IN THE
MISSOURI SUPREME COURT

MICHAEL TISIUS,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC 95303**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
BOONE COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION III
THE HONORABLE KEVIN M.J. CRANE, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***RULES*:**

OTHER:

JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction of this 29.15 death penalty appeal. Art. V, Sec.3, Mo. Const.

STATEMENT OF FACTS

I. Procedural History

Michael Tisius was convicted of first degree murder and sentenced to death. *State v. Tisius*, 92 S.W.3d 751 (Mo. banc 2003)[1]. Michael filed a 29.15 action and the 29.15 motion court granted penalty phase relief and respondent did not appeal. *Tisius v. State*, 183 S.W.3d 207, 211 (Mo. banc 2006). Michael appealed the denial of guilt phase relief and this Court affirmed that denial. *Id.*218.

On the penalty retrial, Michael was sentenced to death and this Court affirmed on appeal. *State v. Tisius*, 362 S.W.3d 398 (Mo. banc 2012). This appeal is taken from the denial of Michael's 29.15 from that penalty retrial.

For the penalty retrial, respondent filed a supplemental notice of the intent to seek death(Ex.4p.48-49;Ex.1p.46). That notice indicated that respondent would rely on Michael's conviction for possession of a prohibited article in the Department of Corrections for events arising on June 6, 2006 and the resulting January 7, 2009

[1] The record on appeal is referenced as follows: (1) the transcript from the original trial (Orig.TrialTr.); (2) State exhibits from the original trial (State's Ex.#p.); (3) the 29.15 hearing transcript in this 29.15 (2ndPCRTr.); (4) the Legal File in this 29.15 (2ndPCRL.F.); and (5) the Exhibits in this 29.15 (Ex.#p.).

conviction(Ex.4p.48-49). Respondent began presenting its penalty retrial case in Boone County on July 12, 2010(Ex.1p.ii-iii). [2]

II. Respondent's Opening Statement

In opening statement, respondent outlined aggravating evidence the jury would hear. The jury heard that Michael wanted to be transferred to a different county jail while he was awaiting trial(Ex.1p.552-53). Respondent represented that when a guard told Michael to fill out a request form that Michael asked whether she knew that he was responsible for killing two guards at the Moberly jail(Ex.1p.552-53). Respondent then told the jury that Michael's statement reflected that he was "proud of what he did"(Ex.1p.553).

Respondent told the jury that it was going to hear evidence that while Michael was held in the Chariton County Jail that he pointed his finger at a guard through glass and said "Bang, bang"(Ex.1p.553).

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[2] The 29.15 court took judicial notice of: (1) the record from the underlying criminal file Boone County case No. 01CR164629; (2) the original trial's direct appeal *State v. Tisius*, 92 S.W.3d 751 (Mo. banc 2002) (SC84036); (3) the first postconviction case Boone County Case No. 03CV165704; (4) the first postconviction appeal *Tisius v. State*, 183 S.W.3d 207 (Mo. banc 2006) (SC86534); and (5) the retrial direct appeal *State v. Tisius*, 362 S.W.3d 398 (Mo. banc 2012) (SC91209) (*See* 2ndPCRTr.16-17). On February 5, 2016, this Court took judicial notice of all of its prior case records in Michael's prior appeals.

Respondent told the jury that while Michael was confined at Potosi on this case that he "decides he needs a weapon" and he was found in possession of "a boot shank, a weapon you would cut up somebody with."(Ex.1p.553).

III. Respondent's Evidence

A. Circumstances of Offense

Randolph County Deputy White began work at 7:00 p.m. on June 21, 2000(Ex.1p.575-78). White was driving toward the jail and arrived there at 12:45 a.m. on June 22nd(Ex.1p.578-79). The jail was an old two story house(Ex.1p.580). White saw Michael and Roy Vance's girlfriend, Tracie Bulington(Ex.1p.592,607-08). Michael was holding a gun over the dispatch counter(Ex.1p.592). White heard Michael fire four gunshots(Ex.1p.597-98).

White radioed for help(Ex.1p.600). Deputy Brown lived one block away, so White went there(Ex.1p.602). When White and Brown returned to the jail, they found jail guards Jason Acton and Leon Egley had been shot(Ex.1p.603-04). Both officers died from head gunshot wounds(Ex.1p.688-96). Blood found on Michael's jeans belonged to Jason Acton(Ex.1p.728-33).

When the shootings happened, seventeen-year-old Thomas Antle was Vance's cellmate(Ex.1p.620,629). Antle overheard a conversation between Michael and Vance about plans to get Vance out(Ex.1p.622-23). Antle heard multiple gunshots and saw Michael running with cell keys and a gun(Ex.1p.625-26). Michael tried unsuccessfully to use the keys to open Vance's cell(Ex.1p.625-26).

Antle recounted Vance was "a manipulative guy" who got younger inmates to do things(Ex.1p.630). Vance had lost the ability to call Bulington because there was a jail phone block, so he got Antle's mother to help him contact Bulington(Ex.1p.630-32). Antle had not wanted to help Vance(Ex.1p.630-31,636). Michael was small in stature compared to Vance(Ex.1p.631).

Michael and Bulington were sitting near a Pizza Hut along Highway 36 in Elwood, Kansas when Officer Vincent arrested them(Ex.1p.704-10). When Vincent approached them, Michael identified himself and stated that he had done something bad(Ex.1p.710,715-16).

Leroyce McAdams found part of a broken pistol lying in the roadway on Highway 36 at about 6:30 a.m. on June 22nd(Ex.1p.658-60,666-77). A blue bandanna was also recovered nearby(Ex.1p.671-77).

Heather Douglas and Bulington were friends(Ex.1p.734). On June 17th, Douglas and Bulington picked up Michael in Columbia and they drove to Macon(Ex.1p.734-35). During the drive, Michael and Bulington discussed how to break out Vance(Ex.1p.735). Michael and Bulington stayed with Douglas 5-6 days(Ex.1p.735-37). One night after Michael and Bulington came back from taking Vance cigarettes, Bulington commented that they had gotten the information they needed from a deputy(Ex.1p.738,741). Before Michael and Bulington went to the jail to give Vance cigarettes, they said they were going on a mission(Ex.1p.738). Douglas asked what that meant and she was told not to worry(Ex.1p.738). Douglas had seen in Bulington's car the gun recovered from the roadway(Ex.1p.738-40). The day before

the shootings, Douglas returned home to find Bulington's car, Bulington's clothes, and Michael's clothes gone(Ex.1p.739-40). The plans Douglas heard discussed to get Vance out did not include shooting anyone(Ex.1p.742).

On June 21st, Rebecca Kilgore saw Michael and he asked to borrow money from her, until he got Vance out of jail(Ex.1p.746-47).

During the nights leading up to the shootings Timothy Whisenand worked as a jail guard(Ex.1p.754-55). One evening Michael and Bulington left cigarettes for Vance and the next evening they left socks(Ex.1p.755-56).

Bulington recounted that she pled guilty to second degree murder and received two concurrent life sentences(Ex.1p.761-62). In June, 2000, Vance was living with her until he got arrested(Ex.1p.763). During a jail visit, Vance told Bulington that he needed a gun to escape and that Michael would provide her the details(Ex.1p.766-68).

Bulington recounted that a few days before the killings, she got a call from Michael and she picked him up at a Columbia convenience store(Ex.1p.768-70). Bulington recounted that she drove to Douglas' Macon house(Ex.1p.770-71). Michael told Bulington that they needed a gun to scare the guards to get them into a holding cell and then they would get cell keys to let Vance out(Ex.1p.770-71). The plan's discussions did not include killing anyone(Ex.1p.772).

Bulington took a gun and ammunition belonging to her parents from their house(Ex.1p.749-52,773-74). The gun was kept in Bulington's car(Ex.1p.774). When Bulington and Michael were driving around, Michael held the gun out the window and fired it into the air(Ex.1p.776-78).

Bulington recounted that she and Michael made two trips to the jail because Michael wanted Jason Acton to be there when they tried to get Vance out(Ex.1p.779-81). Bulington reported that Michael believed Jason would not resist the escape(Ex.1p.779-81). The first two nights Jason was not there(Ex.1p.781). Depending on whether they left cigarettes or socks for Vance was a signal as to whether the planned escape would happen or not that evening(Ex.1p.782-85).

Bulington and Michael went inside the jail and Michael was talking to Jason Acton, who Michael knew from having been a jail inmate(Ex.1p.791-92). Bulington testified that she got cold feet about doing the escape and turned to leave and saw that Michael had a gun alongside his leg(Ex.1p.793-94). Bulington reported that the next thing she knew Michael had shot the guards(Ex.1p.795-97). Michael then took keys and ran towards Vance's cell(Ex.1p.797-98). While Leon Egley was on the floor, he started crawling towards Bulington and Michael shot him again(Ex.1p.799-801).

Bulington and Michael drove on Highway 36 to Kansas(Ex.1p.801). During that drive, Bulington heard Michael talking to himself saying "don't be mad" at me, Roy, and telling Roy he was "sorry"(Ex.1p.801-02,817). On Highway 36, Bulington threw the gun out the window with it wrapped in a bandanna(Ex.1p.802-03). Bulington's car broke down in Kansas and they were arrested(Ex.1p.803).

Bulington testified that leading up to the attempted escape Michael made statements that he was going to do what he needed to do(Ex.1p.804-06). Bulington recounted Vance had a way of convincing and "playing" people to do things he wanted(Ex.1p.809). It was Vance who asked Bulington to get a gun and she did it

because Vance asked her to(Ex.1p.810). Bulington's relationship with Vance was linked to their methamphetamine use(Ex.1p.812).

Bulington recognized that Michael looked up to Vance and wanted to help Vance(Ex.1p.810-11). Michael was quiet and timid, and small in stature compared to Vance(Ex.1p.812-13).

Bulington recounted that no one was supposed to get shot(Ex.1p.813,815). The preparatory discussions focused on doing the escape when there would be a guard who would not resist - to avoid what actually happened(Ex.1p.814).

Highway Patrol Officer Platte questioned Michael. Michael admitted having planned with Vance and Bulington how to get Vance out(Ex.1p.831,836-37). The plan did not involve shooting the guards(Ex.1p.832). Michael also admitted having shot the two guards and using the keys to try to get Vance out(Ex.1p.831-32). Michael recounted driving on Highway 36 to Kansas until Bulington's car broke down(Ex.1p.832-33). Michael said the gun was thrown out of the car in a blue handkerchief(Ex.1p.832-33).

Michael also gave a written statement to Platte about what had happened(Ex.1p.846-49). Michael's statement included that he knew what he did was wrong and the harm was irreparable(Ex.1p.849). That statement continued that if Michael had it to do over, he would have killed himself to save the officers' lives and that he deserved whatever punishment he got(Ex.1p.849,854).

B. Victim Impact

Respondent presented from the two guards' family members victim impact evidence which described the loss they have experienced(Ex.1p.855-70;State's Ex.72p.991-94)

Lori Miller and Jason Acton were engaged to be married(Ex.1p.871-72). Lori had five children from a prior marriage and Jason was involved in every aspect of their lives(Ex.1p.872-73). Lori wondered how her life would have been different if Jason had not died(Ex.1p.874).

C. Aggravation

Through State's Ex. 53, a docket entry from January 7, 2009, the jury was told that Michael entered "an Alford plea of guilty" to possession of a prohibited article in the Department of Corrections and sentenced to five years concurrent to other sentences he had(Ex.1p.884,896-97). The jury was told that the charge as filed in the amended complaint (State's Ex.48), read that the prohibited item was "a metal object commonly known as a boot shank"(Ex.1p.884,889,897). The jury was told that the alleged act happened on June 6, 2006(Ex.1p.884,889,897).

Donna Harmon recounted that she was a Chariton County Jail guard(Ex.1p.898). Harmon reported that on July 2, 2000 she was going into the jail shortly after midnight, when lights are off, and noticed movement in Michael's cell(Ex.1p.899-900). Harmon reported that Michael had his hands raised as though he was holding a pistol and made motions at Harmon, as if he was shooting at her(Ex.1p.899-900).

On cross-examination, Harmon acknowledged that the cell doors at Chariton County are solid doors with a bullet-proof glass window(Ex.1p.901,903). Harmon also acknowledged the Chariton County cells are almost soundproof, and therefore, inmates frequently will make hand gestures to communicate with one another(Ex.1p.901-02).

Jacqueline Petri had assorted duties working in the Boone County Jail in April, 2001(Ex.1p.906-07). Petri was picking up inmate food trays in the evening(Ex.1p.907-08). Michael told Petri that he wanted to be moved from the Boone County Jail(Ex.1p.908). Petri told Michael that he needed to complete a request form(Ex.1p.908). Michael told Petri that he really wanted to be moved that same night(Ex.1p.908-09). Michael was anxious to be moved and told Petri that there was a court order for him to be moved(Ex.1p.909). Petri reported that Michael asked her whether she knew who he was and when she indicated that she did not, that Michael told her that he was the person who killed the two Randolph County jail guards(Ex.1p.908-09).

On cross-examination, Petri testified: "He was, like, you know, Look at me. I'm the one that killed those two jailers. That's how I took it."(Ex.1p.910).

IV. Defense Case

A. Acquaintance Witnesses

Michael's mother, Patty Lambert, recounted that her then husband and Michael's father, Chuck Tisius, left her and Michael a few months after Michael was born in February, 1981(Ex.1p.917-21). Patty had another son, Joey Mertens, who was

two and one-half years older than Michael and whose father was Joseph Mertens(Ex.1p.923-24). In 1981, Patty and her children lived in St. Louis - Brentwood(Ex.1p.918). When Patty and Chuck's marriage ended, Patty got custody of Michael(Ex.1p.922-23).

Chuck, a St. Louis police officer, paid child support sporadically(Ex.1p.924-25,973-74). In 1984, Patty was receiving AFDC for Michael when she moved to south St. Louis City(Ex.1p.926-27).

Patty testified that from 1984 - 1988, Chuck did not have much contact with Michael(Ex.1p.932). Chuck would represent that he was coming to get Michael and not show up, leaving Michael crying(Ex.1p.932). In contrast, Joey's father could be relied on to spend weekends with Joey(Ex.1p.932-34). Joey rubbed it in to Michael how Joey was treated better by his father compared to how Chuck treated Michael(Ex.1p.933-34).

Patty testified that Michael was a quiet reserved child who liked music and drawing(Ex.1p.927,931). Joey was athletic(Ex.1p.931). Joey regularly beat up Michael(Ex.1p.934-35,963-64).

In 1988, Patty, Michael, and Joey moved to Hillsboro(Ex.1p.939). They lived in Hillsboro until 1996(Ex.1p.947). In 1996, they moved back to St. Louis and Michael attended Maplewood High School, but dropped out in ninth grade(Ex.1p.991-92).

During Michael's early school years, his standardized test scores were good(Ex.1p.935-37). As time passed, though, Michael's school performance deteriorated and he repeated sixth grade(Ex.1p.948-52,969-70,975-76,990).

In third grade, Michael displayed signs of depression and problems with self-esteem(Ex.1p.952-53). In middle school, Michael wrote derogatory, self-hate things about himself, reflecting a lack of self-worth(Ex.1p.953-57,960). In Michael's middle school years, he took medication for depression(Ex.1p.961-62). During his teen years, Michael talked about harming himself(Ex.1p.956-57,995). Michael received counseling for his low self-esteem(Ex.1p.962-63). Patty tried to get Michael residential treatment(Ex.1p.966-67).

In his early teens, Michael went to live with Chuck and Chuck's wife, Leslie, for a couple of months after Chuck obtained legal custody of Michael(Ex.1p.980-85,987). One late evening, Chuck appeared at Patty's door with Michael, stating he no longer wanted Michael and she could have him back(Ex.1p.985). Patty never regained legal custody of Michael, allowing Chuck to avoid paying child support(Ex.1p.987).

Michael stopped living with Patty in 1998 and moved to Moberly(Ex.1p.998). Patty was concerned that Michael was a greatly troubled youth(Ex.1p.998).

A Hillsboro family neighbor, Patty Gray, recounted how Michael was a good child who played with her children(Ex.1p.1002-05). Gray recounted how Joey beat up Michael and that she tried to protect Michael(Ex.1p.1006-09).

When Michael failed sixth grade, Janice Page taught Michael during the year that he repeated that grade(Ex.1p.1012-14). Page recounted that in her experience, Michael was someone who was enthusiastic, creative, fun, and liked by other students(Ex.1p.1014,1021-22).

John Reichle was a case manager for St. Louis County youth programs who met Michael in 1998, when he was seventeen and in a G.E.D. program(Ex.1p.1031-32). Reichle helped provide Michael with resources(Ex.1p.1032). Michael lived at the Youth In Need residential program(Ex.1p.1035-36). Reichle recounted how Michael lacked a positive male role model and how Michael's father was uninvolved in Michael's life(Ex.1p.1034,1036-37,1042).

Emmy Moore Burke recounted that she met Michael in August, 1999, because her sister, Billie, dated Michael(Ex.1p.1050-51). Burke described Michael as getting along well with others(Ex.1p.1051-53).

Tina Moore was Emmy's and Billie's mother(Ex.1p.1054-55). Tina knew Michael was shy, quiet, and liked to draw(Ex.1p.1056-57).

Dana Rivera's mother and Michael's mother were longtime friends and Dana babysat Michael and Joey(Ex.1p.1060-63). Dana recounted that Joey bullied Michael(Ex.1p.1062-63). Dana described Michael's father's lack of involvement in Michael's life(Ex.1p.1064-65). Michael was depressed and displayed feelings of self-hatred(Ex.1p.1064-65). Dana described how, as Michael got older, he spent time with her children and was good to them(Ex.1p.1065-66).

Lisa Esry knew Michael through her daughters(Ex.1p.1068). Michael was good with her grandchildren and did drawing with them(Ex.1p.1068-69).

Heather Gabelman is Lisa Esry's daughter(Ex.1p.1072-73). Heather became friendly with Michael because he dated her sister(Ex.1p.1073). Heather described how Michael was good to everyone and he loved drawing(Ex.1p.1074-75).

Michael's half-brother, Joey Mertens, recounted that he was two and one-half years older than Michael(Ex.1p.1082). Joey described how growing up he hated Michael and was jealous of him(Ex.1p.1082). Joey had the benefit of a father who cared about him, while Michael did not(Ex.1p.1082-83). Joey felt their mother gave Michael more attention than him because Michael's father was uninvolved in Michael's life(Ex.1p.1082-83,1089). Joey was always bigger and athletic whereas Michael was a loner who did drawing(Ex.1p.1083-84). Joey admitted beating Michael(Ex.1p.1083-86).

Stephanie Ashley taught Michael art when he attended school in Hillsboro(Ex.1p.1092-93). Michael was very talented in art(Ex.1p.1092-93). Ashley enjoyed having Michael in class(Ex.1p.1095-96). Michael was diligent and helped other students with their art projects(Ex.1p.1096).

Melissa Bowers got to know Michael through her church prison ministry and they discussed spiritual matters(Ex.1p.1078-81).

B. Expert Witnesses

1. Dr. Peterson

Dr. Stephen Peterson testified at the first 29.15 hearing and selected portions of his 29.15 testimony were read to the retrial jury(Ex.1p.1066-67;Ex.5).

a. Dr. Peterson – What The Retrial Jury Heard

Portions of Peterson's prior testimony the jury heard included the following.

Peterson gathered extensive background information and evaluated Michael to determine: (1) whether Michael suffered from a mental disease or defect; (2) if Michael did have a mental disease or defect, whether it impacted his level of criminal responsibility; and (3) whether, based on a complete evaluation of Michael, there was any mitigating circumstances(Ex.5p.227-28,230-34).

Peterson's diagnoses included: (1) major depressive disorder severe without psychotic features; (2) childhood onset post-traumatic stress disorder (PTSD); (3) dysthymia; (4) history of marijuana and alcohol use and dependence; and (5) passive/aggressive and compulsive personality(Ex.5p.235,265-66,268).

Major depressive disorder, depression, is a severe mental disease(Ex.5p.236). Michael's depression was longstanding and began during early childhood(Ex.5p.236-37,267).

Peterson explained that childhood PTSD differs from adult PTSD(Ex.5p.238). Childhood onset PTSD is a serious mental disease because it impairs normal maturation and places a person at risk for abnormal anxiety management, depression, poor judgment, and substance abuse(Ex.5p.269). Peterson discussed that Joey abused Michael(Ex.5p.244-46,254).

