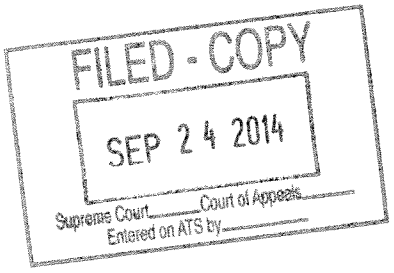
9-24-2014

Dunlap v. State Appellant's Reply Brief Dckt. 41105

IN THE SUPREME COURT OF THE STATE OF IDAHO

TIMOTHY ALAN DUNLAP, Appellant, vs. STATE OF IDAHO, Respondent.	)	DOCKET NO. 41105-2013 (District Court Case No. CV-2011-108)



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Sixth Judicial District for Caribou County Honorable Mitchell W. Brown Presiding

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The opening and responsive briefs filed in this appeal discussed a range of appellate ineffective assistance of counsel claims. This Reply Brief will address a limited selection of claims raised.[1]

I. DUNLAP AGREES THAT STATE LAW BARS MERITS REVIEW OF THE UNDERLYING SUBSTANTIVE ISSUES IN HIS IAC ON APPEAL CLAIMS

In his Appellant's Opening Brief ("Dunlap's Brief"), Dunlap raised an issue regarding whether the underlying substantive claims that were the subject of each ineffective assistance of counsel ("IAC") on appeal claim may be considered on the merits. Dunlap's Brief at 6. The State rephrased this issue as whether the underlying substantive claims were waived because they were known or reasonably could have been known on appeal or during the initial post-conviction proceedings following the resentencing. Brief of Respondent ("State's Brief") at 6. The State noted that Dunlap "properly conceded his substantive claims were known or reasonably could have been known during his first resentencing post-conviction proceedings and appeal." *Id.* at 7.

The State also noted that the page limit imposed for Dunlap's brief in the prior appeal of the resentencing, which Dunlap had offered as an excuse for omitting issues, does not fall within any explicit exception of Idaho Code § 19-2719(5). State's Brief at 7, 10. Dunlap acknowledges that is the current state of the law, and he acknowledged it below. *See* R. 1387 ("Dunlap acknowledges that these record-based substantive claims may be barred in state court under § 19-2719 in this successive petition ...."). Dunlap merely raised the substantive issues to exhaust them in state court and acknowledged they appeared to be barred under § 19-2719.

Dunlap discussed the Court-imposed page limitation only as a reason for this Court to

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[1] The appellate IAC claims regarding instructional issues are meritorious. Dunlap stands on his opening brief regarding those issues and makes no further response.

create an exception to § 19-2719's limits on the merits review of claims in a successive petition. *See* R. 1387, and Dunlap's Brief at 6 ("The only basis or excuse that Dunlap asserts for raising them in the successive petition in this case is that appellate counsel was limited on appeal by the page limits imposed by this Court.").[2] The State seems to have incorrectly interpreted Dunlap's argument – that this Court should relax the waiver provisions of §19-2719 based on its imposition of page limits – as a new and independent due process claim under the federal constitution. *See* State's Brief at 10.

As the State noted, the Fourteenth Amendment due process objection to this Court's page limitation was raised as a defense against summary dismissal and not as a ground for relief in Dunlap's petition. *See id.*; R. 1389. Dunlap did not intend to raise this Court's page limitation as an independent constitutional claim in this proceeding or below. Rather, he was merely offering it as a basis for avoiding summary dismissal, by explaining the connection between the Fourteenth Amendment violation alleged by the SAPD in its moving papers in the prior appeal and this Court's equitable power to excuse the waiver of the underlying substantive claims.

Unless this Court creates an exception to the statutory waiver rule based on the page limitation, Dunlap acknowledges that the underlying substantive issues in his IAC on appeal claims are precluded from review under § 19-2719.

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[2] The State Appellate Public Defender ("SAPD") previously raised an issue regarding page limits when it sought leave to file a 221 page brief on the consolidated appeal of the conviction, sentence and denial of post-conviction relief. *See Dunlap v. State*, ISC #32773, Renewed Motion to Permit Filing of a Brief in Excess of 50 Pages, filed Dec. 21, 2010, at 6-7 (alleging both due process and equal protection concerns under the Fourteenth Amendment as well as an adverse impact on Dunlap's right to "'adequate and effective appellate review,'" quoting *Smith v. Robbins*, 528 U.S. 259, 276 (2000)). This Court rejected this argument. *See State v. Dunlap*, ISC #32773, Order Re: Renewed Motion to Permit Filing of a Brief in Excess of 50 Pages, filed Jan. 12, 2012 (grant of motion limited to 100 pages, rather than the full amount requested).

II. DUNLAP'S APPELLATE IAC CLAIMS FOR FAILURE TO RAISE *WITHERSPOON, MORGAN* AND TRIAL IAC VOIR DIRE ISSUES ARE MERITORIOUS

Dunlap raised three appellate IAC claims relating to jury selection and composition. Specifically, the SAPD failed to raise issues about constitutionally insufficient capital qualification of the jury under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Morgan v. Illinois*, 504 U.S. 719 (1992), as well as trial counsel's ineffective assistance during an inadequate voir dire. Dunlap's Brief at 3, 14. The State argued that the appellate IAC claims fail because the "SAPD's tactical decisions" in omitting these jury selection claims were not objectively unreasonable and that the omissions did not prejudice Dunlap because the claims would not have prevailed on appeal. State's Brief at 12. The State is incorrect.

A. The SAPD's Claim Selection Cannot be a Strategic Decision

In his opening brief, Dunlap argued that the SAPD raised an issue foreclosed by *Ross v. Oklahoma*, 487 U.S. 81 (1988), making it clearly weaker than the issues raised here. *See generally* Dunlap's Brief at 14-15, 22. *Ross* held that the right to an impartial jury is not impacted by the erroneous failure to exclude a member of the venire who should have been removed for cause, if subsequently that venireman was removed by a peremptory strike and did not actually sit on the jury. *Ross*, 487 U.S. at 88.

