

No. 87852

IN THE
Missouri Supreme Court

TRAVIS GLASS,
Appellant/Cross-Respondent,

v.

STATE OF MISSOURI,
Respondent/Cross-Appellant.

Appeal from the Circuit Court of Callaway County, Missouri
13th Judicial Circuit, Division II
The Honorable Gary Oxenhandler, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the partial granting and the partial denial of a Rule 29.15 motion in the Circuit Court of Callaway County, the Honorable Gary Oxenhandler presiding. The conviction sought to be vacated was first degree murder, §565.020, RSMo 2000, for which the sentence was death. This Court has exclusive jurisdiction. MO. CONST., Art. V, § 3

STATEMENT OF FACTS

Appellant, Travis Glass, was convicted of murder in the first degree, §565.020, RSMo 2000, and sentenced to death (L.F.479-480). The evidence of appellant's crime has been summarized by this Court's in *State v. Glass*, 136 S.W.3d 496 (Mo.banc 2004). This Court affirmed appellant's conviction and sentence. *Id.*

On September 28, 2004, appellant timely filed a *pro se* motion for post-conviction relief (PCR.L.F.9-14). Following appointment of counsel, appellant filed an amended motion on January 20, 2005 (PCR.L.F.27-199).

Following an evidentiary hearing spanning three days with multiple witnesses and exhibits, as well as multiple depositions of witnesses taken in lieu of live testimony, on March 29, 2006, the motion court issued findings of fact and conclusions of law, denying appellant's claims as to the guilt phase but granting appellant a new penalty phase (PCR.L.F.7, 759-810). Both the State and Appellant have appealed these findings.

CROSS-APPELLANT'S POINTS RELIED ON

XII.

The motion court clearly erred in granting Appellant/Cross-Respondent's claim that his trial and appellate counsel were ineffective for failing to assert at trial and on appeal that Instruction No. 17 improperly instructed the jury on kidnapping inasmuch as it did not identify the underlying felony, because counsel's actions were reasonable and appellant was not prejudiced in that the instruction properly defined kidnapping, the instruction complied with MAI-CR3d, and it was not vague.

State v. Leady, 879 S.W.2d 644 (Mo.App. W.D. 1994);

State v. Davis, 963 S.W.2d 317 (Mo.App. W.D. 1997);

State v. Bucklew, 973 S.W.2d 83 (Mo.banc 1998);

State v. Smith, 32 S.W.3d 532 (Mo.banc 2000).

XIII.

The motion court clearly erred in granting appellant's claims that counsel was ineffective for failing to call approximately thirty lay witnesses during the penalty phase, because counsel's strategy was reasonable and appellant was not prejudiced, in that counsel called ten lay witnesses including appellant's family members and friends in support of mitigation, and there is no reasonable probability that the testimony offered by the approximately thirty additional lay witnesses would have affected the outcome of trial.

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

Middleton v. State, 80 S.w.3d 799 (Mo.banc 2002).

XIV.

The motion court clearly erred in granting appellant's claims that his counsel was ineffective for failing to call four alleged expert witnesses, Dr. Robert Smith, Dr. Michael Gelbort, Teri Burns, and Terry Martinez, because counsel's investigation into the penalty phase witnesses and experts and their strategic decisions were reasonable and appellant was not prejudiced in that the information that these experts would have provided would have been damaging to appellant's defense, would have been cumulative to other evidence, and would have had limited probative value.

State v. Clay, 975 S.W.2d 121 (Mo.banc 1998);

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

State v. Thompson, 985 S.W.2d 779 (Mo.banc 1999);

Bucklew v. State, 38 S.W.3d 395 (Mo.banc 2001).

ARGUMENT

I. Admissibility of Autopsy Findings

Appellant claims that the motion court clearly erred in denying his claim that trial and appellate counsel were ineffective for failing to raise at trial and on appeal that the autopsy report of the victim and the testimony of Deputy Medical Examiner Dr. Adelstein was inadmissible and in violation of *Crawford v. Washington*, 124 S.Ct. 1354 (2004). Because the autopsy report was prepared by Dr. Dix, who died prior to trial, appellant argues he was denied his right to confrontation (App.Br.47).

During the guilt phase of the trial, the State called Dr. Edward Adelstein (Tr.742). Dr. Adelstein, the former Deputy Medical Examiner, became the Boone County Medical Examiner when Dr. Dix passed away shortly before trial from cancer (Tr.742-743). Dr. Adelstein testified that Dr. Dix had performed the autopsy on the victim (Tr.743). Dr. Adelstein also testified that he was familiar with Dr. Dix's training and background, that he was familiar with Dr. Dix's vitae and that his vitae, State's Exhibit 8-A, was an accurate reflection of his training and experience (Tr.745). Defense counsel objected that the vitae was not admissible because it was not prepared by Dr. Adelstein (Tr.744). That objection was overruled (Tr.744-745, 750). Dr. Adelstein also testified that the autopsy report on the victim had been prepared by Dr. Dix but that he had an opportunity to review it and the photographs taken of the victim (Tr.749-751). Dr. Adelstein also testified that based on his training and experience, and with reference to the autopsy report, he could testify about Dr. Dix's conclusions and explain their meaning (Tr.751).

Dr. Adelstein testified that the autopsy reports were prepared and kept in the ordinary course of business at the medical examiner's office (Tr.750). Trial counsel objected to the admission of the report, stating that there had been no foundation laid for the report and that Dr. Adelstein "had no personal knowledge" (Tr.750). The objections were overruled and the autopsy report was admitted (Tr.750-751). Dr. Adelstein testified to the results of the autopsy (Tr.751-783).

During the evidentiary hearing, appellant's trial counsel testified that Dr. Dix did not testify at the preliminary hearing nor did he depose Dr. Dix prior to his death (PCR.Tr.431-432). Trial counsel testified that it was their goal to get Dr. Adelstein's testimony excluded but that they did not object on the grounds that it violated appellant's right to cross-examine witnesses because they believed that at the time of trial:

Missouri law at the time that one expert is allowed to testify in some certain circumstances about the reports prepared by a different expert as long as the expert who is testifying in court is properly qualified.

(PCR.Tr.435-436). Counsel stated that she did not consider whether the report and vitae were inadmissible on the grounds that they denied appellant his rights to confront and cross-examine Dr. Dix (PCR.Tr.437).

Direct appeal counsel testified via deposition that she did not raise this claim on appeal because the law in Missouri at the time was that autopsy reports were admissible and satisfied the confrontation clause requirements and she did not consider challenging that law (PCR.Tr.500-501). Counsel noted that the *Crawford* decision was handed down

after she had filed her initial brief in the appeal and only a day before she filed her reply brief (PCR.Tr.501-502).

The motion court denied appellant's claims, finding that:

Although the admission of "autopsy reports" and autopsy findings under Crawford have not been addressed in Missouri, many other jurisdictions have addressed this issue and have come to the same conclusion: autopsy reports are not testimonial under Crawford and are not subject to Crawford's constraints. See People v. Durio, 7 Misc.3d 729 (N.Y.Supp. 2005); Smith v. State, 898 So.2d 797 (Ala.Crim.App. 2004); Moreno Denoso v. State, 156 S.W.3d 166 (Tex.App. 2005). Moreover, autopsy reports are admissible under the business records exception to the hearsay rule. See State v. Weaver, 912 S.W.2d 499 (Mo.banc 1995); State v. Jackson, 925 S.W.2d 856 (Mo.App.W.D. 1996). Thus, counsel was not ineffective and Movant was not prejudiced as any objection would have been without merit.

Moreover, to the extent that Movant alleges that counsel's failure to object was ineffective as counsel failed to preserve this claim for appeal, that claim is not cognizable in this proceeding. State v. Beckerman, 914 S.W.2d 861 (Mo.App.E.D. 1996). Finally, as this claim has no merit, appellate counsel was not ineffective for failing to raise this claim on appeal.

(PCR.L.F.767).

Appellate review is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. *State v. Kinder*, 942 S.W.2d 313, 333 (Mo.banc 1996). Findings and conclusions law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. *State v. Taylor*, 944 S.W.2d 925, 938 (Mo.banc 1997). The court's findings and conclusions are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo.banc 1991).

To prevail on a claim of ineffective assistance, a movant must establish that counsel's performance fell below an objective standard of reasonableness, and that movant was prejudiced by his counsel's error. *Strickland v. Washington*, 466 U.S. 668,687 (1984). To prove prejudice, a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.*

The motion court did not clearly err in denying this claim because the autopsy report and Dr. Adelstein's testimony about the autopsy were admissible and not a violation of appellant's right to confrontation under *Crawford*. First, appellant claims that his counsel was ineffective for failing to object based on *Crawford*, but appellant fails to recognize that *Crawford*, had not been decided prior to his trial and in fact, only came down after briefs had been filed in his direct appeal. Counsel cannot be ineffective for failing to anticipate a change in the law. *State v. Parker*, 886 S.W.2d 908 (Mo.banc 1994); *O'Haren v. State*, 927 S.W.2d 447 (Mo.App.W.D.1996)(counsel not ineffective

for failing to anticipate change in law; conduct measured by what law is at time of trial).

Second, as trial counsel noted during his testimony, this type of testimony (i.e. another medical examiner testifying as to the results of another medical examiner's autopsy) is admissible in Missouri. *State v. Mahan*, 971 S.W.2d 307,316 (Mo.banc 1998); *State v. Rhone*, 555 S.W.2d 839 (Mo.banc 1977).

Third, the autopsy report was admissible as a business record and did not violate appellant's right to confrontation. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *State v. Sutherland*, 939 S.W.2d 373, 376 (Mo.banc 1997). Courts generally exclude hearsay statements because of the inherent lack of trustworthiness accompanying such testimony. *State v. Link*, 25 S.W.3d 136, 145 (Mo.banc 2000). But § 490.680, RSMo 2000, provides an exception to the hearsay rule for documents which may be considered "business records."

The United States Supreme Court recently held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause protects a defendant from the use of testimonial hearsay as substantive evidence against him, unless the non-testifying witness is unavailable, and the defendant has a prior, meaningful opportunity to cross-examine that witness. *Id.* at 53-54. Application of *Crawford* therefore revolves around the question of whether the particular evidence at issue is "testimonial" in nature, a term which the Supreme Court declined to wholly define. *Id.* at 51. But the *Crawford* opinion specifically identified business records as examples of non-testimonial statements. 541 U.S. at 56.

State law requires that autopsies be performed for any death by homicide, suicide, accident, unforeseen sudden occurrence, unusual or suspicious manner, or death while in the custody of the law. §§ 58.451 and 58.720, RSMo 2000. And autopsy reports are admissible as business records. *State v. Weaver*, 912 S.W.2d 499 (Mo.banc 1995).

As the motion court noted, Missouri has not yet addressed whether autopsy reports are admissible under *Crawford*; however, many jurisdictions have, and they concur that autopsy reports are not subject to *Crawford*'s constraints. In a case very similar to the case at bar, the Kansas Supreme Court found that a medical examiner could testify regarding the autopsy conducted by another medical examiner prior to trial and the autopsy report was admissible. *State v. Lackey*, 120 P.3d 332 (Kan. 2005). After examining opinions from other jurisdictions, the Kansas Supreme Court found that autopsy reports were business records:

We believe the reason why these cases have not adopted the arguments and reasoning set forth by the defendant is that it would have the effect of requiring the pathologist who performed the autopsy to testify in every criminal proceeding. If, as in this case, the medical examiner is deceased or otherwise unavailable, the State would be precluded from using the autopsy report in presenting its case, which could preclude the prosecution of a homicide case. We view this as a harsh and unnecessary result in light of the fact that autopsy reports generally make routine and descriptive observations of the physical body in an environment where the

medical examiner would have little incentive to fabricate the results. See Moreno Denoso, 156 S.W.3d at 180. (“Even though autopsy reports are partially subjective, they are generally prepared by officials with no motive to fabricate the results of the reports, and as a general rule, a medical examiner's office is not such a uniquely litigious and prosecution-oriented environment as to create an adversarial context.”).

See also Smith v. State, 898 So.2d 907 (Ala.Crim.App.2004)(autopsy report was not testimonial); *Perkins v. State*, 897 So.2d 457,462-65 (Ala.Crim.App.2004)(same); *Moreno Denoso v. State*, 156 S.W.3d 166,180-82 (Tex.App.2005)(after concluding that the certified autopsy report was admissible under the public records exception, the court further found that the autopsy report was nontestimonial and that the admission of the nontestimonial autopsy report without the deceased pathologist’s testimony did not violate the Confrontation Clause); *People v. Durio*, 7 Misc.3d 729, 734-36, 794 N.Y.S.2d 863 (2005) (autopsy report prepared by the Office of the Chief Medical Examiner, a non-law-enforcement agency designated by statute to investigate unnatural deaths, which was used in a murder case without testimony of the medical examiner who performed the autopsy, was not testimonial and, thus, its admission as a business record did not violate the Confrontation Clause).

Here, as in the cases cited above, the autopsy report was a business record that was prepared by Dr. Dix as required by statute – it was not prepared or manufactured at the request of the prosecution. The mere fact that the report may be used in criminal

prosecution does not render the autopsy report testimonial. And, as recognized in *Durio*, *supra*:

courts cannot ignore the practical implications that would follow from treating autopsy reports as inadmissible testimonial hearsay in a homicide case. Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the autopsy report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

Because the autopsy report was a business record and was not testimonial hearsay, any objection by counsel would have been meritless. Moreover, because this claim had no merit, appellate counsel was not ineffective for not raising this claim on appeal. Finally, to the extent that appellant claims trial counsel failed to properly preserve this issue for appeal, this claim is not cognizable. *State v. Beckerman*, 914 S.W.2d 861

(Mo.App.E.D.1996).¹

¹ Although included in his point relied on, appellant offers no argument regarding how the admission of Dr. Dix's vitae was erroneous or how he was prejudiced. Thus, he has abandoned this claim.

II. “Inconsistent” Theories

Appellant claims that trial counsel was ineffective for pursuing inconsistent defense theories in guilt and penalty phase (App.Br.63). Specifically, appellant claims that counsel’s pursuit of a guilt phase defense of innocence or no deliberation and a penalty phase defense of remorse was inconsistent and that he was prejudiced because his guilt phase defense was “unbelievable and inconsistent with his later claim that he was remorseful for the killing” (App.Br.63).

Defense counsel did not make an opening statement during the guilt phase, but in closing, counsel argued that the State had not presented evidence beyond a reasonable doubt that appellant had killed Steffini Wilkins and that, even if the evidence showed that appellant had killed Wilkins, the evidence did not show deliberation and, therefore, appellant was only guilty of murder in the second degree (Tr.1111-1127). During the penalty phase, defense counsel stated in opening statement that they intended to show the jury that although the jury had found appellant guilty of murder in the first degree, which the defense disagreed with, the defense would present multiple witnesses to show the picture of appellant’s life and in particular, that this murder was completely out of character for appellant (Tr.1181-1187). After presenting ten witnesses in support of mitigation, defense counsel argued closing that the State had not presented sufficient evidence of the statutory aggravators, that appellant led a good life and this one act was out of character for him, that the murder was not planned, that appellant had a difficult childhood that was out of his control, and finally, that appellant was remorseful (Tr.1370-

1386).

Trial counsel testified during the evidentiary hearing that appellant had wanted his counsel to argue that he was not guilty of killing Steffini Wilkins and that if counsel made any other argument he would make a demonstration in the courtroom (PCR.Tr.425). Believing that she had not done so, counsel indicated that she should have argued a lack of deliberation as she had told the jury that she was going to (PCR.Tr.425). Counsel testified that although she knew that her co-counsel was going to argue remorse during the penalty phase and that the remorse argument would be inconsistent with arguing that appellant was not guilty of any offense, that was partly due to appellant's insistence that the defense argue that he was not guilty of any offense and also for the purpose of presenting residual doubt to the jury as a possible mitigator (PCR.Tr.426-427). Appellant's co-counsel testified that he argued remorse during the penalty phase because he believed it was a stronger mitigator than the lack of reasonable doubt that had been made during the guilt phase (Exhibit 22 at 238). Co-counsel stated that:

The reason why Cynthia Dryden emphasized in her guilt phase closing argument—in our guilt phase closing argument the reasonable doubt is because Travis Glass was very insistent with us, as a matter of his defense, that he wanted—that he wanted us to attempt to go for an outright acquittal.

We've had many discussions with him about that. And while both, I believe, Ms. Dryden and I felt that the more salable guilt phase theory

would be a lack of deliberation in acknowledging that he killed her, and arguing forcefully for murder in the second degree, Mr. Glass wanted us to make whatever arguments we could to try and persuade the jury to outright acquit him.

And we felt that it was our duty, as his lawyers, to go along with what he wanted his defense to be in the guilt phase.

(Exhibit 22 at 238).

The motion court denied appellant's claim, finding that counsel's actions were reasonable since appellant insisted on trying for an outright acquittal, and that although these theories may be somewhat "inconsistent," counsel's reasons for pursuing them were reasonable and that appellant had failed to demonstrate how he was prejudiced (PCR.L.F.765-766).

The motion court was not clearly erroneous in denying this claim. First, contrary to appellant's assertion that counsel failed to argue lack of deliberation in guilt-phase closing argument, this claim is refuted by the record. During the guilt-phase closing, after arguing that the State had failed to establish appellant's guilt beyond a reasonable doubt, counsel argued that:

Why? If you believe everything, this is not murder in the first degree. Number one trick that Sergeant Platte used. If you believe every single thing that the State put on and that Travis is guilty and he did this, he believed Steffini was alive, and if you coolly intentionally reflect upon

killing someone, you know they're dead. And the trick worked. So we know this is not murder in the first degree. We know that Travis had had too much to drink that night. We know that from Mike King and from what he told the officers, but Mrs. Campbell said also that he was at the bar that night.

