No. SC88063

IN THE
SUPREME COURT OF MISSOURI

MICHAEL D. TAYLOR,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

APPEAL FROM ST. CHARLES COUNTY CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT
THE HONORABLE LUCY D. RAUCH, JUDGE

RESPONDENT'S BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

THEODORE A. BRUCE
Assistant Attorney General
Missouri Bar No. 29687

Post Office Box 899
Jefferson City, Missouri 65102-0899
(573) 751-3321
(573) 751-2096 FAX
theodore.bruce@ago.mo.gov
ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

JURISDICTIONAL STATEMENT

The Appellant's sentence of death for murder in the first degree was upheld in the Circuit Court of St. Charles County, Missouri, by Judge Lucy Rauch, who denied Appellant's Motion to Vacate pursuant to Rule 29.15. Because the sentence in this case is death, this appeal falls within the exclusive appellate jurisdiction of the Supreme Court of Missouri. MO. CONST. art. V, § 3 (as amended effective 1982).

STATEMENT OF FACTS

Appellant was indicted in Washington County Circuit Court on one count of first-degree murder for the October 3, 1999, killing of Shackrein Thomas, his cell mate at the Potosi Correctional Center. (Tr. 873). After a change of venue to St. Charles County, a jury trial on the murder charge was held before Judge Lucy D. Rauch from January 13-18, 2003. (282-91). The sufficiency of the evidence to support Appellant's murder conviction is not challenged. In fact, Appellant never disputed that he killed Mr. Thomas; his only defense at trial was that he suffered from a mental disease relieving him of responsibility for the crime. (Tr. 785-86, 789).

The Facts Pertaining To The Murder

When he committed this murder, Appellant, who had been convicted of first-degree murder and forcible rape in 1998, was serving a life sentence without probation or parole based on his 1995 killing of Christine Smetzer, a fifteen-year old high school student. (Tr. 1505-06, 1509, 1511-12). Appellant raped Ms. Smetzer in a bathroom at McCluer North High School (St. Louis County) and then asphyxiated her by forcing her neck against a toilet with her face in the water. (Tr. 1099, 1101-02, 1505-09).

Before being put in the same cell with Mr. Thomas, Appellant had been in "the hole" for refusing to take a cell mate ("cellee").[1] To get out of the hole, Appellant agreed to take a cell mate, and he and Mr. Thomas were assigned to a cell together. (Tr. 873). Appellant and

[1]State's Exhibit 24 was Appellant's videotaped confession to the murder. (Tr. 979).

Mr. Thomas got along well, and apparently engaged in sexual activity together. (Tr. 974, 989). Appellant even gave his medication to Mr. Thomas, who would ingest it. (Tr. 986).

At approximately 7:30 p.m. on October 3, 1999, only their ninth day in the same cell together, Appellant was reading a book ("Pillars of the Earth") when he put it down and got off his bunk. (Tr. 1035). Appellant put his shoes on for stability and then struck Mr. Thomas in the face, who in turn began swinging his arms at Appellant. Appellant then got behind Mr. Thomas and used a choke hold to strangle him. (Tr. 982). Appellant strangled Mr. Thomas for "ten to twenty" minutes until he finally died. (Tr. 975-76).

At approximately 8:30 p.m., a prison nurse came to Appellant's cell and gave Appellant his anti-depressant medication, Trazadone, which he actually took for the first time since he had been in the same cell with Mr. Thomas. (Tr. 872, 887, 986, 1166).

Before the ten o'clock count had been completed, Appellant pushed the emergency button in his cell to call correctional officers to his cell. (Tr. 803-06; 839). Appellant later said that he did this so that Mr. Thomas's body could be removed because it was in his way. (State's Ex. 24). The officers arrived and asked Appellant what was wrong, but he did not answer. (Tr. 806-07). One officer opened the "chuck hole" in the cell door and told Appellant to "cuff up," meaning that Appellant should turn around and put his hands through the opening so that restraints could be applied. (Tr. 810, 843). At this point the officers could see Mr. Thomas's body lying in the cell. (Tr. 814, 879). Appellant told the officers that his "father" made him do it. (Tr. 811, 845). After several requests to "cuff up," Appellant finally complied and was taken out of the cell. (Tr. 810-12, 843-44).

The officers found Mr. Thomas's lifeless body on the cell floor. (Tr. 848, 851). The body had a bite mark in the middle of the back and one of Mr. Thomas's eyeballs was nearly out of the socket. (Tr. 883, 921, 926, 966-67). A white creamy substance was present between Mr. Thomas's buttocks. (Tr. 967). Although an attempt was made to test the white creamy substance, not enough DNA material was present to conduct a valid test. (Tr. 954). But later testing revealed the presence of Appellant's DNA on the backside of Mr. Thomas's boxer shorts. (Tr. 951, 956).

Mr. Thomas's cause of death was asphyxiation caused by neck compression. (Tr. 930). He also suffered from a swollen left eye, caused by a blunt impact, and abrasions to the abdomen and left cheek. (Tr. 920-21). A toxicology report showed that Mr. Thomas's blood contained Trazadone. (Tr. 933).

Later that night (actually in the early morning hours of October 4, 1999) and again on October 5, 1999, Appellant freely admitted to a Department of Corrections investigator that he had strangled Mr. Thomas to death. (Tr. 975-76). Appellant said that his "father" from the "dark side" told Appellant to "send" Mr. Thomas to him. (Tr. 974-75, 987-88). Appellant denied that this voice commanded him to kill Mr. Thomas, but he knew what sending Mr. Thomas to his "father" meant that he had to do. (Tr. 975, 986-87). During his confession on October 5, 1999, Appellant even demonstrated the choke hold with which he used to strangle Mr. Thomas. (Tr. 982; State's Ex. 24).

Appellant's Insanity Defense

After the State rested its case, Appellant presented the testimony of several witnesses in an attempt to prove that he suffered from a mental disease that excluded him from responsibility for killing Mr. Thomas.

Dr. John Rabun, a forensic psychiatrist, evaluated Appellant for criminal responsibility. (Tr. 1012). Dr. Rabun diagnosed Appellant with paranoid schizophrenia and anti-social personality disorder, though he conceded that no test existed to prove someone has schizophrenia (Tr. 1056, 1068, 1081). Dr. Rabun based this diagnosis on the fact that Appellant reported suffering from delusions and hallucinations, including an auditory hallucination involving what Appellant described as the voice of his "father of darkness." (Tr. 1031, 1036).

Dr. Rabun also testified that Appellant was not malingering, which he explained as the false reporting or exaggeration of medical symptoms for external reasons, such as to avoid a conviction. (Tr. 1037-39). Dr. Rabun reached this conclusion because (1) Appellant had been diagnosed at Fulton State Hospital with paranoid schizophrenia for which he was taking medication; (2) Appellant did not try to blame the killing on the fact that he heard voices; (3) Appellant described the voices as coming from "outside" his head and that the voices were not always present; and, (4) that Appellant did not claim he was hearing voices at the moment he strangled Mr. Thomas. (Tr. 1071-72). Dr. Rabun also opined that Appellant's condition was chronic as evidenced by his eight-month stay at Fulton State Hospital. (Tr. 1061).

Dr. Rabun concluded that when Appellant killed Mr. Thomas, Appellant suffered from schizophrenia and lacked the capacity to know and appreciate the nature, quality, and wrongfulness of his conduct. (Tr. 1075-76).

Dr. William Eikermann, a clinical psychiatrist on the DOC Ward at Fulton State Hospital, treated Appellant at Fulton not long after Appellant had killed Mr. Thomas and also treated him at Crossroads Correctional Center. (Tr. 1115, 1124-25). Dr. Eikermann noted that Appellant was delusional and psychotic, suffering from auditory hallucinations. (Tr. 1127, 1130). He diagnosed Appellant with paranoid schizophrenia and testified that Appellant's behavior improved after Appellant was prescribed Clozaril, a drug with potentially severe side-effects. (Tr. 1128-30). Dr Eikermann, who was chief resident the year before he testified in this case, conceded that he was not a forensic psychiatrist, but denied that Appellant was malingering. (Tr. 1116, 1134). He did testify, however, that Appellant would stop taking his medications (Tr. 1131-32).

Dr. Bruce Harry, a staff psychiatrist at Fulton State Hospital, testified that while substituting for another doctor he saw Appellant a total of three times in 1999 and 2000, less than one-half hour each time. (Tr. 1151-52, 1161-62). Dr. Harry simply repeated some of the symptoms and diagnosis reported by the other doctors, but stated that he did no testing on Appellant and offered no opinion about Appellant's mental condition. (Tr. 1156-61).

Dr. Ahsam Syed, a DOC psychiatric consultant at Fulton Reception and Diagnostic Center, testified that he evaluated Appellant when he entered the corrections system in 1998.

(Ex. F, pp. 4-5).[2] He stated that Appellant reported auditory hallucinations, including hearing the voice of the "father of darkness." (Ex. F, pp. 7-8, 11, 15). Dr. Syed diagnosed Appellant with major depression with psychotic features. (Ex. F, pp. 11, 16). Dr. Syed also testified that Appellant refused to take his medication. (Ex. F, pp. 15-16).

The State's Rebuttal Evidence

After Appellant presented his defense, the State presented rebuttal evidence to show that Appellant suffered from no mental disease or defect, but was simply malingering.

Dr. Richard Scott, a forensic psychologist and certified forensic examiner, evaluated Appellant on two separate occasions in 1996 and 1997 in connection with the Smetzer case. (Tr. 1173-75, 1179-81). Dr. Scott interviewed Appellant for four-and-one-half hours during the first interview and three-and-one-half hours during the second. (Tr. 1184-85, 1200). Dr. Scott reviewed all of Appellant's records generated to that point in Appellant's life, including psychiatric, school, family court, and police records. (Tr. 1182, 1187). Dr. Scott concluded that Appellant did not suffer from a mental disease or defect, but diagnosed him with conduct disorder, adjustment disorder, and mood disturbance. (Tr. 1188-89). In Dr. Scott's opinion, Appellant was aggressive, had a history of violating the rights of others, and he concluded that Appellant had a conduct disorder, but no mental disease or defect as defined by law (Tr. 1189-90, 1192, 1196-97). Dr. Scott found no evidence that Appellant was psychotic, delusional, or suffered from hallucinations, and he found no thought disorder

[2]Dr. Syed's testimony was presented by videotaped deposition (Trial Exhibit F).

typical of psychosis (Tr. 1190).[3] He concluded that Appellant was not insane and was criminally responsible for the Smetzer murder. (Tr. 1199-1200).

After Appellant was evaluated by a defense expert, Dr. Scott re-interviewed Appellant in 1997. (Tr. 1200). During this interview, Appellant reported for the first time suffering from hallucinations and hearing voices. (Tr. 1198-99, 1203, 1208). Appellant described florid visual and auditory hallucinations, including hearing the voice of his "father of darkness" and a visual hallucination of a devilish looking individual with horns; and he directed Dr. Scott's attention to these hallucinations (Tr. 1202, 1209-10).

In Dr. Scott's opinion, Appellant was not genuinely suffering from these symptoms. (Tr. 1204). He also did not find these hallucinations typical of a schizophrenic, and he stated that visual hallucinations were extremely rare and usually brought about by organic psychosis caused by drug use. (Tr. 1210). Also, Appellant did not have the mannerisms of someone suffering from schizophrenia. (Tr. 1204). Typically schizophrenics do not draw attention to the voices they hear and try to cover up their symptoms. (Tr. 1210). After his second evaluation, Dr. Scott confirmed his original diagnosis, but added the clinical finding of malingering. (Tr. 1212).

