

IN THE  
SUPREME COURT OF MISSOURI

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No. SC85980

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WALTER T. STOREY,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

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Appeal from the Circuit Court of St. Charles County, Missouri  
Eleventh Judicial Circuit  
The Honorable Nancy L. Schneider, Judge

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RESPONDENT'S BRIEF,  
STATEMENT AND ARGUMENT

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## STATEMENT OF THE FACTS

The Appellant was tried and convicted of murder in the first degree, and other crimes, and sentenced to death in 1991. *State v. Storey*. 901 S.W.2d 886 (Mo. banc 1995). In 1993, a post-conviction hearing was conducted pursuant to the procedures for Rule 29.15 as they existed at that time. This Court reversed the Appellant's penalty and remanded for a new penalty phase trial based on ineffective assistance of counsel in failing to object to certain arguments by the prosecutor. 901 S.W.2d at 900.

In 1997, a retrial of the penalty phase occurred and the Appellant was again sentenced to death on July 10, 1997. That sentence was reversed by this Court based on instructional error. *State v. Storey*, 986 S.W.2d 462 (Mo. banc 1999).

Upon remand, the Appellant was retried and again sentenced to death on December 17, 1999. *State v. Storey*, 40 S.W.3d 898 (Mo. banc 2001). Upon appeal, this Court affirmed the penalty of death imposed by the jury. *Id.* Appellant then filed his *pro se* motion to vacate under Rule 29.15 (L.F. 7-12), and, on October 22, 2001, Appellant's counsel filed an amended motion to vacate (L.F. 31-230).

The evidence giving rise to the Appellant's conviction, as based on the transcript and testimony from the 1999 trial (Storey III), is summarized as follows:

Lavon Marshall, whose apartment shared a common wall with that of the victim, was awakened in the early morning hours of February 3, 1990, by a woman's scream (Tr. 1107). She heard a man's voice coming from Ms. Frey's apartment angrily saying "shut up, shut up, shut up" (Tr. 1107). She also heard loud banging on the wall, moaning, furniture being moved, drawers being opened and closed, and the sound of running water (Tr. 1109-10).

Ms. Marshall started to call the police, but when things got quiet, she did not complete the call; she did not believe anything was seriously wrong (Tr. 1111). The following morning, when Ms. Marshall went to brunch, she noticed that the light was on in Ms. Frey's bedroom (Tr. 1111). When she came back, the light was off (Tr. 1111).

When Ms. Frey, who taught young children with physical and mental disabilities at United Services for the Handicapped (USH) and was normally very prompt, did not show up for work the morning of February 5, 1990, Karen Stepson, the program director at USH, became concerned (Tr. 920-21, 1132-33). Ms. Stepson

attempted to reach Ms. Frey at home by telephone but received no answer (Tr. 921, 1134). Ms. Stepson then drove to the Sun Lake apartment complex where Ms. Frey lived (Tr. 922, 1134). When she did not see Ms. Frey's car in the parking lot, she returned to the school (Tr. 1135). Next, she telephoned Ms. Frey's mother to see if Ms. Frey was out of town (Tr. 921, 1135). Ms. Frey's mother was unaware of any trip (Tr. 1135).

Still concerned, Ms. Stepson then returned to Ms. Frey's apartment complex with Joseph Ortwerth, the community relations director at USH, and Tom Engle, the executive director of USH, to see if the apartment manager would let them into Ms. Frey's apartment (Tr. 919, 922-23, 1135-36). After securing a key from the apartment manager, the trio entered Ms. Frey's locked, second-floor apartment where Ms. Stepson discovered Ms. Frey's body in a bedroom (Tr. 923-24, 933, 1137). Ms. Frey was lying face down on the floor with her arms behind her back (Tr. 924, 934, 944, 963, 1137; S.Exh. 16, 17). She was naked from the waist down and was lying in a large pool of blood (Tr. 934, 936-37; S.Exh. 16, 17). Ms. Frey's pajama top was soaked in blood and had what appeared to be a tennis shoe print on it (Tr. 937, 990-91). Her bed was in disarray, the mattress was soaked

through with blood, and the walls several feet away from Ms. Frey's body were splattered with blood (Tr. 934, 966-67, 970-71, 1137).

Ms. Stepson's screams upon discovering Ms. Frey's body drew the attention of Appellant and his mother, who lived in the apartment across the hall from Ms. Frey's apartment (Tr. 927).

Appellant's mother invited them into her apartment to call the police (Tr. 927).

The police arrived at Ms. Frey's apartment at 11:35 a.m. (Tr. 931). An examination of the scene revealed that there had been no forced entry into the apartment (Tr. 933, 958-59). The police did, however, discover mud on the balcony railing to Ms. Frey's apartment and on the patio fence to the apartment below and mud smears on the side of the building (Tr. 946-47, 974-75).

Inside, the police recovered a bloody palm print from Ms. Frey's dresser that belonged to Appellant (Tr. 939-43, 965, 1052-53).

In addition, they noted that several items on her night stand had been disturbed and that some of her personal papers, her cosmetic bag, and her coin purse were scattered on her bed (Tr. 967-68; S.Exh. 35, 36). Finally, Ms. Frey's blood was found on

her bathroom carpet and on a towel recovered from the bathroom (Tr. 972-73, 1030, 1037).

Outside, the police found a paper bag containing Ms. Frey's briefcase in the apartment complex dumpster, as well as a paper bag containing a bloody t-shirt, tank-top, and pair of white gloves (Tr. 948, 1005-08, 1015). Ms. Frey's blood was on the gloves and Appellant's blood was on the t-shirt (Tr. 1037-39).

The tank-top tested positive for human blood but further tests were inconclusive (Tr. 1038-39). Ms. Frey's car was found parked in another area of the apartment complex (Tr. 947, 1101-03). Finally, the police recovered Ms. Frey's keys from the lake behind her apartment (Tr. 1100-01, 1103).

Ms. Frey's body was taken to the morgue where an autopsy was performed by Dr. Mary Case (Tr. 889). The autopsy revealed that Ms. Frey died from blood loss and asphyxiation as the result of two incised wounds to her neck (Tr. 898-99, 914-16). These cuts were several inches deep, passing through both of her jugular veins, her airway, and her esophagus, to the front of her spine (Tr. 899, 902, 913; S.Exh. 45, 47). She remained conscious after these injuries for as much as one minute (Tr. 914).

In addition, Ms. Frey sustained numerous injuries to her face including over a dozen bruises, contusions and abrasions (Tr. 892-93; S.Exh. 45, 46, 47, 48, 49). She suffered injuries to her forehead, nose, cheeks, scalp, upper and lower lips, tongue, and one of her eyelids was torn (Tr. 893, 898, 900-03; S.Exh. 45, 46, 47, 48, 49). All of these injuries were inflicted while she was alive, and none of them caused unconsciousness or death (Tr. 899, 915, 917).

In addition, Ms. Frey had defensive injuries to her hands and arms (Tr. 895, 903-06; S.Exh. 50, 51, 52). She had an abrasion on her right knee (Tr. 912). She also had a six-inch-deep stab wound to her right abdominal area (Tr. 896, 899, 906-07, 910; S.Exh. 53). Bruising around the stab wound was consistent with the impact of Appellant's hand as he thrust the knife all the way into her body (Tr. 899). There were four internal impact injuries to the left side of Ms. Frey's scalp which were not externally visible but were caused by four separate blows to her head (Tr. 908-09). Finally, Ms. Frey had five fractured ribs, one of which would have caused her difficulty breathing (Tr. 910-11). These rib injuries were consistent with Appellant having stepped on Ms. Frey's back,

kicked her, or hit her with his fist (Tr. 917). Ms. Frey sustained no less than twenty blunt force impacts to her body (Tr. 900-01, 909-10).

The police sent Appellant and his mother to the police station to be interviewed the morning Ms. Frey's body was discovered (Tr. 986). When interviewed by Lieutenant Zumwalt, Appellant said that around 6:00 p.m., Friday, February 2, 1990, he went to the apartment complex spa where he stayed until 7:00 or 8:00 p.m. (Tr. 987). He then returned to his apartment, changed clothes, and left on foot (Tr. 987). According to Appellant, he was picked up by a woman named "Stacey," who took him to a bar in Wentzville, Missouri (Tr. 987). Appellant claimed to have spent the night with this woman, not returning to his apartment until late Saturday night (Tr. 987). According to Appellant, he remained in his apartment most of the day Sunday, only returning to the spa again around 6:00 p.m. (Tr. 987).

Appellant was interviewed again the following day by Detectives Plummer and Miller (Tr. 1055-56). Appellant was advised of his *Miranda* rights and waived them (Tr. 1057-62). He initially repeated the story he told Lt. Zumwalt (Tr. 1063). He

then told the detectives that on Friday, February 2, 1990, he received a letter from his wife's attorney regarding their upcoming divorce proceedings which accused him of being abusive and violent (Tr. 1066-67). Appellant was upset and walked to the liquor store where he bought a twelve-pack of beer (Tr. 1067). While he was sitting in his apartment drinking this beer, he heard Ms. Frey come home (Tr. 1067). Appellant then went back to the liquor store where he bought more beer (Tr. 1067). Appellant returned home and continued drinking (Tr. 1067). Later that night, he got a knife from his kitchen, climbed the balcony to Ms. Frey's apartment, and entered through an unlocked sliding glass door (Tr. 1067-68). Appellant intended to steal money from Ms. Frey to buy more alcohol (Tr. 1092-93). Appellant removed Ms. Frey's car keys from her jacket, which was hanging on a chair, with the intent of stealing her car (Tr. 1068-69). Appellant then noticed a light on in Ms. Frey's bedroom (Tr. 1069). He went into the bedroom and found her laying on the bed (Tr. 1069). In Appellant's words, he "struggled" with Ms. Frey and then left (Tr. 1069).

Appellant took Ms. Frey's car and her wallet and drove to a bar in Wentzville (Tr. 1069). He threw the wallet in a dumpster

outside the bar (Tr. 1070). He returned home around 11:30 Saturday night (Tr. 1070). When his mother asked about the scratches and abrasions on his chin, chest, arms, shoulder, and legs, he claimed to have fallen by a lake, and he told her the "Stacey" story (Tr. 1071).

Sunday afternoon, after his mother and her boyfriend went to church, Appellant returned to Ms. Frey's apartment to get rid of evidence that might incriminate him (Tr. 1071). He wiped down the apartment to remove his fingerprints and he scrubbed under Ms. Frey's fingernails with a tooth brush to remove any trace of his skin that may have been embedded there when she scratched him (Tr. 1072-73). He threw her keys out of the sliding glass door into the lake and took her briefcase (Tr. 1073). He then threw the briefcase into the dumpster, along with the clothing he wore during the murder and the cleanup (Tr. 1073).

Appellant was again advised of his *Miranda* rights, and he reduced the foregoing statement to writing, and it was read to the jury (Tr. 1075-82). In that statement, Appellant admitted that it was his intent to steal money from Ms. Frey when he entered her apartment (Tr. 1079, 1093).

The police interviewed Appellant a third time on February 7, 1990 (Tr. 1083). After waiving his *Miranda* rights, Appellant gave virtually the same account of the murder as he had the day before (Tr. 1083-84).

In addition to this evidence, the State presented testimony from Deputy Leutkenhaus that luminol testing revealed two blood stains on the carpet in Appellant's bedroom (Tr. 997-1002). Moreover, when Appellant was arrested, the police found several injuries on him, including scratches and abrasions on his right hand, under his right arm, on his upper chest, on his shoulder, at the base of his neck, on his right buttock, on his chin, and on his left knee (Tr. 1011-13, 1016-19). The police also seized his shoes which had blood on them (Tr. 1019-20, 1035).

The State also presented testimony from Lavon Marshall, Karen Stepson, Timothy Frey (Ms. Frey's brother), Gladys Frey (Ms. Frey's mother), Jody Harrison (Ms. Frey's close friend), Robert Reidleberger (Ms. Frey's former student), and Trinje Reidleberger (Robert's mother) about Ms. Frey and the impact that her death had on them and others (Tr. 1113-15, 1132, 1138-59, 1160-85, 1188-1219). Finally, the State read the testimony of Appellant's ex-wife, Kimberly Posey, who was unavailable, from

the second penalty-phase trial in 1997 (Tr. 1123). She testified that Appellant was violent toward her when she was pregnant, that he once put a gun to her head and threatened to kill her and their seven-month-old daughter, that he once raped her, that he once stabbed a tree while threatening to kill her father, and that he once cut her with a knife while having sex with her (1997 Tr. 859-62, 867, 872-874, 882, 888). She also testified that Appellant had a good relationship with his stepfather, Carroll Storey (1997 Tr. 865).

