No. SC 85783

IN THE
MISSOURI SUPREME COURT

MICHAEL WORTHINGTON

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of St. Charles County, Missouri
11th Judicial Circuit
The Honorable Nancy Schneider, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of appellant's Rule 24.035 motion, in St. Charles County Circuit Court. Appellant sought to vacate his convictions of first degree murder, §565.020.1, RSMo 1994; first degree burglary §569.160, RSMo 1994; and forcible rape, §566.030, RSMo 1994. Because the death sentence was imposed, this Court has jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Michael Worthington, was convicted, after a guilty plea, of first degree murder; first degree burglary; and forcible rape, and sentenced to death for the murder, and consecutive sentences of thirty years and life for the burglary and rape, repsectively. State v. Worthington, 8 S.W3d83 (Mo.banc1999).

Procedural History

On August 28, 1998, less than two weeks before his trial was to begin (G.Plea.Tr11), appellant appeared St. Charles County Circuit Court, the Honorable Grace Nichols presiding, and pleaded guilty to first degree murder, first degree burglary, and forcible rape (G.Plea.Tr1,17-18,30). He entered an open plea, having been unable to reach a plea agreement with the state (G.Plea.Tr20).

On September 14-17, 1998, penalty phase proceedings were tried without a jury before the Honorable Grace Nichols (Tr5-6,619).

Evidence

On direct appeal, this Court summarized the evidence as follows:

> On September 29, 1995, appellant, Worthington, and a friend from work, Jill Morehead, were at his condominium in Lake St. Louis, watching television. At about 4:00 p.m., they left to pick up their paychecks from their employer, a local supermarket. They returned to the condo and had dinner and drinks. They then went to a nightclub where each had three drinks. After about two hours, Worthington and Morehead drove to Jennings were Worthington told Morehead

he had to pick up money owed to him by a friend. Worthington testified he actually went to pick up drugs. Morehead stayed in her vehicle, while Worthington was in the house for about 15 minutes. They drove back to his condo where he left Morehead. Morehead left the condo when Worthington did not return after about 45 minutes.

Later that night, Worthington saw that the kitchen window was open in the condominium of his neighbor, Melinda Griffin. Worthington had seen Ms. Griffin around the condominium complex. He got a razor blade and gloves, and when he returned to her condo, he saw that a bathroom light had been turned on. Worthington cut through the screen. He confronted Ms. Griffin in the bedroom. He covered her mouth to stop her screams and strangled her until she became unconscious. Worthington began to rape her and she regained consciousness. Worthington raped Ms. Griffin with such force that he bruised the inside of her vagina, tore both labia minora, and made a large, deep tear between her vagina and anus. Ms. Griffin fought Worthington, and he beat her and strangled her to death. The wounds on her neck showed that Worthington used a rope or cord in addition to his hands to strangle her. He stole her jewelry, credit cards, mobile phone, keys, and her car.

The next morning, September 30, 1995, a police officer pulled Worthington over. Worthington was driving Ms. Griffin's car. The officer

noticed a woman's items in the car such as make-up and shoes, but the car had not been reported stolen.

The next day, October 1, a neighbor discovered Ms. Griffin's body. When police arrived, they found the screen in the kitchen window had been cut to gain entry. They found Ms. Griffin's body lying bruised, bloody, and naked at the foot of the bed, with a lace stocking draped across it. All the bedroom drawers had been pulled open. DNA testing later established that semen found on Ms. Griffin's body came from Worthington.

Police officers found Worthington that evening, but when he saw the police, he pulled out a knife, held it to his throat, and threatened to commit suicide. Police officers convinced him to put the knife down and brought him into custody. Worthington was wearing a fanny pack containing jewelry and keys belonging to Ms. Griffin.

At the police station, Worthington relayed his story of four days of drinking and getting high. After being presented with the evidence against him, Worthington confessed to the killing[1] but could not remember the details since, he said, he was prone to blackouts when using alcohol and cocaine. At the time

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[1]When appellant confessed to killing Ms. Griffin, he stated that there must have been a struggle because his hands were sore but that he claimed that he could not remember the details (Tr. 55, 58). Appellant still refused to admit to the rape (Tr56).

> the offenses occurred, Worthington said he was extremely high on Prozac, cocaine, marijuana, and alcohol. Worthington also said that two friends, Darick and Anthony, helped him with the burglary. However, this story was inconsistent with the physical evidence and with subsequent statements made by Worthington. Worthington pleaded guilty to the crimes charged. The judge imposed the death penalty for the murder conviction, as well as the prison terms for the other offenses.

Worthington, supra at451-452.

Post-Conviction Proceedings

On April 7, 2000, appellant filed a pro se motion for post-conviction relief (P.C.R.L.F8-47). On July 12, 2000, appointed counsel filed an amended motion and requested an evidentiary hearing (P.C.R.L.F99-283).

On January 28, 2002, through February 1, 2002, and on May 19, 2003, the motion court heard testimony from live witnesses, and by deposition, including from trial counsel, Joseph Green and Scott Rosenblum, and admitted physical exhibits (PCRTr19-699;Supp.PCRTr21-41;PCR.L.F4,6,7). On August 18, 2003, evidence was closed on the matter and the case was taken under advisement (PCR.LF7). The motion court ultimately issued findings of fact and conclusions of law denying appellant's motion (PCR.L.F1062-1083). This appeal followed.

ARGUMENT

I. COLLATERAL IMPEACHMENT EVIDENCE

Appellant claims his counsel was ineffective for failing to present Elex and Beverly Mackey to testify that appellant never intentionally set his childhood friend Richy Mackey on fire in an effort to rebut Dr. Max Givon's "aggravating" testimony that appellant "committed such a heinous act which was included in Givon formulating his opinion [that appellant] had anti-social personality [disorder]" (App.Br38-39). Appellant claims he was prejudiced because the trial judge "heard objectively false, untrue information and then relied on [appellant's] criminal history as grounds for imposing death" (App.Br43).

A. Standard Of Review

Appellate review of the denial of a post-conviction motion is limited determining whether the findings of fact and conclusions of law are clearly erroneous. Moss v. State, 10 S.W.3d 508,511(Mo.banc 2000).

The movant has the burden of proving his claims by a preponderance of the evidence. Supreme Court Rule 29.15(i).

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668,688(1984). Appellant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.at694.

B. Facts

Prior to trial, appellant requested a mental examination pursuant to §552.020, RSMo Cum. Supp. 1997 (L.F41-42). Dr. Max Givon filed his report on January 30, 1997 (L.F68).

During the penalty phase, Givon testified that after interviewing two witnesses, reviewing documents pertaining to appellant's history, interviewing appellant for six hours, and reviewing psychological tests he administered to appellant, he found appellant had no mental disease or defect (Tr300-306,313). He diagnosed appellant as cocaine and alcohol dependent, and as having anti-social personality disorder (Tr313). This diagnosis was consistent with the previous diagnoses by other doctors that appellant had severe conduct disorder and anti-social personality disorder, substance abuse, and some depression (Tr419). Givon that appellant definitely appreciated the criminality of his conduct at the time he committed the burglary, rape, and murder (Tr335,450). He also testified appellant's test results and appellant's interview showed malingering (Tr318-29), which is "the intentional production of false or grossly exaggerated psychological or physical symptoms" for an external reward (Tr317).

During Givon's testimony, he read from a portion of his report entitled, "Family and Personal History," where Givon noted, among other admitted acts of repeated misconduct throughout appellant's childhood, that appellant:

> admitted to setting his home on fire twice as well as a garbage truck, adding "I was always doing something destructive; we burned our friend Butch Mackey over 90% of his body, I was 11 then, we were throwing gas on each other."

(Tr310;St.Ex39at5). Givon also noted that his diagnosis of anti-social personality disorder was based on criteria from the DSM IV (St.Ex39at16). He noted that:

[s]pecifically, the defendant has demonstrated a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years as indicated by the following: 1) Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest. 2) Deceitfulness, as indicated by repeated lying. 3) Impulsivity or failure to plan ahead. 4) Irritability and aggressiveness, as indicated by repeated physical fights or assaults. 5) Reckless disregard for safety of self or others. 6) Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior 7) Lack of remorse. Further, there is evidence of severe conduct disorder with onset before age 15 years.

(St.Ex39at16-17).

At the sentencing hearing, the trial court stated the following:

Based on the evidence presented to this Court, I make the following findings. As to Count I, the Court finds the following aggravated circumstances beyond a reasonable doubt.

1. (a), the murder in the first degree of Melinda Sue Griffin by the defendant was committed while the defendant was engaged in the perpetration of forcible rape, and (b), the murder in the first degree of Melinda Sue Griffin by the defendant was committed while the defendant was engaged in the perpetration of burglary in the first degree.

2. The defendant committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or things of monetary value from the victim of the murder, in that he took from Melinda Sue Griffin several items of jewelry, credit cards, the keys to her automobile and other items.

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Having considered all of the evidence, the Court finds beyond a reasonable doubt that the aggravating circumstances outweigh the non-statutory mitigating circumstances and now assesses and declares the punishment at death.

(Sent.Tr28-29). In the "Report of the Trial Judge," the trial court listed the following as "nonstatutory aggravating circumstances" that were indicated by the evidence:

a. The defendant's violent behavior in pre-trial confinement.

b. The defendant's criminal history

c. The defendant was at liberty on bond awaiting sentence on felony burglaries in the Circuit Court of Peoria County, Illinois

(Mov.Ex15at3893).

C. Post-conviction

At the evidentiary hearing, Elex and Beverly Mackey testified that it was their son, Richy, not ("Butchy"), who was burnt over 95% of his body when they were children, 21 years previously (PCR.Tr23,25,55). The Mackeys explained they did not witness the fire (PCR.Tr46,65). According to the Mackeys, Richy told them that Butchy, "another boy," and

a boy named Kevin were blowing fire out of a hose when Richy was accidentally caught on fire (PCR.Tr30,55-56). The Mackeys stated they were not contacted by counsel at the time of appellant's penalty phase trial and they would have been willing to testify if called (PCR.Tr20,44-45,49,64). According to Elex, Richy never said to them that appellant was involved in the fire[2] (PCR.Tr35). Neither Richy nor Butchy were testified at the hearing.[3]

One of appellant's three trial attorneys, Joseph Green, testified he remembered appellant calling his attention to inaccuracies in Givon's report (1stSupp.PCR.L.F452-53). Appellant told him that he did not tell Givon he was involved in burning Butch Mackey

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[2]The state objected to Elex's statement as hearsay but the motion court overruled, citing the excited utterance exception (PCR.Tr29-30).

[3]Appellant tried to admit Movant's Exhibit 51, an affidavit purportedly signed by Richy (PCR.Tr38). However, the State objected as there was no showing why Richy could not testify at the hearing or in a deposition in lieu of testimony (PCR.Tr38-39). Motion counsel explained that they tried to obtain Richy's deposition, but they could not locate him until August 2001, when they had him sign an affidavit while he was in jail (PCR.Tr38-39). The motion court sustained the State's objection (PCR.Tr40). Elex Mackey explained in an offer of proof that both Richy and Butchy have had problems "with the law" most of their lives and will not come to Missouri (PCR.Tr40-42). Appellant has filed this excluded exhibit with this Court, but it should not be considered as it was not considered by the motion court.

(1stSupp.PCR.L.F453-454). Green said he did not consider investigating whether it was true that appellant burned his friend (1stSupp.PCR.L.F457).

The motion court denied his claim, finding that the evidence would be collateral impeachment (PCR.L.F1071;RespAppdxA10).

D. Trial counsel not unreasonable and appellant not prejudiced by counsel's failure to impeach Givon on a collateral matter.

Appellant's claim is meritless. Appellant alleges his trial counsel should have called the Mackeys to rebut Givon's diagnosis of anti-social personality disorder, which was allegedly relied on by the court "as grounds for imposing death" (App.Br42-43). However, appellant's claim of ineffectiveness hinges on several premises that he failed to establish.

Appellant failed to prove that Givon did in fact rely on this incident to render his anti-social personality diagnosis. The record actually belies that claim. First, the incident was reported by appellant as one of the instances when he was acting "destructive" as a child by setting fires (St.Ex39at5). According to Givon, appellant stated "we burned our friend Butch" when they were throwing gas at each other (St.Ex39at5). Thus, the incident was reported to Givon more as an accident than as a "heinous" and "intentional" act characterized by appellant now on appeal (App.Br38,43).

Second, Givon did not specifically mention the Butch Mackey incident when he identified the basis for his diagnosis. Rather, Givon noted it was based on criteria from the DSM IV and primarily from incidents that occurred after appellant was fifteen years old, four years after the Butch Mackey fire (St.Ex39at16). More importantly, appellant did not call

Givon to testify at the hearing to ask him if his diagnosis would change if he knew that appellant did not accidentally set either Butch or Rich Mackey on fire. Given all of the other admitted acts of childhood and adulthood misconduct and crime uncovered during his evaluation of appellant, (See St.Ex39), there is absolutely no evidence that Givon's diagnosis of anti-personality disorder would have changed.

Furthermore, as the motion court correctly noted, whether appellant set fire to a childhood friend is a collateral matter. "A matter is considered collateral if the fact in dispute is of no material significance in the case or is not pertinent to the issues developed." State v. Dunson, 979 S.W.2d 237,242 (Mo.App.W.D.1998). Evidence regarding the Butch Mackey fire came out as an incident reported during Givon's mental evaluation and not as a "non-statutory" aggravating circumstance. This one briefly mentioned incident in Givon's report, from an incredibly long history for someone appellant's age, was simply of no material significance in the penalty phase case and not pertinent to the issues developed.

It is no wonder then, that even after appellant mentioned to his trial counsel that he did not tell Dr. Givon he had set fire to Butch, counsel did not consider investigating whether or not it was true that appellant burned his friend (1stSupp.PCR.L.F457). At any rate, the actual witnesses to the event, Butch and Richy, refused to testify at the hearing (PCR.Tr40-42), all of the other evidence is hearsay and does not refute appellant's involvement but merely establishes that Richy named other people who were involved and has never named appellant (PCR.Tr30,35,55-56). "Failure to call impeachment witnesses does not warrant post-

conviction relief because the facts, even if true, do not establish a defense." State v. Funke, 903 S.W.2d 240,246 (Mo.App.E.D.1995).

In State v. Weaver, 912 S.W.2d 499,519 (Mo.banc1995), the defendant took exception with the prosecutor's evidence and argument regarding the absence of gunshot powder residue. A chemist noted he was provided "very little data" as to when the residue tests were performed or the type of weapon tested. Id. The defendant argued that his counsel should have presented evidence "demonstrating" that the absent data precluded the State's explanation for the absent gunshot powder. Id. This Court held that counsel's "failure to present evidence which would have been purely impeachment on a collateral matter of the officers' lack of attention to detail in reporting data to the chemist is clearly within the range of conduct by competent counsel." Id.

Similarly here, impeaching Dr. Givon's diagnosis of anti-social personality disorder by establishing that one reported instance of misconduct was untrue or incorrect would have been collateral impeachment. Failure to conduct collateral impeachment cannot be a basis for ineffective assistance of counsel. Funke, supra at 246; see also State v. McRoberts, 837 S.W.2d 15,22 (Mo.App.E.D.1992).

The case at bar is distinguishable from Black v. State, __ S.W.3d ___, 2004 WL 2663641 (Mo.banc Nov 23, 2004). In Black, this Court found counsel ineffective for failing to impeach key guilt phase witnesses about an issue which "directly related to the central issue of whether Mr. Black acted with deliberation or in a fit of rage or out of self-defense." Id. at *6. Here, as noted above, the penalty phase impeachment would not go to a guilt phase central

issue, but rather, if proven with competent evidence, would go to impeaching an expert's mental evaluation.

Furthermore, nothing in appellant's failure to impeach Dr. Givon's notation in his report regarding the Butch Mackey fire resulted in prejudice. The record is bare of any evidence of prejudice resulting from counsel's actions. The incident was only mentioned briefly one other time at the penalty phase when the prosecutor asked appellant's aunt if she knew that appellant had set fire to a childhood friend and she stated that she had not (Tr708). The incident was not mentioned in closing argument and not relied on by the prosecutor in any way at the penalty phase trial.

Appellant argues that the trial court relied on appellant's "criminal history" as grounds for imposing death (App.Br43). However, the reference to the Butch Mackey incident was not offered for its truth, but rather as information possibly considered by Dr. Givon's diagnosis. See State v. Gary, 913 S.W.2d 822,830 (Mo.App.E.D.1995). Thus, any impeachment would only go to challenging the diagnosis and the court still would not have relied on the evidence of the incident as substantive evidence of appellant's prior criminal history. Moreover, the trial court did not specifically mention the Butch Mackey incident or even generally any prior juvenile or uncharged misconduct either at sentencing or in the "Report of the trial judge." There was abundant evidence presented as to appellant's prior convictions and history (St.Exhibits 33(b),35,83), such that it could not be said the court's sentence would have changed had Givon's diagnosis been impeached as to this one matter.

In sum, the horrific facts of the case, appellant's long criminal history, the poor evidence that was admitted at the evidentiary hearing on this matter, do not establish a reasonable probability that the trial court would have sentenced appellant to life. Appellant has failed to demonstrate that evidence rebutting the Butch Mackey incident would have affected Givon's analysis, much less that it would have changed the outcome of appellant's sentence.

Therefore, appellant fails to show that the motion court's finding was clearly erroneous.

II. NON-COGNIZABLE DISCLOSURE CLAIMS

Appellant claims that the motion court clearly erred in denying claims that the State "failed to make required disclosures as to Charlotte Peroti" and that counsel was "ineffective for failing to enforce those disclosure requirements" (App.Br45).

A. Standard Of Review

Appellate review of the denial of a post-conviction motion is limited determining whether the findings of fact and conclusions of law are clearly erroneous. Moss v. State, 10 S.W.3d 508,511(Mo.banc 2000).

The movant has the burden of proving his claims by a preponderance of the evidence. Supreme Court Rule 29.15(i).

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's representation fell below an objective standard of reasonableness." and that "there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668,688,694 (1984).

