No. SC84502

IN THE SUPREME COURT OF MISSOURI

ERNEST LEE JOHNSON

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Boone County, Missouri
Thirteenth Judicial Circuit, Division I
The Honorable Gene Hamilton, Judge

RESPONDENT'S BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

LINDA LEMKE
Assistant Attorney General
Missouri Bar No. 50069

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

TABLE OF CONTENTS

Table of Authorities 5

Jurisdictional Statement 8

Statement of Facts 9

Argument

POINT I– Trial counsel's decision not to call Dr. Parwatikar was based on reasonable trial strategy 18

1. Facts 18

2. Standard of review 26

3. Law on ineffective assistance of counsel 26

4. Trial counsel's decision not to call Dr. Parwatikar was based on reasonable trial strategy 27

5. Appellant was not prejudiced 34

POINT II– Trial counsel's decision not to call Michael Maise was based on reasonable trial strategy. 39

1. Facts 39

2. Standard of review 45

3. Law on ineffective assistance of counsel 45

4. Trial counsel's decision not to call Mr. Maise was reasonable trial strategy 46

5. In any event, appellant was not prejudiced 50

POINT III– Trial counsel's decision not voir dire or ask for an instruction regarding appellant's right not to testify was based on reasonable trial strategy 54

1. Facts 54

2. Standard of review 57

3. Law on ineffective assistance of counsel 57

4. Appellant has not rebutted the strong presumption that trial counsel's choice not to voir dire on his right not to testify was reasonable trial strategy . . . 58

5. Appellant has not rebutted the strong presumption that trial counsel's not requesting an instruction on the right not to testify was reasonable trial strategy 60

6. In any event, appellant has not shown Strickland prejudice 61

POINT IV– Appellant presented no evidence to rebut the strong presumption that trial counsel's decision not to call Dr. Carole Bernard to testify was based on reasonable trial strategy 65

1. Facts 65

2. Standard of review 66

3. Law on ineffective assistance of counsel 67

4. Because appellant never asked either trial counsel why they chose not to call Dr. Bernard, appellant has failed to rebut the strong presumption that trial counsel's decision was based on reasonable trial strategy 68

5. In any event, appellant has not shown Strickland prejudice 69

POINT V– Appellant's claim that he is mentally retarded is refuted by the record. 74

1. Facts 75

2. Standard of review 77

3. Appellant's claim is refuted by the record 78

4. Appellant's various arguments are without merit 79

POINT VI– Appellant's claim that trial counsel was ineffective for not presenting even more evidence about his childhood and conduct just before the murders is refuted by the record 84

1. Standard of review 85

2. Mr. McDuffy's testimony was cumulative to other evidence admitted at trial 86

3. Deborah Turner's testimony was cumulative to other evidence admitted at trial 88

4. Evidence of appellant's family's history of mental illness and retardation was cumulative 90

A. Evidence of Ms. Patton's depression was cumulative 91

B. Appellant's attorneys were not ineffective for not offering the genogram; they did offer the genogram into evidence, but the trial court excluded it 93

POINT VII– The statute providing a procedure for resentencing defendants if the death penalty is declared unconstitutional does not bar this Court from remanding for a new penalty phase when there are trial errors 96

1. Facts 96

2. Appellant's claim cannot be reviewed because he did not include it in his motion for postconviction relief, and successive, untimely claims are prohibited under Rule 29.15(d). 97

3. Further, appellant's claim is barred by the law of the case 98

4. In any event, appellant's claim fails on its merits 99

Conclusion 103

Certificate of service and compliance 104

Appendix A1

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. 304, 123 S.Ct. 2242, 153 L.Ed.2d 335 (2002) . . . 71, 74, 78, 81-83

Amrine v. State, 785 S.W.2d 531 (Mo. banc 1990), *cert. denied* 498 U.S. 881 (1990) . 94, 98

Clayton v. State, 63 S.W.3d 201 (Mo.banc 2001), *cert. denied* 122 S.Ct. 2341 (2002) 26, 27, 30, 34, 45, 46, 57, 58, 67, 68

Clemmons v. State, 785 S.W.2d 524 (Mo.banc 1990), *cert. denied* 498 U.S. 882 (1990), *overruled in part on other grounds by* Deck v. State, 68 S.W.2d 418 (Mo.banc 2002) 62

Ellis v. State, 773 S.W.2d 194 (Mo.App. S.D. 1989) 60

Knese v. State, 85 S.W.3d 628 (Mo.banc 2002) 34, 59, 60

Love v. State, 670 S.W.2d 499 (Mo.banc 1984) 60

Middleton v. State, 80 S.W.3d 799 (Mo.banc 2002) 28, 69

Murphy v. State, 54 P.3d 556 (Ok.App. 2002) 82

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) 71, 83

Perkey v. State, 68 S.W.3d 547 (Mo.App. W.D. 2001) 33

Rousan v. State, 48 S.W.3d 576 (Mo.banc 2001) 35, 61

Skillicorn v. State, 22 S.W.3d 678 (Mo.banc 2000), *cert. denied* 531 U.S. 1039 (2000) 36, 51, 70, 88, 90, 92

Smith v. State, 21 S.W.3d 830 (Mo.banc 2000), *cert. denied* 531 U.S. 1196 (2001) . . . 98

Smulls v. State, 71 S.W.3d 138 (Mo.banc 2002), *cert. denied* 123 S.Ct. 503 (2002) . . . 77, 85

State v. Brooks, 960 S.W.2d 479 (Mo.banc 1997), *cert. denied* 524 U.S. 957 (1998) . . 98

State v. Clay, 975 S.W.2d 121 (Mo.banc 1998), *cert. denied* 525 U.S. 1085 (1999) . . . 88, 94, 95, 98

State v. Graham, 13 S.W.3d 290 (Mo.banc 2000) 99

State v. Griffin, 848 S.W.2d 464 (Mo.banc 1993) 101

State v. Johnson, 22 S.W.3d 183 (Mo.banc 2000), *cert. denied* 531 U.S. 935 (2000) . . 10, 76, 78, 81, 94, 97, 99

State v. Johnson, 968 S.W.2d 686 (Mo. banc 1998) 9, 19, 37, 42, 65, 70, 81, 96

State v. Kinder, 942 S.W.2d 313 (Mo.banc 1996), *cert. denied* 522 U.S. 854 (1997) . . 62

State v. Kreutzer, 928 S.W.2d 854 (Mo.banc 1996), *cert. denied* 519 U.S. 1083 (1997) 61, 69

State v. Link, 25 S.W.3d 136 (Mo.banc 2000), *cert. denied* 531 U.S. 1040 (2000) 26, 45, 57, 67, 77, 85

State v. Morrow, 21 S.W.3d 819 (Mo.banc 2000), *cert. denied* 531 U.S. 1171 (2000) . 77, 85

State v. Neff, 978 S.W.2d 341 (Mo.banc 1998) 58, 59

State v. Rowe, 63 S.W.3d 647 (Mo.banc 2002) 100

State v. Storey, 986 S.W.2d 462 (Mo.banc 1999) 60, 63, 64

State v. Tokar, 918 S.W.2d 753 (Mo.banc 1996), *cert. denied* 519 U.S. 933 (1996) . . . 61, 68

State v. Weaver, 912 S.W.2d 499 (Mo.banc 1995), *cert. denied* 519 U.S. 856 (1996) . . 98

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) 26, 27, 30, 45, 46, 50, 54, 57, 58, 61, 62, 64, 65, 67-69, 90

Winfield v. State, No. SC84244 (Mo.banc December 24, 2002) 61, 62, 97

STATUTES

Section 565.020, RSMo 2000 9

Section 565.030, RSMo Cum.Supp. 1991 . . . . . 74, 82

Section 565.035, RSMo 2000 101

Section 565.040, RSMo 2000 . . . . . 96, 97, 100, 101

Section 569.020, RSMo 2000 9

Section 571.015, RSMo 2000 9

OTHER AUTHORITY

MAI-CR 3d 308.14 . . . . . 55, 60

Mo.Const. Art. V, § 3 (as amended 1982) 8

Supreme Court Rule 29.15 . . . . . 8, 97

JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion for postconviction relief pursuant to Supreme Court Rule 29.15. Appellant had sought to vacate his three sentences of death obtained in the Circuit Court of Boone County. Because of the sentences of death imposed, jurisdiction lies in the Supreme Court of Missouri. Mo.Const. Art. V, § 3 (as amended 1982).

STATEMENT OF FACTS

On May 3, 1994, appellant, Ernest Johnson, was charged by information, as a prior and persistent offender, with three counts of murder in the first degree, § 565.020, RSMo 2000, armed criminal action, § 571.015, RSMo 2000, and robbery in the first degree, § 569.020, RSMo 2000 (1st L.F. 39-45).[1] Before his original trial, the state entered an order of *nolle prosequi* on the armed criminal action and robbery in the first degree counts (1st Tr. 474-76).

Procedural History

Appellant was tried before a jury on May 10-18, 1995, in the Circuit Court of Boone County, the Honorable Gene Hamilton presiding (1st Tr. 471, 2632). Appellant was convicted of three counts of murder in the first degree, and sentenced to death for each count. State v. Johnson, 968 S.W.2d 686 (Mo. banc 1998).

Appellant filed a motion for postconviction relief, which was denied after an evidentiary hearing. Id. at 689. Appellant then filed a consolidated appeal. Id. On May 26, 1998, this Court affirmed appellant's convictions, but remanded his case for a new penalty phase. Id. at 702.

---

[1] The record on appeal is designated as follows: (1) original trial transcript (1st Tr.); (2) original trial legal file (1st L.F.); (3) penalty phase retrial transcript (2nd Tr.); (4) penalty phase retrial legal file (2nd L.F.); (5) second postconviction motion transcript (PCR Tr.); and (6) second postconviction motion legal file (PCR L.F.).

On March 8-12, 1999, new penalty phase proceedings were held before a jury in the Circuit Court of Boone County, Missouri, the Honorable Gene Hamilton presiding (2ndTr. 43, 414, 1115). Appellant appealed, and his death sentence was affirmed. State v. Johnson, 22 S.W.3d 183 (Mo.banc 2000), *cert. denied* 531 U.S. 935 (2000).

On October 30, 2000, appellant filed a *pro se* motion for postconviction relief (PCR L.F. 6). On March 19, 2001, counsel for appellant filed an amended motion for postconviction relief (PCR L.F. 2, 38). On November 28, 2001, an evidentiary hearing was held (PCR Tr. 2). On March 22, 2002, the motion court issued findings of fact and conclusions of law, denying appellant's motion for postconviction relief (PCR L.F. 5, 462). This appeal follows.

Evidence Adduced in the Penalty Phase

In February of 1994, appellant lived at 200 Mohawk with his girlfriend, Mary Grant, and her three sons, Rodriguez, Antwane, and Marcus Grant,[2] near the Casey's convenience store at Ballenger Lane, in Columbia (2ndTr. 505, 719-20, 773). The Casey's manager, Mary Bratcher (2ndTr. 859), and assistant manager, Theresa Campbell (2ndTr. 858), were familiar with appellant, because he had been a regular customer for the past three to four months (2ndTr. 899), coming by once or twice each evening to talk or to buy something (2ndTr. 900).

[2] Because the brothers share the same last name, throughout this brief, Rodriguez Grant is referred to as Rod, and Antwane Grant is referred to as Antwane.

On Saturday, February 12, 1994, appellant went to Casey's four times (2ndTr. 867-68, 901-905). The first time, he made a purchase (2ndTr. 902). The second time, he asked Ms. Campbell who would close the store that evening (2ndTr. 902). The third time, he came in and left (2ndTr. 903). The fourth time, he walked around the counter to watch when Ms. Campbell was about to drop money into the floor safe (2ndTr. 904-905). Ms. Campbell called Ms. Bratcher to tell her that appellant had been in the store several times and it made her "kind of leery" (2ndTr. 907).

That evening, appellant borrowed a gun from Rod Grant and test-fired it in the backyard (2ndTr. 777, 787). Appellant dressed in a pair of jeans over some sweat-pants, two pairs of socks, a skullcap that covered his face, a sweater, a buttoned coat with the hood up, a pair of gloves, and a pair of red and black Nikes (2ndTr. 485-93, 667, 686, 693-94, 696-97, 778-79). As he left the house that evening, a guest told him that he "looked like he was about to go rob somebody" (2ndTr. 779). Appellant returned, and half an hour later he left again, dressed the same way (2ndTr. 779).

Store records found at the scene showed that appellant arrived at Casey's just after 11:00 p.m. (2ndTr. 539, 891-92). He killed all three employees who had been working that night, Mary Bratcher, Mable Scruggs, and Fred Jones (2ndTr. 556, 569-70, 859, 862-64). Appellant stabbed Ms. Bratcher's left hand with a flat-head screwdriver at least ten times, forcing the screwdriver completely through her hand eight of those times (2ndTr. 479, 957-58, State's Exhibits 123D-E). He killed Ms. Bratcher in the employee bathroom, where he struck her face with the claw end of the hammer and struck her skull with the round end of

the hammer head a minimum of fifteen times (2ndTr. 956-58). Appellant made a four-inch long cut in the side of her face, broke her skull, injured her brain, and inflicted numerous wounds around her nose and mouth and the back of her head (2ndTr. 955-56, 962, State's Exhibits 123A-C). He left her body on the bathroom floor (State's Exhibits 47E, 54, 57).

Appellant killed Mable Scruggs in the same bathroom (2ndTr. 611-15). He struck her head with the hammer in excess of eight times (2ndTr. 962-63). Appellant cut her face around her eye, nose, and mouth with the hammer, fractured her skull, and injured her brain (2ndTr. 961-62, State's Exhibits 124A-C). He left her body wedged between the wall and the toilet, with her hand inside the toilet bowl (State's Exhibit 47E).

Appellant walked (2ndTr. 600-601) from the bathroom to the cooler door, leaving a trail of bloody shoe prints (2ndTr. 570). He opened the door (2ndTr. 571, State's Exhibits 52A-B), and attacked Mr. Jones inside (2ndTr. 624-27, 631-32). He smashed Mr. Jones' left hand in the cooler door, breaking his ring finger and tearing his skin (2ndTr. 950-51). He shot Mr. Jones in the face (2ndTr. 947), but the shot went through his cheek, and did not kill him (2ndTr. 947-48, State's Exhibit 122B). Appellant struck Mr. Jones in the head with the hammer a minimum of eight times with the round end of the hammer head and two times with the claw end (2ndTr. 950). Appellant cut Mr. Jones' face from his forehead to his ear, caused so much damage to his left eye area that the eye had sunken into the skull and was not visible, cut his cheek with the claw end of the hammer, broke and fractured his skull, and cut his brain (2ndTr. 947, 949-50, 952). Appellant left Mr. Jones' body in the cooler along with the bloody hammer (2ndTr. 473, 565, State's Exhibit 52D)

The doctor who performed the autopsies was unable to determine at what point during the attack each victim lost consciousness (2ndTr. 963). If they had been conscious when they received the blows, their deaths would have been "terrifically painful" (2ndTr. 964).

Other evidence found at the scene showed that appellant had pulled down the store's front window shade (2ndTr. 549-53, 895-96), and had obtained the keys to the floor safe from Ms. Bratcher (2ndTr. 522, 871-72). Appellant took money from the floor safe and register and left out the front door (2ndTr. 461, 522, 535-37, 761-69), and using a key to lock the door behind him (2ndTr. 459, 894-95). He went through a field, discarding his bloody screwdriver and bloody gloves, and hiding his bloody coat and bloody jeans under a tree (2ndTr. 663-71, 686, 704).

Appellant returned home at about 11:30 p.m. (2ndTr. 779-81). He had specks of blood on his face and clothes (2ndTr. 781). He went into the basement, and put all his clothing (2ndTr. 781-82), except his Nike shoes (2ndTr. 586, 757-58), into a garbage bag, and told Antwane to get rid of it (2ndTr. 782). Appellant had money in the form of stacks of bills, which he counted out and put in a bag (2ndTr. 784). He put the bag in the basement ceiling (2ndTr. 784). Appellant also had food stamps, checks, and register tape marked with the Casey's store number, and he burned these items (2ndTr. 761-69).

At 1:12 a.m., February 13, 1994, officers were dispatched to check on the employees at the Casey's store (2ndTr. 455). The front door was locked, and there was blood on the lock and bloody footprints on the ground (2ndTr. 459). Officers secured the

crime scene, and after obtaining a key, found the bodies of the employees inside (2ndTr. 461-62, 471, 473). The wounds were so severe that they initially thought the murder weapon was a shotgun (2ndTr. 557).