Appellant did not testify on his own behalf at the sentencing hearing. He did, however, present his mother's, aunt's, cousin's, and brother's testimony in mitigation of punishment (Tr. 923-1010). In general, these witnesses testified about Appellant's childhood, upbringing, the abuse he suffered at the hands of his stepfather, Carroll Storey, and about Appellant's good deeds.

In addition, Appellant presented the testimony of James Aiken, a prison consultant. After reviewing Appellant's prison records, Mr. Aiken concluded that Appellant could be "safely housed and incarcerated in a correctional facility such as Potosi [Correctional Center] without presenting a risk of harm

to inmates, staff or the community” (Tr. 1234). Appellant also presented the testimony of Jody Robart, the Potosi Correctional Center librarian, who testified that Appellant worked for her between January 1993 and January 1994, that Appellant was not violent, and that Appellant got along with other inmates during that period (Tr. 1292, 1294, 1296-97).

Finally, Appellant presented Dr. Gerald Vandenberg, a clinical forensic psychologist (Tr. 1310). Dr. Vandenberg, who first evaluated Appellant in April 1993, was of the opinion that Appellant suffered from a borderline personality disorder, alcohol dependency, and post-traumatic stress disorder then and at the time of the murder (Tr. 1323-27, 1328, 1334). Upon reevaluating Appellant in 1999, Dr. Vandenberg concluded that Appellant is no longer suffering from post-traumatic stress disorder, that his personality disorder has emolliated over time, that Appellant has adapted well to prison, and that he did not pose a threat to corrections employees or other inmates (Tr. 1333-34, 1336, 1343). In addition, Dr. Vandenberg testified that at the time of the murder, Appellant had the ability to appreciate the wrongfulness of his conduct but lacked the ability to conform his conduct to the requirements of the law

and that he was under the influence of extreme mental or emotional disturbance (Tr. 1333).

In rebuttal, the State called Dr. Max Givon, a forensic psychologist (Tr. 1605). Dr. Givon first evaluated Appellant on September 24, 1990, less than eight months after the murder, pursuant to a court ordered mental evaluation requested by the defense (Tr. 1608, 1610). It was Dr. Givon's opinion that Appellant did not suffer from a mental disease or defect, but that he had an antisocial personality disorder and suffered from alcohol and marijuana abuse (Tr. 1613, 1618, 1620). Dr. Givon also concluded that Appellant was not under the influence of extreme mental or emotional disturbance at the time of the murder and had the capacity to conform his conduct to the requirements of the law (Tr. 1626, 1636). Upon evaluating Appellant again one week before the trial, Dr. Givon concluded that Appellant was presently suffering from an unspecified personality disorder, that the antisocial aspects of his personality had diminished (Tr. 1637).

On September 16, 2003, a hearing was held before Judge Nancy Schneider on Appellant's motion to vacate (L.F. 779). On March 18, 2004, Judge Schneider issued her Findings of Fact and

Conclusions of Law denying the Appellant's motion to vacate (L.F. 778-815).

This appeal followed.

POINTS RELIED ON

I.

THE MOTION COURT DID NOT ERR IN CONCLUDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN REPRESENTING APPELLANT AT TRIAL BECAUSE THE DECISIONS MADE BY COUNSEL WERE REASONABLE AND SOUND TRIAL STRATEGY BY COMPETENT, SKILLED, AND EXPERIENCED COUNSEL WHO KNEW:

1) APPELLANT'S EX-WIFE'S LOVE LETTERS TO APPELLANT WERE INTRODUCED IN HIS 1991 TRIAL AND DID NOT MITIGATE HIS DEATH SENTENCE BY THAT JURY,

2) JERRY BROGDON'S TESTIMONY WAS INTRODUCED IN HIS 1997 TRIAL AND DID NOT MITIGATE HIS DEATH SENTENCE BY THAT JURY,  
AND

3) APPELLANT'S EX-WIFE'S CLAIM TO BE A "CHRISTIAN" WAS AS LIKELY TO "BACKFIRE" AND CAUSE THE JURY TO DISCOUNT THE SINCERITY OF THAT CLAIM, AND, THEREFORE, HER CREDIBILITY.

*Skillicorn v. State*, 22 S.W.3d 678 (Mo. banc 2000), cert. denied,

531 U.S. 1039 (2000);

*State v. Middleton*, 995 S.W.2d 443 (Mo. banc 1999);

*State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994).

II.

THE MOTION COURT DID NOT ERR IN RULING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CALL JUDGE CUNDIFF AT THE HEARING CONCERNING POTENTIAL JURY MISCONDUCT BECAUSE THE HEARING WAS CONDUCTED ADEQUATELY AND CONCLUSIVELY DEMONSTRATED THAT NONE OF THE TWELVE JURORS KNEW OF APPELLANT'S PRIOR VERDICTS IN THAT EACH OF THE JURORS WAS QUESTIONED, UNDER OATH, AND TESTIFIED THAT THEY WERE NOT AWARE OF ANY PRIOR DEATH VERDICTS THAT APPELLANT HAD RECEIVED.

*State v. Brown*, 939 S.W.2d 882 (Mo. banc 1997);

*State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994);

*State v. Martinelli*, 972 S.W.2d 424 (Mo.App., E.D. 1998).

III.

THE MOTION COURT DID NOT ERR IN REFUSING TO ALLOW THE APPELLANT'S MOTION COUNSEL TO QUESTION JURORS A SECOND TIME REGARDING ANY PRIOR KNOWLEDGE OF APPELLANT'S PREVIOUS TRIALS BECAUSE APPELLANT DID NOT ESTABLISH ANY LEGITIMATE CAUSE TO INCONVENIENCE THE CITIZENS WHO NOBLY FULFILLED THEIR SERVICE AS JURORS BY SUBJECTING THEM TO A SECOND HEARING TO ASK THEM QUESTIONS THAT THEY HAD PREVIOUSLY ANSWERED UNDER OATH.

*Keltner v. K-Mart*, 42 S.W.3d 716 (Mo.App., E.D. 2001);

*State v. Fleer*, 851 S.W.2d 582 (Mo.App., E.D. 1993).

IV.

THE MOTION COURT DID NOT ERR IN RULING THAT TRIAL COUNSEL WAS EFFECTIVE IN REPRESENTING APPELLANT AT TRIAL BECAUSE THE ADMISSION OF THE VICTIM IMPACT EVIDENCE AT TRIAL WAS PROPER AND THE USE OF VICTIM IMPACT EVIDENCE WHEN APPELLANT'S CRIME OCCURRED PRIOR TO *PAYNE v. TENNESSEE*, IS NOT AN *EX POST FACTO* VIOLATION SINCE IT IS AN EVIDENTIARY RULE AND NOT A SUBSTANTIVE RULE OF LAW AND THE VICTIM IMPACT EVIDENCE ADMITTED IN THIS CASE WAS NOT IMPROPER.

*State v. Storey*, 40 S.W.3d 898 (Mo. banc 2001);

*State ex rel. Cavallaro v. Goose*, 908 S.W.2d 133 (Mo. banc 1995);

*State v. Potts*, 852 S.W.2d 405 (Mo.App., E.D. 1993).

v.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL BECAUSE ALL OF THE WITNESSES AND TESTIMONY THAT APPELLANT ASSERTS HIS TRIAL COUNSEL FAILED TO PRESENT WERE CUMULATIVE TO OTHER EVIDENCE INTRODUCED BY TRIAL COUNSEL AT PREVIOUS TRIALS-- AND THE RESULTS OF THOSE PREVIOUS TRIALS HAVE CONCLUSIVELY DEMONSTRATED THAT THIS EVIDENCE WOULD NOT HAVE CHANGED THE OUTCOME OF THIS TRIAL.

*State v. Harris*, 870 S.W.2d 798 (Mo. banc 1994);

*Leisure v. State*, 828 S.W.2d 872 (Mo. banc 1992), *cert. denied*,

506 U.S. 923 (1992);

*Skillicorn v. State*, 22 S.W.3d 678 (Mo. banc 2000), *cert. denied*,

531 U.S. 1039 (2000).

VI.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT THE STATE DID NOT FAIL TO DISCLOSE EXCULPATORY EVIDENCE OR IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CONDUCT INDEPENDENT TESTING OF PUBIC HAIRS FOUND AT THE SCENE BECAUSE THE RECORD DEMONSTRATED THAT THE STATE DID DISCLOSE ALL RECORDS AND REPORTS AND THE EVIDENCE SHOWED THAT THE SUBSEQUENT TESTING, WHICH APPELLANT CLAIMS HIS ATTORNEY "FAILED" TO CONDUCT, ACTUALLY WAS INCULPATORY AND PROVIDED ADDITIONAL SCIENTIFIC EVIDENCE OF APPELLANT'S GUILT.

VII.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CALL DIFFERENT EXPERT WITNESSES AT TRIAL BECAUSE TRIAL COUNSEL CANNOT BE DEEMED INEFFECTIVE FOR FAILING TO "SHOP" FOR AN EXPERT WITNESS AND EACH OF THE EXPERTS APPELLANT CLAIMS HIS COUNSEL SHOULD HAVE CALLED HAD SEVERE LIMITATIONS ON THEIR CREDIBILITY AND EFFECTIVENESS AND THEIR TESTIMONY WOULD HAVE BEEN CUMULATIVE TO THE TESTIMONY DR. VANDENBERG PROVIDED ON APPELLANT'S BEHALF.

*Middleton v. State*, 103 S.W.3d 726 (Mo. banc 2003);

*State v. Mease*, 842 S.W.2d 98 (Mo. banc 1992);

*Skillicorn v. State*, 22 S.W.3d 678 (Mo. banc 2000), *cert. denied*,

531 U.S. 1039 (2000).

VIII.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIM THAT HIS CONVICTION AND SENTENCE WAS "PART OF A LARGER PATTERN OF PROSECUTORIAL MISCONDUCT" BECAUSE THE APPELLANT'S ALLEGATIONS WERE SHOWN TO LACK ANY GOOD FAITH BASIS AND THERE IS NO EVIDENCE WHATSOEVER TO SUGGEST THAT APPELLANT WAS PROSECUTED SIMPLY TO ADVANCE THE POLITICAL CAREER OF CONGRESSMAN HULSHOF.

*State v. Tokar*, 918 S.W.2d 753 (Mo. banc 1996);

*State v. Silvey*, 894 S.W.2d 662 (Mo. banc 1995);

*State v. Twenter*, 818 S.W.2d 628 (Mo. banc 1991).

IX.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT'S APPELLATE COUNSEL WAS NOT INEFFECTIVE IN HER REPRESENTATION IN THAT EACH OF THE ISSUES ASSERTED BY APPELLANT WERE MATTERS THAT APPELLATE COUNSEL THOUGHTFULLY CONSIDERED AND MADE A CONSCIOUS, STRATEGIC DECISION THAT NO PURPOSE WOULD BE SERVED IN RAISING THEM AND THEY ARE, IN FACT, NOT MATTERS THAT ENTITLE APPELLANT TO REVERSAL OF HIS SENTENCE.

*Mallett v. State*, 769 S.W.2d 77 (Mo. banc 1989);

*Moss v. State*, 10 S.W.3d 508 (Mo. banc 2000);

*State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003).

X.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO CERTAIN EVIDENCE AND VOIR DIRE BY THE STATE BECAUSE THERE WAS NOTHING OBJECTIONABLE OR PREJUDICIAL THAT RESULTED IN AN UNFAIR TRIAL.

*Skillicorn v. State*, 22 S.W.3d 678 (Mo. banc 2000), cert. denied,

531 U.S. 1039 (2000);

*State v. Gilmore*, 681 S.W.2d 934 (Mo. banc 1984).

XI.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THIS COURT DETERMINED ON DIRECT APPEAL THAT THE ARGUMENT OF THE PROSECUTOR WAS NOT PREJUDICIAL AND, THUS, NO ERROR EXISTED.

*State v. Storey*, 40 S.W.3d 898 (Mo. banc 2001);

*Middleton v. State*, 103 S.W.3d 726 (Mo. banc 2003);

*Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002).

XII.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING THE APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE CLAIMS APPELLANT RAISED WERE WITHOUT MERIT IN THAT THE VOIR DIRE BY THE PROSECUTOR WAS NOT IMPROPER AND THIS COURT HAD ALREADY ADDRESSED THE ISSUE OF APPELLANT'S VOLUNTARY INTOXICATION INSTRUCTION.

*Skillicorn v. State*, 22 S.W.3d 678 (Mo. banc 2000), cert. denied,

531 U.S. 1039 (2000);

*State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995);

*Deck v. State*, 68 S.W.3d 418 (Mo. banc 2003).

