No. SC91255

IN THE

# *Supreme Court of Missouri*

**SCOTT MCLAUGHLIN,**

*Appellant,*

v.

**STATE OF MISSOURI,**

*Respondent.*

Appeal from the St. Louis County Circuit Court
Twenty-first Judicial Circuit
The Honorable Steven Goldman, Judge

## RESPONDENT'S BRIEF

**CHRIS KOSTER**
Attorney General

**JAMES B. FARNSWORTH**
Assistant Attorney General
Missouri Bar No. 59707

P.O. Box 899
Jefferson City, MO 65102
(573) 751 3321
Fax: (573) 751-5391
jim.farnsworth@ago.mo.gov

*Attorneys for Respondent*

## TABLE OF CONTENTS

**TABLE OF AUTHORITIES** ..... 6

**STATEMENT OF FACTS** ..... 12

**STANDARD OF REVIEW** ..... 28

**ARGUMENT** ..... 31

**I. Defendant's motion to disqualify Judge Goldman was properly denied.** ..... **31**

**II. The motion court did not clearly err in denying Defendant's claim that counsel were ineffective for failing to call a psychiatrist to testify during the penalty phase about Defendant's mental-health problems.** ..... **39**

*A. The claim Defendant advances in this appeal differs from the claim he presented to the motion court.* ..... *46*

*B. Counsel made a reasonable strategic decision not to call their psychiatrist, Dr. Caruso, to testify.* ..... *48*

*C. Defendant was not prejudiced by counsel's decision not to present testimony from a forensic psychiatrist.* ..... *52*

**III. The motion court did not clearly err in denying Defendant's claim that trial counsel were ineffective for failing to call a neuropsychologist to testify in the penalty phase that Defendant had brain damage. .....56**

*A. Counsel reasonably relied on the advice of their retained mental-health experts in deciding not to seek out a neuropsychologist.....61*

*B. Counsel's decision not to call a neuropsychologist was not prejudicial. .....65*

**IV. The motion court did not clearly err in denying without a hearing Defendant's claims that trial counsel were ineffective for failing to offer his school, hospital, and jail records for admission in evidence and for failing to object to the trial court's instruction that testimony about the content of these records could not be considered for the truth of the matter asserted. (Responds to Defendant's Points IV and V).....67**

*A. Counsel were not ineffective for failing to object to the court's instruction.....72*

*B. Defendant was not prejudiced by counsel's failure to offer the records for admission in evidence.....74*

**V. The motion court did not clearly err in denying without a hearing Defendant's claim that counsel were ineffective for failing to object during the prosecutor's penalty-phase closing argument to comments comparing jurors to soldiers and encouraging the jurors to "send a message." (Responds to Defendant's Point VI). ....81**

*A. "Soldier" argument.....84*

*B. "Send a message" argument.....88*

**VI. The motion court did not clearly err in denying without a hearing Defendant's claim that counsel were ineffective for failing to request a penalty-phase jury instruction on statutory mitigating factors. (Responds to Defendant's Point VII).....93**

**VII. The motion court did not clearly err in denying Defendant's claim that trial counsel were ineffective for failing to investigate and present evidence at the guilt and penalty phases that Defendant's brother Billy had admitted to raping Victim on the night of the murder (Responds to Defendant's Point VIII).....99**

*A. Billy's purported statements were inadmissible hearsay.....104*

*B. Defendant was not prejudiced by counsel's decision not to offer the statements in evidence.* ..... *110*

**VIII. The motion court did not clearly err in denying Defendant's claim that trial counsel were ineffective for failing to present evidence in the guilt and penalty phases suggesting that Defendant's brother Billy contributed to the DNA found on Victim's body. (Responds to Defendant's Point IX).** ..... **112**

**IX. The motion court did not clearly err in denying without a hearing Defendant's claim that Missouri's death-penalty statute is unconstitutional for failing to "genuinely narrow the class of people eligible for the death penalty." (Responds to Defendant's Point X).** ..... **124**

**CONCLUSION** ..... 130

**CERTIFICATE OF COMPLIANCE** ..... 131

**APPENDIX** ..... 132

## TABLE OF AUTHORITIES

### Cases

*Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988) .....52

*Burgess v. State*, No. SC91571 (Mo. banc July 19, 2011) .....33, 34

*Chambers v. Mississippi*, 410 U.S. 284 (1973) .....105

*Christeson v. State*, 131 S.W.3d 796 (Mo. banc 2004) .....95

*Clayton v. State*, 63 S.W.3d 201 (Mo. banc 2001) .....54

*Coates v. State*, 939 S.W.2d 912 (Mo. banc 1997).....47

*Cole v. Roper*, 623 F.3d 1183 (8th Cir. 2010) .....88

*Cole v. State*, 152 S.W.3d 267 (Mo. banc 2004) .....35

*Coleman v. Brown*, 802 F.2d 1227 (10th Cir. 1986) .....89

*Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000) .....53

*Commonwealth v. Zook*, 887 A.2d 1218 (Pa. 2005).....78

*Cullen v. Pinholster*, 131 S.Ct. 1388 (2011).....28

*Davis v. Kemp*, 829 F.2d 1522 (11th Cir. 1987).....88

*Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002).....83

*Edwards v. State*, 200 S.W.3d 500 (Mo. banc 2006).....31

*English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010).....50, 51

*Forrest v. State*, 290 S.W.3d 704 (Mo. banc 2009).....74, 128

*Gardner v. Ozmint*, 511 F.3d 420 (4th Cir. 2007) .....53

*Gill v. State*, 300 S.W.3d 225 (Mo. banc 2009).....28, 29

*Glass v. State*, 227 S.W.3d 463 (Mo. banc 2007).....95, 96

*Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995).....63

*Goodwin v. State*, 191 S.W.3d 20 (Mo. banc 2006) ..... 28, 52, 53, 64

*Green v. Georgia*, 442 U.S. 95 (1979).....105

*Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273 (Mo. banc 1984) .....36

*Haynes v. State*, 937 S.W.2d 199 (Mo. banc 1999).....31, 34

*Hoskins v. State*, 329 S.W.3d 695 (Mo. banc 2010).....46

*Hutchison v. State*, 150 S.W.3d 292 (Mo. banc 2004) .....77

*In re Marriage of Piercy*, 774 S.W.2d 539 (Mo. App. S.D. 1989) .....35

*Irick v. Bell*, 565 F.3d 315 (6th Cir. 2009).....88, 89

*Johnson v. State*, 333 S.W.3d 459 (Mo. banc 2011) ..... *passim*

*Lockhart v. Fretwell*, 506 U.S. 364 (1993).....122

*Love v. State*, 670 S.W.2d 499 (Mo. banc 1984).....95

*Lyons v. State*, 39 S.W.3d 32 (Mo. banc 2001) .....61

*Martin v. Durham*, 933 S.W.2d 921 (Mo. App. W.D. 1996) .....72

*Matthews v. State*, 175 S.W.3d 110 (Mo. banc 2005) .....126

*Morgan v. Illinois*, 504 U.S. 719 (1992).....128

*Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989).....86, 87

*Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003).....62, 63

*Ringo v. State*, 120 S.W.3d 743 (Mo. banc 2003) .....84

*Rompilla v. Beard*, 545 U.S. 374 (2005) .....60, 78

*Roper v. Simmons*, 543 U.S. 551 (2005).....88

*Ross v. State*, 335 S.W.3d 479 (Mo. banc 2011) .....27

*Sears v. Upton*, 130 S.Ct. 3259 (2010) .....105

*Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999) .....87

*Sinisterra v. United States*, 600 F.3d 900 (8th Cir. 2010) .....88

*Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000) .....48

*State v. Ashley*, 940 S.W.2d 927 (Mo. App. W.D. 1997) .....121

*State v. Barnett*, 980 S.W.2d 297 (Mo. banc 1998).....72

*State v. Baumruk*, 280 S.W.3d 600 (Mo. banc 2009) .....71, 87

*State v. Bradley*, 811 S.W.2d 379 (Mo. banc 1991) .....27

*State v. Brown*, 902 S.W.2d 278 (Mo. banc 1995) .....50

*State v. Cole*, 71 S.W.3d 163 (Mo. banc 2002) .....128

*State v. Davis*, 814 S.W.2d 593 (Mo. banc 1991) .....121

*State v. Ervin*, 979 S.W.2d 149 (Mo. banc 1997).....128

*State v. Hutchison*, 957 S.W.2d 757 (Mo. banc 1997) .....105

*State v. James*, 321 S.W.2d 698 (Mo. 1959) .....35

*State v. Johns*, 34 S.W.3d 93 (Mo. banc 2000) .....128

*State v. Johnson*, 22 S.W.3d 183 (Mo. banc 2000) .....128

*State v. Jones*, 979 S.W.2d 171 (Mo. banc 1998).....72

*State v. Knese*, 985 S.W.2d 759 (Mo. banc 1999).....88, 128

*State v. McLaughlin*, 265 S.W.3d 257 (Mo. banc 2008)..... *passim*

*State v. McMillin*, 783 S.W.2d 82 (Mo. banc 1990).....128

*State v. Middleton*, 998 S.W.2d 520 (Mo. banc 1999).....127

*State v. Phillips*, 940 S.W.2d 512 (Mo. banc 1997).....109

*State v. Powell*, 798 S.W.2d 709 (Mo. banc 1990).....128

*State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993).....128

*State v. Rousan*, 961 S.W.2d 831 (Mo. banc 1998).....127

*State v. Simmons*, 955 S.W.2d 752 (Mo. banc 1997).....32

*State v. Smith*, 944 S.W.2d 901 (Mo. banc 1997).....88

*State v. Smulls*, 935 S.W.2d 9 (Mo. banc 1996).....33

*State v. Strong*, 142 S.W.3d 702 (Mo. banc 2004).....127

*State v. Sutherland*, 939 S.W.2d 373 (Mo. banc 1997).....71

*State v. Taylor*, 298 S.W.3d 482 (Mo. banc 2009).....105, 108

*State v. Tivis*, 948 S.W.2d 690 (Mo. App. W.D. 1997).....31

*State v. Tokar*, 918 S.W.2d 753 (Mo. banc 1996).....28

*State v. Twenter*, 818 S.W.2d 628 (Mo. banc 1991).....60

*State v. Whitfield*, 837 S.W.2d 503 (Mo. banc 1992).....128

*State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003).....128

*State v. Winfrey*, 337 S.W.3d 1 (Mo. banc 2011) .....71

*Stevens v. McBride*, 489 F.3d 883 (7th Cir. 2007).....53

*Storey v. State*, 175 S.W.3d 116 (Mo. banc 2005).....83

*Strickland v. Washington*, 466 U.S. 668 (1984) ..... *passim*

*Strong v. State*, 263 S.W.3d 636 (Mo. banc 2008) .....60

*Taylor v. State*, 262 S.W.3d 231 (Mo. banc 2008) .....77, 78

*Tisius v. State*, 183 S.W.3d 207 (Mo. banc 2006) .....97

*United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992).....89

*United States v. Monaghan*, 741 F.2d 1434 (D.C. Cir. 1984) .....89

*United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991) .....89

*United States v. Young*, 470 U.S. 1 (1985) .....84, 85, 86

*Vierick v. United States*, 318 U.S. 236 (1943).....84, 85

*Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006).....84, 88, 90

*Webb v. State*, 334 S.W.3d 126 (Mo. banc 2011).....28

*Weeks v. State*, 140 S.W.3d 39 (Mo. banc 2004).....120

*Wiggins v. Smith*, 539 U.S. 510 (2003).....50

*Williams v. Taylor*, 529 U.S. 362 (2000) .....77

*Winfield v. State*, 93 S.W.3d 732 (Mo. banc 2002) .....48

*Zink v. State*, 278 S.W.3d 170 (Mo. banc 2009).....27, 73, 126

**Statutes**

Section 547.035, RSMo 2000 .....120

Section 565.032, RSMo 2000 .....90, 92

## Other Authorities

MAI-CR3d 305.04 (2011) .....87

MAI-CR3d 314.44 .....95, 96

## Rules

Supreme Court Rule 2, Canon 3D .....33

Supreme Court Rule 29.15.....27, 45, 126

## STATEMENT OF FACTS

Scott McLaughlin ("Defendant") appeals the denial of his Rule 29.15 motion for post-conviction relief. In the fall of 2006, Defendant was convicted of first-degree murder, forcible rape, and armed criminal action ("ACA") (L.F. 909). He received a death sentence for the murder and consecutive life sentences for the rape and ACA charges (L.F. 911). On direct appeal, this Court affirmed Defendant's convictions. *State v. McLaughlin*, 265 S.W.3d 257 (Mo. banc 2008).

In his subsequent post-conviction motion, Defendant argued that, for various reasons, he was entitled to a new trial on the forcible-rape charge and an entirely new penalty phase (PCR L.F. 28-147). The motion court granted Defendant's request for an evidentiary hearing with respect to five of his ten claims (PCR L.F. 159). Following the hearing, the motion court issued findings of fact and conclusions of law denying all of Defendant's claims for relief (PCR L.F. 172-89).

### Defendant's trial – guilt phase

The evidence adduced at trial, viewed in the light most favorable to the jury's verdict, showed as follows:

On November 20, 2003, Defendant stabbed Beverly Guenther ("Victim") to death and dumped her body on the bank of the Mississippi River (Tr. 1122-25, 1185-89, 1283; St. Ex. 70, 71). Defendant and Victim had been involved in a long-term romantic relationship, which Victim had ended several months earlier (Tr. 802-03, 816, 819-22). After the breakup, Defendant continued to harass Victim, repeatedly calling her at work, showing up at her office uninvited, and lurking outside her home (Tr. 803, 814, 816, 822-24, 956, 961-62).

An hour or so before the murder, Defendant was talking about Victim with his brother, Billy, and said, "I'm fucking killing that bitch" (Tr. 974-75). Defendant drove over to Victim's workplace, parked his car out of sight, and then crouched down near the front stairs so Victim wouldn't see him as she exited the building (St. Ex. 70, 71). Defendant had a steak knife in his back pocket that he had taken from his brother's apartment (St. Ex. 70, 71).

Defendant lay in wait for about 15 minutes, until Victim finally came outside (St. Ex. 70, 71). As she reached the bottom of the steps, Defendant called Victim's name (St. Ex. 70, 71). Startled, Victim told Defendant to leave her alone (St. Ex. 70, 71). When they got close to Victim's truck, Defendant pulled the knife from his pocket and stabbed Victim in the throat (St. Ex. 70, 71; 1098, 1273). Victim tried to fight back, scratching at Defendant's arms and face, but Defendant kept stabbing (St. Ex. 70, 71; Tr. 1189, 1199, 1271-82).

Defendant dragged Victim across the parking lot and put her in his station wagon (St. Ex. 70, 71; Tr. 1020, 1099-1100). He drove to an isolated lot alongside the Mississippi River, bound Victim's ankles with twine, and pushed Victim's body down onto the riverbank (St. Ex. 70, 71; Tr. 1122-25, 1186-89). At some point during the attack, Defendant had sexual intercourse with Victim (Tr. 1316-41, 1356).

The police apprehended Defendant the following day (Tr. 1054-55, 1063, 1171). They found Victim's blood on Defendant's clothes and in his car (Tr. 1356). Defendant had cut large swaths of fabric out of the rear seat of his car and had tried to bleach the interior (Tr. 1050-51, 1117-18, 1173). He initially told police that he did not know anything about Victim's disappearance, but when confronted with the evidence he admitted that he had killed her (St. Ex. 70, 71; Tr. 1185). He led police to the site where he had dumped Victim's body (Tr. 1186-89). She was wearing a blood-soaked blouse and bra, muddy white socks, and nothing else (Tr. 1125, 1263).

The jury found Defendant guilty of first-degree murder, ACA, and forcible rape (Tr. 1471). The jury returned a not-guilty verdict for an additional ACA charge relating to the rape (Tr. 1471).

**Defendant's trial – penalty phase**

During the penalty phase, the State presented victim-impact evidence from Victim's mother, son, and brother (Tr. 1489-1509). In addition, the State presented testimony regarding Victim's application for an order of protection against Defendant (Tr. 1510; St. Ex. 101). Finally, the State presented documents showing that Defendant had been arrested for burglarizing Victim's home and had previously been convicted of tampering, sexual assault, forgery, third-degree assault, and felony non-support (Tr. 1515, 1521-22, 1529-35).

Defendant presented evidence about his troubled childhood and his psychological problems. Defendant's biological father was an alcoholic and was abusive toward Defendant's mother (Tr. 1593, 1909). When Defendant was a toddler, he was adopted by the McLaughlins, who also took custody of Defendant's younger brother and sister (Tr. 1595-96, 1909-10).

The McLaughlins were very strict disciplinarians (Tr. 1913). Mr. McLaughlin had a homemade paddle that he used on the children that he referred to as "the board of education" (Tr. 1913). As Defendant got older, Mr. McLaughlin, a police officer, used his taser and his nightstick to punish Defendant (Tr. 1920). When Defendant and his brother got into an argument, Mr. McLaughlin forced them to go into the backyard and fight (Tr. 1914-15). The McLaughlins also locked the refrigerator and cabinet doors, limiting the children's access to food (Tr. 1916). Once, when one of the family's cats gave

birth, Mrs. McLaughlin made Defendant and his siblings drown the kittens in a bucket of water (Tr. 1917). The kids referred to the McLaughlin residence as "the House of Horrors" (Tr. 1618).

When Defendant was nine years old, he underwent a comprehensive mental evaluation (Tr. 1539-42; Def. Ex. E). Two doctors who participated in that evaluation—psychologist Anthony Udziela and pediatrician Pasquale Accardo—testified for Defendant during the penalty phase (Tr. 1536-67; Def. Ex. E).[1]

Dr. Udziela testified that he looked into Defendant's background as part of his psychological evaluation (Tr. 1542-49). He learned that Defendant's biological mother was a prostitute (Tr. 1545). For the first three years of his life, Defendant was reportedly "unprotected from the hazards of that sort of environment" (Tr. 1545). Defendant's birth parents relinquished custody of him when he was three; he bounced between different foster homes until the McLaughlins adopted him two years later (Tr. 1545-46). Defendant struggled in school, both academically and behaviorally (Tr. 1547-48). Defendant's full-scale IQ tested at 82, in the low/average range, but his verbal intelligence score

[1] Dr. Accardo was unable to testify in person, so his videotaped deposition was played for the jury at trial (Tr. 1569; Def. Ex. E).

was 74, suggesting that Defendant suffered from a language disorder (Tr. 1550-52).

