No. SC91787

IN THE

Supreme Court of Missouri

JOHNNY JOHNSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Louis County Circuit Court
Twenty-first Judicial Circuit
The Honorable Mark D. Seigel, Judge

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
(573) 751 3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

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STATEMENT OF FACTS

Mr. Johnson appeals the denial of his Rule 29.15 motion, in which he alleged various claims of ineffective assistance of counsel (PCR L.F. 32-444). On appeal, Mr. Johnson raises five claims: (1) that counsel was ineffective for failing to present evidence of Mr. Johnson's brain damage; (2) that counsel was ineffective for failing to present the testimony of a sixth-grade teacher who "witnessed the abuse and neglect [Mr. Johnson] suffered as a child"; (3) that counsel was ineffective for failing to present evidence in support of his motion to suppress statements; (4) that the motion court clearly erred in failing to make findings and conclusions on claim 8(f) of the amended motion; and (5) that counsel was ineffective for failing to rebut the state's expert testimony that "suggested [Mr. Johnson's] actions resulted from substance abuse, not his mental illness" (App.Br. 18-24). Mr. Johnson's claims of ineffective assistance of counsel were denied after an evidentiary hearing.

* * *

Trial and direct appeal

In January, 2005, a jury found Mr. Johnson guilty of murder in the first degree, armed criminal action, kidnapping, and attempted forcible rape. *See State v. Johnson*, 207 S.W.3d 24, 30 (Mo. banc 2006). On direct appeal, the Court summarized the facts of Mr. Johnson's crimes (in the light most favorable to the verdict) as follows:

Johnny Johnson's convictions resulted from the murder of six-year old Casey Williamson on July 26, 2002.[] Casey lived with her mother, Angie, and her siblings at her grandfather's home on Benton Street in Valley Park. Casey's parents were separated and her father, Ernie, lived across the street, in the home of Michelle Rehm and her boyfriend Eddy, so that he could remain close to his children.

Two days before Casey's murder, on July 24, 2002, Johnson went to Michelle's house to look for Eddy and Ernie. That same day, he was seen by Casey's sister, Chelsea, and her friend, Angel, when they were riding bikes on Benton Street. Chelsea and her friend noticed that Johnson was following them and sped up as they returned home.

On the night of July 24, 2002, Angie took the children to Michelle's house to spend the night with Ernie. Johnson also stayed at Michelle's house that evening.

The next morning, July 25, 2002, Angie awoke to find Casey on the couch watching cartoons with Johnson. Johnson told Angie that Casey was not bothering him. Unbeknownst to anyone at the time, however, Johnson had begun to think Casey was "cute" and had "ideas" of wanting to have sex with her.

That day, Angie took the children back to her father's house for the day. At one point during the day, Casey, her sister, and other friends, including Angel, were at the home by themselves. Angel noticed Johnson sitting on a chair by the deck and locked the door. Angel later heard knocking, but did not answer the door.

On the evening of July 25, 2002, Johnson joined in a barbeque at Michelle's house. That evening, Casey and her siblings again spent the night with their father at Michelle's house.

The next morning, July 26, 2002, Ernie awoke around 6:00 a.m. to prepare for work. Casey awoke and said she was hungry. Ernie told her that he would take her to her grandfather's house to get breakfast and told her to wait upstairs while he went downstairs to get ready for work. Downstairs, he noticed Johnson asleep on the couch.

Casey did not stay upstairs. Johnson awoke to find Casey standing near the couch watching television and sensed this was his best opportunity to have sex with her. He had decided that to avoid being caught for sexually assaulting her, he would kill her after having sex with her. Johnson asked Casey if she wanted to

go to the glass factory[1] to play games and have fun. Casey said she would go with him and they left. Casey was wearing only her nightgown and underwear. As they walked down Benton Street and into an alley, Casey complained her feet hurt and Johnson picked her up and carried her. When they came to the woods leading to the glass factory, they walked along one of the paths to a sunken pit with brick and concrete walls more than 6 feet high. Casey and Johnson crawled through a small tunnel and dropped into the pit.

Johnson asked Casey if she wanted to see his penis. She said no, but he pulled down his shorts and exposed himself. Casey turned her head away. Johnson then asked Casey to pull down her panties so he could see her vagina. She said no, and Johnson grabbed her underwear, tore it off her, and forced her to the ground. Pinning her to the ground with his chest, Johnson attempted to achieve an erection by rubbing his penis on Casey's leg. Casey started screaming, kicking, and pushing at Johnson, scratching his chest.

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[1] The glass factory, a popular hangout for neighborhood kids, refers to an abandoned factory surrounded by wooded areas and a series of trails.

Even though he had not yet raped Casey, Johnson got up and decided to kill her. He grabbed a brick and hit Casey in the head with it at least six times, causing bleeding and bruising. She was not yet dead or knocked unconscious and started to run around the pit. Johnson hit her with the brick again. She fell to her knees and tried to crawl away from Johnson. He struck her with the brick again, eventually knocking her to the ground and fracturing the right side of her skull. Because she was still moving, Johnson then lifted a basketball-sized boulder and brought it down on the back left side of Casey's head and neck, causing multiple skull fractures. Casey inhaled and exhaled "really fast" and then stopped breathing.

Johnson wiped blood from Casey's face with her underpants and then threw them in an opening in the wall. He buried Casey with rocks, leaves, and debris from the pit. He then went to the nearby Meramec River to wash Casey's blood and other evidence from his body.

The police were looking for Johnson. Officer Chad Lewis met up with him. He had Johnson get in a police car to talk because there were so many people in the area. Without any question being asked, Johnson said he would not hurt "little kids"

and that he liked them because he had one of his own. He explained to Officer Louis that he had gone for a swim in the river and explained his route there. Officer Louis thought Johnson's route was unusual because most locals would have cut through the glass factory to get to the river. He asked Johnson if he had been in the glass factory, which Johnson denied. At Officer Louis's request, Johnson agreed to go to the police station to talk in private.

While at the station, Johnson was identified by a witness who had seen him carrying Casey that morning. Around 8:30 a.m., Detectives Neske and Knieb arrived at the station and took Johnson to a police substation that had an open interview room. On the ride to the substation, Johnson was informed of his rights and indicated he understood them. At the substation, around 9:25 a.m., Johnson signed a waiver form after again being advised of his rights. Johnson said he wanted to make a statement. For about an hour, Johnson and Detective Neske conversed, and Johnson denied seeing or being with Casey that morning. Even when confronted with accounts of witnesses seeing him with Casey that morning, Johnson continued his denials.

When Detective Neske brought up a hypothetical about

Johnson's son being missing, Johnson became angry. Johnson said he was being treated for schizophrenia and had been hospitalized for it in the past. Johnson denied that he was hearing voices and said he usually only saw shadows, but he denied having any hallucinations at that time. Johnson said he had not taken any medication for a month and was not suffering from it anymore.

The detectives took a break from talking with Johnson and brought him food. In the early afternoon, about 1:30 p.m., Johnson agreed to submit to a rape kit. Before the samples were collected, Detective Neske told Johnson that they would determine his involvement and said he needed "to be a man and tell me where she's at." Johnson started crying and said, "She's in the old glass factory."

When asked if Casey was alive, Johnson said she was dead and it was an accident. He said that Casey wanted to go to the glass factory with him and that a rock had fallen from the pit wall when he was climbing it and hit Casey's head, killing her. Johnson said he then "freaked out," thinking he would not be believed, and buried Casey. He said he went to the river to kill himself, but could not. Johnson drew two maps to help officers

find Casey's body, but officers at the scene were unable to find the body and Johnson was taken there.

Before Johnson arrived, however, a private citizen who had joined the search for Casey that morning came upon the tunnel leading to the pit where Johnson had taken Casey. In the middle of the pit, he saw a pile of rocks, blood around the pile, and Casey's foot between the rocks. He saw "a piece of concrete that probably weighed a hundred pounds" where Casey's head would have been. Police arrived and secured the pit.

Johnson was taken to police headquarters. Detective Neske observed the pit and spoke with an officer who was processing evidence at the scene. The evidence officer told Detective Neske that there was no place to climb out of the pit and said there was blood all over the floor of the pit, which contradicted Johnson's story.

Detective Neske went to police headquarters to talk with Johnson. He again advised Johnson of his rights and the waivers, and said he had been to the scene and did not think it was an accident. Johnson then told Detective Neske that once he and Casey were in the pit he had asked Casey if she wanted to see his penis and pulled down his pants. Johnson said that he asked

Casey to show him her vagina and pulled off her underwear, which caused her to start "freaking out" and saying she would tell her parents. Johnson said this caused him to start "freaking out" as well, and he picked up the brick and hit her a couple of times in the head, then dropped the "boulder" on her head. He said he wanted her to expose herself so he could masturbate. He said he wiped blood from Casey's face with the underwear, discarded it, buried the body, and went to the river to wash off the blood. Around 8:30 p.m., Johnson repeated this version of events in an audiotaped statement. In these statements, Johnson did not admit that he intended to take Casey, rape her, or kill her prior to entering the pit.

Later that night, around 11:30 p.m., Detective John Newsham was instructed to take Johnson to the county jail. While Johnson was awaiting booking, Detective Newsham began discussing reading with him. Johnson said he liked to read the Bible and was concerned about his "eternal salvation." He said he was "fine," and that he "felt he was going to receive the death penalty and that he wanted to be executed." He asked Detective Newsham, "[D]o you think I'll ever achieve eternal salvation[?]" Detective Newsham thought that Johnson was indicating he had

not been completely honest earlier and he took this as an opportunity to get more information. He told Johnson that to be forgiven for this crime he had to be completely truthful and honest and not leave out details. Johnson admitted he had not been completely honest. Johnson was returned to police headquarters, again waived his rights, and made verbal and audiotaped statements. In these statements, he admitted that he intended to take Casey for the purpose of having sex with her and planned to kill her after doing so.

An autopsy showed that Casey died from blunt force injuries to her head, which caused skull fractures and bruising of her scalp and brain. She also suffered injuries to her arms, shoulders, legs, and back. Her blood was found on Johnson's shirt and a brick and large rock recovered from the pit. Johnson's semen was found on his shorts.

At trial, Johnson did not deny killing Casey, but disputed that he deliberated before doing so. His diminished capacity defense asserted that he could not deliberate due to mental illness, specifically schizo-affective disorder that caused command hallucinations to rape and kill Casey. In rebuttal, the State's expert testified that Johnson was capable of deliberation and any

> hallucinations that he may have had at the time were due to methamphetamine intoxication, not psychosis.

Johnson, 207 S.W.3d at 31-34 (footnote 1 omitted; footnote 2 renumbered).

In support of his defense, in the guilt phase of the trial, Mr. Johnson presented the testimony of several witnesses, including the testimony of Dr. John Rabun, Dahley Dugbatey, Lisa Mabe, Patricia Friese, Dr. Delaney Dean, Dr. Zafar Rehmani, Dr. Karen Cotton-Willigor, and Connie Kemp (Tr. 1446, 1518, 1543, 1560, 1575, 1752, 1764, 1782). The jury found Mr. Johnson guilty of murder in the first degree, armed criminal action, kidnapping, and attempted forcible rape. *Johnson*, 207 S.W.3d at 30.

During the penalty phase of trial, the State called five victim impact witnesses and presented evidence of Mr. Johnson's prior convictions for seven criminal offenses and two ordinance violations, including convictions for second-degree burglary, felony and misdemeanor stealing, property damage, and an "indecent act" (Tr. 1986-2032). Mr. Johnson presented the testimony of seventeen witnesses, and they presented evidence about his personal and family history, including evidence regarding his own and other family members' mental illnesses (Tr. 2033-2265).

The jury recommended a sentence of death, finding the three statutory aggravating circumstances that had been submitted to it: that the murder was outrageously wanton and vile, that the murder was committed while

committing the offense of kidnapping, and that the murder was committed while committing the offense of attempted forcible rape (L.F. 797-798). On March 7, 2005, the trial court sentenced Mr. Johnson to death for first-degree murder and to consecutive life sentences for the remaining offenses (L.F. 884-888; Tr. 2370-2371).

On November 7, 2006, this Court affirmed Mr. Johnson's convictions and sentences. *Johnson*, 207 S.W.3d at 30. On December 19, 2006, the Court issued its mandate.

Post-conviction proceedings

On March 16, 2007, Mr. Johnson filed a *pro se* motion pursuant to Rule 29.15 (PCR L.F. 1, 7-12). On July 5, 2007, Mr. Johnson filed an amended motion alleging various claims (PCR L.F. 1, 29-306).

In claim 8(a) of the amended motion, Mr. Johnson alleged that trial counsel were ineffective for failing to present evidence that Mr. Johnson suffers from organic brain damage—a condition that affected his ability to think and make decisions (PCR L.F. 32). In claim 8(b), Mr. Johnson alleged that counsel were ineffective in failing to present the testimony of Mr. Johnson's sixth grade teacher, Pamela Strothkamp, who witnessed some of Mr. Johnson's poor performance in school, and who saw evidence of abuse and neglect (PCR L.F. 34). In claim 8(f), Mr. Johnson alleged that trial counsel were ineffective in failing "to present expert and lay testimony to

rebut the aggravating evidence presented by Dr. English that the crime was the result of [Mr. Johnson's] alleged methamphetamine intoxication and not his mental illness" (PCR L.F. 40). In claim 8(g), Mr. Johnson alleged that trial counsel were ineffective for failing to rebut testimony presented at the suppression hearing (*i.e.*, that counsel were ineffective for failing to present evidence showing that Mr. Johnson did not validly waive his rights), and for failing to present evidence supporting the submission of MAI-CR 310.16, an instruction dealing with the voluntariness of a confession (PCR L.F. 42).

The motion court held an evidentiary hearing over the course of four days—November 30 through December 2, 2009, and July 23, 2010 (PCR Tr. 2, 5). In support of his various claims, Mr. Johnson called Dr. Pablo Stewart, Pamela Strothkamp-Dapron, Vito Bono, Dr. Brooke Kraushaar, Catherine Luebbering, Lisa McCulloch, and Dr. Craig Beaver to testify at the hearing (PCR Tr. 7, 396, 474, 491, 561, 569, 584). Depositions in lieu of live testimony were submitted for Ms. Bevy Beimdiek and Ms. Beth Kerry, Mr. Johnson's trial attorneys (PCR L.F. 5). The state submitted the deposition of Dr. Christopher Long (PCR L.F. 5).

On April 5, 2011, the motion court denied Mr. Johnson's post-conviction motion (PCR L.F. 608-655). On May 13, 2011, Mr. Johnson filed his notice of appeal (PCR L.F. 658).

ARGUMENT

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The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id*.

To prevail on a claim of ineffective assistance of counsel, the movant must demonstrate "that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also prove prejudice, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Rule 29.15(*i*).

I.

The motion court did not clearly err in denying Mr. Johnson's claim that counsel was ineffective for failing to present evidence of Mr. Johnson's organic brain damage.

In his first point, Mr. Johnson asserts his attorneys were ineffective for failing to present, through the testimony of Dr. Craig Beaver, "readily available evidence of his brain damage and neuropsychological impairments"—evidence that would have shown that his "ability to think, problem solve, act rationally and deal with stress" were affected (App.Br. 26). He asserts that he was prejudiced because if the jury had heard such evidence from Dr. Beaver "a reasonable probability exists that they would not have found [Mr. Johnson] deliberated and would have likely imposed a life sentence" (App.Br. 26).

