

No. SC86095

**IN THE
SUPREME COURT OF MISSOURI**

MARCELLUS WILLIAMS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**APPEAL FROM ST. LOUIS COUNTY CIRCUIT COURT
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE EMMETT M. O'BRIEN, JUDGE**

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

JURISDICTIONAL STATEMENT 10

STATEMENT OF FACTS 11

STANDARD of REVIEW 22

ARGUMENT 27

 I. (Prosecutorial Misconduct) 27

 A. The record shows that the State complied with all
 discovery requests and did not withhold documents
 or information from defense counsel 28

 B. Appellant’s post-conviction motion does not allege
 facts, but only conclusions, that the State sought to
 manufacture trial testimony 32

 C. The State did not possess any of Mr. Cole’s or Ms.
 Asaro’s personal records containing “impeaching
 information” that had not already been turned over to
 the defense 33

 D. The motion court’s judgment overruling these claims of
 prosecutorial misconduct was not clearly erroneous35

 II. (Cole Impeachment Evidence) 42

 A. The alleged testimony of Mr. Cole’s family members 42

B. Mr. Cole’s drug, mental health, and psychiatric records	50
III. (Asaro Impeachment Evidence)	57
A. Mr. Hopson’s and Ms. Bailey’s impeachment testimony	57
B. The impeachment testimony of Ms. Asaro’s mother	59
C. Impeachment testimony from Appellant’s family members regarding Appellant’s car	62
D. Allegations regarding the testing of Ms. Asaro’s hair, blood, and fiber evidence	63
V. (Continuance)	74
A. The record regarding Appellant’s continuance motion	74
B. Appellate counsel was not ineffective for deciding not to pursue the continuance issue on appeal	77
VI. (Limiting Instruction)	80
A. The escape evidence presented at trial	80
B. Trial counsel were not ineffective in not requesting a limiting instruction	82
VII. (Mitigation Evidence)	87
A. Penalty phase mitigation theory and evidence	87
B. The failure to present evidence of Appellant’s horrendous childhood was not ineffective assistance,	

but constituted a strategically reasonable choice . . .	91
VIII. (Indictment)	94
IX. (Execution-Impact Evidence)	101
X. (Constitutionality of Lethal Injection)	106
XI. (“Conflict of Interest”)	109
XII. (Right to Testify)	112
A. The record concerning Appellant’s testifying at trial	112
B. The motion court did not clearly err in finding that trial	
counsel advised Appellant about the right to testify	
and did not fail to allow him to do so	114
C. Appellant’s failure to testify during the penalty phase	
was not prejudicial	116
XIII. (Rejection of Post-Conviction Counsel)	123
CONCLUSION	130
CERTIFICATE OF SERVICE AND COMPLIANCE	131

TABLE OF AUTHORITIES

Cases

<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998)	98
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	97
<i>Barnett v. State</i> , 103 S.W.3d 765 (Mo. banc 2003)	22, 23, 85
<i>Bittick v. State</i> , 105 S.W.3d 498 (Mo. App. W.D. 2003)	128
<i>Black v. State</i> , 151 S.W.3d 49 (Mo. banc 2004)	49
<i>Blair v. Armontrout</i> , 916 F.2d 1310 (8 th Cir. 1990)	98
<i>Blakely v. Washington</i> , 124 S. Ct. 2531 (2004)	95-97
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	69
<i>Bullard v. State</i> , 853 S.W.2d 921 (Mo. banc 1993)	126
<i>Burgin v. State</i> , 847 S.W.2d 836 (Mo. App. W.D. 1992)	40
<i>Burns v. State</i> , 699 So.2d 646 (Fla. 1997)	104
<i>Camillo v. State</i> , 757 S.W.2d 234 (Mo. App. W.D. 1988)	77
<i>Commonwealth v. Harris</i> , 817 A.2d 1033 (Pa. 2002)	104
<i>Crews v. State</i> , 7 S.W.3d 563 (Mo. App. E.D. 1999)	72
<i>Fuller v. State</i> , 827 S.W.2d 919 (Tex. Cr. App. 1992)	104
<i>Hall v. State</i> , 16 S.W.3d 582 (Mo. banc 2000)	25
<i>Hartman v. Lee</i> , 283 F.3d 190 (4 th Cir. 2002)	98
<i>Hayes v. State</i> , 711 S.W.2d 876 (Mo. banc 1986)	40, 41
<i>Hutchison v. State</i> , 150 S.W.3d 292 (Mo. banc 2004)	44, 58

<i>Jones v. Barnes</i> , 463 U.S. 745 (1983)	77
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	102
<i>Mallett v. State</i> , 769 S.W.2d 77 (Mo. banc 1989)	77
<i>Morrow v. State</i> , 21 S.W.3d 819 (Mo. banc 2000) 22-24, 45, 83, 91, 107	
<i>Moss v. State</i> , 10 S.W.3d 508 (Mo. banc 2000)	77
<i>Murphy v. State</i> , 873 S.W.2d 231 (Mo. banc 1994)	108
<i>People v. Sanders</i> , 905 P.2d 420 (Cal. 1995)	104
<i>Reuscher v. State</i> , 887 S.W.2d 588 (Mo. banc 1994)	77
<i>Ringo v. State</i> , 120 S.W.3d 743 (Mo. banc 2003)	23, 26
<i>Rousan v. State</i> , 48 S.W.3d 576 (Mo. banc 2001)	44
<i>Sattazahn v. Pennsylvania</i> , 123 S.Ct. 732 (2003)	99, 100
<i>Sidebottom v. State</i> , 781 S.W.2d 791 (Mo. banc 1989)	23
<i>Smulls v. State</i> , 71 S.W.3d 138 (Mo. banc 2002)	23, 95
<i>State ex rel. C.J.V. v. Jamison</i> , 973 S.W.2d 183 (Mo. App. E.D. 1998) ...	71
<i>State ex rel. Haley v. Groose</i> , 873 S.W.2d 221 (Mo. banc 1994)	108
<i>State v. Brooks</i> , 960 S.W.2d 479 (Mo. banc 1997) ...	23, 24, 38, 39, 70
<i>State v. Brown</i> , 902 S.W.2d 278 (Mo. banc 1995)	78
<i>State v. Bucklew</i> , 973 S.W.2d 83 (Mo. banc 1998)	71
<i>State v. Carter</i> , 955 S.W.2d 548 (Mo. banc 1997)	40
<i>State v. Chambers</i> , 891 S.W.2d 93 (Mo. banc 1994)	46
<i>State v. Chaney</i> , 967 S.W.2d 47 (Mo. banc 1998)	65, 72

<i>State v. Clemons</i> , 946 S.W.2d 206 (Mo. banc 1997)	25
<i>State v. Cole</i> , 71 S.W.3d 163 (Mo. banc 2002)	94, 95
<i>State v. Edwards</i> , 116 S.W.3d 511 (Mo. banc 2003)	32, 33, 94
<i>State v. Edwards</i> , 983 S.W.2d 520 (Mo. banc 1999)	77, 103
<i>State v. Feltrop</i> , 803 S.W.2d 1 (Mo. banc 1991)	52
<i>State v. Ferguson</i> , 20 S.W.3d 485 (Mo. banc 2000)	23, 44, 45, 65, 70, 72
<i>State v. Gilbert</i> , 103 S.W.3d 743 (Mo. banc 2003)	94
<i>State v. Glass</i> , 136 S.W.3d 496 (Mo. banc 2004)	94
<i>State v. Gollaher</i> , 905 S.W.2d 542 (Mo. App. E.D. 1995)	44
<i>State v. Goodwin</i> , 65 S.W.3d 17 (Mo. App. S.D. 2001)	52, 53
<i>State v. Harger</i> , 804 S.W.2d 35 (Mo. App. E.D. 1991)	54
<i>State v. Harris</i> , 870 S.W.2d 798 (Mo. banc 1994)	24
<i>State v. Kinder</i> , 942 S.W.2d 313 (Mo. banc 1996)	78
<i>State v. Kirk</i> , 918 S.W.2d 307 (Mo. App. S.D. 1996)	40
<i>State v. Kreutzer</i> , 928 S.W.2d 854 (Mo. banc 1996)	126
<i>State v. Loftin</i> , 68 A.2d 677 (N.J. 1996)	104
<i>State v. Long</i> , 140 S.W.3d 27 (Mo. banc 2004)	46, 47
<i>State v. Newton</i> , 925 S.W.2d 468 (Mo. App. E.D. 1996)	55
<i>State v. Newton</i> , 963 S.W.2d 295 (Mo. App. E.D. 1998)	55
<i>State v. Nolan</i> , 418 S.W.2d 51 (Mo. 1967)	99
<i>State v. Parker</i> , 886 S.W.2d 908 (Mo. banc 1994)	110

<i>State v. Phillips</i> , 940 S.W.2d 512 (Mo. banc 1997)	41, 44
<i>State v. Redman</i> , 916 S.W.2d 787 (Mo. banc 1996)	39, 110
<i>State v. Robinson</i> , 835 S.W.2d 303 (Mo. banc 1992)	52
<i>State v. Roll</i> , 942 S.W.2d 370 (Mo. banc 1997)	110, 111
<i>State v. Seiter</i> , 949 S.W.2d 218 (Mo. App. E.D. 1997)	52-54
<i>State v. Smith</i> , 32 S.W.3d 532 (Mo. banc 2000)	102
<i>State v. Stenson</i> , 940 P.2d 1239 (Wash. 1997)	104
<i>State v. Stevens</i> , 879 P.2d 162 (Or. 1994)	104, 105
<i>State v. Stewart</i> , 18 S.W.3d 75 (Mo. App. E.D. 2000)	71
<i>State v. Strong</i> , 142 S.W.3d 702 (Mo. banc 2004)	94
<i>State v. Suter</i> , 931 S.W.2d 856 (Mo.App. W.D. 1996)	39
<i>State v. Taylor</i> , 134 S.W.3d 21 (Mo. banc 2004)	51
<i>State v. Taylor</i> , 944 S.W.2d 925 (Mo. banc 1997)	69, 102
<i>State v. Tisius</i> , 92 S.W.3d 751 (Mo. banc 2002)	94, 95
<i>State v. Twenter</i> , 818 S.W.2d 628 (Mo. banc 1991)	44, 46, 122
<i>State v. Weaver</i> , 912 S.W.2d 499 (Mo. banc 1995)	39, 110
<i>State v. White</i> , 790 S.W.2d 467 (Mo. App. E.D. 1990)	40
<i>State v. Williams</i> , 97 S.W.3d 462 (Mo. banc 2003) ...	21, 64, 65, 82, 92
<i>State v. Wolfe</i> , 13 S.W.3d 248 (Mo. banc 2000)	45
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	22, 23
<i>White v. State</i> , 939 S.W.2d 887 (Mo. banc 1997)	24

<i>Wilcher v. State</i> , 697 So.2d 1087 (Miss. 1997)	104
<i>Wilson v. State</i> , 813 S.W.2d 833 (Mo. banc 1991)	22
<i>Winfield v. State</i> , 93 S.W.2d 732 (Mo. banc 2002)	25, 84, 118, 128

Constitutions, Statutes, Rules, and Instructions

MAI-Cr 3d 310.12	80, 82
MO. CONST. art. V, § 3	10
Rule 25.03	69
Rule 25.04	69
Rule 29.15	22
Rule 29.16	125
Rule 58.01	71
Section 546.740, RSMo 2000	108
Section 559.125, RSMo 2000	71
Section 565.005.1, RSMo 2000	94
Section 565.020, RSMo 1994	10
Section 569.020, RSMo 1994	10
Section 569.160, RSMo 1994	10
Section 571.015, RSMo 1994	10

JURISDICTIONAL STATEMENT

This appeal is from a St. Louis County Circuit Court judgment overruling Appellant's Rule 29.15 motion seeking to vacate and set aside Appellant's convictions and sentences involving the August 10, 1998 robbery and murder of Lisha Gayle in her University City home. Appellant was convicted of first-degree murder (§ 565.020, RSMo 1994), first-degree burglary (§ 569.160, RSMo 1994), first-degree robbery (§ 569.020, RSMo 1994), and two counts of armed criminal action (§ 571.015, RSMo 1994). He was sentenced to death on the murder conviction and received consecutive sentences of thirty years on the burglary conviction, life imprisonment on the robbery conviction, and two thirty-year sentences on the armed criminal action convictions. Because this case involves a sentence of death, this Court has exclusive appellate jurisdiction over this appeal. MO. CONST. art. V, § 3.

STATEMENT OF FACTS

Appellant was charged in St. Louis County Circuit Court with one count of first-degree murder, one count of first-degree burglary, one count of first-degree robbery, and two counts of armed criminal action for the stabbing death of Felicia Gayle in her University City home on August 11, 1998. (L.F. 86-89).¹ Appellant was also charged as a persistent offender. (L.F. 88-89). Appellant's jury trial on these charges began on June 4, 2001, in St. Louis County Circuit Court with Judge Emmett M. O'Brien presiding. (L.F. 9). Viewed in the light most favorable to the jury's verdict, the evidence at trial showed that:

On August 11, 1998, at approximately 8:30 a.m., Appellant dropped off his girlfriend, Laura Asaro, at her mother's house. (Tr. 1841). Appellant, who was driving a dark blue Buick LeSabre, then

¹“L.F.” and “Tr.” refer to the legal file and transcript filed in Appellant's direct appeal before this Court in case number SC83934. “PCR L.F.” and “PCR Tr.” refer to the legal file and transcript filed in this post-conviction appeal. “PCR Mot. Tr.” refers to the hearing transcript on Appellant's motion to compel heard by the motion court in this case.

drove to a bus stop where he caught a bus that took him to University City. (Tr. 1841, 2392). Appellant, who was broke and needed money, got off the bus and began looking for a house to break into. (Tr. 2391-92). He came upon Felicia Gayle's house, which had a holly tree in the front that shielded the front door from the view of the neighbors. (Tr. 1705, 1730, 1733, 2393, 2430-31).

Ms. Gayle, known to her family and friends as Lisha, had also been up early that morning jogging. (Tr. 1732, 2042-43). After stopping by her next door neighbor's house, she went home and showered in the upstairs bathroom. (Tr. 2042-44).

Meanwhile, Appellant knocked on the doors to Ms. Gayle's house, and after no one answered, he knocked out a small window pane near the front door with a "chip" hammer. (Tr. 2394, State's Exhibits 22 and 24). Appellant, who was wearing gloves, reached his hand through the broken window, unlocked the door, and went inside. (Tr. 1885, 2394). As Appellant reached the second floor, he heard the water running from the shower. (Tr. 1850, 2394).

Although he could have left the house, Appellant stayed because he had not finished looking for items to steal. (Tr. 1850). Appellant went back downstairs, but the squeaky floors had given him away; Ms. Gayle, who was now out of the shower, called downstairs asking

if anyone was there. (Tr. 1775, 2395).

Appellant armed himself with a thirteen-inch butcher knife he found in a kitchen drawer and waited at the bottom of the stairs. (Tr. 1850, 2115, 2396, 2413; State's Exhibit 5). Ms. Gayle, clad only in the purple shirt that she wore after getting out of the shower, continued calling downstairs asking, "Who is down there?" (Tr. 1718, 1851, 2397). She gradually crept down the steps repeatedly asking if anyone was there; Appellant lay in wait at the bottom of the stairs. (Tr. 1851, 2397-98). As Ms. Gayle reached a landing on the stairs, Appellant saw her in a mirror and figured that she could see him also. (Tr. 2397-98). He then decided that it was time to strike. (Tr. 1882, 2398).

Appellant's first swing with the butcher knife struck Ms. Gayle in the right forearm tearing off a large piece of flesh and exposing the bone. (Tr. 2152-54, 2398, 2413, State's Exhibit 74). But Appellant did not stop there. He repeatedly stabbed and cut Ms. Gayle with the butcher knife as she struggled with him. (Tr. 2398, 2454). As Appellant slashed and stabbed her, Ms. Gayle cried out for her mother. (Tr. 2398-99). After Ms. Gayle fell to the floor, but while she was still alive, Appellant thrust the butcher knife up to the hilt into Ms. Gayle's neck. (Tr. 1851, 2398-99; State's Exhibits 23, 301,

303). Appellant then twisted the knife until he heard a bone pop, bending the blade in the process. (Tr. 2399, 1920, 2261-62).

Appellant left the knife in Ms. Gayle's neck, and she convulsed for a few moments before she stopped moving. (Tr. 1920, 2399; State's Exhibits 23, 301, 303).

An autopsy revealed that Appellant stabbed or cut Ms. Gayle a total of 43 times. (Tr. 2162). She suffered sixteen stab wounds, seven of which were fatal in and of themselves. (Tr. 2163).

Appellant stabbed Ms. Gayle in the neck, face, and chest. (Tr. 2115). One neck wound cut her carotid artery, while another perforated Ms. Gayle's larynx, causing her to choke on her own blood. (Tr. 2123; State's Exhibit 76). Appellant's final stab wound to left side of Ms. Gayle's neck severed her carotid artery and fractured her vertebral column. (Tr. 2121-22; State's Exhibit 76).

One chest wound went into Ms. Gayle's chest wall and through her heart. (Tr. 2127-28; State's Exhibit 76). Another went through one side of her breast and out the bottom of it. (Tr. 2128-29; State's Exhibit 77). Another chest wound went through her left breast and into her stomach. (Tr. 2134, State's Exhibit 77). Yet another wound came from the back of her chest, through her right lung, and penetrated her heart. (Tr. 2135-37; State's Exhibit 75). She suffered

two other chest wounds, one of which nearly penetrated her heart and one that went through her abdominal wall. (Tr. 2138-41; State's Exhibits 75, 82). Ms. Gayle also suffered a stab wound in the right temple that nearly went into her eye tissue, another stab wound to her right thigh, and three stab wounds to her arms. (Tr. 2117; State's Exhibit 303).

