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BEFORE THE GOVERNOR

OF THE STATE OF MISSOURI

THE HONORABLE BOB HOLDEN

In the matter of:)
)
DANIEL BASILE,) Execution scheduled for August 14, 2002
)
Petitioner.)

APPLICATION FOR A REPRIEVE FROM, OR COMMUTATION

OF A SENTENCE OF DEATH

Introduction

Dan Basile is a 35 year old man who is incarcerated at the Potosi Correctional Center in Mineral Point, Missouri awaiting execution. He is scheduled to be executed at 12:01 a.m. on August 14, 2002. All legal appeals previously filed have been denied.

Summary and History of Proceedings

Dan was tried in the Circuit Court of St. Charles County, Missouri by a Montgomery County jury beginning on April 25, 1994 and concluding on May 9, 1994. *State of Missouri v. Daniel Anthony Basile*, Cause No. CR129-65F. Following the jury's imposition of a sentence of death by lethal gas or lethal injection on May 9, 1994, the Honorable Lucy D. Rauch, St. Charles Circuit Court Judge, sentenced Dan to death on July 11, 1994.

Dan subsequently filed a Rule 29.15 motion on January 17, 1995. An amended 29.15 motion was filed by Dan's appointed counsel on March 20, 1995. The motion was denied by the Honorable Lucy D. Rauch on January 23, 1996 following an evidentiary hearing. On March 4, 1996, Dan filed a Notice of Appeal to the Missouri Supreme Court. The Missouri Supreme Court in *State of Missouri v. Daniel Basile*, 942 S.W.2d 342 (Mo. 1997), affirmed the denial of post-conviction relief and affirmed Mr. Basile's conviction and sentence. Subsequently, Dan's motion for rehearing was denied by the Missouri Supreme Court. Likewise, Dan's petition for writ of certiorari in the United States Supreme Court was denied. Dan then pursued federal habeas remedies in the United States District Court for the Eastern District of Missouri. Dan's petition for writ of habeas corpus was denied by the Honorable E. Richard Webber, United States District Judge for the Eastern District of Missouri, on

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December 16, 1999. *Daniel Basile v. Bowersox*, Case No. 4:97-CV-1110-ERW. Dan's motion to alter, amend or set aside judgment filed under Rule 59(e) was also denied by Judge Webber on February 2, 2000. Dan then filed an appeal in the United States Court of Appeals for the Eighth Circuit. *Daniel Basile v. Al Luebbers*, No. 00-1771. On January 9, 2001, a three judge panel of the Court of Appeals denied Dan's appeal. Dan then filed a petition for writ of certiorari with the United States Supreme Court in *Daniel Basile v. Al Luebbers*, No. 01-6486. On February 19, 2002, the United States Supreme Court denied relief.

The circumstances surrounding the offense, as reported by the Missouri Supreme Court, are as follows:

> The events leading up to the murder began on January 10, 1992, when James Torregrossa went to get a tire for his ex-girlfriend at the Old Orchard service station in Webster Groves. Richard DeCaro worked at the station. Torregrossa and DeCaro knew each other because they both belonged to Gold's Gym. DeCaro told Torregrossa that he had heavy payments on his van and asked Torregrossa if he knew of anyone that could "take it off his hands." In the same conversation, DeCaro asked if Torregrossa knew anyone who could "put a hit on somebody" for him. DeCaro also stated that his wife thought he was having an affair with his secretary and that he would not wish marriage on anyone.
>
> Ten days later, DeCaro purchased a $100,000.00 life insurance policy on behalf of his wife, Elizabeth, listing himself as the primary beneficiary. On January 26, 1992, Richard DeCaro struck Elizabeth with their van, knocking her through the garage wall into the kitchen. She sustained severe bruising. The insurance company paid Richard DeCaro over $30,000.00 as a result of the incident.
>
> In January of 1992, DeCaro asked Craig Wells, a manager of Old Orchard service station, if he knew anyone who could steal his van. Wells introduced DeCaro to Basile. The two met, and DeCaro offered Basile $15,000.00 to steal the van and kill Elizabeth. On February 8, 1992, Basile stole the van, drove it to Jackson, Missouri, and burned it. He received $200.00 for this job.
>
> On February 28, 1992, Basile asked his friend, Jeffrey Niehaus, for a stolen gun that was not traceable. On March 4, Basile showed his half-brother, Doug Meyer, a .22 caliber semi-automatic pistol with pearl-like grips. He claims that he bought the gun from his father for $100.00. On March 5, Basile asked another friend, Susan Jenkins, to get him some latex gloves from the doctors offices in which she worked. On March 6, Basile told Meyer that he could not work that day because he was working for Richard DeCaro.
>
> On March 6, 1992, Richard DeCaro picked up two of his four children from school and then went home to pick up the other two. He drove all four of the children and the family

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dog to the Lake of the Ozarks, leaving St. Louis a little after noon. They checked into Holiday Inn at the lake at 2:59 p.m. Two of the children testified that they saw their mother alive before they went to school that morning. They testified that the dog would always bark at strangers.

