303 S.W.3d 527
Supreme Court of Missouri,
En Banc.

STATE of Missouri, Respondent,
v.
Carman L. DECK, Appellant.

No. SC 89830. | Jan. 26, 2010. | Rehearing Denied March 2, 2010.

Synopsis
Background: Defendant moved for postconviction relief after his convictions for first-degree murder and other offenses and his sentences of death were affirmed, 994 S.W.2d 527. The motion was denied, and defendant appealed. The Missouri Supreme Court affirmed in part, reversed in part, and remanded for a new penalty-phase trial, 68 S.W.3d 418. On remand, defendant received two death sentences. Appeal followed. The Missouri Supreme Court affirmed, 136 S.W.3d 481. The United States Supreme Court granted certiorari and reversed and remanded, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953. On remand in the Circuit Court, Jefferson County, Gary P. Kramer, J., defendant again received two death sentences. He appealed.

Holdings: The Missouri Supreme Court, Zel M. Fischer, J., held that:

[1] trial court was not statutorily required to impose sentences of life imprisonment without the possibility of parole;

[2] trial court acted within its discretion in sustaining the state's motion to strike for cause two prospective jurors who stated that they could not sign a death verdict;

[3] prosecutor's closing-argument comments on certain accomplishments of victims and how descendants of victims would someday want to know whether justice was done did not constitute improper personalization;

[4] prosecutor's closing-argument request for the jury to think about laying on a bed for ten minutes at gunpoint and being rendered helpless did not constitute improper personalization;

[5] defendant was not prejudiced by the prosecutor's erroneous closing-argument suggestion that

defendant had escaped from incarceration more than one time;

[6] defendant was not prejudiced by the prosecutor's erroneous closing-argument suggestion that inmates who defendant helped to escape were serving life sentences;

[7] manifest injustice did not result from trial court's failure to give a Missouri approved jury instruction on procedures in death-penalty cases; and

[8] the death penalty was not excessive or disproportionate.

Affirmed.

Breckenridge, J., concurred in part and concurred in result and filed opinion.

Stith, J., concurred in result and filed opinion in which Wolff, J., concurred.

Teitelman, J., concurred in result only.

West Headnotes (43)

[1] **Sentencing and Punishment**⇐Determination and disposition

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(10)Determination and disposition

Trial court on remand was not statutorily required to impose sentences of life imprisonment without the possibility of parole after the United States Supreme Court concluded that defendant, who had received two death sentences, did not receive a fair penalty-phase trial because he appeared in shackles in the presence of the jury; the reversible error recognized by the United States Supreme Court, i.e., the shackling, was trial error unrelated to the statutory scheme that set out the death-penalty procedures. V.A.M.S. § 565.040(2).

4 Cases that cite this headnote

[2] **Criminal Law**⇨Review De Novo

110Criminal Law
110XXIVReview
110XXIV(L)Scope of Review in General
110XXIV(L)13Review De Novo
110k1139In general

Construction of a statute is a question of law reviewed de novo.

Cases that cite this headnote

[3] **Criminal Law**⇨Selection and impaneling

110Criminal Law
110XXIVReview
110XXIV(N)Discretion of Lower Court
110k1152Conduct of Trial in General
110k1152.2Jury
110k1152.2(2)Selection and impaneling

A trial court's ruling on a challenge for cause will not be disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion.

Cases that cite this headnote

[4] **Jury**⇨Competency for Trial of Issues in General

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k83Competency for Trial of Issues in General
230k83(1)In general

Qualifications for a prospective juror are not determined from a single response to a voir dire question but rather from the entire examination.

2 Cases that cite this headnote

[5] **Jury**⇐Discretion of court

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k85Discretion of court

A trial court has broad discretion to determine the qualifications of prospective jurors.

1 Cases that cite this headnote

[6] **Jury**⇐Bias and Prejudice

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k97Bias and Prejudice
230k97(1)In general

When determining the qualifications of prospective jurors, a trial judge evaluates the venire's responses and determines whether their views would prevent or substantially impair their performance as jurors, including the ability to follow instructions on the burden of proof.

1 Cases that cite this headnote

[7] **Criminal Law**⇐Jury selection

110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.17Jury selection

A great deal of deference is owed on appeal to a trial court's determination that a prospective juror is substantially impaired.

Cases that cite this headnote

[8] **Criminal Law**⇐Jury selection

110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.17Jury selection

Deferential standard of review of a trial court's determination that a prospective juror is substantially impaired applies whether the trial court has engaged in a specific analysis regarding the substantial impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias.

Cases that cite this headnote

[9] **Criminal Law**⇐Jury selection

110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.17Jury selection

A trial court's finding that a prospective juror is substantially impaired may be upheld even in the absence of clear statements from the juror that he or she is impaired.

Cases that cite this headnote

[10] **Jury**⇐Trial and determination

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k124Challenges for Cause
230k133Trial and determination

When there is ambiguity in a prospective juror's statements, a trial court, aided as it undoubtedly is by its assessment of the juror's demeanor, is entitled to resolve it in favor of the state when determining whether the juror is substantially impaired.

Cases that cite this headnote

[11] **Jury**⇐Punishment prescribed for offense

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k104Personal Opinions and Conscientious Scruples
230k108Punishment prescribed for offense

For the purpose of determining whether a prospective juror in a capital case is substantially impaired, even a prospective juror's assurance that he or she can follow the law and consider the death penalty may not overcome the reasonable inferences from other responses that he or she may be unable or unwilling to follow the law.

1 Cases that cite this headnote

[12] **Jury**⇐Punishment prescribed for offense

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k104Personal Opinions and Conscientious Scruples
230k108Punishment prescribed for offense

Trial court acted within its discretion at a penalty-phase trial in a capital case in sustaining the state's motion to strike for cause two prospective jurors who stated that they could not sign a death verdict, even though the jurors stated that they could fairly consider both possible punishments, i.e., death or life imprisonment without the possibility of parole; the jurors' responses revealed an inability to follow instructions if the juror were chosen as foreman of the jury, and trial court could have concluded from the record as a whole that there was a substantial possibility that the juror might not have been able to fairly consider both punishments despite assurances to the contrary.

1 Cases that cite this headnote

[13] **Jury**⇐Punishment prescribed for offense

230Jury
230VCompetency of Jurors, Challenges, and Objections

230k104Personal Opinions and Conscientious Scruples
230k108Punishment prescribed for offense

A prospective juror's reluctance or refusal to sign a death verdict may be considered by the trial court but need not be conclusive in deciding whether the juror should be struck for cause in a capital case; the reluctance or refusal may be considered among other facts and circumstances, including the trial court's observation of the juror.

2 Cases that cite this headnote

[14] **Criminal Law**⇐Necessity and scope of proof
Criminal Law⇐Discretion of court in controlling argument

110Criminal Law
110XXTrial
110XX(C)Reception of Evidence
110k661Necessity and scope of proof
110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2061Control of Argument by Court
110k2063Discretion of court in controlling argument

A trial court is vested with broad discretion to exclude or admit evidence and to control closing arguments.

5 Cases that cite this headnote

[15] **Criminal Law**⇐Evidence in general
Criminal Law⇐Statements as to Facts, Comments, and Arguments

110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error
110k1169Admission of Evidence
110k1169.1In General
110k1169.1(1)Evidence in general
110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error
110k1171Arguments and Conduct of Counsel
110k1171.1In General
110k1171.1(2)Statements as to Facts, Comments, and Arguments
110k1171.1(2.1)In general

To be entitled to relief on appeal, a defendant challenging an evidentiary ruling or a closing argument must show that an error was so prejudicial that he or she was deprived of a fair trial.

1 Cases that cite this headnote

[16] **Sentencing and Punishment**⇐Notice of sentencing factors
Sentencing and Punishment⇐Notice of evidence and witnesses

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)1In General
350Hk1744Notice of sentencing factors
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)1In General
350Hk1745Notice of evidence and witnesses

Neither the statute requiring disclosure of aggravating or mitigating circumstances that either party intends to prove at the penalty phase of a trial for first-degree murder nor the rule requiring disclosure, on request, of certain types of evidence or information requires notice of the specific argument that is going to be made based on disclosures. V.A.M.S. § 565.005(1); V.A.M.R. 25.03.

Cases that cite this headnote

[17] **Sentencing and Punishment**⇐Arguments and conduct of counsel

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(2)Arguments and conduct of counsel

Prosecutor's closing-argument comments on certain accomplishments of victims and how descendants of victims would someday want to know whether justice was done did not constitute improper personalization at a penalty-phase trial in a capital case; the prosecutor did not imply any danger to the jurors or ask the jurors to place themselves in the victims'

shoes.

3 Cases that cite this headnote

[18] **Criminal Law**⇐Appeals to fears of jury

110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2145Appeals to Sympathy or Prejudice
110k2155Appeals to fears of jury

Improper personalization in closing argument is established when the state suggests that a defendant poses a personal danger to the jurors or their families.

8 Cases that cite this headnote

[19] **Sentencing and Punishment**⇐Arguments and conduct of counsel

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(2)Arguments and conduct of counsel

Prosecutor's closing-argument comments on certain accomplishments of victims and how descendants of victims would someday want to know whether justice was done did not constitute an improper appeal to sympathy at a penalty-phase trial in a capital case.

Cases that cite this headnote

[20] **Sentencing and Punishment**⇐Arguments and conduct of counsel

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing

350Hk1780(2)Arguments and conduct of counsel

Prosecutor's closing-argument request for the jury to think about laying on a bed for ten minutes at gunpoint and being rendered helpless did not constitute improper personalization at a penalty-phase trial in a capital case; the jury was not asked in any manner to place itself in the victims' shoes.

Cases that cite this headnote

[21] **Criminal Law**⇐Arguments and conduct in general

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1037Arguments and Conduct of Counsel
110k1037.1In General
110k1037.1(1)Arguments and conduct in general

Plain-error relief is rarely appropriate for claims involving closing arguments because the decision to object is often a matter of trial strategy.

2 Cases that cite this headnote

[22] **Criminal Law**⇐Arguments and conduct in general
Criminal Law⇐Burden of showing error

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1037Arguments and Conduct of Counsel
110k1037.1In General
110k1037.1(1)Arguments and conduct in general
110Criminal Law
110XXIVReview
110XXIV(M)Presumptions
110k1141In General
110k1141(2)Burden of showing error

Under plain-error review, a conviction will be reversed for improper closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice; the burden to prove decisive effect is on the defendant.

5 Cases that cite this headnote

[23] **Criminal Law**⇐For prosecution
Criminal Law⇐Statements Regarding Applicable Law
Criminal Law⇐Matters not within issues
Criminal Law⇐Matters Not Sustained by Evidence

110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2071Scope of and Effect of Summing Up
110k2073For prosecution
110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2084Statements Regarding Applicable Law
110k2085In general
110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2087Matters not within issues
110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2088Matters Not Sustained by Evidence
110k2089In general

The state has wide latitude in closing arguments, but closing arguments must not go beyond the evidence presented; courts should exclude statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury.

3 Cases that cite this headnote

[24] **Criminal Law**⇐Arguments and conduct of counsel

110Criminal Law
110XXIVReview
110XXIV(L)Scope of Review in General
110XXIV(L)2Matters or Evidence Considered
110k1134.16Arguments and conduct of counsel

Entire record is considered when interpreting a closing argument, not an isolated segment.

2 Cases that cite this headnote

[25] **Sentencing and Punishment**⇨Arguments and conduct of counsel
Sentencing and Punishment⇨Harmless and reversible error

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(2)Arguments and conduct of counsel
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(9)Harmless and reversible error

Defendant was not prejudiced at a penalty-phase trial in a capital case by the prosecutor's erroneous closing-argument suggestion that defendant had escaped from incarceration more than one time, given the entire record in which the suggestion was made.

Cases that cite this headnote

[26] **Sentencing and Punishment**⇨Arguments and conduct of counsel
Sentencing and Punishment⇨Harmless and reversible error

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(2)Arguments and conduct of counsel
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(9)Harmless and reversible error

Defendant was not prejudiced at a penalty-phase trial in a capital case by the prosecutor's erroneous closing-argument suggestion that inmates who defendant helped to escape were serving life sentences; the jury was aware that defendant previously had participated in an escape, and no basis existed for a conclusion that the suggestion had a decisive effect on

the outcome of the trial.

1 Cases that cite this headnote

[27] **Sentencing and Punishment**⇐Arguments and conduct of counsel

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(2)Arguments and conduct of counsel

Prosecutor's closing-argument request for jurors to protect prison guards and inmates who would be present with defendant if he received a life sentence constituted a permissible future-dangerousness argument at a penalty-phase trial in a capital case.

Cases that cite this headnote

[28] **Sentencing and Punishment**⇐Dangerousness

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(E)Factors Related to Offender
350Hk1720Dangerousness

One purpose of capital punishment is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.

1 Cases that cite this headnote

[29] **Sentencing and Punishment**⇐Determination and disposition

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(10)Determination and disposition

Law-of-the-case doctrine precluded examination of defendant's claim, on appeal after a second penalty-phase retrial on remand in a capital case, that police officers did not have reasonable suspicion to stop him, even though an officer testified at the first trial that the headlights on defendant's vehicle were off when defendant drove past him, and the officer testified at the second retrial that defendant turned off his lights as he drove past and before he pulled into a parking lot; defendant unsuccessfully raised the issue in his first direct appeal, and the slight factual difference in the officer's testimonies did not establish manifest injustice or constitute facts substantially different from the first adjudication. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[30] **Criminal Law**⇐Evidence wrongfully obtained

110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.8Evidence
110k1158.12Evidence wrongfully obtained

When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether substantial evidence supports the trial court's decision.

Cases that cite this headnote

[31] **Criminal Law**⇐Reception of evidence

110Criminal Law
110XXIVReview
110XXIV(M)Presumptions
110k1144Facts or Proceedings Not Shown by Record
110k1144.12Reception of evidence

When reviewing a trial court's ruling on a motion to suppress, an appellate court views the facts and any reasonable inferences in a light most favorable to the trial court and disregards any contrary inferences.

Cases that cite this headnote

[32] **Criminal Law**⊕Subsequent Appeals
Criminal Law⊕Mandate and proceedings in lower court

110Criminal Law
110XXIVReview
110XXIV(T)Subsequent Appeals
110k1180In general
110Criminal Law
110XXIVReview
110XXIV(U)Determination and Disposition of Cause
110k1192Mandate and proceedings in lower court

A previous holding is the law of the case, precluding relitigation of issues on remand and subsequent appeal.

Cases that cite this headnote

[33] **Courts**⊕Previous Decisions in Same Case as Law of the Case

106Courts
106IIEstablishment, Organization, and Procedure
106II(G)Rules of Decision
106k99Previous Decisions in Same Case as Law of the Case
106k99(1)In general

Decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not.

Cases that cite this headnote

[34] **Criminal Law**⊕Summoning and impaneling jury

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1035Proceedings at Trial in General
110k1035(6)Summoning and impaneling jury

Manifest injustice did not result from trial court's failure, before commencement of the

death-qualification phase of voir dire at a penalty-phase trial in a capital case, to give a Missouri approved jury instruction on procedures in death-penalty cases; the information that would have been conveyed to the veniremembers by the instruction was otherwise provided except for the issue of mental retardation, and mental retardation was not an issue in defendant's case. MAI Criminal 3d No. 300.03A.

Cases that cite this headnote

[35] **Criminal Law**⇐Form and Language in General

110Criminal Law
110XXTrial
110XX(G)Instructions: Necessity, Requisites, and Sufficiency
110k805Form and Language in General
110k805(1)In general

Whenever there is a Missouri approved jury instruction applicable under the law in a criminal case, the approved instruction is to be given to the exclusion of any other instruction.

1 Cases that cite this headnote

[36] **Criminal Law**⇐Duty of judge in general

110Criminal Law
110XXTrial
110XX(G)Instructions: Necessity, Requisites, and Sufficiency
110k769Duty of judge in general

Error results when a trial court fails to give a mandatory instruction.

1 Cases that cite this headnote

[37] **Criminal Law**⇐Instructions in general

110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error

110k1172Instructions
110k1172.1In General
110k1172.1(1)Instructions in general

Supreme Court will reverse on a claim of instructional error only if there is an error in submitting an instruction and that error results in prejudice to the defendant.

Cases that cite this headnote

[38] **Sentencing and Punishment**⇐Determination and disposition

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(10)Determination and disposition

Law-of-the-case doctrine precluded defendant's claim, on appeal after a second penalty-phase retrial in a capital case, that certain jury instructions impermissibly shifted the burden of proof to him with respect to mitigating evidence, where defendant challenged the instructions in an earlier appeal, and the Supreme Court rejected his claim.

Cases that cite this headnote

[39] **Sentencing and Punishment**⇐Determination and disposition

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(10)Determination and disposition

Law-of-the-case doctrine precluded defendant's claim, on appeal after a second penalty-phase retrial in a capital case, that trial court erred in sentencing him to death because the state failed to plead statutory aggravating circumstances in the information; defendant raised an identical claim in an earlier appeal, which the Supreme Court rejected.

1 Cases that cite this headnote

[40] **Sentencing and Punishment**⇨Proportionality

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1788Review of Death Sentence
350Hk1788(6)Proportionality

Supreme Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. (Per Fischer, J., with chief justice and one judge concurring, one judge concurring in part and concurring in result, and three judges concurring in result.) V.A.M.S. § 565.035.

3 Cases that cite this headnote

[41] **Sentencing and Punishment**⇨Proportionality

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1788Review of Death Sentence
350Hk1788(6)Proportionality

When conducting a proportionality review of a death sentence, the Supreme Court simply reviews the sentence and, while giving due deference to the factual determinations reached below, decides whether the sentence is disproportionate as a matter of law. (Per Fischer, J., with chief justice and one judge concurring, one judge concurring in part and concurring in result, and three judges concurring in result.) V.A.M.S. § 565.035.

4 Cases that cite this headnote

[42] **Sentencing and Punishment**⇨More than one killing in same transaction or scheme

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(D)Factors Related to Offense
350Hk1683More than one killing in same transaction or scheme

Death penalty for two murders was not excessive or disproportionate. V.A.M.S. § 565.035.

1 Cases that cite this headnote

[43] **Sentencing and Punishment**⇐Childhood or familial background

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(E)Factors Related to Offender
350Hk1716Childhood or familial background

A bad or difficult childhood does not provide sufficient grounds to set aside a death penalty. (Per Fischer, J., with chief justice and one judge concurring, one judge concurring in part and concurring in result, and three judges concurring in result.)

Cases that cite this headnote

Attorneys and Law Firms

***532** Rosemary E. Percival, Office of the Public Defender, Kansas City, for appellant.

Chris Koster, Atty. General, Evan J. Buchheim, Kevin Zoellner, Office of Missouri Atty. General, Jefferson City, for respondent.

ZEL M. FISCHER, Judge.

I. Introduction and Procedural History

In February 1998, a jury found Carman Deck guilty of two counts of first-degree murder, two counts of armed criminal action, one count of first-degree robbery and one count of first-degree burglary for the 1996 robbery and shooting deaths of James and Zelma Long. He was sentenced to two death sentences. This Court affirmed those convictions and sentences *in State v. Deck,* 994 S.W.2d 527 (Mo. banc 1999) ("*Deck I* ").[1] Deck filed a motion for ***533** post-conviction relief

pursuant to Rule 29.15, which was overruled by the circuit court. On appeal, this Court reversed the death sentences but affirmed the findings of guilt for his convictions. *Deck v. State,* 68 S.W.3d 418 (Mo. banc 2002) ("*Deck II* "). At the penalty-phase retrial, he was, again, sentenced to two death sentences. This Court affirmed the death sentences in *State v. Deck,* 136 S.W.3d 481 (Mo. banc 2004) ("*Deck III* "), but the United States Supreme Court granted certiorari and found he was denied a fair trial because he appeared in shackles in the presence of the jury. *See Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). This Court ordered a second penalty-phase retrial, and Deck again received two death sentences. He appeals these two death sentences on numerous grounds. This Court has exclusive jurisdiction pursuant to Mo. Const. art. V, § 3. The judgment is affirmed.

II. Point One: Automatic Life Sentence under Section 565.040.2

[1] Deck argues the trial court violated his rights to due process, equal protection, and freedom from cruel and unusual punishment under the United States and Missouri Constitutions in sentencing him to two death sentences. He contends section 565.040.2, RSMo 2000, mandates he should have been sentenced to life imprisonment without eligibility for parole because the death sentences imposed were held to be unconstitutional in *Deck,* 544 U.S. at 622, 125 S.Ct. 2007.

