

No. SC88311

In the
Missouri Supreme Court

RICHARD STRONG,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit, Division 6
Honorable Gary M. Gaertner, Jr., Judge

RESPONDENT'S BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
richard.starnes@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

INDEX

TABLE OF AUTHORITIES..... 2

JURISDICTIONAL STATEMENT..... 7

STATEMENT OF FACTS..... 8

ARGUMENT

 POINT I: Juror Contact..... 14

 POINT II: PowerPoint Presentation..... 21

 POINT III: “Religious Batson”..... 28

 POINT IV: Penalty Phase Strategy..... 38

 POINT V: Self-Serving Videotape..... 62

 POINT VI: Guilt Phase Strategy..... 68

 POINT VII: Pre-Crawford Confrontation..... 81

 POINT VIII: Lethal Injection..... 91

CONCLUSION..... 95

CERTIFICATE OF COMPLIANCE AND SERVICE..... 96

TABLE OF AUTHORITIES

Cases

<u>Arizona v. Fulminante</u> , 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)	35
<u>Batson v. Kentucky</u> , 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).....	31
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).83, 88-89	
<u>Davis v. Minnesota</u> , 511 U.S. 1115, 114 S.Ct. 2120, 128 L.Ed.2d 679 (1994).....	32
<u>Davis v. Washington</u> , ___ U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).....	88-89
<u>Florida v. Nixon</u> , 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004).....	76-77
<u>Green v. Georgia</u> , 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979).....	66
<u>J.E.B. v. Alabama ex rel. T.B.</u> , 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994)	31-32
<u>Miller-El v. Dretke</u> , 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005)	32
<u>Sosa v. Alvarez-Machain</u> , 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004).....	33
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	25, 31, 57-58, 65, 74, 76, 85
<u>Tanner v. United States</u> , 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987)	17
<u>Anderson v. State</u> , 196 S.W.3d 28 (Mo. banc 2006).....	59, 74
<u>Clayton v. State</u> , 63 S.W.3d 201 (Mo. banc 2001).....	67,77
<u>Edwards v. State</u> , 200 S.W.3d 500 (Mo. banc 2006)	58-60
<u>Glass v. State</u> , 227 S.W.3d 463 (Mo. banc 2007)	32, 87
<u>Goodwin v. State</u> , 191 S.W.3d 20 (Mo. banc 2006)	74

<u>Knese v. State</u> , 85 S.W.3d 628 (Mo. banc 2002)	35-36
<u>Middleton v. State</u> , 103 S.W.3d 726 (Mo. banc 2003).....	33, 35
<u>Moss v. State</u> , 10 S.W.3d 508 (Mo. banc 2000)	36
<u>Nicklasson v. State</u> , 105 S.W.3d 482 (Mo. banc 2003)	24-25,31,57-58,65,74,85-86,92
<u>O’Neal v. State</u> , 766 S.W.2d 91 (Mo. banc 1989).....	26, 86
<u>Planned Parenthood of Kansas v. Nixon</u> , 220 S.W.3d 732 (Mo. banc 2007)	92
<u>State v. Babb</u> , 680 S.W.3d 150 (Mo. banc 1984).....	17
<u>State v. Barton</u> , SC87859, slip op. (Mo. banc December 18, 2007)	94
<u>State v. Johnson</u> , 968 S.W.3d 123 (Mo. banc 1998)	60
<u>State v. Johnson</u> , 207 S.W.3d 24 (Mo. banc 2006)	16
<u>State v. Jones</u> , 979 S.W.2d 171 (Mo. banc 1998)	26, 28
<u>State v. Mayes</u> , 63 S.W.3d 615 (Mo. banc 2001).....	19
<u>State v. Nunley</u> , 923 S.W.2d 911 (Mo. banc 1996)	25-26, 66-67, 80
<u>State v. Parker</u> , 836 S.W.2d 930 (Mo. banc 1992).....	32-33
<u>State v. Pullen</u> , 843 S.W.2d 360 (Mo. banc 1992).....	33
<u>State v. Strong</u> , 142 S.W.3d 702 (Mo. banc 2004).....	11-12, 22-23, 26, 78, 83, 86
<u>State v. Van Orman</u> , 642 S.W.2d 636 (Mo. 1982).....	83
<u>State v. Weaver</u> , 912 S.W.2d 499 (Mo. banc 1995).....	34
<u>State v. Wilkerson</u> , 616 S.W.2d 829 (Mo. banc 1981).....	66
<u>State v. Wolfe</u> , 13 S.W.3d 248 (Mo. banc 2000)	23
<u>Storey v. State</u> , 175 S.W.3d 116 (Mo. banc 2005).....	17, 27

<u>Worthington v. State</u> , 166 S.W.3d 566 (Mo. banc 2006).....	60, 94
<u>Anderson v. State</u> , 66 S.W.3d 770 (Mo.App., W.D. 2002).....	76
<u>Gardner v. Reynolds</u> , 775 S.W.2d 173 (Mo.App., W.D. 1989).....	17
<u>Hamilton v. State</u> , 31 S.W.3d 124 (Mo.App. S.D. 2000)	37
<u>Hufford v. State</u> , 201 S.W.3d 533 (Mo.App., S.D. 2006).....	76
<u>State v. Cooksey</u> , 787 S.W.2d 324 (Mo.App., E.D. 1990).....	66
<u>State v. Fritz</u> , 913 S.W.2d 941 (Mo.App., W.D. 1996).....	33
<u>State v. Neal</u> , 849 S.W.2d 250 (Mo.App. W.D. 1993).....	37
<u>Gattis v. Snyder</u> , 278 F.3d 222 (3d Cir. 2002)	34
<u>Holder v. Welborn</u> , 60 F.3d 383 (7th Cir. 1995).....	34
<u>Jones v. Plaster</u> , 57 F.3d 417 (4th Cir. 1995)	34
<u>Kesser v. Cambra</u> , 392 F.3d 327 (9 th Cir. 2004)	34
<u>United States v. Darden</u> , 70 F.3d 1507 (8th Cir. 1995).....	34
<u>United States v. Emery</u> , 186 F.3d 921 (8 th Cir. 1999).....	89
<u>United States v. Tokars</u> , 95 F.3d 1520 (11th Cir. 1996)	34
<u>United States v. Walsh</u> , 75 F.3d 1 (1 st Cir. 1996).....	17
<u>United States v. Wright</u> , 506 F.3d 1293 (10 th Cir. 2007)	16
<u>Wallace v. Morrison</u> , 87 F.3d 1271 (11th Cir. 1996).....	34
<u>Weaver v. Bowersox</u> , 241 F.3d 1024 (8th Cir. 2001)	34
<u>Young v. Bowersox</u> , 161 F.3d 1159 (8 th Cir. 1998).....	37
<u>Gonzalez v. State</u> , 195 S.W.3d 114 (Tex.Crim.App.2006).....	89

<u>People v. Moreno</u> , 160 S.W.2d 242 (Colo. 2007)	89
<u>State v. Crawford</u> , 54 P.3d 656 (Wash. 2002).....	86
<u>State v. Jensen</u> , 727 N.W.2d 518 (Wis.2007)	89
<u>State v. Mason</u> , 162 P.3d 396 (Wash. 2007)	89

Other Authorities

Mo. Const., Art. V, § 3 (as amended 1982).....	7
§ 5 65.020, RSMo 2000	7
§ 565.030.4, RSMo Cum.Supp. 2007.....	65
Supreme Court Rule 29.15	24-25, 31, 57-58, 65, 74, 85-86, 92-93

JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of St. Louis County. The convictions sought to be vacated were two convictions for murder in the first degree, § 565.020, RSMo 2000, obtained in the Circuit Court of St. Louis County, and for which appellant was given two death sentences. Due to the sentence imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Richard Strong, was charged by indictment on November 30, 2000, with two counts of murder in the first degree and two counts of armed criminal action for the murders of Eva Washington and Zandrea Thomas (L.F. 27-29).¹ On March 20, 2001, the State filed its notice of aggravating circumstances (L.F. 59-61). An information in lieu of indictment was later filed charging appellant as a prior offender (L.F. 189-194). The armed criminal action charges were severed, and the murder charges went to jury trial beginning February 26, 2003, in the Circuit Court of St. Louis County, the Honorable Gary M. Gaertner, Jr., presiding (L.F. 14, 491; Tr. 2).

The facts of the underlying criminal case, in the light most favorable to the verdict, were stated by this Court in its opinion on direct appeal as follows:

St. Ann police received a 911 call on October 23, 2000, at 3:30 p.m. The call was immediately disconnected. The dispatcher replayed the call and heard a scream. The dispatcher tried to redial the number repeatedly until officers arrived at the

¹The record on appeal consists of the direct appeal record, including the legal file (L.F.), trial transcript (Tr.), a pretrial transcript transcribed by Eleanor Quinn (Pre.Tr.), a sentencing transcript with other pretrial hearings (Sent.Tr.), and two transcripts of aborted plea attempts (Plea.Tr.1 and Plea Tr.2), and the post-conviction proceeding record, including the legal file (PCR L.F.), two volumes of separately-paginated evidentiary hearing transcript (PCR Tr. Vol. 1 and PCR Tr. Vol. 2), and numerous exhibits (Mov. Exh.).

source of the call approximately two minutes later. The call originated from the apartment where Eva lived with her two daughters. The older daughter, Zandrea Thomas, was two years old. Strong is the father of the other girl, who was three months old.

When officers arrived at the apartment and knocked, initially there was no answer at the front or back door. They continued to knock and shouted, and Strong eventually came to the back door. Upon inquiries by the police, Strong initially told them Eva and the kids were sleeping. Strong meanwhile stepped outside and closed the door behind him.

The police again asked about Eva, and Strong told them she had gone to work. Because this was an inconsistent response, the police asked about the children, and Strong told them the kids were inside. The officers asked if they could check on the children, and Strong told them he had locked himself out.² Strong knocked on the door and called for someone to open it.

²After his arrest, officers inventoried the contents of Strong's pockets and found a set of keys. When they returned to the scene, they discovered that one of those keys unlocked the front and back doors to Eva's apartment (footnote in original).

Officers noted that Strong was sweating profusely, had dark stains on the knees of his jeans, and had blood on his left hand. They ordered Strong to step aside and kicked in the door. Strong ran. When the officers chased him, Strong told them, “Just shoot me; just shoot me.” After he was handcuffed, he told the officers, “I killed them.”³

³Although it was not introduced into evidence at his trial, the following exchange was included in the record on appeal. This conversation between the trial court and Strong occurred at a pretrial hearing during which Strong testified under oath:

The Court: And the Court here today is indicating to you vehemently, as strongly as I can talk to you and tell you, that you should not plead guilty but should go to trial. Do you understand that?

Strong: No.

The Court: What don't you understand in that statement, sir?

Strong: If you want to offer me the death penalty and I'm willing to accept it, why don't you understand?

....

The Court: You do not want a trial to determine whether you're innocent or guilty of these crimes?

Inside the apartment, police found the dead bodies of Eva and Zandrea in a back bedroom. They had been stabbed repeatedly with a knife. On the bed, one of the officers found a large butcher knife and a three-month-old baby sitting next to a pool of blood. An autopsy revealed that Eva had been stabbed 21 times, with five slash wounds, and the tip of the knife used to stab her was embedded in her skull. The autopsy of two-year-old Zandrea showed she had been stabbed nine times and had 12 slash wounds.

State v. Strong, 142 S.W.3d 702, 709-10 (Mo. banc 2004).

Appellant was found guilty of both counts of first-degree murder (L.F. 539-540; Tr. 1486-1487). In the penalty phase, the State presented testimony from Officer Daniel Patrick and Michelle Brady that appellant had previously assaulted Washington and struck Zandrea, and had threatened to kill them both (Tr. 1570-1575, 1593-1595, 1596-1597, 1601). The State also called Kim Strong, appellant's ex-wife, who had been assaulted by appellant while pregnant with his child, puncturing her eardrum, and who had been threatened by appellant,

Strong: I know I'm guilty.

Following his guilt and penalty phase trials, Strong's counsel argued in a motion for new trial that the trial court erred in refusing to accept Strong's guilty plea and his request for the death penalty, but Strong did not raise this issue on appeal (Footnote in original).

who said he was going to “commit an O.J.”; Lutricia Braggs, a former co-worker and paramour, who had once been beaten to unconsciousness by appellant while she was driving, causing an accident; and Alvin Thomas, Zandrea’s father, who, in addition to Brady, provided victim impact testimony (Tr. 1536-1541,1551,1561-1563,1569,1602-1606,1611-1613). Additionally, the State presented evidence that both Washington and Ms. Strong had orders of protection against appellant (Tr. 1555-1556;1579-1580).

The defendant called several penalty-phase witnesses, including family, friends, and employers, to testify to appellant’s positive character traits, as well as two witnesses to present jail adjustment evidence (Tr. 1614-1705). Appellant did not testify (Tr. 1707-1709).

The jury recommended that appellant be sentenced to death for each murder (L.F. 573-574). The court later followed that recommendation and sentenced appellant to death for each murder (L.F. 598-602; Sent.Tr. 53). On direct appeal, this Court affirmed appellant’s convictions and sentences. Strong, 142 S.W.3d 709, 729.

On December 22, 2004, appellant timely filed his pro se Motion to Vacate, Set Aside, or Correct Judgment and Sentence (PCR L.F. 5-10). Appointed counsel filed an amended motion, raising twelve claims of ineffective assistance of counsel, four other claims of constitutional violations, and a claim “renewing” earlier ruling in the post-conviction proceeding (PCR L.F. 42-382). An evidentiary hearing was held, at which appellant called two witnesses, childhood friend Lamont Neffer and psychologist Dr. Marilyn Hutchinson (PCR Tr. Vol. 1 1-152, Vol. 2 1-151). Appellant also submitted the deposition testimony of appellant’s mother, Joyce Knox, his uncle, Wayne Garner, Public Defender’s Office

employee Julie Eilers, child “developmentist” Dr. Wanda Draper, trial counsel Bradley Dede, and assisting counsel Patrick Malone, as well as additional testimony by Dr. Hutchinson (Mov. Exh. 33-39). On December 14, 2006, the motion court submitted findings of fact and conclusions of law denying appellant’s motion (PCR L.F. 400-488). This appeal follows.

ARGUMENT

I.