Between 2:00 and 2:30 p.m., a witness noted that the DeCaro garage door was closed. Elizabeth DeCaro left work at 2:20 p.m. At 3:15 p.m., a neighbor stopped by and noticed the garage door was open and that the DeCaro's Blazer with personalized license plates reading "RIK-LIZ" was in the garage, but no one answered the doorbell.

At 4:15 p.m., Basile was seen driving the DeCaro's Blazer in St. Charles. That evening around 6:30 to 7:00 p.m., Basile called an ex-roommate for a ride, stating "Things went down. I did what I had to do." At 7:00 p.m., Basile called Doug Meyer and asked if Meyer had garage space where Basile could work on his car. Basile drove the Blazer to Richard Borak's home in Florissant and gave him a "boom box" stereo from the DeCaro residence as a birthday gift. Basile told Borak that he "did this lady." Just after 8:00 p.m., the Blazer was spotted heading south on Interstate 270. At 10:30 p.m., Basile went to Meyer's house, where they ate pizza before going out for drinks.

Elizabeth DeCaro had planned to meet her sister, Melanie Enkleman, for dinner at 5:00 p.m. When the victim failed to show up for dinner or answer her telephone, Enkleman and a mutual friend went to the DeCaro home. They went in through an open door in the garage and then through an open door leading into the house. They found Elizabeth DeCaro lying face down on the kitchen floor. Enkleman called 911 at around 8:00 p.m.

Elizabeth DeCaro had two gunshot wounds in the back of her neck and bruises on her body. When she was shot, the gun was in contact with her body, and she was either kneeling or lying down. The bullets recovered from her body were from a .22 caliber. Police found no signs of forced entry. Audio-visual equipment had been removed from the home, but the cables and wires had been carefully unplugged or unscrewed from the walls.

On March 7, 1992, after reading about the DeCaro death in the paper, Basile called Craig Wells and stated, "It looks like I've gotten set up." On March 9, Meyer found the DeCaro's dismantled Blazer in the garage that he had provided for Basile. Meyer helped Basile take parts of the Blazer to a dump. Meyer realized that the Blazer belonged to DeCaro and confronted Basile. Basile admitted to Meyer that he stole the Blazer. At trial, Meyer testified that Basile told him "it was either him or her, and he wasn't going back to jail." Basile told Meyer that he was a thief, not a murderer. On March 11, Meyer

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contacted the police.

On March 12, 1992, Basile went to Kenneth Robinson's trailer and told Robinson that he was in trouble because the police thought he had "done the van and the lady." Robinson contacted the police. The police arrested Basile a few hours later.

In the investigation, police found a license plate from the stolen and burned van in Cape Girardeau County. They also found the van itself. The dismantled remains of the DeCaro's Blazer was found in an apartment garage near Fenton, Missouri. Also in the garage was a portable stereo unit. Police later recovered the DeCaro's stolen "boom box" from Ricky Borak's apartment.

Basile did not testify on his own behalf during trial. He presented the testimony of four witnesses. The jury found Basile guilty of first degree murder. Basile also did not testify in the penalty phase. According to a stipulation, he had prior convictions for burglary, stealing and assault. There was testimony that Basile had strangled his neighbor on one occasion and threatened to kill an ex-girlfriend's husband. Elizabeth DeCaro's mother and sister testified about the victim's life and how her loss impacted the family.

In assessing punishment, the jury cited two statutory aggravating circumstances: (1) that Basile murdered Elizabeth DeCaro for another for the purpose of receiving money or other things of value, and (2) that Basile murdered DeCaro as an agent or employee of Richard DeCaro. *§ 566.032(4)* and *(6), RSMo 1986.*

Subsequent legal claims have centered, in part, on improper penalty phase closing arguments of the prosecutor, the ineffectiveness of Dan's trial counsel for their failure to object to the prosecutor's closing arguments, the prejudicial victim impact testimony and evidence produced during Dan's penalty phase, and an erroneous jury instruction that failed to advise the jury that the state was required to prove the existence of non-statutory aggravators beyond a reasonable doubt, and that in order to consider the aggravators, the jury had to unanimously agree on their existence.

Basis for Commutation of Sentence

Undersigned counsel submit the following justifications for the commutation of Mr. Basile's sentence:

1. The emotionally charged setting in which Dan's trial took place.

Through the course of the proceedings, Tim Braun, the prosecutor, pursued every

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conceivable emotional argument as a basis for the imposition of the death sentence. Trial counsel failed on numerous occasions to object to the inadmissible evidence, testimony, and statements.

2. Ms. DeCaro's family testified during the penalty phase, testimony that at one point became so emotional that the court was compelled to call a recess.