The next morning, Sunday, February 13, 1994, appellant told Antwane to get rid of the gun appellant had used in the robbery and murders (2ndTr. 786, 856). Appellant called a jewelry store to ask about a certain ring in a catalogue (2ndTr. 921). At about 12:30 p.m. he called a cab and went to Columbia Mall (2ndTr. 915-16), where he paid cash for the ring and an "I Love You" pendant (2ndTr. 921, 924-25), and then went home (2ndTr. 918).

At about 3:50 p.m., Officer Jimmy Mays of the Missouri State Highway Patrol was told that appellant was a regular customer of Casey's, and was assigned to talk to appellant to see whether he had any information about the murders (2ndTr. 710, 712). Appellant told Antwane that he did not want the police to know he was there (2ndTr. 790). Rod Grant told Officer Mays that he could not come in without a warrant, so Officer Mays went outside and sat in his police car to wait until someone could get a warrant (2ndTr. 711). While he was waiting, Rod Grant came to the window of the car and motioned for Officer Mays to come back to the house (2ndTr. 711). Rod Grant let Officer Mays come inside, and introduced him to appellant (2ndTr. 711-12). Officer Mays said he wanted to talk to appellant about a tragedy at Casey's, and appellant agreed to go with him (2ndTr. 712-13).

At the station, appellant told Officers Mays and McMillen that he had gone to Casey's at about 4:00 p.m. and spent the rest of the evening watching television (2ndTr. 718-21). Since appellant's story conflicted with evidence that had been gathered already,

Officer Mays read appellant his Miranda rights (2ndTr. 721-22). Appellant indicated that he understood those rights, and the officers continued to question him (2ndTr. 722). During the interview, appellant told Officer Mays that he wished he would just take out his gun and shoot him (2ndTr. 727). Appellant would "lighten up" when the officers talked about something other than the Casey's murders (2ndTr. 727). When more evidence connecting appellant to the murders had been gathered, officers confronted appellant with the evidence, and appellant said, "I don't care" (2ndTr. 731). As appellant was being booked, he saw Rod Grant in a holding cell, and said, "[t]hat boy didn't have nothing to do with this case. None of those boys did." (2ndTr. 732). An officer said that appellant could only know that if he had been there, and appellant said again, "I know they weren't there." (2ndTr. 743).

Officers recovered appellant's bloody apparel from the field (2ndTr. 703-704), from the garbage bag which Antwane had put in a park (2ndTr. 485-86, 782), and from appellant's house (2ndTr. 757-58). Tests established that blood consistent with each of the victim's blood was on appellant's jacket (2ndTr. 842), that hairs consistent with each of the victim's hairs was on appellant's clothes, gloves, and the hammer (2ndTr. 851-52, 854-55), and that appellant's shoes made the bloody shoe prints at Casey's (2ndTr. 590-92, 855-56).

The prosecutor presented victim impact testimony from Mable Scruggs' son, Barry Scruggs (2ndTr. 970-73), from Fred Jones' cousin, Gerald Blakey (2ndTr. 974-80), and from Mary Bratcher's son, Robert Bratcher (2ndTr. 981-90).

Appellant presented testimony from his family members about the poor, abusive conditions in which appellant grew up (2ndTr. 998-1046, 1047-65). He presented

testimony about his character from his parole officers (2ndTr. 1075-90, 1091-1110), and from a preacher who first met appellant two weeks before the murders (2ndTr. 1067-74). Appellant also presented testimony from psychologists that appellant had low intelligence, and suffered from fetal alcohol effect, depression, and drug addiction (2ndTr. 1117-96, 1199-1311).

In rebuttal, the prosecutor presented testimony from its psychiatrist that appellant's IQ was high enough for him to function well in society (2ndTr. 1318-19), that he showed "pervasive" anti-social personality disorder (2ndTr. 1319), that he did not suffer from fetal alcohol syndrome or fetal alcohol effect (2ndTr. 1322-23), that it was impossible to diagnose appellant with depression because he had never stopped taking drugs since his adolescence (2ndTr. 1319-20), that appellant did not have diminished capacity (2ndTr. 1324-26), and that appellant was capable of conforming his conduct to the requirements of the law at the time he murdered and robbed (2ndTr. 1326-27).

ARGUMENT

I.

The motion court did not clearly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel for failing to call Dr. Sam Parwatikar to testify about appellant's "cocaine intoxication delirium" at the time of the crimes because trial counsel's decision not to call him was based on reasonable trial strategy after investigation. In any event, appellant was not prejudiced, because two other experts testified to the effects appellant's cocaine dependence and withdrawal had on him the night of the crimes.

For his first point on appeal, appellant claims that the motion court clearly erred in denying his motion for postconviction relief, which alleged ineffective assistance of counsel for failing to call Dr. Sam Parwatikar during the re-trial of appellant's penalty phase (App.Br. 51). Appellant claims that, because this Court overturned appellant's death sentence during his first appeal because his attorneys failed to contact Dr. Parwatikar and have him testify (after hinging their entire penalty phase case on his testimony), that his new attorneys must also have been ineffective for choosing to call two different experts at the re-trial of the penalty phase, and deciding, for strategic reasons, not to call Dr. Parwatikar (App.Br. 52).

1. Facts

During appellant's first penalty phase, his trial counsel, Janice Zembles, planned to call Dr. Parwatikar to testify about "cocaine intoxication delirium," which is not a mental

disease or defect, but is a term used to describe the effects which appellant's cocaine dependence and withdraw had on him on the night he murdered Ms. Bratcher, Ms. Scruggs, and Mr. Jones. State v. Johnson, 968 S.W.2d 686, 697 (Mo.banc 1998). The only medical expert Ms. Zembles called was Dr. William Watson, but he lacked the qualifications necessary to testify about the effect appellant's cocaine use had on his mental state. Id. at 698. Dr. Parwatikar's testimony was the "cornerstone" of Ms. Zembles's penalty phase strategy, and she stated that the only reason he did not testify is that she forgot to telephone him to arrange to have him come to court. Id. at 698-99.

Appellant's attorneys during his penalty phase re-trial were Teoffice Cooper, lead counsel, and Delores Berman, assistant counsel (2ndTr. 1). Their strategy was to "paint a picture of Ernest that would be sympathetic to the jury." (PCR Tr. 31). Therefore, they decided to present testimony about appellant's poor upbringing and his mental deficits, to present testimony that he was a prisoner of crack cocaine and had tried to rid himself of the habit, and to present testimony that appellant was usually nice person and that his family loved him (PCR Tr. 31). Mr. Cooper did not want to call many experts, because, "as a practical matter, [he thought] juries are sometimes offended by expert witnesses who they perceive to be explaining away the behavior of a defendant," so he decided to limit expert testimony to two expert witnesses (PCR Tr. 32).

These two witnesses were Dr. Denis Cowan and Dr. Robert Smith (2ndTr. 1117, 1199). Dr. Cowan was a licensed psychologist who met with appellant and gave him a neuropsychological evaluation (2ndTr. 1117-19). Dr. Cowan testified that, based on his

evaluation of appellant, appellant's use of lots of different illegal drugs, and his past head injuries, contributed to appellant's brain damage and impacted appellant's brain functioning (2ndTr. 1138-39).

Dr. Smith, a clinical psychologist and certified addiction specialist, conducted a psychological and substance abuse evaluation of appellant (2ndTr. 1199, 1203, 1205). He testified that appellant's genetic history and environment put him at risk for becoming addicted to drugs (2ndTr. 1247). He said that appellant was addicted to drugs, as shown by his increased tolerance, inability to cut down on his drug use, and the increase in the amount of time he spent in trying to obtain drugs, to the point where he did very little else (2ndTr. 1248-49). Dr. Smith testified that on the day of the crimes, appellant's girlfriend told him she was leaving him (2ndTr. 1255-56). Appellant was upset, and used cocaine and alcohol all day (2ndTr. 1256). Later in the evening, appellant was unable to obtain more cocaine (2ndTr. 1256). But he "felt a craving for cocaine, felt a need to have more cocaine," and "he was experiencing acute withdrawal" from the cocaine, which was why he decided to commit the robbery (2ndTr. 1256, 1291). Dr. Smith testified that at the time of the crimes, appellant was suffering from alcohol, cocaine, and marijuana dependence, long-standing depression, Fetal Alcohol Effect, and borderline mental retardation, that these conditions all exacerbated each other, and that as a result, at the time of the crimes, appellant was suffering from an extreme mental or emotional disturbance (2ndTr. 1259-63).

During rebuttal, the state called Dr. Jerome Peters, a psychiatrist, who testified, *inter alia*, that appellant had "overwhelming cocaine dependence and alcohol abuse," and

had not been free from drug use even for the three-to-six months necessary to make a diagnosis of a depressive disorder (2ndTr. 1314, 1320).

In his motion for postconviction relief, appellant claimed that his penalty phase re-trial attorneys were ineffective for failing to call Dr. Parwatikar to testify that appellant was suffering from "cocaine intoxication delirium" at the time of the crimes (PCR L.F. 41-42).

Appellant submitted Deposition Exhibit 3 to the Motion Court, which was the deposition of Dr. Parwatikar (App.Exh.3). In this deposition, Dr. Parwatikar testified that he was a psychiatrist, and had examined appellant (App.Exh.3, pg. 6, 15). He said that appellant had used a very high dosage of cocaine the afternoon and evening of the crimes, that appellant was cocaine dependent (App.Exh.3, pg. 16-19). He said that at the time of the crimes, appellant was suffering from "cocaine intoxication delirium," "which affects a person's ability to perceive, implement the information that is available in a logical sequence, and . . . lack of judgement is exhibited by such individuals" (App.Exh.3, pg. 26). He said that the large number of wounds appellant inflicted on Mr. Jones, Ms. Bratcher, and Ms. Scruggs while murdering them, and especially the number of stab wounds he put in Ms. Bratcher's hand, showed that appellant "was in a frenzy" during the crime, because he had used so much cocaine (App.Exh.3, pg. 36-37).

At the hearing on appellant's motion for postconviction relief, Mr. Cooper testified that he did not consult with Dr. Parwatikar, but that he "read a PCR transcript of Dr. Parwatikar" (PCR Tr. 15). He knew that Dr. Parwatikar said that appellant had cocaine psychosis, and possibly delusions, and that Dr. Parwatikar used the term "cocaine

intoxication delirium" in his testimony (PCR Tr. 15). Mr. Cooper also reviewed this Court's opinion reversing appellant's death penalty for not calling Dr. Parwatikar, "or any mental health expert," to testify (PCR Tr. 15-16).

Mr. Cooper testified that he had several conversations with Loyce Hamilton, one of the attorneys who represented appellant during his original trial, regarding whether to use Dr. Parwatikar (PCR Tr. 16). Mr. Cooper could not remember how many times he talked with Ms. Hamilton about Dr. Parwatikar, but specifically recalled discussing Dr. Parwatikar's testimony with her, and that Ms. Hamilton told him that Dr. Parwatikar's testimony "contributed harmful aspects as well as any beneficial aspects" (PCR Tr. 18).[3]

---

[3] Appellant claims that Mr. Cooper said he only had one "fleeting conversation with Hamilton . . . at an office copying machine" (App.Br. 68). Mr. Cooper described where the copier was, but never said that any conversations took place there (PCR Tr. 17). Rather, he testified that he had "several conversations" with Ms. Hamilton in "reference to Dr. Parwatikar" (PCR Tr. 16), and he had "no idea" how many times he talked to her about appellant's case (PCR Tr. 17). He later said "conversation" (PCR Tr. 33, 37) instead of "conversations" (PCR Tr. 16), but that was only after appellant's post-conviction counsel had used the term "conversation" to collectively describe all his communications with Ms. Hamilton regarding appellant's re-trial (PCR Tr. 17).

Ms. Hamilton claimed she did not remember having conversations with appellant's attorneys because she was "busy" at the time, but she denied telling them anything about

Mr. Cooper later testified that he believed that "juries are sometimes offended by expert witnesses who they perceive to be explaining away the behavior of a defendant" (PCR Tr. 32). Then the following exchange took place:

Q. With that philosophy in mind, would you have been interested in calling Dr. Parwatikar in addition to the two experts that you called?

A. Oh, no.

Q. Can you explain that for us?

A. . . . But Dr. Smith was the psychologist hired by the PCR attorney, Loyce Hamilton. And as I indicated on direct, I had a conversation with Loyce about Dr. Parwatikar and about Dr. Smith. And as a result of that conversation, I hired Dr. Smith. And it's my recollection that not only did Dr. Smith conduct his own evaluation of Ernest, but I believe that he reviewed Dr. Parwatikar's efforts on Ernest's behalf as well.

Q. So is it fair to say that after investigation you made a trial strategy decision

---

experts, and said she usually just said hello to Mr. Cooper at the office copier (PCR Tr. 67-68, 72-73).

Thus, appellant's characterization of the evidence as a single conversation at the copier is incorrect. Mr. Cooper said they had many conversations about experts and said nothing about them taking place at a copier, and Ms. Hamilton denied any conversations about expert witnesses.

not to call Dr. Parwatikar?

A. Yes.

(PCR Tr. 32-33).

Delores Berman, appellant's other trial attorney, testified that before the retrial she read this Court's opinion reversing appellant's sentences (PCR Tr. 46). She said she believed she read Dr. Parwatikar's testimony from the first motion for postconviction relief, and that she did know his diagnosis of appellant (PCR Tr. 47-48). She said that they addressed appellant's drug use through Dr. Cowan and Dr. Smith's testimony (PCR Tr. 49).

The motion court denied appellant's claim (PCR L.F. 439). In doing so, the motion court recognized that trial counsel called two mental health experts, Dr. Cowan and Dr. Smith (PCR. L.F. 424). The motion court set out the testimony of those doctors and Dr. Peters, noted that lay witnesses also testified about appellant's cocaine abuse, summarized the testimony of Dr. Parwatikar, and also summarized the hearing testimony of Mr. Cooper, Ms. Berman, and Ms. Hamilton (PCR L.F. 424-38). The motion court held:

> This Court finds that after reviewing the deposition of Dr. Parwatikar taken on August 27, 2001, the testimony from the evidentiary hearing, and the trial transcript, that trial counsel made a reasonable strategy decision not to call Dr. Parwatikar to testify. The impact of the cocaine addiction on Movant was presented to the jury and rejected. Dr. Parwatikar's cumulative testimony about Movant's search for money to get crack cocaine and his depression were presented to the jury by expert testimony that incorporated Dr. Parwatikar's medical opinion as it was

expressed at the first post-conviction proceeding. The trial attorneys for Movant reviewed the doctor's testimony, discussed the selection of experts and lay witnesses, and made a reasonable trial decision not to use the psychiatrist.

This Court concludes that Movant has failed to overcome the presumption that counsel was effective. . . . In the retrial of the penalty phase, there is no question based on the testimony of trial counsel and the trial transcripts that the attorneys representing Movant made an investigation of the law and the facts relevant to "plausible options" of presenting the impact of Movant's cocaine use to the jury. The options that trial counsel chose were reasonable and no plausible claim of ineffective assistance of counsel has been presented by Movant.

Moreover, this Court concludes that the testimony of Dr. Parwatikar would have been "cumulative." Two mental health experts testified at trial, Dr. Smith incorporated Dr. Parwatikar's findings into his testimony, and the evidence of Movant's cocaine use was before the jury.

(PCR L.F. 438-39, Resp.App. A19-A20).

2. Standard of review

The standard of review of the motion court's decision is limited to a determination of whether the findings and conclusions of the court are clearly erroneous." State v. Link, 25 S.W.3d 136, 148 (Mo.banc 2000), *cert. denied* 531 U.S. 1040 (2000). The motion court's rulings "are presumed correct and will be found clearly erroneous only if, upon a review of the entire record, the appellate court is left with a definite and firm impression

that a mistake has been made." Id. at 148-49.

3. Law on ineffective assistance of counsel

A conviction or a death sentence must be affirmed in the face of a claim of ineffective assistance of counsel unless a defendant meets both parts of a two-prong test. Clayton v. State, 63 S.W.3d 201, 206 (Mo.banc 2001), *cert. denied* 122 S.Ct. 2341 (2002). The defendant, "must first show that his attorney's conduct fell below an objective standard of reasonableness and second that his attorney's errors prejudiced his case." Id., Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). "Both parts of the Strickland test must be fulfilled; if he fails to prove either one, no relief can be granted." Clayton v. State, 63 S.W.3d at 206. "The attorney's conduct must be so egregious that it undermines the proper functioning of the adversarial process to such an extent that the original trial cannot be relied on as producing a just result." Id., Strickland v. Washington, 466 U.S. at 686, 104 S.Ct. 2064.

