IN THE

MISSOURI SUPREME COURT

RANDALL KNESE,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC83822**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT
THE HONORABLE ELLSWORTH CUNDIFF, JR., JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions **Page**

Statutory Provisions **Page**

Rules

Other

JURISDICTIONAL STATEMENT

The appellant, Randall Knese, was convicted in St. Charles County Circuit Court of attempted forcible rape, §566.030 RSMo1994, and first degree murder, §565.020, of his wife, and was sentenced to death. This Court affirmed his convictions and sentence in *State v. Knese*, 985 S.W.2d 759 (Mo.banc1999). Appellant filed a motion for post-conviction relief under Rule 29.15, which was denied after hearing, in the Circuit Court, and he appeals from that decision. Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo.Const. (as amended 1982).

STATEMENT OF FACTS

As this Court's opinion in *State v. Knese*, 985 S.W.2d 759, 764 (Mo.banc 1999) describes in detail, Randy Knese killed his wife, Karin, in late March, 1996. On March 22, Karin and their young son had gone to her sister-in-law's house because she was angry about Randy's drug use. (Tr345-46).[1] When Karin returned home, she told Randy that he should leave the home and the two retired to sleep in separate rooms, Karin on the living room couch. (Tr346). Randy awakened early that morning, ingested cocaine, and, about an hour later, approached Karin, wanting to talk, but she didn't want to. (Tr347-48). He laid down beside her, continuing to talk and touch her, but she pushed him off the couch. (Tr348). He again laid down and attempted to engage in foreplay and, when Karin protested, he removed her pants and panties. (Tr348). He attempted to have sex with her. (Tr348). He later told police Karin then went "ballistic" and they began to fight. (Tr348). Karin screamed "rape," and Randy then put one hand over her mouth while squeezing her neck with the other. (Tr348-49). She swung a glass lampshade at him but he blocked it, shattering it. (Tr349). She took a piece of the glass and swung again, cutting Randy's palm. (Tr349). Randy took the glass, slashed her neck, and they

[1] Record references are as follows: Trial transcript: (Tr); Suppression hearing: (ST); Legal file: (LF); Post-conviction transcript: (PCRTr); Post-conviction legal file: (PCRLF); Movant's Exhibits: (MEx). Randy requests that this Court take judicial notice of its own files, specifically the record on direct appeal in *State v. Randy Knese*, S.Ct.80225, as did the motion court. (PCRTr14).

fell to the floor, where Randy began to strangle her. (Tr349). She retaliated, putting a finger in his eye and he head-butted her in response. (Tr349). Randy then stood, kicked her head, and stood on her head for what he believed was five or ten minutes. (Tr349-50). Karin died from manual strangulation and probable suffocation, causing asphyxiation. (Tr515-16,527-28). The pathologist opined that sexual assault was probable since Karin's body was prone, partially nude, her legs were spread and Randy was close to her when she died. (Tr526-72).

In penalty phase, Randy's lawyer called him, his parents, uncle, older brother, a neighbor and two friends. (Tr757-786). They testified on direct for an average of two transcript pages. (Tr757-786). The jury convicted Randy of both counts and, in accordance with the jury's verdict, the court sentenced Randy to death. (LF129-30,146,183-86).

Randy timely filed a post-conviction action and appointed counsel filed an amended motion. (PCRLF9-23,28-592). The state moved to dismiss without an evidentiary hearing (PCRLF593-615) and then to strike the amended motion (PCRLF616-17). The court took the motion to strike under advisement and sustained, in part, the motion to dismiss, dismissing Claims 8-9 (a,b,c,d,e,f,j,k,l,m,n,o,p,q,r,s,t,u,v). (PCRLF660-61). The state thereafter again moved that Claims 8-9(g,h,i), challenging Wendt's failure to investigate and present mitigation evidence; failure to present evidence of Randy's good adjustment in jail, under *Skipper v. South Carolina*, and failures to challenge the inadequate voir dire and to move to strike various jurors, be denied without a hearing. (PCRLR745-750). The court granted an evidentiary hearing on those claims,

but required that all penalty phase witness testimony be presented by deposition. (PCRLF779).[2] Counsel filed exhibits and depositions, according to the court's order, and, on March 20, 2001, a hearing was held at which defense counsel, Bob Wendt, testified. (PRCTr4 et seq).

Wendt first met Randy at the jail a few days after the offense, having gotten the case as a referral from his secretary. (Wendt depo34;PCRTr16). Wendt was licensed in 1967, but surrendered his license on January 1, 1981[3] and was finally reinstated in May, 1989. When Randy's parents hired Wendt, 95% of his caseload dealt with the Federal Employees Liability Act. (Wendt depo11;PCRTr16). Since 1989, aside from Randy's case, he only jury-tried one other criminal case and handled a maximum of 20 criminal cases total. (Wendt depo29;PCRTr19). Of those cases, only Randy's involved violence. (Wendt depo30). He never specialized in criminal defense, but had tried several capital cases before 1980. (Wendt depo21-23;PCRTr17). Randy's was the only bifurcated death penalty case he ever handled. (Wendt depo25;PCRTr17). Wendt attended no criminal law CLE's after 1992. (Wendt depo30;PCRTr19).

Wendt worked alone on Randy's case, obtaining help from no lawyers, paralegals, law students, or law clerks. (Wendt depo40-41;PCRTr21). He "might have" hired an

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[2] The Court also considered Wendt's deposition.

[3] Mr. Wendt apparently lost his license for "conspiracy to effectuate the escape of a federal prisoner." http://www.usdoj.gov/opa/pardonchartlst.html. The motion court stated he was aware of Mr. Wendt's problems. (PCRTr20).

investigator, but had no investigative assistance with penalty phase. (PCRTr21-23). Wendt spent less than 200 hours working on Randy's case, and could have spent as few as 60. (Wendt depo39-40). Wendt met 10-15 times each with the prosecutor and his assistant, discussing the possibility of a deal. (Wendt depo47-50). He met 10-12 times with Randy, and discussed the evidence with him. (Wendt depo56-57). He gathered "information with respect to people that we might use in the penalty phase if it came to that." (Wendt depo57).

Wendt hired a psychiatrist, Dr. Wolfgram, to obtain information about Randy's mental state at the time of the offense. (Wendt depo62). He intended to use Dr. Wolfgram in both phases. (Wendt depo65). He may or may not have sent Wolfgram the police reports for him to use in reaching his conclusions. (Wendt depo63). He decided not to call Wolfgram because he believed more harm than good could result. (Wendt depo65).

When Wendt first met Randy a few days after the offense, Randy seemed to be in a state of shock and still under the influence of drugs—his thought processes were jumbled and flighty and it was difficult for him to carry on a logical, coherent, free-flowing conversation. (Wendt depo34-36). Wendt didn't believe Randy could have knowingly and intelligently waived his *Miranda* rights when he gave statements to the police since, when he saw him three days post-offense, he still wasn't lucid. (Wendt depo70). He didn't request MAI-Cr3d 310.06, informing the jury not to consider involuntary statements, because, since Randy didn't contest having shot Karin, he didn't believe the involuntary nature of the statements was relevant. (Wendt depo75). He

believed, however, that the state would "have had a very difficult time proving murder in the first degree without the statement." (Wendt depo78).

Wendt believed that he had gotten Randy' s hospital records to show that, when he made statements, he was very confused. (Wendt depo80). He interviewed nobody from the hospital about the circumstances of Randy's statements or his mental or physical condition. (Wendt depo80). He had no legitimate reason for not interviewing them. (Wendt depo81).

Wendt's trial theory was that Randy killed Karin in self-defense because he believed that it is a "very effective defense." (Wendt depo87). He didn't consider getting photographs of Randy's wounds, although he believed their presence all over Randy's body supported that theory, and he never asked a doctor to examine Randy to see if the wounds resulted from the struggle or from falling onto the road. (Wendt depo88-91). He believed the most problematic part of the state's evidence was that Randy stood on Karin's throat for 5-10 minutes. (Wendt depo95). He did not contest that fact, although Dr. Wolfgram's deposition stated it was physically impossible, and he didn't seek another expert to support that position. (Wendt depo95-96).

Wendt believed that Randy was a "good kid" and was different from any other criminal client that he'd had because he had had virtually no other problems, and was courteous, honest, reliable, trusting and generous. (Wendt depo112; PCRTr49-50).

Wendt spent only 10% of his preparation time on penalty phase, and figured he spent less than ten hours. (PCRTr72). He subpoenaed four or five witnesses for the whole trial. (Wendt depo69). He obtained information about Randy's background from

Randy and his parents, spending at most 2-3 hours with Randy and not talking with his parents until very close to trial because he was satisfied he had everything he needed and just wanted them to help decide whom might be called in penalty phase. (Wendt depo103-04). He talked briefly with Randy's parents about background, just asking them to confirm what Randy told him and how they would prove it. (Wendt depo116;PCRTr50-51). He only talked to Randy, his parents and his brother, Ralph; doing nothing to corroborate what Randy told him of his life, and "whatever he or his parents told me, I believed." Wendt depo104-05). Although the Kneses had a limited amount of money, "to the extent that it [penalty phase] was inadequate, I don't think money had anything to do with it." (PCRTr52).

Wendt obtained no records about Randy's life before the offense. (Wendt depo108). He knew that records like school records were "critically important" but didn't obtain them because "Number one, I knew it wasn't going to be contested. And number two, I think I told you I only spent maybe a maximum of a few hours preparing the penalty phase. Where are you going to gather those kinds of records in two hours?" (Wendt depo122-23). He noted it would have been more effective to obtain documentary or tangible evidence about Randy's life. (Wendt depo125). He did "very little" investigation of Randy's life in jail, interviewing nobody. (Wendt depo110).

Randy's parents "probably" told him that Randy was an exemplary inmate but he didn't consider showing Randy's good adjustment. (Wendt depo111). Wendt knew that Randy was doing "remarkably well". (PCRTr74). He remembered that Randy had volunteered for a job while in jail yet presented no evidence of his good conduct.

(PCRTr79). While he knew that Randy had started a Bible study group and pursued Bible correspondence courses, he never considered presenting that information. (Wendt depo113-14). He believed that Randy's religious beliefs were not a "convenient" jailhouse conversion but were the real thing. (PCRTr75).

Wendt didn't prepare anyone pre-trial for their penalty phase testimony and they had only a limited amount of time to talk pre-penalty phase. (Wendt depo117). He spoke to some witnesses briefly by phone and some he spoke to just before they testified. (PCRTr55-56). He questioned whether he had spent adequate time developing information from those he contacted and from additional witnesses. (Wendt depo118). The motion court stated, when Wendt acknowledged that he had not spoken to some 21 neighbors, friends, family and coaches of Randy, "Let me stop you right here. Just to say if you think for one minute that I would allow you, if you put on a parade of witnesses like that in the penalty phase, you are wrong. I would not have allowed you to trapes [sic] all of those witnesses in here." (PCRTr63).

Randy presented for the motion court's consideration deposition testimony from family and friends, including Charles Stock, Ralph Knese III, Stanley Miller, Janet Chalupny, Cindy Lane, Jane Knese, Robert Sutter, Scott Langelier and Shirley Harvey. (Stock,RKneseIII,Miller,Chalupny,Lane,JKnese,Sutter,Langelier, Harveydepos). They testified that Randy's parents provided little supervision and interest in his life (Stock depo510-11,516,520; RKneseIII depo334,336-39,359-61,423-24; Chalupny depo269-72,275-78; Harvey depo38-39; JKnese depo667-68). They testified that Randy was an altar boy and involved in church. (Chalupny depo269-70; Sutter depo173; Langelier

depo90-91; JKnese depo633; Harvey depo35). They testified about Randy's sports activities, his teamwork, and his lack of violence. (Harvey depo11; Chalupny depo269-275; Sutter depo177-78; Langelier depo118). They testified about Randy's devastation when his best friend, Mike Chalupny, was decapitated in a car accident, and Randy never received support or counseling to deal with this traumatic event. (JKnese depo682; Harvey depo44-49; Sutter depo180; Langelier depo94,123; Chalupny depo279).

Randy also presented the deposition testimony of witnesses who could have testified about his good conduct in jail. (Kleeschulte,Wade,Wilson,Gruber depos). They testified that Randy was inspirational for other inmates, causing them to re-think the paths their lives were taking. (Kleeschulte depo555-56;Wade depo585-86). They testified that Randy was a peacemaker in jail, mediating disputes and helping guards to maintain order. (Wade depo586-87; Wilson depo609,611; Kleeschulte depo557-58). They testified that Randy volunteered for work in the jail. (Wilson depo610). They testified about his strong faith in God and his Bible studies that he shared with those around him. (Gruber depo459-68,482-83,490-91; Wilson depo604-08; Kleeschulte depo550-51).

Wendt did not voir dire on Randy's right not to testify and didn't submit MAI-Cr3d308.14 because, during voir dire, he hadn't yet decided if Randy would testify, and he believed that the instruction merely highlights that the defendant didn't testify. (Wendt depo136-38;PCRTr48).

Wendt's sole preparation for voir dire was to read the juror questionnaires, some of which he received the morning of trial. (Wendt depo139;PCRTr23). He did not ask

Judge Cundiff for additional time to review the just-received questionnaires. (Wendt depo140;PRCTr27). During trial, he concluded that Dennis Gray, the foreman, was opposed to Randy, and, when the jury announced its death verdict, Gray smirked. (Wendt depo142-43). Wendt immediately thereafter perused Gray's questionnaire, which stated he favored public executions and most admired Oliver North. (Wendt depo144-45; MEx41). When he saw Gray's answers, "I about vomited"(Wendt depo164;PCRTr27) because "I missed it and there is no chance that I would have left him on a jury if I would have seen it ahead of time." (PCRTr28,31). Had Wendt read Gray's questionnaire pre-voir dire, "he would have been my first strike…The mistake in this case, I believe, is the most egregious mistake I've ever made in the trial of a case. It could well have had catastrophic consequences for my client and there's no excuse for it." (Wendt depo145-46). Wendt didn't ask Gray his views on the death penalty because he hadn't seen Gray's responses. (PCRTr34). He made no decision not to ask Gray about his views because he hadn't seen the questionnaire. (PCRTr34). Even though Gray asserted on voir dire that he could be fair and impartial, Wendt still would have wanted to strike him based on his questionnaire responses. (PCRTr89-91). If nothing else, he would have used a peremptory to challenge Gray. (PCRTr90).

Wendt also reviewed Juror Richard Maloney's questionnaire post-trial and, finding that Maloney disfavored "endless appeals," "parole board," and "good time," "clergy to pamper a killer", and that "If he is found guilty, do it," he "can't imagine that I would have left this person on, had I seen those answers." (Wendt depo148-52;PCRTr38). He was "flabbergasted" by Maloney's answers (Wendt depo157) and

believed that he had either not read the entire questionnaire or had missed his answers. (PCRTr36). He stated that "for any criminal defense lawyer…to leave a man who responds like he did…is just an egregious error, and especially in a case like this" because a person with those views doesn't have "a ghost of a chance of being fair and—fair and impartial." (Wendt depo169-71;PCRTr42). If nothing else, he would have used a peremptory to challenge Maloney. (PCRTr100).

Wendt stated that pre-trial he didn't spend adequate time and didn't request it to review the questionnaires. (Wendt depo153). He believed that not requesting adequate time to review the questionnaires or not catching the information in them was "inexcusable." (Wendt depo172-73).

Following the evidentiary hearing, the motion court denied relief on all of Randy's claims. (PCRLF803-43).[4] This appeal follows.

[4] To avoid needless repetition, the court's findings are set forth in the arguments.