The State asserted that the SAPD made a strategic decision in raising "a claim regarding the disqualification of two other jurors for cause in the consolidated appeal." State's Brief at 22-23. This is the *very claim* that Dunlap showed was foreclosed by *Ross*. *See* Dunlap's Brief at 14. The failure to disqualify those two challenged jurors was harmless because they were struck by peremptory challenges and did not sit on the jury. *See id.*

The State "d[id] not concede" that the issue raised by the SAPD was foreclosed by *Ross* and clearly weaker than the omitted issues. State's Brief at 24. While refusing to concede that

the claim was weaker, the State failed to argue that it was *not* clearly weaker. Most significantly, the State failed even to contend that the issue was *not* foreclosed by *Ross*. *See* State's Brief at 22 (merely stating without citation or argument that the claim raised by SAPD was "*allegedly* 'foreclosed by *Ross*'") (emphasis added); *id.* at 24 (no argument other than "does not concede" issue raised was weaker).

The State argued that the SAPD's omission of the issues raised by Dunlap in this appeal was a tactical, winnowing decision, which this Court will not second guess. *Id.* at 23-24. However, strategic decisions must be supported by reasonable professional judgment, *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984), which this decision clearly was not. Deficient performance occurs under the Supreme Court's appellate ineffectiveness test when "ignored issues are clearly stronger than those presented." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). Choosing to raise an issue foreclosed by Supreme Court precedent, to the exclusion of clearly stronger issues, is neither reasonable nor strategic. *See, e.g., Shaw v. Wilson*, 721 F.3d 908, 915-18 (7th Cir. 2013) (when non-frivolous, stronger issue had "better than a fighting chance," raising issue that was "hopeless" and "dead on arrival," was ineffective because "[n]o tactical reason … can be assigned for [his] failure to raise the only substantial claim[] that" defendant had). The State's winnowing argument grossly overstated the latitude given to counsel. While appellate lawyers need not present every non-frivolous argument, "they *are* expected to 'select[] the most promising issues for review.'" *Id.* at 915 (emphasis in original) (quoting *Jones v. Barnes*, 463 U.S. 745, 752-53 (1983)).

In the context of a trial IAC claim, the State acknowledged a "strategic" or "tactical" decision is unworthy of a presumption of competence when the lawyer's decision resulted "'from inadequate preparation, ignorance of the relevant law, or other shortcomings capable of

review.'" State's Brief at 23 (quoting *State v. Dunlap*, 155 Idaho 345, 384, 313 P.3d 1, 40 (2013) ("*Dunlap V*"), petition for certiorari filed, no. 13-1315 (Apr. 28, 2014), and its discussion of trial IAC claims). The SAPD demonstrated ignorance of the law in challenging venire members who were biased in favor of death but did not sit on the jury. This issue was foreclosed by *Ross*. Dunlap's Brief at 14. In ignoring *Ross*, a controlling Supreme Court case, and in raising an issue foreclosed by it, the SAPD performed deficiently[3] and raised a clearly weaker issue. *See Robbins*, 528 U.S. at 288. The venire members who did not sit on the jury shared biases very similar to juror Canaday, who did in fact sit on the jury and whose empanelment the SAPD inexplicably failed to challenge. In failing to challenge both the automatic death penalty ("ADP") jurors who *did* sit on the jury as well as the improper exclusion of juror McMinton in violation of *Witherspoon*, the SAPD omitted clearly stronger issues.

The State also made a policy argument that appears to urge this Court to reject the *Robbins* test. The State argued that the *Robbins* "test would result in a 'weak' claim being filed in virtually every appeal just to leave open the possibility of an ineffective assistance of appellate counsel claim in the future." State's Brief at 24. The State's policy argument is misplaced, unnecessary and should be ignored. Aside from its conflict with the United States Supreme Court, the State's proposed policy ignores the prejudice prong of the appellate ineffectiveness test, i.e., that the unraised issue must offer a reasonable probability of a different result. *Mitchell v. State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998) (citing *Strickland*). The prejudice prong will decrease the likelihood of purposeful sandbagging. It is unlikely that any competent

[3] The SAPD's failure to raise a trial IAC issue about the inadequate voir dire that caused the *Morgan* and *Witherspoon* violations, instead of the issue foreclosed by *Ross*, was likewise ineffective. *See infra* at 26-28.

appellate counsel will purposely omit winning issues while raising clearly weaker ones in the hopes of establishing appellate IAC sometime in the future.

B. Dunlap Raised Appellate IAC Claims Based Upon *Witherspoon* and *Morgan* in Addition to Trial IAC Relating to the Inadequate Voir Dire

The State did not clearly address Dunlap's claims that appellate counsel failed to raise *Witherspoon* and *Morgan* claims. *See* State's Brief at 16. The State devoted the bulk of its argument to the appellate IAC claim based upon trial counsel's inadequate voir dire with respect to jury qualification. *See id.* at 16 ("Dunlap contends the SAPD was ineffective on appeal for failing to raise trial counsel's alleged ineffectiveness during voir dire"); *id.* at 24 ("because Dunlap's ineffective assistance of appellate counsel claim involves an ineffective assistance of trial counsel claim, the appellate counsel claim is wrapped in a double presumption"); *id.* at 27 ("it must be remembered the claims Dunlap is raising involves the SAPD's failure to raise an ineffective assistance of trial counsel claim for alleged inadequacies during voir dire and failing to move for removal of jurors for cause"); *id.* at 31 ("he has failed to pierce the presumption that the decision not to raise these claims was tactical and that the SAPD winnowed out these ineffective assistance of trial counsel claims"); *id.* at 39 ("It is little wonder the SAPD chose not to raise an ineffective assistance of trial counsel claim based upon *Morgan.*").

Embedded within these arguments were instances when the State obliquely referred to Dunlap's appellate IAC claims based upon *Morgan* and *Witherspoon* violations. *See* State's Brief at 17 ("Dunlap contended" McMinton's "exclusion violated *Witherspoon*" and that 11 of 12 seated jurors "were willing to automatically vote for the death penalty in violation of *Morgan*"); *id.* at 25 (discussing lack of prejudice, State asserted McMinton "was properly excused under *Witherspoon*"); *id.* at 31 ("Dunlap has failed to establish the *Morgan* claims are 'clearly stronger than those presented.'"). Those responses, however, are buried within the

State's discussion of the trial IAC claim throughout its brief, in both the earlier sections addressing *Morgan* and *Witherspoon*, State's Brief at 16-40, as well as in a later section that specifically addressed appellate counsel's failure to raise various aspects of trial counsel's inadequate voir dire. *Id.* at 40-43.

