

No. SC90554

*In the
Missouri Supreme Court*

MIGUEL VACA,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from Platte County Circuit Court
Sixth Judicial Circuit
The Honorable Owens Lee Hull, Jr., Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the denial after an evidentiary hearing of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of Platte County. The conviction sought to be vacated was for two counts of robbery in the first degree, section 569.020, RSMo;¹ one count of attempted robbery in the first degree, sections 564.011 and 569.020, RSMo; one count of assault in the second degree, section 565.060, RSMo; and three counts of armed criminal action, section 571.015, RSMo, for which the sentence was life imprisonment plus seventy-five years. Following a Missouri Court of Appeals, Western District, *en banc* opinion affirming Appellant's conviction, the case was transferred pursuant to this Court's order upon Appellant's Application for Transfer. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Supreme Court Rule 83.04.

¹ All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

On March 25, 2004, Appellant was charged in a first amended information with two counts of robbery in the first degree, section 569.020, RSMo; one count of attempted robbery in the first degree, sections 564.011 and 569.020, RSMo; one count of assault in the second degree, section 565.060, RSMo; and three counts of armed criminal action, section 571.015, RSMo. (L.F. 4, 17-19).² Appellant was tried by a jury on December 6-10, 2004, before Judge Owens Lee Hull, Jr. (L.F. 7-10). On direct appeal, Appellant did not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

At 7:00 p.m. on October 21, 2002, John Copeland was leaving work at Quality Cleaners on Barry Road in Platte County. (Tr. 394, 396). As Copeland was walking to his car, he bumped into a man on a mountain bike. (Tr. 397, 400). The man was adjusting a dark-colored ski mask with two holes for the eyes and one hole for the mouth. (Tr. 398). He was also wearing a gray coat, a pair of jeans, and dark colored tennis shoes. (Tr. 398). The man appeared to Copeland to be in his early 40's, about five-four and weighing about 150 pounds. (Tr. 399). Copeland continued to his car, and then

² The record on appeal will be cited as follows: WD65181 Direct Appeal Legal File (L.F.); WD65181 Direct Appeal Transcript (Tr.); WD69004/SC90554 Post-Conviction Legal File (PCR L.F.); WD69004/SC90554 Post-Conviction Transcript (PCR Tr.); and exhibits admitted by Appellant at the Rule 29.15 evidentiary hearing (Mov.'s Ex.).

drove to the front of Quality Cleaners, where he looked into the window to make sure that his boss was all right. (Tr. 397-98).

At approximately the same time, Victoria Lynn was giving a manicure to Alicia Stephens at Salon North, which is next door to Quality Cleaners. (Tr. 341-42, 374, 396). A man wearing a ski mask and holding a gun entered the salon. (Tr. 342, 345, 375-76). Both women believed that the gunman was Hispanic, based on his having dark skin on the hands and around the eyes. (Tr. 353-54, 382). He appeared to Lynn to be over 40 years of age, about five-six in height and weighing about 140 pounds. (Tr. 355). Stephens described him as about five-six and slim or average. (Tr. 383). Both women described the gun as dark. (Tr. 356, 383). Stephens also described the gunman as having a real heavy lisp or speech impediment. (Tr. 384).

The man said, “give me your money.” (Tr. 345, 376). When Lynn did not answer right away, the man raised his voice and said either, “give me your goddamn money” or “give me your fucking money.” (Tr. 345-46, 377). Lynn replied that she didn’t have any money there – that the customers paid by check or credit card. (Tr. 346, 376). The man pointed the gun at the two women and told Stephens to get her purse. (Tr. 347, 376). She opened the purse, removed the billfold, and showed the gunman that all it contained was two pennies. (Tr. 347, 378-79). The man then pointed the gun back at Lynn and told her to get the purse. (Tr. 348-49, 380). Lynn opened the purse and took out a one-dollar bill, which was the only money it contained. (Tr. 351). The gunman took the dollar bill, put it in his pocket, and then reached beneath Lynn’s buttocks and grabbed her crotch. (Tr. 351-52). Lynn spun around and shook her finger at him, saying, “You don’t need to

grab me like that.” (Tr. 352-53, 381). The man waved the gun at Lynn and told her to get on the floor and wait until he was gone. (Tr. 356, 384). The two women complied and the gunman left. (Tr. 357, 384-85).

At 5:00 p.m. on October 30, 2002, John Copeland, who had spotted a man putting on a ski mask shortly before Salon North was robbed, was working alone at Quality Cleaners. (Tr. 403). A man wearing a dark ski mask entered the store. (Tr. 405-06). The man appeared to Copeland to be in his 40’s, about five-four in height and weighing about 150 pounds. (Tr. 408, 410). Copeland said the man spoke with something similar to a lisp. (Tr. 411). The man pointed a black revolver at Copeland and said, “give me the change.” (Tr. 408, 415). Not knowing if the gunman was serious, Copeland rolled his eyes at him. (Tr. 411). The man then fired a shot into the ceiling. (Tr. 411). Copeland handed over all the bills in the drawer, which totaled about one-hundred dollars. (Tr. 411-12). Copeland asked the gunman if he wanted the coins that were in the drawer. (Tr. 412). The gunman shook his head and said, “no.” (Tr. 412). Copeland then obeyed the gunman’s order to lie on the ground, and the gunman fled. (Tr. 412). Copeland testified that there was no doubt in his mind that the man who robbed him was the same man he had seen at the time of the Salon North robbery. (Tr. 419).

On November 15, 2002, a children’s birthday party was taking place on the second floor of the clubhouse at the Cove’s North Apartments. (Tr. 439-40, 444, 453, 460-61). The party was attended by six girls and one boy, and by one adult, Lorie Seper. (Tr. 440-41, 454). A man wearing a dark ski mask and armed with a dark-colored revolver

entered the room where the party was taking place. (Tr. 445-47, 455). The gunman had dark skin and was about five-six and 160 pounds. (Tr. 473).

