

**No. 83909**

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**IN THE  
MISSOURI SUPREME COURT**

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**JOHN MIDDLETON,**

**Respondent,**

**v.**

**STATE OF MISSOURI,**

**Appellant.**

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**Appeal from the Circuit Court of Callaway County, Missouri  
13th Judicial Circuit, Division II  
The Honorable Frank Conley, Judge**

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**RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT**

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## **JURISDICTIONAL STATEMENT**

This appeal is from the denial of appellant's Rule 29.15 motion, obtained in the Circuit Court of Callaway County, the Honorable Frank Conley presiding. Appellant sought to vacate two convictions of first degree murder, § 565.020.1, RSMo 2000, and two convictions of armed criminal action § 571.015, RSMo 2000. Because death sentences were imposed for each conviction of first degree murder, this Court has jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

## STATEMENT OF FACTS

Appellant, John Middleton, was convicted of two counts of first degree murder, § 565.020.1, RSMo 2000, and two counts of armed criminal action, § 571.015, RSMo 2000, and sentenced to death on each count of murder. State v. Middleton, 998 S.W.2d 520,523 (Mo.banc 1999). This Court summarized the facts as follows:

On June 10, 1995, several drug dealers were arrested in Cainsville, Missouri. Appellant, a drug dealer, worried that informants would implicate him as well. That afternoon, he told Tom Constable that there were “some snitches that should be taken care of,” because he did not want to go back to prison. He mentioned several names, including Randy “Happy” Hamilton.

The next day, appellant and his girlfriend, Maggie Hodges, met Hamilton and Stacey Hodge on a gravel road. Stacey Hodge was Hamilton’s girlfriend. Appellant shot Hamilton in the back once with an SKS rifle, and shot Stacey Hodge in the back three times. Appellant then shot Hamilton in the head, killing him. Maggie Hodges killed Stacy Hodge by shooting her in the head with another SKS rifle. Both bodies were placed in the trunk of Hamilton’s car. Appellant drove the car, looking for a place to dispose of the bodies. Hodges followed in a truck.

While driving around, appellant saw Danny Spurling. Appellant – covered in blood and driving Hamilton’s car – said that he had “taken care” of Hamilton. He asked Spurling what to do with the bodies, indicating that he might burn them

in Hamilton's old house. The next morning, appellant gave Spurling the car stereo from Hamilton's car, and said that "they were really going to freak out when they found those two." Appellant had a written list of names, and asked if Spurling knew anyone on the list.

About a week and a half later, appellant told Richard Pardun that "there was a narc around and they were going to take care of it." He said that he had a "hit list," mentioning several names on it, including Hamilton, Alfred Pinegar,<sup>1</sup> and William Worley. Appellant offered Pardun \$ 3,500 to set up a meeting with Worley.

On June 25, 1995, John Thomas was at appellant's house, discussing informants. Appellant listed several people who "needed to be taken care of," including Hamilton, Pinegar, and Worley. Thomas noticed two SKS rifles and a box belonging to Hamilton. When Thomas asked about the box, appellant replied, "the guy who owned that box wouldn't be needing it no more."

About the same time, appellant visited Dennis Rickert in Iowa. Appellant told Rickert: "I'd knowed 'Happy' for 15 [years]. He knew enough to put me away for life. I done 'Happy.'" Appellant also gave Rickert several guns, including two SKS rifles, which Rickert later turned over to the police.

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<sup>1</sup> Appellant was convicted of the murder of Pinegar in 1997. For the appeal in that case, see State v. Middleton, 995 S.W.2d 443 (Mo.banc 1999).

Appellant was arrested for another murder (Pinegar's) in late June 1995. On July 10, 1995, Hamilton's car was discovered in the woods where it had been abandoned. The car stereo was missing. The victims' decomposed bodies were in the trunk. Bullet fragments taken from Stacy Hodge's body displayed class characteristics consistent with the SKS rifles that appellant gave Rickert.

While awaiting trial in the Harrison County jail, appellant confessed to fellow inmate Douglas Stallsworth. Stallsworth testified that appellant described the murders, admitted killing Hamilton and Hodge because they were informants, and acknowledged hiding their bodies and taking the rifles to Iowa. Id. at 523-524. This Court affirmed appellant's convictions and sentences. Id.

On December 3, 1999, appellant filed a pro se motion for post-conviction relief (P.L.F.8-23). On January 31, 2000, counsel filed an amended motion and requested an evidentiary hearing (P.L.F.29-203).

On September 28 and December 21, 2000, an evidentiary hearing was held (P.Tr.9,237). On June 21, 2001, the motion court issued findings of fact and conclusions of law and denied appellant's motion (P.Tr.517-536). This appeal followed.

## ARGUMENT

### I. COUNSEL WAS NOT INEFFECTIVE IN HANDLING EVIDENCE AND ARGUMENTS RELATED TO THE FACT THAT APPELLANT KILLED ALFRED PINEGAR.

In his first point, appellant combines several claims relating to trial counsel's use of, or failure to object to, evidence and arguments related to the fact that he killed Alfred Pinegar in addition to Randy Hamilton and Stacey Hodge (App.Br.30-31).

#### A. The Standard Of Review

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” Moss v. State, 10 S.W.3d 508,511 (Mo.banc 2000). “Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.” Id.

“The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence.” Supreme Court Rule 29.15(i).

#### B. Trial Counsel Were Competent

To prevail on a claim of ineffective assistance of counsel, the movant must “show that counsel's representation fell below an objective standard of reasonableness.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 2068. “A reasonable probability

is a probability sufficient to undermine confidence in the outcome.” Id. If a movant fails to show either deficient performance or prejudice, the court need not address the other component. State v. Allen, 954 S.W.2d 414,417 (Mo.App.E.D.1997).

### **1. Defense counsel’s opening statement and closing arguments**

Appellant first claims that counsel was ineffective in penalty phase for making various statements and arguments about the fact that he was already on “death row” for murdering Alfred Pinegar (App.Br.32-36). In penalty-phase opening statement, counsel began by revealing that appellant was already on “death row” (Tr.851). Then, in wrapping up her opening statement, counsel said: “And at the end of that, ladies and gentlemen, as ironic as you may think it seems, I’m going to come back and I’m going to ask you to spare the life of this man who’s already on death row” (Tr.854).

In penalty-phase closing argument, counsel argued:

Never have had to ask a jury to spare the life of a man who’s already on death row. That’s exactly what I’m asking you to do. And it might be said why? Why does it matter? And it might be said why weren’t we told about this when we all came together on Monday? When it might be kind of scratched off the list by what’s already gone before you as jurors. And I’d like to talk to you about that.

(Tr.1062). Then, after explaining that the murder of Alfred Pinegar was not relevant to the jury’s determination of guilt, defense counsel referenced the weakness of the state’s evidence and argued:

And it might be, in fact it was the word of all those people was enough for you to convict John Middleton of these two murders. But you have to ask yourself, is the word of all the people that came into this courtroom this week enough to take his life again? Is their word good enough to take a man's life?

And if you're asking why does it matter what you do as a jury in this case? And it might be said that Jackie Marrs and Stacey's aunt Doris and her friend Krista Hicks and Randy's sister Linda, that it matters to them that two more sentences of death are imposed. That it might be said to you that they need foreclosure or it might be said to you that justice demands it. And I answer that, ladies and gentlemen. What they need is something that none of you, none of us can ever give back to them. They need Stacey back in that Christmas photo. And they need Randy to have gotten off the drugs and to come back into the family. And no matter how many sentences of death that John Middleton is under, they will never get what they need. And our condolences go out to them, but no matter how many sentences of death a man is under, they will not get what they want. They will not get their loved ones back.

The fact of the matter is John Middleton can only be killed once. And he's already under a sentence of death. John Middleton can only be strapped down to a gurney one time and only once can a needle be inserted into his arm and only once can a lethal dose of poison be injected into his body and only once can John Middleton give up a life, have his life taken in return for these

cases. And these families can only see that happen one time. And when that one time is over, ladies and gentlemen, as he's already under a sentence of death, they're going to have to go home and they're going to have to do what they've been doing this whole time. They've been carrying on with their lives. They've been living. They've been raising their children. They've been loving each other. They've been supporting each other. They've been surviving. And they've been surviving good and in style. And they will continue to do that no matter how many sentences of death this man is under.

And it might be said that you should impose two more sentences of death to make a total of three sentences of death because maybe he won't be executed the first time around. Missouri is a killing state. We're right up there behind Texas and Florida. We kill our killers. We do that in Missouri  
[the prosecutor's objection was overruled]

In those rare occasions when you might have heard somebody under a sentence of death has had their life spared, chalk it up to a higher intervention.

Three sentences of death is excessive. Three sentences of death is wrong. And it might be said to you that three murders is wrong too. We're not condoning that. We agree. Three murders is wrong. Any murder is wrong. We're not asking you to set John free. We're asking you to look at the evidence in this case. And we're asking you to consider the reasons that people came in and testified to what they did. And we're asking you to hold the State to its

burden of proof. The fact of the matter is, there's no question that John was convicted for the murder of Alfred Pinegar. So the statutory aggravating circumstance there, I think it's their first one that he's been convicted for a prior murder has been proven. We cannot disprove that. But he's under a sentence of death, ladies and gentlemen. He's already a condemned man and you're being asked to condemn him again and again. And that's excessive. And it's wrong.

We're not asking you for anything other than a sentence fo life in prison without parole for whatever the remainder of his life will be. We're asking you to impose no additional death sentences. Additional sentences of death, it's such a waste. And to sentence a man to death three times, I will make this argument to you, it shows the same disregard for the sanctity of all human life that they claim.

[the prosecutor's objection was overruled]

Asking for a man to be condemned again and again and again shows disregard for the sanctity of all human life that they are claiming John showed for Al, for Randy and for Stacey.

Mercy and common sense should be prevailing here. Mercy is a very unpopular concept because it's equated in our community any more with weakness. If you're merciful, you're weak. And in fact that's not the case. If you're merciful, you're just. You understand this man is not getting out. You state with a verdict of life in prison without parole or probation on those two

murder charges that you know this man is condemned but you're not going to take any further steps to condemn him any further.

(Tr.1063-1067).

Defense counsel then spent a considerable amount of time arguing (1) that a sentence of life imprisonment would enable the victims to go on with their lives,<sup>2</sup> (2) that sentences of death would not solve the larger problem of drug trafficking, (3) that drugs had played an important role in the murders,<sup>3</sup> (4) that appellant's drug use had affected his mind and changed his behavior and thinking, (5) that appellant was predisposed to depression and vulnerability to drugs, (6) that appellant's drug use had led to hallucinations and paranoid behavior, (7) that even the state's evidence revealed appellant's mental infirmities, and (8) that appellant's drug use "took [him] out of a realm of a reasonable it put him into a realm of a man who is emotionally disturbed, under severe mental and emotional distress" (Tr.1067-1073).

Defense counsel then concluded with the following:

You're never required to sentence someone to death. Never. And the jury instruction tells you that. Three sentences of death is excessive. He's a condemned man, ladies and gentlemen. You don't need to condemn him further. As it is, he never get out. With a verdict of life in prison without parole or probation he never gets out. And he will live out his days in a prison that is not

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<sup>2</sup> After making these arguments, defense counsel reiterated: "Common sense should prevail here because it remains that he can only be killed one time" (Tr.1067).

<sup>3</sup> In making these arguments, defense counsel also said, "we kill our killers" (Tr.1068).

the Ritz by any stretch of the imagination as Cecil Pettis and Dr. Weber talked to you about.

John Middleton is a changed man, his mother and the people from the prison and even the doctor talked about what he was like back then and what he was like now.

Ladies and gentlemen, that's evidence to support a sentence of life no matter how ironic it sounds to you, he's still a man who is loved. He's still a man who has some value. He's adjusted well to the prison in which he's going to spend the rest of his days, however limited they are. And you don't have to take any further steps to condemn this man, ladies and gentlemen.

(Tr.1073).

At the post-conviction evidentiary hearing, counsel explained her trial strategy in making these comments and arguments as follows:

A. I told the jury that [appellant was already under a sentence of death] because I wanted to give this jury anything they could, any reason they could possibly hang on to to not sentence a man to death again for a second time. And I argued in my closing argument in the penalty phase that it was excessive to sentence someone to death more than once. That's what I meant by ironic.

Q. Did you consider worthy [sic] that the sentence would diminish the jury's feeling of responsibility in its sentencing?

A. Yes. I spent a lot of time thinking about that decision whether or not to tell the jury about John's first sentence of death.

\* \* \*

A. Because this is what I had said to you earlier. I'm presenting to them a man who has already been sentenced to death by one jury. And I'm asking them to spare his life. I think a lot of people would see that as an irony, why should I, if he's already under one death sentence. What I wanted them to see was it was an excessive thing to sentence someone to another sentence of death, to another death sentence.

Q. In your opening statement which you made to the jury, you did not tell the jury any significant details about Mr. Middleton's life as mitigating factors that you would be presenting. Can you tell me why you did not?

A. I just generally don't put that kind of information into my opening statements.

\* \* \*

A. [My strategy was] To show the jury how excessive this was. That the State was seeking a second sentence of death for a man on whom they had already received a sentence of death.

\* \* \*

Q. You argue beginning at line 17[, page 1063]. "If you ask him why does it matter what you do as a jury in this case? And it might be said that Jackie

Marrs or Stacey's aunt Doris and her friend Krista Hicks and Randy's sister Lynn that it matter to them that two or more sentence of death are imposed."

A. Yes.

Q. What was your, what was your trial, what was your strategy for making that argument?

A. To try to I guess short-circuit or answer what I thought might be a rebuttal argument in the final half of the State's closing argument. I only get to argue once. So I try to answer as many of what I anticipate the State's rebuttals to be as possible.

\* \* \*

A. I can, my trial strategy for [mentioning the victims' families] is that we are not immune to the pain that a victim's family is suffering. And I want to somehow convey that to the jury. And I want to show the jury we're not disregarding their feelings, but the fact of the matter is you executed this man, they're still going to have to do what they do every day, what they're already doing.

Q. Let me show you line 16 on 1065. You say "Three sentences of death is excessive. Three sentences of death is wrong." Then you argue, "And it might be said to you that three murders is wrong too." What was your trial strategy for making that statement?

A. To try to anticipate and answer any rebuttal that the State might

offer in the final half of their closing argument.

Q. Let me, what I've done here on 1065, part of your argument line 24. "The fact of the matter is there's no question that John was convicted for the murder of Al Pinegar. Substantially so that's an aggravating circumstance there I think is their first one he's been convicted, I think it, it's their first one that he's been convicted of for a prior murder that has been proven." What was your trial strategy reason for making that statement in your argument?

A. I wasn't seeing any sort of guilt for the murder of Al Pinegar but for the fact he was convicted and it's going into my strategy that he was already under a sentence of death and to go any further to sentence him to additional sentences of death would be excessive.

\* \* \*

A. [I argued "we kill our killers"] To show what I thought was essentially an imbalance. We use our drug dealers in the community to go out and make more drug dealers to catch more drug users and more drug dealers, but we take somebody who is convicted of murder and we want a jury or members of the community to then impose a killing upon that person just to show how stupid it all is.

Q. Okay.

A. That we keep compounding the cycle of crime.

Q. Let me refer you to page 1073. Line 19. "Ladies and gentlemen,

that's evidence to support a sentence of life no matter how ironic it sounds to you, he's still a man who is loved." What was your trial strategy for saying no matter how?

A. He was already under a sentence of death. My feeling was this jury could have said why would we bother sparing the life of a man who's already condemned to death? I'm trying to say to them because there's still value in this man. There's still a reason. Even if he is already under one sentence of death, an additional sentence of death would be excessive. "It may be ironic I'm asking you to spare a life you may already view as condemned" but that's what I'm saying to them.

(P.Tr.357-358,360-361,402-407).

The motion court denied appellant's claim, stating:

43. Claim 8(Z) is denied. Counsel's comments in opening statement and closing argument were consistent with a reasonable trial strategy of directly confronting highly damaging evidence and circumstances while trying to persuade the jury that Movant did not deserve a death sentence, and that additional death sentences were unnecessary and excessive.

(P.L.F.533).

**a. counsel's strategy was reasonable**

In challenging the motion court's conclusion that counsel's arguments were part of a reasonable trial strategy, appellant claims that counsel's arguments were unreasonable because

they did not identify mitigating evidence that warranted imposition of a lesser punishment and because they urged the jury to decide punishment on an “entirely extralegal basis” (App.Br. 38). Appellant cites Hall v. Washington, 106 F.3d 742 (7th Cir.1997), to support his claim; however, in Hall, the facts were very different.

First, the defendant’s attorneys in Hall were not faced with the difficult situation of defending a man already convicted of murder and facing a death penalty. In the case at bar, appellant’s peculiar circumstances included the highly damaging fact that he was already facing a death sentence; thus, arguing for mercy based upon the excessiveness of additional death sentences was a reasonable argument tailored to appellant’s specific circumstances.

