No. 84005

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IN THE
MISSOURI SUPREME COURT

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JOHN MIDDLETON,

Respondent,

v.

STATE OF MISSOURI,

Appellant.

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Appeal from the Circuit Court of Adair County, Missouri
2nd Judicial Circuit
The Honorable Russell Steele, Judge

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RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of appellant's Rule 29.15 motion, obtained in the Circuit Court of Adair County, the Honorable Russell E. Steele presiding. Appellant sought to vacate a conviction of first degree murder, § 565.020.1, RSMo 2000. Because the death sentence was imposed, this Court has jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, John Middleton, was convicted of one count of first degree murder, § 565.020.1, RSMo 2000, and sentenced to death. **State v. Middleton**, 995 S.W.2d 423 (Mo.banc 1999). This Court summarized the facts as follows:

> John Middleton was a user and dealer of methamphetamine. On June 10, 1995, police arrested several people in Harrison County, Missouri, for possession and sale of the drug. Middleton told a friend that "the snitches around here are going to start going down." Middleton stated that he had a "hit list" and that Alfred Pinegar was on it. Two days after making these statements, Middleton told the same friend that he was "on his way to Ridgeway, Missouri, to take Alfred Pinegar fishing."
>
> Alfred Pinegar was also a dealer of methamphetamine and was associated with Middleton as a fellow drug dealer. Pinegar lived with his fiancé Priscilla Hobbs in Davis City, Iowa, just north of Harrison County, Missouri. On June 23, 1995, the day of Pinegar's murder, Hobbs was driving toward her home in Davis City when she saw Middleton and his girlfriend Maggie Hodges in a white Chevrolet 4x4 pickup traveling in the opposite direction. Hobbs noticed that Hodges was sitting in the middle of the truck seat instead of in the right passenger's seat. When Hobbs reached her home, Pinegar was not there and the yard had been partly mowed, as if Pinegar stopped in the middle of the job. Pinegar habitually carried a twelve-gauge shotgun, and that shotgun and about two hundred dollars were missing from the home.

Around noon that same day, Wesley Booth was working in the sporting goods department of a Wal-Mart store in Bethany, Missouri. He was approached by Hodges, Middleton, and another man, presumably Pinegar. Middleton asked Booth for six boxes of nine-millimeter shells and two boxes of twelve-gauge "double-ought" buckshot. Middleton paid cash for the ammunition. During the entire transaction Middleton was standing at the counter across from Booth.

Middleton, Hodges, and Pinegar left Wal-Mart and drove several miles northeast of Bethany near the town of Ridgeway where they parked in a field. Pinegar got out of the truck and began to run when he saw Middleton raise the twelve-gauge shotgun. Middleton shot Pinegar twice in the back. Middleton then delivered the fatal wound to Pinegar, shooting him in the face. Middleton dumped Pinegar's body over a fence. After committing the murder, Middleton and Hodges went back to the Wal-Mart store in Bethany to return the nine-millimeter ammunition. They did not return the twelve-gauge "double-ought" shotgun shells. Booth walked with Middleton to the sporting goods department, where he exchanged the nine-millimeter shells for ammunition of another caliber. The two men then walked back to the service desk to complete the exchange.

Later that afternoon, Gerald Parkhurst saw Middleton and Hodges standing next to their pickup on the side of a road north of Bethany. Claiming their pickup had broken down, Hodges asked Parkhurst if he would give them a ride. When Parkhurst agreed to give them a ride, Hodges and Middleton transferred five or six firearms to the trunk of

Parkhurst's car, including the twelve-gauge shotgun Middleton had used to kill Pinegar. Parkhurst took Hodges and Middelton to Spickard, Missouri, where they unloaded the weapons.

Two days after the murder, John Thomas visited Middleton at his home. Middleton and Thomas discussed possible undercover drug informants, and Middleton stated that "something had to be done about them." Middleton also told Thomas that he had acquired Pinegar's twelve-gauge shotgun and that Pinegar "wouldn't be needing it no more." Thomas drove Middleton to the place where the pickup had broken down, helped him remove a defective part, and then Middleton drove the truck away. The next day, on June 26, Pinegar's body was found. At the murder scene, police found a piece of leather fringe, an empty box of twelve-gauge shotgun shells, two expended twelve-gauge shells, a pair of sunglasses with a missing lens, and a small plastic clock with an adhesive square on the back of it.

Later on September 11, while Middleton was in jail, Middleton told [Douglas] Stallsworth, a fellow inmate, that he killed Pinegar because he was afraid that Pinegar was going to "snitch" on him about his methamphetamine dealing. Middleton described the details of Pinegar's murder. He also told Stallsworth that some fringe was missing from his leather jacket and he was worried that it had been left at the murder scene.

***

. . . Middleton did not testify at his trial and offered no evidence in his defense. The jury found him guilty of first-degree murder. In the punishment phase of the trial the

state presented, among other things, evidence that Middleton had also murdered two others, Randy Hamilton and Stacey Hodge, as part of his plan to eliminate "snitches." The jury recommended a death sentence.

Middleton, **supra** at 451-452.

On October 29, 1999, appellant filed a **pro se** motion for post-conviction relief (P.C.R.L.F.4-19). On January 31, 2000, counsel filed an amended motion and requested an evidentiary hearing (P.C.R.L.F.35-175).

On February 13 and 14, 2001 and March 13, 2001, an evidentiary hearing was held (PCR.Tr.1). On August 30, 2001, the motion court issued findings of fact and conclusions of law and denied appellant's motion (PCR.L.F.276-304). This appeal followed.

ARGUMENT

I.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.15 CLAIM THAT THE STATE FAILED TO DISCLOSE A DEAL WITH STATE'S WITNESS JOHN THOMAS BECAUSE THE CLAIM IS WITHOUT MERIT IN THAT APPELLANT FAILED TO ESTABLISH THAT SUCH A DEAL EXISTED. AT ANY RATE, EVEN IF THE DEAL EXISTED APPELLANT CANNOT ESTABLISH THAT HE WAS PREJUDICED FROM THE FAILURE TO DISCLOSE.

Appellant contends that the motion court clearly erred in denying his claim that the state failed to disclose a deal it had made with John Thomas for his testimony (App.Br.31).

A. The Standard Of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." **Moss v. State**, 10 S.W.3d 508,511 (Mo.banc 2000).

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

B. John Thomas had no undisclosed deal or hope of leniency

In denying appellant's claim, the motion court stated:

> 7. Movant's Exhibits 1 and 18, records of witness, John B. Thomas, related to his criminal charges for the sale of methamphetamine, were admitted. These records were offered in support of Movant's claim contained in the handwritten portion of Movant's amended motion that the State made a deal with Mr. Thomas in exchange for his testimony, which deal was not revealed to the defense. While the charges against Mr. Thomas were pending at the time of his testimony, there is no evidence to support the claim that there was any deal made in exchange for Mr. Thomas' testimony. In fact, this claim is rebutted by the testimony of Mr. Thomas at trial. (Tr. 2314, 2352-2356).
>
> This claim is denied.

(PCR.L.F.282-283).

Prior to trial, defense counsel filed a "Motion for Disclosure of Plea Agreements and/or Inducements to State's Witnesses" (Tr.132,L.F.2). Six months before trial, the motion was heard and the prosecutor, Assistant Attorney General David Cosgrove, noted that there had not been any deals or inducements made with any of the State's witnesses (Tr.136). With this understanding, the court sustained the motion and ordered the State to inform defense counsel should any deals be made (Tr.138). On two other occasions close to trial in February 1997, the State noted through both

Cosgrove and Harrison County Prosecutor Christine Stallings that there were no deals made other than those already disclosed by Stallings (Tr.740-741,977).

On February 24, 1997, the day of trial, defense counsel filed a motion to sanction the State by preventing the testimony of John Thomas based on an alleged undisclosed plea agreement (Tr.996,L.F.564). Defense counsel argued that because Thomas' case was still pending, there was evidence of a plea deal (Tr.996). The court asked Cosgrove how the State could explain the fact that no proceedings have been made since 1995 concerning Thomas' case, "if there is not some kind of deal or inducement?" and the following exchange occurred:

> STATE: It doesn't have to be a deal. I think there is a difference between taking a witness and having an agreement with them and promising him an inducement versus refraining from barrelling ahead and prosecuting one of your star witnesses and potentially alienating that witness. That's a big difference. Regardless, the defense is completely aware [of] that situation. So what is there to disclose? We have promised them there is no inducements; we have no agreements with him. He has not been prosecuted yet for the charge that he faces, and he thinks that it is in his best interest to cooperate, and they can cross-examine him on it very effectively, I'm sure. But what else are we supposed to disclose to them? I don't know.
>
> COURT: So you have just left it hanging over his head, in other words?
>
> STATE: Yes.
>
> COURT: But not by agreement?
>
> STATE: Right.

(Tr.999-1000). The court then ruled as follows:

> Well, it seems to me that a failure to prosecute, if the witness were told that he would not be prosecuted if he cooperated or so on, obviously that would be an inducement - - and maybe even an agreement or a deal as far as that's concerned. But unless there is some communication, it seems to me it wouldn't rise to that level, and so I am going to deny that motion, subject to your providing me with any authority contrary-wise. At this time I am going to deny the motion.

(Tr.1003).

At trial, defense counsel's objection to John Thomas testifying based on an alleged undisclosed plea agreement was overruled (Tr.2290). Thomas admitted that he had been arrested on June 10, 1995, on the charge of delivering methamphetamine (Tr.2297). Thomas also admitted that the charge was still pending against him (Tr.2314); however, he testified that no one on behalf of the State told him that if he testified his case would "go away" or he would get a "good deal," and he stated that he had no such expectations (Tr.2314).

On cross-examination, Thomas testified that he had talked to Trooper Mike Spease about becoming an informant for law enforcement because he was worried about the "time" he was facing from his arrest (Tr.2345,2350-2351). Defense counsel questioned him about the difference between obtaining a benefit from law enforcement by becoming an informant and testifying against appellant at trial (Tr.2352-2353). Thomas responded that "giving testimony here has nothing to do with my case" and again noted that he was not expecting a benefit from the State by testifying against appellant (Tr.2353,2354). As to the delay in his pending case, Thomas testified that it was "their decision" to

delay the case until after "these trials"(Tr.2355-2356). He stated that he expected his case to "come up again" after the trials but that he "didn't ask for no help and they didn't offer me none" (Tr.2356). After questioning Thomas about the fact that he asked Trooper Spease for help after his arrest, the following exchange occurred:

> Q: [DEFENSE COUNSEL] Okay. And Trooper Spease told you - - Trooper Noelsch told you that they would say a good word on your behalf, correct?
>
> A: If I made a buy for him.
>
> Q: Okay. If you made a buy for them, but you have also discussed the fact that with respect to testifying against John Middleton, that they would wait until after that is done before they dealt with this old case of yours, correct?
>
> A: That's the way I understood it, yes.

(Tr. 2357). Thomas then stated a final time that he was not expecting a benefit for testifying at trial (Tr.2364).

At the evidentiary hearing, appellant introduced a certified copy of the court file (and a copy of the prosecutor's case file) from Thomas' case which was finally resolved after Thomas had testified at appellant's trial (Mov.Exs.1,18). The docket sheet contained the following entry:

> 2-27-98) appears with counsel, Mr. Gary Allen, and waives preliminary hearing in open court. State appears by Ms. Chris Stallings, and state advises delay in prosecution due to)'s participation as witness in companion proceedings.) bound over to Div I and to appear at 9 a.m., March 17, 1998, and file to be certified to said division.

(Mov.Ex.1). Another docket entry, entered after Thomas testified in appellant's second trial on March 31, 1998, stated:

> 4-21-98 State appears by Pros. Atty. Defendant appears in person and by atty. State files information charging defendant with class C felony of attempt to sell controlled substance.[1] Defendant enters a plea of guilty. Upon examination court finds said plea to be knowingly, voluntary and intelligently made and [illegible] is accepted by court. Sentencing is deferred and PSI is requested of board of probation and parole. Sentencing is set for June 18, 1998, at 9:00 a.m. Bond is cont'd.

(Mov.Ex.1). Then, on September 10, 1998, Thomas was sentenced, but the court suspended imposition of sentence and ordered a five-year probation (Mov.Ex.1).

Citing **Giglio v. United States**, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); **Napue v. Illinois**, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); **Hayes v. State**, 711 S.W.2d 876 (Mo.banc 1986); and **Commonwealth v. Strong**, 761 A.2d 1167 (Penn.2000), appellant asserts that the circumstances surrounding Thomas's guilty plea show that "there was 'an understanding' that Thomas would be treated with leniency" if he testified favorably in appellant's case (App.Br.40). Actually, however, the circumstances of appellant's case do not show any "understanding" or any sort of agreement.

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[1] As appellant points out, Thomas' charge had been reduced from a class B to a class C felony (Mov.Ex.1).

In each of the cases cited by appellant, there were actual discussions between the prosecutor (or someone in the prosecutor's office) and the witness who testified pursuant to either a promise that the witness would not be prosecuted, **Giglio**, **supra** at 153; an "understanding" that the witness would be treated with leniency with a view to pleading guilty to either 24 or 36 months in prison, **Strong**, **supra** at 1174; a promise that the State would seek a reduction in sentence for a co-defendant who was already serving a 199-year sentence, **Napue**, **supra** at 267; or a "bargain" that the "charges would be dismissed," **Hayes**, **supra** at 877 (**see** App.Br.38-40).

In appellant's case, however, there was absolutely no evidence that the prosecutor had any discussions with Thomas about any deals or potential deals. Furthermore, the assistant attorney general who tried appellant's case had no authority to control Thomas' Harrison County case. There was also no evidence that the Harrison County prosecutor had any discussions with Thomas about favorable treatment in his pending case if he testified for the State in appellant's case. In fact, Thomas never indicated in any way that he was expecting any favorable treatment or that he had been given any assurance or intimation that his pending case might turn out better if he testified for the State in appellant's case. The only evidence of a discussion involved "them" telling Thomas that his case would be dealt with after his testimony in both appellant's trials. However, there is absolutely no evidence that such a discussion involved promises or "understandings" of leniency or favorable treatment. Moreover, evidence of Thomas' pending charges was disclosed to the defense and Thomas was cross-examined extensively on that issue.

Appellant, nonetheless, cites the above-quoted docket entry which indicated that Thomas' pending case was delayed "due to) 's participation as witness in companion proceedings" (App.Br.40).

However, there was never any evidence, e.g., from the Harrison County prosecutor, that the "companion proceedings" were the proceedings in appellant's case. Even if the "companion proceedings" were appellant's case, a delay in the pending case (followed by a negotiated guilty plea) does not prove that Thomas was given a deal for his testimony.

In sum, appellant failed to prove that the motion court was clearly erroneous in finding that nothing that happened in Thomas' pending case was connected to Thomas' testimony in appellant's case. Thomas denied any deal; the prosecutor denied any deal; and there was no evidence of cooperation or discussions among the prosecutor in appellant's case, the Harrison County prosecutor, and Thomas indicating that a deal and or inducement had been made.

C. Evidence of the alleged deal would not have been material

Even if there were evidence of a deal and it had not been disclosed to the defense, appellant's claim would still fail. A new trial is constitutionally required only if the undisclosed evidence is "material." **Hayes**, **supra** at 877. This Court has found that evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding might have been different." **Id**. (**citing United States v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 3385, 87 L.Ed.2d. 481 (1985)). In the cases cited by appellant, the undisclosed deals were found to be material because the respective witnesses were the "key," "primary," or "only eyewitness" against the defendant. **Giglio**, **supra** at 154-155; **Strong**, **supra** at 1174; **Hayes**, **supra** at 877.[2]

[2]Although not couched in terms of materiality, the Court in **Napue** did note that the testimony of the "principal witness" was "extremely important." **Napue**, **supra** at 266.