Standard of Review

[2] Deck's claim involves the construction and application of section 565.040.2. The construction of a statute is a question of law reviewed *de novo. State v. Perry,* 275 S.W.3d 237, 241 (Mo. banc 2009).

Analysis

This Court has previously indicated that trial error premised on a constitutional violation not directly affecting the imposition of the death penalty statutory scheme does not result in the application of section 565.040.2. *See State v. Whitfield,* 107 S.W.3d 253 (Mo. banc 2003).

Section 565.040.2 provides that when a death sentence is held to be unconstitutional, the trial court that previously imposed the sentence shall resentence the defendant to life imprisonment without the possibility of parole:

> In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

In *Whitfield,* the jury found the defendant guilty of first-degree murder, "but could not agree on punishment during the penalty phase, voting 11 to 1 in favor of life imprisonment." 107 S.W.3d at 256. Because the jury was unable to reach a verdict, the trial judge "undertook the four-step process required by section 565.030.4," which, at the time, was the process to determine punishment. *Id.* The trial judge found the presence of statutory and non-statutory aggravating circumstances, determined these circumstances warranted death, considered whether there were mitigating circumstances and ***534** found they did not outweigh the circumstances in aggravation, and decided under all the circumstances to impose a death sentence. *Id.*

After all of Whitfield's appeals and claims of ineffective assistance were exhausted, the United States Supreme Court decided *Ring v. Arizona,* 536 U.S. 584, 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and held that capital defendants had a right under the Sixth Amendment to a jury determination of any fact that increases their maximum punishment, which included the finding of any statutory aggravating circumstances. *Whitfield,* 107 S.W.3d at 256. Because the judge, not the jury, made the factual findings and sentenced Whitfield to death, this Court held that the sentence of death was unconstitutionally imposed. *Id.*

This Court then applied section 565.040.2 and sentenced Whitfield to life imprisonment without parole. *Id.* This Court held that section 565.040.2 applied because the entry of the death sentence itself was accomplished through the application of an unconstitutional procedure under chapter 565 because the trial court made findings that the Sixth Amendment required a jury to make. *Id.* at 270. In reaching this holding, this Court noted that the alleged error—allowing the judge to determine the facts making Whitfield eligible for the death penalty—was not "some unrelated trial error, but the very entry of a judgment of death based on the judge's findings" in violation of *Ring,* which made the death sentence itself unconstitutional. *Id.* at 270 n. 20.

In applying section 565.040.2, this Court stressed that the situation in *Whitfield,* in which the entry of the death sentence itself was unconstitutional or imposed under an unconstitutional statutory scheme, was distinguishable from a case such as the case at bar in which a new trial is ordered because of unrelated trial court error that violates a defendant's constitutional rights:

> This [case] is to be distinguished from situations like *State v. Mayes,* 63 S.W.3d 615, 635 (Mo. banc 2001), and other cases cited by the separate opinion, in which a new trial was ordered because of unrelated trial error of constitutional dimension. Here, as discussed, it is the very entry of the death sentence that is held to be unconstitutional, since made without the very jury findings required for imposition of the death penalty under Missouri law, and hence the only remedy is to order imposition of the proper penalty—a life sentence.

Id. at 272 n. 23.

This construction of section 565.040.2 was amplified by the dissent in *Whitfield:*

> Section 565.040, however, does not apply to situations of mere procedural error, even if such error is rooted in constitutional principles. First, the plain words of the statute limit its application to events in which "the death penalty [in its totality] ... is held to be unconstitutional" or in which "any death sentence imposed [as to a particular offender] ... is held to be unconstitutional". Second, there is no policy reason to mandate a particular more extreme remedy when a lesser, more moderate remedy, is sufficient to guard the procedural rights of the offender.

Id. at 274 (Price, J. dissenting) (alteration in original).

This observation is consistent with the legislative intent behind the passage of section 565.040.2. The dissent even went on to point out the several cases in which this Court had concluded that although a death sentence had been imposed, a remand for a retrial of the penalty phase proceeding was the appropriate remedy for a trial error premised on a constitutional violation. *Id.*

***535** The limitation put on the application of section 565.040.2, as articulated in both the majority and dissenting opinions in *Whitfield,* is in perfect harmony with the legislative intent and history behind its enactment.

In this case, Deck is not entitled to the relief allowed by section 565.040.2 because the reversible error recognized by the United States Supreme Court—Deck's shackling in front of the jury—was trial error unrelated to the statutory scheme that set out the death penalty procedures.

III. Point Two: Veniremembers Removal for Cause

Deck asserts the trial court violated his right to a trial by a fair and impartial jury and abused its discretion in sustaining the State's motions, over his objections, to strike certain potential jurors

for cause based on their reluctance to serve as the jury's foreperson. He contends these potential jurors were otherwise qualified to serve as jurors and their only "fault" was a reluctance to serve as foreperson and sign the verdict form of death.

Standard of Review

[3] "The trial court's 'ruling on a challenge for cause will not be disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion.' " *State v. Taylor,* 134 S.W.3d 21, 29 (Mo. banc 2004) (quoting *State v. Smith,* 32 S.W.3d 532, 544 (Mo. banc 2000)).

[4] [5] [6] The qualifications for a prospective juror are not determined from a single response, but rather from the entire examination. *State v. Johnson,* 22 S.W.3d 183, 188 (Mo. banc 2000). The trial court can better evaluate a veniremember's commitment to follow the law and has broad discretion to determine the qualifications of prospective jurors. *Id.* "[T]he trial judge evaluates the venire's responses and determines whether their views would prevent or substantially impair their performance as jurors (including the ability to follow instructions on the burden of proof)." *Id.*

[7] [8] [9] [10] [11] Accordingly, a great deal of deference is owed to the trial court's determination that a prospective juror is substantially impaired. *Uttecht v. Brown,* 551 U.S. 1, 7, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). This deferential standard applies whether the trial court has engaged in a specific analysis regarding the substantial impairment; "even the granting of a motion to excuse for cause constitutes an implicit finding of bias." *Id.* "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Id.* at 9, 127 S.Ct. 2218. The trial court's "finding may be upheld even in the absence of clear statements from the juror that he or she is impaired." *Id.* at 7, 127 S.Ct. 2218. "Thus, when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.' " *Id.* (alteration in original) (quoting *Wainwright v. Witt,* 469 U.S. 412, 434, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)); *see also State v. Tisius,* 92 S.W.3d 751, 763 (Mo. banc 2002) (quoting *State v. Roberts,* 948 S.W.2d 577, 597 (Mo. banc 1997)) ("Where there is conflicting testimony regarding a prospective juror's ability to consider the death penalty, the trial court does not abuse its discretion by giving more weight to one response than to another and in finding that the venireperson could not properly consider the death penalty"). Even a juror's assurance that he or she can follow the law and consider the death penalty may not overcome ***536** the reasonable inferences from other responses that he or she may be unable or unwilling to follow the law. *Uttecht,* 551 U.S. at 18, 127 S.Ct. 2218.

1. The Record Regarding Veniremember Coleman

Although Veniremember Coleman said she could consider a sentence of death, she repeatedly responded with, "I don't know," when asked if she could sign a verdict of death, even knowing that she was not signing simply for herself, but on behalf of the jury as a whole. Ultimately, she said she could make no promises that she could sign a death verdict:

> [Prosecuting Attorney]: ... Ms. Coleman, if you're that juror in that situation, could you give meaningful, realistic, honest consideration to a sentence of death?
>
> [Veniremember Coleman]: Yes.
>
> [Prosecuting Attorney]: Could you give that same sort of consideration to life imprisonment without the possibility of probation or parole?
>
> [Veniremember Coleman]: Yes.
>
> [Prosecuting Attorney]: Could you, if you were the foreperson, sign a verdict?
>
> [Veniremember Coleman]: I don't know.
>
> [Prosecuting Attorney]: Well, you rolled your eyes first, so I kinda thought in my experience, you might say I don't know. Because that can be the weight to your issue. I mean some people feel sometimes that by signing that, I'm the only one responsible for that. And is it fair to say that's kind of what's going through your mind?
>
> [Veniremember Coleman]: Yes.
>
> ...
>
> [Prosecuting Attorney]: And my concern is, is that you might not be able to function as a juror. Do you understand that?
>
> [Veniremember Coleman]: I understand.
>
> [Prosecuting Attorney]: And—but so what I need you to know is, can you assure me that you can do that. Or, is your situation because of your concerns that ... I just don't know that I can sign that form. I can't promise you that I'll be able to?
>
> [Veniremember Coleman]: I don't know that I could.
>
> [Prosecuting Attorney]: Would it be fair to say that you can't promise me that you would be able to?
>
> [Veniremember Coleman]: No, I can't.

Deck's attorney did not ask Veniremember Coleman any questions. The trial court sustained the State's motion to strike Veniremember Coleman for cause apparently based on her statement—that was not followed up—that she was unable to state whether she could sign the verdict form.

2. The Record Regarding Veniremember Ladyman

Veniremember Ladyman also claimed that he could consider both punishments, but said that he would not sign a verdict imposing a death sentence because it was "like playing God":

> [Prosecuting Attorney]: Thank you. Mr. Ladyman. Sir, if you were in that circumstance, asked to consider those things, would you be able to give the same level of consideration to a sentence of death, as a life sentence?
>
> [Veniremember Ladyman]: Yes, I could.
>
> [Prosecuting Attorney]: Would you be able to, also consider or sign the verdict form, sentencing someone—or sentencing someone to die ?
>
> [Veniremember Ladyman]: No.
>
> [Prosecuting Attorney]: And—I don't—is it the same sort of thing we've talked about with others, that it's very personal, and you couldn't stand out alone?
>
> *537 [Veniremember Ladyman]: Well, if—if its like playing God. I don't want to be a part of it, nuh-uh.
>
> [Prosecuting Attorney]: So while you might be able to deliberate and decide—
>
> [Veniremember Ladyman]: Yeah, I can decide.
>
> [Prosecuting Attorney]: And you view that part as playing God?
>
> [Veniremember Ladyman]: Yes.

Veniremember Ladyman maintained this position even though he had heard the prosecutor repeatedly tell others that the jury foreperson signs the verdict form not on behalf of himself or herself, but on behalf of the unanimous jury as a whole.

During questioning by Deck's attorney, Veniremember Ladyman said that he could follow the court's instructions and consider imposing the death penalty or life imprisonment without parole. Deck's counsel also asked him about his statement that he would refuse to sign a verdict form

imposing a death sentence. Veniremember Ladyman said that he could consider the death sentence, and also reaffirmed that he would refuse to sign a verdict form for a sentence of death:

[Defense Counsel]: Mr. Ladyman, we also went through the process together. Unless there's something else that you want to mention to me or state that you believe would be helpful in our consideration to consider whether or not you would be appropriate for the jury?

[Veniremember Ladyman]: [Shakes head.]

[Defense Counsel]: You're shaking your head. I'll take that as a no.

[Veniremember Ladyman]: I'm just saying I ain't signing it. I don't want to be the—

[Defense Counsel]: Let me ask you about that. You talked about that you would not sign the verdict form.

[Veniremember Ladyman]: Right.

[Defense Counsel]: Does the fact that you do not want to sign the verdict form, or that you don't want to serve as the foreman of the jury, does that prevent you from being a jury—a juror in this case, in the sense that—my question is in your mind, I can't be a part of that. I can't be a part of that? You are there. But does that prevent you from giving a realistic consideration to the death penalty?

[Veniremember Ladyman]: That's all the time.

[Defense Counsel]: Sure. Is your reluctance—or I'll even call refusal to sign the verdict form, does that prevent you from considering the death penalty in this case?

[Veniremember Ladyman]: No.

[Defense Counsel]: You could be one of the jurors?

[Veniremember Ladyman]: Yeah.

[Defense Counsel]: You would just defer, as I understand it correctly, and have somebody else serve as foreperson?

[Veniremember Ladyman]: Right.

[Defense Counsel]: Correct me if I'm wrong, but you could realistically consider the death penalty?

[Veniremember Ladyman]: Yeah.

[Defense Counsel]: And you could realistically consider the life in prison?

[Veniremember Ladyman]: Yeah.

The trial court sustained the State's motion to strike Veniremember Ladyman for cause.

Analysis

[12] [13] This Court held in *Smith* that a veniremember's unequivocal statement that he or she could not sign a death verdict can provide a basis for the trial court to sustain a motion to remove the veniremember for cause. 32 S.W.3d at 544. Both veniremembers in question, in ***538** this case, stated that they could not sign a death verdict. A prospective juror's reluctance or refusal to sign a death verdict may be considered by the trial court but need not be conclusive. The reluctance or refusal may be considered among other facts and circumstances—including the judge's observation of the veniremember—in deciding whether a prospective juror should be struck for cause.

In this case, it is not just the simple refusal to sign the verdict that may warrant removal. Where, as here, if a veniremember claims on the one hand that he or she could fairly consider both punishments but, at the same time, unequivocally states that he or she would not sign a verdict of death, the trial court is in the best position to consider whether the record contains sufficient evidence of equivocation creating a doubt as to whether that veniremember would be able to fairly consider both punishments. Here, the veniremembers' responses revealed an inability to follow the court's instructions if that person were chosen as foreman of the jury and the trial court could have concluded from the record as a whole that there was a substantial possibility that the veniremember may not be able to fairly consider both punishments despite their assurances to the contrary. The trial court was in a better position than this Court to make that determination and did not abuse its discretion in sustaining the State's motion to strike these veniremembers for cause.

IV. Point Three: Failure to Provide Notice of Argument

Deck argues the State failed to provide notice of aggravators, as required by section 565.005.1, RSMo 2000, and Rule 25.03 and that the trial court abused its discretion when it allowed the State to argue Deck's future dangerousness and bad prison conduct based on Deck's 1985 conviction for aiding an escape from incarceration.

Standard of Review

[14] [15] The trial court is vested with broad discretion to exclude or admit evidence and to control closing arguments. *State v. Baumruk,* 280 S.W.3d 600, 607 (Mo. banc 2009); *State v. Forrest,* 183 S.W.3d 218, 226 (Mo. banc 2006). Furthermore, to be entitled to relief, an appellant must show an error was so prejudicial that he or she was deprived of a fair trial. *Baumruk,* 280 S.W.3d at 607.

Analysis

The State's amended information charged that Deck was a persistent offender. One of the convictions relied on to support that allegation was Deck's 1985 conviction for aiding an escape. When the State offered a certified copy of that conviction during the penalty-phase retrial, Deck's counsel objected on the ground that the conviction was more prejudicial than probative and that the State had not provided notice it would utilize the conviction. The trial court overruled the objection and admitted the certified copy of the conviction into evidence.

Later, during closing arguments, the State discussed Deck's future dangerousness and bad prison conduct:

> [Prosecuting Attorney]: Sometimes when horrible crimes are committed by wolves, we've got to come to court, and we've got to count on our sheepdogs like for you, and you're our sheepdogs, today. You're our sheepdogs, that by your verdict, can protect the rest of society. While he's going to be in prison for the rest of his life if you let him live, remember, he knows how to escape. He aided and abetted others trying to.
>
> [Defense Counsel]: Objection; not a noticed aggravator.
>
> [The Court]: Overruled.
>
> [Defense Counsel]: Irrelevant.
>
> ***539** [The Court]: Overruled.
>
> [Prosecuting Attorney]: He knows how to escape, helping people that were in for the rest of their lives. I need you to be the sheepdog. I need you to protect the guards that will have to guard him so that he doesn't injure them. I need you to be a sheepdog and even protect other, more vulnerable inmates. But I need you and our society to be the sheepdog.

Section 565.005.1(1) requires that parties, at a reasonable time before trial begins, provide each other with a list of all aggravating or mitigating circumstances that the party intends to prove at the penalty phase of trial. Rule 25.03 requires the State, on written request, to disclose certain materials and information.

It is clear from the record that the State provided notice that it intended to make arguments based on Deck's 1985 conviction. Deck's argument does not articulate any specific violation of section 565.005.1 or Rule 25.03 and, in fact, his brief concedes notice: "Before trial, the State provided Deck notice that it would offer evidence of his prior convictions, including a 1985 conviction for aiding an escape."

Instead, Deck argues the State's failure to give notice it intended to argue his future dangerousness and previous bad prison conduct violated section 565.005.1 and Rule 25.03 as well as his due process rights under *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).

[16] Section 565.005.1 and Rule 25.03 do not require the State to provide notice of arguments it plans to make. Section 565.005.1 requires disclosure of aggravating or mitigating circumstances that either party intends to prove at the penalty phase of trial. Rule 25.03 requires disclosure, on request, of certain types of evidence or information. Neither requires notice of the specific argument that is going to be made based on disclosures.

Deck's reliance on *Simmons* is misplaced. In *Simmons,* the United States Supreme Court found that the due process clause does not allow the execution of a person on the basis of information that he had no opportunity to explain or deny. 512 U.S. at 163–64, 114 S.Ct. 2187. The Supreme Court held that a defendant who was sentenced to death and whose future dangerousness was made an issue by the State was denied due process when it prevented him from providing mitigating evidence or argument during the penalty phase of trial. *Id.* The case before this Court is distinguishable. There is no evidence that Deck was prevented from making any mitigating argument.

Furthermore, the State's disclosure placed Deck on notice that the State was likely to argue his future dangerousness. In *State v. Bucklew,* 973 S.W.2d 83, 96 (Mo. banc 1998), Bucklew argued that the trial court plainly erred in permitting the State to make arguments based on aggravating circumstances because the State failed to disclose aggravating circumstances and failed to give him notice it would argue his future dangerousness based on those circumstances. This Court rejected his claim, finding that the State had given Bucklew notice of statutory and non-statutory aggravating circumstances. *Id.* This Court also found that Bucklew had notice of the State's arguments, based on its disclosure of aggravating circumstances:

> [T]he state may argue inferences from evidence. It is reasonable to infer that a

> person who escaped from jail while awaiting a first degree murder trial and who has a long criminal record would not suffer confinement well. The allegations of fact contained in the state's disclosures and the language the state used ***540** ("anti-social and criminal history") provided Bucklew with sufficient notice of the state's intent to argue future dangerousness.

Id.

V. Point Four: Allegedly Improper Closing Arguments

Deck makes multiple claims related to the State's closing argument. They include: allegedly improper appeals to the jury, allegedly improper personalization, misstatements of facts and the State's future dangerousness argument.

1. Allegedly improper appeals to the jury

Deck alleges this portion of the closing argument was improper personalization:

> [Prosecuting Attorney]: The last thing I'm gonna tell you and say to you is this: I—I've done this job long enough, and this isn't about me—but I've done this long enough that on occasion, five years after a case like this has gone—
>
> [Defense Counsel]: Objection; vouching, personalization.
>
> [The Court]: Sustained.
>
> [Prosecuting Attorney]: Often times, I'll get a phone call later on from a family member, and they'll say—
>
> [Defense Counsel]: Objection; relevance, same objection.
>
> [The Court]: Overruled.
>
> [Prosecuting Attorney]: And they'll say to me, to my granddaughter, I've told them about my loved one that was murdered. They want—they want to know what happened. Can you explain it to them. There are 19 grandchildren. 19 great-grandchildren, and I don't know how many more there'll be. And some day these people are going to be told about James and Zelma Long. And they're gonna be told about what wonderful parents they were, how they liked to fish. How

their Grandmother got her masters and taught. They're gonna be told about these wonderful people. And you know the question they're gonna ask, is they're gonna say well, where are they now? They're gonna have to be told about this. And then they're gonna ask another question, and that question I get to some—unfortunately sometimes explain is was justice done? When you go up there, you'll tell us if justice is done. Now I'm gonna sit down and wait for your answer, so I can tell them.

Standard of Review

The trial court maintains broad discretion in controlling closing arguments. *State v. Edwards,* 116 S.W.3d 511, 537 (Mo. banc 2003). Closing arguments must be examined in the context of the entire record. *Id.* Here, Deck's claim of improper personalization was preserved and will be reviewed for abuse of discretion—whether a defendant was prejudiced to the extent that there is a reasonable probability that the outcome at trial would have been different if the error had not been committed. *Deck III,* 136 S.W.3d at 488; *Deck I,* 994 S.W.2d at 543.

Analysis

[17] [18] This argument did not constitute improper personalization. Improper personalization is established when the State suggests that a defendant poses a personal danger to the jurors or their families. *State v. Basile,* 942 S.W.2d 342, 352 (Mo. banc 1997). "Arguing for jurors to place themselves in the shoes of a party or victim is improper personalization that can only arouse fear in the jury." *State v. Williams,* 97 S.W.3d 462, 474 (Mo. banc 2003) (internal quotations omitted). The record here shows that the State did not imply any danger to the jurors or ask the jurors to place themselves in the victims' shoes.