POINTS RELIED ON

I. JURORS SHOULD HAVE BEEN STRUCK

The motion court clearly erred in overruling Randy's claim that counsel was ineffective for inadequately and incompletely voir diring venirepersons and not striking biased and unqualified jurors, like Dennis Gray and Richard Maloney, because this violated Randy's rights to due process, a fair trial before a fair and impartial jury, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that Wendt failed to review juror questionnaires or ask the court for sufficient time to review them before jury selection. Had he done so, he would have discovered that Gray and Maloney held views rendering them unqualified to serve—since they thought laws are "way too soft" on criminals; favored public executions; revered Oliver North; disfavored "endless appeals," last meals and "clergy to pamper a killer." If he had questioned them further, he would have moved to strike them for cause or peremptorily.

Morgan v. Illinois, 504 U.S. 719 (1992);

Williams v. Taylor, 120 S.Ct. 1495 (2000);

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

State v. McKee 826 S.W.2d 26 (Mo.App.,W.D.1992).

II. INADEQUATE VOIR DIRE

The motion court clearly erred in denying Randy's claim that counsel was ineffective for conducting an inadequate voir dire because counsel's actions violated Randy's rights to due process, effective assistance of counsel, a fair and impartial jury and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that counsel didn't ensure that veniremembers be asked whether they could consider the full range of punishment—including life without parole—and whether they were automatic death penalty jurors. Randy was prejudiced because his jury contained members who could not be fair and impartial.

Morgan v. Illinois, 529 U.S. 719 (1992);

State v. Nicklasson, 967 S.W.2d 596 (Mo.banc1998);

Wainwright v. Witt, 469 U.S. 412 (1985);

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

III. PENALTY PHASE WITNESSES NOT INVESTIGATED

The motion court clearly erred in denying Randy's claim that counsel was ineffective for not investigating or presenting mitigating evidence from family and friends: Charles Stock, Ralph Knese III, Stanley Miller, Janet Chalupny, Cindy Lane, Jane Knese, Robert Sutter, Scott Langelier, Shirley Harvey, because counsel's failure violated Randy's rights to due process, effective assistance of counsel and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that while Wendt called eight witnesses, he spent no time preparing them to testify and never investigated additional available witnesses. Had he done minimal investigation and preparation, he could have established that Randy's parents were distant, ignored him, gave him no supervision or guidance; Randy was an altar boy and involved in church, was an involved, successful sports team-player, received a college academic scholarship but not his dream of a sports scholarship, was shy of girls in high school, was devastated by his best friend's death in high school; was respectful, caring of others, a peacemaker. Randy was prejudiced because these witnesses would have given the jury a more accurate picture of who Randy was and would have given them reasons not to impose death, but to choose life.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

Jermyn v. Horn, 266 F.3d 257 (3rd Cir.2001);

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

Mayfield v. Woodford, 270 F.3d 915 (9th Cir.2001).

IV. GOOD JAIL CONDUCT

The motion court clearly erred in denying Randy's claim that counsel was ineffective for presenting no evidence of Randy's good jail conduct because counsel's failure violated Randy's rights to due process, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that although counsel knew Randy was a model inmate he made no attempt to investigate or adduce that kind of evidence. Randy's good behavior in jail was mitigating and would have been compelling evidence to rebut the State's portrait of Randy as a violent, uncaring, drug-crazed person and to show he was helpful and caring to guards and inmates.

Skipper v. South Carolina, 476 U.S. 1 (1986);

Williams v. Taylor, 120 S.Ct. 1495 (2000);

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

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

V. NO-ADVERSE-INFERENCE INSTRUCTION NOT GIVEN

The motion court clearly erred in denying Randy's claim that Wendt was ineffective for not voir diring on Randy's right not to testify and not requesting the "no-adverse-inference" instruction in guilt phase because this denied Randy's rights to remain silent, due process, a fair and impartial jury, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that Wendt's inaction allowed the jury's unfettered speculation about why Randy was not taking the stand in guilt phase—including that he was confessing to first degree murder.

Carter v. Kentucky, 450 U.S. 288 (1981);

Griffin v. California, 380 U.S. 609 (1965);

Lakeside v. Oregon, 435 U.S. 333 (1978);

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

VI. FAILURE TO INVESTIGATE AFFECTED SUPPRESSION

The motion court clearly erred in denying without a hearing and his motion to reconsider Randy's claim that Wendt was ineffective for not investigating and presenting evidence at the suppression hearing and throughout trial that Randy was high on cocaine when he made statements to the police because Wendt's failures violated Randy's rights to due process, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that his motion states facts, not conclusions that, if true, warrant relief; the facts are not refuted by the record and Randy was prejudiced by Wendt's inaction. Wendt recognized Randy's statements were the primary means through which the state established its case. Had they been excluded, a reasonable probability exists that Randy would not have been convicted of first degree murder, much less sentenced to death.

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

Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990);

Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992);

State v. Tokar, 918 S.W.2d 753 (Mo.banc 1996).

VII. FAILURE TO INVESTIGATE AFFECTED BOTH PHASES

The motion court clearly erred in denying without a hearing and his motion to reconsider Randy's claim that Wendt was ineffective for not investigating and then presenting evidence in both phases of trial that Randy was high on cocaine, suffering from Cocaine Psychosis or Cocaine Delirium, when he committed the offense because Wendt's failures violated Randy's rights to due process, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that Randy's motion states facts, not conclusions, that, if true, warrant relief; the facts are not refuted by the record and Randy was prejudiced by Wendt's inaction. Wendt could have shown, had he thoroughly investigated and then presented the available evidence, that Randy lacked the capacity to deliberate, given the Cocaine Psychosis or Cocaine Delirium, which would have negated the culpable mental state necessary for conviction of first degree murder, and this evidence would have also established that Randy's capacity to appreciate the criminality of his conduct was substantially impaired, thus warranting submission of that statutory mitigating circumstance to the jury.

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

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

Cave v. Singletary, 971 F.2d 1513 (11th Cir.1992);

State v. Tokar, 918 S.W.2d 753 (Mo.banc1996).

VIII. EXCESSIVE VICTIM IMPACT

The motion court clearly erred in denying an evidentiary hearing and denying relief on Randy's claim that Wendt ineffectively failed to object to or attempt to limit the state's presentation of extensive victim impact evidence, which included otherwise inadmissible hearsay, because Wendt's failures denied Randy's rights to due process, confrontation, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and violated §565.030.4 RSMo, in that Wendt unreasonably failed to do anything to limit the jury's consideration of victim impact evidence that would not otherwise be admissible in either phase. This evidence caused the jury to sentence Randy to death based on emotion and other arbitrary factors, not the facts and the law.

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

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

Pennsylvania v. Ritchie, 480 U.S. 39 (1987);

Section 565.030.4 RSMo.

ARGUMENT

I. JURORS SHOULD HAVE BEEN STRUCK

The motion court clearly erred in overruling Randy's claim that counsel was ineffective for inadequately and incompletely voir diring venirepersons and not striking biased and unqualified jurors, like Dennis Gray and Richard Maloney, because this violated Randy's rights to due process, a fair trial before a fair and impartial jury, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that Wendt failed to review juror questionnaires or ask the court for sufficient time to review them before jury selection. Had he done so, he would have discovered that Gray and Maloney held views rendering them unqualified to serve—since they thought laws are "way too soft" on criminals; favored public executions; revered Oliver North; disfavored "endless appeals," last meals and "clergy to pamper a killer." If he had questioned them further, he would have moved to strike them for cause or peremptorily.

Counsel was ineffective for not adequately voir diring veniremembers about their views on the death penalty. He received jury questionnaires pre-trial, but neither reviewed them nor requested enough time to review them to discover biases that would render veniremembers unqualified to serve. Had he discovered the information in the questionnaires, he would have further questioned them and moved to strike them, for cause or peremptorily. By leaving them on Randy's jury, he violated Randy's

constitutional rights to due process, effective assistance of counsel, a fair trial with an impartial jury, and freedom from cruel and unusual punishment.

Dennis Gray and Richard Maloney were jurors on Randy's case; Gray the foreperson. (LF103,129-30). To prepare for voir dire, Wendt did "nothing other than look[] at the questionnaires that had become available prior to the actual voir dire examination." (PCRTr23). The court recalled sending some questionnaires to the lawyers, but some drifted in slowly and late. (PCRTr24). Wendt "spent hours" looking at the questionnaires that were available early, but spent little time on the later ones and didn't request time to review the ones he received close to voir dire. (PCRTr26-27). He didn't recall why he didn't ask for more time. (PCRTr27). He stated he spent inadequate time reviewing the questionnaires and didn't request the time to do so, although he received many questionnaires the morning of trial, including Gray's and Maloney's. (Wendt depo153). He acknowledged that "prudent practice would have dictated that I ask for sufficient time and didn't ask for it, again, it's inexcusable, especially in view of what's contained in here." (Wendt depo153).

Wendt noticed Foreman Gray's demeanor throughout trial and feared he would be the foreperson. (Wendt depo142-43;PCRTr27). When the jury came back with death, Gray smirked. (Wendt depo143). After the jury left, Wendt perused the questionnaires. (Wendt depo144;PCRTr27).

Gray believes our laws are "way to [sic] soft" on criminals; his most admired person is Oliver North; his solution to crime is to "build more jails. And give out longer sentences—keep these off the streets—fewer paroles. I pay enough taxes to float a

battleship anyway." (MEx41). On the death penalty, he stated, "make executions public. If a criminal knew he was being executed in a public square in front of thousands of people, he might [think] twice about committing a murder." (MEx41).

Voir dire revealed nothing untoward about Gray's views on the death penalty. But, the sole question the court asked to instigate a dialogue with jurors was "Is there anybody that could not follow the Court's instructions with respect to the range of punishment? Basically folks, that is what I'm asking you is the death penalty question. Is there anybody here that feels that they could not follow the Court's instructions?" (Tr43).

When Wendt finally reviewed Gray's questionnaire and saw his answers, "I actually became physically nauseated…." (PCRTr27;Wendt depo164). Wendt would not have left Gray on the jury had he known Gray so admired North—Gray would have been his first strike. (PCRTr28,31;Wendt depo145-46). At the very least, that knowledge would have prompted extensive questioning by Wendt to develop a cause strike. (PCRTr32,86). He believed this was "the most egregious mistake I've ever made in the trial of a case. It could well have had catastrophic consequences for my client and there's no excuse for it." (Wendt depo146). Because he didn't see his questionnaire responses, Wendt neither asked Gray his views on the death penalty nor decided not to question Gray. (PCRTr32-34).

Wendt didn't recall reading Richard Maloney's questionnaire before voir dire and is certain he didn't read many of his answers. (PCRTr36). Maloney also believed "for the most part, [our laws are] too soft" on criminals; crime can be solved if we "abolish

the parole board, no more good time," and, as to the death penalty, "don't allow endless appeals, 15 years more time. Last meals, and clergy to pamper a killer. He didn't allow this for his victim. If he is found guilty, do it."(MEx42).

Maloney's answers "flabbergasted" Wendt and were "extremely problematical." (Wendt depo150,157). Although he believed he had seen parts of this questionnaire pre-trial, he was certain he hadn't read the problematical answers because "I can't imagine that I would have left this person on, had I seen those answers." (Wendt depo152;PCRTr36). Especially as to Maloney's "death penalty" answer, had Wendt been aware of it, he would never have allowed Maloney to sit but would have struck him for cause or peremptorily. (PCRTr38,100). He believed it was tantamount to saying "let's go ahead and convict him before we give him a fair trial." (PCRTr103). He didn't move to strike Maloney because he didn't see his answers. (PCRTr42). He believed leaving Maloney on the jury was a mistake because his answers show it is difficult for him to be fair and impartial in a case like Randy's. (PCRT42).

The motion court denied relief, finding the questionnaires could not be viewed in isolation and the jurors' actual responses on voir dire were more important. (PCRLF834). It found that Gray's opinions didn't necessarily indicate an inability to sit but, "Far more significant is the fact that Mr. Gray, under general questioning by the Court and defense counsel, never indicated an inability to be fair and impartial…No basis for striking this individual for cause was presented." (PCRLF835). Similarly, it found that "the record shows that Mr. Maloney never indicated during voir dire that he could not be fair and impartial to both sides." (PCRLF836). The court found Randy failed to show how

Wendt's decision not to peremptorily strike Gray and Maloney prejudiced him. (PCRLF838). It also found Wendt's statement that he would have used his peremptories to remove Gray and Maloney not credible. (PCRLF837). It stated:

> Clearly, given the outcome in this case, it is natural that defense counsel would have second thoughts concerning the jury he picked. Having said that, there is absolutely no reason to believe that a different jury would have reached a different verdict. Further, since none of these three veniremen could have been struck for cause, Wendt would have been required to expend his preemptory [sic] strikes thereby leaving others on the jury that he may also have desired to strike. Choosing how to exercise one's preemptory [sic] strikes is, beyond question, one of the most subjective aspects of trying a case, and removal of a juror is a matter of reasonable trial strategy…Counsel was not obligated to use his limited number of strikes to remove those venirepersons as opposed to any others that he may have considered less desirable from the standpoint of his defense strategy…Courts should not second-guess the decisions of trial counsel, simply because trial counsel is now expressing regrets on how he exercised his preemptory [sic] strikes at the time of trial.

(PCRLF837).

This Court must review the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819,822(Mo.banc2000); *Hall v. State*, 16 S.W.3d 582,585(Mo.banc2000); Rule29.15. Findings and conclusions are clearly erroneous if, upon reviewing the entire record, this Court has a definite and firm impression a mistake

was made. *State v. Taylor*, 929 S.W.2d 209(Mo.banc1996). To establish ineffective assistance, Randy must show counsel's performance was deficient and that performance affected his case. *Strickland v. Washington*, 466U.S.668(1984); *Williams v. Taylor*, 120S.Ct.1495,1511-12(2000). To prove prejudice, Randy must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*., *State v. Butler*, 951S.W.2d600,608(Mo.banc1997).

The motion court's findings were clearly erroneous. Wendt was constitutionally ineffective for not reviewing the questionnaires, which contained the basis for cause strikes of Gray and Maloney or which, after further examination, would have led to Wendt using peremptories to remove them from Randy's jury.

The motion court's findings are based, in part, upon its belief that, since neither Gray nor Maloney indicated an inability to be fair upon questioning, their answers to the questionnaire were irrelevant. This flies in the face of established law.

The right to jury trial guarantees a criminal defendant a fair trial by impartial, "indifferent" jurors. *In re Oliver*, 333 U.S. 257 (1948). A fair trial in a fair tribunal is a basic component of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719,729(1992); *Dennis v. United States*, 339 U.S. 162, 171-72(1950). Without an adequate voir dire, the judge can't fulfill her obligation to remove those who can't impartially follow the instructions and evaluate the evidence. *Rosales-Lopez v. United States*, 451 U.S. 182,188(1981).

In *Morgan v. Illinois, supra,* all empaneled jurors were asked generally if they could be fair and impartial. All agreed they could. The state suggested that such general "fairness" and "follow-the-law" questions were enough to detect those who automatically would vote for death. *Morgan,* 504 U.S.at734. The Court noted *Witherspoon* and its progeny "would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath." *Id.*at734-35.

The court and counsel asked similarly general questions here (Tr42-43,214-16) and neither Gray nor Maloney responded. The question under *Morgan* is not whether they responded to that general question. It is whether, had Wendt been aware of their questionnaire answers, he would have questioned them further, perhaps eliciting that they were "automatic" death penalty jurors, or moved to strike them for cause or peremptorily, based on their questionnaires or on further examination. Wendt's testimony is unequivocal—had he seen the questionnaires, he would have questioned them further. He would not have wanted them on Randy's jury since he didn't believe they could be fair and impartial.