3. The trial court read and provided to the jury penalty phase Instruction No. 14 that failed to include the mandatory language required by MAI-CR3rd 313.41. The language that was omitted from the jury instruction would have advised the jury that the state needed to prove the existence of the non-statutory aggravators beyond a reasonable doubt and that the jury, in order to consider these aggravators, needed to unanimously find their existence.

4. Dan has adjusted to his incarceration, and has made continual efforts to assist other inmates in dealing with institutional life.

5. Unlike many inmates whose immediate family and friends have renounced them after periods of lengthy incarceration, Dan's family and friends remain unwavering in their support.

6. Dan serves as a positive influence upon all of the members of his immediate and extended family by counseling them against drugs, crime and violence.

7. Failure of trial counsel to present available mitigation evidence during the penalty phase.

Standard of Review

Article IV, § 7 of the Missouri Constitution grants the Governor the "power to grant reprieves, commutations and pardons, after conviction . . . upon such conditions and with such limitations as he may deem proper." He is not restricted by strict rules of evidence, and is free to consider a wide range of legal and equitable factors in the exercise of his clemency powers. *See Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1990); *Ohio Adult Parole Authority, et al. v. Woodard*, 523 U.S. 272, 280-81 (1998). He may consider any aspect of the case, including claims which the courts have declined to

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review for procedural reasons. Governor Holden is also free to expand the relevant case law and apply his own interpretation to grant relief if he so desires.

Dan Basile, by and through undersigned counsel, and with the earnest support of numerous individuals and for the meritorious reasons stated below, respectfully requests that Governor Holden, pursuant to the powers granted him by Article IV, § 7 of the Missouri Constitution, grant him executive clemency and commute his sentence from death to life imprisonment without the possibility of parole. Alternatively, Dan requests that Governor Holden grant a reprieve, staying his execution, and convene a board of inquiry pursuant to § 552.070 RSMo 2000, to gather information bearing upon whether his sentence of death should be commuted.

Improper Penalty Phase

During the penalty phase, the prosecutor, Tim Braun, made numerous inaccurate and inflammatory arguments. This conduct was rarely, if ever, objected to by trial counsel. The trial became one where the punishment was based on emotion and not facts. The prosecutor argued during the penalty phase:

> All the people in the neighborhood were in danger when they came by here. (T. 2681).(1)
>
> This is one of the most vicious, cold-blooded, premeditated murders that this community has ever seen. And the only appropriate punishment is death. (T. 2686).
>
> He endangered the lives of children, innocent children, he killed their mother, he endangered the lives of the people that came by that house. (T. 2703-04). (Counsel objected).

These arguments are completely improper. The prosecutor's personal opinions are irrelevant during sentencing. Furthermore, the arguments were clearly unsupported by the record and inaccurate. *See Antwine v. Delo*, 54 F.3d 1357, 1364 (the Cir. 1995)(finding a due process violation where the prosecutor's comments were unsupported and misleading regarding the description of "instantaneous death"); *see e.g. United States v. Bigeleisen*, 625 F.2d 203, 210 (8th Cir. 1980)(finding a due process violation in combination with the prosecutor's reference to facts not in record and his failure to correct a witness's false testimony); *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)(finding that in a capital case the prosecutor misinformed the jury as to the role of appellate review); *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989)(finding a due process violation in a capital case where the prosecutor argued improper and misleading statements).

Tim Braun continued to assert his personal opinions by calling Dan Mr. Evil. He argued:

> She (Elizabeth DeCaro) smelled the stench of evil. She felt the sweat of evil. (T. 2705).

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> Mr. Evil watched her die . . . this is Mr. Evil. (T. 2705).

> Killed in her kitchen by Mr. Evil, the person who calls himself evil. (T. 2702). (Trial counsel did not object).

These improper statements are designed for one purpose - solely to inflame the passions of the jury.

In *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), the prosecutor called the defendant a "mad dog" and the only thing that can be done with "mad dogs" is to put them to death. 861 F. Supp. at 1431. The district court held this argument, along with other improper arguments, was sufficient to grant habeas relief. *See also*, *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991); *Sizemore v. Fletcher*, 921 F.2d 667, 670 (6th Cir. 1990); *State v. Whitfield*, 837 S.W.2d 503, 513 (Mo. banc 1992) (name calling designed to inflame the jury "always error"); *State v. Shurn*, 866 S.W.2d 447, 461 (state Supreme Court stated calling the defendant "scum" was improper).

The improper personalization continued when Tim Braun appealed to the fears and emotions of the jury:

> Now, we all welcome getting home. Everyone welcomes getting home. It's probably more poignant for you right now, and the security when you walk in the door, kick off your shoes, let your hair down, I'm home. Think about Elizabeth's last time coming home . . . walking in, going up, getting a drink of water at the sink, and suddenly a hand on her back. (T. 2704).

