No. 19-6495

IN THE

SUPREME COURT OF THE UNITED STATES

BRENT CURTIS SCHWERTZ — PETITIONER
(Your Name)

vs.

RICHARD JENNINGS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI

U.S. 8TH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BRENT CURTIS SCHWERTZ
(Your Name)

POTOSI CORRECTIONAL CENTER
11593 STATE HIGHWAY O
(Address)

MINERAL POINT, MO 63660
(City, State, Zip Code)

573-438-6000
(Phone Number)

QUESTIONS PRESENTED

Consistent with the holding in Strickland v. Washington, 466 U.S. 668 (1984), which held that to prove prejudice on a claim of ineffective assistance of counsel, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

GROUND ONE: Has prejudice been shown where defense counsel fails to investigate potential issues with Petitioner's make and model of handgun being prone to accidental discharge and/or fails to employ an expert firearms examiner other than the State's expert witness?

GROUND TWO: Has prejudice been shown where defense counsel fails to establish that Petitioner was indigent, and request allocated funds to retain an expert witness under § 600.086.3 R.S.Mo; an inexcusable mistake of law, i.e., an unreasonable failure to understand the resources the state law made available to Petitioner?

GROUND THREE: Has prejudice been shown where the State fails to disclose and release items of evidence, pursuant to Mo. Sup. Ct. R. 25.03 and under Brady v. Maryland; irrespective of whether the evidence was suppressed by the State either willfully or inadvertently, the State's failure to disclose and

release this evidence undermined confidence in the outcome of the trial, in that, said withheld evidence had the potential to alter the jury's assessment of the credibility of a significant prosecution witness?

GROUND FOUR: Has prejudice been shown where the trial court has abused its discretion in denying the motion for mistrial, after a timely objection was made, when the prosecutor asked the State's witness (a police officer) whether Petitioner had said anything to him when Petitioner was placed under arrest, because the prosecutor's question improperly suggested to the jury that, if Petitioner's shooting the victim truly had been an accident, then Petitioner would have told the officer immediately that it was an accident?

GROUND FIVE: Has prejudice been shown where the trial court erred and trial counsel was ineffective for failing to provide Petitioner with the required "auxiliary aids and services" for communication assistance needed under the Americans with Disabilities Act of 1990, and in violation of Sections 476.760, 476.763, and 476.766 R.S.Mo?

GROUND SIX: Has prejudice been shown where defense counsel fails to motion the trial court to suppress Petitioner's alleged post-arrest and pre-Miranda statement that was made in response to Officer Butler's question, that was asked without the required "auxiliary aids and services" certified interpreter for a deaf and/or hearing impaired person?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at Case No. 19-1631; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at Case No. 18-3342-CV-S-MDH-P; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 06, 2019.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 07, 2019, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall ... deprive any person of life, liberty, or property, without due process of law;" "nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides, in relevant part, that "The accused shall ... enjoy the right to have the assistance of counsel for his defense."

The determination of indigency of any person seeking the services of the state public defender system shall be made by the defender or anyone serving under him at any stage of the proceedings. Upon motion by either party, the court in which the case is pending shall have authority to determine whether the services of the public defender may be utilized by the defendant. § 600.086.3 R.S.Mo.

Hearing Impaired defendants on trial to be provided with the required "Auxiliary Aids and Services" for communication assistance needed under the Americans with Disabilities Act (ADA) of 1990. Sections 476.760, 476.763, and 476.766 R.S.Mo.; 42 U.S.C. § 12101(b)(1); 42 U.S.C. § 12132.

STATEMENT OF THE CASE

GROUND ONE

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE, RESEARCH, PRESENT EVIDENCE, AND ARGUE THAT THE HANDGUN INVOLVED IN THIS CASE IS KNOWN TO BE DEFECTIVE IN NUMEROUS WAYS, INCLUDING DISCHARGING WITHOUT HAVING THE TRIGGER PULLED. EVIDENCE DEMONSTRATING NUMEROUS EXAMPLES OF ACCIDENTAL DISCHARGES OF THIS MAKE AND MODEL OF HANDGUN WOULD HAVE SUPPORTED PETITIONER'S DEFENSE OF AN ACCIDENT. COUNSEL'S INEFFECTIVENESS DENIED PETITIONER'S RIGHTS TO DUE PROCESS OF LAW, TO A FAIR TRIAL, AND TO EFFECTIVE ASSISTANCE OF COUNSEL; IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION. PETITIONER WAS PREJUDICED BY COUNSEL'S INEFFECTIVENESS, AND THUS, THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, PETITIONER'S TRIAL WOULD HAVE HAD A DIFFERENT OUTCOME.

On January 28, 2016, the motion court held an evidentiary hearing on the amended motion, at which Kathleen Green, Firearms Examiner for the Missouri State Highway Patrol Crime Lab; David Mills, trial counsel; Eddie Schwertz and Deborah Schwertz (Schwertz's parents); and Brent Schwertz (Petitioner) testified.

Schwertz's theory was that he shot (Tracy Weber) victim accidentally, after they had been arguing about an engagement ring victim refused to return to Schwertz when she broke off the engagement. When victim refused to give back the ring, Schwertz bacame "aggravated." Schwertz then made "the worst decision I've ever made in my entire life," and retrieved a silver Bryco Jennings Model Nine semi-automatic pistol in order to scare victim into giving back the ring. When victim still refused to return the ring, Schwertz loaded a round into the chamber. Victim then told him to put the gun down, they would talk, and she would give him the ring. Schwertz put the gun down on a countertop, but when victim lunged for the gun, he went for the gun as well, he "grabbed the gun" and "the gun went off." Schwertz admitted his finger "could have" been on the trigger, but denied it was his intention to shoot victim, and that it was an accident. Schwertz then called his father, telling him Tracy had been shot, and asking him to call 911. Schwertz also told law enforcement that victim was "shot."