***541** In addition to his improper personalization argument, Deck attempts to tack on an additional claim, alleging this argument constituted an improper appeal to sympathy and that it asked jurors to consider matters outside of the record to reach their verdict. Because this additional claim differs from his objection at trial, it is not preserved for appellate review and is entitled only to plain error review. *State v. Driver,* 912 S.W.2d 52, 54 (Mo. banc 1995).

[19] Deck claims this argument was an improper appeal to sympathy akin to the argument in *Sheppard v. State,* 777 So.2d 659, 661 (Miss.2000), where the prosecutor told the jury that if they voted to acquit, he would want them to call him and explain why they found the defense witnesses credible, so he could explain it to the victim's family. The Mississippi Supreme Court found that argument was reversible error because its purpose was to inflame the jurors and make them believe

they would be held personally accountable for their verdict. *Id.* at 661–62.

The closing argument in this case is distinguishable from that in *Sheppard* because the prosecuting attorney did not tell the jurors that the victims' family would hold them accountable, nor did he attempt to make an improper appeal to sympathy. In fact, the closing argument in this case is closer to the argument upheld by this Court in *State v. Strong,* 142 S.W.3d 702, 726–27 (Mo. banc 2004), where the State argued that family members in the courtroom were victims and described the impact the crime had on them.

This Court has found that statements stronger than those made here were not plain error. *See, e.g., Strong,* 142 S.W.3d at 727–28 (telling jurors the defendant would "escape justice" if death were not imposed); *State v. Ringo,* 30 S.W.3d 811, 821 (Mo. banc 2000) (telling jurors they would be rewarding the defendant if they did not impose death); *Deck I,* 994 S.W.2d at 543–44 (telling the jury the only way they could impose justice and show mercy to the people in the courtroom was to impose death).

2. Allegedly improper personalization

[20] Deck alleges this closing argument was improper personalization:

> Fourth—or three, depravity of mind. Is this the act of a depraved mind? And the instruction goes a little bit further than this. But it tells you what depraved mind in this situation means. But he rendered these people helpless before he killed them. And I would ask you to think about this: laying on a bed for ten minutes at gunpoint, rendered you helpless.

Standard of Review

[21] [22] No objection was made to this argument. Therefore, this claim is only entitled to plain error review. *State v. Johnson,* 284 S.W.3d 561, 573 (Mo. banc 2009). Plain error relief is rarely appropriate for claims involving closing arguments because the decision to object is often a matter of trial strategy. *Id.* Closing arguments must be examined in the context of the entire record. *Id.* Under plain error review, a conviction will be reversed for improper closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice. *State v. Middleton,* 995 S.W.2d 443, 456 (Mo. banc 1999). The burden to prove decisive effect is on the appellant. *State v. Parker,* 856 S.W.2d 331, 333 (Mo. banc 1993).

Analysis

Deck's argument relies on *State v. Storey,* 901 S.W.2d 886 (Mo. banc 1995), and ***542** *State v. Rhodes,* 988 S.W.2d 521 (Mo. banc 1999).

The State in *Storey* argued:

> Think for just this moment. Try to put yourselves in Jill Frey's place. Can you imagine? And, then—and then, to have your head yanked back by its hair and to feel the blade of that knife slicing through your flesh, severing your vocal cords, wanting to scream out in terror, but not being able to. Trying to breathe, but not being able to for the blood pouring down into your esophagus.

Id. at 901.

This Court held the State's argument was improper and undeniably prejudicial because graphically detailing the crime as if the jurors were in the victim's place could only serve to arouse fear in the jury. *Id.*

In *Rhodes,* the State argued:

> Try, try just taking your wrists during deliberations and crossing them and lay down and see how that feels (demonstrating). Imagine your hands are tied up.... And ladies and gentlemen, you're on the floor, and you're like that, with your hands behind your back, and this guy is beating you. Your nose is broken. Every time you take a breath, your broken rib hurts. And finally, after you're back over on your face, he comes over and he pulls your head back so hard it snaps your neck.... Hold your breath. For as long as you can. Hold it for 30 seconds. Imagine it's your last one.

988 S.W.2d at 529.

This Court, relying on *Storey,* stated that graphically detailing the crime as if the jurors were the victims was improper because it interfered with the jury's ability to make a reasoned and deliberate determination to impose the death penalty. *Id.*

The argument here is distinguishable from those made in *Storey* and *Rhodes.* In this case, the jury was not asked in any manner to place itself in the victims' shoes. This Court has denied similar claims in other cases. *See, e.g., State v. Smith,* 944 S.W.2d 901, 918 (Mo. banc 1997); *Roberts,* 948 S.W.2d at 594–95.

3. Misstatement of facts

Deck contends the State made two arguments that prejudicially misstated the facts of the case. Deck's complaint lies with the following two arguments related to his 1985 conviction for aiding escape:

> The next thing we have to do is to convince you that all this bad evidence, the aggravating evidence in this case warrants a death sentence. It does. You can consider all his prior escapes.
>
> ...
>
> He knows how to escape, helping people that were in for the rest of their lives. I need you to be the sheepdog. I need you to protect the guards that will have to guard him so that he doesn't injure them. I need you to be a sheepdog and even protect other, more vulnerable inmates.

Standard of Review

No objection was made to either argument; therefore, they will be reviewed for plain error, which is established only when an argument has a decisive effect on the outcome of the trial amounting to a manifest injustice. *Johnson,* 284 S.W.3d at 573; *Middleton,* 995 S.W.2d at 456. The burden to prove decisive effect is on the appellant. *Parker,* 856 S.W.2d at 333.

Analysis

The only evidence before the jury relating to any escape attempt was the State's allegation that, in 1985, while incarcerated, Deck procured a saw blade to cut through ***543** jail bars to help two men to escape. The record also contains information that Deck attempted to escape from prison in Potosi, but that evidence was discussed at sidebar outside the presence of the jury.

[23] [24] The State has wide latitude in closing arguments, but closing arguments must not go beyond the evidence presented; courts should exclude "statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury." *State v. Rush,* 949 S.W.2d 251, 256 (Mo.App.1997); *see also Storey,* 901 S.W.2d at 901 ("A prosecutor arguing facts outside the record is highly prejudicial"). But it is important to remember that "[t]he entire record is considered when interpreting a closing argument, not an isolated segment." *Johnson,* 284 S.W.3d at 573.

[25] No prejudice resulted from the first argument that suggested Deck had escaped more than one time. It appears the prosecuting attorney's comment was a simple misstatement—he used the plural rather than the singular form of the word "escape." Deck argues that based on this mistake, the jurors speculated, assumed facts outside of evidence and then imposed the death sentences based on that one comment. Comments made during closing argument must be looked at in the context of the entire record. *Id.* After review of the entire record there is no demonstration Deck was prejudiced by this misstatement.

[26] No prejudice resulted from the second argument that suggested the other inmates whom Deck attempted to help escape were serving life sentences. There was no evidence that the inmates Deck aided were "in for the rest of their lives," but the jury was aware he previously had participated in an escape. After review of the entire record, this comment was not prejudicial because there is no basis to conclude that this argument had a decisive effect on the outcome of the trial.

4. Future dangerousness argument

[27] Deck alleges this portion of the State's closing argument was improper:

> He knows how to escape, helping people that were in for the rest of their lives. I need you to be the sheepdog. I need you to protect the guards that will have to guard him so that he doesn't injure them. I need you to be a sheepdog and even protect other, more vulnerable inmates.

Standard of Review

No objection was made to this argument. Deck's claim will be reviewed for plain error—whether the argument had a decisive effect on the outcome of the trial amounting to a manifest injustice. *Johnson,* 284 S.W.3d at 573; *Middleton,* 995 S.W.2d at 456. The burden to prove decisive effect is on the appellant. *Parker,* 856 S.W.2d at 333.

Analysis

[28] Deck relies on *Schoels v. State,* 114 Nev. 981, 966 P.2d 735 (1998), and *Blake v. State,* 121 Nev. 779, 121 P.3d 567 (2005), and claims this argument impermissibly asked jurors to impose

death to prevent him from killing others in the future, thereby saving innocent victims. However, one of the purposes of capital punishment is the incapacitation of dangerous criminals and "the consequent prevention of crimes that they may otherwise commit in the future." *State v. Bolder,* 635 S.W.2d 673, 683 (Mo. banc 1982) (citing *Gregg v. Georgia,* 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)).

In *Simmons,* the United States Supreme Court noted its approval of arguments concerning a defendant's future dangerousness, "This Court has approved ***544** the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." 512 U.S. at 162, 114 S.Ct. 2187; *see also Bucklew,* 973 S.W.2d at 96.

The facts in this case are distinguishable from *Schoels* and *Blake* in that the State, as permitted by *Bucklew* and *Simmons,* permissibly argued future dangerousness but did not suggest or imply the jurors would be directly responsible or held accountable if Deck harmed anyone else in the future.

VI. Point Five: Motion to Suppress

[29] Deck argues that the trial court erred in overruling his motion to suppress evidence—which addressed items seized from his car and subsequent statements made to police—because the police did not have reasonable suspicion to stop him. He claims that this evidence was obtained in violation of his constitutional right to be free of unreasonable searches and seizures and that the impermissible use of this evidence, first at trial and again during the most recent penalty-phase retrial, requires that his conviction and sentences be vacated and remanded for a new trial.

Standard of Review

[30] [31] When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether substantial evidence supports the court's decision. *State v. Rousan,* 961 S.W.2d 831, 845 (Mo. banc 1998). The appellate court views the facts and any reasonable inferences in a light most favorable to the trial court and disregards any contrary inferences. *State v. Lewis,* 17 S.W.3d 168, 170 (Mo.App.2000).

Analysis

Deck unsuccessfully raised this same issue in his first direct appeal. *See Deck I,* 994 S.W.2d at 534–35. In *Deck I,* he argued that he was seized when Officer Wood approached his car and that there was no probable cause, at that time, because it was not unlawful to drive in a private parking lot without turning on his car's headlights. *Id.* at 535.

At the first trial, Officer Wood testified he parked on the road outside Deck's apartment after receiving a tip that Deck and his sister were involved in a robbery-homicide, that they were driving a gold two-door car and that they were probably armed. *Id.* Sometime after 11 p.m., Officer Wood saw Deck drive by and pull into a parking space. *Id.* Officer Wood testified the lights on Deck's car were not turned on, even though it was dark outside. *Id.* Officer Wood approached the car, identified himself and shined a flashlight on Deck. *Id.* Deck leaned down to the passenger's side of the vehicle, at which point Officer Wood ordered him to sit up and show his hands. *Id.* Officer Wood ordered Deck out of the car, searched him, found no weapons, and then searched his car, finding a pistol concealed under the front seat. *Id.* Officer Wood placed Deck under arrest for unlawful use of a weapon. *Id.* Also found in the car was a decorative tin belonging to the victims. *Id.* Deck later, after receiving the *Miranda* warning, made a full confession. *Id.*

This Court affirmed the trial court's ruling admitting the evidence because Deck was not seized, for purposes of the Fourth Amendment, until he was ordered to sit up and show his hands. *Id.* at 535–36. This seizure was based on reasonable suspicion because Officer Wood had observed Deck leaning into the passenger's seat. *Id.* Deck's search and subsequent seizure of items found in the car, as well as his confessions, were permissible, therefore, following the United State's Supreme Court's decisions in ***545** *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) and *Alabama v. White,* 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). *Id.*

[32] [33] The law-of-the-case doctrine[2] precludes reexamination of this issue. *State v. Johnson,* 244 S.W.3d 144, 163 (Mo. banc 2008).

Deck requests that this Court not apply the law-of-the-case doctrine, claiming the evidence on remand concerning his arrest was substantially different from the evidence supporting his conviction in the first appeal. "An appellate court has discretion to refuse to apply the doctrine where the first decision was based on a mistaken fact or resulted in manifest injustice or where a change in the law intervened between appeals." *Walton v. City of Berkeley,* 223 S.W.3d 126, 130 (Mo. banc 2007). Furthermore, the law-of-the-case doctrine has been held not to apply where the evidentiary facts on remand are "substantially different from those vital to the first adjudication and judgment." *Id.*

Deck argues the evidence on remand was substantially different because Officer Wood testified at the first trial that when Deck drove past him, the headlights on his car were off. *See Deck I,* 994 S.W.2d at 535. However, at the most recent penalty-phase trial, Officer Wood testified that Deck turned his lights off as he drove by and before he pulled into the parking spot.

This slight factual difference in Officer Wood's testimony of an event that happened more than a decade ago does not establish manifest injustice or constitute facts substantially different from the first adjudication. In *Deck I,* this Court began its search and seizure analysis at the point that Officer Wood approached Deck's car and saw him lean over to the passenger's seat. 994 S.W.2d at 535–36. Whether Deck's lights were on or off does not change this analysis; accordingly, this Court does apply the law-of-the-case doctrine.

VII. Point Six: Failure to Read Instruction

[34] Deck argues the trial court erred in failing to read MAI–CR 3d 300.03A before death qualification of the venire panel, which resulted in manifest injustice because the jury was unable to respond appropriately to questioning during death qualification.

Standard of Review

[35] [36] "Whenever there is an MAI–CR instruction applicable under the law ..., the MAI–CR instruction is to be given to the exclusion of any other instruction." *State v. Ervin,* 979 S.W.2d 149, 158 (Mo. banc 1998). Error results when a trial court fails to give a mandatory instruction. *State v. Gilmore,* 797 S.W.2d 802, 805 (Mo.App.1990). However, Deck did not object when the trial court failed to read MAI–CR 3d 300.03A at the beginning of death-qualification voir dire. Therefore, this issue has not been preserved for appeal and can only be reviewed for plain error, which requires a finding that the trial court's error resulted in manifest injustice or miscarriage of justice. *Johnson,* 244 S.W.3d at 162.

Analysis

MAI–CR 3d 313.00 Supp. Notes on Use 6(a)(1)(b) states that when a defendant has ***546** been found guilty of first-degree murder committed after August 28, 1993, but before August 28, 2001, MAI–CR 3d 300.03A, "with modification, must be read to the jury panel immediately before the commencement of the 'death qualification' phase of voir dire."[3] That instruction provides:

At this stage of the jury selection process, the attorneys are permitted to question you

concerning your views on punishment. The fact that questions are being asked about punishment at this time should not be taken by you as any indication that the defendant(s) in the case before you (is)(are) guilty of the crime(s) charged. Nothing that is said by the attorneys or by another prospective juror during this process is evidence, and you should not let any such statements influence you in any way.

The possible punishments for the offense of murder in the first degree are imprisonment for life by the Department of Corrections without eligibility for probation or parole or death. The purpose of this questioning is to discover whether or not you are able to consider both of these punishments as possible punishments.

A case in which the death penalty is a possible punishment is tried in two stages. In the first stage, the jury must decide whether the defendant is guilty or not guilty. If the defendant is found guilty of murder in the first degree, a second stage is held in which the jury must decide on appropriate punishment.

If a second stage is reached in this case, the Court will instruct the jury as to the process it must follow to reach its decision on punishment. For present purposes, you should be aware that a conviction of murder in the first degree does not automatically make the defendant eligible for the death penalty. Before the jury may consider imposing the death penalty, it may be asked to consider whether or not the defendant is mentally retarded. If the jury unanimously finds that it is more likely to be true than not true that the defendant is mentally retarded, the defendant cannot be sentenced to death.

Before the jury may consider imposing the death penalty, it must also find, unanimously and beyond a reasonable doubt, that the evidence before it establishes the existence of at least one special fact or circumstance specified by law, called a statutory aggravating circumstance. If no statutory aggravating circumstance is found, the defendant cannot be sentenced to death.

If the jury does not find at least one statutory aggravating circumstance, it still cannot return a sentence of death unless it also unanimously finds that the evidence in aggravation of punishment, taken as a whole, warrants the death penalty, and that this evidence is not outweighed by evidence in mitigation of punishment. The jury is never required to return a sentence of death.

Counsel for the State may proceed.

This instruction was not read. As a result, Deck argues the jury was not able to appropriately respond to questioning during voir dire because: (1) the jury was not instructed that a finding of aggravating circumstances had to be unanimous or that aggravating circumstances must outweigh mitigating circumstances; (2) the jury was not instructed that a first-degree murder conviction does not automatically make a defendant eligible for death or that the jury was not required to return a sentence of death; and (3) the court's failure to give these instructions gave the jury a

false impression that certain steps in the deliberation process were more important.

*547 Deck suffered no manifest injustice from the failure to read this oral instruction because the information that would have been conveyed to the veniremembers by the instruction was otherwise provided. Immediately after the jury panel was sworn, the trial court read the opening instruction to the panel, part of which stated:

> The Court instructs you that, in order to consider the death penalty, you must find one or more statutory aggravating circumstances beyond a reasonable doubt. The burden of causing you to find the statutory aggravating circumstances beyond a reasonable doubt is upon the State.

Later, during voir dire, Deck's attorney told the jury panel that "this is a capitol [sic] case" and that the panel members would be asked about the "issue specifically of life in prison without the possibility of parole or the alternative, the death penalty." Deck's attorney also told the jury panel they would "talk about the issue of the death penalty and ... life in prison without parole." After general voir dire, the trial court told the jury panel they would be questioned in smaller panels about their "attitudes regarding the punishments that are available in this case."

When each small jury panel was questioned, its members were told that a person must first be convicted of first-degree murder before a death sentence can be considered and that Deck had previously been convicted of two counts of first-degree murder. Each small jury panel was told the only available sentences were death and life imprisonment without parole and that the purpose of questioning was to determine whether they could realistically consider both punishments.

All the jury panels were told that before a death sentence can be considered: (1) the State must prove at least one statutory aggravating circumstance beyond a reasonable doubt, which the jury must unanimously agree on; (2) the jury must then also determine whether the aggravating circumstances as a whole justified a death sentence; and (3) the jurors must also conclude that the aggravating circumstances outweigh any mitigating circumstances.

All the jury panels were told that a juror is never required to vote for death and that the failure to unanimously make the required findings would automatically result in a sentence of life imprisonment without parole. Throughout this entire process, phrases and concepts unfamiliar to lay people, including statutory aggravating and mitigating circumstances, were explained in easy-to-understand language.

The only circumstance covered by MAI–CR 3d 300.03A, but not covered by the court or counsel in the form of an oral statement or instruction, was the issue of mental retardation. Because mental retardation was not an issue in this case, no prejudice results from this omission. Otherwise, the information contained in the instruction was conveyed to the jury by attorneys or the court before

death qualification began. Therefore, the trial court's failure to read MAI–CR 3d 300.03A did not result in plain error.

Other cases before this Court have reached a similar conclusion—the failure to read a mandatory instruction did not result in plain error if the jury was otherwise conveyed the information. *See, e.g., Williams,* 97 S.W.3d at 472 (failure to give the jury an instruction on notetaking was technically erroneous, but not plain error because the court read the proper instruction to the jury).

VIII. Point Seven: Instructional Error—Mitigating Evidence

Deck argues the trial court erred in submitting instructions 8 and 13 to the ***548** jury. He contends these instructions did not inform the jury that the State bore the burden of proving aggravating circumstances beyond a reasonable doubt and that aggravation had to outweigh mitigation, thereby preventing the jury from giving meaningful consideration and effect to mitigating evidence. Deck claims the instructions effectively impermissibly shifted the burden of proof.

Standard of Review

[37] This Court will reverse on a claim of instructional error only if there is an error in submitting an instruction and that error results in prejudice to the defendant. *State v. Zink,* 181 S.W.3d 66, 74 (Mo. banc 2005).

Analysis

At the instructions conference, Deck objected to instructions 8 and 13 on the grounds that these instructions impermissibly shifted the burden of proof to the defendant with respect to mitigating evidence. The instructions given were patterned after MAI–CR 3d 313.44A and explained to the jurors if they found the facts and circumstances in aggravation of punishment taken as a whole warrant a death sentence, they must then determine if there were facts or circumstances in mitigation of punishment that were sufficient to outweigh those in aggravation of punishment. The instruction then explains to the jurors that they did not have to agree on mitigating facts, but that if each juror determined that the mitigating evidence outweighs the aggravating evidence, the jury must return a sentence of life without parole.

