IN THE
MISSOURI SUPREME COURT

MICHAEL S. WORTHINGTON,	)	
Appellant,	)	
vs.	)	No. SC 85783
STATE OF MISSOURI,	)	
Respondent.	)	

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

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Because death was imposed, this Court has exclusive jurisdiction of this Rule 24.035 appeal. Art. V, Sec. 3, Mo. Const.

STATEMENT OF FACTS

In August, 1996, Michael's then counsel Eisenstein's motion for a court appointed psychiatric examination under §552.020 was granted and Dr. Givon performed it(T.L.F.41-42,50-53,68). In August, 1997, new counsel, Rosenblum and Green, entered(T.L.F.80,115-16).

On January 13, 1998, Rosenblum and Green filed a notice Michael wanted to plead guilty(T.L.F.150-51). Two days later Judge Cundiff recused himself on his own motion(T.L.F.8).

Rosenblum recalled when Cundiff was on the case he had made statements he was receptive to the possibility of life(1stSupp.R.L.F.639-40). Cundiff made similar statements to Green, if Michael accepted responsibilty(1stSupp.R.L.F.506). Based on Cundiff's comments, Green had decided to pursue a plea(1stSupp.R.L.F.506-07).

After a decision was made to plead in front of Cundiff, he received a letter sent on behalf of the Angelbeck's from elected Prosecutor Braun or a letter personally from the Angelbecks, the victim, Ms. Griffin's family(1stSupp.R.L.F.507). A meeting that included Green, Cundiff, Braun, and the Angelbecks followed(1stSupp.R.L.F.507). Braun and the Angelbecks objected to Cundiff continuing on the case because they believed he had already decided punishment(1stSupp.R.L.F.507). Even though Cundiff assured them that he had not prejudged punishment, the meeting was "pretty intense"(1stSupp.R.L.F.507-

08). In response to their attacks on his fairness, Judge Cundiff recused himself(1stSupp.R.L.F.507-08).

The case was reassigned to Judge Nichols(T.L.F.152). She was appointed in Fall, 1997 to complete another judge's term(24.035Ex.13 at 3402,3405). Nichols was running for her own term on November 3, 1998 against Associate Circuit Judge Nancy Schneider(24.035Ex.13 at 3402,3405).

On August 2, 1998, the Post Dispatch profiled St. Charles County elected officials and their upcoming November elections(24.035Ex.13 at 3414). Braun's "tough on crime" "[p]riorities" included imposing death(24.035Ex.13 at 3419).

On August 28, 1998, Michael pled open to first degree murder, first degree burglary, and forcible rape(T.L.F.349-51;Pl.Tr.1). The day after Michael pled, the Post published an article in which Ms. Griffin's mother, Carol Angelbeck, stated she wanted death(24.035Ex.13 at 3402). Ms. Griffin's mother made repeated calls for death in the Post on September 14th, October 5th, 19th, and 30th(24.035Ex.13 at 3370-71,3376,3384,3395).

At the plea, Michael recounted his actions of drinking alcohol, doing crack, taking his prescription medication, Prozac, and passing out on September 29, 1995(Pl.Tr.22-23). Darick Widger and Anthony Hansen came by and suggested doing a burglary in an apartment nearby Widger's apartment that had an open window(Pl.Tr.23-24). Michael joined them because he needed drug money(Pl.Tr.24). The three took a razor blade to cut through the screen(Pl.Tr.24). They assumed no one was home because they did not notice any lights on

(Pl.Tr.24). Michael showed Hansen how to cut the screen and Hansen climbed through the window(Pl.Tr.24). Hansen let Widger and Michael inside(Pl.Tr.24).

Ms. Griffin was standing in a hallway near the bedrooms and bathroom(Pl.Tr.24-25). Michael did not enter intending to hurt her(Pl.Tr.26). Michael tried to get Ms. Griffin to stop screaming and told her all he wanted was money(Pl.Tr.25). Hansen was tying Ms. Griffin's hand while Widger was tying her foot, when she lunged at Michael(Pl.Tr.25-26). Michael recounted choking and sexually assaulting Ms. Griffin(Pl.Tr.26-29). Michael went back to his apartment where Widger and Hansen were(Pl.Tr.27).

When the plea proceedings were ready to adjourn, respondent requested Ms. Griffin's mother be allowed to give a statement(Pl.Tr.30). She told the court the State would show the severity of what Michael had done to her daughter and present his violent past history, including his St. Charles Jail actions(Pl.Tr.31). She felt "the citizens of St. Charles County need to set an example of this crime. The message needs to be sent to the criminal element that the citizens need to be safe in their homes, not subject to an invasion by a stranger"(Pl.Tr.31).

The penalty hearing ran from September 14, 1998 through September 17th. A September 14, 1998 Post article noted Michael's plea "has left his life in the hands of St. Charles County Circuit Judge Grace Nichols"(24.035Ex.13 at 3395).

Respondent filed an information and endorsed Charlotte Kirn of Troy, Missouri on January 11, 1996, without a specific address(T.L.F.30,35). In August, 1996, Braun charged Charlotte Kirn with felony passing a bad check over

$150(24.035Ex.50 at 2,10). Kirn also used the last names Peroti and Hansen(24.035Ex.50 at 35-36). In November, 1997, she pled guilty to misdemeanor passing a bad check under $150 with a two year suspended imposition of sentence, unsupervised probation, and monthly restitution ordered(24.035Ex.50 at 2,7,39). Two other cases were nolled(24.035Ex.50 at 39).

Peroti lived in the same apartment complex as Michael and Ms. Griffin(Pen.Hrg.Tr.96-98). According to Peroti, about ten days before Ms. Griffin was killed, Michael entered Peroti's apartment late at night by removing a screen from her window and attempted to sexually assault her, but was prevented because her boyfriend chased him out(Pen.Hrg.Tr.99-102). Peroti represented Michael took her car, but returned it, and stole some jewelry(Pen.Hrg.Tr.102-03). Peroti represented the police told her not to pursue charges against Michael because Michael was a target of her undercover narcotics agent work(Pen.Hrg.Tr.103-05,113).

After Peroti testified, Nichols informed both sides she had realized the juvenile court had appointed her as a guardian ad litem for Peroti's son, Anthony Hansen(Pen.Hrg.Tr.120). Respondent asked Green whether he had any objection to Nichols continuing to serve and he did not(Pen.Hrg.Tr.120).

Exhibits 29 A-D and 82A-E described fifty-five "incidents" involving Michael while in the St. Charles County Jail(Pen.Hrg.Tr.151,164) Respondent called St. Charles Jail Officers McKee and Smith to present in detail some

incidents(Pen.Hrg.Tr.136-219). McKee reported Michael was a concern to officers based on his reputation as combative and violent(Pen.Hrg.Tr.188).

Michael's Peoria arrest records were admitted by agreement(Pen.Hrg.Tr.221-22;Exs.35,83A&B). Peoria Officer McKean testified about specific incidents contained in those records and indicated Michael was listed in thirty-seven police reports(Pen.Hrg.Tr.223-33,240-41).

Respondent called Peoria Probation Officer Esposito Frey to testify about a PSI she prepared on Michael because of his September, 1995 burglary and theft guilty plea(Pen.Hrg.Tr.248-54). Michael did not appear for sentencing because he was in Missouri custody on the charges here(Pen.Hrg.Tr.253).

Rosenblum moved to exclude Givon's findings on the grounds the examination he performed was irrelevant as a Chapter 552 competency examination, but Green had stipulated to admitting those findings(Pen.Hrg.Tr.295). Givon found Michael competent both to proceed and at the time of the offense(Pen.Hrg.Tr.300). Givon testified Michael said he had intentionally burned his friend Butch Mackey over 90% of his body when Michael threw gasoline on him(Pen.Hrg.Tr.310). Michael's twenty-two referrals for discipline, while in juvenile detention, were consistent with Givon's findings(Pen.Hrg.Tr.312). Michael was not suffering from a mental disease or defect(Pen.Hrg.Tr.313-14). Givon's diagnoses were malingering, cocaine dependence, alcohol abuse, and anti-social personality(Pen.Hrg.Tr.313-14).

Givon found Michael's case presented a severe case of psychopathology(Pen.Hrg.Tr.317-21). Givon found Michael was not unable to conform his conduct to the requirements of law because of his cocaine and alcohol use and they were not mental diseases(Pen.Hrg.Tr.329-30). The actions Michael admitted at the plea were consistent with anti-social personality and Michael was able to appreciate the criminality of his conduct(Pen.Hrg.Tr.331-35).

Much of respondent's evidence was victim impact and included witnesses reading prepared statements(Pen.Hrg.Tr.509-618). Many witnesses asked Nichols to impose death(Pen.Hrg.Tr.528,545,548,562,616-17).

The court file contained numerous letters that appeared there after the plea and urged death(24.035Ex.56). Postconviction counsel obtained those letters after a hearing because they were kept under seal(R.L.F.60-62,64;1stSupp.R.L.F.494-96). Green never saw the Exhibit 56 letters because, if he had, he would have objected(1stSupp.R.L.F.495,497,499,575).

Counsel called two mitigation witnesses. Michael's mother's sister, Carol Tegard, recounted her sister, Patricia Washburn, and his father, Richard Worthington, were heavy drug and alcohol users(Pen.Hrg.Tr.675-76,680-81,694). She testified about Michael's mother's prostituting and many suicide attempts(Pen.Hrg.Tr.680-82). When Michael was a teenager, his father taught him how to commit burglaries and he was set-up on burglaries his father did(Pen.Hrg.Tr.694-96).

Dr. Evans is a Ph.D. pharmacist who opined Michael was intoxicated at the time of the offense and was incapable of making a decision about his behavior(Pen.Hrg.Tr.738-76). During Braun's cross-examination, Rosenblum complained Braun was engaging in behavior disrespectful to the court because he was "mugging to the victim's family."(Pen.Hrg.Tr.804-05).

Three St. Charles Jail inmates and a records custodian were called to testify and to impeach McKee about an inmate complaint form filed for an incident involving Michael and McKee that had occurred three weeks before the penalty hearing(Pen.Hrg.Tr.637-71). The inmates testified that during the incident McKee made a statement he intended to help respondent in court get death(Pen.Hrg.Tr.638-44,649-51,655-58,665-71). One inmate heard the statement, but was unsure McKee said it(PenHrg.Tr.671). Through the records custodian there was also admitted a tally sheet of all 1996-97 incidents for the St. Charles Jail(Pen Hrg.Tr.645-47).

After the penalty hearing, on October 13, 1998, Green moved to disqualify Braun(T.L.F.396-402). The motion urged Braun should be disqualified because his actions "demonstrated such a personal interest so as to indicate that he is not only unfair to Defendant, but also he has impugned the integrity of the Court and has served to undermine the public confidence in these proceedings"(T.L.F. 396). Even though the case had been pending for three years, Braun had not actively participated until that election year and only after Michael decided to

plead(T.L.F.399). Braun had stated to Green and other attorneys that he was being hurt by the lack of publicity with a plea versus going to trial(T.L.F.399).

The motion to disqualify Braun relied on Braun's and one of his assistant prosecutors, Groenweghe's, statements made in a Post article(T.L.F.400). The October 5, 1998 Post published: "Defendants May Be Pleading Guilty As Ploy To Avoid Getting Death Sentence From Juries"(24.035Ex.13 at 3383-84). That article highlighted a second death eligible St. Charles County defendant had pled guilty the previous week(24.035Ex.13 at 3383-84). Groenweghe told the Post he believed Michael and the other defendant think they have a better chance of avoiding death in front of a judge(24.035Ex.13 at 3383). Ms. Griffin's mother told the Post she wanted a jury to decide Michael's punishment and that she thought Michael pled guilty to avoid death(24.035Ex.13 at 3384). Braun told the Post Kansas City guilty pleas stopped when a judge imposed death(24.035Ex.13 at 3384). Braun said in deciding punishment in a capital case where a defendant pleads guilty, Missouri judges "must consider their constituents"(24.035Ex.13 at 3384). Braun followed with: '"You shouldn't be putting executions up for election, but the judiciary should share the values of the community and reflect them…and the community is overwhelmingly in favor of the death penalty"'(24.035Ex.13 at 3384). Nichols read the Post article and Braun's statements offended her, but denied the motion to disqualify Braun(D.Q.BraunTr.20-21).

Sentencing was held November 4, 1998. Ms. Griffin's mother complained about the court's time having been spent listening to "the defense's excuses"(Sent.Tr.16). She said Michael was a dangerous person who she did not believe could exist within prison(Sent.Tr.18-19). She urged Nichols to think of Michael like the situation where "even the most humane concerned and adamant animal rights person would not need a thunderbolt to know a rabid or a vicious dog should be humanly slain for the good of the whole, and further to ease his own suffering"(Sent.Tr.21L.16-20). She called on Nichols "to give my daughter, Mindy, the justice she so deserves by the decision that Michael Worthington gave her to die by"(Sent.Tr.25L.12-14).

Nichols imposed death (Sent.Tr.28-29;24.035Ex.15 at 3892-93) and this Court affirmed. *State v. Worthington*,8S.W.3d83(Mo.banc1999).

Schneider defeated Nichols in the November, 1998 election and Schneider was the 24.035 judge(24.035Ex.13 at 3404).

Green was responsible for and knew having a complete social history was important to do before deciding on how to pursue guilt and penalty issues(1stSupp.R.L.F.432-33;661-62). Green did not hire a paralegal or mitigation specialist and did not go to Peoria to investigate Michael's background because he did not control expenditures and because of the financial practicalities of running his private practice(1stSupp.R.L.F.433-37,457-459,661-62). The family investigation was limited to speaking to Michael's mother on two occasions for ten to fifteen minutes(1stSupp.R.L.F.455).

From reviewing detailed social history documents 24.035 counsel supplied and personally examining Michael, Drs. Pincus, Cowan, and Smith found Michael has frontal lobe impairment, Tourette's Syndrome, Attention Deficit Hyperactivity Disorder (ADHD), bipolar disorder, and Post Traumatic Stress Disorder(PTSD)(R.Tr.93,98,100,110-11,114-15,117-18,144-45,177-78,240,244-45,268-70,552;24.035Ex.18 at 4636). Behaviors Givon relied on to find anti-social were in fact symptoms of frontal lobe damage, bipolar disorder, ADHD, and Tourette's (R.Tr.101-03,131-35,272-74,310-13,645). Michael has a clear blinking motor tic characteristic of Tourette's syndrome that was observed (R.Tr.98,101,271). Givon's own report established vocal ticks required for a Tourette's diagnosis(R.Tr.173). Tourette's is hereditary(R.Tr.107-08).

On the night of the offense, Michael was not able to have coolly reflected because of his mental illnesses (R.Tr.121,145,194,553-54). These doctors would have supported a diminished capacity defense which Green believes a St. Charles jury could have been persuaded to find and he would have advised Michael to go to trial(R.Tr.503-04,550-51,596). Green also believed a diminished capacity defense could have been successful because a jury would have heard parts of Givon's report were untrue(1stSupp.R.L.F.552-53).

While Michael was held in the St. Charles Jail, he was not medicated for his mental illnesses and the incidents occurring during that time were the result of him not receiving proper medication(R.Tr.122-25,127-28). Michael's St. Charles County Jail records indicate his care providers did not understand Michael's full

array of disorders and the punishments he received only caused his behavior to worsen(R.Tr.555). It simply was incorrect for the State to have portrayed Michael as having been involved in fifty-five "incidents" since some of those "incidents" related to him requiring medical care(R.Tr.125).

These doctors could have rebutted Givon's malingering finding because of the uniqueness and consistency of Michael's particular symptoms and their examination findings were inconsistent with malingering (R.Tr.128-31,196-97,278-79,284,533-34,640-41,644).

In July 1995, shortly before the offense, Dr. Ryall prescribed antidepressants for Michael which likely caused him to become manic(R.Tr.119-20). At the time of the offense, Michael was suffering from an extreme degree of mental, emotional disturbance because he was manic(R.Tr.121-22,146).

Michael was cooperative in furnishing Green relevant information(1stSupp.R.L.F.503). Nichols did not hear Michael endured abuse that included having lit matches thrown on his unclothed body, fondling his testicles and striking them with objects, sticking objects in his rectum, sodomizing him, putting him in a tub of water so that he was barely able to keep his head above water to breathe, placing him in very hot or very cold water, locking him in a closet, and putting him naked in a crawl space with mice, rats, and roaches(R.Tr.543-44).

Michael's mother would have testified she committed Peoria crimes she allowed Michael to be blamed for(1stSupp.R.L.F.320-22). She had sexual

relationships with many police officers and she often called the police to say Michael committed a crime to get their attention or a date(24.035Ex.9 at 2108-09).

Green testified he did not know Charlotte Kirn was Charlotte Peroti when she was called(1stSupp.R.L.F.484). Before Peroti testified, the State never supplied counsel the name Charlotte Peroti, her last known address, and the substance of her expected testimony(1stSupp.R.L.F.483). When Michael heard Peroti testify, he told Green she was fabricating all her testimony, she was mentally unstable, and she was Anthony Hansen's mother(1stSupp.R.L.F.485). If Green had known the contents of Peroti's casefile from her bad check case (24.035Ex.50), then he would have known who she was when she was called to testify(1stSupp.R.L.F.492). Green would have used her casefile to attack her credibility based on the deal she had struck on her bad check case and her use of multiple names(1stSupp.R.L.F.492). Peroti's sexual assault accusation was particularly significant because Green would not have advised Michael to plead guilty if he had committed a prior violent sexual offense(1stSupp.R.L.F.566-67).

Green remembered he had a conversation with Michael during which Michael called to his attention inaccuracies in Givon's report(1stSupp.R.L.F.452-53). Michael told Green he did not tell Givon that he was involved in Butch Mackey being intentionally burnt with gasoline(1stSupp.R.L.F.453-54). The only investigation Green did about Givon's report's inaccuracies was talk to Michael's mother(1stSupp.R.L.F.454). Elex and Beverly Mackey testified their son Richy,

not Butch, was severely burned in a gasoline accident that did not involve Michael(R.Tr.30-31,34-35,55-59).

The motion court denied Michael's 24.035 claims after a hearing. This appeal followed.

POINTS RELIED ON

I. FAILURE TO PRESENT EVIDENCE MICHAEL DID NOT SET RICHY MACKEY ON FIRE

The motion court clearly erred rejecting the claim counsel was ineffective for failing to call Elex and Beverly Mackey to testify that as a youth Michael did not intentionally set on fire his friend Richy Mackey by throwing gasoline on him and had nothing to do with Richy accidentally being set on fire by others such that Richy nearly died when Givon had opined in aggravation Michael had anti-social personality disorder as evidenced by such intentional act committed against not Richy, but his brother Butch, because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called these witnesses to testify Michael did not commit such a heinous act and Michael was prejudiced because the purported incident was a highly aggravated untrue act included in Givon's aggravating anti-social diagnosis.

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

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

State v. McMillin,783S.W.2d82(Mo.banc1990);

State v. Bewley,68S.W.3d613(Mo.App.,S.D.2002);

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

II. PEROTI NONDISCLOSURES AND COUNSEL'S INEFFECTIVENESS

The motion court clearly erred denying the claim respondent violated its disclosure and endorsement obligations as to Charlotte Peroti and counsel was ineffective for failing to insure those obligations were enforced by not objecting and requesting a continuance to investigate Peroti's story because that ruling denied Michael his rights to due process, to be free from cruel and unusual punishment, effective assistance of counsel, and to confront the witnesses against him, U.S. Const. Amends. VI, VIII, and XIV, and under Rule 25.03 in that respondent failed to disclose Peroti would be called to testify that ten days before in the same apartment complex where Ms. Griffin lived, Michael allegedly attempted to sexually assault Peroti after entering Peroti's apartment the same way he entered Ms. Griffin's apartment and that Braun had earlier prosecuted Peroti for passing a bad check.

Further, counsel was ineffective for failing to object to these non-disclosures and to request a continuance to investigate Peroti as reasonably competent counsel would have so acted and Michael was prejudiced because Peroti's accusations and their credibility were critical to the punishment decision because respondent relied on Peroti's claim of a similar attempted sexual assault as grounds for imposing death and Judge Nichols relied on Michael's prior criminal history as a non-statutory aggravator.

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

State v. Thompson,985S.W.2d779(Mo.banc1999);

State v. Marler,453S.W.2d953(Mo.1970);

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

Rule 25.03.

III. ACQUIESCENCE TO JUDGE NICHOLS SERVING DESPITE HAVING REPRESENTED PEROTI'S CO-PARTICIPANT SON, HANSEN

The motion court clearly erred denying the claim counsel was ineffective for agreeing to Nichols serving after she disclosed she had served as guardian ad litem for Peroti's son, Anthony Hansen, an uncharged co-participant, because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel failed to apprise Michael of Nichols' prior relationship and failed to consult with Michael before acquiescing to Nichols continuing to serve and reasonably competent counsel would have informed Michael of that relationship, consulted with him, and not agreed to her continuing to serve and Michael was prejudiced because Michael would not have agreed to Nichols serving, would have withdrawn his plea, and there is a reasonable probability he would not have been sentenced to death.

Alternatively, the motion court clearly erred denying the claim Nichols should have recused herself when she became aware of her prior Hansen representation, because Michael was denied his rights to due process, a fair and impartial judge, and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, because Nichols' prior Hansen representation created an appearance of impropriety.

Geders v. United States,425U.S.80(1976);

In re Murchison,349U.S.133(1955);

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

United States v. Kelly,888F.2d732(11thCir.1989);

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

IV. JUDGE NICHOLS COULD NOT FAIRLY SERVE

The motion court clearly erred denying the claim Michael was denied a fair judge because Michael was denied his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that Braun's campaign press statements calling for death for Michael based on Braun's view that judges should act in conformance with an electorate that overwhelmingly favors death when Judge Nichols was then involved in a contested election against Judge Schneider, Nichols' own statements Braun had created a public appearance Michael's sentence would be determined by politics, Schneider's campaign press statements tracking Braun's, Ms. Griffin's mother's repeated press calls for death, and the extensive impose - death secret letter writing lobbying directed at Nichols kept under seal not disclosed to counsel in violation of *Gardner v. Florida* all created an appearance of impropriety and doubt about Nichols' impartiality.

Alternatively, counsel was ineffective for failing to move to disqualify Nichols because Michael was denied all the previously noted rights and effective assistance of counsel, U.S. Const. Amends. VI, and XIV, in that reasonably competent counsel would have moved to disqualify Nichols and Michael was prejudiced because he was sentenced by a judge for whom there was an appearance of impropriety and a reasonable probability he was death sentenced because she could not fairly serve.

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

Aetna Life Co. v. Lavoie,475U.S.813(1986);

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

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

V. FAILURE TO INVESTIGATE SOCIAL HISTORY

The motion court clearly erred rejecting counsel was ineffective for failing to properly investigate Michael's social history and to furnish it to experts, such as Drs. Pincus, Cowan, and Smith, who would have concluded he suffers from Tourette's Syndrome, Attention Deficit Hyperactivity Disorder, Obsessive Compulsive Disorder, Bipolar Disorder, Frontal Lobe Cerebral Brain Dysfunction, and Post-Traumatic Stress Disorder because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have taken those actions and Michael was prejudiced because these findings would have provided a guilt defense of diminished capacity such that he would not have pled guilty, mitigated punishment, and rebutted aggravation.