He pointed the gun at the children and told them to get on the ground, and then demanded money from Seper. (Tr. 447, 448, 456, 464). Seper emptied the purse to show the gunman that she didn't have any money. (Tr. 465). She offered to give him her checks and credit cards, but the gunman appeared upset that she didn't have any cash, so Seper told him there was money in her apartment. (Tr. 465-66). The gunman shoved the pistol in Seper's side and started to drag her out of the room. (Tr. 448, 457, 466). One of the party guests, a twelve-year-old girl, got up and told the gunman to leave Seper alone. (Tr. 449, 452, 457, 467). He pointed the gun at the girl and told her to sit down and shut up. (Tr. 449, 457-58, 467). The children cried and prayed after the gunman led Seper out of the room. (Tr. 449).

The gunman dragged Seper to the bottom of the steps and tried to force her into a restroom. (Tr. 467-68). Seper was afraid that he was going to rape or shoot her, so she tried to pull away. (Tr. 469-70). The gunman hit her in the head with the gun, and as he did so, Seper slipped out of her jacket and ran away. (Tr. 469-70). Seper ran outside and screamed for help. (Tr. 471). Another resident of the apartment complex, Robert Clardy, was walking from his car to his building when he heard Seper screaming and saw her running from the clubhouse. (Tr. 480, 486-87). Clardy then saw a man running towards him. (Tr. 488). The man was simultaneously pointing a gun at Clardy and removing a ski mask. (Tr. 488). The man said to Clardy, "Get your ass up the steps." (Tr. 489). Clardy turned around and started running, and the man fired a shot at him. (Tr. 489).

The bullet hit a wall behind a stairwell. (Tr. 492). The children, who were still in the clubhouse, heard the gunshot and became even more upset, thinking that the gunman had shot Seper. (Tr. 450, 458).

Police investigators looking into the series of robberies were concerned that they were becoming increasingly more violent, with shots being fired in the last two robberies. (Tr. 516). Police also noticed that in all the robberies, the gunman fled towards the Cove's North and Quail Run apartment complexes, and they determined that he probably lived in one of those complexes. (Tr. 516-17, 523). A flyer was developed containing a general description of the suspect developed from witness statements. (Tr. 517, 520). The flyers described the suspect as a Hispanic or white male, 30 to 45 years of age, five-foot-four to five-foot eight inches and thin build, wearing dark clothing, a dark colored mask with two eyeholes, and armed with a dark colored handgun. (Tr. 524-26). The flyer said that the suspect had been seen on a bicycle, possibly a black mountain bike. (Tr. 527). The flyer also indicated that the suspect had a noticeable inflection in his voice, possibly a lisp or a strong accent. (Tr. 539). The flyer asked anyone with information about the robberies to contact the police or a TIPS hotline. (Tr. 529-30).

Police officers went to the two apartment complexes on the morning of November 20, 2002, and began handing the flyers to anyone who entered or left the premises. (Tr. 530-32). One of the detectives was approached by a woman and her son, who pointed out a townhouse and said that they thought that a Hispanic man who rode a bicycle lived there. (Tr. 534-35, 598-99). The detective called his sergeant over and was relaying the information to him when a cab pulled up in front of the townhouse. (Tr. 535-36).

Appellant got into the cab and hunched down in the back seat. (Tr. 538, 600). The two officers approached the cab and handed Appellant a flyer. (Tr. 538, 601). Appellant appeared to be nervous and the officers noticed that he had a lisp or speech impediment of some sort. (Tr. 538, 540, 601). Appellant was asked for his ID, and a check of his name disclosed an outstanding arrest warrant. (Tr. 540-41, 602). He was arrested, and because he fit the suspect description in the flyer, the officers obtained his consent to search his residence.³ (Tr. 542-44, 602).

The search disclosed a black and purple mountain bike, a Taurus .38 caliber revolver, a receipt for the gun in Appellant's name, .38 caliber ammunition, and some torn blue cloth that appeared to have been a mask. (Tr. 551-57, 571, 575). Crime scene technicians had earlier recovered bullet fragments from Quality Cleaners and a bullet from the wall at Cove's North Apartments, and submitted them to the Kansas City Police Department Crime Laboratory. (Tr. 648-49). Ballistics tests determined that those bullets had been fired from Appellant's handgun. (Tr. 650-51, 665-67).

Officers also recovered some moneybags containing \$444 in cash. (Tr. 583, 693-94). Mixed in with that money was a one-dollar bill with some writing on it. (Tr. 585, 695-96). The date "October 21, 2002," was written on the bill. (Tr. 696). The words "Salon North" had been written on the bill and then scratched out. (Tr. 696, 739-40). The writing also made reference to a female with a "nice ass," to a demand for money,

³ Appellant was 43 years old and weighed 160 pounds when he was arrested. (Tr. 593-94). He is five-feet-six inches tall. (Tr. 593).

and to the fact that two women were present. (Tr. 696). There was also a notation that said, “It felt great.” (Tr. 696). A handwriting expert compared the writing on the bill to handwriting samples submitted by Appellant and determined that it was Appellant’s handwriting on the bill. (Tr. 736, 745).

After being arrested, Appellant was taken to the police station and was questioned by a detective. (Tr. 767-68). When asked what had happened at Salon North, Appellant told the detective, “I have some psychological problems and sometimes I do things wrong.” (Tr. 775). Appellant then described what had happened during the robberies at Salon North, Quality Cleaners, and the Cove’s North clubhouse. (Tr. 775-81). Appellant denied being involved in a similar robbery at a collectibles store that police were also investigating. (Tr. 781).

Appellant testified at trial and presented twenty-five witnesses in the guilt phase. (Tr. viii-xiii). Those witnesses included Appellant’s father, sister, and brother, who provided character testimony; the two victims of the robbery at the collectibles store (for which Appellant was not charged); and the testimony of several police officers concerning other suspects who the police had been looking at prior to Appellant’s arrest. (Tr. 1259-65, 1194-1206, 1032-55, 1166-79, 1240-48, 854-94, 980-81, 992-94, 999-1005, 1127-34, 1154-60, 1227-35). Appellant admitted to owning the handgun and the bicycle seized from his residence. (Tr. 1069-72). Appellant said that when the police questioned him, he denied knowing anything about the robberies. (Tr. 1088). He also testified that the detective who was questioning him pulled out a dollar bill and told him to write on it. (Tr. 1089). Appellant said he wrote down what the detective dictated to

him because he did not want to make the detective mad. (Tr. 1089). During his testimony, Appellant denied committing the robberies or hitting anyone with his gun. (Tr. 1090).