The motion court attempts to escape the inevitable by finding incredible Wendt's testimony that he would have used peremptories to strike Gray and Maloney. (PCRTr837). This ignores three critical facts. First, Wendt did not concede error on the vast majority of claims raised but often asserted a reasonable trial strategy for doing what he did. (See e.g. PCRTr48,80). Second, Wendt's failures to move to strike Gray and Maloney stemmed from his failure to read their questionnaires or to ask for sufficient

time to review them. Thus, at heart, the issue is Wendt's failure to investigate information that was in his lap. *Williams v. Taylor*, 120 S.Ct.1495-1515(2000). Third, as Wendt noted, given their questionnaire responses, **no** reasonable criminal defense lawyer would have left Gray and Maloney on Randy's jury. Gray favors public executions so that defendants think twice about murdering; Maloney believes that, if someone is found guilty "do it," and both believe laws are "too soft" on criminals. (MEx41,42). Their views evince at best a predisposition toward conviction, and at worst, an automatic belief in the death penalty. Neither is the unbiased, impartial juror the Sixth Amendment requires. Randy was prejudiced by Wendt's having left them on the jury. *State v. McKee*, 826 S.W.2d 26 (Mo.App.,W.D.1992); *Presley v. State*, 750 S.W.2d 602 (Mo.App.,S.D.1988)(There, counsel was deemed ineffective for not striking jurors whose expressed views biased them against the defendant. Wendt didn't discover these jurors' biased views because he didn't adequately investigate initially by reviewing their questionnaires. His failures are as egregious as those condemned in *McKee* and *Presley*).

Had Wendt bothered to read the questionnaires, he would have discovered critically important information about men who decided Randy's fate and he would have acted to ensure they were denied that power. The makeup of Randy's jury would have been markedly different under those circumstances and a reasonable probability exists for a different result. This Court must reverse and remand for a new trial, a new penalty phase or impose a sentence of life without probation or parole.

II. INADEQUATE VOIR DIRE

The motion court clearly erred in denying Randy's claim that counsel was ineffective for conducting an inadequate voir dire because counsel's actions violated Randy's rights to due process, effective assistance of counsel, a fair and impartial jury and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that counsel didn't ensure that veniremembers be asked whether they could consider the full range of punishment—including life without parole—and whether they were automatic death penalty jurors. Randy was prejudiced because his jury contained members who could not be fair and impartial.

Had twelve people been randomly selected from the streets of St. Charles and recruited to sit on Randy's case, Wendt would have known no more about their views on the death penalty than he did after voir dire. The questioning was so limited that whether veniremembers were automatic death penalty was often never discovered. Wendt's sole goal was to keep women off the jury (Tr815-17;PCRTr91), not to discover the veniremembers' views. This denied Randy's constitutional rights to due process, effective assistance of counsel, a fair trial, effective assistance of counsel and freedom from cruel and unusual punishment.

The trial court "death-qualified" jurors by asking if they could consider death, but never asked if they could consider life. The court began, asking:

> It is my understanding that the State will be asking for the death penalty in this case. That is range of punishment. I will instruct you on the range of punishment.

> Is there anybody that could not follow the Court's instructions with respect to the range of punishment? Basically folks, that is what I'm asking you is the death penalty question. Is there anybody here that feels that they could not follow the Court's instructions?

(Tr42-43).

The court followed-up individually with each juror with problems about the death penalty (Tr60-61,67-97,99-101). He only asked if they could consider death, never whether they could consider life *Id.* He never asked about mitigation or if they would automatically impose death. *Id*. When the prosecutor tried to expand the questioning, the court refused (Tr118-19,166-67), stating the proper scope of questioning is:

We have already asked these people their opinion on the death penalty everybody sitting out there right now told you, told me that they can do the death penalty. I don't want you going into this area. (Tr119).

Randy challenged this inadequate voir dire on direct appeal. This Court found no plain error, noting, "In order to complain of insufficient voir dire, a defendant must attempt to have a specific question asked or, at a minimum, notify the trial court that he wishes to explore a particular area." *State v. Knese*, 985 S.W.2d 759,776(Mo.banc1999).[5] Randy asserted Wendt was ineffective. (PCRLF457-67). The motion court sustained the state's objections to questions posed to Wendt because this Court had denied the claim upon plain error review. (PCRTr45-46). It then found the record showed "the trial court

[5] Apparently the prosecutor's attempt to expand voir dire was insufficient.

undertook this aspect of voir dire. The Court's questioning of the panel was legally sufficient" (PCRLF840). It found no ineffectiveness. (PCRLF840). These findings are clearly erroneous.

This Court must review the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819,822(Mo.banc2000); *Hall v. State*, 16 S.W.3d 582,585(Mo.banc2000); Rule 29.15. Findings and conclusions are clearly erroneous if, upon reviewing the entire record, this Court has a definite and firm impression a mistake was made. *State v. Taylor*, 929 S.W.2d 209(Mo.banc1996).

To establish ineffective assistance, Randy must show Wendt's performance was deficient and that performance affected his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 120 S.Ct. 1495,1511-12(2000). To prove prejudice, Randy must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.; State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997).

A defendant must have an impartial jury. Part of that constitutional guarantee is an adequate voir dire to identify unqualified jurors. *Morgan v. Illinois*, 529 U.S. 719,729(1992). Without that adequate voir dire, "'the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.'" *Id.*at729-30, citing *Rosales-Lopez v. United States*, 451 U.S. 182,188(1981). To effectuate that voir dire, certain inquiries are required: First, the so-called *Witherspoon* question (determining if a juror will automatically vote for death, regardless of evidence and instructions, *Witherspoon v.*

Illinois, 391 U.S. 510,522,n.21(1968)) and second, the *Witt* question (determining if a juror will automatically vote for life, *Wainwright v. Witt*, 469 U.S. 412,424(1985)). *State v. Nicklasson*, 967 S.W.2d 596,610(Mo.banc1998). These two questions combine to help produce "a jury that could impartially decide all of the issues in [a capital] case." *Lockhart v. McCree*, 476 U.S. 162,180(1986). This Court has recognized that "the absence of a *Witherspoon* inquiry is tantamount to a denial of fundamental fairness in a capital trial." *Nicklasson* at611. It matters not who inquires, merely that inquiry be made. *Id.*

Here, neither the *Witherspoon* nor the *Witt* questions were asked. Minimal constitutional standards were not met. Automatic death penalty venirepersons, such as Jurors Gray and Maloney, served. See, Point I.

Wendt was constitutionally ineffective for failing to voir dire or require that the Court voir dire on these critical issues. *Strickland v. Washington*, 466 U.S. 668(1984). The motion court attempts to avoid this obvious conclusion by stating that it took control of voir dire, which was sufficient, and counsel can't be ineffective for failing to comply with court orders. (PCRLF840). This ignores that, while the nature and extent of questioning on voir dire is within the court's control, it is not beyond reproach, but is subject to review for an abuse of discretion. *Nicklasson* at609. Thus, just as the court would be found to have abused its discretion for disallowing questioning on these critical issues, so too must it be found to have abused its discretion for taking that control and limiting voir dire to avoid those issues. Wendt's failure to request voir dire left them unexplored, with fatal results.

The motion/trial court refused to let Wendt testify about Wendt's failure to act on this claim, stating that this Court had already decided the issue. (PCRTr45-46). The court seems to assert that a finding of no manifest injustice under the plain error standard on direct appeal establishes a finding of no prejudice under the *Strickland* ineffective assistance test. That is inaccurate, as this Court's opinion in *Deck v. State*, S.Ct.83237 (February 26, 2002)(Mo.banc)(holding that manifest injustice on plain error review and prejudice prong of *Strickland* test are not co-equal) reveals.

This Court's opinions in *Sidebottom v. State*, 781 S.W.2d 791 (Mo.banc1989) and *Clemmons v. State*, 785 S.W.2d 524(Mo.banc1990), reveal that these two standards are dissimilar. In *Strickland*, the Court specifically rejected finding the prejudice prong was an outcome-determinative standard because ineffective assistance claims assert the absence of a critical assurance that the proceeding's result is reliable. 466 U.S.at692-94. The standard is lower: A reasonable probability that, but for counsel's error, the result would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. 466 U.S.at694. The roots of this test lie in the test for materiality of exculpatory evidence undisclosed to the defense. *Id.*; citing *United States v. Agurs*, 427 U.S. 97,104,112-13(1976). In *Kyles v. Whitley*, 514 U.S. 419,434(1995), the Court reaffirmed that, under the *Strickland* standard, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case."

In *Sidebottom*, this Court applied the *Strickland* prejudice standard to counsel's failure to object to an exhibit that referred to a rape and burglary, in a small box on one of fifteen pages. *Sidebottom* at796. When the jury asked if Sidebottom had been convicted

of the rape and burglary or just charged with offenses that couldn't be considered in guilt, the court instructed not to consider those entries in reaching its verdict. *Id.*

This Court found "the *bases* for finding no manifest injustice on direct appeal serve to establish no prejudice under the Strickland test." *Id*.(emphasis added). Emphasizing that the trial court had directed the jury to disregard, the prosecutor didn't try to use the unrelated crimes and hadn't consciously tried improperly to inject them, this Court applied the standard of "a reasonable probability that the result would have been different" and found no prejudice. *Id*.at797.

In deciding *Clemmons*, this Court again applied the *Strickland* prejudice standard and noted that prejudice only must undermine confidence in the outcome. *Clemmons* at527. As in *Sidebottom*, this Court found that "the basis for this Court's finding of no manifest injustice on direct appeal served to establish a finding of no prejudice under the *Strickland* test." *Id*.at530.

This Court later decided *State v. Nolan*, 872 S.W.2d 99,103(Mo.banc1994), a consolidated appeal challenging whether an attempted burglary verdict-director that failed to specify the intended crime of burglary was plain error. This Court stated that, for instructional error to constitute plain error, the trial court must have so misdirected or failed to instruct the jury as to cause a manifest injustice or miscarriage of justice. *Id*. That inquiry is fact-driven, but, for instructional error, the party must prove the error "affected the jury's verdict." *Id*. Nolan didn't meet this standard since the jury found he intended to commit the crime and the prosecutor's argument to that effect was supported by the evidence. *Id.* Since Nolan couldn't show the instructional error actually affected

the verdict, no plain error existed. *Id.* (see also *State v. Deck*, 994.S.W.2d527,540 (Mo.banc1999).

This Court also addressed counsel's ineffectiveness for not objecting to the improper instruction or including it in the new trial motion. As to that claim, this Court relied on *Strickland's* prejudice standard. *Id.*at104. This Court found that, "as in *Sidebottom*, the *basis* for no finding of manifest injustice defeats a finding of prejudice under *Strickland*." *Id.*(emphasis added).

The motion court's findings are clearly erroneous. Voir dire was woefully inadequate and didn't ensure the empaneling of a jury that could impartially decide the issues. This Court must reverse and remand for a new trial, or, at the very least, a new penalty phase.

III. PENALTY PHASE WITNESSES NOT INVESTIGATED

The motion court clearly erred in denying Randy's claim that counsel was ineffective for not investigating or presenting mitigating evidence from family and friends: Charles Stock, Ralph Knese III, Stanley Miller, Janet Chalupny, Cindy Lane, Jane Knese, Robert Sutter, Scott Langelier, Shirley Harvey, because counsel's failure violated Randy's rights to due process, effective assistance of counsel and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that while Wendt called eight witnesses, he spent no time preparing them to testify and never investigated additional available witnesses. Had he done minimal investigation and preparation, he could have established that Randy's parents were distant, ignored him, gave him no supervision or guidance; Randy was an altar boy and involved in church, was an involved, successful sports team-player, received a college academic scholarship but not his dream of a sports scholarship, was shy of girls in high school, was devastated by his best friend's death in high school; was respectful, caring of others, a peacemaker. Randy was prejudiced because these witnesses would have given the jury a more accurate picture of who Randy was and would have given them reasons not to impose death, but to choose life.

Wendt did virtually no investigation of Randy's case. He had concluded that Randy was a "good kid" and, for penalty phase, asked Randy and his parents who could be called to support that theory. (PCRTr49-50). He didn't discuss penalty phase with Randy's parents until very close to trial when he asked their help in finding who might be

called. (Wendt depo104,116;PCRTr54). He did nothing to corroborate what Randy told him about his life (Wendt depo104). Those whom he actually called he didn't prepare, other than telling them, just before they testified, to tell the truth. (Wendt depo117;PCRTr55-56). He obtained no records of Randy's life because, "I told you I only spent maybe a maximum of a few hours preparing the penalty phase. Where are you going to gather those kinds of records in two hours?" (Wendt depo123). Because Wendt didn't conduct the most basic investigation, the jury never heard the mitigating evidence of Randy's childhood and young adulthood from family and friends who knew him well. Wendt was ineffective.

Wendt's penalty phase presentation was paltry, despite the wealth of readily available evidence. Randy told the jury how sorry he was for what had happened and thanked family for caring for his son. (Tr757-58). Shirley Harvey, a neighborhood "mom" stated Randy and her son played sports together from age 5-18. (Tr773). Randy was a pleasure to have around, loyal, a loveable boy. (Tr773-74). Darren DeClue had known Randy since high school and played ball with him. (Tr775). Randy was an easygoing guy who never started trouble. (Tr775). Thomas Knese, Randy's uncle, called Randy sports-minded, but very quiet and calm. (Tr776-77). Robert Cordes, a funeral home manager who had known Randy for 13-14 years, said Randy was calm, professional and easy-going in his printing work. (Tr777-79). Everit Jones played baseball with Randy on Sundays and Randy was very calm and never got mad on the ballfield. (Tr780-81). Randy's brother Ralph said they had their differences but Randy was never violent. (Tr782). Randy's father said Randy was a normal son—he got into

mischief when younger but was always kind, gentle, non-violent. (Tr783). Although he suspected Randy used drugs, he never saw it or confronted Randy. (Tr784). Randy's mother said Randy was a loving child who cooked supper starting at age 11-12 and still cooks. (Tr786). She never heard of him being violent. (Tr786).

That comprised Wendt's entire penalty phase presentation. Had he bothered to investigate—talked to witnesses, looked at records—he could have discovered and then made a reasonable strategic decision about what he wanted the jury to consider.

Ralph's trial preparation consisted of Wendt telling him, as they waited to enter the courtroom for penalty phase, "when I put you up there, be positive, talk highly of your brother." (RKneseIII depo423-24). Had Wendt talked to Ralph pre-trial, he would have discovered that, as children, they lacked parental supervision and Ralph, a little "Hitler," pushed his brothers around—using intimidation and force. (RKneseIII depo336-39). Once Ralph Jr. was in third grade and Randy was in kindergarten, they had no babysitter and their parents spent less time with them than parents of other neighborhood kids. (RKneseIII depo334,356-57). Charles Stock, a neighbor who helped the Kneses buy their house, could have testified that the children fended for themselves. (Stock depo510-11,516,520). When they arrived home, no parents were there and they had to borrow a key from Stock to even enter their house. (Stock depo516,519). Because no parents were there after school, the Knese household became the meeting-place, and, under Ralph's leadership, they played poker for money and began smoking cigarettes and then marijuana. (RKneseIII depo359-61).

The Knese boys played sports but their parents usually didn't attend their sporting events and showed little interest in their children's lives. (RKneseIII depo357-58,362). Their dad briefly coached one of Randy's teams but later rarely attended Randy's games, instead concentrating on adult teams he coached and on which Randy's mom played. (RKneseIII depo364-67). Their parents attended tournaments every weekend, often leaving pre-dawn Saturday, returning after dark, then playing again Sunday. (RKneseIII depo367). Ralph Sr. stopped coaching the children's team since he just wanted them to win and he yelled at them. (KneseJ depo667-68). Janet Chalupny, whose son Michael became Randy's best friend from age five, often took Randy to the boys' soccer and baseball games, since Randy's parents rarely attended. (Chalupny depo269-72,275-78). Shirley Harvey, whose son Mike was Randy's other best friend, often gave Randy dinner, and rotated with the Chalupnys at taking Randy to games. (Harvey depo38-39). Randy's mom, Jane, acknowledged they didn't attend most of Randy's games: "we were pretty self-absorbed and really weren't thinking about what we were doing." (KneseJ depo632). Randy's baseball and basketball coach from ages 6-14 thought Randy resented his parents' lack of support, since they rarely attended practices and games, and other parents stood-in for them. (Miller depo305-14).