Dr. Christy Blanchard, a psychologist, testified that in October 2002 she performed psychological testing on Appellant by giving him the Minnesota Multi-Phasic Inventory II. (Tr. 1298, 1301-02). She testified that the validity scales suggested that Appellant was "over

[3]Dr. Scott also performed intelligence testing on Appellant and concluded that Appellant was not mentally retarded. (Tr. 1192, 1194).

reporting, exaggerating, or feigning symptoms," and that the scores in this respect were "extreme." (Tr. 1311). She testified that a score of over 90 on the F-Scale, the scale that determines the validity of the test, was extremely rare. (Tr. 1312-13). When the F-score is elevated the test is reporting far in excess of what an average person with those mental problems would report as symptoms. (Tr. 1312-13). Appellant's F-scale score was 110, which put Appellant within the "fake-bad" profile. (Tr. 1312-13).

Dr. David Vlach, a forensic psychiatrist and certified forensic examiner, evaluated Appellant in this case for both competency to stand trial and criminal responsibility (Tr. 1321-24, 1327-28, 1363). He interviewed Appellant on four different dates for a total of five hours and fifteen minutes and reviewed all of Appellant's records, including those from the Smetzer case. (Tr. 1331, 1334-35, 1364). Dr. Vlach looked for signs of schizophrenia when he evaluated Appellant, but instead found things inconsistent with someone suffering from that disease, including that Appellant was well-groomed, was able to socialize, his speech was normal, and he did not suffer from mania (Tr. 1339, 1340-42).

During these interviews, Appellant volunteered and repeatedly drew attention to the voices he heard–the "father of darkness" and "Tashua." (Tr. 1343, 1345-47). This was unusual for people with mental illness, as they attempt to hide these types of symptoms, but it is typical of people who are malingering. (Tr. 1346-47). Appellant would ask the doctors if he had told them about "my voice," and he would bring a chair with him when he spoke with these doctors, telling them that the chair was for his invisible friend, the crime victim. (Tr. 1354-55). Dr. Vlach testified that this was a highly atypical symptom, one that he had never seen before. (Tr. 1354-55).

Appellant also claimed to have suffered visual hallucinations (blood on his hands), which are extremely rare. (Tr. 1348-49). Also most people are troubled by hallucinations, but Appellant seemed to enjoy them. (Tr. 1349-50). Also, after Appellant spent several months at Fulton after murdering Mr. Thomas, he would report new symptoms in an effort to avoid returning to prison. (Tr. 1351-54). In addition, Appellant's prolonged stay at Fulton was also explained by his inconsistent reporting of symptoms and ever-changing diagnosis. (Tr. 1379). At first, Appellant was diagnosed with major depression with psychotic features, three months later he was diagnosed with disassociative identity disorder, and two months after that he was diagnosed with paranoid schizophrenia. (Tr. 1379). Dr. Vlach testified that this sequence is indicative of malingering, because malingerers do not present a consistent clinical picture. (Tr. 1379).

Dr. Vlach also testified that schizophrenics try to avoid obeying what the voices tell them to do, especially if it is violent. (Tr. 1356). But Appellant said he had to do what the "father" told him. (Tr. 1357). Also, Appellant had the highly unusual symptom of having hallucinations in his sleep. (Tr. 1357). Appellant also claimed that he could summon the "father of darkness" when he was alone in his cell, but the chemical imbalance that causes schizophrenia does not allow a true schizophrenic to control such things. (Tr. 1358-59). But this type of claim is consistent with a malingerer who is trying to convince others that he is insane. (Tr. 1359).

In addition to the MMPI scores which showed that Appellant was faking, Dr. Vlach gave Appellant another test designed to detect malingering. (Tr. 1360). Appellant's score on that test showed that it was highly likely that Appellant was malingering. (Tr. 1361).

In Dr. Vlach's opinion, Appellant did not suffer a mental disease or defect, but was simply malingering. (Tr. 1361). Dr. Vlach concluded that Appellant did not have a mental disease or defect that made him unable to understand the wrongfulness of his conduct, that Appellant was responsible for the crime from a mental aspect, that Appellant knew killing Mr. Thomas was wrong, and that Appellant could have refrained from doing so if he had wanted (Tr. 1366-67). He also concluded that Appellant did not suffer from schizophrenia. (Tr. 1366).

The jury rejected Appellant's insanity defense and found Appellant guilty of first-degree murder. (Tr. 1467).

The Penalty Phase

During the penalty phase the parties each presented only one witness. The State presented the testimony of a detective who investigated the Smetzer murder. (Tr. 1505-16). Appellant presented the videotaped testimony of the superintendent at Crossroads Correctional Center, where Appellant was then incarcerated. (Tr. 1517). The jury unanimously voted to recommended a sentence of death for Appellant (Tr. 1561-62). After overruling Appellant's motion for new trial, the trial court sentenced Appellant to death (Sent. Tr. 13, 19). Appellant's conviction was affirmed by this court. State v. Taylor, 134 S.W.3d 21 (Mo. banc 2004).

On September 2, 2004, the Appellant filed his post-conviction pro se motion to vacate under Rule 29.15.(L.F., p. 11-16). Following the appointment of counsel (L.F. 18-19), Appellant's Amended Motion was filed on December 8, 2004 (L.F. 225-525). An evidentiary hearing was held from March 20-23, 2006 (L.F. 870). On August 14, 2006, the Circuit Court

issued Findings of Fact and Conclusions of Law denying the Appellant's Motion of Vacate (L.F. 869-939). This appeal followed.

ARGUMENT

I.

The motion court did not err in finding that Appellant was not denied a fair trial because the State did not disclose an investigator's memorandum concerning an interview of witness Perschbacher (Exhibit 2), because this omission was not prejudicial to Appellant's defense in that both the trial court and all attorneys present concluded that Perschbacher was thoroughly and effectively impeached and lacked any credibility with the jury and did not effect the jury's verdict. Thus, any further impeachment evidence was unnecessary and would not have affected the outcome of the trial in this case.

At the motion hearing, and on appeal, the Appellant devotes substantial energy arguing that he was denied a fair trial because his trial council did not receive a memorandum from one of the state's investigators summarizing an interview with admitted jailhouse "snitch" Perschbacher (Exhibit 2).

Rather than focus on the relevance or materiality of this information to his defense, the Appellant's brief vilifies both the prosecutors and his trial attorneys for failing to disclose or use additional evidence for impeaching Mr. Perschbacher. These attacks ignore the significant, and decisive, factual determination made by the motion court—Mr. Perschbacher had already been thoroughly and completely discredited (L.F., p. 871-873, 926-932). Any further impeachment would have been of no consequence because he had been "thoroughly impeached" (L.F. 927). Because there was no prejudice, Appellant is not entitled to relief.

Standard of Review

"This Court will uphold the findings and conclusions of the motion court unless they are clearly erroneous." Williams v. State, 168 S.W.3d 433, 439 (Mo. banc 2005). "Findings and conclusions are clearly erroneous if, after reviewing the entire record, the appellate court had the definite and firm impression that a mistake has been made." Id. "The motion court's findings of fact and conclusions of law are presumed to be correct." Edwards v. State, 200 S.W.3d 500, 509 (Mo. banc 2006).

Brady Claim

Brady v. Maryland, 373 U.S.83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), holds that "the 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. Ct. 87, 83 S.Ct. at 1196-97. The evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L.Ed.2d 481 (1985); State v. Phillips, 940 S.W.2d 512, 516-17 (Mo. banc 1997).The motion court noted that any Brady violation was unintentional (L.F., p. 931), but also properly recognized that this conclusion did not resolve the issue (L.F., p. 930-931). Instead, the motion court concluded that "Mr. Perschbacher's credibility was thoroughly impeached by the defense and that no further impeachment was necessary." (L.F. 931).

Mr. Perschbacher testified at trial that he intercepted notes from fellow inmate Jerome White-Bey telling Appellant to fake mental illness (Tr. 1268-1270). On cross examination,

Mr. Perschbacher was impeached with his criminal history (Tr. 1271-1280), psychiatric treatment (Tr. 1282), his conduct violations in prison (Tr. 1282-1285), contact he had with prosecutors asking for favorable treatment (Tr. 1285-1289), and his racism (Tr. 1289-1294). Ms. Turlington summarized Mr. Perschbacher's testimony this way: "His testimony was horrible. It wasn't believable." (Turlington March 1, 2006 depo, p. 147).

The prosecutor believed that Mr. Perschbacher did not come across as credible (M. Tr. 339). Both Mr. Wolfrum and Ms. Turlington both believed that Mr. Perschbacher had been "thoroughly impeached," (Turlington April 11, 2006 depo, p. 10; Wolfrum depo., April 11, 2006, p. 27). In fact, Appellant's attorneys had Mr. White-Bey present and available to refute Mr. Perschbacher's accusation, but made a conscious, strategic decision to not call him (Mo. Tr. 534-35, 542-43). There were a number of additional areas of potential cross-examination available. Again, trial council made a conscious decision that further impeachment was unnecessary. (Turlington April 11, 2006 depo, p. 10; Mo. Tr. 542-43).

Under these circumstances, the motion court had a significant basis in law and fact to support the conclusion that further "potential" impeaching evidence was unnecessary. As it was, Appellant's trial counsel[4] had additional areas of cross-examination and impeachment available that he consciously chose, as a matter of sound trial strategy, to not address. [5] As Trial Council Wolfrum stated:

---

[4] Mr. Wolfrum was the attorney who cross-examined Mr. Perschbacher.

[5] The Appellant, of course, challenges his trial counsel's failure to explore every possible basis for impeachment in his subsequent Points Relied On.

> I came to the point where I had a black client and [Perschbacher] was admitting using racial epithets, and I think he had initially- - and again, I'll defer to the transcripts. I'd asked him if he was a racial separatist, and I think he went through sort of a spectrum of, "No. Maybe." And then, you know, I mean, I thought the jury saw him lie about his racism in front of them, and I'll defer to whatever the transcript says is correct. I got to a point, given what I had, that I thought I'd made the best point with him. And the jury had diversity, as well. I though I'd made the best point with him, given what I had, that I was going to be able to. (Wolfrum depo, April 11, 2006, p. 27).

Mr. Wolfrum's co-council, Sharon Turlington, testified that she believed Mr. Perschbacher "was impeached very well by Bob" (Turlington depo, April 11, 2006, p. 9). Again, even though Mr. White-Bey was available to testify, trial council made a strategic decision to not call him because his impeachment of Perschbacher was unnecessary (Turlington depo, April 11, 2006, p. 10).

This testimony comes from two witnesses who were trying to be helpful to Appellant's PCR claims, and any bias they may have had was favorable to Appellant. In addition, the prosecutor also had to reluctantly acknowledge that Mr. Perschbacher was not all that helpful (Mo. Tr. 339).

Thus, the motion court had a significant and substantial basis for her conclusion. She was in a far superior position than an appellate court and appellate counsel to assess the impact of Mr. Perschbacher's testimony. Her conclusions were consistent with the evaluations of trial counsel, and the testimony of trial counsel is bolstered by their actions at

trial in not further attacking Mr. Perschbacher's testimony with the additional impeachment evidence available to them at trial.

For these reasons, this claim was properly denied.

Testimony of Steck and Ainley

Appellant makes a specific argument that his trial counsel should have had the memorandum (Exhibit 2), so that they could have had Jefferson County Officers Steck and Ainley deny the false allegations made by Perschbacher. Appellant cites State v. Long, 140 S.W.3d 27 (Mo. banc 2004), for the proposition that this collateral evidence would be admissible. Of course, Appellant fails to offer any detailed analysis of that case's applicability because Long does not support his claim.