Schwertz testified he told trial counsel at their first meeting to investigate potential issues with his model of gun being prone to accidental discharge, because it "just went off." Schwertz admitted he did not have specific information regarding potential accidental discharge issues with his gun until after the conclusion of his direct appeal.

Schwertz asserts that evidence demonstrating numerous examples of accidental discharges of this make and model of weapon would have supported his theory of an accident in this case, and there is a reasonable probability of a different outcome of the trial and/or 29.15 proceeding had trial counsel and/or PCR counsel presented and argued such evidence. See Affidavit of Arthur Allen MOBar #42762; Affidavit of Shawn C. Hanna (EXHIBITS 60 and 61)(App. F & G).

Trial counsel, David Mills called Kathleen Green, Firearms Examiner for the Missouri State Highway Patrol Crime Lab, to testify at trial, but did not consider asking her about problems with other guns of the same make and model (PCR Tr.37-38, 63). Mr. Mills recalled that Ms. Green testified that it was not easy to load the gun or to get the gun to eject a spent cartridge (PCR Tr.63). Ms. Green's report of her examination of the gun did not indicate anything about whether she checked the gun to see if it would accidentally discharge (PCR Tr.38). According to Mr. Mills, the issue of whether the gun would go off by itself, or whether it had a hair trigger, never came up (PCR Tr.38-39).

Mr. Mills did not investigate whether the gun, or guns of the same make and model, had problems with a hair trigger going off without being touched (PCR Tr.64). Mr. Mills agreed that evidence that the gun could go off accidentally could be relevant to Schwertz's claim that the gun went off by accident

(PCR Tr.70). Mr. Mills acknowledged that he was not limited in his investigation to matters suggested by his client (PCR Tr.71-72).

In Cravens v. State, 50 S.W.3d 290 (Mo.App.S.D.2001), the murder conviction was reversed for ineffective assistance of counsel; counsel failed to investigate the propriety of obtaining expert witnesses whose testimony would have supported defendant's assertions that the shooting was unintentional.

Reasonably competent counsel faced with the facts involved in this case, would have investigated the possibility that the handgun was defective and prone to accidental discharge, and would have presented such evidence to the jury, especially since his client insisted that the shooting was an accident. Counsel had no strategic reason for failing to investigate and present such evidence.

Ms. Green testified that she examined and test fired the gun that was recovered at the scene of the shooting (PCR Tr. 5-6). The gun was a Bryco Jennings Model Nine (PCR Tr.18). Ms. Green did not conduct an "accidental discharge test" on the gun (PCR Tr.16-17). The pistol did have problems with chambering cartridges and ejecting spent cartridge cases; it would not consistently chamber cartridges from the magazine (PCR Tr.9). Ms. Green was aware that the Bryco Company went out of business as a result of a 2003 lawsuit that was filed after a seven year old boy was accidentally shot (PCR Tr.14).

Christopher N. Robinson, Private Forensic Consultant has an extensive 21-year career regarding forensic examinations of firearms. Mr. Robinson specifically states: "I have worked numerous cases over my career involving the Bryco Jennings Nine 9mm pistol, in which the weapon has accidentally discharged. This weapon will discharge when dropped or jarred due to poor engagement between the sear and the firing pin. I have also completed testing and examination of this weapon where the shooter experienced what is known as bump off. This circumstance occurs when the weapon is bumped on one of its surfaces and therefore causes the firearm to discharge." See Affidavit of Christopher N. Robinson (EXHIBIT 62)(APP. H).

Mr. Robinson further states: "I also have first hand knowledge of just how dangerous these weapons are. On January 12, 2001, while working as a Firearms Examiner at the Georgia Bureau of Investigation in Decatur Georgia, I was test firing the Bryco "Jennings Nine" 9mm pistol into a water tank. I pulled the trigger of the weapon but, it did not fire. I removed the magazine from the weapon, took my finger away from the trigger, and placed my hand on the slide of the weapon to try and remove the cartridge from the chamber. As I began to pull the slide to the rear, the weapon discharged shooting me in the palmar surface of my left hand. This type of discharge is known as a "hang fire". "When I pulled the trigger of the firearm, the firing pin, which was under spring tension became

perched on the sear surface. After several seconds, the tension of the spring on the firing pin caused the weapon to fire, even without the trigger being pulled." See Affidavit of Christopher N. Robinson (EXHIBIT 62)(App. H).

Schwertz respectfully requests that this Court carefully read over the Affidavit of Christopher Robinson, because Schwertz was convicted based on the testimony of State's expert witness, Kathleen Green, MSHP Firearms Examiner who examined the gun in question, to testify at trial. However, Ms. Green did not conduct an "accidental discharge test" on the gun (PCR Tr.16-17). More specifically, Ms. Green testified that she had no reason to test the gun to see if it would discharge accidentally (PCR Tr.30). Never-the-less, Schwertz was convicted based on the testimony of Ms. Green. Although, Ms. Green lacked the experience, knowledge, and facts regarding the defects of the Bryco Jennings Model Nine 9mm handgun and guns similar to it.

Mr. Robinson's testimony would have refuted much of Ms. Green's trial testimony and PCR hearing testimony, which as a whole completely minimized the dangers of the model of weapon in question. Mr. Robinson appears to have better knowledge and more experience with this model of weapon, and could have testified in detail about the problems with this particular model and the dangerous reputation of the model in question. It is clear and obvious that the testimony of Mr. Robinson

would have benefitted Schwertz at both his trial and his PCR hearing.

Schwertz asserts that his conviction was obtained by use of materially false testimony of Kathleen Green, State's expert witness, and this Court should consider a new trial be granted based on newly discovered evidence presented herein and under Rule 33, or an evidentiary hearing to present such evidence for review. See Mitchell v. United States, 368 U.S. 439 (1962).

In this case, at trial, Schwertz testified that he had purchased the handgun in mid-October 2009, and that he had never fired it (Tr.668:3-6, 669:14-15; PCR Tr.84:3-5)(**State's Exhibit-A**)(App. I).