Randy's parents' marriage was rocky and they often fought about money. (RKneseIII depo343-46; Stock depo521-23). They never discussed problems with their children (RKneseIII depo356). The family moved several times because Ralph Sr. declared bankruptcy. (Stock depo502-510). Ralph Sr. was "too involved" in sports, and this adversely affected his business and family lives. (Stock depo513-17).

Randy, Michael and Mike became best friends through sports and church, where they attended religious education classes together and Randy was an altar boy. (Chalupny depo269-70; KneseJ depo633; Sutter depo173; Langelier depo90-91). Although some made fun of boys who participated in church, because Randy was confident about what he did, they didn't make fun of him. (Langelier depo116). His church participation began early and extended throughout his youth. He took his first communion at age 8 (Exh1) and was confirmed at age 13. (KneseJ depo638,649;Exh1,2). He also played on church sports teams, learning teamwork and sportsmanship. (Harvey depo35).

The boys played sports—baseball, basketball, soccer—throughout school and were avid sportsmen, learning fundamentals of the games and good sportsmanship. (Chalupny depo269; Sutter depo178). Randy liked sports so well that, when other children might argue or fight, Randy "just wanted to play. He didn't want to fight." (Harvey depo11). He was a "sweet little boy" and "very polite." (Harvey depo11). He included everyone in the games, stuck up for friends even if they weren't the best players, and always defused scuffles among players. (Langelier depo90,97,98; Sutter depo177). He helped others with their skills, sports and academic, without rubbing it in. (Langelier depo104). He cheered friends if they were down. (Chalupny depo275). He continued to play with his friends because they were friends, despite heavy involvement in better teams. (Langelier depo118).

Randy was very close to Mike Chalupny—"if you saw Mike, you saw Randy; if you saw Randy, you saw Mike." (Sutter depo180). They and Michael Harvey were the "Three Musketeers." (Chalupny depo273; Harvey depo44). They played on innumerable

teams throughout grade school and high school. (Exh3; Chalupny depo274). Randy excelled in sports and his academics didn't suffer as he always got A's and B's, culminating in a college academic Presidential scholarship. (KneseJ depo675,677;Exh5). Despite his academic achievements, Randy believed he failed since he didn't receive a sports scholarship. (Sutter depo197). His mother, however, was proud of his academic achievements. (KneseJ depo680).

When Randy was 16, he missed his curfew and his mother suspected he had been drinking. (KneseJ depo681-82). Randy told her he hadn't wanted her to know he had too much to drink and she punished him for two weeks by allowing him to go to practice, but requiring him home thereafter and on weekends. (KneseJ depo682).

During the second weekend, Mike Chalupny was killed in a car accident. (KneseJ depo683). Randy changed drastically upon Mike's death, yet his family recognized no need for counseling. (KneseJ depo683-84; Chalupny depo279; Sutter depo180; Harvey depo49). He felt devastated, guilty because he hadn't been there and became more distant. (Chalupny depo279; Sutter depo180; Harvey depo44). "It was as if someone had just…chopped his leg off because they were together all the time." (Sutter depo180). Randy seemed to turn to people involved in drugs after Mike's death. (Langelier depo94,123). The "three Musketeers" had been "so tight that they wouldn't let each other mess up." (Langelier depo123). Mike Harvey was able to deal with the death better because he got more emotional support from his family, something Randy did not. (Harvey depo44).

Although Randy's friends began dating early, Randy lacked girlfriends because he had low self-esteem, in part due to his bad acne. (Harvey depo21-42; Langelier depo101,105;Sutter depo179; KneseJ depo675; Chalupny depo279). When Randy met Karin, he told friends she was "the one." (Langelier depo105). He brought her to special events like weddings and everyone knew how proud of her and how happy he was. (Harvey depo50; KneseJ depo685-86). He took her to games and took pains to ensure she was at ease and comfortable. (Langelier depo107; Chalupny depo282). His brother Ralph thought Karin would be good for Randy, providing stability and responsibility. (KneseRIII depo388-89). Later, when Karin became pregnant, Randy was ecstatic about the baby. (Harvey depo50-51; Lane depo233-34). He wanted to be a better father to his baby than his father had been to him. (Lane depo233). He wanted to emulate his brother, Ralph, whose children he had cared for several times. (KneseRIII depo386; Lane depo233). When Garrett was born, Randy was "giddy" with happiness. (KneseRIII depo396;Exh6).

Wendt prepared for penalty phase by telling Randy's parents in April to get "some people lined up" who might know Randy's character traits. (KneseJ depo661). The Kneses talked to family and friends and gave Wendt a select group of names and their phone numbers. (KneseJ depo662; KneseRIII depo425). In late May-early June, Wendt told the Kneses to tell those people to hold the trial dates open in case he needed them. (KneseJ depo662). He still hadn't talked to anyone except Randy and his parents. (KneseJ depo662). Wendt told the witnesses to arrive at court at 8 a.m., one hour before court. (KneseJ depo664). Those who would testify waited and Wendt finally stopped to

talk to them, for 5-10 minutes. (KneseJ depo665-66; KneseRIII depo424). He told them to talk about Randy's good traits and characteristics. (KneseJ depo666). He told Ralph III to "be positive, talk highly of your brother." (KneseRIII depo423). He acknowledged Mrs. Harvey but told her nothing. (Harvey depo53-54). "He didn't say anything to hardly any of us…I didn't know what to expect." (Harvey depo54). These witnesses testified extemporaneously, with no further preparation. (KneseJ depo666).

Ralph III didn't believe the jury heard all it could about Randy. "There's much more to a person than saying, yeah, he was a nice kid growing up. I don't think that they heard all that we have talked about today and all the different things that go into making up a person." (KneseRIII depo449). Although not a lawyer, Ralph III understood better than Wendt what the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984) require.

The motion court rejected Randy's claims (PCRLF314-420) that Wendt was constitutionally ineffective for failing to investigate and then present this substantial evidence in mitigation. It concluded that decisions not to call witnesses are presumptively strategic, unless the evidence clearly establishes otherwise, and that there was no indication the result would have been different had Wendt presented it because it was of limited probative value. (PCRLF826-31). These findings and conclusions are clearly erroneous. They must be reversed.

This Court must review the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822(Mo.banc2000); *Hall v. State*, 16 S.W.3d 582,585(Mo.banc2000); Rule 29.15. They are clearly erroneous if, after reviewing the

entire record, this Court has the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo.banc1996).

To establish ineffective assistance, Randy must show that Wendt's performance was deficient and that it prejudiced Randy's case. *Strickland, supra*; *Williams v. Taylor*, 120 S.Ct. 1495,1511-12 (2000). On the first prong of the test, counsel has a duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S at 691; *Kenley v. Armontrout*, 937 F.2d 1298, 1304-09 (8th Cir.1991). While the Sixth Amendment doesn't require that criminal defense lawyers leave no stone unturned and no witness un-pursued, it requires a reasoned judgment as to the amount of investigation the particular circumstances of a given case require. *Jermyn v. Horn*, 266 F.3d 257,307 (3rd Cir.2001). Strategic choices made after less than complete investigation are only reasonable to the extent that reasonable professional limitations support the limited nature of the investigation. *Strickland*, 466 U.S. at 691.

To prove prejudice, he must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*.; *State v. Butler*, 951 S.W.2d 600,608 (Mo.banc1997). This second prong is satisfied if a reasonable probability exists that at least one juror would be sufficiently influenced by mitigation evidence to vote against the death penalty, *United States ex rel. Emerson v. Gramley*, 883 F.Supp. 225,242 (N.D.Ill.1995); *Laird v. Horn*, 159 F.Supp.2d 58, 117 (E.D.Pa.2001), since the jury's verdict for death must be unanimous, and the balance of aggravators and

mitigators is not a "simple arithmetic process." *Jermyn v. Horn*, 266 F.3d at305; *State v. Storey*, 986 S.W.2d 462, 464-65(Mo.banc1999).

In *Williams v. Taylor, supra*, the Court found Williams' counsel constitutionally ineffective because he failed to conduct a thorough investigation of Williams' background. Counsel didn't investigate pre-trial and didn't present available records documenting Williams' childhood, borderline mental retardation, limited schooling and good prison behavior. *Id.*at1514. In finding prejudice from deficient performance, the Court looked at what was omitted and what was adduced, noting the evidence couldn't be viewed in isolation. *Id*.at1515. The Court found counsel ineffective since, had counsel thoroughly investigated, the jury might have voted for life. *Id*.at1515-16.

Like *Williams*, Wendt was ineffective. His investigation was limited to telling Randy's parents to find some witnesses and then he essentially left it to the witnesses to decide what might be important about Randy's life. He admitted that he spent "maybe a maximum of a few hours preparing the penalty phase." (Wendt depo123). He obtained no records because "where are you going to gather those kinds of records in two hours?" (Wendt depo123). He prepared nobody for their penalty phase testimony pre-trial, just telling witnesses to "answer honestly" but, since he didn't know what information even they might possess, he didn't even know what questions to ask to elicit all of that information. (Wendt depo117). Given his lack of investigation, any decisions he might have made cannot be given deference. Even Wendt questioned his performance: "The real question I have in my mind is whether I had spent the time perhaps that I should have spent to develop both more information from specific individuals and additional

individuals…if I had it to do over again, I may have called some additional witnesses." (Wendt depo118).

Despite his trial strategy to show the jury that Randy was a "good kid,"(PCRTr49-51), and that, had drugs not been involved, this wouldn't have happened, Wendt did nothing to find the evidence to present that picture to the jury. And the evidence was readily available. He simply spent no time with the witnesses whom the Kneses brought to court to discover what information they had and then to decide either to what they could testify or whether further investigation was necessary. He conducted no investigation himself, discovering none of the witnesses who were ready, willing and able to testify and the wealth of information that they possessed.

The motion court's suggestion that, because some of Randy's witnesses could have testified about Randy's drug use, Wendt was justified in not calling them (PCRLF827-31) ignores what happened at trial. The state's case was replete with evidence of Randy's drug use. Its penalty phase closing told the jury to sentence Randy to death as a message to others: "Don't get on drugs. Don't do a violent act when you are on drugs…We are standing up against cocaine." (Tr809). Since evidence about drugs was already before the jury, *State v. Knese*, 985 S.W.2d at 773, Wendt wasn't justified in burying his head in the sand and ignoring it. The Supreme Court rejected a similar suggestion in *Williams v. Taylor*, finding that just because an area might have opened up a potentially harmful area doesn't excuse counsel's failure to thoroughly investigate. *Williams, supra*at1514-15. Clearly, failing to call witnesses because they might raise an issue that's already before the jury is nonsensical. Further, Wendt did not attempt to

justify his failure to call witnesses on this ground. If the state now proposes so to justify his failure to call them, it will be fabricating tactical excuses. *Griffin v. Warden*, 970 F.2d 1355,1358-59 (4th Cir.1992).

The motion court's findings ignore that Wendt simply did not investigate this case and suggest that, had anything else been presented, it would have had no effect on the verdict. This flies in the face of established law. First, merely presenting some mitigating evidence "does not excuse the failure to provide evidence of different mitigating circumstances." *Jermyn v. Horn*, 266F.3d at305. Second, as *Williams* clearly establishes, the Sixth and Fourteenth Amendments require a *thorough* investigation. Counsel must sufficiently investigate and prepare to be able to present and explain the significance of all the available mitigating evidence. *Williams* at1513-15. Counsel is not entitled to sit in his office, waiting for mitigation to drop into his lap like manna from Heaven. He has a duty to investigate, independent of his client. *Carter v. Bell*, 218 F.3d 581,589(6th Cir.2000); *People v. Perez*, 592N.E.2d984 (Ill.1992). Spending "a maximum of a few hours" on penalty phase is not the thorough investigation the Constitution contemplates. *Mayfield v. Woodford*, 270 F.3d 915,927 (9th Cir.2001)(like Wendt, counsel kept no billing records but the referee found he spent far less than 40 hours on penalty phase. His investigation was deemed unreasonable). Third, even if the evidence supporting the two statutory aggravators is held sufficient, which this Court has, *State v. Knese*, 985 S.W.2d at779, the inquiry is not over. Can we be confident that, had Wendt investigated and then presented the available mitigating evidence, the jury nonetheless

unanimously would have sentenced him to death? *Williams* at1515. Given the totality of the available mitigation evidence, *Williams* at1515, that confidence is lacking.

This Court must reverse for a new penalty phase, or impose a life without probation or parole sentence.

IV. GOOD JAIL CONDUCT

The motion court clearly erred in denying Randy's claim that counsel was ineffective for presenting no evidence of Randy's good jail conduct because counsel's failure violated Randy's rights to due process, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that although counsel knew Randy was a model inmate he made no attempt to investigate or adduce that kind of evidence. Randy's good behavior in jail was mitigating and would have been compelling evidence to rebut the State's portrait of Randy as a violent, uncaring, drug-crazed person and to show he was helpful and caring to guards and inmates.

Counsel believed that Randy was distinct from any other criminal client he had ever had. He had "totally good character," and was courteous, honest, reliable, trusting and generous. (Wendt depo112). Wendt concluded Randy was a "good kid" whose problem was substance abuse and, had he had no drug problem, this would not have happened. (PCRTr49-50). His goal in penalty phase was to present that picture. (PCRTr50).

Despite his beliefs, he presented virtually no evidence to show the jury who Randy was. And, while his penalty phase closing repeatedly contrasted Randy with notorious killers (Tr800-04), he didn't tell the jury about Randy's good conduct in jail, something drastically different from many defendants and clearly mitigating under *Skipper v. South Carolina*, 476 U.S. 1 (1986).

In penalty phase, the state repeatedly argued and presented evidence of the impact of Karin's death on her family and friends. (Tr677-756). It encouraged the jury to consider not just the statutory aggravating circumstances but the non-statutory circumstances, like Randy's cocaine use, and that he killed his wife and his son's mother, "one of the worst things you can do in our society." (Tr679-80,788).

And, its final closing told them to impose death because Randy had violated a trust—from his family and friends—by bringing drugs into the home and by killing Karin. (T806-07). It told them that Randy lacked remorse. (Tr807-08). It challenged Wendt's argument against imposing death, saying, "Well, shouldn't consider it that bad because it is his first murder. I'm not implying that there will be anymore violence for him, his first and only murder. I just think when you put that statement out, no death penalty if it is only your first murder, that's an insane statement." (Tr807).

Wendt presented no evidence of Randy's good conduct in jail. He subpoenaed and talked to no witnesses and obtained no records. (PCRTr75,76,79; Wendt depo109). He knew Randy was doing "remarkably well" in jail. (PCRTr74). He knew of Randy's religious interests, including having started a Bible study group, and believed Randy had not had a "convenient" jailhouse conversion but held sincere beliefs. (PCRTr74-75). He "vaguely remembered" that Randy had volunteered for a job in the jail. (PCRTr76).

Wendt "never even considered" presenting evidence of Randy's religious work in jail. He made no conscious decision not to present it. (Wendt depo114).

