No. 84987

IN THE
MISSOURI SUPREME COURT

EARL RINGO, JR.,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Boone County, Missouri
The Honorable Ellen Roper, 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 Boone County, Missouri. The convictions sought to be vacated were for two counts of murder in the first degree, §565.020, RSMo 2000, for which the sentences were death. Because of the sentences imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Earl Ringo, Jr. was convicted of two counts of murder in the first degree, §565.020, RSMo 2000, for which the sentences were death, in the Circuit Court of Boone County, Missouri (L.F. 1573-1574, 1611-1612, 1646). The facts adduced at trial are as follows:

A. The crimes

In February 1997, appellant moved to Columbia from his hometown of Jeffersonville, Indiana (Tr. 1736). He moved in with another Jeffersonville native, Elmer "Tiger" Leonhardt (Tr. 1735). While in Columbia, appellant did some carpet laying with Mr. Leonhardt, and worked at some restaurants (Tr. 1736). From May 1997 through January 1998, appellant worked at Ruby Tuesday as a cook (Tr. 1646, 1652).

After early June 1998, however, appellant had no employment (Tr. 1737). He started spending a lot of time back in Jeffersonville (Tr. 1737). Toward the end of June, he called Mr. Leonhardt from Jeffersonville, and told him that his mother had offered to let him live at home (Tr. 1739). He said he would come to Columbia soon to move his things out and that he would pay the rent he owed (Tr. 1739).

Appellant asked his friend, Quentin Jones, to help him move (Tr. 1815). On Friday, July 3, 1998, appellant rented a U-Haul truck in Jeffersonville, then picked up Mr. Jones (Tr. 1710-1712, 1813-1814).

On the way to Columbia, appellant revealed his plan to rob the Ruby Tuesday restaurant where he used to work (Tr. 1815-1818). Appellant told Mr. Jones that they could go to the back door early in the morning and wait for the manager to open the door (Tr. 1817-1818). He said that the manager would let them in, thinking they were employees, because they would wear Ruby Tuesday shirts (Tr. 1818, 1822). Appellant said they would probably be able to get

about $14,000 from the safe (Tr. 1817, 1828). Appellant knew that the previous day's cash proceeds would still be in the safe (Tr. 2023, 1668, 1674-1675). Appellant was carrying a black nine millimeter Lorcin handgun (Tr. 1818, 1759).

That night, at Mr. Leonhardt's duplex in Columbia, appellant showed Mr. Jones the equipment he had brought to use in the robbery (Tr. 1822-1826). Appellant had two ski masks that would cover most of their faces (Tr. 1825-1826). Appellant showed Mr. Jones the two Ruby Tuesday shirts they could wear (Tr. 1822). Mr. Jones only had shorts to wear, so appellant provided him with jeans, which would be what an employee would wear (Tr. 1825). Appellant also showed Mr. Jones and Mr. Leonhardt a bulletproof vest (Tr. 1746, 1820). Appellant and Mr. Jones packed appellant's things and loaded the U-Haul that night, with Mr. Leonhardt's help (Tr. 1747, 1821, 1827).

The morning of Saturday, July 4, 1998, appellant woke Mr. Jones at about 4:30 and said "Come on. Let's go" (Tr. 1828). Appellant was nervous, and said he had been up all night cleaning his gun (Tr. 1829, 1830). Appellant put the gun, the two masks, and a pair of gloves in a backpack (Tr. 1829-1830). They wore the Ruby Tuesday shirts (Tr. 1838). The two men got into the U-Haul, and appellant drove toward Ruby Tuesday (Tr. 1829-1831).

Ruby Tuesday is located on Stadium Boulevard in Columbia (Tr. 1387). Although Ruby Tuesday did not open to the public until 11:00 a.m., the usual procedure was for a manager to arrive at 6:00 a.m. to meet the delivery truck, or 7:00 a.m. if no delivery was expected (Tr. 1390, 1396, 1638). On delivery days, another employee would also come in at 6:00 a.m. to help unload the truck and put away the goods (Tr. 1396,1642-1643). On arrival, the manager would enter the front door, turn off the alarm, and go to the kitchen area and office in the rear of the building (Tr. 1407-1408, 1638-1639). If the truck was not already there, the manager would start the daily routine in the office (Tr. 1640). When the truck driver backed up to the

rear door, the manager would let him in, and they would go over the invoices before unloading (Tr. 1409, 1412, 1640-1641). Later, other employees would be admitted through the rear door as they arrived (Tr. 1420, 1645). Appellant was familiar with these procedures from working there (Tr. 1422, 1427, 1429-1430, 1646, 1652-1658, 2023, 2025). He had actually helped unload the truck at least once (Tr. 1429, 1657), and often worked as the opening cook, arriving at 7:00 a.m. (Tr. 1658). When appellant worked there, there was a period of time when the restaurant received regular Saturday deliveries (Tr. 1429-1430, 1652).

On July 4th, a Saturday, Joanna Baysinger was scheduled to open at 6:00 (Tr. 1396). Ms. Baysinger, who was twenty-two years old (Tr. 1586), had been working at the Ruby Tuesday in Columbia for ten weeks as a manager in training (Tr. 1391, 1625). She was to become a manager at the Ruby Tuesday in Jefferson City, where she lived, when her training was completed (Tr. 1625). That morning, Ms. Baysinger expected a delivery from U.S. Foods (Tr. 1395, 1396).

Appellant parked the U-Haul in a shopping center parking lot, a short distance down the road from Ruby Tuesday (Tr. 1832, 2023). Appellant, carrying the backpack, and Mr. Jones walked down the shoulder of Stadium Boulevard to Ruby Tuesday (Tr. 1834, 2023). No vehicles were on the lot yet (Tr. 2024). They walked around to the back of the restaurant and hid behind dumpsters in the delivery area (Tr. 1840). Appellant told Mr. Jones that they would wait until the manager got there, then knock on the back door (Tr. 1839).

At 5:55 a.m., the U.S. Foods truck pulled up (Tr. 1471). The truck was driven by Dennis Poyser, a forty-four year old (Tr. 1594) man from Fort Wayne, Indiana (Tr. 2307). When the truck arrived, Mr. Jones attempted to leave, but appellant motioned him back and told him to hide (Tr. 1839). They put on the masks, and appellant put on gloves (Tr. 1841, 1846).

Shortly thereafter, Ms. Baysinger came out of Ruby Tuesday and spoke to Mr. Poyser (Tr. 1841). They turned and went inside to go over the invoice (Tr. 1842, 1497-1499). Appellant ran into the kitchen after them and shot Mr. Poyser in the face from a distance of about six inches (Tr. 1842-1843, 1594, 1595-1596). Mr. Poyser immediately fell to the floor (Tr. 1605).

After hearing the gunshot, Mr. Jones ran in and saw Mr. Poyser on the floor, and appellant standing with Ms. Baysinger, who was screaming (Tr. 1843-1844). Appellant took Ms. Baysinger's hand and pulled her into the office (Tr. 1845, 2029). Appellant told Mr. Jones to go to the front of the restaurant and make sure no one else was there, and to shut the back door (Tr. 1846, 1850). Mr. Jones complied, then returned to the office (Tr. 1848).

Appellant pointed the gun at Ms. Baysinger and demanded that she open the safe (Tr. 1848, 2029). Ms. Baysinger opened the top part of the safe, and began to put money from three cash drawers and petty cash into a bag (Tr. 1848-1849, 2029). This was about $1400.00 (Tr. 1661, 1867).

Appellant then ordered Ms. Baysinger to open the bottom part of the safe (Tr. 1849, 2029). Appellant knew that this was where a large amount of money, the cash proceeds from the day before, would be (Tr. 2029,1667-1669, 1674). Ms. Baysinger struggled with the two keys that opened that section, but was unable to get it open (Tr. 1849, 1851-1852, 2029). Appellant kept telling her to "hurry up," and Mr. Jones knocked the phone onto the floor to "scare her into opening up the bottom part of that safe" (Tr. 1851, 1852).

Meanwhile, Tony Jaco, a Ruby Tuesday employee who was supposed to arrive at 6:00 to help with the truck, was running late (Tr. 1430). At 6:15, he arrived at Ruby Tuesday and knocked on the back door (Tr. 1430-1432). After trying for a while and getting no response, Mr. Jaco left and tried to call the restaurant from a McDonald's nearby (Tr. 1432-1433, 1437-

1439). When he got no answer, he returned to Ruby Tuesday and walked around the building looking in windows (Tr. 1440). Unable to discover what was going on, he went home (Tr. 1440).

When appellant heard the knocking on the back door from inside the office, he handed Mr. Jones the gun and one of his gloves (Tr. 1853, 1939-1940, 2032). He said, "If she moves, shoot her" (Tr. 1853). Appellant left the office but disregarded the knocking (Tr. 1853). Instead, he pulled Mr. Poyser into the walk-in cooler by the legs (Tr. 1853, 2033). In the office, Ms. Baysinger continued to try to open the safe (Tr. 1853). She asked Mr. Jones if he wanted to try (Tr. 1853). Mr. Jones just shook his head, because he did not want her to hear his voice (Tr. 1853).

When appellant came back to the office, he no longer wore the mask (Tr. 1858). Mr. Jones handed the gun back to him (Tr. 1855). Appellant fired a shot into the floor beside Ms. Baysinger to hurry her (Tr. 1855, 2029). Ms. Baysinger jumped up, put her hands to her ears, and screamed (Tr. 1855). Then she returned to trying to open the safe, and appellant tried as well (Tr. 1856, 2030). They still could not get it open (Tr. 2030). Appellant asked Ms. Baysinger how much money she had on her, and made her empty the contents of her purse onto a table (Tr. 1856).