A. The motion court's findings and conclusions

In denying this claim (claim 8(a) of the amended motion), the motion court made extensive findings of fact and conclusions of law (PCR L.F. 623-631). The motion court found it significant that while Dr. Beaver had opined that Mr. Johnson had organic brain syndrome and psychiatric disorders that " '. . . would affect his ability to think, to problem solve, to act rationally, to deal with stress, [and] to make appropriate decisions,' Dr. Beaver did not provide a diagnosis . . . and offered no opinion as to his competency to stand

trial, ability to deliberate on his actions or responsibility for the charged crime" (PCR L.F. 626).

The motion court observed that Dr. Dean, Dr. English, and Dr. Becker each evaluated Mr. Johnson, and, in light of their reports, the motion court concluded that the record "refutes Movant's claim that the extent of trial counsel's investigation in this case was unreasonable[.]" (PCR L.F. 627). The motion court observed that "[t]rial counsel testified that they considered and discussed retaining a neuropsychologist" and discussed the possibility with Dr. Draper and Dr. Dean (PCR L.F. 627). The motion court observed that trial counsel did not recall why they did not consult a neuropsychologist, but the motion court found significant that "Dr. Dean's report concluded that her testing 'did not yield scores suggestive of significant neuropsychological impairment (brain damage)" (PCR L.F. 627). The motion court observed that counsel relied on Dr. Dean's report, and that counsel had acknowledged that Dr. Dean had reached her conclusion "after examining Movant at least two (2) times after having discussed hiring a neuropsychologist to examine him" (PCR L.F. 627).

The motion court found it significant that counsel had also consulted with Dr. Dennis Keyes to determine whether Mr. Johnson was mentally retarded (PCR L.F. 628). The motion court observed that "[c]ounsel's failure to recall the reason does not overcome the presumption that the decision not

to pursue a neuropsychologist was sound trial strategy, especially as here, where the record demonstrates Dr. Dean's further evaluations of Movant and written conclusions regarding brain damage as plausible reasons for their decision" (PCR L.F. 628).

The motion court further observed that Dr. Beaver's testing was conducted two and a half years after trial (PCR L.F. 628). The motion court pointed out other factors that diminished Dr. Beaver's credibility in the motion court's view, including the fact that Dr. Beaver was "the first mental health evaluator who believed Movant to be suffering from organic brain damage in more than twenty (20) years of mental health evaluations" (PCR L.F. 629). But the motion court concluded that Dr. Beaver's testimony was of little consequence, as he "never formally diagnosed Movant's condition and failed to offer an opinion as to Movant's responsibility, competency or diminished mental capacity" (PCR L.F. 629).

The motion court concluded, "[w]here trial counsel has made reasonable efforts to investigate the mental status of a defendant, as here, where he was examined by Dr. Dean, Dr. English, Dr. Becker, and Dr. Rabun, counsel should not be held ineffective for not shopping for a psychiatrist or psychologist who would testify in a particular way" (PCR L.F. 629). Further, the motion court concluded "that Dr. Beaver's testimony would not have aided the defense nor changed the outcome of the trial" (PCR L.F. 630). The

motion court did not clearly err.

B. Trial counsel adequately investigated Mr. Johnson's mental defects and reasonably opted not to hire an additional expert

"As a prevailing professional standard, capital defense work requires counsel to '"discover all reasonably available mitigating evidence[.]"'" *McLaughlin v. State*, --- S.W.3d ----, 2012 WL 2861374, *8 (Mo. banc 2012) (quoting *Glass v. State*, 227 S.W.3d 463, 468-469 (Mo. banc 2007) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)). "Counsel has a duty to 'conduct a reasonable investigation and to present evidence of impaired intellectual functioning—evidence that is inherently mitigating—in the penalty phase....'" *Id.* (quoting *Hutchison v. State*, 150 S.W.3d 292, 297 (Mo. banc 2004)). "However, counsel is 'not obligated to shop for an expert witness who might provide more favorable testimony.'" *Id.* (quoting *Johnson v. State*, 333 S.W.3d 459, 464 (Mo. banc 2011) (internal quotations omitted)). " 'The duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.'" *Id.* (quoting *Strong v. State*, 263 S.W.3d 636, 652 (Mo. banc 2008) (quoting *Rompilla v. Beard*, 545 U.S. 374, 383 (2005)). "In this regard, strategic choices made by counsel 'after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . .'" *Id.* (quoting

Strickland, 466 U.S. at 691).

Before trial, Mr. Johnson's attorneys spoke to multiple mental health experts and reviewed extensive mental health records. Counsel deposed Dr. Becker and Dr. English, both of whom had evaluated Mr. Johnson prior to trial (PCR L.F. 413, 515). Counsel spoke to Dr. Rabun, another expert who had evaluated Mr. Johnson in the months before trial, and, after several conversations with him, counsel decided to call him as a defense witness (PCR L.F. 446). Counsel considered whether Mr. Johnson was mentally retarded, and they consulted with Dr. Dennis Keyes (PCR L.F. 368, 447). Dr. Keyes reviewed Mr. Johnson's records but "he concluded that [Mr. Johnson] was not mentally retarded, but he had a learning disability" (PCR L.F. 447).

Counsel retained the services of Dr. Draper to testify about Mr. Johnson's mental and social development and put Mr. Johnson's history into a "meaningful context for a jury" (PCR L.F. 490). They retained the services of Dr. Dean, and Dr. Dean met with Mr. Johnson on multiple occasions to determine whether Mr. Johnson suffered from a mental disease or defect that relieved him of responsibility for his conduct (PCR L.F. 370, 395-396, 451-452). Dr. Dean could not offer an opinion along those lines, but she did believe that Mr. Johnson was mentally ill, suffered from diminished capacity at the time of the crimes, and was incapable of deliberating (PCR L.F. 396).

Counsel also considered whether to obtain a neuropsychological

evaluation of Mr. Johnson. On October 7, 2003, Dr. Draper recommended neuropsychological testing, and counsel decided that they would consult with Dr. Dean (PCR L.F. 373, 452, 517-518). On November 5, 2003, counsel had a conversation with Dr. Dean about neuropsychological testing (PCR L.F. 372, 453, 517). Counsel concluded that they would try to find someone who could do neuropsychological testing (PCR L.F. 372). Dr. Dean then met with Mr. Johnson on two occasions after the November 5 conversation—on December 2, 2003, and on February 5, 2004 (PCR L.F. 453). Dr. Dean then wrote her report on February 17, 2004 (L.F. 454-455).

Counsel could not recall why they decided not to retain another expert to conduct neuropsychological testing (PCR L.F. 373, 376, 491, 498). But they acknowledged that Dr. Dean's evaluation included some neuropsychological testing (the Stroop Neuropsychological Screening Test[2]), and that her testing did not reveal evidence of any significant brain damage (PCR L.F. 375, 455; Mov.Ex. 11, p. 2964). Specifically, they acknowledged that Dr. Dean found that "Mr. Johnson's performance on the Stroop was significantly below the

[2] In parts of the record, the name of this test is misspelled "Stroup." The correct spelling is Stroop (*see* Mov.Ex. 11, p. 2964). The test was developed by John Ridley Stroop. http://en.wikipedia.org/wiki/Stroop_effect (last accessed July 14, 2012).

average score for normal individuals in his age range, and that '[t]his score is most likely a reflection of his learning disability, diagnosed when he was in elementary school" (PCR L.F. 375, 455, 519-520; Mov.Ex. 11, p. 2964). They also acknowledged that Dr. Dean had concluded, based on her tests and Mr. Johnson's history, that "these instruments did not yield scores that are suggestive of significant neuropsychological impairment (brain damage)" (PCR L.F. 375, 520; Mov.Ex. 11, p. 2964).[3] Counsel testified generally that they relied on Dr. Dean's report in deciding how to proceed, but counsel could not specifically recall whether Dr. Dean's report was the basis for deciding not to retain a neuropsychologist (PCR L.F. 376, 520, 531). There was no evidence that the Stroop test Dean conducted was not a valid indicator of neuropsychological impairment,[4] or that Dr. Dean was not qualified to administer the Stroop test.

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[3] Dr. Rabun's report of December 7, 2001, stated that "Mr. Johnson also did not show any features of a cognitive disorder. For example, his abstract reasoning was intact. His attention span was preserved. His intellectual capacity was judged to be in the average range, based upon his use of language and independent living skills" (Def.Ex. K; *see* Mov.Ex. 1 p. 289).

[4] In fact, in evaluating Mr. Johnson, Dr. Beaver also administered the Stroop test as part of a battery of tests (PCR Tr. 606).

In light of this record, the motion court did not clearly err in concluding that counsel's efforts were reasonable, and that counsel reasonably opted to refrain from further neuropsychological testing in light of Dr. Dean's conclusions. As the motion court correctly observed, proof that counsel could not recall a specific strategy is not proof that counsel had no strategy, and such evidence does not overcome the presumption that counsel acted according to a reasonable strategy. *See Bullock v. State*, 238 S.W.3d 710, 715 (Mo.App. S.D. 2007) ("While trial counsel could not recall why he ultimately decided not to call Compton as a witness, this does not overcome the strong presumption that counsel had a strategic reason for not calling her.").

Moreover, the record shows that counsel had consulted with multiple experts, and that one expert (Dr. Dean) had conducted neuropsychological screening and concluded that Mr. Johnson's scores (while significantly below average) were not "suggestive of significant neuropsychological impairment" or brain damage. " '[D]efense counsel is not obligated to shop for an expert witness who might provide more favorable testimony.' " *Johnson v. State*, 333 S.W.3d at 464 (quoting *State v. Kenley*, 952 S.W.3d 250, 266 (Mo. banc 1997)). In short, refraining from retaining an additional expert to conduct more neuropsychological testing was reasonable in light of what counsel had discovered to that point.

Mr. Johnson's case is similar to *Lyons v. State*, 32 S.W.3d 39 (Mo. banc

2001). There, the defendant asserted that "reasonably competent counsel would have sought neuropsychological testing" after an evaluation by two other doctors "identified neuropsychological brain damage problems." *Id.* at 37. But the Court disagreed. The Court observed that the report by the two doctors had "concluded that [the defendant] possessed 'features . . . consistent with [appellant's] severe depression substantially interfering with his cognitive functioning.' " *Id.* at 38. The Court then observed that the two doctors had found that the defendant had "various cognitive deficits, 'despite [appellant] having **no evidence of brain damage**.' (Emphasis added)." *Id.* Accordingly, the Court concluded that a review of the two doctors' report "would likely have led reasonably competent attorneys to conclude that further neuropsychological testing would reveal no additional, beneficial information." *Id.* The same is true here, as Dr. Dean reported that her neuropsychological screening was not suggestive of significant brain damage, and reasonably competent attorneys could have, thus, concluded that further testing would not produce favorable evidence. *See also McLaughlin*, 2012 WL 2861374 at *9 (counsel was not ineffective for failing to retain a neuropsychologist because "based on the advice of Dr. Cunningham and Dr. Caruso that additional testing or an additional expert opinion was not needed, they concluded that the mental health experts retained were sufficient to testify regarding Mr. McLaughlin's mental health issues").

Mr. Johnson cites *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), and *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003), as examples of cases he believes are similar to his case (App.Br. 33, 35). But Mr. Johnson's reliance on these cases is entirely misplaced.

In *Glenn v. Tate*, the record showed a nearly complete absence of any effort by the defense attorneys to present a mitigation case. In fact, the defendant's "lawyers made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty." 71 F.3d at 1207. "The lawyers made no systematic effort to acquaint themselves with [the defendant's] social history." *Id.* at 1208. "They never spoke to any of his numerous brothers and sisters." *Id.* "They never examined his school records." *Id.* "They never examined his medical records (including an emergency room record prepared after he collapsed in court one day) or records of mental health counseling they knew he had received." *Id.* "They never talked to his probation officer or examined the probation officer's records." *Id.* "And although they arranged for tests, some months before the start of the trial, to determine whether he was competent to stand trial, they waited until after he had been found guilty before taking their first step—or misstep . . .—toward arranging for expert witnesses who might have presented mitigating evidence on [the defendant's] impaired brain function." *Id.* "If the lawyers had done what they should have done, they would have

been in a position to show the jury that [the defendant's] family always considered him 'slow;' that as early as the first grade he was assigned to a program for 'educable mentally-retarded children;' that his school I.Q. tests repeatedly produced scores in the 60s; that a clinical psychological evaluation conducted a month before his 14th birthday reported a full scale I.Q. score of 56, placing him 'within the Mental Defective range;' that another psychological evaluation conducted in this time frame described him as 'an ineffectual and dependent young man' who 'is very anxious and insecure;' that he left school virtually illiterate; that his mother beat him and his siblings regularly; and that he was hyperactive as a child, constantly butting his head against things and rocking his body back and forth when he went to sleep." *Id*. Additionally, "[e]xpert testimony adduced at the post-sentence hearing indicated that the hyperactivity was caused by a neurological impairment." *Id*. Indeed, the post-conviction testimony showed that the defendant suffered from brain damage, and that the defendant "did not have the substantial capacity to conform his conduct to the requirements of the law." *Id*.

This complete failure to investigate stands in stark contrast to the comprehensive efforts engaged in by Mr. Johnson's attorneys. Mr. Johnson's attorneys, along with a mitigation specialist, gathered copious amounts of information; they gathered relevant records from schools, hospitals, jails and

prisons; they interviewed family members, teachers, and others; they deposed witnesses; they consulted with numerous mental health experts; and they ultimately called eight witnesses in the guilt phase and seventeen witnesses in the penalty phase (*see* PCR L.F. 369, 411, 421-426, 446-447, 452-454, 463, 488, 490-494, 514, 526). This extensive investigation revealed evidence of cognitive deficits and mental illness, but it did not reveal substantial evidence of organic brain damage. Rather, as outlined above, the defense expert who conducted a neuropsychological screening test concluded that the results of the test did *not* suggest significant neuropsychological impairment or brain damage. Unlike in *Glenn v. Tate*, where there were only court-appointed experts who gave their opinions shortly before sentencing, Mr. Johnson's attorneys conducted an independent investigation well before trial. Mr. Johnson's attorneys were, thus, justified in deciding not to seek further neuropsychological testing.

The circumstances of *Powell v. Collins* are very different, as well. In that case, the defendant alleged that his attorneys "spent less than two full business days preparing, waiting until after the conclusion of the guilt phase to do so." 332 F.3d at 398. Then, "[i]ncredibly, counsel's mitigation testimony consisted of only one witness"—a court-appointed psychologist who had evaluated the defendant's competency, and who had concluded that the defendant had the "capacity to form the intent and purpose to commit

aggravated murder." *Id.* at 398-399. The record showed that "numerous family members and other individuals from [the defendant's] past were willing to testify on his behalf at the sentencing phase; however, defense counsel did not interview any of [the defendant's] family members or friends." *Id.* at 399. Additionally, "[c]ounsel failed to investigate, research, or collect pertinent records regarding [the defendant's] background or history for mitigation purposes, and made no attempt to locate significant persons from [the defendant's] past who may have provided valuable testimony regarding mitigating factors." *Id.* Finally, although the court-appointed psychologist "made vague references to [the defendant's] family history and background, she was not able to fully describe to the jury the extent of [the defendant's] background, history, and character for mitigation purposes, because, as she herself mentioned, she did not have time to interview his relatives." *Id.* Again, this stands in stark contrast to the comprehensive efforts of Mr. Johnson's attorneys.[5]

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[5] Mr. Johnson's reliance on *Powell v. Collins* is further misplaced because in discussing the expert's "inability to provide evidence that [the defendant] suffered from a diminished mental capacity due to organic brain damage," the court stated that "counsel's performance cannot be deemed insufficient on this ground alone[.]" 332 F.3d at 400.