(Tr.1126). Thus, contrary to appellant's assertion, defense counsel did argue the lack of deliberation.

Second, appellant has failed to establish that counsel's actions in arguing their defenses during guilt and penalty phase was ineffective. As noted by trial counsel, the defense during the guilt phase was to argue that the State did not establish appellant's guilt beyond a reasonable doubt and that even if the jury believed that appellant killed Steffini Wilkins, appellant did not deliberate and, thus, he was guilty only of murder in the second degree. During penalty phase, counsel argued a myriad of mitigating factors including: the State's failing to prove aggravating circumstances, appellant's dysfunctional family, appellant's character, and appellant's remorse. Appellant had insisted that counsel argue for an outright acquittal or he would disrupt the trial proceedings. Counsel also wanted to focus on the lack of evidence of deliberation but felt that remorse was a strong mitigator, considering that appellant cried during his confession, said that he wanted to commit suicide, and that he wanted forgiveness. Counsel's approach in arguing what might be considered somewhat inconsistent theories was not ineffective. As this Court recognized in *Middleton v. State*, 103 S.W.3d 726, 736-

737 (Mo.banc 2003):

Where counsel has investigated possible strategies, courts should rarely second-guess counsel's actual choices. Trial counsel is normally in the best position to assess the tradeoffs involved in selecting particular defenses. Thus, while maintaining a consistent theory throughout trial may often be the best approach, at other times it may be prudent to change strategies to accommodate trial developments. These types of strategic choices, “made after thorough investigation are virtually unchallengeable.” (citations omitted). In *Middleton*, the defense had pursued a guilt phase defense of innocence and that the State had failed to prove the crime beyond a reasonable doubt. *Id.* But in the penalty phase, the defense presented evidence that appellant’s chronic methamphetamine abuse caused symptoms functionally identical to paranoid schizophrenia that caused appellant to be psychotic. *Id.* Defense counsel had testified that their client did not want them to present either a diminished capacity or a not-guilty-by-reason-of-insanity defense in the guilt phase and that he was adamant about his innocence. *Id.* Counsel testified that the appellant threatened to act up if they ever attempted to tell the jury he was responsible for the victim’s death during the guilt phase. *Id.* This Court denied the appellant’s claims, finding counsel’s actions reasonable. *Id.*; see also *Middleton v. State*, 80 S.W.3d 799, 806-807 (Mo.banc 2002)(similar facts and analysis).

Just as in *Middleton*, counsel in the case at bar was faced with a client who

demanded that counsel pursue an outright acquittal. Counsel reasonably argued that the State had failed to prove the case beyond a reasonable doubt and that even if the evidence supported a conviction, the evidence only supported a conviction for murder in the second degree. Moreover, once appellant was convicted of murder in the first degree, counsel reasonably decided to pursue several avenues during the penalty phase including arguing that appellant had expressed remorse for the crime of which he had been convicted. This was reasonable.

Appellant claims that the United States Supreme Court's opinion in *Florida v. Nixon*, 125 S.Ct. 551 (2004), precludes counsel from arguing inconsistent theories in guilt phase and penalty phase² (App.Br.65-66). But contrary to appellant's assertion, *Nixon* did not hold that it is ineffective to present a not-guilty defense in guilt phase and argue remorse in penalty phase. In *Nixon*, the Court was faced with the question of whether a defense attorney who admitted his client's guilt during the guilt phase of a death penalty phase would be held ineffective. Recognizing that in capital cases an attorney is often faced with clients who are guilty of murder and the defense focuses on the penalty phase where attorneys can argue for life, after citing to the ABA guidelines, the Court noted

² Appellant also cites to this Court's opinion in *Goodwin v. State*, 191 S.W.3d 20,39 (Mo.banc 2006), where this Court stated in *dicta* that arguing a "he didn't do it" defense and a "he is sorry he did it" mitigation was "impermissible" citing to *Nixon, supra*. But, as noted, this statement was *dicta*, was not central to the holding of the case, and as explained in this point, this was not the holding in *Nixon*.

that a law review article had commented that putting on a “he didn’t do it” defense and a “he is sorry he did it” mitigation “does not work.” *Id.* at 563. But the Court was merely demonstrating that the defense attorney in that case felt his best strategy was to admit guilt but focus on presenting a strong mitigation case. The Court did not hold that an attorney is ineffective for pursuing different strategies in guilt phase and penalty phase.

Here, as in *Middleton*, as stated above, defense counsel was faced with a client who demanded that counsel attempt to convince the jury that the State had not established his guilt. After a finding of guilt, defense counsel was faced with putting on the strongest mitigation possible, which reasonably included arguing that appellant had shown remorse. As the Court noted in *Strickland*:

Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4- 1.1. to 4-8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-689. In short, each capital case is different and no particular

set of detailed rules can govern counsel's conduct. Here, counsel simply pursued the defenses that were the strongest for appellant in each phase of the trial.

Moreover, appellant has failed to demonstrate or even plead how he was prejudiced by his counsel's actions. Appellant fails to indicate how the trial would have been different. Appellant does not identify what different actions counsel should have taken or if counsel should have pursued a different line of defense. It is disingenuous for appellant to assert now, after demanding his defense counsel pursue an outright acquittal or he would disrupt court proceedings, that his counsel was ineffective for following his request. Appellant has failed to demonstrate that counsel's actions were ineffective or that he was prejudiced. The motion court did not clearly err in denying this claim.

III. State's Closing Argument

In his third point, appellant raises multiple claims of ineffective assistance of counsel for failing to object to various statements made by the prosecutor during closing argument (App.Br.68-69).

Credibility of Officer's Testimony

During appellant's guilt phase closing argument, counsel discussed the jury's responsibility in determining whether appellant's statement was voluntarily given and whether to believe the officer's testimony that appellant had confessed to murdering the victim (Tr.1116-1117). Counsel argued:

Because look at this interview. They know, they're talking to someone who is suspected of killing a 13-year-old. And they take him into an interview one by one, and there's no one else with the interviewer. It was just him. Platte, Sergeant Platte, Sergeant Lawzano and Travis. No one else. We know there's Highway Patrol officers all over the place. But there's only one at a time in the interview room with Mr. Glass. This starts at about noon and doesn't end until eight that night if you look at the times in the statement that he's in this room. What do we know? We know they didn't audiotape this interview. They didn't videotape this interview. And their notes were destroyed. That's what we know. We know they didn't have anyone standing on the other side of the one-way mirror that was available for them to use to see what was going on, to hear what was going

on. We know that didn't happen. No one else audiotaped, videotaped, did anything like that for these statements. And there was the one-way mirror. Anyone could have been standing on that other side, it wouldn't have interfered with the investigation or the interview or anything. But they didn't do that.

They destroyed the notes.

Who you believe, what you believe and how much to believe.

Travis told Sergeant Platte over and over and over again he didn't remember. I don't remember going there. He told him that. Until Sergeant Platte told him exactly what to say. Do you remember me sitting here for a little while yesterday with Sergeant Platte going through what Sergeant Platte told him in this little play, this little scenario, this little lie, what Sergeant Platte said, what Travis's written statement says. They're identical. Absolutely 100 percent identical. Word-for word. How much do you believe of that? And if we know that, what about the rest of the statement? In your judgment under the law, how much weight can you give that? That's your decision.

Platte, Officer Platte says that Travis told him, yeah, it's just like you say, that's exactly what happened. Really? Sergeant Platte you know should go to Broadway and write plays because apparently he's psychic or something because he could write exactly what happened and he guessed it.

(Tr.1116-1118). During the State's rebuttal argument, the prosecutor made the following comments in response:

It always amazes me how when I have proof of a statement they say why didn't you write it out for them, even if they couldn't write or even if they asked you to or if you wrote it out they will say well, that can't be right because you didn't let them write it. If they did write it out themselves, you didn't audiotape. And if you do audiotape they say why in the world why didn't you videotape. Can't believe unless you see a videotape. Well, I've given up trying to satisfy them. I don't have to. I've proved the defendant's guilt beyond a reasonable doubt.

(Tr.1127-1128).

Appellant claims that trial counsel should have objected to this argument because it was an improper attack on the defense attorneys (App.Br.72-73). Trial counsel testified at the evidentiary hearing that she failed to make an appropriate objection to the statement (PCR.Tr.457-458). The motion court denied this claim finding that this was a proper argument in retaliation to defense counsel's comments during closing argument, and that appellant was not prejudiced (PCR.L.F.775).

The motion court did not clearly err. This was not an improper attack on defense counsel, this was a comment on defense tactics, and it was a proper response to the defense's argument that the jury should not believe Officer Platte's testimony about appellant's confession. *See State v. Collins*, 150 S.W.3d 349,350 (Mo.App.S.D.2004).

Statements directed at tactics or techniques of counsel rather than counsel's integrity or character are proper. Accordingly, counsel was not ineffective for not objecting.

Response to Defense Counsel's Argument that the State's Witnesses Were Lying

Appellant claims that counsel was ineffective for failing to object to the State's guilt-phase rebuttal closing argument that:

I'm going to talk about a few of these things very briefly.

Believability. Let me emphasize for you what the defense would have you do in order to find this defendant not guilty, you must disbelieve, you must believe that everyone who came in here and testified lied to you. And the simple fact of the matter is there's no evidence to suggest any one of them did.

* * * * *

But these suggestions that all of these men and women would come in here and lie to you frankly is insulting to them. They are professionals and they presented themselves to you as such.

(Tr.1128-1129). Appellant claims that this argument was improper because it distorted the State's burden of proof (App.Br.74).

Counsel testified at the evidentiary hearing that she did not know why she did not object to the statements by the prosecutor (PCR.Tr.459). The motion court denied the claim, finding:

Movant alleges that the prosecutor was improperly arguing that in

order to acquit, the jury had to find that the witnesses were lying. However, upon reading the statement, it is evident that the prosecutor was arguing that this is what the defense was arguing—this was a comment on the defense. This was a proper argument as an attempt to characterize the defense. Counsel was not ineffective for not objecting.

(PCR.L.F.775).

The motion court did not clearly err. This was not an improper attempt to shift the burden of proof as appellant characterizes the argument. Rather, this was a proper comment on defense counsel's attempt to discredit the witnesses and the State's argument as to the credibility of the witnesses. *State v. Kreutzer*, 928 S.W.2d 854,872 (Mo.banc 1996). Accordingly, counsel was not ineffective for not objecting.

Moreover, appellant fails to offer any argument that this alleged improper statement prejudiced him in any way. And there is no reasonable probability that this comment had any effect on the jury's determination of guilt. The motion court did not clearly err.

Appellant Lied to Police

During the State's rebuttal closing argument, the State commented that:

Now, let's talk about this idea that Sergeant Platte lied to this man. Why not? He was lying to Sergeant Platte. If he was telling the truth to Sergeant Platte, how did that little girl's blood get on his car? Oh, I forgot, there's something wrong with how Mr. Hoey did that.

(Tr.1129). Appellant claims that this was an improper because the prosecutor was stating his personal opinion (App.Br.74).

Trial counsel testified that she did not have a reason for not objecting (PCR.Tr.460-461). The motion court denied this claim finding that this was not an improper comment by the prosecutor but rather a proper comment on the evidence (PCR.L.F.775-776).

The motion court did not clearly err. Contrary to appellant's argument, this was not an improper comment by the prosecutor indicating some special knowledge of appellant's guilt. Rather, the prosecutor was commenting on the evidence which showed that appellant lied to the police when he first told them that he did not kill the victim. It is proper for the prosecutor to argue the evidence, the reasonable inferences therefrom, and the credibility of the witnesses. *Kreutzer, supra; State v. Futo*, 990 S.W.2d 7,15 (Mo.App.E.D.1999). It was proper for the State to argue that appellant was lying based on the evidence. *See State v. Ringo*, 30 S.W.3d 811,821-822 (Mo.banc 2000)(no plain error from argument that defendant was "devious, cool, liar" where argument was inferable from the evidence).

Additionally, appellant makes no argument as to how he was prejudiced by this one statement during argument, and there is no reasonable probability that a different result would have occurred had counsel objected.

Asking the Jurors to Watch the Clock

Appellant claims that the following argument by the prosecutor improperly asked

the jurors to place themselves in the victim's position:

In this case, by that man right there. And even if you believe all this, they say well he didn't deliberate, there's a clock right behind you. I want you to turn around and look at it for me. I'm going to start right now. Watch that clock.

(Pause)

Do you remember Dr. Adelstein said 30 seconds that's the earliest time she would have been rendered unconscious? Talk about whether she was in a minute. That's one minute. That's a long time, isn't it? A long time to be applying pressure. Cool reflection upon the matter for any length of time no matter how brief? You bet.

(Tr.1132).

Counsel testified at the evidentiary hearing that she did not object because she did not believe that the prosecutor was placing the jurors in the victim's position but was illustrating appellant's deliberation (PCR.Tr.462). The motion court denied the claim finding that the prosecutor was not putting the jurors in the place of the victim but was showing them how long appellant applied pressure and that 30 seconds was a long amount of time (PCR.L.F.776).

The motion court did not clearly err. The prosecutor was not putting the jurors in the place of the victim as in *State v. Storey*, 901 S.W.2d 886 (Mo.banc 1995), as appellant claims; rather, the prosecutor was demonstrating to the jury that 30 seconds was a long

amount of time to be putting pressure on the victim's neck and that appellant was deliberating during that time. This was proper argument and counsel was not ineffective.

Also, appellant again fails to offer any argument on how this statement prejudiced him, and there is no reasonable probability that an objection to this comment would have altered the result of trial.

Penalty Phase Argument that Death Appropriate for Death of Young Child

During the State's penalty phase closing argument, the prosecutor argued:

So I suggest to you that when you examine all the evidence carefully you will find that you are going to get to that final point of decision. And that you must then, you're going to have to then decide what to do. I'm going to suggest to you in the strongest possible terms that the right thing to do is the penalty of death. Why? Well, there are people, much of what we do in our law and in our culture is designed to protect those among us who cannot protect themselves. Children, those who have infirmities, who for one reason or another cannot care for themselves, they get extra attention in the law. It's called something as simple as a handicapped tag for parking a vehicle. One of the things we as a society do, try to care for those people who are unable to protect themselves. And the first and foremost in that group are mothers and young children.

And while I'm sure she wouldn't have liked being characterized this way, I've never met a 13-year-old girl who did, she was still a child. We all

know that. Because she certainly couldn't take care of herself. And unfortunately that was proven to her by that man there in glaring terms. And I think, therefore, that to ensure as a society that we do what is necessary as much as we are humanly capable of doing so protecting those among us who cannot care for themselves, protect themselves is that we mete out upon those who would abuse those people, who would sexually assault those people, who would beat and murder those people, the ultimate punishment. I know no other way for us to say in no uncertain terms that we will not tolerate that kind of abuse of those people which we as a society wish most to protect.

That's why I ask you for that punishment. Thank you for your attention.

(PCR.Tr.1368-1370). Appellant claims that counsel should have objected to this argument because it was an improper request to sentence appellant to protect society (App.Br.78).

Counsel testified during the evidentiary hearing that he did not object because he did not believe the argument was legally objectionable (Ex 22 at 205). He believed that the prosecutor's argument was a "legitimate attempt to argue to the jury non-statutory aggravating circumstances of the victim's age" (Ex22 at 207).

The motion court denied this claim, finding:

Contrary to Movant's argument, the prosecutor's statements were

not improper personal opinion, did not argue that the sentence of death was part of self-defense, did not argue that murder of a child was a statutory aggravator, and did not tell the jury to “send a message” to others. These statements were proper arguments regarding the aggravating factor (although non-statutory) of the murder of a child, were reasonable inferences based on the evidence, and the State’s position that death was the appropriate sentence. Any objection would have been meritless.

(PCR.L.F.776).

The motion court did not clearly err. Contrary to appellant’s argument, this was a proper argument regarding the appropriate punishment for appellant because he murdered a small child. The prosecutor was not telling the jury to sentence appellant to death to protect society or to “send a message.” The prosecutor was merely telling the jury that because of the victim’s young age, death was the appropriate punishment. Counsel was not ineffective in failing to object.

The Victim’s Life

During the State’s penalty phase rebuttal closing argument, the State argued:

Now, let’s go back and talk about some of what the defense has mentioned here. You know, this part about the defendant’s life still has some value. Well, I’m not sure we can afford that. And I’ll tell you why. Because Steffini Wilkins’ life had value. You heard something about her, didn’t you? She apparently was a very outgoing, caring girl who was a

cheerleader, apparently, you know, well-loved and liked. Was well on her way to becoming a good and contributing citizen. And that man took her from us and we are all diminished for it. He has done more than simply say well I'm not going to be able to do anything more with my life. He has taken a person of considerable value from us. And for that he should bear the consequences.

(PCR.Tr.1386-1387). Appellant claims that this argument improperly compared the value of appellant's life with the value of the victim's life (App.Br.80).

Counsel testified that he did not object because he did not find the argument to be legally objectionable (Ex 22 at 209). The motion court denied appellant's claim finding that counsel's decision not to object was reasonable because the argument was not objectionable. The motion court found that the prosecutor was not comparing the value of appellant's life with the victim's but was arguing that the victim's life had value and that appellant's actions in killing her warranted the death penalty (PCR.L.F.776-777).

