

No. SC94622

In the
Missouri Supreme Court

RICHARD D. DAVIS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from the Circuit Court of Jackson County
Sixteenth Judicial Circuit
The Honorable Marco A. Roldan, Judge**

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant, Richard D. Davis, was convicted of first-degree murder and multiple counts of first-degree assault, forcible rape, and forcible sodomy following a jury trial in the Circuit Court of Jackson County. *State v. Davis*, 318 S.W.3d 618, 621 (Mo. banc 2010). The facts of the underlying criminal case were stated by this Court in its opinion on direct appeal as follows:

[O]n May 15, 2006, officers discovered a shallow grave in rural Lafayette County that contained the body of Marsha Spicer. Police identified Richard D. Davis as a suspect in the Spicer investigation. On May 19, 2006, officers executed a search warrant on Mr. Davis' apartment and seized numerous items, among them a video camera and various videotapes, including tapes police designated as items 26 and 31.

Item 26 depicts footage of Mr. Davis and his girlfriend engaging in forced sexual acts with Ms. Spicer while her hands are bound with duct tape. It depicts Mr. Davis straddling Ms. Spicer's head and forcibly placing his penis in her mouth, punching Ms.

Spicer in the side and stomach, and vaginally and anally raping Ms. Spicer as his girlfriend adjusted the camera angles. Item 31 shows Mr. Davis and his girlfriend performing forced sexual acts on a different victim, Michelle Huff Ricci. It depicts Ms. Ricci with her hands bound with yellow speaker wire. Portions of Item 31 show Mr. Davis vaginally raping Ms. Ricci while his girlfriend straddled her face, anally raping Ms. Ricci while forcing her face into his girlfriend's genitals, forcibly placing his penis in Ms. Ricci's mouth, and choking and striking Ms. Ricci on the head and back while she cried out in pain.

Police interviewed Mr. Davis. During the interview, Mr. Davis stated Ms. Spicer came to Mr. Davis' apartment and they had consensual sex for a while until Ms. Spicer said she wanted to leave. Then Mr. Davis and his girlfriend raped and sodomized Ms. Spicer. Initially, Mr. Davis claimed that Ms. Spicer accidentally suffocated to death while he and his girlfriend raped her. Mr. Davis eventually

admitted, however, that he knew they were going to kill Ms. Spicer as soon as the sex “went too far,” as he decided he could not allow Ms. Spicer to leave the apartment for fear that she would alert the authorities. After Ms. Spicer died, Mr. Davis and his girlfriend cleaned Ms. Spicer's body with bleach and dumped her in the shallow grave in Lafayette County.

During the interview, police also asked Mr. Davis about Ms. Ricci. Mr. Davis stated that Ms. Ricci willingly had come to his apartment and that the two of them as well as Mr. Davis' girlfriend had consensual sex. Eventually, Mr. Davis and his girlfriend tied up Ms. Ricci against her will and raped and sodomized her. Mr. Davis said he hit Ms. Ricci seven or eight different times and that he and his girlfriend tried to smother Ms. Ricci but she resisted too much.

Based on Mr. Davis' interview, the police seized more tapes that were hidden at Mr. Davis' workplace.

These tapes, which the police labeled A, B, C and D, showed Mr. Davis raping, anally sodomizing and punching Ms. Spicer and Ms. Ricci. In addition to the rape and sodomy, Tape A showed Mr. Davis grabbing Ms. Ricci by the hair, holding her face to the camera and boasting about the control he had over Ms. Ricci. Tape B showed Mr. Davis' attempt to smother Ms. Spicer and threaten to crush her larynx if she complained. Tape C showed Mr. Davis' girlfriend sitting her naked body down on Ms. Spicer's face, smothering Ms. Spicer to death while Mr. Davis held Ms. Spicer down. Tape D showed Mr. Davis taunting and choking Ms. Ricci until she urinated.

Davis, 318 S.W.3d at 621-22.

In the penalty phase, the State submitted three statutory aggravating circumstances: that appellant had one or more serious assaultive convictions, that the murder of Ms. Spicer involved depravity of mind, and that the murder of Ms. Spicer occurred while appellant was engaged in the perpetration of rape. *Id.* at 622-623. The jury recommended a death sentence. *Id.* at 623. The trial court sentenced appellant to death for first-degree

murder. *Id.* It also sentenced appellant as a persistent sexual offender to a total of four consecutive life sentences for appellant's numerous other crimes (L.F. 5359-5360). On direct appeal, this Court affirmed appellant's convictions and sentences. *Id.* at 621.

On November 23, 2010, appellant filed his *pro se* Motion to Vacate, Set Aside, or Correct Judgment and Sentence (PCR L.F. 12-171). Appointed counsel filed an amended motion, raising four broad claims of ineffective assistance of trial counsel, a claim of ineffective assistance of appellate counsel, and a claim of an alleged discovery violation (PCR L.F. 182-555). The motion also incorporated all of appellant's myriad *pro se* claims (PCR L.F. 299-554). An evidentiary hearing was held, at which appellant called ten witnesses, including trial counsel Tom Jacquinet and Susan Elliot, trial mitigation specialist Carol Muller, psychiatrist Dr. William Logan, and psychologist Dr. Victoria Reynolds (PCR Tr. 10-1229). On October 1, 2014, the motion court entered findings of fact and conclusions of law denying appellant's motion (PCR L.F. 1397-1530). This appeal followed.

STANDARD OF REVIEW AND STANDARD FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. *Nicklasson v. State*, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. *Id.* On review, the motion court's findings and conclusions are presumptively correct. *Edwards v. State*, 200 S.W.3d 500, 505 (Mo. banc 2006).

To establish ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Nicklasson*, 105 S.W.3d at 483. To establish prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 694; *Nicklasson*, 105 S.W.3d at 483. In the context of capital sentencing, prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the jury would have concluded that the balance of aggravating and mitigating

circumstances did not warrant death. *Johnson v. State*, 388 S.W.3d 159, 163 (Mo. banc 2012).

A movant has the burden of proving grounds for relief by a preponderance of the evidence. *Nicklasson*, 105 S.W.3d at 484; Supreme Court Rule 29.15(i). This Court gives deference to the motion court's superior opportunity to judge the credibility of witnesses. *Barton v. State*, 432 S.W.3d 741, 760 (Mo. banc 2014). Moreover, actions that constitute sound trial strategy are not grounds for ineffective assistance claims, and this Court presumes that any challenged action was a part of counsel's sound trial strategy and that counsel made those decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689-690.

ARGUMENT

I.

Appellant failed to prove that trial counsel was ineffective for failing to call psychologist Dr. Victoria Reynolds to testify about appellant’s alleged childhood “trauma.”

Appellant claims that the motion court clearly erred in denying his post-conviction claim that trial counsel was ineffective for failing to present the testimony of Dr. Victoria Reynolds in the penalty phase, arguing that counsel’s ineffectiveness prevented the jury from hearing “a complete picture” of the “trauma” he allegedly suffered due to “multigenerational incest, sexual and physical abuse, drug use, and prostitution to which he was subjected in childhood” (App. Br. 40-65). But appellant failed to present credible evidence to prove that Dr. Reynolds’s testimony provided appellant with a viable defense, counsel reasonably investigated and presented evidence of appellant’s history of being sexually and physically abused, and the decision for forgo pursuing an additional expert witness was reasonable. Therefore, the motion court did not clearly err in denying appellant’s claim.

A. Facts

1. Penalty Phase Evidence

a. Lay Witnesses

In the penalty phase, counsel called Vickie Gunn, appellant's ex-girlfriend (Tr. 4473). Gunn testified that appellant had told her that he and his sister had been molested and beaten as children (Tr. 4476). He took her to various places around Kansas City and showed her houses that he hid in to get away from the abuse (Tr. 4476). He told her that he saw other families having normal Christmases and that he wished he could have one too, but he was afraid to go home because he would be beaten or molested (Tr. 4476-4477). She testified that she had also heard appellant's sister Yvonne talk about the abuse (Tr. 4492).

Counsel called appellant's sister Yvonne (Tr. 4511). Yvonne testified about appellant's family background (Tr. 4512-4542). She testified that Stanley Cauthern, appellant's and Yvonne's stepfather, physically abused all of the children and their mother and sexually abused Yvonne (Tr. 4519). She said that Cauthern would tell appellant that he was "stupid, he was worthless," he "wouldn't amount to anything in his life," and that nobody loved him (Tr. 4521). She said that she was abused starting at age eight and that Cauthern would be abusive "whenever [he] came home drunk, which was at least five or six times a week" (Tr. 4522-4523). Cauthern would hit kick and punch the children, hit them with the back of his hand, throw them across the room or out into the yard, and hit them with a belt (Tr. 4523). She

testified that appellant would “run away from home a lot” and hide in caves, stay at friends’ houses, or stay out on the street in order to escape the abuse (Tr. 4519). She said that appellant was beaten every time he came home (Tr. 4523). She testified that appellant was put into a “juvenile home” or “boys’ home,” but she was not sure why (Tr. 4520). She testified that she had never seen appellant’s mother try to convince appellant to stay or that they loved him (Tr. 4520).

She testified that Cauthern sexually abused her, also starting when she was eight (Tr. 4526). He would often rip her clothes off, force his hand into her vagina, and force her head down to his penis to make her perform oral sex on him (Tr. 4526-4527). He would punch her in the head if she did not do as he asked (Tr. 4527-4528). She never saw Cauthern sexually abuse the other children, but later learned that all of her siblings, including appellant, had been sexually abused by him (Tr. 4529-4531). Appellant admitted that Cauthern had sexually abused him after appellant was arrested for the charged crimes (Tr. 4530).

Appellant testified that his memories of being violently abused “come and go,” but the first memory was of a stepfather other than Cauthern pushing him into a trash fire when appellant was either four or five years old (Tr. 4719). He remembered that the first time Cauthern beat him was

because he had dropped a beer that Cauthern asked him to fetch, causing the beer to spray Cauthern when he opened it (Tr. 4723-4724). He said that Cauthern burned him with cigarettes and that he had “two scars in my eye” ever since (Tr. 4724). Appellant testified that, when he was in the seventh grade or so, he did not want to strip for a shower in school because he had been beaten in the days leading up to that and had bruises and lacerations all over the back of his body (Tr. 4719-4720). Appellant testified that he started using drugs when he was 11 or 12 to help him “keep [his] sanity or something” because they were the “better thing in my life back then” (Tr. 4729-4730)

As for sexual abuse, counsel asked appellant if anything else happened after the school coach made him strip down; appellant replied that the coach was a “bad guy. I mean, you know, kind of like I am now” (Tr. 4720). He said he had tried to write the things down that had been done to him but he “just couldn’t push it out of [his] head” (Tr. 4720). He said that the coach, Stan, and a person from the “Big Brother program” were “people with sexual problems” and had been “drawn” to him like he was “a magnet” (Tr. 4721). He talked about a man he knew as Sergeant Jackson taking him and other young boys to his farm and making them take off their clothes and shower with him (Tr. 4722-4723). Counsel asked if Cauthern had sexually abused

him; appellant said, “He was just a bad man. Yes, and I know the other guy’s probably going to, you know, dig into it, but, I mean...” (Tr. 4725). When counsel tried to keep appellant focused on the question, appellant said, “He was a bad man. I don’t think I minded it; I’d rather had it than beating me” (Tr. 4725). When asked if he meant that the sexual abuse was better than the beating, appellant replied, “I know it sounds stupid. He was just a bad man, you know” (Tr. 4725). Counsel asked if appellant had to perform oral sex on Cauthern as Yvonne had described; appellant instead talked about how Yvonne had accurately described the experience of Cauthern coming home and coming up the stairs where he would molest her (Tr. 4726).

Appellant said that, after being put in a group home called Haley House when he was 12 or 13, two older youths “took over where Stan left off” and “did sexual stuff” to him (Tr. 4726-4727). Later, he talked about being repeatedly sexually assaulted in prison by another inmate for a period of three months to a year (Tr. 4728-4729). He opined that that was when he “snapped” and “started becoming bad myself” (Tr. 4728). He talked about being placed in a “special unit” in the Jackson County Jail for men who thought they were gay (Tr. 4730-4731). At that point, appellant said that he did not want to talk about this anymore and that it was “not real” (Tr. 4731). Later, he talked about his experience in sexual offender therapy in the

Department of Corrections, admitting that he did not tell the therapist everything about his history of sexual abuse because a psychiatrist he told about his “sexual history with Coach George, Big Brother, and Stan” had broken confidence about it, so he “flipped out” about that and refused to deal with it, instead pretending it never happened (Tr. 4736-4737).

b. Expert Testimony

Counsel called Dr. Steven Mandracchia, a forensic psychologist (Tr. 4568). Dr. Mandracchia was hired in May 2006 to assess appellant’s mental health, mental state at the time of the crime, and his general background and developmental issues that may have contributed to the crimes (Tr. 4571-4572). Prior to trial, he spent 35-40 hours with appellant over about 15 different meetings in a two-plus year period (Tr. 4572). He reviewed the discovery provided by the State, appellant’s records from juvenile court, the Western Missouri Mental Health Center, and the Department of Corrections (including records of sex offender treatment), and statements from appellant’s family members and other background witnesses acquired by counsel (Tr. 4572). He testified that his role included “trac[ing] the roots of what happened to” appellant “starting back in childhood,” which was relevant and important in a case like this (Tr. 4573). He focused on “the family background, the environment in the family, how [appellant’s] interpersonal

skills developed or didn't and then how his...psychosexual development, what kind of things happened to him or what types of things occurred along the way to contribute to, again, the types of things that we're dealing with today" (Tr. 4574).

Dr. Mandracchia testified that there were two "relatively striking" things about appellant's development at a very young age to start him "on a path towards very abnormal sexual development": the "lack of interpersonal connections in the family, physical abuse that existed in the family," and "the nature and range of sexual experiences beginning at a very early age" (Tr. 4574). He testified that, according to the records and appellant's statements, there was harsh and constant physical abuse, inconsistent adult figures, and sexual abuse (Tr. 4576). Appellant's home life was harsh, antagonistic, and unsupportive, contributing to appellant's running away and his placement in the Western Missouri Mental Health Center (Tr. 4576). He talked about how appellant was "severely scapegoated" by his family, getting the brunt of negative behaviors in the home, and that the family was disinterested in following any recommendations to help appellant (Tr. 4579-4580). There were reports of ongoing harsh physical abuse and of "pretty much ongoing sexual abuse within the home" (Tr. 4580). Due to the family and environmental factors, Dr. Mandracchia opined that appellant developed anxiety,

depression, and low self-esteem leading to anger which he would either repress or act out on (Tr. 4581). He also opined that this anger stemming from these elements of his upbringing led to him associate the anger with his sexuality (Tr. 4582).