In Long, this Court did rule that criminal defendants "may, in some cases, introduce extrinsic evidence of prior false allegations." 140 S.W.3d at 31. But that case very clearly dealt with false allegations by a victim, id, in cases where the victim's credibility is a key factor in determining guilt or acquittal. Id. at 30. Neither is true in this case. Mr. Perschbacher was not a victim and Appellant's guilt or innocence was not really in dispute in this case. Therefore, the testimony of the deputies disputing Mr. Perschbacher's claims would not have been admissible to prove Mr. Perschbacher lied. Rousan v. State, 48 S.W.3d 576, 590 (Mo. banc 2001). "[T]he Long decision did not abrogate the rule that extrinsic evidence of prior witness misconduct is generally inadmissible." Williams v. State, 168 S.W. 3d 433, 441 (Mo. banc 2005). As the motion court found, this testimony would not have been admissible, Id.

II.

The motion court did not err in concluding that trial counsel was not ineffective in failing to impeach Mr. Perschbacher with Corrections records because Appellant was not prejudiced by this alleged failure. Trial counsel made a strategic decision to use certain evidence for impeachment and did so with sufficient effect such that Perschbacher was thoroughly impeached and was not credible as a witness and, for this reason, his testimony played no role in the outcome of his case.

(Addressing Points II and III of Appellant's Brief)

The Appellant next claims that his trial counsel was ineffective in failing to further cross-examine Mr. Perschbacher with other potential areas of impeachment. These areas include Mr. Perschbacher's conduct violations in prison and other "bad acts." Besides generally being inadmissible "bad acts" and not a proper basis for impeachment, these records were unnecessary because the evidence clearly and undeniably established that trial counsel thoroughly impeached Mr. Perschbacher and any further attempts to discredit him would have been meaningless and unnecessary.

Standard of Review

This court reviews a motion court's judgment overruling a post-conviction motion for clear error. Rule 29.15(K): Morrow v. State, 21 S.W.3d 819, 822 (Mo. banc 2000). "Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made." Id. The motion court's findings of fact and conclusions of law are presumed to be correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991). Edwards v. State, 200 S.W.3d 500, 509 (Mo. banc 2000).

Ineffective Assistance of Counsel

To show that his counsel was ineffective, Taylor must demonstrate, first, that his counsel's representation "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Second, Taylor must show that this deficiency prejudiced him, meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. 2052. "a reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Counsel's performance is presumed to be reasonable. Id. at 689, 104 S.Ct. 2052. "[C]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691, 104 S.Ct. 2052. In a death penalty case, counsel are expected to "discover all reasonably available mitigating evidence." Wiggins v. Smith, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Edwards v. State, 200 S.W.3d at 516.

Appellant again makes the incorrect assumption that this court's holding in State v. Long, 140 S.W.3d 27 (Mo. banc 2004), makes virtually any "evidence" a criminal defendant proposes to introduce admissible. "To the contrary, Long expressly upheld the rule that extrinsic evidence of prior, specific acts of misconduct is generally inadmissible…"Williams v. State 168 S.W.3d 433, 441 (Mo. banc 2005). Mr. Perschbacher "was neither a victim nor a prosecuting witness." Id.

The rules of evidence continue to prohibit evidence of a witness's prior bad acts. State v. Ferguson, 20 S.W.3d 485, 507 (Mo. banc 2000); State v. Clay, 97 S.W.2d 121, 141 (Mo. banc 1998). The reasons are obvious; the jury must focus on whether the Appellant is or is

not guilty of murder and not be distracted by litigating whether Mr. Perschbacher was or was not guilty of prison infractions. As an example, Appellant wishes to use the allegation that Mr. Perschbacher called the prison nurse a derogatory, vulgar name as potential impeachment his trial counsel was ineffective for failing to present at trial (Appellant's Brief, p. 66). He cites no authority to support the suggestion that name calling or swearing is impeachable behavior. There is no such authority. Likewise, Appellant actually argues that Mr. Perschbacher's response to a conduct violation, "Green eggs and ham, Sam I am, on a train in the rain," should have been introduced (Appellant's Brief, p. 72) because it "could have impeached Perschbacher's veracity showing the flippancy with which he treats serious matters." (Appellant's Brief, p. 74). Again, Appellant cites no authority that "flippancy" or alleged flippancy is a proper basis for impeachment in a criminal trial. As Trial Counsel Wolfrum testified, "I'm not sure that if there had been an objection that I can cross-examine inmates with conduct violations. I mean, they are not like prior convictions." (Mo. Tr. 581). With regard to other violations, Mr. Wolfrum recognized that he was generally limited to Perschbacher's answers to the questions about misconduct and "he said in the deposition that he had not engaged in that" and "I would have also been thinking some about the law on whether this was collateral, or whether I could go into it." (Mo. Tr. 586-87). Trial counsel correctly recognized that there were valid objections to any attempt to introduce this extrinsic, collateral evidence. Trial counsel cannot be deemed ineffective for failing to attempt to introduce inadmissible evidence. "The selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." Williams v. State, 168 S.W.3d 433, 443 (Mo. banc 2005).

In addition, as fully discussed in Point I, supra, there was no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Edwards v. State, 200 S.W.3d 500, 519 (Mo. banc 2006). This is because no further cross-examination of Perschbacher was necessary because he was thoroughly impeached. As the motion court determined, Mr. Perschbacher's testimony was not believed by the jury and his "credibility was [so] thoroughly impeached by the defendant that no further impeachment was necessary." (L.F. 931).

It cannot be overemphasized that trial counsel did not ignore or forget about other bases for impeachment. He made a tactical decision, one that was entirely reasonable and correct, that he had discredited Mr. Perschbacher and no purpose was served by continuing to "pound away" on a witness the jury did not believe. (Wolfrum depo, April 11, 2006, p. 27). Experienced trial counsel knows that a discredited witness can actually become a sympathetic witness if the jury believes that the cross-examination is excessive or particularly mean-spirited.

Trial counsel acted intelligently and made competent tactical decisions regarding the impeachment of Mr. Perschbacher.

III.

The motion court did not err in finding that trial counsel was not ineffective in declining to impeach Mr. Perschbacher with collateral matters because the evidence showed that trial counsel "thoroughly impeached" Mr. Perschbacher and the choice of areas of impeachment were reasonable and proper. Because Mr. Perschbacher was completely discredited, Appellant was not prejudiced by the alleged failure to further impeach Mr. Perschbacher (Addressing Points IV, V, VI, VII, VIII, IX, X of Appellant's Brief).

Unwilling to accept the conclusion reached by every trial observer, including the trial judge, that Appellant's trial counsel thoroughly and completely impeached Mr. Perschbacher, the Appellant sets out a myriad of collateral issues that he claims trial counsel should have addressed. Appellant hopes that he can convince this Court that one of these collateral issues—and he is unwilling to specify which one is most compelling—is so egregious as to require a finding of ineffectiveness.

The State submits that once a witness has been completely discredited, there is no further "level of impeachment" that trial counsel must obtain.

The fallacy of Appellant's position is made evident from the assertions made in his brief. Appellant claims these issues "would have caused jurors to disbelieve Perschbacher." (Appellant's Brief, p. 78). The jurors already did not believe Perschbacher! Furthermore, trial counsel did impeach Mr. Perschbacher with the very evidence Appellant suggests was ignored by counsel, he simply did so in a manner different than Appellant now demands. For example, in Point V, Appellant claims trial counsel should have proven that Mr.

Perschbacher did not solve a murder in Tarkio. Specifically, he claims that Colonel Stottlemyre should have been called as a witness to say that Mr. Perschbacher did not solve that murder. Counsel did not ignore that potential impeachment, but used the evidence in a different way that demonstrated a conscious choice of strategy. Counsel impeached Mr. Perschbacher by implying that his claims that several people confessed to murders is not believable (Tr. 1277). This included the Tarkio murder (Tr. 1278). Choosing a different strategy or how to use evidence is reasonable and not ineffective. Edwards, 200 S.W.3d at 517; Williams v. State, 168 S.W.3d 433, 443 (Mo. banc 2005).

The State does not desire to be repetitious in addressing Appellant's numerous claims regarding Mr. Perschbacher. Nevertheless, in an effort to address his claims, the State feels it necessary to focus on the dispositive issue—trial counsel did all that any defendant could ask of his counsel with regard to Mr. Perschbacher. Trial counsel impeached Perschbacher so that his testimony was not believed by the jury and had no impact in the outcome of his trial.

It takes little legal analysis to recognize that this case was actually about which expert testimony was found credible by the jury. Mr. Perschbacher's testimony did not affect the outcome in any way.

In Point IV, the Appellant insists his attorney should have impeached Mr. Perschbacher with letters he wrote. It is without question that trial counsel knew of these letters since they were discussed during Mr. Perschbacher's pre-trial deposition (Exhibit 49). Thus, trial counsel is not accused of being ineffective in failing to discover or obtain these letters, but in his decision to not cross-examine the witness with these letters. The law is well-established, however, that the "selection of witnesses and evidence are matters of trial

strategy, virtually unchallengeable in an ineffective assistance claim." Edwards, 200 S.W.3d at 518; Williams, 168 S.W.3d at 443.

In Point V, Appellant claims that Colonel Stottlemyre of the Highway Patrol should have been called to disprove that Mr. Perschbacher "solved" a murder in Tarkio. The basic premise is false—Mr. Perschbacher did not assert he "solved" the Tarkio murder. The deposition portions cited by Appellant in Point V do not suggest that Mr. Perschbacher claimed to have solved any murder. In fact, in pages 30 to 34 of his deposition (Exhibit 49), Mr. Perschbacher refuses to talk about other cases. And in pages 121 and 122, he does not say he solved the murder. Mr. Perschbacher said that he provided information, "the information I gave them was good." (Exhibit 49, p. 121), but does not claim that he solved it.

Nothing Colonel Stottlemyre testified was impeaching. He testified that he did not interview the suspect at issue, John Caudil (Mo. Tr., p. 548). And he simply testified that he did not know of any involvement by Mr. Perschbacher in the case (Mo. Tr., p. 549). That is far different from having any direct evidence to contradict Mr. Perschbacher. In fact, Mr. Perschbacher did not testify at trial that the person responsible for the Tarkio murder confessed to him. His testimony was consistent with his deposition testimony:

"Q. Was the case in Iowa?

"A. Well, the body was found in Iowa. It was Tarkio, Missouri that it happened in, but the body was found in Iowa.

"Q. These are guys that you say confessed to you over the years?

"A. The body was found exactly where I said it would be."

(Tr. 1278).

Perschbacher does not say 1) Caudil confessed to him or 2) that he is responsible for the body's discovery.

In Point VI, the Appellant claims Mr. Perschbacher got a "deal." This claim is based entirely upon the fact that Prosecutor Ahsens wrote a letter subsequent to the trial to the Jefferson County Prosecutor indicating Mr. Perschbacher had cooperated (Exhibit 63). Yet the letter very clearly affirms that there was no "deal" and no promise of anything in exchange for the testimony: "I inform you of his cooperation for whatever weight you think it deserves." (Exhibit 63). The letter also explicitly stated: "Mr. Perschbacher, without requesting reward or being promised any benefit, testified for the State in State v. Michael Taylor." (Exhibit 63, p. 44). Appellant presented not one shred of evidence proving otherwise.

In Point VII, Appellant claims counsel was ineffective for failing to call Mr. White-Bey to impeach Mr. Perschbacher. This was a matter of sound trial strategy. As trial counsel indicated, Mr. White-Bey was subpoenaed and available for trial, but counsel made a strategic decision to not call him. (Mo. Tr. 534-35, 543). They were concerned about the possibility of him providing information harmful to the defense (Tr. 541-543; Turlington March depo, p. 141-142). In addition, counsel believed that Perschbacher's "testimony was horrible. It wasn't believable." (Turlington March 1 depo, p. 147). Thus, counsel's decision to not call White-Bey was reasonable.