> Just imagine the terror when she was aware of this person behind her, this person grabbing, even if it's just for a few seconds of terror that rippled through her body and racked her. And then what. Cold steel, searing heat and eternity from the man who says I'm not someone to fuck with anymore a year earlier. (T. 2705). (Trial counsel did not object).

This argument was intended to arouse the passions and prejudices of the jury. The prosecutor invited the jury to imagine being the victim in their own home. He took the jury step by step, beginning with entering their home and ending with the feel of "cold steel, searing heat and eternity". (T. 2705). It is difficult to imagine an argument more clearly designed to inflame the passions of the jury and to produce a verdict based on emotion rather than reason.

The prosecutor also argued that the victim, Elizabeth DeCaro, wanted justice - the death penalty. He stated as follows:

> Elizabeth DeCaro's murder cries out for justice. Elizabeth DeCaro lies restlessly in her grave thirsting for justice. Elizabeth can lie more calmly now. (T. 2706). (Trial counsel objected).

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There is absolutely no evidence to support the theory that Elizabeth DeCaro "thirsted" for the imposition of the death penalty. His assertion of personal knowledge is exactly the type of argument which had been held impermissible in *Newlon* and the United States Supreme Court case of *Berger v. United States*, 295 U.S. 78, 88 (1935).

> Improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

In a final effort to impose the death penalty, the prosecutor argued as follows:

> Have a right to be upset with the system? You bet. There are plenty of us, and I know we are part of the system . . . (T. 2701).

> How do we stop the violence unless we make killers responsible for their acts. This is why we have the death penalty. (T. 2703). (Trial counsel did not object).

For numerous reasons, the above arguments are completely improper. First, there is nothing in the record demonstrating a connection between capital punishment and reduction in crime. This assertion simply cannot be verified. *Gregg v. Georgia*, 428 U.S. 153, 184-85 (1976). Second, this argument invites the jury to punish Dan as an expression of their dissatisfaction with the justice system in violation of the requirement of individualized sentencing. Third, the jury was certainly influenced when the lead prosecutor in St. Charles County tells them they have a right to be "upset" with the justice system.

The improper remarks by the prosecutor were vast. They ranged from injecting his personal opinions, appealing to the emotions of the jury, denigrating defense counsel, improper adverse inferences, and arguing facts not in evidence. Taken as a whole, the closing arguments by the state were unquestionably improper.[(2)] With respect to the efforts of defense counsel or the trial court to minimize the prejudice - neither made a reasonable effort to prevent the prejudice. Many of the state's arguments were made to "fill-in" gaps in their case. There was no evidence that Dan was in the DeCaro basement, yet it was argued without objection. There was no evidence the DeCaro children were in the house at the same time as Dan, yet it was argued without objection. The state was also allowed to argue Elizabeth was "thirsting for justice" (T. 2706) and graphic details of Elizabeth DeCaro's terror the night she was killed when there was no evidence of this. (T. 2704, 2705). The prosecutor was also allowed, without objection, to argue his personal beliefs and whether witnesses were "lying" or stating the "truth". (T. 2398, 2409). He called Dan "Mr. Evil" without objection. (T. 2705). The prosecutor also argued without evidence that "all the people in the neighborhood were in danger," "he endangered the lives of children, innocent children," and the murder was the "most vicious, cold-blooded, premeditated murder that this community has ever seen." (T. 2681, 2686). Without objection, the prosecutor argued the "death penalty" will stop the "violence" in the community (T. 2703) and, without a request for a mistrial, argued the jurors "have the right to be upset with the system." (T. 2701), and this is why we have the death penalty.

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Clearly, the above arguments were prejudicial and inflammatory. In *Newlon v. Armontrout*, 693 F. Supp. 799 (W.D. Mo. 1988), defense counsel failed to object to numerous inflammatory remarks made by the prosecutor during closing arguments. In finding ineffective assistance of counsel, the court stated:

> Counsel's failure to object prevented any ruling which could have stopped the continued tirade or softened the effect with a curative instruction.

Newlon at 810.

Ineffective assistance of counsel is prejudicial if there is a "reasonable possibility" that, but for counsel's unprofessional errors, the result would have been different. *Strickland*, 104 S.Ct. at 2068. Failing to properly object to obvious inflammatory arguments creates a "reasonable probability" the result would have been different. Both trial counsel acknowledged during Dan's 29.15 hearing that they had no reason for not objecting to the many statements set out above. Dan's trial counsel said that in some instances, they knew they should have objected but did not.