Here, Thomas testified that on Sunday, June 25, two days after the murder, he visited appellant at home (Tr.2303-2305, 2357-2359). Appellant and Thomas discussed who they thought the undercover informants were, and appellant observed that "something had to be done about them" (Tr.2306-2308). During this conversation, appellant also commented that he had acquired Alfred Pinegar's shotgun, and that Pinegar "wouldn't be needing it no more" (Tr.2308-2309). Thomas drove appellant to the place on the roadside near Ridgeway where appellant's broken-down truck was parked (Tr. 2309-2311). Thomas also testified in the penalty phase that he saw a black box in appellant's house that belonged to Randy Hamilton and that appellant told him the owner of the black box would no longer need it (Tr.3160,3161).

While Thomas' testimony was indeed valuable for the State, he was by no means the "primary" or "key" witness against appellant at trial. Appellant's confession to his inmate, Douglas Stallsworth, was admitted at trial (Tr.2871-2872,2888). Stallsworth recounted appellant's description of all three murders (Tr. 2871-2874). Also, Richard Purdun, testified similarly to Thomas that some ten days after the drug arrests in Harrison County, appellant told him he had a "hit list," and that Alfred Pinegar was on that list (Tr.2021,2024,2027). Appellant further commented that "the snitches around here are going to start going down" (Tr.2024). A couple of days after making these statements, appellant told Purdun that he was "on his way to Ridgeway, Missouri, to take Alfred Pinegar fishing" (Tr. 2025,2029).

Also, appellant was identified by the Wal-Mart employee who sold him the ammunition during the afternoon of Pinegar's disappearance (Tr.2094-2103,2106, 2114-2117,2124-2125,2134-2135). This is all in addition to the wealth of circumstantial evidence linking appellant to the crime scene, to Pinegar, and to Pinegar's residence. (**See** Statement of Facts). Thus, it cannot be said that "there is a

reasonable probability that, had the [alleged deal between the State and Thomas] been disclosed to the defense, the result of the proceeding might have been different." **Hayes**, **supra** at 877.

Based on the foregoing, the motion court did not clearly err.

II.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO STRIKE FOR CAUSE OR PEREMPTORILY STRIKE JUROR HOLT BECAUSE COUNSEL FAILED TO ESTABLISH THAT COUNSEL ACTED UNREASONABLY AND FAILED TO ESTABLISH THAT HE WAS PREJUDICED IN THAT THE TOTALITY OF MS. HOLT'S RESPONSES ESTABLISHED THAT SHE COULD CONSIDER APPELLANT'S EVIDENCE IN MITIGATION OF PUNISHMENT.

Appellant claims that his counsel were ineffective for failing to move to excuse for cause or peremptorily strike Juror Carol Holt (App.Br.43). Specifically, appellant claims that Ms. Holt should

have been removed because they were "relying on a substance abuse mitigation theory" and she "did not know if she could consider" that sort of mitigation (App.Br.49).

A. The Standard Of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." **Moss v. State**, 10 S.W.3d 508,511 (Mo.banc 2000). "The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **Id**.at 2068. In particular, the removal of a juror is a matter of trial strategy, which cannot constitute ineffective assistance. **Tripp v. State**, 958 S.W.2d 108,111 (Mo.App.,S.D. 1998).

B. The Facts

Appellant points to the following exchange with Ms. Holt during voir dire:

> MR. SLUSHER: Ms. Holt, do you have an opinion about the death penalty?
>
> VENIREPERSON HOLT: I think it is appropriate in certain circumstances.
>
> Q. And has that opinion been something that you've held for a long time?
>
> MR. COSGROVE: Objection.
>
> THE COURT: Sustained.

Q. Is your views of the death penalty -- do you have strong views on the death penalty?

A. Yes. I think that I agree with this lady here in the green pants.

Q. Ms. Adams?

A. Yeah. We're talking in generalities right now, and we haven't discussed exactly what we're talking about. And I think sometimes we have to view what the circumstances are before we can say what we would choose to do.

Q. We're not asking you to tell us what you would choose to do. And I understand, it's frustrating. And I understand your frustration. And it's a difficult thing to question people about, but we need to have an idea of people's views on this issue.

A. I understand. You've had some really difficult questions and we're talking about something very serious. It's a tremendous responsibility. And to just say what I think I would do in that situation would be you can't really know until you view all of those things. And there are certain situations, certain circumstances that don't warrant the death penalty and I think there are some that do.

Q. Do you think --- and I'll ask you some of the questions I've asked others about mitigating factors. Do you think if you were asked to evaluate mitigating factors, that mental health type of evidence is something you could consider?

A. Yes. I think I could, but I also think that sometimes it's used by lawyers to manipulate the system. You know what I'm saying? And I think that you have to really

look at all the evidence and all of the things that are posed to you. But I think, yes, there are some. There are not as many as what we allow, I think.

Q. And it sounds like you're saying what you said earlier, that sometimes you need to really evaluate something before you can know how you can react?

A. Yes.

Q. Do you think if you were asked to consider, as mitigation, issues of drug and alcohol use, is that something you could consider?

A. I can't say for sure. I can't say -- I can say 'yes' but I just don't know.

Q. Do you have any opinion now, as you sit here, about that type of evidence, if it were used to explain someone's actions?

MR. COSGROVE: Object. May we approach?

THE COURT: Yes, indeed.

(Proceedings at the bench:)

MR. COSGROVE: This is seeking a commitment with regard to specific evidence in this case. I can get up there and spend all day talking to them hypothetically, although, it really isn't hypothetical, about my evidence in aggravation and what they feel about that and what they'd consider. And basically, we'd be talking a poll here, just as to who the best jurors are for our particular case. And these jurors, I think, by their answers, are making my objections for me in explaining why these questions are improper.

THE COURT: And explaining to each other, perhaps as well.

MR. COSGROVE: Yes.

(Tr.1553-1556) (emphasis added). The court then sustained the objection, but noted that Ms. Holt's answer that she "did not know" was before the court (Tr.1556-1557).

At the evidentiary hearing, post-conviction counsel had Counsel Slusher review a selected portion of Venireperson Adams responses on page 1541, where she stated that mitigating circumstances such as someone's background "'would have not a lot of weight in my consideration'" (PCR.Tr.441). He then asked Slusher to note that Ms. Holt stated she agreed with Ms. Adams (PCR.Tr.442). Then he asked Slusher why he did not move to strike Ms. Holt, and Slusher answered:

> Again, you have to take the entire jury selection in context. With respect to the answers that you referred me to here I would be surprised, and I guess I am surprised, that we would not have moved to strike this venireperson, especially because of her agreement with Venireperson Adams in light of the response that Venireperson Adams gave that you just referred me to. I didn't see all of Adams responses. She certainly provides answers that would concern me about her ability to act as a good defense venireperson during the death penalty phase

(PCR.Tr.443).

The motion court noted that trial counsel could not recall why he did not object and that at any rate, "[e]ven had trial counsel objected, or taken the other action Movant contends should have been taken, there is no reasonable probability that the outcome of the trial would have been different" (PCR.L.F.298).

C. Juror Holt Was Not Biased

Appellant has failed to prove that his counsel were ineffective for failing to challenge Ms. Holt. First, appellant has failed to prove by the preponderance of the evidence that failing to challenge Ms. Holt, either for cause or peremptorily, on the jury panel was not part of counsels' reasonable trial strategy.

At the evidentiary hearing, counsel noted that he would have to look at the entire jury selection in context, but that by looking at the selected portions given to him by post-conviction counsel, he was "surprised" that he did not challenge her "especially" since she agreed with Ms. Adams (PCR.Tr.443).

However, appellant now on appeal and post-conviction counsel at the hearing merely point to Venireperson Adams' response that mitigating circumstances from a person's past "would have not a lot of weight in my consideration" to illustrate how Ms. Holt agreed with Ms. Adams, (App.Br.44,49, PCR.Tr.441-443). Appellant and post-conviction counsel neglected to set out the entire context of Ms. Adams responses regarding mitigation. She further responded as follows:

> Q. Ma'am, if you were asked to do this weighing process and consider mitigating evidence, could you consider mental health type of testimony?
>
> A. Not as an excuse for committing a crime, no.
>
> Q. When we talk about mitigating factors, did you -- and those are things the defense presents to give, and again if the defense chooses to, those factors the defense presents to what we call 'mitigating punishment'. Your only decision there is whether the person receives life without parole, where this person is never released by law, or death. Do you feel like anything presented to explain someone's action is an excuse?

A. Well, it is very difficult for me, when we don't know what crime we're talking about or what evidence is being presented. I think mitigating evidence would have to be considered on its own merits as it's presented. I don't think I could, in generality, say I would have this reaction, in general, to this kind of thing. I think I would have to have some specifics to influence a decision.

Q. And we've talked about it before, that's one of the things that makes this process very difficult, we're asking you to predict feelings and situations which some things do depend on certain factors when you hear evidence. If you convicted someone of murder in the first degree -- and I talked about it earlier that murder in the first degree is the highest level of homicide where it's coolly deliberated and coolly reflected upon murder. Do you feel like, for that highest level of homicide, that life without parole is an appropriate punishment?

A. I think in some instances it perhaps would be, but again, it's very difficult to give opinions and generalities.

(Tr.1541-1542) (emphasis added). Ms. Holt later responded on voir dire that she agreed with Ms. Adams and stated that "[w]e're talking in generalities right now, and we haven't discussed exactly what we're talking about. And I think sometimes we have to view what the circumstances are before we can say what we would choose to do" (Tr.1554)

It is clear from the record that Ms. Holt was agreeing with Ms. Adams' belief that it was hard to say what they would do on a jury because they were talking in "generalities" and did not agree that she

would not give weight to mitigating circumstances. At any rate, without being given the full context of the voir dire, counsel could not recall why he did not challenge Ms. Holt.

"The reasons lawyers prefer one juror over another can involve subtle fleeting impressions. During jury selection, lawyers can observe a large number of jurors…over a relatively short period of time, and form the impressions that will determine which ones they challenge. While the jurors selected for trial remain under the lawyer's scrutiny throughout the trial, those challenges disappear from view after only a brief observation. Lawyers, excepting those possessing remarkable capacity for memory, are unlikely to remember the challenged jurors or decisions to challenge for very long." **Carter v. Hopkins,** 151 F.3d 872, 875 (8th Cir.1998) **quoting** **McCrory v. Henderson**, 82 F.3d 1243 (2nd Cir. 1996). Where, as here, appellant's trial attorney did not remember the reasons for making a strategic decision, there is a strong presumption that the decision was made as a part of a reasonable trial strategy and appellant has the burden to demonstrate that the challenged actions were outside the scope of professionally competent assistance. **Fretwell v. Norris**, 133 F.3d 621, 627 (8th Cir. 1998). In the present case, appellant has failed to demonstrate that trial counsel's decision to keep Ms. Holt on the jury was not a reasonable trial strategy.

To establish a claim that counsel was ineffective in failing to challenge a prospective juror for cause, appellant must show that a biased juror actually sat on the petit jury. **Presley v. State**, 750 S.W.2d 602,607 (Mo.App., S.D.*en banc* 1988) (a case where the venireperson unequivocally and directly stated that he would be biased against defendant); **Forshee v. State**, 763 S.W.2d 352, 355 (Mo.App., S.D. 1988). When alleging prejudice toward a defendant, it must clearly appear from the evidence that the venireperson was in fact prejudiced. **State v. Smith**, 850 S.W.2d 934, 940

(Mo.App., S.D. 1993). The qualifications of the juror are not determined conclusively by one response, but are made on the basis of the entire examination. **State v. Middleton**, 995 S.W.2d 443, 460 (Mo. banc 1999).

In this case, the entire record indicates that Ms. Holt did not have a "professed bias" against appellant nor does the record show that Ms. Holt stated she could not consider appellant's evidence. Ms. Holt indicated that there were some circumstances that did not warrant the death penalty and some that do (Tr.1555). When asked about mitigating evidence, Ms. Holt continually expressed her frustration with having to say what she would do with such evidence if she sat on a jury because "you can't really know until you view all of those things" (Tr. 1554,1555). She stated that she could consider mental health evidence (Tr.1555). She also noted that sometimes mental health evidence is "used by lawyers to manipulate the system" and that "there are not as many as what we allow, I think" (Tr.1555). The fact that she had an opinion that in some instances she believed mental health evidence could be used to manipulate the system does not mean that she was not qualified to serve on the jury. The issue is whether she would be able to consider the evidence and follow the law.

Then she was asked if she could consider issues of drug and alcohol use and mitigating evidence and she responded, "I can't say for sure. I can't say - - I can say yes but I just don't know" (Tr. 1555). From the record as a whole, it is clear that her answer was in response to her frustration at having to say "for sure" whether she would consider specific evidence, when earlier she had stated that "we have to view what the circumstances are before we can say what we would choose to do" (Tr. 1554).

The bottom line is that the totality of her answers demonstrate that she was open to mental health and general mitigating evidence but that she did not want to commit herself to an answer without

considering all the evidence that would be presented to her as a whole throughout trial. Therefore, Ms. Holt was fully qualified to be a juror and was not subject to a strike for cause. Because counsel cannot be found ineffective for failing to make a non-meritorious objection, **Driscoll v. State**, 767 S.W.2d 5,12 (Mo.banc 1989), the motion court did not clearly err in finding counsel was not ineffective for failing to challenge Ms. Holt for cause.

Because Ms. Holt was qualified to sit on the jury, appellant cannot establish prejudice from her service on the jury, and his claim that counsel was ineffective for failing to exercise a peremptory strike also fails. **Ham v. State**, 7 S.W.3d 433,438-440 (Mo.App.,W.D. 1999). Appellant was "entitled only to twelve fair and impartial jurors, not to twelve jurors who, in hindsight, he believes would have been most favorable to the defense." **Id**. Appellant cannot establish **Strickland** prejudice where one qualified juror served rather than another. **Id**.

Based on the foregoing, appellant's second point on appeal must fail.

III.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT ADEQUATELY INVESTIGATING AND PRESENTING MITIGATION EVIDENCE IN THE FORM OF VARIOUS EMPLOYERS AND RELATIVES BECAUSE APPELLANT FAILED TO PROVE THAT HIS COUNSEL ACTED UNREASONABLY AND APPELLANT WAS NOT PREJUDICED IN THAT COUNSEL STRATEGICALLY CHOSE NOT TO PURSUE "GOOD WORKER" EVIDENCE SUCH TESTIMONY FROM THE PROPOSED WITNESSES WOULD HAVE BEEN LARGELY CUMULATIVE TO THE TESTIMONY AT TRIAL AND/OR HARMFUL TO THE THEORY PRESENTED AT TRIAL.

At the penalty phase of trial, defense called two mental health experts to testify about appellant's mental health problems; appellant's mother who gave background information and history on appellant; Sheriff Forquer to talk about appellant's adjustment to incarceration in jail; and one friend and his brother-in-law to give testimony about appellant's drug use, strange behavior, and to talk about the drug community in an effort to corroborate the experts' testimony (Tr.3238,3248,3257,3300,3409,3606).

Nonetheless, appellant contends that trial counsel were ineffective for failing to investigate and present additional mitigating evidence from family members and former employers (App.Br.50). Specifically, he asserts that counsel should have called Charles, Vern, and Virginia Webb, and Ruby Smith (former employers); and Sylvia Purdin and Glenn Williams (family members)(App.Br.50).

A. The Standard Of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." **Moss v. State**, 10 S.W.3d 508,511 (Mo.banc 2000).

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

B. Counsel Did Not Fail to Present Adequate Mitigating Evidence

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **Id**.at 2068.

"Missouri law does not impose on trial counsel an absolute duty to present mitigating character evidence during the penalty phase of trial." **State v. Hall**, 982 S.W.2d 675,688 (Mo.banc 1998).

In denying these claims, the motion court held:

> 13. The deposition testimony of Sylvia Purdin and Glenn Williams, Exhibits 31 and 26, was admitted. Purdin is Movant's aunt and Williams is Movant's uncle. Each testified as to the problems Movant's mother had with "sniffing gas" when she was young, and to Movant being "quiet", "more or less a loner", and "not a leader" while growing up.

There is no reasonable probability that such evidence in the penalty phase would have changed the outcome of the trial and Movant was not prejudiced by a failure to present such evidence.

