IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MIGUEL VACA,	)	
	)	
Appellant,	)	WD69004
	)	
vs.	)	Opinion Filed: October 13, 2009
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF PLATTE COUNTY, MISSOURI
The Honorable Owens L. Hull, Jr., Judge

Before Court En Banc: Thomas H. Newton, Chief Judge, James E. Smart, Jr., Judge, Joseph M. Ellis, Judge, Victor C. Howard, Judge, Lisa White Hardwick, Judge, James E. Welsh, Judge, Alok Ahuja, Judge, Mark D. Pfeiffer, Judge and Harold L. Lowenstein, Senior Judge

Miguel Vaca appeals the judgment of the motion court denying his Rule 29.15 motion for postconviction relief following an evidentiary hearing. Vaca sought to vacate his convictions for two counts of first degree robbery, section 569.020[1], one count of attempted first degree robbery, section 564.011, three counts of armed criminal action, section 571.015, and one count of assault in the second degree, section 565.060, and total sentence of life plus 102 years. He claims that he was provided ineffective assistance of counsel regarding several evidentiary issues. The judgment is affirmed.

[1] All statutory references are to RSMo 2000, unless otherwise indicated.

Factual Background

Vaca's convictions arise from three robberies or attempted robberies in Kansas City North in October and November 2002. On the evening of October 21, 2002, a man wearing a ski mask and holding a gun entered Salon North on Barry Road. He told Victoria Lynn and her customer Alicia Stevens to "give me your money." When neither responded, the man repeated his demand. Ms. Lynn then told him that she had no cash in the store because all of her customers paid by check. The man pointed his gun at the two women and told them to get their purses. He took a dollar bill from Ms. Lynn and grabbed her crotch from behind. Ms. Lynn spun around and shook her finger at him, stating that "you don't need to grab me like that." The man told the women to get on the floor and wait until he was gone. He then left.

When police arrived, Ms. Lynn and Ms. Stephens gave similar descriptions of the suspect: Hispanic, 5'6", average weight, and with a dark mask and a dark gun. Ms. Stephens also described the suspect as having a heavy lisp or speech impediment.

Immediately prior to the Salon North robbery, John Copeland was leaving work at Quality Cleaners (located next door to Salon North) when he bumped into a man on a mountain bike who was placing a ski mask over his face. Mr. Copeland continued to his car and then drove past the Quality Cleaners store to make sure his boss was all right. Seeing nothing amiss, Mr. Copeland left the area. When he heard the next day that Salon North had been robbed, he contacted the police to describe the man he had encountered the night before as in his 40's, 5'4" tall, and weighing 150 pounds.

On October 30, 2002, at approximately 5:00 pm, Mr. Copeland was working at the cleaners when a man wearing a ski mask entered the store. Mr. Copeland recognized this individual as the same person he had seen on the night of the Salon North robbery. The man pointed a black revolver at Mr. Copeland and told him to "give me the change." When Mr.

Copeland did not immediately comply, the man shot his gun towards the ceiling. Mr. Copeland then handed over all the cash in the register, totaling approximately $100. The man told Mr. Copeland to lie on the ground and left.

When the police arrived at Quality Cleaners, Mr. Copeland informed them that this was the same individual he had seen before the Salon North robbery. Mr. Copeland also mentioned that the man had a unique lisp.

On November 15, 2002, a children's birthday party was taking place on the second floor of the clubhouse at the Cove's North Apartments, close to the location of the earlier robberies. The party was attended by six girls, one boy, and one adult, Lorie Seper. During the party, a man wearing a dark ski mask and armed with a dark colored revolver entered the room and ordered all the children to get on the ground. Ms. Seper later described the suspect as a 5'6" man of "maybe a hundred and sixty pounds." The man demanded money from Ms. Seper, who emptied her purse to show him that she did not have any money. Because he was upset that she didn't have any cash, Ms. Seper told the man that she had money in her apartment. The gunman shoved his pistol in her side and forced her out of the room. One of the party's guests, a twelve-year-old girl, got up and told the gunman to leave Ms. Seper alone. The man pointed his gun at the girl and told her to sit down and shut up. The children cried and prayed after the gunmen led Ms. Seper out of the room.

The gunman forced Ms. Seper to the bottom of the steps and tried to force her into a restroom. Afraid that he was going to rape or shoot her, Ms. Seper tried to pull away. The man hit her in the head with the gun, and Ms. Seper got loose and ran. She ran outside and screamed for help. Robert Clardy, another resident of the apartment complex, was walking from his car to the building when he heard Ms. Seper screaming and saw her running. Mr. Clardy saw a man

running toward him, pointing a gun. The man told Mr. Clardy to "get your ass up the steps," then fired a shot, which hit a wall behind Mr. Clardy. The children, who were still in the clubhouse, heard the gunshot and became even more upset, thinking that the gunman had shot Ms. Seper. The suspect fled the scene.

Investigators believed the same suspect had committed all three crimes. Police prepared a flyer containing a description of the suspect developed from the witness statements and asking that anyone with information about the robberies contact them. The flyer described the suspect as a Hispanic or white male, 30 to 45 years of age, 5'4" to 5'8" tall, with a thin build, wearing a dark mask, armed with a dark-colored handgun, with a lisp or strong accent, and riding a bicycle.

In each of the robberies, the gunman was reported to have fled toward the neighboring Cove's North and Quail Run apartment complexes. On November 20, 2002, the police distributed their flyers to anyone who entered or left the apartment complexes. One of the detectives was approached by a woman and her son, who pointed to a townhouse and said that they thought that a Hispanic man lived there and rode a bicycle.

Shortly thereafter, a cab pulled up in front of this townhouse. The appellant, Miguel Vaca, got into the cab and hunched down in the back seat. Police officers approached the cab and handed Vaca a flyer. He appeared nervous, and the officers noticed that he spoke with a lisp or speech impediment and matched the description of the robbery suspect.[2] Vaca was asked for his identification, and the police discovered that he had an outstanding arrest warrant. Vaca was arrested and consented to a search of his residence.

In Vaca's apartment the police found a black and purple mountain bike, a Taurus .38-caliber revolver, a receipt for the gun in Vaca's name, .38-caliber ammunition, and some torn

[2] Vaca was forty-three years old and weighed one hundred sixty pounds when arrested. He is 5'6" tall.

blue fabric that appeared to have been a mask. Ballistics tests confirmed that bullet fragments recovered from Quality Cleaners and the Cove's North Apartments had been fired from Vaca's gun. Officers also recovered approximately $435 in cash, including a one dollar bill with the following handwritten notations: "October 21, 2002," "Salon North," and references to the fact that there was a female with a "nice ass," and a demand for money. A handwriting expert compared the writing on the bill to the handwriting samples submitted by Vaca and concluded that the writing on the bill was his.

After being arrested, Vaca was taken to the police station where he waived his *Miranda* rights and was interrogated. When asked what had happened at Salon North, Vaca told the detective that "I have psychological problems and sometimes I do things wrong." Vaca then described specific details of the robberies at Salon North, Quality Cleaners, and the Cove's North Clubhouse and admitted to committing all three robberies. However, Vaca stated that he did not remember being involved in a robbery committed in the same vicinity at KC Collectibles, which police were also investigating as part of the series of robberies.

At trial, Vaca testified on his own behalf, denying that he had committed any of the robberies. He contended that when the police questioned him, he denied knowing anything about the robberies. He also testified that the police forced him to write the incriminating evidence on the dollar bill in question.

The jury found Vaca guilty as charged. He was sentenced in accordance with the jury's recommendation to life imprisonment for robbery in the first degree for the Quality Cleaners robbery and ten years imprisonment for the associated armed criminal action count; thirty years imprisonment for robbery in the first degree for the Salon North robbery and ten years imprisonment for the associated armed criminal action count; fifteen years imprisonment for

attempted robbery in the first degree for the crime at Cove's North and thirty years imprisonment for the associated armed criminal action count; and seven years imprisonment for assault in the second degree for striking Ms. Seper in the head with the gun. His convictions and sentences were affirmed by this court in a summary order and accompanying memorandum. *State v. Vaca*, 204 S.W.3d 754 (Mo. App. W.D. 2006).