At Dan's 29.15 hearing, trial counsel Caterina DiTraglia and Beth Davis, provided explanations for the many admissions in failing to object to the numerous improper prosecutorial comments. Ms. DiTraglia acknowledged that Dan's case was the second time she had participated in the penalty phase of capital case. Ms. Davis acknowledged that she had never represented anyone in the penalty phase of a capital case. The rationale provided by both counsel for failing to object to the prosecutor's numerous statements was that they felt that if they did not object, perhaps the jury would be less likely to pay attention to the prosecutor's statements. In several instances, particularly the characterization of Dan as Mr. Evil, Ms. Davis acknowledge that while hearing the comment she felt she should object but merely failed to do so. Similarly, Ms. DiTraglia testified that on numerous occasions while she was listening to the prosecutor's comments and felt that she should object, she failed to do so for absolutely no reason. It appeared from the 29.15 hearing that both counsel, although well-intentioned, failed to exert even the most minimal effort to protect Dan's rights.[3]

Victim Impact Statements

During the penalty phase, Elizabeth DeCaro's mother, Georgianna Van Isegham, testified at length regarding her daughter. (T. 2521). Ms. Van Isegham talked of Elizabeth's birth, following Van Isegham's prayers that her son's cancerous tumor would be cured. (T. 2522). Van Isegham told of her religious beliefs and of how her daughter was name for Saint Elizabeth Ann Seton. (T. 2523). The jury heard at great length about Elizabeth's activities in her church, her religious convictions, and the charitable work Elizabeth did even as a child. (T. 2522-24). Prosecutor Braun reviewed with Van Isegham a scrapbook and pictures of Elizabeth's life. A great deal of time was spent describing how Elizabeth was loved by all who knew her, how family and friends would all want Elizabeth to babysit their children because of her kind, religious nature. (T. 2525-35).

During the testimony of Van Isegham, as she read from her diary of how God's grace was embodied in Elizabeth every day of her life, Prosecutor Braun began to weep openly. The prosecutor's and members of the jury's crying continued while a portrait of Elizabeth and a small statute of St. Theresa, given to Elizabeth by her sister, was shown to the jury.

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Finally, Van Isegham's testimony related the effect Elizabeth's death had on her children. (T. 2549). Van Isegham said her heart breaks when she looks at Jodie and knows that her mother will never be able to buy the first prom dress. (T. 2549). Elizabeth's other daughter, Courtney, made her first communion and Elizabeth was not there. When Van Isegham holds Elizabeth's son, Tony, she feels like she is holding Elizabeth as Elizabeth is part of all of her children. (T. 2550). Van Isegham then read something she wrote about Elizabeth's children and her faith:

> God gives each one of us a special grace that we need so that her childrens' lives are rich and full. That they will always be able to see their mother's love through us. Help our family to surround them with so much love that somehow they can get through this and grow up to be strong loving and caring individuals with no bitterness or resentment in their hearts. I know this is a big job but with us is the love and prayers of our friends and with Elizabeth's spirit in us we will be able to survive this nightmare. (T. 2550).

Melanie Enkleman, Elizabeth's sister, also testified at the penalty phase. (T. 2556-73). Enkleman testified that after Elizabeth's death, Elizabeth's friends had a benefit dance at St. Ann's. (T. 2556-57). Prior to penalty phase testimony, defense counsel and the prosecutor had entered into an agreement that victim impact testimony would not mention benefit dances, card games and money raised on behalf of the DeCaro children. (T. 2557). Defense counsel's request for a mistrial was denied. (T. 2557-58).

Melanie Enkleman continued her testimony and read several letters and poems that were written by herself and friends of Elizabeth. Enkleman read a poem about Elizabeth that was written by Theresa:

> I can see your face, your smile all aglow. It reminds me of the times I used to know. The cheeriness of our laughter, the brightness of your eyes, all this is gone now. To late to say good-bye. Before we were so close, you were my best friend. It's hard to believe those times have ceased to end. People sometimes say, "Wow, she's doing great." Little do they know how much I hate. I hate the way you have to die. I hate that I will never know why. These feelings all are real, there is no doubt. This is how I feel, then and now. (T. 2560).

Enkleman read a letter that Elizabeth's sister, Theresa, had written:

> No words can express the feelings that I had and still have for my sister. The love I felt for her was more than any of you could know. You see I come from a very large family, four sisters, two brothers, and Elizabeth was the closest in age to me. She could always relate to me not only as a sister, but as a friend. She was there from me every time I ever needed her.

> I can remember the endless soccer games we would go to together and the countless shopping trips we had. She was truly my best friend. I could tell her things that at the time were extremely important to me, and no matter how childish or corny they were, she

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would listen. And that meant a lot to me.

To truly describe Elizabeth to you would take more time that we both have. If I did have to describe her, I would say full of life and full of an outgoing love for everyone. **And that is what you, Daniel Basile, took away from me and my family.**

You took away her sweet smile, her warm personality and her generous heart. You took a family as a whole and tore a very important part of it away that ripped out part, Dan, was my sister. And so as you listen to this poem, think of the lives that you have affected, the children who's mother has been selfishly and unfairly taken away, and the family, my family, that will never be the same all because of you. (T. 2561-62 emphasis added).