Second, the record in Hall showed that the defendant’s attorneys conducted virtually no investigation in preparation for penalty phase. Id. at 746. They did not return telephone calls from witnesses who would have testified favorably for the defendant, they did not contact the defendant in the weeks prior to the penalty phase, and they failed to contact at least ten witnesses who were willing to provide a substantial amount of beneficial mitigating evidence. Id. at 746-748. Instead, the attorneys called only three witnesses, including the defendant, who offered little or no mitigating evidence. Id. at 747-748. Then, in closing argument, having no mitigating evidence to rely upon, the attorneys invited the judge to disregard the law and attempted to persuade the judge that the death penalty was inappropriate based on religious and philosophical grounds. Id. at 747. Accordingly, the Seventh Circuit held that “Hall’s attorneys engaged in neither reasonable investigation nor logical argument.” Id. at 749.

In appellant’s case, however, counsel engaged in a reasonable investigation (as will be

discussed in subsequent points) and made reasonable arguments based upon appellant's specific circumstances. In fact, as outlined above, in addition to the arguments against the imposition of additional death penalties, counsel argued: (1) that the state's evidence was weak, (2) that a sentence of life imprisonment would enable the victims to continue with their lives, (3) that drugs had played an important role in the murders, (4) that appellant's drug use had affected his mind and changed his behavior and thinking, (5) that appellant was predisposed to depression and vulnerability to drugs, (6) that appellant's drug use had led to hallucinations and paranoid behavior, (7) that even the state's evidence revealed appellant's mental infirmities, (8) that appellant's drug use "took [him] out of a realm of a reasonable man and it put him into a realm of a man who is emotionally disturbed, under severe mental and emotional distress," (9) that the law as contained in the jury instruction never requires a death sentence, (10) that life imprisonment will confine appellant for the rest of his life, (11) that appellant is a "changed man" according to the testimony of various witnesses, (12) that appellant is still loved, (13) that appellant still has "value," and (14) that appellant has adjusted well to prison life (Tr.1062-1073). And in making these arguments, counsel cited to evidence presented by various witnesses at trial (Tr.1062-1073).

Thus, as is evident, while defense counsel argued extensively for mercy by stressing the allegedly excessive, inhumane, and inappropriate result of imposing additional death sentences, counsel also argued for the imposition of life imprisonment based upon the various types of mitigation evidence adduced at trial. Counsel's arguments were not simply an exhortation that the jury ignore the law and impose life imprisonment based upon wholly extrajudicial bases;

rather, counsel specifically told the jury to consider the evidence, to remember that the law did not require a death sentence under any circumstances, and to consider life imprisonment based upon appellant's peculiar circumstances.

In short, counsel's arguments were a reasonable means of confronting the fact that appellant had already been convicted of first degree murder for killing Alfred Pinegar. See State v. Rousan, 961 S.W.2d 831,851 (Mo.banc 1998)("mercy is a valid sentencing consideration"); Teaster v. State, 29 S.W.3d 858,860 (Mo.App.S.D.2000)(in DWI case, counsel's statement that defendant was "sobering up" was reasonable closing argument used to confront strong uncontradicted evidence of intoxication); Lytle v. State, 762 S.W.2d 830,833-834 (Mo.App.W.D.1988)(conceding some facts in the face of strong evidence is reasonable trial strategy to establish credibility); see also State v. Hamilton, 791 S.W.2d 789,797-798 (Mo.App.E.D.1990)(counsel expressed contempt for his client in an attempt to use reverse psychology); see generally State v. Parker, 886 S.W.2d 908,930 (Mo.banc 1994)(closing argument is a matter of trial strategy). Cf. Rousan v. State, 778 S.W.2d 827,829 (Mo.App.E.D.1989)("If defense counsel believes that stipulating to a fact will not prejudice his client's defense or is not vital to his case in chief, then it is a matter of trial strategy."). Because counsel's arguments were objectively reasonable, appellant cannot show that counsel was ineffective as contemplated by Strickland.

**b. appellant was not prejudiced**

Appellant also argues that counsel's arguments were not reasonable or prejudiced him because they (1) "open[ed] the door to factually false outside the record retaliatory argument"

that “portray[ed] federal courts as granting relief with great frequency in capital appeals such that additional death sentences were needed to ensure [appellant] was executed,” and (2) “lessened the jury’s sense of responsibility . . . contrary to the principles embodied in Caldwell” (App.Br.39-40). These assertions, however, are meritless, and they do not prove that the motion court clearly erred.

As the motion court stated:

Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. The movant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. [Strickland v. Washington, 466 U.S.] at 689. The fact that one might reasonably pursue a different strategy of defense than that chosen by counsel at trial is irrelevant. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. Id., at 689.

(P.L.F.527).

In virtually every case, a reasonable trial strategy will have potential and real drawbacks. That is simply the nature of trial. Here, counsel gave considerable thought to her trial strategy (P.Tr.357), and while she did not “want[] to open the door” to these arguments (P.Tr.410), she undoubtedly knew that her argument would engender some kind of response. She also undoubtedly knew that she had to address appellant’s prior conviction and death sentence. That

the state chose to respond to defense counsel's arguments was simply a natural consequence of employing this strategy.

Moreover, there is no reasonable probability that, in the absence of defense counsel's arguments, the outcome of appellant's penalty phase would have been different. In fact, if defense counsel had failed to confront the evidence of appellant's prior conviction and sentence of death, there is every reason to believe that the jury would have reached the same result. In truth, because a prior conviction for murder in the first degree is such powerful evidence in aggravation, it would have been completely unreasonable for defense counsel to leave this aspect of the case unaddressed.

Additionally, the prosecutor's comment about reversals on appeal (Tr.1074)(while outside the record) was not factually false, and it did not reference any fact not commonly known. People know that death penalty cases are reversed on appeal. In addition, the prosecutor did not argue that federal courts reverse with "great frequency," as appellant asserts (App.Br.39). What the prosecutor said was, "She didn't talk to you about the many different levels of appeals that these cases go through. She didn't talk to you about the Federal Court of Appeals and how often those cases get overturned on appeal because they're death penalty cases" (Tr.1074).

Thus, as is apparent, the prosecutor referred to reversals on "the many different levels of appeals;" and, according to the report appellant cites (and assuming its accuracy), 68% of death-penalty cases are reversed in state and federal appellate courts. See Liebman, Fagan, West, and Lloyd, Capital Attrition: Error Rates in Capital Cases, 1973-1995, 78 Tex.L.Rev.

1839,1849-1852 (2000).

Again, assuming the accuracy of the report, respondent submits that 68% is quite “often.” Accordingly, the prosecutor’s comment, which was a proper response to defense counsel’s arguments, was not false. And, because it referred to a phenomenon generally known to the public (reversals on appeal), it was not based upon any special knowledge that only a prosecutor would have.

Finally, defense counsel’s statements were not contrary to Caldwell v. Mississippi, 472 U.S. 320,105 S.Ct. 2633,86 L.Ed.2d 231 (1985). To establish a Caldwell violation, a defendant necessarily must show that the arguments improperly described the role assigned to the jury by local law. State v. Richardson, 923 S.W.2d 301,321 (Mo.banc 1996). Here, defense counsel’s comments did not improperly describe the jury’s role; rather, the comments were intended to persuade the jury that a death sentence was not appropriate (or necessary) by telling the jury, quite forcefully, that appellant’s other sentence of death was final, irrevocable, and likely to result in the defendant’s death. The comments did not suggest that the responsibility for determining the appropriateness of a death sentence rested elsewhere. And, to the extent that jury might have thought that their verdicts did not matter in this case (due to the other death sentence previously entered in the Pinegar case), the prosecutor’s comments about reversals on appeal adequately informed the jury that their decision in this case was still critically important.

## **2. The state’s rebuttal**

In addition to alleging that counsel unreasonably opened the door to the prosecutor’s

rebuttal, appellant claims that counsel was ineffective for failing to make additional objections to the prosecutor's retaliatory arguments. However, because defense counsel opened the door, defense counsel had no meritorious basis to object.

In any event, after defense counsel vigorously argued that appellant could only be "killed once," that "Missouri is a killing state," that people under a sentence of death are "spared" only on "rare occasions," that additional sentences of death are "a waste," that the jury did not need to "condemn [appellant] any further," that "[appellant] is not getting out," that "[a]s it is, [appellant] never gets out," and that with a sentence of life imprisonment "[appellant]" never gets out" (Tr.1064-1067,1073), the prosecutor responded as follows:

[THE PROSECUTOR]: Ms. Davis may be real sure that this defendant isn't going to get out, but I'm not.

[DEFENSE COUNSEL]: Objection, personalization. Calls for speculation, Judge.

THE COURT: The objection will be overruled. Proceed.

[THE PROSECUTOR]: Ms. Davis mentioned to you about those few occasions where a person's life is spared. She didn't talk to you about the many appeals that people go through.

[DEFENSE COUNSEL]: Judge, I'm going to object to the levels of appeal. That's not relevant and not been evidence in this trial.

THE COURT: The objection will be overruled. Proceed.

[THE PROSECUTOR]: She didn't talk to you about the many different

levels of appeals that these cases go through. She didn't talk to you about the Federal Court of Appeals and how often those cases get overturned on appeal because they're death penalty cases. She didn't talk to you about any of that, did she?

(Tr.1074).

Appellant contends that counsel should have objected more extensively to these arguments. In particular, appellant claims that counsel was ineffective for failing to (1) object "again" to the argument about "how often those cases get overturned," (2) object as "arguing outside the evidence," (3) object that the argument was "factually false, and (4) object that it was "improper to suggest [that] if death was not imposed" appellant could be released (App.Br.41).

In denying these claims, the motion court stated:

22. Movant has failed to overcome the presumption that the decisions of the attorneys, including whether or not to object, was a strategic choice. State v. Tokar, 918 S.W.2d 753,768 (Mo.banc 1996). While Ms. Kerry did attempt to claim to have "no reason" for some of her actions, the Court concludes—based on its observations at trial and at this hearing—that Ms. Kerry was overly eager to acknowledge her "ineffectiveness." The Court does not find such "admissions" credible.

...

42. Claim 8(Y) sets forth a long list of complaints regarding the

opening and closing argument in the penalty phase. The Court finds that Movant has failed to show that any of these claims would have changed the outcome of the trial. Counsel made a conscious decision to not object to every objectionable matter. This is reasonable trial strategy and counsel was not ineffective.

(P.L.F.529,532). The motion court did not clearly err.

“A prosecutor has considerable leeway to make retaliatory arguments in closing.” State v. Middleton, 998 S.W.2d 520,530 (Mo.banc 1999). “A defendant may not provoke a reply and then assert error.” Id.

Here, the prosecutor’s comments were retaliatory to defense counsel’s arguments, and, accordingly, additional objections would have been without merit. In any event, defense counsel did object that the prosecutor was arguing outside the evidence (Tr.1074). That objection was overruled, and there is no reason to believe that another identical objection would have been sustained.

In any event, as discussed above, the prosecutor’s comments were not false and they did not imply special knowledge. People know death penalty cases are reversed on appeal; and, according to the report appellant cites, 68% of death-penalty cases are reversed on appeal. Also, the prosecutor did not suggest that, if death was not imposed, appellant would be released; rather, the prosecutor simply pointed out that defense counsel’s argument that “[appellant] never gets out” was incomplete because there was a possibility that appellant could get out if his case were reversed.

In short, because the prosecutor's comments were urged by counsel's arguments, counsel had no grounds for a meritorious objection. Moreover, because counsel did object without success, there is no reasonable probability that further objections would have been successful.<sup>4</sup>

### **3. The Pinegar murder conviction was valid statutory aggravator**

Appellant also argues that counsel was ineffective for failing to object to the state's use of his Pinegar murder conviction as a statutory aggravator (App.Br.43). Citing State v. Harris, 870 S.W.2d 798,813 (Mo.banc 1994), he claims that § 565.032.2.(1) authorizes the use of a prior murder conviction only if the prior conviction involved a murder that was committed "prior to the charged offense" (App.Br.43).

In denying this claim, in addition to the findings and conclusions made with regard to Claim 8(Y)(which are quoted above), the motion court stated:

44. Claim 8(AA) sets forth a long list of complaints. It is denied. .

..

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<sup>4</sup> Appellant's reliance upon State v. Jordan, 420 So.2d 420 (La.1982), for the proposition that the prosecutor may not argue the possibility of release is misplaced. It is not controlling, and its holding conflicts with this Court's decisions in State v. Middleton, 998 S.W.2d at 529-530; and State v. Richardson, 923 S.W.2d at 321 (argument regarding executive clemency made in response to defendant's assertion that defendant would never get out of prison). See also State v. Jordan, 420 So.2d at 431-432 (dissenting opinions).

As to other evidence in aggravation of punishment (including . . . evidence of Movant's prior convictions) counsel was no ineffective for failing to object because it was admissible to aid the jury in making an individualized determination of the appropriate sentence. Movant has not shown that any objection would have had any probability of changing the outcome of his trial. . . .

The remaining allegations of error in Claim 8(AA) are denied. Movant has not shown either that counsel was incompetent, or that, but for counsels [sic] alleged errors, there is a reasonable probability that the outcome of his trial would have been different.

(P.L.F.534-535). The motion court did not clearly err.

On direct appeal, appellant challenged the use of the Pinegar murder conviction as a statutory aggravator on the same grounds. This Court rejected the claim, saying, "if 'there is a finding of one valid aggravating circumstance beyond a reasonable doubt'" this Court will affirm. State v. Middleton, 998 S.W.2d at 530. Thus, even if counsel had managed to preclude the state from using the Pinegar murder as a statutory aggravator, there is no reasonable probability that the outcome of the trial would have been different because there were still two valid statutory aggravators found by the jury, and, as discussed in the next subsection, evidence of the Pinegar murder was admissible for other purposes.

Additionally, the record shows that defense counsel did object, in limine, to the state's use of the Pinegar murder conviction as a statutory aggravator (L.F.563-564). Thus, there is

no reason to believe that a renewed objection would have changed the outcome of appellant's trial.

Moreover, the submission of this statutory aggravating factor was authorized by the language of § 565.032.2.(1), RSMo 2000, and by the general principles that govern any sentencing hearing. Section 565.032.2.(1) states that a statutory aggravating circumstance is that the “offense was committed by a person with a prior record of conviction for murder in the first degree[.]” This language does not limit the “prior record of conviction” to prior convictions that were entered, or which occurred, before the charged offense.<sup>5</sup> In fact, to comport logically with the aim of individualized sentencing, the jury should consider all relevant facts as they exist at the time of sentencing.

Thus, while dicta in Harris suggests otherwise, it makes no sense to conclude that a serious assaultive conviction subsequent to the charged offense can be used to aggravate the charged offense but that a subsequent murder cannot. However, even if that is so, respondent submits that first degree murder is always a serious assaultive offense; thus a prior conviction for first degree murder (whenever it occurred) can be submitted as a statutory aggravator. See State v. Smith, 781 S.W.2d 761,769 (Mo.banc 1989).

#### **4. Details of the Pinegar murder were admissible in penalty phase**

Next appellant claims that counsel was ineffective for injecting the Pinegar death

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<sup>5</sup> As this Court noted in appellant's direct appeal, the language from Harris that appellant relies upon is “dicta.” Respondent submits that it should not be followed.

sentence into penalty phase and for failing to object to the state's use of the Pinegar murder during penalty phase (App.Br.44-45). As discussed above, however, counsel's use of the Pinegar death sentence was part of a reasonable trial strategy that was intended (along with other relevant sentencing factors) to convince the jury that life imprisonment was appropriate for appellant's circumstances.

In any event, appellant suffered no prejudice from counsel's actions because the jury would have been informed of appellant's death sentence, and the details of the Pinegar murder would have been elicited, with or without counsel's aid or objections. "Appropriate sentencing requires the fullest information possible concerning the defendant's life and characteristics." State v. Gilyard, 979 S.W.2d 138 (Mo.banc 1998)(citing Williams v. New York, 337 U.S. 241,247, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)). "In the penalty phase of a capital trial, the character and history of the defendant, including prior crimes committed by that defendant, are admissible as relevant to the sentencing." State v. Middleton, 995 S.W.2d 443,463 (Mo.banc 1999); State v. Morrow, 968 S.W.2d 100,114-115 (Mo.banc 1998)("The importance of the death penalty decision entitles the sentencer to any evidence that may assist it in making that decision."); State v. Richardson, 923 S.W.2d at 330.

Here, evidence of the Pinegar murder shed light upon appellant's character. See State v. Morrow, 968 S.W.2d at 114-115 (details surrounding murder of another person were properly admitted); State v. Smith, 781 S.W.2d at 769 (details of prior convictions plainly relevant to character); see also State v. Simmons, 955 S.W.2d 729, 740 (Mo.banc 1997).