Vaca filed a Rule 29.15 motion for postconviction relief, which was subsequently amended by counsel. Following an evidentiary hearing, the motion court issued findings of fact and conclusions of law denying Vaca's motion. This appeal followed.

Standard of Review

Appellate review of the denial of a postconviction relief motion is limited to determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous. Rule 29.15(k); *Zink v. State*, 278 S.W.3d 170, 175 (Mo. banc 2009). Findings and conclusions are clearly erroneous only if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *Zink*, 278 S.W.3d at 175 (quotes and citations omitted).

Ineffective Assistance of Counsel Claims

Vaca asserts three points on appeal. In his first point, he argues that his trial counsel was ineffective for failing to call Dr. Bill Geis, a clinical psychologist who had examined Vaca before trial, to testify in the sentencing phase of his trial and for failing to obtain and provide to Dr. Geis additional records concerning his mental state. Vaca's second point alleges that he received ineffective assistance when his attorney elicited evidence of an uncharged robbery and assaults at KC Collectibles on October 28, 2002, during the defense case-in-chief. Finally, Vaca alleges in point three that his counsel was ineffective for eliciting testimony that he had previously pleaded guilty to the charged crimes.

On a claim of ineffective assistance of counsel, the burden is on the movant to prove by a preponderance of the evidence that (1) counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances, and (2) counsel's deficient performance prejudiced him. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Counsel's conduct is presumed reasonable and effective, and to overcome this presumption, the movant must identify "specific acts or omission of counsel that, in light of all the circumstances, fell outside the wide range of professional competent assistance." *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006). To demonstrate prejudice, the movant must "show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Evidence of Mental Condition at Sentencing Hearing

In his first point on appeal, Vaca argues that his trial counsel was ineffective in failing to call Dr. Bill Geis to testify during the sentencing phase and in failing to obtain and provide to Dr. Geis additional records pertaining to his mental state. He contends that counsel's failures prejudiced him because the jury was not provided with relevant information on his mental illness, which would have had a mitigating effect on the punishment assessed by the jury.

Trial counsel testified at the evidentiary hearing that his pre-trial meetings with Vaca raised concerns regarding Vaca's mental health. Accordingly, counsel retained Dr. Geis to examine Vaca for competency and to assist him in determining whether there were any mental health issues that might be used as a defense. Counsel provided Dr. Geis with medical records from Dr. Martin Rhodes and Dr. Susan Laningham as well as some bills for medications that Vaca received while at the Platte County Jail.

Dr. Geis prepared a written psychological evaluation report in which he diagnosed Vaca with Schizophrenia, paranoid type; Dysthymia, early onset (chronic, low-level depression); Post-Traumatic Stress Disorder; Alcohol Abuse; and Borderline Intellectual Functioning. The report noted that Vaca's prior physicians had prescribed anti-psychotic, anti-depressant, and anti-anxiety medicines but that at the time of the crimes, Vaca had not been taking his psychiatric medication because he was having trouble with his insurance. At the time of the interview, Vaca was again taking an anti-depressant, a sleep medication, and anti-psychotic and anti-anxiety medicines that had been prescribed by the detention center doctor.

Dr. Geis's report indicated that Vaca has a history of paranoid schizophrenia in his extended family. The report explained that the diagnosis of schizophrenia was corroborated by Vaca's history of "symptoms of confusion, auditory hallucinations (voices), visual hallucinations (seeing burning people) and extremely poor social and occupational functioning." Vaca reported that prior to committing the crimes, he had "'visions of people burning in fire, yelling and screaming, trying to pull me in.'"

Dr. Geis's report also explained that Vaca reported chronic symptoms of Post-Traumatic Stress Disorder including "nightmares, flashbacks, a startle response and efforts to keep intrusive memories out of his awareness." Prior to the crimes, Vaca had "flashbacks of experiences he had in his 20's of 'one guy choking me real bad.'" Furthermore, Vaca "report[ed] longstanding symptoms of [d]ysthymia…, including very poor sleep, crying jags…, dejection, demoralization, interpersonal withdrawal, fatigue, low motivation and anhedonia." Finally, Dr. Geis determined that Vaca had a "Full Scale IQ" of 73 "suggesting that [Vaca] has always operated in this lower range of intellectual functioning that is consistent with other low-functioning, non-mentally retarded individuals."

Dr. Geis's report found Vaca competent to stand trial. The report also concluded:

> The defendant has a serious mental disease – schizophrenia – that clearly could have had an impact on his ability to form rational thought and conform his behavior to the expectations of society at the time of the offense. This condition of schizophrenia is corroborated by other medical personnel and appears to have been in existence for most of his life. He also has a condition of low intelligence (borderline intellectual functioning) that could have affected his ability to understand the impact of his actions.

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

Section 557.036, RSMo Cum. Supp. 2003, provides for bifurcated trials in non-capital criminal cases "to permit a broader range of evidence relevant to the appropriate punishment to be imposed." *Cardenas v. State,* 231 S.W.3d 835, 838 (Mo. App. W.D. 2007) (citation and internal quotations omitted). The statute provides that "[e]vidence supporting or mitigating punishment may be presented." § 557.036.3. "Such evidence may include, within the discretion of the court, evidence concerning…the history or character of the defendant." *Id.*

In arguing that counsel's failure to call Dr. Geis prejudiced him because information regarding his mental illness would have had a mitigating effect on the punishment assessed by the jury, Vaca essentially urges this court to graft onto non-capital cases the enhanced responsibility imposed on counsel in capital cases. In capital cases, defense counsel has a heightened duty to present mitigation evidence to the jury because of the unique nature of capital sentencing. *Taylor v. State,* 262 S.W.3d 231, 249 (Mo. banc 2008) (Per Stith, J., with two

justices concurring and one justice concurring in the result). Indeed, "[p]revailing professional standards for capital defense work require counsel to 'discover all reasonably available mitigating evidence.'" *Glass v. State*, 227 S.W.3d 463, 468-69 (Mo. banc 2007) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)). "'Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 822 (1991)).

The obligation imposed on a capital defense attorney to present mitigating evidence in the penalty phase[3] has not, however, been imposed on counsel in a non-capital case. *Lambert v. Blodgett*, 393 F.3d 943, 983 (9th Cir. 2004). And for good reason. In a death penalty case there is less risk in introducing potentially mitigating evidence. The effort is to avoid the ultimate punishment. The jury knows the defendant will never be released from prison regardless of the sentence imposed. There is no concern of a dangerous person being released into society. The question is one of life or death.

In non-capital cases, however, injecting all conceivably palliative evidence carries risk. It could further inflame or trouble a jury. For example, the jury could be exposed to information that may lead it to conclude that the defendant is best institutionalized for the safety of himself and others. Such is the case here. While under 557.036.3, Dr. Geis's testimony regarding Vaca's mental condition may have been admissible in the sentencing phase of Vaca's trial, his counsel's failure to present such testimony did not constitute ineffective assistance. Specifically,

[3] *See Wiggins*, 539 U.S. at 524 (counsel's failure to adequately investigate mitigating evidence relating to defendant's background constituted ineffective assistance in capital case); *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000)(counsel's failure to present mitigation evidence of physical abuse and neglect of defendant as a child was ineffective assistance in capital trial); *Glass*, 227 S.W.3d at 469-71 (counsel's failure to call medical doctor, former teachers, probation officers, and experts to present mitigating evidence constituted ineffective assistance in capital trial); *Hutchison v. State*, 150 S.W.3d 292, 304-08 (Mo. banc 2004)(counsel's failure to investigate defendant's life history and present evidence of his impaired intellectual functioning during penalty phase of capital murder trial was ineffective assistance).