"The facts of this case demonstrate the gunshot wound which Tracy Weber obtained on the date of the incident was not brought about by your intentional act; instead, it occurred as a result of the scramble for the gun which you described. These facts point in the direction of the matter being an accident" (**MOVANT'S EXHIBIT-OO**)(App. J).

"Based on what you have told us, it is our position this case arises from an accident and that you did nothing wrong" (**MOVANT'S EXHIBIT-ZZZ**)(App. K).

Schwertz's trial counsel failed to even investigate whether the handgun in this case could have discharged accidentally, or whether this model of gun had a history of discharging accidentally. While Ms. Green indicated that she

had no reason to test the gun to see if it would discharge accidentally (PCR Tr.30), there was ample information available to alert both Mr. Mills and Ms. Green that the Bryco Jennings Model Nine 9mm handgun and guns similar to it, had problems that should have raised a concern that the gun could have fired with very little trigger pressure (PCR Tr.11-14, 18). If Mr. Mills had conducted any research or investigation into the operation of the gun involved in this case, he would have learned about the problems set out in both State's Exhibits B and D (App. L & M)(PCR Tr.11-14, 18), and would have been alerted that he should have Schwertz's gun checked to see if there were circumstances under which it could accidentally discharge. Even if Schwertz's own gun did not appear to have such problems, evidence that other guns of the same make and model had such problems, would have been relevant to the question of whether Ms. Weber was the victim of an accidental shooting.

Ms. Green acknowledged that the gun in evidence in this case is sometimes referred to as a "Saturday Night Special," which is a term used for a small caliber, cheaply made, low-priced firearm (PCR Tr.21). Mr. Mills knew or should have researched, so that he would know, that the gun in this case was essentially a Saturday Night Special. Had he conducted the necessary research, he would have known that the gun was cheaply made, and would have alerted to the problems that had plagued other cheaply made handguns. He would have known

to have the gun thoroughly examined for any defect that could cause the gun to discharge with little or no pull on the trigger. Trial counsel failed to investigate the handgun in this case, a Bryco Jennings Model Nine 9mm handgun (Tr.787). However, he did call the MSHP Firearms Examiner, Kathleen Green, who examined the gun in question, to testify at trial. However, he only used her to establish that the gun in question exhibited "jamming" or not ejecting and chambering the cartridges properly (Tr.787-790). No evidence was presented through her or any other witness about any history involving this manufacturer or the make and model of handgun.

Schwertz advised counsel that he did not recall firing the handgun when it discharged and struck the victim, and that the gun discharged as Schwertz and Ms. Weber both reached for and grabbed the weapon. Schwertz has steadfastly maintained that he did not intentionally shoot Ms. Weber, and that her death was the result of a tragic accident.

Given the circumstances surrounding the discharge of the handgun in this case; evidence that this make and model of handgun has been found to have defects that affect its firing, would have aided in Schwertz's defense, and would have supported his defense that the shooting was an accident. There is a reasonable probability that the jury would have found that the gun in this case discharged unexpectedly when it was grabbed from the counter, without anyone intentionally pulling the trigger.

At the evidentiary hearing, the State presented [AFTE Journal - Spring 2001 Volume 33, Number 2] State's Exhibit-D. Said exhibit is regarding Petitioner's specific make and model handgun; a Bryco Arms model Jennings Nine 9mm LUGER caliber Semiautomatic Pistol. However, pre-trial, the State failed to disclose and release AFTE Journal - Spring 2001 Volume 33, Number 2, which states:

> "WARNING: These pistols may create an EXTREMELY DANGEROUS CONDITION and a POTENTIAL FOR SERIOUS INJURY by firing <u>without pulling the trigger</u>."

In this case, the evidentiary hearing was held on January 28, 2016 (15PU-CV-00432). The following testimony of Kathleen Green (State's expert witness) established that Ms. Green was familiar with the AFTE Journal - Spring 2001 Volume 33, Number 2. Ms. Green testified as follows:

> BY MS. DOLIN: (direct examination)
>
> Q. Okay. Are you familiar with a spring 2001 AFTE article about this make and model weapon?
>
> A. Yes, I have read that.
>
> Q. Okay. All right. Kathleen, I'm going to approach you with what's been marked State's Exhibit D. Do you recognize that?
>
> A. Yes. This is a copy of the AFTE article that I read.
>
> Q. Okay. And the same foundational questions: It's something that people in your field rely upon because it's the same journal as before?

A. Yes.

(PAGE 12, LINES 19-25) (PAGE 13, LINES 1-2).

The AFTE Journal - Spring 2001 Volume 33, Number 2 states as follows:

"WARNING: These pistols may create an EXTREMELY DANGEROUS CONDITION and a POTENTIAL FOR SERIOUS INJURY by firing <u>without pulling the trigger</u>."

Kathleen Green (State's expert witness) committed perjury when she testified that, "I don't know of any situations where this particular gun would fire without pulling the trigger."

Kathleen Green (State's expert witness) testified

BY MR. ALLEN: (cross-examination)

Q. Okay. I'll ask you globally. Is the Bryco Jennings Model Nine known to discharge without having the trigger pulled?

A. No, it is not.

Q. Are you aware of numerous examples of accidental discharges of this make and model weapon?

A. No. Well, accidental discharge to us means that it would fire without pulling the trigger. I don't know of any situations where this particular gun would fire without pulling the trigger.

(PAGE 15, LINES 24-25) (PAGE 16, LINES 1-6).

In addition, regarding this issue, please see "SUGGESTIONS IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT JUDGMENT" (9 page document) filed by Arthur Allen on May 6, 2016. See pages 6-8 (App. N, p.6-8).

Kathleen Green (State's expert witness) committed perjury when she testified that, "I don't know of any situations where this particular gun would fire without pulling the trigger."

