

NO. SC87060

IN THE SUPREME COURT OF MISSOURI

TERRANCE ANDERSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from the Circuit Court of Cape Girardeau County
Thirty-second Judicial Circuit
The Honorable William L. Syler, Judge**

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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STATEMENT OF FACTS

A Cape Girardeau County jury convicted Terrance Anderson of two counts of first-degree murder in the deaths of Deborah and Steven Rainwater. The trial court followed the jury's recommendation and sentenced Anderson to death for the murder of Deborah Rainwater and life imprisonment without the possibility of probation or parole for the murder of Steven Rainwater. Viewed in the light most favorable to the verdict, the following evidence was adduced at trial.

After Anderson dropped out of college, he began hanging around his old high school in Poplar Bluff (Tr. 1439-40, 1508, 1511). He started dating Abbey Rainwater, who was a student there, in February of 1996, when she was about 15 years old and he was about 21 years old (Tr. 1216, 1240, 1388, 1511).

In July 1996, Abbey became pregnant with Anderson's child (Tr. 1264). Her parents, Stephen and Debbie Rainwater, then invited Anderson to live with them (Tr. 1264). After Anderson moved in, he began neglecting his job at Rowe Furniture Company and began staying out late at night (Tr. 1265, 1397-1400). He was fired from his job in December 1996 (Tr. 1401).

That same month, Anderson grabbed Abbey by the neck and threw her against a wall (Tr. 1267). She talked to her parents about Anderson moving out,

and they asked him to move out (Tr. 1265). He then moved in with his mother (Tr. 1385).

After Abbey gave birth to the baby, Kyra, on April 18, 1997, Anderson violently assaulted Abbey on two occasions (Tr. 1217, 1275). During the second of these assaults, on July 24, 1997, Anderson told Abbey that if she told anyone about what he did to her, he would “kill everyone who lived,” he would make her watch as he killed the baby, and he would then kill her and himself (Tr. 1218).

The next morning, Abbey told her parents what had occurred (Tr. 1219). She went to the courthouse and got a restraining order against Anderson (Tr. 1219; State’s Exhibit 38). After she got home from the courthouse, Anderson arrived there (Tr. 1221). She went inside the house, while her father stayed outside and talked to Anderson (Tr. 1221-22).

At about 3:00 p.m. that day, Anderson made a telephone call to Abbey and during their conversation they discussed the restraining order (Tr. 1222-23). Abbey told Anderson that she could not see him, and that his visitation of Kyra would be set up through the court (Tr. 1222). Anderson said that he knew what he had to do now (Tr. 1223).

Late that afternoon, Anderson went to the home of his friend, Jason Brandon (Tr. 1199-1200). Brandon had a .357 caliber magnum handgun in his room (Tr.

1200). Anderson went to Brandon's room to see him, stayed for a short time, left for 10-15 minutes, returned to the room for a short time, and then left again (Tr. 1200-02).

That night, seventeen-year-old Abbey was at her home in Poplar Bluff with two of her high school friends, Stacy Turner and Amy Dorris (Tr. 1028, 1099, 1216, 1224; State's Exhibit 7). Abbey's three-month-old daughter, Kyra, her younger sister, Whitney, and her parents were also at home (Tr. 1224-25).

Abbey, Stacy, and Amy were together in the downstairs section of the house when they heard knocking on the back door (Tr. 1225-26). Stacy looked out the small windows by the side of the door, but did not see anyone (Tr. 1226-27, 1299, 1336). The girls went upstairs and told Stephen Rainwater (Tr. 1227, 1336). He told them to go back downstairs and to see if it happened again, while he watched out a bay window that was right above that door (Tr. 1227). After about a minute, someone knocked on the backdoor again (Tr. 1227). The girls went upstairs, but Stephen Rainwater told them that he had not seen anything (Tr. 1227). He picked up a rifle and walked around the yard to check to see who was out there (Tr. 1227, 1300, 1337). He came back without having found anyone (Tr. 1228, 1300, 1337).

Stephen Rainwater then got in a car and started driving around the neighborhood to see if he could see anything suspicious (Tr. 1228, 1300, 1337).

After he left, the doorbell rang (Tr. 1228, 1301, 1337). Abbey, Stacy, Amy and Whitney went to the door and looked out the small windows next to it (Tr. 1228, 1301, 1338, 1364; State's Exhibit 11). They saw Anderson standing outside the window pointing a handgun at them (Tr. 1228, 1301, 1338, 1364). The girls screamed and backed away from the door (Tr. 1302). As Anderson kicked in the door, splintering its frame, Debbie Rainwater told Abbey to run (Tr. 1143-44, 1230; State's Exhibit 11). Abbey and Whitney ran out of the back of the house (Tr. 1084, 1143, 1230). Abbey ran to a neighbor's house and got a neighbor to call the police, while Whitney stopped fleeing after she got outside of her house (Tr. 1233, 1364). Stacy Turner stayed in that house, but hid in a closet in the master bedroom (Tr. 1339-40). Amy Dorris stayed in the house near Debbie Rainwater (Tr. 1303).

Anderson went straight to Debbie Rainwater, who was standing by a couch and was holding Kyra (Tr. 1303-04). He yelled at her, telling her that she was going to die, and pointed the gun at her (Tr. 1306). She got down on her knees and begged for her life (Tr. 1306). Anderson placed the gun against the back of Debbie Rainwater's head and fired (Tr. 1187-94, 1306; State's Exhibits 22-23). The bullet blew her skull apart, removing most of her brain and killing her instantly (Tr. 1188-90).

Amy Dorris, who had just seen Anderson kill Debbie Rainwater, fled out the front door, but stopped when Anderson came outside after her and told her that he would shoot her if she did not stop (Tr. 1306). He approached Amy, grabbed her by her ponytail, and told her to yell for Abbey “and them” to come out (Tr. 1307-09). Amy yelled, as Anderson requested, but no one came out of hiding (Tr. 1307-09).

While Anderson was out in front of the house, Whitney, who had heard the gunshot, went back into the house and heard Kyra crying (Tr. 1364). She found her mother’s body lying on top of Kyra (Tr. 1365). She lifted her mother’s body off of Kyra, picked up Kyra, and hid with her in the laundry room (Tr. 1366).

Whitney heard the telephone ring, so she went to the master bedroom and answered it (Tr. 1340, 1366). The person on the telephone was Amy’s boyfriend, Robert, and she told him that Anderson was there with a gun and was shooting (Tr. 1366).

Anderson came into the bedroom with the gun, hung up the telephone and took Kyra from Whitney (Tr. 1367). Anderson and Whitney walked out to the front yard, where Amy was still standing, and Anderson, who was holding Kyra, yelled for Abbey (Tr. 1367). Anderson pointed the gun at the baby’s head and yelled that he would shoot the baby if Abbey did not come out (Tr. 1367-68).

Stacy came out of her hiding place in a closet and looked out through the blinds in the window in Abbey's bedroom (Tr. 1340-41). Anderson looked up at her and said, "You might as well come out. Your time is coming" (Tr. 1341).

