

**IN THE
SUPREME COURT OF MISSOURI**

NO. SC83237

CARMAN L. DECK,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY,
MISSOURI**

**TWENTY-THIRD JUDICIAL CIRCUIT
THE HONORABLE GARY P. KRAMER, JUDGE**

RESPONDENT'S BRIEF

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September 27, 1999, Appellant filed a pro se motion for post-conviction relief under Rule 29.15 (PCR L.F. 9-14). An amended motion was filed on December 27, 1999, in which Appellant claimed that his trial counsel was ineffective on various grounds, including several grounds addressed by this Court during Appellant’s direct appeal. These grounds in included claims that counsel was ineffective for: failing to investigate and present mitigating evidence; failing to submit proper penalty-phase instructions; failing to object to improper closing argument; failing to timely object to excessive victim-impact evidence; improperly handling Appellant’s motion for a change of venue; failing to ask that the word	24
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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate Appellant's judgment and sentence under Section 565.020.1, RSMo 2000Section 571.015, RSMo 2000Section 569.020, RSMo 2000Section 569.160, RSMo 2000MO. CONST. art. V, § 3

Appellant was charged in Jefferson County Circuit Court with two counts of murder in the first degree (§ 565.020.1, RSMo 2000), two counts of armed criminal action (§ 571.015, RSMo 2000), one count of robbery in the first degree (§ 569.020, RSMo 2000), and one count of burglary in the first degree (§ 569.160, RSMo 2000), for the shooting deaths of James and Zelma Long and the robbery and burglary of their rural Jefferson County home (PCR L.F. 339; L.F. 56-58).¹ Appellant was also charged as a persistent offender (L.F. 57-58). On February 18, 1998, a jury trial in Jefferson County Circuit Court commenced on these charges with the Honorable Gary P. Kramer presiding (L.F. 26; Tr. 208). The jury found Appellant guilty of all charges, and on April 27, 1998, Appellant received two

“L.F.” and “Tr.” refer to the legal file and transcript in Appellant's direct appeal to this Court, Case no. SC80821. “PCR L.F.” and “PCR Tr.” refer to the legal file and transcript in the present appeal involving Appellant's post-conviction motion. In addition, various depositions in lieu of testimony were admitted into evidence during the post-conviction hearing. Those depositions are referred to by the name of the deponent.

death sentences for the murder convictions, in accordance with the jury's recommendation, two concurrent sentences of life imprisonment for the armed criminal action convictions, thirty years for the robbery conviction, and fifteen years for the burglary conviction (L.F. 28-29, 287-93; Tr. 1073-75; PCR L.F. 339). The sentences for the armed criminal action, robbery, and burglary convictions were ordered to be served consecutively (L.F. 287-93; Tr. 1073-75; PCR L.F. 339).

In addition, the trial court found no probable cause to believe that Appellant had received ineffective assistance of counsel (Tr. 1082). Viewed in the light most favorable to the jury's verdict, the evidence at trial showed that:

The Crimes

In June 1996, Appellant devised a burglary plan with his mother's boyfriend, Jim Boliek, in St. Louis (State's Ex. 69). Mr. Boliek told Appellant that he needed money for a trip to Oklahoma (Tr. 762). Appellant remembered James and Zelma Long, the victims in this case, because he had known the Longs' grandson, Michael Behr, some thirteen years earlier, in DeSoto, Missouri (Tr. 695-696, 704, 762; State's Ex. 69). Appellant used to accompany Mr. Behr to the Longs' house, where Mr. Behr would steal money from the safe (Tr. 696-699, 704, 762; State's Ex. 69).

Appellant planned to break into the Longs' house on a Sunday, while the Longs were at church, to take money from their safe for the Oklahoma trip (Tr.

603, 762; State's Ex. 69). He drove to DeSoto with Mr. Boliek several times to canvass the area (Tr. 762; State's Ex. 69). Appellant bragged to a woman he met during this time period that he knew some people with money and that he was going to take their money (Tr. 603). Appellant told her that he was prepared to do "anything it took" (Tr. 604). He urged this woman to accompany him (Tr. 604). When she refused, Appellant told her that she was "ruining the night" (Tr. 605).

Several Sundays went by without appellant carrying out his plan (Tr. 763; State's Ex. 69). Finally, on Monday, July 8, 1996, Mr. Boliek told appellant that he and appellant's mother wanted to leave for Oklahoma that Friday (Tr. 763; State's Ex. 69). Mr. Boliek gave appellant his .22 caliber High Standard automatic pistol (Tr. 763; State's Ex. 69; Tr. 725).

That afternoon, appellant went to find his sister, Tonia Cummings (State's Exhibit 69). He waited at her apartment at 1230 Enderbury in St. Louis until she came home at about six-thirty in the evening (Tr. 763; State's Exhibit 69).

Appellant and Ms. Cummings drove to rural Jefferson County, near DeSoto, in her car (Tr. 763; State's Exhibit 69). They parked on a back road and waited for it to get dark (Tr. 763; State's Exhibit 69). At nine o'clock, they drove closer to James and Zelma Long's house on Long Road (Tr. 763; State's Exhibit 69). A few minutes later, Appellant and Ms. Cummings pulled into the Longs' driveway (Tr. 764; State's Exhibit 69).

Appellant and Ms. Cummings knocked on the door (Tr. 764; State's

Exhibit 69). When Zelma Long came to the door, Appellant asked for directions to Laguna Palma (Tr. 764; State's Exhibit 69). Mrs. Long invited appellant and Ms. Cummings into the house (Tr. 764; State's Exhibit 69). Later, appellant remarked, "they're country folk, they always do" (Tr. 764).

Mrs. Long explained the directions, and Mr. Long began to write them down (Tr. 764; State's Exhibit 69). Then Appellant walked toward the front door (Tr. 764). As he did, he pulled the pistol from his waistband (Tr. 764; State's Exhibit 69). Appellant turned around, pointed the gun at Mr. and Mrs. Long, and ordered them to go lie facedown on their bed (Tr. 764; State's Exhibit 69). They complied without a struggle (Tr. 764; State's Exhibit 69).

Appellant told Mr. Long to open the safe (Tr. 765; State's Exhibit 69). Mr. Long told appellant that he did not know the combination (Tr. 765; State's Exhibit 69). Mrs. Long said that she did, and she got up and opened the safe (Tr. 765; State's Exhibit 69). Ms. Long took papers and jewelry out of the safe (Tr. 765; State's Exhibit 69; Tr. 563, 596; State's Exhibits 23-25). Appellant told Mrs. Long to get back on the bed (State's Exhibit 69). Then Mrs. Long told Appellant she had two hundred dollars in her purse in the kitchen (Tr. 765; State's Exhibit 69). Appellant sent Mrs. Long into the kitchen, and she brought the money back to him (Tr. 765; State's Exhibits 69 and 2, 4, 5). Mr. Long told Appellant that there was about two hundred dollars in a canister on top of the television set, so Appellant took the canister also (Tr. 765; State's Exhibit 69). Mr. Long offered to

write Appellant a check (Tr. 765). Later, Appellant said, "That's just how nice he was" (Tr. 765).