Williams v. Taylor,529U.S.362,369(2000);

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

Von Dohlen v. State,2004 W.L. 1965873(S.C. Aug. 30, 2004);

Smith v. Mullin, 2004W.L.1690269(10thCir. July 29, 2004);

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

DSM IV-TR;

ABA Guidelines For the Appointment And Performance of Defense Counsel In Death Penalty Cases, 31 Hofstra L.Rev. 913(2003);

Garvey, *Aggravation And Mitigation In Capital Cases: What Do Jurors Think?*, 98 Columbia L.Rev. 1538(1998).

VI. FAILURE TO SUPPLY DR. EVANS SOCIAL HISTORY

The motion court clearly erred denying the claim and accompanying offer of proof counsel was ineffective for failing to adequately investigate Michael's personal social history and to furnish it to Dr. Evans who could have utilized it to testify Michael was not being properly medicated for his mental disabilities in the St. Charles County Jail which would have explained the cause of his jail incidents because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have taken those actions and Michael was prejudiced because that evidence would have rebutted respondent's jail incidents aggravating evidence and mitigated punishment.

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

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

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

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

§632.005(12).

VII. FAILURE TO OBJECT TO LACK OF NOTICE OF NON-STATUTORY AGGRAVATORS AND HEARSAY PRESENTATION

The motion court clearly erred denying the claim counsel was ineffective for failing to object to lack of notice of non-statutory aggravators and respondent's evidence on them constituted hearsay as testified to by respondent's witnesses McKee, Smith, McKean, Frey, and Givon because Michael was denied his rights to due process, to confront witnesses, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel who had not received proper notice of the non-statutory aggravators these witnesses were called to testify about would have objected to the court considering them on lack of notice and hearsay grounds and Michael was prejudiced because Nichols could not have considered the evidence from these witnesses and there is a reasonable probability that without this evidence Michael would not have been sentenced to death.

State v. Ervin,979S.W.2d149(Mo.banc1998);

State v. Thompson,985S.W.2d779(Mo.banc1999);

Crawford v. Washington,124S.Ct.1354(2004);

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

VIII. INVESTIGATION NOT DONE - NO MONEY

The motion court clearly erred rejecting claims counsel was ineffective for failing to fully investigate and to prepare guilt defenses and penalty mitigation because of lack of money, some of which required retaining experts, and that counsel who was so confronted was ineffective for failing to request money from the court to conduct the necessary investigation and preparation because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have conducted the necessary investigation and preparation and to the extent those efforts required a substantial monetary expenditure counsel would have requested necessary money from the court and Michael was prejudiced because he would not have pled guilty and there is a reasonable probability he would not have been sentenced to death.

Ake v.Oklahoma,470U.S.68(1985);

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

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

Thomas v. Kuhlman,255F.Supp.2d99(E.D.N.Y.2003);

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

IX. JUDGE SCHNEIDER'S CAMPAIGN STATEMENTS CREATED THE APPEARANCE SHE COULD NOT FAIRLY SERVE

The motion court, Judge Schneider, erred in denying the motion to disqualify her because that ruling denied Michael his rights to be free from cruel and unusual punishment, due process, and a full and fair hearing before an impartial judge, U.S. Const., Amends. VIII and XIV, in that her campaign statements that a judge's punishment decision in a bench tried capital case should reflect the values of the community considered in the context of Braun's and Ms. Griffin's family's contemporaneous press statements reflected Schneider had advocated death for Michael as part of her campaign strategy to defeat Judge Nichols and thereby created the appearance of impropriety she could not fairly consider the 24.035 claims.

In re Murchison,349U.S.133(1955);

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

Aetna Life Co. v. Lavoie,475U.S.813(1986);

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

X. MICHAEL'S PARENTS SHOULD HAVE TESTIFIED

The motion court clearly erred denying the claims counsel was ineffective for failing to call Michael's parents to rebut aggravating evidence crimes respondent attributed to Michael were in fact not committed by him and to testify about their neglect and abuse of him because Michael was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called them and Michael was prejudiced because there is a reasonable probability that he would have been sentenced to life.

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

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

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

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

XI. VICTIM IMPACT INEFFECTIVENESS

The motion court clearly erred ruling counsel was not ineffective for failing to object to respondent's victim impact evidence because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel failed to object to excessive cumulative victim impact evidence that was so inflammatory it injected passion, prejudice, and arbitrariness, compared the value of Michael's life to Ms. Griffin's life, improperly personalized asking Nichols to view what happened to Ms. Griffin like she would if the same had happened to her family, urged Nichols to disregard mitigation, and expressed a death punishment preference and reasonably competent counsel would have objected and Michael was prejudiced because sentencing was rendered fundamentally unfair and there is a reasonable probability he would have been sentenced to life.

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

Payne v. Tennessee,501U.S.808(1991);

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

XII. INABILITY TO PERFORM CONSTITUTIONAL EXECUTIONS

The motion court clearly erred denying the challenge to the constitutionality of the State's lethal injection methodology and its ability to perform constitutional executions because that ruling denied Michael his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that the State conducted the execution of Emmitt Foster in a manner that required repeated efforts to kill him and caused lingering death, mutilation, and the unnecessary and wanton infliction of pain and similar mishaps in carrying-out executions in other states have occurred such that Missouri cannot carry out constitutional executions.

Gregg v. Georgia,428U.S.153(1976);

Glass v. Louisiana,471U.S.1080(1985);

Nelson v. Campbell,124S.Ct.2117(2004);

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

42U.S.C.§1983.

ARGUMENT

I. FAILURE TO PRESENT EVIDENCE MICHAEL DID NOT SET RICHY MACKEY ON FIRE

The motion court clearly erred rejecting the claim counsel was ineffective for failing to call Elex and Beverly Mackey to testify that as a youth Michael did not intentionally set on fire his friend Richy Mackey by throwing gasoline on him and had nothing to do with Richy accidentally being set on fire by others such that Richy nearly died when Givon had opined in aggravation Michael had anti-social personality disorder as evidenced by such intentional act committed against not Richy, but his brother Butch, because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called these witnesses to testify Michael did not commit such a heinous act and Michael was prejudiced because the purported incident was a highly aggravated untrue act included in Givon's aggravating anti-social diagnosis.

The motion court rejected counsel was ineffective for failing to present evidence Michael never intentionally set his friend Richy on fire by throwing gasoline on him and had nothing to do with other youths accidentally setting Richy on fire. Counsel should have presented this evidence to rebut Givon's

aggravating testimony Michael committed such a heinous act which was included in Givon formulating his opinion Michael had anti-social personality. Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

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

A. Givon's Aggravation

Givon testified in aggravation he evaluated Michael and his diagnoses were: malingering, cocaine dependence, alcohol abuse, and anti-social personality disorder(Pen.Hrg.Tr.313-14). Michael presented severe psychopathology(Pen.Hrg.Tr.317-21). In formulating his opinions, Givon testified Michael had said he had intentionally burned his friend Butch Mackey over 90% of his body when Michael threw gasoline on him(Pen.Hrg.Tr.310). The purported incident appeared in Givon's report(24.035Ex.10 at 2586).

B. Counsels' Testimony

Rosenblum indicated Givon's anti-social finding presented an "extreme difficult[y]" for the defense because it "has become a euphemism for psychopath"(1stSupp.R.L.F.627-28).

Green remembered he had a conversation with Michael during which Michael called to his attention inaccuracies in Givon's report(1stSupp.R.L.F.452-53). Michael told Green he did not tell Givon he was involved in Butch Mackey being burnt(1stSupp.R.L.F.453-54). The only investigation Green did about Givon's report's inaccuracies was talk to Michael's mother(1stSupp.R.L.F.454). Green spoke to Michael's mother a couple of times on the telephone for ten to fifteen minutes each time(1stSupp.R.L.F.455). Green spoke to Michael's mother at court and sent her away because she had continued to want to present herself as a good mother(1stSupp.R.L.F.559-60). Green never considered talking to the people involved with the Mackey burning incident and he never went to Peoria to investigate because of what he was being paid to work on Michael's case(1stSupp.R.L.F.457-58). Michael was cooperative in furnishing Green case relevant information(1stSupp.R.L.F.503).

C. Elex and Beverly Mackey 24.035 Testimony

Elex and Beverly Mackey are married and were living in Peoria when Michael's case was tried(R.Tr.19,48,53). No one associated with Michael's defense contacted them(R.Tr.20,49). Richy Mackey and Elex Mackey III (Butch) are Elex's sons and Beverly's stepsons(R.Tr.22,48).

Both Elex and Beverly testified how Richy, not Butch, was severly burned in an accident that did not involve Michael. Richy and his brother Butch were living in Illinois, while Elex and Beverly lived in Missouri(R.Tr.23,25,51,53).

Elex and Beverly rushed to a Springfield, Illinois hospital burn center after they learned Richy was badly burned(R.Tr.22-25,52). Richy had severe burns on 95% of his body, was in great pain, and was not expected to live(R.Tr.25-26, 28-29,54,56). Richy sustained the burns when his brother Butch and a friend, Kevin, cut up a garden hose into small pieces, one of them blew gasoline through the hose while the other ignited the opposite end like a torch, and Richy, not knowing what the two were doing, walked past into a fireball(R.Tr.30-31,55). Michael had nothing to do with Richy getting so badly burned in this accident(R.Tr.34-35,56-59).

D. 24.035 Findings

Schneider, not Nichols, found the evidence Michael set Butch Mackey on fire was not presented as aggravation, but merely was information contained in Givon's report(R.L.F.1071). This incident was "a collateral matter" and Givon was "rigorously cross-examined" about how his report was prepared and its conclusions(R.L.F.1071). This matter was harmless because a judge will not be misled by irrelevant or incompetent evidence(R.L.F.1071).

E. Counsels' Failure To Establish Such Aggravating Conduct Never Happened

"One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*,80S.W.3d 817,827(Mo.banc2002). *See, also*, *Wiggins v. Smith*,123S.Ct.2527,2537(2003)(counsel has duty to investigate and

rebut aggravating evidence); *Parker v. Bowersox*,188F.3d923,929-31(8thCir.1999) (counsel was ineffective for failing to present evidence that would have rebutted aggravating circumstance that victim was a potential witness against Parker).

The only issue before Nichols was Michael's punishment. Respondent called Givon to establish facts it deemed made this crime sufficiently aggravated to warrant death. The Mackeys would have established the truth that Richy Mackey was badly burned in an accident that did not involve Michael. Setting someone else on fire is a highly aggravated act and is what Nichols heard Michael had done. *See State v. McMillin*,783S.W.2d82,88-89(Mo.banc1990)(death imposed where victim was set on fire with gasoline while alive). That Michael committed such a horrendous act was relied on by Givon in rendering his anti-social diagnosis or as Rosenblum characterized it "psychopath"(1stSupp.R.L.F.627-28).

To support death, Nichols relied on the non-statutory aggravator of Michael's criminal history(24.035Ex.15 at 3893). The act of one youth intentionally setting another on fire would clearly constitute a juvenile crime. Not surprisingly though, Michael was never charged as a juvenile for such an offense because he never committed such an act, but Nichols was left believing he had.

The motion court's harmless error ruling is based on an erroneous statement as to the law on bench tried matters. In bench tried matters, there is a presumption a judge's decision is not influenced by "inadmissible evidence." *State v. Bewley*,68S.W.3d613,619(Mo.App.,S.D.2002). This is not a case of

inadmissible evidence, but rather a case where the trial judge heard objectively false, untrue information and then relied on Michael's criminal history as a grounds for imposing death.

Reasonably competent counsel under similar circumstances would have gone to Peoria, met with the Mackeys, and called them to rebut this false evidence after counsel was told by Michael that he did not set anyone on fire. *See Strickland*, *Ervin*, *Wiggins,* and *Parker supra*. Michael was prejudiced because Nichols heard evidence Michael committed the highly aggravated act of intentionally setting someone on fire that was a factor Givon relied on in making his antisocial diagnosis and then relied on Michael's criminal history as a grounds for imposing death.

This Court should vacate Michael's sentences.

II. PEROTI NONDISCLOSURES AND COUNSEL'S INEFFECTIVENESS

The motion court clearly erred denying the claim respondent violated its disclosure and endorsement obligations as to Charlotte Peroti and counsel was ineffective for failing to insure those obligations were enforced by not objecting and requesting a continuance to investigate Peroti's story because that ruling denied Michael his rights to due process, to be free from cruel and unusual punishment, effective assistance of counsel, and to confront the witnesses against him, U.S. Const. Amends. VI, VIII, and XIV, and under Rule 25.03 in that respondent failed to disclose Peroti would be called to testify that ten days before in the same apartment complex where Ms. Griffin lived, Michael allegedly attempted to sexually assault Peroti after entering Peroti's apartment the same way he entered Ms. Griffin's apartment and that Braun had earlier prosecuted Peroti for passing a bad check.

Further, counsel was ineffective for failing to object to these non-disclosures and to request a continuance to investigate Peroti as reasonably competent counsel would have so acted and Michael was prejudiced because Peroti's accusations and their credibility were critical to the punishment decision because respondent relied on Peroti's claim of a similar attempted sexual assault as grounds for imposing death and Judge Nichols relied on Michael's prior criminal history as a non-statutory aggravator.

The motion court denied the claims respondent failed to make required disclosures as to Charlotte Peroti and counsel was ineffective for failing to enforce those disclosure requirements. Michael was denied his rights to due process, freedom from cruel and unusual punishment, to confront the witnesses against him, effective assistance of counsel, and under Rule 25.03. U.S. Const. Amends. VI, VIII, and XIV.

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

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

The prosecution must disclose favorable evidence material either to guilt or punishment. *Brady v. Maryland*,373U.S.83,87(1963). For purposes of due process, no distinction between exculpatory and impeachment evidence exists. *U.S. v. Bagley*,473U.S.667,676-78(1985). Nondisclosure of *Brady* evidence violates due process "irrespective of the good faith or bad faith of the

prosecution." *Brady*,373U.S. at 87. *See, also, U.S. v. Agurs*,427U.S.97,110(1976). Under *Brady*, the focus is whether Michael was prejudiced. *State v. Whitfield*,837S.W.2d503,508(Mo.banc1992).

The State is required to provide notice of unconvicted misconduct it intends to rely on to prove non-statutory aggravators. *State v. Debler*,856S.W.2d641,656-58; *State v. Ervin*,979S.W.2d149,158(Mo.banc1998); *State v. Thompson*,985S.W.2d779,791-92(Mo.banc1999). *Debler* "does not merely recapitulate the basic criminal discovery requirements contained in Rule 25.03." *Thompson*,985S.W.2d at 792. Rather, "[u]pon request, the state must disclose evidence of unconvicted bad acts, even if that evidence has not been reduced to a writing or other record discoverable under Rule 25.03." *Id.*792.

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

A. <u>Amended Motion Claims</u>

Respondent failed to properly endorse Peroti and failed to provide notice of the non-statutory aggravator, the alleged attempted sexual assault of Peroti(24.035Depo.Ex.42 at 331,334). Respondent failed to disclose Peroti's St. Charles County bad check prior conviction(24.035Depo.Ex.42 at 331,334). Counsel was ineffective for failing to object to respondent having failed to properly endorse Peroti, disclose Peroti's unadjudicated bad act testimony, and

request a continuance to investigate Peroti(24.035Depo.Ex.42 at 332-33,335-36,362-63).

B. Criminal Case Facts

Respondent filed an information and endorsed Charlotte Kirn of Troy, Missouri in January, 1996 without a specific address(T.L.F.30,35). The October, 1996 amended information (T.L.F.5,54-60) contained the same endorsement. In April, 1998 (T.L.F.284), July, 1998 (T.L.F.13,290-92), and August, 1998 (T.L.F15,356-57), respondent filed witness endorsements, but Kirn's name was not included.

In February, 1996, Eisenstein filed a Rule 25.03 patterned motion for discovery which included a request for disclosure of respondent's witnesses, any statements by them and related memoranda, and their prior convictions(T.L.F.4,37-38). In February, 1998, Green/Rosenblum filed a request for disclosure of all respondent's penalty witnesses(T.L.F.219). Also in February, 1998, the defense filed a request for all conviction reports of respondent's witnesses(T.L.F.206-07). In August, 1998, the defense filed a witness endorsement for possible experts they might call which also stated the defense "reserves the right to call in its case in chief any witness that was previously endorsed by the State"(T.L.F.336-37).

Charlotte Peroti testified she lived in an apartment at the same complex as Michael and Ms. Griffin(Pen.Hrg.Tr.96-98). According to Peroti, about ten days before Ms. Griffin was killed, Michael entered her apartment late at night by

removing her window screen and attempted to sexually assault her, but was prevented because her boyfriend chased him out(Pen.Hrg.Tr.99-102). Peroti represented Michael took her car, but returned it and stole some jewelry(Pen.Hrg.Tr.102-03). Peroti represented the police told her not to pursue attempted sexual assault charges because she was an undercover narcotics agent and Michael was a target(Pen.Hrg.Tr.103-05,113).

Green's cross-examination focused on eliciting the details of Peroti's undercover drug agent efforts to have Michael arrested for drugs and not on challenging the veracity of her allegations Michael had attempted to sexually assault Peroti after entering her apartment in the same manner Ms. Griffin's apartment was entered(Pen.Hrg.Tr.103-18). Green's only questioning directed at the alleged attempted sexual assault and her failure to report it were:

> Q. Okay. So you didn't report this incident as a sexual assault. You called another officer you had been working with on some other case?
>
> A. Right.
>
> Q. Okay. And did that officer come over right away to your apartment?
>
> A. We spoke and decided what I should do and then the next day is when I realized that he had taken my car and how he got in, then I reported to Lake St. Louis Police, then I called the MEG unit in St. Louis County, who I was working with and I let them know what

had happened. They asked me to hold off on pressing charges against Michael Worthington.

(Pen.Hrg.Tr.104L.5-16)

……

Q. Now, after this incident in September, did you still have the officer telling you, well, let's not file any charges right now, instead of getting him for an attempted rape or sexual assault charge, we would rather try to get him on a drug charge. Is that the way the plan went down?

A. They wanted to try to get him for the drugs then go for the sexual assault and stealing my car.

(Pen.Hrg.Tr.113L.7-13).

Braun's initial argument urged death based on Michael having broke into Peroti's apartment by going through a window to get sex(Clos.Arg.Tr.7,14), the same behavior alleged as to Ms. Griffin. One non-statutory aggravator Nichols found was Michael's criminal history(24.035Ex.15 at 3893).

C. <u>Peroti's Bad Check Case</u>

In August, 1996, Braun charged Charlotte Kirn with felony passing a bad check over $150(24.035Ex.50 at 2,10). Kirn also used the last names Peroti, Gibson, Deroy, Myers, and Hansen(24.035Ex.50 at 35-36). In November, 1997, she pled guilty to misdemeanor passing a bad check under $150 with a two year

suspended imposition of sentence, unsupervised probation, and monthly restitution ordered(24.035Ex.50 at 2,7,39). Two other cases were nolled(24.035Ex.50 at 39).

D. Counsel's Testimony

Green did not know Charlotte Kirn was Charlotte Peroti when she was called(1stSupp.R.L.F.484). Before Peroti testified, the State never supplied counsel the name Charlotte Peroti, her last known address, and the substance of her expected testimony(1stSupp.R.L.F.483). Green had no reason for failing to object to Peroti testifying when she was called(1stSupp.R.L.F.484). When Michael heard Peroti testify, he told Green she was fabricating all her testimony, she was mentally unstable, and she was Anthony Hansen's mother(1stSupp.R.L.F.485). Green had no reason for failing to object to respondent having not complied with their discovery obligations and violating *Brady*, to inform the court he needed the opportunity to investigate Peroti, and to object to Peroti testifying on the grounds respondent violated *Debler* by failing to disclose the non-statutory aggravator she testified about(1stSupp.R.L.F.485).

If Green had known the contents of Peroti's bad check casefile (24.035Ex.50), then he would have known who she was when she was called(1stSupp.R.L.F.492). Green would have used her casefile to attack her credibility based on the deal she struck on her bad check case and her use of multiple names(1stSupp.R.L.F.492).

While advising Michael to plead, Green was not concerned Michael had a prior conviction for burglary and that a burglary was alleged

here(1stSupp.R.L.F.565-67). Green would not have advised Michael to plead guilty if he had previously committed a violent sexual offense(1stSupp.R.L.F.566-67).

E. 24.035 Findings

Peroti was endorsed as Charlotte Kirn in October, 1996 and endorsed as a defense witness(R.L.F.1076). Counsel was prepared to cross-examine Peroti about her failure to report Michael having allegedly attempted to sexually assault her(R.L.F.1076). These claims were rejected because the penalty was tried before Nichols who found statutory aggravators on which to base death(R.L.F.1077).

F. Direct Appeal

One contention was that Michael was not given notice Peroti would testify about the alleged attempted sexual assault. *State v. Worthington*,8S.W.3d83,90-91(Mo.banc1999). This Court stated: "The record does not reflect a specific objection based on lack of notice." *Id.*90 n.4. This Court noted:

> the record reflects that defense counsel stipulated to the evidence admitted, except for the testimony of Ms. Peroti. As to Ms. Peroti's testimony, the state had endorsed her two years before the penalty phase. Defense counsel was prepared to cross-examine her on the details of her failure to report the burglary and assault to police. Absent objection, there is no basis under a plain error analysis for

concluding that the admission of the evidence was prejudicial to Worthington.

Id.91.

Because this Court found the absence of a specific lack of notice objection meant there was no basis under plain error for finding prejudice, the claims presented here were not previously decided. Moreover, even a direct appeal finding of no plain error, does not mean finding *Strickland* prejudice is foreclosed. *Deck v. State*,68S.W.3d418,424-29(Mo.banc2002).

G. Failure to Disclose Substance of Peroti's Testimony And Bad Check Conviction

1. Testimony Nondisclosure

Respondent's failure to disclose Peroti's identity and the substance of her expected testimony, were prejudicial and violated *Debler, Ervin, Thompson,* and Rule 25.03. Green testified he did not know Kirn was the same person as Peroti and there was never any endorsement of "Peroti"(1stSupp.R.L.F.484). More importantly, Green testified respondent never told him Peroti was going to be called to testify ten days earlier Michael had entered her apartment through a window and attempted to sexually assault her(1stSupp.R.L.F.483) and he would not have recommended a plea if Michael had previously committed a violent sexual offense(1stSupp.R.L.F.566-67). Braun argued for death because of the similarity between Michael's alleged entry and attempted sexual assault of Peroti

and the entry through Ms. Griffin's window and sexual assault of her(Clos.Arg.Tr.7,14).

Green's cross-examination of Peroti did not make the non-disclosure of her expected testimony any less prejudicial. That cross-examination did not focus on attacking the veracity of Peroti's attempted sexual assault allegation, but rather was directed at eliciting the details of her efforts to have Michael arrested for drug offenses. Peroti's attempted sexual assault testimony was especially harmful because of Braun's efforts to paint the incident with Peroti and that with Ms. Griffin as substantially similar in the details and the intent to sexually assault. Green indicated what he would have feared about Michael's criminal history and the opportunity to obtain a life sentence would have been him having a prior conviction for rape or sexual assault and not his burglary history(1stSupp.R.L.F.565-67). What Peroti supplied was evidence of a prior violent sexually related offense, the thing Green feared the most.