Based on his observations of Defendant and the psychological tests he conducted. Dr. Udziela concluded that Defendant had significant issues with attachment, anxiety, and mistrust that were associated with the significant neglect he suffered during the first five years of his life (Tr. 1549-50, 1554). Dr. Udziela added that, in addition to the language disorder, Defendant suffered from attention-deficit disorder with hyperactivity ("ADHD") (Tr. 1554). Dr. Udziela testified that Defendant's childhood problems "markedly affected his development and had a major impact on him resulting in an adjustment disorder with depressed features" (Tr. 1554).

Dr. Accardo conducted a neurodevelopmental, rather than psychological, assessment of Defendant, focusing on the physical factors involved in Defendant's problems (Def. Ex. E). To that end, Dr. Accardo conducted a battery of neurological tests (Def. Ex. E). The tests revealed several signs of brain impairment—Defendant's language skills, "common sense monitoring," and cognitive ability were all deficient (Def. Ex. E). Like Dr. Udziela, Dr. Accardo determined that Defendant had ADHD (Def. Ex. E). Dr. Accardo testified that Defendant's ADHD and impulsivity were "neurologically based" (Def. Ex. E). Dr. Accardo also noticed signs of depression—when he asked

nine-year-old Defendant what he wanted to be when he grew up, Defendant answered that he "wanted to be dead" (Def. Ex. E).

Dr. Accardo concluded that Defendant suffered from some type of brain damage, but acknowledged that he could not determine what had been the cause (Def. Ex. E). He noted that Defendant's parents attributed Defendant's behavioral problems to "a longstanding fear of being left and a persistent lack of a sense of security"—an assessment that Dr. Accardo believed was consistent with the tests his team had conducted (Def. Ex. E). Dr. Accardo testified that although Defendant is capable of "making right choices," the fact that he "has cognitive limitations, language limitations, attentional limitations, and a lot of baggage from a horrible childhood" had an impact on his ability to make decisions (Def. Ex. E).

Dr. Sripatt Kulkamthorn was Defendant's treating physician in 2002 and 2003 (Tr. 1655-56, 1661-63). He testified that Defendant struggled with depression and anxiety and that he prescribed Paxil to help Defendant overcome the depression (Tr. 1657-59). Dr. Kulkamthorn said that he gave Defendant some Paxil samples whenever he had an office visit, but that Defendant may have had a hard time filling the prescription because he didn't have medical insurance (Tr. 1659-60).

Finally, Dr. Mark Cunningham, an expert in clinical and forensic psychology, testified on Defendant's behalf (Tr. 1677-1904). Dr. Cunningham conducted a thorough examination of Defendant and Defendant's history, based on interviews with Defendant himself, members of Defendant's biological and adoptive families, and an extensive review of Defendant's records, including medical, academic, mental-health, and prison records (Tr. 1689-91). Dr. Cunningham's focus was on the impact of the events and factors in Defendant's life on the way Defendant turned out as an adult (Tr. 1692). Dr. Cunningham explained that even though Defendant had a "choice" in whether he killed Victim, his ability to make good or bad choices was affected by the various "risk" and "protective" factors throughout his life (Tr. 1693-1701).

Dr. Cunningham testified that Defendant's life was filled with "risk" factors that impaired his ability to make positive choices (Tr. 1703-1823). He suggested that Defendant's troubles began before he was born—Defendant's biological mother was battered and abused while she was pregnant, and she also drank alcohol and used marijuana while she was pregnant with Defendant (Tr. 1704-05, 1732-34, 1776). Dr. Cunningham opined that Defendant's prenatal exposure to alcohol and drugs may have been a factor leading to his neurological impairment (Tr. 1733-35). In addition, Defendant had a genetic

predisposition for substance abuse and psychological disorders (Tr. 1758-64, 1767-68).

Dr. Cunningham spent a great deal of time discussing Defendant's troubled childhood (Tr. 1707-17, 1749-1801). He described the numerous instances of emotional neglect and abuse that Defendant suffered at the hands of his parents. Defendant routinely witnessed his biological father beating his biological mother (Tr. 1756-57, 1778-79). Defendant's biological and adoptive parents physically abused him (Tr. 1780-81). Defendant's parents also neglected him; they were unaffectionate and impatient, and they didn't give Defendant enough to eat (Tr. 1782-84, 1791-92).

Dr. Cunningham explained that the abuse and neglect Defendant suffered in his childhood did more than create bad memories—they actually affected the chemical architecture of his developing brain (Tr. 1757). He discussed the neurodevelopmental problems that plagued Defendant (Tr. 1743-54). Defendant had a low IQ, had extreme difficulty with language, struggled with visual-spatial cognition, and exhibited ADHD (Tr. 1746-50). Dr. Cunningham highlighted portions of Defendant's school records to demonstrate Defendant's longstanding developmental problems (Tr. 1730, 1750-56, 1795-99). One record in particular, a report from Defendant's elementary-school counselor, stated, "I would evaluate [Defendant's] psychological problems as being extremely serious. I

have worked as an elementary school counselor for nine years in three different schools, and I had had to deal with some very serious cases. [Defendant's] is the most serious of all" (Tr. 1730).

As an adult, Defendant displayed signs of numerous psychological disorders, including major depression, antisocial personality disorder, borderline personality disorder, ADHD, and possibly bipolar disorder (Tr. 1806-14). Dr. Cunningham testified that "these are not conditions that are likely to have arisen after [Defendant's] arrest, particularly given the psychiatric history he has of affective disorders" (Tr. 1814). He added that "the antisocial aspects of [Defendant's] personality also have a chronic component to them," and thus "these are disorders that there is good reason to believe have a continuing presence across his adulthood" (Tr. 1814).

Dr. Cunningham described Defendant's history of romantic relationships as dysfunctional (Tr. 1804-05). He suggested that Defendant perceived Victim's decision to break up with him as abandonment, and, because of Defendant's disruptive attachment history, Defendant was inclined to react in a "horrifically unbalanced sort of way" (Tr. 1820-21).

In contrast to the numerous "risk factors" in Defendant's background, Dr. Cunningham found that Defendant had no "protective factors" in his life (Tr.

1720-23). Dr. Cunningham pointed out that Defendant did not develop any close bonds with friends or adults as a child (Tr. 1722). And he noted that even though Defendant's school tried various interventions with him, they did not begin until Defendant was 7 or 8, and thus were insufficient to "interrupt the very grave problems" that Defendant had (Tr. 1722-23).

Dr Cunningham summarized his testimony as follows:

> [A]cknowledging that this is a simplification of many complex issues that I've described, that there are genetic predispositions that interacted with this ADHD, neuro-behavioral disinhibition, kind of brake failure problem, interacting with disrupted attachment and developmental disorders and a history of abuse and neglect. He observed family violence and his own psychological disorders in childhood and continuing into adulthood, and his abuse of alcohol, those result in somebody who is fragile and reactive and needy and alcoholic, in an episodic alcohol consumption sort of way, who then is in a very volatile, unstable relationship and perceives that he has been abandoned in that relationship, and you get to this offense.

(Tr. 1822-23).

At the conclusion of the penalty phase, the trial court submitted statutory aggravators based on whether the crime involved depravity of mind, whether the

murder was committed while Defendant was engaged in the perpetration of forcible rape, whether Victim was killed because she was a potential witness in Defendant's burglary prosecution, and whether Victim was killed because she was a potential witness in an order-of-protection investigation (L.F. 856-57).

After deliberating, the jurors were unable to unanimously agree on punishment (Tr. 1999-2000; L.F. 865-66). The jury did unanimously find beyond a reasonable doubt that the killing involved depravity of mind through excessive and repeated acts of violence, and did not unanimously find that there were facts and circumstances in mitigation sufficient to outweigh the facts and circumstances in aggravation (Tr. 2000; L.F. 865-66).

Subsequently, the trial court sentenced Defendant to death for first-degree murder and to consecutive terms of life imprisonment for ACA and forcible rape (Tr. 2005; L.F. 17, 909-12, 914-15).

**Post-conviction proceedings**

After this Court affirmed Defendant's convictions on direct appeal, Defendant filed a Rule 29.15 post-conviction motion, which was thereafter amended by counsel (PCR L.F. 1, 5-10, 28-147). In his amended motion, Defendant raised, *inter alia*, the following ten claims:

(1) Counsel were ineffective for failing to call a neuropsychologist to testify during the penalty phase that Defendant is brain damaged (PCR L.F. 30-36, 103-10);

(2) Counsel were ineffective for failing to call a DNA expert in the guilt phase to establish a probability that Billy McLaughlin, Defendant's brother, contributed to the DNA evidence and to challenge the State's DNA-expert testimony (PCR L.F. 36-40, 110-14);

(3) Counsel were ineffective for failing to adduce evidence in the guilt phase regarding statements made by Billy McLaughlin that he had had sex with Victim's body on the night of the murder (PCR L.F. 40-47, 114-18);

(4) Counsel were ineffective for failing to adduce evidence in the penalty phase relating to Billy's statements about having sex with Victim's body and relating to DNA evidence establishing a probability that Billy's DNA was present in the sample found on Victim (PCR L.F. 47-54; 118-25);

(5) Counsel were ineffective for failing to request during the penalty phase that the jury be instructed on statutory mitigating factors (PCR L.F. 54-58, 125-26);

(6) Counsel were ineffective for failing to call a psychiatrist to testify during the penalty phase (PCR L.F. 58-66, 126-32);

(7) The trial judge improperly instructed the jury during the penalty phase not to consider Defendant's records for the truth of the matter asserted, and counsel were ineffective for failing to object to this instruction (PCR L.F. 66-87, 132);

(8) Counsel were ineffective for failing to offer Defendant's jail records, school records, and mental-health hospital records in evidence during the penalty phase (PCR L.F. 87-92, 132-33);

(9) Counsel were ineffective for failing to object to portions of the prosecutor's penalty-phase closing argument, in which the prosecutor compared the jurors to soldiers and asked them to "send a message" (PCR L.F. 97-98, 133-34);

(10) Defendant's death sentence is unconstitutional because the death penalty is "unusual" in that Missouri's statutory scheme fails to effectively narrow the class of death-eligible murderers and places too much discretion in the hands of prosecutors (PCR L.F. 99-103, 134-43).

Defendant's two claims relating to the guilt phase alleged only that counsel's ineffectiveness adversely affected the forcible-rape conviction (PCR L.F. 40, 44-47). Defendant did not allege, and does not argue in this appeal, that the jury's

verdicts finding him guilty of first-degree murder and armed criminal action should be reversed.

After filing his amended motion, Defendant filed a motion to disqualify Judge Goldman from the post-conviction proceedings (PCR L.F. 149-54). Defendant argued that because Judge Goldman had imposed the death penalty after the jury was unable to unanimously agree on a punishment, the judge became a "finder of fact" and thus had "prejudged facts and issues in this case and can no longer be a fair and impartial judge" (PCR L.F. 149-51). Judge Goldman heard arguments and denied Defendant's motion to disqualify (PCR L.F. 2, 159).

The motion court granted Defendant's request for an evidentiary hearing as to claims 8A, 8B, 8C, 8D, and 8F—those claims that alleged that counsel were ineffective for failing to call a neuropsychologist and a psychiatrist in the penalty phase and for failing to present evidence in the guilt and penalty phases relating to the possibility that Billy McLaughlin participated in Victim's rape (PCR L.F. 159). The court also granted Defendant leave to supplement the pleadings with respect to claim 8J—the claim alleging that Missouri's death-penalty scheme is unconstitutional (PCR L.F. 159).

At the evidentiary hearing, Defendant presented testimony from nine witnesses, including a DNA analyst, a neuropsychologist, a psychiatrist, and Defendant's two trial attorneys, Robert Steele and David Kenyon (PCR Tr. 2-603). They also offered volumes of Defendant's records (Mov. PCR Ex. Q-X, Z, AA-DD, FF-NN, PP-UU, XX-ZZ, FFF-GGG). The State called one witness—Alan Derickson, a DNA analyst from the St. Louis County Police crime lab (PCR Tr. 604-719).

Subsequently, the motion court issued detailed findings of fact and conclusions of law denying each of Defendant's post-conviction claims (PCR L.F. 172-89).

## STANDARD OF REVIEW

This Court reviews the motion court's denial of post-conviction relief to determine whether the motion court's findings of fact and conclusions of law are "clearly erroneous." *Ross v. State*, 335 S.W.3d 479, 480 (Mo. banc 2011); Rule 29.15(k).[2] "The motion court's findings and conclusions are clearly erroneous only if, after reviewing the entire record, the Court is left with a definite and firm impression that a mistake was made." *Ross*, 335 S.W.3d at 480. The motion court is in a superior position to determine the credibility of witnesses; thus, this Court defers to the motion court's factual findings and credibility determinations. *Zink v. State*, 278 S.W.3d 170, 178 (Mo. banc 2009). Further, this Court will affirm the motion court's judgment for any reason that is supported by the record, even if it differs from the rationale given by the motion court. *State v. Bradley*, 811 S.W.2d 379, 383 (Mo. banc 1991) (observing that even if the motion court's stated reason for its ruling is incorrect, "the judgment should be affirmed if the action is sustainable on other grounds").

A post-conviction movant is entitled to an evidentiary hearing only if: (1) he has pleaded facts, not conclusions, warranting relief; (2) the facts alleged are

[2] Rule citations herein are to Missouri Court Rules (2011) unless otherwise noted.

not refuted by the record; and (3) the matters complained of resulted in prejudice to the movant. *Webb v. State*, 334 S.W.3d 126, 128 (Mo. banc 2011).

Finally, to prevail on a claim of ineffective assistance of counsel, a post-conviction movant must prove that counsel's performance was deficient and that movant was thereby prejudiced. *E.g. Goodwin v. State*, 191 S.W.3d 20, 25 (Mo. banc 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

The "performance prong" requires the movant to show that counsel's representation fell below an objective standard of reasonableness. *Gill v. State*, 300 S.W.3d 225, 232 (Mo. banc 2009). "This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment." *Goodwin*, 191 S.W.3d at 25 (quoting *Strickland*, 466 U.S. at 687). There is a "strong presumption" that trial counsel was effective and a movant "bears a heavy burden of overcoming that presumption by a preponderance of evidence." *Goodwin*, 191 S.W.3d at 25 (quoting *State v. Tokar*, 918 S.W.2d 753, 761 (Mo. banc 1996)). As the United States Supreme Court recently reiterated, "[s]urmounting *Strickland*'s high bar is never an easy task," and the *Strickland* standard must be applied with "scrupulous care." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1408 (2011).

To satisfy the "prejudice prong," the movant must show a reasonable probability that, but for counsel's poor performance, the outcome of the

proceeding would have been different." *Johnson v. State*, 333 S.W.3d 459, 463 (Mo. banc 2011). In a death-penalty case, a movant may prove prejudice if he shows a reasonable probability that, but for counsel's deficient performance, the jury would have recommended life imprisonment rather than death. *Gill*, 300 S.W.3d at 232.

## ARGUMENT

### I. Defendant's motion to disqualify Judge Goldman was properly denied.

In his first point, Defendant contends that "Judge Goldman erred in denying [Defendant's] motion to disqualify him from hearing the postconviction action" because "Judge Goldman prejudged the issues and worked on his findings and conclusions denying relief during the hearing and before hearing all evidence." App. Br. at 47-51.

This claim is meritless. Nothing in the record suggests that Judge Goldman was anything less than scrupulously fair and impartial. The motion court did not abuse its discretion in denying Defendant's motion to disqualify.

**Additional facts**

After filing his amended motion, Defendant filed a "Motion to Disqualify" Judge Goldman from presiding over the post-conviction proceedings (PCR L.F. 2, 149-54). In his motion, Defendant argued that because his sentencing jury had been unable to decide on punishment and Judge Goldman had ultimately decided to sentence Defendant to death, the judge "has prejudged facts and issues in this case and can no longer be a fair and impartial

judge as to the Rule 29.15 proceedings" (PCR L.F. 149-51). Defendant asserted that Judge Goldman's continued involvement in the case as the post-conviction judge would create an appearance of impropriety and bias against Defendant (PCR L.F. 151-52).

The motion court denied Defendant's motion to disqualify and proceeded with the post-conviction case (PCR L.F. 2, 159).

**Discussion**

Generally, it is beneficial for the judge who presided at trial to conduct the post-conviction case. *Edwards v. State*, 200 S.W.3d 500, 521 (Mo. banc 2006). Nevertheless, principles of due process and fundamental fairness may require disqualification where the judge is biased and prejudiced against the movant. *See id*.; *see also Haynes v. State*, 937 S.W.2d 199, 202 (Mo. banc 1999). A "disqualifying bias or prejudice must be one emanating from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learns from participation in the case." *Haynes*, 937 S.W.2d at 202. "[T]here is a strong presumption that judges are impartial and can discern their own bias or prejudice." *State v. Tivis*, 948 S.W.2d 690, 699 (Mo. App. W.D. 1997). Thus, absent an abuse of discretion, this Court will defer to the trial

court's determination of whether disqualification was required. *Edwards*, 200 S.W.3d at 521.

A judge is not subject to disqualification from a death-penalty post-conviction case simply because he or she presided over the trial and, during sentencing, expressed a belief that the facts warranted the death penalty. *See State v. Simmons*, 955 S.W.2d 752, 770 (Mo. banc 1997). In *Simmons*, the defendant argued that the trial judge should have been disqualified from presiding over the post-conviction case because comments the judge made in his sentencing order revealed bias. *Id*. In particular, the defendant highlighted the judge's comments that he "agree[d] wholeheartedly" with the death sentence, that the murder was "particularly brutal and repulsive," and that the defendant's eventual execution, "when it finally comes after the wheels of justice have ground slowly and exceedingly fine, will be merciful in comparison." *Id*. This Court held that it could "see no bias revealed," noting that "[t]he comments properly express the judge's reasons for agreeing with the jury's recommendation of the death sentence for both murders." *Id*.

In this case, Defendant fails to identify or allege any extrajudicial source of bias or prejudice giving rise to an appearance of impropriety. App. Br. at 47-51; (PCR L.F. 149-54). His motion to disqualify was premised exclusively on Judge Goldman's judicial acts in instructing the jury on evidentiary matters and

in making the requisite determinations to impose a death sentence (PCR L.F. 149-54). In his brief, Defendant expands his argument to include a hodgepodge of remarks Judge Goldman made during the evidentiary hearing that, according to Defendant, create a situation where the judge's "impartiality might reasonably be questioned." App. Br. at 47-53.