In addition to the stab wounds, Ms. Gayle suffered numerous defensive cut wounds to both of her hands and upper arms. (Tr. 2116, 2158). She also suffered cut wounds to her nipple, chin, face, knee, and thigh. (Tr. 215-56).

Ms. Gayle was alive when she suffered these painful cut and stab wounds. (Tr. 2163, 2167). It took several minutes for her to bleed to death after receiving these wounds. (Tr. 2163-64).

Only after he finished attacking Ms. Gayle did Appellant decide that it was time for him to leave. (Tr. 2399-400). Appellant went upstairs, washed up in the bathroom, and put on a sweater from a drawer to cover up the blood he had on his shirt. (Tr. 2400). Appellant also had blood on his boots and on his backpack. (Tr. 1843, 2400). Appellant then grabbed Ms. Gayle's purse and an Apple laptop computer and carrying case belonging to Ms. Gayle's husband, putting both items in his backpack. (Tr. 2395, 2400).

Appellant had to move Ms. Gayle's body so he could leave out of the front door. (Tr. 2401).

Appellant caught a bus back to his car and then went to pick up his girlfriend, Ms. Asaro. (Tr. 1842, 2401). Ms. Asaro noticed that Appellant was acting anxiously and that he wanted to leave. (Tr. 1842). She also thought it was strange that he was wearing a long-sleeved jacket in the middle of August, which was a different shirt than the one he was wearing when he dropped her off earlier that day. (Tr. 1842-43). After Ms. Asaro made Appellant take the jacket off, she saw that he had blood on his shirt. (Tr. 1843). Appellant claimed that he had been in a fight. (Tr. 1843). Ms. Asaro also noticed the laptop computer in the car. (Tr. 1843-44). Later that day, Appellant put the bloody clothes, which were new, in his backpack and threw all of it down a sewer claiming that he did not want them anymore. (Tr. 1844-45).

The next day, while Ms. Asaro was looking in the trunk of the car, she saw Ms. Gayle's purse. (Tr. 1847). She opened it and saw Ms. Gayle's Missouri State identification card. (Tr. 1847, 1874; State's Exhibit 135). Ms. Gayle carried the identification card in her purse and kept her driver's license in her car's glove compartment. (Tr. 1779-82). Ms. Asaro also saw that the purse contained a black

coin purse and several grocery coupons. (Tr. 1847, 1881, 1976). Ms. Gayle kept a coin purse and carried coupons inside her purse. (Tr. 1777-78, 1782). Believing that Appellant was cheating on her, Ms. Asaro demanded that Appellant tell her whose purse it was. (Tr. 1848).

Appellant told Ms. Asaro that it was not what she thought and that the purse had belonged to a lady that he had killed. (Tr. 1848). Appellant then told Ms. Asaro how he broke into Lisha Gayle's house and killed her. (Tr. 1850-52). Appellant asked Ms. Asaro if she wanted the coupons or the purse and when she refused to take them he threw them away. (Tr. 1881).

Appellant then grabbed Ms. Asaro by the throat and began choking her; he warned her not to tell or he would kill Ms. Asaro's children and her mother. (Tr. 1853). Ms. Asaro saw Ms. Gayle's picture on the news and recognized her as the same person pictured on the identification card. (Tr. 1856). Appellant would periodically ask Ms. Asaro if she was thinking about the murder and asked her not to tell anyone about it. (Tr. 1859).

A day or two after the murder, Appellant took the laptop to a family friend and neighbor, Glenn Roberts, who lived a few doors away from Appellant's grandfather's house. (Tr. 1860-61, 1946,

1999-2000). Appellant exchanged the laptop for some crack cocaine.² (Tr. 1861). After the murder, Ms. Asaro was looking in the glove compartment of the Buick LeSabre and discovered a calculator and Post-Dispatch ruler. (Tr. 1865-66; State's Exhibits 4 and 5). Both of these items were memorabilia from Ms. Gayle's employment as a reporter for the Post-Dispatch that she carried in her purse. (Tr. 1770-71). The Post-Dispatch ruler measured columns and print sizes. (Tr. 1774; State's Exhibit 5).

On August 31, 1998, Appellant was arrested on unrelated charges and incarcerated in the St. Louis City Workhouse. (Tr. 1886, 2355). While he was there, Appellant wrote Ms. Asaro a letter expressing his hope that she would not tell about the "U-City incident." (Tr. 1887).

From April until June 1999, Appellant and Henry Cole lived in the same dormitory at the St. Louis City Workhouse. (Tr. 2363-65, 2382). Appellant and Mr. Cole knew each other because Mr. Cole's sister had a daughter named Coco, whose father was Appellant's uncle—the brother of Appellant's mother. (Tr. 2385-86). Mr. Cole

²At trial, Glenn Roberts testified that he gave Appellant \$100 or \$150 for the laptop and carry bag. (Tr. 2001).

was Coco's uncle and Appellant was her first cousin. (Tr. 2385-86). Mr. Cole, whom Appellant knew as "Junior," and Appellant became friendly and talked everyday. (Tr. 2387).

One evening in May 1999, Appellant and Mr. Cole saw a television news report about Ms. Gayle's murder remaining unsolved and that a reward of \$10,000 had been offered. (Tr. 2388-89). About thirty minutes after that broadcast, Appellant approached Mr. Cole and told him that he had "pulled that" and that it was "his caper." (Tr. 2390). Mr. Cole was shocked and asked Appellant if he had really committed the crime. (Tr. 2391). Appellant replied, "Yeah, I laid that down; I did that." (Tr. 2391). Over the next few weeks Mr. Cole and Appellant had approximately four conversations while sitting on Mr. Cole's bunk, during which Appellant told Mr. Cole about the details of the crime. (Tr. 2391-402). After their second conversation, Mr. Cole secretly kept notes about what Appellant had told him. (Tr. 2403, 2420).

During these conversations, Appellant, in referring to his attack on Ms. Gayle, told Mr. Cole that she fought like a "mother-fucker," and that "the little bitch was fighting her ass off." (Tr. 2398, 2454).

After Mr. Cole was released from the workhouse on June 4, 1999, he approached the University City police and told them about

Appellant's involvement in Ms. Gayle's murder. (Tr. 2419-21). During these conversations, Mr. Cole reported details that had never been reported in the press. (Tr. 2464-65, 2830, 2833, 2836, 2844-47). On November 17, 1999, the University City police approached Ms. Asaro, who finally told them that Appellant had admitted to her that he had committed the murder. (Tr. 1909-11).

In January 2000, after Appellant had been indicted for Ms. Gayle's murder, Appellant attempted to escape from the St. Louis City Workhouse, attacking and injuring a correctional officer in the process. (Tr. 2618, 2673-75; State's Exhibits 247 and 248).

On November 18, 1999, the police searched Appellant's Buick LeSabre and found the Post-Dispatch ruler and calculator in the glove compartment. (Tr. 2275-77). The police also recovered the laptop computer belonging to Ms. Gayle's husband from Glenn Roberts. (Tr. 2713-14).

During the guilt phase, Appellant presented evidence from his family members that they had seen Ms. Asaro in the trunk of the Buick and in possession of a laptop computer after the date that Appellant was incarcerated in the workhouse. (Tr. 2777, 2805). Appellant also presented the testimony of a Post-Dispatch employee concerning the details of Ms. Gayle's murder that had been reported

in that newspaper. (Tr. 2820-54). During cross-examination, however, this employee testified that several details, which Ms. Asaro and Mr. Cole had previously reported to police, had never been reported in the newspaper. (Tr. 2830-54).

Appellant did not testify in his own behalf. (Tr. 2989-90). The jury found Appellant guilty on all charges. (Tr. 3073-77).

During the penalty phase, the State presented evidence detailing three of Appellant's previous convictions. (Tr. 3107-67, 3184-91). The State also presented victim-impact testimony from Ms. Gayle's friends and family. (Tr. 3201-78). Appellant presented testimony from several of his friends and family members, including his brothers, mother, and children. (Tr. 3301-434).

The jury found each statutory aggravating circumstances submitted to them, and recommended a sentence of death, which the trial court later imposed. (L.F. 537;Tr. 3525). The trial court also sentenced Appellant to consecutive sentences of life imprisonment for the robbery conviction and thirty years imprisonment each for the burglary and armed criminal action convictions. (Tr. 3525-26).

Appellant appealed to this Court, which affirmed Appellant's convictions and sentences in a January 14, 2003 opinion. *See State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003).

Appellant then filed a pro se Rule 29.15 motion with St. Louis County Circuit Court, (PCR L.F. 6-32), and an amended motion was later filed by appointed counsel, (PCR L.F. 69-353). The motion court denied Appellant's request for an evidentiary hearing on all claims except for the one (claim 8(q)) in which Appellant alleged that his trial counsel was ineffective for failing to allow Appellant to testify during the penalty phase. (PCR L.F. 483). The motion court later entered its findings, conclusions, and judgment overruling Appellant's Rule 29.15 motion. (PCR L.F. 776-816).

STANDARD of REVIEW

Appellate review of a judgment overruling a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law issued by the motion court are “clearly erroneous.” *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *see also Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003); Rule 29.15(k). Appellate review in post-conviction cases is not de novo; rather, the findings of fact and conclusions of law are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). “Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made.” *Morrow*, 21 S.W.3d at 822.

To establish ineffective assistance of counsel, the movant must show both (1) that his counsel’s performance failed to conform to the degree of skill, care, and diligence of a reasonably competent attorney under similar circumstances; and, (2) that the movant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668 (1984); *Barnett*; 103 S.W.3d at 768. To prevail on a claim of ineffective assistance of counsel, the movant must show that counsel’s performance was so deficient as to be unreasonable under the circumstances and that counsel’s errors were so serious as to deprive

the movant of a fair trial, the result of which is unreliable. *See Strickland*, 466 U.S. at 687-88. “To demonstrate prejudice, a movant must show that, but for counsel’s poor performance, there is a reasonable probability that the outcome of the court proceeding would have been different.” *Id.* In proving that counsel’s performance did not conform to this standard, the movant must rebut the strong presumption that counsel was competent and that any challenged action was a part of counsel’s sound trial strategy. *Barnett*, 103 S.W.3d at 769; *Sidebottom v. State*, 781 S.W.2d 791, 796 (Mo. banc 1989). The motion court is not required to address both components of the inquiry if the movant makes an insufficient showing on one. *Strickland*, 466 U.S. at 697.

A movant, even in capital cases, is not automatically entitled to an evidentiary hearing on claims raised in a Rule 29.15 motion. An evidentiary hearing is required only if the motion: (1) alleges facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the records and files in the case; and (3) the matters complained of must have resulted in prejudice. *Ringo v. State*, 120 S.W.3d 743, 745 (Mo. banc 2003); *Barnett*, 103 S.W.3d at 769; *Smulls v. State*, 71 S.W.3d 138, 155 (Mo. banc 2002); *Morrow*, 21 S.W.3d at 822-23; *State v. Ferguson*, 20 S.W.3d 485, 503 (Mo. banc

2000); *State v. Brooks*, 960 S.W.2d 479, 497 (Mo. banc 1997).

The pleading standard that must be met to warrant an evidentiary hearing is controlled by the fact that Missouri is a fact pleading state. *State v. Harris*, 870 S.W.2d 798, 815 (Mo. banc 1994). “A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment.” *White v. State*, 939 S.W.2d 887, 893 (Mo. banc 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*, 21 S.W.3d at 822.

These requirements are designed “to provide the motion court with allegations sufficient to enable [it] to decide whether relief is warranted.” *Id.* at 824. When “the pleadings consist only of bare assertions and conclusions, a motion court cannot meaningfully apply the *Strickland* standard for ineffective assistance of counsel.” *Id.* 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.” *White*, 939 S.W.2d at 893. These “pleading requirements are not merely technicalities.” *Morrow*, 21 S.W.3d at 824.

Appellant cannot use the evidentiary hearing as a vehicle to

adduce facts not alleged in his post-conviction motion. *See Brooks*, 960 S.W.2d at 497 (“[A]n evidentiary hearing is not a means by which to provide [a] movant with an opportunity to produce facts not alleged in the motion.”).

Appellant cites several St. Louis County post-conviction cases to support his complaint that evidentiary hearings in Rule 29.15 capital cases are routinely denied by the St. Louis County Circuit Court. But in *affirming* the motion court’s judgment overruling the movants’ post-conviction motions without an evidentiary hearing in *Barnett*, *Smulls*, *Morrow*, *Ferguson*, and *Brooks*, this Court reinforced its adherence to the rule that allows such claims to be adjudicated without a hearing when the allegations in the motion do not meet the test outlined above.³ In addition, the motion courts in *Smulls* and Appellant’s case did conduct evidentiary hearings on the allegations meeting this test. Appellant also overlooks other cases in which the St. Louis County Circuit Court held evidentiary hearings on some or all of capital defendants’ Rule 29.15 claims. *See Winfield v. State*, 93 S.W.2d 732, 735 (Mo. banc 2002); *Hall v. State*, 16 S.W.3d 582, 584

³Appellant also cites to *Goodwin v. State*, Case No. SC86278, but that case has yet to be briefed.

(Mo. banc 2000); *State v. Clemons*, 946 S.W.2d 206, 221, 224 (Mo. banc 1997). Finally, Appellant's assertion that evidentiary hearings are routinely granted in all other circuit courts (except for the few instances Appellant notes from Jackson County) is refuted by this Court's opinion in *Ringo*, in which the Boone County Circuit Court denied an evidentiary hearing on three of five post-conviction claims. *See Ringo*, 120 S.W.3d at 744.

ARGUMENT

I. (Prosecutorial Misconduct)

The motion court's judgment overruling, without an evidentiary hearing, Appellant's post-conviction allegations of prosecutorial misconduct at trial was not clearly erroneous because those allegations were refuted by the record or included claims not cognizable in a post-conviction proceeding in that they should have been raised on direct appeal.

Claims 8(a), (b), and (c) of Appellant's amended Rule 29.15 motion concern allegations of prosecutorial misconduct. In claim 8(a), Appellant alleged that the State failed to "disclose the addresses" of witnesses Henry Cole and Laura Asaro or "to make them available to the defense team." (PCR L.F. 73). In claim 8(b), Appellant alleged that "agents of the prosecutor actively sought to manufacture testimony in their zeal to convict" Appellant. (PCR L.F. 73). Finally, in claim 8(c), Appellant alleged that the state failed to disclose "critical impeachment evidence" regarding witnesses Cole and Asaro. (PCR L.F. 74).

A. The record shows that the State complied with all discovery requests and did not withhold documents or information from defense counsel.

Appellant's trial began June 4, 2001. (L.F. 9). Over a year earlier, in March 2000, the State filed two applications to preserve the

testimony of State's witnesses Mr. Cole and Ms. Asaro by deposition because they "feared" Appellant and because neither of them had been in contact with the prosecutor or police on a "regular basis." (L.F. 40-45).

In May 2000, the prosecutor sent a letter inviting defense counsel to come to the prosecutor's office to inspect the State's files.⁴ (L.F. 54). The prosecutor also sent defense counsel a nine-page letter detailing the documents that had been served on the defense. (L.F. 71). The letter also notified the defense that Mr. Cole's and Ms. Asaro's videotaped statements were available for viewing and copying. (L.F. 71). Thus, more than one year before trial, the defense team knew that Mr. Cole and Ms. Asaro were potential witnesses.

During the March 9, 2001 hearing held on the State's applications to preserve Mr. Cole's and Ms. Asaro's testimony, the prosecutor informed the trial court that Mr. Cole had moved to New York. (Tr. 4). The prosecutor said that Mr. Cole felt threatened by Appellant's family and feared that Appellant would have him killed

⁴As explained below, the State extended the same invitation during the post-conviction case.

when he discovered that Mr. Cole had gone to police.⁵ (Tr. 4). The prosecutor told the court that he and his investigator were having a “difficult time locating [Cole] within New York.”⁶ (Tr. 3, 5). The prosecutor reported that Mr. Cole had vacillated on whether he was going to testify for the State.⁷ (Tr. 6). Finally, the prosecutor informed the court that Mr. Cole’s current address had been provided to defense counsel.⁸ (Tr. 5).

⁵This representation was confirmed by Mr. Cole’s trial testimony during which he said that he had moved to New York for his “safety” and that he had received “threats.” (Tr. 2557-58). After a bench conference, the trial court struck Mr. Cole’s testimony that he had received threats. (Tr. 2558-60).

⁶At trial, Mr. Cole testified that while the University City police had bought him a bus ticket to New York, after he arrived there he was homeless, had lived on the streets, and had no address. (Tr. 2562, 2582-83).

⁷This representation was confirmed by Mr. Cole’s testimony that he wasn’t certain whether he would show up either at his deposition or trial. (Tr. 2592-93).

⁸The record refutes Appellant’s allegation that the prosecutor lied to the court about Mr. Cole having the AIDS virus. App. Br. at

Also during this hearing, the prosecutor said that Ms. Asaro was a known prostitute and drug user. (Tr. 15). He said that Ms. Asaro was “very difficult” to locate, but that she had been found at the St. Louis City Jail, where she had been incarcerated on a failure to appear charge. (Tr. 17). Although Ms. Asaro had told the prosecutor’s investigator that she would regularly call, she had not done so and the prosecutor did not know where she was residing. (Tr. 18).