Enkleman then read a statement for the court and jury:

But in her short life she did more good than most people do in an entire lifetime. By the way, she touched so many lives. Everyone who ever met her always remembered her. She had such a bubbling personality. She was so full of life. There were so many people affected by her death, including children. She was loved by so many. We received hundreds and hundreds of letters and cards of how Elizabeth touched their lives.

Her life had just begun and nobody had the right to take it away. Her last feelings in life were fear, and all she ever did in life was good. **You have hurt my whole family**. My parents have lived a living nightmare, and they didn't deserve that. They don't have one day they don't think about this. Every holiday, every birthday, every time we get together we are missed by my sister. And that is a feeling that never goes away. The hurt is always there.

You have also hurt our children. Elizabeth's children must grow up knowing that their mother was murdered for greed, in their own home, waiting for her, which is supposed to be a safe place. **The counseling they will need to get through this is expensive, and no child should be put through this. My thirteen year old son still can't stay home by himself because he is terrified someone is hiding and they want to murder him.**

I want you to know what you did to my family is unforgivable, but we will survive with love because we will not allow someone like you to destroy us.

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> **You see, I saw what you did.** Where everybody here has just heard what he did. I saw Elizabeth lying on the floor. I saw her not breathing. I saw them turning her over and the blood on her face. I saw them try to save her. I saw them lift her up, and I saw her neck as red as fire. I saw them put her on the stretcher with the tubes in her and I saw -- and I knew then that she was dead. But I prayed to God that somehow she would live. **And I pray to God now that justice will be served.** (T. 2568 emphasis added).

Following conclusion of Enkleman's reading of her final statement, the court called a recess to allow the jury and the prosecutor and members of the courtroom an opportunity to compose themselves. (T. 2571).

The type and extent of victim impact testimony was clearly prejudicial and violative of Dan's constitutional rights. In addition, the statute under which the trial court allowed this testimony was not in effect at the time of the death of Elizabeth DeCaro.

Notwithstanding the ex-post facto application of § 565.030.4 RSMo (1994), admission of a victim's family members characterization and opinion about the crime, the defendant and the appropriate sentence, violates the Eighth Amendment. Further, the extent and content of the testimony of Van Isegham and Enkleman when combined with the emotional outbursts of Prosecutor Braun and members of the courtroom was clearly prejudicial. The clear language of § 565.030.4 RSMo (1994) specifically limits victim impact testimony to the victim's characteristics and the impact of the crime on the survivors.

The admission and introduction of victim impact evidence at Dan's penalty phase clearly violated his due process rights under the Constitution because of its emotional and inflammatory nature. The United States Supreme Court in *Booth v/ Maryland*, 482 U.S. 496 (1987), clearly addressed this type of victim impact evidence. The *Booth* court found that opinions by victim's family about the crime, the defendant, the appropriate sentence, or the type of individual that the victim was by the penalty phase jury produced error of constitutional dimensions.

The Supreme Court's decision in *Payne v. Tennessee*, 510 U.S. 808 (1991), found that victim impact evidence would be allowed in a limited manner to show the harm caused by the defendant, or to demonstrate in some brief way the unique nature of the defendant, may be relevant and acceptable. However, at no time did the *Payne* court indicate that it was appropriate or acceptable to produce purposeful emotional testimony regarding a family member's opinion about the crime. It is also important to note that while the court in *Payne* found no due process violation, the testimony presented in *Payne* was relatively brief in nature and, on its face, not inflammatory. The type of testimony given in Dan's case greatly exceeds the victim impact testimony approved of by the court in *Payne*. The introduction of the amount and nature of testimony in Dan's case clearly rendered the trial fundamentally unfair. The extensive emotional testimony from Elizabeth DeCaro's family rendered the jury unable to even consider the individual characteristics of Dan. The penalty phase verdict then became not one based upon reasoned deliberation, but one based upon emotion and a desire for vengeance.

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Jury Instruction

Instruction No. 14 as given during the penalty phase of Dan's trial erroneously omitted that the state had to prove the non-statutory aggravators beyond a reasonable doubt, that all twelve jurors had to agree on each non-statutory aggravator, and if they did not unanimously find beyond a reasonable doubt that an aggravator existed, then they could not consider that circumstance in returning the verdict fixing punishment.

Despite the glaring nature of the omission, a specific objection was not made to this instruction by trial counsel. The claim was reviewed by the Missouri Supreme Court in Dan's direct appeal. The Supreme Court reviewed this claim under the doctrine of plain error. The court declined to grant relief.

