IN THE MISSOURI SUPREME COURT

NO. SC88279

DAVID ZINK, Appellant,

v.

STATE OF MISSOURI, Respondent.

Appeal from the Circuit Court of St. Clair County
Twenty-seventh Judicial Circuit
The Honorable William J. Roberts, Judge

RESPONDENT'S BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346

P. O. Box 899
Jefferson City, MO 65102
573 751-3321 Telephone
573 751-3825 Fax
andrew.hassell@ago.mo.gov

Attorneys for Respondent

Table of Contents

Table of Authorities

Cases

Rules

Statement of Facts

A. The State's guilt-phase evidence

1. Zink's confessions

Zink freely admitted before, during, and after his trial that he intentionally killed Amanda Morton on July 11, 2001. Tr. 701, 897-98, 1815, 3797-98. His videotaped confessions to the murder, which can objectively be described as chilling, were admitted into evidence and shown to the jury. St. Ex. 22, 67;[1] Tr. 2349, 2361-62, 2640.

In his confessions, Zink told investigators that he became drunk in bars in Warsaw and Springfield. State's Ex. 22, 67. Zink left Springfield to return home and got lost on Interstate 44. *Id.* He rear-ended victim Amanda Morton's car on an exit ramp. *Id.* In his initial confession, Zink said that Morton voluntarily left with him, but later threatened to call the police if he did not take her back to her car. State's Ex. 22. Zink stated in his second confession that he kidnapped Morton and that she had no choice but to go with him. State's Ex. 67. He also stated that the kidnapping ended after Morton got into his car. State's Ex. 67.

Zink stated that he killed Morton because he was worried that he would go back to prison if she did call police. State's Ex. 22, 67. After deciding

[1] State's Exhibits 22 and 67 were submitted to this Court on direct appeal.

to kill Morton, Zink took her to a cemetery and tied her up. State's Ex. 67. Zink tied the rope around her neck while he considered how he should kill her. *Id.* He told her to look up and then he broke her neck. *Id.* He strangled her with the rope when she continued to make sounds. *Id.* Zink searched for a spot to bury the body and dragged her by the rope to the location he had chosen. *Id.* Worried that Morton might revive, he tried to cut her spinal cord with a knife. *Id.* He covered the body with leaves and then went home and got a shovel. *Id.* Zink later returned to the cemetery and covered the body with dirt. *Id.*

2. Other evidence of the murder

On the evening of July 11, 2001, Morton was visiting her boyfriend, Devan Lee, at his home in Springfield. St. Ex. 85. She left Lee's home at about 12:30 a.m. on July 12. State's Ex. 85. She called Lee on her cell phone after she left, and the two were talking when Lee heard "a slam" that he believed was caused by Morton dropping her cell phone. State's Ex. 85. Morton picked the phone up and told Lee that somebody had just rear-ended her car. State's Ex. 85. David Zink was that person. St. Ex. 22, 67.

Lee heard a sound like someone knocking on Morton's car window, and then heard a male voice ask her for her driver's license. State's Ex. 85. Lee advised Morton to roll up her window and lock her door. State's Ex. 85. A passing motorist saw a man and a woman, presumably Morton and Zink,

standing outside the vehicles. Tr. 1905. The woman was investigating the rear end of the car while talking on a cell phone. Tr. 1905, 1913.

Morton called the Highway Patrol to report the accident. Tr. 1868. Before a trooper could arrive, Strafford Police Officer Kenneth Clark discovered her abandoned car while patrolling the area. State's Ex. 86. The car was sitting by the side of the highway with the engine running, the headlights and hazard lights on, and the driver's side window down. State's Ex. 85, 86. A Greene County deputy and a Highway Patrol trooper arrived at the scene in response to a dispatch call and Officer Clark's call for back-up. State's Ex. 86; Tr. 1929.

The police found Morton's driver's license in the car along with her purse, billfold, clothing, medication, and a credit card. State's Ex. 85, 86; Tr. 2120, 2140. The car keys were still in the ignition. State's Ex. 86. Morton's parents, Lee, and the police attempted to call her cell phone; she did not answer. State's Ex. 86; Tr. 2001.

At about 5:30 a.m. on July 12, Zink checked into a motel at an isolated location near Camdenton. Tr. 2004, 2006-08, 2013-15. Zink filled out a registration card in his own name. Tr. 2009-10, 2038. As he was doing so, Morton came into the lobby. Tr. 2010-11. The owner of the motel, Lloyd Fuller, testified that she stared at him with large eyes, that she was scared,

that she was trembling, and that she seemed "to be kind of tightened up and pulling herself together …" Tr. 2011-12.

When Fuller checked the premises about 8:00 or 9:00 that morning, he found that the room rented to Zink was vacant, and the key had been left inside. Tr. 2016-17. The bed had been slept in and the shower used, but nothing else in the room had been disturbed. Tr. 2046-47.

Fuller recognized Morton on a television newscast that evening and called the police. Tr. 2017-18. Tr. 2126-27, 2270. The police searched Zink's room even though the room had already been cleaned and rented to another customer. Tr. 2019, 2024, 2046, 2128. Fuller gave investigators the registration card that Zink had filled out. Tr. 2019.

St. Clair County Sheriff Ronald Snodgrass and Sergeant Jimmie Stewart then went to Zink's residence. Tr. 2221-22, 2271, 2632. Snodgrass woke Zink up and asked him if he would go to the sheriff's office to talk with Highway Patrol investigators about leaving the scene of an accident. Tr. 2225-26. Zink initially stated that he was not in an accident and didn't have anything to say. Tr. 2226. Zink eventually relented, and rode to the Sheriff's office with his father. Tr. 2227. Sheriff Snodgrass followed in his vehicle, while Sergeant Stewart stayed behind to watch Zink's truck. Tr. 2227. After the police gave Zink his *Miranda* warnings in the St. Clair County Sheriff's Office and showed Zink evidence that placed him near the scene of the

abduction, Zink confessed to the police. St. Ex. 22; Tr. 2229, 2274-75, 2277-78, 2280-81.

The police went to the cemetery but were unable to locate the body. Tr. 2230. They called back to the jail and asked that Zink be brought over. Tr. 2130, 2230, 2285-86. Three officers drove Zink, who gave them directions on how to reach the cemetery. Tr. 2132, 2287. Once he arrived at the cemetery, Zink led the officers straight to the spot where he buried the victim's body. Tr. 2132-33, 2230, 2287. He told the officers that they would find her buried facedown and indicated the direction her head would be pointing. Tr. 2288. He also pointed out the tree to which he tied the victim prior to her death. Tr. 2289. When police uncovered the body, it was buried just as Zink had described. Tr. 2289. Zink also told officers that the twine that he used to tie the victim up would be found by the side of the road. Tr. 2335. A Highway Patrol investigator found bailing twine alongside the highway less than a half-mile from the cemetery entrance. Tr. 2509.

Following an autopsy, pathologists determined that that the cause of death was the breaking of the neck at the fifth cervical vertebra, which injured the spinal cord and stopped her breathing. Tr. 2468-69. The autopsy revealed two cuts on the back of the neck that fractured a vertebra and bruised the spinal cord. Tr. 2428-29, 2462-63. The autopsy also revealed injuries consistent with strangulation, including ligature marks on the neck,

bruises inside the neck near the voice box, a broken hyoid bone, a broken thyroid cartilage, and large hemorrhages under the eyes. Tr. 2426, 2431, 2433, 2442, 2458-60.

The pathologists found ligature marks on the left wrist consistent with the victim being tied-up. Tr. 2437. Five ribs on the right side and three on the left side were broken. Tr. 2465. The right lung was partially deflated. Tr. 2464-65. In all, more than fifty blunt force injuries were noted in nearly all parts of the victim's body. Tr. 2468.

DNA tests matched the semen found in the victim's anus to Zink. Tr. 2572-73. Zink's truck was searched and hair samples were recovered that were consistent with the victim's hair. Tr. 2549. Bluish paint transfer was found on the truck's front grill. Tr. 2550-51, 2632-33. Tests done on the paint transfer showed it was indistinguishable from a paint sample taken from the trunk of the victim's car. Tr. 2550-55.

B. Zink's guilt-phase evidence

Zink presented 35 witnesses and testified in his own behalf. Tr. Index. His defenses were that he did not deliberate before killing Morton, and that he did not abduct her from the accident scene. At Zink's request, the trial court instructed the jury on the lesser-included offenses of second-degree murder and voluntary manslaughter. D.A.L.F. 1084, 1086, 1087. The defense also submitted, and the trial court gave the jury, an instruction directing the

jury to acquit Zink of first-degree murder if it found that he was unable to deliberate due to mental disease or defect. D.A.L.F. 1085.

After deliberation, the jury convicted Zink of one count of first-degree murder. D.A.L.F. 1093.

C. The penalty phase

The State produced evidence about Zink's previous convictions for rape and kidnapping through the victims of those offenses, Sandra Vogt and Tina Tenpenny. Tr. 4006-37, 4038-58. The State also presented victim impact testimony from Amanda Morton's mother, father, and sister. Tr. 4059-82.

Zink presented fifteen witnesses. Dr. Mark Cunningham, a forensic psychologist, testified in detail about Zink's life before he turned eighteen years old and stated that Zink suffered "developmental damage" expressed in "personality disorders, narcissistic characteristics, paranoid characteristics, [and] antisocial characteristics." Tr. 4232. Dr. Cunningham testified that this damage led to Zink's crimes. Tr. 4338-39. Dr. Cunningham also testified that Zink would adjust well to prison life due to his age, his past prison behavior, and the nature of his convictions. Tr. 4254-71.