In addition, inasmuch as the Pinegar murder was part of a common scheme or plan to

murder suspected “snitches,” it was particularly relevant because it was evidence of one of the statutory aggravators. The jury was instructed to find that the murders involved “depravity of mind” only if it found that appellant killed the victims as part of his plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life (L.F.629,636). Thus, the extent and seriousness of appellant’s crimes was shown by evidence of the Pinegar murder. See State v. Middleton, 998 S.W.2d at 531 (this Court determined that appellant’s death penalty was not disproportionate, in part, because appellant composed a list of suspected informants and killed them).

In short, the details of appellant’s prior murder conviction were highly relevant to the jury’s individualized determination of the appropriate sentence in this case.

#### **5. Death penalty was appropriate because of Pinegar murder**

Lastly, appellant claims counsel was ineffective for “failing to object to arguments that told the jury to impose death” because appellant killed Pinegar (App.Br. 47). The prosecutor argued:

(1) “justice demands that this man be held accountable not for just one murder but for all three murders” (Tr.1061);

(2) “This man went out and committed not one, not two, but three murders and threatened the lives of at least three other people. You didn’t do that. He did. It’s for his acts he’s on trial. And it’s for his acts he needs to be punished. That’s the whole point” (Tr.1075);  
and

(3) “Show him as much mercy as he showed Stacey who he shot four times in the back.

Show him as much mercy as he showed Randy who he shot twice in the back. And show him as much mercy as he showed for Al Pinegar who he shot twice in the back” (Tr.1075-1076).

None of these arguments, however, was improper. The evidence of the Pinegar murder was admitted during penalty phase precisely because it was a relevant factor to consider in determining whether to impose a sentence of death. See State v. Middleton, 995 S.W.2d at 463 (evidence of Hamilton and Hodge murders was “used to help the jury to understand the prior acts of Middleton for the purpose of determining his punishment for the murder of Pinegar.”). The defendant’s character, as shown by past acts, was a proper factor to consider in determining whether to impose death sentences. See State v. Morrow, 968 S.W.2d at 114-115; State v. Smith, 781 S.W.2d at 769.

Appellant’s reliance upon Randall v. State, 806 So.2d 185 (Miss.2001), is misplaced. First, it is not controlling. Second, in Randall, the prosecutor commented upon an unrelated murder case in which life imprisonment was imposed and then argued that the only way for the family members of the other murder victim to obtain justice was for the jury to impose a death sentence in Randall’s case.

In appellant’s case, however, the prosecutor argued that justice had been done in the Pinegar case, and that justice was also required for the murders of Hamilton and Hodge. There was no suggestion that justice had not been done in the Pinegar case and that the jury, therefore, should take this second opportunity to punish appellant for that murder. Additionally, the Pinegar murder, unlike the other murder in Randall, was part of a single plan to kill multiple people. It was, therefore, a highly relevant factor to consider in determining

whether death sentences were appropriate. Also, the prosecutor's second and third comments were proper retaliation to defense counsel's arguments that (1) appellant had already been sufficiently condemned in the Pinegar case, and (2) that mercy was appropriate in this case.<sup>6</sup>

### **C. Conclusion**

In sum, counsel was not ineffective in dealing with the evidence of the Pinegar murder because (1) it was incumbent upon counsel to confront this highly damaging evidence, and (2) objections to this clearly admissible evidence would have been futile.

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<sup>6</sup> Appellant's reliance upon Commonwealth v. LaCava, 666 A.2d 221 (Penn.1995), is also misplaced. First, it is not controlling. Second, the court vacated the death sentence in LaCava because the prosecutor's extensive argument about the defendant's involvement in drug trafficking was intended to convince the jury to impose death "as a form of retribution for the ills inflicted on society by those who sell drugs" rather than as punishment for the defendant's murdering a police officer. Id. at 236-237. Thus, unlike the arguments in appellant's case (which urged the jury to impose death based upon appellant's character and crimes), the arguments in LaCava suggested it was proper to punish the defendant for the acts of many other drug dealers.

## **II. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ASSERT VARIOUS CLAIMS ON DIRECT APPEAL REGARDING EVIDENCE AND ARGUMENTS RELATED TO THE PINEGAR MURDER.**

Appellant contends that the motion court clearly erred in denying his claims that appellant counsel was ineffective for failing to assert: first, that evidence and argument related to the Pinegar murder were improperly admitted during guilt phase; and second, that the prosecutor improperly commented upon the appellate process (App.Br.50).

### **A. The Standard Of Review**

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” Moss v. State, 10 S.W.3d 508,511 (Mo.banc 2000).

“The movant has the burden of proving the movant’s claims for relief by a preponderance of the evidence.” Supreme Court Rule 29.15(i).

### **B. Appellate Counsel Was Competent**

To prevail on a claim of ineffective assistance of counsel, the movant must “show that counsel’s representation fell below an objective standard of reasonableness.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id.at 2068.

To support a Rule 29.15 motion due to ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error which would

have required reversal had it been asserted and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it. Moss v. State, 10 S.W.2d at 514. “The right to relief . . . due to ineffective assistance of appellate counsel inevitably tracks the plain error rule; *i.e.*, the error that was not raised on appeal was so substantial as to amount to a manifest injustice or a miscarriage of justice.” Id. at 514-515.

### **1. Pinegar-murder evidence in guilt phase**

At the evidentiary hearing, when asked why she did not assert error based upon the admission of Pinegar-murder evidence during guilt phase, appellate counsel stated:

I guess there were two reasons. The only, the statement that was admitted, that was made during the guilt phase about Alfred Pinegar didn't describe the murder. What it said was, what the witness was permitted to say was he went to the police after Mr. Pinegar's body was found and that he heard Mr. Middleton say that he wanted to take care of some people, among them someone named Alfred. The questioning was a response to a defense question to the witness about how there were, there was some delay in his going to the police which I guess defense counsel was trying to use to impeach credibility. And I think that I felt number one that the reference wasn't particularly egregious I guess for want of a better term and number two that defense probably had opened it up. So I didn't think there was going to be permitted in raising that as a ground for reversal.

(P.Tr.186). When asked about the prosecutor's commenting about the Pinegar murder in

closing, appellate counsel stated:

Well, the trial objection was completely nonspecific. So it would have been a plain error point. Plain error points in my experience do not fa[re] well in argument on appeal. I'm sorry. Plain error points on appeal relating to closing arguments don't fa[re] well in Missouri. So I didn't think it had really enough merit for me to argue it.

(P.Tr.187).

In denying these claims, the motion court stated:

16. Movant called his appellate counsel, Elizabeth Carlyle, to testify. She testified that she raised all issues which she believed had merit and did not appeal those which were without merit. Movant was not denied the effective assistance of appellate counsel.

...

45. Claim 8(BB) is denied. Appellate counsel testified that she raised all issues that she deemed had merit. To support a Rule 29.15 motion due to ineffective assistance of appellate counsel, . . . . [citing test from Moss v. State, supra]. None of Movant's several claims fall into this category of error.

(P.L.F.525,535). The motion court did not clearly err.

At trial, the reference to Pinegar's murder was elicited only after counsel attempted to create a false impression and undermine John Thomas' credibility by pointing out that Thomas had not "run to the police" and told them that appellant had a "stash box" that had belonged to

Randy Hamilton (Tr.575-576). Thomas had testified on direct examination that appellant had said that the owner of the stash box would not be needing it anymore (Tr.558). Defense counsel cross-examined Thomas as follows:

Q. Now, this drug community, these people that you know in these areas that are involved in the drug sales and drug use, is it common for people to trade goods like items that they own for drugs?

A. Yes.

...

Q. And did you know that “Happy Hamilton lived with John for a while like recently, recent to the June 25th date that you were over there? You may not know that.

A. No, I didn’t know.

...

Q. So when you’re over there that morning, 7 a.m. and you see “Happy’s” stash box there at John’s house, you don’t run to the police right away and tell them that John’s got “Happy’s” stash box, do you?

A. No.

(Tr.575-576). In response to counsel’s cross-examination, the court allowed the prosecutor to elicit the following:

Q. When you say “Happy’s” stash box, did you have any reason to be worried at that time?

A. No.

Q. You didn't go to the police as defense counsel pointed out?

A. No.

Q. But you eventually went to the police?

A. Yes.

...

Q. What prompted you to think there was something wrong to go to the police?

A. Well, at the time I seen the box and he said this, I thought it was just, you know, maybe they had traded for drugs. And then when I got home, I told my brother what he'd, what John had told me.

...

Q. Was there a specific event which happened on or about the 26th that caused you to believe —

A. They found Alfred's body.

...

Q. Who were the people that the defendant indicated to you that needed to be taken care of?

A. "Happy", Alfred, Dave Cox, Billy Worley and Leonard Riley was the ones I can remember anyway.

Q. And once you found out that Alfred Pinegar's body had been found, did

this prompt concern on your part?

A. Yes.

Q. And did you go to the police?

A. Yes.

(Tr.578-580).

As is evident, on cross-examination counsel sought to give the jury the misleading impression that Thomas never saw anything strange about the presence of the “stash box” at appellant’s residence. The purpose of this cross-examination was to undermine Thomas’ credibility and create the impression that Thomas neither saw nor heard anything indicating appellant’s guilt. In fact, however, the opposite was true. Thomas had seen the “stash box,” and he had heard appellant planning to kill suspected “snitches” — one of whom turned up dead.

Thus, the court’s decision to allow the prosecutor to complete the picture was a proper exercise of discretion. Defense counsel opened the door, and it was only fair that the state be allowed to counter the incomplete and potentially misleading picture that the defense had painted.

Additionally, evidence of the Pinegar murder was admissible as part of a common plan. The common scheme or plan exception to the rule that bars evidence of other crimes applies when another crime is “interconnected to and nearly contemporaneous with a murder . . . and set the context for that offense.” State v. Roberts, 948 S.W.2d 577,591 (Mo.banc 1997). “[T]he common scheme or plan exception most often applies when the evidence tends to show that the uncharged misconduct proceeds from a single plan formed in advance of both crimes.”

Id. at 591.

Here, as outlined in the Statement of Facts, appellant had composed a list of individuals that he intended to kill as part of a common plan to eliminate suspected “snitches” (see e.g. Tr.558-559). Accordingly, evidence that appellant had killed another person on the list was admissible to show appellant’s guilt with regard to Hamilton.

In sum, appellate counsel was not ineffective for failing to assert error on direct appeal because the reference to the Pinegar murder was admissible to counteract counsel’s cross-examination and to prove appellant’s guilt. Moreover, because the evidence was properly admitted, the prosecutor properly argued the evidence in closing argument. Thus, it would have been futile to assert a plain-error claim on appeal.

## **2. The state’s penalty-phase rebuttal**

In addition to the foregoing, appellant also contends that appellate counsel was ineffective for failing to assert additional claims of error based upon the state’s penalty-phase rebuttal argument that death penalty cases are reversed on appeal (App.Br.57). In addition to the claim that was actually asserted by appellate counsel, appellant claims that counsel should have asserted that the arguments (1) improperly referenced matters outside the record, (2) falsely represented the frequency of Federal Courts of Appeals reversing death penalty cases, and (3) improperly suggested that if death was not imposed appellant might be released from prison (App.Br.57).

These assertions of error are identical to the objections that appellant says trial counsel should have made at trial. See Point I.B.2, above. Thus, had appellate counsel attempted to

assert these claims of error on direct appeal (claims that were not preserved), they would have failed for the reasons outlined in Point I.B.2, above.

### **III. THE STATE DID NOT FAIL TO DISCLOSE ANY DEALS.**

Appellant contends that the motion court clearly erred in denying his claim that the state failed to disclose deals it had made with John Thomas and Dan Spurling for their testimony (App.Br.62).

#### **A. The Standard Of Review**

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” Moss v. State, 10 S.W.3d 508,511 (Mo.banc 2000).

“The movant has the burden of proving the movant’s claims for relief by a preponderance of the evidence.” Supreme Court Rule 29.15(i).

#### **B. There Were No Deals For Testimony**

In denying appellant’s claims, the motion court stated:

10. Movant then admitted into evidence Exhibits 4-16, criminal files of Dan Spurling. These records were offered in support of Movant’s claim that the State made a deal with Dan Spurling in exchange for his testimony that was not revealed to the defense. The exhibits were offered without objection. The exhibits do not support the claim, which is denied. The Court notes that the charges were dismissed by the State on September 5, 1996, or March 31, 1997—prior to Movant’s trial and sentencing. There is no evidence to support the claim that there was any deal, much less that any deal was made in exchange for Mr. Spurling’s cooperation.

11. Exhibit 17 were records of witness John B. Thomas related to his criminal charges for the sale of methamphetamine. There is nothing in this evidence that suggests a deal was made.

...

36. Claim 8(S) is denied. The Court finds there was no “deal” with John Thomas and the State which related in any way to his testimony against Movant. Thomas testified there was no deal (Tr.559). Movant’s Exhibit 42 does not refute that and Movant makes no connection, and the Court finds there was none.

...

38. Claim 8(U) asserts that the State failed to reveal a “deal” with Dan Spurling. The Court finds that there was no deal that was undisclosed. It would be a very unusual practice for the State to have pending cases disposed of prior to a witness’s testimony, and it would be an unwise practice by the State. There is no evidence to overcome the presumption that no deal occurred. This claim is denied.

(P.L.F.10-11,531-532).

At trial, the defense filed a motion that the state reveal any agreements that had been made with prosecution witnesses (Tr.69). The defense asked specifically that the state divulge any consideration given to any witness,

including immunity grants, money, expense fees, clothing, food, shelter,

treatment or maintenance for drug addiction or alcohol addition, assistance to witnesses; family members or friends of witnesses, any special favorable treatment that the witness might have received as an inmate or pretrial detainee, any plea agreements, promises of nonprosecution, deferred prosecution, any agreements that the State would assist with recommending parole or obtaining parole, clemency or prosecution in other jurisdictions, anything that could arguably create an interest or bias in the witness against, in favor of the State or against the defendant.

(Tr.69). The prosecutor responded:

Judge, we filed a letter with defense counsel I think December 10th and listing all priors of all our witnesses in the case as well as any consideration that has been given. There are no deals per se with any of the witnesses in the case. However, Dan Spurling was given a thousand dollars upfront before the case was even filed I believe, this case was filed, but subject went to the Alfred Pinegar case being filed to relocate his family. And that was as a witness protection.

(Tr.70). Defense counsel agreed that that information had been disclosed, and the trial court took the motion to reveal any agreements with the case “in the event that there is some agreement that’s made” (Tr.70).

**1. John Thomas had no undisclosed deal or hope of leniency**

At trial, John Thomas admitted that he had been arrested on June 10, 1995, on the charge of delivering methamphetamine (Tr.556). Thomas also admitted that the charge was

still pending against him (Tr.560-561); however, he testified that he had “not made any kind of deal with the State” (Tr.559). Thomas further testified that after his arrest, and after talking with Trooper Mike Spease, that his bond was “reduced” to a property bond, and that he was able to bond out of jail (Tr.563). He testified, however, that he did not think that the bond reduction had anything to do with Spease (Tr.563). He also testified that he had talked to Spease about becoming an informant for law enforcement (Tr.570). As to the delay in his pending case, Thomas testified that the prosecutor of Harrison county was “postponing it” (Tr.573).

At the evidentiary hearing, appellant introduced a certified copy of the court file (and a copy of the prosecutor’s case file) from Thomas’ case which was finally resolved after Thomas had testified at appellant’s trial (Mov.Exs.17,42). The docket sheet contained the following entry:

2-27-98 ) appears with counsel, Mr. Gary Allen, and waives preliminary hearing in open court. State appears by Ms. Chris Stallings, and state advises delay in prosecution due to )’s participation as witness in companion proceedings. ) bound over to Div I and to appear at 9 a.m., March 17, 1998, and file to be certified to said division.

(Mov.Ex.42). Another docket entry, entered after Thomas testified in appellant’s case on March 31, 1998, stated:

4-21-98 State appears by Pros. Atty. Defendant appears in person and by atty. State files information charging defendant with class C

felony of attempt to sell controlled substance.<sup>[7]</sup> Defendant enters a plea of guilty. Upon examination court finds said plea to be knowingly, voluntary and intelligently made and [illegible] is accepted by court. Sentencing is deferred and PSI is requested of board of probation and parole. Sentencing is set for June 18, 1998, at 9:00 a.m. Bond is cont'd.

(Mov.Ex.42). Then, on September 10, 1998, Thomas was sentenced, but the court suspended imposition of sentence and ordered a five-year probation (Mov.Ex.42).