But Defendant's argument applies too broad a standard for disqualification. Defendant relies on *State v. Smulls*, 935 S.W.2d 9, 26-27 (Mo. banc 1996), in which this Court held that a judge who made racist remarks both during trial and off-the-record erred in refusing to disqualify himself. In support of its holding, the Court referred to Rule 2, Canon 3D,[3] which stated that a judge should recuse where "the judge's impartiality might reasonably be questioned." *Smulls*, 935 S.W.2d at 26. But nothing in *Smulls* suggests that disqualification is appropriate absent an extrajudicial source of bias or prejudice; the bias at issue in *Smulls*—racial animosity—was clearly extrajudicial in nature.

As this Court recently reaffirmed, a defendant must allege an extrajudicial source of bias or prejudice to prevail on a claim that the post-conviction judge erred in failing to disqualify himself or herself from the case. *Burgess v. State*,

[3] This portion of the Code of Judicial Conduct is now designated as Rule 2.03, Canon 3E.

No. SC91571, slip op. at 6 n.5 (Mo. banc July 19, 2011). Finding error anytime a judge failed to withdraw simply because his or her impartiality "might reasonably be questioned" would result in an "unworkable" standard, this Court reasoned, because the "standard, without factual context, is subjective, leaving appellate courts at liberty to find a disqualifying bias from any hostile word, a maximum prison sentence, or even an adverse discretionary ruling." *Id*. (quoting *Haynes*, 937 S.W.2d at 204). Defendant's failure to allege an extrajudicial source of bias or prejudice dooms his claim that Judge Goldman abused his discretion for denying Defendant's motion to disqualify. *See Burgess*, No. SC91571, slip op. at 6 n.5.

Defendant contends that Judge Goldman's bias was apparent because (1) he questioned witnesses "like an advocate," (2) he announced that he did not need to hear all the State's proposed evidence, and (3) he stated at the close of the evidence that he had been working on his findings throughout the proceeding and was ready to make proposed findings right away. App. Br. at 48, 50-51. As explained above, stray remarks by the motion court will not support a motion to disqualify absent an allegation of an extrajudicial source of bias. *See Burgess*, No. SC91571, slip op. at 6 n.5. Moreover, none of the remarks made or actions taken by Judge Goldman during the evidentiary hearing suggest that the judge

held any bias against Defendant, had prejudged the issues, or based his ruling on anything other than the records and evidence presented.

First, there was nothing improper about the court posing questions to witnesses during the evidentiary hearing. "It is the judge's duty to put such questions to the witnesses as seem to him desirable to elicit the truth more fully." *State v. James*, 321 S.W.2d 698, 704 (Mo. 1959). While the court does, of course, have a duty to remain impartial, that duty "does not bar a court from propounding questions to witnesses within the limits of propriety." *In re Marriage of Piercy*, 774 S.W.2d 539, 541 (Mo. App. S.D. 1989). In this case, when Judge Goldman asked questions of the witnesses, the questions were directed at obtaining information to help the judge better understand the evidence—particularly scientific evidence relating to DNA and diagnoses of mental illness (PCR Tr. 163, 289-93, 390-93, 399-400). Had Judge Goldman already made up his mind, he would not have bothered to ask these questions. The fact that he followed-up with the witnesses on particular points of testimony illustrates that he remained open-minded and was focused on the evidence.

Second, Judge Goldman's decision not to have Alan Derickson, the State's DNA expert, present his PowerPoint discussion of DNA terminology did not suggest that the judge was improperly biased against Defendant. By the time Derickson took the stand at the evidentiary hearing, Defendant had already

rested his case (PCR Tr. 603, 606). It was Defendant's burden to prove his claims, and if the motion court believed Defendant had failed to meet that burden, it could legitimately deny relief without hearing *any* of the State's evidence. *See Cole v. State*, 152 S.W.3d 267, 268 (Mo. banc 2004) (noting that the post-conviction movant "bears the burden of proving grounds for relief by a preponderance of evidence"). Further, the PowerPoint presentation that Judge Goldman declined to review contained basic information relating to DNA analysis that the judge had heard twice already, once from Derickson himself at trial and again at the evidentiary hearing from Dr. Stetler, Defendant's DNA expert (Tr. 1297-1312; PCR Tr. 53-62, 606). As Judge Goldman said, "I'm really familiar with all that from before" (PCR Tr. 606). A trial judge has wide discretion in excluding cumulative evidence. *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 276 (Mo. banc 1984). One cannot conclude that Judge Goldman had improperly prejudged the issues simply because he declined to hear testimony explaining the DNA-testing process for the third time.

Finally, Judge Goldman's comment at the conclusion of the evidentiary hearing that he had "worked on these findings throughout this proceeding" does not indicate that the judge had a disqualifying bias or prejudice. Defendant interprets the judge's remark to mean that he "prejudged the issues and did not

consider all of the evidence before deciding to rule against [Defendant].” App. Br. at 50. But that interpretation does not follow from the comment itself. A motion-court judge could “work on” findings by making notes on the witnesses, researching pertinent legal issues, and identifying undisputed facts (such as procedural history). Such preliminary work does not imply that the judge decided the issues before the case was concluded. Indeed, Judge Goldman also said, “[F]rom the testimony of this witness today, I understand well enough now” (PCR Tr. 720). It is apparent that the judge carefully listened to and considered all the evidence in reaching his final decision.

Defendant has failed to overcome the strong presumption that Judge Goldman was fair and impartial. The judge did not abuse his discretion in denying Defendant’s motion to disqualify.

Point I should be denied.

## II. The motion court did not clearly err in denying Defendant's claim that counsel were ineffective for failing to call a psychiatrist to testify during the penalty phase about Defendant's mental-health problems.

In his second point, Defendant contends that trial counsel were ineffective for failing to consult with a "qualified, competent psychiatrist" and have that psychiatrist testify during the penalty phase about Defendant's mental-health problems. App. Br. at 54-70. He acknowledges that counsel had retained psychiatrist Keith Caruso, but claims that counsel were ineffective for failing to investigate Dr. Caruso's background adequately so that they would have discovered, in advance of trial, impeachment material that ultimately led counsel to decide not to present Dr. Caruso's testimony. App. Br. at 55, 65.

This is not the claim Defendant presented in his amended motion. Although Defendant complained in his motion that counsel were ineffective for failing to call a psychiatrist during the penalty phase, he never even mentioned that counsel had retained Dr. Caruso, let alone alleged that counsel were ineffective for failing to search Dr. Caruso's background for negative information. Moreover, the motion court's findings and conclusions on the claim that Defendant did present were not clearly erroneous.

## Post-conviction claim

In his amended motion, Defendant claimed that counsel were ineffective for failing to call a forensic psychiatrist, such as Dr. Stephen Peterson, to testify during the penalty phase that Defendant's mental-health problems caused Defendant to commit the murder while under an extreme mental or emotional disturbance and substantially impaired Defendant's ability to appreciate the criminality of his conduct and conform his conduct to the requirements of the law (PCR L.F. 58-59, 126-31). He alleged that counsel did not adduce any evidence at trial to support the submission of these statutory mitigators, but that testimony from a forensic psychiatrist would have provided this evidence (PCR L.F. 62-65). Defendant alleged that a forensic psychiatrist's testimony would also have supported non-statutory mitigators, including Defendant's struggles with depression, learning disabilities, and low IQ (PCR L.F. 65). Defendant alleged that, had a forensic psychiatrist testified, there is a reasonable probability that Defendant would not have been sentenced to death (PCR L.F. 65-66).

## Additional facts

At the beginning of the penalty phase, defense counsel told the jury that it would "hear from a variety of psychiatrists and psychologists who have evaluated [Defendant]" (Tr. 1481). Counsel went on to outline the expected testimony from Drs. Accardo, Udziela, and Cunningham (Tr. 1483-88). And he

also said that the jury would hear from a psychiatrist named Dr. Keith Caruso (Tr. 1487). Counsel described Dr. Caruso's review of Defendant's records and his interviews with Defendant and Defendant's family (Tr. 1487). He said that Dr. Caruso would tell the jury that Defendant was under the influence of an extreme emotional disturbance and, based on his mental illnesses, Defendant lacked the ability to appreciate the criminality of his conduct or to conform to the requirements of the law (Tr. 1487-88). Dr. Caruso believed that Defendant was suffering from a depressive episode of bipolar disorder at the time the murder was committed (Tr. 1487-88). Counsel's description of Dr. Caruso's expected testimony was consistent with the reports Dr. Caruso had provided pre-trial (St. PCR Ex. 2, 3).

But defense counsel did not call Dr. Caruso to testify. After the defense rested its mitigation case, counsel David Kenyon stated, outside the presence of the jury, that he wanted to "put on the record what happened with respect to Dr. Caruso" (Tr. 1950-51). Mr. Kenyon explained that while the jury was still deliberating during the guilt phase, he received an email from Dr. Caruso informing him that, 17 years earlier, Caruso "ran into trouble in medical school" for altering data on a research project (Tr. 1951-52). Dr. Caruso stated that the data were never published, so no sanctions were imposed, but there was an investigation and the information was published in the federal register (Tr. 1951-

52). According to Dr. Caruso, “this has only come up three times in approximately 90 times on the stand,” but he wanted counsel to be prepared (Tr. 1952). Mr. Kenyon said that he read the email quickly and thought it was potentially problematic, but decided that they needed Dr. Caruso and would “just deal with the things” (Tr. 1952).

The next day, the jury returned its guilty verdicts, and Mr. Kenyon made his penalty-phase opening statement in which he mentioned Dr. Caruso (Tr. 1952). Mr. Kenyon said that he reviewed Dr. Caruso’s email more carefully that evening and became more concerned (Tr. 1952). He searched Dr. Caruso’s name using Google and found a report describing Dr. Caruso’s misconduct as a student (Tr. 1953). Mr. Kenyon discussed the issue with his co-counsel and his supervisor, and he ultimately decided that it “was probably best not to call [Dr. Caruso]” (Tr. 1954). Mr. Kenyon told the court that he did not believe he was ineffective in not calling Dr. Caruso, but thought it might have been ineffective for him to make the statements about Caruso in opening without having fully considered the impeachment information (Tr. 1954-55). Mr. Kenyon said he wanted to advise the prosecutor that, “to the extent they emphasize this in their closing arguments, they may do that at their peril, and it may increase the likelihood of the appellate court finding my statements in opening . . . had a prejudicial effect” (Tr. 1955).

The prosecutor did not emphasize in closing argument the defense's failure to call Dr. Caruso (Tr. 1958-67, 1988-95). In fact, the prosecutor did not mention Dr. Caruso at all and spent very little time discussing Defendant's mental problems, focusing instead on the brutality of the murder (Tr. 1958-67). Only after defense counsel argued that Defendant had been on medication for depression and bipolar disorder his whole life, and that Defendant's mental condition rendered him unable to deal with all the things that had been "building" on him, did the prosecutor question the strength of Defendant's mental-health evidence (Tr. 1986, 1988-89, 1993-94).

At the evidentiary hearing, counsel testified that they retained Dr. Caruso to examine Defendant and evaluate whether any mitigating evidence could be developed from Defendant's mental-health profile (PCR Tr. 552, 582, 584). Counsel explained that their mitigation specialist had seen Dr. Caruso give a presentation at a death-penalty-focused legal-education program and had been impressed by him (PCR Tr. 582-83). Counsel reviewed Dr. Caruso's CV and were aware that he was a licensed professional who had worked on a number of cases in other states, so they did no further investigation of Dr. Caruso's background (PCR Tr. 553-54, 584-85).

Mr. Kenyon repeated his account of receiving an email during trial regarding Dr. Caruso's ethical lapse in medical school and said that he

ultimately decided not to call Caruso because cross-examination on that subject could seriously damage Defendant's case (PCR Tr. 554-55, 585-88). He added, however, that even if he would have had Dr. Caruso testify, he would have chosen to submit the general mitigation instruction rather than an instruction on specific statutory mitigators (PCR Tr. 598-99).

Forensic psychiatrist Stephen Peterson also testified at the evidentiary hearing (PCR Tr. 325-538). Post-conviction counsel hired Dr. Peterson to evaluate Defendant's mental health (PCR Tr. 332-33). As part of his evaluation, Dr. Peterson interviewed Defendant, some of Defendant's family members, and reviewed thousands of pages of Defendant's records (PCR Tr. 335-404, 416, 421). Dr. Peterson determined that the developmental assessments that had already been done of Defendant were correct (PCR Tr. 422-23). Dr. Peterson concluded that, at the time of the crime, Defendant suffered from borderline intellectual functioning, specific learning disorder, ADHD, alcohol abuse, intermittent explosive disorder, and borderline and narcissistic personality features, which included marked impulsivity (PCR Tr. 434-36).

Dr. Peterson noted that Defendant had previously been diagnosed with bipolar disorder, but thought that diagnosis was probably inaccurate and had been made only to justify treating Defendant with medication (PCR Tr. 335-36). Dr. Peterson also found that the stories that had been told about the harsh

environment that Defendant purportedly suffered when with his adoptive parents were contradictory and, in some cases, probably not accurate (PCR Tr. 417-21). For example, he noted that the McLaughlins allegedly kept all their food locked away from the children, but found that there was actually only one locked cabinet and other food was available (PCR Tr. 418). Dr. Peterson also testified that Defendant's "functioning face-to-face" on some of the cognitive tests was "really subtle in terms of actual neurological evidence or neurological injury"—so subtle, in fact, that clinicians normally wouldn't notice the impairment unless Defendant was in distress (PCR Tr. 430).

**Motion court's findings and conclusions**

In its findings and conclusions, the motion court found that counsel had considered the potential usefulness of psychiatric testimony and had been prepared to call psychiatrist Keith Caruso to testify during the penalty phase (PCR L.F. 184). Counsel decided, however, not to call Dr. Caruso after learning at the last minute that Dr. Caruso had been involved in professional misconduct that could call his credibility into question (PCR L.F. 184). The court concluded that counsel's decision not to call their psychiatrist was reasonable as a matter of strategy (PCR Tr. 185).

The court further found that Defendant was not prejudiced by the absence of psychiatric testimony from Dr. Peterson, the psychiatrist that Defendant

retained for his post-conviction case (PCR L.F. 185). The court found that Dr. Peterson's testimony was consistent in all substantial respects with the other mental-health expert testimony presented during the penalty phase, and thus would have been cumulative (PCR L.F. 185). In particular, the court noted that Dr. Peterson's testimony about the impairment in Defendant's executive functioning and the effect of that impairment on Defendant's ability to make sound choices was "nearly identical" to Dr. Cunningham's testimony, "who relied on many if not all of the same records, documents, and diagnoses in reaching that conclusion" (PCR L.F. 185). The court concluded that counsel had presented sufficient mental-health testimony, and that any additional evidence would not have caused a different result (PCR L.F. 185).

## **Discussion**

### *A. The claim Defendant advances in this appeal differs from the claim he presented to the motion court.*

"In actions under Rule 29.15, any allegations or issues that are not raised in the Rule 29.15 motion are waived on appeal." *Johnson*, 333 S.W.3d at 471. "Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal." *Id*. The post-conviction rules do not permit appellate courts to entertain claims on appeal, even for "plain error," that were

not presented in the post-conviction motion. *Hoskins v. State*, 329 S.W.3d 695, 699 (Mo. banc 2010).

In his brief, Defendant contends that "counsel's ineffectiveness lay in not conducting an initial reasonable investigation [of Dr. Caruso] so that counsel then could make the strategic decision about what witnesses, especially experts, to call." App. Br. at 63, 65. He argues that counsel acted unreasonably in failing to conduct "even a cursory investigation into Dr. Caruso's background," which he claims "would have given counsel the information they needed to assess Caruso's credibility and persuasiveness as a witness." App. Br. at 65.

This is not the claim that Defendant raised in his amended motion. In his motion, Defendant alleged only that counsel was ineffective for failing to present psychiatric testimony (PCR L.F. 58-66, 126-31). Defendant did not mention Dr. Caruso at all, and certainly did not allege that counsel acted unreasonably in failing to search Dr. Caruso's background before retaining him (PCR L.F. 58-66, 126-31).

As a result, the motion court did not make any findings about the extent or reasonableness of counsel's investigation into Dr. Caruso's history. Instead, the court addressed the claims raised, and the court concluded, as explained below, that counsel made a reasonable strategic decision, based on the information they obtained, not to use Dr. Caruso at trial (PCR L.F. 184). The motion court cannot

have clearly erred in failing to grant relief based upon an allegation that was never presented. *Coates v. State*, 939 S.W.2d 912, 915 (Mo. banc 1997).

*B. Counsel made a reasonable strategic decision not to call their psychiatrist, Dr. Caruso, to testify.*

Defendant alleged in his amended motion that counsel were ineffective for failing to obtain and present psychiatric testimony from a forensic psychiatrist like Dr. Peterson (PCR L.F. 58-66, 126-132). He alleged that trial counsel would testify "that they had no trial strategy for failing to call a forensic psychiatrist at trial" (PCR L.F. 132). The motion court found these allegations unsupported by the evidence, which showed that counsel had planned to present psychiatric testimony thorough Dr. Caruso,[4] but ultimately chose not to call Dr. Caruso because of the last-minute discovery of impeaching information about Caruso (PCR Tr. 552-54, 582-88; PCR L.F. 184). The court thus concluded that counsel had a legitimate strategic reason not to present the psychiatric testimony (PCR L.F. 184).

These findings and conclusions were not clearly erroneous. When defense counsel believes that a witness's testimony would not unequivocally support his

[4] Dr. Peterson testified at the evidentiary hearing that his diagnosis and assessment was nearly identical to Dr. Caruso's (PCR Tr. 433).

client's position, it is a matter of trial strategy not to call him, and the failure to call him does not constitute ineffective assistance of counsel. *Winfield v. State*, 93 S.W.3d 732, 739 (Mo. banc 2002). Trial counsel Kenyon testified that he believed Defendant's case might have been seriously damaged had the State obtained the impeaching information about Dr. Caruso and cross-examined him with it (PCR Tr. 588). The motion court accepted counsel's explanation and found that his decision not to call Dr. Caruso was not unreasonable.