Vaca was not prejudiced by counsel's failure to introduce Dr. Geis's testimony because the mitigating value of his testimony was highly speculative, and the absence of such did not undermine confidence in the outcome of the sentencing phase of the trial.

Dr. Geis's conclusion was that Vaca's schizophrenia "could" have had an impact on his ability to form rational thought and conform his behavior to the law and that his low intelligence "could" have affected his ability to understand the impact of his actions. Furthermore, the jury heard evidence that Vaca confronted numerous people with a handgun. In one of those instances, he terrorized a group of children and pointed his gun directly at a twelve-year-old girl. He abducted the mother of one of the children and hit her in the head with his gun. Vaca then shot at a man who tried to come to her aid. During one of the robberies, he grabbed a female victim's crotch. He also fired his gun during another robbery. Given the heinous acts Vaca committed, it is difficult to imagine a jury would be more lenient when confronted with evidence that he struggles to control his actions, has symptoms of confusion, hears voices, hallucinates, feels agitated, and has bizarre nightmares and flashbacks. From Dr. Geis's testimony, the jury could have easily concluded that Vaca's mental condition, while not providing a legal reason to find him not guilty, did render him too dangerous to be at-large and that a lengthy sentence was necessary for the safety of the community. While Vaca understandably received substantial sentences for his crimes, he by no means received the maximum. It is just as reasonable to assume Dr. Geis's testimony would have had an aggravating effect rather than supply an argument for mitigation. As Vaca's counsel acknowledged during oral argument, had trial counsel provided this evidence for the jury's consideration, he could have been second guessed because of its negative impact on sentencing.

Vaca speculates that he received a harsher sentence because the jury did not have sufficient information to evaluate his mental difficulties. It is just as plausible that the sentences were simply the result of the seriousness of the crimes coupled with Vaca's implausible denials and incredible testimony. Vaca did not establish that counsel's failure to call Dr. Geis to testify at the sentencing hearing constituted ineffective assistance of counsel.

Similarly, Vaca failed to prove that counsel was ineffective in failing to obtain and provide to Dr. Geis additional records pertaining to his mental state. At the evidentiary hearing, Dr. Geis acknowledged that Vaca's motion counsel provided him with additional records to review regarding Vaca's mental condition that trial counsel had not provided. These included school records; a psychiatric report by prepared by Dr. Rajiv Parikh when Vaca attempted to obtain social security benefits while living in Arizona; social security disability records from Kansas City; records from Dr. Laningham, who saw Vaca three days before the first charged crime; and medical and psychiatric records from the Platte County Jail.

"When pursuing evidence, trial counsel has a duty to make a reasonable professional investigation, or make a reasonable decision that the particular investigation is unnecessary." *Alhamoud v. State,* 91 S.W.3d 119, 121 (Mo. App. E.D. 2002)(citing *Moore v. State*, 827 S.W.2d 213, 215 (Mo. banc 1992)). To prove ineffective assistance of counsel based on inadequate investigation, "the movant must not only allege what specific information trial counsel failed to discover and that a reasonable investigation would have disclosed that information, but also that the information would have aided the movant or improved the movant's position." *Id.*

Vaca failed to establish that the further evidence of his mental condition would have aided or improved his position or that it was reasonably probable that the jury would have recommended a shorter prison sentence if it had had the information. Dr. Geis testified that the

additional records did not change his opinion regarding Vaca's mental health but served only to confirm that opinion. Furthermore, some information contained in the records might have proved harmful to Vaca's case. For instance, Dr. Geis acknowledged that one of the evaluations included in the social security records provided by motion counsel indicated that Vaca may have been exaggerating some of his symptoms or even making them up. And as with Dr. Geis's testimony, the mitigating value of the additional evidence was debatable. The additional records could have reinforced the jury's conclusion that Vaca was unfit to live in society. The motion court did not clearly err in denying Vaca's claims. Point one is denied.

Evidence of Uncharged Robbery and Assaults at KC Collectibles

In his second point, Vaca alleges that he received ineffective assistance of counsel at trial when his attorney elicited evidence of an uncharged robbery and assaults at KC Collectibles on October 28, 2002, during the defense case-in-chief. Originally, in addition to the three robberies for which he was convicted, Vaca was also charged with several offenses arising out of a robbery of KC Collectibles that occurred on October 28, 2002, including two counts of assault in the second degree for striking Connie Miller and Margaret Francis, who were in the store, with a gun. Subsequently, the State filed an amended information, dropping all charges against Vaca pertaining to the KC Collectibles robbery.

Prior to trial, the State filed a motion in limine to exclude all evidence pertaining to the KC Collectibles robbery. Vaca's counsel opposed the motion because he believed as a strategic matter that evidence pertaining to the KC Collectibles robbery supported the defense theory that Vaca did not commit the other three robberies with which he was charged and that the police had engaged in a "rush to judgment" in accusing him. Specifically, when police were investigating the KC Collectibles robbery, it was their belief that the same individual committed all four

robberies because they all shared similar characteristics; for example, one of the witnesses to the KC Collectibles robbery thought she saw the suspect ride away on a bicycle. Accordingly, at the hearing on the postconviction relief motion, Vaca's trial counsel explained that, because of these similarities, he advanced the theory at trial that it was the unidentified person who robbed KC Collectibles, not Vaca, who was responsible for all four robberies. Supporting this theory was the fact that one of the victims of the KC Collectibles robbery had identified another individual in a photo line-up as the perpetrator.

A decision of trial strategy may only constitute ineffective assistance if it is unreasonable. *Zink*, 278 S.W.3d at 176. "Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." *Anderson*, 196 S.W.3d at 33. "'[S]trategic choices made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable.'" *Id.* (quoting *Strickland*, 466 U.S. at 690). A court should rarely second-guess counsel's choices where counsel has investigated possible strategies. *Id.*

Here, both the trial and postconviction records reflect that Vaca's counsel embarked upon a specific, considered trial strategy in choosing to present evidence of the KC Collectibles robbery. Vaca has failed to demonstrate that counsel's strategy was unreasonable. The motion court did not clearly err in rejecting this claim. Point two is denied.

Evidence that Vaca Had Previously Pleaded Guilty to the Charged Crimes

Finally, Vaca alleges in point three that his counsel was ineffective when he opened the door to Robert Clardy's testimony that Vaca had pleaded guilty to the instant charges. Mr. Clardy was the individual at whom Vaca fired a shot during the attempted Cove's North robbery.

During cross-examination of Mr. Clardy, counsel sought to emphasize that Mr. Clardy had been ignored by law enforcement. The following exchange occurred:

> Q. [D]o you remember who was the next person to physically meet with you and talk to you about this case?
>
> A. No one.
>
> Q. No one from law enforcement?
>
> A. No.
>
> Q. Over the two years they never came to ask you about it?
>
> A. I've received letters saying that it was – the court – the cause was continuance – continuance. And I received one that he had pled guilty.
>
> Q. Okay.
>
> A. And that was that.
>
> Q. Okay. Do you have a copy of that letter?
>
> A. No.
>
> Q. Okay. Let me – let met ask you: Did you ever feel left out of this?
>
> [The State]: Objection. Irrelevant.
>
> [The Court]: Sustained.
>
> Q. Do you recall me and my investigator coming to see you?
>
> A. Yes.
>
> Q. And do you recall telling us that you were somewhat frustrated that no one –
>
> [The State]: Objection, Your Honor. Irrelevant.
>
> [The Court]: Sustained.
>
> Q. No further questions, sir.

(Emphasis added.)

On March 25, 2004, and June 10, 2004, Vaca attempted, unsuccessfully, to enter pleas of guilty to the charges in question. While any reference to these attempted guilty pleas was improper under to Rule 24.02(d)(5), Vaca did not receive ineffective representation in this regard. At the hearing on the postconviction relief motion, Vaca's counsel stated that he was "surprise[d] and shock[ed]" by Mr. Clardy's response regarding a guilty plea because he was unaware that the prosecutors had notified victims about Vaca's attempts to plead guilty. No one disputes that Vaca's counsel did not intend to elicit information regarding these attempted guilty pleas but was instead attempting to demonstrate that Mr. Clardy had felt left out of the process of investigating the crimes and prosecuting the suspect. Vaca has failed to demonstrate that counsel's strategy was unreasonable.