Citing Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Hayes v. State, 711 S.W.2d 876 (Mo.banc 1986); and Commonwealth v. Strong, 761 A.2d 1167 (Penn.2000), appellant asserts that the circumstances surrounding Thomas's guilty plea show that "there was 'an understanding' that Thomas would be treated with leniency" if he testified favorably in appellant's case (App.Br.73). Actually, however, the circumstances of appellant's case do not show any "understanding" or any sort of deal.

In each of the cases cited by appellant, there were actually discussions between the prosecutor (or someone in the prosecutor's office) and the witness who testified pursuant to a "deal" or "understanding" (see App.Br.71-72). In appellant's case, however, there was

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<sup>7</sup> As appellant points out, Thomas' charge had been reduced from a class B to a class C felony (Mov.Ex.42).

absolutely no evidence that the prosecutor (an assistant attorney general) had any discussions with Thomas about any deals or potential deals. Furthermore, the assistant attorney general who tried appellant's case had no authority to control Thomas' Harrison County case.

There was also no evidence that the Harrison County prosecutor had any discussions with Thomas about favorable treatment in his pending case if he testified for the state in appellant's case. In fact, Thomas never indicated in any way that he was expecting any favorable treatment or that he had been given any assurance or intimation that his pending case might turn out better if he testified for the state in appellant's case.

Appellant cites the above-quoted docket entry which indicated that Thomas' pending case was delayed "due to )'s participation as witness in companion proceedings" (App.Br.73). However, there was never any evidence, e.g., from the Harrison County prosecutor, that the "companion proceedings" were the proceedings in appellant's case. In fact, the phrase "companion proceedings" would seem to indicate proceedings related to Thomas' pending case, e.g. other drug-related offenses arising out of events in Harrison County. In any event, even if the "companion proceedings" were appellant's case, a delay in the pending case (followed by a negotiated guilty plea) does not prove that Thomas was given a deal for his testimony.

In sum, appellant failed to prove by a preponderance of the evidence that anything that happened in Thomas' pending case was connected to Thomas' testimony in appellant's case. Thomas denied any deal; the prosecutor denied any deal; and there was no evidence of cooperation or discussions among the prosecutor in appellant's case, the Harrison County

prosecutor, and Thomas. The motion court did not clearly err.

## **2. Dan Spurling had no undisclosed deal or hope of leniency**

At trial, Dan Spurling admitted that he had convictions for selling marijuana and endangering the welfare of a child (Tr.528). He testified that he had not received any deals for his testimony (Tr.528). Spurling also admitted that after talking to the police about appellant's case in July 1995, he "pick[ed] up some charges" in Iowa for possession of a controlled substance and possession of an unlicensed firearm (Tr.538). With regard to those two charges, Spurling testified that "[t]hey were never brought forward" (Tr.539). Further, he testified that he had not received any deal whereby those charges were dismissed in exchange for his testimony (Tr.539). He testified that his motive for testifying in appellant's case was that he "felt that it needed to be done. To save the families" (Tr.539).

On cross-examination defense counsel elicited the fact that Spurling only gave the police information about appellant after he had picked up the new charges in Iowa (Tr.541-542). Defense counsel also elicited the fact that Spurling had received a thousand dollars from the state to relocate his family (Tr.542). In addition, defense counsel elicited the fact that Spurling had talked to the sheriff in August 1995 about attempting to get some "cases . . . dismissed in Iowa" (Tr.543). However, at that time, Spurling refused "to make any kind of deals against" appellant (Tr.543). Despite Spurling's refusal to make a deal, his Iowa cases were eventually dismissed (Tr.543).<sup>8</sup>

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<sup>8</sup> The sheriff testified that he did not ask the Iowa prosecutor to dismiss the cases or

With regard to Spurling's two prior convictions, defense counsel also elicited the fact that selling marijuana and endangering the welfare of a child were not the original charges (Tr.543-544). In fact, Spurling had been charged with assault in the second degree and armed criminal action (Tr.544-545). Thus, as defense counsel elicited, Spurling avoided mandatory prison time on the armed criminal action charge and ultimately (after pleading guilty to the lesser offenses) spent only four months in prison before getting out on probation (despite the 15-year sentence imposed) (Tr.545-546).

After defense counsel elicited all of this evidence that tended to indicate that Spurling had received some favorable treatment, Spurling again testified (on re-direct) that the state had never made any deal with him for his testimony (Tr.552). He also testified that he had never asked the state for a deal or requested leniency (Tr.553). Moreover, he reiterated the fact that he had refused to make a deal when offered leniency on the Iowa charges (Tr.553).

At the evidentiary hearing, appellant introduced several exhibits related to Spurling's prior convictions and prior pending charges (P.L.F.17-25;Mov.Exs.4-16). Movant's Exhibits 5, 6, 10, 12, 13, and 14 related to the prior convictions and charges that Spurling had testified about at trial. In particular, they revealed that Spurling had originally been charged with the class A felony of sale of a controlled substance near a school (Mov.Exs.6,12), assault in the second degree (Mov.Exs.5,10), endangering the welfare of a child (Mov.Ex.13), and armed

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“go easy” on Spurling (Tr.776). He knew that the Iowa prosecutor had dismissed the cases, but the prosecutor apparently dismissed them because they were “weak” (Tr.777-778).

criminal action (Mov.Exs.14).

Additionally, they revealed that Spurling had also been charged with another count of the class A felony of sale of a controlled substance (Mov.Exs.9,15),<sup>9</sup> unlawful use of a weapon (Mov.Exs.4,11), another count of assault in the second degree (Mov.Exs.7,16), and another count of armed criminal action (Mov.Ex.8).<sup>10</sup>

To put it simply, the various exhibits showed that Spurling had been charged with a total of eight different offenses. Two of those offenses, assault in the second degree and an associated armed criminal action were dismissed on September 5, 1996 (long before Spurling pled guilty to his two convictions and long before appellant's trial)(Mov.Exs.7,8,16). It is not apparent, however, why those offenses were dismissed.

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<sup>9</sup> This second class A felony drug charge was consolidated with the charge contained in Movant's Exhibit 6.

<sup>10</sup> Despite appellant's assertion (App.Br.69), there is no evidence that Spurling was ever charged with assault in the first degree. The pre-sentence investigation report does mention two class A felony drug charges and an "Assault 1st" charge that was "dismissed;" however, there is no charging document for assault in the first degree, and it seems apparent that the report writer was referring to Spurling's assault second charge that was dismissed on March 31, 1997 (right after Spurling's guilty pleas, which were entered on January 27, 1997, and prompted the pre-sentence investigation report)(see Mov.Exs.5,6,9,10,12,13,15). Spurling's other assault second and armed criminal action charges had been dismissed on September 5, 1996, long before Spurling pled guilty (Mov.Exs.7,8,16).

The remaining six offenses were all disposed of at or near the time that Spurling pled guilty (also long before appellant's trial). More specifically, after Spurling pled guilty to sale of a controlled substance (reduced from a class A felony to a class B felony) and endangering the welfare of a child on January 27, 1997 (see Mov.Exs.6,12,13), the other four charges were all dismissed on March 31, 1997 (Mov.Exs.4,5,9,10,11,14,15). Thus, it is apparent that Spurling worked out some kind of deal with the Harrison County prosecutor to dispose of all of his remaining cases.

What these exhibits failed to prove, however, was that there was any agreement between Spurling and the assistant attorney general that prosecuted appellant's case. Nor did these exhibits contain one iota of evidence that Spurling's plea agreement included a provision that Spurling testify favorably for the state in appellant's case. To the contrary, the plea agreement merely reduced one of appellant's charges, and dismissed four others that were pending. As to the details of the plea agreement, as memorialized by Spurling's defense counsel, the only apparent agreement was that "Mr. Spurling would plead guilty to B distribution of marijuana and D endangerment of a child as completely blind or open pleas" — "open" meaning that the Harrison County prosecutor would not recommend any particular sentence (Mov.Ex.12;Tr.545).<sup>11</sup>

There was simply no evidence that there were any discussions prior to (or after) Spurling's guilty pleas that promised or intimated that Spurling would be granted leniency if

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<sup>11</sup> Appellant's trial counsel knew that Spurling's plea was "open" (Tr.545).

he testified for the state in appellant's case. Indeed, Spurling never indicated that he had received or expected to receive leniency in his Harrison County cases if he testified for the state. Moreover, as the motion court noted, all of Spurling's prior cases were disposed of prior to appellant's trial. Thus, Spurling was well past the point of jeopardy; and, consequently, in the absence of an agreement, there was no reason to believe that Spurling had a greater incentive to testify falsely for the state. See State v. Simmons, 944 S.W.2d 165,179-180 (Mo.banc 1997)(citing State v. Joiner, 823 S.W.2d 50,53 (Mo.App.E.D.1991)).

In sum, appellant failed to prove that anything that happened in Spurling's earlier cases was connected to appellant's case. Spurling denied any deal; the prosecutor denied any deal; there was no evidence that the prosecutor knew about all of Spurling's previously pending charges; and there was no evidence of cooperation or discussions among the prosecutor in appellant's case, the Harrison County prosecutor, and Spurling.

**IV. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CALL DOCTORS JONATHAN LIPMAN, PHILIP MURPHY, AND A.E. DANIEL DURING GUILT PHASE.**

Appellant contends that counsel was ineffective for failing to call three doctors who allegedly would have offered testimony that appellant was either unable to deliberate or suffered from diminished capacity at the time of the crimes (App.Br.76-77). Such testimony, appellant asserts, would have resulted in acquittal or sentences of life imprisonment (App.Br.77).

**A. The Standard Of Review**

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” Moss v. State, 10 S.W.3d 508,511 (Mo.banc 2000).

“The movant has the burden of proving the movant’s claims for relief by a preponderance of the evidence.” Supreme Court Rule 29.15(i).

**B. The Motion Court’s Findings and Conclusions**

In denying these claims, the motion court stated:

13. Movant called Dr. Jonathan Lipman, who did testify at Movant’s penalty phase. Dr. Lipman’s testimony was not persuasive in the penalty phase and the Court finds Dr. Lipman would not have been any more persuasive had he testified at the guilt phase. In fact, his testimony contradicts the testimony of Dr. Daniel. Dr. Lipman testified that the methamphetamine psychosis he concluded existed is indistinguishable from schizophrenia, which is the

diagnosis Dr. Daniel gives.

Counsel was not ineffective for failing to call Dr. Lipman in the guilt phase. Further, the decision to call Dr. Lipman would likely require admitting that Mr. Middleton committed the crimes. Even if Dr. Lipman could have testified as to opinions about the Movant's mental state at the time of the crime, that testimony would not have been persuasive.

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15. Movant then called Dr. Phillip Murphy as a witness. Dr. Murphy testified that Movant was not guilty of the crime for the reason he suffered from a mental disease or defect. Dr. Murphy was consulted by defense counsel prior to trial. His report he generated did not include any conclusion that Movant was not guilty by reason of mental disease. His testimony was a duplication of that provided to the jury by Dr. Lipman. Trial counsel is not under any obligations to "shop" for a particular expert witness. State v. Copeland, 928 S.W.2d 828 (Mo.banc 1996), cert. denied, 117 S.Ct. 981 (1997). Further, counsel is not ineffective for failing to present cumulative evidence. Skillicorn v. State, 22 S.W.3d 678,685 (Mo.banc 2000). Dr. Murphy, based on this Court's observations, would have been no more persuasive than the expert who did testify and his testimony would not have changed the outcome of this case.

Furthermore, the evidence would have been contrary to the trial strategy of counsel to deny that Movant committed the crime. That was a reasonable trial

strategy.

In addition, the mental abnormality the expert testified to was caused by self-induced methamphetamine abuse. Aside from the fact that voluntary intoxication cannot be used as an excuse to negate a mental state, State v. Nicklasson, 967 S.W.2d 596,617 (Mo.banc 1998), this Court finds that such evidence would not be persuasive, or even helpful, in reducing Movant's culpability in the mind of the jurors.

Dr. Murphy's report that he prepared for the defense included no conclusions regarding his sanity or diminished capacity. There is no evidence that he at any time expressed to defense counsel those opinions, or that he held those opinions. Given Dr. Murphy's purported experience in evaluations in criminal convictions, it was reasonable for counsel to assume he held only those opinions expressed in his report.

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17. Movant called Dr. A.E. Daniel, a psychiatrist who testified that Movant suffers from methamphetamine psychosis and paranoid schizophrenia. Dr. Lipman testified at trial to the methamphetamine-induced psychosis. Dr. Daniel's diagnosis of schizophrenia is contradicted by Movant's other experts, Drs. Lipman and Murphy, who both testified that Movant did not suffer from that illness.

Dr. Daniel testified that Movant was acting under extreme duress and that

Movant was not responsible for his conduct. The Court finds this testimony was not credible or persuasive. In fact, Dr. Lipman was a more credible witness and counsel cannot be found at fault for failing to choose a particular expert witness. State v. Copeland, 928 S.W.2d 828 (Mo.banc 1996), cert. denied, 117 S.Ct. 981 (1997).

Dr. Daniel testified that he disagreed with Dr. Murphy's diagnosis of mental disease or defect because, after extensive interviews and review of documents, he believed that it was not possible to come to a conclusion about whether Movant knew of the wrongfulness of his conduct. Thus, he contradicts both Drs. Lipman and Murphy. Dr. Daniel also admitted his opinion about diminished capacity would change had he been aware that Movant arranged to meet the victims for the purpose of killing them.

It is unclear whether Movant is asserting that Dr. Daniel should have been called in addition to, or instead of, some other expert. If he had been called in addition to any other expert, his testimony would be contradictory and would have reduced the credibility of both. Had he testified alone, he would still be subject to cross-examination on the inconsistent opinions of the other experts. Dr. Daniel's attempts to explain these inconsistencies were very unpersuasive.

If Movant asserts that Dr. Daniel should have testified at the guilt or penalty phase as the mental health expert for Movant, the court finds that Dr. Daniel would be ineffective and not credible.

Trial counsel was not ineffective for failing to call Dr. Daniel as a witness at any portion of this trial.

...

21. Movant called his trial attorneys, Sharon Turlington and Beth Davis-Kerry. Ms. Kerry was lead counsel because she had experience with death penalty cases. They had received a great deal of material from prior counsel and they had access to investigators to assist.

The attorneys made a reasonable, strategic decision to not use an insanity defense at the guilt phase because it was inconsistent with the claim that Movant was not there. In addition, Movant insisted he was not there and opposed an insanity defense. The attorneys ultimately made the decision, which was reasonable.

...

23. Claim 8(A) is denied. As noted, Dr. Murphy's testimony was duplicative of Dr. Lipman and was neither credible nor persuasive. Counsel is not ineffective for failing to present cumulative evidence. Skillicorn v. State, 22 S.W.3d 678,685 (Mo.banc 2000). The Court also notes that both testified in Movant's Adair County case, which also resulted in Movant receiving a sentence of death. Thus, the outcome cannot be said to have been different had he testified.

...

26. Claims 8(F) and (G) have been addressed in paragraphs 13, 15 and 21 above. These claims are denied and counsel was not ineffective for the reasons previously stated.

26. Claim 8(H) is denied for the reasons set forth in paragraph 17. Counsel is not required to hire a particular expert to be deemed effective and counsel was not ineffective for failing to hire a psychiatrist, rather than a psychologist.

43. . . . . In addition, counsel made a reasonable strategic decision to not call Dr. Murphy after observing the jury's reaction to Dr. Lipman.

(P.L.F.524-530,533).

### **C. Counsel's Strategy Was Reasonable**

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 2068.

Counsel Turlington explained their decision not to call mental health experts during penalty phase as follows:

The reason that we didn't put this on in the guilt phase is because we were faced with kind of a conundrum. I think we would have like to put that on. But John did not want to pursue a mental disease or defect defense. John was saying

that he was not guilty in this case. And I realized that the law in terms of the 552 statute does not exclude other defenses. you can put on 552 evidence as well as putting on another defense. However, it's in my view not the greatest thing to go into court and say he wasn't there. He didn't do it. But if he was there, he didn't know what he was doing. So that's why we didn't put on the mental disease or defect evidence in the guilt phase.

...

Mr. Middleton didn't want that defense. And I mean in addition, I just feel like putting on two inherently inconsistent defenses I think that's a bad idea.

...

I think as the attorneys, I mean we would be making ultimate decisions as to what is in Mr. Middleton's best interests. But even if we were to put on a mental disease or defect thinking that that's a better defense in this case, Mr. Middleton had always maintained that he wasn't there, and I still think that there was some inherent problems with just pursuing that defense if that, you know, without him being cooperative in that.

(P.Tr.272-274). Counsel Davis-Kerry was not asked why mental health experts were not called during guilt phase.