Trial counsel were not ineffective in failing to call Sylvia Purdin or Glenn Williams as witnesses at trial.

14. Movant introduced the deposition testimony of Ruby Smith, Charles Webb, Vern Webb, and Virginia Webb through Movant's Exhibits 22 through 25. Each was an employer of Movant and testified that Movant was an adequate worker but limited in his skills. None noticed that Movant had any problems with drugs or alcohol, but testified that he had limited mental abilities, got into a negative relationship, and was always dirty, even for a laborer. The court finds that such testimony would not have assisted Movant in the penalty phase of his trial and would not have altered the outcome. The testimony or evidence that Movant was a good worker is neither persuasive nor helpful to Movant. In fact, the Court believes that it would have been counterproductive to have presented this evidence since it shows Movant can conform his conduct for extended periods.

Furthermore, trial counsel testified that the team had made a decision to not actively pursue "good worker" evidence as it was not the focus of their penalty phase strategy. The theory of the case during the penalty phase was based entirely on Movant's methamphetamine-induced psychosis. Counsel were focusing on evidence

that would corroborate the mental health experts' testimony regarding Movant's drug use, paranoia, and delusions. This was reasonable trial strategy.

There is no reasonable probability that the outcome of the trial would have changed had such testimony by his employers been presented at trial and Movant was not prejudiced by the absence of such evidence.

Trial counsel were not ineffective in failing to present such evidence at trial.

(PCR.L.F.287-288).

1. Counsel performed a reasonable investigation and their actions were based on reasonable trial strategy

At the evidentiary hearing, while counsel admitted that they had not contacted the Webbs, Ruby Smith, Sylvia Purdin and Glenn Williams, counsel indicated that they had talked several times with appellant and appellant's mother (PCR.Tr.553-554, 358-359, 481). As to appellant's employment record, counsel indicated that it was the normal procedure for them to order appellant's work files (PCR.Tr.554). Ultimately, it was part of counsels' trial strategy to present evidence based on appellant's paranoia, drug use, and delusions in an effort to corroborate their defense of methamphetamine-induced psychosis as supplied by their two mental health experts (PCR.Tr. 582). As a result, they were not looking for "good employee" evidence (PCR.Tr.653-654). Although they were not necessarily rejecting "good stuff," they were looking to amass other type of evidence as part of their strategy (PCR.Tr.658). Counsel Zembles testified that she would have wanted to call various employers or family witnesses if they could have added to their evidence of his drug use (PCR.Tr.653).

Because counsels' investigation included a review of appellant's employment and family history, and given the evidence of these factors adduced at appellant's trial (as will be discussed more fully below), there is no reason to believe that counsel failed to turn up the information that these six witnesses were prepared to present if called at appellant's trial.

More importantly, it was part of counsels' trial strategy to pursue evidence in furtherance of their experts' diagnosis of methamphetamine-induced psychosis. Given that evidence of appellant's drug dealing and use was going to be admitted at trial as part of the state's aggravating evidence, it was not an unreasonable trial strategy to pursue a defense that would attempt to explain his behavior. "Strategic choices made after a thorough investigation are essentially unchallengeable." **Bucklew v. State**, 38 S.W.3d 395, 398 (Mo.banc 2000).

Furthermore, none of the six witnesses appellant asserts should have been called were aware of, much less could testify to, appellant's extensive methamphetamine use or of any recent paranoid and delusional behavior. They could not shed light on the type of evidence counsel were trying to obtain and thus would not have helped with their defense. Therefore, appellant failed to prove by a preponderance of the evidence that counsel's investigation was inadequate or that their actions were based on anything but reasonable trial strategy.

2. Counsel presented adequate, similar mitigating evidence

Without discussing counsels' efforts to investigate or addressing counsels' trial strategy, appellant claims that counsel were ineffective in their investigation. He likens his case to **Williams v. Taylor**, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), where, appellant claims, defense counsel was found ineffective for failing to discover and present additional mitigating evidence — despite

the fact that defense counsel presented mitigating evidence through "the defendant's mother, his friends, and a psychiatrist" (App.Br.51,57). Appellant's reliance upon **Williams**, however, is misplaced.

In **Williams**, the defense did not begin preparing for penalty phase until a week before trial. **Id**.at 1514. The attorneys failed to conduct an investigation that would have uncovered the defendant's "nightmarish childhood," including the fact that the defendant's parents had been imprisoned for the criminal neglect of the defendant and his siblings, that the defendant had been severely and repeatedly beaten by his father, that the defendant had been committed to the custody of social services for two years, that the defendant had been placed in an abusive foster home, that the defendant was "borderline mentally retarded" and did not advance beyond sixth grade, and that the defendant had aided the police in breaking up a drug ring in prison. **Id**. The defense attorneys also failed to return the telephone call of a favorable witness who offered to testify on the defendant's behalf. **Id**. Moreover, at trial, the only mitigating argument that was advanced by counsel was that the defendant "turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that." **Id**.at 1515.

There was some other purportedly mitigating evidence presented in **Williams**, but appellant's claim that the defense presented mitigating evidence through the defendant's "mother, his friends, and a psychiatrist" (App.Br.51) overstates the matter. The defendant's mother and two neighbors (one of which was pulled from the court audience without ever being interviewed beforehand) testified that the defendant was a "nice boy" and not violent. **Id**.at 1500. The alleged "psychiatric" evidence consisted only of a tape-recorded excerpt of a psychiatrist relating how the defendant had told him that "in the

course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone." **Id**.

In contrast to the **Williams** case, appellant's attorneys took reasonable and sufficient steps to investigate appellant's employment, family, mental health, and past drug use in support of his mental health evidence. They talked with appellant several times prior to trial, they contacted appellant's mother, they contacted several of appellant's recent friends and acquaintances, they engaged the aid of two mental health experts, and contacted the Sheriff of Adair County where he was held during the course of the trial. As a result, they called two mental health experts, appellant's mother, Sheriff Forquer, one friend and his brother-in-law (Tr.3238,3248,3257,3300,3409,3606).

Appellant downplays the mitigation evidence presented at his trial by pointing out that no former employers were called and by summarizing his mother's testimony in three sentences (App.Br.52). However, as the record shows, Janice Middleton testified far more extensively that appellant admits.

She testified that when appellant was born he had to have a series of complete blood transfusions; that as a result of these transfusions the doctors told her appellant would be "slow"; that his father was an abusive, alcoholic man and that when appellant was five years old both he and his sister Rose shot their father with a rifle to protect their mother from abuse; that appellant's father spent time in prison; that appellant became the man of the house after his father left; that appellant had problems when he was in school and he had to attend special classes; that her boyfriend, Ken Harding abused her and the children; that appellant started drinking at age twelve; that appellant was very close to his sister; that she was divorced from appellant's father by the time appellant was eight; that she was a single mother and received no financial support from appellant's father; that appellant had a daughter when he was

sixteen and another daughter and step-daughter after he left the military; that appellant was never married; that appellant quit high school and entered the military when he was sixteen years old; that appellant spent four years in the army; that appellant worked constantly after leaving the army; that appellant worked at a "sale barn" in Leon, Iowa, and at another job at the Decatur County high school; that she takes medication for depression and has been treated for depression;" that she had a nervous breakdown and was committed to a mental hospital; and that she still loves and has forgiven appellant (Tr.3300-3393).

In addition to the history provided by Ms. Middleton, Dr. Jonathan Lipman testified extensively about appellant's history, including: that appellant began using alcohol before he was twelve years old; that appellant began using marijuana regularly at age fifteen; that appellant started using methamphetamine at age fifteen; that appellant was prone to depression based upon his mother's history of depression; that appellant's drug use increased while in the military; that appellant used hashish, heroin, and LSD while in the military; that appellant also abused alcohol while in the military; that appellant's methamphetamine use eventually escalated and caused brain damage; that appellant started having hallucinations and delusions; and that appellant was suffering from extreme emotional distress or mental disturbance at the time of the murders (Tr.3650-51,3667, 3669-70,3708).

Despite the foregoing, and despite the other mitigating evidence of appellant's good behavior in jail (**see** Point IV, below), appellant likens his case to **Jermyn v. Horn**, 266 F.3d 257 (3rd Cir.2001), and claims that, while counsel did present some mitigating evidence, "counsel failed to present evidence of different mitigating circumstances" (App.Br.52-53). In **Jermyn**, however, counsel was ineffective because he failed to prepare for penalty phase until the night before penalty phase began

(whereupon counsel told his clerk to "try to arrange for some mercy witnesses to be there the next morning") and because he failed to investigate critical evidence (known to him) that the defendant had been severely abused as a child. **Id**.at 306-312.[3] Such evidence of abuse would have strongly supported the mitigation theory and undermined the state's single aggravating circumstance. **Id**.

In the case at bar, however, there was no such dearth of preparation or investigation, and trial counsel did not overlook or fail to discover any critical mitigation evidence that would have strongly supported the mitigation theory or undermined the state's aggravators. To the contrary, the mitigation evidence allegedly overlooked by appellant's attorneys was simply additional details of appellant's family and employment history that did not supported a theory based on methamphetamine-induced psychosis. Moreover, the limited anecdotal evidence of appellant's alleged dimwittedness (but strong work ethic) and appellant's disadvantaged childhood would have done little to undermine the state's evidence in aggravation.

3. Appellant Was Not Prejudiced

Finally, even if counsel did not investigate those witnesses and should have called them during the penalty phase, there is no reasonable probability that their testimony would have changed the sentence imposed by the jury.

a. appellant's employment history

[3] Notably, the court held that counsel's actions were even more egregious than those of the trial counsel in **Williams v. Taylor**, **supra**.

Charles, Vern, and Virginia Webb all testified about appellant's employment at their Leon Livestock Auction during 1982 and 1983 (Mov.Exs.23-25). They testified that appellant was a good employee and dependable (for menial tasks), that appellant was a follower, that appellant did not drink or use drugs at work, that appellant had to be supervised (or told what to do), and that appellant had limited mental faculties and no "high-level" skills (Mov.Ex.23 at 6,7,9-10;Mov.Ex.24 at 9,11-13;Mov.Ex.25 at 7-9,11-12).[4] Additionally, they related how Vern and Virginia had cosigned a loan to enable appellant to get an inexpensive truck (Mov.Ex.23 at 11;Mov.Ex.24 at 10;Mov.Ex.25 at 12).[5] Virginia added that appellant was "quiet" and a "loner" (Mov.Ex.25 at 8).[6]

Similarly, Ruby Smith testified that appellant worked for her around the same time period sacking grain (Mov.Ex.22 at 4-5). She testified that appellant had to be supervised, that appellant did not always comprehend his job, that appellant seldom talked to customers, that appellant came to work on time and followed instructions, that appellant could not make out sales tickets (because he could not spell), and that appellant was a "space cadet" or "out there" (Mov.Ex.22 at 5-8,10). She added that

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[4] Appellant was not, as he asserts, the only full-time employee (see Mov.Ex.23 at 5;Mov.Ex.24 at 7-8).

[5] Vern stated that their willingness to cosign on the loan was due to Charles' faith in appellant (Mov.Ex.24 at 10). Charles recalled that it "served our purposes well" because appellant used the truck "for chores" at work (Mov.Ex.23 at 11). Ultimately, appellant proved not to be too reliable, leaving the Webbs to make the final payments on the loan (Mov.Ex.24 at 10-11).

[6] Vern admitted that he recalled very little about appellant (Mov.Ex.24 at 9).

appellant garnered the somewhat demeaning name of "Sale Barn John" because of manure on his clothing (Mov.Ex.22 at 7).

While the Webbs and Smith were not called at appellant's trial, appellant's mother did mention some of his employment history. As outlined above, she testified that appellant was a "slow" child and had to be in special education classes; that appellant was very close to his sister; that appellant had to be the man of the family at age eight when his father left; that appellant quit high school and entered the military when he was sixteen years old; that appellant spent four years in the army; that appellant worked constantly after he left the army; that appellant worked at a "sale barn" in Leon, Iowa, and at another job at the Decatur County high school (Tr.3300-3393).

Thus, while somewhat different, appellant's mother outlined many (if not all) of the facts that the Webbs and Smith outlined in their testimony: appellant was slow, appellant was dependable and hard working, appellant worked menial jobs, appellant had limited education, and (when combined with Dr. Lipman's description of appellant's heavy drug use) appellant later became quiet and distracted. In short, even if counsel had managed to present a few additional anecdotal details of appellant's employment history, there is no reasonable probability that the outcome of appellant's trial would have been different. Additionally, as the motion court noted, further evidence of appellant's ability to conform his conduct could have hindered any attempt to claim that his murdering the victims was the result of mental disease or defect.

b. family history

Glenn Williams, who admitted he had had limited contact with appellant, recalled that appellant was not a "problem child," was "kind of slow," was a "follower," and was an "easy-going kid;" that

appellant played with his children and was not violent; that appellant became a "loner" after he got "tangled with a girl" who had a child; that appellant's father spent time in prison; that appellant got involved with drugs; that seventeen years before appellant's birth, appellant's mother sniffed gasoline until she passed out; that appellant's mother had relationships with three different men while appellant was growing up; that one of appellant's mother's husbands, Ken Harding, could not hold a job and was not around long;[7] and that Harding and appellant's mother took appellant to bars (Mov.Ex.26 at 4-13).

Sylvia Purdin testified that appellant's father went to prison when appellant was a young child; that she babysat appellant while appellant's mother visited Ken Harding in prison; that, as a child, appellant was "quiet," "a loner," and content to sit and play with toys; that appellant did not express himself well; that appellant sometimes played with the other kids; that appellant sometimes seemed mentally alert but sometimes had a "blank expression;" that appellant was a follower rather than a leader; that appellant only sometimes played games and roasted apples and marshmallows with the other kids; that appellant was kind of "backward;" and that appellant's mother had a bad habit of smelling gas (Mov.Ex31).

As outlined above, while not identical, very similar mitigating evidence was presented in penalty phase. Appellant's mother testified that appellant had a daughter and stepdaughter, and that appellant's

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[7] Contrary to appellant's assertion that Harding was "mean" to appellant and appellant's mother, Williams testified that he would "not swear to [that]" (Mov.Ex.26 at 12). Also Williams did not testify that Harding was a "drunk;" rather, Williams testified that he drank a lot of beer with Harding (Mov.Ex.26 at 13).

daughter was adopted by a foster family in Iowa; that appellant was never married; that she takes medication for depression, has been treated for depression," has had a nervous breakdown, and has been committed to a mental hospital; that appellant was a "slow" child; that she was divorced from appellant's father by the time appellant was eight, that she was a single mother, and that appellant's father gave no financial support to the family; that appellant's father went to prison when appellant was very young; that appellant quit high school and entered the military when he was sixteen years old (Tr.3300-3393).

Dr. Lipman, who also testified in the penalty phase, provided further insight, including: that appellant began using alcohol before he was twelve years old; that appellant began using marijuana regularly at age fifteen; that appellant started using methamphetamine at age fifteen; that appellant was prone to depression based upon his mother's history of depression; that appellant's drug use increased while in the military; that appellant used hashish, heroin, and LSD while in the military; that appellant also abused alcohol while in the military; that appellant's methamphetamine use eventually escalated and caused brain damage; that appellant started having hallucinations and delusions; and that appellant was suffering from extreme emotional distress or mental disturbance at the time of the murders (Tr.3650-51,3667, 3669-70,3708).

Thus, instead of a few anecdotal stories about appellant's "blank expression" and some highly attenuated evidence that appellant's mother's gas sniffing (which occurred at least seventeen years prior to appellant's birth) may have affected appellant's cognitive abilities, the jury heard extensive evidence from people who had spend considerable time with appellant that confirmed that appellant was slow, a high school drop-out, a menial laborer, an alcohol drinker before the age of twelve, a methamphetamine

and marijuana user by the age of fifteen, a serious drug abuser in the years prior to and after his two-year stint as a worker at the Leon Sale Barn, and a person prone to mental illness because of his mother's history of depression.