The materials Peterson reviewed reflected that Michael was a desperate and helpless child(Ex.5p.258). Michael was needy, immature, and not equipped to be out on his own, with a longstanding history of being physically abused by his half-brother(Ex.5p.258). Michael displayed the reasoning ability of a young teenager and his cognitive ability was quite immature(Ex.5p.260).

Michael displayed passive dependence and relied on other people(Ex.5p.270). Michael gravitates towards people who take advantage of him and is predisposed to want to please others, so that they like him(Ex.5p.270).

On cross-examination, Peterson indicated that Michael knew right from wrong at the time of the offense and that Michael had told Peterson he knew what he had done was wrong(Ex.5p.290-91).

b. <u>Dr. Peterson – What The Retrial Jury Did Not Hear</u>

The jury did not hear the following portions of Peterson's prior testimony.

Michael viewed Roy Vance as an influential person with whom Michael could align himself and trust(Ex.5p.274). Michael perceived his friendship with Vance as one between equals, not that Vance was taking advantage of him(Ex.5p.274-75). Michael was vulnerable to being influenced by Vance because of the childhood trauma Michael endured with no one to advocate for him and to protect him(Ex.5p.275). Michael's history of depression clouded his judgment about Vance(Ex.5p.276).

Peterson opined that Michael acted with diminished capacity at the time of the shooting(Ex.5p.277-78). The statutory mitigating circumstance of the defendant's

acting under the influence of extreme mental or emotional disturbance at the time of the offense (diminished capacity) was true of Michael(Ex.5p.278-79). This mitigating circumstance existed because of Michael's conditions of major depression, PTSD, dysthymia, and passive dependence on others such as Vance(Ex.5p.278-79).

2. Dr. Daniel

Psychiatrist Dr. Daniel's entire first postconviction testimony was read to the jury(Ex.1p.1076-77).

In 2001, Dr. Daniel was the treating psychiatrist for the Boone County Jail(Ex.6p.58-59). Daniel treated Michael while he was housed there(Ex.6p.61-62,64,69,73). Michael described to Daniel depressive symptoms(Ex.6p.74). Dr. Daniel's diagnosis was major depression of longstanding history, for which he treated Michael with anti-depressants(Ex.6p.74-76,79).

3. Dr. Taylor

Psychologist Shirley Taylor conducted separate evaluations of Michael for purposes of his original trial and then for the penalty retrial(Ex.1p.1106-07). Taylor recounted that Michael's father had sporadic involvement in his life that was characterized by broken promises(Ex.1p.1108-10). During Taylor's evaluations, Michael reported about Joey's beating him(Ex.1p.1111-12).

Taylor's findings in both evaluations were consistent(Ex.1p.1115). Taylor found that Michael suffered from depression, anxiety, and PTSD(Ex.1p.1115).

The shootings were not in keeping with Michael's character and history of passivity and non-aggression and his remorse about the shootings(Ex.1p.1118). Michael had a strong desire to please Vance(Ex.1p.1121).

On cross-examination, Taylor was asked about the statements Petri attributed to Michael - asking Petri whether she knew who he was and that he had killed two guards(Ex.1p.1149). Taylor was also asked whether she was familiar with Harmon's reporting that Michael made gestures like he was shooting a gun at her(Ex.1p.1149). Taylor indicated she was not familiar with either alleged occurrence and would want to know their context to respond to the prosecutor's questioning of how she could consider Michael to be remorseful and passive in light of those matters(Ex.1p.1149-50).

On cross-examination, Taylor was asked about Michael's conviction for possessing a boot shank(Ex.1p.1150-51). Taylor testified that Michael had told her that the boot shank belonged to someone else(Ex.1p.1151). When the prosecutor asked Taylor whether Michael should be believed, Taylor responded that the context rang true to her(Ex.1p.1151).

On cross-examination, Taylor acknowledged that there was never a plan to shoot the guards(Ex.1p.1152). When the prosecutor asked Taylor that Michael must not then have listened to Vance, Taylor replied that was also contextual(Ex.1p.1152).

On cross-examination, Taylor agreed that children raised in positive family settings can grow up to commit murder while children coming from circumstances comparable to Michael's grow up to be productive societal members(Ex.1p.1154).

Respondent asked Taylor whether she was familiar with David Pelzer's book, "A Child Called It," which chronicled his abusive, deprived childhood and how, despite that background, Pelzer succeeded(Ex.1p.1154-58). Respondent asked Taylor whether Pelzer's experiences were worse than Michael's background and she replied that she did not know whether Pelzer's circumstances were worse, but Michael's were horrible(Ex.1p.1157). The prosecutor then asked Taylor whether Michael's experiences being horrible was context dependent and she agreed(Ex.1p.1157).

Respondent elicited from Taylor Pelzer's personal accomplishments(Ex.1p.1157-58). Respondent also elicited from Taylor that through hard work and determination Pelzer grew up to be the kind of person everyone should want to be, despite a horrible childhood(Ex.1p.1158).

Respondent asserted that Taylor could not explain why Michael killed two guards, and Taylor responded that she could make a serious attempt to do so(Ex.1p.1158). Respondent followed by commenting that Taylor's ability to do so was context dependent(Ex.1p.1158-59).

On redirect, counsel elicited that Taylor's testing of Michael utilized validity indices, which showed that that the results of Michael's testing were reliable(Ex.1p.1160-62).

On recross, respondent elicited that the validity tests rely on context(Ex.1p.1162).

On redirect, counsel asked Taylor whether she looks for full context in making assessments and she indicated that she was always better off with more information than less(Ex.1p.1162).

On recross, respondent stated that Taylor did not have the full context of the environment in which Michael was raised(Ex.1p.1163). Respondent continued stating that Taylor did not have the information about Michael mimicking shooting a guard, "bragging about killing," and having "a boot shank" (Ex.1p.1163). Taylor agreed that she would have liked to have known about those matters and the prosecutor countered with that he had given the information to counsel(Ex.1p.1164).

V. Closing Arguments

A. Respondent's Initial Argument

During respondent's initial closing argument, the jury was told death was warranted because Michael "bragged" about killing the guards when he asked Petri whether she knew he was the guy who killed the jail guards(Ex.1p.1183-84). To that, respondent added Michael's acting like he was shooting Harmon was further evidence death was warranted(Ex.1p.1183-84). Those arguments were immediately followed by:

> You don't need any context like Dr. Taylor to know what's going on there. There is no context. That's the type of man we're dealing with.

(Ex.1p.1183-84).

Respondent's initial closing argument included:

> And, you know, it's pretty audacious to come in here now, as this defendant is doing, and saying, I didn't have a dad and, boy, looked [sic] what happened. Do those Miller kids - - do those Miller kids get to kill somebody because their dad, their father figure is gone? If so, Mr. Tisius, write down the name. Tell me who they get to kill, because I bet your name would be on that piece of paper.

(Ex.1p.1184-85).

Respondent continued arguing that the mitigation evidence should not persuade the jury to vote for life because people who have had worse childhood circumstances than Michael became productive societal members(Ex.1p.1185-86). That line of argument continued that there were also people who came from good childhood circumstances, and despite those circumstances, committed bad acts(Ex.1p.1185-86). Respondent argued that a case in point was Dave Pelzer and his life story, "A Child Called It"(Ex.1p.1185-86).

Respondent also argued that Michael is not mentally retarded and the only time Dr. Taylor did not "have any problem with context" was in acknowledging Michael is not mentally retarded(Ex.1p.1187).

Respondent's argument continued that even though Michael would be in the Department of Corrections for the remainder of his life, he committed more crimes(Ex.1p.1189-90). That argument continued:

> He has a boot shank. He's got a boot shank. Because, you know what he knows? There is nothing worse we can do to him. He got five years for that,

and they just ran it concurrent with his life sentence. Every crime he commits from this day forward as long as he's alive is a freebie. It's a freebie.

He's going to be - - continue to be a danger to our society, and we have an obligation. As representatives of our state, we all have an obligation to protect those jailers in those Departments of Correction, those staff members, those doctors, those nurses. And you know what? The Roy Vances of the world that are in those prisons we have to protect from murderers like him.

Ladies and gentlemen, if he killed twice to try and get a friend out, do you think if he's given the opportunity he would kill again to get himself out? (Ex.1p.1190).

B. <u>Defense Closing Argument</u>

Counsel McBride merely opined that Michael's statements to Petri were not "bragging" about the killings and that Petri's testimony demeanor somehow showed that(Ex.1p.1194-95).

Counsel urged that respondent's argument about what Harmon reported should be dismissed because Harmon acknowledged that because of the soundproof conditions at her jail, inmates communicated using hand signals(Ex.1p.1195). Despite asserting that, counsel proceeded to add: "But there was no evidence presented at all that there may have been other inmates around to whom he may have been communicating."(Ex.1p.1195).

Counsel then continued arguing that it was respondent's burden to prove "bragging"(Ex.1p.1195-96).

Counsel's response to respondent's use of the boot shank was to state that there was no evidence that Michael had used it to assault anyone at the Potosi Correctional Center(Ex.1p.1196).

C. Respondent's Rebuttal Argument

In rebuttal, respondent argued that there were no guarantees as to what Michael will or will not do(Ex.1p.1212-13). That argument continued:

> And you know what? Maybe he will die in prison. I think our goal is to make sure he's the only one that does and that no other guard, no other nurse, no other person that works there with him, no other inmate that's in that facility is going to be vulnerable to the same type of decision-making that these two officers suffered from.

(Ex.1p.1213).

Respondent's rebuttal argument included that Taylor had picked and chosen what she looked at while talking about "context"(Ex.1p.1214). Respondent argued that the jury ought to focus on Michael's actions before, during, and after the guards' deaths(Ex.1p.1214-15).

Respondent argued that Michael did not display remorse when he made the "gun" hand-gestures to Harmon(Ex.1p.1218-19) and "brag[ged]" a year later to Petri about the killings(Ex.1p.1218-19). That was followed by respondent's stating that "it's all about the context" and the jury has heard how important context is(Ex.1p.1218-19).

Respondent concluded its rebuttal argument that death was warranted because:

> It can stop Michael Tisius from doing this again. And it is an answer to the plea from the families of Leon and Jason and Randolph County that you do justice in this case.

(Ex.1p.1219).

VI. 29.15 Case

Michael filed a 29.15 action alleging multiple grounds(2ndPCRL.F.9-14). Those grounds included that counsel was ineffective in failing to rebut respondent's aggravation evidence(2ndPCRL.F.43-57).

It was pled that counsel should have presented evidence that inmate Charles Hurt put the boot shank in Michael's radio, that Hurt had a history of setting up other inmates by snitching on them, that Hurt had brutally stabbed to death his Missouri Department of Corrections cellmate, and that Michael was afraid to remove the shank because of Hurt's history of having killed Hurt's cellmate(2ndPCRL.F.50-51). Further, it was alleged that the jury should have been apprised that Michael had entered an *Alford* plea to the boot shank charge and that an *Alford* plea meant that Michael did not admit to having committed the charged act(2ndPCRL.F.50-51). Additionally, it was alleged counsel should have presented picture evidence of the boot shank showing that it had not been sharpened or modified into a weapon(2ndPCRL.F.52).

The pleadings alleged Petri's reporting that Michael had made a statement, which she interpreted as bragging that he was responsible for the two jail guards' deaths, should have been countered with evidence from someone such as Dr. Peterson

that could have explained that Michael's statement was a manifestation of his own feelings of fear caused by circumstances of being in the Boone County Jail(2ndPCRL.F.56).

The amended motion also alleged that Harmon's reporting that Michael had made motions as though he were shooting at her should have been countered with pictures from the Chariton County Jail, which would have established that Harmon could not have seen what she believed she saw because of her location in that Jail and because the lights were out in Michael's cell(2ndPCRL.F.53-54).

The 29.15 court conducted an evidentiary hearing on all of Michael's claims. The court entered Findings denying all of Michael's claims(2ndPCRL.F.321-58).

This appeal followed.

POINTS RELIED ON

I.

BOOT SHANK AGGRAVATION

The motion court clearly erred denying the claim counsel was ineffective for failing to present evidence: that Charles Hurt, having a reputation for setting up other inmates, compelled Michael Tisius to keep the boot shank in Michael's radio and Michael was afraid to remove it because of Hurt's history of stabbing to death Hurt's cellmate; that the shank was not sharpened into a weapon; and that Michael entered an *Alford* plea to the shank charge, thereby not admitting guilt, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have presented all this evidence because it rebutted respondent's evidence and argument that Michael's possessing the boot shank supported death as Michael posed a safety risk to everyone at Potosi and Michael was prejudiced as there is a reasonable probability he would not have been death sentenced.

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

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

North Carolina v. Alford, 400 U.S. 25 (1970);

Brooks v. State, 242 S.W.3d 705 (Mo. banc 2008);

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

II.

FAILURE TO REBUT PETRI'S REPORTING OF STATEMENT AS "BRAGGING"

The motion court clearly erred denying the claim counsel was ineffective for failing to rebut respondent's evidence that Michael's question to Boone County jail guard Petri asking whether she knew who he was as "bragging" that he killed two guards by calling someone, such as Dr. Peterson, to testify that such a statement was subject to another interpretation which was Michael was telling the listener he was frightened and why it was important for him to leave the Boone County Jail, rather than "bragging," because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel, knowing respondent argued in the original trial that Petri's testimony showed "bragging," would have presented evidence of this alternative meaning to rebut respondent's "bragging" characterization. Michael was prejudiced as he would not have been sentenced to death because the jury was left to believe his acts were more aggravated and deserving death.

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

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

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);

State v. McCarter, 883 S.W.2d 75 (Mo.App., S.D. 1994);

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

III.

ALLEGED GUN HAND GESTURES

The motion court clearly erred denying the claim counsel was ineffective for failing to investigate and present evidence rebutting Michael made hand gestures from his cell to Chariton County Jail control bubble guard Harmon mimicking he was firing a gun at her, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have investigated and presented evidence that included pictures supporting that from where Harmon stood in the jail that she was mistaken about the gestures as it either was impossible to see anything, or if anything was visible, it was readily subject to misinterpretation because Michael's cell's lights were out. Michael was prejudiced because had counsel presented such evidence there is a reasonable probability he would not have been death sentenced.

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

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

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);

State v. McCarter, 883 S.W.2d 75 (Mo.App., S.D. 1994);

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

IV.

TAYLOR UNPREPARED

The motion court clearly erred denying the claim counsel was ineffective for failing to prepare Dr. Taylor so that she knew about the Chariton and Boone County Jail allegations, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have advised Taylor of both allegations and Michael was prejudiced because if Taylor had been able to acknowledge having been on notice of that information, then the jury would have known she accounted for those matters in formulating her opinions, and therefore, her opinions were not subject to attack as being based on incomplete information, and there is a reasonable probability Michael would not have been death sentenced.

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);

Strickland v. Washington, 466 U.S. 668 (1984);

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

V.

CROSS OF TAYLOR – MICHAEL DID NOT PLEAD GUILTY

The motion court clearly erred denying the claim counsel was ineffective for failing to include in the motion for new trial the prosecutor's questioning Dr. Taylor whether Michael had pled guilty, after objecting on the grounds of relevance and prejudice during trial, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel, after objecting at trial, would have included that objection in the motion for new trial. Michael was prejudiced because had this claim not been subjected to the more demanding plain error standard of review on appeal there is a reasonable probability his sentence would have been reversed.

State v. Danneman, 708 S.W.2d 741 (Mo.App., E.D. 1986);

Deck v. State, 68 S.W.3d 418 (Mo. banc 2002);

Strickland v. Washington, 466 U.S. 668 (1984);

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

Rule 24.02.

VI.

FAILURE TO SUPPORT SUBMITTING STATUTORY MITIGATORS – INCOMPLETE DR. PETERSON TESTIMONY

The motion court clearly erred denying the claim counsel was ineffective for failing to present portions of Dr. Peterson's prior testimony to support having submitted additional statutory mitigating circumstances that Michael acted under the influence of extreme mental or emotional disturbance (diminished capacity) and Michael's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have presented those portions of Dr. Peterson's prior testimony that would have supported these mitigating circumstances and requested they be included in mitigating circumstances Instructions 9 and 15. Michael was prejudiced because had the omitted testimony been included and the corresponding mitigating circumstances submitted as part of Instructions 9 and 15, then Michael would not have been death sentenced.

Deck v. State, 68 S.W.3d 418 (Mo. banc 2002);

Strickland v. Washington, 466 U.S. 668 (1984);

State v. McCarter, 883 S.W.2d 75 (Mo.App., S.D. 1994);

Butler v. State, 108 S.W.3d 18 (Mo.App., W.D. 2003);

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

VII.

MITIGATION WITNESSES

The motion court clearly erred denying counsel was ineffective for failing to call as mitigation witnesses Michael Tisius' father, Chuck Tisius, Michael's stepmother, Leslie Tisius, Michael's friends, Jamey Baker and Deanna Guenther, and Michael's G.E.D. teacher, Lynn Silverman, because Michael was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have called these witnesses who could have highlighted the severity of the adversity and deprivation Michael endured while living with his mother, Patty, and half-brother, Joey, and the consequences for Michael of living in that environment. Michael was prejudiced as there is a reasonable probability that had the jury heard these witnesses he would not have been death sentenced.

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);

Glass v. State, 227 S.W.3d 463 (Mo. banc 2007);

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

VIII.

VICTIMS' WISHES ARGUMENTS

The motion court clearly erred denying the claim counsel was ineffective for failing to object to respondent's closing arguments urging that death was appropriate as that was what the victims' desired, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to these improper arguments on the grounds they injected passion, prejudice, emotion, and arbitrariness into sentencing. Michael was prejudiced because there is a reasonable probability the jury would not have imposed death had counsel objected to such arguments.

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995);

Berger v. United States, 295 U.S. 78 (1935);

State v. Taylor, 944 S.W.2d 925 (Mo. banc 1997);

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

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

IX.

NO RIGHT TO MERCY ARGUMENT

The motion court clearly erred denying the claim counsel was ineffective for failing to object to respondent's closing argument that Michael did not have the right to ask for mercy, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected as Michael had the right to seek mercy and the jury had the authority to exercise mercy and impose life, and Michael was prejudiced as there is a reasonable probability that the jury would have imposed life absent this improper argument.

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995);

State v. Rousan, 961 S.W.2d 831 (Mo. banc 1998);

Strickland v. Washington, 466 U.S. 668 (1984);

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

X.

FLAT FEE PAYMENT

The motion court clearly erred rejecting the claim that Michael was denied effective assistance of counsel, a fair trial, due process, his right to have conflict free counsel, and was subjected to cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that counsels' flat fee arrangement created a conflict of interest because it created an inherent disincentive for counsel to do all that reasonably competent counsel would have done under similar circumstances, and thereby, resulted in the structural defect of denying Michael his right to counsel and alternatively Michael was denied effective assistance of counsel due to this flat fee arrangement because counsel did not act as reasonably competent counsel in representing Michael, as set forth in Points I through XII, and Michael was prejudiced for the reasons as discussed in those same Points.

Cuyler v. Sullivan, 446 U.S. 335 (1980);

Arizona v. Fulminante, 499 U.S. 279 (1991);

Anderson v. State, 196 S.W.3d 28 (Mo. banc 2006);

State v. Cheatham, 292 P.3d 318 (Ks. 2013);

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

American Bar Association Guidelines For The Appointment And Performance of Defense Counsel In Death Penalty Cases, 31 Hofstra L.Rev. 913 (2003).

XI.

MENTAL AGE BARS EXECUTION

The motion court clearly erred denying the claim counsel was ineffective for failing pretrial to move the trial court and present supporting evidence to prohibit respondent from seeking death, on the grounds that Michael's mental age was less than eighteen years old at the time of the alleged offense, and alternatively if such motion was denied, then counsel was ineffective for failing to request an instruction that the jury must affirmatively find that Michael's mental age was at least eighteen years old at the time of the alleged offense to impose death, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have taken these actions and Michael was prejudiced as he would not have been death sentenced and he is not now properly subject to a death sentence.

Roper v. Simmons, 543 U.S. 551 (2005);

People v. House, 2015 WL 9428803 (Ill. App. 1st Dist. Dec. 24, 2015);

Deck v. State, 68 S.W.3d 418 (Mo. banc 2002);

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

XII.

INSTRUCTIONAL ERROR INEFFECTIVENESS

The motion court clearly erred denying the claim counsel was ineffective for failing to offer alternative penalty instructions or modified instructions to the MAI submitted instructions, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel, based on 2001 ABA identified capital instruction deficiencies, would have offered such alternatives and modifications, and Michael was prejudiced as there is a reasonable probability that had such alternatives/modifications been submitted Michael would not have been death sentenced.