Appellant ordered Mr. and Mrs. Long to lie on their stomachs on the bed, with their faces to the side (Tr. 765; State's Exhibits 69 and 18-20). Appellant stood at the foot of the Longs' bed trying to decide what to do for ten minutes (Tr. 765-766; State's Exhibit 69). He thought, "If I leave 'em, I'm fucked. If I shoot 'em, I'm fucked" (Tr. 766). As he stood there, Mr. and Mrs. Long begged him to take anything he needed, "just don't hurt us" (State's Exhibit 69).

Ms. Cummings, who had been watching out the front door, came down the hallway and called, "Let's get out of here" (Tr. 765; State's Exhibit 69). She ran out the door to the car (State's Exhibit 69).

Appellant put the gun to James Long's head and fired twice into Mr. Long's temple, above his ear and just behind his forehead (Tr. 766; State's Exhibit 69; Tr. 708, 709; State's Exhibits 27-29). Then Appellant either reached across or walked around the bed and put the gun to Zelma Long's head (Tr. 766; State's Exhibit 69; Tr. 714). He shot her twice: in the back of the head and above the ear (Tr. 766, Tr. 714; State's Exhibits 31, 32).

Appellant grabbed the money and left (Tr. 766; State's Exhibit 69). When they were in the car, Ms. Cummings complained of stomach pains (Tr. 766; State's Exhibit 69). Appellant took her to Jefferson Memorial Hospital, where she was admitted (Tr. 766; State's Exhibit 69). Appellant gave his sister about two

hundred fifty dollars of the Longs' money (Tr. 766). Appellant drove back to St. Louis (Tr. 766; State's Exhibit 69).

Appellant's Arrest

Earlier on the day of the murder, an individual named Charles Hill communicated with law enforcement officials (Tr. 554). Based on this information, St. Louis County Police were asked to assist in locating appellant (Tr. 554-555, 565). By the time Appellant drove into the apartment complex where his sister lived after the murders, Officer Vince Wood had been dispatched to the apartment complex in St. Louis County (Tr. 555, 565).

Appellant drove into his sister's apartment complex without his headlights on and parked near 1230 Enderbury (Tr. 566). When Officer Wood saw the car drive up to 1230 Enderbury with no headlights or taillights, he approached the driver's side with a flashlight (Tr. 566-567). As he began to speak, Officer Wood observed Appellant turn away and lean toward the passenger's side floorboard (Tr. 567). Officer Wood instructed Appellant to exit the car (Tr. 568). He searched the area Appellant had been reaching for and found a pistol concealed under the seat (Tr. 568). The gun had one live round in the chamber and several rounds in the magazine (Tr. 569).

Appellant identified himself as Carman Deck (Tr. 568). He was wearing a black "fanny pack" containing two hundred forty-two dollars in cash (Tr. 571, 578, 673-674). The Longs' decorative tin canister, containing thirty-one dollars

and eighty-eight cents in change, was on the floorboard of the front passenger side of the car (Tr. 572-573, 653-654, 664; State's Exhibits 59, 60). Appellant was arrested at eleven thirty-five and taken to the South County precinct station (Tr. 570, 577, 579).

The Police Investigation

Appellant was advised of his *Miranda* rights and he agreed to speak with detectives from the Jefferson County Sheriff's Department (Tr. 743-745). At this point, the detectives had reason to believe that there was a crime scene somewhere in the DeSoto area where one or more victims might need help, but the Longs' bodies had not been discovered (Tr. 755). The detectives began by asking Appellant if he had been in DeSoto that night (Tr. 748). At first, appellant said only that he and his sister had been driving around St. Louis County looking for cars for sale, eventually working their way down to Jefferson County near DeSoto (Tr. 748). Appellant said that Ms. Cummings got sick and he took her to the hospital (Tr. 748). Then, Appellant said, he drove home, where he was arrested on arrival (Tr. 748). He said the tin canister belonged to his sister, and that he had used the gun for target practice (Tr. 748-749).

Det. Shane Knoll of the Jefferson County Sheriff's Department told Appellant that they were investigating a possible homicide (Tr. 749-750). He asked Appellant what he would do if ballistics matched the bullets in his gun to evidence at a crime scene (Tr. 750). Appellant said "it wouldn't look good" for

him (Tr. 750). Det. Knoll asked appellant how he would explain it if the victim's fingerprints matched fingerprints on the tin canister (Tr. 750-751). Again, appellant said "it wouldn't look good" for him (Tr. 751). Det. Knoll asked appellant what he would do if they found his fingerprints at the crime scene (Tr. 751). Appellant replied that he "dd not leave any" (Tr. 751).

Later, Appellant told a different story (Tr. 752). This time, he said that Jim Boliek, his mother's boyfriend, asked him and Ms. Cummings to follow him to DeSoto (Tr. 752). Once there, Appellant said he parked on a back road and waited for about fifteen minutes (Tr. 753). He claimed that Mr. Boliek returned and handed him the .22 caliber pistol and the canister full of coins through the car window (Tr. 753). Appellant said that, as they followed Mr. Boliek back to St. Louis, Ms. Cummings got sick and went to the hospital (Tr. 753). Appellant put this statement in writing at five-thirty in the morning on July 9, 1996 (Tr. 753-754; State's Exhibit 67).

Detectives were still trying to get a lead on where a possible crime scene and a victim or victims might be (Tr. 755). Det. Knoll told Appellant that he needed to know where he thought Mr. Boliek had gone while appellant waited in the car, so that they could see if there were victims who needed help (Tr. 755). Appellant said, "Go to the fourth house on the left on Long Road" (Tr. 755).

Based on that information, officers went to the Longs' house and discovered the bodies of James and Zelma Long on the blood-soaked bed (Tr. 556,

591-593; State's Exhibits 17-20, 27-29, 31-32). Blood spattered the bedroom walls and furniture (Tr. 641, 659).

Meanwhile, Det. Knoll attempted to confirm Appellant's account (Tr. 756). He spoke to several people about Jim Boliek's whereabouts on the night of July 8 (Tr. 757).

At one forty-five on the afternoon of July 9, 1996, Det. Knoll met with appellant again, this time at the Jefferson County Sheriff's Department (Tr. 757, 760). He advised appellant of his rights again, and appellant agreed to talk (Tr. 760; State's Exhibit 68). Det. Knoll told appellant that Jim Boliek had an alibi (Tr. 761). He said, "You need to tell me what really happened" (Tr. 761). Appellant said, "What do I do?" (Tr. 761). Det. Knoll said, "You simply tell me the truth" (Tr. 761). At this point, appellant gave a full account of the events of July 8, 1996, as described above (Tr. 762-766). Afterward, he agreed to make a taped statement (Tr. 769; State's Exhibit 69).