B. Facts

The prosecutor endorsed Charlotte Kirn (Peroti) on October 4, 1996, nearly two years before the penalty phase began (L.F5,59;Tr.i). Appellant then endorsed Ms. Peroti when he "reserve[d] the right to call any witness in the penalty phase that may have been endorsed either by the Defendant and/or the State either in the first phase of the trial and/or second phase of the trial" (L.F341).

During the penalty phase, Peroti, who lived two doors down from appellant, testified that on September 20, 1995, appellant broke into her condominium (Tr96,98,100,102,115), by removing the screen from her kitchen window. He took jewelry and her car keys, and then confronted Peroti and demanded she have sex with him (Tr100,103). Appellant pushed her down on her couch and put his penis in her face, but her boyfriend came chased appellant out of the house (Tr101). Appellant then stole her car (Tr98,102).

On cross-examination, Peroti testified she had reported the crime, but because she was working undercover for the drug police, they asked her not to press charges until after they arrested appellant for drugs (Tr104). Peroti stated that even though appellant was an acquaintance of hers, because he was getting her son drunk and giving him drugs as well as dealing to other children, she called the Lake St. Louis Police several times to work undercover "to try to get Michael Worthington arrested for drugs" (Tr105). Defense counsel

elicited from Peroti that her son, Anthony, told her appellant had given him Jack Daniels and other drugs (Tr107). Peroti also stated that every time appellant was supposed to deliver drugs to her, he would smoke it before he could deliver it to her (Tr109-110). She noted how she thought appellant was a "jerk underneath" (Tr110). Counsel elicited from her that she had a family interest in having appellant arrested and getting him out of the area (Tr110-111). He also elicited from her that even after the assault incident, she tried to see him a couple more times after that, but he was not available (Tr117).

Finally, counsel asked Peroti whether she knew appellant had mentioned her name several times during his statement to the Lake St. Louis police in reference to taking "things" from her and noting "things" that he did to her that were wrong (Tr117). Peroti stated she did not know he had admitted taking her things (Tr117).

C. Appellant's claim regarding State's failure to give notice is not cognizable

Appellant's claim that the state failed to give notice of Peroti's penalty phase testimony and of her prior conviction is not cognizable in post-conviction proceedings because this claim of error could have been raised on direct appeal. See State v. Middleton, 103 S.W.3d 726,740(Mo.banc2003); State v. Weaver, 912 S.W.2d 499,517 (Mo.banc1995)(denying postconviction claim regarding admission of evidence because it could have been raised on direct appeal). Post-conviction motions cannot be used as a substitute for direct appeal. State v. Redman, 916 S.W.2d 787,793 (Mo.banc1996). Clemmons v. State, 785 S.W.2d 524,531 (Mo.banc1990).

In State v. Carter, 955 S.W.2d 548,555 (Mo.banc1997), Carter claimed in his postconviction motion that the prosecutor had "failed to disclose evidence . . . in violation of his discovery request." This Court held, "The state's alleged failure to comply with Carter's discovery request is a claim of trial error, which is outside the scope of a Rule 29.15 motion." Id.

Similarly, in Burgin v. State, 847 S.W.2d 836,839 (Mo.App.W.D.1992), Burgin claimed the prosecutor failed to disclose photographs which were shown to the victims at trial. The appellate court held, "[Movant's] claim that the State failed to disclose evidence is an allegation of trial error which is outside the scope of a Rule 29.15 motion." Id.

In State v. White, 790 S.W.2d 467,474-75(Mo.App.E.D.1990), in his postconviction motion, White claimed the prosecutor used false testimony and failed to disclose evidence at his trial. The appellate court noted his claims were allegations of trial court errors which should have been brought on direct appeal, and held that, "mere trial errors could not be brought within the scope of a motion for post-conviction relief by merely alleging a conclusion that a movant's constitutional rights were affected." Id. at 474. The Court held, "The complaints alleged here concern trial error and are therefore outside the scope of Rule 29.15(a)." Id. at 475.

Appellant did raise a claim on direct appeal pertaining to lack of notice of Peroti's testimony. State v. Worthington, 8 S.W.3d 83,90(Mo.banc 2000). Appellant is not entitled to use his motion for postconviction relief as a second direct appeal. Although appellant did not raise a claim on appeal that the state failed to disclose her prior conviction, he failed to plead

and prove that there are exceptional circumstances that prevented him from raising this claim on direct appeal. Appellant was perfectly capable of raising his claims regarding the prior conviction during his direct appeal, but chose not to do so. Therefore, both of his claims are barred, and the motion court did not clearly err in denying these claims.

D. Post-conviction Proceedings

Appellant filed Charlotte Kirn's (Peroti) bad check case file (Mov.Ex50), which indicated that on August 1996, Ms. Peroti was charged with felony passing a bad check over $150 by the St. Charles County Prosecuting Attorney's Office (Mov.Ex50at2,10).

Appellant's defense counsel, Joe Green, testified he did not know Charlotte Kirn was Charlotte Peroti (1stSupp.PCR.L.F484). Green agreed that the state had never supplied them the name Charlotte Peroti, her last known, address, and the substance of her expected testimony (1stSupp.PCR.L.F483). When asked why he did not object to Peroti testifying, Green responded, "I don't have an answer for you" (1stSupp.PCR.L.F484).

Green stated he found out after the penalty phase when the Pre-sentence Investigation Report was filed that Peroti was not a police informant (1stSupp.PCR.L.F486).[4] Green stated that he would have cross-examined Peroti on the fact that she was not a police informant (1stSupp.PCR.L.F489). Green also stated that had he known of Peroti's bad check casefile, he would have discovered who she was at the penalty phase and he could have used the casefile

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[4]Ms. Peroti clarified on direct-examination that she was an undercover officer for the MEG unit in St. Louis County (Tr118). The PSI report only noted that a member of the St. Charles County MEG unit stated she did not work for them (Mov.Ex55at12).

to attack her credibility (1stSupp.PCR.L.F492). Green was not questioned as to how he knew what to ask her about on cross-examination. Counsel Rosenblum was not asked whether he was aware of Peroti.

The motion court rejected appellant's post-conviction claim and found as follows:

> The records of this case show that Charlotte Peroti (Kirn), herein referred to as Charlotte Peroti, was endorsed by the State as a witness on October 4, 1996, nearly two years before penalty phase began. The record also reflects that Ms. Peroti was also endorsed as a witness for the movant. It is also clear from the transcript of the cross-examination of Ms. Peroti that the movant's trial counsel was prepared to cross-examine Ms. Peroti as to the details of her failure to report the burglary and assault to police, and on the details of her relationship with the movant [(Tr103-118)].
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> . . . The Court's view of Ms. Peroti's testimony is that it could be construed not to bolster her testimony, but to cut against it. Ms. Peroti's testimony demonstrated a personal bias against the movant, which tainted her credibility as a witness. Further, the record fails to show that the State was aware that Ms. Peroti may or may not have at one time worked as an informant for the police.[5]

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[5]Although the motion court did not make a specific finding as to the allegation regarding Peroti's prior conviction, this Court need not remand this case merely for an

(PCR.L.F1076-1077).

E. This Court already determined that Peroti's testimony was not "prejudicial"

Appellant's allegation of ineffective assistance of counsel for his actions with respect to Peroti are essentially the same as appellant's claim raised and rejected for plain error on direct appeal. On direct appeal, appellant claimed "the state did not give notice to the defense that it intended to introduce evidence . . . from a Ms. Peroti of an alleged sexual assault, theft of her car, and assault of her son as evidence of non-statutory aggravating circumstances." State v. Worthington, 8 S.W.3d 83,90(Mo.banc2000). This Court noted that the failure of the state to provide notice of non-statutory aggravating circumstances is error but that the question is whether the lack of notice and admission of evidence "was plain error constituting manifest injustice." Id.

This Court found that "[u]nder the totality of circumstances surrounding this evidence, the prejudice that would arise from such evidence as explained in *Debler* [856 S.W.2d 641 (Mo. banc 1993)] does not exist in this case. Worthington pleaded guilty to these crimes and a judge determined Worthington's sentence." Id. This Court went on to explain the reasoning from Debler that the "potential for prejudice" is lessened in a court-tried case because a trial court recognizes that evidence of uncharged criminal activity as a non-statutory aggravating circumstance is "significantly less reliable" since "no jury or judge has previously determined a defendant's guilt." Id. at 91,n.5.

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isolated issue where it is clear that appellant is not entitled to relief. Crews v. State, 7 S.W.3d 563,568 (Mo.App.E.D.1999).

Finally, this Court made the following findings:

> As to Ms. Peroti's testimony, the state had endorsed her two years before the penalty phase. Defense counsel was prepared to cross-examine her on the details of her failure to report the burglary and assault to the police. Absent objection, there is no basis under a plain error analysis for concluding that the admission of the evidence was prejudicial to Worthington.

Id. at91.

Respondent recognizes that this Court has held that a finding of no plain error on direct appeal does not necessarily equate to finding no prejudice under Strickland. Deck v. State, 68 S.W.3d 418,427-428(Mo.banc2002). This is because plain error can serve as the basis for granting a new trial only when an error is outcome-determinative, while under Strickland, a movant must show that but for counsel's errors, "there is a reasonable probability...the result of the proceeding would have been different." Deck, 68 S.W.3d at 429, quoting Strickland v. Washington, 466 U.S. at 694. However, "this theoretical difference in the two standards of review will seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal, for, in most cases, an error that is not outcome-determinative on direct appeal will also fail to meet the Strickland test." Id. at 428. This is one of those cases where the theoretical difference does not apply.

In Shifkowski v. State, 136 S.W.3d 588 (Mo.App.S.D.2004), the Court of Appeals examined the impact of Deck upon post-conviction claims that had been previously reviewed for plain error on direct appeal. Citing various examples, the Court of Appeals pointed out that

plain-error claims can be disposed of in one of five ways on direct appeal: (1) the reviewing court may simply decline to exercise its discretionary authority to review the point for plain error; (2) the court may conduct plain error review and conclude that no error occurred at all, (3) the court may conduct plain error review and conclude that an error occurred, but it was harmless and caused no prejudice to the appellant, (4) the court may conduct plain error review and conclude that a prejudicial error occurred, but deny relief because the prejudice to appellant does not rise to the level of a manifest injustice or miscarriage of justice; or (5) the court may conduct plain error review and grant relief because the error caused a manifest injustice or miscarriage of justice to occur. Id. at 590-591.

The disposition on direct appeal is important because if the reviewing court on direct appeal found "no error" (the second category identified in Shifkowski), then there was no meritorious basis for counsel to object, and there is no possibility that counsel was ineffective for failing to object. Ringo v. State, 120 S.W.3d 743,746(Mo.banc.2003); Shifkowski v. State, 136 S.W.3d at 591. In other words, under such circumstances, the alleged error cannot be successfully relitigated in the post-conviction context. See Cole v. State, ___ S.W.3d __ 2004 WL 2663608 *1 (Mo.banc November 23, 2004).

Similarly, if the reviewing court on direct appeal concluded there was error but that the defendant was not "prejudiced" (the third category identified in Shifkowski), then, while there may have been a meritorious basis for counsel to object (assuming there was no strategic reason not to), there is no possibility that the defendant was prejudiced by counsel's failing to object. "Prejudice" on direct appeal is less than "manifest injustice," and it cannot be

reasonably distinguished from Strickland prejudice (which is, as this Court held in Deck, also something less than manifest injustice). Accordingly, where, as in the case at bar, a plain-error claim is disposed of on direct appeal as not "prejudicial," the claim cannot be relitigated as a claim of ineffective assistance of counsel.[6]

F. Claim regarding State's failure to give notice of Peroti's testimony is meritless

Should this Court let appellant relitigate this claim, it is still meritless. Apart from finding no prejudice, this Court also made a specific finding that Peroti had been endorsed by the State nearly two years prior to the penalty phase hearing. Worthington, 8 S.W.3d at 91. Although it is true, as appellant notes, that she was endorsed as Charlotte Kirn from Troy, Missouri, the record reflects that counsel did know of Peroti.

The motion court did not have to credit counsel's testimony that he was not aware Charlotte Kirn was Charlotte Peroti. Counsel Green has never stated he did not know who Peroti was or her connection to appellant. At most, he stated that he did not know that the Charlotte Kirn who was endorsed was in fact Charlotte Peroti. These facts also tend to show that counsel was aware of Peroti and also that he would have had a reason for not objecting to her testimony. As outlined above, it was counsel who asked Peroti if she knew appellant had mentioned her during his statement to the police (Tr117). In fact, appellant mentioned his

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[6] The small category of cases that can be relitigated are those that fall into the fourth category identified by Shifkowski – claims where error occurred but where the prejudice did not rise to the level of manifest injustice. But even then each case must be examined to determine whether the defendant was prejudiced under Strickland.

neighbor "Charlotte" six times during his October 2, 1995, statement to the Lake St. Louis Police investigating the murder (St.Ex2Aat27-28,38,40,64,117,205). Appellant admitted to the police that he broke into Peroti's home three weeks prior to the interview and stole her car and other personal property (St.Ex2A).

Counsel Green never testified he was unaware of appellant's statement to the police or what it contained. The evidence at trial shows that Green did know who Peroti was. As both this Court and the motion court noted, counsel thoroughly cross-examined Peroti and revealed her bias against appellant and her desire to see him arrested. Given that there is evidence from the record to reflect that Peroti was known to counsel, appellant has not overcome the presumption that counsel's failure to object to her testimony at the penalty phase was part of his trial strategy. Appellant used Peroti's testimony that she was never able to have appellant arrested for delivering drugs to her because he would immediately smoke all of the drugs as evidence that appellant was intoxicated during the murder (Tr365,757-758).

In addition, appellant never asked counsel Rosenblum if he was aware of Peroti's testimony. Without asking him if he was aware of her, appellant cannot overcome the presumption that counsel's decision not to object based on a lack of notice was part of reasonable trial strategy. See State v. Tokar, 918 S.W.2d753,768(Mo.banc1996) (where this Court held that without further evidence, defendant did not overcome presumption that trial counsel's failure to object was strategic choice by competent counsel). See also State v. Copeland, 928 S.W.2d 828,844(Mo.banc1996).

In an effort to show prejudice, appellant claims Green stated he "would not have advised [appellant] to plead guilty if he had previously committed a violent sexual offense" (App.Br52). However, the record reflects that Green did not state that, but rather responded to a question about what sorts of evidence would bother him to have heard before a jury (1stSupp.PCR.L.F566-567). He noted that he was not "bothered as much" by the fact appellant had a prior burglary conviction, but he would have been bothered if appellant had a prior conviction for rape or assault (1stSupp.PCR.L.F567). At any rate, any claim that counsel would have advised appellant not to plead guilty if he had had a prior conviction for sexual assault is not credible. In any event, whether or not appellant had pled guilty, this evidence would have come out in the penalty phase.

G. Prior conviction claim is also meritless

Appellant's claim that the State did not disclose the fact that Peroti had a prior misdemeanor conviction for passing a bad check also fails. Counsel Green stated that had he known of Peroti's bad check casefile, he would have discovered who she was at the penalty phase and he could have used the casefile to attack her credibility (1stSupp.PCR.L.F592).

"The United States Supreme Court has held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." State v. Weaver, 912 S.W.2d 499,514 (Mo.banc1995)(citing Brady v. Maryland, 373 U.S. 83,87(1963)). A due process violation occurs only "if there is a reasonable

probability that, had the evidence been disclosed to the defense, the result of the proceeding might have been different." Id. (citing United States v. Bagley, 473 U.S. 667(1985)).

Here, there is no reasonable probability that appellant would not have received the death penalty had the court known Peroti had one prior misdemeanor conviction for passing a bad check. As noted, appellant effectively cross-examined Peroti as to her bias against appellant and her motive for testifying against him. The motion court specifically found that Peroti's testimony demonstrated a personal bias against appellant, which tainted her credibility (PCR.L.F1076). Further, Peroti testified she had previously worked as an "undercover person" for the "MEG," (Tr104-106,118), and her work as an undercover drug informant for the police could be construed as evidence that Peroti was involved in drugs herself.

Appellant argues that Green stated he could have used her prior conviction to cross-examine Peroti as to her bias toward the state "because of a deal that she had worked out with the state" (App.Br50,citing to 1stSupp.PCR.L.F492). However, there was absolutely no evidence that Peroti had any deal with the state. Indeed, Peroti pleaded guilty in November 1997, (Mov.Ex50at39-40), and the penalty phase hearing was in September 1998 (L.Fi-iv). The state then filed a motion to revoke Peroti's probation nine days after penalty phase hearing (Mov.Ex50at42). This proves Peroti did not gain anything for providing favorable testimony.

Finally, the trial court did not specifically mention appellant's prior attempted sexual assault on Peroti either at sentencing or in the "Report of the trial judge," when indicating the basis for assessing punishment at death (Sent.Tr28-29;Mov.Ex15at3893).

The cases cited by appellant, State v. Whitfield, 837 S.W2d503 (Mo.banc1992); State v. Phillips, 940 S.W2d512 (Mo.banc1997); and State v. Thompson, 985 S.W2d779 (Mo.banc1999), are distinguishable. In Whitfield, the surprise testimony came from the State's firearms expert who was "a key witness" and testified to guilt phase issues before a jury. 837 S.W.2d at507-508. In Phillips, the undisclosed evidence of the defendant's codefendant claiming that he alone dismembered the victim was also before a jury and not a judge, and went to the only statutory aggravating circumstance found by the jury to impose death - depravity of mind based on dismemberment of the body. 940 S.W.2d at 517. In Thompson, the undisclosed evidence of the prior bad act was presented before a jury. 985 S.W.2d at 792. Here, as mentioned above, since the penalty phase was tried before a judge, not a jury, prejudice from Peroti's testimony was significantly less than in those cases.

Based on the foregoing, appellant's second point on appeal must fail.

