83-84, 93, 104, 105, 107, 127, 132, 147, 151, 154, 181, 184). Johnny had flashbacks which were not consistent with the types of drugs he used (H.Tr. 90-91). Over time, Johnny became more psychotic (H.Tr. 111). In the days before the crime, he was psychotic, paranoid and acting bizarre (H.Tr. 142).

Johnny has heard voices since he was fourteen (H.Tr. 109). Johnny slashed his wrist in response to the commands he heard (H.Tr. 104). The voices reappeared year after year, telling him to hurt himself (H.Tr. 109). He tried to plug his ears to escape the voices (H.Tr. 152-153). He scratched himself and mutilated himself trying to escape (H.Tr. 152-153). He wore a hooded sweatshirt, trying to muffle out the noises (H.Tr. 184). He swallowed razor blades (H.Tr. 189). Johnny, plagued by hallucinations his whole life, desperately wanted them to stop (H.Tr. 177-178). English's suggestion that he used to drugs to get hallucinations made no sense, given Johnny's medical history (H.Tr. 177-178).

English found Johnny's schizoaffective disorder was in remission, but provided no foundation for this finding (H.Tr. 179-180). Johnny was still hearing

voices while incarcerated (H.Tr. 180, 181, 182, 187). Doctors continued treatment with antipsychotic medications (H.Tr. 181, 184). And medical providers observed his psychotic symptoms while in custody (H.Tr. 182-183, 183-184, 187).

Contrary to English's testimony, someone having command hallucinations does not have to act upon them immediately (H.Tr. 104). The overwhelming majority of patients with command hallucinations can control their behavior (H.Tr. 105). But, at times, for some psychotic individuals, the commands become too difficult to resist (H.Tr. 105).

A qualified expert, experienced with dual diagnosis patients, would know that Johnny's psychosis was unlikely due to drug use like LSD, because hallucinations are usually visual (H.Tr. 120-21). A patient does not usually get persistent visual somatic and auditory hallucinations from LSD (H.Tr. 121). Johnny's symptoms were more consistent with schizophrenia (H.Tr. 121, 122). Johnny also did not fit the criteria for Amphetamine Intoxication with Perceptual Disturbances (H.Tr. 174). His perceptual disturbances resulted from his schizoaffective disorder (H.Tr. 174).

Qualified experts would never diagnose a personality disorder, such as Antisocial Personality Disorder, when one is suffering from a psychotic disorder such as schizophrenia (H.Tr. 129-130, 160, 164, 173). The DSM IV 2R directs that an examiner should not diagnose a patient with a personality disorder if the condition is better explained by another psychiatric diagnosis such as schizophrenia (H.Tr. 164).

As discussed in Point IV, *supra*, the motion court did not issue specific findings on this point. But, the record shows that the motion court clearly erred in denying relief on this claim.

Counsel has a duty to discover evidence to rebut aggravating evidence adduced by the State. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). "One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state." *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002), citing *Bell v. Cone*, 535, U.S. 685 (2002). Counsel's failure to investigate and rebut aggravating evidence constitutes ineffective assistance of counsel. *Ervin, citing Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999).

In *Ervin*, counsel failed to investigate a jailhouse assault and refute the State's contention that Ervin had threatened to kill his cellmate. *Ervin*, at 826. The potential for prejudice was strong because the State argued this non-statutory aggravator was a reason to give death. *Id.*, at 827. The State maintained it showed Ervin was a danger to others while incarcerated. *Id.*

In *Parker*, counsel failed to rebut the State's aggravating evidence. The State suggested Parker murdered the victim because she was a potential witness in other pending cases. *Id.* Counsel unreasonably failed to rebut that aggravator with available evidence. *Id.* at 931.

Had counsel properly investigated, they would have been prepared to rebut English's testimony. A qualified expert experienced in treating patients with dual diagnosis, would have told jurors that mental illness and substance abuse are not

separate, but go hand and hand (H.Tr. 20-21). According to the National Alliance on Mental Health, people with both mental illness and substance abuse problems "experience more episodes of psychosis." [8]

Courts agree that substance abuse does not alleviate one's mental illness. In *Kangail v. Barnhart*, 454 F.3d 627 (7th Cir. 2006), an administrative law judge found that when Kangail did not abuse drugs or alcohol, she was no longer mentally ill. As a result, the judge denied her social security benefits. *Id*. The Seventh Circuit reversed. *Id*. Judge Posner flatly rejected this conclusion. *Id*. Instead, he determined that a mental illness "can precipitate substance abuse, for example as a means by which the sufferer tries to alleviate her symptoms." *Id*. at 629. Substance abuse can aggravate mental illness, but the illness still exists. *Id*. Even while sober, Kangail experienced psychiatric symptoms that caused her to leave several jobs. *Id*.

