No. 86278

IN THE
MISSOURI SUPREME COURT

PAUL GOODWIN,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of St Louis County, Missouri
Twenty-first Judicial Circuit
Honorable Emmett M. O'Brien, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial, after an evidentiary hearing on some claims, of a motion to vacate sentence and judgment pursuant to Supreme Court Rule 29.15 in the Circuit Court of St. Louis County. The conviction sought to be vacated is for murder in the first degree, § 565.020,RSMo 2000,for conduct occurring on March 1,1998. Appellant was sentenced to death. Because of the sentence of death imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction over this appeal. Article V, § 3,Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Paul Goodwin, Appellant, was tried by a jury in the Circuit Court of St. Louis County and convicted of first degree murder (Tr.192-1932; L.F.178). After the penalty phase, the jury returned a sentence of death (Tr.2340-2344; L.F.182-184,195). The evidence adduced at trial supporting Appellant's conviction and sentence was as follows:

The murder victim, Joan Crotts, was a widow in her sixties who had lived for some twenty-five years at her home at 2712 Lyndhurst, located near North Hanley Road in St. Louis County (Tr.802,814-816,849-852; St's.Ex.2,4,9,10). She was five feet one inches in height, had poor eyesight and walked with a cane (Tr.853,1082). Next door to Mrs. Crotts' residence, at 2710 Lyndhurst, was a house used as a boardinghouse for men (Tr.857-858,860,1187; St's.Ex.71). In the summer of 1996,Appellant moved into that boardinghouse (Tr.858-859,861,928).

Beginning a week or so after his arrival, Appellant engaged in a series of verbal confrontations with Mrs. Crotts (Tr.858-859). When she called out into her yard to quiet her dogs, Appellant shouted from a window of the boardinghouse, "shut up, fat bitch" (Tr.859-861,922,927,937; St's.Ex.71). Appellant regularly insulted or cursed Mrs. Crotts thereafter (Tr.861,934-935,1188), culminating in an incident in or around August of 1996. On that occasion, Appellant and some friends were having a barbeque in the back yard of the boardinghouse and were throwing empty beer cans and bones over a fence into Mrs. Crotts' yard (Tr.861-863,928-932,1188,1251-1253,1259-1262; see St's.Ex.73). When Mrs. Crotts came out to complain, Appellant picked up a sledgehammer with one hand,

smashed a rock with it and said, "this is your head . . . if you keep messing with me" (Tr.1253-1254,1261-1265,1268-1269).[1]

A short time later, when Mrs. Crotts left her house to attend a social function, Appellant physically confronted her on the driveway between her house and the boardinghouse and said, "get your fat ass back in the house, bitch. I've got one coming for you" (Tr.862,930-933,1189,1199-1200; St's.Ex.71). The victim's daughter and other persons intervened, and the confrontation ended (Tr.862,933-934,1191,1199-1200). That evening, Appellant was evicted from the boardinghouse (Tr.864,934). As he left, Appellant said to Mrs. Crotts, "I'm going to get you for this, bitch" (Tr.864-865,937-938,1191-1192). Over the next six months to a year, Appellant was seen walking in the neighborhood, but not in the immediate vicinity of Mrs. Crotts' house (Tr.866,1192-1193,1200).

Shortly before 5:00 a.m. on Sunday, March 1,1998,a year and a half after Appellant's eviction from the boardinghouse, Mrs. Crotts telephoned the St. Louis County Police to report that her automobile had been tampered with (Tr.802-805,818-819). When a patrol officer, Mark Grobelny, arrived at her house, Mrs. Crotts told him that she had found some papers that had been in the vehicle outside on the ground (Tr.807-808,1051; St's.Ex.53,54). She also reported to Officer Grobelny that someone had also opened the gate into her back yard, letting her dogs loose, and that a step on her back porch was out

[1]Appellant was 6'6" and weighed approximately 280 pounds (Tr.1573).

of place (Tr.807-812,819-820; St's.Ex.5-7). Grobelny walked around the house several times, and later patrolled around the neighborhood in his vehicle, but found no suspicious persons (Tr.808-816).

According to Appellant's statements to police, he opened the gate to Mrs. Crotts' back yard, entered her house and sat on a chair in her basement, where he smoked a cigarette and waited for several hours (Tr.1305-1306,1320-1322; St's.Ex. 84,86,159A,pp.2-3). At 7:21 that morning, Mrs. Crotts received a telephone call from her daughter, Debra Olive, and they talked until 7:59 (Tr.870-872). The victim was preparing to go to church, but she did not arrive there (Tr.872-874). Later that morning, a neighbor telephoned Mrs. Crotts but got no answer (Tr.874,1193-1194).

Appellant told police that he went up the basement stairs carrying a sledgehammer and confronted Mrs. Crotts in her kitchen (Tr.1306-1307,1323-1324,1386,1395; St's.Ex.88-90,159A,pp.3-4). He grabbed her by the arm and forced her into the living room of the house (Tr.1307-1308,1324-1325; St's.Ex.90,159A,p.4). Appellant claimed that he and Mrs. Crotts sat on the living room sofa and talked, and that she asked him if he wanted money or jewelry (Tr.1307-1308,1325; St.Ex.91,159A,p.4). Appellant stated that he then took Mrs Crotts into an adjacent room where she kept her computer and an organ (Tr.1308-1309,1325-1326; St's.Ex.92,93), and from there into her bedroom, where he compelled her to lie down on the bed (Tr.1309,1326-1328; St's.Ex.94-96,159A,pp.4-5). Appellant said that he exposed his penis and tried to force the victim to perform oral sex, but that she was unable to do so because he was unable to maintain an erection

(Tr.1309,1328; St's.Ex.159A,p.5). Appellant stated that he ejaculated on the bed (Tr.1310,1388; St's.Ex.159A, p. 6).

After his sexual contact with Mrs. Crotts, Appellant compelled her to go into the kitchen, where he took a two-liter bottle of Pepsi out of the refrigerator and drank it (Tr.1310,1329-1330; St's.Ex.97-98,159A,pp.6-7); some of the Pepsi was spilled on the kitchen floor (Tr.834-836,876; St's.Ex.27). While Mrs. Crotts was looking out the back door, Appellant took a piece of paper from the kitchen table and wrote on it, "You are next" (Tr.839,1310-1311,1329-1331; St's.Ex.39,99-100,159A,p.6). He then grabbed the victim and forced her to walk to the head of the basement stairs, where he shoved her down the stairs with both hands (Tr.1311,1331-1332,1381; St's.Ex.100-103,159A,p.7). Mrs. Crotts fell the length of the stairs (Tr.1311,1333-1334; St's.Ex.105). As she lay, face down and unmoving, at the bottom of the stairs, Appellant walked down the steps and observed the victim for awhile (Tr.1311-1312,1334; St's.Ex.105,106). Using the sledgehammer he had been carrying, he then struck Mrs. Crotts several times in the back of the head (Tr 1312,1334-1335; St's.Ex.106,159A,p.7). Appellant threw the sledgehammer into a corner of the basement, left the house through a basement door, closed the backyard gate and walked to his home, which was a mile from the victim's house (Tr.875,1312,1335-1337,1350-1351; St's.Ex.11,107-111,159A,pp.7-8). Between 8:00 and 9:00 that morning, Appellant was seen by an acquaintance walking on North Hanley in the direction of his home (Tr.1255-1257,1268; St's.Ex.11).

That afternoon, Mrs. Crotts' daughter, Debra Olive, got a call from a neighbor that

the victim was not answering her telephone (Tr.874,1195). Mrs. Olive went to her mother's house and found her lying at the bottom of the basement stairs in a pool of blood (Tr.874-878). The victim did not open her eyes, but was able to speak (Tr.878); she was naked except for shoes and a housecoat pushed up under her arms (Tr.877-878). When asked if she had been raped, Mrs. Crotts said that she did not know (Tr.878). Olive called 911,and a police officer arrived a short time later (Tr.825-826,878-884). When the officer asked Mrs. Crotts what had happened, she said she did not know (Tr.832). That evening, while Mrs. Crotts was in the hospital and awaiting surgery, she was interviewed by a second officer (Tr.956-958). The victim stated that she had encountered a man holding a hammer at the top of the basement stairs, and that the man had forced her to perform oral sex in the living room (Tr.960-963). She said that the man was having problems maintaining an erection, that he had not ejaculated, and that he was "very angry" (Tr.962-963). Mrs. Crotts told the officer that she had later been pushed down the stairs, and that she had been hit in the back of the head with an object she believed to be a hammer (Tr.963-964). The victim said that she did not recognize her assailant and was unable to describe him (Tr.959-960).

Mrs. Crotts died later that evening during surgery (Tr.918,1123,1282-1283). The cause of her death was "cranialcerebral trauma," resulting from three blows to her head that had caused multiple depressed fractures of her skull and injuries to her brain (Tr.1083-1084,1123,1128-1131,1136-1139,1141-1142,1147,1153-1154; St's.Ex.137-139).

Police discovered a number of items in Mrs. Crotts' home that were relevant to her

murder. A pair of Mrs. Crotts' pants and a pair of her panties, both turned inside out, were found on the floor of the living room (Tr.886-888,1008-1009; St's.Ex.17,19). A handwritten note reading "You are next" was discovered on the kitchen table, and an empty Pepsi bottle was on the kitchen floor near a pool of spilled soda (Tr.1019-1022,1032-1034; St's.Ex.27,28,32,39). Fingerprints on both the note and the bottle were later determined to match those of Appellant (Tr.1178-1182). Two cigarette butts were found in the basement, and also a cigarette wrapper that was of the same brand as the cigarettes smoked by Appellant (Tr.947,1043-1045,1314; St's.Ex.46,48-49). In a corner of the basement was a sledgehammer bearing traces of blood and hair (Tr.947,951-953,1043-1044; St's.Ex.46,47). The blood and hair on the sledgehammer were subsequently determined to be consistent with those of the victim (Tr.1211,1245-1247). Just outside the door leading from the basement, police found a hearing aid that was later established to have been purchased by Appellant (Tr.1049-1050,1166-1169; St's.Ex.52).

On the day after the murder (Monday, March 2,1998), police obtained a search warrant for Appellant's residence (Tr.1051-1054; St's.Ex.76). In the bedroom of the house, officers found and seized a pair of blue jeans, a pair of underpants and a pair of boots (Tr.1055-1060; St's.Ex.79,80). There were stains on both legs of the blue jeans that were determined to be human blood (Tr.1209-1212). Testing of the underpants revealed the presence of acid phosphatase, which is characteristic of seminal fluid (Tr.1212-1214,1221-1222,1225-1233). The boots were found to match bootprints in the spilled Pepsi in Mrs. Crotts' kitchen (Tr.1238-1244; St's.Ex.34-37).

Also on March 2,police officers went to Appellant's place of work, placed him under arrest and transported him to a police station (Tr.1285-1288). Appellant, who had a hearing impairment, was offered a sign-language interpreter in speaking with the officers, but refused it, saying that he could understand what was being said (Tr.1289-1292). After being advised of and waiving his Miranda rights, Appellant gave an oral statement in which he admitted to killing Joan Crotts and provided the details described above (Tr.1292-1314). Appellant declined to give a taped or written statement, but agreed to return to the victim's house and reenact for the officers his account of the crime (Tr.1314-1315). Appellant would not consent to the videotaping of his reenactment, so photographs were taken at various stages of the reenactment (Tr.1315-1337; St's.Ex.84-111). Following the reenactment, officers conducted an additional interview of Appellant in which they tape-recorded his statements without his knowledge (Tr.1338-1341; St's.Ex.158,159); when Appellant became aware of the taping, he altered parts of his account (Tr.1347-1348).

In his interviews with police, Appellant claimed that he had been drinking and that, while intending to go to the boardinghouse where he had once lived, had entered Mrs. Crotts' home by mistake (Tr.1303-1305,1322; St's.Ex.159A,p.9). The boardinghouse and the victim's house did not resemble one another in their external appearance (St's.Ex.4-6,71-73). Appellant stated that he had entered Mrs. Crotts' house through the basement door, which he claimed was unlocked, in the same manner in which he would have entered the boardinghouse (Tr.1305-1306,1320-1321; St's.Ex. 84,85,159A,pp.2-3,9). The basement door to Mrs. Crotts' house was always kept locked because the victim was

physically unable to walk up the outside stairs (Tr.909-910).[2] Appellant asserted that when he had lived at the boardinghouse, he had seen the victim "just one time" and that he had not paid much attention to her (St's.Ex.159A,p.9). In fact, Appellant had had a series of personal confrontations with Mrs. Crotts leading up to his eviction from the boardinghouse (Tr.858-865,927-935,937-938,1188-1189,1191-1192,1251-1254,1259-1265,1268-1269). Appellant also equivocated in his statements to police as to whether he had taken the sledgehammer he used to kill Mrs. Crotts upstairs with him when he confronted the victim, or whether he had picked it up on the way downstairs after pushing her down the stairs (Tr.1307,1324,1333).

An autopsy of Joan Crotts established that she had injuries all over her body. In addition to the skull fractures that caused her death, the victim had bruises and other injuries on her face, chest, shoulders, back, buttocks, knees, thighs, and both hands and arms (Tr.1087-1102,1108-1121,1124; St's.Ex.112-114,117-136). She had eight broken ribs and a broken hip (Tr.1084,1142-1144). Some of the injuries to the victim's hands and

[2]The upstairs back door to Mrs. Crotts' residence, which opened from the back yard into the victim's kitchen, was found by police to be unlocked (Tr.1032; St's.Ex. 6,40).

arms were indicative of "defensive wounds," resulting from an attempt to ward off blows (Tr.1108,1112-1113; St's.Ex.123,126). Many of the specific injuries, and the number of injuries as a whole, were inconsistent with a fall down the stairs, but rather were characteristic of a beating inflicted by another person (Tr.1108-1110,1118,1146-1147,1155-1157,1160-1164).

The defense conceded that Appellant had killed Mrs. Crotts (Tr.790,1875-1876), but presented the testimony of a psychologist, Rosalyn Schultz, who opined that Appellant suffered from a mental disease or defect that prevented him from appreciating the nature, quality and wrongfulness of his conduct, and also that he was incapable of acting with deliberation (Tr.1512,1518-1519). In rebuttal, the state called a psychiatrist, John Rabun, who testified that Appellant did not suffer from a mental disease or defect and was fully responsible for his actions (Tr.1702-1705,1770-1771,1773).

After Appellant was convicted he appealed his conviction to the Missouri Supreme Court. This Court affirmed Appellant's conviction, issuing an opinion on April 24,2001,and its mandate on May 29,2001. *State v. Goodwin*, 43 S.W.3d 805 (Mo.banc 2001).

Appellant filed a *pro se* motion for post-conviction relief on August 27,2001 (PCR.L.F.5-10). Counsel was appointed and an amended motion was filed on December 10,2001 (PCR.L.F.17-18,20-345).

On March 7,2002,Appellant filed a motion to continue the case until the United States Supreme Court decided the issue of whether it is constitutional to execute mentally retarded persons (PCR.L.F.362-364). On February 26,2003,the motion court granted an

evidentiary hearing as to one of Appellant's claims and denied a hearing as to all other claims (PCR.L.F.372-73). On July 11,2003,Appellant filed a motion for a new penalty-phase jury trial on the issue of mental retardation (PCR.L.F.412-415). This motion was heard on September 5,2003,and overruled (PCR.L.F.431,433; PCR.Supp.Tr.2).

An evidentiary hearing was held on September 29,30 and October 1,2003; the motion court entered its findings of fact and conclusions of law denying Appellant relief on July 15,2004 (PCR.L.F.444-479). This appeal follows.

ARGUMENT

I

The motion court did not clearly err in denying, after an evidentiary hearing, Appellant's Rule 29.15 claims (1) that trial counsel were ineffective in failing to present evidence that he was mentally retardation, and (2) that his sentence was unconstitutional in light of *Adkins v. Virginia*, 536 U.S. 304 (2002), because appellant failed to present sufficient evidence of his alleged mentally retarded condition (as defined in § 565.030.6,RSMo Cum.Supp. 2004) and counsel was not ineffective either in investigating appellant's mental condition or in failing to present the evidence that post-conviction counsel discovered after appellant's trial.

In his first point, appellant contends that the motion court clearly erred in denying two of the claims asserted in his amended motion: (1) that counsel was ineffective for failing to present evidence that he was mentally retarded (claim 8(B) of the amended motion); and (2) that his sentence, because of his alleged mental retardation, was unconstitutional in light of the recent decision in *Adkins v. Virginia* (claim 8(C) of the amended motion)(App.Br.50).

Proceeding on the premise that he presented substantial evidence of his alleged mentally retarded condition, appellant first contends that the issue in this case is "simple" – that this Court need only determine "who should weigh this evidence, a postconviction judge or a jury?" (App.Br.53). And, needless to say – inasmuch as the post-conviction judge has already determined the issue against him – appellant opines that the evidence

should have been weighed by a jury (App.Br.53-54).

Appellant next contends that "if this Court finds that a judge can make the factual finding of mental retardation, [this Court] should conclude that the motion judge clearly erred in denying relief" (App.Br.59). In purported support of this argument, appellant asserts that "credibility is for the jury," and that the motion court incorrectly focused on IQ scores and ignored the evidence of appellant's alleged adaptive deficits (App.Br.60).

Finally, appellant argues counsel was ineffective because it was unreasonable not to investigate appellant's mental condition and present evidence of appellant's alleged mental retardation at trial (App.Br.62-63). He points out that, at the time of his trial, evidence of mental retardation was admissible mitigating evidence that could have been considered by the jury (App.Br.62). He also points out, with the benefit of hindsight, that "there could be no reasonable trial strategy for failing to present evidence of mental retardation" because such evidence could constitute an absolute bar to the death sentence (App.Br.65).

A. The Standard of Review

Appellate review of a motion court's denial of a Rule 29.15 motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the court are clearly erroneous. Supreme Court Rule 29.15(k); *Maynard v. State*, 87 S.W.3d 865,866 (Mo.banc 2002).

