No. SC89831

In the Supreme Court of Missouri

MARK A. GILL,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the New Madrid County Circuit Court
Thirty-Fourth Judicial Circuit
The Honorable J. Max Price, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant was convicted in New Madrid County Circuit Court of first-degree murder, kidnapping, armed criminal action, first-degree robbery, and first-degree tampering with a motor vehicle. For the murder, Appellant was sentenced to death. His convictions and sentences were affirmed on direct appeal, and Appellant subsequently filed a motion for post-conviction relief pursuant to Rule 29.15. Following an evidentiary hearing, Appellant's Rule 29.15 motion was denied.

Because the death penalty was imposed, this Court has exclusive jurisdiction. MO. CONST. art. V, § 3.

STATEMENT OF FACTS

In *State v. Gill*, 167 S.W.3d 184 (Mo.banc 2005), this Court recited the facts underlying Appellant's case as follows:

> The victim, Ralph Lee Lape, Jr., lived alone in rural Cape Girardeau County. During the summer of 2002, [Victim] allowed [Appellant] to live in a camper trailer on his property as a favor to a mutual friend. [Victim] spent the Fourth of July holiday weekend at Kentucky Lake, while [Appellant] and a friend, Justin Brown, remained at [Victim's] home. During this time, Brown looked through [Victim's] personal papers and learned that he had a large amount of money in his bank account. Brown and [Appellant] decided that they would kill [Victim] for his money, and on Saturday, July 6, they began preparations for the killing. They obtained a .22 pistol from [Victim's] home and bought a roll of duct tape, and they decided to "get him" in the garage because "once you pull in the garage can't nobody see."
>
> [Victim] arrived home from Kentucky Lake on Sunday, July 7, at approximately 5:30 p.m. [Appellant] and Brown, who were waiting in the garage, opened the garage door for him. After [Victim] stepped out of his extended cab pickup truck, [Appellant] and Brown "grabbed him," and [Appellant] told [Victim] that they "just wanted his money." [Victim]

pleaded to [Appellant], "You don't have to do this . . . I'll give you what you want. Mark, I ain't done nothing but try to help you." [Appellant] and Brown then bound [Victim] with plastic ties and the duct tape. They pushed up the backseat of [Victim's] truck and "slid him in." They divided $240 they found in a ziplock bag that [Victim] had been carrying. [Appellant] then put shovels in the back of the truck because he "knew what [he] was fixin' to do, [he] was going to hell."

[Appellant] drove the truck south on Interstate 55 as Brown held [Victim] down on the floorboard. After finding [Victim's] ATM bankcard in the truck, [Appellant] asked him for the pin number, and he told them the number "right off." [Appellant] and Brown drove [Victim] approximately 80 miles to a desolate cornfield near Portageville, where they took turns "knocking down corn" and "digging a hole." While one of them dug a hole, the other sat in the truck and watched [Victim]. After digging the hole, they took [Victim] out of the truck and removed the duct tape and plastic ties. Ignoring [Victim]'s pleas for mercy, [Appellant] and Brown pushed him into the hole. Then one of them pointed the .22 pistol at [Victim] and pulled the trigger, but the gun misfired. The trigger was pulled a second time, but there was another misfire. On the third try, the gun fired and shot [Victim] in the forehead, killing him. [Appellant] and Brown then "line him up in the hole" and removed all of his clothing and

jewelry. Before they buried [Victim], Brown "stepped on his head" in order to make it fit in the hole. [Victim] had a skull fracture that was "not caused by the bullet," three separate bruises on his head, bruising in his chest, and one of his ribs was completely broken in two.

After killing [Victim], [Appellant] and Brown changed clothes back at the house and withdrew money from [Victim's] bank account with his ATM card. They then drove to St. Louis, withdrew more money, and spent nearly a thousand dollars of the money at strip clubs. After spending the night at the Adam's Mark hotel in St. Louis, [Appellant] and Brown drove back to [Victim's] house, stopping along the way to withdraw more money from [Victim's] bank account.

Once at the house, [Appellant] and Brown began to dispose of the evidence. They dumped the shovels in a wooded area and burned their clothing and the clothing they had removed from [Victim's] body. They threw the gun, [Victim's] jewelry, and other evidence that would not burn into the Mississippi River. Then they drove to Paducah, Kentucky, abandoned [Victim's] truck in a hospital parking lot, and returned to [Victim's] house. When [Victim's] family members inquired about his whereabouts, [Appellant] and Brown told them that he was at Kentucky Lake.

Having withdrawn nearly all of the money from [Victim's] bank account that was accessible with an ATM card, [Appellant] and Brown used [Victim's] computer to transfer $55,000 from another account to the ATM-accessible account. After a friend told [Appellant] that there is no limit in Las Vegas on the amount of money that can be withdrawn from an ATM, [Appellant] and his girlfriend drove there and were married. [Appellant] withdrew approximately $1,600 from [Victim's] account while on the trip.

Ultimately, [Appellant] was arrested in New Mexico. He initially denied any involvement in [Victim's] disappearance and claimed he had permission to use the ATM card. However, he later confessed to planning and participating in the murder, but claimed it was Brown who shot [Victim].

Gill, 167 S.W.3d at 187-88.

Appellant was charged in New Madrid County Circuit Court with first-degree murder, §565.020, RSMo 2000;[1] kidnapping, §565.110; armed criminal action ("ACA"), §571.015; first-degree robbery, §569.020; and first-degree tampering, §569.080 (T.L.F. 138-42). On March 4, 2004, a jury found Appellant guilty on all counts (T.L.F. 281-83). Following evidence and argument in the

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[1] Further statutory references are to RSMo 2000 unless otherwise noted.

penalty phase, the jury found three statutory aggravating circumstances: (1) that the murder was committed for the purpose of obtaining money; (2) that the murder was committed while Appellant was engaged in kidnapping; and (3) that the murder involved depravity of mind (T.Tr. 1457). Pursuant to the jury's recommendation, Appellant was sentenced to death for Victim's murder (T.L.F. 284; T.Tr. 1743). For the robbery, ACA, kidnapping, and tampering offenses, Appellant received consecutive prison sentences of life, thirty years, fifteen years, and seven years, respectively (T.L.F. 284-85; T.Tr. 1473-74). This Court affirmed Appellant's convictions in *Gill*, 167 S.W.3d at 187.

Appellant sought post-conviction relief by a Rule 29.15 motion (PCR L.F. 33-358). Following an evidentiary hearing, the motion court (Judge J. Max Price) issued a detailed order denying each of Appellant's claims (PCR L.F. 470-503).

STANDARD OF REVIEW

This Court reviews the motion court's findings and conclusions denying post-conviction relief for clear error. Rule 29.15(k); *Forrest v. State*, No.SC89343, slip op. at 3 (Mo.banc June 16, 2009).[2] A judgment is clearly erroneous only if, after reviewing the entire record, the Court is left with a "definite and firm impression that a mistake has been made." *Id.* (citing *Goodwin v. State*, 191 S.W.3d 20, 26 (Mo.banc 2006)). The motion court's ruling is presumed correct. *Id.* (citing *Strong v. State*, 263 S.W.3d 636, 642 (Mo.banc 2008)). Additionally, this Court defers to the motion court's credibility determinations, as the motion court is in the best position to observe the witnesses. *Id.* at 19 (citing *State v. Simmons*, 955 S.W.2d 729, 747 (Mo.banc 1997)).

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[2] This opinion is not yet final.

ARGUMENT

I. (pornography on computer)

The motion court did not clearly err in denying Appellant's claim that the State violated its *Brady* obligation to disclose evidence by failing to inform the defense that sexually explicit images, movies, and instant messaging records were found on the computer that Appellant had stolen from Victim. Nor did the court clearly err in denying Appellant's claim that defense counsel was ineffective in failing to obtain the sexually explicit files. The files at issue were not relevant to Appellant's case, they were non-exculpatory, and had no mitigation value. Thus, while the entire contents of the computer were available for counsel's inspection, counsel reasonably chose not to spend time searching the computer. (Responds to Appellant's Points I, II, and III).

In his first point, Appellant argues that the State violated its *Brady* obligation[3] by failing to alert the defense to the fact that Victim's computer contained pornographic content. App.Br. at 44-59. Appellant argues in his second point that, alternatively, defense counsel was ineffective for failing to obtain the computer's contents prior to trial. App.Br. at 60-73. Finally,

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[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

Appellant contends in his third point that the motion court erred in finding that Appellant had failed to establish a sufficient foundation to admit Exhibit 92 (a CD to which the pornographic content had been copied) at the PCR evidentiary hearing. App.Br. at 74-86. For the reasons that follow, each of Appellant's points should be denied.

A. Facts

When Appellant was arrested in New Mexico, the arresting officers found a computer hard drive in the trunk of the car Appellant was driving (T.Tr. 962). The computer had belonged to Victim (PCR Tr. 641). Following Victim's murder, Appellant had used the computer to transfer funds from one of Victim's bank accounts to another, so that the funds would be accessible from an ATM (PCR Tr. 645). After police seized the computer, they examined the contents of the hard drive (PCR Tr. 640; PCR Ex.93, David James's depo., at 9).

Investigators found that an assortment of pornographic images and video files had been downloaded onto the computer (PCR Tr. 641; PCR Ex.93 at 23). Some of the images and movies appeared to depict child pornography or bestiality (PCR Tr. 621-23, 629-30, 641, 650-51). The files had been downloaded sporadically over the course of four months, from February to May 2002 (PCR Tr. 621-26, 646). The child pornography had been downloaded once and not viewed again (PCR Ex.95, Morley Swingle's depo., at 38).

In addition to the images and movies, the police found several transcripts of conversations that had taken place using an instant messaging program (PCR Tr. 619-20, 643-44). The conversations each involved an individual identified as "dogday_afternoon2002," who was using Victim's computer, and an unknown individual (PCR Tr. 619-20; PCR Ex.11 at 3850-63). During the chats, "dogday_afternoon2002" expressed a sexual interest in underage girls (PCR Ex.11 at 3851-63). In one conversation, "dogday_afternoon2002" claimed that he had a 17-year-old daughter named Megan (PCR Ex.11 at 3855-56). He wrote that he was sexually attracted to her and did "touchy feely" things with her (Ex.11 at 3855).

Each of these conversations occurred on July 2, 2002 (PCR Tr. 619-20, 643). Prior to that date, the profile "dogday_afternoon2002" had never been used (PCR Tr. 643-44). There was no way to know who had created the profile (PCR Tr. 642). After Victim's death, on July 9 and July 12, 2002, someone used the "dogday_afternoon2002" profile to send instant messages (PCR Tr. 644).

Shortly after Appellant's case began, defense counsel filed a discovery request seeking any information in the State's possession which tended to "negate the guilt of the defendant as charged, mitigate the degree of the offense charged, or reduce punishment" (T.L.F. 27-28). Neither the investigating officer nor the prosecutor believed that the sexually explicit content on Victim's computer was relevant to Victim's murder (PCR Ex.93 at 44-45; PCR Ex.95 at

23-24, 90). Nevertheless, the State informed the defense that it had possession of Victim's computer and may introduce it at trial (T.L.F. 91). Subsequently, defense counsel had an opportunity to view all the physical evidence at the sheriff's office (PCR Ex.95 at 30-31). The computer was sitting on a table, and defense counsel asked the prosecutor whether there was anything important on the computer (PCR Ex.95 at 31). The prosecutor replied, "You're welcome to look, but not that I know of" (PCR Ex.95 at 31).

Additionally, using a program called EnCase, the investigators prepared a report which listed the file folders that were stored on the computer (PCR Tr. 640; PCR Ex.93 at 18-20). This report was provided to defense counsel prior to Appellant's trial (PCR Tr. 176-78, 302; PCR Ex.72; PCR Ex.95 at 24-25).

Appellant never told his attorneys, prior to his conviction, that he had seen pornography on Victim's computer (PCR Tr. 192, 305-06). Nor did he ever hint that he suspected Victim of being a pedophile—Appellant consistently said, to his attorneys and to the police, that his motive for participating in Victim's murder was money (PCR Tr. 95-96, 191-92, 323, 535; PCR Ex.1 at 6, 25).

B. Analysis

1. *Brady* claim

Motion court's findings

After hearing the evidence, the motion court found that the State did not violate its obligation to disclose evidence pursuant to *Brady* when it did not specifically alert Appellant that pornography was on Victim's computer (PCR L.F. 498-99). First, the court found that the pornographic content was not relevant to Appellant's case (PCR L.F. 473, 499). It found that Appellant's theory of relevance in the guilt phase—that Appellant had found the pornography on Victim's computer and was so upset by it that he could not help but murder Victim—was an "obvious fabrication" (PCR L.F. 473, 482-83). The court also rejected Appellant's argument that the pornography would have been relevant to the penalty phase (PCR L.F. 476, 485-87). The court noted that Victim's character was not relevant to Appellant's culpability for the murder, and the victim impact testimony did not "open the door" to character evidence regarding Victim (PCR L.F. 474, 476-77, 485). The court was also not convinced that Appellant could have used the pornography to pressure the State into reducing the extent of the victim impact evidence offered (PCR L.F. 474, 486).

Second, the court found that the pornography was not exculpatory (PCR L.F. 473, 482, 485-87, 492). To the contrary, the court identified significant

evidence from the record that would have supported an argument by the State that Appellant himself had authored the sexually explicit chats about underage girls and Victim's daughter (PCR L.F. 482, 492). The court believed that the jury would have seen through Appellant's attempt to paint Victim as a pedophile and would have held such a tactic against Appellant (PCR L.F. 482-83).

Finally, the court concluded that the State did not attempt to withhold any evidence from the defense (PCR L.F. 484). Specifically, the State disclosed the contents of the computer by providing the EnCase report to the defense (PCR L.F. 484).

Discussion

The motion court's findings and conclusions denying Appellant's *Brady* claim are supported by the record and are not clearly erroneous. In *Brady*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87; *State v. Holden*, 278 S.W.3d 674, 679 (Mo.banc 2009).

a. The State fulfilled its disclosure obligation

In Appellant's case, the State fulfilled its *Brady* disclosure obligation by making the computer available for inspection by the defense and by providing an

EnCase report summarizing the computer's contents. Supreme Court Rule 25.07 authorizes two different mechanisms for disclosure in a criminal case:

> Unless otherwise ordered by the court, disclosure under Rules 25.03 through 25.06 shall be:
>
> (A) In a manner agreed to by the state and the defendant, or
>
> (B) By the party making disclosure notifying opposing counsel that the material and information to be disclosed may be inspected, obtained, tested, copied, or photographed at a specified time and place and whether suitable facilities are available.

Rule 25.07.