The motion court was not clearly erroneous in denying this claim. This was not like *Storey, supra*, where the prosecutor compared the value of the victim's life with the value of the defendant's life. Rather, the prosecutor was properly arguing that the victim's life had value, that appellant took the life of a person with value, and that his actions warranted the death penalty. Trial counsel was not ineffective for not objecting.

Moreover, appellant fails to offer any argument on how this allegedly improper statement had any effect on the jury's determination of appellant's sentence. Considering

all of the evidence in aggravation, it cannot be said that there is any reasonable probability that this isolated statement during closing argument had any effect on the jury's determination of punishment.

Alcohol Use and Remorse

During penalty phase rebuttal closing argument, the State argued:

We don't know an awful lot about the background or whys or wherefores, why a person grows up to be what they are. I don't know beyond the fact that the defendant was convicted of stealing a couple years before this happened what else there may have been or not been in his life, but I do know this. I don't care how many beers he had that night, I don't care how, whether alcohol was prevalent in his family or not. I cannot imagine what possible excuse there could be for what he has done. There isn't any.

(Tr.1387). The prosecutor also argued that:

Remorse is suggested to you to be important. Well, I suggest to you that remorse means nothing. Steffini Wilins is still dead. And that's the brutal truth.

(Tr.1389).

Appellant claims that his counsel should have objected to these comments because they misled the jury about mitigation; specifically, these comments misled the jury into believing that they could not consider his intoxication and remorse as evidence of

mitigation (App.Br.80).

Appellant's trial counsel testified that he did not find the statements legally objectionable (Ex 22 at 210, 213). Trial counsel explained that the prosecutor was "arguing that the weight of the mitigating evidence that we were putting forth, specifically in this instance in the form of remorse, was under the circumstances entitled to little, if any, weight by the jury." (Ex 22 at 213). During cross-examination, trial counsel admitted that there is a difference between a prosecutor arguing that the mitigation evidence presented was not good enough to overcome the aggravators versus arguing that the jury cannot consider that evidence as mitigation (Ex 22 at 277). Trial counsel also acknowledged that it was proper for a prosecutor to argue that the mitigation evidence presented was not enough to overcome the evidence in aggravation (Ex 22 at 277).

The motion court denied these claims finding that the prosecutor's arguments were proper and that a prosecutor may properly argue "that the evidence is not worthy of belief, that it is not enough to outweigh the aggravating circumstances, or that the jury should not consider it as mitigating." (PCR.L.F.777).

The motion court did not clearly err. Appellant claims that *Lockett v. Ohio*, 438 U.S. 586 (1978), which holds that jurors must be allowed to consider any aspect of a defendant's character proffered as a basis for a sentence other than death as a mitigating factor, prohibited the prosecutor's argument. However, as recognized by both trial counsel and the motion court, the prosecutor was not arguing that the jury could *not*

consider this evidence. Rather, the prosecutor was arguing that this evidence did not outweigh the evidence in aggravation and that the evidence supported a death sentence. The prosecutor's comments were not improper and counsel was not ineffective in not objecting.

Appellant's Entrance to Teenager's Home

Appellant claims that counsel should have objected when the prosecutor argued:

He says oh well she fell off the car multiple times. And that you recall is what the defendant said. After he said he took her to the Indian Camp Access to get her help. I think he may have been looking for some help, but I think he was looking for some help for his own sexual gratification and nothing more. Because the help he was seeking for her was pretty darn obvious from way he left her, isn't it?

We do have a hint, however, of what might have been going on. Because in the month or two prior to this murder we know that he walked uninvited and unannounced into somebody else's home, didn't he? You heard that from Samantha Bramlett and you heard that from Nicole Withrow. Why that didn't turn into something ugly, I can't say. I don't know. But when someone comes up in a sliding glass door in the back of your house and into a bedroom, those are not the actions of a person who has come by just, who has come by with a lawful purpose. What's more, coming there at midnight or after uninvited and unannounced is not the

actions of a lawful person who has lawful conduct on their mind. And he knew—"Is this my house?" Please. It's not even the same county. Not only is it not the same county, it's south of Hannibal, not north of Hannibal. Not only is it not in the same county, it is the home of people he knows. It is the home of a person he knows who has what? Two teenage girls living there.

(Tr.1388-1389). Appellant claims that the prosecutor's argument was improper because it asked the jurors to punish appellant for what he might have done to the other girls (App.Br.82).

Counsel testified that he did not object to these statements because the objection did not occur to him (Ex 22 at 212). The motion court denied this claim finding that evidence regarding the break-ins had been properly admitted and could be argued by the prosecutor (PCR.L.F.777).

The motion court did not clearly err. Contrary to appellant's argument, the prosecutor was not arguing what appellant might or might not do to other teenage victims; rather, when looking at the argument in context, it is apparent that the prosecutor's argument was that appellant's illegal involvement with teenage victims had escalated from the time that he broke into Bramlett and Withrow's homes to when he sexually assaulted and killed the victim. And, even if this was an argument that appellant would be dangerous in the future, this was proper, *State v. Chambers*, 891 S.W.2d 93,107 (Mo.banc 1994); *Simmons v. South Carolina*, 512 U.S. 154 (1994)(arguments on future dangerousness admissible during penalty phase of capital trial). Accordingly, counsel was

not ineffective.

Photographs of the Victim

Appellant claims that counsel was ineffective for failing to object when the prosecutor argued during penalty-phase rebuttal closing argument that:

It has been suggested to you that one of the reasons that you should give life in prison without parole is because the defendant has some musical ability or he writes poetry or he is an artist. Well, I want to show you a couple of things just so you remember. Here is the canvas he worked on that night. And here was his artistry.

(Tr.1390). Appellant claims that his counsel should have objected to this argument and the prosecutor's showing of the pictures of the victim because these gruesome photographs were unduly prejudicial during the penalty phase (App.Br.82).

Counsel testified that he did not object to this because he did not find it to be legally objectionable (Ex 22 at 215). The motion court agreed with trial counsel, and denied this claim finding that pictures of the victim were relevant to the penalty phase to determine the statutory aggravators, and that appellant could not have been prejudiced because the jury was instructed to consider all evidence from the guilt and penalty phases to determine the sentence and the photographs were admitted during the guilt phase (PCR.L.F.777).

The motion court did not clearly err. Crime scene and autopsy photographs are relevant in the penalty phase. Here, the jury was to determine whether the murder

included depravity of mind. The photographs were relevant to that determination. *See State v. Wolfe*, 13 S.W.3d 248,264 (Mo.banc 2000); *State v. Mease*, 842 S.W.2d 98,108-109 (Mo.banc 1992). Any objection would have been meritless.

Do Your Duty

The State, at the end of its rebuttal closing argument, asked jurors to “Do your duty” (Tr.1390). Appellant claims that his counsel should have objected because this statement pressured the jury for a particular verdict (App.Br.83-84).

Trial counsel testified that he did not find it objectionable (Ex 22 at 218-219). The motion court denied appellant’s claim finding the argument proper and that even if improper, appellant suffered no prejudice (PCR.L.F.777-778).

The motion court did not clearly err. A prosecutor may argue the need for strong law enforcement and that conviction of the defendant is part of the jury’s duty to uphold the law and prevent crime. *State v. Roberts*, 948 S.W.2d 577,593 (Mo.banc 1997). As for carrying out its “duty,” the jury was specifically instructed that it was their duty to determine the proper punishment (L.F.413). Accordingly, there is no reason to believe that the prosecutor’s use of the word “duty” created any impermissible pressure to compel a certain sentence.

Based on the foregoing, appellant’s point should be denied.

IV. Admissibility of Medical and School Records

Appellant claims that his appellate counsel was ineffective for failing to raise on appeal that the trial court erred in excluding Exhibits 29-31, appellant's medical and school records (App.Br.85).

During the penalty phase, following the presentation of the defense witnesses, appellant attempted to admit Exhibits 29-31, medical and school records (Tr.1352-1354). The State objected to the admission of the exhibits as irrelevant and immaterial (Tr.1352). The trial court sustained the objection but accepted the records as an offer of proof (Tr.1352-1353). Trial counsel stated on the record that:

Judge, with respect to Defendant's Exhibit 29 which are records of Hannibal Ambulatory Care Center, defense maintains that these records are relevant because they indicate that Travis Glass' weight is 297 pounds back on March the 30th of 1994. It indicates that his weight was 307 pounds back on September the 22nd of 1995. And we believe that those records are relevant because they corroborate what we're trying to establish to this jury was that the defendant was grossly overweight when he was a child and it gives more credence to him being teased as a child. We think that's relevant.

* * * * *

Defendant's Exhibit 30 are the Palmyra High School records. And we believe those records are relevant so that the jury can examine his

grades and helps provide additional information about what kind of a student he is. And we believe this is all relevant as far as penalty phase in terms of giving the jury as much information as we possibly can about the defendant so that they can make an intelligent decision, a well-reasoned and informed decision on punishment. And I believe that we're entitled to provide the jury with as much information as we can on the defendant.

Defendant's Exhibit Number 31 are Blessing Hospital records. And those records corroborate what other witnesses in this case have testified to with respect to Travis being brought to the hospital when he was 23 months old. Lethargic and unresponsive. And it confirms that he was diagnosed with bacterial meningitis and that also supports what witnesses that we have had testify concerning—And like I said, Judge, I believe that when defendant's life is on the line, a jury needs to make a decision about whether or not to sentence this boy to life imprisonment or the death penalty, I think that the jury, and I think there's case law to support the idea that the jury is, that the defendant is entitled to have the jury have as much information as they can about him. And whether or not they want to give this a little tiny weight or a whole lot of weight is up for I believe them to decide. I believe it is relevant and request that the court reconsider its ruling and permit those exhibits to be admitted into evidence for the purposes stated.

The Court: The Court will adhere to its ruling.

(Tr.1353-1354).

Appellate counsel testified at the evidentiary hearing that she did not raise this claim on appeal because she made a judgment call where she felt that trial counsel had not done enough in the record to explain why this evidence was mitigating and admissible (PCR.Tr.529-530). Appellate counsel testified that she felt that to raise this claim on appeal, she needed to be able to point to the appellate court what exactly in the records were going to help appellant and that she was unable to find it (PCR.Tr.529-531). Moreover, appellate counsel felt that because trial counsel had not indicated that they were going to point certain things out to the jury that was beneficial in the records, “it is just like you are throwing the records at the jury” (PCR.Tr.531). Counsel testified that “I guess you could say the raw data was there. It would have been nice to have some explanation as to why this data, these records were—how this was going to be mitigating for the appellate court” (PCR.Tr.531-532). Appellate counsel stated that although she could have sifted through the records and pointed out information to the Missouri Supreme Court, she strategically decided not to raise this issue because she could see “that court coming back with an opinion saying, We don’t have to—you know, this needs to be presented so it’s clear why these are being admitted, that —exactly what it is about these records, not just that they are records that show that he was in school and what he did in school, but what about that is mitigating” (PCR.Tr.532-533).

The motion court denied appellant’s claim, finding that appellate counsel’s

“judgment call” was reasonable and that evidence which appellant claimed would have been presented through the records – i.e., evidence of appellant’s being grossly overweight, evidence of his meningitis which had a risk of brain damage, and evidence of his school performance – was merely cumulative to other evidence (PCR.L.F.773).

To support a claim of ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error that would have required reversal had it been asserted and that was so obvious from the record that a competent and effective appellate lawyer would have recognized it and asserted it. *State v. Moss*, 10 S.W.3d 508,514 (Mo.banc 2000). The right to relief from ineffective assistance of appellate counsel follows the plain error rule in that no relief may be granted unless the error that was not raised on appeal was so substantial as to amount to a manifest injustice. *Id.* at 515.

Here, appellate counsel made a reasonable decision to not raise this point on appeal. She believed that a sufficient offer of proof was not made. An offer of proof must show three things: 1) what the evidence will be; 2) the purpose and object of the evidence; and 3) each fact essential to establishing the admissibility of the evidence. *State v. Tisius*, 92 S.W.3d 751,767-768 (Mo.banc 2002). Where proffered evidence is excluded, relevancy and materiality must be shown by specific facts sufficient to establish admissibility so as to preserve the matter for review. *Id.* The purposes of an offer of proof are: 1) to preserve the evidence so that the appellate court understands the scope and effect of the questions and proposed answers in considering whether the trial

judge's ruling was proper; and 2) to allow the trial judge to further consider the claim of admissibility after having ruled the evidence inadmissible. *Id.*

The offer of proof at appellant's trial only stated three things that the defense believed the records would show: 1) that appellant had been overweight as a child; 2) his school grades – “additional information about what kind of student he is”; and 3) that he had bacterial meningitis when he was 23 months old (Tr.1353-1354). Trial counsel did not offer any other specific facts to demonstrate why each of these exhibits, totaling over 170 pages, were relevant or admissible at trial. Without a sufficient offer of proof, the issue was not preserved and appellate counsel cannot be deemed ineffective for failing to raise an unpreserved claim on appeal. *Blackmon v. State*, 168 S.W.3d 129,134 (Mo.App.W.D.2005).

In this post-conviction case, appellant now claims that appellate counsel should have claimed that the records were relevant to show that appellant had been “semi-comatose” and had a prognosis of “permanent brain damage” when he had meningitis; that appellant had struggled in school, especially in math; that in ninth grade, standardized testing showed appellant had low abilities in various subjects; that he almost did not pass fourth grade; and that he had no disciplinary problems (App.Br.86-87). But none of these specific arguments were presented to the trial court as to why these voluminous records were relevant or admissible. In *Tisius, supra*, this Court found that the defendant had failed to properly preserve for appeal his claim that the trial court erred in not admitting a letter during trial. This Court found that the defendant had not made a

proper offer of proof demonstrating why the letter was relevant and that the defendant's new reasons offered on appeal would not be considered because they were not presented to the trial court. This Court denied the defendant's claim. Here, too, appellant failed to make a sufficient offer of proof demonstrating the relevancy of these records. Thus, appellate counsel reasonably decided not to raise this claim on appeal.

Moreover, appellant has not demonstrated any prejudice. Appellant's trial counsel, as discussed above, indicated that the records would have show his history of bacterial meningitis, his school grades, and his weight problems. But each of these topics were discussed at trial through other evidence. Appellant's aunt discussed his bacterial meningitis, his weight and his grades; appellant's sisters testified as well (Tr.1225-1239, 1255-1269, 1298-1313). Thus, the school records would have been merely cumulative, and appellant cannot show prejudice. *Skillicorn v. State*, 22 S.W.3d 678,683 (Mo.banc 2000). Furthermore, appellant's expectation that the jury would sift through nearly two hundred pages of documents to find information that may or may not have been mitigating is untenable. In *State v. Roberts*, 948 S.W.2d 577,596-597 (Mo.banc 1997), this Court found that the trial court did not abuse its discretion in failing to send back to the jury, over 1000 pages of medical, school, and jail records to the jury. Although the records had been admitted in evidence, the trial court had refused to send the exhibits to the jury because of their considerable volume and the fact that they contained matters that may not have been admissible. *Id.* This Court, in holding that the trial court did not abuse its discretion in refusing to send the records back to the jury, noted that "the records were

over 1000 pages in length and contained many matters not discussed at trial, as well as hearsay, irrelevant information, and information that could easily be misconstrued.” *Id.* This Court also held that “to the extent that the records evidenced relevant matters, such issues were also testified to by [defendant’s] experts. Under these circumstances, we do not find the trial court’s decision on this matter was clearly against reason.” *Id.* In the case at bar, similarly, these voluminous records contained information that was not discussed at trial, irrelevant information, and the information that trial counsel wanted the jury to hear was already presented through appellant’s witnesses. This claim would not have been successful on appeal and, accordingly, appellate counsel was not ineffective for not raising this claim on appeal.

V. Good Conduct in Jail

Appellant claims that trial counsel was ineffective for failing to call two officers at the Callaway County Jail to testify about appellant's good conduct in jail while awaiting trial (App.Br.95).

During the evidentiary hearing, appellant called two officers from the Callaway County Jail, Sergeant Robert Harrison and Deputy Fred Cave to testify about appellant's behavior (PCR.Tr.113-127). Deputy Cave, the transportation officer, testified that he transported appellant during the trial between the jail and the courthouse, and that he transported appellant to the hospital to visit his ailing grandfather on one occasion (PCR.Tr.113-119). Deputy Cave testified that appellant was shackled while he was transported and that he did not have any problems with appellant when he was transported back and forth (PCR.Tr.113-119). Deputy Cave testified that his only contact with appellant was the few times that he transported him (PCR.Tr.118).

Sergeant Harrison testified that part of his duties were to take care of the inmates during his evening shift and that appellant, during his shifts, was very cooperative and one of the best inmates he had (Tr.120-126).

Appellant's trial counsel testified that he was aware of Fred Cave, that he had endorsed him prior to trial, but that during trial, they decided not to call him (Exhibit 22 at 83-85). Counsel had considered calling him to testify because counsel believed that he would testify that he did not believe appellant was a flight risk (Exhibit 22 at 87-88). Counsel testified that he could not recall why they ultimately decided not to call him as a

witness (Exhibit 22 at 85-87). Counsel did recall that they had been interviewing other people at the jail and that one of the “higher-ups” had indicated that appellant was “kind of a pain or kind of a whiner” with respect to certain things that happened in the jail (Exhibit 22 at 88). Counsel testified that appellant had gotten irate over not being able to order pizza on one occasion at the jail, that he had written some type of grievance because he could not have pizza, and that counsel felt that type of evidence would have “displayed of [appellant] is that he was like–like entitled to have this special order-out pizza didn’t reflect well on his character” (Exhibit 22 at 88-89). Counsel also testified that Deputy Cave may have been aware of this information and that he did not want that information to come out during trial.