> The defendant has a heavy burden in proving ineffective assistance. . . . The reviewing court presumes that the trial attorney's conduct was reasonable and was not ineffective. 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.

Clayton v. State, 63 S.W.3d at 206.

"[T]he selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." Id. at 208, *see also* Strickland v. Washington, 466 U.S. at 690, 104 S.Ct. at 2066 ("strategic choices made after thorough

investigation of law and facts relevant to plausible options are virtually unchallengeable").

4. Trial counsel's decision not to call Dr. Parwatikar was based on reasonable trial strategy

At the penalty phase re-trial, the trial strategy was to present a "sympathetic" picture of appellant (PCR Tr. 31). To this end, his attorneys presented evidence of his poor, abusive upbringing and early addiction to drugs (2ndTr. 999-1017, 1024-33, 1214-24), his low-average mental abilities (2ndTr. 1136, 1161-62, 1261), his failed attempts to stop using drugs (2ndTr. 1099-1101, 1248), and the fact that he was suffering from cocaine withdrawal (after binging on crack cocaine) at the time of the crimes (2ndTr. 1255-56, 1290-91).

Appellant's attorneys wanted to avoid offending the jury by trying to "explain away" his violence through expert testimony (PCR Tr. 32). *See* Middleton v. State, 80 S.W.3d 799, 806-807 (Mo.banc 2002) (reasonable for trial counsel to decide not to call expert for fear of offending jury). Their decision to have Dr. Smith review the reports of Dr. Carole Bernard and Dr. Parwatikar (PCR Tr. 33, 60-61) and to incorporate their findings into his testimony was in line with this strategy, allowing them to present the accumulated knowledge of three experts in just one expert witness. They also called Dr. Cowan, in order to have an expert on neuropsychology tell the jury about appellant's brain damage from head injuries and long drug abuse (2ndTr. 1138-39). Thus, by only calling two experts, they were able to present the knowledge of four experts, including Dr. Parwatikar, and present a picture of appellant as someone who had low mental abilities, and abusive childhood, and had fallen into the trap of cocaine dependence.

This depiction of appellant is far more sympathetic than that created by Dr. Parwatikar's testimony. In his deposition, Dr. Parwatikar said that appellant was suffering from "cocaine intoxication delirium," and described the effects as essentially making appellant a monster— violent, paranoid, going berserk at something as simple as a person holding candy (App.Exh.3, pages 28, 33). Even worse, in order to reach his conclusions, Dr. Parwatikar relied on the horrendous, gruesome nature of appellant's murders— how he bludgeoned Ms. Bratcher, Ms. Scruggs, and Mr. Jones to death with the hammer, and especially how he stabbed Ms. Bratcher through the hand eleven times (App.Exh.3, pages 35-36). Dr. Parwatikar's testimony would have had the effect of focusing the jury's attention back on the extremely depraved way in which appellant murdered three innocent people whom he knew. By deciding not to call Dr. Parwatikar, appellant's attorneys were able to put distance between the state's case (where the witnesses described the horror of what appellant actually did), and the jury's deliberations, filling the space between with witnesses who were designed to show that appellant was a poor, unintelligent, prisoner of drug addiction, who was loved by his family and friends, and who had the cards stacked against him his entire life. This strategy would have been entirely undermined by an expert witness telling the jury that appellant was a person who turned into a monster the moment he began coming down from his crack high, even if that expert did use the jargon "cocaine intoxication delirium" in describing this effect. That was the crux of Dr. Parwatikar's testimony.

It was certainly reasonable trial strategy for appellant's attorneys to decide not to

call Dr. Parwatikar himself, but instead to have Dr. Smith distill Dr. Parwatikar's report into an explanation that appellant was dependent on cocaine, had been using cocaine the day and evening of the crimes, that he was suffering from acute withdrawal at the time of the crimes, and that, with appellant's other problems, he was suffering from an extreme mental or emotional disturbance at the time of the crimes. His attorneys had read Dr. Parwatikar's testimony, had consulted several times with his prior trial attorney about the option of using Dr. Parwatikar, and made a reasonable trial strategy decision not to call him. This decision is virtually unchallengeable. Clayton v. State, 63 S.W.3d at 208, *see also* Strickland v. Washington, 466 U.S. at 690, 104 S.Ct. at 2066. Therefore, the motion court's findings were not clearly erroneous, and appellant's point must fail.

Appellant argues that Dr. Smith failed to explain why appellant committed the murders "that day" (App.Br. 54, emphasis in original). However, Dr. Smith explained that, the day of the crimes, appellant had been taking large amounts of cocaine from the afternoon and into the evening, and had been suffering from "acute withdrawal" that night when he was unable to obtain any more cocaine (2ndTr. 1255-56, 1290-91). Dr. Smith's testimony explained appellant's background, and described how all these factors interacted with appellant's addiction and withdrawal on the night of the crimes (2ndTr. 1255-65, 1290-91). Dr. Parwatikar, on the other hand, could not testify at all about the other factors in appellant's history, but only blamed appellant's actions on appellant's decision to binge on crack cocaine (App.Exh.3, pages 16-17, 24-26). Thus, Dr. Smith gave a full picture of appellant's history, and explained that his drug use that day caused all the other factors to

increase, while Dr. Parwatikar just said that appellant used a lot of drugs that day and became a vicious murderer. Thus, appellant's argument is incorrect.

Appellant also argues that Dr. Parwatikar's testimony was necessary to explain "some of the most troubling aspects of the case– both the type and number of wounds inflicted upon the victims and the disarray and bizarreness of the crime scene." (App.Br. 54). However, appellant's attorneys did not ignore the need to address appellant's violence, but they presented Dr. Smith's testimony in an attempt to explain appellant's actions. Dr. Smith described appellant's many cognitive and drug-induced issues, without bringing up appellant's specific murderous acts yet again. Dr. Parwatikar's could not do this; he based his opinion on the actual injuries appellant inflicted on his victims, especially the stab wounds to Ms. Bratcher's hand, and relied on the horror of appellant's acts during the murders in order to say that appellant was under the influence of crack cocaine at the time he committed the crimes (PCR Tr. 36). Thus, by using Dr. Smith instead of Dr. Parwatikar, appellant's attorneys addressed the issue of appellant's extreme violence, but in a strategic way which allowed them to continue to draw the jury's attention away from appellant's crimes themselves.

Further, the crime scene, while a certainly a blood-bath, was not in "disarray," and the only "bizarreness" was the horrible way appellant killed his victims. Rather, the crime scene showed that appellant was very methodical in carrying out the crimes. He wore gloves the entire time (2ndTr. 552-53, 564, 571, 668-70, 783). He pulled down the front blinds of the store (2ndTr. 549-53, 895-96) so no one could see what he did. He herded the

two women into the bathroom, took Ms. Bratcher to the counter, stabbed her hand with a screwdriver at least ten times (2ndTr.479, 526-27, 599, 957-58), and forcing her to open the floor safe, then taking her back to the bathroom and killing Ms. Bratcher and Ms. Scruggs with the hammer (2ndTr. 605-607, 611-15, 955-62, State's Exhibit 47E). Then, still only walking through the store, not running (2ndTr. 600-601), appellant opened the cooler, smashed Mr. Jones's hand in the cooler door, shot him in the face, and killed him with the hammer (2ndTr. 570-73, 624-27, 631-32, 947-52). Then appellant closed the cooler door behind him (2ndTr. 570-71). He walked to the door (2ndTr. 549, 600-601), and locked the front door behind him (2ndTr. 459, 894-95). Other evidence established that appellant went straight home after the murders, gave directions to Antwane to hide his bloody clothing, counted out the cash he had obtained and hid it, and burned the receipts and other incriminating items that had been in the floor safe (2ndTr. 761-69, 784).

Thus, Dr. Parwatikar's testimony did not explain the "disarray and bizarreness of the crime scene," rather, the fact that the crime scene and testimony showed how methodically appellant carried out the robbery and murders refuted Dr. Parwatikar's claim that appellant had lack of judgment and poor perception and logic (App.Exh.3, page 33) at the time he committed the crimes. Therefore, appellant's claim that Dr. Parwatikar's testimony would have explained appellant's violence has no merit.

Appellant also argues that Dr. Parwatikar's testimony would have shown that "In prison, [appellant] would not be a danger, because he would never again be delirious from drug ingestion." (App.Br. 64). However, even Dr. Parawatikar himself testified that "There

are drugs available in the penitentiary." (App.Exh.3, page 60). Further, at trial, Dr. Peters testified that, "As a previous consultant with the Department of Corrections, you cannot assume that an individual confined in the Department of Corrections is free of drugs, as noted by the past history of Mr. Johnson." (2ndTr. 1336). Thus, far from showing that appellant would not be a danger in prison, Dr. Parwatikar's testimony actually showed that appellant was a danger in prison, because he could turn into a homicidal monster anytime he had ingested large amounts of crack cocaine, and that drugs were available in prison. Therefore, appellant's argument has no merit.

Appellant also argues that Mr. Cooper and Ms. Berman failed to investigate Dr. Parwatikar, relying on Perkey v. State, 68 S.W.3d 547 (Mo.App. W.D. 2001). In Perkey, the defendant's trial counsel failed to interview the victim's doctor, who would have testified that the defendant's collision with her car while driving drunk might not have been the cause of her death. Id. at 549-50. The Court of Appeals, Western District, reversed, holding that without interviewing the doctor, trial counsel had no idea that the doctor would have testified that the accident might not have caused the victim's death. Id. at 551-52. Perkey is distinguishable, because in the case at bar, Mr. Cooper and Ms. Berman knew exactly what Dr. Parwatikar's testimony would have been, because they read his testimony from the original postconviction relief hearing (PCR Tr. 15, 60). In his later deposition, Dr. Parwatikar said that his deposition testimony was almost exactly the same as his previous testimony in court (App.Exh.3 pg 43). Thus, unlike Perkey, trial counsel did make a reasonable investigation, because they found out exactly what Dr. Parwatikar's testimony

would be. Therefore, appellant's argument has no merit.

Appellant also argues that trial counsel decision not to call an additional expert was "arbitrary," because the jury might not have found yet another expert "intolerable," and that if he used any experts at all, he had to use all the experts available (App.Br. 69-70). Appellant's argument ignores the fact that it was trial counsel's strategy to call as few experts as possible, and that trial counsel had Dr. Smith incorporate Dr. Parwatikar's findings into his own testimony (PCR Tr. 32-33, 60-61). Thus, trial counsel's decision was not "arbitrary," but was founded on a reasonable trial strategy to use as few experts as possible to convey the most expert knowledge to the jury. Appellant argues that, in hindsight, trial counsel wished that his experts had provided more testimony (App.Br. 70), but hindsight is not an appropriate basis on which to judge the reasonableness of trial counsel's decision. Clayton v. State, 63 S.W.3d at 206; Knese v. State, 85 S.W.3d 628, 633 (Mo.banc 2002) ("Reasonable trial strategy is not ineffective assistance of counsel because it did not work as hoped."). Further, trial counsel testified that he could not remember anything specifically which their experts left out of their trial testimony, and that their testimony did regard the five or six specific areas they wanted to cover in portraying appellant to the jury, and that they succeeded in providing the information from other experts to the jury (PCR Tr. 40, 60-61). Therefore, appellant's argument is without merit.

5. Appellant was not prejudiced

Even if trial counsel's decision not to call Dr. Parwatikar had not been based on reasonable trial strategy, there is no reasonable probability that, had trial counsel presented

Dr. Parwatikar's testimony, the jury would have sentenced appellant to life imprisonment. Rousan v. State, 48 S.W.3d 576, 582 (Mo.banc 2001).

As shown above, Dr. Smith's testimony incorporated Dr. Parwatikar's findings that appellant was cocaine dependent, had used lots of cocaine the day and evening of the crimes, was unable to obtain more cocaine that night, and at the time of the crimes, was suffering acute cocaine withdrawal (2ndTr. 1290-91). Dr. Parwatikar's testimony described the withdrawal as "cocaine intoxication delirium," and excused appellant's crimes by saying that his addiction, plus the way he stabbed and bludgeoned the victims to death, showed that, at the time of the crimes, he was paranoid, lacked judgment, had poor perception and logic, that he was violent and panicky, and that any stimuli was capable of whipping his brain into a frenzy (App.Exh.3 pg. 25-33).

Although the other experts did not use the jargon, "cocaine intoxication delirium," their testimony conveyed the same information to the jury that Dr. Parwatikar's did. Rather than say appellant was violent, paranoid, and panicky when on drugs, Dr. Smith said that, as a result of being abused as a child, appellant acted out in an angry manner when on drugs, and that he was experiencing acute withdrawal at the time of the crimes (2ndTr. 1217, 1239, 1291). Rather than saying appellant had poor judgment and perception when on drugs, Dr. Smith and Dr. Cowan said that appellant had low intellectual functioning as a result of his mother's use of drugs when pregnant with him, the head injuries he had received as a child, and his drug use, and said that his poor intelligence was exacerbated when he used drugs (2ndTr. 1138-39, 1215, 1237-39, 1259, 1262). Rather than simply saying appellant was

cocaine dependent, Dr. Smith related claims that appellant had a family history of drug abuse, an upbringing where drug use was encouraged, and was abused as a child, which caused him to be predisposed to drug dependence, that he did not chose to be an addict, and that he was cocaine and marijuana dependent (2ndTr. 1243-47, 1250-53, 1260). Further, Dr. Peters testified that appellant had "overwhelming cocaine dependence," where appellant had not been free from cocaine for even a three to six month period (2ndTr. 1320).

Thus, the evidence presented at trial established the same thing as Dr. Parwatikar's testimony, except that the evidence was couched in more sympathetic and understandable terms. "Counsel is not ineffective for not putting on cumulative evidence." Skillicorn v. State, 22 S.W.3d 678, 683 (Mo.banc 2000), *cert. denied* 531 U.S. 1039 (2000). Therefore, appellant was not prejudiced from trial counsel's decision not to present this testimony.

Further, as shown above, Dr. Parwatikar's testimony that appellant was illogical and frenzied at the time of the crimes was belied by the planned-out, methodical way in which appellant prepared for the robbery, carried out the robbery and murder, and hid the evidence of his crime immediately after the crime. To the extent Dr. Parwatikar's opinion was based on how "bizarrely" appellant committed the robbery and three murders, his opinion was unreliable. Dr. Peters testified that the methodical way in which appellant planned for and completed the robbery and murders showed that he was not suffering from diminished capacity at the time of the crimes (2ndTr. 1324-27). Thus, Dr. Parwatikar's opinion was contradicted by the state's expert and by the physical evidence in the case, and there is no

reasonable probability that, had the jury heard his testimony, the result of appellant's trial would have been different.

Appellant argues that he suffered prejudice, citing this Court's opinion after his first trial (App.Br. 70). Appellant ignores the fact that on re-trial, his new attorneys had an entirely different trial strategy than that used at his previous trial, and his new attorneys had other experts present the substance of Dr. Parwatikar's findings, but without the emphasis on appellant's bloody acts, the jargon, or the description of appellant as a monster. At appellant's first trial, appellant's attorneys centered their mitigation trial strategy around Dr. Parwatikar's testimony, and through neglect, failed to call him or any other expert to testify about his findings. This Court found prejudice for that reason, that "Dr. Parwatikar's testimony was the cornerstone of Zembles's penalty phase strategy," and her failure to have him, or any other expert, offer similar testimony prevented the jury from considering whether appellant was suffering from diminished capacity at the time of the crimes. State v. Johnson, 968 S.W.2d at 699-702.

In contrast, in the case at bar, the jury was given ample expert testimony on the issue of whether or not appellant had diminished capacity at the time of the crimes, and chose to reject that evidence. There is no reasonable probability that, had trial counsel called yet another expert, Dr. Parwatikar, to give all the gory details about appellant's crimes, to tell the jury appellant turned into a violent, murderous monster when he used crack cocaine, and to tell the jury that drugs were available in prison, that the jury would have reached a different decision, especially in light of the fact that the state's expert and the physical

evidence refuted Dr. Parwatikar's claim that appellant was not thinking and acting in a logical manner at the time of the crimes. Thus, appellant's point has no merit, and must fail.