The jury found Appellant guilty on all counts. (L.F. 9). Appellant presented the testimony of his father at the sentencing phase of the trial, but did not testify himself. (Tr. xiv-xv). The jury recommended sentences of life imprisonment on the count of robbery in the first degree for the Quality Cleaners robbery and ten years imprisonment on the associated count of armed criminal action; thirty years on the count of robbery in the first degree for the Salon North robbery and ten years on the associated count of armed criminal action; fifteen years imprisonment for attempted robbery in the first degree for the incident at Cove's North and thirty years for the associated count of armed criminal action; and seven years for assault in the second degree for striking Lori Seper in the head with the gun during the attempted robbery at Cove's North. (L.F. 9, 17-19). The trial court imposed the sentences recommended by the jury on February 17, 2005, and ordered that the sentences run consecutively. (L.F. 11). The conviction and sentence were affirmed by the Missouri Court of Appeals, Western District, on November 7, 2006, pursuant to Supreme Court Rule 30.25(b). *State v. Vaca*, 204 S.W.3d 754 (Mo. App. W.D. 2006). The mandate issued on November 29, 2006. (PCR L.F. 22-23).

On August 2, 2005, Appellant prematurely filed a *pro se* Motion to Vacate, Set Aside or Correct the Judgment or Sentence. (PCR L.F. 2, 5-14). Counsel was appointed and the motion court suspended the filing of an amended motion until after the mandate

had issued on direct appeal. (PCR L.F. 2, 15, 21). An amended motion was timely filed on February 27, 2007. (PCR L.F. 3, 24-54).

The amended motion raised two claims that are pertinent to this appeal: (1) that trial counsel was ineffective for failing to call Dr. Bill Geis, a psychologist who evaluated Appellant, to testify in the sentencing phase of trial; and (2) that trial counsel was ineffective for eliciting evidence of the robbery at KC Collectibles on October 28, 2002, and the assaults on the two employees of the store. (PCR L.F. 26-27). An evidentiary hearing was held on July 12, 2007. (PCR L.F. 3). Appellant presented testimony from Dr. Geis and from trial counsel, Anthony Cardarella. (PCR Tr. 4, 68). Appellant also entered into evidence the report prepared by Dr. Geis, as well as various other records that Appellant alleged should have been obtained by trial counsel and presented to Dr. Geis. (PCR Tr. 14).

The motion court issued its Findings of Fact, Conclusions of Law and Judgment on September 11, 2007, denying the relief sought in the amended motion. (PCR L.F. 3, 55-67). This appeal follows. (PCR L.F. 4, 69-71). Additional facts specific to the claims raised in Appellant's Points Relied On will be presented in the argument section pertaining to those points.

STANDARD OF REVIEW

The following standard of review applies to both of Appellant's points, which allege that the motion court clearly erred in denying the amended Rule 29.15 motion because Appellant received ineffective assistance of trial counsel, resulting in prejudice.

Appellate review of the denial of a Rule 29.15 motion is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous. Supreme Court Rule 29.15(k); *Matthews v. State*, 175 S.W.3d 110, 113 (Mo. banc 2005). The motion court's disposition will only be disturbed if a review of the entire record leaves the appellate court with the definite impression that a mistake has been made. *Matthews*, 175 S.W.3d at 113. The motion court's findings should be upheld if they are sustainable under any grounds. *State v. Bradley*, 811 S.W.2d 379, 383 (Mo. banc 1991).

In order to establish ineffective assistance of trial counsel, a Rule 29.15 movant must satisfy a two-prong test: (1) counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney; and (2) the movant was thereby prejudiced. *Skillicorn v. State*, 22 S.W.3d 678, 681 (Mo. banc 2000). The court presumes that counsel acted professionally in making decisions and that any challenged action was a part of counsel's sound trial strategy. *Id.* at 681-82. To demonstrate prejudice, a movant must show there is a reasonable probability that, but for counsel's poor performance, the result of the proceeding would have been different. *Id.* at 681. If a movant fails to satisfy either the performance prong or the prejudice prong, this Court need not consider the other. *State v. Nunley*, 980 S.W.2d 290, 292 (Mo. banc 1998).

ARGUMENT

I.

Appellant was not prejudiced by trial counsel's failure to call a psychologist to testify at the sentencing phase of the trial.

Appellant contends that trial counsel was ineffective for failing to call a psychologist, Dr. Bill Geis, to testify at the sentencing phase of trial about Appellant's mental condition. But the motion court did not clearly err in denying Appellant's claim because it is not reasonably likely that Geis's testimony would have resulted in a more lenient sentencing recommendation from the jury.

A. Underlying Facts.

1. Amended Rule 29.15 motion.

The amended Rule 29.15 motion alleged that trial counsel was ineffective for failing to call Dr. Bill Geis to testify in the sentencing phase of the trial. (PCR L.F. 26). Appellant alleged that he was prejudiced because there was a reasonable probability that the jury would have recommended more lenient sentences. (PCR L.F. 26).

2. Evidentiary hearing testimony of trial counsel.

Trial counsel Anthony Cardarella testified at the evidentiary hearing that his pre-trial meetings with Appellant raised concerns about Appellant's mental health. (PCR Tr. 68-69). Appellant told Cardarella that he had received Social Security disability benefits, that he was presently seeing a doctor at the jail, that he had suffered a head injury in 1989, and that he had seen a Dr. Rajiv Parikh in Arizona. (PCR Tr. 69-71). Appellant

also told Cardarella that he was taking naproxen, trazadone, Paxil, clonazepam, and Zyprexa. (PCR Tr. 70).

Cardarella retained Dr. Bill Geis to examine Appellant for competency and to help determine whether there were any mental issues that might assist Cardarella in presenting a defense or in developing alternative defenses. (PCR Tr. 71). Dr. Geis prepared a report for Cardarella, who testified that he did not specifically recall talking to Dr. Geis about his findings, but is sure that they did have that discussion. (PCR Tr. 71-73).