Anderson saw Stephen Rainwater driving towards the house (Tr. 1368). He took Kyra, Whitney and Amy around to the side of the house so that Stephen Rainwater could not see them, and he told them that he would shoot them if they ran (Tr. 1312-13, 1368-69). Anderson, who was holding Kyra, walked out in the front yard with Whitney (Tr. 1369-70). Whitney did not try to run because she did not want to leave Kyra alone with Anderson (Tr. 1314). Anderson approached Steven Rainwater and began talking to him (Tr. 1370-71). He then shot Stephen Rainwater in the forehead (Tr. 1173, 1184, 1373-75). The bullet passed through Stephen Rainwater's skull and caused almost instantaneous death as the result of severe trauma to the brain (Tr. 1184-87; State's Exhibit 31).

Meanwhile, Stacy called 911 on the telephone in the master bedroom told the person on the phone that there was someone in the house with a gun and that she had just heard a second gunshot (Tr. 1342). She then hung up the telephone and hid in the shower in the master bedroom's bathroom (Tr. 1342).

Anderson sent Whitney around the house looking for people, and Whitney saw Stacy in the bathroom (Tr. 1343, 1372). However, Whitney told Anderson that there was no one in the bathroom (Tr. 1343, 1372).

Meanwhile, Officers Paul Clark and Charles Wallace, of the Poplar Bluff Police Department, arrived at the victims' residence and saw Stephen Rainwater lying without any visible signs of life in the front yard (Tr. 1026, 1040, 1065, 1069, 1103). They saw Anderson, who was in Abbey's bedroom, open a window shade over the garage and then open the window (Tr. 1073-74, 1090, 1373). Anderson held the baby in front of him as a human shield, waved a handgun in the direction of the officers, and ordered the police to put down their guns (Tr. 1041, 1046, 1074-76, 1103). Officer Wallace repeatedly told Anderson to put down his weapon, and Anderson repeatedly responded by telling Officer Wallace to put down his gun (Tr. 1042, 1075-76).

After other officers arrived and surrounded the house, Anderson, who was still holding Kyra up in front of him, came out on the front porch of the house without the pistol that he had been brandishing (Tr. 1045-46, 1049, 1076-78, 1104-06). Whitney followed Anderson onto the porch (Tr. 1077, 1374). The officers ordered Anderson several times to give the baby to Whitney, and he eventually complied with their orders (Tr. 1077, 1106-07, 1374).

Anderson then walked towards the officers and was placed under arrest (Tr. 1077-78). The officers searched Anderson and found six live Winchester Super Magnum .357 cartridges in his pants pockets and Debbie Rainwater's blood splattered on Anderson's pants (Tr. 1116-18, 1121, 1292-94). Anderson was informed of his constitutional rights and was placed in a patrol car without the officers having a conversation with him (Tr. 1047). Meanwhile, Whitney told the officers that Anderson shot her mother (Tr. 1049). The officers conducted a protective sweep of the house (Tr. 1049). On a banister immediately inside the front door, they saw a cocked and loaded Colt .357 magnum revolver, which appeared to be the gun that had been taken from Jerry Brandon's residence (Tr.1049, 1078, 1083, 1202-03). Its cylinder contained four live rounds and two spent rounds (Tr. 1141-42). All were Winchester Super Magnum .357 cartridges (Tr. 1147-48).

They next saw Debbie Rainwater's body on the floor (Tr. 1089). Near her body was a baby blanket that had blood and bullet fragments on it (Tr. 1084, 1157). Stacy heard the police in the house and she came out of her hiding place in a shower (Tr. 1050, 1342-43). Abbey stayed at a neighbor's house until the police arrived there (Tr. 1233).

The police found the car that Anderson drove to get to the crime scene (Tr. 1063). It was parked on the corner of Montclair and Mill Street, about a block from the Rainwater's house (Tr. 1063). On the console between the seats, officers found an empty box for Winchester Super X Magnum .357 cartridges (Tr. 1150-51; State's Exhibit 28).

Anderson did not testify in his own behalf. He presented the testimony of witnesses who said that he had always been a peaceful, nonviolent person (Tr. 1390, 1403-04, 1412-15). He presented testimony of Dr. Jonathan Pincus, a neurologist, who said that Anderson could not deliberate because he had suffered brain damage at birth (Tr. 1419-64). Dr. Pincus acknowledged, though, that Anderson had the ability to plan things in advance, and he said that Anderson had no history of fighting (Tr. 1457, 1461). Dr. Dorothy Lewis, a psychiatrist, testified that Anderson suffered brain damage at birth, but that he had no history of violence other than the violence that he had directed at Abbey in the months leading up to the murders (Defense Exhibit D). Dr. Lewis concluded that he could not deliberate on the day that he committed the murders because he was acting differently than he normally acted in that he was severely depressed, paranoid, and in an altered state (Defense Exhibit D). She testified that Anderson told her that he could not remember what happened when Debbie Rainwater was killed, that he believed that

he knew who killed her, but that he could not say who did it (Defense Exhibit D).

Anderson told Dr. Lewis that he shot Stephen Rainwater in order to protect himself (Defense Exhibit D). Dr. Lewis believed that Anderson was not lying because he had maintained the same story for a long time (Defense Exhibit D).

As rebuttal evidence, the State presented the testimony of Dr. Byron English, a psychologist and forensic examiner with the Department of Mental Health (Tr. 1527). He testified that his testing and examination of Anderson revealed that Anderson had an IQ of 84 and that Anderson did not suffer from a mental disease or defect (Tr. 1528-70). He said that Anderson also denied having any symptoms indicating depression, brain damage, or any other mental disease or defect (Tr. 1588-89).

At the close of the evidence, instructions and argument, the jury found that Anderson was guilty of two counts of murder in the first degree (L.F. 1005-1006).

In the penalty phase, Abbey and Whitney Rainwater testified for the State about their deceased parents (Tr. 1650-67). Anderson presented the testimony of five witnesses in an attempt to mitigate punishment (Tr. 1670-02).

After deliberation, the jury recommended that Anderson be sentenced to death for the murder of Debbie Rainwater and life without eligibility for probation or parole for the murder of Stephen Rainwater (L.F. 1036-37). As to the murder of

Debbie Rainwater, the jury found as statutory aggravating circumstances (1) that the murder occurred while Anderson was engaged in the commission of another unlawful homicide, (2) that Anderson by his act of murder knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person, and (3) that the murder was outrageously or wantonly vile, horrible or inhuman because it involved depravity of mind in that Anderson killed Debbie Rainwater as part of a plan to kill more than one person and, thereby exhibited a callous disregard for the sanctity of all human life (D.L.F.¹ 1037). §§565.032.2 (2), (3) and (7), RSMo 2000. The trial court imposed the sentences that were recommended by the jury (Tr. 1848-49). This Court affirmed the convictions and sentences. *State v. Anderson*, 79 S.W.3d 420 (Mo. banc 2002).

Anderson filed his *pro se* Rule 29.15 motion in the Circuit Court of Cape Girardeau County on September 20, 2002 (PCR L.F. 6) and his amended motion on December 18, 2002 (PCR L.F. 1, 19). The motion court held an evidentiary hearing on May 14 and 15, 2003 (PCR Tr. 2). The motion court denied all of Anderson's claims on June 20, 2003 (PCR L.F. 482-503).