To prevail on a claim of ineffective assistance of counsel, a movant must prove: (1) his attorney's performance did not conform to the degree of skill, care and diligence of a

reasonably competent attorney, and (2) he was thereby prejudiced. *Strickland v. Washington*, 466 U.S. 688,694 (1984). To show that counsel's performance was deficient, the movant must establish that counsel's performance fell below an objective standard of reasonableness. *Id*. at 688-689. To satisfy the prejudice prong, the movant must demonstrate that there is a reasonable probability that but for counsel's deficient performance, the result of Appellant's trial would have been different. *Deck v. State*, 68 S.W.3d 418,429 (Mo.banc 2002).

B. Factual Background

1. Evidence at Trial

That Appellant murdered Joan Crotts by beating her in the head with a sledgehammer was conceded by the defense at trial (Tr.790,1875-1876). The evidence against Appellant included his own confessions to police that he entered Mrs. Crotts's home, sat in her basement for a few hours before going up the stairs, confronted her, and then forced her to several different rooms in her home (Tr.1302,1305-1311). Appellant further admitted that after he pushed the victim down the basement stairs, he observed her for a while, picked up a hammer, and then went down the stairs and struck her in the head several times (Tr.1311-1312).

His defenses at trial were (a) that he was unable to appreciate the nature, quality or wrongfulness of his conduct, and therefore was not guilty by reason of a mental disease or defect (Tr.1518-1519); and (b) that, even if he was mentally responsible for his actions, he was incapable of deliberation (Tr.1512).

The defense called one expert during guilt-phase, Rosalyn Schultz, a licensed psychologist (Tr.1416). Schultz testified that she performed an evaluation of Appellant to determine if he was suffering from a mental disease or defect, as defined by § 552.030,RSMo 2000 (Tr.1424). The assessment included interviews with Appellant, his mother, his two sisters and a social worker at the St. Louis City Justice Center (Tr.1427). Schultz interviewed Appellant on four different occasions for a total of almost 11½ hours (Tr.1426).

Schultz reviewed Appellant's educational records from the Special School District and his medical and police records (Tr.1425,1430-1441). She obtained a personal history, including information about Appellant's childhood, adulthood, employment history, and relationships with family members and other people (Tr.1427-30,1443-1444). She also obtained a family medical and psychiatric history (Tr.1460-1466). The diagnostic testing she performed included tests to assess Appellant's competency to stand trial, malingering, IQ, achievement, thoughts and feelings, and traumatic stress (Tr.1427,1470-1473,1480,1482).

Schultz testified that throughout Appellant's educational process he had been diagnosed with a learning disability, a language disorder, and borderline intellectual ability (Tr.1441). She discussed IQ testing that had been done while Appellant attended the Special School District and concluded that "[c]onsistently on the IQ tests, his verbal IQ, his full scale IQ, was in the borderline range, meaning not as low as mildly retarded but not up in the normal range" (Tr.1436). Schultz also performed IQ testing on Appellant

which indicated Appellant had a verbal IQ of 73,performance IQ of 92 and a full scale IQ of 80,which was "within the borderline range of general intellectual capacity" (Tr.1482). His reading ability tested at the eighth grade level, spelling at the fifth grade level, and arithmetic at the fourth grace level (Tr.1483). Shultz concluded that Appellant had borderline intellectual functioning (Tr.1506).

Other testing Schultz performed showed that Appellant was very unhappy, depressed, dissatisfied, withdrawn, lacking in self-confidence, anxious, sullen, alienated and confused (Tr.1476). The testing also showed that Appellant was not malingering (Tr.1470). She concluded that his symptoms indicated post-traumatic stress disorder (Tr.1481). She diagnosed Appellant with major depression disorder, post-traumatic stress disorder, and personality disorder NOS (not otherwise specified)(1499,1505-1506). Major depression and post-traumatic stress disorder are both a mental disease or defect (Tr.1501,1508). Schultz ultimately concluded that on the day of the murder Appellant suffered from a mental disease or defect and was unable to coolly reflect (Tr.1511-1512).

In rebuttal, the State called psychiatrist John Rabun. Rabun was ordered by the trial court to examine Appellant and determine his fitness to stand trial, whether or not he suffered from a mental disease or defect, and his need for hospitalization (Tr.1695). Rabun concluded that Appellant did not suffer from a mental disease or defect, was competent to stand trial, and did not require psychiatric hospitalization (Tr.1699). In coming to his conclusions, Rabun reviewed Appellant's educational history and IQ scores, showing that Appellant's first three full scale IQ tests were all within the borderline range

(Tr.1762). He also reviewed Schultz's testing, showing Appellant's IQ in the average range (Tr.1762). Based on Appellant's first three tests, Rabun put him in the borderline range, meaning "not at all mentally retarded" (Tr.1763). Rabun also discussed Appellant's adaptive functioning, stating that Appellant had no defects in his adaptive level of functioning, meaning his ability to bathe and clothe himself, communicate his desires, feed himself, drive, work, and live independently (Tr.1765).

Appellant was convicted of first degree murder (Tr.1929-1932; L.F.178). During the penalty-phase, the defense called Richard Wetzel, an expert in psychology and neurology, to offer mitigating evidence on Appellant's behalf (Tr.2136). Wetzel had spent a whole day with Appellant in April 1999,another whole day with Appellant in May 1999,2-3 hours in August 1999,and 4 hours in September 1999 (Tr.2143-2144). Wetzel interviewed Appellant's mother and sister, reviewed the reports of Rabun, Schultz, and the medical examiner, and reviewed Appellant's Special School District records, medical records, statements to police, and journal entries (Tr.2144).

Wetzel testified regarding Appellant's hearing and communication problems, alcohol and drug problems, and irresponsible lifestyle (Tr.2145-2146,2148-2149,2162). He also discussed Appellant's IQ tests, concluding Appellant was not mentally retarded (Tr.2163). Wetzel concluded that Appellant had depression of a moderate degree and that he had personality disorder NOS (Tr.2157,2161). He testified that Appellant was impulsive, reactive, and "not a planful person" (Tr.2158). He opined that Appellant's ability to conform his conduct to the law on the night of the murder was substantially impaired, but

that Appellant could control his behavior (Tr.2165).

The jury returned a verdict finding three statutory aggravating circumstances and recommending a death sentence (Tr.2340-2344; L.F.182-184,195).

2. Post-conviction Proceedings

Claim 8(B) of appellant's Rule 29.15 motion alleged that his trial counsel were ineffective for failing to retain the services of a "mental retardation expert" such as Dennis Keyes (PCR.L.F.24,51). In a related claim, claim 8(C), appellant alleged that the imposition of a death sentence was, in light of appellant's alleged mentally retarded condition, unconstitutional (PCR.L.F.26,113).[3] The motion court held an evidentiary hearing "on claim 8(B) and other related issues of mental retardation" (PCR.L.F.444,454).

At the post-conviction evidentiary hearing, Appellant called Keyes, an educational psychologist certified by the state boards of education in South Carolina, New Mexico,

[3] Prior to the post-conviction evidentiary hearing, appellant filed a motion to grant a new penalty phase so that the issue of his mental retardation could be submitted to a jury (PCR.L.F.412-415). This motion was overruled prior to the evidentiary hearing (PCR.L.F.431,433; PCR.Supp.Tr.2).

and Ohio (PCR.Tr.3). Keyes had performed a psycho-educational evaluation of Appellant in November 2001 when Appellant was thirty-five years old (PCR.Tr.50-51,86). The evaluation included interviews with Appellant and his family, and evaluation of Appellant's medical records, school records, letters, cards, records regarding his psychological functioning and physical background, and employment records (Tr.51,53). He also reviewed the testimony of Rabun, Shultz, and Wetzel (Tr.54). Keyes concluded that Appellant functioned within a range of mental retardation, and had since he was a child (PCR.Tr.71).

In coming to this conclusion, Keyes assessed Appellant's intelligence and adaptive functioning (PCR.Tr.60,62-63). He concluded that Appellant's IQ was between 63 and 65,within the mild range of mental retardation (PCR.Tr.79). Keyes administered three tests. The first test, the Wechsler Adult Intelligence Scale, was disregarded due to Keyes's belief that it had been tainted by a previous administration of the same test (Tr.62-63,64).[4] Appellant received a verbal IQ score of 71 on this test, and Keyes admitted that appellant would have scored a full scale IQ of "about 78,79," if he had scored a 90 on

[4] This belief was premised upon Keyes's crediting appellant's claim that the previous administrator had provided him the answers (PCR.Tr.52). Appellant did not testify at the evidentiary hearing to confirm this hearsay, and the administrator of the previous test denied any impropriety (PCR.Tr.595) – two facts that the motion court included in its findings and conclusions (PCR.L.F.461).

the performance aspect of the case (as appellant had recently scored)(PCR.Tr.71,138-139). On the Stanford Binet – a "verbally intensive" test – Appellant's scores were almost all within the range of mental retardation; he achieved a composite score of 67 – one point below the cutoff for mental retardation on that test (PCR.Tr.64-65). On the Kaufman Adolescent and Adult Intelligence Indicator, Appellant's scores were somewhat better – a composite score of 74 (PCR.Tr.66-67).

Keyes also relied on information from Appellant's family members and two of his former teachers, obtained by interviewing these individuals using the Vineland interview format (PCR.Tr.60). The Vineland is used to determine an individual's adaptive behaviors in the areas of daily living skills, socialization and communication (PCR.Tr.61). Appellant's scores indicated functioning at an equivalent of 3.1 years (PCR.Tr.190). Keyes concluded that Appellant had very low adaptive skills and in many ways was unable to care for himself in a manner that is expected of somebody of his age and cultural background (PCR.Tr.61).

Keyes acknowledged that all previous assessments of Appellant's IQ had produced scores between 70 to 80,and that he was the first expert to ever diagnosis mental retardation (PCR.Tr.79,85). Appellant's prior scores can be summarized as follows:

Date	Age	Test(s)	Scores	Examiner

[5] Wechsler Intelligence Scale for Children published in 1949

12/21/73	7 yrs. 1 mo.	WISC[5]	verbal 81,performance 87,full 83	Special School District
5/20/75	8 yrs. 6 mo.	WISC-R[6]	verbal 82,performance 87,full 83[7]	Special School District
4/21/76	9 yrs. 5 mo.	WISC-R	verbal 72,performance 85 full 76	Special School District
4/27/78	11 yrs. 5	WISC-R	verbal 77,performance	Special

[6] Wechsler Intelligence Scale for Children revised

[7] At that time, the Peabody Picture Vocabulary Test showed an IQ of 75,and the Goodenough Intelligence Test showed an IQ of 94 (PCR.Tr.610-611; State's Ex.A-3). The Beery Test of Visual-Motor Integration showed appellant a "Perceptual Quotient" of 92 (PCR.Tr.611; State's Ex.A-3).

[8] The Peabody Picture Vocabulary Test at that time showed an IQ of 68 (PCR.Tr.617; State's Ex. A-5).

	mo.		80,full 76[8]	School District
5/13/80	13 yrs. 6 mo.	WISC-R	verbal 69,performance 80,full 72	Special School District
5 /26/ 83	16 yrs. 6 mo.	WISC-R	verbal 69,performance 91,full 78	Special School District
8/11/98	31 yrs. 1 mo.	WAIS-III[9]	verbal 73,performance 92,full 80	Schultz
1/27/00	33 yrs. 1 mo.	WAIS-III	verbal 81,performance, 90 full 84	Bobbie Meinershagen

Keyes acknowledged that IQ test scores can be lowered if an individual is depressed, that Appellant had a history of depression, and that both Wetzel and Schultz had diagnosed Appellant with depression; however, he did not test Appellant for depression (PCR.Tr.126-128). He acknowledged that he also did not test for malingering

[9] Wechsler Adult Intelligence Scale

(PCR.Tr.137). He acknowledged that, although the Vineland scores gave Appellant an age equivalent of 3.1 years, Appellant's school records showed that he functioned at a much higher level and that Appellant's family members' must have exaggerated their responses (which had the effect of lowering the Vineland score that Keyes reported)(*see* PCR.Tr.190). Lastly, Keyes acknowledged that prior to the murder, appellant was able to live alone, maintain employment, take care of his personal needs, and maintain interpersonal and social relationships – all of which were inconsistent with his conclusion that appellant was mentally retarded (*see* PCR.Tr.187-240).

In addition to Keyes, Appellant called members of his family, including his cousin, two uncles, two sisters; a former tutor; and one former teacher (PCR.Tr.285-286,300-301,380,399-400,414,416,426,534). These witnesses testified regarding Appellant's general intellectual deficits and functioning problems (PCR.Tr.285-572). Appellant did not call either of his trial counsels to testify at the post-conviction hearing.

The State called Bobbie Meinershagen, a certified psychological examiner, who testified that she assessed Appellant for the Potosi Correctional Center in January and February of 2000 (PCR.Tr.574,578,584,586). Ms. Meinershagen administered the Wechsler to Appellant, scoring him at a full scale of 84 (PCR.Tr.591).

Marilyn Lamb, a psychological examiner for the Special School District, testified about evaluations of Appellant, including the IQ scores summarized in the table above (PCR.Tr.604-617). She reiterated that Appellant had always tested in the borderline or dull normal range of intelligence and that she did not find him to be mentally retarded

(PCR.Tr.620).

Vernon Olson, who taught Appellant at the Wirtz Vocational Center, testified about Appellant's achievement in the auto maintenance class (PCR.Tr.665-677). On a scale of 1 to 5 (with five being the best) Appellant scored a 4 on introduction to auto maintenance, 3 on identification and use of hand tools, 3 on lifting equipment, and 3 on tires and balancing (PCR.Tr.672-677).

Richard Scott, a psychologist for the Missouri Department of Health, testified regarding his review of records and testing associated with Appellant's previous assessments (PCR.Tr.681). He stated that malingering is an important consideration when a subject has a motive to lie and appear mentally ill or disabled, and that a subject's depression needs to be assessed to determine if testing will be valid (PCR.Tr.690-691). He testified that Rabun and Schultz had both found borderline intellectual functioning, which excludes a finding of mental retardation, and that Wetzel did not find mental retardation (PCR.Tr.695,697-698). He was confident that Appellant's IQ was in the range of 70-80 (PCR.Tr.708). Scott reviewed Appellant's school records to come to an opinion on Appellant's adaptive functioning (PCR.Tr.714). He noted that the school records have assessments of his behavior in class, relationships with peers, job skills, ability to maintain a checkbook, and personal care (PCR.Tr.714-716). Scott concluded that Appellant was functioning above the level of mental retardation and that he did not meet the definition of mental retardation in the Missouri Statutes or the DSM-IV (PCR.Tr.716-717,748).

3. Motion Court's Findings

In denying appellant's claims, the motion court issued extensive findings of fact and conclusions of law (PCR.L.F.444-479). On the issue of appellant's alleged mental retardation, the motion court ultimately concluded that Keyes's opinion lacked "the necessary evidence required to support his conclusions" (PCR.L.F.471). The motion court pointed out various deficiencies in Keyes's methodology and deficiencies in the evidence presented (e.g., the obvious bias of appellant's lay witnesses), and "reject[ed] Keyes' testimony and status as an expert witness" (PCR.L.F. 472,476).[10] The court also pointed out that all of the other evidence plainly established that appellant was *not* mentally retarded; the court stated:

> In considering the evidence in this case, it is hard to imagine a better independent record of any individual's mental abilities than the records compiled by the Special School District of St. Louis. The Special School District, required by both state and federal law to conduct independent evaluations of needy students, with the student's best interest as their compelling guide, monitored [appellant] from age seven through eighteen and consistently rejected the notion that he was mentally retarded. This evidence is uncontroverted on the issue of [appellant's] intelligence being above the level required to diagnose mental retardation. These

[10] The motion court had previously noted that Keyes was not a licensed psychologist (PCR.L.F.459), a fact that Keyes admitted (PCR.Tr.84).

> records independently and objectively document [appellant's] intelligence and adaptive behaviors prior to age eighteen (18).

(PCR.L.F.475). Then, after extensively reviewing the deficiencies of appellant's evidence and outlining the lengthy and consistent evidence that showed that appellant was *not* mentally retarded (a fact confirmed by the defense experts who testified at appellant's trial), the motion court concluded both that counsel's pre-trial investigation was reasonable, and that "[b]ased upon the evidence before this Court, no reasonable trier of fact could have found [appellant] was mentally retarded" (PCR.L.F.476). The motion court did not clearly err.

C. Appellant Failed to Present Sufficient Evidence of Mental Retardation

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that the execution of a mentally retarded criminal defendant constitutes cruel and unusual punishment, in violation of the Eighth Amendment of the U.S. Constitution. 536 U.S. at 321. The Supreme Court left to the states the task of developing appropriate ways to enforce its decision. *Id*. at 317. Additionally, the Court left to the states the task of formulating a definition of mental retardation. *Id*.

In Missouri, § 565.030.6 defines "mental retardation" or "mentally retarded" as:

> a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills,

community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

§ 565.030.6,RSMo Cum.Supp. 2004.

Under Missouri's capital sentencing scheme, as it exists now, the trier of fact in a capital case must, in relevant part, "assess and declare punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor: (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded[.]" § 565.030.4,RSMo Cum.Supp. 2004. Consistent with this statutory provision, the Missouri Approved Instructions require the inclusion of MAI-CR 3d 313.38 if "there is evidence, whether submitted in the guilt or the punishment phase, that the defendant is mentally retarded." MAI-CR 3d 313.38,Notes on Use 2.

Thus, under the present statutory scheme, when there is sufficient evidence of mental retardation presented at trial, a jury will be instructed as follows:

In determining the punishment to be assessed (under Count(s) _____) against the defendant for the murder of [name of victim in this count], you must first consider whether or not the defendant is mentally retarded.

As used in this instruction, a person is mentally retarded if he suffers from a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with

continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole. As used in this instruction, "preponderance of the evidence" means that it is more likely true than not true that the defendant is mentally retarded.

MAI-CR 3d 313.38.