III. TWELVE-YEAR-OLD ALLEGED DISQUALIFYING BIAS

In his third point, appellant raises two claims. First, appellant claims that counsel was ineffective for failing to inform him that Judge Nichols served as guardian ad litem for "Peroti's son, Anthony Hansen, an uncharged co-participant" and failing to consult with appellant "before acquiescing to Nichols continuing to serve" (App.Br58). Appellant also claims that "Nichols should have recused herself when she became aware of her prior Hansen representation" as it created an appearance of impropriety (App.Br58).

A. Facts

Peroti testified for the state regarding an incident occurring in her home ten days before the murder where appellant broke in and attempted to sexually assault her (Tr100-102). At the end of her testimony, the following exchange occurred:

> COURT: Just informing counsel that during this witness's testimony, it became clear to me that about ten or twelve years ago I was appointed by the juvenile court in St. Charles County as guardian ad litem for Anthony Hansen, who is the witness's son and in a proceeding having to do - I believe he was about six years old at the time, having to do with a burn that took place in a tub, hot water, tub incident and I didn't recognize Ms. Peroti, but she was his mother and I just want to make counsel aware of that so that there - so you have all the information in front of you.
>
> GREEN: [counsel] Thank you, judge.
>
> BUEHLER: [prosecutor] Is there any objection by defense counsel for her to hear these proceedings based upon that representation?
>
> GREEN: No, there is not.
>
> BUEHLER: Okay. State has none either, judge.

(Tr120).

Counsel Green testified that he did not inform appellant about what Judge Nichols had disclosed (1stSupp.PCR.L.F491). Green stated that he did discuss the matter with co-counsel, Rosenblum (1stSupp.PCR.L.F491). Appellant testified that counsel did not inform him about the disclosure (2ndSupp.PCR.L.F218-219) Appellant also stated that had he known, he would

have insisted on withdrawing his plea because of his claims that Hansen acted with him in the murder (2ndSupp.PCR.L.F219-220).

The motion court denied relief:

> As to the second part of the movant's claim, the Court finds to be conclusionary, if not wholly based upon conjecture and speculation, and not supported by the record. The record and transcripts of this case reveal that as soon as the trial court recognized Ms. Peroti, and realized that the Court had once been a Guardian Ad Litem for Ms. Peroti's son, Anthony Hanson, the trial court informed counsel for the State and movant about her former role and the facts surrounding that case. The record of this case also reflects that movant's trial counsel discussed this matter with the trial court and with each other, determined that no conflict of interest existed, and proceeded with the hearing. The court, therefore, finds no conflict of interest by the trial court or movant's trial counsel in this matter.

(PCR.L.F1077).

B. Standard Of Review

Appellate review of the denial of a post-conviction motion is limited determining whether the findings of fact and conclusions of law are clearly erroneous. Moss v. State, 10 S.W3d508,511(Mo.banc 2000).

The movant has the burden of proving his claims by a preponderance of the evidence. Supreme Court Rule 29.15(i).

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668,688,694 (1984).

C. Ineffective Assistance of Counsel Claim

Appellant's allegation that counsel was ineffective for failing to inform and consult with him about Judge Nichols' prior representation of Hansen before waiving an objection to Nichols continuing to serve is meritless.

1. No disqualifying bias

"It is presumed that judges act with honesty and integrity, and will not undertake to preside in a trial in which they cannot be impartial." State v. Kinder, 942 S.W2d313,321 (Mo.banc1996). A trial judge "has discretion to weigh his own bias," and review is for an abuse of discretion. See State v. Boulware, 923 S.W2d402,408 (Mo.AppW.D1996). "A judge should only be disqualified if a reasonable person, giving due regard to the presumption of honesty and integrity, would find an appearance of impropriety and doubt the impartiality of the court." State v. Whitfield, 939 S.W2d361,367 (Mo.banc1997). "Generally, a disqualifying bias or prejudice is one that has an extrajudicial source and results in an opinion on the merits on some basis other than what the judge learned from his or her participation in the case." State v. Carter, 955 S.W2d548,557 (Mo.banc1997).

Here, appellant did not show that the judge's prior representation created a disqualifying bias. There is no indication that Judge Nichols had any extrajudicial source of information about a case. The record shows that her representation as guardian ad litem for Anthony Hansen ended ten to twelve years before appellant's penalty phase hearing (Tr120). The only thing she knew about the case was that it occurred when Hansen was "about six years old" and that it had to do "with a burn that took place in a tub" (Tr120). Therefore, the only connection Judge Nichols had with the case is that several years before the penalty phase hearing she represented a relative of one of the witnesses in an entirely unrelated matter. If a judge's contact with the defendant himself in previous criminal matters, State v. Owens, 759 S.W2d73,75 (Mo.AppS.D1988), or with the mother of a victim, State v. Jones, 7 S.W3d413,416 (Mo.AppE.D1999), do not establish prejudice, then Judge Nichols' contact with a witness's son in a civil matter certainly should not.

Also, from what Judge Nichols disclosed, it would appear that if there would be *any* prejudice, it would be to the state, as the case Nichols served on involved allegations of abuse, possibly by Peroti, upon Hansen.

Even though appellant characterizes Hansen as "an uncharged co-participant," there is absolutely no evidence that Hansen was a co-participant except from appellant's self-serving statements. This Court noted that appellant's claim that two friends, Darick [Widger] and Anthony [Hansen] helped him with the burglary "was inconsistent with the physical evidence and with subsequent statements made by Worthington." State v. Worthington, 8

S.W.3d83(Mo.banc1999)[7]. At any rate, there were no issues in the penalty phase involving whether or not Hansen was involved. Hansen was not a witness. Judge Nichols certainly would not have learned anything from having been Hansen's guardian ad litem when he was six years old that would have been relevant to appellant's penalty hearing twelve years later. 2. Even if there was a disqualifying bias, counsel did not have to consult with appellant

"While certain fundamental decisions in a case-- whether or not to plead guilty, waive a jury, testify, or appeal-- repose with the accused, other decisions that an attorney must make during the course of a trial are for the attorney alone, even without the advice or consultation of the client." State v. Hurt, 931 S.W.2d213,214 (Mo.AppW.D1996). See also State v. Boyd, 913 S.W2d838,845 (Mo.AppE.D1995); Jones v. Barnes, 463 U.S745(1983).

In State v. Baller, 949 S.W2d269,274(Mo.AppE.D1997), the defendant claimed the trial court abused its discretion by accepting a waiver of counsel's disqualification of the trial court without conducting a hearing on the record and obtaining a knowing waiver from defendant himself. The Court of Appeals, Eastern District, noted that the defendant argued, without citing any legal authority, that such a waiver is a fundamental decision which must be

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[7] For example, he alleged that two men had helped him commit these crimes, that one had begun unhooking the VCR and television immediately after entering, and the men had bound the victim (G.Plea.Tr23-24). However, appellant had told police that he had worked alone (Tr56-57), the VCR and television were plugged in and operational when officers arrived at the scene (Tr27), and the autopsy showed that the victim had not been bound (Tr489-90).

made personally by the accused. Id. The Court held that such a decision is not so fundamental that it must be asserted by the accused and reasoned that the defendant's attorney "apparently decided that the waiver was in defendant's best interest, and the trial judge was not required to hold a hearing on the matter as it was by consent of all the parties." Id.

Such is the case here. Counsel Green stated that while he did not consult with appellant, he did consult with co-counsel Rosenblum in making the decision to waive an objection to Judge Nichols continuing to serve (1stSupp.PCR.L.F.491). As in Baller, counsel apparently decided that the waiver was in appellant's best interest.

3. Decision not to seek disqualification was reasonable trial strategy

The record reflects that considering all of the extensive background investigation that was done on Judge Nichols by Green prior to deciding to advise appellant to plead guilty and waive a jury trial in the punishment phase, counsel's decision to continue with Nichols was part of his reasoned trial strategy. Green testified that after the case was re-assigned to Judge Nichols he "talked to other attorneys in the community about [Nichols]," including his partner who had shared office space with her in the past and Judge Ellsworth Cundiff (1stSupp.PCR.L.F510-511,543). Ultimately, Green determined through his investigation that Judge Nichols was " a person of integrity . . . a fair person" (1stSupp.PCR.L.F546). He stated that they "really didn't find anything negative about her" (1stSupp.PCR.L.F546). Counsel's actions were not unreasonable in light of the circumstances.

4. No prejudice

Appellant cannot show how prejudice from counsel's actions. Appellant claims had he known of Judge Nichols' prior representation of Hansen, he would have withdrawn his guilty plea and proceeded to trial (2nd.Supp.PCR.L.F219-220). When Judge Nichols realized that she recognized Peroti from having served as guardian ad litem to her son, Hansen, appellant had already pled guilty. Appellant would not have been entitled to withdraw his plea. A defendant is not entitled to withdraw a guilty plea as a matter of right; such relief is reserved for extraordinary circumstances, such as a showing of fraud, mistake, misapprehension, fear, persuasion, or the holding out of false hopes. State v. Taylor, 929 S.W2d209 (Mo.banc1996). Because appellant would not have been entitled to withdraw, there is no merit to his claim that he was prejudiced by counsel's actions.

Appellant's reliance on Geders v. United States, 425 U.S80 (1976), is unavailing. Geders involved the question of whether the defendant was deprived of his right to the assistance of counsel and held that "an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct and cross-examination impined upon" such a right. 425 U.S. at 91. The claim here does not involve an outright deprivation of appellant's right to consult with his counsel, but whether his counsel was ineffective for failing to consult with him about a matter which rests within counsel's purview.

As already noted above, counsel was under no duty to do so and he was not prejudiced by counsel's actions.

D. Claim of trial court error is not cognizable

Appellant's claim that Judge Nichols should have recused herself is not cognizable because it is a claim of error that could have been raised on direct appeal. State v. Middleton, 103S.W.3d726,740 (Mo.banc2003); Luster v. State, 10 S.W.3d 205,216(Mo.App.W.D.2000). Post-conviction motions cannot be used as a substitute for direct appeal. State v. Redman, 916 S.W.2d 787,793(Mo.banc1996).

Even if this Court were to review appellant's claim of trial court error, his claim would still fail. Appellant has not shown that Judge Nichols abused her discretion when she declined to recuse herself after the parties had agreed to waive any objections. There is no indication that Judge Nichols had any extrajudicial source of information about the case. The fact that Judge Nichols served as guardian ad litem for someone who was not a witness to the case and not involved in anyway did not establish a disqualifying bias. That she brought this to the parties' attention does not show that she thought it was a "problem" (AppBr65), but rather shows good faith on her part[8]. Under the facts outlined above, a reasonable person, giving due regard to the presumption of honesty and integrity, would neither find an appearance of impropriety nor doubt the impartiality of the court. Appellant's point fails.

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[8]It is because the record here merely shows Judge Nichols' good faith and not any "concern about the propriety of continuing to serve," as appellant contends, that the case appellant relies on is distinguishable (App.Br65-66). In United States v. Kelly, 888 F2d732,745 (11th Cir.1989), the trial judge "expressed profound doubts about the propriety of continuing to sit on the case; indeed, he expressed **near certainty** that he should disqualify himself." (Emphasis added).

IV. JUDGE NICHOLS SERVED IMPARTIALLY

Appellant claims that Judge Nichols was not able to fairly serve and she should have been disqualified because his sentence "became linked with judicial election politics" (App.Br77). Appellant's claim is not cognizable. Even if it were, it is meritless because Judge Nichols did nothing to suggest an appearance of impropriety, and set sentencing for after the election to ensure all parties that the election did not influence her decision.

A. Standard Of Review

Appellate review of the denial of a post-conviction motion is limited determining whether the findings of fact and conclusions of law are clearly erroneous. Moss v. State, 10 S.W.3d 508,511(Mo.banc 2000).

The movant has the burden of proving his claims by a preponderance of the evidence. Supreme Court Rule 29.15(i).

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668,688,694 (1984).

B. Facts

1. Guilty Plea, Penalty Phase, and Sentencing Hearings

On January 16, 1998, Judge Ellsworth Cundiff recused himself on his own motion and the case was re-assigned to Judge Grace Nichols (L.F8). On August 28, 1998, less than two

weeks before his trial (G.Plea.Tr11), appellant pled guilty to first-degree murder, first-degree burglary, and forcible rape, before Judge Nichols (G.Plea.Tr1,17-18,30). At the end of the plea proceedings, appellant requested a pre-sentence investigation report (G.Plea.Tr32).

On September 14-17, 1998, penalty phase proceedings were tried without a jury before Judge Nichols (Tr5-6,619). Prior to the start of the hearing, there was a discussion about victim impact statements to be made during the hearing (Tr7). Judge Nichols ordered the prosecutor to instruct his witnesses not to express a preference during their testimony (Tr7). The prosecutor noted he had instructed his witnesses but the victims "have sent victim impact statements to the probation office already" and maybe he could talk to Ms. Tinkham about deleting the portion of the letters where they express their sentencing preference (Tr8).

On October 13, 1998, appellant filed a motion to disqualify Prosecutor Timothy Braun on the basis that statements he had made in the press demonstrated his "stake in the proceedings" (L.F17;396-402). Appellant also filed a motion to permit filing of a pre-sentence investigation ("PSI") report alleging that the state was improperly contacting Probation and Parole Officer Sandy Tinkham and that she had "received numerous phone calls and contacts from the victim's family that went beyond mere impact victim statements" (L.F403-405).

On October 15, 1998, a hearing was held on appellant's motion to disqualify (Oct15DQTr2).[9] At the hearing, defense counsel noted he was withdrawing his motion to file

[9]There are two supplemental transcripts from the direct appeal dated, October 15, 1998. One contains the motion to disqualify hearing and one contains the penalty phase closing arguments.

a private pre-sentence investigation report because the probation officer and the state agreed to add appellant's supplement to the report (Oct15DQTr2). The trial court then noted the following:

> COURT: There was also reference to the letters that are to be provided to both the State and the defense?
>
> COUNSEL: That's correct, your Honor. She [the probation officer] said she would with the Court's - - upon the Court's order and that with respect to the addresses that may be referenced in the letters, those can be blacked out.
>
> COURT: And that was at the request of the State that the addresses be blacked out?
>
> COUNSEL: Yes, your Honor.
>
> COURT: You have agreed to that?
>
> COUNSEL: I have agreed to that.
>
> COURT: Therefore, it will be the order that she provide those letters to both sides.

(Oct15DQTr2-3)[10].

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[10]The court's order read, in relevant part, as follows:

> The Court further orders that copies of letters that were attached to the court's copy of the Pre-Sentence Investigation Report be furnished to attorneys for the state and the defendant. The Court also orders that the addresses of the writers be removed before being submitted to the attorneys.

At the hearing, defense counsel and the state argued the merits of appellant's motion to disqualify Prosecutor Braun based on the statements Braun made to the press (Oct15DQTr3-20). Judge Nichols then noted as follows:

> THE COURT: I know that this came up in a very quick manner. The thing that sets this case apart is the fact that it's a judge-tried case in a penalty phase only. I can tell you right now that I did read the article. I read it on the day that it was printed as I do every morning. I was out of town only two days to the Judicial College but – and I was, in fact, somewhat offended by the statements that were made in that article, but again, as I said earlier, I have a great deal of experience with the press and I know that they are – have limited space within which to write articles. Everything I say does not always appear in the press, and so I took that with a grain of salt that the statements that were made in there may or may not have been complete statements, and that's just years of experience with that kind of situation.
>
> I am not going to disqualify Mr. Braun from participating in this matter, nor am I going to issue a gag order on both sides. **As I said, this is a somewhat unusual circumstance in that I am hearing this case all by myself and there were things during the penalty phase that I would normally have been very harsh about allowing to happen in front of a jury, but you know, I am aware of what's going on, aware of all that's going on, and when I am in**

(L.F406).

the courtroom and I just set aside those things, that if they are intended to impact on my decision, it isn't going to happen, so I would hope that from here on out, we are almost through with this case, we have closing arguments tomorrow.

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. . . It's just a matter of moving through the process, but I would ask that you refrain from making statements that will impact on the state of the judiciary.

I am very concerned about a public appearance, that these things are basically just political decisions that are being made. I have no intention of making a political decision. I will follow the law. I will follow the evidence. I will be working very hard over the next couple of weeks to make sure that every piece of evidence is considered on both sides, and that I have reviewed all of the law.

As you know, I have asked counsel to provide for me all cases that impact on the death penalty and life imprisonment choices that have been made by judges in Missouri and I have done independent research on my own, as you know, to make sure that all cases are covered, and I will be working very hard in the next few weeks to make sure that everything is considered from both sides, and so I would ask that you refrain from discussing this publicly in a – certainly in a political partisan way, because I have no intention of doing that myself, and

I would ask that all of the attorneys involved follow my lead. I will be very disappointed if I hear that there are public statements being made about this case pending the final resolution of the case. Is there anything further?

(Oct15DQTr20-22) (emphasis added).

At the November 4, 1998, sentencing hearing, appellant submitted a supplement to the pre-sentence investigation report (SentTr2). Defense counsel then noted as follows:

COUNSEL: Judge, I am sorry. I have been reminded there was some matters that were contained in the pre-sentence investigation report. There was some victim impact letters that were sent to the Court, and they made references to a preference for the type of punishment. We would ask the Court to disregard those letters and in compliance with our motion in limine.

COURT: **The Court will disregard any portion of those statements that recommend a sentence.**

(SentTr2-3)(emphasis added).

The court then announced that it found two aggravating factors beyond a reasonable doubt: 1) that appellant committed the murder while engaged in the perpetration of forcible rape and first-degree burglary; and 2) that appellant committed the murder for the purpose of receiving money or things of monetary value from the victim (SentTr28-29). The court also found that appellant was raised in a dysfunctional family, was neglected and abused as a child, and was a long-term drug user (SentTr29). The court noted that it considered all the evidence and aggravating and mitigating circumstances, and sentenced appellant to death for the murder

and to consecutive sentences of thirty years and life for the burglary and rape, respectively (SentTr29-30).