The Physical Evidence

James Long died as a result of the two gunshot wounds to the head (Tr. 712). Both wounds contained soot and there was a visible muzzle burn on the skin (Tr. 709; State's Exhibit 42). The medical examiner concluded that both gunshot wounds were contact wounds; that is, the gun was in contact with the body when it was fired (Tr. 709). The arm of Mr. Long's glasses was driven into the wound (Tr. 630, 708; State's Exhibits 42-44). Pieces of bone were driven into Mr. Long's

brain and the brain was torn and cut into small pieces (Tr. 717-718). The damage was massive (Tr. 717-718). The medical examiner extracted two bullet fragments from the tissue of the brain (Tr. 626, 709). She also extracted a portion of the arm of Mr. Long's glasses (Tr. 626).

Zelma Long died of the two gunshot wounds to the head (Tr. 715; State's Exhibits 46-47). Both were contact wounds (Tr. 714). There was extensive fracturing of the skull and some tearing of the brain (Tr. 718). The medical examiner recovered two deformed bullet fragments (Tr. 626, 714-715).

At the Longs' house, officers recovered two shell casings from the bedroom floor and one from under Mrs. Long's elbow (Tr. 619-620; State's Exhibits 35, 37-38). Officers found seven thousand dollars in cash and traveler's checks under a table next to the bed (Tr. 642-643, 694; State's Exhibit 54).

Kathleen Green, of the Missouri State Highway Patrol, examined the pistol recovered from the car, the shell casings recovered from the scene, and the bullet fragments recovered from the bodies (Tr. 720, 722, 727, 732). She concluded that the shell casings found in the Longs' bedroom were definitely expended from the pistol found in the car appellant was driving when he was arrested (Tr. 732). The bullets were consistent with the gun; however, they were so damaged that their individual identifying characteristics were eradicated (Tr. 734-736).

The Defense Case

Appellant did not testify at trial. He presented two witnesses in his defense

(Tr. 792, 798).

Edward Kemp of the Jefferson County Sheriff's Department testified that, in his statement to detectives, Appellant said he was standing near the foot of the bed prior to shooting the Longs (Tr. 793-794).²

Richard Dulinski, appellant's aunt's husband, claimed that Jim Boliek arrived at his house in Enid, Oklahoma on July 12, 1996, carrying a large amount of cash (Tr. 798-800). He also asserted that there were dark stains in the interior of Mr. Boliek's car (Tr. 802).

The Verdicts

At the close of the evidence, and following the instructions and arguments of counsel, the jury returned verdicts of guilty on all counts: that is, two counts of first degree murder, two counts of armed criminal action, robbery in the first degree, and burglary in the first degree (Tr. 835; L.F. 232-237).

The Penalty Phase

The state presented evidence of appellant's seven prior felony convictions, dating from 1985 (Tr. 842-852).

Three of James and Zelma Long's seven children testified about the loss the

Defense counsel was making the point that this was not consistent with the contact gunshot wounds that Mr. and Ms. Long received. The prosecuting attorney clarified on cross-examination that Appellant never actually said exactly where he stood *while* shooting (Tr. 794-795).

extended family was experiencing (Tr. 853, 868, 869). James and Zelma Long would have been married fifty years on their next anniversary (Tr. 858). They had numerous grandchildren and great-grandchildren (Tr. 854-855).

Laura Friedman, the Longs' youngest daughter, testified that she had left her young children with their grandparents for several hours on the day they were murdered (Tr. 870-871). She picked up her children and left the house just minutes before appellant and Ms. Cummings arrived (Tr. 871-872).

Appellant's brother, aunt, stepmother, and a foster parent testified regarding Appellant's difficult childhood and how much Appellant meant to them (Tr. 877-920). A more extensive discussion of their testimony as it relates to Appellant's ineffective assistance of counsel claim is contained under Point I in the Argument section of this brief.

At the close of the penalty phase evidence, and following the instructions and arguments of counsel, the jury found six statutory aggravating circumstances for each count of murder in the first degree: that the murders of James and Zelma Long were each committed while appellant was engaged in the commission of another unlawful homicide; that Appellant murdered each victim for the purpose of receiving money or any other thing of monetary value; that both murders involved depravity of mind, and as a result, were outrageously and wantonly vile, horrible, and inhuman; that each murder was committed for the purpose of avoiding a lawful arrest; that each murder was committed while Appellant was

engaged in the perpetration of burglary; and that each murder was committed while Appellant was engaged in the perpetration of robbery (L.F. 264-65). The jury declared that the punishment for the murder of James Long should be death, and that the punishment for the murder of Zelma Long should be death (L.F. 264-65).

Appellant appealed his sentences and convictions to this Court on the grounds that the trial court: (1) erred in overruling Appellant's motion for change of venue; (2) erred in overruling Appellant's motion to suppress evidence and statements; (3) erred in overruling his *Batson* challenges to the State's peremptory strikes; (4) erred in overruling Appellant's motion to strike a juror for cause; (5) erred in overruling his motion for a mistrial based on excessive victim-impact evidence; (6) erred in refusing to submit non-MAI mitigating circumstance instructions; (7) plainly erred in submitting defective penalty-phase instructions concerning mitigating circumstances; (8) erred in failing to define mitigation for the jury and in failing to provide the jury a dictionary; (9) plainly erred in allowing the prosecutor to make improper comments (no mercy, improper personalization) during closing arguments; and, (10) erred in submitting instructions defining proof beyond a reasonable doubt. On June 1, 1999, this Court issued its opinion affirming Appellant's conviction (PCR L.F. 340). *State v. Sloan*, 998 S.W.2d 142 (Mo. App. E.D. 1999)*State v. Powell*, 985 S.W.2d 823 (Mo. App. E.D. 1998)

Appellant's post-conviction counsel offered each of these depositions into

I.

The motion court’s findings, conclusions, and judgment in overruling and dismissing Appellant’s Rule 29.15 motion were not clearly erroneous because his trial counsel was not ineffective in investigating and presenting mitigation evidence and in deciding not to call an expert witness during the penalty phase on the grounds that Appellant failed to prove his trial counsel acted unreasonably and that he was prejudiced in that: (1) Appellant’s counsel interviewed several witnesses and did not call witnesses who either were not unqualifiedly supportive of Appellant’s case or who might adduce testimony or evidence damaging to Appellant’s case; (2) Appellant’s counsel made a strategic decision not to hire an expert witness because such a witness would not have been helpful and could have possibly alienated the jury.