Deck concedes this Court has previously addressed this argument and rejected it. *See Johnson,* 284 S.W.3d at 588–89 (The appellant's argument that the mitigating evidence instruction "improperly shifts the burden of proof has been rejected by the United States Supreme Court [in *Kansas v. Marsh,* 548 U.S. 163, 170–71, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006)] and this Court."); *see also Forrest,* 183 S.W.3d at 228–29; *Zink,* 181 S.W.3d at 74. Deck offers no meritorious reason why this Court should reconsider its holding in those cases.

[38] Furthermore, in *Deck III,* Deck challenged the mitigating evidence instructions and this Court rejected his claim; Deck's claim is barred by the law-of-the-case doctrine. *Deck III,* 136 S.W.3d at 486; *Johnson,* 22 S.W.3d at 189.

IX. Point Eight: Instructional Error—Burden of Proof

Deck argues the trial court erred in submitting instructions 3, 7, 8, 12 and 13 to the jury.[4] He contends these instructions failed to instruct jurors that the State bore the burden of proving beyond a reasonable doubt that the aggravating facts and circumstances warranted a death sentence and that the evidence in mitigation was insufficient to outweigh the evidence in aggravation.

Standard of Review

This Court will reverse on a claim of instructional error only if there is an error in submitting an instruction and that error results in prejudice to the defendant. *Zink,* 181 S.W.3d at 74. The instructions given were patterned after MAI–CR 3d and are presumptively valid under Rule 28.02(c). *Id.* ("MAI instructions are presumptively valid and, when applicable, ***549** must be given to the exclusion of other instructions").

Analysis

During the instructions conference, Deck objected to instructions 3, 7, 8, 12 and 13. Instruction 3 was patterned after MAI–CR 3d 313.30A and instructed the jury that the burden is on the State to prove statutory aggravating circumstances beyond a reasonable doubt. Instructions 7 and 12, patterned after MAI–CR 3d 313.41A, instructed the jury that if it had determined that one or more aggravating circumstances existed, it was next to consider whether the facts and circumstances in

aggravation of punishment taken as a whole were sufficient to warrant imposing a sentence of death. Instructions 8 and 13, patterned after MAI–CR 3d 313.44A, instructed the jury that if it had found that the facts and circumstances in aggravation of punishment taken as a whole warranted a death sentence, it must then determine if there were facts or circumstances in mitigation of punishment sufficient to outweigh those in aggravation of punishment. They then instructed jurors that they did not have to agree on mitigating facts, but that if each juror determined that the mitigating evidence outweighed the aggravating evidence, the jury must return a sentence of life in prison without parole.

Deck concedes this Court has previously addressed this argument and rejected it. *See Johnson,* 284 S.W.3d at 584–85 (holding that the reasonable doubt standard does not apply to mitigating evidence or non-statutory aggravating factors and that under *Ring* and *Apprendi* only evidence functionally equivalent to an element, including statutory aggravating circumstances, must be found beyond a reasonable doubt); *see also State v. Johnson,* 207 S.W.3d 24, 47 (Mo. banc 2006).

X. Point Nine: Statutory Aggravating Circumstances Not Pleaded in the Information

Deck alleges the trial court erred in sentencing him to death because the State failed to plead statutory aggravating circumstances in the information.

The State's amended information did not allege which statutory aggravating circumstances the State intended to prove. Prior to trial, pursuant to section 565.005.1, the State provided written notice to Deck of the statutory aggravating circumstances it would attempt to prove at trial.

Before trial, Deck filed a motion to quash the information, to require the State to include statutory aggravating circumstances in the information or to preclude the State from seeking the death penalty on constitutional grounds due to the State's failure to include the statutory aggravating circumstances in the information. The trial court overruled this motion.

Analysis

[39] Deck raised an identical claim in *Deck III,* which this Court rejected:

> This Court has addressed this claim numerous times before. The omission of statutory aggravators from an indictment charging the defendant with first degree murder does not deprive the sentencing court of jurisdiction to impose

> the death penalty. Missouri's statutory scheme recognizes a single offense of murder with maximum sentence of death, and the requirement that aggravating facts or circumstances be present to warrant imposition of death penalty does not have the effect of increasing the maximum penalty for the offense.

136 S.W.3d at 490. This claim is barred by the law-of-the-case doctrine. *Johnson,* 22 S.W.3d at 189.

***550** Furthermore, this Court has consistently rejected this argument. *See, e.g., Johnson,* 284 S.W.3d at 589; *Baumruk,* 280 S.W.3d at 617–18; *Zink,* 181 S.W.3d at 74–75. Deck concedes this point and offers no meritorious reason why this Court should reconsider its holdings in those cases.

XI. Point Ten: Proportionality Review

Standard of review

This Court independently reviews Deck's death sentences under section 565.035, RSMo 2000. This Court must determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant.

Section 565.035.3.

[40] This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. *State v. Ramsey,* 864 S.W.2d 320, 328 (Mo. banc 1993).

1. Influence of prejudice

Three separate juries—thirty-six jurors in all—viewing essentially the same evidence have

unanimously concluded that death is the appropriate sentence for Deck. Nothing in the record suggests Deck has been sentenced under the influence of prejudice, passion, or any other improper factor.

2. Aggravating factors

The evidence supports the jury's finding beyond a reasonable doubt of six statutory aggravating factors. In fact, all three juries—thirty-six jurors—have found the same six factors:

(1) Each murder was committed while the defendant was engaged in the commission of another unlawful homicide, § 565.032.2(2).

(2) The murders were committed for the purpose of receiving money or any other thing of monetary value, § 565.032.2(4).

(3) The murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, § 565.032.2(7).

(4) The murders were committed for the purpose of avoiding a lawful arrest, § 565.032.2(10).

(5) The murders were committed while defendant was engaged in the perpetration of burglary, § 565.032.2(11).

(6) The murders were committed while defendant was engaged in the perpetration of robbery, § 565.032.2(11).

Moreover, in both previous appeals, this Court held that, from its review of the record, the evidence "amply supports the statutory aggravators found by the jury." *Deck I,* 994 S.W.2d at 545; *Deck III,* 136 S.W.3d at 489–90.

3. Proportionality

Deck argues this Court should apply the same *de novo* review—based on the Eighth Amendment's prohibition against excessive fines—utilized by the United States Supreme Court in *Cooper Indus., Inc. v. Leatherman Tool Group Inc.,* 532 U.S. 424, 436, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), to review the constitutional validity of a jury's award of punitive damages. This argument is not supported by precedent of the United States Supreme Court and this Court and will not be adopted.

***551** [41] This Court's proportionality review was "designed by the legislature as an additional safeguard against arbitrary and capricious sentencing and to promote the evenhanded, rational and

consistent imposition of death sentences." *Ramsey,* 864 S.W.2d at 328; section 565.035. This Court simply reviews the sentence and, while giving due deference to the factual determinations reached below, decides whether the sentence is disproportionate as a matter of law.

Deck also claims this Court's proportionality review is fatally flawed because it considers only cases in which death was imposed instead of all factually similar cases. This argument has been repeatedly rejected by this Court. *See, e.g., Johnson,* 207 S.W.3d at 50–51; *Smith,* 32 S.W.3d at 559; *State v. Clay,* 975 S.W.2d 121, 146 (Mo. banc 1998). Deck does not base this argument on the statutory language of section 565.035 and offers no meritorious reason why this Court should reconsider its holding in those cases.

The concurring opinion of Judge Stith contends that this Court has incorrectly conducted proportionality review beginning in 1993 with *Ramsey.* The concurring opinion concedes that *Ramsey* correctly held that the United States Supreme Court had held proportionality review was not constitutionally required. The issue in *Ramsey* that the concurring opinion disagrees with is the holding that proportionality review only requires review of similar cases that resulted in a death sentence. This holding in *Ramsey* was unanimous and has not been questioned in any principal, concurring, or dissenting opinion by any member of this Court in seventeen years.

The gist of the concurring opinion, which was not an argument articulated in Deck's brief, is that because section 565.035.6 requires the assistant appointed to accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed, then the legislature must have intended that this Court's proportionality review require comparisons of cases where both a death sentence and a life sentence without probation and parole was imposed.

That is not the case. Section 565.035.5 simply states that this Court's "decision [makes] reference to those similar cases which it took into consideration." Section 565.035.6 provides that the assistant to this Court shall provide whatever extracted information the Court desires with respect to the information it collects. Finally, that section provides that the Court shall determine what staff and methods are necessary to compile "such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence." Read as a whole, these provisions demonstrate that the legislature expressly left to this Court the determination of what cases are similar. Quite simply, the language of the statute relied on by the concurring opinion merely reflected nothing more than the methodology this Court was then using to compile records and is still contained in Rule 29.08(c).[5]

Further, an additional obvious response to the concurring opinion's statement of what the legislature's intention was, as it relates to this issue, is that the legislature ***552** is presumed to be aware of this Court's 17–year–old decision in *Ramsey. Ramsey* expressly stated the statutory review provided for in section 565.035 "merely provides a backstop against the freakish and wanton application of the death penalty" and only requires consideration of similar cases in which

a death sentence was imposed. *Ramsey,* 864 S.W.2d at 328.[6]

The circumstances concerning the appropriateness of imposing the death sentence is a very serious and ongoing public concern. It would certainly be a rare scenario that the legislature would leave these express statements in the *Ramsey* case unaddressed for 17 years if this Court's holdings in *Ramsey* were contrary to what the legislature intended. Our legislature has, in fact, been quick to make clear its intent in response to this Court's pronouncements. *See, e.g., Schoemehl v. Treasurer of Missouri,* 217 S.W.3d 900 (2007).

[42] In this case, the sentence of death is not excessive or disproportionate. The retrial of the penalty phase in this case involves virtually the same evidence as prior trials. In Deck's previous appeals, this Court held that his previous death sentences were not excessive or disproportionate. *Deck I,* 994 S.W.2d at 545 ("[I]mposition of the death penalty in this case is clearly not excessive or disproportionate. The strength of the evidence and the circumstances of the crime far outweigh any mitigating factors in Deck's favor"); *Deck III,* 136 S.W.3d at 490 ("The death sentences in this case are neither excessive nor disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence, and the defendant").

Furthermore, this Court's opinions in *Deck I* and *Deck III* cite numerous opinions in which the death penalty was imposed when "the defendant murdered multiple victims, acted for pecuniary gain, or when the defendant sought to eliminate possible witnesses to avoid a lawful arrest." *Deck III,* 136 S.W.3d at 490 n. 30 (citing *Ringo,* 30 S.W.3d at 811; *State v. Worthington,* 8 S.W.3d 83, 93 (Mo. banc 1999); *State v. Middleton,* 998 S.W.2d 520 (Mo. banc 1999)); *see also Deck I,* 994 S.W.2d at 545 ("There are numerous Missouri cases where, as here, the death penalty was imposed on defendants who murdered more than one person.") (citing *State v. Johnson,* 968 S.W.2d 123 (Mo. banc 1998); *State v. Clemons,* 946 S.W.2d 206 (Mo. banc 1997); *Ramsey,* 864 S.W.2d at 320; *State v. Mease,* 842 S.W.2d 98 (Mo. banc 1992); *State v. Hunter,* 840 S.W.2d 850 (Mo. banc 1992); *State v. Ervin,* 835 S.W.2d 905 (Mo. banc 1992); *State v. Powell,* 798 S.W.2d 709 (Mo. banc 1990); *State v. Reese,* 795 S.W.2d 69 (Mo. banc 1990); *State v. Sloan,* 756 S.W.2d 503 (Mo. banc 1988); *State v. Griffin,* 756 S.W.2d 475 (Mo. banc 1988); *State v. Murray,* 744 S.W.2d 762 (Mo. banc 1988); and *State v. Young,* 701 S.W.2d 429 (Mo. banc 1985)).

[43] Deck suggests the mitigating evidence presented at trial warrants sufficient grounds to set aside his death sentences. The mitigating evidence offered was similar to that offered in the previous trials. That evidence did not provide sufficient grounds to set aside the death sentences. *Deck I,* 994 S.W.2d at 545; *Deck* ***553** *III,* 136 S.W.3d at 490. In this retrial, a child psychiatry expert and a child development expert testified that Deck's childhood experience had an adverse effect on his development. Both experts, however, testified Deck knew right from wrong and committed these crimes by choice. A bad or difficult childhood does not provide sufficient grounds to set aside a death penalty. *State v. Brooks,* 960 S.W.2d 479, 503 (Mo. banc 1997).

Deck argues his sentence is disproportionate when compared to *State v. McIlvoy,* 629 S.W.2d 333

(Mo. banc 1982), in light of the fact that he confessed to his crimes. In *McIlvoy,* the defendant was convicted of capital murder and sentenced to death for his role in the murder of Gilbert Williams. *Id.* at 334–35. Gilbert Williams' murder was planned by his wife, Vicky Williams, and executed by five men. *Id.* at 335. In return for the murder, Vicky Williams had promised money and drug connections. McIlvoy participated in the murder by shooting Gilbert Williams five times. *Id.* at 335–36.

This Court's proportionality review set aside McIlvoy's death sentence, finding the sentence excessive and disproportionate considering the crime and the defendant. *Id.* at 341–42. The court noted that Vicky Williams, the leader of the plot to kill her husband, was sentenced only to life imprisonment. *Id.* at 341. Moreover, the Court noted that McIlvoy had a low IQ (81), a ninth-grade education, a minimal juvenile record and that, at the time of the murder, McIlvoy was under the influence of large amounts of alcohol and drugs that further diminished his subnormal intellect. *Id.* The Court also found facts in his favor that he turned himself in and waited dutifully for St. Louis police officers to pick him up in Dallas, Texas. *Id.* at 341–42.

Deck claims his case is comparable to *McIlvoy* because he, like McIlvoy, confessed to the crimes. Such a comparison is without merit, as the facts show that McIlvoy turned himself in and waited for the police to pick him up. Deck, however, was apprehended while attempting to hide evidence and gave two false alibis before he eventually confessed to the crime. *Id.* Additional distinguishing facts in this case are that Deck planned the robbery based on his knowledge of the victims, robbed the victims at gun point, forced them to the floor, deliberated for ten minutes and then shot them at point-blank range. *Deck I,* 994 S.W.2d at 531–32. Deck was the mastermind of his crime in contrast to McIlvoy, who was a weak follower.

The death sentences given Deck were neither excessive nor disproportionate.

XII. Conclusion

For the foregoing reasons, the judgment and sentences of death are affirmed.

PRICE, C.J., and RUSSELL, J., concur; BRECKENRIDGE, J., concurs in part and concurs in result in separate opinion filed; STITH, J., concurs in result in separate opinion filed; WOLFF, J., concurs in opinion of STITH, J.; TEITELMAN, J., concurs in result only.

PATRICIA BRECKENRIDGE, Judge, concurring in part and concurring in result.

While I concur with the principal opinion's conclusion that the imposition of the death penalty on Carman L. Deck in this case was neither excessive nor disproportionate, I do not agree that the proportionality review under section 565.035, RSMo 2000, only requires review of factually similar cases that resulted in a death sentence. The legislature's directive in section 565.035.6 that records be compiled of "all cases in which the sentence of death or life imprisonment without probation or parole was imposed" clearly communicates its intent that factually similar cases with ***554** sentences of life imprisonment be considered in the proportionality review. The fact that the legislature granted this Court discretion to determine what information from those two types of cases is relevant to conducting the mandated proportionality review does not indicate its intent that the Court should limit the review to only death-penalty-imposed cases. I believe that, as a matter of law, this Court does not have the discretion to eliminate from the proportionality review all cases in which the jury imposes the sentence of life imprisonment without the possibility of probation or parole.

The principal opinion states that the holding in *State v. Ramsey,* 864 S.W.2d 320 (Mo. banc 1993), that proportionality review only requires review of similar cases that resulted in a death sentence, was unanimous and has gone unquestioned by any member of this Court for 17 years. While the *Ramsey* decision was unanimous, it is noteworthy that the Court overturned prior case law *sub silentio* and adopted its new standard of proportionality review without any analysis or discussion of the language of section 565.035. *See, e.g., State v. Mallett,* 732 S.W.2d 527, 542–43 (Mo. banc 1987) ("The issue when determining the proportionality of a death sentence is not whether any similar case can be found in which the jury imposed a life sentence, but rather whether the death sentence is excessive or disproportionate in light of 'similar cases' as a whole."). I also am not persuaded that the legislature's failure to respond to the *Ramsey* decision should be interpreted as its approval of that decision. This Court recently has questioned such a conclusion: "An incorrect judicial interpretation of a statute may also stand simply because the legislature has paid no attention to it. Thus, it is speculative to infer legislative approval from legislative inaction." *Med. Shoppe Int'l, Inc. v. Dir. of Revenue,* 156 S.W.3d 333, 334 (Mo. banc 2005).

I am committed firmly to the principle of stare decisis but, where the issue being addressed is life or death, it is more important to correct a prior erroneous decision of the Court and to undertake the proportionality review as it is intended by the legislature.

I write separately from Judge Stith because of her additional criticism of the principal opinion's statement that the proportionality review in section 565.035.3 is intended for this Court to consider only whether the imposition of the death penalty was a "freakish or wanton application of the death penalty." She notes that the language "freakish or wanton" came from *Ramsey* and not from the statute. While such language is not found in section 565.035, I think the principal opinion is correct that the language of section 565.035.3 supports the conclusion that proportionality review is intended for this Court to identify and correct only the imposition of aberrant death sentences.

I do not read the statute as requiring that the Court act as a super-juror by substituting its judgment of the appropriate punishment for that of the jury and the trial court. While the principal opinion would be served by better utilizing the statute's terms when discussing its review, its use of the language "freakish or wanton" does not indicate the Court is applying an incorrect standard or not undertaking the review required by section 565.035.3.

Although the principal opinion applied an erroneous standard in conducting its proportionality review, a review including similar cases where the jury imposed the sentence of life imprisonment without the possibility of probation or parole does not change this Court's conclusion that Mr. Deck is not entitled to relief. As Judge Stith demonstrates in her opinion concurring in result, the consideration of cases where a sentence of life imprisonment was ***555** imposed would not change the finding that Mr. Deck's sentence was not disproportionate or excessive to the sentences imposed in similar cases. Accordingly, I concur in the result reached by the principal opinion in its proportionality review and concur in the remainder of the opinion.

LAURA DENVIR STITH, Judge, concurring in the result.

I concur in the result of the principal opinion but respectfully disagree with that portion of the opinion holding that proportionality review under section 565.035.3 RSMo 2000 requires this Court to review only other cases in which the death penalty was imposed under similar facts. Section 565.035 requires consideration of all "other similar cases," which includes those in which a life sentence resulted, in determining whether the sentence of death is excessive or disproportionate in light of the crime, the defendant and the strength of the evidence. To the extent that this Court's cases decided between 1994 and the present suggest otherwise, they are contrary to the statute and to cases decided under it from 1979 until 1993 and no longer should be followed.

I. HISTORY OF PROPORTIONALITY REVIEW IN MISSOURI

A. Until 1994, Review Was of Both Death and Life Imprisonment Cases

In *Gregg v. Georgia,* 428 U.S. 153, 197–199, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the United States Supreme Court held that the death penalty is constitutional if not imposed arbitrarily and if procedural safeguards against improper imposition of the death penalty were followed. The Supreme Court noted that the Georgia death penalty procedures analyzed in *Gregg* met these requirements because, among other things, they compared "each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." *Id.* at 198, 96 S.Ct. 2909.

In reliance on *Gregg,* Missouri's legislature re-enacted the death penalty in 1977. § 565.001 et

seq., RSMo Supp.1977. Section 565.008.1 made persons convicted of capital murder eligible for one of two possible sentences—either death or life in prison without eligibility for probation or parole for 50 years. Section 565.014 also noted a right of direct appeal to this Court in all cases in which the death penalty was imposed and required that in all such cases:

> 3. With regard to the sentence, the supreme court shall determine:
>
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance ...
>
> (3) Whether the sentence of death is excessive or ***disproportionate to the penalty imposed in similar cases,*** considering both the crime and the defendant.

§ 565.014.3, RSMo Supp.1977 (emphasis added).