§ 575.040 R.S.Mo., in relevant part, reads:

1. A person commits the crime of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths.

Ms. Green apparently did not carefully read the Spring 2001 article she provided to the State as Exhibit-D, if she read it at all. According to that article, both malfunctioning Bryco Jennings Nine firearms displayed accidental discharges at a point when the trigger was not being pulled. The article described a number of such situations. In one example it occurred "when the slide was pulled to the rear and released to load a cartridge into the chamber, the firearm discharged without the trigger being pulled." The article went on to say that in one of the two examples involved, "the firearm could be discharged by just lifting up slightly on the side or bumping the rear of the slide."

Reasonably competent counsel faced with the facts involved in this case, including his client's steadfast position that the shooting was an accident, would have investigated the possibility that the handgun was defective and prone to

accidental discharge, and would have presented such evidence to the jury. Counsel had no strategic reason for failing to investigate and present such evidence, and there is a reasonable probability that had counsel done so, the result of the trial would have been different.

Trial counsel's failure to exercise the customary skill and diligence that a reasonably competent lawyer would have exercised under similar circumstances amounted to ineffective assistance of counsel, and Petitioner was prejudiced by counsel's ineffectiveness, and counsel's ineffectiveness denied Petitioner's rights to due process of law, to a fair trial, and to effective assistance of counsel, in violation of the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

GROUND TWO

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ESTABLISH THAT PETITIONER WAS INDIGENT, AND REQUEST ALLOCATED FUNDS TO RETAIN AN EXPERT WITNESS UNDER § 600.086.3 R.S.Mo. COUNSEL'S INEFFECTIVENESS DENIED PETITIONER'S RIGHTS TO DUE PROCESS OF LAW, TO A FAIR TRIAL, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION. PETITIONER WAS PREJUDICED BY COUNSEL'S INEFFECTIVENESS, AND THUS, THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, PETITIONER'S TRIAL WOULD HAVE HAD A DIFFERENT OUTCOME.

Petitioner, Schwertz asserts this claim was raised as POINT I. (PCR LF 89-93; Resp. Exh. 15 at 89-93). Schwertz has preserved this issue by his timely-filed pro se Rule 29.15 motion, and the motion court's taking judicial notice of said pro se filings. Furthermore, the motion court failed to issue a "Findings of Fact and Conclusions of Law" on all claims presented, and the State failed to respond under § 509.100 R.S.Mo. Therefore, the State has conceded regarding said claim and the issues involved.

Schwertz has employed (Christopher Robinson) an expert firearms examiner to attest to the facts regarding Schwertz's gun that was recovered at the scene of the accidental shooting.

The gun was a Bryco Jennings Model Nine (PCR Tr.18). The facts will prove that said model handgun is in fact defective and will fire without pulling the trigger; it is generally known and accepted by competent firearms experts that said handgun make and model is prone to accidental discharge.

Newly discovered evidence has become known to Schwertz about Christopher Robinson, Expert Firearms Examiner during March of 2015, through Shawn C. Hanna, who used this expert and has knowledge of him in this field of expertise. See Affidavit of Shawn C. Hanna (EXHIBIT 61)(App. G).

As the Supreme Court recently noted, "an attorney's ignorance of a point of law that is fundamental to his case, combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 134 S.Ct. 1081, 1089 (2014). Here, during voir dire, trial counsel stated, "there will be evidence presented that it was an accident" (Tr.205). However, counsel only put Schwertz on the stand to testify that it was an accident, instead of presenting irrefutable, material, and physical evidence that an accidental shooting "occurred in the midst of an intense domestic quarrel" (Tr.330-331).

In State v. Huchting, it is explained, "jurisdictions ... have uniformly held that the retention of private counsel does not cause a defendant to forfeit his or her eligibility for state assistance in paying for expert witness or investigation

expenses." 927 S.W.2d 411, 419 (Mo.App.1996). "Many of those opinions point out that a defendant who spends down his resources in the middle of his defense or who relies on the largesse of friends and family for initial defense expenses is no less entitled to due process and fundamental fairness than is a defendant who enters the judicial system penniless." Id.

In this case, trial counsel considered contacting an expert, but failed to do so because of his understanding that Schwertz did not have the financial resources to retain such an expert. However, Schwertz had researched and advised counsel of Section 600.086.3 R.S.Mo, and that under said Section, counsel would be able to obtain allocated funds to retain a firearms expert, or allowed reimbursement for expenses incurred for such an expert.

Furthermore, counsel explained to Schwertz that since funds were not available to retain such an expert, he would simply do his best to present testimony from the [State's expert]. See, e.g., Hinton v. Alabama, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014). Here, Christopher Robinson's testimony would have refuted much of Kathleen Green's (State's expert witness) trial testimony and PCR hearing testimony, which as a whole completely minimized the dangers of the model of weapon in question. Mr. Robinson appears to have much better knowledge and more experience with this model of weapon, and could have testified in detail about the problems with this particular

model and the dangerous reputation of the model in question. It is clear and obvious that testimony from Mr. Robinson would have benefitted Schwertz at both his trial and his PCR hearing.

In this case, trial counsel's failure to request funding in order to replace an expert he knew to be inadequate, constitutes ineffective assistance of counsel. See, e.g., Williams v. State, 254 S.W.3d 70 (Mo.App.W.D.2008). Here, specifically, counsel knew that he needed funding to present an adequate defense. However, counsel failed to do any research regarding § 600.086.3 providing for defense funding for indigent defendants (MOVANT'S EXHIBIT-K)(App. O, p.1, 5). Counsel's failures was an inexcusable mistake of law, i.e., an unreasonable failure to understand the resources that state law made available to Petitioner. Had counsel employed the proper procedures for proving indigence, the trial court would have been required to award funds under Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

Reasonably competent counsel faced with the facts involved in this case, would have employed the proper procedures for proving indigence, and requested allocated funds to retain an expert witness under § 600.086.3. Counsel had no logical, strategic reason for his failures, and thus, there is a reasonable probability that, but for counsels unprofessional errors, Schwertz's trial would have had a different outcome.