Leaving aside the question of whether this new statutory scheme requires the submission of this issue to a *jury*, the first question that must be addressed is whether appellant made a requisite showing of mental retardation as defined under § 565.030.6,RSMo Cum.Supp. 2004. For if appellant *failed* to present sufficient evidence of his alleged condition, then there is no reason to believe either that appellant is, in fact, retarded (and thus barred from receiving a sentence of death), or that a jury (or any fact finder) must make an additional factual determination along those lines. *See Taylor v. State*, 126 S.W.3d 755,762-763 (Mo.banc 2004). *Compare Johnson v. State*, 102 S.W.3d 535,540-541 (Mo.banc 2003)(remanding for a new penalty phase where

"evidence of mental retardation was presented and the jury was instructed to consider it, but the jury was not faced with the *Atkins* pronouncement: 'death is not a suitable punishment for a mentally retarded criminal' "). This threshold determination – whether there was sufficient evidence of mental retardation – must first be made by the trial (or motion) court.

Here, appellant failed to make a sufficient showing of "mental retardation. At the evidentiary hearing, no substantial evidence was presented showing that Appellant's alleged mental retardation manifested and was documented prior to his eighteenth birthday. *Compare Johnson v. State*, 102 S.W.3d at 539 (available records that were reviewed by an expert prior to trial contained evidence of mental retardation that manifested and was documented prior to the defendant's eighteenth birthday). In fact, all of the documented evidence showed that Appellant was consistently diagnosed as having borderline intellectual functioning, *not* within the level of mental retardation. Indeed, appellant's newly discovered post-conviction expert, Keyes, acknowledged as much when he testified that he was the first expert to diagnose Appellant with mental retardation (PCR.Tr.85).

Moreover, Keyes's testimony was not substantial evidence that appellant was actually mentally retarded. The motion court, having noted that Keyes was not a licensed psychologist, expressly rejected Keyes's "status as an expert witness" (PCR.L.F.459,472). The motion court did not clearly err. As this Court has held, "[p]ersons who are licensed medical doctors practicing psychiatry, *licensed*

psychologists, and licensed social workers are permitted by law to evaluate persons and make diagnoses of mental disorders." *In re Johnson v. State*, 58 S.W.3d 496,499 (Mo.banc 2001)(emphasis added). As the record shows, Keyes was not licensed; rather he was a "certified" educational psychologist. Accordingly, the motion court was plainly within its discretion in excluding Keyes's "diagnosis" of mental retardation. *See id*. (associate psychologist "should not have been permitted to testify to his 'diagnoses' as 'an expert' at trial").

The tenuousness of Keyes's conclusion was further shown by Keyes's reliance upon data that was not fully tested and data that was admittedly faulty (and by the fact that Keyes made his diagnosis when appellant was thirty-five years old, after years and years of appellant's documented ability to perform above the level of those who are mentally retarded). For example, Keyes failed to test for malingering or depression, which he admitted could have affected the outcome of the testing (PCR.Tr.126,137). He admitted that Appellant's family, when interviewed, gave responses about appellant's adaptive skills that placed Appellant at a much lower level than appellant actually was (PCR.Tr.195-96). Thus, when the motion court determined that Keyes's opinion "lack[ed] the necessary evidence required to support [it]" and was "unworthy of belief" in light of other evidence (L.F.471), the motion court did not clearly err.

Unlike the defendant in *Johnson v. State*, who was "able to articulate specific facts indicating his mental deficiency," *see Johnson v. State*, 102 S.W.3d at 541,appellant did not make the substantial showing that a post-conviction litigant must make before he or

she is entitled to a new penalty-phase proceeding. This court stated there that it was "not holding that all sentenced to death are entitled now to a hearing determining whether they are mental retarded." *Id*. This makes sense because if a defendant cannot make a sufficient showing that he *is* mentally retarded, the issue will never be submitted to the jury. *See* § 565.030.4,RSMo Cum.Supp. 2004; MAI-CR 3d 313.38; *see also Johnson v. State*, 102 S.W.3d at 540.

For example, in *State v. Taylor*, 134 S.W.2d 21,28-29 (Mo.banc 2004), on direct appeal, this Court held that the trial court did not plainly err when it did not *sua sponte* instruct the jury that it could not impose the death sentence if it found him to be mentally retarded. In that case, the defense expert had testified "that Appellant functioned in the borderline range of intellectual ability;" however, the expert had not performed intelligence or cognitive functioning tests. *Id*. The state's expert, who had conducted intelligence testing, testified that the defendant was "in the low average range of intelligence." *Id*. The state's expert also reported "no evidence that revealed any deficit or limitation in Appellant's adaptive behaviors." *Id*. Accordingly, this Court held that the defendant's "sparse evidence was insufficient to support an instruction on mental retardation." *Id*. This Court further observed that "[b]ased upon the evidence in the record, no reasonable juror could have found that Appellant was mentally retarded[.]" *Id*.

In the post-conviction context, this Court has reached the same result where the evidence was plainly insufficient. In *Taylor v. State*, 126 S.W.3d at 762-763,the

defendant claimed (1) that counsel was ineffective for failing to pursue a defense based on mental retardation, and (2) that his death sentence, in light of the decision in *Atkins*, violated the Eighth Amendment. In that case, no expert testified that the defendant fit the definition of "mental retardation" set out in § 565.030.6,RSMo Cum.Supp. 2004. The only evidence that suggested mental retardation was the defense expert's testimony that the defendant's "IQ fell to 'borderline retarded' . . . while he used chemical inhalants." *Id*. Otherwise, the defendant's intelligence was in the "low normal range." *Id*. This Court rejected the defendant's arguments, concluding that the post-conviction litigant had "failed to present any credible evidence in support of his claim that he was mentally retarded." *Id*. at 763.

In light of *Taylor v. State* and *Johnson v. State*, it is evident that a post-conviction litigant must make a sufficient showing of "mental retardation," before he or she will be entitled to a new penalty-phase proceeding. And, here, while appellant managed to marshal more evidence that the appellant in *Taylor v. State*, he did not manage to produce sufficient credible evidence to compel a new penalty-phase trial before a new finder of fact.

As the record shows, appellant simply failed to present any substantial evidence – much less a preponderance of the evidence – that he fit within the definition of "mentally retarded" as statutorily defined. As outlined above, appellant failed to present any substantial evidence that his condition manifested and was documented before eighteen

years of age. In fact, the documented evidence of appellant's intelligence and adaptive behaviors consistently showed that appellant was not mentally retarded – a well-documented conclusion that the three experts who evaluated appellant prior to trial all agreed upon.

Moreover, appellant's purported "expert" was not qualified to offer a diagnosis of mental retardation; and, even if he had been, his testimony lacked a credible basis inasmuch as it (1) was based largely upon belated (and primarily post-conviction) "evidence" that was produced when appellant was thirty-five years old, and (2) demonstrably failed to account for appellant's depression, the possibility of malingering, and the obvious bias of the individuals who provided anecdotal evidence of appellant's allegedly poor adaptive behaviors.

Accordingly, regardless of *which* finder of fact ought to determine the issue of whether appellant was actually mentally retarded, the motion court did not clearly err when it concluded (as would a trial court in an ordinary case) that appellant had failed to present any substantial evidence of mental retardation. This point should be denied.

D. Appellant is not Entitled to a New Penalty Phase

Should this Court conclude that appellant presented sufficient evidence to make a threshold showing of "mental retardation" as defined in § 565.030.6,RSMo Cum.Supp. 2004,the motion court also did not clearly err in weighing the evidence to determine whether appellant was mentally retarded. Citing *Ring v. Arizona*, 536 U.S. 584,589 (2002), and *State v. Whitfield*, 107 S.W.3d 253,256 (Mo.banc 2003), appellant argues that

"whether a defendant is mentally retarded is a factual issue the jury must find in order for a defendant to be *eligible* for death" (App.Br.56)(emphasis added).[11]

However, by framing the issue in terms of death eligibility (i.e., by arguing that the absence of mental retardation is an "element" that increases the maximum punishment), appellant's argument is not consistent with § 565.030.6,RSMo Cum.Supp. 2004 or MAI-CR 3d 313.38. As outlined above, under Missouri's capital sentencing scheme, as it exists now, the trier of fact in a capital case must, in relevant part, "assess and declare punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor: (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded[.]" § 565.030.4,RSMo Cum.Supp. 2004.

Consistent with this statutory provision, the approved instructions require the inclusion of MAI-CR 3d 313.38 if "there is evidence, whether submitted in the guilt or the punishment phase, that the defendant is mentally retarded." MAI-CR 3d 313.38,Notes on Use 2. If there is such evidence, the jury is then instructed that "[i]f you unanimously find

[11] In *Ring* the United States Supreme Court held that capital defendants are entitled "to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589.

by a preponderance of the evidence that the defendant is mentally retarded, you must return a verdict fixing the punishment of the defendant at imprisonment for life[.]" MAI-CR 3d 313.38.

As is evident, both the statute and the approved instruction require the jury to make an affirmative finding of the *existence* of mental retardation (not its absence). And, in those cases where the jury finds the existence of mental retardation by a preponderance of the evidence, the jury must then impose a sentence of life imprisonment. In other words, this factual determination is a factual determination that places a cap upon punishment – it is a factual determination that wholly *limits* rather than increases the range of punishment. In short, it is not a factual determination that in itself makes a person *eligible* for the death sentence as appellant contends; rather, it is a threshold determination that is designed to identify and eliminate those who are *ineligible* for the death sentence.

This factual determination is plainly not the equivalent of requiring the jury to find that the defendant *is not* mentally retarded. Indeed, as is evident from the statute and the pattern instruction, the law *begins* with the proposition that a person is not mentally retarded and only limits the application of the death penalty (in this stage) if the jury finds that a defendant is mentally retarded. Thus, if the jury does not make a finding that the defendant is mentally retarded, the jury has simply affirmed the general proposition that

the defendant is not part of that limited group that is ineligible for the death penalty.[12]

On the other hand, by declining to find that a defendant is mentally retarded, the jury has not thereby determined that the defendant is part of that limited group that is, in fact, *eligible* for the death penalty. To the contrary, it is not until the jury determines whether there is sufficient evidence of a statutory aggravator (as set forth in the instruction that *follows* MAI-CR 3d 313.38), that a defendant first crosses the threshold of eligibility. In short, when a jury declines to find that a defendant is mentally retarded, the jury has indicated nothing more than that the defendant *might* be eligible for the death penalty – a status that every first-degree murderer of normal intelligence shares unless and until the jury makes an additional finding that places the defendant into that narrower class of murderers who are eligible for death.

Citing *Johnson v. State*, 102 S.W.3d 535,appellant asserts that this Court has already concluded that it is improper for the motion court to weigh the evidence and

[12] It is generally apparent that this factual determination does not render a person "eligible" for the death sentence inasmuch as this instruction is not required in every case. *See* MAI-CR3d 313.38,Notes on Use 2.

determine whether a defendant is mentally retarded. However, *Johnson* is distinguishable for at least two reasons. First, prior to trial, the defense uncovered evidence of "mild mental retardation." *See id*. This evidence, which was available to the defense for use during the penalty phase, and which was documented before the defendant was 18 years of age, showed that the defendant's IQ was "as low as 70," and that the defendant had "defective adaptive skills, such as communication, self-care, social life, social and interpersonal development, self direction, and use of community resources." *Id*. at 540-541. Accordingly, it was possible that trial counsel had overlooked a possible avenue during penalty phase and provided ineffective assistance of counsel. *See id*. ("evidence not offered at the penalty phase could put Movant squarely within the realm of mental retardation under section 565.030.6."). However, as will be discussed below, the specter of ineffective assistance of counsel did not arise in this case, because counsel's efforts in uncovering evidence of mental retardation did not fall below an objective standard of reasonableness.

Second, as this Court further observed, in *Johnson*, "at the trial, evidence of mental retardation was presented and the jury was instructed to consider it, but the jury was not faced with the *Atkins* pronouncement: 'death is not a suitable punishment for a mentally retarded criminal.'" *Id*. at 541. Instead, as this Court observed, "the jury instructions treated mental retardation as a mere mitigating circumstance – not the outright bar to punishment dictated by *Atkins*." *Id*. Accordingly, because it was possible that the jury

both believed that the defendant was mentally retarded but nevertheless imposed a sentence of death, the verdict in *Johnson* was rendered unreliable. *Id*. In appellant's case, however, all of the evidence before appellant's jury indicated that appellant was *not* mentally retarded (and mental retardation was not submitted as a mitigating factor). Thus, the fact-finding process was not fatally flawed as in *Johnson*.

In short, unlike *Johnson*, there was no evidence available prior to trial that indicated the existence of mental retardation (i.e., counsel was not ineffective), and the jury was not (in light of the evidence available then) improperly instructed on the issue of mental retardation (i.e., the trial court did not err in instructing the jury). Consequently, and because the Constitution does not require submission to the jury,[13] when the motion court

[13] A number of courts have considered this issue and held consistent with this proposition. *See In re Hawthorne*, 105 P.3d 552,558 (Cal. 2005)(evidentiary hearing on capital defendant's post-conviction claim that he is mentally retarded and thus not subject to the death penalty, must be before a court, not a jury); *Howell v. State*, 151 S.W.3d 450,(Tenn. 2004)(capital murder defendant was not entitled to have jury, rather than trial court judge, determine whether he was mentally retarded, such as would render him ineligible for the death penalty, in post-conviction proceeding); *State v. Flores*, 93 P.3d 1264,1267 (N.M. 2004)(*Ring* not applicable to mental retardation determination); *Ex parte Briseno*, 135 S.W.3d 1,5 (Tex.Crim.App.2004)(lack of mental retardation is not implied element of capital murder); *Head v. Hill*, 587 S.E.2d 613,619 (Ga. 2003)(*Ring* and

was presented with newly-discovered evidence in this case that purported to show that appellant was mentally retarded, the motion court was the proper finder of fact to resolve the issue.

In the alternative to his primary argument, appellant argues that even if the motion court "can make the factual finding of mental retardation," the motion court clearly erred in its determination (App.Br.59). He then argues that "credibility is for the jury," and that the motion court improperly focused on IQ scores while ignoring evidence of appellant's adaptive deficits (App.Br.59-60). However, both of these arguments are simply reiterations of his previous claim that the motion court *should not* make the factual determination. For

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Atkins do not require jury trial on issue of mental retardation); *In re Johnson*, 334 F.3d 403,405 (5th Cir. 2003)(absence of mental retardation is not element of offense); *Russell v. State*, 849 So.2d 95,148 (Miss. 2003)(*Ring* has no application to *Atkins* determination); *State v. Lott*, 779 N.E.2d 1011,1015 (Ohio 2002)(mental retardation does not represent a jury question).

if the motion court "can make the factual determination" as appellant posits in his alternative argument, the motion court must be allowed to make credibility determinations and to accept or reject whatever evidence its deems probative. Indeed, as has often been observed, the motion court is in the best position to evaluate the credibility of the witnesses, *Smulls v. State*, 71 S.W.3d 138,154 (Mo.banc 2002); *Rousan v. State*, 48 S.W.3d 576,589 (Mo.banc 2001), and this Court defers to credibility determinations made by the motion court. *State v. Simmons*, 955 S.W.2d 729,774 (Mo.banc 1997). The same should apply to this question of fact, *if* the Court determines that the motion court can properly make the determination.

E. Counsel was not Ineffective

The motion court also did not clearly err in finding that trial counsel's investigation into Appellant's mental state was reasonable. Counsel is required to discover all reasonably available mitigating evidence. *Hutchison v. State*, 150 S.W.3d 292,302 (Mo.banc 2004). Trial counsel was not called to testify at the post-conviction evidentiary hearing, but the record demonstrates that counsel conducted a reasonable investigation. At trial, during penalty-phase, defense counsel elicited testimony from Appellant's family, friends, and former coworkers, as well as an expert in psychology and neurology (Tr.2137-2138,2205,2212,2221,2226,2241,2255). The lay witnesses testified regarding Appellant's good character, pleasant disposition, hard work, and generosity (Tr.2207-2208,2214-2219,2221-2225). There was also testimony regarding Appellant's dependence on his mother, problems holding down a job, and the effect that his girlfriend's death had

upon him (Tr.2228-2229,2247-2252,2255-2259,2264-2267).

During both guilt and penalty-phase, the defense presented expert testimony regarding Appellant's mental deficits, including the results of IQ testing that had been performed throughout Appellant's childhood, adolescence and adulthood (Tr.1435,1439-1442,1482,2159). There was also expert testimony diagnosing Appellant with depression, post-traumatic stress disorder, and personality disorder NOS, and testimony discussing his hearing disability, learning disability and drug and alcohol problems (Tr.2157,1441,1449,1506-1507,2148-2149,2161). Four mitigating factors were submitted to the jury based on this evidence (L.F.175).

Despite the obvious efforts of trial counsel, appellant argues that their performance fell below an objective standard of reasonableness (App.Br.50). But appellant is incorrect. The mitigation evidence regarding Appellant's mental status was based on the opinions of three separate experts who assessed Appellant prior to trial. As set out above, not only did the court-appointed psychologist assess Appellant's mental status, but two defense experts made assessments as well. Each of these experts had personal interaction with Appellant, conducted testing to assess Appellant's IQ, reviewed Appellant's medical and school records and obtained records and information regarding Appellant's background and social history. Each expert diagnosed Appellant as having borderline intellectual functioning, *not* within the range of mental retardation (Tr.1441,1703,1762-1763,2162). The court-appointed psychiatrist, Rabun, additionally found that Appellant had no deficits in his adaptive level of functioning, as he was able to bathe himself, clothe himself,

communicate desires, feed himself, drive, work, and live independently (Tr.1765).

Defense counsel reasonably relied on the opinions and diagnoses of these three experts. Indeed, after a thorough investigation, trial counsel had virtually no indication that Appellant was mentally retarded, and counsel had no reason to doubt the expert opinions to the contrary. There is also no indication that trial counsel knew or should have known of Keyes, or a similar expert who would have made a diagnosis of mental retardation; and, in any event, counsel was not obligated to shop for such an expert. *Taylor v. State*, 126 S.W.3d at 762. This is especially true in light of all the previous intelligence testing indicating that Appellant was of borderline intelligence, *not* within the range of mental retardation.