Damian Keith Kleeschulte, in 2001 a student at Evangel University, met Randy in mid-February, 1997, in the St. Charles Jail where Kleeschulte was awaiting disposition of

forgery and burglary charges. (Kleeschulte depo547). Randy talked a lot about God, telling Kleeschulte he had to change his life, reject drugs and alcohol, and turn his life over to God. (Kleeschulte depo550). Kleeschulte joined Randy's daily Bible study group, for which Randy was the leader. (Kleeschulte depo550-51). Randy had an enormous impact on Kleeschulte's life. He talked to him about God, was sincerely interested in him, wasn't horrified by what he had done, but just wanted him to get his life back in order. (Kleeschulte depo554-55). When Kleeschulte first got out of jail, he didn't heed Randy's teachings but later realized the truth of his teachings, confessed and worked through his problems. (Kleeschulte depo555). Without Randy, Kleeschulte would not be back in society, sober and in college. (Kleeschulte depo556).

Kleeschulte recalled that Randy was very peaceful in jail and was the leader of the unit, helping guards to calm other inmates if problems occurred. (Kleeschulte depo557,558). The guards liked Randy because he was the reason the unit was so peaceful. (Kleeschulte depo559-60). Once when some inmates locked doors so that the guards couldn't enter, Randy unlocked them, not caring if he looked soft, only "concerned about doing the right thing." (Kleeschulte depo557-58). Kleeschulte never spoke to Wendt, but would have testified for Randy if asked. (Kleeschulte depo564). Kleeschulte was in the county jail when Randy went to trial, thus he was available to testify. (Kleeschulte depo570,573).

John Wade, Jr., also met Randy in jail from 1996-98. (Wade depo582-83). Wade recalled when Randy started the Bible study group and led it daily. (Wade depo583-84). Randy was inspirational to other inmates, seemingly at peace, never violent, never a

threat. (Wade depo585-86). He was a positive role model, helping guards to clean up, calming inmates, mediating disputes, helping answer questions and concerns. (Wade depo586-87).

Steven Ronald Wilson, in jail for DWI's, met Randy there, through his Bible study group and open forum, where Randy was the inmates' spiritual and emotional outlet. (Wilson depo604-08). Even gang members turned to Randy for guidance and he often mediated disputes. (Wilson depo609,611). Randy was never a danger to others, never threatening inmates or guards. (Wilson depo610-12). Randy also volunteered for clean-up duties, dusting and mopping the jail. (Wilson depo610). Randy provided other inmates with necessities, like toothpaste. (Wilson depo610). Wilson would have testified, yet Wendt never even talked to him. (Wilson depo617-18).

Randy Gruber, a preacher with Set Free Ministries' Emmaus Correspondence course, could have testified that Randy completed a curriculum of 11 courses while in jail and became "one of our very good students." (Gruber depo 459-68). Although Gruber hadn't met Randy at the time of trial,

> I only knew him through his writings, but I was very impressed with his writings. He was fresh, he was obviously seeking answers, obviously repentant, obviously had been humbled by what he did. He has always taken responsibility, he has—even then, you know, for his behavior. He has condemned his drinking and his drug use, condemned his behavior toward his wife.

(Gruber depo483). Gruber believed Randy, like St. Paul, accurately showed his character through his letters, and he would have testified for Randy had he been asked. (Gruber depo482,490-91).

The motion court denied this claim after a hearing. (PCRLF831-34). It found since many of Randy's Bible courses were dated after penalty phase, it was "utterly ridiculous" to assert Wendt was ineffective for failing to present the evidence. (PCRLF831). Because Randy hadn't completed the Emmaus Series and hadn't met Rev. Gruber at the time of trial, "it is difficult to see how Mr. Gruber's testimony could have been at all persuasive;" thus Wendt was not ineffective for not calling him. (PCRLF832). The motion court found Kleeschulte was unavailable, having violated probation, and found his testimony would not have been persuasive nor influenced penalty phase. (PCRLF832-33). The motion court found the failure to call Wade not ineffective since Wade's description of Randy as carefree and playing basketball contradicted the picture of a grieving Randy. It thus was not helpful and perhaps harmful. (PCRLF833). Finally, the motion court found Wilson's testimony unpersuasive and didn't believe the rendition of Randy's conversion would have been found credible. Since it would not have influenced the outcome, Wendt was not ineffective for not calling Wilson. (PCRLF834). These findings are clearly erroneous. This Court must reverse and remand for a new penalty phase.

This Court must review the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo.banc2000); *Hall v. State*, 16 S.W.3d 582,585(Mo.banc2000); *Rule 29.15*. Findings and conclusions are "clearly erroneous" if,

after reviewing the entire record, this Court has a definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo.banc1996). To establish ineffective assistance, Randy must show that his counsel's performance was deficient and that the performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 120 S.Ct. 1495,1511-12 (2000). To prove prejudice, Randy must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.; State v. Butler*, 951 S.W.2d 600,608 (Mo.banc1997).

Counsel has a duty "thoroughly" to investigate mitigating evidence. *Williams* at1515. Good conduct while in jail is mitigating. *Skipper, supra*. The Supreme Court in *Williams* condemned counsel for not investigating and presenting such mitigating evidence. *Williams* at1514.

As in *Williams*, Wendt abdicated his duty thoroughly to investigate all available mitigation. Wendt's theory was that Randy was a "nice guy," who, without the influence of drugs, was honest, courteous and reliable. Wendt knew that Randy was a model inmate. (PCRTr74;Wendt depo111). He had a duty to investigate and present the available evidence to portray Randy in that light. Yet, inexplicably, he failed to investigate. He interviewed nobody. He acknowledged that he made no decision **not** to present this evidence.(Wendt depo114). The jury heard **nothing** about Randy's conduct in jail—about him being a model, nonviolent prisoner, about starting a Bible study group and himself completing a Bible correspondence course, about being a mediator and role model for other prisoners, about volunteering for work in the jail. Since Wendt's failure to present this information was based on no strategic decision, it "is not protected by the

presumption in favor of counsel." *Kenley v. Armontrout*, 937 F.2d 1298,1304(8th Cir. 1991).

The motion court's finding that Rev. Gruber's testimony would not have been "at all persuasive" since Randy hadn't yet completed the Emmaus coursework and the two men hadn't met at the time of trial (PCRLF832) was clearly erroneous. Wendt didn't make a reasoned decision not to call Gruber—he didn't take the first step of the process--investigation. He interviewed nobody about Randy's jail conduct, including Gruber, and thus didn't even know what they could say. Rev. Gruber could have testified about Randy's good jail conduct, about which the jury heard **nothing**. Since Wendt presented no evidence about Randy's stellar behavior, a reasonable probability exists that, had the jury heard it, it would have imposed life.

The motion court also denied relief because it believed Kleeschulte would not have been available to testify, since he violated his probation. (PCRLF832). This misstates the record. Kleeschulte was in county jail before and during Randy's trial and thus clearly was available to talk to Wendt and then testify. (Kleeschulte depo569-70). Further, the court's reference to Kleeschulte's priors as conclusive on his trustworthiness is inapposite. Wendt never bothered to investigate so the jury never heard about Randy's life in jail—that he helped people turn their lives around; calmed other inmates and mediated for peace. (Kleeschulte depo557-59). Although Kleeschulte had prior offenses, he attributed the change in his life—sober and in college—to Randy's influence. (Kleeschulte depo556). Had the jury heard this information, a reasonable probability exists that it would have sentenced Randy to life.

The motion court noted that Wade described Randy's demeanor as "carefree," recalled he played basketball a lot, and thus found Wade's testimony would have been harmful. (PCRLF833). This finding ignores that Wendt never even investigated the available witnesses to determine if helpful evidence existed. Further, Wade's statement about Randy's demeanor, when viewed in the context of his spiritual growth, having given his life to God, is positive, not negative. Third, Randy admittedly played basketball while in jail, but, as Wade noted, it's better to play basketball than to fight with inmates or guards, and Randy was never violent in jail. (Wade depo586,595). Thus, Wade's testimony would have confirmed Randy's good conduct in jail. Yet, because Wendt never investigated what was readily available, he never even knew it existed.

The motion court found Wilson's testimony was unpersuasive and wouldn't have influenced the jury. (PCRLF834). This ignores that the jury heard **nothing** about Randy's jail conduct. The court didn't find Randy's "conversion" credible, and in the process, it ignored the substance of Wilson's testimony—that Randy was a leader to inmates—guiding them in times of need, mediating troubles, volunteering to clean the jail, never acting violent. (Wilson depo606-12). Had the jury heard this evidence, a reasonable probability exists it would have sentenced Randy to life.

The motion court's conclusions that Wendt was not ineffective and that Randy wasn't prejudiced since the evidence wouldn't have influenced penalty phase are clearly erroneous. *Williams v. Taylor* is controlling and highly instructive.

In *Williams*, the state presented much evidence of Williams' violence. In 1976, he was convicted of armed robbery and six years later, of grand larceny. 120 S.Ct.at1500.

When he confessed to the murder, he also confessed to having assaulted two elderly persons after the murder. *Id*. In December, 1985, he set a fire outside a house and then attacked and robbed the victim. *Id*. Three months later, he assaulted an elderly woman, leaving her in a vegetative state from which she was not expected to recover. *Id*. He also stole two cars. *Id*. While awaiting trial on the murder, he set a fire in the jail. *Id*. Two experts found he would pose a continuing threat to society. *Id*.

Despite this extensive evidence, the Court found counsel's failure to present mitigation, including Williams' good jail conduct, ineffective. *Id*.at1514. The Court rejected the premise that mitigation must rebut specific aggravators. It noted that none of the mitigation there rebutted the evidence that he had set a fire in jail or his prior violent offenses. Nonetheless, it held that the jury might have voted for life had it heard the mitigating evidence, independent of the state's case. *Id*.at1515-16.

Randy was prejudiced by Wendt's complete failure to investigate and present evidence of his good jail conduct. This evidence wasn't merely a "conversion on the road to Damascus." (PCRLF834). The uncontroverted evidence showed that Randy was never violent, helped guards and inmates mediate disputes, volunteered to clean, and effected positive change in others' lives. The jury heard nothing about this. Had it heard this compelling evidence demonstrating that Randy need not be executed for his offense, a reasonable probability exists that it would have sentenced him to life.

Randy established Wendt's ineffectiveness. This Court should reverse and grant a new penalty phase, or impose a sentence of life without probation or parole.

V. NO-ADVERSE-INFERENCE INSTRUCTION NOT GIVEN

The motion court clearly erred in denying Randy's claim that Wendt was ineffective for not voir diring on Randy's right not to testify and not requesting the "no-adverse-inference" instruction in guilt phase because this denied Randy's rights to remain silent, due process, a fair and impartial jury, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that Wendt's inaction allowed the jury's unfettered speculation about why Randy was not taking the stand in guilt phase—including that he was confessing to first degree murder.

Randy did not testify in guilt phase and Wendt neither voir dired nor requested that the jury be instructed to draw no-adverse-inference from his failure to testify. Wendt's inaction violated Randy's constitutional rights to due process, effective assistance of counsel, a fair and impartial jury, silence, and freedom from cruel and unusual punishment. The motion court's findings to the contrary are clearly erroneous. This Court must reverse and remand for a new trial.

During Wendt's voir dire, he never questioned whether the jury would hold it against Randy were he to not testify. Although Randy did not testify, Wendt did not request an instruction based on MAI-Cr3d 308.14.1, which provides, "Under the law, a defendant has the right not to testify. No presumption may be raised and no inference of

any kind may be drawn from the fact that the defendant did not testify." The Notes on Use provide that, if requested, that instruction must be given.

Randy asserted Wendt was constitutionally ineffective for neither voir diring on the issue nor requesting the instruction. (PCRLF469-71). Wendt claimed he didn't voir dire because they hadn't yet decided whether Randy would testify. (Wendt depo138; PCRTr48). He didn't request the instruction because he thought it was irrelevant and thought it highlighted Randy's failure to testify. (Wendt depo137).

The motion court denied relief, finding Wendt was not ineffective in either respect. (PCRLF841-42). It noted Wendt stated:

> he chose not to request an instruction on Defendant's right not to testify, or to *voir dire* on that issue because he did not want to highlight the issue if Defendant chose not to testify…He also pointed out that the decision as to whether Defendant would testify in his own behalf had not been made at the time of *voir dire*. Thus, this claim is nothing more than a dispute over Wendt's trial strategy and not the proper basis for a claim under Rule 29.15.

Id. These findings are clearly erroneous.

This Court must review the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819,822(Mo.banc2000); *Hall v. State*, 16 S.W.3d 582,585 (Mo.banc2000); Rule 29.15. Findings and conclusions are clearly erroneous if, after reviewing the entire record, the court has the definite and firm impression a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo.banc1996).

To establish ineffective assistance, Randy must show Wendt's performance was deficient and he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668(1984). To prove prejudice, he must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.*; *State v. Butler*, 951 S.W.2d 600,608(Mo.banc 1997).

While strategic decisions are afforded deference, they are not unreviewable since "the mere incantation of the word 'strategy' does not insulate attorney behavior from review. The attorney's choice of tactics must be *reasonable* under the circumstances." *Cave v. Singletary*, 971 F.2d 1513,1518(11th Cir.1992)(emphasis in original). Whether a tactic is reasonable is a question of law and the motion court's findings are likewise subject to review. *Id*. Wendt's failures to voir dire and to request the no-adverse-inference instruction were patently unreasonable.

Criminal defendants are entitled to qualified jury panels, free from bias and prejudice. *State v. Feltrop*, 803 S.W.2d 1,7 (Mo.banc1991). They are entitled to discover that bias and prejudice through voir dire and are allowed wide latitude in their search for open-minded jurors. *State v. Clement*, 2 S.W.3d 156,159 (Mo.App.,W.D.1999), citing *State v. Finch*, 746 S.W.2d 607,613 (Mo.App.,W.D.1988); *State v. Clark*, 981 S.W.2d 143,146-47(Mo.banc1998). In particular, defendants have a right to discover if veniremen will be prejudiced—that they will infer guilt—if the defendant fails to testify. *Clement*, at159.

Similarly, defendants have a right to the no-adverse-inference instruction, upon request. *Carter v. Kentucky*, 450 U.S. 288,300(1981); *Griffin v. California*, 380 U.S.

609(1965). Without that instruction, juries may draw adverse inferences from the defendant's silence. *Carter* at301. Indeed, "It has been almost universally thought that juries notice a defendant's failure to testify. '[T]he jury will, of course, realize this quite evident fact, even though the choice goes unmentioned…. [It is] a fact inescapably impressed on the jury's consciousness.'… '[t]he layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime.'" *Carter*, at301, citing *Griffin*, at621 and 8 J. Wigmore, Evidence §2272, p.426 (J.McNaughton rev.1961). To combat this assumption or speculation, instructions are necessary to ensure that jurors do not infer that the failure to testify means the defendant is guilty. *Carter*, at302.

Wendt's decision not to voir dire on whether the jurors would speculate that Randy was guilty because he didn't testify was unreasonable. Wendt asserted he didn't voir dire on the issue because he hadn't yet decided if Randy would testify in guilt phase. (PCRTr48). This confounds logic. Whether Randy testified or not, no harm would have resulted from such voir dire and, potentially, much benefit would have been gained. If, as occurred, Randy did not testify, voir dire would have exposed those jurors with biases about defendants who exercise their privilege against self-incrimination. *Clement, supra*. Randy then could have struck them for cause. And, if Randy testified, the jury could have believed that, despite whatever concerns some might have, Randy was being up-front and telling them his story. Certainly, no harm would have been done by discovering those jurors who held that kind of bias, even if Randy testified. Randy was prejudiced since, had Wendt voir dired, he could have discovered whether any of the

jurors believed that the failure to testify meant Randy was guilty and he could have educated the entire panel that such an inference is constitutionally impermissible.