Appellant ordered Ms. Baysinger to write "I'm sorry" on a piece of paper (Tr. 1857, 2030). While she was doing that, appellant took Mr. Jones aside and asked him if he "wanted to do this bitch" (Tr. 1858, 1943). Mr. Jones accepted the gun from appellant (Tr. 1859). Ms. Baysinger said that she was done with the note, and stood (Tr. 1859, 1860). Mr. Jones pointed the gun at her head and stood there "contemplating whether to do it or not" for "about a minute and a half" (Tr. 1859-1860). Appellant motioned for him to come on and whispered, "Hurry

up. Come on" (Tr. 1859, 1943). Finally, Mr. Jones shot Ms. Baysinger in the head from only about a foot away and she fell to the floor (Tr. 1860, 1586, 1590, 1593).

Appellant and Mr. Jones took the backpack and the money, walked out the front door and back to the U-Haul (Tr. 1860-1862, 2034). They got on Interstate 70 and started driving east (Tr. 1864, 2035). Appellant and Mr. Jones took the Ruby Tuesday shirts off and put them in the plastic bag that they had carried the money in (Tr. 1865, 2035). Appellant threw the bag in the trash at a truck stop about thirty minutes from Columbia (Tr. 1769, 1771, 1866, 2035). Appellant took the gun apart into twelve or thirteen pieces and threw the pieces into the Ohio River and various trash cans (Tr. 2035-2036). When they got back to Jeffersonville, appellant split the money with Mr. Jones, and sent his mother to pay for the U-Haul with his share (Tr. 1867, 2036).

B. Discovery of the bodies

At about 9:30 a.m., Jason Pounds arrived at Ruby Tuesday for work (Tr. 1629). When he could not get in, he called the restaurant manager, Ron Clemage (Tr. 1629). Mr. Pounds had keys to the building, so Mr. Clemage gave him permission to unlock the building, told him how to turn off the alarm, and asked him to call back after he got in (Tr. 1629).

Mr. Clemage began to get dressed (Tr. 1630). Then he called Ruby Tuesday, because Mr. Pounds had not called (Tr. 1630). Mr. Pounds told him there was "blood all over the place" and to call 911 (Tr. 1631). Mr. Clemage immediately did so, then hurried to the restaurant (Tr. 1631). When he got to the kitchen area, he first saw some broken dishes, then a pool of blood on the floor (Tr. 1632). He noticed that the quiche oven was turned on, which would normally be done as soon as the first manager arrived (Tr. 1632, 1639-1640).

Mr. Clemage discovered Ms. Baysinger's body in the office, along with the open safe and the note on the desk (Tr. 1634). Then he realized that there was a truck out back, and they

did not know where the driver was (Tr. 1636). He returned to the part of the kitchen where he had seen the pool of blood, and noticed drag marks leading into the walk-in cooler (Tr. 1636-1637). He and Mr. Pounds opened the door, saw Mr. Poyser's body, then shut the door and awaited the arrival of police (Tr. 1637-1638).

C. The physical evidence

Mr. Poyser died of the gunshot wound to his head and the resulting injury to the brain (Tr. 1600). The bullet entered less than one inch below his right eye and exited the back of his head after traveling slightly downward (Tr. 1594-1595, 1599). There was a heavy deposit of gunpowder, indicating that the gun had been fired from a distance of about six inches (Tr. 1596-1597).

Ms. Baysinger died of the gunshot wound to her head and the resulting injury to the brain (Tr. 1592). The bullet entered the left side of her head less than one inch above her ear and came out her right ear (Tr. 1586, 1588). The presence of stippling and gun powder suggested that she was shot from a distance of about one foot (Tr. 1586-1587, 1590). There was a scrape on the back of her left hand caused by grazing contact with a bullet (Tr. 1589). This was from either the bullet that appellant fired into the floor of the office or the bullet that killed Mr. Poyser, but not the bullet that killed her (Tr. 1590-1591). She sustained a stab wound on her left leg, made with a knife or other sharp object (Tr. 1589) and an angled cut, made with a sharp object, on the palm of her right hand (Tr. 1588).[1]

At Ruby Tuesday, police recovered a cartridge casing and the delivery invoice from the kitchen floor near the pool of blood (Tr. 1497, 1500). They found bullet fragments among broken plates on a shelf that was about head-high, near where Mr. Poyser was shot (Tr. 1509). Two more cartridge casings were found in the office: one behind Ms. Baysinger and one on the

[1]The evidence did not reveal how Ms. Baysinger received these injuries (see Tr. 2046).

copier (Tr. 1522, 1544-1545). There were numerous bullet fragments on the floor of the office (Tr. 1547). All three cartridge cases were fired from the same Lorcin nine millimeter autoloaded pistol (Tr. 1615-1616, 1621).

The three empty cash drawers were found on the counter in the office, next to the note that said "I'm sorry" (Tr. 1525, 1531). Ms. Baysinger's purse, its scattered contents, and her portfolio of work papers were on the counter (Tr. 1536-1537). The phone had been taken off the wall (Tr. 1577). The keys were still in the unopened lower door of the safe, which contained $4,768.29 in two cash bags (Tr. 1523, 1530).

The truck that Mr. Poyser drove remained outside with the doors open (Tr. 1636, 1465). Police found Mr. Poyser's logbook and trip manifest, showing his arrival at Ruby Tuesday at 5:55 a.m. (Tr. 1466, 1471). Ms. Baysinger's car was also parked on the lot (Tr. 1464).

The two Ruby Tuesday shirts were found at the Moc-1 Truck Stop east of Columbia later on July 4 or early July 5 (Tr. 1768-1769, 1771, 1774).

D. The investigation

Police detectives began trying to find and speak with past and present Ruby Tuesday employees (Tr. 1693). A conversation with one of them led Detective Mark Brotemarkle to contact appellant at his mother's house in Jeffersonville, Indiana (Tr. 1694). Det. Brotemarkle spoke with appellant on the telephone on July 10, 1998 (Tr. 1694, 1696). This conversation was recorded (Tr. 1696). After checking with some of the people appellant mentioned during the conversation, Det. Brotemarkle concluded that appellant lied several times during their conversation (Tr. 1708).

Det. Brotemarkle and several other detectives traveled to Jeffersonville, Indiana on July 12, 1998 (Tr. 1709, 1774, 1950). They first went to the local U-Haul rental company and obtained the receipt for a U-Haul truck rented to appellant on July 3, 1998 (Tr. 1710-1712,

1775). Then they obtained a search warrant for appellant's mother's house (Tr. 1712, 1777). When the search warrant was executed on July 13, 1998, officers found a blue ski mask (Tr. 1785-1786); a receipt for a Lorcin nine millimeter handgun bearing appellant's name (Tr. 1787); some plastic coin wrappers (Tr. 1779, 1780), a bulletproof vest (Tr. 1779, 1782), and a nine millimeter Luger cartridge shoved into a hole in the ceiling (Tr. 1791;). It was later determined that this cartridge was manufactured in the same lot as the expended cartridges recovered at Ruby Tuesday (Tr. 1802, 1803).

Det. Bryan Liebhart spoke with appellant that day at the Jeffersonville Police Department, beginning at about 9:00 a.m. (Tr. 1952-1953). Appellant had been informed of his Miranda rights (Tr. 1952). Appellant maintained that he did not know anything about the murders and again commented "we're all family" (Tr. 1955). He said the last time he was in Columbia was about June 15, 1998 (Tr. 1957-1958).

Throughout the interview, Det. Liebhart and Det. Brad Nelson confronted appellant with the evidence against him (Tr. 1958, 1961, 1965, 1968, 1969, 1970, 1971, 1974, 1975, 1979-1981, 1990). Appellant persistently denied any involvement in the robbery and murders until about 5:00 p.m. (Tr. 1974-1975, 1984-1985, 1988). Then, appellant said, "Okay. I was in there. I'll tell you all about it" (Tr. 1990).

Appellant said that he intended to rob Ruby Tuesday because he needed money to move (Respondent’s Exhibit A). He claimed, however, that he only shot Mr. Poyser because Mr. Poyser "tried to charge at me" (Respondent’s Exhibit A). He admitted that he ordered Ms. Baysinger to empty the safe out (Respondent’s Exhibit A). But he claimed that, as he was leaving, Ms. Baysinger jumped on his back and startled him (Respondent’s Exhibit A). He said that he threw her off and shot her (Respondent’s Exhibit A). Appellant claimed that Mr. Jones waited in the U-Haul and did not know what appellant was doing Respondent’s Exhibit A).

After making this statement, which was videotaped (Tr. 1994; Respondent's Exhibit A), appellant was booked for two counts of murder (Tr. 2017).

After appellant was booked, Quentin Jones turned himself in and admitted that he actually shot one of the victims (Tr. 2018-2019). The detectives therefore contacted appellant again at about 9:30 p.m. (Tr. 2019). This time, appellant said that Mr. Jones shot Ms. Baysinger in the office while appellant was pulling Mr. Poyser into the freezer (Tr. 2033).

E. The defense case

Appellant did not testify. The defense presented evidence of Quentin Jones's prior statements in which he gave accounts of the events surrounding the robbery and murders that differed from his trial testimony (Tr. 2067-2068, 2076, 2080-2081). Defense counsel argued to the jury that appellant did not act with deliberation and was guilty of murder in the second degree (Tr. 2166-2167, 2171, 2184-2185).

F. The verdicts

At the close of the evidence, and following the instructions and arguments of counsel, the jury returned verdicts of guilty on both counts of murder in the first degree (Tr. 2220; L.F. 1573, 1574).

G. The penalty phase

Joanna Baysinger's mother and father testified about the loss the family had experienced and its effect on their lives (Tr. 2287, 2295). In particular, they testified about how difficult Ms. Baysinger's death was for her young son, Jody, who was not quite two years old when she was killed (Tr. 2289-2290, 2294, 2298-2303). Dennis Poyser's wife of twenty-four years, Jama Poyser, testified regarding her life with Mr. Poyser and the effect that her husband's murder had on her and her two daughters, who were teenagers at the time (Tr. 2307-2315).

Both daughters testified about the effect the loss of their father on their lives (Tr. 2315-2324).

Appellant's mother, sister, and both grandmothers testified on appellant's behalf (Tr. 2341, 2360, 2372, 2385). His mother and sister testified that appellant's father died when appellant was eight years old (Tr. 2346-2348), and that his mother subsequently became involved with a man who was abusive to them all (Tr. 2349-2350, 2376-2381). The witnesses described their relationships with appellant and expressed their desire to maintain a relationship with him (Tr. 2349, 2353-2356, 2368-2369, 2383-2384, 2387-2389).

