No. SC90582

In the
Supreme Court of Missouri

ERNEST JOHNSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Boone County Circuit Court
Thirteenth Judicial Circuit
The Honorable Gene Hamilton, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a Boone County Circuit Court judgment overruling Appellant's (Defendant's) Rule 29.15 motion for post-conviction relief. Defendant filed this motion seeking to vacate three sentences of death imposed on him following a third penalty-phase retrial in this capital case. This Court previously affirmed Defendant's 1995 guilty verdicts on three counts of first-degree murder, but the three death sentences recommended by Defendant's first jury and imposed by the circuit court were set aside on direct appeal and the case was remanded for a new penalty-phase proceeding. *See State v. Johnson*, 968 S.W.2d 686 (Mo. banc 1998) (*Johnson I*) (Case No. SC78282). The three death sentences recommended by Defendant's second jury and imposed by the circuit court following the second penalty-phase proceeding were affirmed by this Court (Case No. SC81596). *See State v. Johnson*, 22 S.W.3d 183 (Mo. banc 2000), *cert. denied*, 531 U.S. 935 (2000) (*Johnson II*). Those death sentences were later set aside by this Court during Defendant's second post-conviction appeal and the case was remanded for a third penalty-phase proceeding (Case No. SC84502). *See Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003) (*Johnson III*). Three more death sentences were recommended by Defendant's third jury and imposed by the circuit court, and those sentences were affirmed by this Court on direct appeal (Case

No. SC87825). *See State v. Johnson*, 244 S.W.3d 144 (Mo. banc 2008), *cert. denied*, 129 S. Ct. 172 (2008) (*Johnson IV*). Because this case involves sentences of death, this Court has exclusive appellate jurisdiction over this appeal. MO. CONST. art. V, § 3

STATEMENT OF FACTS

In May 1994, Defendant was charged in Boone County Circuit Court with three counts of first-degree murder, armed criminal action, and first-degree robbery for a robbery and triple homicide occurring on February 12, 1994, at a Columbia, Missouri, convenience store. (3rd L.F. 1, 5).[1] A jury trial on the three murder charges was held in May 1995 in Boone County Circuit

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[1]The abbreviation "1st Tr." refers to the transcript from Defendant's original 1995 capital-murder trial—both guilt and penalty phases—and the abbreviation "1st PCR Tr." refers to the transcript of the combined post-conviction proceeding in that same case (Case No. SC78282). The abbreviations "3rd Tr." and "3rd L.F." refer to the transcript and legal file from Defendant's third penalty-phase proceeding held in May 2006 (Case No. SC87825). The abbreviations "3rd PCR Tr." and "3rd PCR L.F." refer to the transcript of the evidentiary hearing and legal file from Defendant's third post-conviction proceeding, which is the subject of Defendant's current appeal. The motion court granted Defendant's request to take judicial notice of the court records in all previous proceedings pertaining to this case. (3rd PCR Tr. 4). Also, on June 4, 2010, this Court sustained Defendant's motion to take judicial notice of the contents of this Court's files in all of Defendant's previous appeals.

Court before Judge Gene Hamilton. (3rd L.F. 24-26). The jury found Defendant guilty on all three counts and recommended three death sentences, which the circuit court imposed. (3rd L.F. 26-28).

As taken from this Court's 1998 opinion in *Johnson I* affirming Defendant's murder convictions, the evidence presented at trial showed that:

> At eleven o'clock, the morning of Saturday, February 12, 1994, Ernest Johnson bought a bottle of beer and a package of cigarettes at a Columbia, Missouri, convenience store of which he was a frequent customer. He went to the store a second time later that day, but did not make a purchase. On one of these trips, he questioned the cashier about who would be working the next shift. The cashier told Johnson that she would be relieved at 5:00 p.m. by Mabel Scruggs and that the store would close at 11:00 p.m. Johnson left and returned a short time later, but stayed only a few minutes before leaving again. Just before the shift change at 5:00 p.m., Johnson went to the store a fourth time, this time carrying a book bag over his shoulder. The cashier noticed Johnson staring at her while she deposited the money from her shift into the store safe. He did not buy anything.
>
> Johnson went to his girlfriend's house and purchased a twenty-dollar rock of crack cocaine from his girlfriend's eighteen-year-old son, Rodriguez Grant. Johnson left and then later returned to buy two more

rocks. He asked Rodriguez to lend him the .25 caliber pistol Johnson had given to him a couple of weeks earlier in exchange for crack cocaine. Rodriguez agreed, and he and Johnson test-fired the pistol in the back yard. Johnson returned the gun a while later, claiming that it did not work. Still later, Johnson retrieved the gun and left again, wearing layers of clothing, a mask over his face, and black tennis shoes. Since January of 1994, Johnson had confided to Rodriguez his plans to hold up the convenience store, locking all but one employee in the back room and having the remaining employee open the safe.

The next time Johnson returned to the house, from the direction of the convenience store, around 11:45 p.m., his face and clothes were spattered with blood. He came in through the back door and went downstairs to Rodriguez's room. Johnson gave the pistol back to Rodriguez. Johnson then cleaned his tennis shoes, took off his clothes, put the clothes into a trash bag, and told his girlfriend's sixteen-year-old son, Antwane Grant, to get rid of the bag. Johnson had a large amount of money sorted by denomination, and he and Rodriguez counted it. Johnson then hid the money in an air vent. Rodriguez went back upstairs and soon smelled something burning. On returning downstairs, he found Johnson burning paper.

At 1:12 a.m. the following morning, a deputy sheriff responded to a call to check on the convenience store for the possibility of a disturbance involving weapons. The store lights were still on. Through the windows, the officer saw that the cash register was open and the money vault was out and in the middle of the floor. He observed blood smears on the front door lock. City police officers arrived with keys. Upon entering, they discovered two dead bodies and a .25 caliber shell casing in the bathroom. Another body and another .25 caliber shell casing were found inside the walk-in cooler. The safe was empty.

All three victims were store employees: Mary Bratcher, age 46; Fred Jones, age 58; and Mabel Scruggs, age 57. Each victim died from head injuries that were consistent with a bloody hammer found at the scene. In addition, Mary Bratcher suffered at least ten stab wounds to her left hand consistent with a bloody flat-head screwdriver found in a field near the store, and Fred Jones suffered a nonfatal, facial gunshot wound. Police officers also found a bloody Phillips screwdriver, a pair of gloves, a pair of jeans, and a brown jacket in the field next to the store.

Hair on the gloves was consistent with that of Mabel Scruggs. Blood on the gloves was consistent with that of Mabel Scruggs or Fred Jones. Hair on the jacket was consistent with that of Fred Jones. Blood

on the jacket was consistent with a mixture of the blood of all three victims.

Later the same morning that the bodies were discovered, Johnson went to a shopping mall and made over $200 in cash purchases. After he returned to his girlfriend's house, police officers arrived asking for any information about the murders. Johnson initially refused to speak with the officers, but eventually agreed to accompany them to the police station. The interviewing officer did not believe Johnson's alibi and read him his Miranda rights. Johnson then gave conflicting versions of his alibi and became depressed whenever the convenience store was mentioned. He stated that he did not care if the officers shot him. At one point he said, "It took more than one man to do that job."

A search warrant for his girlfriend's house was obtained. The police found a bag containing $443; coin wrappers; partially burned checks, coupons, and a cash register receipt—all bearing the convenience store's name; a live .25 caliber bullet; and a black pair of tennis shoes with the same company logo as the bloody shoeprints found inside the store.

Johnson was placed under arrest and taken to the booking room. Upon seeing Rodriguez Grant in a holding cell, Johnson stated, "That boy didn't have anything to do with this. None of those boys did." When

asked how he knew this information, he responded, "I know they weren't there."

Antwane Grant led the police to the park where he had hidden, at Johnson's direction, a .25 caliber semi-automatic pistol, 17 live rounds of .25 caliber ammunition, a sweat shirt, a pair of sweat pants, a hooded jacket, two stocking caps, and two pairs of socks. Antwane identified the clothes—and the black tennis shoes found at the house—as those Johnson had been wearing the evening of the murders.

Blood found on the sweat shirt was consistent with that of Fred Jones. Blood on the hooded jacket was consistent with that of Fred Jones or Mabel Scruggs. Some hair on one of the stocking caps was consistent with Fred Jones's hair and some was consistent with Johnson's hair.

Johnson I, 968 S.W.2d at 689-90 (footnote omitted).

In *Johnson I*, this Court affirmed Defendant's murder convictions but remanded the case for a second penalty-phase proceeding because Defendant's counsel was ineffective in failing to secure the testimony of Dr. Sam Parwatikar, a psychiatrist who evaluated Defendant and would have testified that Defendant was suffering from cocaine intoxication delirium when he committed the murders. *Johnson I*, 968 S.W.2d at 697-702. (3rd L.F. 29). The jury in Defendant's second penalty-phase proceeding also

recommended three death sentences, which the circuit court imposed. (3rd L.F. 32-33). Those sentences were affirmed by this Court on direct appeal in *Johnson II*. (3rd L.F. 33). But in 2003, this Court issued an opinion in *Johnson III* reversing those death sentences and remanding the case for a third penalty-phase proceeding, (3rd L.F. 33), on the ground that after Defendant's second penalty-phase proceeding, the United States Supreme Court had declared that it was unconstitutional to execute a mentally-retarded murderer and that Defendant had previously articulated specific facts indicating mental deficiency. *Johnson III*, 102 S.W.3d at 541.

Defendant's third penalty-phase proceeding was held in Boone County Circuit Court—with a jury drawn from Pettis County—in May 2006 before Judge Gene Hamilton. (3rd L.F. 40, 42). The State presented evidence from police officers, the medical examiner, and other witnesses regarding the circumstances of the crime. (3rd Tr. 671-72, 682, 694, 706, 844, 854, 874, 895, 939-40, 947, 975; State's Ex. 79).[2] Family members of the three slain store

[2] The abbreviation "State's Ex." refers to exhibits admitted into evidence during Defendant's third penalty-phase proceeding and deposited with this Court under Case No. SC87825. The abbreviation "PCR Ex." refers to exhibits admitted into evidence during Defendant's most recent post-conviction proceeding that is the subject of this appeal.

workers also testified. (3rd Tr. 980, 985, 993). A recorded interview between Defendant and a psychiatrist, Dr. Heisler, who evaluated Defendant for mental retardation in 2004, was played for the jury. (3rd Tr. 953; State's Ex. 78A). The State also presented evidence of Defendant's previous convictions for burglary (1978 and 1981, and 1991), stealing (1978 and 1979), and second-degree robbery (1981). (3rd Tr. 972-73).

Defendant called his brother and sister to testify, as well as former teachers, probation officers, and an ex-girlfriend and ex-cellmate. (3rd Tr. 1015, 1085-86, 1100, 1115-16, 1176, 1195, 1218, 1239). He called a psychiatrist (Dr. Parwatikar) and a psychologist (Dr. Smith) to testify about the effects his alleged cocaine use may have had on him at the time of the murders. (3rd Tr. 1281, 1292, 1344, 1413). Dr. Smith also testified that recent testing showed that Defendant was mentally retarded, that Defendant's mother abused drugs and alcohol when she was pregnant with Defendant, and that Defendant's condition suggested fetal alcohol syndrome. (3rd Tr. 1381-82, 1386-87, 1394, 1408-09, 1428-29, 1479-80, 1492-93). Defendant also presented testimony from Dr. Denis Keyes, who tested Defendant and determined that he was mentally retarded. (3rd Tr. 1502, 1504, 1514-15).

The parties also entered into a stipulation before the jury that Defendant was the only person, other than the three victims, who was in the

store on the night of the murders; that the bloody shoeprints in the store came from Defendant's shoes; that shell casings and bullet found in the store were fired from the Raven handgun; gloves with a raised multi-dot pattern matched the pattern impression near the head of the hammer; and that blood found on the brown coat was consistent with the blood from each of the victims. (3rd L.F. 243; 3rd Tr. 828-29). Other evidence showed that a pair of gloves and a brown coat was found in a field near the store and that a Raven .25 caliber handgun was found in a bag in a park where police had been directed to recover evidence from the crime. (3rd Tr. 821-25, 839). During closing argument, Defendant's counsel said that Defendant would not deny what happened at the convenience store and that Defendant had admitted that he was responsible for it. (3rd Tr. 1778).

The jury found that Defendant had not proved by a preponderance of the evidence that he was mentally retarded. (3rd L.F. 256). It also found beyond a reasonable doubt the existence of six statutory aggravating circumstances:

> (1) each murder was committed while murdering another victim; (2) each murder was committed while murdering yet another victim; (3) each victim was murdered for the purpose of receiving money; (4) each murder involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman; (5) each murder was committed to prevent

defendant's arrest; and (6) each murder was committed while defendant was engaged in a robbery.

(3rd L.F. 314-16; 3rd Tr. 1815-23). Like the previous two juries that have heard Defendant's case, the jury in Defendant's third penalty-phase proceeding recommended three death sentences, which the trial court later imposed. (3rd L.F. 314-16, 326-30; 3rd Tr. 1828-29).

Defendant filed a Rule 29.15 pro se motion for post-conviction relief, and appointed counsel later filed an amended motion. (3rd PCR L.F. 5A-10, 52-176). An evidentiary hearing was held on Defendant's motion, and the motion court received testimony from three mental-health professionals specializing in Fetal Alcohol Spectrum Disorders, from Defendant's third penalty-phase attorneys Elizabeth Carlyle and Tim Cisar, from a law professor, and from several other witnesses relating to guilt-phase testimony. (3rd PCR Tr. 10-763). The motion court later entered findings and a judgment overruling Defendant's motion. (3rd PCR L.F. 336-77).

STANDARD OF REVIEW

This appeal relates solely to the motion court's judgment overruling Defendant's post-conviction motion. Appellate review of a judgment overruling a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law issued by the motion court are "clearly erroneous." *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *see also Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003); Rule 29.15(k). Appellate review in post-conviction cases is not de novo; rather, the findings of fact and conclusions of law are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). "Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made." *Morrow*, 21 S.W.3d at 822.

To establish ineffective assistance of counsel, the defendant must show both (1) that his counsel's performance failed to conform to the degree of skill, care, and diligence of a reasonably competent attorney under similar circumstances; and, (2) that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668 (1984); *Barnett*; 103 S.W.3d at 768. To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was so deficient as to be unreasonable under the circumstances and that counsel's errors were so serious as to deprive the

defendant of a fair trial, the result of which is unreliable. *See Strickland*, 466 U.S. at 687 88. "To demonstrate prejudice, a movant must show that, but for counsel's poor performance, there is a reasonable probability that the outcome of the court proceeding would have been different." *Id.*

In proving that counsel's performance did not conform to this standard, the defendant must rebut the strong presumption that counsel was competent and that any challenged action was part of counsel's sound trial strategy. *Barnett*, 103 S.W.3d at 769; *Sidebottom v. State*, 781 S.W.2d 791, 796 (Mo. banc 1989). The motion court is not required to address both components of the inquiry if the movant makes an insufficient showing on one. *Strickland*, 466 U.S. at 697.