Dr. Mandracchia related that the records showed that people were unsure about the identity of appellant's birth father and that there was no consistent father figure in the home, which had an effect on appellant's sense of safety and security (Tr. 4583). Records show appellant was shy and introverted as a youth, which Dr. Mandracchia attributed to not having an "appropriate arena" in the home to express his feelings (Tr. 4584). He believed that all of the records showed a lack of parental involvement and commitment (Tr. 4585). He opined that these factors "contributed significantly" to appellant's "overall development" (Tr. 4586).

Dr. Mandracchia testified about the impact on appellant's upbringing on his psychosexual development (the psychological context for his sexual development) (Tr. 4587-4594). Dr. Mandracchia testified that appellant reported that, as early as age six, appellant's family members were "encouraging, setting up, making him engage in sexual acts, or at least simulated sexual acts, with his sister" (Tr. 4590). He was also exposed to "fairly graphic and fairly pornographic and non[-]normative" sexual material

(Tr. 4590). This led to a pre-pubescent appellant acting out sexual conduct with some neighborhood girls, behavior that went beyond the typical “playing house” behavior (Tr. 4590-4592). This conduct occurred without interference from parental supervision because “there wasn’t parental supervision just in general” and there were “parental figures that were actually encouraging some of this” (Tr. 4592). By ages 10-12, he was engaging in what he called “sex” with a range of people including adults, and by ages 15-16 he had a stronger sex drive that was “becoming tired of routine sexuality” (Tr. 4591). Dr. Mandracchia opined that childhood sexual abuse also contributed to appellant’s psychosexual development as it would have been “fairly confusing, fairly fearful, and fairly upsetting” (Tr. 4593). He also noted that “multigenerational sexual abuse within” appellant’s family also contributed to his psychosexual development, and posited that it was possible for sexual abuse to “become a norm within a family system” (Tr. 4594).

Following all of this testimony about appellant’s childhood and development, Dr. Mandracchia testified about psychological disorders appellant suffered from, including “several” severe personality disorders, including antisocial personality disorder, narcissistic personality disorder, and paranoid personality disorder (Tr. 4597-4598). He pointed out numerous risk factors from appellant’s childhood which contributed to these disorders,

including rejection, lack of acceptance, lack of warmth, and a lack of support and role models, and noted there were “woefully very little” things he was exposed to which would have helped him avoid developing these disorders (Tr. 4599). He also testified that appellant developed sexual abnormalities, called paraphilia, which developed due to conditioning; the foundation for those paraphilia was laid by the time of appellant’s adolescence (Tr. 4601-4603). The childhood sexual abuse was a factor in the development of these paraphilia (Tr. 4604-4605). He testified that he believed appellant was being “candid” about some of the childhood sexual abuse and other experiences because the other people contacted about appellant’s childhood were not giving information inconsistent with the reports and appellant’s psychosexual development was consistent with the reported childhood experiences (Tr. 4609). Appellant, however, was “extremely reluctant” and “resistant” to discussing sexual abuse at the hands of Cauthern and eventually told Dr. Mandracchia that he was not going to tell Dr. Mandracchia about that (Tr. 4611). Appellant engaged in “very, very little” dialogue about Cauthern (Tr. 4513).

Near the end of his direct testimony, Dr. Mandracchia noted that, while appellant’s behavior was not “out of his control,” numerous factors that contributed to his development from childhood were out of his control,

including the violence he suffered, the sexual abuse perpetrated in his home, the multigenerational sexual abuse in the family, the types of “deviant sexualities” and lack of proper supervision, and the “total abandonment” by his birth father and “significant abandonment” by his stepfather and mother (Tr. 4615-4616). All of the factors in his upbringing—drug use, sexual abuse, physical abuse, abandonment, lack of positive role models—contributed to him becoming the man who committed the charged crimes (Tr. 4616).

2. Amended Motion

In his amended motion, appellant alleged that counsel was ineffective for failing to “investigate, discover, and present evidence at trial” that he “suffers from multiple forms of sexual, physical and emotional trauma” (PCR L.F. 185). He specifically alleged that counsel was ineffective for failing to present the testimony of Dr. Victoria Reynolds (or a similarly qualified expert) to testify about male sexual abuse and trauma (PCR L.F. 186). He alleged that, had counsel called Dr. Reynolds, the jury would have heard about how multigenerational incest, sexual and physical abuse, drug use, prostitution, and the resulting trauma affected his life and psychosexual development (PCR L.F. 186-187). He alleged that Dr. Mandracchia’s testimony was insufficient to explain that his upbringing rose to the level of “trauma” (PCR L.F. 205-207).

He alleged that Dr. Reynolds would have been able to testify that appellant's upbringing, including multigenerational incest, sexual abuse, physical abuse, drug use, prostitution in the family and by himself, and unstable marital relationships were "relevant to trauma" because they increased the "risk factors" that appellant would have been sexually abused (PCR L.F. 210). He alleged that she would have testified that appellant's trauma made it difficult for him to describe "his traumatic experiences" and caused him to have a "dissociated or 'compartmentalized' state of mind" (PCR L.F. 211-212). He alleged that she would have testified that appellant suffered from over-developed emotions such as rage (PCR L.F. 212). He alleged that Dr. Reynolds would have testified that he also suffered severe attachment problems because his mother had no warmth toward him, causing him not to be able to "connect with others" and "understand pain" (PCR L.F. 213-214). He alleged that she would have testified that he also suffered from "confusion" about his sexual orientation because he engaged in sexual activity with men even when he did not want to because he "accepted" abuse for survival and "automatically" accommodated men (PCR L.F. 214-215). He alleged that she would have concluded that appellant had a very fragmented state of mind and sense of self as a result of severe trauma; learned to compartmentalize to contain emotion; blamed himself for not

stopping the abuse against him; incorrectly labeled abuse as “sex”; was wired to respond to sexual stimulation at a very young age; learned to mimic sexualized adult behavior; and had difficulty in having a correct level of empathy for himself and others, as well as an understanding of how others might experience hurt and deserve understanding (PCR L.F. 216-218).

He alleged that Dr. Reynolds’s proposed testimony stood “in stark contrast” to Dr. Mandracchia’s testimony and would have provided “a framework for understanding how the trauma of sexual and physical abuse” affected appellant’s psychosocial and psychosexual development (PCR L.F. 218). He alleged that Dr. Reynolds’s testimony would have “enabled the jury to see a more complete, complex and, therefore, more emphatic and accurate portrayal” of appellant (PCR L.F. 218-219). He alleged that, had counsel presented this testimony, there was a reasonable probability that appellant would have been found not guilty of first-degree murder and sentenced to death (PCR L.F. 219).

3. Evidentiary Hearing Testimony

a. Dr. Reynolds

Dr. Reynolds testified at the evidentiary hearing consistently with the proposed testimony alleged in the amended motion (PCR Tr. 218-295). The information and experiences she based her conclusions on were generally the

same information and experiences Dr. Mandracchia testified to at trial or were information discovered during the post-conviction proceedings, including three meetings with appellant and writings appellant made for purposes of the post-conviction proceeding (PCR Tr. 224-231). She admitted that she does not test for malingering, but relies on her “sense” that descriptions of experience fit into a pattern of trauma and its “imprint” (PCR Tr. 234).

On cross-examination, she admitted that she had consulted in 12-15 death penalty post-conviction cases and had found that all of the movants in those cases had suffered from childhood “trauma” (PCR Tr. 296-298, 503). She testified that she had already made over \$20,000 in appellant’s case, that 80% of her income came from participation in these cases, and that her business came from word-of-mouth referrals from defense attorneys (PCR Tr. 300-301, 504). She testified that she did not support the death penalty (PCR Tr. 301). She testified that she never questioned whether or not appellant suffered trauma (PCR Tr. 303).

Dr. Reynolds said that she had been told that the post-conviction attorneys believed that appellant’s sexual abuse history had not been “evaluated adequately” and that they asked her to gather new additional information from appellant to assess the impact of his experiences (PCR Tr.

304). She acknowledged that appellant was vague and reluctant to reveal information to Dr. Mandracchia about parts of his upbringing but that he provided information to her in “explicit” and “specific” detail (PCR Tr. 305-311). Appellant “fully cooperated” with her with no hesitancy; he did not appear to be guarded about his experiences and did not refuse to talk about anything she asked him about (PCR Tr. 314-315).

Dr. Reynolds admitted that she did not review certain records about the case, including appellant’s trial testimony, his Missouri Sexual Offenders Program treatment records, disclosures about past victims of his various offenses, and the videotapes and interviews from the trial (PCR Tr. 339-349). She did not speak to appellant about the crimes themselves (PCR Tr. 349). She testified that she did not cover appellant’s entire psychosexual history, but only his childhood and adolescence (PCR Tr. 350). She made no diagnosis and stated that her opinions were not “aimed toward any activity or actions that had to do with the facts in the underlying criminal case” (PCR Tr. 352). She acknowledged that appellant could be inconsistent, provided “lots” of contradictions, was “not a great reporter,” and that some of appellant’s reports “maybe couldn’t be true” (PCR Tr. 389-390, 421-422, 424). She conceded that, if appellant was lying about anything, the foundation for her opinion “collapses” (PCR Tr. 399).

b. Trial Defense Team

Trial mitigation specialist Carol Muller testified that, in preparing for trial, it was very difficult to gain appellant's confidence and that appellant did not like it when the defense team did not do things exactly like he wanted (PCR Tr. 865-866). She testified that appellant admitted that he was sexually abused by Cauthern, but would never give any details about what happened (PCR Tr. 878-879). He would talk about abuse at various times in his life, but not about sexual abuse, and he would not give specific information (PCR Tr. 879). Appellant was not a good historian about problems with his family, and he had difficulty disclosing things to the entire team (PCR Tr. 885). His reports about sexual abuse were "cryptic" (PCR Tr. 885-886). Muller also interviewed numerous members of appellant's family attempting to develop a full history for appellant (PCR Tr. 866). While Yvonne, who testified at trial, was willing to help, other family members, including appellant's mother and other sister, were very reluctant to help the defense team (PCR Tr. 867). Muller persistently pursued the family members and eventually was able to interview the mother and other sister as well as appellant's aunts (PCR Tr. 868-872). There was "very little consistency" among the family members about sexual abuse in the household; while several family members believed appellant had been sexually abused, he had never disclosed it to them (PCR

Tr. 870-871). Muller was able find “some common threads” and to confirm issues regarding the boundaries for inappropriate sexual touching in the house (PCR Tr. 870-871). But family members also refuted much of what appellant would say about events (PCR Tr. 892).

Defense counsel Tom Jacquinot, the lead counsel in appellant’s trial, testified that Dr. Mandracchia had been retained prior to his entry into the case and that the defense team decided to keep him on because counsel had a good relationship with the doctor and because he had been working with appellant for a while (PCR Tr. 1128). Dr. Mandracchia worked with the team to develop a social history from a psychological perspective (PCR Tr. 1128). Dr. Logan was also hired to help supplement Dr. Mandracchia and, as a psychiatrist, to make recommendations about medications (PCR Tr. 1129). Counsel testified that the defense team had an ongoing issue with appellant being unwilling to discuss sexual abuse; he would not talk about Cauthern or any of the family issues (PCR Tr. 1132-1133). He rarely discussed the issues and only did so cryptically when he talked about it (PCR Tr. 1179). He testified that the team considered hiring an expert in sexual and physical trauma, but decided against doing so (PCR Tr. 1149). Counsel noted that appellant explicitly refused to talk to Dr. Mandracchia on details of sexual abuse (PCR Tr. 1179-1180). Counsel testified that the primary concern was

appellant's lack of cooperation with the two expert witnesses they had already hired (PCR Tr. 1149). It would have taken a lot of time and effort to hire a third expert and, while appellant would likely have gone through the process of speaking to another expert, counsel had no confidence that appellant would actually expend the effort with sufficient candor to fully cooperate with the expert (PCR Tr. 1150, 1157). Counsel also noted that appellant's family was the most difficult family he had worked with in a capital case that went to trial, even though Muller's efforts to get their help were significant (PCR Tr. 1172). Weighing the costs and benefits of hiring another expert, counsel decided not to hire a witness to testify specifically about trauma (PCR Tr. 1182).

4. Findings and Conclusions

The motion court denied this claim (PCR L.F. 1399-1425). The motion court concluded that the defense team competently investigated appellant's background and that Dr. Mandracchia was both qualified to testify and extensively testified about the effects of the childhood issues—including multigenerational sexual issues, physical and sexual abuse, and relational issues with his family—on appellant's psychosocial and psychosexual development, even though he did not use the word "trauma" to describe it (PCR L.F. 1402-1408). The motion court found that, by calling Dr.

Mandracchia, counsel fulfilled his obligation to present the evidence that Dr. Reynolds would have provided and that counsel was not ineffective for failing to shop for a different expert to testify in a particular way, finding that Dr. Reynolds's testimony would only have put a different "spin" or "gloss" on the evidence presented by Dr. Mandracchia (PCR L.F. 1409).

The motion court also found that Dr. Reynolds's findings were based on information provided by appellant only during the post-conviction proceedings and was not available to trial counsel due to appellant's refusal to cooperate with the defense team, including the two mental health experts, in developing evidence regarding appellant's sexual abuse history (PCR L.F. 1410-1416, 1422). Thus, counsel was not ineffective for being able to develop evidence appellant willfully refused to provide (PCR L.F. 1410-1416).

The motion court found that Dr. Reynolds's opinion was unreliable because she relied too heavily on appellant's self-reporting, which the court believed was "unreliable, non-credible, or both," and failed to consider other evidence, such as interviews with appellant's family members (PCR L.F. 1423-1424). The court also rejected Dr. Reynolds's testimony as not credible due to her bias evidenced by her opposition to the death penalty, her reliance on her testifying for death penalty post-conviction movants for her living, and her determination that appellant had suffered trauma before even

interviewing him (PCR L.F. 1423).

Finally, the motion court found that counsel's testimony that appellant was not sufficiently willing and candid to justify hiring another expert was credible (PCR L.F. 1424-1425).