Furthermore, Vaca's counsel in fact requested a mistrial based on Mr. Clardy's statement. While this motion was denied, counsel asserted the objection and preserved the issue for appellate review. While Vaca now argues counsel should also have requested that the jury be admonished to disregard Mr. Clardy's remark, such objections may simply serve to "highlight the statements complained of, resulting in more harm than good." *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996); *State v. Clay*, 975 S.W.2d 121, 136 (Mo. banc 1998) (defense counsel exercised reasonable strategic judgment in failing to object to prosecutorial statement in opening "in order not to highlight this relatively gruesome statement for the jury").

Regardless, Vaca failed to demonstrate that he was prejudiced by counsel's actions. The evidence of Vaca's guilt was overwhelming. He confessed to the crimes. He matched the physical description given by the victims of the three robberies, and the jury had the opportunity to decide from Vaca's testimony whether he had the "lisp" or speech impediment that many of the victims had described. When the police searched Vaca's home, they found a dark ski mask, a

dark-colored handgun, and a mountain bike, all used in the crimes. Police also found a dollar bill containing Vaca's handwriting, providing incriminating details of one of the offenses. Finally, ballistics testing tied Vaca's handgun to bullets or bullet fragments recovered from two of the crime scenes. In these circumstances, and given the isolated and unprompted nature of Mr. Clardy's remark, Vaca has failed to demonstrate sufficient prejudice. *See State v. Banks*, 215 S.W.3d 118, 121 (Mo. banc 2007) ("[O]verwhelming evidence of guilt may lead an appellate court to find that a defendant was not prejudiced by trial court error."). The motion court did not clearly err in denying this claim. Point three is denied.

The judgment of the motion court is affirmed.

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VICTOR C. HOWARD, JUDGE

Smart, Welsh, Pfeiffer, JJ. and Lowenstein, Sr. J., concur in the opinion of Howard, J., for the court.
Ahuja, J., dissents in separate dissenting opinion.
Newton, C.J., Ellis, J. and Hardwick, J. concur in dissenting opinion.

In the Missouri Court of Appeals
WESTERN DISTRICT

MIGUEL VACA,	**)**	
APPELLANT,	**)**	
	)	
v.	**)**	**WD69004**
	)	**OPINION FILED: OCTOBER 13, 2009**
STATE OF MISSOURI,	**)**	
RESPONDENT.	**)**	

CONCURRING OPINION

I agree with the opinion of the majority on all points. There is very little authority in non-capital cases in Missouri granting relief for ineffectiveness of counsel in sentencing. I write separately merely to express some thoughts as to the reasons for that fact.

Missouri does not have formal, enforceable sentencing guidelines. The discretion of the sentencing entity within the lawful range is not regulated. Accordingly, it is often extremely difficult to show that, if counsel had done something different, the "result" would probably have been different. Generally, what is required is some objective and quantitative sentencing guideline or category that counsel's failure adversely affected. Otherwise, in cases of alleged ineffectiveness based on a failure to present mitigating evidence, the appellate court is merely speculating as to the probable effect of the evidence in question on the sentence.

This principle is illustrated in *Glover v. United States*, 531 U.S. 198 (2001). There, the petitioner claimed that his counsel's failure to argue for "grouping" of offenses under the federal sentencing guidelines constituted ineffectiveness of counsel. The petitioner argued that instead of 84 months of incarceration (which was the sentence imposed) he should have been sentenced within a different guideline, which would have resulted in a sentence that was at least six months less and perhaps as much as twenty-one months less. The district court, without addressing the merits of whether the offenses should have been "grouped" for sentencing purposes, denied the motion on the ground that the increase in sentence was not sufficiently significant to amount to *Strickland* prejudice. The Court of Appeals affirmed. On certiorari, the Supreme Court held that a demonstrable increase in "actual jail time" in confinement resulting from ineffectiveness would have constitutional significance. *Id*. at 203. The court remanded the case for the court for further proceedings including, if appropriate, resentencing. *Id*. at 205.

In Missouri, this principle is illustrated in *Eskridge v. State*, 193 S.W.3d 849 (Mo. App. 2006) and *Pettis v. State*, 212 S.W.3d 189 (Mo. App. 2007). In *Eskridge*, the movant had pleaded guilty to two offenses based upon a plea agreement that her sentences would run concurrently. Her plea counsel, however, failed to make a record with the sentencing court that the plea agreement was for concurrent time. *Eskridge*, 193 S.W.3d. at 851. Counsel also failed to object to the imposition of consecutive sentences. *Id*. The court held that the ineffective assistance of counsel rendered the movant's plea involuntary, and directed that the plea be vacated. *Id*.

In *Pettis*, the movant was charged with drug offenses that he committed while incarcerated. The movant, at the time of the offenses, was serving a life sentence for murder. *Pettis*, 212 S.W.3d at 191. The movant entered his plea of guilty pursuant to an agreement for a

sentence of five years, leaving it up to the court to determine whether to cause the sentence to run concurrent with his life sentence, or consecutive to it. *Id*. Prior to and at the sentencing hearing, counsel failed to advise the defendant and the court that, according to the Rules and Regulations of the Board of Probation and Parole, the defendant would *never* be eligible for parole consideration if the sentence was consecutive. *Id*. at 192-93. The court, in fact, asked counsel about the effect of a consecutive sentence on parole eligibility, and counsel speculated that the defendant's parole eligibility would be "pushed back." No one realized, however, that a consecutive sentence would entirely preclude eligibility for parole. *Id*. On appeal, the court held that the claim of ineffective assistance in sentencing was cognizable. *Id*. at 194. The court further held that ineffective assistance was demonstrated, and that such ineffective assistance was shown to be prejudicial. *Id*. at 195. The court remanded the case for resentencing. *Id*. at 196.

These were not cases where counsel allegedly failed to present mitigating evidence at sentencing. Typically, a movant cannot *show* that the presentation of certain omitted factors at sentencing would have created a reasonable probability that the movant would have received a shorter sentence. *See, e.g., Eichelberger v. State*, 134 S.W.3d 790 (Mo. App. 2004) (movant alleged counsel ineffective in failing to present character witnesses).

The sentencing process differs from the determination of guilt, which, to a large extent, employs logical and factual analysis to decide the facts. The ultimate question in the guilt phase is always a yes or no issue: did the defendant commit the offense or not? The sentencing phase, instead of being concerned with determining from evidence the pertinent facts as to the accusation, is concerned with how to deal with the offender as a person in light of what the defendant has done, giving regard to such matters as the nature of the offense, the offender's

degree of culpability, the victim impact, the offender's previous record, and such highly subjective factors as the sentencer's view of the offender's character, history, age, attitude (including attitude toward the criminal process), and dangerousness. The question of what is the most appropriate sentence will be answered in different ways by different people. Evidence that seems mitigating to five jurors may seem to warrant a greater sentence to three others—or six others. In short, for all practical purposes, it is necessarily an exercise in highly subjective speculation to conclude that there is any reasonable probability that if counsel had presented additional evidence, the result would have been different.