Counsel testified that his investigator had talked to various guards at the jail but did not believe that she had talked with Sergeant Harrison (Exhibit 22 at 88-90). Counsel believed that Sergeant Harrison had good information for the penalty phase (Exhibit 22 at 89-90). Counsel also acknowledged that different officers at the jail had differing opinions about appellant and that he did not want evidence to be presented to the jury that appellant could order pizza in jail and that when he could not get that privilege on one occasion, he complained about it (Exhibit 22 at 89-93).

During cross-examination, counsel acknowledged that if he called a jail guard to testify about appellant’s good behavior, the State could have elicited evidence that appellant had not been a model inmate and that could have diminished the usefulness of the defense witnesses (Exhibit 22 at 265-266).

The motion court denied this claim, finding that appellant had failed to present evidence from some of the jail guards that appellant pled in his motion, that Deputy Cave and Sergeant Harrison's testimony was relatively minor, and that counsel's decision not to present evidence of appellant's good conduct because of the risk of the State introducing evidence of appellant's bad conduct was reasonable (PCR.L.F.804).

The motion court did not clearly err. First, appellant has failed to demonstrate that counsel's decision not to call Deputy Cave was anything but reasonable trial strategy. Counsel had investigated Deputy Cave as well as other law enforcement officials at the jail, had endorsed Deputy Cave to testify, but could not recall the specific reason that they chose not to call him at trial. *Kreutzer, supra*. (appellant has burden of establishing that counsel's actions were not reasonable). Moreover, counsel did not want to risk that any negative evidence about appellant's conduct in jail be presented to diminish the positive evidence. *See Taylor v. State*, 126 S.W.3d 755 (Mo.banc 2004)(counsel's decision not to call expert witness because harmful evidence would be elicited during cross-examination by State was reasonable). Counsel knew that there was evidence that not only was appellant given privileges at the jail, as were other inmates, such as ordering pizza, but that when he was unable to order pizza one night, he became irate, acting as if he was entitled. This was extremely damaging evidence that would not have been looked favorably upon by the jury, and that would have diminished the value of relatively minor testimony of Cave and Harrison that appellant had behaved well. *See Bucklew v. State*, 38 S.W.3d 395 (Mo.banc 2001)(Trial counsel not ineffective for failing to call prison

adjustment expert where testimony would have had “mixed impact” due to evidence of good conduct, low escape risk compared with numerous disciplinary infractions, negative comments about defendant, and evidence of violence in prison). Counsel’s actions in not presenting this evidence was reasonable, considering the potentially damaging testimony that could have been presented and the minimal value of the testimony, and appellant was not prejudiced.

VI. Voir Dire

Appellant claims trial counsel was ineffective during voir dire for 1) failing to ask whether they could consider specific mitigating circumstances; 2) failing to object when the prosecutor discussed appellant's age; and 3) failing to object when the prosecutor allegedly told jurors they had to be unanimous to consider mitigation (App.Br.101).

Counsel's Decision Not to Discuss Specific Mitigators During Voir Dire

Appellant claims that his counsel was ineffective for failing to discuss the specific kinds of mitigating evidence that the defense intended to present (App.Br.102). Specifically, appellant claims that counsel failed to ask the venirepersons whether they would consider age, family background, alcohol addiction, drinking on the night of the offense, lack of a significant criminal history, and good character as mitigating circumstances (App.Br.102).

Counsel testified that it was a mistake not to question on those issues (Exhibit 22 at 196-197). Co-counsel testified that "the only thing I can think of is that we were unsure of what the evidence was going to be in penalty phase at that time still, or some of the – which of the experts we were going to call as to that's why we wouldn't talk about the experts. Why we didn't talk about the other mitigation, I don't have a reason" (PCR.Tr.419-420).

The motion court denied this claim finding that counsel's decision not to inquire about some of the mitigation evidence was reasonable since they were unsure what mitigation evidence they were going to include. The court also found that appellant made

no showing that the jurors were unable or unwilling to consider the evidence presented, that all of the jurors stated that they were willing to follow the court's instructions, and that appellant failed to show that the jurors did not follow the instructions (PCR.L.F.763).

The motion court did not clearly err. First, asking the jurors whether they would consider particular types of evidence as mitigating would have been improper. Questions which: 1) present specific fact scenarios the answers to which arguably constituted obtaining a commitment from the venirepersons, 2) are open-ended regarding how prospective jurors "feel" or "think" about certain issues, or to compare one venireperson's beliefs to another's, 3) misstate the law or the jury's obligation under the law; or 4) are confusing, irrelevant, or argumentative are improper. *State v. Thompson*, 985 S.W.2d 779,790 (Mo.banc 1999). Questions to prospective jurors which ask them to speculate and commit themselves to a course of action depending upon certain contingencies which may subsequently occur or arise during trial are impermissible as they denigrate the solemn duty of jurors to follow the law as laid down in the instructions, and to evaluate the evidence in the light of the instructions, the arguments of counsel and the reasoning of fellow jurors. *State v. Reed*, 629 S.W.2d 424,426-427 (Mo.App.W.D.1981). Moreover, as observed in *State v. Garrett*, 627 S.W.2d 635,642 (Mo.banc 1982), when the inquiry includes questions phrased or framed in a manner to require the one answering to speculate on his own reaction to such an extent that he tends to feel obligated to react in that manner, prejudice can result. The relevant inquiry is whether a juror can follow the law. *State v. Chaney*, 967 S.W.2d 47,57 (Mo.banc 1998).

In *Middleton v. State*, 103 S.W.3d 726,734-736 (Mo.banc 2003), the appellant claimed that his counsel was ineffective for failing to strike a juror for cause who had not committed during voir dire whether she would consider evidence of alcohol and drug use as mitigating evidence. In finding that counsel was not ineffective, this Court held:

In effect, defense counsel suggests that, because defendant planned to argue that his use of alcohol and drugs should be considered as mitigating, therefore he had a right to ask each juror to commit that they would in fact consider such drug or alcohol use to be mitigating. But, the relevant law and penalty phase jury instructions only require that a juror shall consider any evidence which he considers to be aggravating or mitigating. They do not require the juror to specify, in advance of the evidence, which evidence he thinks he will consider to be aggravating or mitigating.

* * * * *

Because Juror Holt was qualified, Mr. Middleton cannot show that he was prejudiced by counsel's decision not to peremptorily remove her from the jury. Mr. Middleton was only entitled to a panel of jurors who were qualified, not to his favorite jurors among those who were qualified. He has not shown that it is reasonably probable that the result of the trial would have been different had another venire member sat on the jury in the place of Juror Holt.

(citations omitted).

Here, appellant claims that his counsel was ineffective for failing to voir dire the venire panel about whether they would consider various types of evidence as mitigating. This would have been improper as this would have been asking the individual jurors to commit to a certain course of action prior to hearing any evidence. Moreover, jurors are not required to consider any type of evidence as mitigating and may afford whatever weight to proffered evidence as they choose. The relevant inquiry is whether the jurors will follow the instructions and the law. These questions were asked of the panel by counsel. Counsel's actions were proper and the motion court did not clearly err in denying this claim.

Second, appellant has failed to demonstrate that he was prejudiced. All of the jurors stated that they could follow the instructions on deciding punishment and would consider all of the evidence prior to making a decision (Tr.328-691). Appellant has failed to make any showing that any jurors were unable or unwilling to follow the court's instructions. Accordingly, appellant was not prejudiced by counsel's alleged error.

Age as a Mitigating Circumstance

Appellant claims that his counsel should have objected to the following:

[by the prosecutor] The defendant in this case as I understand it, correct me if I'm wrong, was 21 years old at the time this crime occurred. That's a relatively young man. Are there any of you who feel that the laws of the State of Missouri should apply with any greater or lesser weight

because the defendant was a relatively young man at the time of the offense?

(Tr.426-427). Appellant alleges that this question “suggest[ed] that jurors should not consider Glass’ age in deciding his punishment” (App.Br.103).

Trial counsel testified that he did not believe that this question, asked during general voir dire, while they were discussing guilt or innocence, was objectionable (Exhibit 22 at 174). Counsel stated, “I still have some problems seeing that as being clearly objectionable, because the laws of the State of Missouri apply the same, whether he’s young or he’s old or whether he’s middle-aged” (Exhibit 22 at 175). Counsel stated that “the laws permit the jury to take into consideration his age in determining punishment. But his age doesn’t—doesn’t, strictly speaking, make the laws of Missouri have lesser or greater weight” (Exhibit 22 at 175). Counsel did state that he could have made a speaking objection to make it clear that age was an appropriate consideration for punishment purposes (Exhibit 22 at 175).

The motion court denied the claim, finding that counsel’s actions were reasonable as the prosecutor’s statement was not incorrect or misleading (PCR.L.F.761). The motion court held that “the prosecutor was not asking for jurors not to consider the Movant’s age as potentially mitigating evidence, but was merely asking the jury whether they would ignore the law and the instructions merely because Movant was young” (PCR.L.F.761). The motion court also found that appellant was not prejudiced (PCR.L.F.761).

Counsel’s actions were reasonable. It is plain the prosecutor merely wanted to

make sure that the jury would apply the law equally to appellant as they would to any other person and not hold the State or the defense to a different burden merely because appellant was young. The prosecutor did not reference punishment or indicate in any way that the jury could not consider age as a mitigating factor.

Moreover, appellant was not prejudiced. As the motion court noted, the jury was properly instructed and appellant made no showing that the jury did not follow the trial court's instructions. There is no indication that the jury believed that they could not consider appellant's age in mitigation.

Discussion on Jury Unanimity

Appellant claims that his trial counsel was ineffective for failing to object to the following statements made by the prosecutor because these statements misled the jury into believing that they had to find the evidence in mitigation unanimously (App.Br.104).

During general voir dire, the prosecutor stated:

Do you all understand the decisions on various matters is the jury must be unanimous one way or the other, for guilty or not guilty or for any other proposition that may be put to you? Do all of you understand that?

(Tr.422). Later, during *Witherspoon* voir dire, the prosecutor stated:

Remember, I told you aggravating circumstances must be proven beyond a reasonable doubt by the State, and you must unanimously find one or more exists. That's not so with mitigating circumstances. You as jurors either believe them or you do not. And if you believe them, you may

assign whatever weight to them that you see fit. You may decide that something does not exist and therefore it, you know, doesn't deserve any consideration. You may decide that it exists but it's worthy of very little consideration or weight. Or you may decide that it exists and it deserves a good bit of consideration or weight in your evaluation of what the penalty should be.

But if you find in the third step the aggravating circumstances outweigh those mitigating circumstances, you then reach phase four or step four. In step four the question is what should the penalty be? Because if you've gotten through all three of the first three steps, then you still have both choices on the table. And you may go either way. That's up to you. But whichever way you go, assuming you get there, you must be unanimous. Clear so far?

(Tr.620-621).

Counsel testified that, in regards to the question during general voir dire, he believed, due to the context of the question, the prosecutor was referring to the prosecutor's burden of proving guilt and the existence of aggravating circumstances (Exhibit 22 at 170). Counsel testified that, at the time, he did not believe that the statement could have been as interpreted as the jury needed to find the mitigating circumstances unanimously (Exhibit 22 at 170-171). Counsel stated he should have objected (Exhibit 22 at 170). Co-counsel testified, in regards to the question during

Witherspoon voir dire, that she did not consider that the prosecutor's statement "failed to tell jurors that regarding penalty, they do not have to be unanimous in mitigating circumstances which they may find" (PCR.Tr.410).

The motion court denied appellant's claim finding that counsel's actions were reasonable because the prosecutor's statements were proper and even if they were an incomplete discussion of the law, appellant failed to show that the jury was misled or that the jury misunderstood their role in determining the guilt of appellant or in determining the appropriate punishment (PCR.L.F.761). The motion court also found that appellant was not prejudiced because these statements were made during voir dire, early on in the trial process, and the jury was properly instructed (PCR.L.F.761).

The motion court did not clearly err. Counsel's actions were reasonable. The prosecutor's comments were correct. As counsel testified, the prosecutor's initial comment was during general voir dire while the prosecutor was discussing guilt or innocence. The prosecutor did not refer to punishment and the statement was not misleading. Any objection would have been meritless. *State v. Clay*, 975 S.W.2d 121 (Mo.banc 1998). As for the second comment, reading the statement in context, it is plain the prosecutor was not referring to the finding of mitigating circumstances. In fact, the prosecutor in the same paragraph states that the jury does not have to find mitigating circumstances unanimously. And, although the discussion may have been incomplete, it was not misleading. The jury was repeatedly told that they did not have to find mitigating circumstances unanimously (Tr.498, 499, 528, 553, 587-88, 620-21) and the jury was

properly instructed as such (L.F.418-421).

Moreover, because this was during voir dire and the jury was properly instructed, and appellant has failed to show that the jury did not follow the instructions, appellant has failed to demonstrate that he was prejudiced. *Boone v. State*, 147 S.W.3d 801 (Mo.App.E.D.2004).

VII. Statutory Mitigator Instruction

Appellant claims counsel was ineffective for failing to request a mitigation instruction to list the statutory mitigator of age (App.Br.112). Appellant claims counsel's decision not to request the instruction was unreasonable because "the jury did not have a long list of statutory aggravators to compare to the statutory and nonstatutory mitigators" and that the jury "was unable to consider his youth as mitigation" without proper instruction (App.Br.112).

Counsel testified at the evidentiary hearing that he did not request the court submit the statutory mitigator of age in the instruction because:

I believe that—and specifying statutory mitigating circumstances in MAI-CR3-313.44A invites the jury to com—compare or juxtapose that instruction with 313.40, which is the list of aggravating circumstances that the State wants the jury to consider.

And I think that when you look at a list of aggravating circumstances that has outrageously wantonly vile, horrible and inhuman sexually assaulted her, inserted his fingers into her vagina, kidnapped her—when you look at those statutory aggravating circumstances and you compare it to a list of statutory mitigating circumstances that includes the defendant's age, I think that that invites the jury to—to compare and decide—when weighing aggravating circumstances against mitigating circumstances, I think it causes the jury to just pay attention to the statutory aggravating and

mitigating circumstances.

And I don't think the statutory mitigating circumstances of age compares to the statutory aggravating circumstances that the State submitted in Instruction No. 17.

And I think that it would cause the jury to be more apt to—to—to balance that third step of the penalty phase process in favor of the State; whereas, if they just have a list of statutory aggravating circumstances from the State in one hand, and in the mitigating circumstances instruction they have language that says you can consider anything to be mitigating circumstances, I think there's less of an inclination for the jury to juxtapose those two and think that they need to compare the list in one other list of the other.

(Exhibit 22 at 159-160). Counsel further explained that before he decides whether to request a statutory mitigator instruction, he always compares what the State is going to include in their statutory aggravators and what statutory mitigators the defense has (Exhibit 22 at 160). Counsel looks at both the number of aggravators and mitigators and the different types of aggravators and mitigators when making his decision (Exhibit 22 at 160-161).

The motion court denied appellant's claim finding that counsel's decision was reasonable, that counsel presented ample mitigating evidence and argued not only appellant's age but other mitigators as well (PCR.L.F.773). The motion court also found

that appellant was not prejudiced, holding that “there is no reasonable probability that had ‘age’ been written on a piece of paper in front of the jury, that the jury’s decision would have been any different” (PCR.L.F.773).

The motion court did not clearly err. Counsel’s actions were reasonable. Counsel explained that it was a strategic decision not to request a statutory mitigating instruction that only listed age because he did not want the jury to compare this short list to the list of statutory aggravators that included that the crime was heinous, that it involved sexual assault, and that it involved a kidnapping. Counsel believed that the instruction that stated that the jury could consider *all* evidence in mitigation was more beneficial to their defense. It was reasonable for counsel to decide not to list the one statutory mitigator, to avoid giving the jury lists that, by comparison, might suggest to some jurors that the evidence in mitigation was not very weighty.

And, contrary to appellant’s claim that without the instruction the jury was unable to consider appellant’s age in mitigation, the jury was specifically instructed that they could consider any and all evidence in mitigation (L.F.418), and counsel argued to the jury that appellant’s age was a mitigating factor (Tr.1384). Thus, the jury was well aware that appellant’s age could be considered, even in the absence of an instruction expressly listing it as a mitigator. And, consequently, there is no reasonable probability that inclusion of the instruction would have altered the outcome of trial.

VIII. Failure to Object

Appellant raises several claims in his eighth point. Appellant raises various claims regarding his counsel's failure to object properly, failure to make a proper offer of proof, and failure to include issues in his motion for new trial (App.Br.116-117).

To the extent that appellant claims that counsel's omissions were prejudicial because they rendered issues unpreserved for appeal, appellant's claims must fail as they are not cognizable. *State v. Beckerman*, 914 S.W.2d 861 (Mo.App.E.D.1996). Post-conviction relief for ineffective assistance of counsel is limited to errors which prejudiced the defendant by denying him a fair trial. *Williams v. State*, No. WD65494, slip op. (Mo.App.W.D.2006).