State v. Kreutzer, 928 S.W.2d 854 (Mo. banc 1996),

cert. denied, 519 U.S. 1083 (1997);

Morrow v. State, 21 S.W.3d 819 (Mo. banc 2000),

cert. denied, 121 S.Ct. 1140 (2001);

evidence during the evidentiary hearing except for three—Art Miserocchi, Carol Miserocchi, and Kathy L. Barker (Appellant’s mother) (PCR Tr. 2-16). At the beginning of each of these depositions, however, counsel stipulated that the deposition testimony could be offered in lieu of live testimony at the evidentiary hearing (A. Miserocchi, p. 5; C. Miserocchi, pp. 4-5; Barker, pp. 4-5).

State v. Clay, 975 S.W.2d 121 (Mo. banc 1998),

cert. denied 119 S.Ct. 834 (1999);

State v. Heslop, 842 S.W.2d 72 (Mo. banc 1992),

cert. denied, 508 U.S. 921 (1993).

II.

The motion court's findings, conclusions, and judgment in overruling and dismissing Appellant's Rule 29.15 motion were not clearly erroneous because his trial counsel was not ineffective in conducting voir dire during death qualification and Appellant has failed to show that he was prejudiced under the *Strickland* standard in that the record shows she addressed the venire panels concerning the issue of mitigation and Appellant has failed to show that any biased juror served on his jury.

Presley v. State, 750 S.W.2d 602 (Mo. App. S.D. 1988),

cert. denied 488 U.S. 975 (1988);

Strickland v. Washington, 466 U.S. 668 (1984);

Teague v. Scott, 60 F.3d 1167 (5th Cir. 1995);

State v. Goff, 694 N.E.2d 916 (Ohio 1998),

cert. denied, 527 U.S. 1039 (1999).

III.

The motion court's findings, conclusions, and judgment in overruling and dismissing Appellant's Rule 29.15 motion were not clearly erroneous because his trial counsel was not ineffective in failing to object to the incomplete instructions given to the jury to guide them in considering mitigating circumstances in that this Court has already rejected this claim under plain error review in Appellant's direct appeal and Appellant failed to show that the jurors were not adequately guided when the instructions considered as a whole are considered.

State v. Deck, 994 S.W.2d 527 (Mo. banc 1999),

cert. denied, 528 U.S. 1009 (1999);

Sidebottom v. State, 781 S.W.2d 791 (Mo. banc 1989),

cert. denied, 497 U.S. 1032 (1990);

Clemmons v. State, 785 S.W.2d 524 (Mo. banc 1990),

cert. denied, 498 U.S. 882 (1990);

State v. Kelley, 953 S.W.2d 73 (Mo. App. S.D. 1997).

IV.

The motion court’s findings, conclusions, and judgment in overruling and dismissing Appellant’s Rule 29.15 motion were not clearly erroneous because his trial counsel was not ineffective in failing to request that the trial court, or to object to the trial court’s failure to, define the term “mitigation” or provide a dictionary to the jury in that this Court has already rejected this claim under plain error review in Appellant’s direct appeal and the law is clear that courts may not define terms in the instructions that are not already defined and that courts may not provide a dictionary to the jury for its use during deliberations.

State v. Deck, 994 S.W.2d 527 (Mo. banc 1999),

cert. denied, 528 U.S. 1009 (1999);

State v. Wise, 879 S.W.2d 494 (Mo. banc 1994),

cert. denied, 513 U.S. 1093 (1995);

State v. Feltrop, 803 S.W.2d 1 (Mo. banc 1991),

cert. denied, 501 U.S. 1262 (1991);

State v. Viviano, 882 S.W.2d 748 (Mo. App. E.D. 1994).

V.

The motion court's findings, conclusions, and judgment in overruling and dismissing Appellant's Rule 29.15 motion were not clearly erroneous because Appellant's constitutional rights were not violated when the motion court refused to allow Appellant to contact the jurors in his case in that: (1) this was an issue that should have been raised on direct appeal and is not cognizable in a Rule 29.15 proceeding; (2) the motion court has the discretion to prohibit such contact, and; (3) Appellant's claim of juror misconduct is speculative and without any factual basis.

State v. Brown, 902 S.W.2d 278 (Mo. banc 1995),

cert. denied 516 U.S. 1031 (1995);

State v. McNeal, 945 S.W.2d 470 (Mo. App. W.D. 1997);

State v. Wade, 926 S.W.2d 43 (Mo. App. E.D. 1996);

State v. Johnson, 968 S.W.2d 123 (Mo. banc 1998),

cert. denied 531 U.S. 935 (2000).

VI.

The motion court's findings, conclusions, and judgment in overruling and dismissing Appellant's Rule 29.15 motion were not clearly erroneous because his trial counsel was not ineffective for failing to object to the prosecutor's closing argument in that this claim has already been rejected by this Court under the plain error standard on Appellant's direct appeal and the prosecutor's comments were not objectionable.

State v. Deck, 994 S.W.2d 527 (Mo. banc 1999),

cert. denied, 528 U.S. 1009 (1999);

State v. Basile, 942 S.W.2d 342 (Mo. banc 1997),

cert. denied, 118 S.Ct. 213 (1997);

State v. Roberts, 948 S.W.2d 577 (Mo. banc 1997),

cert. denied, 118 S.Ct. 711 (1998);

State v. Tokar, 918 S.W.2d 753 (Mo. banc 1996),

cert. denied, 519 U.S. 933 (1996).

VII.

The motion court's findings, conclusions, and judgment in overruling and dismissing Appellant's Rule 29.15 motion were not clearly erroneous because his appellate counsel in his direct appeal was not ineffective for failing to brief the issue concerning the trial court's overruling of Appellant's pre-trial motion to disqualify the entire Jefferson County Prosecuting Attorney's Office in that: (1) counsel made a strategic choice not to include this issue when she did not find any case law supporting Appellant's position; (2) resolution of this issue would not have resulted in a reversal of Appellant's conviction and sentence.

State v. Edwards, 983 S.W.2d 520 (Mo. banc 1999);

State v. Smith, 849 S.W.2d 209 (Mo. App. E.D. 1993);

Lewis v. State, 24 S.W.3d 140 (Mo. App. W.D. 2000);

State v. Smith, 32 S.W.3d 532 (Mo. banc 2000).

VIII.

The motion court did not clearly err when it denied Appellant's claim that the time limits imposed under Rule 29.15 are unconstitutional because those time limits have been repeatedly been found to be constitutional in that they are reasonable and effective procedural requirements.