As a final observation, it must be noted that Mr. Johnson failed to prove that his trial attorneys could have presented the testimony that Dr. Beaver offered at the evidentiary hearing. Every claim of ineffective assistance of counsel must be evaluated in light of what was known and available to counsel at the time of trial. *Strickland*, 466 U.S. at 690 ("a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"). Accordingly, if evidence was not, or could not, have been available at the time of trial, it cannot be said that counsel should have presented it. *See generally Edwards v. State*, 200 S.W.3d 500, 516 (Mo. banc 2006) ("In a death penalty case, counsel are expected to 'discover all reasonably available mitigating evidence.' ").

Here, Dr. Beaver testified at the evidentiary hearing that he formed his conclusions after reviewing fifteen or sixteen volumes of records, conducting interviews of various people (including Mr. Johnson), consulting with Dr. Stewart (a psychiatrist who evaluated Mr. Johnson in April 2007) and conducting various neuropsychological tests (PCR Tr. 602-603, 610-611, 642, 660). A portion of the records and information he considered would not have been available before trial because they documented post-trial events, *e.g.*, psychiatric records produced in the department of corrections through 2007, any post-trial impressions communicated by interviewees, Dr. Stewart's post-

trial psychiatric evaluation, and post-trial "memory testing" conducted by Dr. Brooke Kraushaar in June 2007 (*see* PCR Tr. 603-604, 621, 628, 633, 660). Dr. Beaver relied on this post-trial information, and his conclusions were expressly based on the broader context provided by the records he reviewed: "as an overall picture I felt that Johnny Johnson's overall performance across multiple measures *and given the context of the records that I have reviewed*, showed clear evidence of organic syndrome" (PCR Tr. 607; *see* PCR Tr. 640-641 ("Based on all your testing and your review of the records . . ."). Dr. Beaver did not offer any opinions based only on information that would have been available to him before trial.

Accordingly, Dr. Beaver's testimony was not testimony that counsel could have secured and presented at Mr. Johnson's trial. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. In short, because Dr. Beaver did not confine his conclusions to the relevant records, his conclusions were distorted by post-trial events that he admittedly relied on. As a matter of law, trial counsel cannot be deemed ineffective for failing to present such testimony.

C. Trial counsel presented substantial evidence of Mr. Johnson's intellectual deficits, and Mr. Johnson was not prejudiced by the absence of Dr. Beaver's testimony

Even if the Court were to assume that Dr. Beaver could have offered similar testimony based solely on testing that he could have performed before trial and records that were extant at that time, Mr. Johnson failed to prove that he was prejudiced by counsel's alleged error. In evaluating prejudice, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.* at 695-696. Here, Dr. Beaver's testimony, to the extent that it would have been available at trial, would not have had a pervasive effect on the inferences to be drawn.

1. Guilt phase

In the guilt phase, the state presented a substantial quantum of evidence showing that Mr. Johnson knowingly killed the victim after deliberation. *See State v. Johnson*, 207 S.W.3d 24, 31-34 (Mo. banc 2006). Briefly, the state's evidence showed that Mr. Johnson formed a design to rape and kill the victim, that he induced the victim to leave her home, that he removed the victim from her home, that he took her to a secluded area, that

he induced her into a pit that she could not get out of, that he showed her his penis and asked to see her vagina, that he pulled off her underwear, that he hit her in the head with a rock, that he repeatedly hit her when she tried to get away, that he smashed her head, that he ejaculated at some point during the incident, that he covered up the victim's body with debris, that he attempted to wash the victim's blood off of his body, that he made false statements about the victim's whereabouts, that he lied to the police, and that he eventually confessed to what he had done. *Id*.

The defense called eight guilt-phase witnesses; the defense theory was diminished capacity, *i.e.*, that due to a mental disease or defect Mr. Johnson was incapable of deliberation. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors [of counsel], the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. Here, Dr. Beaver's testimony would not have produced a reasonable doubt respecting guilt.

The defense's first witness, Dr. John Rabun, testified that he reviewed various documents and reports before evaluating Mr. Johnson (Tr. 1451). Dr. Rabun had been ordered by the court in another case to evaluate Mr. Johnson's competency and provide "risk assessments" for sentencing (Tr. 1449, 1472, 1476). Dr. Rabun testified that Mr. Johnson "had a history of treatment since a young age for psychiatric problems in particular starting

around the age of thirteen" (Tr. 1454). He testified that it had "been documented that [Mr. Johnson] had attempted suicide," and that there were other attempts after that first attempt at age thirteen (Tr. 1454). He testified that Mr. Johnson had been repeatedly hospitalized for problems with alcohol, drugs, and mental illness (Tr. 1454, 1458). He also outlined the various diagnoses of mental illnesses that Mr. Johnson had received over the years, including depression; "psychotic symptoms, meaning hallucinations, delusions," and things of that nature; and schizo-affective disorder (Tr. 1455). Dr. Rabun also testified that Mr. Johnson had been diagnosed as "learning disabled," and that he had been in special education classes (Tr. 1458-1459). He testified that Mr. Johnson was reportedly sexually molested as a child, that Mr. Johnson had a history of self-mutilation, and that Mr. Johnson had a family history of substance abuse and mental illness (Tr. 1459). Dr. Rabun testified that a person cannot "get schizo-affective disorder from drug use or substance abuse alone" (Tr. 1460-1461). Dr. Rabun testified that Mr. Johnson had reported LSD use and "hearing voices" (Tr. 1461-1462). Dr. Rabun testified that he evaluated Mr. Johnson on November 16, 2001 (several months before the murder) (Tr. 1463). He opined that Mr. Johnson suffered from "schizophrenia, undifferentiated type" (Tr. 1463, 1473). He based his diagnosis on Mr. Johnson's history of auditory hallucinations ("hearing voices") and delusional beliefs (Tr. 1463-144). For instance, Mr. Johnson held

the belief that "people could place thoughts in his head and that . . . people tried to harm him" (Tr. 1466). Dr. Rabun further observed that Mr. Johnson was paranoid when he was not on medication (Tr. 1466). Mr. Johnson had reported that he heard voices "telling him to harm himself" (Tr. 1466). Dr. Rabun testified that even when on medication, Mr. Johnson sometimes exhibited symptoms (Tr. 1468). Dr. Rabun observed other diagnoses in Mr. Johnson's history, including "major depression" and "psychotic disorder not otherwise specified" (Tr. 1470). Dr. Rabun testified that testing in 1996 revealed an overall IQ of 93, indicating "average" intelligence (Tr. 1471-1472). Dr. Rabun confirmed that in certain situations, Mr. Johnson "would pose an unacceptable risk of violence to himself or others" (Tr. 1476). The risk factors included failing to take medications, the lack of a stable living environment, and the use of alcohol and illegal controlled substances (Tr. 1477).

Dahley Dugbatey testified that she was Mr. Johnson's community support worker in 2002 (Tr.1518). Ms. Dugbatey worked for Adapt, an agency contracted by the Department of Mental Health to provide community support services (Tr. 1519). She testified that Mr. Johnson had been diagnosed with schizo-affective disorder, and that he had suicidal ideation (Tr. 1522). She testified that she helped Mr. Johnson find a psychiatrist, Dr. Patel, and that she transported Mr. Johnson to Dr. Patel's office for appointments (Tr. 1523-1524). She testified that Mr. Johnson had been

prescribed Zyprexa, Trazedone, and Paxil (Tr. 1525). She testified that she assisted Mr. Johnson in obtaining Medicaid, and that she met with him from February 12 until June 28 (Tr. 1526). She testified that during that time, Mr. Johnson was doing well (Tr. 1526). She testified that in June, though, Mr. Johnson reported that he had been seen in a bar by his probation officer (Tr. 1527). Mr. Johnson explained why he had been at the bar, but Ms. Dugbatey thought that "[t]he story didn't sound right" (Tr. 1527). She testified that, at that time, Mr. Johnson's "reality seemed to be off a little," and that his behavior was not normal (Tr. 1528-1529). She testified that Mr. Johnson cancelled his next meeting, and that she became concerned that Mr. Johnson might not be taking his medication (Tr. 1529-1530). She testified that her supervisor wrote a letter to Mr. Johnson on July 15, advising him to contact them by July 31, if he still wanted to receive services (Tr. 1530-1531, 1533). Ms. Dugbatey did not see Mr. Johnson again until she saw him on television on July 26 (after his arrest) (Tr. 1531).

Lisa Mabe testified that she dated Mr. Johnson for four years, and that they had a child together (Tr. 1545). Ms. Mabe testified that that she observed strange behaviors by Mr. Johnson: "A lot of spacing, suicide thoughts, cutting his wrists, . . . tearing up pictures" (Tr. 1546). She testified that Mr. Johnson did not like himself very much (Tr. 1547). She testified that Mr. Johnson was paranoid, and that he was hearing voices and "seeing things

that aren't there, like shadows" (Tr. 1547). She testified that Mr. Johnson spent time in a mental hospital, and that he was prescribed Zyprexa (Tr. 1548-1549). She testified that he sometimes did not take his medications (Tr. 1549). She testified that Mr. Johnson sometimes wore headphones because "[i]t helped drown the voices out of his mind" (Tr. 1549). She testified that Mr. Johnson sometimes wet the bed (Tr. 1550). She testified that when Mr. Johnson stopped taking his medication it started to "hang all over again like temper, passing signs of schizophrenia" (Tr. 1550). (Mr. Johnson had told her that he had been diagnosed with schizophrenia (Tr. 1551).) Ms. Mabe testified that in July, 2002, Mr. Johnson started leaving home and staying in Valley Park (Tr. 1551). She testified that she made calls to get him to come home, and that she went to Valley Park to bring him home, but that he kept going back (Tr. 1551-1553). She testified that she saw Mr. Johnson on July 25, 2002, and that she pleaded with him to come home (Tr. 1552-1553). She testified that Mr. Johnson went home, but that he then "spaced out, screaming at [her] and threw his bike down and just ran" (TR. 1553). She testified that he told her he was doing drugs in Valley Park with "Eddy" or "Ernie" (Tr. 1554). She testified that Mr. Johnson sometime saw people and had "an imaginary friend" named "John Rock" (Tr. 1554). She testified that she heard about Mr. Johnson's arrest on July 26, and that she visited him in jail (Tr. 1554).

Patrica Friese testified that on July 25, 2002, the day before the murder, she saw Mr. Johnson pacing back and forth on the side of Jim Wideman's house (the victim's grandfather's house) (Tr. 1561). She testified that Mr. Johnson's mouth was moving, but that no one else was with him (Tr. 1563). She could not hear what he was saying (Tr. 1564). She testified that he went towards the front door, so she called over there and told Angel Friese to lock the door (Tr. 1562). She testified that when no one answered the door, Mr. Johnson walked across the street and "seemed like he was really mad and upset" (Tr. 1562). She testified that Mr. Johnson sat on a picnic bench and slapped himself in the head (Tr. 1562).

Dr. Delaney Dean, a forensic psychologist, testified that she reviewed approximately 2100 pages of records related to Mr. Johnson, including school records, hospital records, and prison records (Tr. 1583-1584). She testified that Mr. Johnson has an extensive history of mental illness, and that his family also had a history of mental illness (Tr. 1586). She testified that she conducted psychological tests on Mr. Johnson, including the Millon Clinical Multiaxial Inventories, Third Edition, which she conducted twice (MCMI III) (Tr. 1588-1590). She testified that Mr. Johnson's responses on the test were sufficient to provide valid information, but that Mr. Johnson had a tendency to exaggerate some of his symptoms (Tr. 1593-1594). The fact that Mr. Johnson exaggerated symptoms did not mean, however, that he was

malingering (Tr. 1594). Dr. Delaney testified that Mr. Johnson's test score revealed severe depressive disorder, psychosis, and delusional disorder (Tr. 1597). Dr. Delaney testified that she also conducted the Shipley Test, a test that gives an estimation of overall intelligence (Tr. 1599). She testified that Mr. Johnson's IQ was estimated at 85 (Tr. 1599). Dr. Delaney also administered the Stroop Neurosychological Screening Test (Tr. 1599; Mov.Ex. 11, p. 2964). The Stroop test revealed that Mr. Johnson's functioning in completing tasks was very poor, and that he had great difficulty coping with the tasks (Tr. 1600). The Stroop test results were consistent with Mr. Johnson's long history of learning disability (Tr. 1600). Dr. Delaney noted that other doctors had indicated the possibility that Mr. Johnson was mentally retarded, but she stated that her testing did not reveal that (Tr. 1600-1601). She noted that one IQ test in 2003 had produced an IQ of 70 (Tr. 1601). She testified that Mr. Johnson also had a history of being sexually abused during childhood by three different people (Tr. 1601). She stated that one of Mr. Johnson's mother's boyfriends had tried to drown him and had physically abused him (Tr. 1602). Dr. Delaney testified that Mr. Johnson had been in psychiatric hospitals about twelve times, beginning when he was fourteen and attempted suicide (Tr. 1603). She testified that Mr. Johnson received various diagnoses over the years, but that a consistent two-fold theme pervaded the records, namely, that Mr. Johnson was abusing drugs,

and that "independent of the drug abuse there was [sic] severe psychiatric symptoms" (Tr. 1604). She testified that Mr. Johnson was depressed and repeatedly attempted suicide, and that he was diagnosed variously with schizophrenia, major depression with psychotic features, and schizo-affective disorder (Tr. 1604-1605, 1607; *see* Tr. 1617-1618). She testified that Mr. Johnson's records showed that he was in special education classes at various schools, and that Mr. Johnson failed terribly in school (Tr. 1605, 1618). She concluded that Mr. Johnson had "significantly subaverage intellectual functioning" and that his intelligence was in the "borderline to low average range" (Tr. 1618-1619). She testified that, in prison, Mr. Johnson's behavior was "bizarre" and "self-harmful," and that it included banging his head, smearing excrement and urine on his walls, shoving paper into his ear canals so deeply that medical personnel had to extract it, cutting his wrists, and scratching himself (Tr. 1606, 1608). She testified that schizophrenics will "often" put things in their ears, wear headphones, or wear hoods, "as a last ditch effort to try to . . . prevent the voices from being overwhelming" (Tr. 1607). She testified that Mr. Johnson's insight and judgment have never "risen to a normal level" (Tr. 1608). She noted that other doctors had mentioned post-traumatic stress disorder, and she did not "quarrel with that," but she did not offer that diagnosis (Tr. 1617).