Defendant's suggestion that the standard enunciated in *Strickland* should be supplemented in capital cases "by its two prongs," *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Lankford v. Idaho*, 500 U.S. 110 (1991), is curious considering that *Strickland* was, in fact, a capital case in which the defendant was sentenced to death and *Woodson*, which did not involve a post-conviction proceeding, was decided eight years before *Strickland* and considered only the constitutionality of a state statute mandating death as the only sentence for first-degree murder. The issue in *Lankford*, also not a post-conviction case, was whether the defendant and his counsel had constitutionally adequate notice that the judge might sentence

the defendant to death when the prosecutor had informed the court that the State would not be seeking the death penalty. *Lankford*, 500 U.S. at 111-12. Defendant points to nothing in United States Supreme Court jurisprudence following *Strickland* suggesting that the standard for post-conviction cases announced in that case should be supplemented in capital cases.

ARGUMENT

I (expert witnesses).

The motion court did not clearly err in overruling Defendant's post-conviction claim that trial counsel were ineffective for failing to decide after trial began to refuse to present the testimony of the first expert witness (Dr. Keyes) who determined that Defendant was mentally retarded.

In the long history of this case, Defendant has been tested and evaluated by numerous experts regarding his mental condition. Dr. Denis Keyes was the first expert witness who evaluated Defendant and determined that he was mentally retarded. In fact, Dr. Keyes's testing and evaluation convinced another defense expert, Dr. Robert Smith, to revise his previous opinion and now conclude that Defendant is mentally retarded. Despite this, Defendant now suggests that counsel should have jettisoned Dr. Keyes and abandoned his favorable testimony on the eve of, or even during, trial because Dr. Keyes on one occasion insisted that his schedule not be disrupted when trial counsel scheduled him to testify and because this Court issued an opinion in an unrelated post-conviction case finding that a circuit court judge had not clearly erred in deciding that Dr. Keyes's testimony in that case failed to show that the defendant was mentally retarded.

Defendant also suggests that instead of presenting Dr. Keyes's testimony, counsel should have presented the testimony of three witnesses specializing in Fetal Alcohol Spectrum Disorders (FASD), who may not have even been available to testify during Defendant's May 2006 retrial, despite the fact that the entire focus of Defendant's third penalty-phase proceeding was mental retardation, not FASD, which, even if Defendant suffered from it, would not have automatically precluded him from a death sentence. And, moreover, testimony that Defendant suffered from Fetal Alcohol Syndrome would have been cumulative to the extensive testimony on that subject that was presented during Defendant's penalty-phase retrial.

A. The record pertaining to Defendant's claim.

In his amended post-conviction motion, Defendant alleged that trial counsel was ineffective for failing to investigate and call "various credible expert witnesses who would have testified about [Defendant]'s mental condition, including the fact that he is mentally retarded." (3rd PCR L.F. 54). Defendant further alleged that counsel should have hired a psychologist, neuropsychologist, and medical doctor who had expertise in Fetal Alcohol Spectrum Disorder (FASD) to testify that Defendant suffers from this condition and that he is mildly mentally retarded. (3rd PCR L.F. 58-63). In another part of his motion, Defendant alleged that counsel was ineffective for

calling Dr. Denis Keyes, instead of another expert, to testify that Defendant was mentally retarded. (3rd PCR L.F. 95).

1. Pre-trial proceedings.

On January 24, 2005, less than two months before Defendant's third penalty-phase proceeding was set to begin on March 10, 2005, defense counsel moved for a continuance because the defense had just received a report from the State's expert, Dr. Heisler, and the defense expert, Dr. Keyes, had informed defense counsel that he would be unable to review Heisler's report and raw data before the trial was scheduled to begin. (3rd Tr. 36-43). Defense counsel argued that the State's expert had substantial time to review the defense expert's report and raw data, but that the defense did not get the report until just recently and that it was "physically not possible" for Dr. Keyes, who was from North Carolina, to analyze Heisler's report and raw data before trial. (3rd Tr. 41). According to the prosecutor, Dr. Heisler had been diagnosed with cancer which delayed completion of his report. (3rd Tr. 40). The trial court overruled the motion for continuance. (3rd Tr. 43).

On February 25, 2005, the defense moved for another continuance on several grounds, including that defense counsel's law partner's wife had cancer that had spread to her brain, that two defense witnesses (Dr. Smith and Mr. Brandenburg) were unavailable for trial, that another potential

defense witness (Dr. Bernard) could not be located, that the defense was pursuing a writ in the Missouri Supreme Court, and that a general lack of resources precluded counsel from quickly preparing for trial because he was private contract counsel. (3rd Tr. 44-59). Counsel also mentioned that since the written motion had been filed, Dr. Denis Keyes, who defense counsel described as "eccentric," had informed him that the only day he could testify during trial was on Friday and not on Thursday, which was the day defense counsel wanted him to testify. (3rd Tr. 59). Defense counsel, who told the court that he "flat refuse[d] to be dictated by" Dr. Keyes, reported to the court that Dr. Keyes said that if the defense forced him to come on any day but Friday, he would "get off" the case. (3rd Tr. 59). Dr. Keyes was unavailable on the day counsel wanted him because he was a professor and had classes to teach on that day. (3rd Tr. 59). Counsel told the court that a continuance until the "summer months" would resolve his problem with Dr. Keyes's appearance. (3rd Tr. 69).

After mentioning this additional reason for a continuance, defense counsel "begged" the court to grant one so counsel would have adequate time to prepare. (3rd Tr. 61). The court then asked counsel if the case were continued to May, what assurance would the court have that these potentially unavailable witnesses were going to show up. (3rd Tr. 66). Defense counsel made an obviously exaggerated response to insure that the

court would grant the continuance by stating that he would drive out of state to serve Dr. Keyes with a subpoena to make sure he would be there to testify if the case were continued. (3rd Tr. 66-67).

The court then took the motion under advisement and told counsel to fax to the court any "conflict dates" and stressed to defense counsel that the dates should include any conflicts that witnesses might have because the court would not want to discover later "that Dr. Keyes [was] going to be in Timbuktu." (3rd Tr. 70). Defense counsel said he understood the court's concern and that he would contact his witnesses and inform the court of any conflicts. (3rd Tr. 70). The court ultimately granted a continuance until July 28, 2005. (3rd L.F. 39). The case was later continued again, following a defense request for a competency evaluation of Defendant, until May 4, 2006. (3rd L.F. 40).

At some unknown point before Defendant's third penalty-phase proceeding, defense counsel Carlyle spoke with a St. Louis public defender about the findings of a St. Louis County Circuit Court judge in *Goodwin v. State* (a post-conviction proceeding in a capital case) that had been issued in July 2004. (3rd PCR Tr. 632-33). This attorney told Ms. Carlyle that Dr. Keyes was not prepared to testify when called as an expert witness in the *Goodwin* case. (3rd PCR Tr. 634).

Two days before trial began, on May 2, 2006, this Court issued its opinion in *Goodwin v. State*, 191 S.W.3d 20 (Mo. banc 2006), which was an appeal from a St. Louis County Circuit judgment overruling a capital defendant's Rule 29.15 motion for post-conviction relief. (3rd PCR Tr. 634-35). In that appeal, the defendant alleged that the motion court had clearly erred in finding that the defendant was not retarded. *Goodwin*, 191 S.W.3d at 26. Although this Court held that the defendant's claim was refuted by the record, it went on to consider the post-conviction testimony of Dr. Keyes, who had testified that the defendant was mentally retarded. *Id.* at 29. This Court simply found that the defendant had not shown that the motion court had clearly erred in finding that Dr. Keyes's testimony was insufficient to prove that the defendant was mentally retarded. *Id.* at 32. First, Dr. Keyes examined and diagnosed the defendant with mental retardation at the age of 34, but Missouri law required that mental retardation be manifested and documented by the age of 18. *Id.* Second, Dr. Keyes's opinions and conclusions were based on insufficient credible evidence because the Vineland interviews of the defendant, his family members, and friends resulted in responses that were exaggerated, which Dr. Keyes acknowledged.[3] *Id.*

[3] The motion court also found that the "entire source of materials for [Dr. Keyes's] testimony were litigation materials chosen and provided to him by

Finally, Dr. Keyes, who was neither a psychiatrist nor a psychologist, had not been shown to be a qualified expert in administering a verbally-based IQ test to a hearing-impaired person without a hearing aid. *Id.* at 33. This Court concluded that Dr. Keyes's testimony did not "demonstrate clear motion court error, especially when compared with the expert testimony regarding [the defendant's] intelligence presented at trial." *Id.*

Six days after the *Goodwin* opinion was handed down, on May 8, 2006, Defendant's attorneys moved for a continuance after jury selection on the ground that in *Goodwin* Dr. Keyes's testimony had not been found to be credible evidence of the defendant's mental retardation. (3rd L.F. 42, 245-48). After eliciting an assurance from the prosecutor that he would not cross-examine Dr. Keyes regarding the *Goodwin* opinion, which the court and the prosecutor believed was not proper impeachment, Ms. Carlyle informed the court that any concerns the defense had were satisfied. (3rd Tr. 640-42). In overruling the continuance motion, the court noted that what this Court said in *Goodwin* about Dr. Keyes's testimony "was based upon the facts that were

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[the defendant's] counsel," which resulted in Dr. Keyes's testimony being "biased toward the particular conclusion [the defendant]'s counsel desired to reach." *Id.*

elicited in the *Goodwin* case and not on the background that would be provided in this case." (3rd Tr. 642).

2. The trial testimony of Defendant's experts.

During Defendant's third penalty-phase proceeding, Dr. Keyes, who holds a Ph.D. in special education, testified that he gave Defendant the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III), and that Defendant received a full-scale score of 67, which included a verbal score of 69 and a performance score of 70. (3rd Tr. 1502, 1511, 1564, 1568, 1628-30). He testified that an IQ score below 75 raises concerns about mental retardation, but that a person can still be considered retarded even with a score over 75.[4] (3rd Tr. 1521, 1537-38).

Dr. Keyes also testified that Defendant had deficits in seven of the nine adaptive behaviors identified under Missouri's definition of mental

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[4] The DSM-IV states that significantly subaverage intellectual functioning is defined as an IQ of 70 or below and that, taking into account the five point measurement error for IQ tests, it is "possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41-42 (4th ed. text rev. 2000) (DSM-IV).

retardation: (1) communication; (2) home living; (3) social skills; (4) community use; (5) self-direction; (6) health and safety; and (7) leisure and work. (3rd Tr. 1621-23). He described Defendant's specific behaviors in explaining to the jury Defendant's deficiencies in each of these areas. (3rd Tr. 1607, 1613, 1617-22, 1660-66, 1707-08). Dr. Keyes tested Defendant's adaptive behaviors by administering "Vineland" to Defendant's brother and sister. (3rd Tr. 1611, 1614, 1616). Vineland uses a question-and-answer format to obtain anecdotes and specific stories that happened to the person in question before he or she was 18. (3rd Tr. 1614-15). The different skill sets or adaptive behaviors identified in Vineland are analyzed through a series of questions to people who knew the individual closely. (3rd Tr. 1615-16). Dr. Keyes also gave Defendant the Scales of Independent Behavior, which showed that Defendant thought more of his abilities than his family members did, which supported Dr. Keyes's opinion that Defendant operated under a "cloak of competence" to mask his mental retardation. (3rd Tr. 1611, 1737-39).

Dr. Keyes, who first evaluated Defendant after this case was remanded for a third penalty-phase proceeding, was the first expert who determined that Defendant was mentally retarded. (3rd Tr. 1671-72). Dr. Keyes explained the other experts mistakenly believed that Defendant was not mentally retarded because they did not recognize what he described as the "cloak of competence," by which a mentally-retarded individual attempts to

appear to be more intellectually capable than he actually is. (3rd Tr. 1624). He said that mentally retarded people try to conceal their limitations, and that psychologists simply do not understand that retarded people try to appear more capable than they are. (3rd Tr. 1523, 1525).

During his trial testimony, Dr. Keyes mistakenly testified that he had not viewed a recorded interview between Defendant and psychologist Dr. Gerald Heisler, which had been played for the jury without objection during the State's case-in-chief. (3rd Tr. 953-54, 1607-08). After a break was taken, Dr. Keyes testified that he had, in fact, viewed the recorded interview and apologized. (3rd Tr. 1627). Dr. Keyes also testified that he believed that Defendant read at between a second- and third-grade level, but after being given a moment to check his report, he immediately corrected himself and said that it was between a third- and fourth-grade level. (3rd Tr. 1610).

Dr. Keyes also testified that in assessing Defendant's adaptive abilities, he did not consider Defendant's prison behavior because that behavior would be "very different" than behavior outside of prison since prison is the "most structured environment on the planet." (3rd Tr. 1616-17). Consequently, "it would not be appropriate" to view prison behavior because the relevant behaviors are the ones he had when the crime was committed and before. (3rd Tr. 1617).

During cross-examination, Dr. Keyes explained that while he reviewed Defendant's prison behavior, he did not consider it "highly indicative of [Defendant's] actual behaviors" because of the highly-structured nature of prison. (3rd Tr. 165-56). He said that Defendant's behavior outside of prison was more accurate than those in a highly-structured environment. (3rd Tr. 1656-57). When specifically asked about Defendant holding a prison job, Dr. Keyes said that he did not disregard that information or ignore any data, but that he considered the environment in which the behavior occurred in making his assessment. (3rd Tr. 1657-58). When the prosecutor accused Dr. Keyes of telling the jury that he did not consider Defendant's prison behavior, Dr. Keyes corrected the prosecutor and apologized if that was the impression he had given. (3rd Tr. 1658-59). He then explained in detail the prison behaviors he considered and why those behaviors did not provide a sound basis for making overall conclusions regarding Defendant's adaptive behaviors. (3rd Tr. 1659-66).

During cross-examination, Dr. Keyes testified that an IQ score of 84 obtained by Dr. Cowan (since deceased) in 1995 was likely incorrect because it was inconsistent with the scores that he and Dr. Heisler had obtained.

(3rd Tr. 1670-71). Although he had Dr. Cowan's data, he said that he could not get a hold of a WAIS manual.[5] (3rd Tr. 1671).