Trial counsel's failure to exercise the customary skill and diligence that a reasonably competent lawyer would have exercised under similar circumstances amounted to ineffective assistance of counsel, and Petitioner was prejudiced by counsel's ineffectiveness, and counsel's ineffectiveness denied Petitioner's rights to due process of law, to a fair trial, and to effective assistance of counsel, in violation of the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

GROUND THREE

THE STATE FAILED TO DISCLOSE AND RELEASE ITEMS OF EVIDENCE, PURSUANT TO Mo. Sup. Ct. R. 25.03. THE STATE'S UNWARRANTED CONCEALMENT PRESENTS A CLEAR-CUT DUE PROCESS VIOLATION UNDER BRADY V. MARYLAND, AND VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS OF LAW, AND TO A FAIR TRIAL, IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION, IN THAT, THE STATE'S FAILURE TO DISCLOSE AND RELEASE THIS EVIDENCE CONSTITUTES A BRADY VIOLATION, RESULTING IN PREJUDICE TO PETITIONER. THE STATE'S FAILURE TO DISCLOSE AND RELEASE THIS EVIDENCE UNDERMINED CONFIDENCE IN THE OUTCOME OF THE TRIAL.

In this case, pre-trial, trial counsel filed a detailed request for discovery seeking disclosure of any exculpatory information (EXHIBIT 57)(App. P). After Schwertz had exhausted his direct appeal, he received State's Exhibit-D (App. M) on Schwertz's exact make and model handgun; a Bryco Arms model Jennings Nine 9mm LUGER caliber Semiautomatic Pistol.

At the evidentiary hearing, the State presented [AFTE Journal - Spring 2001 Volume 33, Number 2] State's Exhibit-D (App. M), regarding Schwertz's specific make and model handgun; a Bryco Arms model Jennings Nine 9mm LUGER caliber Semiautomatic Pistol. However, pre-trial, the State failed to

disclose and release said AFTE Journal - Spring 2001 Volume 33, Number 2, which states:

> (See pages 13-14 of this petition for the transcribed testimony of Kathleen Green, State's expert witness. Direct examination by: Ms. Dolin, and cross-examination by: Mr. Allen)

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Wearry v. Cain, 136 S.Ct. 1002, 1006 (2016) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 153-154 (1972)). Evidence qualifies as material when there is "any reasonable likelihood" it could have "affected the judgment of the jury." Giglio, supra at 154 (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)). To prevail on his Brady claim, a defendant need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. Smith v. Cain, 565 U.S. 73, 132 S.Ct. 627, 630, 181 L.Ed.2d 571, 574 (2012). He must show only that the new evidence is sufficient to "undermine confidence" in the verdict. Ibid.

In this case, if the State would have disclosed and released **State's Exhibit-D**, this would have likely alerted trial counsel that he needed to further investigate Schwertz's

make and model of handgun. Therefore, counsel would have discovered the history regarding the dangers and defects of the handgun in question. Said history of the Bryco Arms model Jennings Nine 9mm LUGER caliber Semiautomatic Pistol is now before this Court in the Affidavit of Christopher Robinson (EXHIBIT 62)(App. H).

Kathleen Green, State's expert witness testified at the PCR hearing that Schwertz's gun had an 8.5 to 9 pound trigger pull (PCR Tr.7)(State's Exhibit-A)(App. I). Schwertz advised counsel that he did not recall pulling the trigger, and testified at trial that he did not remember his finger being on the trigger (Tr.693), this should have alerted counsel that there was a need to employ an independent firearms examiner, i.e., Christopher Robinson, Private Forensic Consultant and Expert Firearms Examiner.

Nine (9) states currently ban Junk Guns for sale under an "unsafe handgun" statute. This ban includes the sale of cheaply made "Junk Handguns" produced by Bryco Arms/Jennings and marketed as "Saturday Night Specials" (EXHIBIT 11)(App. Q).

Unwarranted concealment by the prosecution should not gain a court's approval. Kyles v. Whitley, 514 U.S. 419, 440 (1995). If evidence was in the custody and control of the State that should have been disclosed to [defendant] and was not, the burden of proof shifts from [defendant] to the State to show how the unrevealed evidence is harmless beyond a

reasonable doubt. Brady v. Maryland, supra. And if the evidence is deliberately hidden, no harm need be shown, and the verdict must be set aside. Napue v. Illinois, 360 U.S. 264 (1959).

In this case, the State's "RESPONSE TO DEFENDANT'S REQUEST FOR DISCLOSURE PURSUANT TO RULE 25.03", the following colloquy occurred between trial counsel, David Mills and Asst. Attorney General, Lauren D. Barrett:

> 9. Any material or information, within the possession or control of the State, which tends to negate the guilt of Defendant as to the offense charged, or reduce the punishment.
>
> ANSWER: The State is not aware of any such information except that which may be contained in the investigative file enclosed herewith.

The State's failure to disclose and release items of evidence, pursuant to Mo. Sup. Ct. R. 25.03 and under Brady v. Maryland, had the potential to alter the jury's assessment of the credibility of a significant prosecution witness, resulting in prejudice to Petitioner, and the State's failure to disclose and release this evidence undermined confidence in the outcome of the trial, in violation of the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

GROUND FOUR

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL REGARDING THE PROSECUTOR HAVING ASKED OFFICER BUTLER WHETHER PETITIONER, SCHWERTZ HAD SAID ANYTHING TO HIM WHEN SCHWERTZ WAS PLACED UNDER ARREST, AND SAID RULING DENIED SCHWERTZ'S RIGHTS TO DUE PROCESS OF LAW, TO A FAIR TRIAL, AND TO REMAIN SILENT, IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE, I §§ 10 AND 19 OF THE MISSOURI CONSTITUTION, IN THAT, THE PROSECUTOR'S QUESTION IMPROPERLY SUGGESTED TO THE JURY THAT, IF SCHWERTZ'S SHOOTING TRACY WEBER TRULY HAD BEEN AN ACCIDENT, THEN SCHWERTZ WOULD HAVE TOLD OFFICER BUTLER IMMEDIATELY THAT IT WAS AN ACCIDENT, AND THAT IMPROPER SUGGESTION TO THE JURY WAS PREJUDICIAL BECAUSE IT DIMINISHED THE CREDIBILITY OF SCHWERTZ'S TESTIMONY THAT THE SHOOTING WAS AN ACCIDENT.