Instruction No. 14 submitted by the state read:

> If you have found beyond a reasonable doubt that one or more of the aggravating circumstances submitted in Instruction No. 13 exist, then, in determining the punishment to be assessed against the defendant for the murder of Elizabeth A. DeCaro, you may also consider:
>
> 1. Whether the defendant pled guilty to burglary in the second degree on October 23, 1984, in Cause Number 512542 in the Circuit Court of St. Louis County, Missouri.
>
> 2. Whether the defendant pled guilty to stealing property of a value of at least $150.00 on October 23, 1984, in Cause Number 512542 in the Circuit Court of St. Louis County, Missouri.
>
> 3. Whether the defendant threatened the life of Dave Carr in a letter written to Lisa Carr postmarked April 26, 1990.
>
> 4. Whether the defendant threatened the life of Dave Carr in a letter written to Lisa Carr postmarked June 27, 1990.
>
> 5. Whether the defendant choked Therese McCormack by placing his hands around her neck in the summer of 1984. (L.F. 381).

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MAI-CR3d 313.41 requires that, after listing the non-statutory aggravators supported by the evidence and requested by the state, the following language **shall** be included:

> You are further instructed that the burden rests upon the state to prove the circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.
>
> If you do not unanimously find from the evidence beyond a reasonable doubt that a circumstance exists, then that circumstance shall not be considered by you in returning your verdict fixing the punishment of the defendant.

The Missouri Supreme Court has been consistent in its rulings that giving or failing to give an instruction in accordance with MAI-3rd is error, and the failure to give the instruction may so prejudice the trial as to demand a reversal of the sentence and a rehearing. Rule 28.0(f); *State v. Isa*, 850 S.W.2d 876 (Mo. banc 1993). Any such errors are presumptively prejudicial unless the contrary appears. *State v. White*, 622 S.W.2d 939 (Mo. banc 1984); *State v. Powell*, 728 S.W.2d 622 (Mo. App. 1987). The Missouri Supreme Court in *Isa* stated that prejudice occurs when the jury may have been adversely influenced by the erroneous instruction. Prejudice was defined by the Supreme Court in *Isa* as the potential for misleading or confusing the jury. The burden is on the party deviating from MAI-3d to show that the deviation is not prejudicial and that there is no possibility that the jury was not misled or confused. *State v. McClure*, 632 S.W.2d 314 (Mo. App. 1982). Prejudice results in a situation where an instruction is given in error or an incomplete instruction is given because the jury is not given clear guidance. The jurors' deliberations become unchanneled and, therefore, inherently suspect. *State v. Isa*, 850 S.W.2d at 902; *Furman v. Georgia*, 408 U.S. 238 (1972).

Instruction No. 14 clearly did not meet the criteria set out by the Missouri Supreme Court in its decision in *Isa*, and fails to comport with Rule 28.02. Omitting the last two paragraphs in Instruction No. 14 is presumptively prejudicial and, because the deliberations and guidance given to the jury was not clear, the error diminished the reliability of Dan's sentence. The verdict is particularly suspect because a later instruction (No. 15) directed the jury to consider the non-statutory aggravators in determining whether the statutory aggravators, if found, warrant imposition of the death penalty.

The Missouri Supreme Court analyzed this issue by stating that it was similar to the situation addressed by the court in *State v. Petary*, 790 S.W.2d 243 (Mo. banc 1990). In that decision, the Missouri Supreme Court rejected the claim concerning the failure to give a complete instruction. The *Petary* opinion, however, did not address either of the two aforementioned principals: that prejudice was presumed, and if there is even a reasonable possibility that an unconstitutional understanding of the instructions exist, the verdict must be set aside. *Isa* at 901, 902.

Given the recent decision by the United States Supreme Court in *Ring v. Arizona*, No. 01-488 (June 24, 2002), the decision of the Missouri Supreme Court regarding this issue is suspect. In *Ring*, the Supreme Court applied its decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to strike down the death penalty scheme in five states in which judges, rather than juries, were assigned the task of finding aggravating factors, and ultimately imposing a sentence of death.

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Although not specifically addressing the question of jury unanimity as to aggravating factors, in Justice Anton Scalia's concurring opinion he discussed the common state practice of instructing on aggravating circumstances in requiring a finding as to aggravating circumstances in order to impose the death penalty. Justice Scalia writes "Wherever those factors exist, they must be subject to the usual requirements of the common law and to the requirement enshrined in our Constitution in the criminal question: there must be found by the jury beyond a reasonable doubt." Regarding unanimity, Justice Scalia stated, "Better for the Court to have invented an evidentiary requirement (a finding of specific aggravating factors) that a judge can find by a preponderance of the evidence, than to one that a unanimous jury must find beyond a reasonable doubt."

The *Ring* majority explained, as did the majority in *Apprendi*, that the traditional means of analysis had relied on whether a fact which must be found is an element of the crime, thus requiring jury findings or are merely a sentencing factor, traditionally left to the judges. The question put forth by the Supreme Court is, however, "one not of form of but effect . . . if a state makes an increase in defendant's authorized punishment contingent upon the finding of fact, that fact, no matter how the state labels it, must be found by a jury beyond a reasonable doubt. *Apprendi* at 486. Instruction No. 14 given in Dan's case allowed the jury to find these aggravating factors, factors that were then considered in the imposition of the death penalty in a manner inconsistent with constitutional mandates.