H. The penalty phase verdicts

At the close of the penalty phase evidence, and following the instructions and arguments of counsel, the jury found three statutory aggravating circumstances for the murder of Dennis Poyser and five statutory aggravating circumstances for the murder of Joanna Baysinger (Tr. 2435-2437; L.F. 1611). The jury declared that the punishment for the murder of Dennis Poyser should be death, and that the punishment for the murder of Joanna Baysinger should be death (Tr. 2435, 2436; L.F. 1612).

I. Sentencing

On July 26, 1999, appellant returned to the Circuit Court of Boone County for sentencing (Tr. 2442). The court imposed two sentences of death, according to the jury's recommendation (Tr. 2466; L.F. 1646).

J. Direct Appeal

This Court affirmed appellant's convictions and sentences. State v. Ringo, 30 S.W.3d 811 (Mo. banc 2000), cert. denied, 523 U.S. 1040 (2001).

K. Post-Conviction

On March 2, 2001, appellant filed his pro se motion for post-conviction relief and following appointment of counsel, filed his amended motion on June 7, 2001 (PCR L.F. 7-65; 70-342a).

The motion court, Judge Ellen Roper, denied three of appellant's claims without an evidentiary hearing (PCR L.F. 571).

An evidentiary hearing for the remaining two claims was held on three separate dates, March 19, 2002, May 2, 2002, and September 24, 2002 (PCR Tr. 1, 227, 414).

On November 13, 2002, the motion court issued its findings of fact and conclusions of law denying appellant's claims (PCR L.F. 560-574).

ARGUMENT

I.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WERE INEFFECTIVE FOR NOT INVESTIGATING AND CALLING TO TESTIFY, A DIFFERENT PSYCHOLOGIST, DR. ROBERT SMITH, TO TESTIFY DURING THE GUILT PHASE THAT APPELLANT WAS UNABLE TO DELIBERATE BECAUSE HE SUFFERED FROM POST-TRAUMATIC STRESS DISORDER, DEPRESSION, AND A LEARNING DISABILITY BECAUSE TRIAL COUNSEL WAS NOT INEFFECTIVE AND APPELLANT WAS NOT PREJUDICED IN THAT TRIAL COUNSEL WERE NOT REQUIRED TO SHOP FOR A MORE FAVORABLE EXPERT AND DR. SMITH'S TESTIMONY WAS NOT CREDIBLE AND THUS WOULD NOT HAVE CHANGED THE OUTCOME OF THE TRIAL.

Appellant claims that his trial counsel were ineffective for failing to present the testimony of psychologist, Dr. Robert Smith, during the guilt phase of the trial (App. Br. 28). Specifically, appellant alleges that Dr. Smith would have testified that appellant suffered from post-traumatic stress disorder, a learning disability, and depression, which caused appellant to react in an impulsive way when he murdered Mr. Poyser, and therefore, he did not deliberate and was not guilty of first degree murder (App. Br. 28)[2].

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[2]Appellant's claim on appeal is somewhat at variance from his post-conviction motion as he now, on appeal, cites additional mental conditions that allegedly caused him to be unable to deliberate on Mr. Poyser's murder that were not alleged in his post-conviction motion. See State v. Clay, 975 S.W.2d 121, 141-142 (Mo. banc 1998), cert. denied, 525 U.S. 1085 (1999).

A. Facts Adduced at Trial

At trial, the State's theory was that appellant had deliberately killed Mr. Poyser. The State presented evidence and argued to the jury that once appellant saw the delivery driver, Mr. Poyser, arrive at the restaurant, he decided he would need to kill him (Tr. 2158). The evidence showed that appellant walked into the Ruby Tuesday's restaurant, approached Mr. Poyser, and shot him at close range, six inches from his head (Tr. 1842-1843, 1594, 1595-1596).

The defense presented the theory that appellant was only guilty of murder in the second degree for the murder of Mr. Poyser because appellant was startled by Mr. Poyser rushing at him and did not deliberate before shooting him (Tr. 2067-2068, 2076, 2080-2081, 2166-2167, 2171, 2184-2185).

B. Facts Adduced at Evidentiary Hearing

During the evidentiary hearing, appellant called Dr. Robert Smith, a clinical psychologist, who testified that appellant suffered from post-traumatic stress disorder, depression, a learning disability, and alcohol and cannabis abuse (PCR Tr. 157). According to Dr. Smith, the trauma appellant suffered as a child, namely the physical abuse by William Vaughn, resulted in appellant developing post-traumatic stress disorder (PCR Tr. 138). Dr. Smith testified that the combination of appellant's mental disorders "interfere[d], diminish[ed] his ability to deliberate and consider his actions" (PCR Tr. 163).

During cross-examination, Dr. Smith, who only met appellant after he was convicted in preparation for his post-conviction action, was questioned on how he knew that appellant's post-traumatic stress disorder was present before the murders and not merely a disorder caused from the traumatic event of murdering two people (PCR Tr. 193). Dr. Smith would only state that appellant felt that murdering two people was upsetting, but not traumatic, and that murdering two people was not a situation that would have a long-lasting impact on

appellant (PCR Tr. 195). Dr. Smith also refused to consider what effect, if any, appellant's post-traumatic stress disorder would have had if the facts were not as appellant had related them, that is, if Mr. Poyser had not rushed appellant and appellant intentionally decided to point the loaded gun at Mr. Poyser and shoot him–the theory the State presented at trial (PCR Tr. 197-199).

Dr. Smith also testified that appellant had aggressive outbursts, that were out of proportion to the situation, which was indicative of post-traumatic stress disorder (PCR Tr. 585-586, 602). However, when cross-examined on this area, Dr. Smith could only relate one incident (other than the murders) in which appellant had overreacted (PCR Tr. 631-633). Dr. Smith testified about a situation in which appellant and his cousin had an argument and appellant yelled loudly which the cousin said was overreacting to the argument (PCR Tr. 632-635). However, Dr. Smith could not provide any details about the encounter (even admitting that he had not known any of the details), could not identify any other outbursts, and most importantly he did not know of any outbursts or startle responses where appellant had become physically violent–with the exception of the murders (PCR Tr. 631-639).

Finally, Dr. Smith testified that persons, such as appellant, with post-traumatic stress disorder try to avoid conflict whenever possible (PCR Tr. 585).

Ruth O'Neill, called to testify by movant, and Ms. Kimberly Shaw, called to testify by the State, appellant's trial counsel, discussed their strategy at trial and their assessments of appellant's mental abilities.

Ruth O'Neill testified that her and her co-counsel, Kimberly Shaw, divided their responsibilities with Ms. O'Neill concentrating on the guilt phase of the trial and Ms. Shaw concentrating on the penalty phase of the trial—although they both assisted each other (PCR Tr. 246). According to O'Neill, she began having concerns, regarding appellant's mental

condition, after meeting with him because appellant had difficulty understanding legal concepts and difficulty remembering things (PCR Tr. 247). O'Neill testified that once she met with appellant's family and learned of William Vaughn, appellant's mother's ex-boyfriend, assaulting appellant with a baseball bat, O'Neill began to wonder if appellant may have suffered from post-traumatic stress disorder or brain damage (PCR Tr. 256). According to O'Neill, she and Shaw then decided to consult a neuropsychologist, Dr. Briggs, to do some testing on appellant (PCR Tr. 256).

O'Neill testified that they asked Dr. Briggs "to perform testing, looking for mental issues regarding mitigation" and specifically, to look for brain damage (PCR Tr. 257). O'Neill also wanted Dr. Briggs to look for things that "would give [them] a clue as to his functioning level intellectually" and to "figure out what to do with Earl's case" (PCR Tr. 257).

According to O'Neill, Dr. Briggs conducted a mental examination on appellant, and found that although appellant was learning-disabled he did not suffer from brain damage and that appellant was not antisocial (PCR Tr. 257). O'Neill testified that after learning of the test results, she did not speak with Dr. Briggs again but referred him to her co-counsel Kimberly Shaw (PCR Tr. 258). Dr. Briggs did not diagnose appellant with post-traumatic stress disorder; according to O'Neill she never asked him about the possibility of appellant suffering from post-traumatic stress disorder; and Dr. Briggs never volunteered that appellant suffered from the disorder (PCR Tr. 293).

Ms. Kimberly Shaw, appellant's other trial counsel, testified that she did not consider raising a mental disease defense with appellant as she did not receive any information that it was something to look into (PCR Tr. 365). Shaw did not recall discussing post-traumatic stress disorder with Dr. Briggs following his testing of appellant (PCR Tr. 375). Shaw never became concerned or thought that appellant may have been suffering from post-traumatic

stress disorder (PCR Tr. 376). Shaw also testified that she would have expected Dr. Briggs to notify her if they needed to explore any other psychological disorders and that Dr. Briggs did not give her any information that appellant's mental abilities should have been investigated further (PCR Tr. 402-403). Dr. Briggs never prepared a report for appellant's attorneys (PCR Tr. 373-374).[3]

According to O'Neill, the theory of appellant's defense was that appellant did not deliberate in killing Mr. Poyser because it was a reactive shooting that resulted from Mr. Poyser coming at appellant (PCR Tr. 269).

The State called Dr. Jeffrey Kline, a psychologist, who also evaluated appellant (PCR Tr. 415). Dr. Kline testified that based on his lengthy interview with appellant, his psychological testing of appellant, and his review of family reports, Dr. Smith's testimony, the trial transcript, appellant's confessions, police reports, autopsy reports, prison records, various developmental records, and school records, he did not believe that appellant was currently suffering from a mental disease or defect, or that he ever had (PCR Tr. 426-429). According to Dr. Kline, appellant did not suffer from any significant symptoms associated with traumatic experiences either now or then and was not suffering from post-traumatic stress disorder (PCR Tr. 439). However, Dr. Kline did believe that appellant did suffer from antisocial personality disorder, cannabis abuse, and alcohol abuse (PCR Tr. 426). Dr. Kline did agree with Dr. Smith that appellant had a learning disorder but disagreed that appellant had suffered from depression (PCR Tr. 492-494).