POINT II

The motion court did not clearly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel on grounds of trial counsel's decision not to call Michael Maise to testify because this decision was based upon a reasonable trial strategy decision to not offend the jury by trying to "explain" appellant's conduct by blaming others, and because Mr. Maise's testimony lacked credibility. In any event, appellant was not prejudiced, because similar evidence showed that Rodriguez Grant assisted appellant's preparation for the robbery and murders.

For his second point on appeal, appellant claims that his trial counsel were ineffective for deciding not to have Michael Maise testify at the re-trial of appellant's penalty phase (App.Br. 72). Appellant argues that Maise's testimony would have shown that appellant acted under extreme duress or under the substantial domination of Rodriguez Grant[4] when he committed the robbery and murders (App.Br. 72).

1. Facts

At appellant's original trial, trial counsel called Michael Maise to testify (1st Tr. 2323). After he tried to take the Fifth Amendment, appellant's attorneys questioned him (1st Tr. 2323-29). The court asked whether Mr. Maise chose to answer her questions, and

[4] Because the brothers share the same last name, throughout this brief, Rodriguez Grant is referred to as Rod, and Antwane Grant is referred to as Antwane.

Mr. Maise asked, "Do I have a choice?" (1stTr. 2329). The court said he was not allowed to take the Fifth Amendment (1stTr. 2330). Mr. Maise then testified (1stTr. 2331).

He said he had three convictions for robbery and one conviction for resisting arrest (1stTr. 2336). He said that while he was in jail, he met Rod (1stTr. 2332). Mr. Maise said that Rod told him that, while he did not do anything at the Casey's store, he "went with Ernest to make sure that Ernest was going to do what Ernest said he was going to do because he didn't trust Ernest. And he gave Ernest a gun, and Ernest would probably pawn it to get some crack with" (1stTr. 2333).

Mr. Maise denied trying to get the prosecutor to give him favorable treatment in exchange for his story about the Casey's murders (1stTr. 2334-35), but then admitted that at the bottom of the letter he wrote to the prosecutor, he wrote, "So if you are interested in my testimony, please meet with me ASAP so we can discuss a deal" (1stTr. 2336). He also admitted that when appellant's attorneys came to talk to him about his story, he told them that he "wanted out" if he testified (1stTr. 2337).

Rod testified at the first trial that he sold three rocks of crack cocaine to appellant the day of the crimes, that appellant came to him and asked for a gun, that appellant's plan was to put everyone in the back of the Casey's store, and then force one of the employees to open the safe (1stTr. 2090, 2097). Rod also testified that he was having sex with his girlfriend at the time of the robbery and murders, that he and his girlfriend had been using a can of whipped cream at the time, and identified a photograph of whipped-cream on his headboard, which photograph police had taken at the house (1stTr. 2100-2102).

Deborah Ann Watson testified at the original trial that, the evening of the crimes, she saw Rod and appellant whispering together and exchanging looks (1stTr. 2017). Later, she heard a gunshot (1stTr. 2019-20). At about 9:50 p.m. she and Rod went down to his bedroom and started having sex, using a can of whipped cream they had bought (1stTr. 2022-23).[5] Appellant interrupted them, and Rod left for about two minutes and came back (1stTr. 2025-26). Later, Antwane called down and said appellant "wants to know if he can get that" (1stTr. 2026). Rod answered, but did not leave the bedroom, and she heard footsteps coming down and then going back upstairs (1stTr. 2026-28). Rod stayed in bed with her until 11:22 p.m., when she had to start getting ready to leave so she could be home before her curfew (1stTr. 2028). Rod and she went upstairs together, and appellant was not in the house (1stTr. 2029-30). Rod and she left at 11:43 p.m., Rod walking her to her car (1stTr. 2031). Then she dropped Rod back off at his house, and saw appellant in the front yard, walking towards the house (1stTr. 2031, 2038). She also testified that she and Rod were enemies because she had found out things about him, and that she never speaks to him anymore (1stTr. 2073).

Antwane also testified about what happened at the house the night of appellant's murders, and said that Rod was home during the time the crimes took place (1stTr. 1957-58).

---

[5] She identified a photograph taken by a detective the day after the murders as depicting Rod's headboard with whipped cream on it (1stTr. 1845-46, 1864-65, 2023).

In penalty phase closing argument at appellant's original trial, trial counsel argued that Rod was a terrible person, that he sold crack cocaine to appellant, that no one "has more domination over a person than a drug dealer who is withholding the drug," that he went with appellant to the Casey's store, that appellant acted under extreme duress or the substantial domination of Rod, and that appellant should not be given the death penalty because Rod received a favorable plea agreement (1stTr. 2649-51).

The jury was instructed on the statutory mitigating circumstance of acting under substantial domination of another person or extreme duress for each of the three murders (1stL.F. 611, 618, 625). The jury chose to impose the death penalty for each of appellant's murders. State v. Johnson, 968 S.W.2d 686, 689 (Mo.banc 1998).

At the re-trial of appellant's penalty phase, appellant's attorney chose not to call Mr. Maise to testify. Antwane testified that Rod sold crack cocaine to appellant, that appellant was using crack the day of the crimes, and that he did not know how much money appellant owed Rod (2ndTr. 807-808). On the evening of the crimes, he heard a gunshot from the back door, and found Rod and appellant standing outside (2ndTr. 777). Later, appellant sent Antwane to get Rod's gun for appellant, and Rod gave appellant the gun (2ndTr. 787). Appellant left, wearing jeans, a jacket with the hood up over his head, and a skull cap and scarf over his face (2ndTr. 778). He returned thirty minutes later (2ndTr. 779). Appellant left again (2ndTr. 778-79), but Rod stayed at the house (2ndTr. 818). At about 11:30 p.m., Rodriguez and Antwane walked their girlfriends to their car (2ndTr. 780). Antwane entered the house, and found appellant in the kitchen, with specks of blood on his face and clothes

(2ndTr. 781). Appellant went downstairs, put his bloody clothes in a bag, and told Antwane to get rid of them (2ndTr. 782). When he returned, appellant and Rod were in the basement, counting out a stack of paper money together (2ndTr. 784). On cross-examination, appellant's counsel emphasized that appellant and Rod were counting the money out together after Rod had told appellant to get his crack cocaine himself and had provided a gun to appellant (2ndTr. 818-19).

On cross-examination of Detective Michael Himmel, appellant's attorneys elicited evidence that there was an unidentified shoe print on a mat behind the Casey's counter (2ndTr. 702-703).

Other evidence showed that the shoe print behind the counter was from dust, not blood, and that all the bloody shoe prints throughout the store came from appellant's shoes only (2ndTr. 586-91, 707, 730-31, 778). It was clear that none of the victims could have gotten up after appellant started attacking them, because there was so much blood that it would have gotten on the soles of their shoes (2ndTr. 628-32).

In appellant's motion for postconviction relief, he alleged that his trial counsel were ineffective for failing to call Mr. Maise (PCR L.F. 45-46). At the hearing on appellant's motion, Mr. Cooper was questioned about Mr. Maise (PCR Tr. 27-28). Mr. Cooper testified that he had purchased a bus ticket for Mr. Maise, and that Mr. Maise was present at appellant's penalty phase re-trial, but that he decided not to call him (PCR Tr. 27-28). Mr. Cooper said he could not remember the specific reason why he did not call Mr. Maise to testify (PCR Tr. 28). Ms. Berman testified that she had read Mr. Maise's testimony before

the penalty phase re-trial, but she did not remember why they did not call him to testify (PCR Tr. 54-55).

The motion court denied appellant's claim, issuing the following findings of fact and conclusions of law:

> During the retrial of the penalty phase, there is no question based on the testimony of trial counsel and the trial transcripts that the attorneys representing Movant made an investigation of the law and the facts relevant to "plausible options" of presenting the impact of Rod Grant's actions in motivating Movant to rob Casey's for the purpose of obtaining more cocaine. . . . At the evidentiary hearing, trial counsel testified that Mr. Maise was present at trial and a decision was made to not call him. This Court finds that it would have been reasonable trial strategy not to call Mr. Maise based on the information the jury heard from Antwane and the defense impeachment of his testimony later in the trial. From the testimony of Antwane, the jury heard about Rod Grant's actions. The jury's failure to hear from Michael Maise that Rod Grant went to Casey's to check on whether Movant had committed the criminal conduct would not have changed the outcome of the trial. As the Missouri Supreme Court has rule, "counsel is not ineffective for not putting on cumulative evidence."

(PCR L.F. 459, Resp.App. A40, citation omitted).

2. Standard of review

The standard of review of the motion court's decision is limited to a determination

of whether the findings and conclusions of the court are clearly erroneous." State v. Link, 25 S.W.3d 136, 148 (Mo.banc 2000), *cert. denied* 531 U.S. 1040 (2000). The motion court's rulings "are presumed correct and will be found clearly erroneous only if, upon a review of the entire record, the appellate court is left with a definite and firm impression that a mistake has been made." Id. at 148-49.

3. Law on ineffective assistance of counsel

A conviction or a death sentence must be affirmed in the face of a claim of ineffective assistance of counsel unless a defendant meets both parts of a two-prong test. Clayton v. State, 63 S.W.3d 201, 206 (Mo.banc 2001), *cert. denied* 122 S.Ct. 2341 (2002). The defendant, "must first show that his attorney's conduct fell below an objective standard of reasonableness and second that his attorney's errors prejudiced his case." Id., Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). "Both parts of the Strickland test must be fulfilled; if he fails to prove either one, no relief can be granted." Clayton v. State, 63 S.W.3d at 206. "The attorney's conduct must be so egregious that it undermines the proper functioning of the adversarial process to such an extent that the original trial cannot be relied on as producing a just result." Id., Strickland v. Washington, 466 U.S. at 686, 104 S.Ct. 2064.

> The defendant has a heavy burden in proving ineffective assistance. . . . The reviewing court presumes that the trial attorney's conduct was reasonable and was not ineffective. 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.

Clayton v. State, 63 S.W.3d at 206.

"[T]he selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." Id. at 208, *see also* Strickland v. Washington, 466 U.S. at 690, 104 S.Ct. at 2066 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable").

4. Trial counsel's decision not to call Mr. Maise was reasonable trial strategy

Appellant's trial counsel had the benefit of appellant's original trial transcript. As shown above, in the original trial, the defense placed great emphasis on Rod's involvement in the crime. Those attorneys tried to excuse appellant's robbery and vicious murders by arguing that appellant had to do what Rod said in order to get more crack cocaine (1stTr. 2651). Mr. Cooper and Ms. Berman were able to see how reluctant Mr. Maise was to testify, and how easily his testimony was impeached, since Mr. Maise had four convictions and was only offering his "story" about Rod in the hopes of using it to get out of jail (1stTr. 2323-31, 2336-37). They also could see that, had they called Mr. Maise, the state could produce three witnesses, all of whom said that Rod was home during the murders (1stTr. 1957-58, 2022-31, 2100-102), and one of whom, Ms. Turner, was an enemy of Rod and had no motive to lie to cover for him, and was corroborated by photographs taken at the house the day after the crimes (1stTr. 1845-46, 1864-65, 2023, 2073).

Further, they could see that Mr. Maise never testified that Rod said he went inside the Casey's store with appellant, or that he told him what to do. Rather, his testimony was only that Rod went to the Casey's store to make sure appellant did what appellant himself

had said he was going to do (1stTr. 2333). Plus, they knew that the physical evidence refuted any claim that someone else was inside Casey's once appellant began attacking the three employees. The physical evidence showed that blood was all over the floor in the Casey's store, from the counter to the back area to the door, yet all the bloody footprints came solely from appellant's shoes (2ndTr. 586-91, 707, 730-31, 778, State's Exhibit 18).

Mr. Cooper testified at the hearing that he was concerned about calling experts who would try to excuse appellant's conduct, for fear they would offend the jury (PCR Tr. 32). The entire point of Mr. Maise's testimony was to excuse appellant's conduct by blaming Rodriguez for putting him up to it. To call someone like Mr. Maise, who was entirely lacking in credibility and whose testimony could be refuted by other witnesses, to try and excuse appellant's acts, certainly carried a serious risk of offending the jury. Further, even if Mr. Maise's testimony could excuse appellant's robbery, it certainly did nothing to excuse the murders, or the atrocious manner in which appellant carried out those murders. It was a reasonable trial strategy decision to choose not to blindly present the same worthless, offensive evidence at appellant's retrial. Therefore, appellant's point must fail.

Appellant argues that Mr. Maise's story could have been corroborated with evidence that there was a shoe print made out of dust on a floor mat (App.Br. 73). The shoe print had no corroborative value. Nothing showed how long the shoe print had been on the floor mat, and, unlike part of the Casey's floor, the counter area had not been mopped (2ndTr. 546). Nothing tied the shoe print to Rod. The fact that all the bloody shoe prints throughout the store came solely from appellant's shoes (2ndTr. 586-91, 707, 730-31, 778, State's Exhibit

18), refutes any claim that another person was in the store, following appellant around and directing his actions.

Appellant also suggests that Mr. Maise's testimony could have been corroborated with testimony from David Hopkins (App.Br. 73, footnote 6). If the testimony of Mr. Hopkins had any value at all, it was to confirm that appellant acted alone. Mr. Hopkins saw someone matching appellant's description at Casey's at 10:30 p.m. the night of the crimes, and no one was with him (1stTr. 2357-58, 2360-61). Just a few minutes later Mr. Hopkins saw a shorter person running along the main street in the same neighborhood, traveling in the general direction of the Casey's store, but he could not tell who it was (1stTr. 2359, 2361). He said he knew Rod, and thought that he probably would have known it if the shorter person were him (1stTr. 2364). The Casey's employees were still performing their normal closing routines at 11:02 p.m. that night (2ndTr. 539-40), so the robbery could not even have begun until at least half an hour after the sighting of the second man. The only probative value of Mr. Hopkins's testimony was that it helped confirm that appellant had gone by himself to Casey's to further plan the robbery and murders, gone back home and gotten a gun from Rod, and then left thirty minutes later to go back and carry out his intentions. The only other possible effect of Mr. Hopkins's testimony would have been to irritate the jury by preposterously suggesting that someone who was simply out jogging on the main street at night, and not recognized as Rod by someone who probably would known him if it were, was really Rod on his way to oversee appellant committing the Casey's

murders.[6]

Thus, appellant's trial counsels acted reasonably in deciding not to call Mr. Maise. They had him present at the trial, and were able to observe the jury and the testimony of other witnesses and made a determination, then and there, not to call him. They knew from the first trial that he lacked credibility and could be contradicted by three state's witnesses and the physical evidence at the crime scene. They also knew that the "blame Rod" defense had not been successful at the first trial, and that they ran the risk of offending the jury if they called him to testify. Therefore, they made a reasonable strategic decision not to call Mr. Maise, and the motion court did not clearly err in denying appellant's claim.

5. In any event, appellant was not prejudiced

Appellant's point not only fails the first prong of the Strickland test, it also fails the second prong, because appellant has not shown prejudice from his attorneys' decision not to call Mr. Maise.

First, as shown above, Mr. Maise's testimony lacked credibility. Mr. Maise was a convicted felon who only supplied his story in hopes of using it to strike a deal. Also, his

---

[6] If Rod was running towards Casey's all by himself at about 10:35 p.m., then he could not have been home at that time to give appellant the gun and escort him to the store. Instead, he must have just waited around in the cold near Casey's for at least half an hour, hoping that appellant would show up. This refutes, rather than corroborates, Mr. Maise's testimony that Rod said that he went with appellant to Casey's (1stTr. 2333).

testimony was contradicted by the physical evidence at the crime scene and by three other witnesses. Further, appellant had no credible evidence which could substantiate Mr. Maise's testimony. There is no reasonable probability that, had the jury heard Mr. Maise's testimony, they would have believed it. Therefore, there is no reasonable probability that, had Mr. Maise been called to testify, the jury would have made a different decision.

Second, Mr. Maise's testimony was cumulative to other evidence presented at trial. The evidence at trial suggested that Rod motivated appellant to commit the robbery. The testimony was that Rod supplied appellant with crack cocaine during the day and early evening (2ndTr. 808), refused to give appellant more drugs later in the evening, and instead had appellant come talk to him (2ndTr. 808-809, 818), and that after the conversation, appellant asked Rod for his gun (2ndTr. 809). The testimony suggested that Rod was with appellant when appellant test fired the gun (2ndTr. 777, 818). The testimony also was that after appellant committed the crimes, Rod went into the basement with appellant and counted out the money from the robbery (2ndTr. 784, 818-19). Thus, the jury had already heard evidence that Rod was involved in the robbery, and further evidence from Mr. Maise on this issue would have been merely cumulative. "Counsel is not ineffective for not putting on cumulative evidence." Skillicorn v. State, 22 S.W.3d 678, 683 (Mo.banc 2000), *cert. denied* 531 U.S. 1039 (2000).