¹“D.L.F.” refers to the direct appeal legal file.

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. banc 2000).

The majority of Anderson’s claims involve ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, Anderson 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); *State v. Link*, 25 S.W.3d 136, 149 (Mo. banc 2000); *State v. Clay*, 975 S.W.2d 121, 135 (Mo. banc 1998). To prove prejudice, Anderson must show that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Link*, 25 S.W.3d at 149. A reasonable probability under *Strickland* is “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

ARGUMENT

I. Dr. Bryan English was a proper rebuttal witness (Responds to Anderson's Points I and VII)

Anderson contends that counsel was ineffective for failing to object to the rebuttal testimony of Dr. Bryan English because it was prohibited by §552.020.14, RSMo 2000. App.Br. 42-48. The motion court denied this claim, holding that Dr. English's testimony was proper rebuttal testimony and was relevant to the determination of whether Anderson suffered from a mental disease or defect (L.F. 499-500). The motion court did not clearly err.

A. Dr. English's testimony was proper under §552.020.14

Section 552.020.14, contrary to Anderson's argument, does not prohibit any testimony from the mental health professional who administers a psychiatric examination. When interpreting a statute, this Court looks to the plain and ordinary meaning of the words in the statute. *Kerperien v. Lumberman's Mut. Cas. Co.*, 100 S.W.3d 778, 781 (Mo. banc 2003). This Court "consider[s] the words used in a statute in their plain and ordinary meaning, which is found in the dictionary." *State v. Carson*, 941 S.W.2d 518, 521 (Mo. banc 1997); *City of Dellwood v. Twyford*, 912 S.W.2d 58, 60 (Mo. banc 1995).

The statute prohibits the introduction into evidence of any “statement made by the accused in the course of any examination of treatment” and any “information received by any examiner or other person” in the course of the competency evaluation in the determination of guilt. The plain language of the statute prohibits only the admission into evidence of statements or information relayed to the mental health professionals that relate to the accused’s guilt, not a bar on the mental health professional’s testimony *in toto*. See *State v. Grubbs*, 724 S.W.2d 494, 499-500 (Mo. banc 1987); *State v. Jaynes*, 949 S.W.2d 633, 638 (Mo.App. E.D. 1997).²

This reading of the statute is reasonable. It provides for a full competency hearing allowing the accused to speak freely in order and for the examiner to make an informed recommendation about competency to the court. A defendant may speak freely during the competency hearing without fearing that the prosecutor may be able to use any of the accused’s admissions at trial, which may present a substantial Fifth Amendment claim against self-incrimination. Without a statute similar to §552.020.14, criminal defendants may be loath to submit to any court-ordered competency examinations because of this Fifth Amendment risk.

²Both *Grubbs* and *Jaynes* refer to §552.020.12, RSMo 1994, which is identical to the current §552.020.14.

In this case, Dr. English was called to rebut the testimony of Anderson's expert witnesses Dr. Jonathan Pincus and Dr. Dorothy Lewis. Dr. English did not testify to any statements that Anderson made to him in the course of the interview. He merely recited the tests that he administered and his conclusion that neither the test results nor Anderson's behavior were indicative of mental disease or defect (Tr. 1526-1542). This testimony is not prohibited under §552.020.14. Any objection would have been futile. Counsel is not ineffective for declining to make a non-meritorious objection. *State v. Clemons*, 946 S.W.2d 206, 227 (Mo. banc 1997).

B. This claim also fails under the doctrine of curative admissibility

Trial counsel was not ineffective for failing to object to Dr. English's testimony because they had previously brought up Dr. English's testimony and conclusions with their expert, Dr. Jonathan Pincus, in order to show that Anderson could not deliberate. Counsel cannot object to the prosecution's use of the same evidence to show the opposite conclusion.

Trial counsel Charlie Moreland showed Dr. Pincus a copy of Dr. English's competency report (Tr. 1446). Dr. Pincus discussed the report in detail. At Moreland's urging, Dr. Pincus testified about the various psychological tests that Dr. English administered to Terrance Anderson as part of the competency

evaluation, the results of those tests, and the meaning of those tests in a medical and psychological context (Tr. 1448-51). Dr. Pincus left the unstated impression that Dr. English agreed with his findings.

Accepting for the sake of argument that English's findings were not admissible into evidence under §552.020.14, trial counsel waived any protection under §552.020.14 that Anderson may have enjoyed when he questioned Dr. Pincus about Dr. English's findings. The doctrine of curative admissibility states that "where a defendant has injected [through inadmissible evidence] an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." *State v. Armentrout*, 8 S.W.3d 99, 111 (Mo. banc 1999); *State v. Weaver*, 912 S.W.2d 499, 510 (Mo. banc 1995); *State v. Lingar*, 726 S.W.2d 728, 734-35 (Mo. banc 1987).

The State's need for Dr. English's rebuttal testimony was directly caused by counsel Moreland's decision to ask Dr. Pincus to comment on and interpret Dr. English's report and to imply that Dr. English, who had not testified at that time, agreed with Dr. Pincus. Under these circumstances, the State was fully entitled to call Dr. English in order to correct this mistaken impression. *See Middleton v. State*, 80 S.W.3d 799, 808 (Mo. banc 2002); *State v. Middleton*, 998 S.W.2d 520,

527-28 (Mo. banc 1999); *State v. Weaver*, 912 S.W.2d 499, 516 (Mo. banc 1995)(the prosecutor properly cross-examined the defendant about his arrest record after the defense produced evidence that young black males were routinely arrested for no reason). Any objection under §552.020.14 that trial counsel may have made to Dr. English's testimony would have been overruled. Counsel is not ineffective for failing to make a non-meritorious objection. *State v. Clemons*, 946 S.W.2d 206, 227 (Mo. banc 1997). This claim fails for this reason also.

C. Anderson cannot show prejudice

Assuming an objection to Dr. English's testimony was proper and would have been sustained, Anderson cannot show *Strickland* prejudice. Dr. English went over the tests that he administered to Terrance Anderson (Tr. 1529-41). Dr. Pincus previously had testified to the results of these tests (Tr. 1447-51). Dr. English testified that he did not see any mental disease or defect in Terrance Anderson (Tr. 1542). Dr. Pincus made that point also, stating that Dr. English came to a different conclusion than he did (Tr. 1456). Dr. English stated that he could not rule out brain damage (Tr. 1569-70), which was the focus of Dr. Pincus' testimony (Tr. 1453-55). Dr. English also stated that he could not rule out that Anderson may have had a mental disease or defect leading to the murders and that he did not go into that subject in his evaluation (Tr. 1582-83). In other words, Dr.

Pincus had already testified to everything that Dr. English did, and Dr. English did not, and could not, comment on the main focus of the defense: that Anderson snapped on the day of the murders. In these circumstances, even without Dr. English's testimony, the jury would have had the similar evidence, including Dr. English's test results, before it. Anderson cannot show a reasonable probability that the jury would have reached a different verdict based with substantially similar evidence in front of it. This claim fails for a lack of prejudice.

D. Appellate counsel was not ineffective for failing to raise this claim on direct appeal

In order to demonstrate that appellate counsel was ineffective, "strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it." *Moss v. State*, 10 S.W.3d 508, 514 (Mo. banc 2000). This claim would not have prevailed on direct appeal because, as discussed above, Dr. English's testimony was proper, the doctrine of curative admissibility would have allowed it, and because there was no prejudice to Anderson. This claim also fails.