Zink also presented the testimony of Dr. Robert Smith, who testified that Zink suffered from narcissistic personality disorder brought on by his abusive and neglectful upbringing. Tr. 4461-68. Dr. Smith also diagnosed Zink with alcohol dependence. Tr. 4460, 4469-72. Finally, Zink presented

testimony that he counseled fellow inmates in the St. Clair County Jail about God. Tr. 4089-90, 4107-08, 4372.

Following evidence, argument, and instructions in the penalty phase of the trial, the jury recommended that Zink be sentenced to death. D.A.L.F. 1118. The jury found three statutory aggravating circumstances: that Zink had two or more serious assaultive convictions, that the murder of Amanda Morton was committed for the purpose of avoiding a lawful arrest of Zink; and that the murder of Amanda Morton involved depravity of mind, and as a result thereof, was outrageously and wantonly vile, horrible and inhuman. D.A.L.F. 1118. The trial court sentenced Zink to death. D.A.L.F. 46.

D. The direct appeal

Zink raised, among other issues, a challenge to his waiver of counsel during the guilt phase. Specifically, he alleged that "the trial court's failure to replace the public defender in the first instance forced him to represent himself; that his waiver of the right to counsel was not given voluntarily, knowingly and intelligently; and that standby counsel forced him to present conflicting defenses thereby canceling out any meaningful defense." *State v. Zink*, 181 S.W.3d 66, 70 (Mo. 2005).

This Court found that the trial court informed Zink about the perils of proceeding *pro se*, his right to representation, his right to a jury trial, his right to appeal, and "all potential consequences associated with the waiver of

counsel." 181 S.W.3d at 70. This Court also found that the trial court presented Zink with a waiver of counsel form which Zink signed in open court. *Id.* This Court held that Zink's waiver of counsel was knowing, voluntary, and intelligent. *Id.* Further, this Court held that

> The court offered Appellant two opportunities to reconsider his decision prior to trial and Appellant declined. Prior to the introduction of evidence, the court extended an invitation that Appellant could change his mind on self-representation at any time during the trial by simply notifying the court. Appellant did not accept this invitation at any time during the guilt phase of his trial, but he did turn his defense over to the public defenders for the sentencing phase of his trial.
>
> The first day of trial, prior to the seating of the jury, Appellant gave his consent to allow standby counsel to address the defense of diminished capacity during opening statement. Appellant introduced standby counsel, stating, "Ah, the Public Defenders will put on their own defense. It's my defense technically. And he will speak to you about this defense." When the public defender addressed the jury, he outlined all of the evidence of the diminished mental capacity defense that he planned to present.

> Appellant also consented to the introduction of evidence to support the diminished capacity defense, the submission of the diminished capacity jury instructions during the guilt and penalty phases of his trial, and the summation of this defense during closing arguments during the guilt and penalty phases of his trial. In fact, Appellant turned the penalty phase defense over to the public defenders, and at completion of the Appellant's case he stated to the court that it was his intent not to disrupt the diminished mental capacity defense and that this phase of the trial was the public defender's "ballgame." Appellant's alleged points of error have no merit.[2]

181 S.W.3d at 70-71.

This Court rejected all of Zink's other claims for relief and held that Zink's death sentence satisfied Missouri's statutory proportionality review.

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[2] Appellant also fails to articulate or cite any authority to support the proposition that the two defenses, i.e., inability to deliberate and diminished mental capacity, were in fact conflicting or why they could not be submitted to the jury in the alternative. [Footnote 4 in original opinion].

E. The post-conviction relief proceedings

Zink filed a *pro se* motion for post-conviction relief under Rule 29.15 in the St. Clair County Circuit Court. PCR L.F. 1. Zink's counsel later filed an amended motion containing eighteen claims, some with multiple subclaims, as well as seven *pro se* claims. PCR L.F. 293-786.

The State filed a motion to dismiss, without an evidentiary hearing, claims 8(m) (an Eighth Amendment challenge to Missouri's lethal injection procedure), 8(o) (a claim that Missouri's penalty-phase jury instructions to not require the jury to find all facts beyond a reasonable doubt), 8(p) (a claim that Missouri's clemency process is arbitrary and capricious), and 8(q) (a claim that counsel should have called Dr. Richard Weiner to "scientifically" demonstrate that jurors do not understand the penalty-phase instructions). PCR L.F. 790-794. The motion court granted that motion, holding that this Court's precedent barred each of these four claims. Resp.App. A1-A4.

The motion court conducted a five-day evidentiary hearing on the remainder of Zink's claims.[3] Zink called fifteen witnesses and testified himself. PCR Tr. Index. The State called three witnesses. *Id.* Following the hearing, the motion court issued findings of fact and conclusions of law

[3] The State will recite the relevant facts from the evidentiary hearing as necessary when responding to Zink's specific claims of error.

denying all of the remaining claims in the petition. Resp.App. A5-A78. This appeal followed.

Standard of Review

The standard of review for denial of a 29.15 motion is clear error. "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Moss v. State*, 10 S.W.3d 508, 511 (Mo. 2000).

The majority of Zink's claims allege ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, Zink must satisfy the two pronged *Strickland* test: he must show that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise in similar circumstances, and he must show that he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to prove prejudice, Zink must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. A reasonable probability under *Strickland* is "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.

Argument

I. The motion court correctly held that counsel was not ineffective for failing to obtain a PET scan, for failing to call Dr. David Preston as a trial witness to testify that Zink has "organic anatomical physiological brain damage," and for failing to mesh this evidence with Dr. William Logan's testimony (responds to Point I of Zink's brief)

A. Motion court testimony

1. Dr. David Preston

Dr. David Preston, a physician practicing in nuclear medicine, testified as an expert witness in Zink's behalf. PCR Tr. 309. Dr. Preston testified that a positron emission tomography (PET) scan allows an examiner to "identify areas of the brain that are either hyper functioning or hypo functioning." PCR Tr. 317. In a PET scan, doctors first place the patient in a controlled environment such as a quiet dark room and wait for them to relax. PCR Tr. 318. They then inject a radioactive tracer named flurodeoxyglocose (FDG) into the patient. PCR Tr. 318. FDG imitates glucose and goes to the areas of the body that are using glucose. PCR Tr. 319. As the body does not metabolize FDG, the FDG remains in the body for a certain amount of time. PCR Tr. 320. The doctors then scan the body, in this case the brain, to determine where the FDG has ended up. *Id.* Doctors then put the digital data readouts into a computer and process it though various algorithms. *Id.* at

321. The end result is a chart demonstrating relative FDG levels in the brain. *Id.*

Dr. Preston found four abnormalities in Zink's brain. First, he found that there was excessive activity in the frontal lobes of Zink's brain. PCR Tr. 323. The frontal lobe is responsible for thinking, behavioral planning, and executive functioning. PCR Tr. 324. Second, he found an asymmetry between the right and left frontal and parietal lobes with the right frontal lobe generating excessive activity. PCR Tr. 324-25. Third, he found a reduction of activity in the cingulate gyrus, a communication system between the frontal lobes and the limbic system. PCR Tr. 326. Fourth, he found a deficit in the amygdala, a potion of the brain believed responsible for risk management. *Id.*

Dr. Preston also testified that Zink's PET scan demonstrated obsessive compulsive disorder. PCR Tr. 351, 356. He testified that the asymmetry could have been due to prior cocaine or amphetamine use. PCR Tr. 353. He testified that the PET scan would neither confirm nor deny the existence of narcissistic personality disorder or paranoid personality disorder. PCR Tr. 353-54. Further, the increased frontal lobe activity did not "definitively" establish that Zink would commit criminal acts; people with increased frontal lobe activity often lead normal lives. PCR Tr. 354. Dr. Preston then testified he could not testify to the degree of mental impairment that Zink may have. PCR Tr. 357.

2. Dr. Kenneth Benedict

Dr. Benedict, a psychologist, testified that Zink suffered from paranoid personality disorder, narcissistic personality disorder, and substance abuse disorder. PCR Tr. 105. Dr. Benedict testified that there was no "one-to-one" correlation between radiological tests such as a PET scan and a mental health diagnosis. PCR Tr. 113, 137. He testified that the PET scan and Dr. Preston's testimony that Zink had excessive activity in his frontal lobes would "corroborate" his diagnosis. PCR Tr. 113-114. Dr. Benedict further testified that Dr. Preston's finding that there was a reduction in metabolism in the cingulate gyrus and the amygdala also would have corroborated his diagnoses. PCR Tr. 115-117. On cross-examination, Dr. Benedict stated that none of Zink's mental conditions could be diagnosed solely via a PET scan. PCR Tr. 134-136. Dr. Benedict stated that a PET scan would not be conclusive evidence of "any kind of personality disorder." PCR Tr. 133. Further, with regard to all of Zink's diagnosed disorders, no diagnosis needs a PET scan and none of the diagnostic criteria for any of the disorders are related to the brain's physical dynamics. PCR Tr. 135.

3. Dr. William Logan

Dr. Logan, a psychiatrist, diagnosed Zink with a personality disorder with narcissistic, paranoid, impulsive, and anti-social features. PCR Tr. 468, 470-71. Dr. Logan testified that the heightened activity in Zink's frontal lobes

was similar to someone on stimulants such as amphetamines or someone with obsessive compulsive disorder. PCR Tr. 514, 515-16. This heightened activity, according to Dr. Logan, corresponded to Zink's heightened focus on detail. *Id.* at 514. Further, Dr. Logan testified that the deficits in the limbic system and the amygdala cause Zink "to have difficulty evaluating other people's emotion …, or behavior to make correct inferences." PCR Tr. 524.