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[3]A report prepared by Dr. Briggs was introduced at the evidentiary hearing, although it was not prepared at the time of trial and was never seen by appellant's trial counsel (PCR Tr. 373-375) (Respondent's Exhibit B).

According to Dr. Kline, appellant did not shoot Mr. Poyser as a startled response due to post-traumatic stress disorder (PCR Tr. 479). Dr. Kline testified that although appellant had suffered a traumatic event in his past, the abuse by William Vaughn, he did not suffer from any of the other symptoms associated with post-traumatic stress disorder which would have caused significant distress or impairment in appellant's social, occupational, or other areas of functioning (PCR Tr. 450-452, 483).

According to Dr. Kline, appellant's version of the events leading up to the murder of Mr. Poyser did not constitute an "exaggerated startle response" as would be necessary for post-traumatic stress disorder (PCR Tr. 480). Dr. Kline also explained that even if appellant's reaction to Mr. Poyser was a startle response, appellant's lack of other startle responses throughout his life would preclude a diagnosis of post-traumatic stress disorder (PCR Tr. 556-557).

C. Motion Court Findings

The motion court denied appellant's claim finding that:

> 7. Counsel for Movant engaged three experts to assist in trial preparation: Dr. Wanda Draper, a child development expert with a Ph.D. in child development; Dr. Robert Briggs, a psychologist; and Dr. Wheelock, an expert in learning disorders and dyslexia in particular.
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> 8. Counsel for Movant were informed that he was of normal intelligence, although he was learning disabled. He did not suffer from dyslexia. Dr. Briggs did not diagnose Movant with PostTraumatic Stress Disorder or a brain injury. Dr. Draper made no diagnoses with respect to Movant, but did create a "life path" outlining the significant events with respect to his development.

9. Counsel for Movant also engaged the services of a social worker to investigate Movant's background by interviewing various family members.

(PCR L.F. 566).

The motion court then concluded that:

> Claim 8(a)(II) faults counsel for failing to engage and call Dr. Robert Smith in both the guilt and penalty phases of trial. Dr. Smith's expertise on substance abuse would not have assisted in the defense of this case. Ms. O'Neill was able in the guilty phase of the trial to present evidence to the jury from which it could have found a factual basis for finding Movant guilty of Murder in the Second Degree and Felony Murder. The jury's rejection of Murder in the Second Degree does not establish that counsel was ineffective. Counsel was not required to continue to search for a favorable expert after Briggs' evaluation did not turn out as she thought it might. Although counsel knew of Dr. Smith, they did not have a reasonable basis for engaging yet another expert. **State v. Mease,** 842 S.W.2d 98 (Mo.banc 1992) Claim 8(a)(II) is denied.

(PCR L.F. 573).

D. Standard of Review

This Court's review of the denial of post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. State v. Kinder, 942 S.W.2d 313, 333 (Mo banc 1996), cert. denied 522 U.S. 854 (1997). A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or a death sentence has two components. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Appellant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Id. 466 U.S. at 694. Appellant must also demonstrate that counsel failed in his duty to make a reasonable investigation or in his duty to make a reasonable decision that makes a particular investigation unnecessary. Id. 466 U.S. at 690-691.

In the context of counsel's performance, the selection of witnesses and the presentation of evidence are matters of trial strategy. Leisure v. State, 828 S.W.2d 872, 874 (Mo.banc 1992), cert. denied, 506 U.S. 923 (1992). To demonstrate ineffectiveness for failing to present evidence, a movant must establish at the evidentiary hearing, among other things, that the attorney's failure to present the evidence was something other than reasonable trial strategy. State v. Pounders, 913 S.W.2d 901, 908 (Mo.App. S.D. 1996).

E. Counsel's Actions were Reasonable

The motion court was not clearly erroneous in denying appellant's claim as counsel's actions were reasonable. As the motion court found, trial counsel had already hired a psychologist, Dr. Briggs, to evaluate appellant. Although Dr. Briggs did find that appellant had a learning disorder (PCR Tr. 257), Dr. Briggs never diagnosed appellant with post-traumatic stress disorder or depression. Dr. Briggs did not give any indication that appellant was suffering from any psychological disorder. Moreover, appellant presented no evidence that Dr. Briggs found or told counsel that appellant had diminished capacity at the time of the crime. Dr. Briggs did not give counsel any indication that further investigation of appellant's mental health was necessary. Counsel's decision not to further investigate was reasonable considering the information that counsel had at the time of trial.

In Winfield v. State, 93 S.W.3d 732, 740-741 (Mo. banc 2003), the defendant claimed that although his counsel hired a psychiatrist and a court ordered psychiatrist had examined the defendant, but neither found any evidence of mental illness, his counsel was ineffective for

failing to present evidence that he suffered from an "extreme emotional disturbance." Id. at 740-741. This Court denied the defendant's claim, finding that counsel's investigation of the defendant's mental state was reasonable and counsel was not required to further investigate his mental state or find a more favorable expert to testify. See also Ervin v. State, 80 S.W.3d 817, 824 (Mo. banc 2002) (counsel's decision not to interview other family members reasonable where interviews with appellant and mother and information from two hired psychologists "as all signs, at the time of counsel's decision, indicated that further investigations into [defendant's] background would be cumulative and fruitless). Counsel was not required to search for a more favorable expert that would give them the diagnosis of post-traumatic stress disorder. State v. Kenley, 952 S.W.2d 250, 268-269 (Mo. banc 1997), cert. denied, 522 U.S. 1095 (1998) (Counsel's reliance on expert's finding that defendant was not brain damaged and could conform his conduct to the law was reasonable and counsel not ineffective for failing to find a different expert who would testify more favorably); Lyons v. State, 39 S.W.3d 32 (Mo. banc 2001), cert. denied, 534 U.S. 976 (2001). This is not a case like Seidel v. Merkle, 146 F.3d 750 (9th Cir. 1998), cited by appellant, where counsel failed to conduct any investigation into the defendant's mental health despite knowledge that the defendant suffered from mental illness.[4]

Appellant relies on Ruth O'Neill's testimony that she wondered if appellant suffered from post-traumatic stress disorder and that she should have requested a continuance to get

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[4]Appellant also cites to Boyko v. Parke, 259 F.3d 781 (7th Cir. 2001) in support of his claim that his counsel was ineffective for failing to investigate and present Dr. Smith's testimony (App. Br. 39-40). However, in Boyko, the court made no finding on whether counsel's actions were reasonable or if the defendant was prejudiced. Boyko, was reversed for further hearings at the motion court level.

another psychological evaluation of appellant (PCR Tr. 256, 265). However, the motion court was not required to find trial counsel's testimony credible. State v. Simmons, 955 S.W.2d 729, 747 (Mo. banc 1997), cert. denied, 522 U.S. 1129 (1998) (Deference is given to the motion court's superior opportunity to judge the credibility of the witnesses). Moreover, looking at counsel's conduct at the time of the trial and not in hindsight, as required under Strickland, supra, counsel's actions in relying on Dr. Brigg's evaluation and not shopping for a more favorable expert were reasonable.

F. No Prejudice

Appellant was not prejudiced because there is no reasonable probability that if the jury would have heard Dr. Smith's testimony that the verdict would have been different as the State would have been able to point out the inconsistencies in Dr. Smith's testimony, the incredible nature of his conclusions, and would have presented their own experts, who disputed Dr. Smith's diagnosis of post-traumatic stress disorder, depression, and diminished capacity.

First, had Dr. Smith been called to testify at trial, the State would have been able to discredit Dr. Smith's claim that appellant, due to his post-traumatic stress disorder, avoided conflict whenever possible (PCR Tr. 585). The State would have been able to point out that appellant walked into a restaurant, with a loaded gun, planning to rob it with people inside. This behavior refutes any inference of conflict avoiding.

Second, if Dr. Smith had been called to testify at trial, the State would have been able to cross-examine Dr. Smith's lack of factual support for his conclusions of post traumatic stress disorder. For example, when questioned about whether appellant experienced frequent outbursts or startle responses, one of the diagnostic symptoms of post-traumatic stress disorder, Dr. Smith was unable to relate any instances of physical outbursts and was only able to speak in general terms about one or two verbal outbursts (PCR Tr. 638–639). Dr. Smith

had to admit that he did not know any of the specifics of these alleged outbursts and was only guessing that appellant's reactions were out of proportion to the event (PCR Tr. 638-639). Dr. Smith also admitted that his conclusion that appellant's reaction was overreacting and constituted a startle response was based solely on appellant's cousin's belief that the reaction was too much for the situation (PCR Tr. 638-639). Although Dr. Smith was able to testify that he concluded that appellant had post-traumatic stress disorder, Dr. Smith was not able to offer facts to support this conclusion.

Third, if Dr. Smith had been called to testify at trial, the State would have been able to question him about the inapplicability of his diagnosis to the facts of the crime. During the evidentiary hearing, Dr. Smith would not opine whether appellant's post-traumatic stress disorder, depression, and learning disability would have had any effect on the crime if it was deliberate in accordance with the State's theory at trial and the theory accepted by the jury (PCR Tr. 195-199). Dr. Smith only gave his opinion on how the post-traumatic stress disorder would have affected appellant if appellant had been startled by Mr. Poyser rushing at him. The jury did not accept appellant's version of events that Mr. Poyser rushed at him—rather, their finding of guilty of murder in the first degree shows that they accepted the State's theory–that appellant intentionally killed Mr. Poyser, deliberating on his murder before pointing the loaded gun six inches away from his head and shooting. The jury's verdict negates any finding of a startled response and Dr. Smith's finding would have had no effect. Kenley, supra. (Expert's testimony regarding defendant's alleged mental state on night of crime not helpful where expert could not "tie his diagnosis directly to [the defendant's] actions on the night of the crime").