XIII.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT HAD THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL WAS NOT INEFFECTIVE IN FAILING TO PRESENT THE FLAWED STUDY OF DR. WIENER TO PROVE THAT THE MAI INSTRUCTIONS ARE FLAWED AND DIFFICULT TO COMPREHEND IN THAT THIS STUDY HAS BEEN CONSISTENTLY FOUND TO BE UNRELIABLE BY THIS COURT AND THE STUDY WAS AN OVERT ATTEMPT AT BIASED RESEARCH WHOSE STUDY FAILED TO PROPERLY REPLICATE THE CIRCUMSTANCES ACTUAL JURORS EXPERIENCE IN A CRIMINAL TRIAL.

*State v. Kinder*, 942 S.W.2d 313 (Mo. banc 1996), cert. denied,

522 U.S. 854 (1997);

*Leisure v. State*, 828 S.W.2d 872 (Mo. banc 1992), cert. denied,

506 U.S. 923 (1992);

*Lyons v. State*, 39 S.W.3d 32 (Mo. banc 2001).

## ARGUMENTS

### I.

THE MOTION COURT DID NOT ERR IN CONCLUDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN REPRESENTING APPELLANT AT TRIAL BECAUSE THE DECISIONS MADE BY COUNSEL WERE REASONABLE AND SOUND TRIAL STRATEGY BY COMPETENT, SKILLED, AND EXPERIENCED COUNSEL WHO KNEW:

- 1) APPELLANT'S EX-WIFE'S LOVE LETTERS TO APPELLANT WERE INTRODUCED IN HIS 1991 TRIAL AND DID NOT MITIGATE HIS DEATH SENTENCE BY THAT JURY,
- 2) JERRY BROGDON'S TESTIMONY WAS INTRODUCED IN HIS 1997 TRIAL AND DID NOT MITIGATE HIS DEATH SENTENCE BY THAT JURY,  
AND
- 3) APPELLANT'S EX-WIFE'S CLAIM TO BE A "CHRISTIAN" WAS AS LIKELY TO "BACKFIRE" AND CAUSE THE JURY TO DISCOUNT THE SINCERITY OF THAT CLAIM, AND, THEREFORE, HER CREDIBILITY.

The Appellant challenges his counsel's failure to introduce certain evidence at trial, and to object to one specific comment volunteered by Appellant's ex-wife. In each of these instances, the protracted nature of this case has firmly established, beyond any reasonable doubt, that these claims were not

prejudicial because they would not have altered the outcome of the trial. Additionally, as the motion court properly found<sup>1</sup> the

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<sup>1</sup>The Appellant criticizes the motion court for “adopting” much of the proposed findings of the State. Contrary to his suggestion, as long as the motion court’s findings are supported by the evidence, and are based on independent reflection, this “common practice” raises no constitutional problems. *Skillicorn v. State*, 22 S.W.3d 678, 690 (Mo. banc 2000), *cert. denied*, 531 U.S. 1039 (2000).

Given the too common practice of filing voluminous motions to vacate with

decisions made in this case by Appellant's trial attorneys were reasonable decisions based on trial strategy.

### **Standard of Review**

Review is limited to determining whether the motion court clearly erred in making its findings of fact and conclusions of law. *Skillicorn v. State*, 22 S.W.3d 678, 681 (Mo. banc 2000), *cert. denied*, 531 U.S. 1039 (2000). To establish that his trial counsel was ineffective, the Appellant must prove that his

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hundreds of individual claims, some of which can objectively be called trivial, and given the fact that the motion court must address each and every issue raised, *Evans v. State*, 105 S.W.3d 574, 575 (Mo.App., S.D. 2003), it is not unreasonable to expect a court to rely on the parties to supply proposed findings and to rely on them in issuing a final order. The assertion that the motion court's findings should be "given no deference" is untrue and contrary to Missouri law.

attorneys' performance "did not conform to the degree of skill, care, and diligence of a reasonably competent attorney." *Id.*, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, Appellant must prove that he was actually prejudiced by counsels' poor performance. *Id.*

"To demonstrate prejudice, [Appellant] must show that, but for counsel's poor performance, there is a reasonable probability that the outcome of the court proceeding would be different." *Id.* There is a presumption that counsel acted professionally and that any decisions were part of a reasonable trial strategy. *Id.*

### **Ex-wife's Love Letters**

The Appellant claims that his trial counsel was ineffective in failing to introduce a birthday card and two letters that Appellant's ex-wife, Kim Harnage,<sup>2</sup> sent to the Appellant while awaiting trial (Trial I Tr. 956-63; Exhibits 218, 219, 220). These exhibits were presented by defense counsel at the

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<sup>2</sup>During the course of this protracted litigation, this witness, through marriage, has gone by various last names. Her maiden name is Harnage, and for purposes of simplicity and clarity, that is how the State will identify her in this brief.

Appellant's first trial (Trial I Tr. 956-63), but were excluded at Appellant's second trial based on an objection by the State to their explicit content (Trial II Tr. 874-76, 880). Both previous trials resulted in the jury recommending the penalty of death. *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995); *State v. Storey*, 986 S.W.2d 462 (Mo. banc 1999).

Because Kim Harnage was unavailable for the third trial, the State introduced her 1997 testimony from the second trial (Trial III Tr. 368-70, 376). Appellant's trial counsel did not attempt to offer the exhibits into evidence (PCR II Tr. 378).

Strangely enough, the Appellant asserts that "it was important for the jury to hear the explicit sexual desire content of Kim's writings" (Appellant's Brief, p. 48), since that was the reason the writings were excluded in the second trial (Trial II Tr. 880). Beyond that, Appellant is unable to explain the relevance of hearsay statements that were eight years old at the time of the 1999 trial.

More important, Appellant cannot establish that he was prejudiced by the failure to introduce this evidence. The evidence was introduced in Appellant's first trial in 1991 as part of his cross-examination of Kim Harnage; that jury,

nevertheless, imposed the death penalty. Thus, there is an objective basis for the motion court's conclusion that the result would not be different (L.F. 810). We know, with certainty, that the evidence would not be persuasive. Without a showing of prejudice, this claim is without merit. *State v. Middleton*, 995 S.W.2d 443, 455 (Mo. banc 1999); *State v. Goodwin*, 43 S.W.3d 805, 821 (Mo. banc 2001).

Appellant provides no sound or persuasive argument that the result in Trial III would be different than Trial I. *State v. Chambers*, 891 S.W.2d 93, 113 (Mo. banc 1994).

**Failing to Object to Kim Harnage's Claim to Being a Christian**

Appellant also challenges the strategic decision by trial counsel to not object to Kim Harnage's statement that she did not want to repeat what she had earlier told her parents about Appellant's abuse because she had become a Christian (Trial II Tr. 887).

Once again, Appellant fails to establish that an objection would have been sustained or that Kim Harnage's statement was inadmissible. In fact, trial counsel in the second trial in

1997 did object, but the objection was overruled (Trial II Tr. 887).

The fact that a witness makes a religious reference does not automatically exclude that testimony. Unlike the cases cited by Appellant, *State v. Debler*, 856 S.W.2d 641, 656 (Mo. banc 1993); *State v. Whitfield*, 837 S.W.2d 503, 513 (Mo. banc 1992), the Bible was not being used as a basis for imposing death. Instead the witness was explaining why she did not want to repeat a statement she had made earlier (“I cannot say what I told my parents. I’m now a Christian, I cannot say words like that.”) (Trial II Tr. 880).

The jury was then free to assess Kim Harnage’s testimony and give it whatever weight they deemed proper. Trial counsel did not consider it credible and decided that it would actually diminish her believability (PCR II Tr. 380). “Trial strategy is not a ground for ineffective assistance of counsel.” *State v. Chambers*, 891 S.W.2d 93, 109 (Mo. banc 1994).

#### **Andy Posey**

Appellant next claims that trial counsel should have presented the testimony of Kim Harnage’s later spouse, Andy Posey, that Kim Harnage made “false” claims that Andy Posey was

violent while they were married (Exhibit 269). Trial counsel correctly believed this evidence to be collateral (Exhibit 350, pp. 9-10).

Appellant's theory is that extrinsic evidence of false accusations is now admissible under *State v. Long*, 140 S.W.3d 27, 30-32 (Mo. banc 2004). Of course, *Long* was not published until five years after the 1999 trial, and it is difficult to see how trial counsel could have used that case as authority for admission of this evidence.

Additionally, *Long* allows for extrinsic evidence of false accusations only when "a witness' credibility is a key factor in determining guilt or acquittal." *Id.* at 30. And then, the evidence is admissible only when a defendant can "establish that the prosecuting witness previously made knowingly false allegations . . . by a preponderance of the evidence . . . ." *Id.* at 32.

Without minimizing the importance of the guilt phase of a capital murder trial, Kim Harnage's testimony was not the crucial witness in this cause and the general accusations of Andy Posey about Kim Harnage would not, and should not, be admissible under any circumstances.

Appellant is asserting that the trial court should have digressed into litigating the marriage of Kim Harnage and Andy Posey. Andy Posey asserted that Kim Harnage was “physically aggressive on one occasion” (Exhibit 269, ¶ 3)--hardly compelling impeachment. And would the State be permitted to rebut Posey’s claim that “I know that Kim has made claims to people that I was violent toward Kim during my marriage with her”? What type of violence are we speaking of, and what people heard these claims? These vague accusations by an ex-spouse directed towards Appellant’s ex-spouse are not the type of “mini-trials on collateral issues,” *Long*, 140 S.W.3d at 30, that capital defense attorneys should be mandated to digress into.

**Jerry Brogdon**

Appellant’s next assertion is that trial counsel was ineffective in failing to introduce the telephone deposition of Jerry Brogdon. The telephone deposition became necessary because Mr. Brogdon’s father became critically ill (2003 PCR Tr. 199-200).

The State successfully objected to portions of the deposition which were sustained by the trial court (2003 PCR Tr.

201). Appellant's attorneys, Kenyon and Beimdiek, had a professional disagreement at that point whether the deposition should be introduced in the absence of the portions excluded by the trial court (2003 PCR Tr. 202). In fact, the deposition was then reviewed by the head of the public defender's capital litigation division, who opined that the deposition should not be introduced (2003 PCR Tr. 202).

Thus, the decision to not use Mr. Brogdon's deposition at the 1999 trial was clearly a matter of trial strategy, and the decision was not made until after considerable discussion and consultation. What more could one expect from trial counsel?

Strategic choices by counsel after "investigation are virtually unchallengeable." *Chambers*, 891 S.W.2d at 112.

## II.

THE MOTION COURT DID NOT ERR IN RULING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CALL JUDGE CUNDIFF AT THE HEARING CONCERNING POTENTIAL JURY MISCONDUCT BECAUSE THE HEARING WAS CONDUCTED ADEQUATELY AND CONCLUSIVELY DEMONSTRATED THAT NONE OF THE TWELVE JURORS KNEW OF APPELLANT'S PRIOR VERDICTS IN THAT EACH OF THE JURORS WAS QUESTIONED, UNDER OATH, AND TESTIFIED THAT THEY WERE NOT AWARE OF ANY PRIOR DEATH VERDICTS THAT APPELLANT HAD RECEIVED.

Appellant challenges the decisions of the 1999 trial judge and his counsel with regard to a statement Judge Cundiff heard during a discussion he had with the jurors following their verdict. Though it was affirmatively and conclusively established that none of the jurors were aware that Appellant had previously been sentenced to death, Appellant argues that he is entitled to a contrary presumption, one that Appellant seems to believe is irrebuttable.

### Standard of Proof

The burden is on the defendant to prove jury misconduct. *State v. Brown*, 939 S.W.2d 882, 884 (Mo. banc 1997); *State v. Martinelli*, 972 S.W.2d 424, 434 (Mo.App., E.D. 1998). "Juror

misconduct during deliberations creates a rebuttable presumption of prejudice, which can be overcome with evidence.” *State v. Chambers*, 891 S.W.2d 93, 101 (Mo. banc 1994). “The burden of proof does not shift until misconduct is established, however.” *Brown*, 939 S.W.2d at 884. The decision of the motion court is reviewable only for abuse of discretion. *Chambers*, 891 S.W.2d at 101.

### **No Misconduct was Established**

Judge Cundiff testified that following the verdict, he went back to the jury room to speak to the jurors (Trial III Tr. 1712-14). The room was emotional and, at one point, Judge Cundiff told the jurors that this was the third time Appellant had received a death sentence (Trial III Tr. 1713). At the time, everyone in the jury room was talking at the same time (Exhibit 298, pp. 12-13). Judge Cundiff did hear a male voice say, “I knew that.” (Exhibit 298, pp. 12-13). Judge Cundiff testified “that was in with a number of people saying things and talking to each other and talking to me at the same time.” (Exhibit 298, p. 13).