Dr. Logan specifically stated that Zink did not suffer from obsessive compulsive disorder. PCR Tr. 533-34. Dr. Logan also testified that there is no generally accepted scientific evidence about what portions of the brain were related to any of the diagnosed personality disorders. PCR Tr. 534. He stated that PET scans and other imaging technologies are not used to diagnose personality disorders in everyday situations. PCR Tr. 535.

4. Dr. Robert Smith

Dr. Smith, a clinical psychologist, diagnosed Zink with narcissistic personality disorder and alcohol dependence. PCR Tr. 588, 605, 613. He stated that the impairment in Zink's frontal lobes impaired his intellectual functioning. PCR Tr. 614. He also stated that Zink could not balance thought and emotion because of the deficits in the cingulate gyrus. PCR Tr. 614-15. Further, the deficits in the amygdala caused Zink difficulty in appreciating the risk of certain conduct or behaviors. PCR Tr. 615. Dr. Smith also stated

that a PET scan did not suffice to diagnose any mental impairment. PCR Tr. 621-22.

5. Counsel's actions

Several doctors recommended to Zink's attorneys that the defense further investigate the possibility of brain injury; Dr. Benedict opined that a brain scan would be "reasonable," PCR Tr. 90, 100, and Dr. Hough opined that there needed to be "further investigation," PCR Tr. 651-52. An investigator in the public defender's office advocated for the PET scan with Zink's attorneys and had preliminarily arranged the scan with Dr. Preston. PCR Tr. 818-19. Attorney Tom Jacquinot decided against the scan because of time pressures and the number of other experts he was coordinating. PCR Tr. 947.

B. The motion court's findings

The motion court accepted Dr. Preston's testimony dealing with the PET scan, the results of the PET scan, and the medical basis for the PET scan as true. Resp.App. A9. The motion court also found credible all the doctors' testimony that a PET scan did not establish a definite connection to any specific mental disease or defect. *Id.* The motion court found that the doctors could not use to PET scan to corroborate their diagnoses because of a lack of any generally accepted scientific method connecting personality disorders and physical deficits in the brain. *Id.*

The motion court found that counsel acted reasonably for three reasons. First, the motion court held that counsel's decision not to pursue a PET scan was reasonable because counsel had full knowledge of the possible results and the applicable law and chose not to investigate further. Resp.App. A10. Second, the motion court found that Dr. Preston's testimony would have been cumulative to Dr. Benedict's guilt-phase testimony and that counsel was not ineffective for declining to adduce cumulative evidence. Resp.App. A10-A11. Third, the motion court found that Dr. Preston's testimony would have been inadmissible in the guilt phase and that counsel was not ineffective for failing to offer inadmissible evidence. Resp.App. A11-A12. The motion court also held that Zink could not show prejudice in either the guilt or penalty phases due to the overwhelming evidence against him and that horrific nature of the murder. Resp.App. A11-A14.

C. Analysis

1. Counsel reasonably stopped the investigation

Attorney Tom Jacquinot decided against the scan because of time pressures and the number of other experts he was coordinating. PCR Tr. 947. Counsel conducted a reasonable investigation in this case, calling three experts to testify on Zink's behalf to attempt to show that he could not deliberate and that the murder was the result of Zink's mental illnesses.

No lawyer has unlimited time or resources to devote to a single case. Inevitably, due to an approaching trial date in a complex case, lawyers will have to decide which investigations to pursue in order to maximize their chances to prevail at trial. In this case, counsel decided to stick with the mental health experts (and the lay witnesses) that he was already working with. Counsel cannot be faulted for deciding to call only three mental health experts, especially when the proposed fourth expert's testimony would have been both inadmissible in the guilt phase and weak overall as set out in subsections two, three, and four of this point.

Courts have held that "a reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct." *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001), quoting *Thomas v. Gilmore*, 144 F.3d 513, 515 (7th Cir. 1998). Further, "the defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources. … counsel is not necessarily ineffective for failing to investigate every conceivable matter inquiry into which could be classified as nonfrivolous." *Smith v. Collins*, 977 F.2d 951, 960 (5th Cir. 1992). Here, faced with time pressures, a difficult case, and a difficult client, counsel reasonably chose to forgo a PET scan

which at most would have been cumulative to the other evidence counsel had investigated and that counsel presented at trial. Counsel's actions in this regard were reasonable.

2. Dr. Preston's testimony was cumulative

At trial, Dr. Benedict testified as follows:

> I can sum this up quickly by telling you that the brain regions implicated in the behavioral manifestation of this disorder [ADHD] are the projections from this middle part of the brain to the prefrontal cortex. That these centers in the brain are responsible for "stop signals." You get impulses from the limbic system, the middle part of the brain.
>
> This part of the brain is responsible for dampening the impulse or to say "stop." So, in young children who are hyperactive, it is thought that these brain centers, which are mediated by chemicals, are not doing the job and you get the results in hyperactivity.
>
> In older adults, you see signs of inattention. The brain is not checking the impulse to be distracted and taken off task.
>
> So, just to sum up what's known by the signs of this disorder, we're probably looking at difficulties in this prefrontal cortex area, the projections with the middle part of the brain.

Tr. 3023-24. In a nutshell, Dr. Benedict told the jury at trial that Zink suffered deficits in the limbic system and the prefrontal cortex due to ADHD.

The prefrontal cortex is part of the frontal lobe of the brain. PCR Tr. 115-16, 500, 514-15. The limbic system includes both the amygdala and the cingulate gyrus. PCR Tr. 326, 517, 614. Thus, in the guilt phase, Dr. Benedict told the jury that Zink had the deficits later found by Dr. Preston. Dr. Preston's testimony would have been cumulative to Dr. Benedict's testimony on this point and would not have presented any new information to the jury.

This Court has long held that counsel is not ineffective for failing to present cumulative testimony. *Goodwin v. State*, 191 S.W.3d 20, 38 (Mo. 2006); *Storey v. State*, 175 S.W.3d 116, 138 (Mo. 2005); *Skillicorn v. State*, 22 S.W.3d 678, 683 (Mo. 2000). This claim therefore fails.

3. Dr. Preston's testimony would have been inadmissible in the guilt phase

Zink's guilt-phase mental health strategy was to show diminished capacity, or in other words, the inability to deliberate. D.A.L.F. 1085; Tr. 3818-3819, 3939-3940, 3960-3961. Diminished capacity requires a defendant to show that he has a mental disease or defect and that the mental disease or defect made it impossible for him to have the required mental state for deliberation. *Nicklasson v. State*, 105 S.W.3d 482, 484 (Mo. 2003).

The experts in the motion court testified that the PET scan could not demonstrate the existence of the types of mental diseases or defects that Zink suffers from. Dr. Benedict testified that "I do think there would be, and there have been shown to be significant correlations between certain PET findings and certain patterns of behaviors, just not at a diagnostic level of certainty" and that "there is no generally-accepted medical -- medical practice that would associate a brain -- brain scan finding with any diagnosis of a mental disease." PCR Tr. 135. Dr. Preston testified that he could not testify about the degree of any mental impairment Mr. Zink might have and that he could not link the frontal lobe deficits to Zink's behavior. PCR Tr. 357.

Missouri courts use the *Frye* test to determine the admissibility of scientific evidence. Under this test, results of a scientific procedure "may be admitted only if the procedure is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" *State v. Kinder*, 942 S.W.2d 313, 327 (Mo. 1996), quoting *State v. Davis*, 814 S.W.2d 593, 600 (Mo. 1991), quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). "Admission of an expert's opinion concerning scientific evidence depends upon wide acceptance in the relevant scientific community of its reliability." *State v. Erwin*, 848 S.W.2d 476, 480 (Mo. 1993); *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. 1984). Further, "expert testimony should be excluded if it does not assist the jury or if it unnecessarily diverts the jury's

attention." *State v. Brown*, 998 S.W.2d 531, 549 (Mo. 1999); *State v. Lawhorn,* 762 S.W.2d 820, 823 (Mo. 1988).

In this case, the PET scan could not show that Zink suffered from a mental disease or defect. In fact, according to Dr. Benedict, there is no generally accepted medical practice that would associate a brain scan with any diagnosis of a mental disease. Dr. Preston has testified in the past that "the images produced by the [PET scan] could not predict behavior and did not have a causal relationship to criminal behavior." *United States v. Purkey*, 428 F.3d 738, 753 (8th Cir. 2005).

Therefore, under *Frye*, the PET scan evidence would have been inadmissible in the guilt phase to show that Zink suffered from a mental disease because there is no generally accepted medical practice making that link. This evidence was also irrelevant in the guilt phase; Dr. Benedict testified that none of the diagnostic criteria for personality disorders are related to the brain's physical dynamics. PCR Tr. 135. This evidence therefore could not have helped the jury to determine if Zink had a mental disease or defect because it does not address any of the diagnostic criteria. It therefore was irrelevant and inadmissible. *Brown*, 998 S.W.2d at 549.

This Court has repeatedly held that counsel in not ineffective for failing to offer inadmissible evidence. *Williams v. State*, 168 S.W.3d 433, 441 (Mo.

2005); *State v. Ferguson*, 20 S.W.3d 485, 507 (Mo. 2000). Zink's claim thus fails with respect to the guilt phase.

4. Zink cannot show prejudice

In order to show prejudice, Zink must demonstrate a reasonable probability that the result of the trial would have been different if counsel had presented Dr. Preston's testimony. *Strickland*, 466 U.S. at 694. He cannot make this showing with respect to either the guilt or penalty phases due to the overwhelming evidence against him.