Missouri's legislature also required that, in conducting this proportionality analysis, "*the supreme court shall include in its decision a reference to those similar cases which it took into consideration.*" § 565.014.5, RSMo 1977 (emphasis added). It provided this Court with an attorney assistant to accumulate "the records of *all capital cases* in which sentence was imposed after May 26, 1977, or such earlier date as the court may deem appropriate." § 565.014.6 (emphasis added). This assistant was directed to "provide the court with whatever extracted information the court desires with respect thereto." *Id.*

***556** The first capital murder case in which this Court applied the proportionality analysis required by the Missouri legislature was *State v. Mercer,* 618 S.W.2d 1 (Mo. banc 1981). The Court was clear at that time that the duty imposed on it by these provisions to review similar cases in deciding proportionality meant it was required to review all cases in which the death penalty was submitted, whether the sentence actually imposed was life imprisonment or death, stating:

> The records of all capital cases in which sentence was imposed after the effective date, accumulated pursuant to § 565.014.6, have been reviewed. *Those cases in which both death and life imprisonment were submitted to the jury, and which have been affirmed on appeal are considered as similar cases,* [section] 565.014.5.

Mercer, 618 S.W.2d at 11 (emphasis added).

Indeed, the only controversy at that time was whether the Court also should consider cases in which the death penalty was *not* sought but in which it *might have* been sought, with Judge Seiler

arguing in dissent that:

> I do not agree that we discharge our duty under section 565.014.2(3) to determine "(w)hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases" by restricting our consideration to cases in which both death and life imprisonment were submitted to the jury and which have been affirmed on appeal. This is too limited in scope. It eliminates from consideration all cases in which the state waived the death penalty, all cases in which life imprisonment was given and no appeal taken, all capital cases pending before us [but not as of that time affirmed] in which life imprisonment was given, and all cases in which capital murder was charged but the jury found defendant guilty of a lesser crime than capital murder.... The purpose of appellate review of the death penalty is to serve "as a check against the random or arbitrary imposition of the death penalty." *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). It is our solemn duty, in my opinion, to guarantee that similar aggravating and mitigating circumstances do not bring about a death sentence in one case and life imprisonment in another.

Mercer, 618 S.W.2d at 20–21 (Seiler, J., dissenting).

The next year, this Court reaffirmed in *State v. Bolder,* 635 S.W.2d 673 (Mo. banc 1982), that "similar cases" included all cases in which the fact-finder was required to choose between death or life imprisonment, stating:

> *Relevant cases for a review* of the appropriateness of the sentence *are those in which the judge or jury* first found the defendant guilty of capital murder and *thereafter chose between death or life imprisonment* without the possibility of parole for at least fifty years.

Id. at 685 (emphasis added).

In 1983, the legislature modified the proportionality review statute to add the requirement that this Court consider "the strength of the evidence" in addition to the crime and the defendant as a part of its proportionality review. § 565.035.3, RSMo Supp.1983. And, importantly here, it revised section 565.035.6 so that instead of stating that the Court's assistant should accumulate the records of "all capital cases," the statute expressly required that records of both death and life imprisonment cases be accumulated for comparison purposes in determining what are similar cases, stating:

> The court shall accumulate the records *of all cases in which the sentence of death or life imprisonment without probation or parole was imposed* after [the ***557** reinstitution of the death penalty on] May 26, 1977, or such earlier date as the court may deem appropriate.

§ 565.035.6, RSMo Supp.1983 (emphasis added).

The proportionality review statute has remained essentially unchanged in relevant respects since that time.[1] So too did this Court's approach to the proportionality analysis for the next decade. In case after case, this Court considered other cases with similar facts, regardless of whether the penalty imposed was death or life imprisonment.

For instance, *State v. Lashley,* 667 S.W.2d 712 (Mo. banc 1984), found that the imposition of the death penalty was not arbitrary in light of the entire record, after comparing the case to other "lying in wait" cases in which the choice of life imprisonment or the death penalty was submitted. *Id.* at 716. *Lashley* cited to *State v. McDonald,* 661 S.W.2d 497 (Mo. banc 1983), *overruled on other grounds by, State v. Barton,* 936 S.W.2d 781 (Mo. banc 1996), which had approved the death penalty in a "lying in wait" case after taking into account both the crime and the defendant, stating, "In arriving at this conclusion we have reviewed the cases decided since the enactment of our current capital murder statute ... where the death sentences were affirmed, one case which reversed the death sentence because of its disproportionality, and capital cases in which the choice of death or life imprisonment without possibility of parole for fifty years was submitted to the jury." *McDonald,* 661 S.W.2d at 507.

Similarly, in *State v. Wilkins,* 736 S.W.2d 409, 417 (Mo. banc 1987), this Court compared the defendant, his crime and the strength of the evidence to that in other cases in which life imprisonment had been imposed, as well as those in which death had been imposed, in finding that the death sentence was not disproportionate.[2]

Again, in *State v. Six,* 805 S.W.2d 159, 169 (Mo. banc 1991), this Court held that "for purposes of § 565.035.3(3), this Court has examined those capital murder and first degree murder cases in which death and the alternative sentence of life imprisonment have been submitted to the jury and the sentence has been affirmed on appeal."

B. Beginning with Ramsey, this Court Strayed From a Proper Application of the Proportionality Review Required by Section 565.035

Despite this long-settled interpretation of what constituted similar cases under section 565.035, in *State v. Ramsey,* 864 S.W.2d 320 (Mo. banc 1993), this Court began undertaking a different—and much more limited—proportionality review. *Ramsey* correctly noted that the United States Supreme Court had held, "Proportionality review is not constitutionally required. It is designed by the legislature as an additional safeguard against arbitrary and capricious sentencing and to promote the evenhanded, rational and consistent imposition of death sentences." *Id.* at 328, *citing Pulley v. Harris,* 465 U.S. 37, 47–48, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

Pulley held that the Eighth Amendment to the United States Constitution does not require that a

court undertake a proportionality review. *558 *Pulley,* 465 U.S. at 50–51, 104 S.Ct. 871. It did not address, however, the kind of analysis that is required under Missouri's proportionality review statute. Nonetheless, without distinguishing or overruling any of this Court's many cases (including those noted above) stating that proportionality review requires consideration of all prior capital cases, regardless of whether a death sentence was imposed, *Ramsey* rejected what it called the argument that it should be "parsing through homicide cases" by examining and weighing different facts. 864 S.W.2d at 327. Rather, it said, section 565.035 proportionality review "merely provides a backstop against the freakish and wanton application of the death penalty.... If the case, taken as a whole, is plainly lacking circumstances consistent with those in similar cases in which the death penalty has been imposed, then a resentencing will be ordered." *Id.* at 328.

Although *Ramsey* briefly mentioned that cases imposing a life sentence "had been examined" and found to differ in regard to the presence of aggravating circumstances and the lack of mitigating ones, *id.,* it did not cite or discuss such cases. Thereafter, in reliance on *Ramsey*'s statement that the purpose of proportionality review is to provide a "backstop against the freakish and wanton application of the death penalty," *id.* at 328, with rare exceptions[3] this Court's cases began to compare the facts of the defendant's case against only other cases in which imposition of the death penalty had been approved. *See, e.g., State v. Parker,* 886 S.W.2d 908, 933–34 (Mo. banc 1994); *State v. Richardson,* 923 S.W.2d 301, 330 (Mo. banc 1996); *Lyons v. State,* 39 S.W.3d 32, 44 (Mo. banc 2001); *State v. Johnson,* 207 S.W.3d 24, 50–51 (Mo. banc 2006); *State v. Barton,* 240 S.W.3d 693, 709–11 (Mo. banc 2008).

Few of these cases actually analyze the language of section 565.035, however, or compare the analysis this Court undertakes to that required by the statute. Instead, they cite to the statement in *Ramsey* that the purpose of proportionality review is to protect against the freakish or wanton imposition of a death sentence and then note that prior cases have imposed death on similar facts so the death sentence is not disproportionate.

C. Section 565.035 Requires Consideration of Both Death and Life Imprisonment Cases

Section 565.035 does not permit this Court to limit its analysis to a determination whether imposition of the death penalty was "freakish or wanton," however. That language comes from *Ramsey,* which notes the minimum standard that is constitutionally required to be met in order to avoid the arbitrary imposition of the death penalty. I agree that this is the ultimate constitutional issue, but the statute sets out a more specific, and I believe more stringent, proportionality analysis: the Court is required to determine whether the sentence of death is excessive or disproportionate after considering similar cases in light of three factors—the crime, the defendant and the strength of the evidence. § 565.035.3.[4] Whether a death sentence *559 is imposed is not a listed factor. To the contrary, after stating that this Court is to list "those similar cases which it took into consideration," § 565.035.5, the statute requires that this Court appoint an assistant to

"accumulate the records of all case in which the sentence of death *or life imprisonment* without probation or parole was imposed." § 565.035.6 (emphasis added).

It would be pointless for section 565.035.6 to require this Court to accumulate records of cases in which life imprisonment is imposed if life imprisonment cases are inherently dissimilar to this Court's proportionality review under the statute. That is why the cases interpreting section 565.035 and its predecessor prior to *Ramsey* considered both death and life imprisonment cases, for both may constitute "similar cases" under section 565.035.[5]

Although this type of proportionality review is required by statute, rather than by the Eighth Amendment, the duty is no less important. Cases in which a life sentence was imposed should be included in this Court's proportionality analysis. That is not to say that the existence of a large number of cases in which a death sentence was imposed on similar facts may not be more persuasive or that cases that did not compare the case before them to those in which a life sentence was imposed reached the wrong result. Rather, the analysis simply is incomplete unless one also looks at cases in which life imprisonment resulted, and there is a risk that this lack of complete analysis, in the rare case, may have prevented this Court from identifying a case in which the death penalty was disproportionate when considered as against similar cases as a whole.

Further, it is worthwhile to note that United States Supreme Court Justice John Paul Stevens, in a statement respecting the denial of a petition for writ of certiorari in *Walker v. Georgia,* —— U.S. ——, ——– ——, 129 S.Ct. 453, 454–55, 172 L.Ed.2d 344 (2008), recently expressed concern about Georgia's current failure to consider cases in which a life sentence was imposed, stating that consideration of the latter cases seems "judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court."

In *Walker,* the defendant argued that Georgia's capital punishment scheme was unconstitutionally arbitrary because it failed to conduct a meaningful proportionality review. Justice Stevens noted that this issue was not preserved properly; ***560** therefore, he concurred in the denial of certiorari but said, "I write separately to emphasize that the Court's denial has no precedential effect." *Id.* at 454. The reason he wanted to emphasize this point, he said, was his concern that *Gregg* and similar cases had affirmed the lack of arbitrariness of Georgia's death penalty procedures partly in reliance on Georgia's statutory requirement that its supreme court independently review the imposition of the death penalty and its proportionality to similar cases in which death or a life sentence without parole had been imposed. *Id.* at 454.

Justice Stevens noted there is a "special risk of arbitrariness" in cases in which the victim and defendant are of different races, such as in *Walker;* therefore, it greatly troubled him that Georgia had carried out only a "perfunctory" proportionality review and had not considered cases in which death was not imposed, despite the heightened risk of arbitrariness, stating, "had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence,

it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment." *Id.* at 455–56.

Justice Stevens further found such cases to be "eminently relevant to the question whether a death sentence in a given case is proportionate to the offense," *id.* at 456, and that, "failure to acknowledge ... cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that [the reviewing court] will overlook a sentence infected by impermissible considerations." *Id.* In other words, if one limits one's consideration only to cases in which a similar penalty was imposed, then it is almost preordained that the cases will be found to be similar, but this says nothing about whether the case also is similar to cases outside the orbit of the court's analysis.

While it is unclear whether the other justices share Justice Stevens' viewpoint, the concern he raises is a realistic one that, by categorically refusing to look at cases in which a life sentence was imposed, a court may be excluding from consideration cases that are in fact similar to the one before it. It therefore is not surprising that Missouri's legislature expressed its intent that cases in which a life sentence was imposed are to be a part of this Court's proportionality review.

Such a review does not impose a new requirement on this Court to count good and bad facts or to become a super-juror and second-guess the jury's consideration of the evidence. Such a review requires the Court only to continue doing what it now does in regard to cases in which death was imposed—review them to determine whether the sentence of death is disproportionate in light of the crime, the defendant and the strength of the evidence, *see, e.g., State v. Chaney,* 967 S.W.2d 47, 59–60 (Mo. banc 1998) (finding death sentence disproportionate in light of strength of the evidence after comparing to other death cases)—but to include similar cases in which a life sentence was imposed in that analysis. *See, e.g., State v. McIlvoy,* 629 S.W.2d 333, 341–42 (Mo. banc 1982) (finding death sentence disproportionate to the penalty imposed in similar cases after considering both death and life sentence cases). The Court now simply must apply its already existing analysis to the broader universe of cases required by statute—those in which either death or a sentence of life without parole were imposed.[6]

***561** The principal opinion already considers similar cases in which a death penalty resulted. Therefore, this separate opinion determines whether the death sentence here is disproportionate in light of similar cases by additionally reviewing the cases Mr. Deck cites as similar but in which a life sentence was imposed, and also by reviewing other cases in which a life sentence was imposed that also involved multiple murders during the course of a robbery or burglary.

II. PROPORTIONALITY REVIEW

The facts of Mr. Deck's case are chilling. He and his mother's boyfriend originally decided to rob

the home of an older couple, James and Zelma Long, while the couple was at church. But because they wanted the money sooner for a trip, Mr. Deck and his sister went to the Longs' rural home in DeSoto, Missouri, on a weekday night. After gaining entry through a ruse, Mr. Deck pulled a pistol from his waistband and ordered the Longs to lie face down on their bed. They did so. Mrs. Long opened their home safe and gave Mr. Deck the paper and jewelry inside as well as $200 from her purse and additional cash in the house. Mr. Deck then forced the Longs to lie back down while he stood at the foot of the bed trying to decide what to do for ten minutes, as they begged for their lives. When his sister got tired of acting as a lookout and left the house for the car, he put the gun to Mr. Long's head and shot him twice, then did the same to Mrs. Long. Neither survived. During the penalty phase of the trial, the Longs' son read a statement the family had prepared addressing the impact of the deaths on their family.

Mr. Deck offered mitigation evidence that it was not a planned murder, that he made a "lousy" decision while scared and nervous, and that he confessed and cooperated with police. As the majority notes, he presented additional mitigation evidence, which in a prior case was described this way:

> The defense presented substantial evidence concerning the abuse Mr. Deck suffered as a child, the lack of parental love and his continual move from one foster home to another. It presented evidence that, despite all this, he continued to love and care for his younger siblings, scrounging for food for them and bathing them while his mother was out at clubs or with boyfriends. It showed how the Pucketts wanted to adopt him and give him a chance to grow up in a loving family, but he was instead returned to his mother and further abuse.

Deck v. State, 68 S.W.3d 418, 430 (Mo. banc 2002). He also presented expert evidence in this trial as to the effect of his difficult childhood, evidence which the jury heard and considered before deciding to impose the death penalty, as had the 24 jurors in his two prior penalty-phase trials.

The jury found six aggravators—that each murder was committed while the defendant was engaged in the commission of another homicide; that the murders were committed for the purpose of receiving money or any other thing of monetary value; that the murders were outrageously and wantonly vile, horrible and inhuman in that they involved depravity of mind; that they were committed for the purpose of avoiding a lawful arrest; that they were ***562** committed while the defendant was engaged in the perpetration of a burglary; and that they were committed while the defendant was engaged in the perpetration of a robbery.

Mr. Deck argues the facts were insufficient to support imposition of the death penalty because persons in other cases with similar facts were sentenced to life in prison. He relies most heavily on *State v. Dulany,* 781 S.W.2d 52 (Mo. banc 1989), and *Conn v. State,* 769 S.W.2d 822 (Mo.App.1989). Mr. Conn and his girlfriend, Ms. Dulaney, acted together to rob and murder Mr. Conn's aunt and uncle, possibly because his aunt and uncle had refused to loan him money for

bail. In *Conn,* although the State had announced its intent to seek the death penalty, the State and defendant reached a plea agreement of a life sentence, and a jury never heard the case. 769 S.W.2d at 823–24. This Court always has held that cases in which the State agrees not to seek the death penalty are not considered in the proportionality analysis. *See, e.g., State v. Mercer,* 618 S.W.2d at 11.

Dulany did go to trial. But the State had no direct evidence that Ms. Dulaney actually committed the murders, and she testified that she merely assisted Mr. Conn, who actually murdered both victims. The State argued, therefore, that she should be found guilty either as the perpetrator or as an accomplice to Mr. Conn. 781 S.W.2d at 53–55. The jury may have found that Ms. Dulaney acted only as an accomplice to her boyfriend, particularly in light of the evidence of her dependence on him. By contrast, in *Deck* the evidence is not ambiguous as to who directly killed the victims. Mr. Deck was the mastermind; he committed the two murders himself—his role is like that of Mr. Conn, not of Ms. Dulaney.

Mr. Deck also relies on *State v. Owens,* 827 S.W.2d 226 (Mo.App.1991), in which the defendant was convicted of two counts of first-degree murder for shooting two persons during the course of a burglary yet received a life sentence. *Id.* at 227. While both cases involve multiple murders in the course of a robbery, there were five co-conspirators in *Owens,* three of whom pleaded guilty and blamed the murders on the defendant. *Id.* at 232. The jury may have found that testimony self-serving and not credible in light of their plea agreements. Further, a jury deadlocked as to the fifth defendant, and the court imposed a death sentence. *State v. Griffin,* 756 S.W.2d 475 (Mo. banc 1988).

The remaining cases Mr. Deck cites in support of his argument are substantially factually disparate from Mr. Deck's case. *See State v. Merrill,* 990 S.W.2d 166 (Mo.App.1999) (conviction was based largely on testimony of girl who was four years old at time of murders); *State v. Holcomb,* 956 S.W.2d 286 (Mo.App.1997) (murders did not take place in the course of a robbery); *State v. Futo,* 932 S.W.2d 808 (Mo.App.1996) (same); *State v. Clark,* 859 S.W.2d 782 (Mo.App.1993) (same).

Although Mr. Deck does not cite to them, consideration also has been given to other cases in which multiple murders were committed during the course of a robbery or burglary but in which the jury decided to impose a life sentence. In most of these cases, multiple persons were involved in the crimes, each of whom either denied involvement or claimed that their co-defendants were the ones who actually killed the victims. In such circumstances, the jury might well have concluded that the defendant was involved in the crime but that the evidence was unclear whether the defendant personally caused the death or acted merely as an accomplice.

This is an important distinction from Mr. Deck, who clearly was the mastermind of the crime and admits committing the ***563** murders himself. *Compare State v. Downs,* 593 S.W.2d 535 (Mo. banc 1980) (youthful defendant without priors denied involvement, and statements of co-defendants sometimes implicated him but at other times inconsistently implicated others as

actually committing murders in the course of robbery); *State v. Harper,* 713 S.W.2d 7 (Mo.App.1986) (credibility of co-defendant who claimed defendant actually shot victims during home robbery undermined by plea deal he made in return for his testimony; testimony of surviving victim identifying defendant arguably was inconsistent with co-defendant's testimony that defendant just shot once and unsure if hit anyone, and defendant strongly argued credibility issues); *State v. Jennings,* 815 S.W.2d 434 (Mo.App.1991) (multiple co-conspirators pointed fingers at each other as actual killers in multiple homicide store robbery). *See also State v. Clark,* 711 S.W.2d 928 (Mo.App.1986) (19–year–old defendant did not confess to the crime and presented evidence that one of two murders occurred during a struggle for his gun in a robbery gone wrong and that he had a two-year-old daughter).

While these cases in which a life sentence was imposed are comparable in some ways to Mr. Deck's case, they differ from it in important respects in regard to the age of the defendant, the strength of the evidence and whether the defendant actually committed the murder or acted as an accomplice. It is also appropriate to consider that Mr. Deck admitted committing a multiple homicide after deliberating over the victims and placing them in fear for 10 minutes, that he did so to hide his crime in the course of a robbery, and that the jury found his conduct vile and outrageous. As noted by the principal opinion, there are many cases in which a person has received a death sentence when the crime involved multiple murders during the course of a robbery and, as here, involved acts of brutality and showed depravity of mind, or was committed to avoid detection or arrest. *See also Deck,* 136 S.W.3d at 490; *Deck,* 994 S.W.2d at 545.

For all of these reasons, while I believe the principal opinion errs in failing to consider similar cases in which a life sentence was imposed, I conclude that consideration of these cases would not change the result and that imposition of the death penalty is not disproportionate or excessive to the sentence imposed in similar cases.

All Citations

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Footnotes

1 A full recitation of the facts regarding Deck's conviction is available at *Deck I.*

2 A previous holding is the "law-of-the-case," precluding re-litigation of issues on remand and subsequent appeal. " '[T]he decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not.' " *State v. Graham,* 13 S.W.3d 290, 293 (Mo. banc 2000) (citing *Shahan v. Shahan,* 988 S.W.2d 529, 533 (Mo. banc 1999)).