Thus, virtually every aspect of appellant's personal history that appellant argues should have been presented to the jury was, in fact, presented to the jury. If counsel had managed to present the few additional family details described by Sylvia Purdin and Glenn Williams, there is no reasonable probability that the outcome of appellant's trial would have been different. In fact, such scant evidence of "limited cognitive abilities" — provided by lay people who spent limited amounts of time with appellant many years prior to the murders — would have proved only that appellant was, perhaps, a little "slow" when he was a child. That single fact, however, to the extent that it was not already shown by other mitigating evidence, would not have provided any compelling explanation (or excuse) for appellant's turning to drugs and, eventually, murder.

The motion court did not clearly err in denying appellant's claim and therefore this point should be denied.

IV.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.15 CLAIM THAT COUNSEL DID NOT ADEQUATELY INVESTIGATE AND PRESENT EVIDENCE OF APPELLANT'S ABILITY TO ADAPT TO INCARCERATION BECAUSE COUNSEL WAS NOT INEFFECTIVE IN THAT COUNSEL'S ACTIONS WERE BASED ON REASONABLE TRIAL STRATEGY AS COUNSEL CALLED SHERIFF FORQUER TO TESTIFY ABOUT APPELLANT'S ADJUSTMENT TO JAIL WHILE AWAITING TRIAL AND APPELLANT WAS NOT PREJUDICED IN THAT SOME OF THE EVIDENCE FROM APPELLANT'S IOWA PRISON RECORDS WOULD HAVE BEEN HARMFUL.

Appellant contends that trial counsel were ineffective for failing to present evidence of his good behavior while incarcerated in Iowa (App.Br.59). He claims that, if the jury had heard from Jake Noonan, his corrections counselor, and seen his Iowa Corrections file, there is a reasonable probability that the jury would have imposed life (App.Br.59).

A. Facts

The State presented evidence during the penalty phase of trial regarding appellant's escape while in the Harrison County jail (Tr.3194-3198). In response, defense counsel intended to call Sheriff Randall Forquer to testify about appellant's behavior and adjustment while in the Adair County jail awaiting trial (Tr. 3232). The State opposed, arguing that it was prejudicial to the State to have the sheriff testify on appellant's behalf after he had been caring for the jury during nearly three weeks of sequestration and had developed a relationship with them (Tr.3232-33). Counsel Zembles argued

"given what the State has put on about this escape from the Harrison County Jail, that I have a right to put on evidence on his lack of attempts of escape in the Adair County Jail" (Tr.3235). The court noted that counsel had endorsed the sheriff as a witness and allowed counsel to present Sheriff Forquer's testimony (Tr.3236).

Sheriff Forquer testified that appellant had been in the Adair County jail since December 28, 1995 (Tr.3239-40). He noted that appellant had not made any attempts to escape from jail (Tr.3240). He stated that in the approximately 14 and a half months that appellant had been in his jail, he had not "caused any trouble" (Tr.3240). Sheriff Forquer further noted that in all the time appellant had been in his jail appellant had not assaulted another inmate or guard (Tr.3241). Counsel also elicited from the sheriff that after the jury had found him guilty of first degree murder, appellant was aggravated and frustrated because he could not reach his mother on the phone (Tr.3241). After appellant had a contact visit with his mother, "the situation was under control" (Tr.3241).

With regard to their investigation of appellant's previous incarceration, Counsel Zembles testified at the evidentiary hearing that they were aware of appellant's Iowa incarceration and Counsel Slusher stated that he believed they had his prison records (PCR.Tr.372,568). They did not interview appellant's counselor Jake Noonan (PCR.Tr.373,569). When asked if Counsel Zembles could remember a trial strategy for not wanting to use the records in penalty phase, she answered, "if there was bad stuff in there" (PCR.Tr.569).

B. The Standard Of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." **Moss v. State**, 10 S.W.3d 508,511 (Mo.banc 2000).

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

C. Counsel Acted Reasonably And Appellant Was Not Prejudiced

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **Id**.at 2068.

In denying this claim, the motion court stated:

> 20. . . . The failure to present this evidence was a matter of reasonable and sound trial strategy. The focus of the penalty phase was to present evidence that would corroborate the testimony of Dr. Lipman and Dr. Murphy regarding their diagnosis of methamphetamine-induced psychosis. Trial counsel were looking for evidence that would corroborate Movant's drug use, paranoia and delusions. This was reasonable. Emphasizing Movant's prison records does not seem to be wise strategy, particularly when it emphasizes that Movant has been confined on multiple occasions. The benefit of this evidence was never explained and is not apparent.

The outcome of the proceeding would not have been different had such evidence and testimony been presented at the penalty phase and such failure did not prejudice Movant.

Trial counsel were not ineffective for failing to present such evidence.

(PCR.L.F.293-294).

As in Point III, appellant attempts to liken his case to **Williams v. Taylor**, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)(App.Br.60). As discussed above, however, counsel did not fail to investigate or prepare as did counsel in **Williams**. To the contrary, counsel investigated appellant's history of incarceration and previous and current confinement (along with other aspects of appellant's history) and ultimately presented a witness who testified favorably about appellant's recent confinement at the Adair County Jail while awaiting trial (Tr.3238-3248).

Appellant failed to prove that counsel's decision not to use the Iowa prison records was anything other than reasonable trial strategy. Counsel knew that appellant had been incarcerated in Iowa, and appellant failed to prove that Zembles (or Slusher) failed to review the Iowa records before choosing to call Sheriff Randall Forquer instead to rebut the State's evidence of appellant's escape while in the Harrison County jail.

In fact, when asked if she could think of a trial strategy for not presenting evidence of the prison records, Zembles stated that she would not have wanted to use the records if there was "bad stuff" in them (PCR.Tr.569). Here, in addition to having some favorable evidence in the Iowa prison records noting his "above average adjustment," his "very good attitude,"and "above average work evaluations," there was also evidence that could have been considered "bad stuff" by Zembles.

In the records there was evidence that appellant received at least four minor violations; that his MMPI test suggested "possible exaggeration"; that he was diagnosed by a licensed psychologist with having an anti-social personality disorder; that the psychologist concluded in his summary that appellant had a "long-term history of aggressive acting out going back to his teen years" and he was an "obvious substance abuser who doesn't really take much responsibility for his behavior"; that he did not seem to want help with his drug problem but that he recognized he had to participate in the drug programs to be released on parole; that his likelihood for drug recovery "was doubtful"; and that his drug counselor noted appellant did not take an active role, nor participated or seemed interested in the drug abuse counseling (Mov.Ex.28 at 5,6,10,18,27,32,49,53,
54,90). In addition, the records made five different references to appellant's prior criminal history including that as a juvenile he had arrests for malicious mischief and possession of a controlled substance; and that as an adult he was fined for public intoxication, he received a two-year suspended sentence for Theft-3rd, was placed on probation for a trespass resulting in injury/damage, and received six months jail time and one year of informal probation for possession of a controlled substance with intent to manufacture or deliver (Mov.Ex.28 at 6,10,18,27).

The vast majority of this information would not otherwise have been before the jury. The State did not present evidence of appellant's entire criminal history. The State only presented evidence of appellant's prior conviction for possession of amphetamine with intent to manufacture or deliver (Tr.3039-43,3126-27). Given the disadvantages associated with introducing appellant's Iowa prison records, appellant has not shown that counsel's decision not to introduce those records was anything other than reasonable trial strategy. **State v. Simmons**, 955 S.W.2d 729, 749-50 (Mo.banc 1997)

(counsel not ineffective for failing to present mental health mitigating evidence where expert's report also contained damaging information).

Because counsel were trying to amass evidence of appellant's recent drug use and paranoid behavior that would have led up to the time of the murder, it was not likely that they would have wanted information suggesting that appellant had an opportunity to receive treatment for his drug problems back in 1991 and 1992, three and four years prior to the murders, and that he did not seem interested in seeking help for his problems. Nor would counsel have wanted the jury to have information that appellant was diagnosed with anti-social personality disorder and that his MMPI test suggested "possible exaggeration." This information could have been used to impeach their two mental health experts.

In addition, counsel's use of appellant's more recent incarceration in the Adair County jail was reasonable trial strategy. The evidence presented by counsel showed that appellant did not "cause trouble," that appellant did not try to escape from jail in the fourteen and a half months prior to his trial, and that he had never assaulted any inmates or guards (Tr.3239-3241). Furthermore, as the State had noted prior to Sheriff Forquer's testimony at trial, it *was* favorable for the defense to have the man who had attended to the jury and forged a relationship with them through nearly three weeks of sequestration to testify that appellant was not a problem in jail. Sheriff Forquer's testimony was therefore likely to be received far more favorably than Jake Noonan's account of appellant's behavior in Iowa nearly six years earlier.

Quite simply, appellant's Adair County confinement was far more relevant than the incarceration that took place several years earlier. Appellant's condition had changed drastically in the intervening

years, and evidence of appellant's current ability to adjust to confinement had far greater probative value. In addition, the evidence of appellant's escape would have undermined the Iowa evidence to the same extent that it undermined the evidence that was actually presented at appellant's trial. The fact that appellant had not escaped in Iowa would have simply been a reminder to the jury that appellant's current circumstances were far worse than those in Iowa.

Finally, because this evidence was the same kind of evidence that would have been obtained from appellant's Iowa records and Jake Noonan, counsel was not ineffective for failing to present the Iowa evidence. Counsel is not ineffective for failing to present cumulative evidence. **Skillicorn v. State**, 22 S.W.3d 678,685 (Mo.banc 2000).

Based on the foregoing, appellant's fourth point on appeal must fail.

V.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.15 MOTION ON THE CLAIM THAT COUNSEL WERE INEFFECTIVE FOR FAILING TO CALL DOCTORS JONATHAN LIPMAN, PHILIP MURPHY, AND A.E. DANIEL DURING GUILT PHASE BECAUSE COUNSEL ACTED REASONABLY AND APPELLANT WAS NOT PREJUDICED IN THAT (1) APPELLANT WAS ADAMANT ABOUT NOT PRESENTING AN "INSANITY" DEFENSE DURING GUILT; (2) DOING SO WOULD HAVE CAUSED THEM TO ELICIT EVIDENCE OF APPELLANT'S OTHER TWO MURDERS IN GUILT; (3) THE EVIDENCE WOULD NOT HAVE BEEN ADMISSIBLE; AND (4) THE EXPERT'S TESTIMONY WAS NOT PERSUASIVE.

Appellant contends that counsel were ineffective for failing to call three doctors who allegedly would have offered testimony that appellant was either unable to deliberate or suffered from diminished capacity at the time of the crimes (App.Br.66). Such testimony, appellant asserts, would have resulted in acquittal or sentences of life imprisonment (App.Br.66).

A. The Standard Of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." **Moss v. State**, 10 S.W.3d 508,511 (Mo.banc 2000).

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

B. The Motion Court's Findings and Conclusions

In denying these claims, the motion court stated:

11. Movant's trial counsel made a reasonable, strategic decision to not use a defense of not guilty by reason of mental disease or defect excluding responsibility (sometimes hereinafter referred to as "insanity") at the guilt phase of the trial because it was inconsistent with Movant's contention that he was not present at the killing of Al Pinegar. Movant insisted that he was not there and strongly opposed an insanity defense. Counsel were also concerned about Movant "acting up" if they had decided to present an insanity defense during the guilt phase. The attorneys ultimately made the decision not to present an insanity defense or insanity evidence during the guilt phase, which was reasonable sound trial strategy and consistent with Movant's position regarding that defense . . .

***

15. Movant introduced the testimony of Dr. Phillip Murphy from Movant's post conviction relief motion hearing in Callaway County. Dr. Murphy testified that Movant was not guilty of the crime because he suffered from a mental disease or defect. Dr. Murphy was consulted by defense counsel prior to trial and testified at the penalty phase.

Dr. Murphy's testimony at the guilt phase would have been contrary to the trial strategy of counsel to deny that Movant committed the crime. That was reasonable and sound trial strategy.

Also, counsel worried that because Dr. Murphy examined Movant's actions during both Mr. Pinegar's murder and the other two murders Movant was being charged with in the Callaway County case in order to render his opinions about Movant's mental health, evidence of the other two murders might come into evidence during the guilty phase.

In addition, the mental abnormality Dr. Murphy testified to was caused by self induced methamphetamine abuse. This is analogous to voluntary intoxication, which cannot be used as an excuse to negate a mental state. *State v. Nicklasson*, 967 S.W.2d 596, 617 (Mo. banc 1998) . . .

***

Trial counsel were not ineffective in failing to call Dr. Murphy as a witness at the guilt phase of the trial and for failing to ask him if Movant could deliberate at the time of the crime.

Movant's claims set forth in subparagraph 8 (F) are denied.

16. Movant introduced the testimony of Dr. Jonathan Lipman from Movant's Callaway County PCR motion hearing. Dr. Lipman testified at Movant's penalty phase in Adair County.

The decision to call Dr. Lipman in the guilty phase would likely have required admitting that Movant committed the crime. As noted above, Movant was adamant about not putting on evidence which would constitute an admission that he killed Mr. Pinegar.

Further, Dr. Lipman's testimony was not persuasive in the penalty phase and would not have been any more persuasive had the testified at the guilty phase. Also, from Ms.Zembles' testimony, Dr. Lipman, unlike Dr. Murphy, was not able to "give them" a defense of not guilty by reason of mental disease or defect. He would only testify as to a diminished capacity defense. Ms. Zambles did not want to present the contradictory opinions of Dr. Lipman and Dr. Murphy during the guilt phase of trial. This was reasonable trial strategy.

Trial counsel were not ineffective in failing to call Dr. Lipman as a witness during the guilt phase of the trial.

Movant's claims set forth in subparagraph 8 (G) are denied.

17. Movant called Dr. A.E. Daniel, a psychiatrist, who testified that Movant suffers from methamphetamine-induced psychosis and paranoid schizophrenia. Dr. Daniel's diagnosis of schizophrenia is contradicted by Movant's other experts, Dr. Lipman and Dr. Murphy, who both testified that Movant did not suffer from that illness. Both testified at the penalty phase of trial to the methamphetamine-induced psychosis. Dr. Daniel testified that Movant was acting under extreme duress, could not deliberate, and was not responsible for his conduct. Dr. Daniel testified that he disagreed with Dr. Murphy's diagnosis of mental disease or defect because, after extensive interviews and review of documents, he believed that it was not possible to comment to a conclusion about whether Movant new of the wrongfulness of his conduct. Thus, he contradicts both Dr. Lipman and Dr. Murphy.

It is unclear whether Movant is asserting that Dr. Daniel should have been called in addition to, or in place of, some other expert. If he had been called in addition to another expert, his testimony would be contradictory and would have reduced the credibility of both. Had he testified alone, he would have been subject to cross-examination on the inconsistent opinions of the other experts Dr. Daniel's attempts to explain these inconsistencies were not persuasive.

If Movant asserts that Dr. Daniel should have testified at the guilt phase as the mental health expert for Movant, as mentioned above, trial counsel had made a decision to only present mental health evidence during the penalty phase in light of Movant's opposition to an insanity defense and to the admission that he was present during the killing. This was reasonable and sound trial strategy.

Further, counsel cannot be found at fault for failing to choose a particular expert witness. *State v. Copeland*, 928 S.W.2d 828 (Mo. banc 1996).

(PCR.L.F.286,288-291).

C. Counsel's Strategy Was Reasonable

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **Id**.at 2068.

Counsel Zembles testified that while everything at trial was a team effort, she was considered lead counsel and was responsible for the penalty phase and anything to do with mental health issues (PCR.Tr.541). She explained their decision not to call mental health experts during guilt phase as follows:

> To the best that I can reconstruct in my memory, the extensive conversations the team had about this matter - - - Number one, presenting either an NGRI[8] or a diminished capacity defense in the guilt/innocence phase of the trial required of necessity of admitting either tacitly or openly to the jury that Mr. Middleton had killed Mr. Pinegar. It also, probably, involved putting the other two murders up front in the guilt phase, because the three murders together were part of what Mr. Murphy and Dr. Lipman were looking at. So we would have stuck those other two murders up front, which is called - - - In our line of work is called front-loading the mitigation.
>
> John was absolutely adamant that we were not to offer any defense that even hinted that he killed these people, because he did not believe that he had killed these people and he was very strong in his opinion about that. And we argued with him, cajoled him, pleaded with him, yelled at him over a series of years about offering a mental defense in the guilt/innocence stage of the trial. He was adamant that he did not

[8]Throughout the evidentiary hearing the phrase "NGRI" was used by both counsel and the experts to refer to "not guilty by reason of mental disease or defect."

want that done, and he was going to act up in some fashion if we ever got up and attempted to tell a jury that he was responsible for the deaths of these people.