The State characterized Dunlap's arguments about appellate counsel's failure to raise a trial IAC claim as "repetitive, perplexing and confusing." *Id.* at 40. Seemingly, the "repetitive" comment reveals that the State viewed the trial IAC issue as the only jury selection issue appellate counsel failed to raise. This interpretation seems congruent with the State's discussion of appellate counsel's failure to raise a trial IAC claim in all of the jury-related sections of its brief.

Notwithstanding the State's approach, Dunlap raised three distinct appellate IAC claims based upon the SAPD's failure to raise: (1) a *Witherspoon* claim regarding juror McMinton, *see* Dunlap's Brief at 15-23; (2) a *Morgan* claim regarding juror Canaday and ten other jurors, *see id.* at 23-36; and (3) a trial IAC claim for an inadequate voir dire encompassing failures to question and rehabilitate jurors and move to exclude or object to the exclusion of various jurors based on *Morgan* and *Witherspoon*. *See id.* at 36-43.

In asserting that the *Morgan* and *Witherspoon* claims arise from IAC of appellate counsel in failing to raise IAC of trial counsel, the State attempts to have the Court review the claims through two levels of deference, based on the presumption that both trial and appellate counsel acted strategically. State's Brief at 24-25. But that assertion is misplaced and inapplicable. The failure to raise *Morgan* and *Witherspoon* violations on appeal involves only appellate counsel's

decision on issue selection. In contrast, the failure to raise a trial IAC claim might require the showing of an unreasonable strategic decision by both trial counsel and appellate counsel.[4]

The failure to object at trial does not preclude this Court from considering the claims, although it does subject the claims to harmless error review.[5] The *Morgan* and *Witherspoon* errors address fundamental constitutional rights to an impartial jury under the Sixth Amendment and due process under the Fourteenth Amendment. *Witherspoon*, 391 U.S. at 518; *Morgan*, 504 U.S. at 729. These errors are not harmless. "If even one such [ADP] juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Morgan*, 504 U.S. at 729. *See generally* Dunlap's Brief at 23.

C. Canaday was a Substantially Impaired Juror Under *Morgan*

In response to Dunlap's argument that Canaday was a "substantially impaired" ADP juror who sat in violation of *Morgan*, Dunlap's Brief at 25-27, the State declined to address the most troubling aspects of her voir dire testimony that established her impairment. Instead, the State urged deference to hypothetical strategic decisions by trial counsel. State's Brief at 27-28. The scenarios hypothesized are irrelevant to whether Canaday was substantially impaired. The

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[4] As set forth in Dunlap's opening brief and *infra* at 26-28, however, he has shown that both trial and appellate counsel were ineffective. Moreover, there can be no reasonable strategic judgment in leaving on the jury someone who is ADP and substantially impaired under *Morgan*, or in failing to challenge that result on appeal. *See, e.g., Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001) (failure to challenge biased juror cannot be a strategic decision, because counsel cannot waive defendant's basic Sixth Amendment right to an impartial jury and import non-harmless, structural error into the trial).

[5] As this Court found last year, "when reviewing a capital sentence we will address all of the errors a defendant raises, whether preserved by objection or not...." *Dunlap V*, 155 Idaho 345, 362, 313 P.3d at 18 (2013). Had the SAPD raised on appeal the issues Dunlap alleges should have been raised, each would have been reviewed even if no objection had been made below. However, for each such unpreserved issue Dunlap had the burden of proving the error was not harmless. *Id.* at 363, 313 P.3d at 19.

State's inability to rebut Dunlap's showing that Canaday was substantially impaired as an ADP juror mandates reversal of the district court decision.

First, the State asserted several excuses to support its argument that trial counsel made a "strategic" decision passing Canaday for cause. *Id.* at 27-28. However, those excuses are relevant to the trial IAC claim, but not the *Morgan* claim.

Second, the hypothesized excuses for trial counsel not moving to exclude Canaday are so poorly conceived that they are unreasonable and nonstrategic. For example, the State hypothesized that trial counsel likely desired to keep Canaday as a juror because she initially expressed an opinion that the State should have to offer "proof to an absolute certainty," and she further explained that the evidence should show the defendant "did the crime without doubt."[6] *See* State's Brief at 27. In the circumstances of this case, that hypothetical argument has no basis. This is a resentencing case, and Canaday was informed not only that Dunlap had already pled guilty, but also that "two young ladies have died at Tim Dunlap's hands." R. 1794. His guilt was already determined beyond all doubt. Keeping a potential juror, because she "has expressed an exceptionally strong desire" to hold the State to proof of the elements, is not strategic when those elements were already definitively established and the juror's sworn statements at voir dire and in her questionnaire established her ADP bias. Similarly, Canaday's belief that "[i]nnocent people have been executed," State's Brief at 27, is equally irrelevant to this case because Dunlap's guilt was already conclusively established.

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[6] This is clearly not the law, and after the prosecutor discussed and clarified Canaday's misconception, she understood and agreed to follow the law. R. 1790-91. The State's suggestion that trial counsel "would have wanted to retain a juror who expressed an exceptionally strong desire to have the state prove the elements required for imposition of the death penalty," State's Brief at 27, makes no sense given Canaday's subsequent assurance that "reasonable doubt is appropriate." R. 1791.

The State also suggested defense counsel passed Canaday for cause because she would not view Dunlap's crime as a brutal one. This proposition is based upon her questionnaire answer indicating that watching graphic depictions of the deaths on television had desensitized her. *See id.* at 27; R. 2078. To the extent Canaday's beliefs about the level of brutality could come into play, it would tend to impact the aggravating factor of an especially heinous, atrocious, or cruel murder, *see* I.C. § 19-2515(9)(e), an aggravator that was not presented to the jury. If, instead, the questionnaire statement was taken as a general comment, it falls short of a strategic reason to retain an ADP juror. Television and movies generally are fictitious and not applicable to real life. Regardless, to the extent graphic depictions of human deaths desensitized Canaday, it is hard to fathom how being desensitized would make her less hostile to State-inflicted killing. Her desensitization to killing would be a minus, not a plus, for Dunlap. Being desensitized to the killing of humans makes her more likely to vote for an execution, not less.[7] None of these statements provide a strategic reason for choosing to leave an ADP venire member on the jury.