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

Strickland v. Washington, 466 U.S. 668 (1984);

Deck v. State, 68 S.W.3d 418 (Mo. banc 2002);

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

ABA March/April 2012 Missouri Death Penalty Assessment Report.

XIII.

APPELLATE COUNSEL INEFFECTIVENESS – REJECTED AGGRAVATOR

The motion court clearly erred denying the claim appellate counsel was ineffective for failing to raise it was error for the trial court to have submitted, as to the Jason Acton count, the aggravating circumstance whether the murder of Jason Acton occurred while Michael was engaged in the commission of another unlawful homicide of Leon Egley, because Michael was denied effective assistance of appellate counsel, due process, freedom from double jeopardy, and freedom from cruel and unusual punishment, U.S. Const. Amends. V, VI, VIII, and XIV, in that reasonable appellate counsel would have raised this claim because the jury in the original penalty phase rejected this aggravator such that respondent was collaterally estopped from resubmitting this aggravator to the retrial jury. Michael was prejudiced because had appellate counsel raised this claim there is a reasonable probability his death sentence, as to the Jason Acton count, would have been reversed.

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

Williams v. State, 168 S.W.3d 433 (Mo. banc 2005);

State v. Dowell, 311 S.W.3d 832 (Mo.App., E.D. 2010);

Ashe v. Swenson, 397 U.S. 436 (1970);

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

APPLICABLE STANDARDS

Throughout, there are repeating standards governing review. To avoid unnecessary repetition these standards are set forth now and incorporated by reference in their entirety into all briefed Points.

Appellate Review

Review is for whether the 29.15 court clearly erred. *Barry v. State*, 850 S.W.2d 348, 350 (Mo. banc 1993).

Ineffectiveness

To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A movant is prejudiced if there is reasonable probability but for counsel's errors the result would have been different. *Deck v. State*, 68 S.W.3d 418, 426 (Mo. banc 2002). A reasonable probability sufficiently undermines confidence in the outcome. *Id.*426. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994); *Butler v. State*, 108 S.W.3d 18, 25 (Mo.App., W.D. 2003).

Eighth and Fourteenth Amendment

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

ARGUMENT

I.

BOOT SHANK AGGRAVATION

The motion court clearly erred denying the claim counsel was ineffective for failing to present evidence: that Charles Hurt, having a reputation for setting up other inmates, compelled Michael Tisius to keep the boot shank in Michael's radio and Michael was afraid to remove it because of Hurt's history of stabbing to death Hurt's cellmate; that the shank was not sharpened into a weapon; and that Michael entered an *Alford* plea to the shank charge, thereby not admitting guilt, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have presented all this evidence because it rebutted respondent's evidence and argument that Michael's possessing the boot shank supported death as Michael posed a safety risk to everyone at Potosi and Michael was prejudiced as there is a reasonable probability he would not have been death sentenced.

Michael was denied effective assistance of counsel because counsel failed to rebut respondent's boot shank aggravation. There is a reasonable probability that had counsel rebutted this evidence Michael would not have been death sentenced.

I. What the Jury Heard

A. Opening Statement

In opening statement, respondent told the jury that while Michael was confined at Potosi on this case that he "decides he needs a weapon" and he was found in possession of "a boot shank, a weapon you would cut up somebody with."(Ex.1p.553).

B. Evidence

Through State's Ex. 53, a docket entry from January 7, 2009, the jury was told Michael entered "an Alford plea of guilty" to possession of a prohibited article in the Department of Corrections and sentenced to five years, concurrent to his other sentences(Ex.1p.884,896-97). The jury was told the amended complaint (State's Ex.48) read that the prohibited item was "a metal object commonly known as a boot shank" and the alleged act happened June 6, 2006(Ex.1p.884,889,897).

Before the jury was told about Michael's shank conviction, counsel, Christopher Slusher, objected on multiple grounds, including that Michael had entered an *Alford* plea where he did not concede guilt(Ex.1p.886-87).

II. Counsels' Testimony

A. Slusher

Counsel Slusher testified that during his representation of Michael he became aware that Michael entered a guilty plea on the shank charge, but was not aware that his plea was an *Alford* plea(Ex.102p.40-41,43-44).[3] Slusher knew respondent was

[3] Slusher's memory at the 29.15 hearing was mistaken because he objected at trial that Michael had entered an *Alford* plea, not conceding guilt(Ex.1p.886-87).

going to use the shank guilty plea as aggravation(Ex.102p.41-42). The plea occurred January 7, 2009, which was a year and a half before the penalty retrial began in July, 2010(Ex.102p.23,41-42). The jury was not given any guidance as to the meaning of an *Alford* plea(Ex.102p.44).

Slusher's understanding of the boot shank charge was "making a weapon" at a correctional facility from a piece of metal that was inside the sole of a shoe or boot, and the piece of metal had been altered in some way(Ex.102p.44).

Prior to the penalty phase, counsel received from respondent pictures of the shank(Exs.70,71,72) (Ex.102p.44-47). The shank photos did not reflect any modification evidencing sharpening(Ex.102p.47). The jury did not see the shank photos(Ex.102p.48).

Slusher recalled co-counsel, Scott McBride, and respondent had some form of agreement about the shank(Ex.102p.48-49).

Slusher recounted the shank was found in the back of Michael's radio and Michael said another inmate set him up(Ex.102p.51).

Slusher recounted they had a letter Michael sent the Warden on June 7, 2006(Ex.102p.53-58). That letter said Charles Hurt put the shank in Michael's radio(Ex.102p.53-58). Slusher acknowledged they had Corrections documents that established Michael asked for protective custody several times, before the shank incident, because he feared other inmates(Ex.102p.56-57). Counsel did not investigate Hurt(Ex.102p.58).

Slusher indicated they did not present any evidence to support Michael's explanation that someone else put the shank in his radio and he was afraid to take it out(Ex.102p.57).

Slusher was not aware Hurt was convicted of capital murder for stabbing his cellmate to death in May, 1982(Ex.102p.58;Ex.73).

Slusher did not request a copy of Michael's Corrections property records, which reflected Michael never owned a pair of boots(Ex.102p.59). Slusher had no strategy reason for failing to request Michael's property records(Ex.102p.59).

Slusher was not aware of an April 13, 2006 Corrections memo (Ex.69) which prohibited inmates at all institutions from wearing boots effective June 1, 2006(Ex.102p.60). The jury was not apprised of the Corrections memo(Ex.102p.61). The shank was found in Michael's radio on June 6, 2006(Ex.102p.60-61).

Slusher did not investigate the circumstances surrounding the shank being in Michael's radio(Ex.102p.61).

The photos of the boot shank were not as bad as Slusher thought because he was expecting the shank to be sharpened into a weapon-looking instrument and that was not the case(Ex.102p.62). Slusher thought the jurors' mental image of the shank would have been the same as his – sharpened into a weapon(Ex.102p.62).

Slusher remembered the prosecutor had urged the jury in closing argument to impose death based on Michael's possessing the shank because it reflected Michael's future dangerousness(Ex.102p.63).

On cross-examination, Slusher was asked whether the report about how the shank came to be in Michael's radio was based on Michael's statements to corrections officials, and therefore, constituted hearsay(Ex.102p.113-14). Slusher indicated those statements possibly could be objectionable as hearsay without Michael's testifying, but Slusher believed that Assistant Attorney General Zoellner, who tried the case for respondent, would have worked with them to allow Michael's reporting of why the shank was found in his radio without needing to call Michael as a witness(Ex.102p.114). On direct examination, Slusher testified that in their dealings with Assistant Attorney General Zoellner on Michael's case that Zoellner had indicated that he was "going to be unusually loose with us in my experience as to allowing us to do things."(Ex.102p.15).

Also on cross-examination, Slusher testified that he believed that informing the jury that Michael's plea had been an *Alford*-type plea would have been helpful information for the jury to have(Ex.102p.115). Slusher indicated that jurors would have understood the significance of an *Alford* plea in the more common terminology that is used of being a plea of "nolo contendere"(Ex.102p.115).

B. McBride

Counsel McBride indicated they knew respondent intended to rely on Michael's shank conviction in aggravation(2ndPCRTr.366). There was no consideration given to putting before the jury the meaning of an *Alford* plea(2ndPCRTr.366-67).

McBride knew a shank could be used as a weapon(2ndPCRTr.367). No investigation of the circumstances surrounding the shank charge was done(2ndPCRTr.367). McBride thought they were "stuck" with Michael's plea(2ndPCRTr.367).

McBride was unaware that Michael's Corrections records reflected he never owned a pair of boots(2ndPCRTr.369-70). McBride knew from either Michael or Corrections records that Michael had requested protective custody and Michael had reported that someone else put the shank in his radio(2ndPCRTr.369-70).

On cross-examination, McBride testified he did not think "linger[ing] over" the boot shank, Boone County jail events, and the Chariton County jail matters so as to create "a mini trial" would have advanced Michael's interests(2ndPCRTr.403).

III. Mitigation Specialist Miller

The Public Defender made mitigation specialist Tami Miller available to counsel in September, 2009(Ex.102p.23-24,104-05). Miller discussed with Michael the details of the shank incident(2ndPCRL.F.193-94)[4]. Michael told Miller he kept the shank in his radio only because another inmate threatened to harm him if he refused, and therefore, Michael felt he had no other choice(2ndPCRL.F.194). Miller recalled discussing with Slusher what Michael had told her about the details of the shank incident(2ndPCRL.F.194). Miller was uncertain whether she had discussed with McBride what Michael had reported about the shank incident(2ndPCRL.F.194).

[4] Along with being part of the 2ndPCRLF, Miller's deposition was also Ex.103.

Miller was not asked by Slusher or McBride to speak to witnesses or conduct any investigation into the shank events(2ndPCRL.F.194).

IV. Timothy O'Hara

Timothy O'Hara was serving sentences for involuntary manslaughter and armed criminal action at Potosi in 2006(2ndPCRTr.222). O'Hara was aware Michael was charged with possession of a boot shank, found in Michael's radio(2ndPCRTr.222). O'Hara recounted Charles Hurt was confined at Potosi at the time the shank was found(2ndPCRTr.225).

When O'Hara testified that it was his understanding that Hurt put the shank in Michael's radio, respondent's objection that O'Hara was testifying based on belief, rather than personal knowledge, was sustained(2ndPCRTr.223-25).

O'Hara recounted that Hurt was serving time for killing his prison cellmate(2ndPCRTr.226-27). Hurt had the reputation for violence within the prison system and for setting up other inmates for charges(2ndPCRTr.226-27).

O'Hara was familiar with boot shanks as a metal support in the bottom of a boot, which could be torn out(2ndPCRTr.227). O'Hara knew that boot shanks were modified in prison and turned into weapons by sharpening(2ndPCRTr.227-28).

O'Hara identified pictures of the unmodified boot shank that respondent had furnished to counsel(Exs.70,71,72)(2ndPCRTr.228-29). O'Hara recounted Corrections "grandfathered in" allowing inmates who had boots to keep them, which was later followed by boots being barred entirely(2ndPCRTr.229-30). If counsel had

contacted O'Hara, then he would have testified to the same matters he testified to in the 29.15 case(2ndPCRTr.230).

V. Hurt Killed His Cellmate

Hurt's official court casefile record reflected that in July, 1981, he killed his prison cellmate using "a home-made knife" to stab him many times(Ex.73p.2-3). Hurt was convicted of capital murder and sentenced to life in prison and ineligible for parole for fifty years(Ex.73p.14).

VI. 29.15 Findings

The findings stated counsel objected to the shank evidence conviction, but choose not to introduce evidence explaining Michael's possession(2ndPCRL.F.332). Counsel wanted to minimize this incident, and thereby, make it less significant(2ndPCRL.F.332). Corrections records would have shown Michael had reported the shank belonged to another inmate and that Michael only allowed it to be stored in his property because Michael was afraid of that individual(2ndPCRL.F.332). At the 29.15 hearing, another inmate testified that he had heard reports that the shank belonged to someone other than Michael(2ndPCRL.F.332).

The findings stated that the jury did not know how an *Alford* plea differed from a "regular" guilty plea(2ndPCRL.F.346). Because one issue was Michael's remorse, apprising the jury of the meaning of an *Alford* plea "would not necessarily have helped" Michael(2ndPCRL.F.346).

The findings stated that the evidence Michael would have wanted presented consisted of inadmissible hearsay reports of the investigation, including Michael's

statements(2ndPCRL.F.347). Counsel speculated that the prosecutor might not have objected, but no such evidence was introduced(2ndPCRL.F.347). Even if the prosecutor had not objected, counsel expressed the belief that the best way to handle the shank conviction was "not dwelling on it"(2ndPCRL.F.347). Respondent's evidence was limited to reading that Michael pled guilty to possessing a prohibited article, a boot shank(2ndPCRL.F.347). The jury was not informed why Corrections did not allow inmates to have boot shanks or that shanks were particularly dangerous(2ndPCRL.F.347). It was not unreasonable for counsel to have avoided giving the jury additional details about the shank conviction, to which the jury could have attached additional weight(2ndPCRL.F.347). There was no reasonable probability of a different result, as the first jury imposed death before the boot shank conviction occurred(2ndPCRL.F.348).

VII. Counsel Was Ineffective

A. Counsel Did Not Act Reasonably

Reasonable counsel would have investigated and presented evidence regarding all the factual circumstances surrounding Michael's conviction for possessing a boot shank and his entry of an *Alford* plea. *See Strickland*.

"One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002). *See, also, Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel has duty to investigate and rebut aggravation); *Parker v. Bowersox*, 188 F.3d 923, 929-31 (8th Cir. 1999) (counsel was

ineffective for failing to present evidence rebutting aggravation that victim was potential witness against Parker).

At Ervin's penalty phase, respondent introduced jail guard aggravation testimony Ervin assaulted his cellmate and threatened to kill him. *Ervin*, 80 S.W.3d at 821, 825-26. In Ervin's 29.15, it was alleged counsel was ineffective for failing to conduct investigation that would have established that Ervin did not commit those acts. *Id.*825. Counsel testified he did not interview witnesses that would have rebutted this aggravation evidence "because he believed it was best to just let the state put on whatever evidence it had and then let the matter 'drop.'" *Id.*825. If counsel had interviewed the victim, then counsel would have learned it was not Ervin who assaulted him. *Id.*826. Further, if counsel had interviewed inmate Pearson, counsel would have learned Pearson admitted to having committed the assault and Ervin was not responsible. *Id.*826.

This Court found Ervin's counsel was ineffective for failing to investigate the cellmate incident and remanded for a finding on the issue of prejudice while "strongly suggest[ing]" finding prejudice. *Ervin*, 80 S.W.3d at 826-28, and concurring opinion of Shrum, S.J. This Court indicated in *Ervin* "[t]he potential for prejudice is strong" based on how respondent used the alleged threat to kill the cellmate. *Id.*827. That prejudice was highlighted because respondent relied on the incident to show Ervin posed a danger to others while incarcerated. *Id.*827. This Court added: "The characterization of Ervin as an inmate who would rescue a cellmate from harm versus

an inmate who would kill his cellmate is highly material in a sentencing proceeding." *Id.*827.

Michael's counsel knew prior to retrial respondent intended to rely on the shank as aggravation and had received photos of it(Ex.102p.41-42,44-47;Exs.70,71,72;2ndPCRTr.366). Counsel knew Michael had maintained Hurt had forced him to keep the shank in his radio and Hurt then set up Michael to get caught with it(Ex.102p.51,53-58;2ndPCRTr.369-70). Counsel knew Michael had reported to mitigation specialist Miller that he kept the shank in his radio only because another inmate, Hurt, threatened to harm him if he did not(2ndPCRL.F.194). Despite what counsel knew, they did not investigate the circumstances of Michael's possessing the shank(Ex.102p.61;2ndPCRTr.367). Reasonable counsel who knew respondent intended to rely on the shank as aggravation would have investigated all the details and circumstances of the shank incident. *See Ervin* and *Parker*. Counsels' actions were not reasonable. *See Ervin, Parker,* and *Strickland.*

Reasonable counsel who had investigated Hurt would have learned that his court casefile records reflected he was convicted of stabbing his cellmate to death using "a home-made knife"(Ex.102p.58;Ex.73p.2-3).

It is recognized an *Alford* plea allows a defendant to plead guilty to an offense and accept its penalty, while not admitting to committing the acts constituting the offense. *Brooks v. State*, 242 S.W.3d 705, 707 n.2 (Mo. banc 2008) (relying on *North Carolina v. Alford*, 400 U.S. 25, 37 (1970)). Even, though respondent read from the court case file documents in the shank case (State's Exs.48, 53) (Ex.1p.884,889,896-

97), *supra*, there was no consideration given to placing before the jury the meaning of an *Alford* plea(2ndPCRTr.366-67). Moreover, Slusher objected on grounds that Michael had entered an *Alford* plea where he did not concede guilt(Ex.1p.886-87). Counsel Slusher believed that the jury's knowing the meaning of an *Alford* plea as being the equivalent of a plea of "nolo contendere" would have been helpful(Ex.102p.115). The United States Supreme Court in *North Carolina v. Alford*, 400 U.S. 25 (1970) "treated such guilty pleas as the functional equivalent of a plea of nolo contendere." *See State v. Palmer*, 491 A.2d 1075, 1082 (Conn. 1985). Reasonable counsel would have ensured that when the jury learned that Michael had entered an *Alford* plea (Ex1p.896-97) that it also understood he was not admitting he committed the acts charged, rather that he was entering a plea of "nolo contendere." *See Strickland* and *Palmer*. Under *Brooks*, counsel could have ensured the jury was apprised that Michael's *Alford* plea meant Michael did not admit to having possessed the shank. *See*, *Brooks*.

Respondent had disclosed photos of the shank evidencing it had not been modified into a weapon for stabbing(Ex.102p.44-47;Exs.70,71,72). Michael's Corrections records would have established he never owned a pair of boots in prison(Ex.102p.59). Reasonable counsel would have relied on these photos to rebut respondent's aggravation that Michael intended to use the shank as a stabbing weapon. *See Ervin*, *Parker* and *Strickland.*

The findings rejected this claim because counsel wanted to minimize this incident and make it less significant(2ndPCRL.F.332). Counsel testified that their

view was that they were "stuck" with Michael's plea, they did not want to "linger" over the shank, and they did not want "a mini trial" on it(2ndPCRTr.367,403). In *Ervin*, this Court found it was unreasonable for counsel to "let the state put on whatever evidence it had and then let the matter 'drop,'" rather than investigating the jail incident. *Ervin*, 80 S.W.3d at 825. Michael's counsels' testimony reflects they did the same as Ervin's counsel, and therefore, their failure to investigate the shank details was unreasonable. *See Ervin*. Like Ervin's counsel, Michael's counsel let the shank matter "drop" and did not investigate it. *See Ervin*.

Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994); *Butler v. State*, 108 S.W.3d 18, 25 (Mo.App., W.D. 2003). Foregoing presenting evidence because it contains something harmful is unreasonable when its harm is outweighed by its helpfulness. *See Hutchison v. State*, 150 S.W.3d 292, 305 (Mo. banc 2004). Counsels' failure to investigate and rely on Michael's reporting that Hurt had compelled him to keep the shank inside his radio was a lack of diligence and not an objectively reasonable and sound strategy choice. *See Kenley*, *McCarter*, and *Butler*. Respondent's use in closing argument of the conviction for possessing the shank establishes Michael was prejudiced by counsels' lack of diligent investigation.

The findings rejected this claim, in part, because statements by Michael about the circumstances surrounding why the shank was in his radio constituted

hearsay(2ndPCRL.F.347). In *Green v. Georgia*, 442 U.S. 95, 97 (1979), the Court recognized the hearsay rule cannot be rigidly applied to exclude relevant reliable mitigation because to do so violated *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978). Prohibiting evidence explaining Michael possessed the shank unwillingly because of Hurt's intimidation would violate *Green*. Moreover, counsel noted they had every reason to believe respondent's counsel would have worked with them to allow Michael's explanation of why the shank was found in his radio without the need for calling Michael as a witness(Ex.102p.114). Slusher noted that in their dealings with Assistant Attorney General Zoellner on Michael's case that Zoellner had indicated that he was "going to be unusually loose with us in my experience as to allowing us to do things."(Ex.102p.15).

In any event, had counsel conducted a reasonable investigation, they could have made the decision to call Michael to testify about what he had reported, if respondent's counsel was not agreeable to allowing Michael's reporting without calling him. Further, counsel could have relied on O'Hara's testimony, under *Green*, that it was his understanding Hurt put the shank in Michael's radio(2ndPCRTr.223-25). Additionally, under *Green*, counsel could have called mitigation specialist Miller to testify to Michael's reporting to her that another inmate had threatened to harm Michael if he did not keep the shank in his radio(2ndPCRL.F193-94).