Contrary to the 24.035 finding, Peroti was not endorsed as a defense witness. Defense counsel merely submitted a generic pleading, as is common practice, endorsing all of respondent's witnesses as potential defense witnesses(T.L.F.336-37). Peroti was not endorsed as a defense witness.

In *Thompson*, respondent called the defendant's ex-wife to testify about a violent prior act in which the defendant shot someone. *State v. Thompson*,985S.W.2d at 791-92. That testimony was prejudicial for several reasons including: that the undisclosed act was a significant act of violence, the

undisclosed act was different in kind from other aggravating evidence presented, the conduct of the charged offense and undisclosed offense were similar, and the respondent argued the history of violence surrounding the undisclosed act supported imposing death. *Id.*792.

The same *Thompson* considerations apply here. The alleged attempted sexual assault of Peroti was a significant act of violence. It was different from the other non-statutory criminal bad act evidence which focused on Michael's burglary and theft history. The conduct here, entry through a window and a related sexual assault, were similar to those Peroti alleged and Braun argued those similarities warranted death. Moreover, respondent presented, and Braun argued, the events here reflected the history of violence seen previously with Peroti. Further, Michael was prejudiced because Green would not have advised Michael to plead guilty if he had committed a prior violent sexual offense(1stSupp.R.L.F.566-67).

In *State v. Whitfield*,837S.W.2d503,506-08(Mo.banc1992), respondent's failure to disclose, until the morning of trial a coat containing a bullet hole, which tended to confirm the truth of portions of a witness' testimony, required a new trial. Similarly, respondent's evidence here of the alleged attempted sexual assault of Peroti formed the basis for Braun's assertion death was appropriate because Michael had as to Peroti engaged in acts he cast as virtually identical to those involving Ms. Griffin. The non-disclosure of what Peroti would testify to and failure to properly endorse her was prejudicial.

2. Peroti's Undisclosed Bad Check Conviction

Peroti's bad check conviction case was not disclosed in violation of *Brady*(1stSupp.R.L.F.484-85). Green would have used Peroti's bad check file to attack her credibility because of the deal she had gotten and her use of multiple names(1stSupp.R.L.F.492). Peroti's credibility was essential to Braun's claim death was appropriate because of the similarity between what happened to Ms. Griffin and Michael's alleged attempted actions as to Peroti. Because Peroti's credibility was so critical to Braun's argument for death, the failure to disclose her bad check conviction was prejudicial.

In *State v. Phillips*,940S.W.2d512,516-18(Mo.banc1997), the death sentence was reversed because the State failed to disclose a witness' police statement during which the witness said the defendant's son had admitted dismembering the victim's body and not the defendant. The undisclosed evidence in *Phillips* substantially undermined the State's theory for imposing death. Likewise, here the credibility of respondent's theory that what took place ten days before at Peroti's apartment mirrored what took place at Ms. Griffin's apartment, and therefore warranted death, hinged on Peroti's credibility.

Convictions relating to a person's honesty, like passing a bad check, are the type of evidence that permit a witness to be seriously impeached. *State v. Marler*,453S.W.2d953,957(Mo.1970)(defendant was "seriously impeached" with convictions for passing a bad check and larceny). The failure to disclose Peroti's

bad check conviction, for which her credibility could have been substantially challenged, requires Michael's convictions and sentences be vacated.

3. Counsel Was Ineffective

Green had no reason for failing to object to respondent having not complied with their discovery obligations and violating *Brady* and to inform the court he needed the opportunity to investigate Peroti(1stSupp.R.L.F.485).

Reasonably competent counsel under similar circumstances would have objected to respondent having failed to properly endorse Peroti and to respondent having failed to disclose the substance of her non-statutory aggravator testimony. Michael was prejudiced because Peroti's testimony was the foundation on which Braun based his claim Michael was guilty of a similar offense ten days earlier thereby deserving death and there is a reasonable probability without Peroti's testimony he would not have been sentenced to death. *See Strickland*.

Further, reasonably competent counsel under similar circumstances would have requested the opportunity to investigate Peroti by seeking a continuance and with that opportunity would have discovered the *Brady,* bad check impeaching information. Michael was prejudiced because Peroti's credibility would have been seriously undermined and there is a reasonable probability he would not have been sentenced to death. *See Strickland*.

Respondent's non-disclosures and counsel's ineffectiveness all prejudiced Michael because Peroti's testimony was part of the non-statutory aggravating evidence weighed in arriving at the punishment decision. Nichols relied on

Michael's criminal history(24.035Ex.15 at 3893). Nichols' decision was based on weighing all the aggravating evidence against the mitigating evidence. Because Peroti's testimony matters were included in that balancing decision, Michael was prejudiced.

This Court should vacate Michael's convictions and sentences.

III. ACQUIESCENCE TO JUDGE NICHOLS SERVING DESPITE HAVING REPRESENTED PEROTI'S CO-PARTICIPANT SON, HANSEN

The motion court clearly erred denying the claim counsel was ineffective for agreeing to Nichols serving after she disclosed she had served as guardian ad litem for Peroti's son, Anthony Hansen, an uncharged co-participant, because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel failed to apprise Michael of Nichols' prior relationship and failed to consult with Michael before acquiescing to Nichols continuing to serve and reasonably competent counsel would have informed Michael of that relationship, consulted with him, and not agreed to her continuing to serve and Michael was prejudiced because Michael would not have agreed to Nichols serving, would have withdrawn his plea, and there is a reasonable probability he would not have been sentenced to death.

Alternatively, the motion court clearly erred denying the claim Nichols should have recused herself when she became aware of her prior Hansen representation, because Michael was denied his rights to due process, a fair and impartial judge, and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, because Nichols' prior Hansen representation created an appearance of impropriety.

The motion court rejected claims counsel was ineffective for acquiescing to Nichols serving and Nichols should have recused herself when she became aware Peroti was Anthony Hansen's mother, an uncharged co-participant in Ms. Griffin's death and someone who Nichols had represented as a guardian ad litem. Michael was denied his rights to due process, a fair an impartial judge, to be free from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). To establish prejudice where a plea was entered, a movant must demonstrate there is a reasonable probability that absent counsel's errors he would not have pled and insisted on going to trial. *Hill v. Lockhart*,474U.S.52,58-59(1985).

At the conclusion of Peroti's testimony, in a private conference, the following occurred:

> THE COURT: Just informing counsel that during this witness's testimony, it became clear to me that about ten or twelve years ago I was appointed by the juvenile court in St. Charles County as a guardian ad litem for Anthony Hanson, who is the witness's son and in a proceeding having to do – I believe he was

about six years old at the time, having to do with a burn that took place in a tub, hot water, tub incident and I didn't recognize Ms. Peroti, but she was his mother and I just want to make counsel aware of that so that there – so you have all the information in front of you.

MR. GREEN: Thank you, judge.

MR. BUEHLER: Is there any objection by defense counsel for her to hear these proceedings based upon that representation?

MR. GREEN: No, there is not.

MR. BUEHLER: Okay. State has none either, judge.

(Pen.Hrg.Tr.120L.5-L.21).

A. 24.035 Claims

Counsel was ineffective for acquiescing to Nichols serving without apprising and consulting Michael about the prior relationship between Nichols, Peroti, and Peroti's son, Hansen, after she made her disclosure and thereby deprived Michael of the opportunity to decide whether to continue to proceed in front of her(24.035Depo.Ex.42 at 336,364-66). Nichols should have recused herself when she realized her prior relationship(24.035Depo.Ex.42 at 332,335,356-60).

B. 24.035 Findings

The claims were conclusory, speculative, and not supported by the record(R.L.F.1077). Michael did not establish counsel failed to act as reasonably competent counsel(R.L.F.1077).

C. 24.035 Evidence

Green testified he did not inform Michael about what Nichols had disclosed and did not consult with Michael about whether Michael wanted his case to continue in front of her(1stSupp.R.L.F.490-91).

Michael testified that after counsel returned from the conference with Nichols he asked what had taken place and was only told not to worry because nothing major happened(2ndSupp.R.L.F.218). Counsel did not tell Michael about Nichols' previous relationship with Peroti(2ndSupp.R.L.F.218-19). Michael did not learn what had transpired until he received his direct appeal transcript(2ndSupp.R.L.F.219). If counsel had told Michael about Nichols' prior relationship with Peroti and Peroti's son, he would not have consented to proceeding in front of her and would have insisted on withdrawing his plea because Hansen was a co-participant and Nichols had represented Hansen(2ndSupp.R.L.F.219-20).

D. Counsel Was Ineffective

The right to counsel includes the right to confer with counsel. *Geders v. United States*,425U.S.80(1976). *Geders* reversed the defendant's conviction when the defendant whose testimony had begun, but was not finished before adjourning for the day, was ordered not to speak with counsel during the overnight recess. *Id.*91. The trial court's order denied Geders his Sixth Amendment right to the assistance of counsel because it prevented Geders from consulting with his

attorney during the overnight recess "when an accused would normally confer with counsel." *Id.*91. In *Strickland*, the Court recognized that "[f]rom counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland,*466U.S. at 688.

According to Peroti, about ten days before Ms. Griffin was killed, Michael entered her apartment late at night by removing a window screen and attempted to sexually assault her, but was prevented from doing so because her boyfriend chased him out(Pen.Hrg.Tr.99-102). It was that testimony that formed the basis for Braun's initial argument urging the court to impose death on Michael for having broke into Peroti's apartment by going through a window to get sex (Clos.Arg.Tr.7,14), the same behavior alleged to have involved Ms. Griffin. Peroti's testimony effectively cast all blame on Michael and away from her son, Hansen, who Nichols had represented.

Michael had the right to consult with counsel. *See Geders*. The decision whether to continue in front of Nichols, following her disclosure, was an issue about which an accused would normally confer with counsel. *See Geders*. The important decision whether to continue in front of Nichols was a matter about which counsel had a duty to consult with Michael about because Nichols had ultimate punishment responsibility. *See Strickland.* Further, counsel had the duty to inform Michael of the details of Nichols' disclosure. *See Strickland.*

Counsel did not inform Michael about Nichols' disclosure and did not confer with Michael about its details(1st Supp.R.L.F.490-91). Reasonably competent counsel under similar circumstances would have informed and conferred with Michael about Nichols' disclosure because of the prior relationship between Nichols, Peroti, and Peroti's son, Hansen, and because Peroti's testimony coupled with Braun's argument (Point II), had the effect of casting all fault on Michael and thereby exonerated her co-participant son, Hansen. *See Geders and Strickland*. Michael was prejudiced because he would not have agreed to continuing in front of Nichols and would have withdrawn his plea(2ndSupp.R.L.F.219-20) and there is a reasonable probability that he would not have been sentenced to death. *See Strickland.*

E. <u>Nichols Was Required To Recuse Herself</u>

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

Nichols had been the guardian ad litem for Peroti's son, Anthony Hansen, who was an uncharged co-participant in Ms. Griffin's death(Pen.Hrg.Tr.120). At Michael's plea hearing, Nichols heard about Hansen's participation in the events resulting in Ms. Griffin's death. Hansen and Widger suggested burglarizing Ms. Griffin's apartment(Pl. Tr.23-24). It was Hansen who climbed through Ms. Griffin's window(Pl.Tr.24). Hansen let Widger and Michael inside(Pl.Tr.24). Hansen was tying Ms. Griffin's hand while Widger was tying her foot, when she lunged at Michael(Pl.Tr.25-26).

A reasonable person would find an appearance of impropriety existed for Nichols to serve because she was serving in a case where she alone had the responsibility for deciding punishment when there was evidence that someone she had previously represented, Hansen, was an uncharged co-participant. *See Smulls*. Nichols' bias came from the extrajudicial source of her prior representation of Hansen as his guardian ad litem. *See Nicklasson*. Nichols was required to disqualify herelf.

Michael's case parallels *United States v. Kelly*,888F.2d732,737-38(11thCir.1989), that was also judge tried. In *Kelly*, the trial judge's wife and a defense witness' wife were close personal friends. *Id.*738. The judge sua sponte expressed concerns to the parties about continuing to serve. *Id.*738. The judge, however, ultimately left it to the parties to jointly consent to his disqualification or to him continuing. *Id.*738. When the parties did not agree, he stayed on. *Id.*738.

The *Kelly* Court concluded the trial judge should have disqualified himself because he had conveyed concerns about the propriety of continuing to serve. *Kelly*,888F.2d at 745. Most pertinent to Michael's case was the following:

> a federal judge should reach his own determination [on recusal], *without calling upon counsel* to express their views.... The too frequent practice of advising counsel of a possible conflict, and asking counsel to indicate their approval of a judge's remaining in a particular case is fraught with potential coercive elements which make this practice undesirable.

Kelly,888F.2d at 745-46(bracketed material, ellipsis, and emphasis in original).

What *Kelly* said a judge should not do, leave the decision of the propriety of a judge continuing to serve to the parties to decide, took place here. First, Nichols disclosed her prior relationship and concluded stating she wanted counsel to be aware of it(Pen.Hrg.Tr.120L.5-14). The prosecutor then asked Green if he objected to Nichols staying on(Pen.Hrg.Tr.120L.16-18). Then Green and the prosecutor both indicated they had no objection(Pen.Hrg.Tr.120L.16-21).

When Nichols made her disclosure she did, like *Kelly*, indicate her concern about the propriety of continuing to serve. Further, like *Kelly*, Nichols left the issue of the propriety of her continuing to serve to the parties to decide, something *Kelly* indicated a judge should not do. Nichols should have decided herself the propriety of continuing to serve and should have recused herself.

This Court should vacate Michael's convictions and sentences.

IV. JUDGE NICHOLS COULD NOT FAIRLY SERVE

The motion court clearly erred denying the claim Michael was denied a fair judge because Michael was denied his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that Braun's campaign press statements calling for death for Michael based on Braun's view that judges should act in conformance with an electorate that overwhelmingly favors death when Judge Nichols was then involved in a contested election against Judge Schneider, Nichols' own statements Braun had created a public appearance Michael's sentence would be determined by politics, Schneider's campaign press statements tracking Braun's, Ms. Griffin's mother's repeated press calls for death, and the extensive impose - death secret letter writing lobbying directed at Nichols kept under seal not disclosed to counsel in violation of *Gardner v. Florida* all created an appearance of impropriety and doubt about Nichols' impartiality.

Alternatively, counsel was ineffective for failing to move to disqualify Nichols because Michael was denied all the previously noted rights and effective assistance of counsel, U.S. Const. Amends. VI, and XIV, in that reasonably competent counsel would have moved to disqualify Nichols and Michael was prejudiced because he was sentenced by a judge for whom there was an appearance of impropriety and a reasonable probability he was death sentenced because she could not fairly serve.

The motion court denied the claims Judge Nichols should have been disqualified and counsel was ineffective for failing to move to disqualify her. Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel when Nichols served. U.S. Const. Amends. VI, VIII, and XIV.

A. Caselaw Standards

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To obtain a hearing, a movant must allege facts warranting relief resulting in prejudice. *Belcher v. State*,801S.W.2d 372,375(Mo.App.,E.D.1990). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

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

B. Claims Pled

Michael was denied a fair penalty judge or alternatively counsel was ineffective for failing to move to disqualify Nichols(24.035Depo.Ex.42 at 369-70). These claims were based on Braun's and Nichols' elected positions hinging on Michael's sentence(24.035Depo.Ex.42 at 369-70). The punishment decision was being influenced by Ms. Griffin's family's public calls for death and Parents of Murdered Children lobbying Nichols for death(24.035Depo.Ex.42 at 369-70).

Judge Schneider's campaign against Nichols used Michael's case as a forum for her death penalty opinions(24.035Depo.Ex.42 at 381). In the October 21, 1998 Post, Schneider said: '"The death penalty and life in prison is an issue all citizens are concerned about …The judge can take the place of the jury, so it is important that public officials share their values and beliefs"'(24.035Depo.Ex.42 at 381). Schneider added: '"It's very important for a judge to reflect the values of the community"'(24.035Depo.Ex.42 at 381). The article noted Nichols was in the midst of Michael's case and she would be responsible for punishment(24.035Depo.Ex.42 at 381).

The October 28, 1998, Post "Letter From Readers" author called on St. Charles voters to vote for Schneider, if Nichols had not sentenced Michael to death by the November 3rd election(24.035Depo.Ex.42 at 383).

At the October 15, 1998, hearing to disqualify Braun, Nichols had stated that Braun's comments offended her(24.035Depo.Ex.42 at

386)(Hrg.D.Q.BraunTr.20) and Nichols said she was "very concerned about a public appearance, that these things [the punishment decision] are basically just political decisions that are being made"(24.035Depo.Ex.42 at 386)(Hrg.D.Q.BraunTr.22).

The pleadings relied on Ms. Griffin's mother's repeated Post calls for death(24.035Depo.Ex.42 at 390) and on Braun's October 5, 1998, Post comments calling for judges to consider their constituents' wishes that overwhelmingly favor death(24.035Depo.Ex.42 at 392-93). Braun's statements were improperly calculated to pressure Nichols to impose death and intended to shift the focus away from his high profile defeat in the *DeCaro* case(24.035Depo.Ex.42 at 394).

Twenty-four letters written to Nichols were sealed and Michael's counsel did not know about them(24.035Depo.Ex.42 at 396-97). The motion identified the author's names, participation of Parents of Murdered Children, and reproduced excerpts calling for death(24.035Depo.Ex.42 at 397-400)

C. 24.035 Findings

There was a presumption a judge acts with honesty and integrity and will not preside where the judge cannot be impartial(R.L.F.1078). Cited was a judicial canon a judge shall not be swayed by partisan interests, public clamor or fear of criticism(R.L.F.1078). Both Braun and Nichols were defeated(R.L.F.1078). Movant had not pled supporting facts, but reviewing the claim gratuitously, it had no merit(R.L.F.1078).

D. Factual Grounds For Disqualification

1. Braun's and Angelbecks' Media Campaigns

The August 2, 1998 Post profiled St. Charles County elected officials and their upcoming November elections(24.035Ex.13 at 3414). Braun's "tough on crime" "[p]riorities" included imposing death(24.035Ex.13 at 3419).

On August 28, 1998, Michael pled(Pl.Tr.1). The August 29th Post carried Ms. Griffin's mother's calls for death(24.035Ex.13 at 3401-03).

The penalty hearing ran from September 14, 1998 through September 17th. The September 14th Post noted Michael's plea "has left his life in the hands of St. Charles County Circuit Judge Grace Nichols"(24.035Ex.13 at 3395). That article noted Ms. Griffin's mother wanted a jury trial, but called on Nichols to impose death(24.035Ex.13 at 3395).

The October 5, 1998 Post published: "Defendants May Be Pleading Guilty As Ploy To Avoid Getting Death Sentence From Juries"(24.035Ex.13 at 3383-84). A second St. Charles County defendant had pled guilty in a death eligible case(24.035Ex.13 at 3383-84). Braun's assistant Groenweghe told the Post he believed Michael and the other defendant think they have a better chance of avoiding death in front of a judge(24.035Ex.13 at 3383). Ms. Griffin's mother told the Post she wanted a jury to decide Michael's punishment and she thought Michael pled to avoid death(24.035Ex.13 at 3384). Braun told the Post Kansas City guilty pleas stopped when a judge imposed death(24.035Ex.13 at 3384). Braun said in deciding punishment in guilty plea capital cases, Missouri judges "must consider their constituents"(24.035Ex.13 at 3384). Braun added: '"You

shouldn't be putting executions up for election, but the judiciary should share the values of the community and reflect them…and the community is overwhelmingly in favor of the death penalty"'(24.035Ex.13 at 3384).

After the penalty hearing, on October 13, 1998, Green moved to disqualify Braun based on Braun's and Groenweghe's October 5th Post statements (T.L.F.396-402). The motion urged Braun should be disqualified because his actions "demonstrated such a personal interest so as to indicate that he is not only unfair to Defendant, but also he has impugned the integrity of the Court and has served to undermine the public confidence in these proceedings"(T.L.F. 396). Even though the case had been pending for three years, Braun had not actively participated until election year and only after Michael decided to plead(T.L.F.399). Green's motion recounted Braun had stated to him and other attorneys he was being hurt by the lack of publicity with a plea versus going to trial(T.L.F.399).

On October 15, 1998, Nichols heard counsel's motion to disqualify Braun and said Braun's comments offended her, but refused to disqualify(Hrg.D.Q.BraunTr.20-21). She also stated she was "very concerned about a public appearance, that these things [the punishment decision] are basically just political decisions that are being made"(Hrg.D.Q.BraunTr.22).

On October 15, 1998, Nichols heard closing arguments. The October 16th, Post reported Braun's closing argument, including Braun having invoked silence for five minutes for the court to imagine how long it took Ms. Griffin to

die(24.035Ex.13 at 3379-80)(*See* Clos.Arg.Tr.14-15). The October 19, 1998 Post reported again on closing arguments and repeated Ms. Angelbeck's calls for death(24.035Ex.13 at 3376).

The October 21, 1998 Post published an article about Nichols' and Schneider's race(24.035Ex.13 at 3405-06). Schneider said: '"The death penalty and life in prison is an issue all citizens are concerned about …The judge can take the place of the jury, so it is important that public officials share their values and beliefs"'(24.035Ex.13 at 3405). Schneider added: '"It's very important for a judge to reflect the values of the community"'(24.035Ex.13 at 3405). The article noted Nichols was on Michael's case and she would be responsible for deciding life or death(24.035Ex.13 at 3405).

The October 27, 1998 Post published: "Braun, Banas Clash In Race For Prosecutor Issue Of Experience, What Should Count Dominates Contest."(24.035Ex.13 at 3430-31). Braun said: " he has personally sent two people to death row, which is more than any other prosecutor has in St. Charles County"(24.035Ex.13 at 3430). Braun contrasted that with opponent Banas who had never put anyone there(24.035Ex.13 at 3430). Banas stated Braun only prosecutes major cases around election time and leaves out those he has lost, like the 1994 *DeCaro* case where the defendant was acquitted of hiring someone to kill his wife(24.035Ex.13 at 3430).

The October 28, 1998 Post published a "Letter From Readers" whose author called on St. Charles voters to vote for Schneider if Nichols did not sentence Michael to death by the November 3rd election(24.035Ex.13 at 3373-75).

The October 30, 1998 Post published Ms. Griffin's mother's Letter to the Editor calls for death(24.035Ex.13 at 3370-71).

Both Nichols and Braun were defeated on November 3, 1998(24.035Ex.13 at 3404; 24.035Ex.15 at 3883). Sentencing was the next day, November 4, 1998.

Braun's campaign contributions showed in June, 1997 Ms. Griffin's parents gave four baseball tickets worth $76(24.035Ex.18 at 4754). On October 18, 1998, Ms. Griffin's mother contributed $500 to Braun(24.035Ex.18 at 4757). That same day Ms. Griffin's stepfather made a separate $500 Braun contribution (24.035Ex.18 at 4758). On October 28, 1998, Ms. Griffin's stepfather made another $500 Braun donation(24.035Ex.18 at 4759-60).