Appellant claims that Mr. Maise's testimony was not cumulative, and includes a chart which sets out what appellant thinks Mr. Maise's testimony would have added (App.Br. 80-81). Appellant's entire chart boils down to Mr. Maise's statement that Rod

said he "went with Ernest to make sure that Ernest was going to do **what Ernest said he was going to do** because he didn't trust Ernest. And he gave Ernest a gun, and Ernest would probably pawn it to get some crack with" (1stTr. 2333, emphasis added).[7] This testimony does not show that Rod planned appellant's crimes; rather, it shows that appellant planned the crimes and told Rod what his plans were in order to convince Rod to let appellant use his gun. As shown above, the jury had already heard evidence of this.

Further, contrary to appellant's assertion (App.Br. 81-82), Mr. Maise's statement does not show that Rod went inside the Casey's and ordered appellant about as appellant committed the robbery and murders. At most it shows that Rod went with appellant far enough to make sure that appellant went to the Casey's store instead of the pawn shop. Nothing in Mr. Maise's testimony contradicts the fact that appellant planned the robbery, went into the Casey's store alone, robbed it, and tortured and murdered Ms. Scruggs, Ms. Bratcher, and Mr. Jones. Nothing in Mr. Maise's testimony suggests that Rod told appellant to viciously murder the employees. Thus, nothing in Mr. Maise's testimony shows that appellant committed the **murders**, as opposed to the robbery, while acting under

---

[7] Appellant's chart includes a claim that the jury "would have heard" that "Grounds existed to charge and convict Rodriguez of robbery and three counts of murder" (App.Br. 80). However, this information did not come from Mr. Maise's testimony. Therefore, Rod's potential charges are irrelevant to the issue of whether appellant was prejudiced from counsel's decision not to call Mr. Maise.

the substantial domination of Rod. Thus, Mr. Maise's testimony could not have proved the mitigating circumstance of appellant committing the murders under the substantial domination of Rod. The jury had already heard evidence that Rod was involved in the robbery, and there is no reasonable probability that, had the jury heard the additional information that Rod went with appellant far enough to make sure he went to Casey's instead of to a pawn shop, the jury would have found that appellant acted under the substantial domination of Rod while committing the murders.

The only other possible value to appellant from Mr. Maise's testimony was that he claimed he heard Rod say that he thought appellant might pawn Rod's gun. Contrary to appellant's assertion, this testimony does not show that appellant "would rather have pawned the gun than commit the crimes" (App.Br. 82). All this testimony shows is that Rod was careful to protect his property. Rod's "worry" about what appellant "might" have done has extremely little weight, if any at all, against the hard facts of the horrendous murders appellant chose to commit on his own once inside Casey's.

Therefore, the motion court did not clearly err in finding that Mr. Maise's testimony was largely cumulative, and in finding that the jury's failure to hear Mr. Maise's statement would not have changed the outcome of trial. Accordingly, appellant's point has no merit, and must fail.

POINT III

The motion court did not clearly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel on grounds that trial counsel did not ask the venire panel members whether they would hold it against appellant if he did not testify and did not request an instruction on the right not to testify because this decision was based on reasonable trial strategy in that appellant and trial counsel had not yet made the decision that appellant would not testify when the proceedings began, and it is reasonable for trial counsel to believe that the instruction would draw attention to the fact that the defendant did not testify. In any event, appellant has not shown Strickland prejudice.

For appellant's third point on appeal, he claims that his trial counsel were ineffective for not asking the venire panel members whether they would hold it against appellant if he did not testify (App.Br. 84). In his amended motion for postconviction relief, appellant claimed that the jury may have held his failure to testify against him, and that the fact that his attorneys did not request an instruction on the right not to testify "exacerbated" the decision not to voir dire on this issue (PCR L.F. 215, 217).

1. Facts

During the penalty retrial voir dire, the venire panel was not asked whether they would hold it against appellant if he did not testify. (*See* 2ndTr. 46-406). Appellant's trial counsel did ask the venire panel members whether they understood that the burden of proof was on the state and whether appellant's prior convictions would affect them (2ndTr. 143-

46). At the close of the evidence, appellant's trial counsel did not request that the jury be given an instruction that they were not allowed to draw an adverse inference from appellant's failure to testify (*see* 2ndTr 1340-46). *See* MAI-CR 3d 308.14.

During appellant's case, appellant's expert, Dr. Robert Smith, testified about appellant's version of the crimes (2ndTr. 1255-56, 1291-92). Appellant said that, the day of the crimes, he was depressed because his girlfriend said she was leaving him, so he used cocaine and some alcohol throughout the day (2ndTr. 1255-56). At the end of the day, appellant craved more cocaine, and talked to Rod, who gave him a gun (2ndTr. 1256). Appellant then went to Casey's with the intent of robbing it to get money to buy more cocaine (2ndTr. 1256). According to him, he went into the store, waited for the last customer to leave, took the employees to the bathroom and locked them in (2ndTr. 1291). He took some money and was about to leave, when he heard some noises from the back of the store (2ndTr. 1292). He went to the bathroom area (2ndTr. 1292). He said that he became involved in an altercation with a male employee, and that he shot the employee (2ndTr. 1292). He said that he had no memory of anything else until he was outside the store and going back to his house (2ndTr. 1292).

In appellant's amended motion for postconviction relief, he claimed that his trial counsel was ineffective for not asking the jury whether they would hold it against him if he chose not to testify, and said the voir dire was made worse by trial counsel's not asking for an instruction on this issue (PCR L.F. 215, 217).

At the evidentiary hearing on appellant's motion, appellant's trial attorney who

handled voir dire, Teoffice Cooper, testified as follows:

Q. Did you ask the jury whether they'd hold it against Ernest if he did not testify in this case? . . .

A. I would stand on the transcript. I don't recall, but that is an area of inquiry that a defense attorney generally addresses, especially if they are convinced that the defendant will not testify. . . .

Q. In addition to the lay witnesses and the expert witnesses, was it the trial strategy to have Mr. Johnson testify at trial?

A. I don't, I'm sorry, have a specific recollection. I do have a specific recollection of Ernest. And I just don't think we would have ever relied on him testifying. He had to be coaxed into the courtroom on a couple of occasions during the trial– . . .

Q. Do you have a memory as to when you made a specific decision not to rely on Ernest in the penalty phase?

A. No, but I would guess it was early on. Ernest is a reticent sort of guy.

(PCR Tr. 22, 35-36). Mr. Cooper agreed that it is always the defendant who makes the actual decision of whether or not to testify (PCR Tr. 36). Appellant never asked Mr. Cooper any question about his decision not to submit an instruction on appellant's right not to testify (*see* PCR Tr. 12-41).

The motion court denied appellant's claim, finding that appellant failed to show that, at the time of voir dire, trial counsel and appellant had determined that appellant would not

testify (PCR L.F. 453, Resp.App. A34). The motion court, who was also the trial court, found that trial counsel had conducted a thorough voir dire, and that appellant had failed to meet either prong of the Strickland test regarding his voir dire and instructional claims (PCR L.F. 454-55, Resp.App. A35-A36).

2. Standard of review

The standard of review of the motion court's decision is limited to a determination of whether the findings and conclusions of the court are clearly erroneous." State v. Link, 25 S.W.3d 136, 148 (Mo.banc 2000), *cert. denied* 531 U.S. 1040 (2000). The motion court's rulings "are presumed correct and will be found clearly erroneous only if, upon a review of the entire record, the appellate court is left with a definite and firm impression that a mistake has been made." Id. at 148-49.

3. Law on ineffective assistance of counsel

A conviction or a death sentence must be affirmed in the face of a claim of ineffective assistance of counsel unless a defendant meets both parts of a two-prong test. Clayton v. State, 63 S.W.3d 201, 206 (Mo.banc 2001), *cert. denied* 122 S.Ct. 2341 (2002). The defendant, "must first show that his attorney's conduct fell below an objective standard of reasonableness and second that his attorney's errors prejudiced his case." Id., Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). "Both parts of the Strickland test must be fulfilled; if he fails to prove either one, no relief can be granted." Clayton v. State, 63 S.W.3d at 206. "The attorney's conduct must be so egregious that it undermines the proper functioning of the adversarial process to such an

extent that the original trial cannot be relied on as producing a just result." Id., Strickland v. Washington, 466 U.S. at 686, 104 S.Ct. 2064.

> The defendant has a heavy burden in proving ineffective assistance. . . . The reviewing court presumes that the trial attorney's conduct was reasonable and was not ineffective. 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.

Clayton v. State, 63 S.W.3d at 206.

4. Appellant has not rebutted the strong presumption that trial counsel's choice not to voir dire on his right not to testify was reasonable trial strategy

It has long been held that a prosecutor may not comment on a defendant's right to testify, because it violates the Fifth Amendment freedom from self-incrimination. State v. Neff, 978 S.W.2d 341, 344 (Mo.banc 1998) (statute enacted in 1877 "preserved the pre-existing constitutional prohibition against commenting on a defendant's exercise of his right to remain silent."). If a prosecutor makes a direct reference to a defendant's failure to testify, and an objection to the statement is overruled, the error "will almost invariably require reversal of the conviction." Id. This shows how careful courts are to protect a defendant against unwanted attention being placed on his right not to testify.

It is hard to imagine a more direct reference to a defendant's right not to testify than asking the jury, "would you hold it against my client if he did not testify?" *See* id. Conducting voir dire on the issue of the defendant's right not to testify thus carries with it the effect of drawing attention to the exercise of that right, an effect which is considered so

dangerous that if the prosecutor were to do the same thing, it could require a mistrial. Therefore, if trial counsel chooses not to conduct voir dire on this issue for fear of drawing the jury's attention to the defendant's right not to testify, the decision is well-within the bounds of reasonable trial strategy. Knese v. State, 85 S.W.3d 628, 635 (Mo.banc 2002).

Appellant never met his burden of rebutting the strong presumption that trial counsel's actions were based on reasonable trial strategy. At the hearing, Mr. Cooper never said that he knew during voir dire that appellant would not testify. Rather, he only said that he would "guess" that the decision was made "early on" (PCR Tr. 36). Nothing in this testimony shows that, at the time of voir dire, appellant's attorneys knew he would not take the stand. Also, Mr. Cooper never said that he would definitely have conducted voir dire on this issue if he had known appellant would not take the stand. Rather, he only testified that he thought defense attorneys "generally" conduct voir dire on this issue (PCR Tr. 22). This testimony does not rebut the fact that, in this case, Mr. Cooper decided not to conduct voir dire, and does not rebut the strong presumption that he had a reasonable trial strategy for doing so. Therefore, appellant has failed to carry his burden to show that Mr. Cooper's decision to forego voir dire on this issue was not based on reasonable trial strategy, and the motion court did not clearly err in denying this claim.

5. Appellant has not rebutted the strong presumption that trial counsel's not requesting an instruction on the right not to testify was reasonable trial strategy

MAI-CR 3d 308.14 states in pertinent part as follows: "Under the law, a defendant

has the right not to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify." This instruction may be modified for penalty phase by removing the words, "of guilt." State v. Storey, 986 S.W.2d 462, 463-64 (Mo.banc 1999). The Notes on Use to this instruction provide that it "must be given if the defendant does not testify **and** if requested by the defendant." (Notes on Use 2, emphasis added). The Notes on Use leave it entirely in the defendant's hands whether or not to request the instruction.

Reasonable trial counsel may decide to forego the instruction, believing that it highlights the fact that the defendant did not testify. Knese v. State, 85 S.W.3d at 635; Ellis v. State, 773 S.W.2d 194, 199 (Mo.App. S.D. 1989). Such a decision does not constitute ineffective assistance of counsel. Knese v. State, 85 S.W.3d at 635; Love v. State, 670 S.W.2d 499, 502 (Mo.banc 1984) ("An objectively reasonable choice not to submit an available instruction does not constitute ineffective assistance of counsel.").

Appellant never rebutted the strong presumption that his trial counsel's decision not to request the instruction was made in the exercise of reasonable trial strategy. Appellant never even asked Mr. Cooper why he did not offer the instruction. Without adducing any evidence on the issue, he had nothing with which to rebut the presumption. State v. Tokar, 918 S.W.2d 753, 768 (Mo.banc 1996), *cert. denied* 519 U.S. 933 (1996) (where defendant failed to ask trial counsel why he did not object to improper argument, defendant had presented no evidence to rebut the presumption of reasonable trial strategy), State v. Kreutzer, 928 S.W.2d 854, 874-75 (Mo.banc 1996), *cert. denied* 519 U.S. 1083 (1997).

This presumption is further strengthened by the clear reason not to offer the instruction, namely, fear of highlighting the failure to testify. Therefore, his claim has no merit, and must fail.

6. In any event, appellant has not shown Strickland prejudice

Appellant's argument also fails on the second prong of the Strickland test, prejudice. In a motion for postconviction relief, it is appellant's burden to prove that, but for counsel's actions, there is a reasonable probability that the result of the proceeding would have been different. Rousan v. State, 48 S.W.3d 576, 582 (Mo.banc 2001).

A similar claim of prejudice was rejected Winfield v. State, No. SC84244 (Mo.banc December 24, 2002). This Court held, "To conclude that with the presence of the "no adverse-inference" instruction that the jury would have opted for life imprisonment instead of the death penalty is speculative. With no more than arguments and conclusions grounded in speculation, Winfield cannot establish prejudice." Id., slip op. at 6-7. *See also* Clemmons v. State, 785 S.W.2d 524, 531 (Mo.banc 1990), *cert. denied* 498 U.S. 882 (1990), *overruled in part on other grounds by* Deck v. State, 68 S.W.2d 418 (Mo.banc 2002) ("Clemmons does not show any prejudice from absence of the instruction, nor does he allege there was any improper comment or suggestion regarding Clemmons' election not to testify.").

Here, as in Winfield and Clemmons, appellant has failed to show that there was any improper comment made concerning his right to testify, or that he suffered any prejudice from counsel's decision not to submit the instruction. Nor has appellant shown that any

juror was negatively affected by counsel's decision not to question the venirepersons or ask for the instruction. *See* State v. Kinder, 942 S.W.2d 313, 338 (Mo.banc 1996), *cert. denied* 522 U.S. 854 (1997) (defendant did not demonstrate Strickland prejudice from trial counsel's failure to voir dire on racial issue where defendant did not show any juror was actually biased). The jury was not left to speculate as to what appellant would have said if he had taken the stand– appellant's version of the crime was adduced through the testimony of Dr. Smith (2ndTr. 1255-56, 1291-92). Therefore, appellant has failed to show Strickland prejudice from his trial counsel's decision not to voir dire or ask for an instruction on appellant's right not to testify. Accordingly, the motion court did not clearly err in denying his claim, and his point must fail.

Appellant argues that prejudice should be presumed, because the jury can always impose life, relying on State v. Storey, 986 S.W.2d 462 (Mo.banc 1999), *cert. denied* 528 U.S. 895 (1999) (App.Br. 92-93). Appellant's argument amounts to a claim that failure to give this optional instruction is always prejudicial. If this were correct, then the instruction should be mandatory, and the defendant should no longer enjoy the option of choosing to forego the instruction. However, appellant's argument is incorrect.

In Storey, the defendant requested an instruction on his right not to testify, but the trial court refused to give it. Id. at 464. On that direct appeal, it was the state's burden to prove that the trial court's error was harmless beyond a reasonable doubt. Id. This Court found that the state had not met its burden to do so, in part because of a jury's discretion to always impose life imprisonment. Id. at 464-65.

Storey is distinguishable. In Storey, there was no indication that the defendant's version of the crime was adduced at all, id. at 463, but in the case at bar, appellant's version of the crime was adduced through Dr. Smith, so the jury was not left to speculate as to what appellant would have said. Even more importantly, the burden was on the state in Storey to prove that the trial court's error was harmless beyond a reasonable doubt. But in appellant's collateral attack upon his conviction, the burden is on him to prove not only that counsel's actions were unreasonable, which, as shown above, he utterly failed to do, but also that he suffered Strickland prejudice, which is a reasonable probability that the decision not to ask for the instruction changed the result of the proceeding. Under Strickland, appellant is not allowed to presume prejudice, he must prove it. The prosecutor's failure to prove the trial error harmless beyond a reasonable doubt in Storey is not equivalent to proof that prejudice actually occurred. Therefore, Storey is both factually and legally distinguishable, and appellant's reliance on that case is misplaced. Accordingly, his point must fail.