B. <u>Prejudice</u>

It was critical the jury have heard Michael was victimized in being forced by another inmate with a history of having killed his cellmate to keep an object that

could be modified into a weapon. The shank evidence was highly prejudicial in light of how respondent relied on it in closing argument. *See Strickland*.

Respondent argued in initial closing argument that even though Michael would be in prison for the remainder of his life, he committed more crimes(Ex.1p.1189-90). That argument continued:

> He has a boot shank. He's got a boot shank. Because, you know what he knows? There is nothing worse we can do to him. He got five years for that, and they just ran it concurrent with his life sentence. Every crime he commits from this day forward as long as he's alive is a freebie. It's a freebie.
>
> He's **going to be - - continue to be a danger to our society**, and we have an obligation. As representatives of our state, we all have an obligation to **protect those jailers** in those Departments of Correction, **those staff members, those doctors, those nurses**. And you know what? The Roy **Vances** of the world that are in those prisons **we have to protect** from murderers like him.
>
> Ladies and gentlemen, if he killed twice to try and get a friend out, do you think **if he's given the opportunity he would kill again to get himself out?**

(Ex.1p.1190) (emphasis added).

Counsel's response to respondent's use of the shank was to state that there was no evidence Michael had used it to assault anyone at Potosi(Ex.1p.1196). That argument, however, did not address respondent's contention that Michael's

possession of the shank showed he posed a future danger to everyone connected with Potosi.

Respondent's rebuttal closing argument included that there were no guarantees as to what Michael will or will not do(Ex.1p.1212-13). That rebuttal argument continued:

> And you know what? Maybe he will die in prison. **I think our goal is to make sure he's the only one that does and that no other guard, no other nurse, no other person that works there with him, no other inmate that's in that facility is going to be vulnerable** to the same type of decision-making that these two officers suffered from.

(Ex.1p.1213) (emphasis added).

Respondent concluded its argument that death was warranted because: "It can stop Michael Tisius **from doing this again**. And it is an answer to the plea from the families of Leon and Jason and Randolph County that you do justice in this case."(Ex.1p.1219) (emphasis added).

Besides respondent's use in closing argument, it repeatedly used the shank as grounds for attacking Dr. Taylor's opinions and credibility during cross-examination. On cross-examination, Taylor was asked about Michael's conviction for possessing a boot shank(Ex.1p.1150-51). Taylor testified that Michael had told her that he was holding the shank for someone(Ex.1p.1151). When the prosecutor asked Taylor whether Michael should be believed, Taylor responded that the context rang true to her(Ex.1p.1151).

On re-cross of Taylor, the prosecutor stated that Taylor did not have the information about Michael mimicking shooting a guard, "bragging about killing," and having "a boot shank" (Ex.1p.1163). Taylor agreed that she would have liked to have known about those matters and the prosecutor countered that he had given the information to counsel(Ex.1p.1164). The use of the boot shank evidence as a tool for attacking Taylor's opinions made it that much more critical that counsel have rebutted the shank evidence.

The findings state that the jury was not told why Corrections did not allow inmates to have boot shanks or that the shanks were dangerous(2ndPCRL.F.347). However, in respondent's opening statement the prosecutor told the jury Michael "decides he needs a weapon" and he was found in possession of "a boot shank, a weapon you would cut up somebody with."(Ex.1p.553). Moreover, that finding is clearly erroneous because the jury was told in respondent's closing arguments that Michael possessed the boot shank with the intention to use it as a weapon against anyone who was at Potosi(Ex.1p.1189-90,1212-13,1219). Further, the jury was told that Michael pled guilty to the charge of possession of a prohibited item in the Department of Corrections(Ex.1p.896-97). That the conviction was for possessing an item described as "a metal object commonly known as a boot shank" (Ex.1p.884,889,897), must have facially conveyed to the jury an image, as it did for Slusher (Ex.102p.62), that a boot shank was regarded as posing a danger to people's safety.

In *Ervin*, this Court recognized that the characterization of Ervin as someone who would rescue his cellmate versus someone who would kill him was critical. *Ervin*, 80 S.W.3d at 827. Similarly, the proper characterization of Michael as someone who was victimized and forced by Hurt to leave the shank in his radio by Hurt, rather than as someone who was calculating how to hurt others at Potosi by keeping a sharpened shank, was significant. *See Ervin*.

Presenting evidence that Michael unwillingly possessed the boot shank and did so out of intimidation would have rebutted and mitigated respondent's use of the shank as aggravation. *See Ervin*, *Parker*, and *Strickland*. Michael was prejudiced because the jury was left believing that he posed a risk to everyone at Potosi when in fact he was someone who had sought out protective custody because of his fear of being victimized at Potosi. That prejudice was driven home in respondent's closing argument. There is a reasonable probability Michael would not have been sentenced to death had the jury heard evidence that Michael had not possessed the shank with an intention to use it to hurt anyone and only possessed it because he was intimidated into leaving it in his radio by another inmate (Hurt) who had killed his cellmate.

A new penalty phase is required.

II.

FAILURE TO REBUT PETRI'S REPORTING OF STATEMENT AS "BRAGGING"

The motion court clearly erred denying the claim counsel was ineffective for failing to rebut respondent's evidence that Michael's question to Boone County jail guard Petri asking whether she knew who he was as "bragging" that he killed two guards by calling someone, such as Dr. Peterson, to testify that such a statement was subject to another interpretation which was Michael was telling the listener he was frightened and why it was important for him to leave the Boone County Jail, rather than "bragging," because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel, knowing respondent argued in the original trial that Petri's testimony showed "bragging," would have presented evidence of this alternative meaning to rebut respondent's "bragging" characterization. Michael was prejudiced as he would not have been sentenced to death because the jury was left to believe his acts were more aggravated and deserving death.

Michael was denied effective assistance of counsel because counsel failed to rebut respondent's aggravation evidence that Michael made a statement to Boone County Jail guard Petri "bragging" he had killed two guards. Counsel failed to present evidence, such as that available from Dr. Peterson, that Michael's statement was subject to another interpretation which was Michael was telling the listener he

was frightened and why it was important for him to leave the Boone County Jail and not that he was "bragging." There is a reasonable probability that had counsel rebutted this evidence Michael would not have been death sentenced.

I. Use of Petri's Testimony - Original Trial

At the original trial, Petri was the last witness to testify in guilt (Orig.TrialTr.894-98). Petri testified about her encounter with Michael on April 6, 2001(Orig.TrialTr.895).

Respondent's guilt phase rebuttal closing argument finished with urging the jury to convict Michael of first degree murder based on the statements Petri attributed to Michael(Orig.TrialTr.944-45). That argument was as follows:

> Remember Jackie Petri, my last witness. The guard from the Boone County Jail. "Don't you know who I am? Don't you read the papers? I killed two police officers up in Moberly." Folks, what does that tell you? Besides admitting the acts again? What does it tell you? **He's proud of it. He sees it as part of his identity. Makes him a big man. Okay. Big man.**
>
> How about murder in the first degree? That will give you something to be proud of. That's what you ought to do, folks. That's exactly what you ought to do. And that's what I'm going to urge you to do. Because that's what this is. Murder in the first degree. Two counts. Because that's the just result.
>
> You've been very attentive and very kind. Thank you again.

(Orig.TrialTr.944-45) (emphasis added).

II. Retrial Objection Record

Counsel objected to Petri's testimony urging that Michael's statements could be viewed as ambiguous and lead to "wild inferences"(Ex.1p.890-94).

Respondent argued this "bad act evidence" went to "the true character of this Defendant"(Ex.1p.890-94). Respondent urged this testimony was admissible because it "show[ed] a flagrant disregard to law enforcement and our society in general by making such acts and conducts and it is something the jury should consider."(Ex.1p.890-94). Respondent asserted the jury should be allowed to assess whether Michael is in fact remorseful for the killings or whether he was bragging(Ex.1p.890-94). Respondent noted that counsel were long on notice of this matter and it was on record in a transcript(Ex.1p.890-94).

III. What The Jury Heard On Retrial

A. Opening Statement

In opening statement, the jury heard that Michael wanted to be transferred to a different county jail while he was awaiting trial(Ex.1p.552-53). Respondent represented that when a guard told Michael to fill out a request form that Michael asked whether she knew that he was responsible for killing two guards at the Moberly jail(Ex.1p.552-53). Respondent then told the jury that Michael's statement reflected that he was "proud of what he did"(Ex.1p.553).

B. Petri's Retrial Testimony

Petri was picking up inmate food trays in the evening during April, 2001(Ex.1p.906-08). Michael told Petri he wanted to be moved from the Boone County Jail(Ex.1p.908). Petri told Michael that he needed to complete a request

form(Ex.1p.908). Michael told Petri that he really wanted to be moved that same night(Ex.1p.908-09). Michael was anxious to be moved and told Petri that there was a court order for him to be moved(Ex.1p.909). Petri reported that Michael asked her if she knew who he was and when she indicated that she did not, that Michael told her he was the person who killed the two Randolph County guards(Ex.1p.908-09).

McBride's cross-examination covered only two complete pages of transcript(Ex.1p.909-11). On cross-examination, McBride elicited generally from Petri that Michael had indicated that there was a court order for him to be moved from Boone County and that Michael was anxious to leave Boone County(Ex.1p.909). Petri testified: "He was, like, you know, Look at me. I'm the one that killed those two jailers. That's how I took it."(Ex.1p.910). Counsel's cross-examination did not include any evidence that Michael's statement was subject to another interpretation - Michael was telling the listener he was frightened and why it was important for him to leave the Boone County Jail(Ex.1p.909-110).

IV. Dr. Peterson's Second 29.15 Testimony

Dr. Peterson testified that Michael's statement to Petri was subject to an interpretation other than "bragging"(2ndPCRTr.324). That interpretation was that Michael was telling the listener he was frightened and why it was important for him to leave the Boone County Jail(2ndPCRTr.324).

V. Counsels' Testimony

A. Slusher

Slusher testified he was aware respondent intended to call Petri and she was expected to testify as she did at the prior trial(Ex.102p.64-65). Slusher was uncertain what, if any, pretrial preparation was undertaken as to Petri(Ex.102p.65).

B. McBride

McBride was aware respondent intended to call Petri(2ndPCRTr.365).

On cross-examination, McBride testified he did not think "linger[ing]" over the boot shank, Boone County jail events, and the Chariton County jail matters so as to create "a mini trial" would advance Michael's interests(2ndPCRTr.403). In particular, as to Petri, McBride thought that her overall reaction was that she was not bothered by her exchange with Michael(2ndPCRTr.403). McBride did not want to "make it into a bigger deal" than it was(2ndPCRTr.403-04).

VI. 29.15 Findings

The findings stated counsel "opted against" introducing evidence to rebut this matter because counsel wanted to minimize it rather than dwell on it and make it more significant(2ndPCRL.F.331-32). Counsel addressed this matter through brief cross-examination highlighting that Michael's comments were ambiguous and could have related to his request for a jail transfer, rather than constituting bragging about having killed two guards(2ndPCRL.F.347-48). Even if counsel should have done more, it found no reasonable probability the additional evidence would have altered the result(2ndPCRL.F.348). The findings stated none of the 29.15 evidence presented "conclusively refutes the evidence at trial"(2ndPCRL.F.348). Because of the seriousness of the offense, "the probable outcome of the trial would have been the

same even if the State had not introduced evidence about the two jail incidents . . . .”(2ndPCRL.F.348).

VII. Counsel Was Ineffective

“One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence.” *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002). *See*, *also*, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel has duty to investigate and rebut aggravation); *Parker v. Bowersox*, 188 F.3d 923, 929-31 (8th Cir. 1999) (counsel ineffective for failing to present evidence that would have rebutted aggravation that victim was potential witness against Parker).

At Ervin’s penalty phase, respondent introduced in aggravation, through a jail guard, that Ervin threatened to kill his cellmate and assaulted him. *Ervin*, 80 S.W.3d at 821, 825-26. In Ervin’s 29.15, it was alleged counsel was ineffective for failing to conduct investigation that would have established Ervin did not commit those acts. *Id.*825. At the 29.15 hearing, counsel testified he did not interview witnesses that would have rebutted this aggravation “because he believed it was best to just let the state put on whatever evidence it had and then let the matter ‘drop.’” *Id.*825. If counsel had interviewed the victim, then counsel would have learned that it was not Ervin who assaulted him. *Id.*826. Further, if counsel had interviewed inmate Pearson, counsel would have learned about Pearson’s having admitted to committing the assault and that Ervin was not responsible. *Id.*826. This Court found Ervin’s

counsel was ineffective for failing to investigate the cellmate incident. *Id.*826-28, and concurring opinion of Shrum, S.J.

Michael's counsel was ineffective because reasonable counsel who knew that at the original trial respondent concluded its guilt phase closing argument urging that Petri's testimony demonstrated Michael was "proud" of killing the jail guards (Orig.TrialTr.944-45), would have investigated the circumstances surrounding Michael's statements. *See Ervin*. Reasonable counsel would have called someone, like Dr. Peterson, to testify that a reasonable interpretation of Michael's statement was that Michael was telling the listener he was frightened and why it was important for him to leave the Boone County Jail, rather than an expression of "pride" by Michael as to what he had done(Orig.TrialTr.944-45).

Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994); *Butler v. State*, 108 S.W.3d 18, 25 (Mo.App., W.D. 2003). Counsels' actions did not reflect a reasonable strategy, but rather a failure to prepare, investigate, and then present the reasonable alternative construction that Michael was telling the listener he was frightened and why it was important for him to leave the Boone County Jail(2ndPCRTr.324). *See Kenley* and *McCarter*. Contrary to the findings (2ndPCRL.F.347-48), McBride did not elicit any evidence on cross-examination of Petri to suggest Michael's statements could be interpreted that Michael was telling the

listener he was frightened and why it was important for him to leave the Boone County Jail(Ex.1p.909-11). McBride's cross-examination actually highlighted respondent's assertion that Michael's statements reflected bragging when he elicited from Petri: "He was, like, you know, Look at me. I'm the one that killed those two jailers. That's how I took it."(Ex.1p.910).

In *Ervin*, this Court rejected the notion counsel can just let the state put on whatever evidence it has and then let the matter "drop." *See Ervin*, 80 S.W.3d at 825. McBride testified his strategy was the same as the one in *Ervin*, to not "linger" on respondent's aggravation and not "make it into a bigger deal" than it was(2ndPCRTr.403-04). Under *Ervin*, McBride's strategy was unreasonable. *See, McCarter* and *Butler*.

While McBride testified he perceived Petri's overall reaction was she was not bothered by her exchange with Michael (2ndPCRTr.403), the unreasonableness of this assumption was highlighted by respondent's use of Petri's testimony in the original trial's closing argument that Michael was "proud" of what he had done(Orig.TrialTr.944-45).

The prejudice from counsels' failure to offer an alternative interpretation for what Petri alleged Michael said is shown by respondent's use of Petri's testimony in closing argument. *See Ervin*. During respondent's retrial initial closing argument, the jury was told death was warranted because Michael "bragged" about killing the guards when he asked Petri whether she knew he was the guy who killed the jail guards(Ex.1p.1183-84). *See Strickland*, *Deck*, and *Ervin*.

In McBride's closing argument, he merely opined that Michael's statements to Petri were not "bragging" about the killings and that Petri's testimony demeanor somehow showed that(Ex.1p.1194-95). McBride then continued arguing it was respondent's burden to prove "bragging"(Ex.1p.1195-96). McBride's telling the jury that Petri's demeanor did not establish bragging was a meaningless act, especially in light of McBride's cross-examination that elicited even further prejudice: "He was, like, you know, Look at me. I'm the one that killed those two jailers. That's how I took it."(Ex.1p.910). *Cf. Ervin*. The jury needed to hear evidence of an alternative explanation for Michael's statement that Michael was telling the listener he was frightened and why it was important for him to leave the Boone County Jail(2ndPCRTr.324)

In rebuttal argument, respondent told the jury Michael did not display remorse when he made the gun-hand gestures to Harmon(Ex.1p.1218-19) and "brag[ged]" a year later to Petri about the killings(Ex.1p.1218-19). Respondent's rebuttal argument was devastating because it combined the Harmon and Petri evidence as proof that this offense was particularly aggravated. *See Ervin* and *Strickland*.

The prejudice to Michael from counsels' failure to rebut Petri's testimony is underscored by how respondent relied on Petri's testimony to discredit Dr. Taylor's opinions on cross-examination. Taylor indicated that she was not familiar with both the Petri and Harmon occurrences and would want to know their context in order to respond to the prosecutor's questioning about how she could consider Michael to be remorseful and passive in light of those matters(Ex.1p.1149-50).

On re-cross, the prosecutor attacked Taylor, stating that Taylor did not have the information about Michael's mimicking shooting a guard, "bragging about killing," and having "a boot shank" (Ex.1p.1163). Taylor agreed that she would have liked to have known about those matters and the prosecutor countered that he had given the information to counsel(Ex.1p.1164).

The findings are clearly erroneous in stating that the 29.15 evidence failed to "conclusively refut[e]" the trial evidence(2ndPCRL.F.348). Michael's burden instead was to establish a reasonable probability of a different result. *See Strickland* and *Deck*. There is a reasonable probability that Michael would not have been sentenced to death had the jury heard that the statement Petri attributed to Michael could be interpreted as Michael was telling the listener he was frightened and why it was important for him to leave the Boone County Jail. *See Strickland*, *Deck*, and *Ervin*.

A new penalty phase is required.

III.

ALLEGED GUN HAND GESTURES

The motion court clearly erred denying the claim counsel was ineffective for failing to investigate and present evidence rebutting Michael made hand gestures from his cell to Chariton County Jail control bubble guard Harmon mimicking he was firing a gun at her, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have investigated and presented evidence that included pictures supporting that from where Harmon stood in the jail that she was mistaken about the gestures as it either was impossible to see anything, or if anything was visible, it was readily subject to misinterpretation because Michael's cell's lights were out. Michael was prejudiced because had counsel presented such evidence there is a reasonable probability he would not have been death sentenced.

Michael was denied effective assistance of counsel because counsel failed to rebut respondent's aggravation from Chariton County jail guard Harmon that Michael mimicked hand gestures of firing a gun at her. There is a reasonable probability that had counsel rebutted this evidence Michael would not have been death sentenced.

I. What The Jury Heard

A. Opening Statement

Respondent told the jury that it was going to hear evidence that while Michael was held in the Chariton County Jail that he pointed his finger at a guard through glass and said "Bang, bang"(Ex.1p.553).

B. Harmon's Retrial Testimony

Donna Harmon was a Chariton County Jail guard(Ex.1p.898). On July 2, 2000, she was going into the jail shortly after midnight(Ex.1p.899-900,904). Harmon testified that lights are **turned off** in the inmate cells at 11:00 p.m.(Ex.1p.899-900). Harmon noticed movement in Michael's cell(Ex.1p.899-900). Harmon reported that Michael had his hands raised as though he was holding a pistol and made motions at Harmon as if he was shooting at her(Ex.1p.899-900).

On cross-examination, Harmon acknowledged that the cell doors at the Chariton County Jail are solid doors with a bullet-proof glass window(Ex.1p.901,903). Harmon also acknowledged that the cells are almost soundproof, and therefore, inmates frequently will make hand gestures to communicate with one another(Ex.1p.901-02). Referencing the glass between Harmon and Michael, Harmon testified: "[w]e can see into their cells," but "[i]t's not so clear for them to see into us."(Ex.1p.903-04).

II. 29.15 Claim

The amended motion alleged counsel was ineffective for failing to present evidence that included pictures depicting the lighting conditions around Michael's cell and where Harmon was standing(2ndPCRL.F.53-54). In particular, it was alleged Harmon could not have seen Michael making gestures with the lights out in his

cell(2ndPCRL.F.53). It was alleged Harmon would not have had a clear view of what Michael was doing because of the lighting conditions around Michael's cell and where Harmon was standing(2ndPCRL.F.53-54).

III. Counsels' Testimony

A. Slusher

Slusher knew Harmon would be called and knew what her testimony was expected to be based on her testimony at the original trial(Ex.102p.63). Slusher did not recall having done any investigation into Harmon's ability to actually see into Michael's cell based upon the limited lighting conditions(Ex.102p.64). The retrial defense team did not have anyone go to the Chariton County Jail to take pictures to show the jury what the lighting conditions were(Ex.102p.64). There was no strategy reason for failing to investigate the lighting conditions at the Jail(Ex.102p.64).