When the prosecutor suggested to Dr. Keyes that Defendant's mother, Jean Ann Patton, was not mentally retarded, Dr. Keyes said that he did not know because he had not interviewed her. (3rd Tr. 1716-17). On redirect examination, Dr. Keyes testified that Defendant's half-brother Danny was mentally retarded and institutionalized. (3rd Tr. 1747). Another defense expert, Dr. Parwatikar, testified that Defendant's mother had "mental problems," which resulted in numerous admissions to mental hospitals. (3rd Tr. 1296-97).

Dr. Robert Smith, a clinical psychologist, testified during the third penalty-phase proceeding that while he believed that Defendant's IQ was 77 when he previously evaluated Defendant in 1996, he had now changed his opinion based on the work performed by both Drs. Keyes and Heisler.[6] (3rd Tr. 1344, 1381, 1426-27, 1432-36, 1457-58). Dr. Smith said that he believed that

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[5] To obtain Defendant's IQ score of 84 in 1995, Dr. Cowan had given Defendant the Wechsler Adult Intelligence Scale-Revised (WAIS). (1st PCR Tr. 207, 225).

[6] Dr. Smith had interviewed Defendant and his family members during his evaluation. (3rd Tr. 1352-53).

Defendant's IQ was not 77, but closer to 67, and that Defendant is mentally retarded. (3rd Tr. 1426-27, 1471). Dr. Smith testified that an IQ score below 70 would be indicative of retardation. (3rd Tr. 1382).

Dr. Smith also testified that Defendant had deficits in the areas of communication, social skills, home living, self-direction, and functional academics. (3rd Tr. 1489-91). He provided specific examples of Defendant's behaviors in describing Defendant's deficits in these areas to the jury. (3rd Tr. 1462, 1468, 1489-91).

Dr. Smith also testified that Defendant's mother, Jean Ann Patton, began abusing alcohol in her teenage years, that she openly acknowledged drinking during all of her pregnancies, including the one with Defendant, and that she abused multiple drugs while pregnant with Defendant. (3rd Tr. 1386, 1400-01). He said that other relatives confirmed Defendant's mother's drug and alcohol use during all her pregnancies, "particularly with [Defendant]." (3rd Tr. 1386, 1394, 1400-01). He also said that one of the complicating factors leading to Defendant's mother's death was alcoholism and that she had abused alcohol and numerous drugs during her life. (3rd Tr. 1386-87).

Dr. Smith also described how Defendant's mother's alcohol use affected Defendant's fetal development. (3rd Tr. 1394). He said that Defendant was born prematurely and had a low birthweight. (3rd Tr. 1394). Dr. Smith then

testified about Fetal Alcohol Spectrum Disorder (FASD) and its effects on Defendant:

> There's a body of literature that talks about Fetal Alcohol Spectrum Disorder. What it basically talks about is that the mother's consumption of alcohol, while pregnant, can have very serious effects upon the development of a fetus.

(3rd Tr. 1401). Dr. Smith then used demonstrative exhibits to explain to the jury the diagnostic criteria for FASD and how Defendant fit into each of those categories, including his mother's drinking throughout her pregnancy with Defendant and Defendant's pre- and post-natal growth retardation. (3rd Tr. 1402-03). He also described symptoms of central nervous system deficits, mental retardation, Attention-Deficit Disorder, hyperactivity, and developmental delays relating to FASD and how Defendant's condition met those criteria:

> And when we look at [Defendant]'s history, particularly his school records, what we find is that he had significant difficulties throughout school and, in fact, was placed in special education classes and was identified as having behavior at times that was consistent with being hyperactive and having difficulties with attention.

(3rd Tr. 1403-04).

Dr. Smith then described for the jury the facial characteristics attributable to children suffering from the effects of their mothers' abuse of alcohol:

> Facial characteristics. One of the things that's in the literature is that children who are born from their mother's abusing alcohol during the child's development are born with specific facial features that can be identified and labeled reflecting directly to the mother's use of alcohol.

(3rd Tr. 1404). Using diagrams from the National Institute on Alcohol Abuse and Alcoholism juxtaposed with pictures of Defendant as a small child, Dr. Smith explained to the jury the changes in facial features attributable to "Fetal Alcohol Effect" (FAE) caused by a mother's use of alcohol during fetal development, including a "flat midface," a "thin upper lip," and a lack of groove in the philtrum, which is the groove that starts at the tip of the nose and goes down to the upper lip. (3rd Tr. 1405-07, 1494-95). Because these features "soften" as a child gets older, Dr. Smith explained that someone diagnosing these features will look at childhood photographs. (3rd Tr. 1407). Dr. Smith then explained how the childhood pictures of Defendant showed that he fell into these categories:

> If we take a look at [Defendant]'s photograph here, what you'll notice again is the very thin upper lip as opposed to the lower lip. You will notice the lack of the philtrum, the division below the nose to the lip.

You will notice the sort of high and low flat forehead, the dropping eyelids, and somewhat low-set ears, very similar to the things that we're talking about up here. Even the chin is a little small, but that's not really that, that significant.

But I think the other issues, again, the philtrum, the thin lip, the flat forehead and midface, and the low-set ears, are all very, very common characteristics of Fetal Alcohol Effect.

(3rd Tr. 1407).

Dr. Smith told jurors that the most severe effect of FASD was "mental retardation" and that the "most common cause of mental retardation in the United States is alcohol abuse by the mother during pregnancy." (3rd Tr. 1408). Defense counsel then reminded the jurors that Dr. Smith had diagnosed Defendant as being mentally retarded:

Q. Now, you've indicated that you reviewed data that supports a diagnosis of mental retardation; is that correct?

A. That is correct.

(3rd Tr. 1408).

Dr. Smith then described what the research on children suffering from Fetal Alcohol Syndrome (FAS) has shown as those children become adolescents and adults. (3rd Tr. 1409). These behaviors included attention deficit, hyperactivity, truancy, school suspensions and dropouts, drug and

alcohol abuse, temper outbursts, vandalism, stealing, and defiance of authority. (3rd Tr. 1410). He then outlined which of these behaviors applied to Defendant:

> As we go through them and look at [Defendant's] history again, looking at what they said about his behavior in school, some of the things that he was arrested for in late adolescence and adulthood, we know that he's had difficulties with attention and hyperactivity, that he often was truant from school, that he had difficulties in school, that he abused alcohol and drugs, that he has had times with temper outbursts, that he was stealing, and that there were times when he was defiant of authority.

(3rd Tr. 1410-11).

Finally, Dr. Smith opined that Defendant was suffering from Fetal Alcohol Syndrome:

> Q. Based on your overall evaluation, including the new data that you considered, do you believe that [Defendant] has Fetal Alcohol Syndrome?
>
> A.. I think all the data that's currently available would indicate that his characteristics and the test data suggests Fetal Alcohol Syndrome.

(3rd Tr. 1408-09).

3. The post-conviction evidence.

During the evidentiary hearing on Defendant's post-conviction motion, Dr. Natalie Novick-Brown, a clinical and forensic psychologist who predominately treated sex offenders, specialized in violent-sexual-predator evaluations, and had testified over 100 times, testified that she formed a multi-disciplinary team of Fetal Alcohol Spectrum Disorder (FASD) experts in 2006.[7] (3rd PCR Tr. 10-13, 137). The team was formed to perform a variety of evaluations in criminal cases, especially for sentencing and post-conviction purposes. (3rd PCR Tr. 13).

She said that to make a diagnosis for Fetal Alcohol Syndrome (FAS) two criteria must be present: 1) physical manifestations of FASD conditions and; 2) psychological, neurodevelopmental, cognitive, and behavorial manifestiations. (3rd PCR Tr. 20). According to Dr. Brown's testimony, this diagnosis requires a multidisciplinary-team approach, including a medical doctor to assess the physical manifestations, a psychologist to assess the functional deficits, and a neuropsychologist to measure current

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[7] Dr. Brown had also been a presenter at a national conference for the development and integration of mitigation evidence with respect to criminal clients suffering from FAS and had given presentations to federal and state public defenders handling capital cases. (3rd PCR Tr. 138-39).

manifestations of brain damage. (3rd PCR Tr. 20). But in her report to post-conviction counsel, she wrote that "solo practitioners can and do diagnose FASD," though a multidisciplinary approach was "optimal." (PCR Ex. 23, p. 20). Dr. Brown conceded that a finding of Alcohol Related Neurodevelopmental Disorder (ARND), formerly known as Fetal Alcohol Effect (FAE), which involves central nervous system abnormalities (cognitive, behavioral, and developmental) can be made without a diagnosis of physical manifestations. (3rd PCR Tr. 16-17). She agreed that the only difference between FAE and Fetal Alcohol Syndrome (FAS) was the physical manifestations in a facial features and that there was no difference between the two diagnoses in terms of neurodevelopmental, cognitive, or behavioral functioning. (3rd PCR Tr. 189-90).

During her evaluation, Dr. Brown interviewed Defendant but none of his family members, except for sending Defendant's sister a questionnaire through defense counsel. (3rd PCR Tr. 32-33, 140-41). She diagnosed Defendant as having mild mental retardation, FASD, and a cognitive disorder. (3rd PCR Tr. 116). She also described the tests she had given Defendant and testified that the results showed Defendant had "global impairment in executive function skills," including impulse control, ability to

shift focus, working memory, and planning and organization.[8] (3rd PCR Tr. 108-09).

In assessing Defendant's adaptive skills, she relied on the Vineland and the Scales of Independent Behavior scores obtained by Dr. Keyes.[9] (3rd PCR Tr. 94-96). She said that Dr. Keyes's evaluation of Defendant was mentioned several times in her report; indeed, Dr. Keyes's testing and evaluation of Defendant are heavily cited in her report. (3rd PCR Tr. 155; PCR Ex. 23).

She agreed that during Defendant's third penalty-phase proceeding, Dr. Smith recognized Defendant as suffering from FAE and FAS and that he testified before the jury about this condition. (3rd PCR Tr. 48, 143, 181, 189). She conceded that Dr. Smith was qualified to diagnose FAE (now ARND). (3rd PCR Tr. 143). She also said that Dr. Smith had interviewed several members

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[8] Another test Dr. Brown gave Defendant was the GSS-1, a standardized test to measure whether someone is vulnerable to being coerced or led into behavior by more forceful persons. (3rd PCR Tr. 109-10). She claimed that Defendant's score was close to the mean for "false confessors." (3rd PCR Tr. 111). Never in the long history of this case has Defendant ever denied that he committed these murders or suggested that he falsely confessed.

[9] Dr. Brown said that Dr. Keyes's adaptive assessments were consistent with her neuropsychological tests. (3rd PCR Tr. 124).

of Defendant's family in performing his evaluation and had viewed childhood photographs of Defendant. (3rd PCR Tr. 43, 51).

Dr. Paul Conner, a clinical psychologist and neuropsychologist specializing in FASD, testified about the neuropsychological evaluation he performed on Defendant, which included a score of 71 on the WAIS-III IQ test given in March 2009. (3rd PCR Tr. 199-200, 205-08). In concluding that Defendant's adaptive functioning was at a very low level, Dr. Conner relied on the adaptive tests (Vineland and Scales of Independent Behavior) Dr. Keyes gave Defendant in 2003. (3rd PCR Tr. 209-10, 245, 251, 257). Dr. Conner concluded that Defendant was mildly mentally retarded and suffered from FASD. (3rd PCR Tr. 222, 224, 239). When asked to support his diagnosis of mental retardation, Dr. Conner referred to Dr. Keyes's 2003 testing of Defendant. (3rd PCR Tr. 240).

Dr. Richard Adler, a forensic and clinical psychiatrist, testified that he was the medical director for the multidisciplinary FASD assessment team, which he referred to as "FASD Experts dot com." (3rd PCR Tr. 270). He evaluated Defendant's facial features and concluded that Defendant suffered from Partial Fetal Alcohol Syndrome, as well as mild mental retardation. (3rd PCR Tr. 304-08, 315, 319, 324-25). He based his conclusion about Defendant's significant limitations on adaptive functioning on what he had read in the reports given by other experts. (3rd PCR Tr. 311-12). He also

agreed that Dr. Smith testified about Defendant's Fetal Alcohol Syndrome during Defendant's third penalty-phase proceeding. (3rd PCR Tr. 347-48).

Defense counsel Carlyle testified that her primary responsibility during Defendant's third penalty-phase proceeding was expert witnesses. (3rd PCR Tr. 591-94). She said that it was her belief that two witnesses (Smith and Keyes) testifying that Defendant was mentally retarded was enough, and that she had Defendant evaluated for FASD by Dr. Smith and presented his expert testimony to prove that Defendant suffered from it. (3rd PCR Tr. 599-601, 665, 675-76). Defense counsel Cisar testified that he and Carlyle were aware of Defendant's FASD and chose not to hire an additional expert to testify about that condition. (3rd PCR Tr. 711-12).

4. The motion court's findings.

In rejecting Defendant's claim, the motion court found that counsel cannot be deemed ineffective for failing to shop for a more favorable expert. (3rd PCR L.F. 339). It noted that Drs. Smith and Keyes had testified that Defendant was mentally retarded and that Dr. Smith "testified at great lengths" about Defendant suffering from FASD, the facial features associated with this disorder, the Defendant's characteristics that linked him to this disorder, and the difficulties Defendant suffered because of it. (3rd PCR L.F. 339). To the extent Defendant was claiming that Dr. Smith could not

diagnose FAS because he was not a medical doctor, the court noted that "the jury was never informed that Dr. Smith could not" make such a diagnosis. (3rd PCR L.F. 340-41). The court also found that the investigation into Defendant's mental health was thorough and that counsel could not be faulted for failing to employ a team of FASD experts. (3rd PCR L.F. 339-40). Finally, the Court found that the testimony presented during the evidentiary hearing was "simply cumulative" to the information presented during Defendant's third penalty-phase proceeding. (3rd PCR L.F. 340).

B. The motion court did not clearly err in finding that counsel was not ineffective for calling Dr. Keyes as a witness.

"The selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." *Anderson v. State*, 196 S.W.3d 28, 37 (Mo. banc 2006); *Williams v. State*, 168 S.W.3d 433, 443 (Mo. banc 2005). "Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." *State v. Johnston*, 957 S.W.2d 734, 755 (Mo. banc 1997). *See also Maclin v. State*, 184 S.W.3d 103, 108 (Mo. App. S.D. 2006) (holding that trial counsel's choices about the witnesses and evidence presented at trial constitute trial strategy decisions that are "virtually unchallengeable and rarely furnish a ground for finding ineffective assistance

of counsel"). "Trial counsel is given great discretion in which evidence to present to the jury." *Coleman v. State*, 256 S.W.3d 151, 156 (Mo. App. W.D. 2008).