In response to Appellant's request for disclosures, the State informed Appellant that it had possession of Victim's computer and might introduce it in evidence at trial (T.L.F. 91). Subsequently, the State invited defense counsel to view all the physical evidence, including the computer, at the sheriff's department (PCR Ex.95 at 30-31). During the inspection, defense counsel asked the prosecutor whether there was anything important on the computer, and the prosecutor responded that he did not believe so, but that defense counsel was "welcome to look" (PCR Ex.95 at 31). By making the computer, including its contents, available for examination by the defense, the State fulfilled its obligation to disclose. The State went even further, however, disclosing to the

defense the EnCase report that listed the file directories saved on Victim's computer (PCR Tr. 176-78, 302; PCR Ex.72; PCR Ex.95 at 24-25).

Appellant suggests that it was not enough for the State to provide him access to all of the evidence—he argues that the prosecutor was affirmatively obligated to alert the defense that there was pornography on Victim's computer, whether or not the prosecutor believed that the pornography was relevant to Appellant's case. App.Br. at 48-49. This argument overstates the State's obligation pursuant to *Brady*. As this Court has recognized, *Brady* "does not require that the prosecuting attorney perform the investigation and preparation for trial which normally should be performed by defense counsel." *State v. Swiggart*, 458 S.W.2d 251, 253 (Mo. 1970).

Although Appellant does complain that the prosecutor did not disclose the sexual content on Victim's computer, this contention is contradicted by the record, which makes clear that the *entire* contents of Victim's computer were available to Appellant for review. Defense counsel chose not to spend time examining the contents of the computer. The State was not required to do defense counsel's work by identifying and highlighting particular data on Victim's computer that the State might guess would be of interest to the defense.

b. Pornography was immaterial

Additionally, the court did not clearly err in rejecting Appellant's *Brady* claim because the allegedly non-disclosed pornography was not material to

either the guilt or penalty phases of Appellant's trial. "Evidence is material 'only when there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed to the defense.'" *Holden*, 278 S.W.3d at 679 (quoting *State v. Salter*, 250 S.W.3d 705, 714 (Mo.banc 2008)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Storey v. State*, 175 S.W.3d 116, 141 (Mo.banc 2005).

(1) Guilt phase

"Evidence of a victim's character is generally inadmissible except in specific instances." *State v. Hall*, 982 S.W.2d 675, 681 (Mo.banc 1998). The "specific instances" in which victim character evidence is admissible appears to be limited to cases in which the defendant asserts self-defense:

> Where self-defense is an issue in a criminal case, the trial court may permit a defendant to introduce evidence of the victim's prior specific acts of violence of which the defendant had knowledge, provided the prior acts are reasonably related to the crime with which the defendant is charged. *In any other form*, the character of the victim is not relevant to the guilt of the defendant and may not be raised by any party.

State v. Isa, 850 S.W.2d 876, 895 (Mo.banc 1993) (emphasis added).

Appellant suggests that the non-disclosure of the pornography affected the guilt phase of his case because it prevented "a reliable determination" that

Appellant was guilty of first-degree, rather than second-degree, murder. App.Br. at 58-59. Although the argument is not developed in his brief, it appears that Appellant is suggesting that, had the jury been aware of the child pornography on Victim's computer, it might have found Appellant guilty of a lesser-degree of murder. This follows the argument Appellant made in his amended motion, where Appellant alleged that he knew about the pornography prior to Victim's murder (PCR L.F. 38). He alleged that he was so upset by his discovery of the pornography that he had a "diminished capacity" at the time of the murder (PCR L.F. 74, 84, 87-88).

First, Appellant's allegedly hostile response to his purported suspicion that Victim was a pedophile would not have justified the admission of the pornography at trial. As stated above, evidence offered to attack a victim's character is admissible *only* in cases where the defendant claims self-defense. *See Isa*, 850 S.W.2d at 895. Here, Appellant does not assert that the pornography would have supported a self-defense claim. Instead, he implies that the jury might have found that Appellant's culpability for the murder was lessened because Victim was allegedly a pedophile. Such a purpose does not fall within the narrow scope of cases in which evidence of a victim's character is admissible.

Moreover, Appellant's contention that he knew about the pornography prior to Victim's murder was refuted by the record (PCR L.F. 473, 482-83). Prior

to his conviction, Appellant never told anyone that he had seen pornography on Victim's computer or that he suspected Victim was a pedophile (PCR Tr. 192, 305-06). Instead, he repeatedly told his attorneys and the police that his motive for participating in Victim's murder was to steal Victim's money (PCR L.F. 456; PCR Tr. 95-96, 191-92, 323, 535; PCR Ex.1 at 6, 25). Only Appellant knew his personal motive for killing Victim. If the pornographic materials had been relevant to this motive (and Appellant's purported diminished capacity), it stands to reason that Appellant would have informed his attorneys and thereby given his attorneys a reason to sift through Victim's computer. Absent such a disclosure by Appellant to his attorneys, it is apparent that Appellant's alleged suspicion that Victim was a pedophile is a *post hoc* fabrication.

Additionally, the police were able to determine that the pornographic images were downloaded in the spring of 2002, before Appellant moved into Victim's home (PCR Tr. 646). None of the images were viewed in June or July of 2002, when Appellant resided with Victim (PCR Tr. 647). Thus, Appellant could not have seen the pornography before the murder took place. Because Appellant was not aware, prior to the murder, that there was pornography on Victim's computer, evidence of the pornography was not relevant during the guilt phase.[4]

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[4] Alternatively, if Appellant *did* know about the pornography prior to the murder, his *Brady* claim would fail because the prosecution "has no obligation to

Appellant also argues that the pornography was relevant during his guilt phase because it could have been used to rebut the prosecutor's characterization during opening statement that Victim was a "Good Samaritan" for allowing Appellant to live with him during the summer of 2002. App.Br. at 58-59. This argument fails for two reasons. First, taken in context, the prosecutor's reference to Victim as a "Good Samaritan" was not a statement about Victim's character, but instead was simply an attempt to explain why Appellant was living in Victim's house. The prosecutor said, "You're going to hear that the reason [Appellant and Victim] knew each other at all, was that [Victim] was being a good samaritan and was letting this man live on his premises, because [Appellant] was down and out and needed a place to stay" (T.Tr. 587). This remark was directly relevant to the case, as it established the relationship between Appellant and Victim prior to the murder. The prosecutor's comment did not give the defense *carte blanche* to assault Victim's character with alleged bad acts that were completely unrelated to the charged offense.

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disclose evidence of which the defense is already aware and which the defense can acquire." *Williams v. State*, 168 S.W.3d 433, 440 (Mo.banc 2005); *see also Holden*, 278 S.W.3d at 679-80 ("If the defendant had knowledge of the evidence at the time of trial, the state cannot be faulted for non-disclosure.").

Second, despite Appellant's assertions to the contrary, evidence that Victim had pornography on his computer would not rebut the prosecutor's reference to Victim as a "good samaritan." Rebuttal evidence is that which "tends to explain, counteract, repel, or disprove" evidence presented by the offering party. *See State v. Gardner*, 8 S.W.3d 66, 72 (Mo.banc 1999). As noted above, the prosecutor's remark was expressly based on the fact that Victim had taken Appellant into his home as a favor to a mutual friend (T.Tr. 587). The evidence of pornography in no way explains, counteracts, repels, or disproves that fact. The pornography thus had no relevance to Appellant's guilt phase.

(2) Penalty phase

Appellant also contends that the evidence of pornography was material during the penalty phase to rebut victim impact testimony that portrayed Victim as "Mr. Mom," a "saint," and of "Lincolnesque moral character." App.Br. at 49-59. But Appellant's argument misunderstands both victim impact testimony in general and the testimony offered in his case.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the United States Supreme Court held that "victim impact" evidence was admissible in the penalty phase of a capital murder trial to reflect the harmful effect that the murder had on the victim's loved ones. *Id.* at 819-25; *see also State v. Gill*, 167 S.W.3d 184, 195 (Mo.banc 2005). The impact evidence offered in *Payne* was from the victim's mother, who testified that her young grandson (the victim's son), missed his

mother and baby sister, both of whom were murdered by the defendant. *Payne*, 501 U.S. at 826. The Court found that the testimony "illustrated quite poignantly" the harm caused by the murder, and was admissible. *Id.*

The defendant in *Payne* argued that the admission of victim impact evidence invited jurors to find that defendants whose victims were assets to the community were more deserving of capital punishment than those whose victims were reprobates. *Id.* at 823. The Supreme Court disagreed, noting that "victim impact evidence is not offered to encourage comparative judgments of this kind... It is designed to show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." *Id.* Thus, victim impact evidence is not about the victim's good character or the contribution that the victim may have made to society—it is meant to remind the jurors that the victim was a unique individual, irrespective of his or her moral integrity, whose death inflicted a painful loss on his or her family.

During the penalty phase of Appellant's trial, several of Victim's family members, including his sister, brother, brother-in-law, and daughter, testified (T.Tr. 1170-1225). While the survivors did recall some of their personal memories of Victim and explained how his death would affect their lives, no one made the sweeping, general statements about Victim's moral uprightness that Appellant insists opened the door to a no-holds-barred assault on Victim's

character. For example, Appellant asserts that the survivors' testimony portrayed Victim as a "saint" (App.Br. at 44, 49-53), but no witness ever used that term. Instead, it was *Appellant's* counsel, David Kenyon, who testified at the evidentiary hearing that he thought Victim was "painted" as a "saint" during the trial (PCR Tr. 173).

Additionally, Appellant claims that the survivors portrayed Victim as having "Lincolnesque moral character." App.Br. at 52-53. He claims that Victim's brother read a quote from the Gettysburg Address "as epitomizing [Victim's] character." App.Br. at 53. But it is clear from the testimony that Victim's brother was not comparing Victim to Lincoln, but was instead using the quote to express his own feelings of loss. Victim's brother recounted a story from his childhood where Victim showed him kindness (T.Tr. 1219-20). Then he read the quote, "The world will little note, or long remember what we say here. But they will never forget what we did here" (T.Tr. 1221-22). Victim's brother was simply trying to explain that he would not forget the times he spent with Victim.

Appellant also points out that Victim's brother-in-law described the fascination with the "mythical west" that he and Victim shared. App.Br. at 52. Victim's brother-in-law testified that he and Victim learned "good life lessons" from their studies of the west, including "you don't cheat at cards, you don't start any trouble, but you stand up to it when it comes" (T.Tr. 1195). He described

these "lessons of the west" in the context of explaining his feeling of kinship with Victim—he did not say that Victim unfailingly followed those lessons.

Finally, Appellant complains that Victim's sister said that Victim sometimes reminded her of "Mr. Mom." App.Br. at 52-53. The context of this reference was Victim's sister's recollection that "the proudest and happiest day of [Victim's] life was the day his daughter Megan was born" (T.Tr. 1187). The characterization of Victim as "Mr. Mom" did not imply that Victim was a perfect human being, but rather that his sister remembered him as a loving member of the family.

The State's presentation of victim impact evidence does not open the door to a wholesale attack on the victim's character in response. Although Respondent has discovered no Missouri cases directly addressing this issue, courts in other states have refused to allow defendants to generally disparage the victim's character in response to victim impact evidence. In *State v. Powers*, 101 S.W.3d 383 (Tenn. 2003), the state presented evidence in the penalty phase of a capital murder trial regarding the impact of the victim's death on her three children. *Id.* at 402. The defendant, in response, argued that he had the right to rebut the victim impact evidence by producing evidence that the victim had engaged in extramarital affairs and had had difficulties in her marriage. *Id.* at 401. The Tennessee Supreme Court held that the trial court properly excluded the defendant's proffered evidence of the victim's bad character:

> We fail to see how evidence that the victim's personal life was less than ideal is relevant to rebut [evidence from the victim's children] or how it could mitigate [the defendant's] culpability for the crime. . . . [T]he purpose underlying the admission of victim impact evidence . . . [is] the need to provide justice for the victim. This goal would be completely undermined if we were to grant criminal defendants unfettered discretion to disparage the victim's character. . . .

Id. at 402. Accordingly, the Court rejected the defendant's argument that he should be permitted to rebut victim impact testimony by introducing evidence reflecting badly on the victim's character. *Id.*

Likewise, the California Supreme Court addressed this issue in a capital case where the girlfriend of a drug dealer had been shot to death in her home during a robbery. In *People v. Harris*, the victim's mother testified in the penalty phase as to her anguish and grief over the murder of her daughter. 118 P.3d 545, 558-59 (Cal. 2005). The defendant then tried to introduced evidence that the victim was "not the innocent victim portrayed by the prosecution but rather a person who made voluntary choices to live in a dangerous situation and maintain a lifestyle that contributed to her death." *Id.* at 575. The trial court refused to allow the defendant to attack the victim's character and, on appeal, the California Supreme Court affirmed:

> Testimony from the victims' family members was relevant to show how the killings affected them, not whether they were justified in their feelings due to the victims' good nature and sterling character. Accordingly, defendant was not entitled to disparage the character of the victims in rebuttal.

Id.; *see also Alvarado v. State*, 912 S.W.2d 199 (Tex.Crim.App. 1995).

This Court should follow the lead of the other states that have refused to allow defendants to attack the victim's character as a purported response to the specific harm described by victim impact evidence. The victim impact testimony presented during Appellant's penalty phase was not, as Appellant tries to suggest, an exposition on Victim's exemplary character. It was instead simply a statement from each survivor about how Victim was uniquely important to him or her and an expression of the loss each survivor felt as a result of Victim's death. Any evidence that Victim's computer contained pornography would not have rebutted the impact testimony that the survivors presented.[5] While the

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[5] During the pendency of Appellant's post-conviction motion, Victim's sister and brother-in-law testified that they were unaware of any allegations of sexual impropriety against Victim (PCR Ex.94 at 27, 49-50). Victim's daughter testified that her father had never done or said anything to her that was sexually

pornography may have smeared Victim's character, it would not have "counteracted or disproved" the feelings or memories that the survivors had about Victim. Thus, the motion court did not clearly err in finding that the pornography evidence would have been improper rebuttal evidence and was entirely immaterial to Appellant's case.

Finally, Appellant argues that even if the pornography evidence would not have been admissible, it still would have been useful to him because he could have used it as leverage to dissuade the prosecutor from eliciting glowing character evidence regarding Victim. App.Br. at 57-59. In support, Appellant points to the trial of Appellant's co-defendant, Justin Brown, in which defense counsel had obtained the pornography evidence. App.Br. at 57-59. Appellant claims that although the *Brown* defense attorneys were prevented from using the pornography at trial, they successfully limited the scope of the victim impact evidence. App.Br. at 57-59. Ultimately, Brown was sentenced to life without parole. App.Br. at 58.