2. Post-Conviction Proceedings

a) Letters

Appellant and the state stipulated to Movant's Exhibit 56, which consists of letters that were sealed in appellant's St. Charles County court file in cause number CR195-2377FX (PCR.L.F926). The file consists of 24 letters. Thirteen of the letters were addressed to Sandy Tinkham, the probation and parole officer assigned to write appellant's pre-sentence investigation report, (Mov.Ex56at9,25,29,30,32,34,36,37,38,39,41,44,45), while three of them were faxed to Tinkham from the St. Charles County Prosecuting Attorney's Office[11] (Mov.Ex56at20,21,23). Three other letters were either not addressed or were addressed "to whom it may concern" (Mov.Ex56at17,28,42). However, one of the letters addressed to "whom it may concern" had a file stamp showing it was received by the Board of Probation and Parole on the same day other letters addressed to Ms. Tinkham were received, Sept. 9, 1998 (Mov.Ex42). The remaining four letters were addressed directly to Judge Nichols, with two

[11]The file stamp on the letters and in the fax letterhead are marked September 9-14, 1998 (Mov.Ex56). These dates corroborate the prosecutor's statement, prior to the penalty phase hearing, that the victims had already sent victim impact statements to Ms. Tinkham before the Court had ordered him to instruct them not to express their sentencing preference (Tr7-8).

of the four letters having been written *after* the sentence was imposed, and with three of the four letters calling for Nichols to impose the death penalty (Mov.Ex56at3,5,7,33).

b) Newspaper Articles and Letters to the Editor

Appellant filed Movant's Exhibit 13 with the motion court, which contained all of the St. Louis Post-Dispatch articles and letters to the editor referencing appellant's case from October 1995 to December 1998 (Mov.Ex13at3349-3466). Appellant highlighted some of the articles in his amended motion and on appeal, particularly: those newspaper articles covering the proceedings which quote Ms. Griffin's mother, calling for the death penalty (Mov.Ex13at3401-3403,3395,3379,3376); articles covering the primary and general elections for prosecutor where Prosecutor Braun was quoted as saying that "the judiciary should share the values of the community" and that the "community is overwhelmingly in favor of the death penalty" (Mov.Ex13at3419,3383-3384,3430); articles covering the election for St. Charles County judge where Associate Circuit Judge Nancy Schneider was quoted as saying "the death penalty and life in prison is an issue all citizens are concerned about . . . . The judge can take the place of the jury, so it is important that public officials share their values and beliefs" and which noted that Nichols was presiding over a case where she "must decide whether to sentence him to death or life in prison" (Mov.Ex13at3405-3406); and letters to the editor calling for the death penalty or calling for voters to vote for Judge Schneider instead of Judge Nichols if she did not make a decision on appellant's sentence prior to election day and insinuating that Nichols was waiting to sentence appellant so she could only "slap him on the wrist" (Mov.Ex13at3373-3375,3370-3371). There was also an article noting Prosecutor

Braun and Judge Nichols were defeated in the November 3, 1998 election (Mov.Ex13at3404).

c) Testimony Adduced

When asked if Green ever considered asking for a change of judge for cause, the following exchange occurred:

A: [GREEN] I can't say whether we - - I don't recall whether we considered it. I would say that it's a strong possibility, given that I filed a motion for a gag order as to what was going on. But if we had made a decision, we would have filed a motion for change of judge, and I don't believe we did. But I'll defer to the court file.

Q: [PCR COUNSEL] Well, you didn't.

A: Okay.

Q: My next question is, why didn't you?

A: I have no reason. I can't tell you why we didn't.

(1stSupp.PCR.L.F493). Green stated he did not recall receiving the letters that were directed to Tinkham (1stSupp.PCR.L.F493-499). Green stated he had " no reason" for not filing a motion to disqualify Judge Nichols (1st.Supp.PCR.L.F493). Green also stated that some of the letters were appropriate while others asking for the death sentence were not (1stSupp.PCR.L.F499).

d) Motion Court Findings

The motion court denied this claim finding:

> Missouri Supreme Court Rule 20.03, Canon 3 states that "[a] Judge shall perform the duties of judicial office impartially and diligently. Paragraph B(3) of this Cannon further states that "[a] judge shall be faithful to the law and maintain professional competence in it. **A judge shall not be swayed by partisan interests, public clamor or fear of criticism**." [Empasis in original].
>
> The Court also notes that both the trial judge, Grace Nichols, and the elected St. Charles County Prosecutor, Timothy Braun, were both defeated in that election.
>
> The movant has not pled facts in support of this claim, and the Court gratuitously reviewed the allegations raised in this claim and has reviewed the records and file of this case and finds this claim to be without merit, and therefore this claim is denied.

(PCR.L.F1078). In a related claim, not raised on appeal, regarding whether counsel should have questioned the judge about her views on the death penalty, the motion court noted:

> In the present case the trial court set the sentencing date of this case on November 4, 1998, *the day after election day*. The record reflects that Judge Nichols, by setting this matter for pronouncement of sentence the day after the date of election for her position, made a conscientious and deliberate effort to remove this case from any appearance of political expediency.

(PCR.L.F1081)(emphasis added).

C. Appellant's claim is not cognizable and meritless

Appellant's claim that he did not receive a fair sentencing hearing because Judge Nichols could not fairly serve is not cognizable because it is a claim of error that could have been raised on direct appeal. See State v. Middleton, 103 S.W.3d 726,740(Mo.banc2003); Wilkins v. State, 802 S.W.2d 491,503-504 (Mo.banc1991)(claim of trial court error for hearing inadmissible evidence from the pre-sentence investigation report and victim impact statements at sentencing hearing not cognizable in a post-conviction motion). Post-conviction motions cannot be used as a substitute for direct appeal. State v. Redman, 916 S.W.2d 787,793 (Mo.banc1996).

Even if this Court were to review appellant's claim of trial court error, his claim would still fail. "It is presumed that judges act with honesty and integrity, and will not undertake to preside in a trial in which they cannot be impartial." State v. Kinder, 942 S.W.2d 313,321(Mo.banc1996). A trial judge "has discretion to weigh his own bias," and review is for an abuse of discretion. See State v. Boulware, 923 S.W.2d 402,408 (Mo.App. W.D.1996). "A judge should only be disqualified if a reasonable person, giving due regard to the presumption of honesty and integrity, would find an appearance of impropriety and doubt the impartiality of the court." State v. Whitfield, 939 S.W.2d 361,367(Mo.banc1997). "Generally, a disqualifying bias or prejudice is one that has an extrajudicial source and results in an opinion on the merits on some basis other than what the judge learned from his or her participation in the case." State v. Carter, 955 S.W.2d 548,557(Mo.banc1997).

In State v. Taylor, 929 S.W.2d 209,220(Mo.banc1996), the defendant claimed that strong public opinion about the case required the judge's recusal. The defendant noted the judge received a letter from someone asking to impose the death penalty and another letter thanking the judge for imposing the death penalty. Id. This Court held there was an insufficient basis for recusal as "it is not unusual for a judge to receive letters from the public or for there to be publicity for crimes such in this case." Id (citing State v. Schneider, 736 S.W.2d 392,403-404(Mo.banc1987)).

In State v. McMillin, 783 S.W.2d 82, 96 (Mo.banc1990), the defendant objected to the trial court's "alleged reliance upon a victim impact statement" that was included in the pre-sentence investigation report. This Court noted there would be a danger if such victim impact evidence is heard by a jury. Id. This Court further noted that "[t]he sentence in this case, however, was imposed by the experienced trial judge after ample opportunity to weigh the facts and the law. Where a judge, rather than a jury, is the trier of fact, the reviewing court presumes that inadmissible evidence is not prejudicial." Id.

Such is the case here. Appellant has not overcome the presumption of Judge Nichols' impartiality. The record shows that of all the letters in Movant's Exhibit 56, only four were actually addressed to Judge Nichols, with two of the four having been written *after* the sentence was imposed, and with three of the four letters calling for Nichols to impose the death penalty (Mov.Ex56at3,5,7,33). The other letters were either not addressed, or addressed to Sandy Tinkham or "to whom it may concern." (Mov.Ex56). Appellant has not shown Judge

Nichols even read the letters, much less that she considered the pleas for a death sentence in making her determination.

Judge Nichols did refer to the letters addressed to Tinkham, which were attached to the pre-sentence investigation report and which were ordered disclosed to both sides (See Oct15DQTr2-3;L.F406). Although Green claimed at the motion hearing that he did not recall seeing the letters, Green objected to these letters sent to Tinkham and asked Judge Nichols not to consider the pleas for a death sentence (SentTr2-3). Judge Nichols responded that she would "disregard any portion of those statements that recommend a sentence" (SentTr2-3). This demonstrates that Judge Nichols would not let anything inappropriate in any letters influence her decision.

There is no evidence to show that Judge Nichols relied on the letters in considering appellant's sentence. He cannot overcome the presumption that Judge Nichols acted with integrity and followed the law. Indeed, the fact that Judge Nichols said she would not consider the letters attached to the pre-se refutes appellant's claim.

Appellant's reliance on Gardner v. Florida, 430 U.S349 (1977), is unavailing (App.Br80). In Gardner, the Supreme Court ruled that the Due Process clause was violated when a judge relied, in part, on confidential portions of a pre-sentence report. Id.at 351. The trial court in Gardner specifically stated that his death penalty sentence was based in part on confidential information contained in the pre-sentence report. Id. In contrast, here, the vast majority of the letters in the sealed court file were sent to the pre-sentence investigation writer and disclosed to both sides, and Judge Nichols stated that she would not consider the

pleas for a death sentence. In addition, Judge Nichols never said she relied on letters; she said she only considered the evidence in the case in deciding appellant's sentence (SentTr28-29). There was simply no evidence that Judge Nichols relied on the letters that were sealed in the court file. Therefore, appellant's reliance on Gardner is misplaced.

The fact that Judge Nichols sealed the letters does not suggest an appearance of impropriety. Rather this shows that she did not consider them but wanted to preserve the letters for the record by sealing them in the court file. The same could be said about the letters addressed to Sandy Tinkham. Because Judge Nichols ordered that the letters disclosed to the parties be redacted by blacking out names and addresses, (L.F406), it would appear that Nichols sealed the unredacted letters in the court file. The record also shows that defense counsel were well aware of the letters that were sent to Tinkham. The fact remains that appellant cannot show that Nichols was unduly influenced by the letters.

Nor does the record support the inference that Judge Nichols was unduly influenced by the election politics or the publicity in the case. Appellant notes that at the motion to disqualify Prosecutor Braun based on his statements to the press, Judge Nichols noted she was offended by the statements and was "very concerned about a public appearance, that these things are basically just political decisions" (App.Br69). Appellant fails to note, however, that in the end Judge Nichols stated she had **"no intention of making a political decision"** and that she would "follow the law" and "follow the evidence." (Oct15DQTr21-22) (emphasis added).

Further, as the motion court noted, Judge Nichols took the issue of politics out of the equation by delaying sentencing until November 4, 1998, the day *after* the election. If she really was influenced by the public clamor for the death penalty during the election, then she would have sentenced appellant to death *before* the election in order to gain favor with the voters. Indeed, one letter to the editor asked for the voters to vote Judge Nichols out if she did *not* make a decision prior to election day (Mov.Ex13at3373-3375). If, on the other hand, she was afraid of the voters' reaction to her decision to give him life imprisonment without parole, she would have so sentenced him after the election. Appellant's argument that Judge Nichols imposed the death penalty in order to "position" herself for some future elective office is pure speculation (App.Br80). Such an argument is an indictment on all judges in the state, both elected and appointed, for it would raise doubt on all judges' decisions by claiming that the judges are positioning themselves for some unknown future election.

Thus, even if appellant's claim could be considered in a post-conviction motion, given all the evidence from the record and from Judge Nichols herself that she would not consider pleas for the death sentence or allow politics to enter her decision, and that she would follow the law and evidence, appellant's claim that Judge Nichols could not fairly serve must be denied.

D. Ineffective Assistance of Counsel Claim

Appellant claims that "reasonably competent counsel under similar circumstances . . . would have moved to disqualify Nichols" (App.Br81). However, as already noted, there was absolutely no evidence in the record to support appellant's claim that Judge Nichols could not

fairly serve. Furthermore, the motion court did not have to credit counsel Green's testimony that he had no reason for failing to move to disqualify Judge Nichols, especially since Green first noted that there was a "strong possibility" that they had considered moving to disqualify Nichols around the time he moved to disqualify the prosecutor (1stSupp.PCR.L.F493). Also, as noted in Point III, Green conducted a thorough investigation of Nichols before advising appellant to plead guilty before her (1stSupp.PCR.L.F511). Green found that Judge Nichols was " a person of integrity . . . a fair person" (1stSupp.PCR.L.F546). He stated that he "really didn't find anything negative about her" (1stSupp.PCR.L.F546). Given that Green found Judge Nichols to be a person of integrity, and the record amply supports that conclusion, it is no wonder that he decided not to move to disqualify her from the proceedings.

Nor has appellant shown that he suffered Strickland prejudice from his counsel's actions. Appellant's post-conviction motion did not plead any facts showing prejudice. Appellant's amended motion and his argument on appeal merely contain the conclusory allegation that Judge Nichols could not fairly serve under the circumstances. Appellant "is unable to point to any statement or ruling or other conduct by the trial judge during the course of the trial that bears any hint of bias." Kinder, 942 S.W.2d at 322.

Based on all the foregoing, appellant's claim that Judge Nichols could not fairly serve must be denied.

V. ADEQUATE SOCIAL HISTORY INVESTIGATION (Responds to Appellant's Points V and VIII).

Appellant contends his counsel were ineffective for failing to adequately investigate his mental state at the time of the murder. Appellant presents two challenges in Point V. First, appellant contends that counsel were ineffective when they failed to further investigate a diminished capacity defense based on various diagnoses made by Drs. Pincus, Cowan, and Smith, mental health experts called during the post-conviction proceedings(App.Br82). Second, appellant argues counsel were ineffective when they failed to investigate and present additional mental health mitigation evidence at the penalty phase (App.Br82). Finally, in appellant's Point VIII, appellant contends counsel Green was ineffective for failing to "fully investigate" guilt defenses and penalty mitigation because of lack of money and that counsel should have requested funds from the court under Ake v. Oklahoma, 470 U.S68 (1985) (App.Br123). Because the claims are interrelated, respondent will address them together.

A. Standard Of Review

Appellate review of the denial of a post-conviction motion is limited determining whether the findings of fact and conclusions of law are clearly erroneous. Moss v. State, 10 S.W.3d 508,511(Mo.banc 2000).

The movant has the burden of proving his claims by a preponderance of the evidence. Supreme Court Rule 29.15(i).

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's representation fell below an objective standard of reasonableness" and that "there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668,688,694 (1984).

While Strickland involved a claim of ineffective assistance of trial counsel, a claim of ineffective assistance of counsel in the context of a guilty plea is judged by the same standard. Hill v. Lockhart, 474 U.S52 (1985). In the context of a guilty plea, however, "[t]he . . . 'prejudice' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. . . ." Id.at58. "If conviction results from a guilty plea, any claim of ineffective assistance of counsel is immaterial except to the extent that it impinges the voluntariness and knowledge with which the plea was made." State v. Roll, 942 S.W.2d 370,375 (Mo.banc1997).

B.Guilt Phase

Appellant claims counsel were ineffective for failing to further investigate "his social history and furnish it to experts, such as Drs. Pincus, Cowan, and Smith" (App.Br82). Appellant claims that had he furnished such information, he would have been diagnosed with "Tourette's Syndrome, Attention Deficit Hyperactivity Disorder, Obsessive Compulsive Disorder, Bipolar Disorder, Frontal Lobe Cerebral Brain Dysfunction, and Post-Traumatic Stress Disorder" and raised a diminished capacity defense (App.Br82). Appellant argues that as a result of counsel's failure to investigate, his guilty plea was unknowing and involuntary.

To establish prejudice, appellant contends that he would not have pleaded guilty had he known that he had a viable defense to the murder.

1. Motion Court Findings

The motion court concluded that counsel acted reasonably in not further investigating a diminished capacity defense for several reasons. The motion court made extensive findings of fact and stated in part:

> The Court, as a preface to addressing the movant's claims made in 8(a) and 9(a), finds that the trial court heard testimony from members of the movant's family describing the difficult childhood of the movant[12]. In addition to the testimony of the movant's family, much of the movant's history, including educational, medical, psychological and substance records, of the movant's life, was well documented as evidenced by the thousands of pages of reports prepared on the movant throughout his life. These records consisted of a psychological report prepared by the movant's school psychologist, Valerie Kessler, when the movant was fourteen years of age; movant's Limestone, Illinois Community High School records, Lincoln Land Community College records; records from the Peoria County Juvenile Court regarding the movant; the movant's birth records from the St. Francois Medical Center, Peoria, Illinois; records of the Illinois Department of Corrections; Juvenile Division; admission and discharge

[12]One of appellant's family members testified at trial, Carol Tegard, his maternal aunt (Tr673-724).

narratives from a substance abuse treatment program at White Oaks Knolls; several reports from Methodist Medical Center, Peoria, Illinois; a psychological evaluation by Leone Legan, M.A., and Donald Legan, Ed.D., on August 3, 1989; records from the Human Service Center/White Oaks Companies of Illinois, which contained a psychosocial assessment of the movant dated September 6, 1994.

Those records clearly supported the movant's mitigating claims that he had been abused and neglected and that he had a long-term drug problem. Moreover, movant's trial counsel could not have presented this evidence without investigating movant's psychological and social history.

Movant's trial counsel, N. Scott Rosenblum, testified that he had obtained the services of an additional expert witness, Dr. Kevin Miller, M.D., a psychiatrist. Trial counsel testified that he provided this witness with the materials that were requested by the expert witness and that Dr. Miller also had two meetings with the movant. The findings of Dr. Miller and Dr. Givon concluded that movant did not suffer from a mental disease at the time of the offense or at the time of trial. These findings further concluded that the movant knew and appreciated the nature, quality and wrongfulness of his conduct.