B. Appellant Failed to Prove His Claim

The selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim. *Vaca v. State*, 314 S.W.3d 331, 335 (Mo. banc 2010). Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance of counsel. *Id.* To prevail on a claim of ineffective assistance of counsel for failing to call a witness, a defendant must show that counsel knew or should have known of the existence of the witness, the witness could have been located with reasonable investigation, the witness would have testified, and the witness's testimony would have provided a viable defense. *Strong v. State*, 263 S.W.3d 636, 652 (Mo. banc 2008). In a death penalty case, counsel is expected to discover all reasonably available mitigating evidence. *Johnson v. State*, 388 S.W.3d 159, 165 (Mo. banc 2012). This includes, among other things, investigating the defendant's medical history and family and social history. *Id.* Counsel is not ineffective for failing to shop for an expert that would testify in a particular way. *Id.* The

duty to investigate does not force defense lawyers to “scour the globe” on the off-chance something will turn up. *Id.* Reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *Id.*

1. Appellant Failed to Prove Dr. Reynolds’s Testimony Provided a Viable Defense

Appellant’s claim first fails because he failed to present credible evidence that Dr. Reynolds’s testimony would have provided him a viable defense. First, the motion court did not believe Dr. Reynolds’s testimony about appellant and trauma and thus rejected it (PCR L.F. 1423-1424). This Court gives deference to the motion court’s factual findings and credibility determinations. *Zink v. State*, 278 S.W.3d 170, 178 (Mo. banc 2009); *Barton v. State*, 432 S.W.3d 741, 760 (Mo. banc 2014). Because there was no other evidence presented by appellant that his childhood experiences amounted to trauma that resulted in the conclusions that Dr. Reynolds reached about the alleged trauma, he presented no credible evidence that there was any evidence about appellant’s psychological development that counsel should have presented that he failed to present.

Appellant argues that this Court is not bound by the motion court’s credibility findings because the motion court cannot substitute its credibility

finding for the jury's right to determine credibility at a trial in determining whether there was prejudice from counsel's failure to present the evidence (App. Br. 65). Even if appellant's statement of the law was correct, he misconstrues the motion court's finding. The motion court did not find that appellant was not prejudiced because a jury would not have believed Dr. Reynolds's testimony. Instead, the court did not believe that appellant established that counsel's performance was deficient because the only evidence supporting the claim of deficiency was not believable. Appellant bore the burden of proving his claim by a preponderance of the evidence. *Dorris v. State*, 359 S.W.3d 113, 118 (Mo. banc 2011); Rule 29.15(i). If appellant's argument was correct, appellant would bear no burden to prove an alleged claim; he would need only to have made an allegation and shown that he could have presented such evidence regardless of its truth. This cannot be the law. Counsel has no obligation to present false evidence. *See, e.g., Vann v. State*, 26 S.W.3d 377, 380 (Mo. App., S.D. 2000) (counsel has a duty not to knowingly present perjured testimony); *State v. Dixon*, 969 S.W.2d 252, 257 (Mo. App., W.D. 1998) (counsel was not ineffective for failing to call an alibi witness when counsel doubted the legitimacy of the witness's testimony). Thus, a movant must prove that the evidence counsel should have presented was true. Because the motion court found that Dr. Reynolds's testimony was

not true, appellant failed to prove that counsel's performance violated his duty to provide effective assistance of counsel.

Further, appellant failed to prove that Dr. Reynolds's testimony would have provided a viable defense even if it had been true. Despite appellant's arguments to the contrary, other than the use of the word "trauma," Dr. Reynolds's testimony did not provide any significant substantive evidence that was not included in Dr. Mandracchia's testimony. As the motion court concluded, Dr. Mandracchia's testimony set out appellant's theories about the effect of intergenerational sexual dysfunction, physical and sexual abuse, lack of parental supervision and support, and early exposure to inappropriate sexual activity on appellant's psychological and psychosexual development (Tr. 4574-4616; PCR L.F. 1402-1409). Failing to present cumulative evidence is not ineffective assistance of counsel. *Bucklew v. State*, 38 S.W.3d 395, 401 (Mo. banc 2001). Moreover, Dr. Mandracchia's testimony was actually more relevant than Dr. Reynolds's testimony in one important respect. Dr. Reynolds conceded that she did not try to cover appellant's entire psychosexual history, limiting her opinions to appellant's childhood and adolescence, and did not attempt to explain how the alleged trauma affected any "activity or actions" that had anything to do with the charged offenses (PCR Tr. 349-350, 352). But Dr. Mandracchia went further than Dr.

Reynolds, not only describing how appellant's childhood shaped his psychosexual development, but actually impacted the disorders and paraphilia which contributed to the charged crimes (Tr. 4597-4599, 4601-4605, 4615-4616). Because counsel presented evidence that was either cumulative to or more relevant than Dr. Reynolds's testimony, Dr. Reynolds's testimony added nothing that would have aided appellant's defense. Thus, appellant failed to prove that Dr. Reynolds's testimony provided a viable defense.

2. Counsel Reasonably Investigated and Presented Evidence of Appellant's Childhood Abuse History and Development

Further, counsel was not ineffective because counsel reasonably investigated and presented evidence of appellant's childhood abuse history and its effect on his development. As detailed above, counsel employed a mitigation specialist who, with the aid of an investigator, doggedly questioned appellant and his family and pursued other witnesses to learn about appellant's upbringing to obtain evidence of physical and sexual abuse (PCR Tr. 865-879, 885-894). Counsel employed two different mental health experts to, among other things, investigate appellant's social history from a psychological perspective (PCR Tr. 1128-1129, 1166). And counsel called one of those experts to testify to appellant's history and psychosexual

development, believing that witness to be the better witness for that purpose (PCR Tr. 1157-1158, 1188). Having employed a qualified expert to testify to the same subject matter, counsel should not be found ineffective for failing to shop around for an expert to testify in a particular way. *Ringo v. State*, 120 S.W.3d 743, 749 (Mo. banc 2003). This was not a case where counsel failed to investigate a certain area of appellant's life or call an expert about that area. Counsel conducted a reasonable investigation into abuse and appellant's psychosexual development and called a witness for that purpose. Counsel was not ineffective.

3. Counsel's Decision to Forgo an Additional Witness was Reasonable

Even though counsel had no obligation to pursue an additional witness on the issue of childhood "trauma," the evidence showed that he considered pursuing such a witness but made a reasonable decision to forgo such an expert. Counsel explained that appellant was reluctant to fully discuss his abusive past, making investigation of this issue difficult (PCR Tr. 1127, 1132-1133, 1149, 1169-1170, 1179-1180). Appellant had trouble cooperating with the two experts counsel had already hired for the same or similar purposes, leading counsel to believe that hiring a third expert would not have been sufficiently helpful to justify such an expert (PCR Tr. 1149-1150, 1157-1158, 1180, 1187-1188). Appellant was reluctant to fully cooperate with ideas that

were not his (PCR Tr. 1125). Counsel's statements, credited by the motion court, were consistent not only with mitigation specialist Muller's testimony to the same effect (PCR Tr. 865-866, 877-879, 885-886), but also with appellant's testimony at trial, in which he refused to directly answer most questions about sexual abuse (Tr. 4720-4723, 4725-4731, 4736-4737).

Counsel is not responsible for his client's failure to cooperate in the case. *State v. White*, 913 S.W.2d 435, 438 (Mo. banc 1996); *State v. Brown*, 902 S.W.2d 278, 298 (Mo. banc 1995); *see also Strong*, 263 S.W.3d at 649 (counsel's choice not to pursue a defense based on the defendant's state of mind was reasonable where counsel could not rely upon the defendant's position to be consistent based on his reluctance to cooperate). Appellant argues that these holdings should not apply to him because his failure to cooperate was not because he was unwilling, but because he was unable (App. Br. 61-62). To support this claim, appellant relies on the testimony of Dr. Logan that appellant's bipolar I disorder caused him to lack capacity to cooperate with counsel (App. Br. 61). But the motion court rejected Dr. Logan's testimony that appellant suffered from bipolar disorder or was in any way incompetent or unable to cooperate with counsel (PCR L.F. 1454, 1464-1465). To the extent that Dr. Reynolds's testimony would have supported such an argument, it was also not believed by the motion court (PCR L.F.

1423-1424). The motion court found that appellant's failure to cooperate was willful (PCR L.F. 1410-1416). As shown above, the evidence supported that conclusion. Thus, appellant's failure to fully cooperate with counsel's investigation justified counsel's decision not to hire a third expert witness. Counsel is permitted to draw a line and reasonably conclude that further investigation is unnecessary when he believes such investigation would be a waste. *Johnson*, 388 S.W.3d at 165. Counsel's decision was reasonable. Counsel was not ineffective.

For the forgoing reasons, appellant's first point on appeal must fail.

II.

Appellant failed to prove that trial counsel was ineffective for allegedly failing to provide sufficient information to Dr. William Logan and call him at trial to testify that appellant had bipolar I disorder to support various defenses based on his mental condition (responds to appellant's Points II-V).

In Points II through V, appellant raises several claims of ineffective assistance of trial counsel for failing to call Dr. William Logan to testify in both the guilt and penalty phases that appellant suffered from bipolar I disorder at the time of his crime and through his trial, which would have established: 1) that appellant was incompetent to stand trial; 2) that appellant was unable to deliberate; 3) that appellant's sentence should be mitigated because the ability to appreciate the wrongfulness was substantially impaired and he was under the influence of extreme mental or emotional disturbance; and 4) that appellant was not guilty by reason of insanity. But appellant failed to prove that Dr. Logan's testimony would have provided a viable defense as the motion court found Dr. Logan's testimony, including his diagnosis of bipolar disorder, not credible. Moreover, counsel reasonably investigated Dr. Logan and each of these potential defenses and his subsequent decisions not to use Dr. Logan and these defenses were

reasonable trial strategy. Finally, appellant was not prejudiced as there was not a reasonable probability of a different result but for counsel's failure to call Dr. Logan. Therefore, the motion court did not clearly err in denying these claims.

A. Facts

1. Pretrial Deposition of Dr. Logan

In a pretrial deposition, Dr. Logan was hired by trial counsel in December 2006 initially to assist in improving appellant's mood and communications between appellant and the defense team (Resp. Exh. 222:9).¹ In his role, Dr. Logan had engaged in "ongoing discussions" with counsel about appellant's competence (Resp. Exh. 222:9, 11). Dr. Logan testified that, while appellant's "functional relationship" with counsel had not been "the best," Dr. Logan believed appellant's mental condition had never reached the level where he could say within a reasonable degree of medical certainty that appellant was incompetent to stand trial (Resp. Exh. 222:9-10). In evaluating competency, Dr. Logan reviewed twenty-two different *pro se* motions filed by appellant which included information that appellant believed his behavior had changed in the time leading up to the crime due to being prescribed a

¹The number before the colon is the exhibit number, the number after the colon is the page number within the exhibit.

selective serotonin reuptake inhibitor (Resp. Exh. 222:25; L.F. 157, 169-170, 412, 418, 670-672). Dr. Logan received a “note pad of writings and things that [appellant] had recorded” that appellant gave him (Resp. Exh. 222:32-33). Dr. Logan also reviewed a “rambling note, which he gave to Carol Muller” (Resp. Exh. 222:85).

Dr. Logan described appellant as guarded, suspicious, sometimes paranoid, agitated, anxious, at times depressed, and pessimistic (Resp. Exh. 222:71). He found appellant’s thoughts to be “very disorganized” (Resp. Exh. 222:71). He suspected that appellant had an underlying mood disorder, noting periods when appellant was “very tense, very irritable, very aggressive” (Resp. Exh. 222:91-92). He noted that psychiatrist Wade Hachinsky, who saw appellant in March and April prior to the crimes, thought appellant had depression and difficulties with anxiety and questioned if it was possible that appellant had some type of bipolar disorder (Resp. Exh. 222:92). He had not seen any record where any prior doctor had said appellant did not have a bipolar disorder, but also noted that he had never been diagnosed with it, finding the record “pretty silent on that” (Resp. Exh. 222:92). He testified that appellant’s behavior when raping child victim J.B. was “too organized for a manic episode,” but a mood disorder may have contributed to it (Resp. Exh. 222:98). When asked if he diagnosed appellant

with any identifiable psychiatric or psychological condition, he mentioned a possible underlying mood disorder due to the presence of anxiety and depression, as well as a paranoid personality disorder, which may have “impinge[d]” on his competency (Resp. Exh. 222:132-133). He also diagnosed appellant with polysubstance abuse and dependence, sadomasochistic sexual disorder, and pervasive personality disorder with borderline paranoid antisocial narcissistic traits (Resp. Exh. 222:132-134). He testified that, while it was “close,” he believed appellant was competent to stand trial (Resp. Exh. 222:151).

Dr. Logan discussed information he had gathered about appellant’s early years, including abuse, incest, and lack of boundaries which affected appellant’s psychological formation and may have contributed to appellant’s “sexual perversions” and pedophilic and deviant sexual fantasies (Resp. Exh. 222:36-37, 42-50). He opined that appellant’s drug and alcohol use was a factor indicating “very little structure or positive influences in his life” (Resp. Exh. 222:76-78). He discussed that the information received showed that appellant started showing antisocial behavior at ages 10-11 (Resp. Exh. 222:51). He explained that appellant often talked about “episodes of anxiety, of feeling increasing build-up of tension” and could not regulate his emotions due to his childhood abuse (Resp. Exh. 222:81-82). He also said there was a

connection between his upbringing and his rage, objectifying his victims, lack of empathy, and desire for power over people (Resp. Exh. 222:81). He considered appellant's rape of J.B. to be a crime of opportunity, giving him a chance to act out his pedophilic fantasy, which Dr. Logan considered "the ultimate reenactment of his own sexual victimization with him being in absolute control over somebody who's absolutely defenseless" (Resp. Exh. 222:94-97). He acknowledged that the circumstances surrounding all of the crimes were factors that could aggravate punishment (Resp. Exh. 222:99-100). He characterized his assessment of the mitigating value of his potential testimony as "general mitigation" based on appellant's childhood influences and poor sense of sexual identity and self-esteem (Resp. Exh. 222:101-102). He did not believe that his findings would fit into any particular established category of statutory mitigating circumstance, but did believe it was relevant to a "general provision" that his mental condition may have impacted him (Resp. Exh. 222:137). He did not believe that appellant was "under the influence of extreme emotion or mental disturbance" or "under extreme duress" at the time he killed Spicer (Resp. Exh. 222:141-142). He did not believe appellant's capacity to appreciate the criminality of his conduct was "substantially impaired" (Resp. Exh. 222:142).