Appellant claims that this Court's holdings in *State v. Wheat*, 775 S.W.2d 155 (Mo.banc 1989); *State v. Storey*, 901 S.W.2d 886,901 (Mo.banc 1995); and *Deck v. State*, 68 S.W.3d 418 (Mo.banc 2002), support his position that counsel's failure to preserve issues for appeal is cognizable (App.Br.119). But a reading of each of these cases demonstrates that this issue was not raised or addressed in any of these cases. These cases do not support appellant's position. Trial counsel's performance must be judged by whether it affected the fairness of the defendant's trial; whether counsel adequately preserved issues for appeal does not affect the fairness of the trial. To the extent appellant claims that each of these inactions prejudiced his trial, Respondent will address each claim below.

Counsel's failure to cite to *Green v. Georgia*

Appellant claims counsel was ineffective for failing to argue (after the prosecutor had objected to certain lines of questioning) that under the United States Supreme Court case of *Green v. Georgia*, 442 U.S. 95 (1979), hearsay testimony is admissible during the penalty phase (App.Br.117).

During appellant's sister's penalty phase direct examination, defense counsel asked:

Q. Were you aware of whether or not Travis ever had any kind of problems drinking?

A. I'd hear him talk about it from time to time but you know.

Mr. Ahsens [the prosecutor]: Object, then, Your Honor, this is obviously from hearsay. Has no personal knowledge.

The Court: The objection will be sustained. Proceed. (Tr.1265).

Later, during appellant's aunt's testimony, the prosecutor again objected on hearsay grounds when appellant's counsel questioned her as follows:

Q. You don't know that that incident didn't have [any impact on his behavior as an adult], doesn't have?

A. I don't know if it does or it doesn't. I don't know. I'm not a doctor. I don't know.

Q. You were told by the doctors—

Mr. Ahsens: Objection to what she may have been told by others.

Mr. Kenyon: This, he opened—

The Court: The objection will be sustained. Let's proceed. (Tr.1309).

Finally, when trial counsel attempted to admit a memory book or "biography of his life" which appellant had compiled in high school, the prosecutor again objected on hearsay grounds, which the trial court sustained (Tr.1310).

Trial counsel testified that he did not consider arguing to the trial court that under *Green v. Georgia*, the trial court should admit the hearsay testimony (Exhibit 22 at 137, 146, 148). The motion court denied these claims finding³ that the evidence was hearsay and not admissible, that the evidence was cumulative to other evidence, and that there was no reasonable probability that had this evidence been admitted that the verdict would have been any different (PCR.L.F.771).

The motion court did not clearly err. Contrary to appellant's assertion (App.Br.120), the U.S. Supreme Court in *Green v. Georgia* did not make a blanket holding that all hearsay evidence was admissible in a penalty phase trial. Rather, the United States Supreme Court held that a state's rules of evidence may *sometimes* be required to give way in the punishment phase of a capital trial, but only when there are "substantial reasons . . . to assume its reliability." *Green v. Georgia*, 442 U.S. at 97; *see also State v. Phillips*, 940 S.W.2d 512,517 (Mo.banc 1997). In *Green*, the Court ruled that the statement of a witness against his penal interest should have been admitted in the

³ The motion court also rejected these claims for failure to preserve issues for appeal as non-cognizable (PCR.L.F.771).

punishment phase, even though the State of Georgia did not recognize statements against penal interest as admissible, because there was ample corroboration of the reliability of the statement and the issue was critical in the trial. *Green*, 442 U.S. at 97; see *Chambers v. Mississippi*, 410 U.S. 284 (1973); *State v. Wise*, 879 S.W.2d 494,521-522 (Mo.banc 1994)(cumulative evidence of appellant’s talents in music and poetry was not admissible under *Green* because no evidence of reliability and was not a critical issue in case).⁴ In no way did the United States Supreme Court abrogate hearsay rules of evidence for criminal defendants. Evidence is not simply admissible during the penalty phase just because a defendant wants to admit it.

Here, appellant has made no showing that these hearsay statements were reliable and in fact, has made no attempt to argue their reliability. These hearsay statements, offered for the truth of the matter asserted, were not admissible simply because they were offered by the criminal defendant in the penalty phase of his trial, and counsel was not ineffective for failing to cite *Green v. Georgia* to the trial court, as it would not have benefitted his position.

Appellant also was not prejudiced. Evidence of appellant’s drinking had already been admitted at trial, witnesses testified about appellant’s life, and appellant’s aunt had testified about appellant’s spinal meningitis and its potential to result in brain damage. Thus, these statements were cumulative to other evidence and their exclusion did not

⁴ The Supreme Court in *Green* considered “most important” the fact that the state had presented this very statement in the prosecution of Green’s codefendant. 442 U.S. at 97.

prejudice appellant.

Counsel's failure to properly object

Appellant claims that counsel failed to properly object to two lines of questioning by the prosecutor (App.Br.117). Appellant claims that counsel should have objected to the following lines of questioning because the prosecutor's questions improperly misled the jury into believing that evidence in mitigation must be tied to the crime (App.Br.117-121).

During the State's cross-examination of appellant's sister, the State asked:

Q. Mrs. Hammel, are you trying to tell us that there's something in your brother's upbringing that led to his murder of Steffini Wilkins?

A. No. (Tr. 1268).

Trial counsel's objection that the question was argumentative was overruled (Tr.1268).

During the State's cross-examination of appellant's aunt, the State asked Ms. Patre:

Q. Ms. Patre, this incident you described where the defendant was two years old, do you have any reason to believe that has had any impact on his behavior as an adult?

A. They told us it's possible that he could do some brain damage.

Q. That's not what I asked you. I asked you, do you have any reason to believe you know whether or not that has had any impact on his behavior as an adult?

Mr. Kenyon [defense counsel]: I'm going to object, Your Honor.
She answered that question fairly and honestly.

Mr. Ahsens: Well, no.

The Court: Just a minute, gentlemen. Let the Court rule the objection. The objection will be overruled. You may ask your question. Please will respond to the question.

Q. Ms. Patre, I'm not trying to be difficult. But do you know whether that incident has had any impact on his behavior as an adult, yes or no, please?

A. No. I don't know. (Tr.1308).

Counsel testified that he did not believe that the questions were improper:

I didn't view his question as implying that [mitigation evidence] had to be related [to the crime]. I viewed his question as it sure would be more persuasive to a jury if it was related, but I didn't perceive the question as....implying...if mitigating evidence has something to do with the crime, I think it is more persuasive.

That doesn't mean that if it—if mitigating evidence doesn't have anything to do with the crime, that it's not admissible. And I don't think his question suggests not admissible. I think his question just simply suggests, and I think legitimately so, that it sure would be more persuasive if it could be tied to the crime.

And so he was pointing out that it doesn't appear to be tied to the crime, so it should be less persuasive to the jury.

(Exhibit 22 at 141). Counsel also explained that he believed that the prosecutor's question did not go towards the admissibility of the evidence but that the prosecutor was trying to persuade the jury that penalty phase evidence that has to do with the crime would be more persuasive than penalty phase evidence not associated with the crime (Exhibit 22 at 140-45).

The motion court denied appellant's claims finding that appellant's assertion that these lines of questioning misled the jury into believing that they could not consider mitigation evidence that was not tied to the crime was pure speculation, that the prosecutor merely asked Ms. Hammel to explain her position regarding her testimony, that the prosecutor did not tell the jury not to consider any mitigating evidence, that it was proper for the prosecutor to argue that mitigating evidence is not worthy of belief or does not outweigh the aggravating factors, and that Patre had repeatedly testified that brain damage could have resulted from appellant's spinal meningitis (PCR.L.F.771).

The motion court did not clearly err. Counsel was not ineffective for deciding not to object to these questions because they did not mislead the jury into believing that they could not consider the mitigating evidence; rather, the prosecutor was simply pointing out through cross-examination that the mitigation evidence was not as persuasive because it did not explain appellant committing such a horrific crime. This was proper.

Appellant also has failed to show prejudice. The jurors were properly instructed

that they could consider any evidence admitted in guilt or penalty phase as mitigating or aggravating (L.F.418). Appellant has not shown that the jury was unable to follow the instructions, and his assertion that they were misled is merely speculation.

IX. Lethal Injection

Appellant claims the motion court clearly erred in denying a hearing on his claim that lethal injection in Missouri is cruel and unusual punishment due to the method of execution, which could result in pain and suffering (App.Br.124).

This Court has repeatedly denied such claims, because the claim is not ripe for review, the pleadings do not plead sufficient facts demonstrating that there is a problem with the lethal injection process that will result in appellant's execution being inhumane and unconstitutional, and because it is unknown what method of execution will be used when and if appellant is executed. *Morrow v. State*, 21 S.W.3d 819,828 (Mo.banc 2000); *Williams v. State*, 168 S.W.3d 433,446 (Mo.banc 2005); *Worthington v. State*, 166 S.W.3d 566,582-583 (Mo.banc 2005); *Goodwin v. State*, 191 S.W.3d 20 (Mo.banc 2006). Appellant's pleadings fail for the same reasons.

X. Dr. Wiener's Study

Appellant claims counsel was ineffective for failing to object to the penalty- phase instructions based on a study by Dr. Richard Wiener (App.Br.131).

The motion court did not clearly err in denying this claim, as this Court has, on numerous occasions, found that the MAI-CR instructions are constitutional and that Dr. Wiener's study should be discounted. *Hutchison v. State*, 150 S.W.3d 292 (Mo.banc 2004); *Middleton v. State*, 103 S.W.3d 726 (Mo.banc 2003); *Smulls v. State*, 71 S.W.3d 138 (Mo.banc 2002); *Lyons v. State*, 39 S.W.3d 32,43-44 (Mo.banc 2001); *State v. Deck*, 944 S.W.2d 527,542-543 (Mo.banc 1999); *State v. Jones*, 979 S.W.2d 171,181 (Mo.banc

1998)(counsel's failure to object to possible jury misunderstanding of instructions does not support claims of ineffective assistance of counsel).

XI. Proportionality Review

Appellant claims that this Court's proportionality review denies due process because *de novo* review should apply on appellate review of death sentences, this Court's database does not comply with §565.035.6 and omits numerous cases, and this Court fails to consider all similar cases required by statute (App.Br.135).

The motion court did not clearly err in denying this claim. This claim has been repeatedly denied by this Court and appellant offers no new arguments in support. *See State v. Edwards*, 116 S.W.3d 511 (Mo.banc 2003); *Lyons v. State*, 39 S.W.3d 32,44 (Mo.banc 2001); and *State v. Clay*, 975 S.W.2d 121,146 (Mo.banc 1998).

XII.⁵

The motion court clearly erred in granting Appellant/Cross-Respondent's claim that his trial and appellate counsel were ineffective for failing to assert at trial and on appeal that Instruction No. 17 improperly instructed the jury on kidnapping inasmuch as it did not identify the underlying felony, because counsel's actions were reasonable and appellant was not prejudiced in that the instruction properly defined kidnapping, the instruction complied with MAI-CR3d, and it was not vague.

In his post-conviction motion, appellant alleged that his trial and appellate counsel were ineffective for failing to challenge Instruction No. 17, on the grounds that the aggravating circumstance of kidnapping failed to instruct the jury “what felony they had to find that [appellant] committed, and thus [the jury] was not instructed to find all the essential elements of the crime of kidnapping” and therefore “it cannot be reliably determined that jurors were unanimous in their finding of what the felony was” (PCR.L.F.182, 183). Appellant also alleged that because Instruction No. 17 failed to identify the felony that appellant committed, it allowed jurors to find murder as the underlying felony, and therefore, the instruction failed to genuinely narrow the class of persons eligible for the death penalty (PCR.L.F.184). Appellant claimed that the instruction was “vague, failed to genuinely narrow the class of persons eligible for death and failed to allow for meaningful appellate review because without listing what specific

⁵ Point XII is the Cross-appellant's first point.

felony the jurors had to find, Instruction 17 “gave jurors a roving commission to consider any bad acts which jurors believed Travis may have committed to be ‘felonies’ which would allow them to find the aggravating circumstance” (PCR.L.F.186-187).

Finally, appellant claimed that because the prosecutor had argued that the “felony” that appellant had committed for the kidnapping was sexual assault and the jury rejected sexual assault when it failed to find the existence of the first aggravating circumstance on depravity of mind (which included a finding that appellant had sexually assaulted the victim),” the evidence was insufficient to support the aggravator of kidnapping (PCR.L.F.189).

Instruction 17 read as follows:

In determining the punishment to be assessed against the defendant for the murder of Steffini Wilkins, you must first unanimously determine whether one or more of the following statutory aggravating circumstances exist:

1. Whether the murder of Steffini Wilkins involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You may make a determination of depravity of mind only if you find that the defendant, while killing Steffini Wilkins or immediately thereafter, sexually violated her by inserting one or more fingers or other similar blunt object into the vagina of Steffini Wilkins.

2. Whether the murder of Steffini Wilkins was committed while the defendant was engaged in the perpetration of kidnapping.

A person commits the crime of kidnapping if the person unlawfully removes another without his or her consent from the place where he or she is found or unlawfully confines another without his or her consent for a substantial period, for the purpose of:

- (a) Holding that person for ransom or reward, or for any other act to be performed or not performed for the return or release of that person; or
- (b) Using that person as a shield or as a hostage; or
- (c) Interfering with the performance of any governmental or political function; or
- (d) Facilitating the commission of any felony or flight thereafter; or
- (e) Inflicting physical injury on or terrorizing the victim or another.

You are further instructed that the burden rests upon the State to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exist, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections

without eligibility for probation or parole.

(L.F.415-416).

During the State's penalty phase closing argument, the prosecutor argued that:

The second aggravating circumstance is that Steffini Wilkins was murdered by the defendant while he was engaged in the perpetration of a kidnapping. And then the instruction goes on at some length to define exactly what kidnapping means in the law. And it says that person commits the crime of kidnapping, that the person unlawfully removes another without his or her consent from the place where he or she is found or unlawfully confines another without his or her consent for a substantial period and then lists a series of possible purposes for those actions, the last two of which is for facilitating the commission of any felony or flight thereafter.

What were those felonies? I suggest to you probably sexual assault of some kind because we do know that there was injuries to Steffini Wilkins' body that proved that such a thing happened. She was found nude with her own bra wrapped around her throat. We know there were those injuries. And what I said was to the interior of the entrance of her vagina, not done within as was suggested.

Or for inflicting physical injury or terrorizing the victim. And we know that she was beaten and struck repeatedly and choked again and again

and again and drug across the ground. That there was no obvious purpose to injure. I don't know what do we call that. So I suggest to you, ladies and gentlemen, that there is after evidence from the physical evidence at the crime scene and on the body of Steffini Wilkins alone to prove that those two aggravating circumstances exist.

(Tr.1366-1367).

The jury's verdict form reflected that the jury found, beyond a reasonable doubt that:

The murder of Steffini Wilkins was committed while the defendant was engaged in the perpetration of kidnapping.

Travis E. Glass committed the crime of kidnapping when he unlawfully removed Steffini Wilkins from her home without her consent for the purpose of facilitating the commission of a felony or flight thereafter.

(L.F.424).

Trial counsel testified at the evidentiary hearing that he did not object on the grounds raised in appellant's post-conviction motion in regards to Instruction No. 17 because the grounds did not occur to him at the time of trial (Exhibit 22 at 221-228). Appellate counsel testified that she had considered raising the issue on appeal but could not recall why she decided not to (PCR.Tr.558-565). Counsel mentioned that she did note that she did not think that the jury would have to specify a particular felony as long as the

jury believed that there was a purpose to commit some felony (PCR.Tr.560). Appellate counsel also testified that she did not believe that the specification of a particular felony was required to satisfy *Ring* and *Apprendi* (PCR.Tr.561).

The motion court granted appellant's claims, finding that counsel should have objected and raised on appeal that Instruction 17 should have listed the specific felony that they had to find that appellant committed; that Instruction 17 allowed the jury to find the aggravating circumstance even if the jurors were not unanimous in their finding of the underlying felony; that the instruction failed to genuinely narrow the class of persons eligible for the death penalty; that the instruction was vague, failing to narrow the class of persons eligible for death, failed to allow for meaningful appellate review of the basis of the imposition of death; and that the evidence was insufficient to support the aggravating circumstance found by the jury because the felony suggested to them was sexual assault, but the jury rejected that a sexual assault had occurred when the jury rejected the aggravator that the murder was outrageously and wantonly vile (PCR.L.F.804-809).

The motion court clearly erred in granting this claim.

Jury Not Required to Find that Appellant Committed a Felony

First, contrary to the motion court's findings (and appellant's assertion in his motion), the jury is not required to find that appellant committed any felony. As can be seen from the above quoted instruction, the jury is only instructed that the defendant kidnapped the victim with the **purpose** to commit a felony or flight thereafter, the jury is never required to find that the defendant actually committed a felony. *State v. Leady*, 879

S.W.2d 644,647 (Mo.App.W.D.1994) (§ 565.110.1 does not require that the perpetrator successfully complete a felony-only that his purpose for the confinement be the commission of a felony).

Jury Not Required to Find Specific Felony

Second, contrary to the motion court's findings, the jury was not required to find a specific felony. Although it is true that if a defendant is charged with the crime of kidnapping, MAI-CR3d 319.24 requires that the specific felony be listed, where kidnapping is included as a definition for the statutory aggravators, MAI-CR3d does not require the felony to be specified. The definition of "kidnaping" used in Instruction 17 was copied verbatim from MAI-CR3d 333.00. The model instructions do not require the felony to be named when the term "kidnaping" is not the crime committed but is merely an aggravator and is simply being defined. The jury was only required to unanimously find that a kidnaping had occurred.