As noted above, Defendant has "refined" his claim on appeal—he now argues that "the ineffectiveness lay in not conducting an initial reasonable investigation so that counsel then could make the strategic decision" to call a psychiatrist other than Dr. Caruso. App. Br. at 65. For the reasons already explained, this Court must disregard Defendant's new argument—nowhere in his amended motion are any allegations that counsel's investigation into Dr. Caruso was insufficient or objectively unreasonable.

And even if Defendant had included such an allegation in his amended motion, it would fail because Defendant has not shown that counsel's investigation fell below any standard of objective reasonableness. In *Skaggs v. Parker*, 235 F.3d 261, 268 (6th Cir. 2000), the Court of Appeals, Sixth Circuit, identified the typical manner by which attorneys find experts—"through recommendations from colleagues and general familiarity within the legal

community." In this case, counsel based their decision to retain Dr. Caruso on a recommendation from their mitigation specialist, who had been impressed by a presentation she had seen of Dr. Caruso's (PCR Tr. 582-83). They reviewed Dr. Caruso's CV, were aware that he was a "licensed professional," and knew that Dr. Caruso had worked on a number of other cases in other states (PCR Tr. 554, 584). As counsel Robert Steele put it, "I had no reason to think there was anything wrong with Dr. Caruso" (PCR Tr. 554).

Thus, contrary to Defendant's assertion on appeal, counsel did conduct at least a "cursory" investigation into Dr. Caruso's background. They were familiar with his qualifications and knew that he was a frequently relied-upon expert in cases like theirs. They did not know that, nearly two decades earlier, Dr. Caruso committed an ethical violation while in medical school (*See* Tr. 1951-52). But counsel had no reason to think they needed to dig more deeply into Dr. Caruso's academic record in search of bad acts that did not result in criminal charges, official sanctions, or a barrier to licensure. The reasonableness of counsel's actions must be weighed in light of the information they had available to them at the time, without the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. Counsel is not ineffective for declining to expend the limited resources available to seek out information or develop an argument that he or she has no reason to believe will be useful or effective. *See State v. Brown*, 902 S.W.2d 278, 299

(Mo. banc 1995). Defendant's insistence that "the most minimal search would have given counsel the information they needed" is skewed by hindsight; the relative ease of locating the damaging information is obvious now only because the information has already been discovered.

The cases upon which Defendant relies are distinguishable. First, he cites *Wiggins v. Smith*, 539 U.S. 510 (2003). App. Br. at 61. In *Wiggins*, counsel conducted virtually no investigation into mitigation, despite having information suggesting the presence of mitigating facts in the defendant's personal history. *Wiggins*, 539 U.S. at 523-28. This case is completely different. Here, counsel conducted an extensive investigation, including retaining a psychiatrist to evaluate Defendant's mental health. They simply did not research their *expert*'s life history, as they had no information suggesting there might be a problem.

Defendant also cites *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010). In *English*, defense counsel decided at the last minute not to call an alibi witness—a woman who had been romantically involved with both the defendant and the victim—because he learned that the witness had allegedly tampered with other witnesses in the case and may have fabricated her story. *Id*. at 727. The Court of Appeals held that counsel was not ineffective for deciding not to call the witness, but was ineffective for failing to investigate and discover these deficiencies in advance of trial. *Id*. at 727-29. The court noted that counsel could

have discovered the tampering issues simply by interviewing the other witnesses in the case, which counsel should have done anyway. *Id*. at 728-29. In addition, the court emphasized that counsel had no reason to think that an investigation into the witness's story was unnecessary. *Id*. at 729.

In this case, by contrast, counsel did have reason to think that investigation into Dr. Caruso's background was unnecessary. Unlike the alibi witness in *English*, who had ended a relationship with the victim and taken up with the defendant, and thus had an inherent credibility problem, Dr. Caruso was a licensed psychiatrist who was giving talks at death-penalty-law seminars and testifying in death-penalty cases across multiple jurisdictions. Counsel had no reason to doubt Dr. Caruso's qualifications.

*C. Defendant was not prejudiced by counsel's decision not to present testimony from a forensic psychiatrist.*

Not only has Defendant failed to prove that counsel's performance was deficient, he failed to prove that he was prejudiced by counsel's decision not to present psychiatric testimony from a forensic psychiatrist like Dr. Peterson. A defendant cannot be prejudiced by counsel's failure to present evidence that "would barely have altered the sentencing profile" presented to the jury. *Strickland*, 466 U.S. at 699-700. Counsel's decision not to adduce cumulative

evidence, including evidence relating to mental health, is not ineffective. *Goodwin*, 191 S.W.3d at 37-38.

The motion court found that the testimony Dr. Peterson would have offered was consistent, in all substantial respects, to testimony the jury heard through the mental-health experts who did testify (PCR L.F. 185). This finding was not clearly erroneous. Through Drs. Accardo, Udziela, Kulkamthorn, and Cunningham, Defendant presented extensive evidence outlining his mental-health problems, including cognitive impairments, impulsivity, low IQ, learning disorders, ADHD, borderline personality disorder, antisocial personality disorder, depression, and bipolar disorder (Tr. 1949-54, 1657, 1735-37, 1749-54, 1806-10; Def. Ex. E). Not all the medical information was from Defendant's childhood—Dr. Cunningham discussed Defendant's development over the course of his life and testified that the mental-health problems that Defendant continued to display even after the murder likely afflicted him before the crime as well (Tr. 1814).

In each of the cases relied upon by Defendant, defense counsel's failure to call psychiatrists to testify about the defendants' mental health left the juries without any mitigating mental-health evidence at all. *See Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988) (counsel promised to call a psychiatrist and psychologist to testify that the defendant could not appreciate the wrongfulness

of his conduct, but did not produce such evidence and instead called only lay witnesses); *Stevens v. McBride*, 489 F.3d 883, 888-89, 896-97 (7th Cir. 2007) (the only psychiatric testimony defense counsel presented at the penalty phase was from a "quack" who believed mental illness did not exist and whose therapeutic methods involved putting 18-year-olds on his lap and sticking a bottle in their mouths); *Combs v. Coyle*, 205 F.3d 269, 287-88 (6th Cir. 2000) (the only mental-health expert presented during the penalty phase provided testimony adverse to the defense).

In Defendant's case, on the other hand, the experts who testified on Defendant's behalf provided a wealth of mitigating mental-health evidence. Even if Dr. Peterson's testimony could be considered marginally more persuasive, it was largely identical to the mental-health evidence the jury already heard, and counsel cannot be deemed ineffective for failing to present it. *See Goodwin*, 191 S.W.3d at 37-38; *see also Gardner v. Ozmint*, 511 F.3d 420, 428 (4th Cir. 2007) (finding no prejudice in counsel's decision not to call additional experts whose testimony would have been "virtually the same" as the evidence offered by counsel at trial).

Finally, Defendant has not shown that Defendant had a viable alternative to Dr. Caruso. His claim of ineffectiveness is premised on the proposition that, had counsel discovered the problems with Dr. Caruso sufficiently in advance of

trial, they would have retained someone like Dr. Peterson instead. But many of the details in Dr. Peterson's testimony could have been damaging to Defendant's overall mitigation theory. For example, Dr. Peterson believed Defendant was wrongly diagnosed as bipolar—an affliction that defense counsel highlighted in closing argument (Tr. 1986; PCR Tr. 335-36). He also testified that some of the more vivid aspects of the abuse and neglect that occurred during Defendant's childhood, such as Defendant's adoptive parents reportedly locking away all the food in the house, may have been exaggerated (PCR Tr. 418-19). And he indicated that evidence of Defendant's neurological injury was so subtle that it was not readily noticeable (PCR Tr. 430). "An attorney is not ineffective for further investigate or call a witness to testify . . . who cannot be counted on to give testimony favorable to his client." *Clayton v. State*, 63 S.W.3d 201, 208 (Mo. banc 2001). Defendant cannot have been prejudiced by counsel's failure to investigate and reject Dr. Caruso if the alternative also would have been damaging.

Point II should be denied.

## III. The motion court did not clearly err in denying Defendant's claim that trial counsel were ineffective for failing to call a neuropsychologist to testify in the penalty phase that Defendant had brain damage.

In his third point, Defendant argues that trial counsel were ineffective for failing to retain a neuropsychologist, such as Dr. Robert Heilbronner, to conduct a neuropsychological evaluation on Defendant and then testify during the penalty phase about Defendant's neuropsychological impairments. App. Br. at 71-81.

This claim should be rejected. Counsel reasonably relied on the advice of the mental-health experts they had already retained that no further experts were needed. Moreover, Defendant was not prejudiced by counsel's decision because evidence of his neuropsychological impairments was presented to the jury through other witnesses.

**Post-conviction claim**

In his post-conviction motion, Defendant claimed that trial counsel were ineffective for failing to investigate and call a neuropsychologist to testify in the penalty phase that Defendant is brain damaged (PCR L.F. 30-36, 103-10). He alleged that testimony from a neuropsychologist, such as Dr. Heilbronner, would

have provided mitigating evidence about the extent of Defendant's brain damage that the jury heard from no other source (PCR L.F. 35). Defendant alleged that trial counsel would testify that they overlooked and failed to consider calling a neuropsychologist and had no strategy reason for failing to do so (PCR L.F. 108-09).

**Additional facts**

Defendant called neuropsychologist Robert Heilbronner to testify at the evidentiary hearing (PCR Tr. 219-323). He described neuropsychology as a subspecialty of clinical psychology that focuses on the relationship between brain dysfunction and its impact on a person's thinking skills, behavior, and personality (PCR Tr. 223). A neuropsychological examination is a comprehensive, objective assessment of various aspects of a person's thinking skills (PCR Tr. 225, 258).

After being retained by post-conviction counsel, Dr. Heilbronner performed a neuropsychological examination on Defendant (PCR Tr. 227). As part of his assessment, Dr. Heilbronner reviewed school, medical, and jail records pertaining to Defendant, as well as portions of trial testimony from Drs. Cunningham, Accardo, Udziela, and Kulkamthorn (PCR Tr. 227). He interviewed Defendant for an hour or so, then administered a variety of neuropsychological tests (PCR Tr. 229).

On an intelligence test, Defendant showed a borderline to low-average range of intellectual functioning, with a full-scale IQ of 79, a verbal IQ of 75, and a non-verbal IQ of 89 (PCR Tr. 234-35). According to Dr. Heilbronner, Defendant did pretty well in the areas of learning, memory, attention, and mental and perceptual motor-processing speed (PCR Tr. 238-39). Defendant had great difficulty, however, with "executive functioning" tasks, which required abstract thinking and higher-level problem solving (PCR Tr. 231-32, 240-43). Defendant showed signs of moderate depression, mild anxiety, hopelessness and pessimism, and ADHD (PCR Tr. 244-45).

Dr. Heilbronner concluded that there was objective evidence that Defendant suffered from neuropsychological impairment as a result of brain dysfunction (PCR Tr. 246). The impairment was most pronounced in Defendant's verbal abilities and problem-solving skills (PCR Tr. 246-47). Dr. Heilbronner testified that signs of Defendant's cognitive impairment were visible at an early age (PCR Tr. 248). He said that fetal alcohol exposure, abandonment, neglect, and abuse in Defendant's childhood were likely causes of the brain damage (PCR Tr. 248-50). And he opined that Defendant's neuropsychological profile would not have changed since the murder, as he believed no intervening events would explain the test results and the results were

"highly consistent" with the previous testing that had been conducted on Defendant when he was younger (PCR Tr. 247).

Dr. Heilbronner testified that he had no criticisms of the examinations or analyses of the mental-health experts who testified on Defendant's behalf at trial (PCR Tr. 289-90, 293). He noted that Dr. Accardo emphasized "executive dysfunctions," which also was prominent in Dr. Heilbronner's exam, and reached the same conclusion as Dr. Cunningham regarding the symptoms and potential sources of Defendant's neuropsychological impairment (PCR Tr. 256-57, 285, 293). Dr. Heilbronner admitted that a person with brain dysfunction will not necessarily commit crimes, and Dr. Cunningham's testimony was "so important" because it connected the various factors to the risk of violent crime (PCR Tr. 288).

Trial counsel Steele and Kenyon testified that they were aware of the records in Defendant's files that suggested possible neurological impairment (PCR Tr. 542-43, 570). They said that they consulted with the mental-health professionals that they had already retained—Drs. Caruso and Cunningham—and were advised that they did not need to retain any other mental-health experts (PCR Tr. 543-44, 572-73). Counsel relied on the advice of their experts in deciding not to seek out a neuropsychologist to examine Defendant (PCR Tr. 543-44, 572-73).

In addition, Mr. Kenyon mentioned that the budget for hiring experts in a capital case is not unlimited (PCR Tr. 597-98). For his work on this case prior to the evidentiary hearing, Dr. Heilbronner was paid $17,761 (PCR Tr. 254). He was set to receive several thousand dollars more for the time he spent preparing for the hearing and testifying (PCR Tr. 253-54, 289).

**Motion court's findings and conclusions**

The motion court concluded that counsel did not act unreasonably in failing to seek out, retain, and call at trial a neuropsychologist like Dr. Heilbronner (PCR L.F. 175). The court found that counsel reasonably relied on the advice of the mental-health experts they had retained to decide that hiring a neuropsychologist was unnecessary (PCR L.F. 175).

Additionally, the motion court concluded that Defendant was not prejudiced by counsel's decision not to call a neuropsychologist (PCR L.F. 174). The court found that Dr. Heilbronner's testimony was, "in all substantial respects," the same as the testimony provided by the mental-health experts who did testify (PCR L.F. 174). Specifically, the court noted that Dr. Heilbronner diagnosed Defendant with long-standing brain damage, which resulted in learning disabilities, depression, ADHD, and indications of a conduct disorder and antisocial personality disorder (PCR L.F. 174). The court concluded, "These psychological and medical diagnoses were fully developed at trial and consistent

with the testimony of Dr. Heilbronner" (PCR L.F. 174). Finally, the court observed that the State did not dispute that Defendant suffered from brain damage or other psychological impairments, but instead argued against the significance of those diagnoses when weighed against the evidence of Defendant's guilt and the aggravating circumstances (PCR L.F. 174-75).

## **Discussion**

### *A. Counsel reasonably relied on the advice of their retained mental-health experts in deciding not to seek out a neuropsychologist.*

Counsel's choice of witnesses in presenting a mitigation case is "ordinarily a matter of trial strategy and will not support an ineffective assistance of counsel claim." *Strong v. State*, 263 S.W.3d 636, 652 (Mo. banc 2008). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Strong*, 263 S.W.3d at 652 (quoting *Rompilla v. Beard*, 545 U.S. 374, 383 (2005)). "In the real world, containing real limitations of time and human resources, criminal defense counsel is given

heavy deference in deciding what witnesses and evidence are worthy of pursuit." *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. banc 1991).

Reasonably competent counsel may rely on the opinions of their experts in determining whether additional medical or mental-health testing would be beneficial. *Lyons v. State*, 39 S.W.3d 32, 38 (Mo. banc 2001). In *Lyons*, the defendant alleged that his attorneys were incompetent because they failed to have Defendant undergo neuropsychological testing. *Id*. This Court disagreed, noting that the defendant's lawyers had retained a private mental-health expert who examined the defendant and reviewed his records. *Id*. The Court held that it was reasonable for the defendant's attorneys to rely on their already-retained expert's advice in determining what types of additional mental-health testing should be performed. *Id*.

In this case, trial counsel retained two mental-health experts—psychiatrist Keith Caruso and forensic psychologist Mark Cunningham (PCR Tr. 543-44, 572-73). Both Caruso and Cunningham interviewed Defendant and reviewed Defendant's records (Tr. 1690-91; St. PCR Ex. 2). Defense counsel relied "to a very large extent" on the advice of these experts regarding whether additional experts would be necessary or useful to call (PCR Tr. 543-44, 572-73). Drs. Caruso and Cunningham did not recommend that counsel seek out a neuropsychologist, and counsel did not act unreasonably in relying on the advice

of these experts and spending their time, money, and energy on other aspects of the mitigation case. "[D]efense counsel is not obligated to shop for an expert witness who might provide more favorable testimony." *Johnson*, 333 S.W.3d at 464.

Defendant suggests that it was unreasonable for counsel to rely on Dr. Caruso because he was later found to be "incredible" or "unqualified." App. Br. at 71, 78. But, as explained in Point II, *supra*, counsel never suggested that Dr. Caruso was not credible or unqualified—only that his ethical problem from medical school was impeachment material that was potentially so damaging that it wasn't worth the risk to call him. That particular problem, which counsel did not even learn about until mid-trial, does not render counsel's reliance on Dr. Caruso's advice regarding additional experts unreasonable. And Defendant makes no effort to explain why counsel could not reasonably rely on Dr. Cunningham's advice that calling an additional expert would not be necessary.

Defendant's case is unlike *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003), upon which Defendant principally relies. App. Br. at 78-79. In *Powell*, defense counsel failed to conduct even a basic investigation into mitigating circumstances—he did not retain any independent mental-health experts, did not obtain or review any pertinent records, and did not interview any of the defendant's family members or friends. 332 F.3d at 398-400. The only witness

he called in the penalty phase was a court-selected psychologist whose testimony turned out to be adverse to the defendant. *Id*. Counsel's complete failure to prepare a case in mitigation, including his failure to retain an independent mental-health expert, was unreasonable and ineffective. *Id*.

Likewise, Defendant's reliance on *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995), is misplaced. App. Br. at 78 n.12. In *Glenn*, defense counsel presented reports from court-appointed experts who concluded that there were no facts in mitigation and, specifically, that the crime was not the product of mental retardation or organic brain disease. 71 F.3d at 1210-11. The court of appeals found counsel's performance ineffective, noting that no reasonably competent counsel would have presented such self-destructive evidence or would have failed to offer readily available evidence that the defendant suffered from organic brain damage. *Id*. at 1208-10.

In Defendant's case, in contrast, counsel presented extensive mitigation evidence, including testimony from four witnesses regarding Defendant's mental-health problems. Counsel did not seek further mental-health evidence because their experts advised that it was unnecessary. Counsel's performance in this case is not comparable to the performance of counsel in *Powell* or *Glenn*.

Here, the record shows that counsel thoroughly investigated Defendant's mental health by calling two experts to examine Defendant. Counsel reasonably

relied on the advice of these experts in declining to seek additional testing or expert testimony regarding Defendant's mental health. The motion court did not clearly err in rejecting Defendant's claim of ineffective performance.