There was a great deal of psychological history of the movant by the time he plead guilty to the charges and the penalty phase trial, and these diagnoses were not entirely favorable to the movant. Dr. Max Givon's diagnostic

impressions of the movant were: Axis I, malingering, cocaine dependence and alcohol abuse; the Axis II diagnosis was that the movant had an antisocial personality disorder. There were also findings, a psychosocial history prepared by Kevin Morrison dated September 6, 1994 among the records of movant's last attempt at substance abuse[] treatment and a report regarding the two sessions the movant had with a psychiatrist, Dr. Jo-Ellyn Ryall, M.D. that took palce on July 31, 1995 and August 15, 1995.

***

Movant's trial counsel could rely on Dr. Givon's pretrial psychiatric report regarding the movant's mental state and of the reports prepared by Kevin Morrison, Dr. Ryall and the subsequent opinion proffered by Dr. Miller. Movant's trial attorney, Mr. Rosenblum, further testified that Dr. Miller could not refute the findings of Dr. Givon.

***

. . . It is this court's finding that trial counsel made reasonable efforts to explore the possibilities of a diminished capacity defense and to investigate the mental status of the movant, prior to the movant pleading guilty to these charges and concluded that there was no basis to present the defense of diminished capacity. The Court not only finds that these efforts were made prior to the movant pleading guilty to these charges but that the movant was further advised that by pleading guilty to the charges of forcible rape and burglary in the first

degree, he would be admitting to one of the aggravating circumstances submitted by the State.

***

The Court finds it abundantly clear, from the expert testimony at the trial and from the evidentiary hearing on the movant's post-trial motion, that reasonable experts interpreted the movant's social history in different ways. Much of the evidence the movant now presents could have been used against him by the State. Early accounts and descriptions of the movant's life confirm the diagnostic impressions of antisocial behavior and malingering made by Dr. Givon and confirmed by Dr. Miller. . . The court finds the movant to not be a credible or reliable witness due to his disparate and conflicting testimony throughout these proceedings. These inconsistencies also give further credence to Dr. Givon's finding that the movant was malingering.

The Court finds problems inherent with Dr. Pincus' testimony at the post-trial evidentiary hearing in this matter. Again, much of the information that Dr. Pincus relied upon for his diagnosis was based upon the unreliable disclosures made by the movant. Dr. Pincus testified that his conclusions were based upon a single meeting he had with the movant more than four years after the movant had committed the rape and murder of Melinda Griffin. Presumably, the movant having been in the custody of the St. Charles County Detention Center and the Missouri Department of Adult Corrections since the time of his arrest for these

offenses, alcoholic beverages that he had access to at the time he committed these crimes. Dr. Pincus also testified that he reviewed the same materials that had been examined by Dr. Givon and Dr. Miller.

Similarly, Dr. Smith examined the movant over four years after he raped and murdered Melinda Griffin. A majority of the tests administered to the movant by Dr. Smith related to substance abuse issues. Although Dr. Smith would have added details and more elaborate explanations to those of Dr. Evans, his testimony was essentially cumulative to the evidence on the main point; that movant's conduct was the product of cocaine and alcohol intoxication rather than a sane and sober mind. Since the trial court did find as a mitigating circumstance that movant suffered from a long term substance abuse, Dr. Smith's testimony was essentially cumulative and the failure to present that testimony was not prejudicial to the movant.

Trial counsel's pre-trial conduct in having the movant examined by two mental health professionals and consulting with and calling as a witness Dr. [Roswell] Lee Evans, Jr., a doctor of pharmacy, was a reasonable and thorough investigation. Reasonable strategic decisions are not transformed into ineffective counsel claims simply because the court rejects that theory of the case. Furthermore, trial counsel cannot be found to be ineffective for not locating another expert witness who would testify in a particular way.

(PCR L.F1067-1071)

2) Decision to Plead Guilty

In support of his claim that counsel acted unreasonably, appellant presented testimony of one of his attorneys, Joseph Green. The state presented the testimony of Scott Rosenblum, the attorney who was hired to represent appellant. Both attorneys discussed the process and strategy that went into advising appellant to plead guilty. Wayne King, a man who claimed to be appellant's uncle, consulted with both Green and Rosenblum to represent appellant (1stSupp.PCR.L.F618)[13]. Ultimately, King hired Rosenblum, who in turn contracted Green's services for $10,000 (1stSupp.PCR.L.F436,523,618). In August 1997, Rosenblum, Bradford Kessler, and Green entered their appearance (L.F7). Green believed the combined "unique talents" of Rosenblum, Kessler and himself, would amount to a "dream team" (1stSupp.PCR.L.F445). Prior to appellant's case, Green had handled from forty to fifty capital cases (1stSupp.PCR.L.F521). Rosenblum had practiced exclusively in criminal law from the late 1980's, and had tried more than 150 jury trials, fifty homicides and seven capital murder trials (1stSupp.PCR.L.F616,618). Rosenblum asked Green to handle DNA issues and penalty phase issues (1stSupp.PCR.L.F446,620).

Early on, the team considered whether they should concede that appellant was in the Ms. Griffin's condo through either an alibi, "someone else did it" or mental disease or defect defense (1stSupp.PCR.L.F450,621). Green had just finished working on another DNA case with the same laboratory in appellant's case (1stSupp.PCR.L.F446). As such, Green already

[13]From 1995 to August 1997, appellant was represented by Joel Eisenstein and R. Todd Ryan (L.F1-8).

had the lab proficiency and protocal reports (1stSupp.PCR.L.F447). He talked with an expert about the DNA results and determined there was "little - - - if no way to challenge the contamination of the genetic markers that matched [appellant] that were found on her body" (1stSupp.PCR.L.F447,621).

Then, they considered Dr. Givon's mental examination report (1stSupp.PCR.L.F450). Appellant's previous attorney had requested a mental examination pursuant to §552.020 (L.F41-42).Dr. Givon noted in his report that after interviewing two witnesses, reviewing a large number of documents pertaining to appellant's history, interviewing appellant for six hours, and reviewing the result of a psychological test he administered to appellant, he found that appellant had no mental disease or defect (St.Ex39at1-2). Givon diagnosed appellant as cocaine and alcohol dependent, and as having anti-social personality disorder (St.Ex39at16). He also reported that appellant's test results and his interview with appellant showed malingering (St.Ex16).

After they reviewed Givon's report the defense team "figured" that a diminished capacity defense was out (1stSupp.PCR.L.F450,531,622). Rosenblum believed that in general, diminished capacity defenses do not go over well and are difficult to defend (1stSupp.PCR.L.F622-623). Rosenblum believed they would have an "uphill battle" presenting a diminished capacity defense given all the evidence of appellant's drug and alcohol use (1stSupp.PCR.L.F624).

In January 1998, during a pre-trial conference, Green got the impression from Judge Ellsworth Cundiff that if appellant were to plead guilty to first-degree murder, Cundiff would

be amenable to giving appellant a sentence of life in prison without parole (1stSupp.PCR.L.F506-507). Appellant filed a motion to change his plea and decided to plead guilty when according to Green, Judge Cundiff recused himself after having an "intense" meeting with Ms. Griffin's family (1stSupp.PCR.L.F507-508). The case was re-assigned to Judge Nichols (L.F8).

At this point, the team regrouped and debated the "pros and cons" of pleading guilty with appellant (1stSupp.PCR.L.F509). Green testified that after the case was re-assigned to Judge Nichols he "talked to other attorneys in the community about [Nichols]," including his partner who had shared office space with her in the past and Judge Cundiff (1stSupp.PCR.L.F510-511, 543). Ultimately, Green determined through his investigation that Judge Nichols was " a person of integrity . . . a fair person" (1stSupp.PCR.L.F546).

While determining what the next step would be, Rosenblum discussed appellant's case with Dr. Cuneo (1stSupp.PCR.L.F628-629, 631)[14]. He consulted with a Dr. Raven as well during this time, but he declined to take on the case (1stSupp.PCR.L.F629). Rosenblum was then looking for a medical doctor because he believed they were more persuasive than psychologists (1stSupp.PCR.L.F629). He retained Dr. Kevin Miller, a forensic psychiatrist with St. Louis University to see if appellant could have a diminished capacity defense (1stSupp.PCR.L.F629-630).

Dr. Miller had several hours of visitation with appellant in addition to receiving police reports, Dr. Givon's report, and the records that Givon used (1stSupp.PCR.L.F631). Dr. Miller

[14]Dr. Cuneo was endorsed as a defense witness (LF34).

diagnosed appellant with ADHD, cocaine dependency, alcohol abuse, PTSD, major depressive disorder, anti-personality disorder (Mov.Ex10at2608). Miller noted the possible presence of bipolar and disassociative disorders as well as malingering and complex partial seizures (Mov.Ex10). He primarily wanted to use Miller for the guilt phase (1stSupp.PCR.L.F634). He talked to Green about Miller's findings (1stSupp.PCR.L.F634).[15] Rosenblum also had "lengthy discussions" with Miller and began to "rule him out" as a witness:

> He had talked about things that caused me great concern. **Things such as self reporting incidents that were not evidenced under hypnosis**, which I thought could have played into the malingering issue.
>
> The **anti-social personality disorder, which would have collaborated Givon**, and one of my main goals was to discredit Givon. That was disturbing, very disturbing.
>
> He ruled out bipolar disorder, which I thought we had some notes from the jail that certainly I could use as cross-examination on Givon because of some of the things Givon did or didn't do when he received some of the jail notes.
>
> **So by and large I thought whatever little nuggets that you could mine from Dr. Miller's report it was far outweighed by what I considered substantial, substantial negative impact his testimony would have had**.

---

[15]Green testified that he did not find out about Dr. Miller until the post-conviction proceedings (1stSupp.PCR.L.F467).

(1stSupp.PCR.L.F634-635) (emphasis added).

Also during this time, the team had access to "the sources of data" used by Dr. Givon, and the data contained a lot of appellant's social history which had been documented throughout his life (1stSupp.PCR.L.F529). In addition, Green contacted appellant's mother "at least two timess," through ten to fifteen minute phone calls (1stSupp.PCR.L.F455). During these phone calls, Green could not get much history from her because it "was hard to keep her on topic" as she was concerned about how she was coming off in the media as a bad mother (1stSupp.PCR.L.F455). His mother wanted to defend her position as a great mother (1stSupp.PCR.L.F455). Green stated that he did not consider asking for her records (1stSupp.PCR.L.F456). Green also tried to locate appellant's father, but he was incarcerated at that time (1stSupp.PCR.L.F562). Ultimately, the team were "reviewing different options and preparing to try the case and had to be ready to try the case" (1stSupp.PCR.L.F644).

After Judge Nichols was assigned to the case, appellant asked the team why he still could not plead guilty (1stSupp.PCR.L.F640). They discussed the advantages to pleading guilty, which included avoiding angering the judge by going to trial when there was overwhelming evidence and that by just doing a penalty phase, it would show the judge how appellant was taking responsibility (1stSupp.PCR.L.F642). They also explained the risks, which included that he would have to admit to the statutory aggravators because of the rape and burglary charges (1stSupp.PCR.L.F643). At all times, Rosenblum told appellant that they could take the case to trial, and that it was his decision (1stSupp.PCR.L.F646).

Green decided there were disadvantages to having a jury trial:

To the best of my recollection as I sit here some years later, **our concerns were the nature of the crime itself,** that it was a home invasion into a single woman's house, **that she was sexually assaulted, the manner of her death and the length of time it took to kill her by virtue of strangulation, the videotape** of the scene that showed her body in a – as I recall, a spread-eagle position with some type of animal feces around her body, completely exposed.

That was a significant factor, taking into account the fact that he – his DNA that we could not rebut was present at the scene and her body. It was taken into account that we had virtually no defense to murder in the first degree, given his own statements that he made to the police that were going to be put into evidence.

And that after a jury would hear all that, and if we challenged that with a jury by – that we would lose some credibility with the jury going into the penalty phase for – for challenging all those aspects of him being not guilty.

(1stSupp.PCR.L.F565-566) (emphasis added).

Rosenblum had similar concerns:

My opinion on this case, based on everything, **based on all the facts**, **based on the photographs**, based on Mr. Worthington's appearance, based on just **the rather egregious pictures that were going to be displayed**, I thought trying the case, actually trying the case to a judge would have been better strategy that trying it to a jury in St. Charles County, based upon what I learned,

based upon the information I was relying on by those that may be been in a better position than me to determine the atmosphere and the jury demographics in St Charles.

(1stSupp.PCR.L.F626) (emphasis added).

Green and Rosenblum advised appellant to plead guilty (1stSupp.PCR.L.F647).

3. Counsel's actions were objectively reasonable

As is evident, counsel's investigation of appellant's mental state at the time of the crime was in no way deficient. "In terms of an attorney's duty to investigate, an investigation need only be adequate under the circumstances, and 'the reasonableness of a decision not to investigate depends upon the strategic choices and information provided by the defendant.'" Ringo v. State, 120 S.W3d743,748 (Mo.banc2003). "When counsel knows generally the facts that support a potential defense, 'the need for further investigation may be considerably diminished or eliminated altogether.' " Id. And, in assessing a decision not to investigate, courts must "apply[] a heavy measure of deference to counsel's judgments." Ervin v. State, 80 S.W3d817,824 (Mo.banc2002).

Here, defense counsel were seasoned, capital-litigation attorneys, who had tried a combined total of approximately fifty to sixty capital cases, and who had decided after weighing the facts of the case, two mental health reports, which contained mental evaluations of appellant throughout his life, and numerous school, hospital, rehabilitation, and police reports, that appellant's best course of action was to plead guilty and try the penalty phase before the judge.

Although Rosenblum had retained Dr. Miller to evaluate appellant in the hope of a diminished capacity defense, and Miller did make some favorable conclusions, Rosenblum decided that "**whatever little nuggets that you could mine from Dr. Miller's report it was far outweighed by what I considered substantial, substantial negative impact his testimony would have had"** (1stSupp.PCR.L.F635). Thus, counsel reasonably avoided the use of evidence that would have had a "mixed impact." Bucklew v. State, 38 S.W3d395,398 (Mo.banc2001). Rosenblum feared that Miller would corroborate Givon's anti-social personality disorder and malingering diagnoses. Counsel were reasonable in relying on both Drs. Givon and Miller's reports and deciding to advise appellant to plead guilty. Counsel investigated possible strategies and their actions should rarely be "second-guess[ed]." Middleton v. State, 103 S.W3d726, 736 (Mo.banc2003). "Trial counsel is normally in the best position to assess the tradeoffs involved in selecting particular defenses." Id.

Appellant insists that there was not enough investigation done and that with more information they could have furnished it to other experts who would have been more favorable. However, because counsel had already shopped for an expert, there was no duty to continue to shop for a more favorable expert. "[D]efense counsel cannot be found ineffective for failing to shop for a more favorable expert witness." Winfield v. State, 93 S.W3d732,741 (Mo.banc2002) (where previous mental examination concluded that "a mental disturbance did not substantially affect [the defendant's] behavior during the instant offense," counsel was not ineffective for failing to investigate and present psychiatric evidence of extreme emotional disturbance through a different expert); Lyons v. State, 39 S.W.3d 32, 38-39 (Mo.banc2001)

(where previous expert examination had observed "no evidence of brain damage," counsel was not ineffective for failing to obtain a different expert to conduct neuropsychological testing). Indeed, Green stated that he does not go "expert shopping," but rather seeks experts who are credible and not "overused" (1stSupp.PCR.L.F579).

As the foregoing demonstrates, the motion court did not clearly err when it found that counsel conducted an adequate investigation of this case. Counsel made a reasoned determination not to pursue a mental health defense after a thorough investigation of the facts underlying appellant's crime and of his mental health background.

4. Appellant was not prejudiced

Appellant must show that he would not have pleaded guilty and instead would have insisted on going to trial had counsel conducted a further investigation. Hill v. Lockhart, 474 U.Sat58. A review of the record supports the motion court's finding that appellant would not have insisted on going to trial because the evidence shows that he did not have a viable diminished capacity defense.

In support of his claim that he had a viable diminished capacity defense, appellant presented the testimony of three experts. Appellant called Dr. Jonathan Pincus, a neurologist, who diagnosed appellant with Frontal Lobe Disorder, Tourette's Syndrome, Obsessive Compulsive Disorder, Bipolar Disorder, and Attention Deficit Disorder (PCRTr93,98,110,111). Pincus concluded that appellant could not deliberate and was under the influence of extreme emotional disturbance at the time of the murder (PCRTr121). Dr. Pincus also stated that appellant was undermedicated while in the St. Charles County jail

(PCRTr124). In addition to the documents Drs. Givon and Miller had, Pincus was furnished with affidavits from appellant's mother, father and various friend and family members as well as his mother's police reports and his uncle's mental health records (PCRTr101-102).

However, Pincus conceded that he was the first mental health professional, from a long line of others, who has diagnosed appellant with Tourette's Syndrome (PCRTr164). Pincus acknowledged that the same observations he believed supported his Tourette's diagnosis, such as disrupting others and making loud noises, could also support an anti-social personality disorder diagnosis (PCRTr160-162). The reports of appellant having tics before age 13 came from either appellant or his father and Pincus only observed one motor tic during his evaluation (PCRTr164,169). His obsessive-compulsive disorder diagnosis was also based on appellant's self-reporting (PCRTr191).

In addition to Pincus' testimony, appellant presented the testimony of Dr. Dennis Cowan, a neuropsychologist (PCRTr210). Cowan concluded appellant had significant frontal lobe dyfunction resulting in problems with his higher-lever abstract reasoning, problem-solving, judgment, decision-making, and short-term functioning(PCRTr325-326). Cowan found these problems were caused by genetics, head injuries, the abuse appellant's mother suffered during pregnancy, and appellant's substance abuse (PCRTr326). Cowan's diagnoses included cerebral brain dysfunction, ADHD, Tourette's and bipolar disorder (Mov.Ex18at4636). Cowan interviewed and performed tests on appellant's mother, father, uncles and aunt (PCRTr248). The motion court found that the evidence from Cowan's report

dealing with his examination of all the family members was inadmissible and irrelevant (PCRTr263).