Appellant argues that trial counsel could have had no reasonable strategy for failing to present evidence of Appellant's mental retardation (App.Br.65). But the reasonableness of counsel's actions should be judged based on the information that was available to them – which, as set forth above, indicated that appellant was not mentally retarded. Where trial counsel has, as here, made reasonable efforts to investigate the mental status of the defendant, and has concluded that there is no basis in pursuing a particular line of defense, counsel should not be held ineffective for not shopping for another expert to testify in a particular way. *Ringo v. State*, 120 S.W.3d 743,749 (Mo.banc 2003). In short, in presenting mitigating evidence, Appellant's trial counsel reasonably relied on the results of the investigation and were not ineffective in failing to discover and present evidence of Appellant's alleged mental retardation. This point should be denied.

II

The motion court did not clearly err in denying, without an evidentiary hearing, Appellant's Rule 29.15 claim that his trial counsel was ineffective in failing to adequately investigate Appellant's case and present evidence that Appellant was not evicted from the boardinghouse due to the victim's complaints and never threatened the victim, because Appellant's allegations did not warrant relief in that he failed to alleged that he informed his counsel that the State's evidence of motive was erroneous or what witnesses could provide testimony contradicting the State's theory and, in any event, the alleged testimony would only have refuted the State's evidence of motive and would not have provided Appellant with a viable defense to first degree murder.

Appellant claims that the motion court clearly erred in denying, without an evidentiary hearing, his Rule 29.15 claim that his trial counsel was ineffective in failing to investigate the State's evidence of Appellant's motive and in failing to call certain witnesses who would have refuted the State's theory of motive (App.Br.67). Appellant claims that had his counsel called certain witnesses to testify that Appellant never threatened the victim, had an antagonistic relationship with the victim, or was evicted from the boardinghouse because of the victim's complaints, such evidence would have rebutted the State's evidence of deliberation and motive and caused doubts as to whether Appellant deliberated (App.Br.67,73). Appellant's claim is without merit because his Rule 29.15 motion did not demonstrate that his counsel's investigation and presentation of a defense

was unreasonable or that the testimony of these witnesses would have established that Appellant did not deliberate before the murder.

Standard of Review

Appellate review of a motion court's denial of a Rule 29.15 motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the court are clearly erroneous. Rule 29.15(k); *Maynard v. State*, 87 S.W.3d 865,866 (Mo.banc 2002). Courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief. *Id*. A movant is entitled to an evidentiary hearing only if his motion meets three requirements: (1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters of which movant complains must have resulted in prejudice. *Id*. To demonstrate prejudice, the facts alleged must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id*. No hearing is required in the absence of allegations showing prejudice. *Id*.

Law on Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a movant must allege facts, not refuted by the record, that establish: (1) his attorney's performance did not conform to the degree of skill, care and diligence of a reasonably competent attorney, and (2) he was thereby prejudiced. *See Strickland v. Washington*, 466 U.S. 688,694 (1984).

To show that counsel's performance was deficient, the movant must establish that counsel's performance fell below an objective standard of reasonableness. *Id*. at 688-689. To satisfy the prejudice prong, the movant must demonstrate that there is a reasonable probability that but for counsel's deficient performance, the result of Appellant's trial would have been different. *Deck v. State*, 68 S.W.3d 418,429 (Mo.banc 2002).

In the context of death penalty sentencing, the defendant must show that, but for his counsel's ineffective performance, there is a reasonable probability that the jury would have concluded after balancing the aggravating and mitigating circumstances, death was not warranted. *State v. Kenley*, 952 S.W.2d 250,266 (Mo.banc 1997).

Factual Background

1. Trial Evidence

The fact that Appellant had killed Joan Crotts by beating her in the head with a sledgehammer was conceded by the defense at trial (Tr.790,1875-1876). Appellant's defenses were (a) that he was unable to appreciate the nature, quality or wrongfulness of his conduct, and therefore was not guilty by reason of a mental disease or defect (Tr.1518-1519); and (b) that, even if he was mentally responsible for his actions, he was incapable of forming the intent element of deliberation (Tr.1512).

The State presented evidence that during the summer of 1996,Appellant lived in a boardinghouse next door to the victim, Joan Crotts, and had several confrontations with her. Debora Olive, the victim's daughter, described three confrontations between Appellant and Mrs. Crotts (Tr.849-865). She testified that in the summer of 1996,about a

week after Appellant moved into the boardinghouse, she witnessed Appellant yell at her mother from inside the kitchen of the boardinghouse and say "shut up, fat bitch" (Tr.859,861). She also testified that sometime in August 1996,she witnessed another confrontation between Appellant and Mrs. Crotts, while she and some others were having a barbeque and Mrs. Crotts was standing outside of her home up the street (Tr.861-862). She stated that on this day, Appellant was in the backyard of the boardinghouse drinking with some friends, and that when Mrs. Crotts started to walk across the street to join the barbeque, Appellant told her "to get her fat ass back in the house, I'm going to get you, bitch" (Tr.862-863). Mrs. Olive testified that the last confrontation she witnessed between Appellant and her mother occurred on the day that Appellant was kicked out of the boardinghouse, which she thought was the same day as the barbeque (Tr.863-864). She stated that she saw her mother come outside of her home as Appellant was being evicted and that Appellant told Mrs. Crotts "I'm going to get you for this, bitch" (Tr.864-865).

Carol Anne Stanley testified that she lived down the street from Mrs. Crotts and had also witnessed confrontations between Mrs. Crotts and Appellant during the summer of 1996 (Tr.1185,1188). She stated that she witnessed a confrontation between Appellant and Mrs. Crotts over Appellant drinking and playing the radio too loud (Tr.1188). She stated that during this confrontation, Appellant called Mrs. Crotts a "fat bitch" and told her to get back in her house (Tr.1189). She also stated that she witnessed Appellant threaten Mrs. Crotts as he was moving out of the boardinghouse, and later on that same day, Appellant told Mrs. Crotts that he was going to "get [her] for this" (Tr.1190-1191).

Melvin Hall testified that on one occasion during the summer of 1996,he was in the backyard of the boardinghouse with Appellant and observed Appellant and Mrs. Crotts get into a verbal confrontation about some chicken bones that were thrown into Mrs. Crotts' yard (Tr.1251-1253). He stated that during this confrontation Appellant picked up a sledge hammer and smashed a rock, telling Mrs. Crotts that the rock was going to be her head if she kept "messing" with him (Tr.1253-1254).

During the State's closing argument, the prosecutor referred to Appellant's confrontations with Mrs. Crotts as part of a long list of evidence and testimony that showed Appellant acted with deliberation when he killed the victim (Tr.1863-1864,1868,1870,1907).

2. Appellant's Rule 29.15 Motion

Appellant's Rule 29.15 motion, claim 8(e), alleged that his trial counsel was ineffective in failing to adequately investigate and present evidence to rebut the State's evidence showing that Appellant had an antagonistic relationship with Mrs. Crotts, Appellant was evicted from the boardinghouse, and Appellant was angry with Mrs. Crotts because his eviction was a result of her complaints to the boardinghouse owner (PCR.L.F.29,134).

Appellant alleged that this evidence would have come from several witnesses who were willing and able to testify at his trial (PCR.L.F.29-31,135-136). Appellant alleged that trial counsel was ineffective in failing to present this evidence through the testimony of Mary Elaine Dickerson (Appellant's mother), Royal Crase (the boardinghouse owner),

Andy Silkwood (Appellant's best friend) and Ray Dickerson (Appellant's childhood friend[14])(PCR.L.F.30-31,135-136,148).[15]

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[14]Ray Dickerson's alleged testimony is not discussed in claim 8(e) of the amended motion (PCR.L.F.29-31,134-156). His alleged testimony is discussed in a separate Rule 29.15 claim not raised or cited in the argument section of Point II of Appellant's brief. In claim 8(f) Appellant alleged that Mr. Dickerson would have testified that he had known Appellant since he was a child and that although Appellant was picked on and manipulated as a child, he never retaliated against anyone (PCR.L.F.159,163-164).

[15]Appellant's Rule 29.15 claim also included witnesses Mary Mifflin (Appellant's sister) and Richard Meggins, but the failure to call these two witnesses is not raised in

Appellant alleged that Royal Crase, the boardinghouse owner, would testify that he never observed Appellant and Mrs. Crotts involved in a confrontation, that Mrs. Crotts never complained about any of the tenants, and that Appellant was not evicted because of confrontations he had with Mrs. Crotts (PCR.L.F.153). Mr. Crase would have allegedly testified that he was fairly certain he asked Appellant to leave the boardinghouse because of Appellant's drug use (PCR.L.F.29,135,153).

Appellant alleged that his mother, Mary Goodwin, would testify that Appellant was evicted from the boardinghouse because of his drug use, but that she paid his rent and he did not move out of the boardinghouse until November 1996 (PCR.L.F.149-150,151). Mrs. Goodwin would have allegedly testified that Appellant did not own a radio, TV, or stereo, and thus, did not have arguments with Mrs. Crotts about loud music coming from his room (PCR.L.F.150). Mrs. Goodwin would have allegedly testified that Appellant wanted to move in with his girlfriend, Penny Palermo, and that after he moved out of the boardinghouse he moved into a rental home with Ms. Palermo (PCR.L.F.150-152).

Appellant alleged that Andy Silkwood would testify that he helped Appellant move his belongings out of the boardinghouse in November 1996,and that Appellant did not threaten Mrs. Crotts on that day (PCR.L.F.135-136,151).

Appellant alleged that with reasonable investigation his counsel would have become

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Appellant's brief.

aware of these witnesses and their testimony (PCR.L.F.29-30; 135). He alleged that he gave his mother a list of witnesses and his mother called trial counsel and gave counsel Andy Silkwood's name and address (PCR.L.F.149). Appellant further alleged that after his sister showed him the prosecution's witness list, he told her that he never had a confrontation with Mrs. Crotts, and his sister subsequently informed trial counsel that Appellant was not evicted in the manner the prosecution would present (PCR.L.F.152).

3. Motion Court's Findings

The motion court denied Appellant's claim, without an evidentiary hearing, finding that the proposed testimony would have been inadmissible "hearsay, speculation and opinion as to Movant's thoughts" and would not have provided Appellant with a defense to murder (PCR.L.F.450). The motion court also noted that Appellant's mother testified at trial but offered no testimony regarding the relationship between Appellant and the victim (PCR.L.F.450).

Legal Analysis

Appellant did not allege facts showing his counsel's investigation or failure to call certain witnesses was unreasonable. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Hutchison v. State*, 150 S.W.3d 292,302 (Mo.banc 2004). There is a strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689; *White v. State*, 939 S.W.2d 887,895 (Mo.banc 1997). "[T]he defendant must overcome the presumption that,

under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

Appellant has failed to allege facts that take his case outside the presumption of effectiveness. To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: 1) trial counsel knew or should have known of the existence of the witness, 2) the witness could be located through reasonable investigation, 3) the witness would testify, and 4) the witness' testimony would have produced a viable defense. *Hutchison v. State*, 150 S.W.3d at 304. Appellant failed to allege facts showing that his counsel did not conduct a reasonable investigation or that counsel was unreasonable in failing to discover and call witnesses to testify that Appellant did not threaten Mrs. Crotts when he lived next door and was not evicted from the boardinghouse due to those threats. Appellant alleged that had his counsel conducted reasonable investigation, counsel would have discovered the information and witnesses alleged (PCR.L.F.29-30); however, he did not allege that he personally informed his trial counsel that any of these witnesses had information that would be helpful to his defense. Appellant merely alleged that his mother gave counsel a list with Mr. Silkwood's name on it,[16] and that he told his sister that he was not evicted from the boardinghouse in the manner the State was claiming, and that she asked trial counsel to contact Mr. Crase

[16]Appellant did not allege that his mother informed trial counsel what information Mr. Silkwood could provide that would be helpful to the defense.

(PCR.L.F.149,153). Even assuming the witnesses would have testified as Appellant alleges, if Appellant did not inform counsel that the State's witnesses were being untruthful, or that there were additional witnesses who had contrary information, counsel could not have been unreasonable in failing to locate and call them.

An additional reason that counsel was not unreasonable is that it was not germane to the defense theory and would not have provided a viable defense. Appellant pleaded not guilty by reason of mental disease or defect (L.F.2). He conceded that his actions caused the victim's death (Tr.790,1875-1876). It is clear from the record that the defense strategy was to show that Appellant was suffering from mental deficits, was not in control or able to appreciate the nature of his actions, and was incapable of forming intent (Tr.1512,1518-1519). The defense expert testified that Appellant was suffering from a mental disease or defect on the night of the murder and was not able to appreciate the nature and quality of his actions or to cooly reflect (Tr.1511-1512,1519). None of the alleged testimony would have supported the defense theory or provided Appellant with another viable defense to first degree murder. In light of the defense theory, counsel's failure to further investigate the reasons Appellant left the boardinghouse and failure to call witnesses that would merely have refuted the testimony that Appellant threatened the victim eighteen months before she was murdered, was not unreasonable.

Appellant argues that this evidence would have "rebutted the State's theory of the case and call[ed] into doubt whether [Appellant] deliberated on the killing." (App.Br.73). The only argument Appellant proffers for how this testimony would have refuted

Appellant's deliberation is that the evidence would have been contrary to the State's evidence and argument on Appellant's motive to kill the victim–that Appellant was angry with the victim and wanted to get even with her for having him evicted (App.Br.72-73).

Motive is not an element of first degree murder, *State v. Taylor*, 701 S.W.2d 725,730(Mo.banc 1985), thus, any evidence refuting motive would not have provided Appellant with a viable defense. Appellant claims that trial counsel can be ineffective for failing to rebut the State's evidence of motive (App.Br.71). Appellant's sole legal support for this proposition comes from his reliance on the holding of *Parker v. Bowersox*, 188 F.3d 923 (8th Cir 1999), which is factually distinguishable. The Eighth Circuit in *Bowersox* held that a capital defendant's trial counsel was ineffective for failing to present evidence during penalty-phase that would have refuted evidence that the defendant killed the victim because she was a potential witness against him in an assault case, which was the only statutory aggravator the jury found. *Id*. at 929-31. The court held that because counsel's primary duty during penalty-phase was to neutralize the aggravating circumstances advanced by the state and present mitigating evidence, it was critical for defendant's counsel to show that defendant did not murder the victim be cause she was a potential witness.

No such case exists here. The jury in Appellant's case did not make a finding during guilt or penalty-phase regarding Appellant's motive. Motive is not an element of the crime and was not a statutory aggravator given to the jury. Thus, motive was never a critical determination in Appellant's case and counsel did not fail to investigate or refute a

critical part of the State's case.

As such, the allegations, even if true, do not establish that the outcome of Appellant's trial would have been different if counsel would have presented evidence to refute Appellant's motive. "Counsel's conduct must be viewed in the context of the entire record. If counsel is not shown to have failed to discover or present evidence or legal issues that would be material and admissible to establish reasonable doubt as to defendant's guilt, no prejudice is shown." *State v. Twenter*, 818 S.W.2d 628,635 (Mo.banc 1991).

There is no reasonable probability that the alleged testimony would have affected the verdict. Although the State presented evidence and argued that Appellant held a grudge against the victim due to his eviction, this evidence was not critical to the State's case on deliberation. There was ample other evidence that Appellant deliberated. As the prosecutor outlined in his closing argument, Appellant's deliberation was show by the fact that he snuck into the victim's home, hid in the basement, carried a hammer with him when he came up the stairs, took time to think about what to do next at various times during the incident, and killed the victim so that he would not get caught by the police (Tr.1852,1863-64,1868,1870-71). Appellant's own admissions to police established that he sat in the victim's basement for about three hours before going up the stairs, confronting the victim and forcing her to several different rooms in the home (Tr.1302,1305-1311). Appellant further admitted that after he pushed the victim down the stairs, he observed her for a while, picked up a hammer, and then went down the stairs

and struck her in the head several times (Tr.1311-1312). In addition to skull fractures, the victim had numerous injuries covering her entire body, including defensive wounds and injuries that were not consistent with a fall down the stairs (Tr.1087-1102,1108-1121,1124,1146-1147,1155-1155,1160-1164).

In short, the evidence that Appellant "cooly reflected" before he murdered the victim was overwhelming. Appellant did not show a reasonable probability of a different outcome in light of the overwhelming evidence of his guilt. Therefore, the trial court did not clearly err in denying Appellant's claim without hearing evidence.

III

The motion court did not clearly err in denying, without an evidentiary hearing, Appellant's Rule 29.15 claim that his trial counsel was ineffective in failing to investigate the testimony of Ronald Krabbenhoft and call him to rebut James Hall's testimony that Appellant threatened the victim by smashing a rock with a sledgehammer and telling her that the rock would be her head if she kept "messing" with him, because Appellant failed to allege facts warranting relief and his claim is refuted by the record in that Mr. Krabbenhoft's testimony at the motion for new trial hearing did not rebut Hall's testimony and would have been more damaging than helpful to Appellant's defense.

Appellant claims that the motion court clearly erred in failing to grant an evidentiary hearing and in denying his claim that his trial counsel was ineffective in failing to investigate and failing to call Ronald Krabbenhoft to rebut testimony that Appellant threatened Mrs. Crotts with a sledgehammer (App.Br.76). Appellant claims that this testimony would have undermined the State's case for deliberation and death (App.Br.76). Appellant's claim is without merit because his Rule 29.15 motion did not demonstrate that his counsel's investigation and presentation of a defense was unreasonable and, in any event, Mr. Krabbenhoft's testimony, as already found by this Court on direct appeal, would not have benefitted Appellant's case.

Standard of Review – Standard for Ineffective Assistance of Counsel

As set forth in Respondent's Point II.

Factual Background

1. Trial Evidence

The fact that Appellant had killed Joan Crotts by beating her in the head with a sledgehammer was conceded by the defense at trial (Tr.790,1875-1876). Appellant's defenses were (a) that he was unable to appreciate the nature, quality or wrongfulness of his conduct, and therefore was not guilty by reason of a mental disease or defect (Tr.1518-1519); and (b) that, even if he was mentally responsible for his actions, he was incapable of forming the intent element of deliberation (Tr.1512). In testifying to these conclusions, the defense mental health expert, Rosalyn Schultz, took as true Appellant's statements that he had entered Mrs. Crotts' home because he mistook it for the boardinghouse where he had once lived, and that he had only seen the victim once before and "didn't recognize her [and] didn't pay . . . much attention to her" (Tr.1303-1305,1322; St's.Ex. 159A, p. 9; see Tr.1469,1488-1490,1625-1626,1630-1632,1646-1650).