Third and most significantly, the State entirely failed to address the statements by Canaday that evidenced a closed mind in favor of automatically imposing death. As set forth in Dunlap's Brief, Canaday was only open-minded (i.e., capable of following her oath) "to a point," and that point was her own "rules and absolutes." Her "rules and absolutes" comprised overwhelming support for the death penalty, including the beliefs that life without parole was not a harsh enough punishment for murder, that understanding the facts and circumstances of a

[7] The State also offers Canaday's statement that it was "difficult" to know how she would feel about making the death penalty decision, because she had not "had to live ... out ... [her] beliefs before." *See* State's Brief at 30. This statement offers no real insight into Canaday's beliefs. It merely reflects the truism that never having previously participated in a death penalty decision she couldn't know how she would feel, because she had no prior experience to inform her.

murder was not important, and that not executing murderers was disrespectful to victims. In addition to being predisposed and automatically in favor of death, she was a person who "sticks to her own views" and was not swayed by others. *See generally* Dunlap's Brief at 25-27.

The State suggested that Canaday's beliefs were irrelevant, so long as she could set them aside, consider the evidence and follow the court's instructions. State's Brief at 30-31. However, Canaday never said she could be open-minded and set her beliefs aside. To the contrary, she said she was only open-minded "to a point," that point was her "own set of rules and absolutes," and she "pretty much stick[s] with [her] own" views. R. 1795-97. Unable to say she could set aside her own absolutes and rules, Canaday was actually biased and automatically in favor of the death penalty, notwithstanding her willingness to "try hard to be fair." R. 1796. *See, e.g., Hughes v. United States*, 258 F.3d at 460-61; *Thompson v. Altheimer & Gray*, 248 F.3d 621, 624, 626-27 (7th Cir. 2001) (Posner, J.).

The only other statements the State relied upon to argue Canaday was not *Morgan* impaired are her assertions that her decision to impose the death penalty would be based "on the facts and law in the case," State's Brief at 28, that she believed she could be "fair," and that she would listen to the evidence. *Id.* at 30. These assertions are nothing more than the dogmatic answers to "general fairness and 'follow the law' questions" that *Morgan* held were insufficient to "detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath." *See Morgan*, 504 U.S. at 734-35. ADP jurors like Canaday "by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding." *Id.* at 735.

Canaday's statements that she would follow the law and the court's instructions do not negate her obvious impairment. "As to general questions of fairness and impartiality, such

[ADP] jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed." *Id.* "Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law ... It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so." *Id.* at 735-36.

The State also failed to respond to Dunlap's point that Canaday rejected each of the "clarifications that 'saved' the ADP juror" in *Treesh v. Bagley*, 612 F.3d 424, 438-39 (6th Cir. 2010). *See* Dunlap's Brief at 26-27. Unlike cases cited by the State where challenged jurors who supported the death penalty promised to follow the law and consider mitigation, State's Brief at 29, Canaday's statements established that her own "rules and absolutes" did not allow her to give effect to mitigation. She believed that life without parole was not a harsh enough penalty for murder. Upon conviction for murder, Canaday was a juror who would automatically impose death regardless of the facts in mitigation.

The State failed to even address these points, much less rebut them. Effectively, the State has conceded them. This Court should reverse and remand for a new sentencing before an unbiased jury.

D. McMinton was Wrongly Excluded For Cause

The State contended that McMinton was properly excluded for cause, no *Witherspoon* violation occurred and therefore the SAPD was not ineffective in failing to raise the improper exclusion of McMinton on appeal. State's Brief at 20-26. The State acknowledged McMinton's willingness to give the death penalty and her general support for "an eye for an eye" philosophy.

Id. at 20. In suggesting that the trial court properly excluded McMinton under *Witherspoon* based on her unwillingness to give death to mentally ill murderers, *id.* at 25, the State erred.

1. Deficient Performance in the SAPD's Claim Selection

The State argued that Dunlap failed to establish deficient performance because the SAPD made a reasonable tactical decision in choosing to omit the issues that Dunlap has raised as the basis for his appellate ineffectiveness claims.[8] State's Brief at 22-23. The SAPD's so-called "tactical decision," in choosing not to contest McMinton's exclusion and instead challenging the "disqualification of two other jurors for cause" in the appeal, *id.* at 22-23, did not excuse the deficient performance by appellate counsel.

The issue raised on appeal by the SAPD was without merit, in contrast to the McMinton-related *Witherspoon* claim. The State asserted that the SAPD's decision to raise on appeal the claim challenging the two jurors, but omit a claim about McMinton, reflected a "tactical decision to raise other claims on appeal that may have a greater chance of success." *Id.* at 23. This claimed tactical decision has previously been addressed here and in Dunlap's opening brief. The claim raised by the SAPD was the one foreclosed under *Ross v. Oklahoma*. *See* Dunlap's Brief at 14, 23; *see supra* at 3-5. Raising a clearly weaker claim on appeal and omitting a clearly stronger claim is not a reasonable tactical decision and constitutes deficient performance by appellate counsel. *See supra* at 4-5. *See generally* Dunlap's Brief at 4-6 (citing appellate IAC cases and standards).

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[8] The State contended that the SAPD raised a claim similar to Dunlap's *Witherspoon* claim in the post-conviction proceeding, intimating that the later omission on appeal was strategic. State's Brief at 22. That claim was framed as an IAC claim, however. The "similar" claim related only to trial counsel's failure to object to the prosecution's motion to strike McMinton for cause and for not rehabilitating her. *See* R. (#37270) 802-03.

2. Prejudice from Omitting *Witherspoon* Claim

As to prejudice from the SAPD's deficient performance, the State's assertion that Dunlap cannot show prejudice is also wrong. *See* State's Brief at 25. A *Witherspoon* violation occurred, contrary to the State's assertion. Even though the trial court denied an opportunity for rehabilitation and clarification when it abruptly terminated McMinton's voir dire, her strong statements on the effect of a capital defendant's mental health problems on her sentencing decision do not justify excusing her for cause. A prospective juror may be excluded for cause only if her views on capital punishment would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." *Gray v. Mississippi*, 481 U.S. 648, 658 (1987). "[J]urors – whether they be unalterably in favor of, or opposed to, the death penalty in every case – by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding." *Morgan*, 504 U.S. at 735. Plainly, McMinton was not opposed to the death penalty in every case. Accordingly, she was not *Witherspoon* excludable.