Fourth, had Dr. Smith testified at trial, the State would have called their own experts to rebut Dr. Smith's findings. Dr. Kline, who testified at the evidentiary hearing, evaluated

appellant and found specifically that appellant did not suffer from post-traumatic stress disorder or depression (PCR Tr. 439). The Department of Corrections psychologist who evaluated appellant, did not diagnose appellant with post-traumatic stress disorder and agreed with Dr. Kline that appellant suffered from a type of conduct disorder (Respondent's Exhibit E). The jury would have been presented with experts who did not find post-traumatic stress disorder and agreed that appellant was suffering from some type of conduct disorder. These experts would have destroyed any credibility left in Dr. Smith's findings and the jury would not have changed their verdict. The motion court was not clearly erroneous in denying appellant's claim.

Trial counsel was not ineffective as they were not required to shop for a more favorable expert and appellant was not prejudiced as Dr. Smith's non-credible testimony would not have changed the jury's verdict.

Based on the foregoing, appellant's claim must fail.

II.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIMS THAT HIS TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO PRESENT MITIGATING EVIDENCE REGARDING APPELLANT'S CHILDHOOD DEVELOPMENT AND APPELLANT'S MENTAL STATE AT THE TIME OF THE CRIME THROUGH DR. DRAPER AND DR. SMITH BECAUSE 1) COUNSEL STRATEGICALLY DECIDED NOT TO CALL DR. DRAPER AS HER TESTIMONY MAY HAVE CONFLICTED WITH APPELLANT'S MOTHER'S TESTIMONY; 2) COUNSEL HAD OBTAINED THE SERVICES OF A PSYCHOLOGIST OTHER THAN DR. SMITH AND COUNSEL WAS NOT REQUIRED TO SHOP FOR A MORE FAVORABLE EXPERT; AND 3) APPELLANT WAS NOT PREJUDICED IN THAT THERE IS NO REASONABLE PROBABILITY THAT THE JURY'S VERDICT WOULD HAVE CHANGED IF THIS EVIDENCE WOULD HAVE BEEN PRESENTED.

Appellant claims that his trial counsel were ineffective for failing to investigate and present expert testimony during the penalty phase of his trial (App. Br. 42). Specifically, appellant claims that his counsel should have presented the testimony of Dr. Wanda Draper, a childhood development specialist, to testify about various aspects of appellant's childhood and the effects on his development; and Dr. Robert Smith, a psychologist, to testify that appellant suffered from post-traumatic stress disorder, depression, and a learning disability, and that appellant "reacted based on past abuse and the recurring trauma in an impulsive way when he shot Mr. Poyser" (App. Br. 42). Appellant alleges that if the jury had heard this evidence during the penalty phase, there is a reasonable probability that the jury would have sentenced him to life (App. Br. 42).

A. Dr. Draper

During the evidentiary hearing, appellant called Dr. Wanda Draper, a childhood development specialist, to testify. Dr. Draper testified that she had a bachelor's degree in education and a master's degree and PhD in child development (PCR Tr. 5-6). Dr. Draper admitted that she was not qualified to diagnosis appellant with any mental conditions (PCR Tr. 26-27). Dr. Draper then testified about appellant's childhood development (PCR Tr. 5). Dr. Draper prepared a "life path" of allegedly adverse occurrences of appellant's life (PCR Tr. 32-80). According to Dr. Draper, appellant was never able to go beyond the second stage of childhood development and emotionally "he was stagnated or stifled at about age 12." (PCR Tr. 79). Dr. Draper summarized the major factors that impacted appellant's development as "alcoholic father, a lot of abuse within–abuse and neglect within his childhood, his growing-up years, extreme amount of overwhelming stress and worry that he could not do anything about" (PCR Tr. 81). Based on these factors, according to Dr. Draper, appellant had an unsuccessful school life, an "inability to perform adequately in school, and the inability to build on previous stages of his development because each stage left him with an accumulation of abuse and neglect and high levels of stress" (PCR Tr. 81).

Kimberly Shaw testified that she and Ruth O'Neill, her co-counsel, had hired Dr. Draper in anticipation of her testifying during the penalty phase of the trial (PCR Tr. 367). Ms. Shaw testified that she had subpoenaed Dr. Draper and had flown her in for the trial (PCR Tr. 380). However, once the jury returned a finding of guilt, Ms. Shaw reevaluated her selection of penalty phase witnesses and decided not to call Dr. Draper but only to call appellant's family members (PCR Tr. 381). Ms. Shaw wanted to call appellant's mother, Carletta Ringo, to testify and felt that Dr. Draper's testimony would have conflicted with appellant's mother's testimony (PCR Tr. 381). Ms. Shaw testified that she wanted the emphasis of the defense's

penalty phase evidence to be appellant's mother and was concerned on how the information that Dr. Draper had "was going to flow" with Carletta Ringo's testimony (PCR Tr. 381). Ms. Shaw strategically decided not to use Dr. Draper's testimony (PCR Tr. 382).

The motion court denied appellant's claim finding that:

> Dr. Draper was and is not competent to make a psychological or psychiatric diagnosis. Ms. Shaw's decision not to call Dr. Draper in the penalty phase of trial was based on trial strategy after thorough investigation. Claim 8(a)(I) is without merit.

(PCR L.F. 572-573).

This Court's review of the denial of post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. State v. Ervin, 835 S.W.2d 905, 928 (Mo. banc 1992), cert. denied, 507 U.S. 954 (1993). A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or a death sentence has two components. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Appellant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. 466 U.S. at 694.

In the context of counsel's performance, the selection of witnesses and the presentation of evidence are matters of trial strategy. Leisure v. State, 828 S.W.2d 872, 874 (Mo.banc 1992), cert. denied, 506 U.S. 923 (1992). To demonstrate ineffectiveness for failing to present evidence, a movant must establish at the evidentiary hearing, among other things, that the attorney's failure to present the evidence was something other than reasonable trial strategy. State v. Pounders, 913 S.W.2d 901, 908 (Mo.App. S.D. 1996).

The motion court's finding that counsel's actions were reasonable is not clearly erroneous. As Ms. Shaw testified at the evidentiary hearing, her decision not to call Dr. Draper was made after a full investigation and with complete knowledge of Dr. Draper's anticipated testimony. Ms. Shaw's decision was a reasonable trial strategy. Ms. Shaw decided that appellant's mother's testimony would be the emphasis of the penalty phase. Appellant's mother was able to testify about the abuse that appellant suffered from and events of his childhood. The jury was able to hear about these events from someone who lived through it, first-hand, not through a person with no personal connection to appellant. Shaw made the strategic decision to not risk Dr. Draper's testimony taking away from appellant's mother's testimony–the most valuable testimony in the penalty phase. Ms. Shaw's decision was reasonable.

Moreover, appellant was not prejudiced from the lack of Dr. Draper's testimony from the penalty phase. As Ms. Shaw explained, Dr. Draper's testimony would have taken the emphasis away from Carletta Ringo's testimony and may have conflicted with it. For example, Dr. Draper testified that Ms. Ringo was not a good mother (PCR Tr. 40-41, 48), that she neglected her children (PCR Tr. 48), and that appellant received bad grades in school (PCR Tr. 42, 71, 78), whereas Ms. Ringo testified that appellant did fine in school (Tr. 2353); that she and appellant had a good relationship(Tr. 2354-2355), and that she loved her son (Tr. 2356). Dr. Draper's testimony would have conflicted with Carletta Ringo's and would have diminished Ms. Ringo's credibility and the impact of her testimony. Appellant was not prejudiced by counsel's decision to forego Dr. Draper's testimony.

Finally, much of Draper's testimony relating to appellant's childhood was cumulative to the testimony of appellant's family members at trial. Evidence relating to his terrible childhood including the abuse by Vaughn (Tr. 2350, 2377-2380), his father's death (Tr. 2347-

2348), his lack of grief after his father's death (Tr. 2347-2348), and appellant's change in personality after living with Vaughn (Tr. 2387-2388). Trial counsel cannot be held ineffective for failing to introduce cumulative evidence. Skillicorn v. State, 22 S.W.3d 678, 683 (Mo. banc 2000), cert. denied, 531 U.S. 1039 (2000); State v. Johnson, 957 S.W.2d 734, 755 (Mo. banc 1997), cert. denied, 522 U.S. 1150 (1998). The motion court was not clearly erroneous in denying this claim.

B. Dr. Smith

Appellant also claims that his trial counsel were ineffective for failing to investigate and call Dr. Smith during the penalty phase (App. Br. 42). Appellant claims that Dr. Smith could have testified about appellant's post-traumatic stress disorder, depression, and learning disability, and would have testified that appellant's reactive shooting of Mr. Poyser was the result of his past abuse and "recurring trauma" (App. Br. 42).

Dr. Smith's testimony and the motion court's findings are set out in Point I, supra.

The motion court was not clearly erroneous in denying appellant's claim because, as discussed in Point I, trial counsel were not ineffective for failing to shop for a more favorable expert. Mease, supra. Moreover, appellant failed to question Ms. Shaw, appellant's penalty phase attorney, on why she did not investigate Dr. Smith for the penalty phase, why she did not consider calling a mental health expert, or what her strategy was in regards to the penalty phase. "Trial counsel's actions are presumed to be trial strategy and appellant has the burden of overcoming the presumption that, under the circumstances, the challenged action was not 'sound trial strategy.'" Strickland, 466 U.S. at 689. Appellant cannot fail to ask counsel about their strategy behind taking certain actions and then presume that such failure was not reasonable trial strategy. As recognized in State v. Tokar, 918 S.W.2d 753, 768 (Mo. banc 1996), failure to make this inquiry signifies failure to meet his burden of proof. By failing to

make this inquiry, appellant has failed to show that counsel's actions were not strategic and appellant has failed to overcome his burden.