As a result, the motion court concluded that Judge Cundiff “had no way of knowing or assuming the comment the juror made was

in response to him telling the jurors about Appellant's past trials." (L.F. 814). Judge Cundiff indicated that a bailiff was with him who did not recall hearing the statement (Trial III Tr. 1718).

Judge Cundiff did not inform the parties of this immediately, but considered what he should do (Exhibit 298, p. 20). Judge Cundiff ordered the parties to appear on September 29, 1999 (Exhibit B attached to Exhibit 298). At the hearing, Judge Cundiff informed the attorneys about what had transpired (Trial III Tr. 1712-14). Eventually, Judge Nancy Schneider conducted a hearing in which each of the jurors was called, and each denied any knowledge of previous death sentences (November 22, 1999 Hearing Tr. 16-35). Judge Schneider found no misconduct (November 22, 1999 Hearing Tr. 35-36).

### **Allegations of Judicial Misconduct**

Appellant claims that Judge Cundiff is, himself, guilty of prejudicial misconduct because he did not notify counsel immediately. Appellant makes the astounding and unjustified accusation that, as a result, the jurors were less honest and truthful (Appellant's Brief, pp. 60-61). Appellant's brief is lacking in any authority that we presume jurors will be

dishonest. The motion court's finding that there was no misconduct was not an abuse of discretion.

### **Ineffective Assistance of Counsel**

Likewise, trial counsel was very aggressive in addressing this issue. Upon being made aware of the comment, they immediately filed a motion for a hearing (Exhibit 333). Counsel argued that a hearing was necessary, and that it should happen quickly (Trial III Tr. 1731-32). Judge Cundiff denied the request for a hearing (Exhibit 333; Trial III Tr. 1714-15; Exhibit C of Exhibit 298). Trial counsel then sought a writ of mandamus (Exhibit D of Exhibit 298). The persistence of trial counsel paid off and, on November 17, 1999, Judge Cundiff reversed his previous decision and ordered a hearing (Exhibit F of Exhibit 298). At the hearing, Appellant's trial attorneys advocated a much broader examination of the jurors than permitted by the court (November 22, 1999 Hearing Tr. 9, 12-13).

The "ineffectiveness" Appellant now asserts is that trial counsel did not insist on calling Judge Cundiff and Bailiff Paulson as witnesses. Why would counsel do such a thing when Judge Cundiff already had disclosed and detailed his knowledge of the incident, and Judge Cundiff further indicated that he

spoke to Paulson, who did not hear anything (Trial III Tr. 1712-18).

As a judge, it is reasonable to expect, and assume, that Judge Cundiff was truthful and forthright about what occurred without the need for him to take a formal oath and be subject to cross-examination. Indeed, it was Judge Cundiff who voluntarily brought this matter to the attention of the parties. Furthermore, upon deposition of Judge Cundiff as part of his second PCR, Appellant learned nothing of any significance that Judge Cundiff had not already disclosed. In addition, Bailiff Paulson confirmed that there were several people talking at the time the statement was made (Exhibit 349, pp. 13-14).

Trial counsel was not ineffective in failing to perform a meaningless act. The end result of the hearing was that each and every juror testified that he or she had no prior knowledge that Appellant had previously received a sentence of death. Appellant's jury is not guilty of any misconduct.

### III.

THE MOTION COURT DID NOT ERR IN REFUSING TO ALLOW THE APPELLANT'S MOTION COUNSEL TO QUESTION JURORS A SECOND TIME REGARDING ANY PRIOR KNOWLEDGE OF APPELLANT'S PREVIOUS TRIALS BECAUSE APPELLANT DID NOT ESTABLISH ANY LEGITIMATE CAUSE TO INCONVENIENCE THE CITIZENS WHO NOBLY FULFILLED THEIR SERVICE AS JURORS BY SUBJECTING THEM TO A SECOND HEARING TO ASK THEM QUESTIONS THAT THEY HAD PREVIOUSLY ANSWERED UNDER OATH.

Jury service, particularly in a case with consequences as serious as a capital murder trial, can be challenging, demanding, and emotional. Combined with the inconvenience of sequestration, jury service can be a difficult experience. Sound public policy, therefore, dictates that jurors not be subjected to unnecessary post-trial, second-guessing challenges to their integrity, or further and future disruptions of their lives to discuss a previous decision. “[I]t ill serves the judicial system to subject jurors to the embarrassment and inconvenience of a post-trial hearing and thereby add to the reasons so many citizens are reluctant to serve as jurors.” *Keltner v. K-Mart*, 42 S.W.3d 716, 722 (Mo.App., E.D. 2001).

The longstanding rule of law in Missouri is “that a juror’s testimony or affidavit may not be used to impeach a verdict as to misconduct inside or outside the jury room whether before or after the jury is discharged.” *State v. Fleer*, 851 S.W.2d 582, 595 (Mo.App., E.D. 1993). Given the seriousness of the consequences of this jury’s verdict, the State had no strong objection to the trial court’s decision to ultimately allow each juror to be questioned.

But, in the absence of any arguable basis to suggest the jurors were anything other than completely truthful during the hearing in 1999, there was simply no justification for Appellant’s attempts to further inconvenience these jurors based only on a “hope” that he could impeach their verdict.

Indeed, it is ironic that, in Point II, Appellant complains of a delay of two months between the verdict (September 17, 1999) and the hearing (November 22, 1999) claiming this made it “less likely they were to get honest, truthful, and complete information” (Appellant’s Brief, pp. 60-61), yet, in Point III, he sees no problem in questioning jurors four years later.

The decision of the motion court was both prudent and proper.

#### IV.

THE MOTION COURT DID NOT ERR IN RULING THAT TRIAL COUNSEL WAS EFFECTIVE IN REPRESENTING APPELLANT AT TRIAL BECAUSE THE ADMISSION OF THE VICTIM IMPACT EVIDENCE AT TRIAL WAS PROPER AND THE USE OF VICTIM IMPACT EVIDENCE WHEN APPELLANT'S CRIME OCCURRED PRIOR TO *PAYNE v. TENNESSEE*, IS NOT AN *EX POST FACTO* VIOLATION SINCE IT IS AN EVIDENTIARY RULE AND NOT A SUBSTANTIVE RULE OF LAW AND THE VICTIM IMPACT EVIDENCE ADMITTED IN THIS CASE WAS NOT IMPROPER.

Though Appellant was unsuccessful at challenging the victim impact evidence presented at his third trial, *State v. Storey*, 40 S.W.3d 898, 908 (Mo. banc 2001), Appellant, nevertheless, again challenges this same evidence under the guise of "ineffective assistance of counsel."

#### Standard of Review

To establish ineffective assistance of counsel, the Appellant must prove that his attorneys' performance at trial "did not conform to the degree of skill, care, and diligence of a reasonably competent attorney." *Skillicorn v. State*, 22 S.W.3d 678, 681 (Mo. banc 2000), *cert. denied*, 531 U.S. 1039 (2000).

Appellant must also show he was actually prejudiced by counsel's

poor performance. *Id.* There is a presumption that counsel was competent, *id.*, and review is limited to a determination whether the motion court clearly erred in its findings. *Id.*

### **Ex Post Facto**

Appellant first argues that, because the decision of *Payne v. Tennessee*, 501 U.S. 808 (1991), permitting the use of “victim impact” evidence was not issued until after Appellant committed his crime in 1990, the use of victim impact evidence in his subsequent trial(s) is a violation of the constitutional prohibition against *ex post facto* laws. Appellant cites an Oregon appellate case, *State v. Metz*, 887 P.2d 795 (Or.App. 1994), as his sole authority for this proposition.

The reasons for the Oregon appellate court’s decision in *Metz* is much more complicated than simply suggesting that it found an *ex post facto* violation. Nevertheless, it is sufficient to point out that the decision was based solely on the court’s interpretation of the Oregon Constitution. *Id.* at 446.

In Missouri, interpretation of the meaning of *ex post facto* violations have been consistent with the decisions of the United States Supreme Court. “The *ex post facto* clause is aimed at laws

that are retroactive and that either alter the definition of crimes or increase the punishment for criminal acts already committed.” *State ex rel. Cavallaro v. Goose*, 908 S.W.2d 133, 136 (Mo. banc 1995). A “mere ‘disadvantage’ to an offender is not the standard for judging the *ex post facto* effect of a law.” *Id.*

Though retroactive, a “change in the law [that] is merely procedural” is not an *ex post facto* violation. *State v. Potts*, 852 S.W.2d 405, 407 (Mo.App., E.D. 1993); *Miller v. Florida*, 482 U.S. 423, 433, 107 S.Ct. 2446, 2452, 96 L.Ed.2d 351 (1987).

“Hence, no *ex post facto* violation occurs if the change in the law is merely procedural and does ‘not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.’” 482 U.S. at 433, 107 S.Ct. at 2452-53.

In *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), the defendant’s sentence of death was affirmed even though the statutory death penalty scheme that existed at the time of his crime was unconstitutional under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). 432 U.S. at 288, 97 S.Ct. at 2296. The Court noted

that “the inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed.” 432 U.S. at 293, 97 S.Ct. at 2298.

As an example, the Supreme Court cited *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), where a convicted felon testified against Hopt at trial, even though “as of the date of the alleged homicide a convicted felon could not have been called as a witness.” 432 U.S. at 293, 97 S.Ct. at 2298.

“Even though this change in the law obviously had a detrimental impact upon the defendant, the Court found that the law was not *ex post facto* because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment nor changed the proof necessary to convict.” *Id.*

That same Court in *Dobbert* also noted its earlier decision in *Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed.2d 204 (1898), where the conviction was initially

reversed by the Missouri Supreme Court because of the inadmissibility of certain evidence. Prior to the second trial, the

law was changed to make the evidence admissible and defendant was again convicted. Nonetheless, the Court held that this change was procedural and not violative of the Ex Post Facto Clause.

432 U.S. at 293, 97 S.Ct. at 2298.

Though *Payne* and Missouri's statutes, enacted subsequent to *Payne*, allow the admission of evidence that was not admissible at the time Appellant murdered Ms. Frey, the changes do not violate the *ex post facto* clause. This change did not alter "substantive personal rights" of the Appellant. *Miller v. Florida*, 482 U.S. at 430, 107 S.Ct. at 2451. The State's burden of proof did not change and the evidence that constitutes both the crime of murder in the first degree and eligibility for the death sentence did not change whatsoever. It "simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Dobbert*, 432 U.S. at 293-94, 97 S.Ct. at 2298.

A number of jurisdictions have come to this conclusion. *Washington v. Murray*, 952 F.2d 1472, 1480 (4th Cir. 1991);

*Nooner v. Arkansas*, 907 S.W.2d 677, 689 (Ark. 1995); *Mitchell v. State*, 884 P.2d 1186, 1204 (Okl.Crim.App. 1994); *Windom v. State*, 656 So.2d 432, 439 (Fla. 1995); *Livingston v. State*, 444 S.E.2d 748, 752 (Ga. 1994); *Davis v. State*, 598 N.E.2d 1041, 1051 (Ind. 1992); *State v. Muhammad*, 678 A.2d 164, 181 (N.J. 1996); *State v. Clark*, 990 P.2d 793, 810 (N.M. 1999).

### **Victim Impact Evidence Affirmed on Direct Appeal**

On direct appeal, the Appellant challenged much of the victim impact evidence, without success. *State v. Storey*, 40 S.W.3d 898, 908 (Mo. banc 2001). Under the guise of “ineffective assistance of counsel,” the Appellant now challenges essentially every other aspect of the victim impact evidence. The mode of attack does not avoid the propriety of this evidence.

“Victim impact evidence is admissible under the United States and Missouri Constitutions.” *Id.* at 909. “[T]he State is also allowed to present evidence showing each victim’s ‘uniqueness as an individual human being.’” Only if the introduction of victim impact evidence “renders the trial fundamentally unfair” is the admission of such evidence unconstitutional. *Id.*

a. Ms. Frey's Mother

Appellant argues that his attorney should have objected when the victim's mother testified that the only way she can see the victim now is to visit the cemetery (Trial III Tr. 1187).

The fact that Ms. Frey's mother no longer gets to see her daughter is proper evidence of the "specific harm caused by the defendant." *Payne*, 501 U.S. at 825, 111 S.Ct. at 2597. Evidence that helps "the jury to see the victim as something other than a 'faceless stranger'" is admissible. *State v. Storey*, 40 S.W.3d at 909. The State has a legitimate interest in informing the jury that the victim's "death represents a unique loss to society and in particular to [her] family." *State v. Knese*, 985 S.W.2d 759, 771 (Mo. banc 1999), quoting *Payne*, 501 U.S. at 825.