In addition - - - In addition to John's wishes and promises about what would happen if we offered such a defense- - - I had Dr. Murphy who would give an NG - - who would give me a not guilty by reason of mental disease or defect testimony. And I had Dr. Lipman who would not go that far, but, would give me the diminished capacity. I decided that in conjunction with all of the other reasons . . . that it would not be a good idea to put up one doctor saying NGRI and another doctor saying, no, not NGRI. So we didn't. We saved them for penalty.

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. . . I don't believe I ever said to them, "Do you think these opinions are inconsistent?" Because I don't think they are inconsistent exactly. I just don't think it's very persuasive to a jury.

***

. . . We paid attention to John. We paid attention - - - It was a different focus from the beginning to after we had the opinions. I mean, we had serious long conversations with John after we had the opinions about offering this defense and what would be required further of him if we were to offer this defense. Why Dr. Lipman couldn't give us a not guilty by reason of mental disease or defect and what else would be required of John to get that from Dr. Lipman.

We had tons of conversations about this, and John was adamant, and, yes, we deferred to his wishes on that topic.

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[As to why she didn't present the testimony of a psychiatrist] I had - - - In my opinion I had everything I needed or wanted from the lay witnesses and both of my experts. I quite honestly had spent a ton of money on this case. We paid a lot of money to Dr. Murphy and Dr. Lipman, and I didn't really see that a psychiatrist would have anything more to add. I had my methamphetamine psychosis from both of my doctors, so I didn't think I needed a third one.

(PCR.Tr.562-564,564,565,566-567). Counsel Slusher, who was responsible for the guilt phase of trial, also noted that appellant did not want to present a mental health defense but also added that they did not offer the experts' testimony in guilt phase because they were based on intoxication and thought it would be difficult to get such evidence in at trial (PCR.Tr.370,371,372,451-452,541). He also thought that "NGRI" defenses are difficult defenses to make work at trial (PCR.Tr.371). Slusher also noted that they had a "general" reasonable doubt argument in the guilt phase of trial (PCR.Tr.361).

To accomplish this defense, counsel vigorously cross-examined the state's witnesses, revealed their biases, revealed possible deals with the state's key witnesses, exposed how the state's key witnesses had reasons to cooperate with (and testify favorably for) the state, undermined the strength of the state's evidence, and pointed out holes in the state's case (Tr.2027-2029,2040-2041,2060-2063,2072,2110-12, 2112,2125, 2120,2149, 2172,2175-2176,2179,2239,2241,2251-2253,2258-2260,2267,2284,2297,

2318,2324,2331,2343-2346,2352,2355-57,2419,2493,2509,2693,2699,2773,2776,2876, 2889). Then, in closing argument, defense counsel vigorously pursued this defensive strategy and pointed out all of the weaknesses in the state's case (Tr.2920-2921, 2926-2949).

This was a reasonable strategy to pursue in guilt phase. As this Court recently has stated: "It is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a reasonable strategy." **Clayton v. State**, 63 S.W.3d 201,207 (Mo.banc 2001). In fact, in **Clayton**, under slightly different circumstances, this Court stated: "In this case, even though using a diminished capacity defense by itself might have been a reasonable trial strategy, it was also reasonable, as demonstrated above, to argue that a reasonable doubt of guilt existed." **Id**.

Likewise, in the case at bar, it was reasonable to forego a defense based upon mental disease or defect and hold the state to its burden of proving appellant's guilt beyond a reasonable doubt. Utilizing a defense of mental disease or defect would have required the defense to admit (at least implicitly) that appellant had committed the crimes. By avoiding that course of action, however, counsel were able to hold the state to its burden without making any concessions. Counsel indicated that bringing in the other two murders in the guilt phase was one of the factors they considered (PCR.Tr.563) (contrary to appellant's assertion that there was no evidence to support such a finding by the motion court) (App.Br.80).

Appellant nonetheless, argues that counsel's decision to forego the mental defense and persist in a reasonable doubt theory was unreasonable (App.Br.78); however, the record refutes that claim. Counsel engaged the aid of two mental health professionals, Drs. Phillip Murphy and Jonathan Lipman

(who conducted thorough evaluations) (PCR.Tr.556-557,562). Both of them ultimately testified during penalty phase (Tr.3409-3605,3606-3745).

With regard to their preparation and investigation, Counsel Zembles testified that she discussed with Dr. Murphy appellant's diagnosis and that he was willing to give her an "NGRI" and diminished capacity defense (PCR.Tr.557-559,561). She also noted that prior to trial she was aware of Dr. Lipman's findings as well and knew that he could give her a diminished capacity defense and knew the reasons why he could not give her an "NGRI" defense (PCR.Tr.562, 565). As noted above, she also had extensive discussions with appellant regarding their findings (PCR.Tr.563).

However, neither Lipman nor Murphy ever told counsel [from the Calloway County case and presumably counsel here as well] prior to trial (orally or in his written report), that he believed appellant could not deliberate at the time of the crimes or that he believed appellant could not appreciate the criminality of his conduct or conform his conduct to the requirements of the law (Mov.Ex.2 at 33-35,102-103).[9] At trial, both Dr. Murphy and Dr. Lipman concluded that appellant's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was

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[9] Despite their silence on the issue prior to trial, both doctors opined at the post-conviction hearing that appellant could not deliberate at the time of the crimes (Mov.Ex.2 at28-29,100-101). Dr. Lipman attempted to explain this discrepancy between his trial and post-trial testimony by saying, "That phraseology [whether appellant could deliberate] was not used by [appellant's attorneys]. That phraseology was not used" (Mov.Ex.2 at34). Similarly, Dr. Murphy attempted to cast blame on appellant's attorneys by saying that they had not asked him whether appellant could deliberate (Mov.Ex.2 at109-110).

"substantially impaired," not non-existent (Tr.3538,3708). Thus, if the doctors secretly held opinions that they did not divulge, counsel should not be held responsible. **See Lyons v. State**, 39 S.W.3d 32,41 (Mo.banc 2001). After all, in discussing these issues with counsel, these experienced doctors undoubtedly knew that counsel would have been interested in hearing about appellant's inability to deliberate. In fact, at trial, Dr. Murphy testified that because appellant could not discuss the murders with him he could not give an "NGRI" defense and stated, "if we had that situation, I would have been, as a professional expert recommending to you that you consider an NGRI - - not guilty by reason of insanity first stage defense" (Tr.3599).

Accordingly, it was eminently reasonable for counsel to conclude that a defense based upon mental disease or defect was not tenable, and that holding the state to its burden of proof was the better course of action. As is apparent, counsel took reasonable steps to investigate and obtain favorable expert testimony about appellant's mental status; and, for that very reason, appellant's reliance upon **Dumas v. State**, 903 P.2d 816 (Nev.1995), is misplaced. In **Dumas**, despite the fact that the state's expert found that the defendant was incapable of premeditated murder, defense counsel "made no independent inquiry concerning [defendant's] mental condition." **Dumas v. State**, 903 P.2d at 817.

As outlined above, counsel in appellant's case conducted a thorough investigation of appellant's mental health. **See Lyons v. State**, 39 S.W.3d at 37. And, having conducted a thorough investigation (including the retaining of two competent mental health experts), counsel had no obligation to shop for another expert like Dr. Daniel. **Id**.at 41. As noted above, counsel stated that she believed

she had the mental health evidence required for appellant's defense and so she did not need to look further for a psychiatrist (PCR.Tr.566-567). Dr. Daniel conceded as much at the evidentiary hearing:

Q. [state] Okay. Doctor, you indicated again, that psychiatrists have some specialized training in evaluating chronic disease and metabolic disease that psychologists, perhaps like Doctors Murphy and Lipman, do not have. And would have to, in your opinion I believe, consult with a psychiatrist. Is that correct?

A. That is correct.

Q. Did I state that right? Now, there was no head impact chronic disease or metabolic disease in this particular instance that we're talking about that would require that additional level of training, is there?

A. This is correct.

Q. Do you have any knowledge, Doctor, that either Dr. Lipman or Dr. Murphy did not receive the same information, obviously apart from the trial transcript where they actually testified, that you had received? Do you have any information one way or another that they didn't receive?

A. I have no information.

(PCR.Tr.97-98). Thus, as Dr. Daniel conceded and as trial counsel decided, after having consulted two mental health professionals there was no reason for counsel to further seek Dr. Daniel's or any other psychiatrist's or expert's opinion.

D. Appellant Was Not Prejudiced

Despite counsel's efforts in investigating a mental defense, appellant nevertheless claims that he was prejudiced by counsel's failure to call Drs. Lipman, Murphy, and Daniel in guilt phase. Appellant

was not prejudiced, however, for two reasons: first, the doctors' testimony was not admissible; and second, the doctors' testimony (even if it were admissible) was not persuasive.

1. The doctors' testimony was not admissible

All three doctors' opined that appellant could not deliberate due to a mental disease or defect caused by appellant's voluntary ingestion of methamphetamine (Tr.3423,3589,3594,3656-57,Mov.Ex2 at 17,29,94,107, PCR.Tr.101-102). Appellant told Dr. Daniel and Dr. Lipman that at the time of the murders, he was using methamphetamine and had been ingesting from half a gram to one gram daily (Mov.Ex.2 at 8,PCR.Tr.51-52).

"Introduction of a voluntary drugged state to negate a culpable mental state is prohibited." **State v. Nicklasson**, 967 S.W.2d 596,617 (Mo.banc 1998) (evidence was properly prohibited where the doctors based their opinions that Nicklasson's ability to deliberate was impaired on his "voluntary substance abuse"); **State v. Roberts**, 948 S.W.2d 577,588 (Mo.banc 1997); **see State v. Rhodes**, 988 S.W.2d 521,526 (Mo.banc 1999). "[V]oluntary intoxication may not negate a defendant's mental state or provide an insanity defense absent a separate mental disease that results in diminished capacity without the voluntarily ingested drugs." **Id**.

Appellant suggests that the motion court erroneously relied on this Court's decision in **Nicklasson** and cites to numerous cases that were decided before **Nicklasson** (App.Br.79). The cases that appellant cites to for the proposition that "intoxication accompanied by psychosis can serve to negate a mental state," **Joyce v. State**, 684 S.W.2d 553 (Mo.App., E.D. 1984); **State v.**

Preston, 673 S.W.2d 1 (Mo. banc 1984); and **State v. Williams**, 812 S.W.2d 518 (Mo.App., E.D. 1991) (which relies on **Preston**) do not help him (App.Br.79). **Joyce** and **Preston** were decided prior to a 1984 amendment to § 562.076. Prior to the 1984 amendment, a defendant was allowed to use evidence of an intoxicated condition to negate the mental states of purpose or knowledge. § 562.076.1 (1), and (2), RSMo 1978. Appellant's cases relied on a decision that did not take into account the amendment where voluntary intoxication could no longer be used to negate *any* mental state. **See** § 562.076.1, RSMo 2000; **See State v. Mouse**, 989 S.W.2d 185, 188-189 (Mo.App., S.D. 1999); **State v. McGreevey**, 832 S.W.2d 929, 931 (Mo.App., W.D. 1992); and **State v. Elam**, 779 S.W.2d 716, 717 (Mo.App., E.D. 1989). "Ingestion of a drug, or alcohol, because of an addiction, or compulsion, is not done involuntarily as that word is used in the statute." **Elam**, **supra** at 717.

Here, because the doctors' all opined that appellant's mental disease or defect was methamphetamine induced, their testimony was not admissible to negate appellant's culpable mental state.

2. The doctors were not persuasive

Even if it were admissible, the testimony was not persuasive. Dr. Lipman testified that appellant could not "coolly reflect," and that appellant's capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired" (Mov.Ex.2 at29,33). However, on cross-examination, he admitted that appellant's denying involvement in the crime and covering for Maggie Hodges could be a "sign of a certain level of rationality" (Mov.Ex.2 at37-38). He also admitted that he could not really determine whether appellant knew the difference between right

and wrong because appellant had denied any involvement in the crime (Mov.Ex.2 at39-40). Lipman stated: "I cannot answer the question specifically regarding what he thought he was doing and why he thought he was doing it. Because he told me he didn't do it" (Mov.Ex.2at40).

Similarly, Dr. Murphy testified that appellant could not coolly reflect, and that appellant did not "recognize the wrongfulness of his acts" (Mov.Ex.2.at.100-101). However, on cross-examination, he admitted that he had not put those findings in his written report, that appellant's making a list of snitches could show deliberation, that a delusional person can still know right from wrong and conform his or her conduct to the law, that appellant's arranging to meet the victims "took planning," that appellant was able to conform to the law in driving his car, that appellant knew enough to hide the bodies and dispose of the guns, and that appellant's actions looked like they were "cool reflected" (Mov.Ex.2 at103-107).

Dr. Daniel admitted that it was a requirement that the defendant admit the murders in order for him to say whether appellant understood the nature, quality, or wrongfulness of his actions (PCR.Tr.99). In concluding, he admitted that some of appellant's alleged "delusions" and fears were based in reality (PCR.Tr.54,97).

As is evident, while each doctor was willing to answer some questions favorably, they also admitted that appellant exhibited signs of rationality, that appellant appeared to have deliberated, that appellant might have deliberated, that appellant conformed some of his conduct to the law, and that appellant might have known right from wrong (as outlined above, however, two of them testified that they could not determine whether appellant knew right from wrong).

Such equivocal testimony was completely incredible in light of appellant's extensive efforts to make a hit list, track down the "snitches," lure the snitches to remote places, hide the bodies, and avoid

detection. In fact, in the face of such overwhelming evidence of deliberation, there is simply no reasonable probability that their testimony would have changed the outcome of appellant's guilt phase. **See Lyons v. State**, S.W.3d at 37.

3. Appellant's new claim on appeal

Finally, appellant argues that counsel were ineffective for presenting "inherently contradictory" theories in guilt and penalty by arguing that appellant "did not commit the Pinegar homicide" and then argue "that his acts should be excused because of his mental impairments" (App.Br.78). This claim was not raised in his amended motion. This Court has repeatedly held that claims which would properly have been raised in a post-conviction motion, but were not included in such a motion, are waived and cannot be reviewed on appeal. **State v. Johnson**, 968 S.W.2d 686,695-697 (Mo.banc 1998); **Coates v. State**, 939 S.W.2d 912,915 (Mo.banc 1997). By failing to raise this claim in his post-conviction motion, this claim is not reviewable by this Court. **Id.**

Even assuming that this claim was properly before the court, appellant's claim still fails. Defense counsel pursued a reasonable doubt theory of defense in the guilt phase and then used evidence of appellant's methamphetamine-induced psychosis as evidence in mitigation of punishment (PCR.Tr.361). This Court has recently held, (in slightly different circumstances where two defenses were presented simultaneously in the guilt phase), that asserting "a reasonable doubt of guilt exits and that the accused had diminished capacity are not inconsistent." **Clayton**, 63 S.W.3d at 206. The decision to use both defenses "turns solely on a question of trial strategy." **Id**. at 207 (distinguishing **Ross v. Kemp**, a case which appellant relies upon). As discussed above, counsel strategically chose to present the mental health evidence solely in the penalty phase.

Appellant nonetheless cites **State v. Harris**, 870 S.W.2d 798 (Mo.banc 1994), to support his claim that shifting the defensive theory is deleterious to the defense (App.Br.76-77); however, the facts of appellant's case do not present the "defense-*du-jour*" situation contemplated in **Harris**. In **Harris**, this Court held that it was reasonable for counsel to avoid evidence of mental disease or defect in the penalty phase because the defense had asserted self-defense in the guilt phase. **Id**.at 816. This Court noted that "the injection of evidence of a mental disease or defect during the penalty phase risks alienating a jury that has *consistently* heard a different theory of the case during the guilt phase." **Id.** (emphasis added).