2. <u>Letter Writing Lobbying</u>

The court file contained numerous letters that appeared in the file after the plea and urged death(24.035Ex.56). Postconviction counsel obtained those letters after a hearing because they were kept under seal(R.L.F.60-62,64;1stSupp.R.L.F.494-96).

Janet Powers wrote Michael "deserves" death(24.035Ex.56 at 2). Mary Ruth Musick, a friend of Ms. Griffin's sister, "recommend[ed]" death (24.035Ex.56 at 37). Pat Decker urged Nichols "to give justice" to Michael because he admitted killing Ms. Griffin(24.035Ex.56 at 41).

Carol Clark wrote twice. According to Clark "many Lake St. Louis residents" want death(24.035Ex.56 at 3). Advocating death, Clark stated: "I want anyone who is thinking of committing a crime, to choose to go elsewhere because you don't want to be judged in St. Charles County"(24.035Ex.56 at 3).

Clark's second letter invoked the Bible: '"All they that take the sword, shall perish with the sword"'(24.035Ex.56 at 4). Clark continued: "Worthington is not worthy to take up space in a jail cell and therefore, I, the Jury, cast my vote for the Death Sentence"(24.035Ex.56 at 4). Clark admonished Nichols to consider if the victim had been her daughter then she, like the Angelbecks, would want death(24.035Ex.56 at 4). Clark wrote she "cast [her] vote for Death by Hanging" because it most closely paralleled how Ms. Griffin died(24.035Ex.56 at 4). Invoking scripture again Clark wrote: '"All they that strangle, shall perish by strangulation"'(24.035Ex.56 at 4).

Kathleen Cummings-Kearns, Ms. Griffin's mother's forty year friend, urged execution with no show of mercy because Michael was a "piece of human detritus"(24.035Ex.56 at 7). While she did not know the legal standards "to sentence this scum to death but if ever a death sentence would serve all of humanity it seems to me this scum fits that profile"(24.035Ex.56 at 7).

Norma June Hunt, Ms. Griffin's parents' friend, urged death based on perceived plea bargaining abuses and submitted her poetry about Ms. Griffin including: "that Villainous, Murderer, Rapist, animal, has taken my shining star, away from me"(24.035Ex.56 at 7,10-14).

Rose Gronemeyer, the Baysingers, and, and an unsigned letter all stated they were parents of murdered children and all advocated death(24.035Ex.56 at 17-19,36,38).

The Winkelers, parents of a murdered child, urged death invoking "an eye for an eye"(24.035Ex.56 at 28). They told the court to disregard Michael's mitigation(24.035Ex.56 at 28).

On Parents of Murdered Children letterhead, Mata Weber, the St. Louis "Chapter Leader," advocated death asking Nichols to "try to understand what we, as parents, are going through"(24.035Ex.56 at 29).

Cherie Lynn Million was present at Michael's plea, lobbied for death, and complained about a system that might permit Michael to avoid death because he pled(24.035Ex.56 at 34-35).

Betty Downey, parent of a murdered child, was present at Michael's plea, complained about the possibility of Michael avoiding death because he pled, called on Nichols to "try to put yourself in the victim's place," and urged Nichols not to consider Michael's mitigation(24.035Ex.56 at 39-40).

Maria Kane was present at Michael's plea, lobbied for death, wrote she realized she was looking at "a dangerous monster," and stated she "shuddered to think of how many years this animal walked the streets among good, decent people"(24.035Ex.56 at 42). She posed: "why should we, as taxpayers, be forced to support this degenerate?" and if Michael's actions did not warrant death, then why do we have a death penalty?(24.035Ex.56 at 42).

Tammy Klossner, Ms. Griffin's sister's friend, urged Nichols to disregard Michael's mitigation because it was "a crock," and complained society should not "have to support" Michael(24.035Ex.56 at 44).

Butch Hartman of "Parents of Murdered Children" lobbied for death to send a message to people who commit violent acts(24.035Ex.56 at 29,45).

The lobbying letters included a picture of an angel writing with a quill pen(24.035Ex.56 at 1).

E. Counsels' Testimony

Green recalled political considerations did not figure into Michael's case when it was in front of Cundiff because he was not a candidate(1stSupp.R.L.F.441). When the case was in front of Nichols, Green was concerned because she was running(1stSupp.R.L.F.442). Green filed his motion to disqualify Braun directed at Braun's October 5th Post statements because he thought Braun was trying to motivate a sentencing decision based on political considerations(1stSupp.R.L.F.444).

Green had no reason for failing to move to disqualify Nichols(1stSupp.R.L.F.493). Green never saw the Exhibit 56 letters because, if he had, he would have objected(1stSupp.R.L.F.495,497,499,575).

Rosenblum recalled when Cundiff was on the case he had made statements he was receptive to the possibility of life(1stSupp.R.L.F.639-40). Cundiff made similar statements to Green, if Michael accepted

responsibilty(1stSupp.R.L.F.506). Based on Cundiff's comments, Green decided to pursue a plea(1stSupp.R.L.F.506-07).

After a decision was made to plead in front of Cundiff, he received a letter sent on behalf of the Angelbecks from Braun or a letter from the Angelbecks themselves(1stSupp.R.L.F.507). A meeting that included Green, Cundiff, Braun, and the Angelbecks followed(1stSupp.R.L.F.507). Braun and the Angelbecks objected to Cundiff continuing on the case because they believed he had already decided punishment(1stSupp.R.L.F.507). Even though Cundiff assured them he had not prejudged punishment, the meeting was "pretty intense" (1stSupp.R.L.F.507-08). In response to their attacks on his fairness, Cundiff recused himself(1stSupp.R.L.F.507-08).

Even though Nichols set sentencing for the day after she and Braun lost, Green did not believe that established improper political considerations were removed because Nichols continues to serve as a senior judge(1stSupp.R.L.F.555-57).

F. Nichols Could Not Fairly Serve

1. Disqualification

Nichols was not able to fairly serve, there was an appearance of impropriety, and she should have been disqualified because Michael's sentence became linked with judicial election politics.

The 24.035 pleadings in fact alleged facts warranting relief resulting in prejudice. *See Belcher, supra*. The motion court heard evidence and it clearly erred when it denied the claim on the merits.

After Michael pled and before sentencing, Ms. Griffin's mother made repeated press calls for Nichols to impose death(24.035Ex.13 at 3370-71,3376,3384,3395,3401-03). To further his "tough on crime" election campaign, Braun made his October 5th press statements about judges(24.035Ex.13 at 3384). Braun's statements were intended to politically pressure Nichols to impose death. Braun's statements offended Nichols and she expressed concern Braun's statements created "a public appearance" punishment would be determined by political considerations(Hrg.D.Q.BraunTr.22). Two weeks before her election contest against Nichols, Schneider made nearly identical comments to Braun's October 5th statements, and thereby, advocated death for Michael while employing election politics to pressure Nichols to impose death(24.035Ex.13 at 3405).

Besides Braun's, Schneider's, and Ms. Griffin's mother's press behavior, there was the orchestrated post-plea court secret sealed letter writing death lobbying campaign. Those letters included attacks on a system that might permit Michael to avoid death because he pled(24.035Ex.56 at 7,34-35,39-40), called on the court to disregard mitigation(24.035Ex.56 at 28,40,44), and urged the court to place itself in the victim's family's place(24.035Ex.56 at 4,40).

The actions of how and why Cundiff was removed from the case highlight the appearance of unfairness of Nichols having served and imposed death. From Cundiff's comments, Green had determined he was open to life, if Michael accepted responsibility. Cundiff was forced off the case because of the victim's family's desire for death when they were allowed to personally advocate that view to him. A trial court is not required to follow the victim's family members' wishes when the punishment options are death or life. *State v. Jones*,979S.W.2d171(Mo.banc1998); *State v. Barnett*,980S.W.2d297(Mo.banc1998). This Court reasoned: "the basic tenet of the criminal justice system [is] that prosecutions are undertaken and punishments are sought by the state on behalf of the citizens of the state, and not on behalf of particular victims or complaining witnesses." *Barnett*,980S.W.2d at 308. Those tenets were ignored when the Angelbecks' fervor for death was permitted to force Cundiff off when counsel had every reason to believe he was receptive to life, if Michael accepted responsibility. This simply adds to the appearance of unfairness of Nichols having served and imposed death.

All these factors would cause a reasonable person to have factual grounds to find an appearance of impropriety and doubt Nichols' impartiality. *See Smulls* and *Aetna, supra*. The bias that existed came from sources other than those Nichols learned from serving on the case. The press statements by Braun, Ms. Griffin's mother, and Judge Schneider did not come from serving on Michael's case. Likewise, the orchestrated effort of dumping letters in the court file

advocating death was not part of the proper and orderly course of court proceedings, and thus, was not something learned during the course of normal court proceedings with notice to both sides. Moreover, the placement of those letters under court seal, so Green never learned of them, only heightens the perception of the appearance of unfairness because the appearance is the documents were sealed to conceal Nichols considered improper matters.

Nichols' unfairness is further demonstrated by the letters being sealed and never made available to Green because that action was prohibited under *Gardner v. Florida*, 430U.S.349(1977). In *Gardner*, the trial judge imposed death where portions of a PSI were not disclosed to counsel. *Id*.353-54. The Court reversed the death sentence because there was no opportunity for the defendant's counsel to challenge the undisclosed material. *Id*.356,360. The Court rejected the state's argument a judge should be allowed to impose death with "secret information" because it by-passed the truth seeking function of the adversarial process. *Id*.360. Nichols placed under seal many documents calling for death and kept Green from ever viewing them in violation of *Gardner*, and thereby, demonstrated further her inability to fairly serve.

It is irrelevant Nichols sentenced Michael the day after her defeat because as Green indicated Nichols continues to serves as a senior judge(1stSupp.R.L.F.555-57). Nichols could in the future again seek elective office, whether to her former judgeship or other public office, and therefore, in response to defeat imposed death to better position herself. Nichols had been both

a member of the St. Charles City Council and its mayor(24.035Ex.13 at 3405). There is the appearance Nichols sentenced Michael to death after the election because she learned her lesson for future elections from failing to sentence Michael before election day as demanded in the October 28th Letter to the Editor.

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

Michael's counsel was ineffective for failing to move to disqualify Nichols. Green had no reason for failing to move to disqualify(1stSupp.R.L.F.493). Reasonably competent counsel under similar circumstances confronted with Braun's, Schneider's, and Ms. Griffin's mother's press politicizing of Michael's case and Nichols' own stated concerns about Braun's conduct would have moved to disqualify Nichols. *Strickland, supra*. Michael was prejudiced because there was an appearance of impropriety for Nichols to have served and to have sentenced him to death and there is a reasonable probability Michael was sentenced to death because she could not fairly serve. *Strickland, Smulls*, and *Aetna, supra*.

This Court should vacate Michael's convictions and sentences.

V. FAILURE TO INVESTIGATE SOCIAL HISTORY

The motion court clearly erred rejecting counsel was ineffective for failing to properly investigate Michael's social history and to furnish it to experts, such as Drs. Pincus, Cowan, and Smith, who would have concluded he suffers from Tourette's Syndrome, Attention Deficit Hyperactivity Disorder, Obsessive Compulsive Disorder, Bipolar Disorder, Frontal Lobe Cerebral Brain Dysfunction, and Post-Traumatic Stress Disorder because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have taken those actions and Michael was prejudiced because these findings would have provided a guilt defense of diminished capacity such that he would not have pled guilty, mitigated punishment, and rebutted aggravation.

The motion court rejected counsel was ineffective for failing to adequately investigate Michael's social history and provide it to experts. Reasonable counsel would have learned Michael suffers from multiple impairments that would have provided a diminished capacity guilt defense, mitigated punishment, and rebutted aggravation. Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

A. Review Standards

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

Once a plea is entered counsel's effectiveness is relevant only to the extent it impacted whether the plea was knowing, intelligent, and voluntary. *Wilson v. State*,813S.W.2d833,838(Mo.banc1991). To establish prejudice, a movant must demonstrate there is a reasonable probability absent counsel's errors he would not have pled and insisted on going to trial. *Hill v. Lockhart*,474U.S.52,58-59(1985).

B. Aggravation

Rosenblum moved to exclude Givon's findings as a §552 competency examination, but Green had stipulated to them(Pen.Hrg.Tr.295).

Givon found Michael competent to proceed and at the time of the offense(Pen.Hrg.Tr.300). Michael's twenty-two juvenile detention discipline referrals were consistent with Givon's findings(Pen.Hrg.Tr.312). Michael was not suffering from a mental disease or defect(Pen.Hrg.Tr.313-14). Givon's diagnoses were malingering, cocaine dependence, alcohol abuse, and anti-social personality (Pen.Hrg.Tr.313-14). Michael displayed severe psychopathology(Pen.Hrg.Tr.317-21). Michael was not unable to conform his conduct to the requirements of law(Pen.Hrg.Tr.329-30).

Many materials Givon reviewed were police generated(24.035Ex.10 at 2583). Others were: (1) Esposito Frey's Peoria County PSI; (2) Barton letter to Juvenile Court Judge Bode; (3) Illini Paint employment data requests; (4) Limestone Community H.S. Records 1986-87; (5) 1993 Community College records; (6) Michael's White Oaks treatment records; (7) letter to Judge Barnes regarding substance abuse treatment; (8) Michael's Methodist Medical Center reports; (9) school psychologist Kessler's evaluation at fourteen; (10) Donald Legan evaluation of 8/3/89; (11) work schedule sheet for Michael; (12) Illinois Juvenile records; (13) Dr. Ryall's notes; (14) Michael's birth records; and (15) St. Charles Jail medical records(24.035Ex.10 at 2583).

Officer McKee reported Michael was involved in fifty-five St. Charles Jail incidents and Exhibits 29 A-D and 82A-E described them(Pen.Hrg.Tr.151-52,164). He possessed homemade alcohol and when it was found he threatened a guard(Pen.Hrg.Tr.138-39). A razor blade was found in Michael's cell(Pen.Hrg.Tr.140-42). Michael assaulted a jail officer and when he was restrained threatened to kill other officers(Pen.Hrg.Tr.142-44).

Michael instigated fights and challenged an officer to fight(Pen.Hrg.Tr.144-47). He got into an argument with the control bubble officer which included him spitting and throwing things(Pen.Hrg.Tr.147-48).

Michael wedged a broom handle in a sliding security door(Pen.Hrg.Tr.149-50). McKee reported Michael was a concern because of his combative and violent reputation(Pen.Hrg.Tr.188).

By stipulation, respondent introduced the preliminary hearing transcript from an assault charge against Michael where Michael chased and struck inmate Mintner with a broom(Pen.Hrg.Tr.199;24.035Ex.16 at 4180-84,4188-93). Officer Smith testified to what he saw(Pen.Hrg.Tr.199-206).

C. Nichols' Findings

Statutory aggravators found were: (a) murder during a burglary and forcible rape; and (b) murder committed to receive money or any other thing of monetary value(Sent.Tr.28-29;24.035Ex.15 at 3892-93). Non-statutory aggravators were: (a) violent pre-trial jail behavior; (b) criminal history; and (c) on bond awaiting sentencing on Peoria County, Illinois burglary charges(24.035Ex.15 at 3893).

Statutory mitigators were: (a) acted under extreme mental or emotional disturbance; (b) was an accomplice and participation was relatively minor; and (c) age(24.035Ex.15 at 3894). The non-statutory mitigators were: (a) suffered abuse and neglect; (b) suffers from chemical dependency; (c) adjusts well to incarceration; and (d) was under the influence of narcotics, alcohol, and prescription drugs(24.035Ex.15 at 3894; Sent.Tr.29).

D. Doctors Who Would Have Made A Difference

1. Dr. Pincus

Dr. Pincus, a Georgetown neurologist, examined Michael and found his brain's frontal lobes, responsible for judgment, were not functioning properly(R.Tr.67,85,93,95,98). Pincus witnessed a clear blinking motor tic

characteristic of Tourette's syndrome, a hereditary disease(R.Tr.98,101,107-08). *See* DSM IV-TR at 113. Michael's records showed a history of obsessive compulsive and childhood origin Attention Deficit Hyperactivity Disorder (ADHD), both commonly associated with Tourette's(R.Tr.100,110-11). *See* DSM IV-TR at 112. Disruptive behaviors Givon identified, such as making noises and interfering with others, were consistent with Tourette's(R.Tr.101-03). Givon's report established vocal ticks required for Tourette's(R.Tr.173).

At the time of this offense, September 30, 1995, Michael had a frontal lobe problem, Tourette's, ADHD, obsessive compulsive disorder, and bipolar disorder independent of drug use, but not anti-social (R.Tr.110,114-15,117-18,131-35,144-45,171,177-78). In July, 1995, shortly before the offense, Dr. Ryall prescribed antidepressants which likely caused Michael to become manic(R.Tr.119-20). Pincus' diagnoses are not based simply on Michael's self-reporting, there was independent confirmation(R.Tr.184-85).

Michael was not able to have coolly reflected because of his mental illness and neurological condition(R.Tr.121,145,194). He was unable to appreciate the criminality of his conduct and to conform his conduct to the requirements of law(R.Tr.122,146). He was suffering from an extreme degree of mental, emotional disturbance because he was manic(R.Tr.121-22,146). Michael tried hard to cooperate with Pincus' examination, is not sophisticated enough to fake, and therefore, was not malingering(R.Tr.128-31,196-97).

While Michael was held in the St. Charles Jail, he was not medicated for his mental illnesses and the incidents were the result(R.Tr.122-25,127-28). It was incorrect for the State to have portrayed Michael as having been involved in fifty-five "incidents" because some related to needing medical treatment(R.Tr.125).

2. <u>Dr. Cowan</u>

Dr. Cowan is a neuropsychologist(R.Tr.205-11). Cowan's testing found Michael has severe frontal lobe dysfunction(R.Tr.240,287-88,294-96,325). Cowan's diagnoses included cerebral brain dysfunction, ADHD, Tourette's, and bipolar(24.035Ex.18 at 4636). Michael was impaired as to abstract reasoning, executive functions, and aggressive behavior control, due to Tourette's (R.Tr.240,244-45,268-70,279-83,322-23,325-27). Like Pincus, Cowan observed motor tics and which were also evidenced in 1985 (24.035Ex.9 at 2186-92) and 1989 (24.035Ex.9 at 2193-97) records(R.Tr.271,320).

Anti-social is not a proper diagnosis because Michael was not diagnosed before fifteen with conduct disorder(R.Tr.274-78,311,313). Symptoms Michael displayed, and Givon relied on to find anti-social, like impulsivity, irritability, irresponsibility, reckless disregard for the safety of himself and others are consistent with frontal lobe dysfunction and Tourette's(R.Tr.272-74,310-13).

A glaring omission from Givon's report was he did not speak to any of Michael's family, and therefore, important relevant history was missing(R.Tr. 302-03). Givon's malingering finding was based on giving the MMPI II, but Givon did not follow its administration protocol(R.Tr.307-08).

3. Dr. Smith

Dr. Smith is a clinical psychologist(R.Tr.458).

Michael's mother had a history of bipolar, PTSD, substance dependence, homelessness, and prostitution(R.Tr.491). She was a drug addict while pregnant with Michael and intoxicated when she gave birth(R.Tr.492,536-37). Substance abuse during pregnancy and ADHD are linked(R.Tr.492-93,536). Michael's father and his mother's father beat Michael's mother when she was pregnant with him(R.Tr.492-94,537).

Michael's father introduced him to drugs and alcohol(R.Tr.494,544). At twelve, Michael was living with his father and his father would wait outside houses while he sent Michael inside to burglarize(R.Tr.494,546). If Michael stole the "wrong" things, his father beat him and sent him back(R.Tr.546). Michael's mother used drugs with him and involved him in stealing(R.Tr.494). Michael's parents' actions were significant because children rely on their parents to teach them right from wrong(R.Tr.495).

Michael's mother allowed anyone to babysit, because of her life-style, disappearing for weeks(R.Tr.499-500,539-40). She ignored baby-sitters physically and sexually abusing Michael which included having lit matches thrown on Michael's unclothed body, fondling his testicles and striking them with objects, sticking objects in his rectum, sodomizing him, putting him in a tub of water so he was barely able to keep his head above water to breathe, placing him in very hot or very cold water, locking him in a closet, and putting him naked in a

crawl space amongst mice, rats, and roaches(R.Tr.495-96,539-40,543-44).

Michael's mother had many psychiatric hospitalizations and fifteen to twenty suicide attempts(R.Tr.500-05,514,542;24.035Ex.1 at 161,168,215). One suicide attempt she purposely swerved her car head on into another with Michael suffering a head injury that can cause brain damage(R.Tr.504,544-45;24.035Ex.1 at 44).

Michael's mother got drunk and had sex in front of him(R.Tr.514). He saw her beaten and abused by boyfriends and family, take overdoses, and slit her wrists(R.Tr.515). She set their house on fire, destroying all his belongings(R.Tr.515,545).

Michael's maternal grandfather, Steven Czerwinski, was alcoholic, depressed, suicidal, violent, erratic, unpredictable and suffered from PTSD(R.Tr.498-99,516-19). Michael's maternal grandmother was alcoholic(R.Tr.519).

Michael did not choose to use drugs when he was nine, his father was responsible(R.Tr.645-46). Michael's father's siblings had significant drug and alcohol problems(R.Tr.522). Michael had a high risk of drug and alcohol addiction because of genetics and the drug abusing environment in which he was raised(R.Tr.505-06,508,535-36,645-46).

Michael's paternal grandfather, Vincent Worthington, was alcoholic(R.Tr.521). His paternal grandmother, Isabel Worthington, was diagnosed with paranoia and later schizophrenia(R.Tr.521-22,531-32,534-35).

Smith disagreed with Givon because Givon failed to avail himself of Michael's family and the records Smith reviewed(R.Tr.644,648-49). Michael's reporting was accurate because it was corroborated by records and others and he was not malingering(R.Tr.533-34,640-41,644).

Michael suffers from - ADHD, bipolar, cerebral brain dysfunction, PTSD, and substance dependence, but not anti-social(R.Tr.552,645). Michael was suffering from diminished capacity because of his diagnosed mental illnesses, other than his substance dependence(R.Tr.553-54).

Michael's jail records indicate his care providers did not understand Michael's disorders and his punishments only caused his behavior to worsen(R.Tr.555).