Missouri courts have held that "[i]neffective assistance will not lie . . . where the conduct involves the attorney's use of reasonable discretion in a matter of trial strategy." *State v. Heslop*, 842 S.W.2d 72, 77 (Mo. banc 1992); *see also State v. White*, 798 S.W.2d 694, 698 (Mo. banc 1990). "It is only the exceptional case where a court will hold a strategic choice unsound." *Heslop*, 842 S.W.2d at 77. *See also State v. Kenley*, 952 S.W.2d 250, 266 (Mo. banc 1997) ("Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable."); *State v. Maddix*, 935 S.W.2d 666, 671 (Mo. App. W.D. 1996).

In *Johnson III*, which involved Defendant's post-conviction appeal from the second retrial of the penalty-phase in this case, this Court reversed Defendant's three death sentences and remanded this case to the trial court for a third penalty-phase proceeding because the record showed that Defendant had articulated specific facts relating to possible mental retardation. Under Missouri law, a capital defendant convicted of first-degree murder must be sentenced to life imprisonment if the jury "finds by a preponderance of the evidence that the defendant is mentally retarded." Section 565.030.4(1), RSMo Cum. Supp. 2009. Although this law specifically

applied only to crimes committed after August 28, 2001, subsequent to its adoption the United States Supreme Court held that it was unconstitutional to execute a mentally retarded defendant. *See Johnson III*, 102 S.W.3d at 537; *Atkins*, 536 U.S. 304, 321 (2002). Because Appellant had articulated specific facts relating to possible mental retardation during his second penalty-phase proceeding, which occurred before the enactment of the statute and the Court's decision in *Atkins*, this Court decided that a remand for a third penalty-phase proceeding, during which this issue could be addressed, was appropriate. *Johnson III*, 102 S.W.3d at 541. Counsel testified that the primary focus of their trial strategy was to demonstrate that Defendant was mentally retarded.

Consequently, the reason why counsel chose to call Dr. Keyes as a witness at trial is obvious. Dr. Keyes was the first expert to have evaluated and tested Defendant and to conclude that he was mentally retarded. *See Johnson IV*, 244 S.W.3d at 156. In fact, as outlined above, Dr. Keyes's evaluation and report convinced Dr. Smith, who had previously opined that Defendant operated in the borderline range of intelligence, to change his opinion and conclude that Defendant was, in fact, mentally retarded. *Id.*

In addition, counsel were obviously aware that Dr. Keyes's work had been cited by the United States Supreme Court in *Atkins* and that he had evaluated two other Missouri capital defendants sentenced to death, Alis

Ben-Johns and Steven Parkus, and had determined that each of them was mentally retarded. (3rd Tr. 1510, 1633-34, 1637). *See Atkins*, 536 U.S. at 316 n.20. Both Ben-John's and Parkus's death sentences were commuted to life without parole after they were found to be mentally retarded. *See In re Parkus*, 219 S.W.3d 250, 255-56 (Mo. banc 2007); *State ex rel. Johns v. Kays*, 181 S.W.3d 565, 565-66 (Mo. banc 2006).

Defendant's suggestion that counsel should have jettisoned the only expert who had extensively tested Defendant for both intellectual functioning and adaptive behaviors and concluded that he was mentally retarded based simply on the fact that Dr. Keyes insisted that counsel schedule his appearance at trial so that it did not disrupt Dr. Keyes's responsibilities in teaching his college classes is nearly nonsensical.

Defendant also attempts to prove that Dr. Keyes was unprepared by citing to testimony in which Dr. Keyes misspoke and had to correct himself. In every instance, Dr. Keyes either on his own, or with the assistance of trial counsel, corrected whatever misstatement he may have made. And the matters about which Defendant now complains involved testimony on trivial or collateral matters. On the issue of mental retardation, Dr. Keyes provided consistent and coherent testimony to explain his opinion that Defendant was mentally retarded.

Defendant complains that Dr. Keyes testified that he did not consider Defendant's prison behavior in assessing his adaptive functioning. But as described above, Dr. Keyes did take those behaviors into consideration, but discounted their reflection of Defendant's actual adaptive functioning because they occurred in a structured prison setting. Defendant's post-conviction expert, Dr. Brown, similarly testified that adaptive functioning in prison cannot be compared to living in the community. (3rd PCR Tr. 197-98).

Defendant's argument that Dr. Keyes's minor misstatements showed a lack of preparation applies equally to the "experts" he called to testify during the post-conviction hearing. For example, Dr. Brown could not remember that Mr. Bradshaw performed IQ testing for Dr. Heisler until post-conviction counsel reminded her. (3rd PCR Tr. 63). On another occasion she mistook testing performed by Dr. Cowan as having been performed by Dr. Smith. (3rd PCR Tr. 121-22). When asked whether she had watched Dr. Heisler's recorded interview with Defendant, Dr. Brown equivocated and stated that her "memory [was] pretty vague." (3rd PCR Tr. 159). She also could not remember if counsel introduced her to Defendant during her prison interview with him and stated: "I do so many evaluations that I just don't have a specific memory of that." (3rd PCR Tr. 182). She also could not recall which testimony of Dr. Smith she had reviewed because there were "so many

records in this case" and that she did not "have that good of a memory." (3rd PCR Tr. 189).

In addition, Dr. Adler, the psychiatrist who examined Defendant, mistook Danny Patton, Defendant's profoundly mentally retarded and institutionalized brother, as being an alcoholic and crack addict. (3rd PCR Tr. 281-82). He apologized for this "omission." (3rd PCR Tr. 282). Dr. Adler also could not remember Defendant's high school art teacher, Mr. Mason, even though Mr. Mason was mentioned in Dr. Adler's report. (3rd PCR Tr. 333-34). On another occasion, Dr. Adler had to refer to his report to answer a question. (3rd PCR Tr. 345).

Defendant relies heavily on this Court's opinion in *Goodwin* to support his claim that counsel was ineffective for calling Dr. Keyes as a witness. But the *Goodwin* opinion was handed down only two days before Defendant's third penalty phase began, much too late for counsel to abandon Dr. Keyes as a witness. And Dr. Smith's revised opinion concluding that Defendant was mentally retarded was based on the work Dr. Keyes had performed. In fact, the opinion of Defendant's post-conviction experts finding Defendant to be mentally retarded is based primarily on Dr. Keyes's testing, reports, and testimony. If all these experts felt confidently relying on Dr. Keyes's work and opinions in formulating their own expert opinions about Defendant's

mental retardation, then surely trial counsel employed reasonable trial strategy in calling Dr. Keyes as a witness at trial.

Defendant's suggestion that this Court found Dr. Keyes not credible in *Goodwin* is based on a misreading of this Court's opinion. The opinion refers to the motion court's findings that Dr. Keyes's opinion lacked sufficient evidentiary support based on the fact that post-conviction counsel had chosen all the source materials on which Dr. Keyes based his opinion and that these materials were chosen in an effort to bend Dr. Keyes's testimony toward the result post-conviction counsel wanted to reach. *Goodwin*, 191 S.W.3d 32. Consequently, it appears that is was not Dr. Keyes's credibility that was in question, but the credibility of Goodwin's post-conviction counsel. This Court also noted that Dr. Keyes had not been shown to be a qualified expert in administering a verbal-based IQ test to a hearing-impaired test subject. *Id.* at 33. That is not an issue in Defendant's case. Finally, the jury in Defendant's case heard nothing about either the motion court's findings or this Court's opinion in *Goodwin*.

Defendant also argues that his post-conviction "experts, unlike Keyes, were prepared to testify about [Defendant]'s Flynn Effect adjusted IQ scores." But Defendant overlooks the fact that Dr. Keyes gave extensive testimony about the Flynn Effect on Defendant's previous IQ scores, and he even testified that he had corresponded with Dr. Flynn, the man who discovered

this effect. (3rd Tr. 1678-88). Even if the post-conviction witnesses testimony about the Flynn Effect were found credible—which Respondent does not concede—almost all of Defendant's scores, except for his sixth grade IQ test, could still be above 70, after applying the 5 point error rate applicable to IQ testing. (PCR Ex. 25). Moreover, an IQ score simply measures intellectual functioning, and does not, by itself, prove mental retardation under Missouri law. Continual and extensive deficits in adaptive behaviors must also be proved.

"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. The reasonableness of counsel's actions must be viewed as of the time counsel's conduct occurred, taking into consideration the circumstances of the particular case. *Id.* at 690. The proper standard is to "determine, whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

Considering the circumstances of Defendant's case, the favorable testimony Dr. Keyes presented, and the fact that other experts, including those called in this post-conviction case, relied on his testing and evaluation

of Defendant, counsel cannot be found ineffective in calling Dr. Keyes's as a witness during Defendant's penalty-phase retrial.

C. The motion court did not clearly err in finding that counsel was not ineffective for failing to hire other experts.

To prove a claim of ineffective assistance for failing to call a witness, the movant must show that: "(1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense." *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004).

"When a movant claims ineffective assistance of counsel for failure to locate and present expert witnesses, he must show that such experts existed at the time of trial, that they could have been located through reasonable investigation, and that the testimony of these witnesses would have benefited movant's defense." *State v. Davis*, 814 S.W.2d 593, 603-04 (Mo. banc 1991). Moreover, counsel cannot be found ineffective for not having called witnesses that he or she did not know existed. *State v. Stewart*, 859 S.W.2d 913, 918 (Mo. App. E.D. 1993).

Defendant failed to prove that the post-conviction experts he claims counsel should have retained were available for his 2006 penalty-phase

retrial. Dr. Brown testified that she did not form her "multidisciplinary team" until 2006. Considering the time that would have been necessary to review records, complete testing, and perform an evaluation of Defendant, it does not appear that these team of experts would have been available to perform these tasks and testify at Defendant's May 2006 retrial.

Even if these experts were available, their testimony on Defendant's mental retardation was simply cumulative to that given by Drs. Smith and Keyes during Defendant's trial. In fact, the post-conviction experts relied almost exclusively on Dr. Keyes's and Dr. Smith's testing and interviews in determining that Defendant was mentally retarded, especially with respect to his adaptive behaviors. The post-conviction experts interviewed no one except for Defendant, while Drs. Smith and Keyes had interviewed many people in conducting their evaluations of Defendant.

In addition, the testimonies of Drs. Keyes and Smith tracked the Missouri statute defining mental retardation, especially with respect to Defendant's deficits in adaptive behaviors. The post-conviction witnesses did not base their testimony on the statute, but instead tailored it to fit the criteria under the DSM-IV.

The General Assembly has defined the terms "mental retardation" or "mentally retarded" as:

> a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

Section 565.030.6. The testimony of Drs. Keyes and Smith followed the statute and identified those adaptive behaviors outlined in the statute in which they believed Defendant was deficient. The post-conviction experts did not relate their testimony to the requirements of Missouri law.

The fact that the post-conviction experts specialized in FASD does not establish that counsel were ineffective for failing to call them as witnesses. The focus of Defendant's retrial was mental retardation, not Fetal Alcohol Syndrome. A finding of mental retardation would have precluded Defendant from being executed, while a finding that he suffers from FAS is simply evidence in mitigation of punishment. Nonetheless, Dr. Smith presented extensive testimony regarding FASD, FAS, and FAE during the retrial. The post-conviction testimony was simply cumulative to that which the jury heard.

In *State v. Ferguson*, 20 S.W.3d 485 (Mo. banc 2000), the defendant claimed that trial counsel were ineffective for failing to call "three expert witnesses, either in addition to or instead of the two expert witnesses that were called," to testify about the defendant's "past and present alcohol and drug addiction, his intelligence, his genetic predisposition to a major depressive disorder, and his family history of mental illness and alcoholism." *Id.* at 509. This Court found that counsel were not ineffective because this "additional evidence would have been cumulative" since the "two experts who were called did testify, at length, about [the defendant]'s intelligence, depression and substance abuse." *Id.* Additionally, counsel is not required "to shop for an expert witness who might provide more favorable testimony." *Anderson*, 196 S.W.3d at 37; *see also Smulls v. State*, 71 S.W.3d 138, 156 (Mo. banc 2002) ("Counsel is not ineffective for failing to shop around for additional experts.").

When determining whether a defendant has suffered prejudice from counsel's errors, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the

proceeding." *Id.* The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

The failure of trial counsel to present the testimony of the post-conviction experts did not undermine the reliability of the result of Defendant's retrial. Nearly identical, and more credible, testimony was presented during Defendant's retrial.

In addition, there is no reasonable probability that the result of Defendant's retrial would have been different if the post-conviction experts would have testified. Notwithstanding the evidence in mitigation of punishment, the circumstances surrounding the triple homicide Defendant committed were so horrific that the jury's verdict recommending three death sentences would not have changed if he had presented more of the same mitigation evidence.

In the course of stealing money from a convenience store, Defendant savagely beat three store employees to death with a hammer. (State's Ex. 79, pp. 949-50, 958, 962). Not only did he beat them in the head with the hammer anywhere between 8 and 15 times each, he also hit them with the claw end of the hammer, shot one employee in the face and slammed his finger in a cooler door, nearly severing it, and, finally, stabbed completely through the back of another employee's hand at least eight times with a flat-

headed screwdriver. (State's Ex. 79, pp. 950-51, 956-58, 962-63; State Exhibits 69A, 69B, 69D, 70D, 70E). Defendant beat his victims so savagely that he left large openings in their heads exposing bone and brain matter. (State's Ex. 79, pp. 951-52, 955-56, 961; State's Exhibits 69A, 70B, 71C).

In addition, the jurors heard evidence of Defendant's numerous previous convictions and the fact that Defendant averages three conduct violations per year in prison, including violations for fighting and for stealing from the prison cafeteria. (3rd Tr. 1167, 1169).

Defendant's claim that the mitigating evidence presented in this post-conviction case, which mirrors that presented during his third penalty-phase proceeding, would have changed the outcome of his case ignores the fact that three juries have now recommended that Defendant be given three death sentences for the murders in this case. *See Johnson I*, 968 S.W.2d at 689; *Johnson II*, 22 S.W.3d at 185; *Johnson IV*, 244 S.W.3d at 149. In fact, it appears that each jury heard substantially the same mitigating evidence, except that the second and third juries heard the additional evidence that Defendant was suffering from "cocaine intoxication delirium," and the third jury heard the mental-retardation and fetal-alcohol evidence. *Johnson I*, 968 S.W.2d at 699-700; *Johnson II*, 22 S.W.3d at 193; *Johnson IV*, 244 S.W.3d at 151-57.

The cases on which Defendant relies are inapposite and entirely distinguishable.