In this case, the trial court denied counsel's request for a mistrial, when the prosecutor asked Officer Butler whether Petitioner, Schwertz said anything when Schwertz was placed under arrest. The failure to declare a mistrial was an abuse of discretion, because the question suggested to the jury that if the shooting had truly been an accident, then Schwertz would have immediately told Officer Butler that it was an accident.

When Officer Butler asked Schwertz if anyone else was in the house and whether they were hurt, Schwertz responded that his girlfriend was there and he had shot her in the chest (Tr.487, 526). Butler testified that Schwertz never asked him to help Tracy (Tr.491). Butler was then asked if Schwertz had said anything else to him that night, and Butler responded, "No" (Tr.491). Counsel objected that this asked about post-arrest silence, and requested a mistrial (Tr.491). Counsel argued that a mistrial be granted, because the jury was left to wonder why Schwertz did not tell Butler immediately that shooting Tracy was an accident (Tr.496). The court denied the mistrial request because it did not view the statement to be harmful in the way alleged (Tr.498-99). Counsel believed any alternative remedy short of a mistrial would be more harmful than helpful (Tr.499). However, the court indicated that it was willing to consider other forms of relief, other than a mistrial, if requested (Tr.575-76). Counsel indicated that he was not requesting an instruction to disregard, because that would only serve to hilight the problem the prosecutor's questioning created (Tr.579). During direct examination the following colloquy occurred between David Hansen, Attorney General and Officer Butler:

Q. At any time when you showed up there, did he ever ask you to go help Tracy?

A. Not that I can recall.

Q. Well, would you have remembered that?

A. I would say I would, yes.

Q. Did he say--and did he say anything else to you there that night?

A. No, sir.

Q. Did you hear--

MR. MILLS: Judge, may we approach?

THE COURT: Yes, you may.

(A BENCH CONFERENCE WAS HELD.)

MR. MILLS: I think at this point we're asking about post-arrest silence and you just elicited an answer from this officer concerning post-arrest silence. I think we need to move for a mistrial. That's a violation of his Fifth Amendment privilege.

(Tr.491).

Counsel requested the opportunity to research the issue that evening, of whether the prosecutor had improperly injected Schwertz's not making a statement that the shooting was an accident, and to submit a brief the next morning, and the trial court indicated it would consider such a filing (Tr.500-01, 548). On the following day, before trial resumed, counsel filed a motion for a mistrial with supporting suggestions based upon research having used Schwertz's post-arrest and pre-Miranda failure to volunteer that what had happened was an accident (Tr. 555-579; L.F.36-41). See Miranda v. Arizona, 384 U.S. 436, 479 (1966). The record showed that the circumstances here were post-arrest and pre-Miranda (Tr.556). The problem with the prosecutor's question to Officer Butler was that it raised a question in the jury's mind of: Why Schwertz did not tell Butler that the shooting was an accident (Tr.562).

A defendant's right to remain silent is protected by the Fifth Amendment to the United States Constitution and Article I, § 19 of the Missouri Constitution. State v. Powell, 682 S.W.2d 112, 113 (Mo.App.E.D.1984).

The State is prohibited from using an accused's silence, at the time of arrest and after receiving Miranda warnings, for impeachment. State v. Anthony, 857 S.W.2d 861, 868 (Mo.App.W.D. 1993). The State is not allowed to use a defendant's post-arrest silence as either affirmative proof of guilt or to impeach. State v. Noel, 871 S.W.2d 628, 629 (Mo.App.E.D.1994)(relying on Doyle v. Ohio, 426 U.S. 610 (1976)). The State cannot show that a defendant failed to volunteer an exculpatory statement, or failed to deny or explain, while under arrest, an incriminating fact about which no question was asked. State v. Howell, 838 S.W.2d 158, 161 (Mo.App.S.D.1992). Admitting a defendant's post-arrest silence invades his constitutional rights. Id. at 161. The State is allowed to use a defendant's immediate post-arrest, pre-Miranda warning silence for purposes of impeaching the defendant's testimony "when a neutral expectancy of an exculpatory statement exists as a result of a defendant's testimony and defendant's silence is probative of inconsistencies in that testimony." State v. Antwine, 743 S.W.2d 51, 69 (Mo.banc 1987). When a defendant offers an explanation for his actions at trial and circumstances suggest he would naturally have given the explanation earlier if it was true, his previous silence may be used to impeach him if the silence was not the result of

exercising his Fifth Amendment rights. State v. Cornelious, 258 S.W.3d 461, 466 (Mo.App.W.D.2008). Here, however, Schwertz absolutely exercised his Fifth Amendment right to remain silent. Therefore, Schwertz should receive the benefits and protection under the Fifth Amendment to the United States Constitution and Article I, § 19 of the Missouri Constitution. State v. Powell, 682 S.W.2d 112, 113 (Mo.App.E.D.1984).

In State v. Graves, 27 S.W.3d 806, 810 (Mo.App.W.D.2000), it was recognized that "[c]onsistent with the Fifth Amendment privilege against self-incrimination is the notion that the State may not use post-arrest silence as affirmative proof of the defendant's guilt." The State's use of post-arrest, pre-Miranda silence as affirmative proof of guilt is prohibited under the Fifth Amendment. Graves, 27 S.W.3d at 811. "While the law in Missouri does permit the use of pre-Miranda silence to impeach a defendant's testimony and to conduct a defendant's defense, the adverse effect on the Fifth Amendment is too severe to extend the use of post-arrest, pre-Miranda silence for affirmative proof of guilt." Graves, 27 S.W.3d at 812.