B. McBride

McBride testified they were aware respondent would be calling Harmon at trial(2ndPCRTr.364). McBride testified there was not any investigation of the lighting conditions at the Chariton County Jail done about what Harmon was expected to say because of her prior testimony(2ndPCRTr.364-65).

IV. Lighting Conditions Photos

A. Respondent's Investigator's Photos

In response to the 29.15 allegations, in June 2013, respondent's investigator, Gerald Greene, took photos with varying lighting conditions at the Chariton County jail from where Harmon reported she was standing and looking into Michael's cell

(Exs.76,77,78) (2ndPCRTr.171-80). In respondent's photos (Exs. 76,77,78), there was a Chariton County jail guard, who was not Harmon, standing in the cell where Michael was housed(2ndPCRTr.171-80). Exhibits 76 and 77 had lights on in the cell where Michael was housed, even though Harmon testified at trial the lights in Michael's cell were off(Ex.1p.899-900). Exhibit 78 had lights off in the cell where Michael was housed(Ex.78).

Greene testified that in all the photos that he took he stood where Harmon reported she was standing and viewing Michael in his cell(2ndPCRTr.177). Greene also testified that under the lighting conditions in all three photos he would have been able to see the hand gestures Harmon attributed to Michael(2ndPCRTr.177).

Greene testified he **did not know** that Harmon's testimony was that **the lights were off** in Michael's cell(2ndPCRTr.180).

In the photos with the cell lighted (Exs.76,77), the guard is visible from where Harmon reported she was standing. In contrast, for the photo with the cell lights out (Ex.78), there is only a small partial, incomplete, faint, barely visible outline of the guard.

B. 29.15 Counsels' Investigator's Photos

Postconviction counsel's investigator, Peron "Butch" Johnson, also took photos in October, 2012(Exs.74,75) at the Chariton County Jail from where Harmon reported she stood and looked into Michael's cell(2ndPCRTr.182-83). Johnson took his photos from the control bubble, where Harmon reported she stood(2ndPCRTr.183-84). The photos were taken in the direction of the cell where Michael was

held(2ndPCRTr.183). The conditions and physical set-up at that Jail were the same in October, 2012 as they were when Michael was housed there in July, 2000(2ndPCRTr.183).

Unlike for the Attorney General's investigator, the sheriff prohibited Johnson from taking photos with anyone standing in Michael's cell(2ndPCRTr.185-87).

Exhibit 74 has the lights out in the cell Michael occupied(2ndPCRTr.184,188). The interior of that cell is not visible at all and it is black(Ex.74)(2ndPCRTr.184,188-89). Someone inside the bubble, where Harmon reported she was, could not see a person in Michael's cell with the lights out in that cell(2ndPCRTr.188-89).

Johnson testified that when the lights are out in the cell Michael occupied, the hallway between the bubble and the cell has reduced lighting, which actually makes viewing inside the cell more difficult(2ndPCRTr.190).

Exhibit 75 has the lights on in the cell Michael occupied(2ndPCRTr.185).

V. 29.15 Findings

The findings stated that in briefly cross-examining Harmon, counsel brought out that inmates could not clearly see into the control room(2ndPCRL.F.331). The photographs and testimony about the Chariton County Jail "were inconclusive as to whether the jailer could have seen Tisius and vice versa"(2ndPCRL.F.332). Counsel addressed the issue through brief cross-examination that suggested "Tisius might not have seen the jailer in Chariton County"(2ndPCRL.F.347-48). Tisius' evidence on the Chariton County issue was "inconclusive," and therefore, counsel was not

ineffective for addressing this matter "through a brief cross-examination rather than dwelling on [it]"(2ndPCRL.F.347-48).

The findings stated that even if counsel should have done more, there is no reasonable probability that the additional evidence would have altered the result because of the seriousness of the offense(2ndPCRL.F.348). None of the evidence presented at the 29.15 hearing "conclusively refutes the evidence at trial"(2ndPCRL.F.348).

VI. Counsel Was Ineffective

"One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002). *See, also, Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel has duty to investigate and rebut aggravating evidence); *Parker v. Bowersox*, 188 F.3d 923, 929-31 (8th Cir. 1999) (counsel was ineffective for failing to present evidence that would have rebutted aggravation that victim was a potential witness against Parker).

Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994); *Butler v. State*, 108 S.W.3d 18, 25 (Mo.App., W.D. 2003).

At Ervin's penalty phase, respondent introduced in aggravation, through a jail guard, that Ervin assaulted and threatened to kill his cellmate. *Ervin*, 80 S.W.3d at

821, 825-26. Reasonable investigation, however, would have uncovered that in fact Ervin did not commit the assault and another inmate did. *Id.*826.

This Court found Ervin's counsel was ineffective for failing to conduct the investigation of the cellmate incident and remanded for a finding on the issue of prejudice while "strongly suggest[ing]" it find prejudice. *Ervin*, 80 S.W.3d at 826-28, and concurring opinion of Shrum, S.J. This Court indicated in *Ervin* that "[t]he potential for prejudice is strong" based on how respondent used the alleged threat to kill the cellmate. *Id.*827. That prejudice was highlighted because the state relied on the incident to show Ervin posed a danger to others while incarcerated. *Id.*827.

Reasonable counsel here would have investigated and relied on photos and testimony about those photos demonstrating that either Harmon was mistaken about the gestures as it was impossible to see anything, or if anything could be seen, it was readily subject to misinterpretation due to poor lighting, which included the lights in Michael's cell were out. *See Ervin*, *Wiggins*, and *Parker*. Counsels' actions did not reflect a reasonable strategy, but rather a failure to prepare, investigate, and then present evidence relating to the lighting. *See Kenley*, *McCarter*, and *Butler*. The photos taken **by both parties with the lights out** establish Harmon could not have seen what she reported. Exhibit 74, taken by 29.15 counsel's investigator, shows it was impossible for Harmon to have seen what she reported because the cell is black(2ndPCRTr.184,188-89). Similarly, Exhibit 78, taken by respondent's investigator, evidences only a small, partial, incomplete faint, barely visible outline of the guard who stood in the cell where Michael was housed.

During respondent's initial closing argument, the jury was told death was warranted because Michael "bragged" about killing the guards when he asked Petri whether she knew he was the guy who killed the jail guards(Ex.1p.1183-84). To that, respondent added Michael's acting like he was shooting Harmon was further evidence death was warranted(Ex.1p.1183-84).

In rebuttal argument, respondent argued Michael did not display remorse when he made the gun hand gestures to Harmon(Ex.1p.1218-19) and "brag[ged]" a year later to Petri about the killings(Ex.1p.1218-19). That was followed by respondent's stating that "it's all about the context" and the jury had heard how important context was(Ex.1p.1218-19).

Harmon's testimony was highly prejudicial because of how in closing argument respondent relied on Harmon's version of what she believed she saw. *See Ervin*. Respondent cast Harmon's version of what she believed she saw as evidence that Michael was unremorseful about having killed two jail guards. Standing alone, the "bragging" argument about the offenses, based on Petri's testimony, was highly prejudicial. That prejudice was only accentuated and compounded by evidence that Michael was unremorseful because he pretended to be shooting at a Chariton County jail guard, such that he was unremorseful, when he was accused of killing two Randolph County jail guards. *See, Strickland*. Like in *Ervin*, respondent relied on Harmon's testimony to show Michael posed a danger to others while incarcerated. *Cf. Ervin*.

The prejudice to Michael from counsels' failure to rebut Harmon's testimony is underscored by how respondent relied on Harmon's testimony to discredit Dr. Taylor's opinions on cross-examination. Taylor was asked whether she was familiar with Harmon's reporting that Michael made gestures like he was shooting a gun at her(Ex.1p.1149). Taylor indicated she was not familiar with both the Harmon and Petri occurrences and would want to know their context in order to respond to the prosecutor's questioning about how she could consider Michael to be remorseful and passive in light of those matters(Ex.1p.1149-50).

On re-cross, the prosecutor attacked Dr. Taylor, stating that Taylor did not have the information about Michael's mimicking shooting a guard, "bragging about killing," and having "a boot shank" (Ex.1p.1163). Taylor agreed that she would have liked to have known about those matters and the prosecutor countered that he had given the information to counsel(Ex.1p.1164).

The findings rejected this claim by relying on counsel's cross-examination of Harmon for the proposition that Michael "might not have seen the jailer in Chariton County"(2ndPCRL.F.347-48). The issue is not whether Michael saw Harmon, but rather whether Harmon saw Michael engage in gestures mimicking shooting a gun at all, or, if she did see some gestures, whether she accurately perceived Michael's engaging in actions constituting such mimicking, taking into account that Michael's cell's lights were out.

The findings also state that the 29.15 evidence was "inconclusive" as to whether Harmon and Michael could see one another(2ndPCRL.F.332). As noted, the

issue is not whether Michael could see Harmon, but rather what Harmon reported she could see Michael doing. The standard for judging Michael's claim is not "conclusive" evidence calling into question Harmon's reporting, but rather whether there is a reasonable probability the result would have been different under *Strickland*. The jury should have seen and heard this evidence, so it could decide whether to believe, or not, Harmon's perception of what happened. The 29.15 photos here, and the 29.15 witnesses' testimony associated with the photos, establish that there is a reasonable probability that the jury would not have believed Michael engaged in mimicking shooting a gun at Harmon. Further, had the jury seen and heard this evidence about the lighting conditions, there is a reasonable probability that the jury would not have sentenced Michael to death. *See, Strickland*.

A new penalty phase is required.

IV.

TAYLOR UNPREPARED

The motion court clearly erred denying the claim counsel was ineffective for failing to prepare Dr. Taylor so that she knew about the Chariton and Boone County Jail allegations, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have advised Taylor of both allegations and Michael was prejudiced because if Taylor had been able to acknowledge having been on notice of that information, then the jury would have known she accounted for those matters in formulating her opinions, and therefore, her opinions were not subject to attack as being based on incomplete information, and there is a reasonable probability Michael would not have been death sentenced.

Counsel failed to apprise Dr. Taylor about the Chariton and Boone County Jail allegations. On cross-examination and in closing argument, respondent challenged Taylor's opinions' legitimacy based upon her not knowing about those allegations. Effective counsel would have prepared Taylor by making her aware of these allegations so that her opinions could not be challenged for failing to take them into account. Michael was prejudiced as there is a reasonable probability that had Taylor's opinions not been open to such challenge, that Michael would have been sentenced to life.

I. Trial Record

Taylor found Michael suffered from depression, anxiety, and PTSD(Ex.1p.1115). The shootings were not in keeping with Michael's character and history of passivity and non-aggression, and his remorse(Ex.1p.1118).

On cross-examination, Taylor was asked about the statements Petri attributed to Michael's asking Petri whether she knew who he was and that he had killed two guards(Ex.1p.1149). Taylor was also asked whether she was familiar with Harmon's reporting that Michael made gestures like he was shooting a gun at her(Ex.1p.1149). Taylor indicated she was not familiar with both these alleged occurrences and would want to know their context in order to respond to the prosecutor's questioning about how she could consider Michael to be remorseful and passive in light of those allegations(Ex.1p.1149-50).

On recross, respondent stated Taylor did not have the information about Michael mimicking shooting a guard, "bragging about killing," and having "a boot shank" (Ex.1p.1163). Taylor agreed that she would have liked to have known about those matters and the prosecutor countered with that he had given the information to counsel(Ex.1p.1164).

II. 29.15 Pleadings

The 29.15 pleadings alleged that counsel was ineffective for failing to adequately prepare Dr. Taylor for cross-examination about what Petri and Harmon testified about in aggravation(2ndPCRL.F.67). It was pled that counsel failed to provide to Dr. Taylor the information Petri and Harmon were expected to testify about(2ndPCRL.F.67).

III. Counsels' Testimony

A. Slusher

Slusher indicated he and McBride discussed whether to call Taylor, after considering her original trial's testimony, and they decided to call her(Ex.102p.11-12). Preparing Taylor for trial was McBride's responsibility(Ex.102p.12-13). There was no strategy for failing to prepare Taylor for cross-examination about the alleged Chariton and Boone County Jails' occurrences(Ex.102p.74-75).

B. McBride

McBride testified he was primarily responsible for Taylor(2ndPCRTr.346-47,354). McBride and Slusher decided they wanted to call Taylor(2ndPCRTr.400-01).

IV. Findings

The findings state Dr. Taylor was not called at the 29.15 to testify how her testimony would have been different if she had known about the Chariton and Boone County occurrences, thereby causing, the claim to be abandoned (2ndPCRL.F.336,353). Also, the 29.15 failed to establish that preparation would have changed Taylor's responses that would have created a reasonable probability of a different result(2ndPCRL.F.353).

V. Counsel Was Ineffective

A lack of thoroughness and preparation constitutes deficient performance under *Strickland*. *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991). There was a lack of thoroughness and preparation here because counsel failed to apprise

Taylor about the Chariton and Boone County Jail allegations(Ex.1p.1149-50). That failure resulted in cross-examination of Taylor that questioned the validity of her opinions as based on incomplete information(Ex.1p.1149-50,1163-64).

The prejudice to Michael is highlighted by respondent's closing arguments that attacked Taylor's opinions as based on incomplete information. *See*, *Strickland*. In respondent's initial closing argument, the jury was told death was warranted because Michael "bragged" about killing the guards when he asked Petri whether she knew he was the guy who killed the jail guards(Ex.1p.1183-84). To that, respondent added that Michael's acting like he was shooting Harmon was further evidence death was warranted(Ex.1p.1183-84). Respondent immediately continued:

> You don't need any context like Dr. Taylor to know what's going on there. There is no context. That's the type of man we're dealing with.

(Ex.1p.1183-84).

Respondent's rebuttal argument included that Taylor had picked and chosen what she looked at while talking about "context"(Ex.1p.1214). Respondent argued the jury ought to focus on Michael's actions before, during, and after the guards' deaths(Ex.1p.1214-15).

If counsel had acted as reasonable counsel and apprised Dr. Taylor about the Chariton and Boone County Jail allegations, then Taylor's opinions could not have been attacked and rendered meaningless for having failed to take those jail allegations into account. *See Kenley and Strickland*. Michael was prejudiced by this lack of

preparation as there is a reasonable probability he would have been sentenced to life had Taylor's opinion not been open to such attacks. *See Kenley and Strickland.*

A new penalty phase is required.

V.

CROSS OF TAYLOR – MICHAEL DID NOT PLEAD GUILTY

The motion court clearly erred denying the claim counsel was ineffective for failing to include in the motion for new trial the prosecutor's questioning Dr. Taylor whether Michael had pled guilty, after objecting on the grounds of relevance and prejudice during trial, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel, after objecting at trial, would have included that objection in the motion for new trial. Michael was prejudiced because had this claim not been subjected to the more demanding plain error standard of review on appeal there is a reasonable probability his sentence would have been reversed.

Trial counsel objected to the prosecutor's asking Dr. Taylor whether Michael had pled guilty, but failed to include that issue in the motion for new trial, resulting in the appeal claim being subjected to plain error review. Counsel was ineffective because had this matter not been subjected to the more difficult plain error standard of review, then there is a reasonable probability a new penalty phase would have been ordered on direct appeal.

I. Trial Record

During cross-examination of Dr. Taylor, respondent asked her whether Michael had a motivation to lie to her(Ex.1p.1140). Respondent's questioning

included: "But did he plead guilty? No. Right? He didn't plead guilty."(Ex.1p.1140). Counsel McBride objected, noting Michael was not offered the opportunity to plead guilty(Ex.1p.1140). McBride objected that the question was not relevant and highly prejudicial(Ex.1p.1140). That objection was overruled(Ex.1p.1140-41), but not included in the motion for new trial(Ex.4p.212-21).

When the court overruled the objection, it stated that it was overruling the objection with the understanding respondent was going to ask a different question(Ex.1p.1141). The follow-up questioning asked Taylor when she was hired whether Michael had yet been convicted of any offense and sentenced(Ex.1p.1141-42).

II. Direct Appeal

On direct appeal, this questioning of Taylor was argued as plain error(Ex.2p.76-95). On direct appeal, it was argued this questioning was improper because it led the jury to believe Michael had the opportunity to plead guilty but did not, even though he was guilty(Ex.2p.89-90). Further on direct appeal, it was urged that from the beginning of Michael's case a plea offer of life without parole was sought, but respondent would not make any offer less than death(Ex.2p.90). Thus, it was misleading for the prosecutor to tell the jury Michael did not plead guilty, after denying him that opportunity(Ex.2p.90). Respondent's questioning was also misleading because respondent's other evidence and argument urged Michael was not remorseful(Ex.2p.90).

This Court rejected the plain error claim because the defense sought remorse and sorrow testimony from Taylor and respondent's cross-examination was an attempt to discredit the veracity of the feelings Michael reported to Taylor. *State v. Tisius*, 362 S.W.3d 398, 408-09 (Mo. banc 2012). This Court added that the jury would have known that Michael had not pled guilty because it was not called upon to determine guilt or innocence. *Id.*408-09.

III. Counsels' Testimony

A. Slusher

Slusher testified Taylor was McBride's witness(Ex.102p.75). Slusher testified that the court overruled the objection, "but in effect the question wasn't asked."(Ex.102p.77) Slusher testified he thought he probably had a strategy reason for not including this matter in the motion for new trial(Ex.102p.77).

B. McBride

McBride testified he did not know why he failed to properly object(2ndPCRTr.375-76).

IV. 29.15 Findings

The findings noted counsel had objected to this questioning, but failed to include it in the motion for new trial(2ndPCRL.F.336). The challenges to the cross-examination of Taylor were deemed "meritless"(2ndPCRL.F.352).

V. Counsel Was Ineffective

Rule 24.02(d)(5) renders inadmissible any evidence of a guilty plea later withdrawn, or an offer to plead guilty or statements made in connection with any plea

offers. The use of a withdrawn guilty plea and statements associated with it is reversible error. *State v. Danneman*, 708 S.W.2d 741, 743 (Mo.App., E.D. 1986) (relying *on Kercheval v. U.S.*, 274 U.S. 220 (1927)). Rule 24.02, *Danneman,* and *Kercheval* all recognize the inherently prejudicial nature of injecting the type of matters like the prosecutor injected into Michael's case. Moreover, Michael's counsel objected on the grounds of relevance and prejudice (Ex.1p.1140), but they just failed to include this matter in the motion for new trial(Ex.4p.212-21). As a result, this matter was subjected to more demanding plain error and manifest injustice review.

In *Deck v. State*, 68 S.W.3d 418, 422-24 (Mo. banc 2002) defense counsel submitted two defective penalty phase mitigating circumstances instructions that were given to the jury. On direct appeal, this Court rejected that the defective instructions constituted plain error. *Id.*424-25.

Deck's 29.15 motion alleged counsel was ineffective for having submitted defective instructions. *Deck v. State*, 68 S.W.3d at 425-31. Respondent argued that because there was no plain error on direct appeal, counsel could not have been ineffective. *Id.*425-27. This Court rejected that contention because plain error on direct appeal can only serve as a basis to grant a new trial if the error was outcome determinative. *Id.*427. In contrast, the test for evaluating ineffective assistance of counsel under *Strickland* is not an outcome determinative test. *Id.*427. The tests for granting a new trial under plain error review and ineffective assistance are not equivalent. *Id.*427. The appropriate standard for proving prejudice under *Strickland* is lower than what is required for plain error. *Id.*428. The ultimate issue under

Strickland is whether a movant was denied effective assistance of counsel such that the court's confidence in the fairness of the proceeding is undermined. *Id.*428.

Reasonable counsel who had objected to this evidence would have included this matter in the motion for new trial so on appeal the objection would not have been subjected to the more difficult plain error standard. *See Strickland*. It is not objectively reasonable and sound strategy to object at trial and then fail to include this matter in the motion for new trial. *See*, *McCarter*, *Butler*, Rule 24.02, *Danneman*, and *Kercheval*. Michael was prejudiced because respondent's inquiry allowed respondent to create the impression that Michael had declined to plead guilty and demonstrate remorse when respondent would not allow Michael the opportunity to plead guilty to life without parole and would allow a plea only to a death sentence(Ex.2p.90). *See Strickland*. Further, Michael was prejudiced by counsels' ineffectiveness because had his claim not been required to be raised as plain error, then there is a reasonable probability his sentence would have been reversed on direct appeal. *See Deck* and *Strickland*.

This Court should order a new penalty phase.

VI.