In Point VIII, the Appellant complains that trial counsel should have called various employees of the Department of Corrections to impeach Perschbacher by means of various collateral issues. As an example, the Appellant wanted counsel to call Linda Edgar, a

caseworker, to testify that Perschbacher "had a reputation for flooding his cell" (Appellant's Brief, p. 93). Appellant also claims counsel should have called these witnesses to show Perschbacher was "deranged" (Appellant's Brief, p. 94). Appellant presents no authority to suggest "deranged" is a recognized diagnosis, nor does he explain how these collateral matters would be admissible. As the trial attorneys stated, their decision to not call Investigator King was a matter of trial strategy (Tr. 556-57; Turlington March depo, p. 146-47). This was based on an assessment of Perschbacher's testimony that is consistent with the conclusion of everyone present at trial—Mr. Perschbacher was thoroughly impeached and had absolutely no credibility. (Turlington March 1 depo, p. 147; L.F. 875; Wolfrum April 11, 2006 depo, p. 27). Once an individual is dead, he cannot be further killed. Once Mr. Perschbacher had been thoroughly impeached, further impeachment was impossible and unnecessary.

In point IX, Appellant again argues that the testimony of Jefferson County Officers Steck and Ainley should have been more fully explored. As already explained in Point I of the State's brief, Appellant is incorrect that the testimony proffered by Appellant of these two officers was admissible. Because any impeachment would have been about uncharged "bad acts," collateral to any central issue, Appellant would have been bound by Mr. Perschbacher's answers. The motion court did not "open the door" to further investigation because it noted that Prosecutor Ahsens' explanation for not disclosing the Dresselhaus memo (Exhibit 2), was concern it might impede a Highway Patrol investigation (Mo. Tr. 305). The motion court did not cite that testimony as an "excuse", but simple noted that this was Ahsens' explanation for not disclosing the memo. The court did not assume that the

prosecutor's good faith belief obviated his responsibility under Brady (L.F. 930-931); [6] the court simply noted any violation was not intentional (L.F. 931). Thus, whether there was or was not an investigation of a collateral matter is even more collateral to the relevant issues in the case.

What was, and is, important to this appeal was the finding by the motion court that Appellant was not prejudiced because Mr. Perschbacher was so completely discredited—"His testimony had no impact on the outcome of the trial." (L.F. 930). There was, therefore, no reason to "reopen" this case to allow Appellant to investigate further matters that were not relevant to the resolution of his claims.

In Point X of his brief, Appellant again claims counsel should have impeached Mr. Perschbacher with various records, and then accuses the State of intentionally concealing Mr. Perschbacher's "lies." Appellant wanted counsel to prove Mr. Perschbacher had a conduct violation for throwing feces (Appellant's Brief, p. 103). As noted earlier, and by trial counsel at the motion hearing, conduct violations are not convictions and are not generally admissible. (Mo. Tr. 586-7). And, as trial counsel noted, Mr. Perschbacher did not sign the violation (Mo. Tr. 586)—so how could he prove Mr. Perschbacher committed the misconduct? (Exhibit 55).

It should be noted that Mr. Perschbacher did not deny this "bad act" at trial; it was during his deposition (Exhibit 49) with regard to tattooing violations. Trial counsel testified

[6] It is well-established that the good faith or bad faith of the prosecutor is immaterial to a Brady violation.

that some of the other violations "are more serious than tattooing in my mind." (Mo. Tr. 588). Similarly, trial counsel did not confront Perschbacher with his pending assault charge because "I think it came across as he knew what I was talking about and that would have been the impression, I guess, I would have thought the jury was getting. I mean, it didn't come across as he was denying it. He was sort of being evasive…" (Mo. Tr. 584).

As the motion court noted, Appellant's insistence on demanding that his trial counsel impeach Mr. Perschbacher with every possible bit of possible cross-examination makes meaningful review difficult because he does not distinguish between the trivial and the effective (L.F. 877).

Additionally, to base impeachment of a witness by the fact that it was mentioned that he had been at a psychiatric ward in a short reference in a police report (Exhibit 14) seems absurd. As trial counsel accurately noted, "I don't know that I can confront [Perschbacher] with something that he did not write himself." (Mo. Tr. 577). There is no evidence whatsoever as to why Mr. Perschbacher was at the mental health ward. Was it a routine examination? Was he suicidal? This also involves evidence of an unconvicted crime, not generally admissible. It is unreasonable to argue counsel had an obligation under the Constitution to ask a question about such a trivial, collateral matter that is not even proper cross-examination.

Furthermore, Appellant's attempt to claim the prosecution failed to correct "false evidence" is, itself, completely inaccurate. Again, whether Mr. Perschbacher was, or was not, in St. Anthony's psychiatric ward is trivial. The prosecutor testified he did not know if the

information was false (Mo. Tr. 323). And, contrary to Appellant's suggestions, that piece of information is trivial and not something counsel would be expected to know. Again, it is a fact buried in a police report about an unconvicted crime. Neither reason nor common sense would suggest the prosecutor deliberately deceived the court and jury.

Finally, as has been set out in detail previously, none of these alleged errors were prejudicial because Mr. Perschbacher's "testimony had no impact on the outcome of the trial." (L.F. 930). Mr. Perschbacher was sufficiently and thoroughly impeached by trial counsel. Additional impeachment would not have affected the outcome of the trial because the jury did not believe Mr. Perschbacher—even without this additional impeachment. For this reason, the Appellant's claims are without merit.

IV.

The Trial Court did not err in finding that Mr. Perschbacher was not credible and that his testimony did not have an impact on the outcome of the trial because that finding is consistent with the conclusions of Appellant's trial counsel and the evidence in this case.

(Addressing Point XI of Appellant's brief)

Appellant makes the confusing claim that the motion court somehow violated Appellant's Due Process rights by issuing its Findings of Fact and Conclusions of Law. The essence of the Appellant's claim is that the State has taken contradictory positions with regard the Mr. Perschbacher's testimony and that this alleged inconsistency is somehow fatal to Appellant's convictions.

The alleged inconsistency is based on the fact that the State called Mr. Perschbacher as a witness and asked that the jury believe his testimony during closing argument. Appellant argues that the State is, therefore, forbidden to now concede that Mr. Perschbacher was not credible and his testimony did not persuade the jury to convict. How this "inconsistency" translates into a reversal of Appellant's conviction is not explained.

The position of the State is not inconsistent. The State believed that the testimony of Mr. Perschbacher was true and that Appellant was faking his insanity. The State *continues* to believe Mr. Perschbacher's evidence was true and that Appellant attempted to fake symptoms of insanity. That is not inconsistent with the State acknowledging what every other individual present in the courtroom concluded—Mr. Perschbacher was not persuasive

or credible. There is no Due Process violation arising from the State acknowledging that one of its witnesses was not effective at trial.

Appellant relies on Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000), to support his claim. In that case the issue before the Eight Circuit was entirely different:

> The question before us is whether the Due Process Clause forbids the State from using inconsistent, irreconcilable theories to secure conviction *against two or more defendants* in prosecutions for the same offenses arising out of the same event. 205 F.3d at 1050 (emphasis added).

The State is not accused of advancing "factually contradictory theories" to convict Appellant and/or another. 205 F.3d and 1051. Due Process is violated only when the inconsistency exists "at the core of the prosecutor's cases against defendants for the same crime." Clay v. Bowersox, 367 F.3d 993, 1004 (8th Cir. 2004); State v. Carter, 71 S.W.3d 267, 272 (Mo. App. S.D. 2002).

Nor does the fact that the Motion Court signed the proposed Findings offered by the State create any constitutional violation. This Court has consistently held that adoption of a party's proposed Findings and Conclusions is not error. Skillicorn v. State, 22 S.W.3d 678, 690 (Mo. banc 2000); State v. Kenley, 952 S.W.2d 250, 261 (Mo. banc 1997). In this case, we know that the Motion Court did not blindly sign the Findings proposed, since she explicitly asked for changes before signing (L.F. 865). She could not have asked for changes unless she had read the proffered Findings.

This claim is without merit.

V.

The Trial Court did not err in finding that Appellant was not prejudiced by Investigator Dresselhaus destroying letters he received from Mr. Perschbacher because in addition to the destruction being made in good faith, the Appellant was not prejudiced because Appellant's trial counsel thoroughly impeached Mr. Perschbacher and any prior, inconsistent statements or impeachment contained in those letters was not necessary for Appellant's attorney to impeach Mr. Perschbacher.

(Addressing Point XII of Appellant's Brief).

As Appellant has acknowledged in previous Points Relied On, Mr. Perschbacher was in contact with many criminal justice officials seeking favorable treatment in exchange for information. Mr. Perschbacher was a snitch; this fact was made obvious at trial.

Investigator Dresselhaus testified that he received a number of letters from Mr. Perschbacher that predated Appellant's case. [7] Mr. Dresselhaus said that none of the letters were case specific (Mo. Tr. 287). Mr. Dresselhaus's explanation is that he considered the letters a nuisance. (Mo. Tr. 287). Indeed, the State did disclose all of the letters of Mr. Perschbacher that were retained (Exhibit 49). These letters are rambling narratives that go on and on. They were of no evidentiary value to the State, and though Appellant's attorney had these letters, he chose to not use them for impeachment. Counsel's motivation in part was because the letters were self-serving and self-promoting (Mo. Tr. 640).

[7] "I believe the letters that I threw away, Mr. Mermelstein, were letters that predated the Taylor case." (Mo. Tr. 288).

Appellant's claim that these letters were "critical impeaching evidence" (Appellant's Brief, p. 111), is patently untrue. As has been established in Point I, supra, Mr. Perschbacher was effectively and thoroughly impeached by Appellant's trial counsel and the failure to keep these letters, and to disclose them, was not prejudicial to Appellant.

VI.

The Motion Court did not err in finding that Appellant was not denied his right to effective appellate counsel because appellate counsel's decision that an appeal asserting error in admitting Mr. Perschbacher's testimony would not prevail was accurate. The testimony was not offered for the truth of the matter asserted, but was offered as evidence about advice the Appellant was receiving from a fellow inmate as to how to defend his case. Thus, the evidence was not objectionable as inadmissible hearsay.

(Addressing Point XIII of Appellant's Brief)

Appellant next attacks his appellate counsel for failing to raise on appeal a challenge to Mr. Perschbacher's testimony based on a hearsay objection. In addition to the fact that Mr. Perschbacher's testimony played no role in the jury's decision, the evidence was not inadmissible hearsay.

Standard of Review

"To prevail on a claim of ineffective assistance of appellate counsel, the Movant must establish that counsel failed to raise a claim of error that was so obvious that a competent and effective lawyer would have recognized and asserted it." Williams v. State, 168 S.W.3d 433, 444 (Mo. banc 2005). The claimed error must have been sufficiently serious to create a reasonable probability that, if it were raised, the outcome of the appeal would have been different. Smith v. Robbins, 528 U.S. 259, 285 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

Mr. Perschbacher testified that Appellant received notes from a fellow inmate, White-Bey, telling Appellant to play the "nut role" and do "crazy things" to "beat" his murder

charge (Tr. 1266-1270). These statements could not qualify as hearsay because they do not meet one of hearsay's essential elements—it is not being offered for the truth of the matter asserted.