The motion court did not abuse its discretion in denying appellant's motion for leave to contact the jurors from his trial because appellant's request did not constitute a proper request to contact jurors, as it did not involve external juror misconduct and sought to impeach the verdict, and there was no real probability of prejudice, as the only post-conviction claim that appellant's request was relevant to was meritless.

Appellant claims that the motion court erred in refusing to allow him to contact jurors to investigate and prove claims regarding the jury in his amended motion, especially because the court faulted appellant for failing to present the testimony of jurors to support one of his post-conviction claims (App.Br. 33-40). But because appellant's request sought to contact jurors in an effort to improperly impeach the verdict, and because appellant was not prejudiced, as his underlying post-conviction claim was meritless, the motion court did not abuse its discretion.

A. Facts

St. Louis County Local Rule 53.3 states, in relevant part, as follows:

Petit Jurors. Petit jurors shall not be required to provide any information concerning any action of the petit jury, unless ordered to do so by the Court. Attorneys and parties to an action shall not, directly or indirectly, communicate with any petit juror, except with the leave of Court. If an attorney or party

receives evidence of misconduct by a petit juror, the attorney or party shall inform the Court and the Court may conduct an investigation to establish the accuracy of the misconduct allegations.

St. Louis County Circuit Court Local Rule 53.3(2).

Appellant filed a motion prior to the filing of his amended motion requesting permission to speak with all of the jurors from his trial (PCR L.F. 22-27). Appellant alleged that he anticipated raising a claim that counsel was ineffective for failing to question the panel during *voir dire* regarding the ability to remain fair and impartial after viewing gruesome photographs and a claim concerning the record made by counsel regarding the prosecutor's peremptory strikes against venire members Bobo and Stevenson (PCR L.F. 23). He also claimed that he "may develop" additional claims requiring investigation of the jurors (PCR L.F. 23). The motion court denied the motion, but stated that it would reconsider the ruling upon a showing of a reasonable cause to believe from a post-conviction allegation that the defendant's rights had been violated (PCR L.F. 22).

In his amended motion, appellant alleged that counsel was ineffective for failing to challenge the strikes of Bobo and Stevenson as improperly motivated by religion, and that counsel was ineffective for failing to examine the venire members regarding the effect of gruesome photographs on their ability to consider mitigating evidence (PCR L.F. 43-44, 52). Regarding the second claim, he alleged that the error was "structural," relieving him of the

obligation to prove that the jurors could not actually consider mitigating evidence, and pointed out that he was not permitted to contact the jurors (PCR L.F. 269-271).

While the claim regarding the religious strikes did not require the examination of the venire members, the motion court denied appellant's claim regarding *voir dire* in part due to a failure to prove that any of the venire members would have been excluded had counsel asked about the photographs, but also due to counsel's sound strategic decision not to conduct *voir dire* on the issue in order not to emphasize how brutal the crimes were, but to instead use *voir dire* to develop rapport and establish credibility, as well as wanting to avoid getting into the facts to avoid creating a reason for the State to strike potentially favorable jurors (PCR L.F. 475-477).

B. Standard of Review

A court has wide discretion to restrict post-trial contact with jurors to protect jurors from fishing expeditions by losing parties. United States v. Wright, 506 F.3d 1293, 1303 (10th Cir. 2007); see State v. Jones, 979 S.W.2d 171, 183 (Mo. banc 1998)(courts have “discretionary power to grant permission for contact with the jurors after trial”). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Johnson, 207 S.W.3d 24, 40 (Mo. banc 2006). Where reasonable persons can differ about the propriety of the action taken by the trial court, no abuse of discretion will be found. Id. The defendant bears the burden of showing that there is a “real probability” that he was prejudiced by the abuse of discretion. Id.

C. There Was No Abuse of Discretion

“The rule is perfectly settled, that jurors speak through their verdict, and they cannot be allowed to violate the secrets of the jury room, and tell of any partiality or misconduct that transpired there, nor speak of the motives which induced or operated to produce the verdict.” State v. Babb, 680 S.W.3d 150, 152 (Mo. banc 1984). “Jurors should not be subjected to interrogation and possible harassment by the parties to a cause in which they have served in an effort by any party to invade the sanctity of the jury room and impeach their verdict.” Gardner v. Reynolds, 775 S.W.2d 173, 177 (Mo.App., W.D. 1989). Further, the affidavit or testimony of a jury is inadmissible for the purpose of impeaching a verdict, and evidence of alleged juror misconduct is only permissible as to juror misconduct that occurred outside the jury room. Storey v. State, 175 S.W.3d 116, 130 (Mo. banc 2005). Thus, the rule for the limitation on jury contact in investigating claims regarding jurors is clear: jurors are not to be contacted but for inquiries as to juror misconduct occurring outside the courtroom. The rationale is also clear: to protect the important interests in the finality of the verdict and the privacy of the deliberations. United States v. Walsh, 75 F.3d 1, 8 (1st Cir. 1996), *citing* Tanner v. United States, 483 U.S. 107, 120, 107 S.Ct. 2739, 2747-48, 97 L.Ed.2d 90 (1987). Thus, the Twenty-First Circuit’s Local Rule, which protects jurors from harassment by parties, but allows a mechanism to investigate real concerns of jury misconduct, is well within the discretion of trial courts.

In this case, the motion court did not abuse its wide discretion based on the allegations raised by appellant’s motion for contact with the jurors. As to the claim regarding the strikes

of Stevenson and Bobo, there was absolutely no reason necessary to contact the venire members, as the trial record contained all information necessary to litigate that claim—the venire member’s testimony was completely unnecessary. As to the claim regarding counsel’s failure to *voir dire* regarding the photographs, appellant’s motivation for contacting the jurors was impermissible—appellant was seeking to impeach the verdict by showing that the jury’s penalty phase verdict was improperly influenced by the gruesome photographs. As this is not a claim based on an improper external interference with the jury, but the internal motivations of the jury based on the evidence adduced at trial, any evidence about those motivations would be inadmissible as attempting to impeach the verdict.

In Jones, this Court addressed a similar claim based on a similar rule of the Twenty-Second Circuit Court. Jones, 979 S.W.2d at 183. The motion court, based on a showing of good cause, permitted contact with the jurors only as to a specific issue of alleged external juror misconduct: whether they made any phone calls, were familiar with appellant, his family or his friends, and whether any pressure was placed on the jurors by anybody. Id. Jones claimed that this limited ruling precluded him from “investigating, pleading, and proving claims of ineffective assistance of counsel and juror misconduct.” Id. This Court denied that claim, finding that the motion court properly limited the scope of the inquiry to matters involving the alleged external misconduct. Id.

This case is indistinguishable from Jones. In his request, appellant made no allegation that there was good cause to believe that any external juror misconduct had occurred. Thus, appellant failed to present a claim to the motion court for which it was proper to allow

contact with the jurors. Therefore, the motion court did not abuse its discretion in denying the motion.

Appellant also failed to show a “real probability” of prejudice from the denial of the motion. While the motion court did deny appellant’s claim for failing to call jurors to testify that they were improperly influenced by the photographs (PCR L.F. 476-477), this conclusion was ultimately irrelevant, however, as appellant could not have called such witnesses in any case, as any testimony in his favor would have improperly impeached the verdict, and any testimony not in his favor could not have aided him.

Further, the motion court’s denial of this claim was also justified by counsel’s reasonable strategic reason not to *voir dire* on the issue of the photographs. Counsel testified that he had never asked such a question in *voir dire*, believing that one could insult the intelligence of the venire members by suggesting that photographs alone would prevent them from considering evidence and that it was possible to overemphasize the gruesome nature of the photographs (Mov. Exh. 38 133-137). He stated that the venire members knew that the case involved a stabbing and a young child, and would have known that photographs of the murder would be disturbing (Mov. Exh. 38 137, 239-240). He did not want to concentrate on the nature of the offense so as not to alienate the jurors (Mov. Exh. 38 238-239). A trial strategy of not wanting to *voir dire* on a troublesome area to prevent highlighting the issue for the jury so that it will hold the issue against a client is not ineffective assistance of counsel. See State v. Mayes, 63 S.W.3d 615, 628 (Mo. banc 2001).

Additionally, appellant was not prejudiced by counsel's failure to specifically ask about the photos: as counsel noted, the jurors were well aware that appellant was charged with murdering two victims, one of whom was two years old (Tr. 50-51, 55, 114-115, 247-248, 322-323, 403-404, 466, 531-532, 585-586). This information was sufficient to insure that the jurors who said that they could consider mitigating evidence, even when faced with the evidence of these crimes. Thus, appellant would not have been entitled to relief on his post-conviction claim, and could therefore not have suffered prejudice from the motion court's denial of his motion to contact jurors.

For the foregoing reasons, appellant's point must fail.

II.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's post-conviction claim that trial counsel was ineffective for failing to properly object to the prosecutor's use of a projected PowerPoint presentation of photographs admitted into evidence during his penalty phase closing argument because appellant was not entitled to relief on this claim in that appellant already unsuccessfully raised this claim on direct appeal and failed to present any evidence that the jurors were improperly influenced by the presentation.

Appellant claims that trial counsel was ineffective for failing to object to the State's use, during penalty phase closing argument, of a PowerPoint presentation showing photographs that had previously been introduced at trial, arguing that counsel failed to make a record of the "jurors' emotional reaction" to the presentation (App.Br. 41-47). But because this Court held on direct appeal that the PowerPoint presentation was not unduly prejudicial, and because appellant presented no evidence of any emotional reaction to the presentation, appellant was not entitled to relief on his claim.

A. Facts

During the guilt phase, the State introduced a number of photographs and a videotape of the crime scene, and the autopsies of the victims which appellant objected to as gruesome and inflammatory (Tr. 951-965,1023-1024; St. Exh.10-17,19-35,42-45,49-54). At the beginning of the penalty phase, the State reoffered all of its exhibits admitted in the guilt phase for use in the penalty phase (Tr. 1535). When asked if he had an objection, appellant

stated, “No. I have made my record on that,” and the photograph were admitted (Tr. 1535-1536).

The evening before penalty phase closing arguments, the prosecutor advised the court he would be displaying photographs admitted in both phases in his closing argument through using PowerPoint software (Tr. 1720-1721). Appellant objected to the photographs being enlarged when projected, which was overruled (Tr. 1721). Appellant made no other objections to the argument (Tr. 1722-1739, 1754-1759).

On direct appeal, appellant raised, as his first point, a claim that the trial court erred in admitting the photographs in the penalty phase and in allowing the prosecutor to project the photographs as part of a PowerPoint presentation during closing argument, arguing that the photographs were used “solely to engender passion and prejudice” and because “their duplicative nature compounded the prejudice from each individual view.” State v. Strong, 142 S.W.3d 702, 720 (Mo. banc 2004). This Court reviewed the PowerPoint presentation and denied the claim as follows:

Strong contends the computerized slide show was more prejudicial than probative because it resulted in the jury’s being “bombarded with a host of graphic, color images.” As Strong notes in his brief, the slide show depicted photographs of “Eva and Zandrea before the events in question; Eva and Zandrea at the scene and during the autopsies; the butcher knife and [Strong’s mug shot], superimposed on the other images.” Nearly

all of the photographs contained in the slide show were previously admitted, and those not admitted lacked prejudice as they merely contained innocuous photographs of the victims.

“Gruesome crimes produce gruesome, yet probative, photographs, and a defendant may not escape the brutality of his own actions.” State v. Wolfe, 13 S.W.3d 248, 264 (Mo. banc 2000). Strong fails to establish that the slide presentation during the penalty phase prompted the jury to act other than on the basis of reason. The trial court did not abuse its discretion in permitting the state to display a slide show to the jurors during the penalty phase.

Strong, 142 S.W.3d at 720-21.

In his amended motion, appellant claimed that counsel was ineffective for failing to object to the final PowerPoint “montage” of photographs of appellant’s mugshot, the murder weapon, and the victims’ photographs, claiming that the photographs had been “manipulated in a calculated effort to create an emotional response” by the jurors (PCR L.F. 52-53, 272). Appellant alleged that people in the courtroom “moaned and screamed” and that the victim’s “family members ran out” of the courtroom (PCR L.F. 274). Appellant claimed that counsel’s objections to the photographs were inadequate (PCR L.F. 274).

Counsel testified that he looked at the PowerPoint presentation prior to it being presented and objected in chambers to the enlarging and superimposing of the photos in the

presentation (Mov. Exh. 38 138, 141). He believed the presentation was projected on a 5' by 5' screen (Mov. Exh. 38 139). He did not hear any gasps or other reactions in the courtroom, but did believe the presentation was left on as the jurors left the courtroom and was looked at by the jurors (Mov. Exh. 38 139-140). Co-counsel Patrick Malone testified that he believed there was some “gasps or sighs” from non-jurors during the presentation, and that “somebody may have even left the courtroom during the presentation” (Mov. Exh. 39 47). Appellant presented no evidence that any juror expressed any emotional reaction to the presentation.

The motion court denied appellant’s claim, finding that appellant failed to present evidence of the emotion reaction to the presentation, all of the photographs in the presentation were not objectionable, as they had been admitted, and there was no probability of a different result had the presentation not been made (PCR L.F. 478-479).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id.

C. Trial Counsel was Not Ineffective

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel’s performance did not conform to the degree of skill, care, and diligence of a

reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483. A movant has the burden of proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

Appellant was not entitled to relief on this claim because he was estopped from raising it due to this Court's ruling on direct appeal. The doctrine of collateral estoppel bars the relitigation of a previously determined "issue of ultimate fact" when that fact has been determined by a valid judgment. State v. Nunley, 923 S.W.2d 911, 922 (Mo. banc 1996). Collateral estoppel applies when four factors are met: 1) is the issue in the present case identical to the issue decided in the prior adjudication; 2) was there a judgment on the merits in the prior adjudication; 3) is the party against whom collateral estoppel is asserted the same party or in privity with a party in the prior adjudication; and 4) did the party against whom collateral estoppel is asserted have a full and fair opportunity to litigate the issue in the prior suit. Id.