The evidence was not objectionable and for this reason the motion court was entirely correct in ruling that trial counsel was not ineffective for failing to make a baseless objection (L.F. 792).

Testimony of Witnesses Marshall and Stepson

Appellant next objects to the testimony of two witnesses who described the murder as "heinous" (Trial III Tr. 1111),

“incomprehensible” and “brutal” (Trial III Tr. 1158). Even if the Court discounts the fact that these descriptions of this crime are indisputable, these passing comments do not “so [infect] the sentencing proceeding as to render it fundamentally unfair.” *State v. Knese*, 905 S.W.2d at 772. Appellant’s argument to the jury included his recognition there “is no excuse for what Tim Storey did to Jill Frey, none.” (Trial III Tr. 1679). In this case, the descriptions of the crime offered by witnesses Marshall and Stepson were indisputably accurate and Appellant can claim no prejudice from the witnesses’ use of those terms.

### **Hearsay Testimony and Opinions**

Next, Appellant claims that his trial counsel should have objected to certain testimony as being hearsay from Ms. Frey’s mother, brother, and a student. In particular, Appellant challenges that testimony that Ms. Frey’s father’s medical problems and eventual death were complicated by his daughter’s death (Trial III Tr. 1183-84).

Appellant's argument that Mr. Frey's health problems could not be related to his daughter's death because she had been killed ten years earlier (Appellant's Brief, p. 73), intentionally ignores the fact that during those ten years the family suffered through three retrials, a post-conviction hearing, and three appeals. The stress from such circumstances seems self-evident and an objection by Appellant could have resulted in an opportunity to have Ms. Frey's family articulate their travails through the legal system over the last several years. Both witnesses made it clear that they were concluding the death of Jill Frey contributed to her father's death, and not that this was the conclusion of a medical professional. The jury was not misled that these opinions of the Freys were otherwise.

This evidence is not significantly different than the evidence Appellant challenged in his direct appeal, without success. *State v. Storey*, 40 S.W.3d at 909. On direct appeal, Appellant challenged the "plethora of exhibits" introduced at trial, but failed "to show how the specific evidence admitted in this case prejudiced him in such a way as to render the trial fundamentally unfair." *Id.*

### **“Religious Impact”**

Appellant also complains that his trial counsel should have objected to certain victim impact evidence because it made references to religion. Appellant cites *State v. Debler*, 856 S.W.2d 641 (Mo. banc 1993), as support for his claim that religious appeals should not be used to encourage the jury to impose death.

It is ironic that Appellant would challenge any references to religion by witnesses when he, in his closing, suggested that God should decide the time of his death,<sup>3</sup> and alluded to Jesus’s parable of sowing seeds.<sup>4</sup> The references to spiritual matters, such as witness Reidleberger’s testimony that she prayed for Ms. Frey’s family (Trial III Tr. 1214), are not inflammatory and did not attempt to compel the jury to impose a sentence of death based on the Bible.

### **Victim’s Picture**

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<sup>3</sup>“We have been brought here to decide if Tim will die in God’s time or in your time.” (Trial III Tr. 1676).

<sup>4</sup>Trial III Tr. 1682; Luke 8:5-15.

As he did on direct appeal, Appellant belatedly objects to the introduction of a photograph of the victim when she was three. As this Court noted on direct appeal, the photographs “help the jury to see the victim as something other than a ‘faceless stranger.’” *State v. Storey*, 40 S.W.3d at 909.

### **Entire Community as Victim**

Finally, the Appellant asserts that his trial counsel was ineffective in failing to object to the prosecutor’s rebuttal closing argument about the impact Ms. Frey’s death had on the community. Appellant actually misstates what the prosecutor stated, asserting that Ms. Frey’s death “was a loss to the entire community.” (Appellant’s Brief, p. 77).

What the prosecutor actually said was entirely proper and based on the evidence the jury heard regarding Ms. Frey’s contribution to her community.

Like throwing a rock into a pond, there are ripples that go in all directions and those ripples in this case from that murder have washed over this family and this community like a tidal wave.

(Trial III Tr. 1695).

Trial counsel was correct in concluding that objecting to this argument would not have served any purpose (L.F. 797), because this argument was not objectionable.

v.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL BECAUSE ALL OF THE WITNESSES AND TESTIMONY THAT APPELLANT ASSERTS HIS TRIAL COUNSEL FAILED TO PRESENT WERE CUMULATIVE TO OTHER EVIDENCE INTRODUCED BY TRIAL COUNSEL AT PREVIOUS TRIALS-- AND THE RESULTS OF THOSE PREVIOUS TRIALS HAVE CONCLUSIVELY DEMONSTRATED THAT THIS EVIDENCE WOULD NOT HAVE CHANGED THE OUTCOME OF THIS TRIAL.

Appellant now engages in an effort to second-guess the strategic trial decisions of his attorneys to suggest that they should have called different witnesses or adduced "additional evidence" from witnesses whose testimony has been consistently discredited by multiple juries. There is no basis to doubt the sound decision of the motion court that the additional witnesses or testimony would not have altered the outcome.

**Standard of Review**

Appellant has the burden to overcome the presumption that trial counsels' actions were matters of trial strategy. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In order to establish ineffective

assistance of counsel for failure to call certain witnesses, the Appellant must show the witness would have provided a viable defense. *State v. Harris*, 870 S.W.2d 798, 817 (Mo. banc 1994).

Trial counsel cannot be deemed “ineffective for not putting on cumulative evidence.” *Skillicorn v. State*, 22 S.W.3d 678, 683 (Mo. banc 2000), *cert. denied*, 531 U.S. 1039 (2000).

### **The Evidence was Cumulative**

In three separate trials, Appellant has attempted to mitigate his crime by presenting a variety of witnesses to testify regarding his difficult childhood, abuse allegations, drug abuse, neglect, and a number of other factors, hoping to persuade the jury that Appellant was a product of his upbringing (Trial III Tr. 1681). Ample evidence of the difficult factors affecting Appellant’s life were introduced by his attorneys, just as they had in previous trials.

Trial counsel was aware of the potential dangers of calling too many witnesses or witnesses with limited contact with Appellant (PCR Tr. 400). The selection of witnesses and the presentation of evidence are matters of trial strategy. *Leisure v. State*, 828 S.W.2d 872, 874 (Mo. banc 1992), *cert. denied*, 506 US. 923 (1992).

Appellant's claim is essentially an attempt to second-guess the decisions of trial counsel regarding which witnesses to call. Even the best criminal defense attorneys would not defend a particular client the same way. *Strickland v. Washington*, 466 U.S. at 689.

### Employment Information

Appellant claims his trial counsel should have emphasized his "positive" employment history, including records from Chaparral Boats (Exhibit 8). The motion court correctly concluded that the records would not be helpful because those records show Appellant simply quit showing up for work abruptly and show Appellant did not have "head injuries."

Whether intentional or not, Appellant misstates what these records demonstrate. They do not show that he quit for medical reasons. His medical injury was in July of 1987 (Exhibit 8, p. 19). That record showed that the injury was not a head injury, but was a "cervical spine fracture."<sup>5</sup> Additionally, it was over

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<sup>5</sup>As was amply demonstrated during all of Appellant's litigation, the claims by Appellant and his experts that Appellant suffers from head injuries is unsupported by any evidence whatsoever (L.F. 857, 860).

a year later, on December 23, 1988, when Appellant "Quit - reason unknown" (Exhibit 8, p. 1). How this evidence could have possibly been helpful to Appellant is difficult to fathom. It shows he worked, but then just quit. The records provided further support that Appellant's claimed "head injury" was not an injury to his head. Finally, the record clearly established that the neck injury that Appellant received was caused by him driving while intoxicated, a fact not likely to engender much sympathy (L.F. 871).

VI.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT THE STATE DID NOT FAIL TO DISCLOSE EXCULPATORY EVIDENCE OR IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CONDUCT INDEPENDENT TESTING OF PUBIC HAIRS FOUND AT THE SCENE BECAUSE THE RECORD DEMONSTRATED THAT THE STATE DID DISCLOSE ALL RECORDS AND REPORTS AND THE EVIDENCE SHOWED THAT THE SUBSEQUENT TESTING, WHICH APPELLANT CLAIMS HIS ATTORNEY "FAILED" TO CONDUCT, ACTUALLY WAS INCULPATORY AND PROVIDED ADDITIONAL SCIENTIFIC EVIDENCE OF APPELLANT'S GUILT.

In a very bizarre and disjointed claim, Appellant claims that his trial counsel should have impeached witnesses who did not testify, injected a factual dispute as to whether Appellant sexually assaulted the victim after counsel had successfully excluded any such evidence at trial, and failed to do subsequent scientific testing that further implicated him in the crime!

It seems that Appellant also wants to revisit the propriety of his first trial, claim there was a Brady violation in that trial, but admittedly no such violation in his 1999 trial. Respondent must confess that the argument is obtuse, confusing, and completely illogical.

### Jenny Smith

Ms. Smith is a chemist at the Highway Patrol lab, who testified during the 1991 trial, but in no other trial (Trial I Tr. 629-49). She tested some pubic hairs found at the scene and concluded there were differences between those unknown hairs and known samples from Appellant (Exhibit 300). She also found there were some similarities as well (Trial I Tr. 642, 648-49).

Ms. Smith also tested known samples from Ms. Frey's boyfriend, Daniel Cruz, and found differences as well (Exhibit 301). The evidence shows that the State did disclose the Cruz testing report to Appellant's 1991 trial attorney (Exhibit 93; Exhibit 350, pp. 38-39; Exhibit 342; Exhibit 343).

Why Appellant argues otherwise is unknown. What is even less clear is the relevance of the 1991 proceedings to his trial in 1999. Appellant's counsel excluded any argument or evidence from the State that Appellant sexually assaulted the victim (Trial III Tr. 313). Why trial counsel would have any reasonable desire to address the existence of these unknown hairs, and their source, is beyond comprehension. Particularly

when the scientific evidence was, and remains, that there are “similarities” to Appellant.

Next, Appellant claims that trial counsel should have cross-examined Ms. Smith about a memorandum she wrote to a prosecutor in 1995--even though Ms. Smith did not testify in the 1997 or 1999 trials. Appellant’s brief contains the statement that the “letter and script were not disclosed to counsel.” (Appellant’s Brief, p. 98). Of course they were not! Jenny Smith was not a witness in the 1999 trial! These documents were not disclosed during the 1991 trial because they did not exist at that time. They were not disclosed after being created in 1995 because Ms. Smith was not a witness. After being successful in excluding any suggestion by the State that Appellant sexually assaulted Ms. Frey, it is not reasonable for the Appellant’s attorneys to then inject this issue back into the trial simply for the opportunity to cross-examine a witness.

#### **F.B.I. Analysis**

Appellant tries to manufacture some indiscernible prejudice because in 1991 the F.B.I. did some analysis of the hairs--and came to the same conclusions as Ms. Smith (PCR Tr. 55; Exhibit 338).

The hairs found, and their analysis, were not an issue in the 1999 trial. It is, therefore, of no relevance whether the F.B.I.'s identical findings were disclosed in 1991. Even if they had not been, the results were the same as Ms. Smith's and Appellant can make no showing of prejudice--in 1991, and certainly not in 1999.

### **Subsequent Scientific Testing**

Finally, Appellant's post-conviction counsel provided compelling proof that it is generally unwise for trial counsel for a defendant to seek additional scientific testing. Appellant obtained leave of the motion court to have the hairs tested (L.F. 21-26, 426). A microscopic examination of the hairs by Appellant's own expert only confirmed what Ms. Smith had determined in 1991, the hairs did not match Appellant (Exhibit 345, 346).

Appellant then had the hairs tested for DNA content. The first attempt was unable to generate a DNA profile (L.F. 545, 551-52).

Undeterred, Appellant then sent the hairs to an advanced DNA lab that found a match between the hairs and Appellant, although the match is by no means conclusive (L.F. 635). Once

again, the State is unable to fathom how trial counsel could have been ineffective in failing to obtain that evidence.

To the contrary, this case shows the real danger of a defense attorney seeking scientific testing. Trial counsel excluded the State from arguing Appellant sexually assaulted the victim, an argument the State was permitted to make in the first trial. That effect would have been completely negated by this scientific evidence Appellant insisted on obtaining.<sup>6</sup>

The State recognizes that this Court has previously held that trial counsel can be ineffective in failing to seek additional scientific testing. When the results are helpful, such testing can often seem wise with the benefit of hindsight.