Moreover, counsel's strategy during the penalty phase, to present appellant's life history through his family, was reasonable. Counsel presented four family members, appellant's two grandmothers, his sister, and his mother, who testified to appellant's life history including testimony about appellant's schooling, the horrible living conditions they lived in, the abuse appellant suffered at the hands of his mother's boyfriend, the hustling that Mr. Vaughn forced upon appellant and his sister, the affect of appellant's father's death, appellant's taking care of his nieces, nephews and siblings, and the love that the family had for appellant (Tr. 2341-2391). This is not a case like Simmons v. Luebbers, 299 F.3d 529 (8th Cir. 2002), cited by appellant, where counsel only presented one penalty phase witness, the defendant's mother, to ask for her son's life to be spared, and failed to present any evidence of the defendant's traumatic childhood. In the case at bar, counsel thoroughly investigated appellant's childhood and mental health and made a strategic decision to call appellant's family to testify during the penalty phase.

Appellant also cites to Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), where counsel failed to conduct any investigation into the defendant's childhood. In Williams, the United States Supreme Court found that counsel's failure to conduct any investigation for the penalty phase until a week before trial and failure to uncover evidence of the defendant's nightmarish childhood including abuse and neglect from his parents and foster parents, evidence that the defendant was mentally retarded, and evidence that the defendant had aided the police in breaking up a prison drug ring. Id. Counsel's conduct in Williams, is a stark contrast to the attorneys' conduct in the case at bar. See Lyons v. State, 39 S.W.3d 32 (Mo. banc 2001). O'Neill and Shaw extensively investigated appellant's background, his social

history, and his mental condition and presented a complete picture of appellant during the penalty phase. Counsel were not ineffective in presenting appellant's family members during the penalty phase.

Since the filing of appellant's brief, the case of Wiggins v. Smith, 123 S.Ct. 2527 (2003), has been decided, where the United States Supreme Court found that Wiggin's trial counsel was ineffective for failing to investigate the defendant's social history. Id. Comparable to Williams, supra, the counsel in Wiggins, failed to conduct virtually any investigation into his client's childhood and locate an abundance of potentially mitigating evidence, including evidence of severe privation and abuse by his alcoholic, absentee mother, physical torment, sexual molestation, and repeated rape while in foster care, his time spent homeless and his diminished mental capacities. Wiggins, supra, at 2531. Wiggins' counsel only presented one piece of mitigating evidence, Wiggins' lack of prior convictions. The Supreme Court found that counsel's failure to investigate into the defendant's social history was unreasonable and Wiggins was prejudiced by this failure. However, the case at bar is not comparable to Wiggins. Here, counsel investigated appellant's life history; counsel hired a social worker to investigate appellant's history; counsel hired a mental health expert to evaluate appellant; counsel hired an educational specialist to evaluate appellant; and counsel interviewed many of appellant's family members. Counsel conducted a thorough, exhaustive investigation for potentially mitigating evidence and presented that evidence to the jury. This is not a case like Wiggins. Counsel's actions were reasonable.

Finally, appellant was not prejudiced by his counsel's actions, because as discussed more fully in Point I, supra, the State would have thoroughly undermined Dr. Smith's credibility by challenging his lack of facts to support his findings, challenging his conclusions with psychologists who disputed Dr. Smith's conclusions, and challenging the inconsistencies

in his findings. Dr. Smith's testimony would not have affected the outcome of the penalty phase and thus, appellant was not prejudiced.

Based on the foregoing, appellant's claim must fail.

III.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HIS COUNSEL WERE INEFFECTIVE FOR AGREEING TO A CHANGE OF VENUE TO CAPE GIRARDEAU COUNTY AND FOR NOT OBJECTING TO THE PETIT JURY PANEL ON WHICH AFRICAN-AMERICANS WERE ALLEGEDLY UNDER-REPRESENTED AND IN VIOLATION OF THE FAIR CROSS SECTION REQUIREMENT BECAUSE APPELLANT FAILED TO PLEAD SUFFICIENT FACTS TO ESTABLISH THAT THERE WAS A VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT. MOREOVER, APPELLANT FAILED TO PLEAD FACTS ESTABLISHING THAT HE WAS PREJUDICED IN THAT APPELLANT FAILED TO PLEAD THAT THERE WERE ANY BIASED JURORS ON HIS CASE.

Appellant claims that the motion court was clearly erroneous in denying, without an evidentiary hearing, his claim that his counsel were ineffective in agreeing to a change of venue to Cape Girardeau County, which he alleged had a history of under-representing African Americans and thus violated the fair cross-section requirements and for failing to object to his petit jury panel which allegedly under-represented African-Americans (App. Br. 58). Appellant claims that he was prejudiced by his counsel's actions because he was tried by an "all-white jury" and "was more likely to be sentenced to death and convicted for the killing of the white victims" (App. Br. 58)[5].

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[5]Appellant's post-conviction motion claim regarding counsel's agreeing to a change of venue to Cape Girardeau County also included an allegation that Cape Girardeau County failed to comply with Section 494.400, RSMo 2000, to 494.505, RSMo 2000, the jury selection statute (PCR L.F. 311). Appellant does not challenge the motion court's denial of that part of

Appellant alleged in his amended motion the following facts to support his claim: 1) 4.5 % of the people in Cape Girardeau County were African-American (PCR L.F. 303) 2) 4 out of 163 venirepersons called for appellant's case were African-American (PCR L.F. 312); 3) out of about 18 selected criminal cases that were tried by the Public Defender office in Cape Girardeau County between 1996-1998 only 16.6% of the "petit jury panels" in these cases were African-Americans were "fairly represented" (PCR L.F. 306); and the rest of the remaining 18 selected cases African-Americans were not "fairly represented"; 4) appellant's trial counsel were working with counsel appointed in the Terrence Anderson case and knew that Anderson's attorneys were challenging the jury selection process in Cape Girardeau County including raising a "fair cross-section" claim[6] (PCR L.F. 298-302); 5) no African-Americans were seated on appellant's jury (PCR L.F. 313); and 6) appellant was prejudiced as he, an African-American, was tried by an all white jury and was charged with murdering two white people (PCR L.F. 313).

The motion court denied appellant's claim, without an evidentiary hearing, finding that appellant had pled conclusions about the composition of the jury, rather than facts warranting relief (PCR L.F. 572-573).

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. State v. Kinder, 942 S.W.2d 313, 333 (Mo. banc 1996), cert. denied 522 U.S. 854 (1997); Supreme Court Rule 29.15(k). The motion court is not required to hold an evidentiary hearing where the

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his claim on appeal.

[6]Terrence Anderson's direct appeal was affirmed by this Court. State v. Anderson, SC83680, slip opinion (Mo. banc August 19, 2002). Anderson raised a fair cross-section claim regarding Cape Girardeau in his appeal. This claim was denied by this Court. Id.

motion and the files and records of the case conclusively show that the movant is not entitled to relief. Coates v. State, 939 S.W.2d 912, 914 (Mo. banc 1997); Supreme Court Rule 29.15(h). That burden is met only when (1) the movant alleges facts, not conclusions, which would warrant relief, (2) the allegations of fact raise matters not refuted by the record, and (3) the matters complained of resulted in prejudice to movant. State v. Brooks, 960 S.W.2d 479 (Mo. banc 1997), cert. denied 524 U.S. 957 (1998).

To prevail on an ineffective assistance of counsel claim, a movant must establish that the performance of counsel did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and that movant was prejudiced by his counsel's poor performance. State v. Hall, 982 S.W.2d 675, 680 (Mo. banc 1998), cert. denied 526 U.S. 1151 (1999); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove prejudice, a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id.

The motion court was not clearly erroneous in denying appellant's claim as appellant failed to plead facts warranting relief. As will be discussed below, appellant failed to plead facts showing that Cape Girardeau County was violating the fair cross-section requirement and appellant failed to plead facts establishing he was prejudiced as he failed to plead facts establishing that there was a biased juror that sat on his case.

First, appellant failed to plead facts that Cape Girardeau County had a history of underrepresenting African-Americans in their venirepanels and thus were violating the fair-cross section requirements. "To establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons

in the community, and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process." Kinder, supra at 337. "Unless it is shown that the difference between the percentage of the individuals in the identifiable group and those within the venires as a whole is greater than 10%, a prima facie case has not been made." State v. Hofmann, 895 S.W.2d 108, 111 (Mo.App. W.D. 1995); State v. Davis, 646 S.W.2d 871, 876 (Mo.App. W.D. 1995), cert. denied 464 U.S. 962 (1983); see also Singleton v. Lockhart, 871 F.2d 1395, 1398-1399 (8th Cir. 1989), cert. denied 493 U.S. 874 (1989). "To demonstrate systematic exclusion, a defendant must prove unfair underrepresentation of the excluded group on his venire and in general on other venires in the relevant judicial system near the time of his trial." Id. at 1398.

In the case at bar, appellant failed to allege statistical analysis of the venires showing that systematic-underrepresentation occurred and that his counsel should have been aware of it. His motion did not examine all of the venires that had been assembled near the time of his trial. It did not allege any civil cases in that time period, or even all criminal cases in that time period, or even all cases in which the Public Defender's Office was involved during that time period (PCR L.F. 295-318). It was simply a selection of a few cases tried by the Public Defender's Office that had no statistical validity (PCR L.F. 295-318). Appellant does not allege sufficient facts establishing that Cape Girardeau County was violating the fair cross-section requirement. Without alleging facts showing what all the venires' makeup were in the appropriate time period in Cape Girardeau County, appellant cannot show that there was in fact, a history of underrepresentation. The eighteen selected cases chosen by appellant is not sufficient to have given counsel notice that there was a history of underrepresentation and that Cape Girardeau was in violation of the fair-cross section requirement. It only gave notice to counsel that in a few of the cases tried in Cape Girardeau County in the years proceeding

appellant's trial, there was an under-representation of African-Americans. As the motion court found, appellant failed to plead facts warranting relief.

Appellant also claims that his counsel should have also objected to his venirepanel when they saw that African-Americans were underrepresented on his panel (App. Br. 58). However, the composition of a single jury panel does not establish a violation of the fair-cross section requirement and appellant is not entitled to a jury of any specific racial composition. Kinder, supra; see also State v. Jacobs, 813 S.W.2d 318, 321 (Mo.App. W.D. 1991); Brooks, supra; Mallett v. State, 769 S.W.2d 77 (Mo. banc 1989), cert. denied 494 U.S. 1009 (1990). Counsel's failure to object was not ineffective assistance of counsel as it would have been a meritless objection. Counsel cannot be ineffective for failing to make a meritless challenge. State v. Taylor, 831 S.W.2d 266, 272 (Mo.App. E.D. 1992).