3 In this case, modifications would have removed references to the guilt phase of trial.

4 Deck's challenge to instructions 8 and 13 formed the basis for his claim raised in his seventh point.

5 Rule 29.08(c) states:

> When there is a conviction for a crime for which a punishment provided by statute is death, the judge shall file a report in this Court not later than ten days after the final imposition of sentence regardless of the sentence actually imposed. The report shall be on a form prescribed by this Court and shall be accompanied by any presentence investigation report.

6 Judge Stith's concurring opinion, without discussion of *State v. Edwards,* 116 S.W.3d 511, 549 (Mo. banc 2003), states "section 565.035 does not permit this Court to limit its analysis to a determination whether imposition of the death penalty was freakish or wanton." *State v. Edwards,* authored by Judge Stith, notes that this Court's role in proportionality review is "to act as a safeguard by ensuring that a sentence of death is not imposed in a case in which to do so is freakish and disproportionate...." The statute has not changed since *Edwards* was decided.

1 Accordingly, all statutory references for the remainder of this opinion shall be to RSMo 2000, unless otherwise indicated.

2 The Court rejected the view of the three dissenting judges that the defendant's age—he was a minor at the time of the offense—as well as his cognitive-emotional disorder and his extensive drug abuse made him categorically ineligible for the death penalty. *Id.* at 422–23.

3 *See, e.g., State v. Shurn,* 866 S.W.2d 447, 467 (Mo. banc 1993) (without mentioning *Ramsey,* which had been decided just a few months earlier, the Court said it "examines capital murder and first degree murder cases in which the sentencer considers death and life imprisonment to determine whether the sentence is proportionate to other cases").

4 The principal opinion notes that *State v. Edwards,* 116 S.W.3d 511, 549 (Mo. banc 2003) (written by Stith, J.) states that this Court's role is, "to act as a safeguard by ensuring that a sentence of death is not imposed in a case in which to do so is freakish and disproportionate to the sentence given in similar cases considered as a whole." That statement is accurate, although to the extent that it could be read to suggest that this is the only analysis this Court must undertake, it would be incomplete. *Edwards* also quotes the portion of the statute requiring this Court to consider similar cases and to determine whether the sentence is proportionate to them in light of the crime, the defendant and the strength of the evidence, however. It also notes that under the statute this Court's duty is to examine similar cases as a whole, not to simply identify a single similar case in which a particular sentence was imposed, and then examines similar cases in which either a death sentence or a sentence of life imprisonment was imposed, before determining that the death sentence is not disproportionate.

5 The principal opinion notes that the legislature has not changed section 565.035 since *Ramsey* was decided over 16 years ago and therefore must approve of *Ramsey*'s decision not to consider similar cases that resulted in a sentence of life imprisonment. I would note that the legislature also did not change section 565.035 during the more than 14 years that this Court interpreted that section to require consideration of similar cases that resulted in either death or life in prison without parole. Indeed, since the statute unambiguously has required consideration of both types of cases, if similar, for all 30 years since it was enacted, there would be no reason for it to change; it is this Court's recent jurisprudence which is incorrect.

6 I agree with the principal opinion that the statute simply requires the Court to gather information about all of these cases and that it leaves to the Court the discretion to determine which of these constitute similar cases to which the current case should be compared. If the Court exercised such discretion when it found similar life sentence cases, then it would be fulfilling its statutory duty, and, in fact, in the past it has done this *sub silencio.* But *Ramsey* itself says, and the principal opinion nominally appears to affirm, that cases in which a life sentence was imposed are categorically dissimilar and so will not be examined. That is not an exercise of discretion but a refusal to exercise it and makes the statutory requirement to gather life sentence cases pointless.

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381 S.W.3d 339
Supreme Court of Missouri,
En Banc.

Carman L. DECK, Appellant,
v.
STATE of Missouri, Respondent.

No. SC 91746.
|
July 3, 2012.
|
Rehearing Denied Aug. 14, 2012.

Synopsis

Background: Defendant moved for postconviction relief after his convictions for first-degree murder and other offenses and his sentences of death were affirmed, 994 S.W.2d 527. The motion was denied, and defendant appealed. The Supreme Court affirmed in part, reversed in part, and remanded for a new penalty-phase trial, 68 S.W.3d 418. On remand, defendant received two death sentences. Appeal followed. The Supreme Court affirmed, 136 S.W.3d 481. The United States Supreme Court granted certiorari and reversed and remanded for a new penalty phase trial, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953. On remand, defendant again received two death sentences. He appealed. The Supreme Court, 303 S.W.3d 527, affirmed. Defendant filed motion for postconviction relief. The Circuit Court, Jefferson County, Gary P. Kramer, J., denied motion. Defendant appealed.

Holdings: The Supreme Court, Mary R. Russell, J., held that:

[1] defense counsel did not render ineffective assistance, and

[2] trial court's alleged destruction of jury questionnaires did not prejudice defendant, and, thus, he was not entitled to a new trial on this basis.

Affirmed.

West Headnotes (29)

[1] **Criminal Law**⇐Judgment, sentence, and punishment

110Criminal Law
110XXIVReview
110XXIV(M)Presumptions
110k1144Facts or Proceedings Not Shown by Record
110k1144.17Judgment, sentence, and punishment

On appeal from the denial of post-conviction relief, the motion court's findings are presumed correct.

1 Cases that cite this headnote

[2] **Criminal Law**⇐Interlocutory, Collateral, and Supplementary Proceedings and Questions
Criminal Law⇐Post-conviction relief

110Criminal Law
110XXIVReview
110XXIV(L)Scope of Review in General
110XXIV(L)10Interlocutory, Collateral, and Supplementary Proceedings and Questions
110k1134.90In general
110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.36Post-conviction relief

On appeal from the denial of post-conviction relief, the motion court's judgment will be reversed if it clearly erred in its findings of fact or conclusions of law. V.A.M.R. 29.15(k).

1 Cases that cite this headnote

[3] **Criminal Law**⇐Questions of Fact and Findings

110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.1In general

A "clear error" is a ruling that leaves the appellate court with a definite and firm impression that a mistake has been made.

1 Cases that cite this headnote

[4] **Criminal Law**⇐Deficient representation and prejudice

110Criminal Law
110XXXPost-Conviction Relief
110XXX(B)Grounds for Relief
110k1511Counsel
110k1519Effectiveness of Counsel
110k1519(4)Deficient representation and prejudice

To establish ineffective assistance of counsel meriting post-conviction relief, the movant must show that counsel's performance was deficient by falling below an objective standard of reasonableness, and if counsel's performance was deficient, the movant must then prove that he was prejudiced by counsel's deficiency. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[5] **Criminal Law**⇐Prejudice in general

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1879Standard of Effective Assistance in General
110k1883Prejudice in general

For purposes of a claim of ineffective assistance of counsel, "prejudice" is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[6] **Criminal Law**⇐Presumptions and burden of proof in general

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1871Presumptions and burden of proof in general

On a claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct was reasonable and effective; to overcome this presumption, the movant must point to specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of effective assistance. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[7] **Criminal Law**⇐Strategy and tactics in general

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1879Standard of Effective Assistance in General
110k1884Strategy and tactics in general

The choice of one reasonable trial strategy over another is not ineffective assistance; strategic choices made after a thorough investigation of the law and the facts are virtually unchallengeable. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[8] **Sentencing and Punishment**⇐Factors Related to Offense
Sentencing and Punishment⇐Offender's character in general

Sentencing and Punishment⇨Other Offenses, Charges, Misconduct

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(D)Factors Related to Offense
350Hk1665In general
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(E)Factors Related to Offender
350Hk1702Offender's character in general
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(E)Factors Related to Offender
350Hk1703Other Offenses, Charges, Misconduct
350Hk1704In general

When imposing the death penalty, the sentencer must consider the character and record of the defendant and the circumstances of the particular offense.

1 Cases that cite this headnote

[9] **Sentencing and Punishment**⇨Aggravating or mitigating circumstances

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(A)In General
350Hk1622Validity of Statute or Regulatory Provision
350Hk1625Aggravating or mitigating circumstances

To meet constitutional Eighth and Fourteenth amendment requirements, a death penalty statute cannot preclude consideration of relevant mitigating evidence. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[10] **Sentencing and Punishment**⇨Mitigating circumstances in general

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(C)Factors Affecting Imposition in General
350Hk1653Mitigating circumstances in general

A death penalty sentencer may not, as a matter of law, refuse to consider any relevant mitigating evidence.

Cases that cite this headnote

[11] **Jury**⇨Punishment prescribed for offense

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k104Personal Opinions and Conscientious Scruples
230k108Punishment prescribed for offense

A juror in a death penalty case may not refuse to consider mitigating evidence outright.

Cases that cite this headnote

[12] **Criminal Law**⇨Other particular issues in death penalty cases

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1963Other particular issues in death penalty cases

Defense counsel's failure to ask prospective jurors for penalty phase of capital murder prosecution whether they could look at defendant's childhood experience and give it meaningful consideration as a reason to vote against the death penalty was not deficient performance, and, thus, was not ineffective assistance, as such a question would have been improper, in that it asked jurors to commit to the weight they would give the evidence before they heard it.

Cases that cite this headnote

[13] **Sentencing and Punishment**⇨Mitigating circumstances in general

Sentencing and Punishment⇐Manner and effect of weighing or considering factors

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(C)Factors Affecting Imposition in General
350Hk1653Mitigating circumstances in general
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(C)Factors Affecting Imposition in General
350Hk1658Manner and effect of weighing or considering factors

Although a sentencer in a death penalty case may not give mitigating evidence no weight by excluding such evidence from consideration, he may determine the weight to be given relevant mitigating evidence.

Cases that cite this headnote

[14] **Criminal Law**⇐Presentation of witnesses

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1921Introduction of and Objections to Evidence at Trial
110k1924Presentation of witnesses

Counsel's decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise. U.S.C.A. Const.Amend. 6.

6 Cases that cite this headnote

[15] **Criminal Law**⇐Presentation of witnesses

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1921Introduction of and Objections to Evidence at Trial
110k1924Presentation of witnesses

To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a

defendant must show that: (1) counsel knew or should have known of the existence of the witness, (2) the witness could be located through reasonable investigation, (3) the witness would testify, and (4) the witness's testimony would have produced a viable defense. U.S.C.A. Const.Amend. 6.

6 Cases that cite this headnote

[16] **Criminal Law**⇨Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Defense counsel's failure to call additional mitigating witnesses to testify during penalty phase of capital murder prosecution was not ineffective assistance, as defendant failed to show that, had these additional witnesses been called to testify, their testimony would have outweighed the aggravating evidence so that there was a reasonable possibility the jury would have voted for life imprisonment; witnesses' testimony, including testimony that defendant's grandfather was "verbally abusive," was so lacking in substance that it would not have had an impact on the jury in their decision. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[17] **Criminal Law**⇨Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Defense counsel's failure to call additional mitigating witnesses to testify during penalty phase of capital murder prosecution was not ineffective assistance, as the testimony of these witnesses would have offered was cumulative to the mitigation testimony heard by the jury from the expert witnesses and prior depositions presented. U.S.C.A.

Const.Amend. 6.

2 Cases that cite this headnote

[18] **Criminal Law**⇐Introduction of and Objections to Evidence at Trial

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1921Introduction of and Objections to Evidence at Trial
110k1922In general

Counsel is not ineffective for not presenting cumulative evidence. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[19] **Criminal Law**⇐Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Capital murder defendant was not prejudiced during penalty phase by counsel's decision to tell the story of his childhood through expert witnesses rather than presenting a piecemeal picture of his childhood through additional mitigation witnesses, and, thus, counsel's decision was not ineffective assistance, as these witnesses were either uncooperative and had written defendant out of their lives, could not be located, or were of questionable competence to testify. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[20] **Criminal Law**⇐Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Defense counsel's failure during penalty phase of capital murder prosecution to present mitigating testimony from defendant's former fiancee did not prejudice defendant, and, thus, was not ineffective assistance; counsel made reasonable efforts to locate former fiancee, as defense counsel made reasonable efforts to locate former fiancee, but was thwarted by her then husband, and much of her testimony was cumulative. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[21] **Criminal Law**⇐Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Counsel's decision during penalty phase of capital murder prosecution not to call defendant's sister to provide mitigation testimony was a matter of reasonable trial strategy, and, thus, was not ineffective assistance, as sister was also a co-defendant in the underlying murders, counsel did not want to put co-defendant on the stand because counsel did not want to allow the prosecution to cross-examine her about the murders, and counsel was concerned that sister might be viewed as an additional victim because she was in prison for the crimes that she committed with defendant. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[22] **Criminal Law**⇨Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Defense counsel's failure during penalty phase of capital murder prosecution to present a neuropsychologist's testimony concerning defendant's prior head injuries did not prejudice defendant, and, thus, was not ineffective assistance; defendant failed to present any evidence that counsel was aware that defendant's head injuries caused brain damage, and counsel conducted a thorough investigation into defendant's childhood, but there was no evidence of brain damage or impaired psychological functioning. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[23] **Criminal Law**⇨Argument and comments

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1962Argument and comments

Defense counsel's decision during penalty phase of capital murder prosecution not to object to improper hypothetical posed by prosecutor to expert witness on cross-examination in which defendant called himself a "no-good s.o.b." was a matter of reasonable trial strategy, as counsel did not want to highlight the prosecutor's statement. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[24] **Criminal Law**⇨Argument and comments

110Criminal Law

110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1962Argument and comments

Defense counsel's decision during penalty phase of capital murder prosecution not to object to improper hypothetical posed by prosecutor to expert witness on cross-examination in which defendant called himself a "no-good s.o.b." did not prejudice defendant, and, thus, was not ineffective assistance, as prosecutor's statement was a brief one that was subsequently "shut down" by counsel's objection. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[25] **Criminal Law**⇐Prejudice in general

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1879Standard of Effective Assistance in General
110k1883Prejudice in general

The standard of prejudice on a claim of ineffective assistance of counsel is less exacting than the plain error standard. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[26] **Criminal Law**⇐Necessity of Objections in General

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1030Necessity of Objections in General
110k1030(1)In general

Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative.

Cases that cite this headnote

[27] **Criminal Law**⇐Argument and comments

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1962Argument and comments

Counsel's failure to object during penalty phase of capital murder trial to prosecutor's improper suggestion during closing argument that defendant had escaped from incarceration more than one time did not prejudice defendant, and, thus, was not ineffective assistance, given the context of the entire record. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[28] **Criminal Law**⇐Argument and comments

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1962Argument and comments

Defense counsel's failure to object during penalty phase of capital murder trial to prosecutor's statement that defendant, during his prior attempt to escape from prison, helped individuals escape that were in for the rest of their lives, when there was no evidence as to how long the individuals' sentences were, did not prejudice defendant, and, thus, was not ineffective assistance, as the length of the sentences of the individuals whom defendant aided in escape was not consequential or significant. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[29] **Criminal Law**⇐Operation and effect

110Criminal Law
110XXIVReview
110XXIV(G)Record and Proceedings Not in Record
110XXIV(G)11Defects and Objections
110k1109In General
110k1109(3)Operation and effect

Trial court's alleged destruction of jury questionnaires did not prejudice capital murder defendant, and, thus, he was not entitled to a new trial on this basis, as regardless of whether the questionnaires were destroyed by the trial court, copies of the questionnaires for the jurors who served during penalty phase had been filed with Supreme Court and stipulated to by both parties, and jurors provided no additional information on their questionnaires other than their basic personal information and the answers to the yes or no questions contained in the questionnaire.

Cases that cite this headnote

Attorneys and Law Firms

*342 Jeannie Willibey, Public Defender's Office, Kansas City, for Deck.

Evan J. Buchheim, Attorney General's Office, Jefferson City, for the State.

Opinion

MARY R. RUSSELL, Judge.

This is the fifth action to come before this Court involving murders committed in 1996 by Carman Deck ("Movant"). Movant filed this Rule 29.15 post-conviction proceeding, asserting that his counsel at the penalty phase of his capital murder trial was ineffective for failing to call certain witnesses and for other alleged deficient performance. He also alleges that the motion court erred in denying his motion for a new trial. This Court finds no error and affirms the denial of Rule 29.15 relief and the denial of Movant's request for a new trial.

I. Background

In February 1998, a jury found Movant guilty of two counts of first-degree murder, two counts of armed criminal action, one count of first-degree robbery, and one count of first-degree burglary for the 1996 ***343** robbery and shooting deaths of James and Zelma Long. He received two death sentences. This Court affirmed those convictions and sentences in *State v. Deck,* 994 S.W.2d 527 (Mo. banc 1999) ("*Deck I* ").[1] Movant filed a motion for post-conviction relief pursuant to Rule 29.15, which was overruled by the circuit court. On appeal, this Court reversed the death sentences but affirmed the findings of guilt for his convictions. *Deck v. State,* 68 S.W.3d 418 (Mo. banc 2002) ("*Deck II* "). At the penalty phase retrial, he was again sentenced to two death sentences. This Court affirmed the death sentences in *State v. Deck,* 136 S.W.3d 481 (Mo. banc 2004) ("*Deck III* "), but the United States Supreme Court granted certiorari and found Movant was denied a fair trial because he appeared in shackles in the presence of the jury during the penalty phase without a showing of circumstances that required shackling for the safety of those in the courtroom. *See Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). This Court ordered a second penalty phase retrial, and Deck again received two death sentences. This Court affirmed the death sentences. *See State v. Deck,* 303 S.W.3d 527 (Mo. banc 2010) ("*Deck IV* "). Movant filed a Rule 29.15 motion for post-conviction relief on multiple grounds, claiming that his penalty phase counsel was ineffective for (1) failing to ask specific questions during voir dire, (2) failing to call additional mitigation witnesses, (3) failing to conduct neuropsychological testing on Movant, and (4) failing to object during the cross-examination of Movant's expert and during the prosecutor's closing arguments. The motion court denied Movant post-conviction relief on all points. He now appeals. Movant also asserts that the motion court erred in denying him a new trial because the trial court improperly destroyed the jury questionnaires from his penalty phase hearing.[2]

II. Standard of review for Rule 29.15

[1] [2] [3] On appeal from the denial of post-conviction relief, the motion court's findings are presumed correct. *Zink v. State,* 278 S.W.3d 170, 175 (Mo. banc 2009). The motion court's judgment will be reversed if it clearly erred in its findings of fact or conclusions of law. *Id.;* Rule 29.15(k). A clear error is a ruling that leaves the appellate court with a definite and firm impression that a mistake has been made. *Id.*

III. Ineffective assistance of counsel

[4] [5] To establish ineffective assistance of counsel meriting post-conviction relief, the movant must satisfy the two-prong test of *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the movant must show that counsel's performance was deficient by falling below an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. 2052. If counsel's performance was deficient, the movant must then prove that he was prejudiced by counsel's deficiency. *Id.* at 687, 104 S.Ct. 2052. Prejudice, in the *Strickland* context, is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.*

[6] [7] There is a strong presumption that counsel's conduct was reasonable and effective. *Id.* at 689, 104 S.Ct. 2052. To ***344** overcome this presumption, the movant must point to specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of effective assistance. *Id.* at 690, 104 S.Ct. 2052. Further, the choice of one reasonable trial strategy over another is not ineffective assistance. *Zink,* 278 S.W.3d at 176. Strategic choices made after a thorough investigation of the law and the facts are virtually unchallengeable. *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052.

A. Penalty phase counsel was not ineffective during voir dire

Movant alleges that penalty phase counsel failed to adequately ask questions of the venire panel to expose potential bias. Specifically, Movant contends that counsel was ineffective for failing to ask the veniremembers "whether they could look at [Movant]'s childhood experience and give that meaningful consideration as a reason to vote against the death penalty."

[8] [9] [10] When imposing the death penalty, the sentencer must consider the character and record of the defendant and the circumstances of the particular offense. *Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). To meet constitutional Eighth and Fourteenth amendment requirements, a death penalty statute cannot preclude consideration of relevant mitigating evidence. *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Further, a sentencer may not, as a matter of law, refuse to consider any relevant

mitigating evidence. *Eddings v. Oklahoma,* 455 U.S. 104, 113–14, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

[11] A juror in a death penalty case may not refuse to consider mitigating evidence outright. *Morgan v. Illinois,* 504 U.S. 719, 728–29, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). In *Morgan,* the Supreme Court held that the trial judge's refusal to allow defense counsel to ask the venire panel whether they would automatically vote for death if the defendant was convicted of first-degree murder violated the defendant's right to an impartial jury. *Id.* at 735–40, 112 S.Ct. 2222. A juror who would automatically impose the death penalty, the Court reasoned, is not an impartial juror, and the Fourteenth Amendment mandates such a juror be removed for cause. *Id.* at 728–29, 112 S.Ct. 2222. The Court held:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

Id. 729, 112 S.Ct. 2222. Jurors who would automatically vote to impose the death penalty "not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." *Id.* at 736, 112 S.Ct. 2222.