In *Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000), defendant's trial counsel called a psychiatrist to testify about a murder defendant's mental illnesses during the guilt phase of a capital trial. *Id.* at 264. Because the psychiatrist's performance was so poor during the guilt phase—the court described his testimony as bizarre and eccentric—, counsel decided not to use him as a witness during the penalty phase. *Id.* Indeed, counsel testified that the psychiatrist's testimony was "awful" and "incoherent," that he talked "about things that didn't make sense,: that he could not be stopped or "reel[ed] back in," and that "[p]eople in the audience were laughing at him." *Id.* at 269. The jury deadlocked on punishment and the defendant's penalty phase was retried months later. *Id.* at 264. Despite witnessing the psychiatrist's bizarre behavior during the first penalty phase, counsel decided to call him again for the retrial. *Id.* This decision by counsel, the court held, constituted ineffective assistance of counsel. *Id.* at 269-75. Defendant's case can hardly be compared with what occurred in *Skaggs*.

In *Stevens v. McBride*, 489 F.3d 883 (7th Cir. 2007), the court found counsel ineffective for calling a psychiatrist who wrote a scathing report completely unfavorable to the defendant, who believed mental illness was a myth, who failed to reveal devastating information to the defense, and whom

defense counsel described as a "quack," to testify in the penalty phase of the defendant's capital murder trial. *Id.* at 887-89.

In *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), counsel was found ineffective for not conducting a comprehensive investigation of the defendant's mental illnesses after preliminary reports suggested some existed. *Id.* at 1203-04. Finally, in *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003), counsel was found ineffective for failing to conduct further investigation and for relying solely on a witness who admitted she was not competent to diagnose the defendant with diminished capacity due to organic brain damage.

The motion court did not clearly err in rejecting this claim, and its judgment should be affirmed.

II (evidence of substantial domination).

The motion court did not err in finding that Defendant failed to prove that counsel were ineffective for not presenting guilt-phase related evidence to demonstrate that Defendant acted under the "substantial domination of another person" in committing the murders because trial counsel made a reasonable trial-strategy decision to focus on the mental-retardation issue and to avoid as much guilt-phase evidence as possible and no credible evidence supported the submission of that statutory mitigator.

A. The record regarding this claim.

In his post-conviction motion, Defendant alleged that counsel were ineffective for failing to call several guilt-phase witnesses to testify during the penalty phase because the testimony of these witnesses "would have provided viable mitigating evidence."[10] (3rd PCR L.F. 65-73). Defendant alleged that the testimony of these witnesses would have shown that Defendant did not act alone and would have supported submission to the jury

[10] In his Point Relied On, Defendant has pared down this list of witnesses to McDonald, Buel, McMillen, Maloney, Maise, Hopkins, and Muddiman. App. Br. 37.

of the mitigating circumstance that Defendant acted under the substantial domination of another person in committing this crime. (3rd PCR L.F. 68-72).

During Defendant's first trial in 1995, Rodriguez (Rod) Grant testified that he was only 18 years old on the day Defendant committed the murders and that his brothers Antwane and Marcus were 16 and 14, respectively. (1st Tr. 2080). Mr. Grant testified that he never followed Defendant to Casey's to ensure the return of his gun, and he denied that he had ever talked about this case to fellow inmate Michael Maise while in the Boone County Jail. (1st Tr. 2096-99, 2158-59). In exchange for his testimony at Defendant's trial, three charges of second-degree felony murder for aiding and abetting Defendant in the robbery by giving him the gun were dismissed, and he pleaded guilty to first-degree robbery with a recommended sentence of 10 years. (1st Tr. 2139-40-41, 2165). He was never charged with being inside Casey's or participating in the commission of the murders. (1st Tr. 2166).

During the post-conviction evidentiary hearing, retired police officer Kevin McDonald testified that a teenager, LaFonzo Tucker showed him where he had hidden a shotgun. (3rd PCR Tr. 582-83). Rod Grant had given the shotgun to Tucker because Grant did not want the police to find it. (3rd PCR Tr. 586).

Post-conviction counsel entered into a stipulation concerning the testimony of trace-evidence expert Thomas Buel, who had worked at the

Missouri Highway Patrol Laboratory. (3rd PCR Tr. 547-48). The stipulation provided that Mr. Buel compared impressions of bloody marks left on seven shotgun shells found in a wooded area at Indian Hills Park and bloody marks left on the hammer found at the Casey's store and that the impressions on the shells and hammer both had a multi-dot patterned impression. (3rd PCR L.F. 206-07). Mr. Buel compared those impressions with bloody gloves found outside the store and found a "class relationship" between the impressions on the gloves, the hammer, and the shotgun shells. (3rd PCR L.F. 207).

Officer Kenneth McMillen testified at the post-conviction hearing that he gave testimony during Defendant's May 2006 penalty-phase proceeding. (3rd PCR Tr. 580). He said that he interviewed Defendant on February 18, 1994, and that Defendant said he did not shoot anybody and that "one man wasn't strong enough to do that job." (3rd PCR Tr. 580).

During Defendant's original trial, Officer McMillen testified that while he was taking Defendant to the booking room, Defendant saw Rodriguez Grant in a holding cell and said to McMillen, "That boy didn't have anything to do with this. None of those boys did." (1st Tr. 1833-34). Later, after Defendant was told that Rodriguez and Antwane Grant had been arrested, Defendant got upset and told McMillen, "Those boys weren't there, that they didn't do anything." (1st Tr. 1842). When he was asked how he knew they were not at Casey's, Defendant just kept repeating that they were not there.

(1st Tr. 1842). When Officer McDonald suggested to Defendant that the only way he could know that those boys were not there was if he had been there, Defendant replied, "I know they weren't there." (1st Tr. 1843).

Cary Maloney testified during the post-conviction hearing that he worked at the highway patrol lab, that DNA testing on the brown jacket revealed a mixture of blood from all three victims, that testing performed on the bloody gloves was a combination of blood from victim Jones and victim Scruggs, and that Defendant's blood did not appear on either the coat or gloves. (3rd PCR Tr. 680, 688-93).

Michael Maise had died before the evidentiary hearing in this case was held, and counsel offered into evidence a copy of the transcript pages from his testimony at Defendant's first trial. (3rd PCR Tr. 541). Before Mr. Maise, who was called by the defense, testified at Defendant's trial, he attempted to "take the Fifth." (1st Tr. 2323). An extensive colloquy occurred after this during which Mr. Maise expressed reluctance in testifying for Defendant. (1st Tr. 2324-31). When Mr. Maise finally testified before the jury, he said that in February 1994 he had a conversation with Rod Grant at the Boone County Jail, where both of them were incarcerated, and that Rod Grant told him that he had been at the Casey's store, but that he had not done anything to anybody. (1st Tr. 2332-33). He said that Grant also told him that he went to Casey's with Defendant "to make sure that [Defendant] was going to do what

[Defendant] said he was going to do because he didn't trust [Defendant]." (1st Tr. 2333). Grant said he had given Defendant a gun and that Defendant "would probably pawn it to get some crack with." (1st Tr. 2333).

During cross-examination, Mr. Maise, who admitted to having several previous felony convictions, conceded that in a letter he had written to the prosecutor about what Grant had allegedly told him, he wrote "So if you are interested in my testimony, please meet with me ASAP so we can discuss a deal." (1st Tr. 2236-37). He also admitted that after he was approached by defense counsel about his proposed testimony, he told her that he wanted out of jail. (1st Tr. 2337).

Post-conviction counsel also entered into a stipulation that if David Hopkins were called to testify at the post-conviction hearing, his testimony would be the same as he gave during Defendant's first trial. (3rd PCR Tr. 546). During that trial, Hopkins testified that he was at Casey's at 10:30 p.m. on February 12, 1994, and saw a tall man wearing a brown coat with the hood up over his head. (1st Tr. 2357-58). A few minutes later, as he was driving in Indian Hills Subdivision, he saw a shorter man running toward Ballenger Lane. (1st Tr. 2358-59). Although Hopkins knew Rod Grant from school, he could not identify who the shorter man was, but said that if it had been Rod Grant, he probably would have known it. (1st Tr. 2360, 2364). After Defendant was asked to stand up, Hopkins said that Defendant's height and

build matched the taller man he saw wearing the brown coat near Casey's that night. (1st Tr. 2360-61).

Post-conviction counsel presented no evidence regarding Bill Muddiman's testimony. During Defendant's first trial, Mr. Muddiman testified that he drove by Casey's around midnight on the night in question and that he saw "one or two" people looking into the front door of the store. (1st Tr. 2365). Mr. Muddiman said that all he could see was a silhouette and that he could not tell what they looked like, what race they were, or what they were wearing. (1st Tr. 2367-69).

Defense counsel Carlyle testified that she and Mr. Cisar would not have wanted to put on evidence that other people were in Casey's with Defendant unless they could also show that Defendant was not "directing the other people." (3rd PCR Tr. 637). She said that their trial "strategy [was] not to reemphasize the facts of the . . . crime." (3rd PCR Tr. 647).

Tim Cisar testified that the entire case centered on Defendant's mental retardation and that a strategic decision was made to focus on that aspect of the case and not to "retry the guilt phase." (3rd PCR Tr. 701, 758). To that end, Mr. Cisar "made a decision not to go into the facts of guilt," and entered into the stipulation with the prosecutor regarding Defendant being the only person in the store to "streamline" the guilt-phase evidence and avoid as much of it as he could. (3rd PCR Tr. 702-05, 760-61).

The motion court rejected this claim because post-conviction counsel failed to ask trial counsel why they failed to call any of these witnesses, which precluded a finding that no trial strategy reason existed for not doing so. (3rd PCR L.F. 342-49). In addition, the court found that counsel's trial strategy of wanting to avoid as much guilt-phase evidence as possible was reasonable, that none of this proposed testimony would have supported the statutory mitigator that Defendant was acting under the substantial domination of another person, and that no reasonable probability existed that the presentation of this evidence would have changed the outcome of Defendant's third penalty-phase proceeding. (3rd PCR L.F. 342-49).

B. The motion court did not clearly err in rejecting this claim.

Ineffective assistance will not lie when the conduct "involves the attorney's use or reasonable discretion in a matter of trial strategy." *Heslop*, 842 S.W.2d at 77. "It is only the exceptional case where a court will hold a strategic choice unsound." *Id.* "Counsel is strongly presumed to have made all significant decisions in the exercise of reasonable professional judgment." *Johnson*, 968 S.W.2d at 699. "Where trial counsel decides as a matter of trial strategy to pursue one evidentiary course to the exclusion of another, trial counsel's informed, strategic decision not to offer certain evidence is not

ineffective assistance." *State v. Simmons*, 944 S.W.2d 165, 181 (Mo. banc 1997)

"Reasonable choices of trial strategy, no matter how ill fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." *Worthington v. State*, 166 S.W.3d 566, 573 (Mo. banc 2005). "It is also not ineffective to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy." *Id.*

Defendant suggests that if counsel would have ignored their better judgment and exposed the jury to this evidence, it would have supported submission of the statutory mitigator showing that Defendant acted under the "substantial domination of another person":

> Statutory mitigating circumstances shall include the following:
>
> * * * *
>
> (5) The defendant acted under extreme duress or under the substantial domination of another person;[11]

Section 565.032.3(5), RSMo 2000.

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[11] The jury was instructed that it should consider, as mitigating evidence, whether Defendant committed the murders while he "was under the influence of extreme mental or emotional disturbance." (3rd L.F. 260, 267, 274).

The fallacy of Defendant's argument is that this evidence barely proves that anyone else was involved in the crime, much less that Defendant acted under the "substantial domination of another person." The only evidence Defendant presented that even suggests that someone else was in the vicinity of the store when Defendant committed the murders came from Mr. Maise, a convicted felon who claimed that Defendant's girlfriend's son, Rod Grant, told him that he went with Defendant to Casey's make sure Defendant did what he said he was going to do. Any credibility to Maise's story evaporated when Maise attempted to peddle it to the prosecutor in exchange for "a deal." Even if there was some truth in Maise's testimony, it hardly supports submission of the statutory mitigator relating to a defendant acting under the substantial domination of another person.

Even Defendant's repeated statements to police showed that Rod Grant was not present at Casey's when the murders were committed. It is difficult to conceive how any fact finder could conclude from this evidence that Defendant acted under the substantial domination of Defendant's girlfriend's 18-year-old son, who Defendant repeatedly denied was even at Casey's, much less involved in committing the crimes. In fact, it is likely the jury would have been annoyed if trial counsel had made such an attempt. Trial counsel employed reasonable trial strategy in avoiding as much guilt-phase evidence as possible so the jury would not hear any more of guilt-phase evidence of

this horrific crime than was necessary. The presentation of the evidence suggested by Defendant in this post-conviction case would have only provoked a reply by the State, which is what counsel wanted to avoid.

Defendant's reliance on *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), is misplaced. In *Glenn*, counsel was found ineffective for conducting little or no preparation for the capital defendant's penalty phase when, after the defendant was sentenced to death, it was revealed that the defendant was "a young man who had been classified in school as mentally retarded, who was apparently acting at the instigation of an older brother, who was highly susceptible to suggestion by people he admired, and who suffered from global brain damage sustained before he was born." *Id.* at 1205.

The motion court did not clearly err in rejecting this claim.

III (Dr. Bernard's deposition and mother's mental-health records).

The motion court did not clearly err in rejecting Defendant's claim that counsel were ineffective for not offering into evidence the deposition of Dr. Carole Bernard or Defendant's mother's mental-health records because Defendant failed to prove that these documents were admissible for the truth of the matters asserted in them, and even if they were admissible, Defendant has failed to prove any prejudiced.

A. The record regarding this claim.

In his post-conviction motion, Defendant alleged that trial counsel were ineffective for failing to offer into evidence the deposition of Dr. Carole Bernard, who evaluated Defendant, and the Mid-Missouri Mental Health records of Defendant's mother, Jean Ann Patton. (3rd PCR L.F. 89-93).

During trial, defense counsel informed the prosecutor that they were not going to call Dr. Bernard as a witness. (3rd Tr. 1341).

Ms. Carlyle testified that she provided Dr. Carole Bernard's deposition to her expert witnesses, Drs. Keyes and Smith, but that she did not have a trial-strategy reason for not offering the deposition into evidence. (3rd PCR Tr. 619-20). Mr. Cisar testified that he and co-counsel had discussed calling

Dr. Bernard as a witness, but that he could not remember why they decided not to. (3rd PCR Tr. 733).

Ms. Carlyle did not have a trial-strategy reason for not offering Defendant's mother's mental-health records into evidence, but said that she would have wanted the jury to know that Defendant's mother was mentally retarded. (3rd PCR Tr. 624-26).