Finally, appellant has failed to plead facts warranting relief in that he has failed to plead any facts establishing that any biased jurors sat on his case. A mere allegation of prejudice is insufficient to support a claim of ineffective assistance of counsel. State v. Farley, 863 S.W.2d 669, 672 (Mo.App. W.D. 1993), citing State v. Starks, 856 S.W.2d 334, 336 (Mo. banc 1993). As this Court has stated:

> To hold that racial prejudice may be inferred from the absence of members of the defendant's race on the jury would be, in practical effect, to hold that the defendant has a right to members of his race on the jury. A defendant, however, has no right to a jury of any particular racial composition.

State v. Mallett, 732 S.W.2d 527, 540 (Mo. banc 1987), cert. denied 484 .U.S. 933 (1987).

Further, any allegation that this jury was somehow prejudiced against appellant, because of his race or otherwise, is refuted by the record. The jury was examined during voir dire about

appellant's race (Tr. 740-746, 1185-1186). Not one member of the panel stated they would have any problem with the fact that appellant was black and the victims were white (Tr. 740-746, 1185-1186). Moreover, the approximately 800 pages of transcript devoted to voir dire demonstrates that appellant was presented with an unbiased, qualified jury panel . See Taylor, supra at 272-273. Appellant makes no showing whatsoever that the jury was biased against him, and therefore cannot show prejudice from counsel's failure to challenge the jury panel.

Because appellant did not allege facts warranting relief nor demonstrate prejudice, he was not entitled to an evidentiary hearing. Therefore, the motion court did not clearly err in denying his claim and appellant's claim must fail.

IV.

A. THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WERE INEFFECTIVE FOR NOT OBJECTING TO THE TRIAL COURT'S RESPONSE TO THE JURY'S QUESTION ABOUT SENTENCING BECAUSE COUNSEL WAS EFFECTIVE AND APPELLANT WAS NOT PREJUDICED IN THAT, AS THIS COURT FOUND ON DIRECT APPEAL, IT WAS NOT ERROR FOR THE TRIAL COURT TO TELL THE JURY THAT IT COULD NOT ANSWER ITS QUESTION ON HOW SENTENCING WOULD BE CARRIED OUT.

B. THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO "THE PROSECUTOR'S IMPROPER COMMENTS AND GESTURES" BECAUSE APPELLANT WAS NOT PREJUDICED IN THAT EVEN TAKEN AS TRUE, THE PROSECUTOR'S ALLEGED BEHAVIOR WOULD NOT HAVE NEGATIVELY AFFECTED APPELLANT OR AFFECTED THE VERDICT.

Appellant claims that the motion court erred in denying two of his claims without an evidentiary hearing: 1) that his counsel was ineffective for failing to object to the trial court's response to the jury's question about sentencing; and 2) that counsel was ineffective for failing to object to "the prosecutor's improper comments and gestures" made during trial (App Br. 66). Appellant alleges that the motion court's findings denying these claims without a hearing because they were raised on direct appeal was in error as that is contrary to this Court's holding in Deck v. State, 68 S.W.3d 418, 426-429 (Mo.banc 2002) (App. Br. 66).

A. Counsel's alleged failure to object to the trial court's response to the jury question

Appellant alleged in his motion that his trial counsel were ineffective for failing to object to the trial court's response to a jury question during deliberation (PCR L.F. 284).

During the jury's deliberation, the jurors sent the trial court a note which read as follows:

> If we give death on Count I, and Life without possibility of parole on Count II, how will the counts be carried out? Is there a chance that our Count I verdict will/could be changed.

(L.F. 1579; Tr. 2432).

The trial court and counsel had the following discussion:

> THE COURT: My inclination is simply to tell them I can give them no further instructions. Is that agreeable with the state?
>
> MR. CRANE (prosecuting attorney): Yes.
>
> THE COURT: The defense counsel?
>
> MS. SHAW (defense counsel): Did you finish reading it, Danny?
>
> MR. KNIGHT (assistant prosecuting attorney): What did it say?
>
> MS. SHAW: Go ahead and read it.
>
> That's agreeable, Judge.
>
> THE COURT: All right. I'll let the reporter write down what the note is. And then I'll just tell them, "I can give you no further instructions at this time."

(Tr. 2432). Thereafter, the trial court responded in writing "I can give you no further instructions at this time" (L.F. 1579).

Appellant's direct appeal counsel raised this issue on direct appeal as plain error. State v. Ringo, 30 S.W.3d 811, 818 (Mo.banc 2000). This Court denied appellant's claim, finding:

> Defendant maintains the jury was attempting to ascertain whether its sentencing recommendation would be insulated frm systematic interference. That is, he asserts the jury's sentencing decision was premised upon its uncorrected belief that if it did not sentence him to death on count two, its verdict on count one would be supplanted. Of course, this is mere speculation. Where a jury is properly instructed on the law, mere speculation about the jury's reason for asking a question during its deliberation will not serve as a basis for finding plain error. In this case, the trial court's decision to restrict jury instructions to those already given was not error, plain or otherwise. *Taylor*, 943 S.W.2d at 680 (declining plain error review of a trial court's decision to refer the jury to its previous instructions when asked about a sentencing issue). As discussed below, it is not evident that the instructions tendered the jury were either insufficient or erroneous.

Ringo, supra.

In denying appellant's post-conviction claim that his counsel was ineffective for failing to object to the trial court's response, the motion court found that the claim had already been decided adversely to appellant on direct appeal and could not be relitigated in a post-conviction motion under the guise of ineffective assistance of counsel (PCR L.F. 573).

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. State v. Kinder,

942 S.W.2d 313, 333 (Mo banc 1996), cert. denied 522 U.S. 854 (1997); Supreme Court Rule 29.15(k). The motion court is not required to hold an evidentiary hearing where the motion and the files and records of the case conclusively show that the movant is not entitled to relief. Coates v. State, 939 S.W.2d 912, 914 (Mo. banc 1997); Supreme Court Rule 29.15(h). That burden is met only when (1) the movant alleges facts, not conclusions, which would warrant relief, (2) the allegations of fact raise matters not refuted by the record, and (3) the matters complained of resulted in prejudice to movant. State v. Brooks, 960 S.W.2d 479 (Mo. banc 1997), cert. denied 524 U.S. 957 (1998).

The motion court was not clearly erroneous in denying appellant's claim because the trial court's response or instruction to the jury was proper. As this Court found on direct appeal, the trial court's decision to restrict jury instructions to those already given was not error. Ringo, supra at 818. The practice of exchanging communications between the judge and jury is not commended. State v. Taylor, 408 S.W.2d 8, 10 (Mo. 1966). "Responses that simply refer the jury to the proper instructions already given are not improper." State v. Johnston, 957 S.W.2d 734, 752 (Mo. banc 1997), cert. denied, 522 U.S. 1150 (1998). When the instructions as given are correct, clear, and unambiguous, it is appropriate for the trial court to simply allow the jury to be guided by those instructions. State v. Clay, 975 .S.W.2d 121, 134 (Mo. banc 1998), cert. denied, 525 U.S. 1085 (1999); Johnston, 957 S.W.2d at 752; United States v. Smith, 104 F.3d 145, 148-149 (8th Cir. 1997).

It is true that, when a jury communicates confusion about the jury instructions, the trial court should respond "with concrete accuracy." Clay, 975 .S.W.2d at 134 (citing Bollenbach v. United States, 326 U.S. 607, 612-613, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946)). This jury's question, however, did not show that the jurors were confused about the instructions. Ringo, supra. Rather, it is apparent that they wanted to know under what circumstances their verdict

could be changed in the future, presumably through the appellate process or executive clemency. Missouri courts have long held that such matters are irrelevant to the jury's determination of guilt or punishment and should be of no concern to them. State v. Olinghouse, 605 S.W.2d 58, 69 (Mo. banc 1980); State v. Rollins, 449 S.W.2d 585, 591 (Mo. 1970), cert. denied, 399 U.S. 915 (1970); State v. Cornett, 381 S.W.2d 878, 881 (Mo. banc 1964); State v. Sempsrott, 587 S.W.2d 630, 635 (Mo.App. E.D. 1979). The trial court therefore could not have properly responded to the jurors' concerns.

The trial court quite correctly refrained from giving supplemental instructions. The jury did not express confusion about an important legal issue. The additional information that they requested would not have been appropriate for their consideration. The motion court was not clearly erroneous in denying appellant's claim.

Appellant claims that the motion court's finding is contrary to this Court's holding in Deck v. State, 68 S.W.3d 418, 426-429 (Mo. banc 2002). In Deck, this Court held that a finding of no plain error on direct appeal does not necessarily prevent a finding of no prejudice under the test for ineffective assistance of counsel, although the difference between the standards will seldom result in a granting of post-conviction relief where relief has been denied on direct appeal under the plain error standard. Id.

Appellant is correct in stating that a denial of a claim under plain error does not necessarily preclude the raising of the same issue under the guise of ineffective assistance of counsel. However, appellant fails to recognize that this Court did not only find that the trial court's response was not plain error. This Court found that the trial court's response was not error at all. Ringo, supra. at 818. A finding of no error does preclude a finding of prejudice under the Strickland standard. Counsel could not be ineffective for failing to object to the trial

court's response when the response was correct and not in error. The motion court did not err in denying appellant's claim.

2. Counsel's failure to object to prosecutor's comments and gestures

Appellant also claims that the motion court was clearly erroneous in denying, without an evidentiary hearing, appellant's claim that his counsel were ineffective for failing to object to various comments and gestures allegedly made by the prosecutor during the trial (App. Br. 66).

The motion court denied appellant's claim, without an evidentiary hearing, finding that he had raised this claim on direct appeal and was foreclosed from raising the same claim under the guise of ineffective assistance of counsel (PCR L.F. 573).