II. Counsel was not ineffective for failing to move to strike venireperson David Dormeyer for cause (Responds to Anderson's Points II and VIII)

Anderson contends that trial counsel was ineffective for failing to move to strike venireperson David Dormeyer because Dormeyer would have required the defense to convince him that life was an appropriate punishment. App.Br. 49-70. The motion court determined that counsel's failure to strike Dormeyer was a strategic decision in that counsel moved to strike another venireperson for cause who gave near-identical answers as Dormeyer and that the answers Dormeyer gave were in response to a confusing hypothetical that the trial court warned Anderson's counsel to stop using because it falsely implied that the defense would not present any mitigating evidence (L.F. 512-13). The motion court also determined that Anderson was not prejudiced because he did put on evidence in the penalty phase (L.F. 515). The motion court did not clearly err.

A. The underlying facts

Juror Dormeyer, Charlie Moreland, one of Anderson's attorneys, and the prosecutor stated the following during voir dire:

Prosecutor: Same question, sir. Final point of decision, could you vote for the death penalty?

Panelist Dormeyer: Yes

Prosecutor: Could you vote for another sentencing alternative of life without parole:

Panelist Dormeyer: Yes.

Prosecutor: And would you be willing, sir, to listen and give full and fair consideration to all of the evidence before you made a final decision?

Panelist Dormeyer: Yes.

Tr. 546-47.

Trial counsel Moreland: ... Mr. Dormeyer?

Panelist Dormeyer: I'd kind of like a restatement of the question. I'm kind of-

Mr. Moreland: Would you be able to give serious consideration to a sentence of life in prison without parole?

Panelist Dormeyer: Well, can I ask a question? Without the-

Mr. Moreland: I don't know if I'll be able to answer or not.

Panelist Dormeyer: Well, if there's no evidence otherwise, I probably-I mean, I believe in capital

punishment, but that's not, I have to be really convinced. That's what I'm saying.

Mr. Moreland: Are you saying that you have to be convinced by the State, or you really have to be convinced by me?

Panelist Dormeyer: I would have to be convinced that the person was not deserving of capital punishment.

Mr. Moreland: Okay. So your position in entering—if you're on the jury and entering the penalty phase, the death penalty is automatically an appropriate punishment in your mind, right?

Panelist Dormeyer: Uh-huh.

Mr. Moreland: And a life imprisonment could be an appropriate punishment if I can persuade you so?

Panelist Dormeyer: Right

Mr. Moreland: All right: Would you require me to put on evidence to persuade you that life imprisonment would be appropriate in this

case before you would give serious
consideration to a life sentence?

Panelist Dormeyer: I believe so.

Mr. Moreland: Okay. And you understand the burden of
proof is on the state?

Panelist Dormeyer: Yes.

Mr. Moreland: But you would nonetheless require us to put
on, to convince you otherwise?

Panelist Dormeyer: Right.

Mr. Moreland: Against the death sentence?

Panelist Dormeyer: Right.

Tr. 576-77.

B. The rule of *Strickland v. Washington* governs this case

Generally, a defendant raising claims of ineffective assistance of counsel must prove both that counsel's conduct fell below a professionally acceptable level and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Anderson contends that he is not required to demonstrate prejudice, relying on *Presley v. State*, 750 S.W.2d 602 (Mo.App. S.D. 1988)(*en banc*) and *Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992). This contention fails.

The United States Supreme Court in *Strickland* identified two groups of situations in which prejudice is presumed: actual or constructive denial of the right to counsel and conflict of interest claims. 466 U.S. at 692. The Court further defined these categories in *Bell v. Cone*, 535 U.S. 685 (2002), holding that “actual or constructive denial of counsel” is limited to three specific types of cases: first, the complete denial of counsel; second, when counsel totally fails to subject the state’s case to meaningful adversarial testing; and third, when counsel is called on to render assistance in a situation where competent counsel could not do so. 535 U.S. at 695-96. Anderson’s claim does not fit into any of these categories. He had counsel who actively represented him through the entire trial and had adequate time to prepare, and his claim does not involve a conflict of interest. Anderson therefore must show prejudice.

The two cases Anderson cites fail to correctly state the law in light of *Bell*. The opinion in *Presley v. State* ignores the language in *Strickland* restricting the types of cases in which prejudice is presumed and instead focuses on the nature of the deprivation under the Due Process Clause. 750 S.W.2d at 606-07. The dissent in that case recognized the majority opinion’s flaw by quoting both *Strickland* and *State v. Harvey*, 692 S.W.2d 290 (Mo. banc 1985), governing precedent from this Court and the Supreme Court. 750 S.W.2d at 609-10 (Maus, J., dissenting). In

light of the Supreme Court's decisions in *Strickland* and *Bell*, *Presley* does not properly state the law and should be overruled. The opinion in *Johnson v. Armontrout*, which relies on *Presley* for authority, similarly ignores the restrictions that *Strickland* imposed and is not persuasive authority. Anderson must demonstrate prejudice.

C. Counsel's decision not to strike Dormeyer was strategic

The motion court determined that this determination was strategic based on the fact that counsel aggressively voir dired the potential jurors on their probable reaction if the defense failed to adduce evidence in the penalty phase and moved to strike a juror in the same group as Dormeyer because she would have required the defense to put on evidence in the penalty phase (L.F. 514). The motion court also determined that counsels' testimony that their decision was not strategic was not credible. These conclusions were not clearly erroneous.

The trial court's determination that counsels' decision was strategic was correct. During voir dire, defense attorney Charlie Moreland aggressively questioned every venire panel on what they would do if the defense chose not to put on evidence in the penalty phase (Tr. 407, 455-56, 503-11, 557-58, 564-70, 642-43, 722-23, 743, 793). In fact, this question was one of the first questions Moreland asked nearly every panel. *Id.* In fact, nearly immediately prior to his

conversation with Dormeyer, Moreland had an extended conversation on this same topic with venireperson JoAnn Williams (Tr. 566-67).³ This conversation with Ms. Williams turned into an extended side-bar conversation in which the trial court told counsel that

I think you should be tailoring your questions to what you have an expectation of developing and not giving an impression of a circumstance which isn't going to follow. In other words, you're telling me in good faith that you expect there to be some mitigating circumstances and that you'll prove them or make an effort to prove them, but I think you're leaving the impression with this panel, as you have throughout the day, that just isn't going to happen this way. I don't think that's fair to the jurors for one thing.

Tr. 569. After this sidebar, Moreland had a conversation with juror Dormeyer about what Dormeyer might do if the defense did not put on evidence in the penalty phase (Tr. 576-78). After questioning of this voir dire panel was complete, defense counsel Scott McBride unsuccessfully tried to strike Ms. Williams for

³Although the transcript identifies this venireperson as Josephine Williams, Ms. Williams states that her correct name is JoAnn Williams (Tr. 537).

cause based on the fact that she would require the defense to present evidence in order to consider life imprisonment as a possible punishment (Tr. 583-84).