FAILURE TO SUPPORT SUBMITTING STATUTORY MITIGATORS – INCOMPLETE DR. PETERSON TESTIMONY

The motion court clearly erred denying the claim counsel was ineffective for failing to present portions of Dr. Peterson's prior testimony to support having submitted additional statutory mitigating circumstances that Michael acted under the influence of extreme mental or emotional disturbance (diminished capacity) and Michael's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have presented those portions of Dr. Peterson's prior testimony that would have supported these mitigating circumstances and requested they be included in mitigating circumstances Instructions 9 and 15. Michael was prejudiced because had the omitted testimony been included and the corresponding mitigating circumstances submitted as part of Instructions 9 and 15, then Michael would not have been death sentenced.

Trial counsel presented only selected portions of Dr. Peterson's prior testimony. Effective counsel would have read to the jury portions of Peterson's testimony that supported obtaining, as part of mitigating circumstances Instructions 9 and 15, that Michael acted under the influence of extreme mental or emotional

disturbance (diminished capacity) and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. Michael was prejudiced because he would not have been sentenced to death had this evidence been presented to support giving instructions containing these mitigating circumstances.

I. 29.15 Pleadings

The amended motion alleged counsel was ineffective for failing to read multiple parts of Dr. Peterson's prior testimony(2ndPCRL.F.24-34). It was alleged that had the jury heard the omitted portions there would have been evidence to support obtaining two additional statutory mitigating circumstances - that Michael acted under the influence of extreme mental or emotional disturbance (diminished capacity) and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired(2ndPCRL.F.33-34).

II. Dr. Peterson – What The Jury Heard

The portions of Peterson's prior testimony that the jury heard included the following.

Peterson gathered extensive background information and evaluated Michael to determine: (1) whether Michael suffered from a mental disease or defect; (2) if Michael did have a mental disease or defect whether it impacted his level of criminal responsibility; and (3) whether, based on a complete evaluation of Michael, there were any mitigating circumstances(Ex.5p.227-28,230-34).

Peterson's diagnoses included: (1) major depressive disorder severe without psychotic features; (2) childhood onset post-traumatic stress disorder (PTSD); (3) dysthymia; (4) history of marijuana and alcohol dependence; and (5) passive/aggressive and compulsive personality(Ex.5p.235,265-66,268).

Major depressive disorder, depression, is a severe mental disease(Ex.5p.236). Michael's depression was longstanding and began during early childhood(Ex.5p.236-37,267).

Peterson explained childhood PTSD differs from PTSD involving adults(Ex.5p.238). Childhood onset PTSD is a serious mental disease because it impairs normal maturation and places a person at risk for abnormal anxiety management, depression, poor judgment, and substance abuse(Ex.5p.269). Peterson highlighted that Michael's half-brother, Joey Mertens, was extremely abusive of Michael and beat Michael(Ex.5p.244-46,254).

The materials Peterson reviewed reflected Michael was a desperate and helpless child(Ex.5p.258). Michael was needy, immature, and not equipped to be out on his own with a longstanding history of being physically abused by his half-brother(Ex.5p.258).

Michael displayed the reasoning ability of a young teenager and his cognitive ability was quite immature(Ex.5p.260).

Michael displayed passive dependence and relied on other people(Ex.5p.270). Michael gravitates towards people who take advantage of him(Ex.5p.270). Michael is predisposed to want to please other people, so that they like him(Ex.5p.270).

On cross-examination, Peterson indicated Michael knew right from wrong at the time of the offense, and Michael had told Peterson that he knew what he had done was wrong(Ex.5p.290-91).

III. Dr. Peterson – What The Jury Did Not Hear

The jury did not hear the following from Dr. Peterson's prior testimony.

Michael viewed Roy Vance as a powerful person with whom Michael could align himself with and trust(Ex.5p.274). Michael perceived his friendship with Vance as one of equals and not that Vance was taking advantage of him(Ex.5p.274-75). Michael was vulnerable to being influenced by Vance because of the childhood trauma Michael endured with no one to advocate for him and to protect him(Ex.5p.275). Michael's history of depression clouded his judgment about Vance(Ex.5p.276).

Peterson opined Michael acted with diminished capacity at the time of the shooting(Ex.5p.277-78). The statutory mitigating circumstance of the defendant acted under the influence of extreme mental or emotional disturbance at the time of the offense (diminished capacity) was true of Michael(Ex.5p.278-79). This mitigating circumstance existed because of Michael's conditions of major depression, PTSD, dysthymia, and passive dependence on others such as Vance(Ex.5p.278-79).

On redirect, Peterson indicated that knowing right from wrong is different from refraining from doing wrong(Ex.5p.291).

IV. The Statutory Mitigators Actually Submitted To The Jury

Instruction 9 (Count I) and Instruction 15 (Count II) both submitted the following mitigating circumstances instructions: (1) whether the defendant had no significant history of prior criminal activity; (2) whether the defendant acted under extreme duress or substantial domination of another; and (3) the defendant's age at the time of the offense(Ex.4p.187,195). [5]

V. Counsels' Testimony

A. Slusher

Slusher testified Peterson was not called as an in-person witness, and only portions of his prior 29.15 testimony were read to the jury, because what was appropriate to present to a 29.15 hearing judge was different from what counsel wanted a jury to hear(Ex.102p.14-16). Slusher testified Assistant Attorney General Zoellner agreed to allow counsel to present selected excerpts of Peterson's prior 29.15 testimony to the jury(Ex.102p.14-16).

It was Slusher's responsibility for determining which portions of Peterson's prior testimony to present(Ex.102p.16).

Slusher testified that portions of Peterson's prior testimony directed at Michael was led by co-defendant Vance into trying to assist Vance to escape from jail was something they did not perceive the jury could be persuaded to endorse(Ex.102p.14-16).

[5] Instructions 9 (Count I) and 15 (Count II) submitted statutory mitigators and they are identical in content(Ex.4p.187,195;2ndPCRL.F.79).

B. McBride's Testimony

McBride testified the defense theory was that Michael was a young man who, in trying to help Vance to escape, sought to please Vance because Vance had become a father figure to Michael and Michael's will was overborne by Vance(2ndPCRTr.347-48). McBride indicated they looked into the circumstances in which Michael was raised to support that theory(2ndPCRTr.347-48).

McBride testified it was Slusher who decided which portions of Peterson's prior 29.15 testimony were read to the jury(2ndPCRTr.358,401).

McBride testified that portions of Peterson's testimony that went to the mitigators of having acted under the influence of extreme mental or emotional disturbance (diminished capacity) were not read to the jury because Slusher and McBride believed that they had presented what they needed from Peterson's prior testimony when considered in combination with other witnesses(2ndPCRTr.358-61).

VI. 29.15 Findings

The findings stated that at the original trial, Dr. Taylor testified in penalty phase(2ndPCRL.F.326). At the first 29.15, Drs. Peterson and Daniel testified(2ndPCRL.F.326-27). Taylor and Peterson came to the same conclusions - that Michael had a need for approval that caused him to come under Vance's influence, and had suffered abuse growing up(2ndPCRL.F.326-27). Taylor gave more concise answers than Peterson(2ndPCRL.F.327).

The findings stated that counsel decided to call Taylor to testify and to present Peterson and Daniel through reading their prior testimony(2ndPCRL.F.327). All of

Daniel's prior testimony was read, while excerpts of Peterson's testimony were read(2ndPCRL.F.327). Slusher and McBride selected the portions of Peterson's prior testimony they considered most helpful(2ndPCRL.F.327). Presenting Peterson's detailed testimony would not have helped the jury understand his conclusions(2ndPCRL.F.328).

The findings stated that the omitted portions of Peterson's prior testimony were similar to testimony the jury heard from Taylor and Daniel(2ndPCRL.F.328). Taylor noted Michael's desire for the approval of an older male and that Vance filled that role(2ndPCRL.F.328). Taylor noted the significance of the abuse Michael endured from his half-brother and the absence of his father from his life(2ndPCRL.F.328-29). Taylor discussed Michael's mental health issues, concluding that Michael's participation in this offense was out of character(2ndPCRL.F.328-29).

The findings stated that while some attorneys might have called Peterson to testify live, it was equally valid to call Taylor to testify live and present a condensed Peterson version(2ndPCRL.F.344). Counsel could choose to call Taylor as the best witness, and thereby, avoid the opportunity for respondent to elicit contradictory testimony from Peterson(2ndPCRL.F.344).

The findings stated that counsel acted competently in selecting the Peterson excerpts(2ndPCRL.F.344). Even if competent counsel would have called Peterson live or read additional excerpts, there is not a reasonable probability of a different result(2ndPCRL.F.345). The basic information and conclusions Michael alleged

should have been presented through Peterson were presented through Taylor or Daniel or the Peterson excerpts that were read to the jury(2ndPCRL.F.345).

VII. Counsel Was Ineffective

In *Deck v. State*, 68 S.W.3d 418, 423-31 (Mo. banc 2002), counsel was ineffective for submitting defective, incomplete, non-statutory mitigating circumstances instructions. In Michael's case, counsel failed to present available evidence from Peterson's prior testimony that would have supported submitting the mitigating circumstances that Michael acted under the influence of extreme mental or emotional disturbance (diminished capacity), and Michael's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. *Cf. Deck.*

Peterson's omitted prior 29.15 testimony included that Michael's conditions of major depression, PTSD, dysthymia, and passive dependence on others, such as Vance, supported that Michael acted under the influence of extreme mental or emotional disturbance (diminished capacity)(Ex.5p.277-79). Reasonable counsel would have read this prior Peterson testimony to the jury in order to obtain in the statutory mitigating circumstance instructions the specific mitigator that Michael acted under the influence of extreme mental or emotional disturbance (diminished capacity). *See Strickland* and *Deck*. Michael was prejudiced because had the jury heard this prior testimony from Peterson and been given the mitigator that Michael acted under the influence of extreme mental or emotional disturbance (diminished

capacity), in Instructions 9 and 15, there is a reasonable probability Michael would not have been sentenced to death. *See Strickland* and *Deck.*

Peterson's omitted prior 29.15 testimony also would have supported the mitigator that Michael's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Peterson testified that knowing right from wrong is different from refraining from doing wrong(Ex.5p.291). The jury did not hear that Michael regarded Vance as a powerful person he could trust and that they were equals(Ex.5p.274). Further, the jury did not hear that Michael was subject to Vance's influence because of the childhood trauma Michael experienced with no one advocating for or protecting him(Ex.5p.275). Additionally, the jury did not hear that Michael's depression impaired his judgment about Vance(Ex.5p.276).

Reasonable counsel would have presented the noted prior 29.15 Peterson testimony to support submitting the mitigator that Michael's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. *See Strickland* and *Deck.* Michael was prejudiced as there is a reasonable probability that he would not have been death sentenced had the omitted testimony been presented so that the mitigating circumstance that Michael's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired was submitted in Instructions 9 and 15. *See Strickland* and *Deck.*

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994); *Butler v. State*, 108 S.W.3d 18, 25 (Mo.App., W.D. 2003). Slusher's strategy reasons (Ex.102p.14-16), that Peterson's opinions that Michael was led by Vance into trying to help Vance escape were difficult to support, is expressly contradictory to McBride's testimony that the defense theory was that Michael tried to help Vance escape to please him because Vance had become a father figure to Michael and Michael's will was overborne by Vance(2ndPCRTr.347-48). Thus, those strategy reasons were not reasonable. *See*, *McCarter* and *Butler*.

The submission of either of these mitigating circumstances separately or in combination with one another in the mitigating circumstances instructions would have resulted in Michael not being death sentenced. *See Strickland* and *Deck.*

A new penalty phase is required.

VII.

MITIGATION WITNESSES

The motion court clearly erred denying counsel was ineffective for failing to call as mitigation witnesses Michael Tisius' father, Chuck Tisius, Michael's stepmother, Leslie Tisius, Michael's friends, Jamey Baker and Deanna Guenther, and Michael's G.E.D. teacher, Lynn Silverman, because Michael was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have called these witnesses who could have highlighted the severity of the adversity and deprivation Michael endured while living with his mother, Patty, and half-brother, Joey, and the consequences for Michael of living in that environment. Michael was prejudiced as there is a reasonable probability that had the jury heard these witnesses he would not have been death sentenced.

The jury did not hear mitigating evidence from Michael's father, Chuck Tisius, Michael's stepmother, Leslie Tisius, Michael's friends, Jamey Baker and Deanna Guenther, and Michael's G.E.D. teacher, Lynn Silverman. Their testimony would have highlighted the severity of the adversity Michael endured living with his mother, Patty, and half-brother, Joey, and the consequences for Michael of living in that environment.

I. Counsel's Mitigating Evidence Obligations

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (quoted in *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004) and *Glass v. State*, 227 S.W.3d 463, 468 (Mo. banc 2007)). Relevant mitigating evidence "is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard*, 542 U.S. at 284.

Failing to interview witnesses relates to preparation and not strategy. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id.*1304. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994). Foregoing presenting evidence because it contains something harmful is unreasonable when its harm is outweighed by its helpful value. *Hutchison v. State*, 150 S.W.3d 292, 305 (Mo. banc 2004). *See Williams v. Taylor*, 529 U.S. at 395-96 (counsel ineffective in failing to present evidence of severe abuse and defendant's limited mental capabilities where not all the evidence was favorable to defendant).

II. Counsels' Testimony

A. McBride

McBride testified they chose witnesses whose testimony fit their theory(2ndPCRTr.348-53,400-01,408). They did not call other witnesses who they felt did not contribute significantly to their theory(2ndPCRTr.348-53,408).

McBride testified the defense theory was that Michael was a young man who, in trying to help Vance to escape, sought to please Vance because Vance became a father figure to Michael, and that Michael's will was overborne(2ndPCRTr.347-48). McBride indicated that the circumstances in which Michael was raised were used to support that theory(2ndPCRTr.347-48).

McBride testified that investigator Miller may have tried to contact Chuck Tisius or that Chuck was disinterested in testifying(2ndPCRTr.351-53,408). McBride did not recall whether anyone tried to contact Leslie Tisius and they did not have any information to suggest Leslie would be helpful(2ndPCRTr.353).

B. Slusher

Slusher testified that their mitigation theory was that Michael was a troubled youth, the supporting evidence of which included the abuse inflicted by his step-brother(Ex.102p.27). They selected the mitigation witnesses who best fit their mitigation theory(Ex.102p.110-12).

Slusher did not recall there being any strategy reason for not calling Chuck and Leslie Tisius(Ex.102p.36-37).

III. Findings

The findings stated that counsel called multiple witnesses, who testified about the absence of Michael's father from his life, Michael's brother's abuse of him, and

the highs and the lows of Michael's school experiences(2ndPCRL.F.329). Counsel was aware of the witnesses the 29.15 alleged should have been called and choose not to call them(2ndPCRL.F.330,345). Except for Michael's father and his stepmother, the other witnesses presented testimony that was substantially similar to the trial witnesses' testimony(2ndPCRL.F.330). While the testimony of the trial witnesses and the 29.15 witnesses is not identical, there was no significant new information(2ndPCRL.F.330). Some of the 29.15 witnesses noted criminal or anti-social behavior by Michael, which would have been harmful(2ndPCRL.F.330,345-46).

The findings stated that Michael's father and stepmother presented a different image of the reasons for the problems between Michael and his father while placing more blame on Michael and Michael's mother(2ndPCRL.F.330). The actual reason for the strained relationship matters less than the reason perceived by Michael(2ndPCRL.F.330-31). Based on the information Michael and his mother provided counsel, there was no significant reason for counsel to want to get the other side of the perspective(2ndPCRL.F.330-31). Michael's father's account placed Michael in a more negative light than the trial evidence(2ndPCRL.F.331). Competent counsel would not have called Michael's father or stepmother as they would have detracted from the theory presented(2ndPCRL.F.331,346). There is no reasonable probability the 29.15 witnesses' testimony would have produced a different result(2ndPCRL.F.345-46).

IV. Family Mitigation Witnesses

A. Chuck Tisius

Michael's father, Chuck Tisius, recounted that Michael was born in 1981 and that Chuck left for the military in 1982(2ndPCRTr.141). When Chuck returned from training, Patty was involved with other men and engaged in inappropriate behavior, and he filed for divorce(2ndPCRTr.141). Patty went to bars and drank with men, while bringing Michael along(2ndPCRTr.142-43). Chuck wanted primary custody of Michael, but Patty got custody(2ndPCRTr.142-43).

Patty frequently failed to make Michael available for visitation with Chuck and Leslie(2ndPCRTr.144). Patty refused to make visitation accommodations that took into account Chuck's police officer work shifts(2ndPCRTr.143).

When Patty made Michael available for visitation, he was in ragged clothing and smelled of urine(2ndPCRTr.145-46). Chuck and Leslie bought clothes for Michael that they kept at their house because if the clothes went to Patty's house, they were never returned(2ndPCRTr.145-46). Chuck often purchased clothing, including coats, for both Michael and Joey(2ndPCRTr.146-47).

When Patty and Michael moved from St. Louis to Hillsboro, Chuck sent Michael letters telling Michael that he wanted to see him, and he tried calling, but Chuck did not hear back from Michael or Patty(2ndPCRTr.153-56).

When Michael was twelve years old, Chuck successfully petitioned for primary custody because he was concerned about Michael's well-being and not to avoid paying child support(2ndPCRTr.156-58). Michael came to live with Chuck and Leslie, but Michael did not want to follow household rules and he got into trouble at

school(2ndPCRTr.158-61). Michael then went back to living with his mother(2ndPCRTr.159-60). When Michael resumed living with Patty, Chuck wrote Michael, wanting Michael to visit with them(2ndPCRTr.162-63).

When Michael was fifteen, he again came to live with Chuck and Leslie(2ndPCRTr.163-64). Michael appeared at their door with a trash bag of clothes(2ndPCRTr.163-64). Michael stayed with Chuck for a short time, but again encountered problems following rules(2ndPCRTr.163-64).

Chuck was not contacted by any counsel before this 29.15 case(2ndPCRTr.167). Chuck had made calls and left messages at offices responsible for representing Michael(2ndPCRTr.167-68). If Chuck had been contacted to testify on behalf of Michael he would have done so(2ndPCRTr.169). When Chuck received a voicemail on his cell phone from the second 29.15 team's mitigation specialist, he immediately returned her call from where he was having work done on his car(2ndPCRTr.169-70).

B. Leslie Tisius

Leslie Tisius was married to Michael's father, Chuck Tisius, and was Michael's stepmother(2ndPCRTr.56). Chuck was supposed to have visitation with Michael every other weekend, but that did not happen(2ndPCRTr.58). Michael's mother, Patty, frequently did not show up with Michael for visitation with Chuck and Leslie(2ndPCRTr.58). When Patty made Michael available, he was dirty and smelled of urine(2ndPCRTr.59-60). Chuck and Leslie provided clothes for Michael because his clothing did not fit or was dirty(2ndPCRTr.59-60). Chuck and Leslie kept

clothing at their house for Michael because when the clothing went with Michael back to Patty's house, it was not returned(2ndPCRTr.60). Chuck's ability to spend time with Michael was complicated because Chuck worked night and weekend shifts as a police officer(2ndPCRTr.58-59,61).

At one point, Patty dumped Michael on their porch with a trash bag full of clothing stating: "He's your problem now"(2ndPCRTr.63). There was conflict between Chuck and Michael because Chuck had household rules he expected Michael to follow, while Michael's mother, Patty, did not have any rules she expected Michael to follow(2ndPCRTr.64). Leslie indicated Michael was a sad boy in whom she observed signs of depression(2ndPCRTr.70).

Leslie was not contacted by any counsel before this 29.15 case(2ndPCRTr.64).

Reasonable counsel would have interviewed and called Chuck and Leslie, who wanted to make themselves available to help make the case for life. *See Kenley*. Counsel was obligated to obtain evidence which highlighted the adversity Michael endured living with Patty. *See Wiggins, Williams, and Tennard*. The jury heard evidence from Patty that Chuck was an uncaring father who abandoned Michael and who schemed and manipulated custody so as to avoid his child support obligation(Ex.1p.917-21,924-25,932,985,987).

The jury did not hear a vastly different perspective from Chuck and Leslie that Patty drank at bars and brought Michael along(2ndPCRTr.142-43), failed to make Michael available for visitation(2ndPCRTr.58,143-44), refused to accommodate Chuck's work schedule for visitation(2ndPCRTr.58-59,61,143), kept Michael in

ragged clothing while he smelled of urine (2ndPCRTr.59-60,145-46), failed to provide necessities like a coat(2ndPCRTr.146-47), and sought to abandon Michael(2ndPCRTr.63). The jury's hearing only Patty's rendition, was left with the misperception that Michael had at least one stabilizing force in his life with Patty, when in fact that was not the case. It was critical that the jury, in order to not vote for death, have heard the different perspective that Michael had no one to turn to for a consistent, stable, caring environment. *See Strickland* and *Deck*. Michael was prejudiced by the failure to call Chuck and Leslie. *See Strickland* and *Deck*.