But the record indicates that other factors, not the threat of the pornography evidence, accounted for the difference in victim impact testimony at Brown's trial. Significantly, the survivors were not permitted to read

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inappropriate, nor had she ever seen pornography when she used her father's computer (PCR Ex.94 at 40-41).

prepared statements during Brown's trial, whereas in Appellant's trial they did (PCR Ex.95 at 61). This alone may have accounted for the difference in testimony. And while the prosecutor did warn the survivors not to make any "broad statements of glorification" about Victim, he also told them "not to go any further than what was done in [Appellant's trial]" (Ex.95 at 49-50). Thus, the prosecutor prepared for the victim impact testimony in exactly the same way in both trials, without regard to Brown's counsel's access to the pornography. The motion court did not clearly err in finding that Appellant would not have been successful in attempting to use the pornography to pressure the State into limiting the victim impact testimony.

c. Pornography was not exculpatory

Finally, the motion court did not clearly err in finding no *Brady* violation with respect to the pornography because evidence that there was pornography on Victim's computer was not exculpatory. "Exculpatory evidence is evidence that is favorable to an accused." *State v. Phillips*, 940 S.W.2d 512, 516 (Mo.banc 1997). And, as noted above, the State is obligated to disclose only evidence that would be *favorable* to the defendant. *Brady*, 373 U.S. at 87.

Generally, Appellant's use of the pornography evidence would not have helped him simply because it had nothing to do with the murder or with sentencing, as explained in detail above. But if Appellant had chosen to present evidence that there was pornography on Victim's computer, it actually could

have hurt him because the State would have been able to suggest that Appellant, not Victim, was responsible for at least some of the pornographic content.

It appears that the pornographic images and movies were downloaded onto Victim's computer before Appellant moved into Victim's home and were not viewed again (PCR Tr. 621-26, 646-47). The sexually explicit chats, however, all occurred on July 2, 2002, while Appellant was living with Victim (PCR Tr. 619-20). Appellant insists that the author of those chats, "dogday_afternoon2002," was Victim. App.Br. at 76-86.

But the State could have persuasively argued that "dogday_afternoon2002" was actually Appellant, posing as Victim. Appellant had access to Victim's computer, and was easily able to masquerade as Victim online because Victim had written his passwords down on a piece of paper that he kept next to his computer (PCR Tr. 645, 648; PCR Ex.1 at 18). In fact, the record shows that Appellant *did* masquerade as Victim by accessing Victim's bank account online and transferring money into an ATM-accessible fund (PCR Tr. 645). Additionally, the sexually explicit chat transcripts had all been deleted (PCR Tr. 645). Had Victim authored the chats, there would have been no need to delete them—it was his computer. One could thus infer that someone else had participated in the chats, but then deleted the record to prevent Victim from discovering them. Further, Appellant knew that Victim had a daughter named

Megan, as Appellant recognized her and called her by name when she visited the house after her father went missing (PCR Tr. 657). Thus, Appellant could have authored the chat in which "dogday_afternoon2002" expressed sexual interest in "his" daughter, Megan.

Appellant points out that the images of child pornography were downloaded before he moved in with Victim. App.Br. at 85. He argues that "[b]ecause [Victim] placed on [Victim's] computer child pornography, it logically follows that [Victim] authored the chat stating that he had been sexually active with 13 and 15 year old girls." App.Br. at 85. But the motion court did not accept Appellant's assumption that Victim had necessarily downloaded the pornographic images (PCR L.F. 493). As Lieutenant James testified, although he *suspected* Victim was responsible, the images could have been downloaded by Victim "or someone in Victim's house at his computer" (PCR Ex.93 at 26, 48). And it is certainly possible that an unknown houseguest used Victim's computer to view pornography. As noted above, Victim left his passwords written right next to his computer, where anyone could obtain them (PCR Tr. 645, 648; PCR Ex.1 at 18). And Victim's willingness to invite people into his home, even while he was away, is apparent from the facts of this case—Appellant, whom Victim had just met, was permitted to stay at Victim's house over the Fourth of July weekend while Victim went to the lake (PCR Ex.1 at 3-4). Thus, while one might reasonably infer that because Victim owned the computer he probably

downloaded the pornography himself, the motion court did not clearly err in refusing to draw that inference.

Furthermore, Appellant also had an evident interest in pornography—after murdering Victim, he and his accomplice returned to Victim's home and purchased $300 worth of pay-per-view pornographic movies via Victim's satellite service (PCR 647-48). And perhaps most compelling, the chat profile "dogday_afternoon2002," which was used to participate in the sexually explicit chats on July 2, was used again on July 9 and 12—*after* Victim had been killed (PCR Tr. 644). Based on this evidence, the State could argue that Appellant authored the chats, and was trying to portray Victim at trial as a sexual deviant to escape responsibility for the murder. The motion court did not clearly err in finding that the pornography evidence was thus not only immaterial, but was potentially *unfavorable* to Appellant.

Because the pornography was adequately disclosed to Appellant, was immaterial to his guilt and penalty phases, and was not favorable to his defense, the motion court did not clearly err in finding that the State did not violate its *Brady* obligation.

2. Ineffective Assistance – discovery of the pornography

As an alternative to his *Brady* claim, Appellant argues that his defense counsel was ineffective for failing to conduct an adequate investigation into the contents of Victim's computer. App.Br. at 60-73.

Motion court's findings

The motion court rejected Appellant's claim of ineffective assistance relating to counsel's failure to discover the pornography on Victim's computer (PCR L.F. 499). The court found that counsel had no reason to expect that pornography would be on Victim's computer, nor would reasonable counsel search for such information because it would have been of tenuous value (PCR L.F. 475-76). The court also found that no reasonable attorney would have seriously considered using the evidence at trial because of the significant risk that doing so would alienate the jury (PCR L.F. 486-87).

Additionally, the court found that Appellant was not prejudiced by counsel's failure to discover the pornography because the evidence would not have been admissible during the guilt or penalty phase, it might have hurt Appellant had it been admitted, and it could not have been used to dissuade the prosecution from developing victim impact testimony (PCR L.F. 476, 486, 492-93).

Discussion

To prevail on a claim of ineffective assistance of counsel, a post-conviction movant must satisfy the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the movant must show that counsel failed to exercise the level of skill and diligence that a reasonably competent attorney would exercise in a similar situation. *Strickland*, 466 U.S. at 687; *Strong*, 263 S.W.3d at 642. Second, the movant must show that counsel's failure prejudiced movant. *Id.* "Prejudice occurs when a reasonable probability, 'sufficient to undermine confidence in the outcome,' exists that 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Forrest*, No.SC89343, slip op. at 3 (citing *Goodwin*, 191 S.W.3d at 25). With respect to a capital sentence, a movant shows prejudice if he proves there is a "reasonable probability that, but for counsel's deficient performance, the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death." *Id.* (citing *State v. Kenley*, 952 .S.W.2d 250, 266 (Mo.banc 1997)).

Trial counsel is presumed to be effective, and movant bears the burden of proving otherwise. *Forrest*, No.SC89343, slip op. at 4. As the United States Supreme Court explained in *Strickland*,

> 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.... Because of the difficulties in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound strategy.

466 U.S. at 689 (citations omitted). "Reasonable choices of trial strategy, no matter how ill fated they appear in hindsight, cannot serve as a basis for ineffective assistance." *Clayton v. State*, 63 S.W.3d 201, 206 (Mo.banc 2001).

a. Performance

The motion court did not clearly err in finding that defense counsel's failure to discover the pornography on Victim's computer did not render their services below "the level of skill and diligence" of a reasonably competent attorney in a similar situation. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. In an ineffective assistance case, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* Counsel is not ineffective for declining

to expend the limited resources available to seek out information or develop an argument that he or she has no reason to believe will be useful or effective. *See State v. Brown*, 902 S.W.2d 278, 299 (Mo.banc 1995) (counsel not ineffective for failing to prepare rebuttal evidence where there was no reason to believe that a "particular effort on counsel's part would have produced an effective defense").

Appellant's trial counsel reasonably decided not to spend time searching the contents of Victim's computer for evidence to besmirch Victim's character. Importantly, when defense counsel entered their appearance in Appellant's case, Appellant had already confessed to the murder and admitted that his motive was to steal Victim's money (T.Tr. 835, 865; PCR Ex.1 at 9-10, 25). Appellant never said a word to counsel about there being pornography on Victim's computer or about suspecting that Victim was a pedophile (PCR Tr. 191-92, 305-06, 322-23). Thus, defense counsel had no reason to believe that there was pornography on Victim's computer or, more importantly, that it would matter. As defense counsel Kenyon testified at the evidentiary hearing, his focus "just simply was not on whether there would have been pornography on the computer" (PCR Tr. 178). Instead, he was "really so very focused on trying to discover whatever incriminating evidence there might be on [Appellant]" (PCR Tr. 178). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. "Counsel's actions are usually based, quite

properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.*

Appellant claims that a reasonable lawyer would have deposed Lieutenant David James, the officer-in-charge of Appellant's investigation, and that, had defense counsel done so, they would have discovered that Victim's computer contained pornographic content. App.Br. at 64-68. But, given the circumstances of Appellant's case, counsel had no reason to expect that Lieutenant James had any information that was important to Appellant's case. It appeared from the police reports that James's involvement in Appellant's case primarily consisted of assigning leads to other officers (PCR Tr. 138). Counsel testified that it is usually better to interview the officers who did the actual investigating, rather than the officer-in-charge (PCR Tr. 138). At the evidentiary hearing, counsel re-examined each of the reports on which James's name appeared and concluded that nothing therein would have signaled a need to interview James (PCR Tr. 123-49, 296-301). As attorney Kenyon said, "Had we unlimited time and resources, sure, we would have wanted to interview everybody who was even remotely affiliated with this case, but you have to prioritize" (PCR Tr. 149). It was not unreasonable, given the information available to counsel and the circumstances of Appellant's case, to opt not to interview Lieutenant James.

Appellant also argues that if counsel had carefully reviewed the EnCase report, they would have concluded that there was pornography on Victim's

computer and would have demanded to see the computer's complete contents. App.Br. at 66-67. But counsel testified that they did review the EnCase report, and although some of the file names were provocative and may have indicated the presence of pornography, it was not at all clear that the material was child pornography or otherwise obscene (PCR Tr. 167-69, 177, 302-03). And, as counsel Turlington said, the possibility that there was pornography on Victim's computer "just really wouldn't be something that [she] would be concerned about . . . in this case" (PCR Tr. 305). Because counsel had no reason to believe that there were illicit materials on Victim's computer, and because counsel had no reason to expect that such material would be relevant to Appellant's case (*see* Part I.B.2.b., *infra*), the motion court did not err in finding that it was reasonable for counsel to decide not to spend further time examining the contents of Victim's computer.

b. Prejudice

Even if this Court finds that counsel should have obtained and reviewed the entire contents of Victim's computer, Appellant's ineffective assistance claim would still fail because Appellant suffered no prejudice as a result of counsel's failure to obtain the pornography. As explained in detail in Part I.B.1, *supra*, evidence that Victim's computer contained pornography would not have been admissible in either Appellant's guilt or penalty phases because it would have constituted improper character evidence and would not have been proper

rebuttal to the victim impact testimony. Because the evidence would have been inadmissible, counsel was not ineffective for failing to obtain and attempt to use it. *See Williams*, 168 S.W.3d at 441 (Counsel is not ineffective for "declining to investigate and introduce inadmissible evidence").

Appellant analogizes his case to *Gennetten v. State*, 96 S.W.3d 143 (Mo.App.W.D. 2003), in which the Western District Court of Appeals found trial counsel ineffective for failing to interview and call to testify a material witness. In *Gennetten*, the defendant was charged with the second-degree murder of his girlfriend's fifteen-month-old daughter. *Id.* at 145. At trial, the state offered medical testimony that showed that the victim had suffered a fatal brain injury consistent with shaken baby syndrome. *Id.* at 145-46. The state also offered evidence that the victim had suffered a series of severe burns, which its experts testified were consistent with an intentionally inflicted injury. *Id.* The state argued that the jury should consider the burns as evidence of the defendant's intent to harm when he shook the victim. *Id.* at 147. Following his conviction, the defendant filed a motion for post-conviction relief in which he alleged that counsel was ineffective for failing to call a doctor who examined the victim's burns and concluded that there was no indication that the burns were deliberately inflicted. *Id.* at 149. The Western District Court of Appeals held that counsel was ineffective for failing to call the doctor to testify because 1) counsel knew about the doctor, 2) he was available and willing to testify, and 3)

his testimony would have provided the defendant with a viable defense. *Id.* at 148-49.

Appellant's case is distinguishable because, unlike the doctor's testimony in *Gennetten*, the evidence that there was pornography on Victim's computer would not have provided Appellant with a viable defense. It is not a defense to murder, absent a specific claim of self-defense, that the victim had a bad character. *See Hall*, 982 S.W.2d at 681. And even if a defendant could escape liability for murder by proving that he had discovered that the victim was a villain, such a defense would not have applied in this case because, as the motion court explicitly found, Appellant did not know about the pornography prior to the murder (PCR L.F. 473, 482-83).

Moreover, the trial court believed that, for strategic reasons, defense counsel would not have used the pornography even had they obtained it (PCR L.F. 487). Attorney Kenyon testified that having evidence of the victim's bad character would put the defense in a "precarious position" because they would not want to be perceived as "kicking a corpse" (PCR Tr. 172). He explained that "[i]n penalty phase, you don't try and slam a victim by showing bad things that the victim may have done. That generally doesn't go over well with juries" (PCR Tr. 172). Attorney Turlington echoed Kenyon's point, agreeing that there is a significant risk to the defendant if the defense tries to "trash the victim" too much (PCR Tr. 320). While both Kenyon and Turlington speculated that they

might have been able to make the jury aware of the pornography to rebut or limit the State's positive portrayal of Victim, the motion court found that their explanations were half-hearted and not credible, and that neither would have "seriously considered" introducing the pornography (PCR L.F. 487). Thus, the motion court's finding that counsel was not ineffective for deciding not to search the computer's contents for pornography was supported by the record and was not clearly erroneous.

3. Foundation

Appellant's final claim relating to the pornography on Victim's computer challenges the motion court's evidentiary ruling excluding PCR Exhibit 92—the CD on which the pornography was stored—for lack of foundation. App.Br. at 74-86. In its findings, the motion court concluded that Appellant failed to lay a sufficient foundation for admission of the pornographic images because he failed to demonstrate that Victim was the person who downloaded them (PCR L.F. 493).