"Hearsay is any out-of-court statement offered to prove the truth of the matter asserted that depends on the veracity of the statement for its value." State v. Sutherland, 939 S.W.2d 373, 376 (Mo. banc 1997); State v. Copple, 51 S.W.3d 11, 17 (Mo. App. W.D. 2001). The State's theory of admissibility was that it proved that Appellant was told to act "crazy" and proceeded to do so. To some extent, the evidence relates to the Appellant's "state of mind" in preparing his defense. [8] It supports the State's theory that Appellant was, and is, faking his mental illness and that he was encouraged to do so by his fellow inmates.

Furthermore, this evidence did not suffer from the limitations inherent in hearsay testimony because it was Mr. Perschbacher's credibility that was at issue and he was subject to cross-examination. The issue for the jury was not whether what Mr. White-Bey said was true; the issue for the jury was whether Mr. Perschbacher was telling the truth when he claimed Appellant received this advice from White-Bey. It is the truth of Perschbacher's statements, made in court, under oath and subject to cross-examination, that were at issue.

[8] The State does not contend that this testimony falls within the "state of mind" exception to the hearsay rule, which is admissible only in limited circumstances, and usually to prove the victim's state of mind. State v. Bell, 950 S.W.2d 482, 483 (Mo. banc 1997). This evidence simply does not qualify as hearsay because it was not offered for its truth. In fact, the State's position was very clear that Appellant was *not* crazy.

For this reason, appellate counsel was entirely correct in testifying that she did not believe this testimony was hearsay. (Exhibit 82; Deposition of Rosemary Percival, p. 14).

Finally, even if this were improperly admitted hearsay, reversal of Appellant's conviction would be warranted only if Appellant was prejudiced. State v. Nastasio, 957 S.W.2d 454, 459 (Mo. App.W.D. 1998); State v. Bell, 950 S.W.2d 482, 484-85 (Mo. banc 1997). Because the jury did not believe Mr. Perschbacher's testimony, Appellant could not have been prejudiced in the admission of this testimony, and appellate counsel was not ineffective in failing to assert this particular issue on direct appeal.

VII.

The Motion Court did not err in finding that trial counsel was not ineffective in failing to call certain witnesses because the decision to not call these witnesses was a knowing and reasonable decision by trial counsel that was a matter of trial strategy. (Addressing Point XIV of Appellant's Brief)

Appellant's next claim is that his trial attorneys should have called a large number of additional witnesses at his trial. Appellant claims these witnesses "would have provided extraordinary mitigating first hand accounts" of Appellant's history (Appellant's Brief, p. 126). Appellant does not dispute that the jury did, in fact, hear this evidence through the testimony of Appellant's experts, but claims that these first person accounts would somehow have been more persuasive.

To the contrary, trial counsel made a conscious decision that many of these witnesses would not have been persuasive. For example, Appellant's mother, Vera Jackson, was not called because she would have made a bad witness. (Turlington March 1, 2006 depo, p. 288). The evidence of abuse did come in without the need for Ms. Jackson to testify. Counsel considered her a poor witness because Ms. Jackson always tried to blame the institution for Appellant's failure to get help (Turlington March 1, 2006 depo, p. 287-88). Ms. Jackson did not even show up for her son's trial (Turlington March 1, 2006 depo, p. 288). Counsel was also concerned that portions of the testimony might undermine the diagnosis of schizophrenia (Turlington March 1, 2006 depo, p. 264).

Standard of Review

Ineffective assistance for failure to call a witness requires the defendant to show: "(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." Hutchison v. State, 150 S.W.3d 292, 304 (Mo. banc 2004); Edwards v. State, 200 S.W.3d 500, 518 (Mo. banc 2006). "To the extent that information indicating a 'traumatic' childhood was discovered, counsel made a strategic decision not to present it." Edwards, 200 S.W.3d at 516.

Teachers

Trial counsel had clear and cogent reasons for not calling Williams and Kimbrough. These witnesses would have opened the door to evidence that Appellant was a bad child with behavioral problems at an early age. (Turlington March 1, 2006 depo., p. 267, 272, 305). Once again, this would be detrimental to the claim of schizophrenia. (Turlington, March 1, 2006 depo, p. 264, 300).

Family Members

In addition to his mother, Appellant complains that other family members were not called at the penalty phase of the trial. It is important to note that Appellant failed to sustain his burden of overcoming the presumption that counsel was competent and any decision was a matter of trial strategy. State v. Tokar, 918 S.W.2d 753, 766 (Mo. banc 1996). Counsel testified that they decided that their "theme" of the penalty phase would be the conditions under which he would be kept at the Department of Corrections and the Appellant's background. (Mo. Tr. 684-85). They decided to use Dr. Scott's testimony as a basis for

getting Appellant's history before the jury. (Mo. Tr., p. 680-687). Once again, this was a matter of reasonable trial strategy since each of these potential witnesses presented significant shortcomings as witnesses.

For example, Ms. Searcy claims that she had to help remove Appellant from a school bus when he was twelve because he believed "Father Darkness"[9] was there (Exhibit 87, p. 15). The problem with this testimony is that it contradicts the written reports of this incident where it was Appellant's mother who came and removed Appellant from the bus (Exhibit 42, p. 3). In addition, the report of this incident makes *no mention* whatsoever that Appellant heard any voices or that his refusal to exit the bus was due to his hearing a "voice" (Exhibit 42, p. 2-5). This inconsistency did not go unnoticed by the Motion Court (L.F. 920), nor would it be ignored by a jury. Nor would the other family members have been any more persuasive. As the Motion Court noted, there were inconsistencies in the witnesses' reports and there was no corroboration for their testimony (L.F. 920-21).

As another example, Appellant's Aunt Hemphill was not even aware that Appellant was on trial for murder (Exhibit 85, p. 19). It would be hard to argue she was close to her

[9] One area ripe for cross-examination had Ms. Searcy testified is the fact that her title for Appellant's "voice" is incorrect. Appellant claimed it was the "Father of Darkness" he heard, not "Father Darkness" as Ms. Searcy testified to (Exhibit 87, p. 15). This might just be a matter of poor memory or evidence of fabrication by a relative attempting to be overly helpful.

nephew when she was completely unaware of a murder he committed. She also contradicted the claim that Appellant was abused by his natural father (Exhibit 85, p. 11).

Finally, the decision to not call Preston Jackson, the stepfather, was proper. Counsel spoke to Mr. Jackson, but his information focused on Appellant's bad behavior and was not helpful (Turlington, March 1, 2006 depo, p. 294-95).

VIII.

The Motion Court did not err in finding that trial counsel was not ineffective in making a conscious decision to not introduce certain records at trial because the trial attorneys believed that some portions of these records contained unfavorable information and they did not want to introduce records "piecemeal" and made the strategic decision that they would not try to introduce only portions of records.

(Addressing Point XV of Appellant's Brief)

Appellant next claims that his trial counsel was ineffective in failing to introduce certain records into evidence. Trial counsel testified that the decision was a strategic one, intended to keep certain negative information in those reports from the jury. This was a matter of sound strategy and was not ineffective.

Trial counsel made it clear that the decision to not introduce records was a strategic one, rather than an omission or mistake:

> *There were many, many records involved in this case, one being this, this one. We gave all these records to Dr. Rabun, and we before the trial basically decided to take an all-or-nothing approach with the records, and we took the—if we were going to introduce records, we would have introduced all of them or none of them, because I think it would have been a little weird to introduce piecemeal records.*
>
> *And because there were things—not in these records, but primarily in the records from Biggs when he was there for a number of months—that were*

not helpful to us, we chose not to introduce records. And we just didn't introduce records across the board. (Turlington, March, 2006 depo, p. 56).

If we weren't going to introduce the Biggs records, we didn't want to introduce just a few records here and there. So that's why we didn't do it. And I believe we presented the testimony of various witnesses that covered the parts of the records that we felt were important. (Turlington, March 1, 2006 depo, p. 57).

I mean, it would have been great if we could have introduced the records and there weren't harmful things in there. I'm sure we would have. It's just that we decided that we didn't think it was the best option. (Turlington, March 1, 2006 depo, p. 580-291).

It also had records in there, not from doctors, but from—I don't know what they're called, like the case workers and then the person that meets with them like once a week that's the social worker or psychologist or something, that would say that on days when they were getting—there are certain days, apparently, when they send people back to the Department of Corrections. And that on those particular days, he would have an increase in symptoms, and they would attribute this to malingering.

And there were some other—there was one person in particular that was meeting with him once a week that seemed to have some indications that she—I believe it was a woman, and I think it was a psychologist, notes like that met with him once a week—that indicated she was not convinced that he

had a mental disease and that he was malingering. (Turlington, March 1, 2006 depo, p. 59-60).

In spite of this reasoned approach by trial counsel after careful consideration, Appellant claims that a myriad of information should have been introduced because the mitigating value outweighed its prejudice. Appellant cites Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004), as support for this claim. There is, however, one readily apparent distinction between Appellant's case and that of Mr. Hutchison. In Hutchison, this Court found trial counsel ineffective at the penalty phase for failing to review "[r]eadily available records that trial counsel admitted they did not attempt to obtain." Id. at 304. Appellant's claim is that counsel's choice, after reviewing the evidence, was ineffective.

In Edwards v. State, 200 S.W.3d 500 (Mo. banc 2006), this Court noted that this distinction is significant. In Edwards, this court found that to "the extent that information indicating a 'traumatic' childhood was discovered, counsel made a strategic decision not to present it." 200 S.W.3d at 516. "Trial strategy is not a ground for ineffective assistance of counsel." Goodwin v. State, 191 S.W.3d 20, 25 (Mo. banc 2006). And where "counsel has investigated possible strategies, courts should rarely second-guess counsel's actual choices." Middleton v. State, 103 S.W.3d 726, 736 (Mo. banc 2003).

Appellant makes addressing this claim difficult because he references seemingly every possible record as "mitigating," with no recognition of the fact that competent trial counsel must filter through these massive records and evaluate which are significant and which would not be effective with a jury. For example, Appellant claims that his school

records should have been admitted (Exhibit 1). Trial counsel had a very good, valid reason for not using these records:

> *Upon looking at this behavior and upon discussing Michael's behavior with his family, one thing that we where somewhat concerned about, knowing that the onset of schizophrenia is generally late teens or early twenties would be the common onset for schizophrenia, we were very cautious about presenting evidence that would make Michael appear to be like a bad seed from the start. So just basically looking through the school records, we just weren't that interested in putting on the school records or people involved with the school records for that reason. (Turlington March 1, 2006 depo, p. 265).*

The Motion Court noted that this issue was significant and was a natural basis for trial counsel's choices (L.F., p. 875). Likewise, records of Appellant's treatment at a psychiatric center at nine years old (Exhibit 44), and at Hawthorn Children's Psychiatric Center at twelve years old (Exhibit 42), suffer from the same significant risk.

Exhibit 48 is one of the records Appellant claims the jury should have seen. This record shows that as a ten year old boy, Appellant "becomes very aggressive and can be violent." (Exhibit 48). Why would trial counsel possibly want the jury to see this information? Aside from negating the defense claim of schizophrenia, admission of this record would serve no purpose.

Exhibit 43, from Dr. Gilner, is equally unhelpful. This record shows Appellant has "a history of uncontrollable school behavior which includes fighting, profanity, and overall

disruptiveness in class." Once again, how can counsel be ineffective in making a choice to not highlight this information by providing the jury documentation of this fact?

The same concerns would exist for his records at Potosi (Exhibit 12). Even a cursory review of the records show there are negative items in those records that suggest his symptoms may not be genuine. Gary Selbert reports:

> Although Mr. Taylor had reported a lengthy psychiatric history including many suicide attempts, he never attempted suicide while incarcerated at Potosi or Fulton. He also reported a history of self mutilation as directed by "the father of darkness," but until October 3, 1999, there were no reports of this behavior in any of the psychiatric, psychological, or medical progress notes. (Exhibit 12, p. 6-7).