State v. Simmons, 944 S.W.2d 165 (Mo. banc 1997),

cert. denied 522 U.S. 953 (1997);

State v. Roll, 942 S.W.2d 370 (Mo. banc 1997),

cert. denied 522 U.S. 954 (1997);

State v. Blankenship, 830 S.W.2d 1 (Mo. banc 1992);

Duvall v. Purkett, 15 F.3d 745 (8th Cir.1994),

cert. denied, 114 S.Ct. 2753 (1994).

ARGUMENT

I.

The motion court's findings, conclusions, and judgment in overruling and dismissing Appellant's Rule 29.15 motion were not clearly erroneous because his trial counsel was not ineffective in investigating and presenting mitigation evidence and in deciding not to call an expert witness during the penalty phase on the grounds that Appellant failed to prove his trial counsel acted unreasonably and that he was prejudiced in that: (1) Appellant's counsel interviewed several witnesses and did not call witnesses who either were not unqualifiedly supportive of Appellant's case or who might adduce testimony or evidence damaging to Appellant's case; (2) Appellant's counsel made a strategic decision not to hire an expert witness because such a witness would not have been helpful and could have possibly alienated the jury.

Appellant's first claim of ineffective assistance of counsel relates to his counsel's investigation and presentation of mitigating evidence during the penalty phase of his trial. Appellant also complains that trial counsel was ineffective for not presenting an expert witness to testify about the effects Appellant's childhood had on him. The motion court found, and the record reflects, that Appellant's trial counsel conducted an adequate investigation and used reasonable trial strategy in presenting this evidence at trial and in deciding not to use an expert witness.

Standard of Review

Appellate review of the motion court's denial of post-conviction relief is not a de novo review; rather, the findings of fact and conclusions of law are presumptively correct. *State v. Gilpin*, 954 S.W.2d 570, 575 (Mo. App. W.D. 1997); *State v. Colbert*, 949 S.W.2d 932, 939 (Mo. App. W.D. 1997). Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law issued by the hearing court are "clearly erroneous." *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Hall v. State*, 16 S.W.3d 582, 585 (Mo. banc 2000); Rule 29.15. Findings and conclusions are "clearly erroneous" only if after a review of the entire record the court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996)*State v. Twenter*, 818 S.W.2d 628 (Mo. banc 1991)*State v. Clements*, 849 S.W.2d 640 (Mo. App. S.D. 1993)*Strickland v. Washington*, 466 U.S. 668 (1984)*Sanders v. State*, 738 S.W.2d 856 (Mo. banc 1987)*State v. Shurn*, 866 S.W.2d 447 (Mo. banc 1993)*Sidebottom v. State*, 781 S.W.2d 791 (Mo. banc 1989),
cert. denied, 497 U.S. 1032 (1990)

In section 8 (A) of appellant's post-conviction motion, he alleged that his trial counsel failed to present a complete "life history, which would have included mitigating factors about [Appellant's] background" and that counsel failed to call an expert witness to testify about Appellant's childhood development and its effect on Appellant (PCR L.F. 47-48). In section 9(a), Appellant outlined, in story-book

form, Appellant's life history, including various instances of abuse and neglect he suffered (PCR L.F. 16-45). Appellant then listed the names of 343 witnesses to support his claim (PCR L.F. 46-64). Appellant did not identify, however, what any of these witnesses would testify to or whether any of these witnesses were available to testify at the time of Appellant's trial (PCR L.F. 46-64).

Although the motion court did not consider the adequacy of Appellant's pleadings, the record shows that Appellant's post-conviction motion was fatally deficient in that Appellant failed to plead that any alleged witnesses were available at the time of Appellant's trial to testify and that they would have testified if called. *State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1997),

cert. denied 118 S.Ct. 2379 (1998)*Hatcher v. State*, 4 S.W.3d 145 (Mo. App. S.D. 1999)*White*, 939 S.W.2d at 896; *see also* *State v. Jones*, 979 S.W.2d 171, 186-87 (Mo. banc 1998), *cert. denied* 119 S.Ct. 886 (1999).

Appellant's pleadings cannot be cured by the fact that the motion court heard evidence in this case. This Court may only consider claims as they were pleaded to the motion court. *See* *Belcher v. State*, 801 S.W.2d 372, 375 (Mo. App. E.D. 1990); *State v. Harris*, 870 S.W.2d 798 (Mo. banc 1994),

cert. denied, 513 U.S. 953 (1994)*Rohwer v. State*, 791 S.W.2d 741 (Mo. App. W.D. 1990)

During the penalty phase of Appellant's trial, Appellant's counsel called four witnesses: Rita Deck; Beverly Dulinsky; Major Puckett, and; Michael Deck.

Counsel also presented two exhibits showing the various placements, including foster homes, that Appellant received beginning when he was ten (Defense Ex.'s A and B).

Rita Deck, Appellant's stepmother, testified to an incident occurring on or near Thanksgiving in 1975 (Tr. 878, 881-82). She stated that Appellant's father, with whom she was living, received a call that the Appellant and his siblings had been left alone by their mother and that someone needed to pick them up (Tr. 881). She testified that the children were extremely hungry and dirty (Tr. 882). Finally, she testified that Appellant was a "good person" (Tr. 885).

Beverly Dulinsky, Appellant's maternal aunt and Appellant's mother's sister, testified that she knew Appellant since he was about one year old (Tr. 886-87). She stated that Appellant's parents split up when Appellant was eight or nine years old (Tr. 889). She said that Appellant took care of himself and his siblings because Appellant's mother was never there (Tr. 890). Although she believed Appellant's mother loved the children, she testified that Appellant's mother never learned the basic skills of how to raise a family (Tr. 891-92). She testified that Appellant and his siblings were not dressed well, had filthy clothes, were not bathed, had no food, and that dirty dishes and dirty laundry were stacked everywhere (Tr. 889, 892). She also stated that at one point her sister came to her and asked her to take the children, including Appellant, because she could not handle it (Tr. 893).

Ms. Dulinsky also stated that Appellant's father was gone most of the time and that his wife Marietta, another of Appellant's stepmothers, did not like the children and put them in foster homes where they were separated (Tr. 895). She stated that Appellant moved from one place to another during this time until he was reunited with his mother when he was fourteen years old (Tr. 896-97). Finally, she stated that she limited her own children's exposure to her sister, Appellant's mother, because she knew that her sister had shoplifted in front of her own children (Tr. 898).

Major Puckett testified that Appellant was his foster child and lived with him and his wife for eight or nine months when Appellant was thirteen or fourteen years old and was in high school (Tr. 901, 904). He stated that Appellant never displayed erratic behavior (Tr. 904). He also confirmed that Appellant had been subjected to numerous foster placements (Tr. 904). He stated that Appellant would talk about being hungry and his mother's drinking (Tr. 905). He stated that Appellant did chores, did not complain, and had a good relationship with the other children (Tr. 905). He also testified that Appellant took care of his late wife, who was legally blind (Tr. 905-06). Appellant would tell Mr. Puckett that he was afraid to love anyone because of what he had been through (Tr. 906). The last time Mr. Puckett saw Appellant was the day Appellant came to his house and told him that Appellant's mother had thrown him through a plate-glass window (Tr. 907).