Cowan acknowledged that the evidence of appellant's head injuries were self-reported by appellant and he did not conduct or review any EEG, CT or MRI head scans of appellant (PCRTr340,389-390). Cowan also conceded that the ADHD symptoms he observed and interpreted from appellant's background are also seen with people who are on drugs and that depressive episodes can also come from substance abuse mood disorder (PCRTr353-354,373). Cowan also acknowledged that he did not diagnose appellant with Tourette's until after Pincus had, and he had not reported seeing a motor tic from appellant until his second interview (PCRTr404-405).

Finally, Dr. Robert Smith, a clinical psychologist and addiction specialist, testified that based on all of the above referenced materials, he diagnosed appellant with ADHD, bipolar disorder, cerebral brain dysfunction, PTSD, and substance dependence (PCRTr552). Smith testified that appellant was suffering from diminished capacity because of his disorders (PCRTr554). Smith also stated that after reviewing the St. Charles County record, he determined that he was only "intermittenly" provided with medication, the seclusion they had him under triggered PTSD and that his "acting out" was from the Tourette's disorder (PCRTr555). As with Cowan, the motion court held that it was not receiving evidence regarding his interviews with appellant's family members for its truth, but only as it affected Smith's dianoses of appellant (PCRTr491).

These witnesses would not have provided appellant with a viable defense. As noted above, all of the doctors' conclusions were significantly dependent on appellant's self-reporting. The motion court specifically found that appellant was not a credible witness "due to his disparate and conflicting testimony throughout these proceedings" and that the inconsistencies give further credence to Givon's finding that appellant was malingering (PCRLF1070)[16].

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5 The motion court's finding that appellant was not credible is correct in light of new assertions appellant has made during the post-conviction proceedings. Appellant testified in his deposition for the first time that he had a sexual relationship with Ms. Griffin, that she owed $400 for methamphetamine she purchased from Darick Widger two weeks before the murder, and that Widger and Anthony Hansen killed her "over dope" (2ndSupp.PCR.L.F168-169,234). Appellant claimed that Widger was upset about the money she owed, that they fought over breaking into her house to get the money, and that appellant used a key Ms. Griffin had given appellant to enter her apartment (2ndSupp.PCR.L.F171-172,229-230). Appellant admitted that he did not tell this information to any of the mental health experts retained to help him, but claimed that he only told his attorneys (2ndSupp.PCR.L.F263-264). Green and Rosenblum stated that appellant never told them he had a sexual relationship with Ms. Griffin, that he had helped her purchase methamphetamine [although Green "vague[ly] remembered talk of a drug deal and her "peripheral" involvement], or that he had a key to her apartment (2ndSupp.PCR.L.F654,700-701,702,706). Appellant also claimed he was once shot in the head and that he could not recall if he told his mental health experts about the injury

Furthermore, appellant's behavior on the night of the murder was inconsistent with the experts' opinions that appellant was suffering from diminished capacity. The evidence against appellant was strong. The evidence established that appellant lived in the same condominium complex as Ms. Griffin and knew who she was (Tr21,53-54). On the night of the murder, he saw that Ms. Griffin's kitchen window was open (G.PTr23;Tr54). After seeing her window open, appellant got a razor blade and gloves, and when he returned to her condo, he saw that a bathroom light had been turned on - yet he still chose to enter the house and cut through the window screen(Tr22-24). The wounds on her neck showed that appellant used a rope or cord in addition to his hands to strangle her (Tr478-479). The evidence also showed that appellant had been driving Ms. Griffin's car the morning after her murder (Tr31,45-47), appellant had given some of Ms. Griffin's property to his friends (Tr32-37,55), when appellant was arrested he was carrying Ms. Griffin's property in his fanny pack (Tr28-31,56), and appellants initially lied to police officers when questioned about this crime (St.Ex2Aat13,45). All this shows overwhelming evidence that appellant acted with deliberation on the night of the murder.

Finally, appellant has not demonstrated that had these witnesses been available, he would not have pleaded guilty. Although appellant said as much during the post-conviction proceedings, the record belies such a claim.

Rosenblum testified that appellant expressed his "desire" to spare the family from having to go through a trial and that appellant got excited at the prospect of showing a different

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(2ndSupp.PCR.L.F293). None of the mental health experts noted a shot to the head as one of appellant's significant head injuries.

side of himself if he were to plead guilty (1stSupp.PCR.L.F642). Appellant told Rosenblum he had wanted to plead guilty "all along" (1stSupp.PCR.L.F688). In fact, appellant stated in an interview with the St. Louis Post-Dispatch, conducted just after his guilty plea, "I know I'm guilty, so why put the family through it, why put myself through it?" and "I don't think the family would have been able to handle it" (Supp.PCRTr26;PCR L.F713). Appellant further stated that he wanted to plead guilty "right away, but his first attorney had talked him out of it" (PCRL.F713).

Thus, appellant cannot show prejudice. The record refutes appellant's claim that but for his counsel's inadequate investigation of his mental health issues, he would have insisted on going to trial. Hill v. Lockhart, 474 U.Sat58. Appellant testified that he had always wanted to plead guilty and avoid a trial. In light of this testimony, appellant does not explain how the court's conclusion was clearly erroneous.

C. Penalty Phase

Appellant also claims counsel's alleged inadequate investigation of his social history prevented him from calling Drs. Pincus, Cowan, and Smith to "mitigate punishment and rebut aggravation" (App.Br82). Appellant contends he was prejudiced because, had this additional evidence been presented, the court would not have sentenced him to death. The motion court rejected appellant's claim for the same reasons it rejected appellant's guilt-phase claim. The motion court concluded that counsel's decision not to present additional mitigating evidence was reasonable and not prejudicial.

1. Trial Counsel's Actions were Objectively Reasonable.

Rosenblum testified that after a decision was made to plead guilty, he set about devising a strategy to cross-examine Dr. Givon, while Green set about retaining the services of Dr. Roswell Evans to explain appellant's actions as a result of his intoxication on the night of the murder (1stSupp.PCR.L.F635). As with the guilt phase considerations, Rosenblum thought that because Miller's hypnosis did not confirm appellant's self-reporting accounts, Givon's malingering diagnosis would be supported (1stSupp.PCR.L.F636). Counsel's penalty-phase strategy was to offer mitigating evidence to show that appellant was a product of his family environment, abandoned by his parents and "discarded" by the state, and that as such, the state should not then seek his death (1stSupp.PCR.L.F569,650).

To that end, Green made a strategic decision to stipulate to a great deal of evidence that documented his "social history" (1stSupp.PCR.L.F.651). Counsel then elicited from the state's witnesses all of the instances where appellant had mental health or drug abuse treatment during his life; that appellant's parents were well-known to the police (Tr234-235); that appellant's father had an extensive criminal history and that he taught appellant to do burglaries (Tr269); that appellant grew up in a dysfunctional chaotic family, with a chronic alcoholic mother and a heroin-addicted father (Tr.276;St.Ex.33batA-98-102); that he suffered from years of chronic neglect and emotional, physical and sexual abuse, but was never removed from the home (Tr277); that he was diagnosed with social maladjustment with a conduct disorder (Tr276); that appellant attempted suicide several times (Tr277-278); that he was diagnosed with Substance Abuse Disorder and Dysthymic Disorders and Borderline Personality Disorder (Tr280).

Appellant's maternal aunt, Carol Tegard, testified on his behalf that: his father, Richard, was a well-known drug user and his mother, Patty, was dealing drugs (Tr675-676); his maternal grandparents were alcoholics (Tr677); Richard was in and out of jail constantly and would get involved with drugs and disappear (Tr678); Patty eventually became a prostitute to support her drug and alcohol habit (Tr680); Patty attempted suicide 15 to 20 times (Tr681); appellant watched as paramedics responded to the scene upon the suicide attempts (Tr682).

Dr. Evans testified that appellant's alcohol and drug abuse made him unable to control his impulses and impaired his judgment (Tr774) and that he had a classic case of polysubstance abuse (Tr771-772).

Rosenblum noted that "the lack of what a doctor does is more effective in cross-examination than" what is done in substance (1stSupp.PCR.L.F683). Accordingly, Rosenblum set about cross-examining Givon on the methods he used in his mental evaluation of appellant and whether he had a predisposition to diagnose a defendant with malingering. Givon's cross-examination consisted of approximately 112 pages of transcript where Rosenblum got Dr. Givon to acknowledge that other mental health professionals had diagnosed appellant with various disorders that he dismissed (Tr383-385,40,413-415). Givon also conceded that it would be important to establish a genetic basis for appellant's behavior and that such a basis would include that both his parents were drug addicts and his grandparents were alcoholics (Tr354).

Counsel actions were reasonable. Taylor v. State, 126 S.W3d755,762 (Mo.banc 2004) (reasonable to attempt to establish that defendant was a "victim" of a disadvantaged background

and not unreasonable in fearing "adverse aspects" of an expert's testimony that "might" outweigh any usefulness of the testimony).[17]

2. Appellant Not Prejudiced.

Appellant was not prejudiced by counsel's decision not to present additional evidence related to appellant's mental state during the penalty phase because the evidence would not have changed the sentencing outcome. As noted above, counsel elicited a great deal of

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[17]Thus, counsel's actions here are in stark contrast to the actions of counsel found to be ineffective in Wiggins v. Smith, 123S.Ct2527(2003) and Williams v. Taylor, 529 U.S362 (2000). In Wiggins, counsel failed to conduct virtually any investigation into his client's childhood and locate an abundance of potentially mitigating evidence, including evidence of severe privation and abuse by his alcoholic, absentee mother, physical torment, sexual molestation, and repeated rape while in foster care, his time spent homeless and his diminished mental capacities. Wiggins, 123 S.Ctat25. Wiggin's counsel exacerbated this problem by promising the jury in her opening statement that it would hear such evidence. Idat2532. In Williams, supra, the defense attorneys only presented minimal mitigating evidence from three witnesses (including an unplanned witness pulled out of the audience at trial), began preparing for penalty phase only a week before trial, and they did not obtain certain records (because they incorrectly believed that the records were privileged), they failed to introduce available evidence of the defendant's borderline mental retardation, they did not seek prison records, and they failed to return a call of a witness who offered to testify favorably for the defendant.

appellant's social history, both from his family and mental health background, including various diagnoses appellant has had that did not always correspond with Dr. Givon's diagnoses (See also App.Direct.AppealBrief14-15;RespAppdxA22-A30).

There was a great deal of aggravating evidence presented by the State. The evidence showed that appellant had a long criminal history (St.Ex33(b),35,83). He left a drug treatment program on his own accord because it was "too religious" (Tr258). Although he was capable of functioning in the world (Tr454), he consciously chose to keep committing crimes, including robbing and shooting at his own grandfather when that grandfather was dying of cancer (Tr230-31), and breaking into a neighbor's condominium for the purpose of stealing her property and sexually assaulting her (Tr98-103). Appellant has tried to take the least amount of responsibility possible for these crimes: he initially told police that he had nothing to do with the crime (St.Ex2), even after admitting to the murder he told police he did not rape Ms. Griffin (Tr56), he lied when he claimed that he could not remember the rape and murder because he had taken drugs (Tr447-49), he told Givon that he could not have raped Ms. Griffin (Tr307), he tried to fake the results of his mental competency evaluation (Tr320), and he lied at the guilty plea hearing when he claimed that two other men encouraged and helped him to commit the burglary (G.PleaTr23-27,Tr56-57). Also, in the three years appellant was incarcerated before pleading guilty, he was involved in 55 correctional incidents (Tr152,St.Ex82), including threatening to kill jail officers (Tr142-43), and physically assaulting jail officers on more than one occasion (Tr139,142).

Regardless of the abundance of evidence presented on appellant's character in the penalty phase, the bottom line remains, however, that the most aggravating factor remained, as both counsel candidly stated, the "egregious" facts of the crime itself (1stSupp.PCR.L.F565-566,626). These were facts appellant pleaded guilty to before the sentencing phase began.

The motion court was not clearly erroneous in rejecting appellant's second claim of ineffective assistance of trial counsel.

D. Insufficient Funds Allegation

For his third claim of ineffective assistance of counsel, appellant contends that counsel was ineffective because he did not have sufficient funds to adequately investigate his social history and for failing to request funds from the court under Ake v. Oklahoma, supra. The motion court rejected appellant's claim finding as follows:

> The testimony in this case reflects that trial counsel was paid a fee to represent the movant. Further testimony adduced during evidentiary hearing in this case shows that there was no further payment made by the movant towards the expenses incurred by trial counsel for the preparation of this case. Further evidence shows that trial counsel expended funds for an expert witness to review the State's DNA evidence[18]; for Dr. Miller's time for the review of materials relating to the movant's psychological history and two visits with the movant;

[18]As noted earlier, because Green had just finished working on another DNA case with the same laboratory used in appellant's case, Green talked with an expert about the DNA results (1stSupp.PCR.L.F446-447).

and for Dr. Evans' review of the evidence in this matter and to testify at trial. The allegation contained in this point of movant's petition is conclusionary, if not speculative, and thus fails to meet the burden. this point is denied.

(PCR L.F.1075). The motion court's findings and conclusions are not clearly erroneous.

As discussed above, counsel's decision not to further investigate a diminished capacity defense was based on counsel's belief this evidence would not have been effective during the guilty or penalty phases of trial. Counsel had no reason to seek additional funds from the trial court under Ake, especially since appellant's previous attorney had unsuccessfully tried to seek funds from the court.

Furthermore, appellant did not prove that he was prejudiced by an alleged lack of funds. A review of Green's testimony reveals that: Green, who was sub-contracted by Rosenblum, asked Rosenblum for money for some issues and received funds for some while he did not for others; although no money was put forward for a mitigation specialist, Green stated that they did discuss hiring one but that he could not remember why they did not do so (1stSupp.PCR.L.F459-460). This does not overcome the presumption that the team's decision not to hire a mitigation specialist was part of their strategy. Fretwell v. Norris, 133 F.3d 621,623-24(8thCir.1998) (using counsel's inability to recall his reasons for his actions as evidence of ineffective assistance violates Strickland's presumption that an attorney performed reasonably). Also, Green testified that he wanted money for a DNA expert, but then determined that hiring an expert would not be necessary and that he did get money to hire Dr. Evans (1stSupp.PCR.L.F459-460).

Appellant focuses on Green's statements that he did not control the funds and that one of the reasons he did not go to Peoria to investigate appellant's family was because of "time and expense" (App.Br129). However, Green stated that there was a "boatload" of reasons for why he did not go to Peoria, including the "sequence of events" that transpired after the first attempt to plead guilty under Judge Cundiff, and that there were "strategies" involved (1stSupp.PCR.L.F458). Green stated that a lot of the reasons he did not go to Peoria "had to do with the changes of the judge" (1stSupp.PCR.L.F458). Furthermore, appellant did not ask Rosenblum if Green had requested money or if there was any course of action that did not occur due to lack of funds. Rosenblum was "presumed to have undertaken adequate investigation and made adequate strategic decisions" in his handling of the funds. Taylor, 126 S.W3dat758 (where only one of the attorneys in a capital case was called to testify, but the other was not, the defendant failed to carry his burden of proof regarding his allegations of the other's ineffective assistance of counsel.") In fact, the record shows that money was expended to hire Drs. Evans and Miller to evaluate appellant's mental health. Any claim that appellant had insufficient funds to investigate his case has not been proven and is meritless.

Because counsel made a reasonable strategic decision not to further pursue diminished capacity issues and to rely on appellant, his maternal aunt and the "documents" to provide a social history, counsel's decision not to seek funds from the court under Ake was equally reasonable. Moreover, because appellant was not prejudiced by counsel's decision not to further investigate these issues or present additional penalty-phase evidence, appellant was not prejudiced by counsel's actions. This claim is without merit and should be denied.

Based on the foregoing, appellant's claims must be denied.

VI. NEW CLAIM REGARDING PHARMACIST

Appellant claims counsel were ineffective for failing to "adequately investigate appellant's personal history" and furnish it to Dr. Evans, a psychiatric pharmacist, "who could have utilized it to testify [appellant] was not properly medicated for his mental disabilities in the St. Charles County Jail which would have explained" his jail incidents (App.Br108). This claim was not raised in his amended motion. In his motion, appellant raised two separate claims. Claim 8(d) alleged, that had counsel provided adequate social history to Evans prior to his plea "and not limited his inquiry to only the impact of substance abuse on the crime," Evans would have provided a basis for a diminished capacity defense and could have provided support for "numerous statutory and non-statutory mitigating circumstances" (Mov.Ex42at281). Claim 8(e) alleged counsel were ineffective for failing to present Evans to explain appellant's behavior while in the St. Charles County Jail by showing that he was insufficiently medicated for bipolar disorder (Mov.Ex42at299,301).

Appellant's new claim of ineffective assistance of counsel alleges that counsel should have furnished the social history, as pled in claim 8(d), to Evans so he could draw the conclusions about appellant's behavior in the St. Charles County Jail as set forth in claim 8(e). [19]

[19]It is evident appellant is referring to the social history evidence as pled in claim 8(d) as his brief cites to the claim and refers to the diagnoses of Tourette's and bipolar disorders made by Drs. Pincus, Cowan, and Smith (App.Br109,111).

Appellant's new claim on appeal should not be reviewed. This Court may only consider claims as they were pled to the motion court. State v. Clay, 975 S.W2d121,141-142 (Mo.banc1998). Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal. State v. Harris, 870 S.W2d798,815(Mo.banc1994).

If appellant's new claim had been raised in the amended motion, the motion court could have properly denied it. Evans testified that had he known about appellant's Tourette's diagnoses and "these other disorders" it would have had an "impact" on how his behavior was affected at the time of the murder (PCRTr671-672). Evans noted that had he been given appellant's St. Charles County detention records he would have explained that his behavior in jail was as a result of his Tourette's and bipolar disorders which were not treated while he was in jail (PCRTr679). He testified that the medication he was receiving in jail were inappropriate for his disorder (PCRTr680).