Dan Has Adjusted to Institutional Life

Dan has adjusted well to prison life at the Potosi Correctional Center. He has not been involved in any type of violent or aggressive incidents during his nearly nine years at the prison. His only disciplinary infractions have included minor verbal threats made to some of the staff and occasionally sleeping through a count. The threat to the staff was deemed to be of such insignificance that it only resulted in Dan being refused recreation for three days. During the course of a typical day, Dan participates in many of the activities provided at the prison, and typically spends his time watching television, playing Nintendo, or interacting with other inmates. Dan has also worked in the kitchen at the Potosi Correctional Center and being a dorm worker in one of the housing units. On several instances, Dan has, at the request of the institution, monitored inmates who were at risk of committing suicide, or suffering from serious depression. Overall, Dan has exhibited an exemplary correctional adjustment.

Dan has exerted a positive influence upon all of those who have come to know him these past few years and upon those members of his immediate and extended family. Dan's children are very important to him. During the course of his incarceration at the Potosi Correctional Center, he has renewed his relationship with his son and daughter, and receive regular visits from both. Dan also receives regular visits from all of his cousins, nieces, nephews, uncles and aunts. Many of those individuals who watched Dan grow up over the course of the years have seen a remarkable change in Dan since his incarceration. He has become more thoughtful and introspective, and counsels many of the younger members of his family regarding their lives. Dan is always available to discuss problems that any of his nieces or nephews are having and provides a rare insight for them as one who knows the consequences of wrong choices.

Even now that Dan is facing execution, he is still actively working to encourage his nieces, nephews, and two children to do positive things with their lives. He has encouraged all of those who will listen to him to learn from his experiences and to constantly strive to improve their lives.

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No Evidence of Dan's Head Trauma Was Presented

as Mitigation During the Sentencing Phase

Dan had three instances where he sustained head trauma.[(4)] The first incident occurred at age 6 when his head struck a metal bar on playground equipment that resulted in a fall to the pavement. There was a brief loss of consciousness (1 to 2 minutes) with accompanying nausea and vomiting. He was taken to a local hospital where he was treated and discharged to home and the care of his mother.

The next incident involving head trauma occurred when he was 14 years old and living with his father in Florissant, Missouri. The closed head injury (grade 2 concussion) occurred during an incident of physical abuse by his father when his father rammed his head into a column of wooden cabinets. The impact injury resulted in a scalp laceration and swelling. The next day he was taken to a local hospital at the request of school authorities and was treated in the emergency department where he received multiple stitches and discharged to the home and care of his stepmother.

The third closed head injury occurred at age 18 when he was assaulted by two men. He was repeatedly struck in the head with a club resulting in a brief loss of consciousness and a scalp laceration. Subsequent to the assault, he suffered post-concussion symptoms including nausea, vomiting, and dizziness for several days. He was taken to a local hospital where he was treated in the emergency room and received multiple stitches to close the laceration.

Even though this information was available to defense counsel, none was presented during the mitigation phase of the trial.[(5)] Dr. Hanlon concluded in a recent report that Dan manifests brain damage secondary to multiple closed head injuries sustained between the ages of 6 and 18. As a result, Dan was diagnosed as having a significant functional disability.

The failure of trial counsel to present these mitigating facts to the jurors clearly fell below professional standards. Certainly, this information would have been relevant to jurors when deciding whether to sentence Dan to life without the possibility of parole or death.

As a result of the failure to present expert testimony regarding Dan's traumatic brain damage, we request Governor Holden to exercise his discretion and commute Dan's sentence to life imprisonment without the possibility of probation or parole.

Conclusion

In acknowledgment of the facts set forth, counsel, family and friends of Dan Basile respectfully request that his sentence of death be commuted to a sentence of life without the possibility of parole, or alternatively, that reprieve be granted staying Dan's execution, and a board of inquiry be convened to examine the issues set forth above.

Respectfully submitted,

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1. "T." refers to trial transcript; number thereafter refers to the page number.

2. It is important to note the prosecutor cried during the penalty phase. (T. 2541-43). Arguments aimed at inflaming the juror's passions are improper. *Tucker v. Zant*, 724 F.2d 882, 888 (11th Cir. 1984).

3. See attached letter from Caterina DiTraglia, one of Dan's trial attorneys.

4. See attached report of Robert Hanlon, Ph.D., ABPP, Chief Neuropsychological Consultant, Assistant Professor of Psychiatry and Neurology, Northwestern University Medical Center.

5. Interestingly, the only expert that was contacted for mitigation purposes was an Art Therapist who lived in Florida. She was hired to review drawings by Dan when he was young, however, her testimony was never used.