The State presented evidence that Appellant had repeatedly harassed and threatened Mrs. Crotts during the time when he had lived in the boardinghouse next door to her home, refuting Appellant's assertion that he did not know her and supporting an inference that he had killed the victim because he held a grudge against her (Tr.858-865,927-935,937-938,1188-1189,1191-1192,1251-1254,1259-1265,1268-1269). The State's mental health expert, John Rabun, relied upon these facts, among other evidence, in concluding that Appellant did not suffer from a mental disease or defect and that he was able to deliberate (Tr.1730-1733,1770-1774,1801-1803).

According to the State's evidence, one of the several occasions in which Appellant harassed or confronted Mrs. Crotts was an incident in or around August of 1996,a year and a half before her murder (Tr.862-863). The victim's daughter, Debra Olive, testified that Appellant and some other men were drinking in the back yard of the boardinghouse and were throwing empty beer cans and bones over the fence into Mrs. Crotts' yard (Tr.861-862,928-932).

The State called Melvin James Hall, Jr., who testified that he recalled being in the backyard of the boardinghouse with Appellant and several other men, drinking and having a barbeque, sometime during the summer of 1996 (Tr.1251-1253,1259-1261). Appellant and some of the other men were throwing chicken bones over the fence into the yard next door, and a short time later, Hall saw Mrs. Crotts come off her porch into her back yard (Tr.1253-1254,1261-1262). From behind the six-foot fence separating the two properties, Hall heard Mrs. Crotts screaming that they should stop throwing bones into her yard and that she was tired of being harassed (Tr.1253,1261-1264; St's.Ex. 73). Appellant, whom Hall described as "pretty wasted," picked up a sledgehammer with one hand, smashed a rock with it and said, "this is your head . . . if you keep messing with me" (Tr.1253-1254,1262,1264-1265,1268-1269).

A short time after this incident Appellant physically confronted Mrs. Crotts on the driveway between her house and the boardinghouse and said, "get your fat ass back in the house, bitch. I've got one coming for you" (Tr.862,930-933,1189,1199-1200; St's.Ex. 71). That evening, Appellant was evicted from the boardinghouse and as he left, he told

Mrs. Crotts, "I'm going to get you for this, bitch" (Tr.864-865,937-938,1191-1192). Hall did not witness any of Appellant's statements that day except for the one in the back yard (Tr.1254).

2. The Post-Trial Hearing

After Appellant's conviction, the defense contended in a supplemental motion for new trial that the State had improperly failed to disclose statements of Ronald Krabbenhoft that would purportedly have impeached Hall's testimony regarding the incident in the back yard (L.F.240-241). The trial court conducted an evidentiary hearing on this issue at which Mr. Krabbenhoft and an investigator for the prosecution testified (Sent.Tr.11-69).

Mr. Krabbenhoft's testimony at the hearing was as follows: in March or April of 1999,five or six months before Appellant's trial, Krabbenhoft was interviewed by an investigator for the prosecutor's office, Edward Magee (Sent.Tr.22-23,32-33). Krabbenhoft was located at the St. Louis County Jail, where he was confined on felony criminal charges (Sent.Tr.22-23,32-33). The investigator asked Krabbenhoft, who had resided at the boardinghouse, if he recalled an incident involving Appellant and a sledgehammer (Sent.Tr.36-37,45-46). Krabbenhoft said that he had owned a sledgehammer, and that he remembered one occasion when Appellant was with some other residents in the back yard of the boardinghouse and was "showing off" by striking the sledgehammer into the ground (Tr.24-25,39,41,46). Krabbenhoft told the investigator that Mrs. Crotts was not present on this occasion and that Appellant uttered no threats against her (Sent.Tr.24,26,37,39,45,49-50). Krabbenhoft also told the investigator that he

was scared of Appellant because he was "mean" and "violent" when he was drinking, and that Appellant disliked Mrs. Crotts and occasionally harassed her (Sent.Tr.42-44).

Krabbenhoft testified that a man named "Jim," whom he believed to be Melvin James Hall, was present at the time of the incident described above (Sent.Tr.25,38,48-49). Krabbenhoft acknowledged that the occupants of the boardinghouse, including "Jim," frequently drank and socialized in the backyard, and that Krabbenhoft was not present at most of these events (Sent.Tr.39-40,49). The witness admitted that he had corresponded with Appellant after his conviction, and also that he had prior convictions for two counts of child molestation, two counts of felony assault and two counts of indecent exposure (Sent.Tr.29-30,34-35). Krabbenhoft was an endorsed defense witness (L.F.101), but was not interviewed by the defense or subpoenaed to testify at trial (Sent.Tr.27-28).

At the conclusion of the post-trial evidentiary hearing, the trial court denied Appellant's supplemental motion for new trial (Sent.Tr.70; L.F.244).

3. Direct Appeal

Appellant's direct appeal challenged the trial court's overruling of his supplemental motion for new trial based upon the State's failure to disclose Krabbenhoft's statements to the defense. *State v. Goodwin*, 43 S.W.3d 805,812-13 (Mo.banc 2001). This Court reviewed this claim, holding no *Brady*[17] violation had occurred because Appellant's trial preparation was not materially hindered by not having Krabbenhoft's statements available

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

to him. *Id*. at 813. This court commented on Krabbenhoft's testimony as follows:

> First, Krabbenhoft's statement to the police does not impeach Hall's testimony. It is questionable that Krabbenhoft and Hall were speaking of the same event. Krabbenhoft was unsure of when he saw defendant "showing off" by pounding the ground with the sledgehammer. He indicated that there were many social gatherings held at the boardinghouse where the sledgehammer was accessible and he, Krabbenhoft, was absent. Krabbenhoft added that he owned the sledgehammer, which was always kept in the yard, and the residents of the boardinghouse played with it occasionally. Moreover, Krabbenhoft told police that he feared defendant because of his temper and propensity for violence when he consumed alcohol. He told officers that defendant disliked and harassed Mrs. Crotts. Krabbenhoft's testimony, as a whole, does not undermine Hall's testimony about what appears to have been a separate occasion. In fact, it contradicts defendant's claim to have only seen Mrs. Crotts on one day and that he was not sufficiently familiar with the area to be able to distinguish Mrs. Crotts' house from the boardinghouse.
>
> * * * * * It is also unclear how Krabbenhoft's statements, more likely to be damaging than helpful, could possibly have affected defendant's theory of defense or aided in cross-examining Hall any more than his own did.

Id. at 813.

4. Rule 29.15 Motion

Appellant's Rule 29.15 motion alleged that his trial counsel was ineffective in failing to investigate and rebut James Hall's testimony that Appellant threatened Mrs. Crotts with a sledgehammer (PCR.L.F.33-34,167-175). Appellant alleged that trial counsel was ineffective in failing to present this evidence through the testimony of Ronald Krabbenhoft, who was willing and available to testify, and who could have been located through reasonable investigation (PCR.L.F.33,168,171).

Appellant alleged that his sister, Mary Mifflin, asked trial counsel to get in touch with the boardinghouse owner in order to find names of the former tenants who could rebut Hall's allegations (PCR.L.F.170). He also alleged that defense co-counsel, Paul D'Argosa, informed the court during the sentencing hearing that Appellant had told his other trial counsel about Mr. Krabbenhoft's testimony (PCR.L.F.170).

Appellant alleged that Krabbenhoft testified at the sentencing hearing, and then detailed much of this testimony in his Rule 29.15 motion (PCR.L.F.171-72). Appellant alleged that his counsel's failure to call Mr. Krabbenhoft prejudiced him because Krabbenhoft's testimony was crucial to rebut Hall's testimony, and in absence of this testimony, the jury was left with the firm impression that Appellant killed the victim because he wanted to make good on the threat (PCR.L.F.34,168,174).

5. Motion Court's Findings

In denying Appellant's motion without an evidentiary hearing, the motion court

noted that Mr. Krabbenhoft testified at the motion for new trial hearing and the trial court rejected his testimony as not credible (PCR.L.F.450-51). The court further noted that the Missouri Supreme Court found that Krabbenhoft's testimony did not impeach Hall's and would have been cumulative in nature (PCR.L.F.451).

Legal Analysis

Appellant failed to allege facts in his motion showing that his trial counsel should have known that Krabbenhoft had information that would be helpful to the defense and, in any event, the record shows that Krabbehoft's testimony would not have provided Appellant with a viable defense or impeached Hall's testimony, and would have actually been damaging to the defense.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Hutchison v. State*, 150 S.W.3d 292,302 (Mo.banc 2004). There is a strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689; *White v. State*, 939 S.W.2d 887,895 (Mo.banc 1997). "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: 1) trial counsel knew or should have known of the existence of the witness, 2) the witness could be located through reasonable investigation, 3) the witness would testify, and 4) the witness' testimony would have produced a viable

defense. *Hutchison v. State*, 150 S.W.3d at 304.

Appellant failed to allege facts showing that his counsel was unreasonable in not interviewing Mr. Krabbenhoft. Appellant did not allege that he told his counsel to contact this witness or that he told his counsel that this witness was present during the barbeque when the State claimed he threatened Mrs. Crotts. Appellant merely alleged that his sister asked counsel to get in touch with former tenants at the boardinghouse and that co-counsel for the defense, Paul D'Argosa, informed the court during a post-trial hearing that Appellant had told his other trial counsel about Krabbenhoft's testimony (PCR.L.F.170). No facts were alleged showing trial counsel had information that Krabbenhoft could refute James Hall's testimony and in fact, the record shows Krabbenhoft would not have provided impeaching testimony or supported Appellant's defense.

Appellant pleaded not guilty by reason of mental disease or defect (L.F.2). He conceded at trial that his actions caused the victim's death (Tr.790,1875-1876). It is clear from the record that trial counsel's defense strategy was to show that Appellant was suffering from psychological deficits, was not in control of his actions, was unable to appreciate the nature of his actions, and was incapable of forming intent (Tr.1512,1518-1519). Defense experts relied on statements from Appellant that he had entered Mrs. Crotts' home because he mistook it for the boardinghouse where he had once lived, and that he had only seen the victim once before (Tr.1303-1305,1322; St's.Ex. 159A, p. 9; see Tr.1469,1488-1490,1625-1626,1630-1632,1646-1650). None of Krabbenhoft's testimony would have supported the defense theory, and in addition, his testimony regarding

Appellant's harassment of the victim would have refuted statements relied on by defense experts.

Mr. Krabbenhoft's testimony at the motion for new trial hearing also refutes any allegation that the outcome of Appellant's trial would have been different had trial counsel called this witness. "Counsel's conduct must be viewed in the context of the entire record. If counsel is not shown to have failed to discover or present evidence or legal issues that would be material and admissible to establish reasonable doubt as to defendant's guilt, no prejudice is shown." *State v. Twenter*, 818 S.W.2d 628,635 (Mo.banc 1991).

As set out above, this Court has already decided that Appellant was not prejudiced by not having Mr. Krabbenhoft's testimony available to him. *See State v. Goodwin*, 43 S.W.3d at 812-813. This Court's prior opinion clearly states that Krabbenhoft's testimony had no impeachment value and was more likely to be damaging than helpful. *Id*. at 813. As such, although the issue of counsel's effectiveness was not litigated, the prejudicial nature of this evidence has been litigated and determined by this Court contrary to Appellant's claim on this appeal. *See Cole v. State*,152 S.W.3d 267,268-269 (Mo.banc 2004).

Appellant argues that the motion court should not have relied on this Court's prior determination of prejudice in denying an evidentiary hearing (App.Br.82). He contends that the motion court should have granted a hearing, heard all of the evidence that counsel allegedly did not present under all of the claims, and then determined the prejudice from failing to present Krabbenhoft's testimony (App.Br.82). Claims of ineffective assistance of counsel based upon multiple or cumulative errors have been rejected by this Court before.

State v. Whitfield, 939 S.W.2d 361,372 (Mo.banc1997). Appellant's claim should likewise be rejected. The motion court was not required to hear the testimony of other witnesses raised under separate claims before analyzing the prejudicial nature of Mr. Krabbenhoft's testimony. Thus, the motion court properly relied on this Court's prior review of this testimony in finding no prejudice could have been shown.

Appellant's brief alleges not only that this evidence would have effected the guilt phase verdict, but that counsel's failure to call this witness deprived him of mitigating evidence that would have provided jurors with a basis for a sentence less than death (App.Br.79). It is unclear from Appellant's argument how Krabbenhoft's testimony would have provided mitigating evidence. James Hall did not testify during the penalty-phase and none of Krabbenhoft's testimony would have refuted any of the statutory aggravators found by the jury supporting death or supported any of the mitigating circumstances submitted (L.F.182-184,195). In fact, Krabbenhoft's testimony would have been harmful because it showed that Appellant was aware who the victim was and had previously harassed her.

The allegations in Appellant's Rule 29.15 motion, even if true, do not establish a reasonable probability that the outcome of Appellant's trial would have been different if counsel had called Mr. Krabbenhoft to testify. Therefore, the motion court did not clearly err in denying Appellant's claim without an evidentiary hearing.

IV

The motion court did not clearly err in denying, without an evidentiary hearing,

Appellant's Rule 29.15 claim that his trial counsel was ineffective in failing to investigate the pathology reports and physical evidence, and in failing to call a pathology expert such as Thomas L. Bennet to testify that many of the victim's injuries were not consistent with a fall down the stairs, because Appellant's allegations did not warrant relief in that Bennet's testimony would not have refuted Mary Case's ultimate conclusion–that Appellant caused Mrs. Crotts's death, or refuted other evidence showing that Appellant committed repeated acts of violence, and defense counsel adequately investigated and presented a defense of mental disease, as well as mitigating evidence regarding Appellant's mental problems.

Appellant claims that the motion court clearly erred in failing to grant him an evidentiary hearing and in denying his Rule 29.15 claim that his trial counsel was ineffective in failing to investigate the pathology reports and physical evidence and in failing to call a pathology expert such as Thomas L. Bennet to rebut Mary Case's testimony as to the cause of the victim's injuries (App.Br.84). Appellant was not entitled to relief, however, because Bennet's testimony would not have shown that Appellant did not commit repeated acts of violence against the victim and would not have supported the overall defense strategy.

Standard of Review – Standard for Ineffective Assistance of Counsel

As set forth in Respondent's Point II.

Factual Background

1. Evidence at Trial

The State's evidence at trial was that Appellant beat sixty-two year old Joan Crotts (Tr.1108-1110,1118,1146-1147,1155-1157,1160-1164; St's.Ex. 112-114,117-136), and then shoved her down a flight of stairs, breaking eight of her ribs and her hip in the process (Tr.850,1084,1142-1144,1311,1331-1332,1381; St's.Ex. 101-103,159A, p. 7). As the victim lay face down and unmoving at the bottom of the stairs, Appellant walked down the stairs and observed her for awhile (Tr.1311-1312,1333-1334; St's.Ex. 105-106). He then took the sledgehammer that he had been carrying and struck Mrs. Crotts three times in the head, causing multiple depressed fractures to her skull (Tr.1083-1084,1128-1131,1136-1139,1141-1142,1153-1154,1312,1334-1335; St's.Ex. 46-47,137-139,159A, p. 7). These head injuries resulted in "cranialcerebral trauma" and caused the victim's death (Tr.1147).

The State's medical examiner, Mary Case, testified at length regarding the autopsy she performed on the victim (Tr.1072,1077-1078). The injuries Case observed included bruising on the victim's head, lips, eye area, chest, shoulders, arms, hands, buttocks, back and legs (Tr.1082-84,1113-1114; St's.Ex. 112,113,114,117,118,120,121,122,123,124,125,126,127,128,129,130,131,132,133). The victim also sustained fractured ribs and a fractured hip (1084,1142-1143).

Case described the bruising all over the victim's body as being caused by blunt impact to the body (Tr.1093,1095-1096,1097,1098-1001,1114-1116,1118,1120). There were multiple lacerations on the victim's scalp, caused by "blunt trauma, which means there has been blunt impact applied to the body" (Tr.1083,1088,St's.Ex. 113,138,139). Case described the three lacerations on the back of the victim's head as being made with some kind of blunt object, such as the hammer contained in State's Exhibit 1 (Tr.1128). Under the lacerations were two areas of depressed skull fractures (Tr.1083,1130).

Case testified that the bruising to the victim's forearms could have been caused by very tight squeezing, which is suggestive that there might have been grasping and holding (Tr.1101-1102,St's.Ex. 124,125,126). She described the injuries to the back of the victim's hands as defensive wounds, "which means, as you're trying to defend yourself, ward off blows" (Tr.1107-1108). These injuries would not be consistent with a fall down the stairs (Tr.1108).

Case stated that although any individual injury that the victim sustained could be produced by a fall, and some of them may have occurred during the fall, the entirety of the injuries were inconsistent with a fall (1110,1118,1143-1144,1146).

She explained that while the surgeon was operating on the victim's head, her blood pressure started to drop, her heart rate went down, and she had an intra-operative heart problem because of the tremendous stress (Tr.1123). Case concluded that Mrs. Crotts died as a result of cranialcerebral trauma, produced by blunt injury to the brain and skull (Tr.1147). She also testified that Mrs. Crotts died of the stress produced during surgery

(Tr.1123).

2. Rule 29.15 Motion

Appellant's Rule 29.15 motion alleged that his trial counsel was ineffective in failing to investigate and present evidence regarding the pathology reports and physical evidence surrounding the victim's death and, specifically, in failing to call Thomas L. Bennett, or a similarly qualified expert, to rebut the testimony of the State's medical examiner, Mary Case (PCR.L.F.27-28,122-124).

Appellant alleged that had counsel conducted a reasonable investigation into the victim's injuries, he would have located Bennet, or a similarly qualified pathologist (PCR.L.F.28,123). Bennet was the Assistant Chief Medical Examiner for Chapel Hill, North Carolina (PCR.L.F.124). Appellant alleged that Bennet would testify to a reasonable degree of medical probability that: (1) many of the victim's injuries were more probably caused from the fall down the steps, including the bruising to the brain, (2) the victim did not die from head injuries, (3) the cause of the victim's death was hypertensive and atherosclerotic cardiovascular disease, and (4) a microscopic exam would have been helpful to age the coronary artery thrombus and any infarction of the heart muscle, as well

as bruising of the brain (PCR.L.F.130-131).[18]

Appellant alleged that had counsel presented such evidence he would not have been found guilty or sentenced to death (PCR.L.F.28,123). Appellant alleged that he was prejudiced because his attorneys had no evidence to rebut Case's testimony and the alleged evidence would have refuted the aggravating circumstance depravity of mind (PCR.L.F.27,122).