The record also supports the prosecutor’s claim that Ms. Asaro was fearful of Appellant. After Appellant admitted to Ms. Asaro that he had killed the victim, he choked Ms. Asaro until she couldn’t breathe and then threatened to blow up Ms. Asaro’s mother’s house and kill Ms. Asaro’s children and her mother if she told anyone about the murder. (Tr. 1853). Ms. Asaro testified at trial that she was afraid of Appellant.⁹ (Tr. 1859). She also testified that she was

42 The prosecutor simply reported that Mr. Cole’s social worker had said that Mr. Cole had HIV, which had developed into AIDS, and that Mr. Cole was taking prednisone because of it. (Tr. 6, 13). Mr. Cole confirmed at trial that he was HIV positive. (Tr. 2556).

⁹Ms. Asaro’s fear of Appellant was further documented during a bench conference at trial which revealed that two days before trial,

reluctant to even report the crime, much less testify against Appellant at trial. (Tr. 1905, 1909-11).

Although defense counsel complained that discovery was ordered to be closed by January 2001, he conceded on March 9, three months before trial began, that the State had served “over seven hundred pages of discovery” and had been “continuing to disclose evidence in this case.” (Tr. 21). Counsel even acknowledged receiving “new discovery” from the State just that week. (Tr. 20). In fact, during the May 25th hearing on Appellant’s motion for continuance, Appellant’s counsel stated that the prosecution “should be commended for being so thorough” in producing discovery to the defense, (Tr. 94), and that the defense had not been “sandbagged” by the State, (Tr. 98).

The prosecutor told the court that there were “no recorded statements of Mr. Cole or Ms. Asaro that I have not provided the defense.” (Tr. 33). Although the prosecutor had spoken with Mr. Cole or Ms. Asaro on the phone, there were no written or recorded statements of those conversations. (Tr. 33-34). The State had

Ms. Asaro reported that she was threatened by a man with a gun who warned her not to appear at trial. (Tr. 1875).

already provided defense counsel with Mr. Cole's and Ms. Asaro's videotaped statements to police and with police reports concerning both of them. (Tr. 12-13, 19).

On March 13, 2001, almost three months before trial, the prosecutor notified defense counsel of Ms. Asaro's address in St. Louis and Mr. Cole's address in New York. (L.F. 151). The record shows that Appellant's counsel was granted thirty days to conduct discovery before depositions to preserve Mr. Cole's and Ms. Asaro's testimony were taken in April 2001. (L.F. 188; Tr. 89). On June 1, 2001, the State provided a complete copy of both Mr. Cole's and Ms. Asaro's arrest and conviction records. (L.F. 471).

B. Appellant's post-conviction motion does not allege facts, but only conclusions, that the State sought to manufacture trial testimony.

In his amended motion, Appellant alleged that agents of the prosecutor gave John Duncan and Kimber Edwards, neither of whom testified at trial, information about Appellant's case and offered assistance on Duncan's and Edwards's criminal cases in exchange for testimony against Appellant. (PCR L.F. 73-74). Duncan was incarcerated with Appellant at the St. Louis City Workhouse, (PCR L.F. 298), and Edwards was a former correctional officer at that

institution, (PCR L.F. 303).¹⁰ Neither Mr. Duncan’s nor Mr. Edwards’s affidavits state that anyone solicited them to give false or “manufactured” testimony against Appellant. (PCR L.F. 298-304). At most, the affidavits allege only that investigators interviewed them regarding whether Appellant had made any statements to them concerning Ms. Gayle’s murder. Appellant’s motion alleges that trial counsel was ineffective for not investigating these witnesses, (PCR L.F. 74), and concludes that Appellant was prejudiced because the “fact that agents for the state were willing to manufacture evidence taints the veracity of the testimony from the State’s paid snitches,” presumably Mr. Cole and Ms. Asaro. (PCR L.F. 74).

C. The State did not possess any of Mr. Cole’s or Ms. Asaro’s personal records

¹⁰Kimber Edwards, currently an inmate at Potosi Correctional Center, (PCR L.F. 302), was sentenced to death for the contract killing of his ex-wife. *See State v. Edwards*, 116 S.W.3d 511 (Mo. banc 2003). Mr. Edwards’s bias and the credibility of his averments, especially his speculative conclusions about the University City police officer’s motive or intent, must be considered in light of the fact that it was the University City police that investigated Mr. Edwards’s involvement in the murder of his ex-wife. *Id.* at 522-24.

containing “impeaching information” that had not already been turned over to the defense.

Appellant contends that the prosecution possessed “critical impeachment evidence” contained in Mr. Cole’s and Ms. Asaro’s personal records and failed to disclose them during discovery. After filing an amended Rule 29.15 motion, Appellant’s motion counsel filed a request for production of documents. (PCR L.F. 42-47). Included in that request were various personal records relating to Mr. Cole and Ms. Asaro maintained by several different federal, state, and private entities.¹¹

¹¹For Ms. Asaro, the motion sought production of her personal records from: St. Louis Empowerment Center (mental health records); Missouri DOC; St. Louis City Workhouse; Department of Family Services; Social Security and SSI; Booneville Treatment Center for Women; and Probation and Parole. (PCR L.F. 44). For Mr. Cole, the motion sought production of his personal records from Bronx-Lebanon Hospital (mental health records); Amber Residence Hall; Dr. Perry Jenkins Hospitality House; McBurney YMCA, New York; St. Luke’s-Roosevelt Hospital; New York Department of AIDS Services; Social Security and SSI; Federal Bureau of Prisons;

In responding to Appellant's production request and motion to compel, the prosecutor stated that he had met with Appellant's counsel and investigator for over four hours and had allowed them to inspect and copy everything in the State's file concerning this case. (PCR L.F. 57-58). The prosecutor also stated that all police reports and depositions relating to Appellant's case had been disclosed and that the State had no material or information within its possession negating Appellant's guilt or mitigating the degree of the offenses or punishment. (PCR L.F. 58). Finally, the prosecutor stated that the State had no information or documentation tending to show bias or affecting the credibility or reliability of Ms. Asaro and Mr. Cole other than that which had already been disclosed, and specifically that it never had any records from the entities identified in Appellant's motion to compel. (PCR L.F. 59-60).

D. The motion court's judgment overruling these claims of prosecutorial misconduct was not clearly erroneous.

Missouri, Pennsylvania, and Michigan corrections and probation and parole; St. Louis City Workhouse; Barnes Hospital; Federal Justice System; Medicaid; and from any other entity not specifically identified. (PCR L.F. 45).

Appellant's claim that the State failed to disclose Mr. Cole's and Ms. Asaro's addresses or attempted to hide them from the defense is refuted by the record. Both witnesses' addresses were to given to defense counsel well before trial. In addition, the motion court found that both Mr. Cole and Ms. Asaro had been "thoroughly and extensively" deposed before trial:

Trial counsel deposed both Cole and Asaro thoroughly and extensively, several months before trial. Cole's deposition, taken in New York City, lasted two days. Cole was also extensively cross-examined in St. Louis prior to trial in a video-taped deposition to preserve testimony. Asaro was deposed months prior to trial. Clearly both Asaro and Cole were available to trial counsel prior to trial.

(PCR L.F. 781). Appellant also does not explain how the prosecutor's alleged failure to disclose the witnesses' addresses prejudiced him.

Appellant also contends that the prosecutor committed misconduct by having his agents give information to Mr. Duncan and Mr. Edwards and then offered assistance on their criminal cases if they testified against Appellant. Appellant then leaps to the unsupportable conclusion that this activity constituted the

“manufacture” of evidence. Appellant’s amended Rule 29.15 motion does not specifically allege what information was given to Duncan or Edwards or that they were asked to testify falsely against Appellant. (PCR L.F. 73-74). The allegation simply states, without further elaboration, that the prosecutor’s agents “sought to manufacture testimony.” (PCR L.F. 73).

Neither Mr. Duncan’s nor Mr. Edwards’s affidavits contain any allegations that the prosecutor’s agents attempted to “manufacture evidence.” Both affidavits simply allege that an investigator interviewed them and asked whether they had heard Appellant discuss the murder of Lisha Gayle. (PCR L.F. 299-304). To the extent that Edwards’s affidavit mentions false testimony, he averred that he declined to give any; his affidavit contains no allegations that he was asked to. (PCR L.F. 304). Because Appellant’s motion alleges conclusions, not facts, the motion court did not clearly err in overruling this claim without an evidentiary hearing.

To the extent that Appellant alleges his trial counsel were ineffective for not investigating these witnesses who did not testify at trial, his motion is similarly deficient. Appellant alleges no facts demonstrating how the investigation of Mr. Duncan and Mr. Edwards would have proved that the State manufactured evidence through the

testimony of Mr. Cole and Ms. Asaro. In essence, Appellant's motion alleges that if Mr. Duncan and Mr. Edwards had been investigated then Mr. Cole's and Ms. Asaro's veracity would have been tainted. These allegations constitute nothing more than conclusions that the motion court properly rejected.

The record also refutes Appellant's allegations that the State had possession of any of the alleged impeachment evidence supposedly contained in Mr. Cole's and Ms. Asaro's personal records. During a hearing regarding Appellant's request for production of documents filed in this post-conviction case, the prosecutor told the court that he never had possession of any of Mr. Cole's or Ms. Asaro's psychiatric records. (PCR Mot. Tr. 12). The prosecutor also stated that he never had any police reports or case files on Mr. Cole's and Ms. Asaro's prior convictions. (PCR Mot. Tr. 26).

"The prosecution has no obligation to disclose evidence of which the defense is already aware and which the defense can acquire." *Brooks*, 960 S.W.2d at 494. Appellant effectively concedes this point by his argument that the State had a duty to disclose records that it didn't possess. App. Br. at 49, 52. In *Brooks*, the movant made a similar claim that the State had committed a *Brady*

violation by not turning over exculpatory evidence that it had in its possession. *Brooks*, 960 S.W.2d at 500. The movant also demanded an evidentiary hearing and post-conviction discovery to determine if his claim had any merit. This Court affirmed the motion court's denial of that "speculative" claim without discovery and an evidentiary hearing:

Appellant contended in his amended motion that the state had in its possession material, exculpatory evidence that the state failed to turn over to the defense. He sought to establish a claim of violation of *Brady v. Maryland*. Appellant's claim is patently frivolous. It is entirely speculative and conclusional. There is no authority in law for the proposition that a defendant may simply make a general allegation of a *Brady* violation so as to require the motion court to grant an evidentiary hearing and to order that the state disclose its entire file so that a criminal defendant may cast about, attempting to discover whether or not a *Brady* violation may have occurred. Appellant's claim requires no further discussion.

Id. (citation omitted). This holding also answers Appellant's argument that the motion court should have allowed discovery so that Appellant could have pleaded his claims with more specificity. *See Id.*

at 497.

Appellant also suggests that the prosecutor attempted “to preclude the defense from having access” to impeaching material by filing motions in limine to prevent the defense from referring to Mr. Cole’s and Ms. Asaro’s psychiatric history or treatment. App. Br. at 44-45. Appellant does not explain how the simple filing of a motion in limine prevented him from obtaining any of these records. In any event, Respondent is unaware of any case holding that the filing a motion in limine to exclude irrelevant evidence from trial is tantamount to prosecutorial misconduct.

The motion court also correctly found that Appellant’s claims of prosecutorial misconduct were claims of trial court error outside the scope of Rule 29.15 proceedings. It is well settled that, “[p]ost-conviction motions cannot be used as a substitute for direct appeal or to obtain a second appellate review.” *State v. Redman*, 916 S.W.2d 787, 793 (Mo. banc 1996); *State v. Weaver*, 912 S.W.2d 499, 517 (Mo. banc 1995) (denying postconviction claim regarding admission of evidence because it could have been raised on direct appeal); *State v. Suter*, 931 S.W.2d 856, 871 (Mo.App. W.D. 1996) (where postconviction claim could have been raised on direct appeal but was not, claim was waived); *State v. Kirk*, 918 S.W.2d 307, 310

(Mo. App. S.D. 1996) (claim for postconviction relief denied because claim could have been brought on direct appeal).

In *State v. Carter*, 955 S.W.2d 548 (Mo. banc 1997), the movant claimed in his motion for postconviction relief that the prosecutor had “failed to disclose evidence . . . in violation of his discovery request.” *Id.* at 555. This Court held that, “the state’s alleged failure to comply with [movant]’s discovery request is a claim of trial error, which is outside the scope of a Rule 29.15 motion.” *Id.* See also *Burgin v. State*, 847 S.W.2d 836, 839 (Mo. App. W.D. 1992) (“[Movant]’s claim that the State failed to disclose evidence is an allegation of trial error which is outside the scope of a Rule 29.15 motion.”); *State v. White*, 790 S.W.2d 467, 475 (Mo. App. E.D. 1990).

The cases on which Appellant relies to support his argument that prosecutorial misconduct is cognizable in Rule 29.15 proceedings are readily distinguishable. Both cases involve material, exculpatory evidence that was withheld by prosecutors during discovery. In *Hayes v. State*, 711 S.W.2d 876 (Mo. banc 1986), the prosecutor in a murder case affirmatively represented to the defendant’s counsel during discovery that no deals or bargains had been made with the State’s eyewitness to the murder, but failed to disclose a bargain the State later made with the witness. *Id.* at 880.

In *State v. Phillips*, 940 S.W.2d 512 (Mo. banc 1997), this Court held that the state's failure to disclose a witness's statement that the defendant's son dismembered the murder victim's body was material to punishment and thus warranted a reversal of the death sentence and remand for a new penalty-phase proceeding, especially when the prosecutor repeatedly argued to the jury that the defendant deserved a death sentence because she had dismembered the victim's body. *Id.* at 516-17.

The motion court did not clearly err in overruling Appellant's post-conviction allegations of prosecutorial misconduct.

II. (Cole Impeachment Evidence)

The motion court's judgment overruling, without an evidentiary hearing, Appellant's claim that his counsel were ineffective for failing to investigate witness Henry Cole or members of his family was not clearly erroneous because Appellant pleaded conclusions, not facts, and the allegations simply describe evidence of previous bad acts not admissible into evidence.

Appellant claims his attorneys were ineffective for not investigating Henry Cole to discover impeachment evidence that Mr. Cole was "mentally ill, unreliable, and incompetent." Appellant claims that counsel was ineffective for not interviewing members of Mr. Cole's family who would have given a "plethora of information" that Mr. Cole could not be trusted, that he has been a con man, that he would do anything for money, and that the information he provided in his deposition and testimony at trial was untrue. (PCR L.F. 76). The motion court did not clearly err in denying this claim without an evidentiary hearing because Appellant's motion simply pleads conclusions or alleges matters that were not admissible into evidence.

A. The alleged testimony of Mr. Cole's family members.

Appellant's motion alleged that counsel were ineffective for not investigating Mr. Cole's family members. (PCR L.F. 121). The

alleged testimony of these witnesses was nothing more than a recitation of Mr. Cole's past misconduct, some dating back thirty years before the trial in this case, that form the basis for their belief, and post-conviction counsels' allegations, that Mr. Cole can't be trusted. (PCR L.F. 123-37). Hardly any of the alleged testimony has anything to do with the facts of this case, and the few allegations that do are based solely on speculation or conclusions.

The motion court found that these allegations involved bad acts "most of which occurred many years removed from Mr. Cole's testimony at trial" and were, therefore, "irrelevant." (PCR L.F. 784). The court also determined that these allegations contain only "conclusions" and that they do not provide Appellant with a "viable defense to the crimes charged."¹² (PCR L.F. 784).

"To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: 1) trial counsel knew or should have known of the existence of the witness, 2) the

¹²These deficient allegations included that Mr. Cole was a "liar, a con man, and a criminal," "a violent, diabolical, stone-cold killer," (PCR L.F. 123), "a serious drug user," "a snitch," (PCR L.F. 130), and "an informant," (PCR L.F. 137).

witness could be located through reasonable investigation, 3) the witness would testify, and 4) the witness's testimony would have produced a viable defense.” *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004). Counsel's “decision not to call a witness is presumed trial strategy unless clearly shown to be otherwise.” *Rousan v. State*, 48 S.W.3d 576, 581 (Mo. banc 2001).

Claims that a motion court should have granted an evidentiary hearing on allegations that counsel was ineffective in failing to call a witness are “difficult to establish because neither the failure to call a witness nor the failure to impeach a witness will constitute ineffective assistance of counsel unless such action would have provided a viable defense or changed the outcome of the trial.” *Ferguson*, 20 S.W.3d at 506. *See also Phillips*, 940 S.W.2d at 524 (“The mere failure to impeach a witness, however, does not entitle a movant to postconviction relief.”); *State v. Gollaher*, 905 S.W.2d 542, 548 (Mo. App. E.D. 1995) (“The failure to call impeachment witnesses does not warrant relief where the facts, even if true, do not establish a defense.”). Mere impeachment evidence that does not give rise to a reasonable doubt, is not the basis for a claim of ineffective assistance of counsel. *See State v. Twenter*, 818 S.W.2d 628, 640 (Mo. banc 1991).

Nearly all the allegations concerning the testimony of Mr.

Cole's family members involved prior bad acts or misconduct committed by Mr. Cole.¹³ The motion court correctly found that most of this alleged testimony would have been irrelevant and thus inadmissible. Other testimony dealt with Mr. Cole's arrests and commission of crimes not resulting in convictions. (PCR L.F. 123-37). "Generally, one may not attempt to impeach a witness' credibility with evidence of an arrest, investigation, or criminal charge that has not resulted in a conviction." *Morrow*, 21 S.W.3d at 826; *see also State v. Wolfe*, 13 S.W.3d 248, 258 (Mo. banc 2000). "Evidence of an arrest not resulting in a conviction can be used only to demonstrate (1) a specific interest of the witness, (2) the witness's motivation to testify favorably for the state, or (3) that the witness testified with the expectation of leniency." *Morrow*, 21 S.W.3d at 826. In addition, evidence of witnesses' prior bad acts is not admissible. *Ferguson*, 20 S.W.3d at 507.

Nothing in the allegation contained in Appellant's motion

¹³For example, the allegations simply recite past instances in which Mr. Cole allegedly beat his child's mother, failed to care for his family, taught his children to commit crimes, used drugs, and drank excessively. (PCR L.F. 123-37).

related to Mr. Cole's specific interest to testify in this particular case, but concerned only general allegations of bad conduct. Counsel cannot be held ineffective for failing to present inadmissible evidence. See *Twenter*, 818 S.W.2d at 638; *State v. Chambers*, 891 S.W.2d 93, 110 (Mo. banc 1994).

The only allegations involving testimony that could remotely be considered impeachment on the facts of this case are the ones suggesting that Mr. Cole was not afraid of Appellant's family, (PCR L.F. 127), that Mr. Cole went to New York because he is HIV positive, (PCR L.F. 127), and that while Mr. Cole and Appellant were incarcerated together, Mr. Cole indicated to a family member that he "had something big coming," (PCR L.F. 128). But these allegation are of very little value as far as impeachment material, and none of them certainly provided Appellant with a viable defense.

Appellant relies on *State v. Long*, 140 S.W.3d 27 (Mo. banc 2004), for the proposition that extrinsic evidence of Cole's misconduct relating to credibility would have been admissible at trial. But Appellant reads too much into the holding in *Long*. In that case, the victim of a sexual assault voluntarily accompanied the defendant and an accomplice to the defendant's apartment where the victim claimed she was sexually assaulted. *Id.* at 29. The victim remained in the

apartment until the next morning when she forced her way out and went home and bathed. *Id.* Although there was evidence that the victim had been sexually assaulted, no evidence showed that the victim had been assaulted in the defendant's apartment and no physical evidence linked the defendant to the attack. *Id.* At trial, the defendant attempted to introduce evidence that the victim had made previous false allegations, including two instances in which she had recanted her story of physical or sexual assault against a different man. *Id.* at 29-30. The trial court did not allow this evidence to be introduced at trial because it wasn't proper character evidence. *Id.* at 30.

In holding that extrinsic evidence of the victim's previous false allegations was admissible under the facts of that case, this Court reaffirmed the general rule that "specific acts of misconduct relating to credibility [of a witness] . . . may not be proven by extrinsic evidence." *Id.* at 30. This Court acknowledged that the rule furthers the "general policy focusing the fact-finder on the most probative facts and conserving judicial resources by avoiding mini-trials on collateral issues." *Id.* Noting that "several jurisdictions allow defendants to introduce extrinsic evidence to prove that a *victim* has previously made false allegations," this Court held that "*in some cases*"

a defendant may introduce extrinsic evidence of prior false allegations. *Id.* at 31 (emphasis added). This Court then went on to discuss the requirements for establishing admissibility of extrinsic evidence of prior false allegations made by “*victims*” or “*the prosecuting witness.*” *Id.* at 31-32 (emphasis added).

Mr. Cole was not a “victim” or “prosecuting witness” in Appellant’s case. Appellant misconstrues the holding in *Long* as providing for the unlimited, unchecked admissibility of any and all alleged evidence of misconduct relating to credibility by any witness in a criminal case. The plain language of *Long* refutes Appellant’s misapplication of its holding. The holding in *Long*, which was expressly limited by this Court’s opinion as well as the facts of that case, does not open the door to an evidentiary free-for-all against every prosecution witness. Little imagination is needed to realize that Appellant’s proposed extension of *Long* would turn criminal trials into a bizarre version of “This Is Your Life,” involving attacks on witnesses through evidence of alleged prior misconduct.

The holding in *Long* simply does not apply in Appellant’s case. Mr. Cole’s testimony alone did not support Appellant’s conviction. Not only did Appellant’s girlfriend (Ms. Asaro) testify that Appellant also confessed the murder to her, (Tr. 1848-53, 1881-83), she also

testified about Appellant's possession of the murder victim's personal effects (Post-Dispatch ruler, calculator, purse, state identification card) and the victim's husband's laptop computer, (Tr. 1847, 1860, 1865-68, 1874). Another witness (Glenn Roberts), who was Appellant's long-time neighbor, testified that Appellant himself either pawned or sold the laptop to him. (Tr. 1999-2002).

Appellant also relies on *Black v. State*, 151 S.W.3d 49 (Mo. banc 2004), to support his claim that his counsel were ineffective for not impeaching Mr. Cole on "a critical issue." App. Br. at 63. There are several problems with this argument. First, Appellant alleged that his counsel were ineffective for not investigating Mr. Cole's family members as witnesses, not that they were ineffective for failing to impeach Mr. Cole's testimony. Second, this Court noted in *Black* that the evidence known to the defendant's counsel in that case was not only impeachment evidence, but was also evidence that would have been admissible as substantive evidence. *Id.* at 53. Third, the "critical issue" in *Black* involved "the key issue of deliberation," which the jurors struggled with during their deliberations. *Id.* at 57-58. In other words, the evidence at issue in *Black* went to the controverted issue regarding whether the defendant sufficiently deliberated to find him guilty of first-degree murder, thereby

subjecting him to the death penalty, or whether he was guilty of the lesser offense of second-degree murder. *Id.* Nothing in the *Black* opinion suggests that counsel is ineffective for not investigating witnesses who might provide anecdotal evidence of a witness's prior bad acts, most of it inadmissible at trial, allegedly touching only on that witness's general credibility.

B. Mr. Cole's drug, mental health, and psychiatric records.

Appellant also contends that counsel were ineffective for failing to investigate Mr. Cole's mental illnesses and in not seeking his mental health records. The motion court correctly found that Appellant's motion contained only conclusions:

Movant pleads only conclusions, that a court-ordered psychiatric examination would prove Cole incompetent to testify. Movant alleges no basis for his conclusion that the trial court would have found Cole to be an incompetent witness.

Movant provides no basis for concluding that Cole had a mental disease or defect at the time of trial.

(PCR L.F. 786). Appellant's motion simply alleges that Mr. Cole had been treated for drug addiction and mental illness, but contains no allegations identifying any specific information contained in any alleged treatment records that would have established that Mr. Cole

was incompetent to testify at trial. Appellant simply concludes that this alleged information would have caused the trial court to determine “that Cole was incompetent to testify.” (PCR L.F. 78). In fact, Appellant’s motion simply presumes that such records exist, but does not contain any specific allegations that any mental health or psychiatric records were available for Mr. Cole or where these records might be located. In fact, Appellant’s motion faults the State for not disclosing “potentially impeaching information” contained in these records. (PCR L.F. 74). Because Appellant pleaded conclusions, not facts, the motion court properly dismissed this claim without an evidentiary hearing.

Moreover, the motion court correctly concluded that Appellant’s allegations concerning Mr. Cole’s incompetency did not provide Appellant with a viable defense to the murder and other charges. (PCR L.F. 786).

Based on the allegations contained in Appellant’s motion, counsel cannot be deemed ineffective for allegedly not investigating Mr. Cole’s incompetency to testify because the allegations do not rise to the level justifying production, or even an in camera review, of Mr. Cole’s mental health or psychiatric records. First, Appellant’s attorneys would not have been entitled to psychiatric or mental health

records “on the mere possibility” that they might be helpful. *State v. Taylor*, 134 S.W.3d 21, 26 (Mo. banc 2004). The possibility that such records “might have had a bearing on [Cole]’s competency to testify” is insufficient to require production because “there is a presumption that a witness is competent to testify unless that witness exhibits some mental infirmity *and* fails to meet the traditional criteria for witness competence.” *Id.* Even if Appellant’s motion can be read as anecdotally alleging that Mr. Cole suffered some mental infirmity, nothing in the motion alleges that Mr. Cole failed the test which presumes witnesses are competent.

Determination of a witness’s competency to testify is within the discretion of the trial court. *State v. Robinson*, 835 S.W.2d 303, 307 (Mo. banc 1992). To be incompetent to testify, “a witness must exhibit some mental infirmity and fail to meet the traditional criteria for witness competence.” *Id.* A witness is competent to testify if the witness shows “(1) a present understanding of, or the ability to understand upon instruction, the obligation to speak the truth; (2) the capacity to observe the occurrence about which the testimony is sought; (3) the capacity to remember the occurrence about which the testimony is sought; and (4) the capacity to translate the occurrence into words.” *Id.* (quoting *State v. Feltrop*, 803 S.W.2d 1, 10 (Mo. banc

1991)). Before a court is required to conduct an in camera review of records, the defendant must set forth a factual predicate to justify such a review. *State v. Seiter*, 949 S.W.2d 218, 221-22 (Mo. App. E.D. 1997). Several cases demonstrate that the allegations contained in Appellant's post-conviction motion do not meet the required showing that would justify an in camera review of any of Mr. Cole's alleged mental health or psychiatric records.

In *State v. Goodwin*, 65 S.W.3d 17 (Mo. App. S.D. 2001), the defendant, who was charged with statutory rape, sought disclosure of the victim's medical records because counsel believed that the records might show that the victim used alcohol and marijuana during the time the defendant was charged with molesting her. *Id.* at 21. The defendant argued that the victim's use of these drugs would affect her ability to remember and relate the events that occurred. *Id.* The court held that the defendant's failure to "present specific facts to establish what information was contained in the records and how such information would be favorable to him," was "fatal to any claim of error concerning his access to the victim's [hospital] records." *Id.* The court also held that defendant's failure to articulate specific facts supporting the claimed need for these records demonstrated that an in camera review of the records was also not warranted. *Id.* at 23.

In *Seiter*, the defendant, who was charged with sodomy, served a subpoena duces tecum on a social worker and psychologist for records pertaining to the treatment of the victim or the victim's mother. 949 S.W.2d at 220. The trial court quashed the subpoenas and on appeal the defendant argued that this constituted error because the records may include "possibly exculpatory" evidence and "possible impeachment evidence." *Id.* The defendant claimed that the trial court should have reviewed the records in camera to examine their contents. *Id.*

The court of appeals expressly noted that the defendant was seeking evidence in the records "which might 'possibly' be exculpatory or impeaching" and held that the "[d]efendant was not entitled to the production of the records on the mere possibility that the information contained" in them "might be helpful to his case." *Id.* at 221.

Defendant did not present specific facts to establish what information was contained in the records and how such information would be favorable to him. Defendant thus failed to meet the threshold requirement for the trial court to order the production of the psychological and school records because he did not establish a basis for his claim that those records

contained evidence material to his defense.

Id. The court also rejected the defendant's claim that the trial court should have reviewed the records in camera stating that the defendant failed to establish a factual predicate to justify such a review. *Id.* at 221-22

The one case in which an appellate court ordered an in camera review of drug treatment records, and another case on which Appellant relies, are readily distinguishable from the facts alleged in Appellant's motion.

In *State v. Harger*, 804 S.W.2d 35 (Mo. App. E.D. 1991), the defendant, who was charged with rape, sought the victim's drug treatment records to determine if the victim took drugs on the day of the assault. *Id.* at 36-37. Part of the defendant's defense was that the sexual intercourse was consensual and that the victim had traded the sex for cocaine. *Id.* The defendant wanted the records for use as evidence of a prior inconsistent statement because the victim denied using cocaine on the day of the assault. The court remanded the case for an in camera inspection of those records.

In *State v. Newton*, 925 S.W.2d 468 (Mo. App. E.D. 1996), the defendant, who was charged with first-degree murder, kidnapping, and armed criminal action, sought the psychological records of the

only eyewitness identifying the defendant as a participant in the kidnapping and murder of the victim. *Id.* at 469, 471. The defendant specifically claimed that the witness's psychological records may contain evidence that the witness experienced hallucinations at the time the crimes were committed. Because this witness was "a key State's witness" the court held that the trial court erred in quashing a subpoena for these records and in failing to review them in camera. *Id.* at 472; *see also State v. Newton*, 963 S.W.2d 295 (Mo. App. E.D. 1998). Significantly, the court's opinion also noted that a competency hearing had been held and that the defendant had *specific* information that the witness had previously suffered from hallucinations before the defendant sought her psychological medical records. *Id.* at 470-71.

The cases on which Appellant relies are readily distinguishable from his case. The witnesses at issue in *Harger* and *Newton* were vital, if not indispensable, witnesses for the State to prove the charges against the defendants. The witness in *Harger* was the rape victim herself, the only witness to the crime, and the drug treatment records pertained specifically to the crime at issue in the trial. The witness in *Newton* was the only eyewitness to the kidnapping of the victim, who was later found murdered, and specific information had been

developed concerning that witness's experiencing of hallucinations *at the time she witnessed the crime.*

The allegations contained in Appellant's amended motion would not have justified an in camera review of the Mr. Cole's psychiatric, drug treatment, or other mental health records. Appellant alleged only conclusions that Mr. Cole suffered from a mental illness and that he would have been found incompetent to testify at trial. Appellant's motion contains no specific allegation that Mr. Cole was suffering from a mental illness or was hallucinating when Appellant admitted to him that he killed Lisha Gayle.

Any allegation that Mr. Cole was incompetent to testify is also refuted by the record. Mr. Cole's videotaped statement to police and his testimony at trial do not exhibit any signs that he was incompetent to be a witness. (State's Exhibit 126; Tr. 2379-2598). His recollection of events and ability to cogently relay what he saw and heard to the jury are supported by his testimony.

III. (Asaro Impeachment Evidence)

The motion court's judgment overruling, without an evidentiary hearing, Appellant's claim that his counsel were ineffective for failing to investigate witnesses who could have impeached Laura Asaro's testimony was not clearly

erroneous because Appellant pleaded conclusions, not facts, the allegations simply describe evidence of previous bad acts not admissible into evidence, and the allegations are refuted by the record.

Appellant claims his trial counsel were ineffective for failing to investigate several witnesses, including many members of Appellant's family, who could have impeached Ms. Asaro's trial testimony.

A. Mr. Hopson's and Ms. Bailey's impeachment testimony.

Appellant alleged in his motion that Edward Hopson would have testified that Ms. Asaro was a drug addict, that she prostituted herself to neighborhood men as well as to police officers, and that she was a bad mother. (PCR L.F. 153-55). The motion court correctly held that counsel was not ineffective because Mr. Hopson's allegations would not have been admissible at trial and were, in fact, cumulative to testimony at trial:

Edward Hopson completed an affidavit from his incarceration at the Missouri Department of Corrections Hopson alleges certain prior bad acts allegedly committed by Asaro since age eight (8). These alleged prior bad acts were irrelevant and would not have been admissible at trial, but if they were, it would have been cumulative to Asaro's own testimony and the

testimony of others, concerning Asaro's credibility.

(PCR L.F. 787). The record contains evidence that Ms. Asaro was a drug addict, a prostitute, and might receive reward money for testifying at trial. (Tr. 1901, 1904, 1908, 1950-51, 1953, 1955-57).

The motion court also found that because Appellant conceded that another witness to Ms. Asaro's prior bad acts or misconduct, Colleen Bailey, was not known to trial counsel, that counsel could not be found to be ineffective. (PCR L.F. 787-88). A movant cannot prevail on a claim that his counsel was ineffective for failing to call a witness if counsel does not know of the witness's existence. *See Hutchison*, 150 S.W.3d at 304.

Appellant contends in his brief that Mr. Hopson and Ms. Bailey would have also testified that Ms. Asaro disclosed to them that she was setting Appellant up to get the \$10,000 reward. App. Br. at 69. Appellant's amended motion pleads an identical conclusion. (PCR L.F. 78). But Appellant's specific allegations of the testimony that Mr. Hopson and Ms. Bailey would have offered at trial does not state that Ms. Asaro was setting Appellant up for the reward. Appellant alleges only that Mr. Hopson would testify that Ms. Asaro "was looking forward to testifying in the case because she was anticipating receiving a substantial amount of money for her testimony." (PCR

L.F. 155). Similarly, Ms. Bailey's alleged testimony was only that Ms. Asaro was "setting up her drug dealer boyfriend and was going to testify against him at trial." (PCR L.F. 155).

Although Appellant alleges that had Ms. Bailey known Ms. Asaro was to testify at a trial, then Ms. Bailey would have informed the police that Ms. Asaro was going to give false testimony, (PCR L.F. 156), Appellant alleges no facts demonstrating either that Ms. Asaro admitted to Ms. Bailey that the testimony was false or that Ms. Bailey knew other facts proving that. Although Ms. Asaro might have been impeached by testimony that she was "setting up" Appellant for the reward, nothing about that alleged testimony shows that she intended to give false testimony. In other words, Ms. Asaro could have "set up" Appellant by going to the police without Appellant's knowledge, informing them that Appellant admitted committing the murder to her, and truthfully testifying about what she saw in Appellant's car and what she heard Appellant say.

B. The impeachment testimony of Ms. Asaro's mother.

Appellant also contends that his counsel were ineffective for not investigating Ms. Asaro's mother, Cynthia Asaro, who, Appellant alleges, could have testified that Appellant's car was inoperable in August 1998, that she saw her daughter and Appellant riding the bus

during this time, that her daughter gave her some coupons, and that she never read any letters Appellant had written and sent to her daughter. (PCR L.F. 165-66). These matters constitute, at most, mere impeachment evidence and do not provide Appellant with a viable defense.

First, the allegation that Ms. Asaro's mother knew that Appellant's car was inoperable is simply a conclusion based on the factual allegations that on a few occasions she saw her daughter and Appellant riding the bus in August 1998. Whether they rode the bus on occasion is not proof that Appellant's car was inoperable. In addition, Appellant contends that this evidence was important to show that the crime did not occur as Ms. Asaro stated at trial. But at trial, Ms. Asaro testified only that Appellant used the car to drop her off at her mother's house. (Tr. 1841). She did not testify that Appellant used the car to get to the murder victim's house.¹⁴

Second, whether Ms. Asaro gave her mother coupons is

¹⁴Ms. Asaro never testified about how Appellant traveled to the victim's house. It was Henry Cole who testified that Appellant admitted taking the bus to University City, where the victim lived. (Tr. 2392).

immaterial and, again, would not have provided Appellant with a viable defense. Although Ms. Asaro testified that Appellant offered to give her some coupons he found in the victim's purse, which she refused, (Tr. 1881), the fact that Ms. Asaro allegedly gave her mother coupons doesn't prove that they were, in fact, the same coupons contained in the victim's purse or that Ms. Asaro lied about seeing coupons in the purse.

Finally, the allegation that Ms. Asaro's mother never read any letters that Appellant sent Ms. Asaro is also immaterial. At trial, Ms. Asaro testified that Appellant sent her letters from jail, including one asking her not to tell "about the U.City incident," but that her mother had thrown Appellant's letters away. (Tr. 1887-88). Whether Ms. Asaro's mother had ever read these letters, as Appellant alleges, does not impeach Ms. Asaro's testimony that her mother threw them away because Ms. Asaro's mother could have thrown them away without reading them or without, in fact, knowing what they were. In addition, the motion court correctly found that Ms. Asaro's mother's testimony would not have impeached Ms. Asaro's deposition testimony because Ms. Asaro testified that no one other than her had read Appellant's letters. (PCR L.F. 790).

C. Impeachment testimony from Appellant's family members regarding Appellant's

car.

Appellant contends that counsel were ineffective for not investigating several of his family members as witnesses, who, he alleges, would have testified that Ms. Asaro had keys to Appellant's car, that she had access to the trunk, and that she lied during her deposition about whether Appellant's grandfather's phone was capable of three-way calling.

Appellant alleges in his motion that his uncle, brother, and cousin saw Ms. Asaro get into the trunk after Appellant was locked up in the city workhouse. (PCR L.F. 163-65). But Ms. Asaro admitted at trial that she had been in Appellant's trunk to get her clothes after Appellant went to jail. (Tr. 1948, 1980). Also, the allegation does not specify the time or date when Appellant's uncle saw Ms. Asaro. The allegation concerning Appellant's brother states that he couldn't remember when Ms. Asaro got into the trunk or when Appellant was locked up. (PCR L.F. 164-65). Finally, the allegation concerning Ms. Asaro having keys to the car is immaterial considering that other evidence presented during the suppression hearing showed that the car was unlocked. (Tr. 64, 81).

The motion court correctly found that this testimony was cumulative to the trial testimony of Appellant's brother and cousin.

(PCR L.F. 789-90). At trial, Appellant's brother testified that Ms. Asaro had keys to the car, was in the trunk retrieving items on three occasions after Appellant was in jail, and that the car was not operable. (Tr. 2774, 2776-77, 2779, 2781). Appellant's cousin testified that she saw Ms. Asaro use keys to get into the car's trunk August 31, 1998, when Appellant was incarcerated. (Tr. 2791-93).

Finally, Appellant alleges that his grandfather would have testified that his phone was incapable of three-way calling and did not accept collect calls. (PCR L.F. 169). Appellant argues that this would have impeached Ms. Asaro's deposition testimony. But, as the motion court found, Ms. Asaro did not testify at trial that the calls were three-way conversations. (PCR L.F. 791). The motion court properly concluded that even if this were true, it would have been a minor impeachment point at trial. It is certainly not evidence that would have provided Appellant with a viable defense.

D. Allegations regarding the testing of Ms. Asaro's hair, blood, and fiber evidence.

Appellant's motion also alleges that his attorneys were ineffective for not testing Ms. Asaro's "hair, blood, and fibers."¹⁵

¹⁵Appellant's brief also mentions Ms. Asaro's fingerprints, but this claim was not included in Appellant's motion.

The motion then alleges that if those tests would have been performed they would have shown that Ms. Asaro was present at the crime scene and participated in the crime. (PCR L.F. 174, 176). The motion contains no specific factual allegations, such as, for example, that testing had been performed and that it showed that Ms. Asaro's hair, blood, or fibers had been discovered at the scene; it only contains the speculative conclusion that if these tests were performed they would show Ms. Asaro was there. The only other allegation relating to this conclusion was that Appellant's attorneys were "convinced" that Ms. Asaro was present at the crime scene. (PCR L.F. 174). The motion court correctly held that this allegation pleaded only conclusions. (PCR L.F. 792-93).

The motion court also found that Appellant was not prejudiced because there was "no evidence or rational basis to believe that Ms. Asaro was involved in the murder or was at the crime scene." (PCR L.F. 792). This finding is reinforced by this Court's resolution of Appellant's direct-appeal claim that the trial court erred in not submitting as a statutory mitigator that Appellant was an accomplice in the murder or played only a minor role in the crime. This Court held that evidence of unidentified hairs and shoe prints found at the murder scene and testimony that Ms. Asaro was seen with a laptop

computer after Appellant's incarceration didn't support the giving of that instruction. *Williams*, 97 S.W.3d at 472-73.

[T]he testimony that Asaro was seen carrying a laptop computer does not show that Asaro was an accomplice. It shows only that she was carrying an unidentified laptop computer and is not sufficient to support an accomplice instruction.

Id. at 473.¹⁶

Proof that another person had opportunity or motive to commit the offense is inadmissible without proof that this other person committed some act directly connected to the crime. *See State v. Chaney*, 967 S.W.2d 47, 55 (Mo. banc 1998); *Ferguson*, 20 S.W.3d at 507. Appellant alleges no evidence showing that Ms. Asaro committed any act directly connected to Gayle's murder.

Appellant also claims that his attorneys would have had no trial strategy reasons for not seeking Ms. Asaro's hairs, blood, and fibers so that tests could be performed. But without evidence that Ms.

¹⁶During his post-conviction deposition, Appellant asserted that Ms. Asaro received the laptop from one of her prostitution customers, but did not allege that she participated in the murder. (PCR L.F. 671, 690, 793).

Asaro was involved in the crime, it would have been reckless for Appellant's attorneys to run tests that would have shown that none of the hairs found at the scene belonged to Ms. Asaro. The only reasonable trial strategy was to focus the jury's attention on the fact that the State had failed to perform such testing, which kept alive the defense argument that Ms. Asaro might have been involved. That argument would have been untenable if the defense performed tests demonstrating no link between her and the evidence found at the scene.

IV. (Post-Conviction Discovery)

The motion court did not abuse its discretion to the extent it overruled Appellant's motion to compel the State to produce Mr. Cole's and Ms. Asaro's personal records maintained by various federal, state, and private entities because the State did not possess those records, Appellant's claims potentially involving those records were overruled without an evidentiary hearing, and Appellant made no showing that he was entitled to access of these witnesses' confidential, personal records.

Appellant contends that the motion court abused its discretion in overruling his motion to compel production of Mr. Cole's and Ms. Asaro's drug treatment, mental health, hospital, corrections, and police records.¹⁷ Appellant claims that these records were necessary to prove his claims of prosecutorial misconduct and of trial counsel's ineffectiveness in failing to investigate these witnesses.

During the motion to compel hearing, Appellant demanded that the State produce documents that the prosecutor never had in his possession. (PCR Mot. Tr. 9-10). Appellant's counsel asserted that they needed these records because they had "reason to believe" that

¹⁷The list of entities from which these records were sought is contained in Point I.

these records contained impeachment material. (PCR Mot. Tr. 17). The State responded that it did not have any of the records sought in Appellant's production request. (PCR L.F. 58-60).

The motion court stated that Appellant's request was too broad in that it didn't ask for specific documents, but all documents showing bias. (PCR Mot. Tr. 6). The motion court noted that at least some of these records, specifically the probation and parole records, were statutorily confidential and that if Appellant could show any authority to order production of such records, the motion court would reconsider its decision not to order their production.¹⁸ (PCR Mot. Tr. 25-26). The motion court did order the prosecutor to produce a list of Mr. Cole's and Ms. Asaro's convictions and where they occurred. (PCR Mot. Tr. 27-28).

¹⁸The record also reveals that Appellant had taken a deposition of Mr. Cole's probation officer. (PCR Mot. Tr. 24). The motion court noted on the record that a Missouri statute made probation and parole information confidential and asked Appellant's counsel how the court could order production without violating the statute. (PCR Mot. Tr. 25). Counsel replied that he "did not have an answer" on that issue. (PCR Mot. Tr. 25).

While Rule 25.03(A)(7) requires the State to disclose records of a witness's prior convictions, a witness's arrest records are not generally discoverable in a criminal prosecution. Disclosure of additional material beyond conviction records is permitted only if the "defense specifies the material or information sought and the court finds the request is reasonable and the information sought is relevant and material to the defendant's case." *State v. Taylor*, 944 S.W.2d 925, 932 (Mo. banc 1997); *see also* Rule 25.04(A). "Arrests that do not result in convictions are relevant and material only to show a specific interest, motive to testify favorably for the state, or expectations of leniency." *Taylor*, 944 S.W.2d at 932.

Appellant's primary purpose in seeking production of Mr. Cole's and Ms. Asaro's personal, confidential records was to find evidence to support his allegations, which consisted of nothing more than conclusions and speculation, that the State had violated discovery and that his counsel had been ineffective in seeking these records. In *Brooks*, the movant's amended motion for post-conviction relief alleged that the state had in its possession and failed to disclose to the defense exculpatory material in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This Court squarely rejected the argument that a movant making "entirely speculative and conclusional" allegations of

a *Brady* violation is automatically entitled to an evidentiary hearing and to an order requiring the state to disclose the entire contents of its file. *Brooks*, 960 S.W.2d at 500. In this case, the prosecutor voluntarily opened the State’s file to Appellant’s counsel during a four hour meeting, (PCR L.F. 57; PCR Mot. Tr. 14-15), and still no specific *Brady* violation has been found.

In *Ferguson*, the movant sought post-conviction discovery of exculpatory evidence he claimed the State withheld in violation of *Brady*. *Ferguson*, 20 S.W.3d at 503-04. This Court held that the movant was not entitled to discovery on that matter because of the movant’s failure to plead facts, not conclusions, showing that he was entitled to relief:

The *Brady* violation was not actionable from the start and was ultimately dismissed by the motion court for that reason, and therefore, discovery sought pursuant to the *Brady* violation was never “relevant to the subject matter involved in the pending actions.” To hold otherwise—to allow full scale discovery on matters not properly pled—expands and distorts the post-conviction relief proceedings, and *Brady*, itself to something that was never intended.

Id. at 504.

The most glaring problem with Appellant's argument is that the criminal law doesn't require the State to produce documents that it doesn't have. *State v. Bucklew*, 973 S.W.2d 83, 92 (Mo. banc 1998); *State v. Stewart*, 18 S.W.3d 75, 92-94 (Mo. App. E.D. 2000). To the extent that the civil rules of discovery apply to post-conviction cases, this same principle applies. Rule 58.01 allows parties to submit requests to produce documents only if those documents are "in the possession, custody or control of the party upon whom the request is served." Rule 58.01(a). Appellant doesn't explain how the State was supposed to produce files maintained by the federal government, foreign states, or private medical facilities, many of which were out of state.

In addition, many of the records sought by Appellant involved records that are statutorily confidential. *See Stewart*, 18 S.W.3d at 92 (patients' medical records are privileged under state law); § 559.125, RSMo 2000 ("Information and data obtained by a probation and parole officer shall be privileged information and shall not be receivable in any court."). Federal law protects drug treatment records from disclosure. *See State ex rel. C.J.V. v. Jamison*, 973 S.W.2d 183, 185 (Mo. App. E.D. 1998).

Appellant contends that the motion court erred in not ordering

the production of records involved in a separate murder investigation of Debra McClain in Pagedale, Missouri, and an alleged police report involving an earlier search of Appellant's car. App. Br at 93-94. But neither of these claims were pleaded in Appellant's amended Rule 29.15 motion. The motion court was not required to address claims appearing in the pro se motion, but not in the amended motion. *Crews v. State*, 7 S.W.3d 563, 567 (Mo. App. E.D. 1999).

Appellant contended that he was entitled to the police reports on the Pagedale murder because some press accounts suggested that that murder and Ms. Gayle's murder might be related and that they were both stabbing cases. (PCR Mot. Tr. 33, 35). The prosecutor noted that the Pagedale murder was an on-going murder investigation and that the police may have reasons for wanting that information to remain private. (PCR Mot. Tr. 35). The motion court refused to enter an order compelling production of the police file in the Pagedale murder until Appellant could make some further showing that the two cases were related. (PCR Mot. Tr. 38). The motion court did not abuse its discretion and its ruling is consistent with the law excluding evidence that someone else committed the crime unless there is evidence directly connecting some identifiable person with the crime. *See Chaney*, 967 S.W.2d at 55; *Ferguson*, 20 S.W.3d at 507.

To the extent the motion court overruled Appellant's request to produce St. Louis City police records pertaining to an unrelated search of Appellant's car, its decision was not an abuse of discretion. The prosecutor had no reports about a St. Louis City police search of Appellant's vehicle. (PCR Mot. Tr. 42-43). The stated purpose of obtaining this alleged report was to prove prosecutorial misconduct in that the record would show that Ms. Asaro falsely testified that Appellant's uncles gave her access to the trunk and that the prosecutor falsely suggested that the trunk's lock was rusted out, rather than being knocked out during the search. Appellant fails to explain how this information would have substantially impeached Ms. Asaro's testimony or changed the result at trial.

V. (Continuance)

The motion court did not clearly err in overruling, without an evidentiary hearing, Appellant's claim that his appellate counsel was ineffective for not raising a claim that the trial court abused its discretion in overruling Appellant's continuance motion because the record shows that the trial court was within its discretion in denying the continuance and such a claim would not have required appellate reversal.

Appellant contends that this appellate counsel was ineffective for not raising a claim that the trial court abused its discretion in overruling a continuance motion.

A. The record regarding Appellant's continuance motion.

On May 7, 2001, a month before trial began, Appellant filed a motion for continuance arguing that they needed more time to prepare. (L.F. 394-97). The trial court heard argument and overruled this motion two days later (May 9). (L.F. 400).

On May 25, counsel filed a supplemental motion for continuance alleging that: (1) they had just received notice from the State that Appellant's fellow inmate—Mathieu Hose—had said that Appellant admitted murdering a woman by stabbing her 40 times; (2) on May 11 the State gave notice that it intended to present during the penalty phase a witness to testify about a burglary Appellant

committed in Kansas City and that the deposition for the witness had to be canceled; (3) on May 11 the defense received a report that latent fingerprints developed at the crime scene were of insufficient quality; (4) the defense had not yet received a copy of the “formalized written reward agreement” between University City and the victim’s family; (5) the victim’s mother, who was to testify during the penalty phase, refused to speak with a defense investigator; (6) part of DOC’s records on Appellant had not been found yet; and, (7) the defense was waiting for forensic tests to determine whether Appellant was present at the scene. (L.F. 457-60).

During a May 25, 2001 hearing concerning the supplemental continuance motion, counsel contended that a continuance was needed “because of so much activity that . . . has been going on in this case.” (Tr. 88). The defense conceded that the prosecutor had no intention of using Hose’s statement in its case-in-chief.¹⁹ (Tr. 89). The prosecutor confirmed that he had no intention of using this statement at trial, (Tr. 99-100), which he didn’t. The prosecutor also

¹⁹Hose’s testimony at trial dealt solely with Appellant’s participation in an escape attempt from the city workhouse. (Tr. 2615-71).

said that perhaps two months earlier he had given the defense notice of the penalty-phase witness in the Kansas City burglary, that this witness had appeared for a deposition, which defense counsel thought had been canceled, and that the witness was flexible on rescheduling it. (Tr. 101-03).

Appellant's counsel also complained about receiving 362 pages of corrections records consisting of disciplinary action reports concerning Appellant. (Tr. 92). But while the State produced those documents to the defense, the prosecutor had no intention of offering those into evidence at trial. (Tr. 106).

Counsel also wanted to perform forensic testing to exclude Appellant's presence from the scene of the crime. (Tr. 95). But no forensic evidence was presented at trial connecting Appellant to the crime scene, and counsel failed to explain how forensic testing can definitively prove that a defendant was *not* present at a particular place. The defense had hired a forensics investigator to review the forensic samples taken from the murder scene. (Tr. 27). In fact, Appellant did present extensive evidence of forensic testing through two expert witnesses at trial demonstrating that none of the hairs found at the crime scene were Appellant's and that Appellant's DNA was not found on the victim's fingernails. (Tr. 2858-2988).

B. Appellate counsel was not ineffective for deciding not to pursue the continuance issue on appeal.

To support a claim of ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error that would have required reversal had it been asserted and that it was obvious from the record that a competent and effective lawyer would have recognized it and asserted it. *State v. Edwards*, 983 S.W.2d 520, 522 (Mo. banc 1999).

The right to relief . . . due to ineffective assistance of appellate counsel inevitably tracks the plain error rule; *i.e.*, the error that was not raised on appeal was so substantial as to amount to a manifest injustice or a miscarriage of justice.

Moss v. State, 10 S.W.3d 508, 514-15 (Mo. banc 2000) (quoting *Reuscher v. State*, 887 S.W.2d 588, 591 (Mo. banc 1994)).

Appellate counsel does not have the duty to raise every non-frivolous claim on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). “There is ‘no duty to raise every possible issue asserted in the motion for new trial on appeal.’” *Mallett v. State*, 769 S.W.2d 77, 83-84 (Mo. banc 1989) (quoting *Camillo v. State*, 757 S.W.2d 234, 241 (Mo. App. W.D. 1988), “[A]ppellate counsel has no duty to present non-frivolous issues where appellate counsel strategically decides to

‘winnow out’ arguments in favor of other arguments.” *Id.*

“The grant or denial of a motion for continuance lies in the sound discretion of the trial court.” *State v. Brown*, 902 S.W.2d 278, 289 (Mo. banc 1995). A “very strong showing” is required to prove abuse of that discretion, and the party requesting the continuance bears the burden of showing prejudice. *State v. Kinder*, 942 S.W.2d 313, 322 (Mo. banc 1996). “Difficulties counsel might encounter in preparing to deal with evidence do not require the judge to grant a continuance.” *Brown*, 902 S.W.2d at 289.