To accomplish this defense, counsel vigorously cross-examined the state's witnesses, revealed their biases, revealed possible deals with the state's key witnesses, exposed how the state's key witnesses had reasons to cooperate with (and testify favorably for) the state,

undermined the strength of the state's evidence, pointed out holes in the state's case, and obliquely suggested (without ever directly arguing) that Dan Spurling could have committed the crimes (Tr.523-524,538,540-544,546-547,549,560-564,570,575,581,594-595,630,677-679,682-683,686-687,697,698,704,715,717,732-734,751-752,760-761). Then, in closing argument, defense counsel vigorously pursued this defensive strategy and pointed out all of the weaknesses in the state's case (Tr.811-827).

This was a reasonable strategy to pursue in guilt phase. As this Court recently has stated: "It is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a reasonable strategy." Clayton v. State, 63 S.W.3d 201,207 (Mo.banc 2001). In fact, in Clayton, under slightly different circumstances, this Court stated: "In this case, even though using a diminished capacity defense by itself might have been a reasonable trial strategy, it was also reasonable, as demonstrated above, to argue that a reasonable doubt of guilt existed." Id.

Likewise, in the case at bar, it was reasonable to forego a defense based upon mental disease or defect and hold the state to its burden of proving appellant's guilt beyond a reasonable doubt. Utilizing a defense of mental disease or defect would have required the defense to admit (at least implicitly) that appellant had committed the crimes. By avoiding that course of action, however, counsel were able to hold the state to its burden without making any concessions.

Appellant argues that counsel's decision to forego the mental defense was due to a lack of preparation or investigation (App.Br.78); however, the record refutes that claim. Counsel

engaged the aid of two mental health professionals, Drs. Phillip Murphy and Jonathan Lipman (who conducted thorough evaluations), and was prepared to call them at trial (P.Tr.36,43,101-150,359). In fact, Dr. Lipman ultimately testified during penalty phase (Tr.936-1001;P.Tr.36).

With regard to their preparation and investigation, Counsel Turlington testified that she talked to Dr. Murphy prior to trial, and that she was “sure” that she had discussed his diagnosis of appellant (P.Tr.272). Additionally, Counsel Turlington testified that she was “sure” that they had discussed whether appellant was capable of deliberating at the time of the crime (P.Tr.272). However, neither Lipman nor Murphy ever told counsel prior to trial (orally or in his written report), that he believed appellant could not deliberate at the time of the crimes or that he believed appellant could not appreciate the criminality of his conduct or conform his conduct to the requirements of the law (P.Tr.68-70,153-154).<sup>12</sup> Thus, if the doctors secretly held opinions that they did not divulge, counsel should not be held responsible. See Lyons v. State, 39 S.W.3d 32,41 (Mo.banc 2001). After all, in discussing these issues with counsel,

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<sup>12</sup> Despite their silence on the issue prior to trial, both doctors opined at the post-conviction hearing that appellant could not deliberate at the time of the crimes (P.Tr.63-64,151-152). Dr. Lipman attempted to explain this discrepancy between his trial and post-trial testimony by saying, “That phraseology [whether appellant could deliberate] was not used by [appellant’s attorneys]. That phraseology was not used” (P.Tr.69). Similarly, Dr. Murphy attempted to cast blame on appellant’s attorneys by saying that they had not asked him whether appellant could deliberate (P.Tr.160-161).

these experienced doctors undoubtedly knew that counsel would have been interested in hearing about appellant's inability to deliberate.

Accordingly, it was eminently reasonable for counsel to conclude that a defense based upon mental disease or defect was not tenable, and that holding the state to its burden of proof was the better course of action. As is apparent, counsel took reasonable steps to investigate and obtain favorable expert testimony about appellant's mental status; and, for that very reason, appellant's reliance upon Dumas v. State, 903 P.2d 816 (Nev.1995), and Antwine v. Delo, 54 F.3d 1357 (8th Cir.1995), is misplaced. In Dumas, despite the fact that the state's expert found that the defendant was incapable of premeditated murder, defense counsel "made no independent inquiry concerning [defendant's] mental condition." Dumas v. State, 903 P.2d at 817. In Antwine, defense counsel, though entitled to request a second (and presumably more thorough) mental examination, relied on only one twenty-minute examination that was performed by a state psychiatrist who reviewed only a police background sheet. Antwine v. Delo, 54 F.3d at 1365.

Conversely, as outlined above, counsel in appellant's case conducted a thorough investigation of appellant's mental health. See Lyons v. State, 39 S.W.3d at 37. And, having conducted a thorough investigation (including the retaining of two competent mental health experts), counsel had no obligation to shop for another expert like Dr. Daniel. Id. at 41.

#### **D. Appellant Was Not Prejudiced**

Despite counsel's efforts in investigating a mental defense, appellant nevertheless claims that he was prejudiced by counsel's failure to call Drs. Lipman, Murphy, and Daniel in

guilt phase. Appellant was not prejudiced, however, for three reasons: first, the doctors' testimony was not admissible; second, the doctors' testimony (even if it were admissible) was not persuasive; and third, the jury made it clear that it was not inclined to credit a mental defense.

### **1. The doctors' testimony was not admissible**

All three doctors' opined that appellant could not deliberate due to a mental disease or defect caused by appellant's voluntary ingestion of methamphetamine (P.Tr.59,149-150,229-230). "Introduction of a voluntary drugged state to negate a culpable mental state is prohibited." State v. Nicklasson, 967 S.W.2d 596,617 (Mo.banc 1998)(citing State v. Roberts, 948 S.W.2d 577,588 (Mo.banc 1997)); see State v. Rhodes, 988 S.W.2d 521,526 (Mo.banc 1999). "[V]oluntary intoxication may not negate a defendant's mental state or provide an insanity defense absent a separate mental disease that results in diminished capacity without the voluntarily ingested drugs." Id.

Here, because the doctors' all opined that appellant's mental disease or defect was methamphetamine induced, their testimony was not admissible to negate appellant's culpable mental state.

### **2. The doctors were not persuasive**

Even if it were admissible, the testimony was not persuasive. Dr. Lipman testified that appellant could not "coolly reflect," and that appellant's capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired" (P.Tr.52,64,66). However, on cross-examination, he admitted that appellant's

denying involvement in the crime and covering for Maggie Hodges could be a “sign of a certain level of rationality” (P.Tr.72-73). He also admitted that he could not really determine whether appellant knew the difference between right and wrong because appellant had denied any involvement in the crime (P.Tr.74). Lipman stated: “I cannot answer the question specifically regarding what he thought he was doing and why he thought he was doing it. Because he told me he didn’t do it” (P.Tr.75).

Similarly, Dr. Murphy testified that appellant could not coolly reflect, and that appellant did not “recognize the wrongfulness of his acts” (P.Tr.151-152). However, on cross-examination, he admitted that he had not put those findings in his written report, that appellant’s making a list of snitches could show deliberation, that a delusional person can still know right from wrong and conform his or her conduct to the law, that appellant’s arranging to meet the victims “took planning,” that appellant was able to conform to the law in driving his car, that appellant knew enough to hide the bodies and dispose of the guns, and that appellant’s actions looked like they were “cool reflected” (P.Tr.154).

Dr. Daniel testified that he though deliberation meant a person had to be able to think through the “pros and cons of one’s actions” (P.Tr.242). Based upon that definition of cool reflection, he testified that appellant could not “coolly reflect” at the time of the crimes (P.Tr.243). However, Dr. Daniel admitted that he could not say whether appellant understood the nature, quality, or wrongfulness of his actions (P.Tr.244-245). And on cross-examination, he admitted that he reached his conclusion regarding cool reflection without the benefit of knowing that appellant had arranged a meeting with the victims in an isolated location

(P.Tr.249-250). Then, he also admitted that that fact might change his opinion (P.Tr.250). In concluding, he admitted that some of appellant's alleged "delusions" and fears were based in reality (P.Tr.251).

As is evident, while each doctor was willing to answer some questions favorably, they also admitted that appellant exhibited signs of rationality, that appellant appeared to have deliberated, that appellant might have deliberated, that appellant conformed some of his conduct to the law, and that appellant might have known right from wrong (as outlined above, however, two of them testified that they could not determine whether appellant knew right from wrong).

Such equivocal testimony was completely incredible in light of appellant's extensive efforts to make a hit list, track down the "snitches," lure the snitches to remote places, hide the bodies, and avoid detection. In fact, in the face of such overwhelming evidence of deliberation, there is simply no reasonable probability that their testimony would have changed the outcome of appellant's guilt phase. See Lyons v. State, 39 S.W.3d at 37.

### **3. The jury was not buying it**

Finally, the record shows that the jury was not inclined to credit a mental defense. As Counsel Davis-Kerry testified, after Dr. Lipman testified in penalty phase, it was apparent that the jury "hated" the mental defense, and that the jury "hated the whole idea of any sort of psychological defense or any sort of psychological reason or anything having to do with the use of drugs bringing about psychological issues" (P.Tr.359).

Appellant speculates that this response from the jury was due to the fact that defense

counsel presented inconsistent defenses in guilt phase and penalty phase (App.Br.91-92). However, it is equally likely that the jury would have “hated” the mental defense if it had been raised during guilt phase.

In fact, in light of the overwhelming evidence of deliberation, and given the equivocal nature of the doctors’ testimony on the issue, there is every reason to believe that the jury would have been offended by a mental defense or rejected the defense with open scorn. See Id.(counsel reasonably believed that incredible evidence of mental defense could offend jury). Moreover, once the jury made its determination of guilt, the jury probably had no trouble accepting the fact that the defense shifted gears (as a result of the jury’s verdict) and attempted to downplay appellant’s culpability (while still maintaining in closing argument that the state’s evidence of guilt was weak (see Tr.1062-1063)).<sup>13</sup>

Appellant cites State v. Harris, 870 S.W.2d 798 (Mo.banc 1994), to support his claim that shifting the defensive theory is deleterious to the defense (App.Br.91); however, the facts of appellant’s case do not present the “defense-*du-jour*” situation contemplated in Harris. In Harris, this Court held that it was reasonable for counsel to avoid evidence of mental disease or defect in the penalty phase because the defense had asserted self-defense in the guilt phase. Id.at 816. Obviously, those inherently contradictory theories could have easily “alienated” the jury.

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<sup>13</sup> The defense prepared the jury for this potential shift by presenting evidence in guilt phase of appellant’s methamphetamine use, paranoia, and hallucinations (Tr.750-753).

In contrast, in appellant's case, the defense asserted that the state's evidence was weak, and that the jury should not find him guilty. The defense then turned to decreasing appellant's culpability while still maintaining that the state's evidence was weak. This Court has recently held that similarly "inconsistent" defensive theories can reasonably be used in a single trial. See Clayton v. State, 63 S.W.3d at 206-207 (distinguishing Ross v. Kemp, a case which appellant relies upon).<sup>14</sup> This point should be denied.

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<sup>14</sup> Ironically, while claiming counsel was ineffective for using inconsistent theories, appellant also claims counsel was ineffective for *failing* to use inconsistent theories. He claims here that counsel should have used a mental defense, but in Point X, he claims that counsel should have presented evidence that Dan Spurling committed the crimes.

**V. COUNSEL ADEQUATELY INVESTIGATED AND PRESENTED MITIGATION EVIDENCE.**

Appellant contends that trial counsel were ineffective for failing to investigate and present additional mitigating evidence from family members and former employers (App.Br.98). Specifically, he asserts that counsel should have called Charles, Vern, and Virginia Webb, and Ruby Smith (former employers); and Sylvia Purdin and Glenn Williams (family members)(App.Br.98).

**A. The Standard Of Review**

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” Moss v. State, 10 S.W.3d 508,511 (Mo.banc 2000).

“The movant has the burden of proving the movant’s claims for relief by a preponderance of the evidence.” Supreme Court Rule 29.15(i).

**B. Counsel Presented Adequate Mitigating Evidence**

To prevail on a claim of ineffective assistance of counsel, the movant must “show that counsel’s representation fell below an objective standard of reasonableness.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id.at 2068.

“Missouri law does not impose on trial counsel an absolute duty to present mitigating character evidence during the penalty phase of trial.” State v. Hall, 982 S.W.2d 675,688

(Mo.banc 1998).

In denying these claims, the motion court held:

19. Additional evidence was received on December 21, 2000. Movant introduced the deposition testimony of Ruby Smith, Charles Webb, Vern Webb, Virginia Webb, Glenn Williams, and Jake Noonan.

...

21. Movant called his trial attorneys, Sharon Turlington and Beth Davis-Kerry. Ms. Kerry was lead counsel because she had experience with death penalty cases. They had received a great deal of material from prior counsel and they had access to investigators to assist.

...

24. Claims 8(B), (C) and (D) are denied. The testimony of these [family members] was not persuasive nor would it have changed the outcome.

25. Claim 8(E) is denied. The testimony or evidence that Movant was a good worker is neither persuasive nor helpful to Movant. In fact, the Court believes that it would be counterproductive to have presented this evidence since it shows Movant can conform his conduct for extended periods. Trial counsel was not ineffective.

### **1. Counsel performed a reasonable investigation**

At the evidentiary hearing, while counsel admitted that they had not contacted the

Webbs, Ruby Smith, Sylvia Purdin and Glenn Williams, counsel indicated that they had talked several times with appellant and reviewed the twelve boxes of investigative materials gathered by appellant's other two attorneys (P.Tr.264-265,268-271,328-329,331-334). As to appellant's employment record, counsel indicated that they either talked to appellant about it or obtained it from the files obtained from appellant's prior attorneys (P.Tr.270,332). As to investigating appellant's family members, Defense Counsel Turlington indicated that Counsel Davis-Kerry contacted family members (P.Tr.268). Davis-Kerry admitted that she had not contacted Sylvia Purdin or Glenn Williams, but she was not asked about the family members that she did investigate (P.Tr.332).

Because counsels' investigation included a review of appellant's employment and family history, and given the evidence of these factors adduced at appellant's trial (as will be discussed more fully below), there is no reason to believe that counsel failed to turn up the information that these six witnesses were prepared to present if called at appellant's trial. Tellingly, appellant's counsel were never even asked whether they were aware of facts that these six witnesses were prepared to testify about.<sup>15</sup> Thus, appellant failed to prove by a preponderance of the evidence that counsel's investigation was inadequate.

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<sup>15</sup> Admittedly, some of these witnesses' testimony was based upon personal observations; however, most of the salient portions would have been discovered by simply reviewing appellant's employment history and talking to various other family members — the very steps counsel took in investigating appellant's case.

## **2. Counsel presented adequate, similar mitigating evidence**

Without discussing counsels' efforts to investigate, appellant claims that counsel were ineffective in their investigation. He likens his case to Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), where, appellant claims, defense counsel was found ineffective for failing to discover and present additional mitigating evidence — despite the fact that defense counsel presented mitigating evidence through “the defendant’s mother, his friends, and a psychiatrist” (App.Br.99-100). Appellant’s reliance upon Williams, however, is misplaced.

In Williams, the defense did not begin preparing for penalty phase until a week before trial. Id. at 1514. The attorneys failed to conduct an investigation that would have uncovered the defendant’s “nightmarish childhood,” including the fact that the defendant’s parents had been imprisoned for the criminal neglect of the defendant and his siblings, that the defendant had been severely and repeatedly beaten by his father, that the defendant had been committed to the custody of social services for two years, that the defendant had been placed in an abusive foster home, that the defendant was “borderline mentally retarded” and did not advance beyond sixth grade, and that the defendant had aided the police in breaking up a drug ring in prison. Id. The defense attorneys also failed to return the telephone call of a favorable witness who offered to testify on the defendant’s behalf. Id. Moreover, at trial, the only mitigating argument that was advanced by counsel was that the defendant “turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that.” Id. at 1515.

There was some other purportedly mitigating evidence presented in Williams, but appellant's claim that the defense presented mitigating evidence through the defendant's "mother, his friends, and a psychiatrist" (App.Br.99) overstates the matter. The defendant's mother and two neighbors (one of which was pulled from the court audience without ever being interviewed beforehand) testified that the defendant was a "nice boy" and not violent. Id. at 1500. The alleged "psychiatric" evidence consisted only of a tape-recorded excerpt of a psychiatrist relating how the defendant had told him that "in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone." Id.

In contrast to the Williams case, appellant's attorneys took reasonable and sufficient steps to investigate appellant's employment, family, mental health, and prison history. They reviewed twelve boxes of materials provided by appellant's prior attorneys, they talked with appellant several times prior to trial, they contacted appellant's family members, they engaged the aid of two mental health experts, and they talked to employees at the Missouri Department of Corrections. As a result, they called one mental health expert, appellant's mother, and two employees from corrections to testify at appellant's trial.

Appellant downplays the mitigation evidence presented at his trial by pointing out that no former employers were called and by summarizing his mother's testimony in a single sentence (App.Br.100). However, as the record shows, Janice Middleton testified far more extensively that appellant admits.