E. Information 24.035 Examiners Reviewed

Rule 24.035 Exhibits 1-18 included the following: (1) Michael's mother's (24.035Exs.1-5 at 1-1265;), father's (24.035Exs.5-8 at 1266-1974), Uncle Vincent Worthington's (24.035Ex.8 at 1975-2003, 24.035Ex.9 at 2025-89), and grandmother Isabel Worthington's (24.035Ex.16 at 3988-4172) mental health records; (2) Michael's mother's police records(24.035Ex.9 at 2004-24); (3) affidavits from Michael's parents, aunt Janet Blumenshine, James Worthington, former babysitter Bessie Smith, Elex Mackey, Beverly Mackey, and Pam Booth(24.035Ex.9 at 2090-2153;24.035Ex.17 at 4463-66); (4) Michael's Peoria elementary and Limestone Community H.S. records(24.035Ex.9 at 2154-64); (5) Michael's Tazewell County conviction records(24.035Ex.9 at 2165-79); (6)

Illinois Juvenile records(24.035Ex.9 at 2180-85A); (7) Dr. Kessler's report(24.035Ex.9 at 2186-92); (8) Donald Legan evaluation of 8/3/89(24.035Ex.9 at 2193-97); (9) juvenile detention records(24.035Ex.9 at 2198-2232; (10) Dr. Ryall's notes(24.035Ex.9 at 2235-37; Ex.15 at 3868-72); (11) Esposito prepared Peoria County PSI(24.035Ex.9 at 2239-51); (12) Barton letter to Juvenile Court Judge Bode(24.035Ex.9 at 2252-53); (13) Michael's Methodist Medical Center reports(24.035Ex.9 at 2267-2303);(14) Michael's Medical and Psychiatric Records(24.035Ex.10 at 2304-2577); (15) Givon's report(24.035Ex.10 at 2582-2607); (16) Dr. Miller's evaluation(24.035Ex.10 at 2608-16); (17) Michael's Illinois Corrections records(24.035Exs.11-12 at 2617-3082); (18) Michael's St. Charles Jail records(24.035Exs.12-13 at 3083-3348); (19) Lake St. Louis interrogation transcript(24.035Ex.14 at 3571-3788); (20) James Worthington's Illinois Corrections records(24.035Ex.14 at 3789-3867); (21) Dr. Pincus' reports(24.035Ex.15 at 3873-3880;24.035Ex.18 at 4748-51); (22) Nichols' trial report(24.035Ex.15 at 3891-3900); (23) Stephen Czerwinski V.A. records(24.035Ex.15 at 3901-87); (24) Michael's assault preliminary hearing transcript(24.035Ex.16 at 4173-4210); (25) Peoria police reports(24.035Ex.17 at 4211-4337); (26) James Worthington's St. Francis Medical Center records(24.035Ex.17 at 4444-62); (27) Dr. Smith's report(24.035Ex.18 at 4495-4536); (28) Dr. Cowan's report(24.035Ex.18 at 4599-4641); and (29) Michael's Missouri Corrections and prescription records(24.035Ex.18 at 4718-47).

Cowan and Smith reviewed everything in Exhibits 1-18(R.Tr.245-46,483-86,490). Cowan also reviewed Michael's parents' depositions and Richard (Richy) Mackey's affidavit(Rule 24.035 Ex.51)(R.Tr.246-47). Cowan also interviewed Michael's parents, James Worthington, and his aunt Janet Blumenshine(R.Tr.248).

Smith reviewed Michael's parents' depositions(R.Tr.486). Smith's interviews included Michael's parents, his aunt Janet Blumenshine, his half brothers Ryan and Eric Harms, his stepmother Patricia Harms, his former babysitter Bessie Smith, and friend, Wayne King(R.Tr.487).

Pincus reviewed: (1) Michael's mother's police records; (2) Vincent Worthington's mental health records; (3) affidavits from Michael's parents, aunt Janet Blumenshine, James Worthington, former babysitter Bessie Smith, Elex Mackey, Beverly Mackey, and Pam Booth; (4) Michael's school records; (5) Tazwell County court records; (6) Illinois detention records; (7) Dr. Kessler's report; (8) Michael's medical and psychiatric records; and (9) Givon's and Miller's reports(R.Tr.101-02).

F. Counsels' Testimony

1. Green

Green knew having a complete social history was important to decide on how to pursue guilt and penalty(1stSupp.R.L.F.432-33). Rosenblum testified he left Green responsible for social history(1stSupp.R.L.F.661-62).

Green did not do a complete social history that would have included going to Peoria and talking to Michael's relatives and associates because of the financial practicalities of running his own private practice and what he was paid(1stSupp.R.L.F.433-34,457-58). Based on Green's training that type social history should have been done by a paralegal or mitigation specialist, but was not because he did not control expenditures(1stSupp.R.L.F.434-37,459). Green would not expect a defendant to know the information needed to prepare a social history(1stSupp.R.L.F.437).

The information 24.035 counsel developed through Michael's mother's deposition testimony and her affidavit was the type Green would have given to an expert to determine whether Michael suffered from any mental illnesses(1stSupp.R.L.F.455-57). Green did not consider challenging Givon's findings(1stSupp.R.L.F.451). Green did go through Givon's report with Michael and Michael disputed some of Givon's attributing of statements to him, but Green did not consider investigating those(1stSupp.R.L.F.451-53,457). Green spoke to Michael's mother twice for ten to fifteen minutes each time and did not get much social history(1stSupp.R.L.F.455). Green's practice is not to rely on a court appointed examiner to do the necessary social history because his duty is to independently investigate(1stSupp.R.L.F.601).

Green advised Michael to plead because he did not think there was a defense(1stSupp.R.L.F.466,511-12). Smith, Cowan, and Pincus provided opinions

supporting diminished capacity and if Green had had their opinions he would not have advised Michael to plead(1stSupp.R.L.F.465-66,503-04,596).

Green stipulated to admitting Michael's St. Charles Jail records, without investigating(1stSupp.R.L.F.469-70). Green thought Smith's findings would have been helpful for rebutting jail aggravation(1stSupp.R.L.F.515-16). Green did not learn about Dr. Miller's opinions Rosenblum obtained, *infra*, until he received the 24.035 motion(1stSupp.R.L.F.466-67).

Green lived in St. Charles County all his life, had run in the 1994 and 1998 Democratic Prosecutor primaries there, and kept apprised of local politics(1stSupp.R.L.F.441-42,548-49). Green thought a St. Charles jury would have been receptive to diminished capacity based on Michael's mental illnesses and because parts of Givon's report were untrue(1stSupp.R.L.F.550-54).

2. <u>Rosenblum</u>

A diminished capacity defense was considered, but Givon's report did not support it and Givon's malingering and anti-social findings were problematic(1stSupp.R.L.F.622,627-28). Rosenblum had Dr. Miller evaluate Michael to assess diminished capacity(1stSupp.R.L.F.630). Miller was not called because his unfavorable findings outweighed the favorable, especially the anti-social finding(1stSupp.R.L.F.634-36). If Rosenblum had had information that would cause an evaluator to not find anti-social, then he would have provided it(1stSupp.R.L.F.694).

If Rosenblum had obtained a diagnosis of organic brain disorder, then that would have assisted him in determining whether to pursue diminished capacity(1stSupp.R.L.F.674). If Rosenblum had known the mental health histories of Michael's family, then he would have provided Miller that information(1stSupp.R.L.F.680-82).

Neither Miller nor Givon contacted any of Michael's family(1stSupp.R.L.F.684).

G. Dr. Miller

Dr. Miller reviewed the police generated materials, Givon's materials, and partial records of Michael's Methodist Medical Center psychiatric hospitalization(24.035Ex.10 at 2608;1stSupp.R.L.F.631,668-72).

Miller's diagnoses were: (1) ADHD; (2) cocaine and alcohol abuse; (3) PTSD; (4) major depression, recurrent; (5) rule out bipolar; (6) rule out dissociative disorder; (6) rule out malingering; and (7) anti-social personality (24.035Ex.10 at 2613).

H. Michael's Testimony

Michael would not have pled if counsel had properly investigated(2ndSupp.R.L.F.222).

I. 24.035 Findings

Nichols heard testimony from "members" of Michael's family recounting his difficult childhood with "thousands of pages" from Michael's life(R.L.F. 1067). The "thousands of pages" are documents Givon relied on(R.L.F. 1067).

See 24.035Ex.10 at 2583. Givon's report and the documents he relied on were admitted by stipulation(T.L.F.365; Pen.Hrg.Tr.6-7,295). These records supported abuse and neglect and counsel could not have presented them without investigating(R.L.F.1067).

Rosenblum retained Miller and both Miller and Givon had concluded Michael did not suffer from a mental disease or defect(R.L.F.1067-68). It was proper for counsel to rely on Givon's reports and what Givon relied on and Miller could not refute Givon(R.L.F.1068). Counsel acted reasonably because Michael was evaluated by Givon and Miller and counsel called Evans(R.L.F.1071).

Counsel made reasonable efforts to investigate diminished capacity, there was no basis to present it, and made a strategic decision not to rely on it(R.L.F.1068-69). There was no factual basis for Michael would not have pled if diminished capacity had been available(R.L.F.1069).

Counsel was not ineffective for failing to call from out-of-state Pincus and Smith because there was no showing they were known to counsel and reasonable counsel operating under their constraints would have found experts to testify similarly(R.L.F.1069,1073).

Reasonable experts interpreted Michael's social history differently and "[m]uch" of the 24.035 evidence could have shown antisocial(R.L.F.1069-70). The 24.035 experts' testimony would not have been helpful because they relied on history from Michael who was not reliable(R.L.F.1070).

Smith would have provided cumulative testimony to Evans and Nichols had found substance abuse was mitigating(R.L.F.1070).

J. Counsel Failed To Properly Investigate

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). In *Williams v. Taylor*,529U.S.362,369,395(2000), trial counsel presented mitigating evidence through the defendant's mother, his friends, and a psychiatrist, but failed to conduct investigation that would have uncovered extensive evidence of his abusive and deprived childhood. The jury also did not hear Williams was borderline mentally retarded and his mental impairments were likely organic in origin. *Id.*370,395-98. Williams was denied effective assistance under *Strickland*. *Id*.396-98. Moreover, counsels' failure to conduct sufficient investigation that would have uncovered mitigating evidence, but also would have yielded unfavorable past acts was not reasonable. *Id*.396.

Similarly, in *Wiggins v. Smith*,123S.Ct.2527,2537,2542(2003), the Court found counsel's failure to conduct a thorough investigation that would have uncovered evidence of physical and sexual abuse reflected only a partial mitigation case was presented. That partial case was the result of inattention and not reasoned strategic judgment and constituted ineffective assistance. *Id.*2537,2542.

In *Wiggins v. Smith*, the Court recognized counsel had abandoned their investigation of the defendant's background "after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 123S.Ct. at 2537(relying on ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6). Guideline 11.8.6 indicated counsel's obligations included investigating "medical history, educational history, employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences." *Wiggins*,123S.Ct. at 2537(emphasis in opinion).

ABA Guideline 10.7A provides counsel has "an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." *See* ABA Guidelines For the Appointment And Performance of Defense Counsel In Death Penalty Cases, 31 Hofstra L.Rev. 913, 1015(2003). The investigation expected "requires extensive and generally unparalleled investigation into personal and family history." *Id.*1022. "It is necessary to locate and interview the client's family members …and virtually everyone else who knew the client and his family …." *Id.*1024. Besides the client's records, counsel should obtain the records of "his parents, grandparents, siblings, cousins, and children." *Id.*1025. "A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment." *Id.*1025. "Counsel must also

investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence." *Id.*1027.

Counsel did not even acquire rudimentary knowledge about Michael's background. *Wiggins, supra*. Counsel did not interview in detail Michael's family and extended family and did not obtain their treatment history records. Green did not hire a paralegal or mitigation specialist and did not go to Peoria to investigate Michael's background because of financial limitations(1stSupp.R.L.F.433-37,457-459,661-62). Green failed to obtain a social history, even though his training mandated it(1stSupp.R.L.F.434-35). Family investigation was limited to speaking to Michael's mother on two occasions for ten to fifteen minutes(1stSupp.R.L.F.455). Michael's family history evidences an extensive history of mental illness from a multi-generational, horizontal, and vertical perspective. *See* Guidelines, 31 Hofstra L.Rev. at 1025; 24.035 Posterboard Exs.32,36.

In a death penalty case, counsel is obligated to conduct an investigation that allows them to determine what sort of experts to consult. *Caro v. Calderon*,165F.3d1223,1226(9thCir.1999). The information Michael's mother furnished in the 24.035 investigation was the type Green would have furnished to a mental health professional to determine whether Michael suffered from any mental illnesses(1stSupp.R.L.F.456-57). Michael's father's deposition provided greater detail about Michael's abusive environment(1stSupp.R.L.F.463). Green believed Smith's, Cowan's, and Pincus' diagnoses would have supported

diminished capacity and if he had had their findings, he would have advised go to trial(1stSupp.R.L.F.465-66,503-04,596). Green never obtained accurate diagnoses because he had not conducted the necessary social history investigation to determine what experts to consult followed by providing them with that history.

Smith found Michael was not able to understand the consequences of a plea because of his mental illnesses(R.Tr.555-56). Thus, the plea was not knowingly, intelligently, and voluntarily entered. *See Wilson v. State supra.*

Miller reviewed the same materials as Givon(24.035Ex.10 at 2608; 1stSupp.R.L.F.631,668-72). If Rosenblum had known Michael's family's mental health histories, then he would have furnished that to Miller(1stSupp.R.L.F.680-82).

Counsel's responsibility to investigate includes bringing to the attention of mental health experts examining the defendant facts the experts did not request. *Wallace v. Stewart,*184F.3d1112,1116(9thCir.1999). Counsel could not furnish Miller with facts necessary for an accurate assessment of Michael that Miller had not requested because they failed to conduct the necessary factual investigation into Michael's social history. Pincus, unlike Miller, was able to identify Michael's frontal lobe disturbance and Tourette's (R.Tr.138-39) because he was provided necessary personal data. For trial strategy to be a proper basis to deny relief, the strategy must be reasonable. *Butler v. State,*108S.W.3d18,25(Mo.App.,W.D.2003). The decision not to call Miller was not reasonable because it was the product of having failed to furnish Miller with a

comprehensive social history so he could render accurate diagnoses. Miller's diagnoses included needing to "rule out" bipolar disorder and malingering, potential diagnoses that needed additional investigation(24.035Ex.10 at 2613). After reviewing the detailed social history 24.035 counseled furnished that included Michael's mother's bipolar diagnosis, Pincus, Cowan, and Smith concluded Michael suffers from bipolar and was not malingering(R.Tr.110,112-15,117-18,128-31,177-78,196-97,278-79,284,533-34,552,640-41,644;24.035Ex.18 at 4636).

Counsel's responsibility includes providing State examiners with statements and records helpful to accurately profile the defendant's mental health. *Wallace v. Stewart*,184F.3d at 1117. Since counsel did not conduct the type of social history required to determine the type of expert they needed, they were not able to furnish Givon that history.

In *Starr v. Lockhart*,23F.3d1280,1288-90(8thCir.1994), the defendant's death sentence was reversed and the court reasoned, it was inappropriate to rely on a court ordered examination because "it did not delve into the mitigating questions essential to Starr."

What counsel did here and the 24.035 court sanctioned(R.L.F.1068) was what *Starr* condemned, rely on the State's examiner. Green acknowledged that as Michael's counsel he had a duty to investigate Michael's social history independent of Givon(1stSupp.R.L.F.601). In fact what happened was Green relied on Givon's work and stipulated to its admission(Pen.Hrg.Tr.6-

7,295;T.L.F.365). Contrary to the 24.035 findings (R.L.F.1067), counsel did not investigate Michael's social history, they simply relied on Givon. Rosenblum found pursuing diminished capacity was problematic because of Givon's findings and not any independent investigation(1stSupp.R.L.F.622,627-28). If Rosenblum had known the psychiatric history for Michael's family he would have furnished that to Miller(1stSupp.R.L.F.680-82). Miller could not have rendered accurate diagnoses on which to base a decision not to call him without having a complete social history.

In *Von Dohlen v. State*,2004 W.L. 1965873 *2(S.C. Aug. 30, 2004) counsel called a psychiatrist at penalty who testified the defendant had a transient, non-serious adjustment reaction and substance abuse. Counsel failed to provide the psychiatrist with social history information that would have supported diagnoses of longstanding serious mental illness. *Id*.*2-*5. Applying *Wiggins* to these facts, counsel was ineffective and death was set aside. *Id*.*4-*5. Counsels' actions here were worse, they relied on the State's psychologist Givon, who had nothing favorable to say, and called Evans to talk only about the effects of substance abuse. Counsel could have called experts to testify about Michael's longstanding serious organic mental disabilities.

The findings (R.L.F.1069,1073) counsel was not ineffective because these experts were unknown to counsel simply ignores counsel's duty to conduct a thorough investigation. *See Williams v. Taylor, Wiggins, and Guideline 10.7A.* Counsel had a duty to secure experts who possessed expertise like those of Pincus,

Cowan, and Smith who could have expressed similar opinions if furnished with a thorough social history. Likewise, the finding that had counsel obtained the favorable evidence, they also would have discovered unfavorable anti-social behavior (R.L.F.1070) was expressly rejected in *Williams v. Taylor*,529U.S. at 396. The expert testimony was rejected because much history came from Michael(R.L.F.1070). The diagnoses provided, however, were not primarily based on Michael's self-reporting and what he did report had independent confirmation(R.Tr.129-30,184-85,533-34,640-41).

The failure to conduct adequate investigation followed by consultation with appropriate experts meant Michael pled when he had a diminished capacity defense Green thought a St. Charles jury could be persuaded to find(1stSupp.R.L.F.550-54). Pincus concluded Michael was not able to have coolly reflected because of his mental illnesses(R.Tr.121,145,194). Smith found Michael had suffered from diminished capacity based on his mental illnesses, unrelated to his substance abuse(R.Tr.553-54). If Green had had Smith's, Cowan's, and Pincus' diagnoses he would not have advised Michael to plead because diminished capacity was available and Michael would not have pled(1stSupp.R.L.F.503-04;2ndSupp.R.L.F.222).

Reasonably competent counsel under similar circumstances would have conducted the appropriate social history investigation needed to obtain experts who could have accurately assessed Michael's mental infirmities and who would have provided diagnoses supporting diminished capacity. *See Kenley* and ABA

Guideline 10.7A, *supra*. Michael was prejudiced because he would not have pled and there is a reasonable probability he would not have been convicted of first degree murder. *See Hill v. Lockhart*, *supra*.

Empirical data shows "organic brain problems" are highly persuasive mitigation. *Smith v. Mullin*, 2004W.L.1690269(10thCir. July 29, 2004). Michael's multiple organic brain disorders would have been highly persuasive mitigation(R.Tr.93,95,98,107-08,110,114-15,117-18,177-78,240,327,552;24.035Ex.18 at 4636). The Tourette's impaired Michael's abstract reasoning, executive functions, and aggressive behavior control(R.Tr.244-45). That Michael was thrown into a manic state at the time of the offense, caused by Dr. Ryall prescribing antidepressants to someone with bipolar(R.Tr.119-22,146), would have been compelling mitigation evidence and rebutted respondent's aggravation.

"One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*,80S.W.3d 817,827(Mo.banc2002). *See*, *also*, *Wiggins v. Smith*,123S.Ct. at 2537 (counsel has duty to investigate and rebut aggravating evidence); *Parker v. Bowersox*,188F.3d923,929-31(8thCir.1999).

One aggravator was Michael's pretrial jail conduct(24.035Ex.15 at 3893). Pincus would have rebutted and mitigated it by testifying that the jail incidents were the result of Michael not receiving proper psychiatric medications(R.Tr.122-25,127-28). Pincus also could have rebutted respondent's evidence Michael had

been involved in fifty-five "incidents" since some related to him needing medical care(R.Tr.125). Smith would have testified Michael's care providers did not recognize his entire array of disorders and the punishments imposed only made his behavior worse(R.Tr.555). Green took no actions to investigate, mitigate, and rebut the matters contained in the jail records, but instead stipulated to their admission(1stSupp.R.L.F.469-70).

Pincus also could have rebutted Givon's malingering. Specifically, Pincus found Michael was not malingering because he could not fake his motor eye tic, he was not sophisticated enough to fake, and the consistencies between Pincus' and Cowan's findings(R.Tr.128-31,196-97). Cowan's testing found Michael was not malingering(R.Tr.278-79,284) and Givon had not followed the malingering test protocol(R.Tr.307-08). Smith, likewise, would have rebutted and mitigated Givon because Michael's mental impairments were corroborated with records and by others(R.Tr.533-34,640-41,644).

Pincus could have rebutted and mitigated Givon's anti-social because the symptoms presented by frontal lobe damage are the same for anti-social(R.Tr.131-35). Cowan found the behaviors Givon relied on were consistent with Tourette's and frontal lobe dysfunction and not Givon's diagnoses(R.Tr.274,312-13). Cowan would have rebutted and mitigated anti-social because there had not been a prior conduct disorder diagnosis before fifteen(R.Tr.274-78,311,313). Smith would have rebutted and mitigated anti-social because he found Michael's symptoms consistent with Tourette's, bipolar, and ADHD(R.Tr.645).

The motion court misstated the record finding counsel was not ineffective because Nichols had "thousands" of pages from Michael's life while listing documents Givon relied on(R.L.F.1067;24.035Ex.10 at 2583). Nichols did have Ex.39A-H, some documents Givon relied on, but those are only about one-half inch thick and do not even remotely approach "thousands" of pages. More importantly, Givon had nothing favorable to offer. The motion court also misstated the record when it found that "members" of Michael's family testified, only Tegard briefly testified. Smith was not cumulative to Evans(R.L.F.1070) because Evans only dealt with the impact of Michael's substance use(Pen.Hrg.Tr.738-76).

Loss of control arising from substance abuse is not particularly mitigating. Garvey, *Aggravation And Mitigation In Capital Cases: What Do Jurors Think?*, 98 Columbia L.Rev. 1538,1565(1998). More jurors think drug addiction is aggravating than mitigating. *Id.*1565. The only expert counsel presented was Evans, who offered drug addiction testimony(Pen.Hrg.Tr.738-76). Braun told Nichols Michael's drug and alcohol use made his acts more aggravated(Clos.Arg.Tr.20-21). In contrast, Tourette's, ADHD, bipolar, and cerebral frontal lobe impairment, were all diagnoses that clearly would have significantly mitigated punishment and Nichols never heard. *See Smith v. Mullin*, *supra*. While Nichols heard from Tegard some abuse and neglect evidence, she never heard it rose to causing PTSD.

Reasonably competent counsel under similar circumstances would have conducted a thorough social history investigation and presented testimony like that available from individuals like Pincus, Cowan, and Smith to mitigate punishment and respond to aggravation. *See Williams v. Taylor*, *Wiggins*, *Ervin*, and Guideline10.7A, *supra*. Michael was prejudiced because there is a reasonable probability he would not have been sentenced to death. *See Williams v. Taylor*, and *Wiggins*.

This Court should vacate Michael's convictions and sentences.

VI. FAILURE TO SUPPLY DR. EVANS SOCIAL HISTORY

The motion court clearly erred denying the claim and accompanying offer of proof counsel was ineffective for failing to adequately investigate Michael's personal social history and to furnish it to Dr. Evans who could have utilized it to testify Michael was not being properly medicated for his mental disabilities in the St. Charles County Jail which would have explained the cause of his jail incidents because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have taken those actions and Michael was prejudiced because that evidence would have rebutted respondent's jail incidents aggravating evidence and mitigated punishment.