That the jury would have heard that Michael was not following household rules because Patty did not have comparable rules and got into some trouble at school(2ndPCRTr.64,158-61), was outweighed by the favorable mitigating circumstances Chuck and Leslie offered. *See*, *Hutchison* and *Williams*.

V. Friends – Mitigation Witnesses

A. Jamey Baker

Jamey Baker grew up with Michael in Hillsboro(2ndPCRTr.92). Jamey saw Joey "brutal[ly]" beat Michael such that he "could not imagine getting [his] butt beat like that"(2ndPCRTr.94). Joey's beating Michael went beyond what was normal for sibling fighting(2ndPCRTr.94). Michael's mother treated Joey better than she treated Michael(2ndPCRTr.95).

Jamey Baker's testimony was obtained by deposition for the first 29.15(Ex.8)

B. Deanna Guenther

Deanna Guenther grew up with Michael in Hillsboro(2ndPCRTr.80). Michael spent lots of time at Deanna's house to escape from Joey(2ndPCRTr.81-82). Joey treated Michael "horribly"(2ndPCRTr.82). Joey physically assaulted Michael and cursed at him(2ndPCRTr.83). There was one incident where Joey beat Michael so badly that he was unconscious(2ndPCRTr.83).

Deanna Guenther's testimony was obtained by deposition for the first 29.15(Ex.9).

C. Lynn Silverman

Lynn Silverman was Michael's G.E.D. teacher(Ex.82p.7-8). Michael was homeless(Ex.82p.9). Silverman help connect Michael with youth services to help him with housing(Ex.82p.9). Silverman became especially concerned about Michael's well-being when he made a drawing with a tombstone saying that he wanted to kill himself(Ex.82p.9-10).

Lynn Silverman's testimony was obtained by deposition for the first 29.15(Ex.13).

Reasonable counsel would have called Jamey Baker, Deanna Guenther, and Lynn Silverman, who were readily available because they had provided deposition testimony for the first 29.15 case(Exs.8,9,13). Counsels' strategy for not calling these witnesses was not reasonable. *See, McCarter*. Jamey Baker and Deanna Guenther described the severity and magnitude of the beatings Michael endured in a way that the jury needed to hear to fully grasp. Jamey described how Michael was "brutal[ly]" beaten and he "could not imagine getting [his] butt beat like that"(2ndPCRTr.94).

Deanna described how Joey had beaten Michael so badly that Michael was unconscious(2ndPCRTr.83). Michael was prejudiced as there is a reasonable probability that the jury would not have sentenced Michael to death had they heard Jamey Baker and Deanna Guenther. *See Strickland* and *Deck*.

Counsels' strategy in not calling Lynn Silverman, likewise, was not reasonable. *See*, *McCarter*. Lynn was able to present evidence of Michael's destitute homeless state (Ex.82p.9) and the depth of despair Michael felt through his drawing a tombstone, while expressing that he wanted to kill himself(Ex.82p.9-10). Michael was prejudiced as there is a reasonable probability the jury would not have sentenced Michael to death had they heard Lynn Silverman. *See Strickland* and *Deck*.

All of these mitigating witnesses individually and in combination with one another would have resulted in the jury voting for life had they been called to testify.

A new penalty phase is required.

VIII.

VICTIMS' WISHES ARGUMENTS

The motion court clearly erred denying the claim counsel was ineffective for failing to object to respondent's closing arguments urging that death was appropriate as that was what the victims' desired, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to these improper arguments on the grounds they injected passion, prejudice, emotion, and arbitrariness into sentencing. Michael was prejudiced because there is a reasonable probability the jury would not have imposed death had counsel objected to such arguments.

Respondent urged the jury in closing argument to impose death because that was the punishment the victims wanted. Reasonable counsel would have objected to these arguments and Michael was prejudiced as he would not have been sentenced to death.

I. Trial Record

Respondent's victim impact evidence included calling Lori Miller. Lori Miller and Jason Acton were engaged to be married(Ex.1p.871-72). Lori had five children from a prior marriage and Jason was involved in every aspect of their lives(Ex.1p.872-73). Lori wondered how her life would have been different if Jason had not died(Ex.1p.874).

Respondent's initial closing argument included:

> And, you know, it's pretty audacious to come in here now, as this defendant is doing, and saying, I didn't have a dad and, boy, looked [sic] what happened. Do those Miller kids - - do those Miller kids get to kill somebody because their dad, their father figure is gone? If so, Mr. Tisius, write down the name. Tell me who they get to kill, because I bet your name would be on that piece of paper.

(Ex.1p.1184-85).

Respondent concluded its rebuttal argument that death was warranted because:

> It can stop Michael Tisius from doing this again. And it is an answer to the plea from the families of Leon and Jason and Randolph County that you do justice in this case.

(Ex.1p.1219).

II. McBride's And Slusher's Testimony

McBride made the defense's closing argument, and therefore, was responsible for objecting to respondent's arguments(2ndPCRTr.376). McBride did not have a strategy reason for failing to object to respondent's arguments about the victims' families' desires for death(2ndPCRTr.380-82).

Slusher testified there was no strategy reason for failing to object to these arguments(Ex.102p.84-86).

III. Direct Appeal Opinion

The plain error challenge to the argument that death was the answer to the victims' families pleas was rejected because this Court in other cases, where there

were stronger statements than those made here, had found no plain error. *State v. Tisius*, 362 S.W.3d 398, 410-11 (Mo. banc 2012).

IV. 29.15 Findings

The findings state counsel testified he did not view as objectionable most of the closing arguments alleged in the 29.15 as objectionable(2ndPCRL.F.337). The findings state that this matter was raised on direct appeal and this Court found nothing improper about respondent's argument(2ndPCRL.F.337). Further, the findings state that for the reasons set forth on direct appeal any objection to closing argument would have been meritless or there is not a reasonable probability of a different result had an objection been made(2ndPCRL.F.352).

V. Counsel Was Ineffective

Failure to make timely proper objections to arguments can constitute ineffectiveness. *State v. Storey*, 901 S.W.2d 886, 900-03 (Mo. banc 1995) (counsel ineffective failing to object to penalty arguments asserting facts outside record). The *Storey* argument was improper and counsel was ineffective because "[a]ssertions of fact not proven amount to unsworn testimony by the prosecutor." *Id*.901. A prosecutor presenting facts outside the record is highly prejudicial "because the jury is aware of the prosecutor's duty to serve justice, not just win the case." *Id*.901 (relying on *Berger v. United States*, 295 U.S. 78, 88 (1935)). The argument in *Storey* was also improper because it was calculated to inflame the jury and appealed to emotion. *Storey*, 901 S.W.2d at 902.

In *State v. Taylor*, 944 S.W.2d 925, 937 (Mo. banc 1997), the prosecutor urged the jury to impose death by putting their emotions into their decision making and getting mad at the defendant. Urging the jury to decide punishment on emotion and to get mad was impermissible. *Id.*937-38. In reversing Taylor's death sentence, this Court observed: '"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."' *Id.*937 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

Respondent's arguments in Michael's case were based on facts outside the record and made the prosecutor an unsworn witness as to the victims' wishes. *See*, *Storey*. Further, respondent's invocation of the victims' wishes for death injected passion, prejudice, emotion, and arbitrariness into the sentencing decision. *See, Storey, Taylor,* and *Gardner*.

In *Deck v. State*, 68 S.W.3d 418, 422-24 (Mo. banc 2002), defense counsel submitted two defective penalty phase mitigating circumstances instructions that were given to the jury. On direct appeal, this Court rejected that the defective instructions constituted plain error. *Id.*424-25.

In *Deck*, this Court found counsel was ineffective because the defective instructions went to a "critical issue" and the errors were "sufficiently egregious." *Deck*, 68 S.W.3d at 429. The missing paragraphs were "pivotal" to the defense offered. *Id.*430.

As discussed in Point V, and incorporated here, under *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002), a finding of no plain error as to an issue decided on direct appeal does not foreclose finding counsel was ineffective. Further, counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo.App., S.D. 1994); *Butler v. State*, 108 S.W.3d 18, 25 (Mo.App., W.D. 2003).

While this Court found no plain error on Michael's direct appeal, that does not mean counsel was effective. *See, Deck.* Reasonable counsel would have objected to these improper arguments about the victims' desired punishment because they injected passion, prejudice, emotion, and arbitrariness into the sentencing decision. *See, Storey, Taylor,* and *Gardner*. Michael was prejudiced as there is a reasonable probability he would not have been sentenced to death if these arguments had been objected to. *See Strickland* and *Deck.*

This Court should order a new penalty phase.

IX.

NO RIGHT TO MERCY ARGUMENT

The motion court clearly erred denying the claim counsel was ineffective for failing to object to respondent's closing argument that Michael did not have the right to ask for mercy, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected as Michael had the right to seek mercy and the jury had the authority to exercise mercy and impose life, and Michael was prejudiced as there is a reasonable probability that the jury would have imposed life absent this improper argument.

Counsel failed to object to respondent's improper, prejudicial argument that Michael did not have the right to ask for mercy. Reasonable counsel would have objected and absent this argument there is a reasonable probability the jury would have voted for life.

I. Trial Record

Respondent's initial closing arguing included:

> Ladies and gentlemen, you can -- and I told you during voir dire a couple days ago, you can extend mercy for whatever reason to this man. You can do that. But the one thing he does not have the right to do is to ask for it. He forfeited that right on June 22nd when he committed these two murders.

(Ex.1p.1176-77).

II. Direct Appeal

On direct appeal, this Court found that respondent's argument urged the jury to reject Tisius' plea for mercy and was not plain error. *State v. Tisius*, 362 S.W.3d 398, 409-10 (Mo. banc 2012).

III. Counsels' Testimony

A. McBride

McBride made the defense's closing argument, and therefore, he was responsible for objecting to respondent's arguments(2ndPCRTr.376). McBride thought respondent's argument about mercy was objectionable because the jury can extend mercy for any reason it chooses(2ndPCRTr.377). McBride did not have a strategy reason for failing to object(2ndPCRTr.377).

B. Slusher

Slusher testified he did not consider this argument objectionable and had it been his responsibility to object, he would not have(Ex.102p.77-79).

IV. 29.15 Findings

The findings state counsel testified he did not view as objectionable most of the closing arguments alleged in the 29.15(2ndPCRL.F.337). The findings state this matter was raised on direct appeal and this Court found nothing improper(2ndPCRL.F.337). Further, the findings state that for the reasons set forth on direct appeal, any objection to closing argument would have been meritless or there is not a reasonable probability of a different result(2ndPCRL.F.352).

V. Counsel Was Ineffective

Failure to make timely, proper objections to arguments can constitute ineffective assistance. *State v. Storey*, 901 S.W.2d 886, 900-03 (Mo. banc 1995).

In *State v. Rousan*, 961 S.W.2d 831, 851 (Mo. banc 1998), this Court indicated that "mercy is a valid sentencing consideration when based on the circumstances of the case, in that a jury can sentence the defendant to life in prison even if it determines that the aggravating circumstances outweigh the mitigating circumstances." Respondent's argument here told the jury that the fact of killing two people meant Michael lost "the right" to have the jury exercise mercy(Ex.1p.1176-77). That argument was contrary to *Rousan*.

As discussed in Point V, and incorporated here, under *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002) a finding of no plain error as to an issue decided on direct appeal does not foreclose a finding counsel was ineffective.

While this Court found no plain error on Michael's direct appeal as to this particular portion of respondent's closing argument, that does not mean counsel was effective. *See, Deck*. Reasonable counsel would have objected to respondent's argument as contrary to *Rousan* because Michael had the right to seek mercy and the jury had the authority to exercise mercy and impose life. *See Storey, Rousan,* and *Strickland*. Michael was prejudiced as there is a reasonable probability that the jury would have imposed life absent this improper argument. *See Strickland*.

A new penalty phase is required.

X.

FLAT FEE PAYMENT

The motion court clearly erred rejecting the claim that Michael was denied effective assistance of counsel, a fair trial, due process, his right to have conflict free counsel, and was subjected to cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that counsels' flat fee arrangement created a conflict of interest because it created an inherent disincentive for counsel to do all that reasonably competent counsel would have done under similar circumstances, and thereby, resulted in the structural defect of denying Michael his right to counsel and alternatively Michael was denied effective assistance of counsel due to this flat fee arrangement because counsel did not act as reasonably competent counsel in representing Michael, as set forth in Points I through XII, and Michael was prejudiced for the reasons as discussed in those same Points.

Michael's two attorneys were each paid $10,000. This flat fee arrangement constituted a structural defect denying Michael his right to counsel. Alternatively, Michael was denied effective assistance because of this fee arrangement.

I. Counsels' Testimony

A. Slusher

Slusher recounted he was paid $10,000 to do the penalty phase retrial(Ex.102p.103). That $10,000 was payment for trial preparation, trial, and sentencing(Ex.102p.103). There was no requirement to record hours

worked(Ex.102p.103-04). Reimbursement for expenses required documentation(Ex.102p.103).

Trial began in July, 2010(Ex.102p.23). In September, 2009, Public Defender mitigation specialist Tami Miller became involved(Ex.102p.23,105). Miller became involved because the Public Defender's practice had been to deny requests to pay for mitigation specialists, but rather substitute one of its in-house specialists(Ex.102p.23-24,104-05).

Slusher believed that he met with mitigation family member witnesses in Hillsboro, while Miller worked more with McBride on matters involving Dr. Taylor(Ex.102p.25-26). Michael's case was not one where they sent Miller out to locate many new witnesses(Ex.102p.25-26). Slusher also thought he talked to Moberly area witnesses(Ex.102p.26).

Slusher testified he utilized his law firm's investigator, Rollin Thompson, to do "some" work, but not "a tremendous amount"(Ex.102p.105-06). Thompson was the firm's salaried employee(Ex.102p.105-06). Slusher testified Thompson did not do significant investigation, such as investigating the boot shank because "[a]s a general reason I couldn't afford to have him do a tremendous amount of work on this case, so"(Ex.102p.106). Being paid $10,000 for Michael's case, made it "hard to afford to have [Thompson] do too much."(Ex.102p.106).

B. McBride

McBride testified they were paid a flat fee of $20,000, split between them(2ndPCRTr.343).[6] The flat fee covered all work done no matter how much or little(2ndPCRTr.343). They could submit separate expense requests(2ndPCRTr.343-45). McBride testified there was nothing he did or did not do because of the flat fee arrangement(2ndPCRTr.407).

II. 29.15 Findings

The findings noted that the terms of the Public Defender's contract with the two attorneys was that each was to be paid $10,000 and expenses were reimbursable(2ndPCRL.F.340). Both attorneys testified that the fee arrangement did not impact their representation(2ndPCRL.F.340). There was evidence that both attorneys' law firms donated investigative assistance(2ndPCRL.F.340).

The findings stated the court was not aware of any authority on the proper manner to compensate attorneys(2ndPCRL.F.357). It is impossible to devise a form of compensation that does not have the potential for creating conflicts between attorneys, their clients, and the person paying the attorneys' fees(2ndPCRL.F.357). The fees paid here "effectively put counsels on notice from the start that much of their work in this case would be, for all intents and purposes, *pro bono* work"(2ndPCRL.F.357-58).

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[6] Public Defender clerical assistant for contracts, Sharon Carter, identified their contract (Ex.80) as a flat fee contract providing each attorney would be paid $10,000(2ndPCRTr.191-94).

The findings stated that a potential for a conflict of interest is insufficient to support a claim of ineffective assistance(2ndPCRL.F.358). An inmate asserting ineffective assistance, premised on a conflict of interest, is required to establish that the potential conflict actually adversely impacted counsel's representation(2ndPCRL.F.358). Counsels' testimony was the fee arrangement did not adversely impact their representation(2ndPCRL.F.358).

III. Denial of Right To Counsel/Ineffective Counsel

The ABA Guidelines for representation in death penalty cases, Guideline 9.1 – Funding And Compensation, provides flat fees are "improper." *See American Bar Association Guidelines For The Appointment And Performance of Defense Counsel In Death Penalty Cases*, 31 Hofstra L.Rev. 913, 981 (2003). *See also*, 2008 revision (same) at: americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2008-supplementary-guidelines/2008-guideline-9-1.html.[7] The rationale is that flat fee rates discourage lawyers from doing more than what is minimally necessary to qualify for the flat payment. *See* 31 Hofstra L.Rev. at 982. Such flat fee arrangements pit the client's interest against the lawyer's interests. *State v. Cheatham*, 292 P.3d 318, 340 (Ks. 2013).

[7] Wherever a web address is provided in this brief the web introductory letters have been omitted to avoid hyperlinking.

The defendant's capital conviction in *Cheatham* was reversed because of counsel's flat fee arrangement. *Cheatham*, 292 P.3d at 340-41. The flat fee arrangement created an actual conflict of interest and the lawyer's performance was adversely affected by "the financial disincentive under which [counsel] labored" as demonstrated by counsel's failure to adequately investigate and prepare. *Id.*341.[8] The *Cheatham* Court held that it was unnecessary for the defendant to show he was actually prejudiced by counsel's failure to adequately pursue his defense. *Id.*341.

Cheatham's counsel was disbarred because of having followed a flat fee arrangement. *See In Re Hawver*, 339 P.3d 573, 595-97 (Ks. 2014). In ordering disbarment, the *Hawver* Court reasoned: "Hawver had a financial disincentive under the circumstances to devote the necessary time and resources to Cheatham's case." *Id.*596.

The flat fee arrangement here violated the ABA's Guidelines for capital cases. The flat fee arrangement created an actual conflict of interest between Michael's interest and counsels' financial interests. *See* ABA Guideline 9.1, *Cheatham,* and *Hawver.* Slusher acknowledged the existence, and the impact, of the conflict and competing financial interests when he testified that he "couldn't afford" to have investigator Thompson devote much time to investigation(Ex.102p.106).

[8] In *State v. Cheatham*, 292 P.3d 318, 341 (Ks. 2013), that Court also relied on counsel's failure to withdraw to serve as an alibi witness for the defendant as additional grounds for reversing the conviction.

When a defendant alleges a conflict of interest the defendant must demonstrate: (1) an actual conflict of interest between the attorney and the client; and (2) the established conflict of interest adversely affected the lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). Here Slusher's testimony that he "couldn't afford" to have Thompson do much investigation (Ex.102p.106) establishes both prongs of the *Cuyler v. Sullivan* test.

The right to counsel, guaranteed by the Sixth Amendment, is a fundamental right. *Argersinger v. Hamlin*, 407 U.S. 25, 29-33 (1972). A defendant forced to face state court felony charges without the assistance of counsel guaranteed by the Sixth Amendment is denied due process of law. *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963). The competing interests conflict between representing Michael under a flat fee arrangement and counsels' financial interests denied Michael his right to have counsel. *See Gideon.*

Structural errors in the constitution of the trial mechanism "require[e] automatic reversal of the conviction because they infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993). A trial in which structural error has occurred "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). In cases where there is a structural error *Strickland* prejudice is not required. *See, e.g., Anderson v. State*, 196 S.W.3d 28, 39-42 (Mo. banc 2006) (failure to strike automatic death penalty and burden shifting juror on punishment denied defendant effective assistance of counsel without

showing prejudice because error was structural). Michael was denied his right to counsel because he was represented by counsel who had a conflict of interest and that denial was a structural error requiring reversal. *See Brecht, Fulminante,* and *Gideon.*

Moreover, Michael was denied effective assistance of counsel under *Strickland* because of the conflict this flat fee arrangement created when counsel failed to act as reasonably competent counsel under similar circumstances as discussed in Points I through XII. Further, Michael was prejudiced under *Strickland* for the reasons set forth in those Points.

In *Dorsey v. State*, 448 S.W.3d 276, 300-01 (Mo. banc 2014), Slusher and McBride, with investigator Thompson, provided flat fee representation in Dorsey's death penalty case. This Court rejected Dorsey's flat fee claim, reasoning that there was no evidence that decisions as to the use of Thompson's investigation were based on finances. *Id.*300. Michael's case is distinguishable from *Dorsey* because here Slusher testified that he "couldn't afford" to have Thompson do much investigation(Ex.102p.106).