Another reason there are few cases like Vaca's reported is that the decision as to the presentation of mitigating evidence is often more an art than a science. An appellate court is poorly equipped to sense (from the written transcript) the courtroom dynamics that may be very obvious to defense counsel at the trial. When a criminal defendant has rejected the advice of counsel, and has insisted on taking the witness stand to deny guilt in the face of overwhelming evidence – in short, when the defendant faces the jury and gives a very poorly received account of his "innocence," counsel may perceive that the jury may have little patience with the presentation of evidence that might be considered mitigating if the defendant had either pleaded guilty or had chosen not to take the stand to present what counsel believes was perceived as an elaborate lie. Counsel will instinctively know it when that occurs. When counsel has otherwise performed with reasonable competence, he or she should not readily be second-guessed by an appellate court that may not sense the things that counsel sensed in the courtroom.[4]

[4] The nature of a capital case, as the majority explains, with only two options, has a somewhat different landscape. Counsel need not worry about the degree of patience of the jury with extensive evidence that counsel hopes will be considered mitigating. The jury is going to be *very* patient with the sentencing portion of the case, and most jurors will be looking for anything that in their minds can justify avoiding the death penalty, so that they do not have to go to sleep at night with the death penalty decision on their minds. In the non-capital case there are a multitude of sentencing choices, none of which rise to

For these reasons, I believe, relief will generally be allowed by an appellate court only in the cases of clear prejudice where there is some obviously objective and quantitative result from counsel's ineffectiveness, as in *Eskridge* and *Pettis*.

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James M. Smart, Jr., Judge

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the level of the death penalty. Finally, if a jury has pronounced a death sentence in a capital case, the judge may have more to overcome in political terms to reject the capital option and sentence to life without parole. Here, in contrast, the judge could have imposed a lighter sentence than the jury recommendation, if he thought appropriate, without creating a firestorm. For obvious reasons, a capital case has a heightened concern with stringent due process.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MIGUEL VACA,	)	
APPELLANT,	)	
	)	
v.	)	**WD69004**
	)	
STATE OF MISSOURI,	)	**FILED: October 13, 2009**
RESPONDENT.	)	

DISSENTING OPINION

I concur in the majority's resolution of Appellant Miguel Vaca's second and third Points Relied On, which contend that he received ineffective assistance of counsel during the guilt phase of his trial. I respectfully dissent, however, from the majority's resolution of Vaca's first Point, in which he argues that his attorney failed to competently represent him in the sentencing phase. Based on my conclusion that Vaca's sentencing-phase claim has merit, I would reverse in part, and remand with directions that Vaca be given a new sentencing hearing.

I.

As the majority recounts, Vaca committed a series of aggravated offenses, and the evidence of his guilt (which included his confession, as well as physical evidence found in his home) was overwhelming. On the seven counts for which he was convicted, Vaca faced possible life sentences on five; moreover, by operation of §§ 558.019.3 and 556.061, he would be required to serve 85% of the sentences imposed for his convictions on at least the two first-degree robbery counts. The sentences actually imposed, which total life plus 102 years,

essentially mean that Vaca, who was forty-three at the time of the offenses, will spend most, if not all, of the rest of his life in jail.

The majority's analysis recognizes that Vaca was constitutionally entitled to the effective assistance of counsel at both the guilt and sentencing phases of his trial. During the sentencing proceeding, the State presented the testimony of five of the victims of Vaca's crimes, each of whom described the grave and lasting toll that his actions had taken on their lives.

Despite the stakes for Vaca, and the State's sentencing-phase presentation, the case presented by Vaca's counsel at the sentencing hearing can only be described as perfunctory. Counsel's entire opening statement in the sentencing phase was that "[t]he defense intends to call Mr. Vaca, Sr., for some brief history for your information. Thank you." In its entirety, the examination of Vaca's father – the defense's only sentencing-phase witness – consisted of the following:

Q. For the record, sir, please state your name.
A. Miguel Vaca.
Q. And can you explain to the jury how long your son has been in the custody of the jail facility?
A. Well, I say about 45 months.
Q. Have you and your wife, Elaine, visited him on a regular basis?
A. Well, ever since he's been here, about – on account of the weather maybe about two times.
Q. Has your son ever been to a prison setting before?
A. Never.
Q. Has your son ever been convicted of a felony or a misdemeanor?
A. Never.
Q. Thank you, sir. That's all the questions I have.

Counsel's entire closing argument consisted of the following:

> Thank you, Judge. Ladies and gentlemen, I intend to be extremely brief. I would first tell you that Mr. Vaca accepts your verdicts and appreciates your total attention to both sides during the trial this week. I would indulge you if there is any actions that I took that offended you, I would ask that you – implore you not to take that out on Mr. Vaca.
>
> The punishment available for Counts I, III, and V are special charges under the law, and because one of the witnesses indicated their desire that Mr. Vaca not simply be returned to society within a year, that was their wish, I would explain to you that for the charges of the robbery and attempted robbery, the sentence you impose under the Missouri Department of Corrections scheme, Mr. Vaca would be required to serve 85 percent of the term that you impose before he would become first eligible for parole or release on those three charges only.
>
> I would just have one favor and comment, and ask that you avoid vengeance for vengeance[']s] sake and just seek fairness and please indulge him for his lack of prior criminal history. Thank you.

The majority opinion describes the report prepared by Dr. Bill Geis, which defense counsel had in his possession, and had reviewed, prior to the sentencing proceeding. Dr. Geis' report concluded that Vaca suffers from paranoid schizophrenia, dysthymia, Post-Traumatic Stress Disorder, and borderline intellectual functioning. Among other things, these conditions triggered auditory and visual hallucinations, nightmares, flashbacks to traumatic events, very poor sleep, dejection, low motivation, fatigue, interpersonal withdrawal, and "extremely poor social and occupational functioning." Dr. Geis reported that Vaca had a full-scale IQ of 73; "in terms of cognitive functioning" he operated at the level of "an 8-year-old boy," exhibiting "pretty limited functioning where a person probably couldn't hold a job." Confirming Dr. Geis' assessment, although Vaca was in his mid-40s at the time of his arrest, he had lived primarily with family members, had never held long-term employment, and "has never had a girlfriend or even dated." Dr. Geis' report indicates that Vaca had controlled the symptoms of his mental illness by taking various medications, but had ceased taking his medications approximately one week before the first of the offenses "because he was having trouble with his insurance."

Although Dr. Geis found Vaca competent to stand trial, his report noted that Vaca's mental health conditions could have played a significant role in his commission of the offenses at issue:

> The defendant has a serious mental disease – schizophrenia – that clearly could have had an impact on his ability to form rational thought and conform his behavior to the expectations of society at the time of the offense. This condition of schizophrenia is corroborated by other medical personnel and appears to have been in existence for most of his life. He also has a condition of low intelligence (borderline intellectual functioning) that could have affected his ability to understand the impact of his actions.

Dr. Geis testified at the post-conviction evidentiary hearing that he found no signs of malingering in Vaca's account of his symptoms and medical history.

The jury was clearly attuned to Vaca's potential mental-health issues. During their deliberations in the guilt phase, the jury asked the following questions:

> Was [Vaca] given psychological testing
> Had he been compliant with medications before arrest
> Is he currently on meds

The court refused to answer these questions.

Despite the specific evidence of Vaca's mental illness which was actually in defense counsel's possession at the time of trial, and the jury's evident interest in the issue, counsel did not call Dr. Geis to testify in the penalty phase. Counsel explained the reasons for this omission at the post-conviction evidentiary hearing. Counsel acknowledged that he had limited experience with criminal trials at which guilt and sentencing phases were bifurcated, and that Vaca's may have been his first such case involving a "significant crime." Vaca's counsel also admitted that "the strength of the [State's] case [against Vaca] was very high," and therefore he was "pretty certain that [he was] going to reach a sentencing phase." Nonetheless, defense counsel spent scarce time preparing for the penalty phase of the trial:

> The only – well, specifically, the only thing I can recall doing would be to think about family members that might testify perhaps to draw some type of sympathy whether or not Mr. Vaca himself would testify, the defendant. . . . I think that was the extent of the – the amount of consideration I gave that.

Vaca's counsel admitted that he gave no consideration to calling Dr. Geis in the sentencing phase: "I honestly didn't give that a thought"; "I didn't analyze it from that perspective at all." Defense counsel testified that "[t]here was no strategic reason that I can recall for not calling Dr. Geis at sentencing," and that Dr Geis' report "could have been utilized with an attempt to gain leniency or seek leniency from a jury." When asked whether he had an "intentional strategy" to "substitute those three witnesses [Vaca's father, brother, and sister, each of whom testified in the guilt phase] for Dr. Geis," counsel responded emphatically: "Of course not."