Graves' claim that respondent's use of her post-arrest, pre-Miranda silence was not preserved, and the Graves Court indicated that if it had been preserved, then its result may have been different. Graves, 27 S.W.3d at 812. The Graves Court noted that even though in opening statement, defense counsel had revealed the intent to use a self-defense strategy that did not present anything for the State to impeach or contradict, because

opening statement was not a presentation of evidence. Graves, 27 S.W.3d at 812. The Graves Court observed that "while, as it turned out, Ms. Graves did raise self-defense in her case-in-chief, we cannot thereby conclude, in retrospect, that no harm was done in the end." Graves, 27 S.W.3d at 812. The Graves Court added: "[a]t the moment the State referred to Ms. Graves' silence in its case-in-chief, Ms. Graves Fifth Amendment privilege against self-incrimination was violated." Graves, 27 S.W.3d at 812.

In this case, the same thing occurred as it did in Graves. However, here, Schwertz's claim, unlike Graves' claim, was preserved. Schwertz's entire defense through his testimony was based on proving that the gun accidentally fired, and that he never intended to shoot Tracy. The Prosecutor's question that suggested if the shooting had been an accident, then Schwertz would have told Officer Butler it was an accident when Schwertz was arrested, was highly prejudicial (Tr.491).

In State v. Rayner, 549 S.W.2d 128, 132-33 (Mo.App.K.C.D. 1977), the Court found that an instruction to disregard inadmissible evidence did not cure the prejudice a police officer created that "implied" the defendant's guilt in the charged offense, and a mistrial should have been declared. The Rayner Court considered what happened to be a situation of trying to unring a bell. Id. at 133.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires the law to treat

identically situated persons in the same way. The Fourteenth Amendment forbids a State to "deny any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. This means "that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The Fifth Amendment requires the federal government to obey the same equal protection standards as the states. Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975).

In this case, Petitioner's right to equal protection of the law was violated when the Missouri Court of Appeals refused to grant him the same relief that was previously granted to identically situated litigants, and therefore, the Court of Appeals' affirmed judgment violated Petitioner's right to equal protection of the law, and is contrary to established case law in State v. Graves, supra; and State v. Rayner, supra, in that, the factual and legal issues in Graves and Rayner are identical to Petitioner's case.

The trial court erred and abused its discretion in denying the motion for mistrial, and Petitioner was prejudiced by the court's ruling, and the court's ruling denied Petitioner's rights to due process of law, to a fair trial, and to remain silent, in violation of the 5th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 19 of the Missouri Constitution.

GROUND FIVE

THE TRIAL COURT ERRED, AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROVIDE THE REQUIRED "AUXILIARY AIDS AND SERVICES" FOR COMMUNICATION ASSISTANCE TO PETITIONER NEEDED UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990, SECTIONS 476.760, 476.763, AND 476.766 R.S.Mo., AND PETITIONER WAS PREJUDICED BY THE TRIAL COURT'S ERROR AND COUNSEL'S INEFFECTIVENESS, AND DENIED PETITIONER'S RIGHTS TO DUE PROCESS OF LAW, TO A FAIR TRIAL, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE 6TH, 8TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10, 18(a), AND 21 OF THE MISSOURI CONSTITUTION, AND THUS, THERE IS A REASONABLE PROBABILITY THAT, BUT FOR THE TRIAL COURT'S ERROR AND COUNSEL'S INEFFECTIVENESS, PETITIONER'S TRIAL WOULD HAVE HAD A DIFFERENT OUTCOME.

The Americans with Disabilities Act (ADA) was enacted in 1990 "[t]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). "It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accomodations, which are covered by Title III." Tennessee v. Lane, 541 U.S. 509, 516-517, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) (Title II of the ADA, as applied to cases implicating the fundamental right of access to

the courts, constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment); Pruett v. State, 606 F.Supp.2d 1065, 1072 (D.Ariz.2009).

Title II of the ADA prohibits discrimination against a qualified individual with a disability regarding a public entity's services, programs, or activities and such exclusion or discrimination was by reason of the individual's disability. 42 U.S.C. § 12132; Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002). Here, Petitioner requested numerous accomodations for his disabilities that include: Dyslexia, LD-Learning Disability, Hearing Impairment, Tinnitus (ringing in ears) and Audio Processing Disorder. However, the trial court and Petitioner's attorney of record, David Mills (Tr.660) failed to provide the required assistance needed under the (ADA) Americans with Disabilities Act of 1990 (PCR Tr.100) (See EXHIBITS 2-6)(App. R-V).

The previously-mentioned disabilities substantially limit Petitioner's major life activities and his ability to read, spell, write, and hear spoken words correctly. These disabilities are caused by an inherited trait that affects how Petitioner's brain works to interpret spoken, written, and visual information (PCR Tr.105). For more information on this issue see GROUND NINE, A - H in the original habeas petition filed in the U.S. District Court (6:18-cv-03342-MDH). See Guide to Judiciary Policy, Vol. 5, Ch. § 255, Services to the Hearing Impaired and Others with Communication Disabilities. Thomas v. Lighthouse of Oakland Cnty., 2016 U.S. Dist. LEXIS 87129.

GROUND SIX

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOTION THE TRIAL COURT TO SUPPRESS PETITIONER'S ALLEGED POST-ARREST AND PRE-MIRANDA STATEMENT THAT WAS MADE IN RESPONSE TO OFFICER BUTLER'S QUESTION, THAT WAS ASKED WITHOUT THE REQUIRED "AUXILIARY" AIDS AND SERVICES" CERTIFIED INTERPRETER FOR A DEAF AND/OR HEARING IMPAIRED PERSON, PURSUANT TO SECTIONS 476.750 - 476.766 R.S.Mo., AND MIRANDA WARNING. COUNSEL'S INEFFECTIVENESS DENIED PETITIONER'S RIGHTS TO DUE PROCESS OF LAW, TO A FAIR TRIAL, TO REMAIN SILENT, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10, 18(a), AND 19 OF THE MISSOURI CONSTITUTION. PETITIONER WAS PREJUDICED BY COUNSEL'S INEFFECTIVENESS, AND THUS, THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, PETITIONER'S TRIAL WOULD HAVE HAD A DIFFERENT OUTCOME.