During the course of post-conviction counsel's interrogation of Ms. Carlyle regarding her failure to offer various records into evidence, the motion court asked whether these records "would have been admitted for the limited purpose that Dr. Keyes relied on those [records] in giving his opinion." (3rd PCR Tr. 623-24). Post-conviction counsel replied, "Yes, your Honor. And that would have made them part of the record for any later appeals or anything of that nature." (3rd PCR Tr. 624). But Defendant's other post-conviction counsel, Mr. Carter, insisted that these types of records would be admissible for the truth of what they asserted despite their containing hearsay. (3rd PCR Tr. 736-43).

The motion court rejected the claim concerning Dr. Bernard's deposition on the grounds that Defendant failed to prove that trial counsels' actions were not reasonable trial strategy, that Dr. Bernard was unavailable to testify thus making her deposition admissible, that the jury could rely on the deposition for the truth of the matter asserted simply because the

deposition was provided to expert witnesses, and that whatever was contained in the deposition was cumulative to other evidence presented concerning Defendant's alleged mental retardation. (3rd PCR L.F. 357-58).

As for counsel's failure to offer into evidence Defendant's mother's mental-health records, the motion court rejected this claim on the grounds that the jury was already aware of Defendant's mother's alcohol use through other testimony, that the records were inadmissible hearsay, that this evidence was cumulative to what had already been admitted, and that no reasonable probability existed that the result would have been different if these records had been admitted. (3rd PCR L.F. 361).

B. The motion court did not err in rejecting this claim.

"In Missouri, an expert is permitted to rely on hearsay evidence to support an opinion, even though the hearsay evidence is not independently admissible, if that evidence is of a type reasonably relied upon by other experts in that field." *State v. Gary*, 913 S.W.2d 822, 830 (Mo. App. E.D. 1995), overruled on other grounds by *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997). Such hearsay statements may be considered only on the credibility of the expert's opinion, but they are not substantive evidence of the truth of the statement's assertions. *Id.*

To the extent that Defendant is suggesting that these records were admissible because they were reviewed by defense experts, this is contrary to Missouri law. The records were not admissible to prove the truth of their contents simply because an expert reviewed them. Some independent basis must exist to support admission of these records into evidence. Since both records contained inadmissible hearsay, neither the deposition nor medical records were admissible.

In fact, it appears that trial counsel made a strategic decision not to call Dr. Bernard as a witness at trial. They were obviously aware of what her previous testimony had been, had discussed whether she should be called, and then decided not to have her as a witness. Defendant cannot now complain that counsel were ineffective in not presenting Dr. Bernard's deposition when the record suggests that counsel chose not to call her as a witness. In any event, without a showing that Dr. Bernard was unavailable as a witness, counsel would have had no basis for offering the deposition into evidence.

In addition, Defendant was not prejudiced because Dr. Bernard was unable to provide a reliable IQ score during her deposition. When she was asked that question, Dr. Bernard replied:

> I have in the notes that I had low seventies. And since I don't have my data, I can't give you an exact number. But that to me would be under

seventy-five, certainly. So—and probably if it were seventy, I would have said seventy. So seventy-one, two, three, somewhere in there, probably.

(PCR Ex. 15, p. 24). Moreover, when Dr. Bernard was asked if Defendant "always functioned in a mentally retarded range," Dr. Bernard's initial response was, "That's hard to say . . . ." (PCR Ex. 15, p. 48). Her complete, and somewhat equivocal, response was:

That's hard to say, you know. I think when he was an infant he was—you would have to say for the first two or three years—four, I think is the number of years you give for developmentally delayed versus mentally retarded. After that and after all his testing, yes, probably.

(PCR Ex. 15, p. 48). Because Drs. Smith and Keyes unequivocally testified that Defendant was mentally retarded, Dr. Bernard's testimony, equivocal as it was, would have been cumulative, at best.

Defendant was not prejudiced by counsel's failure to admit his mother's mental-health records, assuming they were admissible, because the jury had already heard evidence that his half-brother Danny was profoundly mentally retarded and had been institutionalized. In any event, the issue was whether Defendant was mentally retarded, not whether his mother was. Considering that Defendant's brother and sister, who testified during the third penalty phase, were clearly not retarded, the jury would not have found that

Defendant was, in fact, mentally retarded simply because some dated medical record showed his mother had an IQ score of 61 and a diagnosis of mental retardation.

The motion court did not clearly err in rejecting this claim

IV (failure to object—Heisler interview).

The motion court did not clearly err in finding that Defendant failed to prove that counsel was ineffective for not objecting to admission of Dr. Heisler's recorded interview with Defendant because trial counsel had a strategic reason for wanting the jury to view the video because it was evidence of Defendant's mental retardation and an objection would have been without merit since Defendant waived his right not to incriminate himself when he placed his mental condition into issue, Defendant's guilt was no longer at issue since he had already been convicted, and this was a retrial of the penalty phase on the issue of Defendant's alleged mental retardation.

A. The record regarding this claim.

In his post-conviction motion, Defendant alleged that counsel were ineffective for failing to move to exclude portions of the recorded interview between Defendant and Dr. Heisler on the ground that Defendant was not advised of his right to remain silent and the interview included questions about Defendant's commission of the offense, which, Defendant alleged, were not relevant to the issue of his mental retardation. (3rd PCR L.F. 82-89).

During Defendant's third penalty-phase proceeding, the State filed a pre-trial motion asking the trial court to order Defendant to submit to a mental examination to be conducted by Dr. Gerald Heisler. (3rd PCR L.F. 199). Following a hearing and stipulation by the parties, the court ordered Defendant to submit to a mental examination for the purpose of "assessing whether [Defendant] is mentally retarded as that term is defined by section 565.030.6, RSMo." (3rd PCR L.F. 209-10).

At the beginning of the interview, Dr. Heisler informed Defendant that "Boone County" had hired him to assess Defendant, that the interview was being recorded, and that it was not confidential and would be shared with defense counsel and other attorneys. (State's Ex. 78). Defendant acknowledged that the interview was being conducted "for the State." (State's Ex. 78).

In addition to the numerous topics discussed during the interview, at one point Dr. Heisler asked Defendant if he knew why he was in prison, and Defendant responded that he was in for "first-degree murders." (State's Ex. 78). He then asked Defendant if he was "good for the crime?" (State's Ex. 78). Defendant said that he was and that the crimes were "about my drug habit." (State's Ex. 78). When Dr. Heisler asked Defendant to describe his drug use on the day of the crime, Defendant said that he stayed at "Indian

Hills" all day and that "Rob . . . was giving me dope on credit."[12] (State's Ex. 78). Defendant said that "Rob" would not give him any more drugs so he asked him to give him a .22 gun so that he could rob a store with it and get more money to buy drugs. (State's Ex. 78). Defendant said he went to the store and waited until the last person left and then announced that he was robbing the store. (State's Ex. 78). Defendant said that he wore a mask so the store employees would not identify him. (State's Ex. 78).

He said that he knew the store had two safes and that the manager had the key to the second safe. (State's Ex. 78). Although he knew the manager had the key, Defendant said that she denied having it. (State's Ex. 78). Defendant said that he took her to the bathroom and when he returned he caught her trying to flush the key down the toilet, which made him mad. (State's Ex. 78). Defendant said that he just "started shooting people." (State's Ex. 78). When Dr. Heisler asked him about the "hammer," Defendant said "that's later on." (State's Ex. 78). When asked whether he took off some garments after he left the store, Defendant said that "there was

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[12] Presumably, Defendant's mention of "Rob" was a reference to Rod Grant, Defendant's girlfriend's 18-year-old son, who had given Defendant the drugs on the day in question when Defendant lived with them in the Indian Hills subdivision.

blood all over" him. (State's Ex. 78). Defendant said that he had worn multiple layers of clothes when he went to the store and that he had gotten blood on his gloves and had discarded them. (State's Ex. 78). When asked if he wore multiple layers of clothes because he might get blood on them, Defendant replied, "Nah. . . . if they tell what kind of clothes I got on, well, I can switch." (State's Ex. 78).

He said that after leaving the store he went back to the house and bought more drugs from "Rob." (State's Ex. 78). He also said that the "two boys" that lived at the house tried to burn some checks because they knew what Defendant had done since Defendant "told them because I thought they was my kids. I trusted." (State's Ex. 78). Defendant said he washed the blood off his face, counted the money (about $1500, maybe more), paid "Rob" off, and left the house to buy more drugs. (State's Ex. 78).

The recorded interview was admitted during trial without objection and played for the jury. (3rd Tr. 953; State's Ex. 78).

Defense expert Dr. Parwatikar testified on direct examination that he had interviewed Defendant as part of his evaluation, and that Defendant had told him that he had used a "significant amount of cocaine" on the day the murders occurred. (3rd Tr. 1290-91). On cross-examination, he testified that Defendant told him that he went to the store with a gun, but that he could not remember anything else other than he started shooting. (3rd Tr. 1323-26).

Afterwards, he realized that he had done something wrong, told his girlfriend's sons about it, and got rid of the gloves and clothing he had worn. (3rd Tr. 1325-28).

During direct examination of defense expert Dr. Smith, he testified that he had spent five hours interviewing Defendant and that he had reviewed Dr. Heisler's report as part of his evaluation. (3rd Tr. 1352-53). During cross-examination, Dr. Smith said that Defendant told him that he had locked the employees in the bathroom and that when he heard noises coming from the bathroom and returned, he got into a physical altercation with the male employee and shot him. (3rd Tr. 1452-53). Defendant told Dr. Smith he could not recall what happened after the shooting. (3rd Tr. 1453-54).

Dr. Keyes testified during direct examination that he had spent eight hours interviewing Defendant during his evaluation. (3rd Tr. 1544-45). He also said that he had reviewed Dr. Heisler's recorded interview with Defendant. (3rd Tr. 1627).

Defense counsel Carlyle testified during the post-conviction hearing that she did not object to the video of the Heisler interview because she believed it showed that Defendant was mentally retarded. (3rd PCR Tr. 608-11). She said that part of the stipulation concerning the interview was that it be videotaped. (3rd PCR Tr. 670).

The motion court rejected this claim on the ground that counsel had a reasonable trial-strategy reason for not objecting to the recorded interview because counsel believed it showed that Defendant was mentally retarded and supported the defense; it also found that a motion to suppress would have been meritless because Defendant placed his mental condition in issue. (3rd PCR L.F. 352-54).

B. The motion court did not clearly err in rejecting this claim.

In viewing the Heisler interview with Defendant (State's Ex. 78), one can see why trial counsel did not object to its admission into evidence. Defendant exhibits behaviors during the interview that trial counsel could have reasonably believed were evidence that he was mentally retarded. Counsel referred to the interview during closing argument, stressing to jurors that they had the benefit of seeing Defendant interviewed and how he could not perform a simple magic trick or remember who the president before Clinton was. (3rd Tr. 1789). The motion court did not clearly err in finding that counsel had a reasonable trial strategy reason for not objecting to the admission of the recorded interview.

Moreover, any objection counsel may have raised to the recorded interview on the ground that Defendant had not waived his right not to incriminate himself would have been without merit since Defendant had

placed his mental condition into issue by claiming that he was mentally retarded, and, thus, not subject to capital punishment.

In *State v. Copeland*, 928 S.W.2d 828 (Mo. banc 1996), overruled on other grounds by *Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008),the defendant argued that her right to self-incrimination had been violated when the State called as a witness during the penalty phase of a capital trial the psychiatrist who performed the defendant's pretrial competency evaluation. *Id.* at 839. But because the defendant had put her mental condition in issue by claiming that she was a battered spouse, this Court held that she had "waived any claim that the testimony by [the competency psychiatrist] or other experts who examined her violated her privilege against self-incrimination." *Id. See also State v. Thompson*, 985 S.W.2d 779, 786 (Mo. banc 1999) ("once a defendant places his mental condition at issue, he waives any claim that information or testimony from experts violates his privilege against self-incrimination"); *State v. Worthington*, 8 S.W.3d 83, 91-92 (Mo. banc 1999); *Glass v. State*, 227 S.W.3d 463, 483 (Mo banc 2007). In reaching this holding, the court in *Copeland* distinguished the United States Supreme Court's holding in *Estelle v. Smith*, 451 U.S. 454 (1981), on which Defendant relies:

> That case [*Estelle*] stands for the proposition that a "criminal defendant who neither initiates a psychiatric evaluation nor attempts

> to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." In this case, the defendant not only attempted to introduce, but had introduced evidence regarding her mental condition, specifically her status as a victim of battered woman syndrome. Because this case does not fall within the rule enunciated in *Estelle*, that case is inapposite.

Id. (quoting *Estelle*, 451 U.S. at 468) (citation omitted). In fact, the Court in *Estelle* distinguished that case from cases in which the defendant is relying on the defense of insanity and intends to present expert psychiatric evidence on that issue at trial. *Estelle*, 451 U.S. at 455-56. The Court also noted that on "the same theory, the Court of Appeals here carefully left open 'the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state.'" *Id.* at 456 n.10.

The motion did not clearly err in rejecting this claim.

V (failure to object—Dr. Kline's report).

The motion court did not clearly err in finding that Defendant failed to prove that counsel were ineffective for failing to object to the prosecutor's questions asking defense experts whether they had been furnished a copy of Dr. Kline's competency evaluation by defense counsel, which they had, and in asking if Dr. Kline had found Defendant not to be mentally retarded because any objection to these questions would have been without merit.

A. The record regarding this claim.

In his post-conviction motion, Defendant alleged that trial counsel were ineffective for failing to object to the prosecutor's questions to defense experts regarding the competency evaluation performed by Dr. Kline on the ground that this information was not admissible at Defendant's trial under § 552.020.14, RSMo 2000. (3rd PCR L.F. 112-15).

Before Defendant's third penalty-phase proceeding began, defense counsel filed a motion for a mental examination of Defendant to determine if he was competent to stand trial. (3rd L.F. 238-39; 3rd PCR Tr. 714-15). This competency evaluation was ordered by the court and performed by Dr. Jeffrey Kline at the Mid-Missouri Mental Health Center, and a competency evaluation completed by Dr. Kline was filed with the circuit court. (3rd L.F.

40; 3rd PCR Tr. 602). Dr. Kline reviewed the numerous records associated with Defendant's case, including previous evaluations, and conducted a 110-minute interview with him. (PCR Ex. 57). Dr. Kline wrote in his report that he believed Defendant operated within the borderline range of intellectual functioning. (PCR Ex. 57).

During defense counsel's direct examination of Dr. Parwatikar, testimony was adduced that Dr. Parwatikar had previously conducted an evaluation on Defendant to determine whether he was competent to stand trial or whether he had a mental disease or defect to support an insanity defense. (3rd Tr. 1285-88). During cross-examination, the prosecutor asked Dr. Parwatikar, without objection, whether he had seen Dr. Kline's report, and Dr. Parwatikar replied that he had. (3rd Tr. 1306, 1309). Dr. Parwatikar said that Dr. Kline had found that Defendant was not mentally retarded, but that he could not agree or disagree with that finding. (3rd Tr. 1310).