3. Motion Court's Findings

In denying Appellant's claim without granting an evidentiary hearing, the motion court found that his pleading did not refute the ultimate issue found by Case and the Missouri Supreme Court–that Appellant's conduct proximately caused the victim's death, and the precise cause of death is not relevant to his mental state at the time he stuck the victim (PCR.L.F.449). *See Goodwin*, 43 S.W.3d at 816. The motion court further found that because it was clear that Appellant's deliberate acts caused the victim's death, he was not prejudiced by the failure of his attorneys to call an expert such as Bennet

[18]Appellant's Rule 29.15 motion also contained allegations, not raised on appeal, that Bennet would have testified that the physical evidence did not support a conclusion that the victim was sexually assaulted (PCR.L.F.130).

(PCR.L.F.450).

Legal Analysis

Trial counsel was not ineffective in failing to further investigate the specific cause of the victim's injuries and in failing to present the testimony of Bennet during the guilt or penalty-phase of Appellant's trial. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Hutchison v. State*, 150 S.W.3d 292,302 (Mo.banc 2004). There is a strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689; *White v. State*, 939 S.W.2d 887,895 (Mo.banc 1997). "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

1. Guilt-phase Issues

Even if true, Appellant's allegations would not have entitled him to relief. To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: 1) trial counsel knew or should have known of the existence of the witness, 2) the witness could be located through reasonable investigation, 3) the witness would testify, and 4) the witness' testimony would have produced a viable defense. *Hutchison v. State*, 150 S.W.3d 292,304 (Mo.banc 2004).

Bennet's testimony would not have supported the defense strategy or provided Appellant with a viable defense. The defense conceded that Appellant's actions killed Joan

Crotts, but presented a defense of not guilty by reason of mental disease or defect (Tr.790,1875-1876). Defense counsel argued that Appellant was unable to appreciate the nature, quality or wrongfulness of his conduct, and that, even if he was mentally responsible for his actions, he was incapable of forming the intent element of deliberation (Tr.1512; 1518-1519). The defense guilt-phase expert, Rosalyn Schultz, a licensed psychologist, testified in support of these conclusions. Bennet's testimony would not have added anything to Appellant's defense at trial.

Bennet's testimony also would not have contradicted the ultimate conclusion of the State's medical examiner–that Appellant's conduct proximately caused the victim's death (Tr.1123,1147). *See Goodwin*, 43 S.W.3d at 816,n. 4. His testimony also would not have contradicted Appellant's admissions to police and statements to the defense's medical expert, that he waited in the victim's basement for a few hours before confronting her in the kitchen, forcing her into different rooms in her home, and eventually pushing her down the basement stairs and beating her with a hammer (See Tr.1302-1312,1467-1470,1488-1490; St's.Ex 158,159).

Although Bennet would have testified that the victim's injuries, including the brain injuries, were probably caused by the fall (PCR.L.F.130), the defense conceded that Appellant caused Mrs. Crotts' death by the use of a hammer (Tr.790,1875-1876). Accounts presented by both the State and the defense showed that Appellant not only pushed the victim down the stairs toward a concrete floor, but followed her down the stairs and beat her with a hammer. The evidence that Appellant struck the victim after

deliberation was overwhelming and not refuted by Bennet's testimony as to how Appellant caused the rest of the numerous injuries Mrs. Crotts sustained.

In light of the evidence against Appellant, trial counsel's decision to focus on a defense theory that challenged his mental capacity, not the physical evidence regarding the exact manner in which Appellant killed the victim, was reasonable. Reasonable trial strategy does not become ineffective assistance of counsel because it did not work as hoped. *State v. Johnston*, 957 S.W.2d 734,755 (Mo.banc 1997). Additionally, because Bennet's testimony would not have refuted evidence showing Appellant's actions caused all of the victim's injuries, and eventually her death, there is no reasonable probability that had the jury heard Bennet's testimony, the verdict would have been different.

Appellant's case is distinguishable from cases cited in his brief. Appellant likens his case to *State v. Cravens*, 50 S.W.3d 290 (Mo.App.S.D. 2001). In *Cravens*, the murder defendant's theory of defense was that he was attempting to grab the gun from the victim when it accidentally discharged. *Id.* at 293,n. 3. The State's expert testified that the victim was shot from six to eight feet away, but at the post-conviction hearing, the defense presented the testimony of two experts who concluded that the victim was shot from a maximum of 1 foot away and that the shot was fired at an upward angle, only a few inches from her face. *Id*. The Southern District Court of Appeals held that defendant's trial counsel was unreasonable in failing to investigate the evidence surrounding the victim's death and there was a reasonable probability that had the jury heard such evidence, the

outcome of the trial would have been different. *Id.* at 295-98.

Appellant's case is factually distinguishable because his claim is not that his counsel failed to investigate or present evidence on his only defense. Appellant's counsel did investigate and present a well supported mental defense. Appellant's expert during guilt- phase testified regarding the vast amount materials reviewed and testing conducted that supported her conclusions that Appellant suffered from a mental disease or defect and could not have deliberated (Tr.1424-1512,1519). Defense counsel's choice to present a mental defense and not to challenge how the injuries were produced was reasonable strategy.

The case at bar is also distinguishable from *Cravens* when comparing the prejudicial effect of not having the expert testify. Here, defense counsel did present a theory of defense supported with expert testimony. Additionally, Bennet's testimony would not have contradicted the ultimate conclusion that Appellant had caused all of the victim's injuries and was responsible for her death. Unlike the defense experts in *Cravens*, Bennet would not have been able to provide evidence showing that Appellant had not deliberated and had not intentionally caused the victim's injuries and death.

The other two cases cited by Appellant, *Wolfe v. State*, 96 S.W.3d 90 (Mo.banc 2003), and *Moore v. State*, 827 S.W.2d 213 (Mo.banc 1992), are similarly distinguishable. In each of these cases trial counsel was found ineffective for failing to present evidence that would have supported a theory that the defendant was completely

innocent and not involved in the crime. In *Wolfe*, the defendant claimed that he was framed by the State's only eyewitness to the murder, but defendant's trial counsel failed to present readily available evidence that the eyewitness' hair was found in the back seat of the victim's car and in a box of ammunition the State claimed was used in the murder. *Wolfe*, 96 S.W.3d at 92-94. In *Moore*, the defense counsel failed to investigate physical evidence collected at a rape scene and from the rape victim which would have shown that the defendant was not the source of the semen found. *Moore* 827 S.W.2d at 215. In each of these cases the evidence defense counsel failed to present would have supported the only defense presented at trial, and if believed, would have exonerated the defendant.

Such is not the instant case. Defense counsel presented a mental defense, supported by expert testimony, and the additional expert testimony Appellant alleges should have been presented would not have supported the defense raised at trial, or shown that Appellant did not commit the crime.

2. Penalty-phase Issues

Appellant also claims that Bennet's testimony would have affected the jury's penalty-phase verdict (App.Br.84). The crucial question in analyzing this claim is whether there is a reasonable probability that, had Bennet testified, the jurors would have unanimously recommended a sentence of life imprisonment without the eligibility of probation or parole. *State v. Johnson*, 968 S.W.2d 686,701 (Mo.banc 1998). In determining the existence of this reasonable probability, this Court considers the weight of evidence supporting each statutory aggravating and mitigating factor on which the jurors

would have been instructed had they been presented with Bennet's testimony. *Id*. The Court must also considers the impact of the testimony in the context of all the evidence presented. Id.

Here, there is no reasonable probability that the jury's verdict would have been different had Bennet testified. The jury found the following statutory aggravating circumstances:

> 1. Whether the murder of Joan Crotts involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible or inhuman. You can make a determination of depravity of mind only if you find that the defendant committed repeated and excessive acts of physical abuse upon Joan Decker Crotts and the killing was therefore unreasonably brutal, and
>
> 2. That the defendant killed Joan Decker Crotts after she was rendered helpless by defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life, and
>
> 3. Whether the murder of Joan Decker Crotts was committed while the defendant was engaged in the perpetration of burglary. . .
>
> 5. Whether the murder of Joan Kecker Crotts was committed while the defendant was knowingly in the attempt to perpetrate sodomy.

(L.F.182-184,195).

Appellant claims that Bennet's testimony would have refuted the first aggravating

circumstance found by the jury, "depravity of mind," by showing that the victim was not subjected to repeated and excessive physical abuse (App.Br.84). Although Bennet's conclusions regarding the victim's injuries would have refuted the State's contention that Appellant beat the victim prior to pushing her down the stairs, his testimony would not have refuted all of the evidence showing depravity of mind. Even had Bennet been believed by the jury, the State's evidence still showed that Appellant pushed Mrs. Crotts down a flight of stairs, causing bruises over her entire body, breaking many of her ribs, and breaking her hip so that she could not have walked (Tr.850,108,1142-1144,1146,1311,1331-1332,1381; St's.Ex. 101-103,159A, p.7). After shoving Mrs. Crotts down the steps, causing multiple and disabling injuries, Appellant beat her with a hammer (Tr.1083-1084,1128-1131,1136-1139,1141-1142,1153-1154,1312,1334-1335; St's.Ex.46-47,137-139,159A,p.7). This showed Appellant committed "repeated and excessive" acts of violence, and that he killed Mrs. Crotts after he had rendered her helpless at the bottom of the stairs. Even in light of Bennet's testimony, there was still substantial evidence of appellant's depravity of mind.

Additionally, Appellant does not allege that any of Bennet's testimony would have refuted the State's evidence regarding the two other statutory aggravating circumstances found by the jury. Either one of these circumstances was sufficient to support the death sentence. *Goodwin*, 43 S.W.3d at 819-820; *see State v. Brown*, 902 S.W.2d 278,299 (Mo.banc 1995). In light of the evidence in aggravation in this case, there is no reasonable probability that Bennet's testimony would have altered the outcome.

V

The motion court did not clearly err in denying, without an evidentiary hearing, Appellant's Rule 29.15 claim that his trial counsel was ineffective in failing to call certain witnesses to testify that Appellant was not capable of detailed planning, was easily confused, got lost on occasion, and had legitimate reasons for walking on Hanley road during the year and a half prior to the victim's death, because Appellant failed to make allegations entitling him to relief in that the witnesses' testimony was either inadmissible lay opinion, cumulative to the defense experts' testimony at trial, or otherwise would not have provided Appellant with a viable defense.

Appellant's Point V challenges the motion court's denial, without an evidentiary hearing, of three of the claims raised in his Rule 29.15 amended motion (App.Br.92). Appellant's Rule 29.15 motion, claims 8(h) and 8(i), alleged that his trial counsel was ineffective in failing to locate and call several witnesses who would have allegedly testified about Appellant's lack of mental capacity and his inability to carry out a plan and deliberate (PCR.L.F.34-35,35-36,175-193,197-200). Claim 8(j) alleged that Appellant's trial counsel was ineffective in failing to call Appellant's mother and sister to testify regarding Appellant's legitimate reasons to be walking on Hanley Road during the eighteen months after he had been evicted from the boarding house (PCR.L.F.37,201-204).

Standard of Review – Standard for Ineffective Assistance of Counsel

As set forth in Respondent's Point II.

A. Claims Regarding Appellant's Mental Capacity and Ability to Devise a Plan

1. Rule 29.15 Motion

Appellant alleged that his trial counsel was ineffective in failing to call numerous witnesses who would have testified that Appellant was mentally incapable of forming and carrying out a plan to kill Mrs. Crotts (PCR.L.F.35-36,176-177,197-198). These witnesses included Appellant's family members, friends, and two of his Special Education School District teachers (PCR.L.F.176,178-179,182,185,190,192,197,199). Appellant alleged that one or a combination of these witnesses would have testified as follows:

Appellant had serious intellectual deficits and became confused easily (PCR.L.F.178-179,193). He had serious problems in communication, attention span, motivation, self-concept and knowledge retention (PCR.L.F.180). He was passive, dependent, lethargic and had trouble following directions (PCR.L.F.180 191). Appellant was very concrete, impulsive and his short-term memory was poor (PCR.L.F.180,184-185,187). Appellant was emotionally disturbed, had low intelligence, had problems finding an maintaining employment, and had problems accomplishing other life tasks such as bill paying and budgeting (PCR.L.F.183 186-187-189).

When Appellant attended the Special School District he wandered away from school several times (PCR.L.F.179,199). On one occasion, when Appellant was trying to visit a friend of his family's, he went up to and knocked on the wrong door late at night (PCR.L.F.193). Appellant had never made a plan in his entire life and was incapable of carrying out a plan (PCR.L.F.182,185-186).

Appellant alleged that this testimony would have rebutted that State's theory that Appellant planned the crime for eighteen months and knew what he was doing when he entered the victim's home, and that the jury would not have convicted him or sentenced him to death had this evidence been presented (PCR.L.F.35,36,176,197).

2. Motion Court's Findings

The motion court found that the alleged testimony would have been inadmissible hearsay, speculation, or opinion testimony as to Appellant's thoughts and motives and would not have provided Appellant with a defense (PCR.L.F.451,452). The motion court further found that Appellant's experts had testified to his mental capabilities and abilities to form the appropriate intent and much of the alleged testimony would have been cumulative or conflicting with this expert testimony (PCR.L.F.451,452).

3. Analysis

Appellant's allegations did not entitle him to relief. To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: 1) trial counsel knew or should have known of the existence of the witness, 2) the witness could be located through reasonable investigation, 3) the witness would testify, and 4) the witness' testimony would have produced a viable defense. *Hutchison v. State*, 150 S.W.3d 292,304 (Mo.banc 2004). The testimony that the alleged witnesses could have provided would have been either inadmissible, cumulative, or otherwise would not have provided Appellant with a defense to murder.

During guilt-phase, the defense presented the expert testimony of Rosalyn Schultz,

who's expert opinion was that Appellant was unable to appreciate the nature, quality and wrongfulness of his conduct, and also that he was unable to form the mental state of deliberation (Tr.1499-1513,1518-1519). In coming to these conclusions, Schultz relied on records from the Special School District showing that Appellant had been diagnosed as having borderline intelligence, a learning disability, and being very passive, dependent, depressed, and impulsive (Tr.1436-1442). Rosalyn's own testing indicated that Appellant was depressed, withdrawn, lacked confidence, felt alienated and was confused (Tr.1476). In making her diagnosis she relied in part on Appellant's statements that on the night of the murder he was trying to find the boardinghouse where he used to live, and when he awoke in the victim's basement, he believed he was in the basement of the boardinghouse (Tr.Tr.1469,1572-1573).

All of the testimony that the additional witnesses could have given regarding Appellant's limited mental capabilities would have been inadmissible lay opinion as to Appellant's mental state. To the extent that it would have been admissible, it would have been cumulative to the testimony of the State's expert. Trial counsel could not have been ineffective for failing to call witnesses who would have given cumulative testimony. *Christeson v. State*, 131 S.W.3d 796,799 (Mo.banc 2004)("Counsel is not ineffective in failing to present cumulative evidence[.]").

All of the alleged testimony regarding Appellant's history of mental and intellectual problems was testified to by the defense expert, including testimony explaining diagnoses recorded in Appellant's Special School District records. Trial counsel was not

unreasonable in failing to present additional, non-expert testimony regarding Appellant's mental capabilities and ability to plan and deliberate.

The only testimony that could possibly be considered not cumulative was testimony regarding Appellant's wandering away from school on occasion and going to the wrong house one time when he was trying to visit a friend (See PCR.L.F.179,193,199). Inasmuch as this testimony would have been relevant to support an inference that Appellant accidentally wandered into the victim's home, this evidence would have merely explained Appellant's presence in the home, not provided him a defense to pushing Mrs. Crotts down the basement stairs and beating her to death. Even had the jury accepted that Appellant entered the home by mistake, this fact would not have refuted any of the evidence showing that Appellant carried a hammer up the stairs, confronted Mrs. Crotts, forced her into different areas of her home, took time to think about what he was going to do next, pushed her down a flight of stairs, followed her down the stairs, and then beat her with a sledgehammer (Tr.1306-1312,St's.Ex. 158-159).

Whether or not Appellant had the ability to concoct and execute a long drawn out plan, the evidence that Appellant "cooly reflected" is overwhelming. Appellant's own admissions to police established that he sat in the victim's basement for a few hours before going up the stairs and confronting the victim (Tr.1302,1305-1311). Appellant further admitted to forcing her to different rooms in her home, pushing her down the stairs, observing her for a while, picking up a hammer, and then going down the stairs and striking her in the head several times (Tr.1311-1312).

In light of this evidence, there is no reasonable probability that had counsel presented evidence showing Appellant mistakenly entered Mrs. Crotts' home hours before killing her, the verdict would have been different. *Lyons v. State*, 39 S.W.3d 32,36-37 (Mo.banc 2001)(overwhelming evidence of deliberation defeats claim that counsel was ineffective in failing to present medical testimony to show he was incapable of deliberating). Appellant also alleged in his motion and claims in his brief that these witnesses would have provided mitigating evidence that would have given the jury a basis for a sentence less than death (PCR.L.F.35,176; App.Br.97). Appellant's brief and motion both fail to explain how this evidence was mitigating or how he was prejudiced by his attorney's failure to present it in mitigation. The defense called several witnesses in mitigation, including an expert to testify about Appellant's mental abilities and several of Appellant's family members (Tr.2137,2213,2221,2226,2241,2255). The defense expert, Richard Wetzel, testified about Appellant's borderline IQ and communication and learning problems (Tr.2146-2147,2159-2163). He discussed Appellant's problems with alcohol and depression and described Appellant as impulsive and reactive (Tr.2149,2154,2158). Members of Appellant's family, including his mother, sister, brother in law and grandmother in law also testified on Appellant's behalf (Tr.2221,2226,2241,2255).