She testified that appellant had a daughter and step-daughter; that appellant was never married; that she takes medication for depression and has been treated for depression since

“before 1982;” that she had a nervous breakdown and was committed to a mental hospital; that appellant was a “quiet, shy” child and did not “make too many friends;” that appellant “depended on his sister;” that appellant liked to go to Sunday school as a child; that appellant got a maintenance job at a doughnut shop when he was eight years old to help the family “live a little better;” that she was divorced from appellant’s father by the time appellant was eight; that she was a single mother and received no financial support from appellant’s father; that appellant liked to spend time with her brother’s children in the country; that appellant was helpful and did not give her problems; that appellant “got bored” in highschool; that appellant did yard work and field work when he was in highschool; that appellant quit highschool and entered the military when he was sixteen years old; that appellant spent four years in the army; that appellant worked constantly after leaving the army; that appellant worked at a “sale barn” in Leon, Iowa, and at another job at the Decatur County high school; that appellant was “very upset” by the death of his grandfather; that appellant conscientiously visited her after she left the mental hospital; that appellant’s personality changed in 1995; that her relationship with appellant also changed in 1995; that appellant was “awful quiet . . . like he had something on his mind;” that appellant’s personality has now changed back to that of his childhood; that appellant now engages in Bible study with her through the mail; and that she still loves and has forgiven appellant (Tr.1005-1021). On cross-examination, she revealed that appellant’s daughter was adopted by a foster family in Iowa (Tr.1023).

In addition to the history provided by Ms. Middleton, Dr. Jonathan Lipman testified extensively about appellant’s history, including: that appellant began using alcohol before he

was twelve years old; that appellant began using marijuana regularly at age fifteen; that appellant started using methamphetamine at age fifteen; that appellant was prone to depression based upon his mother's history of depression; that appellant's drug use increased while in the military; that appellant used hashish, heroin, LSD, and an amphetamine called "X-12" while in the military; that appellant also abused alcohol while in the military; that appellant's methamphetamine use eventually escalated and caused brain damage; that appellant started having hallucinations and delusions; and that appellant was suffering from "extreme emotional distress or mental disturbance at the time of the Hamilton, Hodge murders" (Tr.949-955,959-960,977).

Despite the foregoing, and despite the other mitigating evidence of appellant's good behavior in prison (see Point VII, below), appellant likens his case to Jermyn v. Horn, 266 F.3d 257 (3rd Cir.2001), and claims that, while counsel did present some mitigating evidence, "counsel failed to present evidence of different mitigating circumstances" (App.Br.101).<sup>16</sup> In Jermyn, however, counsel was ineffective because he failed to prepare for penalty phase until the night before penalty phase began (whereupon counsel told his clerk to "try to arrange for some mercy witnesses to be there the next morning") and because he failed to investigate critical evidence (known to him) that the defendant had been severely abused as a child. Id. at 306-312.<sup>17</sup> Such evidence of abuse would have strongly supported the mitigation theory and

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<sup>16</sup> Although the Third Circuit declined to follow the analysis used by the district court, appellant cites the underlying district court's opinion.

<sup>17</sup> Notably, the court held that counsel's actions were even more egregious than those

undermined the state's single aggravating circumstance. Id.

In the case at bar, however, there was no such dearth of preparation or investigation, and trial counsel did not overlook or fail to discover any critical mitigation evidence that would have strongly supported the mitigation theory or undermined the state's aggravators. To the contrary, the mitigation evidence allegedly overlooked by appellant's attorneys was simply additional details of appellant's family and employment history that only marginally supported a theory of diminished capacity or mental disease or defect (the theory appellant claims counsel should have advanced). Moreover, the limited anecdotal evidence of appellant's alleged dimwittedness (but strong work ethic) and appellant's disadvantaged childhood would have done little to undermine the state's evidence in aggravation.

### **3. Appellant was not prejudiced**

Finally, even if counsel did not investigate those witnesses and should have called them during the penalty phase, there is no reasonable probability that their testimony would have changed the outcome of appellant's trial.

#### **a. appellant's employment history**

Charles, Vern, and Virginia Webb all testified about appellant's employment at their Leon Livestock Auction during 1982 and 1983 (Mov.Exs.35-37). They testified that appellant was a good employee and dependable (for menial tasks), that appellant was a follower, that appellant did not drink or use drugs at work, that appellant had to be supervised (or told what

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of the trial counsel in Williams v. Taylor, *supra*.

to do), and that appellant had limited mental faculties and no “high-level” skills (Mov.Ex.35 at 6,7,9-10;Mov.Ex.36 at 9,11-13;Mov.Ex.37 at 7-9,11-12).<sup>18</sup> Additionally, they related how Vern and Virginia had cosigned a loan to enable appellant to get an inexpensive truck (Mov.Ex.35 at 11;Mov.Ex.36 at 10;Mov.Ex.37 at 12).<sup>19</sup> Virginia added that appellant was “quiet” and a “loner” (Mov.Ex.37 at 8).<sup>20</sup>

Similarly, Ruby Smith testified that appellant worked for her around the same time period sacking grain (Mov.Ex.34 at 4-5). She testified that appellant had to be supervised, that appellant did not always comprehend his job, that appellant seldom talked to customers, that appellant came to work on time and followed instructions, that appellant could not make out sales tickets (because he could not spell), and that appellant was a “space cadet” or “out there” (Mov.Ex.34 at 5-8,10). She added that appellant garnered the somewhat demeaning name of “Sale Barn John” because of manure on his clothing (Mov.Ex.34 at 7).

While the Webbs and Smith were not called at appellant’s trial, appellant’s mother did

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<sup>18</sup> Appellant was not, as he asserts, the only full-time employee (see Mov.Ex.35 at 5;Mov.Ex.36 at 7-8).

<sup>19</sup> Vern stated that their willingness to cosign on the loan was due to Charles’ faith in appellant (Mov.Ex.36 at 10). Charles recalled that it “served our purposes well” because appellant used the truck “for chores” at work (Mov.Ex.35 at 11). Ultimately, appellant proved not to be too reliable, leaving the Webbs to make the final payments on the loan (Mov.Ex.36 at 10-11).

<sup>20</sup> Vern admitted that he recalled very little about appellant (Mov.Ex.36 at 9).

mention some of his employment history. As outlined above, she testified that appellant was a “quiet, shy” child and did not “make too many friends;” that appellant “depended on his sister;” that appellant got a maintenance job at a doughnut shop when he was eight years old to help the family “live a little better;” that appellant was helpful and did not give her problems; that appellant “got bored” in highschool; that appellant did yard and field work for people when he was in highschool; that appellant quit highschool and entered the military when he was sixteen years old; that appellant spent four years in the army; that appellant worked constantly after he left the army; that appellant worked at a “sale barn” in Leon, Iowa, and at another job at the Decatur County high school, that appellant conscientiously visited her after she left the mental hospital, that appellant’s personality changed in 1995 (when he was using drugs), and that appellant was “awful quiet . . . like he had something on his mind” (Tr.1005-1021).

Thus, while somewhat different, appellant’s mother outlined many (if not all) of the facts that the Webbs and Smith outlined in their testimony: appellant was quiet, appellant was a loner, appellant was dependable and hard working, appellant worked menial jobs, appellant had limited education, and (when combined with Dr. Lipman’s description of appellant’s heavy drug use) appellant later became quiet and distracted. In short, even if counsel had managed to present a few additional anecdotal details of appellant’s employment history, there is no reasonable probability that the outcome of appellant’s trial would have been different. Additionally, as the motion court noted, further evidence of appellant’s ability to conform his conduct could have hindered any attempt to claim that his murdering the victims was the result of mental disease or defect.

**b. family history**

Glenn Williams, who admitted he had had limited contact with appellant, recalled that appellant was not a “problem child,” was “kind of slow,” was a “follower,” and was an “easy-going kid;” that appellant played with his children and was not violent; that appellant became a “loner” after he got “tangled with a girl” who had a child; that appellant’s father spent time in prison; that appellant got involved with drugs; that seventeen years before appellant’s birth, appellant’s mother sniffed gasoline until she passed out; that appellant’s mother had relationships with three different men while appellant was growing up; that one of appellant’s mother’s husbands, Ken Harding, could not hold a job and was not around long;<sup>21</sup> and that Harding and appellant’s mother took appellant to bars (Mov.Ex.38 at 4-13).

Sylvia Purdin testified that appellant’s father went to prison when appellant was a young child; that she babysat appellant while appellant’s mother visited Ken Harding in prison; that, as a child, appellant was “quiet,” “a loner,” and content to sit and play with toys; that appellant did not express himself well; that appellant sometimes played with the other kids; that appellant sometimes seemed mentally alert but sometimes had a “blank expression;” that appellant was a follower rather than a leader; that appellant only sometimes played games and roasted apples

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<sup>21</sup> Contrary to appellant’s assertion that Harding was “mean” to appellant and appellant’s mother, Williams testified that he would “not swear to [that]” (Mov.Ex.38 at 12). Also Williams did not testify that Harding was a “drunk;” rather, Williams testified that he drank a lot of beer with Harding (Mov.Ex.38 at 13).

and marshmallows with the other kids; that appellant was kind of “backward;” and that appellant’s mother had a bad habit of smelling gas (P.L.F.395,399-408).

Again, as outlined above, while not identical, very similar mitigating evidence was presented in penalty phase. Appellant’s mother testified that appellant had a daughter and stepdaughter, and that appellant’s daughter was adopted by a foster family in Iowa; that appellant was never married; that she takes medication for depression, has been treated for depression since “before 1982,” has had a nervous breakdown, and has been committed to a mental hospital; that appellant was a “quiet, shy” child, and did not “make too many friends;” that she was divorced from appellant’s father by the time appellant was eight, that she was a single mother, and that appellant’s father gave no financial support to the family; that appellant liked to be out with her brother’s children in the country; that appellant “got bored” in high school; that appellant quit high school and entered the military when he was sixteen years old; that appellant was “very upset” by the death of his grandfather; and that appellant’s personality changed in 1995 when he became “awful quiet . . . like he had something on his mind” (Tr.1005-1021,1023).

Dr. Lipman, provided further insight, including: that appellant began using alcohol before he was twelve years old; that appellant began using marijuana regularly at age fifteen; that appellant started using methamphetamine at age fifteen; that appellant was prone to depression based upon his mother’s history of depression; that appellant’s drug use increased while in the military; that appellant used hashish, heroin, LSD, and an amphetamine called “X-12” while in the military; that appellant also abused alcohol while in the military; that

appellant's methamphetamine use eventually escalated and caused brain damage; that appellant started having hallucinations and delusions; and that appellant was suffering from "extreme emotional distress or mental disturbance at the time of the Hamilton, Hodge murders" (Tr.949-955,959-960,977).

Thus, instead of a few anecdotal stories about appellant's "blank expression" and some highly attenuated evidence that appellant's mother's gas sniffing (which occurred at least seventeen years prior to appellant's birth) may have affected appellant's cognitive abilities, the jury heard extensive evidence from people who had spend considerable time with appellant that confirmed that appellant was quiet, shy, a highschool drop-out, a menial laborer, an alcohol drinker before the age of twelve, a methamphetamine and marijuana user by the age of fifteen, a serious drug abuser in the years prior to and after his two-year stint as a worker at the Leon Sale Barn, and a person prone to mental illness because of his mother's history of depression.

Thus, virtually every aspect of appellant's personal history that appellant argues should have been presented to the jury was, in fact, presented to the jury. If counsel had managed to present the few additional family details described by Sylvia Purdin and Glenn Williams, there is no reasonable probability that the outcome of appellant's trial would have been different. In fact, such scant evidence of "limited cognitive abilities" — provided by lay people who spent limited amounts of time with appellant many years prior to the murders — would have proved only that appellant was, perhaps, a little "slow" when he was a child. That single fact, however, to the extent that it was not already shown by other mitigating evidence, would not have provided any compelling explanation (or excuse) for appellant's turning to drugs and,

eventually, murder. Moreover, due to the outcome in appellant's Adair county case (a sentence of death for the murder of Alfred Pinegar), and given the fact that appellant presented more extensive evidence of his family history to the jury in that case, there is every reason to believe that the presentation of additional family history in the case at bar would have had absolutely no effect on the outcome of appellant's trial. See Point VI, below. This point should be denied.

**VI. COUNSEL ADEQUATELY INVESTIGATED AND PRESENTED EVIDENCE OF APPELLANT’S PERSONAL HISTORY THROUGH JANICE MIDDLETON, AND APPELLANT WAS NOT PREJUDICED BY COUNSEL’S FAILURE TO MORE EXHAUSTIVELY QUESTION JANICE MIDDLETON.**

Appellant claims that counsel should have questioned Janice Middleton, his mother, more exhaustively and elicited further details of his life history (App.Br.107). He points out that Ms. Middleton presented a more extensive life history at his Adair County case, in which he was also sentenced to death (App.Br.107).

**A. The Standard Of Review**

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” Moss v. State, 10 S.W.3d 508,511 (Mo.banc 2000).

“The movant has the burden of proving the movant’s claims for relief by a preponderance of the evidence.” Supreme Court Rule 29.15(i).

**B. Appellant Failed To Carry His Burden Of Proof**

In denying this claim, the motion court stated:

Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. The movant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. [Strickland v. Washington, 466 U.S.] at 689.

The fact that one might reasonably pursue a different strategy of defense than that chosen by counsel at trial is irrelevant. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *Id.* at 689. . . .

a. Movant has failed to present any evidence that the outcome of his case would have been any different had his counsel taken the actions he asserts should have been undertaken. After reviewing the record, this Court finds that the outcome would not have been different.

. . .

21. Movant called his trial attorneys, Sharon Turlington and Beth Davis-Kerry. Ms. Kerry was lead counsel because she had experience with death penalty cases. They had received a great deal of material from prior counsel and they had access to investigators to assist.

. . .

44. Claim 8(AA) sets forth a long list of complaints. It is denied.

. . . On two claims pled in the alternative, which related to testimony allegedly available through Brian Fifer and Janice Middleton, Movant failed to present any evidence.

. . .

The remaining allegations of error in Claim 8(AA) are denied. Movant has not shown either that counsel was incompetent, or that, but for counsels [sic]

alleged errors, there is a reasonable probability that the outcome of his trial would have been different.

(P.L.F.533-535). Though the motion court erred somewhat in stating that appellant “failed to present *any* evidence,” the motion court did not clearly err in denying this claim because (1) as to certain aspects of this claim, appellant failed to present any evidence, and (2) appellant failed to prove that he received ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, the movant must “show that counsel’s representation fell below an objective standard of reasonableness.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 2068.

### **1. Counsel’s use of Janice Middleton’s testimony was reasonable**

The selection of witnesses and the decision not to call additional witnesses are matters of trial strategy. Lyons v. State, 39 S.W.3d 32,39 (Mo.banc 2001). Strategic decision made after thorough investigation are virtually unchallengeable. Id.

Here, as in Point V, above, appellant likens his case to Williams v. Taylor. However, for the reasons discussed above, appellant’s case is not analogous to Williams. For example, there is no evidence of the general lack of preparedness evident in Williams; rather, counsel reviewed extensive investigative materials provided by appellant’s first attorneys, contacted appellant and family members prior to trial, engaged the assistance of two mental health experts, investigated appellant’s incarceration history, and called four witnesses at trial who

provided various types of mitigation evidence. See Lyons v. State, 39 S.W.3d at 38-40.

Without discussing counsel's efforts to investigate appellant's life history, appellant simply points out that Ms. Middleton previous testimony in his Adair County case was more extensive than that offered in this case. While that is true, and assuming that counsel was not aware of the additional facts contained in Ms. Middleton's Adair-County testimony, counsel cannot be deemed ineffective for failing to discover evidence that appellant's mother did not share with them during the investigation. See Id.

Moreover, appellant failed to prove that counsel failed to fully investigate and uncover appellant's life history. Trial counsel were never asked whether they had uncovered the various facts that appellant now alleges counsel should have uncovered and presented at trial through Ms. Middleton. Having failed to ask the question, appellant failed to prove by a preponderance of the evidence that counsel did not discover the facts contained in Ms. Middleton's Adair-County testimony. See State v. Tokar, 918 S.W.2d 753,768 (Mo.banc 1996).

Further, appellant also failed to present any evidence that Ms. Middleton was willing to offer the same testimony a second time at appellant's second trial. See State v. Clay, 975 S.W.2d 121,143 (Mo.banc 1998)(must show witness would testify if called). She was obviously willing to testify at appellant's trial, but there is no evidence that she would have been willing to reveal the same facts (many of which were potentially embarrassing) to another jury (especially considering that she apparently did not divulge those facts to counsel).

## **2. Appellant was not prejudiced**

In any event, even assuming that counsel did not uncover (but should have discovered)

the facts contained in Ms. Middleton's Adair-County testimony, and even assuming that Ms. Middleton would have been willing to repeat the testimony that she gave in Adair County, appellant was not prejudiced.