Similarly, Johnny still had psychotic symptoms even when he was confined and had no access to drugs or alcohol. He did not stop being schizophrenic just because he drank alcohol or used drugs. Like *Kangail*, he tried to self-medicate to ease his symtoms. Johnny tried to drown out the voices in his head any way he could, with drugs, with alcohol, with hooded sweatshirts, with paper stuffed into

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[8] Found at:

http://www.nami.org/Template.cfm?Section=By_Illness&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=54&contentID=23049

his ears. Johnny tried to muffle the noises and keep them out. He cut his wrists and swallowed razorblades in an effort to cope. As every doctor who had encountered Johnny found, he was severely mentally ill. Contrary to English's suggestion, Johnny's mental illness did not disappear simply because he used drugs and alcohol.

In *Zachry v. Astrue*, 2010 WL3586295, slip op. (E.D. Okla. 2010), Zachry was diagnosed with paranoid schizophrenia and amphetamine induced psychotic disorder. Zachry experienced hallucinations, often auditory command hallucinations. *Id.* at 2. The administrative law judge found that without drug use, the man would not be disabled and therefore could not receive social security benefits. *Id*. The reviewing court reversed. *Id*. Because the hallucinations continued even without the drug use, the drugs could not alone cause the man's mental illness. *Id*.

So, too, Johnny was mentally ill even though he used drugs. The two go hand and hand and cannot be neatly separated as English told the jury. Neither could Johnny's hallucinations be neatly packaged as methamphetamine-induced as opposed to symptoms resulting from his mental illness. Scientific research shows the absurdity of English's testimony that one must act on a command hallucination immediately. "Command Hallucinations, Compliance, and Risk Assessment" published in the American Academy of Psychiatry and the Law (1998) noted various factors determine whether or not an individual hearing command hallucinations will comply with the command. A person hearing a command is

more likely to comply if the person recognizes the hallucinated voice. Id. Researchers report rates of compliance ranging from 39.2 percent to 88.5 percent. *Id*.[9] *See also*, Clinical Psychology Review that concludes that a command hallucination by itself is "not sufficient to produce action, but more factors must be at work and "psychological processes mediate the process." Found at : http://www.sciencedirect.com/science/article/pii/S027273580400042X. The scientific research does not support English's opinions, but the jury never heard this evidence, because counsel did not rebut English's testimony.

Johnny was prejudiced by counsel's failure. The trial court instructed the jury that an intoxicated or a drugged condition whether from alcohol or drugs would not relieve Johnny of responsibility for his conduct (D.L.F. 764). The court told jurors that mental disease or defect does not include an abnormality manifested only by repeated antisocial conduct or alcoholism without psychosis or drug abuse without psychosis (D.L.F. 768). Without information rebutting English's testimony, the jury must have concluded that Johnny's drug use meant he was not mentally ill.

English's testimony, while contrary to scientific principles, likely swayed the jury. The jurors likely concluded that Johnny was antisocial, even though that

[9]Hersh, K., and R. Borum, *Command Hallucinations, Compliance, and Risk Assessment*, 26 Journal of the American Academy of Psychiatry and the Law, 353-359(1998).

diagnosis was improper since he was schizophrenic or had a schizoaffective disorder. The jury likely found he deliberated, because they did not have accurate information, based on science, about command hallucinations and whether an individual must follow them. Had jurors heard the information rebutting English's testimony, they likely would not have found Johnny deliberated.

Jurors also likely would have understood Johnny's mental illness, how the voices inside his head made him react and how he tried to alleviate those voices any way he could. They would have concluded that he suffered from extreme mental or emotional disturbance, Section 565.032.3 (2). Jurors would have found that his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired, Section565.032.3 (3). With this information, a reasonable probability exists that jurors would have sentenced Johnny to life.

This Court should reverse.

CONCLUSION

For the reasons presented, Johnny Johnson respectfully requests that this Court:

Points I, II, III, and V - grant a new trial;

Points I, II, III, and V - grant a new penalty phase; and

Point IV - reverse the motion court's order and remand for specific findings of fact and conclusions of law.

Respectfully submitted,

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Certificate of Compliance and Service

I, Robert W. Lundt, 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, in Times New Roman size 13 point font. The brief contains 20,933 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The PDF files containing this brief and appendix and served on opposing counsel have been scanned for viruses using Symantec Endpoint Protection, updated in March, 2012. According to that program, these files are virus-free.

A true and correct copy of the appellant's brief was filed via the Missouri eFiling System on this 15th day of March, 2011, to Shaun Mackelprang at the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

/s/ Robert W. Lundt
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