Cardarella testified that the strength of the State's case was substantial, and that he was pretty certain that the case would reach a sentencing phase. (PCR Tr. 79-80). He prepared for that sentencing phase by thinking about which family members might testify in an attempt to gain sympathy for Appellant, and also considered whether or not Appellant should testify at that stage of the trial. (PCR Tr. 80). Cardarella said that he did not give any consideration to having Dr. Geis testify in the sentencing phase. (PCR Tr. 81). Cardarella testified that he could not recall a strategic reason for not calling Dr. Geis at sentencing. (PCR Tr. 81). Cardarella said that he did call some of Appellant's relatives during the guilt phase in order to elicit testimony about Appellant's mental issues and disability. (PCR Tr. 109-10). Cardarella wanted the jury to conclude from that testimony that Appellant could not be responsible for the robberies. (PCR Tr. 111).

3. Dr. Geis's report and evidentiary hearing testimony.

Dr. Geis also testified at the evidentiary hearing. (PCR Tr. 4). He was a licensed psychologist and Director of Behavioral Health Research at the University of Missouri-Kansas City School of Medicine, and also had a private practice in clinical psychology

and forensic psychology. (PCR Tr. 4). He testified that Cardarella retained him to assess the possibility of an NGRI defense as well as Appellant's competency to stand trial. (PCR Tr. 10). Dr. Geis saw Appellant on June 5, 2003, at the Platte County Jail. (PCR Tr. 6-7). Dr. Geis interviewed Appellant and administered two psychological tests: the Wechsler Adult Intelligence Scale-Revised (WAIS-R), and a Psychiatric Diagnosis Interview for Schizophrenia. (Movant's Ex. 1, p. 1). Dr. Geis prepared a report dated October 14, 2003, that was admitted into evidence as Movant's Exhibit 1. (PCR Tr. 7, 14). In addition to the interview and the psychological tests administered at the jail, the report was also based on the police investigative report into the charged crimes and records from Appellant's treating physician, Dr. Martin Rhodes. (Mov.'s Ex. 1, p. 1).

The report indicated that Appellant had trouble in school and attended special education classes before dropping out in the eighth grade. (Mov.'s Ex. 1, p. 2). Appellant lived at home until age 36 and held a series of odd jobs. (Mov.'s Ex. 1, p. 2). The report also showed a long history of violent behavior. When Appellant was eight or nine years old, he stabbed a boy in the back with a pencil after the boy pushed him. (Mov.'s Ex. 1, p. 2). In 1986, Appellant punched a woman whom he thought had made a derogatory comment about him, and was arrested for assault. (Mov.'s Ex. 1, p. 2). Appellant told Dr. Geis that he got into several fights with men during that time. (Mov.'s Ex. 1, p. 2). When Appellant was living with his brother in Arizona, he got into a fight with his nephew and spent the night in jail. (Mov.'s Ex. 1, pp. 2-3). Appellant told Dr. Geis that he watched too much violence on television and was worried that it had a negative effect on him. (Mov.'s Ex. 1, p. 2).

Appellant told Dr. Geis that he thought he was having a mental breakdown when he came to the jail. (Mov.'s Ex. 1, p. 4). Appellant reported "seeing things and seeing people burning and trying to pull me into this." (Mov.'s Ex. 1, p. 4). He said that he was having flashbacks to incidents from his 20's of being slapped, beaten, and whipped. (Mov.'s Ex. 1, p. 4). Appellant said that he was having a lot of nightmares and that he had been hearing voices for many years. (Mov.'s Ex. 1, p. 4). Appellant told Dr. Geis that he had been drinking heavily at the time of his arrest and that he did not know what was going on in his mind. (Mov.'s Ex. 1, p. 4). Appellant also said that he had stopped taking his psychiatric medication because he was having trouble with his insurance. (Mov.'s Ex. 1, p. 5). Appellant reported that he was no longer able to see his physician, that he had picked a new physician, but he had not yet gone to see her. (Mov.'s Ex. 1, p. 5). Dr. Geis concluded that Appellant's impulse control appeared to fluctuate with his psychiatric status. (Mov.'s Ex. 1, p. 4).

Dr. Geis diagnosed Appellant with four Axis I conditions: Schizophrenia, paranoid type; Dysthymia, early onset; Post-Traumatic Stress Disorder; and Alcohol Abuse. (Mov.'s Ex. 1, p. 6). Appellant was also given an Axis II diagnosis of Borderline Intellectual Functioning; an Axis III diagnosis of Hypertension and chronic neck pain; an Axis IV diagnosis of Stresses of disability and poverty; and an Axis V diagnosis of poor Global Assessment of Functioning. (Mov.'s Ex. 1, p. 6). The WAIS-R testing showed that Appellant's IQ scores were in the borderline range of intelligence, and were consistent with low-functioning, non-mentally retarded individuals. (Mov.'s Ex. 1, p. 5). The report found that Appellant was competent to stand trial. (Mov.'s Ex. 1, p. 7). The

report also concluded that Appellant's schizophrenia could have had an impact on his ability to form rational thought and conform his behavior at the time of the offense, and that his low intelligence could have affected his ability to understand the impact of his actions. (Mov.'s Ex. 1, p. 7).

Dr. Geis testified that he was certain that he talked to Cardarella about the report, but could not recall the details of their conversations. (PCR Tr. 7-8). Dr. Geis specifically could not recall whether he and Cardarella discussed the possibility of his testifying at the sentencing phase of the trial. (PCR Tr. 9). Dr. Geis said that he reviewed his calendar for the date of the sentencing phase of the trial, and did not see anything that would have prevented him from testifying. (PCR Tr. 10).

B. Analysis.

To establish ineffective assistance of counsel for failing to call a witness, Appellant must show that the witness could have been located by reasonable investigation, that the witness would testify if called, and that the testimony would provide a viable defense. *Bucklew v. State*, 38 S.W.3d 395, 398 (Mo. banc 2001). Even if those conditions are met, Appellant must still demonstrate a reasonable probability of a different outcome had the witness testified. *Id.* at 399. A different outcome in the context of sentencing phase testimony would be a more lenient sentencing recommendation from the jury, and Appellant has not shown a reasonable probability that Dr. Geis's testimony would have caused that result.

Appellant was tried under the bifurcated trial procedure set out in section 557.036, RSMo. Under that procedure, evidence mitigating punishment may be

presented during the sentencing phase of the trial. § 557.036.3, RSMo Supp. 2003.