Although Appellant presents this argument as a distinct point, it is inseparable from his *Brady* and ineffective assistance claims regarding the pornography. The motion court's exclusion of the exhibit matters only to the extent that it impacted the court's findings with respect to the merits of Appellant's substantive claims. This is manifest in Appellant's request for relief

on this point—he does *not* request that this Court vacate his convictions if it finds the motion court erred in its evidentiary ruling. App.Br. at 86. Instead, he refers the Court back to Points I and II, and asks that the Court reverse based on those claims. App.Br. at 86. And, as argued above, the motion court's denial of Appellant's *Brady* and ineffective assistance claims was supported by the evidence and was not clearly erroneous irrespective of whether the court was correct in refusing to admit PCR Ex.92.

Even though the images themselves were excluded from evidence for lack of foundation, all the evidence necessary for the motion court to resolve Appellant's claims *was* admitted. Both the defense expert and Lieutenant James testified that they discovered pornography, including child pornography, bestiality, and explicit chat transcripts, on Victim's computer (PCR Tr. 619-23, 629-30, 641-44, 650-51; Ex.93 at 23). There seemed to be no dispute, for the purposes of the evidentiary hearing, that the material was, in fact, illicit pornography. Thus, PCR Ex.92, containing the actual pornographic material, added nothing to the evidentiary picture—it was wholly cumulative of the testimonial evidence that had already been admitted. Where excluded evidence is cumulative of other properly admitted evidence, the exclusion could not have contributed to the outcome of the proceeding and is thus harmless beyond a reasonable doubt. *See State v. Lloyd*, 205 S.W.3d 893, 904 (Mo.App.S.D. 2006). Here, the motion court was able to fully consider the points raised in Appellant's

motion based on the testimony provided, without viewing the actual pornography. Thus, the court's evidentiary ruling as to lack of foundation for PCR Ex.92, whether or not it was correct, did not prejudice Appellant and does not warrant reversal.

II. (court's adoption of State's proposed findings)

Appellant is not entitled to relief based on his allegation that the motion court failed to exercise independent judicial judgment by adopting the State's proposed findings of fact and conclusions of law because: 1) Appellant has failed to provide an adequate record to prove that the court did, in fact, adopt the State's proposed findings; 2) Appellant has failed to preserve this issue for appellate review in that he did not object to the State's proposed findings nor did he timely file a motion to correct any alleged errors in the court's judgment, and; 3) Appellant has failed to develop sufficient "independent evidence" to prove that the motion court did not "thoughtfully and carefully consider" his claims. (Responds to Appellant's Point IV).

Appellant argues that the motion court committed constitutional error by adopting the proposed findings of fact and conclusions of law submitted by the State without exercising "independent judicial judgment." App.Br. at 87-97. To support his contention, Appellant identifies portions of the court's findings that he believes were inconsistent with the evidence presented and concludes that the errors demonstrate a lack of independence on the part of the court. App.Br. at 87-97. For the reasons that follow, Appellant's point should be denied.

1. Record on appeal is insufficient to permit review

Although Appellant asserts that the motion court simply "signed" the State's proposed findings, he has failed to include a copy of the proposed findings in the record. As a result, this Court is unable to compare the motion court's findings to the State's findings to determine whether the court adopted the State's proposal verbatim or whether the court made changes. It is the "appellant's duty to ensure that the record on appeal includes all the evidence and proceedings necessary for determination of the questions presented." *State v. Sumowski*, 794 S.W.2d 643, 646 (Mo.banc 1990); Rule 30.04(c). Without an adequate record, the merits of Appellant's point cannot be considered.

2. Claim is not preserved for appeal

In addition, Appellant failed to preserve his claim because he did not timely object to the State's findings or file a motion to correct the motion court's judgment. "To preserve appellate review, constitutional claims must be made at the first opportunity." *State v. Kenley*, 952 S.W.2d 250, 260 (Mo.banc 1997). "The purpose of the timeliness rule is to allow the trial court the opportunity to correct errors and avoid prejudice in the first instance." *Id.* In *Kenley*, the defendant argued, as Appellant does here, that the post-conviction motion court erred "by adopting in whole the State's proposed findings as the amended

findings of the court," contending that the findings "did not reflect an independent judicial evaluation of the evidence." *Id.*

This Court found that the *Kenley* defendant had failed to preserve his point for appeal. *Id.* The Court observed that the defendant was given an opportunity to submit proposed findings and was supplied a copy of the State's proposed findings, but declined to propose any findings of his own and did not object to the State's proposal. *Id.* The Court also noted that the motion court retained control over its judgment for thirty days after entry of judgment, during which time the defendant could have asked the court to reopen its judgment to correct any alleged errors. *Id.* The defendant did not do so. *Id.* This Court concluded that, "[b]ecause [the defendant] did not timely object to the motion court's action, any issue regarding the motion court's adoption of the prosecutor's proposed findings of fact and conclusions of law is not preserved for appellate review." *Id.*

In an order dated June 19, 2008, the motion court requested that both Appellant and the State submit proposed findings no later than September 30 (PCR Tr. 666; PCR L.F. 399). On September 29, Appellant filed his own set of proposed findings of fact and conclusions of law (PCR L.F. 4). It does not appear, however, that Appellant objected to the State's proposed findings (PCR L.F. 4). More importantly, nothing in the record indicates that Appellant objected to the motion court's findings, conclusions, and judgment by filing a

motion to modify the court's judgment once it was entered (PCR L.F. 4). As a result, Appellant failed to preserve for appellate review any claim regarding the motion court's alleged adoption of the State's proposed findings.

3. Purported errors do not demonstrate lack of independent judicial evaluation

In any event, the record does not support Appellant's claim that the motion court committed constitutional error in adopting the State's proposed findings of fact and conclusions of law. "In the absence of independent evidence that the court failed to thoughtfully and carefully consider the claims, 'there is no constitutional problem with the court adopting in whole or in part the findings of fact and conclusions of law drafted by one of the parties.'" *State v. Link*, 25 S.W.3d 136, 148 (Mo.banc 2000). "Moreover, a minor error in the motion court's findings does not establish that the court did not carefully consider the state's proposed findings." *Id.* (finding that the presence of five alleged errors in the court's findings did not establish that the court failed to thoughtfully and carefully consider the claims); *see also State v. Ferguson*, 20 S.W.3d 485, 510 (Mo.banc 2000) (finding no evidence that the court failed to carefully consider the claims even though the court entered its judgment on the same day that the proposed findings were submitted). The court's findings, "though not the product of the district judge's mind, are formally his; they are

not to be rejected out-of-hand, and they will stand if supported by evidence." *Kenley*, 952 S.W.2d at 261 (citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964)); *see also Lyons v. State*, 39 S.W.3d 32, 43 (Mo.banc 2001) ("[B]ecause the motion court issued valid findings and conclusions supported by the evidence, the motion court did not clearly err merely because it adopted the findings and conclusions drafted by the state.").

To support his claim that the motion court's findings demonstrated a lack of independent judicial consideration, Appellant picks out several findings that he insists were contrary to the evidence. But the findings that Appellant identifies as erroneous either contained minor errors only or were not erroneous at all.

a. Officer James's assumptions about source of pornography

The motion court found that the evidence presented by Appellant was insufficient to demonstrate that Victim had downloaded the pornographic images and videos onto his computer or that Victim had authored the sexually explicit chats (PCR L.F. 474, 492-93, 495-97). Appellant claims that this finding was "expressly contrary" to Officer James's testimony "that [Victim] authored the sexual chats and that James' [*sic*] concluded [Victim] was 'a pervert.'" App.Br. at 87-91. Appellant's argument misrepresents James's testimony.

Appellant states that James testified that he had "concluded from his analysis of [Victim's] computer that [Victim] authored the sex chats and not

anyone else." App.Br. at 88. This is incorrect. In fact, James testified that "[I]t's always a problem putting someone at a computer keyboard. But it was my *assumption* that it was [Victim] carrying on these conversations, based on several things. . ." (PCR Ex.93 at 26) (emphasis added). James explained that he assumed that the chats were carried on by Victim because the author of the chats had used Victim's user ID (PCR Ex.93 at 26). But other evidence suggested that someone *other than* Victim was using Victim's ID. For example, Victim's passwords were written down next to his computer, and Victim's chat account was accessed at least twice after his death (PCR Tr. 644-45, 648; PCR Ex.1 at 18). The motion court was not obligated to accept Lieutenant James's assumption that Victim had participated in the sexually explicit chats, especially in light of the evidence suggesting otherwise.

Appellant also points out that James testified that "there was nothing in [Victim's] computer to link [Appellant] to placing the child pornography on [Victim's] computer." App.Br. at 88. But James testified that he could not be sure that Victim had put the child pornography there either. As he explained during his deposition, because the pornography was downloaded before Appellant moved in with Victim, James assumed that either Victim "*or someone in [Victim's] house at his computer*" was responsible (PCR Ex.93 at 48) (emphasis added). The motion court did not clearly err in finding that this

equivocal testimony would have been insufficient to prove that Victim was a pedophile.

Finally, Appellant states that Lieutenant James "concluded [Victim] was 'a pervert.'" App.Br. at 87. But again, Appellant takes James's comment out of context. During his deposition, James was asked whether he felt obligated to inform the prosecutor or the defense when he discovered pornography on Victim's computer (Ex.93 at 38). James replied, "Well, I thought, I don't know what it's got to do with anything. But I knew [Victim]. I didn't know he was a pervert until I got his computer" (Ex.93 at 38). The significance of this testimony is not that James "concluded" that Victim was "a pervert"—it is clear from the surrounding testimony that James simply assumed that Victim was responsible for the pornography because the material was on Victim's computer and Victim's user accounts were accessed. James's "pervert" comment was intended to communicate that he did not think that Victim was the sort of person who would have child pornography on his computer. This does not qualify as a "conclusion" that Victim was a "pervert." And, as explained in greater detail in Part I.B.1.c., *supra*, the record was sufficient to support the motion court's finding that the pornography was not necessarily attributable to Victim. Thus, James's testimony did not "expressly contradict" the motion court's findings and does not cast doubt upon the court's independent evaluation of the evidence.

b. Swingle's testimony about pornography at *Brown* trial

The motion court found that "[i]n the Justin Brown case, the [pornography] evidence was fully revealed prior to trial but was excluded and ruled irrelevant" (PCR L.F. 485), relying on prosecutor Swingle's deposition testimony. Appellant points out that Swingle was more descriptive, testifying that "the judge ruled that [the evidence] was irrelevant unless the victim impact witnesses went so far in saying good things about the victim, and the judge used the phrase that he walks on water or that he's a saint, that it would open the door to cross-examination on that, about the bad stuff on the computer" (Ex.95 at 46-47); App.Br. at 91. For its part, the motion court was not required to provide a verbatim account of the *Brown* court's ruling, nor was it compelled to agree with the *Brown* court's implication that victim impact evidence, no matter how laudatory, *could* open the door to an unbridled attack on a Victim's character. In any event, the motion court's finding that the pornography evidence was ruled to be irrelevant in *Brown* was accurate and lends no support to Appellant's allegation that the motion court failed to exercise independent judgment.

c. Search of Victim's residence

The motion court also found that "a search of [Victim's] home found no evidence whatsoever of any pornography" (PCR L.F. 492-93). Appellant claims that the court could not have independently reached this conclusion because

"[Appellant's] counsel has found no record evidence to support such a search was done." App.Br. at 92. But Exhibit 61, which was filed with this Court by Appellant, reveals that police did search Victim's residence no fewer than three times following the murder. Exhibit 61 is a memorandum prepared by the defense which memorializes the defense team's visit to the sheriff's department to inspect the physical evidence (PCR Ex.61). The memorandum notes that multiple items were available for inspection that had been "seized from [Victim's] house" on July 29-30 and August 2, 2002 (PCR Ex.61). The memorandum does not note that pornography was found during the searches (PCR Ex.61). Thus, the motion court's finding was supported by the record.

d. Cates's testimony regarding Victim's departure for the lake

The motion court found that Victim left his home on July 2, 2002, to go to the lake for the Fourth of July weekend (PCR L.F. 492). The court found that this fact would have added support to the State's potential argument that Appellant, not Victim, had authored the sexually explicit chats on July 2 (PCR L.F. 492). Appellant points out that Scott Cates's testimony, which was cited by the court to establish Victim's departure date, indicated that Victim had left on July 3, 2002, rather than July 2. App.Br. at 92; (PCR Ex.97 at 59-60).

Although Appellant is correct that Cates testified that he thought Victim arrived at the lake on July 3, the motion court's finding that Victim left on July 2 nevertheless finds support in the record and was not clearly erroneous.

Significantly, Cates was very uncertain with respect to the dates that he and Victim arrived at the lake—he said that he did not remember exactly when he arrived at the lake, but "if [he] remember[ed]," Victim arrived at the lake on July 3 (PCR Ex.97 at 59-60).

Another witness, however, indicated that Victim had left town before July 3. David Donley, a realtor in Cape Girardeau county, testified at trial that he met with Victim on July 1 or 2 to discuss selling Victim's home (T.Tr. 695-96). Victim said that he was headed out to the lake for the weekend, and that he needed Donley to show him some homes that day because he was going to leave soon after (T.Tr. 696). Based on this testimony, it was not clear error for the motion court to find that Victim had left for the lake on July 2. The court's citation to Cates's testimony, without citation to other portions of the record for additional support, was a non-substantive, minor error that does not suggest a lack of independent judgment.

e. Defense counsel's testimony regarding use of pornography evidence

As part of its finding that counsel was not ineffective for failing to obtain the evidence of pornography, the court recalled that counsel had testified that "they could not ethically argue that [Victim's] life had less value even if they had evidence that he might have been a pedophile" (PCR L.F. 476). Appellant protests that although counsel testified that such an argument would be unwise, they never said that it would be unethical. App.Br. at 92.

Appellant is correct in his assertion that counsel did not expressly testify that it would be *unethical* to argue that Victim's life was less valuable because there was evidence that he might have been a pedophile (PCR Tr. 198, 319). But counsel went further than simply saying that it would be unwise to make such an argument. Attorney Kenyon testified that he "would never" argue that his client should be spared the death penalty because "the victim was a bum" (PCR Tr. 197). And attorney Turlington acknowledged that a defense attorney would not be permitted to argue that a defendant should not receive the death penalty because the victim was a criminal (PCR Tr. 319). Like all attorneys, Kenyon and Turlington are ethically bound to zealously advocate for their client. If, as Kenyon testified, he "would never" argue the victim's bad character because of the high possibility that it would damage his client, then it follows that such an argument would be unethical—it would violate his ethical duty to advance his client's interests. Therefore, even though Kenyon and Turlington would not use the term "unethical" to describe the type of argument at issue, it was not clear error for the motion court to characterize it as such.

f. Typographical errors

Finally, Appellant attacks the independence of the motion court's findings by identifying a handful of typographical errors therein. App.Br. at 94-97. As noted above, minor errors do not establish that the court failed to independently evaluate the evidence when considering the proposed findings. *Link*, 25 S.W.3d

at 148. And it is difficult to imagine errors more minor than those complained about by Appellant (e.g. mistakenly referring to Scott Cates as "Scott Cate," or misspelling Cherie Rone's name as "Cheri"). That the court mistakenly spelled witness Arvil Skinner's name "Arzil" reveals nothing about the court's consideration of the evidence or the validity of the conclusions that it reached. The court's judgment should not be discarded simply because a few typographical errors survived to the final draft.