Dr. Logan testified that he had a "grasp" on appellant's mental

condition between March 2006 and when he was arrested in May 2006 based on information given to him by appellant as well as Dr. Hachinsky's records (Resp. Exh. 222:120). Dr. Logan found that, starting in late 2005, appellant became more focused on sexual exploits (Resp. Exh. 222:121). At that point, appellant started seeking out people with unusual sexual interests more frequently with whom he could act out his sexual interests (Resp. Exh. 222:121). It was around this time that Riley moved in with him (Resp. Exh. 222:121). Appellant revealed none of his sexual interests or his prior rape conviction to Dr. Hachinsky (Resp. Exh. 222:122). Dr. Logan opined that appellant's disordered thinking, little internal control, chronic mood fluctuations, substance abuse, and little experience regulating himself in an adult manner made him more vulnerable to acting out his sexual interests (Resp. Exh. 222:124).

When asked if the drugs prescribed by Dr. Hachinsky (or anyone else) had any "relevance or nexus" to appellant's conduct, Dr. Logan testified that the first drugs, Lexapro and Ativan, did not work well and thus would not have been taken very much (Resp. Exh. 222:124). The next set of drugs, Paxil and Clonopin, were more helpful, and he did not think any drug effects played a role in this, as he was on "pretty standard clinical dosages" which would not have caused any "marked change" in appellant's behavior (Resp.

Exh. 222:124).

Dr. Logan testified that he would not characterize his work in this case as being a “criminal responsibility exam,” something he rarely found in cases on which he worked (Resp. Exh. 222:64-66). He testified that the crime itself appeared to show that appellant was “acting in the furtherance of a sexual fantasy/perversion,” part of which was “sadomasochistic” and which showed “pedophilic interests” (Resp. Exh. 222:71-72). Dr. Logan defined appellant’s actions as “cruel,” “[e]vil,” and “sadistic,” driven “a lot” by the need to exert control and power over people (Resp. Exh. 222:72). He found no evidence of a congenital brain abnormality or defect or brain injury (Resp. Exh. 222:78-80). Appellant was not mentally retarded and had “rather good verbal skills” (Resp. Exh. 222:85-86).

Dr. Logan testified that he believed the crimes against victim Spicer were motivated by appellant’s desire for power and the fantasy of committing a homicide during “rough sex three-ways” (Resp. Exh. 222:87-88). He acknowledged that appellant killed Spicer in the pursuit of sexual pleasure, although he could not conclude that it was purposeful as opposed to being “carried away” to the point that he and accomplice Riley’s “control over their sexual fantasies diminished” (Resp. Exh. 222:87-91). He admitted that victim Ricci was purposefully killed to prevent her from telling about the sex crimes

that might result in appellant going back to prison (Resp. Exh. 222:91). While there were some “passing references” by appellant to “dissociating a bit” while choking his victims, Dr. Logan did not believe “that would have risen to the level of any kind of defense or responsibility by any criteria that I know of in Missouri” (Resp. Exh. 222:100, 134). He thought any lack of responsibility argument was “pretty [weak]” (Resp. Exh. 222:100). He also did not believe there was any evidence of diminished capacity in the case (Resp. Exh. 222:101, 134, 151).

b. Pretrial Depositions of Dr. Mandracchia

Dr. Steven Mandracchia was also hired by the defense team to work with appellant on mental health issues, including the issue of competency (Resp. Exh. 265:7-8).² He testified that he never saw any competency issue while working with appellant (Resp. Exh. 265:8). He saw no indications of

²Much of Dr. Mandracchia’s testimony about appellant’s upbringing and personality disorder diagnoses was similar to his trial testimony summarized in Point I, supra, and will not be repeated in this point. A large portion of the deposition was Dr. Mandracchia and the prosecutor going through the doctor’s notes of interviews with appellant. Respondent only cites to Dr. Mandracchia’s testimony about the specific alleged mental illness issues raised in appellant’s Points II-V.

brain abnormality (Resp. Exh. 265:16). He saw no indication that the taking of prescription drugs had any effect on appellant's conduct in this case (Resp. Exh. 265:17). There was no basis for a finding of diminished capacity; he believed that there was nothing showing appellant lacked the ability to deliberate (Resp. Exh. 265:18). He had the opinion that appellant had no defense that a mental disease or defect would render appellant not responsible for his conduct under chapter 552 (Resp. Exh. 265:18). He testified that appellant did not suffer from a mental disease or defect (Resp. Exh. 265:19). While there were indications that there had been diagnoses of anxiety disorders and general depressive disorders, Dr. Mandracchia did not believe that there was a historical basis for those diagnoses (Resp. Exh. 266:200). He testified that appellant was not acting under the influence of extreme emotional or mental disturbance at the time of Spicer's murder as that phrase is used legally (Resp. Exh. 266:202-203). He testified that appellant was also not acting under extreme duress from a legal point of view (Resp. Exh. 266:203). He believed appellant had the ability to appreciate the criminality of his conduct and that his capacity to conform his conduct to the requirements of the law was not substantially impaired (Resp. Exh. 266:204).

2. Amended Motion

In his amended motion, appellant alleged that counsel was ineffective

for failing to provide Dr. Logan with a letter from appellant setting out alleged changes in behavior after taking medication prescribed to him by a psychiatrist (PCR L.F. 187). He alleged that counsel was ineffective for failing to call Dr. Logan to testify in the penalty phase to provide mitigation testimony (PCR L.F. 187). He alleged that counsel was ineffective for failing to request that Dr. Logan evaluate appellant's mental state at the time of the crime to support a diminished capacity defense or statutory mitigating circumstances (PCR L.F. 187-188). Due to these alleged failures, appellant claimed that Dr. Logan was prevented from diagnosing appellant with bipolar I disorder, which would have allowed him to testify that appellant was incompetent to stand trial because he lacked the capacity to assist his legal team; that appellant's ability to appreciate the nature and wrongfulness of his conduct and conform that conduct to the law was substantially impaired; that the murder of Spicer was committed while appellant was under the influence of extreme mental or emotional disturbance; and that appellant's capacity to appreciate the criminality of his conduct or conform it to the law was substantially impaired (PCR L.F. 188).

Appellant alleged that, after appellant was convicted and sentenced in this case, appellant contacted Dr. Logan while representing himself in his pending Clay County case for victim Ricci's murder (PCR L.F. 232). Appellant

sent the doctor a copy of a letter he said that he had provided defense counsel that he had wanted to show Dr. Logan during the Jackson County case (PCR L.F. 233). He alleged that Dr. Logan claimed that he never received the letter and that he believed that it might support a theory that SSRI medication prescribed by Dr. Hachinsky may have “exacerbated an already serious mental illness,” a theory which would have allegedly supported a diminished capacity defense and statutory mitigating circumstances (PCR L.F. 233-234). He alleged that Dr. Logan subsequently agreed to evaluate appellant for the post-conviction proceeding and learned much more information from appellant than appellant had been willing to give Dr. Logan prior to trial (PCR L.F. 234-244).

Based on this new information, which he alleged counsel failed to provide, Dr. Logan would have willing to testify that appellant suffered from a severe mental illness—bipolar I disorder, mixed, severe with psychotic features—in the spring of 2006, resulting in emotional instability with both mania and depression (PCR L.F. 245). He alleged that Dr. Logan would testify that the SSRI, without the concurrent use of a mood stabilizer, produced manic symptoms which appellant failed to recognize and which led to “persistent elevated mood, irritability, grandiosity, decreased need for sleep, hypertalkativeness, racing thoughts, distractability [sic], increased

goal directed activity (especially sexually), and impaired insight and judgment” (PCR L.F. 245). He alleged that the disorder was a severe mental illness that caused him to lack the capacity to assist his legal counsel in his own defense in that his “persecutory ideas” about the defense team and “emotional lability” prevented appellant from being able to fully cooperate with the defense team (PCR L.F. 245-246).

He alleged that Dr. Logan would also testify that it was his opinion that appellant’s capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of the law were “substantially impaired” at the time of Spicer’s murder (PCR L.F. 246). He alleged that the bipolar disorder “negat[ed] his ability to deliberate” (PCR L.F. 246). He alleged that Dr. Logan would also testify that appellant’s capacity to conform his conduct to the requirements of the law were substantially impaired and he was under extreme duress at the time (PCR L.F. 246). Thus, he alleged, the testimony would have supported a finding of incompetence, a diminished capacity defense, and the submission of two statutory mitigating circumstances (PCR L.F. 246).

Appellant alleged that he was prejudiced by counsel’s failure to provide “information they possessed to Dr. Logan” during trial preparations and that, had Dr. Logan had that information, there was a reasonable probability that

appellant would have been found incompetent to stand trial, would not have been found guilty of first-degree murder, or would not have been sentenced to death (PCR L.F. 247).

3. Evidentiary Hearing Evidence

a. The Letter

The letter appellant allegedly mailed to his trial team was admitted into evidence (Resp. Exh. 215). It complained that appellant was not permitted to take an envelope containing information he had written about his alleged behavior changes into his previous meeting with Dr. Logan (Resp. Exh. 215). After setting out several pages of complaints about the defense team, appellant stated that he had provided this information before, but would do it again in this letter (St. Exh. 215). He then set out 79 different behavior changes he claimed to have had after starting to take the SSRI, including such things as having more sex than typical; not writing letters to his sister; stopping fishing trips; writing things down in a notebook, including “bad ways” to die; falling down at work one time; socializing with people he would not have socialized with before; lying; not finishing projects he started; making sex videos with rough sex instead of only with threesomes; and not praying or going to church (St. Exh. 215). Many of the items were redundant, such as saying he started smoking again at one point and at another point

saying he started doing “everything I quit doing again” (St. Exh. 215).

Dr. Logan testified that, in all but his first meeting with appellant, appellant was tense, paranoid, suspicious, and unrevealing (PCR Tr. 527). He thought his defense team was working against him; for example, he got angry because counsel would not set up a meeting between counsel, appellant, appellant’s accomplice Dena Riley, and Riley’s counsel (PCR Tr. 527-528). While appellant was angry and paranoid, Dr. Logan saw “nothing bizarre” (PCR Tr. 528-529). He evaluated appellant for competence but claimed that he never gave a definitive answer as to whether or not appellant was competent or incompetent (PCR Tr. 530). Eventually, Dr. Logan had to stop meeting with appellant for some time because appellant did not appreciate the defense team getting information from other witnesses (PCR Tr. 530-531).

Dr. Logan testified that, prior to trial, he had reviewed Dr. Hachinsky’s report of treatment of appellant (PCR Tr. 556). He noted that Dr. Hachinsky believed appellant might have bipolar disorder, but that it could not yet be diagnosed (PCR Tr. 557).

Dr. Logan testified that, prior to trial, counsel Susan Elliot and mitigation specialist Carol Muller met with him to ask him about a possible insanity defense based on appellant’s use of the SSRI (PCR Tr. 541-543). He

told them that such a defense would not be viable (PCR Tr. 546-547). But he claimed that he told them about a phenomenon called “switching” where the drug can cause a bipolar person to switch from depression to mania (PCR Tr. 547).

After appellant’s conviction, Dr. Logan testified that appellant contacted him about assisting with appellant’s Clay County case, but that funding for his services could not be arranged (PCR Tr. 549-551). During that time, he did receive a letter that he believed appellant had written specifically to him “about some additional symptomology” (PCR Tr. 549). He claimed he received the letter in the 2009-2010 time period (PCR Tr. 559). Later, for the post-conviction case, he assessed appellant (PCR Tr. 562-563). He claimed that the information he now had was different than the pretrial information because it was “more detailed” (PCR Tr. 563). By that point, appellant had been diagnosed as bipolar in the Department of Corrections and was being treated with medication, so he was more organized in his thinking than he was before trial (PCR Tr. 563).

Dr. Logan testified to appellant’s alleged behavior changes after taking Lexapro prescribed by Dr. Hachinsky, but claimed that he had learned them from his interview with appellant, not from the letter (PCR Tr. 564-568, 570-571). Dr. Logan claimed he only had information about “a few” of those

symptoms before trial (PCR Tr. 568). He also reviewed information collected by appellant or his post-conviction counsel after the trial in this case as well as information available to him prior to trial (PCR Tr. 568-569, 572-575).

Based on the new information he learned in evaluating appellant for the post-conviction case, Dr. Logan claimed that, in the spring of 2006, appellant suffered from bipolar disorder with a persistent elevated or irritable mood and rapid cycling (mania and depression both manifesting in the course of a day) (PCR Tr. 576). He claimed that appellant's symptoms qualified as a manic episode with some psychotic features, including paranoia and suicidal thoughts (PCR Tr. 576). He claimed he had "insufficient information" to make that diagnosis prior to trial and, had he had the information he now had, he could have made that diagnosis prior to trial (PCR Tr. 577). He claimed that the SSRI likely triggered further manic symptoms in late March (PCR Tr. 577). He claimed that this was different from an "SSRI defense" because the SSRI triggering "switching" was merely a phenomenon in bipolar patients, not a defense that the drug caused people to act bizarrely and paradoxically to the purpose of the drug (PCR Tr. 578). With "additional information," he could have made the diagnosis of SSRI-triggered mania due to switching prior to trial (PCR Tr. 578).

Dr. Logan claimed that appellant's bipolar disorder was a severe

mental disease or defect which substantially affected his reasoning, judgment, and ability to conform his behavior to the law at the time in question (PCR Tr. 580). He claimed that it affected appellant's ability to assist his trial defense team by causing him to be excessively irritable and volatile, to react with paranoia and suspicion, to be unable to listen to their advice, to appreciate what was not in his best interest, and to be unable make sound, competent decisions based on counsel's advice (PCR Tr. 581). He testified that he made all of these same conclusions prior to trial except for the bipolar diagnosis and that, had he had the same information before trial he had now, he also would have made that diagnosis (PCR Tr. 588-589).

On cross-examination, Dr. Logan admitted he did not watch the tapes of appellant's crimes, even though he admitted watching the crimes occur would be helpful in forming his opinion and may have altered his ultimate opinion (PCR Tr. 643, 646-647). He conceded that the trial team had made tapes available to him (PCR Tr. 648). The same was true of other sex tapes appellant made throughout that spring that he did not view (PCR Tr. 648-650). He also did not watch the videos of appellant's police interviews, which might have provided additional information about appellant's state of mind (PCR Tr. 653-654). Dr. Logan agreed that he took appellant at his word for appellant's recollection of events of the crimes in forming his opinion instead

of watching the tapes (PCR Tr. 656-657). Dr. Logan acknowledged that there were numerous witnesses who saw appellant in the fall of 2005 and spring of 2006 whom he did not interview about appellant's condition and consider in reaching his opinions (PCR Tr. 657-669, 672-676). He "assumed" he did not read all of the relevant law enforcement reports (PCR Tr. 676-679). He conducted no psychiatric tests on appellant (PCR Tr. 680).