Here, the defense prepared the jury for this potential shift in theories by eliciting evidence in guilt phase of appellant's methamphetamine use, paranoia, and hallucinations (Tr.2006-2891). Moreover, once the jury made its determination of guilt, the jury probably had no trouble accepting the fact that the defense shifted gears (as a result of the jury's verdict) and attempted to downplay appellant's culpability. Thus, there was no danger of alienating the jury in this case as contemplated in **Harris**.

Based on the foregoing, this point should be denied.

VI.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.15 MOTION ON THE GROUNDS THAT HIS TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE IN THEIR ACTIONS REGARDING THE "SELL THIS ADDRESS" EVIDENCE PRESENTED DURING THE PENALTY PHASE BECAUSE THE RECORD DEMONSTRATES THAT THE OUTCOME OF THE TRIAL OR APPEAL WOULD NOT HAVE BEEN DIFFERENT IN THAT THE OBJECTED TO EVIDENCE WAS ADMISSIBLE, THERE WAS NO EVIDENCE THAT COUNSEL WOULD HAVE KNOWN TO LOCATE AN IOWA INMATE TO REFUTE THE OBJECTED TO EVIDENCE, AND THERE WAS NO PREJUDICE ESTABLISHED FROM THE LATE DISCLOSURE AS COUNSEL HAD ADEQUATE NOTICE OF THE OBJECTED TO EVIDENCE.

Appellant contends that the motion court was clearly erroneous in denying "multiple claims related to respondent's use of a letter [appellant] wrote to Paul Oglesbee and his wife, [appellant's] sister, Rose" during the penalty phase at trial (App.Br.84). Specifically, appellant alleges that:

(1) counsel were ineffective for failing to object to Oglesbee's testimony that he thought the phrase "sell this address" in a letter appellant wrote meant appellant was placing a "hit" on Oglesbee and Rose as "speculative opinion";

(2) counsel were ineffective for failing to call Brian Fifer to refute Oglesbee's testimony that appellant had threatened to "put a hit" on the Oglesbees;

(3) direct appeal counsel was ineffective for failing to raise on appeal "trial counsel's objections to respondent's use of the letter"; and

(4) the motion court clearly erred in overruling appellant's claim that he was denied his right to notice of non-statutory aggravating circumstances on the basis that the letter was not disclosed until the day of Oglesbee's testimony

(App.Br.82-83).

A. Facts

On February 18, 1997, close to trial, Counsel Zembles notified the court during a conference call that there were some letters written by appellant to Oglesbee and/or appellant's sister Rose that she learned about during Oglesbee's deposition on or about January 7, 1995 (Tr.705). According to Zembles, Rose had also mentioned the letters in her deposition and Rose and Oglesbee both stated that they had given the letters to Sheriff Duane Hobbs (Tr.705-706). Zembles was concerned because she had not yet received copies of the letters, and from the depositions she realized the letters involved "some kind of threat" (Tr.706). The prosecutor noted that while he was aware of the letters his investigator was working to get them from Sheriff Hobbs and he would fax the letters to Zembles as soon as he received them (Tr.708). When the court asked if that "took care" of the issue, Zembles responded that it would (Tr.709).

At the penalty phase of trial, defense counsel called Oglesbee for the purpose of testifying about the changes in appellant from his increased methamphetamine use in 1995 and to give more background about the drug community (Tr.3258-3273). On cross-examination by the state, Oglesbee stated that he had received correspondence from appellant after appellant had been arrested in June

1995 (Tr.3280). Counsel objected to the use of State's Exhibit 106, a letter from appellant to Rose and stated that it had only been turned over to them that morning (Tr.3280). The prosecutor noted that counsel was aware of the contents of the letter from the deposition and that Oglesbee had just found the letter that day, gave it to him, and he subsequently handed the letter over to the defense "within five minutes of receiving it" (Tr.3281).

The prosecutor further noted that the letter was relevant because in the "p.s" of the letter appellant wrote "She'll write or I'll sell this address" (Tr.3281,3285). Because the phrase was a threat to Rose, the State wanted to show how appellant was still threatening people even after he had stopped using methamphetamine (Tr.3281). Counsel Slusher argued that it was not a threatening letter, but that when read in context with two other letters from appellant, State's Exhibit 48 and 49, the letter was just referencing a property dispute (Tr.3282).

Counsel then admitted that the letter, including the "p.s." portion of the letter, was referred to in the deposition (Tr.3283). When asked by the court what they would have done had they physically had a copy of the letter, counsel responded that they would have questioned Oglesbee about the context of all three letters and about the property dispute (Tr.3284). Counsel surmised that the State wanted to have Oglesbee give his interpretation of the letter (Tr.3285). Counsel then objected on relevancy grounds as well (Tr.3285). The trial court initially sustained counsel's objection as a discovery violation (Tr.3286).

When the court asked the prosecutor if the discovery covered everything in the letter, the prosecutor read the following portion from Oglesbee's deposition:

> No, he wrote a couple of letters to us after he had been in jail about three or four weeks, and he threatened us and wanted Rose to write him. And then on his p.s. he put down, 'if you don't write I'll sell her address,' which I took it as his threat to be a hit.

(Tr.3288). After a brief recess the court ruled as follows:

> Counsel, I've reviewed some authority on the issues of the discovery concerning this first letter, and I think - - - Obviously it wasn't really a Brady case, because it wasn't exculpatory material, but I considered it a failure to disclose the statement of the defendant, which was only disclosed to the defendant today. But I recognize that the witness was subpoenaed by the defense, is the defendant's witness. The State has a right to cross-examine, and that there has been no failure by the State of it[s] burden. As soon as they got this, they turned it over. I recognize that essentially the whole thrust of it has been discussed by deposition, particularly the most pertinent part, the p.s., which has a suggested threat . . . I think it is relevant particularly as to the threat, and I think it maybe is appropriate cross-examination . . . On reflection, I'm going to change my ruling and I will admit #106.

(Tr.3288-3289). After the court finally ruled that the letter was admissible, counsel asked the court to recognize the objections that were made from the bench and the court agreed (Tr.3289).

The prosecutor then moved, over counsel's objections, to admit the letters into evidence (Tr.3291). Oglesbee described the letter, including the "sell this address" comment and stated that he took the phrase to mean appellant was "putting a contract on [them] for a hit" (Tr.3292).

On redirect examination, counsel asked Oglesbee about the letters and elicited from him that appellant believed he and Rose broke into his house and took some of his property (Tr.3296). He further elicited from Oglesbee that the "context of the letters was about [appellant's] concern that [he] had some of [appellant's] property"and that the letters were consistent with his paranoid behavior (Tr.3297-3298). Finally, counsel elicited from Oglesbee that he did not like appellant (Tr.3298).

B. The Standard Of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." **Moss v. State**, 10 S.W.3d 508,511 (Mo.banc 2000).

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **Id**.at 2068.

As to these related claims, the motion court ruled both that trial counsel were not ineffective for failing to present evidence or "take the actions Movant complains of"and that "the outcome of the

proceeding would not have been different had such evidence and testimony been presented at the penalty phase" (PCR.L.F.294,303).

1. Evidence And Testimony From Oglesbee Regarding The Letter Was Admissible

Generally, both the state and the defense are allowed to present evidence regarding the defendant's character in the penalty phase. **State v. Clay**, 975 S.W.2d 121, 132 (Mo. banc 1998). "Because of the importance of the death penalty decision, the sentencer is entitled to any evidence that assists this decision." **Id.** It is well-settled that this may include evidence of other misconduct, even serious unconvicted crimes. **Thompson**, 985 S.W.2d at 791; **State v. Kinder**, 942 S.W.2d 313, 331 (Mo. banc 1996).

Evidence of the veiled threat to the Oglesbees was admissible as evidence of appellant's character. Throughout the trial, appellant was attempting to explain to the jury that his conduct was influenced by his methamphetamine use. As the prosecutor noted at trial, the State wanted to use the evidence of the threat, made about a month after his arrest, to show the jury how appellant continued to be aggressive even after he stopped using methamphetamine daily. Furthermore, because appellant had elicited Oglesbee's opinion about appellant's state of mind during the months prior to the murders, the State was entitled to also ask his opinion on what he thought appellant was saying in the letter.

At any rate, there is no reason to believe that the absence of that veiled threat would have affected the outcome of appellant's trial. The remaining evidence in aggravation included, among other things, threats of violence or death to Eddie Fickus (Tr.3276).

In addition, even if the veiled "sell this address" threat was discounted, there was still evidence that appellant had once assaulted his sister Rose (Tr.3277). And, of course, appellant's veiled threat

was only a small detail when compared to the three murders that he committed in executing his plan to eliminate the people he suspected were "snitches."

2. Counsel's Failure To Call Fifer Was Reasonable

At the evidentiary hearing, Counsel Zembles recalled knowing about the "sell this address" phrase and that it involved a late disclosure (PCR.Tr.581). When asked if she would have wanted to use Fifer's testimony to explain the meaning of the phrase, she remarked that "Fifer was the guy that was in jail with [appellant] in Iowa" and noted that the letter to Rose was written years later (PCR.Tr.584). Apparently, the idea of finding an old Iowa prison cellmate to state what his interpretation of the phrase meant in Iowa to explain the meaning of a phrase written years later did not exactly jump out at Zembles. At any rate, when pressed by post-conviction counsel, Zembles stated that she might have wanted to use Fifer, but that it would have depended on what he would say (PCR.Tr.584).

When asked if there were any reasons why he would not investigate and present evidence regarding the meaning of the phrase, Counsel Slusher said:

> Well, I guess I could think of many reasons why you might not want to present it. But I guess you would want to investigate what was behind the statement. Family dynamics can certainly play a part in the penalty phase of a death penalty trial. That is something you might want to look into.
>
> Can I think of reasons why you wouldn't want to? Maybe there was a dispute between them that was Mr. Middleton's fault, and that might not be something that presented him in a great light. So, there could be a ton of things, I guess.

(PCR.Tr.379).

At any rate, appellant has not shown how counsel would have had a reason to know about Fifer or to know that Fifer was willing to present potentially helpful testimony regarding this phrase. To claim ineffective assistance of counsel for failing to call a witness, a movant must prove by a preponderance of the evidence that the witness was either known to his attorneys or that the witness could have been found after reasonable investigation. **See State v. Jones**, 979 S.W.2d 171,186 (Mo.banc 1998).

Here, counsel investigated appellant's case and spoke with appellant several times prior to trial. However, there was absolutely no evidence that counsel ever had Fifer's name prior to trial, or that counsel ever had any reason to believe that Fifer had any potentially helpful information. Appellant's post-conviction motion did not assert whether appellant told counsel about Fifer (PCR.L.F.57-59,154-156), and neither of appellant's attorneys nor appellant testified to that fact at the evidentiary hearing. Movant's Exhibit 28, the Iowa prison records submitted at the evidentiary hearing contain no reference to Brian Fifer. Also, there was no evidence of any other records in counsels' possession that referenced Fifer. In any event, even if Fifer were somewhere mentioned in appellant's Iowa prison records, counsel would not have known that Fifer could testify favorably about the "sell this address" phrase. Absent an explanation from appellant (of which there was no evidence), counsel would not have known that it was important to contact another Iowa inmate.

Accordingly, there was absolutely no evidence that counsel was made aware of, or should have been aware of Fifer's testimony. The motion court did not clearly err.

Even assuming that counsel reasonably should have discovered Fifer's testimony, appellant was not prejudiced by counsel's failure. Paul Oglesbee testified that appellant had told them that he

(appellant) was going to "sell this address," and that he understood that phrase to mean that appellant was going to "put a hit" on them (Tr.3292).

In his deposition, Fifer, a ten-year veteran of the Iowa Department of Corrections, refuted Oglesbee's testimony by explaining that "sell your address" really means that an inmate "[is] not going to write no more" (Mov.Ex.30). Fifer explained that inmates have their own peculiar slang, and that "people out there they don't understand, you know" (Mov.Ex.30). Apparently.

But there is no reasonable probability that this testimony would have affected the outcome of appellant's case. First, there is little reason to believe that the jury would have credited Fifer's testimony over Oglesbee's — especially in light of appellant's circumstances and actions around the time of the letter. Second, even if the jury would have credited Fifer's testimony and concluded that appellant had not threatened to "put a hit" on the Oglesbees there is no reason to believe that the absence of that veiled threat would have affected the outcome of his trial. This point should be denied.

3. Appellate Counsel Was Not Ineffective

Appellant claims that his appellate counsel should have "argued on appeal trial counsel's objections to respondent's non-disclosure of the letter, Exhibit 106, which served as the basis for a non-statutory aggravator" (App.Br.91).

To support a Rule 29.15 motion due to ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it. **Moss v. State**, 10 S.W.2d at 514.

Here, appellate counsel, Elizabeth Carlyle, testified that she did not think the claim regarding the "sell this address" comment had legal merit (PCR.Tr.155). As to counsel's claim regarding his appellate counsel, the motion court found that counsel raised 26 issues on appeal and raised those issues she felt had merit (PCR.L.F.303). The court also found that the claim did not have merit (PCR.L.F.304).

As mentioned above, evidence as to the letter, State's Ex. 106, and the meaning of the phrase in the letter was properly admitted at trial. Also, while it is true that this evidence is inadmissible if the state does not provide notice that it intends to introduce the evidence. **Thompson**, 985 S.W.2d 779, 791 (Mo.banc 1999); **State v. Debler**, 856 S.W.2d 641, 657 (Mo. banc 1993), here, as outlined above, appellant did have notice of the evidence.

The trial was on February 24 1997, (Tr.979), and as early as January 7, 1997, counsel were put on notice that appellant had written the Oglesbees a letter containing the phrase "she'll write or I'll sell this address" (Tr.3288). Appellant admits as much in his brief, but only as to the claim regarding counsel's failure to call Brian Fifer (App.Br.91). Not only were they on notice about the letter, but counsel knew that Oglesbee interpreted the phrase to mean that appellant had threatened to put "a hit" on them (Tr.3288). As counsel was able to formulate his interpretation of the letter, (that when read in context with two other letters the letters were about a property dispute), clearly counsel was not surprised and was able to question Oglesbee on redirect examination regarding another possible interpretation of the letter (Tr. 3296-98). In fact, at trial when asked by the court what they would have done had they physically had a copy of the letter earlier, counsel responded that they would have questioned Oglesbee about the context of all three letters and about the property dispute (Tr.3284). That is precisely what counsel was able to do on redirect examination. Not only did he elicit information

about the property dispute from Oglesbee, but he got him to admit that he disliked appellant and that the letters seemed consistent with his paranoid behavior (Tr.3297-98).

Thus, because the evidence was admissible and appellant was not prejudiced or surprised by the late disclosure of the actual letter (as they were well aware of the contents of the letter), appellate counsel was not ineffective for failing to raise issues regarding the "sell this address" phrase on appeal.

4. Appellant's Allegation of Trial Court Error

Also embedded within several of the claims regarding the "sell this address" claims is a claim that appellant was denied due process because the State allegedly failed to disclose various "non-statutory aggravating circumstances." (App.Br. 92). This claim is not cognizable. The State's alleged failure to disclose is a claim of trial court error, which is outside the scope of a Rule 29.15 motion. **State v. Carter**, 955 S.W.2d 548, 555 (Mo. banc 1997). Claims of trial court error will only be considered in a Rule 29.15 motion where fundamental fairness requires, and then, only in rare and exceptional circumstances. **Id.** Appellant failed to allege any rare or exceptional circumstances. Therefore, appellant's final claim should not be considered here on appeal.

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

VII.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, AFTER A HEARING, APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON FAILURE TO MAKE VARIOUS OBJECTIONS DURING THE PENALTY PHASE OF TRIAL BECAUSE COUNSEL CANNOT ESTABLISH THAT COUNSEL'S ACTIONS WERE UNREASONABLE OR THAT HE WAS PREJUDICED THEREBY IN THAT COUNSEL EITHER STRATEGICALLY CHOSE NOT TO OBJECT OR THE RECORD ESTABLISHES THAT THE OUTCOME OF THE PROCEEDINGS WOULD NOT HAVE BEEN DIFFERENT.