Evidence relating to the history and character of the defendant may be admitted within the discretion of the court. *Id.* Dr. Geis's evaluation of Appellant would have been admissible as evidence concerning the history and character of the defendant, but Appellant has not shown a reasonable probability that Dr. Geis's testimony would have benefitted him in the sentencing phase.

1. Death penalty cases are inapposite.

Appellant relies on three opinions from this Court that found trial counsel ineffective for not presenting mental health evidence during the penalty phase of a capital trial. But all three of those cases relied on the heightened duty that capital defense counsel have to discover and present mitigating evidence to the jury. *Taylor v. State*, 262 S.W.3d 231, 249 (Mo. banc 2008); *Glass v. State*, 227 S.W.3d 463, 470 (Mo. banc 2007);⁴ *Hutchison v. State*, 150 S.W.3d 292, 302, 307-08 (Mo. banc 2004). Appellant disclaims an intent to engraft that duty onto non-capital cases, but argues that the capital cases are instructive because the sentencing procedure in capital and non-capital cases are similar. In fact, there are significant differences between the two that make the capital

⁴ In *Glass*, the motion court had granted the defendant's Rule 29.15 claim that he was prejudiced by counsel's failure to call a neuropsychologist at the sentencing phase. *Glass*, 227 S.W.3d at 470. In upholding that determination, this Court noted that the motion court was in the best position to assess the probable impact of that testimony. *Id.* That same standard applies to the motion court's ruling in this case.

cases inapposite in evaluating the potential impact of mitigating evidence in non-capital cases.

The sentencing statute for non-capital cases is non-specific as to the types of evidence that can be introduced:

Evidence supporting or mitigating punishment may be presented. Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant.

§ 557.036.3, RSMo Supp. 2003. The statute gives no guidance as to how the jury is to consider aggravating and mitigating evidence. *Id.* And the instruction given to juries in non-capital cases merely tells the jury that it should consider the evidence presented in either the guilt or sentencing phase of trial in assessing and declaring the defendant's punishment. MAI-CR 3d 305.03.

By contrast, the jury in a capital case is given far more explicit guidance in its deliberations. First of all, a jury cannot return a death sentence unless it finds beyond a reasonable doubt the existence of at least one of seventeen statutory aggravating circumstances. §§ 565.030.4(2), RSMo Supp. 2001; 565.032.2(1)-(17), RSMo 2000. The jury then has to determine whether the evidence in mitigation of punishment outweighs the evidence in aggravation of punishment. § 565.030.4(3), RSMo Supp. 2001. Among the mitigating circumstances that the jury has to consider are any statutory mitigating circumstances submitted to it. *Id.* One of the statutory mitigating

circumstances is directly related to the defendant's mental health, asking the jury to consider whether "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." § 565.032.3(6), RSMo 2000.

A jury in a capital case is specifically instructed that if it finds that the aggravating facts and circumstances warrant imposition of a death sentence, it must then determine whether there are mitigating facts and circumstances that are sufficient to outweigh the aggravating facts and circumstances. MAI-CR 3d 313.44A. If there is evidence to support any of the statutory mitigating circumstances, then that mitigating circumstance is specifically submitted in the instruction. MAI-CR 3d 313.44A. The jury is specifically instructed that all jurors need not agree upon the particular mitigating facts and circumstances. MAI-CR 3d 313.44A. The jury is further instructed that it is not required to return a death sentence even if it does not find the existence of mitigating facts and circumstances sufficient to outweigh the aggravating facts and circumstances. MAI-CR 3d 313.46A.

The instructions given in a capital case serve to focus the jury's attention on mitigating evidence, and to stress the significance of that evidence, in a way that the jury instruction in a non-capital case does not. Where a capital defendant's mental health is at issue in the sentencing phase, that evidence is highlighted to the jury by being specifically listed in the instructions as a mitigating circumstance. Thus, this Court found in *Taylor* that the defendant was prejudiced by counsel's failure to present mental health evidence because the jury was deprived of that evidence "at a time when their

instructions would have permitted them to give mitigating effect to their conclusions about Mr. Taylor’s history of mental illness” *Taylor*, 262 S.W.3d at 251. In this case, Dr. Geis’s report concluded that Appellant had a serious mental disease – schizophrenia – that could have had an impact on his ability to form rational thought and conform his behavior to the expectations of society. (Mov.’s Ex. 1, p. 7). That language mirrored the statutory mitigating language found in section 565.032.3(6), RSMo. But unlike the jury in a capital case, the jury in Appellant’s case would not have been specifically instructed to consider that conclusion as a mitigating circumstance.

The instructional scheme in capital cases thus enhances the prejudicial effect of not presenting all available mental health evidence at sentencing in a manner not present in non-capital cases. Thus, a finding of prejudice in a capital case is not particularly instructive on the issue of prejudice in a non-capital case.

2. Mental health evidence is often treated as an aggravating factor.

Even though capital juries are instructed to give mitigating effect to a defendant’s mental health issues, there is reason to believe that does not always happen.

Commentators who have studied the use of mental illness defenses in capital cases have concluded that, “mental illness – rather than serving as a mitigating factor – can be seen as an aggravating factor.” Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of “Mitigating” Mental Disability Evidence*, 8 Notre Dame J.L. Ethics & Pub. Pol’y 239, 274 (1994). That is due to attitudes and perceptions that many jurors bring into their deliberations, including “the omnipresent obsessive fear of feigned mental states, and the presumption of an absolute linkage between mental illness

and dangerousness.” *Id.* at 258-59. “In this environment, it is easy to see how evidence of mental illness – ostensibly introduced for mitigating purposes – can be construed by jurors (or by judges) as aggravating instead.” *Id.* at 259.

This Court has found that capital counsel should not forego presenting mitigating evidence because it might contain some harmful information. *Taylor*, 262 S.W.3d at 251; *Hutchison*, 150 S.W.3d at 304-05. But one of the reasons a higher duty has been imposed on capital counsel to present mitigating evidence is the unique nature of the stakes that are involved. *Taylor*, 262 S.W.3d at 249. Counsel in a capital case is trying to avoid the ultimate punishment for his client. And the jury in a capital case knows that if it does not impose the death penalty, the defendant will still receive a sentence of life without parole.⁵ A capital jury thus knows that the public will be protected from the defendant’s dangerous behavior no matter what it does.