Movant argues that *Morgan* prohibits the empaneling of any juror who would not view childhood evidence as a reason to vote against the death penalty. Movant essentially contends that *Morgan* requires that counsel be permitted to ask the venire panel how certain mitigating evidence ***345** would impact their deliberations and, further, that counsel was ineffective for failing to do so. Movant's contention is that failing to ask the venire panel during voir dire, "whether they could look at [Movant]'s childhood experience and give that meaningful consideration *as a reason to vote against the death penalty* " was a violation of Rule 29.15.

[12] [13] Movant's proposed question is not essential to his effective assistance of counsel, as asking the potential jurors whether they would view Movant's childhood experience *as a reason to vote against the death penalty* is improper because it asks the potential jurors to commit to the weight they would give the evidence before they hear it. Although the jury is clearly required to

consider mitigating evidence in deciding whether to impose the death penalty under *Lockett, Eddings,* and *Morgan,* the court and the parties may not inquire as to *how* such evidence will affect the potential jury's decision. Although a sentencer may not give mitigating evidence no weight by excluding such evidence from consideration, he or she may determine the weight to be given relevant mitigating evidence. *Eddings,* 455 U.S. at 114–115, 102 S.Ct. 869. Under these facts, counsel's performance was not deficient.

Although the questioning that Movant proposes is improper, exploration of juror biases regarding certain types of evidence is appropriate during voir dire. It is possible that a juror could be biased by the introduction of childhood evidence. The prosecution here adequately explored this possibility when it asked the following question to the venire panel:

> And I guess the question I want to ask you is that you'll hear—I anticipate you'll hear some evidence concerning [Movant]'s childhood, his upbringing.
>
> ...
>
> Is there anybody here, that if you start hearing evidence about troubled childhoods, things like that, it's going to [a]ffect your ability to be fair in this case, one way or the other?

No venireperson indicated that such evidence would affect his or her ability to be fair in the case.

The prosecution's question adequately probed the potential jurors' bias without asking them to improperly commit to how certain evidence would affect their deliberations. The duty of counsel and the court in voir dire is to uncover biases of potential jurors to ensure an impartial jury. It is not the duty of counsel to ensure that biased jurors partial to their side are empaneled.

Because Movant failed to prove defense counsel's performance was deficient, Movant did not satisfy the first prong of *Strickland*'s ineffective assistance of counsel test. The motion court did not clearly err in denying Movant post-conviction relief on this issue.[3]

B. Counsel was not ineffective by not calling additional mitigation witnesses

Movant argues that counsel was ineffective by failing to call the following mitigation witnesses: Michael Johnson, Carol and Arturo Misserocchi, Latisha Deck, Elvina Deck, Wilma Laird, Rita Deck, Stacey Tesreau–Bryant, and Tonia Cummings. He also contends that counsel was deficient for failing to present the deposition testimony of D.L. Hood and Pete Deck. ***346**

Movant argues that the additional mitigation witnesses would have provided "additional detail" about (1) the abuse and neglect suffered by Movant, (2) the care that Movant provided his younger siblings during their childhood, and (3) the bad character of Movant's caregivers during his childhood. Further, Movant argues that counsel was ineffective for choosing to present mitigating evidence through experts and prior deposition testimony rather than "live lay witnesses." Movant states that "live lay witnesses" would have conveyed to the jury that his life had value.

[14] [15] Counsel's decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise. *Hutchison v. State,* 150 S.W.3d 292, 304 (Mo. banc 2004). To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: (1) counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense. *Id.; State v. Harris,* 870 S.W.2d 798, 817 (Mo. banc 1994).

Because Movant is challenging counsel's failure to call certain witnesses during the penalty phase, a "viable defense" is one in which there is a reasonable probability[4] that the additional mitigating evidence those witnesses would have provided would have outweighed the aggravating evidence presented by the prosecutor resulting in the jury voting against the death penalty. *See Storey v. State,* 175 S.W.3d 116, 138 (Mo. banc 2005) (stating that the introduction of additional mitigating evidence of the same nature as the evidence that was presented would not have outweighed the particularly disturbing photographs introduced as aggravating evidence).

1. The motion court did not clearly err in finding that counsel was not ineffective for not calling additional witnesses

a. Testimony of mitigation witnesses presented to the jury

At the penalty phase hearing, counsel presented the live testimony of Dr. Wanda Draper, a child development expert, and Dr. Eleatha Surratt, a psychiatrist. Counsel also presented the videotaped depositions of Mike Deck (Movant's brother) and Mary Banks (Movant's aunt).

Finally, counsel read aloud the depositions of Major Puckett (Movant's short-term foster parent) and Beverly Dulinsky (Movant's aunt). The jury heard the following testimony.

Movant's parents were unmarried when he was born. They had three other children, Tonia, Latisha, and Mike. Neither parent was willing to accept responsibility for Movant's poor upbringing.

As an infant, Movant suffered physical problems as the result of being kept in a home with no air conditioning in August. His parents had been feeding Movant powdered commodity milk instead of baby formula. Relatives purchased baby formula for Movant and would mix it up before they gave it to Movant's parents because his parents would use the canned cream in their coffee and cereal.

The experts detailed Movant's difficult childhood. When Movant was three months old, he was taken to the hospital ***347** for dehydration and possible pneumonia because he did not have enough liquid or food. His mother had an explosive temper, and she would beat Movant often during his early years, leaving marks on him. Dr. Draper stated that Movant's mother was "quite abusive."

In addition to the physical abuse, Movant also did not have much emotional stability during his early years. Movant and his siblings were often left with relatives and babysitters while his parents went to nightclubs and bars. Movant's parents frequently brought their children to the bars, where they would sit in the bar, be left in the car, or be permitted to run free in the parking lot.

There were several times when the children were left at home alone. They did not know where their mother was, they were dressed "shabby," and there was no food in the house.

Movant's mother neglected the children because she was busy pursuing sexual relationships with various men. She would even have sex in her car in front of her children. Eventually, Movant's parents separated, and his mother moved in with her band member and boyfriend, D.L. Hood. Hood did not want anything to do with the children, so Movant's mother left the children with the Division of Family Services ("DFS").

During periods of extreme neglect, Movant took on the primary parenting role for his brothers and sisters. He was their major caregiver and the only person on whom they could count. Movant's brother testified that Movant "pretty much took care of [the Deck children]." He would steal food or go door-to-door to beg for food so that the Deck children would have something to eat. Movant's mother also taught Movant how to steal and encouraged him to do so. The children were also sexually abused.

From reading the depositions of Movant's brother and father, Dr. Draper related to the jury that

one Thanksgiving, the sheriff's office discovered that Movant and his siblings had been left alone for a couple of days without food or supervision. While being fed Thanksgiving dinner by relatives, Movant's brother was so hungry that he ate his food too fast, causing him to vomit onto his plate. He was so desperately hungry that he tried to eat his own vomit off the plate.

When Movant was in fourth grade, Pete Deck, Movant's father, began living with a woman named Rita. Movant's father left Rita and married a woman named Marietta who was an alcoholic and did not want the children. Marietta would feed her own children a regular meal but would give the Deck children cold bologna and hot dogs without bread for dinner. Movant's brother stated that she would also "torture" the children by making them kneel on broomsticks "just because she didn't like us" and that "[s]he pretty much wanted my dad to herself."

Dr. Draper and Dr. Surratt also related to the jury one of Marietta's particularly disturbing abusive acts. When 11– or 12–year–old Movant was riding in the car with Marietta, he told her that he needed to go to the bathroom. Marietta told him to wait, but he could not, so he defecated in his pants. Marietta was so furious that she took off his clothes, took his own fecal matter, and smeared it on his face. She made him keep the fecal matter there so long that it began to dry. She also took a photograph of Movant with the feces smeared on his face and showed it to others. Movant's brother corroborated Marietta's actions. Mary Banks, Movant's aunt, stated that Movant's mother showed her the picture. She described the picture in her deposition. Eventually, Marietta ***348** drove the Deck children to DFS and left them there. Movant was placed with a foster family, separated from his younger siblings.

Movant was initially placed with Carol and Arturo Misserocchi, but he did not stay with them very long. He did not make a connection with the Misserocchis. When Movant was about 13 years old, his aunt and uncle, Mary Banks and Norman Deck, sought to adopt him. His mother refused to allow the adoption unless they paid her the same sum she was receiving in government assistance. Because his aunt and uncle could not afford to do so, Movant was not adopted and he was again placed in foster care. From the time he was removed from the Misserocchis' home, he was placed in three different homes before he was placed in the care of Major and Linnie Puckett.

The Pucketts provided Movant with a regimented environment, and he thrived in that environment. The Pucketts would establish a routine for all of their foster children of homework and chores, and they would always have dinner together so that they could talk about whatever was on their minds. Movant had such a good relationship with Linnie Puckett that he began to call her "mom." About a year after Movant was placed with the Pucketts, however, Movant's mother showed up without warning and took him away. He begged her not to take him, saying that "if you take me away, you are killing me inside."

Movant's mother took him to live with her and Ron Wurst, her boyfriend at the time, who physically abused Movant's mother. About three months after he was removed from the

Pucketts' home, Movant returned to their home asking to stay because his mother knocked him through a plate glass door. When Movant was 17, he dropped out of school and moved into his own living quarters. He asked his mother to move in with him to protect her from Wurst.

When Movant was 29 he became engaged to Stacey Tesreau–Bryant. She had a child with whom Movant had a good relationship.

Dr. Draper opined that all of Movant's childhood experiences made him the person he was at the time of the crime. Although "he was of normal intelligence" and "had potential," he had "no way to develop into a responsible, caring citizen." She also stated that she believed Movant suffered an "extreme case of a horrendous childhood" because he moved 22 times in 21 years, along with the abuse, neglect, and lack of guidance. Dr. Surratt opined that Movant's childhood was similar to one of the "most extreme cases of child abuse ever described."

Movant's brother testified that he and the rest of the Deck children were separated from Movant during their childhood. The rest of the Deck children went to live with Norman and Elvina Deck, but Movant continued to live with his mother. Movant's brother testified that if Movant had been afforded the same opportunities as himself, namely to live in a stable environment with Norman and Elvina for seven years, things might have turned out differently for Movant. Major Puckett also testified that if Movant had been allowed to stay with him, he believed that Movant would have been a "wonderful man."

Dr. Draper studied the depositions of Movant's parents, Movant's brother, Tonia Cummings, Mary Banks, Elvina and Norman Deck, Stacey Tesreau–Bryant and her son, Major Puckett, and the Misserochis.

Dr. Surratt interviewed Movant's parents, Movant's brother, Tonia Cummings, Latisha Deck, Mary Banks, Elvina Deck, ***349** Rita Deck, Wilma Laird, Stacey Tesreau–Bryant, and Beverly Dulinsky. She also read the depositions of D.L. Hood, Major Puckett, and the Misserochis.

b. The testimony of Michael Johnson, the Misserochis, and D.L. Hood was inconsequential

The motion court did not clearly err in finding that the testimony of the following four witnesses would have been inconsequential.

Michael Johnson

Michael Johnson was Marietta's son and Movant's stepbrother. He would have testified that Movant's grandfather did not like him and that he was verbally abusive. He also would have testified that the Deck children were "closed off."

Carol Misserocchi

Carol Misserocchi, Movant's short-term foster parent, would have testified that Movant was placed with her family for about six to eight months when he was 10 or 11 years old. She would have testified that Movant's family made no attempt to contact him, and that Movant showed very little emotion and that he did not bond with her. The other children at the Misserochis' did not like Movant, and he was "sassy."

Arturo Misserocchi

Arturo Misserocchi, Carol's husband, would have testified that he believed Movant's parents might have tried to call Movant when he lived at his and Carol's home. Movant also did not bond with Arturo, although he described Movant as "a cute little kid," with a "wonderful personality."

D.L. Hood

D.L. Hood, who is now deceased, was a former band-mate and boyfriend of Movant's mother. His previous deposition stated that Movant's mother was "crazy" and that she tried to stab Hood one night. He also stated that Movant's mother was promiscuous. Movant's mother also told him that she had taken the kids to the welfare office and left them on the steps.

[16] Movant failed to show that, had the additional mitigating witnesses been called to testify, their testimony would have outweighed the aggravating evidence so that there was a reasonable probability the jury would have voted for life. The additional witnesses' testimony would not have produced a "viable defense." *Hutchison,* 150 S.W.3d at 304. Michael Johnson only added that Movant's grandfather was "verbally abusive." The Misserocchis had a brief interaction with Movant in the distant past. Hood only spoke to the interactions he had with Movant's mother and recounted the same stories the jury had heard from other witnesses about the mother's sexual promiscuity and neglect of her children. These witnesses' testimony was so lacking in substance that it would not have had an impact on the jury in their decision. The motion court did not clearly err in finding that these four witnesses' testimony would not have been compelling.

c. The testimony of Latisha Deck, Elvina Deck, Wilma Laird, Rita Deck, and Pete Deck was cumulative

The motion court did not clearly err in finding that the testimony of the following five witnesses would have been cumulative to the evidence presented by counsel at the penalty phase.

***350** *Latisha Deck*[5]

Latisha Deck, Movant's mentally disabled sister, would have testified that Movant took care of her when she was little.

Elvina Deck

Elvina Deck, Movant's aunt, would have testified that Movant's mother beat him. She also would have testified that his mother was very promiscuous—so much so that she even prostituted herself. She would have told her account of the incident in which the Deck children were brought to her home, dirty and starving, on Thanksgiving Day. She also would have

provided her account of Marietta, Movant's stepmother, making the children kneel on broomsticks and her account of the "feces incident." She would have testified that Marietta encouraged Movant and his sister to steal for her. Elvina also would have testified that she still loved Movant very much. Counsel hired an investigator and made attempts to contact Elvina Deck to testify at the penalty phase, but she could not be found.

Wilma Laird

Wilma Laird was Movant's aunt. She would have testified that she saw Movant's mother hit Movant in the temple with a flip-flop when he was one or two years old, although she downplayed the incident as "nothing drastic." She also would have testified that Movant's parents could be "good" parents. She stated that Movant's father tried to do the best he could for his children.

Rita Deck

Rita Deck, Movant's stepmother, would have given her account of the Thanksgiving Day incident. She would have testified that when Movant's father left her, she continued to care for the Deck children because she did not know where Movant's mother was. Movant's aunt came for the children one day and gave them to Movant's father and his new wife, Marietta. Rita was upset that the children were in Movant's father's and Marietta's care because Rita "really cared for the kids."

Rita would have testified that Movant was "a good kid" and that he did not give her any trouble. She also would have testified that the four Deck children were very close.

Counsel subpoenaed Rita, but she was not cooperative and did not comply with her subpoena. Counsel stated that Rita did not want to be involved in the third retrial.

Pete Deck

Pete Deck, Movant's father, would have testified that, after he left Movant's mother and the Deck children, he continued to take money to Movant's mother to provide for the children. He also would have testified regarding the incident in which the sheriff called him to pick up his children from Movant's mother's house on Thanksgiving Day because they had been left alone. He also would have testified to his former wife Marietta's poor treatment of the children, including the "feces incident." He would have testified that Marietta suggested foster care in front of Movant, and when Movant's father asked Movant how he felt about foster care, he stated that he would rather live in foster care than live with Marietta.

***351** When Movant's father was asked how many places Movant had lived from birth to age 16, he responded "four or five." He was surprised to hear that Movant had lived in more than 20 places in that time period.

Movant's father attended Movant's first trial, but Movant's counsel in the first penalty phase hearing did not call him to testify because he was in poor health and had high blood pressure. Movant's second post-conviction counsel subpoenaed Movant's father to testify at the penalty phase. At that time, he was living with Rita again, and she called counsel to report that he was too ill to testify. Counsel then received a doctor's note that stated testifying in court would be hazardous to his health. Counsel considered Rita and Movant's father to be uncooperative and had doubts about his medical condition. Rita and Movant's father did not comply with their subpoenas.

[17] [18] The testimony that these five witnesses would have offered was repetitive to the mitigation testimony heard by the jury from the expert witnesses and previous depositions presented. Movant's argument that these five witnesses would have provided "additional detail" of his case in mitigation all but concedes that their testimony would have been cumulative. Counsel is not ineffective for not presenting cumulative evidence. *Skillicorn v. State,* 22 S.W.3d 678, 683 (Mo. banc 2000).

[19] Neither was counsel ineffective for failing to provide the jury with "live lay witnesses" rather than the experts' testimony that included the lay witnesses' statements. Significantly, the motion court noted:

> While Movant claims that the live testimony of these witnesses would bolster the believability of his claims of a difficult childhood, the [c]ourt has already indicated that the testimony was not compelling. Most of these witnesses were family members whose perceived motive to exaggerate was just as great as the experts, if not significantly greater.

Movant's contention that counsel was ineffective for failing to call live "lay witnesses" to provide "additional detail" of Movant's childhood is similar to the claims of the movant in *Storey,* 175 S.W.3d 116. In *Storey,* counsel presented the testimony of Storey's family members as well as a clinical forensic psychologist to show "all of the bad influences and discord that surrounded Storey's childhood." *Id.* at 123–24. His counsel also presented the testimony of an expert in the field of corrections and criminal justice to testify about Storey's nonviolent prison record. *Id.* at 123. In his motion for post-conviction relief, Storey claimed, *inter alia,* that his counsel was ineffective for failing to call additional mitigation witnesses. *Id.* at 137. Specifically, Storey claimed his counsel was ineffective for failing to call non-family witnesses to testify about his childhood because non-family evidence would have been inherently more credible than the family evidence presented by counsel. *Id.*

This Court held that Storey's counsel was not ineffective for failing to call additional non-family mitigation witnesses because additional witnesses would "reiterate the same stories already presented by witnesses who testified at trial." *Id.* at 138. Storey also argued that his counsel should have presented more family mitigation witnesses who would have provided additional details of his childhood and additional details of his good character. *Id.* This Court found that Storey's counsel had introduced this type of mitigation evidence through other family members, and that he failed to show that any of the additional witnesses ***352** would have presented a viable defense. *Id.* at 137–38. "Counsel was not 'ineffective for not putting on cumulative evidence.' " *Id.* at 138 (quoting *Skillicorn,* 22 S.W.3d at 683).

The motion court here did not clearly err in finding that Movant was not prejudiced by counsel's strategic decision to tell the story of his childhood through experts rather than presenting a piecemeal picture of his childhood through uncooperative witnesses who had written Movant out of their lives (such as Movant's father and Rita Deck), through a witness who could not be located (Elvina Deck), or through a witness of questionable competence to testify (Latisha Deck). Additionally, Wilma Laird would have undermined counsel's strategy to highlight Movant's parents' horrible parenting by painting them in a favorable light.

Counsel's decision not to call cumulative "live lay witnesses" was an exercise of reasonable trial strategy. The motion court did not clearly err in finding that counsel was not ineffective for failing to call these five witnesses.

d. Counsel made reasonable efforts to locate Stacey Tesreau–Bryant

[20] Stacey Tesreau–Bryant, Movant's former fiancée, would have testified that she previously dated and lived with Movant for one year. At the time they dated, her son Dylan was approximately two years old. Movant helped take care of Dylan, and he treated him like a son. Dylan even called Movant "Daddy P." Movant continued to have a relationship with Dylan after Movant and Stacey's relationship ended. Movant told Stacey that his mom used to date a lot of men when he was young and that he had been molested by some of the men. She also would have testified that Movant shared with her that he was raped in prison.

Penalty phase counsel sent an investigator to Stacey's home. Stacey's husband at the time was hostile to the investigator and refused to provide Stacey's employer or work phone number. Counsel testified that given the husband's hostile nature and the tangential nature of Stacey's testimony, they decided to bring out Stacey's information through the experts.

Because Stacey has since separated from her husband, post-conviction counsel was able to locate her. Stacey testified that the only way for Movant's counsel to contact her would have been to ask her husband because she was disabled and unemployed, and her husband was always home. He was "totally against" Stacey's involvement in Movant's penalty phase hearing. Movant did not carry his burden to show that Stacey could have been located through reasonable investigation to testify at the penalty phase.