As outlined in Point V, above, Ms. Middleton's testimony in this case was quite extensive and covered much of the same information that appellant claims counsel should have presented. To reiterate briefly, she testified about some of her past mental problems, some of her past marital problems, and some of the family's resultant difficulties; she testified obliquely about appellant's troubled familial relationships (having a daughter adopted by a foster family); she testified about appellant's work history (including his four years in the military); she testified about certain aspects of appellant's childhood (including his quitting highschool); she testified about appellant's responses to certain events later in life (how he was "very upset" by his grandfather's death and how his personality changed in subsequent years); and she testified about appellant's recent improvement in prison (Tr.1005-1021).

In addition, as outlined in Point V, above, Dr. Jonathan Lipman testified extensively about appellant's history of drug and alcohol abuse, appellant's propensity for depression (due to his mother's mental history), appellant's mental infirmities (including brain damage, hallucinations, and delusions), and appellant's "extreme emotional distress or mental disturbance at the time of the Hamilton, Hodge murders" (Tr.949-955,959-960,977).

In light of this evidence, which painted a picture of a largely deprived and troubled childhood, there is no reasonable probability that additional evidence of appellant's disadvantaged childhood would have had any effect upon the outcome of trial. In fact, much

of Ms. Middleton's Adair-County testimony simply was not mitigating. Appellant's infant health problems, his minor childhood head injury, and abusive acts committed before appellant was ever born provided little or no mitigation for the murders that appellant committed many years later. Ms. Middleton did testify about some abusive behavior she suffered at the hands of her first husband and Ken Harding, but she also testified that appellant was eventually able to stop most of this abusive behavior by shooting his father (causing a "flesh wound") and by reporting Harding to the police (resulting in his incarceration).

While such evidence would have highlighted one particularly unfortunate aspect of appellant's life, both periods of abuse also stand out as periods in which appellant confronted evil and overcame it. As such, those early events in appellant's life had the potential to stand out as evidence that he was always able to recognize right from wrong and take affirmative action to do the right thing (rather than being victimized). In any event, evidence of one more unfortunate circumstance, in light of all of appellant's other problems was of only minimal value (especially considering the grievous nature of offenses).

Furthermore, given the sentence of death imposed in appellant's Adair County case (under essentially the same facts), there is no reasonable probability that Ms. Middleton's testimony, if it had again been presented in this case, would have affected the outcome of this case. As the United States Supreme Court stated in Strickland, a claim of prejudice that relies upon the mere possibility of a different decision by a different decisionmaker is untenable. The Court stated:

In making the determination whether the specified errors resulted in the

required prejudice, a court should presume . . . that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, “nullification,” and the like. A defendant has no entitlement to the luck of a lawless decisionmaker . . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel’s selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry.

Strickland v. Washington, 466 U.S. at 694-695, 104 S.Ct. at 2068.

Admittedly, the facts presented to each of appellant’s juries were not perfectly identical; nevertheless, the facts were exceedingly similar, and, consequently, there is little reason to believe that the jury in this case would have been swayed by this evidence when another was not. For all of the foregoing reasons, this point should be denied.

**VII. COUNSEL ADEQUATELY INVESTIGATED AND PRESENTED EVIDENCE OF APPELLANT’S ABILITY TO ADAPT TO INCARCERATION.**

Appellant contends that trial counsel were ineffective for failing to present evidence of his good behavior while incarcerated in Iowa (App.Br.114). He claims that, if the jury had heard from Jake Noonan, his corrections counselor, and seen his Iowa Corrections file, there is a reasonable probability that the jury would have imposed life (App.Br.114).

**A. The Standard Of Review**

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” Moss v. State, 10 S.W.3d 508,511 (Mo.banc 2000).

“The movant has the burden of proving the movant’s claims for relief by a preponderance of the evidence.” Supreme Court Rule 29.15(i).

**B. Counsel Acted Reasonably And Appellant Was Not Prejudiced**

To prevail on a claim of ineffective assistance of counsel, the movant must “show that counsel’s representation fell below an objective standard of reasonableness.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id.at 2068.

In denying this claim, the motion court stated:

21. Movant called his trial attorneys, Sharon Turlington and Beth Davis-Kerry. Ms. Kerry was lead counsel because she had experience with

death penalty cases. They had received a great deal of material from prior counsel and they had access to investigators to assist.

...

29. Claims 8(J), (K), and (L) suggest counsel was ineffective in failing to present evidence that Movant was “well adjusted” in prison. This was a matter of trial strategy. Emphasizing Movant’s prison record does not seem to be a wise strategy, particularly when it allows the State to emphasize that Mvoant escaped from confinement, along with the fact that it emphasizes that Movant has been confined on multiple occasions. The “helpfulness” of this evidence was never explained. These claims are denied.

(P.L.F.528,530).

As in Points V and VI, appellant attempts to liken his case to Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)(App.Br.115). As discussed above, however, counsel did not fail to investigate or prepare as did counsel in Williams. To the contrary, counsel investigated appellant’s history of incarceration (along with other aspects of appellant’s history) and ultimately presented two witnesses who testified favorably about appellant’s recent incarceration at Potosi (Tr.1024,1046).

With regard to their investigation of appellant’s previous incarceration, Counsel Turlington testified that they had “some information about [appellant’s] incarceration in Iowa,” but that she did not recall whether she had reviewed his “Anamosa State Penitentiary” file (P.Tr.277-279). As to why they did not present evidence of his Iowa incarceration, Turlington

testified:

Well, we did not use these Iowa records in the trial. We did put on someone from the Potosi Correctional Center where Mr. Middleton was incarcerated at the time of the trial that talked about his incarceration there. But we did not use the Iowa records at all.

(P.Tr.279). She did not recall whether anyone had contacted Jake Noonan, appellant's Iowa case worker (P.Tr.280).

Counsel Davis-Kerry was not asked whether she reviewed appellant's Iowa prison records. She testified, however that she did not contact Jake Noonan (P.Tr.334). When asked why, she testified:

I didn't see any reason to contact people from the Iowa Department of Corrections. I contacted people from the Missouri Department of Corrections. I contacted people from the Missouri Department of Corrections where he had been recently.

(P.Tr.334).

As is evident, appellant failed to prove that counsel's decision not to use the Iowa prison records was anything other than reasonable trial strategy. Counsel knew that appellant had been incarcerated in Iowa, and appellant failed to prove that Davis-Kerry (or Turlington) failed to review the Iowa records before choosing to use his Missouri records from Potosi.

In addition, counsel's use of appellant's more recent incarceration was reasonable trial strategy. The evidence presented by counsel showed that appellant did not have "behavior

problems,” that appellant only had two very minor conduct violations, that appellant presented “no problems,” that appellant had not made any attempt to escape, that appellant was not violent, that appellant had “adjusted well,” that appellant has a job in food services, that appellant had never indicated any desire not to work, and that appellant was not involved with any gangs (Tr.1032-1033,1037-1038,1045). Further, counsel also presented evidence through a prison psychologist that appellant was “very cooperative,” that appellant was quiet and polite, that appellant had never given his psychologist any problems, that appellant had never threatened anyone, that appellant had adjusted well to prison, and that appellant’s psychologist did not have to take any special safety measures when appellant came for counseling (Tr.1049-1050,1052).

Because this evidence was the same kind of evidence that would have been obtained from appellant’s Iowa records and Jake Noonan, counsel was not ineffective for failing to present the Iowa evidence. Counsel is not ineffective for failing to present cumulative evidence. Skillicorn v. State, 22 S.W.3d 678,685 (Mo.banc 2000).

Moreover, appellant’s Potosi incarceration was far more relevant than the incarceration that took place several years earlier. Appellant’s condition had changed drastically in the intervening years, and evidence of appellant’s current ability to adjust to prison life had far greater probative value. In addition, the evidence of appellant’s escape would have undermined the Iowa evidence to the same extent that it undermined the evidence that was actually presented at appellant’s trial. The fact that appellant had not escaped in Iowa would have simply been a reminder to the jury that appellant’s current circumstances were far worse than those

in Iowa.

Finally, though not mentioned in his post-conviction motion, appellant now argues that evidence of his Iowa incarceration would have been helpful because it would have shown the jury that appellant was behaving well in prison not simply because he was facing a sentence of death but because he was just a good prisoner (App.Br.118-119). Actually, however, appellant was already under a death sentence. Accordingly, there is little reason to believe that the jury would have thought that appellant was behaving himself as a last-ditch ruse to avoid death by proving that he was capable of adapting to life in prison.

**VIII. COUNSEL WAS NOT INEFFECTIVE IN FAILING TO MAKE VARIOUS OBJECTIONS, OR IN ELICITING OR DECIDING NOT TO ELICIT VARIOUS EVIDENCE.**

In his eighth point, appellant raises six separate claims of error. Respondent will address them in the order that they are raised.

**A. The Standard of Review**

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” Moss v. State, 10 S.W.3d 508,511 (Mo.banc 2000).

“The movant has the burden of proving the movant’s claims for relief by a preponderance of the evidence.” Supreme Court Rule 29.15(i).

**B. The Motion Court Did Not Clearly Err**

In denying the various claims made in this point, the motion court stated:

18. . . .

. . . Movant has failed to show that reasonable trial strategy was not behind counsel’s decision not to object to the matters in question. See State v. Kennedy, 824 S.W.2d 936 (Mo.App.1992). Trial strategy is not a ground for claiming ineffective assistance. State v. Shurn, 866 S.W.2d 447 (Mo.banc 1993), cert. denied, 115 S.Ct. 118 (1994).

a. Movant has failed to present any evidence that the outcome of his case would have been different had his counsel taken the actions

he asserts should have been undertaken. After reviewing the record, this Court finds that the outcome would not have been different.

...

22. Movant has failed to overcome the presumption that the decisions of the attorneys, including whether or not to object, was a strategic choice. State v. Tokar, 918 S.W.2d 753,768 (Mo.banc 1996). While Ms. Kerry did attempt to claim to have “no reason” for some of her actions, the Court concludes—based on its observations at trial and at this hearing—that Ms. Kerry was overly eager to acknowledge her “ineffectiveness.” The Court does not find such “admissions” credible.

...

42. Claim 8(Y) sets forth a long list of complaints regarding the opening and closing arguments in the penalty phase. The Court finds that Movant has failed to show that any of these claims would have changed the outcome of his trial. Counsel made a conscious decision to not object to every objectionable matter. This is reasonable trial strategy and counsel was not ineffective.

...

44. Claim 8(AA) sets forth a long list of complaints. It is denied.

...

As to the claims that relate to Dr. Lipman, the state’s questioning of Dr.

Lipman was proper in that it tested his qualifications, skills, and credibility, and the validity and weight of his opinion. The various objections would have been without merit, and there is no reasonable probability that any of the objections would have changed the outcome of movant's trial.

...

The remaining allegations of error in Claim 8(AA) are denied. Movant has not shown either that counsel was incompetent, or that, but for counsels [sic] alleged errors, there is a reasonable probability that the outcome of his trial would have been different.

(P.L.F.527-529,532-534).

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 2068.

### **1. Objection to Dr. Lipman's testimony that appellant lied**

Appellant first contends that counsel was ineffective for failing to preserve a claim of error that the state improperly questioned Dr. Lipman about whether he believed appellant had lied to him (App.Br.123). He claims that if the error had been preserved by trial counsel then the outcome of his appeal might have been different (App.Br.123,125).

An expert generally "may not give opinions on the credibility of witnesses." State v.

Middleton, 998 S.W.2d 520,527 (Mo.banc 1999). In the case at bar, however, the state's questioning of Dr. Lipman did not relate to the credibility of any witness because appellant was not a witness.

Here, the state's cross-examination properly tested Lipman's qualifications, skills, and credibility, and the validity and weight of Lipman's opinion. State v. Smith, 32 S.W.3d 532,550 (Mo.banc 2000). On direct examination, Lipman had already testified that his opinion was based, in part, upon a personal history that he had obtained from appellant during a two-day evaluation period (Tr.948-949). In fact, Lipman testified that obtaining a personal history was "very important" in evaluating appellant (Tr.949). Consequently, it was entirely proper for the state to inquire as to the reliability, or accuracy, of the history that Lipman thought he had obtained from appellant. See id. In addition, appellant can hardly claim prejudice, because he elicited similar evidence in support of his case on direct examination (Tr.953). "Counsel cannot be deemed ineffective for failing to make or preserve a non-meritorious claim." Morrow v. State, 21 S.W.3d 819,826 (Mo.banc 2000).

## **2. Eliciting William Worley's testimony about a "freshly dug grave"**

Appellant next contends that counsel was ineffective for eliciting the fact that William Worley had seen what appeared to be a "freshly dug grave" in appellant's yard (App.Br.125). This evidence was elicited by counsel as follows:

- Q. And do you know in your opinion when did [appellant's behavior] change?
- A. Probably in '94 he's getting a little weird.
- Q. Okay. Getting weird because of the drug use?

A. Yeah.

...

Q. All right. Tell us, you said he was getting weird. Tell us what you mean by that. What was he doing that makes you say that?

A. Talking about people out in the woods and stuff like that. Just weird stuff.

...

Q. What other things did you see John Middleton do that make you say he's acting weird?

A. Just weird stuff.

Q. Like what? Give us some examples.

A. I don't know, walk around his yard picking up little things, cellophane, you know.

Q. Cellophanes.

A. Yeah, little stuff to put drugs in. Saying that people's been here, been in my attic. Stuff like that. Walk around the yard.

...

Q. You said that John was looking for little baggies of methamphetamine on the ground where there weren't any?

A. Yep.

Q. You observed that behavior?

A. Yep.

Q. He's looking for drugs on the ground?

A. Yep.

Q. Was there any drugs that you could see?

A. Nope.

Q. All right. And you said that he was acting real crazy?

A. Yes.

Q. And you said that he was calling a well "Happy"?

A. Yes, ma'am.

Q. And this was in May?

A. I ain't for sure exact date.

Q. Okay. And I think you also said you saw a freshly dug grave at John's house about the size of a person.

A. What looked like one.

Q. What looked like one?

A. Yes.

Q. You said it was covered up with boards?

A. Yep.

(Tr.912-914).

As is evident, this testimony was part of counsel's strategy to depict appellant as having succumbed to the effects of heavy methamphetamine use. It was not, as appellant now argues,

evidence that supported a finding of guilt. In fact, there was never any real suggestion that the victim's bodies were first buried and then put in the trunk of the victim's car to be discovered later; rather, the evidence presented at trial showed that appellant killed the victims, put them in the trunk of the victim's car, and left the car in a field where it was later found. Moreover, the digging in appellant's yard was, as elicited by counsel during guilt phase, "a small hole" for the water line that was "two or three foot long" (Tr.768).

Also, unlike the cases cited in appellant's brief, there is no possibility that appellant suffered any prejudice from this evidence. Appellant's guilt had already been decided; thus, this evidence (even assuming the jury believed that appellant really did dig a "grave" as opposed to a "small hole" for a "water line") had little or no meaning. In short, there is no reasonable probability that, absent this evidence, the jury would have imposed life imprisonment.

### **3. The prosecutor's "send a message" to drug users argument**

Appellant next contends that counsel was ineffective for failing to more specifically object to the prosecutor's argument that the jury should send a message to drug dealers by imposing a sentence of death (App.Br.127-128). He claims that the exact same arguments were made in Commonwealth v. LaCava, 666 A.2d 221 (Penn.1995), and found to be improper (App.Br.128)

As noted in Point I, above, appellant's reliance upon LaCava is misplaced. First, the case is not controlling. Second, the court in LaCava vacated the death sentence because the prosecutor's extensive argument regarding the defendant's involvement in drug trafficking was intended to convince the jury to impose death "as a form of retribution for the ills inflicted on

society by those who sell drugs” rather than as punishment for the defendant’s murdering a police officer. Id. at 236-237. Thus, unlike the arguments in the case at bar (which urged the jury to “send a message” to drug users), the arguments in LaCava suggested that it would be proper to punish appellant for the acts of many other drug dealers.

Here, the prosecutor did not urge the jury to punish appellant because of the acts of others; rather, the prosecutor told the jury to send a message that “[w]e’re not going to tolerate drugs and we’re not going to tolerate anybody who kills because of drugs” — acts which appellant was guilty of committing (Tr.127-128). “The state may argue that the jury should send a message that society will not tolerate certain conduct.” State v. Simmons, 944 S.W.2d 165,182 (Mo.banc 1997); see State v. Link, 25 S.W.3d 136,147 (Mo.banc 2000).

Appellant also contends, citing State v. Storey, 901 S.W.2d 886,901 (Mo.banc 1995), that the prosecutor’s argument was improper because it referred to matters outside the record (App.Br.182-129). However, this case is distinguishable from Storey. “[T]he prosecutor may argue the prevalence of crime in the community and may call on common experience in doing so.” State v. Simmons, 944 S.W.2d at 182 (distinguishing Storey). There was nothing improper about the prosecutor’s argument; thus, any objection would have been non-meritorious.