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<sup>6</sup>Likewise, Appellant had the palm print on the victim's dresses analyzed as part of his post-conviction discovery. That analysis simply confirmed that Appellant was in the victim's bedroom and was guilty of her murder (L.F. 872, ¶ 114).

But this case amply demonstrates the real and serious dangers an attorney must consider in seeking additional scientific testing on behalf of a criminal defendant.

VII.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CALL DIFFERENT EXPERT WITNESSES AT TRIAL BECAUSE TRIAL COUNSEL CANNOT BE DEEMED INEFFECTIVE FOR FAILING TO "SHOP" FOR AN EXPERT WITNESS AND EACH OF THE EXPERTS APPELLANT CLAIMS HIS COUNSEL SHOULD HAVE CALLED HAD SEVERE LIMITATIONS ON THEIR CREDIBILITY AND EFFECTIVENESS AND THEIR TESTIMONY WOULD HAVE BEEN CUMULATIVE TO THE TESTIMONY DR. VANDENBERG PROVIDED ON APPELLANT'S BEHALF.

Appellant next lists seven "experts" whom he claims his trial counsel should have called as witnesses at his trial. It is unclear whether he believes trial counsel should have called all seven in addition to the expert who did testify for Appellant, Dr. Vandenberg, or instead of Dr. Vandenberg. It is unclear whether Appellant thinks that the error was in failing to call any particular one, or all seven. What is clear is that this claim is nothing more than post-trial second-guessing and that trial counsel's decision on the use of experts was a strategic decision made after careful consideration by the attorneys who represented Appellant.

### Standard of Review

Appellant must overcome a strong presumption that the conduct of his trial counsel fell within the range of reasonable trial assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Appellant must further show actual prejudice from any deficiency, in that there is reasonable probability that the outcome would be different but for trial counsel's unprofessional errors. *Id.* "Where counsel has investigated possible strategies, courts should rarely second-guess counsel's actual choices." *Middleton v. State*, 103 S.W.3d 726, 736 (Mo. banc 2003). The law is well established that trial counsel is not ineffective for failing to "shop" for a mental health expert who would testify in a certain way. *State v. Mease*, 842 S.W.2d 98, 114 (Mo. banc 1992).

### Argument

Each of the experts listed by Appellant are experts who offered nothing new to Appellant's defense. And each of them possess their own shortcomings in credibility and persuasiveness.

#### 1. Dr. Cowan

Dr. Cowan seems to be the preferred expert whenever hindsight is used to select a mental health witness. *Lyons v. State*, 39 S.W.3d 32, 36 (Mo. banc 2001); *State v. Kenley*, 952 S.W.2d 250, 261-62 (Mo. banc 1997); *State v. Tokar*, 918 S.W.2d 753, 758 (Mo. banc 1996).

In this case, trial counsel believed that the impairment Dr. Cowan claims to have discovered was mild and unpersuasive and there were no medical records to support his claim of brain damage (Tr. 228-30). Throughout this protracted litigation, Appellant has hired experts who conclude there was brain damage and brain injury from a 1987 auto accident--due to Appellant's intoxication--yet that conclusion is unsupported by all of the medical records (L.F. 790, 799; Exhibit 294, p. 38). Dr. Cowan's expertise has suffered this problem before. *State v. Kenley*, 952 S.W.2d at 262 ("no medical records support Dr. Cowan's conclusion that Kenley suffered a closed head injury"). In fact, as in *Kenley*, even if a jury were to accept Dr. Cowan's speculation that Appellant suffered brain damage when he became intoxicated and crashed his car, this "is not always something that causes sympathy to the jury." *Id.*

The court did not clearly err in finding trial counsel effective.

## 2. Dr. Vliestra

The motion court found that Dr. Vliestra's testimony related to Appellant's childhood "without providing any insight into his background related to movant's criminal behavior." (L.F. 802).

The court did not believe this testimony would make Appellant sympathetic and thought such a course of testimony could "backfire" given the victim's lifelong effort to help children (L.F. 803).

There is nothing substantially different that Dr. Vliestra could offer to the jury. Appellant's childhood, his abuse claims, his chemical abuse, and lack of a father were all established matters in all three of Appellant's trials.

Dr. Vliestra offered no opinion as to Appellant's mental state at the time of the crime (Exhibit 295, p. 65). Dr. Vliestra had to rely on Jill Miller's thoroughly discredited report<sup>7</sup> in coming to her conclusions (Exhibit 295, p. 66). All

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<sup>7</sup>As will be shown, Jill Miller has been consistently found by courts to be incredible and her report thoroughly unreliable and inaccurate.

of Dr. Vliestra's work has been for the defense and, frankly, most of those clients are on death row (Exhibit 295, pp. 68-69).

This history hardly leads to a conclusion that she would be persuasive.

Finally, Appellant claims Dr. Vliestra would have explained that Appellant's brother, Keith, did not engage in vile criminal behavior because Keith "had the opportunity to live with a supportive family" (Appellant's Brief, p. 110). Yet, Keith did not do so until high school (Exhibit 295, p. 62), which contradicts Dr. Vliestra's theory that "early childhood development plays a major role in how a person lives their life as an adult" (Exhibit 295, p. 61), and, thus, explains the differences between Appellant and Keith.

### 3. Dr. Straub

Once again, Dr. Straub offered nothing new or different from the testimony of Dr. Vandenberg. In fact, trial counsel made a strategic decision to not call Dr. Straub because Dr. Vandenberg could establish everything Dr. Straub could have presented (Tr. 235-36). As the motion court noted, Dr. Straub had to change his earlier opinion that Appellant suffers from antisocial personality disorder (Exhibit 297, pp. 63-64, 66, 81-

83, 113; 1993 PCR Tr. 411, 433), a major inconsistency that Dr. Straub would have a very difficult time explaining. And, as the motion court noted, Dr. Straub's claim that Appellant was in a "disassociative state" at the time of the murder, without being able to determine if Appellant even committed the murder, makes his conclusions incredible (L.F. 800-01).

Trial counsel is not ineffective in failing to present cumulative evidence. *Skillicorn v. State*, 22 S.W.3d 678, 683 (Mo. banc 2000), *cert. denied*, 531 U.S. 1039 (2000).

#### 4. Dr. Smith

Dr. Smith seems to be another expert whose name appears in post-conviction pleadings as a witness who "should have" been called. *Taylor v. State*, 126 S.W.3d 755, 762 (Mo. banc 2004); *State v. Kenley*, 952 S.W.2d 250, 264 (Mo. banc 1997).

The motion court found Dr. Smith's testimony was neither credible nor persuasive. (L.F. 798). This is not due simply to the fact that all of Dr. Smith's work has been for the public defender's office (L.F. 798). Dr. Smith's testimony is problematic in that Appellant gave Dr. Smith the same outlandish story the jury rejected in his first trial--that Appellant was present at the murder but someone who looked like an in-law

committed the murder. *State v. Storey*, 901 S.W.2d 886, 900 (Mo. banc 1995). (Exhibit 293, pp. 65-66). Given the fact that this was only a penalty phase trial, that Appellant had confessed to the murder, and that the police recovered the murder weapon and the victim's property as a result of that confession, to have again injected that absurd claim would not have been sound legal strategy.

#### 5. Dr. Jolly

Trial counsel determined that Dr. Jolly was not necessary because Dr. Vandenberg covered the same information during his testimony (Tr. 242-43). She was also concerned that Dr. Jolly would be perceived as a "bureaucrat not a scientist" (Exhibit 436; Tr. 239), and that Dr. Jolly also lacked medical records to corroborate his conclusion that Appellant suffered a head injury (Tr. 239-40). Finally, Dr. Jolly's testimony suffers from the assumption that "another man" murdered Ms. Frey (PCR Tr. 695-96; L.F. 790).

#### 6. Jill Miller

Jill Miller was found by the 1993 PCR court to be unreliable and not credible, with a "flawed" report (L.F. 791). The motion court in 2004 came to the same conclusion (L.F. 791,

802). The court noted Ms. Miller's incomplete reporting of Appellant's 1987 automobile accident--where she omitted the fact it was caused by his drunk driving and where she wrongly concluded it resulted in a head injury (L.F. 802).

Additionally, trial counsel was aware that this Court had affirmed the exclusion of Jill Miller from testifying as an expert in an earlier case, *State v. Brown*, 998 S.W.2d 531, 549 (Mo. banc 1999). (L.F. 791). Trial counsel also knew that Miller was known to "give attitude" and had a blow-up with another public defender (Tr. 244-45).

Nevertheless, in spite of all of this "baggage," trial counsel contacted Ms. Miller who did, indeed, have an "attitude" (Tr. 247-49). Trial counsel preferred to have lay witnesses testify to the events in Appellant's life instead of hearsay from Ms. Miller (Tr. 252-55).

The assertion, under these circumstances, that trial counsel was ineffective in failing to call Jill Miller is baseless. Ms. Miller's report is nothing more than hearsay (Exhibit 61), and the State is unable to discern what possible expertise Ms. Miller possesses.

7. Dr. Pierce

In fact, Appellant indirectly acknowledges Jill Miller's expertise is not self-evident by claiming that trial counsel should have established Jill Miller's expertise by calling Dr. Pierce to explain why Jill Miller is qualified. If an expert needs another expert to explain why she's qualified to be an expert, that expert is not very persuasive.

The motion court found that Dr. Pierce would not have qualified Jill Miller as an expert (L.F. 815). In fact, no university gives a degree in forensic social work (L.F. 803)-- which is Jill Miller's claimed area of expertise.

Trial counsel did not present a "half-hearted" defense. They considered each of the experts discussed and made a strategic decision to use Dr. Vandenberg rather than any of these others. They are not ineffective simply because Dr. Vandenberg did not persuade the jury to sentence Appellant to life.

### VIII.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIM THAT HIS CONVICTION AND SENTENCE WAS "PART OF A LARGER PATTERN OF PROSECUTORIAL MISCONDUCT" BECAUSE THE APPELLANT'S ALLEGATIONS WERE SHOWN TO LACK ANY GOOD FAITH BASIS AND THERE IS NO EVIDENCE WHATSOEVER TO SUGGEST THAT APPELLANT WAS PROSECUTED SIMPLY TO ADVANCE THE POLITICAL CAREER OF CONGRESSMAN HULSHOF.

The irony of this claim is that the only misconduct evidence arises from asserting, and advocating on appeal, a baseless assertion that is so lacking in any factual or legal foundation. The reason a sentence of death was sought in this case is because death was appropriate. Three different prosecutors and three separate juries have conclusively established this fact.

#### Standard of Review

Appellate review of the motion court's ruling is limited to a determination of whether the findings of fact and conclusions of law are "clearly erroneous." *State v. Tokar*, 918 S.W.2d 753, 761 (Mo. banc 1996). Allegations in a post-conviction motion are not self-proving; a movant has the burden to prove the allegations by a preponderance of the evidence. *State v.*

*Silvey*, 894 S.W.2d 662, 671 (Mo. banc 1995). Deference must be given to a motion court's superior opportunity to judge the credibility of witnesses. *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. banc 1991). A hearing court is not clearly erroneous in refusing to grant relief on an issue which is not supported by evidence at the evidentiary hearing. *State v. Silvey*, 894 S.W.2d 662, 671-72 (Mo. banc 1995).

### **Prosecutorial Misconduct**

The pertinent facts are as follows:

1. Kenny Hulshof tried the first case in 1991 (Exhibit 292, p. 6). Hulshof did not consider running for political office until June 1994 (Exhibit 292, p. 115). The jury sentenced Appellant to death. *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995).
2. In 1997, Linda Koch prosecuted Appellant in his second trial. *State v. Storey*, 986 S.W.2d 462 (Mo. banc 1999). The jury sentenced Appellant to death. *Id.* at 463.
3. At the third trial in 1999, the prosecutors were Robert Ahsens and Nels Moss. *State v. Storey*, 40 S.W.3d 898

(Mo. banc 2001). The jury recommended a sentence of death. *Id.*

Appellant failed to produce one scintilla of evidence that the decisions of Hulshof in 1991, Koch in 1997, or Ahsens and Moss in 1999 were motivated by any improper consideration. Indeed, Appellant quotes a letter from Prosecutor Ahsens, dated December 2, 1996, in which he expressly states that he agrees with the Frey family that the death penalty is appropriate.<sup>8</sup> (Exhibit 348). Congressman Hulshof explicitly stated that he did not seek the death sentence for political reasons (Exhibit 292, p. 113). The motion court expressly determined that Hulshof was not motivated by political considerations (L.F. 808).

Undeterred by the facts, and apparently oblivious to the seriousness of making serious accusations impugning the integrity and reputation of a fellow attorney, Appellant's brief repeats these accusations on appeal.