The motion court's findings concerning guilt-phase prejudice speak for themselves:

> In guilt phase, the State presented two of Zink's confessions in which he explained that he intentionally killed the victim because she could turn him in to the authorities and cause him to go back to prison. These confessions, as Zink's trial attorneys admitted, showed Zink as cold, callous, and calculating and constituted powerful evidence of guilt. The guilt phase evidence further showed that Zink kidnaped [sic] the victim and that he brutally assaulted the victim, causing at least fifty bruises, breaking the victim's neck, strangling the victim, breaking a number of the victim's ribs, and sexually assaulting her. Zink then stuffed leaves and other debris in the victim's mouth, dug a

> shallow grave, and buried the victim. After confessing to the authorities, Zink led the police to the body. Zink sent inflammatory letters to media sources that in effect bragged about the murder and stated that he wanted the death penalty. Zink's demeanor during his trial testimony further demonstrated to the jury that he was cold and calculating, and Zink's evolving stories to the police demonstrated a calculated intent to avoid conviction and punishment for his crimes. In comparison to the overwhelming evidence against him, Zink cannot demonstrate a reasonable probability that the result of the guilt phase trial would have been different if counsel had introduced evidence from the PET scan that was cumulative to Dr. Benedict's expert testimony already before the jury.

Resp.App. A12-A13. In light of the overwhelming evidence against him at trial, including his two chilling confessions, Zink cannot show that Dr. Preston's report had a reasonable probability of creating a different result in the guilt phase, especially when Dr. Benedict testified about the same basic conclusions. There simply was too much evidence of deliberation in this case for Dr. Preston's testimony to have had a reasonable probability of changing the result.

Similar logic applies to the penalty phase. "The question is whether, when all the mitigation evidence is added together, is there a reasonable probability that the outcome would have been different?" *Storey v. State*, 175 S.W.3d 116, 160 (Mo. 2005), quoting *Hutchison v. State*, 150 S.W.3d 292, 306 (Mo. 2004). Further, "the defendant 'must show that, but for his counsels' ineffective performance, there is a reasonable probability that the jury would have concluded after balancing the aggravating and mitigating circumstances, death was not warranted.'" *Storey*, 175 S.W.3d at 160, quoting *Rousan v. State*, 48 S.W.3d 576, 582 (Mo. 2001). In this case, the jury's verdict would not reasonably have changed after hearing Dr. Preston's evidence.

In addition to the horrific details of the murder presented in the guilt phase, the State produced penalty-phase evidence about Zink's prior rape and kidnapping offenses, which involved multiple rapes of each victim, multiple other forced sexual acts including oral sex as well as vaginal and anal sodomy with carrots, cucumbers, Coke bottles, and other objects, death threats against the victims, and the use of a knife against both victims' throats in order to force them to do his bidding. Tr. 4007-4024, 4042-49. In one of these cases, Zink aggressively pursued the victim's car on a Dallas, Texas, freeway. Tr. 4008-09. After the victim though she had lost him, went to her apartment, and began to get out of her car, Zink kidnapped her with a knife. Tr. 4009-

4011. The State also introduced evidence of Zink's Texas convictions for two counts of aggravated rape, his federal conviction for one count of kidnapping for ransom, and his Kansas conviction for burglary and stealing. Tr. 3827-3829.

In contrast to this powerful evidence, Dr. Preston's testimony would have had minimal value. Dr. Preston admitted that he could not link the PET results to Zink's behavior. PCR Tr. 357. Dr. Benedict admitted that there was no generally accepted scientific basis for associating brain deficits and personality disorder diagnoses. PCR Tr. 135. In short, the PET scan would not present any new findings to the jury. It would have been cumulative to Dr. Benedict's guilt-phase testimony. Tr. 3023-24. It further would attempt to provide medical proof of Zink's personality disorders and justify his horrific criminal offense, a step that the doctors admit could not be done. Simply put, this evidence was weak.

Dr. Preston's testimony could also have been damaging for Zink's case. Dr. Preston testified that the increased activity in Zink's frontal lobes could have been the result of amphetamine and cocaine use and that he knew of Zink's prior drug use. PCR Tr. 353. The other doctors acknowledged this finding. PCR Tr. 498, 514. The State thus could have agued to the jury that Zink's drug use, not his personality disorders, was responsible for his brain

deficits. The jury would not haven been favorably impressed by more damaging information about Zink's past bad acts.

Presenting Dr. Preston's testimony would not have created a reasonable probability that the result of the trial would have been different in light of the horrific facts of this case. This Court has declined to find *Strickland* prejudice in light of particularly egregious crimes such as those in this case:

> When all of the evidence is viewed together, in this case, there is no question that the jury sentenced [Zink] to death because of his horrendous murder and not because counsel did not object more often or complain about any of the claims in these points relied on, in any combination.

Storey, 175 S.W.3d at 159-160. This Court should affirm the denial of this claim.

II. The motion court correctly held that trial counsel was not ineffective for failing to object to the prosecutor's closing argument in the penalty phase (responds to Point II of Zink's brief)

A. The argument concerning General Sherman

1. Zink did not argue that the prosecutor's statements were false in the motion court

Zink contends that counsel should have objected to the prosecutor's argument referencing General William Tecumseh Sherman. App. Br. 62-66. He specifically contends that the prosecutor misrepresented the facts about General Sherman's life and falsely stated that Sherman's father was sentenced to death for killing Sherman's mother. *Id.*

This claim is improperly raised in this court as it related to the factual accuracy of the prosecutor's argument. Zink did not raise any contention about the factual correctness of the prosecutor's references to General Sherman in his rule 29.15 motion. His sole argument was that counsel should have objected

> when the prosecutor argued that William Sherman was a great military mind who grew up under adverse circumstances and Sherman's circumstances should be contrasted to [Zink's] circumstances as to why [Zink's] circumstances were not mitigating (Tr. 4553-54). The prosecutor continued comparing

> military people who died in combat to [Zink]. (Tr. 4555-56). These arguments were improper because they were based on facts not in evidence, personal opinion, and appealed solely to passion and prejudice.

PCR L.F. 410. Zink's PCR counsel did not ask counsel about any factual inaccuracies in the Sherman story. PCR Tr. 997-998. The motion court made no determination about any factual inaccuracies in the Sherman story. Resp.App. A47.

This Court does not consider claims not raised or argued in the motion court: "claims of ineffective assistance of counsel that are raised for the first time on appeal are procedurally barred, and this Court will not consider such claims." *State v. Shurn*, 866 S.W.2d 447, 470 (Mo. 1993); *State v. Ervin*, 835 S.W.2d 905, 929 (Mo. 1992); Rule 29.15(c). This Court should dismiss the portion of this claim relating to the argument's factual veracity.

2. Analysis

The challenged argument is as follows:

> Now remember that I questioned one of the doctors a little bit about the man whose father had killed his mother, who had been prosecuted, convicted, and executed; how he had to go live with an overbearing uncle, and all of those other things. Of course, we didn't get to the end of that. I will now. There's a lot

more I could tell about it, including the nervous breakdown as an adult.

His name was William Tecumseh Sherman. One of the greatest military minds of his times. Unless you're a Southerner, then you don't like him at all.

But people who grow up rough can do just fine. And the overpowering majority of them do.

Tr. 4553-54.

The motion court held that this argument did not adduce facts not in evidence because nearly all of the facts in question were discussed during Dr. Cunningham's testimony, Tr. 4322-24, and that the point of the argument—people from rough backgrounds succeed in life—was proper. Resp.App. A47. Thus, the argument was unobjectionable. *Id.* Further, the motion court found that Zink could not show prejudice due to the overwhelming evidence against him. *Id.*

The motion court's decision was correct. The prosecutor's basic argument was that people from rough backgrounds can (and do) live good lives. This common-sense argument was permissible; it directly refuted the defense argument that Zink's poor upbringing was the proximate cause of his crimes.

Even assuming that the prosecutor got the facts about General Sherman wrong, Zink cannot demonstrate prejudice. It is highly unlikely that the jury would have sentenced David Zink to life imprisonment if counsel had objected to the comments about General Sherman in light of the hideous nature of the murder in this case as set out in the facts section of this brief. The prosecutor could have made this same argument with a different factual predicate or by using the hypothetical presented to Dr. Benedict. This subclaim therefore fails.

B. Arguments about prosecutorial discretion and societal self-defense

Zink contends that counsel was ineffective for failing to object to four separate comments as follows:

a. "I will always seek the death penalty when you kill a little girl." Tr. 4527.

b. "The only thing I can tell you is that if this is not a situation for the death penalty, all these facts and aggravation taken as a whole, I cannot imagine what is." Tr. 4524.

c. The death penalty "is societal self-defense. We have the right to remove the predators from the sheep." Tr. 4528.

d. "You are the ones who will decide whether society is going to defend itself from this man [pointing to defendant]." Tr. 4528.

App. Br. 66-68.

The motion court denied this subclaim, holding that comments (c) and (d) properly invoked societal self-defense, that comment (b) was a proper argument on the strength of the evidence in this case, and that counsel was not ineffective for failing to object to these proper arguments. Resp.App. A45-A46. Further, even assuming that argument (a) was improper, Zink suffered no prejudice.

The motion court correctly decided this claim. This Court has held that societal self-defense is a proper point of argument in the penalty phase: "the argument of societal self-defense, has previously been upheld by this Court and the United States Supreme Court as being permissible and not violative of a defendant's rights to a fair trial." *State v. Forrest*, 183 S.W.3d 218, 228 (Mo. 2006). One of the statements upheld in *Forrest* was "society, just like each one of us as an individual has the right to self-defense, even if that right of self-defense includes killing in order-against an unprovoked attack ... Society has the right to defend itself … you are society. We look to you to defend us." This comment is indistinguishable from those in this case. The prosecutor's statements (c) and (d) were permissible arguments.