Appellant's claim fails because Evans' additional testimony would at all times be dependant on the Tourette's and bipolar diagnoses from experts such as Pincus, Cowan and Smith. These three experts' diagnoses were derived from the social history that was not in their possession. As explained in more detail in Point V, counsel had strategic reasons for not shopping for more favorable experts and seeking the sort of social history alleged in claim 8(e) after they had conducted an extensive and reasonable investigation of his mental health background. Counsel investigated possible strategies and their actions should rarely be "second-guess[ed]." Middleton v. State, 103 S.W3d726, 736 (Mo.banc2003). "To pursue one evidentiary course to the exclusion of another as an informed strategic decision not to offer

certain evidence is not ineffective assistance." Ringo v. State, 120 S.W3d743,748 (Mo.banc2003)[20].

Appellant's claim must fail.

[20]To the extent appellant claims counsel were ineffective for failing to provide the St. Charles County Jail medical records so that Evans could independently made a diagnosis as to his behavior in jail, claim 8(e), he failed to meet his burden of proof. Evans noted that in order for him to render a diagnosis, he needs either a psychologist or psychiatrist's diagnosis for him to give an opinion (PCRTr661). Evans never testified that just based on the St. Charles County Jail records *alone*, and without the diagnoses from Pincus,Cowan, and Smith, he could render an opinion that appellant was not appropriately medicated and explain his behavior in jail.

VII. STIPULATIONS REASONABLE TRIAL STRATEGY

Appellant claims his counsel was ineffective for failing to object to the state's evidence of certain "non-statutory aggravators" testified to by "McKee, Smith, MeKean, Frey, and Givon" as reasonably competent counsel would have objected on the basis of lack of "proper notice" and on hearsay grounds (App.Br114).

A. Facts

Appellant acknowledges he was notified by the state of the following: witness endorsements for St. Charles County officers Michael McKee (July 1997), penalty phase witnesses St. Charles County officer Robert Smith (July 1998), Peoria police officer Jerry McKean (July 1998), Illinois probation officer Christine Frey (July 1998), and Dr. Max Givon (August 1998) (App.Br116-119 citing to Tr290-292,356). The record also shows that the state disclosed: a five-page report from the St. Charles County Department of Corrections, complaint number 97-7166 (L.F146); a mugshot from the Peoria County Sheriff's Department and an eleven page adult interview worksheet prepared by probation officer Frey (L.F283); forty-one pages of Lake St. Louis Police Department records (L.F344); 490 pages of records from the St. Charles County Sheriff's Department (L.F344,345); "numerous" reports from the Peoria Police Department (L.F345); and copies of the documents, reports, test results and records used by Dr. Givon (L.F345).

On August 7, 1998, counsel filed a notice of mitigating circumstances stating that appellant would, among other things, offer the non-statutory mitigating circumstance that appellant "as a child, suffered abuse and neglect at the hands of his mother and father"and that

he suffered from chemical dependency (L.F339). Counsel also asserted in his notice that the evidence in support of mitigation would be presented through corroborating documents of:

> a. Department of Corrections records from the State of Illinois and St. Charles County Jail
>
> b. those documents referenced in Max Givon's report, specifically page 2 of his report to the Court

(L.F340).

On September 11, 1998, before the penalty phase began, counsel stipulated to the admission of the "St. Charles County Jail records," the "mental evaluation report of Dr. Givon and the documents he referenced in his report," the "Pre-Sentence Investigation Report from the State of Illinois," and the "Peoria, Illinois police abstracts which reference Michael Worthington as a suspect" (L.F367-68).

On September 14, 1998, just prior to the start of the penalty phase hearing, counsel Green made a record about the stipulations and noted as follows:

> GREEN: That's fine. Only other item that I would like to put on the record right now is that with respect to the stipulation as to I am the lead counsel now for the penalty phase of this case **and I have thought long and hard about the evidence that's to be admitted during this sentencing hearing.** There are certain legal objections that I could make to the foundational requirements and chain of custody to some of this evidence that we have stipulated to, there is also constitutional arguments that typically could be made with respect to the

> aggravating circumstances that have been filed by the State **and I have made a conscious decision, which I believe is in the best interest of my client, to waive such objections and foundational requirements** because my position is that since this is not a jury trial, but is a Court trial, that the Court would have to review this evidence anyway in order to make those rulings and in addition, **that especially for this case, that as much information that we can put before the Court is best for my client and also this information would subsequently end up before the Court through the pre-sentence investigation report that has been offered**. So those are my reasons as to why I am entering into the stipulation and why we are not having hearings on motions to preclude certain statutory aggravating circumstances. That's all I wanted to put on the record at this time.

(Tr8-9).

At trial, appellant again stipulated to the admission of this evidence (Tr135-36,151, 221-22,629). The stipulation at trial also included State's Exhibits 29 and 82 (prison misconduct), State's Exhibits 35 and 83 (prior arrests in Illinois), and State's Exhibits 39 (A-E)(documents referenced in Dr. Givon's report).

The evidence showed that appellant had a long criminal history (St.Ex33(b),35,83). Also, in the three years appellant was incarcerated before pleading guilty, he was involved in 55 correctional incidents (Tr152;St.Ex82), including refusing to follow orders (Tr147-48,182-83,188), making alcohol in his cell (Tr138-39), stealing a razor blade and hiding it

in his cell (Tr140-41), fighting with other inmates (Tr144-46), beating another inmate with a broom (Tr202-206), trying to disable a door (Tr206), pulling out his stitches in order to go back to the hospital (Tr179-82), threatening to kill jail officers (Tr142-43), and physically assaulting jail officers on more than one occasion (Tr139,142).

Judge Nichols stated in the "Report of the Trial Judge," that she found as non-statutory aggravators appellant's: (a) violent pre-trial confinement behavior; (b) criminal history; and (c) bond awaiting sentencing status on Peoria County, Illinois burglary charges (Mov.Ex15at3893).

B. Post-Conviction Proceedings

1. Evidence

Counsel Green stated in his deposition testimony that he stipulated to the St. Charles County Jail records because he could not think of legal objections to keep them out and he chose not "to fight a fight" he was not going to win (1stSupp.PCR.L.F469-470). Green stated that instead of delaying the proceedings, he decided to gain favor with the court by only making objections that were "truly meritorious" (1stSupp.PCR.L.F470). Green also stated that in addition to having Dr. Givon's mental evaluation report, he had access to Dr. Givon's sources of data and was familiar with the sources (1stSupp.PCR.L.F529). Green also stated that he viewed the evidence of appellant's social history as documented by "records from Illinois" as more favorable to the defense than if he had called appellant's mother to testify (1stSupp.PCR.L.F561). The records were "consistent with the abusive and neglective childhood" Green was trying to present to the court (1stSupp.PCR.L.F561). Green agreed

that there was an "extensive" history of appellant's life that was documented (1stSupp.PCR.L.F732).

Despite having testified that he made a conscious decision to stipulate to the records, Green agreed to motion counsel's leading questions that: he did not investigate the factual bases for the St. Charles County reports (1stSupp.PCR.L.F470); he did not know prior to sentencing that the state was going to present evidence that he stole from his grandmother in 1994 (1stSupp.PCR.L.F474); that he did not know appellant's mother claimed she gave a knife to the Peoria police and told them appellant had a knife (1stSupp.PCR.L.F475); that he had no reason for not objecting to the non-statutory aggravators where appellant was only a suspect (1stSupp.PCR.L.F486-487); and he did not investigate the Peoria police reports because he got the evidence "so late" (1stSupp.PCR.L.F600).

2. Findings

The motion court denied appellant's claim and held as follows:

> . . .[T]he trial transcript indicates that movant was aware that these records would be admitted. The record further reflects that Sergeant McKee from the St. Charles County Department of Corrections was the primary witness for the State regarding the movant's misconduct from the time of his arrest to the time of the penalty phase trial.
>
> The trial transcript also shows that movant's trial counsel anticipated this evidence and called Jerry Scott Wallace and Donald L. Wolf, who were both inmates who had been confined with the movant and had witnessed an incident

between the movant and Sergeant McKee. Mr. Wallace, who for a time was confined in the same cell unit as the movant, testified that Sergeant McKee had a personal bias against the movant [(Tr664-67)].

C. Standard Of Review

Appellate review of the denial of a post-conviction motion is limited determining whether the findings of fact and conclusions of law are clearly erroneous. Moss v. State, 10 S.W.3d 508,511(Mo.banc 2000).

The movant has the burden of proving his claims by a preponderance of the evidence. Supreme Court Rule 29.15(i).

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668,688,694 (1984).

D. This Court has already determined that admission of the "non-statutory aggravators" was not "prejudicial"

Appellant's allegation of ineffective assistance of counsel for stipulating to the evidence is essentially the same as appellant's claim raised and rejected for plain error on direct appeal. On direct appeal, appellant claimed "the state did not give notice to the defense that it intended to introduce evidence of his bad conduct in jail; his behavior in school; his burglaries with his father; misconduct with friends and associates . . . as evidence of non-

statutory aggravating circumstances." State v. Worthington, 8 S.W.3d 83,90(Mo.banc2000). This Court noted that the failure of the state to provide notice of non-statutory aggravating circumstances is error but that the question is whether the lack of notice and admission of evidence "was plain error constituting manifest injustice." Id.

This Court found that "[u]nder the totality of circumstances surrounding this evidence, the prejudice that would arise from such evidence as explained in *Debler* [856 S.W.2d 641 (Mo. banc 1993)] does not exist in this case. Worthington pleaded guilty to these crimes and a judge determined Worthington's sentence." Id. This Court went on to explain the reasoning from Debler that the "potential for prejudice" is lessened in a court-tried case because a trial court recognizes that evidence of uncharged criminal activity as a non-statutory aggravating circumstance is "significantly less reliable" since "no jury or judge has previously determined a defendant's guilt." Id. at 91,n.5.

Respondent recognizes that this Court has held that a finding of no plain error on direct appeal does not necessarily equate to finding no prejudice under Strickland. Deck v. State, 68 S.W3d418,427-428 (Mo.banc2002). This is because plain error can serve as the basis for granting a new trial only when an error is outcome-determinative, while under Strickland, a movant must show that but for counsel's errors, "there is a reasonable probability...the result of the proceeding would have been different." Deck, 68 S.W3dat 429, quoting Strickland v. Washington, 466 U.Sat 694. However, "this theoretical difference in the two standards of review will seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal, for, in most cases, an error that is not outcome-

determinative on direct appeal will also fail to meet the Strickland test." Id. at 428. This is one of those cases where the theoretical difference does not apply.

As noted in Point II above, if the reviewing court on direct appeal concluded that there was error but that the defendant was not "prejudiced" by the error (see Shifkowski v. State, 136 S.W3dat590-591), then, while there may have been a meritorious basis for counsel to object (assuming there was no strategic reason not to), there is no possibility that appellant was prejudiced by stipulating to the complained-of evidence. Accordingly, where, as in the case at bar, a plain error claim is disposed of on direct appeal as not "prejudicial," the claim cannot be relitigated as a claim of ineffective assistance of counsel.

E. Claim regarding stipulation is meritless

Should this Court let appellant relitigate this claim, it is still without merit.

The record shows counsel's decision to stipulate to the "non-statutory aggravators" was part of his reasoned trial strategy.

"'[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S.at689.

Here, the record amply demonstrates that counsel decided to stipulate to the evidence after careful consideration. As noted above, appellant was given sufficient notice of the witnesses and the substance of the evidence that the state intended to present at the penalty

phase. Furthermore, appellant filed a notice of mitigating circumstances and stated the evidence in support of mitigation may be presented through corroborating documents of:

a. Department of Corrections records from the State of Illinois and St. Charles County Jail

b. those documents referenced in Max Givon's report, specifically page 2 of his report to the Court

(L.F340). Counsel then decided to stipulate before the penalty phase began to the admission of the "St. Charles County Jail records," the "mental evaluation report of Dr. Givon and the documents he referenced in his report," the "Pre-Sentence Investigation Report from the State of Illinois," and the "Peoria, Illinois police abstracts which reference Michael Worthington as a suspect" (L.F367-68). Finally, counsel Green made every effort to explain on the record that after he thought "long and hard" he decided stipulating to the evidence was in appellant's best interest (Tr8-9).

"A stipulation is generally a matter of trial strategy and will not support a claim of ineffective assistance of counsel." State v. Holloway, 877 S.W2d692,697 (Mo.AppE.D 1994). In State v. Johnson, 829 S.W2d630,633 (Mo.AppW.D1992), the defendant claimed his counsel was ineffective for stipulating as to the testimony of a witness. The Court of Appeals, Western District, denied his claim finding that counsel exercised reasonable trial strategy and tried to act in a way "favorable to the best interests of her client." Id. The Court reasoned as follows:

> A client is bound by the decisions of counsel as to the management of the trial and as to the stipulations which give effect to that strategy. A stipulation of counsel, deliberately wrought and then given effect, binds not only the client, but as the orderly administration of justice demands, is given credit by a court of review.

Id.

Similarly here, counsel decided that the bulk of the complained-of evidence was going to come out at the penalty phase of trial or in a pre-sentence investigation report. Indeed, this Court noted that in general, "both the state and the defense are allowed to introduce evidence regarding 'any aspect of defendant's character.'" Worthington, 8 S.W.3d at90. Further, under Rule 29.07(a), the trial court may order a PSI report. State v. McMillin, 783 S.W.2d 82,96 (Mo.banc1990). This Court noted that under Rule 29.07(a)(2):

> The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition, his social history, and the circumstances affecting his behavior or may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant . . . .

Id.

Thus, the bulk of the evidence would be put before the trial court whether or not counsel objected. Counsel decided not to make meritless objections and anger the court, but to instead try to use the evidence to appellant's advantage. Counsel wanted to use the evidence

to support his mitigation theory that appellant "as a child, suffered abuse and neglect at the hands of his mother and father"and that he suffered from chemical dependency (L.F339). This was reasonable.

Finally, as this Court noted on direct appeal, appellant cannot show he was prejudiced, as his penalty phase was tried before a court and not a jury. And, appellant rebutted this evidence through extensive cross-examination (Tr164-469), and by calling three witnesses to testify that Sergeant McKee had a personal bias against appellant and that the events did not occur as McKee described (Tr649-654,655-657,664-667).

Based on the foregoing, appellant's claim must be denied.

VIII. JUDGE SCHNEIDER SERVED IMPARTIALLY(Responds to Appellant's Point IX).

Appellant claims that Judge Schneider's campaign statements made two weeks before her election against Judge Nichols and before appellant's sentencing hearing created an appearance of impropriety that she could not fairly consider his post-conviction motion (App.Br135). Appellant claims that Judge Schneider's statements "advocated death for [appellant]" (App.Br135).

A. Claim

Appellant filed a motion to disqualify the motion court, Judge Nancy Schneider, and "all past and present St. Charles County Judges" claiming that a combination of Judge Schneider's campaign statements and public opinion that was "galvanized for the death sentence in this case" showed that neither Judge Schneider nor the other St. Charles County judges could fairly serve (PCRL.F74-89).

As in his claim pertaining to Judge Nichols' alleged inability to fairly try his case, appellant presented evidence of numerous newspaper articles in support of his claim (PCRL.F74-89)[21]. Appellant quoted from a newspaper article describing both judicial candidates, Judge Schneider and Judge Nichols (PCRL.F92). The article read, in relevant part, as follows:

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[21]More details as to the other newspaper articles appellant relies on is outlined in Point IV above.

"I will make sure cases are handled quickly and justice is meted out so people can continue to have confidence that everything is being done so they can live in a safe environment," Schneider said.

She also said as a circuit judge and St. Charles resident for 40 years, she would work to maintain a safe community by sharing the same concerns as residents.

"The death penalty and life in prison is an issue all citizens are concerned about . . . . The judge can take the place of the jury, so it is important that public officials share their values and beliefs," Schneider said.

Nichols is in the midst of a case where a defendant has waived his right to a jury trial, and she must decide whether to sentence him to death or life in prison.

"It's very important for a judge to reflect the values of the community," Schneider said.

(PCRL.F92).

Appellant also filed an article which stated that Judge Nichols was defeated by Judge Schneider on November 3, 1998 (Mov.Ex13at3404).

On March 2, 2001, a motion hearing was scheduled and appellant's motion to disqualify was argued by the parties (PCRL.F2).[22] That same day, the motion court denied appellant's motion to disqualify (PCRL.F790).

B. Analysis

It is well-settled Rule 51.05, which applies to a request for change of judge, does not apply to Rule 24.035 hearing. Thomas v. State, 808 S.W2d364,367 (Mo.banc1991). A post-conviction movant may move for disqualification of the judge only on constitutional due process grounds that the judge is biased or prejudiced against movant. Clearly, the movant is not entitled to a change of judge absent a finding that the judge presiding in this case has a bias or prejudice against the movant. Boxx v. State, 857 S.W2d425,428 (Mo.AppE.D1993).

A judge is entitled to a presumption that he or she will not undertake to preside over a trial or hearing in which he or she cannot be impartial. Boxx, 857 S.W2dat428. "It is presumed that a judge acts with honesty and integrity and will not undertake to preside in a trial in which the judge cannot be impartial." State v. Kinder, 942 S.W2d313,321 (Mo. banc1996). The standard of review as to whether there is bias or prejudice sufficient for disqualification of a judge is limited to whether a reasonable and disinterested bystander would reasonably question the impartiality of the judge. Wright-El v. State, 890 S.W2d664,671 (Mo.AppE.D1994), and Thomas v. State, 808 S.W2dat367. This presumption

[22]The motion court, in denying the motion, noted that it did so after consideration of the motion, the state's response, and argument of counsel (PCRL.F790). If those proceedings were transcribed, appellant did not provide a transcript.

is only overcome and disqualification required if there is "a factual context that gives meaning to the kind of bias" that requires disqualification of a judge. Smulls v. State, 10 S.W3d497,499 (Mo.banc2000) and Haynes v. State, 937 S.W2d199,203 (Mo.banc1996).

In those cases requiring recusal, this Court has found that the common thread is "either a fact from which prejudgment of some evidentiary issue in the case by the judge may be inferred or facts indicating the judge considered some evidence properly in the case for an illegitimate purpose." Smulls, 10 S.W3dat499; Haynes, 937 S.W2dat204.