The record contains nothing demonstrating that appellate counsel could have made the “strong showing” required to prove that the trial court abused its discretion in denying the continuance. Nothing alleged in Appellant’s motion for continuance required the trial court to exercise its discretion to grant the motion.

The State never offered the fellow inmate’s (Hose) statement that Appellant admitted the murder. The prosecutor heard about the statement the day before Hose’s deposition and disclosed it the evening before the deposition. (Tr. 99). Appellant does not explain any prejudice he suffered from not having a continuance to investigate the witness to the Kansas City burglary to be presented during the penalty phase. In addition, no prejudice was proved

simply because counsel was notified that no usable prints were taken from the crime scene or that the defense had not received a copy of the written reward agreement, especially when the defense was well aware that a reward had been offered. No prejudice occurred simply because the victim's mother refused to talk to the defense. The DOC records served on Appellant's counsel consisted mostly of Appellant's disciplinary reports that the prosecutor did not use at trial. And, finally, the forensic evidence presented at trial refutes Appellant's claim that he suffered any prejudice from the denial of a continuance to conduct further testing. Forensic evidence was not a part of the State's case at trial.

Finally, Appellant attempts to establish ineffectiveness by outlining other points appellate counsel raised on appeal that in his judgment were "weaker." Respondent is unaware of any case suggesting that pursuit of other subjectively weaker claims is proof that appellate counsel was ineffective for not pursuing a different claim. Claims that counsel pursued "weaker" claims does not satisfy the requirement of showing that the claim at issue was so obvious that an attorney would have asserted it and that the claim would have required reversal.

VI. (Limiting Instruction)

The motion court's judgment overruling, without an evidentiary hearing, Appellant's claim that trial counsel were ineffective for not requesting or offering a limiting instruction concerning the evidence of Appellant's escape was not clearly erroneous because it was an optional instruction and Appellant alleged only a conclusion that the jury misused this evidence to support his claim of prejudice.

Appellant contends that trial counsel were ineffective for not requesting or offering a limiting instruction, specifically MAI-Cr 3d 310.12, be given to the jury in conjunction with evidence that Appellant attempted to escape from custody while the charges at issue in this case were pending against him.

A. The escape evidence presented at trial.

Near the close of State's guilt-phase case, the prosecutor presented evidence that Appellant attempted to escape from the St. Louis City Workhouse on the evening of January 28, 2000. The State called two witnesses—Mathieu Hose, an inmate who had discussions with Appellant about the escape, and Captain Terry Schiller, a St. Louis City corrections officer whom Appellant assaulted during the escape attempt.

When he attempted to escape, Appellant was incarcerated at the St. Louis City Medium Security Jail, where he had been held since

September 1, 1998. (State's Exhibit 129). The record showed that on the day he attempted to escape, Appellant had been sentenced in St. Louis City Circuit Court to twenty years in prison for robbery, armed criminal action, and unlawful use of a weapon. (State's Exhibit 231). But the record also showed that just before the attempted escape, Appellant had been indicted on the multiple charges, including first degree murder, involved in this case. (L.F. 17-20).

As to the escape attempt itself, Mr. Hose testified that he, Appellant, and two other inmates discussed plans to escape from the workhouse. (Tr. 2618). They discussed different plans concerning how to get out and what to do with the guards. (Tr. 2618-19). Hose testified that Appellant proposed that the guards be killed. (Tr. 2619).

Hose stated that the escape attempt began as they were returning to the dormitory from the recreation area. (Tr. 2621). Appellant struck one of the guards in the head with a metal bar, which "busted open" the guard's head. (Tr. 2621-23, 2625, 2637; State's Exhibits 234, 247, 248). The guard fell to the ground while other inmates picked up a table and tried to break out a window. (Tr. 2628-30).

Captain Schiller testified that he rushed to the scene after hearing the words “officer down” and a plea for help. (Tr. 2674). He saw Leslie Harrison, the guard Appellant had struck, bleeding like a “stuck pig from the top of his head.” (Tr. 2676). While getting Officer Harrison to safety, Captain Schiller saw inmates trying to break out a window with a table. (Tr. 2674). After putting Officer Harrison in an office, Captain Schiller returned to the area where the inmates were attempting to break out the window. (Tr. 2674).

As Captain Schiller stepped through a doorway into the multi-purpose room, Appellant attacked him by attempting to hit him with an iron bar. (Tr. 2674, 2689). Captain Schiller caught the bar before it hit him and he and Appellant wrestled over it. (Tr. 2674-75). Appellant had obtained the metal bar from a weight machine in the gym. (Tr. 2674-75, 2682; State’s Exhibit 234).

Neither side requested that any limiting instruction be given to the jury with respect to the escape evidence. On direct appeal, this Court held that the escape evidence was properly admitted as evidence of Appellant’s consciousness of guilt. *Williams*, 97 S.W.3d at 469.

B. Trial counsel were not ineffective in not requesting a limiting instruction.

The instruction Appellant claims his counsel should have offered, MAI-Cr 3d 310.12, is a limiting instruction covering evidence that the defendant was involved in an offense or offenses other than the ones for which he is being tried. The optional language of the instruction reveals that it primarily pertains to other crimes evidence that the prosecution offers to prove identification, motive, intent, absence of mistake or accident, or presence of a common scheme or plan. But the instruction does contain a catch-all provision that allows the court to “specify [any] other purpose for which the evidence was received as substantive evidence of guilt.” In Appellant’s case that “other purpose” would have been his consciousness of guilt.

The motion court rejected this claim on the ground that Appellant pleaded only conclusions and speculation concerning the effect the failure to give this instruction may have had on the jury. (PCR L.F. 800). Indeed, Appellant’s amended motion simply states that had counsel offered an instruction patterned after MAI-Cr 3d 310.12, “the jury could not have used the evidence improperly as propensity or character evidence.” (PCR L.F. 87). The motion court correctly concluded that this allegation was nothing more than speculation that the jury did, in fact, consider the escape evidence as

propensity or character evidence against Appellant. Appellant's claim was properly rejected as pleading only conclusions, rather than facts. *See Morrow*, 21 S.W.3d at 822-23.

Moreover, nothing in the record supports Appellant's speculation. As the excerpt from the prosecutor's closing argument quoted in Appellant's brief demonstrates, the prosecutor simply argued that the escape evidence showed how desperate Appellant was to escape from jail after being indicted for Ms. Gayle's murder. App. Br. at 107; Tr. 3057. *See also Winfield*, 93 S.W.3d at 737 (affirming motion court finding that counsel was not ineffective for failing to request the no-adverse-inference instruction during penalty phase when the post-conviction motion failed to allege any "evidence that the instruction would have resulted in a different outcome" and only alleged the speculative conclusion that the jury would not have voted for death).

The motion court also found that the failure to request the limiting instruction was a matter of trial strategy in that such an instruction "may have highlighted the attempted escape by specifically calling attention to it." (PCR L.F. 799-800). This finding is not clearly erroneous considering that the escape evidence consisted of only two witnesses and consumed a mere 83 pages of a

3538-page transcript.

Appellant contends that the motion court was precluded from considering whether the failure to request a limiting instruction was trial strategy because it failed to hold an evidentiary hearing on this particular claim. But in *Barnett* this Court relied, in part, on trial strategy considerations in upholding the motion court's finding that trial counsel was not ineffective in conducting voir dire: "Although another attorney may well have employed a different strategy, tactical and strategic decisions—which might have been handled differently by many or even most attorneys—will not establish ineffectiveness." 103 S.W.3d at 771. This Court further stated that the movant could not "overcome the presumption that defense counsel's omission . . . was sound trial strategy." *Id.*

The holding in *Barnett* also supports the motion court's finding in this case that Appellant suffered no prejudice in counsel's failure to request a limiting instruction. In *Barnett*, the movant, who was convicted of murder and sentenced to death, claimed that his counsel was constitutionally ineffective for not requesting that the no-adverse-inference instruction be given to the jury during the penalty phase. 103 S.W.3d at 773. Although this Court held that this claim was procedurally barred because it was not included in the movant's

Rule 29.15 motion, it nevertheless found that the claim was without merit because the omission of an “optional instruction fails to establish prejudice cognizable by *Strickland*.” *Id.*

Just like the no-adverse-inference instruction at issue in *Barnett*, the limited purpose instruction provided by MAI-Cr 3d 312.12 is also an optional instruction. The failure of trial counsel to request this optional instruction did not prejudice Appellant. The motion court did not clearly err in finding that counsel was not ineffective.

VII. (Mitigation Evidence)

The motion court did not clearly err in overruling, without an evidentiary hearing, Appellant's claim that trial counsel were ineffective in failing to present mitigation evidence concerning Appellant's bad childhood to explain his criminal history because Appellant's motion fails to specifically identify any individual family members who would have so testified; and this strategy would have been inconsistent with the penalty-phase strategy of residual doubt about Appellant's guilt and showing that Appellant was involved with and close to his family, especially his children.

Appellant contends that his trial counsel were ineffective for failing to investigate potential mitigation evidence, including evidence of a "turbulent childhood" and difficult family background with psychiatric testimony demonstrating how his abusive childhood explained Appellant's criminal history.

A. Penalty phase mitigation theory and evidence.

During the evidentiary hearing before the motion court, Appellant's trial attorneys both testified that their primary mitigation strategy during the penalty phase was to advance the theory of residual doubt.²⁰ (PCR Tr. 46, 93). In other words, the strategy was

²⁰Although the motion court did not grant an evidentiary on this

to convince the jury to vote for life imprisonment based on a residual doubt that Appellant committed the offense, notwithstanding the jury's first-degree guilty verdict in the guilt phase. The other penalty-phase theory involved Appellant's "family network." (PCR Tr. 46). This theory involved the introduction of evidence "to show how [Appellant] grew up, that he had a family network of a mother and aunts and brothers and sisters" and that Appellant was the father of two children. (PCR Tr. 46). This evidence was designed to show the jury that Appellant had a family that he was still involved with and was a role model for his children. (PCR Tr. 46). Appellant's testimony before the motion court confirmed that "residual doubt" was the penalty-phase mitigation theory. (PCR L.F. 597).

Appellant's penalty-phase evidence followed this strategy. Appellant's aunt testified that she visited Appellant in jail and that Appellant talked to her about problems and made her feel better. (Tr. 3301, 3308-10). She observed Appellant's good relationship with his son, Marcellus Jr., and stepdaughter, and that the children were

claim, the evidentiary hearing on Appellant's failure-to-testify claim (Point XII) necessarily included testimony relating to this claim, as well as other claims, presented in this appeal.

happy and inspired around their father. (Tr. 3312-13, 3320).

Appellant's youngest brother testified that Appellant was quiet and "very smart" and that Appellant wrote him letters. (Tr. 3335). He also said that Appellant was close to Marcellus, Jr. (Tr. 3341-42). Another of Appellant's brothers testified that he stayed in contact with Appellant through visits and phone calls. (Tr. 3361).

Appellant's former girlfriend testified that she observed Appellant's relationship with Marcellus, Jr., and that Appellant speaks with and writes to his son, who loves his father. (Tr. 3374, 3382-83). She also said that Appellant was a "book person" and that education was important to him. (Tr. 3384). The mother of Appellant's son and stepdaughter testified that Appellant's motto is "education, education, education." (Tr. 3408).

Appellant's son, Marcellus Jr., testified that he visits his dad in prison and that his father tells him to do good in school and read. (Tr. 3414-15, 3421). Appellant's stepdaughter also testified that she frequently visited Appellant in prison. (Tr. 3425-27).

Appellant's mother testified that she took Appellant's son to visit his father in prison, that Appellant wrote and called his children, and that Appellant had a good relationship with them. (Tr. 3436-37). She also testified that she stayed in contact with Appellant and that

he made her feel good during their conversations. (Tr. 3442-43).

Appellant's closing argument followed this strategy.

Appellant's counsel reminded the jury that Appellant "was more than a criminal. He's a father, he's a brother, he's a counselor, too." (Tr. 3489). Counsel then pursued the residual doubt theory by revisiting Mr. Cole's credibility while assuring the jury that he wasn't questioning their guilt-phase verdict. (Tr. 3498). Counsel argued that Appellant's "good character" and positive influence as demonstrated by his family members' testimony, especially his children, was a mitigating circumstance. (Tr. 3501-03). The residual doubt theory was also reinforced by Appellant's counsel's reaction to the prosecutor's description of his argument as an "eloquent plea for mercy and forgiveness of his client." (Tr. 3510). Appellant's counsel claimed that the prosecutor was misrepresenting his argument: "I didn't ask for forgiveness." (Tr. 3510). Under the residual doubt theory, defendants who are not guilty don't need forgiveness.

B. The failure to present evidence of Appellant's horrendous childhood was not ineffective assistance, but constituted a strategically reasonable choice.

The most glaring problem with Appellant's claim is his failure to identify in his amended motion any witnesses, other than a generic

reference to “family members,” who would have testified about his abusive childhood. (PCR L.F. 90-91). The failure to specifically identify the witnesses and allege that they were ready, willing, and able to testify is fatal to his claim. *See Morrow*, 21 S.W.3d at 823. In addition, the testimony his family members did offer during the penalty phase belie Appellant’s current allegations about his terrible childhood and that his family would have testified about how awful they were to Appellant.

The motion court found that evidence that Appellant had an abusive childhood and lived in a dysfunctional family, which would explain his life of crime, would have cast him as a “violent, aggressive, angry person.” (PCR L.F. 801). This, the motion court held, would have been inconsistent with the admitted penalty-phase strategy of showing Appellant as a loving son, brother, and father with a family network. (PCR L.F. 801-02). Such evidence would also have decimated the residual doubt theory:

Had trial counsel presented evidence and argued that [Appellant] was angry, aggressive, and violent due to violence, abuse, drugs and other negative factors in his childhood, such strategy would have been tantamount to a concession of guilt with an explanation of why [Appellant] committed such a

violent murder. This evidence would have defied trial counsel's reasonable trial strategy of presenting [Appellant] as a family man, who is innocent of such a violent murder.

(PCR L.F. 802).

Evidence that Appellant suffered abuse as a child at the hands of his family also would have been difficult to juxtapose against the supportive testimony of his aunt, brothers, and mother concerning strong family ties and values. The jury would have gone into deliberations wondering what evidence to believe. An argument that counsel would have been ineffective if they had presented such conflicting evidence would be more plausible than the one Appellant advances here. The motion court did not need an evidentiary hearing on this claim to conclude that this would have been a terrible trial strategy for the penalty phase.

Finally, the motion court properly found that the "abusive-childhood" defense would not have affected the outcome of the trial. As described in this Court's opinion on direct appeal, Appellant's "crime involved a vicious attack" during he which he stabbed Ms. Gayle "forty-three times," including "seven fatal wounds." *Williams*, 97 S.W.3d at 475. Common sense suggests that the jury would likely not have dismissed death as a sentencing option in the face of

such extreme, senseless brutality simply because Appellant had a bad childhood. The motion court correctly found that the strategy of explaining Appellant's criminal history through evidence of his bad childhood would have simply confirmed for the jury that their guilt-phase verdict finding that Appellant was responsible for Ms. Gayle's murder was entirely correct.

Appellant's only chance with the jury was residual doubt, which he pursued by his unrelenting attack on Mr. Cole's and Ms. Asaro's credibility, coupled with evidence of the close-knit ties he maintained with his family, especially his children. The motion court did not clearly err in finding that counsel was not ineffective for not presenting mitigation evidence of Appellant's bad childhood.

VIII. (Indictment)

The motion court did not clearly err in overruling Appellant's claim that his trial counsel were ineffective for not filing a motion to quash the indictment on the ground that the indictment did not plead the statutory aggravating circumstances because this Court has repeatedly and uniformly rejected similar claims.

Appellant contends that his trial counsel were ineffective for not objecting to the indictment because it failed to contain any allegations identifying the statutory aggravating circumstances.

Under § 565.005.1, RSMo 2000, the state is required to give the defendant notice “[a]t a reasonable time before the commencement of the first stage of [a capital trial]” of the statutory aggravating circumstances that it intends to submit in the event that the defendant is convicted of first-degree murder. The State did so in this case (L.F. 28-30, 128-30, 187, 219-22).

Trial counsel were not ineffective because “[t]his Court has repeatedly held that statutory aggravating circumstances need not be pleaded in the information or indictment.” *State v. Strong*, 142 S.W.3d 702, 711-12 (Mo. banc 2004); *see also State v. Glass*, 136 S.W.3d 496, 513 (Mo. banc 2004); *Edwards*, 116 S.W.3d at 543-44; *State v. Gilbert*, 103 S.W.3d 743, 747 (Mo. banc 2003); *State v. Tisius*, 92 S.W.3d 751, 766-67 (Mo. banc 2002); *State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc

2002). “The maximum penalty for first-degree murder in Missouri is death, and the required presence of aggravating facts or circumstances to result in this sentence in no way increases this maximum penalty.” *Tisius*, 92 S.W.3d at at 766-67 (quoting *Cole*, 71 S.W.3d at 171). Trial counsel cannot be found ineffective for failing to raise a non-meritorious claim. *Smulls*, 71 S.W.3d at 157.

The Supreme Court’s recent opinion in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), does not alter this analysis. In *Blakely*, the defendant pleaded guilty to second-degree kidnapping, which carried a maximum term of imprisonment of ten years. *Id.* at 2535. But another Washington statute, the Washington Sentencing Reform Act, limited the length of sentences judges could impose within the statutory range. *Id.* Under that statute, the maximum sentence to which the defendant could have been exposed based on the facts admitted in his plea was 53 months. *Id.* at 2534-35. The sentencing guidelines allowed a judge to impose a sentence above the standard range if the judge found “substantial and compelling reasons justifying an exceptional sentence.” *Id.* at 2535. Although the State recommended a sentence within the standard range, the trial court, after hearing a description of the kidnaping, imposed an “exceptional sentence” of 90 months based on a judicial finding that the defendant

had acted with “deliberate cruelty,” a statutorily enumerated ground for the imposition of a sentence beyond the standard range. *Id.*

In reversing the defendant’s sentence, the Court reaffirmed *Apprendi* and held that the defendant’s sentence was unconstitutional because the facts supporting the imposition of a sentence beyond the 53-month maximum set by the sentencing statute “were neither admitted by [the defendant] nor found by a jury.” *Id.* at 2537. In other words, the finding of “deliberate cruelty” that allowed the judge to impose a sentence beyond the standard maximum was a fact found not by a jury, but only by the judge. Despite the fact that the offense itself provided a maximum sentence of 10 years, the Court held that the “relevant ‘statutory maximum,’” as established by Washington’s sentencing guidelines when applied to the facts contained in the defendant’s plea, was only 53 months, not 10 years:

Our precedents make clear . . . that the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts

punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

Id. (citations and internal quotations omitted) (emphasis in original).

The constitutional infirmity in *Blakely* was the judge's imposition of an exceptional sentence based only on the facts admitted in the guilty plea, which were insufficient under state law to justify a sentence beyond the statutorily mandated standard range. The additional facts that authorized an "exceptional sentence" were constitutionally required to be made by a jury before the judge was allowed to impose a sentence beyond the standard range of 53 months.

Nothing in *Blakely* suggests that these facts are constitutionally required to appear in an indictment, only that the jury must find them to warrant the extended sentence. This conclusion is reinforced by the Court's reaffirmation of *Apprendi*, in which the Court expressly noted that it was not addressing the indictment issue and observed that the Fifth Amendment's Indictment Clause had not been applied to the States. *Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000).

Because the Indictment Clause does not apply to the states, the only constitutional provision relevant to state charging documents is

the Sixth Amendment requirement that an accused “be informed of the nature and cause of the accusation,” which has been applied to the states through the Fourteenth Amendment. *Blair v. Armontrout*, 916 F.2d 1310, 1329 (8th Cir. 1990). The difference between the rights guaranteed by the Fifth Amendment and those guaranteed by the Sixth and Fourteenth Amendments is instructive. The Fifth Amendment’s Indictment Clause specifies that criminal charges must be initiated by a grand jury indictment and requires that all elements of the criminal offense charged be stated in the indictment.

Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998).

The Sixth and Fourteenth Amendments, by contrast, require only that a criminal defendant receive notice of the “nature and cause of the accusation” and do not specify the form that this notice must take. *Hartman v. Lee*, 283 F.3d 190 (4th Cir. 2002). Even legally insufficient charging documents have been held not to violate the Sixth Amendment when the defendant received actual notice of the charge against him. *Hartman*, 283 F.3d at 194-96; *Blair*, 916 F.2d at 1329.

Under Missouri law, Appellant was entitled to, and received, notice before trial of the statutory aggravating circumstances that the state intended to offer in the punishment phase. Nothing in *Apprendi*,

Blakely, or any other case supports Appellant's claim that this notice provision violates the Sixth and Fourteenth Amendment to the United States Constitution.

Appellant's reliance on *State v. Nolan*, 418 S.W.2d 51 (Mo. 1967), is also misplaced. In *Nolan*, the defendant was convicted and sentenced of the crime of first-degree robbery by means of a dangerous and deadly weapon, which carried a greater penalty than the crime of first-degree robbery. *Id.* at 52. The court held that the information was insufficient by charging the defendant with first-degree robbery "with force and arms" because this language was not the same as charging that the defendant used a dangerous and deadly weapon. *Id.* at 54. Here, by contrast, Appellant was given notice of the statutory aggravating circumstances upon which the State intended to rely. Also, this Court's later decisions in *Strong*, *Glass*, *Edwards*, *Gilbert*, *Tisius*, and *Cole*, control over the holding in *Nolan*, which is distinguishable on its facts.

Finally Appellant's reliance on *Sattazahn v. Pennsylvania*, 123 S.Ct. 732 (2003), to support his position is also misplaced since that case involves only the application of the Double Jeopardy Clause to capital-sentencing proceedings, not what must be pleaded in an indictment or information. Appellant contends that the Court held

that the underlying offense of murder is a lesser-included offense of murder plus one or more statutory aggravating circumstances. But the Court made no such holding. In context, the opinion simply states that for purposes of the Sixth Amendment’s jury trial guarantee, the offense of capital murder requires the finding of an additional element—a statutory aggravating circumstance—not present in a non-capital murder case:

That is to say, for purposes of the Sixth Amendment’s jury-trial guarantee, the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances.”

Id. at 739. Moreover, this statement was included in Part III of the opinion, which was joined by only three Justices.

IX. (Execution-Impact Evidence)

The motion court did not clearly err in overruling, without an evidentiary hearing, Appellant's claim that his appellate counsel was ineffective for not raising a claim that the trial court abused its discretion in precluding Appellant from presenting penalty-phase evidence concerning the psychological impact Appellant's execution might have on Appellant's children because the trial court acted within its discretion in ruling that such evidence was irrelevant and, thus, inadmissible.

Appellant argues that his appellate counsel was ineffective for not raising a claim on direct appeal that the trial court erred in not allowing Appellant to present expert testimony during the penalty phase concerning the psychological impact Appellant's execution might have on Appellant's children. Because this evidence was irrelevant to the jury's consideration of the proper sentence to impose, appellate counsel was not ineffective in not raising this claim on direct appeal.

During the penalty phase, Appellant's counsel informed the trial court that they wished to present the testimony of a psychologist to testify about "the psychological impact" Appellant's execution would have on his children. (Tr. 3389). The State objected to this evidence, and the trial court ruled that this evidence was irrelevant and precluded Appellant from presenting this expert testimony. (Tr.

3395).

The motion court found that appellate counsel was not ineffective for failing to raise this issue on appeal because evidence concerning the impact Appellant's execution may have on his children was irrelevant because it did not relate to Appellant's character, record, or circumstances of the offense. (PCR L.F. 812). In reaching this conclusion, the motion court relied on *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), in which the Court held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (emphasis in original). Testimony from a defendant's family member, or an expert witness, regarding the impact a defendant's execution would have on the family members or any other third party is simply not evidence relating to the character or record of the defendant or part of the circumstances of the offense with which he or she is charged.

This Court has previously held that testimony from a murder victim's family about what should be the appropriate sentence is inadmissible in a capital case. *Taylor*, 944 S.W.2d at 938; *State v. Smith*,

32 S.W.3d 532, 555 (Mo. banc 2000). This rule should also logically apply to exclude testimony from the defendant's family regarding the appropriate sentence.

In addition, evidence about the impact a crime had on the victim or victims is evidence directly relating to the illegal act committed by the defendant and for which he is to be punished. Conversely, evidence regarding how a legally authorized punishment may affect the defendant's family or other third parties contravenes the considered legislative judgment in having that punishment available and is not germane to the issue of what punishment is appropriate for the crime charged. In other words, evidence about how a defendant's sentence may affect others distracts the jury from its charge of determining the appropriate sentence for that particular crime.

To support a claim of ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error that would have required reversal had it been asserted and that it was obvious from the record that a competent and effective lawyer would have recognized it and asserted it. *See Edwards*, 983 S.W.2d at 522. Any remaining doubt regarding whether appellate counsel was ineffective in failing to raise this issue on appeal is removed by the fact that every other state, except one, that

has considered this issue has held that so-called “execution-impact” evidence is irrelevant and, consequently, inadmissible. The supreme courts of California, New Jersey, Washington, Mississippi, Florida, and Pennsylvania, as well as the Texas Court of Criminal Appeals, have held that execution-impact evidence is not admissible in capital cases and that it is not constitutionally required to be admitted under *Lockett*, even when victim-impact evidence has otherwise been admitted during trial. See *People v. Sanders*, 905 P.2d 420, 459 (Cal. 1995); *State v. Loftin*, 68 A.2d 677, 712-13 (N.J.1996); *State v. Stenson*, 940 P.2d 1239, 1282 (Wash. 1997); *Wilcher v. State*, 697 So.2d 1087, 1104 (Miss. 1997); *Burns v. State*, 699 So.2d 646, 654 (Fla. 1997); *Commonwealth v. Harris*, 817 A.2d 1033, 1054 (Pa. 2002); *Fuller v. State*, 827 S.W.2d 919, 935-36 (Tex. Cr. App. 1992).

Appellant, however, relies on the only state court opinion holding that such evidence is admissible, *State v. Stevens*, 879 P.2d 162 (Or. 1994). In *Stevens*, the State had called the defendant’s wife as a witness and elicited testimony that the defendant had abused both his wife and daughter. *Id.* at 163. The defense then attempted to ask the wife if she had “an opinion as to whether it would be better for [the defendant’s and witness’s daughter] if her father lived in prison for the rest of his life without possibility of parole or died.” *Id.* The trial

court sustained the prosecution's relevancy objection to that question. *Id.* at 165. In reversing the trial court, the appellate court relied on an Oregon state statute, not the state or federal constitution, in holding that the question was relevant. *Id.* at 168. The statute in question required the jury to answer four questions in determining whether to impose a death sentence. The question at issue in *Stevens*, asked the jury "whether the defendant should receive a death sentence." *Id.* at 163 n.4.

Missouri's statutory scheme is different than the one at issue in *Stevens*. Although the Oregon court discussed *Lockett* in reaching its decision, it misconstrues the United States Supreme Court's holding in that case and its reasoning behind allowing the admission of execution-impact evidence is fatally flawed. The reasoning applied by the courts that have not allowed such evidence and their conclusion that this type of evidence is irrelevant and not related to the defendant's character or record is more persuasive. In any event, the motion court cannot be found to have clearly erred in deciding that appellate counsel was not ineffective for failing to raise this issue on appeal.

X. (Constitutionality of Lethal Injection)

The motion court's judgment overruling Appellant's constitutional claim that execution by lethal injection is unconstitutional was not clearly erroneous because issues regarding the manner in which executions are carried out are not cognizable in Rule 29.15 proceedings.

In claim 8(v) of his amended motion, Appellant simply "ask[ed] that the Missouri courts and the federal courts reconsider the issue of execution by lethal injection and lethal gas." (PCR L.F. 94). As evidentiary support for his motion, Appellant alleged that lethal injection failed "to comport with the United States and the Missouri Constitution." (PCR L.F. 280). Appellant then describes the circumstances of allegedly flawed executions by lethal injection occurring in other jurisdictions and Missouri's 1995 execution of Emmett Foster. (PCR L.F. 280-90).

The motion court rejected Appellant's constitutional challenge because the constitutionality of Missouri's death penalty statute was a matter for direct appeal that cannot be raised in a motion for post-conviction relief. (PCR L.F. 814).

Notwithstanding whether this claim could have even been appropriately raised on direct appeal, this Court has already considered this issue and denied a similar claim that was raised in

a capital defendant's post-conviction motion. In *Morrow*, this court rejected a post-conviction claim challenging the constitutionality of the lethal injection procedures because the movant had failed to allege "facts that tend to show that there is a problem of administration of the death penalty by lethal injection that is likely to occur again in Missouri." *Morrow*, 21 S.W3d 828. A movant cannot meet this pleading requirement "simply by claiming that there are no assurances that future executions will be humane and constitutional and citing to examples from other jurisdictions in support of these contentions." Appellant's allegations are essentially indistinguishable from those rejected in *Morrow*.

Appellant did not allege facts showing the protocols used in the Foster execution are still in use or will be used at the time of his execution. Nor did he allege that the same individuals who participated in the Foster execution would be involved in Appellant's execution. In addition, neither the prosecuting attorney, who represented the State during Appellant's post-conviction proceeding, nor the trial court that imposed the death sentence, have any authority over the manner in which the execution is conducted. The General Assembly has mandated that the execution of a death sentence "shall be under the supervision and direction of the director of the

department of corrections.” Section 546.740, RSMo 2000.²¹

It is well-established that when a defendant does not wish to test the legality of the original conviction or sentence, but to challenge the manner in which his sentence is being carried out, the proper remedy is not a post-conviction motion, but a proceeding for a writ of habeas corpus. *Murphy v. State*, 873 S.W2d 231, 232 (Mo. banc 1994) (sentencing court has no discretion in crediting jail time proper remedy is habeas corpus or mandamus); *State ex rel. Haley v. Groose*, 873 S.W2d 221, 223 (Mo. banc 1994) (habeas corpus is available when an inmate claims prison conditions constitute cruel and unusual punishment). Rule 29.15 outlines the procedures for claiming that the sentence imposed violates the constitution. It does not provide relief for defendants wishing to challenge the specific manner in which that sentence is carried out.

²¹Appellant’s brief includes a footnote with a website address purporting to contain a copy of Missouri’s lethal injection manual. The manual found at this private website, one that is obviously not affiliated with the Missouri Department of Corrections, was published nearly twenty years ago.

XI. (“Conflict of Interest”)

The motion court did not clearly err in overruling, without an evidentiary hearing, Appellant’s claim that his counsel were ineffective because the trial court failed to hold a hearing on the pro se motion he filed before trial alleging a “conflict of interest” since this was a claim of trial court error that should have been raised on direct appeal, and, in any event, Appellant’s pro se motion contained no allegations demonstrating an actual conflict of interest or an irreconcilable difference between Appellant and his trial counsel.

Appellant contends that the motion court clearly erred in rejecting his claim that his trial counsel were ineffective because the trial court failed to hold a hearing on Appellant’s pro se motion alleging that his counsel had a “conflict of interest.” Appellant’s amended motion specifically alleged his trial counsel “were ineffective when the [trial court] did not hold a hearing on [Appellant]’s pro se motion for actual conflict of interest.” (PCR L.F. 86). As evidentiary support for his claim, Appellant basically repeated his allegations that counsel were ineffective for not investigating certain impeachment witnesses outlined earlier in his motion. (PCR L.F. 127-32).

Before Appellant’s trial began, he filed a pro se motion “for actual conflict of interest.” (L.F. 444-45). In that motion, Appellant

complained that his counsel were not investigating “important witnesses.” (L.F. 444). The record does not reflect that the trial court ever held a hearing or ruled on Appellant’s pro se motion. The motion court denied this claim. (L.F. 796-99).

The motion court did not clearly err in denying this claim. First, this is simply a claim of trial court error that should have been raised on direct appeal now disguised as an ineffective assistance of counsel claim. *Redman*, 916 S.W.2d at 793; *State v. Weaver*, 912 S.W.2d at 517. Appellant does not explain how his trial counsel can be blamed for the trial court’s failure to conduct a hearing on his pro se motion. Appellant’s amended motion contains no allegations showing how counsel were incompetent for not obtaining a hearing on his pro se motion.

Second, Appellant’s pro se motion fails to contain any allegations alleging that his counsel had a true conflict of interest. To establish a claim of conflict of interest, the defendant must show “that an actual conflict adversely affected his lawyer’s performance.” *State v. Parker*, 886 S.W.2d 908, 929 (Mo. banc 1994). “Conflict of interest normally arises where one attorney represents multiple defendants whose interests diverge.” *Id.*; see also *State v. Roll*, 942 S.W.2d 370, 377 (Mo. banc 1997). A conflict of interest doesn’t

arise in individual representation, or, in other words, when counsel represents the defendant alone. *Id.* Simply because Appellant was dissatisfied with his counsel's alleged failure to investigate certain witnesses does not establish a conflict of interest.

Finally, to the extent that Appellant's pro se motion was a plea to have his trial counsel removed because of a disagreement about trial strategy, it also fails to establish either trial court error or ineffective assistance. "To prevail on a claim of irreconcilable differences with counsel, the defendant must produce objective evidence of a 'total breakdown in communication' between the defendant and counsel." *Id.* Appellant's pro se motion alleges no evidence of such a total and complete breakdown of communication. Even if it had, a claim that the trial court should have conducted a hearing regarding this matter is also a claim of trial court error that should have been raised on direct appeal, not in a post-conviction proceeding.

XII. (Right to Testify)

The motion court did not clearly err in overruling, after an evidentiary hearing, Appellant's claim that his trial counsel were ineffective in not advising Appellant about his right to testify during the penalty phase or in failing to allow Appellant to do so because the motion court found that counsel did advise Appellant of his right to testify, the record shows that counsel did not prevent him from so doing, and that Appellant suffered no prejudice by not testifying during the penalty phase.

Appellant contends that the motion court clearly erred in overruling his claim that trial counsel were ineffective for not allowing Appellant to testify during the penalty phase. The motion court's findings, conclusions, and judgment, all made after an evidentiary hearing was conducted on this issue, were not clearly erroneous.

A. The record concerning Appellant's testifying at trial.

Appellant didn't testify during either the guilt or penalty phases of his murder trial. At the end of the guilt phase, a record was made that Appellant was, based on the advice of counsel, waiving his right to testify *in this case*:

Appellant's Counsel: I have discussed with my client his right to take the stand, and upon my advice *he is not going to take*

the stand in this case, or testify in this case.

The Court: Did you hear what your lawyer said, Mr. Williams?

[Appellant]: Yes.

The Court: Do you agree with what he said?

[Appellant]: Yes, I agree.

The Court: And you made a decision not to testify?

[Appellant]: Yes.

The Court: You understand that you have the right to testify?

[Appellant]: I understand.

The Court: And that you have the right not to testify?

[Appellant]: I understand both rights.

The Court: Okay. And it's your decision not to testify?

[Appellant]: Based on my lawyer's decision, advice.

(Tr. 2989-90) (emphasis added). During his deposition, Appellant stated that he did not testify during the guilt phase upon the advice of counsel. (PCR L.F. 728, 730).

In his amended post-conviction motion, Appellant alleged that he was prejudiced because he was the “only person who could have explained to the jury how he came in possession” of the victim’s husband’s laptop computer. (PCR L.F. 92). He further alleged that “[t]his evidence was critical in supporting the penalty phase theory of

residual doubt.” (PCR L.F. 92). The motion court conducted an evidentiary hearing on this claim; both of Appellant’s trial attorneys testified during the hearing and Appellant’s testimony was offered through his deposition.

The motion court found that Appellant had failed to prove that his trial counsel were incompetent in failing to advise Appellant about testifying, or in not allowing him to testify, in the penalty phase. Moreover, the motion court concluded that Appellant was not prejudiced by his failure to take the stand during the penalty phase. (PCR L.F. 803-10).

B. The motion court did not clearly err in finding that trial counsel advised Appellant about the right to testify and did not fail to allow him to do so.

The motion court found that if Appellant’s counsel, Joseph Green, who was primarily responsible for the penalty-phase evidence, had determined that it had been in Appellant’s best interests to testify, then Mr. Green would have discussed the issue with Appellant and would have allowed Appellant to testify in the penalty phase. (PCR L.F. 804-05). The court found that Mr. Green had followed these principles in all of his capital cases and that Appellant’s case was no different. (PCR L.F. 804-05). In reaching this conclusion, the motion court relied on the extensive experience

Appellant's attorneys had in handling capital trials. (PCR L.F. 803-04).

The motion court noted that Mr. Green and his co-counsel Christopher McGraugh were experienced and competent trial lawyers. (PCR L.F. 803-04). The record shows that Mr. McGraugh had been involved in fifty capital trials, four of which had gone to trial, and that Mr. Green had worked on thirty or forty capital trials, twenty-two of which had gone to trial.²² (PCR Tr. 44, 89).

The motion court also found no credibility in Appellant's testimony that he wasn't informed about his right to testify and that he didn't know he had such a right. (PCR L.F. 806, 809-10). The motion court relied on the fact that Appellant sat through voir dire in this case during which the trial mechanics were explained to several jury panels. (PCR L.F. 806). The record shows that extensive voir dire was conducted during which the jury was informed of both phases of a capital trial. (Tr.150-665). Appellant's contention is also refuted by the fact that he saw a parade of witnesses, including

²²At one point, Mr. Green testified that he had been involved in 10-12 actual trials, but later he said that he had tried twenty-two capital cases. (PCR Tr. 89, 95).

several called by the defense, testify during the penalty phase.
(Tr.3300-3382).

To support his argument that the motion court clearly erred in finding that Appellant was informed of his right to testify in the penalty phase, Appellant relies on the fact that both of his attorneys testified at the evidentiary hearing that they couldn't remember discussing with Appellant about testifying in the penalty phase. (PCR Tr. 46, 53-54, 65-66, 67-68, 94, 102, 112). But the trial court was not obliged to conclude that this testimony proved that counsel did not, in fact, inform Appellant of his right to testify during the penalty phase. *See Black*, 151 S.W.3d at 54 (holding that the motion court is not required to accept an attorney's claim that he or she had no trial strategy reasons for not impeaching a witness). Mr. McGraugh testified that his normal practice was to discuss with his clients their right to testify. (PCR Tr. 60). He said that he didn't give any thought about Appellant testifying during the penalty phase. (PCR Tr. 61-62). Mr. Green testified that if he had thought it had been to Appellant's advantage to testify, then he would have advised him to do so. (PCR Tr. 131-32). Mr. Green also acknowledged that in only one capital case he had handled did the defendant testify during the penalty phase, and in that case the defendant had admitted

his culpability for the crime. (PCR Tr. 116-17).

C. Appellant's failure to testify during the penalty phase was not prejudicial.

The motion court also correctly found that Appellant suffered no prejudice by his failure to testify during the penalty phase. The only two allegations of prejudice Appellant advanced was that he was unable to explain his possession of the victim's husband's laptop computer and that State's witness Laura Asaro participated in the murder.²³ The motion court noted, however, that during his deposition, Appellant didn't claim that Ms. Asaro was involved or participated in Ms. Gayle's murder. (PCR L.F. 806). Indeed, all Appellant would say is that he didn't know why Ms. Asaro would lie about him. (PCR L.F. 684-85, 743).

Appellant said that if he had been called during the penalty phase he would have testified that he saw Ms. Asaro get off the bus

²³Although not alleged in his post-conviction motion, Appellant said during his deposition that he would have also testified about his upbringing. (PCR L.F. 603). As discussed earlier in Point VII, evidence about Appellant's turbulent childhood would have been inconsistent with the residual doubt theory advanced during the penalty phase

with the laptop. (PCR L.F. 670-71). The motion court correctly concluded that this testimony would have been cumulative to the testimony of Trammel Harris, who testified that he saw Ms. Asaro get off the bus carrying the laptop. (Tr. 2804-05). The failure to present cumulative evidence is not ineffective assistance of counsel. *See Winfield*, 93 S.W.3d at 740.

Appellant also said that he would have testified that Ms. Asaro told him that she received the laptop from one of her prostitution customers and that both he and Ms. Asaro went into Glenn Roberts's house to discuss a sale or pawn of the laptop. (PCR L.F. 671). He further testified that he would have told the jury that Roberts gave Ms. Asaro \$150 for the laptop and that Roberts agreed to hold it until Ms. Asaro came back for it. (PCR L.F. 672). While this would have certainly impeached Ms. Asaro's testimony, it would have also impeached the testimony of Glenn Roberts, Appellant's neighbor and the long-time friend to Appellant's grandfather and uncles. (Tr. 1999).

Roberts testified that Appellant was alone when he came to Roberts house to sell the laptop and that Roberts gave the \$150 directly to Appellant. (Tr. 2000-01, 2041). Roberts said that he saw a female, but that she stayed in the car while Appellant came in

alone. (Tr. 2002). Impeaching his friend's testimony on what Appellant asserts was such a critical issue would have not furthered Appellant's cause during the penalty phase, and would likely have given the jury a reason not to believe him and reinforced their finding that Appellant killed Ms. Gayle, thereby scuttling the residual doubt theory.

The major problem with Appellant testifying during the penalty phase would have been all the highly prejudicial evidence that the jury would have been exposed to. For instance, Appellant testified that he and Ms. Asaro used the money Roberts gave them to buy drugs. (PCR L.F. 673). Appellant revealed that his drug habit cost about \$50 per day. (PCR L.F. 699). Despite his contention that Ms. Asaro received the laptop from one of her prostitution customers for services rendered, he conceded that the most Ms. Asaro received for a "trick" was \$40, but that the laptop was worth at least \$150. (PCR L.F. 695). Appellant could not explain this discrepancy.

Appellant also admitted that he committed various crimes to make money, including literally catching Ms. Asaro's customers with their pants down and taking their wallets while Ms. Asaro was performing oral sex on them. (PCR L.F. 702-04). Appellant's resume` also included "supervising" drug houses. (PCR L.F. 705).

He also admitted carrying a gun in 1998, though he couldn't remember where he got it from. (PCR L.F. 706-07).

While Appellant could have denied to the jury that he killed Ms. Gayle, which he repeatedly did during his deposition, (PCR L.F. 676-78, 680, 711, 734),²⁴ he said that he would have also told the jury that he couldn't remember committing the donut-shop robbery in St. Louis City, a crime for which he was convicted, (State's Exhibit 231), but that he couldn't deny that he committed the crime only because the police reports say he did it. (PCR L.F. 710). He would have had to admit to over 100 conduct violations while in the penitentiary and that he was convicted of burglary. (PCR L.F. 726). Finally, he testified that when he was performing burglaries, he tried to pick houses where no one was home and after getting no response from ringing the bell or knocking on the door, he would just break in. (PCR L.F. 726).

Appellant's post-conviction testimony concerning his previous

²⁴The strategy of having the defendant take the stand during the penalty phase and deny that he was guilty of the murder immediately after the jury had just found him to be so, is not only detrimental to the residual doubt theory, but it is, at best, ill-advised.

convictions demonstrates additional problems he would have encountered from testifying in the penalty phase. Although he was convicted of robbing the Burger King where he worked, (Tr. 3163-64, 3167; State's Exhibit 232), he testified that he didn't commit that robbery and was wrongfully convicted. (PCR L.F. 733-34). He did admit that he committed the burglary in Kansas City, but that it was the only burglary he committed there. (PCR L.F. 737-38, 740). He claimed that for every burglary he ever committed, he was caught by police. (PCR L.F. 742-43). He denied that he committed the second-degree assault for which he was convicted, but instead lied under oath so that he could get the plea deal. (PCR L.F. 740-41). Finally, he insisted that he never tried to escape from the St. Louis City Workhouse and that the corrections officer and his fellow inmate (Mathieu Hose) lied about his participation in the escape attempt. (PCR L.F. 744-46).

Even Appellant's trial counsel confirmed that any testimony Appellant might have given during the penalty phase was problematic. Mr. McGraugh testified that since Appellant didn't testify they were able to advance the argument that someone else, perhaps one of Ms. Asaro's prostitution customers, burglarized the victim's house and that Ms. Asaro may have been present at the

crime scene. (PCR Tr. 58). He also agreed that evidence that Appellant robbed Ms. Asaro's "tricks" and ran a drug house would "not have been favorable." (PCR Tr. 68-69). He admitted that the evidence Appellant might have given about the laptop was cumulative to other evidence already in the record. (PCR Tr. 75).

Although Mr. Green recognized some of the problems Appellant might face if he had testified during the penalty phase, (PCR Tr. 106-09), he refused to admit that Appellant's testifying in the penalty phase would have been prejudicial. Instead, he said that he didn't know whether it would have been helpful or harmful for Appellant to have testified in the penalty phase. (PCR Tr. 111-12). The record would suggest that Mr. Green's judgment is much keener than that. The overwhelmingly prejudicial impact Appellant's penalty phase testimony would have had on the jury perhaps explains why neither of Appellant's trial counsel can remember discussing the issue with him. In any event, the motion court was not clearly erroneous in determining that the matter had been discussed with Appellant and that a decision had been reached by all involved that Appellant would not testify.

Deference is given to the motion court's superior opportunity to judge the credibility of the witnesses." *Twenter*, 818 S.W.2d at 635.

The motion court found Appellant's deposition testimony not to be credible. (PCR L.F. 807). It concluded that Appellant never wanted to testify during the penalty phase. (PCR L.F. 807-08). The motion court also noted the prejudicial impact Appellant's penalty-phase testimony would have had on the jury, including specific mention of the matters discussed above, and properly concluded that there is no reasonable probability that the result of the trial would have been different if Appellant had testified during the penalty phase. (PCR L.F. 809-10).

XIII. (Rejection of Post-Conviction Counsel)

The motion court did not err in failing to hold a hearing concerning Appellant's motion to reject post-conviction counsel because the record shows that such a hearing was unnecessary in that Rule 29.16 does not give capital defendants the unfettered right to reject court appointed post-conviction counsel and the record in this case shows that Appellant was not competent to reject counsel and did not understand the legal consequences of doing so.

Appellant complains that the motion court clearly erred in failing to hold a hearing on Appellant's motion seeking to reject his court appointed post-conviction counsel.

After appointed counsel had filed an amended Rule 29.15 motion, Appellant filed a pro se motion notifying the motion court that of his "desire[] to reject counsel pursuant to Rule 29.16(a)." (PCR L.F. 356-57). Appellant alleged that he had "no trust" or "confidence" in his appointed post-conviction counsel. (PCR L.F. 356). Appellant alleged that his appointed counsel were not using all the discovery tools available to them and that all claims for post-conviction relief had not been alleged in the amended motion. (PCR L.F. 356-57). The only relief sought in Appellant's motion was the rejection of counsel. (PCR L.F. 357). Appellant then filed a second pro se motion basically repeating his earlier claims. (PCR L.F. 362-

63). In a later motion for reconsideration, Appellant listed several other claims he contended should have been raised in his post-conviction motion. (PCR L.F. 757-73).

In response to the motion court's order directing Appellant's appointed counsel to respond to the pro se motion, Appellant's counsel outlined a few of the actions they had taken in Appellant's case. (PCR L.F. 399-400). The motion court considered Appellant's pro se motion to reject counsel, appointed counsel's response, and "being fully advised in the premises," denied both of Appellant's motions to reject appointed counsel and his motion for reconsideration. (PCR L.F. 774).

Rule 29.16 gives indigent capital defendants the right to reject appointment of counsel in Rule 29.15 post-conviction cases:

When a motion is filed as provided in Rule 29.15 to set aside a sentence of death, the court shall find on the record whether the movant is indigent. If the movant is indigent, the court shall cause to be appointed two counsel to represent the movant. If movant seeks to reject the appointment of counsel, the court shall find on the record, after a hearing if necessary, whether the movant is able to competently decide whether to accept or reject the appointment and whether the movant rejected the offer with

the understanding of its legal consequences. Unless the movant is so competent and understands the legal consequences, movant shall not be permitted to reject the appointment of counsel.

Rule 29.16(a). The remaining provisions of Rule 29.16 deal with the qualifications all appointed counsel must possess before being permitted to represent an indigent capital defendant in a Rule 29.15 case. Rule 29.16(b).

Under Rule 29.16, the motion court is not required to hold a hearing before ruling on a pro se motion to reject the appointment of counsel. While the motion court is required to “find on the record” whether the movant is able to competently decide whether to accept or reject counsel and whether he or she understands the legal consequences of doing so, to the extent that the record in this case does not reflect that the motion court made any findings, this purported deficiency is not an impediment to the motion court’s order overruling Appellant’s pro se motion or this Court’s review of that decision.

Even without specific findings, the record demonstrates that Appellant was not competent to decide to reject counsel and that he failed to understand the consequences of doing so. This is reflected

in the timing of Appellant's motion and the content of his pro se motions and motion for reconsideration. Appellant filed his pro se motion to reject counsel only after appointed counsel had already filed an amended Rule 29.15 motion. Included in that motion and subsequent motions Appellant filed were additional Rule 29.15 claims that Appellant contends his appointed counsel should have raised. But since these claims were advanced both after the deadline for a Rule 29.15 motion had passed and the amended motion had been filed, they are untimely and may not be reviewed. *See State v. Kreutzer*, 928 S.W.2d 854, 878 (Mo. banc 1996).

Appellant obviously didn't understand the consequences of rejecting counsel at that late stage in the proceedings. The motion court did not need a hearing to determine that Appellant failed to understand the consequences of his rejection. The fact that Appellant believed he could assert new claims, or resurrect old ones, after the filing of the amended motion shows that he was not competent to do so. If an amended Rule 29.15 motion requires legal expertise to draft, *see Bullard v. State*, 853 S.W.2d 921, 922 (Mo. banc 1993), then what comes after it undoubtedly calls for legal expertise and representation by counsel. It is apparent that Appellant does not understand the consequences that rejection of counsel and

representing himself at the post-amended-motion stage would have had.

The myriad, adverse consequences that may be visited on a Rule 29.15 movant representing himself were recently catalogued by the court of appeals:

Although an incarcerated indigent may represent himself, one choosing to do so accepts certain disadvantages. Inherent problems attend an indigent incarcerated defendant proceeding pro se in a 29.15 motion. Because a Rule 29.15 motion is a civil proceeding, an indigent incarcerated defendant has no right to be present at the hearing under either the rule or the constitution. An indigent defendant proceeding pro se cannot, therefore, compel the motion court to allow him to be present during the hearing.

A pro se litigant who is not present at a Rule 29.15 hearing obviously can not address the court or cross-examine witnesses. The inability of a pro se litigant to cross-examine a witness in a Rule 29.15 hearing does not violate the confrontation clause. A pro se litigant is, moreover, held to the same standards as [a] licensed attorney. A pro se litigant is entitled to no indulgence [he or she] would not have received if

represented by counsel. A pro se litigant must follow the same rules and procedures as counsel. Although appellate courts recognize the problems faced by pro se litigants, they cannot relax [the] standards for non-lawyers. This principle is not grounded in a lack of sympathy but rather is necessitated by the requirement of judicial impartiality, judicial economy and fairness to all parties. When a litigant proceeding pro se at a Rule 29.15 hearing does not follow the rules, harsh consequences can result.

Bittick v. State, 105 S.W.3d 498, 504-05 (Mo. App. W.D. 2003)

(citations and internal quotation marks omitted).

Considering these adverse consequences, none of which Appellant evidently considered when he sought to reject appointed counsel, it was apparent to the motion court that Appellant did not understand the consequences of his actions and was thus not competent to reject appointed counsel. Considering the seriousness of a post-conviction proceeding in a capital case, evidenced by Rule 29.16's requirement that appointed counsel have experience in capital litigation, courts should not lightly or summarily sustain pro se motions to reject appointed counsel. Making it easy for capital movants to reject appointed counsel could also lead to gamesmanship

in which movants repeatedly reject and then later seek reappointment of counsel. The motion court did not err in overruling Appellant's motion to reject counsel in this case.

Finally, to the extent that Appellant is arguing abandonment by post-conviction counsel on the ground that they refused to follow his directions, this Court has already rejected that argument. *See Winfield*, 93 S.W.3d at 739 (refusing to extend the concept of abandonment to include alleged failure on the part of post-conviction counsel to raise claims).

CONCLUSION

The motion court did not clearly err in overruling and dismissing Appellant's Rule 29.15 motion. Its decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 25,842 words, excluding the cover, the signature block, this certification, and any 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 on March 21, 2005, to:

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