The motion court also correctly found that argument in comment (b) was proper. This Court has held that a "prosecutor may state his personal opinions on whether the death penalty should be imposed so long as that

argument is fairly based on the evidence." *State v. Edwards*, 116 S.W.3d 511, 547 (Mo. 2003), quoting *State v. Clemons*, 946 S.W.2d 206, 231 (Mo. 1997). The challenged comment in *Edwards* was "if there was ever a case in which the death penalty was merited, it's a case in which a person has a criminal witness scheduled because the system will break down." 116 S.W.3d at 547. The comment in this case "if this is not a situation for the death penalty, all these facts and aggravation taken as a whole, I cannot imagine what is" is indistinguishable. The argument therefore was proper.

The point of argument (a) was that the killing of a young woman was especially heinous and deserved the death penalty. The prosecutor admittedly phrased this argument in an inartful manner, but that does not end the inquiry. The thrust of the argument was that the prosecutor sought the death penalty because of the circumstances of the crime. This argument is proper; it is the main consideration in the penalty phase. Further, the prosecutor did not cite to any facts outside the record as the death of Amanda Morton at Zink's hands was not in dispute. Finally, the prosecutor did not try to tell the jury that they had to follow his lead. He told them that "it is your decision. And again, I'm not going to try and tell you what [you] ought to do." Tr. 4527. This comment, although inartfully phrased, was not objectionable.

This Court has repeatedly held that counsel is not ineffective for failing to make a meritless objection. *Tisius v. State*, 183 S.W.3d 207, 218 (Mo.

2006); *Middleton v. State*, 103 S.W.3d 726, 741 (Mo. 2003); *State v. Clemons*, 946 S.W.2d 206, 227 (Mo. 1997). This subclaim thus fails with regard to arguments (a), (b), (c), and (d).

Even if counsel should have objected to any of these arguments, Zink cannot show prejudice. The facts of this case demonstrate that Zink abducted and sexually assaulted a nineteen-year-old and then brutally murdered her in order to avoid returning to prison. Zink callously admitted these facts to the police on two separate occasions. In light of this evidence, he cannot show a reasonable probability that the result of the trial would have changed if counsel had objected to these arguments. This subclaim fails.

C. The "who deserves to die" argument

Zink contends that counsel should have objected to the prosecutor's argument that Amanda Morton, as well as soldiers defending the United States, did not deserve to die. App. Br. 68-70. Zink argues that this argument was improper because it equated the victim's death with soldier's deaths. App. Br. 69.

The prosecutor's argument was in response to an analogy introduced by Zink's counsel. This "intruder story" analogy[4] and argument was as follows:

> In a popular story … there is a group and they're on a journey. They're on this journey and an intruder becomes an ugly, dangerous scary intruder.
>
> One of the people on the journey draws a sword and killed the intruder. And there is an elder that grabs the hand that holds the sword and says "You do not know what you are doing. He was once a man, a man once was he, who you know nothing about."
>
> The person with the sword says "I'm angry and scary and ugly and justice."
>
> And the elder says "Many who do not deserve to die, do."
>
> She was one of the many. She did not deserve. She deserved every dream which you've heard about. Don't think for one minute that that isn't a loss.

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[4] The analogy appears to have its roots in J.R.R. Tolkien's *Lord of the Rings* books and the recent movies based on those books. *See* J.R.R. Tolkien, *Fellowship of the Ring* 65-66 (Random House 2002) *and* J.R.R. Tolkien, *The Two Towers* 245-46 (Random House 2002).

And then he says—and then the elder says "Many who deserve to die, don't. He may still serve some purpose to us."

And the story, the once human man who appears to have lost all but one single shred of humanity remains in the story. The person who is much, much like a toad never transformed into a handsome prince; never becomes a hero. The person stays in the story and shapes every single event.

That one person who justice said, "Fear, anger, righteousness." Mercy says, "He once was a man whom you know very little about. He may still serve some purpose."

The law hands you the sword of justice, each and every one of you … The hand of mercy, each and every one of you is given that hand.

I submit to you that things have changed. You don't know everything about David Zink that once was. But I hope and pray that at least one or more of you have seen enough mitigation in there to conclude that the death penalty is not warranted.

*****

The voice of wisdom is never the first voice, never the first voice which you will hear in your heart. Fear, anger, justice they are always the first thing in a case like this.

That he may still serve some purpose. So I ask all of you to consider the power of mercy and the dangers of justice of the hand. He may still serve us a purpose.

Tr. 4546-4548. The prosecutor's responsive argument was:

The story of the intruder. Many who die, don't deserve it. That's entirely true, like Amanda Morton. I can think of a lot of folks who didn't deserve it; died on the beaches in Normandy, the snows of Bastogne, the seas around Midway, and hundreds of other places, fields and hills around Gettysburg, if you wish. None of those men deserved to die. Perhaps some of them did, but we don't know.

They fought for what they believed in. But that's not what we're dealing with here. We are not talking about war; we're talking about cold-blooded murder.

"And many who deserve to die, don't." Well, that's true, too, I suppose. And they serve some purpose. Because in the story, we didn't know anything about the guy.

Well, here we know a great deal about the Defendant. And that is why we must act. Not because we don't like the way he looks, but because we know so much about the damage he has done.

Tr. 4555-4556.

The motion court denied this claim, holding that this argument was proper rebuttal, that it asked the jury to "take a well-informed look at Zink's life and decide what his sentence should be," that any objection would have been meritless, and that Zink could not show prejudice. Resp.App. A47.

The motion court's decision was correct. Defense counsel's argument asked the jury to impose life in order to allow Zink to serve a purpose later in life and to exercise mercy in that hope. The prosecutor's argument responded specifically to that reasoning, telling the jury that they knew enough about David Zink and the damage that he had caused to vote for a death sentence. This was proper rebuttal argument.

Zink objects to the prosecutor's use of soldiers killed in battle as those who did not deserve to die. App.Br. 69. However, the prosecutor himself told the jury that the soldiers were not in the same situation as in this case. Tr. 4555. Thus, the prosecutor did not to compare or contrast Zink, or the victim in this case, with brave men and women who have died for the United States. He asked the jury vote for the death penalty because of who David Zink was and what he had done. Tr. 4556-4559.

The prosecutor's argument was proper. Any objection would have been meritless. Counsel is not ineffective for failing to make a meritless objection. *Tisius v. State*, 183 S.W.3d 207, 218 (Mo. 2006); *Middleton v. State*, 103

S.W.3d 726, 741 (Mo. 2003); *State v. Clemons*, 946 S.W.2d 206, 227 (Mo. 1997). This subclaim fails.

D. The "mercy equals weakness" argument

Zink contends that counsel should have objected to the prosecutor's argument equating mercy with weakness. App.Br. 70-71. The prosecutor's argument was as follows: "What you have heard from the defense in their argument is a plea for mercy. What you didn't hear, but what was still there, was the prayer for weakness. That is what is really going on there." Tr. 4559. The motion court held that even if this argument was improper, Zink could not demonstrate prejudice. Resp.App. A49-A50.

The motion court did not err. This Court in *State v. Rousan*, 961 S.W.2d 831, 850-51 (Mo. 1998), held that prosecutors may argue against mercy, but that "prosecutors should avoid … any suggestion that the jury is weak if it fails to return a certain verdict."

In *Rousan*, the prosecutor argued that "The defense has asked you for mercy and what they are hoping for is weakness. I'm sorry. It's a hard choice. Weakness is something we can no longer afford. Do your duty. Thank you folks." 961 S.W.2d at 851. This Court found that the trial court did not err in refusing to sustain an objection to this argument because the "reference to weakness was only part of a larger and otherwise appropriate argument, was

isolated and brief, and was not emphasized by the prosecutor." 961 S.W.2d at 851.

This case presents near-identical facts. The challenged argument in this case is indistinguishable from the one in *Rousan*. In this case, the remark was brief, not further emphasized, and part of a larger argument about why Zink did not deserve mercy based on the facts of this case. *Rousan* thus controls this case. Any objection would have been meritless. Counsel is not ineffective for failing to make a meritless objection. *Tisius v. State*, 183 S.W.3d 207, 218 (Mo. 2006); *Middleton v. State*, 103 S.W.3d 726, 741 (Mo. 2003); *State v. Clemons*, 946 S.W.2d 206, 227 (Mo. 1997). This subclaim thus fails.

E. The "send a message" argument

Zink contends that counsel should have objected to the prosecutor's argument urging the jury to "send a message" that killing little girls was unacceptable and would be punished harshly. App.Br. 71.

The challenged argument was as follows:

> This isn't hatred. This is a process by which you decide what must be done–what must be done. And there is more to it than just punishing the defendant. Consider what message will come out of this courtroom with your verdict. I hope the message will

> be [that] you don't get to kill little girls on our watch and not face the ultimate penalty.

Tr. 4559-4560. The motion court found that this argument was proper because it was sufficiently related to the facts of this case and because Zink could not show prejudice. Resp.App. A50.

The motion court correctly determined this claim. This Court has held that "a prosecutor may argue the need for strong law enforcement, the prevalence of crime in the community, and that conviction of the defendant is part of the jury's duty to uphold the law and prevent crime." *State v. Roberts*, 948 S.W.2d 577, 595 (Mo. 1997. In *Roberts*, this Court upheld the following prosecutorial arguments:

> You're not representing yourself in this case, you're representing the community." Recommending the death sentence would be "a statement of the community that this type of crime is outrageous." The murder was "horrible and it effects everybody, it reduces the quality of life for everybody in the whole county of St. Louis, a crime like this is not just a one person crime." … "This is not gonna happen in St. Louis County, we're going to deter other murderers from committing these crimes and we're gonna punish those that do. We have to protect ourselves."