4. Record shows that court was actively engaged in case

Not only were the substantive findings of the motion court supported by the evidence, there are indications in the record that the court was actively following the testimony presented and was capable of conducting an independent evaluation. For example, after proposed mitigation specialist Cessie Alfonso described in detail the manner in which Appellant's grandmother sexually exploited Appellant's mother before Appellant was born, Alfonso paused and asked, "Am I making any sense here?" (PCR Tr. 56). The court responded, "Not a whole lot to the Court, but you're answering his questions. Maybe you can tie it together later on" (PCR Tr. 56). In its subsequent findings, the court observed that the relevance of the social history provided by Alfonso was unclear, and that the testimony was rambling and difficult to understand (PCR

L.F. 479). There is no reason to believe that the finding reflected anything but the court's own evaluation of the evidence.

Similarly, after investigator Catherine Luebbering testified about the effects that Appellant's family members had on Appellant as he was growing up, the Court asked Luebbering a follow-up question to ensure that it understood her testimony (PCR Tr. 414-15). The court was clearly paying close attention to the evidence and was able to reach its own conclusions. The court requested proposed findings from both parties by September 30, 2008 (PCR Tr. 666; PCR L.F. 399), and did not enter its judgment until October 8 (PCR L.F. 4), allowing itself more than a week to evaluate the evidence and consider the parties' proposals. Appellant has failed to present independent evidence that the court failed to thoughtfully and carefully examine his claims. The court did not clearly err in adopting the State's proposed findings (to the extent that it did so) after its careful review. Appellant's point should be denied.

III. (alleged prosecutorial misconduct)

The motion court did not clearly err in denying Appellant's claim that prosecutor Morley Swingle committed prosecutorial misconduct by discussing with defense attorneys the possibility of a plea agreement in which the State would agree not to seek the death penalty if Appellant provided information which led to the prosecution of Pat Davis. Despite Appellant's assertions to the contrary, the record clearly shows that Swingle participated in the negotiations in good faith, but ultimately decided not to make an offer because Appellant was unable to provide actionable information against Davis. (Responds to Appellant's Point V).

Appellant argues that, prior to his trial, prosecutor Morley Swingle engaged in prosecutorial misconduct by purposely misleading defense counsel into thinking that the State would agree to waive the death penalty if Appellant provided information that would permit the prosecution of attorney Pat Davis, an acquaintance of Appellant. App.Br. at 98. Appellant claims that Swingle knew that such a deal would never be made because Victim's family felt strongly that the death penalty should be pursued. App.Br. at 106. The record, however, unequivocally demonstrates that Swingle was genuinely interested in the possibility of a plea agreement and would have made a plea offer if Appellant

had been able to provide incriminating, verifiable information against Pat Davis. Appellant's accusation that Swingle engaged in "deception" is utterly unfounded and should be rejected.

A. Facts

In late 2002 and early 2003, while Appellant's case was awaiting trial, defense attorney Dee Berman spoke with prosecutor Morley Swingle about the possibility of a plea agreement (PCR L.F. 449-50; PCR Ex.95 at 73). Appellant claimed that he had incriminating information about a local attorney, Pat Davis, and would be willing to cooperate in Davis's prosecution if the State would agree not to seek the death penalty in Appellant's case (PCR L.F. 450-52; Ex.95 at 74-75). Swingle informed defense counsel that he was interested in hearing what Appellant had to say, but would not guarantee a plea offer (PCR Ex.95 at 74, Depo.Ex.1-Swingle's 1/9/03 letter). Evidently, Appellant's original defense counsel spent a significant portion of their time trying to develop information about Pat Davis (PCR L.F. 431-39, 452-53).

By late April 2003, defense counsel indicated to Swingle that they were thinking about seeking a continuance because they had spent so much time investigating Pat Davis that they had not sufficiently prepared for Appellant's trial (PCR Ex.95 at 79). At that point, the trial was scheduled for September 2003 (PCR Ex.95, Depo.Ex.2-Swingle's 4/22/03 letter to Berman). Swingle told

defense counsel that he would oppose any request for a continuance, pointing out that the trial had been set nine months in advance and was still five months away (PCR Ex.95, Depo.Ex.2-Swingle's 4/22/03 letter to Berman). He reiterated that he was still willing to consider a plea if Appellant could provide useful information about Pat Davis, but clearly advised the defense that no decision had been made and that they should be preparing for trial (PCR Ex.95 at 84, Depo.Ex.2-Swingle's 4/22/03 letters to Berman).

In June 2003, attorneys Berman and Estes withdrew from the case and attorneys Kenyon and Turlington assumed responsibility for Appellant's defense (PCR L.F. 449; PCR Tr. 118). On July 23, 2003, Kenyon and Turlington met with Swingle (PCR Tr. 154-55; PCR Ex. 60). During the meeting, defense counsel got the impression that Swingle may be willing to take the death penalty off the table if Appellant helped federal prosecutors "get" Pat Davis (PCR Ex.60). It was clear to defense counsel that no deal would "be forthcoming unless and/or until the feds indict Pat Davis" (PCR Ex.60). The defense attorneys also told Swingle that they would need a continuance (PCR Ex.60). Swingle was reluctant, but he recognized that the defense needed a continuance and agreed to consider a new date (PCR Ex.60). At the subsequent motion hearing on August 7, defense counsel requested that the case be continued for an additional year (T.Tr. 88-89). The defense did not cite the Davis investigation as

a reason for needing the continuance (T.Tr. 84-92). After some discussion, both parties agreed to a trial date of March 2004 (T.Tr. 91).

Attorneys Kenyon and Turlington spent some of their remaining time investigating Appellant's allegations against Pat Davis, in the hope that the information would lead to a federal indictment and Swingle would withdraw his request for the death penalty (PCR Tr. 156-58, 290-91). As it turned out, Appellant was not able to provide any information that would support criminal charges against Pat Davis. Although Appellant implicated Davis in various crimes, his testimony could not be corroborated (PCR Tr. 292-94; PCR Ex.95 at 75). Additionally, the statute of limitations had run on some of the offenses that Davis had allegedly committed (PCR Ex.95 at 75). Thus, Davis was never charged and Swingle did not make a plea offer to Appellant (PCR Tr. 292-94; PCR Ex.95 at 75-76). Nevertheless, Swingle left the possibility of an agreement open until the very end—had Appellant been able to provide verifiable information that led to sufficiently significant charges against Pat Davis, Swingle would have been willing to waive the death penalty against Appellant in exchange for Appellant's cooperation (PCR Ex.95 at 76-78, 81-83).

Motion Court's findings

The motion court found that Appellant "failed to present any evidence to support" his "serious allegation of 'unprofessional, unethical, and deliberately misleading behavior by the prosecutor'" (PCR L.F. 494). The court noted that

defense counsel never testified that the prosecutor misled them (PCR L.F. 494). While the defense may have spent "considerable effort" trying to gather evidence to implicate Davis, they could not find anything to corroborate Appellant's claim (PCR L.F. 494). The court found that, "[g]iven the strength of the State's case and the evidence against [Appellant], it was entirely reasonable for [Appellant's] counsel to believe that their best hope for sparing [Appellant] from the death sentence was to gather evidence to indict Mr. Davis. They simply could not do so. But there is no evidence that the prosecutor misled defense counsel or ever acted improperly" (PCR L.F. 494).

B. Analysis

The motion court did not clearly err in finding no evidence to support Appellant's claim of "deception" by prosecutor Swingle. It is true, of course, that "a prosecutor may not convey incorrect or misleading information to a defendant." *State v. Kilgore*, 771 S.W.2d 57, 65 (Mo.banc 1989). And as Appellant points out, the prosecutor's obligation to be honest and forthright with defendants extends to plea negotiations. *See* App.Br. at 100-01. But Appellant's allegation that Swingle misled the defense into believing that a deal was possible when Swingle knew that it was not is conclusively refuted by the record.

Most significantly, Swingle affirmatively testified that he remained open to the possibility of a plea agreement throughout the course of Appellant's case. By January 9, 2003, it was clear to Swingle that Appellant would not implicate Davis in Victim's murder (PCR Ex.95 at 76). However, Swingle was still willing to consider a deal if Appellant could provide verifiable information implicating Davis in other serious crimes, not just the murder of Victim:

> If [the defense] would have come back with, say, saying they had documented proof that, let's say, Pat Davis had done one of our unsolved murders in Cape Girardeau's history and he had confessed that to [Appellant] and [Appellant] had worn a tape recorder and had Pat Davis on tape saying, yes, he had done one of the unsolved murders in Cape's history, yes, I would have—I would have made a deal in a heartbeat to waive the death penalty in order to get [Appellant's] testimony against Pat Davis to solve one of our unsolved murders. . . . So I was keeping the option open. If we would end up having, you know, something really, really important come out of this.

(PCR Ex.95 at 77). Swingle explained that his interest was not necessarily limited to murder charges:

> I mean, we can sort of go down a checklist of things I would have [made a deal for] or things I wouldn't. Petty theft, no. Money laundering, yes. And there's lots in between I would probably say yes to as well.

(PCR Ex.95 at 78). Swingle's testimony thus expressly refutes Appellant's allegation that Swingle would never have been willing to make a deal irrespective of what information Appellant provided. The motion court was entitled to credit this testimony and deny Appellant's claim.

Appellant argues that "a death waiver deal was not possible because Swingle attaches great weight to the victim's family's wishes and [Victim's] family only was agreeable to a death waiver, [*sic*] if [Appellant] could implicate Davis in [Victim's] death." App.Br. at 107. But Appellant overstates the extent to which Swingle felt bound to follow the family's wishes. As Swingle acknowledged, the opinion of the victim's family is a "strong factor" in determining whether Swingle will seek the death penalty (PCR Ex.95 at 71-72). But Swingle made clear that "ultimately, [he is] going to be the one that makes the call" (PCR Ex.95 at 72). When discussing whether he would have been willing to accept a plea agreement in exchange for information implicating Davis in money laundering, Swingle explained that he would have made the deal even if Victim's family resisted:

> I would have gone to [Victim's sister], and I would say, here's a lawyer we can nail for money laundering. I intend to take the death penalty off the table now, and even if she wouldn't have been happy about it, I would have done it to get—to get, you know, a lawyer for money laundering. . . .

(PCR Ex.95 at 77-78). Appellant's claim of "deception" rests solely on his assumption that Swingle would not have accepted a plea unless Victim's family agreed. But, as the record shows, Swingle was willing to consider an agreement even if the victim's family would not have supported it. Swingle's interest in a potential plea was genuine, and defense counsel was not misled.

Finally, whether or not Swingle would have been willing to make a deal without the support of Victim's family, Appellant cannot have been prejudiced by Swingle's part in the plea negotiations because Appellant was unable to deliver on his side of the potential bargain. Defense counsel understood that under no circumstances would Swingle agree to a deal unless Appellant could provide information that led to Pat Davis's prosecution (PCR Tr. 156-57, 290; PCR Ex.60). And Appellant simply could not supply the necessary information. As attorney Turlington explained, although Appellant "said many things about Pat Davis . . . there was just nothing physical or there was no kind of corroborating evidence that would back up [Appellant's] word" (PCR Tr. 292). Because Appellant was not able to provide any information that the prosecutors could use, his allegation that Swingle would not have made the deal anyway is beside the point. If defense counsel wasted any time investigating Pat Davis, that wasted time is attributable to Appellant for his inability to provide information that could be corroborated, not to Swingle for participating in plea

negotiations. Based on the record, the motion did not clearly err in denying Appellant's unfounded claim of prosecutorial misconduct.

IV. (ineffective assistance - alternative mitigation evidence)

The motion court did not clearly err in denying Appellant's claim that defense counsel was ineffective for declining to present additional evidence during the penalty phase to emphasize Appellant's difficult childhood or to suggest that Appellant suffered from post-traumatic stress disorder (PTSD) at the time of the murder because the additional witnesses and records that Appellant claims should have been presented would have been cumulative or contradictory to the evidence that was presented at trial. (Responds to Appellant's Points VI and VII).

In his sixth and seventh points, Appellant argues that the motion court clearly erred in denying his ineffective assistance of counsel claims for failing to investigate and present additional mitigating evidence through witnesses Derrick Fitzgerald, Gary Riley, Cessie Alfonso, Dr. Donald Cross, and Mary Alice Gill, and through various medical and mental health records. App.Br. at 109-46.

A. Facts

According to defense counsel Kenyon, there are two general theories regarding how to present a mitigation case during the penalty phase of a capital murder trial: "One is to discuss all the horrible upbringing the client may have had and then another approach, which is actually the approach that [Kenyon]

prefer[s], is to show all of the good things about a client" (PCR Tr. 200-01). He explained that in Appellant's case, the defense decided to combine the two approaches, pointing out that Appellant had endured a difficult childhood but "was not the monster that the State was trying to paint him to be" (PCR Tr. 201). As counsel told the jury in penalty phase opening statement, "You will learn that [Appellant] grew up under emotionally, grew up emotionally deprived, and physically and emotionally abused. But despite all of these things, [Appellant] still grew up to be a loving parent, and, [*sic*] a loving son, and a supportive brother" (T.Tr. 1150).

The defense presented thirteen witnesses during the penalty phase, including Appellant's family, friends, and an expert in human development to describe how Appellant's upbringing influenced his personality as an adult (T.Tr. 1228-1391).

Mary Alice Gill, Appellant's mother, was the first witness (T.Tr. 1228). She described Appellant's family history, mentioning that several of Appellant's relatives, including his great-uncle, uncle, and brother, suffered from mental illness (T.Tr. 1228-33). She explained that her mother (Appellant's grandmother) was mean to Appellant as he was growing up (T.Tr. 1236). She said, however, that Appellant was a happy-go-lucky sports enthusiast who never gave her any serious problems (T.Tr. 1239). She said that Appellant was a good

child who knew right from wrong, and that she could not believe that he could commit murder (T.Tr. 1240).

Appellant's younger siblings, Carl and Lori, also testified (T.Tr. 1254-63). Carl described Appellant as "an ordinary kid" growing up (T.Ex.M at 4). Lori said that Appellant was always protective of her and loved her no matter what (T.Tr. 1257). She said that Appellant was friendly, outgoing, and popular as a child, adding that he was an usher in church (T.Tr. 1257-59). She thought that Appellant was a compassionate person who had a good heart (T.Tr. 1261). Lori also described the environment in which she and her siblings were raised. She said that their mother was not emotionally supportive and whipped the children (T.Tr. 1259, 1263).