Appellant's mental state had already been determined at the penalty-phase, thus, any testimony witnesses could have given supporting an inference that Appellant did not deliberate was irrelevant. Counsel presented several character witnesses and an expert witness in mitigation, and there is no reasonable probability that had counsel called the

additional witnesses listed in Appellant's motion, the jury would not have voted for death. *Lyons v. State*, 39 S.W.3d at 36-37.

B. Claim Regarding Appellant Walking on Hanley

1. Trial Testimony

The only testimony at trial regarding Appellant walking on Hanley Road came from prosecution witnesses Debra Olive and Carol Stanley. Ms. Olive, the victim's daughter, testified that she lived across the street from her mother and that "off and on within a year to six months after [Appellant] was kicked out you would see him walking down North Hanley" (Tr.866). Carol Stanley, who also lived on the same street as the victim, testified that after Appellant left the boardinghouse she never saw him in the immediate neighborhood but did see him walking down Hanley Road (Tr.1192). No other testimony was elicited regarding Appellant's presence on Hanley or in the victim's neighborhood after he moved out of the boardinghouse.

2. Rule 29.15 Motion

Appellant alleged that his trial counsel was ineffective in failing to call witnesses to testify that he had legitimate reasons for walking up and down Hanley Road during the eighteen months between the time he moved out of the boardinghome and the time of the victim's death (PCR.L.F.37,201-202). Appellant alleges specifically, that trial counsel should have called his mother, Mary Goodwin, and his sister, Mary Mifflin, who would have testified that Appellant lived close to Hanley Road during the eighteen month period and often walked to the gas station or pawn shop on Hanley (PCR.L.F.203-204). Appellant

claimed he was prejudiced because trial counsel failed to rebut the prosecution's implication that Appellant was walking up and down Hanley, plotting to kill Mrs. Crotts (PCR.L.F.204).

3. Motion Court's Findings

The motion court found that the testimony regarding Appellant walking in the area was offered as an additional basis of the witnesses' identification of Appellant, and the alleged testimony of Appellant's mother and sister would not have provided Appellant with a defense (PCR.L.F.452).

4. Analysis

Appellant was not entitled to relief because he failed to allege facts showing how the alleged testimony would have affected the outcome of his trial. As set out above, the evidence regarding Appellant's deliberation was overwhelming and the State's case did not rest on showing that Appellant had plotted well in advance of the murder to kill Mrs. Crotts. The prosecutor's argument regarding deliberation focused much more on Appellant's actions once inside the victim's home, not his possible motive or eighteen month plan to get back at Mrs. Crotts (Tr.1852,1863-64,1868,1870-71). In fact, there was no testimony elicited that Appellant was walking on Hanley for some sinister purpose or that he had stalked Mrs. Crotts, and the testimony showed that Appellant had not even been seen in the victim's immediate neighborhood (Tr.1192).

As stated above, any evidence that would have tended to refute an inference that Appellant concocted a long, drawn out plan to murder Mrs. Crotts did not refute any of the

overwhelming evidence of his deliberation once he confronted Mrs. Crotts on the night of the murder. Moreover, having a legitimate purpose to walk down Hanley did not preclude the possibility that Appellant also had a sinister motive. Viewed in this light, there is no reasonable probability that this evidence would have affected the guilt or penalty-phase verdicts.

VI

The motion court did not clearly err in denying, without and evidentiary hearing, Appellant's Rule 29.15 motion claims that his trial counsel was ineffective in (1)failing to adequately investigate and provided the defense experts with Appellant's social history, and in (2) presenting conflicting theories during guilt and penalty-phase, because Appellant's motion merely alleges conclusions, not facts entitling him to relief, in that Appellant did not allege what specific information his counsel failed to discover or how this information would have affected his trial, and the defense did present a consistent theory that Appellant was unintelligent, depressed, explosive and had diminished ability to control his actions.

Appellant claims that the motion court clearly erred in denying, without an evidentiary hearing, his Rule 29.15 claims that his trial counsel was ineffective in failing to adequately investigate his background and provide the defense experts with relevant background information, and that his trial counsel was ineffective in presenting inconsistent theories during guilt and penalty-phase (App. Br. 101). Appellant claims that due to his counsel's actions, neither his guilt or penalty-phase defenses were believable (App.Br.101). Appellant alleged mere conclusions that the outcome of his trial would have been different, but did not allege the existence of any specific materials the experts did not have, or allege facts showing that a mental defense was not a reasonable strategy.

Standard of Review – Standard for Ineffective Assistance of Counsel

As set forth in Respondent's Point II.

Factual Background

1. Trial Evidence and Procedure

The fact that Appellant had killed Joan Crotts by beating her in the head with a sledgehammer was conceded by the defense at trial (Tr.790,1875-1876). Appellant's guilt-phase defense was not guilty by reason of mental disease or defect (NGRI)(L.F.17-19). During guilt-phase, the defense mental health expert, Rosalyn Schultz, testified that she performed an evaluation of Appellant to determine if he was suffering from a mental disease or defect, as defined by Missouri law. *See* § 552.030,RSMo 2000 (Tr.1424). The assessment procedure included interviews with Appellant, his mother, his two sisters and a social worker at the St. Louis City Justice Center (Tr.1427). Schultz interviewed Appellant on four different occasions for a total of almost 11½ hours (Tr.1426). Schultz reviewed Appellant's educational records from the Special School District and his medical and police records (Tr.1425,1430-1441). She obtained a personal history, including information about Appellant's childhood, adulthood, employment history, and relationships with family members and other people (Tr.1427-30,1443-1444). She also obtained a family medical and psychiatric history (Tr.1460-1466). The diagnostic testing Schultz performed included tests to assess Appellant's competency to stand trial, malingering, IQ, achievement, thoughts and feelings, and traumatic stress (Tr.1427,1470-1472,1473,1480,1482).

Schultz testified that throughout Appellant's educational process he had been

diagnosed with a learning disability, a language disorder and borderline intellectual ability (Tr.1441). The testing that Schultz performed on Appellant showed that Appellant was very unhappy, depressed, dissatisfied, withdrawn, lacking in self-confidence, anxious, sullen, alienated and confused (Tr.1476). She concluded that his symptoms indicated post-traumatic stress disorder (Tr.1481). She explained that people like Appellant can have explosive reactions when they feel overwhelmed and that there is a potential for such a person to be in a panic state and not know what is going on (Tr.1481,1484-1485).

Schultz diagnosed Appellant with major depression disorder, post-traumatic stress disorder and personality disorder NOS (not otherwise specified)(1499,1505-1506). Major depression and post-traumatic stress disorder are both a mental disease or defect (Tr.1501,1508). Schultz ultimately concluded that on the day of the murder Appellant suffered from a mental disease or defect and was unable to coolly reflect (Tr.1511-1512).

Appellant was convicted of first degree murder (Tr.1929-1932; L.F.178). During the penalty-phase, the defense called Richard Wetzel, an expert in psychology and neurology, to offer mitigating evidence on Appellant's behalf (Tr.2136). Wetzel had spent a whole day with Appellant in April 1999,another whole day with Appellant in May 1999,2-3 hours in August 1999 and 4 hours in September 1999 (Tr.2143-2144). Wetzel interviewed Appellant's mother and sister, reviewed the reports of the State's mental health expert and medical examiner, reviewed Schultz's reports, and reviewed Appellant's Special School District records, medical records, statements to police and journal entries (Tr.2144).

Wetzel testified regarding Appellant's hearing and communication problems,

alcohol and drug problems and borderline intelligence (Tr.2145-2146,2148-2149,2162). Wetzel concluded that Appellant had depression of a moderate degree and that he had personality disorder NOS (Tr.2157,2161). He testified that Appellant was impulsive, reactive and "not a planful person" (Tr.2158). In his opinion, Appellant's ability to conform his conduct to the law on the night of the murder was substantially impaired, but Appellant could still control his behavior (Tr.2165).

The jury was instructed that in mitigation of punishment they must consider: (1) whether the murder was committed while Appellant was under extreme emotional disturbance; (2) whether Appellant acted under extreme duress or under substantial domination of another person; and (3) whether his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (L.F.186).

2. Rule 29.15 Motion

Appellant's Rule 29.15 motion alleged that his trial counsel was ineffective in (1) failing to investigate and provide the guilt and penalty-phase experts with Appellant's complete social history and in (2) presenting an implausible guilt-phase defense of mental disease or defect (PCR.L.F.23-24,40-41).

Appellant alleged that Wetzel would have testified at the post-conviction hearing that he was originally hired by the defense to supplement Schultz's area of expertise, and that he disagreed with Schultz and told Appellant's trial attorneys that NGRI did not apply to Appellant's case (PCR.L.F.42). He would have testified that it is customary in Missouri to

limit mental disease or defect to psychosis, dementia, or relatively severe mental retardation (PCR.L.F.41). He would have testified that he was not well prepared for his testimony and that although he was provided with a social history and memorandums of interviews with Appellant's family members and friends, he lacked basic information damaging or helpful to Appellant's case (PCR.L.F.45).

Appellant also alleged that trial counsel's decision to pursue NGRI was made without adequate investigation of Appellant's background, and that if counsel had investigated, he would have determined that Appellant had no history of mental disease or defect (PCR.L.F.42,44). Appellant alleged that it was unreasonable for defense counsel to present an inconsistent theory during penalty-phase–that Appellant was aware of the wrongfulness of his conduct–and that had counsel presented a cohesive defense, the jury would not have sentenced him to death (PCR.L.F.42).

3. Motion Court's Findings

In denying Appellant relief, the motion court found that the record refuted his claim that trial counsel failed investigate and provided a social history to defense experts (PCR.L.F.448). The motion court further found that both of the defense experts' testimony and reports presented a consistent diagnosis of depression, with a slight disagreement as to the severity, and that Wetzel's testimony during penalty-phase was the basis for several factors that were submitted in mitigation (PCR.L.F.448).

Legal Analysis

Appellant's allegations amount to nothing more than bare conclusions that the

outcome of his trial would have been different had his counsel conducted further investigation and not relied on a NGRI defense. "[C]ourts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief." *Ringo v. State*, 120 S.W.3d 743,746 (Mo.banc 2003). Appellant failed to allege specific information trial counsel would have discovered upon further investigation. He failed to allege how additional investigation into his social history would have affected the outcome of his trial or the opinions of the defense experts. Additionally, Appellant failed allege what defense his trial counsel should or could have relied on instead of NGRI. Appellant did not allege facts showing the outcome of his trial was affected by his counsel's inaction.

Here, the record shows that the investigation into Appellant's defense and choice to rely on NGRI was a reasonable strategic choice. There is a strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689; *White v. State*, 939 S.W.2d 887,895 (Mo.banc 1997). Schultz's testimony demonstrates that she was provided with medical and educational records from Appellant's childhood and adulthood (Tr.1425,1430-1441). She conducted several interviews with Appellant where she gained valuable information regarding his social history (Tr.1426). During these interviews Schultz obtained information regarding every aspect of Appellant's life, including education, work history, family life, personal relationships and more (Tr.1427-30,1443-1444).

After reviewing all of this information and administering several diagnostic tests, Schultz came to the conclusion that Appellant suffered from a mental disease or defect.

No allegations support a finding that Schultz was not qualified to give her opinion or that trial counsel was unreasonable in relying on her opinion when preparing for Appellant's defense. Because trial counsel reasonably relied on an expert's opinion his strategic choice is virtually unchallengeable. *State v. Kinder*, 942 S.W.2d 313,335 (Mo.banc 1996).

Similarly, during penalty-phase, counsel presented a reasonable mitigation defense and provided Wetzel with sufficient background information. Wetzel reviewed Shultz's reports and other records that Shultz relied on, in addition to conducting his own interviews of Appellant and reviewing notes on interviews with Appellant's family members and friends (Tr.2143-2144).

The record further shows that both the guilt and penalty-phase defenses revolved around a consistent theme. Both experts concluded that Appellant possessed borderline intelligence, had drug and alcohol problems, suffered from depression and personality disorder NOS, was explosive and had trouble controlling his actions (Tr.1476,1481,1499,25-5-1506,2145-2146,2148-2149,2162,2157,2161,2158). The consistent defense theme was to show Appellant's diminished capacity to control his actions due to his psychological problems, low level of functioning and intellectual deficits.

Appellant argues that the defense presented inconsistent theories, resulting in his penalty-phase defense being unbelievable (App.Br.101). He likens his defense strategy to a case of "he didn't do it" but "he is sorry he did it," citing *Florida v. Nixon*, 125 S.Ct. 551,563 (2004)(discussing a capital defense attorney's decision to admit guilt during guilt-phase in order to save credibility during penalty-phase)(App.Br.106-107). The guilt and

penalty-phase defenses in Appellant's case did not constitute such a contradiction. The defense conceded Appellant had caused the victim's death but consistently focused on his diminished culpability for his actions. The only difference between the experts' conclusions was that Schultz concluded Appellant's depression qualified as a mental disease or defect (Tr.1511-1512), and Wetzel, although agreeing that Appellant was depressed and impaired, did not believe his depression was so severe that he could not control his actions (Tr.2165).

Presenting Wetzel's opinion that Appellant did not have a mental disease or defect was not an unreasonable strategy in light of the jury's verdict, rejecting NGRI. *Middleton v. State*, 80 S.W.3d 799,806 (Mo.banc 2002)(recognizing that at times it is prudent to change trial strategies to accommodate trial developments). Wetzel's other testimony regarding Appellant's diminished ability to control his actions was still relevant as mitigating evidence and supported three mitigating factors submitted to the jury. Even if the jury was not convinced that Appellant's mental state absolved him of responsibility or precluded him from deliberating, the jury could nevertheless conclude that Appellant was less culpable. This testimony was not so inconsistent with the guilt-phase defense as to make it unbelievable. *Clayton v. State*, 63 S.W.3d 201,206-207 (Mo.banc 2001)(pointing out that it is not ineffective assistance in every case to present inconsistent theories).

In sum, the allegations do not show that counsel was unreasonable in relying on NGRI or that there was another possible defense counsel should have relied on. The defense presented a consistent defense theory during both phases of trial and called

experts who testified based on reasonable investigations of Appellant's background. Therefore, there is no reasonable probability that had trial counsel investigated further and not relied on NGRI, the result of the guilt or penalty-phase verdict would have been different.

VII

The motion court did not clearly err in denying, without an evidentiary hearing, Appellant's Rule 29.15 claim that Missouri's administration of lethal injection is unconstitutionally cruel and inhumane because the claim was without merit.

Appellant claims that the motion court clearly erred in denying, without an evidentiary hearing, his claim that Missouri's method of execution – lethal injection – is unconstitutional (App.Br.111). This claim is without merit.

The motion court denied Appellant's claim, finding that an identical claim was considered and rejected without an evidentiary hearing in *Morrow v. State*, 21 S.W.3d 819,828 (Mo.banc 2000)(PCR.L.F.453). The motion court did not clearly err.

This Court recently considered and rejected an identical claim in *Worthington v. State*, No. SC85783,slip op. at 23-24 (Mo.banc May 31,2005); this Court stated:

> Finally, Mr. Worthington argues that execution by lethal injection, and its related procedures, causes death by a process that involves lingering death, mutilation, and unnecessary and wanton infliction of pain in violation of the Eighth and Fourteenth Amendments to the United States Constitution. In support of his claim, he cites the case of Emmitt Foster, who was executed by the State in 1995. Mr. Worthington alleges that Foster's execution took 30 minutes to carry out and that Foster convulsed during the execution. Further, Mr. Worthington cites to nine other lethal

injection executions from other states that involved similar incidents.[19]

> For the reasons set out in *Morrow v. State*, 21 S.W.3d 819,828 (Mo.banc 2000), the argument that lethal injection is unconstitutional *per se* because if improperly performed it may result in unnecessary and wanton infliction of pain and so constitute cruel and unusual punishment is rejected.

Id. This Court further noted that

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

Id. at 24 n.3. The same is true in the case at bar. The motion court did not clearly err.

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[19] In his amended motion, appellant also cited to Mr. Foster's execution and the executions of nine other inmates from other states (PCR.L.F.228-233).

VIII

This Court should deny review of Appellant's claim of unpreserved trial court error raised for the first time in Appellant's post-conviction brief, because Appellant's claim that the trial court plainly erred in failing to *sua sponte* grant a mistrial during the prosecutor's allegedly improper closing argument is not cognizable in an appeal from a Rule 29.15 proceeding.

In any event, Appellant suffered no manifest injustice because the prosecutor's comments in closing argument were proper.

Appellant claims that this Court should grant him a new penalty-phase because the prosecutor's unobjected to closing argument contained six types of impermissible and prejudicial arguments, resulting in manifest injustice (App.Br.116,135).

Cognizability

Appellant acknowledges that the claim he is now making has never been raised in any post-trial proceeding or on direct appeal (App.Br.122). Appellant did not object to the allegedly improper arguments at trial, did not include a claim of error in his motion for new trial, did not include a claim on direct appeal regarding closing argument and did not include a claim regarding closing argument in his Rule 29.15 motion (App.Br.122).

Appellant also acknowledges case law from this Court holding that claims that have not been presented to the motion court cannot be raised for the first time on appeal. *Amrine v. State*, 785 S.W.2d 531,535 (Mo.banc 1990). This Court has previously addressed claims of error that were not presented to the motion court as follows:

> Plain error review may be considered "on appeal." Rule 84.13(c). This is not an appeal of [defendant's] conviction. Rather, this is an appeal of the post-conviction proceeding. Our standard of review here is whether the post-conviction court "clearly erred" in denying relief in the post-conviction proceeding. Since the issue was never raised in the post-conviction proceeding, error by that court, plain, clear or otherwise, is not discernible.

White v. State, 939 S.W.2d 887,904 (Mo.banc 1997). Indeed, it is well settled that claims not included in the amended motion cannot be reviewed on appeal.