POINT IV

The motion court did not clearly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel on grounds of trial counsel's decision not to call Dr. Carole Bernard to testify because appellant failed to rebut the presumption that trial counsel's decision was based on reasonable trial strategy in that appellant never questioned trial counsel about their decision not to call Dr. Bernard. In any event, appellant has not shown Strickland prejudice, because the jury heard Dr. Bernard's conclusions through Dr. Robert Smith's testimony, and further testimony by the doctor herself would have been cumulative.

For his fourth point on appeal, appellant claims the motion court clearly erred in denying his motion for postconviction relief (App.Br. 95). In his amended motion for postconviction relief, appellant claimed his trial counsel was ineffective for deciding not to call Dr. Carole Bernard to testify about appellant's intelligence (PCR L.F. 42).

1. Facts

In appellant's first appeal, he alleged error from the fact that his trial counsel did not call Dr. Bernard in the guilt phase, which claim was denied. State v. Johnson, 968 S.W.2d 686, 696 (Mo.banc 1998).

At the retrial of the penalty phase, Dr. Robert Smith testified that he consulted with Dr. Bernard, and relied upon her interview and testing of appellant in forming his conclusions (2ndTr. 1208-1209). Trial counsel asked Dr. Smith what Dr. Bernard told him, and Dr. Smith said that Dr. Bernard conducted psychological interviews and testing of

appellant (2ndTr. 1225-27). Dr. Bernard discovered that appellant could not read, and she "did some intellectual assessment" and found his I.Q. to be in the "borderline mental retardation range" (2ndTr. 1227). Dr. Smith testified that appellant was not mentally retarded, but was a step above that (2ndTr. 1228). Dr. Smith testified that appellant "has consistently been in the borderline mental retardation range of intellectual functioning" (2ndTr. 1228).

In his amended motion for postconviction relief, appellant claimed that his attorneys were ineffective for deciding not to call Dr. Bernard to testify, arguing that she would have testified that appellant was "mildly mentally retarded" (PCR L.F. 42).

At the hearing on his motion for postconviction relief, appellant failed to ask either attorney their reasons for not calling Dr. Bernard.

The motion court denied appellant's claim, finding that Dr. Bernard's testimony was consistent with that of other experts, that appellant's I.Q. was below average, but did not, by itself, place him in the mentally retarded range (PCR L.F. 440-42, Resp.App. A21-A23). The motion court found that the trial transcripts showed that trial counsel had investigated Dr. Bernard, and found that her testimony would have been cumulative to Dr. Smith's (PCR L.F. 443, Resp.App. A24).

2. Standard of review

The standard of review of the motion court's decision is limited to a determination of whether the findings and conclusions of the court are clearly erroneous." State v. Link, 25 S.W.3d 136, 148 (Mo.banc 2000), *cert. denied* 531 U.S. 1040 (2000). The motion

court's rulings "are presumed correct and will be found clearly erroneous only if, upon a review of the entire record, the appellate court is left with a definite and firm impression that a mistake has been made." Id. at 148-49.

3. Law on ineffective assistance of counsel

A conviction or a death sentence must be affirmed in the face of a claim of ineffective assistance of counsel unless a defendant meets both parts of a two-prong test. Clayton v. State, 63 S.W.3d 201, 206 (Mo.banc 2001), *cert. denied* 122 S.Ct. 2341 (2002). The defendant, "must first show that his attorney's conduct fell below an objective standard of reasonableness and second that his attorney's errors prejudiced his case." Id., Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). "Both parts of the Strickland test must be fulfilled; if he fails to prove either one, no relief can be granted." Clayton v. State, 63 S.W.3d at 206. "The attorney's conduct must be so egregious that it undermines the proper functioning of the adversarial process to such an extent that the original trial cannot be relied on as producing a just result." Id., Strickland v. Washington, 466 U.S. at 686, 104 S.Ct. 2064.

> The defendant has a heavy burden in proving ineffective assistance. . . . The reviewing court presumes that the trial attorney's conduct was reasonable and was not ineffective. 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.

Clayton v. State, 63 S.W.3d at 206.

"[T]he selection of witnesses and evidence are matters of trial strategy, virtually

unchallengeable in an ineffective assistance claim." Id. at 208, *see also* Strickland v. Washington, 466 U.S. at 690, 104 S.Ct. at 2066 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable").

4. Because appellant never asked either trial counsel why they chose not to call Dr. Bernard, appellant has failed to rebut the strong presumption that trial counsel's decision was based on reasonable trial strategy

At the evidentiary hearing, appellant called Mr. Cooper and Ms. Berman, his two trial counsel, to testify (PCR Tr. 12, 41). Appellant questioned each attorney about a variety of issues, but never questioned either attorney about the decision not to call Dr. Bernard.

Where a movant fails to question trial counsel about the reason for a decision, there is no evidence to rebut the strong presumption that the decision was based on reasonable trial strategy. In State v. Tokar, 918 S.W.2d 753 (Mo.banc 1996), *cert. denied* 519 U.S. 933 (1996), the defendant claimed that his trial counsel was ineffective for failing to object to improper argument. However, although the defendant questioned his trial counsel about other issues at the evidentiary hearing, he failed to ask any questions about the decision not to object to the argument. Id. at 768. This Court found that the argument was objectionable, but because the defendant failed to ask his trial counsel the reason for the decision, the defendant had presented no evidence to rebut the presumption that trial counsel's decision not to object was based on reasonable trial strategy. Id., State v. Kreutzer, 928 S.W.2d 854, 874-75 (Mo.banc 1996), *cert. denied* 519 U.S. 1083 (1997).

Similarly, in the case at bar, appellant called his trial counsel, but did not ask either one about the reasons they did not call Dr. Bernard. Without this evidence, it is impossible for appellant to rebut the strong presumption that trial counsel's decision not to call her was based on reasonable trial strategy.[8] Therefore, appellant's point must fail.

5. In any event, appellant has not shown Strickland prejudice

Even if appellant had not failed to meet the performance prong of the Strickland test, appellant still fails the prejudice prong of this test. At trial, Dr. Smith incorporated Dr. Bernard's findings into his own testimony (2ndTr. 1208-1209, 1225-27). He reported to the jury that Dr. Bernard had interviewed appellant and given him a variety of tests, and that she had determined that appellant was in the "borderline mental retardation range" (2ndTr. 1227). Thus, Dr. Smith already testified to the substance of Dr. Bernard's testimony. While Dr. Bernard may have provided more detail about appellant's specific performance

---

[8] This presumption is reinforced by trial counsel's testimony regarding the decision not to call Dr. Parwatikar, which testimony was that trial counsel wished to limit the number of expert witnesses for fear of offending the jury (PCR Tr. 32). *See* Middleton v. State, 80 S.W.3d 799, 806-807 (Mo.banc 2002) (reasonable for trial counsel to decide not to call expert for fear of offending jury). Further, there are a myriad of other possible, strategically sound, reasons for trial counsel's decision— for example, perhaps Dr. Bernard has a terrible demeanor when testifying, or perhaps trial counsel felt it would bore the jury to hear of Dr. Bernard's results both from her and Dr. Smith.

on particular tests, the heart of her testimony had already been succinctly delivered by Dr. Smith. "Counsel is not ineffective for not putting on cumulative evidence." Skillicorn v. State, 22 S.W.3d 678, 683 (Mo.banc 2000), *cert. denied* 531 U.S. 1039 (2000). Because her testimony would have been cumulative to Dr. Smith's testimony, the trial court did not clearly err in denying appellant's claim.

Appellant argues that Dr. Bernard's testimony was not cumulative, because instead of testifying that appellant was "borderline mentally retarded," she would actually have testified that he was "mildly mentally retarded" (App.Br. 96-97, 102). The striking problem with appellant's claim is that if Dr. Bernard would have said that, it was only because she had changed her testimony, without any reason to support it.

Dr. Bernard's testimony, presented to this Court during appellant's first appeal, was that appellant was in the "borderline mentally retarded range." State v. Johnson, 968 S.W.2d 686, 696 (Mo.banc 1998). Dr. Bernard testified during her deposition that she had given her notes to Dr. Smith (App.Exh.4, page 51-52). Dr. Smith reported that Dr. Bernard had concluded that appellant was in the "borderline mental retardation range" (2ndTr. 1227). Dr. Bernard testified, at her deposition for appellant's second postconviction relief proceedings, that the only time she had met with and tested appellant was in March of 1995 (App.Exh.4, page 15-16, 52-53). Therefore, until her deposition for appellant's second motion for postconviction relief, her opinion was the same that Dr. Smith told the jury, which was that appellant was "borderline mentally retarded."

During that deposition, contrary to appellant's assertion (App.Br. 102), Dr. Bernard

never testified that appellant is "mildly mentally retarded." Rather, she testified that she assessed appellant's I.Q. to be in the low 70's, and that the 70-80 range of I.Q. is "borderline" mentally retarded,[9] while 55-70 is considered "mild" retardation (App.Exh.4, page 11-12, 24). She also said that appellant's I.Q. was sub-average, but, if his adaptive skills were fine, he would be considered "more higher functioning," and not mentally retarded (App.Exh.4, page 24-25). Later, she testified that appellant's poor grades before he completely dropped out of high school were consistent with "the way mild mental retardation goes" (App.Exh.4, page 38). But she never said that this consistency in one particular detail of her assessment caused her to find that appellant was, in fact, mildly mentally retarded.

Appellant cites to pages 47-48 in the deposition to support the claim that she testified that appellant was "mildly mentally retarded" (App.Br. 97). But all she testified there was that appellant has probably always been in some range of mental retardation,

---

[9] Her testimony that an I.Q. of 80 or below is borderline mentally retarded conflicts with the definition of retardation adopted by professional organizations. Atkins v. Virginia, 536 U.S. 304, 123 S.Ct. 2242, 2245, 153 L.Ed.2d 335 (2002), note 5, states that the American Psychiatric Association set an I.Q. of 70-75 as the upper limit cut-off for "the intellectual function prong of the mental retardation definition." *See also* Penry v. Lynaugh, 492 U.S. 302, 308, 109 S.Ct. 2934, 2941, 106 L.Ed.2d 256 (1989), note 1 (intellectual functioning component of mental retardation requires an I.Q. of 70 or below).

without specifying whether it was borderline, mild, or severe (App.Exh.4, pages 47-48). The actual testimony is as follows:

> Q. Has Ernest Johnson always functioned in a mentally retarded range?
>
> A. That's hard to say, you know. I think when he was an infant he was– you would have to call for the first two or three years– four, I think is the number of years you give for developmentally delayed versus mentally retarded. After that and after all his testing, yes, probably.

(App.Exh.4, pages 47-48). Dr. Bernard was being asked how long appellant had intellectual insufficiencies, not their degree. Her testimony here is certainly not an opinion that appellant was mildly mentally retarded– she was never asked that question, and never gave an opinion that he was.

Accordingly, there is no merit to appellant's claim that she could have offered this additional opinion. Her original opinion was that appellant was borderline mentally retarded, Dr. Smith reported that finding to the jury at appellant's re-trial, she had conducted no new interviews or tests before her deposition for the second evidentiary hearing, and she never said, during that last deposition, that appellant was mildly mentally retarded. Therefore, the motion court did not clearly err in finding her testimony to be cumulative to that offered by Dr. Smith and the other experts, and appellant's point must fail.

POINT V

The motion court did not clearly err in denying, without an evidentiary hearing, appellant's claim that he cannot be executed due to mental retardation because appellant's claim is refuted by the record in that the record shows that appellant is not mentally retarded.

For his fifth point on appeal, appellant claims that the motion court clearly erred in denying his motion for postconviction relief alleging he cannot be executed because he is mentally retarded (App.Br. 105). However, the record clearly shows that appellant is not mentally retarded.

Appellant relies on Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In that case, the Court decided that it violates the Eighth Amendment to execute mentally retarded individuals. Id., 122 S.Ct. at 2252. The Court did not adopt a definition of mental retardation, but cited with approval two similar definitions promulgated by the American Association of Mental Retardation and the American Psychiatric Association. Id., 122 S.Ct. at 2245, note 3. Both of these definitions require two things: 1) significantly subaverage intellectual functioning; and 2) significant limitations in at least two adaptive areas. Id.[10]

---

[10] Compare these definitions with the definition adopted by the Missouri Legislature– "significantly subaverage intellectual functioning" with "limitations in two or more adaptive behaviors . . . ." Section 565.030.6, RSMo Cum.Supp. 1991.

Under these definitions, both significantly subaverage intellectual functioning and significant limitations in adaptive areas are required. If appellant does not have significantly subaverage intellectual functioning, he cannot fit the definition of mental retardation.

1. Facts

At the retrial of appellant's penalty phase, appellant presented testimony from Dr. Dennis Cowan and Dr. Robert Smith. Dr. Cowan testified that appellant's I.Q. is 84 full scale, 83 verbal, and 86 performance, which are all in the dull normal to low average range (2ndTr. 1161-62). He testified that appellant had some brain damage due to his history of head injuries and drug abuse (2ndTr. 1135, 1138-39). He testified that this brain damage only caused appellant "questionable to mild impairment" (2ndTr. 1136). He gave no opinion on whether appellant was mentally retarded.

Dr. Smith testified that Dr. Carole Bernard concluded that appellant was borderline mentally retarded (2ndTr. 1225-27). Dr. Smith testified that appellant is not mentally retarded, but is borderline mentally retarded, which is a level above mental retardation (2ndTr. 1228). He testified that an I.Q. of 84 was low average intelligence (2ndTr. 1282).

In rebuttal, the state called Dr. Peters (2ndTr. 1314). He testified about all the materials he reviewed in order to assess appellant, which included Dr. Cowan's and Dr. Smith's reports (2ndTr. 1317). He said that appellant's I.Q. had been tested at 66, 77, and 84, and that the "bottom line" was that appellant's functional I.Q. was 84, which is in the low average range (2ndTr. 1318). He testified that the I.Q. test is culturally biased against

African-Americans, which would make appellant's I.Q. 3-6 points higher (2ndTr. 1318), or between 87 and 90. He testified that appellant had "pervasive" "antisocial personality disorder," shown by his juvenile delinquency, truancy from school, arrests, incarcerations, drug abuse, lack of remorse, not taking responsibility, and not conforming to social norms (2ndTr. 1319). He said it was "inconceivable" that appellant suffered from Fetal Alcohol Syndrome (2ndTr. 1323). He said there was "no such thing" as "borderline mental retardation" (2ndTr. 1330). He testified that there was "no indications in any of the testing of significant brain impairment, nor is there any indication of mental retardation." (2ndTr. 1333).

In his amended motion for postconviction relief, appellant claimed that he could not be executed because he is mentally retarded (PCR L.F. 42-43).

The motion court denied an evidentiary hearing on this claim (PCR L.F. 315), but allowed Dr. Carole Bernard's deposition to be admitted into evidence in support of appellant's motion for postconviction relief (PCR Tr. 5, App.Exh.4).

The motion court denied appellant's claim (PCR L.F. 446-47, Resp.App. A27-A28). In its findings, the motion court quoted this Court's opinion setting out evidence from the penalty phase retrial which refuted his claim of mental retardation (PCR L.F. 446, Resp.App. A27), State v. Johnson, 22 S.W.3d 183, 193 (Mo.banc 2000), *cert. denied* 531 U.S. 935 (2000). The motion court stated that nothing in appellant's postconviction pleadings would change the conclusion that appellant was not mentally retarded (PCR L.F. 446, Resp.App. A27). Further, the motion court found that, "no evidence was presented at

the evidentiary hearing" that would have changed the conclusion that appellant "was not mentally retarded" (PCR L.F. 446, Resp.App. A27).

2. Standard of review

The standard of review of the motion court's decision is limited to a determination of whether the findings and conclusions of the court are clearly erroneous." State v. Link, 25 S.W.3d 136, 148 (Mo.banc 2000), *cert. denied* 531 U.S. 1040 (2000). The motion court's rulings "are presumed correct and will be found clearly erroneous only if, upon a review of the entire record, the appellate court is left with a definite and firm impression that a mistake has been made." Id. at 148-49.