Wendt's decision not to request the instruction is similarly nonsensical. He purportedly didn't request the instruction because he didn't want to highlight that Randy hadn't testified. But, as the Court noted in *Carter* and *Griffin*, *supra*, when the defendant doesn't testify, that "fact [is] inescapably impressed on the jury's consciousness." *Griffin* at621-22; *Carter* at301. The *Carter* Court further specifically rejected Wendt's reasoning for not requiring the instruction. It noted that Kentucky asserted the instruction would have emphasized the defendant's failure to testify. It stated, "This purported justification was specifically rejected in the *Lakeside* (*Lakeside v. Oregon*, 435 U.S. 333,339(1978)) case, where the Court noted that '[i]t would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect.'" *Id.* at303.

Wendt's failure to request the instruction prejudiced Randy. Had he requested it, the jury would have understood that they could not consider Randy's failure to testify as evidence of guilt. An instruction to that effect is "perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination." *Carter*, at302. To suggest that the instruction would have had no effect is tantamount to saying that jurors will not heed the court's instructions. *Id.*; *Bruno v. United States*, 308 U.S. 287,294(1939).

The motion court clearly erred in finding Wendt was not ineffective for failing to voir dire and to request a no-adverse-inference instruction in guilt phase. This Court must reverse and remand for a new trial.

VI. FAILURE TO INVESTIGATE AFFECTED SUPPRESSION

The motion court clearly erred in denying without a hearing and his motion to reconsider Randy's claim that Wendt was ineffective for not investigating and presenting evidence at the suppression hearing and throughout trial that Randy was high on cocaine when he made statements to the police because Wendt's failures violated Randy's rights to due process, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that his motion states facts, not conclusions that, if true, warrant relief; the facts are not refuted by the record and Randy was prejudiced by Wendt's inaction. Wendt recognized Randy's statements were the primary means through which the state established its case. Had they been excluded, a reasonable probability exists that Randy would not have been convicted of first degree murder, much less sentenced to death.

The state's case hinged on Randy's statements to the authorities, because, according to the prosecutor, (Tr606-09,612,614,618-19,623,655-57,792,807-08), they established both guilt of first degree murder and the statutory aggravators necessary to sentence Randy to death. In arguing first for conviction and then death, the prosecutor told the jury to consider those statements, but to ignore and condemn Randy for being high on cocaine that night. (Tr604,614,616,619,621-22,654,656,806,809). Wendt did virtually nothing to counter the state's attack, despite readily available evidence that would have supported suppressing the statements. Wendt was constitutionally ineffective. This Court must remand for an evidentiary hearing on these claims.

This Court's opinion in *State v. Knese*, 985 S.W.2d 759,764-66 (Mo.banc1999) states the essence of what occurred on March 23, 1996. In the early morning, Renee Beile, one of Randy's neighbors, heard a dog barking and a man yelling that he needed something.(Tr373-74). She went to her kitchen and Randy came through the front door, landing on the couch.(Tr374-75). His sweatpants and underwear were around his ankles and he wore no shirt.(Tr375-78,381). He pulled his clothes up and entered the kitchen where they yelled at each other.(Tr375,383). She wanted him out of the house; he told her he needed help; "they" were after him, and asked her to call 911.(Tr375-76,384,386-87). Beile's boyfriend entered the kitchen and Randy went to the bedroom, sat on a television, returned to the kitchen and then jumped out the back door.(Tr377-78). Beile thought Randy was high on drugs and out-of-it. (Tr389).

Ruth Lovell, who was putting trash in the dumpster on her way to work, heard screams, re-entered her car and saw Randy running between two trailers, wearing only sweatpants. (Tr391-92,396). Randy was screaming and had a broom in his hand(Tr392-93). He jumped onto her car's hood, she screamed for him to get off or she would hit and run him over.(Tr393). He slid off, opened the passenger door and began to enter, hanging from the car.(Tr394). Both screamed louder and louder and she sped up, with Randy finally falling onto the pavement and then into a ditch.(Tr394).

Shortly after 6 a.m., officers found Randy in the middle of the road, his pants pulled below his buttocks, which were cut and abraded.(Tr267-68,278-79,299-300). Randy told them the Devil had come to get him and someone was under the police

car.(Tr279). He said "the bitch" had tried to kill him.(Tr280). As the paramedic treated him, Randy said she had tried to strangle him(Tr308).

Randy was transported to the hospital where officers questioned him(Tr283,328). Officer Chestnut, who testified at the suppression hearing but not at trial, took pictures of Randy and seized his clothes(Tr449). He described Randy's condition at 7:25-7:30a.m. as abnormal, wild with a wide open look to his eyes.(STr18). His eyes rolled back and forth rapidly and he had a far-away stare(STr18). Although he lay flat on his back, his body was pacing(STr18). He asked if he had killed his wife(STr18). Chestnut said he was fading in and out of reality(STr21). Although not capable of being moved since he required a CAT scan, at 8 a.m. Randy described the night's events that culminated in Karin's death(STr9,29-34;Tr347-50). He said that, after he left the trailer, he thought he saw a guy with a gun, wearing a black coat, chasing him(Tr351). That was when he jumped on Lovell's car(Tr351-52). Randy made three other statements to officers that day(STr51-54;Tr333-66).

Wendt filed a one-page generic motion to suppress(LF25). The court "summarily" overruled it and admitted Randy's detailed statements. *State v. Knese* at765. This Court noted that, while Officer Chestnut saw Randy "fading in and out of reality" at 7:30 a.m., by 8 a.m. and again at 10a.m., the other officers said he was just fine. *Id.*;(Tr333-38,345-53,365;STr26,28,34,36,41-42).

On appeal, this Court denied Randy's claim that the trial court should have sustained his motion to suppress. *Knese* at766. This Court noted that Randy had claimed his mental condition rendered his confession "unintelligent" but presented no specific

grounds in his suppression motion; presented no evidence at the suppression hearing or any other time, and didn't suggest what caused the deficient mental condition. *Id*. This Court stated that merely because sometime earlier Randy may have used cocaine and faded in and out of reality sometime before he talked to police didn't render his waiver unintelligent. *Id*. This Court noted that Randy's claims of unknowing and involuntary waiver were raised first on appeal and thus preserved nothing for review. *Id*. Further, this Court noted that Wendt had stipulated at the hearing that the officers had properly advised him of his *Miranda* rights, and, as to voluntariness, "despite the fact that he was in the hospital at the time, there is not the slightest evidence in the record that Mr. Knese's numerous statements were anything less than voluntary, and the trial court did not plainly err in failing to exclude the confession on this basis." *Id*.at766-67.

Randy asserted that Wendt's failures adequately to challenge his statements, through investigation and presentation of evidence, at the suppression hearing and at trial rendered him constitutionally ineffective.(PCRLF165-255,256-74,275-89). He asserted that, since Wendt didn't investigate and present evidence, through witnesses like people at the scene that morning; police officers; paramedics and treating physicians from St. Joseph Hospital, of the ongoing effects of Randy's cocaine use at the time of his statements, the trial court didn't have the evidence to support sustaining his suppression motion.(PCRLF165,167,175-78,189,257-66). He further asserted that, even had the court then denied the suppression motion, because Wendt didn't pursue this readily available evidence, he ineffectively didn't request an instruction based on MAI-Cr3d310.06, which would have let the jury give less weight to his statements because of the ongoing effects

of his cocaine usage. (PCRLF270-72). Randy set forth in his pleading the witnesses and other information sources which would support these claims.(PCRLF244-55,273-74,281-89).

Part of the evidence that Randy proposed to adduce would have come from Wendt, whose deposition Randy took before filing the amended motion.(Wendt depo1). Wendt recalled that, when he met Randy within a few days of the offense, Randy still bore the cuts and abrasions on his body, seemed to be in a state of shock and still seemed under the influence of drugs.(Wendt depo34-35). Even then, it was difficult for Randy to think cognitively—his thought processes were jumbled and he couldn't have a logical, coherent conversation. (Wendt depo35). Randy's thinking was flighty and disjointed. (Wendt depo36).

Wendt didn't believe that Randy could have knowingly waived his *Miranda* rights because three days post-offense, Randy still wasn't lucid. (Wendt depo70). For that reason, Wendt called Officer Chestnut who had seen Randy in that agitated and confused state one-half hour before his statement. (Wendt depo71). He did not, however, call Chestnut at trial since he had eyewitnesses to testify about Randy's condition. (Wendt depo72).

Wendt believed he obtained Randy's hospital records to substantiate that Randy was "in a very confused state" when making his statements. (Wendt depo80). The trial record demonstrates, however, that, if obtained, no records were adduced. See Tr.Index. Wendt interviewed nobody at the hospital about Randy's mental or physical condition and couldn't "give you any legitimate reason today why I would not have, for example,

interviewed any of the hospital personnel who came in contact with Randy." (Wendt depo80-81). Wendt would have been "shocked" had the hospital tests not shown Randy was high on cocaine. (Wendt depo81). Wendt also didn't consult a pharmacologist about the effects of the drugs in Randy's system on his perceptions and behaviors. (Wendt depo88). Although Wendt didn't know what Cocaine Psychosis or Cocaine Delirium mean, except in laymen's terms, (PCRLF213; Wendt depo67), he obtained information about them from no other source.

The motion court denied a hearing on the claims that Wendt was constitutionally ineffective in not challenging adequately Randy's statements.(PCRLF660-61). Thereafter, in support of Randy's motion to reconsider the denial of a hearing, counsel filed affidavits from Dr. Lee Evans, a Doctor of Pharmacy and Dean of the School of Pharmacy at Auburn University, and Dr. Robert Smith, a Clinical Psychologist specializing in treating alcoholism and substance dependence, both of whom Randy had listed as witnesses and detailed in the amended motion to what they would have testified. (PCRLF190,218-19,227-40,279-80,720-30,731-44). As set forth in both the amended motion and in the subsequently-filed affidavit, if called, Evans would have testified, based on the records, that Randy experienced cocaine-induced delirium before and after the murder and his conduct was not merely due to intoxication. (PCRLF729). He would have stated that "Randy's confession contained misperceptions of the actual events as a result [of] his psychotic thinking."(PCRLF729). He finally would have testified that "it is very unlikely that Mr. Knese was able to comprehend the full significance of the Miranda, which was repeated several times, while acutely intoxicated, nor was he able to

reflect on the consequences of providing any statement to police without the presence of legal counsel." (PCRLF730).

As noted both in the amended motion and in the subsequently-filed affidavit, Dr. Smith would have testified, based on his review of the records, that Randy was suffering from several psychological disorders at the time of the offense, including Alcohol Dependence, Cannabis Dependence, Cocaine Dependence, Cocaine Induced Mood Disorder, Cocaine Induced Psychotic Disorder and Cocaine Induced Delirium. (PCRLF739). He would have stated that these disorders affected Randy's emotions, thought processes and behavior when he made statements to the police. (PCRLF739). Smith would have testified that the symptoms from Randy's Cocaine Induced Delirium—memory deficits, reduced ability to focus and maintain attention, disorientation and visual hallucinations—impaired his ability to comprehend his rights when the police read them and his perceptions of events. (PCRLF742). Smith would have confirmed that Randy's Cocaine Induced Psychosis and Delirium affected him when he was interviewed and made his statements. (PCRLF743). Smith would have confirmed Randy's ability to fully understand police and comprehend his rights was impaired. (PCRLF744).

The motion court found, as to Claim 8-9(c), that Wendt was not ineffective for not presenting a psychologist pre-trial or at trial to testify about the effect of illegal drugs on Randy. (PCRLF811). The psychiatric and medical testimony proposed in the motion would not have changed its suppression ruling. (PCRLF811). The court concluded that the files and records conclusively showed Randy was disentitled to relief. (PCRLF813).

As to Claim 8-9(d), the court found that the record showed Wendt had filed and argued a motion to suppress, which was rejected on direct appeal and, in his deposition, Wendt had said it was bad trial strategy to ask the jury to ignore a defendant's statements on the grounds it was involuntary. (PCRLF812). The court further found, "Indeed, most trial attorneys know that jurors are not likely to disregard a confession, especially in a case where the confession is consistent with the physical evidence, and where there was no indication or police coercion. Seeking an instruction pursuant to MAI-Cr3d 310.06 would simply highlight the statement."(PCRLF813). Moreover, the court stated, "to ask the jury to disregard the statements to police because Defendant was high on cocaine also contradicted Movant's trial strategy not to use illegal drug abuse as a defense."(PCRLF814). The court concluded the files and records showed Randy was disentitled to relief. (PCRLF814).

As to Claim 8-9(e), the court found that Randy's proposed pharmacological testimony wouldn't have changed his ruling on the suppression motion and the issues of drug use and the voluntariness of the statement had been litigated on direct appeal and couldn't be relitigated.(PCRLF814). The court stated,

> The issue in this case is not what an expert hired after the trial has to say about cocaine psychosis, but whether trial counsel pursued a trial strategy designed to avoid using defendant's illegal use of drugs as an excuse for this crime. In Mr. Wendt's deposition, taken by Movant's present attorneys, he testified that, as a matter of trial strategy, he wished to minimize references to Knese's drug use out of fear that it would work to his client's detriment.(PCRLF814-15).

These findings are clearly erroneous. Randy was entitled to a hearing. *Rule 29.15(k).*

A motion court need not hold an evidentiary hearing unless (1) the movant cites facts, not conclusions, which, if true, would entitle him to relief; (2) the factual allegations aren't refuted by the record and (3) the matters complained of prejudiced the movant. *State v. Ferguson*, 20 S.W.3d 485,503(Mo.banc2000); *State v. Moss*, 10 S.W.3d 508,511(Mo.banc2000). Randy's amended motion states facts that entitle him to relief; they aren't refuted by the record and he was prejudiced. This Court must remand for an evidentiary hearing.

As with any claim based on ineffective assistance of counsel, *Strickland v. Washington* 466 U.S. 668 (1984), provides the standard under which performance must be measured. To establish ineffective assistance, Randy must show Wendt's performance was deficient and prejudice resulted. Prejudice is shown if a reasonable probability exists that, but for counsel's errors, the result would have been different. *Id.*; *State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997).

Counsel must make a reasonable investigation in preparing a case or make a reasonable decision not to conduct a particular investigation. *Strickland*, 466U.S.at691. Strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*.at690-91. Failing to interview witnesses or discover mitigating evidence relates to trial preparation, not strategy. *Chambers v. Armontrout*, 907 F.2d 825,828 (8th Cir.1990); *Kenley v. Armontrout*, 937 F.2d 1298,1304 (8th Cir.1991). Just calling something strategy does not, however, "insulate attorney behavior from review.

The attorney's choice of tactics must be *reasonable* under the circumstances." *Cave v. Singletary*, 971 F.2d 1513,1518 (11th Cir.1992)(emphasis in original).

Randy was entitled to a hearing. First, the motion pleads facts, not conclusions, that, if true, entitle him to relief. The pleading details the kinds of evidence that Wendt could have presented, upon minimal investigation, to support his stated theory that Randy was high on cocaine when police interrogated him, and that his waivers were thus invalid. (Wendt depo34-36,70-71;PCRLF174-89 et seq). As to each claim, Randy indicated the witnesses who could have supported them. (PCRLF244-55).

The motion court denied a hearing and rejected these claims on three bases. First, it stated Wendt's trial strategy was to avoid references to Randy's illegal drug use and to have presented this evidence would have violated that strategy. (PCRLF812,813,814). This finding must fail for several reasons. First, the court denied a hearing on this claim. Thus, for it to deny the claim by relying on a limited presentation of evidence through Wendt's deposition violates both logic and Rule 29.15. If a motion is to be denied based on counsel's strategic decisions, a hearing should be held. *See State v. Tokar*, 918 S.W.2d 753 (Mo.banc 1996).