Despite recognizing that his claim is procedurally barred, Appellant requests plain error review because his case is an appeal from a death sentence (App.Br.122). Appellant cites instances where the Court of Appeals has engaged in plain error review in post-conviction appeals. However, all of the cases cited by Appellant allowed for post-conviction review of jurisdictional claims. *See Searcy v. State*, 981 S.W.2d 597 (Mo.App.W.D. 1998); *McCoo v. State*, 844 S.W.2d 565,568 (Mo.App.S.D. 1992); *Ivy v. State*, 81 S.W.3d 199,205 (Mo.App.W.D. 2002). Appellant does not cite to any case law reviewing for plain error a claim of trial court error, raised for the first time in an appellant's brief on an appeal from a post-conviction proceeding. This court should follow its precedent and decline to review Appellant's claim. However, respondent will gratuitously respond to Appellant's arguments.

Appellant claims that several constitutional violations occurred during the prosecutor's penalty-phase closing argument, and that the totality of the improper

arguments resulted in manifest injustice. To reverse a conviction under plain error review on a claim of improper closing argument, a defendant must establish not only that the argument was improper, but that it had a decisive effect on the outcome of the trial and would amount to a manifest injustice or miscarriage of justice if the error were left uncorrected. *State v. Anderson*, 79 S.W.3d 420,439 (Mo.banc 2002). Statements made in closing argument will only rarely amount to plain error. *Id*.

This Court has acknowledged that "Courts especially hesitate to find plain error in the context of closing argument because the decision to object is often a matter of trial strategy, and in the absence of objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention." *State v. Edwards*, 116 S.W.3d 511,536 (Mo.banc 2003). Appellant's claims regarding improper argument are set out and discussed individually below.

1. "<u>Personalization</u>"

Appellant argues that the prosecutor improperly expressed his personal belief in the propriety of the death sentence, implied special knowledge of facts outside the record and emphasized his position of authority (App.Br.126). Appellant points to the following segments of the prosecutor's argument:

> I want to start with Instruction No. 19. These are what we talked about in the very beginning as aggravating circumstances. These are what make this case a death penalty case.

These do not exist--In St. Louis County we have a small number of murders every year. Not every one of those murders is a first degree. Very few of those murders are death penalty cases.

This is what sets this case apart from any other case. These are the factors which you have to look at which make this case far worse than many others. These are the factors which raise the stakes**.**

(Tr.2298)

A death sentence is something very, very difficult, and it is only for special cases. And this is one.

(Tr.2319).

It's not easy, folks, It is not easy. But it is the right thing to do. And I think each and every one of you know that it is the right thing to do, no matter how hard it is.

I asked every single one of you a week ago if I prove to you every element of every crime, every aggravating circumstance, all the other evidence of aggravation, I said, Can every one of you, when I show you the appropriate case for the death penalty, can every one of you vote for the death penalty? And you all promised me you could.

I've done my job. Do yours.

(2321-2322).

Closing arguments "must be interpreted with the entire record rather than in

isolation."

State v. Edwards, 116 S.W.3d at 537. It is therefore, necessary to lay out portions of the prosecutor's penalty-phase closing argument not cited in Appellant's brief. The prosecutor began his penalty-phase closing argument telling the jury:

> Your job is clear. Your job is justice. Your job is to decide the appropriate punishment.
>
> That is what I want to remind you first is what we are talking about here is punishment, punishment for one person for what he did to one person.
>
> The issue in this case is not how a sentence of death affects his family or his friends. The decision of punishment and death and the appropriateness of death in this case is about how he had affected your community by taking a member of your community from you in the most brutal, heinous, inhumane way.
>
> * * * * *
>
> This has nothing to do with the grief of the Crotts family, although they are entitled to their grief. It has nothing to do with the shame and grief of the Goodwin family. Their willingness to take the blame for what he did is sad, tragic. . .
>
> What we are talking about here is his responsibility. . .You do what you do in this case because of his guilt and his responsibility. That is what

punishment is about. And we are talking about punishment in this specific case, not that hypothetical case I talked to you about last week.

(2295-2297). In rebuttal penalty-phase closing argument the prosecutor stated:

I'm going to ask you again to do what your job is, which is to look at the facts in this case, to recall and recollect what that man did.

* * * * *

You must look at the facts and not the emotions, because the facts will show you that he is not a man as painted by his family . . .

(Tr.2319).

At no point during the prosecutor's argument did he imply that he possessed knowledge of special facts outside of the record. He did not, as Appellant suggests, tell the jury that Appellant's case was "the worst of the worst," he never referenced other murders or compared other cases to Appellant's. In context, the prosecutor's argument was that first degree murder is the worst crime in society, and that when there are statutory aggravators present, that is when the defendant is subject to the death penalty.

In *State v. Christeson*, 50 S.W.3d 251 (Mo.banc 2001), this Court reviewed a similar, but preserved claim that the prosecutor in a capital case improperly argued "Again, I tell you, this is the worst case in our society the worst crime in our society, murder in the first degree." *Id.* at 270. This court found that in context, the argument did not refer to the defendant's case in particular, but rather, the statement was part of an argument that murder is the worst crime in our society and that that is why it is the only

crime for which the death penalty is available. *Id.*

In this case, the prosecutor did not imply that he was privy to information outside of the record. Instead, he merely expressed his opinion as to whether the death penalty should be imposed in this case, with the statutory aggravators that were present in this case. A prosecutor may state his personal opinions on whether the death penalty should be imposed so long as that argument is fairly based on the evidence. *State v. Johns*, 34 S.W.3d 93,117 (Mo.banc 2000). The prosecutor's argument urged the jury to give death because the State had proved all of the aggravating circumstances. Because the prosecutor's argument that death was deserved was based on the evidence, no manifest injustice occurred.

Appellant likens the prosecutor's comments in his case to the prosecutors' improper arguments reviewed in *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999), and *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989). In *Newlon,* the prosecutor personalized to the jury by asking the jurors what they would do if the defendant was going to harm their child. *Newlon,* 885 F.2d at 1342. He went on to stress his authority and position by stating "I'm talking to you as Prosecuting Attorney of this county -- the top law enforcement officer in St. Louis County," and told the jury he had been a prosecutor for ten years and "I've never seen a man who deserved it more than [the defendant]." *Id.* at 1339,1342. Similarly, in *Shurn*, the prosecutor asked the jury whether they would kill someone who was going to kill their child and stressed that he was the top law enforcement officer in the

county and that he decided which cases deserved the death penalty, and that "there's no case that could be more obvious[.]" *Shurn*, 177 F.3d at 665.

In both of these cases, the court found that the prosecutor's closing argument was "filled with improper statements," as the prosecutor had emphasized his position of authority, expressed his personal opinion on the propriety of the death sentence and appealed to the jurors' fears and emotions. *Shurn* 177 F.3d 665; *Newlon*, 885 F.2d at 1337. Appellant's reliance on these two cases is misplaced because at no point did the prosecutor in Appellant's case make an argument regarding the safety of the jurors' family or refer to his official position or decision making authority regarding which cases deserve death. The prosecutor's argument regarding the propriety of a death sentence was based on the statutory aggravators that the State proved. Because the prosecutor's argument to impose the death penalty was fairly based on ample evidence, the trial court did not plainly err in failing to *sua sponte* grant a mistrial.

2. <u>Protection of the Community/Sending a Message</u>

Appellant also complains about the prosecutor's argument regarding the protection of the community (App.Br.118,129). The following sections of his argument were cited:

> The issue in this case is not how a sentence of death affects his family or his friends. The decision of punishment and death and the appropriateness of death in this case is about how he has affected your community by taking a member of you community from you in the most brutal, heinous, inhumane way.

(Tr.2296).

> And what we must do to protect people in our community like Joan Crotts, the elderly, the immobile, the easy victims of prey in our community, we must raise the stakes for people like Paul Goodwin and tell them that these kinds of crimes are going to be dealt with in the most severe way.

(Tr.2298).

> But I am not going to tell you it's easy. Because it's not easy to stand here and ask you to do this, and I know it's not easy for you to do it. But if it is right and it is just, it is exactly what you swore to do and exactly the burden that you must shoulder for the benefit of your entire community.

(Tr.2299).

> We must raise the stakes on people who prey upon our elderly, the weak, those people who cannot protect themselves. We must raise the stakes.

(Tr.2302).

> And I do not tell you this is easy, because it's not. But this is your opportunity as members of this community to send a message to Paul Goodwin and those who would prey upon our innocent, easy victims.
>
> You must protect those victims by your verdict, and you will if you sentence him to death. To give him life in prison will allow him to finish his life an easy way, does not do justice for Joan Crotts.

(Tr.2318).

As set out above, the prosecutor's closing argument urged the jury to base their decision on the facts of Appellant's case. He told the jury to consider "punishment is this specific case" and to look at facts and not emotions (Tr.2297,2319). The prosecutor cited evidence and the reasonable inferences from that evidence and argued that the evidence indicated that Appellant deserved the death penalty.

Appellant claims that the prosecutor's argument regarding the protection of society pressured the jury to sentence Appellant to death, not based on the evidence, but to protect society in general (App.Br.129). Appellant argues that such arguments have consistently been condemned (App.Br.129); however, this Court has often held that it is proper for a prosecutor to argue that the jury should "send a message" to the community that criminal conduct will not be tolerated. *State v. Link*, 25 S.W.3d 136,147 (Mo.banc 2000); *see e.g. State v. Phillips*, 940 S.W.2d 512,520 (Mo.banc 1997)("The prosecutor is allowed to argue that the jury should send a message that criminal conduct will not be tolerated."); *State v. Cobb*, 875 S.W.2d 533,537 (Mo.banc 1994)(prosecutor urged jurors to "[s]end a message that [it] is unacceptable to be falling down drunk and driving a car in this county. Send the message to everyone who would think about doing it, to everyone who endangers the lives of other citizens everywhere when they're driving on the highways while intoxicated.").

Such arguments have also consistently been upheld by this Court in capital cases. In *State v. Knese*, 985 S.W.2d 759 (Mo.banc 1999), this court found no plain error where the prosecutor argued that the jury should sentence the defendant to death to "send a

message" to others who would consider such a crime. *Id*. at 775. In *State v. Lyons*, 951 S.W.2d 584 (Mo.banc 1997), this court held that it was proper for the prosecutor to argue "If you let him get off the hook without the death penalty, you will be sending the wrong message." *Id*. at 595. And in *State v. Roberts*, 948 S.W.2d 577 (Mo.banc 1997), this court found proper, the prosecutor's argument: "You're not representing yourself in this case, you're representing the community," recommending the death sentence would be "a statement of the community that this type of crime is outrageous," and "[t]his is not gonna happen in St. Louis County, we're going to deter other murderers from committing these crimes and we're gonna punish those that do. We have to protect ourselves." *Id*. at 595.

The prosecutor's argument in Appellant's case was substantially similar to numerous arguments that this Court has held proper in the past. The prosecutor properly urged the jury to consider the effect upon society if they did not render a death sentence and never told them to base a verdict on anything other than the evidence.

3. <u>Comment on Jurors' Duty</u>

Appellant also claims that the prosecutor improperly argued that the jury had a duty to recommend a death sentence (App.Br.119,130). As outlined above, the prosecutor spoke about the juror's duty to uphold the law, saying "if it is right and it is just, it is exactly what you swore to do and exactly the burden that you must shoulder for the benefit of your entire community" (Tr.2299). He further argued:

> We are a civilized society, a society of laws. And the laws in this

state tell you the cases where people commit murder with these elements of aggravation--And, remember, you just have to find one -- and any one of these aggravating circumstances, especially this first one, that the tremendous physical abuse disabled, these require the stakes to be raised.

* * * * *

Don't let him make you feel that you do something wrong if you do the right thing. The remark, don't spill any more blood, is offensive, because you are not doing anything other than your duty when you sentence him to death.

* * * * *

He will receive the justice he deserves when you all do the job you swore to do. Do not show him mercy that he did not show Joan Crotts. Do not give him something that he has not earned, like mercy.

2316-2318).

Lastly, the prosecutor reminded the jurors that they had all promised that if the State proved its case and showed that the defendant deserved the death penalty, they swore that they could return a sentence of death (Tr.2321-2322).

Appellant characterizes these comments as telling the jury that they had a sworn duty to give death (App.Br.119). He argues that these comments on the jury's duty were akin to the argument reviewed by the Nevada Supreme Court in *Evans v. State*, 28 P.3d 498,515 (Nev. 2001). In *Evans*, the prosecutor argued: "do you as a jury have the

resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do your legal duty?" *Id*. The Nevada Supreme Court held that asking the jury if it had the "intestinal fortitude" to do its "legal duty" was highly improper, and that suggesting that the jury has a duty to decide one way or the other is designed to stir passion and can only distract a jury from its actual duty of impartiality. *Id*. The court further found that the prosecutor's words -- "resolve," "determination," "courage," "intestinal fortitude," "commitment," and "duty -- were particularly designed to stir the jury's passion and appeal to partiality. *Id*.

The argument in the case at bar was not an improper characterization of the jurors' duty and was not designed to appeal to the jury's passion. In context, the prosecutor argued that the defendant deserved the death penalty and that if the jurors believed that the prosecution had proved it's case, showing that the defendant deserved death, it was their duty to return a death sentence. The prosecutor correctly told the jury that if the evidence showed that Appellant deserved the death penalty, "if it is right and it is just," they must return a verdict sentencing him to death. This was not an incorrect statement of the law or an appeal to passion.

4. <u>Fear of Public Disapproval</u>

Appellant claims that the following statements were an attempt by the prosecutor to coerce the jury by fear of public disapproval:

> A week ago I stood before you and I told you that this would be a difficult case and that it is not a decision that is easy to make. You're going

to leave here sometime in the near future and go back to your families, to your jobs, to your homes. And you'll be forever changed by this case.

But as you go back to your families and your homes and your jobs, you'll be asked, Where you been? What you been doing? And you will tell them you were on a murder case. And they'll say, What was it about? And you'll tell them: This six foot six, 350-pound man broke in a little old lady's house, and in that house he beat her, he forced her to take his penis in her mouth, he raped her in the very bed she'd slept in for thirty-five years. What did he do then? He took a drink of soda and he ended her life in a most horrible way.

And you'll be asked, Well, what happened? What did you do? And you'll say, I did the right thing. I gave him what he deserved. I gave him what he earned.

(Tr.2321).

Appellant's argument does not discuss how or why this argument coerced the jury into returning a verdict of death (App.Br.131-132). These comments did not suggest that the public would disapprove of a particular verdict. Additionally, even if the argument was improper, it was merely an isolated reference to the jurors' family and friends.

5. <u>Comment on Right Not to Testify</u>

Appellant cites the following argument as an impermissible comment on his right not to testify (App.Br.121):

> And no matter how much his family apologizes to you, ask yourself: Was he sorry when he grabbed her? Was he sorry when he twisted her arms so badly that it split her skin and she bled? Was he sorry when he punched her in the mouth? Was he sorry when he put his penis in her mouth? Was he sorry when he tried to pry her legs apart?
>
> Was he sorry as she stood at the back door, wondering how this could have happened and how she could be in her kitchen, the kitchen where she raised her family, the kitchen she had lived in, the place she felt safe?

(Tr.2300).

Appellant argues that the prosecutor repeatedly emphasized that the jurors never heard Appellant say that he was sorry (App.Br.132). This is a mischaracterization. The prosecutor did not argue that the jury never heard Appellant apologize, but that Appellant was not in fact sorry for what he did when he did it. The prosecutor never pointed out the defendant as he sat in court or asked the jury if he was sorry as he sat in court. In context, the prosecutor's remark was not a direct or an indirect comment on Appellant's failure to take the stand; rather, it was a comment about his apparent lack of remorse.

Generally, a prosecutor may comment during the punishment phase on the lack of remorse to show the nature of the defendant's character. *State v. Anderson*, 79 S.W.3d 420,439-40 (Mo.banc 2002). In *Anderson*, this Court held that the trial court did not plainly err in overruling the defendant's objection to the prosecutor's argument: "But have you

been watching the defendant here? Have you seen a tear for [the victims]?" *Id.* at 440. This court held the prosecutor's argument was a permissible comment on the defendant's apparent lack of remorse as he sat in the courtroom. *Id.* So too, the prosecutor in Appellant's case did not allude to the fact that Appellant did not testify, but rather argued that Appellant was not remorseful for what he did.

6. <u>Denigrating Defense Counsel</u>.

Lastly, Appellant claims that the prosecutor denigrated defense counsel by making the following argument:

> The next is kind of interesting. Whether the murder of Joan Crotts was committed while the defendant was under the influence of extreme mental or emotional disturbance. Think of what Wetzel, who was only called in the second half . He wasn't called in the first half when they tried to sell you a bill of goods called Rosalyn Schultz. He testified that he was not suffering from extreme mental or emotional disturbance, that he had control, he could control himself.

(Tr.2304).

Appellant argues that the statement "they tried to sell you a bill of goods called Rosalyn Schultz" was only part of a "barrage of arguments that counsel had put on a witness who fabricated her testimony and 'cooked a report'" (App.Br.121-122). Appellant, however, does not cite to any other portions of the prosecutor's penalty-phase closing argument. He merely cites to a portion of the guilt-phase closing argument, where the

prosecutor argued:

> Don't surrender your common sense for one second to somebody who he's paid, after the clock kept running yesterday, about nine thousand dollars to come in here and give him a way out. Because that's what it is. It's a way out.
>
> * * * * *
>
> Use your common sense. That's all you need back there, all you need to see through Schultz. Yes, I did harangue her. Yes, I did point out that she didn't include things in her report. Funny, she knew what cookin' a report meant because she cooked one up.

(Tr.1912-1913).

All of these statements were permissible comments on the credibility and bias of Schultz' testimony. The prosecutor can comment on the credibility of witnesses. *State v. Edwards*, 116 S.W.3d 511,538 (Mo.banc 2003). In so doing, a prosecuting attorney may "belittle and point to the improbability and untruthfulness of specific testimony." *State v. Weaver*, 912 S.W.2d 499,513 (Mo.banc 1995)(it was within the range of proper closing argument when prosecutor called the defendant's misidentification defense a "cock and bull story" and a "smokescreen," referred to the defendant as a liar, said defense counsel was "bold" and called into question the credibility and motives of several defense witnesses). The comments here were directed at the defense witnesses, not the credibility of defense counsel.

None of the arguments cited by Appellant were improper or amounted to manifest injustice. Therefore, if reviewed, Appellant's point should be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 27,895 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 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, postage prepaid, this ___ day of August, 2005, to:

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RESPONDENT'S APPENDIX