Michael Deck testified that he was Appellant's younger brother (Tr. 908-09). He stated that things were not great when he and Appellant were children, but that Appellant took care of him (Tr. 910). He stated that Appellant acted like a parent and would give him and his other siblings baths and get them food because they were hungry all the time (Tr. 911). Mr. Deck also testified to the Thanksgiving incident when his mother could not take care of them and they were left with their Aunt Beverly (Dulinsky) (Tr. 911-12). He testified that he was so hungry and ate so fast after getting to his aunt's house that he threw up in his plate and tried to eat it again (Tr. 912). He stated that Appellant was as hungry as he was (Tr. 913).

Mr. Deck also stated that his father's wife Marietta was horrible to him and the other children (Tr. 914). He stated that Marietta only gave them hot dogs to eat and would punish them for no reason, including forcing them to kneel on broomstick handles and beating them (Tr. 914). He stated that Appellant was beaten harder than the other children and that Marietta slapped him in the face (Tr. 914-15). Mr. Deck also related an incident in which Marietta smeared feces on Appellant's face when he accidentally went to the bathroom in his pants (Tr. 915). He also stated that at one point his Uncle Norman and Aunt Elvina took in all the children to live with them except Appellant (Tr. 916). He stated that Appellant was neglected and abandoned while growing up (Tr. 920). Finally Mr. Deck stated that he began bonding with his brother as they got older and wanted to continue

that process, and that he knew that Appellant loved Mr. Deck's children (Tr. 916, 919).

Appellant's counsel testified that she prepared all her witnesses before they testified. (PCR Tr. 135-36). In addition to the time spent interviewing Rita Deck, counsel testified that she spent half an hour with her immediately before she testified (PCR Tr. 130). She prepared Beverly Dulinsky by going to her home in Oklahoma (PCR Tr. 133). She also stated that Beverly was very hesitant to talk about her sister Kathy and did not want to speak against her (PCR Tr. 133, 200-01). This probably explains why Beverly was more forthcoming during her deposition when she did not have to testify in front of her sister like she did at trial. Her time to prepare both Major Puckett and Michael Deck was affected by their location out of state, and in Mike's case, out of the country (PCR Tr. 133, 135, 205). She did not know Puckett was going to testify until a week before trial, but she believed that she had adequate time to prepare him (PCR Tr. 205). She prepared Mike Deck for one and one-half hours before he testified ((PCR Tr. 210).

This testimony provided the jury with an adequate view of appellant's background, and some of the alleged additional evidence would have been cumulative. *See State v. Taylor*, 929 S.W.2d 209, 225 (Mo. banc 1996), *cert. denied* 519 U.S. 1152 (1997). Counsel is under no obligation to present defendant's background in mitigation in a death penalty case, and defense counsel certainly need not present cumulative evidence of a defendant's background. *State*

v. Clay, 975 S.W.2d 121, 145 (Mo. banc 1998), *cert. denied* 119 S.Ct. 834 (1999).

**Appellant's Trial Counsel Was Not Ineffective In Investigating Appellant's
Life**

Appellant's claim that his trial counsel did not conduct an adequate investigation of his life is unsupported by the record. The motion court determined that Appellant's counsel was not ineffective in investigating Appellant's life history (PCR L.F. 343). Appellant's trial counsel testified that she met with Appellant frequently before the trial commenced and that she talked to ten or twelve people in investigating his life history, including Appellant, Appellant's mother, Beverly Dulinski (Appellant's maternal aunt), Richard Dulinsky (Appellant's uncle), the Miserocchi's (foster family), Major Puckett (foster parent), and the Adams (another foster family) (PCR Tr. 86, 91-92). These people gave names of other people that could be contacted for information (PCR Tr. 91-92). Appellant's counsel testified that she had a fairly complete life history in Appellant's case, which included information referred to as "bad mitigation" (PCR Tr. 92-93).

Appellant's counsel also testified that she talked with Pete and Rita Deck (Appellant's father and stepmother) for two hours concerning Appellant's childhood (PCR Tr. 117). She also sent Elvina Deck (Appellant's paternal aunt) an interview letter and actually interviewed Wilma Laird (Appellant's paternal aunt). She testified that Wilma Laird did not want to talk about the family (PCR

Tr. 129). She also stated that she did not follow up on every witness name given unless they had specific information (PCR Tr. 128-29).

Counsel's failure to interview witnesses is rarely sufficient to support a claim of ineffective assistance of counsel. *Yoakum v. State*, 849 S.W.2d 685, 688 (Mo. App. W.D. 1993), *citing*

Appellant complains that his counsel was ineffective for not contacting or presenting certain witnesses or information as mitigating evidence during the penalty-phase of Appellant's trial, but the record shows that counsel employed reasonable trial strategy in not calling certain witnesses in an effort to control or prevent "bad" or "negative" mitigation evidence from being presented to the jury. She testified that her strategy was to minimize the "bad" mitigation evidence the jury might hear (PCR Tr. 160). In other words, Appellant's counsel employed reasonable trial strategy to prevent the jury from hearing evidence about Appellant that would make them less likely to recommend a life sentence, and perhaps more likely to return with a death sentence.

Kathy Barker (Appellant's Mother)

During the evidentiary hearing, Appellant's trial counsel testified that she made a strategic decision not to call Appellant's mother (Kathy) to the stand for a number of reasons (PCR Tr. 204). She testified that she talked with Kathy on several occasions and met with her for ninety minutes before Appellant's trial began (PCR Tr. 112, 114). She stated that these conversations left her with the

distinct impression that Kathy was more concerned and protective of Appellant's sister, Tonia Cummings, who was Appellant's accomplice in the Long murders and was herself facing first degree murder charges at the time of Appellant's trial (PCR Tr. 21, 115). Tonia did not plead guilty to second degree murder charges until May 21, 1998, nearly a month after Appellant was sentenced in his case (Cummings Depo., p. 142).

Counsel was afraid that Kathy might say something bad about Appellant to help her daughter, Tonia (PCR Tr. 203). She testified that Kathy only talked about Tonia and complained how this situation was so unfair to her (PCR Tr. 137-38). She did not believe that Kathy was "wholeheartedly behind her son" (PCR Tr. 138). She simply did not trust Kathy, so she decided not to call her as a witness (PCR Tr. 201). This lack of trust was surely exacerbated by counsel's strategy to portray Kathy and Marietta as bad care givers (PCR Tr. 201).