The motion court credited defense counsel's testimony concerning his trial strategy, and his reasons for failing to call Dr. Geis to testify at the sentencing hearing. The court determined, however, that counsel's testimony established a reasonable strategic basis for his failure to present Dr. Geis:

> During the evidentiary hearing, trial counsel testified that he presented evidence of movant's good character and his mental disability and previous bike accident through family members and movant himself. Trial counsel testified that he did not call Dr. Bill Geis as a witness during the sentencing phase because he did not analyze the case that way. He had presented all of this evidence during the guilt portion of the trial. Trial counsel pursued reasonable trial strategy regarding his concerns about the movant's mental competence.

In its Conclusions of Law, the motion court repeated its finding that defense counsel presented sufficient evidence of Vaca's mental health problems during the guilt phase; the court also emphasized that Dr. Geis' testimony would not have established Vaca's incompetence to stand trial, or a guilt-phase defense:

> Trial counsel, during the guilt phase of trial, established movant's mental problems from members of his family. Movant's brother and sister testified about movant's mental problems and disabilities, as did movant's father. Movant

himself testified about his own mental disability and that he was on Social Security disability.

The report trial counsel obtained from Dr. Geis concerning movant's mental status did not establish that movant was either incompetent or not guilty by reason of mental disease or defect. Movant did not suffer from a mental disease or defect that qualified as a defense under Chapter 552.

. . ..

As stated, the report trial counsel obtained from Dr. Geis did not provide any type of viable defense. Movant was neither incompetent to proceed [n]or was [he] not guilty by reason of mental disease or defect.

II.

Contrary to the majority and the motion court, I conclude that, in the circumstances of this case, defense counsel's acknowledgement that he "didn't give . . . a thought" to calling Dr. Geis establishes constitutionally ineffective representation. Further, in line with a series of Missouri Supreme Court cases addressing similar situations, I believe that there is a reasonable probability – while by no means a certainty – that presenting Dr. Geis' testimony would have led to a different outcome in Vaca's sentencing proceeding.[5]

A.

The findings and conclusions on which the motion court relied to reject Vaca's claim do not, in my view, provide a sufficient basis to deny relief: the motion court's findings are in important respects contrary to the record, and its legal conclusions misapprehend the nature of Vaca's claim.

First, the motion court ascribed a strategic motive to counsel's failure to call Dr. Geis by referencing counsel's testimony that "he did not analyze the case that way." But a review of the post-conviction evidentiary hearing transcript reveals that counsel's testimony unambiguously

[5] Because I believe Vaca is entitled to relief based on counsel's failure to call Dr. Geis, who had given counsel a detailed report concerning Vaca's mental health prior to trial, I find it unnecessary to address Vaca's claim that counsel should have further investigated his mental health to discover *additional* information for use in the sentencing proceeding.

establishes the *lack* of a strategic motive for failing to call Dr. Geis, not the *existence* of one. Counsel testified that his trial preparation and trial strategy focused on the guilt phase of the trial (where he intended to argue mis-identification and a false confession), even though he recognized that a sentencing phase was highly likely given the strength of the evidence against his client. Although counsel testified that he reviewed Dr. Geis' report, he admitted that he had given <u>no</u> consideration to calling Dr. Geis in the sentencing phase, and had no strategic basis for his failure to do so: "I honestly didn't give that a thought." Counsel's only "preparation" for the sentencing phase was to consider which family members could testify to generate sympathy for Vaca (and his brief questioning of Vaca's father, quoted in full above, did not do even that). In this context, counsel's further statement that "I didn't analyze [the issue of calling Dr. Geis] from that perspective at all" is an admission that he failed to develop a strategy or prepare for the sentencing phase, not that Dr. Geis' likely testimony was somehow inconsistent with a considered sentencing-phase strategy counsel had formulated.[6]

<u>*Second*</u>, as the majority opinion recognizes, in order to prove ineffective assistance for failure to call a witness, a Rule 29.15 movant must show that "(1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense." *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004). Here, the State does not dispute the first three elements; the only issue is whether Dr. Geis' testimony would have provided a "viable defense." In finding that Dr. Geis' testimony "did not provide any type of viable defense," the motion court observed that his testimony would neither have negated

[6] Counsel's candid testimony (which the trial court credited) also belies the concurring opinion's suggestion that counsel may have relied on "instinct[ ]" or what he "sensed in the courtroom" in making a considered decision to omit Dr. Geis. Conc. Op. at 4.

Vaca's competence to stand trial, nor established a basis for a finding that he was not guilty by reason of mental disease or defect. But this conclusion fundamentally misconstrues the nature of Vaca's claim. Vaca's claim is not that Dr. Geis' testimony should have been offered in the *guilt* phase to establish a basis for his acquittal; instead, Vaca argues only that Dr. Geis' testimony should have been presented in the *sentencing* phase, because it would have been relevant to the jury's assessment of his appropriate punishment. Whether the omitted witness would have established "a viable defense" *to Vaca's guilt* is simply irrelevant. *Cf. Eichelberger v. State*, 134 S.W.3d 790, 792 (Mo. App. W.D. 2004) ("Because the alleged error . . . occurred during sentencing, the prejudice prong requires [a movant] to show there is a reasonable probability he would have received a lesser sentence if his counsel had called the [ ] witness[ ].").

Third, the motion court's finding that "[t]rial counsel, during the guilt phase of trial, established movant's mental problems from members of his family," is also disproved by the record. Contrary to the motion court's finding, there was absolutely *no* reference during Vaca's trial to: schizophrenia; dysthymia; post-traumatic stress disorder; Vaca's limited intelligence and intellectual functioning; his auditory and visual hallucinations; or the fact that he was unmedicated at the time of the crimes in question due to difficulties with his insurance coverage. Indeed, it is more than a little ironic that the State now argues that Vaca's mental health was adequately presented during the guilt phase, when it repeatedly objected to the defense's presentation of any evidence during the guilt phase concerning Vaca's mental health, on the ground that it had not been properly pled as a defense. Thus, prior to the defense's opening statement, the prosecution made the following argument:

> Your Honor, I might, before [defense counsel] begins his opening statement, I know that he has advised the Court that at some point he intends to try to present evidence of the defendant's mental history or mental condition. Under [chapter] 552, the defendant has not complied with those sections. That is

> not relevant and should not be permitted into evidence by the Court. And I would ask also that the Court, because it's not likely to be admissible evidence, prohibit [defense counsel] from making any statements regarding that during his opening statement.
>
> . . . As the Court knows, Section 552 sets out, you know, the procedure for mental condition – history to come into evidence. And I know that the defendant in this case for many, many months sought psychological – at least one psychological evaluation that was provided to the Court, but at no point has he pled or followed any other requirements of 552 to plea or raise an issue of either not guilty by reason of insanity or diminished capacity.

In response, defense counsel explained that "I don't intend to go in that direction," but merely intended to present evidence concerning the knowing and voluntary nature of Vaca's waiver of his rights and pre-trial statement; "[m]y evidence will be aimed more towards whether or not this was a false confession." In light of this colloquy, and other objections made by the prosecution during the guilt phase, the State cannot now plausibly claim that Vaca presented the equivalent of Dr. Geis' testimony through other, guilt-phase witnesses.

In any event, the evidence regarding Vaca's mental condition admitted during the guilt phase was extremely limited. For example, Detective Todd Butler – who conducted the interrogation that led to Vaca's confession – testified that Vaca stated during his interrogation that "I have psychological problems and sometimes I do things wrong." No further details were provided. Both Detective Butler and Vaca's brother testified that Vaca had only completed an 8^{th} or 9^{th} grade education; but neither specifically addressed his intelligence or intellectual functioning. Vaca's sister testified that Vaca was on "disability," without elaboration. Vaca's brother testified that Vaca suffered a head injury in 1988 that required cranial surgery; however, when asked whether Vaca's behavior changed following the injury, his brother merely stated that "he seemed, you know, just to be sometimes just nervous, real, you know, kind of nervous, and that's about it."