That same report also indicated he assaulted a prison guard when Mr. Taylor became angry over a search of his cell, and that Mr. Taylor was found with a weapon in his cell on another occasion. It was, therefore, very reasonable for trial counsel to decide that "the records from Biggs have problems, I believe, in my opinion, for this case. And we didn't want to introduce just piecemeal the records which were not as crucial and then leave out the records from Biggs." (Turlington, March 1, 2006 depo, p. 333). Additionally, counsel noted: "There are not a ton of references to him hearing voices. Much of it is self reported symptoms. And that's why we chose not to introduce any of the records." (Turlington, March 1, 2006 depo, p. 334).

It is abundantly clear that Appellant's trial counsel were not dilatory or negligent in approaching this trial. They very thoroughly and carefully reviewed all of the evidence

available and made a strategic decision how to deal with these records. While in hindsight Appellant now wishes to second-guess their judgment, the choices made by counsel were not unreasonable.

IX.

The Motion Court did not err in finding that Appellant's trial counsel was not ineffective in failing to object to the expert testimony of Dr. Scott and Dr. Vlach because their testimony was relevant and admissible in determining whether Appellant suffered from a mental disease or defect at the time he murdered Mr. Thomas, and the testimony did not violate § 552.020.14, RSMo. since it is the Court's findings on competency that are inadmissible, not the conclusions of a mental health expert.

(Addressing Point XVI of Appellant's Brief)

In rebuttal to the Appellant's evidence that he suffered from a mental disease, the State introduced the testimony of Dr. Scott and Dr. Vlach. Both of these mental health experts examined Appellant to determine if he was competent to proceed to trial and if he suffered from a mental disease or defect (Tr. 1188, 1189, 1200, 1212-14, 1361-62, 1339).

The State submits that this testimony was very relevant and did not mislead or confuse the jury, nor did it violate the statutory limitations on the use of an expert's conclusion and any statements the Appellant made.

Initially, it is important to note that the decision by trial counsel to not object to evidence regarding the issue of competency was deliberate, not inadvertent. Trial counsel did not object to questions regarding competency because she wanted the jury to understand that competency is different from responsibility (Turlington March 1, 2006 depo, p. 24). In fact, she was able to have Dr. Scott admit that he did not have an opinion as to Appellant's responsibility for the Thomas murder. (Turlington March 1, 2006 depo, p. 29). Allowing this

testimony by Dr. Scott to be admitted is reasonable since Dr. Rabun considered Dr. Scott's earlier diagnosis in coming to his opinions (Turlington March 1, 2006 depo, p. 28).

In asserting a defense of mental disease or defect, Appellant certainly put his mental health history at issue. In fact, Appellant claims his counsel were ineffective in failing to present childhood mental health records into evidence (Appellant's Brief, Points XIV, XV). Why then are his mental health records for a previous murder not relevant to his criminal responsibility for a second murder? The argument defies logic. In fact, this Court noted in Appellant's direct appeal that "Dr. Rabun had testified that he had reviewed the records of Appellant's prior rape and murder when forming his opinion of Appellant's mental state." State v. Taylor, 134 S.W.3d 21, 25 (Mo. banc 2004).

Appellant relies on Anderson v. State, 196 S.W.3d 28 (Mo. banc 2006), as sole authority for his claim that the testimony was inadmissible. In Anderson, however, the mental health expert had examined the defendant to determine *only* his competency. 196 S.W.3d at 34. This is significant. Both Dr. Scott and Dr. Vlach examined Appellant to determine *both* his competency *and* his responsibility. While statements by a defendant made during a competency exam, §552.020, RSMo., are not admissible under § 552.020.14, RSMo., no tall statements made during "responsibility" exam are so limited, statements of the accused during an examination to determine responsibility are not admissible "only on the issue of whether the accused committed the act charged." Section 552.030.5, RSMo. In other words, there is no blanket prohibition against the admission of the statements of the accused under a §552.030 examination.

In this case, no statement was ever introduced "on the issue of whether the accused committed the act charged." Obviously, there never was any question whether Appellant murdered Mr. Thomas; the only issue was whether Appellant was criminally responsible for that act. Thus, there was no violation of § 552.020.14 or 552.030.5 RSMo.

Furthermore, the State did not otherwise violate § 552.020.14, RSMo., through the testimony of Dr. Scott or Dr. Vlach, because the statute explicitly states it is the "finding of the court" that is not admissible or "otherwise be brought to the notice of the jury." The State did not do so. As part of the relevant mental health history of the Appellant, the State presented evidence that he was not suffering from a mental disease or defect when he murdered Ms. Smetzer, was competent at the time he was tried for that crime, and he was not insane at the time he murdered Mr. Thomas.

To prevail on this claim, Appellant must show any objections would have been sustained and that this failure to object deprived him of a fair trial. State v. Clemens, 946, S.W.2d 206, 228 (Mo. banc 1997). Counsel is not ineffective for failing to make objections that lack merit. Id.

Appellant clearly put his mental health history at issue in this case. Again, he now argues that trial counsel should have presented none of that history. Dr. Scott's evaluation and Dr. Vlach's evaluation were both considered by Appellant's experts. Trial counsel clearly understood this and decided to use this information to stress to the jury the distinctions between competency and responsibility.

Had Appellant been found incompetent to proceed to trial in the Smetzer murder, the State is confident that Appellant would have highlighted that fact to the jury in arguing lack

of responsibility for Mr. Thomas's murder. The State simply demonstrated the logical converse.

In doing so, the State did not violate the statutory limitations on statements made by Appellant during those examinations. And the relevance of the testimony is obvious. Dr. Scott testified that Appellant was malingering (Tr. 1203-1210), and that Appellant not once mentioned hallucination until he re-examined Appellant (Tr. 1202-03). This information was very relevant.

X.

The Motion Court did not err in finding that trial counsel was not ineffective for deciding to not call certain expert witnesses because trial counsel has no constitutional duty to "shop" for certain experts and these experts were inconsistent and not credible. Trial counsel were competent in their choice of experts used at trial and the presentation of evidence in support of Appellant's claim that he lacked responsibility for the murder due to schizophrenia.

(Addressing Points XVII and XVIII of Appellant's Brief)

Appellant claims his attorneys used the "wrong" experts and at his motion hearing paraded a variety of new experts offering opinions that were cumulative to those presented at trial or, in some cases, inconsistent with Appellant's trial evidence. Appellant believes that by presenting a large number of experts, the jury would have been persuaded that he was "insane" at the time of the murder.

At trial, counsel presented the testimony of four expert witnesses: Dr. Rabun, Dr. Harry, Dr. Eikermann, and Dr. Syed, along with the testimony of Gary Selbert, Chief of Potosi's Mental Health Services. (L.F. 874). Apparently, Appellant believes more or different experts are mandated by the Constitution.

The law is well-established, however, that counsel is not "ineffective for not putting on cumulative evidence." Skillicorn v. State, 22 S.W.3d 678, 683 (Mo. banc 2000); Goodwin v. State, 191 S.W.3d 20, 38 (Mo. banc 2006). "Where counsel has investigated possible strategies, courts should rarely second-guess counsel's actual choices." Middleton v. State, 103 S.W.3d 726, 736 (Mo. banc 2003). Finally this Court has consistently held that "counsel

is not obliged to shop for an expert witness who might provide more favorable testimony." State v. Kenley, 952 S.W.3d 250, 266 (Mo. banc 1997); Taylor v. State, 126 S.W.3d 755, 762 (Mo. banc 2004).

Dr. Peterson

The Motion Court found that Dr. Peterson was not an expert in SIRS (Structured Interview of Reported Symptoms), that Dr. Peterson never met or evaluated Appellant, and that Dr. Peterson misstated Dr. Vlach's conclusion (L.F. 898). Appellant offers absolutely no evidence to suggest the Court's findings were incorrect.

Dr. Peterson reluctantly acknowledged that the SIRS test is intended for the very purpose Dr. Vlach used it—"to determine genuine from feigned, or false psychiatric symptoms, of which malingering was one type." (Exhibit 112, p. 100). Dr. Peterson reluctantly admitted that the SIRS test was not the sole basis for Dr. Vlach's conclusion that Appellant was malingering (Exhibit 112, p. 104). Dr. Peterson did not interview Appellant; Dr. Vlach did interview Appellant (Exhibit 112, p. 107).

The irony of Dr. Peterson's testimony is how obviously circular it is. Dr. Peterson testified that the SIRS test is not given to people who hallucinate (Exhibit 112, p. 22). The very issue before the jury was whether Appellant was faking his hallucination. Yet Dr. Peterson—who did not even meet or evaluate Appellant—wants to assert the test is not valid because Appellant suffers from the very hallucination that Dr. Vlach concludes he is faking!

Dr. Gelborn

Had Dr. Gelborn testified, he would have refuted Appellant's claims of mental retardation. Dr. Gelborn would have testified that Appellant's overall IQ was 81, and would have admitted that he cannot conclude that Appellant is mentally retarded (Mo. Tr., p. 124, 147). In Goodwin v. State, 191 S.W.3d 20 (Mo. banc 2006), this Court noted that the Diagnostic and Statistical Manual suggests a range of 65-75 is normally necessary to establish mental retardation. 191 S.W.3d at 31, n. 7.

In discussing the possibility of having neurological testing with their experts, trial counsel made a conscious decision that this testimony would not be all that helpful and really does not support a mental disease or defect defense (Turlington March 1, 2006 depo, p. 125). Counsel is absolutely correct that this evidence can "come across as not being that big of a deal." (Turlington March 1, 2006 depo, p. 127).

Finally, the Motion Court did find Dr. Gelbert was "not particularly persuasive or credible." (L.F. 918). While he tried to present his findings as "objective" tests, he reluctantly admitted that there is some "interpretation" involved. (Mo. Tr., p. 147).

Dr. Moldin

Dr. Moldin would offer very little evidence different from that of Dr. Rabun and the other experts who testified on behalf of Appellant. There are, however, a number of aspects of Dr. Moldin's testimony that would not have been helpful. Dr. Moldin also refutes Appellant's claim that he is mentally retarded (Mo. Tr., p. 62) (overall IQ is low-average). Dr. Moldin diagnosed Appellant with a schizoaffective disorder, which is different than schizophrenia (Mo. Tr. 32). Dr. Moldin reluctantly admitted that the validity scales—which

detect individuals trying to fake mental illness—were high for Appellant (Mo. Tr. 84-86). He acknowledged that almost all of the reports of hearing "voices" were made after the first murder (Mo. Tr. 89, 91), and that it would be unusual for Appellant to have heard voices at a young age (Mo. Tr. 99).

Why would trial counsel possibly think it prudent to call Dr. Moldin when his testimony would only bolster the State's theory of fabrication and would invalidate the mental retardation claim Appellant makes on appeal?

Dr. Caul

Trial counsel had Dr. Caul ready to testify at Appellant's criminal trial, but made a strategic decision to not use him as a witness (Turlington March 1, 2006 depo, p. 70). The decision was that Dr. Caul would not add that much to the case and the evidence had gone as well as it could (Turlington March 1, 2006 depo, p. 70).

Another important factor was that Dr. Caul did his evaluation at about the same time as Dr. Scott did his evaluation, and this would again highlight the issue of malingering[10] (Turlington March 1, 2006 depo, p. 70-71).

Trial counsel also made a strategic decision to not present a claim of mental retardation. (Turlington March 1, 2006 depo, p. 75-79). The evidence was not compelling and Dr. Rabun would not offer an opinion that Appellant suffered from mental retardation

[10] Appellant has the luxury of being inconsistent. He challenges the introduction of Dr. Scott's evaluation in the Smetzer case as irrelevant, yet claims counsel was ineffective in failing to present Dr. Caul's evaluation of Appellant in that same case.