Jury Need Not Be Unanimous As to Felony

Third, even assuming that the jury was required to find a specific felony to support the finding of kidnapping as an aggravator, the jury was not required to be unanimous as to the underlying felony. A jury is only required to be unanimous as to whether a defendant is guilty or not guilty, or, here, whether appellant committed a kidnapping to support an aggravator; the jury need not be unanimous as to the means by which the crime was committed. *State v. Davis*, 963 S.W.2d 317,323-324 (Mo.App.W.D.1997)(jury need only be unanimous as to the ultimate issue of the defendant's guilt or innocence of

the crime charged); *State v. Dooley*, 851 S.W.2d 683,686-687

(Mo.App.E.D.1993)(unanimity is required only with respect to the ultimate issue of guilt or innocence and not with respect to alternative methods by which the crime may be committed). The fact that some jurors could have agreed that appellant had the purpose to commit a sexual assault, some the murder, or some that he had the purpose to commit sodomy or rape, does not matter as long as the jury agreed, as their verdict indicates that they did, that appellant had the purpose to commit a felony. The jury was only required to find that appellant had committed a kidnapping; the jury was not required to be unanimous as to the method which appellant committed the kidnapping, and was not required to find what felony appellant had the purpose to commit. The jury merely had to agree, to support the finding of the aggravator, that appellant had committed a kidnapping.

Jury Only Required to Find a Contemporaneous Multi-Crime Event

Fourth, the minimum threshold for the death penalty was found because the jury was only required to find that appellant had committed a contemporaneous, multiple-crime event. *State v. Bucklew*, 973 S.W.2d 83,94-95 (Mo.banc 1998). The jury was not required to find that appellant had committed some felony to support the kidnapping aggravator. The jury only had to find that appellant had kidnapped the victim with the purpose to commit a felony or flight thereafter. Once the jury had found that appellant had kidnapped the victim, the threshold was met to support a finding of a death sentence. “If the jury finds a contemporaneous, multiple-crime event, the minimum threshold for

imposition of the death penalty is crossed and the jury may find that this defendant deserves “a more severe sentence...compared to others found guilty of murder [alone].” *Id.*; see also *State v. Smith*, 32 S.W.3d 532,555-556 (Mo.banc 2000)(where intended crime was not specified for burglary, which was statutory aggravator, the defendant suffered no prejudice because jury was only required to find that the defendant had committed a contemporaneous, multiple crime event and jury had found that appellant had unlawfully entered the home to commit a crime).

Murder Can Be Underlying Felony

Fifth, contrary to the motion court’s findings, the murder may be the underlying felony to support the finding of kidnapping. This does not make the standards authorizing the imposition of death vague nor does the “double-counting” of the murder fail to “distinguish between the few cases where death is imposed and the many in which it is not” (PCR.L.F.807). Murder may be considered the underlying felony. See *Smith, supra* (murder was the intended crime for burglary in capital case); *Bucklew, supra*. (murder was the intended crime for burglary and kidnapping). This does not make the murder count once for guilt and once for penalty. Rather it is the contemporaneous crime, in this case, kidnapping, that elevates this murder to be death sentence eligible.

Evidence was Not Insufficient to Support Finding

Sixth, contrary to the motion court’s findings, the evidence was not insufficient to support the finding of kidnapping merely because the jury did not find the depravity of mind aggravator. Movant alleged in his motion that the evidence was insufficient to

support the aggravating circumstance found by the jury because the felony suggested by the prosecutor was sexual assault and the jury rejected a finding of sexual assault because they rejected a finding of sexual assault when they failed to find the aggravating circumstance that “the murder of Steffini Wilkins involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman.” (L.F.415).

But contrary to the motion court’s findings, the jury was not required to find that appellant had committed a sexual assault to conclude that appellant kidnapped the victim. As discussed above, the jury was not required to find that appellant had committed any particular felony. The jury was only required to find that appellant had the purpose to commit a felony or flight thereafter. As there was no requirement for a finding of a felony, the fact that the jury did not find that the murder involved depravity of mind which included a finding that appellant had sexually violated the victim has no effect on the finding that appellant kidnapped the victim.

And, the fact that the jury did not find this aggravating circumstance does not indicate that the jury did not find that Wilkins was sexually assaulted. Rather, there are two requisite findings in the instruction. One, the jury must find depravity of mind (which includes a finding of sexual assault) and two, that the murder was “outrageously and wantonly vile, horrible, and inhuman.” The jury could have found that a sexual assault occurred but rejected the second element that the murder was “outrageously and wantonly vile, horrible, and inhuman.” The lack of finding of this aggravator does not

mean a lack of finding of sexual assault. Moreover, the mere fact that the jury did not submit this aggravator does not mean that there was insufficient evidence. The jury may have compromised or attempted to show some sort of leniency. This does not render the verdicts or the jury's findings inconsistent.

Moreover, as discussed above, the fact that the prosecutor may have suggested sexual assault does not mean that the jury was required to find that this was the felony that appellant had the purpose to commit. The evidence was sufficient to find that appellant had committed the murder (as he had already been found guilty) which would have satisfied the finding that appellant had the purpose to commit the murder.

Alternatively, different jurors, as discussed above, could have found that appellant had the purpose to commit different felonies. The fact is that the jury found, beyond a reasonable doubt, that appellant had kidnapped the victim, which was the only factual finding necessary.

Because the jury was not required to find that appellant had committed any felony, because the instruction was not required to identify what felony appellant had the purpose to commit when he kidnapped the victim, because the evidence reflected that appellant committed a multiple-crime event, and because the evidence was sufficient to support this finding, trial counsel and appellate counsel were not ineffective in failing to raise these claims at trial and appeal. The motion court's clearly erred, for Instruction No. 17 properly instructed the jury.

XIII.

The motion court clearly erred in granting appellant's claims that counsel was ineffective for failing to call approximately thirty lay witnesses during the penalty phase, because counsel's strategy was reasonable and appellant was not prejudiced, in that counsel called ten lay witnesses including appellant's family members and friends in support of mitigation, and there is no reasonable probability that the testimony offered by the approximately thirty additional lay witnesses would have affected the outcome of trial.

During the penalty phase, appellant's trial counsel called ten witnesses in support of mitigation⁶ (Tr.1225-1352). In addition, counsel had investigated over twenty other lay witnesses—people who had known appellant throughout his life (Exhibit 4). These witnesses included appellant's family members, friends, former teachers, and former employers and co-workers (Exhibit 4).

Ultimately, trial counsel presented ten witnesses including appellant's family members and friends to testify about appellant's childhood, his character, his schooling, medical problems, and his talents, among other things.

Tonya Gallaher, appellant's older sister, testified that appellant did not know who

⁶ Counsel also attempted to introduce medical and school records of appellant in support of mitigation; the trial court excluded those exhibits (Tr.1352-1355); *see* Point IV for discussion on the propriety of trial court's actions. Counsel had also investigated various mental health experts but due to trial strategy decided not to call those witnesses. *See* Point XIV for discussion.

his father was, that he was raised by his grandparents in Palmyra, Missouri; that their mother occasionally lived near appellant but that she did not raise him, and was never around; that other family members lived close by; that appellant was a normal child growing up; that she never saw any violent behavior by appellant; that he was very friendly but kept to himself; that he had “quite a few friends”; that they did not have friends over to the house; that appellant was always extremely overweight; that appellant liked to play music, sing, draw, play video games, write, draw pictures, play the saxophone and piano; that appellant was “really good in anything he tries”; that appellant was great with her children, and would play with them; that there were no doors in the house that they grew up in; that their grandfather was a strict disciplinarian—if you violated the rules, the children were spanked or put in timeout, and “very seldom did they get a whipping”; that grandfather was a recovering alcoholic; that her mother and Gollaher had drinking problems; that she knew that appellant drank but unaware if had drinking problem; that he attended church regularly; that when appellant was two years old, he was very sick with spinal meningitis; and that she had been in contact with appellant since he had been locked up (Tr.1225-1239).

Counsel also called Amanda Meyer, a friend of appellant’s since childhood (Tr.1242). Meyer testified that she was a few years younger than appellant; that her parents were friends with appellant’s family; that they were both in the school band; that appellant was very nice and talented; that appellant would help out whenever he could; that she went to prom with appellant, had a wonderful time, he walked her to the door

that night and held an umbrella for her because it was raining; that appellant was not a mean or violent person; that he was always nice; and that “if you just wanted to talk or whatever, you know, Travis was there” (Tr.1242-1248).

Sue Wilson, Amanda Meyer’s mother also testified; she and her husband owned the bowling alley (Tr.1250). Wilson testified that she knew appellant through his grandfather who sold the Wilson’s fresh vegetables; that appellant and his grandfather worked on church projects with her; that appellant was a customer at the bowling alley; that appellant was very friendly; that her daughter went to prom with him; that they were “very impressed with him”; and that she never knew him to be mean or violent (Tr.1250-1253).

Tina Hammel, appellant’s other sister, testified that appellant’s grandparents raised them; that they were unaware of who appellant’s father was; that appellant’s grandfather was in poor health from a stroke and heart attack; that his grandmother’s health was not good; that appellant’s mother was only around from time to time and did not help with the upbringing; that appellant was a “good kid” when they were growing up; that he was kind of hyper at times; that being a little brother, he got on her nerves sometimes but he was a good kid; that he was funny; that he was never violent, but when he was a teenager, he became a little mouthy; that he was friendly; that he kept mostly to himself; that he enjoyed school; that he was involved in band and music; that he had some friends at school; that he had been extremely overweight; that appellant was constantly teased about being overweight and that it was tough on him but he never said

anything; that he loved to play the saxophone; that he competed in contests with his singing; that he was artistic and drew cartoons; that he wrote poetry; that he wrote a song for her wedding; that their grandfather was an alcoholic; that her mother was an alcoholic and that she noticed appellant started going downhill about the time he graduated from high school because a Bible college did not accept him; that most of his friends had moved away and he tried to find a job and “his place” (Tr.1255-1266).

Linda Herner, appellant’s aunt, testified that she lived near appellant while he was growing up, that her sister, appellant’s mother, was not around to raise her kids; that she would see appellant every day when he was growing up; that appellant was a good kid; that he did not like to be around big groups of people; that he was shy; that he was not violent, that he was a “normal kid”; that appellant’s grandfather had been an alcoholic; that appellant’s mother had a problem with alcohol; that appellant started to go downhill around the time he graduated from high school; that he started running around with a group of people that was not the best group; that one night around 1:30 a.m., appellant’s grandparents called Herner because appellant had come home and was intoxicated and was yelling at his grandparents, Herner went over and called the jail’s mental health coordinator (where she worked) who spoke to appellant on the telephone and got appellant to calm down but had appellant leave the house for the night; that appellant had been turned down by a church college in St. Louis; that appellant was a little disgusted and felt like no one cared after he was turned down by the school; that she was very upset when she saw that appellant had been arrested for the murder; that she was shocked

because “when [appellant] was growing up, we used to have, we have a big garden at my dad’s house, when Travis was growing up, dad would always want him to go out and shoot the birds with the pellet gun and he wouldn’t do it. He wouldn’t kill a bird. When I seen him standing there, it’s like this can’t be happening,” and it was not the Travis Glass she knew her whole life (Tr.1269-1280).

Trial counsel also presented the testimony of Jeff Patre, appellant’s uncle, who lived next door to appellant and his grandparents (Tr.1282-1283). Jeff Patre testified that appellant got along well with others but he was kind of a loner; that music was important to him; that he was a talented musician; that he played the saxophone; that he was artistic; that appellant was not physically aggressive; that appellant played with his children and they grew up together; that Jeff and his wife attended appellant’s school functions; that they attended church together; that appellant’s mother was not around; that appellant’s mother dated a man that appellant’s grandfather did not get along with so appellant’s mother stayed away; that appellant helped out around the house and in the garden; that appellant started going downhill around the time he left high school because he was hanging out with some kids that “wasn’t right for him”; that appellant, who had worked as a bartender, had gotten drunk and driven one night, and had called his uncle to come get him after hitting a curb; that appellant was extremely overweight; that Jeff Patre kept in contact with appellant and visited him in jail; that appellant was given permission to visit his grandfather in the hospital when he was in jail awaiting trial; that he loved his nephew and if he was sentenced to life, he would continue seeing him (Tr.1282-1295).

Appellant's aunt, Connie Patre, testified that she married appellant's uncle Jeff Patre and had known appellant his entire life (Tr.1299). She testified that appellant was a "normal kid" who had his good days and his bad days; that he was friendly; that he was not overly outgoing but had friends; that he was not violent; that he was "relatively calm"; that he contracted spinal meningitis when he was approximately two years old and was extremely sick and that they had been told that they would be lucky if there was not brain damage and that he had been in the hospital for two weeks; that his mother was not around when he was growing up; that they did not know who appellant's father was; that in high school, appellant was manager of the Palmyra basketball team; that he played saxophone in the band; that appellant was a good artist; that he helped around the house; that he had a close relationship with his grandparents; that appellant's grandmother wrote a letter stating that she was thinking about him and that she wished she could be there; that the murder was inconsistent with the character of appellant; that appellant was an easy-going, non-violent person; and that if the jury sentenced appellant to life, she would maintain contact with him (Tr.1298-1307).

Michael Patre, appellant's cousin, testified that he grew up with appellant, that they would play Nintendo, basketball, football, and other games together; that the family went to Florida to Disney World together; that appellant was not a violent person; that he was easygoing; that appellant liked to have fun; that he enjoyed playing the saxophone; that they would watch TV and listen to CDs together; that in high school, appellant helped the middle school band; that appellant was a good artist; that he has visited

appellant in jail and spoken with him on the telephone; and that he loved and missed appellant (Tr.1313-1321).

Reverend Robert Axton of the United Pentecostal Church in Palmyra testified that appellant attended his church and that appellant played with his children (Tr.1322-1323). Reverend Axton testified that appellant began attending his church while appellant was in high school; that appellant was a “quiet sort of young man”; that he was a follower; that he always seemed to be in the back of the crowd; that appellant would regularly attend many services that he would play music and sing during the services; that he attended a district youth convention and that during the convention, the Reverend noticed that appellant seemed to have “found something that’s good” that was impacting him; that appellant left the convention with a purpose that he wanted to be more involved in ministry; that appellant decided to go to Bible school; that appellant had wanted to make things right with God; appellant wanted to be baptized; that the Reverend completed a recommendation for appellant to attend the Bible school but that he had to state that appellant was too new to give a good recommendation; that appellant was not accepted to the school; that after that, appellant started not attending church as regularly, and that there was a “definite countenance change” in him after that (Tr.1322-1333).

Finally, appellant’s mother, Sandy Glass, testified on his behalf (Tr.1334). She testified that her parents raised her three children; that appellant was conceived as a result of a one-night stand; that appellant never asked who his father was; that she now visits appellant regularly; that her second husband traveled a lot and she traveled with him; that

she did not have a relationship with appellant while he was growing up; that she had even given up guardianship to appellant's grandparents; that she did not visit appellant often because her family had a problem with her second husband; that the only school function she attended was appellant's graduation; that she had a drinking problem; that she drank while she was pregnant with appellant; that her father was an alcoholic; that her brother used to drink as well; that appellant wrote poetry and won an award for it; that she loved her son very much; and that she would visit him if he was incarcerated (Tr.1334-1352).

Counsel also introduced various pictures of appellant as a child, teenager (Tr.1232, 1245, 1246, 1286, 1287, 1301, 1316).

Counsel argued during the penalty phase that they wanted the jury to see a picture of appellant's life, that this incident was completely out of character for him, that appellant was not raised by his mother, that the family had alcohol problems, that appellant was a very talented young man in music and art, that appellant had been extremely overweight and had been ridiculed during his life, that appellant was not a violent person, and that "the crime you have convicted [appellant] of was completely and totally out of character for what [appellant] is like" (Tr.1181-1186). Counsel argued that although the jury had convicted him of a horrible crime, appellant was not an evil person, that he was a human being, and that he did not deserve the death penalty for this single act (Tr.1370-1371). Counsel told the jury that there were reasons to reject the death penalty: 1) if appellant killed the victim, it was out of panic and not part of an overall plan; 2) appellant had been extremely intoxicated that evening; 3) the statutory

aggravators had not been proven beyond a reasonable doubt; 4) that appellant was remorseful; 5) appellant's up-bringing was out of his control; 6) appellant's weight and being made fun of; 7) the family's problem with alcoholism; 8) appellant had family and friends that still loved him; 9) appellant had a positive influence on people's lives; 10) appellant would no longer be a threat because he would be in prison forever; 11) appellant's life still had value; 12) appellant was 21 years-old; and 13) this crime was out of character for appellant (Tr.1370-1386).

Despite his counsel's considerable investigation into appellant's background and multiple witnesses called to testify on appellant's behalf, appellant claimed in his amended motion for post-conviction relief, that his counsel was ineffective for failing to call approximately thirty additional lay witnesses varying from elementary school teachers who knew appellant for approximately a year to former friends of appellant (PCR.L.F.128-150).

Appellant called many of these witnesses to testify either at the evidentiary hearing or via deposition (See generally PCR.Tr.; Exhibits 39-57, 60). Counsel testified during the evidentiary hearing that their strategy during the penalty phase was that "Travis Glass had a – a sympathetic background, he had a difficult upbringing, the abandonment by his mother, and that there was sympathetic factors in his background that we wanted the jury to take into consideration" (Exhibit 22 at 252-253). Counsel also testified that the defense focused on that appellant "was a good person, that [appellant] hadn't been involved in any egregious illegal activities, people seemed to like him, he

was talented, and that there was value in his life” (Exhibit 22 at 253). Counsel wanted to show the jury that this crime was a “very out-of character” thing (Exhibit 22 at 253). Counsel testified that he tried to convey to the jury that appellant did not deserve the death penalty for this one act that was out of character when he had an otherwise good life (Exhibit 22 at 253).