Second, while courts generally will not second-guess an attorney's strategic decisions, merely calling something "strategic" doesn't insulate it from review. *Cave*, *supra*at1518. The strategy must be reasonable. *State v. McCarter*, 883 S.W.2d 75,76-77(Mo.App.,S.D.1994). Here, Wendt's alleged strategy was inherently unreasonable. Although Wendt didn't believe Randy's waivers were voluntary, knowing and intelligent; he believed drugs were the entire cause of what happened, and he believed the state

couldn't convict on murder first without those statements, (Wendt depo34-36,53,70-71,78,85), he wanted to keep the word cocaine away from the jury as much as possible. (Wendt depo77,83-84).[6]

But, what was the state's case? From beginning to end, the state harped on Randy's drug use. It told the jury to convict and sentence him to death, not just for what he had done to Karin but because of that drug use. (Tr604,614,616,619,621-22,654,656,806,809). Clearly, Randy's drug use was before the jury. Indeed, it occupied center stage. As in *Kenley v. Armontrout*, *supra*, Wendt's failure to address that evidence, to hide his head in the sand, was unsupportable.

In *Kenley*, counsel had not fully investigated the available mitigating evidence and adduced none. The District Court concluded that counsel's investigation was thorough

[6] The motion court suggested jurors are unlikely to disregard a defendant's statements and that obtaining an instruction under MAI-Cr3d310.06 merely highlights the statements, especially if they are consistent with the physical evidence and there's no evidence of police coercion. (PCRLF813). If the jurors are unlikely to disregard a statement, it must be asked what possible benefit arises from ignoring it and allowing it to go, unchallenged, to the jury. And, once the statement is under consideration, the instruction at least gives the jury guidance in how to consider the circumstances surrounding its making. Further, in this case, the court's underlying premise is flawed since, as Drs. Evans and Smith could have testified, Randy's statement is inconsistent with the facts. (PCRLF729,744; see also Wendt depo95-96).

and his decision not to investigate further was reasonable in light of the information he had. *Kenley*at1304. The Eighth Circuit, however, noted the wealth of information that was readily available upon minimal investigation *Id*.at1307. It further noted that the potentially aggravating aspects of the mitigating evidence either were already in evidence, wouldn't have had "any significant incremental aggravating effect" and were mostly cumulative. *Id*.at1309. The Court stated that, had counsel conducted an adequate investigation, he might have decided that the risks outweighed the benefits of that evidence, but, even if the investigation were adequate, no harm would have resulted from its use. *Id.*

Similarly, in *Chambers v. Armontrout*, 907 F.2d 825,830-31(8th Cir.1990), the Court refused to find reasonable counsel's failure to call a witness to support the self-defense theory merely because he was concerned that the cross-examination of the witness at the first trial had been extremely damaging. And, in *Mauldin v. Wainwright*, 723 F.2d 799,800(11th Cir.1984), where counsel had not investigated Mauldin's chronic alcoholism and subsequent hospitalization, the court found his attorneys couldn't have made a strategic decision only to present lay witnesses on alcoholism since their investigation was legally insufficient. *See also Hall v. Washington,* 106 F.3d 742,749(7th Cir.1997)(counsel's "utter disregard" for the case led to their failure to investigate and then produce substantial evidence in mitigation).

Had Wendt adequately investigated, he could have discovered and then presented the ample evidence to support his belief that Randy couldn't knowingly, voluntarily and intelligently waive his rights because of the psychological and physical effects of his

cocaine use that night. Since Randy's drug use was already before the jury, Wendt's attempts to hide his head in the sand were futile and merely gave the state unfettered license to spin that drug use to its benefit. It was an unreasonable strategy to ignore evidence that was already before the jury when Wendt could have presented it in a positive, helpful light.

The motion court also denied relief because the evidence proposed in the amended motion would not have changed its ruling on the motion to suppress. (PCRLF811,814). What the court's ruling might have been is not dispositive. Had Wendt investigated and then presented the additional evidence, the court would have been obligated to hear it. And, had it nonetheless chosen to deny the suppression motion, this Court would have engaged in *de novo* review. *State v. Werner*, 9 S.W.3d 590,595(Mo.banc2000); *State v. Berry*, 54 S.W.3d 668,672(Mo.App.,E.D.2001). Since this Court specifically noted that the record was minimal about the knowing, voluntary and intelligent nature of Randy's waiver, *Knese* at766, the additional evidence may well make a difference.

The motion court also asserted that, since the claims were presented and rejected on direct appeal, they are unreviewable. (PCRLF813). This Court noted the claims were at best incompletely preserved for review and were based on an incomplete record, due to Wendt's lack of investigation. *Knese* at766. To suggest that this Court may not re-visit the issues when raised and fully investigated subverts Rule 29.15.

Wendt's performance was woefully inadequate. Yet, if this Court affirms the motion court's denial of a hearing, that level of performance will be condoned as an acceptable standard of conduct in a death penalty case. It is not acceptable since it

comports with neither the Sixth Amendment nor *Strickland*. The facts set forth in Randy's amended motion would entitle him to relief, they are not refuted by the record and Wendt's inaction prejudiced Randy. Randy is entitled to a hearing to adduce evidence on his claims.

VII. FAILURE TO INVESTIGATE AFFECTED BOTH PHASES

The motion court clearly erred in denying without a hearing and his motion to reconsider Randy's claim that Wendt was ineffective for not investigating and then presenting evidence in both phases of trial that Randy was high on cocaine, suffering from Cocaine Psychosis or Cocaine Delirium, when he committed the offense because Wendt's failures violated Randy's rights to due process, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that Randy's motion states facts, not conclusions, that, if true, warrant relief; the facts are not refuted by the record and Randy was prejudiced by Wendt's inaction. Wendt could have shown, had he thoroughly investigated and then presented the available evidence, that Randy lacked the capacity to deliberate, given the Cocaine Psychosis or Cocaine Delirium, which would have negated the culpable mental state necessary for conviction of first degree murder, and this evidence would have also established that Randy's capacity to appreciate the criminality of his conduct was substantially impaired, thus warranting submission of that statutory mitigating circumstance to the jury.

The state asserted, both in evidence and argument, that Randy's statements to the authorities established both his guilt of first degree murder and the appropriateness of the death penalty. (Tr606-09,612,614,618-19,623,655-57,792,807-08). The state repeatedly told the jury to consider Randy's statements, but more important, to condemn Randy for being high on cocaine the night Karin was killed. (Tr604,614,616,619,621-

22,654,656,806,809). Despite the state's repeated trumpeting that Randy's drug use had caused Karin's death, Wendt did nothing to counter the attack. Minimal investigation would have disclosed evidence that would have countered the state's attack and supported both a diminished capacity defense in guilt phase and submitting the statutory mitigating circumstance that Randy's capacity to appreciate the criminality of his conduct was substantially impaired because of the drug use. Wendt was constitutionally ineffective. This Court must remand for an evidentiary hearing on these claims.

GUILT PHASE EVIDENCE

This Court rejected Randy's claim on direct appeal that insufficient evidence of deliberation existed to sustain his first degree murder conviction. *State v. Knese*, 985 S.W.2d 759,769 (Mo.banc1999).[7] This Court noted that deliberation is "cool reflection for any length of time no matter how brief," *Id*., §565.002(3), but found sufficient evidence, "in particular Mr. Knese's own statements, from which a reasonable juror could have concluded that Mr. Knese deliberated on the killing of Ms. Knese." *Knese* at769.

Randy challenged Wendt's failures to investigate and then adduce evidence in guilt phase to demonstrate he could not deliberate—had diminished capacity. (PCRLF192-220,279-80,291-308). He obtained no records to demonstrate the physical

[7] To avoid needless repetition, Randy incorporates by reference the facts adduced at trial, which are set forth in the preceding point and further explicate the statement of facts from this Court's opinion at *State v. Knese*, 985 S.W.2d 759,764-66 (Mo.banc1999).

and psychiatric effects of Randy's drug use; he interviewed almost no witnesses who saw those effects first-hand; he consulted only Dr. Wolfgram, not providing him with adequate or complete records, and then discounted Wolfgram's testimony, after never gaining an understanding of the meaning and potential significance of Cocaine Psychosis or Cocaine Delirium. (PCRLF206-22,275-80,290-300).

At Wendt's deposition, he stated that he didn't want to use Randy's cocaine use as "an excuse" and he didn't like it as a defense. (Wendt depo83-85). He had consulted Dr. Wolfgram, a psychiatrist, but had concluded that he couldn't use him to attack Randy's mental state, despite that Wolfgram concluded that Randy suffers from Depression and substance abuse, which resulted in a diminished capacity. (Wendt depo64;PCRLF297-98). He didn't consult a pharmacologist (Wendt depo88) and never considered using another expert witness or pursuing a cocaine psychosis or cocaine delirium defense, believing neither was supported by the evidence. (Wendt depo66-67).

After the motion court denied a hearing on these claims, (PCRLF660-61), Randy presented the affidavits of Drs. Evans and Smith, both of whom he had alleged in his amended motion as potential witnesses, along with the substance of their proposed testimony (PCRLF185,190,218-19,227-44,278-80) with his motion to reconsider. Both stated that, based on their review of the records, they would testify that Randy would not have been able to deliberate due to Cocaine-Induced Psychosis and Cocaine-Induced Delirium. (PCRLF729-30,742-44).

The motion court denied relief and affirmed its denial of a hearing. It stated that Wendt made strategic decisions not to call Wolfgram because he didn't want to risk

Randy being subjected to an evaluation by the state and that he had wanted to stay away from Randy's drug use because the jury would hold it against him. (PCRLF810-12). As to Wendt's failures to call a pharmacologist to support the Cocaine Psychosis or Delirium diagnoses, the court found the issues of Randy's drug use and the voluntariness of his statement had been addressed on direct appeal. (PCRLF814). Finally, it stated that the issue is not what an expert might say about Cocaine Psychosis but "whether trial counsel pursued a trial strategy designed to avoid using defendant's illegal use of drugs as an excuse for this crime." (PCRLF814). The court found that what Randy proposed was merely a different strategy and, as such, wasn't cognizable. (PCRLF814-15). These findings are clearly erroneous and demonstrate that Randy was entitled to a hearing. *Rule 29.15(k).*

A motion court need not hold an evidentiary hearing unless (1) the movant cites facts, not conclusions, which, if true, would entitle him to relief; (2) the factual allegations aren't refuted by the record, and (3) the matters complained of prejudiced the movant. *State v. Ferguson*, 20 S.W.3d 485,503(Mo.banc2000); *State v. Moss*, 10 S.W.3d 508,511(Mo.banc2000).

Strickland v. Washington, 466 U.S. 668 (1984) provides the standard by which an attorney's performance must be measured. To establish ineffective assistance, Randy must show Wendt's performance was deficient and prejudice resulted. Prejudice is established if a reasonable probability exists that, but for counsel's errors, the result would have been different. *Id.; State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997).

Counsel must make a reasonable investigation in preparing a case or make a reasonable decision not to conduct a particular investigation. *Strickland*, 466 U.S.at691. Strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*.at690-91. Failing to interview witnesses or discover mitigating evidence relates to trial preparation, not strategy. *Chambers v. Armontrout*, 907 F.2d 825,828(8th Cir.1990); *Kenley v. Armontrout*, 937 F.2d 1298,1304(8th Cir.1991). Just calling something strategy does not, however, "insulate attorney behavior from review. The attorney's choice of tactics must be *reasonable* under the circumstances." *Cave v. Singletary*, 971 F.2d 1513,1518(11th Cir.1992)(emphasis in original).

As this Court noted, what the jury heard, un-rebutted by evidence from the defense, was that Randy had deliberately killed Karin. *Knese* at769. Wendt's "strategy" of not addressing Randy's drug use, apparently hoping it would disappear, was patently unreasonable, given the state's repeated references to it throughout trial. *Kenley*, *supra; Cave*, *supra*. Wendt knew that Randy's statements were critically important and he knew that, without them, the state would have problems convicting him of murder first. (Wendt depo78). Yet, he did minimal investigation to attempt to address that issue. He didn't contact a pharmacologist to explain the related issue of the impact of cocaine on Randy's perceptions, beliefs, and actions, although a pharmacologist could have explained that Randy was suffering from Cocaine-Induced Psychosis or Delirium, a mental disease or defect under §552.010, and that, on this basis, Wendt could have challenged that critical element of the state's case. (PCRLF185,218-19,227-44,276-80,291-300) In fact, he

never even asked experts what these diagnoses meant. (Wendt depo67). He didn't pursue this challenge despite his retained expert's finding that Randy had a diminished capacity at the time of the offense due to the cocaine psychosis. (PCRLF212-18).

As with the suppression of Randy's statements, the motion court recites the mantra of "trial strategy" to avoid both a hearing and granting relief. Even if this Court ultimately denies relief on these claims, they were adequately pleaded, properly presented and warrant a hearing since they go to the heart of the matter—whether Wendt exercised reasonable trial strategy. *See State v. Tokar,* 918 S.W.2d 753 (Mo.banc1996)..

PENALTY PHASE EVIDENCE

On direct appeal, Randy challenged the court's failure to instruct on the statutory mitigator of whether Randy's capacity to appreciate the criminality of his conduct was substantially impaired. Although Wendt had objected to the court's action, he neglected to include the allegation in the new trial motion so this Court's review was for plain error. (Tr672-74;LF140-41); *Knese* at777. This Court found no plain error because, as the state had noted, Wendt "did not offer any evidence…psychiatric testimony, to demonstrate that his capacity to appreciate the criminality of his conduct was substantially impaired as a result of drug use." *Id*. The only evidence to this effect was the testimony that he had taken cocaine, his behavior was wild and he believed he was being chased by the Devil. *Id*. This Court stated, "Given the slight evidence presented here of Mr. Knese's alleged failure to comprehend the criminality of his conduct due to cocaine use, there was no manifest injustice in the failure to give the requested instruction, especially since the 'extreme mental disturbance' mitigating instruction was given." *Id*. at777-78.

Randy alleged that Wendt's failure to present sufficient evidence to support this mitigating circumstance and properly preserve the issue was constitutionally ineffective. (PCRLF277-80,503-09,521-30). Drs. Evans and Smith, who had been listed in the amended motion, along with the substance of their proposed testimony (PCRLF185,218-19,227-44) and whose affidavits were submitted to support Randy's motion to reconsider, stated they could have testified that Randy suffered from Cocaine Psychosis, Delirium and delusions at the time of the incident. (PCRLF729-30,742-44). At Wendt's deposition, he stated that he believed more harm than good would come from arguing in penalty phase for life based on someone's capacity to appreciate his conduct being affected by drugs. (Wendt depo 66).

The motion court rejected Randy's claim and denied a hearing, finding Wendt's decision was strategic and Randy's post-conviction counsel merely suggested a different strategy to take. (PCRLF815). These findings are clearly erroneous.

Yet again, the motion court attempted to bypass the requirement of a hearing by calling something a strategic decision **before** any hearing has been held. *See State v. Tokar, supra*. Further, even were the label of "strategy" given Wendt's inaction, since he didn't adequately investigate to discover what evidence could have been adduced, no deference may be given to his decisions. *Kenley*, 937 F.2d at1304; *Eldridge v. Atkins*, 665 F.2d 228, 235-37 (8th Cir. 1981); *Chambers*, 907 F.2d at828. Merely saying "strategy" won't insulate counsel's actions from review, *Cave* at1518, since they must be reasonable under the circumstances. Here the state repeatedly admonished the jury to sentence Randy to death **because** of his drug use. (Tr604,614,616,619,621-22,654,656,806,809).

For Wendt to ignore that enormous aspect of the state's case, and to allow the state to use it without challenge is clearly untenable.