With regard to the murder, Dr. Delaney testified that Mr. Johnson told

her that he had stopped taking his prescribed medications at least a week before the murder (Tr. 1620). She testified that Mr. Johnson had been using methamphetamine "for a period of at least twenty-four and possibly seventy-two hours," and that Mr. Johnson said he received the methamphetamine from "Eddy" (Tr. 1620, 1622). She testified that Mr. Johnson said that he had a conversation with the victim, and that he decided to take her to the glass factory with him because "it would be fun to go to this place with [the victim] where he had been having fun with his brothers when he was a kid" (Tr. 1623-1624). She testified that Mr. Johnson "strongly denied" having a plan to harm the victim (Tr. 1624). She testified that Mr. Johnson said that as they walked to the glass factory, he started "hearing voices and the voices" said, "show yourself to her, show yourself to her"—meaning that "he should show his penis to her" (Tr. 1625). She testified that Mr. Johnson said that the voices got louder, and that they became "more negative, sexual and violent in nature" (Tr. 1626). She testified that Mr. Johnson was "arguing with the voices," and that as the voices got louder they became "more coercive" and overrode his original intent (Tr. 1626). She testified that Mr. Johnson showed the victim his penis, and that the victim started crying (Tr. 1626). She said that Mr. Johnson said that "the voice had been saying, hit her, her hit, her hit very loud" (Tr. 1626). She testified that Mr. Johnson said the voices "were incredibly overwhelming and that he did hit her with a rock and that he hit

her with several other rocks until she died and then he covered her up" (Tr. 1626). She testified that Mr. Johnson said that "the voices said, we knew you could do it, you did it, you did it," and that they became congratulatory (Tr. 1627). She testified that Mr. Johnson said that "it was not until he saw her dead that he realized what he had done was wrong" (Tr. 1627). She testified that when the voices switched from a command tone to a congratulatory tone that Mr. Johnson "was able to recover himself" and see that "a very terrible thing happened, that he had killed this little girl and it was wrong" (Tr. 1627). She testified that Mr. Johnson said he was "very upset, that he was very frightened and that he was very sorry for what he had done" (Tr. 1627). Mr. Johnson told Dr. Delaney that he cried (Tr. 1627). She testified that Mr. Johnson described how he had covered the body and attempted to wash the blood off himself (Tr. 1628). She testified that Mr. Johnson said that he had talked to the police and initially denied knowing where the victim was (Tr. 1628). She testified that Mr. Johnson said that he told the police that he was hearing voices, but that the police told him that he was not hearing voices (Tr. 1628). Dr. Delaney testified that a person having a psychotic episode can appear to "engage in behavior that appears purposeful or mindful" (Tr. 1629). She testified that in her opinion Mr. Johnson "was not coolly reflecting on what he was about to do" (Tr. 1630). She opined that "his severe mental disorder prevents him from engaging in cool reflection," and she explained

how some of his actions revealed a lack of planning or intent to hide his crime (Tr. 1630-1631). She stated, "The psychological and psychiatric lack of cool reflection is [Mr. Johnson's] entire life history, which is a condition of severe mental illness, which has clouded his capacity to engage in rational decision making throughout his entire life" (Tr. 1630-1631). She acknowledged that Mr. Johnson has a long history of substance abuse, and she testified that substance abuse "can cause people to have hallucinations or trigger a person to have hallucinations if they are otherwise disposed to mental illness" (Tr. 1632). She found it significant that Mr. Johnson had continued to report hallucinations in prison, because that "confirm[ed] the underlying psychosis that [Mr. Johnson's] symptoms of psychosis comes from inside [Mr. Johnson]" (Tr. 1633). In other words, she said, "They can be worsened sometimes by the use of drugs, but they don't come from the use of drugs. These symptoms come from his underlying mental illness" (Tr. 1633). She reiterated that Mr. Johnson's insight and judgment are very impaired and always have been (Tr. 1633). She testified that, in her opinion, Mr. Johnson suffered from schizo-affective disorder (Tr. 1634). She also diagnosed personality disorder with some features of antisocial personality and some features of borderline personality disorders (Tr. 1634). She testified that, at the time of the offense, Mr. Johnson "was under the influence of extreme mental or emotional disturbance" (Tr. 1635-1636). She further testified that Mr. Johnson's

capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired (Tr. 1636). She reiterated her opinion that Mr. Johnson did not have "the capacity or ability to coolly reflect on his killing of" the victim (Tr. 1636). She stated that she believed Mr. Johnson was responsible for the murder, but that he lacked mental capacity due to his mental illness (Tr. 1636-1637).

Dr. Zafar Rehmani, a psychiatrist, testified that he evaluated Mr. Johnson and provided treatment in jail for his schizophrenia since 2003 (Tr. 1754). He testified that Mr. Johnson has a history of self-injurious behavior, and that he recalled one instance of such behavior when Mr. Johnson banged his head against a door (Tr. 1759-1760). He testified that Mr. Johnson had been compliant with his medications, but that Mr. Johnson still reported having auditory hallucinations at the jail (Tr. 1760-1761).

Dr. Karen Cotton-Williger, a psychologist, testified that she evaluated Mr. Johnson in 2001 and 2002 (Tr. 1766-1767). She testified that Mr. Johnson had only a ninth-grade education, and that he had a history of mental illness and substance abuse (Tr. 1767). She testified that she assessed Mr. Johnson on July 29, 2002, a few days after the murder, and determined that he needed to stay in the psychiatric infirmary (Tr. 1769). She testified that Mr. Johnson denied any psychotic symptoms, but that in August 2001, Mr. Johnson had reported "a good number of psychotic symptoms" (Tr. 1771).

She stated that Mr. Johnson's "solicitous" manner and "smiling" countenance "seemed a bit inappropriate in light of the current circumstances" (Tr. 1771). She testified that Mr. Johnson said that he "wanted to be put to death by the State" (Tr. 1771). She stated that Mr. Johnson had said that what he had done was "very, very wrong," and that he "did not believe his mental illness had anything to do with the offense" (Tr. 1773). She said that Mr. Johnson admitted what he had done but said that he "did not know why he did it" (Tr. 1773). She testified that she questioned Mr. Johnson's reporting of his drug and alcohol abuse (Tr. 1776). She testified that while in jail (before trial), Mr. Johnson continued to report auditory hallucinations and trouble sleeping despite his medications (Tr. 1780).

Connie Kemp, Mr. Johnson's mother, was the final guilt-phase witness for the defense (Tr. 1782). She testified that Mr. Johnson injured his head three times as a child and required stitches (Tr. 1784-1785). She testified that Mr. Johnson had learning disabilities, that he had to repeat kindergarten and first grade, and that he was placed in special education classes (Tr. 1786). She testified that Mr. Johnson was hospitalized for a suicide attempt when he was thirteen or fourteen years old, and that he was placed on anti-depressant medication (Tr. 1787). She testified that Mr. Johnson overdosed on his medication and had to be hospitalized again (Tr. 1788-1789). She testified that Mr. Johnson engaged in self-mutilation, and

that he started using drugs when he was a teenager (Tr. 1789-1791). She said he would "come home drunk or stoned" (Tr. 1791). She testified that Mr. Johnson started stealing things from her, and that she suspected he stole to support his drug habit (Tr. 1791-1792). She could not recall how many times Mr. Johnson had been hospitalized, but she recalled taking him to the hospital ten or eleven times (Tr. 1792-1793).

The testimony that Dr. Beaver could have offered would have provided very little new information for the jurors to consider. Dr. Beaver referred to Mr. Johnson's low intelligence, low IQ tests, problems in school, and learning disabilities (PCR Tr. 607-609). He also referred to Mr. Johnson's head injuries (PCR Tr. 614-615). He testified that Mr. Johnson's use of drugs exacerbated his problems and interfered with normal brain development (PCR Tr. 625). He testified that Mr. Johnson's psychiatric problems also made it more difficult to deal with cognitive difficulties (PCR Tr. 630). He concluded by opining that Mr. Johnson "does have an organic brain syndrome combined with significant psychiatric disorders and those are permanent conditions" (PCR Tr. 641). He opined that these conditions "would affect his ability to think, to problem solve, to act rationally, to deal with stress, [and] to make appropriate decisions" (PCR Tr. 641).

Significantly, Dr. Beaver did not opine that Mr. Johnson's conditions rendered him incapable of deliberation. In other words, even if the jury had

believed everything Dr. Beaver said, the jury still could have concluded that Mr. Johnson knowingly killed the victim after deliberation. And, as such, there is no reasonable probability that Dr. Beaver's testimony would have had any effect on the outcome of the guilt phase, especially in light of the state's overwhelming evidence of guilt, and in light of similar defense evidence that failed to produce either an acquittal or a conviction on the lesser offense of murder in the second degree.

Indeed, there is little reason to believe that Dr. Beaver's testimony would have had any effect, because, as outlined above, evidence of the same tenor was presented at trial by the defense. For instance, Connie Kemp, Mr. Johnson's mother, testified that Mr. Johnson had injured his head three times as a child and required stitches (Tr. 1784-1785). Ms. Kemp also testified that Mr. Johnson had learning disabilities, that he had to repeat kindergarten and first grade, and that he was placed in special education classes (Tr. 1786). She also referred to Mr. Johnson's psychiatric problems and drug use (Tr. 1787-1793). Dr. Rabun also referred to Mr. Johnson's learning disabilities and special education classes (Tr. 1458-1459). Dr. Delaney referred to Mr. Johnson's low IQ, learning disabilities, terrible failures in school, and "significantly subaverage intellectual functioning" (Tr. 1599-1601, 1605, 1618-1619). Dr. Delaney testified that Mr. Johnson's insight and judgment have never "risen to a normal level" (PCR Tr. 1608). Moreover,

Dr. Delaney opined that Mr. Johnson "was not coolly reflecting on what he was about to do" (Tr. 1630). She opined that "his severe mental disorder prevents him from engaging in cool reflection," and she explained how some of his actions revealed a lack of planning or intent to hide his crime (Tr. 1630-1631). She testified: "The psychological and psychiatric lack of cool reflection is [Mr. Johnson's] entire life history, which is a condition of severe mental illness, which has clouded his capacity to engage in rational decision making throughout his entire life" (Tr. 1630-1631). She also acknowledged that Mr. Johnson's condition "can be worsened sometimes by the use of drugs" (Tr. 1633). She testified that Mr. Johnson was "under the influence of extreme mental or emotional disturbance," that his capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired, and that he did not have "the capacity or ability to coolly reflect on his killing of" the victim (Tr. 1635-1636).[6]

[6] Mr. Johnson observes that Dr. Delaney's testimony was subject to attack on cross-examination, and that the prosecutor tried to show how she had "cooked" her report (App.Br. 38). But Dr. Beaver's testimony was also subject to various attacks on cross-examination, and, notably, on cross-examination, Dr. Beaver agreed that Mr. Johnson acted purposely when he concealed the victim's body, when he washed the victim's blood off, and when he lied to the

In short, Dr. Beaver's testimony was legally inferior to Dr. Delaney's testimony as it did not provide a viable defense. Moreover, except for identifying a different possible cause for Mr. Johnson's intellectual deficits (organic brain syndrome), Dr. Beaver's testimony was essentially cumulative to the testimony that the defense presented at trial. "Counsel is not ineffective for not presenting cumulative evidence." *Deck v. State*, --- S.W.3d ---, 2012 WL 2754211, *9 (Mo. banc 2012) (citing *Skillicorn v. State*, 22 S.W.3d 678, 683 (Mo. banc 2000)).

2. Penalty phase

Dr. Beaver's testimony also would not have produced a reasonable probability of different result in the penalty phase. "When a defendant challenges a death sentence . . ., the question is whether there is a reasonable probability that, absent the errors [of counsel], the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

In Mr. Johnson's case, the evidence in aggravation was very strong. The offenses were heinous, the evidence of guilt was overwhelming, and the jury found multiple aggravating circumstances. The jury did not find that the

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police (PCR Tr. 715).

evidence in mitigation outweighed the evidence in aggravation, and the jury ultimately concluded that a death sentence was warranted.

There is no reasonable probability that Dr. Beaver's testimony about organic brain syndrome and the effect it had on Mr. Johnson's "ability to think, to problem solve, to act rationally, to deal with stress, [and] to make appropriate decisions" would have affected the outcome of the penalty phase. The jury had already heard evidence of Mr. Johnson's intellectual deficits and psychiatric problems, and merely attributing his intellectual deficits to a different mental disease or defect would have had little or no effect.

Additionally, the defense presented substantial mitigating evidence showing Mr. Johnson's stunted social and mental development. In addition to the evidence presented during the guilt phase, trial counsel presented the testimony of seventeen witnesses in the penalty phase. These witnesses included family members, educators, a social worker, and an expert in human development.

Mr. Johnson's sister, Katie Johnson, testified that Mr. Johnson was "teased a lot growing up," and that "[o]ther kids made fun of him the way he looked, his learning disability"(Tr. 2034). She testified that Mr. Johnson would "say people were there that weren't there" (Tr. 2036). She testified that she was aware of sexual abuse he suffered as a child (Tr. 2036). She testified that she was present when Mr. Johnson was sexually abused as four-year-old

child—that someone in the neighborhood took Mr. Johnson into a shed and "made him to do things" (Tr. 2036). She testified that Mr. Johnson was in mental hospitals several times, and that he sometimes did not take his medications because he did not like the side effects (Tr. 2037-2038). She testified that she saw "the outcome" after another neighbor molested Mr. Johnson (Tr. 2039-2040). On cross-examination, she testified that she and others, including Mr. Johnson, did "a lot of illegal drugs" (Tr. 2041-2042).

Wanda Draper, Ph.D., a specialist in developmental epistemology, testified that she had studied Mr. Johnson's life (Tr. 2045-2046). She had interviewed Mr. Johnson and a number of family members, and she had reviewed about 2000 pages of records (Tr. 2047). Her investigation revealed that Mr. Johnson was a neglected infant; that he did not have a stable home life; that he experienced traumatic events; that he was physically, verbally, and sexually abused; that he struggled in school; that he abused alcohol at a young age; that he had learning disabilities; that he abused illegal drugs; that he made suicide attempts; that he committed crimes; that he was diagnosed with various mental illnesses; that he was sexually assaulted in prison; and that he still exhibited various psychological problems in prison (Tr. 2077, 2079-2081, 2084-2088, 2092-2094, 2096-2106). She testified that throughout Mr. Johnson's life he did not develop normally, and that she saw very little growth and maturation (Tr. 2083, 2085, 2089, 2092, 2099, 2101-

2102, 2108). She testified that Mr. Johnson did "not develop the components of his life that would help him to mitigate against inappropriate behavior, such as the development of empathy for others" (Tr. 2108). She stated that "he does not have the internal strengths to make good choices and decision that would prevent destructive and aggressive behaviors toward others and towards himself" (Tr. 2108-2109). She concluded: "He does not have the sense of reality that would make it possible for him to see his own development and help to promote that development by his daily living" (Tr. 2109).

Shirley McCulloch, a librarian and kindergarten teacher at Mr. Johnson's elementary school, testified that she had been part of Mr. Johnson's Individualized Education Plan (IEP) team (Tr. 2063-2064). She recalled that Mr. Johnson was "a very sweet little boy" who loved storytelling and the library (Tr. 2065-2066). She testified that academically, Mr. Johnson was "limited" and "challenged," and that he "didn't seem to interact as much with the students" (Tr. 2066).