In a postconviction relief proceeding:

> an appellant is entitled to an evidentiary hearing only if his motion meets three requirements: (1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters of which movant complains must have resulted in prejudice.

Smulls v. State, 71 S.W.3d 138, 155 (Mo.banc 2002), *cert. denied* 123 S.Ct. 503 (2002), *quoting* State v. Morrow, 21 S.W.3d 819, 823 (Mo.banc 2000), *cert. denied* 531 U.S. 1171 (2000). Thus, if appellant's claim is refuted by the record, the motion court did not clearly err in denying his request for an evidentiary hearing on this claim.

3. Appellant's claim is refuted by the record

As shown above, the record of appellant's penalty phase retrial included unequivocal

testimony from two experts that appellant is not mentally retarded, and testimony from a third expert that appellant's I.Q. is in the low average range and his brain damage only causes him mild impairment (2ndTr. 1136, 1228, 1333). On direct appeal from his penalty phase retrial, appellant claimed that he should not be executed because of his mental abilities. State v. Johnson, 22 S.W.3d at 192-93. This Court denied appellant's claim, stating: "Defendant emphasizes that he suffers from borderline retardation (below average intelligence), reflecting Fetal Alcohol Effect and a head injury. The jury heard expert evidence -from both defendant and the State - including the flat statement of defendant's expert that defendant 'is not mentally retarded.'" Id. at 193.

This evidence clearly refutes appellant's claim that he is mentally retarded. Appellant was evaluated by several experts, including Dr. Bernard, in order to determine appellant's mental history and level of mental functioning. Their findings were related to the jury through expert testimony at trial, and even appellant's experts agreed that appellant's I.Q. was in the lower end of the average range and that he was not mentally retarded (2ndTr. 1136, 1228, 1333). This evidence shows that appellant does not meet either definition of mental retardation cited with approval in Atkins. Thus, any claim by appellant that he is now mentally retarded and that Atkins prohibits his execution is refuted by the record. Accordingly, the motion court did not clearly err in denying appellant's claim without an evidentiary hearing.

4. Appellant's various arguments are without merit

Appellant argues that the motion court did not conduct its own review of the record,

but instead relied on this Court's opinion denying appellant's direct appeal from his retrial (App.Br. 107-108). This assertion ignores the motion court's findings that nothing in the pleadings or evidentiary hearing would change a conclusion that "appellant was not mentally retarded" (PCR L.F. 446). In order for the motion court to find that none of the pleadings or evidence presented would change a finding that appellant is not mentally retarded, the motion court had to consider the pleadings and evidence on this issue, and determine for itself that they did not show that appellant was mentally retarded. Further, on a related claim, the motion court specifically found that appellant, "has presented no evidence that [he] was mentally retarded . . ." (PCR L.F. 444, note 3). Therefore, appellant's argument is meritless.

Appellant also claims that the motion court did not consider the evidence he presented from Dr. Bernard on the issue of his mental retardation claim, and therefore he was denied an opportunity to present evidence on this issue (App.Br. 108). This is incorrect. In its ruling, the motion court stated that it did consider the evidence presented at the evidentiary hearing (PCR L.F. 446), and Dr. Bernard's deposition was evidence presented at the evidentiary hearing (PCR Tr. 5, App.Exh.4). The motion court found, however, that this evidence did nothing to change the determination that appellant was not mentally retarded (PCR L.F. 446). Therefore, there is no merit to appellant's claim that "no fact-finder has ever considered whether the preponderance of the evidence shows that Ernest is mentally retarded" (App.Br. 112). And, there is no merit to appellant's assertion that he has been denied the opportunity to have a hearing on the issue of his mental

abilities— he has had four such opportunities— two trials and two postconviction relief proceedings.

Appellant also claims that the motion court's ruling was clearly erroneous because he presented "substantial evidence" that he is mentally retarded (App.Br. 109). As shown above, all the experts at appellant's trial, including appellant's own experts, found that appellant was of low-average intelligence, and/or that he was not mentally retarded (2ndTr. 1136, 1228, 1333). As shown in Respondent's Point IV, Dr. Bernard never gave an opinion that appellant is mildly mentally retarded. She said that his I.Q. alone was not low enough to classify him as mentally retarded (App.Exh.4, page 24-25), that he had some adaptive difficulties (App.Exh.4, page 40-42), and that he had always functioned in a mentally retarded range (App.Exh.4, page 47-48), which, in her opinion, included borderline mental retardation (App.Exh.4, page 12). Dr. Smith said "borderline mental retardation" is not mental retardation (2ndTr. 1228), and Dr. Peters said there is no such thing (2ndTr. 1330). Therefore, appellant's claim that he presented "substantial" evidence that he is mentally retarded is completely devoid of merit.

Appellant argues that he did not have as much motive to present testimony of his mental abilities at his two trials and postconviction hearings because Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), had not yet been issued (App.Br. 108). This assertion is astonishing in light of the fact that appellant was at risk for the death penalty at both trials and his attorneys researched and/or presented evidence at his trial and evidentiary hearings on his mental abilities in order to attempt to mitigate his murders

(PCR Tr. 5). State v. Johnson, 968 S.W.2d 686, 696-97 (Mo.banc 1998); State v. Johnson, 22 S.W.3d at 193. It is difficult to imagine a more compelling "motive" to present evidence to a fact-finder than a desire to avoid the death penalty or to have its imposition reversed.

In any event, Atkins does not help appellant. In that case, there was evidence that Atkins was mentally retarded, with an I.Q. of 59. Atkins v. Virginia, 123 S.Ct. at 2245. Atkins challenged his conviction solely on the grounds that he could not be executed based on his mental retardation, and the Supreme Court of Virginia rejected his claim, relying on United States Supreme Court precedent. Id., 123 S.Ct. at 2246. The United States Supreme Court reversed that precedent, holding that execution of mentally retarded individuals violates the Eighth Amendment. Id., 123 S.Ct. at 2250, 2252. The Court remanded the case for further proceedings in light of this reversal. Id., 123 S.Ct. at 2252.

Atkins is distinguishable. In that case, there was expert testimony at trial that Atkins was mentally retarded. In the case at bar, however, the closest appellant came to providing evidence of mental retardation was Dr. Bernard's opinion that appellant was "borderline mentally retarded," which Dr. Smith explained is not mental retardation, and which Dr. Peters testified does not exist (2ndTr. 1227-28, 1330). Unlike Atkins, appellant presented absolutely no expert opinion that he is mildly mentally retarded, and his own experts and the state's expert testified that he is not mentally retarded (2ndTr. 1228, 1333).

Appellant also relies on Murphy v. State, 54 P.3d 556 (Ok.App. 2002), for the proposition that he is entitled to an evidentiary hearing on his claim of mental retardation.

Murphy is distinguishable, because, as explained above, appellant was able to litigate his claim of mental retardation in his postconviction motion.

Appellant also argues that even if is not mentally retarded, this Court should extend Atkins and decide that the Eight Amendment prohibits his execution (App.Br. 106). Under appellant's argument, all defendants with below average intelligence could claim that the Eighth Amendment prohibits their execution. Appellant cites no case suggesting that Atkins should be broadened. Further, appellant provides no reasoned basis for discarding the United States Supreme Court's limit, and provides no explanation of how to determine which below average, but not mentally retarded, individuals are eligible for the death penalty and which are not. Appellant's argument should therefore be rejected.

Appellant also argues that he cannot be executed under § 565.030.4(1), RSMo Cum.Supp. 2001 (App.Br. 115-16). That statute applies only to murders committed after August 28, 2001. Section 565.030.7, RSMo Cum.Supp. 2001. Appellant seems to claim that having a starting date of the statute violates Atkins (App.Br. 116). This claim is incorrect. The definitions of mentally retarded in Atkins and the statute are congruent, and both prohibit execution of the mentally retarded. The fact that appellant committed his murders before 2001 simply means that he must ground his claim in Atkins, rather than in the statute. Respondent does not dispute that if appellant were, in fact, mentally retarded, he could not be executed under Atkins, because his claim would not be Teague-barred. Penry v. Lynaugh, 492 U.S. 302, 330, 109 S.Ct. 2934, 2953, 106 L.Ed.2d 256 (1989). Therefore, appellant's point has no merit, and must fail.

POINT VI

The motion court did not clearly err in denying, without an evidentiary hearing, appellant's motion for postconviction relief alleging ineffective assistance of counsel on the ground that his counsel did not present even more evidence about appellant's childhood and his actions in the days before the murders because his claim is refuted by the record in that the record shows that the suggested evidence was merely cumulative to other evidence presented at trial and could not have changed jury's decision.

For his sixth point on appeal, appellant claims that the motion court clearly erred in denying, without an evidentiary hearing, three claims in his motion for postconviction relief regarding his attorney's not presenting additional evidence about appellant's upbringing and conduct in the days before his murders (App.Br. 117). In his amended motion for postconviction relief, appellant claimed that his trial counsel were ineffective for: 1) not presenting testimony from convict Phillip McDuffy that appellant was sad about his drug addiction in the days before the murder; 2) not presenting testimony from a teacher's aide at appellant's elementary school, Deborah Turner, that appellant did not get the special education he needed to succeed, and that for two years he went to a predominantly black elementary school which was inferior to a predominantly white elementary school; 3) not presenting medical records of appellant's mother's mental illness and a genogram showing which of appellant's relatives had mental illnesses and/or mental retardation.

1. Standard of review

The standard of review of the motion court's decision is limited to a determination of whether the findings and conclusions of the court are clearly erroneous." State v. Link, 25 S.W.3d 136, 148 (Mo.banc 2000), *cert. denied* 531 U.S. 1040 (2000). The motion court's rulings "are presumed correct and will be found clearly erroneous only if, upon a review of the entire record, the appellate court is left with a definite and firm impression that a mistake has been made." Id. at 148-49.

In a postconviction relief proceeding:

> an appellant is entitled to an evidentiary hearing only if his motion meets three requirements: (1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters of which movant complains must have resulted in prejudice.

Smulls v. State, 71 S.W.3d 138, 155 (Mo.banc 2002), *cert. denied* 123 S.Ct. 503 (2002), *quoting* State v. Morrow, 21 S.W.3d 819, 823 (Mo.banc 2000), *cert. denied* 531 U.S. 1171 (2000). Thus, if the claims appellant raised in his motion are refuted by the record or fail to show prejudice, the motion court did not clearly err in denying his request for an evidentiary hearing on this claim.

2. Mr. McDuffy's testimony was cumulative to other evidence admitted at trial

At trial, appellant called C. W. Dawson, Jr., who testified that he was the senior minister at All People's Church in Columbia, Missouri, that he had several advanced

degrees, that he had an extensive career in drug counseling (2ndTr. 1067-68). He said appellant came to his church two weeks before the murders, went before the congregation, and said that "his life was out of control" and that he "had a serious addiction" (2ndTr. 1070-72). Appellant asked the church to provide "a community of support for him, because he couldn't do it for himself" (2ndTr. 1071). During the next week, Rev. Dawson met with appellant on Tuesday, and appellant told him that he wanted inpatient drug treatment, and wanted to know if Rev. Dawson would help with that (2ndTr. 1071). On Thursday, appellant returned, and they spoke about appellant's addiction and how appellant was "out of control" (2ndTr. 1071). Appellant told him that, "things he said he would not do, he ended up doing. The things he didn't want to do, he ended up doing" (2ndTr. 1072-73). Appellant came to church the next Sunday and was baptized, and five days later he committed the murders (2ndTr. 1071-72).

Antwane testified that appellant was using crack cocaine the day and evening of the murders, until Rod refused to send him more (2ndTr. 808-809).

In his amended motion for postconviction relief, appellant claimed that his attorneys were ineffective for not calling Mr. McDuffy (PCR L.F. 229). Appellant said Mr. McDuffy would have testified that he was on probation for two weapons convictions (PCR L.F. 229-30). Mr. McDuffy would have said that two days before the murders, he was in the probation office, and he heard appellant beg to be locked up because he was using "too much drugs" (PCR L.F. 230). Mr. McDuffy would have said that appellant told him he needed help because "It's telling me to do things that I should not be doing," and that he

wanted to be put in the Phoenix House, a drug treatment center, before he did something "stupid" (PCR L.F. 230).

The motion court denied this claim without an evidentiary hearing (PCR L.F. 315). The motion court found that Mr. McDuffy's testimony would have been cumulative to other evidence presented at trial, including testimony from the minister (PCR L.F. 450-51, Resp.App. A31-A32).

The motion court's findings are not clearly erroneous. As shown above, Rev. Dawson told the jury that he was a drug counselor, and that the week before the murders, appellant said he was out of control, doing things he did not want to do and would not do except for the fact that he was using drug, that he wanted to be put in inpatient treatment, and that he needed community support because he could not control his addiction on his own. Mr. McDuffy's testimony was that, two days before the murders, appellant said drugs were telling him to do things he did not want to do, and appellant wanted to be put in inpatient treatment because of his drug use. Mr. McDuffy's testimony was entirely duplicative of Rev. Dawson's testimony. Therefore, counsel could not have been ineffective for not calling him, and appellant could not have suffered prejudice. Skillicorn v. State, 22 S.W.3d 678, 683 (Mo.banc 2000), *cert. denied* 531 U.S. 1039 (2000) ("Counsel is not ineffective for not putting on cumulative evidence."); State v. Clay, 975 S.W.2d 121, 145 (Mo.banc 1998), *cert. denied* 525 U.S. 1085 (1999) (no prejudice from trial counsel's decision not to call cumulative witnesses).

Appellant claims that Mr. McDuffy's testimony was not cumulative because he

showed that appellant was addicted and wanted help two days before the murders, but Rev. Dawson only showed that appellant was addicted and wanted help the week before the murders (App.Br. 121-22). This claim makes no sense– appellant had told Rev. Dawson about a severe addiction making his life out of control and making him do things he did not want to do, and said that he needed inpatient treatment. It is ludicrous to suggest that there is a meaningful difference between having this conversation the week before the murders and having this conversation six days later, when the evidence at trial showed that appellant was not in any inpatient treatment at the time of the crimes and that he had been using vast amounts of crack cocaine the day of the murders (2ndTr. 808-809, 1255-56). Therefore, the motion court did not clearly err in denying this claim.

3. Deborah Turner's testimony was cumulative to other evidence admitted at trial

At trial, appellant presented extensive evidence of his poor upbringing, including evidence that his father was a "sharecropper" (2ndTr. 1006), that they lived miles from town in a shack with no plumbing, (2ndTr. 1010, 1013), and that children at appellant's school made fun of him because he was slow and took special education classes (2ndTr. 1017, 1033). Appellant's brother testified that for "[t]he majority of our lives" they lived in Charleston, Missouri (2ndTr. 999). Dr. Smith testified that appellant was eighteen in 1979 (2ndTr. 1275-76), which shows that appellant was born in 1961.

In his amended motion for postconviction relief, appellant claimed that Ms. Turner would have testified that appellant's elementary school was racially segregated (PCR L.F.

200), that he went to that elementary school "for one or two years" (PCR L.F. 200), and that during that time he would not have received adequate attention due to overcrowding in the classroom (PCR L.F. 201).

The motion court denied this claim without an evidentiary hearing (PCR L.F. 315). In its findings, the motion court found that testimony about the inferior school system from the dozens of witnesses appellant listed in his amended motion (one of whom was Ms. Turner) would have been cumulative to evidence presented at trial (PCR L.F. 450-52).

The motion court's findings were not clearly erroneous. The jury had already heard testimony that appellant was a child in the sixties, that he lived in poverty in rural Missouri, that his father was a "sharecropper," and that he was teased for being in special education classes. Obvious inferences from this evidence are that appellant was a child when inroads were just starting to be made into alleviating racial discrimination, and that he had a poor educational experience, in part as a result of that discrimination. Ms. Turner's testimony was more detailed, but was of the same substance; that appellant's elementary school was still segregated in the sixties, and that he had a poor educational experience. Thus, her testimony would have been cumulative to that already adduced, and appellant's attorneys were not ineffective for not presenting it. Skillicorn v. State, 22 S.W.3d 678, 683 (Mo.banc 2000), *cert. denied* 531 U.S. 1039 (2000) ("Counsel is not ineffective for not putting on cumulative evidence.").