Wendt's performance was woefully inadequate. Yet, if this Court affirms the motion court, his performance will be condoned. This standard of practice is unacceptable. The facts set forth in Randy's amended motion would entitle Randy to relief, are not refuted by the record, and Wendt's failures to act prejudiced Randy. Randy is entitled to a hearing to adduce evidence on these claims.

VIII. EXCESSIVE VICTIM IMPACT

The motion court clearly erred in denying an evidentiary hearing and denying relief on Randy's claim that Wendt ineffectively failed to object to or attempt to limit the state's presentation of extensive victim impact evidence, which included otherwise inadmissible hearsay, because Wendt's failures denied Randy's rights to due process, confrontation, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and violated §565.030.4 RSMo, in that Wendt unreasonably failed to do anything to limit the jury's consideration of victim impact evidence that would not otherwise be admissible in either phase. This evidence caused the jury to sentence Randy to death based on emotion and other arbitrary factors, not the facts and the law.

The state's penalty phase consisted, in large part, of seven witnesses who testified about Karin Knese and the impact of her death. (Tr682-754). They testified about their experiences, read prepared statements and asked that the jury do "justice." The state also introduced 55 photographs, including Karin's baby pictures and pictures of her father, who had died almost 20 years earlier when she was nine. The state emphasized this evidence as a critical factor for the death penalty. It caused the jury to base its decision on emotion, not reason, the facts and the law and violated Randy's constitutional rights to due process, confrontation, and freedom from cruel and unusual punishment and §565.030.4 RSMo. Wendt's failures to object and to attempt to limit this evidence in any way violated Randy's right to effective assistance of counsel.

In *Payne v. Tennessee*, 501 U.S. 808(1991), the Court held that introducing victim impact evidence did not *per se* violate the Eighth Amendment. The majority and two concurring opinions specifically limited their ruling to evidence about a victim's characteristics and the impact of the death on survivors. Missouri's Legislature codified *Payne* in §565.030.4 in 1993, amending it to allow the state to introduce, "within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others." The *Payne* Court noted, however, that even those kinds of evidence could violate the Due Process Clause, since they have the potential to be unduly inflammatory and might so infect the proceeding as to render it fundamentally unfair. *Payne*, 501 U.S. at831 (O'Connor, J., concurring). In *Payne*, the Court found no Eighth Amendment or Due Process violation since the sole evidence came from the victim's mother and the prosecutor's argument. The evidence offered a "brief glimpse" of the harm caused, the defendant could have foreseen the harm, and it was relevant to his blameworthiness. *Id*.at838.

Here, the evidence offered was unduly inflammatory, rendering penalty phase fundamentally unfair. It far exceeded the scope of the statute and contained hearsay and other otherwise inadmissible evidence. Wendt was constitutionally ineffective for failing to object.

Karin's mother, Janet Powers, recalled her emotions when she learned of Karin's death.(Tr682-84). She was hysterical about her daughter's death, about her grandson's well-being, and she drove from Florida, in anguish about the death. (Tr683-84).

Mrs. Powers talked about Karin's relationships with her cousins, stepsister and nephew. (Tr684). Karin was born in 1969 and the jury saw her baby picture.(Tr684;Exh.78). When she was nine, her father died, and the jury saw his photo just after he graduated from high school, before Karin was even born.(Tr685-86;Exh79). Mrs. Powers told how she had met him, where they went to school and church, and how he died of kidney cancer, over 18 years before Karin died. (Tr685-86). Mrs. Powers told how Karin's father said he would miss his children and that his death devastated them. (Tr686-87).

Mrs. Powers described in detail Karin's love for her father's parents; how she visited them; how their deaths had affected her, and how they had attended Karin's wedding. (Tr687-88). Mrs. Powers then detailed Karin's relationship with her mother's mother; how Karin had worked in her house and yard; they had sat and talked and how Karin wanted to go to her grandmother's nursing home to have pictures taken of her with Garrett. (Tr688-90;Exh.81,82). Mrs. Powers told that her mother, who has short-term memory loss, hasn't asked about Karin since her death and Mrs. Powers never told her. (Tr690-91).

Mrs. Powers also spoke of Karin's relationship with her brother, Skip. (Tr691-92). They were always close; fishing, riding and swimming together. (Tr692,697,709). The jury saw 15 photographs of Karin with her brother in various settings. (Exh.106-119).

Mrs. Powers talked of Garrett, showing photographs of him just home from the hospital, at 13 months, and of his room, decorated with angels. (Ex.83,84,87(a-c)). She

told how Garrett smiled, teethed, giggled, played games and played with his grandparents. (Tr693-95).

Mrs. Powers talked of her marriage, where they lived and every move they made to a different home. (Tr695-97). She said Karin was determined, persistent, a trier. (Tr697). Even though she was small, she took riding lessons and wasn't afraid. (Tr708). She was a cheerleader, even at ten. (Tr697-98;Exh.85-86). She was in the band's color guard for several years, during which she even played for the football Cardinals and the President.(Tr701-02;Exh.101). Christmas was Karin's favorite holiday and the family always got together on Christmas Eve. (Tr698). Mrs. Powers then showed the jury a multitude of pictures of Karin and her brother with Santa, from when she was a baby through high school. (Tr698-99,709;Exh.88-94,99-100).

Karin attended Southwest Missouri State University for two years, then came home and worked part-time and attended school part-time at UMSL. (Tr702). She worked at a daycare center and took three years to finish school, attending at night. (Tr702-03). The jury saw a photo of her graduation and her diploma, a BS from UMSL. (Tr700-02;Exh.103). She then attended and completed a real estate course, while working and pregnant with Garrett. (Tr700;Exh.104).

Mrs. Powers talked about Karin's thoughtfulness, arranging formal photographs of herself and her brother for her mother's 50th birthday, (Tr704;Exh.119);arranging surprise birthday parties (Tr704); having a video made of her mother's favorite photos so she could enjoy them (Tr704-05); calling her mom just to say hi.(Tr708).

Mrs. Powers was but the first of seven witnesses the state called. Karin's brother, Skip; her step-sister, Lee Ann; her high school friend, Michelle; her cousins, Susan and Janine and her aunt, Gloria testified to similar effect and in as great detail. (Tr711-54). Thus, family member after family member detailed Karin's characteristics, their relationships and the impact of her death on them.

Their testimony wasn't limited to those areas. They also talked about the circumstances of Karin's father's death, his feelings about dying and how he'd miss his children. (Tr686-87). They talked of Randy making long-distance phone calls and not paying for them (Tr741-42,745-47). They talked of the brutality of the crime, of Randy and their prayers that "justice will be done." (Tr749-50,754). They related hearsay, including Karin's father's comments nearly 20 years earlier (Tr686); Karin's conversations with her mother and a friend about Randy's drug use (Tr706-07,728-31) and her troubled marriage (Tr730); her nephew's statements to his mother (Tr720);a witness's friend's comments about a lady from church who had spoken at a church meeting (Tr747-48), and a principal's comments at a graduation ceremony. (Tr753).[8]

[8] Prohibitions against hearsay apply to penalty phase. *State v. Kreutzer*, 928 S.W.2d 854,868 (Mo.banc1996); *State v. Wise*, 879 S.W.2d 494 (Mo.banc1994). This evidence violated Randy's right to confrontation, *Pennsylvania v. Ritchie*, 480 U.S. 39,51(1987), since it left him unable to challenge, cross-examine and confront Karin's long-dead father, a church acquaintance, a school principal, Karin herself. *See State v. Bell*, 950

Randy challenged the victim impact evidence on direct appeal, but noted that his challenge wasn't properly preserved. This Court rejected the claim, noting, "Mr. Knese failed to object to any of the victim impact evidence, and we are not, therefore, presented with the question of whether all of the evidence presented would have been admissible had proper objection been made. No manifest injustice occurred in allowing the jury to hear the type or extent of victim impact evidence presented in this case." *Knese*, at772.

Randy asserted that Wendt was constitutionally ineffective for failing to object to this copious and improper evidence. (PCRLF485-502). The motion court denied a hearing on this claim (PCRLF660-61). It found that claims raised on direct appeal can't be litigated on post-conviction and that findings of no manifest injustice under plain error preclude findings of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). (PCRLF820). It also concluded that the files and records conclusively show Randy wasn't entitled to relief. (PCRLF820-21). The motion court's findings are clearly erroneous.

The motion court's first finding purports to be based on *Leisure v. State*, 828 S.W.2d 872 (Mo.banc1992). In *Leisure*, this Court noted that four points presented related to issues raised on direct appeal, and the assertions that counsel was ineffective on those grounds. *Id.*at874. This Court stated that issues decided on direct appeal couldn't be re-litigated in post-conviction actions as ineffective assistance of counsel. *Id.* If

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S.W.2d 482,483-85(Mo.banc1997); *State v. Revelle*, 957 S.W.2d 428 (Mo.App.,S.D.1997).

Leisure is read literally, it runs afoul of the purposes of Rule 29.15 and conflicts with cases such as *State v. Storey*, 901 S.W.2d 886,901(Mo.banc1995). To that extent, it should no longer be followed.

Rule 30.20 provides that "whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20 often provides the mechanism whereby, on direct appeal, notwithstanding that a claim is improperly or inadequately preserved, a party can request review because the failure to do so would result in manifest injustice or a miscarriage of justice. While rarely granted, this Court has occasionally found plain error warranting relief. *See State v. Zindel*, 918 S.W.2d 239 (Mo.banc1996); *State v. Pritchard*, 982 S.W.2d 273 (Mo.banc1999).

Rule 29.15 provides that a person convicted of a felony, who claims his conviction or sentence violates the state or federal constitution, may seek relief under the Rule. Of the claims that may be raised under Rule 29.15, claims of ineffective assistance of counsel are specifically enumerated. And, as this Court has repeatedly held, such claims are not cognizable on direct appeal. *See*, *Wheat v. State*, 775 S.W.2d 155 (Mo.banc1989).

If this Court reads *Leisure* as the motion court would have it do, when counsel on direct appeal raises an issue that is perhaps inadequately preserved but has resulted in a manifest injustice or miscarriage of justice, the defendant would forever be precluded from raising the **separate** constitutional claim of ineffective assistance of counsel. Thus, the defendant, under *Leisure*, is forced to choose among his constitutional rights. This clearly is not what this Court intended nor does it comport with our Constitutions.

Simmons v. United States, 390 U.S. 377,394 (1968); *State v. Samuels*, 965 S.W.2d 913 (Mo.App.,W.D.1998).

This Court's decisions in cases such as *State v. Storey*, 901 S.W.2d 886,901 (Mo.banc1995), reveal that *Leisure* should no longer be followed. In *Storey*, this Court granted relief based on counsel's failure to object to the prosecutor's improper closing arguments but found no plain error on the claim based solely on the improper closing arguments. While *Storey* fell under the consolidated Rule 29.15 appeals process, surely, if this Court had intended *Leisure* to be controlling, it would have rejected Storey's ineffective assistance claim. Yet, it did not, since it found the claims addressed different issues—the one the improper argument, the other counsel's ineffectiveness—and those different issues required different results.

Randy's claim of ineffective assistance for failure to object to the excessive and improper victim impact evidence is not foreclosed merely because a related claim was denied upon plain error review on direct appeal.[9] The motion court's findings to the contrary are clearly erroneous.

The related basis for the motion court's denial of relief on this claim is its assertion that, since this Court found no manifest injustice on plain error review, a finding

[9] An anomalous result from the motion court's holding would be that direct appeal counsel, who raised the plain error allegation on direct appeal and thus caused the related ineffective assistance claim to be un-reviewable on post-conviction, could not be charged with ineffective assistance either and the claim would be entirely insulated from review.

of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) is precluded. This argument is factually and legally flawed, as this Court's opinion in *Deck v. State*, S.Ct.83237 (February 26, 2002(Mo.banc) clearly reveals. First, this Court's opinion reveals that its decision is based, at least in part, on Wendt's failure to object to any of the evidence and thus, "we are not…presented with the question of whether all of the evidence would have been admissible had proper objection been made." *Knese*, at772. Were objection made and the question properly before the court, a different answer might result.

The motion court's holding is also legally erroneous since manifest injustice does not equal prejudice under *Strickland*. This Court's opinions in *Sidebottom v. State*, 781 S.W.2d 791 (Mo.banc1989) and *Clemmons v. State*, 785 S.W.2d 524(Mo.banc1990), reveal that these two standards are dissimilar.

In *Strickland*, the Court specifically rejected finding the prejudice prong was an outcome-determinative standard because ineffective assistance claims assert the absence of a critical assurance that the proceeding's result is reliable. *Strickland* at692-94. The standard is lower: a reasonable probability that, but for counsel's error, the result would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id*.at694. The roots of this test lie in the test for materiality of exculpatory evidence undisclosed to the defense. *Id.*; citing *United States v. Agurs*, 427 U.S. 97,104,112-13(1976). In *Kyles v. Whitley*, 514 U.S. 419,434(1995), the Court reaffirmed that, under the *Strickland* standard, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case."

In *Sidebottom,* this Court applied the *Strickland* prejudice standard to counsel's failure to object to an exhibit that referred to a rape and burglary, on one page of fifteen. *Sidebottom* at796. When the jury asked if Sidebottom had been convicted of the rape and burglary or just charged with offenses that couldn't be considered in guilt, the court instructed it not to consider those entries in reaching its verdict. *Id.*

This Court found "the *bases* for finding no manifest injustice on direct appeal serve to establish no prejudice under the Strickland test." *Id*.(emphasis added). Emphasizing that the trial court had directed the jury to disregard, the prosecutor didn't try to use the unrelated crimes and hadn't consciously tried improperly to inject them, this Court applied the standard of "a reasonable probability that the result would have been different" and found no prejudice. *Id*.at797.

In deciding *Clemmons*, this Court again applied the *Strickland* prejudice standard and noted that prejudice only must undermine confidence in the outcome. *Clemmons* at527. As in *Sidebottom,* this Court found that "the basis for this Court's finding of no manifest injustice on direct appeal served to establish a finding of no prejudice under the *Strickland* test." *Id*.at530.

This Court later decided *State v. Nolan*, 872 S.W.2d 99,103(Mo.banc1994), a consolidated appeal challenging whether an attempted burglary verdict-director that failed to specify the intended crime of burglary was plain error. This Court stated that, for instructional error to constitute plain error, the trial court must have so misdirected or failed to instruct the jury as to cause a manifest injustice or miscarriage of justice. *Id*. That inquiry is fact-driven, but, for instructional error, the party must prove the error

"affected the jury's verdict." *Id*. Nolan didn't meet this standard since the jury found he intended to commit the crime and the prosecutor's argument to that effect was supported by the evidence. *Id.* Since Nolan couldn't show the instructional error actually affected the verdict, no plain error existed. *Id.* (see also *State v. Deck*, 994.S.W.2d527,540 (Mo.banc1999).

This Court also addressed counsel's ineffectiveness for not objecting to the improper instruction or including it in the new trial motion. As to that claim, this Court relied on *Strickland's* prejudice standard. *Id.*at104. This Court found that, "as in *Sidebottom*, the *basis* for no finding of manifest injustice defeats a finding of prejudice under *Strickland*." *Id*.(emphasis added).

Thus, although the lack of one may help prove the lack of the other, these concepts are not the same thing. The motion court's holding to the contrary is clearly erroneous.

Wendt should have objected to this evidence. It far exceeded the scope of the statute and *Payne* and contained calls for "justice" and hearsay, the speakers of which Randy was never allowed to confront. It rendered the penalty phase result fundamentally unreliable. This Court should reverse for an evidentiary hearing on this claim, or, alternatively, should reverse and remand for a new penalty phase.

CONCLUSION

Based on the foregoing arguments, Randy requests that this Court reverse and remand for a new trial, for a new penalty phase, vacate his death sentence and re-sentence him to life without parole, and for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of February, 2002, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 23,886 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

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Janet M. Thompson