Dr. Logan admitted that post-conviction counsel had contacted him during the preparation of the case because his statements to post-conviction counsel about the new information he had learned had only come from his new interviews with appellant (PCR Tr. 687). PCR counsel asked if there were any documents that had not been provided (PCR Tr. 687). Only at that point did Dr. Logan say that he had not received the letter from appellant (PCR Tr. 687-688).

Dr. Logan admitted that appellant had conducted his own research into the adverse effects of Paxil and Lexapro and was the first to bring up the possibility of an SSRI defense (PCR Tr. 690-691). Appellant sent Dr. Logan unsolicited articles about switching and rapid cycling (PCR Tr. 691-692). He did not remember that, as early as during the police interrogation, appellant told Riley that they would get mental evaluations (PCR Tr. 692).

Dr. Logan admitted that, while working with appellant before trial he

had learned of or personally observed many of the symptoms in appellant that he now said he had learned from new information gained during the post-conviction proceeding (PCR Tr. 703-717). Dr. Logan admitted that, at Muller's suggestion, appellant gave a notebook full of his writings to Dr. Logan, but Dr. Logan never reviewed it (PCR Tr. 752-754). He conceded that he did not have a good memory of his meeting with Susan Elliot about the proposed SSRI defense and, at the time of his pretrial deposition, he had no recollection of it (PCR Tr. 755-756). He conceded that his post-conviction direct testimony that he remembered meeting with Susan Elliot was "inaccurate" (PCR Tr. 756).

Dr. Logan testified that he reviewed Dr. Hachinsky's reports from visits that appellant continued to make up until one-to-three days after appellant murdered Spicer (PCR Tr. 768). Appellant did not appear to be in any distress in those meetings; his mood was stable, insight and judgment were intact, his thought process were logical, linear, and goal directed, and no psychosis was observed (PCR Tr. 767, 770). He told the doctor that the drugs were helpful, even though the Ativan he was prescribed at the same time as the Lexapro would wear off after a few hours (PCR Tr. 767-770). By that point, Dr. Hachinsky no longer included the possible bipolar diagnosis in his findings (PCR Tr. 770-771). Dr. Logan admitted that none of the drugs played

any major role in the case “in and of” themselves; he still believed there was no “SSRI defense” and that the crimes were not a “side effect” of the medications (PCR Tr. 771). He opined that appellant’s actions were not affected by the influence of any drug during the crimes (PCR Tr. 737). He said that his pretrial answer that the drugs did not play any major role in the crimes and that the “pretty standard clinical dosages” would not have caused changes in his behavior on the medications was still a correct answer, although he was “clarifying” that he was referring to “side effects” (PCR Tr. 772).

Dr. Logan acknowledged that appellant had never been diagnosed with bipolar disorder prior to trial but had repeatedly been diagnosed with a “severe personality disorder” (PCR Tr. 797). He admitted that he relied on post-trial Department of Corrections’s records to reach his conclusions (PCR Tr. 798). He conceded that appellant was not diagnosed bipolar in Department of Corrections’ assessments in 2008 and July 2011, but, in a record later in July 2011, appellant told DOC doctors that he had been diagnosed with bipolar disorder and that the symptoms got worse on Lexapro (PCR Tr. 800-801). This statement was untrue (PCR Tr. 801). From that point on, “bipolar disorder by history” appeared in appellant’s medical records (PCR Tr. 802-803). Appellant continued to tell DOC treatment personnel that

he suffered from bipolar disorder, had been diagnosed with it before being arrested, and that it got worse on Lexapro (PCR Tr. 802-803).

Dr. Logan conceded that appellant was not suffering from diminished capacity at the time he murdered Ricci; his alleged disorder did not render him unable to appreciate the wrongfulness of his conduct or make him unable to control his behavior (PCR Tr. 807). He was capable of deliberating and forming intent (PCR Tr. 807). He was also criminally responsible for the rape of J.B. (PCR Tr. 808). He was experiencing no psychotic features during Spicer's murder (PCR Tr. 809). His acts of luring her to the apartment under false pretenses and binding her were not due to mental disease or defect (PCR Tr. 809-810). He was capable of deliberating in setting up the murder (PCR Tr. 810). There was "some deliberation" in setting up the plastic sheet on the bed for the murder (PCR Tr. 810). Dr. Logan conceded that, if "deliberation is equal to planning, he was" capable of deliberation (PCR Tr. 813).

c. Defense Team Testimony

Both Susan Elliot and Carol Muller testified that they met with Dr. Logan to discuss the possibility of raising some defense related to appellant having a change in behavior after having taken SSRIs (PCR Tr. 124-125, 896-897). Muller testified that they brought a "document" that appellant had

prepared with information about his claim that the SSRI had affected his mental state and showed it to Dr. Logan (PCR Tr. 896-897). Dr. Logan reviewed the document and gave it back (PCR Tr. 897). Dr. Logan told them that a defense based on appellant's use of SSRIs was not possible and would have made no difference in the case for several reasons: 1) the drugs would not stay in his system long enough to affect these crimes; 2) the events of the crimes required planning inconsistent with such a defense; 3) appellant's involving an accomplice in the crimes was inconsistent with such a defense; and 4) appellant was receiving other drugs at the same time from other family members, so any actions could not be attributed to only the SSRIs (PCR Tr. 125-126, 193, 897-898). Thus, Dr. Logan concluded that an SSRI defense was not a viable defense "in any form" (PCR Tr. 899). He rejected it not only for the guilt phase but also as a mitigating circumstance (PCR Tr. 194).

Both Elliot and Muller testified about their efforts to pursue evidence to support appellant's claims in the letter of how SSRIs affected his mental state (PCR Tr. 187-192, 880-882). None of the evidence appellant claimed would support the defense was found or, if it was found (such as appellant's notebook), it was unhelpful; none of the witnesses he wanted were willing or able to identify behavior changes (PCR Tr. 187-192, 880-882).

Elliot testified that appellant was a difficult client; he would not listen to advice, wanted to control what was discussed and what claims were pursued, and, when counsel would research something, he would not listen when she came back and told him it would not be helpful (PCR Tr. 168). Appellant thought he was smarter than everybody else (PCR Tr. 168). Muller testified that appellant was very “challenging”; if the defense team did not do things exactly like he wanted, he would criticize them (PCR Tr. 866). Muller stated that appellant only wanted Dr. Logan to answer his questions about drug reactions and, if he was not there to discuss that, appellant did not want to see him (PCR Tr. 877).

Counsel Tom Jacquinet testified that appellant did not have a lot of “give and take” in the case; he always wanted the defense team to stay focused on his ideas and conduct the case how he saw fit (PCR Tr. 1123). He would stay fixated on his ideas and would not listen to anything which would contradict those ideas (PCR Tr. 1125).

Jacquinet testified that he hired Dr. Mandracchia to primarily assess appellant’s mental state and develop a social history (PCR Tr. 1128). Dr. Logan was hired to complement Dr. Mandracchia and give another perspective as well as to help with recommendations of medications (PCR Tr. 1129). Due to the overwhelming nature of the evidence of guilt, counsel

believed this was a penalty phase case (PCR Tr. 1131-1132). Additionally, while Dr. Mandracchia found that appellant had mood disorders, a variety of sexual disorders, and a severe personality disorder, he did not diagnose appellant with a mental disease or defect under chapter 552 to mitigate the offense or provide a full defense (PCR Tr. 1133). The disorders appellant was diagnosed with would not have significantly impaired his ability to coolly reflect (PCR Tr. 1134). Further, subsequent to trial, Dr. Mandracchia found appellant competent not only to go to trial in Clay County, but also to represent himself (PCR Tr. 1180-1181). Dr. Logan also did not provide a diagnosis permitting a defense under chapter 552 (PCR Tr. 1176-1177). Neither doctor saw a significantly severe, continuous manic episode through the several weeks of behavior involved in the offense which would permit any defense under chapter 552, and each repeatedly said there was no such defense (PCR Tr. 1196).

Jacquinet was not certain that he would have relied a bipolar diagnosis for a defense even if one of the doctors believed appellant suffered from the disorder (PCR Tr. 1146-1147). If the doctor posited that the disease prevented appellant from appreciating the wrongfulness of his conduct, Jacquinet would have been less likely to have used that doctor since that conclusion was “so far off the mark” given the other evidence that the defense would have lost

credibility (PCR Tr. 1148). He speculated that it was “possible” that he would use such a doctor for a diminished capacity defense or for statutory mitigating circumstances (PCR Tr. 1148). Counsel, however, decided that it was better to rely on the general catchall mitigating circumstance instead of specific mitigating circumstances related to appellant’s mental state; he believed that the defense would get a more positive result that way instead of having the jurors argue whether or not the specific circumstances existed (PCR Tr. 1177-1178).

Jacquinet decided after the pretrial depositions that he would use Dr. Mandracchia at trial and not Dr. Logan (PCR Tr. 1157). By that point just before trial, appellant’s relationship with Dr. Logan had deteriorated and the doctor had a very negative attitude towards appellant that was apparent in his demeanor during the deposition (PCR Tr. 1157-1158). Dr. Mandracchia had worked with appellant longer, had a better relationship with him, and had some sympathy for appellant’s situation despite the nature of the crimes (PCR Tr. 1157). After Dr. Mandracchia’s testimony, which was neutralized or possibly resulted in a “net loss” after cross-examination, counsel decided that he would not want to follow that with an even weaker expert in Dr. Logan (PCR Tr. 1159).

4. Findings and Conclusions

The motion court issued very detailed findings and conclusions denying all of appellant's claims regarding appellant's alleged bipolar disorder (PCR L.F. 1425-1466). The trial court found that appellant failed to prove that Dr. Logan did not review the letter prior to trial, finding credible Muller's testimony that Dr. Logan did review a document that was either the letter or essentially the same as the letter and finding Dr. Logan's testimony about the what happened at his meeting with Elliot and Muller not credible (PCR L.F. 1447, 1463-1465). Moreover, the court found that the information in the letter was otherwise available to and known to Dr. Logan through the various other records he reviewed and in his numerous conversations with appellant as evidenced by his notes from those meetings (PCR L.F. 1428-1431, 1464). Appellant failed to explicitly prove what information Dr. Logan learned from the letter itself and not from post-trial records and interviews that he did not already know or have access to prior to trial, thus failing to prove that counsel's alleged failure to provide the letter had any effect on Dr. Logan's pretrial conclusions (PCR L.F. 1431-1432, 1445, 1448, 1463).

The motion court rejected appellant's claims that Dr. Logan could have established that he suffered from bipolar disorder or that the diagnosis would have provided any viable defense based on appellant's mental state (PCR L.F.

1432-1444). The court found that appellant failed to “provide a reliable basis that [appellant] currently is, or has been, afflicted with bipolar disorder at any time in the past” and concluded that appellant’s post-trial diagnoses of bipolar disorder was improperly influenced by appellant’s own non-credible statements and his erroneous self-report that he had been previously diagnosed with the disorder (PCR L.F. 1434, 1463). The court concluded that counsel sufficiently investigated appellant’s competency, diminished capacity, responsibility, and mitigating circumstance and, based on the opinions of the two experts at that time that none of these offenses were available, reasonably decided not to pursue them (PCR L.F. 1432-1444).

The motion court repeatedly found that Dr. Logan’s testimony was not credible, noting that the doctor demonstrated a “poor and inaccurate recollection of events,” relied on appellant’s own biased and non-credible reports instead of better evidence (such as the videos of the crimes themselves), and improperly relied on post-trial information that could not have been available before trial (PCR L.F. 1433, 1456, 1458-1459, 1462-1465).

B. Appellant Failed to Prove His Claim

The selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim. *Vaca v. State*, 314 S.W.3d 331, 335 (Mo. banc 2010). Reasonable choices of trial strategy, no

matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance of counsel. *Id.* To prevail on a claim of ineffective assistance of counsel for failing to call a witness, a defendant must show that counsel knew or should have known of the existence of the witness, the witness could have been located with reasonable investigation, the witness would have testified, and the witness's testimony would have provided a viable defense. *Strong v. State*, 263 S.W.3d 636, 652 (Mo. banc 2008). Counsel is not ineffective for failing to shop for an expert that would testify in a particular way. *Johnson v. State*, 388 S.W.3d 159, 165 (Mo. banc 2012). The duty to investigate does not force defense lawyers to "scour the globe" on the off-chance something will turn up. *Id.* Reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *Id.*

1. Appellant Failed to Prove Dr. Logan's Testimony Provided a Viable Defense

a. The Letter

Appellant's four claims regarding counsel's alleged failure to call Dr. Logan at trial to testify to appellant's alleged bipolar disorder are all dependent on his allegation that counsel failed to provide Dr. Logan with a copy of a letter appellant allegedly sent counsel about his purported

personality changes that he claimed occurred after taking Lexapro prescribed to him in March 2006 (App. Br. 68, 70, 78, 87-88, 92, 94). The reason for this is clear: if trial counsel had not failed to provide Dr. Logan with that letter, counsel could not have been ineffective because Dr. Logan's pretrial conclusions were directly contrary to appellant's claim on each of these points (Resp. Exh. 222:100-102, 134, 137, 141-142, 151). Thus, appellant alleged that Dr. Logan's conclusions were based on information contained in the letter and not just information from new investigation (PCR Tr. 559, 687-688).

But appellant failed to prove any of these claims because he failed to prove that Dr. Logan did not receive the letter or essentially identical information in other forms. The motion court found credible Muller's testimony that Muller and counsel Susan Elliot gave Dr. Logan a document that appeared to be the same letter Dr. Logan claimed not to have received (PCR Tr. 896-897). The motion court concluded that this may have been that letter, thus disbelieving Dr. Logan's testimony that he did not receive the letter (PCR L.F. 1447, 1463-1465). This Court gives deference to the motion court's factual findings and credibility determinations. *Zink v. State*, 278 S.W.3d 170, 178 (Mo. banc 2009); *Barton v. State*, 432 S.W.3d 741, 760 (Mo. banc 2014). It was appellant's burden to prove his claim by a preponderance

of the evidence. *Dorris v. State*, 359 S.W.3d 113, 118 (Mo. banc 2011); Rule 29.15(i). Because appellant failed to prove by a preponderance that Dr. Logan did not receive the letter, he failed to prove his claim.

Further, appellant failed to prove that, even if he did not receive the exact letter, he did not receive the same or sufficiently similar evidence as that found in the letter which should have led him to reach the conclusions before trial that he claimed to reach after trial. If the document that Muller gave appellant was not the letter, it appeared to be essentially the same type of document; Muller testified that it was a document created and mailed by appellant setting out information about the SSRI issue (PCR Tr. 896-897). Dr. Logan reviewed appellant's pretrial *pro se* motions, which included claims by appellant that his behavior had changed in the time leading up to the crime due to a prescription drug he had taken (L.F. 157, 169-170, 412, 670-672). The motions set out several of the same allegations appellant included in the August 2007 letter and the existence of evidence he believed demonstrated his changes in behavior (L.F. 157, 407, 412, 418, 670-672). Dr. Logan received a note pad of writings by appellant and a "rambling" note from appellant to Muller (Resp. Exh. 222:32-33, 85). Dr. Logan admitted that he had observed or received reports of numerous symptoms set out in the letter during his pretrial evaluations of appellant (PCR Tr. 703-717).