These facts demonstrate that trial counsel had a strategy with every venire panel to actively seek out venirepersons who would require the defense to put on mitigation evidence in the penalty phase. Trial counsel questioned Dormeyer's panel on this issue and unsuccessfully moved to strike for cause another venireperson on these same grounds. At the same time, trial counsel stated that they did not have a strategic reason for not objecting to Dormeyer. The motion court's function as the finder of fact was to resolve this dispute. It did so by choosing to disbelieve, in light of the record, trial counsels' testimony. The motion court was fully entitled to believe all, some, or none of any testimony presented at the PCR evidentiary hearing. *State v. Hunter*, 840 S.W.2d 850, 863 (Mo. banc 1992). Further, this Court has held that "counsel's postconviction testimony is not conclusive of whether the alleged omissions in cross-examination were, in fact, trial strategy" and that "a reviewing court undertakes an independent assessment of whether a particular action was truly trial strategy, recognizing that overzealous counsel seeking to gain a new trial for their client may downplay their performance at trial." *State v. Whitfield*, 939 S.W.2d 361, 370 (Mo. banc 1997).

The motion court had a sufficient basis to conclude that counsels' decision not to object was strategic. Experienced counsel do not just forget about potential claims of error in voir dire within minutes of raising the same claims with respect to other jurors. Experienced counsel do not repeatedly question a series of venire panels about an issue and then not follow up on potentially unfavorable answers. They also do not extensively question a juror about his potential bias and then fail to follow up with a motion to strike for cause. In this case, counsel had sound strategic reasons not to object to Dormeyer; the trial judge had already overruled a similar objection to venireperson Williams and counsel knew that they would be presenting evidence in the penalty phase, which was the sole concern Dormeyer had. In other words, they knew that moving to strike Dormeyer would be futile and that Dormeyer's alleged bias would not affect the penalty phase. As counsel had a strategic reason not to strike Dormeyer, this claim fails under *Strickland*. 466 U.S. at 690-91.

As a corollary matter, Anderson argues that the motion court should not have signed findings of fact and conclusions of law prepared by the State. 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. banc 1994). In this case, both sides submitted proposed findings to the motion court. It is obvious from the record that the motion court reviewed the State's proposed findings before signing them; he corrected errors in the document (L.F. 488, 502). 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.

D. Any motion to strike Dormeyer for cause would have been futile

The law is well-established that “[t]he standard for reviewing the exclusion of a venireperson during the death-qualification phase of jury voir dire is whether the venireperson’s views would prevent or substantially impair the performance of the duty as a juror in accordance with the instructions and the oath.” *State v. Winfield*, 5 S.W.3d 505, 510 (Mo. banc 1999); *Wainwright v. Witt*, 469 U.S. 412, 424-25 (1985). In this case, Dormeyer would have required the defense to put on evidence to convince him that a life sentence was appropriate. However, the defense chose to put on this evidence, and as the trial court recognized, had made this decision before trial (Tr. 569). Trial counsel knew before trial that they were

going to put on evidence of mitigation and did so. Dormeyer's viewpoint was a non-starter in light of the evidence that was going to be presented; it simply would never have come into play. Any challenge for cause therefore would have been denied as counsels' challenge to venireperson Williams was. Counsel is not ineffective for failing to make a non-meritorious objection. *State v. Clemons*, 946 S.W.2d 206, 227 (Mo. banc 1997). This claim must fail.

E. Dormeyer's belief did not affect this case because Anderson put on a mitigation case

The sole ground upon which Anderson claims juror Dormeyer was biased is that he would have required the defense to put on evidence in mitigation of punishment. Anderson, however, chose to put on evidence in mitigation of punishment in the penalty phase. As soon as he did so, Dormeyer was able to give full consideration to a life sentence. Dormeyer's "bias" therefore did not come into play in this case and Anderson cannot demonstrate prejudice.

Both this Court and the Missouri Court of Appeals have addressed similar issues. This Court has held that any plain error from a juror's expectation that the defendant will testify is eliminated when the defendant actually testifies. *State v. Hadley*, 815 S.W.2d 422, 424 (Mo. banc 1991). In *Hadley*, one juror stated during voir dire that he would be inclined to presume guilt if the defendant did not testify.

815 S.W.2d at 423. This Court held that “[a]ny potential miscarriage of justice in having [the disputed venireperson] on the jury was entirely dependent upon defendant failing to testify.” *Id.* at 424. Since the defendant testified, there was no plain error. *Id.* at 423.

The Court of Appeals has also rejected an argument similar to the one Anderson makes in this appeal. In *State v. Stanley*, 124 S.W.3d 70 (Mo.App. S.D. 2004), the trial court denied the defense counsel’s motion to strike a juror for cause. The challenge was based on the juror’s statement that she “would think that if [the defendant] thought he was innocent enough he needs to say so.” *Id.* at 73. The defendant failed to include denial of the strike in his motion for a new trial. He appealed, seeking plain-error review. The court held that, while it would have been error to include a juror that would have drawn an improper inference of guilt if the defendant did not testify, since he did testify, there was no manifest injustice or miscarriage of justice. *Id.* at 78. Nothing in the record indicated that the defendant only testified because of inclusion of the challenged juror. *Id.* at 79. Thus, when the defendant testified, any possible prejudice was cured. *Id.* The Court of Appeals reached identical results in *State v. Eastburn*, 950 S.W.2d 599 (Mo.App. S.D. 1997) and *State v. Eberius*, --S.W.3d-- (Mo.App. S.D., Feb. 3, 2006).

This case is indistinguishable from *Hadley, Stanley, Eastburn, and Eberius*. Dormeyer's sole condition to consider a life sentence was satisfied when Anderson put on a mitigation case because Dormeyer then considered the entire range of punishment, as shown by the jury's verdicts of death on one count and life imprisonment on the other. To paraphrase this court's decision in *Hadley*, any potential miscarriage of justice in having Dormeyer on the jury was entirely dependent upon defendant failing to put on a mitigation case. 815 S.W.2d at 424. No *Strickland* prejudice occurred in this case because Anderson put on mitigation evidence.

Anderson cites as authority in support of his position *Knese v. State*, 85 S.W.3d 628 (Mo. banc 2002). In *Knese*, the defendant's attorney did not review the jury questionnaires before voir dire, and as a result, two jurors whose views may have mandated the death penalty in any case and who were outspokenly pro-death penalty were seated on the jury. 85 S.W.3d at 632. This Court found that *Knese* demonstrated *Strickland* prejudice because he had shown a reasonable probability that the result of the trial may have been different if these two jurors had not served. 85 S.W.3d at 633.

This case is distinguishable from *Knese*. In this case, juror Dormeyer did not state, as did the jurors in *Knese*, a predisposition to impose the death penalty at

all times and in all circumstances. Dormeyer's questions revolved around one small portion of the process: whether the defense would put on evidence and advocate for a sentence of life imprisonment, a circumstance which did not arise at Anderson's trial. These two cases are inapposite, and *Knese* does not govern this case.

In conclusion, the motion court's findings were not clearly erroneous, and this claim fails.