During both direct and cross-examination of defense expert Dr. Smith, he testified that he had reviewed Dr. Kline's report as part of his evaluation of Defendant. (3rd Tr. 1352, 1422). He agreed that Kline had not found Defendant to be mentally retarded. (3rd Tr. 1422).

Dr. Keyes testified during direct examination that he had reviewed Dr. Kline's report as part of his evaluation. (3rd Tr. 1547). On cross-examination, he agreed that Dr. Kline opined that Defendant was not mentally retarded.

(3rd Tr. 1667). He also agreed that Dr. Kline wrote in his report that when Dr. Kline asked Defendant what would happen if he was found mentally retarded, Defendant said he would get a life sentence. (3rd Tr. 1694-95). He also agreed that Kline reported that Defendant said he did not mind being found mentally retarded because it is true. (3rd Tr. 1695). On redirect-examination, Dr. Keyes pointed out that Dr. Kline did not perform any intelligence testing on Defendant. (3rd Tr. 1740).

Defense counsel Carlyle testified that she did not have a trial-strategy reason for not objecting to references to Dr. Kline's report during the cross-examination of Drs. Parwatikar, Smith, and Keyes. (3rd PCR Tr. 602-06). Defense counsel Cisar said that Kline's report had been provided to both Drs. Smith and Keyes. (3rd PCR Tr. 759).

The motion court rejected this claim on the ground that the defense witnesses Smith and Keyes had testified that they were provided with Dr. Kline's report when doing their evaluations of Defendant, that the prosecutor did not ask anything about Kline's opinion on whether Defendant was competent to proceed with trial, and that the State was entitled to ask the defense experts about the information they relied on in forming their opinions. (3rd PCR L.F. 350-52).

B. The motion court did not clearly err.

Missouri law does not permit someone to be tried for a criminal offense if they suffer from a mental illness that prevents them from understanding the proceedings or assisting in their defense:

> No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

Section 552.020.1, RSMo 2000. If the trial judge has reason to believe that the accused lacks the capacity to understand the proceeding or assist in his or her defense, the judge must order an examination of the accused by a psychiatrist or psychologist. Section 552.020.2, RSMo 2000. If an examination is ordered, a report shall be filed with the court containing detailed findings, an opinion whether the accused suffers from a mental disease or defect, and an opinion whether the accused lacks the ability to understand the proceedings or assist in his or her defense. Section 552.020.3, RSMo 2000. The circuit clerk is required to deliver copies of the report to the prosecutor and defense counsel, but the report itself is "not a public record or opened to the public" and the result of any such examination shall not be open to the public. Section 552.020.6 and .13, RSMo 2000. Finally, no

statements made by the accused, or information obtained, during such an evaluation may be admitted into evidence against the accused "on the issue of guilt":

> No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused is mentally fit to proceed shall in no way prejudice the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

Section 552.020.14, RSMo 2000.

Defendant contends that counsel should have objected to any reference or question regarding Dr. Kline's competency evaluation based on the ground that this would violate subsection 14. But the prosecutor's question was simply whether the expert witnesses were aware of Dr. Kline's report, which

they had already testified had been provided to them, and whether they were aware that Dr. Kline had not found Defendant to be mentally retarded. These questions did not violate the statute because they did not seek to elicit information about any statements the accused made or information received by the examiner (Dr. Kline). Instead, the question was directed toward the opinion of Dr. Kline on the issue of Defendant's mental retardation, which was the central issue at Defendant's third penalty-phase proceeding.

Even if the prosecutor's questions could be broadly interpreted as falling within the information described in subsection 14, the testimony adduced was not admitted in evidence on the issue of guilt. The issue of Defendant's guilt was determined fifteen years ago during his first trial; the issue now is the appropriate punishment for his crimes. In addition, the prosecutor asked no question eliciting information on whether Dr. Kline found Defendant mentally fit to proceed with trial. The only evidence adduced on that issue was elicited by defense counsel when testimony was adduced from Dr. Parwatikar that he had found Defendant competent to proceed to trial back in 1995.

In *Copeland*, a psychiatrist performed a competency evaluation under § 552.020 to determine if a capital defendant was competent and otherwise fit to stand trial. 928 S.W.2d at 838. During the penalty phase proceeding, the defendant presented evidence that she suffered from battered spouse

syndrome. *Id.* In response, the State called as a witness the psychiatrist who performed the defendant's competency evaluation to testify that the defendant was not a battered spouse. *Id.* The defendant claimed on appeal that counsel was ineffective for failing to timely and properly object to the psychiatrist's testimony on the ground that it was inadmissible under § 552.020.12 (now § 552.020.14). *Id.* This Court rejected that claim because the testimony was adduced during the penalty phase and not on the issue of the defendant's guilt:

> Here defendant's guilt had already been established when [the psychiatrist's] testimony was presented. The issue upon which he testified was admitted in response to the testimony of [the defense expert] relating to mitigation of punishment. The statute in question, § 552.020.12, only prohibits admission of the examiner's testimony on the issue of guilt. The statute was not violated.

Id. at 839.

In addition, the prosecutor was entitled to conduct a probing inquiry into the matters the testifying experts considered in forming their opinions. *See State v. Thompson*, 985 S.W.2d at 787 ("A substantial inquiry into the factual basis of an expert opinion is a proper object of cross-examination . . . .").

Consequently, an objection by defense counsel to the prosecutor's questions about Dr. Kline's report, especially in light of the fact that the defense experts had already testified that they had reviewed it as part of their evaluation, would have been without merit. "Counsel will not be deemed ineffective for failing to make nonmeritorious objections." *State v. Clay*, 975 S.W.2d 121, 135 (Mo. banc 1998); see also *State v. Kreutzer*, 928 S.W.2d 854, 878 (Mo. banc 1996).

Finally, Defendant cannot establish that he was prejudiced by the prosecutor's brief inquiry about Dr. Kline's report. The jury heard that several other mental-health professionals had evaluated Defendant during the long course of this litigation and had found him not to be mentally retarded. And Dr. Keyes pointed out that while Dr. Kline had opined that Defendant was not mentally retarded, Dr. Kline had not performed any intelligence testing on Defendant.

The motion court did not clearly err in rejecting this claim.

VI (geographic disproportion).

Defendant's post-conviction claim that capital punishment in Boone County is arbitrarily and capriciously imposed is not cognizable in this post-conviction appeal because it differs from the claim raised before the motion court and because it is a constitutional challenge that should have been raised on direct appeal.

In his post-conviction motion, Defendant alleged that death penalty is in Missouri is unconstitutionally applied on the ground that it is randomly inflicted the statutory aggravating circumstances provided by Missouri law, § 565.032.2, RSMo 2000, do not sufficiently narrow the class of first-degree murder cases eligible for capital punishment. (3rd PCR L.F. 99-103). The motion court rejected this claim on the ground that Missouri courts have repeatedly held that the capital-punishment statutes are constitutional and properly narrow the cases in which a death sentence may be sought. (3rd PCR L.F. 363-65).

In Defendant's brief before this Court, however, he challenges the death sentence imposed in Boone County on Defendant because death sentences are sought and imposed at a substantially higher rate than

elsewhere in Missouri. This is an entirely different claim, and as such it is not preserved for appellate review in this post-conviction proceeding.

"A point raised on appeal after a denial of a postconviction motion can be considered only to the extent that the point was raised in the motion before the trial court." *State v. Evans*, 992 S.W.2d 275, 295 (Mo. App. S.D. 1999) (quoting *State v. Mullins*, 897 S.W.2d 229, 231 (Mo. App. S.D. 1995)). "The point cannot be raised for the first time on appeal." *Id.* Further, "plain error review is not available to post-conviction claims not raised in the motion court." *Burns v. State*, 964 S.W.2d 548, 551 (Mo. App. S.D. 1998). "An appellate court is without jurisdiction to consider an issue not raised before the motion court." *Mullins*, 897 S.W.2d at 231.

Moreover, Defendant's pleadings cannot be cured by the fact that the motion court heard evidence in this case. This Court may only consider claims as they were pleaded to the motion court. *See Belcher v. State*, 801 S.W.2d 372, 375 (Mo. App. E.D. 1990); *State v. Clay*, 975 S.W.2d at 141-42. Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal. *State v. Harris*, 870 S.W.2d 798, 815 (Mo. banc 1994). This is because pleadings may not be amended to conform to the evidence after the time for amending pleadings under Rule 29.15 has passed. *Rohwer v. State*, 791 S.W.2d 741, 743-44 (Mo. App. W.D. 1990).

Moreover, this is a claim that should have been raised on direct appeal. A "post-conviction motion cannot be used as a substitute for a direct or second appeal." *Henderson v. State*, 786 S.W.2d 194, 196 (Mo. App. E.D. 1990). A post-conviction movant "who deliberately bypasses a constitutional claim cannot by post-conviction proceedings raise claims of error he could have raised on direct appeal." *Id.* at 196-97. "[T]rial court error is not cognizable in a 29.15 motion unless fundamental fairness requires it to be raised, which only occurs in exceptional circumstances." *State v. Franklin*, 854 S.W.2d 438, 444 (Mo. App. W.D. 1993). "Constitutional claims which could have been raised on direct appeal are subject to waiver except 'where fundamental fairness requires otherwise and only in rare and exceptional circumstances.'" *Henderson*, 786 S.W.2d at 197 (quoting *McCrary v. State*, 529 S.W.2d 467, 472 (Mo. App. St.L.D. 1975)).

Defendant has also failed to make any attempt to show that his case constitutes one of those "rare and exceptional" circumstances in which such claims are not considered waived. *See State v. Carter*, 955 S.W.2d 548, 555-56 (Mo. banc 1997) (holding that the movant had not alleged "any rare and exceptional circumstances," even though the State had failed to disclose information showing that the pathologist who performed the autopsy on the murder victim was incompetent).

Another infirmity relating to this claim is the fact that it is based on a study of homicide cases in which the initial charging decision was made between January 1, 1997, to December 31, 2000. (3rd PCR Tr. 362, 528-29). Defendant was charged, tried, and convicted of first-degree murder and initially sentenced to death in 1994 and 1995. (3rd L.F. 1-28).

Finally, similar claims have been previously rejected by this Court. *See State v. Whitfield*, 837 S.W.2d 503, 514-15 (Mo. banc 1992) (rejecting claim that Missouri's system of capital punishment provides for unfettered prosecutorial discretion); *State v. Ramsey*, 864 S.W.2d 320, 330 (Mo. banc 1993) (rejecting claim that Missouri's death-penalty statute vests too much discretion in the prosecutor to seek the death penalty).

CONCLUSION

The circuit court did not clearly err in overruling Defendant's motion for post-conviction relief. Its judgment should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 19,549 words as determined by Microsoft Word 2007 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed on November 18, 2010, to:

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STATE OF MISSOURI

APPENDIX TABLE OF CONTENTS

Mo. Const. art. V, § 3

The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

Section 552.020, RSMo 2000:

1. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

2. Whenever any judge has reasonable cause to believe that the accused lacks mental fitness to proceed, he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, who are neither employees nor contractors of the department of mental health for purposes of performing the examination in question, to examine the accused; or shall direct the director to have the accused so examined by one or more psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals. The order shall direct that a written report or reports of such examination be filed with the clerk of the court. No private physician, psychiatrist, or psychologist shall be appointed by the court unless he has consented to act. The examinations ordered shall be made at such time and place and under such conditions as the court deems proper; except that, if the order directs the director of the department to have the accused examined, the director, or his designee, shall determine the time, place and conditions under which the examination shall be conducted. The order may include provisions for the interview of witnesses and may require the provision of police reports to the department for use in evaluations. The department shall establish standards and provide training for those individuals performing examinations pursuant to this section and section

552.030. No individual who is employed by or contracts with the department shall be designated to perform an examination pursuant to this chapter unless the individual meets the qualifications so established by the department. Any examination performed pursuant to this subsection shall be completed and filed with the court within sixty days of the order unless the court for good cause orders otherwise. Nothing in this section or section 552.030 shall be construed to permit psychologists to engage in any activity not authorized by chapter 337, RSMo. One pretrial evaluation shall be provided at no charge to the defendant by the department. All costs of subsequent evaluations shall be assessed to the party requesting the evaluation.

3. A report of the examination made under this section shall include:

(1) Detailed findings;

(2) An opinion as to whether the accused has a mental disease or defect;

(3) An opinion based upon a reasonable degree of medical or psychological certainty as to whether the accused, as a result of a mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense;

(4) A recommendation as to whether the accused should be held in custody in a suitable hospital facility for treatment pending determination, by the court, of mental fitness to proceed; and

(5) A recommendation as to whether the accused, if found by the court to be mentally fit to proceed, should be detained in such hospital facility pending further proceedings.

4. If the accused has pleaded lack of responsibility due to mental disease or defect or has given the written notice provided in subsection 2 of section 552.030, the court shall order the report of the examination conducted pursuant to this section to include, in addition to the information required in subsection 3 of this section, an opinion as to whether at the time of the alleged criminal conduct the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law. A plea of not guilty by reason of mental disease or defect shall not be accepted by the court in the absence of any such

pretrial evaluation which supports such a defense. In addition, if the accused has pleaded not guilty by reason of mental disease or defect, and the alleged crime is not a dangerous felony as defined in section 556.061, RSMo, or those crimes set forth in subsection 11 of section 552.040, or the attempts thereof, the court shall order the report of the examination to include an opinion as to whether or not the accused should be immediately conditionally released by the court pursuant to the provisions of section 552.040 or should be committed to a mental health or mental retardation facility. If such an evaluation is conducted at the direction of the director of the department of mental health, the court shall also order the report of the examination to include an opinion as to the conditions of release which are consistent with the needs of the accused and the interest of public safety, including, but not limited to, the following factors:

(1) Location and degree of necessary supervision of housing;

(2) Location of and responsibilities for appropriate psychiatric, rehabilitation and aftercare services, including the frequency of such services;

(3) Medication follow-up, including necessary testing to monitor medication compliance;

(4) At least monthly contact with the department's forensic case monitor;

(5) Any other conditions or supervision as may be warranted by the circumstances of the case.

5. If the report contains the recommendation that the accused should be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed, and if the accused is not admitted to bail or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed.