Appellant's mother-in-law, Mary Kinder, described Appellant's relationship with his wife and daughters (T.Tr. 1277-99). She said that Appellant was loving and affectionate with the children, and that the girls missed him (T.Tr. 1284-85). She also said that Appellant was respectful and considerate toward her, and even tried to help her out financially when money was tight (T.Tr. 1282-83). Appellant's eleven-year-old stepdaughter testified that she visited Appellant regularly in prison with her family and missed the fun things that they used to do together (T.Tr. 1272-74).

Jim Bidwell and Richard Atwell, each of whom had coached Appellant when he was younger, testified that Appellant was an outgoing, friendly kid who

got along well with people (T.Tr. 1251, 1299). Jim McKay, Appellant's former football coach, said that Appellant was a good worker and a good athlete when he was in school (T.Tr. 1382). He said that it was not in Appellant's character to be mean (T.Tr. 1386). McKay also testified that a few years before the trial, he had been hospitalized for heart problems and Appellant had come to visit him (T.Tr. 1385). McKay's wife, Patricia, had been Appellant's first-grade teacher, and said that Appellant was an excellent student and was always respectful (T.Tr. 1372-74).

James Mills and Jim Vise, jailers at the New Madrid County Jail where Appellant was confined prior to and during trial, testified that they had never had any problems with Appellant (T.Tr. 1342, 1349). Mills added that Appellant was outgoing and friendly, and steered clear of fights (T.Tr. 1343). Jason Ward, a New Madrid County investigator, told the jury that while Appellant was in jail, he agreed to talk to an at-risk juvenile to try to dissuade him from a life of crime (T.Tr. 1368-69).

The defense also presented testimony from Dr. Wanda Draper, an expert on human development (T.Tr. 1303-38). To reach her opinions, Dr. Draper interviewed Appellant, members of his family, his friends, counselors, and teachers, and looked at records involving both Appellant and members of his family (T.Tr. 1305-06). Dr. Draper testified that the records showed a history of mental illness in Appellant's family—his maternal grandmother, some of his

aunts and uncles, and his brother all suffered from mental health problems (T.Tr. 1308-09). The records did not show that Appellant suffered any specific mental illness, but Dr. Draper did note that Appellant had taken Prozac and Xanax, both intended to treat anxiety and depression and possibly other conditions (T.Tr. 1310).

Dr. Draper said that Appellant had developed attachment issues stemming from his childhood (T.Tr. 1312, 1324). She described Appellant's family as "disintegrated," pointing out that Appellant's grandmother was hostile to Appellant and that his mother did not give him the support he needed (T.Tr. 1315-18). She also noted that Appellant's father was absent and unknown to Appellant, and whenever Appellant asked who his father was he was punished and told not to ask (T.Tr. 1313). Dr. Draper also testified that Appellant had been molested by a male neighbor, which caused Appellant to feel ashamed (T.Tr. 1319-20). Dr. Draper opined that Appellant's childhood hindered his development, and that Appellant struggled to define himself (T.Tr. 1322). As a result, Dr. Draper testified that Appellant suffered from an attachment disorder that prevented him from forming affectionate bonds with others and making good decisions (T.Tr. 1324-28).

On the other hand, Dr. Draper emphasized that Appellant integrated well when he was in school and was accepted by his peers (T.Tr. 1319, 1322). He developed good relationships with his coaches, who provided a stabilizing

influence on his life (T.Tr. 1323). Dr. Draper testified that when Appellant was in high school, he had a good support system that helped him to succeed (T.Tr. 1330). The structured environment provided to Appellant in jail also improved Appellant's ability to function (T.Tr. 1331). When Appellant is outside a structured environment, Dr. Draper concluded, he struggles and is more likely to get into trouble (T.Tr. 1331).

In closing argument, the defense argued that Appellant's difficult childhood, with his unsupportive mother, his mentally ill brother, and sexually abusive neighbor, prevented Appellant from becoming a "stable and well functioning adult" (T.Tr. 1440-41). But the defense suggested that Appellant had been a good child despite his tumultuous home life:

> [Appellant] didn't start off bad. He was a nice kid, despite all of his problems, he really was not that bad of a kid. And he especially did well in high school when he was playing football. When he had coaches who were adult males, who spent a lot of time with him, who were supportive of him, and, who, he was in a very structured environment. Why is this information important? One, because [Appellant] isn't a person who just started off from the get go evil. That's not this case. And, two, I'm asking you to consider sending [Appellant] to prison. And what's prison? It's a structured environment. And he has done the best is his life when he is in that kind of environment.

(T.Tr. 1444). The defense concluded the argument by saying: "Spare [Appellant's] life. He's a human being, he knows that what he has done is wrong. He's a human being whose life matters to other people. Please, spare him." (T.Tr. 1447).

B. Analysis

As set forth in detail in Part I.B.2, *supra*, counsel's efforts will not be considered unconstitutionally ineffective unless it is proven that counsel's services fell below the level of skill and diligence expected of a similarly situated, reasonably competent attorney and that counsel's failure prejudiced the defendant. *See e.g. Strickland*, 466 U.S. at 687. Counsel's choice of witnesses in presenting a mitigation case is "ordinarily a matter of trial strategy and will not support an ineffective assistance of counsel claim." *Strong*, 263 S.W.3d at 652. "Counsel's 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Id.* (citations omitted). "In addition, 'the duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.'" *Id.* (quoting *Rompilla v. Beard*, 545 U.S. 374, 383 (2005)).

"To prevail on a claim of ineffective assistance of counsel for failing to call a witness, a defendant must show that: (1) trial counsel knew or should have known of the existence of the witness, (2) the witness could be located through reasonable investigation, (3) the witness would testify, and (4) the witness's testimony would have produced a viable defense." *Id.* (citing *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo.banc 2004)). The failure to call a witness whose testimony would not unequivocally support the defendant's position does not constitute ineffective assistance of counsel. *Winfield v. State*, 93 S.W.3d 732, 739 (Mo.banc 2002).

The record shows that Appellant's defense team thoroughly investigated the facts necessary to present its mitigation case. Appellant's first capital attorneys, Jeff Estes and Dee Berman, interviewed Appellant, his mother, his sister, Lisa, and his wife, Katina (PCR L.F. 425-27, 439, 454). They also hired a psychologist, Dr. Schultz, to evaluate Appellant (PCR L.F. 454). When attorneys Kenyon and Turlington took over Appellant's defense, they continued the mitigation investigation. Investigator Sean Goliday, who was specially trained to identify factors in a defendant's background that might have mitigation value, contacted witnesses, arranged interviews, and obtained records (PCR Ex.96 at 21-22, 29, 46, 69). Goliday spoke with Appellant's siblings, his mother, his aunt, his mother-in-law, and his former teachers and coaches (PCR Ex.96 at 32-45). Goliday also collected Appellant's school, military, employment, and prison

records, as well as medical records for Appellant and Appellant's brother, Carl (PCR Ex.96 at 46-48; Ex.15 at 5143-44). Kenyon and Turlington met with Dr. Schultz and decided not to use her testimony; instead, they retained Dr. Draper to evaluate the impact of Appellant's upbringing on his development (PCR Tr. 188-89, 285-86).

The defense's extensive preparation was evident in their mitigation presentation—they called witness after witness to praise Appellant for his positive characteristics. According to the defense's theory, Appellant had been a delightful child (T.Tr. 1239, 1251, 1257-59, 1299, 1372-74), and had become a devoted father (T.Tr. 1272-74, 1284-85), a good friend (T.Tr. 1385), and a model prisoner (T.Tr. 1342-43, 1349, 1368-69). The abuse Appellant endured as a child resulted in an attachment disorder which hindered Appellant's ability to make good decisions, which helped to explain why Appellant participated in Victim's murder (T.Tr. 1324-28). But, the defense argued, if Appellant were placed in a stable environment, like prison, he could function adequately and would not pose a danger to anyone (T.Tr. 1331, 1342-43, 1349, 1368-69, 1444).

Appellant argues that, notwithstanding the extensive testimony presented by the defense during the penalty phase, "[t]he jury did not hear a thorough mitigation case recounting [Appellant's] dysfunctional family background and [the] abuse he experienced." App.Br. at 109. He alleges that counsel was ineffective for failing to call as witnesses Derrick Fitzgerald, Cessie Alfonso,

Gary Riley, and Dr. Donald Cross to present additional testimony about Appellant's background. App.Br. at 109. Additionally, Appellant claims that counsel was ineffective for failing to present "complete evidence" of Appellant's background from Appellant's mother, Mary Alice Gill. App.Br. at 109. Finally, Appellant alleges that counsel was ineffective for "failing to rely on [Appellant's] family members' mental health records and failing to rely on [Appellant's] medical records." App.Br. at 109. But, as explained below, the presentation of this additional evidence would not have helped Appellant. Thus, the motion court did not clearly err in denying Appellant's claim of ineffective assistance.

1. Derrick Fitzgerald

a. Intended testimony

Derrick Fitzgerald is Appellant's first cousin, and he and Appellant spent a great deal of time together when they were children (PCR Tr. 7-9). Fitzgerald believed that Appellant's household was dysfunctional (PCR Tr. 12). The family had a history of mental illness and incest (PCR Tr. 35-37). He described Appellant's mother as "unkind, unsociable, and just nasty" (PCR Tr. 15). She verbally abused the children, including Appellant, whom she called a "bighead bastard" (PCR Tr. 19). Fitzgerald said that when Appellant was thirteen or fourteen years old, Appellant was molested by a neighbor (PCR Tr. 27-29). Alcohol was also freely available to the children when Appellant was growing

up, and Fitzgerald remembered seeing Appellant intoxicated when Appellant was fourteen (PCR Tr. 32-34).

Fitzgerald testified that, as a child, Appellant did not get along with his younger siblings (PCR Tr. 21). In particular, Appellant bullied Lori, his little sister (PCR Tr. 21). Fitzgerald also said that Appellant had always been a mean kid, but as he became a teenager, "he got meaner, more violent, more dysfunctional, disobedient" (PCR Tr. 30, 40-41). Fitzgerald explained that Appellant "put on appearances" for people at school and around town so they would think that he was nice (PCR Tr. 41). But "the person that [Fitzgerald] saw at school was totally different from the person that [he] saw at home" (PCR Tr. 42).

b. Motion court's findings

The motion court found that although Fitzgerald provided some additional details about Appellant's home life, for the most part his testimony was not significantly different than the picture presented at trial (PCR L.F. 478). The court also found that Fitzgerald's testimony regarding Appellant's alleged sexual abuse was inconsistent with the testimony of other witnesses and was not credible (PCR L.F. 478). Additionally, the court found that Fitzgerald's demeanor diminished his credibility—"he laughed very inappropriately when discussing some of the alleged details" and "seemed to find some of [Appellant's] conduct amusing" (PCR L.F. 478). Finally, the court found that some of

Fitzgerald's testimony would "definitely not have been helpful to [Appellant]" (PCR L.F. 478). In particular, the court noted that Fitzgerald testified that Appellant got "meaner" as he got older (PCR L.F. 478). The court concluded that trial counsel was not ineffective in failing to call Fitzgerald at trial (PCR L.F. 478).

c. Discussion

The motion court's findings were not clearly erroneous. Fitzgerald's testimony regarding the dysfunction in Appellant's household and the sexual abuse Appellant allegedly endured was largely cumulative of the testimony provided at trial by Mary Alice Gill, Carl Gill, Lori Gill, and Dr. Draper (T.Tr. 1228-36, 1259, 1263, 1312-20, 1324; T.Ex.M). "The failure to develop or introduce cumulative evidence does not constitute ineffective assistance of counsel." *Forrest*, No.SC89343, slip op. at 6; *see also Worthington v. State*, 166 S.W.3d 566, 578 (Mo.banc 2005) (finding that counsel was not ineffective for failing to call the defendant's mother and father to testify when the defendant's aunt, who was called, was able to provide much of the same evidence that the defendant's parents would have offered).

More importantly, the record strongly supported the motion court's finding that parts of Fitzgerald's testimony would not have been helpful to Appellant. Appellant argues that "foregoing [*sic*] mitigation because it contains something harmful is not reasonable when its prejudicial effect may be outweighed by the

mitigating value." App.Br. at 127. Perhaps so, but here, the potential damage posed by Fitzgerald's testimony far outweighed any mitigating value. Fitzgerald's testimony that Appellant was "always mean" and "got meaner" as he got older would have severely undermined the defense theory that Appellant was friendly and kind to those around him when he was younger. Additionally, Fitzgerald testified that Appellant was mean to his younger siblings and bullied his sister (PCR Tr. 21). This contradicted Lori Gill's testimony that Appellant was protective of her and loved her "no matter what" (T.Tr. 1257). Finally, Fitzgerald said that Appellant was merely putting on an act by being nice to people at school and in the community (PCR Tr. 41). This would have destroyed the positive testimony of Appellant's former coaches and teachers, who the jury would believe had simply been fooled by Appellant's charade. Therefore, not only would Fitzgerald's proposed testimony have been less than unequivocally helpful, it would have been potentially devastating to the defense theory. *See e.g. Taylor v. State*, 126 S.W.3d 755, 763 (Mo.banc 2004) (noting that counsel was not ineffective for declining to introduce evidence of the defendant's past substance abuse because such evidence could be considered aggravating rather than mitigating). The motion court did not clearly err in finding that counsel was not ineffective for failing to call Fitzgerald.

2. Cessie Alfonso

a. Intended Testimony

Cecilia ("Cessie") Alfonso is a clinical forensic social worker / mitigation specialist (PCR Tr. 43-44). She conducts "biopsychosocial" assessments, to "identify the dynamics in the person's life that contributes significantly to shaping their stance in the world, their capacity to manage the demands of life and how they function within the context of their life" (PCR Tr. 45). Appellant's PCR team hired Alfonso to evaluate Appellant (PCR Tr. 47). She reviewed thousands of documents and interviewed Appellant, his mother, his siblings Lori and Carl, and one of his aunts (PCR Tr. 48).

Alfonso testified that Appellant's mother, Mary Alice, did not develop proper parenting skills because Mary Alice's own mother was abusive and was not nurturing (PCR Tr. 53-56, 67). Alfonso said that Mary Alice was physically and verbally abusive and did not make Appellant feel special (PCR Tr. 62). Although Appellant excelled at sports, his mother was not supportive and did not attend his games (PCR Tr. 81). Appellant also suffered because his father was absent—Alfonso explained that only a man can teach a boy to be a man because, for example, only a man can take a boy into the men's room and teach him restroom rituals (PCR Tr. 68). From his family, Appellant learned that

"men drink, men fight, women are abused, human beings are disrespected" (PCR Tr. 70).