In addition, Kathy was still living with Jim Boliek, who had helped Appellant plan the Long robbery (PCR Tr. 115, 202). Part of Appellant's defense was to cast suspicion on Boliek as the shooter (PCR Tr. 202). Finally, Kathy did not accept responsibility for the things she did wrong in raising her children and did not want to be portrayed as a bad mother (PCR Tr. 138, 201-02). Kathy never admitted to any physical abuse of her children, but she did admit leaving them alone on occasion (PCR Tr. 116).

Tonia Cummings (Appellant's sister)

Appellant's counsel testified that she did not call Tonia as a witness because Tonia still had first degree murder charges pending against her (PCR Tr. 140). She also testified that she did not interview Tonia for mitigation purposes because Tonia's attorney told her that Tonia would not be helpful because "she was a basket case and did not remember anything" (PCR Tr. 140-41, 220). Appellant's counsel also knew that Tonia's attorney would not let her testify (PCR Tr. 220). Tonia's attorney stated during her testimony that she would have been "adamant" and would have used all her powers of persuasion to prevent Tonia from testifying in Appellant's case (PCR Tr. 27, 33-35). She would have been concerned that Tonia would have incriminated herself, jeopardized her plea negotiations, and possibly subjected herself to a perjury charge, if she would have testified (PCR Tr. 27, 33-35).

Appellant's trial counsel also wanted to keep unfavorable evidence away from the jury that might come out if Tonia testified. This included the incestuous relationship Appellant had with his sister, which was something Appellant's counsel did not want the jury to hear (PCR Tr. 221-22). Appellant's brother, Michael Deck, testified that he knew about the incest because Appellant and Tonia admitted it to him, and he believed that Appellant and Tonia were still engaged in such a relationship while they were living together in 1996, just before Appellant murdered the Longs (M. Deck Depo., pp. 32-33). During her deposition, Tonia confirmed that Appellant had sex with her when she was five years old and

testified that Appellant made frequent sexual advances toward her and laughed about it (Cummings Depo., 71, 81-82, 92-93, 172, 174).

Tonia also had other information that Appellant's counsel would have preferred the jury not hear, such as: Appellant drank 12-18 beers a night; that he started drinking when he was twelve years old; that he smoked marijuana daily and snorted cocaine three or four times a week; that he had sex with his cousins and his stepfather's daughter when he was a teenager; that he was still having sex with one cousin, who was married, even as late as 1996; that he expressed a desire to have sex with his Aunt Beverly (Dulinski); that he was a male stripper and escort; that he was raped in prison; that he used drugs heavier after he was raped; that he did not care if he went back to prison; that he owned a gun; that he bought people presents with stolen money; and that he wrote bad checks to buy things (Cummings Depo., pp. 69-72, 74-78, 81-82, 84-85, 88, 92-93, 166, 172-76, 178).

Carman Lee (Pete) Deck (Appellant's Father)

Counsel testified that she did not call Appellant's father because he was "very unhelpful" in that he could not remember many events in Appellant's childhood (PCR Tr. 118, 137, 199). It was Pete's wife, Rita Deck, who filled in the gaps (PCR Tr. 119). Pete also did not recognize that his ex-wife Marietta had been abusing his children (PCR Tr. 119). Pete's deposition reflects this lack of knowledge and that much of what he knew was told to him by others (P. Deck Depo., p. 20-22, 32, 39). At one point he testified that it was hard for him to

remember these things and to remember that far back (P. Deck Depo., p. 20). Pete did not remember the foster homes that Appellant had been placed in, nor did he know why Appellant had been put in these homes (P. Deck Depo., p. 43). This is easily understood considering Pete's long hours of work and being away from home so much (P. Deck Depo., pp. 25-26)

Pete also testified that he never witnessed Appellant being abused (P. Deck Depo., p. 55). Pete also confirmed that he had bad health, including bad nerves, and that he almost passed out one day while he was at court for Appellant's trial (P. Deck Depo., p. 68-70). This is yet another reason why counsel might have decided not to call him to the stand during the penalty phase.

Pete's deposition also sheds light on an event that Appellant now claims was a traumatic incident that the jury should have heard—the shooting of his dog. Pete explained that the dog had gone mad and needed to be shot before it hurt someone (P. Deck Depo., p. 41-42). He explained that Appellant was told the reasons why and that he comforted him about it (P. Deck Depo., p. 42, 53, 59). Appellant's Aunt Elvina testified to the same thing in her deposition (E. Deck Depo., p. 35-36).

Stacey and Dylan Tesreau

Appellant's counsel testified that she made a decision not to call Stacey Tesreau, who was Appellant's ex-girlfriend and ex-fiancé, for various reasons. First, an attorney-friend of Stacey's had called Appellant's counsel to ask if she

would talk to Appellant and try to get him to stop harassing Stacey with repeated calls to her office (PCR Tr. 216-17). Appellant was apparently making collect calls to her office while he was in the Jefferson County Jail awaiting his trial (PCR Tr. 216-17; S. Tesreau Depo., p. 36). Stacey wanted to handle the matter informally as opposed to filing some sort of legal action to stop the harassment (PCR Tr. 217). In addition, counsel did not want the jury to hear that Appellant might have been stealing money from one girlfriend and giving it to Stacey (PCR Tr. 217).

The sound judgment not to call Stacey as a witness was only reinforced during Stacey's deposition in this case when she related other matters that would have been damaging to Appellant during the penalty phase. This included: that Appellant was molested in prison; that Appellant had been stealing Stacey's child support money and using her credit cards to obtain money to gamble with; that Appellant wrote bad checks; and that Appellant let guys "give him head" when he was in prison (S. Tesreau Depo., pp. 17-18, 19, 31-32, 41). Finally, Stacey admitted that she was seeing another man at the time of Appellant's trial and that he would not have liked her testifying for Appellant (S. Tesreau Depo., p. 43).

Appellant's counsel testified that she would not have called Dylan Tesreau, Stacey's child, to the stand because of his young age (Dylan was only four at the time of Appellant's trial) and because he did not have enough relevance to Appellant's life (PCR Tr. 215-16). Counsel stated that she generally avoided

calling children to the stand because she did not want the jury to think that they were exploiting children (PCR Tr. 215-16). The decision not to call Stacey and Dylan was a product of sound trial strategy that the motion court properly did not second guess.

Elvina Deck, Mary Banks, and Wilma Laird

Appellant's counsel testified that while she knew about Elvina and Wilma, both aunts to Appellant, she did not call them to testify. The name Mary Banks did not appear in her file and she did not recall if Appellant ever told her about Mary (PCR Tr. 123, 226). She testified that she did not call Wilma Laird because Wilma told her office that she did not want to talk about the family (PCR Tr. 129, 143). She stated that Elvina was not called because she did not respond to counsel's attempts to contact her (PCR Tr. 139).