In any event, appellant was not prejudiced by the absence of this testimony. All Ms. Turner could say was that appellant was in an overcrowded classroom for one, possibly two

years of elementary school, and needed more attention at that time. This testimony is of slight probative value, and borders on the irrelevant. The evidence of the vicious, calculated, and horrifying way in which appellant carried out his robbery and murders was powerful. There is no probability, certainly no reasonable probability, that any reasonable juror would have voted for life imprisonment simply because appellant did not get a lot of personal attention for one year of elementary school. Thus, appellant cannot show Strickland prejudice from the lack of this evidence, and his claim must fail.

4. Evidence of appellant's family's history of mental illness and retardation was cumulative

Appellant next faults his attorneys for failing to present more evidence about his mother's mental illness and a genogram illustrating his family's mental illness or retardation (App.Br. 124).

A. Evidence of Ms. Patton's depression was cumulative

In his amended motion for postconviction relief, appellant claimed that his attorneys should have introduced medical records which showed that Ms. Patton had been diagnosed with depressive neurosis and inadequate personality, that she had threatened to kill herself and someone else, that she had two hospitalizations for depression and nervous breakdown, and had multiple admissions for alcohol intoxication (PCR L.F. 88).

The motion court denied this claim, finding that the jury had heard evidence of Ms. Patton's use of alcohol and mistreatment of appellant, and had heard a time-line of

appellant's life, and that appellant's proffered evidence was merely cumulative to that which had already been presented at trial (PCR L.F. 448-49, 451-52).

At trial, Dr. Robert Smith testified that he had a chart starting with appellant's great-grandparents that showed which family members had problems with drug abuse, mental retardation, and mental illness (2ndTr. 1243). The trial court excluded the exhibit (2ndTr. 1245). Then Dr. Smith testified that appellant's maternal grandmother, three maternal uncles, two paternal uncles, one paternal aunt, and both appellant's father and mother, Jean Ann Patton, abused alcohol or other drugs (2ndTr. 1246). He also testified that Ms. Patton "was a chronic alcoholic, abused both alcohol and other drugs, had great difficulty sort of taking on the responsibilities of being a mother" and that she "would disappear for two or three months at a time," leaving the children with her father, and that she could not cope with the living conditions (2ndTr. 1216-18). He testified that Ms. Patton abandoned appellant, and later prostituted appellant, and used drugs and alcohol as a reward (2ndTr. 1222-23, 1250). He testified that appellant had a genetic influence "[t]hat influenced his susceptibility to depression" (2ndTr. 1254).

Dr. Smith's testimony established that Ms. Patton was addicted to drugs and alcohol, that she could not cope with her environment, that she would disappear for months at a time, that she finally abandoned the children, and years later, she brought the children into drug use and prostitution. His testimony also established that appellant inherited a predisposition to depression. The detailed testimony about Ms. Patton's problems coupled with the statement that appellant inherited a tendency to depression leads to the obvious

inference that he inherited this tendency from Ms. Patton. Thus, any additional testimony about Ms. Patton's problems was merely cumulative to the testimony already adduced. Skillicorn v. State, 22 S.W.3d 678, 683 (Mo.banc 2000), *cert. denied* 531 U.S. 1039 (2000) ("Counsel is not ineffective for not putting on cumulative evidence.").

Also, there is no reasonable probability that the admission of Ms. Patton's medical records would have changed the outcome of trial. The jury had already heard detailed testimony that appellant himself was addicted and depressed (2ndTr. 1239-42, 1247-49), and that he was genetically predisposed for those conditions (2ndTr. 1254). Additional evidence about his mother's condition does nothing more than highlight someone else's problems. It makes no difference how many times Ms. Patton was admitted to the hospital if appellant was not depressed himself. Ms. Patton's records, therefore, were simply irrelevant to the issue of appellant's mental condition, except for the fact that they showed appellant had a family history of depression, which evidence had already been introduced. There is no reasonable probability that, had even more detailed evidence of Ms. Patton's problems been introduced, it would have changed the outcome of the penalty phase.

B. Appellant's attorneys were not ineffective for not offering the genogram; they did offer the genogram into evidence, but the trial court excluded it

In appellant's amended motion, he faulted his attorneys for failing to offer into evidence a genogram depicting which of appellant's family members had mental retardation or mental illness. (PCR L.F. 78-79).

The motion court denied appellant's claim, finding the evidence to be cumulative

(PCR L.F. 451-52).

Appellant's claim fails because appellant's attorneys did, in fact, offer into evidence a family genogram showing mentally retarded, mentally ill, and drug addicted relatives (2ndTr. 1243). However, as the attorneys were unable to show the origin of the hearsay information on their chart, the trial court excluded the exhibit (2ndTr. 1245). Therefore, appellant's claim that his attorneys were ineffective for failing to offer a genogram is without merit; they did offer a genogram exhibit. Any claim that the trial court erred in sustaining the state's objection to the exhibit is a claim of trial court error which was not raised in his motion for postconviction relief.[11] "Claims which were not presented to the motion court cannot be raised for the first time on appeal." Amrine v. State, 785 S.W.2d 531, 535 (Mo. banc 1990), *cert. denied* 498 U.S. 881 (1990); State v. Clay, 975 S.W.2d 121, 144 (Mo.banc 1998), *cert. denied* 525 U.S. 1085 (1999). Accordingly, appellant's claim as to the family genogram must fail.

In any event, the information in the genogram was cumulative. The genogram shows that appellant's maternal grandmother, three maternal uncles, two paternal uncles, one

---

[11] The claim would not have been reviewable if it had been raised in the motion for postconviction relief; the claim should have been raised on direct appeal, if ever. State v. Johnson, 22 S.W.3d 183, 189 (Mo.banc 2000), *cert. denied* 531 U.S. 935 (2000) ("According to the law of the case doctrine, failure to raise points in a prior appeal means that a court later hearing the case need not consider them.").

paternal aunt, and appellant's father and mother were addicted to drugs (PCR L.F. 264, Resp.App. A48). Dr. Smith testified that appellant's maternal grandmother, three maternal uncles, two paternal uncles, one paternal aunt, and both appellant's father and mother, Jean Ann Patton, abused alcohol or other drugs (2ndTr. 1246). The genogram shows that appellant's sister, Beverly Johnson, his half-sister, and his mother, Ms. Patton, had either mental retardation or mental illness, without specifying which condition each had (PCR L.F. 264). Beverly Johnson testified at trial that she was addicted to drugs (2ndTr. 1048, 1055-56), and there was extensive evidence that appellant's mother was addicted to drugs (2ndTr. 1216-18, 1222-23, 1246, 1250). Thus, almost everything in the genogram had already been admitted into evidence at trial. "'Defense counsel is under no obligation to present the defendant's background in mitigation in a death penalty case,' . . . and defense counsel certainly need not present cumulative evidence of his background." State v. Clay, 975 S.W.2d at 145. Further, there is no reasonable probability that, if the jury had heard about several more relatives, who were not appellant's progenitors, having drug addictions or mental illness or retardation that the result of the proceeding would have been different. This is especially true considering that all this evidence came solely from testimony of appellant's relatives (2ndTr. 1244), and appellant's relatives had good things to say about appellant's background and upbringing until appellant's death penalty trial preparations were well underway (2ndTr. 1280-81). Id., (no prejudice from not introducing cumulative evidence). Therefore, even on the merits, appellant's claim fails.

POINT VII

Appellant's claim regarding § 565.040.2, RSMo 2000, the procedure for sentencing defendants to life imprisonment if the death penalty is found unconstitutional, cannot be reviewed by this Court because appellant did not raise it in his motion for postconviction relief, and, even if he had, this Court should not review it because it is barred by the law of the case in that appellant did not raise it in his initial appeal. In any event, the statute could not have been applied to bar appellant's retrial, because the statute only mandates a sentence of life imprisonment if the death penalty is declared generally unconstitutional and does not bar retrial in the case of trial errors.

In his seventh point on appeal, appellant claims that the trial and/or motion courts erred in not *sua sponte* applying § 565.040.2, RSMo 2000, to bar his penalty phase retrial (App.Br. 128). This section is entitled, "Death penalty, if held unconstitutional, resentencing procedure." Section 565.040, RSMo 2000. Appellant argues that this statute should prevent retrials any time a death sentence is reversed and remanded for trial errors, so long as those errors are grounded in the constitution (App.Br. 129).

1. Facts

After appellant's original trial and motion for postconviction relief, he filed a consolidated appeal. State v. Johnson, 968 S.W.2d 686 (Mo.banc 1998). In that appeal, he did not raise any claim regarding application of § 565.040.2, RSMo 2000, as a bar to any retrial (*see* Appellant's Brief in appeal No. SC78282). After appellant's penalty phase

retrial, he filed a direct appeal. State v. Johnson, 22 S.W.3d 183 (Mo.banc 2000), *cert. denied* 531 U.S. 935 (2000). In that appeal, he did not raise any claim regarding application of § 565.040.2, RSMo 2000, as a bar to the retrial which he had obtained (*see* Appellant's Brief in appeal No. SC81596). After his sentence of death was affirmed, he filed a motion for postconviction relief, and he concedes he did not raise this issue in that motion (App.Br. 129).

2. Appellant's claim cannot be reviewed because he did not include it in his motion for postconviction relief, and successive, untimely claims are prohibited under Rule 29.15(d).

Supreme Court Rule 29.15(d) provides as follows:

> (d) Contents of Motion. The motion to vacate shall include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall declare in the motion that the movant has listed all claims for relief known to the movant and acknowledging the movant's understanding that the movant waives any claim for relief known to the movant that is not listed in the motion.

Thus, under the clear terms of the rule, the movant must plead all claims in his motion, and he waives any claims which are not included in the motion. "The effect of Rule 29.15(d) is to bar all claims not raised in a timely filed pleading." Winfield v. State, No. SC84244 (Mo.banc December 24, 2002), slip op. at 6. "Claims which were not presented to the motion court cannot be raised for the first time on appeal." Amrine v. State, 785 S.W.2d 531, 535 (Mo. banc 1990), *cert. denied* 498 U.S. 881 (1990); State v. Clay, 975 S.W.2d

121, 144 (Mo.banc 1998), *cert. denied* 525 U.S. 1085 (1999).

Allowing a movant to present new claims on appeal is allowing him to file a second, untimely motion for postconviction relief. This is clearly prohibited by the rule and by this Court's cases. Smith v. State, 21 S.W.3d 830, 831 (Mo.banc 2000), *cert. denied* 531 U.S. 1196 (2001) ("Successive motions pursuant to Rule 29.15 are invalid."); State v. Brooks, 960 S.W.2d 479, 499 (Mo.banc 1997), *cert. denied* 524 U.S. 957 (1998) ("Supplementary Rule 29.15 pleadings that are filed outside of the valid and mandatory time limits will not be reviewed."); State v. Weaver, 912 S.W.2d 499, 520 (Mo.banc 1995), *cert. denied* 519 U.S. 856 (1996) ("the time limits for filing and amending pleadings under Rule 29.15 are valid and mandatory and the trial court is without authority to give additional time beyond that provided by Rule 29.15(f)"). Appellant cannot raise an untimely claim in addition to those he filed in his motion for postconviction relief. Therefore, his new claim on appeal must be denied.

3. Further, appellant's claim is barred by the law of the case

Even if appellant had raised his claim in his motion for postconviction relief, the claim is not reviewable, because it is barred by the law of the case. "The decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not." State v. Graham, 13 S.W.3d 290, 293 (Mo.banc 2000). "According to the law of the case doctrine, failure to raise points in a prior appeal means that a court later hearing the case need not consider them." State v. Johnson, 22 S.W.3d 183, 189 (Mo.banc 2000), *cert. denied* 531 U.S. 935

(2000). "Appellate courts have discretion not to apply the doctrine where there is a mistake, a manifest injustice, or an intervening change of law." State v. Graham, 13 S.W.3d at 293.

Here, appellant was perfectly capable of raising this claim in his first appeal. That would have been the proper time to raise it, if ever. It is a complete waste of judicial resources for appellant to wait until after he has had a retrial, appeal, and postconviction proceedings from that retrial, to file a claim arguing that he should not have had a retrial at all. It also could be used as an improper tactic; waiting until all the proceedings are over, gambling on the verdict, and then raising a claim that the proceedings should not have taken place at all. There is no mistake or intervening change of law, and certainly no manifest injustice in preventing a movant from springing late claims on the court after all the proceedings are over. Further, as shown below, there is no merit to his claim. Therefore, even if his claim had been raised in his motion for postconviction relief, it would still have been barred by the law of the case.

4. In any event, appellant's claim fails on its merits

"Courts apply certain guidelines to interpretation, sometimes called rules or canons of statutory construction, when the meaning is unclear or there is more than one possible interpretation. When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." State v. Rowe, 63 S.W.3d 647, 649 (Mo.banc 2002).

Section 565.040, RSMo 2000, provides in pertinent part as follows:

Death penalty, if held unconstitutional, resentencing procedure. . . .

> 2. In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri si further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

The plain language of this statute states that only when the death sentence itself is found unconstitutional will the defendant automatically be sentenced to life imprisonment. By the plain language of this statute, the automatic sentence reduction does not apply to trial errors, but only if to sentence the defendant to death at all is unconstitutional.

In overturning appellant's first death sentence, this Court did not hold that it was unconstitutional to apply the death penalty to appellant at all. Rather, appellant's case was remanded due to trial error; an attorney failing to call the witness upon whom she hinged her entire mitigation phase case. Section 565.035.5, RSMo 2000, specifically provides that in cases of trial error, this Court has power to remand the case for retrial. Therefore, § 565.040.2, RSMo 2000, does not apply to appellant's case, his reliance on that statute is misplaced, and his point must fail.

Even if the plain language were not against appellant, the rules of statutory construction show that appellant's argument has no merit. If there were any question as to

the meaning of § 565.040.2, RSMo 2000, this Court would have to harmonize it with § 565.035, RSMo 2000. State v. Griffin, 848 S.W.2d 464, 471 (Mo.banc 1993) ("Under the common law canons of construction, this Court must harmonize the provisions cited as controlling . . ."). That section provides that this Court "shall consider the punishment as well as any errors enumerated by way of appeal," § 565.035.2, RSMo 2000, and that, "In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to: . . . (3) Set the sentence aside and remand the case for a retrial of the punishment hearing." Section 565.035.5, RSMo 2000. This section clearly gives this Court power to review decisions for trial errors, and remand for retrial of the punishment phase. Reading this statute and § 565.040.2, RSMo 2000, together, it is even more crystal clear that the latter section only mandates life imprisonment if the sentence itself is unconstitutional, and that this Court has power to remand for a new sentencing phase in any case of trial error.

Appellant argues that his death sentences were unconstitutional, because they were obtained in violation of his sixth amendment right to counsel (App.Br. 129). Under appellant's argument, any trial error which is based on any provision of the constitution renders the death sentence as applied to that defendant unconstitutional. Under appellant's argument, if the trial court errs by admitting objects seized under a warrant with insufficient supporting affidavits in violation of the Fourth Amendment, the death sentence is unconstitutional, and he may not be retried. If the trial court errs in limiting the scope of cross-examination of a state's witness in violation of the Sixth Amendment, the death

sentence is unconstitutional, and he may not be retried. If the prosecutor accidentally makes an indirect reference to the defendant's right to testify in violation of the Fifth Amendment, his death sentence is unconstitutional, and he may not be retried. Obviously, all of these situations are merely trial errors, notwithstanding they have a constitutional dimension. Appellant attempts to twist the statute— which was designed to lay out the procedure to follow if the death sentence itself is unconstitutional— into a mechanism to emasculate this Court's power to remand for new trials, a power explicitly granted by other statutes. Appellant's strained interpretation is without merit. Therefore, even if appellant had raised this claim in his motion for postconviction relief, and even if it were not barred by the law of the case, it fails.

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's motion for postconviction relief and sentences of death should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

LINDA LEMKE
Assistant Attorney General
Missouri Bar No. 50069

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

CERTIFICATE OF SERVICE AND OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 24,431 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 31st day of December, 2002, to:

Rosemary E. Percival
Assistant Appellate Defender
Office of the State Public Defender
Western Appellate Division
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106-1910
(816) 889-7699
(816) 889-2001 (fax)

JEREMIAH W. (JAY) NIXON
Attorney General

LINDA LEMKE
Assistant Attorney General
Missouri Bar No. 50069
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

APPENDIX

Motion court's findings A2

Section 565.030, RSMo Cum.Supp. 2001 . . . . . A44

Section 565.035, RSMo 2000 . . . . . A46

Section 565.040, RSMo 2000 . . . . . A47

Appellant's genogram A48