Id. The argument in this case was similar, if not less emphatic, than those upheld in *Roberts*. Therefore, any objection would have been overruled. Counsel is not ineffective for failing to make a meritless objection. *Tisius v. State*, 183 S.W.3d 207, 218 (Mo. 2006); *Middleton v. State*, 103 S.W.3d 726, 741 (Mo. 2003); *State v. Clemons*, 946 S.W.2d 206, 227 (Mo. 1997). This subclaim thus fails.

F. The "duty" argument

Zink contends that counsel should have objected to the prosecutor's argument urging the jury to "do their duty" and telling the jury that "the only thing necessary for evil to thrive is for good men and women to do nothing." App.Br. 72-74. The motion court denied this claim, holding that this Court had specifically upheld the use of the quote and that the prosecutor properly asked the jury to return a verdict based on the facts of this case. Resp.App. A51-A52. The motion court also held that Zink could not show prejudice.

The motion court was correct. In *State v. Forrest*, 183 S.W.3d 218, 228 (Mo. 2006), this Court specifically upheld this same prosecutor's use of the quote that about evil triumphing if good men and women do nothing. This Court held that this quote was interrelated with, and an appropriate discussion of, mercy in a capital case. *Id.* This portion of the claim fails.

Further, this Court has upheld a request for the jury to do its duty and return a death sentence in conjunction with a request for the jury to deny

mercy. *State v. Storey*, 40 S.W.3d 898, 911 (Mo. 2001); *State v. Rousan*, 961 S.W.2d 831, 850-51 (Mo. 1998). Zink's claims therefore fail.

G. Zink was not prejudiced

Zink cannot show *Strickland* prejudice even assuming that counsel should have objected to some or all of these arguments. The evidence of Zink's guilt and his suitability for the death penalty was overwhelming. The facts of this case demonstrate that Zink abducted and sexually assaulted a nineteen-year-old and then brutally murdered her in order to avoid returning to prison. Zink callously admitted these facts to the police on two separate occasions. The State adduced evidence that Zink been convicted of rape in two prior Texas cases, one of them eerily similar to this one. These offenses involved multiple rapes of each victim, multiple other forced sexual acts including oral sex as well as vaginal and anal sodomy with carrots, cucumbers, Coke bottles, and other objects, death threats against the victims, and the use of a knife against both victims' throats in order to force them to do his bidding. Tr. 4007-4024, 4042-49. In one of these cases, Zink aggressively pursued the victim's car on a Dallas, Texas, freeway. Tr. 4008-09. After the victim though she had lost him, went to her apartment, and began to get out of her car, Zink kidnapped her with a knife. Tr. 4009-4011. The State also introduced evidence of Zink's federal conviction for one count

of kidnapping for ransom and his Kansas conviction for burglary and stealing. Tr. 3827-3829.

Viewed in this light, there is no reasonable probability that the jury would have voted for life imprisonment absent some or all of the challenged arguments. This Court resolved a similar situation in *State v. Roberts*, 948 S.W.2d 577, 595-96 (Mo. 1997): "there was overwhelming evidence in this case to support a recommendation of the death penalty. It borders the frivolous to suggest that the jury based its sentencing recommendation in this case on something other than the overwhelming evidence of aggravating circumstances."

Zink cannot show prejudice. This Court should deny this point in its entirety.

III. The motion court correctly determined that Zink was competent to waive counsel (responds to Points III, V, and VII of Zink's brief)

Zink contends that he was incompetent to waive counsel based on his mental illnesses and a "staffing crisis" in the public defender system. App.Br. 75-95. He also alleges that his waiver was unknowing and involuntary because the trial court did not advise him that he could not approach witnesses and that he would have to wear a leg restraint under his pants. App.Br. 104-109. He further alleges that he was incompetent to stand trial. App.Br. 118-129.

A. These claims are not cognizable under Rule 29.15

This Court has repeatedly held that claims of trial court error are not cognizable under Rule 29.15. *State v. Ferguson*, 20 S.W.3d 485, 509 (Mo. 2000); *State v. Brown*, 902 S.W.2d 278, 295 (Mo. 1995). Further, Rule 29.15 is not a substitute for direct appeal and does not allow for claims that could have been, but were not, raised on direct appeal except in rare and exceptional situations. *Tisius v. State*, 183 S.W.3d 207, 212 (Mo. 2006). The Missouri Court of Appeals has expressly held that self-representation claims are not cognizable in a Rule 29.15 proceeding. *Phillips v. State*, 214 S.W.3d 361, 364-65 (Mo.App. S.D. 2007); *Henderson v. State*, 786 S.W.2d 194, 196-97 (Mo.App. E.D. 1990).

Zink does not show any exceptional circumstances that prevented him from raising his claims on direct appeal that the trial court improperly denied him his right to represent himself. Therefore, these claims are not properly presented in this appeal. This Court should dismiss them.

B. Zink was competent to stand trial and to waive counsel

Even if these claims were cognizable in this appeal, they would fail.

The motion court found every expert's testimony that Zink was incompetent to waive counsel not credible. Resp.App. A19-A20. The court found that counsel David Kenyon's testimony that Zink appeared competent was "very credible." Resp.App. A20. Finding that the tests for competence to waive counsel and competence to stand trial are the same, the motion court adopted its findings rejecting Zink's claim that he was incompetent to stand trial. *Id.* There, the court found that Zink had both the cognitive ability to understand trial and that he actually understood the "significance and consequences" of his decisions. Resp.App. A17. The court relied on its fifty-page colloquy with Zink about his waiver of counsel to support his conclusion. *Id.*

The motion court correctly decided this claim. The tests for competence to waive counsel and competence to stand trial are the same. *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993); *State v. Shafer*, 969 S.W.2d 719, 729 (Mo. 1998). This test has two prongs: first, "whether he [the defendant] has

the ***ability*** to understand the proceedings." *Shafer*, 969 S.W.2d at 729, quoting *Godinez*, 509 U.S. at 401, n.12 (emphasis in *Godinez)*, and second, "whether the waiver or plea is voluntarily and knowingly made," 969 S.W.2d at 729.

Every expert in this case testified that Zink had the cognitive ability to understand the proceedings against him. PCR Tr. 125, 138 (Dr. Benedict); PCR Tr. 677 (Dr. Hough); PCR Tr. 535-36 (Dr. Logan); PCR Tr. 585, 626 (Dr. Smith). Zink told the trial court that he understood his rights, and, in an extensive colloquy, discussed his right to counsel with the trial court. Tr. 553-603. The record sufficiently supports the motion court's factual finding that Zink had the ability to understand the proceedings against him.

The second prong looks to whether Zink's waiver was knowing and voluntary. This Court held in Zink's direct appeal that his waiver of counsel was knowing and voluntary. *State v. Zink*, 181 S.W.3d 66, 70-72 (Mo. 2005). "[A] matter decided on direct appeal may not be relitigated in post-conviction relief proceedings even if movant offers a different theory." *Mallett v. State*, 769 S.W.2d 77, 83 (Mo. 1989), quoting *Schlup v. State,* 758 S.W.2d 715, 716 (Mo. 1988); *Storey v. State*, 175 S.W.3d 116, 154 (Mo. 2005). This Court's prior decision that Zink's waiver of counsel was knowing and voluntary controls this case. Zink fails the second prong of the *Shafer* test.

For these reasons, Zink cannot demonstrate that his waiver of counsel was unknowing and involuntary and he cannot show that he was incompetent when he waived counsel or that he was incompetent to proceed to trial. This claim fails.

IV. Counsel was not ineffective for failing to object to Zink's hidden leg restraint

Zink contends that counsel was ineffective for not objecting to the sheriff's requiring Zink to wear a hidden leg restraint during trial. App.Br. 96-103.

The motion court held that there was no credible evidence that the jury ever saw the restraint and that there was no violation of Zink's rights. Resp.App. A23-A24.

"The Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. 622, 629 (2005). In this case, however, the trial court made explicit factual findings that the restraint was not visible to the jury. Resp.App. A23-A24.

Those factual findings are not clearly erroneous. The court itself stated that the restraint was not visible. Resp.App. A23. The restraint was designed to fit under the defendant's pants and sheriff's deputies put it on Zink every morning of trial. PCR Tr. 363. The jurors who testified via deposition specifically stated that the restraint was not visible. Pet. Ex. 3 at 15; Pet. Ex. 4 at 24-25. There is no evidence in the record that any person, much less a juror, saw the restraint device while Zink was in the courtroom.

Deck prohibits visible shackling devices. There were no visible shackling devices such as leg irons, chains, or handcuffs used in this case. Any objection would have been meritless. Counsel is not ineffective for failing to make a meritless objection. *Tisius v. State*, 183 S.W.3d 207, 218 (Mo. 2006); *Middleton v. State*, 103 S.W.3d 726, 741 (Mo. 2003); *State v. Clemons*, 946 S.W.2d 206, 227 (Mo. 1997). This claim thus fails.

Zink argues that the jury "knew" there was a restraint device because Zink could not move freely. This argument speculates that the jury knew the State was the source of the restraint device. Additionally, Zink's argument would bar any type of restraint device in a courtroom because any type of physical device meant to impede motion will impede motion or be noticeable at some point. That is what the restraint device is meant to do.