At trial, the prosecutor repeatedly used Petitioner's alleged statement to Officer Butler that, "I shot her in the chest" (Tr.318, 323, 487, 836, 837, 844). However, said statement was made in response to a question asked by Officer Butler, without the required "auxiliary aids and services" certified interpreter required by state law (§ 476.753.2) and Miranda warning, and after Petitioner was tazed in a police dominated atmosphere, where coercive, improper strong arm tactics, and deceptive strategems were employed. (See App. W).

Officer Butler testified he commanded Schwertz to get down on the ground; Schwertz did not comply and started walking back towards inside the house; he (Butler) yelled at Schwertz to get on the ground; Butler yelled in a loud & direct manner; Schwertz continued to walk back inside the residence; Schwertz did not comply with any of the commands Butler gave him (Tr.481-83).

Officer Butler testified that he shot Schwertz with a taser, which knocked Schwertz on the ground (Tr.481-84). Butler recounted that Officer Scott then handcuffed Schwertz (Tr.486, 515). Butler then proceeded to ask Schwertz if anyone else was in the house and whether they were hurt, to which Schwertz responded that his girlfriend was there and he had shot her in the chest (Tr.487, 526). That was followed by Butler testifying that Schwertz never asked him to help Tracy (Tr.491). Butler was then asked if Schwertz said anything else to him that night, and Butler responded, "No" (Tr.491). The statements that Schwertz made were made in response to what he thought Butler's questioning was of him. To treat what occurred here as an "omission" from a post-arrest, pre-Miranda statement, without a certified interpreter, would render the Federal and State Constitutions meaningless. U.S. Const. Amend. V and Mo. Const. Art. I, § 19. See, e.g., Miranda v. Arizona, 384 U.S. 436, 444 (1966).

Section 476.753.1 requires "auxiliary aids and services" to be provided to a deaf person who is involuntarily detained or arrested based upon the deaf person's expressed needs. Wadas v.

Director of Revenue, 197 S.W.3d 222, 224 (Mo.App.W.D.2006). Section 476.753.2 goes on to state:

> No answer, statement, admission or other information, written or oral, shall be admissible as evidence in any judicial or administrative proceeding if obtained from a deaf person who is involuntarily detained or arrested before an interpreter or auxiliary aids and services are provided to that deaf person, based on the deaf person's expressed needs.

Section 476.750 provides definitions for the terms utilized in § 476.753 and defines "auxiliary aids and services" as "the device or service that the deaf person feels would best serve him or her which includes, but is not limited to qualified interpreters, notetakers, transcription services ..." § 476.750(1). "Qualified interpreter" is then defined as "an interpreter certified and licensed by the Missouri Interpreter Certification System or deemed competent by the Missouri Commission for the Deaf, who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary." § 476.750(5)(App. W).

Construing the provisions of § 476.753 in the context of all of the relevant related statutory provisions, the Wadas court has previously held that § 476.753.2 "contemplates a 'qualified interpreter' within the meaning of Section 476.750(5) when it uses the word 'interpreter.'" Wadas, 197 S.W.3d at 226.

Sections 476.750 - 476.766 all relate to the interpretation or auxiliary aids and services provided to hearing impaired

persons. Sections 209.285 - 209.339 are also pertinent, in that, they deal with the certification and licensing of interpreters for the deaf. These sections must all be read together to gather the intent of the legislature. State v. White, 622 S.W.2d 939, 944 (Mo.banc1981)(App. W).

In Miranda, 384 U.S. at 444, the Supreme Court of the United States held that custodial interrogation by police must not occur prior to a suspect being informed of his right to assistance of counsel, and his right against self-incrimination. Id. at 444. By "custodial interrogation," the Court "meant questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. The Court expounded on this fairly simple definition in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), where it stated that Miranda applies when a suspect is subjected either to express questioning or its functional equivalent--words or actions the police should know are reasonably likely to elicit an incriminating response. Id. at 300-02; see also State v. Cook, 67 S.W.3d 718, 721 (Mo. App.S.D.2002).

The place where an interrogation takes place does not conclusively establish the presence or absence of custody. A deprivation of freedom may take place at one's home as well as at the police station. Orozco v. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969). In such a context, statements of a suspect, whether exculpatory or inculpatory, are inadmissible on

the issue of the defendant's guilt of the charged offense when made without the benefit of "auxiliary aids and services" and having been informed of his rights under the Fifth Amendment. Miranda, supra. (See EXHIBIT 7)(App. X).

The prejudicial effect of the statement that, "I shot her in the chest," far out-weighed its probative value, in that, said statement adduced at trial passed beyond the realm of legal relevance and moved into the territory of undue prejudice. The State felt it needed to present this statement to refute the defense's theory of an accidental shooting. However, the State's repeated use of this statement was excessive, and clearly overstepped the bounds of necessity, and prejudiced Petitioner. Moreover, counsel should have motioned the court to suppress this statement. Instead, this statement was adduced repeatedly, and allowed the jury to try Petitioner based on this otherwise inadmissible statement.

Counsel should have motioned the court to suppress this statement, because U.S. Const. Amend. V is applicable to the States in all criminal prosecutions. Moreover, the protection against self-incrimination under the Missouri Constitution is commensurate with that provided in the Federal Constitution, Mo. Const. Art. I, § 19; § 476.753.2 R.S.Mo.

REASONS FOR GRANTING THE PETITION

The Petition For A Writ Of Certiorari should be granted because the (motion court) Circuit Court of Pulaski County's findings of fact are not supported based on the Affidavit of Christopher Robinson. Furthermore, both opinions issued by the Missouri Court of Appeals and the U.S. District Court are adopted from the motion court, wherein, the courts have overlooked material matters of fact and law. Herein, Petitioner has established by clear and convincing evidence that the courts' opinions are erroneous. A manifest injustice or miscarriage of justice will result in the absence of relief.

CONCLUSION

The Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

/s/ Brent C. Schwertz

Date: October 23, 2019