F. Appellate counsel was not ineffective for failing to raise this claim

In order to demonstrate that appellate counsel was ineffective, "strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it." *Moss v. State*, 10 S.W.3d 508, 514-15 (Mo. banc 2000). This claim would not have prevailed on direct appeal because, as discussed above, Dormeyer was qualified to serve on the jury in light of the fact that Anderson put on a case in the penalty phase. Further, "the right to relief ... due to ineffective assistance of appellate counsel inevitably tracks the plain error rule; i.e., the error that was not raised on appeal was so substantial as to amount to a manifest injustice or a miscarriage of justice." *Moss*, 10 S.W.3d at 514-15. Under *Hadley*, there would

have been no plain error relief if appellate counsel would have raised this claim.

Appellate counsel therefore was not ineffective. This claim fails.

III. Trial counsel was not ineffective for failing to call Cecilia Alfonso as a witness in the penalty phase (Responds to Anderson’s Point III)

The motion court denied this claim as follows:

Movant contends that trial counsel was ineffective for failing to call Cecilia Alfonso, a social worker, as a penalty phase witness.

“A decision to not call a witness is presumed trial strategy unless clearly shown to be otherwise.” *Winfield v. State*, 93 S.W.3d 732, 739 (Mo. banc 2002), *quoting Rousan v. State*, 48 S.W.3d 576, 582 (Mo. banc 2001). Further, “strategic decisions made after thorough investigations of law and facts relevant to plausible options are virtually unchallengeable.” *Strickland v. Washington*, 466 U.S. at 690-91. Finally, “when defense counsel believes a witness’ testimony would not unequivocally support his client's position, it is a matter of trial strategy not to call him, and the failure to call such witness does not constitute ineffective assistance of counsel.” *Winfield, supra*.

Trial counsel Scott McBride’s decision not to call Ms. Alfonso was a strategic decision. Prior to trial, movant’s counsel had hired Ms. Alfonso as a mitigation specialist to advise them about possible issues to be raised at both the guilt and penalty phases of trial. Ms.

Alfonso provided defense counsel with a report. PCR Tr. at 255. Mr. McBride stated that he did not call Ms. Alfonso as a witness because “there was concern that what Cecilia had to offer may have not fit with what Dr. Lewis had to present, and we went with Dr. Lewis.” PCR Tr. at 256. Thus, Mr. McBride, after receiving Ms. Alfonso’s report, decided not to call her as a witness because her testimony may have conflicted with movant’s expert’s testimony. Under the Missouri Supreme Court’s decision in *Winfield*, counsel’s decision not to call Ms. Alfonso as a witness was a strategic decision that does not rise to the level of ineffective assistance of counsel. This claim will be denied.

PCR L.F. 520-22.

This Court has repeatedly held that “counsel’s decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise.” *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. banc 2005); *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004). “As a matter of trial strategy, the determination to not call a witness is virtually unchallengeable.” *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. banc 2005); *State v. Jones*, 885

S.W.2d 57, 58 (Mo.App. W.D.1994). This Court has also held that “[w]hen defense counsel believes a witness’ testimony would not unequivocally support his client's position, it is a matter of trial strategy not to call him, and the failure to call such witness does not constitute ineffective assistance of counsel.” *Winfield v. State*, 93 S.W.3d 732, 739 (Mo. banc 2002); *Rousan v. State*, 48 S.W.3d 576, 582 (Mo. banc 2001).

In this case, trial counsel Scott McBride testified that he did not call Ms. Alfonso as a witness because “there was concern that what Cecilia had to offer may have not fit with what Dr. Lewis had to present, and we went with Dr. Lewis.” PCR Tr. 256. McBride chose not to call Alfonso based on a potential conflict between her testimony and the expert’s testimony. Under *Winfield* and *Rousan*, this does not constitute ineffective assistance of counsel.

Further, under *Strickland*, “strategic decisions made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” 466 U.S. at 690. In this case, McBride and Anderson’s other attorneys had received a report from Alfonso stating her conclusions (PCR Tr. 255). They knew precisely what she would testify to if called in the penalty phase. In light of this fact, counsel made an informed strategic decision not to call Alfonso as a witness. This decision is virtually unchallengeable under *Strickland*.

Finally, “[i]t is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a reasonable strategy.” *Clayton v. State*, 63 S.W.3d 201, 207-08 (Mo. banc 2001). Counsel could have called Alfonso or he could have called Dr. Lewis. Counsel chose to call Dr. Lewis, a reasonable strategy to show diminished capacity. Counsel was not ineffective for pursuing one reasonable strategy instead of another.

In order to avoid the fact that this claim fails under *Strickland*, *Winfield*, and *Clayton*, Anderson cites cases that deal with counsel’s failure to investigate mitigating evidence: *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (“In this case ... petitioner’s claim stems from counsel’s decision to limit the scope of their investigation into potential mitigating evidence”); *Hutchison v. State*, 150 S.W.3d 292, 307 (Mo. banc 2004) (“Here, as in *Wiggins*, the defendant’s claim of ineffective assistance of counsel arises from trial counsel’s decision to limit the scope of their investigation into potential mitigating evidence”). These cases, which do not address when counsel is ineffective for not calling a witness that counsel has discovered, paid, and received a report from, are inapposite. To the extent that Anderson is attempting to morph his claim into a failure to investigate from the failure to call claim he presented to the motion court, that claim fails also;

Anderson's attorneys hired Alfonso and received a report from her. They therefore investigated what Alfonso would testify to.

Anderson also cites *Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002), for the proposition that counsel was ineffective for not putting evidence of Anderson's childhood abuse before the jury. *Simmons* dealt with a very different set of facts; in that case, counsel failed, with no reason given, to put voluminous evidence of abuse and sexual victimization gleaned from a number of witnesses into evidence. 299 F.3d at 936-37. In this case, the information itself is not at issue. The issue, as pled in the motion court (L.F. 27-29) and Anderson's brief (App.Br. 24), is specific: whether counsel should have called Cecilia Alfonso as a witness. Counsel had a valid reasons not to call Alfonso; they believed that her testimony may undercut their expert witness and hurt the defense. *Simmons* is not persuasive authority either.

For all of these reasons, this claim must fail.

IV. Anderson knew about the mental health issues in the Rainwater family before trial and could have obtained the relevant records (Responds to Anderson’s Point IV)

Anderson contends that the prosecutor, Robert Ahsens, committed a *Brady*⁴ violation when he advised Abbey Rainwater, the victims’ daughter, not to sign a medical release for her psychiatric records and that the State had a duty not to impede Anderson’s ability to obtain these records.

This particular claim was not raised in Anderson’s Rule 29.15 motion. The motion did not mention Ahsen’s advice to Abbey Rainwater (L.F. 55-60). The *Brady* claim, as pled in the amended motion, was based on State’s failure to disclose Abbey’s mental health records in response to Anderson’s general motion for disclosure (L.F. 55-56). Anderson cannot now transform his legal theory; he is restricted to the facts and law that he pled in his amended Rule 29.15 motion. *Johnson v. State*, 103 S.W.3d 182, 187-188 (Mo.App. W.D. 2003). “Claims which were not presented to the motion court cannot be raised for the first time on appeal.” *Amrine v. State*, 785 S.W.2d 531, 535 (Mo. banc 1990); Supreme Court Rule 29.15(d). As a result, review of this morphed claim is not available in this Court.