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<sup>8</sup>The State is at a loss as to how that letter is evidence of anything other than the prosecutor being upright and honest with opposing counsel so that needless time would not be wasted on negotiations that would not be fruitful.

This allegation is not made in good faith and is frivolous.

Appellant desperately tries to attach some significance to the fact that the day following the Court's reversal of Appellant's first conviction, the "State hadn't decided if it will pursue the death penalty a second time." (Exhibit 221). How shocking that the State would actually give some thought to whether or not to seek a death sentence! How Appellant can take the fact that the State would ponder how to proceed and infer an evil motive is beyond comprehension.

Appellant was not offered life because the nature of his crime, as evidenced by the unanimous decision of 36 citizens, is deserving of a sentence of death.

IX.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT'S APPELLATE COUNSEL WAS NOT INEFFECTIVE IN HER REPRESENTATION IN THAT EACH OF THE ISSUES ASSERTED BY APPELLANT WERE MATTERS THAT APPELLATE COUNSEL THOUGHTFULLY CONSIDERED AND MADE A CONSCIOUS, STRATEGIC DECISION THAT NO PURPOSE WOULD BE SERVED IN RAISING THEM AND THEY ARE, IN FACT, NOT MATTERS THAT ENTITLE APPELLANT TO REVERSAL OF HIS SENTENCE.

Appellant attacks the effectiveness of his appellate counsel for failing to raise five issues on appeal:

1. Victim impact evidence was not admissible at the time he committed his murder and, thus, was not admissible in his 1999 trial;
2. The trial court erred in excluding evidence of Keith Storey's relationship to his biological father;
3. Appellant's statement to police that he'd tell them "what really happened" but first he needed to talk to a lawyer, violated *Miranda*;
4. Appellant had a constitutional right to waive a jury trial; and

5. Appellant was entitled to a new guilt phase because his Georgia conviction had been set aside.

### **Standard of Review**

To support a claim of ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error that would have required reversal had it been asserted and that was so obvious from the record that a competent and effective appellate lawyer would have recognized it and asserted it. *Moss v. State*, 10 S.W.3d 508, 514 (Mo. banc 2000). The right to relief from ineffective assistance of appellate counsel follows the plain error rule in that no relief may be granted unless the error that was not raised on appeal was so substantial as to amount to manifest injustice. *Id.* at 515. Even if an issue is not frivolous, appellate counsel has no duty to assert every possible claim, especially when counsel is making a strategic decision to “winnow out” arguments in favor of others. *Mallett v. State*, 769 S.W.2d 77, 83 (Mo. banc 1989).

#### **1. Victim Impact**

Appellant admits that his appellate counsel tried to assert the claim that the evidence of victim impact was inadmissible because *Payne v. Tennessee*, 501 U.S. 808 (1991), was not the law

at the time of his crime (Tr. 96-100; Exhibits 311, 312, 313).

The fact that this Court rejected the claim establishes that it does not rise to the level of “plain error.” A matter raised on direct appeal cannot be relitigated, even on a different theory (ineffective appellate counsel), during a post-conviction proceeding. *Mallett v. State*, 769 S.W.2d at 83.

Additionally, the claim has no merit. As noted by the State in Point IV, *supra*, the rule in *Payne* is a procedural rule that can be applied retroactively. *Washington v. Murray*, 952 F.2d 1472, 1480 (4th Cir. 1991); *Nooner v. Arkansas*, 907 S.W.2d 677, 689 (Ark. 1995); *Mitchell v. State*, 884 P.2d 1186, 1204 (Okl.Crim.App. 1994); *Windom v. State*, 656 So.2d 432, 439 (Fla. 1995); *Livingston v. State*, 444 S.E.2d 748, 752 (Ga. 1994); *Davis v. State*, 598 N.E.2d 1041, 1051 (Ind. 1992); *State v. Muhammad*, 678 A.2d 164, 181 (N.J. 1996); *State v. Clark*, 990 P.2d 793, 810 (N.M. 1999).

Appellate counsel is not ineffective in refusing to make a claim on appeal that she believed lacked merit.

## 2. Keith Storey Evidence

Appellate counsel considered the evidence proffered at trial regarding Keith Storey and his relationship with his

natural father and decided the evidence was not significant and its exclusion would not result in a new trial (L.F. 804).

The fact is, this evidence was collateral to the issue of Appellant's punishment, and is not particularly persuasive. Keith Storey, like Appellant, had been subject to the same abusive atmosphere most of his life that Appellant wished to claim mitigated his conduct (Trial III Tr. 1581-90). It was not until high school before Keith Storey ever had this "relationship" with his father (Exhibit 295, p. 62). If, as Appellant's own witnesses assert, it is one's early childhood experiences that are important in establishing one's personality and behavior (See, e.g. Dr. Vliestra, Exhibit 295, p. 6), then Keith Storey's contact with his natural father in late adolescence does very little to explain why Keith Storey did not engage in similar violent acts. Trial courts are given wide latitude in determining the admissibility of evidence. *State v. Williams*, 97 S.W.3d 462, 468 (Mo. banc 2003). Appellate counsel was not incompetent in believing the court's decision fell within that permissible level of discretion.

Appellate counsel made a conscious decision that the issue was not serious enough to require reversal; her decision was sound strategy.

### 3. Right to Counsel

Appellant next claims appellate counsel should have raised on appeal the fact that a police officer volunteered that Appellant stated “maybe I need to talk to a lawyer.” (Trial III Tr. 1064).

In making this argument, Appellant completely misstates the facts surrounding the testimony. Appellant did not state “he needed to talk to a lawyer” (Appellant’s Brief, p. 144). Instead, Officer Plummer was testifying that he informed the Appellant of his rights under *Miranda* and that Appellant agreed to answer questions (Trial III Tr. 1057-1062). Detective Plummer then explained that Appellant claimed he was with a girl named “Stacey” the night of the murder (Trial III Tr. 1063). The testimony then went as follows:

Q. And, sir, what else did you ask  
him?

A. Well, at that point we told him we didn't - we believed that he wasn't being completely truthful with us.

Q. Did he indicate whether or not, in fact, he was being truthful with you at that time?

A. When we made - when I made that statement, he nodded his head in an affirmative way and said, okay, I'll tell you what really happened, but maybe I need to talk to a lawyer.

Q. Did you offer him an opportunity?

MR. KENYON: Your Honor, may I object and approach the bench, please?

(Trial III Tr. 1064).

At the bench, the prosecutor indicated that the comment was volunteered (Trial III Tr. 1065). The trial court denied a motion for mistrial, and the Appellant declined to request any further relief (Trial III Tr. 1065-66).

Officer Plummer then testified that Appellant did not invoke his right to be silent, but proceeded to give a full confession:

(Back in the presence of the jury.)

Q. (By Mr. Ahsens) Did the defendant then agree to give you a full statement?

A. Yes, sir.

Q. In doing so then, sir, did you inquire again as to his whereabouts during the period of time of February 2nd and February 3rd and 4th?

A. Yes, I did.

(Trial III Tr. 1066).

Thus, the facts are not as Appellant attempted to present them to this Court. Unlike *State v. Dexter*, 954 S.W.2d 332, 338 (Mo. banc 1994), where the State “repeatedly” commented on the defendant invoking his right to remain silent, in this case the Appellant did not invoke his rights.

The law is firmly established that if an individual wants to invoke his right to remain silent, he must do so clearly and

unequivocally. *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994); *State v. Wolf*, 91 S.W.3d 636 (Mo. App., W.D. 2002). “Maybe I should talk to a lawyer” is “not a request for counsel.” *Davis v. United States*, 512 U.S. at 462, 114 S.Ct. at 2357.

The record is obvious that Appellant did not invoke his right to remain silent and, instead, went on to give a full and detailed confession. Furthermore, the comment made by Appellant was clearly part of an admission that he had lied to the police in giving them a false alibi. The claim is completely lacking merit.

#### 4. Waiver of Jury

Appellant claims that his appellate attorney was ineffective in failing to assert that Appellant had the right to waive a jury trial under Article I, § 22(a) of the Missouri Constitution. Showing an unwillingness to fulfill his obligation to be candid with this Court, the Appellant ignores the fact that he did not waive a jury trial in 1991, was convicted of his crime in 1991 by a jury, and, thus, he has no constitutional claim.

No one has placed any restriction on Appellant's right to a jury, or to waive a jury. Section 565.006.3, RSMo, simply states that if a defendant does seek a jury trial on guilt, he may not waive a jury trial on punishment "except by agreement with the state and the court." Unlike the constitutional right to a jury trial on guilt, a "defendant has no constitutional right to have a jury assess punishment." *State v. Taylor*, 929 S.W.2d 209, 219 (Mo. banc 1996); *State v. Nunley*, 980 S.W.2d 290, 293 (Mo. banc 1998).

The right to a jury, and the right to waive that jury, given to Appellant under Article I, § 22, related to his right to have a jury decide his guilt. Appellant's right was not impinged upon; he exercised that right. There is, however, no constitutional right to "divide" his trial by seeking a jury for guilt and waiving it for punishment. Such a procedure "is not a right for the defendant to waive, rather a privilege for the State to grant." *State v. Taylor*, 929 S.W.2d at 217.

#### 5. Vacated Conviction

Finally, Appellant requires this Court to reconsider an issue it has already decided. This Court has already held that

use of Appellant's Georgia conviction was harmless error. *State v. Storey*, 986 S.W.2d 462, 465-66 (Mo. banc 1999). This was the reason appellate counsel did not waste the time and effort to raise the issue on appeal (PCR Tr. 82-83). The motion court found this to be a reasonable decision (L.F. 804). It most certainly was.

X.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO CERTAIN EVIDENCE AND VOIR DIRE BY THE STATE BECAUSE THERE WAS NOTHING OBJECTIONABLE OR PREJUDICIAL THAT RESULTED IN AN UNFAIR TRIAL.

Appellant's next claim is that his trial counsel should have objected to certain evidence presented by the State, and then preserved those objections. The State submits that these particular issues raised by Appellant were not prejudicial and, in most cases, were not objectionable.

Standard of Review

To establish ineffective assistance of counsel, the Appellant must prove that his attorneys' performance at trial "did not conform to the degree of skill, care, and diligence of a reasonably competent attorney." *Skillicorn v. State*, 22 S.W.3d 678, 681 (Mo. banc 2000), *cert. denied*, 531 U.S. 1039 (2000).

Appellant must also show he was actually prejudiced by counsel's poor performance. *Id.* There is a presumption that counsel was competent, *id.*, and review is limited to a determination whether the motion court clearly erred in its findings. *Id.*

1. Appellant's Confession

During the course of his confession to Detective Plummer, Appellant indicated that "he used to believe in the death penalty. He said he didn't believe in it anymore. He didn't think he should get off free." (Trial III Tr. 1086-87). Any rational trier of fact would interpret this statement as an acknowledgment of culpability by the Appellant.

Advocating the irrational, however, the Appellant claims his trial attorney should have recognized this was improper evidence of Appellant's personal views on the propriety of the death penalty. Appellant cites no place in the record where the prosecutor made such an argument, or even implied that Appellant's "position" on the death penalty requires the jury to impose that penalty. The statement was introduced simply as part of the evidence that Appellant voluntarily acknowledged his guilt.

Appellant makes the insincere assertion that guilt was not relevant to the penalty phase. Then why did he present an expert to try to limit Appellant's culpability for the murder?

To convince the jury that death is appropriate, the State is entitled to convince this penalty phase jury that Appellant is culpable for the murder. Appellant's statement is reasonably interpreted as his acknowledgment that he committed a terrible crime. The interpretation that Appellant asks this Court to make is unreasonable and outlandish.

2. **Appellant's Parole Eligibility**

Next Appellant asks this Court to make another unreasonable inference from the State's expert testifying that he was uncertain whether Appellant's antisocial personality disorder would again manifest itself if Appellant "is in a free community." (Trial III Tr. 1637). The motion court properly determined that the statement was not significant and was not highlighted (L.F. 797).

Once again, Appellant's attempt to suggest that this was an overt "warning" to the jury that a life sentence could mean Appellant's eventual release from prison is not supported by reason or common sense. In fact, the reason the trial attorneys did not object is because they did not make that interpretation.

3. **Voir Dire of Ms. Willis**

Next, Appellant suggests that trial counsel should have objected to the voir dire question whether a venire person had a preference of punishment “for people who go around committing murder first.” (Trial III Tr. 355). Somehow, somehow, the Appellant believes that this comment was intended, and interpreted, as a suggestion that Appellant was a multiple murderer. The motion court did not make such an inference (L.F. 794), and no reasonable person could make such an interpretation.