Vaca himself testified that he was receiving Social Security disability payments; when asked to describe the nature of his disability, Vaca first described limitations in the functioning of his left shoulder, arm, neck, and right knee; he then stated without further elaboration that "I also have a lot of headaches off and on. And – I was taking some [medication] for mental disorder." Vaca listed the prescription medications he was taking at the time of his arrest, identifying Clonazepam, Trazodone, Naproxen, Paroxetine, Bupropion, and Zyprexa. No explanation was provided as to the conditions these medications were intended to treat. Vaca later explained that, when he was arrested, he had to ask the arresting officers to retrieve his prescription medications; he testified that, until the medications took effect, "I was really having like a – like a panic attack spell or something – something like a seizure." Vaca testified that "I have these [panic attacks] all the time." To the extent this testimony may have suggested that Vaca was taking medications for significant, wide-ranging mental health issues, however, he undercut any such speculation by testifying that "I'm always nervous. *That's why I take medication*."

Further, to the extent the motion court found that "*trial counsel testified* that he presented evidence of movant's good character and his mental disability . . . through family members and movant himself," that finding is contrary to counsel's own testimony: when asked whether he had an "intentional strategy" of using the testimony of Vaca's family members during the guilt phase as a "substitute" for Dr. Geis, counsel responded: "Of course not."

Thus, each of the considerations on which the motion court relied to reject Vaca's sentencing-phase claim is flawed, and cannot support the denial of relief on that claim.

B.

Without addressing the rationales offered by the motion court, the majority concludes that Vaca's sentencing-phase claim is meritless for a separate reason: that "[t]he mitigating

value of Dr. Geis's testimony is highly speculative," and that "[i]t is just as reasonable to assume Dr. Geis's testimony would have an aggravating effect rather than supply an argument for mitigation." Maj. Op. at 10. But the Missouri Supreme Court has addressed this precise issue in a number of cases, and held that the failure to present evidence of severe mental-health issues and intellectual deficits presents a reasonable probability of a different sentencing-phase outcome. I accordingly disagree with the majority's conclusion that Vaca failed to show he was prejudiced by counsel's failure to call Dr. Geis at sentencing.

At the outset, it bears emphasis that, to demonstrate prejudice, Vaca's burden is only to "show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

> This standard is not met by showing that the errors "had some conceivable effect on the outcome of the proceeding" or that the errors "'impaired the presentation of the defense,'" as those standards are either unworkable or subject to being satisfied by every error. On the other hand, the Supreme Court specifically rejected the argument that a movant must meet an "outcome-determinative" test by showing that it is more likely than not that counsel's deficient conduct altered the outcome of the case, because "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."

Deck v. State, 68 S.W.3d 418, 426 (Mo. banc 2002) (quoting *Strickland*, 466 U.S. at 693).

In a series of death-penalty cases, the Missouri Supreme Court has held that defense counsel's failure to present evidence of a defendant's significant mental illness and intellectual deficits presents a reasonable probability of a different sentencing outcome.[7] Thus, the Court

[7] Like the majority, I recognize that the standards for *counsel's performance* in capital murder prosecutions may be heightened as compared to non-capital cases. *See Taylor v. State*, 262 S.W.3d 231, 249 (Mo. banc 2008) ("Because of the unique nature of capital sentencing – both the stakes

recently held that the failure to call a physician "who would have testified about [appellant's] impaired intellectual functioning can be prejudicial as such evidence can be inherently mitigating." *Glass v. State*, 227 S.W.3d 463, 469 (Mo. banc 2007); *see also id.* at 471 ("It is well-established that evidence of impaired intellectual functioning is valid mitigating evidence in the penalty phase of [a] capital case, regardless of whether defendant has established a nexus between his mental capacity and crime.").

In *Taylor v. State*, 262 S.W.3d 231 (Mo. banc 2008), the Supreme Court held that a defendant was entitled to a new sentencing proceding "where there was unutilized but abundant and compelling mitigation evidence regarding Mr. Taylor's abusive upbringing and lifelong struggles with mental illness," concluding that, "[h]ad trial counsel presented the available mitigation evidence, there is a reasonable likelihood that the outcome of the penalty phase proceeding may have been different." *Id.* at 237. The mental-health evidence omitted from the sentencing phase in *Taylor* was markedly similar to the evidence at issue here, involving the defendant's prior diagnoses with paranoid schizophrenia, antisocial personality disorder, Post-

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and the character of the evidence to be presented – capital defense counsel have a heightened duty to present mitigation evidence to the jury."). But I do not believe, as the majority contends, that Vaca's arguments would require this Court "to graft onto non-capital cases the enhanced responsibility imposed on counsel in capital cases." Maj. Op. at 9. Here, we deal with a witness known to defense counsel prior to trial, who had issued a detailed report which counsel had reviewed; there is no need in this case to address the scope of counsel's obligations in a non-capital case "to 'discover all reasonably available mitigating evidence.'" *Glass v. State*, 227 S.W.3d 463, 468-69 (Mo. banc 2007) (citation omitted). (The case cited by the majority, *Lambert v. Blodgett*, 393 F.3d 943 (9th Cir. 2004), refuses only to import from capital to non-capital cases the duty to investigate and discover potentially mitigating evidence.) I cite the death-penalty cases in the discussion which follows not for their performance standards, but instead for their analysis whether counsel's failure to present mitigation evidence involving a defendant's mental health and intellectual capacity prejudiced the defendant – *i.e.*, whether the omission of such evidence created a reasonable probability of a different outcome. As to this latter issue, the death-penalty cases, which also involve bifurcated guilt and sentencing proceedings, provide useful guidance. (Contrary to the majority, I also believe the "risk in introducing potentially mitigating evidence" (Maj. Op. at 10) in a case in which a defendant faces a death sentence is at least as great, if not greater, than in a non-capital case like this one.) This Court has previously recognized the important similarities between the bifurcated proceedings now authorized in non-capital cases pursuant to § 557.036, RSMo Cum. Supp. 2003, and those which have been conducted for many years in capital cases. *See, e.g.*, *Cardenas v. State*, 31 S.W.3d 835, 838 (Mo. App. W.D. 2007); *State v. Berry*, 168 S.W.3d 527, 539-40 (Mo. App. W.D. 2005).

Traumatic Stress Disorder, and depression. *Id.* at 237-38. Notably, in *Taylor* – and in sharp contrast to this case – the defendant had pursued a mental disease or defect defense during the guilt phase of his trial, and therefore the defense had already presented, in the guilt phase, the testimony of five separate mental health experts concerning Taylor's mental illnesses. *Id.* at 238. Despite the extensive guilt-phase evidence concerning Taylor's mental health, the Court nevertheless held that presentation of *additional* mental-health evidence during the wider-ranging sentencing-phase proceeding presented a reasonable probability of producing a different outcome. *Id.* at 252-53.