Alfonso said that Mary Alice allowed a neighbor to sexually abuse Appellant in exchange for favors—the neighbor would drive Mary Alice around town and buy clothes for Appellant (PCR Tr. 74-75). Alfonso believed that Appellant's history of suffering sexual abuse made Appellant unable to respond appropriately when he began to suspect that Victim was a pedophile (PCR Ex.84 at 11).

Appellant drank to escape his problems (PCR Tr. 72-73). He joined the Navy, but could not succeed there because all he did was drink and get into fights (PCR Tr. 84). Appellant attributed his failure, at least in part, to racism within the Navy (PCR Tr. 85). Alfonso said that Appellant also failed in his relationships with women (PCR Tr. 86-87). Although Appellant married more than once, he abused his wives and neglected his children (PCR Tr. 95).

Alfonso concluded that part of who Appellant is today is a consequence of the emotional, physical, and sexual abuse he endured as a child (PCR Tr. 89-90). Appellant did not have an adequate support system and did not develop proper coping mechanisms, and finally he broke down (PCR Tr. 90, 94).

b. Motion court's findings

The motion court did not find Alfonso's testimony to be compelling (PCR L.F. 479). It concluded that Alfonso's explanations as to the relevance of

Appellant's social history were "rambling and very difficult to understand" (PCR L.F. 479). The court found that Alfonso's testimony simply consisted of hearsay statements from Appellant's family, related in an "ineffective manner" (PCR L.F. 479).

Additionally, the court found that Alfonso's conclusions arising from Appellant's allegation that he suspected Victim was a pedophile were not credible (PCR L.F. 479-80). The information that Appellant provided to Alfonso, that Victim watched pornographic movies and wandered the house in his underwear, was inconsistent with statements Appellant made to others, "making [Appellant's] new theory that he killed [Victim] because he was a pedophile even more incredible and unbelievable than it already is" (PCR L.F. 480).

The court also believed that portions of Alfonso's testimony would not have gone over well with the jury. Alfonso testified that all Appellant did between the ages of 18 and 24 was "get drunk and have sex" (PCR L.F. at 479). The court also found that Alfonso tended to use profanity "without consideration as to the impact her glee at word choices might have on the listener" (PCR L.F. 479).

Finally, the court found that Alfonso's information was not significantly different than that provided by any other defense witness (PCR L.F. 480).

c. Discussion

The motion court did not clearly err in finding that counsel was not ineffective for declining to call Alfonso. First, the record supported the court's finding that Alfonso's testimony was not significantly different than testimony provided by the witnesses who were called. Dr. Draper, Mary Alice Gill, and Lori Gill all testified about the abuse that took place in the Gill household while Appellant was growing up (T.Tr. 1228-63, 1303-38). Although Alfonso's testimony may have added details, the substance was the same—Appellant's mother was abusive and unsupportive, Appellant was sexually abused by a neighbor, and as a result of the abuse Appellant struggled to make good decisions in his life. Because the substance of Alfonso's testimony was cumulative of other witnesses, counsel was not ineffective in failing to call her. *See Forrest*, No.SC89343, slip op. at 6.

The court also did not err in finding that Alfonso's testimony was not credible. This Court should defer to the motion court's superior opportunity to observe the witness in evaluating credibility. *Id.* at 19. Moreover, the record supports the motion court's findings. Alfonso based an important part of her testimony on Appellant's allegation that he suspected Victim was a pedophile before the murder (PCR Tr. 96-109; PCR Ex.84 at 11). But, as noted above, the motion court found that Appellant fabricated his claim that he knew anything about the computer pornography prior to the murder. *See* Part I.B.1.b, *supra*.

Alfonso acknowledged that there was no record of Appellant telling anyone that he killed Victim because he thought Victim was a pedophile, but she nonetheless accepted Appellant's new story (PCR Tr. 96-100). Specifically, Alfonso testified that she thought the alleged fact that Victim walked around his own house in his underwear could lead her to conclude that Victim was a pedophile (PCR Tr. 100). The motion court did not clearly err in finding Appellant's newly formulated "pedophile defense" unbelievable, nor in finding that Alfonso's reliance thereon reduced her credibility.

The record also supports the court's finding that Alfonso's testimony could potentially have alienated the jury, particularly through her frequent use of profanity. Appellant argues that "when Alfonso utilized offensive language she apologized for having to do so, indicated that she was quoting exactly what was said to her, and declared such language to be 'venomous.'" App.Br. at 130. It is true that when Alfonso used profanity, she did so in the context of attributing the language to someone else. It is not clear, however, that the repeated use of such language was necessary. The first time, Alfonso used the language to emphasize the verbal abuse that Appellant endured (PCR Tr. 54-55). Subsequent uses of profanity, on the other hand, did not refer to language that Appellant actually heard. For example, in describing Appellant's grandmother's hypothetical reaction to Mary Alice getting pregnant, Alfonso speculated that Appellant's grandmother would say, "listen, you dumb ass bitch, you got yourself

in this fucking situation" (PCR Tr. 61). Alfonso also testified that when she asked Mary Alice why she did not attend Appellant's sporting events, Mary Alice told her, "I was busy working. I didn't have time for that shit" (PCR L.F. 81). Alfonso also said that, in Portageville, "calling a black man a n----r is like buying a sandwich" (PCR L.F. 80). It cannot be said that the court, having observed Alfonso's demeanor throughout her testimony, clearly erred in concluding that Alfonso's repeated use of profanity may have caused the jury to negatively perceive her.

Finally, counsel was not ineffective for declining to call Alfonso because her testimony did not unequivocally support Appellant. *See Winfield*, 93 S.W.3d at 739. Alfonso testified that Appellant's relationships with women had not been successful, and that Appellant *abused his wives* and *neglected his children* (PCR Tr. 86-87, 95). This testimony would have undermined one of the defense's primary mitigation arguments, which was that Appellant was a loving, attentive family man who should be spared, if not for his own sake, then for the sake of his little girls (T.Tr. 1272-74, 1277-99, 1446). Counsel was not ineffective for failing to call Alfonso.

3. Gary Riley

a. Intended Testimony

Gary Riley coached Appellant's little league team when Appellant was ten years old (PCR Tr. 339). Riley noticed that Appellant's home life was difficult, so he took Appellant under his wing, picking him up for practice, inviting him over to play with his son, and giving Appellant some spending money on road trips (PCR Tr. 340-42, 350). Riley found Appellant to be a fun, lovable little boy and enjoyed spending time with him (PCR Tr. 340). He never had any trouble with Appellant's behavior (PCR Tr. 534).

Riley also testified regarding his observations about race relations in Portageville (PCR Tr. 346-48). He thought that there was a racist attitude toward African-Americans in the community (PCR Tr. 354). Riley himself is white (PCR Tr. 354).

b. Motion court's findings

The motion court found that although Riley was a credible witness, his testimony would not have changed the outcome of the case (PCR L.F. 487). The court noted that, "[i]n fact, Mr. Riley testified that [Appellant] told him that he was in trouble because he was 'chasing the dollar.' This only confirms [Appellant's] sole motivation for the killing was financial" (PCR L.F. 487).

c. Discussion

The motion court did not clearly err in finding that Riley's testimony would not have changed the outcome of the case. The bulk of Riley's testimony, that Appellant was a good, fun-loving kid, was cumulative of testimony provided by witnesses who did testify, including Jim Bidwell, Richard Atwell, and the McKays (T.Tr. 1251, 1299, 1372-86). Appellant complains that the coaches and teachers who testified did not shed any light on the "dysfunctional circumstances" that Appellant "dealt with daily." App.Br. at 131. But evidence of Appellant's dysfunctional home life was presented in abundance, in far more detail than Riley offered, through Dr. Draper, Mary Alice Gill, and Lori Gill (T.Tr. 1228-63, 1303-38). Lori, for example, testified about the whippings that she and her siblings, including Appellant, received (T.Tr. 1259). And Dr. Draper testified that Appellant's mother and grandmother were cruel to Appellant and verbally and physically abused him (T.Tr. 1315). Riley, on the other hand, testified that he never went into Appellant's house or interacted with Appellant's family members (PCR Tr. 341). He guessed that Appellant's family life was "dysfunctional" because Appellant never seemed to be supervised by a responsible adult (PCR Tr. 341-42). This testimony would not have added any value to the testimony already provided by Appellant's mother and sister and by Dr. Draper, who personally interviewed Appellant's family members.

Appellant also insists that Riley's testimony was necessary to describe "the racial prejudice [Appellant] encountered growing up in Portageville." App.Br. at 132. But there is no evidence that alleged racism in the community had anything to do with the murder. Multiple witnesses presented by the defense suggested that white adults in the community, particularly Appellant's coaches and teachers, were supportive of Appellant (T.Tr. 1323; PCR Tr. 82, 249-50, 271, 543-44). Appellant got along well with his white peers at school (T.Tr. 1319). But more importantly, Appellant confessed that the reason he and Brown killed Victim was to steal Victim's money (Ex.1 at 6, 25; PCR Tr. 192-93, 323, 514). Riley recognized this—he testified that Appellant had gotten himself in trouble for "chasing the dollar" (PCR Tr. 358). Appellant's broad allegations of community racism simply were not shown to be relevant, and Riley's confirmation that Appellant's motive was purely financial would not have aided Appellant's case. The defense was not ineffective for deciding not to call Riley.

4. Dr. Donald Cross

a. Intended testimony

Donald Cross is a clinical psychologist who was hired by Appellant's PCR team to evaluate Appellant (PCR Tr. 425, 432). He testified that he reviewed thousands of pages of records and interviewed Appellant and several members of Appellant's family (PCR Tr. 433-54). Appellant's elder sister, Lisa, told Dr.

Cross that she would not testify on Appellant's behalf because Appellant was mean to her and abused her when they were younger (PCR Tr. 449-50). She added that Appellant had called her derogatory names and made racist remarks about her because her skin was darker than his (PCR Tr. 450).

Based on his investigation, Dr. Cross concluded that there was a significant amount of physical and sexual violence in Appellant's past (PCR Tr. 455). When Appellant was seven or eight-years-old, he was molested (PCR Tr. 463, 467). Dr. Cross thought that Appellant wanted to strike back against the pedophile who hurt him, but that the culprit died before he got the chance (PCR Tr. 464).

Dr. Cross believed that sports and Appellant's relationship with coaches provided a "buffer" in Appellant's life that allowed him to divert his anger into a "socially appropriate medium" (PCR Tr. 464-65). Appellant's problems in the military and thereafter were predictable because his original buffers were gone and Appellant could not manage himself (PCR Tr. 469-72, 486-87). His family members, many of whom were mentally ill, had been poor role models (PCR Tr. 472). Dr. Cross testified that Appellant had difficulty forming emotional bonds with people (PCR Tr. 495). He said that Appellant had not been emotionally close to his wives, and that he was incapable of having a close relationship with his children (PCR Tr. 496).

Dr. Cross conducted a series of personality and intelligence tests on Appellant (PCR Tr. 457-58, 476). Appellant demonstrated slightly above-average intelligence (PCR Tr. 476). The results of his personality tests, however, were all invalid (PCR Tr. 477). Dr. Cross explained that the invalidity of the personality tests was attributable to Appellant's history of drug abuse (PCR Tr. 457-58). However, Dr. Schultz, another psychologist who had tested Appellant, also received invalid results and concluded that Appellant was malingering (PCR Tr. 457-58). The results of Dr. Cross's tests for traumatic stress were also invalid (PCR Tr. 477-78).

Nevertheless, Dr. Cross concluded that Appellant suffered from post-traumatic stress disorder (PTSD), brought on by the physical and sexual abuse that he suffered in his youth (PCR Tr. 491). Dr. Cross testified that when Appellant saw the pornography of Victim's computer, it reminded him of the childhood abuse that he had endured (PCR Tr. 493). According to Dr. Cross, Appellant's PTSD led to the murder of Victim and Appellant's subsequent conviction (PCR Tr. 501). He testified that seeing the pornography on Victim's computer gave Appellant the impression that Victim was a child predator and stirred the intense emotions that Appellant felt about his own abuse, which "contributed to what [Appellant] did in terms of being involved in the murder of [Victim]" (PCR Tr. 508-10). Dr. Cross testified that Appellant simply became so angry at the thought of Victim abusing a child that he "just didn't know how to

stop" himself from murdering Victim (PCR Tr. 510). But, Dr. Cross added, Appellant made very clear that it was Brown, not him, who actually shot Victim (PCR Tr. 511).

b. Motion court's findings

The motion court found that, for the most part, Dr. Cross did not offer any insights or information that was significantly different than that presented at trial by Dr. Draper (PCR L.F. 489-90).

The court also noted that Dr. Cross was not a persuasive witness (PCR L.F. 490). The tests that he conducted returned invalid results, which may suggest that Appellant was attempting to fool the tests, but Dr. Cross's explanation that Appellant's history of drug use would account for the results was "wholly implausible and Dr. Cross sounded as if he were merely making excuses for this evidence of deception" (PCR L.F. 490).

The court found that Dr. Cross was "clearly inclined to believe [Appellant's] version of events. He became extremely defensive on cross-examination and lacked any effectiveness as a witness" (PCR L.F. 491). The court noted that Dr. Cross's "conclusion that [Appellant] 'could not think ahead' because of his diminished capacity is completely incredible and would not be believed by any juror" (PCR L.F. 491).

Finally, the court rejected Dr. Cross's conclusion that the murder had been motivated, even in part, by Appellant's purported suspicion that Victim was a

pedophile and its interaction with Appellant's PTSD (PCR L.F. 490-91). The court reiterated that the evidence (described in Part I, *supra*) showed that Appellant had not seen any pornography prior to the murder and never reported seeing any pornography until after he learned of its existence post-conviction (PCR L.F. 491). Therefore, the court reasoned, Dr. Cross's theory was premised upon Appellant's fabrication and had to be disregarded (PCR Tr. 490).

c. Discussion

The motion court did not clearly err in finding that counsel was not ineffective for failing to call Dr. Cross at trial. First, the motion court was correct that much of Dr. Cross's testimony was cumulative of that presented at trial by other defense witnesses, particularly Dr. Draper. Like Dr. Cross, Dr. Draper testified that Appellant had endured physical and sexual abuse as a child, and as a result Appellant developed an attachment disorder that limited his ability to make good decisions (T.Tr. 1303-38). While Dr. Cross used the term "buffers" and Dr. Draper referred to "structured environment" (T.Tr. 1331), the crux of both experts' testimony was the same—that Appellant struggled to control his behavior in situations where he lacked an adequate support system.

Appellant complains that Dr. Draper, unlike Dr. Cross, could not "present a mental health diagnosis." App.Br. at 141. But that actually turned out to be an advantage for Dr. Draper because she was not saddled with a set of invalid results from psychological tests that she then would have had to explain away.