In his seventh point, appellant raises four separate claims of error. Respondent will address them in the order that they are raised.

A. The Standard Of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." **Moss v. State**, 10 S.W.3d 508,511 (Mo.banc 2000).

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

B. The Motion Court Did Not Clearly Err

In denying the various claims made in this point, the motion court stated:

> 28. Subparagraph 8(U) sets forth a long list of complaints regarding the opening statement and closing argument in the penalty phase. Trial counsel made a

conscious decision to not object to every possible objectionable matter. Furthermore, counsel testified that, after one of her objections is sustained . . . she often chooses not to ask for further relief because she believes it is best to simply "move on." This is reasonable trial strategy.

***

As to the claims that relate to Dr. Lipman, the State's questioning of Dr. Lipman was proper in that it tested his qualifications, skills, and credibility, and the validity and weight of his opinions. The various objections would have been without merit, and there is no reasonable probability that any of the objections would have changed the outcome of Movant's trial.

***

29. . . . As to evidence in aggravation of punishment, including evidence of circumstances surrounding Movant's three related murders, and evidence of Movant's prior convictions, trial counsel were not ineffective for failing to object because it was admissible to aid the jury in making an individualized determination of the appropriate sentence. Nonstatutory aggravating circumstances may be considered, including prior criminal convictions and crimes for which the defendant is charged but which have not yet reached conviction.

***

The Court finds that Movant has failed to show that there is a reasonable probability that any of these claims would have changed the outcome of the trial and, therefore, Movant was not prejudiced.

Trial counsel were not ineffective in failing to take the actions Movant complains of in Subparagraph 8(V).

(PCR.L.F.298,299,301-302,303).

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984). The movant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **Id**.at 2068.

1(a). Details of the Hamilton and Hodge murders were admissible in penalty phase

Appellant claims that counsel were ineffective for failing to object to the State's use of the Hamilton and Hodge murders during penalty phase (App.Br.96-99).

Lead counsel Zembles, who was in charge of the penalty phase, stated at the evidentiary hearing that it was part of her trial strategy to present evidence of the other murders in the penalty phase. Although appellant is correct in noting that Zembles had initially filed a motion to exclude evidence of nonstatutory aggravators and unadjudicated conduct, Zembles testified at the hearing that she later wanted the evidence of appellant's drug use and evidence of the two prior murders in at trial to corroborate her experts' testimony regarding the methamphetamine-induced psychosis (PCR.Tr.582). She also stated that she would have elicited the evidence if it had not been brought out by the State

(PCR.Tr.582). She also candidly noted that she did not know what she would have done if the trial court had sustained her motion to exclude the evidence because it would have "gutted [their] defense" (PCR.Tr.600-601). Counsel Holden noted that she did not object to the evidence because they believed the evidence "went to some of the aggravators that the State were trying to show" (PCR.Tr.503). "Strategic choices made after a thorough investigation are essentially unchallengeable." **Bucklew v. State**, 38 S.W.3d 395, 398 (Mo.banc 2000).

Furthermore, appellant suffered no prejudice from counsel's actions because the jury would have been informed of the prior murders, and the details of the murders would have been elicited, with or without counsel's aid or objections. "Appropriate sentencing requires the fullest information possible concerning the defendant's life and characteristics." **State v. Gilyard**, 979 S.W.2d 138 (Mo.banc 1998)(citing **Williams v. New York**, 337 U.S. 241,247, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)). "In the penalty phase of a capital trial, the character and history of the defendant, including prior crimes committed by that defendant, are admissible as relevant to the sentencing." **State v. Middleton**, 995 S.W.2d 443,463 (Mo.banc 1999); **State v. Morrow**, 968 S.W.2d 100,114-115 (Mo.banc 1998)("The importance of the death penalty decision entitles the sentencer to any evidence that may assist it in making that decision."); **State v. Richardson**, 923 S.W.2d 301 (Mo.banc 1996).

Here, evidence of the Hamilton and Hodge murders shed light upon appellant's character. **See State v. Morrow**, 968 S.W.2d at 114-115 (details surrounding murder of another person were properly admitted); **State v. Smith**, 781 S.W.2d,761, 769 (Mo. banc 1989) (details of prior convictions plainly relevant to character).

In addition, inasmuch as the Hamilton and Hodge murders were part of a common scheme or plan to murder suspected "snitches," they were particularly relevant because they were evidence of one of the statutory aggravators. The jury was instructed to find that the murder involved "depravity of mind" only if it found that appellant killed the victim as part of his plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life (L.F.615). Thus, the extent and seriousness of appellant's crimes was shown by evidence of the Hamilton and Hodge murders. **See State v. Middleton**, 995 S.W.2d at 467 (where this Court determined that appellant's death penalty was not disproportionate, in part, because appellant composed a list of suspected informants and killed them).

In short, the details of appellant's prior murders were highly relevant to the jury's individualized determination of the appropriate sentence in this case.

1(b). Argument that death penalty was appropriate because of Hamilton and Hodge murders

Appellant also claims counsel were ineffective for failing to object to arguments that referenced the other murders and that told the jury to impose death because appellant killed Hamilton and Hodge (App.Br.94-96). The prosecutor argued, among other things, as follows:

(1) "Three people dead . . . And why? Not due to a psychosis, but due to the defendant's selfishness. . . so that he didn't have to go to prison for his drug dealing" (Tr.3761-62);

(2) "Does our society accept the fact - - or accept the argument or the position that you should not get the death penalty after the murder of three people because you, after voluntarily consuming methamphetamine, put yourself into a state of paranoia . . ." (Tr.3767);

(3) " . . . he murdered three people" (Tr.3755);

(4) " And so when you weigh that evidence in mitigation against the evidence in aggravation, the lives of Al Pinegar, Stacey Hodge and Randy Hamilton and the reason for which they were killed, I submit to you that the evidence in aggravation in this case far out-weighs the evidence in mitigation - - far out-weighs it" (Tr.3763-3764); and

(5) "And is life in prison the appropriate punishment? I submit to you it is not. Alfred Pinegar would have taken life without in a heartbeat. Stacey Hodge would have taken life without in a heartbeat. Randy Hamilton would have taken a sentence of life without in a heartbeat. And they all got the death penalty at the hands of this defendant. - - not because they were guilty of anything, just because they knew too much" (Tr.3764).

None of these arguments was improper. The evidence of the Hamilton and Hodge murders were admitted during penalty phase precisely because it was a relevant factor to consider in determining whether to impose a sentence of death. This Court has already determined that evidence of Hamilton and Hodge murders was "used to help the jury to understand the prior acts of Middleton for the purpose of determining his punishment for the murder of Pinegar." **State v. Middleton**, 995 S.W.2d at 463. The defendant's character, as shown by past acts, was a proper factor to consider in determining whether to impose death sentences. **See State v. Morrow**, 968 S.W.2d at 114-115; **State v. Smith**, 781 S.W.2d at 769.

And appellant's contention that the prosecutor argued for the jury to weigh the value of the victim's lives in argument number (4) is without merit (App.Br.96). No where does the prosecutor tell the jury to weigh the victim's lives against appellant's, but instead asks them to consider the reasons why

appellant chose to kill them versus all of the evidence that was presented in mitigation. This was not improper. Appellant's claims as to counsel's failure to object to references to the other murders fails.

2. Prosecutor's Closing Argument Was Proper

Appellant next claims that his trial counsel was ineffective for failing to object to two comments by the prosecutor during the State's initial penalty argument (App.Br.101).

Appellant complains about the following italicized portion of the prosecutor's argument:

> *Paranoia is fear; it is fear. And did this defendant have or act paranoid, think paranoid things? Yes. Was he as paranoid as he led these doctors to believe? I doubt it, and I think you should doubt it.* I think you should read the letters, recall the letters that he wrote to his sister from jail - - fairly sophisticated manipulations, fairly sophisticated manipulations. "People are trying to frame me"; "I don't know why you won't come to see me"; "I found Jesus Christ now." That is manipulation.

(Tr.3758).

Appellant claims that the prosecutor's argument constituted "improper personalization and implied the prosecutor had special knowledge" (App.Br.101). Counsel Zembles testified at the evidentiary hearing that she thought the argument was improper personalization and testimony and that she thought it should have been objected to at trial (PCR.Tr.608). However, appellant suffered no prejudice from counsel not objecting because the argument was proper.

A prosecutor is entitled to draw reasonable inferences from the evidence presented at trial, **State v. Kreutzer**, 928 S.W.2d 854, 873 (Mo. banc 1996), and may during closing argument, state

opinions or conclusions that are fairly drawn from the evidence, and may draw any inference from the evidence that he believes in good faith to be justified. **State v. Taylor**, 944 S.W.2d 925 (Mo.banc 1997); **State v. Ward**, 745 S.W.2d 666, 672 (Mo. banc 1988). Furthermore, the prosecutor's argument would have constituted an improper personalization only if there was a suggestion of personal danger to the jurors or their families if appellant were to be acquitted. **State v. Simmons**, 944 S.W.2d 165, 182 (Mo.banc 1997); **State v. Norton**, 949 S.W.2d 672, 677 (Mo. App.W.D. 1997).

Here, the aforementioned comments made no such suggestion. The prosecutor simply commented on the evidence presented of appellant's paranoia and then he immediately urged the jury to look to the evidence to determine for themselves the degree of paranoia he truly exhibited. Also, nowhere did the prosecutor state that he had special knowledge of the truth or falsity of appellant's paranoia. It was not improper and counsel cannot be deemed ineffective for failing to make a meritless objection. **State v. Clay**, 975 S.W.2d 121, 136 (Mo.banc 1998).

Appellant next claims that counsel should have objected to the prosecutor's argument that one of his murder victims, Stacey Hodge, was "moaning in agony before she [was] finally finished off by Maggie" (App.Br. 101,Tr.3760). Appellant argues it was objectionable because "there was no evidence to support it" and it was "highly inflammatory"(App.Br.101-102).

Counsel Zembles stated at the evidentiary hearing that "[i]f there was testimony to that effect I would not find that argument objectionable. If there was no testimony to that effect then it would be speculation at the very least" (PCR.Tr.610). She also stated that she did not recall if there was testimony to that effect (PCR.Tr.611). Counsel was correct in not objecting because there was evidence to support the argument.

During the penalty phase of trial, Doug Stallsworth testified that appellant had confessed to him about all three murders. He testified that when Hodge got out of the car, appellant shot her and "[t]hen when she fell down and was *kind of suffering, and moaning*, and stuff they walked over and Maggie shot her in the head" (Tr.3181) (emphasis added).

Thus, because the prosecutor's argument that Hodge was "moaning in agony" after having been shot once and then being shot again was fully supported by the evidence at trial, the argument was proper. At any rate, it is quite legitimate for a prosecutor to "recount in detail the victim's pain and suffering, engendering sympathy in the jury during the penalty phase closing argument." **State v. Rhodes**, 988 S.W.2d 521, 528 (Mo.banc 1999). Such argument is improper personalization only if it suggests a personal danger to the jurors or their families. **Id.** Counsel cannot be ineffective for failing to make a meritless claim. **Clay**, **supra** at 136.

3. Objection to Dr. Lipman's Testimony That Appellant Lied

Appellant next contends that counsel was ineffective for failing to object to the State improperly questioning Dr. Lipman about whether he believed appellant had lied to him (App.Br.103). He claims that if trial counsel had objected then the outcome of his trial might have been different (App.Br.104).

In a similar claim raised on direct appeal as to the questioning of Dr. Murphy where this Court found it was proper, this Court noted that an expert generally "may not give opinions on the credibility of witnesses." **State v. Middleton**, 995 S.W.2d 443,459 (Mo.banc 1999). In the case at bar, however, the state's questioning of Dr. Lipman did not relate to the credibility of any witness because appellant was not a witness.

Here, the state's cross-examination properly tested Lipman's qualifications, skills, and credibility, and the validity and weight of Lipman's opinion. **Middleton, supra**; **State v. Smith**, 32 S.W.3d 532,550 (Mo.banc 2000). On direct examination, Lipman had already testified that his opinion was based, in part, upon a personal history that he had obtained from appellant during a two-day evaluation period (Tr.3621-3622). In fact, Lipman testified that obtaining a personal history through a "very very detailed clinical interview" is information that is "part of what we consider overall" (Tr.3621-3622). Consequently, it was entirely proper for the state to inquire as to the reliability, or accuracy, of the history that Lipman thought he had obtained from appellant. **See id.** In addition, appellant can hardly claim prejudice, because he elicited similar evidence in support of his case on direct examination (Tr.3663-3664). Counsel is not ineffective for failing to make a meritless claim. **Clay**, **supra** at 136.

4. Counsel Not Ineffective for Failing to Object to the Penalty Phase Verdict Director

Finally, appellant claims that his counsel were ineffective for "failing to object to the mental element of 'knowinlgy' having been omitted from penalty verdict director, Instruction No. 15" (App.Br. 104).

Instruction 15, provided, in relevant part, as follows:

> In determining the punishment to be assessed against the defendant for the murder of Alfred Pinegar, you must first unanimously determine whether one or more of the following statutory aggravating circumstances exists:
>
> 1. Whether the murder of Alfred Pinegar involved depravity of mind and whether, as a result therof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find that the

defendant killed Alfred Pinegar as a part of defenant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of human life.

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2. Whether the defendant murdered Alfred Pinegar for the purpose of concealing or attempting to conceal the defendant's delivery of methamphetamine, a controlled substance.

A person commits the crime of delivery of a controlled substance when he delivers a controlled substance knowing that the substance is a controlled substance.

(L.F.615).

Appellant is correct in noting that MAI-CR 3d 325.04.1 requires that the jury find a defendant "knowingly" delivered a controlled substance and that here, the "knowingly" requirement was absent from the verdict director (App.Br.105). However, here, appellant was not prejudiced by the failure of his counsel to object to the missing element of "knowingly" from the verdict director because it was not a disputed element of the crime. **State v. Hill**, 970 S.W.2d 868, 872 (Mo. App.W.D. 1998). **See also State v. Anderson**, 951 S.W.2d 710, 711-712 (Mo.App.E.D. 1997) (Convictions for delivery of a controlled substance affirmed even though the verdict directors did not require a finding that the defendant knew that the drug he was delivering was methamphetamine because actual knowledge was "not a contested factual issue"); **State v. Wurtzberger**, 40 S.W.3d 893, 898 (Mo.banc 2001).

In fact, as mentioned previously, the fact that appellant used and sold methamphetamine was a conceded fact at trial and eliciting evidence of that fact was part of counsel's trial strategy (Tr.3033,3090,3266,3673). The fact that appellant did not dispute the "knowing" element of appellant

selling methamphetamine precludes a finding of **Strickland** prejudice as there is no probability that the result of the trial would have been different.

Furthermore, it is well-settled that in a case with multiple aggravating circumstances, claims that additional ones found by the jury were defective state no basis for relief. **State v. Taylor**, 18 S.W.3d 366,378 (Mo.banc 2000);**State v. Smith**, 944 S.W.2d 901, 921 (Mo.banc 1997). This is because Missouri is a non-weighing state. **Sidebottom v. Delo**, 46 F.3d 744 (8th Cir. 1995); **LaRette v. Delo**, 44 F.3d 681, 687 (n. 4) (8th Cir. 1995). In the present case, the jury found both aggravating circumstances (L.F.626).

The motion court was not clearly erroneous in denying appellant's claim. Based on the foregoing, appellant's seventh point on appeal must fail.

VIII.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, AFTER A HEARING, APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BECAUSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ASSERT CLAIMS ON DIRECT APPEAL REGARDING AN ALLEGED CONFLICT OF INTEREST AND AN INSTRUCTION DEFECT IN THAT (1) COUNSEL ONLY RAISED THOSE CLAIMS SHE BELIEVED HAD LEGAL MERIT AND (2) RESOLUTION OF THOSE ISSUES WOULD NOT HAVE RESULTED IN A REVERSAL OF APPELLANT'S CONVICTION AND SENTENCE.