Thus, the logical conclusion of Zink's argument is that any restraint device that the jury may notice would be forbidden by the Fifth Amendment. This requirement would essentially ban any restraint devices from the courtroom. In this age of escape attempts and courtroom attacks on judges, court personnel, and attorneys, this is a risk that trial courts can not afford to take. *Deck* does not stand for this broad proposition; it bans only visible shackling devices. There were no visible shackling devices used in Zink's trial.

This Court should deny this claim.

V. The motion court correctly found that counsel was not ineffective for failing to object to the prosecutor's guilt-phase closing arguments (responds to Point VI in Zink's brief)

A. The argument that Zink was attempting to manipulate the process

Zink challenged the prosecutor's argument that Zink was trying to "feed" the diminshed capacity defense. App.Br. 111-114. The challenged argument in full was as follows:

> Now, folks, what's going on? I've been sitting here and you have had infinite patience with what you heard in this courtroom. And I have tried—I have sat there and listened to it as you have and I said, what in the world are they doing?
>
> Well, it finally occurred to me what's going on. And you have seen the defense tactics laid bare before you in this courtroom today and what they are is very simple. The Defendant comes in here and attempts, with what he is doing, to feed counsel's theory of diminished mental capacity.
>
> *****
>
> What else did he say? He doesn't remember all this. Good grief. Again, it happened first. The Defendant lied to you and lied to the police at every opportunity.

> Recall he said that nothing could stop him from achieving his objectives. Of course, he was saying that was the death penalty at the time. But could that not have all been manipulation, again intended to feed this diminished mental capacity defense. Manipulation. Smoke screen. That's what that is.

Tr. 3965, 3966-67.

The motion court found that this argument was proper because it was only an attack on Zink and highlighted the fact that Zink is willing to say whatever he needs to say to win. Resp.App. A41.

The motion court was correct. Contrary to Zink's arguments, this argument does not accuse counsel of any wrongdoing. The sole person that the prosecutor speaks about is Zink and the sole point is that Zink is trying to manipulate the system. The prosecutor did not once say that counsel was a participant in this scheme. He only said that Zink was trying to use any opening, including the defense arguments, to escape conviction and punishment for his crimes.

This Court has rejected similar claims:

> To suggest that the arguments advanced by defense counsel are "smokescreens" or "bold" fall short of accusing counsel of suborning perjury or the other egregious accusations against defense counsel that occurred in *Burnfin*, *Harris*, or other cases relied on by the defendant. At most, the comments by the

> prosecuting attorney were near error which, by definition, is not error.

State v. Weaver, 912 S.W.2d 499, 514 (Mo. 1995). Other courts have also held that references to the defense being a "smokescreen" are permissible. *People v. Stitely*, 35 Cal.4th 514, 559-60 (2005); *People v. Marquez*, 1 Cal.4th 553, 575-576 (1992); *People v. Pierce*, 632 N.Y.S.2d 905, 906 (App. Div. 1995).

This subclaim lacks merit.

B. The "duty to convict" argument

Zink argues that counsel should have objected to the prosecutor's argument that the jury had a "duty to convict" Zink. App.Br. 114-116. The prosecutor's argument was: "justice in this case is murder in the first degree. Your duty is to return justice. Do your duty." Tr. 3978. The motion court held that this argument was proper. Resp.App.A44-A45.

The motion court was correct. This court has repeatedly held that a prosecutor may argue that the jury has a duty to uphold the law. *State v. Roberts*, 948 S.W.2d 577, 594 (Mo. 1997); *State v. Mallett*, 732 S.W.2d 527, 537 (Mo. 1987); *State v. Preston*, 673 S.W.2d 1, 8 (Mo. 1984). The prosecutor did nothing more than this here. This subclaim lacks merit.

Zink cites *Viereck v. United States*, 318 U.S. 236 (1943) in support of his point. The closing argument in that case was completely different from

the one here. There, in the case of a man for failing to register as the agent of a German company during World War II, the prosecutor argued that:

> In closing, let me remind you, ladies and gentlemen, that this is war. 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 because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.
>
> This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime, just as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.
>
> As a representative of your Government I am calling upon every one of you to do your duty.

318 U.S. at 248 n.3. The Court stated that this argument was "an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice." 318 U.S. at 247. The argument in *Vierick* directly suggested that citizens had a duty to be

soldiers in World War II. Here, in contrast, the prosecutor's comments were directly related to evidence of Zink's guilt of first-degree murder and the lack of any evidence to support a lesser verdict. *Vierick* does not control this case.

C. The "millisecond" argument

Zink contends that the prosecutor's argument that "as long as he had a millisecond of time to reflect, that's enough for cool reflection; that's enough for deliberation," Tr. 3883, misstated the meaning of the term "deliberation." App.Br. 116-117. The motion court found that this argument was proper because deliberation is defined as "cool reflection for any period of time, no matter how brief," Mo.Rev.Stat. §565.002(3) (2000), and a millisecond is a brief period of time. Resp.App.A34-A35.

The motion court's decision is correct. A millisecond (.001 second) is a brief period of time. Theoretically, the prosecutor's statement was correct and one millisecond suffices for deliberation. However, this claim fails for a much simpler reason: the lack of prejudice. In his confessions, Zink stated that after deciding to kill the victim, he took her to the cemetery and tied her up. State's Ex. 67. He tied the rope around her neck while he considered how he should kill her. *Id.* He told Morton to look up, and then broke her neck. *Id.* She continued to make some sounds, so he strangled her with the rope. *Id.* Zink hit the victim at least fifty times. Tr. 2468. He also tried to cut her spinal cord with a knife to ensure that she died. State's Ex. 67. There was

ample evidence of deliberation for much more than .001 second in this case. Objecting to the prosecutor's millisecond comment would not have had a reasonable probability of changing the guilt-phase verdict in light of Zink's admissions. This claim fails.

D. Zink was not prejudiced

Zink cannot show *Strickland* prejudice even assuming that counsel should have objected to some or all of these arguments. The evidence of Zink's guilt was overwhelming. The facts of this case demonstrate that Zink abducted and sexually assaulted a nineteen-year-old and then brutally murdered her in order to avoid returning to prison. Zink callously admitted these facts to the police on two separate occasions. In light of this evidence, objecting to the prosecutor's arguments would not have had a reasonable probability of changing the first-degree murder verdict. This claim fails.

VI. The motion court did not err in signing the State's proposed findings (responds to Point VIII in Zink's brief)

Zink argues that the motion court erred by signing findings of fact and conclusions of law prepared by the State. App.Br. 130-139. This Court has previously rejected such claims:

> Adopting all or part of a party's proposed findings, or adopting by reference the wording of a party's motion, has become a common practice among lawyers and judges in both criminal and civil cases. Courts frequently request both parties to draft findings of fact and conclusions of law that conform to how the court intends to resolve the issues in dispute. The court then takes the parties' recommendations under advisement and either drafts its own findings of fact and conclusions of law or adopts one of the parties' findings in whole or in part. As long as the court thoughtfully and carefully considers the parties' proposed findings and agrees with the content, there is no constitutional problem with the court adopting in whole or in part the findings of fact and conclusions of law drafted by one of the parties. Once the trial court determines that it agrees with one of the parties' findings and signs the order, the court has in effect adopted that party's findings as its own.

> It is clear from the record that the prosecutor drafted some or all of the August 1, 1990, findings of fact and conclusions of law. We find no constitutional violation regarding this practice as long as the trial court is satisfied that its findings of fact and conclusions of law reflect its independent judgment. Because there was no evidence presented that the findings and conclusions did not reflect the court's own independent judgment, this point is denied.

State v. White, 873 S.W.2d 590, 600 (Mo. 1994). In this case, both sides submitted proposed findings to the motion court. PCR L.F. 869-1039 (Zink's proposed findings); PCR L.F. 1040-1113 (State's proposed finding accepted by court). The motion court, having reviewed the proposed findings, chose to adopt them, a practice specifically allowed by this Court. The motion court did not err in adopting the State's proposed findings of fact and conclusions of law.

VII. The motion court did not err in allowing Zink to voluntarily dismiss his claim that trial witnesses provided courtroom security (responds to claim IX in Zink's brief)

Zink contends that Zink was incompetent to proceed with his Rule 29.15 proceeding and that the motion court therefore erred in allowing him to voluntarily dismiss his claim that trial witnesses also provided courtroom security. App.Br. 140-144.

At the beginning of the Rule 29.15 evidentiary hearing, following the admission of a number of stipulated exhibits, Zink informed the trial court that he wished to dismiss three claims in his amended petition. PCR Tr. 76. The following colloquy ensued:

> THE COURT: You've discussed this—these three claims and the effect of dismissing them at this point with Mr. Zink?
>
> [PCR COUNSEL]: Yes.
>
> THE COURT: Ah, all right. Mr. Zink, have you discussed dismissing those three specific claims with your lawyers?
>
> MR. ZINK: Yes, I have. I'm the one that directed to dismiss those particular claims.
>
> THE COURT: All right. And you've had plenty of time to discuss that with them?
>
> MR. ZINK: That's correct.

THE COURT: All right. Do you need any more time to discuss those with them?

MR. ZINK: No.

THE COURT: All right. You understand the legal effect, I'm sure, of dismissing those claims at this time. They will be dismissed with prejudice, meaning they can't be brought up again in this proceeding. And they will not be considered in this proceeding; you understand that?

MR. ZINK: Yeah, that's correct.

THE COURT: It's as if they had never been filed.

MR. ZINK: Correct.

THE COURT: And you want me to dismiss then those three?

MR. ZINK: Yeah, those three, only; those three particular ones.

THE COURT: Right, okay. And is anyone forcing or threatening you in any way to do that?

MR. ZINK: No, that was my own decision after I reached those three issues.