The question was not improper and was not objectionable. And, considering the fact that Appellant presented his entire life to the jury, no juror could conceivably have sentenced Appellant based on a false belief that Appellant had committed other murders.

#### **4. Competency Evidence**

As part of Dr. Givon’s evaluation of Appellant, Dr. Givon determined that Appellant was competent (Trial III Tr. 1614-15).

Counsel objected and was overruled (Trial III Tr. 1614-15). How could counsel be “ineffective” when she objected and had the objection overruled? Appellant fails to explain what more she should have done.

If, as Appellant suggests, his competency is “irrelevant” to the determination of the appropriate punishment, then Appellant was not prejudiced by its admission. On the other hand, the fact that Appellant suffers from no mental disease or defect that would effect his thought process in any way may be a relevant factor for jurors in deciding if Appellant should receive a sentence of death.

#### 5. Factual Details of Other Cases

As part of the legitimate cross-examination of Appellant’s “corrections expert,” Mr. Aiken, the State questioned him about the fact that murders had occurred within the Missouri prison system. (Trial III Tr. 1268-71). Admittedly, the prosecutor had some details of some of the killings incorrect.

The issue, however, is if Appellant’s trial counsel should have been constitutionally required to know the details of those other killings and objected to certain questions as inaccurate.

The motion court held that counsel should not be held to such a standard (L.F. 795-96). The court also found this was not prejudicial (L.F. 795-96).

Indeed, the two questions regarding the two fact scenarios were never answered:

A. I do not have the particulars on  
that particular case.

(Trial III Tr. 1270).

As the jury is instructed, a question is not evidence and no prejudice results from questions that are not answered. *State v. Gilmore*, 681 S.W.2d 934, 942 (Mo. banc 1984). Appellant makes a claim of prosecutorial misconduct without a scintilla of evidence to support such a serious allegation. Because Mr. Aiken did not acknowledge the facts described, there is no reason to believe the jury came to any conclusions about who was killed in prison under any particular circumstances. Finally, Appellant is unable to explain how these questions were actually prejudicial.

XI.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THIS COURT DETERMINED ON DIRECT APPEAL THAT THE ARGUMENT OF THE PROSECUTOR WAS NOT PREJUDICIAL AND, THUS, NO ERROR EXISTED.

On direct appeal, Appellant claimed he was denied a fair trial because the prosecutor suggested that the defense was “praying for weakness” (Trial III Tr. 1698). This Court examined the claim and denied it, finding that it cannot be said “that there is a reasonable probability that the jury’s verdict would have been different had the argument not been made.” *State v. Storey*, 40 S.W.3d 898, 911 (Mo. banc 2001). Undeterred by this unequivocal finding by this Court, Appellant asks that energy be expended revisiting this issue under an ineffective assistance claim.

This effort is wasted, and obviously so, since this Court’s conclusion that there was no reasonable probability that the outcome would not be different forecloses a finding of ineffective assistance of counsel. *Middleton v. State*, 103 S.W.3d 726, 732 (Mo. banc 2003) (counsel’s deficient performance

must be prejudicial); *Deck v. State*, 68 S.W.3d 418, 425 (Mo. banc 2002).

Appellant's second claim is so fundamentally baseless that he is unwilling to elaborate on the complaint in his brief. He claims that the prosecutor "compared" the value of the Appellant and victim's life in violation of *State v. Storey*, 901 S.W.2d 886, 902 (Mo. banc 1995).

The argument of the prosecutor in this third trial was fundamentally and significantly different from that in the first trial. The prosecutor in this third trial expressly stated "I don't want to get into the business of measuring the value of one life against another . . . (Trial III Tr. 7000-01). The prosecutor then limited his comments to indicating--based on the evidence--that Ms. Frey was "a fine woman."

The argument held improper in the first trial did not simply "compare" the two lives; the prosecutor attempted to "simplify" the law by arguing that the only thing the jury must do is to compare the two lives, whereas, the law really requires a jury to consider "a wide array of aggravating and mitigating circumstances." *Id.*

The arguments are not similar and the argument in this case was appropriate and proper. It is Appellant's argument in his brief that is deceptive and inaccurate.

XII.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING THE APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE CLAIMS APPELLANT RAISED WERE WITHOUT MERIT IN THAT THE VOIR DIRE BY THE PROSECUTOR WAS NOT IMPROPER AND THIS COURT HAD ALREADY ADDRESSED THE ISSUE OF APPELLANT'S VOLUNTARY INTOXICATION INSTRUCTION.

Appellant claims his trial counsel was ineffective in failing to make or preserve various objections during voir dire.

Appellant fails to establish that these matters are clearly objectionable in his brief. Appellant also claims that his trial counsel should have raised an issue already decided by this Court, giving no basis for the Court to decide the issue differently.

Standard of Review

To establish ineffective assistance of counsel, the Appellant must prove that his attorneys' performance at trial "did not conform to the degree of skill, care, and diligence of a reasonably competent attorney." *Skillicorn v. State*, 22 S.W.3d 678, 681 (Mo. banc 2000) cert. denied, 531 U.S. 1039 (2000). Appellant must also show he was actually prejudiced by counsel's

poor performance. *Id.* There is a presumption that counsel was competent, *id.*, and review is limited to a determination whether the motion court clearly erred in its findings. *Id.*

**A. Burden Shifting**

Appellant claims that the State shifted its burden of proof by stating during voir dire that its verdict “must be unanimous either way . . .” (Trial III Tr. 534). Both trial counsel and the motion court found nothing improper about this statement (L.F. 794; Exhibit 350, pp. 130-31). Appellant fails to articulate how this statement is inaccurate, or how it shifts the State’s burden improperly. While it is true that the legal result of a deadlocked jury is life imprisonment, the law also seeks jury unanimity in its verdict.

**B. Assessing a Penalty**

Appellant’s second claim is also devoid of any authority to support his claim that the prosecutor misstated his burden. The prosecutor stated during voir dire that “the defense does not have to prove any of those things beyond a reasonable doubt, nor do they ever have to prove anything.” (Trial III Tr. 528). He then discussed the weighing of aggravating and mitigating factors (Trial III Tr. 528). He then said:

After you go through that weighing process, you reach a point where you are no longer talking about matters being proven beyond a reasonable doubt. It is simply a matter of deciding what the penalty should be.

(Trial III Tr. 528).

Again, Appellant fails to cite any authority that what was said was inaccurate. Both trial counsel and the motion court were unable to see the obvious impropriety in that statement (Exhibit 350, pp. 127-29; L.F. 794). At no point does the prosecutor attempt to “shift the burden of proof.” Indeed, he stated that the Appellant never had to prove anything (Trial III Tr. 528). One could very reasonably say that once all of the weighing of factors has been done, the individual jurors are then left with the decision whether death or a life sentence is the appropriate penalty.

**C. Intoxication Instruction**

Finally, Appellant claims that his trial attorneys were constitutionally ineffective in failing to raise an issue that was decided by this Court on appeal from the first trial. In

*State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), this Court rejected Appellant's claim "that trial counsel was ineffective for failing to preserve the issue, even though he was tried before *Erwin* was decided." 901 S.W.2d at 896. The holding in *State v. Erwin*, 848 S.W.2d 476 (Mo. banc 1993), was limited "to cases tried in the future and cases subject to direct appeal where the issue had been preserved." 901 S.W.2d at 896.

In support of his claim, Appellant cites a case decided after his 1999 trial, *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2003). First, Appellant does not explain why his trial counsel should have considered case law that did not exist at the time of trial. Second, in the first appeal, this Court expressly found trial counsel was not ineffective. *State v. Storey*, 901 S.W.2d at 896. The *Deck* decision involved this Court considering, for the first time, the issue of ineffective assistance. Nothing in *Deck* suggests to reasonable counsel that this Court will reconsider a specific issue already determined in a previous decision. Trial counsel was not ineffective.

XIII.

THE MOTION COURT DID NOT CLEARLY ERR IN FINDING THAT APPELLANT HAD THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL WAS NOT INEFFECTIVE IN FAILING TO PRESENT THE FLAWED STUDY OF DR. WIENER TO PROVE THAT THE MAI INSTRUCTIONS ARE FLAWED AND DIFFICULT TO COMPREHEND IN THAT THIS STUDY HAS BEEN CONSISTENTLY FOUND TO BE UNRELIABLE BY THIS COURT AND THE STUDY WAS AN OVERT ATTEMPT AT BIASED RESEARCH WHOSE STUDY FAILED TO PROPERLY REPLICATE THE CIRCUMSTANCES ACTUAL JURORS EXPERIENCE IN A CRIMINAL TRIAL.

Appellant's final claim is that his trial attorneys should have asserted that he was denied a fair trial because the jury instructions are difficult to understand. This claim of ineffective assistance of counsel is based on discredited research that this Court has already rejected as unpersuasive. Trial counsel was not ineffective in failing to make an argument that lacks merit.

Standard of Review

Review of the denial of post-conviction relief is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. *State v. Kinder*, 942

S.W.2d 313, 333 (Mo. banc 1996), *cert. denied*, 522 U.S. 854 (1997). To establish ineffective assistance, the Appellant must show his counsel's performance was deficient and that the outcome would be different but for that deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Matters of trial strategy are not proper claims for ineffective assistance. *Leisure v. State*, 828 S.W.2d 872, 874 (Mo. banc 1992), *cert. denied*, 506 U.S. 923 (1992).

#### **Counsel was not Ineffective**

The Appellant apparently feels that it should be a constitutional obligation of all defense counsel to assert that Dr. Wiener has "proved" that jury instructions in capital cases are incomprehensible. In *State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999), this Court rejected Dr. Wiener's research

because the people interviewed for the study did not act as jurors. They were given hypothetical facts that were different than the facts in this case, and they did not hear the testimony of witnesses, observe physical evidence or deliberate with eleven other jurors.

*Id.* at 542. ....

The motion court also found Dr. Wiener's research to be biased and flawed (L.F. 809). The motion court noted that a similar claim was denied by the Seventh Circuit. *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993). Likewise, subsequent decisions by this Court have continued to find Dr. Wiener's research unpersuasive. *Lyons v. State*, 39 S.W.3d 32, 43 (Mo. banc 2001); *Middleton v. State*, 103 S.W.3d 726, 743 (Mo. banc 2003).

The reasons are obvious. Dr. Wiener still does not use jurors in his studies, but finds volunteers who read his advertisement in the *Riverfront Times* (Exhibit 216, p. 95). Dr. Wiener's "model instructions" include the definition for "preponderance of the evidence," a term of no relevance in criminal instructions (Exhibit 216, p. 109). His definition of reasonable doubt is not accurate ("no doubt"). (Exhibit 216, pp. 111-12). The fact scenario he used in his study differed from the real facts in Appellant's case (Exhibit 216, p. 92). The subjects in his study did not have the benefit of seeing real witnesses, hearing closing arguments, or deliberating as a jury (Exhibit 216, p. 90).

Since he began his study in 1994, in a transparent effort to “prove” the instructions were invalid, Dr. Wiener continues to present excuses for the shortcomings in his study. Dr. Wiener makes the astounding claim that twelve jurors, sitting down with the written instructions and deliberating together after hearing all of the evidence and the argument of the attorneys does not increase the jurors’ understanding of the instructions (Exhibit 216, p. 126). His basis--a study where the “jurors” were read a five-page summary of the case (Exhibit 216, p. 127). That is not similar to the real life experience of an actual juror.

And in response to the reasonable suggestion that closing arguments by the attorneys, where they are free to discuss the instructions, aids a juror’s comprehension, Dr. Wiener abrogates any semblance of scientific objectivity and suggests that the State should have to prove that closing argument assists in comprehension (Exhibit 216, p. 130).

Dr. Wiener is clearly an advocate and is dedicated to challenging the death penalty. He is free to do so. But neither he nor Appellant should expect any court to adopt his biased and flawed conclusions based on the wholly unpersuasive research he has conducted.

Nor is counsel ineffective in failing to present this research when it has been consistently rejected by this Court.

**CONCLUSION**

For the foregoing reasons, the decision of the motion court should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

The undersigned hereby certifies:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and (c) of this Court and contains 17,980 words, excluding the cover, and this certification, as determined by WordPerfect 9 software; and
2. That the labeled disk, simultaneously filed with the hard copies of this brief, has been scanned for viruses and is virus-free; and
3. That two true and correct copies of the attached brief, and a labeled disk containing a copy of this brief, were mailed, postage prepaid, this 11th day of April, 2005, to:

William J. Swift  
3402 Buttonwood  
Columbia, MO 65201-3724

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THEODORE A. BRUCE