The Idaho capital sentencing statute requires jurors to find an aggravating circumstance in order to make the defendant eligible for a death sentence. I.C. § 19-2515(3)(b). If an aggravating circumstance is proved, the death penalty "shall" be imposed "unless mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust." *Id.* If an aggravating circumstance is found, then each juror is instructed to:

> [d]ecide for yourself whether all mitigating circumstances presented, when weighed against each statutory aggravating circumstance proven by the State, are sufficiently compelling to make the imposition of the death penalty unjust. ... You must each decide for yourself whether mitigating circumstances exist and, if so, then consider them in your individual weighing process.

R. (#32773, Aug. Vol. 1) 21. *See also* I.C. § 19-2515(7)(b).

This instruction illustrates the bifurcated process of the eligibility and selection phases of capital sentencing procedures. Eligibility for a capital sentence is determined at the statutory narrowing phase by determining the existence of an aggravating circumstance unanimously and beyond a reasonable doubt. *See* I.C.§ 19-2515(3)(b). Selection of the death penalty by the jury requires that it unanimously agree that death should be imposed. *Id.* Selection of this punishment follows only after each individual juror considers whether the "mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust." *Id.* If any single juror found that the presented mitigating circumstances were sufficiently compelling to make death unjust, the jury cannot be unanimous and cannot agree to impose death. A sentence of life without parole would necessarily result. *See* I.C. § 19-2515(7)(b). The decision whether or not death is unjust remains with each juror in their own personal discretion and exercise of moral judgment. *See* R. (#32773, Aug. Vol. 1) 21. *Cf. Morgan*, 504 U.S. at 732 n.6 (after consideration of all relevant evidence, jurors deciding whether to impose the death penalty under Illinois's "balancing approach" statute -- which is much like Idaho's statute -- have considerable discretion, and *Witherspoon*'s general principles apply more strongly under such statutory schemes).

McMinton was not substantially impaired in her ability to follow the instructions and her oath at either the eligibility or selection phases of the capital sentencing proceedings. Despite McMinton's clear statements to the effect that she was "an eye for an eye" juror in favor of the death penalty for most or all murderers, she was willing to modulate that position in accordance with her oath to consider mitigating factors including mental health problems. For McMinton, mental health problems were highly mitigating. Her consideration of mental health problems

shows that far from being substantially impaired in her ability to follow the instructions and her oath, McMinton was able to consider and weigh mental health problems and give effect to this most basic of mitigating evidence in considering what sentence to impose.

McMinton was not substantially impaired in her ability to determine the aggravating circumstances. McMinton's demonstrated support for the death penalty clearly established that she was able to follow the instructions and her oath with respect to the factual question regarding proof of the existence of an aggravating circumstance beyond a reasonable doubt. Nothing in the questionnaire or her voir dire refuted her ability to impartially reach that decision. Thus, at the eligibility stage she plainly was able to follow her oath and the instructions.

Likewise, McMinton was fully able to follow the instructions and her oath regarding her own personal decision about whether any evidence that might be presented was mitigating. She personally found evidence of mental problems highly mitigating, but that personal judgment did not prevent her from following the instructions or her oath. To the contrary, Instruction 14 explicitly required her to make that decision "for [her]self." Further, after making her own personal decision whether mitigating circumstances existed, McMinton was able to exercise her own personal judgment, for herself, as the instructions required. She was fully able and willing to decide whether the existence of any mitigating circumstances she found to exist made the imposition of death unjust in her personal judgment and individual weighing process. The exercise of her own discretion in making that moral judgment for herself is precisely what the statute and instructions required. McMinton was not substantially impaired in her ability to follow the instructions or her oath at the selection phase of the sentencing proceeding. *See generally* Dunlap's Brief at 15-20.

The State argued that McMinton is substantially impaired with respect to mitigation because she would vote for life in any case where the evidence presented proved that the defendant had mental health problems. This flawed argument is based on her answer to the leading stake-out question regarding mental health problems. State's Brief at 25. A potential juror's answers to leading questions are substantially less persuasive. Answers that "may be considered expressions of a lack of impartiality," when "made in response to leading questions" are "less persuasive." *Young v. Hofbauer*, 52 Fed. Appx. 234, 240 (6th Cir. 2002). *See Murphy v. Florida*, 421 U.S. 794, 801-02 (1975) (disregarding admission of predisposition to convict because "[w]e cannot attach great significance to this statement, however, in light of the leading nature of counsel's questions and the juror's other testimony....").

As seen under the Idaho statute and Instruction 14, determining whether a mitigating circumstance exists and whether it makes imposition of death unjust is an entirely individual decision made independently by each juror. Those determinations are within a juror's complete discretion as an individualized, reasoned and moral determination. Clearly, in considering and giving effect to mitigating evidence of mental health problems, McMinton could follow the instructions and her oath. Converting McMinton into a *Witherspoon-Witt* excludable, based on her consideration of the mitigating evidence and willingness to give it effect in accordance with the instructions and her oath, violates *Witherspoon* and its progeny. *See Wainwright v. Witt*, 469 U.S. 412, 424 (1985) ("a prospective juror may be excused for cause because of his or her views on capital punishment" when "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'").

McMinton plainly was not "unalterably in favor of, or opposed to, the death penalty in every case." *See Morgan*, 504 U.S. at 735. Taking at face value the words placed in her mouth

by the prosecutor's leading stake-out question, she would not be willing to give death to a mentally ill defendant at the selection phase. R. 1812. The State elevated this single answer to impairment. But that assumes, implausibly and without any foundation in the record, that she would accept any hint of mental illness as dispositive. The judge cutoff voir dire of McMinton after she responded to the State's leading question, and admonished the defense against further questions. R. 1812. Defense counsel then stated that he would "let the Court inquire." The trial court declined to inquire further and struck McMinton for cause. *Id.*

In any event, the voir dire of McMinton revealed an openness to imposing both life and death, depending on the mitigating circumstances that might be presented. She was an impartial juror willing and able to give effect to mitigation based on her individual consideration of the evidence. That is precisely how the statute in Idaho and the death penalty under the Constitution is supposed to work.