6. The clerk of the court shall deliver copies of the report to the prosecuting or circuit attorney and to the accused or his counsel. The report shall not be a public record or open to the public. Within ten days after the filing of the report, both the defendant and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a psychiatrist or psychologist, as defined in section 632.005, RSMo, or a physician with a minimum of one year training or experience in providing

treatment or services to mentally retarded or mentally ill individuals, of their own choosing and at their own expense. An examination performed pursuant to this subsection shall be completed and a report filed with the court within sixty days of the date it is received by the department or private psychiatrist, psychologist or physician unless the court, for good cause, orders otherwise. A copy shall be furnished the opposing party.

7. If neither the state nor the accused nor his counsel requests a second examination relative to fitness to proceed or contests the findings of the report referred to in subsections 2 and 3 of this section, the court may make a determination and finding on the basis of the report filed or may hold a hearing on its own motion. If any such opinion is contested, the court shall hold a hearing on the issue. The court shall determine the issue of mental fitness to proceed and may impanel a jury of six persons to assist in making the determination. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein shall have the right to summon and to cross-examine the examiner who rendered such opinion and to offer evidence upon the issue.

8. At a hearing on the issue pursuant to subsection 7 of this section, the accused is presumed to have the mental fitness to proceed. The burden of proving that the accused does not have the mental fitness to proceed is by a preponderance of the evidence and the burden of going forward with the evidence is on the party raising the issue. The burden of going forward shall be on the state if the court raises the issue.

9. If the court determines that the accused lacks mental fitness to proceed, the criminal proceedings shall be suspended and the court shall commit him to the director of the department of mental health.

10. Any person committed pursuant to subsection 9 of this section shall be entitled to the writ of habeas corpus upon proper petition to the court that committed him. The issue of the mental fitness to proceed after commitment under subsection 9 of this section may also be raised by a motion filed by the director of the department of mental health or by the state, alleging the mental fitness of the accused to proceed. A report relating to the issue of the accused's mental fitness to proceed may be attached thereto. If the motion is not contested by the accused or his counsel or if after a hearing on a motion the court finds the accused mentally fit to proceed, or if he is ordered discharged from the director's custody upon a habeas corpus hearing, the criminal proceedings shall be resumed.

11. The following provisions shall apply after a commitment as provided in this section:

(1) Six months after such commitment, the court which ordered the accused committed shall order an examination by the head of the facility in which the accused is committed, or a qualified designee, to ascertain whether the accused is mentally fit to proceed and if not, whether there is a substantial probability that the accused will attain the mental fitness to proceed to trial in the foreseeable future. The order shall direct that written report or reports of the examination be filed with the clerk of the court within thirty days and the clerk shall deliver copies to the prosecuting attorney or circuit attorney and to the accused or his counsel. The report required by this subsection shall conform to the requirements under subsection 3 of this section with the additional requirement that it include an opinion, if the accused lacks mental fitness to proceed, as to whether there is a substantial probability that the accused will attain the mental fitness to proceed in the foreseeable future;

(2) Within ten days after the filing of the report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a psychiatrist or psychologist, as defined in section 632.005, RSMo, or a physician with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, of their own choosing and at their own expense. An examination performed pursuant to this subdivision shall be completed and filed with the court within thirty days unless the court, for good cause, orders otherwise. A copy shall be furnished to the opposing party;

(3) If neither the state nor the accused nor his counsel requests a second examination relative to fitness to proceed or contests the findings of the report referred to in subdivision (1) of this subsection, the court may make a determination and finding on the basis of the report filed, or may hold a hearing on its own motion. If any such opinion is contested, the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein relative to fitness to proceed shall have the right to summon and to cross-examine the examiner who rendered such opinion and to offer evidence upon the issue;

(4) If the accused is found mentally fit to proceed, the criminal proceedings shall be resumed;

(5) If it is found that the accused lacks mental fitness to proceed but there is a substantial probability the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall continue such commitment for a period not longer than six months, after which the court shall reinstitute the proceedings required under subdivision (1) of this subsection;

(6) If it is found that the accused lacks mental fitness to proceed and there is no substantial probability that the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall dismiss the charges without prejudice and the accused shall be discharged, but only if proper proceedings have been filed under chapter 632 or chapter 475, RSMo, in which case those sections and no others will be applicable. The probate division of the circuit court shall have concurrent jurisdiction over the accused upon the filing of a proper pleading to determine if the accused shall be involuntarily detained under chapter 632, RSMo, or to determine if the accused shall be declared incapacitated under chapter 475, RSMo, and approved for admission by the guardian under section 632.120 or 633.120, RSMo, to a mental health or retardation facility. When such proceedings are filed, the criminal charges shall be dismissed without prejudice if the court finds that the accused is mentally ill and should be committed or that he is incapacitated and should have a guardian appointed. The period of limitation on prosecuting any criminal offense shall be tolled during the period that the accused lacks mental fitness to proceed.

12. If the question of the accused's mental fitness to proceed was raised after a jury was impaneled to try the issues raised by a plea of not guilty and the court determines that the accused lacks the mental fitness to proceed or orders the accused committed for an examination pursuant to this section, the court may declare a mistrial. Declaration of a mistrial under these circumstances, or dismissal of the charges pursuant to subsection 11 of this section, does not constitute jeopardy, nor does it prohibit the trial, sentencing or execution of the accused for the same offense after he has been found restored to competency.

13. The result of any examinations made pursuant to this section shall not be a public record or open to the public.

14. No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his

motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused is mentally fit to proceed shall in no way prejudice the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

Section 552.030, RSMo 2000:

1. A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person's conduct.

2. Evidence of mental disease or defect excluding responsibility shall not be admissible at trial of the accused unless the accused, at the time of entering such accused's plea to the charge, pleads not guilty by reason of mental disease or defect excluding responsibility, or unless within ten days after a plea of not guilty, or at such later date as the court may for good cause permit, the accused files a written notice of such accused's purpose to rely on such defense. Such a plea or notice shall not deprive the accused of other defenses. The state may accept a defense of mental disease or defect excluding responsibility, whether raised by plea or written notice, if the accused has no other defense and files a written notice to that effect. The state shall not accept a defense of mental disease or defect excluding responsibility in the absence of any pretrial evaluation as described in this section or section 552.020. Upon the state's acceptance of the defense of mental disease or defect excluding responsibility, the court shall proceed to order the commitment of the accused as provided in section 552.040 in cases of persons acquitted on the ground of mental disease or defect excluding responsibility, and further proceedings shall be had regarding the confinement and release of the accused as provided in section 552.040.

3. Whenever the accused has pleaded mental disease or defect excluding responsibility or has given the written notice provided in subsection 2 of this section, and such defense has not been accepted as provided in subsection 2 of this section, the court shall, after notice and upon motion of either the state or the accused, by order of record, appoint one or more private psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a

minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, who are neither employees nor contractors of the department of mental health for purposes of performing the examination in question, to examine the accused, or shall direct the director of the department of mental health, or the director's designee, to have the accused so examined by one or more psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals designated by the director, or the director's designee, as qualified to perform examinations pursuant to this chapter. The order shall direct that written report or reports of such examination be filed with the clerk of the court. No private psychiatrist, psychologist, or physician shall be appointed by the court unless such psychiatrist, psychologist or physician has consented to act. The examinations ordered shall be made at such time and place and under such conditions as the court deems proper; except that, if the order directs the director of the department of mental health to have the accused examined, the director, or the director's designee, shall determine the time, place and conditions under which the examination shall be conducted. The order may include provisions for the interview of witnesses and may require the provision of police reports to the department for use in evaluation. If an examination provided in section 552.020 was made and the report of such examination included an opinion as to whether, at the time of the alleged criminal conduct, the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality or wrongfulness of such accused's conduct or as a result of mental disease or defect was incapable of conforming such accused's conduct to the requirements of law, such report may be received in evidence, and no new examination shall be required by the court unless, in the discretion of the court, another examination is necessary. If an examination is ordered pursuant to this section, the report shall contain the information required in subsections 3 and 4 of section 552.020. Within ten days after receiving a copy of such report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by an examiner of such accused's or its own choosing and at such accused's or its expense. The clerk of the court shall deliver copies of the report or reports to the prosecuting or circuit attorney and to the accused or his counsel. No reports required by this subsection shall be public records or be open to the public. Any examination performed pursuant to this subsection shall be completed and the results shall be filed with the court within sixty days of the date it is received by the department

or private psychiatrist, psychologist or physician unless the court, for good cause, orders otherwise.

4. If the report contains the recommendation that the accused should be held in custody in a suitable hospital facility pending trial, and if the accused is not admitted to bail, or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending trial.

5. No statement made by the accused in the course of any such examination and no information received by any physician or other person in the course thereof, whether such examination was made with or without the consent of the accused or upon the accused's motion or upon that of others, shall be admitted in evidence against the accused on the issue of whether the accused committed the act charged against the accused in any criminal proceeding then or thereafter pending in any court, state or federal. The statement or information shall be admissible in evidence for or against the accused only on the issue of the accused's mental condition, whether or not it would otherwise be deemed to be a privileged communication. If the statement or information is admitted for or against the accused on the issue of the accused's mental condition, the court shall, both orally at the time of its admission and later by instruction, inform the jury that it must not consider such statement or information as any evidence of whether the accused committed the act charged against the accused.

6. All persons are presumed to be free of mental disease or defect excluding responsibility for their conduct, whether or not previously adjudicated in this or any other state to be or to have been sexual or social psychopaths, or incompetent; provided, however, the court may admit evidence presented at such adjudication based on its probative value. The issue of whether any person had a mental disease or defect excluding responsibility for such person's conduct is one for the trier of fact to decide upon the introduction of substantial evidence of lack of such responsibility. But, in the absence of such evidence, the presumption shall be conclusive. Upon the introduction of substantial evidence of lack of such responsibility, the presumption shall not disappear and shall alone be sufficient to take that issue to the trier of fact. The jury shall be instructed as to the existence and nature of such presumption when requested by the state and, where the issue of such responsibility is one for the jury to decide, the jury shall be told that the burden rests upon the accused to show by a preponderance or greater weight of the credible evidence that the defendant was suffering from a mental

disease or defect excluding responsibility at the time of the conduct charged against the defendant. At the request of the defense the jury shall be instructed by the court as to the contents of subsection 2 of section 552.040.

7. When the accused is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state as well as state the offense for which the accused was acquitted. The clerk of the court shall furnish a copy of any judgment or order of commitment to the department of mental health pursuant to this section to the criminal records central repository pursuant to section 43.503, RSMo.

Section 565.032, RSMo 2000:

1. In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Whether a statutory aggravating circumstance or circumstances enumerated in subsection 2 of this section is established by the evidence beyond a reasonable doubt; and

(2) If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole, or release except by act of the governor. In determining the issues enumerated in subdivisions (1) and (2) of this subsection, the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment, including evidence received during the first stage of the trial and evidence supporting any of the statutory aggravating or mitigating circumstances set out in subsections 2 and 3 of this section. If the trier is a jury, it shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment, but shall be instructed that each juror shall consider any evidence which he considers to be aggravating or mitigating.

2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;

(2) The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide;

(3) The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another;

(5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;

(7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty;

(9) The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;

(11) The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo;

(12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness;

(13) The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility;

(14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance;

(15) The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195, RSMo;

(16) The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195, RSMo;

(17) The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

Rule 29.15:

(a) Nature of Remedy--Rules of Civil Procedure Apply. A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure to be followed for motions filed pursuant to this Rule 29.15 is governed by the rules of civil procedure insofar as applicable.

(b) Form of Motion--Cost Deposit Not Required--Time to File--Failure to File, Effect of. A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form No. 40.

No cost deposit shall be required.

If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence.

If no appeal of such judgment or sentence was taken, the motion shall be filed within 180 days of the date the person is delivered to the custody of the department of corrections.

If:

(1) An appeal of such judgment or sentence is taken;

(2) The appellate court remands the case resulting in entry of a new judgment or sentence; and

(3) An appeal of the new judgment or sentence is taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming the new judgment or sentence.

If no appeal of such new judgment or sentence is taken, the motion shall be filed within 180 days of the later of:

(1) The date the person is delivered to the custody of the department of corrections; or

(2) The date the new judgment or sentence was final for purposes of appeal.

Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule29.15.

(c) Clerk's Duties. Movant shall file the motion and two copies thereof with the clerk of the trial court. The clerk shall immediately deliver a copy of the motion to the prosecutor. Upon receipt of the motion, the clerk shall notify the sentencing judge and shall notify the court reporter to prepare and file the complete transcript of the trial if the transcript has not yet been prepared or filed. If the motion is filed by an indigent pro se movant, the clerk shall forthwith send a copy of the motion to the counsel who is appointed to represent the movant.

(d) Contents of Motion. The motion to vacate shall include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall declare in the motion that the movant has listed all claims for relief known to the movant and acknowledging the movant's understanding that the movant waives any claim for relief known to the movant that is not listed in the motion.

(e) Pro Se Motion--Appointment of Counsel--Amended Motion, Required When. When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and

whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the pro se motion and (2) all claims known to the movant are alleged in the pro se motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

(f) Withdrawal of Counsel. For good cause shown, counsel may be permitted to withdraw upon the filing of an entry of appearance by successor counsel. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed. If an indigent movant is seeking to set aside a death sentence, successor counsel shall have at least the same qualifications as required by Rule 29.16 as the withdrawing counsel.

(g) Amended Motion--Form, Time for Filing--Response by Prosecutor. Any amended motion shall be signed by movant or counsel. The amended motion shall not incorporate by reference material contained in any previously filed motion. If no appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both a complete transcript has been filed in the trial court and counsel is appointed or (2) the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. Any response to the motion by the prosecutor shall be filed within thirty days after the date an amended motion is required to be filed.

(h) Hearing Not Required, When. If the court shall determine the motion

and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. In such case, the court shall issue findings of fact and conclusions of law as provided in Rule 29.15(j).

(i) Presence of Movant--Record of Hearing--Continuance of Hearing--Burden of Proof. At any hearing ordered by the court the movant need not be present. The court may order that testimony of the movant shall be received by deposition. The hearing shall be on the record and shall be confined to the claims contained in the last timely filed motion. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence.

(j) Findings and Conclusions--Judgment. The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the constitution of Missouri or the constitution of the United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence as appropriate.

(k) Appeal--Standard of Appellate Review. An order sustaining or overruling a motion filed under the provisions of this Rule 29.15 shall be deemed a final judgment for purposes of appeal by the movant or the state. If the court finds that a movant allowed an appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering the same. If the sentencing court finds against the movant on the issue of indigence and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigence so as to permit review of that issue by the appellate court. 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.

(l) Successive Motions. The circuit court shall not entertain successive

motions.

(m) Schedule. This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 1996. If sentence is pronounced prior to January 1, 1996, postconviction relief shall continue to be governed by the provisions of Rule 29.15 in effect on the date the motion was filed or December 31, 1995, whichever is earlier.