This Court also rejected Dorsey's claim because counsel testified they did not make any decisions relating to representing Dorsey based on their compensation and the 29.15 court found their testimony credible. *Dorsey*, 448 S.W.3d at 300. Here, the 29.15 findings stated that the testimony of counsel was credible that the flat fee did not negatively impact their representation(2ndPCRL.F.358). That finding, while consistent with McBride's testimony (2ndPCRTr.407), was contradicted by Slusher's

testimony that Thompson was used sparingly because he "couldn't afford" to pay Thompson to work extensively on Michael's case(Ex.102p.106).

Moreover, the finding that the flat fee did not impact representation of Michael is clearly erroneous for reasons analogous to those applied in the judge disqualification context. In *State ex rel. McCulloch v. Drumm*, 984 S.W.2d 555, 556-58 (Mo.App., E.D. 1999), Judge Drumm made statements at sentencing that if he had been the finder of fact, rather than the jury, then he would not have convicted the defendant, but would have found her not guilty by reason of mental disease or defect. After the defendant's conviction was reversed, the case was returned to Judge Drumm for retrial and Drumm granted the defendant's request for a bench trial. *Id*.557. The state then moved to disqualify Drumm from the bench trial because of his sentencing statements. *Id*.556-58. At the hearing on the motion to disqualify, Drumm "testified that even though he had formed opinions on the case at that time [prior trial], he would not let his former opinions on the issue of mental disease or defect affect his judgment in the upcoming jury-waived trial." *Id*.557. The Court of Appeals noted that it had "no doubt" Drumm could fairly serve, but the standard for disqualification was whether a reasonable person would have factual grounds to doubt Drumm's impartiality, and therefore, he was required to be disqualified. *Id*.557-58.

While both Judge Drumm and McBride could each credibly profess that he would not deviate from his own designated obligations within the court system that is not the appropriate legal standard by which their circumstances are evaluated. McBride can truthfully and genuinely believe that his work on Michael's case was not

adversely impacted by the flat fee agreement, but ABA Guideline 9.1, *Cheatham*, and *Hawver* all recognize that such arrangements constitute a conflict of interest.

This Court should reverse Michael's death sentences and order a new penalty phase.

XI.

MENTAL AGE BARS EXECUTION

The motion court clearly erred denying the claim counsel was ineffective for failing pretrial to move the trial court and present supporting evidence to prohibit respondent from seeking death, on the grounds that Michael's mental age was less than eighteen years old at the time of the alleged offense, and alternatively if such motion was denied, then counsel was ineffective for failing to request an instruction that the jury must affirmatively find that Michael's mental age was at least eighteen years old at the time of the alleged offense to impose death, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have taken these actions and Michael was prejudiced as he would not have been death sentenced and he is not now properly subject to a death sentence.

Trial counsel was ineffective for failing to move to preclude death pretrial and present supporting evidence on the grounds Michael's mental age was less than eighteen years old at the time of the alleged offense. Alternatively, if that motion was denied, then counsel should have requested an instruction that the jury must affirmatively find that Michael's mental age was at least eighteen years old at the time of the alleged offense to impose death.

I. Counsels' Testimony

A. Slusher

Slusher was aware Michael was nineteen years old when the alleged acts happened(Ex.102p.94).

Slusher acknowledged that Dr. Peterson's prior 29.15 testimony at p.260 (Ex.5p.260) reflected that while Michael was twenty-two years old at the time that Peterson evaluated him that Michael displayed the reasoning ability of a young teenager and his cognitive ability was quite immature(Ex.102p.94-95). Slusher also acknowledged that particular portion of Peterson's prior 29.15 testimony at p.260 (Ex.5p.260) was read to the penalty retrial jury(Ex.102p.94-95)

In the prior 29.15 at p.279-80(Ex.5p.279-80), Peterson testified that Michael was under the substantial domination of Roy Vance and was naive, immature, and needed a father figure(Ex.102p.95).

Slusher testified there was no strategy reason for failing to pursue a motion to dismiss death based on Michael's mental age being less than eighteen years old(Ex.102p.95-96). Slusher testified there was no strategy reason for failing to investigate Michael's mental age being less than eighteen(Ex.102p.96).

B. McBride

McBride testified that he was not aware of any case that has held that having a mental age less than eighteen precludes imposing death(2ndPCRTr.408).

II. 29.15 Findings

The findings stated that at the time of the offense, Michael was nineteen years old(2ndPCRL.F.338). Some of the 29.15 experts opined that as a result of child abuse, Michael had the psychological age of an adolescent(2ndPCRL.F.338). This

matter was not raised on direct appeal and it is not alleged appellate counsel was ineffective for failing to raise it on direct appeal(2ndPCRL.F.338). This claim should have been raised on direct appeal and not in postconviction(2ndPCRL.F.355) (relying on *McLaughlin v. State*, 378 S.W.3d 328, 357 (Mo. banc 2012)). Even assuming the claim can be presented in postconviction, it lacks merit(2ndPCRL.F.355).

The findings stated that in *Roper v. Simmons*, 543 U.S. 551, 569 (2005), the Court opted for a biological chronological age that was not linked to mental age(2ndPCRL.F.355). A defendant can present mental age evidence as mitigation, but possessing a mental age less than eighteen at the time of the offense is not a *Simmons* bar to execution(2ndPCRL.F.355-56). Trial and appellate counsel were not ineffective(2ndPCRL.F.355-56).

III. <u>Counsel Was Ineffective</u>

In *Roper v. Simmons*, 543 U.S. 551, 569, 574 (2005), the Court recognized the Eighth Amendment prohibits executing juveniles for acts committed when they were less than eighteen. In reaching that result, the Court identified three "general differences between juveniles under 18 and adults," which establish juveniles cannot with reliability be classified among the worst offenders. *Id.*569. First, there is a lack of maturity and an underdeveloped sense of responsibility in youth often resulting in impetuous and ill-considered actions and decisions. *Id.*569. Second, juveniles are more vulnerable or susceptible than adults to negative influences and outside pressures, including peer pressure. *Id.*569. Third, the character of a juvenile is not as well formed as an adult such that their irresponsible conduct is not as morally

reprehensible as an adult's conduct and is not evidence of irretrievably depraved character. *Id.*569-70. Because of the diminished culpability of juveniles, the penological justifications for the death penalty apply to them with lesser force than to adults. *Id.*571.

The reasoning of *Simmons* has been extended to find a mandatory life without parole sentence should not apply to a defendant who was nineteen years old at the time of the alleged homicide. *People v. House*, 2015 WL 9428803 *25-28 (Ill. App. 1st Dist. Dec. 24, 2015). The *House* Court found that designating someone as a mature adult after age eighteen was "arbitrary." *House*, 2015 WL 9428803 at *25. The age eighteen designation was "arbitrary" because research in neurobiology and developmental psychology have concluded that the brain does not finish developing until the mid-twenties and young adults are more similar to adolescents. *Id.**25.

The same rationale that warrant not imposing death on someone whose biological age is less than eighteen at the time of the offense applies with equal force to someone whose mental age at the time of the offense is less than eighteen. *See Simmons. Cf. House*. There was evidence available through Dr. Peterson that Michael had the reasoning ability of a young teenager with a cognitive ability that was significantly immature (Ex.102p.94-95;Ex.5p.260), and that Michael was under the substantial domination of Roy Vance and was naive, immature, and needed a father figure(Ex.102p.95;Ex.5p.279-80). Reasonable counsel would have moved pretrial and presented supporting evidence to prohibit death on the grounds that Michael's mental age was less than eighteen at the time of the offense and if that motion was

denied, then alternatively would have requested an instruction that the jury must affirmatively find Michael's mental age was at least eighteen years at the time of the offense to impose death. *See Strickland* and *Simmons*. Michael was prejudiced because had counsel taken these actions there is a reasonable probability that Michael would not have been death sentenced.

The findings' reliance on *McLaughlin v. State*, 378 S.W.3d 328, 357 (Mo. banc 2012), that this claim should have been raised on direct appeal is misplaced(2ndPCRL.F.355). In *McLaughlin*, this Court rejected **a generalized challenge** that Missouri's death penalty scheme is arbitrary and capricious as a claim that should have been raised on direct, not on 29.15. *Id.*357. The *McLaughlin* claim did not involve ineffective assistance. *Id.*357. The claims pled here were that **counsel was ineffective** in failing to take specific actions (moving pretrial with supporting evidence or alternatively requesting an instruction) (2ndPCRL.F.76) to support a constitutional challenge based on *Simmons*.

In *Deck v. State*, 68 S.W.3d 418, 425 (Mo. banc 2002), respondent argued that this Court having found no plain error in the inadvertent omission of required paragraphs from the mitigating circumstances instruction on direct appeal precluded the subsequent 29.15 claim that counsel was ineffective for submitting a defective instruction. As discussed in Point V, and incorporated here, under *Deck* a finding of no plain error as to an issue decided on direct appeal does not foreclose finding counsel was ineffective. This Court rejected respondent's argument in *Deck* because

of the different standards of review applicable to plain error claims versus ineffectiveness. *Id.*425-29.

Deck's recognition that different standards of review apply to direct appeal claims versus postconviction ineffective assistance of counsel claims establishes a dichotomy between rules that govern direct appeal claims versus postconviction ineffective assistance of counsel claims. Because the present claim is ineffective assistance, it is not foreclosed under *McLaughlin* and under *Simmons* Michael's psychological age below 18 precluded a death sentence.

This Court should order a new penalty phase. In the alternative, this Court should reverse Michael's death sentence and impose life without probation or parole.

XII.

INSTRUCTIONAL ERROR INEFFECTIVENESS

The motion court clearly erred denying the claim counsel was ineffective for failing to offer alternative penalty instructions or modified instructions to the MAI submitted instructions, because Michael was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel, based on 2001 ABA identified capital instruction deficiencies, would have offered such alternatives and modifications, and Michael was prejudiced as there is a reasonable probability that had such alternatives/modifications been submitted Michael would not have been death sentenced.

Counsel did not offer alternative or modified penalty instructions based on 2001 ABA identified problems with capital instructions. If counsel had offered instructions taking into account the 2001 ABA identified deficiencies, then there is a reasonable probability Michael would not have been death sentenced.

I. 29.15 Claim Pleadings

The amended motion alleged that the ABA created the Death Penalty Moratorium Implementation Project in 2001, and that Project identified problem areas in capital sentencing instructions(2ndPCRL.F.76-84). The pleadings alleged counsel was ineffective for failing to offer alternative instructions or modified instructions to those submitted (Ex.4p.177-200), taking into account the ABA identified deficiencies, on the following: (1) that the jury was not required to find mitigating factors beyond

a reasonable doubt; (2) that aggravating and mitigating circumstances were to be weighed so that there was not a mere counting of number of aggravators versus number of mitigators; (3) defining what constitutes non-statutory mitigating circumstances, how to find them, and how they are to be considered in deliberating, which as to Michael involved lack of parental guidance, victimization of Michael from bullying, and abandonment; (4) that a sentence of life without parole really means a defendant will die in a prison and not be paroled; (5) when the jury posed questions to the judge in Michael's case about issues that arose in deliberations (requesting transcripts from the original sentencing proceedings, the verdicts in the prior proceedings, and ability to change the foreperson) the jury should have been given specific responsive instructions and not merely told it was to be guided by the evidence and the instructions; and (6) an instruction that explained a mental disease or disorder, like Michael's major depression, is a mitigating circumstance and is not to be treated as a sign Michael would be dangerous in the future(2ndPCRL.F.76-84).

II. Counsels' Testimony

Slusher and McBride testified they did not object to defects in the penalty instructions because the given instructions were consistent with the law at the time and the MAI pattern instructions(Ex.102p.96-103;2ndPCRTr.391-96).

III. Findings

The findings stated that on direct appeal this Court rejected two instructional error claims(2ndPCRL.F.339). The allegations are outside the scope of post-conviction(2ndPCRL.F.356). ABA recommendations are non-binding guides to what

is considered competent representation and are not federally constitutionally mandated(2ndPCRL.F.356). The trial court followed approved mandatory MAI instructions, and therefore, counsel was not ineffective(2ndPCRL.F.356-57).

IV. Counsel Was Ineffective

Under the Eighth Amendment, a defendant is entitled to a jury capable of a reasoned moral judgment about whether death ought to be imposed. *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter and Stevens, JJ. concurring). The Eighth Amendment imposes a heightened standard for reliability in the determination death is the appropriate punishment. *Id.*172. The need for heightened reliability mandates recognition of a capital defendant's right to require instructions on the meaning of terms used. *Id.*172. Whenever there is a reasonable likelihood a juror will misunderstand a sentencing term a defendant may demand instruction on its meaning. *Id.*172-73. When such a request is denied, a death sentence should be vacated as arbitrarily, discriminatorily, wantonly, and freakishly imposed. *Id.*172-73.

Problems with juror understanding of capital punishment instructions, as set forth in the 29.15 pleadings (2ndPCRL.F.76-84), were identified in The ABA June 2001, Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States Report at 29-36 (available at: americanbar.org/content/dam/aba/migrated/irr/finaljune28.authcheckdam.pdf).

The ABA March/April 2012 Missouri Death Penalty Assessment Report includes recommendations that Missouri's pattern instructions should be amended to address all the issues which the 29.15 pleadings (2ndPCRL.F.76-84) identified as

problematic. *See* ABA March/April 2012 Missouri Death Penalty Assessment Report at ix, xiii, xxx-xxxii, 291-305 (available at americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.authcheckdam.pdf). *See, also*, Ex.81 Missouri Report February, 2012 at ix, xiii, xxx-xxxii.

Reasonable counsel, in light of the ABA recommendations in 2001, would have offered alternative penalty instructions or modified instructions to the MAI submitted instructions as to all the grounds alleged in the 29.15 amended motion. *See Simmons* and *Strickland.* That reasonable counsel would have taken such actions is borne out by the Missouri specific February, 2012 (Ex.81) and March/April 2012 ABA Missouri Death Penalty Assessment Report. *See Simmons* and *Strickland*. Michael was prejudiced because there is a reasonable probability that had the jury been instructed, as urged in the 29.15 pleadings, that he would not have been death sentenced. *See, Strickland*, and *Deck*.

A new penalty phase at which the jury is properly instructed is required.

XIII.

APPELLATE COUNSEL INEFFECTIVENESS – REJECTED AGGRAVATOR

The motion court clearly erred denying the claim appellate counsel was ineffective for failing to raise it was error for the trial court to have submitted, as to the Jason Acton count, the aggravating circumstance whether the murder of Jason Acton occurred while Michael was engaged in the commission of another unlawful homicide of Leon Egley, because Michael was denied effective assistance of appellate counsel, due process, freedom from double jeopardy, and freedom from cruel and unusual punishment, U.S. Const. Amends. V, VI, VIII, and XIV, in that reasonable appellate counsel would have raised this claim because the jury in the original penalty phase rejected this aggravator such that respondent was collaterally estopped from resubmitting this aggravator to the retrial jury. Michael was prejudiced because had appellate counsel raised this claim there is a reasonable probability his death sentence, as to the Jason Acton count, would have been reversed.

Direct appeal counsel was ineffective for failing to raise the claim of error for the trial court's submitting, as to the Jason Acton count, the aggravating circumstance whether the murder of Jason Acton occurred while Michael was engaged in the commission of another unlawful homicide of Leon Egley. Appellate counsel should have raised the claim that respondent was collaterally estopped from submitting this aggravator because the jury in the original penalty phase did not find it.

I. Appellate Counsel's Testimony

At the original trial, respondent submitted as aggravators for the Jason Acton count: (1) whether the murder of Jason Acton was committed while the defendant was engaged in the commission of another unlawful homicide of Leon Egley; and (2) whether the murder of Jason Acton was committed against a peace officer engaged in his official duties(2ndPCRTr.205-06;Ex.3p.32). The jury in the original trial did not find the first aggravator(2ndPCRTr.205-07;Ex.3p.40).

Appellate counsel, Jeannie Willibey, testified that trial counsel had preserved the objection that respondent should not have been allowed to submit at the penalty retrial the aggravator whether the murder of Jason Acton was committed while Michael was engaged in the commission of the homicide of Leon Egley because the jury in the original trial did not find this aggravator(2ndPCRTr.205-08). Willibey testified that she did not have a strategy reason for omitting this claim from her brief(2ndPCRTr.208). Willibey researched this issue and found the caselaw was unfavorable, which included *State v. Storey*, 40 S.W.3d 898, 914-15 (Mo. banc 2001)(2ndPCRTr.209). Willibey made a notation to raise the issue, if she could stay within the brief's word limit(2ndPCRTr.209-10).

Appellant's initial original brief was filed August 12, 2011(Ex.2p.131). The brief contained 30,377 words for which the permissible word limit was 31,000 words(Ex.2p.132).

II. 29.15 Findings

The findings stated that at the original penalty phase, as to the count involving Jason Acton, the jury's verdict only listed as an aggravator that Acton was a peace officer killed in the line of duty(2ndPCRL.F.333). The original penalty phase jury did not list as an aggravator that Jason Acton's death occurred during the course of another homicide(2ndPCRL.F.333). The verdict form did not require the jury to make a finding as to each submitted statutory aggravator, but instead permitted the jury to consider the aggravation evidence upon finding one statutory aggravator without deciding on the existence of the remaining statutory aggravators(2ndPCRL.F.333).

The findings stated that at the penalty retrial, respondent requested, and the trial court submitted, an aggravator instruction which listed Jason Acton was a peace officer killed in the line of duty, Acton was killed during the course of another homicide, and Acton's death was wantonly vile and inhumane(2ndPCRL.F.333).

The findings stated that this claim asserts that appellate counsel was ineffective for failing to assert a double jeopardy based claim(2ndPCRL.F.348). A jury has not necessarily unanimously acquitted a defendant of aggravators not found when it finds less than all the aggravators submitted(2ndPCRL.F.349).

The findings stated that at the time of direct appeal, the controlling decisions recognized that the failure to find an aggravator in a prior penalty phase did not bar the resubmission of that aggravator, and therefore, appellate counsel cannot be ineffective for failing to raise this matter(2ndPCRL.F.349).

III. <u>Counsel Was Ineffective</u>

A defendant is entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). To be entitled to relief on a claim appellate counsel was ineffective, a movant must establish that competent and effective appellate counsel would have raised the error and that there is a reasonable probability that if the claim had been raised, the appeal outcome would have been different. *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005).

In *State v. Dowell*, 311 S.W.3d 832, 836 (Mo.App., E.D. March 23, 2010), the state was precluded from prosecuting the defendant for aggravated forcible rape after the defendant was found not guilty of first degree murder and the lesser degrees of homicide submitted as to the same victim where the state had sought the death penalty. The Notice of Intent to Seek Death alleged that the homicide was committed during the course of rape. *Id.*839. The state's theory throughout the murder trial was that the defendant killed the victim because he raped her. *Id.*839. Respondent argued that collateral estoppel did not apply because "the jury did not necessarily find that [Defendant] did not commit the violence against Victim, the jury did not necessarily decide an ultimate fact in [Defendant's] favor that the State would have to prove in the aggravated forcible rape case." *Id.*841. The *Dowell* Court rejected this argument, finding it was a "hypertechnical argument" that was contrary to *Ashe v. Swenson*, 397 U.S. 436 (1970). *See Dowell*, 311 S.W.3d at 841. In rejecting collateral estoppel challenges, cases like *Storey*, adopted respondent's same argument which the *Dowell* Court rejected based on *Ashe*. *See Storey*, 40 S.W.3d at 914-15.

Reasonable appellate counsel would have briefed the collateral estoppel claim using caselaw like *Dowell* and *Ashe* as authority for why cases like *Storey* were wrongly decided. *See Evitts*. Dowell was decided March 23, 2010 almost a year and a half before the appellant's brief was filed on August 12, 2011. *See, State v. Dowell*, 311 S.W.3d 832, 836 (Mo.App., E.D. March 23, 2010) and (Ex.2p.131). Michael was prejudiced because had the claim been briefed there is a reasonable probability that his death sentence as to the count involving the death of Jason Acton would have been reversed. *See Williams.*

This Court should reverse Michael's death sentence as to the Jason Acton count and order a new penalty phase.

CONCLUSION

For the reasons discussed in Points I through XII, this Court should order a new penalty phase. Alternatively, for the reasons set forth in Point XI, this Court should impose life without probation or parole. Lastly, at minimum for the reasons set forth in point XIII, this Court should order a new penalty phase on the Jason Acton count.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 29,568 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in April, 2016. According to that program the brief is virus-free.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 6th day of April, 2016, on Assistant Attorney General Shaun Mackelprang at Shaun.Mackelprang@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
William J. Swift