Here, the doctrine of collateral estoppel applies to this claim. First, the issue—whether the PowerPoint presentation used by the prosecutor improperly resulted in the jury making its penalty phase decision on the basis of emotion instead of careful deliberation—was identical on both direct appeal and in the post-conviction proceeding. The fact that

appellant has now framed it as a claim of ineffective assistance of counsel is of no effect. A post-conviction motion cannot be used to receive a second appellate review of issues decided on direct appeal, even if raised under a different theory. O’Neal v. State, 766 S.W.2d 91, 92 (Mo. banc 1989). Second, there was a judgment on the merits: this Court reviewed the presentation and found that the presentation did not cause the jury “to act other than on the basis of reason.” Strong, 142 S.W.3d at 721. The third factor is clearly met—the same two parties from the direct appeal were involved in the post-conviction proceeding. And fourth, appellant had a full and fair opportunity to present his claim on direct appeal: this Court even reviewed the claim as a preserved claim of error. Id. at 720-21. Therefore, appellant was estopped from raising this claim in his amended motion by raising it on direct appeal, and cannot receive relief on the claim now.

Further, to the extent that appellant’s claim is somehow different than the claim on appeal in that it focuses on counsel’s failure to make a record of the effect of the presentation on the jury, appellant is still not entitled to relief on this claim. The failure to present evidence in support of factual allegations in a post-conviction claim constitutes an abandonment of that claim. Nunley, 980 S.W.2d at 293. While appellant presented some evidence that courtroom observers, likely the victims’ or appellant’s families or friends, might have expectedly reacted somewhat emotionally to the photographs, there was no testimony that anyone observed a single one of the jurors express any emotional impact whatsoever to the display. Further, appellant could not have presented any testimony from the jurors about the impact of the presentation, as that would have constituted an improper

attempt to impeach the verdict.⁴ See Storey v. State, 175 S.W.3d 116, 130 (Mo. banc 2005). Therefore, appellant failed to prove his claim that there was a reasonable probability of a different result but for the alleged emotional impact of the presentation.

For the foregoing reasons, appellant's point must fail.

⁴ A more detailed discussion of impeachment of the verdict can be found in Point I, supra.

III.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's post-conviction claim that counsel was ineffective for failing to challenge the State's peremptory strikes of venire members Stevenson and Bobo as improperly based on religion because counsel was not ineffective in that the law at the time of trial did not protect venire members from being struck for religion-based reasons, the State also had religion-neutral reasons for each strike, and appellant failed to plead or prove Strickland prejudice, which was required.

Appellant claims that counsel was ineffective for failing to challenge the State's peremptory strikes of venire members Stevenson and Bobo as improperly motivated by religion, arguing that an amalgam of constitutional provisions, concurring opinions and the Universal Declaration of Human Rights rendered such a strike improper at the time of trial (App.Br. 48-58). But because the law at the time of trial (and now) did not include religion as an improper ground for a peremptory strike, the strikes were justified by other race-, gender-, and religious-neutral reasons, and appellant did not plead nor demonstrate Strickland prejudice, counsel was not ineffective.

A. Facts

After appellant made his Batson challenges to the State's strikes of Stevenson and Bobo, the State offered explanations for the strikes (Tr. 908-910,919). Regarding Stevenson, the prosecutor said she was particularly unhappy about the jury being sequestered; did not look terribly interested in the case; was not very strong on being able to give the death

penalty; mentioned belonging to a church, which may have made her not extremely strong on the death penalty; did not have minor children, which the prosecutor considered important in this case; and had a brother in prison, although that did not appear to be too much of a problem for her (Tr. 910-912). The court found these explanations race-neutral, noting it was aware of the brother in prison, her statement about church, her having no minor children, her answers and physical demeanor regarding the death penalty and her “obvious expression of disgust” at the prospect of sequestration (Tr. 911-913).

Appellant responded that several veniremembers had no minor children, including Schmidt, Moreland, Keachie, Schuetz, Boles, Proulx, and Cox, and also pointed out Keachie had a friend convicted of manslaughter (Tr. 913-914). The prosecutor explained that Keachie was a young teacher who worked with children, and that the rest of the allegedly similar members were much stronger on the death penalty (Tr. 915-916). The court found no pretext, noting Stevenson’s physical disdain as sequestration, acknowledging that wanting jurors with exposure to young children was logically relevant, and taking into account the prosecutor’s reputation and the court’s experience with him (Tr. 917-918).

As to Bobo, the prosecutor noted that, although he had minor children, he was the dean of Coventry Seminary, and would assume that, since he had a high position at an institution training those in a religious vocation, that he was very religious (Tr. 919,921-922). The prosecutor also argued that Bobo was not as strong as he would like on the death penalty and had a cousin in prison for murder (Tr. 919-920). The court found these explanations race-neutral (Tr. 920-21). Appellant claimed McCabe, a retired parochial

school teacher, was similarly situated to Bobo, but the prosecutor responded that there was a big difference between a school teacher and the dean of a seminary (Tr. 921-922). The court found no pretext (Tr. 922-923).

In his amended motion, appellant alleged that counsel was ineffective for failing to challenge the strikes as improperly based on the venire member's religious affiliations and activities (PCR L.F. 43-44, 55-71). He alleged that counsel should have been aware of an "expansion" of the principles supporting Batson to protect the rights of litigants and jurors, and found that provisions of the federal and state constitutions and state statutes, as well the Universal Declaration of Human Rights, justified the challenge (PCR L.F. 59-66). He also alleged that he did not need to demonstrate prejudice, as counsel's failure to raise a "religious Batson" challenge was "structural error" (PCR L.F. 69-70).

Counsel testified that he did not raise a "religious Batson" challenge to the strikes because he had never seen a successful religion-based challenge to a peremptory strike and did not believe there was any case law protecting religion under Batson (Mov. Exh. 38 82-83, 159-161).

The motion court denied this claim, finding that appellant failed to allege required Strickland prejudice, that current law regarding peremptory strikes protected only race and sex, that the State gave more than one reason for each strike and did not discriminate based on any specific religious affiliation, and that counsel is not ineffective for failing to predict a change in the law, being judged by the law in existence at the time (PCR L.F. 409-412).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id.

C. Trial Counsel was Not Ineffective

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483. A movant has the burden of proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

1. Religion-Based Strikes were Not Challengeable Under Batson

Using a peremptory challenge to strike a potential juror based solely on that venire member's race violates the Equal Protection Clause of the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). That prohibition was later extended to strikes solely based on the gender of the potential juror. J.E.B. v.

Alabama ex rel. T.B., 511 U.S. 127, 130, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). This rule, however, has never been extended to strike based on religion. In Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), the United States Supreme Court noted that only “some” lower courts had found that religion is protected under Batson and its progeny, and cited only one federal circuit court that had (the 2nd Circuit), one state court which had (Connecticut), and one federal circuit court which “suggested” that religion was protected (the 7th Circuit). This minimal support for the position that religion is protected by Batson demonstrates that the Supreme Court has never held that Batson extends to protect religion. See Davis v. Minnesota, 511 U.S. 1115, 114 S.Ct. 2120, 128 L.Ed.2d 679 (1994)(J. Thomas, dissenting)(in dissent of the denial of certiorari from the Minnesota Supreme Court’s finding that religion was *not* protected under Batson, the J.E.B. dissenters take the majority to task for refusing to apply Batson and J.E.B. to religion). Because there is no binding federal precedent applying Batson to religion, it cannot be said that counsel was unreasonable in failing to make a religious-based challenge to the State’s strike. In reviewing an ineffective assistance of counsel claim, counsel’s conduct is measured by what the law is at the time of trial. Glass v. State, 227 S.W.3d 463, 472 (Mo. banc 2007).

Likewise, there is no binding Missouri case stating that the Missouri Constitution or statutes prohibit peremptory strikes from being based on religion. In his concurring opinion in State v. Parker, 836 S.W.2d 930 (Mo. banc 1992)(J. Price, concurring), Judge Price stated that Batson and its pre-J.E.B. progeny, coupled with the Missouri Constitution, “suggest” that religious-based strikes may be prohibited, but, recognizing that the issue was not before

the court, stated that it would be “folly” for the court to set the parameters of Batson. Id. at 942-43. Thus, this concurring opinion shows that Missouri law has not place religion into the protection of Batson. Cases since Parker have upheld strikes subject to Batson challenges based where the explanations for the strikes were based on religious motivations. See State v. Pullen, 843 S.W.2d 360, 363 (Mo. banc 1992)(strike upheld where the prosecutor believed the venire member wavered as to whether her religion would allow her to impose the death penalty); State v. Fritz, 913 S.W.2d 941, 946 (Mo.App., W.D. 1996)(strike upheld where the prosecutor was concerned venire member’s religious beliefs might prevent her from judging other people). Therefore, state law did not place counsel on notice that he was required to raise a “religious Batson” challenge to the State’s strikes.

The Universal Declaration of Human Rights also does not compel a finding that peremptory strikes cannot be based on religion, as “the Declaration does not of its own force impose obligations as a matter of international law.” Sosa v. Alvarez-Machain, 542 U.S. 692, 734, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). Thus, to the extent this document could even apply to peremptory strikes, it imposes no legal obligation to parties to not use religion as a basis for a strike. Therefore, none of the legal bases for appellant’s claim would have required the trial court to sustain a “religious Batson” challenge. Counsel is not ineffective for failing to raise a meritless objection. Middleton v. State, 103 S.W.3d 726, 741 (Mo. banc 2003).

2. “Mixed-Motive” Strikes Do Not Violate Batson

Further, regardless of the propriety of using religion as a basis for a strike, appellant was not entitled to relief because religion was not the only basis for the strike. The United States Supreme Court has not ruled on the propriety of “mixed motive” strikes—strikes where the prosecution tenders a race- or gender-neutral reason for the strike as well as a race- or gender-related reason. Kesser v. Cambra, 392 F.3d 327, 335-37 (9th Cir. 2004). The federal circuit courts who have examined this issue of federal constitutional law, however, have uniformly endorsed mixed-motive strikes, finding that such strikes do not violate Batson and its progeny. Id. at 337, *citing* Gattis v. Snyder, 278 F.3d 222, 232-35 (3d Cir. 2002); Weaver v. Bowersox, 241 F.3d 1024, 1032 (8th Cir. 2001); United States v. Tokars, 95 F.3d 1520, 1531-34 (11th Cir. 1996); Wallace v. Morrison, 87 F.3d 1271, 1274 (11th Cir. 1996); United States v. Darden, 70 F.3d 1507, 1530-32 (8th Cir. 1995); Jones v. Plaster, 57 F.3d 417, 420-22 (4th Cir. 1995); Holder v. Welborn, 60 F.3d 383, 388-390 (7th Cir. 1995).

Of particular note in those cases is Weaver, which reviewed the action of this Court in State v. Weaver, 912 S.W.2d 499, 509 (Mo. banc 1995), in which this Court upheld a strike that included a racial motivation, but was not solely race-motivated. State v. Weaver, 912 S.W.2d at 509. The Eighth Circuit found that this Court’s approach was consistent with its own precedent permitting mixed-motive strikes. Weaver v. Bowersox, 241 F.3d at 1031-32. Thus, the presence of a race-neutral, or by extension, gender-neutral, reason for a peremptory strike validates the strike under Missouri and federal precedent, even if there is also a race- or gender-related reason for the strike. Therefore, any objection by counsel would have been

meritless. Again, counsel is not ineffective for failing to make a meritless objection. Middleton, 103 S.W.3d at 741.

3. Strickland Prejudice was Required

Finally, appellant's post-conviction claim that he was not required to demonstrate Strickland prejudice because counsel's failure to raise a "religious Batson" objection was also meritless. Structural error is error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). A structural error is not subject to harmless error review on direct appeal. Fulminante, 499 U.S. at 310. First, respondent is aware of neither any United States Supreme Court case nor Missouri opinion holding that a Batson violation is a structural error which always permits the presumption of prejudice. This issue, however, need not be decided, because the issue of structural error, while important to determinations on direct appeal, is simply inapplicable to post-conviction proceedings.

Appellant relies on Knese v. State, 85 S.W.3d 628 (Mo. banc 2002), to argue that this Court has previously suggested that a claim constituting structural error could be recognized in a post-conviction proceeding and that there is prejudice *per se* from counsel's failure to object to structural error (App.Br. 22-23). However, a review of the language in Knese shows this is simply not true. In Knese, this Court reversed the defendant's death sentence because counsel failed to read the questionnaires of two jurors whose answers suggested that

they would automatically impose a sentence of death following a finding of guilt in the guilt phase. Id. at 631-33. In doing so, it concluded as follows:

This complete failure in jury selection is a structural error. (Citation omitted). On direct appeal, the United States Supreme Court, as a “per se rule,” requires vacating a death sentence imposed by a jury whose composition is affected by Witherspoon error. (Citation omitted).

In this post-conviction proceeding, ***Knese must show by a preponderance of the evidence that counsel's deficient performance prejudiced the defense.*** Deck v. State, 68 S.W.3d 418, 425 (Mo. banc 2002). Here, ***there is reasonable probability--sufficient to undermine confidence in the outcome--that Knese was prejudiced*** by his counsel’s failure to read the questionnaires and *voir dire* the two jurors.

Knese, 85 S.W.3d at 633 (emphasis added). While noting that, had appellant’s claim of error been raised on direct appeal, it would have required reversal without a consideration of prejudice, this Court clearly stated that, because this was a post-conviction proceeding, the movant still bore the responsibility of pleading and proving Strickland prejudice. Id. This is consistent with other Missouri cases showing that, even if an error would have required reversal without demonstrating prejudice on direct appeal, Strickland prejudice must be shown in a post-conviction proceeding. Moss v. State, 10 S.W.3d 508, 512-514 (Mo. banc

2000) (absent a showing that a biased juror served on the jury, counsel's failing to move for an automatic change of venue due to pre-trial publicity was not presumptively prejudicial in the Strickland context); Hamilton v. State, 31 S.W.3d 124, 126-127 (Mo.App. S.D. 2000) (involvement of prosecutor who had a conflict of interest did not result in Strickland prejudice even though prejudice would have been presumed on direct appeal); State v. Neal, 849 S.W.2d 250, 257 (Mo.App. W.D. 1993) (involvement of prosecutor who had a conflict of interest did not result in Strickland prejudice even though prejudice would have been presumed on direct appeal). This is also consistent with federal law rejecting a claim that alleged structural error is not Strickland prejudice and stating that a defendant must show Strickland prejudice from counsel's failure raise a Batson challenge. Young v. Bowersox, 161 F.3d 1159, 1160-61 (8th Cir. 1998). Thus, Knese does not support appellant's argument, but must defeat it. As such, appellant's failure to plead or prove Strickland prejudice is fatal to his claim.

For the foregoing reasons, appellant's point must fail.