Christopher Reeves, an assistant principal at Mr. Johnson's middle school, testified that Mr. Johnson was a learning disabled student, and that he was involved in disciplining some students who had made fun of Mr. Johnson (Tr. 2148). Linda White, a special education teacher at Northwest School District, testified that Mr. Johnson was one of her eighth grade special education students, and that he was "one of the quiet kids" (Tr. 2152-2153).

Karen Gilbert, a school counselor at Mr. Johnson's middle school testified that Mr. Johnson was admitted at a hospital after he had threatened suicide (Tr. 2158-2159). She testified that Mr. Johnson told her he did not commit suicide because "he was afraid he'd go to hell and he didn't want to go to hell" (Tr. 2159-2160).

Susan Betts, Mr. Johnson's seventh grade teacher, testified that Mr. Johnson was learning disabled (Tr. 2164). She testified that a group of poorly-behaved students called Mr. Johnson names, including "pee wee" (Tr. 2165). She said that the other students said he was "stupid, dumb, evil," and that he was "a bad one" who was "going to kill somebody because he's so evil and so bad" (Tr. 2165). She testified that the behavior of the students was "too stressful" for her, and that she stopped teaching (Tr. 2166). She opined that "it was probably too stressful" for Mr. Johnson (Tr. 2166).

Mr. Johnson's step-father, Greg Kemp, testified that Mr. Johnson spent time in mental hospitals, that he walked away from a job one day, that "he was just all messed up going from hospital to hospital," and that he lived a transient lifestyle (Tr. 274, 2176). On cross-examination, he said that, on one occasion, he thought Mr. Johnson was unable to work because he had taken some drugs (Tr. 2179-2180).

Mr. Johnson's grandmother, Lillie Owens, testified that Mr. Johnson was close with his grandfather, but that his grandfather died when he was

thirteen years old (Tr. 2183-2184). She testified that Mr. Johnson was present when his grandfather died at the house, and that, afterward, Mr. Johnson became "more distraught," and that he attempted suicide (Tr. 2185, 2192-2193). She testified that Mr. Johnson spent time in the mental hospital, and that his grandfather also spent time in a mental hospital (Tr. 2186). She testified that Mr. Johnson's behavior changed in July, 2002, and that he started leaving home (Tr. 2188). She testified that the last time she saw Mr. Johnson before the murder was on July 23, 2002 (Tr. 2189).

Mr. Johnson's paternal grandmother, Loetta Johnson, testified that Mr. Johnson helped care for his father who suffered from diabetes and eventually had amputations due to gangrene (Tr. 2198-2199). She testified that Mr. Johnson cut his wrists on one occasion, and that he was put into a drug treatment center (Tr. 2199-2200).

Mr. Johnson's aunt, Kay Rennick, testified that she observed behavior in Mr. Johnson's father that made her wonder whether he was "a little slow" (Tr. 2206). Mr. Johnson's brother, Robert Johnson, testified that Mr. Johnson was a "quiet child" that did not make friends easily (Tr. 2210). He testified that Mr. Johnson made many suicide attempts, and that Mr. Johnson went to the mental hospital many times (Tr. 2211). He testified that other kids called Mr. Johnson "a retard" and said "he's not right" (Tr. 2212). He testified that one of their mother's boyfriends, Mickey Miller, called Mr. Johnson "retard"

and "stupid," and that he once threw Mr. Johnson into a river or lake (Tr. 2212-2213). He testified that Mr. Miller also slapped and struck Mr. Johnson (Tr. 2214). He testified that their father was "mental" or "[v]ery slow" (Tr. 2217). Mr. Johnson's sister-in-law, Sarah Johnson, testified that Mr. Johnson was "mentally challenged" (Tr. 2224). She testified that Mr. Johnson had spent time in the hospital, and that he was different when he was on medication (Tr. 2224). She testified that when Mr. Johnson was not on his medication he was irrational, and she stated that three weeks before the murder "it was clear that he was not on his medication" (Tr. 2224). She said that Mr. Johnson told her "he had started to hear voices" (Tr. 2225).

Lisa Mabe testified about Mr. Johnson's sons and said that Mr. Johnson was a good father (Tr. 2230-2233). Dahley Dugbatey testified that Mr. Johnson was proud of his sons, and that he wanted to take responsibility for his son, Devon (Tr. 2240-2241). Another of Mr. Johnson's brothers, Eric Johnson, testified that he saved Mr. Johnson's life when he fell through the ice (Tr. 2245). He testified that he (Eric) went to "Special School" and did not finish school (Tr. 2246). Mr. Johnson's mother, Connie Kemp, testified that Mr. Johnson's father had "mental problems" (Tr. 2251). She testified that she took Mr. Johnson to the hospital nine or ten times because of suicide attempts (Tr. 2253). She testified that she sought a facility where Mr. Johnson could live, but that she was never able to place him full-time (Tr.

2254). She identified various photographs of Mr. Johnson at different times in his life, and she testified that she loved him (Tr. 2255-2265).

In light of the substantial mitigating evidence presented in both the guilt and penalty phases, there is no reasonable probability that Dr. Beaver's limited testimony would have caused the jury to assess a life sentence. The jury was well aware of Mr. Johnson's intellectual deficits, his psychiatric problems, and his difficult childhood. This point should be denied.

II.

The motion court did not clearly err in denying Mr. Johnson's claim that counsel were ineffective for failing to present the testimony of Mr. Johnson's sixth grade teacher, Pamela Strothkamp.

In his second point, Mr. Johnson asserts that counsel were ineffective for failing to present the testimony of his sixth grade teacher, Pamela Strohtkamp (App.Br. 40). He asserts that he was prejudiced because "Ms. Strothcamp's testimony would have supported counsel's defense that Johnny could not deliberate and would have supported a life sentence" (App.Br. 40).

A. The motion court's findings and conclusions

In denying this claim, the motion court made extensive findings and conclusions (PCR L.F. 631-634). The motion court found that counsels' efforts in investigating Mr. Johnson's childhood and education were sufficient and did not fall below an objective standard of reasonableness, especially after Mr. Johnson told them not to contact Ms. Strothkamp (PCR L.F. 631-632). The motion court observed that counsel had interviewed multiple teachers and people from Mr. Johnson's schools, that counsel called several of those people to testify at trial, that counsel had also called several family members at trial, and that counsel had called Dr. Wanda Draper, a human development expert, at trial (PCR L.F. 632).

The motion court found that Ms. Strothkamp—who knew Mr. Johnson

more than ten years before the murder—could not provide a viable defense for Mr. Johnson (PCR L.F. 633). The motion court stated that she was not qualified to provide a diagnosis of "auditory processing disorder" as she attempted to do at the evidentiary hearing (PCR L.F. 633). The motion court also found Ms. Strothkamp to be not credible, concluding that her allegedly clear memories of Mr. Johnson were not likely after eighteen years (PCR L.F. 633). The motion court also observed that there was nothing to corroborate her claim that she made a hotline call on Mr. Johnson's behalf (PCR L.F. 633). Finally, the motion court concluded that her testimony was largely cumulative to the testimony of other witnesses (PCR L.F. 634). The motion court, thus, concluded that Mr. Johnson was not prejudiced (PCR L.F. 634). The motion court did not clearly err.

B. Counsel reasonably investigated Mr. Johnson's childhood and educational background

Before trial, Lisa McCulloch, a mitigation specialist who worked for the public defender's office, investigated Mr. Johnson's social history and provided memoranda to counsel about her findings (PCR Tr. 570; PCR L.F. 488). Ms. McCulloch tried to contact Ms. Strothkamp and left messages at two different numbers (PCR Tr. 570, 573). In her investigation, she attempted to contact sixty-six witnesses (PCR Tr. 575). She interviewed Linda White, an eighth grade teacher who testified at trial; Susan Betts, a

seventh grade teacher who testified; Shirley McCulloch, a kindergarten teacher who testified; Christopher Reeves, a principal who testified; Karen Gilbert, a school counselor who testified; Jim Strube, a minister; numerous relatives; Jingjia Hu, a seventh and eighth grade special education teacher; David Staat, an eighth grade special education teacher; Mike Murphy, a classmate from sixth, seventh, and eighth grades; Barbara Johnson, a first grade teacher; and Laura Knies, a first grade teacher (PCR Tr. 575-577).

Ms. McCulloch testified that she spoke to Mr. Johnson, and that he instructed her not to contact Ms. Strothkamp (Tr. 573). She said she made no further attempts to contact Ms. Strothkamp (Tr. 573).

One of Mr. Johnson's attorneys testified that she thought they had presented sufficient information from people at Mr. Johnson's schools, even though there were others that they could have called (PCR L.F. 463). Mr. Johnson's other attorney confirmed that they had called education witnesses and family members in the penalty phase (PCR L.F. 526). She testified that, in selecting witnesses, an attorney must balance various concerns, including the possibility that redundant witnesses will cause the jury to "get sick and tired of hearing about it and dismiss it, not pay any attention to it at all" (PCR L.F. 527).

Ultimately, in the guilt phase, counsel called several witnesses, including Dr. John Rabun, Dahley Dugbatey, Lisa Mabe, Patricia Friese, Dr.

Delaney Dean, Dr. Zafar Rehmani, Dr. Karen Cotton-Williger, and Connie Kemp (Tr. 1446, 1518, 1543, 1560, 1575, 1752, 1764, 1782). These witnesses provided expert and lay testimony in support of a diminished capacity defense. In the penalty phase, counsel presented the testimony of seventeen witnesses who provided additional evidence about Mr. Johnson's personal and family history, including evidence regarding his own and other family members' mental illnesses (Tr. 2033-2265).

Based on the foregoing, counsel's efforts were reasonable, and it cannot be said that they failed to discover reasonably available evidence. It is true that counsel did not talk to Ms. Strothkamp, but their extensive investigation into Mr. Johnson's history, and their extensive consultations with multiple mental health experts, uncovered evidence of the same sort Ms. Strothkamp allegedly would have provided. And, as outlined above in Point I, counsel presented a comprehensive picture of Mr. Johnson's mental deficits, difficult childhood, psychiatric problems, and developmental deficits.

As such, Mr. Johnson's reliance on cases like *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Hutchison v. State*, 150 S.W.3d 292 (Mo. banc 2004), is misplaced. In each of those cases, counsel was entirely or nearly entirely derelict in investigating and discovering certain types of information. *See McLaughlin*, 2012 WL 2861374 at *21 (noting that *Williams* and *Hutchison*

"involved a complete failure by trial counsel to introduce important mitigating evidence.").

In *Williams v. Taylor*, for example, the defense did not begin preparing for penalty phase until a week before trial. 529 U.S. at 395. The attorneys failed to conduct an investigation that would have uncovered the defendant's "nightmarish childhood," including the fact that the defendant's parents had been imprisoned for the criminal neglect of the defendant and his siblings, that the defendant had been severely and repeatedly beaten by his father, that the defendant had been committed to the custody of social services for two years, that the defendant had been placed in an abusive foster home, that the defendant was "borderline mentally retarded" and did not advance beyond sixth grade, and that appellant had aided the police in breaking up a drug ring in prison. *Id*. at 395-396.

Moreover, at trial, the only mitigating argument that was advanced by counsel was that the defendant "turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that." *Id*. at 398. There were also a few other bits of purportedly mitigating evidence presented in *Williams*, including evidence from the defendant's mother, two neighbors, and a psychiatrist, but this evidence was extremely limited. The defendant's mother and two neighbors (one of which was pulled from the court audience

without ever being interviewed beforehand) testified that the defendant was a "nice boy" and not violent. *Id.* at 369. The "psychiatric" evidence consisted of a tape-recorded excerpt of a psychiatrist relating how the defendant had told him that "in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone." *Id.* These poor efforts stand in stark contrast to counsel's extensive efforts in Mr. Johnson's case.

In *Wiggins v. Smith*, similarly, counsel failed to engage in a thorough investigation. Counsel's investigation was limited to three sources: a psychologist who tested the defendant, but who provided no background history; a PSI report; and records kept by the Baltimore City Department of Social Services. 539 U.S. at 523-524. Counsel did not expand their investigation based on information seen in the reports, and, at trial, it was apparent that counsel had not prepared adequately for penalty phase. *Id.* at 524-527 ("counsel put on a halfhearted mitigation case, taking precisely the type of ' "shotgun" ' approach the Maryland Court of Appeals concluded counsel sought to avoid."). Mr. Johnson's attorneys, by contrast, conducted an extensive investigation, and they presented a cohesive and thorough case in both the guilty and penalty phases.

In *Rompilla v. Beard*, while counsel interviewed the defendant, some of his family members, and three mental health experts, "None of the[se] sources proved particularly helpful," in producing any mitigation evidence.

545 U.S. at 381. The defendant was uninterested in providing information, and he said that his childhood was "normal, save for quitting school in the ninth grade." *Id.* (citations omitted). The defendant's family members stated that they did not know Rompilla very well because Rompilla had spent most of his adult years and some of his childhood years in custody. *Id.* at 381-382. The experts' reports provided "nothing useful," and counsel "did not go to any other historical source that might have cast light on Rompilla's mental condition." *Id.* at 382. Having consulted these sources, counsel apparently went no further, for counsel did not review school records or any records of the defendant's adult or juvenile incarcerations.

But, more importantly, having failed to find any substantial mitigating evidence, counsel also failed to investigate the basis for the state's aggravating circumstance, namely, the defendant's prior conviction for rape and assault. *Id.* at 383. Counsel failed to even review the prior conviction until the day before the penalty phase. *Id.* at 383-385. And even after counsel reviewed the prior conviction, counsel failed to review the other material in the file. *Id.* at 385.

Under such circumstances, where the investigation had not turned up much mitigating evidence, the Court stated that "it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond

to a case for aggravation." *Id*. at 385. In other words, because counsel's efforts in finding mitigating evidence had not produced much fruit, counsel was obligated to attempt to undermine the state's evidence in aggravation. For, "[w]ithout making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim." *Id*. at 386.[7]

In *Hutchison*, the record showed that "Hutchison's counsel were overwhelmed, under-prepared and under-funded by the time they arrived at the penalty phase." 150 S.W.3d at 302. "They spent most of the available time preparing for the guilt phase of the trial, and as a result, the jury did not hear compelling evidence for mitigation in the penalty phase." *Id*. "Counsel knew that they needed to prepare for the penalty phase, but they left no time to prepare adequately and to present such evidence." *Id*. As a result, counsel completely failed to obtain and investigate "[r]eadily available records" that

[7] In discussing whether the defendant was prejudiced, the Court went on to point out that a review of the prior conviction file would have turned up abundant mitigating information that could have been investigated and prepared for trial. *Id*. at 390 ("it is uncontested they would have found a range of mitigation leads that no other source had opened.").

"documented Hutchison's troubled childhood, mental health problems, drug and alcohol addiction, history of sex abuse, attention deficit hyperactivity disorder, learning disabilities, memory problems and social and emotional problems." *Id.* at 304. Here, by contrast, counsel investigated all of these aspects of Mr. Johnson's life, and they presented a comprehensive picture of Mr. Johnson's life to the jury.