Under long established constitutional law, a juror must be allowed to consider relevant mitigating evidence, including mental health problems, in making a reasoned moral decision in selecting a punishment. "In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), a majority of the Court reaffirmed that a sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death." *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989). "If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to *emotional and mental problems*, may be *less culpable* than defendants who have no such

excuse.'" *Id.* at 319 (emphasis added) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

Dunlap does not argue here that the opportunity to present mitigating evidence to the jury was restricted in violation of the above principles.[9] Even assuming unrestricted presentation of mitigating evidence, the problem in this case was that a juror willing to give weight to a particular mitigating factor was improperly excluded.

The sentencer must "be able to give effect to the evidence in imposing sentence," and "[o]nly then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence." *Penry*, 492 U.S. at 319 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 305 (1976)). "'Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character and crime.'" *Penry*, 419 U.S. at 319 (emphasis in original) (quoting *Brown*, 479 U.S. at 545 (O'Connor, J., concurring)). *See McCleskey v. Kemp*, 481 U.S. 279, 304, 306 (1987).

A juror must be allowed to respond to evidence of mental illness, substance abuse and a troubled childhood "in a reasoned, moral manner and to weigh such evidence in [her] calculus of deciding whether a defendant is truly deserving of death." *Brewer v. Quarterman*, 550 U.S. 286, 296 (2007). "The sentencer ... may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 114-15.

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[9] The SAPD raised such challenges in the prior appeal. Dunlap is not disagreeing with or waiving those prior arguments.

Mental illness is one of the most powerful mitigators in capital sentencing proceedings. *See Hooks v. Workman*, 689 F.3d 1148, 1201 (10th Cir. 2012) (noting "the crucial mitigating role that evidence of ... mental health problems can have in the sentencing phase" of a capital case (internal quotation omitted)); *cf. Sears v. Upton*, 561 U.S. 945, 1034-35 (2010) (un-presented "mental and psychological impairments" helped provide prejudice for an inadequate mitigation investigation); *Porter v. McCollum*, 558 U.S. 30, 40, 42-43 (2009) (failure to uncover and present evidence of "mental health or mental impairment" was deficient performance and it was prejudicial not to present jury with evidence of "brain abnormality and cognitive defects"). In excluding McMinton because she would give effect to one of the most powerful mitigators, mental illness, the trial court erred in finding her substantially impaired in her ability to follow the instructions or obey her oath.

Under the Idaho statute and a long line of case law, McMinton was entitled to individually consider and give the weight she thought was proper to mitigating evidence of mental illness. She was able to follow the law, vote for both life and death, consider and give effect to the mitigating and aggravating evidence, and was not irrevocably committed to a decision before hearing the evidence. *See* State's Brief at 30-31 (citing *Witherspoon*, 391 U.S. at 522 n. 21, and acknowledging that the "most that can be demanded" of a potential juror is the ability to consider both life and death sentences and "not be irrevocably committed, before the trial has begun," for or against the death penalty "regardless of the facts and circumstances that might emerge in the course of the proceeding") (internal quotations omitted). Under *Morgan* and *Witherspoon*, McMinton was not impaired.

After McMinton responded to the prosecutor's leading question by noting that she could not give death if there were "evidence of any sort of mental problems," [10] the trial judge ended further questioning of her and dismissed her for cause. R. 1812. McMinton brought up the topic of mental problems because she was familiar with a serious mental illness, paranoid schizophrenia, from which her step-sister suffered. R. 1810, 1812. The State's leading and improper stake-out question lumped all mental illness together as one item, no matter how trivial or severe, though it was clear McMinton's frame of reference was a serious and debilitating form of mental illness, paranoid schizophrenia.

The State suggested that it is a "mystery" how McMinton could have been rehabilitated given her answers and the time limits[11] imposed by the court. State's Brief at 25. However, a competent attorney would have examined McMinton about her frame of reference. With this in mind, counsel could have distinguished within a very few questions that McMinton likely viewed less serious mental health problems, like minor depression or obsessive compulsive disorder, differently than paranoid schizophrenia. An examination would also have inquired into whether she could consider the evidence of mental health problems, weigh them against Dunlap's crime, and come to different life or death sentencing decisions depending on the

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[10] This was an improper stake-out question. *See United States v. Fell*, 372 F.Supp.2d 766, 770-71 (D. Vt. 2005); *United States v. Johnson*, 366 F.Supp.2d 822, 842-43, 845 (N.D. Iowa 2005); *State v. Prince*, 266 Ariz. 516, 529, 250 P.3d 1145, 1158 (Ariz. 2011) (en banc).

[11] To the extent that the time limit entered into the decision to cease questioning of McMinton, defense counsel's ability to rehabilitate and adequately voir dire a qualified juror was nevertheless impeded. "Without an 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." *Morgan*, 504 U.S. at 729-30. *See Thompson*, 248 F.3d at 624-25 (when juror said only that she would "*try* to be fair," trial judge "should have followed up" by asking "whether she would follow his instructions on the law and suspend judgment until she had heard all the evidence").

severity of the mental health problem. McMinton's statement was not a complicated issue and could have been handled straightforwardly.

The State also argued that the trial judge's decision to excuse McMinton was entitled to deference because he had observed her demeanor and credibility. *Id.* at 26. However, McMinton was not deceptive in the least; rather she was forthright and open. She acknowledged both her support for the death penalty and that she valued mitigation evidence regarding a defendant's mental health problems. Nobody questioned her credibility. *See* R. 1812 (trial court states simply that "she is taken really in on this mental problems"). Her answers were unambiguous and clear and her truthfulness or credibility are not at issue. *See Thompson*, 248 F.3d at 624-25 (declining to defer to trial judge's ruling on challenge for cause in part because "no issue of credibility [was] presented" and there was "no argument that [potential juror] was not telling the truth"). This is the kind of "clear case" referenced by the State, State's Brief at 26, when the need to defer to the trial judge's ability to observe the juror's manner of testifying is unnecessary. *See, e.g., Franklin v. Anderson*, 434 F.3d 412, 427-28 (6th Cir. 2006) (cold record was so persuasive and clear that it outweighed presumptive deference to the trial judge).

In conclusion, McMinton was an unbiased potential juror who was erroneously excused for cause in violation of *Witherspoon, Witt* and *Morgan.* Such an erroneous exclusion invalidates the sentence and is never harmless. Accordingly, the sentence must be reversed.