Appellant contends that the motion court clearly erred in denying his claims that appellate counsel was ineffective for failing to assert: first, that the trial court erred in denying a motion that sought to exclude the testimony "of certain witnesses because attorneys who had represented [appellant] also had represented state witnesses on charges against them," and second, that Instruction 15, the penalty verdict director, "omitted the 'knowingly' mental state requirement from one aggravator" (App.Br.107).

A. The Standard Of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." **Moss v. State**, 10 S.W.3d 508,511 (Mo.banc 2000).

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

B. Appellate Counsel Was Competent

To support a Rule 29.15 motion due to ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it. **Moss v. State**, 10 S.W.2d at 514. "The right to relief . . . due to ineffective assistance of appellate counsel inevitably tracks the plain error rule; *i.e.*, the error that was not raised on appeal was so substantial as to amount to a manifest injustice or a miscarriage of justice." **Id**.at 514-515.

As to appellant's claims of ineffective assistance of appellate counsel the motion court found as follows:

> Ms. Carlyle raised 26 issues on appeal. She testified that she raised all issues which she believed had merit and did not appeal those which were without merit. Specifically, apart from a few of the answers given, when asked why she did not raise as issues on appeal all of the 40 sub-claims raised in 8(W), Ms. Carlyle testified that she did not feel the issues had any legal merit.

(PCR.L.F.303). The court also found that the issues did not have merit (PCR.L.F.304). The motion court did not clearly err.

1. There Was No Conflict Of Interest

At the evidentiary hearing, when asked why she did not assert error based upon an alleged conflict of interest, appellate counsel, Elizabeth Carlyle stated:

> I know that I considered the issue. I don't remember the reasoning, but as I've said the reason that I didn't include points was because I didn't think they had any legal merit.

(PCR.L.F.173-174).

Trial counsel sought to dismiss or in the alternative to exclude the testimony of Bobby Henderson, Danny Spurling, and Doug Stallsworth based on an alleged conflict of interest from the Chillicothe Public Defender's Office having represented appellant and the three men at the same time (L.F.541-549). However, because Henderson and Spurling did not testify at trial, appellant now argues on appeal that reasonably competent counsel "would have raised as error the trial court's denial of the motion to exclude testimony from Stallsworth" (App.Br. 112). Specifically, he asserts that there was a conflict when Darren Wallace of the Chillicothe Office represented both appellant and "Stallsworth at the same time Stallsworth furnished the State incriminating evidence" (App.Br.112).

As proof of this, appellant notes that when trial counsel's motion was argued pre-trial, the court judicially noticed that the Chillicothe Office entered on behalf of appellant on June 29, 1995, moved to withdraw on July 27, 1995, was permitted to withdraw on July 27, 1995, and counsel from the Capital Division entered appearance on September 19, 1995 (App.Br.110,Tr.914-916). Appellant argues that the time frame of these events is crucial because:

> The Chillicothe Office must have continued to represent [appellant] after leave was granted to withdraw on July 27, 1995 until a representative of the Capital Division entered an appearance on September 19, 1995; otherwise, [appellant] would not have been represented by any attorney . . . On that same day, [September 19, 1995] while

Mr. Wallace represented Stallsworth, Stallsworth furnished law enforcement with inculpatory statements [appellant] allegedly made.

(App.Br.111-112). Thus, as framed by appellant, the issue is whether representatives of the Chillicothe Public Defender's Office still represented appellant while also representing Stallsworth on the day, September 19, 1995, he furnished law enforcement with the confession appellant had made to him in jail.

However, appellant's assertion that there was a conflict of interest claim that appellate counsel should have litigated on appeal fails for two main reasons. First, appellant did not prove by the preponderance of the evidence that Wallace had in fact represented Stallsworth. The only "record" he cites to in his brief is either trial counsel's pleadings or their argument at trial (App.Br.110,L.F.543,App.Br.112,L.F.543,Tr.902). He did not call Wallace or Stallsworth to testify at the evidentiary hearing to establish if indeed this representation occurred. Allegations contained in a post-conviction motion are not self-proving and a movant has the burden of proving his asserted grounds for relief by a preponderance of the evidence. **State v. Silvey**, 894 S.W.2d 662, 671 (Mo. banc 1995); Supreme Court Rule 29.15(i). A hearing court is not clearly erroneous in refusing to grant relief on an issue which is not supported by evidence at the evidentiary hearing. **State v. Silvey, supra.**

More importantly, appellant's claim fails because although the trial court took judicial notice of certain dates purportedly from the Associate Circuit Division file of appellant's case, the actual docket

sheets from the Associate Circuit reflect that in fact, the Capital Division entered its appearance on July 27, 1995.[10] The docket entry reads as follows:

> 7-27-95 State appears by PA; Defendant appears in person and by attorney Darren Wallace. Motion to preserve investigative notes filed and sustained. Order signed. Motion for strict enforcement of Rule 3.6 and 3.8 filed and overruled. Chillicothe P.D. office allowed to withdraw. Central unit capital division office of PD enters appearance.

(Supp.L.F. 6) (emphasis added). Then a docket entry from September 11, 1995, showed that a "Notice and Motion for Disclosure" were filed by trial counsel Zembles (Supp.L.F.6). Also, the specific entry of appearance by Zembles and Charles Moreland was not filed until September 25, 1995 (Supp.L.F.5).

Thus, because the record demonstrates that appellant was represented by the Capital Division as of July 27, 1995, there was no conflict of interest from the Chillicothe Office representing Stallsworth

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[10] At the pre-trial hearing, trial counsel asked the trial court to take judicial notice of the entire Associate Circuit file and the court indicated that it would just notice certain dates (Tr.913-914). It is clear that the court was taking notice of these dates relying on trial counsel's memory and speculation of the file as Zembles noted that she wished she "had a copy of the docket sheet" and Slusher promised to file the docket sheet with the court at a later date (Tr.914,915). Respondent would ask this Court to take judicial notice of the docket sheet from appellant's case in the Associate Circuit Division, CR495-156F that has been assembled in a supplemental legal file.

on September 19, 1995, if indeed he was being represented by Wallace, at the time he heard appellant's confession in jail and notified his parole officer of the confession. In fact, on the day when Stallsworth heard appellant's confession, September 11, 1995, Zembles, an attorney from the Capital Division, had filed a motion for discovery on his behalf (Tr.2887, Supp.L.F.6).

The bottom line is that there was no dual representation, much less a conflict of interest, from the Chillicothe Public Defender's Office allegedly representing Stallsworth. Thus, appellate counsel cannot be found ineffective for failing to raise a meritless claim.

2. Counsel Not Ineffective for Failing to Raise on Appeal an Issue as to the Penalty Phase Verdict Director

Finally, appellant claims that his appellate counsel was ineffective for failing to raise as an issue on appeal "the failure to include the required mental element of 'knowingly' in Instruction No.15" (App.Br. 113). However, this assertion of error is identical to the objection that appellant says trial counsel should have made at trial. See Point VII.B.4, above. Thus, had appellate counsel attempted to assert these claims of error on direct appeal (claims that were not preserved), they would have failed for the reasons outlined in Point VII.B.4, above.

Appellant's eighth point on appeal must fail.

IX.

THE MOTION COURT DID NOT CLEARLY ERR IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO RELIEF UPON HIS CHALLENGE TO MISSOURI'S CLEMENCY PROCEDURE, BECAUSE APPELLANT DOES NOT HAVE STANDING TO RAISE THE CLAIM AND IT IS NOT COGNIZABLE IN A POST-CONVICTION MOTION IN THAT APPELLANT ADMITTEDLY HAS NOT SOUGHT CLEMENCY AS PROVIDED UNDER STATE LAW AND THE COMMUTATION OF DARRELL MEASE'S DEATH SENTENCE DID NOT RENDER APPELLANT'S DEATH SENTENCE ARBITRARY AND CAPRICIOUS.

Appellant contends that Missouri's clemency process is arbitrary and capricious (App.Br.114). He cites the clemency granted to Darrell Mease, after a request by Pope John Paul II, as evidence thereof (App.Br.114).

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." **Moss v. State**, 10 S.W.3d 508,511 (Mo.banc 2000).

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

In denying this claim, the motion court stated:

> 23. . . . First, appellant's claim fails because it is not ripe for action by this Court, and therefore, this is not the proper forum for raising this claim as an execution date has not been set and an application for clemency has not been filed or considered.

Furthermore, although some minimal due process protections apply to a state clemency proceeding, *see Ohio Adult Parole v. Woodard*, 523 U.S. 272, 288, 289 (1998). The decision to grant or deny clemency is left to the discretion of the governor, see Mo.Const. Art. IV, Sec. 217.800(1) RSMo; Sec. 522.070 RSMo; *Roll v. Carnnahan*, 225 F.3d 1016,1017 (8th Cir. 2000).

Commutation of another's death sentence does not render Movant's death sentence arbitrary or capricious.

(PCR.L.F.295-296).

The motion court was correct. The application of mercy in one case does not invalidate the imposition of the death penalty in another case. The constitutionally required checks on arbitrariness were present in appellant's case, and this Court has already determined on direct appeal that appellant's sentence was not imposed as the result of any caprice or whim.

The motion court also did not clearly err because appellant's challenge to the clemency process is not cognizable in this proceeding. Supreme Court Rule 29.15(a) provides a mechanism for an individual following a guilty verdict to raise claims that the "conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States[.]" However, the manner in which an executive decision was made with regard to clemency in another case is not in any way related to the judicially-imposed conviction and sentence in appellant's case.

In addition, because appellant has not made a clemency request to date, he lacks standing to challenge the clemency process. **State v. Entertainment Ventures I, Inc.**, 44 S.W3d 383,387

(Mo.banc 2001)("[T]o have standing to raise a constitutional issue, the objecting party's rights must have been affected."). The motion court did not clearly err.

X.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO MORE EXHAUSTIVELY CHALLENGE THE PENALTY PHASE INSTRUCTIONS BY PRESENTING EVIDENCE OF DR. RICHARD WIENER'S STUDY BECAUSE (1) COUNSEL'S FAILURE TO PRESENT

THE EVIDENCE WAS REASONABLE, IN THAT THIS COURT HAS REPEATEDLY DENIED SUCH CLAIMS, AND (2) APPELLANT WAS NOT PREJUDICED, IN THAT THERE IS NO REASON TO BELIEVE THAT APPELLANT'S JURY MISUNDERSTOOD THE INSTRUCTIONS.

Appellant claims on his tenth point on appeal that the motion court was clearly erroneous in denying his claim that trial counsel were ineffective for failing to provide to the trial court Dr. Richard Wiener's study regarding jury comprehension of penalty phase instructions in their objections regarding penalty phase instructions (App.Br.117). Appellant alleges that it was necessary for trial counsel to include Dr. Wiener's study which allegedly proves that jurors' comprehension is low and that the instructions "preclude the jury from giving mitigating circumstance evidence the consideration that is required" (App.Br.118).

Trial counsel Zembles testified that she did not remember if she was aware of Dr. Wiener's study, so she could not answer why she did not introduce the study in support of their motion against the jury instructions (PCR.Tr.579). However, she did not believe that a judge would ever sustain the motion and stated that she primarily files the motion to preserve the issue for federal review (PCR.Tr.580). Counsel Slusher guessed that he was probably aware of the Wiener study at the time of trial, but he did not know why they did not present the study (PCR.Tr.377). Ultimately, he believed that the issue was properly litigated (PCR.Tr.377).

In denying appellant's claim, the motion court found as follows:

> 24. Movant called Dr. Richard Wiener to testify. Dr. Wiener performed a study in 1994, commissioned by the Public Defender's Office, on the issue of whether Missouri's MAI instructions are confusing to the jury . . . The Court finds that Dr. Wiener's findings

and conclusions are not persuasive and do not establish that Missouri's MAI instructions, including those in Movant's murder trial, were confusing or misleading to the jury.

The Missouri Supreme Court has previously considered and rejected this contention and Dr. Wiener's conclusions . . . Furthermore, to the extent Movant now claims that Dr. Wiener's 1998 updated report responds to the Missouri Supreme Court's criticisms regarding the study in further support of his claim for ineffective assistance of counsel, such evidence and argument is irrelevant to Movant's claim regarding trial counsel's actions during Movant's trial in 1997.

(PCR.L.F.296) (internal citations omitted).

The motion court was not clearly erroneous in denying appellant's claim. Trial counsel cannot be deemed ineffective for failing to raise a meritless issue. **State v. Clay**, 975 S.W.2d 121, 136 (Mo.banc 1998). This Court on numerous occasions has found that the MAI-CR instructions are constitutional and Dr. Wiener's study should be discounted. **Lyons v. State**, 39 S.W.3d 32, 43-44 (Mo.banc 2001); **State v. Deck**, 944 S.W.2d 527, 542-543 (Mo.banc 1999); **State v. Jones**, 979 S.W.2d 171, 181 (Mo.banc 1998) (Counsel's failure to object to possible jury misunderstanding of instructions does not support claims of ineffective assistance of counsel).

Counsel's failure to more exhaustively pursue their objections to the penalty phase instructions by including Dr. Wiener's study would not have been successful and their objections would have had not merit.

Counsel argues nonetheless that Dr. Wiener's later study "establishes that counsel's failure to rely on the 1994 study was unreasonable" because "the later study arrived at the same conclusions and

disproved the criticisms this Court had made of the 1994 study" (App.Br.122). However, Dr. Wiener's latest study, that he claimed was funded by the National Science Foundation, was only referenced briefly at the hearing because the study had not been completed and was not yet published (PCR.Tr.204,275-278, 317). He only anticipated that it would be published "later this year" (PCR.Tr.326).

At any rate, the newest study still does not alleviate the problems that this Court found with the earlier study. In **Lyons**, this Court reiterated its holdings in **Deck** and **Jones** and noted that:

> Wiener's study was flawed in part because the people interviewed for the study did not act as jurors. They were given hypothetical facts that were different from the facts [of the case] and they did not hear the testimony of witnesses, observe the evidence, or deliberate with eleven other jurors. More particularly, read in the context of the instructions as a whole, the term "mitigating," . . . is always contrasted with the term "aggravating" so that no reasonable person could fail to understand the meaning of the term.

39 S.W.3d 32 at 43.

In the newest study, Dr. Wiener purportedly used "711 death qualified Missouri residents" to participate in "groups between six and twelve individuals" (PCR.Tr.275). They viewed a three hour re-enactment video tape of a "recently tried Missouri Death penalty case" (PCR.Tr.275-276). According to Dr. Wiener, they used professional actors to "play the roles of all the participants in the actual trial" (PCR.Tr.276). After viewing the tape, they were supposedly asked to deliberate as juries with the group (PCR.Tr.276). According to Dr. Wiener, there was only "a very, very slight- - one to two percent - - difference in comprehension from before deliberation to after deliberation" (PCR.Tr.276).

Again, as this Court noted in **Lyons**, the main problem remains in that the participants did not act as jurors. They only heard an "abbreviated" version of a trial, and not appellant's trial. In addition, it would be hard-pressed to find a capital case that only lasted three hours. Obviously, there was a wealth of evidence that was not presented before the jury. Without, knowing more about this latest study, there is nothing to show how long or in what way the actors argued the case to the jury in the re-enactment video. There is also still no way to quantify the difference between the understanding appellant's actual jurors had with participants in a study who simply watch a video. Thus, the motion court was correct in noting that evidence of this latest study is irrelevant to the question of whether counsel were ineffective for failing to present evidence of Dr. Wiener's flawed study at the time of trial in 1997. Counsel's failure to object to the juror's possible misunderstanding of the instructions based on Dr. Wiener's study does not support a claim of ineffective assistance of counsel.

Based on the foregoing, appellant's final point must fail.

CONCLUSION

For the foregoing reasons, the judgment of the motion court should be affirmed.

Very truly yours,

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CERTIFICATE OF COMPLIANCE AND SERVICE:

I hereby certify:

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

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

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

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