*B. Counsel's decision not to call a neuropsychologist was not prejudicial.*

Additionally, Defendant is not entitled to relief because he was not prejudiced by the absence of such testimony. As noted in Point II, *supra*, counsel's decision not to adduce cumulative mental-health evidence does not constitute *Strickland* prejudice. *See Goodwin*, 191 S.W.3d at 37-38.

The neuropsychological evidence that Defendant claims should have been presented through Dr. Heilbronner was cumulative to the mental-health evidence that defense counsel presented at the penalty phase through Drs. Udziela, Accardo, and Cunningham. Dr. Heilbronner would have testified that Defendant had a low IQ and struggled with complex problem solving (PCR Tr. 231-43). He suggested that Defendant's brain damage was likely caused by childhood factors, including fetal alcohol exposure, abuse, neglect, and abandonment (PCR Tr. 248-50). And he noted that Defendant showed signs of depression, anxiety, and ADHD (PCR Tr. 244-45). Drs. Udziela and Accardo testified to these same facts, based on their evaluations of Defendant when he was nine—they noted that Defendant had a borderline/low IQ, struggled with ADHD and depression,

and showed signs of brain damage, based especially on Defendant's poor performance on neurological tests (Tr. 1551-58; Def. Ex. E).

Defendant argues that Drs. Udziela and Accardo examined Defendant as a child, and the jury needed to hear that Defendant still had brain dysfunction as an adult. App. Br. at 80-81. But Dr. Cunningham filled that gap. He described Defendant's mental-health problems in detail, and explained that Defendant's difficult childhood, including alcohol exposure, abuse, and neglect, could actually have altered the chemistry of Defendant's developing brain (Tr. 1730-34, 1746-57). He discussed the mental-health problems that continued to plague Defendant and testified that these conditions appeared to have troubled Defendant from childhood up through the time of Defendant's arrest for the murder (Tr. 1790-91, 1806-14). And Dr. Cunningham connected the mental-health problems that Defendant had suffered his entire life to the murder for which he had just been found guilty (Tr. 1822-23).

Had Dr. Heilbronner testified, he simply would have offered more of the same mental-health testimony that the jury heard through Drs. Udziela, Accardo, and Cunningham. The motion court did not clearly err in concluding that Dr. Heilbronner's testimony would have been cumulative of the evidence presented at trial, and thus Defendant failed to prove prejudice.

Point III should be denied.

## IV. The motion court did not clearly err in denying without a hearing Defendant's claims that trial counsel were ineffective for failing to offer his school, hospital, and jail records for admission in evidence and for failing to object to the trial court's instruction that testimony about the content of these records could not be considered for the truth of the matter asserted. (Responds to Points IV and V).

In his fourth point, Defendant claims that trial counsel were ineffective for failing to present school records, hospital records, and jail records documenting the medical treatment that Defendant had received over the years. App. Br. at 82-91. He contends that the records contained mitigating information, including descriptions of Defendant's academic difficulties, reports from his teachers and counselors speculating as to the cause of Defendant's troubles, and accounts of the mental-health diagnoses he had received and medications he had taken. App. Br. at 84-87. Defendant argues that these records were admissible with virtually no limitation, and counsel was obligated to present them during the penalty phase. App. Br. at 88-89. And he claims that it "borders on the frivolous" to suggest that the records were cumulative of the testimony at trial, as the State

disputed whether Defendant suffered from bipolar disorder and challenged Dr. Cunningham's credibility, calling him "Dr. Excuse." App. Br. at 90-91.

In his related fifth point, Defendant argues that trial counsel were ineffective for failing to object when the trial court told the jury that expert testimony describing the content of the records could be considered only insofar as it contributed to the expert's opinion, rather than for the truth of the matter asserted. App. Br. at 92-94. Defendant claims that "background records are independently admissible in death penalty cases," and thus argues that the trial court's instruction was contrary to the law. App. Br. at 94.

For ease of analysis, Respondent will address these points in reverse order. With regard to Point V, the trial court's instruction to the jury not to consider the information in the records for the truth of the matter asserted was unobjectionable. As Defendant argues at length in Point IV, the records themselves were not admitted in evidence. The experts' second-hand testimony about the contents of the records was hearsay, and Defendant does not argue otherwise. The trial court's limiting instruction was correct; any objection would have been meritless.

Furthermore, the motion court did not clearly err in concluding that Defendant was not prejudiced by counsel's failure to offer these records for admission in evidence. The purpose for which Defendant insists these records

should have been admitted—to show that Defendant had a lifelong struggle with mental-health problems—was achieved through the testimony of the numerous witnesses who testified at trial. There was no reasonable probability that the outcome of the penalty phase would have been different had the records been offered and admitted. Thus, the motion court did not clearly err in denying relief without holding an evidentiary hearing.

**Post-conviction claims**

In his amended motion, Defendant alleged that counsel were ineffective for failing to offer for admission in evidence Defendant's records from the St. Louis County Jail, his school records, and his records from St. Joseph's Hospital (PCR L.F. 87-92, 132-33). He alleged that these records "would have been important mitigating evidence by themselves because they would have documented [Defendant's] life history" (PCR L.F. 88). He also alleged that the records were important to assist the jury in weighing the experts' opinions (PCR L.F. 88).

Defendant also alleged that the trial court incorrectly instructed the jury that they could not consider the experts' testimony about the content of the medical and mental-health records that they reviewed for the truth of the matter asserted (PCR L.F. 66-87, 132). He claimed that counsel were ineffective for failing to object to the court's instruction (PCR L.F. 82-84, 86-87).

## Additional facts

During the penalty phase of Defendant's trial, Drs. Udziela, Accardo, and Cunningham testified that they relied on Defendant's records in reaching their expert opinions (Tr. 1543-44, 1561, 1691, 1702-04, 1730-31, 1734-35, 1748-61, 1767, 1790-1801, 1867-69; Def. Ex. E). The trial court informed the jury that it could consider the evidence described from the records as part of the basis for the experts' opinions, but could not consider the substance of the records for the truth of the matter asserted (Tr. 1544-45, 1571-72, 1704-05).

Among the records relied upon by Dr. Cunningham were Defendant's school records, his jail records, and his mental-health records (Tr. 1691). Dr. Cunningham used information from these records to support his conclusion that Defendant suffered from a variety of psychological maladies that had affected him since childhood and continued to affect him in adulthood (Tr. 1795-1801, 1814, 1822-23). Dr. Cunningham even picked out particular portions from Defendant's school records to highlight for the jury, such as a report from Defendant's elementary school counselor who remarked that Defendant's case was the most serious he'd ever seen (Tr. 1730, 1797-98).

Although the motion court denied Defendant's request for an evidentiary hearing with regard to his claims involving the presentation of the records, Defendant offered the records at the evidentiary hearing and the motion court

received them (PCR Tr. 319-20, 335, 344-45, 345-60, 366-70; Mov. PCR Ex. Q-X, Z, CC, DD, HH, II).

**Motion court's findings and conclusions**

The motion court concluded that any objection to the limiting instruction would not have been well-founded, as it is proper to instruct the jury to consider background information as the basis for an expert's opinion rather than for the truthfulness of the facts asserted (PCR L.F. 186). The court further concluded that, assuming *arguendo* that the St. Louis County jail records, the school records, and the St. Joseph's hospital records were admissible, Defendant was not prejudiced by counsel's failure to introduce those records because "[Defendant's] attorneys placed abundant evidence of his mental health problems and his struggles in school before the jury, and this evidence would have been cumulative of the evidence presented at trial" (PCR L.F. 187).

## **Discussion**

*A. Counsel were not ineffective for failing to object to the court's instruction.*

The motion court did not clearly err in concluding that counsel had no viable basis to object to the trial court's instruction that the jury should consider testimony describing the contents of Defendant's records only for the purpose of supporting the conclusions of the expert witnesses who relied on those records. The testimony about the records, if offered for the truth of the matter asserted, would have been inadmissible hearsay. Counsel thus acted reasonably in introducing the evidence for the limited purpose of explaining the basis of the experts' opinions.

"A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends upon the veracity of the statement for its value." *State v. Winfrey*, 337 S.W.3d 1, 6 (Mo. banc 2011) (quoting *State v. Sutherland*, 939 S.W.2d 373, 376 (Mo. banc 1997)). "Such statements are generally inadmissible unless they fall within a recognized exception to the hearsay rule." *Id*. An expert, however, may rely on otherwise inadmissible hearsay evidence in reaching an opinion. *State v. Baumruk*, 280 S.W.3d 600, 617 (Mo. banc 2009).

When an expert describes for the jury the hearsay statements that he or she relied on in reaching his or her opinion, it is appropriate for the trial court to give an instruction "limiting the extent to which and the purpose for which the jury may consider the evidence." *Martin v. Durham*, 933 S.W.2d 921, 923-24 (Mo. App. W.D. 1996) (finding no error in court's instruction in a personal-injury case that certain facts the plaintiff's expert testified he relied on in reaching his opinion could not be considered for the truth of the matter asserted, but only as the basis for the opinion). Defendant argues that *Martin* is inapposite because the "[c]autionary instructions in negligence actions differ vastly from instructions required in death penalty cases." App. Br. at 93. But Defendant cites no authority to support this proposition, nor does he offer any authority to suggest that the rules of evidence do not apply in capital cases. Indeed, this Court has previously held that hearsay evidence is inadmissible, even in the penalty phase of a capital trial. *See e.g. State v. Barnett*, 980 S.W.2d 297, 306 (Mo. banc 1998). And this Court has further recognized that, even in capital cases, evidence that is proper for one purpose but improper for other purposes should be received, subject to a limiting instruction if requested. *State v. Jones*, 979 S.W.2d 171, 182 (Mo. banc 1998).

The records upon which the experts in this case relied were hearsay. They consisted of out-of-court statements, memorialized in writing, by a variety of

declarants, including doctors, nurses, teachers, counselors, and social workers (Tr. 1543-44, 1561, 1691, 1702-04, 1730-31, 1734-35, 1748-61, 1767, 1790-1801, 1867-69; Def. Ex. E; Mov. PCR Ex. Q-X, Z, CC, DD, HH, II).

Defendant argues that the background records were "independently admissible." App. Br. at 94. But this argument misses the point. It is possible, had counsel laid a proper foundation to establish that the records fell within an established hearsay exception, that at least some of the records could have been admitted. But counsel did not lay such a foundation, the records were not shown to fall within any hearsay exception, and thus the records (and testimony about the contents of those records) could not be considered for the truth of the matter asserted. Defendant has offered no argument to the contrary. App. Br. at 92-94. The trial court's limiting instruction, in light of the evidence presented, was appropriate and unobjectionable. Counsel cannot be deemed ineffective for declining to make a non-meritorious objection. *Zink v. State*, 278 S.W.3d 170, 188 (Mo. banc 2009).

*B. Defendant was not prejudiced by counsel's failure to offer the records for admission in evidence.*

Because the motion court denied Defendant's request for an evidentiary hearing on Points IV and V, no record was developed as to whether trial counsel had a strategic reason not to offer Defendant's school, hospital, and jail records

for admission in evidence or whether counsel could have established an adequate foundation for their admission. Nevertheless, the motion court did not clearly err in denying Defendant's claim because counsel's decision not to offer the records was not prejudicial.

The decision not to introduce a defendant's background records is not prejudicial where those records are cumulative of other evidence already admitted. *See Johnson*, 333 S.W.3d at 468-69; *see also Forrest v. State*, 290 S.W.3d 704, 709-10 (Mo. banc 2009). In this case, Defendant argues that his records showed that childhood trauma, learning and behavioral disabilities, and depression caused him to struggle in school (App. Br. at 84-86), and that his mental-health problems continued throughout adulthood (App. Br. at 86-87). But Defendant's lifelong difficulty with mental-health impairments was established through the testimony of the witnesses Defendant presented at trial.

Drs. Udziela and Accardo testified extensively about the problems Defendant had with mental health as a child (Tr. 1536-68; Def. Ex. E). Dr. Udziela talked about the trauma in Defendant's childhood that may have contributed to his problems (Tr. 1544-49). Dr. Accardo described Defendant's poor performance on cognitive tests and recalled signs of depression, including Defendant's statement that when he grew up, he wanted to be dead (Def. Ex. E). The doctors also testified about Defendant's low IQ, his personality and

behavioral problems, his learning disorders, and his neurological impairment (Tr. 1550-54; Def. Ex. E). They concluded that Defendant was brain damaged and suffered from an adjustment disorder with depressed features, a learning and language disorder, and ADHD (Tr. 1554; Def. Ex. E).

Dr. Kulkamthorn testified that he treated Defendant in 2002 and 2003, giving Defendant medication for depression (Tr. 1656-63). Virginia Aurich, a friend of Victim's who had socialized with Victim and Defendant, said that she had seen Defendant take medication, which she understood was for bipolar disorder, and that the medication seemed to calm him down (Tr. 839, 844). And Kimberly Barrett, a friend of Defendant's, testified that she took Defendant to a mental hospital a few months before the murder, and when he was released she was instructed to make sure Defendant took his medications (Tr. 1636, 1651).

Dr. Cunningham testified extensively about Defendant's background, discussing Defendant's troubled childhood, his difficulties in school, his dysfunctional relationships, and neurological impairments and psychological disorders, including ADHD, major depressive disorder, borderline personality disorder, and bipolar disorder (Tr. 1677-1823). Ultimately, Dr. Cunningham concluded that Defendant suffered from psychological disorders in childhood that continued into adulthood, which were caused or exacerbated by a genetic predisposition, exposure to violence and trauma in his youth, and alcohol abuse

(Tr. 1822-23). He further concluded that Defendant's fragile, needy, and reactive state, coupled with his volatile, unstable relationship with Victim and his perception of abandonment, were factors that led to the murder (Tr. 1822-23).

Defendant contends that "it borders on the frivolous to suggest the information in these background records was cumulative to the testimony adduced at trial" because the trial court instructed the jury not to consider the records for their truth and because the State challenged Dr. Cunningham's credibility and whether Defendant actually had bipolar disorder. App. Br. at 90. But Defendant ignores half of the trial court's limiting instruction. Although the jury was told that it could not consider the content of the records for the truth of the matter asserted, the jury was instructed that it could consider the records to evaluate the bases of Drs. Udziela's, Accardo's, and Cunningham's opinions (Tr. 1544-45, 1571-72, 1704). Thus, the jury was not without the ability to determine whether the opinions of these experts were supported by the records—they were simply not to consider the content of the records for their truth *independently* of the experts' testimony. The actual admission of the records would have been cumulative.

Moreover, the State's attack on Dr. Cunningham's credibility, characterizing him as "Dr. Excuse," had nothing to do with the factual basis for

his opinion. The point of that argument was to suggest that Defendant's longstanding mental-health problems, which were almost entirely undisputed by the State, did not excuse the murder (Tr. 1988-93). The admission of the records would not have refuted the State's contention that Defendant's problems were not adequately mitigating to overcome the aggravating circumstances.

Finally, the cases upon which Defendant relies do not support his position because, in each of the cited cases, counsel's failure to investigate and present the defendants' background records left the juries with virtually no evidence regarding the defendants' history of abuse and mental-health problems. In *Williams v. Taylor*, 529 U.S. 362, 395-98 (2000), counsel failed to investigate and introduce evidence showing the defendant's "nightmarish" childhood and "borderline" mental retardation; the only evidence presented in mitigation was the fact that the defendant turned himself in. In *Hutchison v. State*, 150 S.W.3d 292, 304-05 (Mo. banc 2004), counsel did not obtain records documenting the defendant's troubled childhood, mental-health problems, and so forth. The mental-health expert testified only as to the defendant's low IQ and lack of education; he "gave no interpretations and provided no testimony to assist the jurors in making an educated determination about [the defendant's] mental condition and whether it mitigated the offense." *Id*. at 306-07. In *Taylor v. State*, 262 S.W.3d 231, 251 (Mo. banc 2008), counsel did not introduce any of the

records on which their psychiatrist relied in reaching his conclusions about the defendant's abusive background, history of mental illness, and eventual diagnosis. But the expert testified only during the guilt phase, and his testimony about the defendant's background was limited in scope because it was directed only at whether the defendant lacked the capacity to appreciate the wrongfulness of his conduct at the time of the offense. *Id*. at 250-51. And in *Commonwealth v. Zook*, 887 A.2d 1218, 1230-34, 1234 n.16 (Pa. 2005), counsel possessed evidence showing that the defendant suffered a serious brain injury before he committed the charged murders, but did not present evidence of that injury at trial.[5]

In contrast, the defense evidence in this case describing Defendant's background, including his mental health, was abundant. Although the jury could not consider the records for their truth, they could consider the descriptions of the records to determine whether the experts' opinions were supported by evidence. The motion court did not clearly err in determining that admission of

---

[5] Defendant also cites *Rompilla v. Beard*, 545 U.S. 374, 383-85 (2005), but the issue in that case was counsel's failure to investigate records that would have allowed them to rebut the prosecution's case in aggravation. The Court did not decide whether counsel's efforts in building a mitigation case were constitutionally adequate. *Id*. at 382-83.

the records themselves would have been cumulative and that there was no reasonable probability that the admission of the records would have changed the outcome of the proceeding.

Points IV and V should be denied.

## V. The motion court did not clearly err in denying without a hearing Defendant's claim that counsel were ineffective for failing to object during the prosecutor's penalty-phase closing argument to comments comparing jurors to soldiers and encouraging the jurors to "send a message." (Responds to Point VI).

In his sixth point, Defendant argues that his trial attorneys were ineffective for failing to object to remarks during the prosecutor's penalty-phase closing argument "comparing jurors to soldiers who must kill during wartime and urging jurors to sentence [Defendant] to death to 'send a message.'" App. Br. at 95-103.

This point is meritless. Viewed in context, both the "soldier" remark and the "send a message" remark fell within the wide range of appropriate closing argument. Moreover, there is no reasonable probability that these brief remarks improperly affected the outcome of the case. The motion court did not clearly err in denying Defendant's claim.

**Post-conviction claim**

In his amended motion, Defendant alleged that counsel were ineffective for failing to object in the penalty-phase closing argument "when the prosecutor compared jurors to soldiers and implied the jurors had a duty to impose death,

just as soldiers have duties in war they do not enjoy" (PCR L.F. 97). He argued that the prosecutor's remark "does away with the concept of discretion afforded to a jury . . . and was calculated to remove reason and responsibility from the sentencing process" (PCR L.F. 97).