Additionally, much of Stacey's testimony was cumulative, and that Movant was raped in prison called attention to his adult criminal life rather than focusing on his traumatic childhood. Movant did not carry his burden to show that, had Stacey been located and testified at Movant's third penalty phase hearing, there was a reasonable probability the jury would have voted for life instead of imposing the death penalty.

e. Counsel's decision not to call Tonia Cummings was reasonable trial strategy

[21] Tonia Cummings, Movant's sister, was also his codefendant in the murders underlying this case. Tonia would have largely given the jury another account of the same testimony that they heard at trial. To that extent, Tonia's testimony would have been cumulative. However, Tonia did provide a few additional details. ***353** She stated that Marietta would make the Deck children stay outside all day long and that she would make them use the bathroom outside as well. They were constantly thirsty and hungry in her care. She recounted a particular incident in which Movant found a big bag of dog food and fed it to the Deck children because they were so hungry. Marietta would also squirt dish soap in the children's mouths and make them swallow it. She also would have testified that Marietta was particularly hard on Movant, saying that "he's

never going to amount to nothing, he's a piece of shit, we're bastards, our mother's a whore."

Tonia would have testified that when Movant was a teenager, their mother would fist-fight him. Movant also told Tonia that he was a "worthless piece of shit, that he's never going to amount to anything, that nobody ever loved him, all he wanted was for somebody to love him."

Although Tonia's testimony helped provide a complete picture of Movant's traumatic childhood, the decision not to call her as a witness at the penalty phase was undoubtedly reasonable trial strategy. Counsel did not want to put Movant's codefendant on the stand because counsel did not want to allow the prosecution to cross-examine her about the murders. Also, counsel was concerned that Tonia may be viewed as an additional victim because she was in prison for the crimes that she committed with Movant. "Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable." *Anderson v. State,* 196 S.W.3d 28, 37 (Mo. banc 2006); *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable...."). As counsel's decision not to call Tonia Cummings was one of reasonable trial strategy, counsel was not ineffective for deciding not to put her on the stand.

C. Movant was not prejudiced by counsel's decision not to present a neuropsychologist's testimony

Movant claims that counsel was ineffective because they were aware that he had sustained multiple head injuries and was malnourished as a child, yet they did not request funding to conduct neuropsychological testing on Movant. Movant's hospital records reflected the following head injuries: a "laceration on his forehead" when Movant was 6 years old, a "possible concussion" when he was in a car accident at age 13, an incident where he hit his head on the bars in prison when he was 19 that caused him temporary blurred vision and a "spinning" head, and a laceration on his head in 1992. Movant also told counsel that he hit his head during a car accident and that he had been struck in the head with a baseball bat during a fight. Finally, there was evidence that Movant woke up one morning with a knot on his head, not able to remember the previous night.

[22] Although Movant presents a list of injuries to his head, he does not present any evidence that his counsel was aware that those injuries caused brain damage. Further, he does not present any evidence, independent of his own post-conviction expert's testimony, that these injuries caused permanent damage at all. Because counsel did not have any reason to believe that Movant

suffered from a neuropsychological impairment, counsel did not explore presenting that type of evidence in mitigation. Movant fails to prove that counsel was ineffective for failing to do so because he was not prejudiced by the decision.

In an attempt to prove prejudice, Movant presented the testimony of a neuropsychologist, Dr. Gelbort, at the post-conviction ***354** hearing. Dr. Gelbort's findings, however, did not suggest that Movant suffered from impaired mental functioning. The results of testing showed that Movant had an IQ score of 91, which is within the normal range. Movant admits that "Dr. Gelbort did not find significant or moderate impairment on any of the [IQ tests, and his] scores were grossly within the normal range." Dr. Gelbort also stated in his testimony, "And for what it's worth, and to be ... very upfront with it, I've not described significant or even moderate impairment on any of these [IQ] tests." Dr. Gelbort also described Movant as performing in the "borderline defective range" on the Category Test. Movant admits, however, that "[i]n and of itself, the borderline impairment score on the Category Test does not mean anything."

To support his contention that counsel was ineffective in deciding not to pursue evidence of impaired neuropsychological functioning, Movant relies on *Hutchison*'s statement that "evidence of impaired intellectual functioning is inherently mitigating...." 150 S.W.3d at 308. Dr. Gelbort admitted, however, that he did not find significant or even moderate impairment on any IQ tests.

Further, Movant's case is readily distinguishable from *Hutchison*. *Hutchison* involved a movant who displayed objective signs of impaired intellectual functioning that his counsel failed to investigate. Hutchison's records showed that he had been diagnosed with significant mental disabilities and had an IQ of 78. *Id.* at 306; *id.* at 309 (Limbaugh, J., dissenting). Further, Hutchison's counsel was woefully unprepared for the penalty phase because they failed to conduct an investigation into Hutchison's life history, troubled background, and mental and emotional deficits. *Id.* at 297. Counsel obtained a cursory report from a mental health expert that identified some problems but failed to follow up on the issues uncovered in that report. *Id.* at 306. This Court held that counsel was ineffective for failing to conduct a thorough investigation and evaluation of these possible mitigators. *Id.* at 307–08.

In contrast, counsel in Movant's case conducted a thorough investigation into Movant's childhood, and there was no evidence of brain damage or impaired psychological functioning. Counsel made a decision not to pursue neuropsychological testing based on the facts they had gathered from their investigation. This Court, however, need not address whether this decision was one of reasonable trial strategy because Movant fails in his burden to show a reasonable probability that, had a neuropsychologist like Dr. Gelbort testified at his penalty phase hearing, the jury would have voted for life. Dr. Gelbort's testimony shows that Movant was not intellectually impaired, and his "borderline defective" score on the Category Test "did not mean anything" by itself. Movant was not prejudiced by counsel's decision not to conduct neuropsychological testing.

D. Counsel was not ineffective for failing to object to the prosecutor's cross-examination of Dr. Surratt

During Movant's penalty phase hearing, the prosecutor and Dr. Surratt engaged in the following transaction on cross-examination:

> **Prosecutor:** —Well I'm asking you—I didn't mean to cut you off—but I'm asking you about you being here today. Not prior work in this case, but being here today, you're here today to explain his behavior?
>
> **Dr. Surratt:** Yes.
>
> **Prosecutor:** And wouldn't it be easy or helpful to explain his behavior, if you had asked him why did you put a gun ***355** against these people's head and kill them?
>
> **Dr. Surratt:** And it could have, yes.
>
> **Prosecutor:** It could have, but it also could have been pretty detrimental to Mr. Deck, if he said, the reason I killed them is *because I'm a no-good s.o.b. and wanted them dead,* because I didn't want to go to prison. That wouldn't be a very good answer for Mr. Deck, would it?
>
> **Dr. Surratt:** It would have went along with my findings of how he responds to things; is it good or bad, not for me to say, but it certainly would have been fitting.
>
> **Prosecutor:** He wanting these people dead just because he wanted their money fits along with what you believe?
>
> **Counsel Tucci:** Objection; asked and answered.
>
> **The Court:** Sustained; move on, please.

(Emphasis added).

Movant contends that the prosecutor's question to Dr. Surratt, including the statement that "it also could have been pretty detrimental to Mr. Deck, if he said, the reason I killed them is because I'm a no-good s.o.b. and wanted them dead," was improper name-calling and an ad hominem personal attack on Movant designed to inflame the passions of the jury. Movant argues that his counsel was ineffective for failing to object to the statement.

In support of this proposition, Movant cites *State v. Banks,* 215 S.W.3d 118 (Mo. banc 2007). In *Banks,* during rebuttal to the defense's closing argument, the prosecutor stated:

> And, ladies and gentlemen, when the scene is set and held[6] and we have to go and catch the Devil, there are no angels as witnesses. This is Hell. He is the Devil. They aren't angels. He is guilty beyond a reasonable doubt.

Id. at 119.

The trial court permitted the prosecutor's argument over the defense's objection. *Id.* On appeal, this Court held that the trial court abused its discretion in overruling the defense's objection because the prosecutor's remark was "pure hyperbole, an ad hominem personal attack designed to inflame the jury." *Id.* at 121. Although *Banks* is instructive about what constitutes improper prosecutorial argument, it does not provide guidance as to when counsel's failure to object to such an argument would constitute ineffective assistance of counsel.

More on point, *State v. Storey,* 901 S.W.2d 886 (Mo. banc 1995), addresses when counsel is ineffective for failing to object. In *Storey* the prosecutor made multiple objectionable statements during opening and closing arguments. *Id.* at 900–02. The prosecutor argued facts outside the record by declaring that "[t]his case is about the most brutal slaying in the history of this county." *Id.* at 900. He also improperly personalized his argument to the jury:

> Think for just this moment. Try to put yourselves in [the victim]'s place. Can you imagine? And, then—and then, to have your head yanked back by its hair and to feel the blade of that knife slicing through your flesh, severing your vocal cords, wanting to scream out in terror, but not being able to. Trying to breathe, but not being able to for the blood pouring down into your esophagus.

Id. at 901. He also argued:

> I want you to think about that guy right there on the front row, [the victim's ***356** brother]. What if he had happened onto this brutal thing and seen his very close sister in the process of murdered? Would he have been justified in

> taking the Defendant's life? Yes. Without question. Without question.

Id. at 901–02. The victim's brother did not see the murder, and suggesting that he did only served to inflame the jury. *Id.* at 902. The argument also improperly equated the jury's sentencing function with self-defense by asking if the victim's brother would have been justified in taking the defendant's life if he was, in fact, present during the victim's murder. *Id.*

Finally, the prosecutor improperly weighed the value of the defendant's life against the value of the victim's, stating:

> Why do we have the death penalty? The reason we have the death penalty is because the right of the innocent people to live outweighs—by huge leaps and bounds, outweighs the right of the guilty not to die. The right of the innocent completely outweighs the right of the guilty not to die, and, so, it comes down to one basic thing. Whose life is more important to you? Whose life has more value? The Defendant's or [the victim]'s?

Id.

In spite of the fact that the prosecutor's arguments were obviously objectionable, Storey's counsel failed to object to any of them. *Id.* This Court held that "counsel's failure to object cannot be justified as trial strategy." *Id.* "A reasonably competent lawyer would have objected to the obviously improper arguments." *Id.* Further, this Court found that the counsel's failure to object was prejudicial and reversed Storey's death sentence. *Id.* at 902–03.

Storey was an extreme case of multiple inflammatory improper prosecutorial arguments that were presented at key junctures in the penalty phase hearing. Storey's counsel's failure to object under those circumstances clearly amounted to ineffective assistance of counsel. In this case, Movant's counsel did not fail their client as counsel in *Storey* did.

State v. Tokar, 918 S.W.2d 753 (Mo. banc 1996), is more analogous to Movant's counsel's performance in this case. In *Tokar,* the prosecutor stated that the "jurors might pray that their children will not have to experience what the [victim's] children went through with the murder of their father." *Id.* at 768. This Court reasoned that the movant correctly argued that the prosecutor's statement improperly personalized the argument and was error. *Id.* The prosecutor's error, however, did not justify reversal. *Id.* Applying *Strickland,* the movant was still required to prove that "trial counsel's failure to object did not conform to the degree of skill,

care, and diligence of a reasonably competent attorney and that he was prejudiced." *Id.* This Court noted:

> In many instances seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes. It is feared that frequent objections irritate the jury and highlight the statements complained of, resulting in more harm than good.

Id. Tokar held that the movant failed to overcome the presumption that the failure to object was a strategic choice by competent counsel. *Id.* This Court also held that the movant failed to prove prejudice. *Id.* "The level of aggravating circumstances in this case overcomes any reasonable probability that the outcome of the sentencing phase would have been any different in the absence of this remark by the prosecutor when considered in the context of the trial as a whole." *Id.*

Finally, this Court noted:

> ***357** [T]he alleged mistakes in this case do not equate to the "egregious errors, each compounding the other" that we found in *State v. Storey,* 901 S.W.2d 886, 902 (Mo. banc 1995). In that case, we reversed the defendant's sentence of death and remanded the cause for a new sentencing proceeding because defense counsel was ineffective in failing to object to the prosecutor's repeated argument of facts outside the record, personalization of the argument, and misstatement of the law. *Storey,* 901 S.W.2d at 902–03. The statements argued here simply do not compare.

Id. at 769.

[23] [24] Although the movant in *Tokar* failed to present any evidence during the post-conviction hearing regarding his counsel's failure to object to the prosecutor's improper argument, the testimony of Movant's counsel in this case only bolsters the conclusion that counsel's decision not to object was the exercise of reasonable trial strategy. *See id.* at 768.

Counsel Tucci could not specifically remember why he did not object to the prosecutor's statement, but he did state that he must have had a reason. Counsel Reynolds did not object because it was Tucci's witness, but he believed that Tucci may have not objected because he did not want to highlight the issue for the jury. He further noted that Tucci did object very quickly after the prosecutor's statement in question to "shut down" the prosecutor's argumentative line of questioning.

Although the hypothetical posed to Dr. Surratt in which Movant called himself a "no-good s.o.b." was improper on behalf of the prosecutor, counsel exercised reasonable trial strategy in not objecting to the statement. Counsel did not want to highlight the prosecutor's statement. Movant fails to overcome the presumption that counsel's failure to object was an exercise of reasonable trial strategy.

Further, Movant was not prejudiced by the prosecutor's statement when considering it within the context of the entire record. It was a brief statement that was subsequently "shut down" by counsel's objection. Just as in *Tokar,* "the alleged mistakes in this case do not equate to the 'egregious errors, each compounding the other' that we found in *State v. Storey.*" *Id.* at 769 (quoting *Storey,* 901 S.W.2d at 902). "The statements argued here simply do not compare." *Id.* The motion court did not clearly err in concluding that counsel's decision not to object was an exercise of reasonable trial strategy.

E. Counsel was not ineffective for failing to object to the prosecutor's arguments about Movant's prior conviction for aiding escape

Movant was convicted of aiding an escape from prison in 1985. This evidence was introduced at trial in the form of Movant's sentence and judgment for the crime. No other evidence was admitted. During closing argument, the prosecutor told the jury: "You can consider all his prior escapes." The transcript also reads:

> **Prosecutor:** While he's going to be in prison for the rest of his life if you let him live, remember, he knows how to escape. He aided and abetted others trying to.
>
> **[Movant's Counsel]:** Objection; not a noticed aggravator.
>
> **The Court:** Overruled.
>
> **[Movant's Counsel]:** Irrelevant.
>
> **The Court:** Overruled.
>
> **Prosecutor:** He knows how to escape, helping people that were in for the rest of their lives.

Movant contends that his counsel was ineffective for failing to object to: (1) the prosecutor's use of the term "all his prior ***358** escapes," when Movant was, in fact, only convicted once of aiding others in their escape; and (2) the prosecutor's statement that Movant helped individuals

escape "that were in for the rest of their lives," when there was no evidence as to how long the individuals' sentences were.

On direct appeal, this Court reviewed these same prosecutorial statements for plain error and found that after reviewing the entire record, movant was not prejudiced by those statements. *Deck IV,* 303 S.W.3d at 542–43.

[25] [26] This Court's determination that no plain error prejudice resulted from the prosecutor's statements does not end the inquiry in this case, as the *Strickland* standard of prejudice is less exacting than the plain error standard. *Deck II,* 68 S.W.3d at 425–29. Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. *Id.* at 427. In contrast, *Strickland* prejudice requires a *reasonable probability* that the result would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. 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...." *Deck II,* 68 S.W.3d at 428. There are only a "small number of cases in which the application of the two tests will produce different results." *Id.* Movant's case is not one of those cases.

[27] [28] Looking at the prosecutor's misstatement in the context of the entire record, the failure of counsel to object to the prosecutor's simple misstatement in using the plural form did not prejudice Movant under the plain error standard or the *Strickland* standard. Further, in the context of the entire record, the motion court did not clearly err in determining that the length of the sentences of the individuals whom Movant aided in escape was not "consequential or significant." Movant fails to prove that, but for counsel's failure to object to these prosecutorial misstatements, there was reasonable probability that the result of Movant's sentencing phase would have been different. The motion court did not clearly err in denying Movant relief on this point.

IV. Movant is not entitled to a new trial based on the trial court's alleged destruction of the juror questionnaires

[29] Movant argues that the motion court erred in denying his motion for a new trial because the trial court destroyed the juror questionnaires in violation of Court Operating Rule 4.21 and Rule 27.09(b). Movant contends that if he had been able to review the juror questionnaires of three particular jurors, he would have been able to determine whether their responses to the questions showed any bias against the defense. He contends that two of the jurors in question may have been biased because counsel noted juror Wheeler was "staring down [Movant]" and that Movant

"does not like" juror Hayden. He also contends that the juror questionnaire may have provided more insight into why juror Holt knew a few Jefferson County bailiffs.[7]

Movant contends that, under the standard set forth in *In re R.R.M v. Juvenile Officer,* 226 S.W.3d 864, 866 (Mo.App.2007), a defendant is entitled to a new trial if he exercised due diligence in attempting to obtain a complete record and is prejudiced by the incomplete nature of the record. ***359** It is not clear from the record whether the juror questionnaires were actually destroyed by the trial court, but the motion court's denial of Movant's request to review the juror questionnaires stated they had been destroyed.[8] Regardless of whether the questionnaires were destroyed by the trial court, copies of the juror questionnaires for the 12 jurors who served during the penalty phase trial have been filed with this Court and stipulated to by both parties. The questionnaires asked general questions about the juror's personal information, including name, address, employer, marital status, duration of residence in the county, persons living with the juror, and contact information. Additionally, each questionnaire asked the juror to check "yes" or "no" in response to the following questions:

3. Have you previously served as a juror anywhere?

....

6. Have you or members of your immediate family ever suffered an accidental physical injury?

....

7. Have you or members of your immediate family ever been a party to any lawsuit for damages?

....

8. Has a CLAIM for personal injury ever been made against YOU?

....

9. Have you ever made any CLAIM for personal injury?

....

10. Are you related to or close friends with any law enforcement officer?

Movant fails to prove prejudice as required by *In re R.R.M.* Jurors Wheeler and Hayden provided no additional information on their juror questionnaires other than their basic personal information and the answers to the yes or no questions contained in the questionnaire. Nothing

in their responses indicates they would be biased against the defense. Juror Holt's juror questionnaire also contained no information beyond the yes or no responses requested on the form. Movant was not prejudiced because the juror questionnaires did not provide evidence that any juror was biased against the defense. Movant was not entitled to a new trial.

V. Conclusion

Movant has failed to prove that the motion court clearly erred in denying him post-conviction relief or erred in denying his request for a new trial. The judgment is affirmed.

All concur.

All Citations

381 S.W.3d 339

Footnotes

1 A full recitation of facts underlying Movant's conviction is available in *Deck I.*

2 Because the death penalty was imposed, this Court has jurisdiction pursuant to article V, section 3 of the Missouri Constitution.

3 Because counsel's performance was not deficient, there is no need to address Movant's argument that the motion court's refusal to permit him to interview the jurors prevented him from proving prejudice under the second prong of *Strickland.*

4 A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

5 Movant also contends that the trial court abused its discretion in determining that Latisha Deck was not competent to testify due to her mental disabilities. This Court need not address whether the trial court abused its discretion because Latisha's testimony would have been cumulative.

6 It was noted in *Banks* that this was likely a transcription error and should have read "the scene is set in Hell." *Id.* at 119 n. 2.

7 Movant also stated that he wanted access to the juror questionnaires to obtain juror contact information so that he could contact the jurors. As discussed above, Movant was not entitled to contact the jurors. The failure to obtain contact information did not result in prejudice.

8 In Movant's motion below, his counsel explained:
Counsel then called Division 2 and explained that she was trying to get a copy of the questionnaires, and she was forwarded to

> Pam with the Circuit Clerk's office. Counsel explained the specific circumstances of the case. Pam informed counsel that the questionnaires had been destroyed. As such, counsel had not been able to locate the questionnaires or obtain all of the jurors' correct addresses and information. On Thursday afternoon, August 26, counsel learned that the questionnaires are in the court file (a public defender investigator went to Division 2, and the clerk then discovered that the questionnaires were in the file but could not release them without the Judge's approval). Counsel had court out of town on Friday, August 27, and so will not be able to seek to obtain copies of the questionnaires, by motion, on or after the due date of this amended motion (August 30,2010).

Then, on October 12, 2010, the motion court denied Movant's motion to review juror questionnaires because "the questionnaires have been destroyed."

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1617

Carman L. Deck

Appellant

v.

Troy Steele and Joshua D. Hawley, Missouri Attorney General

Appellees

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:12-cv-01527-CDP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Benton did not participate in the consideration or decision of this matter.

October 10, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans