

No. 84806

---

**IN THE SUPREME COURT OF MISSOURI**

---

**DAVID M. BARNETT,**

*Appellant,*

vs.

**STATE OF MISSOURI,**

*Respondent.*

---

**Appeal from the Circuit Court of St. Louis County, Mo.  
Twenty-First Judicial Circuit, Division 17  
The Honorable Larry L. Kendrick, Judge**

---

**RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT**

---

**JEREMIAH W. (JAY) NIXON**  
Attorney General

**BRECK K. BURGESS**  
Assistant Attorney General  
Missouri Bar No. 34567

Post Office Box 899  
Jefferson City, Missouri 65102-0899  
(573) 751-3321  
*Attorneys for Respondent*

**TABLE OF CONTENTS**

	<u>PAGE</u>
TABLE OF CONTENTS .....	2
TABLE OF AUTHORITIES .....	3-8
JURISDICTIONAL STATEMENT .....	9
STATEMENT OF FACTS .....	10
ARGUMENT	
I. Alleged failure of trial counsel to present complete social history .....	19
II. Alleged failure of trial counsel to object to late disclosure of date of availability of shoes .....	31
III. Alleged failure of trial counsel to object to evidence of other crimes .....	38
IV. Alleged failure of trial counsel to adequately question venirepersons .....	45
V. Alleged failure of trial counsel to present evidence of the victims’ childrens’ views on the appropriate punishment for appellant .....	51
VI. Claim not pled in appellant’s Rule 29.15 motion concerning the alleged failure of trial counsel to submit an instruction on appellant’s right not to testify. ....	55
VII. Claim of ineffective assistance of post-conviction counsel .....	57
CONCLUSION .....	60
CERTIFICATE OF COMPLIANCE AND SERVICE .....	61

**TABLE OF AUTHORITIES**

**PAGE**

**CASES**

<u>Belcher v. State</u> , 801 S.W.2d 372 (Mo.App., E.D. 1990) .....	24
<u>Bucklew v. State</u> , 38 S.W.3d 395 (Mo.banc 2001), <u>cert. denied</u> 534 U.S. 964 (2001) .....	26
<u>Burns v. Gammon</u> , 173 F.3d 1089 (8 <sup>th</sup> Cir. 1999) .....	59
<u>Clark v. State</u> , 30 S.W.3d 879 (Mo.App., S.D. 2000) .....	56
<u>Clemmons v. State</u> , 785 S.W.2d 524 (Mo.banc 1990), <u>cert. denied</u> 498 U.S. 882 (1990) .....	56
<u>Coates v. State</u> , 939 S.W.2d 912 (Mo.banc 1997) .....	55
<u>Coleman v. Thompson</u> , 501 U.S. 722, 111 S.Ct. 2566, 115 L.Ed.2d 640 (1991) .....	57
<u>Edgington v. State</u> , 869 S.W.2d 266 (Mo.App., W.D. 1994) .....	25,27
<u>Eichelberger v. State</u> , 71 S.W.3d 197 (Mo.App., W.D. 2002) .....	49
<u>Ellis v. State</u> , 773 S.W.2d 194 (Mo.App., S.D. 1999) .....	56
<u>Holt v. State</u> , 24 s.W.3d 708 (Mo.App., E.D. 1999) .....	49
<u>Hultz v. State</u> , 24 S.W.3d 723 (Mo.App., E.D. 2000) .....	48
<u>Kilgore v. State</u> , 791 S.W.2d 393 (Mo.banc 1990), <u>cert. denied</u> 493 U.S. 874 (1989) .....	22
<u>Knese v. State</u> , 85 S.W.3d 628 (Mo.banc 2002) .....	56
<u>Leisure v. State</u> , 828 S.W.2d 872 (Mo.banc 1992), <u>cert. denied</u> 506 U.S.	

923 (1992) .....	24,31,40
<u>Lockett v. Ohio</u> , 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) .....	52
<u>Luleff v. State</u> , 807 S.W.2d 495 (Mo.banc 1991) .....	57,58
<u>Madsden v. State</u> , 62 S.W.3d 661 (Mo.App., W.D. 2001) .....	40,41
<u>Moore v. State</u> , 934 S.W.2d 289 (Mo.banc 1996) .....	58
<u>Morrow v. State</u> , 21 S.W.3d 819 (Mo.banc 2000), <u>cert. denied</u> 522 U.S.	
896 (1998) .....	21,22,23,25,47,50
<u>Nolan v. Armontrout</u> , 973 F.2d 615 (8 <sup>th</sup> Cir. 1992) .....	59
<u>Payne v. Tennessee</u> , 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) .....	52
<u>Pollard v. State</u> , 807 S.W.2d 498 (Mo.banc 1991), <u>cert. denied</u> 502 U.S.	
943 (1991) .....	58
<u>Roberts v. Bowersox</u> , 61 F.Supp. 896 (E.D. Mo. 1999) .....	59
<u>Rohwer v. State</u> , 791 S.W.2d 741 (Mo.App., W.D. 1990) .....	22
<u>Sanders v. State</u> , 807 S.W.2d 493 (Mo.banc 1991) .....	58
<u>Skillicorn v. State</u> , 22 S.W.3d 678 (Mo.banc 2000), <u>cert. denied</u> 531 U.S.	
1039 (2000) .....	41
<u>State v. Baker</u> , 23 S.W.2d 702 (Mo.App., E.D. 2000) .....	41
<u>State v. Barnett</u> , 980 S.W.2d 297 (Mo.banc 1998), <u>cert. denied</u> 525 U.S.	
1161 (1999) .....	33
<u>State v. Basile</u> , 942 S.W.2d 342 (Mo.banc 1997), <u>cert. denied</u> 522 U.S.	
883 (1997) .....	41,43

<u>State v. Blankenship</u> , 830 S.W.2d 1 (Mo.banc 1993) .....	21
<u>State v. Campbell</u> , 26 S.W.3d 249 (Mo.App., W.D. 2000) .....	52,53
<u>State v. Carlisle</u> , 995 S.W.2d 518 (Mo.App., E.D. 1999) .....	37
<u>State v. Carter</u> , 955 S.W.2d 548 (Mo.banc 1997), <u>cert. denied</u> 523 U.S. 1052 (1998) .....	49
<u>State v. Chambers</u> , 891 S.W.2d 93 (Mo.banc 1994) .....	47,50
<u>State v. Clark</u> , 981 S.W.2d 143 (1998) .....	47
<u>State v. Clements</u> , 789 S.W.2d 101 (Mo.App., S.D. 1990) .....	53
<u>State v. Dixon</u> , 70 S.W.3d 540 (Mo.App., W.D. 2002) .....	52
<u>State v. Ervin</u> , 835 S.W.2d 905 (Mo.banc 1992), <u>cert. denied</u> 507 U.S. 954 (1993) .....	57,58
<u>State v. Hall</u> , 982 S.W.2d 672 (Mo.banc 1998), <u>cert. denied</u> 526 U.S. 1151 (1999) .....	47
<u>State v. Harris</u> , 870 S.W.2d 798 (Mo.banc 1994), <u>cert. denied</u> 513 U.S. 953 (1994) .....	21,24
<u>State v. Hatcher</u> , 4 S.W.3d 145, 150 (Mo.App., S.D. 1999) .....	48
<u>State v. Hope</u> , 954 S.W.2d 537 (Mo.banc 1997) .....	58
<u>State v. Hunter</u> , 840 S.W.2d 850 (Mo.banc 1992), <u>cert. denied</u> 509 U.S. 926 (1993) .....	57
<u>State v. Johns</u> , 34 S.W.3d 93 (Mo.banc 2000) <u>cert. denied</u> 532 U.S. 1012 (2001) .....	53
<u>State v. Johnson</u> , 968 S.W.2d 686 (Mo.banc 1998), <u>cert. denied</u> 525 U.S.	

935 (1998) .....	55
<u>State v. Johnston</u> , 957 S.W.2d 734 (Mo.banc 1997), <u>cert. denied</u> 522 U.S.	
1150 (1998) .....	37
<u>State v. Kilgore</u> , 771 S.W.2d 57 (Mo.banc 1989), <u>cert. denied</u> 493 U.S.	
874 (1989) .....	37
<u>State v. Kinder</u> , 942 S.W.2d 313 (Mo.banc 1996), <u>cert. denied</u> 522 U.S.	
854 (1997) .....	37,53
<u>State v. Knese</u> , 85 S.W.3d 628 (Mo.banc 2002) .....	
	47
<u>State v. Lacy</u> , 851 S.W.2d 623 (Mo.App., E.D. 1993) .....	
	49
<u>State v. Light</u> , 835 S.W.2d 933 (Mo.App., W.D. 1992) .....	
	56
<u>State v. Madison</u> , 997 S.W.2d 16 (Mo.banc 1999) .....	
	39
<u>State v. Mathews</u> , 33 s.W.3d 658 (Mo.App., S.D. 2000) .....	
	53
<u>State v. Mease</u> , 842 S.W.2d 98 (Mo.banc 1992), <u>cert. denied</u> 508 U.S.	
918 (1993) .....	30
<u>State v. Middleton</u> , 998 S.W.2d 520 (Mo.banc 1999), <u>cert. denied</u> 528 U.S.	
1167 (2000) .....	53
<u>State v. Morrow</u> , 968 S.W.2d 100 (Mo.banc 1998), <u>cert. denied</u> 525 U.S.	
896 (1998) .....	42
<u>State v. Moss</u> , 10 S.W.3d 508 (Mo.banc 2000) .....	
	47,50
<u>State v. Mullins</u> , 897 S.W.2d 229 (Mo.App., S.D. 1995) .....	
	56
<u>State v. Nicklasson</u> , 967 S.W.2d 596 (Mo.banc 1998), <u>cert. denied</u> 525 U.S.	

1021 (1998) .....	52
<u>State v. Oates</u> , 12 S.W.3d 307 (Mo.banc 2000) .....	46,49
<u>State v. Parker</u> , 886 S.W.2d 908 (Mo.banc 1994), <u>cert. denied</u> 514 U.S.	
1098 (1995) .....	58
<u>State v. Simmons</u> , 955 S.W.2d 729 (Mo.banc 1997), <u>cert. denied</u> 522 U.S.	
1129 (1998) .....	43
<u>State v. Simonton</u> , 49 S.W.3d 766 (Mo.App., W.D. 2001) .....	37
<u>State v. Smith</u> , 32 S.W.3d 532 (Mo.banc 2000) .....	52
<u>State v. Taylor</u> , 929 S.W.2d 209 (Mo.banc 1996), <u>cert. denied</u> 519 U.S.	
1152 (1997) .....	21,30
<u>State v. Tokar</u> , 918 S.W.2d 753 (Mo.banc 1996), <u>cert. denied</u> 519 U.S.	
933 (1996) .....	39,55
<u>State v. Toler</u> , 889 S.W.2d 151 (Mo.App., S.D. 1994) .....	36,37
<u>State v. Vinson</u> , 800 S.W.2d 444 (Mo.banc 1990) .....	22
<u>State v. White</u> , 939 S.W.2d 887 (Mo.banc 1997), <u>cert. denied</u> 522 U.S.	
948 (1997) .....	21
<u>State v. Winfield</u> , No. SC84244 (Mo.banc December 24, 2002) .....	55,56,59
<u>State v. Winston</u> , 959 S.W.2d 874 (Mo.App., E.D. 1997) .....	41,43
<u>State v. Young</u> , 943 S.W.2d 794 (Mo.App., W.D. 1997) .....	43
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d	
674 (1984) .....	22,35,41,47,56

<u>Tuilaepa v. California</u> , 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) . . . . .	47
<u>United States v. McVeigh</u> , 153 F.3d 1166 (10 <sup>th</sup> Cir. 1998) . . . . .	46
<u>Wilkes v. State</u> , 82 S.W.3d 925 (Mo.banc 2002) . . . . .	23
<u>Wright v. State</u> , 14 S.W.3d 612 (Mo.App., E.D. 1999) . . . . .	58

OTHER SOURCES

Supreme Court Rule 29.15(d) . . . . .	55
Supreme Court Rule 29.15(g) . . . . .	22
Supreme Court Rule 29.15(k) . . . . .	21
MAI-CR3d 308.14, Notes on Use 2 . . . . .	55,56

## **JURISDICTIONAL STATEMENT**

This appeal is from the denial of a motion to vacate judgment and sentence under Rule 29.15 in the Circuit Court of St. Louis County. The convictions sought to be vacated were for two counts of murder in the first degree, §565.020, RSMo 2000, one count of robbery in the first degree, §569.020, RSMo 2000, and two counts of armed criminal action, §571.015, RSMo 2000, for which appellant was sentenced to death for both counts of murder in the first degree and consecutive life sentences for the other three offenses. This Court has jurisdiction over this appeal because of its order effective July 1, 1988, that all death penalty post-conviction appeals be heard here, pursuant to this Court's power under Rule 83.06.

## STATEMENT OF FACTS

### **A. Trial and direct appeal**

Appellant, David Barnett, was charged by indictment on March 15, 1996, with two counts of murder in the first degree, two counts of armed criminal action, and two counts of robbery in the first degree (L.F. 27-30).<sup>1</sup> On March 10, 1997, the cause went to trial before a jury in the St. Louis County Circuit Court, the Honorable Larry L. Kendrick presiding (Tr. 111). Appellant was represented by Ellen Blau and Curtis Cox (Tr. 1).

#### **1. Guilt-phase evidence**

Viewed in the light most favorable to the verdicts, the following evidence was adduced: The victims in this case were appellant's grandparents, Clifford Barnett, who was 81 years old, and Leona Barnett, who was 75 years old (Tr. 598-599; State's Exhibit 1, 10).

In the week before February 4, 1996, appellant went to Rhonda James' house on Cornell in Webster Groves almost every day to "chill" with some friends (Tr. 653-655). During that week, appellant told James that he was going to have his grandparents rent him a Dodge Intrepid (Tr. 656). He talked about that car almost every day (Tr. 656).

On February 4, 1996, the victims attended church services and Sunday school at the Kirkwood Baptist Church (Tr. 894-895, 899). They then went with some friends and had lunch

---

<sup>1</sup>Respondent asks this Court to take judicial notice of its files from the underlying criminal case. The record cited by respondent consists of the trial transcript ("Tr."), the trial legal file ("L.F."), various trial exhibits as designated, appellant's direct appeal brief, and the post-conviction legal file ("P.C.L.F.").

at Miss Sheri's restaurant on Manchester (Tr. 894-895, 899). They left that restaurant before 1:00 p.m. (Tr. 895).

While the victims were away from their home, at 423 Barron in Glendale, appellant entered it and then called a friend (State's Exhibits 8-11). Appellant told his friend that he had won the lottery and that he had a bunch of money (State's Exhibits 10-11).

After the victims walked into their home, appellant knocked them to the ground, kicked them, and repeatedly stabbed them with knives (State's Exhibits 9-11). During this attack, he repeatedly returned to the kitchen to get more knives (State's Exhibits 9-11). He used four knives in his attack on the victims (Tr. 711-714, 745; State's Exhibits 9-11). After he killed them, he listened for breathing to make sure that they were dead (State's Exhibits 9, 11).

Clifford Barnett suffered ten stab wounds to the right side of the neck, two cuts to the right side of the neck, two cuts on either side of the nasal bridge, two cuts on the back of the left hand and at the base of the right finger, a laceration at the nasal bridge, a bruise on the right facial cheek, a bruise above the right eye, a bruise to the left of the lips, bruises on the tongue, a bruise below the nose, a bruise above the left ear, and a scrape at the crown of his head (Tr. 818-820; State's Exhibits 28 I-L). He died from stab wounds to the neck (Tr. 824). Three of them cut the right internal carotid artery and the right internal jugular vein (Tr. 824).

Leona Barnett had five stab wounds to the right side of her neck (Tr. 825; State's Exhibits 28 D-E). When her body was found, a knife was still sticking in her neck through one of those wounds (Tr. 825; State's Exhibit 28 B). The knife's blade was embedded in her third cervical vertebra (Tr. 825, 828). She also had seven stab wounds to the left side of her neck,

a cut in front of the right ear, two cuts to the left ear, a black right eye, and bruised lips (Tr. 826; State's Exhibits 28 F-H). Additionally, her ribs, two through ten, were fractured on both sides of her sternum, suggesting that someone may have stomped on her chest (Tr. 828). She died from the neck wound that still contained a knife when she was found (Tr. 828-829). The knife cut a carotid artery (Tr. 829).

Appellant took about \$120 dollars from Leona Barnett's purse, took the victims' car keys, lowered two of the shades in the house, locked up the house, got his coat off of the couch, and then drove off in the victims' 1995 Dodge Intrepid (State's Exhibits 8, 10-11; Tr. 846, 656-657; State's Exhibits 31 A-B).

Appellant showed up at Rhonda James' house that afternoon with the victims' car and told her that it was the car that his grandparents were going to get for him (Tr. 656-657). Appellant gave rides that day and that night to James and to other friends (Tr. 657; State's Exhibit 10).

Appellant's father, John Barnett, became concerned when he was unable to contact his parents on the day of the murder (Tr. 602-606).<sup>2</sup> Around 9:00 p.m. that night, he used a key to enter their house (Tr. 605). As he walked into the house, he saw the body of Clifford Barnett, who was still wearing a coat, on the floor in the hallway between the kitchen in the living room (Tr. 606, 818; State's Exhibits 30 A-E). He knew that Clifford Barnett was dead, because there was a large amount of blood by Clifford Barnett's head (Tr. 606; State's Exhibit

---

<sup>2</sup>John Barnett had adopted appellant (Tr. 609). Appellant started living with him as a foster child when appellant was eight years old (Tr. 609). Appellant lived with him until appellant was seventeen or eighteen years old (Tr. 609).

30 Q). He picked up the telephone in the living room and called 911 (Tr. 606). When the 911 operator asked him whether anyone else was in the house, he looked down the hallway and saw the body of Leona Barnett, who was still wearing a coat, on the floor in the hallway by the back bedroom (Tr. 607, 825; State's Exhibits 30 G-N). While John Barnett was still on the telephone with the 911 operator, police officers started arriving at the scene (Tr. 607, 617).

An officer determined that the bathroom window was a possible point of entry for the victims' assailant (Tr. 695; State's Exhibits 29 S-T, X-Y). There were fingermarks on the screen and in the corner of the window (Tr. 695). Appellant's fingerprints were found on the window (Tr. 695, 754; State's Exhibit 29 V). There were scuff marks on the wall and there was a shoeprint on the air conditioner (Tr. 695; State's Exhibit 29 U-T, W). That shoeprint and bloody shoeprints on the kitchen and bedroom floors were similar in tread design and pattern to the shoes that would later be seized from appellant (Tr. 669, 695-700, 767-769, 774).

At 1:00 a.m., February 5, 1996, appellant entered the Schnuck's grocery store on Brentwood (Tr. 623-625). Appellant stood in the store's vestibule and looked out the window (Tr. 625). When he was asked whether he was going to buy anything at the store, he indicated that his car had broken down and that he was waiting for his father to come from Columbia, Missouri, to pick him up (Tr. 626, 636-637). Appellant paced back and forth and appeared to be very nervous (Tr. 629). Appellant was still there at 5:00 a.m. (Tr. 659).

Appellant drove the victims' car to 2910 Texas Avenue (Tr. 844-845; State's Exhibit 10). He parked the car in front of that residence, took a gasoline credit card from the car, and went inside (State's Exhibit 10).

At around 8:00 that morning, police officers found the victims' vehicle parked in front of 2910 Texas Avenue (Tr. 843-844). They knocked on the door of that residence at that address for about five to ten minutes, but no one answered it (Tr. 844). They went to 2912 Texas Avenue and started knocking on that door (Tr. 844). While they were doing that, appellant walked out of 2910 Texas Avenue (Tr. 844). An officer said, "That's David Barnett" (Tr. 844-845). Appellant walked up to some uniformed officers and said, "I understand you guys are looking for me. I did it by myself, no one else was involved and I drove the car here" (Tr. 845).

The officers patted down appellant for weapons and found a hard object in his left front pocket (Tr. 846). Appellant indicated that the object was the keys to the Dodge Intrepid (Tr. 846). The officers handcuffed appellant and asked if he needed his coat (Tr. 846-847). Appellant indicated that his coat was on the back seat of the victim's car, but that he did not need it (Tr. 847; State's Exhibit 31 D). Appellant was transported to the Glendale Police Department (Tr. 847).

Appellant's shoes were seized and, as was mentioned above, were found to be similar in tread design and pattern to the shoeprints that were found at the crime scene (Tr. 669, 695-700, 767-769, 774).

The victims both had type A blood (Tr. 779). Type A blood was found on appellant's shoes and on appellant's jacket (Tr. 779-781, 786-789). Electrophoretic examination of the protein markers in blood revealed that one spot of blood on appellant's shoes was consistent with the proteins of Clifford Barnett, while another spot of blood was consistent with the proteins of Leona Barnett (Tr. 779-781). Some reddish brown stains were also found on appellant's shirt, but the stains were too small to determine whether they were blood (Tr. 785).

Coin wrappers that were filled with coins were found in the pockets of appellant's coat (Tr. 706, 708; State's Exhibits 31 E-F). These coin wrappers were similar to coin wrappers that were found in the victims' dresser in their bedroom (Tr. 686; State's Exhibit 29 O). A Phillips 66 credit card with Clifford Barnett's name on it was found in appellant's wallet (Tr. 848-849; State's Exhibit 22 F).

Appellant was taken to a room and informed of his Miranda rights (Tr. 848, 850). Appellant said that he understood his rights and that he wanted to make a statement (Tr. 850-851). Appellant signed a written waiver form (Tr. 851; State's Exhibit 7). Appellant made an audiotaped statement (Tr. 853; State's Exhibit 8). Appellant then made a written statement (Tr. 856; State's Exhibit 9). Appellant was again informed of his rights, waived his rights, and made a videotaped statement (Tr. 856-857; State's Exhibit 10). Appellant was taken to the crime scene (Tr. 859; State's Exhibit 11). He was again informed of his rights, waived his rights, and he did a videotaped reenactment of crimes (Tr. 859; State's Exhibit 11). In these statements, appellant said that he killed the victims, that he stole money from Leona Barnett's purse, and that he stole the victims' car. Appellant said that his grandmother said something to him before

he started attacking his grandparents, but that he did not remember what she said and that she did not say anything “bad” or “belligerent” to him (State’s Exhibits 8-10).

Appellant did not testify on his own behalf. His sole guilt-phase witness was an acquaintance who testified that appellant would spend large amounts of time sitting alone at the Steak & Shake restaurant where she worked (Tr. 906-910).

At the close of the evidence, instructions and argument of counsel, the jury found that appellant was guilty of two counts of murder in the first degree, two counts of armed criminal action, and one count of robbery in the first degree (the count of forcibly stealing the victims’ car) (L.F. 651-655). Appellant was acquitted of one count of robbery in the first degree (the count of forcibly stealing money from Leona Barnett) (L.F. 656).

## **2. Penalty-phase evidence**

In the penalty phase, the State presented evidence from two of the victims’ family members who testified about the victims (Tr. 1003-1013, 1021-1041). It also presented evidence of appellant’s prior convictions for burglary in the second degree, stealing under \$150, stealing from a person, and three counts of forgery (Tr. 999-1002; State’s Exhibit’s 34-36).

Appellant presented evidence from about thirteen witnesses, including two psychiatrists, a psychologist, appellant’s brother, appellant’s aunt, social workers, a worker at the school where appellant attended sixth grade, a counselor and the principal from his high school (Tr. 1049-1241). His evidence showed: that he had been adopted and had a bad childhood in an unstable family, that he had a history of mental problems, that he had mental

problems when he murdered his grandparents, that he had been physically mistreated by a girlfriend who had given birth to a child of appellant's, and that he had a drinking problem (Tr. 1049-1239).

At the close of the evidence, instructions and argument of counsel, the jury found that appellant should be sentenced to death for each of the counts of murder in the first degree (L.F. 727-728). As to the murder of Leona Barnett, the jury found three statutory aggravating circumstances (L.F. 706, 728). As to the murder of Clifford Barnett, the jury found four statutory aggravating circumstances (L.F. 699, 728). After finding appellant to be a prior and persistent offender, the trial court sentenced appellant to death for both counts of murder in the first degree, and to three consecutive life sentences for the other counts (Tr. 941; L.F. 808-809, 824). On direct appeal, this Court affirmed appellant's convictions and sentences. State v. Barnett, 980 S.W.2d 297 (Mo.banc 1998), cert. denied 525 U.S. 1161 (1999).

### **B. Rule 29.15 proceedings**

On March 22, 1999, appellant filed a Rule 29.15 motion (P.C.L.F. 4). On June 30, 1999, appellant's 197-page amended Rule 29.15 motion was filed for appellant by his post-conviction counsel, John Tucci and Antonio Manansala (P.C.L.F. 23-220). The State filed a motion to deny appellant's claims without an evidentiary hearing (P.C.L.F. 221-239). On July 23, 2001, the motion court denied appellant's request for an evidentiary hearing and asked the parties to file proposed findings (P.C.L.F. 399-400). In an untimely attempt to remedy the defects in his pleadings, on September 10, 2001, appellant filed 3,862 pages of materials and

asked for the motion court to reconsider its ruling denying him an evidentiary hearing (P.C.L.F. 403-4265). On July 29, 2002, the motion court issued its findings of fact and conclusions of law and denied appellant's motion for post-conviction relief (P.C.L.F. 4313-4333).

## ARGUMENT

### I.

**The motion court did not clearly err when it denied, without an evidentiary hearing, appellant's claims of ineffective assistance of counsel that alleged (A) that appellant's trial counsel failed to investigate and provide the jury appellant's complete social history and call a qualified health care professional to explain why appellant murdered his grandparents, and (B) that his trial counsel should have called Dr. Smith, instead of the three psychiatric experts who were called on appellant's behalf in the penalty phase, because appellant failed to plead facts unrefuted by the record which if true showed that he was entitled to relief.**

Appellant's first point on appeal mixes two different sets of claims and findings. Respondent will address claims 8(a) and 8(c) from appellant's post-conviction motion separately.

#### A. Claim 8(a)

Appellant alleges that the motion court clearly erred when in denying a hearing on his claim that his trial counsel were ineffective for failing to investigate and then provide to the jury information about his complete social history because this evidence would have explained to the jury why he murdered his grandparents (App.Br. 29; P.C.L.F. 26). He also alleges that his counsel should have presented the evidence to "a qualified mental health professional who would have presented a cohesive and thorough explanation to the jury" in an attempt to get a life sentence for appellant (P.C.L.F. 57-58). He acknowledges that his Rule 29.15 pleadings

were deficient, but asks this Court to ignore the deficiencies on the ground that evidentiary hearings should be encouraged (App.Br. 40).

The motion court made the following findings:

4. Movant's claim 8(A) is that counsel was ineffective in failing to present a complete and accurate account of Movant's life and background during penalty phase. A narrative of Movant's life history is set out over twenty-five pages of the amended motion and another twenty-two pages are dedicated to listing the hundreds of witnesses and organizations that would supply the proof it an evidentiary hearing is held. The claim does not allege sufficient facts for this Court to grant an evidentiary hearing. To obtain a hearing based on counsel's failure to investigate and present witnesses, Movant must 1) specifically identify who the witnesses were, 2) what their testimony would have been, 3) whether or not counsel was informed of their existence, and 4) whether or not they were available to testify. State v. Jones, 979 S.W.2d 171, 186-87 (Mo.banc 1998). Movant's narrative does not connect a specific portion of the narrative to a particular witness, does not allege that counsel was informed of their existence, and does not state that any of these witnesses were available to testify. "Where the pleadings consist only of bare assertions and conclusions, a motion court cannot meaningfully apply the Strickland standard for ineffective assistance of counsel." Morrow v. State, 21 S.W.3d 819, 824 (Mo.banc 2000). Furthermore, the record refutes Movant's claim that this evidence should have

been presented through a qualified mental health professional. Dr. Rosalyn Schultz, a psychologist, included many of the facts contained in the narrative in her testimony during the penalty phase.

(P.C.L.F. 4321).

On appeal from the denial of a post-conviction motion, the ruling of the lower court will be overturned only if it is “clearly erroneous.” Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. State v. Taylor, 929 S.W.2d 209, 224 (Mo.banc 1996), cert. denied 519 U.S. 1152 (1997).

Missouri is a fact pleading state. State v. Harris, 870 S.W.2d 798, 815 (Mo.banc 1994), cert. denied 513 U.S. 953 (1994). In order to be entitled to an evidentiary hearing, 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).

“A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment.” State v. White, 939 S.W.2d 887, 893 (Mo.banc 1997), cert. denied 522 U.S. 948 (1997). “As distinguished from other civil pleadings, courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief.” Morrow v. State, 21 S.W.3d 819, 822 (Mo.banc 2000), cert. denied 522 U.S. 896 (1998); White v. State, supra at 893. Without timely pleadings containing reasonably precise factual allegations, “scarce public resources would be expended

to investigate vague and often illusory claims, followed by unwarranted hearings.” Id.<sup>3</sup> “In sum, pleading requirements are not merely technicalities.” Morrow v. State, supra at 824.

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). The defendant must show that counsel’s performance was deficient and that it prejudiced the defense. Id., 466 U.S. at 687. In order to show prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. Thus, to warrant an evidentiary hearing on a claim of failure to investigate and call a witness to testify, a movant must allege: “(1) the identity of the witness; (2) what the witness’ testimony would have been; (3) that counsel was informed of the witness’ existence; (4) whether the witness was available to testify; and (5) that the testimony would have provided the movant with a viable defense.” Wilkes v. State, 82 S.W.3d 925, 928 (Mo.banc 2002).

---

<sup>3</sup>Rule 29.15 pleadings also differ from other civil proceedings because they cannot be amended to conform to the evidence in that the amendment of Rule 29.15 motions is governed by the strict time limitations found in Rule 29.15(g), rather than the Rules of Civil Procedure. Rohwer v. State, 791 S.W.2d 741, 743-744 (Mo.App., W.D. 1990); Kilgore v. State, 791 S.W.2d 393, 395 (Mo.banc 1990), cert. denied 493 U.S. 874 (1989); State v Vinson, 800 S.W.2d 444, 447 (Mo.banc 1990).

The pleadings in question in the Rule 29.15 motion consist of some 26 pages of biographical background narrative pled in story-book form followed by a listing of about 22 pages of witnesses and agencies, i.e. about 450 witnesses and agencies including “‘Coochie’, address unknown (Friend of David)” (Tr. 26, 33-80). The pleadings do not allege facts showing that any of the approximately 450 witnesses for this claim would have testified on any specific the matters in question, that counsel was informed of their existence, that they would have been located through a reasonable investigation, that they were available to testify, and that they would have testified if called. Appellant also failed to allege facts showing which witnesses would have been able to testify about cited documents or lay foundations for the admissibility of documents, that counsel was informed of the documents in question, that the documents were available at the time of the trial, that reasonable counsel would have found the documents and that they would have caused a different result to occur in the trial.

This is exactly what happened in Morrow v. State, *supra* at 823-825. In that case, the appellant pled 40 pages of “‘biographical background’ narrative” in which described events that had occurred in his life. This was followed by a listing of 24 witnesses and five sets of records. *Id.* at 823. This Court found that the appellant was not entitled to an evidentiary hearing. It reasoned:

Appellant did not allege that any listed witness was available to testify or that the witness would have testified if he or she had been called to do so. Appellant did not connect a specific portion of appellant’s narrative to a particular witness. It is impossible, therefore to determine whether any of the individual witnesses

would have provided mitigating evidence through their testimony.... Appellant's pleading was deficient in other respects. To obtain an evidentiary hearing on the claim, a movant must also allege that he provided trial counsel with pertinent and sufficient information regarding how to contact potential witnesses, or that such information was readily available.... Appellant did not allege, nor is it apparent from the record, that the facts trial counsel allegedly failed to discover were readily available.

Id. at 824.

Appellant recognizes that his Rule 29.15 pleadings are deficient and attempts to fix them by citing the 3,862 pages of materials that he submitted to the motion court *after* it ruled that his pleadings were insufficient and that he was not entitled to an evidentiary hearing (App.Br. 34-37, 39-41; P.C.L.F. 399, 403-4265). However, as was discussed above, the issue in this case is whether appellant's timely filed Rule 29.15 motion pled sufficient facts, rather than whether other he sufficiently pled facts in other documents that he later filed. Leisure v. State, 828 S.W.2d 872, 878 (Mo.banc 1992), cert. denied 506 U.S. 923 (1992). He cannot expand the facts pled in his Rule 29.15 motion, Belcher v. State, 801 S.W.2d 372, 375 (Mo.App., E.D. 1990); State v. Harris, *supra* at 815, and the motion court and this Court are without jurisdiction to consider facts other than those pled in that motion. Edgington v. State, 869 S.W.2d 266, 269 (Mo.App., W.D. 1994). Thus, appellant's repeated references in his brief to the 3,862 pages of materials, pages 403-4312 of the post-conviction legal file, that

he dumped before the motion court after it denied him and evidentiary hearing should be ignored by this Court (App.Br. 33-37,40-41).

Appellant also alleges that while he did not plead that any of the witnesses would have testified if called, every once in a while he connected some of the facts alleged to specific witnesses (App.Br. 39-40). He cites as an example that he pled: “Charles believes his Uncle Walter is living on the streets of St. Louis, homeless and suffering from a mental illness. Shirley remembers that her Uncle Wendell heavily abused alcohol.” (P.C.L.F. 34; App.Br. 39). However, appellant never alleged who should have been called to testify about this matter. This same pleading form was rejected in Morrow. There, this Court stated, “Such attributions...appear rarely, and are insufficient to overcome appellant’s defective motion. More importantly, even assuming the scant attributions were sufficient, appellant failed to allege whether the witnesses were available to testify, would have testified if available, and whether trial counsel was informed of their existence.” Morrow v. State, *supra* at 824.

Additionally, the motion court did not clearly err by finding that appellant failed to plead facts showing that the presentation of the evidence in question would have caused a reasonable probability that a different result would have occurred in appellant’s trial because appellant presented an abundance of evidence about his social history to the jury and there is no reason to believe that the jury would have imposed a life sentence if it had received some additional evidence of the same tenor. See Bucklew v. State, 38 S.W.3d 395, 401 (Mo.banc 2001), *cert. denied* 534 U.S. 964 (2001). Appellant presented evidence from about thirteen witnesses, including two psychiatrists, a psychologist, appellant’s brother, appellant’s aunt,

social workers, a worker at the school where appellant attended sixth grade, a counselor and the principal from his high school (Tr. 1049-1241). His evidence showed: that he had been adopted and had a bad childhood in an unstable family, that he had a history of mental problems, that he had mental problems when he murdered his grandparents, that he had been physically mistreated by a girlfriend who had given birth to a child of appellant's, and that he had a drinking problem (Tr. 1049-1239). The evidence of appellant's background was so extensive that it took up about nine pages of the Statement of Facts in appellant's direct appeal brief (Appellant's Direct Appeal Brief 5-13). Those pages are included in this brief's appendix (Appendix at A22-A30).

Appellant's claim that the evidence in question should also have been presented to "a qualified mental health professional who would have presented a cohesive and thorough explanation to the jury" in an attempt to get a life sentence for appellant was deficient in that it did not plead facts showing who that expert was, that the expert was reasonably available at the time of trial, that reasonable counsel would have been aware of the expert and would have retained the expert, what the testimony of the expert would have been, and that the expert's testimony would have caused a different result (P.C.L.F. 57-58). Additionally, appellant failed to plead facts showing a reasonable probability that a different result would occur if the evidence in question was presented because appellant had three qualified mental health professionals who testified about psychiatric mitigating evidence (Tr. 1107-1133, 1147-1240).

**B. Claim 8(c)**

In claim 8(c), appellant alleged that the motion court clearly erred when in denying a hearing on his claim that his trial counsel were ineffective for failing “to present a mental health expert who could clearly relate [appellant’s] psychological problems to the offense in a manner easily understood by the jury” (P.C.L.F. 27; App.Br. 37). He claimed that the findings of Dr. Ahmad B. Ardekaani, Dr. Donn Kleinschmidt, and Dr. Rosalyn Schultz were underdeveloped (P.C.L.F. 28). He alleged that instead of presenting these witnesses, “trial counsel should have called Dr. Robert L. Smith, a psychologist, who would have related [appellant’s] psychological problems in a manner easily understood by a jury.” (P.C.L.F. 28). Appellant improperly attempts to fix deficiencies in his pleadings by citing the 3,862 pages of materials that he filed *after* it denied him and evidentiary hearing (App.Br. 41). See Edgington v. State, *supra* at 269. This Court should disregard all argument that is based on those pages, that is citations to pages 403-4312 of the post-conviction legal file.

The motion court made the following findings:

6. Movant’s claim 8(C) is that trial counsel was ineffective in preparing and presenting expert witnesses at trial. Movant claims that the jury did not understand the opinions of the experts and that counsel should have obtained a different expert, Dr. Robert L. Smith, who would have better explained Movant’s mental problems to the jury. The claim that counsel did not prepare the expert witnesses is refuted by the record. The transcript shows that trial counsel provided Dr. Schultz with the records necessary to render her opinions. A review of the transcript shows that the testimony of the experts was clear.

Movant has no constitutional right to effective assistance of expert witnesses. Wilson v. Greene, 155 F.3d 396, 401 (4<sup>th</sup> Cir. 1998). The claim that the jury did not understand the testimony of the experts is based on the jury's request to see a chart prepared by Dr. Schultz to show a timeline of Movant's life and psychological and social problems. Movant is not entitled to an evidentiary hearing because this claim is mere speculation. The jury's request to see the chart does not mean they did not understand her testimony. Over the course of deliberations, the jury asked to see many of the exhibits. It is equally likely that the jury wanted to see Exhibit R because they understood the impact of Dr. Schultz's testimony and understood the awesome decision they were asked to make. Movant's claim that Dr. Robert Smith would have been a better expert witness suffers from the same problems that his claim 8(B) does. Movant does not claim that Dr. Smith was known or should have been known to counsel, and the claim that Dr. Smith would have presented better on the witness stand is pure speculation.

(P.C.L.F. 4323).

The record shows that Dr. Ardekaani and Dr. Kleinschmidt testified about appellant's mental problems that were diagnosed in 1992, which supported the testimony of Dr. Schultz who testified about her full investigation of appellant's life history and his mental state at the time of his crimes (Tr. 1107-1133, 1148-1231). Dr. Shultz testified that the materials that she considered *included*: appellant's audio and video confessions to the homicides; interviews

of appellant, John Barnett, and Secil Blount; appellant's school records from 1985-1994; appellant's hospital records from 1991-1992; a neuropsychological evaluation by Dr. Gilbert in September 1996; records of Dr. Doris Gilpin, a psychiatrist who saw appellant in the mid-1980s; appellant's adoption records from 1981-1988; appellant's juvenile court records; police reports; and depositions of John Barnett, Scott Humphries, and Chris Barnett (P.C.L.F. 116; Tr. 1151-1152). Appellant did not plead that Dr. Schultz was unaware of any specific facts about his background and show that these facts would have changed her testimony. See Morrow v. State, supra at 824. The psychiatric testimony was as easy to understand as could be expected. In fact, Dr. Schultz utilized a poster board captioned "David Barnett's Developmental History Trauma & Loss," Defense Exhibit R, that appellant stated in his direct appeal "concisely and chronologically summarized all the painful events in [appellant's] life, commencing at infancy through young adulthood, which warranted a sentence of less than death" (Appellant's Direct Appeal Brief 30).

Appellant also did not plead facts showing that reasonable counsel would have refused to call these expert witnesses to testify because he did not plead facts showing that reasonable counsel would have known before trial that any alleged defects in their testimony would outweigh the advantages in their testimony. Nor did appellant plead facts showing that his death sentence resulted from the decision to call these three experts as witnesses. He certainly would not have been better off if no expert witnesses had been called.

Appellant attempts to get around this defect in his claim by arguing that his counsel should have called a different psychologist, Dr. Smith, as a witness (P.C.L.F. 28). However,

“[c]ounsel cannot be faulted for failing to shop for a psychiatrist who would testify more favorably.” State v. Taylor, 929 S.W.2d 209, 225 (Mo.banc 1996), cert. denied 519 U.S. 1152 (1997); State v. Mease, 842 S.W.2d 98, 114 (Mo.banc 1992), cert. denied 508 U.S. 918 (1993).

Additionally, appellant failed to plead facts showing that his trial counsel would have known of the existence of Dr. Smith, who is from Beachwood, Ohio, or that reasonable counsel would have known that Dr. Smith would have testified more favorably than the doctors who testified (P.C.L.F. 143). In fact, appellant’s pleadings allege that he needed the testimony of about 435 witnesses to prove this claim, which suggests that Dr. Smith’s testimony would have been too detailed and convoluted to be effective (P.C.L.F. 126-148). Appellant’s pleadings do not allege facts showing that appellant’s counsel acted unreasonably and that there is a reasonable probability that their actions were the cause of appellant being sentenced to death. Thus, appellant’s first point must fail.

## II.

**The motion court did not clearly err when it denied, without an evidentiary hearing, appellant's claim that his trial counsel were ineffective on the ground that they failed to timely object to the State's late disclosure of Officer Granat's testimony that appellant's shoes became available for sale in the St. Louis area three days before appellant murdered his grandparents because appellant failed to allege facts showing that he was prejudiced by the actions of his counsel.**

Appellant alleges that the motion court clearly erred when it denied, without an evidentiary hearing, his claim that he was denied effective assistance of counsel because his trial counsel failed to timely object to the State's late disclosure of Officer Granat's testimony that appellant's shoes became available for sale in the St. Louis area three days before appellant killed his grandparents (App.Br. 43). Appellant claims that this was prejudicial because it corroborated other evidence that showed that he climbed into the victims' home through a window (App.Br. 43; 29-30, 155-161).

Appellant improperly attempts to supplement his pleadings by citing the 3,862 pages of materials that he submitted to the motion court *after* it ruled that his pleadings were insufficient and that he was not entitled to an evidentiary hearing (App.Br. 41). However, the issue in this appeal is whether appellant's timely filed Rule 29.15 motion pled sufficient facts, rather than whether other he sufficiently pled facts in other documents that he later filed. Leisure v. State, 828 S.W.2d 872, 878 (Mo.banc 1992), cert. denied 506 U.S. 923 (1992).

Thus, this Court should disregard all argument in appellant's brief that is based on references to pages 403-4312 of the post-conviction legal file.

The record that properly may be considered shows that in appellant's confessions to the police, he said that he entered the victim's house through the front door, waited there until the victims arrived home, stabbed the victims to death, stole money from Leona Barnett's purse, and then stole the victims' car (State's Exhibits 8-10). Appellant said that his grandmother said something to him before he started attacking his grandparents, but that he did not remember what she said and that she did not say anything "bad" or "belligerent" to him (State's Exhibits 8-10).

The State's theory was slightly different than appellant's statement because its theory was that appellant came into the victim's home through a window, instead of a door, when he entered the home to wait for the victims. The physical evidence showed that the victims' bathroom window appeared to be appellant's point of entry (Tr. 695; State's Exhibits 29 S-T, X-Y). There were fingermarks on the screen and in the corner of the window, and appellant's fingerprints were found on the window (Tr. 695, 754; State's Exhibits 29 V). There were scuff marks on the wall, and there was a shoeprint on the air conditioner that was beneath the window (Tr. 695; State's Exhibit 28 U-T, W). The shoeprint was made from the shoe removing dust from the surface of the air conditioner (Tr. 773).

Victor Granat, who was employed at the St. Louis County Crime Laboratory, testified that the shoeprint on the air conditioner and the bloody shoeprints on the kitchen and bedroom floors were similar in tread design and pattern to appellant's shoes, which were brand new (Tr.

669, 695-700, 767-769, 774). He testified that appellant's shoes were manufactured on October 12, 1995 (Tr. 769). He then testified, without objection, that appellant's shoes were available for distribution to retail stores on February 1, 1996, which was three days before the murder (Tr. 616, 769). After the parties indicated that they did not have any more questions for Granat, he was excused (Tr. 775).

After the testimony of another witness, appellant's counsel moved for a mistrial because the State had not revealed that Granat would testify that appellant's shoes became available for distribution on February 1, 1996 (Tr. 801-804, 807). The trial court overruled appellant's motion for a mistrial ( Tr. 805).

Appellant's counsel asked to have the jury instructed to disregard the evidence in question from Granat, to have the state prohibited from arguing that testimony, and to have Granat recalled (Tr. 805, 809). The trial court noted that appellant had the opportunity to cross-examine Granat on this subject and that Granat had been excused (Tr. 807-808). It found that appellant's request was untimely, and that striking the testimony of Granat without allowing the State to inquire further of Granat would be unfair (Tr. 808). Thus, it denied appellant's motions (Tr. 808, 812-813).

On appeal, this Court found that appellant had waived his claim as to the discovery violation by failing to object at their earliest opportunity. State v. Barnett, 980 S.W.2d 297, 304-305 (Mo.banc 1998), cert. denied 525 U.S. 1161 (1999).

The Rule 29.15 motion court made the following findings:

The State called Victor Granat who testified that shoe prints left inside the victim's house and a print on the top of the air conditioner outside the house were consistent with prints made from the shoes taken from Movant at the time of his arrest. Granat testified that these particular shoes were manufactured on October 12, 1995 and available for sale February 1, 1996, three days before the murders. Trial counsel made a late objection that Granat's testimony about the dates was hearsay and was not properly disclosed to the defense before trial. Movant claims prejudice because the improper evidence bolstered the State's argument that Movant entered the victim's home through the bathroom window, in contrast to defendant's statements to police that he entered through an unlocked door and the print on the air conditioner happened some time prior to the date of the murders. Movant is not entitled to an evidentiary hearing on this issue because he cannot show prejudice. Assuming counsel had made a proper, timely objection to this testimony, and assuming this Court had sustained it, the jury would not have heard Granat's testimony of the date of manufacture or availability of the shoes. The jury still would have heard Granat's testimony that Movant's shoes were consistent with shoe prints at the scene and that the prints left on the top of the air conditioner were left by disturbing the dust on top of the unit. The jury had already heard Detective Wesley Smith state the probable point of entry was the bathroom window based on the shoe print in the dust on the air conditioner, on disturbance of the dust on the screen of the bathroom

window and from fingerprints left on the bathroom window. Those fingerprints were identified as belonging to Movant. Furthermore, in the big picture of the entire case, the issue of how Movant got into the house is of minimal significance. Once in the house, Movant called his brother and left a message. He then attacked and stabbed the victims with five different steak knives as the victims returned home. Medical evidence showed the victims suffered multiple stab wounds and blunt trauma from being beaten and kicked. Movant then took items of value from the house and took the victims' car. After his arrest, Movant confessed in writing, on audiotape and videotape. He then went with police to the home for a video re-enactment where he stated he entered through the front door. Had trial counsel made a timely objection to Granat's testimony, the excluded testimony would not have altered the outcome of the trial. Movant cannot show prejudice on this claim and he is not entitled to an evidentiary hearing.

(P.C.L.F. 4325-4326).

The motion court did not clearly err when it found that appellant failed to plead facts showing prejudice under Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), because the absence of the evidence in question would not have caused a reasonable probability as to a different result of the trial in that, as was discussed above in detail in the motion court's findings, there was strong evidence that appellant entered through

the window, even without the testimony in question. See State v. Toler, 889 S.W.2d 151, 161 (Mo.App., S.D. 1994).

Moreover, it is not a defense to a claim of deliberation to allege that a defendant came in through a door rather than a window, waited for the victims so that he could kill them and take their car, and then viciously murdered them with numerous knives. Here, as is discussed in the Statement of Facts in this brief, the uncontradicted evidence showed that appellant went to the victims' home so that he could kill them and take their car, waited for them to arrive there, and then brutally murdered them without any provocation.

Appellant's claim that the evidence was weak is not based on an analysis of the evidence of his guilt, but on the fact that the jury deliberated for 19 hours (App.Br. 48). However, just as quick deliberations do not necessarily mean that there is overwhelming—or even sufficient—evidence, long, careful and thoughtful deliberations do not mean that the evidence was weak. Such deliberations may be a sign of the seriousness that the jurors take their responsibilities, the amount of evidence that they have to consider, or even that just one juror had trouble correctly weighing the overwhelming evidence. They may have nothing to do with the two counts of murder in the first degree and simply have been related to the acquittal of appellant for the count of robbery in the first degree that pertained to him forcibly stealing money from Leona Barrett (L.F. 656). Thus, the motion court did not clearly err when it found that even if appellant could have proven that he did not come in through the window there was no reasonable probability that a different result would have occurred.

Additionally, appellant failed to plead facts showing that he was prejudiced by the actions of his counsel because appellant did not plead facts showing that the trial court would have excluded the evidence in question if a timely objection had been made. The trial court had substantial discretion as to what remedy to apply, State v. Kinder, 942 S.W.2d 313, 328 (Mo.banc 1996), cert. denied 522 U.S. 854 (1997), and appellant failed to plead facts showing that the exclusion of the evidence would have been the proper remedy, see State v. Simonton, 49 S.W.3d 766, 782-783 (Mo.App., W.D. 2001), in that he did not plead facts showing that he would have handled the evidence in question differently and that this would have changed the outcome of the trial if the evidence had been timely disclosed. State v. Carlisle, 995 S.W.2d 518, 521 (Mo.App., E.D. 1999); State v. Kilgore, 771 S.W.2d 57, 66 (Mo.banc 1989), cert. denied 493 U.S. 874 (1989); State v. Johnston, 957 S.W.2d 734, 750 (Mo.banc 1997), cert. denied 522 U.S. 1150 (1998); State v. Toler, supra at 161.

If the evidence had been disclosed timely, appellant still would not have been able to refute the fact that his shoes were not available in the St. Louis area until three days before the murder. Since the timeliness of the disclosure had nothing to do with appellant's ability to defend against the evidence, appellant failed to plead facts showing that the trial court would have excluded the evidence had he made a timely objection to it. Thus, the trial court would have been acting within its discretion by refusing to exclude the evidence in question, appellant failed to plead facts showing that Strickland prejudice occurred, and his second point on appeal must fail.

### **III.**

**The motion court did not clearly err when it denied, without an evidentiary hearing, appellant's claim that he was denied effective assistance of counsel on the ground that his trial counsel failed to object to (1) Officer Morris' testimony that when he responded to the scene of the murders he was told by appellant's father that appellant had been "arrested by Ladue the other day"; (2) testimony from Rhonda James that appellant had been smoking marijuana in the days leading up to the killings; and (3) Officer Nelke's testimony that he used appellant's mug shot when he searched the neighborhood for appellant because appellant failed to plead facts showing that counsel failed to make reasonable strategical decisions not to object to these matters and that he was prejudiced by the actions of his counsel.**

Appellant alleges that the motion court erred in denying an evidentiary hearing on his claim that he was denied effective assistance of counsel on the ground that his trial counsel failed to object to: (1) testimony from Rhonda James that appellant had been smoking marijuana in the days leading up to the killings; (2) Officer Morris' testimony that when he responded to the scene of the murders he was told by appellant's father that appellant had been "arrested by Ladue the other day"; and (3) Officer Nelke's testimony that he used appellant's mug shot when he searched the neighborhood for appellant (App.Br. 49; P.C.L.F. 30-31, 162-165, 4327). Appellant claims that above was inadmissible evidence of some of his other bad acts (App.Br. 49).

#### **A. Appellant failed to plead facts showing the lack of a reasonable strategy**

The motion court's first reason for denying appellant's claim is that appellant failed to allege facts showing that counsel did not make a tactical decision not to object to the evidence in question. "Counsel's actions are presumed to be a matter of trial strategy." State v. Madison, 997 S.W.2d 16, 22 (Mo.banc 1999). Appellant failed to allege facts to overcome this presumption.

In addition to other reasons that are discussed below, counsel may not have wanted to object to the evidence in question out of fear of highlighting the evidence. As this Court stated in State v. Tokar, 918 S.W.2d 753, 768 (Mo.banc 1996), cert. denied 519 U.S. 933 (1996):

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

Appellant's failure to plead that a strategic decision was not behind the failure to object is as fatal to his claim as the failure to present evidence on this matter. Thus, appellant's claims in his third point on appeal are without merit.

Appellant appears to recognize this defect in his pleadings and improperly attempts to supplement his pleadings by citing the 3,862 pages of materials that he submitted to the motion court *after* it ruled that his pleadings were insufficient and that he was not entitled to an evidentiary hearing (App.Br. 50-51). However, the issue in this appeal is whether appellant's timely filed Rule 29.15 motion pled sufficient facts, rather than whether other he sufficiently pled facts in other documents that he later filed. Leisure v. State, 828 S.W.2d 872, 878

(Mo.banc 1992), cert. denied 506 U.S. 923 (1992). Thus, this Court should disregard all argument in appellant's brief that is based on references to pages 403-4312 of the post-conviction legal file.

### **B. Evidence in question**

Should this Court ignore appellant's failure to plead facts showing that a reasonable trial strategy was not involved, respondent will address the specifics of the evidence in question.

1. Appellant's first claim pertains to the evidence of what occurred when Officer Henry Morris arrived on the scene of the murders. After he arrived there, he spoke to appellant's father, John Barnett, in an attempt to find out who could have killed the victims (Tr. 618). Appellant's father told him, "Yes, I think my son David did it, he's always been in trouble with the law" (Tr. 619). Appellant's father then stated the matter which appellant claims should have been objected to, which is that appellant "was just arrested by Ladue the other day" (Tr. 619; App.Br. 49).

Reasonable counsel would not have objected to this evidence and appellant could not have been prejudiced by the actions of his counsel because this evidence was admissible not as substantive evidence of possible bad acts by appellant, but merely to explain the actions of the officers and to show why they focused their investigation on appellant. Madsden v. State, 62 S.W.3d 661, 671 (Mo.App., W.D. 2001); State v. Baker, 23 S.W.2d 702, 715 (Mo.App., E.D. 2000).

Alternatively, as was discussed above in section “A,” reasonable counsel may have decided not to draw attention to the evidence in question because it was not sufficiently prejudicial. See State v. Basile, 942 S.W.2d 342, 356 (Mo.banc 1997), cert. denied 522 U.S. 883 (1997)(evidence that the defendant in this death-penalty case smoked marijuana, had a pregnant girlfriend, had two girlfriends at once, and treated one of them “fairly bad” did not amount to plain error or Strickland prejudice because they were references to past non-crimes, or were not perceived as being criminal acts that carried sufficient prejudicial value). For this same reason, the lack of an objection would not result in Strickland prejudice. It also would not result in Strickland prejudice because at most it was a vague reference to an unspecified crime. State v. Winston, 959 S.W.2d 874, 878 (Mo.App., E.D. 1997).

Further, appellant could not have been prejudiced because there was overwhelming evidence of appellant’s guilt. See Skillicorn v. State, 22 S.W.3d 678, 688 (Mo.banc 2000), cert. denied 531 U.S. 1039 (2000). As is discussed in the Statement of Facts, the evidence showed that appellant went to the victims’ home so that he could kill them and take their car, waited for them to arrive there, and then brutally killed them without any provocation.

Appellant’s claim that the evidence was weak is not based on an analysis of the evidence of his guilt, but on the fact that the jury deliberated for 19 hours (App.Br. 53). However, just as quick deliberations do not necessarily mean that there is overwhelming—or even sufficient—evidence, long, careful and thoughtful deliberations do not mean that the evidence was weak. Such deliberations may be a sign of the seriousness that the jurors take their responsibilities, the amount of evidence that they have to consider, or even that just one juror had trouble

correctly weighing the overwhelming evidence. As the motion court correctly stated, “Viewed in the light of all of the evidence, the testimony about prior arrests and marijuana use did not alter the outcome of the trial, and thus, the failure to object did not prejudice Movant” (P.C.L.F. 4327).

2. Appellant claims that his counsel should have objected to testimony from Rhonda James that he had been smoking marijuana in the days leading up to the murders (App.Br. 49; Tr. 659). Appellant neglects to mention that James also testified that later in the week before the murder, he started acting differently and started shaking when they got high (Tr. 659). Since it was undisputed that appellant murdered the victims and the only issue was whether appellant deliberated upon the murders, counsel may have wanted for evidence of drug use to be admitted because it may have caused jurors to lend more credibility to his defense that he just snapped and flew into a rage, rather than deliberating on the murders (Tr. 595, 961). See State v. Morrow, 968 S.W.2d 100, 107-108 (Mo.banc 1998), cert. denied 525 U.S. 896 (1998).

Additionally, the motion court properly found that viewed in the light of all of the evidence, the testimony about marijuana use did not alter the outcome of the trial (P.C.L.F. 4327). In addition to the overwhelming evidence of guilt, the evidence of marijuana use seems trivial compared to the undisputed evidence that appellant murdered his grandparents and the evidence in question was unlikely to make the jurors think that appellant was guilty of murder in the first degree rather than murder in the second degree. See State v. Basile, supra at 356.

Rather, as was discussed above, counsel could hope that the jury would draw the opposite inference.

3. Appellant claims that his counsel should have objected when Detective Steve Nelke testified as follows about what occurred as he searched for appellant in the area where the victims' car was found:

And I had a mug shot of David Barnett, and I said, "That's David Barnett." As a matter of fact, he was wearing the same clothes that he was wearing in the mug shot.

(Tr. 844-845). Appellant claims that this constituted evidence of one of his other crimes (App.Br. 49).

However, the "[f]ailure to object to the detective's referring to 'mug shots' does not establish ineffectiveness of counsel because references to 'mug shots' do not necessarily infer that the defendant has committed other crimes." State v. Young, 943 S.W.2d 794, 798 (Mo.App., W.D. 1997); State v. Simmons, 955 S.W.2d 729, 749 (Mo.banc 1997), cert. denied 522 U.S. 1129 (1998). "Admission of a defendant's mug shot constitutes prejudicial evidence of other crimes only when the mug shot or accompanying testimony discloses a defendant's prior arrests or convictions." State v. Young, supra at 798-799. Without such a disclosure, it is "at most, a vague and indefinite reference to an unspecified crime" that is not prejudicial, State v. Winston, supra at 878, and counsel may not have wished to draw further attention to the comment. Additionally, there was overwhelming evidence of appellant's guilt and the evidence in question did not pertain to the only issue in dispute, which is whether appellant

deliberated on the murders. Thus, the motion court did not clearly err when it found that appellant failed to plead facts showing a reasonable probability that evidence in question would have altered the outcome of the trial (P.C.L.F. 4327).

#### **IV.**

**The motion court did not clearly err when it denied, without an evidentiary hearing, appellant's claim that he was denied ineffective assistance of counsel during voir dire on the ground that his trial counsel failed to find out if the jurors would be prejudiced by the fact that appellant murdered his elderly grandparents and had three prior convictions (though he really had six prior convictions) because appellant failed to allege facts which if true would entitle him to relief and his claims are refuted by the record.**

Appellant alleges that the motion court clearly erred when it denied, without an evidentiary hearing, his claim that his counsel were ineffective on the ground that they failed to conduct an adequate voir dire on the fact that appellant murdered his elderly grandparents and the fact that he had "three prior convictions" (App.Br. 55; P.C.L.F. 28, 152-154). His motion alleged that due to counsels' ineffectiveness "we can never know" if jurors who were prejudiced against appellant heard his case (P.C.L.F. 153).

##### **A. Fact that appellant murdered his elderly grandparents**

The motion court found that appellant's claim that his trial counsel did not ask the venire whether the fact that appellant murdered his elderly grandparents "would prejudice the jurors against [appellant,]" was refuted by the record and appellant failed to plead facts showing that he was prejudiced by his trial counsel's actions (P.C.L.F. 152, 4324).

It is refuted by the record because the record shows that the venirepersons were informed of these facts and appellant's counsel then questioned them in order to determine

whether they could be fair after being exposed to these facts. During voir dire the trial court read the following statement to each panel:

The victims in this case were an older couple, Clifford R. and Leona Barnett, husband and wife, who lived in the City of Glendale here in St. Louis County. They were killed in their home by stabbing over one year ago on February 4<sup>th</sup>, 1996.

The defendant, Mr. Barrett, is their grandson...

(Tr. 140-141, see also Tr. 185-186, 227, 280-281, 326-327, 376-377). Appellant's counsel then discussed the allegation that appellant had stabbed his grandparents and questioned the venirepersons on their ability to be fair and impartial and follow the court's instructions (Tr. 205-218, 252-266, 306-317, 356-366, 399-410, 522-560). Thus, the record refuted appellant's claim that the venirepersons were not questioned on this matter.

Moreover, appellant's claim is without merit because the question that he proposes that his counsel should have asked would have improperly sought a commitment from the venirepersons as to how they would act as to relevant evidence in the case and would not provide a basis for disqualifying venirepersons. See State v. Oates, 12 S.W.3d 307, 312 (Mo.banc 2000)(defense properly prevented from asking if the venirepersons believed that the fact that a person is shot in the back of the head automatically defeats a claim of self-defense because it would not provide a basis for disqualifying jurors); United States v. McVeigh, 153 F.3d 1166 (10<sup>th</sup>Cir.1998)(in a death-penalty case from a bombing in Oklahoma, the defense was properly prevented from asking questions about how jurors would vote on the

issue of punishment after hearing the evidence). The fact that appellant murdered his grandparents is evidence that may properly be considered by the jury in sentencing appellant because it is evidence of the circumstances of his offense and his character. See Tuilaepa v. California, 512 U.S. 967, 976, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994); State v. Chambers, 891 S.W.2d 93, 107 (Mo.banc 1994). The fact that some venirepersons might want to use this evidence in the sentencing phase is not a disqualifying bias.

This case differs from State v. Clark, 981 S.W.2d 143 (1998), in which this Court held that the trial court should have allowed disclosure of the fact that the victim was a baby so that the parties could determine the jurors ability to fairly consider *all of the evidence* in light of that fact. In the case at bar, the proposed inquiry seeks to commit jurors to not using a harmful, yet relevant, facts against appellant, rather than to find out if the venirepersons could fairly decide the case.

Additionally, appellant failed to plead facts showing that Strickland prejudice occurred, see State v. Knese, 85 S.W.3d 628, 633 (Mo.banc 2002), because he failed to plead facts showing that any biased jurors served on his case. Morrow v. State, 21 S.W.3d 819, 827 (Mo.banc 2000), cert. denied 531 U.S. 1171 (2001); State v. Moss, 10 S.W.3d 508, 513-514 (Mo.banc 2000); State v. Hall, 982 S.W.2d 672, 682 (Mo.banc 1998), cert. denied 526 U.S. 1151 (1999). In fact, appellant pled that he did not know whether any biased jurors sat on the case (P.C.L.F. 153). “Movant’s own motion demonstrates the speculative nature of his claim.” State v. Hatcher, 4 S.W.3d 145, 150 (Mo.App., S.D. 1999). Thus, appellant’s claim is without merit.

### **A. Fact that appellant had three prior convictions**

Appellant's claim that his trial counsel were ineffective for failing to voir dire the venirepersons as to "whether the fact that [appellant] had three prior convictions would prejudice the jurors against [appellant]" is misleading because appellant actually had six prior convictions. They were for burglary in the second degree, stealing under \$150, stealing from a person, and three counts of forgery (Tr. 999-1002; State's Exhibit's 34-36). Appellant failed to allege facts showing which of these convictions his counsel should have been revealed to the jury during voir dire.

In any event, the motion court's first reason for denying appellant's claim was that the record showed that counsel decided not to voir dire on this issue as a matter of reasonable trial strategy (P.C.L.F. 152, 4325). It reasoned:

The record is clear that Movant was not going to testify in the guilt phase since counsel inquired at length about Movant's right not to testify, and thus, his prior convictions would not have been brought up during the guilt phase. Counsel's strategy to obtain a not guilty or a conviction for second degree murder in the guilt phase would have been hampered had the jury known of the prior convictions.

(P.C.L.F. 4325). See Hultz v. State, 24 S.W.3d 723, 725-726 (Mo.App., E.D. 2000)(counsel was effective even though she did not to question venirepersons on whether they would automatically convict the defendant, who was going to testify, on account of his prior

convictions because it was reasonable for counsel to choose not to call attention to prior convictions – especially when they closely resemble the charges on trial).

Appellant claims that the motion court could not find that trial strategy was involved without holding an evidentiary hearing (App.Br. 61). However, “[w]here the record reveals defense counsel’s conduct constituted reasonable trial strategy, the post-conviction motion court may deny relief without granting an evidentiary hearing.” Eichelberger v. State, 71 S.W.3d 197, 200 (Mo.App., W.D. 2002)(quoting Holt v. State, 24 S.W.3d 708, 710 (Mo.App., E.D. 1999)); State v. Lacy, 851 S.W.2d 623, 632 (Mo.App., E.D. 1993); State v. Carter, 955 S.W.2d 548, 560 (Mo.banc 1997), cert. denied 523 U.S. 1052 (1998).

In the case at bar, appellant’s trial counsel made it clear that they did not expect that appellant would testify, allowing them to hide appellant’s convictions from the jury in the guilt phase, because they questioned the jurors on their ability to fairly decide the case if appellant did not testify (Tr. 528-538). It was reasonable for counsel to attempt to hide appellant’s convictions during the guilt phase – especially since they were crimes that were consistent with the State’s theory that appellant deliberately murdered his grandparents during a robbery.

Moreover, appellant’s claim is without merit because the question that he proposes that his counsel should have asked would have improperly sought a commitment from the venirepersons as to how they would act as to relevant evidence in the case and would not provide a basis for disqualifying venirepersons. See State v. Oates, supra at 312. The fact that appellant had six prior convictions is evidence that may properly be considered by the jury in

sentencing appellant because it is evidence of his character. See State v. Chambers, supra at 107. The fact that some venirepersons might want to use this evidence in the sentencing phase is not a disqualifying bias.

The motion court also denied appellant's claim because he failed to plead facts showing that Strickland prejudice occurred because he failed to plead facts showing that any biased jurors served on his case (P.C.L.F. 4325). See Morrow v. State, supra at 827; State v. Moss, supra at 513-514. In fact, appellant plead that he did not know whether any biased jurors sat on the case (P.C.L.F. 153). Thus, appellant's fourth point is without merit.

**V.**

**The motion court did not clearly err when it denied, without an evidentiary hearing, appellant's claim that he was denied effective assistance of counsel in the penalty phase on the ground that his counsel failed to call the victims' children to testify that they, as Christians, did not believe in the death penalty and they wanted appellant sentenced to life without probation or parole because that evidence was inadmissible.**

Appellant alleges that the motion court clearly erred when it denied, without an evidentiary hearing, his claim that his counsel should have called the victim's children in the penalty phase to testify that they, as Christians, did not believe in the death penalty and wanted appellant to be sentenced to life without probation or parole (App.Br. 62; P.C.L.F. 31, 176-179).

The motion court made the following findings:

Movant's claim 8(G) is that counsel was ineffective because they failed to call John Barnett, Lana Barnett-Campbell and Polly Barnett-Hargett as witnesses in the penalty phase to state that they wanted Movant to receive a sentence of life without parole. "The admission of a victim's family members' characterizations and opinions about the appropriate sentence are inadmissible and Payne v. Tennessee, Sec. 217.762.4, 565.030.4, and 595.209.1(4)." State v. Taylor, 925, 938 (Mo.banc 1997) *citing* Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); State v. Roll, 942 S.W.2d 370, 378 (Mo.banc 1997). This Court received letters from John Barnett, Lana Barnett-

Campbell and Polly Barnett-Hargett prior to sentencing and was aware of their wishes. Counsel is not ineffective for failing to present inadmissible evidence and Movant was not prejudiced.

(P.C.L.F. 4328-4329).

Appellant argues that the evidence in question was admissible because Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), held that the sentencer in a capital case cannot be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record (App.Br. 68). However, the court simultaneously stated that “[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.” Id., 438 U.S. at 604 (n. 12). see also State v. Nicklasson, 967 S.W.2d 596, 619 (Mo.banc 1998), cert. denied 525 U.S. 1021 (1998)(evidence that defendant's family members would visit him in prison was irrelevant because “that a convicted murderer's relatives care about him is not relevant to the punishment question”).

Appellant ignores the fact that after Lockett was decided the United States Supreme Court held that evidence of victims' family members opinions about the appropriate sentence is irrelevant and inadmissible. Payne v. Tennessee, 501 U.S. 808, 830 n. 2, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); State v. Smith, 32 S.W.3d 532, 555 (Mo.banc 2000). Such evidence is also inadmissible because the family members are not experts on the issue of sentencing and lay witnesses are not permitted to state a conclusion concerning the ultimate issue for the jury. State v. Dixon, 70 S.W.3d 540, 548-549 (Mo.App., W.D. 2002); State v. Campbell, 26 S.W.3d

249, 253 (Mo.App., W.D. 2000). Nor would an expert witness be permitted to testify as to what punishment appellant deserved because that would invade the province of the jury. See State v. Mathews, 33 S.W.3d 658, 662 (Mo.App., S.D. 2000); State v. Clements, 789 S.W.2d 101, 109-111 (Mo.App., S.D. 1990); State v. Kinder, 942 S.W.2d 313, 334 (Mo.banc 1996), cert. denied 522 U.S. 854 (1997).

Appellant attempts to circumvent the above cases by alleging that the State opened the door to this inadmissible evidence by presenting evidence that the victims were Christians and by calling Lana Barnett-Campbell to testify in the penalty phase about the loss that she suffered because of her parents' death (App.Br. 66-67).

Under the opening the door theory, also known as the doctrine of curative admissibility, if one party introduces inadmissible evidence, the other party may introduce otherwise inadmissible evidence to rebut or explain inferences raised by the first parties evidence. State v. Johns, 34 S.W.3d 93, 117 (Mo.banc 2000), cert. denied 532 U.S. 1012 (2001). However, appellant did not allege that the State presented any inadmissible evidence. This is fatal to his claim because one cannot use inadmissible evidence to rebut inferences raised by admissible evidence. State v. Middleton, 998 S.W.2d 520, 528 (Mo.banc 1999), cert. denied 528 U.S. 1167 (2000)(“Absent an exception, hearsay testimony cannot be used to rebut inferences drawn from admissible evidence adduced during cross-examination”). Since the State did not present inadmissible evidence on the victims' family members views concerning the appropriate punishment in this case, appellant was precluded from presenting evidence on this

same matter. Thus, appellant failed to allege facts which if true would show that his counsel were ineffective and his fifth point on appeal must fail.

## VI.

**The motion court did not commit plain error when it failed to grant appellant relief on a claim that was never presented to it, that is a claim that appellant was denied effective assistance of counsel on the ground that his trial counsel did not request that the trial court submit an instruction on appellant's failure to testify to the jury, because that claim is not cognizable on appeal in that this Court lacks jurisdiction to consider claims that are not presented in a timely filed Rule 29.15 motion.**

In appellant's sixth point, he argues that the motion court committed plain error by failing to grant him relief on a claim that he never presented to it (App.Br. 70). He alleges that on its own motion the Rule 29.15 court should have found, without an evidentiary hearing, that he was denied effective assistance of counsel because his trial counsel did not request an instruction on his right not to testify in the penalty phase (App.Br. 70). He appears to argue that this Court should change MAI-CR3d 308.14, Notes on Use 2, so that the instruction in question is mandatory rather than optional (App.Br. 72-74).

However, this exact same claim was recently rejected by this Court in State v. Winfield, No. SC844244, slip op. at 6 (Mo.banc December 24, 2002). There, this Court based its decision on the fact that under Rule 29.15(d) a movant waives all claims that are not raised in a timely filed pleading. Id.; State v. Johnson, 968 S.W.2d 686, 695 (Mo.banc 1998), cert. denied 525 U.S. 935 (1998); State v. Tokar, 918 S.W.2d 753, 769 (Mo.banc 1996), cert. denied 519 U.S. 933 (1996); Coates v. State, 939 S.W.2d 912, 915 (Mo.banc 1997). "An appellate court is without jurisdiction to consider an issue not raised before the motion

court.’’ State v. Mullins, 897 S.W.2d 229, 231 (Mo.App., S.D. 1995)(quoting State v. Light, 835 S.W.2d 933, 941 (Mo.App., E.D. 1992)). Thus, appellant’s sixth point on appeal must fail.

Respondent gratuitously notes that had this claim been raised in appellant’s timely filed post-conviction motion, it still would fail. It is reasonable for counsel to forgo requesting the instruction, believing that it highlights the fact that the defendant did not testify. Knese v. State, 85 S.W.3d 628, 635 (Mo.banc 2002); Ellis v. State, 773 S.W.2d 194, 199 (Mo.App., S.D. 1999). This Court has recognized this proposition by making the instruction in question optional. MAI-CR3d 308.14, Notes on Use 2. Additionally, appellant does not contend that the motion court erred by refusing to grant him an evidentiary hearing on this claim and does not request the opportunity to prove that a reasonable strategic decision was not involved. See Clark v. State, 30 S.W.3d 879, 883 (Mo.App., S.D. 2000). Moreover, he cannot prove Strickland prejudice from the absence of this optional instruction. See State v. Winfield, *supra* at 6-7; Clemmons v. State, 785 S.W.2d 524, 531 (Mo.banc 1990), cert. denied 498 U.S. 882 (1990).

## VII.

**The motion court did not clearly err by failing to appoint new counsel and allow them to file additional pleadings before reaching the merits of appellant's claims based on alleged ineffective assistance of post-conviction counsel for not pleading a claim of ineffective assistance of trial counsel in the penalty phase because claims of ineffective assistance of post-conviction counsel are categorically unreviewable in that there is no right to effective assistance of post-conviction counsel.**

Appellant alleges that the motion court clearly erred by failing to find that appellant was abandoned by his post-conviction counsel and by then failing to appoint new counsel, pursuant to Luleff v. State, 807 S.W.2d 485 (Mo.banc 1991), before reaching the merits of appellant's claims (App.Br. 76, 79). He argues that appointment of new post-conviction counsel and the filing of additional pleadings was necessary because his post-conviction counsel were ineffective in that they failed to plead that appellant was denied effective assistance of trial counsel in the penalty phase on the ground that his trial counsel did not request a jury instruction on appellant's right not to testify (App.Br. 76).

However, there is no constitutional right to counsel in a post-conviction proceeding. State v. Hunter, 840 S.W.2d 850, 871 (Mo.banc 1992), cert. denied 509 U.S. 926 (1993); Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2566, 115 L.Ed.2d 640 (1991). Consequently, a post-conviction movant has no right to effective assistance of counsel. State v. Hunter, supra at 871. For this reason, to the extent that appellant claims his post-conviction counsel was ineffective, such a claim is "categorically unreviewable," Id.; State v. Ervin, 835

S.W.2d905, 928-29 (Mo.banc 1992), cert. denied 507 U.S. 954 (1993); Pollard v. State, 807 S.W.2d 498, 502 (Mo.banc 1991), cert. denied 502 U.S. 943 (1991), and is not a cognizable claim on appeal. See State v. Parker, 886 S.W.2d 908, 933 (Mo.banc 1994), cert. denied 514 U.S. 1098 (1995); Wright v. State, 14 S.W.3d 612, 613 (Mo.App., E.D. 1999). Therefore, appellant's claim that his post-conviction counsel were ineffective is without merit and should be denied.

With respect to his claim of abandonment, which is just raised in the argument portion of appellant's brief, appellant also fails to assert grounds for relief (App.Br. 77). As stated above, Missouri courts do not recognize a claim of ineffective assistance of post-conviction counsel, and the appellate courts will not broaden the scope of the abandonment concept to include perceived ineffectiveness of motion counsel. State v. Hope, 954 S.W.2d 537,545 (Mo.banc 1997). Abandonment occurs when (1) post-conviction counsel takes no action on a movant's behalf and as such the record shows that the movant is deprived of a meaningful review of his claims, or (2) when post-conviction counsel is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner. Moore v. State, 934 S.W.2d 289, 291 (Mo.banc 1996); Luleff v. State, supra at 497-498; Sanders v. State, 807 S.W.2d 493, 494-495 (Mo.banc 1991). Here, a claim of abandonment is not applicable to appellant's situation. As the above discussion shows, there are only two ways for abandonment to occur. Appellant is not raising either of these two in his brief on appeal.

Appellant urges this Court to adopt a new avenue for showing abandonment by counsel: that of "materially incomplete action" (App.Br. 79). However, this Court has recently rejected

an identical claim in State v. Winfield, No. SCSC84244, slip op. at 10 (Mo.banc December 24, 2002), and stated that “it will not expand the scope of abandonment beyond the aforementioned two-part criteria. See State v. Ervin, 835 S.W.2d 905, 928-29 (Mo.banc 1992).”

Appellant also urges this Court to adopt the proposition that an appeal arising from a post-conviction relief motion is a “first appeal of right,” thus entitling him to the Sixth Amendment right to effective assistance of counsel (App.Br. 80). This claim, however, has been soundly rejected by this Court, the Eighth Circuit Court of Appeals as well as the United States District Court for the Eastern District of Missouri. State v. Winfield, *supra* at 10; Nolan v. Armontrout, 973 F.2d 615, 617 (8<sup>th</sup>Cir. 1992); Burns v. Gammon, 173 F.3d 1089,1092 (8<sup>th</sup>Cir. 1999); Roberts v. Bowersox, 61 F.Supp. 896, 916 (E.D., Mo.1999).

In sum, appellant’s claim that his post-conviction counsel were ineffective for failing to plead certain issues in the post-conviction relief motion is a claim which is not cognizable in Missouri courts. Nor does appellant’s case fall within the recognized acts which constitute abandonment by post-conviction counsel. Thus, appellant’s seventh point on appeal must be denied.

**CONCLUSION**

In view of the foregoing, the respondent respectfully requests this Court to affirm the denial of appellant's Rule 29.15 motion.

Respectfully submitted,

**JEREMIAH W. (JAY) NIXON**  
Attorney General

**BRECK K. BURGESS**  
Assistant Attorney General  
Missouri Bar No. 34567

Post Office Box 899  
Jefferson City, Missouri 65102-0899  
(573) 751-3321  
*Attorneys for Respondent*

**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 \_\_\_\_\_ 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 January, 2003, to:

Janet Thompson  
Office of State Public Defender  
3402 Buttonwood  
Columbia, Missouri 65201  
(573) 882-9855  
*Attorney for Appellant*

**JEREMIAH W. (JAY) NIXON**  
Attorney General

**BRECK K. BURGESS**  
Assistant Attorney General  
Missouri Bar No. 34567

Post Office Box 899  
Jefferson City, Missouri 65102-0899  
(573) 751-3321  
*Attorneys for Respondent*