IV.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant’s post-conviction claim that counsel was ineffective for failing to investigate and call five witnesses in the penalty phase—his mother, his uncle, his childhood friend, a child “developmentalist,” and a psychologist—to testify about appellant’s “social history” showing that his crimes were essentially caused by mental problems resulting from his bad childhood because counsel was not ineffective in that counsel investigated both appellant’s family history, in which family members failed to disclose any of the information alleged in the post-conviction motion, and appellant’s mental health, which revealed that appellant was not suffering from a mental disease or defect, and, following that investigation, counsel made a reasonable strategic decision to pursue a penalty phase defense based on appellant’s good character in the present, which would have been undermined by presentation of evidence of appellant’s “bad childhood.”

Appellant claims that counsel was ineffective for failing to adequately investigate and present “all available” mitigating evidence (PCR L.F. 58-76). He argues that counsel should have obtained different information from appellant’s mother, Joyce Knox, and uncle, Wayne Garner, than he elicited from them at trial, and should have called appellant’s childhood friend, Lamont Netter, and experts such as child “developmentalist” Dr. Wanda Draper and psychologist Dr. Marilyn Hutchinson, to present a penalty phase theory explaining that appellant’s murders were the uncontrollable result of mental illness caused by his “impoverished childhood...filled with neglect, violence, and abuse” (PCR L.F. 58-76). But

counsel: did investigate appellant's social history, during which he was presented a completely different picture of appellant by the same witnesses supporting the post-conviction claims; did investigate appellant's mental condition, which appellant refused to cooperate with and which revealed no mental illness which would mitigate appellant's culpability; and then decided on a reasonable penalty phase strategy, based on the statements of the fifteen witnesses he called during the penalty phase, that appellant was a good man whose life was worth sparing, which would have been undermined by the presentation of testimony regarding appellant's allegedly bad childhood and inability to control his rage. Thus, counsel was not ineffective.

A. Facts

1. Penalty Phase

At trial, counsel presented fifteen witnesses in the penalty phase. Carolyn Graham, appellant's co-worker, testified that she had known appellant for two to three years (Tr. 1614-1615). She stated that appellant was a good employee and competent worker who took care of his responsibilities, and that he was easy to get along with and was never angry (Tr. 1614-1618). Victor R. Barr, the executive director of a childcare center, testified that appellant volunteered at the facility as a cook starting in early 2000 (Tr. 1621). Barr, who found appellant to be an industrious worker, genial, polite, and professional, decided to start paying appellant for his work (Tr. 1622-1623). Barr testified that he liked appellant and his work ethic (Tr. 1623).

Rodney Epps, appellant's barber for at least 15 years, testified that he regularly saw appellant, who would come in with his family (Tr. 1624-1625). He testified that appellant treated Zandrea just like his natural children, and that he would arrange for meals for the children while he was there to get his haircut (Tr. 1626-1627, 1629). He described appellant as "always friendly" and "sort of like family" (Tr. 1627-1628). Margaret McDaniel, a co-pastor at Lovejoy Missionary Baptist Church, testified that appellant had attended that church with Washington along with their children (Tr. 1644-1645).

Wayne Garner,⁵ appellant's uncle, testified that he did not see appellant often, only at one or two family holidays a year, but was able to see that appellant was a loving father who was able to interact "fine" with other children at the gatherings (Tr. 1630-1633). Linda Johnson, appellant's aunt, testified that appellant used to volunteer to babysit her children when they were younger, and described his hugging and playing with the children (Tr. 1635-1637). Appellant was very generous with the children, giving them money and buying them ice cream (Tr. 1637). He also would do catering jobs with her, and did all of the catering for her daughter's wedding (Tr. 1636).

Lynn Kueker, a family friend who knew appellant's children since they were born, testified that she interacted with appellant, his children, and Zandrea "a lot," as the families used to do attend activities, such as sports games, together (Tr. 1646-1648). She testified that appellant "loved" her kids and was "crazy about them," was playful with them, and had taken them to the park and to McDonald's before (Tr. 1646-1649). She testified that her

⁵Garner was identified as "Dayne Garner" in the transcript (Tr. 1630).

youngest one still asked about getting to see appellant again (Tr. 1649). James Smith, appellant's former brother-in-law, testified that appellant always had a "cool calm" nature around kids and could handle children "better than I ever do" (Tr. 1650-1652).

Darrell Strong, appellant's brother, testified that he never had any problems with appellant while growing up (Tr. 1654-1655). He testified that appellant would take his nephews, nieces, and other children to the zoo or park on occasion (Tr. 1655). He testified that appellant was the type of person who went out of his way to help, describing an incident where he drove to Louisiana to do Darrell a favor (Tr. 1655-1656). He also described the relationship between appellant and Zandrea as strong (Tr. 1657).

Lynn Strong, appellant's sister, testified that appellant would babysit for her "all the time" while he was in high school (Tr. 1658). Later, he would get a rental van and take her grandchildren, along with other family children, to places like McDonald's or Discovery Zone (Tr. 1659). She said that her children were with appellant "all the time" while growing up and was "the only father my son knew" (Tr. 1660). She testified that her children still sent him pictures while he was in jail, and would continue to have a relationship with him if he was sentenced to life (Tr. 1660-1662). She also testified that appellant would take Zandrea different places with him (Tr. 1662).

Appellant's sister Paula Strong testified that, while growing up, appellant assumed, the third son and fifth child of eight, assumed the role of father figure since their father was not around (Tr. 1663-1664). As an adult, appellant spent a lot of time with her and her family—her son "practically lived with" appellant and his family (Tr. 1664). Appellant

would babysit for her and would take her children places (Tr. 1664-1665). While her daughter was in the hospital sick for about six weeks, appellant was there “night and day,” even after other people stopped coming (Tr. 1665). He also made sure her older child was taken care of during that time (Tr. 1665). She said that “[w]hatever was going on at the time, he stepped in as he did always” (Tr. 1665). Because she was a single mother, appellant would mow her yard for her (Tr. 1665). Everything appellant did for her, he was never asked to do any of it (Tr. 1665). She considered his kindness and generosity to family as “his legacy” (Tr. 1666). He got her car repaired for her, bought food for her when it was needed, and paid bills that needed paying (Tr. 1666-1667).

Appellant’s niece, Y’Keta Childs, testified that she lived with appellant for a while and that he was always like a father to her because she did not have a dad (Tr. 1684-1685). He took her to day camp, parks, “whatever we wanted to do” (Tr. 1685-1686). He used to help her with her homework when she was in school, and did “everything” for her and her mother (Tr. 1687-1688). Appellant would have fun and joke with the kids (Tr. 1688).

William Bradford, the unit supervisor for the Department of Justice Services testified that appellant had adjusted to his confinement at the facility and did not pose any threat to the institution (Tr. 1638-1639). He testified that appellant was not a troublemaker and got along with other inmates, engaging in activities with them (Tr. 1640). He testified that appellant attended church services held at the facility (Tr. 1643).

Joyce Page, a full-time prison minister, testified that she had started counseling appellant in the jail sometime before June 2001 (Tr. 1689-1690). She considered appellant a

leader who was well-versed in the Scripture and took time to get to know the new people in the study group, even trying to learn to speak to Hispanic inmates in their own language (Tr. 1690-1691). She said appellant had the ability to calm a situation and pull people aside to talk to them (Tr. 1691). She said that he almost never missed the study group meetings (Tr. 1692). Having seen thousands of inmates in just St. Louis County in her more than 20 years of experience, she believed appellant had adjusted to his confinement, helping other inmates on a regular basis (Tr. 1693-1694).

Finally, appellant's mother, Joyce Knox, testified that appellant's father left the family when appellant was between 10-12 years old, and that appellant took on the role of "everybody's daddy," loving and taking care of the younger children in the house (Tr. 1696-1697). When the children got older, appellant was always the one who was there when they needed him (Tr. 1698). She testified that appellant would take the family children places, treating them like he was Santa Claus (Tr. 1699). She testified that he brought Zandrea over to her house 3-5 times a week and that she was always with him (Tr. 1700). Appellant never treated any child differently from his own, and appellant always spent time with the children at family gatherings (Tr. 1701-1703). She believed being with children was appellant's "greatest joy" (Tr. 1703). She also testified that appellant worked two or three jobs at a time, yet would still be at her house three or four times a week helping her out (Tr. 1705).

In closing argument, counsel argued that the version of appellant presented in the guilt phase was contradicted by the evidence in the penalty phase, suggesting that the picture of appellant presented by his witnesses presented the more accurate picture (Tr. 1741). He

acknowledged that appellant would die in prison regardless of the sentence given and that it was a harsh sentence (Tr. 1740, 1742-1744, 1750, 1753). He argued that the defense witnesses presented an “entirely different individual” than the State suggested, one with “intrinsic value” which should not be ignored (Tr. 1744). While he had troubles with relationships with women, counsel argued, life imprisonment sufficiently eliminates any future danger from that (Tr. 1745). He talked about how all of the children appellant had the chance to help outside of jail could still learn from him if he lived (Tr. 1746). He argued that appellant had shown that he can also be a benefit to society by helping those in prison who would be able to return to society someday, which justified sparing his life (Tr. 1747-1749). He argued that any good that could come from this case would be lost if the jury sentenced appellant to death (Tr. 1751-1752).

2. Amended Motion

Appellant alleged that counsel was ineffective for failing to thoroughly investigate and present evidence of appellant’s “social history,” specifically claiming that he should have further investigated Knox, both Strong sisters, Garner, aunt Brenda Fonville, and childhood Lamont Netter, as well as hiring qualified mental health experts, such as Dr. Wanda Draper and Dr. Marilyn Hutchinson, to explain that appellant: was “born into severe general mental illnesses and drug addictions;” lived in an unstable environment without a positive role model; was abandoned by his father, neglected by his mother, and not reached out to by anyone else in the family; was placed in juvenile detention; went to eleven different schools and lived at numerous addresses; lived in “abject poverty” without adequate food,

clothing, or housing; was raised in an environment “rife” with violence; was “terrorized” by his siblings; was teased, picked on, shot at, and assaulted by neighbor kids; and saw friends and assaulted and his mother “brutalized” (PCR L.F. 46). Appellant claimed that all of the family and friend witnesses were willing and available to testify about appellant’s “social history,” and that counsel was aware of all of the family witnesses but Netter, who could have been discovered through reasonable investigation (PCR L.F. 46-47). He claimed that this evidence would have shown that appellant’s violent acts, including the murders, were a result of his “violent, abusive, and traumatic” life, as well as establishing a foundation for experts to testify on appellant’s behalf (PCR L.F. 47).

Appellant claimed counsel and co-counsel, Patrick Malone, were deficient in their investigation for the penalty phase (PCR L.F. 98-101). Appellant then set out almost 60 pages of proposed testimony that counsel should have obtained and presented from the family and friend (PCR L.F. 104-163). Appellant alleged that counsel should have hired a psychologist such as Dr. Marilyn Hutchinson to testify about appellant’s psychological development and diagnoses of mental illness to support such statutory mitigating circumstances as extreme emotional distress and substantial impairment of his capacity to conform (PCR L.F. 164-183). Finally, he alleged that counsel should have hired a child development expert like Dr. Wanda Draper to testify that appellant was unable to withstand the “developmental damage” of his background, which “deteriorated” his ability to cope (PCR L.F. 183-212).

3. Evidentiary Hearing

Appellant did not present testimony from either Strong sister or Fonville (PCR L.F. 422). Netter (who was identified as “Neffe” in the transcript) testified that appellant was a very good friend when he was nine and appellant was ten (PCR Tr., Vol. 1 6). He told stories of playing sports with appellant, in which both won a lot of awards (PCR Tr., Vol. 1 7-9). He testified about appellant not having good clothes, getting teased, and living in a bad neighborhood (PCR Tr., Vol. 1 9-12). Netter provided no testimony that he would have been available to testify at the time of trial.

Garner testified by deposition, which referenced an affidavit setting out his proposed testimony (Mov. Exh. 32, 35). The vast majority of the proposed testimony dealt with Knox, although he did state that the family often lacked necessities and lived in “deplorable” housing in bad neighborhoods, that Knox dated “unsavory, abusive” men who abused her during appellant’s “formative years,” that the children saw Knox drunk, and that he tried to help the family as much as possible (Mov. Exh. 32 7). He described appellant as a child as “quiet,” “shy,” and “restless, but obedient” (Mov. Exh. 32 8). He also stated that counsel only talked to him briefly on the phone and right before his testimony and never inquired about appellant’s “social history” (Mov. Exh. 32 1-2). On cross-examination, he admitted that appellant was always able to control his anger whenever he saw appellant (Mov. Exh. 37 11).

Knox testified that her proposed testimony was contained in numerous interview reports prepared by the Public Defender’s Office investigators (Mov. Exh. 1 532-534, 541-

548; 2 600-628, 700-712; 37 6-10). Knox repeatedly amended and added to her proposed testimony over time so that it grew from three pages to more than 40 pages (Mov. Exh. 1 532-534, 541-548; 2 600-628, 700-712; 37 6-10). She testified that the defense team never talked to her about appellant's "social history" (Mov. Exh. 37 10). While she admitted counsel talked to her several times, she claimed that he said he could not talk about the case (Mov. Exh. 37 10-12). She testified that appellant had a hard life—they had little income and had to beg for food, he lived at 26 different addresses and attended 11 different schools, affecting his grades, and ran into trouble in the bad neighborhood, causing him to have to fight to defend himself (Mov. Exh. 37 15-20). She testified that her mother was abusive and her sister Wilma was mentally ill (Mov. Exh. 37 23, 29-38). She believed appellant was like Wilma, experience "rages" and forgetting bad stuff that happened (Mov. Exh. 37 38-40). She once witnessed appellant have a seizure (Mov. Exh. 37 44-45). She claimed that she told counsel that she believed appellant was mentally ill (Mov. Exh. 37 53). She claimed that counsel only talked about her testimony before she went in the courtroom, and never asked anything about appellant growing up (Mov. Exh. 37 57). She later admitted, however, that she had obtained appellant school records for Dede (Mov. Exh. 37 63-64). She testified that Dr. Rabun had spoken with her, but not about a "social history" (Mov. Exh. 37 58). She also admitted that she told a police investigator that appellant had told her that Washington had killed Zandrea (Mov. Exh. 37 66-68). She claimed that appellant never attacked someone, but only ever acted in self-defense (Mov. Exh. 37 68-69). She also vilified

Washington, claiming that she was abusive to Zandrea, was violent, and was mentally disturbed (Mov. Exh. 37 78-82).

Dr. Hutchinson testified that reviewed records provided to her, and then met with appellant for a total of nine hours over two different meetings, during which he talked to her about his relationships, family, interests, and the murders (PCR Tr., Vol 1 35-36). She testified that appellant had a “vast number” of psychological diagnoses, and reached the ultimate conclusion that, at the time of the murders, appellant was under extreme emotional distress and his capacity to conform his conduct was substantially impaired (PCR Tr., Vol 1 40, 131-144). She then testified in detail about how appellant’s upbringing affected his mental health (PCR Tr., Vol 1 62-127). She testified to statements appellant made about the crime, which included a lot of detail blaming victim Washington for starting the fight and for bringing a knife into it, but did not recall what happened after he stabbed the victim the first time (PCR Tr., Vol 1 145-146). She criticized the psychological testing done prior to trial, rejecting Dr. Rabun’s conclusions, the factual statements appellant made to Dr. Rabun, and the observation of appellant at Fulton (PCR Tr., Vol. 2 3-8). She rejected any conclusion that appellant engaged in repetitive violence or was a batterer (PCR Tr. Vol. 2 22-27). She did describe appellant’s violence as “unpredictable” and later admitted appellant got angry “a lot” (PCR Tr. Vol. 2 27). She found that appellant lies only in two situations—when he wants to look better (like a fantasy), or when he says he wants the death penalty (PCR Tr., Vol. 2 28-29).

On cross-examination, Dr. Hutchinson acknowledged that she did not take into account repeated acts of violence or threats against the victim when reaching her conclusions, partially because some of this information was not given to her by appellant's attorneys or appellant's family, whom she mostly relied on for the facts she used (PCR Tr., Vol. 2 35-40, 48-49, 53, 67). She admitted that she had no independent proof that any information given to her by appellant's family was true, such as medical or psychological records, family photos, job records, conversations with past educators, neighbors, or co-workers (PCR Tr., Vol. 2 54-61). She testified that she had testified about fifty times in court, but only a couple of those times were for the State (PCR Tr., Vol. 2 44-45). She testified that, even with evidence of prior threats to kill both of the victims, appellant had no "conscious intent to kill them" (PCR Tr., Vol. 2 80-81).

Dr. Draper testified that she reviewed numerous records and then conducted interviews in order to compile a "multigenerational social history" (Mov. Exh. 33 13, 15-22). She specifically stated that she reviewed these records for facts that were "mitigating in nature" in reaching her developmental conclusions (Mov. Exh. 37). She summarized the life histories of the various members of appellant's family, pointing out specific episodes along the way (Mov. Exh. 33 22- 37, 39-40, 44-50, 54-70, 83, 96). This included accusations against Washington by members of appellant's family (Mov. Exh. 33 37). She reached a conclusion that appellant suffered from: "severe disorganized detachment disorder," which was a result of similar disorders in appellant's family, which actually impacted his brain, and which resulted in appellant having "all of these negative and fearful kinds of behaviors"

(Mov. Exh. 33 38-39, 42-43). She claimed that this disorder was “one of the major reasons for people committing violent crimes” and a “major factor in killers” (Mov. Exh. 33 79-80, 123). She concluded that, due to “genetic inheritance” from his mother’s side of the family, his mother’s unhealthy lifestyle during pregnancy, and the environment he grew up in, he “manifested several severe problems” and did not “meet the developmental milestones” that would be expected (Mov. Exh. 96-97). The end result was that he “could not maintain control of his behavior,” affecting his daily life, creating impulsive behavior, and allowing “his aggression and his violence [to become] paramount in his reactive behavior,” which cause him to “totally [lose] control of himself” (Mov. Exh. 98-99).

Dr. Draper testified that more than a third of her annual income in the previous year came from work she did for the Missouri cases, having worked on behalf of the Missouri Public Defender’s between 30-40 times (Mov. Exh. 33 14, 205-206). She had never testified on behalf of the State (Mov. Exh. 33 206). On cross-examination, she admitted that she did not talk to anyone independent of appellant’s family or friends to reach conclusions about the victim and had no independent proof, but did not believe the family lied to her (Mov. Exh. 33 114-115). In compiling her whole report, she relied solely on the documents and names of witnesses provided to her by appellant’s attorneys, and did not seek out other unbiased witnesses (Mov. Exh. 33 118-119). She did not believe that the family exaggerated anything they told her (Mov. Exh. 33 120). When confronted with negative information not given to her, such as appellant’s threats against the victims, she refused to say that such information would affect her conclusion that appellant was not in control of himself at the time of the

murder, but was in a “seizure-like state” (Mov. Exh. 33 126-127, 129-131). Regardless of information she admitted she did not have, she still would have the same conclusion that the murders were caused by his developmental disorder (Mov. Exh. 33 136). She also admitted that she interviewed appellant in reaching her conclusions for up to five hours (Mov. Exh. 33 137, 168). She admitted that she did not talk to former educators, classmates, landlords, doctors, or co-workers, but relied mostly on the family for her information (Mov. Exh. 33 143-144). She would not even admit appellant told any lie, instead calling his false statements “confusion” (Mov. Exh. 33 178-179). When faced with the fact that he butchered Washington and Washington’s child that was not his, but did absolutely no harm to his own child, she still would not concede that appellant could have possibly not been in a trance-like state during the murders (Mov. Exh. 33 192-193).

Co-counsel Patrick Malone testified that counsel asked him to interview certain individuals whom Malone believed were potential penalty phase witnesses (Mov. Exh. 39 9). Counsel discussed the concept of mitigation with him throughout his involvement in the case (Mov. Exh. 39 9). He testified that he spoke with most of the penalty phase witnesses, most of whom did not have information about appellant’s early life (Mov. Exh. 39 12-31). As for those who would have had such information, Malone had no independent recollection about what they told him (Mov. Exh. 16-30).

Counsel testified that he had tried around 100 criminal cases, had worked on 14-17 death penalty cases, and had been lead counsel on 5-6 capital cases (this one being the most recent), of which he had never before had a client sentenced to death (Mov. Exh. 38 5, 30,

143). He testified that he attended CLE seminars which included instruction on death penalty litigation and that he used resources from death penalty litigation groups in preparing the case (Mov. Exh. 38 6-7, 28). He specifically used a checklist designed for investigating mitigation evidence that he had used in the past to ask witnesses about possible avenues of mitigation (Mov. Exh. 38 28, 143). Malone would have used the same resource (Mov. Exh. 38 28, 94). Had there been any issues to discover about appellant's life history, including childhood issues, the defense team would have discovered at least those and more using those mitigation resources (Mov. Exh. 38 51-52, 102).

Counsel described appellant as being "very frustrating" to deal with while trying to prepare the defense, as he had "substantial difficulty" in getting appellant to help; appellant refused to talk about the case or gave counsel contradictory accounts about what happened (Mov. Exh. 38 55-56, 144, 148-150, 154-155). Appellant had made statements ranging from admitting that he "must have" committed the murders to denying committing the murders to admitting that he killed Washington, but only in self-defense after she had killed Zandrea (Mov. Exh. 38 148). At one point, appellant told counsel, "You want to know a secret? Everything I told you I made up;" counsel could not tell which version of events appellant was referring to (Mov. Exh. 38 147-148).

Counsel also repeatedly tried to have appellant evaluated for any mental illness issues that may assist in choice of strategy, but appellant specifically did not want to pursue such a strategy and refused to fully cooperate with the evaluations (Mov. Exh. 38 57, 61-67, 151-153). Counsel requested a psychological exam to be conducted, and Dr. John Rabun was

designated to conduct the examination (L.F. 409-414). Appellant twice declined to be interviewed by Dr. Rabun, so the court ordered that appellant be sent to the Fulton State Hospital for observation with a report to follow (Mov. Exh. 1 254). In that report from January 2002, Dr. Rabun stated that appellant did discuss some personal history with the staff at Fulton, in which he denied having any symptoms suggestive of a serious medical or neurological disorder, including seizures; he only complained of varicose veins (Mov. Exh. 1 257). A neurological exam was free of pathology (Mov. Exh. 1 257). He denied any signs of anxiety, depression, impairments in “reality testing,” hearing voices, problems with past thought process, or difficulty sleeping (Mov. Exh. 1 257). He had no sleep or appetite problems and denied ever having psychiatric treatment while at Fulton (Mov. Exh. 258). A staff psychiatrist found that he was alert, coherent, and fully oriented, finding no signs of a major mental disorder (Mov. Exh. 258). He had no behavioral problems while at Fulton, denied psychotic symptoms, did not appear to respond to unseen stimuli, and did not express self-harm thoughts (Mov. Exh. 258). Dr. Rabun found that, based on those and his own observations, he did not find any evidence that appellant suffered from a mental disorder (Mov. Exh. 1 261-262).

in January 2003, Dr. Rabun conducted a second mental evaluation on appellant at counsel’s request (Mov. Exh. 1 265; 38 58-59). Appellant denied remembering anything about the crimes (Mov. Exh. 1 266). He noted that, while appellant was receiving counseling at the jail, he showed no evidence of a psychotic disorder, having been described as depressed (Mov. Exh. 1 270). He reported suicidal and homicidal thoughts about killing

himself and everyone in his pod, but denied an intention to do either (Mov. Exh. 1 271-272). He showed neither major depression nor acute mania (Mov. Exh. 1 271). He did not voice delusional beliefs and did not show psychotic thinking (Mov. Exh. 1 272). His memory was intact regarding learning new information (Mov. Exh. 1 272). His IQ was estimated at average to low average (Mov. Exh. 1 272). While Dr. Rabun did diagnose antisocial personality disorder, appellant did not show signs of a major mental disorder (Mov. Exh. 1 272). As Dr. Rabun's examinations were not helpful to the defense, counsel did confer with Knox about getting the money for a private exam, but the funds were not available, and counsel did not believe appellant wanted to submit to another exam anyway (Mov. Exh. 38 92-93).

Because counsel could not get mitigation information from appellant, he turned to the members of appellant's family, but the members of the family told him none of the "extraordinary" events that were pled in the amended motion (Mov. Exh. 38 99-100, 103-104, 177-178). The mitigation witnesses contacted by the defense, including the appellant's family, presented a "entirely different picture than what was pled in the amended motion (Mov. Exh. 38 107). The family either failed to tell him the things that were included in the amended motion, or in fact told him contradictory things (Mov. Exh. 38 105). He asked appellant and the family questions about appellant's childhood, using the checklist as a guide, but many answers were simply not given or were "painted in a completely different, contradictory figure than what was pled in the amended motion (Mov. Exh. 38 179-180). While there was "minimal" childhood information given to him, such as school records and

appellant getting in trouble at school with fights and a shooting incident, in much of what was in the amended motion was not told to any member of the defense team, and did not represent the Richard Strong he was told about and got to know (Mov. Exh. 38 118, 180-181).

Based on the information he gathered during investigation, including the possible misinformation by appellant and his family, counsel believed that the best strategy for the penalty phase would be to show that appellant was now a good man who was able to reason, care, and do good things, instead of an excuse defense based on a bad childhood, most of the evidence of which was kept from him (Mov. Exh. 38 120-121, 187, 189). Counsel believed a strategy based on too many things from the distant past was not that beneficial, as jurors would care what appellant was like now, and such a defense could be seen as making excuses for the murders, which could alienate or offend the jury (Mov. Exh. 38 120-121, 190). This was the defense best supported by the evidence, as all accounts given to him showed that appellant cared about children, did wonderful things such as volunteering and giving food away (Mov. Exh. 38 121, 177). He hoped that the portrait of a good man in the penalty phase would be so opposed to the bizarre image created in the guilt phase that the jury would conclude that the murders were an anomaly and spare appellant's life (Mov. Exh. 38 83, 173, 188). Even if witnesses had shared all of the information in the amended motion, however, counsel still believed the best course of action was the one he took, as the abuse excuse could harm the defense, would be inconsistent with the guilt phase theory, and would have opened the door to a considerable amount of negative information not introduced

during the State's case, especially on the cross-examination of expert witnesses (Mov. Exh. 186-190, 197-211).

4. Findings

The motion court denied appellant's claim (PCR L.F. 422-452). It found that counsel was not ineffective for failing to investigate appellant's social history first because counsel did investigate the history (PCR L.F. 426-428). Appellant and his family either never shared or actually denied that appellant had a troubled childhood, sharing a completely different picture of appellant, and counsel was reasonable in concluding that appellant and his interested relatives would have been willing to share the necessary information; thus, counsel could not be faulted for appellant's and his family's lack of full cooperation (PCR L.F. 428). Counsel also investigated possible psychological impairment by trying to have appellant evaluated two different times, both of which reached the conclusion that appellant had no mental disease or defect that would benefit a mental defense of any kind (PCR L.F. 429-430). Because those conclusions were reasonable, counsel had no duty to "doctor shop" for a more favorable expert (PCR L.F. 430). Counsel's choice of penalty defense was itself reasonable—counsel presented "abundant" evidence that appellant was a good man whose life was worth sparing (PCR L.F. 433-434). Counsel also did not believe the "abuse excuse" of blaming the murder of a two-year-old girl on appellant's bad childhood would work, especially in light of other evidence of all sorts of prior bad acts the State would be able to use to impeach an expert (PCR L.F. 431-439). The motion court found that neither of the expert witnesses appellant presented in the post-conviction proceeding were credible due to

bias: both only relied on facts beneficial to their theory and disregarded detrimental facts, unreasonably refusing to concede that any bad fact would alter their opinions; both had close working relationships with the Public Defender's System and testify for them in many cases; both conceded that they only relied on information provide by appellant's family members and friends, who had a motive to lie, and did not seek corroboration from independent sources of information; both failed to interview the one member of the family who claimed that the family exaggerated the conditions of appellant's childhood; and both failed to seek out information which could possibly present appellant in a bad light, showing that they had an agenda by not gathering all of the relevant information (PCR L.F. 441-445).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id.