C. Mr. Johnson was not prejudiced in the guilty or penalty phase by the absence of Ms. Strothkamp's testimony

To prevail on a claim of ineffective assistance of counsel for failing to call a witness, the movant must prove that the witness's testimony would have produced a viable defense. *Hutchison v. State*, 150 S.W.3d at 304. In evaluating prejudice, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.

1. Guilt phase

The state presented a substantial quantum of evidence showing that Mr. Johnson knowingly killed the victim after deliberation. *See State v. Johnson*, 207 S.W.3d 24, 31-34 (Mo. banc 2006). The state's evidence showed that Mr. Johnson formed a design to rape and kill the victim, that he induced the victim to leave her home, that he removed the victim from her home and took her to a secluded area, that he induced her into a pit that she could not

get out of, that he showed her his penis and asked to see her vagina, that he pulled off her underwear, that he hit her in the head with a rock, that he repeatedly hit her when she tried to get away, that he smashed her head, that he ejaculated at some point during the incident, that he covered up the victim's body, that he attempted to wash the victim's blood off, that he made false statements about the victim's whereabouts, that he lied to the police, and that he eventually confessed to what he had done. *Id*.

At the evidentiary hearing, Ms. Strothkamp testified that Mr. Johnson (more than ten years before the murder) did not "fit in with the other students in many ways," and that he "lagged behind" the others (PCR Tr. 409). She testified that he was "very reticent," and that he attempted suicide when he was thirteen years old (PCR Tr. 413-414). She testified that he was "ridiculed" by the other students, and that they "made fun of him because he was dirty and because he smelled and because he appeared to be kind of in their minds, stupid" (PCR Tr. 417). She testified that he smelled of body odor and urine, and that his clothes were dirty (PCR Tr. 417). She said that sometimes he smelled "[d]ank, like somebody that had been involved in some form of sexual act and had not cleaned up after' (PCR Tr. 418). She testified that Mr. Johnson's mother did not take her concerns seriously (PCR Tr. 419).

She testified that she observed signs that led her to suspect neurological problems, and she testified that Mr. Johnson's full scale IQ was

82—in the average to low average range (PCR Tr. 427, 433). She testified that she observed "[a]n inability to attend to what was being spoken, a lack of understanding of language," and she said that she recommended a full evaluation "to determine if he was truly indeed language impaired, to see if he had auditory processing difficulties" (PCR Tr. 406). She testified that on one occasion she called child protective services because Mr. Johnson was dirty and had bruises on his neck (PCR Tr. 442-443, 458).

Ms. Strothkamp's testimony did not provide a defense to murder in the first degree. She did not (and could not) opine that Mr. Johnson suffered from a mental disease or defect that rendered him incapable of deliberating. She simply could not provide a defense of any sort for Mr. Johnson.

Mr. Johnson suggests that her testimony would have supported a defense because it "would have provided an important factual basis for Dr. Beaver's expert opinion that [Mr. Johnson] had an auditory processing disorder" (App.Br. 47). But there are two problems with this argument: first, Dr. Beaver did not testify at trial and, as discussed above in Point I, counsel was not ineffective for opting to rely on Dr. Dean's testimony for a defense; and second, even if Dr. Beaver had testified, his testimony about an auditory processing disorder did not provide a defense to murder in the first degree. As discussed above in Point I, Dr. Beaver's testimony did not provide a viable defense because even if the jury believed everything he said, rational jurors

could have concluded that Mr. Johnson knowingly killed the victim after deliberation—he did not opine that Mr. Johnson could not deliberation.

To the extent that Ms. Strothkamp's testimony could have supplied some additional factual support for Dr. Delaney's testimony, Mr. Johnson still was not prejudiced because there was already substantial evidence showing that Mr. Johnson suffered from cognitive deficits. Dr. Rabun testified about Mr. Johnson's extensive psychiatric history (*see* Tr. 1454), and he testified that Mr. Johnson had been diagnosed as "learning disabled" and placed in special education classes (Tr. 1458-1459). Dr. Delaney testified that Mr. Johnson had an extensive history of mental illness (Tr. 1586), and she testified that he had an estimated IQ of 85 (Tr. 1599). She testified that her neuropsychological testing revealed that Mr. Johnson's functioning in completing tasks was very poor, and that he had great difficulty coping with tasks (Tr. 1600). She testified that this was consistent with his long history of learning disability (Tr. 1600). She also observed that at one time, testing revealed an IQ of 70 (Tr. 1601). She testified that he was placed in special education classes and failed, and she concluded that Mr. Johnson had "significantly subaverage intellectual functioning" and "borderline to low average range" intelligence (Tr. 1618-1619). Dr. Cotton-Williger testified that Mr. Johnson had only a ninth-grade education (Tr. 1767). Mr. Johnson's mother, Connie Kemp, testified that Mr. Johnson had suffered multiple head

injuries, that he had learning disabilities, that he had to repeat kindergarten and first grade, and that he was placed in special education classes (Tr. 17-84-1786).

In short, to the extent that Ms. Strothkamp had information supporting the conclusion that Mr. Johnson suffered from some sort of mental deficit, it was cumulative to the other evidence presented by the defense, and there is no reasonable probability that it would have caused the jury to acquit Mr. Johnson or find him guilty of a lesser offense. "Counsel is not ineffective for not presenting cumulative evidence." *Deck v. State*, --- S.W.3d ---, 2012 WL 2754211, *9 (Mo. banc 2012) (citing *Skillicorn v. State*, 22 S.W.3d 678, 683 (Mo. banc 2000)).

2. Penalty phase

There is no reasonable probability that Ms. Strothkamp's testimony would have caused the jury to assess a life sentence. The evidence in aggravation was very strong. The offenses were heinous, the evidence of guilt was overwhelming, and the jury found multiple aggravating circumstances. The jury did not find that the evidence in mitigation outweighed the evidence in aggravation, and the jury ultimately concluded that a death sentence was warranted.

Mr. Johnson asserts that he was prejudiced because "not a single teacher or school official testified about the physical abuse he suffered"

(App.Br. 50). Of course, Ms. Strothkamp also did not testify about any physical abuse because she only saw bruises that were suggestive of physical abuse. In any event, even if her recollection is credited (and the motion court had its doubts about her credibility), and even if it is concluded that the bruises were inflicted by another person (Mr. Johnson had a history of self-mutilation and suicide), the jury was provided other, more specific evidence of the abuse Mr. Johnson suffered.

As outlined above in Point I, the defense presented extensive evidence of Mr. Johnson's history in the guilty and penalty phases. It will not all be repeated here, but, briefly, Dr. Rabun testified about Mr. Johnson's history of self-mutilation (Tr. 1459). Lisa Mabe testified about Mr. Johnson's bed wetting (Tr. 1550). Dr. Dean testified that Mr. Johnson had a history of being sexually abused by three different people (Tr. 1601). Dr. Dean also testified that one of Mr. Johnson's boyfriends tried to drown him and physically abused him (Tr. 1602).

In the penalty phase, Katie Johnson testified that Mr. Johnson was "teased a lot growing up" (Tr. 2034). She testified that she was present when Mr. Johnson was sexually abused by a neighbor, and that she was aware of another incident of sexual abuse (Tr. 2036-2038). Dr. Wanda Draper testified that her investigation revealed, *inter alia*, that Mr. Johnson was a neglected infant; that he did not have a stable home life; that he experienced traumatic

events; and that he was physically, verbally, and sexually abused (Tr. 2077, 2079-2081, 2084-2088, 2092-2094, 2096-2106). Christopher Reeves testified that Mr. Johnson was learning disabled, and that he was involved in disciplining some students who had made fun of Mr. Johnson (Tr. 2148). Susan Betts, a seventh grade teacher testified that other students called Mr. Johnson names (Tr. 2165). Robert Johnson testified that other kids called Mr. Johnson "a retard" (Tr. 2212). He testified that one of their mother's boyfriends, Mickey Miller, called Mr. Johnson "retard" and "stupid," and that he once threw Mr. Johnson into a river or lake (Tr. 2212-2213). He testified that Mr. Miller also slapped and struck Mr. Johnson (Tr. 2214).

In short, in light of the substantial mitigating evidence presented in both the guilt and penalty phases, including evidence of physical abuse, there is no reasonable probability that Ms. Strothkamp's cumulative testimony about perceived abuse and neglect would have caused the jury to assess a life sentence. The jury was well aware of Mr. Johnson's intellectual deficits, his psychiatric problems, and his difficult childhood. This point should be denied.

III.

The motion court did not clearly err in denying Mr. Johnson's claim that counsel was ineffective for failing to present evidence in an attempt to prove that Mr. Johnson's *Miranda* waiver was not valid or that his confession was not voluntary.

In his third point relied on, Mr. Johnson raises two related claims. His first claim is that counsel was ineffective for failing to present evidence at the suppression hearing to prove that his *Miranda* waiver was not valid (App.Br. 56). He asserts that "had counsel presented evidence of [his] mental condition and his inability to understand his rights [through the testimony of Dr. Brooke Kraushaar, Dr. Craig Beaver, and Dr. Pablo Stewart], the motion to suppress would likely have been granted" (App.Br. 56).

His second claim is that counsel should have presented evidence of his mental condition through those doctors at trial (App.Br. 56). He asserts that if counsel had done so, "the jury could have considered this evidence in determining whether his statements were voluntary and reliable and whether his waiver of his rights was knowing and intelligent" (App.Br. 56).

A. The motion court's findings and conclusions

In denying these two claims, the motion court made extensive findings and conclusions (PCR L.F. 646-652). The motion court first observed that in determining the voluntariness of a confession, the relevant question is

whether there was police coercion, not whether the defendant suffered from a mental condition (PCR L.F. 646). The motion court stated that a person can knowingly confess if he understands that the evidence may be used against him, and the motion court stated that there is no requirement that the defendant fully understand all potential consequences of a confession (PCR L.F. 647). The motion court concluded that there was no evidence that the police acted improperly in questioning Mr. Johnson (PCR L.F. 647).

The motion court next observed that Dr. Stewart did not specifically address the question of whether Mr. Johnson could have validly executed a *Miranda* waiver, but the motion court assumed, based on Dr. Stewart's belief that Mr. Johnson was "actively psychotic every day of his life including the entire day of the murder, that Dr. Stewart was "of the opinion that he did not believe the waiver of Miranda was knowingly and intelligently made" (PCR L.F. 647). The motion court did not find Dr. Stewart's testimony persuasive to that end (PCR L.F. 647). (The motion court had made additional findings related to Dr. Stewart in denying a different claim, and the court referenced those findings in addressing this point (PCR L.F. 647).) The motion court concluded: "The Court has previously listened to each statement as well as all of the testimony offered regarding Movant's mental condition on the day of the crime and finds Dr. Stewart's presumed opinion to be against the weight of the evidence and not credible" (PCR L.F. 647).

The motion court observed that Dr. Beaver also did not "specifically address this claim [regarding the validity of the *Miranda* waiver] in his testimony" (PCR L.F. 647). The motion court declined to "speculate as to what opinion, if any, he may have had regarding this specific issue" (PCR L.F. 647).

The motion court outlined Dr. Kraushaar's testimony and observed that she had concluded that Mr. Johnson "did not have the mental capacity to provide a valid waiver of his Miranda rights" (PCR L.F. 648). The motion court observed that various facts brought out on cross-examination undermined her credibility and the reliability of her testing (PCR L.F. 648). For example, she admitted that she told Mr. Johnson "prior to any testing that she was there to determine whether or not he understood his Miranda rights" (PCR LF. 48). She also admitted that her evaluation took place more than two and a half years after Mr. Johnson was found guilty and sentenced to death (PCR L.F. 648). She admitted that she did not conduct any "validity testing" during her evaluation (PCR L.F. 648).

With regard to the Grisso test that she used to evaluate Mr. Johnson's understanding of the *Miranda* warnings, the motion court observed that Dr. Kraushaar testified that she had never administered the test before giving it to Mr. Johnson (PCR LF. 648). She acknowledged that Mr. Johnson scored 6 out of 8 points on the first part of the Grisso test, and that he scored 11 out of

12 on the second part (PCR L.F. 648-649). She testified that on the final two tests, Mr. Johnson stated "he didn't know" on many answers, and she admitted that "there is no accurate way to tell if [Mr. Johnson] is lying or telling the truth when he indicates a lack of knowledge" (PCR L.F. 649).

Dr. Kraushaar also admitted that she was unaware of Mr. Johnson's previous criminal record and his exposure to *Miranda* warnings in the past (PCR L.F. 649). She did not know that Mr. Johnson had been given the *Miranda* warnings nine times previously and invoked his rights on three of those occasions (PCR L.F. 649). She admitted that Mr. Johnson "could" have understood his rights on the prior occasions when he invoked his rights (PCR L.F. 649). Dr. Kraushaar was also unaware of more than twenty-five other prior occasions when Mr. Johnson's probation officer had advised him of the *Miranda* warnings (PCR L.F. 649).

The motion court observed that trial counsel were aware of Mr. Johnson's prior criminal history, and that counsel had received copies of reports showing that Mr. Johnson had been given the *Miranda* warnings on at least nine prior occasions (PCR L.F. 649). The motion court found significant that counsel were aware of Mr. Johnson's history of oral and written confessions (PCR L.F. 649). Counsel testified that parts of Mr. Johnson's confession were useful for the defense, and one of Mr. Johnson's attorneys stated that Mr. Johnson never indicated he was threatened by the

police (PCR L.F. 649).

The motion court then concluded that "[i]n considering the evidence presented in the officers depositions, at the motion to suppress, during the trial and at the post-conviction evidentiary hearing, the evidence is compelling that [Mr. Johnson] understood his Miranda rights and the consequences of waiving those rights" (Tr. 649). The motion court then outlined various facts that supported its conclusion, including Mr. Johnson's conduct before, during, and after the waiver and interrogation; the fact that the officers advised Mr. Johnson of the warnings multiple times; the fact that the officers took care to ensure that Mr. Johnson understood the warnings; the content of Mr. Johnson's confessions; evidence of Mr. Johnson's age, previous criminal experience, education, background, and average to low average intelligence; and Mr. Johnson's competency evaluation before trial (PCR L.F. 649-650).

The motion court also found that the Grisso test administered by Dr. Kraushaar was "highly questionable" in light of various facts, including that Mr. Johnson was told the purpose of the test and could subjectively manipulate the test (PCR L.F. 651) The motion court also observed that Dr. Kraushaar was inexperienced in administering the test, and that the test was administered five years after the waiver (PCR L.F. 651). The motion court opined that it also could have been unfavorable for the jury to hear about the

extent of Mr. Johnson's criminal history in the guilt phase (PCR L.F. 651).

The motion court ultimately concluded that "[t]he evidence presented at the post-conviction hearing is insufficient and lacks credibility to have caused this Court to sustain a motion to suppress his statements to police" PCR L.F. 651-652). The motion court also concluded that Dr. Kraushaar's testimony could have been viewed by the jury as unfavorable (PCR L.F. 652). And, finally, the motion court concluded that there was "overwhelming evidence of the voluntariness of Movant's confessions" and, thus, that there was no reasonable probability that the outcome of trial would have been any different (PCR L.F. 652). The motion court did not clearly err.