⁴*Brady v. Maryland*, 373 U.S. 83 (1963).

In any case, the claim is meritless. The motion court made relevant factual findings with respect to Anderson's original *Brady* claim as pled in his Rule 29.15 motion:

This Court finds that the movant and his attorneys knew about Ms. Rainwater's suicide attempt well in advance of trial, asked Ms. Rainwater about the suicide attempt in her deposition prior to trial, and indicated that they could have subpoenaed the records prior to trial. McBride Deposition, pp. 23-25; Moreland Deposition (3/9/05), pp. 24-27. Mr. Moreland even tried to get a release of Ms. Rainwater's medical records at that time. Moreland Depo. (3/9/05), p. 24-25. Likewise, trial counsel were aware of Stephen Rainwater's possible amphetamine use by virtue of the fact that they filed a motion for the state to disclose any police reports involving Stephen, Moreland Depo. (3/9/05), p. 8, and the fact that Stephen suffered from bipolar disorder, *id.* at 25-26.

L.F. 492.

Anderson's attorneys knew about Abbey's mental health issues and her father's mental health issues well in advance of trial. The law is well established that the state cannot be held responsible for not disclosing evidence when the

defense has equal access to that evidence: “[t]he prosecution has no obligation to disclose evidence of which the defense is already aware and which the defense can acquire.” *State v. Brooks*, 960 S.W.2d 479, 494 (Mo. banc 1997). As the Court of Appeals has held, “[t]here is substantial authority that the prosecutor cannot be cited for a discovery violation where the defendant had knowledge of the existence of the item that the State failed to disclose.” *State v. White*, 931 S.W.2d 825, 832-33 (Mo.App. W.D. 1996).

In addition to knowing about the mental health issues in the Rainwater family before trial, Anderson had a legal remedy to obtain the mental health records: a subpoena and an *in camera* hearing to determine which portions of the privileged records were relevant. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987); *State ex rel. White v. Gray*, 141 S.W.3d 460, 463-64 (Mo.App. W.D. 2004)(adoption records); *State ex rel. King v. Sheffield*, 901 S.W.2d 343, 346 (Mo.App. S.D. 1995)(police personnel files); *State v. Davison*, 884 S.W.2d 701, 703 (Mo.App. S.D. 1994)(Department of Family Services records and juvenile officer records); *State v. Taylor*, 944 S.W.2d 925, 931 (Mo. banc 1997)(counseling records); *State v. Parker*, 886 S.W.2d 908, 916 (Mo. banc 1994)(police personnel files). The prosecutor’s alleged advice to Abbey did not hide these options or

make them unavailable to Anderson; attorney Charlie Moreland admitted that he could have used these methods (Moreland Depo. (3/9/05) 25-28).

Anderson's counsel could have moved to subpoena the mental health records long before trial. The prosecutor's alleged advice to Abbey Rainwater not to turn over all of the records would not have been an issue; the trial court could have conducted an *in camera* hearing, as the motion court did in this case, and determined what records needed to be disclosed to the defense. The state was not responsible for Anderson's failure to obtain the records; his attorney decided not to follow the legal methods available to obtain the records that they knew existed.

Further, Anderson cannot demonstrate any prejudice. Judge Syler's *in camera* review of the documents shows that Abbey Rainwater suffered from depression after her parent's death and had a prior suicide attempt (L.F. 405). They also show that Stephen Rainwater suffered from chronic depression and may have suffered from bipolar disorder (L.F. 405). The records do not bear on Abbey Rainwater's competency as a witness because they do not relate to her ability to observe or relate the facts of the crimes. The fact that both Abbey and Stephen Rainwater suffered from depression and that Stephen Rainwater may have suffered from bipolar disorder would not reasonably have changed the result of the trial; it would not have any impact on the verdicts due to the fact that Anderson shot

Deborah Rainwater while she was kneeling, holding Anderson's daughters and begging for her life; that Anderson shot Stephen Rainwater without provocation, and that Anderson used his baby daughter as a human shield while he was searching for Abbey Rainwater.

For all of these reasons, this claim fails.

**V. Counsel did not need to shop for a more favorable expert witness
(Responds to Anderson's Point V)**

Anderson contends that counsel was ineffective for failing to retain and call Dr. Donald Cross because Dr. Cross would have testified in the guilt phase that Anderson suffered from post-traumatic stress disorder (PTSD) at the time of the crimes. App.Br. 105–120. The motion court denied this claim:

The record demonstrates that trial counsel hired Dr. Dorothy Lewis to evaluate movant. Dr. Lewis testified at trial that movant could not deliberate because he was severely depressed, paranoid, and in an altered state. Defense Trial Ex. D. The record also reflects that trial counsel hired Dr. Jonathan Pincus, a neurologist, who testified at trial that frontal lobe damage to the brain, as well as depression, made movant incapable of deliberating in the murders. Tr. at 1440-41, 1454. Trial counsel Charlie Moreland testified that he had a submissible case based on these experts' testimony to put to the jury, Moreland Depo. (9/18/03) at 31, and trial counsel Scott McBride testified that Dr. Lewis' testimony was sufficient for the diminished capacity defense, PCR Tr. at 284.

“Defense counsel cannot be found ineffective for failing to shop for a more favorable expert witness.” *Cole v. State*, 152 S.W.3d 267, 270 (Mo. banc 2004); *Taylor v. State*, 126 S.W.3d 755, 762 (Mo. banc 2004); *Winfield v. State*, 93 S.W.3d 732, 741 (Mo. banc 2002).

Movant’s allegations present nothing more than the fact that hiring yet another expert, albeit a African-American, would have resulted in a diagnosis more favorable to movant. Under the Missouri Supreme Court’s rulings in *Cole*, *Taylor*, and *Winfield*, counsel was not ineffective. This claim will be denied.⁵

L.F. 522-23. The motion court did not clearly err.

⁵This Court also finds that counsel tried to hire an African-American mental health professional, Dr. Andrea Nichols, but chose not to pursue her services. Moreland Depo. (9/18/03) at 32-33. Counsel was therefore advised of the need for an African-American mental health professional and acted to obtain one. For the record, this Court also finds Dr. Donald Cross’ testimony not credible in its entirety and especially as it relates to any diagnoses. Dr. Cross seemed only too willing to testify in favor of movant and say whatever he needed to say to help movant’s case. [Footnote four in motion court judgment.]

At trial, counsel presented the testimony of Dr. Dorothy Lewis and Dr. Jonathan Pincus, who testified that Anderson lacked mental capacity on the day of the murders because he “just snapped” and was under an extreme emotional or mental disturbance. As the motion court found, counsel Moreland testified that he had a submissible case based on these experts’ testimony to put to the jury. Moreland Depo. (9/18/03) at 31. In fact, Anderson submitted a diminished capacity instruction to the jury (D.L.F. 987, 989, 991, 993). The jury could have accepted the doctor’s testimony and Anderson’s diminished capacity defense if they had chosen to do so. At most, Dr. Cross would have supplemented the testimony that Anderson presented to the jury.