C. Trial Counsel was Not Ineffective

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but

for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483. A movant has the burden of proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

1. Counsel Conducted a Reasonable Investigation

In this case, counsel was not ineffective for failing to investigate appellant's social history because, as the motion court found, counsel conducted a proper investigation of the social history. There is no requirement that counsel compile a "composite" social history, as long as counsel conducts the necessary investigation of a defendant's history. Edwards v. State, 200 S.W.3d 500, 516 (Mo. banc 2006). Counsel, both himself and through his associate, conducted interviews with numerous members of appellant's family in order to discover appellant's social history, and were told none of the information that appellant claims counsel should have discovered. In Edwards, this Court held that counsel was not ineffective for failing to discover evidence of the extent of domestic violence in the home, the defendant's mother's depression, and the extent of odd behaviors by the defendant as a child, where none of the witnesses the defendant or his family told counsel about disclosed any of the detailed information counsel did not obtain. Id. Thus, this Court held, the information Edward's counsel did not receive from the witnesses was not "reasonably available" to trial counsel. Id.

Likewise, in this case, counsel made a reasonable investigation of appellant's family history, and was presented a picture completely different than that alleged in the amended

motion. Either appellant's family lied to counsel then, or lied to post-conviction counsel (and the motion court) now. Either way, counsel cannot be faulted for appellant and his family's refusal to share relevant information upon his questioning of them. Thus, as in *Edwards*, the evidence of appellant's "traumatic" childhood was not reasonably available, and counsel was not ineffective for failing to obtain it. Edwards, 200 S.W.3d at 516.

Counsel also made a reasonable investigation of appellant's mental condition. He had appellant evaluated by Dr. Rabun on two different occasions (once by observation based on appellant's non-cooperation, and once by interview and examination), and both times Dr. Rabun found that appellant was not suffering from a mental disease or defect of any seriousness. Further, due to appellant's limited to non-existent cooperation with the earlier mental examinations, counsel believed appellant did not want to participate in any more exams, consistent with his desire not to pursue a psychological defense (Mov. Exh. 38 57, 221). Because counsel investigated appellant's mental condition, he was not ineffective for failing to conduct further investigation. Counsel is not required to shop for an expert witness who might provide more favorable testimony. Anderson v. State, 196 S.W.3d 28, 37 (Mo. banc 2006).

Because counsel conducted reasonable investigations of appellant's personal and family history to the best of his ability in light of appellant's and his family's sandbagging and of appellant's mental condition, counsel was not ineffective for failing to investigate appellant's "social history."

2. Appellant's Proposed Evidence Conflicted with Counsel's Penalty Phase Strategy

Because counsel conducted a thorough investigation into mitigating evidence, counsel's choice of trial strategy in the penalty phase was virtually unchallengeable. Edwards, 200 S.W.3d at 516. Here, based on the overwhelming evidence he found regarding appellant's good character, as well as evidence that appellant had adjusted to incarceration well, counsel decided to pursue a strategy of showing that appellant took care of his family, was a hard worker, loved and was loved by children, and would be an asset to society while incarcerated if given a life sentence. He presented fifteen different witnesses to support that defense. Such a choice of trial strategy is reasonable. See, e.g., id. at 16-17 (the strategic decision to present a defense that Edwards was "contributing member of a loving family" was reasonable, even with evidence indicating a traumatic childhood); State v. Johnson, 968 S.W.3d 123, 133 (Mo. banc 1998)(the strategic decision to present a defense that Johnson was the "product of a good Christian family" instead of portraying family as cold and unloving was reasonable). Therefore, counsel's choice of trial strategy was reasonable.

Because counsel wanted to portray appellant in the best light possible, presenting any evidence of appellant's alleged rough childhood, abject poverty, abusive households, mental illness, or "trance-like" murder sprees would have seriously undermined counsel's reasonable strategy. Counsel is not ineffective for failing to call witnesses or present evidence which does not unqualifiedly support the defense. Worthington v. State, 166 S.W.3d 566, 577 (Mo. banc 2006). Thus, because the evidence constituting appellant's claim would not have unqualifiedly supported a defense attempting to show that appellant was a good man worth saving, instead of a monster needing to be killed, counsel was not

ineffective for failing to present the new testimony of Knox, Garner, Netter, Dr. Hutchinson, and Dr. Draper.

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

V.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's post-conviction claim that trial counsel was ineffective for failing to present appellant's videotaped statement to police during the penalty phase because counsel was not ineffective in that the tape contained inadmissible hearsay and contained information harmful to counsel's theory of defense, and any evidentiary value the tape would have had in showing remorse would have opened the door to evidence that he was not remorseful.

Appellant claims that counsel was ineffective for failing to introduce a videotaped statement by appellant to police to show that he was remorseful and to show "mitigating circumstances surrounding the offense," i.e., appellant's statements about what happened immediately before the murders (App.Br. 77-85). But because the tape contained inadmissible hearsay, contained information contrary to counsel's penalty phase theory, and because using the tape to show acceptance of responsibility and remorse would have opened the door to other evidence showing that appellant did not accept responsibility or show remorse, counsel was not ineffective.

A. Facts

During the guilt phase, counsel attempted to introduce the videotape of appellant's statement to Chief Ron Hawkins, in which he eventually admitted that he "must have killed" the victims, claiming that the tape was partially inculpatory and partially exculpatory, because appellant claimed on the tape that Washington initially used the knife during the

fight and that Zandrea simply got in the way (Tr. 1227-1228). The prosecutor objected to the introduction of self-serving statements on the tape as inadmissible hearsay (Tr. 1228-1229). The court ruled that the portions of the tape that were actually audible were exculpatory, and thus the tape was inadmissible (Tr. 1230-1232). Counsel did not offer the tape in the penalty phase, but included the exclusion of the statement from the guilt phase in his motion for new trial (L.F. 579).

On the tape, many of appellant's answers to questions were inaudible (PCR L.F. 326-379). Appellant repeatedly said that he did not remember what he did and did not know why he did it (PCR L.F. 361, 368, 371, 379). He apparently said he was sorry once, but did not know why he was sorry (PCR L.F. 348). He made contradictory statements about Washington, stating at times that she did not do anything to make him mad, but then saying that she punched him, cut him with a knife, pushed him, and told him to leave (PCR L.F. 342, 347, 359, 364-365, 379). Appellant only acknowledged cutting the victims because the police told him that he did (PCR L.F. 356, 361, 368, 372).

In his amended motion, appellant claimed that counsel was ineffective for failing to offer the videotape in the penalty phase (PCR L.F. 49). Appellant alleged the tape was "important mitigation evidence" because it showed that his mood was "subdued" and that he cried, and showed that he acknowledged that he was responsible for the crimes, even though he did not admit "many details" (PCR L.F. 236-237). He claimed prejudice because the jury would have seen that he accepted responsibility and was remorseful (PCR L.F. 238).

Counsel testified that he tried to introduce the tape in the guilt phase to try to inject a possible issue for appeal (Mov. Exh. 38 127-128). He believed that, while the tape showed that appellant was “discombobulated” and that his “frame of mind was not accurate,” which could have benefited the guilt phase defense regarding the State’s alleged rush to judgment, counsel believed that there was too much negative information in the tape to try to use it in the penalty phase even if he could (Mov. Exh. 38 129). Counsel did not recall appellant showing remorse on the tape, but, even if there was, there was other evidence that appellant did not show remorse that could have been used if he tried to show remorse, such as his statements that he did not remember the murders, that he denied the killings, and that he blamed Washington for killing Zandrea (Mov. Exh. 38 128-130, 221-223, 230). He also stated that evidence acknowledging that he killed the victims in the penalty phase would have been inconsistent with counsel’s guilt phase strategy, and would have made the jury think that the “wool was getting pulled over their eyes” (Mov. Exh. 38 190-191).

The motion court denied the claim, finding that appellant failed to present any evidence establishing a foundation for the tape, that the tape contained inadmissible hearsay, that counsel’s trial strategy was sound, and that admitting the tape would have opened the door to damaging evidence, including evidence that appellant did not accept responsibility for the crimes and had no remorse, including other statements that he did not remember the crimes and statements that Washington killed Zandrea (PCR L.F. 462-466).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id.

C. Trial Counsel was Not Ineffective

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483. A movant has the burden of proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

Here, counsel was not ineffective for failing to introduce the tape. First, the tape contained inadmissible self-serving hearsay, including all of the evidence appellant argues explains what "triggered" the events leading to the murder. Evidence in mitigation of punishment "may be presented subject to the rules of evidence at criminal trials." § 565.030.4, RSMo Cum.Supp. 2007. A defendant's self-serving hearsay statements are not

admissible. State v. Wilkerson, 616 S.W.2d 829, 834 (Mo. banc 1981); State v. Cooksey, 787 S.W.2d 324, 328 (Mo.App., E.D. 1990). Thus, appellant's statements in the interview claiming that he did not know or remember what happened and blaming the victim for cutting him and for starting the alleged fight leading to the murders was clearly inadmissible.

Appellant attempts to circumvent this rule of evidence by claiming that the rules of evidence do not apply to a capital penalty phase, citing the United States Supreme Court opinion of Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). Green is inapplicable, however. First, that opinion, dealing with a co-defendant's inculpatory statement which exculpated the defendant, states that the holding applies to the "facts of this case" and in "these unique circumstances," thus limiting the application of that case to the facts of the case. Id. at 97. Therefore, Green cannot stand for a general proposition that the rules of evidence do not apply to the penalty phase. Second, the opinion deals with the Due Process right to introduce another person's statement against penal interest as set out in Chambers v. Mississippi, a judicially recognized exception to the hearsay rule. Id. There is no such exception for appellant's self-serving statements. Thus, Green does not render the inadmissible tape admissible.

Appellant also was not entitled to relief on his claim regarding the alleged evidence of the "trigger" for the murders because appellant did not include this claim in the amended motion, raising it for the first time on appeal. Claims not presented to the motion court cannot be raised for the first time on appeal. State v. Nunley, 980 S.W.2d 290, 292 (Mo.

banc 1997). Thus, the motion court could not have clearly erred in rejecting a claim not put before it.

As to introducing the tape to show that appellant “accepted responsibility” for the crimes and showed remorse, the tape barely shows either, as appellant never admitted without qualification that he murdered the victims. Regardless, to the extent that the tape could possibly be construed as showing remorse or responsibility, counsel’s reasonable choice of trial strategy did not include an admission of responsibility during the penalty phase, and in fact would have been damaging to the defense theory, which never admitted that appellant committed the murders. Further, as the motion court found, admitting the tape for the purpose of showing remorse would have opened the door to evidence counsel was aware the State had showing that appellant subsequently stated that he did not know what had happened and that he had stated to others that Washington had killed Zandrea, which would have shown a complete lack of responsibility and remorse for the crimes (Mov. Exh. 38 221-223; Mov. Exh. 37 66-68). Counsel is not ineffective for failing to present evidence that might undermine the whole theory of trial. Clayton v. State, 63 S.W.3d 201, 209 (Mo. banc 2001). Because the tape had the potential to do far more harm than good, counsel was not ineffective for failing to introduce it in the penalty phase.

For the foregoing reasons, appellant’s point must fail.

VI.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant’s post-conviction claim that counsel was ineffective for presenting an “unreasonable” reasonable-doubt defense strategy instead of a “lack of deliberation” defense in the guilt phase because appellant was not entitled to relief on this claim in that counsel’s decision to pursue a reasonable doubt defense was a reasonable strategic decision.

Appellant claims that counsel was ineffective for choosing to pursue a defense during the guilt phase that the State had not proven appellant guilty beyond a reasonable doubt, arguing that the evidence of his involvement in the murders was “overwhelming” and that the “only question” was whether or not appellant deliberated prior to the murders (App.Br. 86-97). But because counsel believed, based on his experience and the evidence, that a reasonable doubt defense was the best available defense for purposes of both the guilt and penalty phases; had been told numerous different stories about the murder by appellant; did not have appellant’s cooperation; and was not authorized by appellant to pursue a defense where he admitted that appellant committed the killings; and because counsel did not want to open the door to additional evidence showing that appellant had previously assaulted and threatened to kill both victims, counsel’s choice of defense was not clearly unreasonable.

A. Facts

At trial, trial counsel pursued a guilt phase defense that the State did not prove its case beyond a reasonable doubt, attempting to point out that the State’s case was built on

unproven assumptions and a rush to judgment and that, because of mistakes made during the investigation of the murder, that the testimony of the State's witnesses could not be trusted (Tr. 1453-1467). For example, he pointed out that the officers repeatedly altered and amended their police reports to keep changing the story of the investigation and to try to make the reports match up with each other (Tr. 1457-1459). In his cross-examinations of the witnesses, he challenged such things as: the timing of the 911 call, which was relevant to the amount of time appellant allegedly had to commit the crime (Tr. 999); that the phone was hung up as opposed to pulled out of the wall during the call (Tr. 1007); the qualifications and conclusions of blood-spatter testimony (Tr. 1040-1043); omissions from police reports, including the "inadvertent" omission of appellant's admission to the killings (Tr. 1120-1121, 1138-1139, 1205-1206, 1281-1290); that the scene could not be left in its original state due to the necessity of removing appellant's child from the bed (Tr. 1216-1217); and that certain pieces of evidence were not investigated until well after the original investigation (Tr. 1292-1298).

In the penalty phase, counsel called fifteen different witnesses including family, friends, and employers, to testify to appellant's good character, as well as two witnesses to present jail adjustment evidence (Tr. 1614-1705). He argued that there was a "contradict[ion]" between the guilt phase depiction of appellant and the penalty phase depiction, which accurately showed appellant's life as one with value, that life imprisonment would be a sufficient punishment to protect society, and that appellant could be a beneficial member of society in prison (Tr. 1740-1753).

In his amended motion, appellant alleged that counsel was ineffective for pursuing the “unreasonable doubt” defense instead of a theory in which he admitted that appellant committed the murders but argued that there was no deliberation (PCR L.F. 44-45, 71-87). He alleged that, due to the evidence showing that appellant was guilty, the chosen defense, which he describes as “haphazard” and “offensive,” left “no chance” of a not guilty verdict or of residual doubt to affect the penalty phase verdict (PCR L.F. 44, 71-73, 76-77). He alleged that he had admitted the murders to counsel (although he did not know why he did it) and that he had not insisted on a “not guilty” defense (PCR L.F. 74-76). He alleged that counsel should have called witnesses Carolyn Graham and Sterling Frazier to testify about appellant’s good mood earlier that day and plans later in the day to show a lack of deliberation; questioned Officer Henry Kick about the lack of money on appellant when arrested to show no plan to escape; questioned Chief Hawkins about the lack of damage in the rest of the apartment; questioned medical examiner Dr. Turgeon to show the absence of defensive wounds to explain that there was no prolonged struggle; and presented insurance documents to show that appellant had no financial interest in the victims’ deaths (PCR L.F. 78-83). He also alleged that counsel’s guilt phase strategy was inconsistent with presenting a penalty phase strategy relying on appellant’s bad childhood, which he alleged counsel did not, but should have, investigated (PCR L.F. 86-87).

Appellant presented no testimony or other evidence from those witnesses he alleged that counsel should have called to support a lack of deliberation defense. He did present the testimony of counsel, who testified that he had tried around 100 criminal cases, had worked

on 14-17 death penalty cases, and had been lead counsel on 5-6 capital cases (this one being the most recent), of which he had never before had a client sentenced to death (Mov. Exh. 38 5, 30, 143). Counsel testified that he attended CLE seminars which included instruction on death penalty litigation and that he used resources from death penalty litigation groups in preparing the case (Mov. Exh. 38 6-7, 28).

Counsel described appellant as being “very frustrating” to deal with while trying to prepare the defense, as he had “substantial difficulty” in getting appellant to help and appellant refused to talk about the case or gave counsel contradictory accounts about what happened (Mov. Exh. 38 55-56, 144, 148-150, 154-155). Appellant had made statements ranging from admitting that he “must have” committed the murders to denying committing the murders to admitting that he killed Washington, but only in self-defense after she had killed Zandrea (Mov. Exh. 38 148). At one point, appellant told counsel, “You want to know a secret? Everything I told you I made up;” counsel could not tell which version of events appellant was referring to (Mov. Exh. 38 147-148). Counsel did discuss mounting a defense based on trying to obtain a second-degree murder conviction, and while he did not recall appellant specifically prohibiting counsel from pursuing that defense, appellant also never authorized that defense and never told counsel to make any admissions that he did anything (Mov. Exh. 38 85, 91, 168). Counsel also repeatedly tried to have appellant evaluated for any mental illness issues that may assist in choice of strategy, but appellant specifically did not want to pursue such a strategy and refused to fully cooperate with the evaluations, which revealed no mental illness problems to support a defense (Mov. Exh. 38 57, 61-67, 151-153).

Counsel testified that he did not take the choice of guilt phase theory lightly, and concluded that he would try to attack the State's case in a effort to raise a reasonable doubt, a defense he believed was the "only thing I could do" (Mov. Exh. 38 83, 162, 165). He testified that he rejected a lack of deliberation defense for several reasons (Mov. Exh. 38 84). First, he had no "heartfelt conclusion" that he was comfortable believing that appellant had actually killed the victims without deliberation—he had too much conflicting information about the crime from appellant based on appellant's "radically different" statements about the crime (Mov. Exh. 38 84-85). Counsel did not wish to admit that appellant committed the crimes without appellant giving specific instructions to admit that he had actually committed the murders, and did not believe the evidence of guilt was so overwhelming that he had no choice but to choose and admission defense (Mov. Exh. 38 88-89). Second, he believed that, had he argued that appellant lacked deliberation, the State could have introduced numerous pieces of evidence showing that appellant had deliberated that were not admitted during the guilt phase, including that appellant had assaulted Washington before and had threatened to kill both victims in the past, telling Washington at one point that he had dug a "shallow grave" for her (Mov. Exh. 38 163-164, 167, 174). Based on his experience, he believed that it was "always" more "dangerous" to present a defense that the State could rebut during its presentation of evidence as opposed to a defense based on attacking the State's case, and wanted to avoid doing that (Mov. Exh. 38 168). Third, he believed that a reasonable doubt guilt phase was beneficial to the penalty phase: he hoped to present such a contradictory picture of how good a person appellant was during the penalty phase in the hopes that the

jury would believe that appellant was more like the penalty phase picture than the bizarre murderer depicted in the guilt phase and sentence him to life (Mov. Exh. 38 89, 173). Had he presented an admission defense, he feared that it would have actually accentuated the issue of deliberation and minimized the impact he wanted in the penalty phase (Mov. Exh. 38 173-174).

The motion court denied appellant's claim (PCR L.F. 412-422). The court noted its personal knowledge of counsel's considerable professional experience, counsel's training under one of the "preeminent criminal defense attorneys" in Missouri, its belief that appellant received "excellent" representation by counsel, and counsel's successful history in defending capital cases (PCR L.F. 401-402). The court also noted 1) that appellant did not present any of the testimony that he claimed counsel should have presented in guilt phase; and 2) that appellant did not plead that counsel should have presented in the guilt phase any of the evidence he actually did present to support his penalty phase claim (PCR L.F. 412-413). The court found that counsel did his best to work with appellant, whom the court believed, based on its observations over the months the case was pending, was purposely attempting to "manipulate and control" the system with his non-cooperation (PCR L.F. 402-403, 414-415). The court found that counsel reviewed all of the positives and negatives of various theories, and that counsel chose a "sound" theory that he thought was most advantageous of the available defenses, even if it was the "lesser of two evils" (PCR L.F. 415, 422). It found that counsel made timely objections, conducted "close and exacting" cross-examinations, and made a cogent closing argument to support his theory that the State

had failed to present reliable evidence to support guilt beyond a reasonable doubt (PCR L.F. 415). The motion court also found that appellant did not suffer prejudice from the choice not to pursue a lack of deliberation defense, as there was overwhelming evidence of deliberation, which would have been even worse had counsel opened the door to appellant's bad acts demonstrating an intent to kill both of the victims (PCR L.F. 416-421).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id.

C. Trial Counsel was Not Ineffective

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483. A movant has the burden of proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

Here, counsel was not ineffective for choosing a reasonable doubt theory in the guilt phase instead of a claim of lack of deliberation. Counsel clearly conducted a sufficient investigation of the guilt phase—he reviewed all available reports and tried to review them with appellant, investigated certain claims in the State’s case, twice tried to have appellant evaluated for a mental disease or defect to see if that would support a defense, and interviewed witnesses to use in the guilt phase (Mov. Exh. 38, 39). The defense that counsel chose—that the State’s case could not be trusted as proof beyond a reasonable doubt due to irregularities in the investigation, casting doubt on the testimony of the officers (which comprised most of the guilt phase evidence)—was supported by evidence (Tr. 999, 1007, 1040-1043, 1120-1121, 1138-1139, 1205-1206, 1216-1217, 1281-1290, 1292-1298). Thus, the choice cannot be said to be constitutionally “unreasonable,” i.e., that counsel’s decision was so outside the “wide range of professional conduct” that he was no longer functioning as counsel contemplated by the Sixth Amendment. Anderson v. State, 196 S.W.3d 28, 34 (Mo. banc 2006); Goodwin v. State, 191 S.W.3d 20, 25 (Mo. banc 2006). That the strategy did not work is constitutionally irrelevant. Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance. Anderson, 196 S.W.3d at 34. It is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy. Anderson, 196 S.W.3d at 34.

Counsel was also justified in pursuing a reasonable doubt theory in light of appellant’s refusal to cooperate with counsel and his insistence at making inconsistent statements about

the crime. Counsel was entitled to rely on what appellant told him in determining the theory of defense. “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” Strickland, 466 U.S. at 691. It is not unreasonable for trial counsel to rely on statements of the defendant in determining what defenses to pursue at trial. Hufford v. State, 201 S.W.3d 533, 539 (Mo.App., S.D. 2006); Anderson v. State, 66 S.W.3d 770, 777 (Mo.App., W.D. 2002). Because appellant often denied killing one or both of the victims, it was not professionally unreasonable for counsel to decide that he had to pursue the one available defense that did not rely on appellant’s statements about the crime instead of pursuing a defense that appellant expressly denied.

Further, in the same vein, counsel decided not to use any defense where he conceded that appellant had committed either of the murders because appellant had never authorized him to concede that appellant had committed any criminal act (Mov. Exh. 38 84-85, 168). It cannot be said to be unreasonable for counsel to reject a defense that he believed was not supported by his client. While the United States Supreme Court has ruled (almost two years *after* appellant’s trial) that pursuing an admission defense that a client has not authorized is not automatically ineffective assistance of counsel, Florida v. Nixon, 543 U.S. 175, 188-92, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), this does not mean counsel is unprofessional or unreasonable in refusing to pursue a defense that his client does not support.

Counsel's decision on the guilt phase defense was also justified because it was part of an overall strategy that also took into mind his penalty phase strategy—to show that the real appellant was not at all like the person portrayed in the guilt phase and that the was therefore an act so outside his actual character, thus giving the jury a reason to find that appellant's life was a life worth saving, which included evidence showing that appellant would present no danger in prison, and would actually benefit society if allowed to live. By pursuing a line that appellant lacked deliberation, i.e., that the murder was actually caused by some uncontrollable rage, counsel would have done harm to the penalty phase case—if appellant could be swept up into uncontrollable rage at the time of the murder, he could do the same at some other time. Counsel may effectively pursue a guilt phase theory that “avoid[s] a counterproductive course” with a theory seeking “to persuade the trier that his client's life should be spared.” Nixon, 543 U.S. at 191. Counsel is not ineffective for failing to present evidence that might undermine the whole theory of trial. Clayton v. State, 63 S.W.3d 201, 209 (Mo. banc 2001). Thus, counsel's rejection of the lack of deliberation theory, which may have harmed his penalty phase theory, was not ineffective assistance.

Additionally, appellant did not suffer prejudice, i.e., a reasonable probability of a different outcome but for counsel's action, due to the selection of the reasonable doubt theory as opposed to a lack of deliberation theory. On direct appeal, this Court found sufficient evidence of deliberation:

The evidence and reasonable inferences therefrom
demonstrate that sufficient evidence existed for the jurors to

find that Strong deliberated. A photograph of the kitchen created the inference that Strong removed the butcher knife from that room and took it to the bedroom where he used it to kill Eva and Zandrea. The 911 call established that Eva attempted to call for help, yet her call was disconnected while she screamed.

Autopsies revealed that both victims suffered multiple stab wounds: Eva was stabbed 21 times and had five slash wounds, and Zandrea was stabbed nine times and had 12 slash wounds. In lieu of seeking medical help for either victim, Strong first ignored police, next lied to them by saying he had locked himself out, and then ran away. The evidence was sufficient as to each victim to submit the first degree murder charges to the jurors and to support their guilty verdicts.

State v. Strong, 142 S.W.3d 702, 717 (Mo. banc 2004). Had counsel sought to challenge deliberation as his guilt phase strategy, he would have opened the door to specific evidence of prior bad acts that would have made the case for deliberation overwhelming, as set out by the motion court:

Movant lied to police at the scene about what was going on. He lied about the victim's whereabouts. He put on different clothes to hide his blood. When asked about the blood on him he stated that he cut his hand. He closed the door while talking to the

police and locked it. He maintained composure under police questioning. An inference shows that Movant cut the phone line and had Eva's 911 phone call terminated. He ran from the police. He asked the police to shoot him. He killed a child that did not belong to him but did not kill his own child who was in the room when the murder took place. There were prior threats to kill Eva and her baby. There was a prior history of abuse, including choking Eva until she became unconscious. At some point he made a deliberate decision to go to the kitchen and pick up a knife. He could have just beaten her or choked her as in the past incidents, but Movant made a deliberate choice to use a knife and inflict injuries to both victims. The nature of wounds show a measured and controlled attack where most wounds were intended to kill and identical in both victims. The two-year-old child suffered cruel and horrendous wounds and had her head nearly sawed-off. The number of wounds to both victims showed Movant was unable to sustain a rage-like attack without tiring first and continuing. He had ample time to terminate his attack. Movant never called for medical help for the victims which shows an inference that Movant had deliberated.

(PCR L.F. 419-420). In light of the overwhelming evidence available to show deliberation, appellant was not prejudiced by presenting a defense that did not depend on showing that appellant did not deliberate, and in fact it was sound trial strategy not to attempt to overcome this overwhelming mass of evidence of deliberation.

Finally, in his brief, appellant argues that counsel should have presented evidence of Eva Washington's alleged bad character during the guilt phase garnered from reports of his family members, from medical records, and from the evaluations by psychological expert witnesses to blame her for "trigger[ing] the events leading to the stabbings" (App.Br. 87-90). This argument is improper. First, appellant did not allege in his amended motion that *any* of this evidence should have been presented in the guilt phase, and raises this claim for the first time on appeal (PCR L.F. 44-45, 71-87). Claims not presented to the motion court cannot be raised for the first time on appeal. State v. Nunley, 980 S.W.2d 290, 292 (Mo. banc 1997). Second, the information that appellant now claims should have been presented that was obtained by appellant's post-conviction experts came, in part, from appellant's cooperation with them, including specific statements appellant himself made to the experts during their interviews of him while preparing his post-conviction case (App.Br. 89-90; H.Tr. Vol. 1 34-35). But as appellant refused to cooperate with the same type of expert witnesses prior to trial, counsel cannot possibly be faulted for failing to discover information that appellant decided not to share while counsel was representing him. Thus, appellant's reliance on this new argument is improper, and must be rejected.

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

VII.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's post-conviction claim that trial counsel was ineffective for failing to object to penalty phase testimony about victim Eva Washington's statements to police regarding appellant's assault of her as violating his right to confrontation because counsel was not ineffective in that: this Court found the statements admissible on direct appeal under the law applicable at the time of trial as excited utterances; Crawford v. Washington, which constituted a change in the law regarding confrontation, was not decided until after appellant's trial and sentencing; and Crawford does not establish a Confrontation Clause violation in the admission of this evidence.

Appellant claims that counsel was ineffective for failing to object to statements victim Washington made to the police upon their arrival at the scene of a 1999 assault on her by appellant as violating appellant's right to confrontation (App.Br. 98-112). But because this Court found that the statements were admissible as excited utterances on direct appeal, Crawford v. Washington (which changed the law regarding confrontation) was not decided until after trial and sentencing, and Crawford and its progeny does not establish a Confrontation Clause violation in this case, appellant was not ineffective for failing to make a confrontation objection.

A. Facts

Prior to the penalty phase, the parties discussed motions *in limine* (Tr. 1495). The prosecutor said he would be introducing evidence of excited utterances made by Washington

to Officer Daniel Patrick upon arrival at the scene of an assault on her by appellant, to which counsel did not object (Tr. 1499-1500, 1503-1508).