E. If McMinton was Substantially Impaired Under *Witherspoon-Witt*, then Numerous Other Jurors were Substantially Impaired Under *Morgan*

Many of the jurors that Dunlap argued were impaired under *Morgan* share an impairment with regard to some kind of basic mitigating evidence. *See* Dunlap's Brief at 24-36. Some, like Canaday, Craig Crandall and Lonnie Taggart, expressed their ADP views fairly explicitly, such as their belief that life without parole was not a harsh enough penalty for murder. *Id.* at 24-29.

Others, like Corey Kunz and Mat Gronning, appeared to favor death in all instances of first degree murder and would consider life only for lesser degrees of murder where there was some defense to the crime. *Id.* at 29-32. The State attacked Dunlap's characterization of the jurors, one by one. *Id.* at 26-40. Having already replied regarding Canaday's substantial impairment, Dunlap stands on his opening brief as to jurors Crandall, Taggart, Kunz and Gronning, who were openly ADP.

Many of the jurors also expressed attitudes that precluded them from giving effect to a defendant's difficult childhood, a particular category of classically mitigating evidence, or were predisposed in favor of an aggravating circumstance. *Id.* at 32-36. As to those jurors, Dunlap offers this rebuttal to the State's challenges. Seven jurors agreed that it "doesn't matter what kind of childhood a murderer had." *See id.* at 32-35. Five jurors agreed that "someone already convicted of murder is likely to kill someone else." *See id.* at 35-36. Dunlap argued that these jurors were substantially impaired in their ability to consider and give effect to a defendant's difficult childhood and to decide impartially the aggravating circumstance of propensity to commit murder. *Id.* at 32-26.

The State argued that seeking to disqualify jurors based on these questionnaire responses, especially when mitigation had not been defined, is "preposterous." State's Brief at 35 n.5. For the reasons that follow, the State is wrong. First, the State's position is self-contradictory. The State itself defended in its brief the dismissal for cause of McMinton, based on a substantial impairment in her ability give death when mental illness is present and despite her pre-disposition toward death generally. Like all the venire members in voir dire, McMinton did not receive a definition of mitigation. Disqualification for a substantial impairment in a juror's ability to follow the instructions and her oath (and consider and give effect to mitigation) does

not require that mitigation be defined during voir dire.[12] Second, in attempting to uphold the stake-out and disqualification of juror McMinton, based on her feelings about a particular kind of mitigating evidence, mental illness, *id.* at 25-26, the State ignores the logical congruity that would make similar statements by other jurors equally disqualifying. Thus, if McMinton's willingness to consider and give great weight to a single category of mitigating evidence, mental illness, was disqualifying as a substantial impairment, then other jurors' unwillingness to consider another category of mitigation, a defendant's difficult childhood, must be equally disqualifying.

If a venire member who is willing to consider death can be disqualified because a particular category of mitigation is so persuasive to her that she would give life if that mitigation were sufficiently present, then other venire members should likewise be disqualified, despite claims that they will consider a life sentence and mitigating evidence in general, when they disregard as irrelevant an entire category of mitigation. The statement "it doesn't matter to me" indicates a categorical rejection of evidence of a defendant's childhood. It is not simply a decision to give such evidence little weight, but to exclude it from consideration and give it no weight at all.

In *Eddings*, the Supreme Court evaluated a case involving a youthful, emotionally disturbed defendant with a difficult family history and childhood. 455 U.S. at 114-16. The Court stated that "the sentencer" may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 114 (emphasis in original). "The sentencer ... may determine the

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[12] If a definition of mitigation is required, then that is a shortcoming demonstrating further error in the disqualification of McMinton.

weight to be given relevant mitigating evidence. But they may not give it no weight *by excluding such evidence from their consideration.*" *Id.* at 114-15 (emphasis added).

Jurors who disregarded a defendant's childhood in advance of the trial, because "it didn't matter," were substantially impaired. Their answer indicated they essentially deemed this classically mitigating category of evidence irrelevant. They failed to consider it and discarded it as a distraction unworthy of consideration. While they might be entitled to assign it little or no weight after hearing and considering the evidence but being unimpressed, *see, e.g., Copenhefer v. Horn*, 696 F.3d 377, 386-87 (3rd Cir. 2012), they may not disregard it in advance. *See United States v. Sampson,* 335 F.Supp.2d 166, 229 (D. Mass. 2004) (interpreting *Eddings* as distinguishing between considering relevant mitigating evidence but giving it little or no weight, and refusing to consider relevant mitigation and giving it no weight because sentencer did not consider the mitigation to be relevant at all). Here, these five jurors in advance of trial excluded Dunlap's childhood from their consideration by concluding it "didn't matter" without hearing any evidence. In forbidding a sentencer from excluding relevant mitigation from its consideration, the Court stated in *Eddings* that "*Lockett* [*v. Ohio* and the Constitution] requires [the juror] to listen." *Eddings*, 455 U.S. at 114 n. 10.

In contrast, McMinton plainly was willing to consider and determine the weight of mitigating evidence related to a defendant's mental problems. *See supra* at 15-17, 20. Yet she was disqualified precisely for her ability to follow the court's instructions and her oath, her willingness to make an individual determination of the weight of mitigating evidence and in an appropriate case, to give life when sufficient evidence was presented on that mitigation, notwithstanding her general inclination to favor death. If she was substantially impaired in

considering and valuing classic mitigating evidence highly, then the jurors who disregarded a defendant's childhood entirely, because "it didn't matter," were also substantially impaired.

In a similar vein, but with respect to the propensity to commit murder aggravating circumstance, five jurors, Canaday among them, should have been disqualified for cause because they were substantially impaired as to that aggravating circumstance. Those jurors agreed that "someone already convicted of murder is likely to kill someone else." Dunlap's Brief at 35-36. Further, they were informed that Dunlap had killed two different women on two different occasions. *See, e.g.*, R. 1794. With no examination of these jurors about this answer on the questionnaire, the only record evidence indicates an expressed, clear belief with respect to predisposition to find a particular aggravating circumstance. Based on the facts they were told about Dunlap's prior murders, and believing he was "likely to kill someone else," these jurors were predisposed when they applied the court's propensity instruction to find that Dunlap had "an affinity toward committing murder" and was a "willing, predisposed killer, a killer who tends toward destroying the life of another" and "kills with less than the normal amount of provocation." *See* R. 152. If McMinton was substantially impaired based on her belief that a defendant with sufficiently severe mental problems should not be executed, then these five jurors were substantially impaired by their belief that a convicted murderer was likely to kill again.