(Turlington March 1, 2006 depo, p. 75). Mr. Wolfrum had used the mental retardation defense recently and had not gotten a good result; given the weak evidence to support such a claim the trial attorneys decided to not ask for an instruction. (Turlington March 1, 2006 depo, p. 85). Unlike Appellant's motion counsel, experienced trial counsel simply concluded that Dr. Caul's testimony was not very compelling (Turlington March 1, 2006 depo, p. 80). This is a decision that was made after thorough investigation and reflection by trial counsel. Appellant now overstates Dr. Caul's conclusions in order to claim prejudice. The fact is that Dr. Caul did not find Appellant to be mentally retarded; his full scale IQ was 76 (Exhibit 111, p. 29).

On direct appeal, this Court noted that based "upon the evidence in the record, no reasonable juror could have found that Appellant was mentally retarded," State v. Taylor, 134 S.W.2d 21, 29 (Mo. banc 2004). Dr. Caul's testimony would not have added any additional evidence to support such a claim.

More importantly, the decisions of trial counsel were reasoned decisions based on their experience, knowledge of the law and facts they had available.

XI.

The Motion Court did not err in finding that trial counsel was not ineffective in failing "to present complete evidence" concerning why Dr. Selbert transferred Appellant to Fulton State Hospital because trial counsel made a reasonable decision to not introduce records because they contained negative information and to rely on Dr. Rabun to establish the diagnosis of schizophrenia.

(Addressing Point XIX of Appellant's Brief)

Appellant returns to his complaint that trial counsel should have introduced his records from Fulton State Hospital, and now adds that counsel should have asked more questions of Dr. Selbert when he testified. In other words, Appellant is not satisfied with counsel's decision to call Dr. Selbert; Appellant believes there are more questions that should have been asked of him.

The "additional information" is utterly insignificant. As has already been discussed in other portions of the brief (Points VII and VIII), trial counsel elicited testimony from Dr. Selbert that Appellant heard voices from the Father of Darkness (Tr. 1142, 1145, 1149-50). The "additional information" is a note Dr. Selbert made on Exhibit 12 of a "self-report" by the Appellant. (Appellant's Brief, p. 159).

Once again, trial counsel decided that they were not going to present written records because they contained negative information (Turlington March 1, 2006 depo, p. 59). As counsel explained, the Fulton records had harmful and negative information that counsel did not want the jury to see. As noted previously, there is a report from Dr. Selbert dated October 7, 1999, in which he indicates:

> Although Mr. Taylor had reported a lengthy psychiatric history including many suicide attempts, he never attempted suicide while incarcerated at Potosi or Fulton. He also reported a history of self mutilation as directed by "the father of darkness", but until October 3, 1999 there were no reports of this behavior in any of the psychiatric, psychological or medical progress notes. (Exhibit 12, p. 60-7).

It defies understanding why Appellant insists that trial counsel should have presented this harmful evidence, which only bolsters the State's theory of fabrication to the jury. Dr. Selbert did not treat or diagnose Appellant. (Exhibit 109, p. 31).

Trial counsel decided that it would be better to present to the jury "helpful" information through the testimony of Dr. Rabun rather than to introduce the records. (Turlington March 1, 2006 depo, p. 56-57). "Where counsel has investigated possible strategies, courts should rarely second-guess counsel's actual choices." Middleton v. State, 103 S.W.3d 726, 736 (Mo. banc 2003).

XII.

The Motion Court did not err in finding trial counsel was not ineffective for failing to make objections to certain arguments and questions by the prosecution during trial because the questions or argument by the prosecution did not deny the Appellant a fair trial and it was within the discretion of Appellant's trial counsel to decide an objection would not be raised.

(Addressing Point XX of Appellant's Brief)

Appellant suggests his counsel was constitutionally deficient in failing to make a number of objections to various statements or questions by the prosecutor. The State submits that any objection would not have been valid and that Appellant was not prejudiced by his counsel's failure to object.

Standard of Review

To establish ineffectiveness of counsel, Appellant must show "counsel's representatives fell below an objective standard of reasonableness." Goodwin v. State, 191 S.W.3d 20, 25 (Mo. banc 2006). Appellant must then establish actual prejudice by showing that there is a reasonable probability that, but for counsel's ineffective performance, there is a reasonable probability the result would have been different. Id. There is a strong presumption that counsel was effective. State v. Tokar, 918 S.W.2d 753, 761 (Mo. banc 1996). There is also a presumption that the Motion Court's findings and conclusions were correct. Skillicorn v. State, 22 S.W.3d 678, 681 (Mo. banc 2000).

Illinois Moratorium

Appellant complains that trial counsel should have objected to the State's discussion, during voir dire, concerning the recently announced moratorium on death sentences in Illinois. Appellant claims the statements made by the prosecutor were misleading.

Jurors are instructed that they must follow the law as given to them by the Court. MAI CR-3d 30201. There is no question that the decision by Governor Ryan of Illinois generated a great deal of publicity and a great deal of scrutiny of the death penalty. The State certainly had the right, and responsibility, to make sure that any potential juror did not presume that Missouri was plagued by the same problems the media claimed existed in Illinois. That is all the prosecutor did in this case.

The prosecutor's comments did nothing more than to ask the jurors to assume what the law requires them to assume—that the laws of Missouri are constitutional and must be followed. Any constitutional defects in Missouri's law will be dealt with by this Court, not by the jury.

Therefore, asking the jury to assume and accept the proposition that Missouri's law is not unconstitutional is not improper or prejudicial. It is assumed that the jury obeyed the Court's directions and followed the instructions given. Boone v. State, 147 S.W.3d 801, 808 (Mo.App. E.D. 2004).

Cross-examination of Dr. Eikermann

The prosecutor asked a question of Dr. Eikermann that was objected to, and the objection was sustained. (Tr. 1135-36). Appellant claims trial counsel was ineffective because she did not ask for a mistrial. Both trial counsel and the Motion Court concluded

that such a request would not have been granted (Turlington March 1, 2006 depo, p. 19; L.F. 891).

The trial court had broad discretion in determining the scope of cross-examination, including the impeachment of a witness. Black v. State, 151 S.W.3d 49, 55 (Mo. banc 2004). The declaration of a mistrial is a drastic remedy to be granted only in extraordinary circumstances where the prejudice can be cured by no other means. State v. Sprinkle, 122 S.W.3d 652, 658 (Mo.App. W.D. 2003); State v. Gilbert, 103 S.W.3d 743, 751 (Mo. banc 2003).

Because the trial court determined that a mistrial would not be granted had it been requested, no prejudice was suffered by his attorney's failure to request a mistrial. Counsel cannot be deemed ineffective for failing to perform a meaningless act. White v. State, 939 S.W.2d 887, 898 (Mo. banc 1997); Goff v. State, 70 S.W.3d 607, 612 (Mo.App. S.D. 2002) (concurring opinion).

Reference to Sane Suicide Bombers

Next, Appellant completely misstates the record by claiming that the State compared Appellant to a Middle East suicide bomber. That is *not* what the prosecutor said, and Appellant's argument asks this Court to come to an absurd conclusion about what was said. The prosecutor was arguing that suicide bombers do "crazy" things, but are not necessarily insane. (Tr. 1553-54). An objection was made by Appellant's counsel, and that objection was sustained.

Appellant claims that trial counsel should have demanded a mistrial. This argument was not the equivalent of calling the defendant Charles Manson, Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999), or the Devil, State v. Banks, 215 S.W.3d 118 (Mo. banc 2007).

Insanity was the central issue in this case. Rather than calling Appellant a Middle Eastern terrorist, the prosecutor was attempting to say that an individual can do seemingly "crazy" things but not be insane. The Court did not allow the prosecutor to make this argument, based on the Appellant's attorney's complaint that "the analogy is going too far." (Tr. 1553-54). Trial counsel thought having the objection sustained was a sufficient remedy (Mo. Tr. 773). Trial counsel's decision was reasonable and accurate.

Arguing for Jury to Impose Death

The Appellant's next argument is that his trial counsel failed to object when the State made the following closing argument: "And all that is necessary for evil to triumph is for good men and women to do nothing. If you send him back to where he was, we're right back where we started. Is that nothing? It certainly hasn't accomplished anything." (Tr. 1555-56). The trial counsel made a conscious decision to not object because he did not believe such an objection would be sustained. (Mo. Tr. 775-6).

Appellant's challenge to this argument is based entirely on a misreading of the decision of the Illinois Supreme Court in People v. Johnson, 803 N.E.2d 405 (Ill. 2003). Appellant implies in his argument that the Illinois Supreme Court reversed the conviction in Johnson because the prosecutor uttered the Edmund Burke quote: "All that is necessary for evil to prevail is for good men to do nothing."

A reading of that opinion, however, makes it clear that the case was reversed because of a "pervasive pattern" of intentional prosecutorial misconduct. 803 N.E.2d at 83.

It is true that in Illinois it is apparently improper for the prosecutor to ask the jury to "send a message." 803 N.E.2d at 420.[11] But that is not the law in Missouri. And it should not be. Deterrence is a legitimate factor in punishing individuals and that is obviously what the State was discussing.

MMPI Test Results

Appellant does not even make a good faith effort to substantiate this claim in his brief; he simply argues that trial counsel was ineffective and ignores the Motion Court's finding that the State's testing of Appellant's mental capacity did not violate Estelle v. Smith, 451 U.S. 454 (1981). (L.F. 891-92). This Court very clearly rejected this identical argument in State v. Worthington, 8 S.W.3d 83(Mo. banc 1999):

> Estelle stands for the proposition that a "criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." 451 U.S. at 468, 101 S.Ct. 1866. Here, [Appellant], through counsel, requested the evaluation

[11] Of course, the Illinois Supreme Court acknowledges it has been inconsistent in its treatment of this argument: "We are aware that courts have, in the past, both sanctioned and condemned prosecutors' exhortions to 'send a message' that crime in general will not be tolerated." 803 N.E.2d at 78.

pursuant to section 552.020 and put his mental condition in controversy. Thus, since [Appellant] initiated the examination, he was not compelled to testify against himself, nor was his right to counsel violated. 8 S.W.3d at 91-92. See, also, State v. Copeland, 928 S.W.2d 828, 839 (Mo. banc 1996).

Prosecutor's Closing Arguments on "Duty"

Once again, the Appellant "throws out" a claim with no attempt made to persuade this Court that there is any merit to his contention. This claim is, in fact, completely meritless. The argument by the prosecutor did not exceed the permissible bounds of persuasion, and no reasonable individual could believe the prosecutor was doing anything more that arguing a conviction, and then a sentence of death, was the appropriate outcome in this case. Mr. Wolfrum did not believe an objection would be sustained (Mo. Tr., p. 764-66, 845-48). His professional judgment was accurate. In Storey v. State, 175 S.W.3d 116 (Mo. banc 2005), the Court found no error in the prosecutor asking the jury to "Do your duty." 175 S.W.3d at 154.

Burden of Proof Discussion in Voir Dire

Finally, Appellant alleges that Trial counsel should have objected when the State discussed the process for deciding death during voir dire. Trial counsel did not find the inquiry objectionable (Mo.Tr. 782-784). After making the inquiry that Appellant finds so objectionable, the Prosecutor clarified his question as follows:

The question I have for you is, and keeping in mind that a jury must be, is required to keep an open mind and listen to all of the evidence, go through the entire process

before you make a final decision, the question I have for you is whether you can fully and fairly consider both alternatives." (Tr. 72-73).