Appellant clearly spoke to Dr. Logan about his alleged changes in behavior as appellant refused to speak to Dr. Logan unless Dr. Logan spoke to him about the proposed SSRI defense (PCR Tr. 875-876). And Dr. Logan's notes of his interviews with appellant are full of references to the same types of behaviors that appellant included in the letter (Resp. Exh. 223). Thus, appellant failed to prove that Dr. Logan did not have all or essentially all of the same information that was contained in the letter prior to trial even if Dr. Logan had not received the letter. Counsel could not have been ineffective for failing to give Dr. Logan information that was merely cumulative to the information he already possessed. Therefore, appellant failed to prove that counsel's alleged failure to provide the letter either occurred at all or had any effect on Dr. Logan's ability to evaluate appellant's mental condition. Appellant failed to prove that Dr. Logan's testimony provided a viable defense.

b. The Bipolar Diagnosis

Appellant's claims also rely on the claim that appellant actually suffered the mental disease or defect of bipolar I disorder (App. Br. 66-67, 77-78, 87-88, 94-95). Such a claim is essential to appellant's points on appeal regarding competency, responsibility, and diminished capacity. To make a successful claim that the defendant was incompetent to proceed to trial, was not guilty by reason of mental disease or defect excluding responsibility, or

did not have the state of mind which is an element of the offense, all require a finding of a mental disease or defect under § 552.010. §§ 552.010, 552.015.2(1),(2),(7), 552.020.1,3(2), 552.030.1, RSMo 2000.

But the motion court found the entirety of Dr. Logan's testimony incredible (PCR L.F. 1433, 1456, 1458-1459, 1462-1465). The trial court specifically discounted Dr. Logan's testimony that appellant actually suffered from bipolar disorder, finding that the evidence was insufficient to "provide a reliable basis that [appellant] currently is, or has been, afflicted with bipolar disorder at any time in the past." (PCR L.F. 1434, 1463). The motion court found that Dr. Logan's diagnosis improperly relied on appellant's unbelievable self-reporting and his false statements that he had been previously diagnosed with the disorder (PCR L.F. 1434, 1463). *Zink*, 278 S.W.3d at 178; *Barton*, 432 S.W.3d at 760. Because the motion court rejected Dr. Logan's testimony that appellant suffered from bipolar disorder and appellant failed to present any other evidence showing that appellant suffered from the disorder at the time of the crimes, appellant failed to prove that he suffered from a mental disease or defect pursuant to § 552.010. Thus, appellant failed to prove that any of the chapter 552 defenses were available to him. Therefore, counsel could not have been ineffective for failing to obtain an opinion that appellant suffered from such a mental disease.

Appellant argues that this Court is not bound by the motion court's credibility findings because the motion court cannot substitute its credibility finding for the jury's right to determine credibility at a trial in determining whether there was prejudice from counsel's failure to present the evidence (App. Br. 85-86, 92-93, 98-99). Even if appellant's statement of the law was correct, he misconstrues the motion court's finding. The motion court did not find that appellant was not prejudiced because a jury would not have believed Dr. Logan's testimony. Instead, the court did not believe that appellant established that counsel's performance was deficient because the only evidence supporting the claim of deficiency was not believable. Appellant bore the burden of proving his claim by a preponderance of the evidence. *Dorris*, 359 S.W.3d at 118; Rule 29.15(i). If appellant's argument was correct, appellant would bear no burden to prove an alleged claim; he would need only to have made an allegation and shown that he could have presented such evidence regardless of its truth. This cannot be the law. Counsel has no obligation to present false evidence. *See, e.g., Vann v. State*, 26 S.W.3d 377, 380 (Mo. App., S.D. 2000) (counsel has a duty not to knowingly present perjured testimony); *State v. Dixon*, 969 S.W.2d 252, 257 (Mo. App., W.D. 1998) (counsel was not ineffective for failing to call an alibi witness when counsel doubted the legitimacy of the witness's testimony). Thus, a movant

must prove that the evidence counsel should have presented was true. Because the motion court found that Dr. Logan's testimony was not true, appellant failed to prove that counsel's performance violated his duty to provide effective assistance of counsel.

2. Counsel's Investigation was Reasonable and His Decisions were Reasonable Trial Strategy

Further, counsel was not ineffective because he conducted a reasonable investigation of appellant's mental condition and his decisions not to pursue the alleged defenses and mitigating circumstances was reasonable trial strategy. Counsel hired two different experts to evaluate appellant (Tr. 1128-1129). While counsel's initial reasons for hiring each doctor was not necessarily for the purpose of considering each of the mental defenses, each of them reached conclusions based on their numerous interactions with appellant and review of voluminous records regarding appellant's mental state. Dr. Mandracchia testified at his pretrial deposition that he did not see any issue suggesting that appellant was incompetent (Resp. Exh. 265:7-8). He testified that there was no basis for finding that appellant lacked the ability to deliberate which would support a diminished capacity defense (Resp. Exh. 265:18). He opined that appellant did not suffer from any mental disease or defect at all and thus did not have one that would exclude

responsibility (Resp. Exh. 265:18). He testified that appellant was not acting under the influence of extreme emotional and mental disturbance or distress at the time of Spicer's murder (Resp. Exh. 266:202-203). And he testified that appellant had the ability to appreciate the criminality of his conduct and that his capacity to conform his conduct to the requirements of the law was not substantially impaired (Resp. Exh. 266:204). By hiring Dr. Mandracchia and receiving findings about each of these issues, counsel satisfied his obligation to investigate all of the alleged mental health defenses alleged by appellant. Having employed a qualified expert to testify to the same subject matter as appellant alleged counsel should have investigated and called a witness to testify about, counsel should not be found ineffective for failing to shop around for an expert to testify in a particular way. *Ringo v. State*, 120 S.W.3d 743, 749 (Mo. banc 2003).

Yet, counsel also employed Dr. Logan who also reached conclusions on all of these issues. Dr. Logan testified in his deposition that he concluded that appellant was competent to stand trial (Resp. Exh. 222:151). He testified that appellant's conduct did not fit into any specific statutory mitigating circumstances, finding that appellant was not under the influence of extreme emotional or mental disturbance or distress and his capacity to appreciate the criminality of his conduct was not substantially impaired (Resp. Exh.

222:137, 141-142). He testified that any “lack of responsibility” argument was “pretty weak” and that appellant’s mental condition did not rise to the level of any kind of responsibility defense “by any criteria that I know of in Missouri” (Resp. Exh. 222:100, 134). He did not believe there was any evidence of diminished capacity (Resp. Exh. 222:101, 134, 151). Thus, Dr. Logan’s conclusions were identical to Dr. Mandracchia’s conclusions. Counsel’s reliance on two different experts’ conclusions that there was no viable mental health defense for the guilt phase or for specific statutory mitigating circumstances was not ineffective.

Moreover, counsel had other strategic reasons for not pursuing two of the alleged defenses and for not calling Dr. Logan. First, counsel believed that any defense based on a full lack of responsibility would have been meritless in light of the overwhelming evidence that appellant understood the wrongfulness of his conduct and that such a defense would have caused the defense to lose credibility (PCR Tr. 1148). He would have so doubted the credibility of a doctor that reached such a conclusion that he would not even have used that doctor (PCR Tr. 1148). Second, counsel believed that relying on a general mitigation instruction instead of submitting specific mental health mitigation circumstances was more beneficial to this case as it would prevent jurors from arguing about whether specific circumstances were

proven and would instead let the jurors consider the mitigating evidence as a whole (PCR Tr. 1177-1178). And counsel decided to call Dr. Mandracchia instead of Dr. Logan because Dr. Mandracchia had a better relationship with appellant; Dr. Logan's relationship with appellant had deteriorated, he had a very negative attitude about appellant, and counsel believed Dr. Logan no longer wanted to be involved in the case as he no longer appeared invested (PCR Tr. 1157-1158, 1188-1189). Appellant failed to overcome the presumption that all of these strategic reasons were reasonable. "The choice of one reasonable trial strategy over another is not ineffective assistance." *Zink*, 278 S.W.3d at 176.

3. Appellant Failed to Prove Prejudice

Finally, appellant failed to prove his claim because he failed to prove that there was a reasonable probability of a different result at trial had counsel pursued any of these mental defenses. First, as to the competency issue, a defendant is competent when he has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him. *State v. Anderson*, 79 S.W.3d 420, 432 (Mo. banc 2002). A defendant is presumed competent to stand trial and bears the burden of showing that he is incompetent. § 552.020.8, RSMo 2000; *Anderson*, 79

S.W.3d at 432-33. This Court does not independently weigh the evidence but accepts as true all evidence and reasonable inferences that tend to support the trial court's finding. *Id.* at 433. A mere disagreement among experts does not necessarily indicate error; on the contrary, the trial court has the duty to determine which evidence is more credible and persuasive. *Id.*

Here, appellant did not prove that presenting an opinion from Dr. Logan that appellant was incompetent would have been sufficient to establish incompetence. First, the motion court (which was also the trial court) did not believe Dr. Logan's testimony (PCR L.F. 1433, 1456, 1458-1459, 1462-1465). The motion court is free to conclude that a defendant's evidence of incompetence was not credible. *Edwards v. State*, 200 S.W.3d 500, 520 (Mo. 2006). Second, Dr. Mandracchia had testified that there was no competency issue with appellant as appellant had no mental disease or defect, evidence the motion court could rely on in concluding that appellant was competent even if Dr. Logan found otherwise (Resp. Exh. 265:7-8, 19). Third, there was evidence from all of the members of the defense team that appellant's refusal to cooperate was not due to a mental illness but because he was controlling, manipulative, and only wanted his defense conducted in the manner he saw fit (PCR Tr. 168, 866, 877, 1123, 1125, 1188). Thus, there was not a reasonable probability that appellant would have been found incompetent.

Second, there was not a reasonable probability that any defense negating all of appellant's responsibility, the element of deliberation, or mitigating appellant's sentence based on his mental condition would have resulted in appellant being acquitted of first-degree murder or not being sentenced to death. The evidence that appellant knew and appreciated the wrongfulness of his conduct, that he deliberated on Spicer's murder, and that his crimes were not motivated by extreme emotional or mental disturbance or distress was overwhelming. This Court concluded on direct appeal that appellant's guilt was overwhelming. *State v. Davis*, 318 S.W.3d 618, 641-42 (Mo. banc 2010). This Court stated:

After independently researching both death and life cases, this Court is hard-pressed to find anything in the case law similar to the appalling and gruesomely documented murder committed by Mr. Davis. This crime was unspeakable, Mr. Davis' conduct cold and calculating, and the evidence of guilt overwhelming. Ms. Spicer was beaten and sexually abused repeatedly before being smothered to death by Mr. Davis and his girlfriend for their sexual gratification. Many of these events, including the

point of Ms. Spicer's death, were recorded on videotape by Mr. Davis himself.

Id. at 645. In light of the overwhelming evidence of appellant's "cold and calculating" murder of Spicer and sex crimes against Ricci over the course of several weeks, there was no reasonable probability that the jury would have believed Dr. Logan's testimony and found that appellant did not appreciate the wrongfulness of his conduct or lacked the ability to deliberate.

Moreover, the aggravating evidence was essentially as harrowing as the evidence of appellant's guilt. After his filmed rape, torture, and attempts to kill Ricci, appellant took her to a remote area, made her strip, tried to strangle her with rope, and then smothered her to death (Tr. 4343, 4355; St. Exh. 595). He set her body on fire to destroy her remains (Tr. 4351, 4355; St. Exh. 595). While on the run from police, appellant and Riley, posing as relatives of a family in Kansas, kidnapped their daughter J.B., after which appellant raped and sodomized her so badly she needed surgery to repair the damage to her body (Tr. 4307, 4315-4338, 4357-4361, 4409-4448; St. Exh. 595). After being caught by police, appellant, resigned to his fate, said to Riley about all of the crimes, "We got to do some things we wanted" (Tr. 4398). Even Dr. Logan agreed that appellant's alleged mental disease did not mitigate his responsibility for his murder of Ricci and crimes against J.B.

(PCR Tr. 807-808). And all of this occurred within a year or so after appellant's release from a nineteen-year prison sentence for forcibly raping a woman who had stopped to help him because she thought he was a stranded motorist; during the rape, he used the same kind of language about wishing the victim was a little girl that he used during the charged offenses (Tr. 4290-4301; St. Exh. 595). In light of the overwhelming nature of the aggravating circumstances, there was not a reasonable probability that Dr. Logan's proposed testimony would have led the jury to reject a death sentence and recommend a life sentence. Thus, appellant failed to prove prejudice.

For the forgoing reasons, appellant's second, third, fourth and fifth points on appeal must fail.

III.

Appellant failed to prove that trial counsel was ineffective for failing to call Dr. Logan to testify to an involuntary intoxication defense³ based on appellant's alleged use of a selective serotonin reuptake inhibitor (SSRI) antidepressant two months prior to the crime (responds to appellant's Point VI).

Appellant claims that trial counsel was ineffective for failing to call Dr. Logan to testify that appellant was involuntarily intoxicated by prescribed antidepressants, arguing that such testimony would have led to the jury finding that appellant was not guilty of first-degree murder or should not be sentenced to death (App. Br. 100-111). But appellant failed to prove that any

³Appellant's point relied on states that counsel should have raised "an involuntary intoxication or a diminished mental capacity defense" based on his taking the SSRI (App. Br. 100). To the extent that appellant's proposed diminished capacity defense is different than the involuntary intoxication defense, appellant does not develop a separate line of argument for a diminished capacity defense in his argument (App. Br. 100-111). Where a point is not developed in the argument portion of the brief, the claim is considered abandoned. *State v. Mason*, 420 S.W.3d 632, 637 n. 5 (Mo. App., S.D. 2013).

alleged involuntary intoxication defense was viable, counsel conducted a reasonable investigation of the effect of SSRIs on his mental condition, and appellant did not prove prejudice. Therefore, the trial court did not clearly err in denying appellant's claim.