B. Mr. Johnson failed to prove that counsel were ineffective for failing to present evidence attempting to prove Mr. Johnson's *Miranda* waiver was invalid

In his argument, Mr. Johnson has asserted a claim that was not included in his amended motion, namely, that trial counsel were ineffective for failing to attempt to prove that Mr. Johnson's *statements* to the police were involuntary and, thus, should have been suppressed on that basis by the trial court (App.Br. 65-70). He cites, for example, *Blackburn v. Alabama*, 361 U.S. 199 (1960), a case in which police officer's exploitation of a defendant's mental problems rendered a confession involuntary (App.Br. 65). Mr. Johnson also points out that he was interrogated over a period of

approximately sixteen hours, that he was isolated during his interrogation, that the police allegedly employed an implicit threat of "mob violence," that he was handcuffed to a chair at one point during the interrogation, and that the police exploited Mr. Johnson's mental illness and religiosity (App.Br. 66-68). He then asserts that if counsel had presented evidence of his mental illness and cognitive deficits "at the motion to suppress hearing, his confessions would have likely have been found involuntary" and suppressed by the trial court (App.Br. 70).

This new claim was not included in Mr. Johnson's amended motion. In claim 8(g), Mr. Johnson alleged that counsel was ineffective for failing to present the testimony of various experts to prove that he "was incompetent to waive his Miranda rights" (PCR L.F. 244). The amended motion alleged that testimony offered by Dr. Pablo Stewart (that Mr. Johnson was psychotic) and testimony offered by Dr. Craig Beaver (that Mr. Johnson suffered from organic brain syndrome) would have shown that it was "highly improbable that [Mr. Johnson] would have been able to competently waive his Miranda rights" (PCR L.F. 250). The motion further alleged that Dr. Robert Gordon and Dr. Brooke Kraushaar would have testified that they conducted testing and concluded that Mr. Johnson "did not have the capacity to 'intelligently' waive his Miranda rights at the time of his statement" (PCR L.F. 257).

Because the amended motion did not allege that counsel should have

presented the experts' testimony to convince the trial court to suppress Mr. Johnson's post-*Miranda* statements on the grounds that they were involuntary, Mr. Johnson's claim on appeal cannot be reviewed. "In actions under Rule 29.15, 'any allegations or issues that are not raised in the Rule 29.15 motion are waived on appeal.' " *McLaughlin v. State*, --- S.W.3d ---, 2012 WL 2861374, *7 (Mo. banc 2012) (quoting *Johnson v. State*, 333 S.W.3d 459, 471 (Mo. banc 2011) (citation omitted)). " 'Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal.' " *Id*. "Furthermore, there is no plain error review in appeals from post-conviction judgments for claims that were not presented in the post-conviction motion." *Id*. (citing *Hoskins v. State*, 329 S.W.3d 695, 696-697 (Mo. banc 2010)). Accordingly, Mr. Johnson's new claim cannot be addressed. *Id*.[8]

[8] On direct appeal, Mr. Johnson alleged that statements he made to Detective Newsham were involuntary; he alleged that "his statements were coerced by Detective Newsham's comments on eternal salvation and were made after he had been in police custody for about 16 hours." *State v. Johnson*, 207 S.W.3d 24, 45 (Mo. banc 2006). In support of his claim, he stated that he "failed to complete ninth grade and was in need of medication for his mental illness at the time the statements were made." *Id*. The Court found that Mr. Johnson's statements were voluntary. *Id*.

To the extent that Mr. Johnson argues the claim that he asserted in the amended motion, the motion court did not clearly err. "A trial court's ruling on a motion to suppress must be supported by substantial evidence." *State v. Johnson*, 354 S.W.3d 627, 631 (Mo. banc 2011). "The facts and reasonable inferences from such facts are considered favorably to the trial court's ruling, and contrary evidence and inferences are disregarded." *Id.* " 'Deference is given to the trial court's superior opportunity to determine the credibility of witnesses.' " *State v. Gaw*, 285 S.W.3d 318, 320 (Mo. banc 2009) (quoting *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998)).

Here, in reviewing the evidence presented to it, the motion court did not clearly err in concluding that the evidence presented at the evidentiary hearing would not have induced the court to find the *Miranda* waiver invalid. As the motion court observed, there was strong evidence showing that Mr. Johnson was advised of and understood the *Miranda* warnings.

For instance, the evidence showed that the police repeatedly advised Mr. Johnson of the *Miranda* warnings. At the suppression hearing, and similarly at trial, Detective Paul Neske testified that he picked up Mr. Johnson (after he had been arrested), that he advised Mr. Johnson in the car on the way to the police station of his right against self-incrimination and his right to counsel, and that appellant said he understood (Tr. 127-131, 1239, 1242). At the police station, Detective Neske again advised Mr. Johnson of

the *Miranda* warnings, and Mr. Johnson voluntarily executed a written waiver, saying that he understood his rights and wanted to make a statement (Tr. 132-134, 1242-1247). At that time, the warning form was on the table in front of Mr. Johnson, and after Detective Neske read each warning, Mr. Johnson wrote his initials next to the warning and stated that he understood (Tr. 133). Mr. Johnson then read the waiver portion of the form, stating that he had read the warnings and understood them (Tr. 133). Mr. Johnson further indicated that he wanted to make a statement, that he did not want an attorney, that he understood what he was doing, and that no threats or coercion had been used against him (Tr. 133-134).

Mr. Johnson and Detective Neske spoke on and off throughout the day, and Mr. Johnson showed an awareness of his perilous circumstances, as he went from initially denying any involvement in the crime to admitting that he had killed the victim after she "freaked out" when he exposed his penis to her (Tr. 135-147, 1248-1292). Detective Neske advised Mr. Johnson of his rights at least one other time during these conversations, and Mr. Johnson again said he understood and voluntarily waived his rights (Tr. 142, 1289). At no time did Mr. Johnson indicate that he did not understand, and he never indicated that he was in distress or unwilling to talk (Tr. 165-166).

Other evidence also showed that Mr. Johnson was in a rational state of mind and was capable of understanding the warnings. For instance, later

that night, while awaiting booking at the jail with Detectives John Newsham and Craig Longworth, Mr. Johnson and Detective Newsham discussed reading and the works of Edgar Allen Poe (Tr. 184-185, 187, 1365-1367). As they discussed Poe's writings, Mr. Johnson said that he did not read "The Raven" because he did not like poetry, and he corrected Detective Newsham when he got the title of "The Fall of the House of Usher" wrong (Tr. 184-185, 1366-1367).

The conversation turned to other reading, and Mr. Johnson said that he liked to read the Bible (Tr. 185, 1367). Mr. Johnson said that he was concerned about his "eternal salvation" (Tr. 1367). He said he was "fine," and that he anticipated being executed for his crime, but he asked Detective Newsham, "[D]o you think I'll ever achieve eternal salvation[?]" (Tr. 185, 1367-1368). Detective Newsham said yes, and, because he thought Mr. Johnson was indicating that he had not been completely honest earlier, he stated that, to be forgiven, Mr. Johnson had to be completely truthful and not leave out any details (Tr. 186, 1368). Mr. Johnson then admitted that he had not been completely honest, and he said that he wanted to make a further statement (Tr. 186, 1368-1369). Mr. Johnson again waived his rights (again initialing the form) and made both verbal and audiotaped statements, admitting that he had intended to take the victim for the purpose of having sex with her and that he had planned to kill her after doing so (Tr. 171-179,

1375-1381; St.Exh. 90). Detective Newsham testified that appellant never showed any physical, emotional, or mental stress during the conversation, and never answered any question inappropriately (Tr. 180).

The motion court further concluded that Mr. Johnson's age, previous criminal experience, education, background, and average to low intelligence supported the conclusion that he understood the implications of waiving his rights and talking to the police (PCR L.F. 650). These were all valid factors to consider, and the record supports the motion court's conclusions. Defense counsel admitted, for example, that Mr. Johnson had previously been given the *Miranda* warnings on numerous occasions, and that Mr. Johnson had made statements in many of those cases (PCR L.F.429-430) (Other questions asked of Dr. Kraushaar revealed that Mr. Johnson had made statements in some cases while invoking his rights in others (*see* PCR Tr. 544-553).)

Mr. Johnson points out that the experts he presented at the evidentiary hearing offered testimony showing, or at least suggesting, that he was either incapable of understanding the *Miranda* warnings, or that his ability to understand them was limited (App.Br. 59-62). But, as outlined above, the motion court did not find their testimony persuasive or credible, and the motion court had legitimate reasons for questioning their credibility and concluding that they were not persuasive. This Court gives deference to the motion court's credibility determinations. *State v. Gaw*, 285 S.W.3d at 320.

Moreover, it was not clearly erroneous for the motion court to conclude that Mr. Johnson was capable of waiving his rights, and that he in fact validly waived his rights, when testing showed that Mr. Johnson was reading at a high school level in Spring of 2004, and a psychiatric evaluation revealed that Mr. Johnson was deemed competent to stand trial (Tr. 1814-1816). Dr. Rabun had also evaluated Mr. Johnson about seven months before the murders, and he had determined that Mr. Johnson was competent to proceed in other court proceedings, and that previous testing had shown his IQ to be 93 (Tr. 1471-1472, 1510-1512, 1884; Def.Ex. K; *see* Mov.Ex. 1, pp. 289-290). Indeed, Dr. Rabun observed that Mr. Johnson's "abstract reasoning was intact," that his "intellectual capacity was . . . in the average range, based upon his use of language and independent living skills," and that "Mr. Johnson answered all of the . . . competency questions without difficulty" (Def.Ex. K; Mov.Ex. 1, p. 289).

Mr. Johnson cites *State v. Flower*, 539 A.2d 1284 (N.J. Super.L. 1987), and *People v. Bernasco*, 562 N.W.2d 958 (Il. App. 1989),[9] as examples of cases where statements were suppressed when the defendant suffered from a mental illness (App.Br. 70-72). But Mr. Johnson's reliance on these cases is

[9] Mr. Johnson cites to 541 N.W.2d 774 (App.Br. 71), but the correct cite for the *Bernasco* case is 562 N.W.2d 958.

misplaced. The *Flower* case is not an appellate case reviewing a trial court's ruling; rather, it is the published decision of a trial-level court ordering the suppression of statements. *See Flower*, 539 A.2d at 210, 216-217. Thus, in that case, the trial court merely weighed the evidence against the state and concluded that the defendant there could not have understood the *Miranda* warnings. Similarly, in the *Bernasco* case, the trial court suppressed the defendant's statements. 562 N.W.2d at 350-351. Thus, in affirming the trial court's order, the reviewing court deferred to the trial court's factual findings and stated that it would "not disturb a trial court's determination on a motion to suppress evidence unless it is against the manifest weight of the evidence." Here, by contrast, the motion court *did not* credit the testimony of the experts at the post-conviction hearing, and it concluded that the credible evidence showed a valid *Miranda* waiver. The motion court did not clearly err.

It should also be noted that it does not appear that, at the time of trial, counsel would have been able to present the various opinions offered by Dr. Beaver, Dr. Stewart, and Dr. Kraushaar. As discussed above, in Point I, Dr. Beaver's opinion was based in part upon information that was not available at the time of trial because it was not yet extant (*see* PCR Tr. 603-604, 621, 628, 633, 660). Dr. Stewart likewise reached his conclusion that Mr. Johnson was psychotic every day based in part on records and information that were not yet extant at the time of trial (*see* PCR Tr. 186-189, 191-193, 194-195).

And, finally, Dr. Kraushaar's testimony suffered from two defects. First, at the time of the suppression hearing in December 2004, she was not yet a doctor of psychology. According to her CV and her testimony at the evidentiary hearing, she did not receive her doctorate until 2005 (PCR Tr. 492; Mov.Ex. 24). She also was not a licensed psychologist at the time of the suppression hearing (*see* PCR Tr. 492; Mov. Ex. 24).[10] Thus, she would not have been able to hold herself out to the trial judge with the same credentials. Second, she also relied on information that was not extant at the time of trial, including Dr. Beaver's neuropsychological testing (PCR Tr. 498). In fact, in conducting her tests, she conducted no "validity testing" because such testing had recently been conducted by Dr. Beaver (PCR Tr. 522, 533, 558-559). In other words, in gauging the reliability of her test results, she expressly relied on information that was not extant before trial.

As stated above in Point I, "[a] fair assessment of attorney performance

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[10] According to her CV, her license number is 2007003961 (Mov.Ex. 20). According to the Missouri Division of Professional Registration, that license number was issued to Brooke E. Kraushaar, on February 14, 2007. *See* https://renew.pr.mo.gov/licensee-search-detail.asp?passkey=2046899 (last accessed July 16, 2012). Thus, her license was apparently issued just a few months before she evaluated Mr. Johnson in June, 2007 (PCR Tr. 514).

requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Here, because Dr. Stewart, Dr. Beaver, and Dr. Kraushaar did not confine their conclusions to information that would have been available before trial, their conclusions were distorted by post-trial events. As a matter of law, trial counsel cannot be deemed ineffective for failing to present such testimony. In any event, the motion court cannot be faulted for finding such testimony not credible and unpersuasive on the issue of whether Mr. Johnson executed a valid *Miranda* waiver.

In sum, Mr. Johnson was not prejudiced by counsels' failing to present the testimony of Dr. Stewart, Dr. Beaver, and Ms. Kraushaar at the suppression hearing. The motion court did not credit their testimony, and it is not apparent that counsel could have secured similar testimony at the time of trial. There is, thus, no reasonable probability that their testimony would have led the trial court to suppress Mr. Johnson's statements on the basis of an invalid *Miranda* waiver.

C. Mr. Johnson failed to prove that counsel were ineffective in failing to present additional evidence to the jury to prove that Mr. Johnson's confession was involuntary

Mr. Johnson's other claim is that counsel should have presented

additional (or different) evidence of his mental state at trial so the jury could consider it in determining whether his statements to the police were voluntary (App.Br. 73). " 'The test for whether a confession is voluntary is whether the totality of the circumstances created a physical or psychological coercion sufficient to deprive the defendant of a free choice to admit, deny, or refuse to answer the examiner's questions.' " *State v. Faruqi*, 344 S.W.3d 193, 203 (Mo. banc 2011) (quoting *State v. Simmons*, 944 S.W.2d 165, 173 (Mo. banc 1997)). "In determining whether a defendant's confession resulted from improper coercion, this Court considers a range of factors relating to the defendant, including his or her 'age, experience, intelligence, gender, lack of education, infirmity, and unusual susceptibility to coercion.' " *Id.* "The Court also considers whether the defendant was advised of his rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of coercive techniques such as deprivation of food or sleep." *Id.*

To the extent that a mental health expert could cast light on some of these issues—*i.e.*, intelligence, lack of education, infirmity, or susceptibility to coercion—it must be recognized that trial counsel presented such testimony through the testimony of various witnesses in the guilt phase. The testimony of the defense witnesses is set forth in greater detail in Point I, but it bears repeating here that Dr. Rabun testified about Mr. Johnson's extensive psychiatric history, including his history of hallucinations and delusions; his

extensive drug use; his diagnosis as "learning disabled," and his placement in special education; and his "average" intelligence (Tr. 1454-1455, 1458-1459, 1471-1472).