Defendant also claimed that counsel were ineffective for failing to object to the prosecutor's argument stating that a reason to impose the death penalty is to "send a message" (PCR L.F. 97). Defendant argued that the remark suggested that Defendant "should be sentenced to death as part of the self-defense of society" (PCR L.F. 98).

**Additional facts**

At the conclusion of the rebuttal portion of his penalty-phase closing argument, the prosecutor argued as follows:

> You know, [Victim] didn't have somebody there who was trying to decide her fate and decide whether she should live or die. She just had this man. You know, sometimes when you come in, you have a duty. You've all seen this. You've all seen the soldiers in World War II. You know, they're now what? In their 70s and 80s, if they're still around.
>
> They went back in World War II, and they did their duty. The war wasn't something I'm sure they took pleasure in. They didn't want to do that. They didn't want to get taken away from their families and go over

> and fight the Germans and the Nazis. That wasn't what they wanted to do; they had a duty to do it, and they did their duty. And just as you have a duty to do.
>
> . . . .
>
> When you talk to those men now, and you look at those men, you know what? They're able to stand up there tall, and they're proud. They're not proud because of what they had to do to those other young men, but they're proud because they're able to do their duty. They did what was right even though it was hard to do that.
>
> So, ladies and gentlemen, you've heard all the evidence. You've heard both the aggravating and mitigating. It's up to you to decide. In doing that, if you're trying to think why should you do this, well, number one, the evidence is there for you to do it. And, number two, you know, you could send a message. Even if it only stops one other person from doing what he did, that's a message you want to send.

(Tr. 1994-95).

**Motion court's findings and conclusions**

The motion court concluded that Defendant did not demonstrate that the complained-of portions of the prosecutor's argument were improper,

considering the argument as a whole, or that counsel's failure to object deprived Defendant of his right to a fair trial (PCR L.F. 188).

**Discussion**

*A. "Soldier" argument.*

Defendant's complaint about the prosecutor's "soldier" argument was raised and litigated on direct appeal. *McLaughlin*, 265 S.W.3d at 274-76. After detailed analysis, this Court found no plain error in the argument. *Id*.

As a rule, issues litigated on direct appeal cannot be relitigated, even on a different theory, during a post-conviction proceeding. *Storey v. State*, 175 S.W.3d 116, 154 (Mo. banc 2005). But there is a narrow exception. Where an appellate court reviews an unpreserved claim of trial error and concludes simply that no plain error occurred, the defendant is not necessarily precluded from relitigating the claim as an assertion of ineffective assistance of counsel for failure to object. *Deck v. State*, 68 S.W.3d 418, 426-29 (Mo. banc 2002). This is because the *Strickland* standard of prejudice is slightly less demanding than the "manifest injustice" standard required for reversal on plain-error review. *Id*. Nevertheless, this Court noted that "the theoretical difference in the two standards of review will seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal for, in most cases, an error that is not outcome-determinative on direct appeal will also fail to meet the *Strickland*

test." *Id*. at 428 (citing *Strickland*, 466 U.S. at 694, 697). Of course, if the Court on direct appeal found no error at all, plain or otherwise, the point cannot be relitigated in a post-conviction motion as a claim of ineffective assistance of counsel. *Ringo v. State*, 120 S.W.3d 743, 746 (Mo. banc 2003).

In his brief, Defendant fails to even acknowledge that the propriety of the prosecutor's "soldier" argument was addressed by this Court on direct appeal. App. Br. at 95-103. Thus, he offers no argument to suggest that his case falls within the exceedingly rare class of cases in which *Strickland* prejudice exists but plain error does not. In any event, the prosecutor's argument was not so clearly inappropriate that counsel acted unreasonably in not objecting or that there was a reasonable probability that the argument improperly affected the outcome of the trial.

Defendant contends that the motion court's conclusion that the prosecutor's argument was not improper "directly conflicts" with *Vierick v. United States*, 318 U.S. 236 (1943); *United States v. Young*, 470 U.S. 1 (1985); and *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006). App. Br. at 97. But this Court's analysis on direct appeal identifies the critical distinction between the argument made in this case and the arguments condemned in the cases upon which Defendant relies.

On direct appeal, this Court expressly distinguished *Weaver*, noting that in that case, the prosecutor's "soldier" argument is "extensive, direct, graphic, and specifically tells the jury that it is its duty to impose the death penalty." *McLaughlin*, 265 S.W.3d at 275. In Defendant's case, on the other hand, this Court observed that the prosecutor's comment was less extensive and, more importantly, "did not tell the jury that it was its duty to impose death":

> Rather, he basically told the jurors that, like soldiers, they had a duty, but then he identified that duty as being to hear the evidence and decide on a punishment, stating, "[s]o, ladies and gentlemen, you've heard all the evidence. You've heard both the aggravating and mitigating. It's up to you to decide." He did not tell them it was their duty to decide to kill, in other words, but to reach a decision.

*McLaughlin*, 265 S.W.3d at 276.

Likewise, the prosecutors' arguments in *Viereck* and *Young* did not merely remind the jury that it had a duty to make a decision. In *Viereck*, the defendant was charged with violating a federal law requiring the registration of foreign agents. 318 U.S. at 237-39. In closing argument, the prosecutor said to the jury, "This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families . . . ." *Id*. at 247 n.3. The prosecutor said that the

American people were relying on the jury to protect them against "this sort of crime," and told them they had a duty to perform. *Id*. The Supreme Court, noting that "passion and prejudice are heightened by emotions stirred by our participation in a great war," found the argument inappropriate and "highly prejudicial." The argument went far beyond merely exhorting the jurors to reach a decision—it affirmatively told the jurors that enemies were plotting their deaths and the deaths of their families and that they had a patriotic duty to "perform" for the American people.

In *Young*, defense counsel stated in summation that the defendant was the only person who had acted with honor and integrity during the whole affair. 470 U.S. at 5. In rebuttal, the prosecutor responded that the jurors could "acquit him for that" if it was their pleasure, but suggested that he did not think they were doing their job to find facts in opposition to the law and conclude that "that's honor and integrity." *Id*. Thus, the prosecutor's argument implied that, to do its job, the jury must convict. This was unlike the argument in Defendant's case, where the prosecutor argued that the jury's duty was "to hear the evidence and decide on punishment." *McLaughlin*, 265 S.W.3d at 276.

And, despite Defendant's assertion to the contrary, the prosecutor's argument in this case was nothing like the arguments criticized in *Newlon v. Armontrout*, 885 F.2d 1328, 1335-36 (8th Cir. 1989), and *Shurn v. Delo*, 177

F.3d 662, 665-67 (8th Cir. 1999). App. Br. at 99. In *Newlon*, the prosecutor, in closing argument, expressed his personal belief in the propriety of the death sentence, implied that he had special knowledge outside the record, emphasized his position of authority as prosecuting attorney, attempted to link the defendant with well-known mass murderers, appealed to the jurors' personal fears and emotions, and asked the jurors to "kill him now. Kill him now." 885 F.2d at 1335. The argument in *Shurn* was "essentially the same." 177 F.3d at 667. The prosecutor's closing argument here was not comparable.

Before penalty-phase closing arguments, the trial court instructed the jury, "[I]t is your duty to be governed in your deliberations by the evidence as you remember it," and "It is your duty to render such verdict under the law and the evidence concerning the punishment to be imposed as in your reason and conscience is true and just" (L.F. 863; Tr. 1957); *See* MAI-CR3d 305.04 (2011). The prosecutor's argument was consistent with this instruction. Counsel did not act unreasonably in declining to object, and there is no reasonable probability that the jury's verdict was improperly affected by the argument.

*B. "Send a message" argument.*

This Court has previously held that "send a message" arguments are permissible in penalty-phase summations. *State v. Baumruk*, 280 S.W.3d 600, 618 (Mo. banc 2009); *State v. Knese*, 985 S.W.2d 759, 775 (Mo. banc 1999);

*State v. Smith*, 944 S.W.2d 901, 919 (Mo. banc 1997). As the Court explained in *Smith*, "It is proper to make statements that amount to a call for action, requesting jurors to send a message of intolerance to the community." *Id*. One of the two major penological justifications for the death penalty is the deterrence of capital crimes by future offenders. *See Roper v. Simmons*, 543 U.S. 551, 553 (2005). Arguments encouraging the jury to impose the death penalty for the purpose of deterring future crime is plainly consistent with this justification.

It is true that the Eighth Circuit Court of Appeals has "previously frowned upon" closing arguments in death-penalty cases asking the jurors to "send a message." *See e.g. Cole v. Roper*, 623 F.3d 1183, 1194-95 (8th Cir. 2010); *Sinisterra v. United States*, 600 F.3d 900, 910-11 (8th Cir. 2010). The Court reasons that "[s]uch arguments impinge upon the jury's duty to make an individualized determination that death is the appropriate punishment for the defendant." *Id*. (citing *Weaver*, 438 F.3d at 841).

But the Eighth Circuit appears to be an outlier in disapproving of "send a message" arguments during the penalty-phase of capital trials. Several other federal circuits have held that such arguments are not improper. *See Irick v. Bell*, 565 F.3d 315, 324-26 (6th Cir. 2009); *Davis v. Kemp*, 829 F.2d 1522, 1527 (11th Cir. 1987) ("Arguments by the prosecutor that the death penalty serves as a deterrent are proper."); *Coleman v. Brown*, 802 F.2d 1227, 1239 (10th Cir. 1986)

("[C]omments concerning the penological justifications for the death penalty, i.e. retribution, incapacitation, and general deterrence, are appropriate.").

In *Irick*, the Sixth Circuit noted the distinction between cases in which "send a message" arguments were made in guilt-phase closing arguments and cases in which the arguments were made in separate penalty phases. 565 F.3d at 325 n.2. Three of the four cases Defendant relies upon to support his argument—*United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992); *United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991); and *United States v. Monaghan*, 741 F.2d 1434 (D.C. Cir. 1984)—fall into the former category. In those cases, the courts worry that "the defendant will be convicted for reasons wholly irrelevant to his guilt or innocence" if the prosecutor invokes principles of general deterrence. *See Johnson*, 968 F.2d at 771 (quoting *Monaghan*, 741 F.2d at 1441). But in cases like Defendant's, where guilt has already been determined by the time the prosecutor makes the "send a message" argument, such a concern does not exist.

In addition, the Eighth Circuit's worry that "send a message" arguments may undermine the individualized nature of a capital-sentencing proceeding is alleviated by Missouri's capital-sentencing scheme. By requiring consideration of specific aggravating and mitigating circumstances as a prerequisite to the imposition of the death penalty, Missouri law guarantees individualized

consideration in every case. *See* § 565.032. The jurors are instructed that they must return a verdict of life without eligibility probation or parole unless they find at least one aggravating circumstance beyond a reasonable doubt and do not find that the facts in mitigation outweigh the evidence in aggravation (L.F. 856-58). Even if the jurors are asked to consider the potential deterrent effect of imposing the death penalty in a particular case, this does not deprive the defendant of his right to an individualized determination of whether the death penalty is warranted.

In light of the extensive authority, both from this Court and from the federal courts, holding that it is not inappropriate for prosecutors to ask jurors to "send a message" by imposing the death penalty, counsel cannot be considered ineffective for failing to object to the prosecutor's argument in this case.

Finally, even if the "send a message" argument in this case was improper, there is no reasonable probability that it affected the outcome of the trial. The remark in this case was very brief—far less extensive and less provocative than the lengthy argument in *Weaver* in which the prosecutor told the jurors over and over that "death" is the message to send "to the scum of the world." *Weaver*, 438 F.3d at 837. And, as this Court observed in its opinion on direct appeal, the jury instructions "focused the jury's attention on the individualized facts and

circumstances of the case . . . .” *McLaughlin*, 265 S.W.3d at 276. The motion court did not clearly err in denying Defendant’s claim.

Point VI should be denied.

## VI. The motion court did not clearly err in denying without a hearing Defendant's claim that counsel were ineffective for failing to request a penalty-phase jury instruction on statutory mitigating factors. (Responds to Point VII).

In his seventh point, Defendant contends that counsel were ineffective for failing to request that the trial court submit an instruction on statutory mitigators during the penalty phase. App. Br. at 104-06.

Because the record shows that counsel made a reasonable strategic decision not to ask for the statutory mitigation instruction, Defendant's point should be denied.

**Post-conviction claim**

In his amended motion, Defendant claimed that counsel were ineffective for failing to request a penalty-phase instruction which included the statutory mitigating circumstances enumerated in sections 565.032.3(2) and (6) (PCR L.F. 54-58, 125-26). He argued that Dr. Cunningham's penalty-phase testimony supported the submission of these two statutory mitigating factors and that counsel's decision not to seek an instruction on these specific factors was ineffective (PCR L.F. 55-58). Defendant alleged that, if granted an evidentiary hearing, trial counsel David Kenyon and Robert Steele would testify that they

had no strategic reason for failing to submit the statutory mitigating circumstances instruction (PCR L.F. 125-26).

**Additional facts**

At the close of the penalty phase, the court made a brief record regarding the defense's proffered instruction on mitigating evidence:

> THE COURT: I think the record should reflect there was some discussion informally that we didn't put specifically on the record with respect to statutory and mitigating circumstance, and Mr. Kenyon and Mr. Steele expressed to the Court their specific instruction, not one prepared by the State, but their instruction, that they wanted to submit it in the case based on mitigating instructions as set out in Instruction No. 24. So it's clearly their instruction. Anyway, they wanted to submit the matter as a matter of legal strategy. Is that right, gentlemen?
>
> MR. KENYON: Yes, sir.

(Tr. 1956). Consistent with defense counsel's request, the jury received a general mitigation instruction, directing them to consider "any facts or circumstances which [they] find from the evidence in mitigation of punishment" (Tr. 1957; L.F. 858).

Although the motion court denied Defendant's request for an evidentiary hearing regarding his claim that counsel was ineffective for declining to ask that

the jury be instructed on statutory mitigators, the issue was nevertheless discussed during counsel's testimony at the evidentiary hearing (PCR Tr. 591, 598-99). Trial counsel David Kenyon, who was the attorney primarily responsible for conducting Defendant's penalty-phase defense, testified that he doesn't like to submit statutory mitigating circumstances as part of the instructions because he believes "it tends to limit the jury" (Tr. 559-60, 591). He added that whether or not he presented evidence to support the statutory mitigators, he would have chosen to offer the general mitigation instruction that was ultimately given rather than ask that the jury be instructed on statutory mitigating circumstances (Tr. 598-99). Mr. Kenyon said that, based on his familiarity with the law and his experience trying cases, he had concluded that the defense is better off without an instruction listing specific statutory mitigating circumstances (PCR Tr. 600).

**Motion court's findings and conclusions**

In its findings and conclusions, the motion court noted that Mr. Kenyon testified at the evidentiary hearing that, as a matter of trial strategy, he does not request instructions containing statutory mitigating circumstances because he feels such instructions unduly limit the jury in its consideration of mitigating evidence (PCR L.F. 183). In accordance with this strategy, Defendant tendered an instruction patterned after MAI-CR3d 314.44, which allowed the jurors to

consider "any facts or circumstances which [they] find from the evidence in mitigation of punishment" (PCR L.F. 183). The court concluded that counsel's strategy was reasonable and thus denied Defendant's claim (PCR L.F. 183-84).

**Discussion**

The motion court's findings and conclusions are not clearly erroneous. "[A]n objectively reasonable choice not to submit an available instruction does not constitute ineffective assistance of counsel." *Christeson v. State*, 131 S.W.3d 796, 801 (Mo. banc 2004) (quoting *Love v. State*, 670 S.W.2d 499, 502 (Mo. banc 1984)). In a capital case, defense counsel may, as a matter of reasonable trial strategy, decide not to pursue a specific instruction regarding statutory mitigating circumstances. *Glass v. State*, 227 S.W.3d 463, 475 (Mo. banc 2007).

In *Glass*, the defendant argued that counsel was ineffective for failing to request an instruction on the statutory mitigating factor of age. *Id*. Counsel explained that he preferred to offer the general mitigation instruction, which instructed the jury to consider all facts and circumstances in favor of mitigation. *Id*. He said that he believed offering a specific mitigating instruction on age would cause the jury to focus its deliberations too narrowly by balancing that one factor against the aggravators. *Id*. This Court held that counsel's decision to proffer the general mitigation instruction to avoid unduly focusing the jury on the defendant's age was a reasonable trial strategy. *Id*.

In this case, defense counsel made it clear at trial, before the instructions were given, that for strategic reasons they wanted the jury to receive the general mitigation instruction that they had prepared (Tr. 1956). The trial court noted that Mr. Kenyon and Mr. Steele requested the general instruction during an off-the-record discussion, and Mr. Kenyon confirmed on the record that the defense preferred the mitigation instruction, as presented in Instruction No. 24, as "a matter of legal strategy" (Tr. 1956). Then, at the evidentiary hearing, Mr. Kenyon explained that the basis for the strategy was that he believed a specific statutory mitigation instruction "tends to limit the jury" and that, in his experience, the defense is "better off without them" (PCR Tr. 591, 600).

Like the strategy upheld by this Court in *Glass*, counsel's strategy in this case was reasonable. Defense counsel had a sound, strategic reason to request the general mitigation instruction, consistent with MAI-CR3d 314.44, rather than risk "unduly focusing" the jury on the two statutory mitigating factors Defendant claims the evidence supported.

Defendant argues in his brief that post-conviction counsel "did not proffer other evidence" to support his claim of ineffectiveness because Judge Goldman had denied a hearing on the claim. But the record shows that post-conviction counsel had no other evidence to present. In his motion, Defendant alleged that he would support his claim with the trial transcript and testimony from David

Kenyon and Robert Steele, both of whom would allegedly testify that they had no strategic reason to withhold the statutory mitigation instruction (PCR L.F. 125-26). The trial transcript, however, showed that Kenyon and Steele did make a strategic decision to submit Instruction No. 24 as written (Tr. 1956). Further, Mr. Steele testified that Mr. Kenyon was primarily responsible for the penalty phase (PCR Tr. 559-60), and Mr. Kenyon explained the strategic basis for his decision (PCR Tr. 591, 598-600).

Finally, there is no reasonable probability that Defendant was prejudiced by counsel's decision not to specifically instruct the jury on statutory mitigators. "Jurors are presumed to follow the court's instructions." *Tisius v. State*, 183 S.W.3d 207, 216 (Mo. banc 2006). Here, the jury was instructed, "You shall also consider any facts or circumstances which you find from the evidence in mitigation of punishment" (L.F. 858). This instruction, broadly instructing the jury to consider *all* mitigating facts and circumstances, necessarily tells the jury to consider the facts and circumstances that would compose the statutory mitigators. Defendant cannot have been prejudiced by counsel's decision to submit an instruction requiring the jury to consider all facts and circumstances that weigh in his favor.

Point VII should be denied.

## VII. The motion court did not clearly err in denying Defendant's claim that trial counsel were ineffective for failing to investigate and present evidence at the guilt and penalty phases that Defendant's brother Billy had admitted to raping Victim on the night of the murder (Responds to Point VIII).

In his eighth point, Defendant argues that trial counsel were ineffective for failing to investigate and present testimony from three family members—Shawn Delgado, Tammy Sinclair, and Anthony Connor—that Defendant's brother Billy McLaughlin admitted to raping Victim on the night she was murdered. App. Br. at 107-116. Defendant contends that Billy's purported admissions would have provided Defendant with a defense to the rape charge during the guilt phase and would have increased the likelihood that the jury would have imposed a life sentence because his "moral culpability" would have been lessened. App. Br. at 113.

But Billy's alleged statements were inadmissible hearsay, and counsel did not act unreasonably in declining to offer this inadmissible evidence. Moreover, because the statements would not have exonerated Defendant, and could, in fact, have weakened his defense theory, he was not prejudiced by counsel's decision not to offer the statements.

## Post-conviction claim

In his amended motion, Defendant claimed that counsel were ineffective for failing to present evidence in both the guilt and penalty phases that Billy McLaughlin, Defendant's brother, had told relatives that he had had sex with Victim on the night of her murder (PCR L.F. 50-52, 114-25). He admitted that Billy's purported statements would have been hearsay, but claimed that due process would have required the trial court to admit the statements (PCR L.F. 42-44, 52). Defendant further claimed that Billy's statements, if admitted, would have raised a reasonable doubt as to whether Defendant was guilty of rape, and would also have refuted the aggravating circumstance that the murder involved depravity of mind (PCR L.F. 44-43, 53).

## Additional facts

During the penalty phase of Defendant's trial, defense counsel called Defendant's cousin, Shawn Delgado, to provide some background about Defendant's childhood (Tr. 1614-22). Outside the presence of the jury, Ms. Delgado testified in an offer of proof that Defendant's brother Billy[6] had told her

[6] Throughout the proceedings, witnesses occasionally referred to Billy by his birth name, Kevin Daffner (Tr. 1596).

that he was involved in Victim's murder (Tr. 1622-24). According to Ms. Delgado, Billy told her that he had tied Victim's legs together and helped to drag her to the riverbank (Tr. 1623). Billy purportedly said that at the riverbank "[Defendant] had cut [Victim] again and then had sex with her" (Tr. 1623). Billy allegedly said that Victim's neck was cut from ear-to-ear and from her neck to her pelvic bone (Tr. 1623). Billy also allegedly told Ms. Delgado that he had been present at the actual murder; he said he saw Defendant stab Victim in the back (Tr. 1623).

The trial court found there was an insufficient basis to qualify Billy's purported statements as admissible declarations against penal interest for due-process purposes (Tr. 1626-27). The court thus excluded the statements (Tr. 1626-27).

At the PCR evidentiary hearing, Defendant called Shawn Delgado, Tammy Sinclair, and Anthony Connor to testify about what Billy had told them. Ms. Delgado testified that five or six months after Victim's murder, she and her cousin, Anthony Conner, were at her grandmother's when Billy came in and made statements about Victim's rape and murder (PCR Tr. 17, 23). Ms. Delgado testified that Billy told her he was "there throughout the whole thing" (PCR Tr. 17). When PCR counsel asked Ms. Delgado what Billy had said about the rape, Ms. Delgado responded that Billy had implicated Defendant:

> Well, he—well, [Billy] said that [Defendant] did it. And I said, Why would [Defendant] do it if, you know, if he, you know, was romantically involved with her? And I said, are you sure you didn't do it? And he said, No. It was [Defendant].

(PCR Tr. 18). PCR counsel pressed Ms. Delgado on whether Billy had ever told her that he had sex with Victim (PCR Tr. 18). At first she said she did not remember, and then, after continued questioning, she said that Billy had told her that he had sex with Victim's body (PCR Tr. 18-19). On cross-examination, Ms. Delgado reviewed the offer of proof she had given at trial and admitted that when she said "Scott had cut her again and then had sex with her," she was referring to Defendant having sex with Victim (PCR Tr. 21-22). She also repeated the assertion she had made at trial that Billy had described Victim as having been cut from ear-to-ear and from her neck to the pelvic bone (PCR Tr. 22).

Anthony Connor, Defendant's nephew, testified that he was present during the conversation that Ms. Delgado had with Billy several months after the murder (PCR Tr. 89-91, 93). According to Mr. Connor, Billy said that he had raped Victim in the back of a car and tied her up (PCR Tr. 91-92). His impression was that Victim was deceased by the time Billy raped her (PCR Tr. 92).

Tammy Sinclair testified that her daughter, Shawn Delgado, had mentioned to her that Billy apparently had some connection to Victim's rape and murder (PCR Tr. 28-29). So the next time she saw Billy she asked him why he was telling people that he was with Defendant when Victim was killed (PCR Tr. 29). Billy purportedly replied that he had accompanied Defendant to Victim's workplace and had encouraged Defendant to kill Victim (PCR Tr. 29). According to Ms. Sinclair, Billy then said that he and Defendant drove toward St. Louis city, with Victim still alive in the backseat (PCR Tr. 29-30). Billy purportedly told Ms. Sinclair that he suggested to Defendant that he pull over and "tap some of that," and that Defendant had said, "No man, I already had it. Just leave her alone" (PCR Tr. 30). Then, according to Ms. Sinclair, Billy said that he climbed into the backseat and raped Victim while she was still alive, gurgling blood (PCR Tr. 30, 35).

Trial counsel testified at the evidentiary hearing that they were aware that Ms. Delgado, Ms. Sinclair, and Mr. Connor had allegedly heard Billy say that he was involved in Victim's rape and murder (PCR Tr. 557, 575-78). But they testified that they were not interested in presenting evidence that Billy had sex with Victim because they thought that, insofar as it did not exclude Defendant from also having had sex with Victim that night, it was irrelevant (PCR Tr. 560-62). Moreover, such evidence would not have assisted their defense theory on

the rape charge, which was that, as a legal matter, one cannot rape a dead body (PCR Tr. 562, 593).

**Motion court's findings and conclusions**

The motion court rejected Defendant's claim that counsel were ineffective for failing to present testimony from Ms. Delgado, Ms. Sinclair, and Mr. Connor about Billy's purported admissions, concluding that such testimony was inadmissible hearsay (PCR L.F. 180-83). The court explained that Defendant's right to due process did not support admission of the statements because the statements were not corroborated by other evidence, they were made long after the murder occurred, and they did not exonerate Defendant (PCR L.F. 181-83).

**Discussion**

*A. Billy's purported statements were inadmissible hearsay.*

As Defendant conceded in his amended motion, the testimony of each witness that he now claims counsel were ineffective for failing to present would have been hearsay (PCR L.F. 42). Nevertheless, Defendant argues that his right to due process entitled him to present this evidence irrespective of the general bar against hearsay. App. Br. at 112-16.

This Court has recognized that the Due Process Clause creates a constitutionally based exception to the general prohibition against the admission of hearsay. *State v. Taylor*, 298 S.W.3d 482, 493 (Mo. banc 2009). Under this

exception, hearsay statements may be admitted if they "both exonerate the accused and are originally made and subsequently offered at trial under circumstances providing considerable assurance of their reliability." *Id.*; *see also Chambers v. Mississippi*, 410 U.S. 284, 300 (1973). "Three circumstances of reliability have been recognized: '1) each confession is in a very real sense self-incriminatory and unquestionably against interest; 2) each statement was spontaneously made to a close acquaintance shortly after the murder occurred; and 3) the statements are corroborated by other evidence in the case.'" *Taylor*, 298 S.W.3d at 493; *Chambers*, 410 U.S. at 300-01; *State v. Hutchison*, 957 S.W.2d 757, 761 (Mo. banc 1997).

A similar rule governs the admissibility of hearsay evidence in the penalty phase of capital trials. As the United States Supreme Court recently noted, "reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule." *Sears v. Upton*, 130 S.Ct. 3259, 3263 n.6 (2010) (citing *Green v. Georgia*, 442 U.S. 95, 97 (1979)). Accordingly, the rule against admission of hearsay evidence will not bar the admission of such evidence if it is "highly relevant to a critical issue in the punishment phase of the trial" and "substantial reasons existed to assume its reliability." *Green*, 442 U.S. at 97. In *Green*, the Supreme Court found an excluded out-of-court confession to be sufficiently reliable where the

declarant made the statement spontaneously to a close friend, it was plainly against interest, and "the evidence corroborating the confession was ample"—so much so that the State used it against the declarant in a separate trial and obtained a death sentence. *Id*.

In this case, Billy's purported statements to Ms. Delgado, Ms. Sinclair, and Mr. Connor were not admissible in either the guilt or penalty phases under the due-process hearsay exception. The statements do not exonerate Defendant, which is critical to their guilt-phase admission, and the circumstances surrounding the statements do not provide even minimal, let alone considerable, assurance of their reliability.

First, the statements do not exonerate Defendant. Although Billy purportedly told Ms. Delgado, Ms. Sinclair, and Mr. Connor that he had had sex with Victim on the night of the murder, Billy never said that he was the *only* one who raped Victim (PCR Tr. 14-38, 88-96). Indeed, both Ms. Delgado and Ms. Sinclair indicated that Billy told them that Defendant had had sex with Victim—Ms. Delgado said Billy blamed Defendant outright for the rape (Tr. 1623; PCR Tr. 18, 22-24), and Ms. Sinclair said that Billy told her that Defendant declined his invitation to rape Victim on the way to the dump site because he'd "already had it" (PCR Tr. 30).

In his brief, Defendant claims that "Billy said [Defendant] took no part in the rape and did not act with him." App. Br. at 111. He does not support this assertion with any citation to the record. It may be that Defendant is relying on Mr. Connor's answer when the trial court asked, "[D]id [Billy] say whether [Defendant] molested or raped her, too?" (PCR Tr. 95). Mr. Connor responded, "No, he said him" (PCR Tr. 95). But Mr. Connor did not say that Billy claimed to have acted alone in the rape—he simply indicated that Billy did not say one way or another whether Defendant also raped Victim (PCR Tr. 95). Because none of Billy's statements would have exonerated Defendant, they were not admissible in the guilt phase.

Second, the statements do not bear sufficient indicia of reliability to fall within the due-process hearsay exception, either for purposes of the guilt or penalty phases. Perhaps most importantly, the statements were not corroborated by any evidence in the case, and, in fact, were inconsistent with the evidence in several significant respects. Although Billy allegedly claimed to have been present when Defendant transported and dumped the body, Defendant told police that he had been alone (St. Ex. 70, 71). Ms. Delgado said that Billy had told her that Defendant stabbed Victim in the back and had cut her from ear-to-ear and from neck-to-pelvis (Tr. 1623; PCR Tr. 22). But Victim exhibited no such injuries (Tr. 1255-83); *See also McLaughlin*, 265 S.W.3d at 274 n.11

(denying Defendant's direct-appeal claim that Billy's statements about helping Defendant dispose of the body should have been admitted, reasoning that Billy's description of the injuries was inconsistent with the evidence). Billy's roommate testified at trial that Defendant visited their apartment on the night of the murder, left alone, and then returned covered in blood; Billy remained at the apartment the entire time (Tr. 973-80). The following morning, Defendant's pants were muddy from disposing of Victim's body, but Billy was clean (Tr. 980-81, 1047); *McLaughlin*, 265 S.W.3d at 274 n.11. And the DNA swab taken from Victim's vagina revealed the presence of DNA consistent with Defendant's genetic profile, but inconsistent with Billy's. *See* Point VIII, *infra*.

Additionally, these statements were not made "shortly after the murder occurred." *See Taylor*, 298 S.W.3d at 493). Instead, Billy allegedly made these statements five or six months after the November murder (PCR Tr. 23, 30-31, 93). And Billy's purported statement to Ms. Sinclair was not even spontaneous—she confronted him about the story he had allegedly told to Ms. Delgado and Mr. Connor (PCR Tr. 29).

Finally, the statements from these three witnesses were inconsistent with each other. Ms. Delgado said twice that Billy had told her that Defendant had raped Victim, until finally, after repeated questioning by PCR counsel, she said that Billy had admitted that he had sex with Victim, too (Tr. 1623; PCR Tr. 17-

19, 22). Ms. Sinclair said that Billy told her Victim was still alive when he raped Victim in the backseat of the car, but Mr. Connor said that Billy reported that Victim was already dead at the time of the rape (PCR Tr. 29-30, 92-94).

The circumstances present here are far different from the circumstances at issue in *State v. Phillips*, 940 S.W.2d 512 (Mo. banc 1997), in which this Court held that an out-of-court statement by the defendant's son that he had assisted in the murder by dismembering the victim was admissible under the due-process hearsay exception. *Id*. at 517-18. The Court noted that the out-of-court statement was substantially corroborated by other evidence, including evidence that the declarant had accurate, detailed knowledge of undisclosed facts relating to the murder and that he had been seen using the murder weapon for target practice within a day or so after the murder. *Id*. In Defendant's case, on the other hand, there is no such corroborating evidence.

The motion court did not clearly err in concluding that the due-process hearsay exception did not apply in this case, that the statements were inadmissible hearsay, and that counsel were therefore not ineffective for failing to offer the statements in evidence.

*B. Defendant was not prejudiced by counsel's decision not to offer the statements in evidence.*

Even if Billy's purported statements to Ms. Delgado, Ms. Sinclair, and Mr. Connor were admissible, Defendant would not be entitled to relief because he has not shown that he was prejudiced by counsel's failure to offer this testimony.

As noted above, the hearsay statements would not have exonerated Defendant of the murder or the rape. At most, they would have indicated that Defendant and Billy both raped Victim. It is difficult to see how Defendant's "moral culpability" would be lessened if the evidence showed that, after he stabbed his former girlfriend repeatedly, both he *and* his brother had sex with her.

More importantly, Billy's statements, as reported by Ms. Delgado and Ms. Sinclair, were fundamentally inconsistent with the defense strategy relating to the rape. Defense counsel argued strenuously, both during the guilt and penalty phases, that the "rape" should not be considered a part of the murder because sexual penetration occurred after Victim was already dead (Tr. 1429-32, 1969-70). And although the jury convicted Defendant of forcible rape, it did not find, as an aggravating circumstance, that "the murder of [Victim] was

committed while the defendant was engaged in the perpetration of forcible rape" (L.F. 856, 865-66).

Ms. Delgado said that Billy told her that when he and Defendant took Victim to the riverbank, Defendant "cut her again and then had sex with her" (Tr. 1623). And Ms. Sinclair testified that Billy told her that Victim was still alive when he raped her in the backseat of Defendant's car, and that Defendant said he didn't want to join in because he'd "already had it" (PCR Tr. 30). This testimony tended to suggest, contrary to the defense theory, that Victim was alive when Defendant had sex with her.

Because the presentation of this evidence would not have helped Defendant and had a strong potential to hurt his case, it cannot be concluded that Defendant was prejudiced by counsel's decision not to present the testimony to the jury.

Point VIII should be denied.

## VIII. The motion court did not clearly err in denying Defendant's claim that trial counsel were ineffective for failing to present evidence in the guilt and penalty phases suggesting that Defendant's brother Billy contributed to the DNA found on Victim's body. (Responds to Point IX).

In his ninth point, Defendant claims that trial counsel were ineffective for failing to investigate and present testimony from a DNA analyst in the guilt and penalty phases of trial to rebut the State's DNA testimony and suggest that Billy McLaughlin might have contributed to the DNA mixture found in Victim's vagina ("the DNA mixture"). App. Br. at 117-28. He argues that his DNA expert, Dr. Stetler, could have testified that because Defendant and Billy are closely related and share so many homozygous alleles, the odds that their genetic profile is exactly the same is 1 in 16,000, far more likely than the 1-in-2-million figure that the State's expert quoted. App. Br. at 122.

But before the evidentiary hearing, Billy's DNA was actually tested and was found to be different in several significant respects from Defendant's. Defendant cannot claim that counsel acted unreasonably in declining to present expert testimony on the probability of a genetic match when, as the more recent, more reliable evidence shows, there was no match at all. Moreover, Defendant's

own expert admitted at the evidentiary hearing that even if Billy could be considered a contributor to the DNA mixture, Billy cannot have been the *only* contributor, and Defendant cannot be excluded as a co-contributor. Thus, the DNA evidence, at best, would have implicated Billy in the rape without exonerating Defendant. The motion court did not clearly err in finding that counsel's handling of the DNA evidence was not unreasonable.

**Post-conviction claim**

In his amended motion, Defendant claimed that trial counsel were ineffective for failing to call a DNA expert, such as Dr. Dean Stetler, to testify in the guilt and penalty phases that there was a high probability that Billy McLaughlin could not be excluded as a contributor to the DNA mixture and that the State's expert had failed to consider a particular allele that could not have been contributed by Defendant or Victim (PCR L.F. 36-40, 47-54, 110-14, 118-25). Defendant admitted that, at the time of trial, Billy's DNA was not available for testing, but he alleged that Dr. Stetler could identify a probability of what Billy's DNA might be by examining Billy's parents' genotypes, and then compare that probability to the DNA mixture taken from Victim's body (PCR L.F. 39, 110-14). He alleged that Dr. Stetler would testify that, if the extra allele that the State's expert disregarded was included in the comparison, Defendant would be excluded and Billy would not (PCR L.F. 39).