A. Facts

Appellant repeatedly complained to the trial court in *pro se* pretrial motions that counsel was failing to pursue a defense that appellant's behavior changed after he started taking a prescribed selective serotonin reuptake inhibitor (SSRI) (L.F. 157, 169-170, 412, 418, 670-672). In his pretrial deposition, Dr. Logan testified that he had reviewed twenty-two different *pro se* motions filed by appellant (Resp. Exh. 222:25). He was also given a note pad of writings and a "rambling note" appellant had made about the case (Resp. Exh. 222:32-33). He also testified that he did not believe that appellant was under the influence of any type of alcohol or drug during the charged crimes (Resp. Exh. 222:118-119). When asked if the drugs prescribed by appellant's psychiatrist Dr. Hachinsky (or anyone else) had any "relevance or nexus" to appellant's conduct, Dr. Logan testified that the first drugs, Lexapro (the SSRI) and Ativan, did not work well and thus would not have been taken very much (Resp. Exh. 222:124). The next set of drugs, Paxil and Clonopin, were more helpful, and he did not think any drug effects played a

role in this, as appellant was on “pretty standard clinical dosages” which would not have caused any “marked change” in appellant’s behavior (Resp. Exh. 222:124).

In his amended motion, appellant alleged that counsel failed to provide Dr. Logan with a letter detailing appellant’s change in behavior after allegedly taking the SSRI, which prevented Dr. Logan from being able to diagnose appellant with bipolar I disorder which was exacerbated by the drug, causing manic symptoms which lasted through the time of the crimes and the preparation of appellant’s defense (L.F. 187-188, 233-234, 245-246). In his *pro se* claims incorporated into the motion, appellant made numerous allegations related to a claim that counsel was ineffective for failing to fully investigate and present an involuntary intoxication defense based on doctor error in prescribing the SSRI (PCR L.F. 300-302). He pled roughly thirty-five pages of alleged symptoms, witness names, and citations to various studies and articles which he claimed supported his allegation that his behavior changes leading up to the crimes were caused by the SSRIs he took (PCR L.F. 302-338).

At the evidentiary hearing, counsel Susan Elliot testified that she researched the issue of behavioral changes being triggered by taking SSRIs and went through the case record information consistent with such a theory

(Tr. 125). Both Elliot and Carol Muller testified that they met with Dr. Logan to discuss the possibility of raising some defense related to appellant having a change in behavior after having taken SSRIs (PCR Tr. 124-125, 896-897). Muller testified that they brought a “document” that appellant had prepared with information about his claim that the SSRI had affected his mental state and showed it to Dr. Logan (PCR Tr. 896-897). Dr. Logan reviewed the document and gave it back (PCR Tr. 897). Dr. Logan told them that a defense based on appellant’s use of SSRIs was not possible and would have made no difference in the case for several reasons: 1) the drugs would not stay in his system long enough to affect these crimes; 2) the events of the crimes required planning inconsistent with such a defense; 3) appellant’s involving an accomplice in the crimes was inconsistent with such a defense; and 4) appellant was receiving other drugs at the same time from other family members, so any actions could not be attributed to only the SSRIs (PCR Tr. 125-126, 193, 897-898). Thus, Dr. Logan concluded that an SSRI defense was not a viable defense “in any form” (PCR Tr. 899). He rejected it not only for the guilt phase but also as a mitigating circumstance (PCR Tr. 194). Elliot was “surprised” at how dismissive Dr. Logan was of a defense based on appellant’s taking of SSRIs (PCR Tr. 193).

Both Elliot and Muller testified about their efforts to pursue evidence

to support appellant's claims in the letter of how SSRIs affected his mental state (PCR Tr. 187-192, 880-882). None of the evidence appellant claimed would support the defense was found or, if it was found (such as appellant's notebook), it was unhelpful; none of the witnesses he wanted were willing or able to identify behavior changes (PCR Tr. 187-192, 880-882).

Dr. Logan testified that appellant contacted him about assisting with appellant's Clay County case, but that funding for his services could not be arranged (PCR Tr. 549-551). During that time, Dr. Logan did receive a letter that he believed appellant had written specifically to him "about some additional symptomology" (PCR Tr. 549). He claimed he received the letter in the 2009-2010 time period (PCR Tr. 559). Later, for the post-conviction case, he assessed appellant (PCR Tr. 562-563). He claimed that the information he now had was different than the pretrial information because it was "more detailed" (PCR Tr. 563). By that point, appellant had been diagnosed as bipolar in the Department of Corrections and was being treated with medication, so he was more organized in his thinking than he was before trial (PCR Tr. 563).

Dr. Logan testified to appellant's alleged behavior changes after taking Lexapro prescribed by Dr. Hachinsky, but claimed that he had learned them from his interview with appellant, not from the letter (PCR Tr. 564-568, 570-

571). Dr. Logan claimed he only had information about “a few” of those symptoms before trial (PCR Tr. 568). He also reviewed information collected by appellant or his post-conviction counsel after the trial in this case as well as information available to him prior to trial (PCR Tr. 568-569, 572-575).

Based on the new information he learned in evaluating appellant for the post-conviction case, Dr. Logan claimed that, in the spring of 2006, appellant suffered from bipolar disorder with a persistent elevated or irritable mood and rapid cycling (mania and depression both manifesting in the course of a day (PCR Tr. 576). He claimed that appellant’s symptoms qualified as a manic episode with some psychotic features, including paranoia and suicidal thoughts (PCR Tr. 576). He claimed he had “insufficient information” to make that diagnosis prior to trial and, had he had the information he now had, he could have made that diagnosis prior to trial (PCR Tr. 577). He claimed that the SSRI likely triggered further manic symptoms in late March (PCR Tr. 577). He claimed that this was different from an “SSRI defense” because the SSRI triggering “switching” was merely a phenomenon in bipolar patients, not a defense that the drug caused people to act bizarrely and paradoxically to the purpose of the drug (PCR Tr. 578). With “additional information,” he could have made the diagnosis of SSRI-triggered mania due to switching prior to trial (PCR Tr. 578).

Dr. Logan claimed that he remembered speaking to Elliot and Muller about the SSRIs and said that they were considering “an SSRI defense” (PCR Tr. 546). He conceded that he told them that he did not think such a defense was viable (PCR Tr. 546). But he claimed that he tried to explain the “switching” phenomenon which causes a bipolar person to switch from a state of depression to mania, which resulted in Elliot and Muller becoming “confused” (PCR Tr. 547). On cross-examination, however, he conceded that he did not have a good memory of his meeting with Elliot about the proposed SSRI defense and, at the time of his pretrial deposition, had no recollection of it (PCR Tr. 755-756). He conceded that his post-conviction direct testimony that he remembered meeting with Susan Elliot was “inaccurate” (PCR Tr. 756). He also admitted that none of the drugs played any major role in the case “in and of” themselves; he still believed there was no “SSRI defense” and that the crimes were not a “side effect” of the medications (PCR Tr. 771). He opined that appellant’s actions were not affected by the influence of any drug during the crimes (PCR Tr. 737). He said that his pretrial answer that the drugs did not play any major role in the crimes and that the “pretty standard clinical dosages” would not have caused changes in his behavior on the medications was still a correct answer although he was “clarifying” that he was referring to “side effects” (PCR Tr. 772).

The motion court denied appellant's claim (PCR L.F. 1448-1453, 1521-1526). The court found that counsel reasonably investigated any potential defense involving the SSRI's by trying to track down evidence appellant claimed supported his allegations of behavioral changes and by speaking to Dr. Logan about it (PCR L.F. 1449). The court specifically rejected Dr. Logan's testimony about talking to Elliot and Muller about "switching" as not credible, noting that Dr. Logan later admitted he did not remember the meeting (PCR L.F. 1450-1451). The court concluded that Elliot's inquiry about whether appellant's ingestion of SSRI's could support a viable defense was shut down by Dr. Logan's insistence that there was no defense related to the ingestion of the drugs "in any way, shape or form" (PCR L.F. 1452). The court rejected all of Dr. Logan's testimony that appellant suffered from bipolar disorder, including that he suffered a manic episode brought on by taking the antidepressant (PCR L.F. 1433, 1450-1451, 1456, 1458-1459, 1462-1465).

B. Appellant Failed to Prove His Claim

The selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim. *Vaca v. State*, 314 S.W.3d 331, 335 (Mo. banc 2010). Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a

claim of ineffective assistance of counsel. *Id.* To prevail on a claim of ineffective assistance of counsel for failing to call a witness, a defendant must show that counsel knew or should have known of the existence of the witness, the witness could have been located with reasonable investigation, the witness would have testified, and the witness's testimony would have provided a viable defense. *Strong v. State*, 263 S.W.3d 636, 652 (Mo. banc 2008). Counsel is not ineffective for failing to shop for an expert that would testify in a particular way. *Johnson v. State*, 388 S.W.3d 159, 165 (Mo. banc 2012). The duty to investigate does not force defense lawyers to "scour the globe" on the off-chance something will turn up. *Id.* Reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *Id.*

1. Appellant Failed to Prove Dr. Logan's Testimony Provided a Viable Defense

Appellant's claim first fails because he failed to present credible evidence that Dr. Logan's testimony about appellant's use of SSRI's and "switching" would have provided him a viable defense. First, as with all of appellant's previous points, the motion court did not believe any of Dr. Logan's testimony, finding him to be non-credible (PCR L.F. 1433, 1450-1451, 1456, 1458-1459, 1462-1465). The motion court rejected appellant's claim that

his use of Lexapro caused him to “switch” from a depressed state to a manic state (PCR L.F. 1448-1453). The motion court rejected his claim that Dr. Logan told Elliot and Muller about “switching” (PCR L.F. 1450). The motion court rejected the claim that appellant suffered bipolar I disorder at the time, a condition necessary for SSRI “switching” to take place (PCR L.F. 1432-1444, 1463). The motion court rejected appellant’s claim that counsel had not received appellant’s information about his alleged behavioral changes after taking Lexapro (PCR L.F. 1450-1451). And the motion court rejected appellant’s self-serving reports of his behavioral changes, especially in light of the fact that counsel could not find any evidence to verify any of the information appellant claimed supported his allegations (PCR L.F. 1432-1444, 1463).). The motion court was free to reject this testimony as incredible, and this Court gives deference to the motion court’s factual findings and credibility determinations. *Zink v. State*, 278 S.W.3d 170, 178 (Mo. banc 2009); *Barton v. State*, 432 S.W.3d 741, 760 (Mo. banc 2014). Appellant utterly failed to present any credible evidence in support of this claim, and therefore it must fail.

Further, Dr. Logan’s testimony did not present a viable “involuntary intoxication” defense because Dr. Logan’s testimony established that appellant was not under the influence of any drug at the time of the crimes

and thus was not involuntarily intoxicated. A person who is in an intoxicated or drugged condition from drugs is criminally responsible for his conduct unless such condition is involuntarily produced and deprived him of the capacity to know or appreciate the nature, quality, or wrongfulness of his conduct. § 562.076.1, RSMo 2000. By necessity, for there to be an involuntary intoxication defense, the evidence must show intoxication. Dr. Logan's testimony did not do so.

Dr. Logan testified at the post-conviction hearing that he did not believe that a defense that appellant was acting under the influence of an SSRI⁴ would be viable (PCR Tr. 545-547). Dr. Logan admitted that none of the drugs played any major role in the case "in and of" themselves; he still believed there was no "SSRI defense" and that the crimes were not a "side effect" of the medications (PCR Tr. 771). He opined that appellant's actions were not affected by the influence of any drug during the crimes (PCR Tr.

⁴Appellant argues that his claim was not an "SSRI" defense, but a claim of intoxication by any kind of antidepressant (App. Br. 105). This belies the claims in his amended motion, which repeatedly and exclusively refer to SSRI medications (PCR L.F. 231, 236, 238, 245, 300-338). Appellant cannot present a claim to this Court which was not before the motion court. *Mallow v. State*, 439 S.W.3d 764, 769-70 (Mo. banc 2014).

737). He said that his pretrial answer that the drugs did not play any major role in the crimes and that the “pretty standard clinical dosages” would not have caused changes in his behavior on the medications was still a correct answer, although he was “clarifying” that he was referring to “side effects” (PCR Tr. 772).

This testimony shows that Dr. Logan never testified, either pretrial or in the post-conviction case, that appellant was acting under the influence of any drug in the time leading up to the crimes or during the crimes themselves. He explicitly stated that the drugs were not a factor in the crimes (PCR Tr. 737, 771). Instead, what he was claiming was that the SSRI triggered a manic episode by “switching” appellant from a depressed state to a manic state (PCR Tr. 547). The drug was not the cause of the mania; appellant’s alleged bipolar disorder was the cause of the mania (PCR Tr. 577-578). Thus, Dr. Logan was not testifying that appellant had an involuntary intoxication defense; he was testifying to a lack of responsibility by reason of mental disease or defect defense. Because Dr. Logan’s testimony did not establish that appellant was actually intoxicated by any substance at all,

appellant did not have a viable involuntary intoxication defense.⁵ Counsel is not ineffective for failing to raise a meritless issue at trial. *Trotter v. State*, 443 S.W.3d 621, 626 (Mo. App., W.D. 2014).

2. Counsel's Investigation of the Effect of SSRIs was Reasonable

Moreover, even if there was a potential defense of involuntary intoxication by SSRIs, counsel's investigation of that potential defense was reasonable. Counsel Elliot investigated the potential theory of a defense involving SSRIs early in the case (PCR Tr. 125). The defense team attempted to find witnesses and physical evidence to support appellant's claims of behavioral changes, but could find nothing that appellant claimed could be found (PCR L.F. 187-192, 880-882). Elliot and Muller visited Dr. Logan, showed him a document detailing appellant's alleged behavioral changes, and asked if there was any possible defense involving SSRIs (PCR L.F. 124-125, 896-897). Such a question, along with the claims of behavioral changes Dr. Logan was certainly exposed to, should have been sufficient to alert Dr. Logan that there was a possible defense involving SSRIs, switching, and a potential diagnosis of bipolar disorder. Yet Dr. Logan set out several reasons

⁵As explained in Point II, *supra*, the motion court rejected the claim that Dr. Logan could have provided a viable NGRI defense based on his post-trial bipolar diagnosis of appellant.

why he believed that such a defense was not available “in any form” for either the guilt or penalty phases (PCR Tr. 126-126, 193-194, 897-899). Counsel researched the issue, attempted unsuccessfully to corroborate appellant’s symptoms of other evidence, and had one of the defense’s mental health experts tell her there was no such possible defense. Counsel’s decision not to further pursue a defense involving SSRI after such thorough investigation refuting the defense was reasonable. Counsel may reasonably end a certain line of investigation when it appears further investigation would be fruitless. *Strong*, 263 S.W.3d at 652. Appellant failed to prove that counsel’s investigation of the SSRI issue was deficient.