Although appellant correctly notes that the motion court incorrectly found that this issue was raised on direct appeal–on direct appeal appellant claimed that the prosecutor made improper statements during closing arguments–the motion court was not clearly erroneous in denying appellant's claim without an evidentiary hearing because appellant has failed to plead facts establishing that he was prejudiced.

In order to be entitled to an evidentiary hearing on a Rule 29.15 motion, a movant must 1) cite facts, not conclusions, which, if true, would entitle movant to relief; 2) the factual allegations must not be refuted by the record; and 3) the matters complained of must prejudice the movant. State v. Blankenship, 830 S.W.2d 1, 16 (Mo.banc 1993).

In the case at bar, appellant's facts as pled could not have prejudiced him. Appellant alleged that the prosecuting attorney made various allegedly improper comments and gestures during the trial, including rolling his eyes, making hand gestures, whispering loudly at bench conferences, pacing the floor during defense counsel's examination of witnesses, showing autopsy photographs to members of the gallery, and speaking to co-counsel during a defense

witness's testimony (PCR L.F. 319-325). Even assuming that the prosecutor acted as appellant claims, these trivial comments and conduct could not have had any effect on the jury or prejudiced appellant. If anything, these alleged comments and gestures would have impaired the credibility of the prosecutor. See Oregon v. Lotches, 17 P.3d 1045, 1071 (Or. 2000) (as trial court noted, the prosecutor's behavior of head-shaking, scoffing, and laughing during defense witness's testimony was more harmful to the State's case, not the defendant); United States v. Collins, 78 F.3d 1021, 1039 (C.A. 6 (Ky)., 1996) (prosecutor's instances of laughter, gestures and facial expressions may have been improper but not likely to mislead jury or prejudice accused); Kansas v. Jones, 47 P.3d 783, 803 (Kan. 2002) (Prosecutor's shaking head during witness's testimony was not prejudicial or deny defendant a fair trial). This is not a case where the prosecutor makes inflammatory remarks about opposing counsel to the jury. See State v. Burnfin, 771 S.W.2d 908 (Mo.App. W.D. 1989); State v. Greene, 820 S.W.2d 345 (Mo.App. S.D. 1991). The prosecutor's alleged behavior would not have been prejudicial to appellant. State v. Basile, 942 S.W.2d 342, 351-352 (Mo. banc 1997), cert. denied, 522 U.S. 883 (1997) ("Not every statement of frustration with opposing counsel.....[is]an attack on the integrity of opposing counsel. A criminal trial is an adversarial process. Occasional outbursts are expected, but not necessarily approved."). Appellant does not allege that the prosecutor commented on his counsel's integrity or even made any comments about appellant's case or his counsel. Moreover, the jury was instructed that counsel's comments and questions were not evidence to be considered in determining appellant's guilt. (L.F. 1545). Even taking appellant's allegations as true, these remarks and gestures were not of a character that would have prejudiced appellant; there is no reasonable probability that the outcome would have been different if counsel had objected. The motion court was not clearly erroneous in denying appellant's claim without an evidentiary hearing.

Based on the foregoing, appellant's claim must fail.

V.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN NOT RULING ON APPELLANT'S PRO SE CLAIMS AND PROCEEDING ON APPELLANT'S AMENDED MOTION BECAUSE THE PRO SE CLAIMS WERE UNREVIEWABLE IN THAT AN AMENDED MOTION SUPERCEDES ANY PREVIOUS MOTIONS.

APPELLANT'S CLAIM THAT HIS POST-CONVICTION COUNSEL FAILED TO RAISE ALL THE CLAIMS IN HIS PRO SE MOTION IN THE AMENDED MOTION IS AN UNREVIEWABLE CLAIM OF INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL.

Appellant claims that his post-conviction counsel failed to include every claim that he raised in his pro se motion and that this was a violation of Supreme Court Rule 29.15 (App. Br. 74). Appellant also alleges that the motion court should have ruled on appellant's pro se claims even though an amended motion had been filed on his behalf (App. Br. 74).

A. Claim of Motion Court Error

Appellant claims that the motion court erred in not ruling on his pro se claims, even though his appointed counsel had filed an amended motion (App. Br. 74). Appellant's claim is without merit. Once an amended motion has been filed, the motion court only considers those claims raised in the amended motion. Supreme Court Rule 29.15(g). Rule 29.15(g) provides that "the amended motion shall not incorporate by reference material contained in any previously filed motion." In light of this rule, where an amended motion has been filed, that motion supercedes any previous motions for post-conviction relief. Self v. State, 14 S.W.3d 223, 226 (Mo.App S.D. 2000); Leach v. State, 14 S.W.3d 668, 669 (Mo.App. E.D. 2000). Allegations that were included in the pro se motion but are not included in the amended motion

are not for consideration by the motion court. Self, supra. The motion court did not err in not ruling on appellant's pro se claims that were not included in the amended motion.

B. Claim of ineffective assistance of post-conviction counsel

Appellant also claims that his post-conviction counsel were ineffective for failing to include every claim from his pro se motion in the amended motion (App. Br. 74). Appellant's claim is unreviewable.

The Sixth Amendment guarantees a defendant the right to effective assistance of counsel, which includes the right to a lawyer who is free of conflicts of interest. Cuyler v. Sullivan, 446 U.S. 335, 348-350, 100 S.Ct. 1708, 1718-1719, 64 L.Ed.2d 333 (1980). There is, however, no constitutional right to counsel in postconviction proceedings. State v. Hunter, 840 S.W.2d 850, 871 (Mo. banc 1992), cert. denied, 509 U.S. 926 (1993) (citing Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991)). Consequently, a movant cannot claim constitutionally ineffective assistance of postconviction counsel. Id.; Krider v. State, 44 S.W.3d 850, 859 (Mo.App.W.D. 2001).

Therefore, claims of ineffective assistance of postconviction counsel are categorically unreviewable. Winfield v. State, 93 S.W.3d 732, 738 (Mo.banc 2002); Barnett v. State, 103 S.W.3d 765, 773 (Mo.banc 2003); State v. Hunter, 840 S.W.2d at 871; State v. Ervin, 835 S.W.2d 905, 928-929 (Mo. banc 1992); Pollard v. State, 807 S.W.2d 498, 502 (Mo. banc 1991), cert. denied, 502 U.S. 943 (1991).

Because appellant had no constitutional right to the assistance of counsel in his postconviction proceeding at all, it follows that he had no right to the effective assistance of counsel. As such, this Court should decline to review appellant's claim here, which is nothing more that a claim of ineffective assistance of postconviction counsel.

Appellant acknowledges that this Court recently rejected his very claim in Winfield, supra, and Barnett, supra, but merely asks this Court to reverse their finding without offering any new argument or support. Appellant's claim is without merit. State v. Johnson, 968 S.W.2d 686, 695 (Mo. banc 1998), Winfield, supra; Barnett, supra.

Even assuming that appellant's claim was reviewable, appellant's claim is without merit as counsel was not required to include all of appellant's pro se claims in the amended motion. Appellant claims that his counsel had a duty to raise his claims as raised in his pro se motion under Supreme Court Rule 29.15(e). Rule 29.15(e) provides in relevant part, that:

> When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims.

Appellant alleges that this language requires counsel to *only* allege additional facts to the claims raised in the pro se motion or allege additional claims, but that counsel cannot eliminate any claims from the pro se motion. Appellant ignores, however, the additional language of Supreme Court Rule 29.15 which states that "the amended motion shall not incorporate by reference material contained in any previously filed motion." Supreme Court Rule 29.15(g). As discussed earlier, this section, an amendment to the rule in 1996, shows the Court's intent that the amended motion would contain all claims to be presented to the motion court and that claims in the pro se motion would not be considered. Leach, supra. Counsel is not required to retain all claims included in the pro se motion when amending the motion.

Appellant asks this Court to hold that Supreme Court Rule 29.15(e) requires counsel to keep all claims from the pro se motion in the amended motion, regardless of the claims' merit, comparing the Rule to a New Jersey post-conviction rule which requires counsel to advance all the claims that the petitioner advances regardless of the claim's merit (App. Br. 79). However, unlike New Jersey apparently, Missouri requires that attorneys filing documents in court must ensure that the "claims presented are not intended to harass or cause unnecessary delay, are warranted by existing law or nonfrivolous argument for the extension, modification, or reversal of existing law, and have evidentiary support or are likely to have support after a reasonable opportunity for further investigation or discovery." Supreme Court Rule 55.03(b). This Rule applies to post-conviction proceedings. State v. Simmons, 955 S.W.2d 752, 771 (Mo.banc 1997). Therefore, counsel is not required, nor should they be required to file frivolous claims or claims without merit. In fact, this Court has upheld sanctions imposed on counsel for raising frivolous claims. Simmons, supra.

Supreme Court Rule 29.15(g) provides for appointment of counsel to assist movants in presenting their claims in a lawyerlike fashion. Brooks v. State, 882 S.W.2d 281 (Mo.App. E.D. 1994). Counsel is required to amend the motion to present claims with merit to the motion court. Counsel is not required to reiterate claims from the pro se motion if they have no basis in fact or merit. See e.g. Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) (Counsel was not ineffective for failing to present perjured testimony from the defendant where professional conduct prohibited counsel from doing so—"These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct"). Counsel is required to file an amended motion alleging sufficient facts to support viable claims. Counsel should and is required to amend the motion, presenting

viable claims to the motion court. Counsel's amended motion was not in violation of Supreme Court Rules.

In fact, appellant does not even contend that any of his pro se claims had any merit or needed additional facts alleged. Counsel was not required to include all pro se claims in the amended motion. The motion court was not clearly erroneous in not ruling on appellant's pro se motion and counsel did not violate the Supreme Court Rules.

Based on the foregoing, appellant's claim must fail.

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's post-conviction relief 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)/Local Rule 360 of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of August, 2003.

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IN THE
MISSOURI SUPREME COURT

EARL RINGER, JR.,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Boone County, Missouri
The Honorable Ellen Roper, Judge

RESPONDENT'S APPENDIX

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