The motion court denied counsel was ineffective for failing to provide Evans with Michael's personal social history and the related offer of proof. Counsel should have provided Evans with that background information because he could have explained Michael's St. Charles County Jail incidents were the product of him not being properly medicated for his mental disabilities. Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant

must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

A. Claims Pled

Counsel was ineffective because they failed to supply Evans with Michael's social history which would have provided Evans necessary background to support a diminished capacity defense or at least mitigated punishment by rebutting aggravation(24.035Depo.Ex.42 at 279-82).

B. 24.035 Findings

This claim was treated as only involving counsel's ineffectiveness for failing to furnish social history information to Evans to support diminished capacity(R.L.F.1075). Evans was not qualified to render a psychological opinion under Chapter 552 which read in conjunction with §632.005(12) limits those who can express such an opinion to psychiatrists, psychiatry residents, psychologists, psychiatric nurses, and psychiatric social workers(R.L.F.1075). Since Nichols had found Michael's substance abuse mitigating any additional testimony from Evans would have been cumulative(R.L.F.1075).

C. Evans' Penalty Hearing Testimony

Evans is a Ph.D. pharmacologist and Auburn University's Pharmacy School Dean whose expertise includes the psychiatric effects of abused substances(Pen.Hrg.Tr.725-30). Psychological examinations are outside Evans' education and training and he is not qualified to render DSM

diagnoses(Pen.Hrg.Tr.732-33). Michael displayed classic polysubstance abuse symptoms(Pen.Hrg.Tr.772). Evans opined Michael was intoxicated at the time of the offense and was incapable of making a decision about his behavior(Pen.Hrg.Tr.738-76).

D. Evans' 24.035 Testimony

Evans' educational training included having done a pharmacy residency and he is a board certified psychiatric pharmacist(R.Tr.650).

Green asked Evans to evaluate Michael to determine the impact of his substance abuse on his behavior(R.Tr.654). Green spent "a very small amount of time" discussing Michael's case with Evans and no time preparing Evans to testify(R.Tr.654-55). The documents Green furnished were: (1) Givon's report; (2) Michael's Methodist Medical Center records; (3) police reports; (4) DNA reports; and (5) cocaine plasma concentration report(R.Tr.657-58).

Evans understood his role to be to discuss at penalty the impact of substance abuse on Michael(R.Tr.658-59). For Evans to fully utilize his expertise in formulating his opinions, he needed to coordinate with a psychologist's or psychiatrist's evaluation and diagnosis because under law he cannot provide a diagnosis(R.Tr.661).

Respondent objected under §632.005 to the 24.035 court hearing evidence from Evans(R.Tr.662-68). Rule counsel indicated Evans would testify to additional matters he could have testified to at the penalty hearing if he had been provided the social history data compiled for the 24.035(R.Tr.665). The court

sustained respondent's objection to Evans testifying stating it had a problem with Evans expressing his 24.035 opinions because he would be repeating his penalty hearing testimony as if Pincus, Cowan, and Smith had just given their diagnoses to Nichols(R.Tr.666-67). Evans' testimony was presented as an offer of proof(R.Tr.667-68).

Evans was furnished and reviewed the social history data compiled for the 24.035(24.035Ex.18 at 4651-59)(R.Tr.670-88). From reviewing all the data, and focusing on the St. Charles Jail records, Evans indicated because Michael's Tourette's and bipolar disorder were not being treated at the jail his resulting jail problems incidents were explainable for that reason(R.Tr.679,681-82). Michael was not consistently given drugs in the jail needed to treat his mental illnesses and when he was given appropriate medicines he did not get appropriate dosages(R.Tr.680-81). Even more problematic was while in the jail he was given an anti-depressant which made his bipolar disorder worse(R.Tr.680-81). The offer of proof was denied(R.Tr.692-93).

E. <u>Counsels' Testimony</u>

As discussed in greater detail in Point V, and incorporated here, counsel did not conduct a detailed investigation of Michael's social history. Green, who was responsible for the social history investigation, did not hire a paralegal or mitigation specialist and did not go to Peoria to investigate Michael's background because he did not control expenditures and because of the financial practicalities of running his private practice(1stSupp.R.L.F.433-37,459,661-62). The social

history investigation was limited to speaking to Michael's mother on two occasions for ten to fifteen minutes(1stSupp.R.L.F.455).

F. Counsel's Failure to Rebut And Mitigate Jail Evidence

The failure to conduct a thorough investigation that would mitigate punishment and rebut aggravation constitutes ineffective assistance of counsel. *Williams v. Taylor*,529U.S.362(2000); *Wiggins v. Smith*,123S.Ct.2527(2003). "One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*,80S.W.3d 817,827(Mo.banc2002). *See*, *also*, *Wiggins v. Smith*,123S.Ct. at 2537 (counsel has duty to investigate and rebut aggravating evidence); *Parker v. Bowersox*,188F.3d923,929-31(8thCir.1999).

The motion court's ruling, relying on Chapter 552 in conjunction with §632.005(12) as applied to Evans, was clearly erroneous. Evans never offered DSM diagnoses as to Michael's mental disabilities. Evans as a board certified psychiatric pharmacist was not prohibited from offering his assessments Michael had not been receiving proper medications and their correct dosages for his mental illnesses. Those assessments were not prohibited under §632.005(12) and Evans as a board certified psychiatric pharmacist was uniquely qualified to so testify.

Respondent called witnesses and presented documents to support Michael was involved in fifty-five pre-trial jail incidents(Pen.Hrg.Tr.151-52). The documents, testimony, and Nichols' finding jail behavior as aggravating are discussed in greater detail in Point V and incorporated here.

Evans' 24.035 testimony would not have been cumulative to his trial testimony (R.L.F.1075) because his trial testimony was limited to addressing the impact of Michael's intoxication on his decision making ability at the time of the offense(Pen.Hrg.Tr.738-76). The additional testimony that could have been presented would have explained Michael's jail behavior.

Reasonably competent counsel under similar circumstances would have conducted a thorough social history investigation and provided that information and documentation to Evans who could have utilized it to testify Michael was not being properly medicated for his mental disabilities while held in the jail and would have explained the cause of his jail incidents. Michael was prejudiced because that evidence would have rebutted respondent's aggravating evidence and mitigated the punishment imposed such that there is a reasonable probability he would not have been sentenced to death.

This Court should vacate Michael's sentences.

VII. FAILURE TO OBJECT TO LACK OF NOTICE OF NON-STATUTORY AGGRAVATORS AND HEARSAY PRESENTATION

The motion court clearly erred denying the claim counsel was ineffective for failing to object to lack of notice of non-statutory aggravators and respondent's evidence on them constituted hearsay as testified to by respondent's witnesses McKee, Smith, McKean, Frey, and Givon because Michael was denied his rights to due process, to confront witnesses, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel who had not received proper notice of the non-statutory aggravators these witnesses were called to testify about would have objected to the court considering them on lack of notice and hearsay grounds and Michael was prejudiced because Nichols could not have considered the evidence from these witnesses and there is a reasonable probability that without this evidence Michael would not have been sentenced to death.

The motion court rejected counsel was ineffective for failing to object to respondent's presentation of non-statutory aggravators through witnesses McKee, Smith, McKean, Frey, and Givon without proper notice and the evidence was hearsay. Michael was denied his rights to due process, to confront witnesses, to be free from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

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

A. Officer McKee

Respondent presented evidence of multiple incidents involving Michael while he was in the St. Charles Jail through jail officer McKee(Pen.Hrg.Tr.164). In July 1997, respondent filed a witness endorsement that only listed and stated: "The Major Case Squad report involving the above referenced witness has previously been disclosed to defendant's attorney through discovery"(T.L.F.78).

Green stipulated to admitting Michael's St. Charles County Jail records because he thought there was no legal basis for objecting and had not investigated the contents' veracity(T.L.F.365-68;Pen.Hrg.Tr.6-7;1stSupp.R.L.F.469-70). McKee was not personally present for all incidents he testified about, and therefore, did not have personal knowledge(Pen.Hrg.Tr.174).

Michael possessed homemade alcohol and when it was found, he threatened a guard(Pen.Hrg.Tr.138-39). A razor blade was found in Michael's cell(Pen.Hrg.Tr.140-42). Michael assaulted a jail officer and when he was restrained he threatened to kill other officers(Pen.Hrg.Tr.142-44).

Michael was the kind of person who was involved in and instigated fights(Pen.Hrg.Tr.144-46). Michael challenged an officer to fight and got into an

argument with the control bubble officer which included him spitting at the control center and throwing things(Pen.Hrg.Tr.147-48).

Michael wedged a broom handle in a sliding security door(Pen.Hrg.Tr.149-50). McKee stated Michael's jail records reflected he was involved in fifty-five jail incidents as documented in Exs.29A-C and Ex.29D summarized those in chart form(Pen.Hrg.Tr.151-52). Michael's reputation was combative and violent(Pen.Hrg.Tr.188).

B. Officer Smith

Only Smith's name, along with other names, appeared in a July, 1998 penalty endorsement(T.L.F.290-92).

By stipulation respondent introduced a preliminary hearing transcript from an assault charge brought against Michael arising from a fight with another St. Charles County inmate, Mintner, and Michael chasing and striking Mintner with a broom(Pen.Hrg.Tr.6-7,199;T.L.F.365-68;24.035Ex.16 at 4180-84,4188-93;Trial Ex.38). Respondent called Jail Officer Smith to testify to what he saw(Pen.Hrg.Tr.199-206).

C. Officer McKean

Only McKean's name appeared in the same endorsement filing with Smith, *supra*(T.L.F.291). Michael's Peoria arrest records were admitted by agreement(Pen.Hrg.Tr.6-7,221-22;T.L.F.365-68;Exs.35,83A and B).

Peoria Officer McKean testified about specific incidents contained in those records(Pen.Hrg.Tr.223-33). Michael did three burglaries where he stole items

from guest rooms using a master key at Jumer's Motel, where he worked(Pen.Hrg.Tr.224-28). Michael's mother gave a knife to the police while stating she was doing that because of Michael's violent tendencies and the knife was used to assault her father(Pen.Hrg.Tr.239-40,247). Trial Exhibit 35M reported Michael shot at his grandfather(Pen.Hrg.Tr.240). Michael admitted using someone's bank card to get ATM money(Pen.Hrg.Tr.240-41).

McKean indicated Michael was listed in thirty-seven police reports(Pen.Hrg.Tr.228-29). Several reports reflected Michael's maternal grandparents were the victims of burglaries, thefts, and assaults he did(Pen.Hrg.Tr.229-30).[1]

D. <u>Probation Officer Esposito Frey</u>

Only Esposito Frey's name appeared in the same filing endorsing McKean and Smith, *supra*(T.L.F.291). In April, 1998, respondent disclosed Frey's Interview Worksheet for penalty(T.L.F.283). Respondent endorsed Frey without identifying what non-statutory aggravators she would testify about and requested an out-of-state subpoena for her to testify about her worksheet and report(T.L.F.284-85).

Frey testified about a PSI she prepared as a Peoria Probation Officer because of Michael's September, 1995 guilty plea for burglary and

[1] As discussed in Point X, Michael's mother committed many acts attributed to him and the alleged assault of his grandfather never happened.

theft(Pen.Hrg.Tr.248-54). The burglary occurred at Jumer's Motel and the theft was for stealing cigarettes from Kroger's(Pen.Hrg.Tr.250-52). Frey's report was admitted by stipulation(Pen.Hrg.Tr.6-7,253-54;T.L.F.365-68). Michael did not appear for sentencing because he was in Missouri custody on the charges here(Pen.Hrg.Tr.253).

Frey testified about Michael's former placements in juvenile facilities for burglaries and thefts(Pen.Hrg.Tr.253-55). While at a juvenile detention center, Michael formulated an escape plan and was regarded as a major security risk(Pen.Hrg.Tr.255). Frey's escape risk information came from the hearsay letter of a juvenile detention administrator(Ex.33B at "C29-30"). Frey, relying on the report of School Psychologist Kessler done when Michael was a seventh grader, testified Michael told Kessler that "[w]hen his adrenaline gets going, he could kill someone"(Pen.Hrg.Tr.257;Ex.33B at "A50"). Again relying on Kessler's report, Frey testified Michael had thoughts of killing others by stabbing them in the chest, including his stepfather, teachers, and other children(Pen.Hrg.Tr.257;Ex.33B at "A53").

In April, 1998, respondent endorsed Kessler and sought an out-of-state subpoena for her to testify about her evaluation and statements Michael made(T.L.F.284,287). Only Kessler's name appeared in the same filing endorsing McKean, Smith, and Frey *supra*(T.L.F.291). Kessler did not testify, but her evaluation was presented as hearsay through Frey, *supra*.

E. <u>Dr. Givon</u>

On August 31, 1998, respondent endorsed Givon without specifying what non-statutory aggravators he would testify about(T.L.F.356).

Green stipulated to admitting Givon's report and the documents Givon relied on(PenHrg.6-7,295;T.L.F.365-68). Givon testified Michael said he had burned his friend Butch Mackey over 90% of his body when Michael threw gasoline on him(Pen.Hrg.Tr.310). Twenty-two referrals for discipline, while held in juvenile detention, were consistent with Givon's findings of conduct disorder(Pen.Hrg.Tr.312).

F. Braun's Argument And Proposed Findings

In Braun's argument, he urged the court to impose death based on matters that included: incidents that resulted in Michael having been placed in juvenile detention (Clos.Arg.Tr.17), adult convictions Michael had for burglary and theft (Clos.Arg.Tr.17), thefts from Michael's grandparents and assaulting his grandfather (Clos.Arg.Tr.17), taking an ATM card (Clos.Arg.Tr.17), breaking into motel rooms (Clos.Arg.Tr.17), stealing cigarettes from Kroger (Clos.Arg.Tr.17), assaulting a St. Charles jail inmate with a broomstick (Clos.Arg.Tr.18), statements made to a school psychologist about killing someone (Clos.Arg.Tr.18), threatening to kill jail guards (Clos.Arg.Tr.19,24), fighting with jail guards (Clos.Arg.Tr.19), and his reputation with guards as confrontational(Clos.Arg.Tr.19). Braun also told Nichols: "he can't live peacefully in prison. He doesn't deserve a life sentence. The death penalty is needed to stop him"(Clos.Arg.Tr.19).

Respondent's proposed findings argued the non-statutory aggravators supporting death included: (a) Michael's prior conviction history; (b) Michael was on bond awaiting sentencing for Illinois burglary and theft charges; and (c) Michael's St. Charles County Jail conduct(T.L.F.420-21).

G. Non-Statutory Aggravators Found

Nichols found as non-statutory aggravators Michael's: (a) violent pre-trial confinement behavior; (b) criminal history; and (c) bond awaiting sentencing status on Peoria County, Illinois burglary charges(24.035Ex.15 at 3893).

H. 24.035 Findings

Counsel was not ineffective for stipulating to admitting Michael's St. Charles Jail records because the trial transcript indicates counsel was aware those records would be admitted(R.L.F.1079-80). The trial transcript indicates trial counsel anticipated the evidence presented through McKee because counsel called two inmates, Wallace and Wolf, to testify about McKee's personal bias towards Michael(R.L.F.1079-80).

Counsel had provided notice mitigating evidence Michael came from a dysfunctional family where he was abused and neglected and he had a long history of drug abuse would be presented(R.L.F.1079-80). The evidence now complained of "went towards supporting these propositions" (R.L.F.1079-80).

I. Counsel Was Ineffective

The State is required to provide notice of unconvicted misconduct it intends to rely on to prove non-statutory aggravators. *State v. Debler*,856S.W.2d641,656-58; *State v. Ervin*,979S.W.2d149,158(Mo.banc1998); *State v. Thompson*,985S.W.2d779,791-92(Mo.banc1999).

Counsel was not provided here with the required notice of what specific acts would be presented as non-statutory aggravators through each of these witnesses. *See Thompson* and *Debler, supra*. The only notice counsel had was that each of these witnesses might be called.

That counsel may have been aware of Michael's jail records (R.L.F.1079-80), ignores counsel was not provided notice as to what evidence was going to be presented through respondent's witnesses and which aggravators their evidence would support. That counsel called fellow jail inmates to testify (R.L.F.1079-80) that during an incident McKee made a statement he intended to help respondent in-court get death (Pen.Hrg.Tr.638-44,649-51,655-58,665-71), likewise ignores the notice requirement. Further, the testimony of other jail inmates was undoubtedly received with great skepticism because they were inmates.

The findings suggest respondent's duty to disclose did not exist because counsel gave notice of certain mitigating circumstances(R.L.F.1079-80). Such a finding is squarely at odds with this Court's decisions in *Thompson, Ervin*, and *Debler*.

Reasonably competent counsel under similar circumstances who was not provided notice of the specific non-statutory aggravators to be presented, required

under *Thompso*n and *Debler*, would have objected to all the noted evidence of non-statutory aggravators and not stipulated to admitting aggravating matters presented through these witnesses. *See Strickland*, *supra*. Further, reasonably competent counsel under similar circumstances would have objected on the grounds that much of what these witnesses testified about constituted improper hearsay. *See Crawford v. Washington*,124S.Ct.1354(2004). *See also*, *State v. Bell*, 950S.W.2d482(Mo.banc1997)(reversing conviction when respondent introduced hearsay evidence to challenge defendant's version of how his wife was set on fire).

Michael was prejudiced because if counsel had objected, then Nichols would have been required to not consider the evidence from these witnesses and there is a reasonable probability without this evidence Michael would not have been sentenced to death. That prejudice is apparent because the witnesses supported, and Braun argued, non-statutory aggravators Nichols found (24.035Ex.15 at 3893). The prejudice to Michael is apparent because had counsel objected then crimes attributed to Michael, but he never committed (Points I,II,X) would not have been weighed in determining punishment.

This Court should vacate Michael's sentences.

VIII. INVESTIGATION NOT DONE - NO MONEY

The motion court clearly erred rejecting claims counsel was ineffective for failing to fully investigate and to prepare guilt defenses and penalty mitigation because of lack of money, some of which required retaining experts, and that counsel who was so confronted was ineffective for failing to request money from the court to conduct the necessary investigation and preparation because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have conducted the necessary investigation and preparation and to the extent those efforts required a substantial monetary expenditure counsel would have requested necessary money from the court and Michael was prejudiced because he would not have pled guilty and there is a reasonable probability he would not have been sentenced to death.

The motion court rejected claims counsel was ineffective for failing to fully investigate and to prepare guilt defenses and penalty mitigation because of a lack of money and for failing to request money under *Ake v.Oklahoma*,470U.S.68(1985). Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

A. Caselaw Standards

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To obtain a hearing, a movant must allege facts warranting relief resulting in prejudice. *Belcher v. State*,801S.W.2d 372,375(Mo.App.,E.D.1990). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). To establish prejudice where a plea was entered, a movant must demonstrate there is a reasonable probability absent counsel's errors he would not have pled and insisted on going to trial. *Hill v. Lockhart*,474U.S.52,58-59(1985).

B. Pre-Plea Lack of Money

Eisenstein's co-counsel, Ryan, filed a July, 1997 motion requesting the court pay for experts, testing, and psychological evaluations because Michael had always been "indigent"(T.L.F.69,73-74). The motion indicated attorneys' fees had been paid by a non-relative and the non-relative could not pay these other costs(T.L.F.73-74). Cundiff denied the motion(T.L.F.76-77). In August, 1997, Rosenblum and Green entered(T.L.F.80,115-16).

C. Claims Pled

Michael was denied effective assistance of counsel, due process, a fair trial, equal protection, and subjected to cruel and unusual punishment in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments because Green did not have the

money or support staff to investigate guilt or penalty(24.035Depo.Ex.42 at 260,262). Green would testify Rosenblum controlled expenditures and denied his request for investigator assistance(24.035Depo.Ex.42 at 260,262,264). Green would testify because he had insufficient funds to investigate he failed to: (1) interview Michael's family and other Peoria associates; (2) provide expert witnesses with a complete social history; and (3) present testimony of a psychologist, neuropsychologist, and neurologist for a guilt defense, penalty mitigation, and rebutting Givon(24.035Depo.Ex.42 at 260,262-65).

Green would testify but for his lack of investigation, he would have recommended Michael go to trial(24.035Depo.Ex.42 at 261-62,270,274). Michael would testify he would have followed that recommendation(24.035Depo.Ex.42 at 261-62,264). Michael was prejudiced by the lack of money because it unreasonably resulted in recommending Michael plead open(24.035Depo.Ex.42 at 261). As a result of Green's failure to investigate, Michael's plea was not knowing, intelligent, and voluntary(24.035Depo.Ex.42 at 261,263-64,273-74).

Green would testify Rosenblum paid him $10,000 for his time, but little for case preparation expenses(24.035Depo.Ex.42 at 265,271). The $10,000 came from $50,000 paid to Rosenblum by Michael's family friend, Wayne King(24.035Depo.Ex.42 at 265).

Green would testify even though he was not retained to prepare the entire case he eventually did because no one had(24.035Depo.Ex.42 at 265,267). Green would testify initially it was agreed he, Rosenblum, and Kessler would share

responsibilities(24.035Depo.Ex.42 at 266). Green would testify the initial agreement was Kessler would assist on penalty, but because of a dispute between Rosenblum and Kessler that Kessler left Rosenblum's office(24.035Depo.Ex.42 at 266). Green would testify he was retained only to investigate DNA and mitigation(24.035Depo.Ex.42 at 271).

Because Green lacked money to properly investigate, he had a duty to so inform the court(24.035Depo.Ex.42 at 265). Because Green failed to apprise the court of the lack of money, Michael was sentenced to death based on counsel's ineffectiveness(24.035Depo.Ex.42 at 265). Green failed to request money from the trial court to pay for experts(24.035Depo.Ex.42 at 270).

D. Counsels' And Michael's Testimony

Wayne King hired Rosenblum; King is referred to as Michael's uncle, but in fact is not(1stSupp.R.L.F.446,585-86,655-56). Rosenblum subcontracted with Green for $10,000 to work on the case with him and Kessler(1stSupp.R.L.F.436,446,523). Green was to work on DNA and mitigation, but Green subsequently acquiesced to a larger role without renegotiating compensation(1stSupp.R.L.F.446,527,572-73).

From Green's prior capital experience, he knew having a social history was important to do before deciding on how to pursue guilt and penalty (1stSupp.R.L.F.432-33). Rosenblum left Green primarily responsible for social history(1stSupp.R.L.F.661-62).

Green did not do a complete social history that would have included going to Peoria and talking to Michael's relatives and associates(1stSupp.R.L.F.433-34). Based on Green's training that type of social history should have been done and would have been done by a paralegal or mitigation specialist(1stSupp.R.L.F.434-35). Green did not have investigative assistance because he could not contract with anyone since he did not control spending(1stSupp.R.L.F.435-37).

Green did not "retain" a DNA expert because he had another case involving the same laboratory, and therefore, had that lab's proficiency reports and protocols(1stSupp.R.L.F.446-47). Green did "talk" with DNA expert Stetler, but based on having seen the genetic markers and the proficiency reports decided not to request money for a challenge(1stSupp.R.L.F.447,460)[2].

The social history information 24.035 counsel developed through Michael's mother's deposition testimony and affidavit was the type Green would have given to a psychologist or psychiatrist to determine whether Michael suffered from any mental illnesses(1stSupp.R.L.F.456-57). Green never went to Peoria because of the financial practicalities of running his private practice and what he was paid(1stSupp.R.L.F.457-58).