Dahley Dugbatey testified that she was concerned that Mr. Johnson might not be taking his medication shortly before the murder, that she thought his "reality seemed to be off a little," and that his behavior was not normal (Tr. 1528-1530). Lisa Mabe offered lay testimony about Mr. Johnson's mental illness and his strange behavior immediately before the murder (Tr. 1546-1549, 1553). Patrica Friese also offered lay testimony suggesting that Mr. Johnson was experiencing hallucinations the day before the murder (Tr. 1561, 1563).

Dr. Delaney Dean also testified about Mr. Johnson's extensive history of mental illness (Tr. 1586). She testified that her testing revealed severe depressive disorder, psychosis, and delusional disorder (Tr. 1597). She estimated Mr. Johnson's IQ at 85 (Tr. 1599). Her neuropsychological test revealed that Mr. Johnson's functioning in completing tasks was very poor, and that he had great difficulty coping with the tasks (Tr. 1599-1600). She said her findings were consistent with Mr. Johnson's long history of learning disability (Tr. 1600). She noted that other doctors had indicated the possibility that Mr. Johnson was mentally retarded, and she noted that one IQ test in 2003 had produced an IQ of 70 (Tr. 1600-1601). She testified that

Mr. Johnson's records showed that he was in special education classes at various schools, and that he failed terribly in school (Tr. 1605, 1618). She concluded that Mr. Johnson had "significantly subaverage intellectual functioning" and that his intelligence was in the "borderline to low average range" (Tr. 1618-1619). She testified that Mr. Johnson's insight and judgment have never "risen to a normal level" (Tr. 1608).

Dr. Dean also testified that Mr. Johnson's "severe mental disorder prevents him from engaging in cool reflection," and she explained how some of his actions on the day of the murder revealed a lack of planning or intent to hide his crime (Tr. 1630-1631). She stated, "The psychological and psychiatric lack of cool reflection is [Mr. Johnson's] entire life history, which is a condition of severe mental illness, which has clouded his capacity to engage in rational decision making throughout his entire life" (Tr. 1630-1631). She reiterated that Mr. Johnson's insight and judgment are very impaired and always have been (Tr. 1633). She testified that, at the time of the offense, Mr. Johnson "was under the influence of extreme mental or emotional disturbance" (Tr. 1635-1636).

Dr. Karen Cotton-Williger, testified that Mr. Johnson had only a ninth-grade education, and that he had a history of mental illness and substance abuse (Tr. 1767). Connie Kemp, Mr. Johnson's mother, testified that Mr. Johnson injured his head three times as a child and required stitches (Tr.

1784-1785). She testified that Mr. Johnson had learning disabilities, that he had to repeat kindergarten and first grade, and that he was placed in special education classes (Tr. 1786).

Aside from using different terminology, or aside from diagnosing a different mental disease or defect, Dr. Stewart, Dr. Beaver, and Dr. Kraushaar would have added little additional, pertinent information for the jury to consider on the issue of voluntariness.[11] *See generally Deck v. State*, --- S.W.3d ---, 2012 WL 2754211, *9 (Mo. banc 2012) ("Counsel is not ineffective for not presenting cumulative evidence.") (citing *Skillicorn v. State*, 22 S.W.3d 678, 683 (Mo. banc 2000)). Additionally, their testimony—based as it was (at least in part) on information that was not extant at the time of trial—is of questionable value.

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[11] It should be noted, for example, that most of Dr. Kraushaar's testimony focused on whether Mr. Johnson's waiver was intelligent (PCR Tr. 512); she offered little testimony (aside from evidence of low intelligence) that would have suggested that Mr. Johnson's statements were involuntary. It should also be noted that she severely undermined her credibility when she opined that Mr. Johnson had not understood his waiver in this case, but she stated that she could offer no opinion about his previous waivers in other cases because, as she said, "I wasn't there, I can't say" (PCR Tr. 550, 552)

In short, the jury received a comprehensive view of Mr. Johnson's mental state at the time of his interrogations, and, as discussed above in Point I, it cannot be said that counsel's efforts in presenting such evidence fell below an objective standard of reasonableness. Counsel had obtained the aid of multiple experts, and counsel should not be faulted for failing to shop for other experts. *Johnson v. State*, 333 S.W.3d at 464. This point should be denied.

IV.

Mr. Johnson's claim regarding a lack of findings for claim 8(f) was waived, in that he failed to file a motion to amend as required by Rule 78.07(c); and, consequently, this Court should decline to review the motion court's judgment denying relief on claim 8(f). No remand is required or warranted. (Responds to Points IV and V of Mr. Johnson's brief.)

In his fourth point, Mr. Johnson asserts that the motion court clearly erred in failing to issue findings of fact and conclusions of law for claim 8(f) of the amended motion (App.Br. 80). He states that "the motion court has left [him] unable to challenge the motion court's ruling, and has left this Court nothing to review" (App.Br. 83). He asserts that, as a matter of due process he is entitled to findings and conclusions, and he, thus, argues that this lack of findings and conclusions entitles him to a remand (App.Br. 83).

In his fifth point, despite the lack of findings identified in Point IV, Mr. Johnson asserts that the motion court clearly erred in denying claim 8(f), wherein he asserted that counsel was ineffective for failing to rebut Dr. English's testimony that Mr. Johnson's "actions resulted from substance abuse, not his mental illness" (App.Br. 84) He asserts that he was prejudiced "because English's testimony went unrebutted and the jurors were instructed that Johnny's drug use would not relieve him of responsibility and that

mental disease or defect did not include antisocial conduct" (App.Br. 84). He asserts that "[b]ased on English's testimony, the jury found [him] guilty of first degree murder and imposed death, disregarding [his] mental illness and his inability to conform his conduct to the requirements of law" (App.Br. 84). He concludes that "[h]ad counsel rebutted his testimony, the jury likely would have found that [he] could not deliberate and likely would have imposed a life sentence" (App.Br. 84).

A. Any claim regarding the lack of findings on claim 8(f) was waived, and, as a consequence, this Court should decline to review the denial of claim 8(f) because there is nothing for this court to review

Mr. Johnson points out that pursuant to Rule 29.15(j), findings of fact and conclusions of law are required for all issues presented in a post-conviction motion (App.Br. 82). This is a well-settled proposition, and citing *Ervin v. State*, 80 S.W.3d 817, 825-827 (Mo. banc 2002), he points out that this Court remanded for more specific findings in a case where the motion court had failed to issue specific findings on a particular issue (App.Br. 82).

At the time *Ervin* was decided, however, Rule 78.07(b) provided that, "[i]n cases tried without a jury . . . neither a motion for a new trial nor a motion to amend the judgment or opinion is necessary to preserve any matter for appellate review." Rule 78.07(b) (2002). Thus, a lack of requisite findings

could be raised on appeal, even if the absence of those findings was not brought to the trial court's attention for correction.

In 2005, Rule 78.07(b) was amended to state that no motion was necessary to preserve issues for appeal, "[e]xcept as otherwise provided in Rule 78.07(c)." Rule 78.07(b) (2005). Rule 78.07(c) was amended to state that "[i]n all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." Rule 78.07(c) (2005). Rule 78.07(c) has remained unchanged since 2005.

Here, as Mr. Johnson implicitly acknowledges in his brief (App.Br. 81-82), he did not file a motion to amend the motion court's judgment. Accordingly, Mr. Johnson's challenge to the lack of findings and conclusions for claim 8(f) was not preserved and it should not be reviewed. *Gerlt v. State*, 339 S.W.3d 578, 584 (Mo.App. W.D. 2011) (declining to review the appellant's claim that the motion court failed to issue findings and concludions for a claim asserted in a Rule 24.035 motion); *accord generally Sneil, LLC v. Tybe Learning Center, Inc.*, --- S.W.3d ---, 2012 WL 2755877, *8 (Mo. banc 2012). "The purpose of Rule 78.07(c) is to ensure that complaints about the form and language of judgments are brought to the attention of the trial court where they can be easily corrected, alleviating needless appeals, reversals, and

rehearings." *Gerlt*, 339 S.W.3d at 584. This purpose is consistent with one of the aims of Missouri's post-conviction rules, namely, to prevent delay in the resolution of a movant's claims. *Id*. Accordingly, because Mr. Johnson failed to preserve his claim regarding the lack of findings, this Court should decline to review it, and the court should not remand for additional findings.[12] *See id*. at 584-585.

Mr. Johnson argues that he has a due process right to findings, and he implies that denying his claim would "arbitrarily" abrogate his state-created right to findings. But there was a procedure for Mr. Johnson to follow to obtain findings—a motion to amend as required by Rule 78.07(c)—and, thus, Mr. Johnson has not been arbitrarily denied his right to findings and conclusions. He had thirty days to review the motion court's judgment and seek an amendment; that was sufficient time to satisfy due process. Point IV should be denied.

Additionally, because the motion court did not issue findings of fact and

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[12] Mr. Johnson requests plain error review (App.Br. 82), but as the Court has made plain, "There is no 'plain error' review in appeals from denial of relief under Rule 24.035" or Rule 29.15. *See Hoskins v. State*, 329 S.W.3d 695, 696 (Mo. banc 2010) (noting that "Rule 29.15 has parallel provisions applicable to challenging the lawfulness of conviction and sentencing following trial.").

conclusions of law, there is nothing for this Court to review on claim 8(f). "Appellate review of the trial court's action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous." Rule 29.15(k). " 'The absence of findings or conclusions giving the basis for the trial court's action leaves an appellate court in the dark' and presents nothing of substance to review." *Merrick v. State*, 324 S.W.3d 469, 470 (Mo.App. S.D. 2010).[13] Accordingly, and because Mr. Johnson failed to take the requisite steps to obtain findings and conclusions, this Court should decline to review Mr. Johnson's Point V.

B. Mr. Johnson is not entitle to any relief on claim 8(f)

If the Court overlooks the lack of findings for claim 8(f), the Court should not remand the case because Mr. Johnson's claim failed to state facts warranting relief, and he failed to prove that counsel was ineffective in failing to call Dr. Stewart—either in addition to, or instead of, Dr. Dean.

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[13] Respondent acknowledges that in *Merrick*, the Court of Appeals remanded for findings. 324 S.W.3d at 470-471. But in light of the older cases cited therein, it appears that the court was simply following previous practice under the old rule. The court did not consider the newer provisions of Rule 78.07(c), and it does not appear that the state asserted lack of preservation.

As set forth above, Mr. Johnson asserts that counsel was ineffective for failing to "rebut" Dr. English's testimony that Mr. Johnson's "actions resulted from substance abuse, not his mental illness" (App.Br. 84). Citing to Dr. Stewart's testimony at the evidentiary hearing, Mr. Johnson points out that Dr. Stewart would have been able to testify about Mr. Johnson's psychiatric history (App.Br. 87-89). In particular, Mr. Johnson points out that counsel could have presented evidence that Mr. Johnson's hallucinations occurred even when he was confined and drug free (App.Br. 87). Mr. Johnson points out that counsel could have presented evidence that a person having command hallucinations does not have to act upon them immediately (App.Br. 89). He also points out that counsel could have presented testimony suggesting that Dr. English's diagnosis of personality disorder was not appropriate in light of Mr. Johnson's schizophrenia (App.Br. 89). But Mr. Johnson's various claims do not warrant any relief.

Mr. Johnson asserts this claim as if Dr. English had testified in the state's case-in-chief, and trial counsel had then failed to "rebut" his testimony. In fact, Dr. English was a *rebuttal* witness who was called by the state to rebut the testimony of Mr. Johnson's experts (Tr. 1797). In other words, Mr. Johnson's experts (and other witnesses) had already established the defense's case, and there was no need to call a surrebuttal witness to establish it again, or to suggest a different defense theory. In fact, it would

have been counterproductive for counsel to call a different mental health expert like Dr. Stewart, whose testimony did not accord with the testimony of Dr. Dean (who had already testified in the defense's case-in-chief). (In denying claim 8(d), the motion court concluded that counsel's performance in electing to proceed with Dr. Dean (instead of shopping for an expert like Dr. Stewart) was reasonable (PCR L.F. 6400-645).)

The record shows that before Dr. English took the stand, the defense experts had testified at length about Mr. Johnson's psychiatric history. All of their testimony will not be repeated, but it is worth noting that Dr. Rabun testified that a person cannot "get schizo-affective disorder from drug use or substance abuse alone" (Tr. 1460-1461). He testified that even when on medication, Mr. Johnson sometimes exhibited symptoms (Tr. 1468). On cross-examination, he testified that a person does not have to follow command hallucinations (Tr. 1492).[14] He testified on re-direct examination that his diagnosis of schizophrenia was not based only on drug use because Mr. Johnson exhibited symptoms when not on drugs (Tr. 1508).

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[14] Mr. Johnson cites to a couple of articles as evidentiary support for some claims he makes about command hallucinations (App.Br. 92-93). It does not appear that these articles were presented to the motion court, and they are not competent evidence; thus, any reference to them should be disregarded.

Dr. Dean testified that Mr. Johnson received various diagnoses over the years, but that a consistent two-fold theme pervaded the records, namely, that Mr. Johnson was abusing drugs, and that "independent of the drug abuse there w[ere] sever psychiatric symptoms" (Tr. 1604). She acknowledged that Mr. Johnson had a long history of substance abuse, and she testified that substance abuse "can cause people to have hallucinations or trigger a person to have hallucinations if they are otherwise disposed to mental illness" (Tr. 1632). She found it significant that Mr. Johnson had continued to report hallucinations in prison, because that "confirm[ed] the underlying psychosis that [Mr. Johnson's] symptoms of psychosis comes from inside [Mr. Johnson]" (Tr. 1633). In other words, she said, "They can be worsened sometimes by the use of drugs, but they don't come from the use of drugs. These symptoms come from his underlying mental illness" (Tr. 1633). She testified that, in her opinion, Mr. Johnson suffered from schizo-affective disorder (Tr. 1634). She also diagnosed personality disorder with some features of antisocial personality and some features of borderline personality disorders (Tr. 1634).

Dr. Rehmani testified that he had evaluated Mr. Johnson and had provided treatment in jail for his schizophrenia since 2003 (Tr. 1754). He testified that Mr. Johnson had been compliant with his medications, but that Mr. Johnson still reported having auditory hallucinations at the jail (Tr.

1760-1761). Dr. Karen Cotton-Williigor testified that she evaluated Mr. Johnson in 2001 and 2002 (Tr. 1766-1767). She testified that while in jail before trial, Mr. Johnson continued to report auditory hallucinations and trouble sleeping despite his medications (Tr. 1780).

In short, there was no need for counsel to "rebut" Dr. English's responsive testimony; counsel had presented a comprehensive defense of diminished capacity (along with an expert diagnosis of Mr. Johnson's mental illnesses), and the various points that Mr. Johnson suggests counsel should have made with an expert like Dr. Stewart had already been made or did not need to be made to adequately present that defense. This point should be denied.

CONCLUSION

The Court should affirm the denial of Mr. Johnson's Rule 29.15 motion.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 23,436 words, excluding the cover, this certification, the signature block, and the appendix, as counted by Microsoft Word; that the electronic copy of this brief was scanned for viruses and found to be virus free; and that notice of the filing of this brief, along with a copy of this brief, was sent through the Missouri eFiling System on 16th day of July, 2012, to:

ROBERT W. LUNDT
1010 Market Street, Suite 1100
St. Louis, MO 63101
Tel.: (314) 340-7662
Fax: (314) 340-7685

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent