

No. 83822

**IN THE
MISSOURI SUPREME COURT**

RANDALL KNESE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from the Circuit Court of St. Charles County, Missouri
11th Judicial Circuit, Division 1
Honorable Ellsworth Cundiff, Jr., Judge**

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of St. Charles County. The convictions sought to be vacated were for murder in the first degree, § 565.020.1, RSMo 1994, and attempted forcible rape, § 566.030.2, RSMo 1994, for which the sentences were death for first degree murder and twenty years in the custody of the Department of Corrections for attempted rape. Due to the sentence imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Randall Knese, was charged by information on April 15, 1996 with first degree murder and attempted forcible rape (L.F. 20-23).¹ Thereafter, the State filed a Notice of Intent to Seek the Death Penalty (L.F. 28-29). Following appellant's election to try both the murder and attempted rape at the same time, this cause went to trial before a jury beginning on June 16, 1997 in the Circuit Court of St. Charles County, the Honorable Ellsworth Cundiff presiding (L.F. 7; Tr. 10, 19-20).

This Court stated the evidence adduced at trial as follows:

On the morning of March 23, 1996, one of Mr. Knese's neighbors heard a dog barking across the street and then a man yelling. When the neighbor went to her kitchen door to see what was going on, Mr. Knese, wearing only a pair of sweatpants pulled down around his ankles, opened the front door, ran into the

¹The record on appeal consists of the trial transcript ("Tr."), the direct appeal legal file ("L.F."), a suppression hearing transcript ("Mot.Tr."), another motion hearing transcript ("Supp.Tr."), the post-conviction legal file ("PCR L.F."), the evidentiary hearing transcript ("PCR Tr."), State's trial exhibits ("St.Exh."), appellant's post-conviction exhibits ("Mov.Exh."), and post-conviction depositions, which will be designated by the last name of the deponent (e.g., "Wendt"). Respondent requests that this court take judicial notice of its file from the direct appeal in this case, State v. Randall B. Knese, No. 80225.

neighbor's house and landed on the couch. Mr. Knese then stood, pulled up his pants, and came into the kitchen, where he and the neighbor began to yell at each other. When the neighbor's boyfriend came into the kitchen, Mr. Knese ran into the bedroom and sat on the television. After then going into the bathroom, Mr. Knese came back into the kitchen and then ran outside.

Another neighbor saw Mr. Knese standing outside, holding a broom and screaming. When the neighbor drove closer to where Mr. Knese was standing, Mr. Knese jumped on the hood of the car. The neighbor noticed that Mr. Knese had some scratches on his face, but did not otherwise appear to be injured. Mr. Knese slid off the hood and opened the passenger-side door. The car gained speed, however; and before Mr. Knese was able to get inside the car, he was dragged along the car's side until he eventually let go. The neighbor who was driving the car called the police when she arrived at work.

The police found Mr. Knese lying in the road and noticed that he was bloody and had multiple cuts and abrasions. When asked how he sustained the injuries, Mr. Knese originally said that the "devil had come to get him." He later said that "the bitch tried to kill" him. Mr. Knese also told a paramedic that he did not

want to be treated differently for what he had done. Mr. Knese was then taken to the hospital.

While one police officer had been taking care of Mr. Knese in the road, another officer investigated Mr. Knese's home. From the front porch of the home, that officer saw Karin Knese lying motionless on the floor. Her body was partially nude, with her legs spread apart. The officer found no pulse or other signs of life. A paramedic later pronounced Ms. Knese dead.

At the hospital, the police advised Mr. Knese of his Miranda rights, and Mr. Knese waived them. Mr. Knese made four statements about the events that had occurred earlier in the day. The police audiotaped one of the statements. Throughout these statements, Mr. Knese admitted to killing his wife. According to Mr. Knese, his wife had taken their child and visited Ms. Knese's sister-in-law the night before, because Ms. Knese was angry about Mr. Knese's drug use. When she returned, she told Mr. Knese that she wanted him to leave their home. They both then went to sleep in separate rooms; Ms. Knese slept on the couch. Mr. Knese woke up early that morning and ingested some cocaine. About an hour after using cocaine, Mr. Knese went into the living room to talk about the couple's problems. Mr. Knese

laid down by his wife, but Ms. Knese did not want to talk. Ms. Knese pushed him off the couch, but Mr. Knese continued touching her and talking to her. He forced himself back onto the couch and tried to engage in foreplay. When Ms. Knese protested, Mr. Knese pulled off her pants and panties. He forced himself on top of her and attempted to have sex with her; however they did not engage in intercourse because Mr. Knese could not sustain an erection.

Ms. Knese then, according to Mr. Knese, went "ballistic." The two began to fight, and Ms. Knese screamed, "rape." When she did this, Mr. Knese put one hand over her mouth while he squeezed her neck with the other. Ms. Knese grabbed a glass lampshade and swung. Mr. Knese blocked the swing with his arm, and the lampshade shattered. Ms. Knese picked up a piece of glass and swung again. This time she cut Mr. Knese's palm. Mr. Knese then took the glass and slashed her neck. The two fell to the floor, where Mr. Knese again began to strangle Ms. Knese. At one point, his hold was so tight that his thumb went through her skin. He also bit her neck. When she put a finger in his eye, he headbutted her. At the end of the altercation, Mr. Knese stood up, kicked her head and stood on her neck for five or ten minutes.

At trial, the State presented physical evidence that corroborated Knese's confession. A forensic pathologist performed an autopsy on Ms. Knese and listed the cause of death as manual strangulation and probable suffocation, combining to cause asphyxiation. She found multiple abrasions, large amounts of hemorrhage, bruising, lacerations and cuts about Ms. Knese's head and neck area. The medical examiner also gave her opinion that sexual assault was probable, based on the fact that the body was in a prone position with legs spread and was partially nude, and the fact that Ms. Knese had been killed with the assailant very close to her body.

State v. Knese, 985 S.W.2d 759, 764-65 (Mo. banc), cert. denied 526 U.S. 1136 (1999).

At the close of evidence, instructions, and arguments of counsel, appellant was found guilty of first degree murder and attempted forcible rape (L.F. 129-130; Tr. 663). The next day, the juror's were instructed as to a sentence for attempted rape and returned a recommendation of twenty years in the custody of the Department of Corrections (L.F. 133; Tr. 676).

During the penalty phase, the State presented victim impact testimony from the victim's mother, brother, aunt, step-sister, two cousins, and best friend (Tr. 682-754). The State also presented evidence that appellant had two DWI convictions (Tr. 755). Appellant presented his own testimony and that of his mother, father, brother, uncle, three friends, and a professional

acquaintance (Tr. 773-786). At the conclusion of the penalty phase, the jury found two aggravating circumstances and returned a verdict of death (L.F. 146; Tr. 812-813).

On September 8, 1997, the trial court followed the recommendations of the jury and sentenced appellant to death for first degree murder and twenty years for attempted rape (L.F. 183-184; Tr. 825). Appellant appealed to this Court, which affirmed the convictions and sentences. Knese, 985 S.W.2d at 779.

On June 7, 1999, appellant filed his *pro se* Motion to Vacate, Set Aside, or Correct Judgment and Sentence (PCR L.F. 9-23). Counsel was appointed to represent appellant and filed an amended motion (PCR L.F. 24, 28-592). The motion court denied appellant's request for an evidentiary hearing on all but three of appellant's 22 claims (PCR L.F. 660-661). An evidentiary hearing was held on those three claims, at which appellant's trial counsel testified and the depositions of other witnesses were received (PCR Tr. 4, 6-7, 14-105).

On June 11, 2001, the motion court submitted findings of fact and conclusions of law denying appellant's motion (PCR L.F. 803-843). This appeal follows.

ARGUMENT

I.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING HIS POST-CONVICTION CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR INADEQUATE VOIR DIRE BECAUSE APPELLANT FAILED TO PROVE THAT HE SUFFERED STRICKLAND PREJUDICE IN THAT HE FAILED TO PROVE THAT JURORS GRAY OR MALONEY WERE ACTUALLY BIASED AGAINST HIM OR THAT ANY “AUTOMATIC” DEATH PENALTY JURORS SERVED ON HIS JURY (Responds to Points I and II of Appellant’s Brief).

Appellant contends that the motion court clearly erred in denying post-conviction relief because counsel was ineffective for conducting an inadequate and incomplete voir dire, resulting in the impaneling of jurors who could not be fair and impartial (App.Br. 26, 34). In Point I, appellant complains that trial counsel failed to fully review the juror questionnaires or ask for more time to do so, and therefore he failed to discover that jurors Dennis Gray and Richard Maloney were allegedly unqualified to serve because of their views on crime and the death penalty (App.Br. 26-29, 33). In Point II, appellant argues that counsel failed to ensure that jury members were asked if they would automatically impose the death penalty or whether they could consider a life sentence (App.Br. 34-37). Appellant claims that these errors prejudiced appellant because the jury included members who were not fair and impartial (App.Br. 33-34).

A. Facts

Prior to trial, questionnaires were completed by members of the venire for counsel for both sides to use in evaluating venirepersons (Tr. 21). The questionnaires included the questions about members' opinions on crime, the death penalty, and people they admired (Mov.Exh. 41, 42). Many of the questionnaires were available to counsel prior to the day of the voir dire, but a number were not given to counsel until immediately prior to voir dire (PCR Tr. 23-24; Wendt 139;). Included in that group of questionnaires were those of venirepersons Gray and Maloney (PCR Tr. 141, 147; Mov.Exh. 41, 42). Gray's questionnaire indicated these views: that he most admired Oliver North; that laws are "way to [sic] soft" on criminals (as opposed to "too hard" or satisfactory); that unemployment and welfare were primary causes of crime; that more jails, longer sentences, and less paroles should be used to help solve the crime problem, and that public executions might make someone think twice about committing a murder (Mov.Exh. 41). Maloney's questionnaire indicated these beliefs: that laws were, "for the most part, too soft" on criminals; that "drugs, greed, and power" were primary causes of crime; that the parole board and "good time" should be abolished; and, regarding the death penalty, "Don't allow endless appeals, 15 years more time, last meals, and clergy to pamper a killer. He didn't allow this for his victim. If he is found guilty, do it" (Mov.Exh. 42).

During voir dire, the trial court asked the jury the following question about the range of punishment:

It is my understanding that the State will be asking for the death penalty in this case. That is the range of punishment. I will instruct you on the range of punishment.

Is there anybody that could not follow the Court's instructions with respect to the range of punishment? Basically folks, that is what I'm asking you is the death penalty question. Is there anybody here that feels that they could not follow the Court's instructions?

(Tr. 43). This was the only question the court asked the entire panel regarding the death penalty. All venirepersons responding to that question were questioned regarding their views outside the hearing of the panel, and each said, to varying degrees, that they would have trouble considering the death penalty (Tr. 43-44, 57, 59-60, 67-95, 99-100). Later, when the prosecutor attempted to question a venireperson for whom there was no questionnaire regarding the death penalty, the court stopped him, reminded him that the prosecution had initially had concerns about "poisoning the panel as to the death penalty," and told him not to go into that area (Tr. 118-119). The court reiterated this position when the prosecutor asked for permission to ask an individual venireperson about his death penalty views based on his questionnaire answer (Tr. 166).

At the end of the State's portion of voir dire, the panel was asked, "Is there anyone who for any reason feels that they cannot serve fairly and impartial [sic] both to the State and to the defense in this case?" (Tr. 144). Neither Gray nor Maloney indicated that they had any trouble being fair and impartial (Tr. 144-173).

During his portion of voir dire, counsel did not attempt to ask any questions about the death penalty, nor did he ask Gray or Maloney any questions (Tr. 180-221). He also asked the

entire panel if anyone would have difficulty being fair and impartial, and neither Gray nor Maloney responded (Tr. 215-217). Both Gray and Maloney were on appellant's jury, Gray serving as the foreman (L.F. 103; PCR Tr. 27; Wendt 142-143).

In his amended post-conviction relief motion, appellant claimed counsel was ineffective for failing to move to strike Gray and Maloney either for cause or peremptorily, alleging that both jurors were "too biased to fairly serve on any jury" (PCR L.F. 440-445). Appellant claimed that, at the very least, counsel was ineffective for failing to read Gray's and Maloney's questionnaire responses and ask either juror about their views (PCR L.F. 440-441, 444). Appellant also alleged that counsel was ineffective for failing to ensure an adequate death-qualification voir dire in that he did not question and identify "automatic death penalty" jurors or move for a more "extensive and meaningful" death-qualification process (PCR L.F. 459). Appellant claimed he was prejudiced because his jury was conviction- and death penalty-prone (PCR L.F. 438).

In both his pre-motion deposition and his evidentiary hearing testimony, counsel testified that he had previous experience in death-qualification voir dire, having been counsel in 10-15 previous first-degree murder cases (Wendt 157-158; PCR Tr. 25). He testified that he spent several hours reviewing those questionnaires he received before the start of trial (PCR Tr. 139). He stated that he tried to review all the questionnaires received the day of trial, but said he had to do it quickly and did not ask for more time to review them all (Wendt 139-140, 153; PCR Tr. 27). Counsel claimed that he had not read the answers that either Gray or Maloney had given regarding their views on crime and the death penalty and that he would have

moved to strike both jurors, or at least questioned them, had he read those answers (Wendt 145-146, 152, 165-172).

At the deposition, even though counsel was asked about his general preparations for voir dire, he was not asked about ensuring that the voir dire included questions to identify “automatic death penalty” jurors (Wendt 139, 154-158). When appellant was precluded from asking questions on this issue at the evidentiary hearing, appellant offered the deposition testimony as an offer of proof, even though it contained no testimony on this issue (PCR Tr. 44-46, 49).

The motion court denied these claims, finding that appellant failed to plead or prove that either Gray or Maloney were actually biased against appellant (PCR L.F. 834-836, 838). The motion court found counsel’s testimony that he would have struck Gray and Maloney incredible (PCR L.F. 837). The motion court also found that it took control of the death qualification voir dire and that counsel was not ineffective for complying with the court’s orders (PCR L.F. 841).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Lyons v. State, 39 S.W.3d 32, 36 (Mo. banc), cert. denied 122 S.Ct. 402 (2001); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id.

C. Analysis

To prove ineffectiveness, the defendant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Bucklew v. State, 38 S.W.3d 395, 397 (Mo. banc), cert. denied 122 S.Ct. 374 (2001). To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Lyons, 39 S.W.3d at 36. A movant has the burden of proving grounds for relief by a preponderance of the evidence, and must satisfy both the performance and prejudice prong to prevail. State v. Kreutzer, 928 S.W.2d 854, 877 (Mo. banc 1996), cert. denied 519 U.S. 1083 (1997); State v. Taylor, 929 S.W.2d 209, 224 (Mo. banc 1996), cert. denied 519 U.S. 1152 (1997); Supreme Court Rule 29.15(i).

Both of appellant's post-conviction claims as to the adequacy of counsel's voir dire must fail because appellant failed to prove that he suffered prejudice. If a movant fails to show

prejudice, the reviewing court need not evaluate performance. Taylor, 929 S.W.2d at 224-225. To establish prejudice from the jury selection process, appellant must prove that jurors who served were actually biased against him. See Clemmons v. State, 785 S.W.2d 524, 529 (Mo. banc), cert. denied 498 U.S. 882 (1990); Hightower v. State, 1 S.W.3d 626, 631 (Mo.App., S.D. 1999).

Here, as to Point I, appellant simply claimed in his motion that Gray and Maloney were “too biased to fairly serve on any criminal jury” because of their views on crime and the death penalty (PCR L.F. 441). However, the bias or prejudice required to disqualify a juror is a predisposition to convict before evidence is heard. State v. Lynch, 816 S.W.2d 692,694 (Mo.App., S.D. 1991). Here, the juror’s views on what should happen to death row inmates *after* their conviction and sentence deal only with the collateral consequences of the conviction and sentence and do not indicate that either juror was necessarily prejudiced in favor of guilt. State v. Ivory, 916 S.W.2d 337, 339 (Mo.App., S.D. 1995).

An review of the record reveals that neither Gray’s nor Maloney’s views had any effect on their ability to be fair and impartial. The qualifications of the juror are not determined conclusively by one response (in this case, the questionnaire answers), but are made on the basis of the entire examination. State v. Middleton, 995 S.W.2d 443, 460 (Mo. banc), cert. denied 528 U.S. 1054 (1999). When the panel was asked by both attorneys whether there was anything which would prevent them from being fair and impartial, neither juror responded (Tr. 144-173, 215-217). Group questioning and nonverbal responses may be considered in determining a venireperson’s qualifications as a potential juror. Bannister v. State, 726 S.W.2d

821, 826 (Mo. banc), cert. denied 483 U.S. 1010 (1987).

Appellant also failed to establish prejudice regarding counsel's failure to ensure that no "automatic death penalty" jurors sat on appellant's jury. In his amended motion, appellant did not identify a single juror who would have automatically imposed the death penalty or who could not have considered mitigating factors, which is required to show prejudice (PCR L.F. 438-469). Clemmons, 785 S.W.2d at 529. Appellant's failure to specifically plead and prove which jurors were "automatic death penalty" jurors in his motion defeats his claim.

In his brief, appellant claims that venirepersons Gray and Maloney were "automatic death penalty" jurors because of their views about the death penalty (App.Br. 37). However, appellant did not identify either as "automatic death penalty" jurors in his motion, nor did he prove that at the evidentiary hearing (PCR L.F. 438-469). Because this claim was not made to the motion court, appellant is precluded from raising it now. State v. Nunley, 980 S.W.2d 290, 292 (Mo. banc 1998), cert. denied 526 U.S. 1100 (1999). Further, as explained above, appellant failed to prove that either Gray or Maloney were prejudiced against appellant at all, let alone that they would only impose death. It is possible that their views on the death penalty would make them much more cautious in imposing death because they believed the consequences should be harsher *after* that decision is made. There is no evidence to support this, but this is exactly the type of speculation appellant engages in to assert that those jurors would automatically impose death. In actuality, we do not know whether either juror, or any juror, would have automatically imposed death because appellant failed to meet his burden of pleading and proving that fact.

Because appellant failed to plead and prove prejudice arising from counsel's alleged errors in voir dire, the motion court's findings were not clearly erroneous, and appellant's first two claims on appeal must fail.

II.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT POST-CONVICTION CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO INVESTIGATE OR CALL CERTAIN PENALTY PHASE WITNESSES BECAUSE HE DID NOT PROVE COUNSEL KNEW OR SHOULD HAVE KNOWN ABOUT THE WITNESSES WHO DID NOT TESTIFY AT TRIAL, AND EVERY WITNESS'S TESTIMONY ABOUT APPELLANT'S DRUG USE VIOLATED COUNSEL'S REASONABLE TRIAL STRATEGY AND WOULD NOT HAVE UNQUALIFIEDLY SUPPORTED THE DEFENSE (Responds to Appellant's Point III).

Appellant claims that the motion court erred in finding that trial counsel was ineffective “for not investigating or presenting mitigating evidence from family and friends” (App.Br. 41-42). Appellant claims that, had counsel “done minimal investigation,” he could have presented such evidence as: appellant’s parents were distant and did not provide supervision (App.Br. 41, 43-44); appellant was an altar boy (App.Br. 41, 45); and appellant was “shy of girls in high school” (App.Br. 41, 47). Appellant argues that this type of evidence would have “given the jury a more accurate picture of who [appellant] was and would have given them reasons not to impose death, but to choose life” (App.Br. 41).

A. Facts

At the penalty phase, counsel called a total of nine witnesses, including appellant, to testify on appellant’s behalf (Tr. 756-772).

Shirley Harvey testified that she had known appellant since he was five years old (Tr.

773). She testified that she saw him every day from the time he was five until he was seventeen or eighteen (Tr. 773). She has a son who is the same age as appellant, and the two boys would play together daily, usually playing soccer or baseball (Tr. 773). She testified that her family would invite appellant to go places with their family, and her son would do things with appellant's family (Tr. 773). She described appellant as "a typical young boy who loved to play sports (Tr. 773). She also said that appellant was a good, loyal friend to her son (Tr. 773). She said that appellant was a lovable and special boy (Tr. 773-774). She testified that, after the boys went away to different colleges, she did not see appellant as much, although she would see him at family functions such as his younger brother's graduation (Tr. 773-774). She also attended his wedding (Tr. 774).

Darren DeClue testified that he had known appellant since their high school years, and had maintained frequent contact with him (Tr. 775). The two would play ball together and also gather at his house, where appellant would bring the victim (Tr. 775). It seemed to DeClue that everything would be alright with appellant because there never seemed to be any problems with him (Tr. 775). He testified that appellant was very easygoing and "never, never" tried to start any trouble with anyone (Tr. 775). He testified that he had never seen appellant behave in anything but a gentlemanly fashion, including when appellant was around the victim (Tr. 775-776).

Thomas Knese, appellant's uncle, testified that appellant was a "pretty sports-minded" person (Tr. 777). He described appellant as quiet and calm, and noted that appellant never seemed to get "stirred up in any way" by anything other than sports (Tr. 777). He had never

seen appellant do anything ungentlemanly, out of order, or out of line (Tr. 777).

Robert Kordis testified that he was the manager of a funeral home that did business with the appellant's family printing business, which fulfilled ninety-five or more percent of the funeral home's printing needs (Tr. 777, 779). He testified that he had known appellant thirteen or fourteen years (Tr. 778). He stated that appellant always conducted himself in a professional manner and was calm most of the time (Tr. 778). He testified that if he would have a problem with a printing error on prayer cards, which could be upsetting to a mourning family, appellant would make sure the errors were corrected and the cards always brought back on time so as not to disturb a visitation (Tr. 779).

Everit Jones testified that he had known appellant for about five years (Tr. 780). He testified that he had started a baseball team in Portage Des Sioux, and that appellant wanted to play baseball and joined the team (Tr. 780). He testified that the two played a lot of baseball on Sundays for six months out of each year (Tr. 780). He stated that the team had started as a non-profit organization and had to raise money, and that appellant would make fliers to advertise to businesses so they could raise money (Tr. 780). He testified that appellant never did anything untoward or ungentlemanly (Tr. 781). He described appellant as a very calm person (Tr. 781). He testified that appellant never got mad on the ball field (Tr. 781). If appellant ever made a mistake, he would simply walk off the field, get his glove, and go back on the field (Tr. 781). Jones found it "amazing" that appellant never got mad (Tr. 781).

Ralph Knese, III, testified that he was appellant's older brother by three years (Tr. 782). He testified that, although he and appellant had their differences, much like any other siblings,

there was never any violence between the two (Tr. 782). He testified that if either would ever get mad at the other, appellant would simply throw his hands up, laugh, and walk away (Tr. 782). He testified that appellant never appeared to be a violent person to him (Tr. 782). He testified that he was as shocked by the murder as everyone else (Tr. 782).

Ralph Knese, Jr., appellant's father described appellant as a very kind and gentle son (Tr. 783). He testified that, while appellant got into mischief when he was younger and was disciplined for it, he was a normal son (Tr. 783). He said that appellant had never been violent at all (Tr. 783). He testified that appellant worked for the family printing business (Tr. 784). He testified that, while he had suspicions, he never saw appellant do any drugs and never confronted appellant about that (Tr. 784). Further, he testified that the victim never told him about appellant using drugs (Tr. 785).

Jane Knese, appellant's mother, testified that after the murder, she and her husband fully cooperated in making sure that the victim's parents got custody of the victim's son (Tr. 785). She described appellant as a very loving and caring child (Tr. 786). As an example, she testified that when he was eleven or twelve, appellant started helping with the cooking so that the family could eat meals on time (Tr. 786). She testified that he grew up continuing to cook and made the best barbeque in the family (Tr. 786). She stated that she never got any calls from school that appellant had been in trouble (Tr. 786). She testified that appellant was never violent (Tr. 786). She never got any complaints from anyone that appellant started any fights (Tr. 786).

In his amended motion, appellant claimed that trial counsel was ineffective for failing

to investigate the testimony of penalty phase witnesses who testified (PCR L.F. 324-369), as well as failing to investigate and call other witnesses (PCR L.F. 369-412). As to those witnesses, appellant claimed that, had counsel “conducted any investigation at all, even as cursory as to just ask [appellant] or his parents for the names of witnesses that they knew would be willing to come forward and testify on appellant’s behalf” (PCR L.F. 381). In all, appellant detailed the alleged testimony of twenty-nine different penalty phase witnesses he claimed counsel should have investigated (PCR L.F. 324-412). Appellant claimed that, had counsel investigated and presented these witnesses, the picture of appellant presented by the State would have “crumbled” and appellant would not have been sentenced to death (PCR L.F. 315).

The motion court granted a hearing on this claim (PCR L.F. 771), but ordered the testimony of all penalty phase witnesses to be submitted by deposition (PCR L.F. 779). Of the 29 witnesses that appellant alleged would have been willing to testify, appellant presented the depositions of nine (PCR Tr. 6-7; PCR L.F. 5). These nine witnesses included six who did not testify at trial (Janet Chalupny, Stanley Miller, Charles Stock, Larry Scott Langelier, Robert Sutter, Cindy Rae Lane) and three who did (Shirley Mae Harvey, Ralph Knese III, Jane Knese).

One group of these witnesses gave detailed testimony about appellant’s youth. Shirley Mae Harvey and Janet Chalupny testified that their children played sports together and that appellant spent a lot of time with their families because appellant’s parents hardly ever went to or took appellant to his sporting events (Harvey 9, 13-15, 33-41; Chalupny 268-278, 290). Stanley Miller, appellant’s youth sports coach, also testified regarding these facts (Miller 305-314). Charles Stock testified that appellant and his brothers were left home by themselves

often and he had to give appellant and his brothers the spare key to their home because appellant's parents were not there (Stock 516-521). All of these witnesses ceased having regular contact with appellant after high school or earlier (Harvey 47-48, 57; Chalupny 292; Miller 318; Stock 529); Stanley Miller only saw appellant once during high school, when he caught appellant smoking marijuana (Miller 315).

Two other witnesses were appellant's boyhood and high school friends. Larry Scott Langelier and Robert Sutter started attending religion classes and playing sports with or against appellant in grade school and continued to be athletically involved with appellant through high school (Langelier 89-93; Sutter 169-170, 177-178). Sutter also testified that appellant was a server at church with him (Sutter 173). Langelier continued to have contact with appellant through sports until the murder, but Sutter did not see appellant after high school (Langelier 95-96; Sutter 173, 183, 203).

Cindy Rae Lane was appellant's friend and the live-in girlfriend of appellant's drug dealer (Lane 221-224, 226, 235-236). Most of her testimony regarded appellant's drug use (Lane 223-230, 237-238, 240, 241-244, 246-247, 253, 257-259). In addition to Lane's testimony, all of the above witnesses testified about appellant's drug use, many offering it as an excuse for appellant's actions during the crime or his statements afterward (Harvey 49, 64, 66, 68, 71-72; Langelier 94-95, 100-101, 123, 127, 138-139, 149, 151; Sutter 183-194, 196-197, 204, 207, 209; Chalupny 280-281; Miller 315, 320-321; Stock 528, 530, 534).

The other witnesses presented by deposition were appellant's mother Jane Knese and his brother Ralph Knese III. Both testified in detail about appellant's upbringing and the fact

that appellant's parents were not home a lot, leaving Ralph in charge of the house (J.Knese 629-634; R.Knese 334-339, 342). Both also testified about letters, poetry and drawings appellant sent to them and other family members after he was incarcerated (J.Knese 693-695, 708-715, 720, 724; R.Knese 405-406, 410-411, 413-417). Both testified about appellant's drug use, including trouble that appellant got into and harm done to the family because of drugs (J.Knese 681, 687-688, 693, 703-704, 739-747, 750-753, 755, 761, 763-764; R.Knese 378-380, 384-385, 387, 390-392, 430-431, 434, 437-438, 445-446). Ms. Knese also offered drug addiction as an explanation for appellant's actions (J.Knese 744-745, 747-748, 763).

These witnesses testified to traits they observed about appellant, including that he was: shy with girls (Harvey 41-42; Langelier 101-102; Sutter 178-179; Lane 232); a peacemaker (Harvey 55; Langelier 97; Sutter 177; Lane 231, 237); very polite (Harvey 11; Chalupny 275); never violent or in trouble (Harvey 11, 55-56; Langelier 127-128, 150-151; Lane 228, 237; Chalupny 283-284; Miller 316-317; R.Knese 403; Stock 524, 529; J.Knese 634, 747); very focused on and determined about sports (Langelier 102, 118; Sutter 178, 193-195; Miller 308-310); devastated by the death of a best friend during high school, leaving him withdrawn (Harvey 44-46; Langelier 111; Sutter 179-180; Chalupny 279-280; J.Knese 683-684); in love with and respectful of the victim (Harvey 50; Langelier 105-106, 125-126; Lane 228, 233, 240, 255; J.Knese 702); and happy about the birth of his son (Harvey 51; Langelier 109; Lane 234; R.Knese 396, 400-401; J.Knese 698-699). All of the witnesses who did not testify at trial said they were not contacted about testifying, they were willing and available to testify, and all but Lane said they would not have been difficult to contact (Langelier 133-134; Sutter

201-202; Lane 236-237; Chalupny 285-286; Miller 317; Stock 532).

At the evidentiary hearing, counsel testified that he spent the overwhelming amount of his time preparing the guilt phase of the case, and likely spent only a maximum of ten hours preparing the penalty phase (PCR Tr. 72). Counsel testified that in preparing for the penalty phase, he talked to appellant and his parents about who to call to testify about the kind of person appellant was as a child and young man (PCR Tr. 50-51). In her deposition, Jane Knese testified that counsel did ask for a list of potential witnesses in the first part of April, more than two months before trial, and that they compiled a list and gave those names and numbers to counsel (J.Knese 660-662). However, Ms. Knese did not testify as to who specifically was on that list (J.Knese 662). Counsel testified that he spent little time with the penalty phase witnesses that he did call other than appellant's parents, and made phone calls to each witness prior to their testimony which lasted no longer than thirty minutes each (PCR Tr. 55-56). He also spent a brief time with the witnesses outside the courtroom prior to their testimony (PCR Tr. 55-56). He testified that he did not ask for old photos, certificates, or appellant's poetry or drawings (PCR Tr. 65-66).

The motion court denied appellant's claim, finding that many of appellant's complaints about counsel were matters of trial strategy and were simply hindsight, that much of the proposed testimony did not unqualifiedly support the defense or would have violated trial counsel's strategy of avoiding references to appellant's drug use, and that most of the testimony would not have provided appellant a defense as it was not reasonably probable to have affected the outcome of the trial (PCR L.F. 825-831).

B. Analysis

To prove ineffectiveness with regard to death penalty sentencing, a movant must show that, but for his counsel's ineffective performance, there is a reasonable probability that the jury would have concluded, after balancing the aggravating and mitigating circumstances, that death was not warranted. Rousan v. State, 48 S.W.3d 576, 582 (Mo. banc 2001). Counsel has no absolute duty to present mitigating character evidence and is under no duty to present background evidence in mitigation of punishment. State v. Clemons, 946 S.W.2d 206, 223 (Mo. banc), cert. denied 522 U.S. 968 (1997). Counsel will be found ineffective in failing to locate and call witnesses if the movant can show that trial counsel knew or should have known of the existence of such witnesses, that the witnesses could have been located through reasonable investigation, that the witnesses would have testified if called and that their testimony would have provided a viable defense. State v. Harris, 870 S.W.2d 798, 817 (Mo. banc), cert. denied 513 U.S. 953 (1994). If the testimony would not unqualifiedly support the defendant, failure to call that witness does not constitute ineffective assistance of counsel. State v. Jones, 921 S.W.2d 28, 35 (Mo.App., W.D. 1996).

1. Appellant Failed to Plead and Prove that Counsel Knew or Should Have Known About Non-Testifying Witnesses

As stated above, to prove counsel was ineffective for failing to call witnesses, appellant had to prove that counsel knew or should have known of the existence of the witnesses. Harris, 870 S.W.2d at 817. Here, appellant failed to prove that counsel had any reason to know that any of the above-mentioned witnesses that did not testify at trial even existed. In his amended

motion, appellant claimed that counsel should have at least asked appellant and his parents for the names of possible witnesses, but claimed that he did not (PCR L.F. 381). However, both counsel and Ms. Knese testified that this happened (PCR Tr. 49-51; J.Knese 660-662). Counsel testified that he talked to the eight witnesses who testified, and no others (PCR Tr. 82). Appellant did not present any evidence that the list contained any of the witnesses whose testimony was not presented at trial, nor did he plead that counsel was ever advised of these witnesses, or that counsel could have discovered any of these witnesses except by asking appellant and his parents who they were. Because he did not prove that counsel knew or should have known of the six witnesses who did not testify at trial, appellant's claim regarding those six witnesses must fail.

2. The Proposed Testimony Did Not Unqualifiedly Support the Defense

After conducting an investigation of appellant's mental state, including hiring a psychiatrist to examine appellant, counsel made the strategic decision not to present evidence of appellant's drug use, as he did not believe jurors would be sympathetic due to someone committing this type of crime because they were on drugs, and that even suggesting that the jury should not punish appellant too harshly because of his drug use would do more harm than good (Wendt 62-69, 81-87, 182, 189-190).² Ms. Knese testified that, prior to trial, counsel

²This issue of counsel's trial strategy and the reasonableness of his investigation regarding it is developed in Point VI of Respondent's Brief, as that point directly deals with appellant's claim that counsel was ineffective for failing to pursue and present a defense based

did not want the penalty phase witnesses testifying about appellant's cocaine use (J.Knese 737). Clearly, counsel had a trial strategy to avoid relying on appellant's drug use as a reason to excuse him from the death penalty.

However, the testimony of every witness that appellant suggests counsel should have called or elicited more information from includes significant information about appellant's drug use (Harvey 49, 64, 66, 68, 71-72; Langelier 94-95, 100-101, 123, 127, 138-139, 149, 151; Sutter 183-194, 196-197, 204, 207, 209; Lane 223-230, 237-238, 240, 241-244, 246-247, 253; Chalupny 280-281; Miller 315, 320-321; R.Knese 378-380, 384-385, 387, 390-392, 430-431, 434, 437-438, 445-446; Stock 528, 530, 534; J.Knese 681, 687-688, 693, 703-704, 739-747, 750-753, 755, 761, 763-764). Lane's testimony is almost exclusively about appellant's drug use, since her boyfriend was appellant's drug dealer (Lane 223-230, 237-238, 240, 241-244, 246-247, 253). Many of the witnesses even specifically used appellant's drug use as the explanation why appellant committed his crimes and why his statements about the crimes could not be trusted, such as: Ms. Knese's statements that it was a blessing that her other sons were not addicted to drugs, explaining why they, who had the same upbringing as appellant, did not commit these kind of crimes (J.Knese 744-745); appellant must have been addicted to have caused his wife anguish prior to her death (J.Knese 747-748); that he must have been "really messed up" to have done this (Langelier 127); that the victim's death made Langelier see how bad appellant's drug problem really was (Langelier

on defendant's mental state due to his drug use.

149); that appellant could not have changed as much as was necessary to have committed the murder “unless he was ill” (Chalupny 287); that everything in appellant’s confession could not be believed because he was on cocaine (Harvey 64); that appellant could not have known what he was doing at the time of the murder (Harvey 72); and that “it had to be the drugs” which made him commit the murder (Lane 238).

This testimony clearly went against counsel’s reasonable strategic decisions to avoid blaming appellant’s crimes on his drug use. Counsel cannot be faulted for not seeking this type of testimony. In State v. Johnston, 957 S.W.2d 734 (Mo. banc 1997), cert. denied 522 U.S. 1150 (1998), counsel made a strategic decision not to pursue evidence of the defendant’s drug use and criminal history in mitigation in order to portray the defendant in a positive light and avoid the problem areas in his life. Id. at 755. This Court stated: “Ineffective assistance of counsel claims are not meant to be a means to second guess the trial strategy of the defense. Where trial counsel reasonably decides as a matter of trial strategy to pursue one evidentiary course to the exclusion of another, trial counsel's informed, strategic decisions not to offer certain evidence is not ineffective assistance.” Id. Clearly, Johnston is directly on point in this case. After investigating the impact of drugs on appellant’s mental state, counsel decided not to pursue this type of evidence as he did not believe it would have benefitted the defense (Wendt 62-69, 81-87, 182, 189-190). Where a witnesses testimony does not unqualifiedly support the defense, counsel is not ineffective for failing to call those witnesses. Jones, 921 S.W.2d at 35.

Appellant’s claim that Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d

389 (2000), requires counsel to investigate areas that he has chosen to avoid as a matter of trial strategy misapplies that case (App.Br. 50-53). In Williams, counsel was found ineffective for failing to investigate any evidence of the defendant’s “nightmarish childhood,” available through the social services bureau, which would have demonstrated that the defendant suffered horrific abuse, pervasive neglect, and mental retardation, as well as failing to investigate evidence of the defendant’s positive jail conduct which could have refuted the aggravating factor of future dangerousness. Id. at 370-371, 395-398. The Williams Court found that the presence of some negative information in the “voluminous” evidence which spoke in favor of a defendant did not justify a decision to ignore it. Id.

Here, counsel did not “ignore” appellant’s drug use and mental state, as appellant argues, but investigated the issue and made a reasonable decision not to pursue it. See Point VI, supra. Other than the evidence of appellant’s drug use, these witnesses’ testimonies simply gave more detailed facts about the same information presented at trial—appellant’s peaceful, non-violent nature, his willingness to be helpful and courteous, and his love of sports (Tr. 773, 775, 777, 778-783, 786)—or about other things such as being an altar boy or being uncomfortable about girls (Harvey 41-42; Langelier 101-102; Sutter 173, 178-179; Lane 232; Chalupny 270). The nature of this kind of evidence simply was not of the quality or magnitude of that in Williams, but was simply additional evidence of appellant’s background, which, as previously stated, counsel had no duty to present. Clemons, 946 S.W.2d at 223. Appellant has completely failed to demonstrate how any of this could have created a reasonable probability of a different result.

Even though counsel was under no obligation to present evidence of appellant’s

background as mitigation, he presented the testimony of eight different witnesses to present this kind of evidence. To suggest that counsel was constitutionally required to present more of this type of information when he did not have to present any is illogical. Here, counsel used the witnesses he had to demonstrate that appellant was always non-violent and that this act was out of character for him. While not successful, it cannot be said that counsel was ineffective for failing to present more background evidence that would have proclaimed appellant's drug use as an excuse for his actions. Because appellant failed to prove his claim for post-conviction relief, appellant's third claim on appeal must fail.

III.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S POST CONVICTION CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE OF APPELLANT'S "GOOD JAIL CONDUCT" BECAUSE APPELLANT DID NOT PROVE COUNSEL KNEW OR SHOULD HAVE KNOWN ABOUT HIS PROPOSED WITNESSES, THE EVIDENCE DID NOT UNQUALIFIEDLY SUPPORT THE DEFENSE, AND APPELLANT DID NOT PROVE PREJUDICE IN THAT HIS EVIDENCE WAS FOUND INCREDIBLE AND UNPERSUASIVE BY THE MOTION COURT AND THE EVIDENCE WAS NOT RELEVANT SINCE APPELLANT'S FUTURE DANGEROUSNESS WAS NOT AN ISSUE AT TRIAL (Responds to Appellant's Point IV).

Appellant claims the motion court erred in denying his post-conviction claim that counsel was ineffective for failing to investigate and present evidence of appellant's "good jail conduct" (App.Br. 54). Appellant argues that counsel knew appellant was "a model inmate," yet made no efforts to obtain and present witnesses to present this view (App.Br. 55). Appellant contends that he was prejudiced because, had the jury heard evidence of his "stellar behavior" and influence on other inmates, it is reasonably probable the jury would have imposed a life sentence (App.Br. 60, 62).

A. Facts

As detailed in Point II, appellant presented his own testimony and the testimony of eight other witnesses during the penalty phase (Tr. 757-786). None of these witnesses presented evidence of appellant's conduct while in the county jail (Tr. 757-786).

In his amended motion, appellant claimed that counsel was ineffective for failing to investigate and present appellant's jail records, the testimony of Randall Gruber, the director of a prison ministry and Bible correspondence course, and the testimony of five inmates who could testify to appellant's religious activities in jail, his role as leader and mediator in his wing of the jail, and his peaceful, nonviolent behavior (PCR L.F. 421-433). Appellant alleged that, had this evidence been presented, appellant would not have been sentenced to death because the jury would have seen that appellant did not present a future danger and had a life worth saving (PCR L.F. 434).

The deposition testimony of Gruber and three inmates were offered into evidence for the evidentiary hearing and were considered by the court, as well as appellant's jail records (PCR L.F. 807-808; PCR Tr. 6-7, 13; Mov.Exh. 39). Each witness testified that they were not contacted by counsel, but if they had been, they were willing, able, and available to testify at appellant's trial (Gruber 480-481; Kleeschulte 564; Wade 588-589; Wilson 615-618).

Gruber testified that he was the regional director of the Emmaus Correspondence School and Set Free Ministries (Gruber 459). He stated that he became acquainted with appellant when appellant sent completed courses to the school (Gruber 460). Gruber stated that he had not met appellant face-to-face until after appellant's trial, which he admitted would

affect his credibility, and that only knew anything about appellant based on appellant's written answers on the course materials (Gruber 486, 489). He admitted that appellant had only completed a small number of courses at the time of trial, having only first contacted the school approximately five months prior to trial, which did not set him apart from other students (Gruber 487). However, based on his limited interaction, he believed that appellant's faith was sincere, that appellant was "humble and servant-hearted," and that appellant was repentant and humbled by "what he did" (Gruber 472-473,483).

Damian Kleeschulte testified that he met appellant in the St. Charles County Jail while incarcerated awaiting trial for multiple counts of forgery and burglary (Kleeschulte 547). He said that appellant spoke a lot about God and impressed upon him the need to change his life (Kleeschulte 550). He testified that appellant led Bible studies for inmates in the wing, attended services every Sunday, and got him involved in the correspondence courses (Kleeschulte 552-554). He described appellant as peaceful, a leader, and a "model inmate" (Kleeschulte 557-560). He claimed that appellant had a big impact on his life (Kleeschulte 554). However, Kleeschulte also admitted that, at the time of trial, he had six or seven convictions for felonies that would affect his trustworthiness, including forgery, burglary, felony stealing, and passing bad checks (Kleeschulte 562, 567-568). He also admitted that appellant never asked him to testify, nor did he ever offer to do so (Kleeschulte 572).

John Wade, Jr. met appellant at a jail church service (Wade 582-583). Wade testified that appellant started a daily Bible study group and was the leader of that group (Wade 583-584). He described appellant as outgoing, positive, inspirational, happy, and carefree (Wade

585). He believed appellant adjusted “fine” to jail, appearing relaxed and at peace, and was a positive role model (Wade 586). He testified that he would attempt to help clean up, calm other inmates after a ruckus, and helped inmates get answers to questions (Wade 586-587). He stated that it did not appear that appellant’s conscience bothered him, and that appellant spent a lot of time playing basketball (Wade 592-593).

Steven Wilson met appellant in jail in March or April of 1997 when he was transported to St. Charles from Cameron for court proceedings (Wilson 604). He said that he would be at the jail from 18 to 35 days at a time while his case was pending, but he was not in jail at the time of appellant’s trial (Wilson 604, 619). He also testified about appellant’s Bible study group and the fact that appellant attended church services (Wilson 605-607). He claimed that appellant was a “spiritual outlet” and that everyone, including gang members, could talk about their troubles and beliefs with appellant (Wilson 608-609). Wilson testified that he had been in and out of prison four times for driving while intoxicated, and had 12 to 14 DWI convictions over 20 years, including three felonies (Wilson 615, 620). Wilson admitted that he did not know who appellant’s lawyer was and that appellant never asked him to testify, saying that they “didn’t have that type of relationship” (Wilson 620).

In his deposition, counsel testified that he did not investigate any evidence of appellant’s “jail adjustment” because he never considered it (Wendt 110-114). He believed that he was aware of appellant’s and also believed appellant was an “exemplary inmate” (Wendt 110, 113-114). However, he did not believe that “jailhouse conversion” testimony accounts for much, and in appellant’s specific case, believed that appellant was already genuinely good

when not using drugs (Wendt 111). Counsel affirmed at the evidentiary hearing that, while he was aware of appellants religious interest in jail, he did not speak with Gruber or any jail inmates and presented no evidence of appellants jail conduct (PCR Tr. 74-79). He testified at the hearing that appellant never advised him about Gruber or Kleeschulte being potential witnesses and that Kleeschulte's convictions might affect his credibility (PCR Tr. 83).

The motion court denied appellant's claims for numerous reasons, including: that Gruber's testimony would not have been "at all persuasive" at trial since he had never met appellant and appellant had only completed a small percentage of the correspondence courses at the time of trial; that Kleeschulte had numerous felony convictions, was never asked to testify by appellant, and his testimony would not have influenced the outcome of the sentencing phase; that Wade's testimony would not have fully supported the defense as he described appellant as "carefree" and admitted that appellant's conscious did not appear to bother him; and that Wilson had only known appellant a couple of months and that his testimony was not persuasive or credible (PCR L.F. 831-834).

B. Appellant Did Not Prove Ineffectiveness

To prove ineffectiveness with regard to death penalty sentencing, a movant must show that, but for his counsels' ineffective performance, there is a reasonable probability that the jury would have concluded, after balancing the aggravating and mitigating circumstances, that death was not warranted. Rousan v. State, 48 S.W.3d 576, 582 (Mo. banc 2001). Counsel will be found ineffective in failing to locate and call witnesses if the movant can show that trial

counsel knew or should have known of the existence of such witnesses, that the witnesses could have been located through reasonable investigation, that the witnesses would have testified if called and that their testimony would have provided a viable defense. State v. Harris, 870 S.W.2d 798, 817 (Mo. banc), cert. denied 513 U.S. 953 (1994). If the testimony would not unqualifiedly support the defendant, failure to call that witness does not constitute ineffective assistance of counsel. State v. Jones, 921 S.W.2d 28, 35 (Mo.App., W.D. 1996).

Here, appellant has failed to prove that appellant was ineffective for failing to call any of his “good jail adjustment” witnesses. First, as to Randall Gruber, counsel testified at the evidentiary hearing that he did not recall getting any information about appellant’s correspondence course (PCR Tr. 76). Appellant never told counsel about Gruber (PCR Tr. 83). Appellant has failed to prove that he even knew of Gruber by name, as Gruber testified that they did not exchange personal letters, but that appellant would send completed tests to the *ministry*, which included appellant’s written comments, and the *ministry* would send out more tests (Gruber 465-466). He admitted that he had not even met appellant prior to the trial, and everything he knew about appellant came from appellant’s written comments (Gruber 486, 489). Appellant has failed to prove that counsel knew or should have known of Gruber, and counsel could not be ineffective for failing to call him as a witness.

Appellant has similar problems when it comes to the jail inmates he alleged counsel should have called. Counsel testified that, although Kleeschulte claimed appellant made a big impact on his life (Kleeschulte 554), appellant never told counsel about Kleeschulte (PCR Tr. 83), nor did counsel recall knowing about appellant’s Bible study group (PCR Tr. 74-75).

Appellant has likewise failed to prove that he told counsel about Wade or Wilson. Because counsel was not advised by appellant of these witnesses, the absurd conclusion appellant seems to suggest is that counsel should have simply interviewed every inmate in the St. Charles County Jail who had any contact with appellant whatsoever in the hope of isolating inmates who would have been helpful. This approach would have been patently unreasonable, especially in light of the fact, as testified to by Wilson, that in a county jail, people “come and go like myself” (Wilson 606). Without some proof that appellant at least mentioned these people to counsel, there is no reason that counsel should have known they existed, and therefore could not have been ineffective for failing to call them.

Further, not all the evidence that appellant claims showed his “good” jail conduct unqualifiedly supported his defense. Wade testified that appellant appeared happy and “carefree” and did not seem to be burdened by his conscience (Wade 585, 592-593). This evidence could have been used to show that appellant was not truly remorseful for his actions, as he testified at trial (Tr. 757-758). Counsel is not ineffective for failing to present evidence that does not unqualifiedly support his defense. Jones, 921 S.W.2d at 35.

B. Appellant Did Not Prove Prejudice

Appellant’s claim must also fail because he did not prove that he was prejudiced from counsel’s failure to present this evidence. First, the motion court found that much of the evidence elicited from these witnesses was not persuasive and specifically found that Gruber would not be persuasive due to his lack of personal contact with appellant, that Wilson’s testimony was not persuasive due to his limited contact with appellant, and that evidence of

appellant's religious conversion was not credible (PCR L.F.832, 834). The court also commented on Kleeschulte's twelve felony convictions, which affected his credibility, and would have at trial, since he already had six or seven at that time (PCR L.F. 832; Kleeschulte 567). Witness credibility is the motion court's responsibility in a post-conviction matter. Rousan, 48 S.W.3d at 589. While appellant claims this does not excuse counsel from having to investigate this information (App.Br. 60), appellant does have the burden to prove that this evidence creates a reasonable probability of a different result at trial. Strickland, 466 U.S. at 694. Appellant fails to explain how incredible evidence could have possibly affected the outcome of his trial. Appellant claims that, for example, Kleeschulte's testimony that appellant changed his life, and that he was now sober and in college, would have created a reasonable probability of a life sentence (App.Br. 60). However, it would have been impossible for counsel to present this evidence, as Kleeschulte was in the jail at the time of trial, and did not "change his life" until after a subsequent arrest for a probation violation, which was months after the conclusion of the trial (Kleeschulte 60).

Appellant also failed to show how any of this evidence would have possibly changed the verdict since this type of jail conduct evidence directly relates to appellant's future dangerousness, which was never an issue at appellant's trial, and not to his moral culpability at the time of the murder. Appellant cites Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), as "controlling" on the issue of whether counsel should have presented this type of evidence. However, in Williams, the jury fixed death *because* they found a probability of future dangerousness, and the United States Supreme Court stated that

available mitigation evidence showing the horrible circumstances of Williams' life prior to the murder was necessary to try to influence "the jury's appraisal of his moral culpability" for the murder. Williams, 529 U.S. at 398.

Here, unlike Williams, there was absolutely no argument that appellant presented a future danger. In fact, as appellant points out in his brief, the State conceded that appellant would not be a future danger, stating, "I'm not implying that there will be any more violence for him" (Tr. 807; App.Br. 55). Likewise, the evidence of appellant's conduct in jail after the murder could not reflect on appellant's moral culpability at the time of the murder, which is exactly what the aggravating evidence and arguments were directed toward. Because this evidence was not relevant to the issues appellant's jury had to consider, appellant has failed to prove how this evidence would have changed any juror's mind about the proper punishment for the murder.

In light of the foregoing, appellant's fourth point on appeal must fail.

IV.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO VOIR DIRE AND REQUEST AN INSTRUCTION REGARDING APPELLANT'S RIGHT TO NOT TO TESTIFY BECAUSE COUNSEL HAD REASONABLE STRATEGIC REASONS NOT TO PRESENT THIS ISSUE TO THE JURY AND APPELLANT DID NOT PROVE PREJUDICE IN THAT HIS STATEMENTS ABOUT THE CRIME WERE BEFORE THE JURY, WHICH DID NOT HAVE TO SPECULATE AS TO WHAT HE WOULD TESTIFY TO, AND APPELLANT FAILED TO IDENTIFY A SINGLE JUROR WHO HELD APPELLANT'S FAILURE TO TESTIFY AGAINST HIM (Responds to Appellant's Point V).

Appellant claims that the motion court erred in finding no ineffective assistance of counsel in counsel's decision not to question the jury during voir dire or request an instruction on appellant's right not to testify (App.Br. 63). Appellant argues that voir dire and the "no-adverse inference" instruction were necessary to find biased jurors and educate the panel that they could not hold appellant's failure to testify against him (App.Br. 66-67). Appellant contends that he was prejudiced because the jury would have understood they could not consider appellant's decision not to testify had the voir dire and instructions included this issue, and without this information, the jury was allowed to speculate about why appellant did not testify (App.Br. 63, 67).

A. Facts

During voir dire, neither the prosecutor nor counsel questioned the juror's regarding their views on appellant's right to refrain from testifying (Tr. 33-221). No juror expressed any opinion as to that right (Tr. 33-221). Appellant did not testify during the guilt phase (Tr. 581-597). Counsel did not request that MAI-CR 308.14.1 regarding appellant's right not to testify be submitted, and therefore it was not given to the jury (Tr. 599-602; L.F. 108-124).

Appellant alleged in his amended motion that counsel's decision not to point out appellant's right not to testify to the jury was ineffective (PCR L.F. 469-471). Appellant claimed that counsel "permitted a jury to be seated without ensuring that the jury would not consider [appellant's] declination to testify as evidence of [appellant's] guilt" (PCR L.F. 470). Appellant claimed that "[t]here may very well have been people on this jury who did not look favorably on the fact that [appellant] did not testify during the guilt phase and used it against him as evidence of guilt" (PCR L.F. 471).

In his deposition taken before the amended motion was filed, counsel stated that he did not submit the instruction because he believed that giving the instruction highlights the fact that appellant did not testify to the jury (Wendt 137). He also believed that the instruction was not relevant because appellant's statement to police detailing his version of events was coming into evidence, and therefore the jury was hearing what appellant had to say about the crime (Wendt 136-138). Counsel stated that he did not voir dire on the issue because the decision as to whether appellant would testify was not made at that time, and counsel did not even want to raise the issue if appellant actually testified (Wendt 138).

At the evidentiary hearing, counsel reiterated that he did not voir dire on this issue

because that decision had not yet been made and because he believed that “if somebody doesn’t testify, you run just as much prospect of creating a negative impression by questioning the jury about it” (PCR Tr. 48).

In denying this claim, the motion court found that counsel’s decisions on this issue were trial strategy and appellant failed to overcome the presumption that such trial strategy was sound (PCR L.F. 841-842).

B. Counsel’s Decisions were Reasonable Trial Strategy

To demonstrate ineffectiveness, appellant must prove by a preponderance of the evidence that counsel’s actions did not conform to those of a reasonably competent attorney. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Kreutzer, 928 S.W.2d 854, 877 (Mo. banc 1996), cert. denied 519 U.S. 1083 (1997). Actions that constitute sound trial strategy are not grounds for ineffective assistance claims, and this Court presumes that any challenged action was a part of counsel's sound trial strategy and that counsel made those decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689-690.

MAI-CR 308.14 states in relevant part, “Under the law, a defendant has the right not to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify.” MAI-CR 3d 308.14.1. The notes on use show that the instruction must be given if a defendant doesn’t testify *and* if requested by the defendant. MAI-CR 3d 308.14, Note on Use 2.

An objectively reasonable choice not to submit an available instruction does not

constitute ineffective assistance of counsel. Love v. State, 670 S.W.2d 499, 502 (Mo. banc 1984); State v. Butler, 904 S.W.2d 68, 73 (Mo.App., E.D. 1995). There are sound strategy reasons for not seeking an instruction on a criminal defendant's failure to testify, as the instruction serves to highlight that failure. Ellis v. State, 773 S.W.2d 194, 199 (Mo.App., S.D. 1989). The provision that the instruction is to be given only on request recognizes that lawyers have varying attitudes about the instruction, and this Court should not second-guess trial counsel on a point on which lawyers have differing viewpoints. State v. Naumowicz, 923 S.W.2d 482, 487 (Mo.App., E.D. 1996). This same logic should apply to questions about the right not to testify during voir dire, as counsel's handling of voir dire is also a matter of trial strategy. See State v. Kinder, 942 S.W.2d 313, 338 (Mo. banc 1996), cert. denied 522 U.S. 854 (1997).

Here, appellant's counsel's strategic reason for not conducting voir dire and requesting an instruction on appellant's right not to testify was a matter of trial strategy. In his deposition, counsel stated he did not offer MAI-CR 308.14 because he did not want to highlight the fact that appellant did not testify (Wendt 137). In his evidentiary hearing, he stated that this was also the reason for his decision not to voir dire on the issue of appellant's testimony at all, especially in light of the fact that a decision regarding appellant testifying had not yet been made (PCR Tr. 48). Because counsel's actions were not outside the realm of the skill, care, or diligence of a reasonable attorney, these decisions were reasonable strategic decisions and therefore do not provide appellant relief.

Appellant claims that the United States Supreme Court cases Lakeside v. Oregon, 435

U.S. 333, 98 S. Ct. 1091, 55 L. Ed. 2d 319 (1978), and Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), reject counsel's strategic reasons for his decisions (App.Br. 67). However, this argument misinterprets the holdings of those cases. Lakeside expressly limited its holding to finding that the trial court submitting a no-adverse-inference instruction over the objection of the defendant did not violate appellant's privilege against compulsory self-incrimination. Lakeside, 435 U.S. at 340-341. The holding in Carter specifically recognized that a no-adverse-inference instruction must be given *if requested by the defense*. Carter, 450 U.S. at 303-304. Obviously, this acknowledges that there may be situations where the defense may choose not to make that request. If the United States Supreme Court (or this Court, through its approved instructions) believed that this instruction was necessary in every case where a defendant does not testify, the instruction could have been made mandatory. Because the instruction is optional, and appellant failed to prove that counsel's reasons for not seeking to voir dire or instruct on this issue were not reasonable trial strategy, appellant's point must fail.

C. Appellant Failed to Demonstrate Prejudice

In any event, appellant's claim must fail because he failed to establish any prejudice from counsel's actions. To show prejudice, appellant must prove that, but for counsel's actions, there is a reasonable probability that the outcome of the trial would have been different. Strickland, 466 U.S. at 694.

In Clemmons v. State, 785 S.W.2d 524 (Mo. banc), cert. denied 498 U.S. 882 (1990), this Court rejected a claim similar to appellant's because the movant failed to prove that he was

prejudiced from the absence of the instruction. Id. at 531. This Court noted that appellant did not allege there was any improper comment or suggestion regarding appellant's right not to testify. Id.

Here, as in Clemmons, appellant points out no comment made at trial about appellant failing to testify. In fact, as counsel acknowledged, appellant's version of the events was before the jury through appellant's statements, so the jury did not have to speculate as to what appellant would have testified (Wendt 137-138).³ Counsel pointed out that appellant admitted he caused the victim's death, alleviating any concern that appellant would be convicted because of his silence (Wendt 137-138). These facts show that there was no reason for the jury to wonder what appellant had to say about the crime—they heard it from appellant's own statements. Therefore, appellant has failed to show how information on appellant's right not to testify could have possibly benefitted his defense. Id.

Also, in a claim that counsel was ineffective for failing to ask particular questions in the voir dire, a movant must demonstrate that one of his jurors was actually affected by that failure. See Kinder, 942 S.W.2d at 338. Appellant failed to prove that a single juror considered his failure to testify in reaching a verdict. Therefore, appellant has not met his burden of establishing Strickland prejudice.

In light of the foregoing, appellant's fifth claim on appeal must fail.

³The version of events appellant's statements reveal is substantially the same as the facts of the murder appellant alleges in his amended motion (St.Exh. 31; PCR L.F. 141-142).

V.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE THE EFFECT OF APPELLANT'S DRUG-AFFECTED MENTAL STATE ON HIS STATEMENTS BECAUSE HIS CLAIM WAS REFUTED BY THE RECORD IN THAT APPELLANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHTS AND MADE THE STATEMENTS, THERE WAS NO PREJUDICE AS THE MOTION COURT WOULD NOT HAVE CHANGED ITS RULING AS TO SUPPRESSION, AND COUNSEL HAD A REASONABLE TRIAL STRATEGY TO AVOID PRESENTING THIS EVIDENCE AT TRIAL (Responds to Appellant's Point VI).

Appellant claims that the motion court clearly erred in denying, without an evidentiary hearing, his claims that counsel was ineffective for failing to investigate and present evidence at the suppression hearing and at trial that appellant was under the influence of cocaine at the time he made his statements to police (App.Br. 69, 74-75, 78). Appellant argues that, had counsel pursued evidence that he was "suffering from several psychological disorders at the time of the offense" (all based on the voluntary ingestion of drugs), the trial court would have suppressed his statements because it was "very unlikely that [appellant] was able to comprehend the full significance of Miranda, which was repeated several times, while acutely intoxicated, nor was he able to reflect on the consequences of providing any statement to police without the presence of legal counsel" (App.Br. 69, 74-75, 78, 80-81). Appellant claims that had

counsel investigated and presented this evidence, it was reasonably probable that he would not have been convicted of first degree murder or sentenced to death, or at the very least, that this Court would have been able to review *de novo* the trial court's denial of his suppression motion (App.Br. 69, 81).

A. Facts

Counsel filed a brief motion to suppress appellant's statements (L.F. 25). On direct appeal, this Court stated the facts elicited at the suppression hearing as follows:

At the suppression hearing the State presented the evidence of four police officers. The first officer to speak with Mr. Knese was an evidence technician, Officer Chestnut, who collected Mr. Knese's clothes and photographed his injuries. Officer Chestnut first saw Mr. Knese at approximately 7:30 a.m. and was in his presence on and off for two hours. He did not ask Mr. Knese any questions, although Mr. Knese made several statements spontaneously that were not introduced at trial. He testified that when he initially saw Mr. Knese he was acting "abnormal" and that he was acting "wild": "He had a wide open look in his eyes, far away stare. His eyes were rolling back and forth very rapidly, staring at the ceiling. He was lying flat on his back. His body was acting like he was pacing." Although initially he was "fading in and out of reality," later Mr. Knese "calmed down and

he seemed like he was more understanding of what was going on and understanding of what had transpired." A second officer, Sergeant Schwendemann, spoke with Mr. Knese immediately before Officer Chestnut, and described him as "calm and rational" at that time. The statements made by Mr. Knese to Sergeant Schwendemann also were not presented at trial.

Detective Harvey, who did testify at trial, began to interrogate Mr. Knese at approximately 8 a.m. He testified that, at that time, Mr. Knese appeared "very coherent and understood what [Detective Harvey] was talking about." Detective Harvey advised him of his Miranda rights, and Mr. Knese indicated that he understood each of the rights. Mr. Knese then made a detailed statement describing the altercation with his wife in which he admitted choking her into unconsciousness. Detective Harvey returned at 2:20 that afternoon to have Mr. Knese repeat his confession on audio tape. Before he began the interrogation, Detective Harvey gave Mr. Knese a form advising him of his Miranda rights, read it to him as Mr. Knese read along and, after Mr. Knese had agreed, on audio tape, that he understood the rights he was waiving, had Mr. Knese sign the waiver. Mr. Knese then gave a detailed forty minute interview where he described the

altercation where he killed his wife. At that time, Detective Harvey testified, Mr. Knese appeared lucid and coherent. Detective Harvey again returned to Mr. Knese's bedside at 5:20 the same afternoon. After again advising Mr. Knese of his Miranda rights, Detective Harvey asked Mr. Knese if he had had intercourse with his wife prior to killing her. Mr. Knese indicated that he had attempted to, but was unable to maintain an erection. Detective Morrissey also testified at the suppression hearing and at the trial. He testified that Mr. Knese approached him at 9:50 that morning, after he had been Mirandized by Detective Harvey, and described the incident to him in some detail. Detective Morrissey testified that during this statement and the statements made to Detective Harvey, Mr. Knese was coherent.

State v. Knese, 985 S.W.2d 759, 765-66 (Mo. banc), cert. denied 526 U.S. 1136 (1999).

This Court reviewed appellant's claim that his waiver of his rights under Miranda was unintelligent and held that the trial court did not err in overruling the motion to suppress on that basis. The Court found that, regardless of the evidence that appellant may have used cocaine and appeared to be impaired some time before waiving his rights, the mere fact that appellant may have had a deficient mental condition because of drug use did not render his waiver unintelligent. Id. at 766. The Court stated, "Given that Mr. Knese repeatedly waived his

Miranda rights over a period of a period of many hours and gave detailed, coherent statements over that time,” the trial court’s ruling was not erroneous. Id. The Court also found that the trial court did not plainly err in overruling the motion on the grounds that appellant’s waiver was involuntary and unknowing, stating that there was no evidence that appellant’s statements were involuntary. Id. at 766-67.

In his amended motion, appellant claimed that counsel was ineffective for failing to present evidence that appellant “was not lucid” and that he was suffering from a psychosis which rendered “his subsequent statements” unintelligent and unknowing (PCR L.F. 174-175). Appellant claimed that counsel should have called eyewitnesses and experts who could have relayed their observations and “explained the significance” of appellant’s state of mind and testify that appellant could not comprehend the Miranda warnings while intoxicated (PCR L.F. 175-180, 185, 279-280). Appellant also faulted counsel for not presenting such evidence at trial and for not requesting MAI-CR 310.06 (PCR L.F. 256-272).

The motion court denied appellant’s claims without an evidentiary hearing for numerous reasons, including: that the court would not have changed its mind regarding suppression even with the additional evidence; that this Court determined relevant issues on direct appeal; that counsel did investigate appellant’s mental state but decided not to put that information before the jury as a matter of trial strategy to avoid using appellant’s drug use as an excuse for his actions; and that appellant’s statements were consistent with the defense presented at trial (PCR L.F. 811-815).

B. Appellant’s Claims are Refuted by the Record

To be entitled to a post-conviction evidentiary hearing, a movant must allege facts not refuted by the record which would warrant relief if true, and those allegations must demonstrate prejudice. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Here, appellant's claims are refuted by the record.

1. Knowing and Intelligent

The determination of whether a waiver of rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), is knowing and intelligent depends on the facts of the case and review is based on the totality of the circumstance, taking into account the background, experience, and conduct of the accused. State v. Bucklew, 973 S.W.2d 83, 90 (Mo. banc 1998), cert. denied 525 U.S. 1082 (1999). A knowing and intelligent waiver of that right is normally shown by having a police officer testify that he read the accused his rights, asked whether those rights were understood, and received an affirmative response. State v. Wise, 879 S.W.2d 494, 505 (Mo. banc 1994), cert. denied 513 U.S. 1093 (1995). Further, an impaired mental condition, whether caused by delusion or drug use, does not by itself render a statement unintelligent, as a defendant does not have the right to confess to a crime only when totally rational and properly motivated. Knese, 985 S.W.2d at 766.

Here, the record refutes appellant's allegation that his waiver of rights was unknowing. Appellant was repeatedly advised of his rights prior to any questioning (Mot.Tr. 29, 38-40, 42-43; Tr. 329, 341-42, 353-356; St.Exh. 32, 33). When he was advised of his rights, appellant stated that he understood those rights and that he wanted to speak to the officers (Mot.Tr. 29-30, 38-41; Tr. 329-330, 342-343; 354-357, St.Exh. 32, 33). As appellant was clearly

informed of his rights, both verbally and in writing, and then waived those rights, his waiver was knowing. Bucklew, 973 S.W.2d at 90.

Likewise, the record also refutes appellant's allegation that he unintelligently waived his rights. Prior to the first interview, appellant was observed by another officer appeared calm, rational, and "perfectly normal" for a person in the hospital (Mot.Tr. 25). At the times appellant was advised of his rights, he was very coherent and lucid, understood what the officer was talking about and never said he did not understand, was not behaving unusually or bizarrely, had well-organized thoughts, and appeared to be suffering no physical problem impairing his ability to answer questions (Mot.Tr. 25, 28-29, 34, 36, 41-42). After being advised of his rights, appellant later initiated a conversation with a detective, showing not only that appellant did not wish to remain silent, but that he fully intended on speaking with the police about the murder (Mot.Tr. 51-52; Tr. 332-333). Appellant's own trial testimony supports this conclusion, as appellant testified that, in giving his statements, he was "just trying to talk to the police and tell them what happened" so that he could "understand" what happened (Tr. 758-759). Clearly, as this Court found on direct appeal, appellant's waiver of his rights was intelligent.

"The requirement that a waiver of rights be knowing and intelligent does not mean that a defendant must know and understand all of the possible consequences of the waiver. [Citation omitted]. Rather, it requires that the defendant understood the warnings themselves[.]" State v. Powell, 798 S.W.2d 709, 713 (Mo. banc 1990), cert. denied 501 U.S. 1259 (1991). Even appellant's own post-conviction expert said that appellant's cocaine use

caused him to be unable to “comprehend the full consequences of the full significance of Miranda” or to reflect on those consequences (L.F. 730). These things not required to establish appellant’s statements as knowing and intelligent. As the evidence clearly showed, appellant knowingly and involuntarily waived his Miranda rights, and any further expert testimony would have been futile at any stage of the litigation. Counsel is not ineffective for failing to pursue a non-meritorious claim. Smulls v. State, SC83179 (Mo. banc February 26, 2002), slip op. at 31.

2. Voluntary

Appellant’s claim that his statement was involuntary, and therefore that counsel was ineffective for failing to undertake investigation to prove such, was also refuted by the record. Appellant’s claim that his mental condition due to cocaine use made his waiver of rights involuntary does not establish a viable claim. Coercive police activity is a necessary predicate to finding that a confession is involuntary, and mental condition alone does not dispose of a claim of constitutional involuntariness. Colorado v. Connelly, 479 U.S. 157, 164, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); State v. Skillicorn, 944 S.W.2d 877, 889-890 (Mo. banc), cert. denied 522 U.S. 999 (1997). Here, not only was there no evidence whatsoever that appellant was subject to any coercion, appellant did not plead that any existed (PCR L.F. 165-280). Further, as discussed above, the evidence of appellant’s willingness to speak to the police shows that appellant voluntarily spoke to the police about his crime (Mot.Tr. 51-52; Tr. 332-333, 758-759). Once again, counsel cannot be faulted for not pursuing non-meritorious claims. Smulls, slip op. at 31.

B. The Motion Court Would Not Have Changed Its Ruling

Appellant claims that the motion court's finding that it would not have changed its ruling on the motion to suppress even with additional evidence of appellant's mental state is irrelevant because this Court could have reviewed that ruling *de novo* on appeal (App.Br. 81). This argument fails for two reasons. First, the motion court's ruling was relevant because the trial court's decision would only be reviewed to see if there was sufficient evidence to support the ruling, which would have been viewed in the light most favorable to the ruling. State v. Blankenship, 830 S.W.2d 1, 14 (Mo. banc 1992); State v. Smith, 944 S.W.2d 901, 910 (Mo. banc), cert. denied 522 U.S. 954 (1997). As shown above, there was more than sufficient evidence to support the court's ruling, even with additional evidence of appellant's mental state. Second, appellant's claim that, had counsel pursued more evidence, his claim would have been preserved for appeal is not cognizable under Rule 29.15 as it does not affect the fairness of his trial. Fears v. State, 991 S.W.2d 190, 190 (Mo.App., E.D. 1999). Therefore, appellant has failed to show that any additional evidence would have had a reasonable probability of affecting the court's ruling on a motion to suppress, and has therefore failed to demonstrate Strickland prejudice.

C. Presentation of the Evidence of Statements at Trial

Appellant also claims that counsel should have introduced evidence at trial of appellant's mental state with regard to his statements or to instruct on the issue of appellant's statements (App.Br. 78-81). However, as respondent more fully develops in Point VI of this brief, counsel testified in his deposition prior to the filing of the amended motion that he did

not want to present any evidence that appellant's drug use was somehow an excuse for his crime, which was a reasonable strategic decision following reasonable investigation (Wendt 65-66, 84-86; Resp.Br., *infra*). Further, counsel had additional strategic reasons for not contesting the statements, including his belief, based on experience, that asking a jury to ignore the statements of a defendant could have hurt more than it would help, and including the fact that the defense was not going to contest that appellant had committed the acts resulting in the victim's death, so, by the time of trial, appellant's waiver of rights did not make a difference, and the statements were actually helpful in supporting appellant's claim of self-defense (Wendt 73-79). These reasons cannot be said to be unreasonable, and therefore the record refutes a claim that counsel did not act as a reasonable attorney in making these decisions.

In light of the foregoing, appellant's sixth claim on appeal must fail.

VI.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT’S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PURSUE A DEFENSE AT BOTH PHASES OF TRIAL REGARDING APPELLANT’S MENTAL STATE DUE TO DRUG USE BECAUSE THE RECORD REFUTED APPELLANT’S CLAIM IN THAT COUNSEL CONDUCTED A REASONABLE INVESTIGATION, SUCH A DEFENSE WAS INADMISSIBLE, AND COUNSEL HAD A REASONABLE TRIAL STRATEGY TO AVOID SUCH EVIDENCE (Responds to Appellant’s Point VII).

Appellant claims motion court error in denying, without an evidentiary hearing, his claim that counsel ineffective for failing to investigate and present evidence to support a diminished capacity defense in both the guilt and penalty phases of trial (App.Br. 83-84). Appellant claims that counsel’s trial strategy to avoid blaming drugs for the murder was “patently unreasonable” (App.Br. 87). Appellant claims that, had counsel investigated and presented this evidence, it would have either negated the required mental state for first degree murder or allowed the submission the statutory mitigating factor that appellant’s ability to appreciate the criminality of his conduct (App.Br. 83, 87-89).

A. Facts

Prior to trial, counsel disclosed to the State that he intended to call Dr. Edwin Wolfgram, a psychiatrist, to “give a medical opinion that during the struggle between the defendant and the deceased that the defendant’s state of mind was such that he reasonably

perceived himself to be in danger of great bodily harm” (L.F. 32). Counsel later disclosed that he intended to call Wolfgram to testify during the penalty phase regarding appellant’s state of mind (L.F. 42). In response, the State filed a number of motions, including a motion to exclude Wolfgram’s testimony, for disclosure of Wolfgram’s notes, and to compel a psychiatric examination of appellant (L.F. 44-45, 55-61).

According to the motion for a psychiatric exam, the State had deposed Wolfgram and discovered that Wolfgram would testify that: appellant initially perceived himself to be in danger of serious bodily harm from the victim; appellant suffered from major depression and polysubstance abuse; appellant possessed a diminished mental capacity as a result of a mental disease or defect; appellant was not a sociopath; and appellant had a favorable prognosis (L.F. 59).

After the State’s motions to compel and for a psychiatric exam were granted, counsel withdrew Wolfgram as a witness (L.F. 65-66, 69).

At trial, counsel presented a theory of self-defense—that the victim had initiated a physical attack on appellant which escalated, and that he did not intend to kill her, but only to immobilize her so he could safely disengage from the struggle (Tr. 257-263, 637-648). He also attempted to show that there was no evidence that appellant had attempted to rape the victim, but that he was simply trying to reconcile with the victim when the fight started (Tr. 258, 264-265, 627-636). He asked jurors voir dire questions regarding whether they believed a man had the right to defend himself from a woman, even if he was under the influence of drugs at the time (Tr. 183-184, 186-187, 208-211, 213). He also examined jurors who had

friends of family members involved with drugs as to their views (Tr. 187-206). During the guilt phase, counsel did not put on any evidence that appellant's drug use provided him a defense for the murder (Tr. 257-265, 648).

Prior to the penalty phase, counsel offered an instruction including the statutory mitigating factor that appellant's capacity to appreciate the criminality of his conduct was impaired (Tr. 672). Counsel argued that appellant's statements to the police supported the instruction (Tr. 673). That instruction was denied, but the court did allow an instruction including the statutory mitigating factor that appellant committed the murder while under the influence of extreme mental or emotional disturbance (Tr. 672-673; L.F. 140-141).

Counsel called appellant and eight other witnesses during the penalty phase (Tr. 756-786). On cross-examination, appellant acknowledged that he was high on cocaine when he killed his wife, but that was no excuse for what happened (Tr. 761). Aside from asking appellant's father whether he knew about appellant's drug use, counsel did not attempt to introduce drug evidence (Tr. 784).

In his amended motion, appellant presented a number of claims that counsel was ineffective for failing to investigate and present evidence of appellant's drug use (PCR L.F. 101-141, 165-280). Appellant alleged that counsel should have presented: a "social history" including appellant's history of drug use (PCR L.F. 73-155); the testimony of "mental health, substance abuse, and other professionals to explain the significance" of the social history (73, 152-153, 155); evidence that appellant suffered from "cocaine-induced psychosis," "cocaine-induced delirium," and "cocaine-induced mood disorder" which would have provided various

defenses throughout the litigation (PCR L.F. 152-153, 165-244, 279); and the testimonies of a psychiatrist or psychologist and a pharmacologist to explain how drugs affected appellant (PCR L.F. 155, 165-166, 218-220, 275, 277-280, 290). Appellant claimed he was prejudiced for a number of reasons, including that his statements would not have been given any weight by the jury, that he would not have been found guilty of first-degree murder, and that he would not have been sentenced to death (PCR L.F. 73, 166, 168, 256, 270-272, 275, 280, 290-91).

In his deposition on behalf of appellant taken prior to the filing of the amended motion, counsel testified that he chose not to use any defense involving appellant's use of drugs in either phase (PCR L.F. 62-69, 81-87). He stated that he believed: that a drug-oriented defense would not "sell" in most places, including St Charles County (Wendt 66); that such a defense could cause more harm than good (Wendt 66); that using appellant's cocaine use as an excuse "just kills it" (Wendt 83); that a defense that asked the jury not to get mad at appellant for using cocaine was "hogwash" (Wendt 84); that people are not sympathetic to illegal substances (Wendt 84); that an ordinary jury under these circumstances would not be "in the least forgiving" because of drugs (Wendt 84); and that asking the jury to "take it easy" on appellant because of cocaine use was not a preferable defense (Wendt 85-86). He had hired Wolfgram and provided Wolfgram information about the case to determine appellant's mental state and ability to form intent, but decided not to use Wolfgram for two reasons (Wendt 62-64). First, he became convinced that he could not use appellant's voluntary drug use to establish diminished capacity in the guilt phase (Wendt 64). Second, he did not want to use Wolfgram in the penalty phase because of Wolfgram's "demeanor," meaning that Wolfgram did not have

any problem believing that “there should probably be mitigation of punishment if somebody does not fully understand and appreciate the nature, quality, and wrongfulness of their act because of substance abuse at the time of commission of a crime[,]” which conflicted with his own views, based on life experience, as to what a jury would be willing to accept (Wendt 65-66, 84). Further, he did not consider consulting a pharmacologist because he did not see the need for one (Wendt 88). He decided to pursue a self-defense theory because he believes that appellant’s actions were self-defense, that it is a very effective defense, and, even if there is not an acquittal, if there is any question about one of the elements of the defense in the jury’s mind, they would not convict of the maximum offense (Wendt 87-88).

The motion court denied appellant’s claims without an evidentiary hearing (PCR L.F. 660-661, 811-816). The court found that counsel had hired a psychiatrist to investigate appellant’s mental state, but decided not to use Wolfgram as a matter of trial strategy (PCR L.F. 812). The court found that counsel’s decisions regarding using drug evidence as an excuse for appellant’s crime and his choice of self-defense was trial strategy, and appellant agreed with that strategy (PCR L.F. 812-816). The court held that the files and records in the case conclusively showed that appellant was not entitled to relief on these claims (PCR L.F. 813-816).

B. The Record Refutes Appellant’s Claim of Inadequate Investigation

To be entitled to a post-conviction evidentiary hearing, a movant must allege facts not refuted by the record which would warrant relief if true, and those allegations must demonstrate prejudice. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant’s

claim that trial counsel failed to investigate is reviewed to see if counsel made a reasonable investigation or a reasonable decision not to investigate. Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, appellant's claims must fail because the record refutes his allegations that counsel did not reasonably investigate a defense based on a lack of requisite mental state, and that if he had investigated, he would have been able to show that appellant suffered from "cocaine psychosis" or "cocaine delirium" (PCR L.F. 152-153, 165-168, 213, 218-219, 241-242, 278-279; App.Br. 83, 87-89).

In his deposition, counsel stated that he hired Wolfgram specifically to evaluate appellant's mental state and his ability to form the requisite intent and provided Wolfgram with case information with that purpose (Wendt 62). As the State noted in its motion for a psychiatric exam, and as appellant alleged in his amended motion, that even though Wolfgram claimed that appellant had a diminished capacity, Wolfgram did not diagnose appellant as suffering from "cocaine delirium" or "cocaine psychosis" at the time of the murder, but as suffering from major depression and polysubstance abuse which "contributed to" a diminished capacity (L.F. 59; PCR L.F. 297).

According to § 552.010, RSMo 2000, a mental disease or defect that can negate responsibility does not include drug abuse without psychosis. Here, there is no indication that Wolfgram believed appellant suffered from any psychosis, but that cocaine use could cause one to "be in an excited state, have misperceptions" and experience paranoia, and that appellant was "not fully and completely aware of his environment" at the time of the murder (PCR L.F. 297-298). This does not rise to the level of a diagnosis of "cocaine psychosis" or "cocaine

delirium,” and therefore counsel could not have known appellant could potentially have been suffering from either. Where trial counsel makes a reasonable effort to investigate a defendant’s psychological condition, the decision not to seek a psychologist to testify in a particular way will not constitute ineffective assistance of counsel. State v. Chambers, 891 S.W.2d 93, 113 (Mo. banc 1994). When a mental evaluation is performed, counsel may rely on that evaluation and not seek a second exam. See State v. Van Ralston, 824 S.W.2d 75, 78 (Mo.App., E.D. 1991). Counsel is not ineffective for failing to shop around for additional experts. Lyons v. State, 39 S.W.3d 32, 41 (Mo. banc 2001). Counsel was not advised by Wolfgram that appellant suffered from “cocaine delirium” or “cocaine psychosis,” and therefore had no reason to believe that either was a potential source of any defense. Counsel was entitled to rely on Wolfgram’s diagnosis and not seek other experts, as appellant claims he should have (App.Br. 85, 87, 89). Because counsel did conduct an investigation of appellant’s mental state, and that investigation was reasonable, the record refutes appellant’s claim.

C. “Diminished Capacity” Due to Voluntary Drug Use was Not a Viable Defense in the Guilt Phase

After conducting his investigation of appellant’s mental state, counsel became convinced that he could not use appellant’s drug-induced “diminished capacity” during the guilt phase due to discussions with the State and review of cases (Wendt 64-65). Despite appellant’s claims to the contrary, counsel was absolutely correct.

§ 562.076.3 states:

Evidence that a person was in a voluntarily intoxicated or drugged condition may be admissible when otherwise relevant on issues of conduct but in no event shall it be admissible for the purpose of negating a mental state which is an element of the offense. In a trial by jury, the jury shall be so instructed when evidence that a person was in a voluntarily intoxicated or drugged condition had been received into evidence.

§ 562.076.3, RSMo 1994. Nothing in the record shows that appellant's use of drugs prior to the murder was anything but voluntary. Appellant's own testimony during the penalty phase showed that appellant was "high on cocaine" at the time of the murder, used drugs to have "some fun" after ball games, used cocaine starting at age 22, would not stop even though his wife wanted him to, and would share cocaine with others (Tr. 761-764). Appellant's own amended motion acknowledged that appellant voluntarily used cocaine prior to the murder, even spying on the victim through the window to discover where she hid the cocaine so he could find it (PCR L.F. 139-141). Clearly, appellant's condition due to his drug use at the time of the murder was due to his voluntary use of cocaine, and was therefore inadmissible.

This Court's opinions reinforce that drug use cannot be used to negate a requisite mental state, even if a defendant claims that the drug use caused or exacerbated a mental disease or defect. In State v. Roberts, 948 S.W.2d 577 (Mo. banc 1997), cert. denied 522 U.S. 1056 (1998), this Court responded to the defendant's claim that he should have been allowed to present evidence that he was unable to deliberate due to the effects of cocaine on his

preexisting mental condition by stating:

Section 562.076.3 clearly and unambiguously prohibits introduction of a voluntary drugged condition to negate a culpable mental state, even where the drugged condition exacerbates a tendency toward rage and anti-social behavior. If the underlying mental condition does not result in diminished capacity without the drug does not change the evidentiary calculus. We conclude that where a defendant's argument amounts to a but-for-the-drugs-I-voluntarily-took-I-would-not-have-committed-this-crime-argument, section 562.076.3 and [State v. Erwin, 848 S.W.2d 476 (Mo. banc 1993)] prohibits the introduction of evidence of a voluntary drugged condition as per se proof that he could not possess the requisite culpable mental state.

Id. at 589. See also State v Nicklasson, 967 S.W.2d 596, 617 (Mo. banc), cert. denied 525 U.S. 1021 (1998); State v. Rhodes, 988 S.W.2d 521, 525 (Mo. banc 1999).

In this case, it is clear that appellant seeks to impugn counsel for not pursuing a defense that appellant could not form the mental state necessary to be convicted of first degree murder (App.Br. 84-85, 87-88). However, counsel would not have been able to present this evidence even if he chose to try, as it is inadmissible. Counsel cannot be found ineffective for failing to present inadmissible evidence. Skillicorn v. State, 22 S.W.3d 678, 686-687 (Mo. banc) cert. denied 531 U.S. 1039 (2000). Therefore, appellant did not plead facts warranting relief,

and therefore he was not entitled to an evidentiary hearing.

D. Counsel's Decisions were Reasonable Trial Strategy

In any event, appellant was not entitled to relief on any of these claims because trial counsel chose, as a matter of trial strategy, not to use evidence of appellant's drug use as an excuse for the murder in either phase of trial. As stated above, counsel believed such defenses did not result in much compassion with juries and could wind up doing more harm than good, especially in asking the jury to "take it easy" and not "get mad" at appellant because appellant's drug use made him commit murder (Wendt 62-69, 81-87, 182, 189-190, 193-195).

The selection of witnesses and introduction of evidence are matters of trial strategy. State v. Kinder, 942 S.W.2d 313, 336 (Mo. banc 1996) cert. denied 522 U.S. 854 (1997). Strategic choices made after thorough investigation relevant to plausible options are virtually unchallengeable. Id. This includes the selection of a theory of defense. See id.

As explained above in Section B, counsel conducted a reasonable investigation of appellant's mental state, and, after doing so, decided that he would not pursue such a defense. In the guilt phase, he decided to pursue a strategy of self-defense because, even though it was a "tough, tough situation," he believed it was the best strategy available (Wendt 95). He pointed out several pieces of evidence which supported that theory, including appellant's wounds, the "complete state of disarray" of the crime scene which indicated a struggle, and appellant's own statements indicating his state of mind during the struggle and that the victim died in that struggle (Wendt 78-79, 88, 93, 97). Counsel stated that this was appellant's desired defense prior to trial, as it was most compatible with the story appellant told him in

preparation of trial, and appellant agreed to a self-defense strategy rather than a strategy based on appellant's drug use (Wendt 93, 175-176, 179, 181-183).

Counsel's choice of to avoid the use of appellant's drug use as an excuse for his crimes in either phase was reasonable trial strategy. First, the record reflects that counsel's assessment of how St. Charles juries would react to such a defense in either phase was accurate. In voir dire, the prosecutor asked if jurors would consider it more or less serious that a person committed a crime under the influence of drugs (Tr. 123). Of the eight people called on to responded to that question, six of the venirepersons stated they believed that drug use provided no excuse and that it would be worse for someone to commit a crime while on drugs (Tr. 123-129). Only one venireperson indicated that a defendant's drug use would in any way lessen a defendant's fault or the seriousness of the crime (Tr. 127). Second, this Court has recognized that the fact that a jury may be less sympathetic to someone whose mental state was affected by his own substance abuse, and upheld a motion court's denial of post-conviction relief based on that reasoning. State v. Kenley, 952 S.W.2d 250, 261-262 (Mo. banc 1997), cert. denied 522 U.S. 1095 (1998). Clearly, counsel's choice of strategy in not attempting to make appellant's drug use an excuse for his crimes or a reason to provide leniency was not unreasonable.

Appellant complains that the motion court erroneously used trial strategy to deny his claims without an evidentiary hearing, and that a hearing was required to deny relief based on trial strategy. However, where the record reflects a reasonable trial strategy for a decision of counsel, that trial strategy can be used to deny appellant the right to a hearing. See, e.g., State

v. Carter, 955 S.W.2d 548, 560 (Mo. banc 1997), cert. denied 523 U.S. 1052 (1998).

Here, the motion court took judicial notice of counsel's deposition, which had been taken at appellant's request prior to the filing of the amended motion and which was filed with the court (Wendt 1; PCR L.F. 1, 6, 807). Therefore, it is part of the record and can be used to refute appellant's claims.

Despite appellant's claim that counsel "ignored" evidence of appellant's drug use, the record reflects that counsel made a reasonable investigation into appellant's mental state, and then made a reasonable strategic choice to avoid using that evidence as an excuse for appellant's crime. Therefore, the trial court did not clearly err in denying appellant's claims without an evidentiary hearing, and appellant's seventh point on appeal must fail.

VII.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO "EXCESSIVE VICTIM IMPACT" EVIDENCE BECAUSE THE EVIDENCE WAS ADMISSIBLE AND APPELLANT'S CLAIM OF PREJUDICE WAS REFUTED BY THE RECORD (Responds to Appellant's Point VIII).

Appellant claims that counsel was ineffective for failing to object or attempt to limit victim impact evidence (App.Br. 91). He argues that the evidence "far exceeded the scope" of allowable victim impact evidence and included inadmissible evidence (App.Br. 92, 101). Appellant complains that he was prejudiced by counsel's failure because the jury "base[d] its decision on emotion, not reason, the facts and the law" (App.Br. 91).

A. Facts

During the penalty phase, the State presented victim impact testimony from the victim's mother, brother, stepsister, aunt, two cousins, and best friend (Tr. 682-754). Each witness testified about the victim's relationships, activities and achievements, and character traits and the impact of the victim's death on their lives (Tr. 682-754). Some of these witnesses also testified to non-statutory aggravating factors, including the effect of appellant's drug use on the marriage and appellant's phone bills from calls involving sports gambling (Tr. 706-707, 728-730, 741-742, 744-747). In addition, 51 photos of the victim, her diploma and real estate license were admitted (Tr. 12-14, 709). Counsel objected during to testimony about

appellant's bad acts (Tr. 712-713, 742-745).

In his amended motion, appellant alleged that counsel was ineffective for failing to object to or attempt to limit the "excessive" victim impact evidence (PCR L.F. 485). He claimed that a reasonably competent attorney would not have let the penalty phase "go so far beyond the standard intended by" Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (PCR L.F. 498). Appellant also alleged that counsel failed to object to hearsay (PCR L.F. 499-500). Appellant claimed that he was prejudiced because the victim impact testimony caused the jury to "impose the death sentence under the influence of passion, prejudice, and arbitrary factors" (PCR L.F. 485).

The motion court denied this claim without an evidentiary hearing, finding that the victim impact issue had been resolved against appellant on direct appeal and that "files and records of this case conclusively show that the movant is entitled to no relief on his claim" (PCR L.F. 820-821).

B. The Victim Impact Evidence was Admissible

Appellant's claim that the victim impact evidence was excessive is based on the false premise that Payne and § 565.030.4 restrict the amount of victim impact evidence that can be introduced to a "brief glimpse" of the harm caused by a murder (App.Br. 92). However, as this Court noted on direct appeal, this interpretation of Payne is incorrect. State v. Knese, 985 S.W.2d 759, 771 (Mo. banc), cert. denied 526 U.S. 1136 (1999). Payne simply holds that "[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision" as to imposing the death

penalty and specifically states that victim impact evidence should not be treated any differently than any other relevant evidence. Payne, 501 U.S. at 827. The only limitation placed on this type of evidence by Payne is that provided by the Due Process Clause: that the evidence must not be so unduly prejudicial that it renders the trial fundamentally unfair. Id. at 825. Section 565.030.4 states that evidence in aggravation of punishment “may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others.” § 565.030.4, RSMo 2000. The State is permitted to show that the victim is an individual whose death represents “a unique loss to society and to their family” and that the victim is not simply a “faceless stranger.” State v. Gray, 887 S.W.2d 369, 389 (Mo. banc 1994), cert. denied 514 U.S. 1042 (1995).

In this case, each victim’s testimony focused on either the victim (i.e., their relationships with her, the activities they witnessed her participate in, and the characteristics they observed) or on the impact of the death on their lives (their reaction to the news of her death, what they miss about her). Because all of these witnesses testified as to the “specific harm caused by” appellant to each of them and to others, their testimony was generally admissible for that purpose. State v. Storey, 40 S.W.3d 898, 908 (Mo. banc), cert. denied 122 S.Ct. 272 (2001).

Appellant also complains about specific items of testimony that were hearsay “without confrontation” or otherwise inadmissible (App.Br. 95, 101). Most of the alleged hearsay testimony, such as the victim’s late father’s statement about missing his children when he died (Tr. 686), the victim’s nephew’s statements to his mother that “Aunt Karen” was watching over

him (Tr. 720), or the story read at a graduation ceremony which was partially repeated at trial by the victim's cousin (Tr. 753-754) were not admitted for the truth of the matter asserted, but to show the closeness of the family relationships and the affect of the victim's death on the family, and were therefore admissible. See State v. Brown, 998 S.W.2d 531, 546 (Mo. banc), cert. denied 528 U.S. 979 (1999). Statements such as the nephew's or the victim's aunt's testimony about a woman at her friend's church (Tr. 747-748) showing the reactions of non-witnesses to the death have been allowed by this Court and the U.S. Supreme Court. Payne, 501 U.S. at 814-815 (the victim's young son's statements testified to by victim's mother); Storey, 40 S.W.3d at 908 (a teaching associate of the victim testified to students' reactions to victim's death).

Further, other testimony appellant complains about was also admissible. Appellant complains about testimony regarding appellant's failure to pay for phone calls to gambling businesses and the effect of appellant's drug problems on the marriage (App.Br. 95, 101; Tr. 706-707, 728-731, 741-745). However, this evidence was not "victim impact testimony," but admissible evidence appellant's character, which the State may introduce during the penalty phase. State v. Cole, SC 83485 (Mo. banc February 26, 2002), slip op. at 14 (evidence of the defendant's prior convictions, order of protection violations, and child support payment record was not "victim impact evidence," but admissible evidence of the defendant's character). Appellant also complains about "prayers that justice be done" (App.Br. 95-101; 749-750, 754). These types of statements are not improper as long as they do not request a specific punishment. Bucklew v. State, 38 S.W.3d 395, 399 (Mo. banc 2001), cert. denied 122 S.Ct.

374 (2001).

Appellant has completely failed to identify victim impact testimony that would have been found inadmissible if counsel had objected. Counsel cannot be deemed ineffective for declining to make non-meritorious objections to victim impact testimony. State v. Kreutzer, 928 S.W.2d 854, 878 (Mo. banc 1996), cert. denied 519 U.S. 1083 (1997). Therefore, appellant failed to plead facts warranting relief, and was therefore not entitled to a hearing on his claim.

C. Appellant's Claim of Prejudice was Refuted by the Record

Appellant correctly points out that a finding of “no manifest injustice” on direct appeal does not preclude review for Strickland prejudice in a post-conviction proceeding (App.Br. 98-101). Deck v. State, No. 83237 (Mo. banc February 26, 2002), slip op. at 10-14. However, this Court stated noted that “this theoretical difference in the two standards of review will seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal, for in most cases, an error that is not outcome-determinative on direct appeal will also fail to meet the Strickland test.” Id. at 13. Here, not only was there a finding of “no manifest injustice” on direct appeal, which supports the denial of the claim, but this Court also made a finding of fact on direct appeal which directly refutes appellant’s allegation of Strickland prejudice.

On direct appeal, this Court conducted its independent statutory review of appellant’s death sentence and found, after a careful review of the record and transcript, “that the sentence of death imposed for the murder of Karen Knese was not imposed under the influence of

passion, prejudice, or any other arbitrary factor.” Knese, 985 S.W.2d at 779. Appellant’s sole claim of prejudice in his amended motion was that the victim impact evidence caused the jury to “impose the death sentence under the influence of passion, prejudice, and arbitrary factors” (PCR L.F. 485-486, 465, 500-501). Appellant failed to allege any facts to demonstrate that this Court’s finding as to the lack of passion or prejudice in the sentencing was incorrect, or that a more careful review of the record than this Court made on direct appeal would reveal that arbitrary factors controlled this jury’s decision to impose death. Without any such allegation, appellant’s claim of prejudice is squarely refuted by the record, and therefore, he was not entitled to a hearing on this claim. Appellant’s final point on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's convictions and sentences and the denial of his Rule 29.15 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 19,583 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 1st day of May, 2002, to:

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APPENDIX