The record also demonstrates that the defense team hired yet another psychologist, Dr. Andrea Nichols, to look at Anderson’s mental health at the time of the crime. Moreland Depo. (9/18/2003) at 44-45. At that time, Moreland had already interviewed Dr. Cross in connection with this case and decided not to use him. *Id.* at 45. In short, Moreland interviewed Dr. Lewis, Dr. Nichols, and Dr. Cross and decided to hire only Dr. Nichols and Dr. Lewis. *Id.* at 43-45.

Counsel in this case hired three mental health experts. Based on those expert’s reports, counsel was able to submit a diminished capacity instruction. This court has repeatedly held that “[d]efense counsel cannot be found ineffective

for failing to shop for a more favorable expert witness.” *Cole v. State*, 152 S.W.3d 267, 270 (Mo. banc 2004); *Taylor v. State*, 126 S.W.3d 755, 762 (Mo. banc 2004); *Winfield v. State*, 93 S.W.3d 732, 741 (Mo. banc 2002). In a nutshell, Anderson makes that contention in this case: counsel should have retained Dr. Cross because he had a better diagnosis than the other mental health experts. This claim fails.

Anderson cites *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) and *Williams v. Taylor*, 529 U.S. 362 (2000) to support his claim that trial counsel had not conducted a reasonable investigation by not hiring Dr. Cross. These cases are inapposite. The counsel in *Wiggins* failed to conduct virtually any investigation into his client’s childhood and locate an abundance of potentially mitigating evidence, including evidence of severe privation and abuse by his alcoholic, absentee mother, physical torment, sexual molestation and repeated rape while in foster care, his homelessness, and his diminished mental capacities. 123 S.Ct. at 2531. The jury in *Wiggins* heard only one significant mitigating factor: the fact that *Wiggins* had no prior convictions. *Id.* at 2543. The Supreme Court held that “counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with regard to sentencing strategy impossible,” *id.* at 2538, and held that *Wiggins* demonstrated *Strickland* prejudice, *id.* at 2542.

Counsel in *Williams* similarly failed to introduce available evidence that Williams was “borderline mentally retarded” and did not advance past the sixth grade. 529 U.S. at 396. Counsel did not seek out prison records about Williams’ commendation for helping to break up a prison drug ring, for returning a guard’s missing wallet, or prison officials’ statements that Williams was one of the least likely inmates to act in a dangerous manner. *Id.* The Supreme Court held that “trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant’s background.” *Id.*

In Anderson’s case, counsel conducted a thorough investigation. Counsel hired two experts who opined that Anderson lacked the capacity to understand his conduct at the time he committed the murders. Counsel is entitled to believe the opinions of the experts he hires, especially when they do not indicate that any further testing is needed. This investigation into Anderson’s mental health distinguished this case from *Wiggins* and *Williams*, cases in which counsel conducted no reasonable investigation. *See Lyons v. State*, 39 S.W.3d 32, 40-41 (Mo. banc 2001)(distinguishes *Williams* under similar circumstances). Anderson’s claim fails.

VI. The prosecutor's closing arguments were proper (Responds to Anderson's Point VI)

Anderson contends that counsel was ineffective for failing to object to five separate statements in the prosecutor's arguments in both guilt and penalty phases of trial. App.Br. 121-35. Anderson admits that all of the ineffectiveness claims that he is now asserting were raised in the direct appeal. App.Br. 122. The motion court denied this claim because this Court had determined that the prosecutor's statements did not constitute error (L.F. 501-02). The motion court did not clearly err.

This Court determined Anderson's direct appeal that "[w]ith respect to [Anderson's] twelve claims of error concerning closing argument for which no objection was offered at trial, we find no error of law." *State v. Anderson*, 79 S.W.3d 420, 439 (Mo. banc 2002). As no error of law occurred, any objection by counsel to these statements would have been meritless. *Cole v. State*, 152 S.W.3d 267, 268-69 (Mo. banc 2004); *Ringo v. State*, 120 S.W.3d 743, 746 (Mo. banc 2003). Counsel is not ineffective for declining to make meritorious objections. *State v. Clemons*, 946 S.W.2d 206, 227 (Mo. banc 1997). This claim fails.

Anderson, in an attempt to avoid the plain language this Court used in his direct appeal, argues he only argued that these statements were plain error on direct

appeal and that this Court was restricted to plain error review. App.Br. 123. Thus, following his argument, “no error of law” equates to no plain error, and under *Deck v. State*, 68 S.W.3d 418, 424-25 (Mo. banc 2002), the finding of no plain error does not compel a finding of no *Strickland* prejudice. *Id.*

This argument ignores the plain language of this Court’s opinion. This Court stated that “no error of law” occurred with respect to the prosecutor’s closing argument. If this Court had wanted to say that no plain error existed, this Court would have done so. The plain language of this Court’s opinion dooms Anderson’s claim just as it did a similar claim in *State v. Cole*:

Appellant alleges ineffective assistance of counsel for trial counsel’s failure to object to four statements made by the prosecutor during the State’s guilt phase closing argument. This Court specifically addressed these four statements in Appellant’s direct appeal when Appellant claimed they were improper and prejudicial, and the Court found no error of law in association with these statements. Again, finding no error of law, an extended opinion on these issues would have no precedential value.

152 S.W.3d 267, 268 -269 (Mo. banc 2004)(footnotes omitted). This claim is meritless.

VII. The State was not required to allege the aggravating circumstances in the charging document (Responds to Anderson's Point IX)

Anderson contends that the State was barred from seeking the death penalty because the State did not include the aggravating factors in the charging document. App.Br. 144-47. The motion court denied this claim:

Movant claims that counsel was ineffective for not filing a motion precluding the State from seeking the death penalty against movant because the State had not pled the aggravating factors in the charging documents. The Missouri Supreme Court has repeatedly rejected this claim, and it has no merit. *State v. Strong*, 142 S.W.3d 702, 712 (Mo. banc 2004); *State v. Glass*, 136 S.W.3d 496, 513 (Mo. banc 2004); *State v. Edwards*, 116 S.W.3d 511, 543-44 (Mo. banc 2003); *State v. Gilbert*, 103 S.W.3d 743, 747 (Mo. banc 2003); *State v. Tisius*, 92 S.W.3d 751, 766-67 (Mo. banc 2002); *State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc 2002).

L.F. 502. As the motion court found, this Court has repeatedly rejected this claim. Anderson fails to mention this Court's contrary decisions in his brief and suggests no reasons why this Court should reconsider its prior rulings. This claim has no merit.

VIII. Anderson's claim that lethal injection violates the Eighth Amendment should be rejected (Responds to Anderson's Point X)

Anderson contends that lethal injection as administered by the State of Missouri may cause him undue pain. As the motion court found (L.F. 502-03), this Court has consistently rejected this precise claim. *Worthington v. State*, 166 S.W.3d 566, 582-83 (Mo. banc 2005); *Morrow v. State*, 21 S.W.3d 819, 828 (Mo. banc 2000). Anderson does not cite this Court's precedent in his brief nor does he present any reason to reconsider these decisions. This claim therefore should be denied.

CONCLUSION

For the aforementioned reasons, respondent prays that this Court affirm the motion court's order denying Anderson's Rule 29.15 motion.

Respectfully submitted,

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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 WordPerfect 9 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 _____, 2006, to:

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Respondent's Appendix

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