## Additional facts

During the guilt phase of Victim's trial, the State called Alan Derickson, a forensic scientist with the St. Louis County crime laboratory, to testify about the DNA comparisons he had done in this case (Tr. 1295-1373). Derickson testified that when DNA from different sources is compared, analysts look at alleles—specific genetic markers—that appear at 13 different loci, plus a 14th locus that reveals the sex of the genetic profile (Tr. 1298). Each allele has a number associated with it, such as 15, 16, or 18 (Tr. 1302). The analyst compares two DNA samples by identifying which alleles are present at each known locus, and then comparing whether the alleles match (Tr. 1302-03). Depending on the quality of the sample, genetic information may not be available for all 13 loci (Tr. 1311-12). The analyst takes the information he or she does have and determines how common that genetic profile is, based on an FBI database (Tr. 1311). If the analyst does not detect any difference between the discernable alleles at each locus from two different samples, the two are considered a match (Tr. 1311).

Mr. Derickson testified that he obtained a vaginal swab from Victim's body which tested positive for the presence of semen (Tr. 1341). Derickson used a chemical procedure to isolate the male fraction of the genetic material present, which he designated "F2" (Tr. 1343-46). Derickson was unable to completely

separate the male from the female DNA—he obtained a mixture (Tr. 1346). At one locus, Derickson found an extra allele, so he decided to exclude it for statistical purposes (Tr. 1344). But at the other 12 loci, all of the alleles from Defendant and Victim were accounted for (Tr. 1346). Derickson determined that only 1 in every 2.2 million people in the Caucasian population could have contributed to that mixture, and Defendant and Victim were two such people (Tr. 1346-47).

At the post-conviction evidentiary hearing, trial counsel testified that they had had the DNA tested by an independent consultant before trial to determine whether Defendant could be excluded as a contributor (PCR Tr. 550-51, 579-81). The independent testing revealed the existence of an extra allele in the DNA mixture at the D5 locus that did not match Defendant or Victim, but nevertheless did not conclude that Defendant could be excluded as a contributor to the DNA mixture (PCR Tr. 564, 579-81). One of Defendant's attorneys, Mr. Steele, testified that he thought it was irrelevant whether Billy had had sex with Victim's body; he was concerned only with whether the DNA evidence implicated Defendant (PCR Tr. 561).

Dr. Dean Stetler, a geneticist from the University of Kansas, testified at the PCR hearing that he had reviewed the DNA work done in this case, plus additional testing from Billy McLaughlin and from Larry Daffner and Jill

Turner, the biological parents of Defendant and Billy (PCR Tr. 39-48). Dr. Stetler testified that at first he was asked to determine whether there was a probability that a biological brother of Defendant's could have contributed to the F2 sample found in the DNA mixture (PCR Tr. 46). He said that, without knowing anything about the parents' genotypes, the odds that two brothers could both have been contributors was "something like 1 in 67 million" (PCR Tr. 46). But he said that after he reviewed the genotypes of the Mr. Daffner and Ms. Turner, the odds that Defendant and Billy shared the same genotypes at each relevant loci improved considerably, to "something like 1 in 16,000" (PCR Tr. 46).

Dr. Stetler testified that after he had done this probability analysis involving Billy's expected genotype based on his parents' genetic information, he actually obtained Billy's genetic profile (PCR Tr. 47-48). He admitted that having Billy's DNA is "definitely" more reliable than simply drawing probabilities from his parents' genotypes (PCR Tr. 116-17, 176).

Dr. Stetler compared known samples from Billy, Victim, and Defendant to the F2 mixture (semen taken from Victim's vaginal swab) and reached the following conclusions: (1) Defendant must be included as a potential contributor because his alleles are represented at all 13 loci (PCR Tr. 65), and (2) the DNA mixture in the F2 sample cannot comprise DNA from only Victim and Billy

because 3 loci in the mixture contain alleles that cannot be attributed to either of them (PCR Tr. 66-67, 82). In other words, if Billy had sex with Victim on the night of the murder, at least one other male did, too—and Defendant cannot be excluded as that person (PCR Tr. 65-67, 82). Dr. Stetler also testified that he did not find anything wrong with the St. Louis County lab's work in including Defendant as a possible contributor to the sample (PCR Tr. 123-24).

Dr. Stetler acknowledged that the St. Louis County lab had excluded Billy as a possible contributor because Billy's genotype showed the presence of a 13 allele at locus D18 and 10 and 13 alleles at locus CSF—alleles that were not represented in the mixture (PCR Tr. 71-72; St. PCR Ex. 8). But Dr. Stetler argued that those apparently missing alleles might actually have been present in the F2 sample, just in quantities too low to be detected (PCR Tr. 77-81).

Mr. Derickson testified at the PCR hearing that the apparently "extra" alleles in the F2 sample that could not be attributed to Victim or Defendant either could not be reproduced in subsequent tests and thus were considered machine error (PCR Tr. 629-30) or were discernable in such low quantities that they were below the interpretive threshold established by the lab for reliable results (PCR Tr. 633-35). In any event, the presence of an extra allele in a mixture does not provide a basis to exclude someone as a possible contributor to

that sample if all of that person's alleles are represented elsewhere (PCR Tr. 687).

Mr. Derickson explained that a person is excluded as a contributor to a mixture if that person has alleles at particular loci that are not represented at those loci in the mixture (PCR Tr. 638-39). Here, Billy was excluded as a contributor because he possessed alleles at the D18 and CFS loci that were not represented in the F2 DNA mixture (PCR Tr. 639; St. PCR Ex. 8). Derickson criticized Dr. Stetler's argument that Billy's missing alleles might actually be present, noting that the argument depended on assumptions "below threshold data" (PCR Tr. 655-57). Derickson concluded his testimony by repeating the conclusion on which everyone agreed—that no matter how many contributors there were to the DNA mixture, Defendant could not be excluded (PCR Tr. 714).

**Motion court's findings and conclusions**

The motion court concluded that counsel were not ineffective for failing to present testimony from a DNA analyst such as Dr. Stetler in an attempt to implicate Billy in the rape (PCR L.F. 175-80). The court began by noting that Billy's DNA was not available at the time of trial, and that Dr. Stetler admitted that extrapolation from the DNA of Billy's parents would have been a much less

reliable method of determining whether an individual is included or excluded as a contributor to an unknown sample (PCR L.F. 175). The court thus concluded that the presentation of such evidence would have suffered from inherent credibility problems and would not have benefited Defendant's case (PCR L.F. 177).

Further, the court noted that both Dr. Stetler and Mr. Derickson testified about the actual results of Billy's DNA testing, which became available after trial but before the evidentiary hearing (PCR Tr. 177). The court found that Mr. Derickson provided reliable, credible testimony that Billy must be *excluded* as a possible contributor (PCR Tr. 178). And the court found that Dr. Stetler's testimony would not have helped the defense because it did not exclude Defendant as a possible contributor—the only issue that defense counsel believed was relevant to their strategy (PCR Tr. 179). Finally, the court concluded that counsel acted reasonably in having the DNA independently tested and, after receiving confirmation that Defendant could not be excluded as a contributor to the DNA mixture, declining to "go shopping for another expert who could testify differently" (PCR Tr. 179).

## **Discussion**

The motion court's findings of fact and conclusions of law are not clearly erroneous. It is the post-conviction movant's burden to present evidence at the hearing to prove the allegations in his motion by a preponderance of evidence. *Weeks v. State*, 140 S.W.3d 39, 44 n.5 (Mo. banc 2004) (citing § 547.035, RSMo 2000)). Here, the evidence presented by Dr. Stetler at the post-conviction hearing, even if believed in its entirety, conclusively refutes Defendant's post-conviction claim.

In his motion, Defendant alleged that testimony from Dr. Stetler would prove that, comparing all 13 loci contained in the F2 fraction to genotypes from Defendant and Billy, "the result *would exclude* [Defendant] and *would not exclude* Billy McLaughlin" (PCR L.F. 39) (emphasis original). But Dr. Stetler did not so testify. He testified that Defendant *cannot be excluded* as a possible contributor to the F2 sample, and that if Billy was included, some other male rapist had to be included too (PCR Tr. 65-67, 82). Thus, the claim that Defendant sought to prove—that the DNA evidence could implicate Billy in the rape and clear Defendant—was defeated by his own expert. Mr. Derickson's testimony only further refuted Defendant's claim, showing that Billy could actually be excluded as a contributor to the DNA mixture (PCR Tr. 639; St. PCR Ex. 8). In light of this testimony, the motion court did not clearly err in

concluding that counsel were not ineffective for declining to try to implicate Billy in the rape with the DNA evidence.

Trial counsel did not neglect to follow up on the State's DNA analysis; they decided to have the DNA independently tested to verify that Defendant could not be excluded as a contributor (PCR Tr. 550-51, 579-81). Only after the independent analyst confirmed that Defendant could not be excluded did counsel decline to seek further testing (PCR Tr. 564). As noted above, counsel is not obligated to shop around until they find an expert who will provide the most favorable testimony. *See Johnson*, 333 S.W.3d at 464. After counsel independently verified that the State's DNA results including Defendant as a contributed to the DNA mixture were valid, it was not unreasonable for counsel to choose not to conduct further DNA testing. *See State v. Davis*, 814 S.W.2d 593, 603-04 (Mo. banc 1991) (finding no ineffectiveness where counsel consulted with a DNA expert, found that independent analysis agreed with the State's results, and thereafter declined to shop around for further experts who might further corroborate the State's testing); *State v. Ashley*, 940 S.W.2d 927, 930 (Mo. App. W.D. 1997) (same).

Defendant's argument focuses on Dr. Stetler's original probability analysis, which suggested that if Billy's genotype were projected based on his parents' DNA there was a 1-in-16,000 chance that he was a contributor to the

DNA mixture. App. Br. at 124-26. But Defendant's argument ignores that Dr. Stetler's probability analysis was undercut entirely by the subsequent tests using Billy's actual genotype—tests that Dr. Stetler himself admitted were more reliable (PCR Tr. 116-17, 176).

To obtain relief on a claim of ineffective assistance of counsel, the defendant must prove that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (quoting *Strickland*, 466 U.S. at 687). "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Fretwell*, 506 U.S. at 369. In *Fretwell*, trial counsel failed to make an objection based upon a case that was, at the time of trial, good law. *Id*. at 367-68. Subsequently, the case upon which counsel allegedly should have relied was overruled, but the defendant nevertheless argued that he was prejudiced by counsel's failure to make the objection because it would have entitled him to relief at the time. *Id*. The Supreme Court disagreed, holding that where counsel's allegedly deficient conduct does not diminish the reliability of the trial process, the Sixth Amendment guarantee is not implicated. *Id*. at 369.

The Supreme Court's decision in *Fretwell* is instructive in this case. It is true that Billy's DNA was not available for testing at the time of trial, and thus,

had counsel tried to implicate Billy then, the available evidence might have been limited to probabilities about what Billy's genotype *could have been*. But circumstances have changed. Billy's actual DNA has been tested, and even Defendant's expert admits that he cannot have been the sole rapist and Defendant cannot be excluded. Had counsel presented the "probability" evidence at trial, the proceeding would have been less reliable, not more so.

Moreover, if this case is reversed, Dr. Stetler (or a similar expert) will not extrapolate on retrial about what Billy's genotype *might be*. He will testify about the results of the tests using Billy's actual DNA. And he will conclude, as he did at the evidentiary hearing, that if Billy raped Victim, at least one other male—possibly Defendant—did, too (PCR Tr. 65-67, 82). Defendant's trial counsel did not think that proving that both Billy and Defendant raped Victim would help Defendant's case, and, for the reasons outlined in Point VII, *supra*, this belief was not unreasonable.

The motion court did not clearly err in concluding that counsel's performance in handling the DNA was neither unreasonable nor prejudicial.

Point IX should be denied.

## IX. The motion court did not clearly err in denying without a hearing Defendant's claim that Missouri's death-penalty statute is unconstitutional for failing to "genuinely narrow the class of people eligible for the death penalty." (Responds to Point X).

In his final point, Defendant argues that Missouri's death penalty statute is unconstitutional in that it fails to narrow the pool of those who are eligible to receive the death penalty and imposes death arbitrarily and capriciously. App. Br. at 129-33.

But each of the attacks Defendant levies against Missouri's statutory scheme has been repeatedly and consistently rejected by this Court. The motion court did not clearly err in refusing to entertain constitutional arguments that this Court has already rejected.

**Post-conviction claim**

In his amended motion, Defendant argued that Missouri's death-penalty statute fails to adequately narrow the class of death-eligible murders, leaving the determination of who receives the death penalty largely to the discretion of individual prosecutors (PCR L.F. 99-103). His argument rested in large part upon an Arizona Law Review article describing a study analyzing Missouri's death-penalty scheme conducted by Professors Katherine Barnes, David Sloss,

and Stephen Thaman (PCR L.F. 99-103, 134-43; Mov. PCR Ex. MMM). The study leveled three criticisms against Missouri's statutory scheme: (1) there is no "real difference" between first-degree murder (for which the death penalty is a possibility) and second-degree murder (for which it is not) because "deliberation" is so broadly defined; (2) the "wantonly vile" aggravator is so vague that it "can be found to be present in over 90% of all first degree murder eligible cases"; and (3) the failure of the statute to narrow the class of death-eligible murders leaves the decision to the discretion of the individual prosecutors (PCR L.F. 137-38, 140-42).

**Motion court's findings and conclusions**

The motion court found Defendant's claim to be without merit, noting that Missouri's death-penalty scheme has been upheld by this Court against a variety of constitutional challenges (PCR L.F. 189). The court also observed that many of the recommendations outlined in the study for improvement of the death-penalty law would require political action by "all three branches of government," and thus were beyond the power of the court to enact (PCR L.F. 189).

**Discussion**

As an initial matter, this Court should decline to consider Defendant's constitutional challenge to Missouri's death-penalty statute because the challenge should have been raised on direct appeal. A Rule 29.15 post-conviction motion is not a substitute for direct appeal. *Zink v. State*, 278 S.W.3d at 176. "Allegations of trial error involving constitutional violations are not cognizable in a Rule 29.15 motion without a showing of exceptional circumstances for not raising the constitutional grounds on direct appeal." *Matthews v. State*, 175 S.W.3d 110, 115 (Mo. banc 2005). Here, Defendant has not alleged the existence of any "exceptional circumstances" that prevented him from attacking the constitutionality of Missouri's death-penalty statute on direct appeal, and no such circumstances are apparent from the record. Accordingly, this Court should summarily deny his point as non-cognizable.

Even if this claim were properly before the Court, it would fail on the merits. The study that Defendant's argument is based upon has already been reviewed by this Court—in *Johnson v. State*, 333 S.W.3d at 471-72, the defendant challenged the constitutionality of Missouri's death-penalty statute based on the same study Defendant relies upon here. In *Johnson*, the motion court characterized the study as "severely flawed," noting deficiencies in the data and the lack of "professional and practical experiences in criminal law." *Id*. at 472. This Court found no error in the motion court's conclusions. *Id*.

Moreover, as this Court pointed out, "even if the study was not flawed, it does not necessarily establish that Missouri's statutory scheme is unconstitutional." *Id*. Apart from the study, Defendant cites no authority to support his specific constitutional attacks against Missouri's death-penalty law. App. Br. at 131-33.

Indeed, the constitutional arguments criticizing Missouri's death-penalty scheme outlined by the study and advanced in Defendant's brief have all already been explicitly rejected by this Court. First, Defendant argues that the distinction between first- and second-degree murder in Missouri—the element of "deliberation"—is illusory and thus fails to narrow the pool of those eligible for death. App. Br. at 131. But this Court has repeatedly rejected the argument that the definition of "deliberation"—"cool reflection for any length of time no matter how brief"—is too indefinite to plainly distinguish between first-degree and second-degree murder. *State v. Rousan*, 961 S.W.2d 831, 851-52 (Mo. banc 1998); *see also State v. Strong*, 142 S.W.3d 702, 716 (Mo. banc 2004); *State v. Middleton*, 998 S.W.2d 520, 524 (Mo. banc 1999).

Second, Defendant argues that the "wantonly vile" aggravator has been construed so broadly as to apply to almost any murder. App. Br. at 131. Thus, he argues, this aggravating circumstance fails to narrow the class of those eligible for the death penalty. App. Br. at 131. This Court has held otherwise. *See State v. Williams*, 97 S.W.3d 462, 473-74 (Mo. banc 2003); *State v. Cole*, 71 S.W.3d

163, 171-72 (Mo. banc 2002); *State v. Johns*, 34 S.W.3d 93, 113 (Mo. banc 2000); *State v. Johnson*, 22 S.W.3d 183, 191 (Mo. banc 2000); *State v. Knese*, 985 S.W.2d 759, 778 (Mo. banc 1999); *State v. Ervin*, 979 S.W.2d 149, 165-66 (Mo. banc 1997).

Finally, Defendant argues that "geographical disparities dictate which defendants receive death." App. Br. at 131-33. But, as the allegations in Defendant's amended motion make plain, "geographical disparities" is just another term for prosecutorial discretion (PCR L.F. 101) (alleging that, "in Missouri, who gets charged with first-degree murder and, of those charged, who actually stand in jeopardy of the death penalty, is completely up to the individual county prosecutors who may exercise their discretion in any manner they chose [*sic*]"). Time and again, this Court has rejected the claim that Missouri's statutory death penalty procedure is unconstitutional because it vests too much discretionary power in local prosecutors. *E.g. Johnson*, 333 S.W.3d at 471; *Forrest*, 290 S.W.3d at 716-17; *State v. Ramsey*, 864 S.W.2d 320, 330 (Mo. banc 1993); *State v. Whitfield*, 837 S.W.2d 503, 515 (Mo. banc 1992); *State v. Powell*, 798 S.W.2d 709, 714 (Mo. banc 1990); *State v. McMillin*, 783 S.W.2d 82, 101-02 (Mo. banc 1990) (abrogated on other grounds by *Morgan v. Illinois*, 504 U.S. 719 (1992)).

In light of the overwhelming weight of authority rejecting Defendant's constitutional arguments, the motion court did not clearly err in denying Defendant's claim without hearing additional evidence.

Point X should be denied.

## CONCLUSION

The motion court's judgment should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

_____

JAMES B. FARNSWORTH
Assistant Attorney General
Missouri Bar No. 59707

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
jim.farnsworth@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 26,108 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 22nd day of August, 2011, to:

Melinda K. Pendergraph
Woodrail Centre, Bldg. 7, Ste. 100
1000 West Nifong
Columbia, Missouri 65203

_____

JAMES B. FARNSWORTH
Assistant Attorney General
Missouri Bar No. 59707
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEY FOR RESPONDENT
STATE OF MISSOURI

## APPENDIX

Findings of Fact, Conclusions of Law and Order.....A1