Green did not consider requesting money for experts under *Ake* because Eisenstein's earlier request was denied(1stSupp.R.L.F.459). Rosenblum

[2] Green's testimony expressly refuted the 24.035 finding, *infra*, a DNA expert was "retained."

authorized spending money for Evans, but not a mitigation specialist or going to Peoria(1stSupp.R.L.F.459).

Green knew for a plea to be knowing, intelligent, and voluntary it was necessary to investigate before recommending a plea(1stSupp.R.L.F.724). Michael did not have the expertise to know whether his plea was knowing, intelligent, and voluntary(1stSupp.R.L.F.725-26).

Michael would not have pled guilty if counsel had properly investigated his case(2ndSupp.R.L.F.222).

E. 24.035 Findings

The claim was ruled as denied without a hearing because the pleadings failed to allege facts not refuted by the record and if true warranted relief(R.L.F.1074). Money was spent for an expert "retained" to review DNA evidence after records were sent to that expert, Miller's examination, and Evans(R.L.F.1075). The pleadings were conclusory and speculative(R.L.F.1075).

F. Counsel Was Ineffective

1. Inadequate Preparation

Despite the motion court's ruling, the record shows it actually heard evidence and did not deny without a hearing.

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). As discussed in greater detail and incorporated here, *Williams v. Taylor*,529U.S.362(2000) and *Wiggins v.*

Smith,123S.Ct.2527(2003), require counsel conduct a thorough investigation into mitigation and presenting only a partial mitigation case is not effective assistance.

Green knew reasonably competent counsel under similar circumstances would have had a paralegal or mitigation specialist prepare a social history before deciding how to pursue guilt and penalty(1stSupp.R.L.F.432-35). That investigation and preparation did not get done because Green did not have the authority to spend money(1stSupp.R.L.F.435-37). Green's reasons for failing to go to Peoria included the financial practicalities of running his own practice and what he was paid(1stSupp.R.L.F.457-58). The social history information 24.035 counsel developed was the kind Green would have given to a psychologist or psychiatrist to assess Michael for mental illnesses(1stSupp.R.L.F.456-57). Like counsel in *Williams v. Taylor* and *Wiggins v. Smith, supra,* Michael's counsel failed to act as reasonably competent counsel under similar circumstances when they failed to fully investigate Michael's case. Green would not have advised Michael to plead guilty, if he had fully investigated Michael's case (1stSupp.R.L.F.503-04). Moreover, if a proper social history had been done, then Michael's mental disabilities would have been properly diagnosed (Point V) and respondent's aggravation would have been rebutted and mitigated (Points I,V,VI,X). Michael was prejudiced because he would not have pled guilty and there is a reasonable probability he would not have been sentenced to death (2ndSupp.R.L.F.222). *See Williams*, *Wiggins*, and *Strickland.*

Counsel's failures here are similar to those in *Thomas v. Kuhlman*,255F.Supp.2d99,111(E.D.N.Y.2003) where private counsel was ineffective. If counsel had investigated the crime scene, then counsel would have learned it was physically impossible for a state's witness to have seen what she claimed. *Id.*101.

Thomas' counsel did not hire an investigator to examine the crime scene because he did not believe the defendant's family would have paid for it. *Id.*111. Counsel had a duty to at least get on the subway and go to the witness' vantage point and ascertain himself whether the witness could have actually seen what she claimed, even though the time counsel would have spent going was a lost opportunity cost for generating other income. *Id.*110. While sending an investigator to the scene would have required spending counsel's money, "[h]aving accepted the responsibility of representing a criminal defendant, counsel owes a duty to his client that will on occasion require him to make financial outlays that might be considered unfair for an ordinary businessman who, unlike a licensed attorney, has not voluntarily adopted an enhanced ethical obligation to society." *Id.*110-11. That aside, counsel still had failed to request investigation money from the county under state statute. *Id.*111.

To the extent Green could have done necessary investigation and preparation without unreasonable financial burden to himself, whether that have been his own time spent or financial outlay to others to have performed the work, he failed to act as reasonably competent counsel under similar circumstances. *See*

Thomas. Michael was prejudiced because he would not have pled guilty (2ndSupp.R.L.F.222) and there is a reasonable probability he would not have been sentenced to death based on the aggravation that would have been rebutted and the mitigation that could have been presented (Points I,V,VI,X). *See Strickland*.

2. <u>Failure To Request Money</u>

The due process clause requires a defendant has a fair opportunity to present his defense. *Ake v.Oklahoma*,470U.S.68,76(1985). That opportunity "derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Id*.76. An adequate opportunity to present a defense requires a defendant be provided the basic tools needed. *Id.*77. An indigent defendant is entitled to have the court pay for expert assistance necessary to evaluate, to prepare, and to present his defense, which in *Ake* was a psychological defense. *Id.*83,86-87.

A defendant is still eligible for State funding to pay for necessary expert services when the defendant is indigent and represented by private counsel when that counsel was paid for by a friend or relative. *See State v. Jones*,707So.2d975,977-78(La.1998); *Ex parte Sanders*,612So.2d1199(Ala.1993). Such funding is still available to protect the defendant's right to a fair trial. *Jones*,707So.2d at 977. King hired Rosenblum who then subcontracted with Green to represent Michael(1stSupp.R.L.F.436,446,523,585-86,655-56). Under

Jones' and *Sanders'* rationale, Michael would have been eligible for court paid for expert services, if requested.

In *Moore v. State*,827S.W.2d213,214-15(Mo.banc1992), appointed counsel was ineffective for failing to obtain blood testing that would have supported innocence. Counsel had argued to the jury the defendant had requested the blood testing, but could not afford it. *Id.*215. At the postconviction hearing, the Public Defender's comptroller testified money had been available, but counsel had made no effort to get it. *Id.*214. Michael's counsel was like Moore's because they made no effort to avail themselves of money from the court, even though under *Ake* the court was constitutionally required to make the funds available.

In *Starr v. Lockhart*,23F.3d1280,1288(8thCir.1994) the Court noted *Ake* requires "that an indigent defendant be supplied with the basic tools necessary for an effective defense." Those basic tools include experts. *Id.*1288. The defendant's death sentence was reversed, where the request for a mental health expert to assist preparing a diminished capacity defense and mitigating circumstances had been denied, because an appropriate examination to explain the effects of Starr's mental retardation on his relative culpability at sentencing was necessary. *Id.*1288,1290.

Green acknowledged the need to have done a social history(1stSupp.R.L.F.432-37). The information that would have been obtained was the type Green would have furnished to a mental health professional(1stSupp.R.L.F.456-57). That social history required someone having

gone to Peoria. Green was obligated to act as reasonably competent counsel and to have requested money from the court for the services that needed to be done, like counsel in *Starr* did. If that request had been denied, then under *Ake* and *Starr* Michael would have been entitled to relief.

Green did not seek money from the court because Cundiff had denied Eisenstein's/Ryan's motion(T.L.F.69,73-74,76-77;1stSupp.R.L.F.459). That request, however, was made to Cundiff, and not Nichols(T.L.F.76-77). Ryan's motion did not assert providing court funded expert assistance was constitutionally mandated and it cited no legal authority for providing necessary funds(T.L.F.73-74). Reasonably competent counsel under similar circumstances would have requested the necessary funds from Nichols while basing that request on *Ake's* constitutionally mandated rights.

The *Starr* Court rejected the argument the State had made, and the trial court had adopted, that Starr's due process right to expert assistance was satisfied by the court ordered examination done and the defense's ability to subpoena state examiners. *Starr*,23F.3d at 1288-89. That examination was not appropriate to Starr's needs and the ability to subpoena and to question a state examiner "does not amount to the expert assistance required by *Ake*." *Id.*1289. The State examination was inappropriate because "it did not delve into the mitigating questions essential to Starr." *Id.*1289. Similarly, Givon's court ordered exam done on Michael did not permit counsel to fail to request from the court the necessary funding.

Reasonably competent counsel under similar circumstances who was aware of the preparation and investigation that was needed and who lacked the necessary money would have requested it from the court. *See Strickland, Ake,* and *Starr*. Michael was prejudiced because had his case been properly investigated he would not have pled(2ndSupp.R.L.F.222) and there is a reasonable probability he would not have been sentenced to death based on the aggravation that would have been rebutted and mitigation that would have been presented(Points I,V,VI,X).

This Court should vacate Michael's convictions and sentences.

IX. JUDGE SCHNEIDER'S CAMPAIGN STATEMENTS CREATED THE APPEARANCE SHE COULD NOT FAIRLY SERVE

The motion court, Judge Schneider, erred in denying the motion to disqualify her because that ruling denied Michael his rights to be free from cruel and unusual punishment, due process, and a full and fair hearing before an impartial judge, U.S. Const., Amends. VIII and XIV, in that her campaign statements that a judge's punishment decision in a bench tried capital case should reflect the values of the community considered in the context of Braun's and Ms. Griffin's family's contemporaneous press statements reflected Schneider had advocated death for Michael as part of her campaign strategy to defeat Judge Nichols and thereby created the appearance of impropriety she could not fairly consider the 24.035 claims.

Schneider made campaign statements approximately two weeks before both her election contest against Nichols and sentencing. Those statements advocated death for Michael. The statements created the appearance of impropriety Schneider could not fairly consider the 24.035. Schneider should have disqualified herself and the failure to do so denied Michael his rights to be free from cruel and unusual punishment, due process, and a full and fair hearing. U.S. Const., Amends. VIII and XIV.

Rule 24.035 counsel moved to disqualify Schneider based on campaign statements she made about Michael's case in an October 21, 1998 Post Dispatch article(R.L.F.74-93). That motion was denied (R.L.F.790;R.Tr.4-5).

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

On the merits of a postconviction claim litigated, review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). However, because this claim involves the fundamental fairness of the 24.035 proceedings, this Court should review for whether the motion court erred in refusing to disqualify itself.

A. Death Penalty Election Politics

Judge Nichols was appointed in Fall, 1997 to complete another judge's term(24.035Ex.13 at 3402,3405). She was running for her own term on November 3, 1998 against Associate Circuit Judge Nancy Schneider(24.035Ex.13 at 3402,3405).

The August 2, 1998, Post profiled St. Charles County elected officials and their upcoming November election contests(24.035Ex.13 at 3414). Braun's "tough on crime" "[p]riorities" included imposing death(24.035Ex.13 at 3419).

On August 28, 1998, Michael pled(Pl.Tr.1). After Michael pled and before sentencing, Ms. Griffin's mother made repeated press calls for Nichols to impose death(24.035Ex.13 at 3370-71,3376,3384,3395,3401-03).

On September 14, 1998, the penalty hearing began and it concluded on September 17, 1998. The September 14, 1998 Post published an article in which it noted Michael's plea "has left his life in the hands of St. Charles County Circuit Judge Grace Nichols"(24.035Ex.13 at 3395).

The October 5, 1998 Post published: "Defendants May Be Pleading Guilty As Ploy To Avoid Getting Death Sentence From Juries" highlighting a second death eligible St. Charles County defendant had pled guilty(24.035Ex.13 at 3383-84). Braun's assistant Groenweghe told the Post he believed Michael and the other defendant think they have a better chance of avoiding death in front of a judge(24.035Ex.13 at 3383). Braun told the Post Kansas City guilty pleas stopped when a judge imposed death(24.035Ex.13 at 3384). Braun said in deciding on punishment in a capital case where a defendant pleads guilty, Missouri judges "must consider their constituents"(24.035Ex.13 at 3384). Braun followed that with: '"You shouldn't be putting executions up for election, but the judiciary should share the values of the community and reflect them…and the community is overwhelmingly in favor of the death penalty."'(24.035Ex.13 at 3384).

On October 15, 1998, Judge Nichols heard closing arguments. The October 16th Post reported on Braun's arguments (24.035Ex.13 at 3379-80)(See Clos.Arg.Tr.14-15). The October 19th Post reported again on closing arguments and repeated Ms. Angelbeck's calls for death(24.035Ex.13 at 3376).

The October 21, 1998 Post published an article about Nichols' and Schneider's race(24.035Ex.13 at 3405-06). Schneider said: '"The death penalty and life in prison is an issue all citizens are concerned about …The judge can take the place of the jury, so it is important that public officials share their values and beliefs"'(24.035Ex.13 at 3405). Schneider added: '"It's very important for a judge to reflect the values of the community"'(24.035Ex.13 at 3405).

Schneider defeated Nichols in the November 3, 1998 election(24.035Ex.13 at 3404).

B. <u>Judge Schneider's Campaign Comments Advocated Death For Michael</u>

The Post articles show Braun and Ms. Angelbeck, through their repeated press statements, sought to use the upcoming judicial election to pressure Nichols to impose death. In that forum, they impugned the integrity of any judge who would follow the law and then choose to impose life.[3] Braun's October 5th call in such a public forum as the Post for Nichols to consider her constituents and their values that overwhelmingly favored death in sentencing Michael had the singular

[3]More detail of Braun's and Ms. Angelbeck's press statements is found in Point IV and incorporated here.

purpose of threatening Nichols if she did not impose death, then she would be defeated in November. After Braun's October 5th press statements Schneider on October 21st repeated nearly verbatim Braun's admonition to Nichols in order to advance her campaign for Nichols' judgeship.

Schneider's comments were not made in isolation on some blank slate, but rather against the backdrop of Braun's nearly identical statements calling for death for Michael and the statements of Ms. Griffin's mother also calling for death. Schneider's press statements, viewed in the emotionally charged campaign environment in which they were made, were not some general endorsement of the death penalty for appropriate offenses, but instead reflected the opinion that for Michael death was the appropriate punishment. Because Schneider had expressed such a view on the appropriate punishment for Michael, a reasonable person would have factual grounds to find an appearance of impropriety and doubt her impartiality in serving on his 24.035 case. *See Smulls, supra*. Further, that opinion, on the appropriateness of death for Michael, was based on an extrajudicial source and not from what Schneider learned from serving on Michael's case because Schneider made her statements when she was not the judge on his case, but instead was running against the judge on his case. *See State v. Nicklasson, supra.* Moreover, Schneider could not fairly decide whether Nichols was unable to fairly serve (Point IV) because of Schneider's death penalty campaign press statements.

This Court should reverse for a new 24.035 hearing before a judge other than Judge Schneider.

X. MICHAEL'S PARENTS SHOULD HAVE TESTIFIED

The motion court clearly erred denying the claims counsel was ineffective for failing to call Michael's parents to rebut aggravating evidence crimes respondent attributed to Michael were in fact not committed by him and to testify about their neglect and abuse of him because Michael was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have called them and Michael was prejudiced because there is a reasonable probability that he would have been sentenced to life.

The motion court rejected counsel was ineffective for failing to call Michael's parents to present mitigating evidence about their neglect and abuse and to rebut, and thereby mitigate, aggravating evidence that crimes respondent attributed to Michael were not committed by him. Michael was denied effective assistance, due process, and freedom from cruel and unusual punishment when counsel failed to call these witnesses. U.S. Const. Amends. VI, VIII, and XIV.

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

A. Mitigating Evidence Presented

Michael's mother's sister, Carol Tegard recounted her sister, Patricia Washburn, became pregnant with Michael when she was sixteen and married his father, Richard Worthington(Pen.Hrg.Tr.675). Both of Michael's parents were heavy drug and alcohol users(Pen.Hrg.Tr.675-76,680-81,694). Tegard also testified about Michael's mother's prostituting and her many suicide attempts(Pen.Hrg.Tr.680-82). Tegard's sister, Mary's, husband Gary was the only responsible father figure Michael had, but he died when Michael was seven(Pen.Hrg.Tr.687,690-91). When Michael was a teenager, his father taught him how to commit burglaries and he was set-up on for burglaries his father did(Pen.Hrg.Tr.694-96). In 1994, Michael was homeless and living out of his mother's car, until she sold it for drugs(Pen.Hrg.Tr.693-94).

Evans testified Michael was intoxicated at the time of the offense and was incapable of making a decision about his behavior(Pen.Hrg.Tr.725-30,738-76).

B. Mitigation Not Presented

1. Patricia Washburn

Patricia divorced Richard Worthington because he beat her(1stSupp.R.L.F.318). On one occasion, Patricia's father attempted to stop Richard from attacking her, but Richard beat up and badly bloodied Patricia's father while Michael was in another room crying(1stSupp.R.L.F.310-12). Richard had a job once that lasted three weeks(1stSupp.R.L.F.315). Richard stole all the

family food stamps and food, including Michael's milk and used the stamps to buy drugs(1stSupp.R.L.F.317-18)(24.035Ex.9 at 2104).

Patricia did drugs while she was pregnant with Michael(1stSupp.R.L.F.314). Richard introduced Michael to drugs when he was nine(1stSupp.R.L.F.318-19).

Patricia burglarized her parents' home to get money for drugs, blamed Michael for those burglaries, and she would have told Nichols she did those burglaries(1stSupp.R.L.F.320-22). She had sexual relationships with many police officers and she often called the police to say Michael committed a crime to get their attention or a date(24.035Ex.9 at 2108-09).

Trial Exhibit 35M reported Michael shot at his grandfather(Pen.Hrg.Tr.240). Patricia did not believe her father's accusation, made one month before he died, and her father was suffering from brain cancer, seizures, and PTSD(24.035Ex.9 at 2114;1stSupp.R.L.F.88). He also had been suffering from delusional thoughts for several years(24.035Ex.9 at 2114). There was no physical evidence to support the shooting allegation(1stSupp.R.L.F.88).

Patricia left Michael with a babysitter who sexually abused him and ignored his reporting of the abuse because it would have interfered with her lifestyle(1stSupp.R.L.F.327-28,419-21). Michael was present during suicide attempts Patricia made and he would cry and yell for his grandmother(1stSupp.R.L.F.353).

Patricia told Green she was a good mother because she did not believe prostituting to survive and doing drugs made her bad(1stSupp.R.L.F.332-34). Patricia was willing to work with counsel to help Michael(1stSupp.R.L.F.335-37). When she came to court, counsel told her to leave because they feared respondent would subpoena her(1stSupp.R.L.F.337-39,407).

Patricia's 24.035 testimony was obtained while she was in the Peoria County Jail(1stSupp.R.L.F.285-86).

2. Richard Worthington

Richard knew Patricia stole from her parents to buy drugs and then blamed Michael(24.035Ex.9 at 2095-96;1stSupp.R.L.F.113-14). Patricia routinely called the police to say Michael had stolen things when she did the stealing(24.035Ex.9 at 2096).

When Michael was an infant, Richard sold Michael's formula and the family's food stamps for drugs leaving Patricia and Michael without food(1stSupp.R.L.F.214-15). Richard sold on the streets Michael's ADHD prescription drug, Ritalin(1stSupp.R.L.F.226-27). Richard considered his major occupation or skill to be a drug dealer(1stSupp.R.L.F.178). Patricia always had men at the house having sex and doing drugs(1stSupp.R.L.F.220).

When Michael was nine, his father shot him up with heroin and later introduced him to other drugs, like crack(24.035Ex.9 at 2096). Richard taught Michael how to do burglaries and would threaten him if he stole things that were not valuable(1stSupp.R.L.F.106-07,227-28).

Richard recounted the incident where he beat-up Patricia's father which was precipitated by him having beat-up Patricia, blackening her eye(1stSupp.R.L.F.68-70).

Counsel did not contact Richard, he did not know about Michael's charges, and he would have been willing to work with counsel(1stSupp.R.L.F.4-5). Richard's 24.035 testimony was obtained at a drug treatment center where he had gone from jail(1stSupp.R.L.F.1,128-29,244-45).

C. 24.035 Findings

Michael's records presented before Nichols supported his mitigating claims he was abused, neglected, and had long-term drug problems(R.L.F.1067). Counsel could not have presented this without investigating Michael's social history(R.L.F.1067).

Family member testimony would have been cumulative(R.L.F.1071-72). Nichols had found Michael was neglected, abused, and raised in a dysfunctional family(R.L.F.1072). Counsel acted reasonably, conducted a reasonable investigation, made a reasonable decision not to conduct further investigation, and there was no prejudice(R.L.F.1072-73).

Patricia was contacted by counsel and reported Michael had a good life and she was a good mother(R.L.F.1071-72). Counsel testified Patricia was present at the penalty hearing, but chose not to call her(R.L.F.1072). Patricia testified she was under the influence of crack and had a significant habit at the time of the penalty hearing(R.L.F.1072).

Richard testified he had not had contact with Michael since 1997 and between the time of the arrest and plea Michael did not know where Richard was(R.L.F.1072). Richard testified he did not have much of a relationship with Michael when he was a child(R.L.F.1072). Richard had been incarcerated, and therefore, unavailable(R.L.F.1072).

D. Counsel's Testimony

Green spoke to Michael's mother a couple of times on the telephone for ten to fifteen minutes each time and he would not expect to get a good social history from that investigation(1stSupp.R.L.F.455,595). Because of what Green was being paid to work on Michael's case, he could not afford to go to Peoria(1stSupp.R.L.F.457-58). Green spoke to Michael's mother at court and sent her away because she had continued to want to present herself as a good mother, and thus, he was concerned respondent might call her(1stSupp.R.L.F.559-61). In Patricia's 24.035 testimony, she maintained she was a good mother while still acknowledging she was a prostitute who had done drugs with Michael and stole from her family(1stSupp.R.L.F.593).

Green reviewed Patricia's 24.035 deposition and affidavit and believed information she could have supplied would have been helpful for penalty(1stSupp.R.L.F.455-56). Patricia's testimony rebutted some of respondent's aggravators because she committed acts attributed to Michael(1stSupp.R.L.F.456-57). Patricia having a substantial crack habit would

have only factored into whether Green called her to testify (1stSupp.R.L.F.558-59).

Green reviewed Richard's deposition and affidavit and found they provided greater detail about the harmful environment in which Michael was raised(1stSupp.R.L.F.463). Green had located Richard, who was incarcerated(1stSupp.R.L.F.562).

Green learned from Patricia's deposition the purported incidents where Michael shot at and stole from his grandfather were untrue(1stSupp.R.L.F.477-78).

E. Patricia And Richard Should Have Testified

1. Failure To Rebut Aggravation

"One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*,80S.W.3d 817,827(Mo.banc2002). *See, also*, *Wiggins v. Smith*,123S.Ct.2527,2537(2003)(counsel has duty to investigate and rebut aggravating evidence).

Both Patricia and Richard could have furnished testimony rebutting respondent's aggravators Michael had burglarized his grandparents' home on numerous occasions(1stSupp.R.L.F.113-14,320-22)(24.035Ex.9 at 2095-96). Patricia and Richard could have rebutted crimes attributed to Michael when Patricia reported those alleged crimes in order to facilitate her having police sexual encounters(24.035Ex.9 at 2108-09)(24.035Ex.9 at 2096). Patricia also could have

rebutted respondent's aggravating evidence Michael had shot at her father based on the multiple physical and mental problems her father was experiencing(24.035Ex.9 at 2114;1stSupp.R.L.F.370-71).