THE COURT: Then the Court at this time dismisses with prejudice the claim in 8(E), 8(H), and 8(N).

PCR Tr. 76-77. The trial court later reduced this order to writing. Resp.App. A6.

The trial court properly granted Zink's motion to voluntarily dismiss this claim. This Court's Rule 67.02(b) provides that a court order "upon such terms and conditions as the court deems proper" may allow for voluntary dismissal. The motion court here specified that the dismissal would be with prejudice, and Zink agreed to that condition.[5] The motion court engaged in an extensive colloquy with Zink to ensure that Zink understood the consequences of his decision. The motion court therefore had the power to enter its order. Zink waived further consideration of this claim by voluntarily dismissing it. *See Smith v. State*, 100 S.W.3d 805 (Mo. 2003) (inmate was competent to waive his entire post-conviction appeal).

Zink tries to evade the effects of his action by contending that he was incompetent to proceed in his Rule 29.15 proceeding. He and his attorneys failed to present this claim to the motion court as well. If Zink truly was incompetent to proceed, his attorneys as well as Zink's expert mental health witnesses could (and should) have brought that fact to the Court's attention.

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[5] A dismissal without prejudice would have had the same effect to Rule 29.15(l)'s bar on successive petitions.

This Court should decline to allow Zink to overcome one procedurally defaulted claim with a second procedurally defaulted claim.

Further, Zink was not incompetent during the Rule 29.15 hearing. He was able to lucidly discuss this case and his underlying criminal trial at length as a witness. PCR Tr. 798-813, 1074-1222. He also has shown his understanding of this case by attempting to file a *pro se* brief with this Court. He cannot overcome his voluntary dismissal of this claim.

For these reasons, this Court should deny this claim.

VIII. The motion court correctly determined that counsel was not ineffective for failing to object to the introduction of Dr. Spindler's report (responds to claim X of Zink's brief)

Zink contends that counsel was ineffective fort failing to object to the introduction of Dr. James Spindler's autopsy report, Dr. Keith Norman's use of that report, and the prosecutor's argument based on the report. App.Br. 145-147. Zink contends that admission of the report violated *Crawford v. Washington*, 541 U.S. 36 (2004).

The motion court held that trial counsel was not ineffective because Dr. Norton independently testified to all of the findings in the report and that the report therefore was cumulative to Dr. Norton's testimony. Resp.App. A32-A33.

1. *Crawford* does not apply to autopsy reports

The Supreme Court held in *Crawford* that the Confrontation Clause barred testimonial hearsay unless the defendant had a prior opportunity for cross-examination and the declarant was unavailable. 541 U.S. at 68; *State v. March*, 216 S.W.3d 663, 665 (Mo. 2007). The term "testimonial" "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68. In *Davis v. Washington*, 126 S.Ct. 2266, 2273-74 (2006), "the Court held that a statement made in response to police interrogation is testimonial when its "primary

purpose" is not to respond to an ongoing emergency but "to establish or prove past events potentially relevant to later criminal prosecution." 216 S.W.3d at 666. Therefore, "when a laboratory report is created for the purpose of prosecuting a criminal defendant …, it is testimonial." 216 S.W.3d at 667.

The autopsy report in this case was not prepared for the purpose of prosecuting Zink. Under Missouri law, an autopsy is ordered by either the county coroner or the county medical examiner. Mo.Rev.Stat. §58.451.7 (2000); Mo.Rev.Stat. §58.725 (2000). Under both of these statutes, the discretion to conduct an autopsy lies with the coroner or the medical examiner. *Id.* The purpose of these autopsies is to determine the cause of death. *Id.*; Mo.Rev.Stat. §58.720 (2000). Results of the autopsies and the findings detailing cause of death are public records. §§58.451(6) and 58.725. Thus, an autopsy report is not part of a police investigation, interrogation, or any other police or prosecutorial activity. The report in this case was not created for the purpose of prosecuting Zink. It was created to determine the cause of death. It therefore is not testimonial hearsay under *Crawford*.

Courts considering this issue have near-unanimously held that autopsy reports do not fall under *Crawford*. *United States v. Feliz*, 467 F.3d 227, 229 (2d Cir.2006); *State v. Lackey*, 120 P.3d 332, 348-52 (2005); *People v. Durio*, 794 N.Y.S.2d 863, 867-869 (App. Div. 2005); *Moreno-Denoso v. State*, 156 S.W.3d 166, 180-82 (Tex. Ct. App. 2005); *State v. Anderson*, 942 So.2d 625,

628-629 (La. Ct. App. 2006); *State v. Craig*, 853 N.E.2d 621, 639 (Ohio 2006); *but compare Perkins v. State*, 897 So.2d 457, 462-65 (Ala. Ct. Crim. App. 2004) (allowing admission of autopsy report under *Crawford*) *with Smith v. State*, 898 So.2d 907, 917 (Ala. Ct. Crim. App. 2004) (opposite holding).

2. *Crawford* arguably allowed business records to be admitted

The Supreme Court in *Crawford* stated that "most of the hearsay exceptions [in 1791] covered statements that by their nature were not testimonial-for example, business records or statements in furtherance of a conspiracy." 541 U.S. at 55. Chief Justice Rehnquist recognized in his dissent that business records were not testimonial: "to its credit, the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records." 541 U.S. at 76.

"Counsel's conduct is measured by what the law is at the time of trial." *Glass v. State*, 227 S.W.3d 463, 472 (Mo. 2007). Business records, which the autopsy report here unquestionably was, were specifically deemed admissible in *Crawford*. Counsel would have had to anticipate that the Supreme Court would have changed this portion of *Crawford* in order to make a valid objection. "Counsel will generally not be held ineffective for failing to anticipate a change in the law." 227 S.W.3d at 472.

Any objection would have been meritless. Counsel had no obligation to raise a meritless objection. *Tisius v. State*, 183 S.W.3d 207, 218 (Mo. 2006);

Middleton v. State, 103 S.W.3d 726, 741 (Mo. 2003); *State v. Clemons*, 946 S.W.2d 206, 227 (Mo. 1997). Counsel understandably did not object here.

3. Zink cannot show prejudice

Even if the autopsy report was inadmissible, Zink cannot show prejudice. The prosecutor still would have been able to introduce the photographs of the victim's injuries and other evidence of the brutal nature of her death. He also could have obtained the services of another doctor to conduct a review of the records and offer medical conclusions. Nearly all of the evidence in Dr. Norton's testimony and Dr. Spindler's report therefore would have been admitted into evidence.

Further, Zink himself testified about the cause of death: he broke the victim's neck, strangled her, and tried to cut her spinal cord. There was no question as to who killed Amanda Morton or how she died. The only question in the guilt phase was whether Zink deliberated. The autopsy report could not answer that question, and evidence about the condition of the victim's body, including photographs, would have been admissible without the autopsy report.

Zink therefore cannot show a reasonable probability that the result of the guilt-phase trial would have been different if counsel had objected to Dr. Spindler's testimony. This claim fails.

IX. Zink's challenge to Missouri's lethal injection procedure is premature (responds to claim XI in Zink's brief)

Zink contends that lethal injection as administered by the State of Missouri may cause him undue pain. App.Br. 148-151. As the motion court found, Resp.App. A2, this Court has consistently rejected this precise claim as unripe in a Rule 29.15 proceeding. *Goodwin v. State*, 191 S.W.3d 20, 40 (Mo. 2006); *Williams v. State*, 168 S.W.3d 433, 446 (Mo. 2005); *Worthington v. State*, 166 S.W.3d 566, 582-83 (Mo. 2005); *Morrow v. State*, 21 S.W.3d 819, 828 (Mo. 2000). This claim therefore should be denied.

X. The motion court correctly found that direct appeal counsel was not ineffective for failing to argue that the penalty-phase jury instructions conflicted with *Ring v. Arizona* and *Apprendi v. New Jersey*

Zink contends that the jury was not required to find all of the facts qualifying him for the death penalty beyond a reasonable doubt under *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey,* 530 U.S. 466 (2000). App.Br. 152-157. In particular, Zink contends that steps two and three in the statutory process under Mo.Rev.Stat. §565.030.4 (2000) must be found beyond a reasonable doubt. *Id.* The motion court denied this claim without a hearing. Resp.App. A2-A3.

In order to prevail on a claim of ineffective assistance of appellate counsel, Zink must show that "the claimed error [was] sufficiently serious to create a reasonable probability that, if it were raised, the outcome of the trial would have been different." *Williams v. State*, 168 S.W.3d 433, 444 (Mo. 2005). He cannot do so here. As the motion court found, this Court has specifically rejected the claim that steps two and three under §565.030.4 must be found beyond a reasonable doubt. *State v. Gill*, 167 S.W.3d 184, 193 (Mo. 2005); *State v. Glass*, 136 S.W.3d 496, 520-21 (Mo. 2004). If Zink's counsel had raised these arguments on direct appeal, they would have failed. Counsel is not ineffective for failing to raise meritless arguments on appeal. *Nicklasson v. State*, 105 S.W.3d 482, 487 (Mo. 2003). This point is meritless.

Conclusion

For these reasons, this Court should affirm the motion court's denial of Zink's Rule 29.15 motion.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-3825 Fax
andrew.hassell@ago.mo.gov

Attorneys for Respondent

Certificate of Compliance and Service

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains _____ words, excluding the cover and this certification, as determined by Microsoft Word 2003 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus free; and that a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of _____, 2007, to:

Mr. William J. Swift
Office of the State Public Defender
Woodrail Center, 1000 W. Nifong,
Building 7, Suite 100
Columbia, Missouri 65203

Attorney for David Zink

ANDREW W. HASSELL
Assistant Attorney General