For these additional reasons numerous jurors were substantially impaired under *Morgan*. Dunlap is entitled to reversal of the district court decision, the grant of post-conviction relief and a new sentencing proceeding.

F. Trial Counsel Were Ineffective at Voir Dire

In a separate section of its brief, the State again asserted the limited time for voir dire as a defense and excuse for trial counsel's inability to adequately explore attitudes of the venire

members about the death penalty and their ability to follow the instructions and their oaths. State's Brief at 41. As before, the limited time for an adequate voir dire presents its own constitutional problem. To the extent time constraints limited voir dire, sometimes without opportunities for necessary rehabilitation, *see, e.g.,* R. 1813, those constraints may be relevant to and intertwined with other claims. *See Dunlap V*, 155 Idaho at 363-64, 313 P.3d at 19-20. *See supra* at 21 and n. 11. Further, trial counsel should have objected to the time limits, when "red flag" answers in questionnaires or voir dire existed, and trial counsel had not been able to address them in the limited time. Regardless, trial counsel's failure to use the limited time for inquiries, motions and objections relevant to capital juror qualification was nevertheless ineffective.

This leads to the State's mischaracterization of the record and Dunlap's Brief regarding the wasted time by trial counsel during voir dire. The State suggested that Dunlap made only a "conclusory" argument on this point, "generally not supported with any facts or citation to the record," and therefore this Court should disregard Dunlap's argument. State's Brief at 42 (criticizing Dunlap's Brief at 38). However, on the very page cited by the State as devoid of citations to facts or the record, Dunlap cited specific instances of wasted, irrelevant voir dire questions and exchanges regarding "the Super Bowl, a juror's ranch and amount of snow there, and the Simpson's and other t.v. shows." Dunlap's Brief at 38 (citing R. 1736, 1747-50, 1762).

The State argued that Dunlap ignored matters of demeanor. The State relied heavily on demeanor, but the trial court never mentioned demeanor, nor expressed any concerns about ambiguity in McMinton's testimony or her credibility. When credibility is not at issue and the statements at issue are plain and unambiguous, demeanor is of little moment. *See supra* at 22, citing *Thompson*, 248 F.3d at 624-25, *Franklin*, 434 F.3d at 427-28.

This leaves tactics and strategy as the State's main defense to trial counsel's inadequate voir dire. State's Brief at 41. The State asserted that cases cited by Dunlap regarding instances of trial IAC during voir dire were inapplicable, not for the truth of the general principle contained therein, but because the facts were distinguishable. State's Brief at 42-43. However, the fundamental principle applies here, even if the facts of those cases are different from the case at bar: there is no reasonable tactical or strategic decision for leaving a biased juror on the jury, and it is ineffective to do so. *See Hughes*, 258 F.3d at 462-63. In this case, juror Canaday most clearly was biased and an ADP juror. [13] Other jurors were also substantially impaired in the ability to follow the instructions and their oath. The seating of those jurors was a result of trial counsel's ineffectiveness and was neither strategic nor harmless, *Knese v. State,* 85 S.W.3d 628, 632-33 (Mo. 2002) (en banc), as the seating of biased jurors is structural error that establishes prejudice. *See Morgan*, 504 U.S. at 729.

In failing to raise this clearly stronger issue of trial IAC for an inadequate voir dire, appellate counsel was ineffective. The State argued yet again that the SAPD made a tactical decision to omit this issue in favor of "more viable claims." State's Brief at 43. As with the other issues, the SAPD's decision to raise the issue foreclosed by *Ross v. Oklahoma* was a clearly weaker claim and resulted in deficient performance. Prejudice from the appellate ineffectiveness flows directly from the clear ineffectiveness of trial counsel on the underlying claim.

For this reason, too, Dunlap is entitled to relief.

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[13] Trial counsel appeared to realize it, yet made no objection and instead shifted gears to another line of inquiry after interrupting Canaday -- as she was about to explain the extent of her views and the personal absolute and rules that she "stick[s] with" -- and asking "is there any *other* reason that you can think of that you wouldn't be able to sit on the jury and be fair and impartial ...?" R. 1797 (emphasis added).

III. APPELLATE IAC CLAIMS FOR FAILING TO RAISE INSTRUCTIONAL ERRORS ARE MERITORIOUS

Dunlap stands on his brief regarding the instructional issues and makes no further response other than to note that the ex post facto and due process violations, Dunlap's Brief at 49-53, were fundamental errors and violated his federal constitutional rights. The change in the law, referenced in Dunlap's Brief at 51-52, was not harmless. Unless the record makes clear that the sentencer "would have imposed the same sentence" under the prior law, an ex post facto violation may not be considered harmless. *United States v. Sanchez*, 549 Fed. Appx. 557, 557 (7th Cir. 2013). *See Peugh v. United States*, __ U.S. __, 133 S. Ct. 2072, 2088 & n.8 (2013). The jury did not make a determination of whether mitigating circumstances outweighed the aggravating circumstances. *Id.* The record does not establish that the jury would have imposed the same sentence under the prior law

IV. CONCLUSION

For all of the reasons set forth in this brief and Dunlap's opening brief, this Court should reverse the district court decision, grant the petition for post-conviction relief and order that Dunlap be re-sentenced before a new jury.

Respectfully submitted this 24th day of September, 2014.

Teresa A. Hampton

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2014, I caused to be served two true and corrected copies of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

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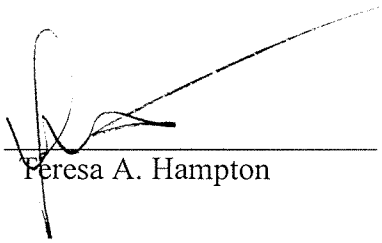

Teresa A. Hampton

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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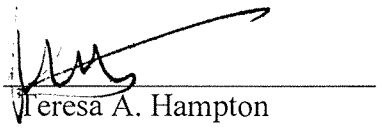
Dated and certified this 24th day of September, 2014.



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