Reasonably competent counsel under similar circumstances would have conducted the necessary investigation to call Patricia and Richard to rebut the aggravating evidence Michael had committed offenses he had not done. *See Ervin, Wiggins v. Smith.* Michael was prejudiced because one non-statutory aggravating circumstance Nichols included in her weighing decision was Michael's criminal history(24.035Ex.15 at 3893). These crimes Michael did not commit were part of what Nichols weighed in her decision making process, and therefore, there is a reasonable probability he would not have been sentenced to death had she heard Michael was not responsible for these offenses. *See Strickland, supra*.

2. <u>Mitigation Not Presented</u>

The failure to interview witnesses or discover mitigating evidence relates to trial preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). The failure to conduct a thorough investigation that would mitigate punishment and rebut aggravation constitutes ineffective assistance of counsel. *Williams v. Taylor*,529U.S.362(2000); *Wiggins v. Smith*,123S.Ct.2527(2003).

The mitigating evidence that could have been presented was compelling and not cumulative. Nichols did not hear about the violent assaultive behavior that

surrounded Michael. She did not hear the family lacked food because food stamps were traded for drugs and Michael's father sold Michael's prescription, ADHD medication. Nichols did not hear Michael's mother cared so little about him she ignored his complaints when a babysitter sexually abused him. While Nichols knew about Patricia's multiple suicide attempts, she was not made aware those attempts were done in Michael's presence with him crying and yelling for his grandmother. Even though Nichols found Michael suffered parental abuse and neglect (24.035Ex.15 at 3894; Sent.Tr.29), she did not hear in any detail its degree and severity. *See Williams v. Taylor* and *Wiggins.*

Green testified he would not have expected to get a good social history from a couple of 15-20 minute phone calls with Patricia(1stSupp.R.L.F.595). Green did not go to Peoria because he was being paid so little(1stSupp.R.L.F.457-58). He did not call Patricia because he was concerned about her desire to portray herself as a good mother(1stSupp.R.L.F.559-60).[4] Green did not act as reasonably competent counsel under similar circumstances because his decision not to call Patricia was based on incomplete, non-thorough investigation. *See Kenley, Williams, and Wiggins supra*. Green's concern Patricia would try to portray

[4] While Green testified that Michael's mother's crack habit would have "factor[ed]" into whether he would have called her(1stSupp.R.L.F.559 L.12-17), as the prosecutor pointed out, Green "ultimately" did not call her because he feared she would portray herself as a good mother(1stSupp.R.L.F.559 L.18-22).

herself as a good mother was not reasonable because while claiming she was a good mother Patricia acknowledged she was a prostitute who had done drugs with Michael and stole from her family(1stSupp.R.L.F.593). No reasonable judge would have believed Michael had had the benefit of a good mother when that mother was a drug using prostitute who stole from her family.

Counsel did not act as reasonable counsel when they located Richard in prison, but failed to call him(1stSupp.R.L.F.562). Reasonable counsel would have had a writ issued for Richard to attend or at a minimum obtained his deposition testimony, as 24.035 counsel did for Patricia at the Peoria jail.

Reasonably competent counsel under similar circumstances would have conducted the necessary investigation to call Patricia and Richard to testify about circumstances detailing the severity of the abuse and neglect Michael endured, especially after having endorsed them as witnesses(T.L.F.339-41). *See Williams v. Taylor* and *Wiggins supra*. Michael was prejudiced because there is a reasonable probability had the sentencing court heard the detailed mitigating evidence Michael's parents could have provided he would have been sentenced to life. *See Strickland, supra*.

Counsel believed Patricia and Richard could have provided the court with helpful evidence that rebutted respondent's aggravators and important details about the deprivation Michael endured that would have been beneficial to the sentencing decision(1stSupp.R.L.F.455-57,463,478). This Court should so find and vacate Michael's sentences.

XI. VICTIM IMPACT INEFFECTIVENESS

The motion court clearly erred ruling counsel was not ineffective for failing to object to respondent's victim impact evidence because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel failed to object to excessive cumulative victim impact evidence that was so inflammatory it injected passion, prejudice, and arbitrariness, compared the value of Michael's life to Ms. Griffin's life, improperly personalized asking Nichols to view what happened to Ms. Griffin like she would if the same had happened to her family, urged Nichols to disregard mitigation, and expressed a death punishment preference and reasonably competent counsel would have objected and Michael was prejudiced because sentencing was rendered fundamentally unfair and there is a reasonable probability he would have been sentenced to life.

The motion court rejected counsel was ineffective for failing to object to respondent's victim impact evidence. The motion court clearly erred and Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). To establish ineffectiveness, a movant

must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984).

A. Impact Evidence

Prepared statements of eleven in-court witnesses were read as well as one statement for two witnesses who did not appear(Pen.Hrg.Tr.509-24,524-29,532-34,535-37,538-46,546-48,549-52,552-54,556-59,560-63,564-68,614-18).

Carolyn Mueller's testimony included: (1) their caring for two premature horses; (2) Ms. Griffin helped her sandbag during flooding; (3) Ms. Griffin's help with a Haitian orphanage Mueller directed; (4) Ms. Griffin's desire to go to the orphanage, Mueller's reluctance to take her because of safety, and if Ms. Griffin had been killed in Haiti such a death would have been with purpose; and (5) Mueller's life is now predominated by fear(Pen.Hrg.Tr.513-18,521-23).

Step-father John Angelbeck's testimony included: (1) Ms. Griffin always gave 100%; (2) Ms. Griffin would have been a wonderful mother; (3) "We are accountable for our own actions. We can't hide behind our childhood. We must be responsible for our own actions and able to accept due punishment for our deeds."; (4) Nichols should consider crime scene pictures of Ms. Griffin's body, Dr. Case's testimony as to how long it took her to die, and the terror she felt; and (5) Michael "must be willing to pay the price of his crime"(Pen.Hrg.Tr.527-29).

Christa Honti's testimony included: (1) Ms. Griffin was "angelic," "the perfect person," and whatever she touched "turned to gold"; (2) Ms. Griffin did

not deserve to die, especially how she died; and (3) her life will never be the same and she has been "living in hell"(Pen.Hrg.Tr.532-34).

Mary Ann Honti's testimony included: (1) Ms. Griffin was "irresistible," became like a daughter, and is forever grateful she called her "mom"; and (2) the contrast between Ms. Griffin's qualities and how she died(Pen.Hrg.Tr.535-37).

Lisa Banga's testimony included: (1) Ms. Griffin was her maid of honor and helped her with all wedding details; (2) the many things she and Ms. Griffin would never get to do, including plan her wedding; (3) rather than offering a toast at Ms. Griffin's wedding Banga gave her eulogy; (4) playing Ex. 41, a videotape of Banga's wedding that included scenes with Ms. Griffin, while Banga commented on how her behavior was typical of her humor; and (5) admonishing Nichols to "give Mindy the justice she deserves"(Pen.Hrg.Tr.541,543-46).

Mona Gordon's testimony included: (1) she loved Ms. Griffin like a daughter and Ms. Griffin called she and her husband "mom and dad"; (2) Michael has "put a hole in my heart"; and (3) admonishing Nichols Ms. Griffin had died a terrible death and "[w]hen Michael broke into her home, he had a choice. Now this Court has a choice"(Pen.Hrg.Tr.547-48).

James Bond described the Angelbecks' pain(Pen.Hrg.Tr.550).

Charlton Pitman's testimony included: (1) "[Ms. Griffin] was a compassionate and gentle person, unlike the person who took her life"; and (2) as a funeral director he had seen many tragic deaths, but he "could not believe that a

human being could be so cruel and cold-hearted. That anyone could have done such a horrible thing to such a gentle person."(Pen.Hrg.Tr.554).

Ms. Griffin's sister's husband Jim Selecky's testimony included: (1) Ms. Griffin was a hopeful, enthusiastic person; (2) anyone who did not know Ms. Griffin will be denied the opportunity of experiencing who she was because of "the brutal act committed by Michael Worthington"; and (3) because of Michael's acts Selecky for the first time owns a 100 pound guard dog(Pen.Hrg.Tr.558-59).

Ms. Griffin's sister Debbie Selecky's testimony included: (1) she had lost a friend and a sister through a senseless violent act; (2) "It is sad when someone has a bad childhood, but many of us do. No matter how sad and tragic, at some point we must take responsibility for our actions and accept the consequences"; and (3) whatever brought Michael to commit these acts is "irrelevant"(Pen.Hrg.Tr.561-63).

Carol Angelbeck, Ms. Griffin's mother, testified she changed clothes before coming to testify to put on the suit Ms. Griffin had planned to wear to her first job because she wanted to bring her to court(Pen.Hrg.Tr.564). She read a prepared statement from the Farrells that included: (1) they met Ms. Griffin through her interest in horses and claimed her as a granddaughter and she them as grandparents; (2) Ms. Griffin wrote a composition about them called "Soul Fillers" that was read and highlighted their shared respect; and (3) Ms. Griffin's death brought total devastation and how much they need one of her hugs(Pen.Hrg.Tr.564-68).

Ms. Angelbeck described a multitude of pictures of Ms. Griffin starting with her at five months through to a picture of her grave on what would have been her twenty-fifth birthday(Pen.Hrg.Tr.572-88; Ex.42A-42TT). She showed a scrapbook Ms. Griffin made for first communion and a high school yearbook picture for each year(Pen.Hrg.Tr.588-89,601-04; Ex.43,Ex.47A-D).

Ms. Griffin's mother recounted in meticulous detail her daughter's academic accomplishments(Pen.Hrg.Tr.589-606; Exs.44,45,46,48-50,51A-C,52-53,54A-C,56-65). Mother's Day gifts and a card with their very personal touches and sentiments they expressed were presented(Pen.Hrg.Tr.612-13;Exs.68,69).

Ms. Angelbeck's first husband, Ms. Griffin's father, was an abusive drunk who she left because she did not want Ms. Griffin growing up around him(Pen.Hrg.Tr.607-10). Ms. Griffin's father died in an alcohol related accident when she was 13; she loved her father, but he often disappointed her(Pen.Hrg.Tr.608-10).

Ms. Griffin was awarded her degree posthumously with a graduation moment of silence and memorial service for her after graduation(Pen.Hrg.Tr.604-06;Ex.66-67). After graduation, Ms. Griffin's mother went to the cemetery, as she always does on Ms. Griffin's birthday(Pen.Hrg.Tr.606).

Next, Ms. Angelbeck read her prepared statement(Pen.Hrg.Tr.614-18). She said when Michael killed Ms. Griffin, he sentenced she and her husband to life without parole(Pen.Hrg.Tr.615). She continued: "[o]ur daughter, Mindy, had so much to give to our world and society as opposed to only taking from society as

Michael Worthington has and will continue to do with drugs and alcohol"(Pen.Hrg.Tr.615). She admonished Nichols to "be brave enough" to impose death(Pen.Hrg.Tr.616). She added: "I am pleading with this Court to send the message that our community will not allow this rapist and the murderers to do this to our children without severe penalties"(Pen.Hrg.Tr.617). She concluded her statement speaking as though she were her daughter asking for "justice," detailing what Michael did to her, stating the pain her parents feel, and her pain that she would never marry and have children(Pen.Hrg.Tr.618).

At the November 4th sentencing, Ms. Griffin's mother argued for death. She complained at least 75% of the court's time was spent hearing defense excuses(Sent.Tr.16). She argued all adults are responsible for their actions and not all individuals who have experienced comparable childhoods commit crimes(Sent.Tr.16-17). She argued Michael's childhood could not be "resurrect[ed]," that "the time has passed for this man," and he is "deviant to a point not reachable nor helpable"(Sent.Tr.18).

Ms. Angelbeck's sentencing comments included she was "humiliated" at having had to present Ms. Griffin's awards, photos, artwork, poetry, and handmade card(Sent.Tr.20). She felt compelled to do so to show Ms. Griffin's life "held some worth" and wondered what they would have done if she had been average(Sent.Tr.20). Her argument included: "Simply put, even the most humane concerned and adamant animal rights person would not need a thunderbolt to know a rabid or a vicious dog should be human[e]ly slain for the good of the

whole, and further to ease his own suffering. Good and bad, right and wrong is not that complicated. A gross crime deserves a gross penalty"(Sent.Tr.21). Michael's crime "deserves this punishment"(Sent.Tr.25). She was "asking this Court to give my daughter, Mindy, the justice she so deserves by the decision that Michael Worthington gave her to die by"(Sent.Tr.25). She called on Nichols to "imagine that Mindy is your daughter, wife, sister, mother or friend"(Sent.Tr.26).

B. Counsel's Testimony

Green had no reason for failing to object(1stSupp.R.L.F.502-03).

C. 24.035 And Direct Appeal Decisions

Because penalty was tried to a judge Michael was not prejudiced(R.L.F.1078-79).

Direct appeal counsel argued the victim impact evidence constituted plain error causing manifest injustice. No plain error manifest injustice occurred. *State v. Worthington*,8S.W.3d83,90(Mo.banc1999).

D. Counsel Was Ineffective

Counsel's failure to make timely proper objections can constitute ineffective assistance. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995)(ineffectiveness failing to object to penalty arguments). In *Storey* there were four types of prosecutor penalty argument error. *Id.*900-03. Those were: (1) arguing outside the evidence; (2) improper personalization; (3) killing defendant was justified; and (4) weighing victim's life value against defendant's. *Id.*900-03.

A finding on direct appeal of no plain error, manifest injustice, does not mean finding *Strickland* prejudice is foreclosed. *Deck v. State*,68S.W.3d418,424-29(Mo.banc2002).

The decision to impose death must be and appear to be based on reason rather than caprice or emotion. *Gardner v. Florida*,430U.S.349,358(1977). In *Payne v. Tennessee*,501U.S.808,827(1991), the Court held if a state chose to admit victim impact during penalty, the Eighth Amendment did not *per se* bar such evidence. Victim impact evidence, however, could rise to the level of being so unduly prejudicial as to violate due process. *Id*.825. The issue is whether the witnesses' testimony or prosecutor's remarks so infected the sentencing proceeding as to render it fundamentally unfair. *State v. Knese*,985S.W.2d759,772(Mo.banc1999).

Respondent's victim impact evidence violated due process and counsel should have objected. *See Payne*. That evidence was improper for several reasons. The quantity and scope of the victim impact evidence violated *Payne*. The court heard evidence about the personal attributes that made Ms. Griffin a wonderful and caring person from eleven live witnesses and the prepared statement of two others. That repetition from so many individuals alone violated *Payne* because it was so inflammatory it injected passion, prejudice, and arbitrariness. The scope of that evidence violated *Payne* because of the quantity of photographs and the content of those photos commencing with a baby picture and concluding with a 25th birthday gravesite photo(Pen.Hreg.Tr.572-88; Ex42A-

42TT). That excess also included the scrapbook from Ms. Griffin's first communion (Pen.Hrg.Tr.588-89; Ex.43), her many academic accomplishments (Pen.Hrg.Tr.589-606; Exs.44,45,46,48-50,51A-C,52-53,54A-C,56-65), yearbook pictures (Pen.Hrg.Tr.601-04;Exs.47A-D), collegiate accomplishments including the awarding and recognition of her degree posthumously (Pen.Hrg.604-06; Exs. 65-67), and Mother's Day gifts and card(Pen.Hrg.Tr.612-13;Exs.68-69).

The victim impact evidence was also improper because it compared the value of Michael's life to Ms. Griffin's life. *See Payne* and *Storey*. Pitman did this: "[Ms. Griffin] was a compassionate and gentle person, unlike the person who took her life"(Pen.Hrg.Tr.554). Ms. Griffin's mother did the same: "[o]ur daughter, Mindy, had so much to give to our world and society as opposed to only taking from society as Michael Worthington has and will continue to do with drugs and alcohol"(Pen.Hrg.Tr.615). At sentencing, Ms. Angelbeck continued this theme stating her reasons for having testified at the penalty hearing about Ms. Griffin's accomplishments was her need to show Ms. Griffin's life had "held some worth" while wondering what they would have done if she had only been average(Sent.Tr.20). Ms. Griffin's "worth" was contrasted with Michael's "worth" as a drug abuser with a criminal history.

Ms. Griffin's mother's call for Nichols to "imagine that Mindy is your daughter, wife, sister, mother or friend" (Sent.Tr.26) is the kind of improper personalization *Storey* condemned. *See Storey*,901S.W.2d at 901(sentencer urged to try and put themselves in the victim's place).

The victim impact evidence was also improper because it included calls to disregard mitigation. Mr. Angelbeck urged: "We can't hide behind our childhood"(Pen.Hrg.Tr.528). Ms. Selecky told Nichols whatever brought Michael to commit this offense was "irrelevant"(Pen.Hrg.Tr.562). Ms. Griffin's mother complained at least 75% of the court's time was spent hearing the defense's excuses(Sent.Tr.16).

In violation of *Payne*, there were repeated calls for death. Mr. Angelbeck urged: "We must be responsible for our own actions and able to accept due punishment for our deeds" and Michael "must be willing to pay the price of his crime"(Pen.Hrg.Tr.528). Ms. Banga said: "give Mindy the justice she deserves"(Pen.Hrg.Tr.545). Gordon said: "[w]hen Michael broke into her home, he had a choice. Now this Court has a choice"(Pen.Hrg.Tr.548). Ms. Griffin's mother was so outraged at the possibility of a life sentence that she lectured Nichols to have the courage to impose death(Pen.Hrg.Tr.616). She said: "I am pleading with this Court to send the message that our community will not allow this rapist and the murderers to do this to our children without severe penalties"(Pen.Hrg.Tr.617). Ms. Griffin's mother compared Michael to "a rabid or a vicious dog" who needed to be put down for his and others' good(Sent.Tr.21). Ms. Angelbeck called on Nichols to act in accordance with "A gross crime deserv[ing] a gross penalty"(Sent.Tr.21). She continued: Michael's crime "deserves this punishment"(Sent.Tr.25). Ms. Angelbeck stated she was "asking

this Court to give my daughter, Mindy, the justice she so deserves by the decision that Michael Worthington gave her to die by"(Sent.Tr.25).

Respondent's evidence was also like the *Storey* argument because it asserted killing Michael was justified. Mueller made that case when she testified that her life has come to be predominated by fear because of how Ms. Griffin died(Pen.Hrg.Tr.521-22). Jim Selecky did the same telling the court because of Michael's acts he for the first time owns a 100 pound guard dog(Pen.Hrg.Tr.559). Mr. Angelbeck made the same case by telling the court to consider the crime scene pictures of Ms. Griffin, Dr. Case's testimony as to how long it took Ms. Griffin to die, and the terror Ms. Griffin felt, even though these matters did not go to proving the aggravators respondent asked the court to find(Pen.Hrg.Tr.528;R.L.F.419-20).

In *State v. Roll*,942S.W.2d370,378(Mo.banc 1997), the death sentenced movant alleged counsel was ineffective for failing to object to four victim impact witnesses asking for death. Roll failed to demonstrate prejudice because judges are presumed not to consider "improper evidence." *Id.*378.

The motion court's reasoning here was flawed and *Roll* is readily distinguished. A significant portion of the victim impact here, unlike *Roll*, was not individually standing alone facially "improper evidence." Rather, it became prejudicial and improper because of its quantity and scope and for that reason alone it violated *Payne*. Under *Payne* it was permissible for the court to consider some of the victim impact evidence, just not the quantity that was presented. The

unfair prejudice was simply compounded when facially improper evidence, like the preference for death, was added.

Reasonably competent counsel under similar circumstances would have objected. *See Strickland*. Michael was prejudiced because the sentencing decision was rendered fundamentally unfair and there is a reasonable probability that had this evidence not been considered he would have been sentenced to life.

This Court should vacate Michael's sentences.

XII. INABILITY TO PERFORM CONSTITUTIONAL EXECUTIONS

The motion court clearly erred denying the challenge to the constitutionality of the State's lethal injection methodology and its ability to perform constitutional executions because that ruling denied Michael his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that the State conducted the execution of Emmitt Foster in a manner that required repeated efforts to kill him and caused lingering death, mutilation, and the unnecessary and wanton infliction of pain and similar mishaps in carrying-out executions in other states have occurred such that Missouri cannot carry out constitutional executions.

The 24.035 motion challenged the lethal injection method and the State's ability to carry-out executions in accordance with Federal law. The motion court rejected this claim. That ruling denied Michael his rights to due process and to be free from cruel and unusual punishment. U.S. Const. Amends. VIII and XIV.

The amended motion alleged lethal injection execution and its related procedures causes death by a process that involves lingering death, mutilation, and the unnecessary and wanton infliction of pain. To support that claim, the pleadings relied on how respondent executed Emmitt Foster(24.035Depo.Ex.42 at 510-11). The State took half-an-hour to kill Foster(24.035Depo.Ex.42 at 510). During the execution, the blinds were drawn so witnesses were precluded from observing the execution(24.035Depo.Ex.42 at 510). Some witnesses refused to

sign the documents that they had witnessed Foster being executed(24.035Depo.Ex.42 at 510). The motion also relied on nine lethal injections executions from other states involving similar incidents(24.035Depo.Ex.42 at 507-10).

The claim was submitted on the pleadings. The motion court cited *Morrow v. State*,21S.W.3d819(Mo.banc2000), which rejected a similar claim, and found there was no evidence the kinds of problems identified would re-occur(R.L.F.1082). It added the claim contained only assertions and conclusions(R.L.F.1082).

Review is for clear error. *Barry v. State*,850S.W.2d348,350(Mo.banc1993). Under the Eighth Amendment, a punishment "must not involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia*,428U.S.153,173 (1976)(opinion of Stewart, Powell, and Stevens, J.J.) *See, also, Louisiana v. Resweber*, 329 U.S. 459, 463 (1947)("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence"). A chosen method of execution must minimize the risk of unnecessary pain, violence, and mutilation. *Glass v. Louisiana*,471U.S.1080,1086(1985)(Brennan, J. dissenting from certiorari denied). A punishment violates the Eighth Amendment if it causes torture or lingering death. *Id*.1086 (citing *In re Kemmler*,136U.S.436,447(1890)).

Since *Morrow*, however, *Nelson v. Campbell*,124 S.Ct.2117(2004) was decided. In *Nelson*, the Court ruled Nelson could bring under 42U.S.C.§1983 his

challenge to the lethal injection procedures planned to be used to execute him. *Id.*2120.

The history of execution mishaps, both in Foster's case and the other nine cases, establish a significant likelihood that those mishaps could be repeated. That mishap history would allow Michael to bring a §1983 challenge under *Nelson.* The motion court clearly erred in rejecting the claim Missouri's execution procedures violate Michael's rights to due process and to be free from cruel and unusual punishment because of the significant likelihood the documented execution mishaps could be repeated in executing him.

This Court should impose life without parole.

CONCLUSION

Michael Worthington requests: Points II, III, IV, V, VIII, vacate his convictions and sentences; Points I, VI, VII, X, XI vacate his sentences; Point XII impose life without parole; and Point IX a new 24.035 hearing before a judge other than Judge Schneider.

Respectfully submitted,

_____
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Certificate of Compliance and Service

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains _____ words, which does not exceed the 31,000 words allowed for an appellant's brief.

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

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were _____ this ____ day of November, 2004, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65102.

_____
William J. Swift

APPENDIX

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