This is not an improper inquiry. Given the fact that it is assumed the jury will follow to Court's instructions, no error occurred. In Storey v. State, 175 S.W.3d 116 (Mo. banc 2005), the exact same claim, involving the same judge, the same prosecutor, and the same appellate counsel, was rejected by this Court. 175 S.W.3d at 157.

XIII.

The Motion court did not err in denying appellant's claim that he is incompetent to be executed because that is a claim more properly presented in another proceeding under §552.060, and appellant failed to present significant evidence establishing he is incompetent. (Addressing Point XXI of Appellant's Brief).

Appellant claims the motion court should have declared him incompetent to be executed. There are two reasons why this claim should be denied.

First, a claim of incompetency is not cognizable in a motion to vacate. Show v. State, 686 S.W.2d 513, 515 (Mo. App. E.D. 1995); State v. Tokar, 918 S.W.2d 753, 762 (Mo. banc 1996). The proper procedure is, in fact, to seek review under §552.060, RSMo. In re Competency of Parkus, 219 S.W.3d 250, 253 (Mo. banc 2007).

Second, the appellant failed to prove that he was incompetent. With regard to the offer of proof made, the motion court concluded:

> Dr. Ahmed indicates that, because of the medications he has prescribed to Movant, "he is fairly under control" and has improved his symptoms. Dr. Ahmed did not testify that Movant was incompetent to be executed. Thus, even if the Court were to accept the claim and the offer of proof, the Movant has failed to sustain his burden of proof on this claim. This claim is denied.
>
> * * *
>
> Movant did not present evidence to support the claim. Dr. Moldin claims he has no concept of the process and result and does not understand his situation.

To the contrary, the elaborate attempt to fabricate an insanity defense leads to the conclusion that he actually does understand the consequences well.

(L.F. 916-17).

This claim was properly denied.

XIV.

The Motion Court did not err in finding the trial counsel was not ineffective in failing to call Dr. Vliestra as a witness because trial counsel is not obliged under the Constitution to call a certain witness and trial counsel made a reasonable decision to call certain expert witnesses after careful consideration and review of all the evidence. (Addressing Point XXII of Appellant's Brief)

Appellant claims that Dr. Vliestra should have been called as an expert to testify concerning his family background and history. On appeal, Appellant argues that the testimony that should have been offered in the penalty phase was that Appellant was raised "in an environment characterized by instability in Michael's life." (Appellant's Brief, p. 173). These are hardly compelling areas of testimony that could persuade a jury to overlook Appellant's murder of two individuals in particularly gruesome manners.

And it is important to point out that Dr. Vliestra seems to be, in fact, a post-conviction expert. She has never been asked to evaluate a case for trial, only for post-conviction motions (Mo. Tr. 214). The reason, as the Motion Court noted, is that she is not credible or persuasive with a jury (L.F. 917). This Court has previously held that trial counsel is not ineffective in failing to call Dr. Vliestra in a case involving the same trial judge. Storey v. State, 175 S.W.3d 116, 145 (Mo. banc 2005).

Counsel decided that the evidence of Appellant's childhood was not disputed by the State and would come in through other witnesses (Turlington March 1, 2006 depo, p. 118-120). It did. For example, the evidence that Appellant was beaten as a child with a coat hanger was heard by the jury at trial (Tr. 1018). Trial "counsel is not obliged to shop for an

expert witness who might provide more favorable testimony." State v. Kenley, 952 S.W.3d 250, 266 (Mo. banc 1997); Taylor v. State, 126 S.W.3d 755, 762 (Mo. banc 2004).

XV.

The Motion Court did not err in finding that appellate counsel was not ineffective in failing to raise a claim that Dr. Adelstein's testimony violated Crawford because appellate counsel could not have reasonable anticipated this change in the law and Appellant was not prejudiced by this alleged failure because the cause of death was not an issue in dispute at trial.

(Addressing Point XXIII of Appellant's Brief)

Appellant claims that his appellate counsel should have asserted in her reply brief that the testimony of Dr. Adelstein violated the holding of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Appellant claims that because Dr. Adelstein's testimony relied on an autopsy report prepared by a deceased pathologist, this "testimonial" evidence was improperly admitted.

The State submits that this evidence would not necessarily be inadmissible under Crawford, appellate counsel cannot be deemed ineffective for failing to anticipate a new rule, the Appellant was not prejudiced because the testimony involved a matter not in dispute, and the rule of Crawford was not retroactive.

Standard of Review

"To prevail on a claim of ineffective assistance of appellate counsel, the [Appellant] must establish that counsel failed to raise a claim of error that was so obvious that a competent and effective lawyer would have recognized and asserted it. The claimed error must have been sufficiently serious to create a reasonable probability that, if it were raised, the outcome of the trial would have been different. Smith v. Robbins, 528 U.S. 259, 285 120

S.Ct. 746, 145 L.Ed.2d 756 (2000)"; Williams v. State, 168 S.W.3d 433, 444 (Mo. banc 2005).

Appellant claims that because Crawford was decided one week before Ms. Percival filed her reply brief, she was ineffective for apparently failing to raise this issue in her reply brief. "Assignments of error set forth for the first time in an appellant's reply brief do not present issues for appellate review." Pearman v. Dept. of Social Services, 48 S.W.3d 54, 55 (Mo.App.W.D. 2001). It would not have been proper to raise a new issue in a reply brief.

Appellate counsel indicated that at the time she filed her brief on behalf of the Appellant, "it was my belief that this was a fairly settled issue, that Missouri law did allow for someone else to testify regarding an autopsy report..." (Exhibit 82, p. 17).

It is also reasonable to conclude that neither the courts nor attorneys were quite certain the extent to which Crawford applied to the situation at Appellant's trial. In fact, the United States Supreme Court has subsequently revised the interpretation of two appellate courts' opinions of Crawford. Davis v. Washington, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); Whorton v. Bockting, 1275 S.Ct. 1173, 167 L.Ed.2d 1 (2007). Even appellate courts have struggled with the proper scope of Crawford; how can appellate counsel be required to anticipate its scope?

In State v. March, 216 S.W.3d 663 (Mo. banc 2007), this Court recently decided that Crawford forbids the introduction of a lab report because it is testimonial. 216 S.W.3d at 666. This was because the laboratory report "was prepared solely for prosecution." Id. It is unreasonable to require counsel to anticipate the impact of Crawford three years later. The United States Supreme Court has expressly acknowledged that its holding in Crawford was

"a new rule" and "was not dictated by prior precedent." Whorton v. Bockting, 127 S.Ct. at 1181. In fact, Crawford was "flatly inconsistent with the prior governing precedent." Id. Again, Appellant cannot honestly argue that anyone could have anticipated the holding in Crawford, or the scope of its subsequent applications.

In fact, the March case was transferred to this Court from the Missouri Court of Appeals because of the issue raised. 216 S.W.3d at 664. (The court of appeals held that admission of the report did *not* violate Crawford). And while it is not a matter the Court must actually determine in order to deny this claim, the State does not concede that Dr. Adelstein's testimony was, in fact, in violation of Crawford or March. In March, the laboratory report was introduced as a business record. 216 S.W.3d at 667. In this case, Dr. Adelstein was, himself, a forensic pathologist who was qualified to testify as to the cause of death (Tr. 914-917). Appellant has failed to suggest or demonstrate that Dr. Adelstein could not have offered his own conclusions if necessary. In addition, an autopsy is not necessarily performed solely for the purpose of providing testimony; arguably, autopsy results are not always "testimonial."

Furthermore, as appellate counsel noted, the cause of death was not in dispute in this case (Exhibit 82, p. 17, 31-32). As has been made obvious from this appeal, the real issue was whether Appellant was criminally responsible for the murder he unquestionably committed. For this reason, Appellant cannot claim any real prejudice from appellate counsel's failure to raise this issue on appeal.

XVI.

The Motion Court did not err in ruling that Missouri's method of execution was not unconstitutional because Appellant failed to present sufficient evidence that the method of execution in Missouri is cruel and unusual and the Eighth Circuit has determined Missouri's method of execution to be constitutional.

(Addressing Point XXIV of Appellant's Brief)

In this claim, Appellant relies on an affidavit from an anesthesiologist who reviewed some information concerning Missouri's method of execution in 2005. (Exhibit 159). Dr. Heath's conclusions were recently rejected by the Eighth Circuit Court in Taylor v. Crawford, No. 06-3651 (8th Circ., June 4, 2007). In that case, Dr. Heath "criticized the State's lack of written protocol." Id. at 3. That is, of course, the inherent problem with Dr. Heath's conclusions; he cannot say that the procedures are painful, only that the "potential" exists. (Exhibit 139, p. 132).

The Eighth Circuit has concluded "that Missouri's written lethal injection protocol does not violate the Eighth Amendment." Id at 12.

Similarly, this Court has consistently rejected similar arguments based solely on a defendant's claim that there are "no assurances that future executions will be humane and constitutional." Morrow v. State, 21 S.W.3d 819, 828 (Mo. banc 2000); Worthington v. State, 166 S.W.3d 566, 582 (Mo. banc 2005).

Appellant's "evidence" is that if the execution is performed incorrectly, he might experience pain. He presented no evidence that such an event is likely and, in fact, presented

no evidence that this has ever occurred in Missouri. After "carefully examining" the records, the Eighth Circuit noted there is not evidence that any of the last six inmates executed in Missouri "suffered any unnecessary pain." Taylor v. Crawford, supra at 12.

XVII.

The Motion Court did not err in finding that trial counsel was not ineffective for failing to present the testimony of Dr. Richard Weiner that the jury instructions are impossible to comprehend by a jury because that research has been consistently discredited by this Court.

(Addressing Point XXV of Appellant's Brief)

Finally, Appellant asks this Court to disregard its prior holdings rejecting Dr. Weiner's research, providing absolutely no factual or legal basis for this Court to change its opinion. As the Motion Court concluded:

> Counsel strategically chose not to raise this claim as it has been repeatedly denied by the Missouri Supreme Court. This Court finds counsel's actions were reasonable. This claim is meritless. Dr. Weiner's research has been rejected by the Missouri Supreme Court repeatedly. Smulls v. State, 71 S.W.3d 138 (Mo. banc 2002); Lyons v. State, 39 S.W.3d 32 (Mo. banc 2001); State v. Deck, 994 S.W.2d 527, 542-43 (Mo. banc 1999). Those shortcomings continue to exist. Dr. Weiner's opinions and conclusions are not credible and his bias is obvious. Trial counsel was not ineffective in failing to call Dr. Weiner and present his research. Trial counsel was familiar with this work, and with the fact that this research has been consistently rejected by Missouri's courts. Trial counsel is not ineffective for failing to raise a meritless claim. (L.F. 938-39).

In Storey v. State, 175 S.W.3d 116 (Mo. banc 2005), this Court denied an identical claim because the Appellant "points to nothing specific about the instructions that was confusing to the jury, but instead argues generally that all death penalty instructions are flawed." 175 S.W.3d at 159. Storey's counsel did not fall below the objective level of reasonableness by failing to object to the instructions based on Dr. Weiner's study. Id.

Trial counsel was not ineffective in failing to make an objection that had no merit. Id.

CONCLUSION

For the foregoing reasons, the Motion Court's denial of Appellant's Motion to Vacate should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

THEODORE A. BRUCE
Assistant Attorney General
Mo. Bar No. 29687

P.O. Box 889
Jefferson City, MO 65102
573-751-1508
573-751-5391 (Facsimile)
theodore.bruce@ago.mo.gov
Attorneys for Respondent

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 _____ 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, and a floppy disk containing a copy of this brief, were mailed this _____ day of July, 2007, to:

William Swift
Office of State Public Defender
Woodrail Centre
1000 West Nifong, Suite 100
Columbia, MO 65203

_____
THEODORE A. BRUCE