Counsel testified that in addition to the eight to ten witnesses that they called to testify at the penalty phase, they had investigated numerous other potential witnesses (Exhibit 22 at 254). Counsel testified that they had relied on appellant, to some extent, to inform them of potentially good witnesses and that some witnesses that appellant had alleged in his post-conviction motion, they had no information that these witnesses had potentially good information (Exhibit 22 at 254-255). Counsel indicated that he had discussed teachers and other individuals that had meant the most to him growing up that could have been potentially good witnesses and that appellant had only offered a couple of names (Exhibit 22 at 255). Counsel testified that although some people may have had beneficial information to tell the jury, if those people were unwilling to testify, it would be dangerous to subpoena them to testify to character evidence because they may try to “get back at you...for bringing them in against their will by saying unfavorable things about your client in front of the jury” (Exhibit 22 at 258-259). Counsel also indicated that even if a witness has “good information” that would be consistent with the defense theory, there were other considerations in whether to call them as a witness (Exhibit 22 at 262). Counsel testified that witnesses may possess harmful information that could

damage the defense, and counsel did not want to present cumulative appearing witnesses before a jury so that the jury did not feel like the defense was wasting their time putting on multiple witnesses saying the same thing (Exhibit 22 at 262-263).

Counsel testified that he likely would not have called all of the witnesses listed in appellant's post-conviction motion because "even if all of them had information that were consistent with our penalty phase, to the extent that some of those witnesses might be cumulative to each other" (Exhibit 22 at 263).

The motion court granted appellant's claims and found that counsel was ineffective for failing to investigate and call all of the witnesses and for failing to call each one of them (PCR.L.F.779-94). The motion court found that there was a reasonable probability that if each of the witnesses would have testified, appellant would not have received the death penalty and found that if counsel had called all of the witnesses alleged in the motion, there was a reasonable probability that the jury would have returned a different verdict (PCR.L.F.779-94).

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. *State v. Kinder*, 942 S.W.2d 313,333 (Mo.banc 1996); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. *State v. Taylor*, 944 S.W.2d 925,938 (Mo.banc 1997).

To prevail on a claim of ineffective assistance, a movant must establish that

counsel's performance fell below an objective standard of reasonableness, and that movant was prejudiced by his counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove prejudice, a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.*

“When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Id.* 466 U.S. at 695.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 689. In order to demonstrate that counsel's performance was deficient, a convicted defendant must show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth

Amendment.” *Id.* 466 U.S. at 687.

Here, counsel conducted a reasonable investigation for appellant’s mitigation evidence. Counsel attempted to contact (or successfully contacted) over forty potential witnesses to testify to appellant’s character and his upbringing (Exhibit 4). Counsel talked with appellant about potential witnesses who would be able to testify as to his character and his upbringing, his school behavior, his commitment to God, and his family. Counsel presented ten witnesses in support of mitigation. These witnesses, as outlined above, discussed appellant’s talents in music, art, and writing. These witnesses testified to appellant’s love of the saxophone and singing. These witnesses testified as to appellant’s absentee mother and not ever knowing his father. These witnesses testified as to appellant being raised by his grandparents and his aunt and uncle. These witnesses testified as to appellant’s grandfather being a strict disciplinarian. These witnesses testified to appellant being extremely overweight and being teased about it. These witnesses testified about appellant having spinal meningitis as a young child and its potential lasting effects. These witnesses testified as to appellant’s issues with alcohol and the family history of alcoholism. These witnesses testified to appellant’s commitment to God. These witnesses testified as to appellant’s good character and his willingness to help his family and friends. These witnesses testified as to appellant being shy and not having a lot of friends. These witnesses testified to appellant’s disappointment into not being accepted into a Bible college and his change in behavior after high school. These witnesses testified about appellant’s non-violent nature. Finally, these witnesses testified

as to their love for appellant.

Not only did counsel present all of this evidence during the penalty phase, counsel also relied on evidence from the guilt phase and the alleged weakness of the State's evidence in the penalty phase to demonstrate that appellant did not deserve the death penalty. As outlined above, counsel pointed out appellant's remorse. Counsel argued that the murder was not a planned killing. Counsel explained to the jury that the aggravating circumstances were not proven beyond a reasonable doubt. Counsel rebutted the State's assertion that appellant walking into the two houses was sexual in nature. Counsel argued appellant's lack of serious criminal history. Counsel argued that appellant was young. Counsel argued that appellant's upbringing was out of his control. Counsel argued that appellant's behavior that night was out of character for him. Counsel argued that appellant was panicked that night and was extremely intoxicated. And counsel argued that appellant, if sentenced to life in prison, would not be a threat to society.

Counsel's actions in investigating and presenting the penalty phase did not fall below an objective standard of reasonableness. Counsel investigated numerous character witnesses (in addition to expert witnesses) and presented a wealth of information to the jury. The fact that the jury rejected the mitigation case does not render counsel's actions unreasonable. *See Strickland, supra; Middleton v. State*, 80 S.W.3d 799,809 (Mo.banc 2002).

Despite counsel's extensive investigation and presentation, appellant claimed, and the motion court agreed, that counsel should have investigated and called approximately

thirty other witnesses to testify about appellant's character. Appellant, via deposition and at the evidentiary hearing, called twenty-one witnesses, including former friends, teachers, and probations officers (appellant was on probation for stealing when he murdered the young victim)(Exhibits 39-56,60; PCR.Tr.43-68). These witnesses' testimony consisted generally that appellant had some difficulty in school, that he loved to play the saxophone, that he did not have any problems on probation (of course, until he murdered the victim), and (with some exception) that he was non-violent (Exhibits 39-56, 60; PCR.Tr.43-68). But most, if not all, of this information was already presented to the jury. *Skillicorn*, 22 S.W.3d at 683. (counsel is not ineffective for not presenting cumulative evidence). Counsel recognized at the evidentiary hearing that he would not have considered calling all of these witnesses because of their cumulative nature and the potential of "wasting the jury's time."

Moreover, many of these witnesses presented real dangers for the defense. For example, Chris Brandstat, a former friend of appellant's, stated that appellant was no longer a person that Brandstat wanted to be around, that appellant had betrayed his trust and that he no longer considered appellant a friend (Exhibit 55). Counsel testified that knowing that information "would seriously weigh against wanting to call him" (Exhibit 22 at 257). And, considering that the only beneficial information that Brandstat would have provided was that appellant liked the saxophone, that he was teased because he was overweight, and that appellant was friendly, it cannot be said that Brandstat would have been a beneficial witness for the defense or contrary to the motion court's findings, that

there was a reasonable probability that the outcome would have been different.

And appellant's probation officers would have testified that appellant had no violations during his time on probation (Exhibits 52 and 53). Of course, one of the probation officers was out of the country during the trial and the State would have been able to point out that appellant committed this heinous murder while appellant was on active probation and again point out appellant's prior criminal history to the jury. Contrary to the motion court's findings, counsel was not ineffective for failing to call the probation officers.

Counsel also strategically decided, after investigation, not to call one of appellant's former teachers, Donna Brown, who was close to the victim's family, unwilling to testify, and as counsel recognized, posed a real danger as a character witness when she could have testified more positively for the State (Exhibit 22 at 258-259). And, considering that her testimony was basically that appellant was quiet, enjoyed music, was not a discipline problem, and was disappointed when he did not get into college, it cannot be said that counsel's decision was unreasonable when this evidence was merely cumulative to evidence that ten other witnesses testified to and she was such a reluctant witness.

Moreover, Debbie Roberts, a former teacher of appellant's, who had been investigated by counsel, would have testified completely contrary to appellant's defense. Roberts testified that appellant could be aggressive at times during her class (Exhibit 45). As counsel testified at the evidentiary hearing, this would have been in complete

contradiction of the defense that this one violent act was completely out of character for appellant (Exhibit 22 at 261).

One final example, Debra Boutwell, who had seen appellant at one of the bars appellant went to, was close to the victim's family, had stated that she did not even talk to appellant, had been uncooperative during her evidentiary hearing testimony, and stated that she did not like appellant (Exhibit 56). Even assuming that she would have testified that appellant was nice to her, it cannot be said, contrary to the motion court's findings, that there is a reasonable probability her isolated testimony to that issue would have made a difference in the verdict, considering she was so hostile to appellant.

Counsel's actions were reasonable and appellant was not prejudiced in that much of the testimony offered by appellant was merely cumulative to evidence presented during the penalty phase and many of the witness's testimony would have been more harmful than helpful. The motion court clearly erred in granting these claims.

In its findings, the motion court focuses on these witnesses' ability to testify to appellant's "impaired intellectual functioning" (PCR.L.F.779). Specifically, the motion court points to Dr. Scherr's testimony that appellant could have had brain damage from the spinal meningitis that he had when he was two years old and some of the former teachers' testimony that appellant struggled in some subjects during school (PCR.L.F.779-786). But contrary to the motion court's findings, Dr. Scherr did not testify that appellant suffered any brain damage from the spinal meningitis. Dr. Scherr, who had no memory of appellant or seeing him in the hospital, only testified that the family was

informed that brain damage was a possible consequence (Exhibit 2). Of course, this is the same testimony that appellant's aunt gave during the penalty phase (Tr.1298-1313). And the teachers, contrary to the motion court's findings, did not testify that appellant had impaired functioning; they testified that appellant struggled in some subjects but also testified that appellant was able to learn and that he was not motivated. This does not demonstrate impaired intellectual functioning and could have been harmful to the defense. Moreover, counsel indicated that he had no information that many of these witnesses had any information that would have been beneficial to appellant. Counsel specifically asked appellant for teacher's names that would have information—appellant did not offer up these witnesses. The motion court was clearly erroneous in finding that counsel's actions in investigation and presentation of the penalty phase was unreasonable and that appellant was prejudiced.

XIV.

The motion court clearly erred in granting appellant's claims that his counsel was ineffective for failing to call four alleged expert witnesses, Dr. Robert Smith, Dr. Michael Gelbort, Teri Burns, and Terry Martinez, because counsel's investigation into the penalty phase witnesses and experts and their strategic decisions were reasonable and appellant was not prejudiced in that the information that these experts would have provided would have been damaging to appellant's defense, would have been cumulative to other evidence, and would have had limited probative value.

Appellant alleged in his amended motion that trial counsel was ineffective for failing to call four alleged expert witnesses in penalty phase: Dr. Robert Smith, a psychologist; Dr. Michael Gelbort, a neuropsychologist; Teri Burns, a speech pathologist; and Terry Martinez, a toxicologist during the penalty phase (PCR.L.F.151-160). The motion court granted appellant's claims finding that counsel was ineffective for failing to call each of these witnesses (PCR.L.F.794-802).

Dr. Robert Smith

Trial counsel consulted Dr. Smith, a psychologist, to conduct a psychological evaluation of appellant (Exhibit 22 at 105). Counsel had intended to call Dr. Smith to testify during the penalty phase of the trial, however, sometime prior to trial, counsel learned that the State intended to introduce various evidence of appellant's sexual proclivities (Exhibit 22 at 108-09, 268). Specifically, the State had evidence that

women's underwear and personal identification as well as child pornography had been found in appellant's home (Exhibit 22 at 108-09, 268-70). The State intended to introduce this evidence at trial during the penalty phase (Exhibit 22 at 108-09; Tr.281-85). Trial counsel wanted desperately to keep this damaging evidence out of trial and fought to keep it out (Exhibit 22 at 108-09, 272-73; PCR.Tr.465-67). The trial court granted the defense's request to keep out this evidence because the State did not have evidence establishing that it was appellant who had stolen the underwear and personal identification or that it was appellant's child pornography that had been located on the computer located in appellant's home (Exhibit 22 at 273). Trial counsel was aware however, that appellant had admitted to Dr. Smith that he had, in fact, stolen the women's underwear and personal identification from women and used those items as sexual stimulants for his sexual fantasies and masturbation (PCR.Tr.446, 466). Trial counsel was also aware that even though Dr. Smith had beneficial testimony for appellant such as that he suffered from borderline personality disorder, that he was acting under extreme emotional distress when he murdered the victim, and he suffered from alcohol dependence, Dr. Smith had also diagnosed appellant with paraphilia and possibly pedophilia and fetishism (Exhibit 22 at 108-09, 269-73; Exhibit 13). Concerned that if Dr. Smith testified, it would open the door to all of the evidence regarding appellant's sexual proclivities, trial counsel decided not to call Dr. Smith to testify during the penalty phase (Exhibit 22 at 108-09, 270-73; PCR.Tr.446, 467).

The motion court found that counsel's actions were not reasonable and that

appellant was prejudiced by the absence of Dr. Smith's testimony from the penalty phase. Specifically, the motion court found that Smith's testimony had "substantial mitigating value" and would not have opened the door to introduction of the child pornography evidence (PCR.L.F.799). The motion court found that Smith's testimony would have supported the statutory mitigators that appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and that appellant acted under the influence of extreme mental or emotional disturbance (PCR.L.F.799). The motion court also found that although evidence of appellant's sexual disorder of fetishism could be perceived negatively, "it was hardly worse than evidence the jury had already heard that Movant had killed the young girl in this case" (PCR.L.F.799). The motion court found that because appellant had denied that the child pornography was his, Smith's testimony could not have opened the door to any evidence of the child pornography (PCR.L.F.799-800).

The motion court clearly erred in granting this claim. Trial counsel's actions were reasonable.

Trial counsel's decision not to call a witness is presumed to be trial strategy unless otherwise clearly shown. *State v. Clay*, 975 S.W.2d 121, 143 (Mo.banc 1998)[]. Strategic choices made after thorough investigation are essentially unchallengeable. *State v. Ramsey*, 864 S.W.2d 320, 340 (Mo.banc 1993)[].

Trial counsel had consulted Dr. Smith and were fully aware of his potential

testimony. Although it is true that appellant had denied that the child pornography found on the computer was his, appellant had admitted that the women's underwear and the women's identifications were his, that he had stolen them, and that he used them in his sexual fantasies. Trial counsel had worked very hard to keep all of this evidence out of the trial and, contrary to the motion court's findings, putting Dr. Smith on the stand would have opened the door to this evidence. Dr. Smith had diagnosed appellant with paraphilia and fetishism based on his stealing of the women's items and the use of them. The prosecutor would have been able to cross-examine Dr. Smith about his diagnosis and what he relied on to make this diagnosis. *State v. Thompson*, 985 S.W.2d 779,787 (Mo.banc 1999); *Middleton v. State*, 103 S.W.3d 726,736-737 (Mo.banc 2003)(wide latitude is afforded the cross-examination of witnesses to test qualifications, credibility, skill or knowledge, and the value and accuracy of the expert's opinion); *Goodwin v. State*, 191 S.W.3d 20,39 (Mo.banc 2006)(experts may be cross-examined about facts not in evidence to test the validity of his opinion including the expert's knowledge of facts surrounding the defendant's mental status and the defendant's past interactions that bear on the opinion). Counsel considered this very damaging evidence and rightly so. Counsel's penalty phase defense was that appellant's actions on that night were completely out of character for him. Had the prosecution been able to introduce evidence that appellant had stolen private items from various women including their underwear and identifications and was using these items in his sexual fantasies, this evidence would have severely damaged the defense. The trial court had denied admission of this evidence

because the State had been unable to link that evidence to appellant; considering the fact that appellant admitted that he had, in fact, taken these items to Dr. Smith, the door would have opened to this extremely damaging testimony.

The motion court's finding that this evidence was not any more damaging than the fact that appellant had killed this young girl is clearly erroneous. As discussed, appellant's penalty phase defense was that this murder was completely out of character for him. Admitting evidence that he had broken into young women's homes, had stolen their personal belongings including their underwear and identification because he found them attractive and used them in his sexual fantasies, would have been extremely damaging evidence for appellant and contrary to their entire penalty phase defense.

The motion court, in finding that Dr. Smith's testimony would not have opened the door to the "child pornography" issues completely misses the mark as the motion court incorrectly discusses only the child pornography that was found on the computer. As trial counsel testified, the "child pornography" issues did not only encompass the child pornography on the computer but all of the personal items of the young women that appellant had stolen and was using to masturbate (Exhibit 22 at 108-09, 270-73; PCR.Tr.466-68).

Moreover, contrary to the motion court's findings, Dr. Smith's testimony would have opened the door to the prosecution questioning Dr. Smith about the child pornography. Dr. Smith had initially diagnosed appellant with pedophilia due to the information that appellant had the child pornography on his computer. Although Dr.

Smith later changed that opinion when he did not receive any other information (PCR.Tr.309-12), the State would have been able to inquire about his diagnoses and his change in diagnoses and what he relied on to form those opinions. *Thompson, supra*. Trial counsel's fears that this extremely damaging evidence would come in if Dr. Smith testified was quite real and a legitimate concern. Once the jury heard that appellant had a tendency to break into young women's homes, take their personal belongings and use them as his sexual stimulants, the rest of Dr. Smith's potentially beneficial testimony would have been lost. *See Bucklew v. State*, 38 S.W.3d 395,398-99 (Mo.banc 2001)(counsel not ineffective for failing to call experts who had evaluated appellant where strategically decided that experts' testimony would have had "mixed impact"). Trial counsel's decision was reasonable and the motion court was clearly erroneous in finding otherwise.