Dr. Cross's credibility was damaged by his attempt to excuse the invalid results from Appellant's personality tests as attributable to prior drug use, when another psychologist had concluded that Appellant's test results were invalid because Appellant was malingering (PCR Tr. 456-57).

Appellant points out that Dr. Cross's testimony substantially differed from Dr. Draper's in that Dr. Cross diagnosed Appellant with PTSD and explained how that condition contributed to the murder. App.Br. at 143. But Dr. Cross's theory of the crime as it related to PTSD was dependent on a false premise—that Appellant had seen the pornography on Victim's computer prior to the murder and that Appellant murdered Victim because he suspected that Victim was a pedophile. As the motion court correctly found, the evidence revealed the "pedophile defense" to be an obvious fabrication—none of the pornography had been accessed during the months that Appellant lived with Victim, and Appellant never told anyone that he suspected Victim was a pedophile until the pornography was discovered years later by Brown's counsel. *See* Part I, *supra*. Thus, Dr. Cross's testimony that Appellant's PTSD was triggered by the pornography, sending Appellant into an unstoppable rage of indeterminate length, during which he could not help but kill Victim (although Appellant repeatedly insisted that Justin Brown actually shot Victim), had no credibility (if it would even have been admissible) and would not have helped Appellant.

Finally, Dr. Cross's testimony was peppered with statements that would have been damaging to Appellant. For example, he testified that Appellant's sister Lisa would not testify for Appellant at trial because Appellant had been cruel to her by abusing her and making racist remarks to her when they were younger (PCR Tr. 449-50). Such testimony would have contradicted the defense theory that, despite Appellant's background, he was a "supportive brother" (T.Tr. 1150). Additionally, Dr. Cross testified that Appellant had not been emotionally close to his wives and could not bond with his children (PCR Tr. 496). This, too, would have been inconsistent with the defense's mitigation theory that Appellant "grew up to be a loving parent" (T.Tr. 1150). Given the evidence establishing Appellant's financial motive for the murder and Appellant's "loving father, son, and brother" mitigation theory, counsel was not ineffective for declining to call Dr. Cross to testify at Appellant's trial.

5. Mary Alice Gill

a. Intended testimony

Mary Alice Gill, Appellant's mother, testified that her family was poor when she was growing up, and that she was responsible for taking care of her siblings while her mother "walked the street" (PCR Tr. 208-15). When Mary Alice was a teenager, her mother prostituted her to older men (PCR Tr. 215-16). She gave birth to her eldest child, Lisa, when she was eighteen years old (PCR

Tr. 223). Carl, her next child, was born two years later to a different father (PCR Tr. 224). Because she was so poor, she moved in with her former babysitter, Ms. Lula, and Ms. Lula's husband Mack Hutchison (PCR Tr. 227). In exchange for a few dollars, Mary Alice had sex with Hutchison, who was in his early seventies (PCR Tr. 227). Mary Alice became pregnant with Appellant (PCR Tr. 227).

When Appellant was born, Mary Alice could not bond with him (PCR Tr. 231). As he got older, Appellant became interested in sports (PCR Tr. 241). Mary Alice went to some of his games, but could not go to his football games because they conflicted with her work schedule (PCR Tr. 241-42). Mary Alice testified that because her own mother did not love her, she could not love her children (PCR Tr. 247). Nevertheless, Mary Alice said that she had a good relationship with Appellant when he was a child, although she did swear at him and beat him when she thought he needed it (PCR Tr. 248).

Mary Alice said that one of the men she lived with when Appellant was a child, Junior Criswell, did not like Appellant and was mean to him (PCR Tr. 250-52). Mary Alice did not do anything about that (PCR Tr. 252). She also liked and trusted Dewayne Fraser, a neighbor who Appellant has alleged molested him (PCR Tr. 255-56). Mary Alice would not accept that Fraser had abused Appellant (PCR Tr. 260).

When Appellant left for the Navy, Mary Alice expected that he would not succeed because she did not think that he could take orders (PCR Tr. 263-64). She described her son as "kind of hot headed," and said that he did what he wanted to do (PCR Tr. 271). Mary Alice blamed herself for the way that her children turned out (PCR Tr. 270).

b. Motion court's findings

The motion court found that Mary Alice's PCR testimony was "not significantly different from her previous testimony," but noted that "she has clearly been instructed how to answer questions to reveal her 'insights' into her past" (PCR L.F. 484). The court observed that Mary Alice's description of her difficult family history and of the discrimination that she herself suffered as a youth was "undoubtedly true," but that she was "very unsympathetic as a witness and her testimony offers nothing that a juror would consider as mitigating or in any way relevant to the murder of [Victim] by her son" (PCR L.F. 484).

c. Discussion

Appellant argues that the expanded version of Mary Alice's testimony was necessary to provide detail into his abusive childhood. In support, he relies on *Hutchison*, 150 S.W.3d at 305, where this Court found counsel ineffective for failing to present any background information about the abuse that the defendant suffered as a child, the defendant's mental deficits, and the family's

history of mental illness and substance abuse. App.Br. at 128. In Appellant's case, in contrast, evidence was presented at trial that Appellant was abused when he was younger, his family had a history of mental illness, and that Appellant himself suffered from an attachment disorder that hindered his decision-making ability (T.Tr. 1228-63, 1303-38). The few additional details included in Mary Alice's extended testimony added little to the picture, and it cannot be said that there is a reasonable probability that their inclusion would have affected the outcome of the penalty phase. *See Strickland*, 466 U.S. at 695-96 (observing that some errors by counsel "will have had a pervasive effect on the inferences to be drawn, altering the entire evidentiary picture, and some will have had an isolated, trivial effect").

Appellant argues that Mary Alice's trial testimony portrayed her as having provided a "secure, loving, stable" home, in stark contrast to the impression left by her PCR testimony. App.Br. at 129. But other trial witnesses, especially Lori Gill and Dr. Draper, effectively described the abuse that Appellant endured from Mary Alice and others (T.Tr. 1259, 1318-19)—it was not necessary for Mary Alice to confess to the abuse herself. *See Lyons* 39 S.W.3d at 38-39 (holding that counsel was not ineffective for failing to "exhaustively question" the defendant's sister about the defendant's abusive childhood when other witnesses, including a mental health expert, presented the information to the jury). Mary Alice's trial testimony served a different strategic

purpose—to establish that Appellant was a good child at home as well as at school (T.Tr. 1238-40). This testimony was consistent with the defense's overall mitigation strategy, which was to portray Appellant as basically a good person who had made a terrible mistake, rather than as a person whose horrific background made his violent crime inevitable. *See Middleton v. State*, 103 S.W.3d 726, 738 (Mo.banc 2003) ("Counsel cannot be said to have been ineffective in making reasonable strategic choices and decisions as to what evidence to present.").

Indeed, Mary Alice's PCR testimony would not have been unequivocally helpful to Appellant because some of Mary Alice's statements cast Appellant in a decidedly negative light. She testified that she had expected that Appellant would fail in the Navy because Appellant cannot follow orders (PCR Tr. 263-64). This testimony would potentially have been harmful to Appellant's mitigation argument that Appellant thrives in structured environments like prison and could be trusted not to cause any problems if sentenced to life without parole (T.Tr. 1330-31, 1444). Mary Alice's testimony that Appellant was "hot headed" and did whatever he wanted was potentially damaging for the same reason (PCR Tr. 271). Because of the risks inherent in the additional testimony, it cannot be said that counsel acted unreasonably in limiting Mary Alice's testimony as they did.

Finally, the court's observation that Mary Alice had clearly been coached to answer questions about her background in a certain way strengthens its finding that counsel was not ineffective for limiting Mary Alice's testimony. No matter how substantively compelling Mary Alice's new testimony might have been, it would not have been useful if it appeared that it was all supplied by Appellant's lawyers. Indeed, if Mary Alice's new testimony was a result of coaching by Appellant's PCR team, as the motion court perceived, it may be that the additional testimony was not even available to trial counsel. Trial counsel was not ineffective for restricting their examination of Mary Alice to testimony that she could provide naturally and persuasively.

6. Medical and mental health records

a. Records

Cathy Luebbering, a mitigation specialist who worked with Appellant's PCR team, testified that she gathered thousands of pages of records relating to Appellant and his extended family, including records pertaining to medical services, mental health, employment, and prison (PCR Tr. 402-07). She explained that she thought "much of the information about the family members that is documented on the timeline [prepared using some of the records] could be of a mitigating value if it's all taken into consideration, the whole picture of not

just our client's life, but taking into consideration the generations of experiences of our client's family members" (PCR Tr. 411).

b. Motion court's findings

The court found that counsel was not ineffective for failing to acquire the voluminous records obtained by Luebbering (PCR L.F. 488). The court noted that it was "difficult to imagine why time, money, and energy would be spent on much of this material" (PCR L.F. 488). "Among the documents collected were records of relatives of [Appellant] that did not offer any relevant information and, more important, records no one would have ever reasonably expected to produce relevant or helpful information" (PCR L.F. 488). The court rejected Appellant's implication that a mitigation specialist must be hired "to access every possible record," and noted that it did not find persuasive Luebbering's attempt to explain why the additional information was relevant (PCR L.F. 488-89).

c. Discussion

Appellant argues that "the mental health records for Carl Gill and other relatives would have furnished insight into the dysfunction which surrounded [Appellant] as a child." App.Br. at 132. But these records were cumulative of the testimony presented by Mary Alice Gill and Dr. Draper, both of whom testified that there was a history of mental illness in Appellant's family (T.Tr. 1233, 1308-10). The particular details of the mental illnesses of Appellant's

distant relatives, some of whom may not even have been in contact with Appellant when he was growing up, were irrelevant and not at all mitigating. The court did not clearly err in finding that counsel was not ineffective for choosing not to waste time sorting through every conceivable record for each of Appellant's family members.

Appellant also argues that Appellant's own medical records "documented Carl's having stabbed [Appellant]." App.Br. at 132. But he overlooks the fact that defense counsel actually did have this record prior to trial—it was obtained by investigator Sean Goliday on December 2, 2002, over a year before Appellant's trial (PCR Ex.2 at 513, 518; PCR Ex.15 at 5143). And counsel did establish at trial, through testimony by Appellant's mother and by Carl himself, that Carl stabbed Appellant with a pitchfork when they were children (T.Tr. 1242-43; T.Ex.M at 10). Thus, the medical record itself was cumulative of testimony that was presented. Counsel was not ineffective for failing to highlight the record to the jury.

In Appellant's case, counsel made a considered strategic choice to present some evidence of Appellant's difficult childhood, but to emphasize the positive aspects of Appellant's background and character (PCR Tr. 200-01; T.Tr. 1150, 1444). The defense team spoke to numerous witnesses and reviewed relevant records (PCR Ex.15 at 5143; PCR Ex.96 at 32-45), and ultimately called thirteen witnesses to present Appellant's mitigation case. Counsel's efforts went far

beyond those rejected as inadequate in *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (background investigation limited to PSI and DSS records), *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (counsel failed to obtain any records relating to the defendant's "nightmarish" childhood because they erroneously believed that state law barred access to such records), and *Simmons v. Luebbers*, 299 F.3d. 929, 936-39 (8th Cir. 2002) (counsel presented *no* evidence about the defendant's background at all)—the cases upon which Appellant relies. App.Br. at 133. At best, Appellant's post-conviction claim suggests an *alternative* mitigation strategy, not necessarily a superior one. And the pursuit of one reasonable strategy over another does not constitute ineffective assistance of counsel. *Clayton*, 63 S.W.3d at 207-08; *see also Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

A post-conviction evidentiary hearing is not, and should not be viewed as, an opportunity to present a different or more extensive mitigation case in hopes of convincing a subsequent court that counsel was ineffective for failing to investigate and call various other witnesses. "Judicial scrutiny of counsel's performance must be highly deferential," *Id.* at 689, and, as the Court explained in *Strickland*, there are good reasons for holding that a post-trial inquiry into counsel's performance should not consist of a "second trial" designed to grade

counsel's performance:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

466 U.S. at 690. Here, Appellant's post-conviction inquiry into counsel's performance was essentially a second trial, and counsel's objectively reasonable efforts to present a compelling mitigation case were ignored in favor of gauging whether Appellant's new mitigation theory would have swayed the jury. But, as the United States Supreme Court explained in *Strickland*, that should not be the framework for evaluating counsel's performance. The motion court did not clearly err in finding that counsel's performance during Appellant's penalty phase was not ineffective.

V. (lethal injection procedure)

The motion court did not clearly err in denying Appellant's claim that Missouri's use of lethal injection violates the Eighth Amendment's prohibition of cruel and unusual punishment because Appellant's challenge to the lethal injection method is not ripe for consideration. (Responds to Appellant's Point VIII).

In his final point, Appellant alleges that the motion court clearly erred in denying his constitutional challenge to Missouri's method of lethal injection. App.Br. at 147-49. Appellant claims that the Missouri Department of Corrections has a history of employing incompetent, inadequately trained personnel to carry out lethal injections, and, as a result, Missouri's lethal injection method presents a "substantial risk of maladministration." App.Br. at 148-49. Appellant did not present any evidence in support of this point at his evidentiary hearing.

The motion court summarily denied Appellant's challenge to Missouri's lethal injection method, noting that this Court "has already rejected this claim" (PCR L.F. 502). The motion court was correct. In *State v. Forrest*, this Court held that a claim challenging the constitutionality of Missouri's lethal injection method is not ripe for consideration in a Rule 29.15 motion for post-conviction relief:

> As it is unknown what method, if any, of lethal injection may be utilized by the State of Missouri at such future time, if any, as [Movant's] right to seek relief in state and federal courts is concluded and his execution date and method are set, it is premature for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment . . . .

Forrest, No.SC89343, slip op. at 26 (quoting *Worthington*, 166 S.W.3d at 583 n.3); *see also Zink v. State*, 278 S.W.3d 170, 193 (Mo.banc 2009). The motion court did not clearly err in denying Appellant's unripe claim.

CONCLUSION

In view of the foregoing, the denial of Appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

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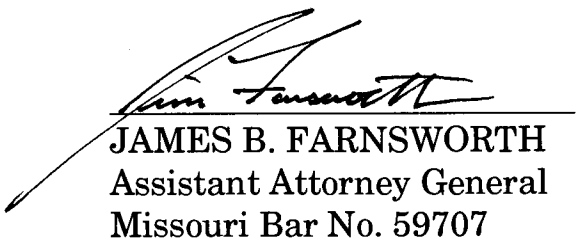

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 22,408 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

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

3. That a true and correct copy of the attached brief, appendix, and a floppy disk containing a copy of this brief, were mailed this 31st day of July, 2009, to:

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