#### **4. The prosecutor’s question about appellant’s two escape attempts**

Appellant next argues that counsel was ineffective for failing to object when the prosecutor asked the Potosi caseworker whether he was aware that appellant had “two escape attempts while” incarcerated in the Harrison County Jail (App.Br.129). He points out that

there was only evidence of one escape attempt, and he claims that the prosecutor's question about two escape attempts caused the jury to impose death sentences instead of life imprisonment (App.Br.130-131).

The prosecutor's question, however, was not evidence, and the jury was so instructed (L.F.598). Thus, there is no reason to believe that the jury accepted the prosecutor's inquiry as proof of two escape attempts when only one had been presented to them.

In addition, even if the jury did think that there had been another escape attempt, there is no reasonable probability that, in the absence of the prosecutor's question, the jury would have imposed a sentence of life imprisonment. Appellant's escape attempt was presented to the jury primarily as evidence of appellant's guilt, i.e., it showed consciousness of guilt. Its value in penalty phase (even if it had happened twice) was very limited and, under the facts of this case, probably contributed little to the jury's decision to impose the death sentence.

#### **5. Failure to elicit opinion from Dr. Lipman about diminished capacity**

Appellant next contends that counsel was ineffective for failing to elicit from Dr. Lipman that appellant's capacity to "appreciate the criminality of his conduct" or to "conform his conduct to the requirements of the law" was substantially impaired (App.Br.131). He claims that if such evidence had been adduced in penalty phase, the jury could have been instructed to consider that mitigating factor, and there is a reasonable probability that the jury would have imposed life imprisonment (App.Br.131-132).

For the reasons discussed in Point IV, above, counsel was not ineffective. Dr. Lipman did not divulge this secretly held opinion to counsel, and, in any event, counsel made a

reasonable strategic reason not to call Lipman after Dr. Murphy's testimony had such a negative impact upon the jury. See Lyons v. State, 39 S.W.3d at 37.

#### **6. The prosecutor's final argument for the death penalty**

Finally, appellant contends that counsel was ineffective for failing to object when the prosecutor argued: "If you can't give the death penalty for this crime, what kind of crimes are you going to give the death penalty for?" (App.Br.132). Citing Storey, supra, he claims that this rhetorical question relied upon facts outside the record (App.Br.133).

This argument, however, is not analogous to the argument made in Storey. In Storey, the prosecutor argued that the defendant's murder was among the most brutal in St. Charles County's history. State v. Storey, 901 S.W.2d at 900-901. This argument was improper because it relied upon facts outside the record (the comparative brutality of other cases) that the jury would reasonably expect the prosecutor to know. Id.

In appellant's case, however, the prosecutor made no reference to any other cases or any special prosecutorial knowledge; rather, the prosecutor merely argued by means of a rhetorical question that the grave facts of appellant's crimes warranted the death sentence. See State v. Simmons, 955 S.W.2d 752,774 (Mo.banc 1997)(counsel not ineffective for failing to object to prosecutor arguing, "if all these decisions aren't cool reflection on you want this person to die, then let me tell you nothing ever is;" and "If not in this brutal murder case, if not with this piece of evidence, then when?"). This point should be denied.

**IX. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CALL BRIAN FIFER.**

Appellant contends that counsel was ineffective for failing to call Brian Fifer to testify in penalty phase (App.Br.134). He claims that Fifer should have been called to refute Paul Oglesbee's penalty-phase testimony that appellant had threatened to "put a hit" on the Oglesbees (App.Br.134).

**A. The Standard Of Review**

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." Moss v. State, 10 S.W.3d 508,511 (Mo.banc 2000).

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

**B. Appellant Failed To Carry His Burden of Proof**

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.at 2068.

In denying this claim, the motion court stated:

Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide

range of reasonable professional assistance. The movant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. [Strickland v. Washington, 466 U.S.] at 689. The fact that one might reasonably pursue a different strategy of defense than that chosen by counsel at trial is irrelevant. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. Id. at 689. . . .

a. Movant has failed to present any evidence that the outcome of his case would have been any different had his counsel taken the actions he asserts should have been undertaken. After reviewing the record, this Court finds that the outcome would not have been different.

. . .

21. Movant called his trial attorneys, Sharon Turlington and Beth Davis-Kerry. Ms. Kerry was lead counsel because she had experience with death penalty cases. They had received a great deal of material from prior counsel and they had access to investigators to assist.

. . .

44. Claim 8(AA) sets forth a long list of complaints. It is denied. . . .

. . . On two claims pled in the alternative, which related to testimony allegedly available through Brian Fifer and Janice Middleton, Movant failed to present any evidence.

...

The remaining allegations of error in Claim 8(AA) are denied. Movant has not shown either that counsel was incompetent, or that, but for counsels [sic] alleged errors, there is a reasonable probability that the outcome of his trial would have been different.

(P.L.F.533-535). Though the motion court erred somewhat in stating that appellant “failed to present *any* evidence,” the motion court did not clearly err in denying this claim because (1) as to certain aspects of this claim, appellant failed to present any evidence, and (2) appellant failed to prove that he received ineffective assistance of counsel.

**1. Counsel’s failing to call Fifer was reasonable**

At the evidentiary hearing, Counsel Turlington testified that she did not recall contacting Fifer (P.Tr.281). She was not asked whether she knew about Fifer, or whether she knew that Fifer was willing to present testimony capable of casting some doubt upon Oglesbee’s testimony about appellant’s threat to “put a hit” on the Oglesbees. Counsel Davis-Kerry testified that she did not contact Fifer (or Jake Noonan) because she “didn’t see any point to it” (P.Tr.334). She explained her answer by pointing out that she had contacted people from “the Missouri Department of Corrections where appellant had been recently” (P.Tr.334). Davis-Kerry was not asked whether she knew about Fifer, or whether she knew that Fifer was willing to present potentially helpful testimony.

Given these responses, it is apparent that counsel did not know about Fifer, and that counsel did not know that Fifer was willing to present potentially helpful testimony. However,

to claim ineffective assistance of counsel for failing to call a witness, a movant must prove by a preponderance of the evidence that the witness was either known to his attorneys or that the witness could have been found after reasonable investigation. See State v. Jones, 979 S.W.2d 171,186 (Mo.banc 1998).

Here, counsel investigated appellant's case and spoke with appellant several times prior to trial. However, there was absolutely no evidence that counsel ever had Fifer's name prior to trial, or that counsel ever had any reason to believe that Fifer had any potentially helpful information. Appellant's post-conviction motion asserted that he had told counsel about Fifer (P.L.F.109), but neither appellant's attorneys nor appellant testified to that fact at the evidentiary hearing. The post-conviction motion also alleged that Fifer's name was included in his Iowa prison records "which counsel had in their possession" (P.L.F.109); however, Movant's Exhibit 40, the Iowa prison records submitted at the evidentiary hearing contain no reference to Brian Fifer. Also, there was no evidence of any other records in counsels' possession that referenced Fifer. In any event, even if Fifer were somewhere mentioned in appellant's Iowa prison records, counsel would not have known that Fifer could testify favorably about the "sell this address" phrase. Absent an explanation from appellant (of which there was no evidence), counsel would not have known that it was important to contact another Iowa inmate.

Accordingly, there was absolutely no evidence that counsel was made aware of, or should have been aware of Fifer's testimony. The motion court did not clearly err.

## **2. Appellant was not prejudiced**

Even assuming that counsel reasonably should have discovered Fifer's testimony, appellant was not prejudiced by counsel's failure. Paul Oglesbee testified that appellant had told them that he (appellant) was going to "sell this address," and that he understood that phrase to mean that appellant was going to "put a hit" on them (Tr.875).

In his deposition, Fifer, a ten-year veteran of the Iowa Department of Corrections, refuted Oglesbee's testimony by explaining that "sell your address" really means that an inmate "[is] not going to write no more" (P.L.F.387). Fifer explained that inmates have their own peculiar slang, and that "people out there they don't understand, you know" (P.L.F. 387). Apparently.

But there is no reasonable probability that this testimony would have affected the outcome of appellant's case. First, there is little reason to believe that the jury would have credited Fifer's testimony over Oglesbee's — especially in light of appellant's circumstances and actions around the time of the letter. Second, even if the jury would have credited Fifer's testimony and concluded that appellant had not threatened to "put a hit" on the Oglesbees, there is no reason to believe that the absence of that veiled threat would have affected the outcome of appellant's trial. The remaining evidence in aggravation included, among other things, threats of violence or death to Eddie Fickus and Billy Worley (Tr.872,897-899,906-908).

In addition, even if the veiled "sell this address" threat was discounted, there was still evidence that appellant accused Rose Oglesbee of being a "snitch" (Tr.873) — the very class of people that were on appellant's "hit list." In fact, the jury learned that appellant made that accusation the day before he killed Alfred Pinegar (Tr.873). And, of course, appellant's veiled

threat was only a small detail when compared to the three murders that he committed in executing his plan to eliminate the people he suspected were “snitches.” This point should be denied.

**X. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE THAT ALLEGEDLY SHOWED THAT DAN SPURLING COMMITTED THE MURDERS.**

Appellant contends that counsel were ineffective for failing to present the testimony of (1) Don Smith, who would have testified that the bullet fragments recovered from Stacey Hodge's body could have come from a 30-30 Winchester (a type of gun allegedly owned by Dan Spurling), and (2) Jeremy Wyatt, who would have testified that Dan Spurling admitted to committing the murders (App.Br.139). He argues that, had such evidence been admitted during guilt phase, there is a reasonable probability that he would have been acquitted or "at worst . . . sentenced to life" (App.Br.139).

**A. The Standard Of Review**

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." Moss v. State, 10 S.W.3d 508,511 (Mo.banc 2000).

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

**B. Appellant Failed To Carry His Burden Of Proof**

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different.” Id. at 2068.

In denying these claims, the motion court stated:

12. Jeremy Wyatt testified. He is the son of Movant’s co-defendant. He testified that Dan Spurling threatened Wyatt with scissors out of anger for Movant’s murder of the victims. Wyatt then testified that within a very few moments, Mr. Spurling admitted to the same killings. This testimony is entirely incredible and not worthy of belief.

Furthermore, trial counsel was not ineffective for failing to call this witness. First, the witness was so patently unbelievable that no competent counsel would have called him as a witness.

Second, Mr. Wyatt testified that, other than speaking to a deputy the next day (an assertion this Court finds not worthy of belief), he did not tell anyone until after the trial. Counsel could not, therefore, have been ineffective because this evidence was not available.

...

14. Movant called Don Smith to the stand. Mr. Smith testified as a firearms expert. He testified that the bullets recovered from the victims could have been fired from a number of weapons and not just the SKS rifles of the Movant. This testimony does not contradict the testimony of State’s witness Green and, the Court finds, would not have been persuasive with a jury. Counsel was not ineffective for failing to call this expert as a witness at trial. The

witness's testimony was confusing and he was not credible. Claim 8(O) is denied.

...

21. Movant called his trial attorneys, Sharon Turlington and Beth Davis-Kerry. Ms. Kerry was lead counsel because she had experience with death penalty cases. They had received a great deal of material from prior counsel and they had access to investigators to assist.

...

32. Claim 8(O) is denied. The testimony of witness Green was properly admitted and, as noted, Mr. Smith's testimony did not contradict her testimony and was not persuasive.

...

37. Claim 8(T) is also denied. First, Movant failed to set forth with the required specificity the evidence that Movant thinks his counsel should have presented that Dan Spurling committed the murders. Morrow v. State, 21 S.W23d 819 (Mo.banc 2000). Movant's claim that there was unrepresented evidence of Dan Spurling's culpability is unsupported by the evidence presented.

(P.L.F.523-524,528,531-532).

### **1. Don Smith's testimony about a 30-30 Winchester**

As appellant points out, at the evidentiary hearing, Don Smith testified that the bullet fragments recovered from Stacey Hodge could have been fired from a 30-30 Winchester

(P.Tr.90). That being said, there was absolutely no evidence that Spurling actually owned a 30-30 rifle at the time of the murders.

Appellant points out that Spurling had been charged with assault in the second degree and armed criminal action arising from his allegedly having pointed a 30-30 rifle at Penny Whitt and her unborn child (App.Br.143). Additionally, appellant points out that the state indicated its intention to admit a 30-30 Winchester obtained from Spurling at Spurling's trial on those charges (App.Br.143). This, he claims, was evidence that Spurling actually owned a 30-30 Winchester.

However, a charging document is not evidence, and the various documents contained in Spurling's criminal files from Harrison County also are not evidence that Spurling actually owned a 30-30 Winchester. Furthermore, even if the hearsay evidence of Spurling's owning a 30-30 Winchester is considered for the truth of the matter asserted, there was still no evidence that Spurling owned a 30-30 Winchester at the time of the murders.

Spurling was charged with assault in the second degree and armed criminal action for acts he committed on May 17, 1996 (Mov.Exs.7,14). That date was nearly a year after the murders of Randy Hamilton and Stacey Hodge, which occurred on June 11, 1995; thus, there was absolutely no evidence that Spurling owned a 30-30 Winchester at the time of the murders. And, accordingly, Smith's testimony that the bullet fragments could have come from a 30-30 Winchester would have been meaningless (except to point out that the bullet fragments did not necessarily come from appellant's SKS rifles — a fact that was clearly established at appellant's trial).

## 2. Jeremy Wyatt's testimony about Spurling's admissions

A movant must prove by a preponderance of the evidence that the witness was either known to his attorneys or that the witness could have been found after reasonable investigation. See State v. Jones, 979 S.W.2d 171,186 (Mo.banc 1998). As the motion court found, however, Wyatt did not tell anyone (except perhaps a sheriff's deputy) about the admissions that Spurling allegedly made to him.

Consequently, counsel was not ineffective. Appellant has never alleged or shown how counsel could have possibly discovered this evidence when Wyatt refused to tell anyone about it prior to appellant's trial.<sup>22</sup> In addition, the evidence was not admissible because it was inadmissible hearsay.

Furthermore, there is no reasonable probability that this evidence would have affected the outcome of appellant's trial. Wyatt testified that Spurling attacked him with scissors, saying, "it was [his] turn to die," because Spurling was mad at Wyatt's stepfather (appellant) and mother for killing the victims (Tr.29). Wyatt then testified that after Spurling attacked him, Spurling admitted to killing the victims (Tr.30). Thus, as the record shows, Wyatt, who undeniably had a motive to testify favorably for appellant, merely told an incredible story that did not persuasively point to Spurling's guilt. Accordingly, the motion court did not clearly

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<sup>22</sup> The motion court did not find it credible that Wyatt had mentioned Spurling's admissions to the deputy. Tellingly, there was no evidence from the deputy (or from a police report) that Wyatt had ever disclosed such important information.

err in concluding that Wyatt's testimony would not have affected the outcome of appellant's trial.

**XI. COMMUTATION OF DARRELL MEASE’S DEATH SENTENCE DID NOT RENDER APPELLANT’S DEATH SENTENCE ARBITRARY AND CAPRICIOUS.**

Appellant contends that Missouri’s clemency process is arbitrary and capricious (App.Br.145). He cites the clemency granted to Darrell Mease, after a request by Pope John Paul II, as evidence thereof (App.Br.145).

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” Moss v. State, 10 S.W.3d 508,511 (Mo.banc 2000).

“The movant has the burden of proving the movant’s claims for relief by a preponderance of the evidence.” Supreme Court Rule 29.15(i).

In denying this claim, the motion court stated:

30. Claim 8(M), challenging the clemency process, is denied.

Commutation of another’s death sentence does not render Movant’s death sentence arbitrary or capricious. On direct appeal, the Missouri Supreme Court has already determined that Movant’s sentence was properly imposed.

(P.L.F.530).

The motion court was absolutely correct. The application of mercy in one case simply does not invalidate the imposition of the death penalty in another case. The constitutionally required checks on arbitrariness were present in appellant’s case, and this Court has already determined on direct appeal that appellant’s sentence was not imposed as the result of any caprice or whim.

The motion court also did not clearly err because appellant's challenge to the clemency process is not cognizable in this proceeding. Supreme Court Rule 29.15(a) provides a mechanism for an individual following a guilty verdict to raise claims that the "conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States[.]" However, the manner in which an executive decision was made with regard to clemency in another case is not in any way related to the judicially-imposed conviction and sentence in appellant's case.

In addition, because appellant has not made a clemency request to date, he lacks standing to challenge the clemency process. State v. Entertainment Ventures I, Inc., 44 S.W3d 383,387 (Mo.banc 2001)("[T]o have standing to raise a constitutional issue, the objecting party's rights must have been affected."). The motion court did not clearly err.

## CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

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## **APPENDIX**

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Court's Special Rule No. 1(b), and that the brief, excluding the cover, the certificate of service, this certificate, and signature block, contains 27,763 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this \_\_\_\_ day of April, 2002, to:

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