Officer Patrick testified that he responded to a domestic violence call at Washington's apartment on the night of November 10, 1999 (Tr. 1570-1571). Patrick saw appellant in the parking lot getting into a car, and another officer detained him at the scene (Tr. 1572). Patrick went to the apartment, where he saw Washington "crying, shaken, visibly upset, borderline hysterical" (Tr. 1572-1573). She had a knot on her forehead and her left eye was bruised (Tr. 1573). Patrick testified that Washington said "he hit me, he hit me in the eye, and he hit me in the mouth, and he choked me until I passed out" (Tr. 1573). The following exchange then occurred:

[Prosecuting Attorney]: At that point did you notice anything else?

A. Well, when she said that he choked her she also told me that - -

[Defense Counsel]: Objection, non-responsive.

THE COURT: That will be sustained.

[Prosecuting Attorney]: Did she say anything else after she said he choked me?

A. Yes.

[Defense Counsel]: Can we approach the bench?

([At the bench]:)

[Defense Counsel]: It was my understanding from in chambers that we were only going into a few of the statements *which were made as excited utterances*.

Do you intend—intend on going through every statement that she made?

[Prosecuting Attorney]: No, just the excited—while she was standing right there. I thought that was the end of it. So I am just going to ask him to describe her physical appearance at that point.

THE COURT: Okay.

(Tr. 1573-1574)(emphasis added). Patrick further testified that the victim had a large wet spot in the crotch of her pants (Tr. 1575).

On direct appeal, this Court held that the victim's statements to Patrick were admissible as excited utterances. State v. Strong, 142 S.W.3d 702, 718 (Mo. banc 2004). This Court stated that her statements “were ‘made under the immediate and uncontrolled domination of the senses as a result of the shock produced’ by her assault” and “were ‘made under such circumstances as to indicate [they were] trustworthy.’” Id., quoting State v. Van Orman, 642 S.W.2d 636, 638 (Mo. 1982). Thus, this Court concluded that “Strong has failed to demonstrate error, plain *or otherwise*, in the admission of this testimony.” Strong, 142 S.W.3d at 718. This Court held this even though Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), had already been decided by the time this Court issued

its opinion and had been raised by appellant in his reply brief (filed 11 days after Crawford was decided) (SC85419 Reply Br. 24-25, 29).

In his amended motion, appellant claimed that counsel was ineffective for failing to object to the victim's out-of-court statements regarding the 1999 assault, claiming that the statements were testimonial and that appellant had no opportunity to cross-examine Washington about the statements (PCR L.F. 50, 239-250). Apparently recognizing the trouble of establishing ineffective assistance of counsel based on a case that was not decided until after trial, appellant alleged that prior cases dealing with the use of prior sworn testimony of witnesses without cross-examination should have been sufficient to advise counsel that the victim's excited utterances made at the scene of the crime were "testimonial" statements and thus objectionable (PCR L.F. 251-252). Appellant also alleged that, without Washington's statements to Patrick, there was no evidence that appellant hit her (PCR L.F. 249-250).

In his deposition, counsel testified that he did not object to the statements because he believed the statements were admissible as excited utterances under the law at the time, and thus he did not want to make a meritless objection "to draw more attention to the negative evidence of the state rather than concentrating on the positive qualities of what I thought we were presenting for Mr. Strong" (Mov. Exh. 38 232-233). He noted that Crawford had not been decided until 2004, which was after trial (Mov. Exh. 38 232). He also noted that this court had found that the statements were admissible (Mov. Exh. 38 233).

The motion court denied appellant's claim, finding that: the victim was unavailable for cross-examination because appellant killed her; that the law at the time of trial controlled; that counsel was not ineffective for failing to predict a change in the law; that, under the law at the time, evidence of excited utterances were admissible (and still were under Crawford); that this Court had held that the statements were admissible; and that any objection would have been meritless (PCR L.F. 466-473).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id.

C. Trial Counsel was Not Ineffective

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483. A movant has the burden of proving grounds for relief

by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

1. Statements Admissible Under the Law at the Time of Trial

First of all, counsel was not ineffective for failing to object to the statements because, under the law at the time of trial, the statements were admissible. As shown above, this Court ruled on direct appeal that there was no error, plain or otherwise, in the admission of the statements, as they were admissible as excited utterances. Strong, 142 S.W.3d at 718. Thus, the admissibility of the statements at the time of trial has already been decided by this Court, and cannot be relitigated now. A post-conviction motion cannot be used to receive a second appellate review of issues decided on direct appeal, even if raised under a different theory. O’Neal v. State, 766 S.W.2d 91, 92 (Mo. banc 1989).

2. Counsel was Not Ineffective for Failing to Anticipate Crawford

Even though he abandons the argument he made in his amended motion—that pre-Crawford law established that the admission of the statements violated confrontation—appellant still argues that counsel should have been aware of the Crawford objection and raised it because Crawford was *being litigated* at the time of trial (App.Br. 110-111). This argument is somewhat disingenuous—even according to appellant’s argument, Crawford’s attorneys had not yet even filed a petition for certiorari prior to the end of trial (App.Br. 111). Crawford had lost the case in Washington, where the state supreme court found the statements made to a police officer in an interview were sufficiently reliable so as to satisfy the Confrontation Clause. State v. Crawford, 54 P.3d 656, 664 (Wash. 2002). For counsel to

have been aware that a case from the Supreme Court of Washington that rejected a Confrontation Clause claim and was not beneficial to the defense would result in a sweeping change of confrontation jurisprudence after the granting a cert petition which was not yet filed in the United States Supreme Court would have required a prescience by counsel of an extraordinary nature.

Clearly, the law does not require attorneys to possess such fortune-telling talents. In reviewing an ineffective assistance of counsel claim, counsel's conduct is measured by what the law is at the time of trial. Glass v. State, 227 S.W.3d 463, 472 (Mo. banc 2007). Counsel will generally not be held ineffective for failing to anticipate a change in the law. Id. In Glass, the movant raised the same claim that appellant raises now—that counsel was ineffective for failing to make a Confrontation Clause objection based on the reasoning of Crawford prior to Crawford being decided. Id. In rejecting that claim, this Court noted that Crawford “substantially altered the Confrontation Clause analysis for hearsay evidence” and found that the motion court did not clearly err in denying the claim, stating:

Glass was tried and convicted before the Crawford case was decided. In order to make the Crawford objection at trial, counsel would have had to anticipate the Supreme Court's holding in an opinion that had not yet been issued.

Glass, 227 S.W.3d at 472. The same is true in this case—there was no way for counsel to know that Confrontation Clause jurisprudence would be altered by the United States Supreme Court in a case that was not even pending before it at the time of trial, let alone not

decided. Because Crawford was not decided at the time of trial, counsel was not ineffective for failing to make an objection based on the reasoning of Crawford.

3. Crawford Did Not Require Exclusion of the Evidence

Further, even under Crawford, the admission of this evidence did not violate the Confrontation Clause. First, the Court, while stating in a footnote that the the “spontaneous declaration” exception to the hearsay rule was “arguably in tension” with the rule in Crawford, did not expressly find that such statements, made “immediat[ely] upon the hurt received,” by their nature violated the new rule. Crawford, 541 U.S. at 58 n. 8. The 2006 consolidated case of Davis v. Washington, ___ U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), decided more than three years after trial and more than a year after the filing of appellant’s amended motion, does not rule out the admissibility of the statements in this case. In the portion of Davis dealing with its companion case, Hammon v. Indiana, the court stated that statements made to police who are just arriving at a domestic violence scene “[o]fficers called to investigate...need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.’ [citation omitted]. Such exigencies may *often* mean that “initial inquiries” produce nontestimonial statements.” Davis, 126 S.Ct. at 2279 (emphasis in original). Here, Washington’s statements were just that—spontaneous statements (specifically, excited utterances), not in response to a question, made to Officer Patrick as he was approaching Washington while he was trying to initially assess the situation (Tr. 1572-1573). Thus, Davis does not preclude the introduction of the statements made in this case.

Second, appellant may have very well forfeited his right to confront Washington in this case, as the jury had already found beyond a reasonable doubt (a conclusion he did not contest in his amended motion nor does he contest on appeal) that he had killed Washington. A defendant may forfeit his constitutional right to confront a witness when he wrongfully procures the absence of the witness. United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999). That prohibition is not necessarily limited to preventing testimony in a trial for the crime about which the statements were made. Id. The doctrine of “forfeiture by wrongdoing” explicitly survived Crawford and its progeny. Crawford, 541 U.S. at 62; Davis, 126 S.Ct. at 2280. While some states require an intent to prevent testimony to apply the doctrine of forfeiture by wrongdoing, see, e.g., People v. Moreno, 160 S.W.2d 242, 245-46 (Colo. 2007)(stating cases requiring intent in non-homicide victim declarant cases), others hold that murdering the declarant constitutes a forfeiture of the right to confront the declarant. State v. Mason, 162 P.3d 396, 404 (Wash. 2007); Gonzalez v. State, 195 S.W.3d 114, 125-26 (Tex.Crim.App.2006); State v. Jensen, 727 N.W.2d 518, 535 (Wis.2007). The reasoning for this rule is succinctly well-stated by the Mason court: “Mason made his right impossible to implement; he has only himself to blame for its loss.” Because appellant deprived himself the right to confront Washington by murdering her, he should not receive a windfall of preventing her otherwise admissible statements from being admitted due to his wrongdoing.

In this case, it is not necessary for this Court to conclude whether or not the statements made by Washington were testimonial or whether appellant forfeited his right to

confrontation. The above merely shows that these issues are not yet settled, and thus that appellant was not deprived a meritorious claim by any reasonable probability due to counsel's failure to object based on the Confrontation Clause. Because counsel did not even have Crawford, the first case in the new confrontation jurisprudence, at his disposal, it was not reasonable to conclude that counsel was ineffective for failing to make such an objection. Thus, the motion court did not clearly err in denying appellant's claim, and appellant's point must fail.

VIII.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's post-conviction claim that Missouri's method of lethal injection constitutes cruel and unusual punishment because appellant was not entitled to relief on that claim in that his claim is not cognizable, his claim is not ripe, and he presented no evidence to support the claim.

Appellant claims that Missouri's method of lethal injection constitutes cruel and unusual punishment (App.Br. 113-118). But because appellant's claim is not cognizable under Rule 29.15, is not ripe, and was not supported by any evidence, appellant was not entitled to relief on this claim.

A. Facts

In his amended motion, appellant alleged that Missouri's method of execution by lethal injection is unconstitutional because the protocol for that method does not provide sufficient safeguards to insure no substantial risk of unnecessary pain during execution (PCR L.F. 54, 285-305). Appellant alleged that he would present the testimony of doctors and witnesses to executions to prove the constitutional violations existing in the drugs, procedures, and personnel used (PCR L.F. 285-305). Appellant, however, presented no evidence in support of this claim at the evidentiary hearing.

The motion court denied the claim, noting that no witnesses testified as to the claim, and finding that the claim was not properly raised in a motion for post-conviction relief and had been previously rejected by this Court (PCR L.F. 484-485).

B. Standard of Review

While review of a claim that an action by the State is unconstitutional is typically reviewed *de novo*, Planned Parenthood of Kansas v. Nixon, 220 S.W.3d 732, 737 (Mo. banc 2007), here, appellant is presenting his constitutional claim in the context of a Rule 29.15 proceeding, so review is for clear error. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id.

C. Appellant was Not Entitled to Relief

Appellant was not entitled to relief on this claim because this claim is not one of the claims that can be raised under Rule 29.15. The relevant portion of that rule states:

A person convicted of a felony after trial *claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States*, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15.

Supreme Court Rule 29.15(a) (emphasis added). A claim challenging the method used to carry out the sentence of death is not a claim that the *sentence imposed* violates the United States Constitution, but that the method used to carry out the sentence is unconstitutional. A comparable claim on a sentence of imprisonment would be that the conditions of confinement violated a constitutional right—even a meritorious claim would not negate the sentence, but would merely provide a remedy for the improper condition. Likewise, a claim related to the method of execution would not negate the sentence (the relief sought in a post-conviction claim), but would merely prevent the use of the unconstitutional method. Even if appellant’s claim had any merit, the State would not be prohibited from using a different, constitutionally-acceptable method of execution. Therefore, this claim is not a claim for which appellant can receive the relief contemplated under Rule 29.15. Thus, this claim is not cognizable under that rule.

Second, it is inappropriate for this Court to address this issue in the post-conviction proceeding because the claim is not ripe. Because there is no way for this Court to determine what protocol will be in place for executions at the time appellant would actually be subject to execution, the supposed injury appellant would be subject to is speculative at best. As this Court has recently stated:

As it is unknown what method, if any, of lethal injection may be utilized by the State of Missouri at such future time, if any, as Mr. Worthington’s right to seek relief in state and federal courts is concluded and his execution date and method

are set, it is premature for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment because it causes lingering, conscious infliction of unnecessary pain.

Worthington v. State, 166 S.W.3d 566, 583 n. 3 (Mo. banc 2005). Thus, until appellant is actually ready to be subjected to a certain protocol to carry out his execution, his claim is premature, and not appropriate for review. State v. Barton, SC87859, slip op. at 30-31 (Mo. banc December 18, 2007).

Third, appellant is not entitled to relief on this claim because he presented no evidence in support of the claim at the hearing, either by live testimony or deposition. The failure to present evidence in support of factual allegations in a post-conviction claim constitutes an abandonment of that claim. State v. Nunley, 980 S.W.2d 290, 293 (Mo. banc 1998). Appellant argues that somehow the motion court's ruling that his claim was not cognizable foreclosed him from presenting this evidence, and that remand for another evidentiary hearing is necessary (App.Br. 117-118). There is nothing in the record, however, showing that the motion court denied the claim as not cognizable prior to the evidentiary hearing; thus, the motion court did not prevent appellant from putting forth his evidence on this claim. Thus, appellant's argument that he was denied the right to present evidence is meritless, and must be rejected. Therefore, appellant's failure to put on evidence in support of this claim when given that opportunity must defeat the claim, and his point on appeal must fail.

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax (573) 751-5391
richard.starnes@ago.mo.gov
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 22,927 words, excluding the cover and this certification, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 11th day of January, 2008, to:

Melinda K. Pendergraph
Office of the State Public Defender
Woodnail Centre, Building 7, Suite 100
Columbia, Missouri 65203

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
richard.starnes@ago.mo.gov
Attorneys for Respondent