Appellant argues that Judge Schneider's views that were expressed during her judicial campaign against Judge Nichols demonstrated that she could not fairly serve on his case (App.Br135).

In Reynolds v. Reynolds, 6 S.W3d183,184-185 (Mo.AppE.D1999), the father in a child custody dispute claimed on appeal that the trial judge was biased against fathers as custodians because of a statement the judge had said during another case that he questioned "whether any man can adequately take care of a child sometimes." The Court of Appeals, Eastern District held:

> A judge's chance remark, made outside the setting of the case at hand, does not demonstrate that the judge is unwilling to hear the evidence and apply the law as he sees it. Judges not infrequently apply laws and legal rules with which they do not agree.

Id. at 185 (internal citation omitted).

Such is the case here. Judge Schneider's statements were not made in regard to this case but about the death penalty in general. There was nothing in the article which would lead a reasonable observer to believe that Judge Schneider would be unwilling to hear *appellant's* evidence and apply the law fairly and without bias.

As appellant argued in Point IV above, pertaining to the claim against Judge Nichols, there was intense public pressure to sentence appellant to death and such pressure demonstrated Judge Schneider's inability to serve. Appellant points out numerous newspaper articles and letters to the editor pertaining to this case. However, Supreme Court Rule 2 Canon 3 B(2) states that "a judge shall be faithful to the law and maintain professional competence in it. **A judge shall not be swayed by partisan interests, public clamor or fear of criticism"** (emphasis added).

Murder cases, and particularly capital murder cases, draw a great amount of public attention. This Court addressed similar concerns when it stated in State v. Schneider, 736 S.W2d392,403-404 (Mo.banc1987) and State v. Taylor, 929 S.W2d209,220 (Mo.banc1996) that "[i]t is not unusual for a judge to receive letters from the public or for there to be publicity for crimes such as in this case." In these cases, this Court found no cause for the recusal of the judge.

In sum, there is no basis from the record for a reasonable observer to believe that Judge Schneider was biased against appellant. Appellant's ninth point on appeal must fail.

IX. FAILURE TO CALL PARENTS REASONABLE TRIAL STRATEGY (Responds to Appellant's Point X).

Appellant claims that his counsel was ineffective for failing to call his parents, Richard Worthington and Patricia Worthington Washburn, to testify at his penalty phase hearing (App.Br141). Appellant asserts that his parents could have rebutted aggravating evidence of crimes appellant committed and to testify about their abuse and neglect of him as a child (App.Br141). Appellant's claim fails because counsel Green contacted Patricia and decided not to call her as she would not help his defense, Green tried to locate Richard but he was incarcerated at the time, and in any event, appellant was not prejudiced as the bulk of their testimony was cumulative to the evidence presented at trial.

A. Standard of Review

Review is for clear error. Moss v. State, 10 S.W3d508,511 (Mo.banc2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness" and that he was prejudiced thereby. Strickland v. Washington, 466 U.S668,688,694(1984). "To establish ineffectiveness of trial counsel for failing to call a witness, movant must show that the witness could have been located by reasonable investigation, that the witness would testify if called, and that the testimony would provide a viable defense." Bucklew v. State, 38 S.W3d395,400 (Mo.banc2001).

B. Facts

Counsel testified that he contacted appellant's mother, Patricia, "at least two times," through ten to fifteen minute phone calls (1stSupp.PCR.L.F455). During these phone calls, Green could not get much history from her because it "was hard to keep her on topic" as she was concerned about how she was coming off in the media as a bad mother (1stSupp.PCR.L.F455). His mother wanted to defend her position as a great mother (1stSupp.PCR.L.F455). He did not feel like he was getting anywhere with her (1stSupp.PCR.L.F455). Green stated that he did not consider asking for her records (1stSupp.PCR.L.F456). Green stated that Patricia showed up at the penalty phase hearing, but he sent her away because she was still worried about whether she appeared to be a good mother (1stSupp.PCR.L.F560). He was worried that she would undermine their mitigation theory that appellant had a horrible childhood (1stSupp.PCR.L.F560). He also considered that the fact that she claimed to be using so much crack cocaine at the time of the sentencing hearing (1stSupp.PCR.L.F559). Green had records of appellant's history of abuse from his Illinois records, and so he felt that the records were more favorable that having Patricia testify (1stSupp.PCR.L.F561).Green also tried to locate appellant's father, but he was incarcerated at that time (1stSupp.PCR.L.F562). Rosenblum was not questioned on this matter.

Richard and Patricia stated that they would have been willing to work with counsel (1stSupp.PCR.L.F4-5,144). Patricia would have testified that as to some of the instances where appellant was arrested for various crimes, that they actually committed the crimes but let appellant be blamed for the crimes (1stSupp.PCR.L.F.320-322). Appellant witnessed his father beat up his grandfather, who was trying to protect Patricia from Richard

(1stSupp.PCR.L.F310-312). Patricia used drugs while pregnant with appellant (1stSupp.PCR.L.F314). Patricia did not believe her father's accusation that appellant shot at him, made one month before he died (1stSupp.PCR.L.F88). Appellant was sexually abused by his baby-sitter (1stSupp.PCR.L.F327-328,419-421). Appellant was present during her suicide attempts (1stSupp.PCR.L.F353). Richard would have testified that he taught appellant how to do burglaries (1stSupp.PCR.L.F. 106-107). Richard introduced drugs to appellant when he was nine (1stSupp.PCR.L.F318-319).

The motion court found that counsel's actions as to both parents were reasonable and no prejudice arose as much of the testimony was cumulative (PCR L.F1072-1073).

C. Analysis

The record shows that counsel's actions in investigating and attempting to locate Richard and Patricia were reasonable. Counsel contacted Patricia twice on the phone, but after talking to her he determined that she would not be helpful to the mitigation defense of showing appellant's disadvantaged childhood because she was focused on portraying herself as a good mother and claiming that appellant had a good life. In fact, when she showed up at the penalty phase hearing, he talked to her to see if she could be helpful and he determined that she was still concerned with portraying herself as a good mother. If counsel believes that the witnesses' testimony would not unqualifiedly support the defense, the decision whether to call the witness is a matter of trial strategy that will not support a finding of ineffective assistance of counsel. State v. Jones, 885 S.W2d57,58 (Mo.AppW.D1994).

Appellant testified that he tried to locate Richard, but he could not as he was incarcerated at the time. Counsel cannot be ineffective for failing to locate a witness who could not be found through reasonable investigation.

Appellant was not prejudiced by counsel's failure to call them as witnesses. As outlined in Point V above, much of the same evidence testified to by appellant's parents was either testified to by appellant's aunt Carol, or it was elicited from the witnesses and documents counsel stipulated to prior to trial. The following information came out during the penalty phase: appellant's parents were well-known to the police (Tr234-235); appellant's father was a well-known drug user who had an extensive criminal history and taught appellant to do burglaries (Tr269,675-676,694-695); during their first burglary, appellant was arrested and admitted guilt, while Richard did not (Tr695-696); appellant grew up in a dysfunctional chaotic family, with a chronic alcoholic mother and a heroin-addicted father (Tr.276;St.Ex.33batA-98-102); he suffered from years of chronic neglect and emotional, physical and sexual abuse, but was never removed from the home (Tr277); his mother was a drug dealer (Tr675-676); his maternal grandparents were alcoholics (Tr677); Richard was in and out of jail constantly and would get involved with drugs and disappear (Tr678); Patricia became a prostitute to support her drug and alcohol habit (Tr680); Patricia attempted suicide 15 to 20 times (Tr681); appellant watched as paramedics responded to the scene upon the suicide attempts (Tr682); because appellant's grandfather was delirious, the family was unsure appellant shot his grandfather (Tr707). (See also App.DirectAppealBr14-18,22-25;Resp.Appdx A22-A30).

Thus, the motion court was correct in finding that counsel could not be held ineffective for failing to present cumulative evidence. Bucklew, 38 S.W3d at401.

X. VICTIM IMPACT PROPER AND NOT PREJUDICIAL(Responds to Appellant's Point IX).

Appellant claims counsel was ineffective for failing to object to "excessive victim impact evidence," which was purportedly so inflammatory, it injected "passion, prejudice, and arbitrariness" in the sentencing proceedings (App.Br151).

A. Facts

During penalty phase, the prosecutor called eleven witnesses to the stand to give victim impact testimony (Triii-iv,509-618). Each witness read his or her own prepared victim impact statement to the court, except the Farrells, whose victim impact statement was read by Mrs. Angelbeck (Tr510,525,532,535,538,547,549,553-54,557,560,564,614). Defense counsel objected during three of the statements when he felt the witnesses began to recommend a penalty (Tr551-52,555-56,562-63). When the prosecutor moved for the admission of the statements, appellant either stipulated or said, "No objection" (Tr534,537,545,548,556, 559,563,630), except to one sentence in the statement of Ms. Selecky that he felt contained a penalty recommendation (Tr563). Appellant said, "No objection" when the prosecutor introduced the photographs of Ms. Griffin (Tr528-29,572), the awards she won (Tr591-95,598-99), her art work and poetry (Tr596-98), and the other evidence about her life (Tr545,589,600,603,605-606,613,618-19).

B. Post-Conviction

Appellant alleged in his amended motion that counsel was ineffective for failing to object to the victim impact evidence on the grounds that the evidence was (1) cumulative, (2)

hearsay, and (3) improperly comparative between the victim and appellant (Mov.Ex42 at465-467).

Counsel testified that the state provided summaries of the victim impact statements it intended to use at the penalty phase (1stSupp.PCR.L.F502). When asked why he did not object to the victim impact testimony when it became "rather lengthy," Green stated that he did not have an answer (1stSupp.PCR.L.F503).

The motion court denied the claim and found that there was no prejudice from the evidence as it was a court-tried case (PCR L.F1078-1079).

C. Standard of Review

Appellate review of the denial of a post-conviction motion is limited determining whether the findings of fact and conclusions of law are clearly erroneous. Moss v. State, 10 S.W.3d 508,511(Mo.banc 2000).

The movant has the burden of proving his claims by a preponderance of the evidence. Supreme Court Rule 29.15(i).

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668,688,694 (1984).

D. Victim impact evidence proper and appellant not prejudiced

On direct appeal, this Court found no plain error regarding the victim impact evidence (See Dir.Appeal.App.Br42-44,61), and noted as follows:

> We disagree with Worthington that the evidence violated his constitutional rights by being unduly prejudicial. *See Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *State v. Roberts*, 948 S.W.2d 577, *cert. denied*, 522 U.S. 1056, 118 S.Ct. 711, 139 L.Ed.2d 652 (1998). Victim impact evidence is designed to show each victim's uniqueness as an individual human being. It is simply another form or method of informing the court about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. *See Payne and Roberts, supra; State v. Knese*, 985 S.W.2d 759 (Mo. banc 1999). During the penalty phase, thirteen witnesses read prepared statements and asked that a message be sent to the community and that "justice" be served through the sentence imposed. Pictures of Ms. Griffin and her family, as well as awards and other evidence about her life were introduced at the hearing. This Court has rejected the notion that the state is only allowed to present a "brief glimpse" of the victim's life. *State v. Knese*, 985 S.W.2d 759. No manifest injustice occurred in allowing the judge, who was sentencing Worthington, to hear this victim impact evidence.

State v. Worthington, 8 S.W.3d 83,90(Mo.banc1999) (internal citations omitted).

Appellant correctly points out that a finding of "no manifest injustice" on direct appeal does not mean finding Strickland prejudice is foreclosed (AppBr158). Deck v. State, 68 S.W.3d 418,427-428(Mo.banc2002). This is because plain error can serve as the basis for granting a new trial only when an error is outcome-determinative, while under Strickland, a movant must show that but for counsel's errors, "there is a reasonable probability...the result of the proceeding would have been different." Deck, 68 S.W.3d at 429, quoting Strickland v. Washington, 466 U.S. at 694. However, "this theoretical difference in the two standards of review will seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal, for, in most cases, an error that is not outcome-determinative on direct appeal will also fail to meet the Strickland test." Id. at428.

On direct appeal, this Court "disagree[d]" with appellant's contention that he was prejudiced by the victim impact evidence. Worthington, 8 S.W.3d at90. This Court never held that there was any error at all in the admission of the evidence. Id. In fact, this Court held that it has rejected the "notion" that the state is only "allowed to present a 'brief glimpse' of the victim's life." Id. This Court also cited to State v. Roll, 942 S.W.2d 370 (Mo.banc1997), and noted that "[j]udges are presumed not to consider improper evidence when sentencing a defendant." Id. at89. Thus, the "theoretical" difference between manifest injustice and Strickland prejudice does not apply to appellant's case.

In addition, not only was there a finding of "no manifest injustice" on direct appeal, which supports the denial of the claim, but this Court also made a finding of fact on direct appeal which directly refutes appellant's allegation of Strickland prejudice. On direct appeal,

this Court conducted its independent statutory review of appellant's death sentence and found, after a careful review of the record and transcript, "that the sentence of death imposed on Mr. Worthington was not imposed under the influence of passion, prejudice, or any other arbitrary factor." Worthington, 8 S.W.3d at 93-94. Appellant's sole claim of prejudice in his amended motion was that the victim impact evidence caused the trial court to "impose the death sentence under the influence of passion, prejudice, and arbitrary factors" (PCR.L.F411). Appellant failed to allege any facts to demonstrate that this Court's finding as to the lack of passion or prejudice in the sentencing was incorrect. Without any such allegation, appellant's claim of prejudice is refuted by the record.

Given that this Court did not find error from the admission of the victim impact evidence, counsel cannot be held ineffective for failing to make a meritless objection. State v. Clay, 975 S.W.2d 121,136(Mo.banc1998). Also, though counsel testified he had no answer for failing to object to the evidence, testimony that counsel simply cannot remember whether or what strategy was employed does not overcome this presumption. Fretwell v. Norris, 133 F.3d 621,623-24(8thCir.1998) (using counsel's inability to recall his reasons for his actions as evidence of ineffective assistance violates Strickland's presumption that an attorney performed reasonably).

Furthermore, the record shows that counsel either stipulated or stated "no objection" when the prosecutor moved for the admission of all of the statements except one, (Tr534,537,545,548,556,559,563,630), the photographs of Ms. Griffin (Tr528-29,572), the awards she won (Tr591-95, 598-99), her art work and poetry (Tr596-98), and the other evidence

about her life (Tr545,589,600,603,605-606,613,618-19). These actions correspond with counsel's testimony as to his stipulations to other evidence, unrelated to this claim, where he stated he decided to only object to "truly meritorious" claims because he wanted to gain favor with the trial court (1stSupp.PCR.L.F470). This was reasonable trial strategy. See State v. Holloway, 877 S.W2d692,697 (Mo.App.E.D1994)(stipulation is generally matter of trial strategy and will not support a claim of ineffective assistance). Appellant's claim fails.

XI.CRUEL AND UNUSUAL PUNISHMENT CLAIM(Responds to Appellant's Point XII).

Appellant alleges the motion court clearly erred when it denied his claim that Missouri's administration of capital punishment is unconstitutional, because "lethal injection execution and its related procedures causes death by a process that involves lingering death, mutilation, and the unnecessary and wanton infliction of pain"(App.Br163). Appellant points to the execution of Emmett Foster in 1995 (App.Br163). He alleges that Foster's execution took 30 minutes to carry out, and that "Foster convulsed during the execution" (App.Br163). **A. Standard of Review**

Review is for clear error. Moss v. State, 10 S.W3d508,511 (Mo.banc2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

B. Discussion

The motion court, citing to Morrow v. State, 21 S.W3d819,828 (Mo.banc2000), which reviewed a similar claim, stated:

> The movant's claim fails. To be successful in this claim, movant must allege, at a minimum, facts that tend to show that there is a problem of administration of the death penalty by lethal injection that is likely to occur again in Missouri. Movant cannot meet this burden simply by claiming that there are no assurances that future executions will be humane and constitutional and citing to examples from other jurisdictions in support of these contentions.

> The allegations contained in this point consisted only of bare assertions and conclusions, and relief cannot be granted. This point is denied.

(PCR L.F1082) (internal citation omitted).

The motion court was correct. Appellant did not plead or prove facts showing the protocols used in Foster's execution are still in use or will be used at the time of *his* execution. Nor did he plead or prove facts showing that the same individuals who participated in Foster's execution would be involved in appellant's execution. See Morrow, 21 S.W3dat 828 (no clear error where defendant alleged no facts tending to show there was a problem with administration of death penalty by lethal injection that was likely to occur again).

It is well-established that when a defendant does not wish to test the legality of the original conviction or sentence, but to challenge the manner in which his sentence is being carried out, the proper remedy is not a post-conviction motion, but a proceeding for a writ of habeas corpus. Murphy v. State, 873 S.W2d231,232 (Mo.banc1994) (sentencing court has no discretion in crediting jail time' proper remedy is habeas corpus or mandamus); State ex rel. Haley v. Groose, 873 S.W2d221,223 (Mo.banc1994) (habeas corpus is available where inmate claims prison conditions constitute cruel and unusual punishment). Rule 24.035(a) is the procedure for raising claims that a conviction or sentence *imposed* violates the constitution and laws of the State or the United States. It does not state that it is a procedure for attacking the *manner* in a sentence is to be carried out.

Finally, appellant's claim that Morrow is distinguishable because of a recent United States Supreme Court case, Nelson v. Campbell, 124 S.Ct.2117(2004), which held that an

inmate may bring a suit under 42U.S.C. §1983 to challenge the lethal procedures planned to be used against him (App.Br164-165), is misplaced. Nelson only demonstrates that there are other methods for attacking the manner in which a sentence is to be carried out and does not alter the analysis used by the motion court. Nelson does not change the fact that appellant failed to sufficiently plead or prove facts under his Rule 24.034 motion or that a post-conviction motion is not one of the procedures for attacking the execution of his sentence.

Based on the foregoing, appellant's final point must fail.

CONCLUSION

For the foregoing reasons, the judgment of the motion court should be affirmed.

Very truly yours,

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CERTIFICATE OF COMPLIANCE AND SERVICE:

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 27,805 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this __ day of January, 2004, to:

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Respondent's Appendix