Moreover, appellant was not prejudiced by the absence of Dr. Smith's testimony. Many of Dr. Smith's conclusions were contrary to appellant's penalty phase defense or to appellant's evidence. All of this could have been pointed out extensively by the State at trial. For example, Dr. Smith testified at the evidentiary hearing that appellant "had not been able to disclose or share or talk or form a relationship with anyone. That's what Travis finds extremely uncomfortable and has not been able to do"(PCR.Tr.263). However, all of the evidence at both trial and during the evidentiary hearing reflected that although appellant did not have a lot of friends, appellant did have friends—friends that testified at trial and at the evidentiary hearing (Tr.1242-50, 1313-333; PCR.Tr.43-60;

Exhibit 49, 55, 60). Dr. Smith also concluded, based solely on appellant's conversations with him that appellant had "no impromptu interaction" (PCR.Tr.263). Again this is contrary to the first-hand recollections of appellant's trial and evidentiary hearing witnesses. Reverend Axton discussed appellant's impromptu interactions during the youth church convention (Tr.1322-34). Appellant asked his friend, Amanda Meyer to go to prom with him and even walked her to the door afterwards (Tr.1242-50).

Dr. Smith testified that appellant "only met his mother at age 15." (PCR.Tr.261). But, again, this was refuted by appellant's own evidence at trial (Tr.1225-40, 1285, 1344).

Dr. Smith claimed that appellant told him that his grandparents were cold, distant, no relationships with others, showed no displays of affection to the children which supported Dr. Smith's conclusion that appellant suffered from borderline personality disorder (PCR.Tr.252). However, this was contrary to defense strategy at trial where counsel attempted to introduce a memory book and grandmother's letter showing the family's love for appellant and contrary to the testimony by nephew that had to live with grandmother because she needed to be with someone, could not be alone after grandfather was in the hospital (Tr.1305-06, 1310, 1320).

Dr. Smith also opined that appellant had a "history of angry outbursts" (PCR.Tr.265). Again, this was contrary to the defense's theory that appellant was not violent and was a very nice person; defense counsel wanted to show that this one incident was out of character for him. Moreover, this was contrary to family and friends'

testimony that appellant was not violent and that he did not get angry (PCR.Tr.309; Exhibits 39-56, 607).

In support of his diagnosis of borderline personality disorder, Dr. Smith claimed that appellant had no career goals (PCR.Tr.308). But this was contrary to the defense's evidence that appellant had tried to get into college, that he wanted to make something of himself.

Finally, appellant had told Dr. Smith that he did not remember anything after he left the bar (PCR.Tr.314). However, as the State pointed out during cross-examination, appellant must be a liar as he confessed to the police in detail. This also would have been very damaging to the defense at trial.

Contrary to the motion court's findings, counsel's actions in strategically deciding not to call Dr. Smith when his testimony, although potentially beneficial, was so damaging to the defense, was reasonable. Plus, Dr. Smith's testimony was contrary to the defense theory and would not have benefitted appellant's defense.

Dr. Michael Gelbort

As with Dr. Smith, discussed above, trial counsel consulted Dr. Gelbort prior to trial to conduct a neuropsychological evaluation of appellant; specifically, counsel hired Dr. Gelbort to assess the presence of any neuropsychological deficits or impairments (PCR.Tr.445). However, at trial, as with Dr. Smith, once the trial court excluded the child pornography from the case, which was something that Dr. Gelbort was aware of, trial counsel decided not to call Dr. Gelbort to testify "in case they would somehow open the

door to that child pornography as a bad act on cross-examination by the State or for some reason the State being able to somehow open the door and try to ask our expert about the child pornography” (PCR.Tr.446). Counsel did not want to do anything that would potentially open the door to allow the State to cross-examine Dr. Gelbort about those issues (PCR.Tr.446). Counsel was aware that Dr. Gelbort had stated that his opinions were not based on the child pornography but counsel was aware that appellant had been interviewed by Dr. Gelbort, that Dr. Gelbort had talked to Dr. Smith who appellant had admitted to some of the “child pornography” issues, and so, to be on the safe side, they decided not to call Dr. Gelbort (PCR.Tr.446-447). Counsel, aware that Dr. Gelbort also performed psychological evaluations and that he had talked with Dr. Smith, were afraid that the State would question Dr. Gelbort whether his opinions would be different than Dr. Smith on the issues of appellant’s paraphilia and use of the women’s private possessions as sexual stimulants (PCR.Tr.448).

On cross-examination, counsel testified that the risk of putting Dr. Gelbort on the stand and opening the door to questioning Dr. Gelbort about the child pornography and appellant’s sexual fantasies with the women’s possessions was greater than the benefit they would have received from Dr. Gelbort (PCR.Tr.467).

Upon further questioning, counsel testified that the defense was concerned that the prosecutor could have asked “Dr. Gelbort if he was aware of certain statements [that appellant made to Dr. Smith regarding the sexual fantasy issues]. The ruling Judge Conley made said there was no tying Travis, there was no one that could tie Travis to the

stuff found in his home” (PCR.Tr.472). Counsel was concerned that because appellant had admitted to Dr. Smith that he had taken the women’s underwear and licenses and that he used them as sexual stimulants, that the State would be able to ask Dr. Gelbort if he was aware of these statements and that this would then have opened the door to this evidence and possibly the evidence of the child pornography (PCR.Tr.472-473).

Although Dr. Gelbort could have testified that appellant had a mild to moderate math disability, that he had slight problems with making new memories, that he was impulsive, and that he had mild impairment with problem solving and reasoning (Exhibit 17), counsel strategically decided that to avoid having the door opened to the evidence of appellant’s sexual issues, they would not call Dr. Gelbort to testify (PCR.Tr.446, 467-468, 472).

The motion court granted appellant’s claim, finding that counsel’s reasons for not calling Dr. Gelbort were not reasonable because Dr. Gelbort’s examination “was not designed to cover topics such as child pornography or sex, and Dr. Gelbort had no information or opinions on these matters” (PCR.L.F.38-39). The motion court found that Dr. Gelbort’s testimony would not have opened the door to allow the State to introduce evidence of the child pornography or women’s underwear (PCR.L.F.39). The motion court also found that appellant was prejudiced by counsel’s decision not to present Dr. Gelbort’s testimony of appellant’s impaired intellectual functioning (PCR.L.F.39).

The motion court clearly erred in granting this claim. Here, as with Dr. Smith, counsel had investigated Dr. Gelbort and had received a copy of his report. However,

prior to trial, counsel learned that the State was intending to introduce evidence that appellant had child pornography on his computer and that appellant had stolen women's underwear and their identification from them; appellant used these items as sexual stimulants. Concerned that because Dr. Gelbort knew about appellant's statements admitting that he had taken these items to Dr. Smith and concerned because not only was Dr. Gelbort a neuropsychologist but a clinical psychologist as well, counsel strategically decided not to call Dr. Gelbort because they did not want to risk the State being able to cross-examine Dr. Gelbort about his knowledge of appellant's admissions (and then the State being able to introduce all of the evidence of appellant's sexual proclivities), asking Dr. Gelbort whether appellant had discussed these during interview, or asking Dr. Gelbort about whether he, as a psychologist, would have come to the same conclusions as Dr. Smith (regardless of whether Dr. Smith testified) about appellant's diagnosis of paraphilia. Counsel had worked very hard to keep evidence of both the child pornography and appellant's tendencies to steal women's personal items to use them in his sexual fantasies out of the hearing of the jury. Counsel reasonably believed that it was too great of a risk to put Dr. Gelbort on the stand, with his limited testimony about appellant's average IQ and his few impairments, and open the door to the State putting on evidence of appellant's sexual tendencies. The benefit of keeping out this damaging testimony outweighed any potential benefit that Dr. Gelbort's testimony might have had. This strategy was reasonable. Counsel was able to put on multiple witnesses to testify about appellant's childhood, character, family, and friends and did not want the jury to hear

about appellant's "bad acts." Counsel wanted the jury left with the impression that this murder was completely out of character for appellant. Evidence that appellant had broken into women's homes, stolen their private items such as underwear and their identification and used these items in his sexual fantasies would have destroyed the defense. Counsel's actions were reasonable. *Ringo v. State*, 120 S.W.3d 743,749 (Mo.banc 2003)(the decision to pursue one evidentiary course to the exclusion of another as an informed strategic decision is not ineffective assistance). The motion court was clearly erroneous in finding counsel's actions unreasonable.

Moreover, appellant was not prejudiced. Dr. Gelbort's testimony was basically that appellant had mild impairments in some areas such as math, problem-solving, and memory making (Exhibit 17). However, the bulk of Dr. Gelbort's testimony reflected that appellant had an average IQ, that he functioned in day-to-day society, that people that have those mild deficits lead productive lives and do not become violent, that appellant could read and spell at high levels and had other strengths (PCR.Tr.325-400). Moreover, the State could have extensively cross-examined him about the fact that although he interviewed appellant, Dr. Gelbort did not discuss the murder with appellant, that these deficits had nothing to do with why appellant murdered, that Dr. Gelbort has extensively worked for the defense, never for the prosecution, that he is not licensed in Missouri, that he was paid an extensive amount of money for his services, that appellant overall functions in the average range, and about his knowledge of appellant's sexual proclivities. Appellant was not prejudiced.

Teri Burns

Appellant, in his amended motion, also contended that his counsel was ineffective for failing to investigate and hire Teri Burns, a speech pathologist, who conducts psycho-educational evaluations (PCR.L.F.158-59). Teri Burns's testimony was basically that although appellant had difficulty in some areas, he had strength in other areas and that overall, he was in the "below average" range (PCR.Tr.151-71). Burns testified that although appellant may have had some difficulties from these deficits, appellant had held jobs, he read novels and magazines, and wrote poetry (PCR.Tr.185-86).

Counsel testified that he had not considered hiring a person like Burns, to conduct a learning disability evaluation, but that he had hired a child development expert who had evaluated appellant, but ultimately decided not to call her at trial (Exhibit 22 at 111-13). Counsel had never heard of Teri Burns (Exhibit 22 at 274).

The motion court found that counsel was ineffective for failing to investigate and call a learning disability expert to testify that appellant's "aptitude functioning is well below age level in a number of areas, and that his test results are consistent with the presence of a learning disability. Movant's fluid reasoning is that of an 11-year-old. Some of his math and writing skills are only at the level of a 12-or 13-year-old" (PCR.L.F.798).

The motion court clearly erred in granting this claim. First, the motion court failed to recognize that counsel conducted a thorough investigation into appellant's mitigation evidence including investigating over forty lay witnesses, hiring a psychologist and a

neuropsychologist to conduct evaluations of appellant, and a child development expert to evaluate appellant, and counsel investigated appellant's medical and school records. Counsel's investigation into mitigation was reasonable. *Strickland, supra*. Moreover, counsel had never heard of Burns and was not aware of her work. *Edwards v. State*, 200 S.W.3d 500,517 (Mo.banc 2006); *State v. Twenter*, 818 S.W.2d 628 (Mo.banc 1991)(counsel not ineffective for being clairvoyant and cannot call a witness of which they have no knowledge).

Moreover, appellant was not prejudiced by the absence of this evidence at trial. Although Burns stated that appellant had some deficits, she recognized that he had many strengths as well and that he had held jobs, that he was reading novels, and could write poetry and music lyrics. Burns's testimony established that appellant was an average person performing average tasks. The State would have been able to demonstrate all of this in cross-examination as well as the fact that appellant's learning deficits had no impact on his ability to be law abiding and did not cause him to commit this heinous murder. The motion court was clearly erroneous in finding that counsel's actions in investigating and presenting the penalty phase was unreasonable or that appellant was prejudiced by Burns's absence at trial.

Terry Martinez

Appellant alleged in his amended motion that his trial counsel was ineffective for failing to call Terry Martinez, a toxicologist, to testify during the penalty phase about appellant's consumption of alcohol on the night of the murder and the effect that the

alcohol had on him (PCR.L.F.160).

During the evidentiary hearing, Martinez testified that based on appellant's self-reporting, that between 2:00 pm. and 12:00 a.m. on the night of the murder, appellant drank approximately a fifth of tequila and sixteen beers (PCR.Tr.218). According to Mr. Martinez, appellant's blood alcohol would have been approximately .30, and a normal person that had consumed that much would have been impaired, walking into walls, falling down, but that due to appellant's tolerance of alcohol, he would have been impaired but not falling down (PCR.Tr.219-222). Martinez claimed that due to appellant's alcohol consumption, he would have loss of inhibition and would not be able to control normal inhibitory impulses (PCR.Tr.222). He also opined that appellant's memory would have been impaired, that appellant may have had a diminished thinking capacity, and that due to the alcohol consumption, appellant was "under the influence of extreme mental or emotional disturbance from a pharmacological or toxicological perspective" (PCR.Tr.223-224).

During cross-examination, Martinez admitted that his determination of appellant's alcohol level and functioning was based on appellant's recount of the amount of alcohol he had that night, that although appellant had claimed to have no memory of the night of the murder, that Martinez was aware that appellant had confessed to details of the crime, that appellant made the decision to kill the victim, that appellant was able to drive his car, that appellant was voluntarily consuming the alcohol, and that Martinez had not met with appellant at any time near the crime but had interviewed him more than four years after

the murder (PCR.Tr.226-236).

The motion court then questioned Martinez about the fact that appellant claimed to have no memory about the murder but that Martinez was relying on appellant's account (or memory) about the amount of alcohol that he had that night (PCR.Tr.238-239).

Martinez acknowledged that he had reviewed various reports that indicated that appellant may have had a lower amount of alcohol that night and that on the low end, appellant could have had an alcohol level of only .12 or .15, which only would have resulted in some loss of inhibition, maybe some aggression or inappropriate behavior (PCR.Tr.239). When asked his calculations were based on information from appellant only, Martinez answered "one way or another, yes" (PCR.Tr.237).

When asked during the evidentiary hearing why counsel did not consult a toxicologist, counsel explained that although they had considered hiring Mr. Martinez and had made initial contact with him, counsel believed that they would be able to admit evidence regarding appellant's alcohol consumption and the effects of that consumption through Dr. Smith (Exhibit 22 at 116-117). Counsel also testified that it was not until right before trial began that the defense decided that they could not call Dr. Smith because of the sexual issues (Exhibit 22 at 116-117).

The motion court granted appellant's claim finding that counsel was ineffective for failing to call Mr. Martinez to testify (PCR.L.F.800-801). The motion court found that counsel should have hired Mr. Martinez to do the evaluation because counsel decided not to call Dr. Smith to testify (PCR.L.F.800). The motion court found that the intoxication

evidence was a “helpful mitigating circumstance” and that Martinez would have been able to give testimony supporting the statutory mitigating circumstance that appellant’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and that he acted under the influence of extreme mental or emotional disturbance (PCR.L.F.801). The motion court found that Martinez had not relied on appellant’s account to come up with his analysis and that other independent accounts showed that appellant was “highly intoxicated” (PCR.L.F.801).

The motion court clearly erred in granting this claim. First, in regards to counsel’s investigation of appellant’s intoxication, counsel’s actions were reasonable. Counsel had hired Dr. Smith and had intended to rely on his testimony to demonstrate to the jury appellant’s intoxication and the effects that the intoxication had on appellant that night. However, right before trial, the issue of the sexual proclivities came up and counsel had to make a strategic decision of whether to call Dr. Smith. As discussed above, this decision was reasonable. This was not a failure to investigate an expert to testify as to appellant’s intoxication and its effects. Rather, this was counsel making an informed decision not to present this evidence because of the dangers of the expert’s other potential testimony. The motion court faults counsel for not consulting with Mr. Martinez when they decided not to use Dr. Smith. but that decision and the issues as to the sexual proclivities did not arise until right before trial. Counsel could not have known months in advance that this issue would arise and that they would be unable to use their expert and might need another one. Counsel conducted a reasonable investigation and due to

changes that occurred right before trial and during trial, counsel made an informed decision not to present this evidence.

Second, the motion court clearly erred in finding that appellant was prejudiced by Martinez's absence during the penalty phase. As the motion court noted at the evidentiary hearing, Martinez could not know exactly how much appellant had to drink that night or what his level of impairment was because his calculation was based on appellant's self-reporting, that appellant had claimed to have no memory of the night but could remember how much he had to drink, and that appellant had claimed to have no memory but he had confessed with details to the police. And, the jury was well aware of the amount of alcohol that appellant claimed to have drunk that night. An expert was not needed to testify that if someone has a fifth of tequila as well as sixteen beers that the person would be impaired, intoxicated, and could possibly blackout. Laypersons are well aware of the general effects of alcohol. Mr. Martinez's testimony would not have added anything to the penalty phase and thus, appellant was not prejudiced by his absence. Finally, alcohol consumption can be viewed as aggravating by a jury and counsel cannot be deemed ineffective for failing to introduce this evidence. *State v. Kenley*, 952 S.W.2d 250,262 (Mo.banc 1997)(even if offered as mitigating evidence, counsel cannot be ineffective for not putting such evidence on, as many jurors find that chemical abuse is an aggravating factor engendering no sympathy for the defendant); *see also Skillicorn v. State*, 22 S.W.3d 678,685 (Mo.banc 2000). The motion court clearly erred.

CONCLUSION

In view of the foregoing, respondent submits that this Court should affirm the denial of post-conviction relief as to guilt phase and all other issues denied by the motion court, and that the judgment granting appellant a new penalty phase should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 29,418 words (as determined by WordPerfect 9 software);

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

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of April, 2007, to:

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