3. Appellant Failed to Prove Prejudice

Moreover, there was not a reasonable probability that an involuntary intoxication defense negating appellant’s responsibility, the element of deliberation, or mitigating appellant’s sentence based on his mental condition would have resulted in appellant being acquitted of first-degree murder or not being sentenced to death. The evidence that appellant knew and appreciated the wrongfulness of his conduct, was able to deliberate on Spicer’s murder, and that his crimes were not motivated by extreme emotional or mental disturbance or distress was overwhelming. This Court concluded on direct appeal that appellant’s guilt was overwhelming. *State v.*

Davis, 318 S.W.3d 618, 641-42 (Mo. banc 2010). This Court stated:

After independently researching both death and life cases, this Court is hard-pressed to find anything in the case law similar to the appalling and gruesomely documented murder committed by Mr. Davis. This crime was unspeakable, Mr. Davis' conduct cold and calculating, and the evidence of guilt overwhelming. Ms. Spicer was beaten and sexually abused repeatedly before being smothered to death by Mr. Davis and his girlfriend for their sexual gratification. Many of these events, including the point of Ms. Spicer's death, were recorded on videotape by Mr. Davis himself.

Id. at 645. In light of the overwhelming evidence of appellant's "cold and calculating" murder of Spicer and sex crimes against Ricci over the course of several weeks, there was no reasonable probability that the jury would have believed Dr. Logan's testimony and found that appellant did not appreciate the wrongfulness of his conduct or lacked the ability to deliberate.

Moreover, the aggravating evidence was essentially as harrowing as the evidence of appellant's guilt. After his filmed rape, torture, and attempts

to kill Ricci, appellant took her to a remote area, made her strip, tried to strangle her with rope, and then smothered her to death (Tr. 4343, 4355; St. Exh. 595). He set her body on fire to destroy her remains (Tr. 4351, 4355; St. Exh. 595). While on the run from police, appellant and Riley, posing as relatives of a family in Kansas, kidnapped their daughter J.B., after which appellant raped and sodomized her so badly she needed surgery to repair the damage to her body (Tr. 4307, 4315-4338, 4357-4361, 4409-4448; St. Exh. 595). After being caught by police, appellant, resigned to his fate, said to Riley about all of the crimes, "We got to do some things we wanted" (Tr. 4398). Even Dr. Logan agreed that appellant's alleged mental disease did not mitigate his responsibility for his murder of Ricci and crimes against J.B. (PCR Tr. 807-808). And all of this occurred within a year or so after appellant's release from a nineteen-year prison sentence for forcibly raping a woman who had stopped to help him because she thought he was a stranded motorist; during the rape, he used the same kind of language about wishing the victim was a little girl that he used during the charged offenses (Tr. 4290-4301; St. Exh. 595). In light of the overwhelming nature of the aggravating circumstances, there was not a reasonable probability that Dr. Logan's proposed testimony would have led the jury to reject a death sentence and recommend a life sentence. Thus, appellant failed to prove prejudice.

For the forgoing reasons, appellant's sixth point on appeal must fail.

IV.

Appellant failed to prove that trial counsel was ineffective for failing to “prepare” appellant’s guilt and penalty phase testimony and call him to testify during the guilt phase (responds to appellant’s Points VII and VIII).

Appellant claims that trial counsel was ineffective for failing to prepare appellant’s testimony for the guilt and penalty phases and for failing to call appellant to testify during the guilt phase (App. Br. 112-125). But appellant chose not to testify in the guilt phase, any failure by counsel to “prepare” for appellant’s testimony was due to appellant’s failure to cooperate with counsel, and appellant failed to prove that he suffered prejudice from his failure to testify as he did not present any evidence of what his proposed guilt phase testimony or more prepared penalty phase testimony would have been or how it would have created a reasonable probability of a different result at trial. Therefore, the motion court did not clearly err in denying appellant’s claim.

A. Facts

1. Trial

Prior to the close of the evidence in the guilt phase, the court asked appellant about his rights regarding testifying (Tr. 4144-4162). During that examination, appellant stated that he understood he had the right to testify, but asked if he was permitted to testify to whatever he wanted to testify to, or if he would have to answer questions put to him by his counsel (Tr. 4145, 4148). Appellant stated that he wanted “to testify and put on evidence,” saying that he wanted “to get where I could talk and have other people that knew me...to just try to, you know, explain the last two months that I was out there” (Tr. 4149-4150). In saying that he “just want[ed] to be heard,” appellant kept referring to trying to put on evidence from other people and to raise the objections he had been raising in *pro se* motions (Tr. 4151, 4154). The court explained that there were things appellant might want to say that were prohibited by the rules of evidence (Tr. 4150-4152). Appellant admitted that he understood, but that he had not discussed this with counsel (Tr. 4152). At that point, the court wanted to take a recess to have counsel speak with appellant (Tr. 4152). Before that recess could be taken, appellant again started to ask if he could talk about what he wanted if called to the stand; the court stopped appellant and told him, as he had previously, that the court did

not want to hear about the content of discussions between appellant and counsel, as those discussions were privileged and the court could not give appellant advice about what evidence he should put on (Tr. 4152).

After a lengthy discussion about appellant's problems with counsel and his desire to argue his *pro se* motions, appellant again said that he understood that he had the right to testify, "but I don't know what actually to testify means, if they have to cross-examine me, if I have to count on them to cross-examine me or do I get to just, to talk to my – to say what I want to say within the legal evidence rules and all that" (Tr. 4157). When the court again attempted to recess so that appellant could speak to counsel, counsel said that he believed it was appropriate for the court to tell appellant that counsel would be required to conduct the examination, that the State would cross-examine, and that the right to testify was not a "free forum opportunity to be heard" (Tr. 4157). The court asked appellant if he understood that counsel would ask the questions, that the State could cross-examine, and that he would not "get to just sit there and tell the jury whatever you want" (Tr. 4157-4158). Appellant said he understood, but asked if he could have counsel "ask questions that I want to ask"; the court said "No" (Tr. 4158). Appellant understood, but then said he did not need counsel and wanted to waive counsel so that he could be heard (Tr. 4158-4159). The court said that it had

already ruled on the waiver of counsel, and then said that appellant's testimony was "going to be under the rules of evidence, and that is [counsel] is going to ask you questions or it's not going to be done at all. Because I will not just let you sit there and talk to the jury on your own" (Tr. 4159). Appellant said that he understood and would try to ask counsel if counsel would ask certain questions (Tr. 4159).

After a recess, appellant said that he understood that, if he chose to testify, it would be under the rules of evidence by the questioning of counsel (Tr. 4160-4161). Appellant said that he would not be able to testify to anything that he wanted to say because counsel would not ask the questions that appellant wanted asked (Tr. 4161). Appellant told the court that he did not want to testify "[b]ecause I would be testifying to basically just what the prosecution wants" (Tr. 4161-4162).

In the penalty phase, the court again told appellant that he could not make counsel ask the questions that appellant wanted and that the questions asked would be up to counsel (Tr. 4703, 4708-4710). Appellant asked if he could ask his counsel to ask him certain questions, a question he had not asked the court during the guilt phase examination (Tr. 4710). The court said that he could "obviously" give counsel questions he wanted asked, but that it was still up to counsel to choose what questions to ask (Tr. 4710-4711).

Appellant chose to testify (Tr. 4711, 4717-4742). Prior to his testimony, appellant spent more than an hour with counsel talking about the decision to testify (Tr. 4707). Appellant was given another fifteen minutes prior to his testimony to write out questions he wanted counsel to ask (Tr. 4715).

Appellant testified about his childhood experiences, including reluctantly giving some information about sexual abuse he suffered (Tr. 4719-4727). He testified about being sexually assaulted in prison (Tr. 4727-4729). He testified about using drugs to help him keep his “sanity” due to all of the abuse (Tr. 4729). He testified about being put in a module in the Jackson County Jail for men who thought they were gay (Tr. 4730-4731). He talked about efforts to “reinvent” himself and make improvements in his life (Tr. 4733-4736). He testified about having problems coming to terms with the sexual abuse he suffered (Tr. 4736-4737). He testified about having problems dealing with stress at some point after getting out of prison, leading to him feeling “wound up” and acting out sexually because of it (Tr. 4738-4741).

2. Amended Motion

In his *pro se* claims contained in his amended motion, appellant alleged that counsel was ineffective for not allowing him to testify on his behalf in the guilt phase even though he repeatedly stated that he wanted to testify (PCR L.F. 302, 337). Appellant alleged that he and not counsel had the right to

determine the subject matter of his testimony and the trial strategy for his trial (PCR L.F. 337). He alleged that counsel was trying to keep the jury from hearing his proposed testimony about his changes in behavior caused by “involuntary intoxication” (PCR L.F. 337). While he did testify in the penalty phase, he claimed that counsel “failed to prepare an effective examination and trial strategy” based on appellant’s preferred theory that the crimes occurred due to his involuntary intoxication, diminished capacity, and mitigation based on the prescriptions he took (PCR L.F. 338).

3. Evidentiary Hearing

At the evidentiary hearing, counsel Tom Jacquinet testified that he attempted to have discussions with appellant about appellant testifying during the guilt phase “weeks in advance” of trial (PCR Tr. 1159-1160). Appellant repeatedly told counsel that he “just wanted to be heard” (PCR Tr. 1160). When counsel would try to explore what that meant, appellant would not provide specific information (PCR Tr. 1160). Appellant would not say if he wanted to testify in the guilt phase, penalty phase, or both (PCR Tr. 1160). He testified that he did not believe that it was in appellant’s best interests to testify and that appellant knew the defense team thought so, but appellant just “had to be heard” (PCR Tr. 1161). Appellant refused to discuss anything specific with the defense team; thus, counsel was never able set out with

appellant what questions to ask (PCR Tr. 1162). Appellant's desire to testify at the guilt phase "all ended" when it was explained that there would need to be structure to the examination and that appellant would not simply be allowed to just start talking (PCR Tr. 1197). Counsel was only able to discuss a question and answer format with appellant right before his penalty phase testimony; counsel stated that they "at least" had an outline for that testimony (PCR Tr. 1161, 1197). Counsel did not tell appellant he would prevent appellant from testifying (PCR Tr. 1196-1197).

Appellant chose not to testify at the evidentiary hearing (PCR Tr. 1210).

4. Findings and Conclusions

The motion court denied appellant's claims, finding that appellant chose not to testify in the guilt phase and that counsel had not done anything to prevent appellant's testimony (PCR L.F. 1529). The motion court credited counsel's testimony and found that appellant failed to produce "sufficient and credible evidence" to support this allegation (PCR L.F. 1529).

B. Appellant Failed to Prove His Claim

Appellant failed to prove that counsel prevented him from testifying in the guilt phase by failing to prepare appellant's testimony. First, as the motion court found, it was appellant's decision not to testify, not counsel's

decision (Tr. 4161-4162). Appellant's choice was not made because counsel failed to prepare appellant to testify, but because appellant disagreed with counsel's trial strategy and wanted to dictate the subject matter of the testimony (Tr. 4145-4161). But the decision about the subject matter of appellant's testimony was properly counsel's, not appellant's. The examination of witnesses and introduction of evidence is a matter left to counsel's exercise of trial strategy. *Anderson v. State*, 196 S.W.3d 28, 37 (Mo. banc 2006). Defense counsel has wide discretion in determining what strategy to use in defending his or her client. *Worthington v. State*, 166 S.W.3d 566, 578-79 (Mo. banc 2005). While a defendant has the right to make certain fundamental decisions, including whether or not to testify, all other decisions belong to trial counsel alone. *Id.* at 579. Thus, appellant failed to prove that counsel's refusal to allow appellant to dictate the subject matter of the testimony was improper. Therefore, there was no improper action by counsel prevented appellant from testifying.

Second, any lack of preparation by counsel of appellant's testimony was not counsel's fault, but appellant's fault. Jacquinet testified that, after appellant said that he wanted to be heard, Jacquinet tried to inquire about the specifics of appellant's testimony (PCR Tr. 1160). Appellant refused to cooperate and tell Jacquinet anything specific about his proposed testimony

(PCR Tr. 1160, 1162). He did not even say if he wanted to testify in the guilt phase or penalty phase (PCR Tr. 1160). Counsel is not responsible for his client's failure to cooperate in the case. *State v. White*, 913 S.W.2d 435, 438 (Mo. banc 1996); *State v. Brown*, 902 S.W.2d 278, 298 (Mo. banc 1995); see also *Strong v. State*, 263 S.W.3d 636, 649 (Mo. banc 2008) (counsel's choice not to pursue a defense based on the defendant's state of mind was reasonable where counsel could not rely upon the defendant's position to be consistent based on his reluctance to cooperate). Appellant failed to plead or prove how counsel was supposed to prepare appellant's testimony when appellant was unwilling to cooperate with counsel in preparing that testimony. Thus, counsel's inability to prepare appellant's testimony in either phase was not deficient performance by counsel.

Finally, appellant failed to demonstrate prejudice. Appellant chose not to testify at the evidentiary hearing (PCR Tr. 1210). Thus, appellant failed to prove what his guilt phase testimony or better-prepared penalty phase testimony would have established. That he alleged what he may have testified to in his amended motion was insufficient to establish his claim. Allegations in a post-conviction motion are not self-proving. *Woods v. State*, 458 S.W.3d 352, 360 (Mo. App., W.D. 2014); *Toten v. State*, 295 S.W.3d 896, 899 (Mo. App., S.D. 2009). The failure to present evidence to provide factual

support for a post-conviction claim constitutes abandonment of that claim. *Weekley v. State*, 265 S.W.3d 319, 323 (Mo. App., S.D. 2008). Without presenting evidence to prove what appellant's proposed testimony would have shown, appellant failed to prove that the testimony would have had any impact on the trial at all, let alone created a reasonable probability of a different result in either phase. Granted, in light of the overwhelming evidence of appellant's guilt and the nature of appellant's crimes, *State v. Davis*, 318 S.W.3d 618, 641-42, 645 (Mo. banc 2010), there was little chance that anything appellant would have testified to would have had any impact on the guilt or penalty phase verdict. But without any testimony at the evidentiary hearing by appellant about the content of his proposed trial testimony, it was impossible to assess the impact of that testimony. Thus, appellant's failure to present evidence to prove the content of his proposed trial testimony defeats his claim of prejudice. Therefore, the motion court did not clearly err in denying appellant's claims.

For the forgoing reasons, appellant's final two points on appeal must fail.

CONCLUSION

In view of the forgoing, the denial of appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains 22,540 words as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 23rd day of September, 2015, to:

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