The deposition testimony of these witnesses shows that any testimony they had to offer was either cumulative to that presented at trial or was not sufficient enough to undermine confidence in the jury's verdict. The only incident Mary Banks testified about was the dehydration Appellant suffered as an infant (Banks Depo., pp. 9-10). But she stated that Appellant fully recovered from it (Banks Depo., p. 10). Appellant's mother testified that this incident was a "normal" simply a sick baby type of thing and that she returned home when she found out he was sick (Barker Depo., pp. 33-34). Appellant's characterization of this incident as a traumatic event is pure speculation and is not supported by the testimony of

any of his witnesses. As for Banks, she had little or nothing to offer because she did not see Appellant very much (Banks Depo., pp. 13-15).

Elvina Deck testified in her deposition about matters that other witnesses testified about during the penalty phase. This included matters such as the Thanksgiving Day incident and Marietta's abuse of the children, including the incident where she smeared feces on Appellant's face (E. Deck Depo., pp. 14-16, 21-22).

Wilma Laird had little additional information to offer that other witnesses had not testified about, but did confirm that she refused to speak to Appellant's attorneys (Laird Depo., p. 27).

The Miserocchis

Appellant's counsel testified that she did not call either Carol or Art Miserocchi as witnesses because they had little recollection of Appellant and they were aware that Appellant had attempted to have sex with a pig while he stayed with them (PCR Tr. 217-18). Appellant's counsel wanted to keep that information away from the jury (PCR Tr. 218). The Miserocchi's depositions confirm that they did not remember much about Appellant, except that he was distant, had a smart mouth, and the other children did not like him (A. Miserocchi Depo., pp. 14, 18; C. Miserocchi Depo., pp. 11-12, 23). The Miserocchis not only confirmed that Appellant attempted to have sex with a pig, but they also testified that he attempted to have sex with their vacuum cleaner as well (A. Miserocchi Depo., p.

15; C. Miserocchi Depo., p. 16-17, 22).

Richard Dulinsky and David Hood

Appellant's counsel testified that she did not speak with Hood and chose not to call Richard Dulinsky because he did not have very much contact with Appellant (he had married Appellant's Aunt only two months before the murders) and because Richard wanted to testify in the penalty phase that Richard Boliek was a "hit man for the mob" (PCR Tr. 96, 219). Hood's and Dulinsky's depositions bear out that Dulinsky had little, and Hood had virtually no, contact with Appellant. Counsel's decision not to call them as witnesses was trial strategy.

Ineffective assistance will not lie when the conduct "involves the attorney's use or reasonable discretion in a matter of trial strategy." TA \c 1 \s "State v. Heslop" \l "State v. Heslop, 842 S.W.2d 72 (Mo. banc 1992),

cert. denied, 508 U.S. 921 (1993)" State v. Heslop, 842 S.W.2d 72, 77 (Mo. banc 1992); See also TA \c 33 \s "State v. White" \l "" State v. White, 798 S.W.2d 694 (Mo. banc 1990) TA \c 1 \s "" \l "State v. White, 798 S.W.2d 694, 698 (Mo. banc 1990). "It is only the exceptional case where a court will hold a strategic choice unsound." " Heslop, 842 S.W.2d at 77. "Counsel is strongly presumed to have made all significant decisions in the exercise of reasonable professional judgment." TA \c 1 \s "State v. Johnson" \l "State v. Johnson, 968 S.W.2d 686 (Mo. banc 1998)" State v. Johnson, 968 S.W.2d 686, 699 (Mo. banc 1998). The selection of witnesses is virtually an unchallengeable question of trial strategy. See TA \c 1 \s "State v. Kreutzer" \l "State v. Kreutzer, 928 S.W.2d 854 (Mo. banc 1996), cert. denied, 519 U.S. 1083 (1997)" State v. Kreutzer, 928 S.W.2d 854 (Mo. banc 1996), cert. denied 519 U.S. 1083 (1997).

There is no absolute duty to present mitigating character evidence. TA \c 1 \s "Rousan v. State" \l "Rousan v. State, 48 S.W.3d 576 (Mo. banc 2001)" Rousan v. State, 48 S.W.3d 576, 583 (Mo. banc 2001); TA \c 1 \s "Clemmons v. State" \l "Clemmons v. State, 785 S.W.2d 524 (Mo. banc 1990),

cert. denied, 498 U.S. 882 (1990)" Clemmons v. State, 785 S.W.2d 524, 528 (Mo. banc 1990), cert. denied, 498 U.S. 882 (1990). In Rousan the defendant complained that this counsel was ineffective for not presenting certain records into evidence. But this Court held that the defendant did not clearly show that the failure to introduce these records was not reasonable trial strategy:

The records clearly contained information about his past misconduct and convictions that went beyond that which the jury heard at voir dire. The introduction of such misconduct could have been prejudicial to [defendant], as "to the average juror . . . unconvicted criminal activity is practically indistinguishable from criminal activity resulting in convictions" TA \c 1 \s "State v. Debler" \l "State v. Debler, 856 S.W.2d 641 (Mo. banc 1993)" State v. Debler, 856 S.W.2d 641, 657 (Mo. banc 1993). Thus, defense counsels' decision not to introduce such non-beneficial items cannot be said to be anything other than reasonable trial strategy.

TA \c 33 \s "Rousan v. State" \l "Rousan, 48 S.W.3d at 583

Appellant's counsel's decision not to call witnesses that she did not trust was also

reasonable trial strategy. “When defense counsel believes a witness’ testimony would not unqualifiedly support his client’s position, it is a matter of trial strategy not to call him to the stand, and the failure to call such witness does not constitute ineffectiveness of counsel.” Rousan, 48 S.W.3d at 587; see also TA \c 1 \s "Murphy v. State, 768 S.W.2d" \l "Murphy v. State, 768 S.W.2d 171 (Mo. App. 1998)" Murphy v. State, 768 S.W.2d 171, 172-73 (Mo. App. 1998). “The strategic choice not to call a witness is virtually unchallengeable.” TA \c 1 \s "Teaster v. State" \l "Teaster v. State, 29 S.W.2d 858 (Mo. App. S.D. 2000)" Teaster v. State, 29 S.W.2d 858, 860 (Mo. App. S.D. 2000); TA \c 1 \s "State v. Butts, 938 S.W.2d" \l "State v. Butts, 938 S.W.2d 924 (Mo. App. 1997)" State v. Butts, 938 S.W.2d 924, 930 (Mo. App. 1997).

To establish ineffectiveness of trial counsel for failing to call a witness, a movant must show that the witness could have been located by reasonable investigation, that the witness would testify if called, and that the testimony would provide a viable defense. TA \c 33 \s "State v. Clay, 975 S.W.2d " \l "State v. Clay, 975 at 143. Defense counsel cannot be found ineffective for
no

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