Similarly, the Court found ineffective assistance meriting a new sentencing proceeding in *Hutchison v. State*, 150 S.W.3d 292 (Mo. banc 2004), based on counsel's failure to investigate possible mitigating evidence, including evidence of Hutchison's mental health problems. The Court found that "[r]eadily available records that trial counsel admitted they did not attempt to obtain would have documented [appellant]'s troubled childhood, mental health problems [including bipolar disorder], drug and alcohol addiction, history of sex abuse, attention deficit hyperactivity disorder, learning disabilities, memory problems and social and emotional problems." *Id*. at 304. "The information about [appellant]'s troubled background and impaired intellectual ability [IQ of 76] contained in Dr. Parrish's records would have provided significant evidence for mitigation not heard by the jury." *Id*. at 305. Because "[t]he jury did not hear significant mitigating evidence about Hutchison's impaired mental functioning and did not have the opportunity to consider and give effect to all of the mitigating evidence in the penalty phase," the Court held that a new sentencing proceeding was warranted. *Id.* at 307; *see also, e.g., State v. Johnson*, 968 S.W.2d 686, 701-02 (Mo. banc 1998) (ordering new sentencing proceeding

where defense counsel failed to present testimony of psychiatrist as to defendant's "cocaine intoxication delirium" at time of murder).[8]

The conclusion that Dr. Geis' testimony raises a reasonably probability of a different outcome in *this* case follows inexorably from these Supreme Court decisions. In addition to borderline intelligence, Dr. Geis would have established that Vaca suffered from a severe psychosis (paranoid schizophrenia), post-traumatic stress disorder and dysthymia, conditions that went unmedicated at the time he committed the offenses based solely on insurance issues. As discussed above, none of this evidence was presented to the jury, in either the guilt or sentencing-phase proceedings. It also bears emphasis that each of the Supreme Court cases discussed above involved a deliberate, aggravated homicide. Despite the majority's reference to "the heinous acts Vaca committed," Maj. Op. at 11, the juries in the Supreme Court's cases had even greater reason than here to impose harsh punishments; yet the Court nevertheless found that the probable mitigating effect of omitted mental health evidence mandated new sentencing hearings.

The possible impact of Dr. Geis' testimony on the jury's assessment of appropriate punishment is confirmed by questions the jury asked during their deliberations on Vaca's guilt. Those questions included:

> Was [Vaca] given psychological testing
> Had he been compliant with medications before arrest
> Is he currently on meds

"While the court's denial of their requests was proper, the requests show that the jury was focusing on the issue of" Vaca's mental health, confirming that the presentation of further

[8] *Bucklew v. State*, 38 S.W.3d 395 (Mo. banc 2001), on which the State relies, does not require a different result. *Bucklew* found that an omitted psychologist's "findings were summarized – almost verbatim – by . . . an[other] expert who testified during the penalty phase," and was thus "cumulative." *Id.* at 398-99. Here, as discussed above, Dr. Geis' testimony would have presented *non*-cumulative evidence of Vaca's significant mental health problems and impaired intellectual functioning.

evidence on this issue raised a reasonable probability of influencing the jury's assessment of appropriate punishment. *Deck v. State*, 68 S.W.3d 418, 431 (Mo. banc 2002) (referencing similar jury questions in assessing prejudicial effect of counsel's ineffective representation); *see also Taylor*, 262 S.W.3d at 251 ("This failure at the penalty phase [to present certain mental health records] is particularly profound since the jury had asked to review these records during [their deliberations in] the guilt phase of the trial."). Particularly in light of the jury's evident interest in these matters, there is a reasonable probability that the jury would have found Vaca's circumstances mitigating, justifying a lesser sentence.[9]

The majority concludes that Dr. Geis' testimony could have achieved the opposite effect, and persuaded the jury that he was "too dangerous to be at-large and that a lengthy sentence was necessary for the safety of the community." Maj. Op. at 11. But Vaca's burden is only to show a "reasonable probability" of a different outcome. While it may not be sufficient for Vaca merely to identify "some conceivable effect" of the omitted evidence, by the same token he need not "show[ ] that it is more likely than not that counsel's deficient conduct altered the outcome of the case." *Deck*, 68 S.W.3d at 426. In *Taylor*, trial counsel testified at the post-conviction evidentiary hearing that he had chosen not to present additional mental health information at sentencing due to concerns similar to the majority's – that "they felt the records contained some harmful information." 262 S.W.3d at 251; *see also id.* at 256 (dissenting opinion, quoting trial counsel's testimony). (Here, of course, Vaca's trial counsel *failed to even consider* presenting Dr. Geis at sentencing.) Despite counsel's considered strategic decision not to introduce such

[9] Moreover, Vaca was *in fact* given a lengthy prison sentence, pursuant to the jury's recommendation; it seems unlikely that presentation of Dr. Geis' testimony would have led to a *heavier* sentence. Although the majority notes that Vaca "by no means received the maximum," Maj. Op. at 11, under statutory provisions governing parole eligibility for inmates 70 years of age or older, and inmates whose aggregate sentences exceed 75 years, *see* § 558.019.3, .4, it is not at all clear that any greater sentence would have any effect on the time Vaca actually serves.

evidence, the Supreme Court in *Taylor* nevertheless held that counsel's failure to present the mental health evidence was constitutionally deficient:

> While not all of the evidence in the records was favorable to Mr. Taylor, such records seldom are. Where the only basis of defense is that one's client has long had a mental illness that reduces his responsibility, the failure to introduce records that present not only support for his history of mental health evaluations and treatment beginning at the extremely young age of 7, but also a treasure trove of mitigation regarding Mr. Taylor's abusive childhood, simply is not a reasonable trial strategy. "Foregoing mitigation because it contains something harmful is not reasonable when its prejudicial effect may be outweighed by the mitigating value." *Hutchison v. State*, 150 S.W.3d 292, 304-05 (Mo. banc 2004). *See also Williams* [*v. Taylor*], 529 U.S. [362,] 396 [(2000)] (reversing death sentence where counsel failed to present mitigating evidence even though "not all of the additional evidence was favorable to [the defendant]").

262 S.W.3d at 251. Certainty that a different outcome would have resulted is not required. *State v. Johnson*, 968 S.W.2d 686, 702 (Mo. banc 1998) ("While this Court does not presume to know the precise effect [a mental health expert's] testimony would have had on the jurors who served on [the defendant's] trial, this Court is left with the definite and firm impression that the record before us demonstrates that [the expert's] testimony would have altered the jurors' deliberations to the extent that a reasonable probability exists that" defendant would have received a lesser sentence).[10]

[10] The concurring opinion suggests that a post-conviction movant can only establish ineffective assistance in the sentence phase where "there is some obviously objective and quantitative result from counsel's ineffectiveness." Conc. Op. at 4. But given that Missouri does not have guidelines under which particular, discrete factors feed into a rigid sentencing formula, the concurring opinion's approach would essentially eliminate *all* claims of ineffective assistance in the sentencing phase, no matter how deficient counsel's performance. Nor can the concurrence's approach be squared with the Missouri Supreme Court's death-penalty decisions. Even though in such cases the jury may be instructed in some detail concerning the mitigating and aggravating circumstances they must consider, they jury ultimately must decide the relatively open-ended questions whether the mitigating evidence "is sufficient to outweigh the evidence in aggravation of punishment," and whether the death penalty is justified "under all the circumstances," and "the evidence as a whole." §§ 565.030.4(3), (4), 564.032.1(2) RSMo; *State v. McLaughlin*, 265 S.W.3d 257, 264-65 (Mo. banc 2008). *Taylor* and the other cited Supreme Court decisions did not find that counsel's failure to put on mental-health evidence in those cases produced "obviously objective and quantitative results"; instead, a "reasonable probability" of a different outcome, undermining the Court's confidence in the result, sufficed. (The lack of precedent concerning ineffectiveness of counsel in this context is likely explained not be the *sub silentio* application of the

III.

In this case Vaca faced a strong likelihood of conviction, and significant prison sentences if found guilty. Counsel had, in his possession, a detailed report by an available expert witness, which presented evidence of Vaca's severe mental health problems and borderline intelligence. The jury expressed its interest in just these issues during the guilt phase; yet Vaca's counsel "didn't give . . . a thought" to offering the mental health evidence during the sentencing phase, instead presenting only an anemic sentencing case based on minimal thought and preparation. In these circumstances, and given findings and conclusions by the motion court which are contrary to the record and misapprehend the nature of Vaca's claim, I would reverse in part, and remand with directions that Vaca be afforded a new sentencing hearing.

Alok Ahuja, Judge

concurrence's suggested standard, but by the General Assembly's relatively recent adoption of bifurcated sentencing proceedings in non-capital cases.)