In Appellant’s case, though, the jury was instructed to consider a range of punishment of ten to thirty years, or life, on the two counts of robbery in the first degree; five to fifteen years for attempted robbery in the first degree; one to seven years, or up to one year in the county jail, or a fine, or a combination of imprisonment and fine, for assault in the second degree; and at least three years imprisonment on the two counts of armed criminal action. (L.F. 89-90). The jury was not instructed on parole eligibility.

⁵ In fact, the defendant in *Taylor* was already serving a sentence of life without parole when he killed his cellmate, the offense for which he received the death penalty. *Taylor*, 262 S.W.3d at 237.

The jury also asked whether it would get to decide whether the sentences would run consecutively or concurrently, and was told that it would not. (L.F. 94). The jury thus had no assurances that Appellant would never be released from jail. So if the jury had reason to believe that Appellant's mental health issues made him more dangerous, it would likely have tried to minimize the risk to the public by recommending lengthy sentences, if not the maximum sentences available. And there is good reason to believe that the evidence not presented would have caused the jury to believe that a lengthy prison sentence was needed to protect the public.

3. Reasonable probability that Dr. Geis's testimony would have enhanced the sentencing recommendation rather than lowered it.

The jury in this case heard ample evidence of Appellant's dangerous behavior. In finding him guilty of committing two armed robberies, one attempted armed robbery, and an assault, the jury heard evidence that Appellant confronted numerous people with a gun. (L.F. 9; Tr. 347, 376, 408, 415, 447, 448, 456, 464). In one of those incidents, he terrorized a group of children, actually pointing the gun directly at a twelve-year-old girl. (Tr. 447, 448, 449, 452, 456, 457, 464, 467). He abducted the mother of one of the children and hit the woman in the head with his gun. (Tr. 466-70). He then shot at a man who tried to come to the woman's aid. (Tr. 489). Appellant also fired his gun during one of the robberies. (Tr. 411). And he grabbed one of the female robbery victims in a lewd manner. (Tr. 351-52).

The seriousness of the crimes alone makes it unlikely that the jury would have recommended a lesser sentence had Dr. Geis testified. And his testimony could actually

have exacerbated the situation by playing into juror concerns about the linkage between mental illness and dangerous behavior. Dr. Geis's report contains a litany of violent behavior by Appellant going back to his childhood. When Appellant was eight or nine years old, he stabbed a boy in the back with a pencil after the boy pushed him. (Mov.'s Ex. 1, p. 2). In 1986, Appellant punched a woman whom he thought had made a derogatory comment about him, and was arrested for assault. (Mov.'s Ex. 1, p. 2). Appellant told Dr. Geis that he got into several fights with men during that time. (Mov.'s Ex. 1, p. 2). When Appellant was living with his brother in Arizona, he got into a fight with his nephew and spent the night in jail. (Mov.'s Ex. 1, pp. 2-3). Appellant told Dr. Geis that he watched too much violence on television and was worried that it had a negative effect on him. (Mov.'s Ex. 1, p. 2).

Not only would the jury have learned about Appellant's violent history, it would have heard Dr. Geis testify that Appellant had been unable to care for himself and be a fully functional member of society. (PCR Tr. 18-19). He also testified about visions and nightmares that Appellant reported experiencing, and that Appellant had reported hearing voices. (PCR Tr. 23). And the jury would have heard about Dr. Geis's conclusion that Appellant's impulse control appeared to fluctuate with his psychiatric status. (Mov.'s Ex. 1, p. 4). The jury could easily have decided that Appellant's mental condition rendered him too dangerous to be at-large and that a lengthy term of imprisonment was necessary for the safety of the community. *See Wackerly v. Workman*, 580 F.3d 1171, 1180 (10th Cir. 2009) (rejecting claim that counsel was ineffective for failing to present mental

health evidence because it could have shown that the defendant was a continuing threat to society).

Appellant points to four questions sent by the jury during its guilt phase deliberations, and contends they are evidence that it would have given mitigating effect to his mental health issues in the sentencing phase. The questions were:

1. Where has Miguel been since arrested 11-2002[?]
2. Was Miguel given psychological testing[?]
3. Had he been compliant with meds before his arrest[?]
4. Is he currently on meds[?]

(L.F. 80). Divining the intent behind jury questions is always difficult, and that is especially true in this case where the questions were asked during the guilt phase of the trial and the allegation of error concerns evidence that would have been presented at sentencing.

But even if the questions are taken as indicative of a concern that the jury might have had during sentencing, one must consider how those questions would have been answered, based on the report that Dr. Geis had prepared at the time of the sentencing hearing and his testimony at the Rule 29.15 evidentiary hearing. In answer to the first question, the jury would have heard that Appellant had been in jail since his arrest. (PCR Tr. 6). On the second question, the jury would have heard that Appellant had been given psychological testing at the jail, and was given Axis I diagnoses of schizophrenia, paranoid type; dysthymia (chronic, low-level depression); post-traumatic stress disorder; and alcohol abuse; plus an Axis II diagnosis of borderline intellectual functioning. (PCR

Tr. 25, 38-39; Mov.'s Ex. 1, pp.4, 5-6). Dr. Geis also testified that Appellant functioned at the level of an eight-year-old. (PCR Tr. 29). On the third and fourth questions, the jury would have heard that Appellant was not compliant with his medications before his arrest, but had been taking anti-psychotic medications while in jail. (Mov.'s Ex 1, pp. 4-5).

The link between the answers to the third and fourth questions is especially significant. Appellant had been prescribed anti-psychotic, anti-depressant, and anti-anxiety medications since at least 2001. (Mov.'s Ex. 1, p. 4). Dr. Geis's evaluation relied in part on records from Dr. Martin Rhodes, a Kansas City physician who treated Appellant in 2001 and 2002. (PCR Tr. 10-11). Dr. Rhodes's records indicated that Appellant was then taking his medications, but that he was nonetheless experiencing a worsening of his symptoms of paranoid schizophrenia. (Mov.'s Ex. 1, p. 3). Dr. Rhodes expressed doubt that Appellant would follow his recommendation to see a psychiatrist who could supervise his medication. (Mov.'s Ex. 2, p. 6). By the time he was arrested, Appellant had stopped taking his medication altogether. (Mov.'s Ex. 1, p. 5). Appellant reported that prior to his arrest, he was having visions of people burning in fire and trying to pull him in, that he was having flashbacks to an incident where he had been choked by another man, and that he was hearing voices. (Mov.'s Ex. 1, p. 5; PCR Tr. 23-24). Appellant also told Dr. Geis that he had been drinking heavily because he was depressed, and that he did not know what was going on in his mind. (Mov.'s Ex. 1, pp. 4-5). By contrast, when Dr. Geis evaluated Appellant at the jail and found him competent to stand trial, he made special note of the fact that Appellant had been on anti-psychotic

medication for several months. (Mov.'s Ex. 1, p. 6). That suggests that Appellant did better in a controlled environment where his medication was supervised.

Appellant cites to additional records that were not made available to Dr. Geis at the time of trial, but which he says demonstrates the breadth of the evidence that would have supported Dr. Geis's opinion.⁶ Those additional records included medical and psychiatric records from the Platte County Jail. (PCR Tr. 13; Mov.'s Ex. 8). Dr. Geis testified that the records showed that Appellant came to the jail in a psychotic state and was immediately prescribed medication. (PCR Tr. 41). Appellant continued on that medication while at the jail. (PCR Tr. 21). And Dr. Geis's report indicates that Appellant's condition had improved while taking the medication at the jail. (Mov.'s Ex. 1, p. 6). The evidence suggested that Appellant was more likely to have psychotic episodes and engage in dangerous behavior when he was not on medication, but that he had trouble staying on his medication when he was out on his own.

The additional records referenced in Appellant's Brief includes Social Security Administration records that, if presented to the jury, would have reinforced the concern about Appellant's ability to manage his mental health conditions on his own. A June 11, 2002, letter from Saint Luke's Shawnee Mission Medical Group showed that Appellant was terminated as a patient when he refused to follow a doctor's advice to seek

⁶ Appellant originally raised a claim before the motion court and the Court of Appeals that counsel was ineffective for failing to provide those records to Dr. Geis. That claim has been abandoned before this Court.

psychiatric care. (Mov.'s Ex. 6). And Appellant admitted in his interview with Dr. Geis that he had generally failed to heed his family's advice that he get psychiatric help. (Mov.'s Ex. 1, p. 4).

The jury could reasonably conclude that public safety would be jeopardized if Appellant, who Dr. Geis said functioned at the level of an eight-year-old, was set loose in society without any oversight. That is especially true in light of Dr. Geis's conclusion that Appellant's impulse control fluctuated with his psychiatric status. (Mov.'s Ex. 1, p. 4). The jury could thus reasonably have found that the best way to protect public safety was to place Appellant in a supervised setting, like prison, where he would get the care and receive the medication that he needed.

The risk in presenting mental health evidence to a sentencing jury, and the difficulty in determining prejudice from the failure to present that evidence, is compounded by the fact that a jury can give aggravating weight to that evidence whether it believes the evidence or not. A jury that ties mental health evidence to future dangerousness will do so because it finds the evidence to be somewhat credible. But commentators have noted situations where a jury will find mental health evidence to be aggravating because it is not seen as credible. And the record in this case suggests the possibility of two of those scenarios.

Dr. Geis admitted at the Rule 29.15 evidentiary hearing that the Social Security Administration records included an evaluation where it was suggested that Appellant may be exaggerating or even lying about his symptoms. (PCR Tr. 58-60). That evidence would feed into "the omnipresent obsessive fear of feigned mental states," that will cause

juries to give aggravating, rather than mitigating, weight to mental health evidence.

Perlin, *supra*, at 258-59.

Research has also shown that jurors are less receptive to mental health evidence where the crime involves “planful” behavior. *Id.* at 247. The jury heard ample evidence demonstrating that Appellant planned his robberies. In each incident, he armed himself with a gun and disguised himself with a ski mask. (Tr. 342, 345, 375-76, 405-06, 408, 415, 445-47, 455). And in the first two robberies, he had to travel from his apartment complex to his targets. (Tr. 516-17, 523). A jury would understandably be skeptical about any mental health arguments when Appellant committed acts involving that degree of advance planning.

The Western District Court of Appeals has noted that the mitigating value of evidence concerning a defendant’s brain damage, learning disabilities, and epilepsy was speculative at best. *Zeitvogel v. State*, 760 S.W.2d 466, 471 (Mo. App. W.D. 1988). That conclusion is appropriate in a non-capital case, where the jury is given little guidance in how to weigh aggravating and mitigating evidence, and where the jury has a greater range of discretion in determining an appropriate sentencing recommendation. And it’s even more true when the mental health evidence has as much, or more, potential to actually serve as aggravating evidence that leads a jury to conclude that a lengthy prison sentence is the only appropriate outcome. Placed in that context, the mitigating effects of Dr. Geis’s testimony would be speculative, and could well have achieved the opposite of the desired effect. Appellant has thus not met his burden of showing that he

was prejudiced by counsel's failure to present that evidence and his point should be denied.

II.

Trial counsel made a reasonable strategic decision to elicit evidence of the uncharged robbery and assaults at KC Collectibles.

Appellant claims that trial counsel was ineffective for eliciting evidence of an uncharged robbery of KC Collectibles on October 28, 2002, and the assault of two employees of the store. The motion court did not clearly err in denying Appellant's claim because counsel made a reasonable strategic choice that the evidence would support the defense theory that another person was responsible for the charged crimes. Appellant also cannot show prejudice in either the guilt or sentencing phases due to the overwhelming evidence of guilt and the evidence of his violent conduct in committing the charged crimes.

A. Underlying Facts.

1. Trial proceedings.

The original information filed by the State charged Appellant with robbery in the first degree, armed criminal action, and assault in the second degree for stealing money from Connie Miller at gunpoint and for striking her with the gun. (L.F. 13-14).

Appellant was also charged with assault in the second degree for striking Margaret Francis with a gun. (L.F. 14). Those charges were dropped from the first amended information. (L.F. 17-19). The State filed a motion in limine seeking to preclude Appellant from adducing any evidence relating to the charges that had been dropped. (L.F. 49-52). The trial court overruled the motion after hearing Appellant's argument

that the evidence was relevant to his defense that another person committed the series of robberies that occurred in the Northland area. (Tr. 180, 186-87).

Appellant presented testimony in the defense case-in-chief from Connie Miller and Margaret Francis. (Tr. 1166, 1240). Miller testified that she and Francis were working at KC Collectibles on October 28, 2002, when a man came into the store wearing a ski mask and holding a handgun. (Tr. 1166-68). The man demanded money and became upset when he found that there was very little cash on the premises. (Tr. 1168). The man hit both women with his gun before leaving the store with about \$200 in cash and some checks. (Tr. 1169, 1175). Miller testified that she went to the window and thought that she saw the man riding away on a bicycle. (Tr. 1169). Francis did not testify about the details of the robbery, but was asked about a videotaped lineup that she viewed. (Tr. 1240-48). Francis testified that she selected someone from the lineup and was told that the person she selected was a police officer. (Tr. 1243).

2. Amended Rule 29.15 motion.

The amended Rule 29.15 motion alleged that trial counsel was ineffective for eliciting evidence of the robbery of KC Collectibles and the assaults on Connie Miller and Margaret Francis. (PCR L.F. 26). The amended motion alleged that Appellant was prejudiced because there was a reasonable probability that the outcome of the guilt phase would have been different. (PCR L.F. 26-27).

3. Evidentiary hearing on Amended Motion.

Trial counsel Anthony Cardarella testified at the evidentiary hearing that his decision to present evidence about the KC Collectibles robbery was based on the State's theory that a single gunman had been responsible for each of the robberies. (PCR Tr. 83). Cardarella said that there were similarities between the KC Collectibles robbery and the charged robberies, and that his strategy was to demonstrate that it was the person who robbed KC Collectibles, and not Appellant, who was responsible for all those robberies. (PCR Tr. 83, 101-02). Cardarella said that he analyzed the evidence as possibly being helpful in the guilt phase of the trial, while acknowledging the possibility that it could have a negative impact at sentencing if Appellant was convicted. (PCR Tr. 87-88).

B. Analysis.

The selection of witnesses and the introduction of evidence are generally questions of trial strategy and are virtually unchallengeable. *Anderson v. State*, 196 S.W.3d 28, 37 (Mo. banc 2006). Cardarella testified that he had a strategy in calling Miller and Francis and presenting evidence of the KC Collectibles robbery. (PCR Tr. 83). He had hoped that the evidence would convince the jury that someone other than Appellant was the person responsible for committing the series of robberies that occurred in the Northland area. (PCR Tr. 83, 101-02). That strategy does not become ineffective just because it did not work as hoped. *State v. Johnston*, 957 S.W.2d 734, 755 (Mo. banc 1997) *see also Anderson*, 196 S.W.3d at 33 (“Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance.”).

Appellant also cannot show that the outcome of the trial would have been different if counsel had not elicited that evidence. First, there was overwhelming evidence of Appellant’s guilt. *See Bucklew*, 38 S.W.3d at 399 (no reasonable probability of a different outcome in the guilt and penalty phases in light of the overwhelming evidence of guilt). Several witnesses described a man fitting Appellant’s age and general build, wearing a dark-colored ski mask and armed with a dark-colored handgun. (Tr. 398-99, 342, 345, 355, 375-76, 383, 405-06, 408, 410, 445-47, 455, 473, 593-94). The gunman was also described as having a lisp. (Tr. 384, 411). Appellant had a lisp. (Tr. 538, 540, 601). The gunman had also been seen on a bicycle, possibly a black mountain bike. (Tr. 527).

When Appellant was arrested, police found a black and purple mountain bike, a Taurus .38-caliber revolver, a receipt for the gun in Appellant's name, .38 caliber ammunition, and some torn blue cloth that appeared to have been a mask. (Tr. 551-57, 571, 575). Ballistics tests determined that the bullets recovered from Quality Cleaners and Cove's North Apartments had been fired from Appellant's handgun. (Tr. 650-51, 665-67). Police also recovered moneybags containing \$444 in cash, including a one-dollar bill that contained incriminating statements made in Appellant's handwriting. (Tr. 583, 585, 693-96, 736, 739-40, 745). That evidence was more than enough for the jury to find Appellant guilty, even if it disregarded his confessions to the robberies. (Tr. 775-81).

Appellant nonetheless claims that he was prejudiced in the sentencing phase because the jury heard evidence that Miller and Francis were pistol-whipped. Even if that evidence had not been presented, the jury still had evidence from the State's case that Appellant confronted numerous people with a gun. (Tr. 347, 376, 408, 415, 447, 448, 456, 464). In one of those incidents, he terrorized a group of children, actually pointing the gun directly at a twelve-year-old girl. (Tr. 447, 448, 449, 452, 456, 457, 464, 467). He abducted the mother of one of the children and hit the woman in the head with his gun. (Tr. 466-70). He then shot at a man who tried to come to the woman's aid. (Tr. 489). Appellant also fired his gun during one of the robberies. (Tr. 411). He also grabbed one of the female robbery victims in a lewd manner. (Tr. 351-52). In light of that evidence of Appellant's violent conduct, he cannot show a reasonable probability

that his sentence would have been different had the KC Collectibles evidence not been presented.

Furthermore, Appellant incorrectly asserts that the State would have been precluded from presenting evidence of the KC Collectibles robbery at sentencing if Appellant had not opened the door to evidence of those offenses. This Court has stated unequivocally that evidence of a defendant's prior unadjudicated criminal conduct may be heard by the jury during the sentencing phase of a trial. *State v. Clark*, 197 S.W.3d 598, 600 (Mo. banc 2006). Appellant thus cannot say that the State would not have presented the same evidence in the sentencing phase that his counsel elicited during the guilt phase, and cannot show a reasonable probability that he received a harsher sentence because of counsel's strategic choice. Appellant's point should be denied.

CONCLUSION

In view of the foregoing, Respondent submits that the denial of Appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and contains 9,535 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 2nd day of March, 2010, to:

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APPENDIX

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